

NO. 84379-1

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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In the Matter of the  
GUARDIANSHIP OF SANDRA LAMB

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SUPREME COURT  
STATE OF WASHINGTON  
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**DEPARTMENT'S SUPPLEMENTAL BRIEF**

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## I. INTRODUCTION

James and Alice Hardman, professional guardians whose wards include Sandra Lamb and Rebecca Robins, asked for authority from the superior court to advance themselves \$385 per month from each of their wards' estates. Of the \$385 request, \$150 was designated as compensation for "advocacy" including community outreach and political advocacy. The superior court granted \$75 per month as compensation for community outreach, but denied \$75 per month for political and lobbying activities. The Hardmans appealed, and the Court of Appeals held that the Hardmans were not entitled to either amount.<sup>1</sup> In affirming the superior court's denial of guardian fees for political activities, the Court of Appeals held that a court-appointed guardian cannot collect compensation for time spent on activities that provide no direct benefit to the ward; and that the Hardmans failed to show that their political activism provides any direct benefit to Ms. Lamb or to Ms. Robins.

A superior court does not abuse its discretion by denying fees to a guardian whose activities are unnecessary or unbeneficial. Because the Hardmans made no showing that their political advocacy was necessary to secure an identifiable benefit to their wards in particular, the Court of Appeals was correct to uphold the superior court's decision.

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<sup>1</sup> As described *infra* at 7 under "Scope of Review", the community outreach fees are not at issue in this appeal.

## II. ISSUES PRESENTED

1. Under RCW 11.92.180, a court-appointed guardian of an incapacitated adult “shall be allowed such compensation for his or her services as guardian . . . as the [superior] court shall deem just and reasonable.” Does a superior court abuse its discretion by denying a guardian’s request for compensation for time spent on political and lobbying activities, where the guardian fails to show that such activities are necessary to provide any direct benefit to the individual ward?

2. Under RCW 11.96A.150, must a court award attorney fees to a court-appointed guardian who unsuccessfully appeals a superior court award of guardian fees based on novel legal theories that the court found were without merit?

## III. STATEMENT OF THE CASE

James Hardman and Alice Hardman are certified professional guardians who have been appointed guardians for at least 23 developmentally disabled individuals who reside at Fircrest School, a residential habilitation center (RHC) operated by the Department of Social and Health Services (Department). CP 21; CP 140. Sandra Lamb and Rebecca Robins are two of those wards. CP 19; CP 107.

In May 2008, the Hardmans requested that the King County Superior Court authorize them to pay themselves a \$385 advance each

month from the estates of each of their wards, which included a request for \$150 per month in “special advocacy fees”. CP 25; CP 114; CP 192. The advocacy fees were intended as compensation for time the Hardmans spend involved in activities that can be broadly categorized as political activism, community organizing, and professional development. *See* CP 130-145; CP 196-202. The Hardmans note that such activities are distinct from their “regular guardianship activities”. CP 196. The Hardmans justified their advocacy fee request by dividing the time spent on advocacy equally across all of the Hardman wards residing at the RHCs who are currently paying the fees. CP 136-137.

The Hardmans describe their political 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. Their activism includes lobbying state and local officials to maintain RHC funding, CP 135; championing various legislative proposals, CP 143; attending local land use meetings, CP 139, 141-143; and providing financial support to organizations, officials and political candidates who the Hardmans believe “favor protecting [RHC] residents.” CP 197. They explain that their advocacy is “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 [the RHC], and to prevent their evictions and the ill effects of dislocation stress on their health and welfare.” CP 130-131.

DSHS was notified of the Hardmans’ May 2008 guardian reports and requests for fees in accordance with RCW 11.92.180. DSHS intervened and objected to (1) the Hardmans’ request for an advance guardian fee allowance above the maximum of \$175 per month allowed for certain Medicaid recipients under RCW 11.92.180, RCW 43.20B.460, and WAC 388-79-030; and (2) the request for an advance of “special advocacy fees.” CP 152-168. The superior court commissioner allowed only \$175 per month as an advance allowance for usual and customary guardianship activities. CP 58. The commissioner also ordered an advance allowance for advocacy fees in each case in the amount of \$150 per month, subject to final court approval at the next accounting. CP 58.

On DSHS’s motion, the superior court judge revised the commissioner’s order and denied in part the “special advocacy fees” requested by the Hardmans. CP 60-62. 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' motion for reconsideration was denied.

CP 262-263; CP 63-66. They appealed; DSHS cross-appealed.

In Division One, the Hardmans argued that the superior court's denial of fees for their lobbying and other political activities constituted a denial of their wards' constitutional right to petition under Wash. Const. art. I, § 4, and the First Amendment of the U.S. Constitution. Op. Br. at 38-48.<sup>2</sup> They further argued that such fees were not limited by DSHS rules regarding appropriate guardian fee deductions for RHC residents, WAC chapter 388-79, because those rules and their authorizing statute are unconstitutional, Op. Br. at 32-38, and contrary to federal law, Op. Br. at 13-30.

On cross-appeal, DSHS argued that the Hardmans could not collect fees for "community outreach" activities because those activities were outside their duties as guardians; were not extraordinary services under WAC 388-79-050; and were not necessary or beneficial to Ms. Lamb or to

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<sup>2</sup> American Civil Liberties Union of Washington filed an amicus brief arguing that political activities are within the scope of a guardian's duties.

Ms. Robins. Resp. Br. at 44-49. Disability Rights Washington (DRW) filed an amicus brief in support of DSHS's position.<sup>3</sup>

The Court of Appeals rejected the Hardmans' arguments, affirming the superior court's denial of compensation for political activities. It agreed with DSHS's arguments on cross-appeal and reversed the superior court's order authorizing compensation for community outreach. *In re Guardianship of Lamb*, 154 Wn. App. 536, 228 P.3d 32 (2009).

#### IV. ARGUMENT

Reasonable compensation to a guardian does not include compensation for time spent on activities that provide no direct benefit to the person or estate of the incapacitated person. The value of a guardian's services depends at a minimum upon the necessity and benefit of those services. Because the Hardmans have not shown that their political activism is necessary to secure any identifiable benefit for Ms. Lamb or Ms. Robins, the Court of Appeals was correct to affirm the superior court's denial of fees on those grounds. Although the Court of Appeals did not reach the issue, the superior court also properly determined that

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<sup>3</sup> DRW is a nonprofit organization designated by the governor and by federal law to protect and advocate for persons with developmental disabilities. 42 U.S.C. § 10801 *et seq.*; 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]"); RCW 71A.10.080.

broad political advocacy of the sort practiced by the Hardmans is outside the scope of a guardian's duties.

**A. Scope Of Review**

The Court of Appeals decision has four main prongs, only two of which are at issue in this appeal. First, the court rejected the Hardmans' various constitutional and federal preemption arguments for payment of their political and lobbying fees. *Lamb*, 154 Wn. App. at 547-49. The Hardmans have not renewed those arguments in their petition for review.

Second, the court held that guardians are not entitled to compensation from the assets of a ward for time spent on activities that provide no direct benefit to that ward, and determined that the Hardmans had not sufficiently shown that either their political or their community outreach activities would provide such a direct benefit. *Id.* at 544-46. The Hardmans appeal from that ruling.

Third, the court also granted DSHS's cross-appeal on the alternative basis that "[e]ven if the Hardmans had demonstrated a direct benefit from their community outreach activities, the [superior] court's order contains insufficient findings supporting the amount of the award to permit appellate review." *Id.* at 546. The Hardmans have not appealed that ruling. The community outreach fees are thus not at issue in this appeal, leaving only the political fees at issue under the second prong.

Finally, the court denied the Hardmans' request for attorney fees under RCW 11.96A.150, both because they were unsuccessful and because of the unique issues involved. *Id.* at 549. The Hardmans appeal the denial of fees.

**B. A Guardian Is Entitled To Compensation For The Realistic Value Of Services Provided As Guardian To The Ward**

The rule in Washington has long been that a guardian is entitled to "fair and reasonable compensation." *In re Leslie's Estate*, 137 Wash. 20, 23, 241 P. 301 (1925). That rule is now codified in the guardianship statute:

A guardian or limited guardian shall be allowed such compensation for his or her services as guardian or limited guardian as the [superior] court shall deem **just and reasonable**. . . . In all cases, compensation of the guardian or limited 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 limited guardian or his or her attorney may apply to the court for an allowance upon the compensation or necessary expenses of the guardian or limited guardian and for attorney's fees for services already performed. If the court finds that the guardian or limited guardian has failed to discharge his or her duties as such in any respect, it may deny the guardian any compensation whatsoever or may reduce the compensation which would otherwise be allowed. . . .

RCW 11.92.180 (emphasis added). The determination of "just and reasonable" compensation for a guardian is largely within the discretion of

the superior court. *E.g.*, *In re Guardianship of Spiecker*, 69 Wn.2d 32, 34-35, 416 P.2d 465 (1966); *Leslie's Estate*, 137 Wash. at 23.

This Court's precedents place two clear restrictions on what activities by the guardian may be compensated: (1) the compensation must be based on the actual value of the services; and (2) the activities must be within the guardian's court-appointed duties.

The first restriction requires that any compensation must be based on the actual value of the guardian's service to the ward. *In re Guardianship of Ivarsson*, 60 Wn.2d 733, 740, 375 P.2d 509 (1962) (compensation limited to a realistic appraisal of the value, if any, of the guardian's services); *In re Montgomery's Estate*, 140 Wash. 51, 53, 248 P. 64 (1926) (compensation limited to "such a sum as the court deems proper in view of the value of the services performed"). A guardian who is unfaithful in his trust, whether by willful act or indifference, is not entitled to any compensation at all. RCW 11.92.180; *In re Guardianship of Youngkin*, 48 Wn.2d 425, 294 P.2d 423 (1956); *In re Carlson's Guardianship*, 162 Wash. 20, 29, 297 P. 764 (1931).

The second restriction requires that the activities must be undertaken within the guardian's capacity as guardian. *In the Matter of the Guardianship of Adamec*, 100 Wn.2d 166, 179, 667 P.2d 1085 (1983) (no compensation to guardian for defending his own financial interests;

such activities are not a part of the guardian's services on behalf of the ward); *Ivarsson*, 60 Wn.2d at 739-40 (no compensation to guardian for parenting her own child; such activities are not a part of the guardian's services "in that capacity").

The political advocacy fees sought by the Hardmans fail on both counts. By engaging in wide-ranging political activities that provide no direct benefit to their individual wards, the Hardmans fail to provide services of value. Even if the Hardmans' political activities were services of some actual value, the superior court correctly denied the fee request because the Hardmans' political activities fall outside their duties as guardians and thus are not part of their services in that capacity.

**C. The Hardmans' Political Activities Provide No Actual Value To Ms. Lamb Or Ms. Robins**

This Court's precedents do not provide a specific test for how the superior court should determine the value of a guardian's services to the ward. However, the Court of Appeals was correct to reason that a guardian cannot receive compensation for activities that benefit the ward not at all, or only incidentally or obliquely, rather than in some direct and articulable fashion. That test grows out of decades of case law articulating the proper test for compensation to court-appointed fiduciaries under

RCW Title 11, which allows compensation only for necessary and beneficial services.

**1. The *Larson* standard that probate attorney fees must be necessary and beneficial was properly extended to guardianship cases.**

This Court has not specifically addressed the issue of guardian compensation since 1983 when it decided *Adamec*. In the intervening years the test articulated in *In re Estate of Larson*, 103 Wn.2d 517, 522, 694 P.2d 1051 (1985), a probate case, has been adopted for use in guardianships. In this case Division I followed the most recent in that line of cases, *In re Guardianship of McKean*, 136 Wn. App. 906, 151 P.3d 223 (2007). *Lamb*, 154 Wn. App. at 545-46.

In *McKean*, the guardian of the estate was awarded fees as well as the cost of attorney fees. *McKean*, 136 Wn. App. at 912. Considering the fees and costs together, the court examined “the need for the work done and whether it benefited the guardianship.” *Id.* at 918 (citing *In re Guardianship of Hallauer*, 44 Wn. App. 795, 800, 723 P.2d 1161 (1986)). After describing why the investigations and legal actions undertaken by the McKean’s guardian were necessary, and how they benefited the wards, the court concluded that the superior court did not abuse its discretion in determining that the fees and costs were reasonable. *Id.* at 918-19.

The necessary-and-beneficial standard applied in *McKean* derives from this Court's jurisprudence regarding legal expenses for personal representatives in probate. See *Larson*, 103 Wn.2d at 522 (describing "criteria to be considered in evaluating attorney fee requests in probate proceedings"); *Hallauer*, 44 Wn. App. at 800 (extending *Larson* to attorney fee requests in guardianship proceedings); *McKean*, 136 Wn. App at 918 (extending *Hallauer* to guardian fee requests). According to *Larson*, a court reviewing a request for legal expenses of a personal representative should consider the following criteria:

In fixing the amount to be allowed as a fee for the attorney of a decedent's personal representative, the court should consider the amount and nature of the services rendered, the time required in performing them, the diligence with which they have been executed, the value of the estate, the novelty and difficulty of the legal questions involved, the skill and training required in handling them, the good faith in which the various legal steps in connection with the administration were taken, and all other matters which would aid the court in arriving at a fair and just allowance.

*Larson*, 103 Wn.2d at 522 (also noting that the factors were identical to those in the Code of Professional Conduct). The *Larson* court explained that a probate attorney's "fiduciary obligations dictate that he charge the estate only for those hours which are reasonably **necessary** in probating the estate." *Id.* at 531 (emphasis added). Efforts that are "not for the **benefit** of the estate" are not compensable. *Id.* at 532 (emphasis added).

Fees for unnecessary, unbeneficial, duplicative, or inefficient tasks should thus be disallowed or discounted appropriately. *Id.* at 531-33.

The Certified Professional Guardian (CPG) Board has cited *Larson's* compensation standard for probate attorneys as the applicable case law when determining reasonable fees for a professional guardian. CPG Board, Ethics Advisory Opinion #2002-0001 (May 12, 2003).<sup>4</sup> In that ethics opinion, the CPG Board cited only two sources of law as applicable to guardian compensation: RCW 11.92.180 and *Larson*. The Board noted that the standards for guardian compensation require “a connection between the amount charged and the work **required**,” and “maintenance of a close correlation between services provided, costs of those services and **benefit** to the estate”. *Id.* (emphases added). That description closely tracks the necessary-and-beneficial standard articulated in *Larson*, *Hallauer* and *McKean*, and applied in this case.

Borrowing standards of compensation for guardians from those for personal representatives in probate is sensible because they follow similar principles. A guardianship court has “[t]he broad power and authority of a court sitting in probate”. *In re Adamec*, 100 Wn.2d at 174. Like guardians, personal representatives are entitled to attorney fees as well as “just and reasonable” compensation. *Compare* RCW 11.92.180

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<sup>4</sup> Available at [http://www.courts.wa.gov/committee/?fa=committee.display&item\\_id=640&committee\\_id=127](http://www.courts.wa.gov/committee/?fa=committee.display&item_id=640&committee_id=127) (last visited October 20, 2010).

(guardians) *with* RCW 11.48.210 (personal representatives). This Court has previously recognized that principles applicable to compensation in guardianship proceedings are applicable in probate as well. *Larson*, 103 Wn.2d at 532-33 (citing restrictions on guardian attorney fees in *Adamec* as authority for similar restrictions on probate attorney fees).

Guidelines for probate attorney compensation can similarly be applied to guardians. Like probate attorneys and personal representatives, guardians are fiduciaries answerable to the court. Unlike the client of an attorney, the guardian's client is often unable to protest an excessive fee request due to her incapacity; and unlike personal representatives, guardians often do not have to answer to other interested parties. In the face of a guardian's obvious self-interest in seeking compensation from the estate of his incapacitated ward, it is appropriate for courts to have a robust role in ensuring that the guardian performs his duties in an efficient manner, preserving rather than depleting the guardianship estate. Especially where, as here, full-time professional guardians seek compensation from 23 or more wards, they should be held to compensation standards no less rigorous than those articulated by the *Larson* court. Guardians have an obligation not to enrich themselves by charging for services that are not necessary to provide an actual benefit to the ward.

**2. Broad political activism provides no compensable value to a ward because it is not a service necessary to secure any particular benefit to the person or estate of the ward.**

The Hardmans have not shown that their political campaigns provide a valuable service, directly or indirectly, to Ms. Lamb or Ms. Robins. The supposed benefit that the Hardmans hope to achieve with their political campaign—keeping all of their wards in their current placement, CP 130-131—is disconnected from any actual present need of, or likely benefit to, these specific individuals. There is no indication that Ms. Lamb or Ms. Robins in particular are likely to be relocated in the near future, or that they would be harmed by relocation.<sup>5</sup> Even assuming that the broad goal is necessary and beneficial, the specific actions taken by the Hardmans are not. For instance, they do not articulate what necessary service they provided to Ms. Lamb by championing legislation providing incentives for Washington colleges to include courses concerning the treatment of people with developmental disabilities, CP 143; or to Ms. Robins by engaging in “a national effort to prevent class action

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<sup>5</sup> The amicus brief of Disability Rights Washington before the Court of Appeals argued that the Hardmans’ political advocacy is contrary to the best interests of the developmentally disabled, in light of the positive effects of deinstitutionalization and the intrinsic harms associated with segregation of the disabled population. Amicus Br. of Disability Rights Washington, at 4-11.

litigation to close RHCs without notice to guardians” in other states, CP 143. The Hardmans keep no timesheets and make no effort to connect their specific political activities to the interests of their individual wards. The benefit, if any, of their political activities to Ms. Lamb and Ms. Robins is so indirect as either to provide no significant value to the ward, or (as discussed below) to not constitute services provided by the Hardmans in their capacity as guardians. Either way the lower courts were correct to deny the request for compensation.

**D. The Hardmans’ Political Activities Are Not Services Provided In Their Capacity As Guardians**

If the Supreme Court concludes that the Hardmans’ political activities provide no actual value to Ms. Lamb and Ms. Robins, there is no need to go further. Even if the Court finds that the Hardmans’ political activities are valuable to their wards, the Court should affirm the superior court’s denial of fees on the basis that political activism on behalf of the disabled is not a service within a guardian’s capacity as guardian.

The superior court denied political advocacy fees because such fees “are outside the scope of [the] guardianship”. CP at 61; CP at 236. The Court of Appeals did not reach that question; it was unnecessary to do so once the case was decided on the grounds that the services provided no

direct benefit.<sup>6</sup> But the issue of the scope of a guardianship was extensively briefed below. DSHS Resp. Br. at 16-24; DSHS Resp. To Br. of Amicus Curiae American Civil Liberties Union of Washington at 1-20. The Hardmans cannot collect compensation for political activism, however well-intended, that far exceeds the duties of their court appointment.

**E. The Hardmans' Political Activities Are Not "Extraordinary Services" Under WAC 388-79-050**

The Hardmans have failed to show that the superior court abused its discretion when it denied them political advocacy fees. Their political activities provide no actual value to the wards, and are not provided in their capacity as guardians.

But even if this Court were to find that the Hardmans were entitled to compensation for those activities, it should decline to order that the fees be paid in the manner requested by the Hardmans, as a deduction from the wards' Medicaid cost of care. The Court of Appeals correctly found it unnecessary to reach that question after disposing of the case on other grounds. *Lamb*, 154 Wn. App. at 546, n.19. If this Court does reach the issue, it should hold that fees for political activities cannot be allowed as a

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<sup>6</sup> The Court of Appeals did note that the Hardmans "fail[ed] to cite any relevant case law establishing that a guardian may exercise political rights of an [incapacitated person]". *Lamb*, 154 Wn. App. at 549. While certainly relevant to whether political activism is a guardianship service, the statement was made in the context of rejecting the Hardmans' constitutional arguments and thus is not precisely on point.

Medicaid deduction under WAC chapter 388-79 because they do not qualify as “extraordinary services.” DSHS Resp. Br. at 26-29, 35-36.

**F. Attorney Fees**

The guardians request review of the denial of their request for attorney fees under RCW 11.96A.150.

Courts have broad discretion to order attorney fees in any RCW 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). The Court of Appeals was correct to deny fees in this case. RCW 11.96A.150 does not require a court to award attorney fees to a non-prevailing party—especially, as here, where that party brought the appeal. It would especially be inequitable to require payment of attorney fees in this case, given that the Hardmans’ appeal was primarily focused on novel legal theories that the Court of Appeals determined were “without merit.” 154 Wn. App. at 547.

The Hardmans have indicated that, if DSHS does not pay, they expect their wards to bear the costs of their appeal. Petition for Review at 10; *see* CP 379-380 (order authorizing attorney fees from Ms. Lamb’s special needs trust for litigation in Court of Appeals). In their appeal to this Court, the Hardmans abandon various arguments they have previously made regarding the civil rights of their wards. The two issues that

remain—when a guardian may collect fees from his ward, and when a guardian may collect attorney fees on appeal—are aimed at protecting the interests of the guardians themselves. If anything, their attempt to charge additional fees places them in a position adverse to their wards. *See In re Gardella*, 152 Wash. 250, 253, 277 P. 846 (1929) (when providing accounting to the court, a guardian is “acting in an adversary capacity” to the ward’s interests). Whatever the propriety of the Hardmans’ previous use of their wards’ estates to pursue this appeal, they cannot charge their wards for an appeal brought solely to secure compensation for themselves. *Larson*, 103 Wn.2d at 532-33; *Adamec*, 110 Wn.2d at 179.

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## V. CONCLUSION

The Court of Appeals was correct to affirm the superior court's order denying the Hardmans an allowance for political advocacy fees. The political activities at issue provide no direct or identifiable benefit, are unnecessary, and are of no significant value to the wards. Alternatively, the superior court correctly determined that politics and lobbying are beyond the scope of a guardian's duties to his ward. As the Court of Appeals held, the superior court did not abuse its discretion by denying the Hardmans' request. This Court should affirm the Court of Appeals.

RESPECTFULLY SUBMITTED this 25<sup>th</sup> day of October, 2010.

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