

DISTRICT OF COLUMBIA COURT OF APPEALS

IN RE: ALEXANDRA MARTEL

**KAREN BROWN STARR,
Appellant**

**ON APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA**

Probate Division

Intervention No.: 123-01

**BRIEF OF *AMICI CURIAE* QUALITY TRUST FOR INDIVIDUALS WITH
DISABILITIES, INC., THE AMERICAN CIVIL LIBERTIES UNION OF THE
NATION'S CAPITAL, THE LEGAL AID SOCIETY OF THE DISTRICT OF
COLUMBIA, LEGAL COUNSEL FOR THE ELDERLY, THE NATIONAL DISABILITY
RIGHTS NETWORK, THE NATIONAL SENIOR CITIZENS LAW CENTER,
PROJECT ACTION!, AND UNIVERSITY LEGAL SERVICES-PROTECTION &
ADVOCACY IN SUPPORT OF ALEXANDRA MARTEL AND IN SUPPORT OF
REVERSAL**

Clifton S. Elgarten (D.C. Bar No. 366898)*
Jennifer G. Knight (D.C. Bar No. 478253)
Christopher E. Gagne (D.C. Bar No. 494392)
Crowell & Moring LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2595
Tel: (202) 624-2500
Fax: (202) 628-5116

*Counsel for Amici Curiae Quality Trust for
Individuals with Disabilities, Inc., The American
Civil Liberties Union of the Nation's Capital, The
Legal Aid Society of the District of Columbia, Legal
Counsel for the Elderly, The National Disability
Rights Network, The National Senior Citizens Law
Center, Project ACTION!, and University Legal
Services-Protection & Advocacy*

Of Counsel:

Laura M. Flegel (D.C. Bar No. 431478)
Erin L. Leveton (D.C. Bar No. 486099)
Quality Trust For Individuals With Disabilities, Inc.
5335 Wisconsin Ave. NW
Washington, D.C. 20015
Tel: (202) 448-1443
Fax: (202) 448-1451

Arthur B. Spitzer (D.C. Bar No. 235960)
American Civil Liberties Union of the Nation's Capital
1400 20th Street, N.W., Suite 119
Washington, D.C. 20036
Tel: (202)457-0800
Fax: (202) 452-1868

Rawle Andrews Jr. (DC Bar No. 436283)
AARP Legal Counsel for the Elderly
601 E Street, NW, A4-410
Washington, DC 20049
Tel: (202) 434-2158
Fax: (202) 434-6464

Janice K. Johnson Hunter (D.C. Bar No. 973948)
National Disability Rights Network
900 Second Street, N.E., Suite 211
Washington, D. C. 20002
Tel: (202) 408-9514
Fax: (202) 408-9520

Rule 28(a)(3) Disclosure Statements

Quality Trust for Individuals with Disabilities, Inc. is a District of Columbia nonprofit corporation. It has no parents, subsidiaries, or stockholders.

The American Civil Liberties Union of the Nation's Capital is a District of Columbia nonprofit membership corporation whose formal corporate name is the American Civil Liberties Union Fund of the National Capital Area. It has no parents, subsidiaries, or stockholders. It is the local affiliate of the American Civil Liberties Union, which is also a District of Columbia nonprofit membership corporation that has no parents, subsidiaries, or stockholders.

The Legal Aid Society of the District of Columbia is a District of Columbia nonprofit corporation. It has no parents, subsidiaries, or stockholders.

Legal Counsel for the Elderly is a nonprofit corporation with no parents or stockholders. LCE is an affiliate of AARP, a nonprofit corporation with no parents or stockholders.

The National Disability Rights Network is a Florida nonprofit membership corporation whose formal corporate name is the National Disability Rights Network.

The National Senior Citizens Law Center is a California nonprofit corporation. It has no parents, subsidiaries, or stockholders.

Project ACTION! is a nonprofit corporation compliant with the District of Columbia NonProfit Corporation Act. It has no parents or subsidiaries and is not a publicly-held corporation.

University Legal Services-Protection & Advocacy is a 501(c)(3) corporation. It has no parents, subsidiaries, or stockholders.

Table of Contents

STATEMENTS OF INTEREST 1

INTRODUCTION 4

STATEMENT OF THE CASE 4

 I. The Statutes and Rules Governing the Roles in Guardianship Proceeding 4

 II. Factual Background 6

 III. Procedural Background 8

ARGUMENT 11

 I. D.C. Statutes and Court Rules Require Counsel to Advocate Zealously on
 Behalf of the Ward 12

 II. The Rules of Professional Ethics Require Counsel to Advocate Zealously
 on Behalf of the Ward. 18

 III. The Superior Court Proceedings Violated The Ward’s Constitutional Due
 Process Right. 20

CONCLUSION 24

Table of Authorities

Cases

<i>Aiken v. United States</i> , 956 A.2d 33 (D.C. 2008)	17
<i>Armstrong v. Manzo</i> , 380 U.S. 545 (1965)	22
<i>Bolling v. Sharpe</i> , 347 U.S. 497 (1954)	20
<i>Dist. of Columbia v. Mayhew</i> , 601 A.2d 37 (D.C. 1991)	20
<i>Estate of Milstein v. Ayers</i> , 955 P.2d 78 (Colo App. 1998).....	14
<i>Heller v. Doe</i> , 509 U.S. 312 (1993)	20
<i>In re E.H.</i> , 880 P.2d 11 (Utah Ct. App. 1994).....	16
<i>In re Guardianship of Henderson</i> , 838 A.2d 1277 (N.H. 2003).....	15
<i>In re Hutchinson</i> 534 A.2d 919 (D.C. 1987)	13
<i>In re K.L.</i> , 751 N.W.2d 677 (N.D. 2008).....	16
<i>In re Keiler</i> 380 A.2d 119 (D.C. 1977)	13
<i>In re Lee</i> , 754 A.2d 426 (Md. Ct. Spec. App. 2000).....	15, 23
<i>In re M.D.(S.)</i> , 485 N.W.2d 52 (Wis. 1992)	16
<i>In re Orshansky</i> 804 A.2d 1077 (D.C. 2002)	14, 20
<i>In re R.E.S.</i> 2009 D.C. App. LEXIS 351 (D.C. Aug. 13, 2009)	15, 16
<i>In the Matter of M.R.</i> , 638 A.2d 1274 (N.J. 1994)	18, 19, 20
<i>Lassiter v. Dep't of Soc. Servs. of Durham County, N.C.</i> , 452 U.S. 18 (1981)	22
<i>Prokupek v. Larson</i> , 708 N.W.2d 262 (Neb. 2006)	15

<i>Vitek v. Jones</i> , 445 U.S. 480 (1980)	20
<i>Walton v. Dist. of Columbia</i> , 670 A.2d 1346 (D.C. 1996)	20

Statutes

20 Pa. Cons. Stat. § 5511(a) (2009)	22
20 Pa. Cons. Stat. § 5512.2 (2009)	22
755 Ill. Comp. Stat. 5/11a-10 (2009)	15, 22
755 Ill. Comp. Stat. 5/11a-21 (2009)	22
Ala. Code § 26-2A-102 (2009)	22
Ala. Code § 26-2A-110 (2009)	22
Alaska Stat. § 13.26.106 (2009)	22
Alaska Stat. § 13.26.125 (2009)	22
Ariz. Rev. Stat. § 14-5303 (2009)	22
Ariz. Rev. Stat. § 14-5307 (2009)	22
Ariz. Rev. Stat. § 14-5312.01 (2009)	22
Ark. Code Ann. § 28-65-213 (2009)	22
Ark. Code Ann. § 28-65-220 (2009)	22
Cal. Prob. Code § 1470(a) (2009)	22
Cal. Prob. Code § 2670 (2009)	22
Colo. Rev. Stat. § 15-14-305 (2008)	22
Colo. Rev. Stat. § 15-14-318 (2008)	22
Conn. Gen. Stat. § 45a-678 (2008)	22
Conn. Gen. Stat. § 45a-673 (2008)	22
D.C. Code § 16-2304 (2001)	16
D.C. Code § 21-2001 (2001)	5
D.C. Code § 21-2011 (2001)	6
D.C. Code § 21-2033 (2001)	4, 5, 6, 11, 12, 15, 17
D.C. Code § 21-2041 (2001)	5, 12
D.C. Code § 21-2044 (2001)	6
D.C. Code § 21-2047 (2001)	6
D.C. Code § 21-2049 (2001)	5, 12
D.C. Code §§ 20-2031 (2001)	22

D.C. Code §§ 21-2041 (2001)	5
Del. Code Ann. tit. 12 § 3901 (2009)	22
Fla Stat. ch. § 744.102 (2009)	15
Fla. Stat. ch. 744.3215 (2009)	22
Fla. Stat. ch. 744.331 (2009)	22
Ga. Code Ann. § 29-4-11 (2009).....	22
Ga. Code Ann. § 29-4-20 (2009).....	22
Ga. Code Ann. § 29-4-41 (2009).....	22
Ga. Code Ann. § 29-4-42 (2009).....	22
Ga. Code Ann. § 29-4-61 (2009).....	22
Haw. Rev. Stat. Ann. § 560:5-305 (2009).....	22
Haw. Rev. Stat. Ann. § 560:5-318 (2009).....	22
Idaho Code § 15-5-303 (2009)	22
Idaho Code § 15-5-307 (2009)	22
Ind. Code Ann. § 29-3-5-1 (2009).....	22
Iowa Code § 633.561 (2008)	22
Iowa Code § 633.561 (2008)	15
Kan. Stat. Ann. § 59-3063 (2008)	22
Kan. Stat. Ann. § 59-3087 (2008)	22
Kan. Stat. Ann. § 59-3088 (2008)	22
Ky. Rev. Stat. Ann. § 387.560 (2009).....	22
La. Code Civ. Proc. Ann. Art. 4544 (2009).....	22
La. Code Civ. Proc. Ann. Art. 4554 (2009).....	22
La. Code Civ. Proc. Ann. Art. 4569 (2009).....	22
Mass. Gen. Laws ch. 190B, § 5-106 (2009).....	22
Mass. Gen. Laws ch. 190B, § 5-311 (2009).....	22
Md. Est. & Trusts Code Ann. § 13-211 (2009).....	22
Md. Est. & Trusts Code Ann. § 13-705 (2009).....	22
Me. Rev. Stat. Ann. tit. 18-A § 5-303 (2009).....	22
Me. Rev. Stat. Ann. tit. 18-A § 5-307 (2009).....	22
Mich. Comp. Laws § 700.5303 (2009).....	22
Mich. Comp. Laws § 700.5305 (2009).....	22
Mich. Comp. Laws § 700.5310 (2009).....	22

Minn. Stat. § 524.5-304 (2008)	22
Minn. Stat. § 524.5-317 (2008)	22
Mo. Rev. Stat. § 475.075 (2009)	22
Mo. Rev. Stat. § 475.083 (2009)	22
Mo. Rev. Stat. § 475.115 (2009)	22
Mont. Code Ann. § 72-5-315 (2009).....	22
Mont. Code Ann. § 72-5-325 (2009).....	22
N.C. Gen. Stat. § 35A -1293 (2009).....	22
N.C. Gen. Stat. § 35A-1107 (2009).....	22
N.D. Cent. Code, § 30.1-28-03 (2009)	22
N.D. Cent. Code, § 30.1-28-07 (2009)	22
N.H. Rev. Stat. Ann. § 464-A:40 (2009).....	22
N.H. Rev. Stat. Ann. § 464-A:6 (2009).....	22
N.J. Stat. Ann. § 3B:12-24.1 (2009).....	22
N.M. Stat. Ann. § 45-5-303 (2009)	22
N.M. Stat. Ann. § 45-5-307 (2009)	22
N.Y. Mental Hyg. Law § 81.10 (2009)	22
N.Y. Mental Hyg. Law § 81.11 (2009)	22
N.Y. Mental Hyg. Law § 81.35 (2009)	22
N.Y. Mental Hyg. Law § 81.36 (2009)	22
Neb. Rev. Stat. § 30-2619 (2009).....	22
Neb. Rev. Stat. § 30-2623 (2009).....	22
Nev. Rev. Stat. Ann. § 159.0485 (2009)	22
Nev. Rev. Stat. Ann. § 159.187 (2009)	22
Nev. Rev. Stat. Ann. § 159.1905 (2009)	22
Ohio Rev Code Ann. § 2111.02 (2009).....	22
Ohio Rev Code Ann. § 2111.49 (2009).....	22
Okla. Stat. tit. 30, § 3-107 (2009).....	22
Or. Rev. Stat. § 125.025 (2007).....	22
Or. Rev. Stat. § 125.080 (2007).....	22
Or. Rev. Stat. § 125.090 (2007).....	22
Or. Rev. Stat. § 125.225 (2007).....	22
R.I. Gen. Laws § 33-15-18 (2009).....	22

R.I. Gen. Laws § 33-15-7 (2009).....	15, 22
S.C. Code Ann. § 62-5-303 (2008).....	22
S.C. Code Ann. § 62-5-307 (2008).....	22
S.D. Codified Laws § 29A-5-117 (2009)	22
S.D. Codified Laws § 29A-5-309 (2009)	22
S.D. Codified Laws § 29A-5-509 (2009)	22
Tenn. Code Ann. § 34-1-107 (2009)	22
Tenn. Code Ann. § 34-1-121 (2009)	22
Tenn. Code Ann. § 34-1-25 (2009)	22
Tex. Prob. Code § 646 (2009)	22
Tex. Prob. Code § 694C (2009).....	22
Tex. Prob. Code § 694K (2009)	22
Utah Code Ann. § 75-5-303 (2009).....	22
Utah Code Ann. § 75-5-307 (2009).....	22
Va. Code Ann. §§ 37.2-1006 (2009)	22
Vt. Stat. Ann. Tit. 14 § 3065 (2009).....	22
Vt. Stat. Ann. Tit. 14 § 3068 (2009).....	22
Vt. Stat. Ann. Tit. 14 § 3068a (2009).....	22
Vt. Stat. Ann. tit. 14, § 3065 (2009)	16
W. Va. Code § 44A-2-6 (2009)	22
W. Va. Code § 44A-2-7 (2009)	22
W. Va. Code § 44A-2-9 (2009)	22
Wash. Rev. Code § 11.88.045 (2009).....	16, 22
Wash. Rev. Code § 11.88.120 (2009).....	22
Wis. Stat. § 54.42(1) (2009)	22
Wis. Stat. § 54.42(a) (2009)	16
Wis. Stat. § 54.54 (2009).....	22
Wis. Stat. § 54.64(2)(a)(4) (2009)	22
Wyo. Stat. § 3-1-205(a)(iv) (2009).....	22

Other Authorities

A.B.A. Model R. Prof. Conduct 1.14	13
A.B.A. Formal Opinion 96-404 (Aug. 2, 1996)	21

D.C. Rules of Prof'l Responsibility R. 1.146, 18

D.C. Rules of Prof'l Responsibility R. 1.14(a).....18, 19

D.C. Rules of Prof'l Responsibility R. 1.318

D.C. Rules of Prof'l Responsibility R. 1.3(a).....6

D.C. SCR-PD Rule 305passim

D.C. SCR-PD Rule 305(a)(6)6, 17

D.C. SCR-PD Rule 3066, 7, 13

Daniel L. Bray & Michael D. Enslay, "Dealing with the Mentally Incapacitated Client: The Ethical Issues Facing the Attorney," 33 Fam. L. Q. 329 at 342 (Summer 1999).....19

David A. Green, "'I'm Ok-You're Ok': Educating Lawyers To 'Maintain A Normal Client-Lawyer Relationship'" With A Client With A Mental Disability," 28 J. Legal Prof. 65 at 88-89 (2003-04)20

Fla. Bar Reg. R. 4-1.14(a)15

H.R. Rpt. 100-639, at 1, 4 (Sept. 25 1987).....21

Individual Support Plans

 D.C. DDS Policy No. 71, Nov. 2008, on-line at http://dds.dc.gov/dds/frames.asp?doc=/dds/lib/dds/individual_support_plans_policy_and_procedures.pdf10

Joan L. O'Sullivan and Diane E. Hoffman, "The Guardianship Puzzle: Whatever Happened to Due Process?," 7 Md. J. Contemp. L. Issues 11 (Fall/Winter 1995-96)24

Joan L. O'Sullivan, "Role of the Attorney for the Alleged Incapacitated Person," 31 Stetson L. Rev. 687.....23

Law Revision Commission Commentary for NY Mental Hyg. Law § 81.10 (1993)15

Michael D. Casasanto, Mitchell Simon & Judith Roman, "A Model Code of Ethics for Guardians," 11 Whittier L. Rev. 543 (1989).....14

N.J. Court Rules, R. 4:86-4(b) (2009)15

Ronald D. Rotunda & John S. Dzienkowski, *Legal Ethics - The Lawyer's Deskbook On Professional Responsibility* § 1.14-1 (2009-2010 Ed.)19

U.S. Const. Amend. V20

U.S. Const. Amend. XIV20

Vicki Gottlich, "The Role of the Attorney for the Defendant in Adult Guardianship Cases: An Advocate's Perspective," 7 Md. J. Contemp. Legal Issues 191 (Fall/Winter 1995-96).....20

STATEMENTS OF INTEREST

Quality Trust for Individuals with Disabilities, Inc. (“Quality Trust”) is an independent, non-profit District of Columbia organization, created pursuant to a 2001 settlement and consent decree in the long-running litigation now styled *Evans v. Fenty*.¹ Quality Trust’s mission is to assist in the development and maintenance of a city-wide system that affords people with intellectual and developmental disabilities (“IDD”) high-quality, person-centered services and support, regardless of the extent or severity of their needs. Quality Trust endeavors to accomplish this mission by, *inter alia*, (1) monitoring and reporting on the operation of the D.C. system, and (2) providing advocacy and/or legal representation to people with developmental disabilities on a broad range of issues, including, among others, guardianship, capacity and the right to self-determination.²

The American Civil Liberties Union of the Nation’s Capital (“ACLU-NC”) is the Washington D.C. affiliate of the American Civil Liberties Union (ACLU), a nationwide, nonprofit, membership organization with more than 500,000 members, dedicated to protecting the civil liberties and civil rights of all Americans, including people with intellectual disabilities. The ACLU-NC has participated in many cases before this Court, both as counsel for parties and as *amicus curiae*, when significant civil liberties and civil rights are at stake. The ACLU joins this *amicus* brief because important statutory and constitutional rights of the subject of this

¹ See *Evans v. Williams*, 139 F. Supp. 2d 79, 82 (D.D.C. 2001); *Evans v. Williams*, Civ. No. 76-293 (SSH), Consent Order (D.D.C. 2001); *Evans v. Williams*, Civ. No. 76-293 (SSH), Settlement Agreement (D.D.C. 2001). The *Evans* case is concerned with the rights of people in the District of Columbia (D.C.) with intellectual and developmental disabilities.

² In keeping with its judicially-decreed mission, Kristina Southerly of Quality Trust provided pro bono lay advocacy services to Alexandra Martel, the ward in this matter, from 2006 through early 2009.

guardianship proceeding were abridged. The ACLU's Charter and Bylaws authorize the organization to take positions on issues such as this.

The Legal Aid Society of the District of Columbia ("Legal Aid") is the oldest general civil legal services program in the District of Columbia, providing free legal assistance to low-income residents of the District of Columbia, representing clients in judicial and administrative proceedings and providing in-person counseling in the areas of landlord-tenant law, family law, public benefits, and consumer law. Through its Appellate Advocacy Project, founded in 2004, Legal Aid has represented parties or *amici* in more than three dozen cases before this Court. Legal Aid joins this *amicus* brief because of its commitment to ensuring that persons living in poverty and other disadvantaged persons enjoy meaningful access to counsel and to due process of law. Indeed, Legal Aid has been working, both in the District and throughout the nation, to promote the right to counsel in civil disputes implicating fundamental rights. Legal Aid is therefore particularly concerned when appointed counsel fail to zealously represent the interests of the clients they are appointed to represent.

Legal Counsel for the Elderly ("LCE"), an affiliate of AARP, is the primary provider of legal services and advocacy for the elderly population in the District of Columbia.

The National Disability Rights Network ("NDRN") is the non-profit membership association of protection and advocacy ("P&A") agencies that are located in all 50 states, D.C., Puerto Rico, and U.S. Territories. P&A agencies are authorized by federal law to provide legal representation and advocacy to individuals with disabilities, and to investigate abuse and neglect of individuals with disabilities in a variety of settings. The P&A System comprises the nation's largest provider of legally-based advocacy services for persons with disabilities. NDRN works to create a society in which people with disabilities are afforded equality of opportunity and are

able to fully participate by exercising choice and self-determination. NDRN's By-Laws authorize participation in this *amicus* brief.

The National Senior Citizens Law Center ("NSCLC") is a non-profit organization that advocates nationwide to promote the independence and well-being of low-income older persons and people with disabilities. For more than 35 years, NSCLC has served these populations through litigation, administrative advocacy, legislative advocacy, and assistance to attorneys and paralegals in legal aid programs. NSCLC joins this *amicus* brief because of the crucial issues of due process and self-determination raised in the guardianship proceeding.

Project ACTION! (Advocacy, Change, Training, Information, Organizing, and Networking!) is a coalition of self-advocates and self-advocacy groups from D.C. and surrounding areas. Members are adults with IDD who share many common issues and concerns, including equal rights, health care, and employment. Project ACTION!'s work is primarily organizing and advocating on issues affecting people with IDD. Its interest in this brief arises from its interest in ensuring a universal right to self-determination.

University Legal Services-Protection & Advocacy ("ULS-P&A") is the federally-designated protection and advocacy program for people with disabilities in D.C. ULS-P&A advocates for the human and civil rights of people with disabilities to receive quality services and supports to which they are entitled and to be fully included and integrated into their community. Among other things, ULS-P&A represents hundreds of people with disabilities every year, monitors the services provided to people with disabilities, issues public reports and participates in numerous workgroups and coalitions designed to improve the lives of D.C. residents with disabilities. Many of the individuals ULS-P&A represents have court-appointed guardians or other surrogate decision-makers, or are committed to the care of D.C. ULS-P&A's

designation as the protection and advocacy agency gives it authorize participation in this *amicus* brief.

INTRODUCTION

In the post-appointment guardianship proceeding that is the subject of this appeal, counsel for the ward argued for the recommendations of the guardian *ad litem* (“GAL”), disregarding the ward’s expressed position. In the experience of *amici* who work closely with people with intellectual and developmental disabilities (“IDD”) in the D.C. Superior Court, this is unfortunately not a unique situation because the role of an attorney representing a person with such a disability is often misunderstood. Far too often, the attorneys for people with IDD advocate for a legal position that is different or even counter to the position expressed by the client because the attorney deems this to be “in the best interest” of the client. The D.C. Guardianship Act anticipates that the court may need an additional perspective in individual cases and provides a means for this through, for example, provisions allowing for appointment of a GAL or a visitor. *See* D.C. Code § 21-2033 (2001). Irrespective of the availability of these additional perspectives, an essential aspect of an intervention proceeding and, indeed, of any adversarial process, is the necessity for a lawyer to represent zealously the legal position of his client. D.C. Code § 21-2033 (2001); D.C. SCR-PD Rule 305. *Amici* seek a pronouncement from this Court that an attorney representing a person who is the subject of a guardianship proceeding must advocate zealously for the actual, expressed position of the person who is the subject of the proceeding.

STATEMENT OF THE CASE

I. The Statutes and Rules Governing the Roles in Guardianship Proceeding

The separate roles of the counsel for the ward who is the subject of the proceeding, the guardian, and GAL are set forth in the D.C. Guardianship Act (D.C. Code § 21-2001 *et seq.*), the

D.C. Superior Court Rules for the Probate Division, and the District of Columbia Bar Rules of Professional Conduct, and are summarized below:

1. Counsel for the Ward or Proposed Ward. The D.C. Guardianship Act requires that counsel represent the subject of an intervention proceeding. D.C. Code §§ 21-2041(d) and (h), 21-2049(b)-(c) (2001). Accordingly, once a guardianship proceeding has begun, the court will appoint counsel for the subject of the proceeding, if the person is not already represented. *Id.* Section 21-2033(b) of the Guardianship Act sets forth the general duty of counsel in this context “to represent zealously that individual’s legitimate interests,” as well as some “minimum” requirements, including “[s]ecuring and presenting evidence and testimony and offering arguments to protect the rights of the subject of the guardianship or protective proceeding and further that individual’s interests.” D.C. Code § 21-2033(b) (2001). The D.C. Superior Court Rules for the Probate Division underscore the mandate for counsel to ascertain and advocate for his client’s wishes, stating:

Upon being retained by or appointed to represent the subject of an intervention proceeding, counsel shall. . . [r]epresent the subject at any hearing pursuant to D.C. Code §§ 21-2041(h) or 21-2054(e). To the maximum extent possible the subject of the proceeding shall remain responsible for determining his or her legitimate interest. In cases where a guardian *ad litem* has been appointed because the subject is unconscious or otherwise wholly incapable of determining his or her interests, even with assistance, counsel shall follow the guardian *ad litem*’s determination of the subject’s interests. In all other cases, counsel shall to the maximum extent possible ascertain directly the subject’s determination of his or her legitimate interest.

D.C. SCR-PD Rule 305(a)(6). The D.C. Rules of Professional Responsibility similarly require an attorney to “represent a client zealously and diligently within the bounds of the law.” D.C. Rules of Professional Responsibility R. 1.3(a). When a client is considered to have diminished capacity, Rule 1.14(a) of these professional rules requires the attorney to “as far as reasonably possible, maintain a typical client-lawyer relationship with the client.” D.C. Rules of Professional

Responsibility R. 1.14. “Even if the person has a surrogate decision-maker, the lawyer should as far as possible accord the represented person the status of client . . .” *Id.*, Comment 2.

2. Guardian. A court appoints a guardian after it determines that “the individual for whom a guardian is sought is incapacitated and that the appointment is necessary as a means of providing continuing care and supervision of the person of the incapacitated individual.” D.C. Code § 21-2044(b) (2001). Except as limited by the court in the order of appointment, the guardian “is responsible for care, custody, and control” of the ward. D.C. Code § 21-2047 (2001).

3. Guardian ad litem. In the guardianship context, a court may often appoint a GAL to “assist the subject of an intervention proceeding to determine his or her interests in regard to the guardianship. . . or to make that determination if the subject of the intervention proceeding is unconscious or otherwise wholly incapable of determining his or her interest in the proceeding even with assistance.” D.C. Code §§ 21-2011(9), 21-2033(a) (2001). The D.C. Superior Court Rules for the Probate Division similarly provide that “[i]f the individual is wholly incapable of determining his or her own interests, the guardian ad litem shall make that determination and advise the individual’s counsel accordingly.” D.C. SCR-PD Rule 306. In making this determination, the GAL must, among other things, “encourage [the subject] to participate, to the maximum extent of that individual’s abilities, in all decisions and to act on his or her own behalf on all matters in which he or she is able.” *Id.*

II. Factual Background

Alexandra Martel (hereinafter referred to as “Ms. Martel” or “the ward”) is a 32-year-old woman who has diagnoses of: Asperger’s Syndrome, Pervasive Developmental Disorder,

Schizophrenia, Psychotic Disorder and mild intellectual disability. (App. 179, 396.)³ She speaks in full sentences, expresses her ideas, and “communicates her wants, needs, and preferences.” (App. 401.) She attends classes at Montgomery Community College, participates in various social activities, including an acting group and a program that visits local museums, and enjoys shopping, spending time with her pets, and listening to all kinds of music. (App. 406, 652.) She has volunteered as a counselor’s aide for disabled children and hopes to work in child-care. (App. 419, 652.) Ms. Martel lives with her father, Erich Martel, but would prefer to live independently in her own home. (App. 34, 653-654.)

Ms. Martel has been subject to a guardianship for nearly eight years. In 2001, in the course of divorce proceedings between her parents, the D.C. Superior Court, Family Division first appointed a GAL, Ellen MacDonald, for Ms. Martel⁴ (App. 179-180.) Thereafter, upon petition of the GAL, the Superior Court appointed a third-party as guardian, Myrna L. Fawcett. (*Id.*) Ms. Martel had requested that the court appoint her mother, Karen Brown Starr, to serve as her guardian. The Superior Court acknowledged the request, stating that it “respects Alexandra Martel’s desire to have her mother assist in taking care of her.” (App. 179.) The court found, however, that it was “not in the best interest of [Alexandra Martel] for either [her mother or her father] to be appointed as Alexandra’s guardian” due to the contentious nature of their ongoing divorce proceedings. (*Id.*) In 2005, the initial guardian resigned and the Superior Court appointed Ms. Martel’s current, court-paid guardian, Andrea Sloan. (App. 227-29.)

³ All “App.” citations refer to Appellant’s Appendix.

⁴ Ellen MacDonald, who has since changed her name to Ellen MacDonald Farrell, served as GAL for Ms. Martel from late 2001 until late 2005, a time when Ms. Farrell was employed with Chadbourne & Parke LLP. Ms. Farrell now an attorney at Crowell & Moring LLP, counsel for *amici*, but is *not* involved on behalf of any *amicus* in connection with these proceedings.

Ms. Martel's current guardian is involved in nearly every aspect of her life, large and small. She has restricted Ms. Martel's ability to visit with her mother and must pre-approve all visits and travel requests. (App. 58.) Ms. Martel's guardian has also restricted Ms. Martel's use of a cell phone and her ability to decide whom she can bring with her to doctor's appointments. (App. 521; 538-39.) Ms. Martel has voiced serious discontent with the extent of her guardian's involvement in her life and with the restrictions the guardian has placed on her. (App. 34.) Ms. Martel is only 32 years old, and she is likely to continue to be subject to a guardianship for many years to come. The outcome of these proceedings could have a substantial impact on the most intimate day-to-day details of her life for decades.

III. Procedural Background

In April 2008, Ms. Martel's mother filed a Petition Post Appointment ("Petition") seeking, among other things, dismissal of Ms. Martel's guardianship, limitation of the guardianship, or replacement of the guardian. (App. 156-304.) Ms. Martel's father, Erich Martel, opposed the Petition, as did Ms. Martel's guardian. (App. 305-328; 374-554.)

On April 11, 2008, the Superior Court appointed Leslie G. Fein, Esq., as counsel for Ms. Martel in connection with the Petition. (App. 329.) At the initial hearing on May 22, 2008, Ms. Martel's counsel did not advocate for Ms. Martel's position on whether the guardianship should be dismissed or limited, or if her guardian should be replaced. Instead, Ms. Martel's counsel requested the appointment of a GAL (App. 37-39), and reiterated the view he offered in his May 9, 2008 Answer to the Petition that Ms. Martel "appeared to lack the capacity to understand the nature and possible consequences of the proceedings, the alternatives that are available, or the rights to which she is entitled." (App. 371-373.) At the May 22, 2008 hearing, the Superior Court granted Mr. Fein's request and appointed a GAL for Ms. Martel (App. 39); the GAL appointed was C. Hope Brown, Esq.

On or about June 17, 2008, Quality Trust, which provided pro bono lay advocacy services to Ms. Martel for several years, sought leave to participate in the proceedings by: (1) filing a brief addressing certain legal issues and standards applicable to any appointment of a guardian, and (2) being present at and participating in any hearings concerning a guardian for Ms. Martel. (App. 562-566.) Quality Trust took no stance on the merits of the Petition, but rather sought to ensure that Ms. Martel's position was advocated for in the process. (App. 568.) At the June 24, 2008 hearing, the Superior Court denied Quality Trust request for leave to participate in the hearings, stating his belief that Quality Trust's participation was unnecessary because Ms. Martel had counsel to advocate for her position; however, the court did agree to accept Quality Trust's brief into the record. (App. 97-99; *see also id.* at 102 (“[I]t’s my thinking that [the objective of making sure Alexandra’s voice is heard] is adequately fulfilled with Mr. Fein, you know, she’s represented by independent counsel, not mother’s counsel. Not father’s counsel[.]. . . not by the guardian, not by the guardian ad litem, but by her own lawyer.”).)

At a status conference on October 7, 2008, the GAL recommended that the guardianship remain in place and “that Ms. Sloan remain as the guardian in this matter.” (App. 110.) When asked his position, Ms. Martel’s counsel stated that Ms. Martel “has consistently told me as late as yesterday that she doesn’t believe she has the need for a guardian at all, and certainly does not want Ms. Sloan to continue to service in that, if the Court feels there should be a guardian.” (App. 110-11.) He then repeated his view that Ms. Martel could not determine her own best interests and, therefore, adopted the position of the GAL as the position of his client, stating, “I believe Ms. Brown has done a thorough job and *I can’t do anything other than put forward her argument and her position as the position of my client. . . .*” (App. 111 (emphasis added).) The court did not correct this significant misinterpretation of the governing law. (*Id.*)

At this same conference, counsel for Ms. Martel's mother, Kim Viti Fiorentino, argued that Ms. Martel's 2007 Individual Support Plan ("ISP") contradicted the GAL's findings, as it stated that "[Alexandra] Martel demonstrated the capacity to choose someone to make these decisions on her behalf." (App. 113.)⁵ Ms. Fiorentino also noted that the court had not heard from Alexandra herself. (App. 138-39.) The court, however, declined to ask Ms. Martel if she would like to speak to the court or otherwise question her because she was represented by counsel who could call her to testify, if he wished:

THE COURT: The Court couldn't take it upon itself to jump over counsel and say, Mr. Fein [counsel for Ms. Martel], I'm going to interrogate your client, I want your client to stand up and speak, I want your client to do this and do that. That would put me in an untenable position.

MS. FIORENTINO: I agree, Your Honor, and we can both ask Mr. Fein if his client would like to speak to the Court.

THE COURT: I'm not going to ask Mr. Fein that question. That's Mr. Fein's responsibility. I can't interject myself between he and his client and say, Mr. Fein, don't you think I want to speak to your client.

(App. 141.)⁶

On February 9, 2009, the Superior Court issued an order denying Ms. Martel's mother's Petition, without conducting an evidentiary hearing. (App. 698.) This appeal followed on March 10, 2009. (App. 699-702.)

⁵ An ISP is "the document describing the results of the person-centered planning process, addressing the strengths, preferences, needs and dreams as described by the person and the team." Individual Support Plans, D.C. DDS Policy No. 71, Nov. 2008, on-line at http://dds.dc.gov/dds/frames.asp?doc=/dds/lib/dds/individual_support_plans_policy_and_procedures.pdf.

⁶ This exchange occurred shortly after Ms. Martel's counsel informed the court that he was not advocating for her position. The court's lack of insistence that counsel advocate for her position is indicative of the court's agreement with counsel's interpretation of Rule 305. (App. 111.)

ARGUMENT

Amici file this brief to bring a narrow but critical legal question to the attention of the Court of Appeals: whether DC SCR-PD Rule 305 requires counsel for the ward to advocate zealously for the ward's stated interest in the outcome of the litigation, or whether counsel is bound, once a GAL is appointed, to advocate for the GAL's recommendation, regardless of whether it aligns with the ward's position. *Amici* maintain that the plain language of the DC SCR-PD Rule 305, as well as D.C. Code § 21-2033, the D.C. Rules of Professional Responsibility, and the procedural due process right of the Fifth Amendment all mandate that counsel for the ward advocate for his client's position. That a GAL may take a different position cannot change the obligation of the attorney to advocate for the ward's legal position. To interpret the rule otherwise would deny the ward any meaningful representation.

Amici take no position as to the outcome of the underlying Petition on the merits. Whether Ms. Martel continues to require a guardian, the scope of that guardianship, and who should serve, are determinations properly left to the Superior Court. However, *amici* assert that DC SCR-PD Rule 305 was misinterpreted throughout the proceeding and that as a result Ms. Martel was effectively denied representation in the proceeding, in contravention of D.C. law. In fact, Ms. Martel was worse off than someone with no attorney; she had an attorney who knowingly advocated *against* her stated position. The Judge noted during the proceeding that Ms. Martel had "adequate, competent representation," and thus implicitly affirmed the ward's counsel's interpretation of the court rule. The lack of meaningful representation resulted in an abrogation of Ms. Martel's statutory and due process rights and tainted the proceedings.

Therefore, *amici* urge this Court to reverse and remand the decision of the Superior Court for further proceedings during which appointed counsel must advocate zealously Ms. Martel's own position so that the court can properly consider it.

