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SUPREME COURT OF THE STATE OF WASHINGTON

**In the Matter of the
GUARDIANSHIP OF SANDRA LAMB**

**SUPPLEMENTAL BRIEF OF AMICUS CURIAE
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON**

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I. INTRODUCTION

The parties have framed the issue before this Court as a technical question regarding the standard for guardian compensation: DSHS¹ champions the “direct benefit” standard adopted by the Court of Appeals; the Hardmans² urge this Court to reverse the Court of Appeals and instead adopt a “best interests” standard. However this Court ultimately resolves the parties’ dispute as to the standard for compensation, it should make clear that the severely disabled retain the fundamental constitutional right to engage in political speech and that such right may be exercised by a duly-appointed guardian when necessary to advance the best interests of the ward.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of Washington (“ACLU-WA”) is a state-wide, nonpartisan, nonprofit organization of over 20,000 members, dedicated to protecting and advancing civil rights and civil liberties throughout Washington. ACLU-WA has a long history of working to safeguard free speech rights, including the right to petition the government for redress of grievances and the right to express dissention opinions. ACLU-WA is also committed to protecting the civil liberties of

¹ Respondent, the Washington State Department of Social and Health Services (hereinafter “DSHS”).

² Petitioners, Alice and James Hardman (together, the “Hardmans”).

the disabled, including those declared legally incapacitated. To that end, ACLU-WA has participated in numerous cases involving free speech rights guaranteed by the federal and state constitutions and the rights of the disabled. ACLU-WA was granted leave to participate as amicus curiae in the Court of Appeals in this case.

III. STATEMENT OF THE CASE

Sandra Lamb and Rebecca Robins are severely disabled individuals. Guardians' Supplemental Br. ("G. Supp. Br.") at 1; DSHS Supplemental Br. ("DSHS Supp. Br.") at 2. Both Ms. Lamb and Ms. Robins have a medical diagnosis of profound mental retardation and have multiple disabilities which affect their ability to express themselves. G. Supp. Br. at 1 (describing Ms. Lamb as a person of limited speech and articulation); *id.* at 2 (describing Ms. Robins as a person of no speech). In the mid-1980s, the King County Superior Court declared Ms. Lamb and Ms. Robins "incapacitated." DSHS Brief ("DSHS Br.") at 4-5; RCW 11.88.010(1) (defining "incapacitated").

In the 1990s, the court appointed petitioners the Hardmans, two certified professional guardians, to serve as Ms. Lamb's and Ms. Robins' co-guardians. DSHS Br. at 2, 4-5. Due to the severity of Ms. Lamb's and Ms. Robins' disabilities, the Hardmans are the "full Co-guardians of the Person and Estate with independent authority." G. Supp Br. at 2.

Ms. Lamb and Ms. Robins currently reside at Fircrest School (“Fircrest”), a “residential habilitation center” (“RHC”) in Shoreline, Washington. Ms. Lamb has lived at Fircrest since 1964; Ms. Robins was first admitted in 1984. G. Supp. Br. at 2.

In January 2004, a proposal was introduced in the Washington State Legislature to close Fircrest. The Hardmans determined that maintaining a residence at Fircrest was in the best interests of both Ms. Lamb and Ms. Robins, based on specific evidence of the wards’ negative reaction to being moved previously, and they therefore petitioned the legislature to keep the center open so the wards would not have to face being moved from their home again. *See* DSHS Br. at 5-9 (describing political activities undertaken by Hardmans with references to record); *In re Guardianship of Lamb*, 154 Wn. App. 536, 540-41, 228 P.3d 32, 34 (2009), *review granted*, 169 Wn.2d 1010, 236 P.3d 895 (2010).

The Hardmans acknowledge that a debate exists regarding the benefits of institutionalized care at RHCs like Fircrest versus community living. They are likewise aware that the opinion that institutionalized care at Fircrest is in the best interests of Ms. Lamb and Ms. Robins is contrary to what they call the “anti-RHC” movement. DSHS Br. at 8-9 (citing Advocacy Report). Amicus curiae Disability Rights Washington (“DRW”) asserted below that closing Fircrest is consistent with the “trend

toward deinstitutionalization,” *see* Amicus Curiae Brief of Disability Rights Washington (“DRW Br.”) at 4-11, further confirms the existence of differing points of view among disability rights advocates.

In May 2008, the Hardmans petitioned the court to add compensation for political advocacy on behalf of their wards opposing the closure of Fircrest to their annual guardianship fees. Guardians’ Br. (“G. Br.”) at 3; DSHS Br. at 5-6. On June 6, 2008, a court commissioner approved the Hardmans’ petition, subject to additional reporting. G. Br. at 4; DSHS Br. at 9. Upon DSHS’s motion, the King County Superior Court revised the commissioner’s order to exclude fees for the Hardmans’ political advocacy, stating that “the political and lobbying activities undertaken by Guardians are outside the scope of their guardianship.” DSHS Br. at 10 (quoting Order on Mot. to Rev. at 2). After unsuccessfully moving for reconsideration, the Hardmans appealed.

The Court of Appeals denied the Hardmans’ appeal on December 21, 2009, on the basis that the Hardmans were not entitled to compensation because they “fail[ed] to establish that these activities provide a direct benefit to their wards.” *Lamb*, 154 Wn. App. at 539. The Court explained its limited view of the “direct benefit” test when it cited another case as an example of such benefit: “Specifically, the work performed by the guardian had brought to light the daughters’ assets and

interests[.]” 154 Wn. App. at 546 (citing *In re Guardianship of McKean*, 136 Wn. App. 906, 919, 151 P.3d 223, 229 (2007)).

IV. ARGUMENT

In the proceedings below, all parties and *amicus curiae* acknowledged the importance of free speech rights protected by the First Amendment and the Washington State Constitution, including the right to petition the government for redress of grievances and the right to dissent.³ In addition, the parties and *amicus curiae* recognize that the disabled and incapacitated retain their constitutional rights, including the right to free speech. What was in dispute was whether the rights guaranteed by the First Amendment and the Washington State Constitution—in particular the right to petition the government for redress of grievances—may be exercised by a court appointed guardian on behalf of an incapacitated ward.

The Court of Appeals sidestepped the constitutional implications of this case and held that the Hardmans are not entitled to reasonable (and modest) compensation in connection with an appeal to the Washington State Legislature not to shutter the group home that has long provided shelter and nurture to their wards. *Lamb*, 154 Wn. App. at 539. The Court of Appeals based its judgment on a perceived lack of evidence that the

³ See U.S. Const., amend. I; Wash. Const. art. 1, §§ 4, 5.

petitioners' exercise of their wards' constitutionally-protected political speech rights provided a "direct benefit" to the wards.⁴ *Id.* at 546. In so holding, the Court of Appeals applied an unduly restrictive definition of "direct benefit" that devalues constitutionally-protected participation in the political process by those whose lives and well-being would be most directly affected by the legislature's action.

A. The Exercise of Fundamental Free Speech and Petition Rights on Behalf of and in the Best Interest of an Incapacitated Person Provides a Direct Benefit.

The value of political participation is twofold. First, political participation furthers our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 721, 11 L.Ed.2d 686 (1964). Second, political participation promotes individual dignity and autonomy:

The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately

⁴ The Court of Appeals also noted a perceived lack of "relevant case law establishing that a guardian may exercise political rights of an IP [incapacitated person], such as the right to petition, in the IP's best interests when the IP cannot express his or her preferences." *Lamb*, 154 Wn. App. at 549. Yet, as the Court of Appeals acknowledged, there is substantial authority for the proposition that a guardian may exercise fundamental constitutional rights on behalf of a ward, such as the right to refuse life-sustaining medical treatment. Brief of *Amicus Curiae* American Civil Liberties Union of Washington ("ACLU-WA Br.") at 13-15.

produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Cohen v. Cal., 403 U.S. 15, 24, 91 S. Ct. 1780, 1787-88, 29 L.Ed.2d 284 (1971).

Despite the well-established societal and individual benefits of political participation, DSHS argues that political advocacy provides a “direct benefit” (and thus is only within the scope of a guardian’s duties) when it can be proven to advance the ward’s economic interest. Such a rule, however, would only sanction advocacy that results in a pecuniary benefit to the ward, a result directly at odds with the goal of “remov[ing] governmental restraints from the arena of public discussion[.]” *Cohen v. Cal.*, 403 U.S. at 24.

The need for individualized and potentially dissenting political advocacy on behalf of the disabled is manifest. As DRW acknowledged below, a political debate “in the judicial, administrative, legislative, and community arenas” is ongoing with respect to the rights of the disabled and incapacitated. DRW Br. at 2. Because individual incapacitated persons may have interests that differ from those being championed by legislators or disability rights organizations, there is an ongoing need for their diverse viewpoints to be heard by the legislature. *See Roth v. United*

States, 354 U.S. 476, 484, 77 S. Ct. 1304, 1308, 1 L.Ed.2d 1498 (1957) (the First Amendment “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people”).

DSHS nevertheless contends that “the abstract value of communication is not enough.” DSHS Response to Brief of Amicus Curiae Julian Wheeler at 4. But the policy underlying the First Amendment is that diverse expression of views bestows a value on society and the speaker that is, in and of itself of manifest import. *See Stromberg v. California*, 283 U.S. 359, 369, 51 S. Ct. 532, 536, 75 L.Ed. 1117 (1931) (“The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.”); *Whitney v. California*, 274 U.S. 357, 375, 47 S.Ct. 641, 648, 71 L.Ed. 1095 (1927), *overruled in part by Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 23 L.Ed.2d 430 (1969) (“Those who won our independence believed . . . that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government”). If accepted, DSHS’s argument would preclude *any* individual participation in the

political process by the incapacitated—a result plainly contrary to the purpose and spirit of the First Amendment.

Of course, a guardian does not have an unfettered right to engage in political speech on behalf of a ward. Rather, a guardian is under a legal obligation to advance the best interests of the ward. CPG Standard⁵ § 403 (summarizing guardian’s ethical and legal obligation to ward); *id.* at § 402 (describing applicable decision standards); RCW 11.92.010(4). The particular advocacy in question must therefore be calculated to advance the best interests of the ward—a legal obligation that is both well-understood by professional guardians and routinely policed by reviewing courts.

Here, the Court of Appeals specifically noted that Ms. Lamb had previously been transferred out of Fircrest once, with deleterious effects on her health and happiness. 154 Wn. App. at 540-41. Among the advocacy activities listed on the Hardmans’ requests for reimbursement was lobbying against a bill which would have created a commission with authority to close residential homes such as Fircrest. *Id.* While DSHS contends that the Hardman’s advocacy provided no “direct benefit” because there was allegedly no imminent threat that Fircrest would be closed (DSHS Supp. Br. at 15), the Hardmans could nevertheless

⁵ The Washington State Certified Professional Guardian Standards of Practice.

reasonably conclude their advocacy was undertaken in Ms. Lamb's best interests based on her prior negative reaction to being moved out of Fircrest. And, if the advocacy did indeed advance Ms. Lamb's best interests, it also provided her with a direct benefit in the form of ensuring that her individual voice was heard by the legislature.

The judiciary's role should be limited to determining whether political advocacy by a guardian on behalf of a ward is undertaken in the best interests of the ward. If so, the activity is both within the scope of the guardianship and provides a direct benefit to the incapacitated ward, whether such advocacy promotes narrow economic interests or, as here, broader interests integral to the ward's quality of life. Any concern that such a rule would create a "blank check" for guardians to engage in political advocacy would be relieved by the fact that political advocacy, like any action undertaken on behalf of a ward, is subject to review judicial review. RCW 11.92.010; *see also* RCW ch. 11.88. Moreover, there are monetary limits on the amount guardians can collect over a given period of time, WAC 388-79-030, and fee petitions are subject to judicial review to ensure they are just and reasonable. RCW 11.92.180; WAC 388-79-050. This Court should not, and need not, disturb the established rules for evaluating the propriety and reasonableness of a guardian's request for compensation.

B. The Exercise of Fundamental Rights by Guardians is Permissible under the Washington Guardianship Statute.

While DSHS concedes that the Court of Appeals “did not reach [the] question” (DSHS Br. at 16), it nevertheless urges this Court to hold that political advocacy is never within the scope of a guardian’s duties—even when, as here, the Hardmans are the *full* guardians of severely disabled individuals who have no ability to speak for themselves and the political activities at issue are a logical extension of the guardians’ statutory obligation to secure the most appropriate placement for their wards. RCW 11.92.043(4). A fair reading of guardianship law reveals that DSHS’s argument has no merit and that rights retained by the ward can, and, to have any meaning, must be exercised by the guardian.

1. The Incapacitated Retain Fundamental Speech Rights.

A judicial finding of incapacity does not deprive an individual of his or her civil rights, *Matter of the Guardianship of Ingram*, 102 Wn.2d 827, 836, 689 P.2d 1363, 1368 (1984), including free speech rights.⁶ As both DSHS and DRW acknowledged below, courts have repeatedly held that the free speech rights of the disabled are guaranteed by both the federal and state constitutions. DSHS Br. at 39-40; DRW Br. at 12-13; *see*

⁶ See also RCW 71A.10.030(1) “[t]he existence of developmental disabilities does not affect the civil rights of the person with the developmental disability except as otherwise provided by law.”

also *Thomas S. v. Flaherty*, 699 F. Supp. 1178, 1203-04 (W.D.N.C. 1988), *aff'd*, 902 F.2d 250 (4th Cir. 1990) (courts have “explicitly held” that the First Amendment guarantees mentally disabled right to freedom of association); *Martyr v. Bachik*, 770 F. Supp. 1406, 1411 (D. Or. 1992) (recognizing First Amendment rights of mental hospital patients, including right to petition government); *Martyr v. Mazur-Hart*, 789 F. Supp. 1081, 1088-89 (D. Or. 1992) (same); *Wyatt v. Stickney*, 344 F. Supp. 373, 379 (M.D. Ala. 1972) (recognizing right of mental institution patients to send and receive mail from public officials); *aff'd in relevant part by Wyatt v. Alderholt*, 503 F.3d 1305, 1307, 1312 (5th Cir. 1974). In sum, the “existence and viability of a long-established personal right,” like freedom of speech, “does not hinge upon its prescient exercise, nor is it extinguished when one is adjudged incompetent.” *In re Guardianship of L.W.*, 167 Wis. 2d 53, 74, 482 N.W.2d 60 (1992).

Moreover, the State of Washington explicitly protects the civil liberties of the incapacitated through the guardianship system. The state has acknowledged its obligation to ensure that the developmentally disabled “enjoy all rights and privileges under the Constitution and laws of the United States and the state of Washington.” RCW 71A.10.015; RCW 11.88.005 (“it is the intent of the legislature” to enable “all” people “to

exercise their rights under the law to the maximum extent”).⁷ Simultaneously, the legislature recognizes that “some people with incapacities cannot exercise their rights or provide for their basic needs without the help of a guardian.” RCW 11.88.005 (statement of legislative intent) (emphasis added); RCW 11.92.043(4) (“It shall be the duty of the guardian . . . [to] assert the incapacitated person’s rights and best interests.”) (emphasis added). To this end, the Washington Supreme Court, in interpreting the guardianship statute, has held that a “finding of incompetency merely means that the ward’s rights will be exercised by the guardian on the ward’s behalf.” *Ingram*, 102 Wn.2d at 836; *In the Matter of the Welfare of Colyer*, 99 Wn.2d 114, 129, 660 P.2d 738, 746-47(1983).

2. Political Advocacy is Within the Scope of a Guardian’s Duties.

Washington law makes clear that assertion of the rights of an incapacitated ward is not just within the scope of a guardian’s duties, but required of the guardian. As noted above, RCW 11.88.005 recognizes that some people need the help of a guardian to exercise their rights. Under Washington law, once appointed, a full guardian literally stands-in-the-shoes of the ward and exercises the ward’s rights on his or her behalf. *See, in addition to* RCW11.88.005, RCW 11.92.043(4) (guardian must

⁷ *See also* CPG Standards § 401 (“civil rights and liberties of the incapacitated person shall be protected”) and § 403.8 (“guardian shall protect the incapacitated person’s rights and best interests against infringement by third parties”).

“assert” incapacitated person’s rights). Any limits on the scope of the guardianship are either explicitly stated in the appointing court’s order or expressly set forth by the guardianship statute. *See, e.g.*, RCW 11.88.010(2) (court can limit scope of guardianship where incapacitated retains ability to manage some affairs), RCW 11.92.043(5) (limiting guardian’s ability to fully exercise ward’s right to consent to certain medical procedures); *Ingram*, 102 Wn.2d at 836 (finding RCW 11.92.040(3), now RCW 11.92.043(5), restricts guardians’ ability to exercise ward’s right to choose enumerated medical treatments). As this Court has held, when a statute contains express exceptions, those exceptions must be read narrowly. *See Colyer*, 99 Wn.2d at 129 (express exclusions in guardianship statute must be read narrowly). Consequently, and contrary to DSHS, unless the appointing court or guardianship statute explicitly takes away or limits a ward’s rights, that right is assumed to remain with the ward and may be exercised by the guardian.⁸

When a guardian petitions on behalf of a ward, the guardian is exercising the ward’s fundamental rights, not usurping them, as DSHS argues. Courts have repeatedly found that it is the duty of a guardian to

⁸ The Court of Appeals noted that the order appointing James Hardman as Ms. Lamb’s guardian stated that she “shall not retain her right to vote.” *Lamb*, 154 Wn. App. at 540. A limited abrogation of a specific right, however, does not terminate other fundamental rights. *See, e.g., United States v. Hinkley*, 725 F. Supp. 616, 625 (D.D.C. 1989) (“It is well-established that persons committed to state institutions through involuntary procedures do not surrender all of their constitutionally guaranteed civil rights.”).

exercise fundamental rights on behalf of the guardian's incapacitated ward. See *Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 308, 110 S. Ct. 2841 (1990) (fact of incompetency does not deprive individual of fundamental right to refuse medical treatment); *Ingram*, 102 Wn.2d at 836 (recognizing constitutional right to chose medical treatment); *Colyer*, 99 Wn.2d at 124 (incompetent's right to chose medical treatment is equal to competent's). The Court of Appeals dismissed these authorities on the ground that each involved the right to refuse medical treatment. 154 Wn. App. at 548-49. But these authorities in fact stand for the proposition—equally applicable in this case—that individuals do not relinquish their fundamental rights when they become incapacitated and that such rights, to have any meaning at all, must be exercised by duly-appointed guardians.

In this respect, the Court of Appeals erred in relying on the probate attorney's fees standard to inform its understanding of direct benefit and subsequently the scope of a guardian's compensable fees. See *Lamb* 154 Wn. App. at 545-46 (relying on *In re Guardianship of McKean*, 136 Wn. App. 906 (2007)). Because the duty of a probate attorney is to the estate's assets, it is reasonable to conclude that a benefit is provided only where the result of the attorney's work is to enhance the value of the estate. See, e.g., *In re Guardianship of Hallauer*, 44 Wn. App. 795, 799, 723 P.2d

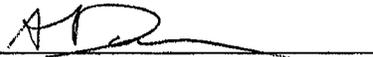
1161, 1165 (1986). A full guardian's duties, however, are much broader. *See, e.g.,* RCW 11.88.005, RCW 11.92.043(4). As DSHS notes, the activities engaged in by the Hardmans in this case include "lobbying state and local officials to maintain RHC funding; championing various legislative proposals; attending local land use meetings; and providing financial support to organizations, officials and political candidates who the Hardmans believe 'favor protecting [RHC] residents.'" As the wards on whose behalf the Hardmans engaged in these activities are severely disabled, there is no one who will engage in these activities if they are not within the scope of the guardians' duties. The scope of the guardian's authorized duties must therefore be commensurately broad.

V. CONCLUSION

For the forgoing reasons, this Court's judgment should affirm the right of the disabled to exercise the fundamental constitutional right to engage in political speech through their duly-appointed guardians.

Respectfully submitted this 31st day of May, 2011.

**AMERICAN CIVIL LIBERTIES UNION
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CERTIFICATE OF SERVICE

I, Alfred A. Day, hereby certify and declare that on the 31st day of May, 2011, I sent a copy of the foregoing document via electronic mail and U.S. mail to the following:

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