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No. 62711-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In the Matter of the
GUARDIANSHIP OF SANDRA LAMB

**DISABILITY RIGHTS WASHINGTON'S ANSWER
TO ACLU'S MOTION TO APPEAR AS AMICUS AND BRIEF**

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TABLE OF CONTENTS

I. ISSUES ----- 1

II. BRIEF ANSWER----- 1

III. ARGUMENT-----2

 1. Given the lack of any expression of preference by the ward,
 guardians lack the authority to engage in political activity that does
 not directly benefit the ward.-----2

 2. The content of the guardians’ speech on behalf of a ward requires
 an individualized assessment of the ward’s preferences. -----8

IV. CONCLUSION ----- 10

TABLE OF AUTHORITIES

Cases

<i>Cruzan v. Missouri Dept. of Health</i> , 497 U.S. 261 (1990)	5, 8
<i>In re A.B.</i> , 196 Misc. 2d 940 (S.Ct. 2003)	5
<i>In re Coyle</i> , 99 Wn.2d 114 (1983).....	4
<i>In re Estate of D.W.</i> , 134 Ill. App. 3d 788 (1985)	4
<i>In re Guardianship of L.W.</i> , 167 Wis. 2d 53 (1992).....	4
<i>In re Quinlan</i> , 70 N.J. 10 (1976).....	8
<i>Matter of the Guardianship of Ingram</i> , 102 Wn.2d 810, 836, 689 P.2d 1363 (1984).....	4, 8, 9, 10
<i>Thompson v. Oklahoma</i> , 487 U.S. 815, 825 n.23, 108 S.Ct. 2687 (1988)..	4
<i>Tunstall v. Bergeson</i> , 141 Wash.2d 201, 5 P.3d 691 (2000).....	1

Statutes

RCW 11.88.005	3
RCW 11.88.010(1)(c)	6
RCW 11.88.010(5).....	6
RCW 11.88.095(a) and (f)	8
RCW 11.92.040	3
RCW 11.92.043	3, 5, 7
RCW 11.92.043(4).....	3, 7
RCW 11.92.043(5).....	3

Other Authorities

CPG 401.7.....	8
CPG 401.10.....	8

I. ISSUES

1. Do guardians have the authority to charge fees for exercising their wards' fundamental rights to free speech in the political process?
2. Must guardians conduct an individualized determination of the ward preferences and needs prior to charging fees for engaging in any group political activities on the ward's behalf?

II. BRIEF ANSWER

Amicus is unaware of any law or regulation providing guardians (including professional guardians like the Hardmans) with the authority to “literally stand-in-the-shoes of the ward and exercise the ward’s rights” and speak as if the guardian *is* the ward. American Civil Liberties Union of Washington (“ACLU”) Brief, p. 11. Instead, courts have held that First Amendment rights to speech are highly protected. *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wash.2d 201, 5 P.3d 691 (2000). While holding itself out as “committed to protecting the civil liberties of the disabled”, the ACLU’s brief fails to recognize a distinction between a guardian advocating on behalf of the individual ward and a guardian using the ward’s funds to pursue a national and statewide group political agenda for which there is no evidence of support from the ward.

The ACLU’s brief also fails to advocate for the protection of the other constitutionally protected interests implicated in this appeal:

property and liberty. DRW Brief, p. 14. It is undisputed that the Hardmans seek a significant monetary payment from each of their wards estates – potentially totaling \$50,400 annually. *See* CP 136. Yet, the ACLU’s brief lacks any particularized reason why individual wards, like Ms. Lamb or Ms. Robins, should be footing the bill for pursuit of a political agenda that will not directly benefit them. Instead, the record shows that the guardians sought compensation for paying for group advocacy like newsletters to other guardians, professional development activities for the guardian, and cross continental junkets to Washington D.C. CP 135, 143, 193-197.

The ACLU argues that a guardian automatically assumes the rights of Ms. Lamb or Ms. Robins “*unless* those rights or the guardianship have been expressly limited by the court or by statute”. ACLU brief, p. 11 (emphasis in original). This position is an interesting twist on the notion of individual free speech as it substitutes the voice of the guardian for the person with a disability (the ward); thereby depriving the ward of *any* voice of her own in the political process.

III. ARGUMENT

1. **Given the lack of any expression of preference by the ward, guardians lack the authority to engage in political activity that does not directly benefit the ward.**

Guardians do not have rights, they have responsibilities. These responsibilities include maintaining and caring for their ward in the least restrictive setting consistent with the individual's freedom and appropriate to their personal care needs. RCW 11.92.043(4), Exhibit A. The guardian also has a duty to "assert" the incapacitated person's rights and best interests. *Id.* Guardians must also submit fee petitions when they seek the property of their wards estates, as well as provide timely consent for health care. RCW 11.92.040, Exhibit B, and RCW 11.92.043(5).¹

The Washington guardian statute recognizes that the power of guardians should be minimal and only exercised as necessary.

It is the intent of the legislature to protect the liberty and autonomy of all people of this state, and to enable them to exercise their rights under the law to the maximum extent, consistent with the capacity of each person. The legislature recognizes that people with incapacities have unique abilities and needs, and that some people with incapacities cannot exercise their rights or provide for their basic needs without the help of a guardian. *However, their liberty and autonomy should be restricted through the guardianship process only to the minimum extent necessary to adequately provide for their own health or safety, or to adequately manage their financial affairs.*

RCW 11.88.005 (emphasis added); *see also* DRW brief, p. 15 and Exhibit

C. The ACLU seeks to go beyond the statutory responsibilities and claim

¹ Group advocacy that cannot be shown to relate to the individual desires of a ward is outside the scope of an individualized guardianship. *See* RCW 11.92.040 and RCW 11.92.043. The ACLU mistakenly claims DRW attempts to act as the "exclusive voice" or "sole representative" of individuals with disabilities. ACLU Brief, pgs. 16-17. Group and individual advocacy is not exclusive to DRW, as mentioned in our brief, the other similar organizations include the Arc of Washington, the Developmental Disabilities Council, and the Independent Living Centers. DRW Amicus, p. 8.

that guardians may be compensated for exercising their *wards'* rights to free speech by engaging in group political activity. ACLU Brief, pgs. 10-13 and 18.

Every single case the ACLU cites to support its arguments that guardians “literally stands-in-the-shoes” of their wards to exercise first amendment rights is distinguishable. ACLU Brief, pg. 11. All of those cases pertain to circumstances where the guardian has a *responsibility* under the guardianship statute to make a decision about one’s healthcare, and often life-sustaining treatments when the ward was terminally ill or in a vegetative state.² See ACLU Brief, pgs. 6-7 (citing *Matter of the Guardianship of Ingram*, 102 Wn.2d 827 (1984) (relating to guardian’s power to order surgical procedure to remove ward’s larynx); *In re Estate of D.W.*, 134 Ill. App. 3d 788 (1985) (authority of guardian to give consent for ward to have abortion); *In re Guardianship of L.W.*, 167 Wis. 2d 53 (1992) (examining guardian’s authority to give consent for withdrawal of life-sustaining treatment from ward); *In re Coyle*, 99 Wn.2d 114 (1983) (addressing husband’s authority to give consent for life support to be

² The ACLU also mistakenly argues that guardians have broad authority over their wards by citing to a footnote in *Thompson v. Oklahoma*, 487 U.S. 815, 825 n.23, 108 S. Ct. 2687 (1988). ACLU Brief, p. 9. This case was not about the authority or duty of one person to exercise the rights of another. Instead, the question was whether a 15-year-old could be held responsible for a murder to the same extent as an adult. *Id.* at 815. There was no discussion in the case or footnote regarding which rights could be exercised by another person, or the circumstances in which this can be done.

removed from woman in chronic vegetative state); *In re A.B.*, 196 Misc. 2d 940 (S.Ct. 2003) (N.Y. case addressing whether mother could consent to withdrawal of life support from child in permanent vegetative state); *Cruzan v. Missouri Dept. of Health*, 497 U.S. 261 (1990) (relating to consent for termination of artificial hydration and nutrition)).

The fact that all these cases discuss consent for medical treatment is significant because, unlike rights to free speech, the provision of timely, informed consent regarding healthcare decisions is an expressed responsibility of guardians under RCW 11.92.043. Yet, no court has ever recognized a duty or authority for guardians to exercise constitutional rights of their wards, such as the right to vote, practice a religion of their choice, associate with others, or engage in free speech. Just as guardians are not permitted to charge fees for voting on behalf of their wards or attending a religious service on behalf of their wards, they should also be prohibited from charging fees for engaging in group political speech.³

The first amendment right to engage in the political process is more analogous to the constitutional right to vote than it is to the right to provide informed consent. DRW Brief, p. 13-14. *See* DRW Brief, p. 13-14. No court has ever ruled that a guardian could exercise their ward's right to vote on the ward's behalf. To the contrary, if the ward is

³ By charging Ms. Lamb's and Ms Robins' accounts, the guardians are transforming their own political advocacy into a purported political activity of the ward.

incapable of voting, the court can expressly take that right away. RCW 11.88.010(5). That does not give the guardian the right or duty to vote on the ward's behalf according to how the guardian believes the ward should vote. Conversely, if the ward's right to vote has not been limited, the guardian cannot go and vote for the ward because the guardian believes the ward is incapable of doing so. The guardian cannot also vote as if they were the ward based on a false assumption that all wards with severe disabilities would vote for a particular issue.

However, the ACLU seeks to allow guardians to appropriate the free speech rights of individuals with disabilities based exclusively on their belief that Ms. Lamb and Ms. Robins' disabilities prevent them taking part in the political or community outreach efforts. ACLU Brief, p. 2, 3, 10, 16.⁴ This appropriation includes an assumption that either of these women would want or need their personal funds expended on group political efforts to keep institutions open, even those institutions they have never visited.

The ACLU misconstrues the statutory duty of guardians to "assert" the rights of the ward by conflating the "assertion" of one's rights with the "exercise" of one's rights. ACLU Brief, p. 8, 11, 12, etc., citing to RCW

⁴ Note that the guardianship statute expressly forbids such a broad brush when assessing whether a guardianship should be established but rather states: "Age, eccentricity, poverty, or *medical diagnosis alone* shall not be sufficient to justify a finding of incapacity." RCW 11.88.010(1)(c) (emphasis added).

11.92.043(4). "Asserting" rights is different from actually exercising the ward's rights by substituting the guardian's speech for the ward's speech. The ACLU uses the term "exercise" to mean "literally stand-in-the-shoes of the ward and exercises the ward's rights on his or her behalf." ACLU Brief, p.11.

The record does not indicate that the guardians are helping their wards attend an outreach event or that specific outreach was done in conjunction an effort to address individual needs. There is no evidence of individual circumstances in the record to support that the Hardmans' group political activities assert their wards' particular interests. Therefore, such activities are outside the scope of their guardianship. Automatically assuming the power to exercise the first amendment rights of wards without inquiry into the opinion of the ward, like assuming the power to exercise the right to vote, is outside the scope of guardianship laws and regulations. If the ACLU's arguments prevail, guardians will be able to charge fees for activities that go beyond responding to individual needs. The ACLU's arguments would give guardians an unfettered right to disregard the opinion of the ward and to "literally [stand]-in-the-shoes of the ward" in all respects. Such unfettered discretion is an invitation for the exploitation of people with disabilities.

2. The content of the guardians' speech on behalf of a ward requires an individualized assessment of the ward's preferences.

Even where the statute expressly allows guardians to exercise their wards' rights for them, courts require an individualized inquiry into what that individual ward would choose given the circumstances. *Ingram*, 102 Wn.2d at 838; *see also, In re Quinlan*, 70 N.J. 10 (1976); *Cruzan*, 497 U.S. 261 (upholding state's requirement for clear and convincing evidence of patient's wishes); CPG 401.7, *see* Exhibit C (regulations of certified public guardians (CPGs) contain a duty to consult with the ward respect their values and opinions as well as acknowledge their "residual capacity to participate in or make some decisions"). Guardianship proceedings and guardianship advocacy is also limited to the unique needs and individual preferences of the person with a disability. DRW brief, p. 12 citing to RCW 11.88.095(a) and (f), Exhibit D. Guardians are mandated to "seek *independent* professional evaluations, assessments, and opinions when necessary to identify the incapacitated person's needs and best interests". CPG 401.10 (emphasis added), *see* Exhibit C.

Even where guardians are given expressed statutory authority to provide informed consent for medical decisions, the courts limit the scope of what a guardian can do to the individual needs of the ward. ACLU, p. 11, citing *Matter of Guardianship of Ingram*, 102 Wn.2d 810, 836, 689

P.2d 1363 (1984). The *Ingram* Court discussed a surgery to remove the ward's larynx for cancer treatment. There, the Court decision discusses making an individualized determination about what the ward would choose: "All courts seem to agree that the goal is to do what the ward would do, if she were competent to make the decision." *Id.* at 838. The Court went on to state, "The ward's express interest must be given substantial weight, even if made while the ward is incompetent." *Id.* at 840.⁵

Here, the needs or interests of either Ms. Lamb or Ms. Robins cannot be assumed by *any* party or *amici curiae*. DRW's brief explained both the history of deinstitutionalization, the limits on professional guardianship, and highlighted the expressed preferences of an ever growing majority of people with disabilities. DRW Brief, pgs 4-11. Based on this political and social movement, the guardians cannot assume that the wards in this case endorse the guardians' political activities or have opted to finance the guardians' campaign. The ACLU's brief failed to consider the duty to conduct an inquiry into the individual wishes of

⁵ The *Ingram* Court went into a detailed factual analysis of the individual case to make that determination. There was testimony that 99% of patients agree to the procedure, but given the individual's conditions, it was not so clear that the procedure would be optimal for her. *Id.* at 832. The case also held that if it were determined that the ward would not choose the procedure, the state's interest in preserving life would not justify a substitution for what she would want since it was not a choice between life and death, but a choice between two treatments, albeit one had greater efficacy but more side effects. *Id.* at 843.

Ms. Lamb or Ms. Robins. The ACLU brief also failed to present a particularized reason why either individual wants to contribute their voice and money to the Hardmans' general and group lobbying efforts against downsizing institutions - not just the institutions in which the individual wards live, but also all other institutions across the state and even the country.

At the very least, if *Ingram* is to provide an analogy for first amendment rights, it requires an individualized evaluation of what Ms. Lamb and Ms. Robins would choose - not solely what the guardians think is in their best interest and without inquiry into how the ward actually benefits. Ultimately, the Hardmans' political activities lack any individually tailored relationship to meeting the unique needs of Ms. Lamb and Ms. Robins, and therefore should be rejected.

IV. CONCLUSION

The ACLU's brief ignores the important fact that the record does not factually establish that Ms. Lamb or Ms. Robins want the Hardmans to use their limited resources to engage in political group advocacy, or that such activity has any direct impact on their ability to have their personal needs met. The court should prohibit payment from either Ms. Lamb or Ms. Robins' estates to fund the Hardmans' group political activities absent

a factual finding that Ms. Lamb or Ms. Robins would individually exercise their rights in this way.

Dated this 19th day of October, 2009.

Respectfully submitted,

Disability Rights Washington,
Amicus Curiae

By



EMILY COOPER PURA, WSBA # 34406

CERTIFICATE OF SERVICE

I, Mona Rennie, hereby certify and declare that on the 19th day of October, 2009, I caused to be served by legal messenger a copy of the foregoing document to the following:

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I also served by email and first-class mail, postage prepaid a copy of the same documents to the following:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 19th day of October, 2009.



Mona Rennie, Legal Assistant
Disability Rights Washington

RCWs > Title 11 > Chapter 11.92 > Section 11.92.043

11.92.040 << 11.92.043 >> 11.92.050

RCW 11.92.043

Additional duties.

It shall be the duty of the guardian or limited guardian of the person:

(1) To file within three months after appointment a personal care plan for the incapacitated person which shall include (a) an assessment of the incapacitated person's physical, mental, and emotional needs and of such person's ability to perform or assist in activities of daily living, and (b) the guardian's specific plan for meeting the identified and emerging personal care needs of the incapacitated person.

(2) To file annually or, where a guardian of the estate has been appointed, at the time an account is required to be filed under RCW 11.92.040, a report on the status of the incapacitated person, which shall include:

- (a) The address and name of the incapacitated person and all residential changes during the period;
- (b) The services or programs which the incapacitated person receives;
- (c) The medical status of the incapacitated person;
- (d) The mental status of the incapacitated person;
- (e) Changes in the functional abilities of the incapacitated person;
- (f) Activities of the guardian for the period;
- (g) Any recommended changes in the scope of the authority of the guardian;
- (h) The identity of any professionals who have assisted the incapacitated person during the period.

(3) To report to the court within thirty days any substantial change in the incapacitated person's condition, or any changes in residence of the incapacitated person.

(4) Consistent with the powers granted by the court, to care for and maintain the incapacitated person in the setting least restrictive to the incapacitated person's freedom and appropriate to the incapacitated person's personal care needs, assert the incapacitated person's rights and best interests, and if the incapacitated person is a minor or where otherwise appropriate, to see that the incapacitated person receives appropriate training and education and that the incapacitated person has the opportunity to learn a trade, occupation, or profession.

(5) Consistent with RCW 7.70.065, to provide timely, informed consent for health care of the incapacitated person, except in the case of a limited guardian where such power is not expressly provided for in the order of appointment or subsequent modifying order as provided in RCW 11.88.125 as now or hereafter amended, the standby guardian or standby limited guardian may provide timely, informed consent to necessary medical procedures if the guardian or limited guardian cannot be located within four hours after the need for such consent arises. No guardian, limited guardian, or standby guardian may involuntarily commit for mental health treatment, observation, or evaluation an alleged incapacitated person who is unable or unwilling to give informed consent to such commitment unless the procedures for involuntary commitment set forth in chapter 71.05 or 72.23 RCW are followed. Nothing in this section shall be construed to allow a guardian, limited guardian, or standby guardian to consent to:

- (a) Therapy or other procedure which induces convulsion;
- (b) Surgery solely for the purpose of psychosurgery;
- (c) Other psychiatric or mental health procedures that restrict physical freedom of movement, or the rights set forth in *RCW 71.05.370.

A guardian, limited guardian, or standby guardian who believes these procedures are necessary for the proper care and maintenance of the incapacitated person shall petition the court for an order unless the court has previously approved the procedure within the past thirty days. The court may order the procedure only after an attorney is appointed in accordance with RCW 11.88.045 if no attorney has previously appeared, notice is given, and a hearing is held in accordance with RCW 11.88.040.

[1991 c 289 § 11; 1990 c 122 § 21.]

Notes:

*Reviser's note: RCW 71.05.370 was recodified as RCW 71.05.217 pursuant to 2005 c 504 § 108, effective July 1, 2005.

Effective date -- 1990 c 122: See note following RCW 11.88.005.

RCWs > Title 11 > Chapter 11.92 > Section 11.92.040

11.92.035 << 11.92.040 >> 11.92.043

RCW 11.92.040

Duties of guardian or limited guardian in general.

It shall be the duty of the guardian or limited guardian of an estate:

(1) To file within three months after the guardian's appointment a verified inventory of all the property of the incapacitated person which comes into the guardian's possession or knowledge, including a statement of all encumbrances, liens, and other secured charges on any item;

(2) To file annually, within ninety days after the anniversary date of the guardian's or limited guardian's appointment, and also within thirty days after termination of the appointment, unless the court for good cause orders a different deadline to file following termination, a written verified account of the administration, which account shall contain at least the following information:

(a) Identification of property of the guardianship estate as of the date of the last account or, in the case of the initial account, as of the date of inventory;

(b) Identification of all additional property received into the guardianship, including income by source;

(c) Identification of all expenditures made during the account period by major categories;

(d) Any adjustments to the guardianship estate required to establish its present fair market value, including gains or losses on sale or other disposition and any mortgages, deeds of trust or other encumbrances against the guardianship estate; and

(e) Identification of all property held in the guardianship estate as of the date of account, the assessed value of any real property and the guardian's estimate of the present fair market values of other property (including the basis on which such estimate is made), and the total net fair market value of the guardianship estate. In addition, immediately following such statement of present fair market value, the account shall set forth a statement of current amount of the guardian's bond and any other court-ordered protection for the security of the guardianship assets;

(3) The court in its discretion may allow reports at intervals of up to thirty-six months for estates with assets (exclusive of real property) having a value of not more than twice the homestead exemption. Notwithstanding contrary provisions of this section, the guardian or limited guardian of an estate need not file an annual report with the court if the funds of the guardianship are held for the benefit of a minor in a blocked account unless the guardian requests a withdrawal from such account, in which case the guardian shall provide a written verified account of the administration of the guardianship estate along with the guardian's petition for the withdrawal. The guardian or limited guardian shall report any substantial change in income or assets of the guardianship estate within thirty days of the occurrence of the change. A hearing shall be scheduled for court review and determination of provision for increased bond or other provision in accordance with RCW 11.88.100;

(4) To protect and preserve the guardianship estate, to apply it as provided in this chapter, to account for it faithfully, to perform all of the duties required by law, and at the termination of the guardianship or limited guardianship, to deliver the assets of the incapacitated person to the persons entitled thereto. Except as provided to the contrary herein, the court may authorize a guardian or limited guardian to do anything that a trustee can do under the provisions of RCW 11.98.070 for a period not exceeding one year from the date of the order or for a period corresponding to the interval in which the guardian's or limited guardian's report is required to be filed by the court pursuant to subsection (2) of this section, whichever period is longer;

(5) To invest and reinvest the property of the incapacitated person in accordance with the rules applicable to investment of trust estates by trustees as provided in chapter 11.100 RCW, except that:

(a) No investments shall be made without prior order of the court in any property other than unconditional interest bearing obligations of this state or of the United States and in obligations the interest and principal of which are unconditionally guaranteed by the United States, and in share accounts or deposits which are insured by an agency of the

United States government. Such prior order of the court may authorize specific investments, or, in the discretion of the court, may authorize the guardian or limited guardian to invest and reinvest as provided in chapter 11.100 RCW without further order of the court;

(b) If it is for the best interests of the incapacitated person that a specific property be used by the incapacitated person rather than sold and the proceeds invested, the court may so order;

(6) To apply to the court no later than the filing of the inventory for an order authorizing disbursements on behalf of the incapacitated person: PROVIDED, HOWEVER, That the guardian or limited guardian of the estate, or the person, department, bureau, agency, or charitable organization having the care and custody of an incapacitated person, may apply to the court for an order directing the guardian or limited guardian of the estate to pay to the person, department, bureau, agency, or charitable organization having the care and custody of an incapacitated person, or if the guardian or limited guardian of the estate has the care and custody of the incapacitated person, directing the guardian or limited guardian of the estate to apply an amount weekly, monthly, quarterly, semi-annually, or annually, as the court may direct, to be expended in the care, maintenance, and education of the incapacitated person and of his or her dependents. In proper cases, the court may order payment of amounts directly to the incapacitated person for his or her maintenance or incidental expenses. The amounts authorized under this section may be decreased or increased from time to time by direction of the court. If payments are made to another under an order of the court, the guardian or limited guardian of the estate is not bound to see to the application thereof.

[1991 c 289 § 10; 1990 c 122 § 20; 1985 c 30 § 9. Prior: 1984 c 149 § 12; 1979 c 32 § 2; 1977 ex.s. c 309 § 13; 1975 1st ex.s. c 95 § 20; 1965 c 145 § 11.92.040; prior: 1957 c 64 § 1; 1955 c 205 § 15; 1941 c 83 § 1; 1917 c 156 § 205; Rem. Supp. 1941 § 1575; prior: 1895 c 42 § 1; Code 1881 § 1614.]

Notes:

Effective date -- 1990 c 122: See note following RCW 11.88.005.

Short title -- Application -- Purpose -- Severability -- 1985 c 30: See RCW 11.02.900 through 11.02.903.

Severability -- Effective dates -- 1984 c 149: See notes following RCW 11.02.005.

Severability -- 1977 ex.s. c 309: See note following RCW 11.88.005.

Compulsory school attendance law, duty to comply with: RCW 28A.225.010.

Disabled person, defined: RCW 11.88.010.



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Standards of Practice Regulation (400)

400 Standards of Practice

The following standards apply to all Certified Professional Guardians (Guardian). Standards apply only to the degree that the court has granted the authority contemplated in a given standard.

401 General

A guardian shall exercise care and diligence when making decisions on behalf of an incapacitated person. The civil rights and liberties of the incapacitated person shall be protected. The independence and self-reliance of the incapacitated person shall be maximized to the greatest extent consistent with their protection and safety.

401.1 The guardian shall at all times be thoroughly familiar with RCW 11.88, RCW 11.92, GR 23, these standards, and any other regulations or statutes which govern the conduct of the guardian in the management of affairs of an incapacitated person. When a question exists between the standards and a statute, timely direction shall be sought from the court. If a guardian is aware of a court order of the court in a specific case which may lead to a conflict with these regulations, the guardian shall disclose this to the court.

401.2 The guardian shall seek legal advice as necessary to know how the law applies to specific decisions.

401.3 The guardian shall provide reports and accountings that are timely, complete, accurate, understandable, and in a form acceptable to the court.

401.4 The guardian shall not act outside of the authority granted by the court.

401.5 The guardian shall protect the personal and economic interests of the incapacitated person and foster growth, independence, and self-reliance.

401.6 The guardian must know and acknowledge personal limits of knowledge and expertise and shall assure that qualified persons provide services to the incapacitated person.

401.7 Whenever feasible a guardian shall consult with the incapacitated person, and shall treat with respect, the feelings, values, and opinions of the incapacitated person. Wherever possible, the guardian shall acknowledge the residual capacity of the incapacitated person to participate in or make some decisions.

401.8 When the guardian has limited authority the guardian shall work cooperatively with the incapacitated person or with others who have authority in other areas for the benefit of the incapacitated person.

401.9 The guardian shall cooperate with and carefully consider the views and opinions of professionals, relatives, and friends who are knowledgeable about the incapacitated person.

401.10 The guardian shall seek independent professional evaluations, assessments, and opinions when necessary to identify the incapacitated person's needs and best interests.

401.11 The guardian shall recognize that his or her decisions are open to the scrutiny of other interested parties and, consequently, to criticism and challenge. Nonetheless, subject to orders of the court, the guardian alone is ultimately responsible for decisions made on behalf of the incapacitated person.

401.12 When possible, the guardian will defer to an incapacitated person's autonomous capacity to make decisions.

401.13 A guardian shall not disclose personal or other sensitive information about the incapacitated person to third parties except when necessary and appropriate to the needs of the incapacitated person.

401.14 The duties of a guardian to an incapacitated person are not conditioned upon the person's ability to compensate the guardian.

401.15 Guardians of the Person shall have meaningful in-person contact with their clients as needed and shall maintain telephone contact with care providers, medical staff, and others who manage aspects of care as needed and appropriate. Meaningful in-person contact shall provide the opportunity to observe the incapacitated person's circumstances and interactions with care givers.

401.16 Guardians of the Estate only shall maintain meaningful in-person contact with their clients as necessary to verify the individual's condition and status and that financial arrangements are appropriate.

401.17 All certified professional guardians and guardian agencies have a duty by statute to appoint a standby guardian. In appointing a standby guardian it is the best practice to appoint a certified professional guardian unless otherwise authorized by the local court with jurisdiction. (Amended January 9, 2006).

402 Decision Standards

All decisions and activities of the guardian shall be made according to the applicable decision standard.

402.1 The primary standard is the Substituted Judgment Standard. This means that the guardian shall make reasonable efforts to ascertain the incapacitated person's historic preferences and shall give significant weight to such preferences. Competent preferences may be inferred from past statements or actions of the incapacitated person.

402.2 When the competent preferences of an incapacitated person cannot be ascertained, the guardian is responsible for making decisions which are in the best interests of the incapacitated person. A determination of the best interests of the incapacitated person shall include consideration of the stated preferences of the incapacitated person.

403 Ethics

The guardian shall exhibit the highest degree of trust, loyalty, attentiveness, and fidelity in relation to the incapacitated person.

403.1 The guardian shall avoid self-dealing, conflict of interest, and the appearance of a conflict of interest. Self-dealing or conflict of interest arise when the guardian has some personal, family, or agency interest from which a personal benefit would be derived. Any potential conflict shall be disclosed to the court immediately.

403.2 All expenses paid or incurred on behalf of the incapacitated person by the guardian shall be documented, reasonable in amount, and incurred for the incapacitated person's welfare.

403.3 All compensation for the services of the guardian shall be documented, reasonable in amount, and incurred for the incapacitated person's welfare. The guardian shall not pay or advance himself/herself fees or expenses except as approved by the court.

403.4 Provision of compensated services other than guardianship services to an incapacitated person by the guardian shall be considered a potential conflict of interest, which must be fully disclosed.

403.5 An organization whose primary activities are provision of therapeutic, clinical, residential, or medical services shall not act as guardian for one of its patients or clients. Employees, agents, or components of such an organization shall not act as guardian for one of its patients or clients.

403.6 The guardian shall disclose to the court and interested parties all compensation, fees and expenses requested, charged, or received in a guardianship case.

403.7 Payment of fees or other compensation for guardianship services by a party other than the incapacitated person is a potential conflict of interest which shall be fully disclosed.

403.8 The guardian shall protect the incapacitated person's rights and best interests against infringement by third parties.

403.9 The guardian shall, whenever possible, provide requested information to the incapacitated person unless the guardian is reasonably certain that substantial harm will result from providing such information. This information shall include, but not be limited to, regular reports on the status of investments and operating accounts, and on the costs and disbursements necessary to manage the incapacitated person's estate, medical and other personal information related to the care of the incapacitated person.

403.10 Unless otherwise directed by the court, the guardian shall provide copies of all material filed with the court and notice of all hearings in the guardianship to the incapacitated person.

404 Residential Decisions

The guardian shall ensure that the incapacitated person resides in the least restrictive environment that is appropriate and available.

404.1 The guardian shall acknowledge the need to allow all persons the opportunity to engage in activities and live in conditions which are culturally and socially acceptable within the context of the incapacitated person's cultural and life values; or, when cultural and life values cannot be determined, conditions which are culturally and socially acceptable.

404.2 The guardian shall take reasonable measures to effectuate the incapacitated person's residential preferences.

404.3 The guardian shall know the current state of the law regarding limits on the guardian's authority as to residential decisions.

404.4 The guardian shall not remove the incapacitated person from his or her home or separate the incapacitated person from family and friends unless such removal is necessary to prevent significant harm or because of financial constraints. The guardian shall make reasonable efforts to ensure the incapacitated person resides at the incapacitated person's home or in a community setting.

404.5 The guardian shall, to the extent possible, select residential placements which enhance the quality of life of the incapacitated person, provide the opportunity to maximize the independence of the incapacitated person, and provide for physical comfort and safety.

404.6 A relocation should include consultation with professionals actively involved in the care of the incapacitated person, the incapacitated person, objective third parties and, whenever possible, appropriately involved family and friends of the incapacitated person.

404.7 The guardian shall, as necessary, thoroughly research and evaluate the incapacitated person's residential alternatives.

404.8 The guardian shall regularly monitor the incapacitated person's residential placement to ensure appropriateness and that such placement is the least restrictive alternative. The guardian shall consent to changes, as they become necessary, advantageous, or otherwise in the incapacitated person's best interests. The guardian shall consider that even changes within an existing residential facility have an impact on the quality of life of the incapacitated person.

404.9 Should the only available placement not be the most appropriate or least restrictive, the guardian shall regularly review alternatives to the placement and shall make reasonable efforts to arrange an appropriate and least restrictive residence.

405 Medical Decisions

The guardian shall provide informed consent on behalf of the incapacitated person for the provision of care, treatment and services and shall ensure that such care, treatment and services represents the least restrictive form of intervention that is appropriate and available.

405.1 The guardian shall monitor the care, treatment, and services the incapacitated person is receiving to ensure that it is appropriate. The guardian shall consent to changes in service as necessary, advantageous, or in the best interests of the incapacitated person.

405.2 The guardian shall actively promote the health of the incapacitated person by arranging for

regular preventive care including but not limited to dental care, diagnostic testing, and routine medical examinations.

405.3 The guardian shall be available at all times to respond to urgent need for medical decisions. The guardian shall provide directives regarding treatment or non-treatment to be followed by medical staff in emergencies.

405.4 In the event the only available treatment, care or services are not the most appropriate and least restrictive, the guardian shall advocate for the incapacitated person's right to appropriate and least restrictive treatment, care or services.

405.5 The guardian shall be fully informed as to risks and benefits to the incapacitated person prior to seeking advance court authorization for medical treatment when law requires such authorization.

405.6 The guardian shall be familiar with the law regarding the withholding or withdrawal of life-sustaining treatment.

406 Financial Management

The guardian shall assure competent management of the property and income of the estate. In the discharge of this duty, the guardian shall exercise the highest level of fiduciary responsibility, intelligence, prudence, and diligence and avoid any self-interest.

406.1 The guardian shall know and obey the law related to managing an incapacitated person's estate. Such knowledge shall include statutes relating to the investment of assets, restrictions imposed on investing and expenditures by RCW 11.88 and 11.92, and laws relating to employment, income, and taxes. The guardian shall hire competent professionals as appropriate to assure compliance with all statutes and regulations relating to the management of funds.

406.2 The guardian shall maintain all bonding, blocking, and insurance requirements as may be required by the court.

406.3 The guardian shall manage the estate with the primary goal of providing for the needs of the incapacitated person.

406.4 In certain cases, guardian shall consider the needs of the incapacitated person's Dependents for support or maintenance, provided appropriate authority for such support is obtained in advance. The wishes of the incapacitated person as well as past behavior can be considered, bearing in mind both foreseeable financial requirements of the incapacitated person and the advantages and disadvantages to the incapacitated person of such support or maintenance.

406.5 The guardian shall exercise prudence in investment, shall periodically review the incapacitated person's situation and assets, and make recommendations regarding appropriate investments. In the exercise of prudence the guardian shall:

406.5.1 Not allow assets to sit idle except for good reasons.

406.5.2 Consider the tax consequences of decisions.

406.5.3 Consider the incapacitated person's long term ability to sustain costs of arrangements made by the guardian.

406.5.4 Consider the incapacitated person's ability to gain the benefits of specific decisions.

406.5.5 Consider the costs incurred in managing investments, including the costs of the guardian, those specialists hired by the guardian, and the costs of the investment vehicles.

406.5.6 Consider the incapacitated person's historical investment pattern and tolerance for risk, lifestyle needs, care and medical needs, estate considerations, tax consequences, and life expectancy.

406.6 When the available estate of the incapacitated person is sufficient, the guardian may petition the court for authority to make such gifts as are consistent with the wishes or past behavior of the incapacitated person, bearing in mind both foreseeable requirements of the incapacitated person and the advantages and disadvantages to the incapacitated person of such gifts, including tax consequences.

406.7 A guardian shall not accept a gift from an incapacitated person or their estate other than ordinary social hospitality.

406.8 When it is likely that the incapacitated person's estate will be exhausted, the guardian shall, as appropriate, make plans and take necessary steps to acquire public benefits on behalf of the incapacitated person. When implementing necessary changes in the incapacitated person's lifestyle, the guardian shall seek to minimize the stress of any transition.

406.9 There shall be no self-interest in the management of the estate by the guardian; the guardian shall exercise caution to avoid even the appearance of self-interest.

406.10 A guardian shall not commingle the funds of an incapacitated person with funds of the guardian or the funds of staff. A guardian may consolidate client accounts, using appropriate accounting software and procedures, including pro-rata assignment of interest earned and fees paid and accurate individual accounting for each client's funds, provided the guardian has received specific authority from the court to do so. Each payment from a consolidated account shall be from funds held in the account on behalf of the individual for whom the payment is made.

406.11 The guardian shall not borrow from an incapacitated person. A guardian shall not lend funds at interest to an incapacitated person.

406.12 The responsibility to protect and preserve the guardianship estate rests with the certified guardian appointed by the court. When the guardian is an agency, this responsibility is that of the agency and the certified guardians identified with the Certified Professional Guardian Board as the responsible guardians for the agency. While it may be appropriate and necessary to retain and reasonably rely upon the services of knowledgeable individuals or entities to assist in the performance of duties, it is the responsibility of the guardian to provide appropriate oversight and review, in order to preserve the guardianship estate. (Amended September 11, 2006).

407 Changes of Circumstances

The guardian has an affirmative obligation to be alert to changes in the incapacitated person's condition or circumstances and report to the court when an increase or reduction in the authority of the guardian should be considered.

407.1 The guardian shall seek out information that will provide a basis for termination or limitation of the guardianship.

407.2 Upon indication that termination or limitation of the guardianship order is warranted, the guardian shall request court action.

407.3 The guardian shall assist the incapacitated person to terminate or limit the guardianship and arrange for independent representation for the incapacitated person when necessary.

407.4 If the guardianship is a limited guardianship, the guardian shall report to the court when there are circumstances in which the incapacitated person appears to require assistance which exceeds the authority of the guardian.

407.5 If the guardianship is of the person only, the guardian shall report to the court when protection of the incapacitated person's estate may be necessary.

407.6 If the guardianship is of the estate only, the guardian shall report to the court when protection of the person may be necessary.

408 Applicable Law

The guardian shall perform duties and discharge obligations in accordance with current Washington law governing the certification of guardian. In each guardianship, the guardian shall comply with the requirements of the court that made the appointment.

[Courts](#) | [Organizations](#) | [News](#) | [Opinions](#) | [Rules](#) | [Forms](#) | [Directory](#) | [Library](#)
[Back to Top](#) | [Privacy and Disclaimer Notices](#)

RCWs > Title 11 > Chapter 11.88 > Section 11.88.095

11.88.093 << 11.88.095 >> 11.88.097

RCW 11.88.095

Disposition of guardianship petition.

(1) In determining the disposition of a petition for guardianship, the court's order shall be based upon findings as to the capacities, condition, and needs of the alleged incapacitated person, and shall not be based solely upon agreements made by the parties.

(2) Every order appointing a full or limited guardian of the person or estate shall include:

(a) Findings as to the capacities, condition, and needs of the alleged incapacitated person;

(b) The amount of the bond, if any, or a bond review period;

(c) When the next report of the guardian is due;

(d) Whether the guardian ad litem shall continue acting as guardian ad litem;

(e) Whether a review hearing shall be required upon the filing of the inventory;

(f) The authority of the guardian, if any, for investment and expenditure of the ward's estate; and

(g) Names and addresses of those persons described in RCW 11.88.090(5)(d), if any, whom the court believes should receive copies of further pleadings filed by the guardian with respect to the guardianship.

(3) If the court determines that a limited guardian should be appointed, the order shall specifically set forth the limits by either stating exceptions to the otherwise full authority of the guardian or by stating the specific authority of the guardian.

(4) In determining the disposition of a petition for appointment of a guardian or limited guardian of the estate only, the court shall consider whether the alleged incapacitated person is capable of giving informed medical consent or of making other personal decisions and, if not, whether a guardian or limited guardian of the person of the alleged incapacitated person should be appointed for that purpose.

(5) Unless otherwise ordered, any powers of attorney or durable powers of attorney shall be revoked upon appointment of a guardian or limited guardian of the estate.

If there is an existing medical power of attorney, the court must make a specific finding of fact regarding the continued validity of that medical power of attorney before appointing a guardian or limited guardian for the person.

[1995 c 297 § 5; 1991 c 289 § 6; 1990 c 122 § 9.]

Notes:

Effective date -- 1990 c 122: See note following RCW 11.88.005.