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NO. 62711-2

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

In the Matter of the
GUARDIANSHIP OF SANDRA LAMB,

**DSHS RESPONSE TO BRIEF OF AMICUS CURIAE AMERICAN
CIVIL LIBERTIES UNION OF WASHINGTON**

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I. INTRODUCTION

On October 14, 2009, the court accepted an amicus curiae brief filed by American Civil Liberties Union of Washington (ACLU). ACLU's brief addresses whether a court-appointed guardian may be paid from the ward's estate for lobbying the political branches of government.¹ ACLU, taking as their first principle that an incapacitated person's political and free speech rights are lost unless exercised by a guardian,² misconprehends the nature of guardianships and urges on this court an unconstitutional reading of Washington's guardianship statute. The real issue in this case is whether the state can involuntarily transfer, from a ward to her guardian, the right to engage in her own political speech. The state lacks that power, and has made no attempt to exercise it.

¹ ACLU does not respond specifically to the question, raised by DSHS's cross-appeal, of whether a guardian may substitute his own speech and associations in the community for those of an institutionalized ward. However, all of these First Amendment rights at issue in this case—expression, petition, and association—are closely related, and similar in that they cannot be restricted by the guardianship court without due process and a compelling state interest. Presumably the results on DSHS's cross-appeal should mirror those of the Hardmans' main appeal; neither amici nor the parties have articulated any reason why a guardian might have the power of political speech but not community speech, or vice versa.

² There is a long history in our country of assuming, based upon a label of "retardation" or, in earlier times, "idiot" or "imbecile," that an individual is incapable of exercising any rights at all. Robert L. Hayman, Jr., *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, 103 Harv. L. Rev. 1201 (1990); see Amicus Br. of DRW at 7-10. Once that conclusion is accepted, it becomes far easier to hand those useless rights of the disabled individual over to others. See Hayman, *Presumptions of Justice* at 1206-11 (discussing *Buck v. Bell*, 274 U.S. 200, 47 S. Ct. 584, 71 L. Ed. 1000 (1927), which upheld the forced sterilization of a mentally retarded woman).

II. ARGUMENT

In the hundreds of years since guardianships were first articulated under English common law, there is no indication that guardians have ever exercised or sought the powers that ACLU proclaims they must have as a matter of constitutional law. A disabled person has no constitutional “right” to be declared legally incompetent, to have her First Amendment rights removed by a court and then exercised without her consent by a stranger. There is no indication that our state legislature intended the guardianship statute to deprive any person of her speech rights—especially because there is no due process provided in the guardianship petition process to protect those rights; and because the political branches have put in place other institutions to help ensure that the collective interests of the developmentally disabled are not lost merely because those individuals lack the capability to build political advocacy organizations for themselves.

A. Guardianship Is A Deprivation Of Liberty

ACLU starts from the notion that guardianship constitutes a “preservation” of the rights of an incapacitated person. Br. of ACLU at 12, n. 6; 10-13. The aspiration behind guardianships may be that courts and guardians will be better able to assert the ward’s rights than the ward could for herself. However, “[t]he beneficial motives behind guardianship

[can] obscure[] the fact that guardianship necessarily entails a deprivation of the fundamental liberty to go unimpeded about one's ordinary affairs." *In re Link*, 713 S.W.2d 487, 493 (Mo. 1986). Guardianship deprives a ward of liberty because it transfers the ward's own decision-making authority to the guardian, without her consent.

Short of incarceration, guardianship is one of the most restrictive actions that the state may take against the liberty of a citizen. *E.g.*, *Kainz v. Ingles*, 731 N.W.2d 313, 325 (Wis. 2007) (guardianship "contemplates removing a person's liberty to make decisions"); *In re Towne*, 3 P.3d 154, 159 (Okla. 2000) (guardianship entails a "massive curtailment of liberty"); *In the Matter of Doe*, 181 Misc.2d 787, 790 (NY 1999) ("whatever the extent of a guardianship, it inevitably entails a deprivation of liberty"). By an extraordinary exercise of sovereign power, the state empowers a private citizen, a stranger, to decide for the ward (against her expressed desires if necessary) questions relating to her finances, RCW 11.92.040(4); residence, RCW 11.92.043(4); education, *id.*; and health, RCW 11.92.043(5)—subject to continuing court oversight. RCW 11.92.010.

An adult subject to a court-ordered guardianship cannot decide for herself many of the most important questions of her life. A person subject to even a limited guardianship "lose[s]... those rights and disabilities specifically set forth in the court order." RCW 11.88.010(2) (emphasis

added). When a petition for guardianship is filed, state law requires that the alleged incapacitated person be provided notice that “IF A GUARDIAN IS APPOINTED, YOU COULD *LOSE*” a number of specified rights. RCW 11.88.030(4)(b) (*italics added*). The Order Appointing Guardian pattern form created by the Administrative Office of the Courts describes each of the powers granted to the guardian as “revoked” from the ward. WPF GDN 04.0100, at p. 4 (2004), *available at* http://www.courts.wa.gov/forms/documents/WPF_GDN_04_0100.doc.

The legislature has judged those deprivations so severe as to warrant, if requested, both trial by jury and counsel at public expense. RCW 11.88.045. While the deprivations may only be imposed when a court determines them to be necessary for the welfare of a vulnerable person, ACLU is mistaken to characterize a guardianship as merely preserving a ward’s rights.³ In fact, a guardianship must by definition

³ ACLU claims that the U.S. Supreme Court has “endorsed” the view that the rights of the incapacitated, or at least the profoundly retarded, are meaningless unless they are exercised by a guardian. Br. of ACLU at 9. The dicta they quote from *Thompson v. Okla.*, 487 U.S. 815, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1988), is from a case holding that execution of a child criminal is unconstitutional. In fact, the passage ACLU cites is part of a discussion about the many legal deprivations, including of First Amendment rights, to which children are subjected by virtue of their lack of legal capacity. *Thompson*, 487 U.S. at 823-825. To the extent that incapacity on the bases of childhood and profound retardation are similar—a comparison that is not altogether apt—*Thompson* in fact undermines rather than supports ACLU’s position that guardianship does not constitute a deprivation of rights. An adult citizen who is given the legal status of an infant can hardly be said not to have lost her rights.

supplant the ward's own rights to at least the extent that it provides a guardian with the authority to decide on the ward's behalf.⁴

B. The Constitution Does Not Mandate, And In Fact Generally Prohibits, That Wards Be Deprived Of First Amendment Rights

ACLU argues that to deny a guardian the power to take over a ward's fundamental right to free speech would constitute an unconstitutional abridgment of that right. First, the Constitution does not require states to assign someone to engage in political speech on behalf of an incapacitated person without her consent. And second, a court order empowering the Hardmans to control what Ms. Lamb and Ms. Robins may (and may not) say would be a state action depriving those individuals of their core First Amendment rights, which cannot be done unless narrowly tailored to serve a compelling state interest.

1. The Constitution does not require that an incapacitated person's core rights be exercised by another.

ACLU argues that the Constitution requires states to give to a third party every personal right of an incapacitated person, because the failure to do so would constitute a practical impairment of her formal rights. The

⁴ It would be meaningless, for instance, to say that a guardian has the power to give medical consent on a ward's behalf if that power did not include overriding the ward's own silence or statements disapproving of medical treatment. See *Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 269-70, 110 S. Ct. 2841, 111 L.Ed.2d 224 (1990) ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body"). However well-meaning the guardian's exercise of power, and however well it serves the ward's best interests, it deprives her of the right to choose for herself.

U.S. Supreme Court rejected that argument in *Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990).

The petitioner in *Cruzan* was a previously competent woman who suffered an injury that left her in a persistent vegetative state. 497 U.S. at 266. Nancy Cruzan's parents and guardians requested that nutrition and hydration be removed to allow Ms. Cruzan to die. *Id.* at 267-68. Prior to her incapacity, Ms. Cruzan had made statements that suggested she would not want to live under such circumstances. *Id.* at 268. However, those statements did not amount to the "clear and convincing" evidence required by Missouri law to show an incapacitated person's wishes in the absence of a formal living will. *Id.* at 268-69. The Supreme Court upheld Missouri's high procedural safeguards that "assure that the action of the surrogate conforms as best it may to the wishes expressed by the patient while competent." *Id.*

The Court went on to reject the right of any other person to substitute their own judgment for that of the incapacitated person, stating bluntly that "we do not think the Due Process Clause requires the State to repose judgment on these matters with anyone but the patient herself." *Id.* at 286. The argument that the state must accept the substituted judgment of the parent-guardians as to what Ms. Cruzan's wishes would have been, was rejected. *Id.* at 285-86. The Court noted that "an incompetent person

is not able to make an informed and voluntary choice to exercise... [any] right. Such a 'right' must be exercised for her, *if at all*, by some sort of surrogate." *Id.* at 280 (emphasis added). The mere fact of Ms. Cruzan's incapacity did not require that even her parents be allowed to exercise her right to refuse medical treatment without her express consent. *Id.* at 286.

The other cases cited by ACLU do not suggest otherwise. In *Martyr v. Bachik*, 770 F. Supp. 1406 (D. Or. 1992), and *Martyr v. Mazur-Hart*, 789 F. Supp. 1081 (D. Or. 1992), the federal courts considered the First Amendment rights of Robert Martyr, who was in the habit of sending threatening letters from the mental institution in which he was confined. In both cases, the court affirmed that Mr. Martyr kept his free speech rights despite his confinement and illness; and that the custodial state hospital could only restrict those rights in a manner narrowly tailored to serve the compelling interest of encouraging Mr. Martyr's treatment and recovery. There was no indication that the patient's First Amendment rights would be adequately protected if the state were to allow a guardian to write Mr. Martyr's letters for him. *See also Wyatt v. Stickney*, 344 F. Supp. 373 (M.D. Ala. 1972) (unrestricted right of mental institution patients to send sealed mail; no discussion of a guardian's power to restrict that right).

In *Thomas S. v. Flaherty*, 699 F. Supp. 1178 (W.D.N.C. 1988), the court affirmed that institutionalized developmentally disabled individuals have a First Amendment right to free association with people in the wider community. There was no indication that a guardian's substituted exercise of that right would be sufficient.

First Amendment rights are just as personal and just as fundamental as the liberty interests involved in *Cruzan*. The Constitution does not require that Washington repose judgment on a person's political speech in anyone other than the person herself.

2. Neither courts nor guardians may force a ward to engage in political speech without compelling cause.

Not only does the Constitution not mandate that a guardian be given a ward's First Amendment rights; it in fact prohibits such an abridgment of the ward's rights absent the most compelling circumstances. It is not the state that has deprived Ms. Lamb and Ms. Robins of their political voices;⁵ their profound disabilities have done that. Their disability is not a state action. However, a guardianship order *is* state action. The guardian cannot exercise any power that the court could not

⁵ The parties and amici have all assumed throughout this case that Ms. Lamb and Ms. Robins in fact have no capacity to form political views of their own due to their profound disabilities. It bears noting that such a finding has never been explicitly made by the guardianship court. *See infra* at 14-16.

exercise itself; and the court cannot compel the ward to engage in political speech, even if to do so would be in her best interest.

Unlike the parent of a minor child, the guardian's authority to act on behalf of his adult incapacitated ward is not personal to him. His power is civil in nature, vested in him by the court, *Trenton Trust v. Western Surety*, 599 S.W.2d 481, 489 (Mo. 1980); and subject at all times to court control and direction. RCW 11.92.010; *Seattle-First Nat'l Bank v. Brommers*, 89 Wn.2d 190, 200, 570 P.2d 1035 (1977) ("The court having jurisdiction of a guardianship matter is said to be the superior guardian of the ward, while the person appointed guardian is deemed to be an officer of the court.")⁶ Whether the guardian exercises his power over the ward based solely on the general order of appointment, or instead follows a more specific court order, he can only do those things as guardian that the court could order him to do as an officer of the court.

It is well established that "freedom of speech prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47, 61, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006); *West Virginia Bd. of Ed. v. Barnette*, 319 U. S.

⁶ See also *Zuber v. Zuber*, 112 N.E.2d 688, 689 (Ohio App. 1952) ("Guardian of an incompetent is not the 'alter ego' of the incompetent with power to carry on all ward's personal or business ventures in name of ward and in same manner as such ward would be able to do except for the adjudication of incompetence, but office of guardian is to manage and conserve ward's estate and to provide for care and protection of his person.")

624, 643, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943) (the government may not “compel [a person] to utter what is not in his mind”). This prohibition applies to the legally incompetent as well as the competent. *See Barnette*, 319 U. S. 624 (unconstitutional to require children to recite Pledge of Allegiance). And it applies with no less force to the courts than it does to the other branches of government. *E.g., Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984). The court’s inherent power to protect incompetents by appointing a guardian does not include the power to compel speech except when narrowly tailored to a compelling state interest. *See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983) (strict scrutiny standard).

When the Hardmans exercise their power as court-appointed guardians to compel Ms. Lamb and Ms. Robins to engage in political speech, each woman utters something which is not in her mind. They utter only what the Hardmans think would be in their best interests to have in their minds, if their minds were capable of thinking such things. Whether the content of that speech is chosen by the guardian under general order of the court, or by the court itself via a specific order directing the guardian to speak, is irrelevant. The state cannot wield such

power absent the most compelling of circumstances, and cannot grant a guardian authority that the sovereign itself does not have.

C. Political And Speech Rights Are Not Within The Statutory Definition Of Guardians' Powers

ACLU argues that a guardian may exercise every right of the ward “*unless* those rights or the guardianship have been expressly limited by the court or statute.” Br. of ACLU at 11. Washington’s guardianship statute cannot be construed in that manner; and if it were, it would raise serious due process concerns. Washington’s guardianship statute provides the authority whereby a court may order the rights of an incapacitated person to be assumed by a guardian, and sets the upper limits as to which rights may be removed from the ward. Especially when read consistently with the legislative intent to maximize the ward’s autonomy, the statute does not provide courts with authority to remove the ward’s right to free speech.

1. The guardianship statute should be read to maximize the rights retained by the ward.

A guardian of the person is meant to “assert the incapacitated person’s rights,” RCW 11.92.043(4), and “help” her to “exercise” those rights, RCW 11.88.005. Whether a guardian may *assert* a ward’s First Amendment rights by *helping* her to exercise them herself whenever possible, is a very different question from whether a guardian may

substitute himself for the ward to directly *exercise* what he determines is the best use of the ward's rights. See *Cruzan*, 497 U.S. at 287 n. 12 ("The differences between the choice made *by* a competent person... and the choice made *for* an incompetent person by someone else... are so obviously different that the State is warranted in establishing rigorous procedures for the latter class of cases which do not apply to the former class." (emphases in original)).

Our guardianship statute does not define precisely what a "guardian" or "guardianship" is.⁷ A term not defined in a statute will be given its common law meaning. *In re Brazier Forest Products*, 106 Wn.2d 588, 595, 724 P.2d 970 (1986). At the time Washington's first guardianship statute was implemented, there is no indication that guardianship was understood at common law to include taking on the First Amendment rights of the ward. See Resp. Br. of DSHS at 21-22.

Since that time, the legislature has if anything indicated its intent to *restrict* the power of guardians.⁸ Prior to 1990, the statute allowed a

⁷ American Heritage Dictionary of the English Language, Fourth Edition, unhelpfully defines a guardian as "One who is legally responsible for the care and management of the person or property of an incompetent or a minor."

⁸ In the 1980s, Washington courts on two occasions expanded the scope of guardianships in small but important ways. In the first, in a reaction to the rise of medical technology that radically changed end-of-life care, the courts interpreted the power to make medical decisions as including the decision to forego life-sustaining treatment. *In re Welfare of Colyer*, 99 Wn.2d 114, 660 P.2d 738 (1983); *In re Guardianship of Hamlin*, 102 Wn.2d 810, 689 P.2d 1372 (1984). In the second, in a reaction both to the liberalization of divorce law and to the expansion of guardianship

guardian of the person to be appointed for anyone who was “[i]ncompetent... of... caring for himself[.]” Former RCW 11.88.010(1)(b) *amended* by Laws of 1990, ch. 122. In 1990, that vague language was clarified. Laws of 1990, ch. 122; *see infra*. The legislative history from 1990 shows that the revisions were meant to prevent financial exploitation, and to address the problem that “existing laws... do not contain enough standards and specificity to promote responsible and beneficial behavior on the part of those involved in the guardianship process.” S. Comm. on Children & Family Svcs., Final Rep. on Engrossed Substitute S.B. 6868, 51st Leg., Reg. Sess. (Wash. 1990). The “liberty and autonomy” of persons subject to guardianship “should be restricted through the guardianship process only to the minimum extent necessary to adequately provide for their own health or safety[.]” RCW 11.88.005. In light of this legislative purpose, the statute should be read to maximize the

powers in the right-to-die arena, the courts interpreted the power to bring suit on behalf of the ward as including filing for divorce. *In re Marriage of Gannon*, 104 Wn.2d 121, 124, 702 P.2d 465 (1985); *see* Kurt X. Metzmeier, *The Power of an Incompetent Adult to Petition for Divorce Through a Guardian or Next Friend*, 33 U. Louisville J. Fam. L. 969 (1994-95) (courts have used the guardian’s new power to make end-of-life decisions to justify extending the power to sue for divorce). Importantly, both instances involve expansion of a power already explicitly recognized by the guardianship statute; and both pre-dated the 1990 statutory amendments. The court should resist the slippery slope of ACLU’s argument that, because a guardian now has the enormous power to let the ward die, he should have all other powers as well. “[T]he provision of food and water to one incapable of oral self-nourishment raises unique concerns.” *In the Matter of the Guardianship of L.W.*, 482 N.W.2d 60, 70 (1992).

autonomy of incapacitated persons by restricting the powers of guardians and the courts over the lives of their wards.

2. There is no indication that the legislature meant for incapacitated persons to give up their speech and petition rights.

A guardianship of the person is only appropriate upon a finding of “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) (emphasis added). The statute thus provides precisely four grounds upon which a guardianship of the person may be imposed. It does not allow a guardianship to be imposed on an individual upon a “demonstration inability to adequately” engage in free speech or other First Amendment rights. If the legislature meant to remove a person’s ability to speak her own political views on the basis that she is incapable of providing for her own nutrition, health, housing, or physical safety, it did not say so. Even if the statute could be read in that way, such an interpretation must be avoided if possible. *State ex rel. Morgan v. Kinnear*, 80 Wn.2d 400, 402, 494 P.2d 1363 (1972) (courts construe a statute in a manner that avoids a constitutional question where there is a reasonable alternate reading). To remove a person’s ability to speak for herself, in the community and in the halls of government, on the basis that she is at risk of harm from poor self-management of her health or housing,

presents such a poor tailoring between the harm to be avoided and the restriction on liberty imposed that it would likely be unconstitutional. *See Perry*, 460 U.S. at 45 (strict scrutiny standard).

Nor is there any indication that an alleged incapacitated person is given pre-deprivation notice and due process of the loss of free speech and petition rights. The statute provides for notice to the alleged incapacitated person only that she may lose “THE FOLLOWING RIGHTS:

- (1) TO MARRY OR DIVORCE;
- (2) TO VOTE OR HOLD AN ELECTED OFFICE;
- (3) TO ENTER INTO A CONTRACT OR MAKE OR REVOKE A WILL;
- (4) TO APPOINT SOMEONE TO ACT ON YOUR BEHALF;
- (5) TO SUE AND BE SUED OTHER THAN THROUGH A GUARDIAN;
- (6) TO POSSESS A LICENSE TO DRIVE;
- (7) TO BUY, SELL, OWN, MORTGAGE, OR LEASE PROPERTY;
- (8) TO CONSENT TO OR REFUSE MEDICAL TREATMENT;
- (9) TO DECIDE WHO SHALL PROVIDE CARE AND ASSISTANCE;
- (10) TO MAKE DECISIONS REGARDING SOCIAL ASPECTS OF YOUR LIFE.

RCW 11.88.030(4)(b). Clearly, this list includes some rights that cannot be exercised by anyone if not the ward herself, such as the rights to “hold an elected office,” “to possess a license to drive,” and “to marry”,⁹ as well

⁹ At common law, it was “generally held that a guardian ha[d] no standing to bring an action for the divorce of his ward” because that choice was too “personal” for a guardian to make. *Jones v. Minc*, 77 Wn.2d 381, 384 (1969) (nonetheless allowing

as a number that fall within the common law scope of a guardian's powers. The legislature's enumeration of rights in RCW 11.88.030(4)(b) supports opposite conclusions from those reached by ACLU: that a guardianship deprives a person of her rights, both those that a guardian takes over and those he cannot; and that nobody other than the ward herself may exercise any of her rights other than those specifically mentioned.¹⁰

A guardian should assist his ward to exercise all of her rights, but should not take from the ward those rights that have not been explicitly removed by the imposition of the guardianship. Absent a clear legislative intent to expand guardianships beyond their historical scope, this court should decline to add politicking and public speaking to the list of rights supplanted by a guardianship.¹¹

guardian the power to seek annulment of ward's marriage). Washington's Supreme Court eventually overruled that limitation, allowing guardianship courts the power to authorize divorce actions by guardians. *Gannon*, 104 Wn.2d 121. However, it appears that no court has yet held that a guardian may say "I do" on behalf of an incapacitated adult—much less, in a closer analogy to this case, use the ward's funds to get himself married "on the ward's behalf" if the ward is not suited to get married herself.

¹⁰ The list of rights of which the legislature intended alleged incapacitated persons to be given notice prior to deprivation should be read to imply that rights not mentioned should be excluded, under the maxim "expressio unius est exclusio alterius" (to express one thing is to exclude another), given the specificity of the list. *State v. Modica*, 164 Wn.2d 83, 93, 186 P.3d 1062 (2008). Moreover, an alleged incapacitated person who lost the right to free speech, following receipt of a notice that did not list that right as one of the many specific rights that might be lost, would be deprived of due process of law.

¹¹ An attempt to extend ACLU's legal theory beyond the instant case tends to lead to absurd results. For instance, may a guardian prevent the ward from attending a political rally based on his judgment that the cause is against the ward's best interests?

D. Existing Advocacy Organizations Help Address The Lack Of Direct Political Advocacy By Incapacitated Developmentally Disabled Individuals

In the context of political advocacy for incapacitated persons, the legislature has already acted, and has not adopted the guardian-as-lobbyist model being pressed upon the court by the Hardmans and ACLU.¹² The legislative and executive branches have tasked multiple institutions with advocating to policy-makers on behalf of the individual and collective interests of the developmentally disabled; independent action by the courts to set up guardians in a parallel political advocacy role is both unnecessary and inappropriate.

The Governor has appointed Disability Rights Washington as this state's protection and advocacy program for the rights of the developmentally disabled. *See* RCW 71A.10.080; Amicus Br. of DRW at

Having made such a determination, is the guardian himself then required to attend opposing rallies and testify against such legislation—even if that would be inconsistent with his own political views? When the guardian writes a pamphlet as a substituted exercise of the ward's own speech rights, is the ward the legal author of the work for purposes of copyright? If the guardian has every fundamental right not excluded by the statute, can the guardian choose the ward's religion if she never got one for herself? Can a guardian who has lost his own right to gun ownership don the mantle of his ward's Second Amendment right in order to carry a firearm on her behalf?

¹² In contrast, the power of guardians to render substituted judgments and best-interest determinations in the context of right-to-die cases was made in the context of a pressing new issue presented by changing technologies, which had not yet been addressed by the legislature. The courts should hesitate to step in where the legislature has already set public policy. *See Hamlin*, 102 Wn.2d at 821-22 (“The Legislature is the better forum in which to fashion the necessary procedures to safeguard the rights and liabilities of the many persons and institutions involved in this complex arena.”).

1-2.¹³ The Washington State Developmental Disabilities Council similarly engages in and supports political advocacy for the developmentally disabled, “engag[ing] in advocacy, capacity building, and systemic change activities.” Executive Order 96-06; 42 U.S.C. § 15021(1).¹⁴ The Center on Human Development and Disability at the University of Washington receives federal funding under the “University Centers for Excellence in Developmental Disabilities Education, Research, and Service” program to, among other things, train potential caregivers and “advise Federal, State, and community policymakers” on matters related to the developmentally disabled. *See* 42 U.S.C. § 15063(a).

These programs have been created and supported by both Congress and the state. The political branches have noticed the problem presented by incapacitated persons who lack an independent political voice, and chosen a public policy to help ameliorate that problem. In addition, the

¹³ DRW was funded in part by a \$616,802 grant from the federal government in fiscal year 2009. U.S. Department of Health and Human Services, Administration for Children and Families, “Administration on Developmental Disabilities: FY 2009 P&A Final Allotment Table,” *available at* <http://www.acf.hhs.gov/programs/add/allotments/FY09PAFinalallotments.html> (last visited Oct. 16, 2009); *see* Omnibus Budget Act of 2009, Pub. L. No. 111-8 (March 11, 2009).

¹⁴ The Developmental Disabilities Council received \$1,240,323 from the federal government in fiscal year 2009. U.S. Department of Health and Human Services, Administration for Children and Families, “Administration on Developmental Disabilities: FY 2009 DD Council Final Allotment Table,” *available at* <http://www.acf.hhs.gov/programs/add/allotments/FY09DDFinalallotments.html> (last visited Oct. 16, 2009); *see* Omnibus Budget Act of 2009.

legislature itself has a duty to see that our laws adequately protect incapacitated citizens. To the extent that public and political, rather than individual and personal advocacy for the rights of incapacitated institutionalized persons is necessary, the legislature has chosen not to assign that role to guardians; nor should the court take that radical step, given the separation of powers problems that it would raise. *See* Resp. Br. of DSHS at 23-24. It is not the place of a court to supplant the legislature's policy with an alternative lobbying institution of its own devise and under its sole control.

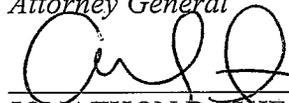
III. CONCLUSION

The defining feature of constitutional rights such as speech, petition, and religion is that they are rights of the individual to independent, personal actions based on independent, personal reasons. The literal exercise of such rights by another person does nothing to advance the ultimate reasons behind those rights—reasons such as participatory democracy and self-fulfillment. A court or court-appointed guardian deciding what speech is in a person's best interests is repugnant to those purposes. Washington's guardianship statute does not allow a court to transfer such personal rights from the ward to a guardian, even out of a sense of beneficence; and the Constitution does not require that anyone other than the ward herself be allowed to exercise those rights.

No artifice of the state can literally give to Ms. Lamb and Ms. Robins their own political views and acts if nature did not already give them the requisite abilities. The creation of a new legal fiction, that of an imagined political persona to formally “substitute” for the ward’s practically unknowable voice, is unnecessary and unwise.¹⁵ As between the imperfect solutions already in place, and the less perfect solution suggested by ACLU, the court should defer to the political branches. This court should decline ACLU’s invitation to thrust guardians into the political arena.

RESPECTFULLY SUBMITTED this 21st day of October, 2009.

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¹⁵ “The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind.” *Meyer v. Grant*, 486 U.S. 414, 419, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988).

CERTIFICATE OF SERVICE

I certify that I caused to be served a copy of this document, DSHS Response to Brief of Amicus Curiae American Civil Liberties Union of Washington, on all parties or their counsel of record on the date below as follows:

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

Dated this 21st day of October 2009 at Olympia,

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