

62711-2

62711-2

84379-1

NO. 62711-2-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

FILED
COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
2019 MAR 25 PM 1:02

In the Matter of the
GUARDIANSHIP OF SANDRA LAMB

**DSHS RESPONSE BRIEF AND
OPENING BRIEF ON CROSS-APPEAL**

ROBERT M. MCKENNA
Attorney General

JONATHON BASHFORD
Assistant Attorney General
WSBA #39399
7141 Cleanwater Drive SW
Olympia, WA 98504-0124
(360) 586-6535

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ASSIGNMENTS OF ERROR	1
III.	STATEMENT OF THE CASE.....	2
IV.	ARGUMENT IN RESPONSE.....	11
	A. Ripeness.....	11
	B. Standard Of Review.....	12
	C. Guardian Fees Generally.....	13
	1. Generally, guardians are entitled to just and reasonable compensation for all necessary and beneficial services.	13
	2. Guardians may not collect fees for services that are outside the scope of their appointment.	14
	D. Guardians May Not Be Compensated For Political Activities	16
	1. There is no legal basis for the proposition that a guardian’s duties include political activities.	17
	2. Public policy does not support extending the law of guardianships to require guardians to engage in politics and lobbying on behalf of their wards.	21
	E. Guardian Fees For Political Activities Are Not A Valid Deduction From A Fircrest Resident’s Cost Of Care	24
	1. The Hardmans’ argument against the validity of DSHS rules is raised for the first time on appeal and is not properly before the Court in this non-APA action.	25

2.	The maximum fees that may be awarded to guardians of certain DSHS clients are limited by Ch. 388-79 WAC	26
3.	The guardian fee restrictions of Ch. 388-79 WAC apply to Ms. Lamb and Ms. Robins as residents of Fircrest.....	29
4.	Political activities are not “extraordinary services” under WAC 388-79-050.	35
5.	The regulation of guardian fees does not raise separation of powers concerns.....	37
F.	Limiting A Guardian’s Fees Does Not Implicate The Constitutional Right To Petition	39
G.	Attorney Fees	41
V.	ARGUMENT ON CROSS-APPEAL	43
A.	There Is No Legal Basis For The Proposition That A Guardian’s Duties Include Community Outreach Activities	44
1.	Public policy does not support extending the law of guardianships to require guardians to engage in community outreach on behalf of their wards.	45
B.	Guardian Fees For Community Outreach Activities Are Not A Valid Deduction From A Fircrest Resident’s Cost Of Care.....	47
C.	There Is No Evidence That Community Outreach Is Necessary And Beneficial To Ms. Lamb Or Ms. Robins	48
VI.	CONCLUSION	49

TABLE OF AUTHORITIES

Cases

<i>Ang v. Martin</i> , 154 Wn.2d 477, 114 P.3d 637 (2005).....	12
<i>Blanchard v. Golden Age Brewing Co.</i> , 188 Wash. 396, 63 P.2d 397 (1936)	38, 39
<i>Brooks v. Flaherty</i> , 699 F. Supp. 1178 (W.D. N.C. 1988), judgment aff'd, 902 F.2d 250 (4th Cir. 1990).....	44
<i>Brown v. Owen</i> , __ Wn.2d __, No. 81287-0, slip op. at 12 (March 5, 2009).....	23
<i>California Motor Transport Co. v. Trucking Unlimited</i> , 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972).....	40
<i>Casco Co. v. Thurston County et. al.</i> , 163 Wash. 666, 2 P.2d 677 (1931)	38
<i>Day v. Az. Health Care Cost Containment System Administration</i> , 109 P.3d 102 (Az. 2005).....	34
<i>Dep't of Health and Mental Hygiene v. Campbell</i> , 771 A.2d 1051 (Md. 2001)	34
<i>Dix v. ICT Group, Inc.</i> , 160 Wn.2d 826, 161 P.3d 1016 (2007).....	13
<i>Estate of Burks v. Kidd</i> , 124 Wn. App. 327, 100 P.3d 328 (Div. II 2004), <i>review denied</i> , 154 Wn.2d 1029 (2005).....	42
<i>Estate of D'Agosto</i> , 134 Wn. App. 390, 139 P.3d 1125 (Div. I 2006), <i>review denied</i> , 160 Wn.2d 1016 (2007).....	42, 43

<i>Florence Nightingale Nursing Home v. Perales</i> , 782 F.2d 26, (2d Cir.1986), cert. denied, 479 U.S. 815, 107 S. Ct. 68, 93 L.Ed.2d 26 (1986).....	33
<i>Guardianship of Read v. Kenefick</i> , 555 So.2d 869 (Fla. Dist. Ct. App.1989).....	14
<i>Guardianship of Sapp</i> , 868 So. 2d 687, 697 (Fla. Dist. Ct. App. 2004).....	15
<i>Harris v. McRae</i> , 448 U.S. 297, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980).....	30
<i>In Re Barclay</i> , 705 S.W.2d 518 (Mo. 1985).....	34
<i>In re Estate of Larson</i> , 103 Wn.2d 517, 694 P.2d 1051 (1985).....	14
<i>In re Guardianship of Hallauer</i> , 44 Wn. App. 795, 723 P.2d 1161 (1986).....	14
<i>In Re Guardianship of McKean</i> , 136 Wn. App. 906, 151 P.3d 223 (2007).....	12, 14
<i>In Re Guardianship of Spieker</i> , 69 Wn.2d 32, 416 P.2d 465 (1966).....	12
<i>In Re Murphy's Estate</i> , 30 Wash. 1, 70 P. 107 (1902).....	37
<i>In re Sall</i> , 59 Wash. 539, 110 P. 32 (1910).....	21, 37
<i>In the Matter of the Guardianship of Adamec</i> , 100 Wn.2d 166, 667 P.2d 1085 (1983).....	37
<i>In the Matter of the Guardianship of Hayes</i> , 93 Wn.2d 228, 608 P.2d 635 (1980).....	38

<i>In the Matter of the Guardianship of Ivarsson,</i> 60 Wn.2d 733, 375 P.2d 509 (1962).....	14, 15
<i>Judd v. American Tel. and Tel. Co.,</i> 152 Wn.2d 195, 95 P.3d 337 (2004).....	26
<i>Martyr v. Mazur-Hart,</i> 789 F. Supp. 1081 (D.Or. 1992).....	44
<i>Mearns v. Scharbach,</i> 103 Wn. App. 498, 12 P.3d 1048 (Div. III 2000), <i>review denied,</i> 143 Wn.2d 1011 (2001).....	42
<i>Multicare Medical Center v. State of Wash.,</i> 768 F. Supp. 1349, (W.D. Wash. 1991).....	30
<i>NAACP v. Button,</i> 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963).....	40
<i>O'Connell v. Conte,</i> 76 Wn.2d 280, 456 P.2d 317 (1969).....	32
<i>Parsons v. Dep't of Social & Health Servs.,</i> 129 Wn. App. 293, 118 P.3d 930 (2005), <i>review denied,</i> 157 Wn.2d 1004 (2006).....	2, 6, 8
<i>Pollock v. Horn,</i> 13 Wash. 626, 43 P. 885 (1896).....	22
<i>Quesnell v. State,</i> 83 Wn.2d 224, 517 P.2d 568 (1973).....	20
<i>Ramey v. Reinertson,</i> 268 F.3d 955 (10th Cir.2001).....	31
<i>Roon v. King County,</i> 24 Wn.2d 519, 166 P.2d 165 (1946).....	38
<i>Rudow v. Div. of Medical Assistance,</i> 707 N.E.2d 339 (Ma. 1999).....	34

<i>Shelley v. Elfstrom</i> , 13 Wn. App. 887, 538 P.2d 149 (1975).....	12
<i>State v. Jones</i> , 57 Wn.2d 701, 359 P.2d 311 (1961).....	20
<i>Thomas v. Collins</i> , 323 U.S. 516, 65 S. Ct. 315, 89 L. Ed. 430 (1945).....	40
<i>Timm v. Montana Dept. of Public Health and Human Services</i> , 343 Mont. 11, 184 P.3d 994, 997 (2008).....	31, 32
<i>United Mine Workers of America v. Illinois State Bar Association</i> , 389 U.S. 217, 88 S. Ct. 353, 19 L. Ed. 2d 426 (1967).....	40
<i>Wilder v. Va. Hosp. Ass'n</i> , 496 U.S. 498, 110 S. Ct. 2510, 110 L. Ed. 2d 455 (1990).....	30

Statutes

42 U.S.C. § 1396	30
Administrative Procedure Act (APA), Chapter 34.05 RCW	25
Balanced Budget Act of 1997, Pub. L. 105-33, §5522(c)(1) (1997)	32
Laws of 1997, ch. 312	22
Laws of 2005, ch. 236	22
Laws of 2005, ch. 236, § 1	19
Laws of 2005, ch. 236, §2	19
RCW 11.88.010	13, 18
RCW 11.88.010(1)(a)	18
RCW 11.88.010(5)	18

RCW 11.88.030(4)(b)	18
RCW 11.92.043	15, 16
RCW 11.92.043(4)	17, 44
RCW 11.92.150	3, 27
RCW 11.92.180	passim
RCW 11.96A.150	41, 42, 43
RCW 11.96A.150(1)	42
RCW 11.96A.150(2)	42
RCW 29A.72.010	19
RCW 34.05.010(3)	26
RCW 34.05.510	26
RCW 34.05.570	26
RCW 43.203.410 - .460	32, 33
RCW 43.203.415	33
RCW 43.20B.410	2
RCW 43.20B.445	33
RCW 43.20B.460	27, 29
RCW 70.129	7
RCW 71A.20.020	2

Other Authorities

1 Timothy Walker, <i>Introduction to American Law Designed as a First Book for Students</i> 265 (4th ed. 1860)	21
Black's Law Dictionary, 547 (6th ed. 1990)	33
<i>CPG Standards of Practice</i> § 401	17
<i>CPG Standards of Practice</i> § 401.14	17
Mary Joy Quinn, <i>Guardianships of Adults: Achieving Justice, Autonomy, and Safety</i> 20 (2005)	22

Rules

42 C.F.R. § 430.1	30
42 C.F.R. § 435.725	32, 33
42 C.F.R. § 435.725(c)	34, 35
42 C.F.R. § 435.725(d)	34
42 C.F.R. § 435.733(d)	34
42 C.F.R. § 435.832(d)	34
42 C.F.R. § 455.20	30
42 C.F.R. § 435.725(c)	33
42 C.F.R. § 435.733	32
42 C.F.R. § 435.733(c)	33
42 C.F.R. § 435.832	32
42 C.F.R. § 435.832(c)	33

42 C.F.R. § 483.420(a)(9)	45
42 U.S.C. § 1382a(b)	31
42 U.S.C. § 1396a(a)	30
42 U.S.C. § 1396a(a)(10)	31
42 U.S.C. § 1396o(a)(2)(C)	32
42 U.S.C. § 1396p	32
42 U.S.C. § 1396p(a)(1)	32
42 U.S.C. § 1396p(b)(1)	32
42 U.S.C. 1382(e)(1)(B)	32
45 C.F.R. § 1385.3	8
Chapter 388-79 WAC	passim
RAP 2.5(a)	25
WAC 11.92.180	35
WAC 388-513-1315	31
WAC 388-513-1340	31
WAC 388-513-1380	32, 33
WAC 388-513-1380(4) and (5)	34
WAC 388-513-1380(5)(e)	34
WAC 388-515-1505(8)	33
WAC 388-550-4650	30
WAC 388-79-010	28

WAC 388-79-020	33
WAC 388-79-030	3, 28
WAC 388-79-030(1)	28
WAC 388-79-040	28
WAC 388-79-050	passim
WAC 388-79-050(4)	46
WAC 388-79-050(4)(b)(i)	34
WAC 388-79-050(4)(b)(ii)	28, 29, 46
WAC 388-79-050(4)(b)(iii)	29, 35, 47
WAC 388-79-050(4)(c)	29
WAC 388-825-089	32
WAC 388-835-0925	25

Constitutional Provisions

Const. Art. II, §7	19
--------------------	----

I. INTRODUCTION

Guardians James Hardman and Alice Hardman appeal from two orders, consolidated on appeal, denying their request for an allowance for fees to engage in lobbying and other political activities, including political efforts to prevent the closure of Fircrest School. They request that those fees be deducted on a monthly basis from the income of their wards, subject to final approval at the next triennial guardianship accounting. The requested “advocacy” fees would be in addition to the fees that the Hardmans already receive for performing the normal duties of a guardian.

Respondent/Cross-Appellant Department of Social and Health Services (DSHS) cross-appeals from the portions of the same orders which awarded an allowance to the Hardmans to engage in a public relations campaign and attend community meetings.

II. ASSIGNMENTS OF ERROR

1. Do a guardian’s duties to protect the rights of his wards include a duty to engage in community outreach on behalf of his wards?
2. If a guardian’s duties include community outreach on behalf of his wards, is the trial court’s allowance for guardian fees in this case consistent with the requirement, in WAC 388-79-050, that excess guardian fees must be for “extraordinary” services?
3. If a guardian’s duties include community outreach on behalf of his wards, was there adequate evidence for the court to conclude that community outreach is necessary and beneficial in this case?

III. STATEMENT OF THE CASE

James Hardman and Alice Hardman are certified professional guardians. CP 21. They act as co-guardians for dozens of DSHS clients, including at least 23 clients who reside at Fircrest School. CP 140. Fircrest, located in Seattle, is one of five residential habilitation centers (RHCs, formerly known as “state residential schools”) established by state law to serve persons with developmental disabilities. RCW 71A.20.020.¹ “RHCs provide for those children and adults who are exceptional in their needs for care, treatment, and education by reason of developmental disabilities.” *Parsons v. Dep’t of Social & Health Servs.*, 129 Wn. App. 293, 296, 118 P.3d 930 (2005), *review denied*, 157 Wn.2d 1004 (2006).

DSHS is the state agency that administers the Medicaid program in Washington State and provides institutional services to developmentally disabled individuals at Fircrest. State law provides that “[t]he estates of all mentally or physically deficient persons who have been admitted to the state residential schools... shall be liable for their per capita costs of care, support and treatment[.]” RCW 43.20B.410. DSHS argued below that “[w]hen [guardian] fees are paid [from an RHC resident’s income], they

¹ The record does not contain a description of Fircrest. According to the DSHS website, “Fircrest School provides support to about 200 people with developmental disabilities in a residential setting.... Services to the individuals who reside at Fircrest are partially funded through two different programs that are regulated by the Centers for Medicaid and Medicare Services. The Nursing Facility within Fircrest provides individualized health care and activities to persons who have unique medical needs. The Intermediate Care Facility for the Mentally Retarded (ICF/MR) provides individualized habilitative services that support and enhance individual skills and strengths.” Dep’t of Social and Health Servs., Division of Developmental Disabilities - Fircrest Residential Habilitation Center, available at <http://www.dshs.wa.gov/dd/Fircrest.shtml> (last visited March 10, 2009).

reduce the amount that would otherwise be available to the state in reimbursement, thus increasing the amount of federal and state Medicaid funds that are required to be spent on each eligible client.” CP 153.² The legislature has granted DSHS the authority to place a cap on guardian fees that can be taken from an RHC resident’s income, and required notice by guardians to DSHS when requesting fees in such cases:

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

RCW 11.92.180. DSHS has capped the amount of guardian fees that can be paid from the individual income of an RHC client at \$175 per month for “usual and customary” guardianship activities. WAC 388-79-030; WAC 388-79-050.

In addition to acting as joint guardians for dozens of DSHS clients, the Hardmans engage in various community and political activities related to the developmentally disabled. James Hardman is president and legal committee chair of Friends of Fircrest (FoF), an advocacy organization for institutional services. CP 134; CP 143. He serves as legislative chair of

² The Hardmans dispute, for the first time on appeal, DSHS’s authority to impose such liability. Guardians’ Opening Brief at 13-30. DSHS responds to that argument beginning at page 25 of this brief. However, there is no dispute that DSHS does have rules imposing such liability, and does in fact charge RHC residents including Ms. Lamb and Ms. Robins for their costs of care.

Washington State Disabilities Issues Caucus (WSDIC). CP 143. He is a member the advocacy groups VOR (formerly Voice of the Retarded), Action DD, and Friends of Rainier. *Id.* James Hardman works on state lobbying efforts through Action for RHCs, CP 135; and works “within the State Democratic convention as a delegate to advocate for the resolution of support for Fircrest and other state RHCs.” CP 136.

Among the wards served by the Hardmans are Sandra Lamb and Rebecca Robins. Ms. Lamb is a 52 year-old woman with a medical diagnosis of profound mental retardation. CP 115. She is a client of DSHS residing at Fircrest. CP 111; CP 115. Ms. Lamb has an income of \$1106 per month in Social Security Administration benefits. CP 111. She is also the beneficiary of a special needs trust established in 2008. CP 122; CP 203.

King County Superior Court originally found Sandra Lamb to be incapacitated in 1986. CP 97-100. Alice Hardman was appointed as guardian of Ms. Lamb in 1993. CP 104. James Hardman was appointed as co-guardian in 1997. CP 107. On May 2, 2008, the Hardmans filed a triennial Guardian’s Report for Ms. Lamb. CP 109. They asked for approval of their guardian fees for the prior reporting period. CP 112. They also sought an allowance during the new 3-year reporting period of \$225 per month for guardian fees, plus \$150 per month for “special advocacy fees.” CP 114. The request for guardian fees was later increased to \$235 per month. CP 192.

Ms. Robins is a 53 year-old woman with a medical diagnosis of profound or severe mental retardation. CP 26. Like Ms. Lamb, she is a client of DSHS residing at Fircrest. CP 22; CP 21. Ms. Robins is the beneficiary of \$892 per month from a railroad retirement account. CP 22.

King County Superior Court originally found Rebecca Robins to be incapacitated in 1985. CP 1-5. Alice Hardman was appointed as guardian of Ms. Robins in 1993. CP 11. James Hardman was appointed as co-guardian in 1998. CP 19. On May 9, 2008, the Hardmans filed a triennial Guardian's Report for Ms. Robins. CP 20. They asked for approval of their guardian fees for the prior reporting period. CP 23. They also sought an allowance during the new 3-year reporting period of \$235 per month for guardian fees, plus \$150 per month for "special advocacy fees." CP 25.

In support of the request for "special advocacy fees," the guardians attached a 16-page document labeled "Advocacy Report of James R. Hardman" to the Guardian's Report. CP 130-145.³ The advocacy report describes various activities including community service, public outreach, and political activity⁴ undertaken by the Hardmans from January 2004

³ The citation is to the report submitted for Sandra Lamb. The same report, identical except for the case heading, was attached to the Guardian's Report for Rebecca Robins. CP 39-54. Because the two reports are duplicative, for simplicity's sake this brief cites throughout only to the Advocacy Report for Sandra Lamb and does not provide the equivalent Robins citation in the clerk's papers.

⁴ Additionally, much of the advocacy report is taken up with describing litigation with which the Hardmans and their wards have been involved. Ms. Lamb was a party to one case, CP 134, though not all of the cases described. *E.g.*, CP 131-132. The record does not identify any litigation, prior to this case, to which Ms. Robins was a party. In this appeal, the Hardmans are not seeking compensation for the time spent on litigation, which has been awarded separately. CP 189.

until February 2008. *Id.*⁵ The Hardmans refer to these efforts collectively as “advocacy,” which is distinct from their “regular guardianship activities.” CP 196. The advocacy report was later supplemented with a 7-page declaration from James Hardman. CP 196-202.

Both James and Alice Hardman participate in advocacy. CP 197. The Hardmans present their activities as “collectively advocating for all of [their wards] as their political voice,” CP 141, in a number of “efforts [that] are not easily segregated from one another.” CP 140. According to the report, the guardians’ advocacy was made necessary when, in January 2004, a legislative proposal was introduced that would have closed Fircrest. CP 130.⁶ The Hardmans allege that closure would be “hazardous” to the Fircrest residents, and that “[e]ach time groups of residents of RHCs are moved the ‘herd is culled[.]’” CP 201. The Hardmans acknowledge that relocating from RHCs is beneficial for some residents. CP 144. But, they maintain, Ms. Lamb “suffer[ed]” when transferred out of Fircrest to another RHC; her suffering “appeared to cease the moment she returned.” CP 144. There is no information in the record as to whether Ms. Robins might benefit from relocation.

⁵ While the date in the footer and the signature of the advocacy report indicate that the report extends only to February 2007, that is clearly scrivener’s error. *See* CP 141 (report through February 2, 2008).

⁶ This Court noted in subsequent litigation that the closure bill, Engrossed Senate Bill 5971, “did not pass. But the legislature made several budget allocations for costs associated with reducing the size of Fircrest....” *Parsons v. Dep’t of Social & Health Services*, 129 Wn. App. 293, 297, 118 P.3d 930 (2005), *rev. denied*, 157 Wn.2d 1004 (2006). DSHS successfully implemented downsizing at Fircrest, over the objection of the Hardmans. *See id.* at 298; CP 131-132. The Hardmans’ fees for pursuing that litigation are not at issue in this case.

Since the proposal to close Fircrest was introduced unsuccessfully in 2004, the Hardmans have engaged in advocacy “for the purpose of exercising the resident’s [sic] civil rights to participate in primarily political efforts to prevent the closure of their homes at Fircrest, and to prevent their evictions and the ill effects of dislocation stress on their health and welfare.” CP 130-131.

The Hardmans’ advocacy includes a wide range of political efforts beyond the involvement with community groups described above. They lobby state and local officials. CP 135. Beyond simply opposing the closure of Fircrest, they champion various specific legislative initiatives, including:

bills which would extend to RHC residents the rights... contained in RCW 70.129; incentives for Washington colleges to include courses concerning the treatment of people with developmental disabilities (DD); background checks for all who care for people with DD; funding for RHCs; and, whistleblower protection for professionals who treat people [i]n RHCs.

CP 143. They attend land use planning meetings for the Fircrest area in an attempt to prevent certain types of development. CP 139, 141-143. They are involved with “[a] national effort to prevent class action litigation to close RHCs without notice to guardians,” CP 143; as part of that effort, the Hardmans attend an annual VOR conference and engage in lobbying efforts in Washington, D.C. CP 139; CP 197.

Other advocacy activities identified in the report include: “produc[ing] informational materials, and a monthly newsletter,” CP 135;

creating public relations materials such as a PowerPoint slide presentation about Fircrest residents, CP 140; “lobby[ing] media, radio, television, [and] newspapers,” CP 135; organizing tours of Fircrest for “influential people,” *id.*; “work[ing] with communications professionals to maximize effectiveness,” *id.*; “advocat[ing] with... the Shoreline Chamber of Commerce,” *id.*; “instigating CMS (Center for Medicare and Medicaid Services) to investigate,” *id.*; and, “financial support for FoF, Friends of Rainier..., Action DD, WSDIC, VOR, WAPG [Washington Association of Public Guardians], and officials and candidates who favor protecting Fircrest residents.” CP 197.

The Hardmans contrast their advocacy for institutional care to “anti-RHC advocacy [that] appears to be ideologically driven and exists throughout the nation.” CP 144. They identify a number of organizations including DSHS, Disability Rights Washington (DRW),⁷ and ARC (formerly known as Association for Retarded Citizens) as persisting in an “article of faith that congregate care is bad[.]” CP 134. They reason that

⁷ DRW was formerly known as Washington Protection and Advocacy Systems (WPAS), CP 198, and is referred to in that way in several places in the record. DRW “is a nonprofit organization designated by the governor to protect and advocate for persons with disabilities.” *Parsons*, 129 Wn. App. at 298; *see* 45 C.F.R. § 1385.3 (protection and advocacy agencies designated by states to “pursue administrative, legal and appropriate remedies or approaches to ensure protection of, and advocacy for, the rights of [developmentally disabled persons].”) In *Parsons*, WPAS appeared “as a friend of the trial court, to address ‘important issues regarding the positive effects of deinstitutionalization on individuals with developmental disabilities[.]’ [and] argued that [DSHS]’s ‘actions to downsize and possibly close Fircrest were supported by the relevant expert clinical literature in the field and were consistent with relevant federal and state laws.’” 129 Wn. App. at 298 (internal brackets and footnotes omitted).

DRW's opposition to them means "[c]ontinued guardianship advocacy is the only protection afforded to" the Fircrest residents. CP 133.

James Hardman represents that he "devote[s] 80-100 hours per month on [advocacy] activities." CP 136. He "believes continual advocacy for residents of RHCs will be necessary for the foreseeable future." CP 144-145. The Hardmans' advocacy fee request, \$150 per month for each ward, is justified by dividing the time spent on advocacy across all of the Hardman wards residing at Fircrest. CP 136-137.

The Hardmans' guardian reports and requests for fees were served on DSHS in accordance with RCW 11.92.180. DSHS intervened and objected before the Superior Court commissioner, as to both Ms. Lamb and Ms. Robins, to (1) the Hardmans' request for an advance guardian fee allowance above \$175 per month, and (2) the request for an advance of "special advocacy fees." CP 152-168.⁸ A joint hearing on the Lamb and Robins cases was held on June 6, 2008. CP 58; CP 204; CP 216-218 (transcript of oral ruling). The court commissioner allowed only \$175 per month as an advance allowance for usual and customary guardianship activities in each case. CP 58; CP 204. The commissioner also ordered an advance allowance for advocacy fees in each case in the amount of \$150 per month, subject to court approval at the next accounting. *Id.* The order clarified that the Hardmans would be required at the next accounting to "submit a report specifically reporting the time spent on advocacy and

⁸ DSHS did not object to the reasonableness of the Hardmans' fees for the prior reporting period.

specifically relating the benefit conferred by that advocacy” on each of the wards. *Id.*

DSHS filed Motions to Revise the commissioner’s orders, challenging the prospective fees for advocacy. CP 206-215. A hearing was held on August 28, 2008 before Judge Steven Gonzalez. CP 233. Judge Gonzalez revised the commissioner’s orders, and denied in part the “special advocacy fees” requested by the Hardmans (relabeling them “extraordinary fees”). CP 60-62; CP 235-237. The court’s orders differentiated between political advocacy and community outreach:

- a. The political and lobbying activities undertaken by Guardians are outside the scope of their guardianship of [the ward]. The Guardians’ request for extraordinary fees for the next reporting period are denied to the extent that those fees relate to political and lobbying activities.
- b. Community outreach activities that are necessary to protect the best interests of [the ward] are within the scope of the guardianship. Therefore, the Motion to Revise is denied and the Guardians’ extraordinary fees claimed for the next reporting period are allowed to the extent that those fees relate to community outreach that is necessary to protect the best interests of [the ward]. The court finds that the fees for those activities currently amount to between \$50 and \$75 per month.

CP 61; CP 236. The Hardmans filed a motion for reconsideration. CP 262-263. The motion was denied without further elaboration. CP 63-66; CP 289-292. The Hardmans appeal, and DSHS cross-appeals the order from Superior Court.

IV. ARGUMENT IN RESPONSE

Washington law does not contemplate a guardian engaging in, and receiving compensation for, the types of activities classified by the Hardmans as “advocacy.” There is no basis in statute, regulation, case law, or history to award guardian fees for a guardian’s political activities—even when those activities relate to and may benefit incapacitated persons generally. A guardian requesting fees from the estate of his ward must show that his activities are both necessary and actually, as opposed to potentially, beneficial.

The Hardmans variously argue against the validity of DSHS rules, the financial responsibility of RHC residents, and the constitutionality of constraints on guardians’ fees. None of those arguments has merit.

A. Ripeness

This appeal is from two orders provisionally awarding guardian fees to the Hardmans. All sums paid to the Hardmans under the orders are “subject to Court approval at the next regular accounting.” CP 62; CP 237. Reserved for that time are all questions regarding the reasonableness of the Hardmans’ hourly rate; the number of hours actually spent on guardianship activities; and whether such activities were reasonable, necessary and beneficial to the wards.⁹ The only issues ripe for appeal are whether the Hardmans can, under state law, receive guardian fees for the

⁹ The Hardmans do not raise any of these issues in their opening brief.

political and community outreach activities for which they seek to be paid; and whether there was adequate evidence below for the Superior Court to provide an advance allowance of \$75 per month, per ward, for the Hardmans' proposed community outreach activities.

B. Standard Of Review

There are two sets of issues before the court on appeal, with two different standards of review. The first set of issues concerns the legal scope of a guardian's authority under state law. The Superior Court ruled as a matter of law that political activities were outside the scope of these guardianships, and that certain community outreach activities were within the scope of the guardianships. The legal scope of a guardianship is a question of law that is reviewed *de novo*. See *Ang v. Martin*, 154 Wn.2d 477, 481, 114 P.3d 637 (2005) (questions of law are reviewed *de novo*).

The second set concerns whether the trial court exceeded its discretion when applying guardianship law to this case. An award of guardian fees is largely within the trial court's discretion, and thus subject to review under the abuse of discretion standard. *In Re Guardianship of Spieker*, 69 Wn.2d 32, 34-35, 416 P.2d 465 (1966); *In Re Guardianship of McKean*, 136 Wn. App. 906, 918, 151 P.3d 223 (2007); *but see Shelley v. Elfstrom*, 13 Wn. App. 887, 889, 538 P.2d 149 (1975) (an appellate court may "act *sua sponte* to protect the apparent interests of a ward"). "Under [the abuse of discretion] standard of review, a trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable

grounds. If the trial court's ruling is based on an erroneous view of the law or involves application of an incorrect legal analysis it necessarily abuses its discretion.” *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007) (internal citations omitted).

C. Guardian Fees Generally

1. Generally, guardians are entitled to just and reasonable compensation for all necessary and beneficial services.

Washington superior courts have the power to appoint a guardian over the person and/or estate of an incapacitated person. RCW 11.88.010. The superior courts also have the power to set the amount of a guardian’s fees. RCW 11.92.180.

A guardian... shall be allowed such compensation for his or her services as guardian... as the court shall deem just and reasonable.... Additional compensation may be allowed for other administrative costs, including services of an attorney and for other services not provided by the guardian.... In all cases, compensation of the guardian... and his or her expenses including attorney's fees shall be fixed by the court and may be allowed at any annual or final accounting; but at any time during the administration of the estate, the guardian... or his or her attorney may apply to the court for an allowance upon the compensation or necessary expenses of the guardian... and for attorney's fees for services already performed.

Id. Thus, the guardian may request an allowance for fees at the beginning of an annual reporting term; the allowance is then accounted for and adjusted up or down as necessary at the annual accounting. *Id.*¹⁰ Two

¹⁰ Judges sometimes order guardians to file a report and accounting every 24 or 36 months, rather than annually, in cases where the ward is believed to be stable and unlikely to recover legal capacity. See CP 58 (36-month reporting period for Robins guardianship); CP 204 (36-month reporting period for Lamb guardianship).

types of fees are contemplated by the statute: administrative costs, which include attorney fees and “other services not provided by the guardian”; and guardian fees, which in contrast can be understood to be compensation for services provided by the guardian himself. *Id.*

A court may not award guardian fees simply on the basis of work performed. *In Re Guardianship of McKean*, 136 Wn. App. 906, 918, 151 P.3d 223 (2007); *In re Guardianship of Hallauer*, 44 Wn. App. 795, 800, 723 P.2d 1161 (1986). Rather, the guardian must establish that the work was necessary and that it benefited the ward. *Id.*; see *In re Estate of Larson*, 103 Wn.2d 517, 523-24, 530-32, 694 P.2d 1051 (1985) (probate attorney has burden to show that hours charged to estate were necessary).

2. Guardians may not collect fees for services that are outside the scope of their appointment.

Even necessary and beneficial activities by a guardian may fall outside the scope of the guardian’s role; such activities are not a proper basis for fees. For instance, a parent cannot charge guardian fees for services to her child if those services are within her parental duties. *In the Matter of the Guardianship of Ivarsson*, 60 Wn.2d 733, 739, 375 P.2d 509 (1962). While Washington courts have not had an opportunity to further trace the contours of that rule, the Florida courts have followed *Ivarsson*, and their subsequent cases provide some guidance.

In *Guardianship of Read v. Kenefick*, the Florida Court of Appeals held that “a daughter is not entitled to compensation as guardian of the person of her mother for merely doing what any daughter does.” 555

So.2d 869 (Fla. Dist. Ct. App. 1989) (citing *Ivarsson*). In a later case involving a sibling guardian, the court stated this principle more generally:

A guardian who is in a close familial relationship with the ward is entitled to compensation for the type of services performed on behalf of the ward for which a non-family member guardian would be entitled to compensation. However, a guardian who is in a close familial relationship with the ward is not entitled to be compensated for the performance of normal family duties on behalf of the ward merely because of his or her status as guardian.

Guardianship of Sapp, 868 So. 2d 687, 697 (Fla. Dist. Ct. App. 2004).

A guardian is not entitled to compensation for services rendered outside the scope of his appointment. *Id.* at 694. The duties of a guardian of the person “generally concern the assessment of the ward’s health and functioning, the development of a plan to promote the ward’s care and well-being, and the implementation of the plan by appropriate measures in the best interests of the ward.” *Id.* at 697; cf. RCW 11.92.043 (duties of guardian of the person).

Courts must be careful to preserve a guardianship estate against requests for fees that stem from family, rather than guardianship obligations. The same concept should apply to political activists whose advocacy goes well beyond that necessary and beneficial to promote the well-being of an individual ward. As explained below, there is no legal or historical basis for providing a guardian with fees for his political activities. When the Hardmans engage in politics, they do so in their roles

as activists rather than as guardians. The income of their wards should not be used to compensate the Hardmans with guardian fees for their activism.

D. Guardians May Not Be Compensated For Political Activities

The Hardmans engage in various political activities that demonstrate their beliefs regarding care of persons with developmental disabilities. Those activities are part of what the Hardmans describe as a national “ideological” struggle over how the government should provide care to the developmentally disabled as a class. Their view is that political activism in that struggle benefits all of the residents of Fircrest collectively. In this case, the Hardmans characterize their political advocacy as necessary to protect the health of Ms. Lamb and Ms. Robins. There is no assertion that their actions are necessary to protect the estates of their wards. If the Hardmans act within the scope of their powers and duties of guardians at all, it is as guardians of the person, RCW 11.92.043, not guardians of the estate.

Guardianship of the person does not include the power for the guardian to exercise the individual political rights of his ward. Such rights are peculiarly personal. There is no indication that Ms. Lamb or Ms. Robins have had those rights taken from them and given to the Hardmans for their substituted judgment; no indication in Washington law that such powers or duties of the guardian are contemplated, much less required; and no indication that judicial expansion of the law of guardianships to include substituted exercise of political rights by guardians is desirable.

1. There is no legal basis for the proposition that a guardian's duties include political activities.

In arguing that a guardian has a duty to politick on behalf of his ward, the Hardmans rely chiefly on two citations. The first, the Standards of Practice of the Certified Professional Guardian (CPG) Board, places no obligation on guardians to engage in political activism.¹¹ Their second citation is to Washington's guardianship statute. Washington law places on a guardian of the person the duty:

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.

RCW 11.92.043(4). The Hardmans rely upon the language above to assert far-reaching duties and powers to engage in politics in their role as guardians of Ms. Lamb and Ms. Robins. Whether a guardian may exercise an incapacitated person's political and free speech rights is an issue of first impression. The law does not supply any support for a

¹¹ *CPG Standards of Practice* § 401 requires a guardian to protect the civil rights and liberties of his ward, but does not suggest that political activism ever falls within the scope of the guardian's appointment. Even if the CPG standards could be read to include a duty of political activism, they do not impose that duty unless politicking is also within the legal scope of a guardianship: the standards "apply only to the degree that the court has granted the authority contemplated in a given standard." *CPG Standards of Practice* § 400. A guardian's duties under the CPG standards flow from his duties under the law, not the other way around. Additionally, a guardian's duties to his ward are entirely independent of the availability of guardian fees. *CPG Standards of Practice* § 401.14.

guardian to engage in political advocacy as a substituted exercise of the ward's rights.

The statutory grounds for finding a person incapacitated do not include any reference to a person's ability to access the political system. A guardianship of the person is appropriate where "the superior court determines the individual has a significant risk of personal harm based upon a demonstrated inability to adequately provide for nutrition, health, housing, or physical safety." RCW 11.88.010(1)(a). There is no indication that guardianship over the person is meant to remedy a person's incapacity to exercise her political rights.

A ward may lose some political rights when a guardian is appointed, but only by due process of law. For instance, the right to vote can be removed only if "the court determines that the person is incompetent for purposes of rationally exercising the franchise in that the individual lacks the capacity to understand the nature and effect of voting such that she or he cannot make an individual choice." RCW 11.88.010(5); *see also* RCW 11.88.030(4)(b) (notice to an alleged incapacitated person that the right to vote or hold public office may be lost). In enacting RCW 11.88.010, the legislature found that:

the right to vote is a fundamental liberty and that this liberty should not be confiscated without due process. When the state chooses to use guardianship proceedings as the basis for the denial of a fundamental liberty, an individual is entitled to basic procedural protections that will ensure fundamental fairness. These basic procedural

protections should include clear notice and a meaningful opportunity to be heard.

Laws of 2005, ch. 236, § 1.

Other political rights hinge on the right to vote. A person must be a qualified voter in order to sit in the state legislature. Const. Art. II, §7. A person who loses the right to vote also loses, at least in part, the right to petition the government. Only a legal voter may petition the legislature by initiative, or submit an initiative to the people of Washington. RCW 29A.72.010. An incapacitated person who loses the right to vote thereby loses the literal “right to petition” via initiative or referendum. However, that does not necessarily mean that an incapacitated person whose right to vote is removed has also lost the other elements of the right to petition her government, such as the right to communicate with members of the executive and legislative branches. Those parts of the right to petition are closely intertwined with the rights of speech and association, which are retained by incapacitated persons. *Infra* at 44-45.

There is no indication on the record that Ms. Lamb or Ms. Robins have lost the right to vote,¹² much less that their right to petition more generally has been removed by due process of law. Rights retained by the ward cannot be exercised by the guardian.

¹² The original orders from 1985 and 1986 appointing guardians for Ms. Robins and Ms. Lamb, respectively, were not included in the clerk’s papers. Nonetheless, both wards were likely stripped of the right to vote. Until 2005, a person found incapacitated by the courts was presumed to lose her right to vote unless the court “specifically finds that the person is rationally capable of exercising the franchise.” *See* Laws of 2005, ch. 236, §2 (reversing that presumption). The GALs who investigated Ms. Lamb and Ms. Robins did not recommend that they retain the right to vote. CP 1-5; CP 97-100.

Even if Ms. Lamb and Ms. Robins have lost certain political rights, it does not follow that the Hardmans have the power to exercise those rights on their behalf. Certain constitutional rights are “peculiarly personal” to the ward and as such cannot be exercised by a guardian. *State v. Jones*, 57 Wn.2d 701, 705-06, 359 P.2d 311 (1961) (holding that counsel for an incapacitated criminal defendant could not waive the defendant’s right to appeal and stating, in dicta, that “even if the appellant had a guardian with authority to exercise discretion on his behalf over his property and person he could not waive a constitutional criminal right which is never within the scope of a guardianship”); see *Quesnell v. State*, 83 Wn.2d 224, 517 P.2d 568 (1973) (guardian ad litem cannot waive right to mental commitment jury trial). A guardian may not vote on behalf of his ward, nor hold political office in the ward’s name. A guardian’s signature, on behalf of his ward, on an initiative petition would be invalid. Those political rights are peculiarly individual, and so cannot be exercised via a guardian’s substituted judgment. Since voting, holding political office, and petitioning in the name of a ward are outside the scope of a guardian’s appointment, a guardian cannot charge fees for those activities.

Just as improper is the attempt by the Hardmans to bill each of their wards for the time they spend engaged in political advocacy and lobbying. It may be that Ms. Lamb and Ms. Robins, as well as other DSHS clients, could one day benefit from the Hardmans’ proposed law encouraging state colleges to offer courses in the treatment of the developmentally disabled. However, the Hardmans do not have the

authority to lobby for that bill in their role as guardians. State law does not grant the Hardmans the power, much less the positive duty, to engage in lobbying and politicking on their wards' behalf.

2. Public policy does not support extending the law of guardianships to require guardians to engage in politics and lobbying on behalf of their wards.

To grant guardians the authority and duty to engage in politics in the course of their duties would drastically change the law of guardianships from its historical roots, in a manner detrimental to the interests of incapacitated persons. Giving guardians that duty would also raise separation of powers concerns. The court should decline to do so.

The guardianship power of Washington courts descends from the *parens patriae* power of the English crown. *In re Sall*, 59 Wash. 539, 110 P. 32 (1910). In the colonies and early America, guardianship common law was focused upon protecting the estate of those with adequate property. See 1 Timothy Walker, *Introduction to American Law Designed as a First Book for Students* 265 (4th ed. 1860) (“If [the jury] find that he is an idiot and pauper, he is committed to the charge of the overseers of the poor.... If they find that he is an idiot..., but not a pauper, and not requiring confinement, the associate judges appoint a guardian to take charge of the person and property of himself and his children.”). During the second half of the 19th century, states adopted guardianship statutes and procedures, which placed “a heavy emphasis on protection of property rather than person[.]” Mary Joy Quinn, *Guardianships of Adults:*

Achieving Justice, Autonomy, and Safety 20 (2005). Washington's early cases concerning guardianship over adults similarly focused upon property and money disputes. See, e.g. *Pollock v. Horn*, 13 Wash. 626, 630, 43 P. 885 (1896) (real estate dispute). There is no indication from that early history that political involvement was expected of guardians.

In recent decades, the states have moved to update guardianship law to provide greater protection for the rights of alleged incapacitated persons and place new emphasis on appropriate guardianships of the person. Quinn, *Guardianships of Adults* at 31-41; see Laws of 1990, ch. 122 (rewriting guardianship statute); Laws of 2005, ch. 236 (reversing presumption of loss of voting rights). Washington became one of the first states to implement a professional guardian certification program. Quinn, *Guardianships of Adults* at 47 Laws of 1997, ch. 312. While the legislature has updated Washington's guardianship laws, there is no indication that the changes include a new, political role for guardians.

Nor *should* the duties of guardians include political activities. Politics by its nature is an ongoing concern, and political ventures are far from certain of meeting with success. If a guardian's duty is interpreted to include activities that have a small chance of conferring benefit to a ward—to oppose potentially harmful legislation and sponsor potentially beneficial legislation on behalf of his ward—a guardian's job would be infinite. Guardian fees would then have no limits upon them. James Hardman says that advocacy is already “a full time endeavor” that completely “fills the time between regular guardian service activities.” CP

196. But the Hardmans acknowledge that politics are never done: given “more hours in a day, more days in a week, days in a month, months in a year, [they] could easily fill the time in activities designed to protect, foster, and improve the lives of [their] wards.” CP 197-198.

To place upon guardians a political duty—a duty to take to the political arena in a constant effort to protect and improve the legal rights of their wards—would radically change the nature of guardianships. It would also place a substantial burden on guardianship estates to pay for endless hours of duty-bound guardian politicking. This court should decline to extend the law of guardianships in such a way as to place a duty of infinite effort upon guardians.

A political role for guardians would also raise separation of power concerns. A guardian is an officer of the court; the court retains ultimate control to ensure that he acts to protect the best interests of his ward. If guardians have a duty to fight political campaigns on behalf of their wards, then the courts have a duty to oversee those campaigns and pass judgment upon whether they are well- or ill-advised. Judges would take on a policy role that is more appropriate to the legislative and executive branches. “Where the judicial branch is involved, [the court’s] primary concerns are that the judiciary not be drawn into tasks more appropriate to another branch and that its institutional integrity be protected.” *Brown v. Owen*, __ Wn.2d __, No. 81287-0, slip op. at 12 (March 5, 2009).

This case demonstrates the potential danger to the integrity of the judiciary. The Hardmans—ostensibly in their roles as officers of the

court—lobby on behalf of some legislative action and against other legislative action, as part of what the Hardmans label an “ideologically driven” disagreement, CP 144, with the Executive branch and various disability rights organizations. If their claims are accepted and the orders below are overturned, the Superior Court must decide as the finder of fact whether it is necessary and beneficial for the Hardmans to lobby for additional RHC funding, and whether it is necessary and beneficial that they fight any legislative effort to further downsize or close Fircrest. Those are policy questions, properly left to the political process without judicial interference. The courts should not place themselves in a position where they must adjudicate the necessity and benefit of legislation prior to its enactment. The judiciary has a legitimate role in protecting the rights of vulnerable groups such as RHC residents against illegal action by the political branches: to adjudicate legal disputes when they arise.

A guardian’s duties do not and should not include a duty to lobby as the Hardmans seek to do, continually and for the foreseeable future, against their political opponents with the imprimatur of the court.

E. Guardian Fees For Political Activities Are Not A Valid Deduction From A Fircrest Resident’s Cost Of Care

Even if guardian fees for political advocacy can properly be charged under state law, they cannot be charged against the monthly income of Ms. Lamb and Ms. Robins. State and federal regulations

regarding the income of RHC residents do not contemplate deducting guardian fees to fund political lobbying.

1. The Hardmans' argument against the validity of DSHS rules is raised for the first time on appeal and is not properly before the Court in this non-APA action.

The Hardmans assert for the first time on appeal that “there is no valid state law authority that expressly imposes financial liability on Sandy and Rebecca to spend their income to the state.” Guardians’ Opening Brief at 15. Their assertion relies upon the further argument that DSHS rules WAC 388-835-0925 through -0955 “are not valid because they are premised on a false statement of statutory authority” and are “inoperative because [they are] inconsistent with [federal law.]” *Id.* at 28-29. They also argue that rules in Chapter 388-79 WAC are “inoperative” because they are “based on a mistaken premise” about federal law. *Id.* at 29. None of these arguments were raised in Superior Court.

Generally, an issue may not be raised for the first time on appeal. RAP 2.5(a). Exceptions are made for the following errors: “(1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.” *Id.* Since none of those exceptions apply, the Court should decline to take up the Hardmans’ arguments against rule validity.

The Hardmans also cannot challenge the validity of DSHS rules in this proceeding. The Administrative Procedure Act (APA), Chapter 34.05 RCW, “establishes the exclusive means of judicial review of agency

action” except in three situations not applicable here. RCW 34.05.510. “Agency action” includes the adoption or application of an agency rule. RCW 34.05.010(3). “A rule may be reviewed by petition for declaratory judgment filed pursuant to this subsection or in the context of any other review proceeding under this section.” RCW 34.05.570. This appeal is not a proceeding under RCW 34.05.570. A court cannot examine the validity of regulations in the context of a non-APA proceeding. *Judd v. American Tel. and Tel. Co.*, 152 Wn.2d 195, 204-205, 95 P.3d 337 (2004).

However, a background understanding of the financial liability of Ms. Lamb and Ms. Robins is useful to understanding the issues properly before the Court. Accordingly, that background is discussed below.

2. The maximum fees that may be awarded to guardians of certain DSHS clients are limited by Ch. 388-79 WAC

Under RCW 11.92.180 a guardian generally “shall” be allowed just and reasonable compensation where he establishes the need for and efficacy of his actions, but the law imposes certain limits. First, the guardian “shall not be compensated at county or state expense.” RCW 11.92.180. A guardian thus cannot be paid other than from the ward’s own assets—even if those assets are insufficient to provide reasonable compensation for necessary and beneficial guardianship services. Second, guardian fees from the assets of certain DSHS clients are limited:

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

Id. (emphasis added). The second sentence, read literally and in isolation, seems to indicate that DSHS has the authority to set a cap on guardian fees in all cases. However, RCW 43.20B.460 (which delegates to DSHS its authority regarding guardian fees) makes clear that DSHS's power in the second sentence is subject to the same restrictions as in the first sentence:

The department of social and health services shall establish by rule the maximum amount of guardianship fees and additional compensation for administrative costs that may be allowed by the court as compensation for a guardian or limited guardian of an incapacitated person who is a department of social and health services 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 services.

RCW 43.20B.460. Thus, DSHS has the authority and obligation to set the maximum amount of fees and costs available to the guardians of certain DSHS clients. Notwithstanding that such fees may not be just or reasonable to fully compensate a guardian in a given case, a court is limited to awarding guardian fees and costs in no greater amount than is made available under the cap set by DSHS.

DSHS exercised its authority under RCW 43.20B.460 by promulgating Chapter 388-79 WAC, which

establish[es] by rule the maximum amount of guardianship fees and additional compensation for administrative costs that may be allowed by the court for a guardian... of an incapacitated person who is a Medicaid client of the department and is thus required by federal law to contribute to the cost of the client's long-term care.

WAC 388-79-010. The superior court may order guardian fees and costs to be paid from the assets of DSHS clients receiving Medicaid-funded long-term care, but, unless modified by the process described in WAC 388-79-050:¹³

- (1) The amount of guardianship fees shall not exceed one hundred seventy-five dollars per month;
- (2) The amount of administrative costs directly related to establishing a guardianship for a department client shall not exceed seven hundred dollars; and
- (3) The amount of administrative costs shall not exceed a total of six hundred dollars during any three-year period.

WAC 388-79-030. The maximum amount of guardianship fees and costs that can be charged against a DSHS client's participation is thus \$175 per month under normal circumstances. WAC 388-79-030(1).¹⁴ This amount "must be deemed adequate" for all "usual and customary guardianship services[.]" WAC 388-79-050(4)(b)(ii). The department's rules provide that such routine services include:

¹³ WAC 388-79-030 refers only to the process contained in WAC 388-79-040. WAC 388-79-040 applies only to guardian fees awarded "[a]fter June 15, 1998, but before September 1, 2003[.]" For fees awarded after September 1, 2003, the proper process is contained in WAC 388-79-050.

¹⁴ Guardian fees are also limited, in circumstances not applicable here, by WAC 388-513-1380(4).

- (A) Acting as a representative payee;
- (B) Managing the client's financial affairs;
- (C) Preserving and/or disposing of property;
- (D) Making health care decisions;
- (E) Visiting and/or maintaining contact with the client;
- (F) Accessing public assistance programs on behalf of the client;
- (G) Communicating with the client's service providers; and
- (H) Preparing any reports or accountings required by the court.

Id. Usual and customary guardian services are not limited exclusively to this list. *Id.* Excess guardianship fees may not be awarded for any of the listed activities, or any other activity deemed to be usual and customary.

A guardian may receive fees in excess of \$175 from a DSHS client's participation only for "[e]xtraordinary services provided by the guardian," WAC 388-79-050(4)(b)(iii), and only if the court finds that the excess fees are "just and reasonable." WAC 388-79-050(4)(c). The Department's rules provide that "extraordinary services" include:

- (A) Unusually complicated property transactions;
- (B) Substantial interactions with adult protective services or criminal justice agencies;
- (C) Extensive medical services setup needs and/or emergency hospitalizations; and
- (D) Litigation other than litigating an award of guardianship fees or costs.

WAC 388.79.050(4)(b)(iii). This list is also not exclusive.

3. The guardian fee restrictions of Ch. 388-79 WAC apply to Ms. Lamb and Ms. Robins as residents of Fircrest.

The Hardmans argue that RCW 43.20B.460 and chapter 388-79 WAC are contrary to federal law and regulation. These claims are

spurious and supported by citations to irrelevant authority. Institutionalized Medicaid recipients may be required by the state to participate financially in the costs of their care. State law and DSHS rule properly implement that requirement in the state RHCs, including Fircrest.

Congress makes federal funds available to the states for medical services for needy citizens through the Medicaid program. 42 U.S.C. § 1396; *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 502, 110 S. Ct. 2510, 110 L. Ed. 2d 455 (1990). “Participation [in the Medicaid program] by the State of Washington is voluntary. However, once the State makes the decision to participate in the program, it must comply with the federal Medicaid laws and regulations.” *Multicare Medical Center v. State of Wash.*, 768 F. Supp. 1349, 1357 (W.D. Wash. 1991). “The cornerstone of Medicaid is financial contribution by both the Federal Government and the participating State.” *Harris v. McRae*, 448 U.S. 297, 308, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980). States pay the costs of caring for residents of medical institutions using state funds that are then reimbursed in part by the federal government. The federal reimbursement dollars paid to the state are known as “federal financial participation”, e.g. 42 C.F.R. § 430.1; or “federal matching funds.” E.g., 42 C.F.R. § 455.20; WAC 388-550-4650. In order to receive federal matching funds, the states must maintain “state plans for medical assistance” that conform to requirements designed in part to safeguard federal funds and ensure that care meets federal standards. 42 U.S.C. § 1396a(a); see also *Multicare*, 768 F. Supp. at 1356-1357 (discussing the State Plan process).

Medicaid benefits are determined in a two-step process. *Timm v. Montana Dept. of Public Health and Human Services*, 343 Mont. 11, 13, 184 P.3d 994, 997 (2008). The first step requires a determination of whether the Medicaid applicant is eligible to receive Medicaid benefits. *Id.*; see 42 U.S.C. § 1396a(a)(10); WAC 388-513-1315 (eligibility for long-term services such as RHCs).¹⁵ Eligibility for Medicaid is dependent upon a determination of whether an applicant has available resources; coverage will be denied if an applicant's resources exceed the statutory ceiling set by the Supplemental Security Income (SSI) program requirements. *Ramey v. Reinertson*, 268 F.3d 955, 958 (10th Cir.2001); see 42 U.S.C. § 1396a(a)(10); WAC 388-513-1315. A variety of assets are not considered 'available' for the purpose of the eligibility determination, including the home, one car, pre-paid burial plans, and term life insurance. 42 U.S.C. § 1382a(b); WAC 388-513-1340.

If an applicant is Medicaid eligible,¹⁶ then in a second step the state Medicaid agency must determine how much of the Medicaid recipient's total income (including income excluded from the eligibility determination) must be paid towards the cost of care, and how much of the

¹⁵ The Hardmans, in Issue 2, Section A of their Opening Brief, spend a great number of words describing the eligibility income rules, and conflating the eligibility and post-eligibility regulations. Guardians' Opening Br. at 15-21. There is no dispute in this case regarding whether Ms. Lamb and Ms. Robins are eligible for Medicaid benefits.

¹⁶ An applicant who is found ineligible for Medicaid "medically needy" services by virtue of her financial resources may become eligible upon discharging her "spenddown" obligation to dispose of her resources by paying for her own medical costs. WAC 388-513-1305(8)(b); WAC 388-519-0100 through -0110. The Hardmans confuse this provision with the "participation" payments described below. Participation deals with a patient's ongoing income rather than up-front resources.

remaining difference will be paid for by Medicaid. *Timm v. Montana*, 343 Mont. at 13; 42 C.F.R. § 435.725; WAC 388-513-1380.¹⁷

Individuals residing in Washington medical institutions—including RHCs like Fircrest¹⁸—pay a portion of their income toward the cost of their institutional care. RCW 43.203.410 - .460; WAC 388-513-1380; see *O’Connell v. Conte*, 76 Wn.2d 280, 456 P.2d 317 (1969) (rejecting constitutional challenge to statute imposing cost of care requirements in state residential schools). Federal regulations require that “an agency *must* reduce its payment to an institution, for services provided an individual,” by the amount of that individual’s total income, minus any applicable deductions. 42 C.F.R. §§ 435.725, 435.733, and 435.832 (emphasis added). These deductions are known as “post-eligibility deductions.” Under Washington law, the Medicaid client is then required to contribute

¹⁷ 42 U.S.C. § 1396p, on which the Hardmans rely for their federal preemption argument, Guardians’ Opening Br. at 23-24, concerns the circumstances under which Medicaid can later recover compensation from a patient for medical assistance already paid. *E.g.*, 42 U.S.C. § 1396p(a)(1) (“No lien... on account of medical assistance paid”); 42 U.S.C. § 1396p(b)(1) (“No adjustment or recovery of any medical assistance correctly paid”). It is inapplicable here. The Medicaid statutes clearly contemplate that a patient may be required to pay most of her monthly income towards her cost of care. See 42 U.S.C. § 1396o(a)(2)(C) (no additional charges can be made for services “if such individual is required, as a condition of receiving services in such institution under the State plan, to spend for costs of medical care all but a minimal amount of his income required for personal needs”).

¹⁸ “Medical institutions” operated in Washington include Nursing Homes (NF), Hospitals, Hospice Care Centers, State Veteran Nursing Homes, Intermediate Care Facilities for the Mentally Retarded (ICF/MR), Residential Habilitation Centers (RHC), and Institutions for the Medically Diseased (IMD). See Balanced Budget Act of 1997, Pub. L. 105-33, §5522(c)(1) (1997) (clarifying that a hospital, extended care facility, nursing home, or intermediate care facility is a “medical institution” for purposes of SSI, codified at 42 U.S.C. 1382(e)(1)(B); see also 42 U.S.C. 1396o(a)(2)(C) (“hospital, nursing facility, intermediate care facility for the mentally retarded, or other medical institution” (emphasis added)). RHCs provide intermediate care facility for the mentally retarded (ICF/MR) services and/or nursing facility services. WAC 388-825-089.

his or her income, minus those deductions, to the Medicaid institution to help defray the cost of care. RCW 43.203.415; WAC 388-513-1380.¹⁹ The federal regulations label this patient contribution “application of patient income to the cost of care,” e.g. 42 C.F.R. § 435.725; it is commonly referred to in Washington as a client’s financial “participation.” See, e.g. WAC 388-79-020; WAC 388-515-1505(8). The participation requirement prohibits state agencies from paying any amounts that are the responsibility of the patient. The federal regulations allowing for patient participation “are consistent with the statutory plan that Medicaid funds not be paid to reimburse those costs that patients with resources of their own can afford.” *Florence Nightingale Nursing Home v. Perales*, 782 F.2d 26, 29 (2d Cir.1986), cert. denied, 479 U.S. 815, 107 S. Ct. 68, 93 L.Ed.2d 26 (1986).

All of a Medicaid client’s post-eligibility income is contributed toward the cost of care unless it is instead diverted to one of the allowable deductions. WAC 388-513-1380. States are required to deduct, in order: a personal needs allowance; spousal maintenance; family maintenance; necessary medical expenses not covered by Medicaid; and SSI payments received by a person who is admitted to a medical facility for 90 days or less. 42 C.F.R. §§ 435.725(c), 435.733(c), and 435.832(c); see WAC 388-

¹⁹ The Hardmans argue that because RCW 43.203.410 - .460 place liability on the “estates” of RHC residents, the statutes apply only to the deceased. That argument is spurious. The primary legal definition of “estate” is not confined to the property of the deceased. See Black’s Law Dictionary, 547 (6th ed. 1990). Moreover, RCW 43.20B.445 speaks separately of the liability of a resident’s estate in event of death, and the liability of a resident’s estate upon “termination of services” while the resident is still alive.

513-1380(4) and (5).²⁰ For every dollar of deductions, a dollar must instead be spent from state and federal Medicaid funds to cover the client's medical and personal care costs.

Guardianship-related expenses are not named in the federal regulations as a required or optional deduction from participation. *E.g.* 42 C.F.R. § 435.725(c). In its current Medicaid State Plan, Washington has approval to deduct guardian fees, plus administrative costs including the guardian's attorney fees, from participation, as part of the client's personal needs allowance. CP 281.²¹ The State Plan limitations on guardian fees for RHC residents are promulgated in Chapter 388-79 WAC.

The DSHS rule limiting guardian fees requires that an award of guardian fees "ensure that federal Medicaid funding is not jeopardized by noncompliance with federal regulations limiting deductions from the client's participation amount." WAC 388-79-050(4)(b)(i). Increasing Medicaid payments to the RHC to cover client guardian fees beyond that allowed under the WAC and the State Plan would not only violate the requirement that guardian fees "shall not exceed the amount allowed by

²⁰ A state may also elect, as Washington has at WAC 388-513-1380(5)(e), to allow a final deduction for the costs of maintaining a home under certain circumstances. 42 C.F.R. §§ 435.725(d), 435.733(d), and 435.832(d).

²¹ Courts have disagreed over whether guardian fees are required or even allowed to be deducted from an institutionalized Medicaid recipient's cost of care, and if so under which exemption. *See Day v. Az. Health Care Cost Containment System Administration*, 109 P.3d 102 (Az. 2005) (guardian fees cannot be deducted from cost of care as necessary medical expense); *Dep't of Health and Mental Hygiene v. Campbell*, 771 A.2d 1051 (Md. 2001) (guardian fees cannot be deducted from personal needs allowance); *Rudow v. Div. of Medical Assistance*, 707 N.E.2d 339 (Ma. 1999) (guardian fees must be deducted as necessary remedial medical expense); *In Re Barclay*, 705 S.W.2d 518 (Mo. 1985) (same).

the department of social and health services by rule,” WAC 11.92.180; it would constitute misuse of Medicaid funds and would jeopardize state Medicaid funding. *See* 42 C.F.R. § 435.725(c); CP 164. Nor is it any answer to say that if Medicaid will not pay, then the state must; the state is barred by RCW 11.92.180 from paying guardian fees. For that reason, DSHS receives notice under RCW 11.92.180 of guardian fee requests for RHC residents, and has standing to object to excessive fees.

4. Political activities are not “extraordinary services” under WAC 388-79-050.

All of the extraordinary services contemplated by Washington law are bounded in time by the duration of the extraordinary need and so do not act as a permanent exception to the general DSHS cap on fees. Examples of extraordinary services for which a guardian can be compensated are listed in WAC 388-79-050(4)(b)(iii): unusually complicated real estate transactions, substantial criminal justice interactions, extensive medical set up needs, and litigation. What these examples have in common is that each addresses a concrete, extraordinary, but temporary need of the individual ward. Each has an identifiable beginning and end. Once litigation is complete the guardian can return to providing only the usual and customary services; once medical care is set up it can thereafter be maintained with far less effort.

There is no such clarity to the alleged extraordinary need when the threat is political. Politics by its nature is ongoing. In justifying their advocacy, the Hardmans point to a long-term, nationwide trend toward

community placement and away from congregate care such as the RHCs. The guardians allege that some state officials wish to close Fircrest; that disabilities rights organizations favor closing Fircrest; that development may occur on land near the Fircrest facilities; and that there is potential harm to residents of Fircrest who are moved from the facility. There is no allegation that Ms. Lamb or Ms. Robins are being considered for a move out of Fircrest. The Hardmans' lobbying and activist activities do not relate to any specific ongoing legislative, administrative, or judicial actions at the state or federal levels that involve Ms. Lamb or Ms. Robins individually or collectively.

Notwithstanding the absence of any concrete need of their wards, the Hardmans seek to engage in a political campaign continually, into the foreseeable future. The fees they request would thus operate as a permanent exemption from the regulatory cap. There is a real danger to the availability of federal Medicaid funds if advocacy fees are allowed by the court in this and subsequent cases.

Political activities are outside the scope of guardianship duties, and thus not compensable with guardian fees. Even if advocacy were within the scope of the guardians' duties, it does not fall within the scope of "extraordinary" guardianship services contemplated by WAC 388-79-050 because the benefit of political organizing and lobbying is ever-present and thus quite ordinary. Making available guardian fees for the limitless purpose of improving the ward's political prospects would eviscerate the \$175 rule. They should not be allowed.

5. The regulation of guardian fees does not raise separation of powers concerns.

Guardians object that RCW 11.92.180 impermissibly abridges the Court's constitutionally-granted powers of equitable jurisdiction. The limit on guardian fees does not reduce the equitable jurisdiction of the courts. It is true that "the trial court, sitting in a guardianship proceeding, is not limited to the particular powers enumerated in the statutes specifically governing guardianship proceedings." *In the Matter of the Guardianship of Adamec*, 100 Wn.2d 166, 174, 667 P.2d 1085 (1983). But that broader jurisdiction means simply that the guardianship statutes are not the only source of law in this action. "In this state we have no probate court, as distinguished from the court that entertains jurisdiction of other matters. . . [W]hen the court, sitting in a probate proceeding, discovers in a petition the statement of facts which forms the basis of a controversy, we see no reason why it may not settle the issues thereunder[.]" *Id.* (citing *In Re Murphy's Estate*, 30 Wash. 1, 5, 70 P. 107 (1902)). It is also true that the power to appoint guardians was a power at equity, but that power is now channeled and directed by statutory enactments that partially eclipse the common law. "[I]n the absence of countervailing statutes, American courts having equity powers possess a general jurisdiction for the appointment of guardians." *In re Sall*, 59 Wash. 539, 542, 110 P. 32 (1910) (emphasis added). "*In the absence of any limiting legislative enactment, the Superior Court has full power to take action to provide for the needs of a mentally incompetent person[.]*"

In the Matter of the Guardianship of Hayes, 93 Wn.2d 228, 233, 608 P.2d 635 (1980) (emphasis added). “[T]here is no judicial authority for holding that the statutory transformation of an equitable right into a legal right is an encroachment upon the equitable powers of the courts.” *Casco Co. v. Thurston County et. al.*, 163 Wash. 666, 669-670, 2 P.2d 677 (1931).

Here, the legislature has passed a valid law allowing guardians to receive fees in cases where the ward is an RHC resident, as explained above. The legislature also placed the authority to set the cap on those fees in the hands of DSHS, the state agency already charged with negotiating Washington’s Medicaid State Plan with the federal government. Under that authority, DSHS engaged in rulemaking to set a limit on guardian fees that is in accord with the State Plan. The Court retains its jurisdiction to award reasonable fees up to the limit imposed by statute and rule. “*Jurisdiction* does not include the right to act arbitrarily or in violation of the constitution, statutes, or the common law, or the right to set them aside.” *Roon v. King County*, 24 Wn.2d 519, 530, 166 P.2d 165 (1946) (Mallery, J., concurring).

The Hardmans rely on *Blanchard v. Golden Age Brewing Co.*, 188 Wash. 396, 409-412, 63 P.2d 397 (1936), in which the legislature barred the courts from issuing injunctions in labor disputes except in very limited circumstances. “The writ of injunction is the principal, and the most important, process issued by courts of equity[.]” *Blanchard*, 188 Wash. at 415. The statute was held unconstitutional on the grounds that “[t]he Legislature cannot indirectly control the action of the court by directing

what steps must be taken in the progress of a judicial inquiry, for that is a judicial function.” *Id.* at 419.

The power to award guardian fees is in no way akin to the “strong arm of equity” that allows courts to fashion creative remedies by ordering or enjoining action. The legislature has provided an avenue for the payment of guardian fees to certain vulnerable individuals who, under Washington’s former State Plan, formerly had no ability to pay such fees at all. *See* CP 164. The Court’s equitable powers are not even implicated. Even if they were, those powers are not infringed upon by a law in which the court’s discretion is limited to the range in which Washington would remain in compliance with federal Medicaid requirements.

F. Limiting A Guardian’s Fees Does Not Implicate The Constitutional Right To Petition

The Superior Court’s orders do nothing to punish or prevent the exercise of First Amendment rights by the Hardmans or their wards.²² It is indisputable that “the rights to assemble peaceably and to petition for a redress or grievances are among the most precious of the liberties safeguarded by the Bill of Rights. These rights, moreover, are intimately

²² The Hardmans also assert that the order violates Article I, Section 4 of the Washington Constitution, and list the factors relevant to an inquiry, under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), as to whether the state constitution confers rights that are more broad than those protected by the federal constitution. Guardians’ Opening Br. at 42-47. The Supreme Court has already engaged in a *Gunwall* analysis and concluded that “the state constitutional provision on the right to petition the government, article I, section 4... is to be interpreted the same as the federal provision.” *Grant Co. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 815, 83 P.3d 419 (2004) (citing *Richmond v. Thompson*, 130 Wn.2d 368, 380-81, 922 P.2d 1343 (1996)). Moreover, in their analysis the Hardmans fail to articulate any relevant difference between the federal and state rights to petition in the context of guardianships.

connected both in origin and in purpose, with the other First Amendment rights of free speech and free press. ‘All these, though not identical, are inseparable.’ *Thomas v. Collins*, 323 U.S. 516, 530, 65 S. Ct. 315, 323, 89 L. Ed. 430 (1945).” *United Mine Workers of America v. Illinois State Bar Association*, 389 U.S. 217, 88 S. Ct. 353, 19 L. Ed. 2d 426 (1967). The government may not prohibit individuals or groups from vindicating their rights. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510-511, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972) (“it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes”); *NAACP v. Button*, 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963) (state cannot criminalize solicitation of cases by civil rights group). The federal right-to-petition cases focus on injunctions and criminal prohibitions blocking access, for certain groups, to the courts and to quasi-judicial administrative tribunals.

The Superior Court’s order found the political lobbying activities of the Hardmans to be outside the scope of their duties as guardians, and thus not a legitimate basis for guardian fees.²³ It is not the purpose of the guardianship statute to create for each ward a personal lobbyist. As explained above, there is no duty on guardians to identify or draft

²³ DSHS argues on cross-appeal that the Hardmans’ community organizing activities also fall outside that scope.

legislation that would be beneficial to their wards and then bill their wards for the hours spent trying to build support for those measures.

From the denial of guardian fees it does not “follow”, as the Hardmans suggest, that guardians are “prohibited from exercising the right to petition.” Guardians’ Opening Br. at 39. The Hardmans are not forbidden from political activity by either the orders below, or the state’s limitations on the availability of guardian fees. The Hardmans may continue, individually or as part of their various community organizations, to seek legislative and administrative changes that they believe benefit vulnerable populations. Nor are Ms. Lamb or Ms. Robins barred by the Superior Court’s order from being involved personally in political advocacy, to the extent they are capable.

The constitutional right to petition is not a lobbying entitlement program. It does not create a lobbying-fee deduction from payments to the government, whatever form those payments take. An indigent person whose income, by reason of paying taxes, is insufficient to hire a personal lobbyist to push tax-cut legislation does not thereby suffer an abridgment of the right to petition that invalidates the tax. Likewise, there is no abridgment of the right to petition when the state makes available guardian fees, but does not make available lobbying fees, to compensate the guardians of incapacitated individuals.

G. Attorney Fees

The Hardmans request that their attorney fees on appeal be paid by the state under RCW 11.96A.150, and that the reserved issue of fees

below be remanded for consideration by the trial court. Even if the Hardmans are successful in their claims, the court should deny both requests given the novel issues presented.

Courts have broad discretion to order attorney fees in any Title 11 proceeding or appeal to be paid “[f]rom any party to the proceedings” as well as from the estate, trust, or other assets involved. RCW 11.96A.150(1). While a guardian’s costs generally cannot be paid with state funds, RCW 11.92.180, the award of costs in a Title 11 proceeding are not “limited by any other specific statutory provision providing for the payment of costs... unless such statute specifically provides otherwise.” RCW 11.96A.150(2).

However, “[a]n award of fees to either party is unwarranted” under RCW 11.96A.150 where “there are novel issues of statutory construction.” *Estate of D’Agosto*, 134 Wn. App. 390, 402, 139 P.3d 1125 (Div. I 2006), *review denied*, 160 Wn.2d 1016 (2007). In *D’Agosto*, this court followed Divisions Two and Three in denying fees on appeal in probate cases presenting unique issues. *Id.* (citing *Mearns v. Scharbach*, 103 Wn. App. 498, 514-15, 12 P.3d 1048 (Div. III 2000), *review denied*, 143 Wn.2d 1011 (2001); *Estate of Burks v. Kidd*, 124 Wn. App. 327, 333, 100 P.3d 328 (Div. II 2004), *review denied*, 154 Wn.2d 1029 (2005)). The *D’Agosto* court further reversed the award of attorney fees at the trial level. 134 Wn. App. at 402.

The present case presents both unique factual circumstances and legal questions of first impression. While this case involves guardianships

rather than estates, RCW 11.96A.150 does not differentiate between probate and guardianship matters, and the reasoning in *D'Agosto* applies equally to both. An award of fees to the Hardmans from the state would be inappropriate either on appeal or in the proceedings below, and both requests should be denied.

V. ARGUMENT ON CROSS-APPEAL

In this case, the Superior Court found that some community outreach activities were “necessary to protect the best interests” of the wards, and that an allowance of \$75 per month was reasonable for those activities. CP 61; CP 236. The Superior Court did not explain which of the Hardmans’ activities it considered political and which it considered community outreach. Some activities seem clearly to fit within community outreach, such as producing a monthly newsletter, CP 135; or creating a PowerPoint slide presentation about Fircrest residents, CP 140; or organizing tours and making media appearances. CP 135. Other activities, such as involvement with interest groups like Friends of Fircrest, could be characterized as either a community activity or a political activity. In any case, it is clear that the Hardmans engage in several activities that could be considered community activities, and several that could be considered outreach or public relations activities.

For many of the same reasons that guardian fees for political advocacy should be denied, guardian fees for community outreach should also be denied. There is no basis in statute, regulation, case law, or history

to award guardian fees for a guardian's community service and public relations activities.

A. There Is No Legal Basis For The Proposition That A Guardian's Duties Include Community Outreach Activities

The statutory duty of a guardian to "assert the incapacitated person's rights and best interests," RCW 11.92.043(4), provides no more support for a community-outreach duty than it does for a political-outreach duty. Neither the guardianship statute nor the CPG Board Standards of Practice make any mention of a requirement that guardians belong to community organizations that support incapacitated individuals; or a requirement that guardians engage in activities that will improve the image and understanding of their wards, individually or collectively.

The Hardmans' activities that might be characterized as "community outreach" are all associated with the right to free speech and the right to free association. Like the right to vote, the rights of speech and association cannot be taken away without proper notice and hearing. *See Martyr v. Mazur-Hart*, 789 F. Supp. 1081 (D.Or. 1992) (due process requires that a person involuntarily committed by the state does not lose free speech and free association rights without notice and hearing). The First Amendment guarantees the right of freedom of association for residents of institutions for the developmentally disabled. *Thomas S. by Brooks v. Flaherty*, 699 F. Supp. 1178 (W.D. N.C. 1988), judgment aff'd, 902 F.2d 250 (4th Cir. 1990). A loss of legal capacity has no bearing on freedom of association. *See id.* (appointment of guardian had no effect on

analysis of the first amendment rights of legally incapacitated wards). Residents of Medicaid institutions are ensured by federal regulation “the opportunity to communicate, associate and meet privately with individuals of their choice[.]” 42 C.F.R. § 483.420(a)(9). A guardian cannot exercise substituted free-speech and freedom-of-association rights on behalf of an incapacitated individual. Ms. Lamb and Ms. Robins have not lost, and the Hardmans have not taken over, their rights of free speech and free association. Since those rights still belong to the wards, they are outside the scope of the Hardmans’ duties.

1. Public policy does not support extending the law of guardianships to require guardians to engage in community outreach on behalf of their wards.

As with political activity, if guardians are allowed or required to engage in community outreach activities on behalf of their wards, guardianship would become a full-time job in every case. The proliferation of duties and billable hours would place a strain both on the guardians whose duties are unending, and on wards whose resources to pay for guardians are finite.

The time the Hardmans spend engaged in community groups, separate from their political campaigns, is not an appropriate basis for authorization of guardianship fees from the estates of their wards. Like any group of professionals, professional guardians tend to belong to various professional and community organizations. The Hardmans seek to bill each of their wards a *pro rata* share of the time they spend

volunteering and attending meetings that relate to their careers as professional guardians and their professional interest in the disability services community. This type of billing is inappropriate—just as it would be if an attorney were to bill each of his clients for time spent at Continuing Legal Education classes and Bar Association committee meetings. James and Alice Hardman have extensive experience working with developmentally disabled individuals, and they maintain ongoing contact with groups that work with the developmentally disabled. However, when they participate with those organizations they are not providing any service to their wards. They are off the clock.

As for the Hardmans' public relations campaign, Ms. Lamb and Ms. Robins retain their speech and association rights even though they are institutionalized. There is no indication from the Hardmans' advocacy report that activities such as the PowerPoint presentation were meant to aid Ms. Lamb and Ms. Robins in engaging in their own rights of speech and association. Even if they were, that is a "usual and customary guardianship service[]" for which the Hardmans' regular guardian fees "must be deemed adequate[.]" WAC 388-79-050(4)(b)(ii). As discussed below, community outreach is not an "extraordinary" guardianship service under WAC 388-79-050(4).

The Hardmans may aid their wards in exercising their first amendment rights, but they cannot substitute—in place of any speech or associations that their wards are incapable of making—their own speech, and their own associations with other individuals and groups. When the

Hardmans involve themselves in the community, or engage in public relations campaigns, they do so as individuals, not as officers of the court. Guardian fees are not appropriate for the community outreach activities of the Hardmans because those activities are not within the scope of the guardianships.

B. Guardian Fees For Community Outreach Activities Are Not A Valid Deduction From A Fircrest Resident's Cost Of Care

As with political advocacy fees, the fees requested by the Hardmans for community outreach would operate as a permanent exemption from the regulatory cap imposed by chapter 388-79 WAC. There is a danger to the availability of Medicaid funds if community outreach fees are allowed by the court in this and subsequent cases.

Each of the examples, in WAC 388-79-050(4)(b)(iii), of extraordinary services for which a guardian can be compensated are services directed at a concrete and extraordinary need of the individual ward. The Hardmans' community outreach activities do not relate to specific and extraordinary need of Ms. Lamb and Ms. Robins. Like all similar developmentally disabled individuals, Ms. Lamb and Ms. Robins have certain natural barriers to exercising freedoms of speech, expression and association. There is nothing extraordinary about that. If the Hardmans have a duty to engage with and speak to the community in a public relations campaign to foster greater understanding of developmentally disabled individuals and their needs, then *all* guardians have such a duty. As the Hardmans demonstrate, outreach activities are

time-consuming and limitless, and would give rise to many additional guardian fees to be paid from the pockets of these vulnerable adults at the expense of their other obligations. Even if advocacy were within the scope of the guardians' duties, community outreach fees is an exception that would swallow the \$175 rule. They should not be allowed.

C. There Is No Evidence That Community Outreach Is Necessary And Beneficial To Ms. Lamb Or Ms. Robins

Even if guardian fees may include compensation for community outreach activities in some cases, the record does not support even a prospective, provisional allowance of such fees in this case. The Hardmans claim that there exists a national, ideologically driven movement of disability rights groups and government agencies to shut down long-term congregate care facilities such as Fircrest. Assuming that they are correct, they have presented no evidence to show that the movement's political success is likely in the case of Fircrest; or if Fircrest's closure is likely, that Ms. Lamb or Ms. Robins face any threat of harm from such closure; or if there is the threat of harm, that the community outreach activities for which the Hardmans seek payment—such as creating a PowerPoint presentation about Fircrest residents, organizing tours of Fircrest, or attending Friends of Fircrest meetings—are necessary to prevent that harm. The facts that would establish that logical string, necessary to the Hardmans' argument for fees, are not in the record.

Even if the Court were to find evidence that some Fircrest residents face harm that is best addressed through community outreach,

there is no showing that Ms. Lamb or Ms. Robins in particular would benefit from such advocacy. The Hardmans admit that at least some Fircrest residents would respond favorably to being removed from RHCs. Guardians wish to bill all of their clients collectively for activities that at best benefit only some, which activities may also harm the interests of those among their wards who would respond favorably to removal. There is insufficient evidence to support the Superior Court's award of fees for community outreach.

VI. CONCLUSION

Questions of law are subject to *de novo* review on appeal. In this case, the Superior Court found that the political and lobbying activities for which the Hardmans sought an allowance were outside the legal scope of their guardianship of Ms. Lamb and Ms. Robins, but that the Hardmans' community outreach activities provided a legal basis for guardian fees. The court was correct to conclude that political activities were outside the scope of the guardianships. However, the court erred in its determination that community outreach is within the scope of a guardianship. None of the Hardmans' "advocacy" activities are within the scope of a guardianship under Washington law, so no fees may be paid to them for engaging in those activities.

Even if community outreach were within the scope of a guardian's duties, the Superior Court abused its discretion by allowing them in this case. Allowing community outreach fees was manifestly unreasonable

because the Hardmans offered no evidence to show that community outreach would be necessary or beneficial to Ms. Lamb or Ms. Robins.

The Superior Court's denial of political advocacy fees should be upheld. The allowance of prospective fees for community outreach activities should be overturned, and those fees denied. The Hardmans' requests for attorney fees, below and on appeal, should also be denied.

RESPECTFULLY SUBMITTED this 25th day of March, 2009.

ROBERT M. MCKENNA
Attorney General


JONATHON BASIFORD, WSBA #39399
Assistant Attorney General
7141 Cleanwater Drive SW
PO Box 40124
Olympia, WA 98504-0124
(360) 5866535

CERTIFICATE OF SERVICE

I, Jody Redding, certify that I served a copy of this document,
DSHS Response Brief and Opening Brief on Cross-Appeal, on all parties
or their counsel of record on the date below as follows:

Michael L. Johnson
Hardman & Johnson
703 Columbia Street, Suite 400
Seattle, WA 98104

- By United States Mail
- By Legal Messenger
- By Facsimile
- By E-Mail (PDF)
- By Federal Express
- By Hand Delivery by: _____

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

Dated this 25th day of March, 2009 at Olympia,
Washington.

Jody Redding

JODY REDDING
Legal Assistant

FILED
COURT OF APPEALS DISTRICT
STATE OF WASHINGTON
2009 MAR 25 PM 1:02