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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

COURT OF APPEALS NO 40809-1-II

RESA RAVEN,

Petitioner,

vs.

WASHINGTON STATE DEPARTMENT OF SOCIAL
AND HEALTH SERVICES,
Respondent.

BRIEF OF AMICUS CURIAE
WASHINGTON ACADEMY OF ELDER LAW ATTORNEYS

FILED
SUPREME COURT
STATE OF WASHINGTON
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 ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY OF ARGUMENT1

II. INTEREST AND IDENTITY OF AMICUS CURIAE.....2

III. LEGAL ANALYSIS.....2

A. **The *Raven* Decision Conflicts With Well Established Law.....2**

 1. The Division II Court of Appeals decision in *Raven* conflicts with the prior Supreme Court decision in *Ingram*2

 2. The Division II Court of Appeals decision in *Raven* conflicts with the Division I Court of Appeals decision in *Anderson*.....5

B. **Guardians And Elder Law Attorneys Have Been Explicitly Taught That The Residential And Medical Preferences Of The Ward Must Be Implemented To The Fullest Extent Possible8**

C. **The Decision Of Division II Court Of Appeals In *Raven* Would Establish A Per Se Standard Of Neglect That Would Make It Impossible For Guardians To Apply An Appropriate Level Of Care To Each Ward On An Individual Basis.....11**

IV. CONCLUSION.....13

TABLE OF AUTHORITIES

Case Law

In re Anderson, 17 Wn. App. 690, 564 P.2d 1190 (1977).....5, 6, 7, 8

In the Matter of the Guardianship of Ingram, 102 Wn.2d 827, 689 P.2d 1363 (1984)..... 2, 3, 4, 5, 6

Raven v. D.S.H.S., 167 Wn. App 446, 273 P.3d 1017 (2012). 1, 2, 4, 5, 6, 7, 8, 11

Statutes

RCW 11.88.010 (1)(a)(b) 1

RCW 11.88.005 11

RCW 11.92.040.....5, 7

RCW 11.92.190 10

RCW 71.057, 8, 10

RCW 72.23.070(4).....5

Other Authorities

Certified Professional Guardian Manual, Washington State Certified Professional Guardianship Board (2006).....10

Legal Issues Regarding Guardianship and Spousal Community Property Management Dissolution of Marriage Placement of Ward, HOW TO HANDLE COMPLEX GUARDIANSHIP ISSUES, William L. E. Dussault, (WSBA 1993).....8, 9

Washington State Guardian Manual, Washington State Certified Professional Guardian Board (2003).....10

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The published decision of Division II of the Court of Appeals in *Raven v. D.S.H.S.*, 167 Wn. App 446, 273 P.3d 1017 (2012) conflicts with earlier court decisions and raises issues of public interest. The decision in *Raven* implies that the Guardian, Resa Raven, had a “duty to bully” the ward to reside in a nursing home against her expressed wishes. This conflicts with prior case law emphasizing the ward’s right to refuse medical treatment and/or placement in a medical facility. The ruling also conflicts with information and teaching that has been provided to guardians and attorneys at CLEs for the past two decades. This Court should overturn the decision of the Division II because it conflicts with prior case law which confirms the fundamental right of a ward to make ultimate determinations on his or her own health care and residential placement.

The appellate court also held that a guardian may be found to have committed neglect without any corresponding finding that the guardian’s actions proximately caused harm. The ruling establishes a per se liability standard that is unrelated to the substantial risk of harm to person or estate standard described in RCW 11.88.010 (1) (a) (b). This Court should overturn the ruling of Division II because it establishes a per se standard of neglect that unreasonably restricts the ability of a guardian to balance

the autonomy and freedom of an individual ward against the need to protect the ward's person and estate from harm.

II. INTEREST AND IDENTITY OF AMICUS CURIAE

The Washington Academy of Elder Law Attorneys (“WAELA”) consists of Washington members of National Academy of Elder Law Attorneys, who not only practice elder law, but are also especially aware of and concerned with the special issues pertaining to the practice of elder law in Washington State. Many of our members assist clients with guardianships, estate planning, planning for incapacity with durable powers of attorney for financial and health care decisions, Medicaid qualification, asset protection matters, and probates and related litigation. WAELA is also active at the legislative level. WAELA has filed this amicus because our members are especially concerned with protecting the rights of seniors and persons suffering from various incapacitating conditions, as well as providing “real world” guidance and support to their families and fiduciaries.

III. LEGAL ANALYSIS

A. The *Raven* Decision Conflicts With Well Established Law.

1. The Division II Court of Appeals decision in *Raven* conflicts with the prior Supreme Court decision in *Ingram*.

Prior to the appellate decision in *Raven*, the duty of a guardian with regard to decisions on medical treatment was clearly described in *In*

the Matter of the Guardianship of Ingram, 102 Wn.2d 827, 689 P.2d 1363 (1984). *Ingram* described the duties of a guardian when making a decision about a ward's medical treatment.

The ward in *Ingram* was suffering from throat cancer with two alternative treatment options. *Id.* at 829. The first option was surgical removal of the vocal cords, while the second option was radiation treatment. *Id.* Removal of the vocal cords was much more effective, and was the recommendation of the treating physician, but it would have left the ward unable to speak. *Id.* Radiation treatment was likely to fail and result in the death of the ward. *Id.* The ward repeatedly stated her desire to avoid surgery. *Id.* In spite of the ward's expressed desires, the trial court ordered surgery.

The Supreme Court held a special *en banc* hearing, and overturned the decision of the trial court. In determining that the preferences of the ward should be respected, the Court made the following holdings:

- 1) Unless outweighed by some state interest, a person has the right to choose one medical treatment over another, or even refuse medical treatment altogether. *Id.* at 836.
- 2) A judicial finding of incompetency does not deprive the ward of the right to choose or refuse treatment. *Id.* at 836.
- 3) A person's right of self-determination includes the right to choose between alternate treatments as well as the right to refuse life sustaining treatment; the

guardian's duty is to exercise this right on the ward's behalf, by doing what the ward would do if competent. *Id.* at 839 (emphasis added).

4) In determining what the ward would do, if competent, the [decision maker] makes a "substituted judgment" for the ward. The goal is not to do what most people would do, or what the [decision maker] believes is the wise thing to do, but rather what this particular individual would do if she were competent and understood all the circumstances, including her present and future competency. *Id.* at 839.

5) ...[T]he ward's expressed wishes must be given substantial weight, even if made while the ward is incompetent. *Id.* at 840.

6) Particularly where an alternative (albeit much less effective) treatment exists, the court should carefully consider the ward's preference. *Id.* at 841.

7) If the decision maker were to determine that the ward would choose a particular course of treatment (despite the curative potential of an alternative course of treatment), then the State's interest in preserving life would not outweigh that choice. *Id.* at 843 (paraphrasing the court's holding).

The rules set out in *Ingram* established clear legal guidelines for a guardian to follow when determining between alternate courses of medical treatment. However, the *Raven* ruling may be read to suggest that in spite of the guardian's best efforts to adhere to the above rules, the guardian may be found to have committed neglect by failing to bully the ward into a medical treatment that the ward does not want to pursue.

The ward in *Raven* was receiving the best in home care that the State of Washington could provide, and that any guardian could reasonably procure. While the most medically appropriate treatment for the ward may have been to reside in a skilled nursing facility, the ward consistently expressed a desire to receive the less effective in home care. The guardian felt that she had no other option but to allow the ward to remain at home. A.R. 153, COL 28.

The appellate court suggested that Raven had a duty to either obtain better in-home care, or force the ward into a nursing home. *Raven*, 167 Wn. App at 468. Such a ruling is contrary to the ruling in *Ingram*, where the Court allowed the ward to choose her preferred medical treatment in spite of the fact that the guardian, the Court, and the doctors felt her choice was a mistake. This Court should uphold the standards previously established in *Ingram*, and overturn the Division II Court of Appeals decision in *Raven*.

2. The Division II Court of Appeals decision in *Raven* conflicts with the Division I Court of Appeals decision in *Anderson*.

In *Anderson*, Division I of the Court of Appeals ruled that a guardian acting pursuant to RCW 11.92.040 may not use RCW 72.23.070(4) to force a ward into residential mental health care against his or her expressed wishes. *Guardianship of Anderson*, 17 Wn. App. 690,

691, 564 P.2d 1190 (1977). In *Anderson*, a limited guardian was concerned that the ward's "present choice of lifestyle" was the "product of some degree of mental incapacity," and attempted to use his authority as guardian to temporarily place the ward in a mental health care facility for observation against the ward's wishes. *Anderson* at 691. Division I stated that a ward may only be placed into such a facility against their expressed wishes where the facts establish that the ward is "gravely disabled" or poses "likelihood of serious harm to self or others." *Anderson* at 692. The court further held that such an action to place the ward in a facility against his or her wishes was limited to involuntary commitment procedures pursuant to RCW 71.05. *Anderson* at 691.

The decision in *Raven* conflicts with the prior Division I decision in *Anderson*. In *Raven*, Division II suggests that the guardian should have balanced the ward's historical preferences against her clear medical needs. *Raven* at 466. Such a requirement directly conflicts with the decisions in *Anderson* and *Ingram* which held that the authority of the ward to refuse treatment supersedes the authority of the guardian to address the clear medical needs of the ward. *Anderson* at 691; *Ingram* at 839. Had *Raven* attempted to place her ward in a facility against the ward's express wishes in the manner suggested by the Division II Court of Appeals, *Raven* would have had to abuse her authority as guardian in the same manner as was

specifically rejected by the Division I Court of Appeals in *Anderson*.

Anderson at 691.

The *Raven* court did not suggest that the ward should have been involuntarily committed under RCW 71.05, instead suggesting that the guardian, acting pursuant to RCW 11.92.040 and with the authority vested in her as guardian, should have forced the ward into a care facility against her wishes.¹ As the *Anderson* court specifically decided, such an action by the guardian is a violation of the fundamental liberties of the ward, and is impermissible under the state and federal constitutions. The *Anderson* decision has been cited by attorneys and guardians for this purpose for over three decades, and the decision in *Raven* threatens to overturn, or at least unsettle and confuse what has long been regarded as well established law.

¹ While DSHS suggests that the ward may have been amenable to a care facility that was less restrictive than a skilled nursing facility, such a suggestion is pure speculation. In addition to the ward's expressed preferences, the record seems to indicate the ward required a level of care not available in such a facility, thus making her placement in such a facility unproductive. Furthermore, the response of DSHS, that the guardian should have kept pressuring the ward until she capitulated, is demeaning and disrespectful to the wishes of the ward. By their very nature, wards are frequently vulnerable to the influence of others. A guardian should not be forced to attempt to alter the expressed wishes of a ward through repeated and persistent questioning and manipulation.

B. Guardians And Elder Law Attorneys Have Been Explicitly Taught That The Residential And Medical Preferences Of The Ward Must Be Implemented To The Fullest Extent Possible.

The elder law community has consistently taught that a guardian of the person could not and should not place a ward in a residential setting that is contrary to his or her wishes. In 1993, attorney William L.E. Dussault, Chapter 2(a) explicitly wrote:

“Given the statutory references in RCW 71, RCW 11, and the holding in *Anderson*, the inescapable conclusion is that a guardian or limited guardian may not place a ward against the ward’s stated desires unless the Involuntary Commitment Act is used. As argued before the court, this requirement would also apply to individuals whose resistance to placement could be without a “rational basis.”

William L. E. Dussault, *Legal Issues Regarding Guardianship and Spousal Community Property Management Dissolution of Marriage Placement of Ward*, HOW TO HANDLE COMPLEX GUARDIANSHIP ISSUES, p.2a-9 (WSBA 1993).

Mr. Dussault cited and explained how “*In re Anderson*, 17 Wn. App. 690, 564 P.2d 1190 (1977), ruled that the exclusive method of providing a residential placement against the wishes of an individual is the Involuntary Commitment Act RCW 71.05.”² Lecturer Dussault had been the losing counsel on appeal in *Anderson* 16 years earlier.

The court of appeals in *Raven* unfortunately seized upon an offhand comment of expert witness Tom O’Brien to create a duty to

² See Addendum A, Id., p. 2a-8, also p.2-9

conduct monthly visits, necessity notwithstanding. However comparing his writings with his testimony at trial, it is unlikely Mr. O'Brien would have "bullied" Ida into a skilled nursing facility. One of the early and prominent professional guardians and original members of the Guardianship Certification Board, where he served with distinction for ten (10) years, Tom O'Brien, Executive Director of Guardianship Services of Seattle, had taken over as Representative Payee for Sheila Anderson and witnessed first hand her struggles that were in the background of the reported decision. In the 1993 "How To Handle Complex Guardianship Issues" seminar, Mr. O'Brien gave the attendees some of the back story of Sheila Anderson's disabilities following the 1977 decision (eating from dumpsters; sleeping in downtown crawl spaces). His section "Coercive Authority of Guardians" in his lecture "Duties of Guardian and Limited Guardian Managing Difficult Cases," illustrates the limitations that Raven later faced and the advice she would have received from an expert in the field.³ Mr. O'Brian went on to state:

None of the above is invented. It is possible, and wrong, to romanticize Shiela Anderson as a person who made her life on her own terms, which she certainly did. While Shiela was absolutely a person to respect, it was impossible not to share her mothers [sic] wish to somehow offer her a better life. It seems likely that she

³ See Addendum B, Tom O'Brien, *Duties of Guardian and Limited Guardian Managing Difficult Cases*, HOW TO HANDLE COMPLEX GUARDIANSHIP ISSUES p.2b-16 to 2b 19 (1993).

would be alive today if it had been possible to penetrate her defenses. There is no clearer example of how the limits on the authority of a guardian works.

Id., p. 2b-17.

When veteran elder law attorneys, guardians and judges under the Chairmanship of Judge Richard D. Eadie revised the “Washington State Guardian Manual” in 2003⁴, they included the following:

“1. Residential Placement Problems.

A guardian cannot force an incapacitated person to be detained in a residential treatment facility against that person’s will either with or without a court order. A person can only be detained under the involuntary treatment (civil commitment or summons) provisions of Washington law. This includes placements in nursing homes, assisted living centers, boarding homes, or adult family homes. Further, it is the guardian’s responsibility to respect the incapacitated person’s right to live in the setting of his or her choice, even if a person is not, in the opinion of the guardian, acting in his or her own best interests in refusing placement.”

Id., p. 2-7 (internal citations are to RCW 11.92.190 and RCW 71.05 – Involuntary Treatment Act (ITA). The training manual then discusses family and court intervention and referral to the County Designated Mental Health Professional, all avenues explored by Raven. A.R. 2137. It concludes ominously:

“While it is appropriate to seek court direction on residential placement problems, a petition must recognize that neither the guardian nor the court has statutory authority to direct that an incapacitated person live in a particular setting against his or her own will.”

Id. p. 2-8.⁵

⁴ See Addendum C, Washington State Guardian Manual (Washington State Certified Professional Guardian Board, 2003), select pages

⁵ In 2004, the Washington State Certified Professional Guardian Manual, Michael Longyear, Editor, included a section on the same topic that was

C. The Decision Of Division II Court Of Appeals In Raven Would Establish A Per Se Standard Of Neglect That Would Make It Impossible For Guardians To Apply An Appropriate Level Of Care To Each Ward On An Individual Basis.

The appellate court ruled that a guardian could be found guilty of neglect without a corresponding finding of causation and harm. *Raven*, 167 Wn. App. at 465. Such a ruling establishes what is, in effect, a per se standard of neglect that counteracts the requirement that a ward's freedom be restricted "only to the minimum extent necessary" to protect each individual ward from harm. RCW 11.88.005. Without the elements of causation and harm, it is impossible to establish the "minimum extent necessary" standard of care that is appropriate for each individual ward. The only way to determine whether the guardian's level of care for an individual ward is appropriate, is to determine whether that level of care is sufficient to avoid loss or harm for that particular ward.

Ordinarily a WAELA elder law attorney would advise a client that, pursuant to RCW 11.88.005, the primary duty of the guardian is to exercise his or her authority "only to the minimum extent necessary to adequately provide for [the ward's] own health or safety, or to adequately manage [the ward's] financial affairs." RCW 11.88.005. In removing the causation and harm element, however, the *Raven* court has made it nearly

identical. See Addendum D, Certified Professional Guardian Manual (Washington State Certified Professional Guardianship Board, (2006), select pages.

impossible to apply the “minimum extent necessary” standard to each individual ward. The “minimum extent necessary” to protect one ward from harm, will not be the “minimum extent necessary” to protect another ward from harm.

For example, some mildly incapacitated individuals require only minor oversight or restrictions without suffering increased risk of harm, while other incapacitated individuals require more significant safeguards to prevent increased risk of harm to his or her person or estate. The degree of assistance needed is directly determined by the threat of harm that may occur if a less restrictive alternative is implemented. Any finding of neglect must be linked to the potential harm that would be caused by the guardian’s decision to implement either more or less restrictive oversight of the ward. Without this element of proximate cause and harm, there is no way to for the guardian to accurately determine the least restrictive alternative level of care,⁶ nor can the guardian’s attorney meaningfully advise the guardian how to allocate its time and limited resources.

⁶ This is not to suggest that the guardian should implement a level of care that is only sufficient to rise above a baseline level of negligence. The proximate cause and harm factors are important not only for determining negligence, but also to determine what overall level of care is most appropriate.

IV. CONCLUSION

The Supreme Court should reverse the decision of Division II of the Court of Appeals because it conflicts with prior court decisions which upheld the fundamental right of a ward to make the ultimate decision in his or her medical care and residential placement. Furthermore, the ruling by the Court of Appeals should be overturned because it establishes a per se standard of neglect that unreasonably restricts the ability of a guardian to balance the autonomy and freedom of an individual ward against the need to protect the ward's person and estate from harm.

We attorneys at WAELA do not deal with these issues just in a philosophical, analytical manner. Just as a veteran guardian has taken hundreds of wards to hospitals or clinics for urinary tract infections and develops a first hand understanding of the cause and effect of UTI's, so too, do the veteran WAELA attorneys know first hand that a guardian only has so many hours in a day; so many hands to help; and so much money to spend on a caseload. As we read the RCW's, SOP's, WAC's, and the case law, we must counsel our guardians how to protect their clients and themselves in an area of law and human chaos without clear guidelines in every situation.

That counsel must be based upon our best judgment. Division II's opinion changes the rules in the industry without any reason for doing so, sowing more chaos instead of less.

Respectfully Submitted this 14th day of January, 2013.

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By: 

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury pursuant to the laws of the State of Washington, that on January 14, 2013, I caused to be served a true and correct copy of the foregoing document upon counsel listed below by electronic mail and regular U.S. Mail.

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I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated January 14, 2013 at Seattle, WA.


MICHELLE N. WIMMER

Addendum A

How to Handle Complex Guardianship Issues

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COMPLEX GUARDIANSHIP ISSUES

CHAPTER 2a

LEGAL ISSUES REGARDING GUARDIANSHIP AND SPOUSAL COMMUNITY PROPERTY MANAGEMENT DISSOLUTION OF MARRIAGE PLACEMENT OF THE WARD

by William L. E. Dussault

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WILLIAM L. E. DUSSAULT William L. E. Dussault, J.D. 1972, focuses his practice on law for persons with disabilities. He has written and been a frequent CLE speaker in the areas of guardianship, special needs trusts, and other disability related issues. He is an adjunct professor at the University of Washington School of Law on Disability Law, was the co-author of the 1975-1977 Washington State Limited Guardianship Act (R.C.W. 11.88 and 11.99), and participated in the 1990/1991 revisions to the Washington State Guardianship Act (R.C.W. 11.88)

July, 1993

incapacitated person who is unable or unwilling to give informed consent to such commitment unless the procedures for involuntary commitment set forth in Chapter 71.05 or 72.23 R.C.W. are followed."

The prohibitions in this statutory section extend beyond physical placement to activities that occur within otherwise non-restrictive settings that would include "(c) other psychiatric or mental health procedures that restrict physical freedom of movement...". Should any such procedures be deemed necessary by the guardian, a petition to the court is required. Moreover, the court may order the procedure only after an attorney is appointed for the ward.

C. The prohibition against "involuntary" placement goes beyond mental health treatment facilities. R.C.W. 11.92.190 specifically provides:

"No residential treatment facility which provides nursing or other care may detain a person within such facility against their will."

The statutory provision goes on to restrict any exercise of authority by a court in this area unless it is expressly issued in accordance with the "involuntary treatment provisions of Chapters 10.77, 71.05, and 72.23, R.C.W."

R.C.W. 71.05.030 expressly states:

"Persons suffering from a mental disorder may not be involuntarily committed for treatment of such disorder except pursuant to provisions of this chapter, Chapter 10.77 R.C.W. or its successor, Chapter 71.06 R.C.W., Chapter 71.34 R.C.W...".

R.C.W. 71.05.040 further provides:

"Persons who are developmentally disabled, impaired by chronic alcoholism or drug abuse, or senile, shall not be detained for evaluation and treatment or judicially committed solely by reason of that condition unless such condition causes a person to be gravely disabled or as a result of a mental disorder such condition exists that constitutes a likelihood of serious harm to himself or others."

D. In 1976, the mother of Sheila Anderson brought a limited guardianship action to obtain a mental health evaluation for her daughter. A limited guardianship was established, with the limited guardian being given the authority to place the ward

in a mental health evaluation facility for a thirty day period. The purpose of the evaluation was to determine:

"...whether Sheila Anderson's present choice of lifestyle is made freely, knowingly, and intelligently or whether it is the product of some degree of mental incapacity".

The purpose for the evaluation was thus extremely narrow. The guardianship further provided that, should it be determined that Sheila's choice of lifestyle was the product of a mental incapacity, the limited guardian was directed to explore and determine an appropriate residential placement for Sheila and present details on that placement to the court for approval. The Washington State Court of Appeals, in In re Anderson, 17 Wn.App. 690, 564 P.2d 1190 (1977), ruled that the exclusive method of providing a residential placement against the wishes of an individual is the Involuntary Commitment Act, R.C.W. 71.05. The court stated:

"In Washington, the involuntary commitment of a person who has committed no crime against society requires a finding that the person is either 'gravely disabled' or possesses a likelihood of serious harm to self or others as defined by R.C.W. 71.05.020(1) and (3)."

Given the statutory references in R.C.W. 71, R.C.W. 11, and the holding in Anderson, the inescapable conclusion is that a guardian or limited guardian may not place a ward against the ward's stated desires unless the Involuntary Commitment Act is used. As argued before the court, this requirement would also apply to individuals whose resistance to placement could be without a "rational" basis. Nursing homes, group homes, foster placements, and adult family homes, all common "less restrictive" alternatives, are subject to the restrictions.

Addendum B

CHAPTER TWO b

WASHINGTON STATE BAR ASSOCIATION
COMPLEX GUARDIANSHIP SEMINAR

DUTIES OF GUARDIAN AND LIMITED GUARDIAN
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standards it applies for reporting and accountability in cases like this, and quite properly so. In the face of a challenge, however, the full array of fiduciary obligations of guardian to ward were enforced.

A spouse handling the affairs of a married couple may keep poor records or make decisions that seem unwise, but it would seldom even occur to anyone that these decisions could be questioned. In the context of a guardianship, there is a readily available forum for such questions.

Sometimes this works to the advantage of the impaired spouse. Sylvia had never been treated for a major mental illness, certainly a questionable proposition. It was to her long term advantage to have this lapse reviewed.

Again, the job of the guardian in a case like this is, essentially, to make up the difference between the capabilities of the guardian and the guardian's fiduciary duties. Unless there is question about the good faith of the spouse, the co-guardian's authority will usually be drawn fairly narrowly. Certainly, if the co-guardian perceives some impropriety or divergence of interests a report should be made to the court.

COERCIVE AUTHORITY OF GUARDIANS

Attorneys and professional guardians are commonly asked to describe that simple process by which they may impose their judgement on an impaired person to do such things as move out of or into some residential situation, to stop associating with particular people or to take psychiatric medications. Those making such enquiries are often surprised and dismayed to learn that guardians are not given the sort of police power to enforce decisions of this kind. In most guardianship cases, the ward is incapacitated to a degree that there is no likelihood of the guardians choices being frustrated. Very often, the ward is amenable to the assistance of the guardian.

Even in cases in which the ward or others resist the decisions of the guardian, the aura of authority that is popularly conferred on guardians often suffices to discourage challenges of the guardians decisions. This section is directed toward those instances in which the limits of the guardian's authority are tested.

THE ANDERSON CASE

Shiela Anderson was about 25-30 years old, was chronically mentally ill and led the life of a street person. Her mother, unsatisfied to allow her child to persist in this way sought appointment as limited guardian with authority to place Shiela into a 30 day mental health evaluation facility. There can be little question that this would have been in Shiela's best interests. Shiela sought representation and the matter went to the Washington Supreme Court. In 1977 the court found that the guardianship court lacked authority to coerce a residential placement, except under procedures as defined in the Involuntary Treatment Act. For part of this time social service workers were able to persuade Shiela to live in apartment housing. If there was a disturbance of any kind, Shiela would abandon the apartment. She was detained occasionally under the ITA, but never for more than 14 days. While obviously mentally ill, Shiela fed herself, presumably from dumpsters, was not suicidal and did not offer harm to others. She did not want to get her SSI income, which was sent to a professional fiduciary. She refused to leave the area in Seattle bounded by I-5, Highway 99, Union Street and Bell Street. An examination of the street scene on the edges of these borders shows that Shiela's behavior, while strange, was not wholly irrational. Her preferred sleeping place was in crawl spaces under buildings. Most of the time, Shiela successfully evaded efforts to contact her. Shiela died in about 1983.

None of the above is invented. It is possible, and wrong, to romanticize Shiela Anderson as a person who made her life on her own terms, which she certainly did. While Shiela was absolutely a person to respect, it was impossible not to share her mothers wish to somehow offer her a better life. It seems likely that she would be alive today if it had been possible to penetrate her defenses. There is no clearer example of how the limits on the authority of a guardian works.

As will be suggested below, however, Shiela was not a typical in many ways. Her indifference to money is extremely uncommon. Her peculiar mix of mental illness and street craft is also rare. In most instances, a persistent guardian is able to work within our constitutional framework to eventually meet the needs of resistant wards.

Shiela Anderson was not the victim of some gap in the legal system. All in all, it would probably be the lesser good to permit guardians the authority to override the due process requirements mandated in the Anderson decision. The practical problems of guardians implementing authority of this kind are immense.

LEGITIMATE RESIDENTIAL RESTRICTION

Guardians are not without authority to impose decisions on wards. Most of this

authority rests with the guardian of the estate. In addition, although a guardian of the person may not require the ward to take certain actions, neither may the ward require the guardian to act unwisely. For example:

Colleen is a mentally ill young woman who has been subject to guardianship for 18 months. In that time the guardian assisted her to have her own apartment, and later assisted her to move into a boarding home. On both occasions Colleen kept company with abusive "friends", used drugs, damaged property and was eventually detained under the mental commitment laws. The damage and the costs involved in dealing with the many problems Colleen experienced, and Colleen's frequent attempts to get funds from the guardian were extremely costly. Eventually, pursuant to the ITA she was placed in a court ordered "less restrictive alternative" with mandates that she remain in a mental health group home and take prescribed medications. At the end of the 90 day commitment period, Colleen told the guardian that she chose to leave the facility and rent an apartment. The guardian told Colleen that she would not assist to find an apartment and that if Colleen found one, the guardian would not provide deposits or monthly rent. Despite Colleen's angry denunciations about being denied her rights, she was unable to finance any alternative to the group home. Colleen was informed of her right to counsel, but chose not to participate in what she considered the waste of her funds on legal fees. The guardian told Colleen that when some competent professional recommended a less restrictive placement, the guardian would cooperate fully.

This may be viewed as a violation of Colleen's rights. Consider the position of the guardian, however, if she acceded to Colleen's demands. No reasonable observer would predict a successful outcome, and it was nearly certain that large and unrewarding costs would be imposed on the estate if the guardian agreed. The guardian would be properly criticized for wasting the estate.

Dealing with the ward in a situation like this requires a certain amount of finesse. The guardian wants to avoid demeaning the ward by reciting some litany of past mistakes and problems; and wants to avoid long and circular discussions of unrealistic alternatives. A good approach to take is to require, in essence, a second opinion. The guardian tells the ward that the guardian has exhausted his or her ability to come up with alternatives, cannot and will not rely exclusively on the ward's judgement, but will consider any plan that is supported by any reasonable counselor or social worker that the ward can find. A guardian is obligated to assure that such assistance is available, and if the assets of the ward allow, should make available the services of a private case manager with experience

in the disability of the ward. The guardian should in all cases seek to avoid the appearance or fact of a struggle of wills with the ward. The guardian should focus instead on the search for alternatives.

Most of all, the guardian must be extremely careful not to abuse this authority. If it is not completely certain, based on recent and conclusive experience, that the guardian is behaving properly, the guardian must avoid exercising undue coercion of this sort. The guardian should anticipate that the court will review behavior of this sort closely. Depending on the history of the case, it may be advisable for the guardian to schedule a review of the situation.

A guardian of the estate is not often called upon to deal with the issue of personal autonomy in as raw a form as the above, but very commonly restricts the personal choices a person has. The guardian may limit, for sound financial reasons, the amount available to be paid in rent. Obviously, this limits wards, who may be indifferent to the depletion of their estate.

FINANCIAL COERCION

Bill sustained a traumatic brain injury in 1988. His parents were appointed his guardian and retained counsel, who were able to negotiate a damage settlement netting \$275,000. At the time of the settlement in early 1991, Bill was adamant that the funds not be placed in a trust, and retained counsel to assert this position. The funds were placed under the control of the guardians. After two years as guardian, the parents sought out a professional to assume this role. He is unrepresented at the hearing on appointment of successor guardian, having discharged his attorney and having failed to find an attorney willing to represent him. Bill is frequently arrested for getting in fights or assaults, usually committed after drinking. Bill is relentlessly demanding of funds. The new guardian ignores all such demands and places Bill on a budget of \$50.00 per week spending money, provided in two checks per week. The guardian arranges for prepaid meals at a local restaurant near the inexpensive hotel where Bill lives, having been evicted from every apartment in which he has resided. A bus pass is purchased for Bill. Bill is furious about this, he insists on buying a house, starting a business, moving to Colorado and several other plans. He presents his wishes pro se to the judge who has accepted jurisdiction, and the judge is firm in supporting the guardian.

Although the situation described above is scarcely one that a reasonable person would choose for a ward, the guardian is protecting the assets against dissipation, minimizing the amounts the ward has available for drugs or alcohol and is giving the ward experience

Addendum C

WASHINGTON STATE GUARDIAN MANUAL

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Approved by the Washington State Supreme Court
Professional Guardian Certification Board as the
Official Training Manual For
Professional Guardian Certification

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2003 Edition

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James A. Degel, Esq., CPG
Editor-in-Chief

Introduction

This Manual is designed to be used as the educational materials for the mandatory training of professional guardians in Washington State for purposes of certification by the Supreme Court in accordance with General Rule 23, and to assist and support individuals who are serving as court-appointed guardians, as well as other participants in the guardianship process such as those who provide or participate in services of a guardian.

The Manual is intended to provide the reader with basic knowledge of the responsibilities and duties of a guardian, whether as a general or limited guardian, and whether as guardian of the person or estate or both. In addition, it covers the issues of ethics and fees as they pertain to guardians and guardianships.

The Model Statewide Guardianship Forms is an accompanying volume to this Manual and is to be used in conjunction with it. All references to Forms in this Manual are to that volume.

The information contained in this manual does not constitute legal advice. Guardians should consult all applicable statutes and, when appropriate, seek legal advice from an attorney with knowledge and experience in the area of guardianship law. As assets permit, the guardian may retain legal counsel for representation throughout the proceeding. In some circumstances, an attorney may be available on a reduced-fee or fee-waived basis. It is particularly advisable to have an attorney in cases in which the guardianship has substantial assets, owns real property (such as a house), when there is family conflict, or when there have been allegations of abuse, negligent care, or financial impropriety.

Much of the law dealing with guardianships is found in Chapters 11.88 and 11.92 of the Revised Code of Washington. Because the statutes, court rules and court procedures change constantly and because different courts have varying local rules and resources, the information contained in this Manual will become outdated. The Editor encourages each guardian to review the statutes, court rules, and case law carefully, and often, in addition to the materials in this book.

The law pertaining to guardianships and the rights of incapacitated persons is complex and the procedures and forms are complicated. Accordingly, neither this Manual nor the Model Statewide Guardianship Forms are a substitute for the advice and assistance of an attorney who is familiar with guardianship law, procedure, and issues.

All guardians are presumed to know and understand the law governing their actions. The same procedures and standards of conduct apply to professional guardians and to lay or family guardians. The courts hold each guardian to the same high standard of

conduct, regardless of whether or not that guardian is represented by an attorney and whether or not they are compensated for their services.

Serving as a guardian for another person is a serious responsibility. In cases where a guardian neglects his or her duties, mismanages property, fails to provide for the needs of the incapacitated person, or otherwise breaches the duty of a fiduciary, the Court may find that the guardian is personally liable and it may impose financial sanctions and other remedies.

With all the foregoing in mind, little more can be said in appreciation for the willingness of persons to accept the responsibilities of guardian, and for their invaluable assistance to all the persons of our state – assisted and unassisted alike – who benefit thereby!

It is my desire, and that of the authors and editors of this Manual, that it will contribute to training and educating guardians to be the best and most ethical fiduciaries and protectors of the most vulnerable members of our society.

James A. Degel, Esq., CPG
Editor-in-Chief

June 2003

WASHINGTON STATE GUARDIAN MANUAL
Table of Contents
2003 Edition

Acknowledgement and Thanks
 Contributing Authors and Editors
 Introduction

Unit One: Guardians and Guardianships - An Overview

A.	Learning Outcomes	1-1
B.	Legal Rights: the Legal Environment	1-1
C.	Types of Guardians and Guardianships	1-4
D.	Qualifications of All Guardians: Lay, Professional, and Financial Institutions	1-7
E.	Role of the Players in the Guardianship Process	1-7
F.	The Process of Nomination, Selection and Appointment of a Guardian	1-9
G.	Obligations of All Legal Guardians	1-10

Unit Two: Responsibilities of the Guardian of the Person

A.	Learning Outcomes	2-1
B.	Responsibilities and Limitations of the Guardian of the Person	2-1
C.	Identifying Needs and Resources	2-2
D.	Personal Care Plan	2-3
E.	Periodic Status Reports	2-4
F.	Petitions to the Court for Relief	2-5
G.	Changes in Circumstances	2-6
H.	Court Supervision and Delinquency Monitoring	2-6
I.	Residential Placement Problems	2-7
J.	Medical Directives on Code Status	2-8
K.	Informed Consent Regarding Extraordinary Medical Procedures	2-10
L.	Ethical Decision Making	2-10

Unit Three: Responsibilities of the Guardian of the Estate

A.	Learning Outcomes	3-1
B.	Marshaling and Inventorying the Assets	3-1
C.	Protecting the Assets	3-7
D.	Periodic Reports and Accountings	3-10
E.	Significant Changes	3-13
F.	Petitions to the Court for Relief	3-14
G.	Notices to the Court and Designated Persons	3-16
H.	Court Supervision; Delinquency Monitoring	3-16
I.	Sale of Assets	3-17
J.	Gifting of Assets	3-20
K.	The Incapacitated Person as Trust Beneficiary	3-22
L.	Appendices	

Appendix A
 Appendix B
 Appendix C

Unit Four: Employment of Attorneys and Other Professionals

A.	Learning Outcomes	4-1
B.	Employing Professionals to Assist the Guardian	4-1
C.	Professionals Who May Be Employed Only with Specific Court Authority	4-2
D.	Professionals Employed in the Usual Course of Duties	4-3
E.	Roles and Duties of Employed Professionals	4-5

Unit Five: Guardian and Attorney Fees		
A.	Unit Learning Outcomes	5-1
B.	Legal Basis for Guardian and Attorney Fees	5-1
C.	Measures for Setting Compensation	5-3
D.	Maintaining Records and Documenting Costs	5-6
E.	Court Process for Approval	5-7
F.	Who Is to Pay?	5-9
G.	Special Rules for DSHS, VA, and Guardianship Trusts	5-10
Unit Six: Ethical and Conflict Issues		
A.	Learning Outcomes	6-1
B.	Overview of the Ethical Obligations of a Guardian	6-1
C.	Persons Serving in Multiple Roles	6-4
D.	The Guardian as Beneficiary	6-6
E.	Conflicts Within the Assisted Person's Family	6-6
F.	The Complaint and Discipline Process	6-15
G.	Certified Professional Guardian Discipline	6-21
H.	Ethics Advisory Opinions	6-23
Unit Seven: Government Benefits		
A.	Introduction	7-1
B.	Government Income Benefits	7-1
C.	Government Medical Benefits	7-4
D.	How to Apply for Benefits	7-5
E.	Summary of Government Benefits	7-8
F.	Appendices	Appendix A
Unit Eight: Resignation or Removal and Substitution of Guardian		
A.	Learning Outcomes	8-1
B.	Voluntary Resignation of Guardian; Procedure for Substitution	8-1
C.	Removal of Guardian or Vacancy in Office; Procedure for Substitution	8-2
Unit Nine: Termination of the Guardianship and Closing the File		
A.	Learning Outcomes	9-1
B.	Terminating Events	9-1
C.	Guardian's Duties upon Termination	9-6
Unit Ten: Resources		
A.	Learning Outcomes	10-1
B.	Resources	10-1
Unit Eleven: Appendices		
A.	Glossary of Terms	Appendix A
B.	RCW Chapters 11.88, 11.92, and 11.94	Appendix B
C.	Supreme Court Professional Guardian Rule (GR 23)	Appendix C
D.	Standards of Practice	Appendix D
E.	Discipline Regulations	Appendix E
F.	Ethics Advisory Opinion Regulations	Appendix F
G.	Ethics Advisory Opinions	Appendix G

Practice Tip. If the guardian cannot complete a specific report within the required time period, a request to the court for a continuance should be sought. The guardian should advise the court of the reasons for the delay and provide a report as to the status of the proceeding at that time.

Note: There are statutory requirements to which the guardian is held, whether or not a particular requirement is mentioned in a court order. For example, RCW 11.92.043 requires that the guardian of the person file a care plan within 90 days of appointment. If the order appointing guardian for some reason neglects to direct that a care plan be filed by a certain date, the requirement continues to exist, and the court will hold the guardian to it. It is the responsibility of the guardian to familiarize herself with the statutory requirements, in addition to the elements of the court order.

I. RESIDENTIAL PLACEMENT PROBLEMS

A guardian cannot force an incapacitated person to be detained in a residential treatment facility against that person's will either with or without a court order.⁸ A person can only be detained under the involuntary treatment (civil commitment or summons) provisions of Washington law.⁹ This includes placements in nursing homes, assisted living centers, boarding homes, or adult family homes. Further, it is the guardian's responsibility to respect the incapacitated person's right to live in the setting of his or her choice, even if a person is not, in the opinion of the guardian, acting in his or her own best interests in refusing placement.

Practice Tip. The appropriate placement is not necessarily the most secure or controlled environment available. The standard is to meet the needs of the incapacitated person in the *least restrictive* setting.

Resolution to placement issues should first be approached by an objective assessment of the reasons for the incapacitated person's resistance. If a guardian can identify the person's true concerns, it may be possible to alleviate these concerns. For instance, perhaps the person is simply overwhelmed by the complexity of a proposed move.

⁸ RCW 11.92.190

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Other approaches could involve enlisting the support of a person significant to the incapacitated person (such as a family member, friend, or caregiver) or a person the incapacitated person admires or respects (such as clergy, physician or other health care professional, or even the veterinarian for a pet), trial placement on a temporary basis, etc.

If all attempts to reason with the incapacitated person result in a dead end, and if the incapacitated person is demonstrating a danger to herself or others, referral should be made to the County Designated Mental Health Professional (CDMHP) to evaluate for involuntary treatment.

If a move is necessitated by the incapacitated person's inability to afford the level of care she needs to continue to reside at home, the same steps toward resolution apply.

If the guardian and the incapacitated person cannot agree on placement choices to meet care needs, the guardian should seek legal counsel, and formulate a resolution consistent with Washington statute. Other professional assessments may help frame the issue for the guardian, attorney, and the court in, for example, appointing a Guardian ad Litem for a thorough assessment or counsel for the incapacitated person. While it is appropriate to seek court direction on residential placement problems, a petition must recognize that neither the guardian nor the court has statutory authority to direct that an incapacitated person live in a particular setting against his or her will.

Practice Tip. Referral to the CDMHP for involuntary commitment or summons should only be made when actual danger to self or others can be demonstrated. Utilizing this safeguard can be ineffective and frustrating to the guardian if the necessary criteria are not met.

J. MEDICAL DIRECTIVES ON CODE STATUS

The authority to give directives on code status by the guardian or any other surrogate decision-maker is a topic of current controversy, with facility licensing requirements in apparent conflict with the guardian's statutory authority. Until legislation and court cases better define the issues surrounding advance directives, informed consent, and substitute decision making in the area of code status, guardians must work within the DSHS licensing requirements when an incapacitated person resides in a facility.

Upon appointment, the guardian determines as much as possible the incapacitated person's preferences for medical intervention. This should include a discussion of preferences for resuscitation in the event of sudden death, or "code status."

Addendum D

Washington State Certified Professional Guardian Manual

Approved by the Washington State Supreme Court
Professional Guardian Certification Board as the
Official Training Manual for Certification of
Professional Guardians

2004 Edition, Updated

Michael J. Longyear, Esq., CPG
Editor-in-Chief

Manual Distributed on the September 28 & 29, 2006 Training

**WASHINGTON STATE
CERTIFIED PROFESSIONAL GUARDIAN MANUAL
Table of Contents**

Unit One: Guardians and Guardianships - An Overview		
A.	Learning Outcomes	1-1
B.	Legal Rights: the Legal Environment	1-1
C.	Types of Guardians and Guardianships	1-4
D.	Qualifications of All Guardians: Lay, Professional, and Financial Institutions	1-7
E.	Role of the Players in the Guardianship Process	1-7
F.	The Process of Nomination, Selection and Appointment of a Guardian	1-9
G.	Obligations of All Legal Guardians	1-10
Unit Two: Responsibilities of the Guardian of the Person		
A.	Learning Outcomes	2-1
B.	Responsibilities and Limitations of the Guardian of the Person	2-1
C.	Identifying Needs and Resources	2-2
D.	Personal Care Plan	2-3
E.	Periodic Status Reports	2-4
F.	Petitions to the Court for Relief	2-5
G.	Changes in Circumstances	2-6
H.	Court Supervision and Delinquency Monitoring	2-6
I.	Residential Placement Problems	2-7
J.	Medical Directives on Code Status	2-8
K.	Informed Consent Regarding Extraordinary Medical Procedures	2-10
L.	Ethical Decision Making	2-10
Unit Three: Responsibilities of the Guardian of the Estate		
A.	Learning Outcomes	3-1
B.	Marshaling and Inventorying the Assets	3-1
C.	Protecting the Assets	3-7
D.	Periodic Reports, Accountings and Budgets	3-10
E.	Significant Changes	3-13
F.	Petitions to the Court for Relief	3-14
G.	Notices to the Court and Designated Persons	3-16
H.	Court Supervision and Delinquency Monitoring	3-16
I.	Sale of Assets	3-17
J.	Gifting of Assets	3-20
K.	The Incapacitated Person as Trust Beneficiary	3-22
L.	Appendices	Appendix A Appendix B Appendix C
Unit Four: Employment of Attorneys and Other Professionals		
A.	Learning Outcomes	4-1
B.	Employing Professionals to Assist the Guardian	4-1
C.	Professionals Who May Be Employed Only with Specific Court Authority	4-2
D.	Professionals Employed in the Usual Course of Duties	4-3
E.	Roles and Duties of Employed Professionals	4-5
Unit Five: Guardian and Attorney Fees		
A.	Unit Learning Outcomes	5-1
B.	Legal Basis for Guardian and Attorney Fees	5-1
C.	Measures for Setting Compensation	5-3
D.	Maintaining Records and Documenting Costs	5-6
E.	Court Process for Approval	5-7

F.	Who Is to Pay?	5-9
G.	Special Rules pertaining to DSHS, VA, and Guardianship Trusts	5-10
Unit Six: Ethical and Conflict Issues		
A.	Learning Outcomes	6-1
B.	Overview of the Ethical Obligations of a Guardian	6-1
C.	Persons Serving in Multiple Roles	6-4
D.	The Guardian as Beneficiary	6-6
E.	Conflicts Within the Assisted Person's Family	6-6
F.	The Complaint and Discipline Process	6-15
G.	Certified Professional Guardian Discipline	6-21
H.	Ethics Advisory Opinions	6-23
Unit Seven: Government Benefits		
A.	Introduction	7-1
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C.	Government Medical Benefits	7-4
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F.	Appendices	Appendix A Appendix B
Unit Eight: Resignation or Removal and Substitution of Guardian		
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Unit Eleven: Appendices		
A.	Glossary of Terms	Appendix A
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C.	Supreme Court Professional Guardian Rule (GR 23)	Appendix C
D.	Standards of Practice	Appendix D
E.	Discipline Regulations	Appendix E
F.	Ethics Advisory Opinion Regulations	Appendix F
G.	CPG Board Ethics Advisory Opinions	Appendix G
H.	Case Law	Appendix H
I.	Application Information	Appendix I
J.	Annual Re-Certification Requirements	Appendix J
K.	General Information	Appendix K

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Subject: Raven v. DSHS; No. 87483-2

Attached for filing please find the Motion for Leave to File Brief of Amicus Curiae by WAELA and Amicus Curiae Brief of WAELA.

Case: Resa Raven v. Washington State Department of Social and Health Service

Case Number: 87483-2

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