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SUPREME COURT  
OF THE STATE OF WASHINGTON

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RESA RAVEN,

Petitioner,

v.

WASHINGTON STATE  
DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent.

AMICUS CURIAE BRIEF OF WASHINGTON ASSOCIATION  
OF PROFESSIONAL GUARDIANS IN SUPPORT OF  
PETITIONER'S PETITION FOR REVIEW

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## I. INTRODUCTION

This case presents an issue of substantial public interest – whether guardians appointed for incapacitated persons pursuant to chapter 11.88 RCW are guilty of neglect under the Vulnerable Adult Protection Act, chapter 74.34 RCW, if they do not “aggressively pursue”<sup>1</sup> institutionalization of clients who cannot be adequately cared for at home, but who refuse institutionalized care and who do not meet the requirements for involuntary treatment under chapter 71.05 RCW. As argued in the briefs filed by the Petitioner and other amici, the Court of Appeals misinterpreted the informed consent law, RCW 7.70.065, the guardianship statute, RCW 11.92.190, and the Involuntary Treatment Act, RCW 71.05.150. This brief discusses how these errors will have adverse consequences beyond the present case by exacerbating the shortage of guardians for low-income incapacitated persons who have multiple medical and psychological needs.

## II. IDENTITY AND INTEREST OF AMICUS

The Washington Association of Professional Guardians (WAPG) represents the interests of Certified Professional Guardians (CPGs) who meet GR 23 certification standards established by the Washington Supreme Court. There are approximately 270 CPGs in Washington State.

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<sup>1</sup> *Raven v. D.S.H.S.*, 167 Wn. App. 446, 467, 273 P.3d 1017 (2012).

CPGs are appointed when family and friends are unavailable or unsuitable to serve as guardian for an incapacitated person. A significant number of CPG clients have limited resources and qualify for Medicaid.

WAPG's mission includes enhancing the quality of professional guardian services in Washington. Its adopted goals include promoting advocacy and justice for incapacitated people. WAPG's members and the clients they serve have been directly impacted by this case. For that reason, WAPG filed an amicus brief in the Court of Appeals and seeks to file this brief in support of review by the Supreme Court.

### III. ANALYSIS

The shortage of guardians for low-income persons with difficult medical and psychological needs will worsen as a result of the Court of Appeals decision. Until *Raven*, the law and public policy of Washington have clearly prohibited the institutionalization of unwilling wards, even for medical treatment, absent compliance with the involuntary treatment laws. *See* RCW 11.92.190. But now, where a guardian has been found guilty of neglect for failing to "aggressively pursue" institutionalization of an unwilling client, after having requested protective services from DSHS and involuntary treatment from the Designated Mental Health Professional, the law is confusing and contradictory. In cases where wards have sufficient resources, guardians can retain attorneys to advise them

and to petition the courts for instruction and approval of the guardians' actions. But where wards with multiple medical and psychological problems have limited resources to hire attorneys and access the courts, guardians run the risk of being found guilty of neglect if they accept or retain clients whose medical needs and treatment preferences conflict. The solution proposed by the Court of Appeals is for guardians to "step aside" if they cannot reconcile the client's treatment needs and preferences. However, this will result in a worsening of the already significant shortage of guardians for low-income persons with multiple medical and psychological needs.

**A. The Court of Appeals Disregarded the Serious Shortage of Guardians for Low Income Clients.**

The majority and concurring opinions both fault the guardian for not "stepp[ing] aside" and asking the Superior Court to replace her with someone "better qualified."<sup>2</sup> The Court of Appeals' proposed remedy – withdrawal and substitution of the guardian – disregards the well-documented and significant shortage of guardians for low-income persons.<sup>3</sup>

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<sup>2</sup> *Raven*, 167 Wn. App. at 468; *id.* at 473.

<sup>3</sup> See, e.g., Burley, M., *Assessing the Potential Need for Public Guardianship Services in Washington State*, at 1, 13-14, WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, Document No. 11-12-3901 (2011) (estimating that between 4000 and 6000 low-income Washington residents were unable to obtain a needed guardian).

Approximately 2,500 guardianship petitions are filed in Washington State every year, resulting in the establishment of approximately 1,600 new guardianship cases each year.<sup>4</sup> “For low-income or indigent individuals requiring a guardian, there are few options available to help pay for these services.”<sup>5</sup> In Washington, individuals who qualify for Medicaid may have their payment obligation (“participation”) reduced by up to \$175 per month to help pay for guardianship services.<sup>6</sup> As illustrated in the present case, however, this income exemption frequently does not cover the full cost of guardianship services.<sup>7</sup> In the present case, the guardian received \$78.50 per month, which totaled \$2119.50 from her appointment in March 2004 through August 2006. AR 1554, 1558-1564. The guardian was owed \$6006.25. AR 1554, 1564.

In 2005, the Public Guardianship Taskforce of the Washington State Bar Association published a report estimating that 4,500 individuals in Washington State did not have sufficient resources to obtain the

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<sup>4</sup> Office of Public Guardianship, *Legislative Study*, at 1, WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY (June 2008).

<sup>5</sup> Burley, M., *Public Guardianship in Washington State Costs and Benefits*, at 2, WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, Document No. 11-12-3902 (2011).

<sup>6</sup> *Id.* However, in many cases, such as this one, the ward’s participation is less than \$175 per month. Therefore, the actual payment to the guardian is less than \$175 per month. In the present case, the ward’s participation was \$78.50 per month. AR 1554. Thus, payment to the guardian was limited to \$78.50 per month. *Id.*

<sup>7</sup> Burley, M., *Public Guardianship in Washington State Costs and Benefits*, at 2. *supra* at n. 5.

services of a court-appointed guardian.<sup>8</sup> In 2007, the Washington State Legislature passed Substitute Senate Bill 5320, which established the Office of Public Guardianship (OPG) within the Administrative Office of the Courts.<sup>9</sup> See chapter 2.72 RCW. The intent of the legislation was to “promote the availability of guardianship services for individuals who need them and for whom adequate services may otherwise be unavailable.” RCW 2.72.005. But from 2008 through 2011, the OPG served just 87 individuals<sup>10</sup> out of an estimated 4000 to 6000 persons who needed but could not afford guardianship services.<sup>11</sup>

**B. The Court of Appeals Ignored the Mandatory Roles of Other Responsible Parties.**

In considering whether the guardian committed neglect, the Court of Appeals disregarded her efforts to enlist DSHS and the DMHP to obtain protective services and institutionalization for the ward. This failure to acknowledge the mandatory role of other responsible parties and the assignment of blame solely to the guardian in this case will discourage guardians from accepting difficult cases and will weaken the system of

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<sup>8</sup> Burley, M., *Assessing the Potential Need for Public Guardianship Services in Washington State*, at 1, *supra* at n. 3 (citing Washington State Bar Association, August 22, 2005).

<sup>9</sup> OPG did not begin to serve clients until 2008, after the ward in this case had died.

<sup>10</sup> Burley, M., *Public Guardianship in Washington State Costs and Benefits*, at 3, *supra* at n. 5.

<sup>11</sup> Burley, M., *Assessing the Potential Need for Public Guardianship Services in Washington State*, at 14, *supra* at n. 3.

protection by failing to hold other responsible parties accountable.

**1. DSHS refused protective services in June of 2006.**

One of the primary problems that made in-home care for the ward inadequate according to the DSHS Review Decision and echoed by the Court of Appeals were difficulties with the ward's husband and his interference with the ward's care. *Raven*, 167 Wn. App. at 455; AR 168 (CL 56). The guardian was faulted for not retaining an "experienced attorney" to address problems with the ward's husband. *Raven*, 167 Wn. App. at 455; *id.* at 467. With no resources to hire counsel, the guardian instead made a referral to DSHS in June of 2006 to investigate whether the husband's conduct was actionable neglect under the Vulnerable Adult Protection Act. AR 1588. DSHS has a statutory duty to investigate allegations of abuse, neglect abandonment or exploitation of vulnerable adults. RCW 74.34.005(5).<sup>12</sup> If DSHS had found that the husband's interference was actionable in June, DSHS would have been authorized to petition the court for a restraining order against the husband,<sup>13</sup> and DSHS could have provided "protective services," including home care and referral for legal assistance.<sup>14</sup> In June 2006, DSHS determined it could not substantiate the guardian's report or take any action to restrain the

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<sup>12</sup> DSHS was required to initiate a response to the guardian's report within 24 hours. RCW 74.34.063(1).

<sup>13</sup> RCW 74.34.130; RCW 74.34.150; RCW 74.34.020(3).

<sup>14</sup> RCW 74.34.020(13) (2004), currently codified at RCW 74.34.020(14).

husband from interfering with the ward's in-home care. AR 858-9.

The Court of Appeals ignored the Department's decision to decline protective services in June 2006 despite briefing from this amicus regarding the Department's role and duties.<sup>15</sup> This Court should accept review in order to ensure that the critical roles of other mandatory actors like DSHS are considered. The Department's duty to provide protective services was not satisfied by its *post mortem* findings against the guardian.

**2. The DMHP refused to authorize institutionalized care in November 2006.**

The single mechanism for civilly institutionalizing a person for treatment against their wishes is the Involuntary Treatment Act. RCW 71.05.150. Washington's guardianship statute prohibits institutionalization of wards absent compliance with involuntary treatment laws. RCW 11.92.190. The guardian actively pursued institutionalization of the ward pursuant to the Involuntary Treatment Act in November 2006. AR 1594-5. But the DMHP 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; AR 129 (FF 77); AR 1595, and her symptoms were "primarily medical." *Raven*, 167 Wn. App. at 456. The Court of Appeals recited these facts in its ruling, but failed to

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<sup>15</sup> See Brief of Amicus Curiae WAPG filed with the Court of Appeals, at 17-18.

acknowledge the constraints that they placed upon the guardian. This Court should accept review in order to ensure that the critical roles of other mandatory actors like DMHPs are not ignored.

**C. The Court of Appeals Announced a Confusing Standard That Will Discourage Guardians From Accepting Difficult Cases When Clients Do Not Have Funds To Pay For Attorneys.**

The Court of Appeals held that guardians must engage in a balancing test when clients who would benefit from institutionalized care refuse to leave their homes. *See Raven*, 167 Wn. App. at 466 (“Raven was obligated to balance this preference [to remain at home] against Ida’s clear medical needs;”); *id.* at 467 (“This failure to balance Ida’s needs against her stated desires is particularly egregious[.]”) However laudable the Court of Appeals’ intentions may have been, it was improper for it to announce a balancing test that contradicts the plain meaning of RCW 71.05.150 and RCW 11.92.190. Not only was the decision contrary to law, as the Petitioner and other amici have argued, it creates confusion among guardians as to how they are to proceed when a ward’s stated treatment preferences conflict with his or her best interests.

Instead of acknowledging that there is a gap in Washington’s law that requires a legislative solution,<sup>16</sup> the Court of Appeals announced that

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<sup>16</sup> This was the conclusion and recommendation made by the Vulnerable Adult Conference in 2008. The Final Report included the following recommendation:

guardians must apply a balancing test without articulating the criteria that guardians must balance other than the stated preference of the ward and their medical needs, and without articulating the weight to be assigned to these factors. For example, are guardians required to aggressively pursue institutionalization over the objections of the ward in every case where it would be in the best interests of the ward, or only in those cases where the ward is likely to suffer irreparable harm? What are the criteria for determining best interests and whether irreparable harm is likely?

The Court of Appeals decision has generated confusion about whether the substituted judgment or best interest standard applies, particularly with respect to dementia patients. In many cases wards with dementia exercising their residual capacity will express the preference to remain at home even if they could be better cared for in a facility. At what point should the guardian conclude that this expression of intent is delusional, as the Court of Appeals concluded with respect to *Ida*,<sup>17</sup> and who is to make that determination? In *Ida*'s case, notwithstanding the

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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.

Vulnerable Adult Initiative 2008 Final Report at 43. This Report was appended to the Brief of Amicus Curiae WAPG filed in the Court of Appeals.

<sup>17</sup> *Raven*, 167 Wn. App. at 467.

Court of Appeals conclusion that Ida was delusional, *id.*, the DMHP concluded that she could not be detained because her needs were primarily medical.<sup>18</sup> Can guardians now override the determinations of DMHPs as to the mental status of wards, and, if so, under what circumstances?

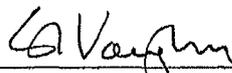
In cases where wards have sufficient funds, guardians can hire lawyers and petition the courts for guidance with these complex issues. However, in cases where there are insufficient funds, guardians will have little choice but to do as the Court of Appeals suggested and “step aside” or decline to be appointed, thereby exacerbating the shortage of guardians for low-income clients. This raises a substantial issue of public interest.

#### IV. CONCLUSION

The Washington Association of Professional Guardians respectfully requests that the Supreme Court accept review because the decision of the Court of Appeals will adversely affect the public interest.

Respectfully submitted this 6<sup>th</sup> day of August 2012.

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<sup>18</sup> AR 871; AR 129 (FF 77); AR 1595; *Raven*, 167 Wn. App. at 456.

**CERTIFICATE OF SERVICE**

I certify, under penalty of perjury pursuant to the laws of the State of Washington, that on August 6, 2012 I caused to be served a true and correct copy of the foregoing document upon counsel listed below by electronic mail and regular U.S. mail. Counsel agreed to accept this method of service.

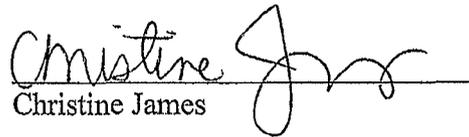
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I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

DATED August 6, 2012 at Seattle, Washington.

  
Christine James