

2011 WL 9692457 (N.H.) (Appellate Brief)
Supreme Court of New Hampshire.

In Re: GUARDIANSHIP OF MARY LOUISE EATON.

No. 2011-0171.
October 3, 2011.

Memorandum of Law

*1 NOW COMES the Board of Directors of the New Hampshire Chapter of the National Academy of **Elder** Law Attorneys, by and through its attorneys, the Tropiano Law Office, and hereby submits the following Memorandum of Law and in support thereof states as follows:

Question Presented

Did the trial court err when it ruled that under [RSA 464-A:43](#) a petitioner seeking guardianship is not entitled to have his or her attorney fees paid by the proposed ward?

Statement of Interest of Amicus Curiae

The issues raised in the instant appeal affect citizens throughout New Hampshire who are incapacitated either due to age or disability, as well as the lawyers who advocate on their behalf and on behalf of their families; specifically, the issue of whether a petitioner in a guardianship matter is permitted, in accordance with RSA 464-A: 43, to be reimbursed, from the ward's estate, for the legal fees and expenses that he or she incurs in pursuing a guardianship petition. Since a son, daughter or other family member generally pursues a guardianship in order to protect his or her mother, father or other loved ones from physical and/or financial harm, a ruling that the petitioner must pay the legal fees and expenses would discourage and in some *2 instances prevent individuals from pursuing necessary guardianships, to the detriment of the incapacitated individuals.

Argument

The proposed ward does not initiate the guardianship proceeding. A family member such as a parent or adult child typically initiates the proceeding. The burden of proof is beyond a reasonable doubt, which is the highest burden of proof in our legal system. The petitioner must satisfy this standard when demonstrating that the proposed ward is incapacitated and in need of a guardian. RSA 464-A: 9, IV. In view of this high burden of proof, the general complexity of the legal procedure, and the often urgent nature of the proposed ward's health or financial situation, many petitioners seek the assistance of lawyers. The question raised in the instant case is who will bear the cost of the legal fees.

RSA 464-A: 43, I seems clear in permitting petitioners who have brought guardianship actions in good faith to have the legal fees they incur reimbursed from the ward's estate. Specifically, RSA 464-A: 43,I provides:

Except in cases in which the petitioner filed the petition in bad faith, the court costs and fees for the counsel and resource person shall be borne by the proposed ward. In cases in which the petitioner acted in bad faith, he or she shall bear all costs of the proceeding.

In interpreting this statute, the authors of the New Hampshire treatise dealing with guardianships concluded that, “[f]or the most part, the costs incurred by the appointment of a guardian or conservator under RSA 464-A are borne by the ward. These

costs include court costs, legal and other fees.” The authors point out the exception for petitioners who filed the petition in bad faith. *Id.* 11 De Grandpre and *3 Zorn, *Probate and Administration of Estates, Trusts & Guardianships, (Fourth Edition)*, Section 70.21 (2011).

Notwithstanding the foregoing, the probate court ruled that a petitioner, as a matter of law, must pay the legal fees even if the petition was brought in good faith to benefit the proposed ward. The court could have narrowed its decision by focusing on the good faith nature of the petition or the reasonableness of the fees, rather than interpreting the statute in a way that seems contrary to a plain reading of the statute and which could have a profound affect on families who are trying to protect their vulnerable family members.

Common examples of cases in which guardianship is pursued include situations in which an elderly person cannot make health care decisions for himself, is in an unsafe living situation, needs assistance with activities of daily living, or is being exploited financially. Guardianship in some cases is the best way to stop an individual who is incapacitated from driving an automobile. In these cases, the family members who pursue guardianship do not profit or gain financially from their actions. Yet, the court's ruling would require them to bear the costs of taking protective actions.

Individuals who are pursuing guardianship on behalf of their adult child, parent, or grandparent are doing so because the family member cannot obtain help from the legal system on his or her own. They are acting as their proxies. The result directly benefits the adult child, parent or grandparent, and only indirectly them. In some cases, the petitioner is an institution, such as a nursing home, assisted living facility or a hospital, or is a public official. They file the petition for guardianship because the proposed ward does not have any family members willing or able to bring *4 forward such a petition. To rule that the petitioner must bear the cost of often significant legal fees would likely deter many families and other third parties from pursuing guardianship, which would primarily harm the incapacitated person.

It is the position of the New Hampshire Chapter of the National Academy of Elder Law Attorneys (“NH-NAELA”) that it is in the public's interest to encourage family members, interested persons and public officials to seek guardianship of those incapacity adults who are unable to seek help from the courts. It would serve the public's interest to encourage a family member or other interested party to bring a petition for guardianship in such situations where there is genuine concern. If the petitioner is unable to seek reimbursement for his or her cost or fees, the concern is that there would be a chilling effect on persons filing such a petition.

Conclusion

The trial court erred when it found that the petitioner in a guardianship proceeding is responsible for his or her own attorney fees and expenses incurred in petitioning for guardianship of an incapacitated adult.