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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

RESA RAVEN,

Petitioner,

v.

WASHINGTON STATE DEPARTMENT OF SOCIAL
AND HEALTH SERVICES,

Respondent.

PETITIONER RAVEN'S ANSWER TO AMICI BRIEFS
IN SUPPORT OF PETITION FOR REVIEW

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ORIGINAL

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I. Introduction

The Petitioner Resa Raven appreciates the strong support of the numerous amici for reversal of the Court of Appeals *Raven* decision. Ms. Raven agrees with the warning of the Amici Curiae Washington Academy of Elder Law Attorneys (WAELA) and the Washington Association of Professional Guardians (WAPG) that the decision below contravenes well-established case and statutory law and fails to provide standards for decision making by guardians, or for the elder law attorneys who advise them. Ms. Raven agrees with the Amici Curiae Disability Rights Washington (DRW), Long-Term Care Ombudsman Program (LTCOP), and Arc of Washington State (ARC) that the *Raven* decision, contrary to law and patients' rights, confers *de facto* involuntary commitment authority on guardians. Finally, Ms. Raven agrees with WAPG's warning that the *Raven* decision will lessen the availability of guardians for low income wards, worsening a serious problem. Ms. Raven urges the Court to accept review and reverse the Court of Appeals decision below.

II. Legal Argument

A. The *Raven* decision contravenes prior law and fails to give guidance to elder law attorneys and guardians.

Amicus curiae WAELA points out that ordinarily the elder law attorney community would advise their guardian clients that, pursuant to

RCW 11.88.005, the primary duty of the guardian is to exercise his or her authority “only to the minimum extent necessary to adequately provide for [the ward’s] own health or safety.” *WAELA Memorandum at 6*. By eliminating the proximate cause requirement for neglect, the Court of Appeals establishes *per se* liability for harm, which will render it impossible for guardians to rationally determine the steps they should take with their wards, given the new, constant threat of a neglect finding, or for the elder law attorney to appropriately advise them. *Id* at 1, 6-7.

Current guardianship law has an array of interlinked statutes that address difficult cases such as the present one, and limit a guardian’s authority, but which were given short-shrift in the *Raven* decision below. Similar to RCW 11.88.005, RCW 11.92.043(4) states that a guardian shall “care for and maintain the incapacitated person in the setting least restrictive to the incapacitated person’s freedom and appropriate to the incapacitated person’s personal care needs.” The Court of Appeals appears to have focused solely on the phrase “appropriate to the incapacitated person’s personal care needs” in determining that Ms. Raven should have somehow convinced or forced Ida into a nursing home against her long-standing wishes.

A guardian’s authority is limited by several statutes. RCW 11.92.043(5) prohibits a guardian from consenting to inpatient psychiatric

care for a ward, absent agreement by the ward. RCW 11.92.043(5) prohibits a guardian from consenting to electroconvulsive therapy and certain other psychiatric treatments absent a court order. And RCW 11.92.190 expressly prohibits detaining a ward in a residential treatment facility that provides nursing care, e.g., a nursing home, even with a court order, unless the RCW 71.05 Involuntary Treatment Act has been followed. This specific statutory prohibition in RCW 11.92.190 prevails over a guardian's general duty to provide "appropriate care."

In addition, RCW 11.92.043(5) says a guardian shall "Consistent with RCW 7.70.065, provide timely, informed consent for health care of the incapacitated person." This Court in *In re Guardianship of Ingram*, 102 Wn.2d 827, 689 P.2d 1363 (1984) gave guardians the best guidance for how to comply with RCW 7.70.065, whereby guardians "must first determine in good faith that that patient, if competent, would consent to the proposed health care," and may only choose care in the person's "best interests" if the patient's wishes cannot be determined. RCW 7.70.065(1)(c). The Court of Appeals in *Raven* ignored this array of other statutory laws, conferred *de facto* involuntary commitment authority on a guardian contrary to RCW 11.92.043(5) and 11.92.190, and threw the guardianship and elder law community into confusion by contradicting prior holdings of this Court and giving them no clear guidance.

B. Low income wards will particularly suffer following the *Raven* decision.

Amici curiae WAPG, DRW, LTCOP and ARC correctly note that Ida had the right to choose to remain at home, that holding guardians strictly liable for bad outcomes at home will exert tremendous pressure to opt for the safer harbor of a nursing home placement rather than risk possible professional ruin from a charge of neglect, and that low income wards in particular will suffer, as their guardians have fewer resources to turn to, and particularly if their guardians heed the advice of the *Raven* court below and resign in the difficult cases.¹

Amicus WAPG points out that where wards have sufficient funds, guardians can hire lawyers and petition the courts for guidance with these complex issues. *WAPG Memorandum at 10*. Guardians for low income wards, who typically are Medicaid clients with the Department of Social & Health Services (DSHS), as was Ida, have very limited access to attorneys. Attorneys fees are considered “administrative costs” for such wards. WAC 388-79-020. The state rules permit no more than \$700 for

¹ The amici point to a number of studies in support of their points, including studies on the shortage of guardians for low income people, the strong wish for most people to not die in a nursing home, and the need for a legislative fix for a gap in the commitment laws. At the Court of Appeals, DSHS objected to the submission of such studies and materials by amici, citing *Bldg. Indus. Ass'n of Wash. v. McCarthy*, 152 Wn.App. 720, 748 n. 12, 218 P.3d 196 (2009). However, the *Bldg. Indus. Ass'n of Wash.* case involved the application of RAP 9.12, which is a special rule for the review of summary judgment orders. This case is not reviewing a summary judgment order. Amici are permitted to file documents with the court not entered below. See *State v. Boyd*, 160 Wn.2d 424, 441 n. 1, 158 P.3d 54 (2007) (Court denied the State’s motion to strike amici exhibits).

administrative costs to establish a guardianship, and no more than \$600 over the subsequent three year period. WAC 388-79-030; RCW 11.92.180. Obviously, this would purchase very little attorney time, insufficient for a complex case such as Ida's. The only sane decision in this post-*Raven* world for a guardian of a complicated, low income ward who wants to remain at home, would be to resign or not take the case.

It should be noted that even for wards with means, the court still would not have authority to approve the guardian detaining a ward in a nursing home against her known express wishes. RCW 11.92.190. While such a guardian might be shielded from a DSHS charge of neglect, it would not have altered the laws applicable to Ida's rights. Similarly, even if Ms. Raven had resigned, no other guardian (if one had been found) would have had more authority to force Ida into a nursing home.²

Ms. Raven did not resign, but instead stuck doggedly with Ida and pushed for her care. It was only through great effort by Ms. Raven that Ida was able to get hospice care and a doctor, then ARNP oversight when

² Likewise, it is sheer speculation to say a different guardian would have been likely to succeed in getting more resources into the home than Ms. Raven and the three home health care agencies and local area agency on aging were able to. Findings of fact must be based on the evidence in the record, not speculation. RCW 34.05.461(4); *State v. Hutton*, 7 Wn.App. 726, 728, 502 P.2d 1037 (1972). Having a different guardian would not have changed the extreme difficulty in finding caregivers willing to work a one hour evening shift, or Ida's repeated resistance to care, or the impossibility of putting nurse delegation in place for five months when there was no doctor or ARNP, or hospice giving Ida the wrong pressure sore mattress in November 2006, or the severe winter storm in December 2006 that deflated Ida's new mattress.

the doctor quit, and finally nurse delegation and new hospice and doctor care, while also respecting Ida's long-standing wishes to live and die at home. Guardians of low-income wards in a post-*Raven* world won't go to these efforts to respect their wards' wishes, but instead will likely put them in a nursing home, or resign, or simply not take the case.

C. The Court of Appeals failed to address the responsibilities of others and the limits on resources.

Amicus WAPG correctly notes that the Court of Appeals ignored the mandatory duty of agencies to provide services and oversight to Ida, and instead placed all responsibility on the guardian, which will discourage guardians from accepting difficult cases and weaken the system of protection by failing to hold these agencies responsible. *WAPG Memorandum at 5-8*. Amicus DRW notes that DSHS has assured the federal government that it provides adequate community service providers, whereas in fact insufficient resources were provided. *DRW Memorandum at 12-16*. Many agencies involved in Ida's care had responsibility for providing services and monitoring her care, yet only the guardian was held responsible for problems.

For example, RCW 74.39A.090(2) directs DSHS to contract with area agencies on aging (AAAs) "(a) to provide case management services to consumers receiving home and community services in their own home."

The AAA is required to “assess the quality of the in-home care services provided to consumers who are receiving services [through a] home care agency.” RCW 74.39A.090(5). Case management responsibilities of the AAA under RCW 74.39A.095(1)(c) include: “Monitoring the consumer’s plan of care to verify that it adequately meets the needs of the consumer.”

Ida’s hospice nurses provided skin wound care and had obligations under RCW 70.127.120; Ida’s home care aides fed, repositioned and cleaned Ida, and had responsibilities under RCW 70.127.120 and WAC 388-71-0515 to provide the services outlined in the plan of care, and to accommodate Ida’s preferences; and DSHS had oversight responsibilities under RCW 74.39A.090(4) to monitor the AAA.

Ms. Raven does not believe that these other agencies and providers neglected Ida, rather, that the various professionals were doing the best they could under trying circumstances and the constraints under the law on forcing treatment or institutional care on a person against her wishes.

In addition, despite DSHS assurances that adequate community resources would be available, there were limits on those resources for Ida. Ida did not receive all the hours of home care approved by DSHS, but it appears that the main obstacle was that not enough additional hours had been approved to interest new caregivers—none were interested in filling a one half to one hour evening shift. Administrative Record (AR) 843.

The AAA case manager noted: "Another issue that may prove impossible is staffing. We may not be able to find someone who is willing to come to client's home 3 times per day for ½ hour even if we are granted permission to authorize 2 caregivers." AR 846. Ida's home care agency reported its worker wouldn't agree to a half hour evening shift. AR 851. The other two home care agencies in Thurston County also reported no worker would fill the shift. AR 851-52; Report of Proceedings (RP) 300.

The DSHS Review Decision found that "at no time did the Department fund the 24 hours per day of personal care that Ida needed." AR 132. Providence Hospice RN Zaire was asked: "Q: What kind of care should she have been receiving? A: She needed to have 24-hour care in the home so that she could be turned regularly. Q: Is that possible in the home? A: It would be possible given the right resources." RP 171. This is consistent with the observation by Pierce County Superior Court Judge van Doorninck at the 3/26/2010 hearing: "I just don't think there are resources available. If wealthy people can hire private nurses, poor people don't have access to that." Verbatim Proceedings 10. The difficulty lay in the short, scattered shifts. This was noted at the 6/16/2006 case managers' meeting: "Short Shifts verses one: Workers may be more willing to work one longer shift. (gas cost and timing of schedule)" AR 1222. There was

talk of possibly combining Ida and her husband Richard's hours, or of getting an exceptional rate beyond 280 hours for Ida but it was not done.

The short scattered shifts, and presumably the state's budget limits, were factors beyond Ms. Raven's, or any guardian's, control. Ms. Raven did what she reasonably could under trying circumstances, limited resources, opposition to care, and the legal constraints on a guardian's authority. She should not be punished for acting in good faith and trying to respect Ida's wishes and rights. No guardian should be punished so.

III. Conclusion

For the foregoing reasons, Petitioner Resa Raven asks the Court to accept review of this matter, reverse the Court of Appeals decision, and reinstate the decision of the Superior Court, affirming the dismissal of the neglect charge and affirming the award of attorney's fees under the Equal Access to Justice Act.

Respectfully submitted this 10th day of September, 2012.

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CERTIFICATE OF SERVICE:

I certify that on the 10th day of September, 2012, a true and accurate copy of the *Answer of Petitioner Resa Raven to the Amici Curiae Briefs in Support of Petition for Review* was served by First Class Mail and electronic mail to the following persons:

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Dated this 10th day of September, 2012.



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Dear Clerk of the Court,

Please find for filing Petitioner Raven's Answer to Amici Briefs in Support of Petition for Review *filed as a single, signed document*. Please replace this document for the earlier version submitted in multiple portions and not signed. I apologize for the inconvenience—my scanner was broken earlier in the day. A copy of this single full document will also be sent to all parties and amici.

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