

No. 40809-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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RESA RAVEN,

Respondent,

v.

WASHINGTON STATE  
DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
FOR PIERCE COUNTY

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**BRIEF OF AMICUS CURIAE  
WASHINGTON ASSOCIATION OF  
PROFESSIONAL GUARDIANS**

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## I. INTRODUCTION

Amicus Washington Association of Professional Guardians (WAPG) is a proponent of vigorous enforcement of this State's laws and public policy favoring the protection of vulnerable adults. For that reason, WAPG does not agree with Respondent Resa Raven that the burden of proof under the Vulnerable Adult Protection Act, RCW 74.34, is clear, cogent and convincing evidence when the statute is applied to the conduct of professional guardians.<sup>1</sup> Nor does WAPG endorse Ms. Raven's argument that a finding of neglect under RCW 74.34.020 requires the proof of actual harm to the vulnerable adult.<sup>2</sup> However, WAPG strongly disagrees with several conclusions made by DSHS in its final agency decision ("Review Decision"), which are contrary to law, and, if upheld by this Court, would in the opinion of WAPG impede not enhance the protection of vulnerable adults who are subject to guardianships.

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<sup>1</sup> See Brief of Respondent at 46-47.

<sup>2</sup> See Respondent's Brief at 23-24, 33-34; Respondent's Reply Brief at 1-3. In child neglect cases, actual harm is not a prerequisite for a finding of "negligent treatment or maltreatment," which is defined in pertinent part as "a failure to act, or the cumulative effects of a pattern of conduct, behavior, or inaction, that evidences a serious disregard of consequences of such magnitude as to constitute a clear and present danger to a child's health, welfare, or safety, including but not limited to conduct prohibited under RCW 9A.42.100." RCW 26.44.020(14) See, e.g., In re Dependency of Schermer, 161 Wn.2d 927, 951, 169 P.3d 452 (2007) (citing In re Welfare of Frederiksen, 25 Wn. App. 726, 733, 610 P.2d 371 (1979)) (holding DSHS need not wait until a child suffers actual harm, but may instead act when there is a discrete danger of harm). WAPG also takes no position on whether the final administrative decision by the Department of Social and Health Services is supported by substantial evidence.

First, Washington law does not allow guardians to place unwilling wards in care facilities.<sup>3</sup> The conclusion of law reached by DSHS that the guardian could “place Ida in the necessary care facility when it became painfully apparent her medical needs could not be met in her home and then deal with whatever opposition she may have expressed at that time”<sup>4</sup> is not a lawful solution to the dilemma that guardians, families, caregivers, health care providers, social workers, and APS staff confront when a vulnerable adult<sup>5</sup> like Ida rejects necessary care. The Review Decision disregards Washington’s informed consent law, RCW 7.70.065, Washington’s guardianship laws, RCW 11.92.190 and RCW 11.92.043(5), and Washington’s involuntary treatment law, RCW 71.05.150.

If Ida’s tragic death is not an acceptable outcome, then the solution must be for stakeholders such as DSHS, WAPG, and disability rights groups to work together to broaden existing laws so that vulnerable adults like Ida can be detained for critical care, while at the same time

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<sup>3</sup> This brief defines “care facilities” to be any out-of-home residential treatment facility, including but not limited to skilled nursing facilities, more commonly referred to as nursing homes.

<sup>4</sup> Conclusion of Law (CL) 44, Administrative Record (AR) 161-162.

<sup>5</sup> Vulnerable adult is defined by RCW 74.34.020(16) to mean a person: “(a) Sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself; or (b) Found incapacitated under chapter 11.88 RCW; or (c) Who has a developmental disability as defined under RCW 71A.10.020; or (d) Admitted to any facility; or (e) Receiving services from home health, hospice, or home care agencies licensed or required to be licensed under chapter 70.127 RCW; or (f) Receiving services from an individual provider.”

recognizing and preserving each individual's rights to self-determination and due process. At least one other state, Massachusetts, has enacted legislation authorizing guardians to admit incapacitated persons to "nursing facilities" "upon a specific finding by the court that such admission is in the incapacitated person's best interest." *See* Massachusetts Uniform Probate Code §5-309(g) (Appendix A-17).<sup>6</sup>

Second, Washington law and general fiduciary principles do not make guardians responsible for ensuring that the needs of their wards are met, as the Review Decision concluded. *See* CL 56, AR 168. As fiduciaries, guardians are held to the highest standards of good faith and due diligence. Guardians must take all lawful and reasonably available measures to obtain necessary care for their wards. But the law does not hold guardians strictly liable for every outcome. The standard of care that DSHS proposes – ensuring that all needs are met – is not reasonable, fair or supported by legal authority.

Third, DSHS cannot condition the performance of its duties under the Vulnerable Adult Protection Act, RCW 74.34, on the conduct of guardians. The Act requires DSHS to take action to protect vulnerable adults. Ida's situation was called to the attention of DSHS in June 2006 when the guardian made an Adult Protective Services (APS) report against

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<sup>6</sup> Excerpts from the Massachusetts Uniform Probate Code are provided in the appendix at A-1 to A-19.

Ida's husband for refusing to consistently administer Ida's medications.<sup>7</sup> AR 1588. In June 2006, APS determined it could not substantiate the report or take any action. AR 858-9. The Review Decision concluded that the guardian should have filed a court petition that would have "forced" DSHS to take action and that, because of the guardian's conduct in this case, DSHS may refuse to provide care to vulnerable adults in future cases involving Ms. Raven. *See* CL 55, 56, AR 167-8. These positions are contrary to law. The Department's duties under RCW 74.34 are independent of the guardian's. It would undercut the important public policy of protecting vulnerable adults for this Court to affirm the final agency decision that posits all responsibility on the guardian and ignores the Department's duty to act.

## II. STATEMENT OF ISSUES

A. Can a guardian lawfully place an unwilling ward in a care facility for necessary treatment? CL 43, 161; CL 44, AR 161-2.

B. Can a guardian be held responsible for guaranteeing that the care needs of a vulnerable adult are met, regardless of legal and practical limitations on the guardian's ability to secure necessary care? CL 46, AR 162; CL 56, AR 168.

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<sup>7</sup> Inadequate medication management was one of the critical deficiencies the Review Decision cited in finding Ms. Raven committed neglect. *See* CL 56, AR 168.

C. Can a guardian be held responsible for the Department's failure to take action to protect a vulnerable adult because the guardian after making a referral to APS did not file a court petition to force DSHS to take some action? CL 55, AR 167.

D. Can DSHS refuse to provide protective services to a vulnerable adult based on prior dealings with the vulnerable adult's guardian? CL 56, AR 168.

### III. STATEMENT OF THE CASE

For the purpose of this brief, WAPG adopts Findings of Fact 1 through 111 as set forth in the Review Decision, except for the description of Ida as "independent" in Finding of Fact 14, AR 103. *See* AR 97 - 142.

### IV. ARGUMENT

#### A. Guardianship And Informed Consent Statutes Should Be Interpreted De Novo.

DSHS does not allege it administers or has "special expertise" relating to the guardianship or informed consent statutes. Therefore, this Court should review legal decisions relating to RCW 11.92.190 and RCW 7.70.065 *de novo*. *See Ames v. Washington State Health Dep't. Med. Quality Assurance Comm'n*, 166 Wn.2d 255, 260-1, 208 P.3d 549 (2009).

#### B. Vulnerable Adults Subject To Guardianship Cannot Be Detained Involuntarily For Necessary Care Without Complying With Civil Commitment Laws.

The Review Decision held:

“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 [quoting RCW 11.92.190].”

The 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 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 needs could not be met in her home and then deal with whatever opposition she may have expressed at that time.

CL 44, AR 161-162 (Emphasis supplied). This conclusion disregards Washington statutes, case law, and due process.

**1. The guardian did not have authority to place Ida in a care facility.**

The guardian would have been in breach of her statutory and court-ordered authority to consent to the placement of Ida in a care facility. In consenting to medical care for an incapacitated person, the guardian must comply with RCW 7.70.065. See RCW 11.92.043(5).<sup>8</sup> The order

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<sup>8</sup> RCW 11.92.043(5) states it shall be the duty of the guardian of the person to:

appointing Ms. Raven limited guardian over Ida's person also required that medical decisions be made "consistent with RCW 7.70.067 [sic]."<sup>9</sup> RCW 7.70.065(1)(c) requires that when consenting to medical care, a guardian "must first determine in good faith that that patient, if competent, would consent to the proposed health care." The hearing record clearly established Ida's "historically consistent refusal to be ... taken out of her home for medical treatment purposes." CL 28, AR 153. The guardian determined that Ida would not have consented to nursing home placement when competent, and the Review Decision found that the guardian's determination was made in good faith. FF 32, AR 108; FF 43, AR 112.

A guardian may not exceed the scope of its statutory or court-ordered authority. A fiduciary has a duty to act only within the scope of his or her authority. RESTATEMENT 3D OF AGENCY, § 8.09. Guardians are "at all times under the general direction and control of the court making the appointment." RCW 11.92.010. The superior court that appoints a guardian retains jurisdiction and broad authority to supervise the guardian

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Consistent with RCW 7.70.065, to provide timely, informed consent for health care of the incapacitated person, except in the case of a limited guardian where such power is not expressly provided for in the order of appointment or subsequent modifying order as provided in RCW 11.88.125 as now or hereafter amended, the standby guardian or standby limited guardian may provide timely, informed consent to necessary medical procedures if the guardian or limited guardian cannot be located within four hours after the need for such consent arises.

<sup>9</sup> Presumably the reference to RCW 7.70.067 was intended to be a reference to RCW 7.70.065. RCW 7.70.067 does not exist.

until the guardianship is terminated. In re Guardianship of Gaddis, 12 Wn.2d 114, 123, 120 P.2d 849 (1942); Seattle-First Nat'l Bank v. Brommers, 89 Wn.2d 190, 200, 570 P.2d 1035 (1977); In re Guardianship of Matthews, 156 Wn. App. 201, 211, 232 P.3d 1140 (2010). Therefore, had the guardian done what the Review Decision concludes she was required to do – place Ida in a care facility and deal with her objections later – the guardian would have been in violation of her fiduciary duties.

**2. The superior court overseeing the guardianship did not have the authority to detain Ida for necessary care.**

Since consensual out-of-home placement by the guardian could not occur consistent with RCW 7.70.065, compulsory detention by court order was the only available option for securing out-of-home care. However, once the court becomes involved in ordering a placement, state action is involved and due process must be satisfied. *See, e.g., In re LaBell*, 107 Wn.2d 196, 201, 728 P.2d 138 (1986) (involuntary commitment for natural disorders is a significant deprivation of liberty which the state cannot accomplish without due process of law). Even short non-penal detention by judicial process implicates constitutionally-protected liberty interests. *See, e.g., In re Harris*, 98 Wn.2d 276, 654 P.2d 109 (1982) (involving the summons procedure for effecting a 72 hour commitment for evaluation for mental health treatment.) Therefore, at a minimum, Ida was entitled to notice and an opportunity to be heard on the issue of whether

the court could remove her from her home for treatment. *See, e.g., In re Dependency of R.H.*, 129 Wn. App. 83, 85, 117 P.3d 1179 (2005) (“In any legal proceeding, the parties are entitled to procedural fairness. This includes, at minimum, notice and the opportunity to be heard.”); *In re the Guardianship of Ingram*, 102 Wn.2d 827, 689 P.2d 1363 (1984) (guardian petitioned the court to order life-saving treatment over the ward’s objections; the Supreme Court upheld the ward’s right to decline life-saving treatment.)

Just as the guardian could not lawfully admit Ida to a care facility without court authority, the superior court overseeing Ida’s guardianship could not grant such authority. RCW 11.92.190 states that 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.” The Review Decision’s attempt to neutralize RCW 11.92.190 by observing it regulates residential treatment facilities ignores the plain meaning that limits the authority of superior courts to authorize involuntary detention. “Plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which that

provision is found, related provisions, and the statutory scheme as a whole.” Christensen v. Ellsworth, 162 Wn.2d 365, 372-373, 173 P.3d 228 (2007) (citations omitted). The provision at issue, RCW 11.92.190, appears in the chapter governing guardians’ powers and duties and prohibits the superior courts from authorizing involuntary placements unless the procedures of RCW 71.05 and RCW 72.23 are observed. RCW 11.92.190 plainly applied.

Thus, the only lawful course of action available to the guardian for securing out of home care was the involuntary treatment process. RCW 71.05.150 authorizes the detention for evaluation and treatment of individuals who “as a result of a mental disorder” present “a likelihood of serious harm” or are “gravely disabled.” The guardian tried to have Ida civilly committed for treatment in November 2006. AR 1594-5. But the Designated Mental Health Professional who assessed Ida in November 2006 concluded that Ida could not be detained under the involuntary treatment laws because she did not have a “mental disorder.” AR 871; FF 77, AR 129; AR 1595.

In summary, under Washington law, the guardian could not consent and the court could not order Ida to be detained in a care facility for care that may have saved her life. If this outcome is unacceptable, the problem needs to be addressed to the legislature.

**3. New legislation would be necessary to involuntarily detain vulnerable adults in residential treatment facilities for necessary care.**

This case tragically illustrates a gap in our current system for protecting vulnerable adults. Ida needed nursing home level of care, either in a long-term care facility or at home. But she was very consistent in her resistance to nursing home care, FF 43, AR 112, and made her wishes clear to the guardian, who was constrained by RCW 11.92.043 and RCW 7.70.065. Therefore, the only legal option was civil commitment, which is not designed to address the needs of the elderly.

Only through a broadening of RCW 71.05.150 or a change to RCW 11.92.190 could a person in Ida's situation be lawfully detained for care against her will. The need for statutory amendments was one of the recommendations of the Vulnerable Adult Conference organized by the State in 2008. The Final Report includes the following recommendation:

Develop a stakeholder work group to help craft legislation that allows for a separate involuntary detention process for vulnerable adults to facility settings when they are diagnosed with dementia.<sup>10</sup> This would address a population that appears to be covered by the guardianship statutes but is not being served by the mental health community because dementia is not considered to be a "mental disorder" in most counties.<sup>11</sup>

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<sup>10</sup> Ida had dementia in addition to mental illness and other medical problems. See FF 5, AR 98; FF 45, AR 113.

<sup>11</sup> Appendix A-43. A copy of the Vulnerable Adult Initiative 2008 Final Report is in the Appendix at A-20 to A-53.

Some states such as Massachusetts have added provisions to their guardianship laws that permit courts to authorize nursing home placement if certain conditions are met. In 2008, Massachusetts adopted a version of the Model Probate Code, which provides in pertinent part: “No guardian shall have the authority to admit an incapacitated person to a nursing facility except upon a specific finding by the court that such admission is in the incapacitated person's best interest.” Mass. ALS 5-309(g) (2008) (Appendix A-17). The precursor to this law was upheld and applied in Doe v. Doe, 377 Mass. 272, 273, 385 N.E.2d 995 (1979), which found it lawful for a guardian to involuntarily commit a ward for mental health treatment, provided it was first established beyond a reasonable doubt that there was a likelihood of serious harm without the placement.

The purpose of this brief is not to propose legislation, but to point out the constraints under current law that prohibit guardians from involuntarily detaining wards for treatment, even when that treatment is clearly in the best interests of wards. It will not further the goal of protecting vulnerable adults if this Court faults the guardian without recognizing the legal constraints that preclude the involuntary treatment of individuals like Ida, who notwithstanding the existence of a guardianship, have the right to oppose institutionalization. In this case, the guardian pursued the only legal option for involuntarily detaining Ida in November

2006, and was told that Ida did not satisfy the legal standard for involuntary treatment. If the State finds Ida's death unacceptable, then the problem needs to be addressed to Washington's legislature.

**C. A Guardian Does Not Have A Fiduciary Duty To Guarantee That Medical Or Care Needs Are Met, But To Exercise Due Diligence In Pursuing All Reasonably And Legally Available Care Options.**

The Review Decision held that the guardian had a duty to ensure that Ida's basic or critical care needs were met. It reads in pertinent part:

Deciding that Ida's wish not to be placed in a facility that could meet her medical needs had to be honored, the Appellant [Ms. Raven] had a duty to ensure that at least Ida's basic medical care needs were being met in her home.

CL 46, AR 162. *See also* CL 56, AR 168 (holding guardian's failure to ensure that critical care needs were met constituted neglect). WAPG readily agrees that guardians as fiduciaries "are held to highest degree of good faith, care, loyalty and integrity." Esmieu v. Schrag, 88 Wn.2d 490, 498, 563 P.2d 203 (1977). But there is no authority for holding guardians responsible for guaranteeing that medical care needs are met without reference to legal and practical limitations on what the guardian could reasonably be expected to accomplish.

Under the standards of practice for certified professional guardians promulgated by WAPG, guardians 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. However, the actual conclusion of law made by the Review Decision goes beyond "due diligence" and "reasonable efforts" by imposing a strict liability standard on guardians that is contrary to law, unfair, and bad public policy. If this Court were to hold guardians responsible for ensuring that the needs of the ward shall be met, as opposed to holding that guardians must exercise due diligence in pursuing all reasonably available sources of care and services, it would encourage other responsible parties, such as APS, to abdicate their responsibilities and discourage competent and caring professionals from entering the field.

**D. The Department's Duty to Protect Vulnerable Adults is not Contingent on the Guardian's Conduct.**

Conclusions of Law 55 and 56 impermissibly condition the Department's duty to protect vulnerable adults on the guardian's conduct:

The Appellant [guardian] 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. ... 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.

CL 55 (emphasis supplied) AR 168.

The Appellant [guardian] cannot expect the Department to partner with her in the future in the care of vulnerable adults based on her conduct as limited guardian in this case.

CL 56, AR 168-169.

**1. Statutory background of the Vulnerable Adult Protection Act.**

In 1981, the U.S. House of Representatives released the first of several reports on elder abuse. Jill Skabronski, *Elder Abuse: Washington's Response to a Growing Epidemic*, 31 GONZAGA L. REV., 627, 633 (1995) (citing H.R. Rep. No. 277, 97<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1981)). The Select Committee on Aging recommended that states enact elderly protection laws. *Id.* As a result of the Committee's findings, each state enacted its own adult protection services laws, court proceedings, and practices concerning services for victims of elder abuse and neglect. *Id.*

The Washington Legislature enacted the Vulnerable Adult Protection Act in 1984 with legislative findings that:

there are a number of adults sixty years of age or older who lack the ability to perform or obtain those services necessary to maintain or establish their well-being... It is the intent of the legislature to prevent or remedy the abuse, neglect, exploitation, or abandonment of [such] persons.

RCW 74.34.010. DSHS "is responsible for investigating allegations of abuse, neglect, abandonment, or exploitation of a vulnerable adult."

DSHS Brief p. 43.<sup>12</sup> The “department and appropriate agencies must be prepared to receive reports of abandonment, abuse, financial exploitation, or neglect of vulnerable adults.” RCW 74.34.005(5). “The department shall initiate a response to a report, no later than twenty-four hours after knowledge of the report, of suspected abandonment, abuse, financial exploitation, neglect, or self-neglect of a vulnerable adult.” RCW 74.34.063(1). If the report is substantiated by DSHS, it then has the authority to provide “protective services” and to petition for judicial protection of a vulnerable adult. Protective services “may include, but are not limited to case management, social casework, home care, placement, arranging for medical evaluations, psychological evaluations, day care, or referral for legal assistance.” RCW 74.34.020(14).<sup>13</sup> Consent of the vulnerable adult to such services can be given by the vulnerable adult or the vulnerable adult’s “legal representative.” *See* RCW 74.34.020(3).

DSHS also has standing under the Vulnerable Adult Protection Act to file a court petition for protection with the consent of the vulnerable adult or the vulnerable adult’s legal representative. *See* RCW 74.34.150

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<sup>12</sup> WAPG agrees with DSHS that the State has a strong interest in protecting vulnerable adults. *See* DSHS Brief p. 43.

<sup>13</sup> The provision was previously codified at RCW 74.34.020(13) under the version of the Act in existence prior to July 22, 2007.

(2004);<sup>14</sup> RCW 74.34.020(3). Remedies available under the Vulnerable Adult Protection Act supplement the guardianship laws and the criminal code.<sup>15</sup> A court “may order relief as it deems necessary for the protection of the vulnerable adult, including but not limited to,” restraining orders against third parties. RCW 74.34.130. Protection orders can be issued over the objection of vulnerable adults. *See, e.g., Endicott v. Saul*, 142 Wn. App. 899, 176 P.3d 560 (2008) (upholding trial court’s order of protection which was opposed by the vulnerable adult).

**2. DSHS had a duty to take action independent of the guardian’s.**

The Review Decision concludes that the guardian should have filed a court petition to force DSHS to take more aggressive protective measures in Ida’s case. But the Department’s duties under the Vulnerable Adult Protection Act are not contingent on the conduct of the guardian. In the present case, a report was made to APS in June of 2006 that Ida’s

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<sup>14</sup> The Department’s authority was clarified in 2007 to authorize judicial petitions for protection with or without the vulnerable adult’s consent. Before 2007, DSHS had express authority to petition for relief with the consent of the vulnerable adult or the vulnerable adult’s legal representative. Since Ida’s guardian had been the one to make the APS referral in June, consent would not have been an issue if DSHS had substantiated the referral.

<sup>15</sup> *See* RCW 74.34.160 (“Any proceeding under RCW 74.34.110 through 74.34.150 is in addition to any other civil or criminal remedies.”); RCW 74.34.100(4) (“A petition for an order may be made whether or not there is a pending lawsuit, complaint, petition, or other action pending that relates to the issues presented in the petition for an order for protection.”).

elderly and impaired husband was not consistently administering her medications. AR 1588. These medications included pain medications and anti-anxiety medications, which were necessary not only for Ida's comfort but for the safety of her caregivers.<sup>16</sup> DSHS was required to initiate a response to the guardian's report within 24 hours. RCW 74.34.063(1). If DSHS had substantiated the allegation of neglect, it would have been authorized to provide protective services and to petition the court to order protections under RCW 74.34.110 with the consent of the guardian, who had made the referral to DSHS in the first place. But DSHS did not substantiate the report of neglect and concluded it could not do anything with this case. AR 858.

Whether the outcome would have been different if DSHS had substantiated the neglect report and taken action in June is unknowable.<sup>17</sup> What is certain, however, is that DSHS had an affirmative duty to act in this case. One of the critical inadequacies found by the Review Decision, inadequate pain management, CL 56, AR 168, was reported by the guardian to APS in June 2006, and DSHS failed to substantiate the report,

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<sup>16</sup> See FF 63, AR 123.

<sup>17</sup> The fact that DSHS could no more ensure that Ida received necessary services than the guardian even though it had far more resources at its disposal also illustrates the fallacy and unfairness of the Review Decision's conclusions of law that hold the guardian responsible for not guaranteeing Ida's care needs were met. See CL 46, AR 162-63; CL 56, AR 168.

provide protective services, or petition the Court for a protection order.

Unlike some state programs like Medicaid,<sup>18</sup> the Department's duties under RCW 74.34 are not contingent on there being no other responsible party. DSHS is not a protector of "last resort," but the arm of the State chiefly responsible for protecting vulnerable adults. *See* DSHS Brief p. 43. As Ida's case illustrates, the potential consequences when a vulnerable adult is being abused or neglected are far too serious for DSHS to refrain from taking action until it is "forced" to do so.

**3. DSHS may not withhold care from vulnerable adults in the future based on the guardian's conduct in this case.**

Conclusion of Law 56 also contains clear legal error in its statement that DSHS may refuse to "partner with her [Ms. Raven] in the future in the care of vulnerable adults based on her conduct as limited guardian in this case." AR 168-9. The Department's responsibilities under RCW 74.34 are not optional. If it receives a report of abuse, neglect, or exploitation, it is required to initiate an investigation within 24 hours. If it substantiates the report, and Ms. Raven is guardian of the vulnerable adult, it would be an abuse of discretion for DSHS to serve the vulnerable adult any differently than if some other professional were guardian. If DSHS perceives deficiencies with Ms. Raven, it may petition the guardianship

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<sup>18</sup> *See, e.g.*, RCW 74.09.180 (Medicaid eligibility presumes no other party is available to pay for care).

court for her removal under RCW 11.88.120 or RCW 11.92.160, or file a grievance under the standards of conduct promulgated pursuant to GR 23(2)(viii). Denying services to a vulnerable adult who has been the victim of abuse, neglect or exploitation is not an option.

## V. CONCLUSION

WAPG respectfully requests that this Court rule in accordance with the principles of law articulated in this brief: (1) Guardians cannot under Washington law involuntarily detain wards for residential treatment. (2) Guardians do not have a fiduciary duty to guarantee care, but a duty to obtain all reasonably and legally available care. (3) DSHS has an unconditional duty to protect vulnerable adults independent of the actions of the vulnerable adult's guardian. (4) DSHS may not withhold protective services because of the conduct of a vulnerable adult's guardian.

Respectfully submitted this 12<sup>th</sup> day of August 2011.

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