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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
BY 
DEPUTY

RESA RAVEN,

Respondent,

v.

WASHINGTON STATE
DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY

**BRIEF OF AMICUS CURIAE
WASHINGTON ASSOCIATION OF
PROFESSIONAL GUARDIANS**

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ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION1

II. STATEMENT OF ISSUES4

III. STATEMENT OF THE CASE.....5

IV. ARGUMENT5

 A. Guardianship and Informed Consent Statutes
 Should Be Interpreted De Novo.....5

 B. Vulnerable Adults Subject to Guardianship
 Cannot be Detained Involuntarily for Necessary
 Care Without Complying With Civil
 Commitment Laws.....5

 1. The guardian did not have authority to place
 Ida in a care facility.....6

 2. The superior court overseeing the
 guardianship did not have the authority to
 detain Ida for necessary care8

 2. New legislation would be necessary to
 involuntarily detain vulnerable adults in
 residential treatment facilities for
 necessary care11

 C. A Guardian Does Not Have A Fiduciary Duty to
 Guarantee that Medical or Care Needs are Met,
 But to Exercise Due Diligence in Pursuing All
 Reasonably and Legally Available Care Options13

 D. The Department’s Duty to Protect Vulnerable
 Adults Is Not Contingent On the Guardian’s
 Conduct.....14

 1. Statutory background of the Vulnerable
 Adult Protection Act15

| | | |
|----|--|----|
| 2. | DSHS had a duty to take action independent of the guardian's | 17 |
| 3. | DSHS may not withhold care from vulnerable adults in the future based on the guardian's conduct in this case | 19 |
| V. | CONCLUSION..... | 20 |

APPENDIX

TABLE OF AUTHORITIES

State Cases

| | |
|---|----|
| <i>Ames v. Washington State Health Dep't. Med. Quality Assurance Comm'n</i> , 166 Wn.2d 255, 208 P.3d 549 (2009)..... | 5 |
| <i>Christensen v. Ellsworth</i> , 162 Wn.2d 365, 173 P.3d 228 (2007)..... | 10 |
| <i>In re Dependency of R.H.</i> , 129 Wn. App. 83, 117 P.3d 1179 (2005)..... | 9 |
| <i>In re Dependency of Schermer</i> , 161 Wn.2d 927, 169 P.3d 452 (2007)..... | 1 |
| <i>Doe v. Doe</i> , 377 Mass. 272, 385 N.E.2d 995 (1979)..... | 12 |
| <i>Endicott v. Saul</i> , 142 Wn. App. 899, 176 P.3d 560 (2008)..... | 17 |
| <i>Esmieu v. Schrag</i> , 88 Wn.2d 490, 563 P.2d 203 (1977)..... | 13 |
| <i>In re Guardianship of Gaddis</i> , 12 Wn.2d 114, 120 P.2d 849 (1942)..... | 8 |
| <i>In re the Guardianship of Ingram</i> , 102 Wn.2d 827, 689 P.2d 1363 (1984) | 9 |
| <i>In re Guardianship of Matthews</i> , 156 Wn. App. 201, 232 P.3d 1140 (2010)..... | 8 |
| <i>In re Harris</i> , 98 Wn.2d 276, 654 P.2d 109 (1982)..... | 8 |
| <i>In re LaBell</i> , 107 Wn.2d 196, 728 P.2d 138 (1986)..... | 8 |
| <i>Seattle-First Nat'l Bank v. Brommers</i> , 89 Wn.2d 190, 570 P.2d 1035 (1977)..... | 8 |
| <i>In re Welfare of Frederiksen</i> , 25 Wn. App. 726, 610 P.2d 371 (1979)..... | 1 |

Statutes

| | |
|--------------------------|-------------------|
| RCW 7.70.065 | 2, 5, 6, 7, 8, 11 |
| RCW 7.70.065(1)(c) | 7 |
| RCW 9A.42.100..... | 1 |
| RCW 10.77 | 6, 9 |
| RCW 11.88 | 2 |
| RCW 11.88.120 | 20 |
| RCW 11.88.125 | 7 |
| RCW 11.92.010 | 7 |
| RCW 11.92.043(5)..... | 2, 6, 11 |
| RCW 11.92.160 | 20 |
| RCW 11.92.190 | 2, 6, 9, 10, 11 |
| RCW 26.44.020(14)..... | 1 |
| RCW 70.127 | 2 |
| RCW 71.05 | 6, 9, 10 |
| RCW 71.05.150 | 2, 10, 11 |
| RCW 71A.10.020..... | 2 |
| RCW 72.23 | 6, 9, 10 |
| RCW 74.09.180 | 19 |
| RCW 74.34 | <i>passim</i> |

| | |
|---|--------|
| RCW 74.34.005(5)..... | 16 |
| RCW 74.34.010 | 15 |
| RCW 74.34.020 | 1 |
| RCW 74.34.020(3)..... | 16, 17 |
| RCW 74.34.020(14)..... | 16 |
| RCW 74.34.020(16)..... | 2 |
| RCW 74.34.063(1)..... | 16, 18 |
| RCW 74.34.100(4)..... | 17 |
| RCW 74.34.110 | 17, 18 |
| RCW 74.34.130 | 17 |
| RCW 74.34.150 | 16, 17 |
| RCW 74.34.160 | 17 |
| Massachusetts Uniform Probate Code §5-309(g) (2008) | 3, 12 |

Other Authorities

| | |
|--|----|
| CPG Standard of Practice §401 | 14 |
| GR 23(2)(viii). | 20 |
| H.R. Rep. No. 277, 97 th Cong., 1 st Sess. (1981)..... | 15 |
| Restatement (Third) of Agency, §809 (2006)..... | 7 |
| Jill Skabronski, <i>Elder Abuse: Washington's Response to a Growing Epidemic</i> , 31 Gonzaga L. Rev., 627 (1995)..... | 15 |
| Vulnerable Adult Initiative 2008 Final Report | 11 |

I. INTRODUCTION

Amicus Washington Association of Professional Guardians (WAPG) is a proponent of vigorous enforcement of this State's laws and public policy favoring the protection of vulnerable adults. For that reason, WAPG does not agree with Respondent Resa Raven that the burden of proof under the Vulnerable Adult Protection Act, RCW 74.34, is clear, cogent and convincing evidence when the statute is applied to the conduct of professional guardians.¹ Nor does WAPG endorse Ms. Raven's argument that a finding of neglect under RCW 74.34.020 requires the proof of actual harm to the vulnerable adult.² However, WAPG strongly disagrees with several conclusions made by DSHS in its final agency decision ("Review Decision"), which are contrary to law, and, if upheld by this Court, would in the opinion of WAPG impede not enhance the protection of vulnerable adults who are subject to guardianships.

¹ See Brief of Respondent at 46-47.

² See Respondent's Brief at 23-24, 33-34; Respondent's Reply Brief at 1-3. In child neglect cases, actual harm is not a prerequisite for a finding of "negligent treatment or maltreatment," which is defined in pertinent part as "a failure to act, or the cumulative effects of a pattern of conduct, behavior, or inaction, that evidences a serious disregard of consequences of such magnitude as to constitute a clear and present danger to a child's health, welfare, or safety, including but not limited to conduct prohibited under RCW 9A.42.100." RCW 26.44.020(14) See, e.g., In re Dependency of Schermer, 161 Wn.2d 927, 951, 169 P.3d 452 (2007) (citing In re Welfare of Frederiksen, 25 Wn. App. 726, 733, 610 P.2d 371 (1979)) (holding DSHS need not wait until a child suffers actual harm, but may instead act when there is a discrete danger of harm). WAPG also takes no position on whether the final administrative decision by the Department of Social and Health Services is supported by substantial evidence.

First, Washington law does not allow guardians to place unwilling wards in care facilities.³ The conclusion of law reached by DSHS that the guardian could “place Ida in the necessary care facility when it became painfully apparent her medical needs could not be met in her home and then deal with whatever opposition she may have expressed at that time”⁴ is not a lawful solution to the dilemma that guardians, families, caregivers, health care providers, social workers, and APS staff confront when a vulnerable adult⁵ like Ida rejects necessary care. The Review Decision disregards Washington’s informed consent law, RCW 7.70.065, Washington’s guardianship laws, RCW 11.92.190 and RCW 11.92.043(5), and Washington’s involuntary treatment law, RCW 71.05.150.

If Ida’s tragic death is not an acceptable outcome, then the solution must be for stakeholders such as DSHS, WAPG, and disability rights groups to work together to broaden existing laws so that vulnerable adults like Ida can be detained for critical care, while at the same time

³ This brief defines “care facilities” to be any out-of-home residential treatment facility, including but not limited to skilled nursing facilities, more commonly referred to as nursing homes.

⁴ Conclusion of Law (CL) 44, Administrative Record (AR) 161-162.

⁵ Vulnerable adult is defined by RCW 74.34.020(16) to mean a person: “(a) Sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself; or (b) Found incapacitated under chapter 11.88 RCW; or (c) Who has a developmental disability as defined under RCW 71A.10.020; or (d) Admitted to any facility; or (e) Receiving services from home health, hospice, or home care agencies licensed or required to be licensed under chapter 70.127 RCW; or (f) Receiving services from an individual provider.”

recognizing and preserving each individual's rights to self-determination and due process. At least one other state, Massachusetts, has enacted legislation authorizing guardians to admit incapacitated persons to "nursing facilities" "upon a specific finding by the court that such admission is in the incapacitated person's best interest." *See* Massachusetts Uniform Probate Code §5-309(g) (Appendix A-17).⁶

Second, Washington law and general fiduciary principles do not make guardians responsible for ensuring that the needs of their wards are met, as the Review Decision concluded. *See* CL 56, AR 168. As fiduciaries, guardians are held to the highest standards of good faith and due diligence. Guardians must take all lawful and reasonably available measures to obtain necessary care for their wards. But the law does not hold guardians strictly liable for every outcome. The standard of care that DSHS proposes – ensuring that all needs are met – is not reasonable, fair or supported by legal authority.

Third, DSHS cannot condition the performance of its duties under the Vulnerable Adult Protection Act, RCW 74.34, on the conduct of guardians. The Act requires DSHS to take action to protect vulnerable adults. Ida's situation was called to the attention of DSHS in June 2006 when the guardian made an Adult Protective Services (APS) report against

⁶ Excerpts from the Massachusetts Uniform Probate Code are provided in the appendix at A-1 to A- 19.

Ida's husband for refusing to consistently administer Ida's medications.⁷ AR 1588. In June 2006, APS determined it could not substantiate the report or take any action. AR 858-9. The Review Decision concluded that the guardian should have filed a court petition that would have "forced" DSHS to take action and that, because of the guardian's conduct in this case, DSHS may refuse to provide care to vulnerable adults in future cases involving Ms. Raven. *See* CL 55, 56, AR 167-8. These positions are contrary to law. The Department's duties under RCW 74.34 are independent of the guardian's. It would undercut the important public policy of protecting vulnerable adults for this Court to affirm the final agency decision that posits all responsibility on the guardian and ignores the Department's duty to act.

II. STATEMENT OF ISSUES

A. Can a guardian lawfully place an unwilling ward in a care facility for necessary treatment? CL 43, 161; CL 44, AR 161-2.

B. Can a guardian be held responsible for guaranteeing that the care needs of a vulnerable adult are met, regardless of legal and practical limitations on the guardian's ability to secure necessary care? CL 46, AR 162; CL 56, AR 168.

⁷ Inadequate medication management was one of the critical deficiencies the Review Decision cited in finding Ms. Raven committed neglect. *See* CL 56, AR 168.

C. Can a guardian be held responsible for the Department's failure to take action to protect a vulnerable adult because the guardian after making a referral to APS did not file a court petition to force DSHS to take some action? CL 55, AR 167.

D. Can DSHS refuse to provide protective services to a vulnerable adult based on prior dealings with the vulnerable adult's guardian? CL 56, AR 168.

III. STATEMENT OF THE CASE

For the purpose of this brief, WAPG adopts Findings of Fact 1 through 111 as set forth in the Review Decision, except for the description of Ida as "independent" in Finding of Fact 14, AR 103. *See* AR 97 - 142.

IV. ARGUMENT

A. **Guardianship And Informed Consent Statutes Should Be Interpreted De Novo.**

DSHS does not allege it administers or has "special expertise" relating to the guardianship or informed consent statutes. Therefore, this Court should review legal decisions relating to RCW 11.92.190 and RCW 7.70.065 *de novo*. *See Ames v. Washington State Health Dep't. Med. Quality Assurance Comm'n*, 166 Wn.2d 255, 260-1, 208 P.3d 549 (2009).

B. **Vulnerable Adults Subject To Guardianship Cannot Be Detained Involuntarily For Necessary Care Without Complying With Civil Commitment Laws.**

The Review Decision held:

“No residential treatment facility which provides nursing or other care may detain a person within such facility against their will. 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 [quoting RCW 11.92.190].”

The provision is found under the “Guardianship – powers and duties of guardian or limited guardian” section of the statute and the Appellant appropriately considered its affect on her duties as Ida’s guardian. However, the provision is directed at the residential treatment facility and what such a facility could or could not do in retaining an incapacitated person. For this reason, and considering the question of what Ida would have consented to under her quickly deteriorating medical condition especially in the latter part of 2006, the more appropriate action would have been to place Ida in the necessary care facility when it became painfully apparent her medical needs could not be met in her home and then deal with whatever opposition she may have expressed at that time.

CL 44, AR 161-162 (Emphasis supplied). This conclusion disregards Washington statutes, case law, and due process.

1. The guardian did not have authority to place Ida in a care facility.

The guardian would have been in breach of her statutory and court-ordered authority to consent to the placement of Ida in a care facility. In consenting to medical care for an incapacitated person, the guardian must comply with RCW 7.70.065. See RCW 11.92.043(5).⁸ The order

⁸ RCW 11.92.043(5) states it shall be the duty of the guardian of the person to:

appointing Ms. Raven limited guardian over Ida's person also required that medical decisions be made "consistent with RCW 7.70.067 [sic]."⁹ 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 clearly established Ida's "historically consistent refusal to be ... taken out of her home for medical treatment purposes." CL 28, AR 153. The guardian determined that Ida would not have consented to nursing home placement when competent, and the Review Decision found that the guardian's determination was made in good faith. FF 32, AR 108; FF 43, AR 112.

A guardian may not exceed the scope of its statutory or court-ordered authority. A fiduciary has a duty to act only within the scope of his or her authority. RESTATEMENT 3D OF AGENCY, § 8.09. Guardians are "at all times under the general direction and control of the court making the appointment." RCW 11.92.010. The superior court that appoints a guardian retains jurisdiction and broad authority to supervise the guardian

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

⁹ 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.

until the guardianship is terminated. 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). Therefore, had the guardian done what the Review Decision concludes she was required to do – place Ida in a care facility and deal with her objections later – the guardian would have been in violation of her fiduciary duties.

2. The superior court overseeing the guardianship did not have the authority to detain Ida for necessary care.

Since 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. However, once the court becomes involved in ordering a placement, state action is involved and due process must be satisfied. *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). Even short non-penal detention by judicial process implicates constitutionally-protected liberty interests. *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.) Therefore, at a minimum, Ida was entitled to notice and an opportunity to be heard on the issue of whether

the court could remove her from her home for treatment. *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.)

Just as the guardian could not lawfully admit Ida to a care facility without court authority, the superior court overseeing Ida’s 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.” The Review Decision’s attempt to neutralize RCW 11.92.190 by observing it regulates residential treatment facilities ignores the plain meaning that limits the authority of superior courts to authorize involuntary detention. “Plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which that

provision is found, related provisions, and the statutory scheme as a whole.” Christensen v. Ellsworth, 162 Wn.2d 365, 372-373, 173 P.3d 228 (2007) (citations omitted). The provision at issue, RCW 11.92.190, appears in the chapter governing guardians’ powers and duties and prohibits the superior courts from authorizing involuntary placements unless the procedures of RCW 71.05 and RCW 72.23 are observed. RCW 11.92.190 plainly applied.

Thus, the only lawful course of action available to the guardian for securing out of home care was the involuntary treatment process. RCW 71.05.150 authorizes the detention for evaluation and treatment of individuals who “as a result of a mental disorder” present “a likelihood of serious harm” or are “gravely disabled.” The guardian tried to have Ida civilly committed for treatment in November 2006. AR 1594-5. But the Designated Mental Health Professional who assessed Ida in November 2006 concluded that Ida could not be detained under the involuntary treatment laws because she did not have a “mental disorder.” AR 871; FF 77, AR 129; AR 1595.

In summary, under Washington law, the guardian could not consent and the court could not order Ida to be detained in a care facility for care that may have saved her life. If this outcome is unacceptable, the problem needs to be addressed to the legislature.

3. New legislation would be necessary to involuntarily detain vulnerable adults in residential treatment facilities for necessary care.

This case tragically illustrates a gap in our current system for protecting vulnerable adults. Ida needed nursing home level of care, either in a long-term care facility or at home. But she was very consistent in her resistance to nursing home care, FF 43, AR 112, and made her wishes clear to the guardian, who was constrained by RCW 11.92.043 and RCW 7.70.065. Therefore, the only legal option was civil commitment, which is not designed to address the needs of the elderly.

Only through a broadening of RCW 71.05.150 or a change to RCW 11.92.190 could a person in Ida's situation be lawfully detained for care against her will. The need for statutory amendments was one of the recommendations of the Vulnerable Adult Conference organized by the State in 2008. The Final Report includes the following recommendation:

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.¹⁰ 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 dementia is not considered to be a "mental disorder" in most counties.¹¹

¹⁰ Ida had dementia in addition to mental illness and other medical problems. See FF 5, AR 98; FF 45, AR 113.

¹¹ Appendix A-43. A copy of the Vulnerable Adult Initiative 2008 Final Report is in the Appendix at A-20 to A-53.

Some states such as Massachusetts have added provisions to their guardianship laws that permit courts to authorize nursing home placement 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.” Mass. ALS 5-309(g) (2008) (Appendix A-17). 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.

The purpose of this brief is not to propose legislation, but to point out the constraints under current law that prohibit guardians from involuntarily detaining wards for treatment, even when that treatment is clearly in the best interests of wards. It will not further the goal of protecting vulnerable adults if this Court faults the guardian without recognizing the legal constraints that preclude the involuntary treatment of individuals like Ida, who notwithstanding the existence of a guardianship, have the right to oppose institutionalization. In this case, the guardian pursued the only legal option for involuntarily detaining Ida in November

2006, and was told that Ida did not satisfy the legal standard for involuntary treatment. If the State finds Ida's death unacceptable, then the problem needs to be addressed to Washington's legislature.

C. A Guardian Does Not Have A Fiduciary Duty To Guarantee That Medical Or Care Needs Are Met, But To Exercise Due Diligence In Pursuing All Reasonably And Legally Available Care Options.

The Review Decision held that the guardian had a duty to ensure that Ida's basic or critical care needs were met. It reads in pertinent part:

Deciding that Ida's wish not to be placed in a facility that could meet her medical needs had to be honored, the Appellant [Ms. Raven] had a duty to ensure that at least Ida's basic medical care needs were being met in her home.

CL 46, AR 162. *See also* CL 56, AR 168 (holding guardian's failure to ensure that critical care needs were met constituted neglect). WAPG readily agrees that guardians as fiduciaries "are held to highest degree of good faith, care, loyalty and integrity." Esmieu v. Schrag, 88 Wn.2d 490, 498, 563 P.2d 203 (1977). But there is no authority for holding guardians responsible for guaranteeing that medical care needs are met without reference to legal and practical limitations on what the guardian could reasonably be expected to accomplish.

Under the standards of practice for certified professional guardians promulgated by WAPG, guardians are required to "exercise care and diligence when making decisions on behalf of an incapacitated person."

Standard of Practice §401. This standard is in line with the Department's brief, which contends guardians have a "duty to try all *reasonably* available sources of care and services ..." DSHS Brief p. 23 (emphasis in original). WAPG agrees with this articulation of the standard of care. However, the actual conclusion of law made by the Review Decision goes beyond "due diligence" and "reasonable efforts" by imposing a strict liability standard on guardians that is contrary to law, unfair, and bad public policy. If this Court were to hold guardians responsible for ensuring that the needs of the ward shall be met, as opposed to holding that guardians must exercise due diligence in pursuing all reasonably available sources of care and services, it would encourage other responsible parties, such as APS, to abdicate their responsibilities and discourage competent and caring professionals from entering the field.

D. The Department's Duty to Protect Vulnerable Adults is not Contingent on the Guardian's Conduct.

Conclusions of Law 55 and 56 impermissibly condition the Department's duty to protect vulnerable adults on the guardian's conduct:

The Appellant [guardian] had a duty to let the court know of her need to be released from the guardianship duties based on her decision not to place Ida in a full-time care facility and her inability to procure staff to meet Ida's basic medical care needs in Ida's home as set forth in her care plans. ... Such action would have forced the court and the Department to take alternate and possibly more aggressive action in providing care for Ida rather than allowing her condition to spiral into a situation where she was lying with open wounds in her own excrement for hours at a time.

CL 55 (emphasis supplied) AR 168.

The Appellant [guardian] cannot expect the Department to partner with her in the future in the care of vulnerable adults based on her conduct as limited guardian in this case.

CL 56, AR 168-169.

1. Statutory background of the Vulnerable Adult Protection Act.

In 1981, the U.S. House of Representatives released the first of several reports on elder abuse. Jill Skabronski, *Elder Abuse: Washington's Response to a Growing Epidemic*, 31 GONZAGA L. REV., 627, 633 (1995) (citing H.R. Rep. No. 277, 97th Cong., 1st Sess. (1981)). The Select 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.

RCW 74.34.010. DSHS “is responsible for investigating allegations of abuse, neglect, abandonment, or exploitation of a vulnerable adult.”

DSHS Brief p. 43.¹² The “department and appropriate agencies must be prepared to receive reports of abandonment, abuse, financial exploitation, or neglect of vulnerable adults.” RCW 74.34.005(5). “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, neglect, or self-neglect of a vulnerable adult.” RCW 74.34.063(1). 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.” RCW 74.34.020(14).¹³ Consent of the vulnerable adult to such services can be given by the vulnerable adult or the vulnerable adult’s “legal representative.” *See* RCW 74.34.020(3).

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. *See* RCW 74.34.150

¹² WAPG agrees with DSHS that the State has a strong interest in protecting vulnerable adults. *See* DSHS Brief p. 43.

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

(2004);¹⁴ RCW 74.34.020(3). Remedies available under the Vulnerable Adult Protection Act supplement the guardianship laws and the criminal code.¹⁵ 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. RCW 74.34.130. Protection orders can be issued over the objection of vulnerable adults. *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).

2. DSHS had a duty to take action independent of the guardian’s.

The Review Decision concludes that the guardian should have filed a court petition to force DSHS to take more aggressive protective measures in Ida’s case. But the Department’s duties under the Vulnerable Adult Protection Act are not contingent on the conduct of the guardian. In the present case, a report was made to APS in June of 2006 that Ida’s

¹⁴ The Department’s authority was clarified in 2007 to authorize judicial petitions for protection with or without the vulnerable adult’s consent. Before 2007, DSHS had express authority to petition for relief with the consent of the vulnerable adult or the vulnerable adult’s legal representative. Since Ida’s guardian had been the one to make the APS referral in June, consent would not have been an issue if DSHS had substantiated the referral.

¹⁵ *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.”).

elderly and impaired husband was not consistently administering her medications. AR 1588. These medications included pain medications and anti-anxiety medications, which were necessary not only for Ida's comfort but for the safety of her caregivers.¹⁶ DSHS was required to initiate a response to the guardian's report within 24 hours. RCW 74.34.063(1). 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 DSHS did not substantiate the report of neglect and concluded it could not do anything with this case. AR 858.

Whether the outcome would have been different if DSHS had substantiated the neglect report and taken action in June is unknowable.¹⁷ What is certain, however, is that DSHS had an affirmative duty to act in this case. One of the critical inadequacies found by the Review Decision, inadequate pain management, CL 56, AR 168, was reported by the guardian to APS in June 2006, and DSHS failed to substantiate the report,

¹⁶ See FF 63, AR 123.

¹⁷ The fact that DSHS could no more ensure that Ida received necessary services than the guardian even though it had far more resources at its disposal also illustrates the fallacy and unfairness of the Review Decision's conclusions of law that hold the guardian responsible for not guaranteeing Ida's care needs were met. See CL 46, AR 162-63; CL 56, AR 168.

provide protective services, or petition the Court for a protection order.

Unlike some state programs like Medicaid,¹⁸ the Department's duties under RCW 74.34 are not contingent on there being no other responsible party. DSHS is not a protector of "last resort," but the arm of the State chiefly responsible for protecting vulnerable adults. *See* DSHS Brief p. 43. As Ida's case illustrates, the potential consequences when a vulnerable adult is being abused or neglected are far too serious for DSHS to refrain from taking action until it is "forced" to do so.

3. DSHS may not withhold care from vulnerable adults in the future based on the guardian's conduct in this case.

Conclusion of Law 56 also contains clear legal error in its statement that DSHS may refuse to "partner with her [Ms. Raven] in the future in the care of vulnerable adults based on her conduct as limited guardian in this case." AR 168-9. The Department's responsibilities under RCW 74.34 are not optional. If it receives a report of abuse, neglect, or exploitation, it is required to initiate an investigation within 24 hours. If it substantiates the report, and Ms. Raven is guardian of the vulnerable adult, it would be an abuse of discretion for DSHS to serve the vulnerable adult any differently than if some other professional were guardian. If DSHS perceives deficiencies with Ms. Raven, it may petition the guardianship

¹⁸ *See, e.g.,* RCW 74.09.180 (Medicaid eligibility presumes no other party is available to pay for care).

court for her removal under RCW 11.88.120 or RCW 11.92.160, or file a grievance under the standards of conduct promulgated pursuant to GR 23(2)(viii). Denying services to a vulnerable adult who has been the victim of abuse, neglect or exploitation is not an option.

V. CONCLUSION

WAPG respectfully requests that this Court rule in accordance with the principles of law articulated in this brief: (1) Guardians cannot under Washington law involuntarily detain wards for residential treatment. (2) Guardians do not have a fiduciary duty to guarantee care, but a duty to obtain all reasonably and legally available care. (3) DSHS has an unconditional duty to protect vulnerable adults independent of the actions of the vulnerable adult's guardian. (4) DSHS may not withhold protective services because of the conduct of a vulnerable adult's guardian.

Respectfully submitted this 12th day of August 2011.

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APPENDIX

MASSACHUSETTS UNIFORM PROBATE CODE

Chapter 521 of the Acts of 2008

G.L. 190B

**Article I
General Provisions**

**Article V
Protection of Persons Under Disability and Their Property**

Based on the Uniform Guardianship and Protective Proceedings Act
with modifications for Massachusetts Practice

Official Comments by the National Conference of
Commissioners on Uniform State Laws

Massachusetts Comments by Mark A. Leahy, Reporter
MBA/BBA Joint Committee on the Uniform Probate Code

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MASSACHUSETTS UNIFORM PROBATE CODE

ARTICLE, PART AND SECTION ANALYSIS

Article I

**GENERAL PROVISIONS, DEFINITIONS AND
PROBATE JURISDICTION OF COURT**

Part 1

SHORT TITLE, CONSTRUCTION, GENERAL PROVISIONS

Section

- 1-101. [Short Title.]
- 1-102. [Purposes; Rule of Construction.]
- 1-103. [Supplementary General Principles of Law Applicable.]
- 1-104. [Severability.]
- 1-105. [Construction Against Implied Repeal.]
- 1-106. [Effect of Fraud and Evasion.]
- 1-107. [Evidence of Death or Status.]
- 1-108. [Acts by Holder of General Power.]
- 1-109. [Standard of Proof.]

Part 2

DEFINITIONS

- 1-201. [General Definitions.]

Part 3

SCOPE, JURISDICTION AND COURTS

- 1-301. [Territorial Application.]
- 1-302. [Subject Matter Jurisdiction.]
- 1-303. [Venue; Multiple Proceedings; Transfer.]
- 1-304. [Reserved.]
- 1-305. [Reserved.]
- 1-306. [Reserved.]
- 1-307. [Magistrate; Powers.]
- 1-308. [Reserved.]
- 1-309. [Reserved.]
- 1-310. [Oath or Affirmation on Filed Documents.]

Part 4

**NOTICE, PARTIES AND REPRESENTATION IN ESTATE
LITIGATION AND OTHER MATTERS**

- 1-401. [Notice; Method and Time of Giving; Objections; Uncontested Matters.]
- 1-402. [Notice; Waiver.]
- 1-403. [Pleadings; When Parties Bound by Others; Notice.]
- 1-404. [Guardian ad Litem and Next Friend.]

ARTICLE V

PROTECTION OF PERSONS UNDER DISABILITY AND THEIR PROPERTY

PART 1

GENERAL PROVISIONS AND DEFINITIONS

- 5-101. [Definitions and Inclusions.]
- 5-102. [Facility of Payment or Delivery.]
- 5-103. [Delegation of Powers by Parent or Guardian.]
- 5-104. [Reserved.]
- 5-105. [Venue.]
- 5-106. [Appointment of Counsel; Guardian ad Litem.]
- 5-107. [Protection of Minors]

PART 2

GUARDIANS OF MINORS

- 5-201. [Appointment and Status of Guardian of Minor.]
- 5-202. [Parental or Guardian Appointment of Guardian for Minor.]
- 5-203. [Objection by Minor Fourteen or Older to Parental Appointment.]
- 5-204. [Court Appointment of Guardian of Minor; Conditions for Appointment;
Temporary Guardian.]
- 5-205. [Reserved.]
- 5-206. [Procedure for Court Appointment of Guardian of Minor.]
- 5-207. [Court Appointment of Guardian of Minor; Qualifications; Priority of Minor's
Nominee.]
- 5-208. [Bond; Consent to Service by Acceptance of Appointment; Notice.]
- 5-209. [Powers, Duties, Rights and Immunities of Guardian of Minor; Limitations.]
- 5-210. [Termination of Appointment of Guardian; General.]
- 5-211. [Reserved.]
- 5-212. [Resignation, Removal, and Other Post-appointment Proceedings.]

PART 3

GUARDIANS OF INCAPACITATED PERSONS

- 5-301. [Nomination of Guardian for Incapacitated Person by Will or Other Writing.]

- 5-302. [Reserved.]
- 5-303. [Procedure for Court Appointment of a Guardian of an Incapacitated Person.]
- 5-304. [Notice in Guardianship or Conservatorship Proceeding.]
- 5-305. [Who May Be Guardian; Priorities.]
- 5-306. [Findings; Order of Appointment.]
- 5-306A. [Substituted Judgment.]
- 5-307. [Bond; Acceptance of Appointment; Consent to Jurisdiction.]
- 5-308. [Emergency Orders; Temporary Guardians.]
- 5-309. [Powers, Duties, Rights and Immunities of Guardians, Limitations.]
- 5-310. [Termination of Guardianship for Incapacitated Person.]
- 5-311. [Removal or Resignation of Guardian; Termination of Incapacity.]
- 5-312. [Reserved.]
- 5-313. [Religious Freedom of Incapacitated Person.]

PART 4

MANAGEMENT OF PROPERTY OF PERSONS UNDER DISABILITY AND MINORS

- 5-401. [Management of Estate.]
- 5-402. [Protective Proceedings; Jurisdiction of Business Affairs of Protected Persons.]
- 5-403. [Reserved.]
- 5-404. [Original Petition for Appointment or Protective Order.]
- 5-405. [Notice.]
- 5-406. [Reserved.]
- 5-407. [Findings; Order of Appointment; Permissible Court Orders.]
- 5-408. [Protective Arrangements and Single Transactions Authorized.]
- 5-409. [Who May Be Appointed Conservator; Priorities.]
- 5-410. [Bond.]
- 5-411. [Terms and Requirements of Bonds.]
- 5-412. [Acceptance of Appointment; Consent to Jurisdiction.]
- 5-412A. [Emergency Orders; Temporary Conservators.]
- 5-413. [Compensation and Expenses.]
- 5-414. [Reserved.]
- 5-415. [Petitions for Orders Subsequent to Appointment.]
- 5-416. [General Duty of Conservator; Plan.]
- 5-417. [Inventory and Records.]
- 5-418. [Accounts.]
- 5-419. [Conservators; Title By Appointment.]
- 5-420. [Recording of Conservator's Letters.]
- 5-421. [Sale, Encumbrance, or Transaction Involving Conflict of Interest Voidable; Exceptions.]
- 5-422. [Persons Dealing With Conservators; Protection.]
- 5-423. [Powers of Conservator in Administration.]
- 5-423A. [Delegation.]
- 5-424. [Distributive Duties and Powers of Conservator.]
- 5-425. [Enlargement or Limitation of Powers of Conservator.]
- 5-426. [Preservation of Estate Plan; Right to Examine.]
- 5-427. [Claims Against Protected Person.]
- 5-428. [Personal Liability of Conservator.]
- 5-429. [Removal or Resignation of Conservator; Termination of Disability;

- Termination of Proceedings.]
- 5-430. [Payment of Debt and Delivery of Property to Foreign Conservator without Local Proceedings.]
- 5-431. [Foreign Conservator; Proof of Authority; Bond; Powers.]

PART 5

DURABLE POWER OF ATTORNEY

- 5-501. [Definition.]
- 5-502. [Durable Power of Attorney Not Affected By Lapse of Time, Disability or Incapacity.]
- 5-503. [Relation of Attorney in Fact to Court-appointed Fiduciary.]
- 5-504. [Power of Attorney Not Revoked Until Notice.]
- 5-505. [Proof of Continuance of Durable and Other Powers of Attorney by Affidavit.]
- 5-506. [Enforcement.]
- 5-507. [Protection; Third Parties.]

PART 3

GUARDIANS OF INCAPACITATED PERSONS

Section 5-301. [Nomination of Guardian for Incapacitated Person by Will or Other Writing.]

(a) A parent, by will or other writing signed by the parent and attested by at least 2 witnesses, may nominate a guardian for an unmarried adult child who the parent believes is an incapacitated person, may revoke or amend the nomination, and may specify any desired limitations on the powers to be granted to the guardian.

(b) An individual by will or other writing signed by the individual and attested by at least 2 witnesses, may nominate a guardian for his or her spouse who the individual believes is an incapacitated person, may revoke or amend the nomination, and may specify any desired limitations on the powers to be granted to the guardian.

MASSACHUSETTS COMMENT

The UPC self-executing parental or spousal appointment of a guardian is not adopted. Instead, the section provides for appointment by the Court after nomination by a parent or spouse and observance of customary procedure. See § 5-303. Nevertheless, this version sets forth a clearer and simpler method for parental nomination than G.L. c. 201, §§ 2A to 2H, without taxing scarce court resources and extends the concept to incapacitated persons of any age, not just minors. This section adopts the language of Uniform Guardianship and Protective Proceedings Act, March 1997 Draft with the additional requirement of 2 attesting witnesses for a non-testamentary appointment of guardian.

Section 5-302. [Reserved.]

Section 5-303. [Procedure for Court Appointment of a Guardian of an Incapacitated Person.]

(a) An incapacitated person or any person interested in the welfare of the person alleged to be incapacitated may petition for a determination of incapacity, in whole or in part, and the appointment of a guardian, limited or general.

(b) The petition must set forth the petitioner's name, residence and address, relationship to the person alleged to be incapacitated, and interest in the appointment, and, to the extent known, set forth the following with respect to the person alleged to be incapacitated and the relief requested:

(1) the name and age of the person alleged to be incapacitated, his or her residence and the date residence was established;

(2) the address of the place it is proposed that the person alleged to be incapacitated will reside if the appointment is made;

(3) a brief description of the nature of the alleged incapacity, and whether:

(A) the person is alleged to be mentally retarded;

(B) the petitioner seeks court authorization to consent to treatment for which a substituted judgment determination may be required; or

(C) the petitioner seeks court authorization to admit the person alleged to be incapacitated to a nursing facility.

(4) the name and address of the proposed guardian, his or her relationship to the person alleged to be incapacitated, the reason why he or she should be selected, and the basis of the claim, if any, for priority for appointment;

(5) the name and address of the person's:

(A) spouse; and

(B) children, or if none, parents and brothers and sisters, or, if none, heirs apparent or presumptive and the ages of any who are minors, so far as known or ascertainable with reasonable diligence by the petitioner;

(6) the name and address of the person who has care or custody of the person alleged to be incapacitated or with whom the person has resided during the 60 days (exclusive of any period of hospitalization or institutionalization) preceding the filing of the petition;

(7) the name and address of any representative payee;

(8) the name and address of any person nominated as guardian by the person alleged to be incapacitated, and the name and address of any guardian or conservator currently acting for him or her in this commonwealth or elsewhere;

(9) the name and address of any agent designated under a durable power of attorney or health care proxy of which the person alleged to be incapacitated is the principal, if known to the petitioner, and the petitioner shall attach a copy of any such power of attorney or health care proxy, if available;

(10) the reason why a guardianship is necessary, the type of guardianship requested, and if a general guardianship, the reason why limited guardianship is inappropriate, and if a limited guardianship, the powers to be granted to the limited guardian;

(11) a statement:

(A) that a medical certificate dated within 30 days of the filing of the petition or, in the case of a person alleged to be mentally retarded, a clinical team report dated within 180 days of the filing of the petition, is in the possession of the court or accompanies the petition; or

(B) of the nature of any circumstance which makes it impossible to obtain a medical certificate or clinical team report which shall be supported by affidavit or affidavits meeting the requirement set forth in Massachusetts Rule of Civil Procedure 4.1(h), in which case the court may waive or postpone the requirement of filing of a medical certificate or clinical team

report; and

(12) a general statement of the property of the person alleged to be incapacitated with an estimate of its value, including any insurance or pension, and the source and amount of any other anticipated income or receipts.

(c) Unless otherwise directed by the court, a medical certificate filed under this Article shall be signed by a physician or licensed psychologist and shall contain:

(1) a description of the nature, type, and extent of the person's specific cognitive and functional limitations;

(2) an evaluation of the person's mental and physical condition and, if appropriate, educational potential, adaptive behavior, and social skills;

(3) a prognosis for improvement and a recommendation as to the appropriate treatment or habilitation plan; and

(4) the date of any examination upon which the report is based.

(d) A person alleged to be mentally retarded must be examined by a clinical team consisting of a physician, a licensed psychologist and a social worker, each of whom is experienced in the evaluation of mentally retarded persons, who shall report their conclusions to the court.

(e) Reasonable expenses incurred in any examination conducted pursuant to this section shall be paid by the petitioner, the estate of the person alleged to be incapacitated, or by the commonwealth as the court may determine.

COMMENT

The procedure described in this section involves two designations or appointments of persons as participants in a court-appointed guardianship proceeding based on incapacity. First, the Court may appoint counsel who may represent the individual in all cases in which he or she lacks adequate counsel of choice. In context, the court probably should determine not only that private counsel is in the case, but that such counsel has been engaged by the individual acting without undue pressure from others having some possible personal interest in the proceeding. Also, the court may designate a guardian ad litem to function as described.

Mandatory participation by a physician or licensed psychologist is not mentioned in connection with guardianship proceedings based on minority. See § 5-206. These officials are mentioned in § 5-404 covering court proceedings seeking what has sometimes been called a "guardian of the estate" and is referred to in this Article as a conservator.

Underlying the guardian ad litem, counsel and physician provisions in this section is the belief that an individual's liberty to select an abode, to receive or to refuse medical, psychiatric, vocational, or other therapy or attention should not be displaced by appointment of a guardian unless the appointment is clearly necessary. In order to properly evaluate the merits of a petition seeking appointment of a guardian, the court should have access to information regarding the individual other than as provided by the petitioner and associated counsel. The precautionary procedures tend to reduce the risk that relatives of the individual may use guardianship procedures to relieve themselves of burdensome but bearable responsibilities for care, or to prevent the person from dissipating assets they would like to inherit, or for other reasons that are not in the best interest of the individual. Also, they are designed to increase the perceptions of the person available to the court and lessen the risk that honestly held but overly-narrow judgments regarding tolerable limits of eccentricity may cause the loss of an individual's liberty.

The mandatory features of a guardianship proceeding make the procedure somewhat more complex than a protective proceeding under § 5-401 et seq. seeking the appointment of a conservator. The differences may tend to discourage use of guardianships and so reduce the instances in which persons may be declared to be without legal capacity. Loss of control over one's property is serious, to be sure, but there are reasons why it may be viewed as less serious than suffering a judgment that one is legally incapacitated and must be placed under the care of a guardian. First, one's property can and should be made available for support of legal dependents. Also, court-directed management of one's property does not impede the personal liberty of the protected person nor prevent the acquisition and enjoyment of assets that may be acquired thereafter. Finally, the interposition of another's control of one's personal freedom is rarely necessary or justified in noncriminal settings. Alternative methods of protecting persons with little ability to care for themselves should be encouraged.

MASSACHUSETTS COMMENT

It should be noted that if circumstances require proceedings for both guardianship and conservatorship, two petitions should be filed, however, they may be consolidated for hearing. See § 1-302(d). The expanded level of detail required in the petition will aid the Court in determining if the appointment of counsel or a guardian ad litem is warranted.

Treatment referred to in § 5-303(b)(3)(B) may include treatment with antipsychotic medication, sterilization, abortion, electroconvulsive therapy, psychosurgery and withdrawal of artificial maintenance of nutrition and hydration. This disclosure will alert the Court to the need of any Rogers type proceedings and may cause the Court to enter limitations on the guardian's letters.

Although § 5-303(b)(11) requires in most cases the filing of a medical certificate or clinical team report with the petition, § 5-306(b) also requires that a medical certificate show an exam not more than 30 days prior to hearing. Thus, it is possible that a new medical certificate might have to be procured prior to hearing. This additional requirement does not apply to clinical team reports.

Subsection (b)(9) has been altered to require disclosure of health care proxies and durable powers of attorney "if known to the petitioner." This should not be understood to lessen the obligation of the petitioner and counsel to inquire as to the existence of such documents, especially in light of priorities of appointment under § 5-305 and priority of authority under § 5-309(e).

Subsection (e) makes applicable to all guardianships a provision which was apropos only to guardianship of the mentally retarded, G.L. c. 201, § 6A (f).

Section 5-304. [Notice in Guardianship or Conservatorship Proceeding.]

(a) In a proceeding for the appointment of a guardian or conservator or for protective order, and if notice is required in a proceeding for appointment of a temporary guardian or temporary conservator, notice shall be given by the petitioner to:

- (1) the person alleged to be incapacitated or the person to be protected and his or her spouse and children, or, if none, parents, brothers and sisters, or, if none, heirs apparent or presumptive;
- (2) any person who is serving as guardian, conservator, or who has the care or custody of the person or with whom the person has resided during the 60 days (exclusive of any period of hospitalization or institutionalization) preceding the filing of the petition;
- (3) in case no other person is notified under paragraph (1), at least one of the nearest adult relatives, if any can be found;
- (4) all other persons named in the petition;

(5) if the person is alleged to be mentally retarded, to the department of mental retardation;

(6) the United States veteran's administration or its successor, if the person is entitled to any benefit, estate or income paid or payable by or through said Administration or its successor; and

(7) any other person as directed by the court.

(b) Notice of hearing on a petition for an order subsequent to appointment of a guardian or conservator must be given to the incapacitated person, person to be protected, the guardian, the conservator and any other person as ordered by the court.

(c) Notice must be served personally on the person alleged to be incapacitated or the person to be protected. In all other cases, required notices must be given as provided in section 1-401.

(d) A person alleged to be incapacitated or person to be protected may not waive notice.

COMMENT

It may be noted that personal service is not necessary for the required notice to a minor age 14 or over under § 5-206 governing proceedings seeking a court-appointed guardian for a minor. In this connection, it should be observed that the instant section, rather than § 5-206, governs if the petition seeks to establish that a minor is incapacitated for reasons other than minority and so is in need of a guardian who will continue to serve in spite of the person's attainment of majority. See § 5-210 and compare § 5-310.

MASSACHUSETTS COMMENT

In section (a)(1) heirs apparent or presumptive have been added to make this section incorporate all requirements of G.L. c. 201, § 7. This section is made applicable to conservatorship proceedings by § 5-405. Domestic partners should be afforded notice by sub-section (a)(2) the application of which has also been expanded by not counting periods of hospitalization or institutionalization in computing the period of residence.

Section 5-305. [Who May Be Guardian; Priorities.]

(a) Any qualified person may be appointed guardian of an incapacitated person.

(b) Unless lack of qualification or other good cause dictates the contrary, the court shall appoint a guardian in accordance with the incapacitated person's most recent nomination in a durable power of attorney.

(c) Except as provided in subsection (b), the following, if suitable, are entitled to consideration for appointment in the order listed:

(1) the spouse of the incapacitated person or a person nominated by will of a deceased spouse or by other writing signed by the spouse and attested by at least 2 witnesses;

(2) a parent of the incapacitated person, or a person nominated pursuant to section 5-301; and

(3) any person the court deems appropriate.

(d) With respect to persons having equal priority, the court shall select the one it deems best suited to serve. The court, acting in the best interest of the incapacitated person, may pass over a person having priority and appoint a person having a lower priority or no priority.

COMMENT

Subsection (a) limits those who may act as guardians for incapacitated persons to "qualified" persons. "Qualified" in its application to "persons" is not defined in this Article, meaning that an appointing court has considerable discretion regarding the suitability of an individual to serve as guardian for a particular ward. In exercising this discretion, the court should give careful consideration to the needs of the ward and to the experience or other qualifications of the applicant to react sensitively and positively to the ward's needs.

Subsections (b) and (c) govern priorities among persons who may seek appointment. Unless good cause or lack of qualification dictates otherwise, priority is with one nominated in an unrevoked power of attorney of the ward that remains effective though the ward has become incompetent since executing the power of attorney.

MASSACHUSETTS COMMENT

The UPC hierarchy of priorities is not adopted as it may create an impediment to appointment of one better suited but of lesser standing. See G.L. c. 201, §§ 6, 6A and 6B which contain no priorities. Section 5-503 allows one to nominate a guardian in a durable power of attorney.

Section 5-306. [Findings; Order of Appointment.]

(a) The court shall exercise the authority conferred in this part so as to encourage the development of maximum self-reliance and independence of the incapacitated person and make appointive and other orders only to the extent necessitated by the incapacitated person's limitations or other conditions warranting the procedure.

(b) Upon hearing, the court may appoint a guardian as requested if it finds that:

(1) a qualified person seeks appointment;

(2) venue is proper;

(3) the required notices have been given;

(4) any required medical certificate is dated and the examination has taken place within 30 days prior to the hearing;

(5) any required clinical team report is dated and the examinations have taken place within 180 days prior to the filing of the petition;

(6) the person for whom a guardian is sought is an incapacitated person;

(7) the appointment is necessary or desirable as a means of providing continuing care and supervision of the incapacitated person; and

(8) the person's needs cannot be met by less restrictive means, including use of appropriate technological assistance.

The court, on appropriate findings, may enter any appropriate order, or dismiss the proceedings.

(c) The court, at the time of appointment or later, on its own motion or on appropriate petition or motion of the incapacitated person or other interested person, may limit the powers of a guardian otherwise conferred by parts 1, 2, 3 and 4 of this article and thereby create a limited guardianship. Any limitation on the statutory power of a guardian of an incapacitated person must be endorsed on the guardian's letters. Following the same procedure, a limitation may be removed or modified and appropriate letters issued.

COMMENT

The purpose of subsections (a) and (c) is to remind an appointing court that a guardianship under this legislation should not confer more authority over the person of the incapacitated person than appears necessary to alleviate the problems caused by the person's incapacity. This is a statement of the general principle underlying a "limited guardianship" concept. For example, if the principal reason for the guardianship is the incapacitated person's inability to comprehend a personal medical problem, the guardian's authority could be limited to making a judgment, after evaluation of all circumstances, concerning the advisability and form of treatment and to authorize actions necessary to carry out the decision. Or, if the incapacitated person's principal problem stems from memory lapses and associated wanderings, a guardian with authority limited to making arrangements for suitable security against this risk might be indicated. Subsection (c) facilitates use by the appointing court of a trial-and-error method to achieve a tailoring of the guardian's authority to changing needs and circumstances. Section 5-106 authorizes use of any public or charitable agency that demonstrates interest and competence in evaluating the condition and needs of the incapacitated person in arriving at a decision regarding the appropriate powers of the guardian.

The section does not authorize enlargement of the powers of a guardian beyond those described in § 5-309 and related sections. Rather, limitations on a guardian's § 5-309 powers and duties may be imposed and removed.

Section 5-306A. [Substituted Judgment.]

(a) No guardian, temporary guardian or special guardian of a minor or an incapacitated person shall have the authority to consent to treatment for which substituted judgment determination may be required, provided that the Court shall authorize such treatment when it (i) specifically finds using the substituted judgment standard that the person, if not incapacitated, would consent to such treatment and (ii) specifically approves and authorizes a treatment plan and endorses said plan in its order or decree. The court shall not authorize such treatment plan except after a hearing for the purpose of which counsel shall be provided for any indigent minor or incapacitated person. Said hearing shall be held as soon as is practicable; provided, however, that if the petitioner requests a temporary order on the grounds that the welfare of the minor or person alleged to be incapacitated requires an immediate authorization of treatment, the court shall act on such request in accordance with the procedures set forth in section 5-308.

(b) The court may delegate to a guardian the authority to monitor the treatment process to ensure that a treatment plan is followed, provided a guardian is readily

available for such purpose. Approval of a treatment plan shall not be withheld, however, because a guardian is not available to serve as monitor. In such circumstances, the court shall appoint a suitable person to monitor the treatment process to ensure that the treatment plan is followed. Reasonable expense incurred in such monitoring may be paid out of the estate of such person, by the petitioner, or, subject to appropriation, by the commonwealth, as may be determined by the court.

(c) Each order authorizing a treatment plan pursuant to this section shall provide for periodic review at least annually to determine whether the incapacitated person's condition and circumstances have substantially changed such that, if competent, the incapacitated person would no longer consent to the treatment authorized therein. Each such order shall further provide for an expiration date beyond which the authority to provide treatment thereunder shall, if not extended by the court, terminate.

(d) An incapacitated person is required to attend any hearing relative to authority to consent to treatment for which a substituted judgment determination is required, unless the court finds that there exist extraordinary circumstances requiring the absence of the incapacitated person in which event the attendance of his or her counsel shall suffice; provided that the court may base its findings exclusively upon affidavits and other documentary evidence if it (1) determines after careful inquiry and upon representations of counsel, that there are no contested issues of fact and (2) includes in its findings the reason that oral testimony was not required.

(e) Any privilege established by section 135A of chapter 112 or by section 20B of chapter 233 relating to confidential communications shall not prohibit the filing of reports or affidavits, or the giving of testimony, pursuant to this part, for the purposes of obtaining treatment of a person alleged to be incapacitated; provided, however, that such person has been informed prior to making such communication that they may be used for such purpose and has waived the privilege.

MASSACHUSETTS COMMENT

The types of treatment for which a substituted judgment procedure may be required are not listed as they may vary depending on the invasiveness of the particular proposed procedure or because of advancements which reduce side effects, etc., see *In Matter of Spring*, 380 Mass. 629, 405 N.E.2d 115 (1980). Treatments for which Court authorization may be required include antipsychotic medication, sterilization, abortion, electro-convulsive therapy, psychosurgery and removal of artificial maintenance of nutrition or hydration. Subsection (b) codifies the annual review of treatment plans established by *Guardianship of Weedon*, 409 Mass. 196, 565 NE2d 432 (1991).

Authority for a guardian to commit a person to a mental health or retardation facility by the Probate Court under G.L. c. 201 is repealed. See § 5-309(f). Guardians may, however, proceed under G.L. c. 213 in the District Court.

Subsection (e) preserves the protections of G.L. c. 201, § 6A(g). See also *Comm. v. Lamb*, 365 Mass. 265 (1974).

Section 5-306B. [Authority to Consent to Treatment.] [Reserved]

MASSACHUSETTS COMMENT

This section is reserved for codification and simplification of the procedure for authorization of Rogers type treatments.

Section 5-307. [Acceptance of Appointment; Consent to Jurisdiction.]

(a) Prior to receiving letters, a guardian shall accept appointment by filing a bond conditioned upon faithful discharge of all duties of the trust according to law and containing a statement of acceptance of the duties of the office. By accepting a parental or court appointment as guardian, a guardian submits personally to the jurisdiction of the court in any proceeding relating to the guardianship that may be instituted by any interested person. The petitioner shall cause notice of any proceeding to be delivered or mailed to the guardian at the guardian's address listed in the court records and to the address then known to the petitioner.

(b) A surety shall be required on the bond of a guardian of an incapacitated person unless the court determines that it is in the best interest of the incapacitated person to waive surety or to require additional sureties. Language in a durable power of attorney or health care proxy waiving the guardian's bond shall be deemed to be a request for waiver of any necessity of sureties on a bond.

(c) The requirements and provisions of section 5-411 apply to guardians appointed under this part.

COMMENT

The "long-arm" principle behind this section is well established. It seems desirable that the court in which acceptance is filed be able to serve its process on the guardian wherever he or she has moved. The continuing interest of that court in the welfare of the minor is ample to justify this provision. The consent to service is real rather than fictional in the guardianship situation, where the guardian acts voluntarily in filing acceptance. It is probable that the form of acceptance will expressly embody the provisions of this section, although the statute does not expressly require this.

MASSACHUSETTS COMMENT

The requirement of a bond for guardians does not appear in the Uniform Probate Code because it is understood that a conservator will be appointed to manage property of a disabled person. It is added here as additional security where a guardian may be receiving periodic income entitlements, etc. for a ward or incapacitated person, which after time may accumulate and deserve protection. Unlike most other UPC states where a bond is always accompanied by a corporate surety, the tradition in Massachusetts continues to be that a guardian's sureties, corporate or personal, may be waived by the court after a request in the petition.

The Court appointment or parental appointment constitutes consent to jurisdiction. Without such acceptance no guardianship is created.

Section 5-308. [Emergency Orders; Temporary Guardians.]

(a) While a petition for appointment of a guardian is pending, if an incapacitated person has no guardian, and the court finds that following the procedures of this article will likely result in immediate and substantial harm to the health, safety or welfare of the person alleged to be incapacitated occurring prior to the return date, and no other person appears to have authority to act in the circumstances, on appropriate motion the court may appoint a temporary guardian who may exercise only those powers granted in the order. A motion for appointment of a temporary guardian shall state the nature of the circumstances requiring appointment, the particular harm sought to be avoided, the actions which will be necessary by the temporary guardian to avoid the occurrence of

the harm and the name and address of any agent designated under a health care proxy or durable power of attorney of which the person alleged to be incapacitated is the principal, and the petitioner shall attach a copy of any such health care proxy or durable power of attorney, if available. Such motion shall be accompanied by an affidavit containing facts supporting the statements and requests in the motion. The appointment may be for a period of up to 90 days except that upon a finding of extraordinary circumstances set forth in its order, the court may order an appointment for a longer period to a date certain. The court may for good cause shown extend the appointment for additional 90 day periods.

(b) If an appointed guardian is not effectively performing duties and the court further finds that the welfare of the incapacitated person requires immediate action, it may appoint, with or without notice, a special guardian for the incapacitated person having the powers of a general guardian, except as limited in the letters of appointment. The authority of any guardian previously appointed by the court is suspended as long as a special guardian has authority. The appointment may be for a period of up to 90 days except that upon a finding of extraordinary circumstances set forth in its order the court may order an appointment for a longer period to a date certain. The court may for good cause shown extend the appointment for additional 90 day periods.

(c) The petitioner must give written notice 7 days prior to any hearing for the appointment of a temporary guardian in hand to the person alleged to be incapacitated and by delivery or by mail to all persons named in the petition for appointment of guardian. A certificate that such notice has been given, setting forth the names and addresses of those to whom notice has been given, shall be prima facie evidence thereof.

(d) If the court determines that an immediate emergency situation exists which requires the immediate appointment of a temporary guardian, it may shorten or waive the notice requirements in whole or in part and grant the motion, provided, however, that prior notice shall be given to the person alleged to be incapacitated as the court may order and post appointment notice of any appointment is given to the person alleged to be incapacitated and those named in the petition for appointment of guardian stating further that any such person may move to vacate the order of the court or request that the court take any other appropriate action on the matter, and on said motion to vacate. The court shall hear said motion as a de novo matter, as expeditiously as possible. A certificate stating that such notice has been given shall be filed with the court within 7 days following the appointment. Upon failure to file such certificate the court may on its own motion vacate said order.

(e) In the event that any person to whom notice is required is of parts unknown, such notice shall be delivered or mailed to that person's last known address, and the fact of such delivery or mailing shall be recited in the certificate of notice.

(f) Appointment of a temporary guardian, with or without notice, is not a final determination of a person's incapacity.

(g) The court may remove a temporary guardian at any time. A temporary guardian shall make any report the court requires. In other respects the provisions of parts 1, 2, 3 and 4 of this article concerning guardians apply to temporary guardians.

COMMENT

The language "and no other person appears to have authority to act in the circumstances" has been added to subsection (a). The added language should aid in preventing the mere institution of a guardianship proceeding from upsetting an arrangement for care under a health care proxy, or for nullifying an opportunity to use legislation like the Model Health Care Consent Act to resolve a problem involving the care of a person who is unable to care for himself or herself.

Under subsection (b), the appointing court retains authority to act on petition or on its own motion to suspend a guardian's authority by appointing a special guardian. The necessary finding, which need not follow notice to interested persons, is that the welfare of the incapacitated person requires action and the appointed guardian is not acting effectively.

MASSACHUSETTS COMMENT

Probate Rule 29B introduced following the 1973 Study of the UPC, adopted a reviewable 90 day limit on temporary guardians or conservators. Temporary guardians for minors, spendthrifts, mentally ill and mentally retarded are authorized by petition under G.L. c. 201, § 14 and the temporary guardian's powers are enumerated in c. 201, § 15. Subsection (c) is similar to § 3-306. Subsections (d) through (f) follow generally Probate Rule 29B and (g) is taken from the Uniform Guardianship and Protective Proceedings Act, § 311(c), March 1997 draft.

Section 5-309. [Powers, Duties, Rights and Immunities of Guardians; Limitations.]

(a) Except as limited pursuant to section 5-306(c), a guardian of an incapacitated person shall make decisions regarding the incapacitated person's support, care, education, health and welfare, but a guardian is not personally liable for the incapacitated person's expenses and is not liable to third persons by reason of that relationship for acts of the incapacitated person. A guardian shall exercise authority only as necessitated by the incapacitated person's mental and adaptive limitations, and, to the extent possible, shall encourage the incapacitated person to participate in decisions, to act on his or her own behalf, and to develop or regain the capacity to manage personal affairs. A guardian, to the extent known, shall consider the expressed desires and personal values of the incapacitated person when making decisions, and shall otherwise act in the incapacitated person's best interest and exercise reasonable care, diligence, and prudence. A guardian shall immediately notify the court if the incapacitated person's condition has changed so that he or she is capable of exercising rights previously limited. In addition, a guardian has the duties, powers and responsibilities of a guardian of a minor as described in section 5-209(b), (c), (d) and (e).

(b) A guardian shall report in writing the condition of the incapacitated person and account for funds and other assets subject to the guardian's possession or control within 60 days following appointment, at least annually thereafter, and when otherwise ordered by the court. A report shall briefly state:

- (1) the current mental, physical and social condition of the incapacitated person;
- (2) the living arrangements for all addresses of the incapacitated person during the reporting period;
- (3) the medical, educational, vocational and other services provided to the incapacitated person and the guardian's opinion as to the adequacy of the incapacitated person's care;

(4) a summary of the guardian's visits with and activities on the incapacitated person's behalf and the extent to which the incapacitated person participated in decision-making;

(5) if the incapacitated person is institutionalized, whether the guardian considers the current treatment or habilitation plan to be in the incapacitated person's best interests;

(6) plans regarding future care; and

(7) a recommendation as to the need for continued guardianship and any recommended changes in the scope of the guardianship.

(c) The court shall establish a system for monitoring guardianships, including the filing and review of annual reports.

(d) The court may appoint a guardian ad litem pursuant to section 1-404 to review a report, to interview the incapacitated person or guardian, and to make such other investigation as the court may direct.

(e) A guardian, without authorization of the court, may not revoke a health care proxy of which the incapacitated person is the principal. If a health care proxy is in effect, absent an order of the court to the contrary, a health-care decision of the agent takes precedence over that of a guardian.

(f) No guardian shall be given the authority under this chapter to admit or commit an incapacitated person to a mental health facility or a mental retardation facility as defined in the regulations of the department of mental health.

(g) No guardian shall have the authority 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.

COMMENT

The reference to § 5-306 coordinates this section with the limited guardian concept. All guardians, however appointed, have the powers and duties of a guardian of a minor as provided in § 5-209, subsections (b), (c), (d), and (e). As discussed in the Comment to § 5-209, these powers do not enable a guardian to deal with property matters of the incapacitated person. A protective order under § 5-401 et seq. is indicated when property management is needed. Though the legislation does not contemplate that the statutory authority of a guardian may be increased by court order, the court, at the time of appointment or on motion or petition thereafter, may limit the power of a guardian in any respect. The provisions of § 5-304(b) requiring advance notice of a proceeding regarding a guardian's power instituted subsequent to appointment would apply to a post-appointment proceeding to impose or remove restrictions on a guardian's authority.

If the incapacitated person had made a health care proxy, the guardian can not revoke it without court order. Further, the agent's decision takes priority over those of the guardian unless the proxy has been revoked by court order. A mental health-care institution includes those institutions or treatment facilities defined in the Uniform Health-Care Decisions Act as adopted by the state. Commitment to a mental health-care institution can not occur without following the state's procedures for involuntary civil commitment. Although a guardian can not commit a ward to a mental health-care institution, the guardian may initiate proceedings under the state's applicable health care act for voluntary or involuntary, commitment, outpatient treatment, or involuntary medication for mental health treatment.

MASSACHUSETTS COMMENT

This section is comparable to G.L. c. 201, §§ 4 and 12. G.L. c. 201, §§ 37-38 address preservation of assets which under the UPC is left to a conservator, c.f. § 5-407. This section has been extensively revised to include the recommendations of the ABA Senior Lawyers Division, Task Force on Guardianship Reform (Second Working Draft, January 27, 1994) and the Uniform Guardianship and Protective Proceedings Act, March 1997 draft and includes a more complete reporting requirement than that of guardians of minors under §5-209(b)(5).

Health care proxies, for purposes of this Code, are defined in Part 1 to include, not only a proxy under G.L. c. 201D, but also pre-statutory powers of attorney for health care and similar instruments executed under the laws of other jurisdictions.

Subsection (f) is added to make it clear that committal proceedings may no longer be brought in Probate Court, but must be undertaken in District Court under G.L. c. 123, even if Rogers orders are made in the Probate and Family Court.

The requirement of specific authority for admission to a nursing facility is an important new protection for the elderly.

Section 5-310. [Termination of Guardianship for Incapacitated Person.]

The authority and responsibility of a guardian of an incapacitated person terminates upon the death of the guardian or incapacitated person, the determination of incapacity of the guardian, the determination that the person is no longer incapacitated, or upon removal or resignation as provided in section 5-311. Testamentary appointment under an informally probated will terminates if the will is later denied probate in a formal proceeding. Termination does not affect a guardian's liability for prior acts or the obligation to report or account for funds and assets of the incapacitated person.

COMMENT

The concept that a guardian's authority may be terminated even though the guardian remains liable for prior acts or unaccounted funds is a corollary of the proposition that a guardian's authority to act for the incapacitated person should end automatically and without court order in certain circumstances. A more primitive concept to the effect that a guardian's authority derived from a court order continues until the court orders otherwise generates unnecessary and excessive use of the courts. Nonetheless, the question of whether a person's incapacity exists or continues and whether a guardian is necessary to provide continuing care and supervision of the incapacitated person is too complex to be resolved automatically save in the instances enumerated in this section. If a court determines that a person's incapacity or need for a guardian has ended, it may terminate the authority and make an appropriate, additional order regarding the guardian's liabilities for acts done or funds for which there has not been any accounting. The additional order might defer the determination regarding liabilities to a later time.

MASSACHUSETTS COMMENT

This section replaces G.L. c. 201, § 13.

Section 5-311. [Removal or Resignation of Guardian; Termination of Incapacity.]

(a) On petition of the incapacitated person or any person interested in the incapacitated person's welfare, the court, after notice and hearing, may remove a guardian if the person under guardianship is no longer incapacitated or for other good

cause. On petition of the guardian, the court, after hearing, may accept a resignation.

(b) The incapacitated person or any person interested in the welfare of the incapacitated person may petition for an order that the person is no longer incapacitated and for termination of the guardianship. A request for an order may also be made informally to the court.

(c) Upon removal, resignation, or death of the guardian, or if the guardian is determined to be incapacitated or disabled, the court may appoint a successor guardian and make any other appropriate order. Before appointing a successor guardian, or ordering that a person's incapacity has terminated, the court shall follow the same procedures to safeguard the rights of the incapacitated person that apply to a petition for appointment of a guardian.

COMMENT

The person's incapacity is a question that usually may be reviewed at any time. However, provision is made for a discretionary restriction on review. In all review proceedings, the welfare of the person is paramount.

The provisions of subsection (b) were designed to provide another protection against use of guardianship proceedings to secure a lock-up of a person who is not capable of looking out for his or her personal needs. If the safeguards imposed at the time of appointment fail to prevent an unnecessary guardianship, subsection (b) is intended to facilitate a person's unaided or unassisted efforts to inform the court that an injustice has occurred as a result of the guardianship.

MASSACHUSETTS COMMENT

Provisions for removal previously found in G.L. c. 201, §§ 13, 13A and 33 are consolidated and restated in this section. The standard for removal in this section is the best interests of the incapacitated person which is new.

Section 5-312. [Reserved.]

MASSACHUSETTS COMMENT

All sections concerning venue in guardianship or protective proceedings are consolidated in § 5-105.

Section 5-313. [Religious Freedom of Incapacitated Person.]

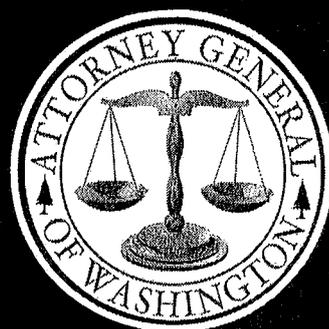
It shall be the duty of all guardians appointed under this article to protect and preserve the incapacitated person's right of freedom of religion and religious practice.

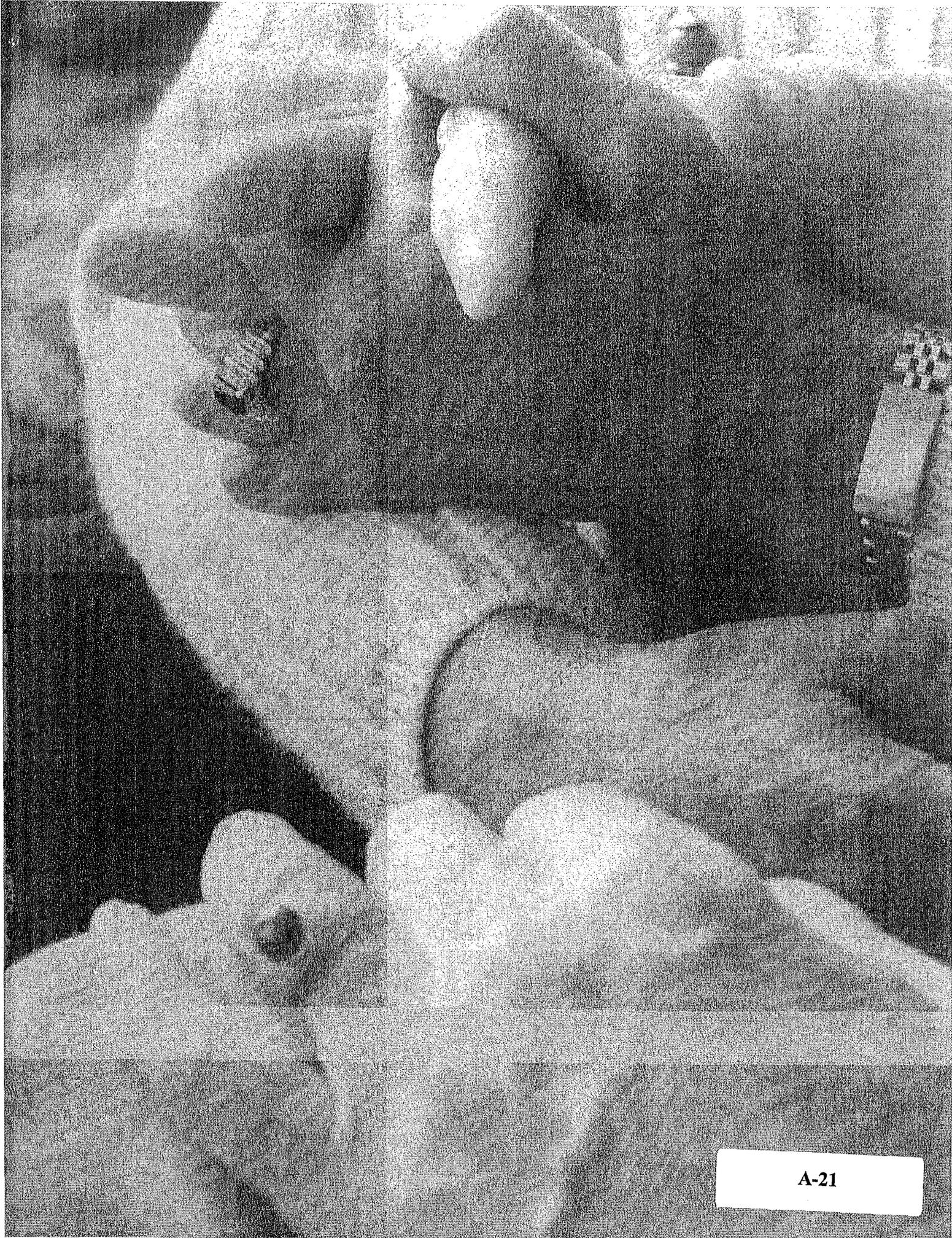
MASSACHUSETTS COMMENT

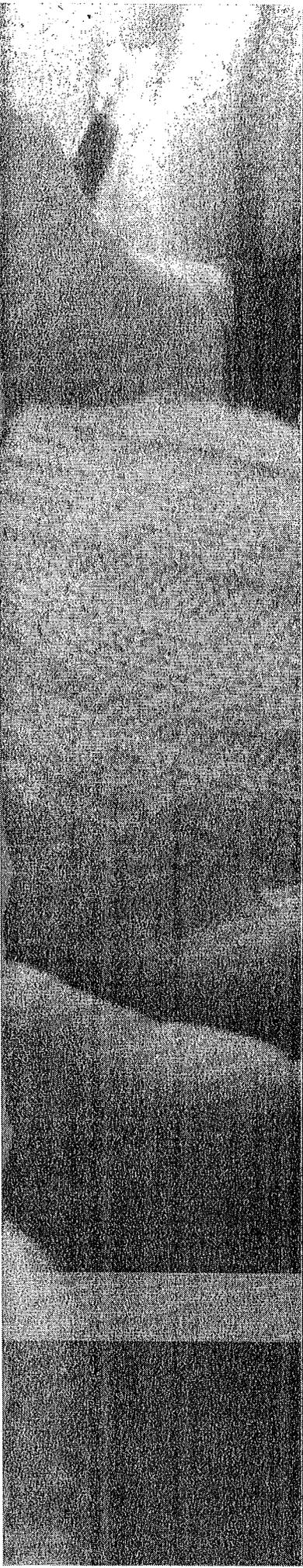
This section is added to preserve G.L. c. 201, § 51.

VULNERABLE ADULT INITIATIVE

2008 FINAL REPORT







VULNERABLE ADULT INITIATIVE

2008 FINAL REPORT

Washington State Office of Attorney General
ROB MCKENNA

A-22



TABLE OF CONTENTS

| | |
|---|----|
| INTRODUCTION | 2 |
| Message from the Attorney General | 3 |
| Vulnerable Adults: An Overview | 4 |
| VULNERABLE ADULT SUMMIT | 8 |
| Summit Overview | 9 |
| WORK GROUPS | 10 |
| Vulnerable Adult Initiative Work Groups Overview | 11 |
| Work Group Summaries | 12 |
| Professional Coordination and Communication Work Group | 13 |
| Protection Subgroup: DSHS/APS | 17 |
| Protection Subgroup: Guardianship | 19 |
| Community Awareness and Training Work Group | 21 |
| Financial Exploitation Work Group | 23 |
| Investigation and Prosecution Work Group | 25 |
| Long-Term Care Work Group | 27 |
| THE NEXT STEPS TO PROTECT VULNERABLE ADULTS | 28 |
| Legislative Recommendations | 29 |
| Statewide Coalition | 29 |



INTRODUCTION

MESSAGE FROM THE ATTORNEY GENERAL

FELLOW WASHINGTONIANS,

Emerging changes in our state are putting a growing number of our family members, friends and neighbors at risk. The physical, emotional and financial abuse and neglect of vulnerable adults, those in their senior years or those over 18 with mental or physical disabilities, is on the rise and demands our attention.

A third of our country's population — more than 77 million souls — will reach retirement in the next few years. While senior years should be filled with well-deserved family time, travel and reflection, for too many of our neighbors, this time presents a rising susceptibility to criminal victimization.

In recent years, our Consumer Protection Division and Medicaid Fraud Control Unit have seen a steady increase in the frequency with which fraud-related cases involve the exploitation and abuse of older adults.

Often isolated, sometimes struggling with poor health and frequently not knowing where to turn for help, more vulnerable adults fall prey to crimes specifically targeted against them. Unfortunately, criminals have seized upon a fact that all of us need to recognize: that these kinds of crimes are rarely reported. In fact, only one in five cases of abuse of a vulnerable adult is ever reported.

We can do better.

Fortunately concerned citizens in the public and private sectors have stepped forward to confront these life-and-death issues. On June 7, 2007, I initiated a summit to confront these very challenges. Concerned caregivers, advocates, law-enforcement officials, social workers and assorted experts from around the state met for one very productive day: The Vulnerable Adult Summit. We concluded the day with a detailed, preliminary inventory of the critical challenges facing vulnerable adults.

The next order of business was to form work groups charged with developing solutions to these challenges. This document, the result of countless hours of thoughtful consideration by some of our state's most dedicated individuals, contains highlights from our work groups' recommendations.

Thank you to the nearly 100 devoted professionals who attended our summit and dedicated the time, effort and determination required to produce the contents of this report. Your contributions have provided the roadmap to create a safer life for some of our most vulnerable citizens.

Sincerely,



Rob McKenna
Attorney General of Washington State





OVERVIEW

VULNERABLE ADULTS: AN OVERVIEW

NATIONAL AND STATE STATISTICS ON THE ABUSE OF VULNERABLE ADULTS

The statistics are startling: beginning Jan. 1, 2006, a baby boomer turns 60 at the rate of 1 per 7.5 seconds.

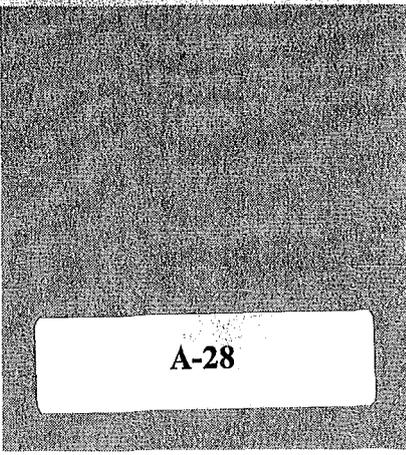
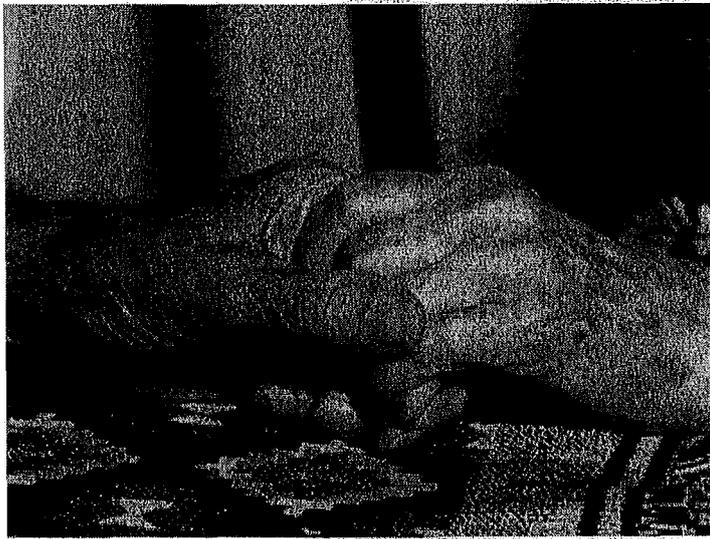
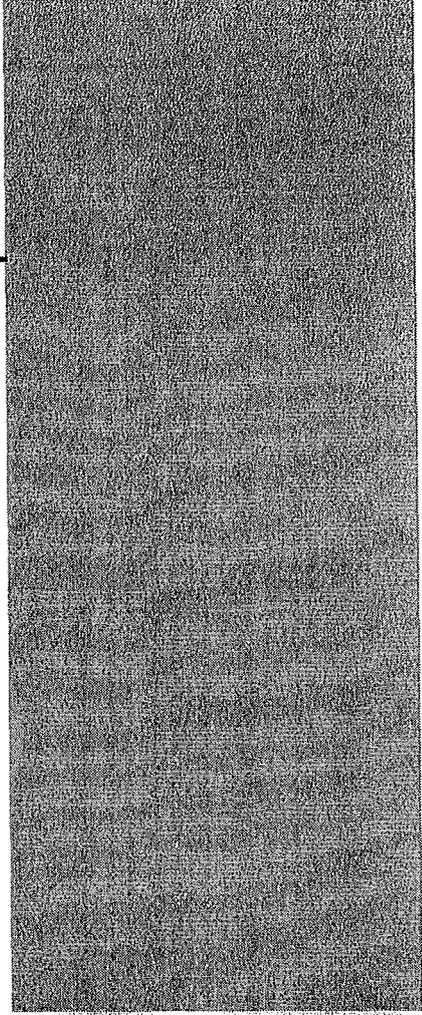
As “boomers” enter an age of increased vulnerability, they are more and more frequently becoming victims of abuse. According to the National Center on Elder Abuse, between 500,000 and 5 million seniors are abused every year in the United States. Frighteningly, these instances of abuse are somewhat unlikely to be reported. Experts suggest that only 1 in 5 — and possibly only 1 in 12 — abuse cases are ever reported. From 1986 to 1996, state and federal government data suggest that there has been a 150 percent increase in reports of elder abuse in domestic settings (*National Center on Elder Abuse National Incidence Summary, September 1998*).

Our state’s Adult Protective Services (APS) program received 13,136 reports of abuse, abandonment, neglect, self-neglect and financial exploitation in 2006 alone. In 2006, APS received more reports of allegations of financial exploitation against vulnerable adults than *any other kind of mistreatment*.

WHO ARE CONSIDERED “VULNERABLE ADULTS” IN WASHINGTON STATE?

State law defines “*vulnerable adults*” as those:

- 60 years of age or older with a functional, physical or mental inability to care for themselves; or
- 18 years of age or older who:
 - Have certain developmental disabilities;
 - Have a guardian as per chapter 11.88 RCW;
 - Live in a nursing home, boarding home (assisted living facility), adult family home or soldier’s home;



- Receive in-home services through a licensed health care agency, hospice or individual provider; and
- Self-direct their own care (criteria outlined in RCW 74.39.050).

WHY ARE THE ELDERLY TARGETED?

- Older adults typically have accumulated more wealth and assets.
- Older adults possess more physical vulnerability.
- An increased likelihood of loneliness and physical isolation presents an opening for those who wish to exploit them.

Perpetrators may be anyone, including lawyers, guardians, financial planners, or strangers.

- They often have love or affection for the perpetrator, who might be a friend, neighbor or family member.
- The frequency of cognitive or memory impairment increases an easily exploitable vulnerability.

- They often lack the skills or knowledge needed to find help.
- They present a reduced risk to the perpetrator of getting caught or prosecuted because:
 - They possess memory challenges, impacting the credibility of charges brought;
 - They may die before they are able to testify;
 - They are sometimes embarrassed to reveal their situation;
 - Victims often deny the crime;
 - They may be dependant on the abuser for assistance.

WHAT IS CONSIDERED AS MISTREATMENT OF A VULNERABLE ADULT?

- Physical, sexual or emotional abuse.
- Abandonment.
- Neglect.
- Financial exploitation.

WHO ARE THE PERPETRATORS?

- 52 percent are men and 48 percent are women (*National Elder Abuse Incidence Study 1999*).
- 85 – 90 percent are family members (*National Elder Abuse Incidence Study 1999*).
- Individuals who are chronically unemployed or underemployed.
- Individuals who are financially dependent upon an elder.
- Those suffering from drugs, alcohol or mental health issues.
- Anyone: lawyers, guardians, financial planners or strangers.
- Any race, religion or national origin.

These statistics were on the minds of our summit participants as they gathered in Tumwater in June of 2007. The following describes the work of the Vulnerable Adult Summit and of the resulting work groups over the last year.





VULNERABLE ADULT SUMMIT

A-31

SUMMIT OVERVIEW

The Attorney General invited more than 100 professionals from around the state to participate in a Vulnerable Adult Summit on June 1, 2007, at the Tumwater Office of the Attorney General.

Including Attorney General's Office (AGO) staff and facilitators, 99 people attended. The participants included law enforcement officials, health care providers, prosecutors, legislators, social workers, bankers and advocates, to name a few. The participants were selected from throughout the state to represent communities large and small, rural, urban, eastern and western. While the problem is complex, the goal was simple: better protect our fastest-growing age demographic — the elderly and disabled adults — from abuse, neglect, criminal mistreatment and financial exploitation.

Summit participants were tasked by Attorney General McKenna and the summit co-chairs to identify the critical issues impacting vulnerable adults. By the end of the session, summit participants had established a list of nearly 90 areas of concern — issues that could be addressed by lawmakers, caregivers, advocates and the community at large. The full list may be found at <http://www.atg.wa.gov/vulnerableadults.aspx>. Many of these items are also listed in the work group summaries below, as they pertain to the final recommendations of those work groups.

At the summit's conclusion, participants were asked to identify themselves and others as possible contributors to solution-oriented

work groups. Work groups were subsequently assembled and presented their reports to Attorney General McKenna on May 9, 2008.

What follows is a detailed look at many of the urgent issues identified at the summit, and summaries of the resulting work group reports. Complete reports are available at atg.wa.gov.

Including AGO staff and facilitators, 99 people were in attendance.

SUMMIT CO-CHAIRS

Dawn Cortez - Director
Medicaid Fraud Control Unit
Attorney General's Office

Louise Ryan - Ombudsman
Long-Term Care Ombudsman's Office

Lon Melchior - Program Manager
Adult Protective Services
Department of Social and Health Services

Leesa Manion - Chief of Staff
King County Prosecuting Attorney's Office

Lynn Mounsey - Assistant Attorney General
Attorney General's Office

ADDITIONAL SUMMIT FACILITATORS

Aileen Miller - Deputy Director
Medicaid Fraud Control Unit
Attorney General's Office

Michael Bagley - Senior Investigator
Attorney General's Office

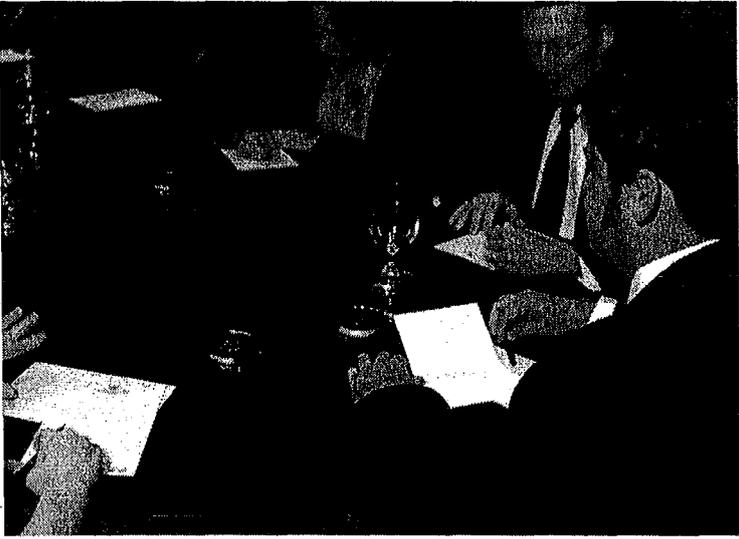
Tim Grandell - Assistant Attorney General
Attorney General's Office

Carolyn Edmonds - Deputy Ombudsman
Long-Term Care Ombudsman's Office

Timothy Leary - Deputy Prosecuting Attorney
King County Prosecuting Attorney's Office

Andrea Jammon - Assistant Attorney General
Attorney General's Office

Rebecca Sears - Former Consumer Protection Outreach and Education Manager
Attorney General's Office



WORK GROUPS

A-33

VULNERABLE ADULT INITIATIVE WORK GROUPS OVERVIEW

WORK GROUP CO-CHAIRS

Catherine Hoover

Assistant Attorney General
Social and Health Services Division

Dawn Cortez

Assistant Attorney General
Director Medicaid Fraud
Control Unit
Criminal Justice Division

Immediately following the summit in June 2007, the Attorney General formed work groups to begin the process of identifying viable solutions to the issues and barriers identified by participants. The barriers and issues fell into six basic categories. Again professionals from around the state were invited to participate in a series of meetings to distill the issues and identify solutions. The kickoff meeting was held in the Seattle Offices of the Attorney General on Sep. 25, 2007. The meeting in which the groups presented their final reports was held on May 9, 2008.





WORK GROUP SUMMARIES

A-35

WASHINGTON STATE VULNERABLE ADULT INITIATIVE'S PROFESSIONAL COORDINATION AND COMMUNICATION WORK GROUP (PCCWG)

BACKGROUND

The Professional Coordination and Communication Work Group took on the following issues identified at the June summit:

- A lack of appropriate funding and resources needed to address the needs of vulnerable adults in the state of Washington.
- Need for better education, training and oversight for all professions and agencies involved in providing care for vulnerable adults.
- Poor coordination between the civil and criminal system leads to cases that fall through the cracks.
- A burdensome and inefficient complexity caused by multiple systems and agencies involved in providing prosecution of abusers.
- The low level of reporting of legitimate cases of abuse.

RECOMMENDATIONS

- 1) Create, formalize, staff and fund a permanent statewide coalition for the prevention of vulnerable adult abuse, criminal mistreatment, neglect and financial exploitation to serve as a center for research, policy development, training, coordination and resources.**
 - a) Research and develop topic-specific best practices, advocate for funding, develop guidelines for preventing the abuse of vulnerable adults and recommend legislation and/or provide advice regarding proposed legislation.
 - b) Coordinate, train and support pilot projects that aim to improve the speed and quality of the investigation of elder abuse. Pilot projects will create and monitor teams of specialized, multi-disciplinary investigative and intervention teams called to sites of vulnerable adult complaints. Teams will provide holistic, individualized investigation, protection and intervention. Separate pilot programs will be established to respond to abuse or neglect and financial exploitation, reflecting similar programs in other states.

PARTICIPANTS

Mike Erp
*Executive Director,
Washington State Institute
of Community Oriented
Policing
Washington State
University*

Lynn Mounsey
Assistant Attorney General

Kristine Glasgow
*Aging and Long Term Care
of Eastern Washington*

Karen Nodolf, RN, MBA
*Department of Social and
Health Services*

Grace O'Connor
*Former Assistant Attorney
General*

Sheryl Reese
*DSHS/Adult Protective
Services Supervisor*

Dawn Cortez
Assistant Attorney General

Debbie Roberts
*DSHS/Division of
Developmental Disabilities
Central Office*

Shaw Seaman
*DSHS/Division of
Developmental Disabilities*

Paul R. Tosch
*Regional Long-Term Care
Ombudsman
Lewis/Mason/Thurston
Counties*

Asia Vue
*Department of Social &
Health Services*

2) Create and support regional, multi-disciplinary task forces to address abuse, neglect, criminal mistreatment and exploitation of vulnerable adults, as well as prevention strategies.

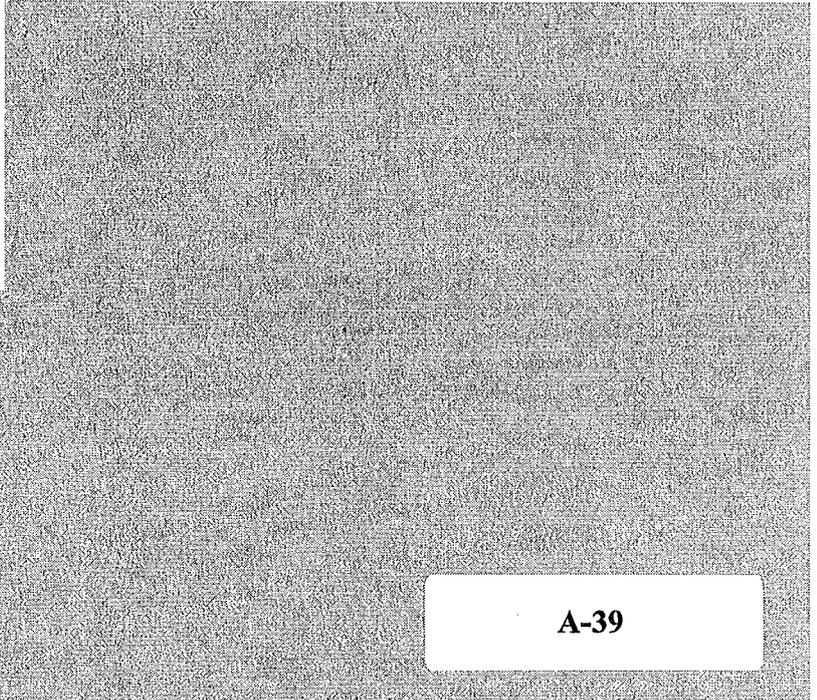
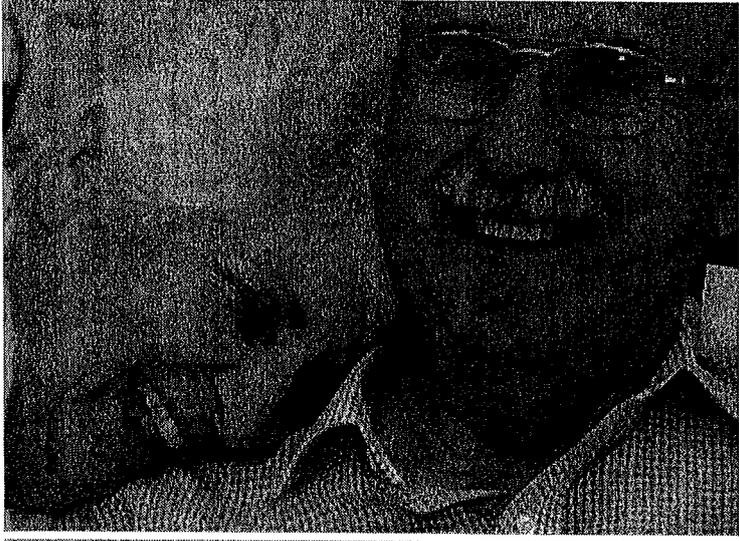
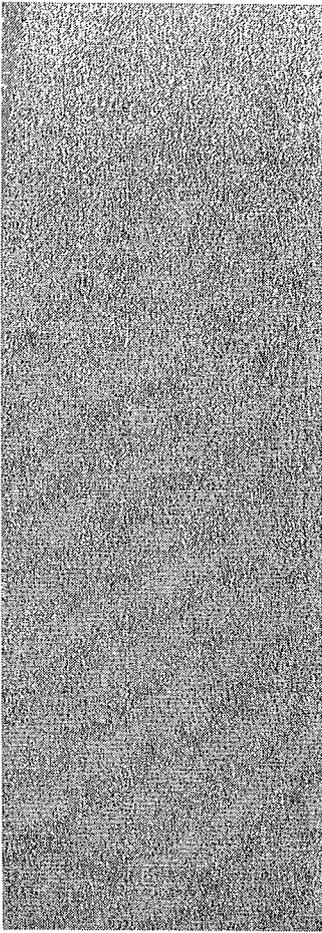
- a) Address regional issues regarding vulnerable adult abuse, neglect and financial exploitation from a multi-disciplinary approach.
- b) Develop regional response and investigation/intervention teams, comprised of representatives of the AGO, law enforcement, prosecutors, DSHS, the medical community, financial institutions, academia, courts, long-term care providers, guardians and other relevant community members.
- c) Create a criminal mistreatment review panel to:
 - Staff difficult cases;
 - Support prosecutors; and
 - Increase the base of knowledge by learning from actual cases as shared by American Medical Association representatives, physicians, nurses and advanced registered nurse practitioners.
- d) Create a death/mortality investigation and review panel to investigate deaths of the elderly and/or vulnerable adults who might otherwise be overlooked and develop criteria for determining which cases should be reviewed.
- e) Create a professional training panel to increase awareness through increased, targeted training.
- f) Create a community training panel to increase community awareness of these issues through targeted forums, meetings and presentations.
- g) Create an investigation and prosecution panel to discuss and track cases involving vulnerable adults.



3) Establish a regional gatekeeper program with regional implementation and funding. This program would locate impaired and at-risk elders who live at home. Since so many victims live in isolated circumstances, this program would train and encourage employees of corporations, businesses and other community organizations to identify at-risk older individuals in desperate need of assistance and make referrals to appropriate investigative agencies or resources. Gatekeeper programs are a cost-effective option for increasing the network of those trained to identify at-risk vulnerable adults and make referrals.

- a) Provide statewide training of community gatekeepers. Gatekeepers will be trained to recognize items or situations that may indicate an older person is at risk: personal appearance, home condition, cognitive/emotional/mental status, physical status, social problems, personality changes, financial problems, caregiver stress, substance use and suicide risk symptoms.
- b) Maintain a list of potential gatekeepers, including: local utility employees, residential property appraisers employed by county assessors, bank personnel, apartment and mobile home managers, postal carriers, fuel oil dealers, police, sheriff and fire department personnel, pharmacists, cable television company staff, ambulance company staff and code enforcers.
- c) Enlist and educate postal workers to identify at-risk adults.

RECOMMENDATION: Establish a permanent statewide coalition to defend against vulnerable adult abuse.



A-39

DEPARTMENT OF SOCIAL AND HEALTH SERVICES (DSHS)/ADULT PROTECTION SERVICES (APS) PROTECTION SUBGROUP

BACKGROUND

The Department of Social and Health Services (DSHS)/Adult Protection Services (APS) Subgroup took on the following issues identified at the June summit:

- The inability or unwillingness of victims to protect themselves.
- Lack of clear legal definitions across professions to adequately prosecute offenders.
- Lack of a solid definition for what is considered "self neglect."

RECOMMENDATIONS

1) **Develop risk assessment instruments that are both reliable (with scores consistent over time) and valid (measuring what they are designed to measure).** Effective risk assessment instruments would:

- a) Assess the risk levels of vulnerable adults at APS intake.
- b) Assess future risk levels and needed safeguards at the closure of APS cases.

The subgroup recommends legislation that would authorize the Washington State Institute for Public Policy to study risk assessment instruments and prepare a report to the Legislature.

2) **Support a bill that would require APS to develop and maintain a publicly searchable database of perpetrators of the abandonment, abuse, neglect and exploitation of vulnerable adults that would:**

- a) Allow for the simple verification of whether a proposed caregiver or employee has an APS finding.

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RECOMMENDATION:
*Develop a publicly
searchable database
of perpetrators.*

b) Require DSHS to develop a feasibility study on linking all DSHS perpetrator databases, thereby making them publicly accessible and promoting public accountability.

3. In order to better identify and assist victims, a formal review of the current legal definition of “vulnerable adult” is needed.

Formal stakeholder group meetings should be held to consider these factors:

- AARP/ages, 60+, 65+ or 66+ as a partial predictor of vulnerability.
- Hearing impairment.
- Vision impairment.
- Persons living with multiple sclerosis.
- Persons living with diabetes.
- Persons living with mental health issues.
- Persons suffering from substance abuse.



GUARDIANSHIP PROTECTION SUBGROUP

BACKGROUND

The guardianship subgroup took on the following issues identified at the June summit:

- Lack of appropriate funding and resources needed to address the guardianship needs of vulnerable adults in the state of Washington.
- Limited legal ability of guardians to intervene when a higher level of care is necessary.
- Better balancing the victim's desire for independence and the need to protect the victim, particularly when the caregiver is the perpetrator.
- Insufficient mental health intervention services to respond to the needs of vulnerable adults.

RECOMMENDATIONS

1) Address a the shortage of guardians:

- a) Expand and fund the Office of Public Guardianship.
- b) The Office of Public Guardianship should conduct a community education and recruitment program to find more guardians for smaller counties and more volunteers for pro bono guardianships overall.

2) Address inadequate and inconsistent guardianship laws by developing a stakeholder work group to consider updating guardianship-related statutes and regulations.

3) Reduce the instances of perpetrators of abuse, neglect or financial exploitation from being appointed as guardians by supporting changes to RCW 11.88.045. These changes will clarify that the alleged incapacitated person is entitled to request a jury trial only on the issue of incapacity, but may request an evidentiary hearing if the issue to be decided is who should be appointed as guardian.

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4. Better protect seniors with dementia by changing the involuntary detention process. 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. 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 dementia is not considered to be a “mental disorder” in most counties.



A-43

COMMUNITY AWARENESS AND TRAINING WORK GROUP

BACKGROUND

The Community Awareness and Training Work Group took on the following issues identified at the June summit:

- Members of the general public have a difficult time accurately identifying the abuse of vulnerable adults.
- When abuse is suspected, information is not readily available about how to report it.
- Physicians are failing to recognize the signs of abuse in vulnerable adults.
- Victims' families need more information about how to access available services.
- The public has a lack of awareness of domestic violence in later life.
- Self-reporting of abuse is difficult or impossible for vulnerable adults.

RECOMMENDATIONS

- 1) Develop a curriculum to educate gatekeepers.** Gatekeepers — those in the best positions to recognize victims — must be identified and given uniform training. Training should provide information about how to identify abuse and how to report it. Easy-to-access materials should be created and distributed to gatekeepers. This work group is developing a PowerPoint presentation for wide distribution.
- 2) Educational flyers should be developed and distributed to the public via multiple channels, including:**
 - a) Inside utility bills;
 - b) At food banks;
 - c) Posted in public restrooms;

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- d) In apartment complexes and low-income housing projects and;
- e) In doctors' offices.

3) Create public service announcements to run statewide. In order to increase general awareness about how to identify and report the abuse of vulnerable adults, PSAs should be funded and produced for distribution to local television, radio stations and print and online publications. PSAs should be divided into modules addressing financial exploitation, domestic violence and self-neglect.



A-45

FINANCIAL EXPLOITATION WORK GROUP

BACKGROUND

The Financial Exploitation Work Group took on the following issues identified at the summit:

- The current response time and coordination of agencies, law enforcement and prosecution is too slow to properly serve victims of abuse.
- Better training and education is needed in both the public and private sectors to aid in prosecutions. Specifically, programs are needed that focus on how to report and investigate financial crimes.
- Better partnerships are needed between banks and the police in order to identify and report financial exploitation.
- Seniors have a fear of guardianships and a loss of independence, which chills reporting.
- Some organizations and individuals, including family members, are reluctant to report financial crimes.
- Financial exploitation is difficult to detect, prevent and prosecute because of the difficulty in getting access to records and documents.

RECOMMENDATIONS

- 1) **Amend the statute to simplify the definition of financial exploitation.** The Vulnerable Adult Statute defines financial abuse in a way that creates barriers to investigation and protective activities.
- 2) **Draft legislation that would create a Protective Power of Attorney.** This document should contain more procedural and substantive protections for the vulnerable adult. To date, power of attorney forms have often been used to financially

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RECOMMENDATION: Develop a program to help financial institutions identify and report financial exploitation.

exploit vulnerable adults. This committee drafted a sample of what the new form should look like.

- 3) Engage financial institutions, the Department of Financial Institutions and law enforcement with the goal of creating step-by-step protocols and guidelines for setting up accounts and dealing with suspected abuse.** Education — even mandatory education for bank tellers — should be considered. At present, joint bank accounts are used by family members and acquaintances to exploit vulnerable adults.

- 4) Expand standardized education programs to be used by financial institutions statewide.** These programs will help employees of financial institutions spot and appropriately react to financial exploitation. Employees at financial institutions have communicated a strong desire to respond to the exploitation they witness, but suggest that some fail to do so due to a lack of training, knowledge and specific guidance.



A-47

INVESTIGATION AND PROSECUTION WORK GROUP

RECOMMENDATIONS

The Investigation and Prosecution Workgroup proposed legislation that would offer the following benefits:

1) Sentencing Enhancements

- For crimes against victims over the age of 70 or meeting the definition of vulnerable adult in RCW 74.34.020(15): 5 years for a class A felony or with a statutory maximum sentence of at least 20 years, or both; 3 years for a class B felony or with a statutory maximum sentence of 10 years, or both; and 18 months for a class C felony or with a statutory maximum sentence of 5 years, or both;
- For crimes against victims over age 65 and up to age 70: three years for a class A felony or with a statutory maximum sentence of at least 20 years, or both; two years for a class B felony or with a statutory maximum sentence of 10 years, or both; 1 year for a class C felony or with a statutory maximum sentence of 5 years, or both;

2) Mandatory Reporting

- Presently, employees of banks and financial institutions are permissive reporters, who are authorized, but not required, to report financial exploitation to APS and law enforcement. Such persons are often the first ones to detect potential financial exploitation. The proposed legislation would make such persons mandatory reporters of suspected financial exploitation.

3) Reporting to Law Enforcement

- Presently, law enforcement receives only certain referrals of abuse, neglect, abandonment and financial exploitation. The legislation would require all referrals to be made to law enforcement, as well as APS.



RECOMMENDATION: Significant new penalties for crimes against vulnerable adults; Making employees of financial institutions mandatory reporters of potential financial exploitation.

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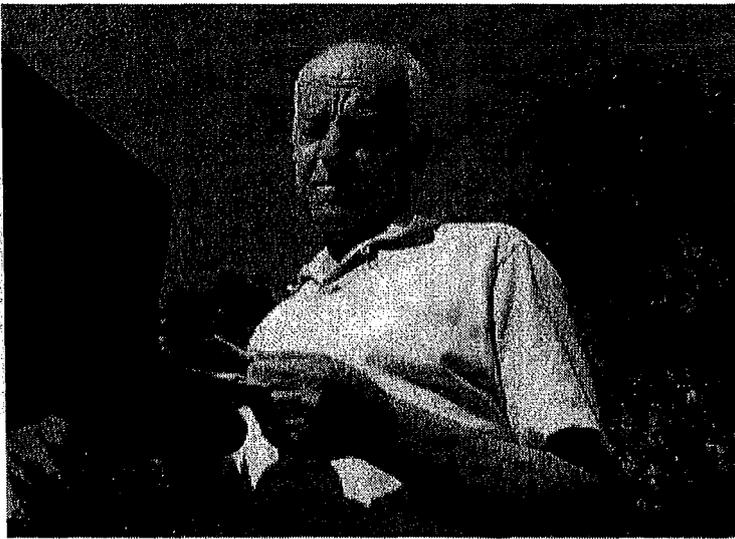
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4) Access to Records and Immunity from Liability

- The proposal would allow law enforcement access to all records in the possession of the reporter that are potentially relevant to the allegation of abuse, neglect, abandonment or financial exploitation. The proposal would also clarify that providing documentation to law enforcement in good faith shall not result in liability.



LONG-TERM CARE WORK GROUP

BACKGROUND

The Long-Term Care Work Group took on the following issues identified at the summit:

- Vulnerable adults in long-term care facilities are exposed to risk because there are too few resources dedicated to checking the backgrounds of caregivers.
- The patchwork of rules regarding what disqualifies a caregiver from working with certain kinds of patients creates a barrier to creating a safe environment for vulnerable adults.
- Government bureaucracy is a barrier to checking the backgrounds of caregivers.
- Funding for Medicaid rates and other services is too low to provide adequate care for vulnerable adults.

RECOMMENDATIONS

- 1) **Annual background checks** should be required on people who provide direct care to vulnerable adults in a long-term setting. These checks are currently only required every two years. Special concern should be paid to individuals providing in-home care and who operate adult family homes or boarding homes.
- 2) **Disqualifying crimes should be the same across settings.** There are currently different disqualifying crimes for people who provide services to children, the disabled and for vulnerable adults. Disqualifying crimes should be the same across settings.
- 3) **Electronic portal for background checks.** DSHS is working on a pilot program to permit background checks to be conducted electronically. DSHS personnel will be able to perform background checks using an internal Web site at a field office. This program should be made accessible to outside facilities through the Internet as soon as possible.
- 4) **Ability to "flag" individuals.** Automatic alerts should be sent to vulnerable adult caregiver facilities when someone working for them has a change of status, i.e. they have a new disqualifying crime or a substantiated finding of abuse, neglect or exploitation.
- 5) **Payment rates should be analyzed.** Funding is too low to provide for adequate long-term care for those suffering from mental health issues. In addition, the flat Medicaid rate for all guardians is too low for increasingly complex cases.

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THE NEXT STEPS

A-51

THE NEXT STEPS TO PROTECT VULNERABLE ADULTS

THE SUMMIT WORK GROUPS' LEGISLATIVE RECOMMENDATIONS

After developing and refining proposals for nearly a year, summit work groups reconvened in May 2008 and suggested that all or some of the following recommendations be proposed to the legislature in 2009:

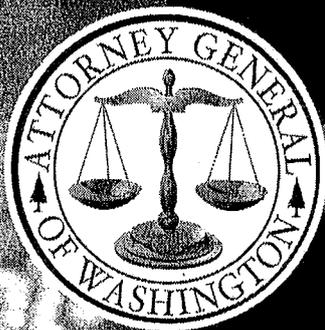
- Add mandatory sentencing enhancements (with medical exceptions) for crimes against victims over age 65 or who meet the definition of a vulnerable adult in Chapter 74.34 RCW, Abuse of Vulnerable Adults Act.
- Make employees of financial institutions mandatory reporters of the financial exploitation of vulnerable adults.
- Strengthen protections for vulnerable adults by clarifying definitions in the vulnerable adult statutes and by improving coordination between reporters of abuse, law enforcement and Adult Protective Services in the relevant RCW (74.34).
- Allow for greater public disclosure of APS information.
- Create a publicly searchable database of perpetrators of vulnerable adult abuse and neglect.

During the coming months, the AGO will work with the Governor's Office, The Department of Social and Health Services, other state agencies and the Legislature to develop omnibus vulnerable adult legislation based on the recommendations of summit and work group participants. Leaders and contributors to the Vulnerable Adult Summit and work groups created as a result of the summit will play key roles advising legislators, testifying in committee hearings and participating in lobbying efforts. Our goal is to have a comprehensive bill signed by the governor in 2009.

STATEWIDE COALITION

The AGO will facilitate meetings between members of local vulnerable adult task forces, The Department of Social and Health Services and other stakeholders to investigate the feasibility of creating a permanent statewide coalition for the prevention of vulnerable adult abuse, criminal mistreatment, neglect and financial exploitation. This coalition will continue to monitor emerging issues impacting vulnerable adults, while advising law enforcement, legislators and care providers on strategies to address those issues. Our goal is to have a permanent coalition in place by the end of 2009.





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A-53

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