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SUPREME COURT  
OF THE STATE OF WASHINGTON

RESA RAVEN,

Petitioner,

v.

WASHINGTON STATE  
DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent.

AMICUS CURIAE BRIEF OF WASHINGTON ASSOCIATION  
OF PROFESSIONAL GUARDIANS

THOMPSON & HOWLE

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## I. INTRODUCTION

The Court of Appeals decision will exacerbate systemic problems that professional guardians routinely see such as

- the lack of funding and insufficient number of guardians able to adequately handle cases involving low-income wards with multiple and complex needs;
- the widespread misperception, even among some judges, that guardians have the authority to place unwilling wards in treatment facilities;
- involuntary treatment laws that do not adequately address the needs of incapacitated persons who suffer physical harm and pain because they refuse medical and palliative care; and
- inadequate and sometimes contradictory responses by DSHS.

Therefore, amicus Washington Association of Professional Guardians supports reversal of the Court of Appeals.<sup>1</sup>

## II. IDENTITY AND INTEREST OF AMICUS

Washington Association of Professional Guardians

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<sup>1</sup> Washington Association of Professional Guardians does not take a position on the issue of whether the Guardian Resa Raven engaged in conduct that constitutes neglect of a vulnerable adult as defined by RCW 74.34.020.

(WAPG) represents the interests of Certified Professional Guardians (CPGs) who meet GR 23 certification standards established by the Washington Supreme Court. There are approximately 270 CPGs in Washington State. CPGs are appointed when family and friends are unavailable or unsuitable to serve as guardian for an incapacitated person. A significant number of CPG clients have limited resources and qualify for Medicaid.

WAPG's mission includes enhancing the quality of professional guardian services in Washington. Its adopted goals include promoting advocacy and justice for incapacitated people. For the reasons discussed below, WAPG believes that the Court of Appeals ruling if upheld will adversely affect the provision of guardianship services in Washington, particularly to incapacitated persons who have lower incomes, fewer assets, and more complicated medical and psychological needs. Because WAPG's members and the clients they serve have been directly impacted by this case, WAPG filed amicus briefs in the Court of Appeals and in support of the Petition for Review to the Supreme Court.

### III. ANALYSIS

#### A. **Washington Law Does Not Allow Guardians To Place Wards In Treatment Facilities Against Their Will.**

During this guardianship, the Ward's physical condition worsened to the point that she needed more care than the Guardian could arrange for her to receive at home.<sup>2</sup> Putting aside the fact question of whether the Guardian could have secured adequate in-home care, it is undisputed that at some point adequate in-home care was not available, resulting in the Ward's physical deterioration. The Ward would have received more immediate, more constant and more skilled care at a nursing home or rehabilitation center, but she had consistently resisted nursing home care and had made her wishes clear to the Guardian. AR 112.

In consenting to medical care for an incapacitated person, guardians must comply with RCW 7.70.065.<sup>3</sup> The

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<sup>2</sup> Amicus refers to the incapacitated person Ida as "Ward" and the Guardian Ms. Raven as the Guardian.

<sup>3</sup> RCW 11.92.043(5) states it shall be the duty of the guardian of the person to:

Consistent with RCW 7.70.065, to provide timely, informed consent for health care of the incapacitated person, except in the case of a limited guardian where such power is not expressly provided for in the order of appointment or subsequent modifying order as provided in RCW 11.88.125 as now or hereafter amended, the standby guardian or standby limited guardian may provide timely, informed consent to necessary

order appointing the Guardian in this case also required that medical decisions be made “consistent with RCW 7.70.067 [sic].”<sup>4</sup> RCW 7.70.065(1)(c) requires that when consenting to medical care, a guardian “must first determine in good faith that that patient, if competent, would consent to the proposed health care.” The hearing record in this case clearly established the Ward’s “historically consistent refusal to be ... taken out of her home for medical treatment purposes.” AR 153. Thus the Guardian determined that the Ward would not have consented to nursing home placement when competent, and the final agency decision found that this determination was made in good faith. AR 108; AR 112.

If the Guardian had placed the Ward in a care facility, she would have been in violation of her statutory and fiduciary duties. A fiduciary has a duty to act only within the scope of his or her authority.<sup>5</sup> Guardians are “at all times under the general direction and control of the court making

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medical procedures if the guardian or limited guardian cannot be located within four hours after the need for such consent arises.

<sup>4</sup> Presumably the reference to RCW 7.70.067 was intended to be a reference to RCW 7.70.065. RCW 7.70.067 does not exist.

<sup>5</sup> RESTATEMENT 3D OF AGENCY, § 8.09.

the appointment."<sup>6</sup> The superior court that appoints a guardian retains jurisdiction and broad authority to supervise the guardian until the guardianship is terminated.<sup>7</sup>

Because consensual out-of-home placement by the guardian could not occur consistent with RCW 7.70.065, compulsory detention by court order was the only available option for securing out-of-home care in this case. However, once the court becomes involved in ordering a placement, state action is involved and due process must be satisfied.<sup>8</sup> Even short non-penal detention by judicial process implicates constitutionally-protected liberty interests.<sup>9</sup> Therefore, at a minimum, the Ward was entitled to notice

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<sup>6</sup> RCW 11.92.010.

<sup>7</sup> See *In re Guardianship of Gaddis*, 12 Wn.2d 114, 123, 120 P.2d 849 (1942); *Seattle-First Nat'l Bank v. Brommers*, 89 Wn.2d 190, 200, 570 P.2d 1035 (1977); *In re Guardianship of Matthews*, 156 Wn. App. 201, 211, 232 P.3d 1140 (2010).

<sup>8</sup> See, e.g., *In re LaBell*, 107 Wn.2d 196, 201, 728 P.2d 138 (1986) (involuntary commitment for natural disorders is a significant deprivation of liberty which the state cannot accomplish without due process of law).

<sup>9</sup> See, e.g., *In re Harris*, 98 Wn.2d 276, 654 P.2d 109 (1982) (involving the summons procedure for effecting a 72 hour commitment for evaluation for mental health treatment.)

and an opportunity to be heard on the issue of whether the court could remove her from her home for treatment.<sup>10</sup>

But just as the Guardian could not lawfully admit the Ward to a care facility without court authority, the superior court overseeing the guardianship could not grant such authority. RCW 11.92.190 states that any “court order, other than an order issued in accordance with the involuntary treatment provisions of chapters 10.77, 71.05, and 72.23 RCW, which purports to authorize such involuntary detention or purports to authorize a guardian or limited guardian to consent to such involuntary detention on behalf of an incapacitated person shall be void and of no force or effect.”

Thus, the only lawful course of action available to the Guardian for securing out of home care was the involuntary treatment process. But the Involuntary Treatment Act, chapter 71.05 RCW, only authorizes involuntary detention for treatment of persons who are “gravely disabled” or pose a

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<sup>10</sup> See, e.g., *In re Dependency of R.H.*, 129 Wn. App. 83, 85, 117 P.3d 1179 (2005) (“In any legal proceeding, the parties are entitled to procedural fairness. This includes, at minimum, notice and the opportunity to be heard.”); *In re the Guardianship of Ingram*, 102 Wn.2d 827, 689 P.2d 1363 (1984) (guardian petitioned the court to order life-saving treatment over the ward’s objections; the Supreme Court upheld the ward’s right to decline life-saving treatment.)

risk of serious harm to themselves or to others.<sup>11</sup> The Guardian tried to have the Ward civilly committed for treatment in November 2006. AR 1594-5. But the Designated Mental Health Professional who assessed the Ward in November 2006 concluded that the Ward was not detainable because she did not have a “mental disorder”<sup>12</sup> and “her symptoms were primarily medical.”<sup>13</sup>

The Court of Appeals committed clear legal error in holding that “Raven appropriately considered Ida’s preference to remain at home. But Raven *was obligated to balance this preference against Ida’s clear medical needs.*” *Raven v. Dep’t of Soc. & Health Servs.*, 167 Wn. App. at 466 (emphasis supplied). Guardians have no authority in this State to balance a ward’s refusal to be placed in a care facility against the ward’s medical needs. The obligation imposed by the Court of Appeals to balance the ward’s

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<sup>11</sup> See RCW 71.05.040, .150, .230, .240, .280, and .320; *In re Guardianship of Anderson*, 17 Wn. App. 690, 692, 564 P.2d 1190 (1977). RCW 71.05.040 provides that persons with dementia cannot be involuntarily detained for treatment “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.”

<sup>12</sup> AR 871; AR 129; AR 1595.

<sup>13</sup> *Raven v. Dep’t of Soc. & Health Servs.*, 167 Wn. App. 446, 456 (2012).

clearly stated opposition to nursing home placement against the ward's medical needs is a misstatement of the law that has generated confusion and concern among professional guardians. Unless the Court of Appeals is reversed, guardians will face the risk of being found to have committed neglect under the Vulnerable Adult Protection Act for complying with well-established statutory limits on their authority.

Only through a broadening of the Involuntary Treatment Act or amendment of RCW 11.92.190 could the Ward have been detained for necessary care against her will. Passage of new legislation that would address cases such as this one was one recommendation coming out of the Vulnerable Adult Conference organized by the State in 2008. The Final Report recommended as follows:

Develop a stakeholder work group to help craft legislation that allows for a separate involuntary detention process for vulnerable adults to facility settings when they are diagnosed with dementia.<sup>14</sup> This would address a population that appears to be covered by the guardianship statutes but is not being served by the mental health community because

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<sup>14</sup> The Ward had dementia in addition to mental illness and other medical problems. See AR 98; AR 113.

dementia is not considered to be a “mental disorder” in most counties.<sup>15</sup>

Some states such as Oregon and Massachusetts have added provisions to their guardianship laws that permit courts to authorize nursing home placement by guardians if certain conditions are met. In 2008, Massachusetts adopted a version of the Model Probate Code, which provides in pertinent part: “No guardian shall have the authority to admit an incapacitated person to a nursing facility except upon a specific finding by the court that such admission is in the incapacitated person's best interest.”<sup>16</sup> The precursor to this law was upheld and applied in *Doe v. Doe*, 377 Mass. 272, 273, 385 N.E.2d 995 (1979), which found it lawful for a guardian to involuntarily commit a ward for mental health treatment, provided it was first established beyond a reasonable doubt that there was a likelihood of serious harm without the placement. Similarly, in Oregon, guardians have express statutory authority to petition the court to place

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<sup>15</sup> A copy of the Vulnerable Adult Initiative 2008 Final Report is in the Appendix to the Amicus Brief filed by WAPG with the Court of Appeals at A-20 to A-53.

<sup>16</sup> Mass. ALS 5-309(g) (2008). A copy of this law is in the Appendix to the Amicus Brief filed by WAPG with the Court of Appeals at A-17.

incapacitated persons in nursing homes and other residential care and treatment facilities if certain procedures are followed and standards are met. See ORS § 125.320

In this case, the Guardian pursued the only legal option for placing the Ward in a care facility by requesting that the DMHP evaluate the Ward under the Involuntary Treatment Act, RCW 71.05. Contrary to the Court of Appeals holding, and unlike some other states, Washington's laws do not authorize guardians to "balance" a ward's refusal of nursing home care against their medical needs. Unless and until Washington's legislature follows the examples of states like Oregon and Massachusetts, guardians should not be penalized for their inability to detain incapacitated persons who would clearly benefit from, but who refuse, out-of-home placement for medical and palliative care.

**B. DSHS Has An Affirmative Duty To Provide Protective Services To Vulnerable Adults Which The Court Of Appeals Failed To Recognize.**

In 1981, the U.S. House of Representatives released the first of several reports on elder abuse.<sup>17</sup> The Select

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<sup>17</sup> Jill Skabronski, *Elder Abuse: Washington's Response to a Growing Epidemic*, 31 GONZAGA L. REV., 627, 633 (1995).

Committee on Aging recommended that states enact elderly protection laws. *Id.* As a result of the Committee's findings, each state enacted its own adult protection services laws, court proceedings, and practices concerning services for victims of elder abuse and neglect. *Id.*

The Washington Legislature enacted the Vulnerable Adult Protection Act in 1984 with legislative findings that:

there are a number of adults sixty years of age or older who lack the ability to perform or obtain those services necessary to maintain or establish their well-being... It is the intent of the legislature to prevent or remedy the abuse, neglect, exploitation, or abandonment of [such] persons.<sup>18</sup>

DSHS "is responsible for investigating allegations of abuse, neglect, abandonment, or exploitation of a vulnerable adult."<sup>19</sup> The "department and appropriate agencies must be prepared to receive reports of abandonment, abuse, financial exploitation, or neglect of vulnerable adults"<sup>20</sup> and "the department shall initiate a response to a report, no later than twenty-four hours after knowledge of the report, of suspected abandonment, abuse, financial exploitation,

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<sup>18</sup> RCW 74.34.010.

<sup>19</sup> Brief of DSHS to the Court of Appeals at 43. WAPG agrees with DSHS that the State has a strong interest in protecting vulnerable adults. *Id.*

<sup>20</sup> RCW 74.34.005(5).

neglect, or self-neglect of a vulnerable adult.”<sup>21</sup> If the report is substantiated by DSHS, it then has the authority to provide “protective services” and to petition for judicial protection of a vulnerable adult. Protective services “may include, but are not limited to case management, social casework, home care, placement, arranging for medical evaluations, psychological evaluations, day care, or referral for legal assistance.”<sup>22</sup>

Consent of the vulnerable adult to such protective services can be given by the vulnerable adult or the vulnerable adult’s “legal representative.”<sup>23</sup> In addition, DSHS also has standing under the Vulnerable Adult Protection Act to file a court petition for protection with the consent of the vulnerable adult or the vulnerable adult’s legal representative or when the Department “has reason to believe that a vulnerable adult lacks the ability or capacity to consent[.]”<sup>24</sup> Remedies available under the Vulnerable Adult

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<sup>21</sup> RCW 74.34.063(1).

<sup>22</sup> RCW 74.34.020(14). The provision was previously codified at RCW 74.34.020(13) under the version of the Act in existence prior to July 22, 2007.

<sup>23</sup> RCW 74.34.020(3).

<sup>24</sup> RCW 74.34.020(3); RCW 74.34.150. Since the Ward’s guardian made the APS referral in June, consent would not have been an issue if DSHS had substantiated the referral.

Protection Act supplement the guardianship laws and the criminal code.<sup>25</sup> A court “may order relief as it deems necessary for the protection of the vulnerable adult, including but not limited to,” restraining orders against third parties.<sup>26</sup> Protection orders can be issued over the objection of vulnerable adults.<sup>27</sup>

The Court of Appeals ignored the Department’s duty of protection while faulting the Guardian for not curing problems that DSHS refused to provide services to address. The Ward’s situation was called to the attention of DSHS in June 2006 when the Guardian made an Adult Protective Services (APS) report against the Ward’s husband for refusing to consistently administer Ida’s medications.<sup>28</sup> These medications included pain medications and anti-anxiety medications, which were necessary not only for the

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<sup>25</sup> See RCW 74.34.160 (“Any proceeding under RCW 74.34.110 through 74.34.150 is in addition to any other civil or criminal remedies.”); RCW 74.34.100(4) (“A petition for an order may be made whether or not there is a pending lawsuit, complaint, petition, or other action pending that relates to the issues presented in the petition for an order for protection.”).

<sup>26</sup> RCW 74.34.130.

<sup>27</sup> See, e.g., *Endicott v. Saul*, 142 Wn. App. 899, 176 P.3d 560 (2008) (upholding trial court’s order of protection which was opposed by the vulnerable adult).

<sup>28</sup> AR 1588. Inadequate medication management was one of the critical deficiencies that DSHS relied on when it found that Ms. Raven committed neglect. See AR 168.

Ward's comfort but for the safety of her caregivers.<sup>29</sup> DSHS was required to initiate a response to the guardian's report within 24 hours.<sup>30</sup> If DSHS had substantiated the allegation of neglect, it would have been authorized to provide protective services and to petition the court to order protections under RCW 74.34.110 with the consent of the Guardian, who had made the referral to DSHS in the first place. But in June 2006, APS found that it could not substantiate the report of neglect and declined to take any action. AR 858-859.

After declining to take protective action on behalf of the Ward, DSHS later faulted the Guardian for failing to file a court petition that would have "forced" DSHS to do something.<sup>31</sup> The Court of Appeals further faulted the Guardian for not retaining an "experienced attorney" to address problems with the ward's husband. *Raven*, 167 Wn. App. at 455; *id.* at 467. But with no resources available to hire counsel because the Ward was a low-income Medicaid recipient, the only recourse that the Guardian had in this

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<sup>29</sup> See AR 123.

<sup>30</sup> RCW 74.34.063(1).

<sup>31</sup> AR 167-8.

case was to seek protective services from DSHS, which as discussed were declined. AR 1588.

This case illustrates an experience that is common among WAPG members. Like the Guardian in this case, WAPG members are frequently asked by DSHS to handle difficult complicated guardianships, only to find after appointment that DSHS is not available or willing to provide requested protective services, or worse yet, faults the guardian for failing to solve problems that predated the professional Guardian's appointment. Frequently, as in the present case, these are cases involving low-income wards where the State is the only source of funds to pay for assistance.

**C. The Court of Appeals Decision Will Exacerbate the Shortage of Guardians for Low Income Persons with Complex Needs.**

The message that the Court of Appeals communicated to professional guardians in *Raven v. D.S.H.S.*, 167 Wn. App. 446, 467, 273 P.3d 1017 (2012) is that they can be found guilty of neglecting a vulnerable adult for failing to "aggressively pursue" institutionalization of wards who refuse to accept out-of-home care. This message will

exacerbate the already critical shortage of guardians for low-income persons with multiple medical and psychological needs. In cases where wards have sufficient resources, guardians can retain attorneys to advise them and to petition the courts for instruction and approval of the guardians' actions. But where wards with multiple medical and psychological problems have limited resources to hire attorneys and access the courts, guardians run the risk of career-ending findings of neglect under the Vulnerable Adult Protection Act, RCW 74.34.

The solution proposed by the Court of Appeals is for guardians to "step aside" in difficult cases where they cannot obtain the ward's consent to out-of-home treatment and in-home services are not available or adequate. *Id.* at 468. This solution erroneously assumes that there is an adequate supply of guardians available to handle complicated cases for low-income clients. But in fact there already is a critical shortage of guardians for low-income persons, which will only be exacerbated by the decision in this case.<sup>32</sup>

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<sup>32</sup> See, e.g., Burley, M., *Assessing the Potential Need for Public Guardianship Services in Washington State*, at 1, 13-14, WASHINGTON STATE

Approximately 2,500 guardianship petitions are filed in Washington State every year, resulting in the establishment of approximately 1,600 new guardianship cases each year.<sup>33</sup> “For low-income or indigent individuals requiring a guardian, there are few options available to help pay for these services.”<sup>34</sup> In Washington, individuals who qualify for Medicaid may have their payment obligation (“participation”) reduced by up to \$175 per month to help pay for guardianship services.<sup>35</sup> As illustrated in the present case, however, this income exemption frequently does not cover the full cost of guardianship services.<sup>36</sup> In the present case, the Guardian received \$78.50 per month, which totaled \$2119.50 from her appointment in March 2004 through

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INSTITUTE FOR PUBLIC POLICY, Document No. 11-12-3901 (2011) (estimating that between 4000 and 6000 low-income Washington residents were unable to obtain a needed guardian).

<sup>33</sup> Office of Public Guardianship, *Legislative Study*, at 1, WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY (June 2008).

<sup>34</sup> Burley, M., *Public Guardianship in Washington State Costs and Benefits*, at 2, WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, Document No. 11-12-3902 (2011).

<sup>35</sup> *Id.* However, in many cases, such as this one, the ward’s participation is less than \$175 per month. Therefore, the actual payment to the guardian is less than \$175 per month. In the present case, the ward’s participation was \$78.50 per month. AR 1554. Thus, payment to the guardian was limited to \$78.50 per month. *Id.*

<sup>36</sup> Burley, M., *Public Guardianship in Washington State Costs and Benefits*, at 2. *supra* at n. 34.

August 2006. AR 1554, 1558-1564. The guardian was owed \$6006.25. AR 1554, 1564.

In 2005, the Public Guardianship Taskforce of the Washington State Bar Association published a report estimating that 4,500 individuals in Washington State did not have sufficient resources to obtain the services of a court-appointed guardian.<sup>37</sup> In 2007, the Washington State Legislature passed Substitute Senate Bill 5320, which established the Office of Public Guardianship (OPG) within the Administrative Office of the Courts.<sup>38</sup> See chapter 2.72 RCW. The intent of the legislation was to “promote the availability of guardianship services for individuals who need them and for whom adequate services may otherwise be unavailable.” RCW 2.72.005. But from 2008 through 2011, the OPG served just 87 individuals<sup>39</sup> out of an estimated

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<sup>37</sup> Burley, M., *Assessing the Potential Need for Public Guardianship Services in Washington State*, at 1, *supra* at n. 32 (citing Washington State Bar Association, August 22, 2005).

<sup>38</sup> OPG did not begin to serve clients until 2008, after the ward in this case had died.

<sup>39</sup> Burley, M., *Public Guardianship in Washington State Costs and Benefits*, at 3, *supra* at n. 34.

4000 to 6000 persons who needed but could not afford guardianship services.<sup>40</sup>

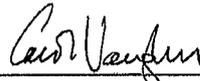
#### IV. CONCLUSION

Finding guardians guilty of neglect because they cannot involuntarily detain incapacitated persons for necessary care will exacerbate the shortage of guardians able to take difficult low-paying cases and encourage DSHS to abdicate its statutory duties under the Vulnerable Adult Protection Act. For the foregoing reasons, this Court should reverse the Court of Appeals.

Dated this 10<sup>th</sup> day of January, 2013.

Respectfully submitted by:

THOMPSON & HOWLE



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<sup>40</sup> Burley, M., *Assessing the Potential Need for Public Guardianship Services in Washington State*, at 14, *supra* at n. 32.