

# In the United States Court of Federal Claims

## OFFICE OF SPECIAL MASTERS

No. 08-258V

Filed: November 15, 2011

Published

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MERRICK LINDSEY, by and through  
KIMBERLY LINDSEY,  
as parent and natural guardian,

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Attorneys' fees and costs; Cost of  
establishing a guardianship

Petitioner,

v.

SECRETARY OF THE DEPARTMENT  
OF HEALTH AND HUMAN SERVICES,

Respondent.

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*Anne Carrion Toale, Maglio, Christopher and Toale, Sarasota, FL., for Petitioner.*  
*Darryl R. Wishard, U.S. Department of Justice, Washington, D.C., for Respondent.*

### ATTORNEY'S FEES AND COSTS DECISION<sup>1</sup>

**GOLKIEWICZ**, Special Master.

On October 7, 2011, petitioner filed an Application for Attorneys' Fees and Costs ["Fee Application" or "Fee App."]. In the Fee Application, petitioner requested \$36,515.50 in attorney fees and \$32,670.84 in costs. The Fee Application also requested an amount for petitioner's own cost of establishing a guardianship for her child; the requested amount is \$1,750.00. P Ex B, attached to P Fee App., filed Oct. 7, 2011. Petitioner anticipated an objection to an award of the guardianship costs and filed her Memorandum of Law in Support of an Award of Guardianship Costs on October 7, 2011 ["Memorandum" or "P Memo"]. Petitioner cites several cases and discusses a "trend to award these costs . . ." P Memo at 1.

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<sup>1</sup> The undersigned intends to post this decision on the website for the United States Court of Federal Claims, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). **As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction "of any information furnished by that party (1) that is a trade secret or commercial or financial in substance and is privileged or confidential; or (2) that includes medical files or similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, the entire decision will be available to the public. Id. Any motion for redaction must be filed by no later than fourteen (14) days after filing date of this filing.** Further, consistent with the statutory requirement, a motion for redaction must include a proposed redacted decision, order, ruling, etc.

On October 17, 2011, respondent filed her Response to Petitioner’s Application for Attorneys’ Fees and Costs [“Response” or “R Resp.”]. Respondent first notes that the parties informally discussed the request for fees and costs. R Resp. at 1. With the exception of costs related to establishing the guardianship, petitioner now requests \$64,000.00 in attorneys’ fees and costs, to which respondent does not object. Id. Respondent does object to an award of the costs for the guardianship; the costs contested are \$1,750.00. Id. at 1.

Respondent states, “[r]espondent was not a party to that separate proceeding. As such, respondent objects to payment of these fees and costs, as these services were not required to proceed on the petition.” Id. at 2 (citing 42 U.S.C. § 300aa-15(e)(1)). Respondent notes that petitioner’s state law requires establishment of a guardian or conservator for awards to a minor in excess of \$10,000.00, which was the case here. R Resp. at 2, n. 1 (citing K.S.A. 59-3053). Respondent cites several special master and Court of Federal Claims decisions where similar costs and fees were denied as they were not incurred on proceedings before the special master. Id. at 3-4. Acknowledging that these decisions are not binding precedent, respondent also cites cases where such costs and fees were reimbursed by the Program. Id. at 4-5. Respondent states that “requiring petitioner to comply with state law to receive settlement proceeds via the stipulation does not make the conservatorship costs part of the ‘proceeding’ on the petition in this case.” Id. at 5. Ultimately, respondent argues that proceedings on the petition must be “incurred as part of the petition before the special master, the Claims Court, the United States Court of Appeals for the Federal Circuit, or the Supreme Court.” Id. (quoting Siegfried v. Sec’y of the Dept. of Health & Human Servs., 19 Cl. Ct. 323, 325 (Cl. Ct. 1990)).

The special masters examining this and similar issues have determined that the appropriate test by which to analyze reimbursement of such costs is a “but for” test. See, e.g., Capriola v. Sec’y of the Dept. of Health & Human Servs., No. 08-835V, slip op. (Fed. Cl. Spec. Mstr. 2010); Ceballos v. Sec’y of the Dept. of Health & Human Servs., 2004 WL 784910 (Fed. Cl. Spec. Mstr. 2004); Velting v. Sec’y of the Dept. of Health & Human Servs., No. 90-1432V, 1996 WL 937626 (Fed. Cl. Spec. Mstr. 1996); Thomas v. Sec’y of the Dept. of Health & Human Servs., No. 92-46V, 1997 WL 74664 (Fed. Cl. Spec. Mstr. 1997); Gruber v. Sec’y of the Dept. of Health & Human Servs., No. 00-749V, 2009 WL 2135739 (Fed. Cl. Spec. Mstr. 2009), vacated 91 Fed. Cl. 993, 2010 WL 966640 (Fed. Cl. 2010)(remanding the case for further proceedings but not reversing the special master’s grant of fees for petitioner’s probate attorney). Regarding respondent’s contention that reimbursed activities must take place before the special master, the undersigned notes that costs for many activities are not under the direct control or view of the court. For example, life care planning, third party mediation, economist review and analysis are not directly before the court yet these costs are routinely agreed to and paid. This is because the actions are related to proceedings on the Petition. Likewise, the guardianship proceedings are related to fulfilling requirements for receipt of funds derived from the Vaccine Petition. See Capriola v. Sec’y of the Dept. of Health & Human Servs., No. 08-835V, slip op. (Fed. Cl. Spec. Mstr. Apr. 29, 2010)(awarding costs for establishment of an estate when probate was initiated solely for handling the Vaccine Act award of compensation); Gruber v. Sec’y of the Dept. of Health & Human Servs., No. 00-749V, slip op., 2009 WL 2135739, at \*10-11.

Herein, the parties’ Stipulation states, “No payments pursuant to this Stipulation shall be made until petitioner provides the Secretary with documentation establishing her appointment as

guardians of Merrick's estate." Stipulation at ¶ 13, filed August 26, 2011. The undersigned previously noted that:

in the majority of cases involving a guardianship, the guardianship is set up to fulfill a condition of receiving the vaccine award. If this condition is set by either court order or as an element of the agreed-upon settlement with respondent, which the special master must ultimately approve, the undersigned sees no distinction from the myriad of other costs incurred by third parties in executing critical pieces of the damages puzzle. The fact that the third party is another court does not change the critical fact that the special master requires that piece of the puzzle to complete the compensation picture.

Ceballos v. Sec'y of the Dept. of Health & Human Servs., No. 99-97V, 2004 WL 784910, 20 (Fed.Cl. Spec. Mstr. 2004)(finding guardianship costs unreimbursable as petitioners established the guardianship for their own purposes, not under direction of respondent or the court).

Petitioner herein was required to set up guardianship as a condition of receiving the stipulated award. See Stipulation at ¶ 13. This is respondent's boilerplate language seen in virtually all stipulations involving minors. Respondent herein attempts to deflect responsibility for this requirement to the State of Kansas. However, respondent is missing the fundamental point that the only reason petitioner incurred this cost was to receive the award under the Vaccine Act. Stated another way, but for the Vaccine Act award, the costs for establishing the guardianship would not have been incurred by petitioner. Without this Vaccine Act award, petitioner would not have set up this guardianship as required by the parties' Stipulation and by state law. This nexus is sufficient to find these costs incurred on the Petition and thus reimbursable. Accordingly, petitioner is awarded the costs of the guardianship, \$1,750.00.

The court hereby awards the petitioner attorney fees and costs in the amount of \$65,750.00. **Specifically, petitioner is awarded a lump sum of \$64,000.00 in the form of a check payable jointly to petitioner and petitioner's attorney; petitioner is also awarded a lump sum of \$1,750.00 in the form of a check payable to petitioner individually.**

The Clerk of the Court is directed to enter judgment accordingly.<sup>2</sup>

**IT IS SO ORDERED.**

s/ Gary J. Golkiewicz  
Gary J. Golkiewicz  
Special Master

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<sup>2</sup>Pursuant to Vaccine Rule 11(a), the parties can expedite entry of judgment by each party filing a notice renouncing the right to seek review by a United States Court of Federal Claims judge. Furthermore, this amount is intended to cover all legal expenses. This award encompasses all charges by the attorney against a client, "advanced costs" as well as fees for legal services rendered. Furthermore, 42 U.S.C.A. §300aa-15(e)(3) prevents an attorney from charging or collecting fees (including costs) which would be in addition to the amount awarded herein. See generally, Beck v. Secretary of the Dept. of Health & Human Servs., 924 F.2d 1029 (Fed. Cir. 1991).