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

RESA RAVEN,

Respondent,

v.

WASHINGTON STATE DEPARTMENT OF SOCIAL
AND HEALTH SERVICES,

Appellant.

**ANSWER OF APPELLANT TO BRIEF OF AMICUS CURIAE
WASHINGTON ASSOCIATION OF PROFESSIONAL
GUARDIANS AND AMICUS CURIAE BRIEF OF DISABILITY
RIGHTS WASHINGTON IN SUPPORT OF
RESPONDENT'S BRIEF**

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I. INTRODUCTION

The Department of Social and Health Services (“Department”) offers the following Answer to the Brief of Amicus Curiae Washington Association of Professional Guardians (“Brief of Professional Guardians”) and the Amicus Curiae Brief of Disability Rights Washington in Support of Respondent’s Brief (“Brief of Disability Rights Washington”).

The Department agrees with the major points raised by amici. First, the Department agrees that guardians and courts may not legally “commit” wards to care facilities against the will of the ward. Next, the Department agrees that guardians are not strictly liable for the condition of their wards; many conditions may negatively impact a ward’s health, independent of and despite a guardian’s best efforts. Finally, it is clear that amici agree with the Department’s Brief of Appellant: guardians have a very strong, affirmative duty to pursue all sources of care reasonably available to their ward. Brief of Professional Guardians at 3. This underscores the Department’s primary position on appeal: Ms. Raven’s failure to pursue a source of in-home care for Ida, and her delay in taking steps to ensure Ida consistently received pain medications, resulted in a violation of her duty to Ida, caused Ida to go without goods and services necessary for her physical and mental health, and is civil neglect under

RCW 74.34.020(12). The finding of neglect against Ms. Raven should be affirmed.

II. LEGAL ARGUMENT

A. **The Neglect Finding is Properly Based on Ms. Raven's Failure to Secure In-Home Care for Ida**

The amici mischaracterize the Final Order, arguing as if it held that Ms. Raven perpetrated neglect under RCW 74.34.020 by failing to send Ida to a nursing home. Brief of Professional Guardians at 6-10; Brief of Disability Rights Washington at 8-16. The Final Order, however, based its neglect finding on Ms. Raven's failure to secure *in-home* care for Ida. Conclusions of Law ("CL") 46, 54, 56. Consequently, even if all conclusions in the Final Order concerning facility care are eliminated, the Final Order's neglect finding should be upheld, because the record includes substantial evidence that Ms. Raven failed in her duty to pursue *in-home* care for Ida.

1. **The Final Order's Holdings Addressing Facility Care Are Legally Accurate**

The Final Order's conclusions about facility care for Ida are somewhat convoluted and confusing, but they do not constitute error or a basis for reversal. CL 42-46. Conclusions of Law 42 and 43 state that in substituting her judgment for Ida as Ida's medical guardian, Ms. Raven had a duty to determine whether Ida would have objected to facility care.

CP 160. Conclusion of Law 44 concludes that, because Ms. Raven did not know for certain whether Ida would have rejected facility care when Ida's health deteriorated so dramatically in the winter of 2006-07, RCW 11.92.190 did not prohibit Ms. Raven from taking Ida to a facility to see if she would accept treatment there. CP 161-62. The conclusions, however, also recognize that a facility could not have detained Ida against her wishes, had she objected. CL 44; CP 161-62.

The Final Order, therefore, does not rely on any mistaken conclusion where a guardian would be expected to involuntarily commit Ida. Moreover, the record shows that the conclusions described above are particularly accurate, because it showed that Ms. Raven eventually took this course of action. She admitted Ida to a nursing and rehabilitation facility in January 2007, Ida did not object to the admission and stayed until her death, and Ida received intensive treatment and her skin ulcers improved at the facility. Finding of Fact ("FF") 83; RP 455:10-18, 456:25-457:18; AR 1453, 1461-1500.

2. The Final Order Held that Once Ms. Raven Determined that She Could Not Institutionalize Ida, Ms. Raven Perpetrated Neglect by Failing to Secure Care Ida Needed in Her Own Home

To the extent that the Final Order holds that a guardian has legal authority to—and under some circumstances must—commit a ward to a

facility against the ward's wishes, the Department agrees with amici: any such holding would violate the law. Under RCW 11.92.190, and the other constitutional and legal authorities discussed by amici, a guardian or court cannot commit a ward to a treatment facility without following the statutory civil commitment due process procedures,¹ and a ward may not be detained in a treatment facility against her will. On appeal, the Department is not asking the Court to uphold any such conclusion, because it would be inconsistent with the law.

This Court can, therefore, satisfy the stated concern of amici because the Final Order can be affirmed based on the conclusions regarding Ms. Raven's actions and omissions concerning Ida's *in-home* care. Specifically, Conclusion of Law 46 holds that: "Deciding that Ida's wish not to be placed in a facility that could meet her medical needs had to be honored, [Ms. Raven] had a duty to ensure that at least Ida's basic medical care needs were being met in her home." (Emphasis added.) Conclusion 46 then concludes that Ms. Raven perpetrated neglect because she failed to pursue additional sources of *in-home* care that Ida desperately needed. Similarly, Conclusion of Law 54 holds that: "Having made the decision that Ida was to remain in her home," Ms. Raven perpetrated neglect by failing to obtain care that Ida needed in her own home. Hence,

¹ Involuntary and voluntary procedures for admission to institutions are contained in chapters 11.77, 71.05, and 72.23 RCW.

the conclusions of law concerning nursing home care are irrelevant to the finding of neglect, because the neglect finding is based on Ms. Raven's failure to pursue *in-home* care for Ida.

B. A Guardian Owes the Highest Fiduciary Duty to Her Ward, But Is Not Strictly Liable for the Ward's Condition

The amici contend that the Final Order improperly imposes a strict liability standard on guardians. Brief of Professional Guardians at 13-14; Brief of Disability Rights Washington at 16-17. While a guardian has a high fiduciary duty to her ward, a guardian is not strictly liable for her ward's condition. Thus, the Department agrees that if there were any holding imposing strict liability on guardians in the Final Order, it would need to be analyzed for whether it is reversible error. But the Final Order does not include any such holding. More significantly, even if the Final Order did, elimination of any such holding would not be a basis to change the result here.

1. The Final Order Does Not Impose a Strict Liability Standard on Guardians

The Final Order includes several conclusions of law reciting Ms. Raven's duties as Ida's medical guardian. *See, e.g.*, CL 47-49, 52, 54, 55-56. In several instances, the Final Order holds that Ms. Raven needed to "ensure" that Ida received care in her home and was responsible to get

“results” for Ida.² CL 48-49, 55. None of these statements implies any type of strict liability. For example, the Final Order also acknowledges in one instance how Ms. Raven’s duty was limited by the range of possibilities, concluding only that Ms. Raven was obligated to secure care for Ida, “to the extent possible.” CL 48. Hence, the Final Order did not seek to impose strict liability on guardians or require guardians to conjure miracles. It recognized that a guardian’s options are limited by what is reasonably possible.

On this point, the Professional Guardians *expressly agree* with the Department’s articulation of a guardian’s standard of care:

[G]uardians are required to “exercise care and diligence when making decisions on behalf of an incapacitated person.” Standard of Practice § 401. This standard is in line with the Department’s brief, which contends guardians have a “duty to try all *reasonably* available sources of care and services ...” DSHS Brief p. 23 (emphasis in original). WAPG agrees with this articulation of the standard of care.

Brief of Professional Guardians at 13-14. Further examination of the Final Order demonstrates that it imposes the same reasonableness standard and does not impose strict liability upon a guardian for every health downturn experienced by her ward. For example, the review judge found that Ms. Raven acted reasonably in choosing to have an injury which was

² Note that the Standards of Practice require professional guardians to “arrange for,” “monitor,” and “ensure” that the care received by the ward is appropriate. AR 1836-37.

found on Ida's leg monitored at home, instead of transporting Ida for medical treatment as recommended by Ida's nurse. FF 94-98; CL 57, 59. The review judge noted that, in hindsight, Ms. Raven may have taken more prudent actions, but found that she acted in good faith, with adequate information, under trying circumstances. CL 59. Similarly, the review judge held that Ms. Raven did not perpetrate neglect for failing to contact Ida or Ida's caregivers after the severe winter storm which left Ida without power and caused her mattress to deflate, leaving her lying in her own waste on painful skin wounds. FF 107-110; CL 57-58. Viewing the entire Final Order in context, it is clear that it is consistent with the reasonableness standard for guardians and does not impose a strict liability standard.

2. The Final Order Properly Concluded that Ms. Raven Perpetrated Neglect by Failing to Pursue Reasonably Available Options for Ida's Care

As a guardian, Ms. Raven owed "the highest degree of good faith, care, loyalty and integrity" to Ida. Brief of Professional Guardians at 13 (quoting *Esmieu v. Schrag*, 88 Wn.2d 490, 498, 563 P.2d 203 (1977)). Ms. Raven's own guardianship expert testified to how this standard would apply here, saying that Ms. Raven needed to "get as much care into [Ida's] house as possible." RP 632:6-12. Thus, the issue raised by the Final Order is whether Ms. Raven violated her duty to "get as much care into

[Ida's] house as possible" and committed civil neglect under RCW 74.34.020(12). The Final Order correctly concluded, "yes." CL 46, 56. The Final Order discussed reasonably available options of in-home care and medications, which were goods and services that Ida needed for her physical and mental health, but that Ms. Raven failed to pursue. FF 62-63, 67-68; CL 56. As a Department client receiving Medicaid funding, Ida's only sources of in-home care were employees of home-care agencies and independent contractor caregivers. WAC 388-71-0500. Even as Ida's in-home situation deteriorated and she went for hours without care or cleaning, Ms. Raven ruled out the use of independent contractors, thereby eliminating one of only two sources of available care. FF 62-63; RP 58:14-21, 822:2-18; AR 852. Independent contractors are required to have the same training and meet the same qualifications as employees of home care agencies. WAC 388-71-0500 to -05665. Thus, in contrast to the assertion of Disability Rights Washington that Ms. Raven rejected independent contractors because they lacked sufficient training and expertise, the record shows that Ms. Raven summarily rejected the idea of independent caregivers, because she did not want to have to supervise such persons. FF 62-63; RP 58:14-21, 822:2-18; AR 852. Moreover, even if the Court accepts amici's invitation to retry the case on appeal, nothing in the record demonstrates Ms. Raven

investigated or was concerned with the quality of care offered by independent contractors. Instead, it showed that Ms. Raven's business partner was a nurse and more experienced professional guardian who took over as Ida's guardian in January 2007. FF 39, 83. Ms. Raven could have transferred the case to her business partner much sooner, had she wished to avoid the need to supervise independent contractor caregivers for Ida.

Similarly, Ms. Raven failed to take steps outlined by a Thurston County Superior Court judge to stop Richard's interference with Ida's pain medications. Ida's receipt of medications was critical, because her assaultiveness with caregivers was exacerbated by her pain. FF 15. The superior court was so concerned with Richard's interference that it recommended the use of an attorney and possible court sanctions against Richard. FF 68; AR 1544-45, 1588. Ms. Raven decided to pursue nurse delegation, which allowed a caregiver to administer Ida's medications, instead of Richard. FF 88; AR 859, 1589. But this process was delayed for five months before Ms. Raven finally took action to get it arranged. FF 88; AR 1589-90, 1594-95. During that time, Ms. Raven continued to document interference by Richard with Ida's medications, but she did not pursue any of the options suggested by the superior court to put a stop to Richard's actions. RP 822:20-826:21.

Hence, by failing to pursue reasonably available options for Ida's care and medications—a duty the Professional Guardians and Ms. Raven's own expert guardianship witness acknowledge that Ms. Raven owed to Ida—the Final Order properly concluded that Ms. Raven failed to supply goods and services necessary for Ida's physical and mental health, and she committed neglect under RCW 74.34.020(12). CL 56.

C. Any Actions or Omissions of DSHS Are Irrelevant to the Determination of Whether Ms. Raven Perpetrated Neglect Under RCW 74.34.020(12)

The Professional Guardians assert that the Department failed in its own duties to Ida and argue that the Department cannot refuse to offer services in the future to any client of Ms. Raven's. Brief of Professional Guardians at 14-20. These are new arguments, not previously introduced by the parties, and therefore are not properly before the Court. *Bldg. Indus. Ass'n of Wash. v. McCarthy*, 152 Wn. App. 720, 748 n.12, 218 P.3d 196 (2009) (court declines to address arguments raised on appeal only by amici). To the extent the Court entertains such arguments, they are irrelevant to the neglect finding against Ms. Raven.

1. Ms. Raven Violated Duties to Ida, Which Were Independent of Any Duties the Department May Have Owed Ida

As a guardian, Ms. Raven owed Ida affirmative duties, which were not contingent upon any duties the Department may have owed to Ida.

Ms. Raven was appointed by the superior court to make all of Ida's medical and care decisions. 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." FF 38; AR 1510-11. She was also ordered to develop, file, and update a plan of care for Ida under RCW 11.92.043(1) and (2). FF 38; 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). The Standards of Practice for professional guardians required her to "actively" promote Ida's health by "arranging for regular preventative care" and "monitor[ing]" Ida's care "to ensure that it [was] appropriate." AR 1836-37. These were affirmative duties imposed on Ms. Raven, and they were not contingent upon any duties the Department may have owed to Ida. CL 47-49.

Certainly, as a low-income Medicaid client, the care resources available for Ms. Raven to draw upon through the Department were limited. However, *Ms. Raven*—not the Department—took actions further limiting Ida's options. The Department's contractor offered to seek independent contractor caregivers, funded through Medicaid, but *Ms. Raven summarily ruled out this option*. FF 62-63; RP 58:14-21, 822:2-18; AR 852. Further, *Ms. Raven*—not the Department—was

counseled by the superior court to take action to stop Richard's interference with Ida's medication, and Ms. Raven failed to pursue it, letting the medication issue lapse for another five months. FF 88; AR 1544-45, 1588. Thus, Ms. Raven violated her independent duty to pursue all reasonably available in-home care options for Ida, thereby perpetrating neglect under RCW 74.34.020(12).

2. The Department Does Not Disavow Its Statutory Authority

The Professional Guardians misconstrue the Final Order's statement that the Department may not seek to "partner with [Ms. Raven] in the future," based on her conduct here. Brief of Professional Guardians at 15. The Professional Guardians argue that the Legislature imposed authority upon the Department to investigate all allegations of abuse and neglect of vulnerable adults and offer protective services under chapter 74.34 RCW. Brief of Professional Guardians at 19-20. The Department generally agrees with Professional Guardians' description of the statutory authority vested in it, and nowhere in its Brief of Appellant does the Department seek to disavow its authority. If Ms. Raven is a guardian for a Department Medicaid client in the future, the Department will be required to work cooperatively with her as the client's guardian, and the

Department will be authorized to act on her client's behalf under its authority in chapter 74.34 RCW.

That being the case, however, no law requires the Department to *voluntarily* partner with Ms. Raven. For example, under RCW 74.34.067(5), the Department may petition for guardians for incapacitated vulnerable adults who have been abused or neglected. In any case in which the Department does so in the future, no law requires the Department to voluntarily nominate Ms. Raven as the proposed guardian. Thus, the Final Order is not improper or incorrect: it does not seek to disavow the Department's statutory authority, and it recognizes the Department's discretion to voluntarily nominate persons other than Ms. Raven to act on behalf of its clients.

D. New Evidence and Arguments Introduced by Amici Are Not Part of the Record or Properly Before the Court

The amici submit documents outside of the record and introduce new arguments that were not previously discussed in the parties' briefing. Brief of Professional Guardians at 11-12, 14-20, App. A; Brief of Disability Rights Washington at 16-20, Exs. 1-3, 5-6. New evidence submitted by amici is not part of the record. *Bldg. Indus. Ass'n of Wash.*, 152 Wn. App. at 748 n.12. New arguments not previously raised by the parties are not properly before the Court. *Id.* at 748. Further, all such

evidence and arguments are irrelevant to the finding that Ms. Raven committed neglect under RCW 74.34.020(12) by failing to pursue reasonably available sources of care and consistent medication for Ida in Ida's own home.

III. CONCLUSION

The Department agrees with the major points made in briefs of amici. A guardian, such as Ms. Raven, has a strong, affirmative duty toward her ward. The guardian is not strictly liable for the ward's condition, and the guardian may not civilly commit her ward against the wishes of the ward. However, under a guardian's strong, affirmative duty, she must pursue all reasonably available sources of care for her ward. Because Ms. Raven failed to do so, the neglect finding against her should be affirmed, the fees awarded to Ms. Raven by the superior court under the Equal Access to Justice Act should be overturned, and her request for additional fees under the Equal Access to Justice Act on appeal should be denied.

RESPECTFULLY SUBMITTED this 24th day of August, 2011.

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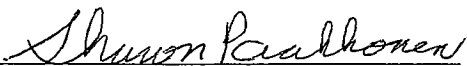
CERTIFICATE OF SERVICE

I certify that on August 24, 2011, I sent via ABC Legal Services a copy of the foregoing Answer of Appellant to Brief of Amicus Curiae Washington Association of Professional Guardians and Amicus Curiae Brief of Disability Rights Washington in Support of Respondent's Brief to the following persons:

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