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SUPREME COURT OF THE STATE OF WASHINGTON

RESA RAVEN,

Petitioner,

v.

WASHINGTON STATE DEPARTMENT OF SOCIAL
AND HEALTH SERVICES,

Respondent.

**ANSWER TO AMICI BRIEFS OF
DISABILITY RIGHTS WASHINGTON, THE LONG TERM CARE
OMBUDSMAN PROGRAM, AND THE ARC OF
WASHINGTON STATE
WASHINGTON ASSOCIATION OF
PROFESSIONAL GUARDIANS
WASHINGTON ACADEMY OF ELDER LAW ATTORNEYS**

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I. INTRODUCTION

This Court should deny review because the Court of Appeals applied existing law to the facts of this case to affirm the finding of the Department of Social and Health Services (“DSHS”) that Ms. Raven neglected her ward. Notwithstanding amici’s arguments, which largely ignore the record in this case, the finding of neglect in this case was based on Ms. Raven’s failure to pursue every reasonable option available for her ward’s care – whether in-home care or in a residential care facility.

By painting the Court of Appeals decision as one imposing a neglect finding against Ms. Raven based on her decision not to put Ida into a nursing home against her will, the amici argue that the decision imposes upon guardians a “duty to bully” their wards into accepting unwanted institutional care.¹ While the amici correctly posit that any such decision would violate the law and certainly chill anyone considering a career as a guardian, they are incorrect to assert that such is the decision here. The Court of Appeals decision makes no sweeping change to guardianship law and creates no conflict with cases on substitute decision making. Instead,

¹ Memorandum of Amicus Curiae Washington Academy of Elder Law Attorneys (“Br. of Elder Law Attorneys”) at 1. The other amici similarly contend that the Court of Appeals decision imposed a duty on guardians to improperly or illegally commit wards in institutions. *Amici Curiae* Brief of Disability Rights Washington, The Long Term Care Ombudsman Program, and the Arc of Washington State in Support of Petitioner’s Petition for Review (“Br. of DRW”) at 1; *Amicus Curiae* Brief of Washington Association of Professional Guardians In Support of Petitioner’s Petition for Review (“Br. of Professional Guardians”) at 1.

it applies the unique facts here to determine that Ms. Raven failed to pursue “every reasonable effort” available for Ida’s care. *Raven v. Dep’t of Soc. & Health Servs.*, 167 Wn. App. 446, 450, 273 P.3d 1017 (2012). There is no question that Ms. Raven was legally prohibited from involuntarily “committing” Ida to a residential care facility against her will. But, at the same time, when Ms. Raven herself felt it was impossible to get more care for Ida in her own home, her guardianship duties required her to at least *discuss* residential care alternatives with Ida and to counsel Ida on making a better residential choice. The Court of Appeals correctly concluded that Ms. Raven’s failure to “mak[e] every reasonable effort to provide the care Ida needed” is “neglect” under the Abuse of Vulnerable Adults Act, chapter 74.34 RCW. *Raven*, 167 Wn. App. at 450. Its decision does not meet criteria for review under RAP 13.4(b).

II. ARGUMENT

A. **The Amici Briefs Distort The Court Of Appeals Affirmation Of The Neglect Finding, Which Was Based On The Particular Facts And Circumstances Of Ms. Raven’s Actions As Ida’s Limited Guardian**

The amici mischaracterize the Court of Appeals decision as one which forces guardians to improperly institutionalize their wards. This is not the case; the Court of Appeals viewed the factual findings in light of Ms. Raven’s obligation to make “every reasonable effort to provide the

care Ida needed” and concluded that those factual findings “support[ed] [DSHS’s] conclusion that Ms. Raven failed to meet her duty.” *Raven*, 167 Wn. App. 450.

Contrary to amici’s characterizations, the record in this case shows that DSHS’s finding of neglect, affirmed by the Court of Appeals, was based simply on the fact that Ms. Raven failed to take reasonable action necessary to secure Ida’s basic care needs. It was not based on any failure of Ms. Raven to illegally or involuntarily “commit” Ida to a nursing home. Rather, Ms. Raven neglected her ward through a pattern of inattention, including:

- Ms. Raven failed to take steps to secure adequate care for Ida in Ida’s home. Each month, 91 hours of in-home care approved by DSHS remained unfilled. *Id.* at 453-57.
- Although Ms. Raven was aware that Ida’s home care agency could not fill all necessary caregiving shifts, Ms. Raven refused to consider hiring independent caregivers to supplement Ida’s in-home care. Ms. Raven rejected out of hand without investigation the request of Ida’s case manager to use independent caregivers, due to Ms. Raven’s personal discomfort with overseeing independent caregivers. *Id.* at 454-55.

- Ms. Raven repeatedly and unreasonably delayed responding to concerns regarding Ida's deteriorating condition raised by Ida's case managers and care providers. *Id.* at 454-55, 459-60.
- Despite Ida's deteriorating condition and concerns expressed by the professionals involved in her care, Ms. Raven's visits to Ida decreased over time, and Ms. Raven often failed to visit Ida for months at a time. *Id.* at 453; DSHS Review Decision and Final Order, Administrative Record ("AR") 112-13 (Finding of Fact ("FF") 44).
- In the winter of 2006, when Ida developed multiple infected pressure sores which were exposed to urine and feces without sufficient in-home care, Ms. Raven did not explore residential care alternatives or go see Ida to discuss her residential care options or encourage her to move to a 24-hour care facility, even if on a temporary basis. Ms. Raven testified that had she done so, it is doubtful Ida would have consented to a care facility, but Ms. Raven failed to take into account the fact that Ida did consent in 1996 to receive temporary treatment in a nursing home after experiencing a fracture. *Raven*, 167 Wn. App. at 459-60; Report of Proceedings ("RP") 776:17-23.

Ms. Raven's decision not to pursue the use of independent care providers in Ida's home was crucial to Ida's well-being and led to her physical deterioration. Ida was a low-income person whose care was funded through the state's Medicaid program. AR 695, 1519. As such, Ida had only two potential sources of in-home care: (1) employees of licensed home care agencies and (2) independent care providers. WAC 388-71-0500. Home care agencies are licensed by the Department of Health and employ caregivers. WAC 388-106-0010 ("agency provider"); WAC 246-335-015(19) (definition of home care agency). Individual providers are independent caregivers meeting specified qualifications, selected by the client or her guardian, and contracting directly with DSHS for payment. WAC 388-106-0010; *see also* WAC 388-71-0500 to -05909. The qualifications and training requirements for both home care agency workers and independent providers are largely identical. WAC 388-71-0500 to -05865.

Ms. Raven testified that she did not want to hire independent providers because of her "great concern" with having to supervise them. RP 822:2-5. There is no legal requirement for guardians to employ persons they are unequipped to supervise, and, as the Court of Appeals recognized, Ms. Raven was free to withdraw. *Raven*, 167 Wn. App. at 468. But Ms. Raven testified that she did not seek to withdraw from Ida's

case, to be replaced by another guardian willing to supervise independent providers. RP 822:6-9. This left Ida stranded. Ms. Raven ruled out the potential use of one of the two sources of in-home care for Ida, but she did not seek to be replaced by a guardian willing to try both sources. Thus, the amicus assertion that “[t]he ward in *Raven* was receiving the best in home care that the State of Washington could provide, and that any guardian could reasonably procure” ignores this context and is inaccurate. Memorandum of Amicus Curiae Washington Academy of Elder Law Attorneys (“Br. of Elder Law Attorneys) at 4.

B. The Amici Similarly Mischaracterize The Court Of Appeals Finding That Ms. Raven Failed To Fulfill Her Obligation To Explore Alternative Sources Of Residential Care For Ida

The amici’s alarm over the fact that the Court of Appeals found fault with Ms. Raven’s failure to aggressively explore residential care options for Ida² is hyperbole and similarly ignores the findings of fact. Any decision holding that a guardian has a legal duty to override the wishes of her ward and “commit” the ward to a residential care facility against the ward’s will would violate the law. The Court of Appeals decision, however, does not say that. At no point does it hold that Ms. Raven – or any guardian – had a duty to illegally “bully” her ward to

² *Raven*, 167 Wn. App. at 466-68.

move to a care facility.³ Instead, the Court of Appeals appropriately faulted Ms. Raven with failing to fulfill the duties she owed to Ida under the circumstances. *Raven*, 167 Wn. App. at 450. Its findings are entirely consistent with the legal obligations of guardians recited in *In re Ingram*, 102 Wn.2d 827, 689 P.2d 1363 (1984), the formally adopted standards of practice for professional guardians, and the training materials for guardians, including those submitted by the amici themselves.

The Court in *Ingram* confirms a guardian's obligation to give "substantial weight" to the ward's "expressed wishes" for care, but to do so, the guardian "should, if possible, interview the patient and observe her physical and mental condition." *Ingram*, 102 Wn.2d at 840-41. The standards of practice for professional guardians mirror this requirement, instructing guardians that "[w]henever feasible a guardian shall consult with the incapacitated person" and "acknowledge the residual capacity of the incapacitated person to participate in or make some decisions." AR 1833. The professional standards also require guardians to "thoroughly research and evaluate the incapacitated person's residential alternatives." AR 1836. And, obviously, the guardian is then required to *discuss those alternatives* with the ward. The training materials offered by Ms. Raven's expert witness on guardianships advise guardians to be

³ At page 1 of the Brief of Elder Law Attorneys, the attorneys maintain that the Court of Appeals decision imposes such a "duty to bully."

“familiar with the available options for residence [and] care” and “strive to know the ward’s preferences.” AR 1854.

Similarly, the training materials offered by amici Elder Law Attorneys instruct guardians to candidly discuss residential alternatives with a ward and influence the ward to make an appropriate choice. In the case of “Colleen,” a young ward who unwisely seeks to move out of a supervised group home and live in her own apartment, the training materials direct that, while Colleen’s guardian may not interfere with Colleen’s choice of a single apartment, the guardian may permissibly influence Colleen to make a better choice, by informing Colleen that the guardian will not pay for the deposit or monthly rent Colleen would need to secure an apartment. Br. of Elder Law Attorneys Add. B at 2b- 18.⁴ If this type of counseling and advice is permissible for a young ward without Ida’s physical disabilities or healthcare needs, then it was reasonable to expect Ms. Raven to investigate residential care alternatives for Ida, discuss them with Ida and Ida’s family, and even counsel Ida to make the best residential care choice possible at the time Ms. Raven concluded it was impossible for her to secure additional care for Ida within Ida’s own

⁴ The training materials go on to suggest that the guardian may wish to advise Colleen that she could seek a second opinion on reasonable residential placements from a counselor or social worker, and the materials also suggest that the guardian may wish to seek court review in case of such stark disagreements between guardian and ward. Br. of Elder Law Attorneys Add. B at 2b- 18-19.

home. These steps are required under the statutes, case law, and training materials for guardians making substituted judgments.

Ms. Raven was aware of Ida's residential alternatives. In June 2006, Ms. Raven documented her knowledge of Ida's residential alternatives, including a "nursing home, assisted living center, boarding home or adult family home." AR 1588. An "assisted living" facility or "boarding home" is a licensed facility which offers residential care. RCW 18.20.020(2). An "adult family home" offers care to up to six residents in a residential home. RCW 70.128.010(1). In both types of facilities, care must be offered in a "home-like" setting and in consideration of each resident's rights to dignity, individuality, privacy and autonomy. *See* RCW 70.128.130(4); RCW 70.129.005, .020, .140; RCW 74.39A.010(2)(a). As a Medicaid client himself, Ida's husband likewise may have been eligible to receive care and live with Ida in one of these types of facilities. AR 695, 1519.⁵

The factual findings belie the contentions of amici that, in the winter of 2006, Ida had expressly and unequivocally rejected the prospect

⁵ This report references the fact that Ida and Richard both received in-home services through the "COPES" program, which is a Title XIX (Medicaid) program described in RCW 74.39A.030(2). The in-home and residential care facility services available to COPES clients are set forth in WAC 388-106-0300 to -0335.

of care in a nursing home, assisted living facility, or adult family home.⁶ When Ida's health took a serious downturn in the winter of 2006, Ms. Raven did not consult with Ida about her residential care choices. Ms. Raven testified that on November 22, 2006, she received a call from Ida's hospice worker who was very "emotional" and using "colors" when describing Ida's pressure ulcers. RP 668:1-19. Ms. Raven testified that she "didn't know enough about bed sores really," but understood that "there was clearly something wrong." RP 668:20-23. Ms. Raven did not go see Ida's pressure ulcers herself. RP 668-70. By December 29, 2006, a hospice nurse described Ida as having "multiple stage 4 skin breakdown on her buttocks, back and legs that are reaching to the bone with undermining . . . [which had] copious amount of brown very foul smelling drainage." AR 130 (FF 79), 689. The nurse was so distressed by the state of Ida's health that she made a neglect referral to DSHS's Adult Protective Services. AR 689. Still, Ms. Raven, whose visits to Ida had decreased over time, did not go see Ida to discuss alternative residential care options. *Raven*, 167 Wn. App. at 453; AR 112-13 (FF 44); RP 776. Ms. Raven

⁶ Despite the fact that Ms. Raven did not discuss nursing home care with Ida in the winter of 2006 (or discuss any other alternative to a nursing home), the Elder Law Attorneys maintain that Ida "consistently expressed a desire to receive the less effective in home care." Br. of Elder Law Attorneys at 4-5. Similarly, Disability Rights Washington contends that "Ida had made clear *to her guardian* that she did not wish to go into a nursing facility." Br. of DRW at 2 (emphasis added). The Professional Guardians also imply that Ida had clearly rejected care in a nursing home (arguing that the Court of Appeals decision improperly requires guardians to institutionalize wards "who refuse institutionalized care"). Br. of Professional Guardians at 1.

testified, “If I had met with her during that period of time in December and talked to her about a nursing home, I think it highly unlikely that she would have agreed to go into a nursing home. . . . But I can’t say without certainty – I can’t say anything with certainty.” RP 776:17-23. Ms. Raven did not balance Ida’s historical statements opposing a permanent transfer to a nursing home against the fact that Ida did consent in 1996 to receive temporary treatment in a nursing home after experiencing a fracture. *Raven*, 167 Wn. App. at 459.⁷ Ms. Raven eventually did transfer Ida to a nursing and rehabilitation center to receive care for her infected wounds in January 2007, but it does not appear that she consulted with Ida before doing so. *See* AR 131-32 (FF 83) (describing Ms. Raven’s decision to transfer Ida, with no mention of discussion with Ida).

Ms. Raven could not say “with certainty” what Ida’s choice would have been because she did not personally consult with Ida, as she was required to do. As the Court of Appeals recognized, Ms. Raven based her decision on what Ida would have chosen, if competent, solely on Ida’s

⁷ Ida’s 1996 decision to accept temporary nursing home care may have been a better indication of the choice Ida would have made if competent about whether or not to accept care in a residential treatment facility. Ida suffered from dementia, a progressive, degenerative disease, so it is reasonable to conclude that she had more capacity in 1996 than later, in 2006. AR 98 (FF 5) (Ida suffered from dementia); Medline Plus, online medical dictionary, <http://www.merriam-webster.com/medlineplus/dementia> (last visited Aug. 29, 2012) (description of dementia of which Court may take judicial notice).

“historical opposition” to residential care and without consideration of new facts demonstrating the mortal danger to Ida of remaining in the home. *Raven*, 167 Wn. App. at 467. Thus, reviewing these findings of fact, the Court of Appeals appropriately concluded that Ms. Raven failed to fulfill her duties with respect to Ida’s residential placement options.

The Court of Appeals decision makes no change to substitute decision-making standards and poses no conflict with statutes or *Ingram*. It does not “chill” guardians, or impose upon them a “duty to bully” wards into accepting unwanted residential care. Instead, it merely underscores the necessity for guardians to investigate and personally discuss with a ward the ward’s residential treatment options. This is especially important in instances where the ward’s health has changed or worsened dramatically. If the Court of Appeals decision is overturned, the resulting message telegraphed to guardians will be thus: “If a ward has made historic statements in opposition to receiving care in a facility, you must act in accordance with those historic statements and your attempt to revisit this topic with the ward – even in light of changes in the ward’s health status – will be viewed as a violation of the ward’s self-determination rights.” The published standards of practice and training materials for guardians, currently advising guardians to consult with and counsel a ward on residential care choices, would need to be revised accordingly.

C. No Causation Is Required For A Pattern Of Neglect Under RCW 74.34.020

Relying upon RCW 11.88.005, the Elder Law Attorneys argue that neglect must be construed to require causation and DSHS must show that a guardian actually caused harm to the ward before neglect may be found. Br. of Elder Law Attorneys at 5-6. But the Elder Law Attorneys ignore the fact that the finding against Ms. Raven was made under the Abuse of Vulnerable Adults Act, chapter 74.34 RCW, not RCW 11.88.005. The Abuse of Vulnerable Adults Act requires no proof of harm to the vulnerable adult for neglect, as follows:

“Neglect” means . . . a pattern of conduct or inaction by a person or entity with a duty of care that fails to provide the goods and services that maintain physical or mental health of a vulnerable adult, or

RCW 74.34.020(12)(a). As set forth in the DSHS’s Answer to Petition for Review at pages 15-20, the statute’s express language requires no causation, is distinct from “negligence” or the cause of action in RCW 74.34.200 under which monetary damages may be recovered against a perpetrator, and authorizes DSHS to extend protective services to a vulnerable adult *before* he or she suffers actual harm. Where the plain language of the statute requires no causation, the statute should not be interpreted in a manner which leads to absurd results and defeats the protective purposes expressly set forth in the Act. *See Kilian v. Atkinson*,

147 Wn.2d 16, 21, 50 P.3d 638 (2002) (“The court must . . . avoid constructions that yield unlikely, absurd or strained consequences.”).

D. Any Argument To Deflect Blame On DSHS Or Others For Ida’s Plight Ignores The Fiduciary Obligations Imposed On Ms. Raven As Ida’s Guardian

The Professional Guardians contend that DSHS and others besides Ms. Raven neglected their duties to Ida, and placing blame on Ms. Raven as Ida’s guardian would chill others from acting as guardians for DSHS clients. Amicus Curiae Brief of Washington Association of Professional Guardians In Support of Petitioner’s Petition for Review (“Br. of Professional Guardians”) at 5-8. This argument ignores the fact that as Ida’s medical guardian, Ms. Raven was the person solely vested with making Ida’s healthcare decisions, and the findings of fact demonstrate that Ms. Raven was the person who limited Ida’s care options by rejecting the use of independent caregivers. The neglect finding against her is warranted under the facts. *Raven*, 167 Wn. App. at 450.

Ms. Raven was appointed as Ida’s medical guardian by court order on March 12, 2004. AR 1508. As guardian, Ms. Raven owed an affirmative, fiduciary duty to act in Ida’s best interests. *Cummings v. Guardianship Servs. of Seattle*, 128 Wn. App. 742, 755, 110 P.3d 796 (2005), *review denied*, 157 Wn.2d 1006 (2006); *see also In re Guardianship of Eisenberg*, 43 Wn. App. 761, 766, 719 P.2d 187 (1986)

("[a] guardianship has been described as 'a trust relation of the most sacred character'").

The rights specifically invested in Ms. Raven under her appointment order were the right to appoint someone to act on Ida's behalf, the right to consent to or refuse medical treatment, and the right to decide who would provide care and treatment to Ida. AR 1511. Ms. Raven was also ordered to act "as required by RCW 11.92" and to complete and file a personal care plan for Ida within three months of appointment and every year thereafter, consistent with the requirements in RCW 11.92.043. AR 1510-11. Under RCW 11.92.043(1), Ms. Raven was required to develop and file an initial care plan for Ida within three months of her appointment, assessing Ida's needs and developing a "specific plan" for meeting them. Thereafter, under RCW 11.92.043(2), Ms. Raven was required to develop and revise Ida's care plans, residential placement, services she required, and address any change to her health or mental status.

The standards of practice applicable to professional guardians further clarified Ms. Raven's duties. Medical guardians, such as Ms. Raven, have affirmative obligations to "*actively* promote" the ward's health "by arranging for regular preventive care," and "*monitor*" the care "to *ensure* that it is appropriate." AR 1836 (emphasis added). Hence, the

medical guardian may not merely rely on others to arrange for or supervise the ward's care, but must instead actively secure and oversee it. And in cases with few options for care, a guardian's duty to pursue all reasonably available options is particularly important. This conclusion is supported by Ms. Raven's own guardianship expert, who testified that if Ida would not agree to receive treatment in a residential care facility, Ms. Raven's "only option" was to "get as much care into the house as possible" RP 632:6-12.

Thus, the failings of others besides Ms. Raven, if any, do nothing to negate the fact that as guardian, Ms. Raven was the person *in charge* of Ida's medical care.⁸ As expressly stated in the standards of practice for professional guardians, "the guardian alone is ultimately responsible for decisions made by the guardian on behalf of the incapacitated person." AR 1834.⁹ Ms. Raven was the person who said "no" to the use of

⁸ The Professional Guardians contend that DSHS was obligated to take legal action to stop Ida's husband from interfering with her care. Br. of Professional Guardians at 6-7. DSHS does not concede that it failed to meet its obligations to Ida. The Professional Guardians overlook the fact that when DSHS believes that protective services are necessary for a person lacking capacity, DSHS is directed to seek the appointment of a guardian to protect the vulnerable adult. RCW 74.34.067(5). That is exactly what DSHS did in January 2004. AR 108 (FF 33). Based on its petition, Ms. Raven was appointed as Ida's medical guardian in March 2004. AR 109-10 (FF 37). As such, the responsibility to take any legal action to obtain medical care for Ida, or stop her husband's interference with it, fell upon Ms. Raven, not DSHS. RCW 11.92.060(5). Further, the Superior Court directed Ms. Raven, not DSHS, to consider retaining an attorney to assist her in addressing the interference by Ida's husband. AR 1544.

⁹ This standard is now codified at Standards of Practice Regulation § 402.4, *available at*

independent care providers, not DSHS or its agents. Her failure to pursue all reasonable alternatives meets the test for “neglect” under RCW 74.34.020, just as the Court of Appeals recognized.

E. The Americans With Disabilities Act Did Not Require DSHS To Set Up A Private Nursing Home For Ida Within Her Own Home

Amicus Curiae Disability Rights Washington, the Long Term Care Ombudsman, and the Arc of Washington (hereinafter, collectively referred to as “DRW”) claim that by criticizing Ms. Raven for failing to “aggressively pursue” residential care options for Ida, the Court of Appeals decision violates the principles established under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, requiring DSHS to serve disabled Medicaid clients in the “least restrictive” community setting. *Amici Curiae* Brief of Disability Rights Washington, the Long Term Care Ombudsman Program, and the Arc of Washington State in Support of Petitioner’s Petition for Review (“Br. of DRW”) at 11-16. The ADA argument was not raised by the parties and should not be entertained here. *See State v. Gonzalez*, 110 Wn.2d 738, 752 n.2, 757 P.2d 925 (1988) (arguments raised only by amici curiae need not be considered); *Long v. Odell*, 60 Wn.2d 151, 154, 372 P.2d 548 (1962) (“[T]he case must be made by the parties litigant, and its course and the issues involved cannot

http://www.courts.wa.gov/committee/?fa=committee.child&child_id=30&committee_id=117#401 (last visited Aug. 27, 2012).

be changed or added to by friends of the court.”) (internal quotation marks omitted).

But even had the ADA argument been raised by the parties, DRW is wrong on the facts and the law. Under the ADA, the State is required to provide services to disabled citizens in the most “integrated” setting possible, instead of requiring such citizens to accept services in an institution. 42 U.S.C. § 12132; *Arc of Wash. State v. Braddock*, 427 F.3d 615, 618 (9th Cir. 2005); *see also Olmstead v. Zimring*, 527 U.S. 581, 600, 119 S. Ct. 2176, 144 L. Ed. 2d 540 (1999). DRW fails to acknowledge that in this case, it was *Ms. Raven*, not the State, that acted to limit Ida’s options for community-based in-home care in Ida’s own apartment. Further, DRW is incorrect to argue that the State is required to establish a “nursing home for one” under the ADA. If an individual requires nursing home care and would not benefit from receiving care in an alternative, community-based setting, the ADA does not require the State to establish a private nursing home for the individual within his or her own home.

Under the ADA’s “integration mandate,” “states are required to provide care in integrated environments for as many disabled persons as is reasonably feasible.” 42 U.S.C. § 12132; *Braddock*, 427 F.3d at 618. “[U]njustified institutional isolation of persons with disabilities is a form of discrimination.” *Olmstead*, 527 U.S. at 600. As DRW acknowledges,

Washington has adopted a home and community-based plan to comply with the ADA. Br. of DRW at 12-15. Through its plan, DSHS funds services for clients who would otherwise require institutional care in the client's own home or in a community-based alternative to a nursing home, such as an assisted living facility or adult family home. Br. of DRW, Ex. B at 12-13; *see also* WAC 388-106-0200, -0300, -0305. Medicaid recipients wishing to remain at home can receive care from caregivers employed by a home care agency, or persons acting as independent care providers. WAC 388-71-0500. Ms. Raven used Catholic Community Services, a home care agency, to supply in-home care to Ida. AR 104 (FF 17); RP 820:3-6. But when Catholic Community Services consistently failed to fill Ida's evening caregiving shift, Ms. Raven rejected the request of Ida's case manager to explore the use of independent caregivers to supplement Ida's in-home care. *Raven*, 167 Wn. App. at 454.

DRW fails to address Ms. Raven's decision not to pursue supplemental in-home care through independent caregivers. Instead, it maintains that DSHS violated the ADA by failing to establish a private nursing home within Ida's own home. Br. of DRW at 15.¹⁰ This is not an

¹⁰ DRW argues that DSHS's program "was designed to provide *nursing home services* [to Ida] in her home." Br. of DRW at 15 (emphasis added). DSHS extends

accurate characterization of DSHS's obligations under the ADA. The ADA requires the State to provide services to a disabled person in a community-based setting if the placement can reasonably be accommodated, taking into account the resources available to the State and the needs of other disabled persons. *Olmstead*, 547 U.S. at 607. But services in a community-based setting are only required if the disabled individual would *benefit* from receiving services in such a setting. *See id.* at 601-02. If the individual is not qualified for community-based services, "nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings." *Id.*¹¹

Similarly, the ADA does not dictate a level of benefits the State must extend. *Id.* at 603 n.14 ("We do not in this opinion hold that the ADA imposes on the States a standard of care for whatever medical services they render, or that the ADA requires States to provide a certain level of benefits to individuals with disabilities.") (internal quotation marks omitted). Because in-home personal care services are *optional*

"skilled nursing" services to in-home clients, but does not allow for the establishment of a "nursing home" within a client's own home. WAC 388-106-0300(7).

¹¹ The Supreme Court explained that "qualified individuals with a disability" are "persons with disabilities who, with or without reasonable modifications to rules, policies, or practices, . . . mee[t] the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." *Olmstead*, 547 U.S. at 602 (alteration in original) (internal quotation marks omitted).

under federal Medicaid law, the ADA did not require DSHS to provide them to Ida, or to any other disabled Medicaid recipient. *See* 42 U.S.C. § 1396a(a)(10)(A); 42 U.S.C. § 1396d(a)(24) (personal care benefits are optional under Medicaid, not mandatory).

Thus, DRW's discussion of the ADA once again fails to address the unique facts in Ida's case and misapplies those facts to the applicable law. The ADA does not restrict the State from expecting a guardian to investigate and encourage a ward who would not benefit from community-based care to accept care in a residential care facility. In Ida's case, it was the professional opinion of the nurses treating Ida's pressure ulcers that Ida required 24-hour care in a nursing home. AR 129 (FF 76), 130 (FF 79), 131 (FF 82). Yet, instead of talking to Ida about her residential care options – including *alternatives* to nursing homes, such as an assisted living facility or adult family home – Ms. Raven kept Ida at home and rejected one of the two sources of Medicaid funded in-home care available. Thus, it was Ms. Raven's actions, not those of DSHS, which limited Ida's options for in-home care. And any contention by DRW that the ADA then required DSHS to set up a private nursing home for Ida within her own home is incorrect. *See Olmstead*, 547 U.S. at 601 n.12; *see also* 42 U.S.C. § 1396n(c) (community-based care options may be

extended under Medicaid only if they are less expensive than nursing home care).

F. Guardians Have A Duty To Withdraw In Cases In Which They Are Unqualified

The Professional Guardians argue that by encouraging guardians like Ms. Raven to withdraw and “step aside,” the Court of Appeals decision will exacerbate a shortage of guardians for low-income Medicaid recipients. Br. of Professional Guardians at 2-5. The Professional Guardians overlook the fact that the decision simply reflects the codified standards of practice for professional guardians. Any deviation from the standards in guardianships for low-income persons will impose a two-tier system, with low-income persons receiving a lower standard of care.

The standards of practice are the same for all wards. Guardians in charge of a ward’s medical decisions must personally visit the ward on a regular basis. *See* AR 1834. Training materials for professional guardians strongly recommend monthly visits, with more in-person monitoring necessary for a ward requiring substantial care but who refuses to move to a residential care facility. AR 1834, 1844. Guardians are required to be thoroughly familiar with the ward’s medical and physical needs, “monitor” the ward’s care and treatment, and “ensure” that it is appropriate. AR 1836, 1853, 1859-60. Guardians are also required to

“regularly examine” notes and logs maintained by the ward’s care providers to “ascertain” that the ward’s care plan is being followed and demonstrate to caregivers that the guardian is watching. AR 1844, 1859.¹²

While the Professional Guardians point out that Ms. Raven only received \$78.50 per month, they fail to address the findings of fact showing that even for that amount, Ms. Raven failed to discharge duties that she unequivocally owed to Ida. Ms. Raven logged six visits to Ida in 2004, two in 2005, and five in 2006. AR 112-13 (FF 44). She was Ida’s guardian for nearly three years. AR 109-10 (FF 37), 131-32 (FF 83). She “believed” that caregivers employed by Catholic Community Services were present in Ida’s home on a daily basis, but she was “not certain.” AR 112-13 (FF 44). Caregivers and family members kept a daily care log in Ida’s home, reflecting Ida’s baths, pad changes, food intake, liquid intake, and other care issues. AR 884-1000. Ms. Raven testified that she had a “vague sense” of Ida’s daily care log, but she did not actually review it until discovery in the administrative hearing. RP 828:21-22, 829:9-11.¹³ She testified that she “never” reviewed daily care records recorded by Ida’s hospice nurses in the winter of 2006. RP 839:21. She reviewed

¹² The training materials cited herein are those prepared by Ms. Raven’s own guardianship expert, Mr. Thomas O’Brien, and are included in the record at AR 1840-46, as well as those prepared by the National Guardianship Association (AR 1847-73).

¹³ This occurred after Ida’s death. Ida died on April 24, 2007, Ms. Raven was notified of the neglect finding in June 2007, and Ms. Raven requested an administrative hearing in July 2007. AR 1, 131-32 (FF 83).

Ida's historic medical records reflecting Ida's chronic problems with pressure sores and was aware that Ida continued to experience periodic skin breakdown during her tenure as guardian. AR 99-100 (FF 6). But she testified that she was not sufficiently familiar with pressure sores to understand the significance of the emotional telephone call from Ida's case manager in November 2006 describing the "colors" of Ida's pressure sores. AR 164-65 (CL 49); RP 668:1-23. She testified that she did not observe Ida's pressure sores in the winter of 2006. AR 835. She recalled researching pressure sores, but did not believe she had done so until preparing for the administrative hearing, *after Ida's death*. RP 835:24 – 836:6. And, as discussed above, she testified that she did not choose to consult with Ida to discuss Ida's residential care options after Ida developed several infected, stage IV pressure sores in the winter of 2006. RP 776:17-23. As well as the multiple breaches set forth in the findings of fact, Ms. Raven herself argued that she was unqualified to employ independent care providers needed to supplement Ida's in-home care, because she lacked an appropriate license. Petition for Review at 19.

DSHS is entitled to expect guardians to fulfill the unequivocal duties clearly set forth in the standards of practice, even for low-income DSHS clients. If and when DSHS ever faces a critical guardianship shortage for Medicaid recipients, it must resort to the Legislature for

solutions, not ask the Court to dilute the standards of practice for low-income wards. Indeed, the existing standards of practice for professional guardians prohibit this: “The duties of a guardian to an incapacitated person are not conditioned upon the person’s ability to compensate the guardian.”¹⁴ The standards also require the guardian to “know and acknowledge personal limits of knowledge and expertise and . . . assure that qualified persons provide services to the incapacitated person.” AR 1833.¹⁵ Guardians also must avoid taking actions which are “self-serving or adverse to the interest of the incapacitated person” and seek termination of the guardianship when warranted. AR 1864, 1865.¹⁶ Under these professional standards, when Ms. Raven felt she lacked expertise or experience needed to secure and supervise Ida’s care, she was required to alert the superior court and seek to withdraw, as the Court of Appeals appropriately recognized. *Raven*, 167 Wn. App. at 468, 473.

¹⁴ Standards of Practice Regulation § 410.4, available at http://www.courts.wa.gov/committee/?fa=committee.child&child_id=30&committee_id=117#410 (last visited Aug. 27, 2012).

¹⁵ This provision is now codified at Standards of Practice Regulation § 402.6, available at http://www.courts.wa.gov/committee/?fa=committee.child&child_id=30&committee_id=117#401 (last visited Aug. 27, 2012).

¹⁶ These provisions are now codified at Standards of Practice Regulation §§ 406.2, 411, available at http://www.courts.wa.gov/committee/?fa=committee.child&child_id=30&committee_id=117#406; http://www.courts.wa.gov/committee/?fa=committee.child&child_id=30&committee_id=117#411 (last visited Sept. 10, 2012).

III. CONCLUSION

The arguments of amici fail to take into account the facts in this case. Applying those facts to the law, the Court of Appeals correctly affirmed the finding of neglect against Ms. Raven under RCW 74.34.020. Because none of the factors for accepting review under RAP 13.4(b) are present, review should be denied.

RESPECTFULLY SUBMITTED this 10th day of September,
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