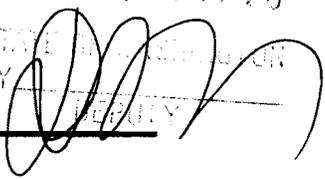


COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY: 

NO. 40809-1-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

RESA RAVEN,

Respondent,

v.

WASHINGTON STATE DEPARTMENT OF SOCIAL
AND HEALTH SERVICES,

Appellant.

BRIEF OF APPELLANT

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I. INTRODUCTION

This case concerns Resa Raven's petition for judicial review under the Administrative Procedure Act, chapter 34.05 RCW, of a Review Decision and Final Order ("Final Order") issued by the Department of Social and Health Services ("DSHS") on April 10, 2009. The Final Order concluded that Ms. Raven "neglected" Ida, a "vulnerable adult," as defined in the Abuse of Vulnerable Adults Act, chapter 74.34 RCW. Under the Act, "neglect" includes the inaction of a person with a duty of care for a vulnerable adult to supply the goods and services that the vulnerable adult needs to maintain his or her physical or mental health, or the inaction that fails to prevent physical harm or pain to the vulnerable adult.

DSHS found that Ms. Raven perpetrated neglect by failing to take action, as Ida's court-appointed guardian, to provide the care and medications that Ida needed in her own home and failing to prevent harm and pain to Ida. Ms. Raven did not pursue actions recommended by the court to stop long-standing interference with Ida's medications, posed by Ida's husband. Ms. Raven also refused to consider one of the two sources of in-home care authorized for Medicaid clients such as Ida, even though Ida's existing caregivers consistently failed to supply the care she needed. The findings showed omissions that went on for months; this is not a case

of second-guessing a guardian's difficult choices. Based on the substantial evidence in the record, the Court should affirm the conclusion that Ms. Raven perpetrated a pattern of neglect in failing to secure in-home goods and services that Ida needed and in failing to prevent harm and pain to Ida.

II. COUNTER-STATEMENT OF ISSUES

1. The facts supported by substantial evidence showed that (a) Ms. Raven was a court-appointed guardian invested with the right to make all medical care and treatment decisions for her ward; (b) Ms. Raven rejected sources of in-home care reasonably available to her ward when the ward's extensive needs for in-home care were not being met through her existing care plan; (c) Ms. Raven did not take reasonable actions to stop interference with the ward's receipt of medications; and (d) this caused harm and pain to the ward. Under these facts, did the agency properly conclude that a medical guardian perpetrated neglect under RCW 74.34.020?

2. Does due process require that the standard of proof for findings of abuse and neglect under chapter 74.34 RCW be heightened to clear, cogent, and convincing, even though a finding under chapter 74.34 RCW does not impair a license?

3. If DSHS's neglect finding is reversed, was DSHS's action nevertheless "substantially justified," precluding an award of fees and costs under the Equal Access to Justice Act, when the record confirms that Ms. Raven failed to take action reasonably available to her to address Ida's lack of in-home care and medications?

III. COUNTER-STATEMENT OF THE CASE

DSHS issued a notice and amended notices of neglect under RCW 74.34.020 to Ms. Raven on June 15, 2007; June 19, 2007; and January 3, 2008. Administrative Record ("AR") 681. The finding was upheld in the Final Order by the DSHS Board of Appeals ("Board") on April 10, 2009. AR 1-2, 97-170 (copy of Board's findings of fact ("FF") and conclusions of law ("CL") attached as **Appendix A**). The Final Order is the final decision of DSHS. RCW 34.05.464(4); WAC 388-71-01275(3). The Final Order was based on the following findings and evidence in the record.

A. Ms. Raven Is Appointed To Make Medical And Care Decisions For Ida

The neglect finding was based on Ms. Raven's actions and omissions as Ida's medical guardian. Ms. Raven, formerly known as Eileen Lemke-Meconi,¹ was Ida's guardian for two years and nine months,

¹ Final Order, FF 1. Ms. Raven does not expressly assign error to individual FF as required by RAP 19.3(h), although her argument implicates certain findings. The FF referenced by the Department in this Counter-Statement of the Case do not appear to be disputed in Ms. Raven's opening brief and are therefore considered verities on appeal.

from March 2004 to January 2007. FF 37, 40, 83. DSHS petitioned for a guardian after finding Ida's in-home care seriously deficient. FF 20, 33.

Ida was 82 when the guardianship was established. FF 37. Ida lived with her husband, Richard, in an apartment in Lacey. AR 1516, 1518, 1567. Richard and Ida both received in-home care through the state's Medicaid program. AR 695, 1519.² Until November 2006, Richard was the person responsible to give Ida her medications. FF 13; AR 728, 753, 763, 1595. Ms. Raven was appointed as Ida's medical guardian. FF 37-38; AR 1508-12. Ms. Raven's appointment order required her to make all medical and care decisions for Ida and to develop, file, and update a care plan for Ida under RCW 11.92.043. AR 1510-11. This was Ms. Raven's first appointment as a professional guardian. FF 39.

B. Ida's Extensive Needs For Repositioning, Bathing, And Medications

Ida was mentally ill and medically fragile. Ida had been bedbound since 1996 and was dependent on others to supply her most basic needs, such as feeding, cleaning, and giving her medications. Her muscles were atrophied and contorted, and her body was described as "flattening" into

Kitsap Cnty. v. Cent. Puget Sound Growth Mgmt. Hrg's Bd., 138 Wn. App. 863, 872, 158 P.3d 638 (2007).

² 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).

her bed. She suffered from painful chronic urinary tract infections and skin breakdown and had experienced mini-strokes, pleurisy, pneumonia, kidney infection, enlarged heart, delirium, and angina attacks. She was paranoid, convinced that others were conspiring against her, and had memory deficits, often forgetting who her caregiver was and sometimes failing to recognize her own daughter. She experienced delusions, hallucinations, and a prior psychiatric commitment. She verbally and physically assaulted her caregivers, being more aggressive when she was in pain and more compliant with care when she received pain medications. FF 3-5, 15; AR 696-705, 729, 762, 1230.

Because Ida was bedbound, she was at substantial risk for skin breakdown. Verbatim Report of Proceedings Before Rebekah Ross, Administrative Law Judge (“RP”) 39:15-21, 167:8-15. Skin breakdown, also known as “pressure sores,” develops when the bony prominences of a person’s body are pressed for long periods against a surface, inhibiting blood flow. The National Pressure Ulcer Advisory Committee categorizes pressure sores into four “stages.” Stage I is an area of redness that fails to resolve within 30 minutes and does not blanch when pressed. Stage II is a superficial area of breakdown, like a blister. Stage III is an area of damage that extends below the skin, into the subcutaneous tissue.

Stage IV is a wound extending into the muscle and bone. RP 228:18–229:5; AR 1950-66; *see also* RP 234:23–236:17.

To avoid pressure sores, Ida’s body needed to be repositioned, and she needed to be bathed after incontinence. Assessments prepared for Ida by her county case manager include generic instructions for repositioning and cleaning persons at risk for skin breakdown, as well as individualized instructions to turn and bathe Ida. RP 39:12-21; AR 692-93, 706-08, 710-11, 720-21, 730-32, 737-42, 755, 761, 764-67, 772-73, 777. Between 2004 and 2006, Ms. Raven signed all of Ida’s assessments. AR 694, 722, 756. Ms. Raven was aware of these needs and made a record of them. AR 1517, 1519-21, 1526-29, 1531.

Ida’s chronic pain from arthritis, urinary tract infections, and skin breakdown, and her mental illness, made her combative with caregivers. FF 5, 15; RP 737:5-15. Ms. Raven documented Ida’s need for medications to address her pain and combativeness. AR 1527, 1531, 1569, 1580-85, 1587, 1590, 1592. In fact, at the beginning of the guardianship, Ms. Raven recorded advice provided by her business partner—a more experienced professional guardian and registered nurse—that “intervention into pain may be the key to [Ida’s] cooperation with medical treatment.” FF 40; RP 480:6–481:18, 498:2-3; AR 1569.

C. Repeated Difficulties With Ida's Receipt Of Consistent Medical Treatment, Medications, And In-Home Care

During Ms. Raven's tenure as Ida's guardian, Ida consistently went without needed caregiving services, medical treatment, and medications.

1. Ida Never Received Sufficient In-Home Caregiving Services

As a Medicaid client, Ida had two sources of in-home care: "individual providers" and home care agencies. WAC 388-71-0500. Individual providers are independent caregivers meeting specified qualifications, selected by the client or her guardian. WAC 388-106-0010; RP 20:24-22:9. Home care agencies are licensed by the Department of Health and employ caregivers. WAC 246-335-015(19); WAC 388-71-0500(2). The care provided by both is primarily non-medical, such as assistance with personal hygiene, dressing, feeding, and housekeeping. WAC 246-335-015(21); WAC 388-106-0010.³

Ms. Raven used Catholic Community Services, a home care agency, to provide care to Ida. FF 17; RP 820:3-6. Given Ida's aggression, Catholic Community Services found it difficult to staff Ida's caregiving shifts. RP 42:9-11, 44:20-24; AR 1528. Ida's husband, Richard, and her primary caregiver, Pam, exacerbated the problem. RP 26:4-22, 30:12-21, 59:21-60:8, 731:10-732:9, 739:9-17; AR 1526-29,

³ Refer to definitions of "activities of daily living," "instrumental activities of daily living," and "personal care services" in WAC 388-106-0010.

1582-84, 1587. They interfered with Ida's receipt of pain medications because they felt the medications made her too sleepy. FF 59; AR 729, 731, 764, 839, 841, 852-54, 1227, 1229, 1231. Ms. Raven documented her awareness of Richard's and Pam's interference. AR 1526-27, 1582-85, 1587-88, 1590, 1592-94.

In January 2006, Ida had multiple areas of stage II skin breakdown and was only being cleaned and repositioned two times a day. AR 845-46. By February 2006, DSHS approved exceptional funding to pay for three caregiving shifts to reposition and clean Ida each morning, afternoon, and evening. FF 9, 60-61; RP 40:13-44:14; AR 758, 764-66, 849, 1586. Ida was approved for 280 hours of care per month, but Catholic Community Services filled only two shifts, or about 189 hours per month. FF 84; RP 42:7-43:3; AR 849, 874. This meant that on a monthly basis, nearly 100 hours of paid care went unfilled, and Ida routinely lacked evening care and lay in her own excrements overnight. RP 42:1-43:3; AR 689, 1526-27, 1531.

In February 2006, Ida's county case manager asked Ms. Raven to use individual providers to supplement Ida's care. FF 60; RP 58:9-21; AR 852. Ms. Raven immediately dismissed the prospect, because she did not want to supervise individual providers. RP 58:14-21, 822:2-18; AR 852. In May 2006, Ms. Raven did speak to another home care agency

that expressed interest in working with Ida, but Ms. Raven never used them to replace or supplement Catholic Community Services. RP 820:3-6, 825:21-23; AR 1542, 1587-88.

2. Medical Providers Terminate Involvement With Ida Due To Lack Of In-Home Care Services And Interference With Ida's Medications

When Ms. Raven was appointed guardian in March 2004, Ida appeared to have no physician. FF 49. Ms. Raven intermittently secured physician services for Ida. In August 2005, Ida was seen in the emergency room for a urinary tract infection and pressure sores and was discharged with a new doctor and a hospice team. FF 57-58, 64. Ida was placed on hospice because she was expected to die in six months or less. FF 58. Ida's doctor and hospice team terminated services nine months later, after informing Ms. Raven of concerns about Richard's interference with Ida's medications, the lack of caregiving in Ida's home, and Ida's assaultiveness, which caused injuries to hospice staff. FF 59-60, 63-64; AR 1580-87.

3. With Ida's Care In Disarray, The Court Provides Ms. Raven With Instructions, None Of Which Ms. Raven Follows

After Ida's doctor and hospice quit, Ms. Raven petitioned the court for instructions in May 2006. AR 1524-33. Ms. Raven described Ida's situation as an "impending crisis of care." AR 1524. She informed the

court that Ida was without evening care and “remains soiled throughout the night until a caregiver arrives at 9am [sic] in the morning.” AR 1531. She described an “uphill battle” posed by Richard’s interference with Ida’s pain medications, causing Ida to become aggressive with her caregivers. AR 1526-29.

In a hearing on June 2, 2006, Ms. Raven discussed her desire to replace Ida’s caregivers and said that “negotiations with the other care agency in the county are going well.” AR 1542. But Ms. Raven did not inform the court about the prospect of retaining individual providers as an additional source of care, or her decision not to look into them. RP 825:24–826:2.

The court recognized that Ida “is in need of better care than she has been receiving” AR 1537. The court also expressed concern about the interference with Ida’s medications and combativeness with caregivers and discussed potential remedies, including retention of an attorney or taking legal action against Richard. AR 1538-39, 1544-49.

The court clearly expected Ms. Raven to take action to address the problems with Ida’s care and medications. AR 1539. However, following the hearing, Ms. Raven did not retain an attorney or take action against Richard. RP 822:20–826:21. She did not fire and replace Catholic Community Services, although caregiver Pam was replaced after suffering

an injury. RP 314:16-25, 820:3-6. She did not supplement Ida's care through the other home care agency. RP 820:3-6, 825:21-22; AR 1588-89.

In June 2006, Ms. Raven asked Catholic Community Services to become approved for "nurse delegation," a process by which staff could legally administer medications to Ida. FF 88; AR 1589-90. But Ida did not have a doctor for three more months. FF 71-72. Thus, because nurse delegation requires physician supervision under RCW 18.79.260(2), nurse delegation could not be initiated for three months. Even after Ms. Raven obtained a doctor for Ida in October 2006, nurse delegation was delayed almost two more months, due to lost paperwork. AR 1594-95. Ms. Raven documented more interference with Ida's medications by Richard during the delay. AR 1593-94.

4. Lack Of In-Home Caregiving Services Is Never Addressed; Ida Is Hospitalized And Transferred To A Rehabilitation And Nursing Center

Ms. Raven obtained a new doctor for Ida on October 6, 2006, and a new hospice team began working with Ida on November 4. FF 71-74. Hospice threatened to quit within days, citing concerns about the lack of in-home care and Richard's interference with medications. FF 74, 78; RP 123:1-22; AR 870, 1360, 1594. This prompted Ms. Raven to look into the delay in nurse delegation, which was finally approved in late

November 2006 and in place by early December, allowing a nurse to replace Richard as the person responsible for Ida's medications. RP 271:1–272:2; AR 1594-95.

Ida developed skin breakdown throughout November and December 2006. RP 125:2-5, 127:2-16, 169:20–170:10, 176:1–177:22, 178:3-25, 229:15–231:11, 305:20-24; AR 1269, 1272, 1277-81, 1286-87, 1291-96, 1299-1300, 1302-09, 1312-13, 1316, 1321-25, 1327-28, 1331. By November 21, she had numerous pressure sores, one which had reached stage IV and was “oozing.” RP 126:23–127:14; AR 1277. A hospice nurse testified that Ida's alternating pressure air mattress may have contributed to skin breakdown, and the mattress was replaced to allow better pressure redistribution. RP 239:1–240:8. But Ida still needed regular repositioning and cleaning, which she failed to receive on a regular basis. RP 243:7-11, 454:2-8. In undisputed testimony, Ida's nurse testified that the primary cause of Ida's skin breakdown was poor nutrition, failure to receive regular repositioning, and exposure of her wounds to urine and feces. RP 170:11-18.

Ms. Raven was informed of the wounds. Ms. Raven testified that on November 22, she received a call from Ida's hospice worker who was very “emotional” and using “colors” when describing the state of Ida's sores. 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. Yet, as Ida’s pressure sores worsened throughout November and December 2006, Ms. Raven did not modify Ida’s in-home care regimen. Eight months after DSHS approved exceptional hours for three caregiving shifts, Ida’s evening shift remained unfilled, no other home care agency was involved, and Ms. Raven did not explore individual providers. RP 43:1-3, 48:21–49:5, 302:2-11, 820:3-13.

The severe winter storms in December 2006 left Ida and Richard without power, causing Ida’s airflow mattress to deflate. FF 101-04. On December 15, Ida’s county case manager and a hospice worker found Ida and Richard without power and heat. FF 102, 104. Ida lay in a pool of urine, and the pressure sores on her buttocks, back, and legs had progressed to stage IV, “reaching down to the bone with undermining . . . [with] copious amount of brown very foul smelling drainage.” FF 79, 104, 105; AR 1282-93. On December 29, 2006, a hospice nurse made a referral to Adult Protective Services (“APS”), describing Ida’s alarming lack of in-home care:

[There] are 2 caregivers [in the home] only 2 hours in the morning and 2 hours in the afternoon. This means that Ida, who is bedbound, stays unchecked in bed from 5PM to 8AM [sic]. During this time she is not feed [sic] or turned and lays in urine and feces until the caregivers come in in the AM. She now has multiple stage 4 skin breakdown on her buttocks, back and legs that are reaching to the bone with

undermining. They have copious amount of brown very foul smelling drainage. Hospice nurses are visiting everyday to change the dressing, but again the patient is incontinent and left in her excrements for over 12 hours.

AR 689. A hospice nurse described working with Ida that winter as “demoralizing.” RP 183:17-21. On December 29, an APS investigator telephoned Ms. Raven and requested permission to have Ida hospitalized. Ms. Raven agreed, and Ida was hospitalized on December 30, 2006. FF 80.

On January 5, 2007, Catholic Community Services terminated services for Ida, stating that Ida’s care plan was unsafe, and Ida’s county case manager also discussed terminating services. FF 82. On January 8, 2007, Ms. Raven consented to have Ida admitted to Evergreen Nursing and Rehabilitation Center. FF 83. Ida did not resist her admission to Evergreen. AR 1451-52. In early January, Ms. Raven asked her business partner, a registered nurse, to take over as Ida’s guardian. FF 83. Ida received regular repositioning and wound management at Evergreen and her pressure sores gradually improved. FF 83; RP 455:10-18, 456:25–457:18; AR 1453, 1461-1500. Ida died on April 24, 2007. FF 83.

D. The Board’s Conclusion—The Actions And Inactions By Ms. Raven Constituted Neglect Of A Vulnerable Adult

The Board concluded that Ms. Raven neglected Ida under RCW 74.34.020 because she failed, as a person with the duty of care for

Ida, to act to secure the goods and services Ida needed in her home, and she failed to prevent Ida from experiencing pain. Final Order, Conclusions of Law (“CL”) 46, 56. In response to Ms. Raven’s belief that the law prevented her from placing Ida in a care facility outside of her home, the Board concluded that Ms. Raven had a duty to provide Ida with the care she needed *in her own home*, including repositioning, “timely bathing” after incontinence, and “effective” medication administration. CL 46. These goods and services were identified in Ida’s care plans and were necessary to prevent Ida’s cycle of skin breakdown and infection. CL 46. Given the fact that Ida’s in-home care was so deficient, the Board concluded that Ms. Raven’s refusal to consider the use of individual providers was unreasonable under the circumstances. CL 31, 54.

E. Superior Court Ruling And Appeal

Pierce County Superior Court Judge Kitty-Ann van Doorninck reversed DSHS and awarded Ms. Raven attorney fees under RCW 4.84.350. Clerk’s Papers (“CP”) 1-9, 93-97. DSHS timely filed its Notices of Appeal and Supersedeas on June 1, 2010. CP 102-21. Under RCW 34.05.570(1) and General Order 2010-1, Ms. Raven bears the burden of demonstrating the invalidity of the Final Order and filed the opening brief.

IV. ARGUMENT

A. Standard Of Review

Under the Administrative Procedure Act (“APA”), Ms. Raven must demonstrate the invalidity of the Final Order. RCW 34.05.570(1)(a); *Hillis v. Dep’t of Ecology*, 131 Wn.2d 373, 381, 932 P.2d 139 (1997). She argues that some of the findings of fact are not supported by substantial evidence and that certain conclusions of law contain errors of law.

The reviewing court sustains an agency finding of fact if it is supported by substantial evidence “when viewed in light of the whole record before the court.” *Heinmiller v. Dep’t of Health*, 127 Wn.2d 595, 607, 903 P.2d 433 (1995), *cert. denied*, 518 U.S. 1006 (1996). Substantial evidence is “a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.” *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hrg’s Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998) (citation omitted). The court reviews de novo both the agency’s conclusions of law and its application of the law to the facts. *Tapper v. Emp’t Sec. Dep’t*, 122 Wn.2d 397, 402-03, 858 P.2d 494 (1993); *Terry v. Emp’t Sec. Dep’t*, 82 Wn. App. 745, 748-49, 919 P.2d 111 (1996). Thus, the court can modify conclusions of law if the agency’s Review Judge “erroneously interpreted or applied the law.” RCW 34.05.570(3)(d); *Heinmiller*, 127 Wn.2d at 601. The court, however, accords “substantial

weight” to the agency’s interpretations of the law within its area of special expertise. *Macey v. Dep’t of Emp’t Sec.*, 110 Wn.2d 308, 313, 752 P.2d 372 (1988).

B. The Abuse Of Vulnerable Adults Act And The Definition Of “Neglect”

The Abuse of Vulnerable Adults Act, chapter 74.34 RCW, requires DSHS to investigate allegations of abandonment, abuse, exploitation, and neglect of vulnerable adults. A “vulnerable adult” is defined to include a person such as Ida: over the age of 60 and lacking the functional, mental, or physical ability to care for herself. RCW 74.34.020(16).

If DSHS concludes that the allegation is founded on a more likely than not basis, DSHS notifies the alleged perpetrator of an initial finding and the right to contest the finding in an administrative hearing. *See* WAC 388-71-0100 to -01280. At the conclusion of the administrative hearing, either the alleged perpetrator or DSHS may request administrative review of the initial order by the DSHS Board of Appeals. WAC 388-71-01265. The Board of Appeals’ decision is the final decision of DSHS. RCW 34.05.464(4); WAC 388-71-01275(3).⁴

⁴ As discussed further below, DSHS uses final findings to review the background of persons applying for licenses to operate care facilities serving vulnerable adults, persons who seek to work in such facilities who will have unsupervised access to vulnerable adults, and persons who seek to contract with DSHS to provide in-home care to Medicaid clients. RCW 74.39A.009, .050(8), .055, .240. The findings are not criminal

Under RCW 74.34.020, neglect can be established in two ways. First, neglect is established when there is a (1) pattern of conduct or inaction (2) by a person or entity with a duty of care that *either* (a) “fails to provide the goods and services that maintain physical or mental health of a vulnerable adult” *or* (b) “fails to avoid or prevent physical or mental harm or pain to a vulnerable adult.” The Final Order finds neglect based on both definitions. CL 56.

C. DSHS’s Order Does Not Contain Errors Of Law Concerning The Duties Of A Medical Guardian

1. Ms. Raven Had A Legal Duty To Decide Who Would Provide Care And Treatment To Ida

Ms. Raven argues that because she was a “limited” guardian, her obligations “did not include the duty to hire and supervise care staff” for Ida. Opening Brief of Respondent (“Raven Brief”) at 30. Ms. Raven’s contention is contradicted by her appointment order, the Standards of Practice for professional guardians, and the testimony of her own expert.

Depending on the alleged incapacitated person’s limitations, a guardianship may be “limited,” investing the guardian with only some of the incapacitated person’s rights. RCW 11.88.095, .030(4)(b) (describing rights an incapacitated person may lose). If the guardianship is limited, the appointment order must specify either the limitations of the

citations, nor do they automatically impair or impact a professional license or certification.

guardianship or, alternatively, the specific authority of the limited guardian. RCW 11.88.095(3).

In Ida's case, Ms. Raven was appointed as a "limited" guardian, in the sense that she was vested only with Ida's medical rights, while authority over Ida's estate remained with Richard and Ida's daughter. AR 1511. However, Ms. Raven's rights to exercise Ida's medical and care decisions were unlimited. Her appointment order invested in her full authority to "consent to or refuse medical treatment," "to decide who shall provide care and assistance" for Ida, and "appoint someone to act on [Ida's] behalf." AR 1510-11. Ms. Raven also was ordered to develop, file, and update a plan of care for Ida under RCW 11.92.043(1) and (2). AR 1511. She was required to assess Ida's physical, mental, and emotional needs and develop a "specific plan" for meeting them. RCW 11.92.043(1). Thereafter, she was required to update Ida's care plan and advise the court of any substantial changes in Ida's condition or changes needed in the scope of the guardianship. RCW 11.92.043(2).

To comply with these requirements, a guardian necessarily must develop, implement, and oversee the plan. This is made even more clear in the Standards of Practice for professional guardians, which require a medical guardian to "actively" promote the ward's health by "arranging for regular preventive care" and "monitor" the care received by the ward

“to ensure that it is appropriate.” AR 1836-37. Ms. Raven offered an expert witness, an experienced professional guardian who trains other professional guardians. RP 618:25–624:25. He testified that Ms. Raven’s appointment order vested her with all medical care decision making for Ida and required Ms. Raven to comply with all of the duties contained in the “Medical Decisions” Standards of Practice Regulation 405 (AR 1836-37). RP at 639:13–642:5. Having offered expert testimony on this issue, the invited error doctrine prevents Ms. Raven from now asserting that she did not have the duty to select and monitor Ida’s caregivers. *Humbert/Birch Creek Constr. v. Walla Walla Cnty.*, 145 Wn. App. 185, 192, 185 P.3d 660 (2008) (citation omitted).

In fact, Ms. Raven’s current claim that she lacked authority to hire and supervise Ida’s care staff is contradicted by her previous statements to the court. In the June 2006 hearing on her petition for instructions, Ms. Raven opined that she had authority to replace Catholic Community Services without further court order. AR 1546. The court agreed, stating “[i]t is my conclusion that you, as the limited guardian of the person, have authority to determine where and by whom [Ida] will be cared for and treated.” AR 1538.

But assuming for the sake of argument that Ms. Raven was not ordered to hire and supervise Ida’s caregivers, Ms. Raven assumed

de facto control over this aspect of Ida's life. She decided to retain Catholic Community Services as Ida's sole caregivers, chose not to bring in another home care agency, and said "no" to individual providers. By assuming control over Ida's care plan, she owed Ida a fiduciary duty in this regard and was responsible for her actions. *See Crisman v. Crisman*, 85 Wn. App. 15, 22, 931 P.2d 163 (1997) (a fiduciary duty may arise when an agent exercises dominion and control over the principal's rights or property).

2. The Affirmative Nature Of Ms. Raven's Fiduciary Duty Required Her To Try To Supply Necessary In-Home Care For Ida

Ms. Raven asserts that the Final Order inappropriately extends the duties of a guardian into the realm of the impossible, thrusting the guardian in the role of "guarantor against all ills." Raven Brief at 24. This hyperbole does not resemble the decision here, which is merely based on the guardian's fiduciary duty. The ruling is quite narrow: a medical guardian commits neglect under the circumstances here where she rejected reasonably available options to secure additional care and medications desperately needed by her ward.

Ms. Raven cannot dispute that a guardian has a fiduciary duty to her ward. *Cummings v. Guard. Servs. of Seattle*, 128 Wn. App. 742, 755, 110 P.3d 796 (2005), *review denied*, 157 Wn.2d 1006 (2006); *see also In*

re Guard. 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’”). A fiduciary must “act primarily for the benefit of another.” *Cummings*, 128 Wn. App. at 755 n.33. The relationship “necessarily involves vulnerability for the party reposing trust in another.” *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 142 Wn.2d 784, 798, 16 P.3d 574 (2001) (Talmadge, J., concurring). As a fiduciary, a guardian has duties of loyalty, care, and full disclosure and must not place his or her personal interests above the ward’s. *See id.* at 798 n.2.

A professional medical guardian’s obligations are comprehensive and affirmative. The Standards of Practice require the guardian 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 given the affirmative nature of the medical guardian’s duties, when resources are limited, the guardian must try all reasonably available options to secure the care needed by her ward. 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.

Ms. Raven fell far short of her duty to "get as much care into the house as possible." Although resources available to Medicaid clients such as Ida are limited, and Ida's combativeness made the situation worse, Ms. Raven's actions and inactions constituted neglect. She spoke to another home care agency that expressed interest in working with Ida but never used them to replace or substitute Catholic Community Services, even after Catholic Community Services failed to supply evening care for eight months after exceptional hours were approved by DSHS. Ms. Raven was informed of the potential to use individual providers, but rejected them, even during November and December 2006, when Ida's pressure sores were exposed for hours to urine and feces due to lack of in-home care. And Ms. Raven chose not to take any action outlined by the court to stop Richard's interference with Ida's medications, instead waiting another five months before nurse delegation could be arranged.

Thus, while DSHS acknowledges that a guardian is not a "guarantor" of her ward's condition under all circumstances, nor should a guardian be expected to summon resources that do not exist, the guardian's duty to try all *reasonably* available sources of care and services provides the basis for the finding of neglect here, where the ward's health

and personal hygiene were substantially compromised due to lack of care. The Final Order relies on a legally sound view of a guardian with medical responsibility for her ward.

D. The Final Order Did Not Erroneously Interpret Or Apply “Neglect” Under RCW 74.34.020 To The Findings Of Fact

1. “Neglect” Does Not Require A Showing Of Harm To The Vulnerable Adult

Ms. Raven incorrectly contends that neglect requires proof of causation, or a showing of harm to the vulnerable adult. Raven Brief at 23-24. As discussed above, “neglect” under RCW 74.34.020 may be proved in two ways. It is established when there is a (1) pattern of conduct or inaction (2) by a person or entity with a duty of care that *either* (a) “fails to provide the goods and services that maintain physical or mental health of a vulnerable adult” *or* (b) “fails to avoid or prevent physical or mental harm or pain to a vulnerable adult.” The Final Order held that Ms. Raven perpetrated neglect under both definitions. CL 56.

The record demonstrates that Ida suffered harm and pain as a result of the lack of in-home care and failure to receive medications. When Ida developed open wounds, her wounds were exposed for hours to urine and excrement. AR 689, 1531. In undisputed testimony, a hospice nurse testified that the cause of Ida’s pressure sores was poor nutrition, lack of care, and lack of repositioning. RP 170:11-18. And Ida experienced

substantial pain and agitation due to interference with her medications. FF 13, 15; AR 1228-37, 1527, 1531. Thus, the record supports the Final Order's holding that Ms. Raven failed to prevent harm and pain to Ida. CL 56.

However, neglect is also established by showing that a person with a duty of care repeatedly "fails to provide the goods and services that maintain physical or mental health of a vulnerable adult." RCW 74.34.020. Both the plain meaning of the statute, as well as the intent of the Abuse of Vulnerable Adults Act, support the conclusion that no showing of harm is required. The Act was adopted to protect vulnerable adults before they are harmed. RCW 74.34.005. Requiring DSHS to establish harm before neglect may be established would excuse repeated inaction of a person with a duty of care to supply goods and services needed by a vulnerable adult and would necessarily require the vulnerable adult to suffer before relief under the Act could be extended. Thus, even without the showing of Ida's suffering, CL 56 is supported by the evidence that Ms. Raven repeatedly failed to secure goods and services that Ida needed in her home.

2. Neglect Is Established By A Breach By A Person With A Duty Of Care To Secure Goods And Services Needed By The Vulnerable Adult

Ms. Raven argues that to establish neglect, DSHS is required to show that additional care and medications would have made a difference for Ida. Raven Brief at 33-34, 40. Ms. Raven's argument distorts the definition of neglect. Neglect does not require DSHS to demonstrate with certainty what would have happened if Ms. Raven had complied with her fiduciary duty. DSHS properly demonstrated neglect under RCW 74.34.020 by establishing that Ms. Raven repeatedly failed, as a person with a duty of care to Ida, to pursue reasonably available options for goods and services that Ida needed in her home.

It is immaterial whether Ida's overall condition would have been different, although the record is clear that more in-home care and medications likely would have kept her more clean and comfortable. It is immaterial that efforts by Ms. Raven to pursue legal action against Richard, or attempts to use individual providers, may have been unfruitful. The neglect exists because of the inaction by Ms. Raven. *See* RCW 74.34.020 ("*inaction* by a person . . . with a duty of care that fails to provide the goods and services" needed by the vulnerable adult) (emphasis added). Ms. Raven could have fulfilled her fiduciary duty by taking some action, and the neglect finding against her would fail.

Thus, it is Ms. Raven—not DSHS—that engages in improper speculation. Raven Brief at 33-34. Delays, lack of resources, and interference made Ida’s case difficult, but as the person with the affirmative fiduciary duty to develop and oversee Ida’s care plan, Ms. Raven needed to pursue courses of action reasonably available. It is inconsistent with Ms. Raven’s affirmative fiduciary duty to reject prospects based on her prediction that they would be unavailable, would make no difference if available, or would require her to take on duties that made her uncomfortable, such as supervising individual providers. By doing so, she improperly placed her personal interests over Ida’s need for in-home care, as held in CL 31. *See also Van Noy*, 142 Wn.2d at 798 n.2. If she lacked the competence to secure or supervise the care Ida needed, she was required by the professional Standards of Practice to inform the court. AR 1833. She could have resigned and turned Ida’s case over to her more experienced business partner much sooner than January 2007.

DSHS properly concluded that the factual findings support the finding of neglect of a vulnerable adult.

E. Any Refusal On Ida’s Part To Move To A Care Facility Does Not Excuse Ms. Raven’s Failure To Secure Care For Ida In Her Own Home

Ms. Raven argues that because it was not legally possible under the substituted judgment standard for her to place Ida in a facility where she

could receive more appropriate care, she did not commit neglect. Raven Brief at 24-27. As a threshold matter, Ms. Raven failed to comply with her duties to regularly monitor, observe, and directly consult with Ida before making decisions on her behalf under the substituted judgment standard. But, even assuming that Ms. Raven correctly determined that Ida would have rejected facility care, Ms. Raven's argument is immaterial, because she committed neglect by failing to secure the *in-home* care to which Ida consented.

1. Ms. Raven Failed To Comply With Her Obligations Under The Substituted Judgment Standard

Ms. Raven asserts that the substituted judgment standard, combined with RCW 11.92.190, prohibited her from placing Ida in a residential care facility against her will. Raven Brief at 27. RCW 11.92.190 prohibits a residential care facility from detaining a resident against his or her will. Under the substituted judgment standard, a guardian is required to make the decisions she believes her ward would make, if competent. RCW 11.92.043(4); *see also* Standards of Practice Regulation 402.1 (AR 1834). This may include the decision *not* to pursue care the ward would have rejected, if competent. *See In re Guard. of Ingram*, 102 Wn.2d 827, 838, 689 P.2d 1363 (1984).

To make informed decisions under substituted judgment, a guardian must comply with a number of obligations. A professional guardian is required to have “meaningful in-person contact” with the ward to “observe” the ward’s circumstances and interaction with caregivers. AR 1834. Ms. Raven’s guardianship expert testified that monthly visits are “standard” for professional guardians. RP 642:13-15. Her business partner testified that it may be necessary for the guardian to immediately go and observe a medically fragile ward after a power outage. RP 495:14–496:4. A guardian is also required to personally consult with the ward about the ward’s choices for care “[w]henver feasible.” AR 1833.

Ms. Raven did not personally observe Ida on a regular basis, and did so even less frequently after Ida developed serious pressure sores in the winter of 2006. AR 1055; FF 44.⁵ Her expert testified that monthly visits by Ms. Raven would have been “better.” RP 645:21-24. There is evidence that Ida had historically opposed facility care, but Ms. Raven testified that she did not consult with Ida about her choices in the winter of 2006. RP 776:8-23. Hence, Ms. Raven acknowledged that she could not be sure of Ida’s preferences for facility care in the winter of 2006. RP 776:17-23.

⁵ Ms. Raven testified that all “substantive” contacts she had with Ida are those which are included in her guardianship billings, summarized by the Board in FF 44. RP 833:16–834:1.

When Ms. Raven did not know what Ida's competent choice for facility care was in late 2006, the Final Order correctly concluded that RCW 11.92.190—which prevents a *facility* from detaining an individual against the individual's will—did not prevent *Ms. Raven* from taking Ida to a care facility to see if she would agree to stay. CL 44. And, in fact, this is what occurred in January 2007. Ms. Raven consented to have Ida admitted to a nursing and rehabilitation center, and Ida did not object to her admission or insist on going home. FF 83. There are no errors of law in the Final Order's conclusions about facility care or the conclusions that Ms. Raven failed to comply with her duties to regularly monitor and observe Ida and to make fully informed decisions and keep the court apprised of Ida's condition. CL 48, 49, 52, 53, 55.⁶

2. Assuming Ida Would Have Chosen In-Home Comfort Care, Ms. Raven Failed To Fulfill Her Duty To Secure It

Even if the Final Order errs in its conclusions about whether Ms. Raven could or should have sooner placed Ida in a care facility, any such error is harmless. By failing to secure sufficient *in-home* care for Ida, Ms. Raven perpetrated neglect, just as the Final Order held in CL 56.

The Final Order concluded that Ms. Raven's belief that Ida opposed facility care was made in good faith. CL 43. However,

⁶ Ms. Raven challenges such FF and CL at Raven Brief at 31, 33, and 40.

Ms. Raven clearly understood that Ida, if competent, would have chosen in-home comfort care. Ms. Raven testified that at the beginning of the guardianship, her goal was to provide “palliative” care for Ida, to “make her more comfortable.”⁷ RP 733:19-23. Near the end of Ida’s life, Ms. Raven’s goal remained the same. She wrote to Ida’s doctor on October 6, 2006, that “[a]t this point I am desperately in search for services that will allow [Ida] to receive hospice care I think it unlikely that [Ida] will be with us much longer, *and I am eager to make her as comfortable as possible in the time that she has remaining.*” AR 2065 (emphasis added). A daily care log maintained by Ida’s caregivers reflects that on most days, Ida accepted basic comfort care. AR 884-1162 (daily entries record Ida routinely accepting “pad change” and “bath” from caregivers).

Thus, the Final Order correctly held that once Ms. Raven determined that Ida’s competent choice would have been in-home comfort care, Ms. Raven’s duty required her to do her best to secure it. CL 46, 54. Ms. Raven’s actions and inactions did not secure such care. She ruled out the use of individual providers and did not bring in the other home care agency, even after Ida’s home care agency failed to fill Ida’s evening

⁷ “Palliate” is “to reduce the violence of (a disease); *also* : to ease (symptoms) without curing the underlying disease.” *Merriam-Webster Online Dictionary* (<http://www.merriam-webster.com/dictionary/palliate?show=0&t=1288633038>) (last visited November 18, 2010).

caregiving shift for eight months after exceptional caregiving hours were approved by DSHS. RP 820:3-13, 822:2–826:21. She knew the critical importance of Ida’s receipt of medications to ease her pain and combativeness, but let the medication situation languish for five more months after the court outlined actions to address Richard’s interference. AR 1544-45, 1595. CL 46 and 56 correctly concluded that, having determined that Ida consented to *in-home* comfort care, Ms. Raven perpetrated a pattern of neglect by failing to pursue sufficient in-home care and services for Ida.

F. The Final Order Does Not Contain Errors Of Law About The “Nurse Delegation” Process

Ms. Raven argues that Richard was the only person who could legally administer Ida’s medications for the many months that Ida was without a doctor, because nurse delegation requires physician supervision under RCW 18.79.260(2). Raven Brief at 27-29. But Ms. Raven ignores the fact that she was informed of other options to address Richard’s interference, which she failed to take.

In the June 2006 hearing on her petition for instructions, the court advised Ms. Raven to consider hiring an attorney or bringing Richard into court on a show cause order. AR 1544-45, 1588. That the court raised such drastic options highlights the depth of its concern and its expectation

that something would be done to remedy the situation. Ms. Raven questions the court's authority to impose such sanctions. *See* Raven Brief at 13. Ms. Raven appears unaware of the court's inherent and statutory rights to sanction Richard for interference. *See King v. Dep't of Soc. & Health Servs.*, 110 Wn.2d 793, 800, 756 P.2d 1303 (1988); Ch. 7.21 RCW.

After the June hearing, Ms. Raven decided to have staff of Catholic Community Services approved for nurse delegation. FF 88; AR 859, 1589. But, as Mr. Raven's brief concedes, nurse delegation must be overseen by a doctor under RCW 18.79.260(2), and Ms. Raven did not secure Ida a new doctor until October 2006. Raven Brief at 28. FF 71-72. During those three months, Ms. Raven did not pursue any of the court's suggestions to address Richard's interference. RP 822:20–826:21.

Furthermore, even after Ida obtained a new doctor in early October 2006, nurse delegation was delayed almost two more months. AR 1594-95. During the delay, Ms. Raven merely documented Richard's interference with Ida's medications. On October 23, 2006, she was informed that numerous bottles of medications that Richard had hoarded and hidden were found. AR 1593; *see also* AR 867, 869. On

November 15, 2006, she noted that “Richard has been giving expired medications, *if at all*.” AR 1594 (emphasis added).⁸

Ms. Raven only took action on nurse delegation when Ida’s new hospice team threatened to quit, due to Richard’s interference. FF 74, 78; RP 123:1-22; AR 870, 1360, 1594. She looked into the delay in late November, and nurse delegation began in early December. RP 271:6–272:2; AR 1594-95. Ms. Raven blames the Department of Health for the delay, but Ms. Raven had a duty to secure Ida’s goods and services. Her inaction on Ida’s medications for five months after receiving instruction from the court is unreasonable.

G. Ms. Raven’s Additional Arguments Do Nothing To Negate The Finding Of Neglect

1. There Is Substantial Evidence To Support The Finding That Ida Needed Repositioning Every Two Hours

Ms. Raven incorrectly asserts that the record lacks substantial evidence to support FF 6, 59, and 75 and CL 17 and 46, finding and concluding that Ida needed repositioning every two hours. Raven Brief at 34-37. There is substantial evidence to support these findings. As well as

⁸ Ms. Raven goes beyond the findings to argue that only two or three bottles of the hoarded medication were Ida’s, and therefore Richard must have been substantially compliant with Ida’s medications. Raven Brief at 43. There is no record of what the hoarded medications were, what date they were issued, how many pills were contained in each bottle, and so on. However, a guardian with a duty for Ida’s care and treatment should have been concerned with *any* amount of hoarded medication and viewed it as evidence of Richard’s continued noncompliance.

what Ms. Raven characterizes as “boilerplate” instructions for repositioning, each of Ida’s assessments also documents individualized concern for Ida’s skin issues and need for repositioning. AR 692-93, 706-09, 710-11, 720-21, 731-32, 737-42, 755, 759, 764-67, 772-73, 777; *see also* AR 1270. In January 2006, Ms. Raven herself wrote that Ida “is only being moved in order to clean her up and is not spending any time in any other position. . . . Standard of care would be to change her every two hours.” AR 1585-86. Further, in her May 2006 petition for instructions, she included a nurse’s statement that Ida needed “turning every two hours.” AR 1531.

2. There Is Substantial Evidence That Ms. Raven Was Asked To Hire Individual Providers

Ms. Raven claims substantial evidence does not support the finding in FF 62 that Ms. Raven was asked to use individual providers in a meeting in June 2006. Raven Brief at 37-39. The record is confusing on this point, and it appears Ms. Raven may not have been present at the June meeting. RP 298:24–300:6. However, if the finding is in error, it is harmless. There is substantial evidence that Ms. Raven was asked to use individual providers four months earlier, in February 2006. RP 58:9-21; AR 852. Ms. Raven admits to the February conversation about individual

providers. Raven Brief at 39 n.10. She testified that she was not comfortable supervising individual providers. RP 822:2-9.

3. There Is Substantial Evidence To Support The Finding That Ida's Pressure Sores In Late 2006 Were Primarily Caused By Lack Of Care

Ms. Raven argues that FF 75, finding that Ida's skin breakdown in November 2006 was caused by poor nutrition and lack of repositioning, is not supported by substantial evidence. Raven Brief at 36-37.

There is substantial evidence to support FF 75. Registered Nurse Zerynthia Zaire of Providence Hospice testified that an airflow mattress contributed to Ida's pressure sores in November 2006, but the wounds worsened even after the mattress was replaced. In undisputed testimony, Nurse Zaire testified that the primary causes of Ida's skin breakdown at that time were poor nutrition and lack of caregiving, causing Ida to lie in her own waste. RP 170:11-171:3; *see also* RP 232:9-14, 233:11-18 (testimony of nurse Annette Yanisch). The fact that Ida may not have developed skin breakdown at other times under similar conditions does not disprove the finding that her skin breakdown in November 2006 was caused by poor nutrition, lack of repositioning, and filth, just as Ida's nurses testified.

H. The Appropriate Standard Of Proof For Civil Findings Of Neglect Under The Abuse Of Vulnerable Adults Act Is Preponderance Of Evidence

Ms. Raven argues that the Court should adopt a clear, cogent, and convincing standard of proof to findings under chapter 74.34 RCW. She cites RCW 34.05.570(3) to argue that this creates a constitutional error, because the fact finder applied a preponderance of evidence standard. She relies on two rulings addressing the due process requirements for a standard of proof in certain professional license disciplinary matters. See *Nguyen v. Dep't of Health*, 144 Wn.2d 516, 526, 29 P.3d 689 (2001), *cert. denied*, 535 U.S. 904 (2002); *Ongom v. Dep't of Health*, 159 Wn.2d 132, 142, 148 P.3d 1029 (2006), *cert. denied*, 550 U.S. 905 (2007). Ms. Raven argues that these cases must be extended to apply here, because a final finding “will” impair her counseling license. Raven Brief at 46.

The Court should reject this argument. As shown below, the *Nguyen* and *Ongom* cases are distinguishable. At most, the finding on Ms. Raven *may* influence the Department of Health to take disciplinary action against Ms. Raven’s license, but it would need to do so in a separate administrative proceeding. RCW 18.130.050. Second, the *Nguyen* and *Ongom* cases have not been followed in the context of a finding of neglect.

1. A Final Finding Does Not Automatically Impair Ms. Raven's Interest Or Prevent Her From Working With Vulnerable Adults In All Capacities

Ms. Raven erroneously asserts that the Final Finding will prohibit her from working with vulnerable adults in any capacity. Raven Brief at 47. A finding under chapter 74.34 RCW is an administrative determination by DSHS that a perpetrator abused or neglected a vulnerable adult on a more likely than not basis. WAC 388-71-01205 to -01280. It is not a disciplinary proceeding against a license held by the perpetrator. In response to a public records request, DSHS is required to provide information about the finding. WAC 388-71-01280. However, there is no authority or evidence in the record to support Ms. Raven's assertion that a final finding is "available to *anyone* with Internet access." Raven Brief at 47.

No law provides that a finding under chapter 74.34 RCW prohibits a perpetrator from working with vulnerable adults in all capacities. DSHS is required to consider such findings in making licensing decisions about certain care facilities, such as issuing a nursing home license or determining whether an employee of such care facilities may work with vulnerable adults in an unsupervised capacity. RCW 74.39A.009, .050(8), .055. DSHS also uses the findings to decide whether to contract with an individual provider who will supply unsupervised, in-home care to

DSHS's clients. RCW 74.39A.009, .050(8), .055, .240. However, no law prevents individuals from working with vulnerable adults in a private capacity, such as providing in-home care paid by the individual or his or her family.⁹

In order for a final finding to affect a license held by a perpetrator, a distinct administrative action must be taken by the licensing entity. For example, DSHS is required to initiate a separate administrative action in order to take action against one of its licensees with a final finding. *See, e.g.*, RCW 18.20.190 (boarding home licenses); RCW 18.51.060 (nursing home licenses); RCW 70.128.150 (adult family home licenses). Similarly, in order for any sanction to be imposed against Ms. Raven's counseling license issued by the Department of Health, it would be necessary for the Department of Health to initiate action under its licensing statutes. *See, e.g.*, RCW 18.19.020; RCW 18.130.050(15). The standard of proof in a Department of Health licensing matter may be heightened, but that rule involves actions that specifically affect the professional's license. *See ¶Nguyen*, 144 Wn.2d at 526.

⁹ Ms. Raven's reliance on RCW 43.43.842 to argue that an APS finding prohibits her from working in *any* capacity with a vulnerable adult is misplaced. On its face, the statute requires DSHS and the Department of Health to adopt rules for background checks for persons who will have unsupervised access to vulnerable adults working in certain facilities or agencies licensed by DSHS or the Department of Health.

Similarly, a final finding under chapter 74.34 RCW does not automatically prohibit Ms. Raven from acting as a certified professional guardian. The standards for certified professional guardians are included in GR 23. They require Ms. Raven to notify the certified professional guardianship board of a “pending or final” finding under chapter 74.34 RCW, but do not require automatic termination of her certification in case of a final finding. GR 23(e)(1)(iv). It would be necessary for the board to move to de-certify Ms. Raven for a final finding under a separate action. GR 23(c)(2)(viii). Thus, Ms. Raven’s assertions that a final finding will automatically prevent her from further work with vulnerable adults are unfounded.

2. There Is No Constitutional Need For A Higher Standard Of Proof For Findings Of Neglect

Ms. Raven’s argument about the standard of proof was rejected by Division I in *Kraft v. Dep’t of Soc. & Health Servs.*, 145 Wn. App. 708, 187 P.3d 798 (2008), *review denied*, 165 Wn.2d 1018 (2009). The petitioner in *Kraft* challenged a finding of mental abuse issued by DSHS under RCW 74.34.020. The petitioner argued that the proper standard of proof to establish the finding was clear, cogent, and convincing under *Nguyen* and *Ongom*, because the finding could result in future action taken against her teaching credential, forever barring her from her chosen field

of employment. The court held that a finding under RCW 74.34.020 was not akin to a license revocation under the Uniform Disciplinary Act, RCW 18.130.050(1). *Kraft*, 145 Wn. App. at 715.

As *Kraft* makes clear, the fact that a civil finding here *may* have *future* consequences upon a license or certification held by a perpetrator of neglect under chapter 74.34 RCW does not fall within *Nguyen* and *Ongom*. To the extent that any future action is taken against any license or certification held by Ms. Raven, such action will be governed by the standard of proof applicable in that particular action, and the fact that such future action may (but is not required to) occur in the future does not serve to increase the standard of proof here.¹⁰

I. The Preponderance Of The Evidence Standard Of Proof Comports With The *Mathews v. Eldridge* Test For Procedural Due Process

Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), provides a framework for reviewing due process arguments. The Court considers three factors: (1) the private interest affected; (2) the risk or erroneous deprivation of such interest posed by the existing procedure, and the probable value, if any, of imposing additional safeguards; and

¹⁰ The State's position is that *Nguyen* and *Ongom* are wrongly decided and due process does not require a higher standard of proof in those cases or in a hypothetical licensing proceeding for Ms. Raven. See generally *Hardee v. Dep't of Soc. & Health Servs.*, No 83728-7 (Wash. argued Oct. 28, 2010), where the Department's Supplemental Brief asks the court to overrule these cases. For purposes of this case, the Court may reasonably follow *Kraft* and distinguish *Nguyen*.

(3) the government's interest, including the function involved and any fiscal and administrative costs that additional procedural requirements would impose. *Mathews*, 424 U.S. at 321.

Ms. Raven argues that her right to pursue her chosen profession is affected by the finding under chapter 74.34 RCW. However, as the court recognized in *Kraft*, such claims brought to challenge a civil finding under RCW 74.34.020 are distinguishable from *Nguyen* and *Ongom*, in that they involve no suspension or revocation of a professional license. No license or degree is at stake. The private interest is therefore limited.

Ms. Raven makes no showing that there is any unreasonable risk of deprivation of her pursuit of her chosen profession based upon a finding of neglect by a preponderance of the evidence under the current administrative procedure. She has availed herself of several of the procedural safeguards that are afforded to her, including (1) timely notice of the finding of neglect against her; (2) pursuit of her right to an administrative appeal to contest the finding, with legal representation; (3) a fair hearing; and (4) review at both the agency and court levels.

The government's interest would also be negatively impacted by a heightened burden of proof. The public interest served by chapter 74.34 RCW is of critical public importance: to allow DSHS in its licensing and contracting decisions to limit access to vulnerable adults by

those who have perpetrated abuse, neglect, abandonment, or exploitation against them. The Legislature adopted chapter 74.34 RCW in recognition that vulnerable adults may be in particular need of protection from abuse, neglect, abandonment, or exploitation. RCW 74.34.005; *Schumacher v. Williams*, 107 Wn. App. 793, 801, 28 P.3d 792 (2001), *review denied*, 145 Wn.2d 1025 (2002). DSHS is responsible for investigating allegations of abuse, neglect, abandonment, or exploitation of a vulnerable adult. RCW 74.34.005; WAC 388-71.

The higher standard of proof argued by Ms. Raven would come only by placing a risk on vulnerable adults. Therefore, given the clear legislative intent to provide for the protection and well-being of our state's vulnerable adults, as expressed by the enactment of specific legislation to provide for them, the public interest to be served under this statute should be given great weight. The government has a duty to protect its vulnerable adults.

One of our government's most sacred duties is to protect those unable to care for themselves. When balancing the needs of vulnerable adults entrusted to state care and the interests of even well-meaning caregivers who fail to provide necessary and adequate supervision over their charges, DSHS must give priority to the safety of these vulnerable adults.

Bond v. Dep't of Soc. & Health Servs., 111 Wn. App. 566, 575, 45 P.3d 1087 (2002). The safety of vulnerable adults is paramount. DSHS should

have the ability to quickly and efficiently determine if a person has neglected a vulnerable adult and act swiftly once it has been determined abuse has occurred.

The *Mathews* factors support the conclusion that a preponderance of the evidence is constitutional. There is a lesser private interest than in *Nguyen*, and there is a heightened public interest in protecting vulnerable adults from perpetrators of neglect. Finally, Ms. Raven makes no showing that there is any unfair likelihood of erroneous deprivation given the procedural safeguards in place.

J. Because DSHS's Neglect Finding Was Substantially Justified, The Award Of Fees And Costs To Ms. Raven Under The Equal Access To Justice Act Should Be Overturned

The superior court's award of fees and costs to Ms. Raven under RCW 4.84.350 should be reversed and Ms. Raven's request for an additional award of fees and costs on appeal should be denied. First, as shown above, she should not prevail. If she does prevail, the Court should conclude that, under the facts here, DSHS's order was substantially justified.

1. The Neglect Finding Was Substantially Justified

A prevailing, qualified party is not automatically entitled to attorney fees under RCW 4.84.350. The award is not granted if the agency's action was "substantially justified." *Id.* Although the term "substantially

justified” is not statutorily defined, Washington courts have followed federal courts in construing the term to mean that the state is required to show that the agency action had a reasonable basis in law and in fact.¹¹ *See Pierce v. Underwood*, 487 U.S. 552, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988); *Constr. Indus. Training Council v. Wash. State Apprenticeship & Training Council*, 96 Wn. App. 59, 68, 977 P.2d 655 (1999). To be substantially justified, DSHS’s decision need not be correct, only reasonable. *Id.* In determining whether agency action is substantially justified, the court examines whether the agency has a statutory authority to act, whether it has a duty to construe the substantive law liberally in favor of protected individuals, and whether or not there is guiding precedent on point. *See Silverstreak, Inc. v. Dep’t of Labor & Indus.*, 159 Wn.2d 868, 892-93, 154 P.3d 891 (2007).

DSHS’s action was substantially justified. Once it received an allegation that Ms. Raven neglected Ida, DSHS had a statutory duty to investigate. RCW 74.34.063(1). DSHS’s finding of neglect is reasonable in fact, given Ms. Raven’s failure to pursue in-home care and medications for Ida under the facts of this case. Ms. Raven’s own

¹¹ RCW 4.84.350 is known as the Washington Equal Access to Justice Act. It was passed in 1995 and patterned after the federal Equal Access to Justice Act. *See* federal Equal Access to Justice Act, Pub. L. No. 99-80, 99 Stat. 183 (codified at 28 U.S.C. § 2412 & 5 U.S.C. §§ 504, 555). As a consequence, our courts have often turned to federal case law for guidance. *See, e.g., Constr. Indus. Training Council v. Wash. Apprenticeship & Training Council*, 96 Wn. App. 59, 64-65, 977 P.2d 655 (1999).

guardianship expert testified that a guardian for an in-home client with extensive needs should “get as much care into the house as possible.” RP 632:6-12. DSHS’s finding is reasonable under the law, because the definition of neglect includes inactions and failure by a person with a duty of care to a vulnerable adult to supply goods and services needed for the vulnerable adult’s physical or mental health. RCW 74.34.020.

No binding precedent under similar circumstances provided guidance to DSHS. No case holds that a guardian is free to reject sources of Medicaid-funded care. “If the question of law is unresolved and of unclear resolution, then the government’s litigation of the issue is reasonable and substantially justified.” *Kali v. Bowen*, 854 F.2d 329, 330-31 (9th Cir. 1988) (quoting District Court decision which the court upheld).

Furthermore, DSHS’s determination of neglect comports with its duties under the Abuse of Vulnerable Adults Act, codified to protect vulnerable adults. RCW 74.34.005. It was reasonable for DSHS to have viewed the facts in the light affording most protection to Ida, the vulnerable adult at issue. *See also Bond*, 111 Wn. App. at 575 (“[w]hen balancing the needs of vulnerable adults entrusted to state care and the interests of even well-meaning caregivers who fail to provide necessary and adequate supervision over their charges, DSHS must give priority to

the safety of these vulnerable adults”). Agency action taken with an effort to balance “sensitive, sometimes competing or conflicting interests in a controversial area” is substantially justified, making it appropriate for the court to deny an award under the Equal Access to Justice Act. *See, e.g., Plum Creek Timber Co. v. Wash. State Forest Practices Appeals Bd.*, 99 Wn. App. 579, 595-96, 993 P.2d 287 (2000).

The superior court ruling awarding fees does not confront the above standard. Instead, the court found that Ms. Raven did not need to hire individual providers because “I know that’s more difficult than it sounds.” Verbatim Report of Proceedings (May 28, 2010) at 11:18-20. But no evidence supports this finding. There is no evidence that Ms. Raven researched the availability or qualifications of individual providers. The record showed that she rejected the idea of using them the first time it was raised with her in February 2006. No other witness or exhibit addressed the qualifications, availability, or feasibility of using individual providers for Ida. Ms. Raven’s expert offered only conclusory testimony that individual providers were “less qualified,” but gave no details or explanation for his view. RP 634:15-18. Given the fact that individual providers are one of only two sources of Medicaid-funded in-home care for its clients, the superior court’s finding is contrary to the record.

2. The Superior Court's Award Of Fees Under The Equal Access To Justice Act Is An Abuse Of Discretion

The superior court also relied on DSHS's decision to appeal the administrative law judge's initial decision to the Board of Appeals, even though the court recognized DSHS's right to appeal:

Absolutely, the Department needed to investigate, that was all appropriate. But then to not let it go once the administrative law judge decided that there wasn't any neglect. Yes, absolutely, the Department has a right to do – to pursue the appeal, but then she's entitled to attorney fees, I think.

Verbatim Report of Proceedings (May 28, 2010) at 11:2-7.

The superior court erred by focusing on one step in the administrative hearing. The statute, however, examines whether the final agency decision was substantially justified. That would examine whether the agency had substantial factual and legal decisions. As shown above, the decision is substantially justified and therefore, if Ms. Raven prevails here, the Court should nevertheless deny her attorney fees and reverse the superior court's award of fees.

K. The "Due Regard" Doctrine Did Not Require The DSHS Review Judge To Adopt The Administrative Law Judge's Speculative Theories About The Motivation Of Witnesses

Ms. Raven incorrectly contends that the Review Judge failed to give "due regard" to the Administrative Law Judge's ("ALJ") ability to observe the witnesses. Raven Brief at 38-39 n.9. The Final Decision

upheld the ALJ's finding that Ms. Raven was credible. CL 36-37. However, it rejected the ALJ's findings that all witnesses other than Ms. Raven lacked credibility. CL 38. In doing so, the Review Judge noted that the ALJ's finding rested on speculation that witnesses other than Ms. Raven were motivated to blame her for Ida's predicament. CL 38. As the Final Order notes, there is no evidence to support such a finding and, in fact, Ms. Raven had not been personally present at Ida's home to observe the events about which such witnesses testified. CL 38. Due regard does not require the Review Judge to defer to the ALJ's credibility determinations. *Regan v. Dep't of Licensing*, 130 Wn. App. 39, 59, 121 P.3d 731 (2005), *review denied*, 157 Wn.2d 1013 (2006) (citing *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 405-06, 858 P.2d 494 (1993)). Instead, the APA authorizes the Review Judge to "make his own independent determinations based on the record," including by "modify[ing] or . . . replac[ing] an ALJ's findings, including findings of witness credibility." *Id.* Where no evidence supported the ALJ's finding that all witnesses other than Ms. Raven lacked credibility, the Review Judge properly rejected such finding.

V. CONCLUSION

The Court should affirm the final DSHS order finding that Ms. Raven perpetrated neglect of Ida, a vulnerable adult, under RCW 74.34.020, and reverse the superior court.

RESPECTFULLY SUBMITTED this 19th day of November, 2010.

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CERTIFICATE OF SERVICE

I certify that I mailed a copy of the foregoing Brief of Appellant to Jeff Crollard, Attorney for Respondent, at Crollard Law Office, PLLC, 1904 Third Avenue, Ste. 1030, Seattle, WA 98101-1170, postage prepaid, on November 19, 2010.



Sharon Paakkonen
Legal Assistant

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STATE OF WASHINGTON
BY _____
COURT OF APPEALS
DIVISION II

APPENDIX A

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES

BOARD OF APPEALS

MAILED
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DSHS
BOARD OF APPEALS

In Re:) Docket No. 07-2007-L-0847

RESA RAVEN) REVIEW DECISION AND FINAL ORDER

Appellant) Adult Protective Services

I. PROCEDURAL HISTORY

1. The Department of Social and Health Services (Department) received an allegation of neglect by the Appellant of a vulnerable adult. After investigation and review, the Department determined the allegation of neglect was substantiated. On June 15, 2007, the Department notified the Appellant that it had made substantiated findings that she neglected a vulnerable adult, based on her failure to check on Ida during a storm in December 2006. The Department amended the notice on June 19, 2007, adding the allegation that the Appellant failed to respond to any of the options for services for the vulnerable adult, and failed to ensure sufficient care in the vulnerable adult's home.

2. The Appellant requested a hearing to contest the Department's substantiated finding of neglect. The hearing request was received by the Office of Administrative Hearings on July 10, 2007.

3. The Department amended its notice again on January 3, 2008. The amended notice states in relevant part:

... APS determined on or about August 2006, you were made aware that a vulnerable adult's in-home care giver reported that adult may have a broken leg, a registered nurse recommended that vulnerable adult be seen in an emergency room and have an x ray, and/or you failed to ensure and obtain that medical care. That vulnerable adult was your ward.

In addition, APS determined on or about December 2006, you failed, as would have been appropriate under the circumstances, to visit or make adequate contact with vulnerable adult, assess that adult's condition, and/or ensure that adult's appropriate personal and medical care during a storm that caused wide-spread power outages including tow prolonged outages at that adult's home. Those two prolonged power

outages caused that adult's electric air bed to deflate leaving her lying on a flat, cold surface. In addition, the power outages left that adult without electricity, heat, and warm food. That vulnerable adult was your ward.

Either one of the actions during August 2006 or December 2006 meet the definition of neglect in the RCW 74.34.020(b). . . .

Finally, APS determined on or about during the Years 2004 through 2006, you failed (1) to adequately visit a vulnerable adult, (2) to personally assess that vulnerable adult's mental health and/or physical health conditions, and/or (3) to ensure that vulnerable adult had sufficient and adequate personal and health care. That vulnerable adult was your ward.

4. Administrative Law Judge (ALJ) Rebekah R. Ross held a hearing on April 14 through 17, 2008, and June 13, 2008. The ALJ issued an Initial Order on September 11, 2008, reversing the Department's substantiated finding of neglect.

5. The Department filed a request for additional time to submit a petition for review of the Initial Order with the Board of Appeals (BOA) on September 25, 2008. The BOA granted the Department's request and extended the deadline for submitting a petition for review to November 17, 2008. When the Department filed a petition for review on November 17, 2008, the Appellant requested an extension of time to February 17, 2009, in which to file a response to the Department's petition for review of the Initial Order. The extension request was granted and the Appellant filed a response on February 17, 2009.

6. The Department's petition for review reads as follows:

Respondent, Department of Social and Health Services ("the Department"), Adult Protective Services ("APS"), by and through its representative, EVELYN J. CANTRELL, submits this Petition for Review of the Initial Order dated September 11, 2008.

I. ISSUES

1. Whether the review judge should add, supplement or substitute her own findings of fact and conclusions of law based on the substantial evidence in the record?
2. Whether the administrative law judge erred in basing findings of facts not supported by the substantial evidence in the record?
3. Whether the administrative law judge erred in making conclusions of law when those conclusions were based on findings of fact that were in error?

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CONCLUSION

For the foregoing reasons, APS' petition for review should be denied and the Initial Order of the ALJ should be affirmed.

II. FINDINGS OF FACT

The undersigned has reviewed the transcript record of the hearing, the documents admitted as exhibits, the submitted post hearing arguments of both parties, the Initial Order, the Department's petition for review, and the Appellant's response to the petition to determine the adequacy and appropriateness of the *Findings of Fact* made by the ALJ in the Initial Order. After review, the undersigned left unchanged those *Findings of Fact* supported by substantial evidence based on the entire record. Where findings were not supported by substantial evidence based on the entire record they have been stricken or amended. Where additional findings are necessary, they have been added or adopted findings supplemented. Findings regarding the Department's notice of the substantiated finding and the Appellant's appeal are set forth in the *Procedural History* section of this decision. Findings regarding credibility of the witnesses are addressed in the *Conclusions of Law and Discussion of Issues* section. The other initial *Findings of Fact*, with deletions, supplements, and amendments, are adopted and incorporated by reference into this decision as set forth below.⁴⁰⁴ Deletions to the initial *Findings of Fact* have been struck through and additions have been underlined.

1. The issue in this case is whether the Appellant, Resa Raven, formerly known as Eileen Lemke-Maconi, neglected Ida,⁴⁰⁵ a vulnerable adult. Ida was the Appellant's ward pursuant to an Order Appointing Limited Guardian Of The Person.

2. The vulnerable adult at issue in this case is Ida, now deceased. Ida was born on April 15, 1921. Accordingly, she was in her early to mid 80's during the time periods at issue.

⁴⁰⁴ RCW 34.05.464(8).

⁴⁰⁵ Ida is referenced by first name only for the purpose of confidentiality, although Ida is now deceased.

3. Ida suffered a fibular fracture⁴⁰⁶ and back pain following a fall in 1996.

Exhibit 90. She remained on the floor for about two days. Her husband, Richard Wright, was present, and tried to call their daughter, who was out of town. Ida requested that no-one else be contacted, although she was urinating on herself and not taking care of her activities of daily living. Exhibit 90, p. 1.

4. Ida apparently has been incontinent of urine since at least 1996. Exhibit 89. Since at least 2001 she was incontinent of bowel and urine.

5. Ida remained bedridden after her 1996 fall, and had severe weakness in her lower extremities that made her unable to walk. Exhibit 93, p. 1. Richard Horsman, DPM, noted in December 2001:

She maintains the left lower extremity in a position of maximum external rotation, and resists all movement. She is really not lucid enough to be able to truly tell whether it is on the basis of hip pain, and one would wonder whether the hip is either fractured or dislocated. However, since she is nonweightbearing and nonambulatory, I am not sure what evaluation or management truly would be warranted.

Exhibit 96, p. 1. In 2001, Ida had a superficial femoral vein extending to the popliteal vein clot.

Exhibit 98, p. 1. She suffered chronic lower extremity edema. Exhibit 102, p. 1. She needed total assistance with most activities of daily living. Exhibit 82.

During the time period at issue in this case, Ida was medically and physically fragile. Her major muscles in her legs had atrophied; she was no longer able to ambulate or sit up; Ida needed total assistance with most activities of daily living; she suffered from a chronic mental illness, secondary to dementia which included visual and auditory hallucinations; she suffered from periodic urinary tract infections, ongoing rheumatoid arthritis, congestive heart failure, and allergies; she was hostile and uncooperative with care; she refused to see a physician; she

⁴⁰⁶The reference in a February 16, 2007, letter of Dr. William N. Elledge, to Ida having an admitting diagnosis of "untreated distal tibial fracture" appears to be in error, because the admission notes refer only to a history of a left femur fracture. See Exhibit 105; Exhibit 23. Although Ida's extremities were examined at Evergreen, there is no evidence of an X-ray or other finding of a tibial fracture. Exhibit 23, p. 1. Even if there were a tibial fracture, there is no evidence of when this would have occurred.

was on hospice care twice; and she suffered from deteriorating pressure ulcers.⁴⁰⁷ Further, "Hospice RN reported that it is like the client's body has melted into the bed. Her knees have moved to the sides of her legs and she has spread out making her body flat and cumbersome to turn. She reported that caregivers would risk pulling client's joints out of sockets, breaking bones or injuring themselves by repositioning client alone. RN commented that due to the client's contractures and arthritis, she must be in tremendous pain without medication."⁴⁰⁸ Ida had contractures causing her legs to be locked into a splayed position with no mobility or range of motion. Attempted movement of her legs under this condition could be extremely difficult and painful.⁴⁰⁹

6. Ida had a long history of skin breakdown (pressure sores) going back to at least 2001. E.g. Exhibit 65; Exhibit 29, p. 21. Skin breakdowns are associated with poor nutrition, lack of turning, and incontinence. Zaire test.; Yanisch test. Ida's care assessment and plan of care during the time period at issue provided that she should be turned every two hours. Allard-Webb testimony. Apparently when Ida was adequately repositioned and accepting good nutrition, her skin would become clear. E.g., Exhibit 69 p. 20. During the time periods at issue, Ida's skin breakdown became increasingly severe and life threatening. Ida liked to lie on her back, and would not lie in any other position. Exhibit 6, p. 16; Exhibit 7, p. 20. When care givers positioned pillows for pressure release, Ida would pull them out. Exhibit 10, p. 52; Duran test. Because Ida had been almost completely bedridden since 1996, regular turning/repositioning and skin care protocol, especially after soiling from urine or stool, were

⁴⁰⁷ Exhibit 90, p. 2 (Providence St. Peter's Hospital medical record); Exhibit 24, p. 2-4 (Guardian ad Litem Report, dated February 23, 2004); Exhibit 27, p. 2 (Guardian's Initial Personal Care Plan, filed September 15, 2005); Exhibit 30, p. 2 (Guardian's Annual Personal Care Report, filed September 16, 2006); Exhibit 20, p. 1 (Providence Sound Home Care and Hospice Clinical and Social Worker notes); Exhibits 6-9 (CARE Assessments dated November 12, 2004, October 19, 2005, January 13, 2006, and January 8, 2007); Exhibit 16, p. 2 (Communication Log written by Margaret Keeler, dated November 17, 2005); Exhibit 17, pp. 2, 8, 10, 13, 14, 16 (Assured Hospice Visit Notes); and Exhibit 18, pp. 1-9 (Assured Hospice Records).

⁴⁰⁸ Exhibit 14, p. 2 (May 25, 2006 Thurston County Multidisciplinary Adult Team staffing).

⁴⁰⁹ Hearing Transcript, pp. 221-222 (RN Weinacht's testimony).

critical to the treatment and prevention of decubitus ulcers and other skin breakdown symptoms.⁴¹⁰ Repositioning every two hours, daily monitoring of skin condition, and regular bathing were part of Ida's care plans from at least 2004 forward.⁴¹¹ The Appellant signed an acknowledgment and agreement of services set forth in the service plans entered after she became Ida's guardian of person for medical decisions.⁴¹² Although the Appellant had signed off on the care assessment plan in 2004 requiring repositioning of Ida every two hours, the Appellant did not have an understanding as to why such repositioning was necessary nor did she question the need for such care. The Appellant only became aware of the need for bi-hourly repositioning during discussions of the issue at subsequent care conferences.⁴¹³ The Appellant was uncertain as to what extent the repositioning occurred and could not recall if she asked Ida's caregivers how many times a day Ida was being repositioned.⁴¹⁴

7. At the time of the November 12, 2004, assessment Ida had 10 pressure ulcers. Exhibit 6, p. 22. At the time of the October 19, 2005, assessment Ida had a pressure area on her left inner knee that was not healing, as observed by Assured Home Health care personal on a subsequent visit a week later,⁴¹⁵ and a stage 2 pressure area on her left inner ankle due to a foley catheter tubing. Her bottom and back did not have any breakdown areas. Exhibit 7, p. 12; Raven test. TR 49:13 - 50:11. Although she would not ever ask for any food or admit hunger, at that time she would usually eat one to two meals per day. Exhibit 7, p. 27. Ida was only being turned once or twice a day although her health care plan called for bi-hourly repositioning. The on-site caregiver was reluctant to turn Ida more often because Ida would moan in pain and complain her bones were "popping." The caregiver also believed Ida did not

⁴¹⁰ See generally Exhibits 6 through 8.

⁴¹¹ Exhibit 6, p.p. 16 and 19, Exhibit 7, p.p. 20 and 22, and Exhibit 8, p.p. 21 and 24.

⁴¹² Exhibit 6, p. 4, Exhibit 7, p. 4, and Exhibit 8, p. 6.

⁴¹³ Tr., p. 724, line 10 through p. 725, line 15.

⁴¹⁴ Tr., p. 727, line 22 through p. 728, line 13.

⁴¹⁵ Exhibit 17, p. 2 and Exhibit 18, p. 3.

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have a long history of skin breakdown and once a day repositioning was adequate.⁴¹⁶

8. Ida was assessed again on January 13, 2006. At that time Assured Home Health and Hospice was requesting an exception to rule for more hours, because Ida needed to be repositioned at least 6 times per day and needed two people to turn her. Exhibit 8, p. 7. This was due in part to Ida's scratching and grabbing at care givers. Exhibit 8, p. 13. Carrie Richards, RN, reported that Ida's back side from her shoulders to her distal lower extremities were red in color, suggesting deep tissue damage, and multiple areas of broken skin on Ida's posterior side. Exhibit 8, p. 13. Ida had multiple stage 1 and stage 2 skin breakdowns. Exhibit 8, p. 28. Despite the request for more hours for more frequent repositioning, it was reported that turning, changing and repositioning were done "2 times daily due to the difficulty in turning client." Exhibit 8, p. 14. The RN requested that two caregivers reposition Ida because her body had flattened out so that the outer side of her knees had moved almost to the back of her knees and touched the bed. The RN was worried that a caregiver would break Ida's bones or dislocate joints when repositioning alone. Exhibit 8, p. 21.

9. Ida was placed in category "D High", with 192 base hours of personal care per month following her November 12, 2004, assessment. Because her husband also received in-home care, those hours were reduced to 176 hours per month. Exhibit 6, p. 2. Ida was placed in category "C High", with 139 base hours of personal care per month following her October 19, 2005 assessment. Those hours were reduced to 124 hours per month. Exhibit 7, p. 2.

Pursuant to a request for exception to rule and a January 13, 2006 assessment, Ida was approved for 280 hours of care. The exception to rule request was made, in part, to meet the need to reposition Ida as least 6 times per day requiring two persons to perform such task due to physical limitations and behaviors.⁴¹⁷

10. Although Ida's care assessments indicated she needed to be turned every two 000101

⁴¹⁶ Exhibit 6, p. 16, Exhibit 18, p. 6 and Exhibit 17, p. 1.

⁴¹⁷ Exhibit 8, p.p. 1 and 7.

hours, this never occurred. ~~because the Department had never approved that many hours of care. Accordingly, the goal was to reposition Ida as much as practical, given the resources available to Ida. Raven test. (cross).~~⁴¹⁸

11. Ida had a long history of urinary tract infections going back to at least 1996. E.g. Exhibits 90; 65. When she had a urinary tract infection, she would express delusions or report hallucinations. The Department's records indicate that in 2001 an RN reported that Ida's earlier-reported hallucinations had gone after her urinary tract infection cleared up. Exhibit 69, p. 4. See also Exhibit 98, p. 2. In 2002, Carol Caulkins, a mental health nurse at Providence Sound Home care, advised an APS worker that Ida was not psychotic, but that Ida had had a bout secondary to a urinary tract infection. Exhibit 69, p. 20. See also Exhibit 6, p. 8.

12. Ida's other physical conditions included glaucoma and cataracts in both eyes, for which she refused surgery. Exhibit 6, p. 7. The diagnoses on her 2004 assessment include rheumatoid arthritis; congestive heart failure; allergies to codeine, orange juice, grapefruit juice and salt (as reported by Ida's daughter); and angina. Exhibit 6, pp. 8 - 9. In 2004, Ida seldom took medications, except for Tylenol or Ibuprofen occasionally, and herbal medications. Exhibit 6, p. 9.

13. By the time of Ida's October 19, 2005 assessment, Ida was prescribed MS Contin control release tablets. Exhibit 7, p. 10. Ida's husband was responsible for administering pain medication, but he reported that she just slept all day if they given the amount the nurse said to give her. Exhibit 7, p. 11. By the time of Ida's January 13, 2006, assessment, she had been prescribed Methadone 10 mg bid. Exhibit 8, p. 15. It was later learned that Ida's husband was not, in fact, administering the prescribed pain medication, but instead was hoarding and hiding medication. Exhibit 10, p. 50. The Appellant was aware Ida was not receiving her pain medication on a regular basis, the medication needed to be

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⁴¹⁸ See adopted Findings of Fact 9 and 61, and Conclusion of Law 26, below.

administered as prescribed to be effective, and that pain can be a contributing factor to aggressive behavior in a patient.⁴¹⁹ From as early as December 2004 through the end of 2006, the Appellant was aware that Ida was experiencing pain due to her resistance to medical treatment and care.⁴²⁰

14. Ida was a strong-willed and independent person. In 2001, an examining physician noted: "Very alert, talkative lady that is oriented to person, place, and time. She basically hardly lets me get a word edgewise." Exhibit 93, p. 1. Another physician noted when Ida was admitted for a psychiatric and physical evaluation in December 2001: "She is conversant and alert. She is oriented to person and place, not to date. She is somewhat a difficult historian and oppositional." Exhibit 94, p. 2. Another physician noted that Ida had had delusions and probably a personality disorder. Exhibit 95, p. 2. Dr. Horsman noted in December 2001: "She has an established history of probable dementia and psychosis, particularly manifest as being verbally abusive and extremely outspoken, with screaming, withdrawal, etc. She has been very independent and largely estranged from her family. . . ." Exhibit 96, p. 1. Dan Anderson, a counselor with Providence St. Peter Hospital had a brief interview with the Appellant on February 6, 2004, and assessed her with Psychosis NOS (Not Otherwise Specified) evidenced by delusions regarding her husband of 18 years and other delusions. Exhibit 99.

15. Ida also had significant behavior issues. She was verbally and physically abusive to care providers, and would scratch and pinch them, and throw items, causing injuries to providers. Clark test.; Duran test. Ida's aggressive behavior towards caregiver's was exacerbated when her spouse failed to give Ida her pain medication on a consistent basis.⁴²¹

16. There is no evidence in the record regarding the history of Ida's mental illness prior to her fall in 1996. In 1996, Ida's report that the Mafia was causing her difficulties and an

⁴¹⁹ Tr., p. 731, lines 10-18 and p. 737, lines 13-15.

⁴²⁰ Id, see also Exhibits 32 and 28.

⁴²¹ Exhibit 28, p. 8.

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APB by the police had been put on her, at first appeared to treatment providers to be delusional. Exhibit 91, p. 1. However, Ida's daughter confirmed some of the events that Ida described, although she had the opinion that Ida's suspicions were slightly exaggerated. Exhibit 91, p. 2. The physician noted that Ida had no previous psychiatric history, and no history of auditory hallucinations, mania, anxiety, or severe depression, and gave her no mental health diagnosis. Exhibit 91. Because the medical records are generally associated with times that Ida had a urinary tract infection, it is difficult to discern the severity of her baseline mental health. On December 26, 2001, Ida was given a final diagnosis of "Psychosis, not otherwise specified, secondary to general medical condition." Exhibit 98. Apparently the provisional admitting diagnoses to rule out -- delusional disorder, depression not otherwise specified, and dementia, see Exhibit 97, p. 2, were ruled out.

17. Ida's formal care providers were Catholic Community Services (CCS) and its employees. Exhibit 6, p. 2. Her informal providers were her daughter, Cheryl Balcom, and her husband, Richard Wright. Exhibit 6, p. 2. Under CCS's contract with the Department (or the Department's agent, AAA), CCS is not permitted to back out of a case unless the client's case manager terminates its services. Clark test.

18. In 1996, Ida consented to placement in a nursing home following her fibular fracture. Exhibit 92. Accordingly, she has not always refused appropriate medical care, although she was taking herbal medicines. Exhibit 90, p. 1.

19. The hearing record does not have contemporaneous documentation concerning Ida's health care, or refusal of care, between 1996 and 2001. However, in 2001, it was reported that Ida had, for several years, been resistant to health care that would have been in her best interest. There is no persuasive evidence that Ida was incompetent when she expressed resistance to receiving appropriate health care.

20. In 2001, Adult Protective Services (APS) investigated an allegation of self

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neglect by Ida, apparently with respect to concerns about behaviors risky to her skin integrity.

The APS investigator found:

APS did not substantiate the allegation due to client's long history and lifestyle pattern of independence and reliance on naturopathic and alternative medicine. Client's cognition is within normal limits though she clearly presents with some psychiatric symptoms eg paranoia. It was her long held lifestyle choices that brought about this referral. As the client is not Self Neglecting due to a lack of functional, mental or physical ability and the risk to her from these behaviors seems minimal to moderate eg. there is some risk to her skin integrity but this behavior is long standing without the demonstration of significant harm to this point, further she is being case managed by AAA. In addition client has the capacity to consent to services and clearly does not wish APS involvement. All of the above factored into the decision by APS to not substantiate due to insufficient evidence.

Exhibit 67, p. 1. In contrast, in 2004, APS made a substantiated finding of self-neglect.

Exhibit 59. Based on the 2004 investigation, the Department determined Ida was, "... not allowing caregivers to assist her with daily activities; she is hearing voices and not eating." The facts supporting the substantiated finding of self neglect lead the Department to file a guardianship petition for Ida, resulting in the appointment of a guardian ad litem and then a guardian of person. The Department specifically stated that the basis for seeking guardianship was Ida's refusal to allow caregivers to change her bedding after it had been soaked in urine and feces and, when a bed change was accomplished, evidence of skin breakdown was discovered.⁴²²

21. Ida received emergency room care in August 2001 for an evaluation and concerns about her living situation. Dr. Stanley M. Feero noted in Ida's history that Ida was unwilling to be placed in a group home or a nursing home. Exhibit 93, p. 1. The Appellant's daughter reported that Ida had been under the care of multiple physicians in the past, but fired them all because she was upset with them. The County Designated Mental Health Professional (CDHMP) determined that Ida was not detainable. Exhibit 94, p. 2.

22. In December 2001, the Appellant's daughter also noted to Tina Lee, MD, that Ida

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⁴²² Exhibit 71, p. 2, lines 3-7.

was generally "difficult at best", and had been noncompliant in the past regarding instructions to care for herself, resulting in numerous conflicts between Ida and health care providers. Exhibit 97, p. 1.

23. An APS investigator interviewed Ida in August 2001, the investigator noted:

[Ida] continues to espouse a natural way of living. She takes vitamins and distrusts the medical establishment even though or because of her past occupation as a nurse. . . . She is very outspoken and independent.

Exhibit 63, p. 3.

24. In December 2001, Ida was seen at the emergency room of Providence St. Peter Hospital. At that time, Ida had become unwilling to allow home health care providers to do anything for her. Richard Brantner, the attending physician, noted that Ida had auditory hallucinations, but otherwise no significant complaints except for pain all over her entire body and her lower extremities. Exhibit 94, p. 1. Dr. Brantner determined that Ida was a risk to herself and was unable to care for herself in her current situation. Ida was admitted to the Psychiatric Service. Exhibit 94, p. 2.

25. While Ida was still in the psychiatric ward, APS investigated a referral against an agency care provider. The finding was unsubstantiated. Exhibit 68. The APS report noted that Ida aggressively verbalized negative comments towards all professionals attending the meeting. The report also stated:

It is to be noted that client is generally non-compliant with treatment and is resistant to intervention in that client has generally refused to comply with taking prescribed medications and following a course of treatment.

Exhibit 68, p. 2. Ida initially refused treatment and medications. Exhibit 69, p. 2. However, Ida did, however, apparently ultimately agree to treatment as a condition to be allowed to return home. Exhibit 68, p. 2.

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26. The records show that following the referrals in 2001, Ida was fairly consistent in refusing medical attention, except for pain medications, even when it clearly would have been in

her best interest. For example, in January 2003 when a caregiver told her that her dark stool was indicative of internal bleeding and she needed to get the a doctor right away, Ida responded that she did not care, and that she just wanted to die. Exhibit 112, p. 2.

27. In March 2002, Ida's doctor apparently made a referral for hospice nursing in Ida's home because Ida wanted to die at home. Exhibit 69, p. 12. In a meeting with Ida's case manager, a hospice caregiver and others on March 22, 2002, Ida repeated several times that she wanted to remain home. Exhibit 69, p. 15.

28. APS made a founded finding of neglect against Ida's daughter, who wanted Ida to be placed in a nursing home. The finding was based on the daughter's efforts to have Ida placed in a nursing home against Ida's expressed interests, and sabotage of other caregivers going into the home. Reese test.; Allard-Webb test. The substantiated finding of neglect against Ida's daughter, Cheryl Balcom, was also based on the determination that Ms. Balcom was actively discouraging Ida and her husband from accepting an alternate caregiver during a time that Ms. Balcom was suspended as a caregiver due to another APS investigation.⁴²³

29. In December 2003, Ida's daughter contacted police because Ida would not allow a visiting doctor to inspect her infected foot. Ida asserted to the police officer that she had the right to refuse medical treatment. Exhibit 108, pp. 1, 3. At that point it was determined that Ida did not meet the criteria for involuntary committal. Exhibit 108, pp. 3-4.

30. Richard Maywald, the CDMHP for South Sound Mental Health and Dan Anderson, a registered counselor at Providence St. Peter Hospital also determined in late 2003 and 2004 that Ida did not meet the criteria for involuntary detention. Exhibit 24, p. 3; Exhibit 57, pp. 4-5; Exhibit 99.

31. The Department's caseworker for her November 2004 assessment noted:
"Client has chosen not to see a Dr. for any of her conditions and is non compliant with

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⁴²³ Exhibit 63, p. 1.

medications or skin protocol. Her caregivers, medical guardian and daughter do the best they can to care for client within her boundaries.” Exhibit 6, p. 3.

32. The Appellant reviewed Ida's medical history and consulted with Ida's husband and daughter to determine Ida's preferences regarding medical care before Ida became incompetent. Ida was inconsistent in whether she would accept treatment and care to address her health needs. However, the Appellant determined that Ida, when competent, consistently refused to be placed in a nursing home or other long term care facility. Raven test. Find The ALJ found and the undersigned agrees that the Appellant's determination about Ida's choice not to be placed in nursing home care was made in good faith.

33. On January 12, 2004, the Department filed a guardianship petition based on its concerns that Ida was refusing medical care, was neglecting herself, and her husband and daughter were unable to make competent decisions for her.⁴²⁴ Exhibit 71. Jan Carrington was appointed as Ida's guardian ad litem. Exhibit 24.

34. Ms. Carrington was unable to locate a physician who would make a house call to examine Ida. She obtained a court order to compel Ida to attend a medical exam. Ida was transported by ambulance to Providence St. Peter Hospital on February 6, 2004, and was examined by medical and mental health personnel. Exhibit 24, p. 2. Joseph F. Pellicer, MD, examined Ida on February 6, 2004. Ida's daughter, husband, and guardian ad litem attended the examination. Dr. Pellicer noted that over the past several months Ida had become increasingly delusional, including paranoid delusional thoughts.

35. Ida's daughter noted that similar symptoms in the past had been associated with a urinary tract infection. Exhibit 100, p. 1. She was found to have a urinary tract infection, and was given a prescription for antibiotics. Exhibit 100, pp. 1-2.

36. Ms. Carrington's guardian ad litem report stated in relevant part:

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⁴²⁴ Exhibit 71, p. 3, Tr., p. 330, lines 7-13, p. 23, line 21 through p. 24, line 1, and p. 227, lines 15-17.

Regarding the need for a guardian, Ida is exhibiting aspects of delirium and possibly psychosis. It is unclear to what degree her current mental status is a product of an untreated urinary tract infection or an underlying mental disorder. Since late November 2003, [Ida] has been uncooperative with her care givers. She rarely allows them to change her bedding and pads or give her a bath. Although medications were prescribed following her medical examination on February 6, 2004, she has refused to take them and is now also refusing to eat. Whether these choices are a product of her delirium or reasonable choices that she has the cognitive capacity to make is unclear. A non-related professional guardian with a mental health background and [sic] could assist in making this determination. A guardian could also arrange for appropriate services based on the result of the assessment and provide informed consent for health care, or the withholding of care, using the substituted judgment standard once [Ida's] needs are assessed.

...

... Ida does need a surrogate health care decision maker at this time and a limited guardian of the person should be appointed for this purpose.

...

... [The Appellant] would visit Ida [last name redacted] to assess her needs, monitor the care she receives, communicate with her family and caregivers to ensure her needs are being met, and ensure she receives appropriate medical attention.⁴²⁵

Exhibit 24, pp. 4 - 5. Ms. Carrington recommended that the Appellant be appointed limited guardian of the person, and that Ida lose the right to consent to or refuse medical treatment or decide who shall provide care and assistance. Exhibit 24, p. 5.

37. On March 12, 2004, the Thurston County Superior Court entered an Order Appointing Limited Guardian of the Person. The order found in relevant part:

- 1.7 Ida . . . is 82 years of age and has been bedridden since 1997 due to an injury to her spine. [Ida] requires complete assistance with most activities of daily living. [Ida] also requires assistance with management of her finances. Currently [Ida] is exhibiting aspects of delirium and possibly psychosis.
- 1.8 Ida . . . is at significant risk of personal harm based on a demonstrated inability to independently provide for her nutrition, health, housing, and physical safety. Ida . . . is also incompetent for purposes of giving informed consent for health care pursuant to RCW 7.70.050 and 7.70.065.

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⁴²⁵ Exhibit 24, p. 6, lines 2-5.

- 1.9 Eileen Lemke-Maconi [the Appellant], the proposed guardian, is qualified to act as limited guardian of the person of Ida. . .
- 1.10 A limited guardian of the person should be appointed. The term of the guardianship should be perpetual. The authority of the guardian should be limited as follows:
 - (1) consent to or refuse medical treatment; and
 - (2) to decide who shall provide care and assistance.
- 1.11 Ida . . . does have the ability to rationally exercise the right to vote. Ida[’s] . . .right to vote should not be revoked.
- 1.12 [Ida] designated her husband, Richard Wright, as attorney in fact under a Durable Power of Attorney (DPOA) executed March 8, 2002. Mr. Wright, however, is presently not capable of fully and effectively exercising his authority under the DPOA, and there is no alternative designated. All prior and existing powers of attorney over medical and personal affairs executed by Ida . . . should be revoked upon appointment of a limited guardian of the person.

38. The order appointed the Appellant as Ida’s limited guardian of the person. The order provided, “The power and duties of the guardian shall be as specifically stated in this order and as required by RCW 11.92.” # The order provided that Ida’s assets would be managed by Ida’s daughter and Ida’s spouse, Richard Wright. The order required the Appellant to make out and file within three months after appointment a personal care plan for Ida that met the requirements of RCW 11.92.043(1), and file an annual report in compliance with RCW 11.92.043(2). Exhibit 25, pp. 3-4. The Appellant was required to report to the court within 30 days any substantial changes in Ida’s condition or change in Ida’s residence. Implicit in this requirement to keep the court informed of any substantial change in Ida’s condition is the duty to regularly monitor Ida’s medical status.⁴²⁶ The order held that Ida lost the right to appoint someone on her behalf, to consent to or refuse medical treatment consistent with RCW 7.70.067, and to decide who shall provide care and assistance. Exhibit 25, p. 4. The Appellant understood that under the order, she was responsible for addressing Ida’s medical 000110

⁴²⁶ See also Exhibit 26, p. 4.

care and was the only person with responsibility for Ida's medical care to the extent granted under the specific language of the order.⁴²⁷ The Appellant acknowledges, and it is found as fact, that she was ultimately responsible for ensuring that individual caregivers were providing the care Ida was supposed to be receiving.⁴²⁸ The Appellant was allowed fees of up \$175 per month for her services as guardian. Exhibit 25, p. 5. In her role as a court appointed guardian, the Appellant was subject to, and understood she was subject to, the Washington State Standards of Practice Regulation for Certified Professional Guardians to the degree that the standards are applicable to medical care decision-making. Such standards would include all those except for "404 Residential Decisions" not made in the context of medical care and "406 Financial Management."⁴²⁹

39. The Appellant is a licensed mental health counselor, who specializes in forensic evaluations. She is also a certified professional guardian. Raven test., 5:21-24⁴³⁰. Ida was the Appellant's first ward as a professional guardian. Raven test., 12:5-7.

40. The Appellant formed a partnership with Helen Helfrich, under the name Adagio Guardian Associates LLC (Adagio). Adagio was given letters of limited guardianship on September 29, 2006. Exhibit 75. The Appellant remained the person primarily responsible during the time periods at issue, although Ms. Helfrich became the primary guardian effective in early January 2007. Exhibits 77 - 79; Helfrich test.

41. At the time the Appellant was appointed as Ida's guardian, she understood from the guardian ad litem that Ida did not need a case manager, as the Department's Area Agency on Aging was providing case management. She also understood that CCS was providing in-

⁴²⁷ Tr., p. 118, lines 19-24 and p. 753, line 12 through p. 754, line 5, respectively.

⁴²⁸ Tr., p. 744, lines 10-13.

⁴²⁹ Tr., p. 641, line 4 through p. 642, line 5, and p. 760, line 12 through p. 762, line 24.

⁴³⁰ Portions of the transcript of the proceedings were ordered by the parties. For those portions of the transcript available, the citations to page and line numbers are provided. Review judge note: The adopted ALJ cites to the preliminary and partial transcripts have been left unchanged in the adopted findings. Page and line cites to testimony entered by the review judge are to the final five volume transcript issued by the court reporter.

home care, and a CCS supervisor was supervising that care. Raven test., TR 13:20 - 15:19.

42. Once the Appellant was appointed Ida's guardian, she met with individuals involved with Ida, including Ida's daughter and husband. Raven test., TR 15:14 - 16:11. The Appellant also met Ida, and although Ida would at times object to people being in her room, she was able to have at least a couple in-depth conversations with her. Raven test., TR 16:12-23.

43. After she was appointed, the Appellant reviewed Ida's records at St. Peter Providence Hospital, and Ida's many volumes of records with AAA. Raven test., TR 19:11 - 20:6. The Appellant noted that Ida was variable in her response to medical care. At times Ida would cooperate in medical care and even apologize for her resistance to receiving medical care. Raven test., TR 20:20 - 21:5. However, the Appellant learned from her review and from discussions with family members that Ida was very consistent in her resistance to nursing home placement. Raven test., TR 21:6 - 16.

44. The Appellant made home visits with Ida when she felt they were needed. She met with Ida with more frequency when she was first appointed as Ida's guardian and she was in the investigative phase. However, her home visits decreased when Assured Home Health and Hospice became involved in the summer of 2005. Raven test., TR 21:17 - 22:11. The Appellant received reports from Ida's case manager, caregivers, and family members when they needed assistance or there was a decision that required the Appellant's consent. Raven test., TR 22:14-25. The Appellant maintained a log of some, but not all, of her activities in Ida's case. Raven test., TR 17:12 - 19:9. The Appellant believes she visited Ida more frequently than the entries in the log indicate, and she had many conversations with others involved in Ida's care that she did not list in the log. Raven test. There was no order requiring the Appellant to log every action she took as a guardian. It is difficult to determine from this hearing record how frequently the Appellant visited Ida or had discussions with Ida's care providers. The Appellant's log entries and her billing statements to the court are the best 000112

evidence of, at least, the minimal frequency of person-to-person visits made by the Appellant to Ida absent the Appellant's testimony as to exactly how many such visits were made. Based on such evidence, the Appellant made at least 6 visits to Ida's home in 2004, at least 2 visits with Ida while she was being hospitalized in 2005, and at least 5 visits in 2006. Three of the five documented visits in 2006 involved Ira's visits to the hospital or clinic.⁴³¹ It cannot be determined from the evidentiary record how many of these visits resulted in face-to-face meetings with Ida while she was awake and could be observed in any meaningful sense. All substantive contacts by the Appellant with Ida were set forth in the Appellant's billable hours accounting submitted to the court.⁴³² The Appellant conceded that she reduced her frequency of visits with Ida once personnel were involved with providing hospice care for Ida. The Appellant relied on such personnel to provide her with status reports, whenever they needed assistance, or whenever there was a decision that required informed consent.⁴³³ Although she believed Ida was seen by Catholic Community Services personnel on a daily basis, the Appellant was not certain as to the frequency of the care visits.⁴³⁴

45. The Appellant did not develop what she considered "rapport" with Ida, because Ida had dementia, and the Appellant believed Ida would not recognize the Appellant when she came one week later, and at times did not even recognize her own daughter and husband. Raven test., TR 29:2-19. Although the Appellant had planned to build rapport with Ida when she was appointed as guardian, when the Appellant came to know Ida she ~~realized~~ believed that Ida's level of dementia prevented this. Raven test. (cross). Ida did exhibit some residual capacity to recognize others, understand processes, and develop relationships.⁴³⁵

46. There is no hard and fast rule regarding how frequently guardians of the person are to visit their wards. O'Brien test.; Helfrich test. It is common for a guardian to taper off

⁴³¹ Exhibit 30, p.p. 8, 9, 10, 11, 12, and 13, and Exhibit 32, p.p. 2, 4, 5, 6, 8, 12, 13, 20, 24, 26, 28, and 32.

⁴³² Exhibit 30, p. 4.

⁴³³ Tr., p. 543, line 23 through p. 544, line 20.

⁴³⁴ Tr., p. 764, line 25 through p. 765, line 3.

⁴³⁵ Exhibit 106, p. 5, Exhibit 24, p. 2, and Exhibit 32, p. 3, respectively.

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contact with a ward. O'Brien test. In written documents prepared for a Certified Professional Guardian seminar held in Seattle, Washington on November 7, 2007, Thomas O'Brien addressed the issue of meaningful in-person contacts between guardians and their wards by stating:

Washington does not specify a time span, but it is fair to say as a general rule that monthly visits are standard unless the client is in circumstances that merit more or less frequent in-person contact. I believe that most professional guardians, and actual practice even among most NGA members is to apply a more personalized standard. The need for in-person contact on a less frequent basis than quarterly is probably suggestive of circumstances in which limits on the guardianship should be considered, or an explanation made and approved by the court. . . .

Why in-person contact is required

- 3.1 To observe the conditions in which the client is living
 - 3.2 To convey to caregivers that there is on-going interest in the well being of the client and informed review of the client's circumstances
 - 3.3 To meet and communicate with the guardianship client so that the guardian will be as informed as possible about the person's attitudes and concerns.
 - 3.4 To assure the guardianship client the guardian is available and concerned. . . .
- . . . For the guardian who has been successful in arranging less restrictive arrangements, or whose guardianship client does not accept appropriate care, the importance of in-person contact is at least as great.

Mr. O'Brien reiterated at hearing that, in his opinion, monthly visits are the general rule, but not a "standard" as set forth in the Washington Standards of Practice for the Certified Professional Guardian Program.⁴³⁶ He further opined that it would have been better if the Appellant had visited Ida more often.⁴³⁷ The necessity of timely meaningful in-person visits by a guardian to maintain a ward's physical health, especially when the ward has refused recommended medical treatment such as nursing home placement, is established by the credible testimony of both Mr. O'Brien and the Appellant's business partner, Helen Helfrich.⁴³⁸ This finding is also

⁴³⁶ Tr., p. 642, lines 13-23.

⁴³⁷ Tr., p. 646, lines 7-10.

⁴³⁸ Exhibit 35, p. 28, line 11 through p. 29, line 6.

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supported by the written material Mr. O'Brien has prepared and presented on the subject.⁴³⁹

The Appellant recognized her duty to provide informed consent regarding medical care for Ida required her to monitor the care, treatment, and services Ida was receiving to ensure it was

appropriate.⁴⁴⁰ The ALJ gave ~~I give~~ weight to the opinion of Thomas O'Brien regarding whether the Appellant breached her duties as a guardian, in light of his work as a guardian since 1982, his being on the certified guardian board since its inception, and his training.

Mr. O'Brien has the opinion that the Appellant did not breach her duty of care as Ida's guardian, either with respect to her visits with Ida, her decisions regarding Ida's care, and her reporting to the court. O'Brien test. The ALJ gave ~~I give~~ no weight to the opinion of Thomas B. Deutch with respect to the Appellant's duty of care as a guardian, as his area of expertise is the duties of guardians ad litem, and he has only a single case as a guardian of the person involving issues very different from the issues in this case. Deutch test., TR 9:10-15; TR 28:25 - 30:11.

47. The Appellant worked on the issue of improving Ida's nutrition, and tried to make sure that Ida's caregivers gave her ~~sufficient potassium~~ foods with sufficient potassium. However, the issue of nutrition was difficult because Ida sometimes would not eat. Raven test., TR 30:6 - 31:2.

48. Edward Cates, MD; saw Ida at Sea Mar Community Health Centers (Sea Mar) in 2001. Cates test. TR 6:6 - 8. He considered himself Ida's primary care physician, and signed off on her home health orders. Cates test. TR 6:14-15; TR 7:15-19.

49. On September 23, 2003, Dr. Cates wrote to Ida and her family, with a cc to the Area Agency on Agency (AAA), the entity that held a contract with the Department to provide care services for Ida:

This is a letter to inform you that I received a request for a home health evaluation through the Area Agency on Aging on September 18, 2003. [Ida] has not been seen in this clinic for over a year and as a consequence, I do not feel that can adequately provide medical care.

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⁴³⁹ See Exhibit 39, p.p. 5, 6.

⁴⁴⁰ Exhibit 38, p. 4, § 405, Tr., p. 742, line 18 through p. 744, line 13, and Tr., p. 760, lines 12-16.

I do not believe in good conscience that without seeing [Ida] in clinic that I can continue to dispatch home health nursing to evaluate [Ida] properly. I believe that I am not able to provide adequate care in this situation. I am happy to see Ida . . . in clinic and provide evaluation and treatment for whatever conditions may be present. I believe that [Ida's] depression and refusal to cooperate with her medical treatment are adversely impacting her health and are in need of evaluation and treatment.

Exhibit 110. Dr. Cates believed that he was still Ida's primary care physician, and intended the letter to mean that she should be brought in to see him. Cates test. TR 10:14 - 19. However, AAA interpreted this to mean that Dr. Cates would no longer be Ida's primary care physician.

50. Ida's Comprehensive Assessment done on October 1, 2003, did not indicate she had any physician or primary care provider. Exhibit 82, p. 2. The assessment states:

Client has had Dr. Eddie Cates at SeaMar clinic as her primary physician in the past but as she has not seen him for close to two years he has currently <thismonth> stated that he will no longer be client's PCP. Dr. Cates had through these two years written RX for visiting nurses to tend to client's infections in her feet and other medical needs. He no longer will do this and current plan is if client needs doctor care she will need to take an ambulance to the ER <client refuses to go to a PCP doctor regularly, some of this is understandable due to her home bound experience>. Case manager has attempted to find visiting Doctors or PA who takes Medicaid but has not been successful in this endeavor. [Spelling errors corrected; items in brackets in original].

Exhibit 82, p. 2. As of December 12, 2003, Valerie Mason, Ida's case manager at the time, advised APS that Ida still did not have a doctor, as she refused to leave the home, and they were unable to find a doctor that would make home visits. Exhibit 56, pp. 1-2.

51. The guardian ad litem report dated February 23, 2004, stated that Ida had no primary care physician and had refused medical treatment for some time. Exhibit 24, p. 2. This is also the information the guardian ad litem gave to the Appellant. Raven test., TR 10:2-15.

The guardian ad litem report also stated that Ida was bedridden and a physician who would make house call to examine her could not be located. Further, the report stated Ida's refusal to be examined and concern about her being at-risk medically were major precipitating factors

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leading to filing of the guardianship by the Department.⁴⁴¹ The Appellant recognized the difficulty in procuring regular medical care for Ida based on her resistance to such care. The Appellant acknowledged her role in attempting to locate a health professional willing to work with Ida on an ongoing basis.⁴⁴²

52. After the Appellant was appointed as Ida's guardian, she collected history, and became concerned because it appeared that everything that could be tried with respect to finding a physician for Ida had already been tried. Raven test., TR 31:14 -21. There are few physicians willing to take patients who are on Medicaid and Medicare, and most of those had already decided they could not provide services for Ida. Raven test., TR 31:24 - 32:4.

53. Sea Mar is the primary agency in Ida's community for Medicaid patients. The Appellant called Sea Mar in an attempt to set up an appointment for Ida. When the Appellant identified the patient as Ida, the person who answered the telephone laughed, and told the Appellant she would look in the records. She then came back and told the Appellant they would not be making an appointment for Ida, and they were not going to be seeing Ida again. Raven test., TR 32:11 - 33:5.

54. AAA serves Medicaid clients, and accordingly is aware of providers who accept Medicaid. Ms. Allard-Webb, Ida's AAA case worker during the relevant time periods, faxed the Appellant a list of Medicaid providers. The Appellant and Ms. Allard-Webb called every provider on the list. They were unable to find a provider from the list that would see Ida. However, as discussed below, the Appellant was able to obtain a physician for Ida through hospice. Raven test., TR 33:6- 34:7.

55. In addition to the list provided by Ms. Allard-Webb, on the advice of Ms. Helfrich, the Appellant contacted other people she knew in the medical and guardian community to see if anyone knew of providers who might accept Ida as a client. She also looked into whether there

⁴⁴¹ Exhibit 24, p. 2.

⁴⁴² Exhibit 26, p. 4.

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were any nurse practitioners setting up business in the community who might be open to taking a difficult case such as Ida. Raven test., TR 34:18 - 35:24. One obstacle to Ida's obtaining a physician was that Ida could only be transported by ambulance, and Medicaid would not pay for an ambulance for routine care visits. Raven test., TR 36:19 - 23.

56. The ALJ found ~~find~~ the Appellant to be credible that she made numerous contacts and explored every resource about which she was aware in an attempt to find a primary physician for Ida. The ALJ found ~~find~~ that the Appellant did not delegate this responsibility to another person, but rather that she was attempting to obtain whatever help she could in this quest.

57. In August 2005, the Appellant called a care conference with CCS and AAA to help improve the quality of Ida's life. Raven test., TR 38:14 - 24. A registered nurse from the AAA made a home visit to examine Ida on August 15, 2005, in response to the caregiver's concerns about a lump on Ida's leg. The nurse determined that Ida was confused, agitated, had pressure and open sores on her leg in need of treatment, was incontinent, and in need of further assessment. The nurse found Ida's entire calf and areas above the calf were very hard to the touch and that she was suffering from contractures of the legs. From Ida's history, the nurse was also concerned about acute urinary infection. The fact that Ida was not being repositioned, was not allowing herself to be cleaned after incontinent episodes, had medical equipment needs requiring prescriptions, and had not been seen recently by a physician led the visiting nurse to conclude that Ida needed to be taken to the emergency room.⁴⁴³ ~~Shortly after that conference,~~ The Appellant concurred with Ida's visiting nurse⁴⁴⁴ ~~decided~~ to have Ida transported to the emergency room, in large part for the purpose of finding a primary physician for Ida. Raven test., TR 41:17-24.

58. The Appellant was with Ida during the approximately eight hours she was in the

⁴⁴³ Tr., p. 218, line 9 through p. 22, line 4.

⁴⁴⁴ Exhibit 32, p. 12.

emergency room, and participated in the planning that led to Ida's discharge. Raven test., TR 43:5 - 44:24. When Ida was in the hospital, it was determined she was eligible for hospice care. Raven test., TR 42:15 - 43:7. The Appellant consented to discharge under hospice care. Raven test., TR 44:23-25. Ida was discharged on August 24, 2005 under hospice care as it was considered that her life expectancy was less than six months. Exhibit 103. The Appellant selected and consented to the hospice provider, and participated in the process of Ida being admitted to Assured Home and Hospice. Raven test., TR 45:1-18.

59. On October 25, 2005, an Assured Home Health nurse made a home care visit to Ida's residence. The nurse spent significant time explaining to Ida's primary caregiver the need to give Ida her prescribed pain medication on a regular basis to allow her body to adjust so that she would not be so sedated by the pain medication. The nurse also emphasized the need to frequently reposition Ida to avoid pressure ulcers in the skin. The caregiver was resistant to such instructions, arguing the pain medication made Ida sleep too much and that one turn per day was sufficient for skin care. Ida was suffering from two pressure sores on her left leg discovered by the visiting nurse during a follow up visit on November 1, 2005. The larger of the two wounds was not showing signs of healing. The nurse discovered that Ida's spouse was not giving Ida her pain medication on a regular basis and that Ida's caregiver continued in her resistance to medicate Ida for pain. The visiting nurse noted that a call would be made to the Appellant to discuss care being provided by Ida's caregiver and spouse. Subsequent nurse visits on November 4, 8, 11, and 15, 2005, revealed that Ida's spouse and a second caregiver continued to be resistant to giving Ida her pain medications. The nurse also noted improved healing in one of Ida's pressure ulcers, but a stage one pressure ulcer developing on Ida's right heel. Ida exhibited considerable pain when attempts were made to reposition her for examination and treatment purposes.⁴⁴⁵

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⁴⁴⁵ Exhibit 17, p.p. 1-10.

On November 17, 2005, the Appellant called another care conference at the behest of Assured Home and Hospice. The hospice was concerned about cooperation from CCS and Ida's husband's failure to give Ida her medication. Raven test., TR 51:2 - 12. Ida was supposed to receive regular dosages of pain medication, and anti-anxiety medication as needed, but there were strong indications that Ida's husband was not giving Ida her pain medication. Raven test., TR 53:2 - 21. The attendees also discussed obstacles to proper skin and incontinence care through regular re-positioning. Ida required two caregivers to reposition her and funds were not available to provide this enhanced personal care. While the Appellant agreed that skilled nursing care would be the best possible solution for Ida, she believed it would be nearly impossible to institutionalize Ida against her will.⁴⁴⁶ Because it appeared that the issues of cooperation in medication related to the family's bereavement about Ida's being terminal, and the Appellant understood that when families are dysfunctional and in turmoil it is not a good idea to make major changes during the holidays, she decided that they should think about what to do, and then discuss the issues again after the holidays. Raven test., TR 54:4 - 15.

A home examination of Ida on December 2, 2005, revealed the pressure ulcer on the later aspect of her left knee had opened slightly more than when last examined. The nurse visit on December 14, 2005, resulted in new wounds being cleaned and covered. Ida was only being repositioned twice a day and would lie in urine and feces after urinating or a bowel movement occurring between repositioning.⁴⁴⁷ The visiting caregiver reiterated the need for Ida's primary caregivers to give Ida her pain medication as prescribed and the need to reposition her every two hours as well as cleaning up urine and feces as needed instead of only twice a day. The primary caregivers resisted these instructions, arguing Ida was in too much pain when repositioned and would not allow caregivers to turn her that often. A follow-up visit on January 7, 2006, revealed that Ida was developing pressure ulcers on her sacrum/buttocks

⁴⁴⁶ Exhibit 16, p. 2.

⁴⁴⁷ Exhibit 18, p. 6.

that were at stage 1 and not healing, as well as the continuing existence of the pressure ulcers on Ida's legs and right foot. A home care visit on January 31, 2006, revealed that Ida's pressure ulcers on both legs and sacrum/buttocks were not healing and had progressed to stage 2 intrusion. Ida was very agitated and aggressive towards her caregivers to the extent even her spouse asked for medication to calm her which was provided by the visiting nurse.⁴⁴⁸

Assured Home Health notes of January 19, 2006, stated and it is found as fact that:

Ida's backside from her shoulders to her distal lower extremities are red in color, suggesting deep tissue damage. She has multiple areas of broken skin on her posterior side. Newly noted is an area on her [right] buttock, 2x2 cm and an area 3x5 cm, Stage II wound ... She has wounds on her lateral knees bilaterally that are also Stage II ... I believe her skin will continue to breakdown and place her at risk for infection and discomfort. Any open areas on her bottom are exposed to urine and stool for extended periods of time during the day.⁴⁴⁹

The Appellant was made aware of Ida's deteriorating skin condition and the lack of adequate care to reverse this process at the care conference held on January 10, 2006.⁴⁵⁰ The Appellant did not personally observe Ida's skin sores at any time.⁴⁵¹

60. A follow-up care conference took place in on January 10, 2006. However, ~~at that time the issues were different because~~⁴⁵² Assured Home and Hospice was noticing that Ida had increased skin breakdown. Raven test., TR 5 5:10 - 20. It was decided that more emphasis needed to be placed on turning Ida. Assured Home and Hospice volunteered to do training of the CCS caregivers in special procedures for turning Ida. Raven test., TR 56:19 - 57:7. Ms. Allard-Webb committed to seeing if the Department would give Ida more hours of personal care to meet Ida's need for more frequent turning. Raven test., TR 57:8 - 12. There was no discussion at that point about hiring independent providers in addition to the CCS providers. Raven test., TR 57:16 - 23. The Department has the ability to contract with

⁴⁴⁸ Exhibit 17, p.p. 10-17.

⁴⁴⁹ Exhibit 18, p. 7.

⁴⁵⁰ Exhibit 32, p.p. 19-20.

⁴⁵¹ Tr., p. 836, lines 7-9.

⁴⁵² See Exhibit 16, p. 2, the issue of frequent repositioning of Ida to prevent skin breakdown was addressed at the November care conference.

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independent providers who have completed state-approved training or with entities such as CCS. Allard-Webb testimony. It is the responsibility of the patient/client or his/her guardian to hire and supervise independent care providers.⁴⁵³

Ida's case manager from the Thurston County Area Agency On Aging, Dana Allard-Webb, contacted the Appellant on February 24, 2006, to ask the Appellant to work with Work Source to find individual care providers to assist in Ida's repositioning needs in the evening. The Appellant expressed hesitancy in doing so due to the lack of supervision over such providers. The case manager informed the Appellant that the existing plan was not working due to the inability to find caregivers to assist with Ida's repositioning in the evening hours. The Appellant informed the case manager that "we will just have to do the best we can with what we have."⁴⁵⁴

61. As of February or March 2006, the request for additional hours of care was granted. Margie Duran, the supervisor with CCS, was going to try to find care providers to fill the hours awarded. If she was unsuccessful, Ms. Allard-Webb was going to ask other licensed home care agencies in town. Raven test., TR 59:4 - 12. Ms. Allard-Webb suggested that they might have to consider independent providers. The Appellant responded that yes, at some point, they may need to do that. During early 2006, the Appellant did not receive have an understanding that she was expected to hire an independent provider for Ida at that point in time as she was still trying to determine if the existing care agency could meet Ida's care needs.⁴⁵⁵ Raven test., TR 60:1 - 25.

62. The Appellant ~~would have been~~ was concerned about independent providers being a viable option for Ida, because there would have been no supervision over such providers, such as the supervision Ms. Duran provided the CCS care providers. Raven test., TR 61:1 - 24. It is speculative whether any person available through the Work Source job bank

⁴⁵³ Tr., p. 341, line 16 through p. 343, line 6.

⁴⁵⁴ Exhibit 10, p. 34, Tr. p.58, lines 14-21.

⁴⁵⁵ Tr., p. 582, lines 15-20.

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would have had the skills and training to serve a client such as Ida without the supervision and training that would be provided by a home health agency. Ida was a client who took "a lot of supervision resources." Clark test. CCS, which advertised for workers through fliers at Evergreen College, word of mouth, and classified advertisements, was unable to find staff to fill all the hours of personal care the Department had approved for Ida. Duran test. ~~I find that the Appellant was reasonable in resisting the suggestion that she seek an independent provider through the Work Source job bank. The hiring of an unqualified and unsupervised person could have caused greater problems for Ida, for which the Appellant would have been responsible.~~ One of the standards of care for guardians is to not exceed one's area of expertise. O'Brien test. The Appellant had no expertise in providing personal care, or in supervising people providing personal care. Raven test.

The Appellant attended a staffing meeting on June 16, 2006, to address the lack of caregivers to meet Ida's care needs. The option of hiring independent providers was discussed.⁴⁵⁶ The Appellant chose not to hire independent care providers because she did not want to assume the responsibility of supervising them. Nor did the Appellant seek to be replaced by the court with a guardian who would be willing to supervise independent care providers.⁴⁵⁷

63. Assured Home and Hospice discharged Ida as a client on May 16, 2006. Exhibit 28, p. 10. The reason was that Ida's husband was not giving Ida her prescribed medication, resulting in Ida being more agitated than she needed to be, resulting in injury to their workers. Raven test., TR 62:17 - 63:9. Assured Home and Hospice expressed willingness to return if they could figure out an arrangement that would allow Ida to get the medication she needed for their workers to be safe. Raven test., TR 63:19 - 25.

64. Steven Standaert, MD, was Ida's physician when Ida received services through

⁴⁵⁶ Tr., p. 49, line 12 through p. 50, line 13 and Exhibit 15, p. 2.

⁴⁵⁷ Tr., p. 821, line 23 through p. 822, line 9.

Assured Home Health and Hospice. He quit as Ida's physician the same day that Assured Home and Hospice discharged Ida, and declined the Appellant's request that he keep Ida as a patient. Raven test., TR 75:23 - 76:8.

65. On May 22, 2006, the Appellant wrote to Dr. Standaert, in connection with her plan to file a petition for direction with the court. She asked Dr. Standaert if, in his opinion, Ida needed to receive regular dosages of Methadone and Lorazepam, in contrast to those medications being administered PRN or when caregivers felt she was in need of them. She also asked Dr. Standaert if he would be willing to continue to be Ida's attending physician if hospice services again were obtained for Ida. She noted that Sea Mar would not accept Ida as a patient. Exhibit 73; Raven test., TR 76:9 - 25.

66. Dr. Standaert responded that Ida should receive regular scheduled Methadone, with other short acting opiates only as needed and rarely. He stated he could not provide care in the future for Ida. Exhibit 74.

67. The Appellant felt that, due to the impasse regarding Ida's care, it was appropriate to seek direction from the court in how to deal with the case. On May 30, 2006, the Appellant filed a petition for direction in the Thurston County Superior Court, in the hopes that the court might have ideas or suggestions that had not occurred to her. Raven test., TR 64:1 - 20; Exhibit 28. She gathered statements from Assured Home and Hospice and Ms. Allard-Webb, in addition to her own statement, so the court could be informed of Ida's situation. Raven test., TR 64:21 - 66:19. The Appellant noted that ideally Ida would be in a skilled nursing facility, but pointed out that this could not happen except by a designated mental health professional. Exhibit 28, p. 6. The Appellant asked the court for any direction available. Exhibit 28, p. 7.

68. A hearing was held on June 2, 2006. Exhibit 29. The Appellant pointed out that Ida's loss of her medical support system qualified as a major change of circumstances that

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should be reported to the court. Exhibit 29, p. 3. Although the Appellant did not receive any viable guidance from the court, one consequence of the proceeding was that Ida's husband was on notice that somebody was paying attention to his choices as they affected Ida, and he began to give Ida her medications more consistently. Raven test., TR 69:2 - 70:6; see also Exhibit 29, p. 15. Although the Department notes that the Appellant never filed a motion to compel Ida's husband to administer her pain medications, which was one of the suggestions made by the judge as a possibility, it presents no argument that there would have been a legal basis to file such a motion. At the court hearing, the Appellant asserted that the situation she was facing with Ida's care was "so dire in a lot of ways" and that Ida had "lost her medical support system. . . ."⁴⁵⁸ Judge Strophy, based on the limited information available to him at the time, initially stated to the Appellant:

It is my conclusion that you, as the limited guardian of the person, have authority to determine where and by whom [Ida] will be cared for and treated. And so what I am hearing you opine in your petition is that she is in need of institutional care, unless there is some concrete assurance that can be given that persons whom you arrange to come in home to care for her will be allowed to do their job without interference and that there will be follow-through, and that doesn't appear to be the case.

It's hard for me to give you direction, but my inclinations and perceptions from my review of the file are, under the statute 74.42 RCW, that I do not believe that you are restricted from taking that action to have residential care arranged for [Ida]. That's my sense, without a great deal of research.

And so while persons cannot be placed in facilities without their consent or against their will, I believe the nursing home statute, as well as the order I entered back in March of 2004, provides that [Ida] loses certain rights, unless exercised by you, and one of those rights is to consent to or refuse medical treatment consistent with RCW 7.70.067; and, additionally, and I quote, "To decide who shall provide care and assistance."

And so if you, as her limited guardian, believe that she needs to be placed in a nursing home or such facility in order to be provided adequate care and assistance, you have that authority to act on her behalf or appoint someone to act on her behalf, and you've been appointed that on her behalf, in my view, under the guardians. She's incapacitated. That's your role.

So if you consent, that's consent, in my view, even though she would resist and fight because of her issues. And she has pain issues that, if not medicated, agitate her and make her difficult to care for and assaultive, apparently, and combative, and so the other alternative is for everybody to throw

⁴⁵⁸ Exhibit 29, p. 3, lines 14-23.

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up their hands and let her deteriorate until she, you know gets to a point where she either lapses into a state where she can't care for herself at all or be cared for unless it's by trained individuals. . . if you were to propose an order authorizing you to make provisions for her care outside the home in a nursing or other institution and they'll accept and they'll accept her based upon the court's order authorizing you to consent on her behalf and admit her, that seems to me to be the only path that, on short notice, I would think would be reasonable.

When the Appellant pointed out to Judge Strophy her concerns over her limitations of placing Ida in a residential treatment facility against her will under RCW 11.92.190, Judge Strophy acknowledged that if that is what the statute says it may "trump" his earlier inclination. Judge Strophy then went on to advise the Appellant to possibly seek an assessment by the mental health professional responsible for civil commitments. The judge also advised the Appellant that she may wish to retain an experienced attorney, possibly with financial assistance depending on the status of Ida's estate, to perhaps pursue compliance by Ida's caregivers and spouse. Judge Strophy reiterated, and the Appellant acknowledged, her authority under the guardianship order to replace the caregivers who may be undermining Ida's care.⁴⁵⁹ Notwithstanding the Appellant's lack of success in procuring necessary care staff to meet Ida's care plan, she did not seek dismissal as guardian of person for Ida from the court.⁴⁶⁰

69. In June 2006, the Appellant found an Advanced Registered Nurse Practitioner (ARNP) ~~would~~ who was willing to write prescriptions for Ida. Exhibit 10, p. 43. However, the ARNP was unable to maintain Ida as a client because she went to work for an agency. Raven test., TR 77:14 - 78:10. The Appellant reported to Ms. Allard-Webb that she had exhausted all possibilities of a physician for Ida, and had spoken with the hospice programs. The only option at that point appeared to be to take Ida to the ER to be seen and receive prescriptions. Exhibit 10, p. 44.

70. Ida's medications ran out in August 2006, and she did not have a provider to prescribe refills. Because this had become an emergency, in mid August 2006, the Appellant

⁴⁵⁹ Exhibit 29.

⁴⁶⁰ Tr., p. 822, lines 6-9.

had Ida transported to the emergency room. Raven test., TR 75:8 - 22. Ida received prescriptions for antibiotics for a urinary tract infection, narcotics, and anti-anxiety agents, but was not admitted to the hospital. Raven test., TR 78:11 -79:17. The Appellant obtained a new list of physicians who would accept Medicaid, and she telephoned those that she had not already called. However, she was told that they were not taking new patients. Raven test., TR 79:1 - 13.

71. In On August 31, 2006, the Appellant made an appointment for Ida to be seen at Sea Mar, although she had concerns that Sea Mar again would not accept Ida. However, the reception apparently could not find Ida's file, and made the appointment. The Appellant completed the new patient paperwork Sea Mar sent, including information about Ida's medical history and financial situation. Raven test., TR 91:1 - 92:22. The Appellant's purpose for making the appointment with Sea Mar was to have Ida examined and to hopefully get her established with a primary care physician.⁴⁶¹

72. On October 6, 2006, the Appellant wrote to Dr. Allison Spencer at Sea Mar to give her some background. Exhibit 76. The Appellant wrote:

At this point I am desperately in search for services that will allow [Ida] to receive hospice care, (or I suppose, some other form of in-home nursing services) so that she can continue to reside in her Lacey apartment. I think it unlikely that she will be with us much longer, and I am eager to make her as comfortable as possible in the time that she has remaining.

Exhibit 76, p. 2. The Appellant noted that Ida's daughter was arranging for ambulance transportation to the appointment. *Id.*

73. Ida was transported by Sea Mar by an ambulance without incident.⁴⁶² The Appellant accompanied Ida, and was in the room while Ida was examined by Dr. Spencer. Ida would not allow the doctor to turn her to examine her back, but Dr. Spencer examined other parts of Ida. Raven test., TR 92:23 - 93:8. The incident involving Ida's leg pain and deformity

⁴⁶¹ Tr., p. 807, line 4 through p. 808, line 2.

⁴⁶² Exhibit 32, p. 26.

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noted by Ida's caregiver on August 26, 2006, and resulting in a nurse recommendation that Ida be seen at the hospital for an x-ray of the leg, was not brought up during Dr. Spencer's examination.⁴⁶³ ~~I find it improbable that Dr. Spencer would not have noticed if Ida had a bone sticking out of her leg or a broken leg (which the Department alleges in its post-hearing memorandum had occurred).~~

74. Dr. Spencer decided she wanted a new hospice team, Providence Home Care/Hospice (Providence Hospice), to take over Ida's care. Raven test., TR 93:21 - 94:7. The Appellant met the Providence Hospice evaluating nurse and social worker at Ida's apartment. Providence Hospice determined that Ida was eligible for its care, so the Appellant signed the necessary paperwork. Raven test., TR 96:15 - 97:6. Providence Hospice took on Ida's case on November 4, 2006. Monterastelli testimony; Exhibit 10, p. 51.

75. At the time Ida began to receive Providence Hospice services she had no areas of skin breakdown. Zaire testimony. However, by November 28, 2006, Ida had developed skin breakdown on her coccyx due to her lying on her back, and that condition began to spread. Zaire testimony. The skin breakdown was caused by poor nutrition and lack of regular repositioning in her bed. The 30 plus skin pressure wounds suffered by Ida when she was finally admitted into the hospital in late December 2006, were preventable and treatable by a regimented turning program found in a skilled nursing facility or in a transitional care unit.⁴⁶⁴ The worsening skin condition was exacerbated by lack of timely personal hygiene resulting in Ida lying in a pool of urine and feces for hours at a time. The prolonged contact with urine had caused skin burns from urine saturation. By November 21, 2006, Ida had deep decubitus ulcers that were open, oozing, and at either Stage III or IV. The Appellant and APS were advised of this situation by phone. The Appellant was further informed by Ida's hospice social worker on November 30, 2006, that, although there had been no significant change from the

⁴⁶³ Tr., p. 615, lines 4-6.

⁴⁶⁴ Tr., p. 452, line 10 through p. 453, line 11, p. 455, lines 13-18, and p. 457, lines 4-18.

last report, Ida's skin continued to breakdown and she would most likely become septic.⁴⁶⁵ The Appellant did not seek immediate medical attention for Ida based on these reports, but deferred to the hospice agency caring for Ida in determining if the situation was acute enough to seek emergency medical attention.⁴⁶⁶ Nor did the Appellant make a person-to-person home visit to assess the situation herself.⁴⁶⁷ Ida needed 24 hour home care to meet her acute care needs such as regular repositioning. She was not receiving adequate care in her home prior to her final hospitalization on December 30, 2006.⁴⁶⁸

76. Linda Monterastelli, the medical social worker with Providence Hospice had concerns about being able to meet Ida's care needs, and believed that Ida should be admitted to a nursing home. Diane Holley, the clinical manager, also believed that Ida needed to be placed in a 24-hour care facility. Holley test.

77. The Appellant agreed that Ida should be in a nursing home, but ~~knew~~ concluded under the applicable law that she lacked the authority to place Ida in a nursing home against her will. The Appellant believed that the only option for Ida to be institutionalized against her will was through involuntary placement through a county designated mental health professional (CDMHP). Previously, the CDMHP had determined that Ida did not meet the strict criteria for involuntary placement, so the Appellant was concerned that if there was a new evaluation, she and hospice should coordinate to present the best case possible for Ida to be found eligible. Raven test., TR 99:9 - 102:7. However, Providence Hospice made a direct referral. The CDMHP determined that Ida was not detainable, as her symptoms were primarily medical. Raven test., TR 105:1-6.

78. Ida's case manager from the Thurston County Area Agency on Aging contacted the Appellant on November 16, 2006, to inform her that Ida had new pressure wounds caused

⁴⁶⁵ Tr., p. 170, line 12 through p. 173, line 17, Tr., p. 127, lines 4-10., Exhibit 21, p. 13, and Exhibit 32, p. 29. See also Tr., p. 233, line 19 through p. 234, line 20.

⁴⁶⁶ Exhibit 34, p. 73, line 7 through p. 74, line 9.

⁴⁶⁷ Exhibit 34, p.p. 29-31.

⁴⁶⁸ Tr., p. 171, lines 17-24.

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by the lack of repositioning, that a nurse delegate was almost in place for Ida's care, and that Providence Sound Home Health Agency was considering terminating hospice services. The Appellant asked the case manager to inform the county designated mental health professional of Ida's new wounds.⁴⁶⁹ The Appellant was also informed on November 15, 2006, by Providence's social worker of their pending termination of services due to the inadequate care being provided for Ida in her home.⁴⁷⁰ On November 22, 2006, Ms. Monterastelli contacted the Appellant and was very concerned about Ida's having significant bed sores. Raven test., TR 105:12 - 106:4. The Appellant told Ms. Monterastelli that she would support Ida being taken to the hospital if that was Ms. Monterastelli's recommendation. Raven test., TR 106:11-14. Ms. Monterastelli advised the Appellant that the hospice policy was that they could take a patient directly to the hospital if needed. The Appellant told Ms. Monterastelli that if hospice decided to do so, she would take care of the transport. Raven test., TR 107:15 - 108:11. Ms. Monterastelli did not ask Ms. Raven to go out to the apartment at that time. † The ALJ based this finding on the Appellant's credible testimony. Raven test., TR 106:18 - 107:14.

79. In late December 2006, the Appellant and Ms. Monterastelli discussed having a major care conference at which all the participants in Ida's care would pool their information and do problem solving. Raven test., TR 124:3 - 22. Ida had multiple stage IV skin breakdowns on her buttocks, back, and legs, that were reaching to the bone with undermining. They had copious amounts of brown very foul smelling drainage. Although hospice nurses visited every day to change the dressing, Ida needed 24 hour care and needed to be turned a minimum of every 2 hours. Exhibit 5, p. 1; Zaire testimony. Apparently Ms. Monterastelli contacted APS to see if it was able to take steps to get Ida the 24 hour care she required. The referral was assigned to Glenda Specht. Reese test.

80. On December 29, 2006, Ms. Specht called the Appellant on the Appellant's cell

⁴⁶⁹ Exhibit 10, p. 52.

⁴⁷⁰ Exhibit 21, p. 6.

phone and told her that she had made arrangements for Ida to be in the emergency room, and that she wanted Ida to be there within about two hours. Raven test., TR 126:23 - 127:9. The Appellant learned that Ms. Specht had not yet seen Ida, and she attempted to give Ms. Specht some background. The Appellant and Ms. Specht had subsequent conversations that day. In one conversation, Ms. Specht said that Ida should be admitted to a nursing home. The Appellant advised her about the legal constraints regarding involuntary placement, and about the meeting that was going to be happening shortly involving problem solving. Raven test., TR 129:15 - 130: 22. The Appellant agreed to Ida's going to the emergency room. Ida was taken to the emergency room and admitted to the hospital on December 30, 2006. Raven test., TR 135:21 - 25; Reese test.

81. On January 2, 2007, the Appellant attended a meeting at the hospital concerning Ida's discharge planning. Various options were discussed. Raven test., TR 137:1 - 141:5.

82. On January 5, 2007, CCS advised Ms. Allard-Webb that over the past several weeks it had seen that Ida's plan of care had become unsafe. It had been recommended by APS, as well as others involved in Ida's home care,⁴⁷¹ that Ida needed 24 hours of care, and CCS was in agreement. CCS gave notice that it would no longer be able to provide care to Ida. Exhibit 81. In addition, AAA discussed terminating its services for Ida. Allard-Webb testimony.

83. On January 5, 2007, the Appellant met with Ms. Specht and other professionals involved in Ida's case. Ms. Specht suggested that a rehabilitation facility, which was an extension of a hospital rehabilitation program, might be seen as something different from a residential treatment center to which Ida could not be involuntarily committed. Raven test., TR 144:5 - 145:8. On January 8, 2007, with the Appellant's and Adagio's consent, Ida was admitted to Evergreen Nursing and Rehabilitation Center (Evergreen) from Providence St. Peter Hospital. Exhibit 105. At that time she had numerous pressure ulcers, of which at least

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⁴⁷¹ See for example Exhibit 5, p. 1, Tr., p. 171, lines 17-24, and care assessment plans entered as Exhibits 6, 7, and 8.

two were stage IV. Exhibit 9, p. 25. However, Ida stated repeatedly on intake at Evergreen that she was in no pain, except for her feet, and refused pain medication. Exhibit 23, p. 1. At that point, Ms. Helfrich took over primary guardianship responsibility for Ida. Raven test., TR 145:19 - 146:16. Ida's wounds progressively improved at Evergreen with an aggressive turning program. Although the Appellant had the understanding that Ida could return home after receiving rehabilitation at Evergreen, Ida passed away on April 24, 2007, while still at Evergreen. Raven test. (cross); Helfrich test.

84. CCS had a contract with the Department to provide personal care for Ida. However, at no time did the Department fund the 24 hours per day of personal care that Ida needed. CCS had a schedule of two caregivers, who were to have three shifts at 8:00 a.m.; 1:00 p.m., and 5:00 p.m., with shift durations ranging from one half hour to three hours. Exhibit 8, p. 34. By December 2006, Ida had been approved to receive 280 hours of care per month. Allard-Webb testimony. However, CCS was only providing caregivers for 189 hours per month, and was only sending workers for two shifts. Exhibit 10, p. 56. CCS advised Ida's case worker that it was difficult to find staff to add to the case but it was "always looking." Exhibit 10, p. 57. Although CCS was not permitted by its contract with the Department to terminate Ida as a client, apparently the Department had no mechanism to force CCS to fully staff the case.

85. Kara Panek, the case manager supervisor, called ~~ether~~ two other home care agencies that served Ida's area, KWA and Armstrong, to see if they had any workers that could fill in more shifts. Exhibit 10, p. 57. Because Ida needed two people to turn her, and because of the limitations in the number of hours of care, it would have been necessary to find people willing to go to Ida's home and work for only one half hour or one hour time slots. It was also difficult to find providers willing to work on weekends or after 5:00 p.m. Allard-Webb testimony.

86. The Appellant had concerns about CCS's care for Ida. However, Ida had developed a good relationship with one of CCS's care providers, Pam Hernandez, and the

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Appellant was concerned that Ida would be more resistant to care if Ms. Hernandez were not her care provider. Raven test., TR 70:23 - 71:9. On the other hand, the Appellant was concerned that Ms. Hernandez apparently was influencing Ida's husband to not regularly administer Ida's medication.

87. The Appellant discussed her concerns about CCS with Ms. Allard-Webb. Ms. Allard-Webb started discussions with a supervisor at Armstrong about either filling shifts that CCS was not filling or taking over Ida's care. The Appellant and Ms. Allard-Webb met with that supervisor. Raven test., TR 71:17 - 72:7.

88. On June 16, 2006, the Appellant and Ms. Allard-Webb met with supervisors from CCS, who expressed that CCS wanted to continue to provide home care to Ida. Raven test., TR 70:7 - 18; The Appellant demanded that if CCS were to stay in the case, it needed to change the way it staffed Ida's care. Raven test., TR 73:16 - 23. CCS suggested that it could provide nurse delegation to caregivers, that would allow the medication issue to be taken out of Ida's husband's hands. Raven test., TR 73:24 - 74:5; Exhibit 10, pp. 41-42. If that were to occur, the Appellant understood from her calls to Assured Home and Hospice that it would be willing to return to give care to Ida. Raven test., TR 74:6 - 17. ~~Again, there was no expectation expressed that the Appellant should hire independent providers for Ida. Raven test., TR 75:4 - 7.~~ ⁴⁷² CCS pursued nurse delegation, and remained as Ida's sole in-home care providers, other than the hospice providers, until Ida was admitted to the hospital ~~in August~~ on December 30, ⁴⁷³ 2006, and did not subsequently return home.

89. ~~On August 15, 2005, Lynn Weinacht, a consulting nurse for AAA, visited Ida in connection with a report that Ida had a lump on her leg. Weinacht test. Although Ms. Weinacht did not find a lump on Ida's leg, she found pressure sores that needed to be assessed and treated. Weinacht test. The Appellant approved Ida's transport to the~~

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⁴⁷² Exhibit 10, p. 34 and Tr., p. 58, lines 14-21.

⁴⁷³ Exhibit 23, p. 1.

~~emergency room, as discussed above.~~

90. The log maintained by Ida's care providers indicated that on August 20, 2006, Ida was very combative, and refused lunch. Exhibit 12, p. 200. On August 21, 2006, and August 26, 2006, Pam Hernandez reported in the log that Ida's legs hurt her very badly. Exhibit 12, pp. 200; 202. Ms. Hernandez reported in the caregiver log that the bone did not look right. Exhibit 12, p. 202.

91. On August 28, 2006, Ms. Allard-Webb received a telephone call from Ms. Hernandez, and Ida's husband, Richard Wright. They reported that Ida's leg bone below her knee was sticking out at an odd angle, and they believed it was dislocated or broken. They wanted a visiting nurse to come out. Ms. Allard-Webb advised them that was not possible because she did not have a doctor to order one, and that Ida would need to go to the emergency room. However, Ms. Hernandez did not arrange for Ida to go to the emergency room. Ms. Allard-Webb left telephone messages for the Appellant at her home and cell phone numbers. Exhibit 10, p. 45.

92. The Appellant returned Ms. Allard-Webb's telephone call, and they discussed the situation. Ms. Allard-Webb told the Appellant that she was told that Ida's bone was sticking out of her leg. When the Appellant asked her what that meant, Ms. Allard-Webb stated she did not know, and it was not really clear if there was an emergency. The Appellant jumped in her car and went to Ida's apartment. Raven test., TR 80:2 - 21.

93. When the Appellant arrived, there was no care provider present, and Ida was sleeping peacefully. Raven test., TR 80:22 - 24. Ida's husband told the Appellant that Ida had been hollering the night before. They discussed issues about administration of pain medications. The Appellant then asked Ida's husband about what was going on with the bones, and told him what Ms. Allard-Webb had told her. Ida's husband then talked about an incident from 2003 when a nurse held Ida's leg and Ida heard a pop. Ida's husband was angry that Ida

had not been given an X-ray on that occasion, and he wanted Ida to be given an X-ray now because Ida's leg had hurt her on a continual basis. Raven test., TR 81:2 - 84:3. The Appellant did not examine Ida's leg. However, she understood from the conversation that there was no contemporaneous incident of Ida having a problem with her leg. Raven test., TR 84:4 - 10. The Appellant told Ms. Allard-Webb what Ida's husband told her, and Ms. Allard-Webb stated she would try to get a consulting nurse out the next day. Raven test., TR 84:11 -19.

94. On August 28, 2006,⁴⁷⁴ Ida's case manager asked the consulting registered nurse for the Thurston County AAA, Mary Gross, to make a home visit to assess Ida's possible leg fracture. The nurse visited Ida and found a horizontal bump approximately an inch-and-a-half in length and a half-inch wide below the right knee. The bump was tender to the touch and Ida's caregiver reported that the bump had only appeared in the last few days and Ida's was experiencing unusually high pain in the leg. Because the situation had existed for a week and there was no swelling, the nurse did not believe it was an urgent situation requiring an immediate trip to the emergency room. However, the examining nurse believed Ida should be seen by urgent care or an emergency room physician. She relayed this belief to the Appellant by voicemail when she was not able to reach her personally.⁴⁷⁵ ~~On August 29, 2006, consulting nurse Mary Gross visited Ida.~~ Ms. Gross left two voice mail messages for the Appellant. In the first, she said she had some information she wanted to talk about with the Appellant, and to call her in the morning. In the second, she said that she was going to be unable to stay in her office because of a family emergency, but that the Appellant should call Ms. Allard-Webb for an explanation of what transpired in her visit. Raven test., TR 85:3 - 19.

95. The Appellant immediately called Ms. Allard-Webb after receiving the second voice mail. Ms. Allard-Webb told the Appellant that Ms. Gross was recommending that Ida be taken to the emergency room for pain in her leg. Ms. Gross was unsure if Ida had a fracture,

⁴⁷⁴ Tr., p. 365, lines 14-15, Exhibit 10, p. 45.

⁴⁷⁵ Tr., p. 365, line 17 through p. 372, line 14. As to specifically stating her recommendation for Ida to be examined at the hospital see Tr., p. 366, lines 23-25.

and thought she should be X-rayed. Exhibit 10, p. 45. Ms. Allard-Webb did not convey to the Appellant that there was any sense of urgency in having Ida seen in the emergency room. Raven test., TR 87:1 - 3. The Appellant asked Ms. Allard-Webb why it was recommended that Ida be seen at the emergency room. Ms. Allard-Webb was not sure. Raven test. (cross). The Appellant suggested that perhaps Ms. Gross made the recommendation for professional liability reasons, and she needed to know if there was a reason to do the transport other than Ms. Gross's professional liability concerns. Raven test. (cross).

96. Ms. Gross had emailed to Ms. Allard-Webb: "Below the right knee there was a horizontal bump approximately an inch and half long and half an inch wide with point tenderness. No discoloration. No swelling at knee or below bump. Pain when right leg is slightly repositioned. Pam reported client's pain at right leg is unusually high. Client visited the ER last week because she was out of medication and does not currently have a PCP. Pam noticed some bruising at below the right knee, which progressed to the present bump 'within a few days' after ER visit." Exhibit 10, pp. 45-46. Ms. Gross did not note any skin breakdown, although Ida did not permit observation of all areas. Ms. Gross's recommendation was: "Client to visit ER for evaluation of right leg. RN called and left messages for medical guardian and client's daughter to call LTMAAA RN's business number." Exhibit 11, p. 1. Ms. Allard-Webb did not forward or read that email to the Appellant. Raven test., TR 86:17 - 25. Ms. Gross did not believe that Ida had an emergency requiring immediate transport to the emergency room, but rather that the bump that was causing Ida pain should be evaluated. Gross test. Ms. Gross and Ida's caregivers discussed calling 911 the evening of the home examination to transport Ida to the emergency room. However, Ms. Gross was informed by Ida's caregivers that the Appellant, as Ida's medical guardian, is the person that would call and arrange for medical attention for Ida.⁴⁷⁶

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⁴⁷⁶ Tr., p. 371, lines 22-25.

97. After speaking with Ms. Allard-Webb, the Appellant spoke with Ida's daughter. She and Ida's daughter concurred that given Ida's fragile medical condition it would be better to not take her to the emergency room unless they knew there was a problem. The Appellant decided that, given the risk of having Ida go to the emergency room for a routine examination, it would be better to have Ida stay where she was and watch ~~to~~ the situation. Raven test., TR 87:7 - 22. Because the Appellant had observed prior ambulance transports of Ida, she was aware that one of the risks of transporting Ida was that Ida was very thin and combative, and there could be potential injury because she would flail around. Raven test., TR 87:23 - 89:16. In addition, the Appellant was concerned about psychological harm to Ida, as she did not want to be taken out of her home. Raven test., TR 89:17 - 90:6. In Thomas O'Brien's opinion, the Appellant's decision not to transport Ida to the emergency room was reasonable, in light of Ms. Gross's recommendation appearing to be a "CYA" type of recommendation. O'Brien test.

98. The ALJ found and the undersigned adopts, ~~find~~ that, given the entire set of information available to the Appellant regarding Ida's history, her decision to not follow Ms. Gross' recommendation to have Ida seen at the emergency room, but instead to have Ida's situation monitored and to schedule an appointment as soon as possible to address all of Ida's medical conditions at Sea Mar, was a decision made in Ida's best interest. That course of action meant that Ida needed to be transported only once instead of twice, and being seen at Sea Mar was more likely to lead to Ida's making contact with an on-going primary care physician. Although the Appellant could have had Ida transported immediately to the emergency room in order to avoid any possible criticism of her decision, she ~~actually~~ made a ~~more courageous~~ decision for the purpose of minimizing trauma to Ida, whose interests she appropriately placed first.

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99. On August 31, 2006, a couple days after Ms. Gross made the recommendation that Ida be seen at the emergency room, the Appellant made an appointment for Ida to be seen

at Sea Mar. However, their next available appointment was not until October. Raven test., TR 91:3-7. Although the doctor examined Ida, except for her back, there was no issue of Ida having an injury to her leg. Raven test., TR 92:25 - 93:11. ~~find~~ The ALJ found it more probable than not that if Ida had a recent bone fracture, that this would have been discovered in that examination, without the need for the Appellant to assist in pointing out the possible leg injury during the examination.

100. There is no evidence, much less medical opinion, that Ida was placed at risk of harm or suffered any harm as a result of the Appellant's decision to schedule Ida to be seen at Sea Mar at the next available appointment slot, instead of taking Ida to the emergency room. The Department's contention in its post-hearing brief that Ida had suffered a bone fracture in August 2006 is unsupported by the medical records, and ~~find~~ the ALJ found it more probable than not that that was not the case. There is no credible evidence that Ida ever had a bone sticking out of her leg, ~~or any emergency~~ that required treatment in an emergency room. Ida's case worker, Ms. Allard-Webb, never expressed to the Appellant that there was any issue or concern about Ida not being immediately seen in the emergency room. Raven test., TR 90:7-11.

101. In December 2006, there was a winter storm that caused power outages both at Ida's apartment in Lacey and at the Appellant's residence. The first unplanned power outage in Olympia (adjacent to Lacey), affecting the Appellant's residence,⁴⁷⁷ took place on December 13, 2006, sometime before 3:46 a.m., but power was restored by 11:30 a.m. Exhibit 111, p. 1. The second power outage took place on December 14, 2006, some time before 7:75 p.m. Power was fully restored on December 21, 2006, at 4:30pm. *Id.* Two unplanned power outages occurred at Ida's place of residence in mid-December 2006. The first occurred on December 15, 2006, on or before 12:12 a.m. and ended at 9:30 p.m. that same day. The

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⁴⁷⁷ Exhibit 111, and Tr., p. 671, line 19 through p. 672, line 5.

second started on or before 12:14 a.m. on December 16, 2006, with power fully restored at 11:40 p.m. on December 17, 2006.⁴⁷⁸

102. Ms. Monterastelli and Zerynthia Zaire, a registered nurse with Providence Hospice, went to Ida's home on December 15, 2006, at 9:45 p.m. The house was dark and cold due to the power outage. The log indicated that care providers had already been at the home at 8:05 a.m. Clark test. The CCS supervisor confirmed to Ms. Monterastelli that Ida's afternoon care providers would be coming as scheduled. Monterastelli testimony. There is no credible evidence that Ida's personal care, as it existed at the time, was significantly interrupted by the outage, or that CCS failed in its duty to staff her care. However, when Ms. Monterastelli and Ms. Zaire arrived, Ida's husband was cold and hungry and huddled in the living room. Ms. Monterastelli believes there was an interruption in Ida receiving her medications because the hospice worker normally gave medications around 8:00 a.m., and on that day was unable to give the medications until 10:15 a.m. Monterastelli testimony.

103. Prior to ~~December~~ late November 2006, Providence Hospice had purchased a continuous flow air mattress for Ida for the purpose of addressing her skin issues. Ms. Yanisch believed that the first mattress ordered by Providence Hospice may have contributed to Ida's rapid skin breakdown since Providence Hospice took on her care. That mattress was replaced with another on November 29, 2006. However, further skin breakdown continued to occur due to the lack of repositioning and skin care protocol set forth in the care plans. Yanisch test.

104. The mattress in place in December 2006 relied on electricity, and did not have a mechanism to stop it from deflating when electricity was interrupted. When Ms. Monterastelli arrived, the mattress had fully deflated, and Ida was soaked in urine lying on the deflated mattress. Annette Yanisch, a consulting nurse who had previously examined Ida but was not at Ida's home during the storm power outage, thought that the mattress did have a foam pad

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⁴⁷⁸ Exhibit 44 and Tr., p. 477, lines 17-25.

underneath it as a fail-safe feature in case of deflation.⁴⁷⁹ However, Ms. Yanisch's testimony regarding this feature was simply a "thought," whereas the hospice nurse and social worker who were present in Ida's home during the power outage and changed out the deflated mattress were much more specific in their testimony as to what Ida was lying on when found during the winter storm.⁴⁸⁰ ~~The mattress had a layer of foam underneath.~~ Yanisch test.

105. Ms. Monterastelli estimates that the bed was deflated about 12 hours. Ms. Monterastelli and the aide lifted Ida off the hard and rubbery,⁴⁸¹ mattress, put a "Geo-Matt replacement mattress in place, and treated Ida's "pretty severe wounds". Ida's bed sores had grown and had become infected. Monterastelli testimony. There was purple and green discoloration with oozing and the appearance of burning on Ida's back.⁴⁸²

106. Following the incident of her mattress deflating, Ida's skin breakdown, which had been at stage III, became significantly worse, with stage IV breakdown. Monterastelli testimony; Zaire testimony. Stage III is skin breakdown that extends below the skin to the subcutaneous tissue. Stage IV goes into the muscle and bone. However, because both occur below the skin, it may be difficult to gauge the degree of breakdown from observation that does not go to the base of the wound. Yanisch test. There was no suggestion at that time that Ida should be taken to the emergency room. The emergency room personnel would not have been able to take care of the issue, and they would likely send Ida home, meaning that Ida's discomfort would have been greater. Zaire test.; Holley test.; Exhibit 5, p. 1. Moreover, the type of treatment that would be provided in a hospital – surgical debridement, would have been a major intervention, inconsistent with the reason the Appellant was receiving hospice care. Yanisch test.

107. The Appellant lives in a secluded, heavily wooded rural area. After the storm,

⁴⁷⁹ Tr., p. 241, lines 5-8.

⁴⁸⁰ See Tr., p. 171, lines 9-16 and p. 179, line 22 through p. 180, line 7.

⁴⁸¹ Tr., p. 132, line 15 through p. 133, line 12.

⁴⁸² Tr., p. 133, lines 15-17.

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she was unable to even get to her driveway due to downed trees and branches. Her office was in her garage, and she was unable at first to get to her office at all. The cordless telephones in her home would not operate due to the lack of electricity. It took the Appellant a few days to clear the debris because it was very cold, and she could work only 20 minutes to one half hour at a time.⁴⁸³ She had to be very careful of falling due to having the condition of benign positional vertigo. Raven test., TR 109:13 - 113:23. However, when the Appellant was able to reach her office and retrieve her cell phone, she was able to make two cell phone calls to her friend from an area on her property where she was able to get cell phone reception. Raven test., TR 117:21 - 118:15.

108. When the Appellant was able to enter her office, the telephone rang, and Ms. Monterastelli was on the line. Ms. Monterastelli told the Appellant that hospice had been in Ida's home, and that they were providing care to Ida. Ms. Monterastelli told the Appellant that she had been out to Ida's home the day of the storm, ~~and that everybody was fine.~~ Raven test., TR 115:15 - 116:22. Ms. Monterastelli informed the Appellant that, although Ida's needs had been met for the day, the family was in extremely dire straits and that Ida would need to be placed in a more comprehensive care if Providence was to continue to provide care.⁴⁸⁴

109. Although Ms. Monterastelli believed that everything for Ida was "squared away" the day following the storm, she wanted to have a discussion with the Appellant regarding Ida's future situation, in light of her need for a higher level of care than she was receiving. Monterastelli test.

110. APS received a referral that during a five-day power outage of December 14,

⁴⁸³ Review Judge note: The Appellant testified to only being able to clear debris in 20 to 30 minute intervals and then return to a "very small space heater in one room. . ." and to "put myself in an electric blanket. . ." to avoid hypothermia. Tr., p. 675, lines 12-18. However, the Appellant did not explain how the small space heater or electric blanket were operable without electricity (i.e. the space heater used some form of energy other than electricity and the electric blanket was used only as a wrap without the benefit of electricity). Because the unchallenged evidence in the hearing record shows the electricity was out at the Appellant's residence during this time period, the undersigned adopts the ALJ's initial finding without amendment other than this footnote.

⁴⁸⁴ Tr., p. 134, lines 2-6.

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2006, Ida was in her home without power. It was alleged that because Ida's alternating air pressure mattress was not functioning, Ida's Stage II decubitus ulcer advanced to Stage IV. Exhibit 1, p. 1. The Department made a substantiated finding of neglect against the Appellant for failing to check on Ida during the power outage. Exhibit 3.

111. The record in this matter was voluminous, and the Department's allegations are very broad set out into three major categories, two as to specific incidents and one covering a long stretch of time. It is not feasible to make individual findings of fact regarding every fact in this case -- either with respect to actions the Appellant took as Ida's guardian or with respect to every action the Appellant allegedly failed to take. This ~~Initial Order~~ Review Decision and Final Order addresses the general contentions about which the Appellant was given notice. Where this ~~Initial~~ order does not make specific individual findings of fact, it may be assumed that either the evidence did not support the allegations, or else the allegations were peripheral or would not fall within the definition of negligent treatment at issue in this case.

III. CONCLUSIONS OF LAW AND DISCUSSION OF ISSUES

Jurisdiction and Standards of Review

1. The Petition for Review of the Initial Order was timely filed and is otherwise proper.⁴⁸⁵ Jurisdiction exists to review the Initial Order and to enter the final agency order.⁴⁸⁶
2. In Adult Protective Services cases, the undersigned's authority to modify an initial hearing decision has been limited by Department rule. The undersigned may modify an initial hearing decision if irregularities occurred in the proceedings that affected the fairness of the hearing, if the findings of fact are unsupported by substantial evidence in the record, if there is a need for clarification in order to implement the decision, or if there are errors of law in the conclusions of law.⁴⁸⁷

⁴⁸⁵ WAC 388-02-0580.

⁴⁸⁶ WAC 388-02-0560 to -0600.

⁴⁸⁷ WAC 388-02-0600(2). Subparagraph (3)(e) of the cited WAC which reads, "*Findings of fact must be added because the ALJ failed to make an essential factual finding. The additional findings must be*

3. It is helpful if all parties in the administrative hearing process understand the unique characteristics and specific limitations of this hearing process. An administrative hearing is held under the auspices of the *executive branch of government* and a presiding administrative or review officer does not enjoy the broad equitable authority held by a superior court judge within the *judicial branch of government*. It is well settled in law and practice that administrative agencies, such as the Office of Administrative Hearings and the Board of Appeals, are creatures of statute, and, as such, are limited in their powers to those expressly granted in enabling statutes, or necessarily implied therein. *Taylor v. Morris*, 88 Wn.2d 586, 588 P.2d 795 (1977). It is also well settled that an ALJ's or a review judge's jurisdictional authority to render a decision in an administrative hearing is limited to that which is specifically provided for in the authorizing statute or Department rule found in the Washington Administrative Code (WAC). An ALJ or review judge acting as a presiding or reviewing officer, is required to apply the Department's rules adopted in the WAC as the first source of law to resolve an issue. If there is no Department rule governing the issue, the presiding officer or review judge is to resolve the issue on the basis of the best legal authority and reasoning available, including that found in federal and Washington constitutions, statutes and regulations, and court decisions.⁴⁸⁸ The presiding officer or review judge may not declare any rule invalid and challenges to the legal validity of a rule must be brought *de novo* in a court of proper jurisdiction.⁴⁸⁹

4. Chapter 74.34 of the Revised Code of Washington (RCW) is titled "Abuse of Vulnerable Adults." The statute establishes a system for reporting instances of neglect of a vulnerable adult and defines neglect as: "(a) a pattern of conduct or inaction by a person or

supported by substantial evidence in view of the entire record and must be consistent with the ALJ's findings that are supported by substantial evidence based on the entire record' has been ruled invalid by the Washington Court of Appeals in *Bashiru Kabbae v. DSHS*, Docket No. 59607-1, Wash. Ct. of App., Div. III (May 5, 2008). Under *Kabbae*, the undersigned is no longer limited by this provision in changing an initial order, can enter additional material findings based on the evidence in the hearing record, and in doing so can set aside or modify the ALJ's findings.

⁴⁸⁸ WAC 388-02-0220.

⁴⁸⁹ WAC 388-02-0225(1).

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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 that fails to avoid or prevent physical or mental harm or pain to a vulnerable adult; or (b) an act or omission that demonstrates a serious disregard of consequences of such a magnitude as to constitute a clear and present danger to the vulnerable adult's health, welfare, or safety."⁴⁹⁰

5. The statute defines "vulnerable adult" to include a person sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself; a person found incapacitated under chapter 11.88 RCW; a person who has a developmental disability as defined under RCW 71A.10.020; a person admitted to any facility; a person receiving services from home health, hospice, or home care agencies licensed or required to be licensed under chapter 70.127 RCW; or a person receiving services from an individual provider. The evidence in the hearing record supports the finding that Ida was a person over the age of sixty who was functionally unable to care for herself, was found incapacitated under RCW 11.88, and was receiving home care services. For this reason, Ida was considered to be a "vulnerable adult" during the relevant time period and she was entitled to the protections provided under the statute.

6. The Department's amended substantiation letter cites to the entire statutory definition of "neglect" (both subparagraph "a" and "b") as a basis for the finding of neglect. At least subparagraph "a" of the statutory definition requires that a "duty of care" must exist between the alleged perpetrator and the vulnerable adult if a finding of neglect is to be substantiated based on failure to maintain the vulnerable adult's physical and mental health or failure to avoid or prevent physical or mental harm or pain.⁴⁹¹ The corresponding relevant regulation defines a "Person or entity with a duty of care" to include a guardian appointed under

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⁴⁹⁰ RCW 74.34.020(11).

⁴⁹¹ RCW 74.34.020(11)(a).

chapter 11.88 RCW.⁴⁹² There is no dispute that the Appellant was appointed Limited Guardian Of The Person in regard to Ida and, thus, was a person with at least some duty of care towards the vulnerable adult.

7. The Department implemented chapter 74.34 RCW by adopting chapter 388-71-0100 through -01280 of the Washington Administrative Code (WAC), entitled "Home and Community Services and Programs-Adult Protective Services." Administrative hearings conducted under these regulations are controlled by statutes and regulations found at RCW 34.05 and WAC 388-02, respectively.⁴⁹³

Standard of Proof Applicable to an APS Hearing

8. Department regulations address what standard of proof is to be used in an APS hearing, providing that, "The ALJ shall decide if a preponderance of the evidence in the hearing record supports a determination that the alleged perpetrator committed an act of abandonment, abuse, financial exploitation or neglect of a vulnerable adult."⁴⁹⁴ The "preponderance of the evidence" standard is required under the regulations relevant to this proceeding. This standard means that it is more likely than not that something happened or exists.⁴⁹⁵

Challenges and Amendments to the Initial Findings of Fact

9. The Department challenges a majority of the Findings of Fact entered by the ALJ in the Initial Order, arguing that many should be amended or supplemented with additional findings based on substantial evidence in the hearing record. Some of the challenges involve either conclusions of law or mixed findings of fact and conclusions of law. The adopted Findings of Fact have been supplemented and/or amended when such additions or changes are relevant, and supported by substantial evidence in the hearing record. Records made contemporaneously in the normal course of business by the Appellant, caregivers, and Department employees have a

⁴⁹² WAC 388-71-0105 "Person or entity with a duty of care."

⁴⁹³ WAC 388-71-01245.

⁴⁹⁴ WAC 388-71-01255(1).

⁴⁹⁵ WAC 388-02-0485.

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high indicia of reliability and have been relied upon in supplementing and amending the adopted Findings of Fact, especially those records corroborated by live testimony allowing for cross examination at hearing. The undersigned has also relied on the credible sworn testimony of witnesses in reviewing the Findings of Fact. Where a contemporaneously kept business record is in conflict with the memory testimony of a witness and the witness has expressed either explicitly or implicitly some reservations about their recollection of an incident or fact, the undersigned has relied on the business record in supplementing or modifying a finding of fact.

10. The Department argues the ALJ committed errors by failing to enter necessary findings of fact, failing to adequately supplement other findings, and by entering findings not supported by substantial evidence in the hearing record. The undersigned has authority to make additional material findings of fact by entering separate findings on review or by supplementing findings adopted from the Initial Order.⁴⁹⁶ The undersigned also has authority to delete or modify findings that are not supported by substantial evidence based on the entire record.⁴⁹⁷ The Department's findings of fact challenges shall be addressed in the order presented in the petition for review.

11. The Department argues that additional findings of fact need to be added to address the Appellant's alleged inconsistent claims in her pre-hearing deposition versus her hearing testimony regarding her inability to call out from her home on December 14, 2006, and shortly thereafter during a winter storm. The Appellant did clarify at hearing that she did not have possession of her cell phone on December 14 or 15, 2006. The Appellant explained that she often did not keep the cell phone in the house proper because of the lack of cell phone service within the house. The Appellant went on to explain she was not certain where the cell phone was until she was able to enter her home office located in the detached garage on

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⁴⁹⁶ See RCW 34.05.464(4) and WAC 388-02-600(3)(e) as affected by the Washington Court of Appeals in *Bashiru Kabbae v. DSHS*, Docket No. 59607-1, Wash. Ct. of App., Div. III (May 5, 2008).

⁴⁹⁷ WAC 388-02-0600(3)(b).

December 16, 2006.⁴⁹⁸ The specific issue of possible cell phone communication was not broached during the brief questioning related to the issue (six questions) at the deposition taken on November 19, 2007. The Appellant's assertion during the deposition that she was unable to call out was consistent with the lack of an operable land-base phone and the Appellant's lack of knowledge as to the whereabouts of her cell phone until she entered the home office in the separate garage on her property. Although the Appellant's deposition statements on the subject were less specific than her testimony at hearing, they were not necessarily inconsistent. The difference in the Appellant's testimony at deposition and at the hearing regarding the inability to call out do not amount to such an inconsistency so as to bring into question her credibility or impeach her testimony on this subject. The ALJ's findings regarding this issue are adequate for the purposes of this decision and do not warrant amendment or supplementation on review. Nor is it necessary to enter an additional Conclusion of Law regarding Evidence Rule 613 other than the legal conclusion reached in this paragraph.

12. The Department asserts that an additional finding of fact needs to be entered acknowledging the Appellant is presumed to have a motivation to prevail in her appeal and clear her name because she is a certified professional guardian and is in a business to provide these type of services. It goes without saying that all appellants challenging adverse actions by the Department through the administrative hearing forum have a motivation to prevail or they would not have sought a hearing. Simply pointing out that an appellant has more to lose than a Department's witness is not enough, by itself, to undermine the sworn testimony of an appellant in this forum. Inconsistency in testimony, testimony clearly in conflict with other credible testimony or other strong evidence, and the demeanor observed by the presiding officer are factors relevant to credibility, not just the position of a witness in this somewhat adversarial process.

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⁴⁹⁸ Transcript of hearing (Tr.), p. 843, line 13 through p. 844, line 16.

13. The Department seeks to have additional findings of fact entered relating to the background history and reasons why the Appellant was appointed as Ida's Limited Guardian of the Person. Such additional findings are material to the case and supported by evidence in the hearing record. Adopted Finding of Fact 33 has been supplemented accordingly. Adopted Finding of Fact 36 already contains much of the additional findings sought by the Department in section V.6 of the petition for review. The adopted finding has been supplemented to include the Guardian ad Litem's recommendations found in paragraph 10.3 of the Guardian Ad Litem Report entered into the hearing record. The last paragraph of adopted Finding of Fact 36 already includes the findings sought by the Department in section V.7. of its petition for review.

14. The Department asserts that additional findings need to be made regarding Ida's loss of rights under the *Order Appointing Limited Guardian Of The Person* entered on March 12, 2004. Adopted Finding of Fact 38 already sets forth the loss of Ida's rights under the order. The adopted finding has been supplemented to include the language regarding the Appellant's powers and duties as guardian under the order.

15. The Department asserts that a finding of fact needs to be entered regarding the transfer of complete medical care decision-making authority from Ida to the Appellant by court order and the Appellant's acknowledgment of her sole responsibility as to Ida's medical care decisions. Paragraph 1.10 of the *Order Appointing Limited Guardian Of The Person* speaks for itself. To the extent the provision requires interpretation or a discussion of its affect, such is more appropriately addressed as a conclusion of law. The Appellant's acknowledgment as to her understanding of her guardianship role is material to this decision and adopted Finding of Fact 38 has been supplemented to include this acknowledgment of understanding.

16. The Department asserts that a finding of fact needs to be entered addressing the relationship between the Appellant, in her role as a court-appointed certified professional guardian, and the Washington State Standards of Practice Regulation for Certified Professional

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Guardians. Although compliance or non-compliance with the practice standards does not automatically create a defense against or prove an APS substantiated finding of neglect, they do set forth what standards professional guardians are expected to meet. To this extent, they are material in defining the role of a guardian and their duty of care in meeting specific needs of a ward. For this reason, adopted Finding of Fact 38 has been supplemented to address the role of the practice standards in relationship to the Appellant's court-ordered duties.

17. The Department argues that findings of fact need to be entered regarding the testimony of the Appellant's expert witness, Tom O'Brien, and the Appellant's business partner regarding adequate meetings between a guardian and his/her ward. The Department's substantiated finding of neglect is based, in part, on the Appellant's alleged lack of in-person contact and attention to Ida's medical needs. Expert testimony as to frequency of in-person visits is relevant to the issue of neglect. Adopted Finding of Fact 46 has been supplemented to reflect Mr. O'Brien's testimony and written documents regarding this subject. Testimony of a guardian who has dealt with situations similar to this case has some relevancy as to the in-person attention provided to Ida. For this reason, adopted Finding of Fact 46 has been supplemented to reflect Helen Helfrich's deposition testimony.

18. The Department asserts that the evidence in the hearing record supports additional findings that regular, meaningful, and in-person visits could have resulted in the Appellant building a rapport with Ida and potentially decreasing her resistance to medical care by allowing herself to be admitted to a long-term facility. Further, the Appellant would have been more informed about Ida's condition and circumstances. A finding that Ida would eventually agree to long-term care in an institution due to a greater number of visits by the Appellant would be based, at best, on speculation and not supported by substantial evidence in the hearing record. Regular and meaningful in-person visits would have provided the Appellant with more complete and contemporary information regarding Ida's medical condition and the extent of care she was

receiving. This fact is relevant to the issue of negligence and adopted Finding of Fact 46 has been supplemented to reflect this fact.

19. The Department argues that an additional finding of fact needs to be entered addressing the Appellant's awareness of her duty to inform the court of significant changes in Ida's medical condition and the mechanism by which this could be done based on her May 30, 2006 petition to the Superior Court. The Appellant's duty to report to the court within thirty days any substantial change in Ida's condition is clearly set out in paragraph 3.4 of the *Order Appointing Limited Guardian Of The Person*. Adopted Finding of Fact 38 has been supplemented to reflect this fact as the Appellant's duties and obligations towards Ida are central to the allegation of neglect issue and are relevant to this proceeding. No further findings are necessary as to the Appellant's *awareness* of her obligation to keep the court apprised of significant changes in Ida's condition or the mechanism available to fulfill that obligation.

20. The Department asserts that an additional finding needs to be entered regarding the Appellant's duty to monitor Ida's medical care needs. Again, findings relating to the Appellant's duty of care to Ida are relevant and adopted Findings of Fact 38 and 46 have been supplemented to reflect the Appellant's duty to monitor Ida's medical condition.

21. The Department assigns error to entry of "Footnote 2" to initial Finding of Fact 3.3 (Footnote numbered 406 as replicated in this decision). The Department argues that uncontested and signed physician letters admitted to the hearing record are unilaterally accepted as reliable evidence. Although Dr. Elledge's letter was unchallenged, his brief summation of Ida's admitting diagnosis does not completely comport with the other admitted and unchallenged evidence in the hearing record. The Evergreen Nursing and Rehabilitation Centers medical records set forth specifically why Ida was admitted under the "Reason for Admission" provision and do not refer to a tibial fracture. It cannot be determined from the hearing record how extensive an examination was done leading to entry of the "Reasons for Admission" entry on January 9, 2007. Nor can it be

determined if Dr. Elledge's summation was based on his own examination or simply a review of the admission records. It was not an error for the ALJ to point out this evidentiary discrepancy in a footnote to the findings and to accept the contemporaneously kept business records of the admitting facility as probably being more accurate. The ALJ only states the physician's reference to an untreated distal tibial fracture "appears" to be in error in attempting to reconcile the two unchallenged pieces of evidence.

22. The Department argues that the findings should be supplemented to more comprehensively set forth Ida's medical condition. Her medical condition during the time period at issue is relevant to the issue of neglect and the Department's proposed supplement is supported by substantial evidence in the hearing record. Adopted Finding of Fact 5 has been supplemented to include the additional information regarding Ida's medical condition and her resistance to care.

23. The Department asserts that initial Finding of Fact 3.6 should be supplemented to include reasons why it was critical Ida be repositioned on a regular schedule to alleviate pressure leading to skin breakdown. The requested supplements are relevant to this case and supported by substantial evidence in the hearing record. Adopted Finding of Fact 6 has been supplemented to reflect these facts.

24. Adopted Finding of Fact 7 has been supplemented to include the importance of regular turning/re-positioning of Ida in preventing skin breakdown. Such a finding is supported by substantial evidence in the hearing record.

25. The Department argues that the ALJ's Finding of Fact 3.8 that Ida's repositioning occurred "2 times daily due to the difficulty in turning client" is not based on the substantial evidence in the record. The notes found in the *Assessment Details Current Significant Change* document entered into the hearing record as Exhibit 8, as cited by the ALJ, records exactly that observation in the last paragraph of page 14 of the document. Whether Ida was repositioned ~~000151~~ once or twice during the day does not change the ultimate resolution of the issue of neglect in this

case. The additional findings requested by the Department are relevant as to the necessary medical care for Ida and are supported by substantial evidence in the hearing record. The findings regarding Ida's care plan requirements and the Appellant's awareness of these requirements is addressed in adopted Finding of Fact 6 rather than adopted Finding of Fact 8.

26. Initial Finding of Fact 3.10 states that because the Department never approved the necessary hours, Ida's bi-hourly repositioning never occurred. Although the Appellant may have believed this to be true, the Department's assessment records kept in the normal course of business and entered into the hearing record as Exhibit 8 show otherwise. The ALJ's basis for the lack of regular repositioning as set forth in initial Finding of Fact 3.10 is in conflict with initial Finding of Fact 3.61 and has been deleted in adopted Finding of Fact 10. The fact that Catholic Community Services was having difficulty staffing Ida's care, although they continued in their efforts to do so, is set forth in adopted Finding of Fact 84.

27. The Department challenges that part of initial Finding of Fact 3.12 wherein the ALJ addressed Ida's reluctance to take medications other than common pain medications. The ALJ's finding is supported by specific language in the care assessment plans and does not conflict with initial Finding of Fact 3.26 wherein the ALJ reiterated Ida's resistance to medical attention other than pain medications.

28. The Department challenges initial Finding of Fact 3.19, wherein the ALJ found Ida had a history of resisting health care that would have been in her best interest and that she was competent when she expressed this resistance. There is ample evidence in the hearing record that Ida did have a healthy suspicion of traditional medical treatment and did not wish to be subjected to procedures that caused her pain notwithstanding the long term medical benefits such treatments could bring. Indeed, the Department, itself, conducted an APS investigation into self-neglect and determined Ida had a "long history and lifestyle pattern of independence and reliance

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on naturopathic and alternative medicine.⁴⁹⁹ What is even more clear in the hearing record is Ida's historically consistent refusal to be permanently institutionalized or taken out of her home for medical treatment purposes. Although Ida was hospitalized for treatment in the past, and received some rehabilitation care outside of her home, the record does not reveal how much she actually consented to such treatment, or if it came about simply out of an emergent crisis and against her wishes when no other options were available. What is clear from the record is Ida's strong opinions regarding the health industry when she was competent to form such opinions and her desire to spend the remainder of her life at home. For a myriad of personally valid reasons, a competent person can choose to forgo what appears to an outsider to be medically necessary treatment, hospitalization, or institutionalized care. This is especially true towards the end of a person's natural life. Recognition and respect for these personal choices is critical in allowing vulnerable adults the dignity and self-determination at a time in their lives when they may have little else. However, honoring a vulnerable adult's residential choices must be tempered by objective common sense as addressed in Conclusion of Law 42, below. The initial finding is supported by substantial evidence in the hearing record and cannot be changed on review.

29. The Department challenges initial Finding of Fact 3.20, arguing the 2001 Outcome Report relied on by the ALJ does not indicate Ida's medical, physical, or mental condition at the time of the investigation into self-neglect. The report specifically states, "Client's cognition is within normal limits. . ." and ". . . client is not Self Neglecting due to a lack of functional, mental or physical ability. . ." The challenged finding has been supplemented to reflect the basis of the substantiated finding of self neglect made in 2004 against Ida and the subsequent appointment of the Appellant as Ida's medical guardian.

30. The Department alleges initial Finding of Fact 3.49 is in error in that the ALJ found that the Area Agency on Aging interpreted Dr. Cates September 23, 2003 letter, to mean

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⁴⁹⁹ See Exhibit 67.

Dr. Cates was declining to be Ida's primary physician. The Comprehensive Assessment done on October 1, 2003, and referenced in the adopted Finding of Fact 50, reiterates that Dr. Cates could not be Ida's primary care physician. The reason why he declined to do so was clear from his letter, Ida refused to come in for examination and possible treatment. The finding is not in error and the reason for his declining Ida as a patient are evident in the reproduced letter contained in the finding as adopted in this decision.

31. The ALJ's conclusion in initial Finding of Fact 3.62 that it was reasonable for the Appellant to resist seeking independent care providers to cover evening and night shifts is not adopted. Allowing Ida to lie in the same position for several hours a day and to allow Ida's open pressure ulcers to be exposed to human urine and feces on a daily basis through the evening and night hours until she received personal bathing in the mornings will not be considered a lesser "problem" for Ida than hiring of independent care providers to prevent this occurrence, supervised or otherwise.

32. Initial Finding of Fact 3.89 has not been adopted into this decision as it references an incident occurring a full year prior to the late August 2006 incident involving Ida's possible broken bone in her leg. Adopted Finding of Fact 57 has been supplemented to address the August 15, 2005 nurse's visit.

33. The Department has challenged many of the other initial findings and those challenges have been considered. Where such challenges warrant changes or supplements, this has been done with cites to supporting evidence, but without further comment here. Where challenged findings have not been changed, the undersigned has determined that such changes are either not supported by substantial evidence in view of the entire record or do not otherwise warrant amending or deleting in light of the ultimate decision made in this case.

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Credibility Determinations

34. Findings of credibility are ultimately findings of fact, and are reviewable by the Board of Appeals pursuant to WAC 388-02-0600(3)(b). In reviewing such findings of fact regarding a witness' credibility, the Review Judge must give due regard to the presiding officer's (ALJ's) opportunity to observe the witnesses as required by RCW 34.05.464(4) and can only reverse those findings of credibility not supported by substantial evidence based on the entire record. The Washington State Court of Appeals Division I concluded:

Under WAC 388-02-0600(2),⁵⁰⁰ the review judge was justified in substituting his factual findings for those of the ALJ only if the ALJ's factual findings were not supported by substantial evidence or if the ALJ failed to make an essential factual finding. Substantial evidence is that which is "sufficient to persuade a reasonable person that the declared premise is true." The reviewing agency or court must accept the fact finder's "views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences."

Constanich v. Department of Social and Health Services, 138 Wn. App. 547, 556, 156 P.3d 232 (2007) citing *Freeburg v. City of Seattle*, 71 Wn. App. 367, 371, 859 P.2d 610 (1993), wherein the same court concluded:

This factual review is deferential, and requires us to view the evidence and the reasonable inferences therefrom in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority, a process that necessarily entails acceptance of the factfinder's views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences.

The same court that entered the *Constanich* decision subsequently ruled:

[A]dministrative rules cannot amend or change legislative enactments. *Univ. of Wash. v. Manson*, 98 Wn.2d 552, 562, 656 P.2d 1050 (1983). Although the language in RCW 34.05.464(4) allows the review officer to limit issues, it does not authorize an agency to limit the authority of the review officer to make his or her own findings through rule making.

The Court of Appeals held that WAC 388-02-0600(3), at least sub-paragraph (e) dealing with adding findings, directly conflicts with RCW 34.05.464(4) and is invalid. *Kabbae v. Department of Social and Health Services*, 144 Wn. App. 432, 443, 192 P.3d 903 (2008). The

⁵⁰⁰ Review Judge note: The cited regulation has been renumbered since entry of the *Constanich* decision.

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court only addressed subparagraph (e) because that provision was before the court.⁵⁰¹

35. The Review Judge's role in reviewing an initial decision entered by an ALJ is not akin to an appellant court reviewing a lower court's decision. Under the Administrative Procedures Act found at RCW 34.05.464 (4), the Board of Appeals Review Judge has fact-finding authority and operates in the highest forum exercising fact-finding authority in the administrative hearing process. The Review Judge's fact finding authority is limited by a requirement to give due regard to the presiding officer's opportunity to observe the witnesses and the regulatory review limitation of not changing a finding of fact (including a finding of fact relating to credibility) unless an initial order's finding of fact is not supported by substantial evidence based on the entire record. The term "only" used in the first sentence of WAC 388-02-0600(3) was rendered invalid and inoperable under the analysis and reasoning set forth by the Court of Appeals in the *Kabbae* case.

36. The ALJ found the Appellant to be credible in her testimony, and accordingly, the ALJ accepted her version of events as set forth in the initial Findings of Fact. In telling the story of the case through the findings, the ALJ cites to the Appellant's testimony no less than 95 times. The Department argues that the Appellant is not credible, based in part on the Appellant's repeated requests during cross examination that questions be repeated or clarified, certain alleged inconsistencies in her testimony, and her motivation to prevail in this matter. As addressed in *Conclusion of Law 12*, above, a party's motivation to prevail is not, in and of itself, enough to impugn the party's credibility. Although the Appellant was extremely cautious in her testimony, both on direct and on cross examination, that alone, is also not enough to reject a finding of credibility. The Appellant was generally consistent in her testimony, although she was

⁵⁰¹ The reasoning for invalidating that provision is applicable to the other regulatory review limitations found in WAC 388-02-0600(3). The Secretary of the Department, recognizing that the regulatory review standards set forth in WAC 388-02-0600(3) are in conflict with the legislative intent of giving the agency review judge the same authority as the presiding officer pursuant to RCW 34.05.464(4), has directed that the regulatory review standards be rescinded which is now in the process of being done. Until that is done, the regulatory review standards, but as limited by *Kabbae*, are still in effect.

unable to recall some details and time frames.

37. A witness can be credible while at the same time not be the best source for accurately conveying what has occurred in every circumstance relevant to resolution of a case. A witness's knowledge, frame of mind, and perspective all affect how accurate their testimony is without impugning their sincere belief in the truthfulness of their assertions. Anyone who has questioned several non-bias objective witnesses to an accident and received multiple conflicting reports of what actually occurred can attest to this. A witness can be found to be credible and their testimony accepted on one issue, but still not be the most accurate or competent source of knowledge regarding another issue, resulting in a rejection of their version of a singular event without attacking their credibility or rejecting their version of another aspect of the case. Credibility goes to a witness's honesty and lack of propensity to fabricate. Where the Appellant was not consistent within her own sworn statements; where she was lacking in personal knowledge of an event compared to other witnesses or; where her recollection of an event from memory, alone, did not comport with the sworn testimony of an involved caregiver, corroborated by contemporaneously kept records in the normal course of business, the undersigned is compelled to accept the later in modifying or supplementing findings. This type of evidence constitutes substantial evidence based on review of the entire record. Pursuant to the regulatory review standards found at WAC 388-02-0600(3) and the deference required under RCW 34.05.464(4), the undersigned accepts the ALJ's credibility findings regarding the Appellant. Such an acceptance requires adoption of the findings based on the Appellant's testimony subject to the considerations set forth above.

38. The ALJ's finding that numerous persons involved in Ida's care who gave sworn testimony at hearing were not credible because they were looking for someone to blame for Ida's horrendous situation is not supported by the hearing record and is not adopted as a 0 0 0 1 5 7 finding in this decision. Nothing in the hearing record would suggest that any of the witnesses

deliberately fabricated their testimony to prevail at hearing and, thus, "get back at" the Appellant. The record does reflect that many of the witnesses had substantial and legitimate concerns about Ida's ongoing treatment or lack thereof, but this understandable perception should not and will not be used to impugn their credibility. Much of what was testified to by those witnesses impugned by the ALJ, involved what each witness had personally observed and that which had occurred outside of the personal knowledge of the Appellant. Where the "stories" told by the Appellant and the Department's witness differ, it is often only in a slight degree which can be attributed to differing perspectives and does not affect the ultimate outcome of this case. In the final analysis, this case does not turn on the credibility of the witnesses, but rather on the legal application of the definition of "neglect" to the facts as presented by both the Appellant and the other witnesses and as accepted and supplemented in the adopted findings.

Neglect

39. It can be acknowledged that when the Department finds it necessary to seek from the Superior Court an order denying a vulnerable adult the ability to make medical decisions for themselves and vesting that serious authority in a professional guardian, the case will often present difficult problems involving the vulnerable adult's care needs and medical decisions. That being understood, ***one could not script a more trying case*** for caregivers, family members, public and private care agencies, courts, and guardians than the one at hand. We have a completely bedridden vulnerable adult incontinent of urine and bowel with practically no physical ability to do the most minimal tasks for herself such as shifting position to avoid skin breakdown. And yet she has the residual cognitive ability to protest institutional residential placement even when such placement is the only way she can receive adequate and necessary around-the-clock care. Added to this, we have a head-strong vulnerable adult who, herself working in the health field for many years as a nurse, has developed a strong and abiding suspicion of traditional

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medicine, and an interest in more naturopathic/holistic medical care. Added to this, the vulnerable adult is combative, abusive, and often physically attacks her caregivers. As if this was not enough, we have a grieving spouse who is unable to provide effective care and simply wants his life partner back, for better or for worse, while not fully recognizing what suffering she must be experiencing to maintain what little they once had. Add a daughter and caregivers who have strong opinions about what is best for the vulnerable adult and are acting on those opinions often in contradiction to an established care plan. Included among these “maverick” caregivers is a relatively long-term caregiver and the only one the vulnerable adult has developed a somewhat effective care relationship with, making it difficult to simply replace her. Into this mix, add a certified professional guardian with a background in mental health who sincerely believes, based on her reading of relevant law and training as a guardian, that the vulnerable adult’s long term wishes not to be institutionalized should be honored. And finally, make this combative and abusive vulnerable adult with extensive medical care needs the guardian’s first court-appointed ward.⁵⁰² Combine all these factors together and we simply have a case fraught with problems.

40. Both parties have spent considerable time and effort challenging or defending the credibility determinations made by the ALJ. However, as concluded above, this case does not turn on disputed facts gleaned from the record but on application of RCW 74.34.020(11) to the facts that are not in dispute or, to the extent they were in dispute, are clearly supported by substantial evidence in the hearing record.

41. The seriousness of Ida’s care needs and the inability of Ida and those closest to her to make sound medical decisions forced the Department to seek court action to *deprive* Ida of the rights to consent to or refuse medical treatment and to also *deprive* Ida of the right to decide who shall provide care and assistance. To take such serious action, the court found that Ida was “at significant risk of personal harm based on a demonstrated inability to independently provide for

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⁵⁰² See Tr., p. 533, line 25 through p. 534, line 2.

her nutrition, health, housing, and physical safety." Further, the court based its decision to deny Ida certain rights and to vest those rights in a guardian of person because Ida was "incompetent for purposes of giving informed consent for health care." It is clear from a review of Ida's care history as taken from the hearing record that the status quo as it existed in early 2004 was not acceptable and that court action was necessary to protect this vulnerable adult from her own poor decision-making. Indeed, the Department had made a substantiated finding of self-neglect based on Ida's complete inability to recognize and meet her most basic medical treatment needs. It was the Department's and the court's intention to remedy this situation by appointment of the Appellant as guardian of person for the specific purpose of making informed medical treatment and care provider decisions.

42. Experiencing the frustrations this case presented, the Appellant appropriately petitioned the Superior Court for direction and assistance. Superior Court Judge Strophy initially opined that the Appellant had the authority to place Ida in a care facility if that was necessary and then agreed that may need to be looked at more closely when the Appellant raised possible legal impediments to placing even an incompetent adult in a residential treatment facility against her will. The Appellant did have a duty under RCW 7.70.065(1)(c) and the *Substituted Judgment Standard* set forth in the professional guardians' Standards of Practice Standards to reasonably determine what Ida, if competent, would have consented to regarding proposed health care which includes placement in a residential treatment facility.

43. The Appellant's determination that Ida did not want to leave her home for medical care was made in good faith and supportable under the available evidence. However, when such a determination is made, the guardian decision-maker must bear in mind the circumstances under which the vulnerable adult initially expressed his/her opposition to out-of-home health care. Any decision regarding residential facility placement has to be tempered with a certain amount of 000160 objective common sense. Take for perhaps an extreme example: What if Ida had been a victim

of an auto accident or house fire and suffered horrendous burns over the majority of her body? The Appellant, as Ida's medical care guardian, could not decide that Ida was not to go into the hospital and subsequently receive necessary long-term rehabilitation through residential care placement because Ida had expressed opposition to such placement prior to the accident. To do so under those circumstances would be tantamount to abetting a slow and painful suicide. Deciding that an incompetent adult would not have opted for residential care when competent does not "etch in stone" that decision for all future circumstances. The Appellant had a duty to consider very carefully if Ida would have opposed any type of out-of-home care when to do so would cause her to suffer from stage IV decubitus ulcers, skin burns caused by urine saturation, and the pain associated with such afflictions due to the lack of regularly administered pain medication. As an example of the untenable option of leaving Ida in home care, the Appellant, herself, conceded that Ida could only be transported to regular, but necessary, medical examinations by ambulance and such transport was cost prohibitive for a person in Ida's financial situation.⁵⁰³ When critical care needs such as transportation to regular medical exams become unobtainable in a home-care situation without waiting for an actual emergency to avoid ambulance costs, residential care facility placement becomes much less an option and much closer to the only alternative.

44. The Appellant raises RCW 11.92.190 which provides:

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.

This 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

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⁵⁰³ See Tr., p. 558, line 6 through p. 559, line 8.

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 care needs could not be met in her home and then deal with whatever opposition she may have expressed at that time. This is what eventually occurred in January 2007, but only after the situation had gone beyond the crisis stage it had been at for some time.

45. It is difficult to determine, in any definitive way, the consequences of taking an incapacitated person out of their home and placing them in a residential treatment facility when that person has held a long-term desire to remain in their home. One could reasonably argue that the final change in residency had as much, or more, to do with Ida's eventual demise a short time after placement as her physiological medical conditions. Perhaps because of the Appellant's mental health background and relatively limited medical experience, the Appellant focused on Ida's psychological health in honoring Ida's wish to remain in her home. Based on the above cited statutes enacted to protect the residential choices of incompetent patients, the clear emphasis on protecting the ward's residential choices in the Certified Professional Guardian Standards of Practice, and evidence of Ida's long-term desire to avoid institutionalized care, the Appellant's decision not to place Ida in a residential treatment facility, at least early on in the guardianship, cannot be, by and of itself, neglect of a vulnerable adult as defined in RCW 74.34.020(11).

46. Deciding that Ida's wish not to be placed in a facility that could meet her medical needs had to be honored, the Appellant had a duty to ensure that at least Ida's basic medical care needs were being met in her home. Bi-hourly repositioning, timely bathing due to incontinence, and effective administration of prescribed medications were neither optimal nor aspirational health care goals. These were tasks required to be performed under the Ida's care plans to prevent

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exactly what was occurring, skin breakdown with some healing eventually leading to severe open wounds that were in danger of becoming septic. Once the Appellant became aware that minimum care and medication tasks under Ida's care plans were not being met, she had a duty to immediately take action to remedy the situation.

47. The Standards of Practice for Certified Professional Guardians within the State of Washington neither define nor control what constitutes neglect under RCW 74.34. As stated in *Conclusion of Law 16* above, minimal compliance with the standards may not always be an adequate defense to an allegation of neglect just as there can be a case where failure to comply with a standard does not constitute neglect of a vulnerable adult. However, the Appellant's duty of care to Ida arose out of her appointment as a limited guardian for the purpose of medical decisions and the Standards of Practice are relevant in determining what her duties and responsibilities were towards Ida's medical care and the expectations arising from her appointment as limited guardian by the court.

48. Under the Guardian Standards of Practice, the Appellant had a duty, to the extent possible, to select residential placement for Ida that enhanced her quality of life, providing for the opportunity to maximize Ida's independence, and providing for Ida's physical comfort and safety.⁵⁰⁴ Because the Appellant made the decision that she could not take Ida out of her home to meet these criteria and it was apparent Ida's care needs were not being met in the home, the Appellant had a further duty to thoroughly research and evaluate Ida's residential alternatives.⁵⁰⁵ When it became apparent that Ida's placement in her home was not the most appropriate placement to meet Ida's needs for a primary care physician, a predictable supply and administration of pain medication, repositioning, and personal bathing needs, the Appellant had a duty to regularly monitor Ida's residential placement and regularly review alternatives to placement. The Appellant had a duty to make herself aware of such alternatives as placement in

⁵⁰⁴ Exhibit 38, p. 4, ¶ 404.5.

⁵⁰⁵ Exhibit 38, p. 4, ¶ 404.7.

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general inpatient care after hospitalization or other rehabilitation care environments that would provide Ida the immediate care she needed at least until she could return to a home environment that did meet her basic care needs.⁵⁰⁶ What monitoring and review that did occur did not result in any effective changes and Ida continued to be subject to care and medical treatment falling short of the terms of all three relevant care plans signed off on by the Appellant.

49. The Appellant had a duty to become knowledgeable regarding Ida's medical care needs so as to allow her to make informed medical decisions on Ida's behalf.⁵⁰⁷ Meeting this duty became especially critical as soon as the Appellant became aware of the absence of a primary care physician, aware of certain caregivers' resistance to dosing prescribed pain medication, aware of caregiver resistance to bi-hourly repositioning, and aware of staffing shortages preventing proper re-positioning and the timely performance of personal bathing after episodes of incontinence. The Appellant admitted that she did not understand why Ida needed to be repositioned every two hours when the Appellant signed off on Ida's first care plan as her guardian of person. Nor did she recall initially inquiring as to the reasons for bi-hourly repositioning.⁵⁰⁸ The Appellant was not aware to what extent the requirement that Ida be repositioned bi-hourly was being met. The Appellant admitted she did not know enough about bed sores to understand what was being conveyed to her by Ms. Monterastelli, who had personally observed Ida's open wounds and informed the Appellant on November 22, 2006, the seriousness of the situation.⁵⁰⁹ The Appellant admits in her direct testimony that Ms. Monterastelli was not an alarmist. The Appellant should have made a meaningful in-person visit to inspect Ida's wounds personally, with or without an invitation to do so, upon hearing Ms. Monterastelli's report. As Ida's medical care decision-maker, the Appellant's "presence was necessary" for her to

⁵⁰⁶ See Tr., p. 670, lines 11-24, and p. 707, lines 10-21, respectively.

⁵⁰⁷ Exhibit 38, p. 4, **405 Medical Decisions**.

⁵⁰⁸ See Tr., p. 725, line 10 through p. 726, line 4.

⁵⁰⁹ See Tr., p. 668, lines 6-23.

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be knowledgeable of Ida's medical care needs, especially during the last few months of 2006.⁵¹⁰

50. What is perplexing about this case is the clear evidence the Appellant was aware, and appropriately concerned about, the care problems existing in Ida's case and the need for corrective action fairly early in the guardianship. Indeed, on November 15, 2005, in responding to a suggestion by Ida's daughter that the caregivers be replaced, the Appellant specifically reported, "I told her that my bottom line stance is that Ida must receive pain meds if she needs them and that if this means replacing the caregivers or institutionalizing Ida because we can't get people in her household to administer the pain meds, we will have to do this."⁵¹¹ In her petition to the court on May 25, 2006, the Appellant spoke of "an impending crisis of care." She goes on to acknowledge the lack of necessary care being given by the primary caregivers to protect Ida's skin integrity and to effectively control her pain through prescribed medications. The Appellant was made aware of the danger of Ida laying in urine and feces with developing bed sores. The Appellant informed the court of the importance of providing Ida with palliative care and the prevention of a difficult death caused by septic conditions. In her petition, the Appellant talked about the need for some form of assisted living arrangement (an apartment where Ida's husband is not the primary caretaker).⁵¹² Notwithstanding the Appellant's clear understanding of the "impending crisis," the status quo continued resulting in Ida suffering open wounds exposed to urine and feces prior to her hospitalization on December 30, 2006.

51. Judge Strophy commented in the Superior Court hearing held on June 2, 2006, "And she has pain issues that, if not medicated, agitate her and make her difficult to care for and assaultive, apparently, and combative, and so the other alternative is for everybody to *throw up their hands and let her deteriorate* until she, you know, gets to a point where she either lapses into a state where she can't care for herself at all or be cared for unless it's by trained individuals."⁵¹³ It

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⁵¹⁰ Tr., p. 669, line 20 through p. 670, line 4.

⁵¹¹ Exhibit 32, p. 18, ¶ 2.

⁵¹² See generally Exhibit 28.

⁵¹³ Exhibit 29, p. 6, line 17 through p. 7, line 1 (emphasis added).

appears, perhaps out of frustration and exasperation, that the Appellant did "throw up her hands and let her deteriorate" in pursuing effective care to meet Ida's bi-hourly repositioning and medication needs set forth in her care plans.

52. The Appellant had a duty to have meaningful in-person contacts with Ida as needed to observe her circumstances.⁵¹⁴ This was especially critical given the Appellant's decision not to place Ida in a residential care facility where she would have been assured of full-time care. It was also critical based on the Appellant's admitted lack of knowledge regarding the day-to-day actual physical care of Ida's body. The Appellant admitted knowing nothing about such tasks as repositioning, bathing, and addressing skin and toe nail issues.⁵¹⁵ The Appellant's lack of regular person-to-person meaningful meetings with Ida over approximately two and half years, but especially during the last few months prior to Ida's final hospitalization, hampered her ability to keep fully apprised of Ida's ongoing and deteriorating condition. Although the Appellant early on acknowledged the need for changes in staffing personnel and staffing hours, the Appellant's lack of regular contact hampered her ability to recognize the increasing emergent need to remedy the shortfalls in the day-to-day care being provided for Ida.

53. If the Appellant had made meaningful in-person visits to Ida in the later part of 2006, the Appellant could have re-evaluated her decision not to place Ida in some form of full-time residential facility for, at least, temporary rehabilitive care. Seeing Ida's horrendous open wounds would have allowed her to recognize that even a person who had resisted out-of-home care in the past would not continue such resistance under the circumstances that were never contemplated during the earlier periods of decision-making. Recognizing these changed circumstances, the Appellant could have exercised her authority under the guardianship order along with the principles of substitute judgment to get Ida the out-of-home full-time care she desperately needed, as occurred in January 2007. At the very least, meaningful in-person visits would have stressed

⁵¹⁴ Exhibit 38, p. 2, ¶ 401.15.

⁵¹⁵ See Tr., p. 584, lines 6-11.

upon the Appellant the need to immediately retain adequate staffing in the home, notwithstanding the Appellant's reluctance to be responsible for their supervision. Because the Appellant insulated herself from Ida's quickly deteriorating condition by failing to personally observe the situation in late 2006, the necessary care decisions were not made.⁵¹⁶

54. Having made the decision that Ida was to remain in her home, the Appellant cannot excuse herself from the duty of procuring independent caregivers to provide necessary bi-hourly repositioning and timely personal bath care by claiming she was not experienced in supervising such staff. The Appellant had a duty to know and make known any limits in her abilities to meet Ida's medical care needs. The Appellant had a duty to ensure that where her knowledge or expertise was lacking other qualified persons were retained to meet Ida's medical needs including supervision of care personnel if necessary.⁵¹⁷

55. *Attempts* at remedying Ida's untenable situation were not enough—effective *results* or turning the responsibility over to others who could obtain the necessary results was required. To simply proclaim that “we will have to do the best with what we have” was not acceptable when such a tactic results in substandard care leading to the suffering Ida experienced within months of the end of her life. Immediately upon recognizing her inability to procure a primary care physician and to arrange for adequate pain management, re-positioning, and personal bathing needs, for whatever reason, the Appellant had a duty to inform the court of her incapacity to obtain staffing to meet these basic medical care needs and seek termination of the

⁵¹⁶ Due to the Appellant's lack of personal observance of Ida's deteriorating condition from November 2006 forward, it was understandable that the Appellant was “surprised,” “just didn't see it coming,” “felt somewhat blindsided,” and “couldn't quite even conceptualize what was going on” when the Department insisted on Ida's hospitalization or placement in residential care within hours on December 29, 2006. See Tr., p. 687, lines 15-18 and p. 690, lines 20-22. The Appellant concedes that she was being told to take action, “that [she] didn't even understand the basis for.” Tr., p. 692, lines 1-2. Her lack of understanding was based, to some extent, on her failure to personally observe Ida's open stage IV decubitus wounds in danger of becoming septic due to exposure to human excrement for hours at a time.

⁵¹⁷ Exhibit 38, p. 1, ¶ 401.6.

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guardianship.⁵¹⁸ The Appellant 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. At the very least in taking such action, the Appellant would have impressed upon the court and the Department the immediate seriousness of Ida's situation, rather than allowing the unacceptable status quo to continue to Ida's detriment. 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.

56. As complex and trying as this case may have been for all concerned, legal resolution based on application of the relevant law to the facts is fairly straight forward. The Appellant's lack of attention and remedial action as Ida's court appointed guardian for medical decisions contributed to Ida's inadequate pain management, inadequate re-positioning, and inadequate personal bath care for at least several months if not longer. These three basic medical care needs were critical to Ida's well-being and, as Ida's court appointed guardian for medical decisions, the Appellant was ultimately responsible to ensure these basic needs were met. The Appellant's failure to ensure these critical care needs were met did constitute a pattern of conduct or inaction that failed to provide the services to maintain Ida's physical health and failed to avoid and prevent physical harm to her. The Appellant cannot expect the Department to partner with her in the future in the care of vulnerable adults based on her conduct as limited

⁵¹⁸ Exhibit 38, p. 7, ¶ 407.2. It is clear from the hearing record that there was a disconnect between the immediate and emergent care needs of Ida and the Appellant's methodology in going about her duties as Ida's guardian for the purpose of making medical decisions. The Appellant would *schedule* care conferences, *consider possible* changes in care providers, and have *discussion about the care* with concerned parties. Such actions neither prevented nor relieved Ida's ongoing suffering from lack of necessary immediate personal care leading to her open wounds exposed to human excrement. Even when Ida was in dire medical straits in need of immediate out-of-home medical care on December 29, 2006, the Appellant was still telling the Department, "Let's have another conversation about what it is you think needs to happen and see what we can figure out" and having another meeting to "problem solve what should happen in this case." See Tr., p. 691, lines 12-14 and p. 693, lines 9-12, respectively.

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guardian in this case. The Appellant's lack of attention and appropriate action as limited guardian for Ida constituted neglect of a vulnerable adult as defined in RCW 74.34.020(11). The ALJ's conclusion to the contrary was an error of law in applying RCW 74.34.020(11) to the facts supported by substantial evidence in this case and the Initial Order is reversed accordingly pursuant to WAC 388-02-0600(3)(c).

57. The Department alleges two other specific incidents of neglect involving the Appellant's failure to act in procuring medical treatment for Ida's alleged leg injury and failure to contact Ida or caregivers during a winter storm power outage. The finding of neglect based on the general lack of attention and action in this case runs through the time periods of both instances. The Appellant's general failure to act to meet the provisions of Ida's care plan arguably exacerbated Ida's condition during the two specific episodes. However, in determining if the two specific incidences constituted neglect, the undersigned must review them independently of the finding of overall neglect due to lack of attention and action to procure adequate day-to-day care for Ida.

58. The winter snow storm that occurred in December 2006 was an act of nature and outside the control of any person. The Appellant was eventually contacted and informed that Ida's situation had been stabilized. If Ida's daily care needs were being met and the Appellant simply was unable to contact Ida or others responsible for her care for a few days, this would not be neglect. Ironically, it was during the snow storm and power outage that the Appellant actually had a defense to the general overall allegation of neglect in that she was incapacitated through no fault of her own to act on Ida's case.

59. The Appellant's decision not to seek immediate emergency medical examination of Ida due to her possible leg injury in August 2006 is a more difficult call. The evidence supports the finding that the consulting nurse was concerned about Ida's leg and advised she be seen at the hospital. Subsequent evidence of an untreated leg bone fracture that differed from Ida's initial

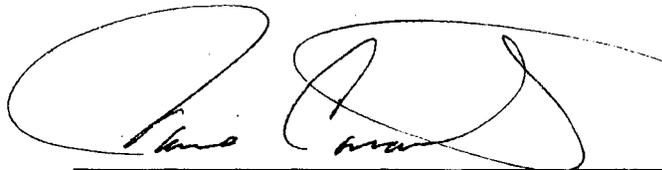
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leg injury that caused her to be bedridden gives credence, in hindsight, to this medical advice. However, considering Ida's frailty and general condition, her resistance to changes in routine and combativeness that could lead to injury during transport even though she had been transported without incident in the past, Ida's relative calmness when the Appellant made a home visit after learning of the incident, and her pending scheduled medical examination in October, the Appellant's decision not to risk an additional emergency room trip cannot be considered totally out of reason. The undersigned rejects both sides inferences regarding the motivations of the consulting nurse in recommending transport to the ER (to limit her professional liability) and Appellant's choice in not transporting Ida (to avoid the chagrin of the ER doctors based on Ida's last visit to obtain medications). For these reasons, the undersigned will not change the ALJ's conclusion that this singular medical care decision did not constitute neglect under RCW 74.34.020(11).

IV. DECISION AND ORDER

For the reasons set forth above, the Initial Order is reversed. The Department's substantiated finding of neglect based on the Appellant's lack of attention and action to ensure the vulnerable adult's daily medical care needs were met is affirmed.

Mailed this 10th day of April, 2009.



JAMES CONANT
Review Judge

Attached: Reconsideration/Judicial Review Information

Copies have been sent to: Resa Raven, Appellant
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