No. 09 PR 291

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.

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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

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[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 the 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 Prof'l 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 Prof'l

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. Martel[4] (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.)

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[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.)

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[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.

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

The District of Columbia Guardianship Act, under which Ms. Sloan was appointed as guardian, and relevant rules, require that the ward's views be heard, particularly when the very existence and terms of a guardianship are at issue. This mandate is reflected in the Act's requirement that the subject of an intervention proceeding be represented by counsel in certain adult guardianship proceedings. D.C. Code §§ 21-2041(d) and (h), 21-2049(b)-(c) (2001). The statute explains that it is the "duty of counsel. . . to represent zealously that individual's legitimate interests." D.C. Code § 21-2033(b) (2001). The Superior Court Probate Rules elaborate on counsel's duty, requiring that the ward be responsible for determining her own interests and that counsel for the ward advocate that position:

> 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 306 (emphasis added). The Official Comment to Probate Rule 305 explains that "D.C. Code § 21-301 and this Rule require counsel to act as a zealous advocate for the subject and not as a guardian, independent investigator or objective finder of fact." *Id.* at Comment. There are only two exceptions: (1) if the client is unconscious, or (2) if she is wholly incapable of determining her own interests. Neither applies to this case. Clearly, the ward was conscious at the proceedings. There was neither any evidence presented nor findings made that she was "wholly incapable of determining" her interests. Her counsel clearly stated several times that she had a position about the outcome of the proceedings. This is underscored by her

ISP, which was entered into the record and describes her as having "demonstrated the capacity to choose someone to make . . . decisions on her behalf." (App. 429.)

A fundamental misinterpretation of D.C. SCR-PD Rule 305 is evident in the record below and in the briefs of the ward's own counsel and her guardian (which brief the ward's father joins). The ward's counsel and her guardian appear to assume that since the ward is subject to a guardianship, she is therefore wholly incapable of determining her own interest, even with assistance. This cannot be the case. Capacity is not a binary, "yes or no" issue. Rather, capacity and incapacity exist on a continuum. *See, e.g*, A.B.A. Model R. Prof. Conduct 1.14, Comment 1 (a client who lacks legal competence may be able "to understand, deliberate upon, and reach conclusions about" their own interest); *In re Keiler,* 380 A.2d 119, 120 n.1 (D.C. App. 1977) ("The standard of professional conduct governing the practice of law in the District of Columbia is the American Bar Association Code of Professional Responsibility."), overruled on other grounds, *In re Hutchinson*, 534 A.2d 919 (D.C. 1987); *see also*, Michael D. Casasanto, Mitchell Simon & Judith Roman, "A Model Code of Ethics for Guardians," 11 Whittier L. Rev. 543 (1989) ("[T]he Model Code provides a framework for making decisions both on behalf of individuals who are deemed incompetent under a statute providing for plenary guardianship but who clearly retain the functional ability to make certain decisions and for individuals with a narrowly limited guardianship."). The Superior Court adjudicates guardianship proceedings for people in a wide range of situations. Some cases involve individuals like the ward in this case, who has a mild intellectual disability and is able to express her preferences; others involve individuals who are unable to articulate their interests at all because, for instance, they are in a coma or have profound intellectual disabilities and are unable to speak; still others involve any array of situations in between. If the Rule were interpreted to mean that every person who is

subject to an order of guardianship is *per se* "wholly incapable," a ward would have no independent voice in the subsequent proceedings and no ability to challenge *any* ongoing guardianship in a meaningful way once it was imposed.

This Court has recognized, in a proceeding regarding the appointment of a guardian and conservator for an elderly woman, that "the Act assigns the highest priority to the incapacitated individual's own stated preference." *In re Orshansky,* 804 A.2d 1077, 1094 (D.C. 2002). The Court explained:

> A principal theme of the Guardianship Act is that *the wishes of the subject of an intervention proceeding regarding the decisions to be made are entitled to consideration and respect* – notwithstanding that the subject of the proceeding is incapacitated. . . . Consistent with this premise, the Act contains several provisions to ensure that the court receives and weighs the views of the incapacitated individual.

Id. at 1093 (emphasis added). Among the protective provisions embedded in the statutory scheme to which this Court was referring is the requirement for appointed counsel to represent zealously the interest of the ward. *See* D.C. Code § 21-2033(b) (2001).[7]

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[7] The District is not alone in requiring that the ward's views be represented and advocated for when fundamental questions of guardianship are at issue. Jurisdictions across the country have recognized that a person who is subject to a guardianship proceeding is entitled to have his or her expressed wishes represented by counsel, even where a GAL has been appointed. *See, e.g., Estate of Milstein v. Ayers*, 955 P.2d 78, 83 (Colo App. 1998) (GAL and counsel for an allegedly incapacitated person "represent differing interests," and "counsel is an advocate for and represents the legal interests of" that person); Fla Stat. ch. § 744.102(1)(2009)(counsel must "represent the expressed wishes of the alleged incapacitated person to the extent it is consistent with the rules regulating The Florida Bar."); Fla. Bar Reg. R. 4-1.14(a) ("When a client's ability to make adequately considered decisions in connection with the representation is impaired, . . the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."); 755 Ill. Comp. Stat. 5/11a-10(b) (2009) (court must appoint counsel for the respondent in a guardianship proceeding "upon respondent's request or if the respondent takes a position adverse to that of the guardian *ad litem*"); Iowa Code § 633.561(4) (2008) (responsibilities of attorney appointed to represent a ward include "represent[ing] the proposed ward," ensuring that the proposed ward is properly advised of his/her rights and the nature and purpose of the proceeding, and ensuring that "the guardianship procedures conform to the

(continued...)

This Court recently discussed the contours of the right to competent and effective assistance of counsel in a case involving termination of parental rights, *In re R.E.S.* 2009 D.C. App. LEXIS 351, at *9 (D.C. Aug. 13, 2009). As in guardianship cases, when a court in the District of Columbia considers the termination of a parent-child relationship, the parent has a statutory right to representation by counsel "at all critical stages of the proceedings." D.C. Code

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statutory and due process requirements of Iowa law"); *In re Lee,* 754 A.2d 426, 438-39 (Md. Ct. Spec. App. 2000) ("The duties of an attorney may at times directly conflict with the duties of a guardian *ad litem.* It is the role of an attorney to explain the proceedings to his client and advise him of his rights, keep his confidences, advocate his position, and protect his interests."(citations omitted); *Prokupek v. Larson,* 708 N.W.2d 262, 276-277 (Neb. 2006) (remanding case and faulting the trial court for, among other things, "refus[ing] to allow [the ward] to dismiss [his attorney] despite the fact that [that attorney] had long since ceased to advocate for her client's expressed desires or to pursue [her client's] right to an evidentiary hearing."); *In re Guardianship of Henderson,* 838 A.2d 1277, 1278-79 (N.H. 2003) (potential ward was denied proper representation in an involuntary guardianship proceeding where his appointed counsel "blurred the boundaries" of the roles between counsel, who is bound by ethical rules to zealously represent his client, and GAL, who must act "in the best interest" of the proposed ward); N.J. Court Rules, R. 4:86-4(b) (2009) (court-appointed counsel's report must, among other things, state "whether the alleged incapacitated person has expressed dispositional preferences and, if so, counsel shall argue for their inclusion in the judgment of the court"); Law Revision Commission Commentary for NY Mental Hyg. Law § 81.10 (1993) ("The role of counsel, as governed by this section, is to represent the person alleged to be incapacitated and ensure that the point of view of the person alleged to be incapacitated is presented to the court."); R.I. Gen. Laws § 33-15-7(b), (d), (g) (2009) (setting forth the guardianship respondent's right to legal counsel, distinguishing the role of GAL from the role of attorney for the respondent, and stating that the GAL "shall not interfere with interested parties and their counsel in gathering and presenting evidence according to court orders and rules of discovery and evidence"); Vt. Stat. Ann. tit. 14, § 3065(b) (2009) (counsel for the respondent in the guardianship proceeding "shall act as an advocate for the respondent and shall not substitute counsel's own judgment for that of the respondent on the subject of what may be in the best interest of the respondent . . . [and] shall endeavor to ensure that . . . the wishes of the respondent, including those contained in an advance directive, as to the matter before the court are presented to the court"); Wash. Rev. Code § 11.88.045(1)(b) (2009) ("Counsel for an alleged incapacitated individual shall act as an advocate for the client and shall not substitute counsel's own judgment for that of the client on the subject of what may be in the client's best interests. Counsel's role shall be distinct from that of a guardian *ad litem*, who is expected to promote the best interest of the alleged incapacitated individual, rather than the alleged incapacitated individual's expressed preferences."); Wis. Stat. § 54.42(a) (2009)
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§ 16-2304 (b)(1) (2001). This Court held in *In re R.E.S.* that mere representation is insufficient; appointed counsel "has the statutory duty to competently represent his or her client." 2009 D.C. App. LEXIS 351, at *9. Likewise, for the right to appointed counsel to be meaningful in a guardianship case, counsel must effectively and competently represent the position of his client. *Id.*; *see also, e.g.*, *In re K.L.*, 751 N.W.2d 677, 685 (N.D. 2008) ("Because of the legislative directive that respondents be afforded counsel in termination proceedings, it would be absurd and meaningless to have the right to appointed counsel, but not to require counsel to be effective in this context."); *In re E.H.*, 880 P.2d 11, 13 (Utah Ct. App. 1994) ("[T]he statute would be meaningless or illusory if it guaranteed only ineffective assistance of counsel"); *In re M.D.(S.)*, 485 N.W.2d 52, 55 (Wis. 1992) ("[W]here the legislature provides the right to be 'represented by counsel' or represented by 'appointed counsel,' the legislature intended that right to include the *effective* assistance of counsel.")).

The Guardianship Act, the Probate Court rules, and governing precedent required that the ward's counsel represent her interest zealously in the guardianship proceedings. He did not. While counsel did recite her position to the court, he went on to say that he was bound to advocate for the contrary position of the GAL. (App. 111.) He was under no such duty under the applicable rules, however, because the ward was not "unconscious or otherwise wholly incapable of determining [] her interests, even with assistance." D.C. SCR-PD Rule 305(a)(6).[8]

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(proposed ward has right to counsel and any attorney obtained or appointed pursuant to this section "shall be an advocate for the expressed wishes of the proposed ward or ward.")

[8] The ward's guardian, in her brief filed in this appeal seeking to defend her continued appointment as guardian, has argued that, notwithstanding D.C. Code § 21-2033 and Probate Rule 305, the ward's counsel was correct in deferring to the GAL's views as if those views reflected the views of his client – even though he conceded that they did not. *See* Brief of Andrea J. Sloan at 36-37. As support for that approach, the guardian cites a Comment to Probate (continued...)

This left the ward in the worst of all situations. She nominally had legal representation and therefore could not independently speak with the court or other counsel to let them know her legal position. Yet, the very person who was bound to represent her interest did not do the things a zealous advocate would do: make oral arguments for her expressed wishes; demand that findings of the GAL be subject to the rigors of an evidentiary hearing; or file motions and briefs in support of her position. Rather, he told the court he would be putting forth the position of another party, and then proffered arguments against the ward's own interest. The court seemed to give this its seal of approval, stating that the ward was well represented even though she, in fact, had no one representing her legal interest. (App. 102.) Like any other litigant, the ward is not guaranteed a successful outcome. However, having appointed counsel must mean that her counsel zealously advocate her legal interest before the court.

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Practice Standard 3, which she quotes as stating that "[w]hen a Guardian *ad litem* is appointed, Counsel for the Subject regards the Guardian *ad litem* as the 'substitute' client." *Id.* at 37. But review of the entire Commentary and Practice Standards that follow reveals that the quoted Comment is directed to the circumstance where a guardian *ad litem* has been appointed because "the subject is wholly unable to determine or state his or her desires and intentions." *See* Probate Practice Standard 3.4, Practice Suggestions ("A Guardian *ad litem* may be appropriate if the subject is wholly unable to determine or state his or her desires and intentions. In the event that a Guardian *ad litem* for the subject is appointed, Counsel for the Subject follows the directives of the Guardian *ad litem* regarding the subject's best interests."). Where the ward has been determined to be "wholly unable," counsel may defer to the GAL. If the ward retains the capacity to render a view, the ward is entitled to have her counsel advocate that view to the maximum feasible extent. The guardian also cites a passing statement from the Judiciary Committee Report on the bill that was to become the Guardianship Act, which states, *inter alia*, that "the precise role of Counsel is to adopt a best interests approach once his or her client's mental abilities are suspect." Brief of Andrea J. Sloan at 36 (citing Report of the Council of the District of Columbia, Committee on the Judiciary Bill 6-7 (June 18, 1986)). It is not clear what the Committee may have meant by this vague remark, but to the extent the comment contradicts the plain language of the Guardianship Act and the Probate Rules, it is irrelevant. *See Aiken v. United States*, 956 A.2d 33, 47 (D.C. 2008) ("We will not disregard a clear statutory command on the basis of an isolated, ambiguous comment in the legislative history.").

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

The D.C. Rules of Professional Responsibility require an attorney to "represent a client zealously and diligently within the bounds of the law." Rule 1.3. When working with a client with an intellectual disability, such as the ward, the rules require counsel to "as far as reasonably possible, maintain a typical client-lawyer relationship with the client." Rule 1.14(a). This is true even if a GAL has been appointed. Rule 1.14, Comment 2. A typical client-lawyer relationship demands that counsel, within ethical limitations, present the position the client desires even if counsel believes that position is unwise.[9] These ethical rules reflect the fundamental nature of the right to be heard within our adversarial system.

A case from the New Jersey Supreme Court with facts similar to the present case illustrates this fundamental imperative. The court in *In the Matter of M.R.* discussed the attorney's ethical obligations, using the New Jersey's Rules of Professional Conduct, which mirror the language in D.C. Rule 1.14(a) and "mandate that an attorney representing a disabled person should maintain, as much as possible, a normal attorney-client relationship with that person." 638 A.2d 1274, 1284 (N.J. 1994). This means that "[o]rdinarily, an attorney should 'abide by [the] client's decisions concerning the objectives of representation,' and 'act with reasonable diligence ... in representing [the] client.' The attorney's role is not to determine

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[9] Rule 1.14 allows an attorney to seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest. "A client who is making decisions that the lawyer considers to be ill-considered is not necessarily unable to act in his own interest, and the lawyer should not seek protective action merely to protect the client from what the lawyer believes are errors in judgment." A.B.A. Formal Opinion 96-404 (Aug. 2, 1996). Regardless, in an intervention proceeding, because a guardian is already in place or because a petition has been filed for guardianship, there is no need for the ward's attorney to take "protective action." The (continued...)

whether the client is competent to make a decision, but to advocate the decision that the client makes" unless they are decisions that are "patently absurd or that pose an undue risk of harm to the client." *Id.* at 1284-85.

Numerous treatises and articles echo these principles describing counsel's role in expressing and advocating for the wishes of an incapacitated client, even if counsel believes that the GAL's view is better-founded. *See, e.g.*, Ronald D. Rotunda & John S. Dzienkowski, *Legal Ethics - The Lawyer's Deskbook On Professional Responsibility* § 1.14-1 (2009-2010 Ed.) ("Even if the client is under a legal disability, he or she might still be capable of understanding the matter, and the lawyer should therefore consult with the client. There are 'intermediate degrees of competence.'"); 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) ("The lawyer must always remember that it is the client's case and the client's life, and the realization that the client's self-knowledge and values are supreme. This mandates that the client be vested with making the final decisions concerning the case even if the client is mentally disabled."); 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) ("[T]he primary reason for the relationship is the same when representing a client with a mental disability, and the lawyer must refrain from usurping the client's role."); 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 at 212, 220-21 (Fall/Winter 1995-96) ("Without someone to represent his or her interests and to

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ward's attorney's role is to maintain, to the greatest extent possible, the normal client-attorney
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advocate on his or her behalf, the defendant may face unnecessary restrictions on self-autonomy and liberty. No one else in the array of individuals involved in a guardianship proceeding will promote the defendant's views.").

Under the ethical rules, the ward's counsel was bound to advocate zealously for her legal interest. He did not.

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

The United States Constitution, through the Fifth and Fourteenth Amendments, requires that due process protections be afforded to a person who is in jeopardy of loss of liberty. *See* U.S. Const. Amend. XIV, 1 (protecting people from any state laws that "abridge the privileges or immunities of the citizens of the United States or deprive any person of life, liberty or property without due process of law"); U.S. Const. Amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law"); *see also Walton v. Dist. of Columbia*, 670 A.2d 1346, 1352 n. 13 (D.C. 1996) (While the Fifth, and not the Fourteenth, Amendment is applicable to the District of Columbia, "courts approach the due process and equal protection clauses of [those two Amendments] in a similar manner with respect to certain issues") (citing, *inter alia*, *Dist. of Columbia v. Mayhew,* 601 A.2d 37, 43 (D.C. 1991); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)).

The fundamental nature of a guardianship is to deny the ward the significant liberty interest of self-determination. *See In re Orshansky*, 804 A.2d at 1080(recognizing that appointment of guardian is "an extraordinary intervention in a person's life and affairs"); *In the Matter of M.R.*, 638 A.2d at 1282 ("A guardianship can be a 'drastic' restraint on a person's

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relationship.

liberty."). *Cf. Vitek v. Jones*, 445 U.S. 480, 491-92 (1980) (recognizing that civil commitment to a mental institution produces "a massive curtailment of liberty" and "requires due process protection"); *Heller v. Doe*, 509 U.S. 312, 341 (1993) (O'Connor, J., concurring in part and dissenting in part) (recognizing that civil commitment of a person with mental retardation or a mental illness involves loss of liberty to 'choos[e] his own friends and companions, selec[t] daily activities, decid[e] what to eat, and retai[n] a level of personal privacy,' among other things").

The effect of a having a court appointed guardian is substantial; a person may lose, among other things, the right to decide where and how to live, how and whether to spend his or her money, with whom to spend time, and whether to accept or reject health care. A Congressional committee that studied abusive guardianship practices found that guardianship is "the most severe form of civil deprivation which can be imposed on a citizen of the United States," and that the typical ward has fewer rights than a convicted felon. H.R. Rpt. 100-639, at 1, 4 (Sept. 25 1987). The Guardianship Act itself recognizes that the imposition of guardianship is a serious deprivation of civil rights, and thus it affords the person the protections inherent in an adversarial proceeding to ensure that the potential loss of such rights is subject to a rigorous adversarial process. D.C. Code §§ 20-2031 *et seq.*[10]

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[10] Other states are nearly unanimous in their recognition that the significance of the interest at stake requires that the subject of a guardianship proceeding be afforded counsel. Forty states set forth a statutory right to counsel and/or appointed counsel in initial guardianship proceedings and certain post-appointment proceedings (including removal of guardianship, modification of current guardianship, or appointment of replacement guardians). *See* Ala. Code §§ 26-2A-102(b), -110(c) (2009); Alaska Stat. §§ 13.26.106(b), 125(c) (2009); Ariz. Rev. Stat. §§ 14-5303(C), -5307(C), -5312.01(K) (2009) ; Ark. Code Ann. §§ 28-65-213(a)(1), -220 (2009); Cal. Prob. Code §§ 1470(a), 2670 (2009); Colo. Rev. Stat. §§ 15-14-305(2), -305(3)(c), -318(3) (2008); Conn. Gen. Stat. §§ 45a-673, -678 (2008); Fla. Stat. ch. 744.331(2)(b), 744.3215(1)(l) (2009); Ga. Code Ann. §§ 29-4-11(c)(1)(D), -20(a)(5), -41(a), -42(a), -61(b) (2009); Haw. Rev. Stat. Ann. §§ 560:5-305(b), -305(c)(3), -318(c) (2009); Idaho Code §§ 15-5-303(b), -307(c) (2009); 755 Ill. Comp. Stat. 5/11a-10(b), 5/11a-21(a) (2009); Kan. Stat. Ann. §§ 59-3063(a)(3), -

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The Supreme Court has interpreted the requirement for due process as one of "fundamental fairness." *Lassiter v. Dep't of Soc. Servs. of Durham County, N.C.*, 452 U.S. 18, 24 (1981). The right to procedural due process (and indeed to substantive due process) that exists in this context demands that a ward in a guardianship proceeding have a fair hearing, and one essential cornerstone of a fair hearing is competent and meaningful representation. *See Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) ("A fundamental requirement of due process is 'the opportunity to be heard' . . . which must be granted at a meaningful time and in a meaningful manner.") (citation omitted); *see also,* Joan L. O'Sullivan, "Role of the Attorney for the Alleged Incapacitated Person," 31 Stetson L. Rev. 687, 702-3 ("If the attorney ignores what the client is saying, then the court does not hear from the client, since no one speaks for him or

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3087(b), -3088(b) (2008); Ky. Rev. Stat. Ann. § 387.560(1) (2009); La. Code Civ. Proc. Ann. Art. 4544, 4554, 4569 (2009); Me. Rev. Stat. Ann. tit. 18-A §§ 5-303(B), -307(C) (2009); Mass. Gen. Laws ch. 190B, §§ 5-106(a), -311(c) (2009); Mich. Comp. Laws §§ 700.5303(3), .5305(3)-(4), .5310(4) (2009); Minn. Stat. §§ 524.5-304(b), -317(c) (2008); Mo. Rev. Stat. §§ 475.075(3), .083(6), .115 (2009); Mont. Code Ann. §§ 72-5-315(2), -325(3) (2009); Neb. Rev. Stat. §§ 30-2619(b), -2623(c) (2009); Nev. Rev. Stat. Ann. §§ 159.0485(1), 159.187(1), 159.1905(2) (2009); N.M. Stat. Ann. §§ 45-5-303(C), -307(D) (2009); N.Y. Mental Hyg. Law §§ 81.10(a)-(c), 81.11(b)(4), 81.35, 81.36(c) (2009); N.C. Gen. Stat. §§ 35A-1107(a), -1293 (2009); N.D. Cent. Code, §§ 30.1-28-03(3)(b), -03(4)(c), -07(3) (2009); N.H. Rev. Stat. Ann. § 464-A:6(I), :40(c) (2009); Ohio Rev Code Ann. §§ 2111.02(C)(7)(a), .02(C)(7)(d), .49(C) (2009); Or. Rev. Stat. §§ 125.025(3), 125.080(4), 125.090(1), 125.225(5) (2007); 20 Pa. Cons. Stat. §§ 5511(a), 5512.2 (2009); R.I. Gen. Laws §§ 33-15-7(d)-(e), -18(a) (2009); S.C. Code Ann. §§ 62-5-303(b), -307(c) (2008); S.D. Codified Laws §§ 29A-5-117, -309, -509 (2009); Tex. Prob. Code §§ 646(a), 694C(a)-(b), 694K(a) (2009); Utah Code Ann. §§ 75-5-303(2), -307(3) (2009); Vt. Stat. Ann. Tit. 14 §§ 3065(a)(1), 3068(d), 3068a(2)-(3) (2009); Wash. Rev. Code §§ 11.88.045(1)(a), 11.88.120(2) (2009); W. Va. Code §§ 44A-2-7(a), -9(c), -6(c), -7 (2009); Wis. Stat. §§ 54.42(1), 54.54, 54.64(2)(a)(4) (2009). Eight states set forth a statutory right to counsel only in the context of initial guardianship proceedings. *See* Del. Code Ann. tit. 12 § 3901 (2009); Ind. Code Ann. § 29-3-5-1(c) (2009); Iowa Code §§ 633.561(1)(a), (1)(e), (3) (2008); Md. Est. & Trusts Code Ann. §§ 13-211(b), -705(d) (2009); N.J. Stat. Ann. § 3B:12-24.1(e) (2009); Okla. Stat. tit. 30, § 3-107(A) (2009); Tenn. Code Ann. §§ 34-1-107(a)(1), -107(f)(1)(B), -125 (2009) (*but see* Tenn. Code Ann. § 34-1-121(a) (2009)); Va. Code Ann. §§ 37.2-1006 (2009). Wyoming appears to
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her other than his or her attorney, who offers evidence to the court based on the 'best interest standard.' . . .The client has no representation in court, and no one communicates his or her interests to the judge.").

A recent decision of the Maryland Court of Special Appeals speaks to these very issues. *In re Lee* involved a guardianship proceeding on behalf of an adult with dementia. In that case the attorney acted as GAL, and, as in this case, ceased to perform the role of attorney and advocate for his client and the client's position. The court found that this resulted in a deprivation of due process for the ward, explaining that:

> The duties of an attorney may at times directly conflict with the duties of a guardian *ad litem.* It is the role of an attorney to explain the proceedings to his client and advise him of his rights, keep his confidences, advocate his position, and protect his interests. Due process demands nothing less, particularly, as here, when the alleged disabled person faces significant and usually permanent loss of his basic rights and liberties.

754 A.2d 426, 438-39 (Md. Ct. App. 2000); *see also* O'Sullivan, 31 Stetson L. Rev. at 703 ("When the attorney acts as a guardian *ad litem*, the due-process protections promised to the alleged incapacitated person are ignored."); Joan L. O'Sullivan and Diane E. Hoffman, "The Guardianship Puzzle: Whatever Happened to Due Process?," 7 Md. J. Contemp. L. Issues 11, 66 (Fall/Winter 1995-96) ("The attorney appointed to represent the [alleged disabled person] is the key to solving the guardianship puzzle. Depending on the role that attorney plays, the [alleged disabled person] may or may not receive substantive due process in the proceeding which deprives her of her rights as an adult citizen.").

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provide some discretion on this question, as counsel can be appointed for a proposed ward "upon order of the court" (Wyo. Stat. § 3-1-205(a)(iv) (2009).

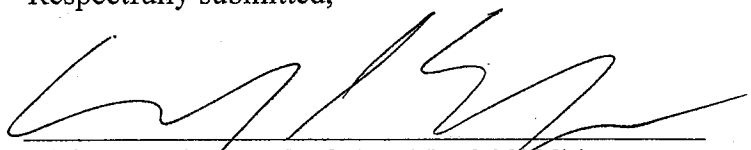
The interpretation of DC SCR-PD Rule 305 that counsel for the ward espoused – that the rule required him to advocate for the position of the GAL and against the stated interest of his own client – and the trial court's acquiescence to this position meant that there was no meaningful adversarial process. As a result, the ward was denied the procedural due process right to a fair hearing guaranteed by the Fifth Amendment.

CONCLUSION

Throughout this proceeding, the ward's attorney consistently advocated for a position opposite his client's stated position, and no one advocated for the articulated position of the ward. Therefore, we urge remand of this case for proceedings in which the ward's position is advocated zealously by her counsel.

Dated: October 15, 2009

Respectfully submitted,



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

CERTIFICATE OF SERVICE

I certify that on this 15th day of October, 2009, I served, via First-Class Mail, postage pre-paid, a true and correct copy of the foregoing 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 on:

Kim Viti Fiorentino, Esq.
Heather L. Howard, Esq.
Shulman, Rogers, Gandal, Pordy & Ecker
11921 Rockville Pike, Suite 300
Rockville, MD 20852

Attorneys for Petitioner/Appellant Karen Brown Starr

Leslie G. Fein, Esq.
Crowley, Hoge & Fein, PC
1710 Rhode Island Avenue, NW
Seventh Floor
Washington, DC 20036-3125

Attorney for Ward Alexandra Martel

Harold Krauthamer, Esq.
Gilda M. Zimmet, Esq.
5530 Wisconsin Ave., #801
Chevy Chase, MD 20815

Attorneys for Interested Person Erich Martel

Andrea J. Sloan, R.N., Esq.
1350 Beverly Road, Suite 115-123
McLean, VA 22102

Guardian of Alexandra Martel

C. Hope Brown, Esq.
4545 42nd Street, NW
Suite 303
Washington, DC 20016

Guardian ad litem for Alexandra Martel

Jennifer G. Knight