

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

IN RE: IRENE WARD

CHANCERY NO. 191352

**BRIEF IN SUPPORT OF MOTION TO STRIKE RELIEF REQUESTED****I.  
INTRODUCTION**

Petitioner John Charles Ward is the husband of the Respondent Irene Ward. Although they reside in the same home they are estranged and Mrs. Ward has for sometime resided in the basement of the family home and Mr. Ward occupies the top floor of a two story house. Mr. Ward has requested that the Irene Ward be declared an incapacitated person pursuant to Section 37.1-134.6 *et. seq.* of the Virginia Code and that he be appointed her Guardian and Conservator. Mrs Ward does not oppose the appointment of a Conservator but has requested that someone other than Mr. Ward be appointed. Mrs. Ward is contesting the appointment of a Guardian of her person.

Petitioner has specifically requested that this court "authorize in-patient treatment to establish a medication and treatment plan if the medical and psychiatric evaluation recommend in-patient care." Mrs. Ward opposes any order requiring that she be hospitalized against her will to an in-patient medical facility.

**II.  
STATUTORY SCHEME**

Title 37.1 of the Virginia Code entitled "Institutions for the Mentally Ill; Mental Illness Generally" establishes a statutory scheme to deal with the myriad of issue which arise as a result

of mental illness. Among other things this Title establishes a Chapter which governs the admissions persons to mental health facilities against their will. In recognition of the potential loss of a constitutionally protected right to liberty, the Virginia legislature has expressly set out the procedures and criteria which must be followed before an individual may be hospitalized against his or her will. In particular, Section 37.1-67.3 of the Virginia Code "Involuntary admission and treatment" requires that a hearing be held before a Special Justice or Judge who shall determine, prior to ordering the hospitalization, if the person whose hospitalization is sought "(i) ... presents an imminent danger to himself or others as a result of mental illness or has been proven to be so seriously mentally ill as to be substantially unable to care for himself, and (ii) that alternatives to involuntary confinement and treatment have been investigated and deemed unsuitable and there is no less restrictive alternative to institutional confinement and treatment..."

Once the determination has been made by the Judge that the commitment criteria has been met and that in-patient treatment is required the Judge shall order that the individual be placed in a hospital or other facility designated by the Commissioner. Section 37.1-1 "Definitions" states "hospital or hospitals" when not modified by the words "state" or "private" shall be deemed to include both state hospitals and private hospitals devoted to or with facilities for the care and treatment of the mentally ill or mentally retarded." Thus, the statutory scheme expressly applies to the commitment of a person with mental illness to both private hospitals and state hospitals.

It should be underscored that prior to holding a hearing the Judge is required to advise the person of their right to volunteer for in-patient treatment for a period not to exceed 72 hours and "ascertain if such person is then willing and capable of seeking voluntary admission." If the

person is “capable and willing” to agree to voluntary treatment for the period of up to 72 hours the Judge is required to order such treatment and dismiss the petition for involuntary hospitalization. The statute confers this right upon the individual who is subject to possible involuntary hospitalization. There is no provision empowering a court appointed guardian to exercise the persons right to either volunteer nor does the statute empowered a guardian to commit a ward to a hospital against his or her will.

Title 37.1 of the Virginia Code also contains the provision for the appointment of a Guardian for a person found to be incapacitated. These provisions are found in Article 1.1 (Section 37.1-134.6 *et. seq.*) which defines “incapacitated person” as an “adult who has been found by a court to be incapable of receiving and evaluating information effectively or responding to people, events or environments to such an extent that the individual lacks the capacity to (i) meet the essential requirement for his health, care, safety or therapeutic needs without the assistance or protection of a guardian...” Section 37.1-137.1 sets out the “Duties and powers of [a] guardian” stating “a guardian stands in a fiduciary relationship to the incapacitated person for whom he was appointed ...” The statute is utterly silent as to the power of a Guardian to hospitalize a person with mental illness against his or her will.

In a related statute, Section 37.1-134.21 “Judicial authorization of treatment and detention of certain persons” Circuit Court Judges are empowered to authorize treatment for a mental disorder, “if it finds upon clear and convincing evidence that (i) the person is either incapable of communicating such a decision due to physical or mental disorder and (ii) the proposed action is in the best interest of the person.” However, this general authority is limited. Subsection 1.2. of the statute expressly prohibits a Circuit Court Judge from authorizing the admission of an

individual to a psychiatric hospital as defined in Section 37.1-1 (discussed above) and the court is further prohibited from authorizing the restraint or transportation of the person *unless necessary for a physical disorder*. (Section 37.1-134.21.I.4, emphasis added.)

### III. ARGUMENT

In construing the meaning and application of this statutory scheme this Court should apply the well recognized principles of legal construction that laws in *pari materia* must be construed with reference to each other. In *Prillaman v. Commonwealth*, 199 Va. 401, 405-406 (October 14, 1957) the Court stated

In 50 Am. Jur., Statutes, § 349, pp. 345, 346, 347, it is said "Under the rule of statutory construction of statutes in *pari materia*, statutes are not to be considered as isolated fragments of law, but as a whole, or as parts of a great connected, homogeneous system, or a single and complete statutory arrangement. Such statutes are considered as if they constituted but one act, so that sections of one act may be considered as though they were parts of the other act, as far as this can reasonably be done. 50 Am. Jur., Statutes, § 349, pp. 345, 346, 347 ...

In *Mitchell Witt, v.* 98 Va. 459, 461, 36 S.E. 528, the court stated: "Statutes which are not inconsistent with one another, and which relate to the same subject matter, are in *pari materia*, and should be construed together; and effect should be given to them all, although they contain no reference to one another, and were passed at different times. Especially should effect be given, if possible, to statutes in *pari materia* enacted at the same session of the Legislature." [citations omitted] ... "It is a cardinal rule of construction that statutes dealing with a specific subject must be construed together in order to arrive at the object sought to be accomplished."

In *Alger v. Commonwealth*, 19 Va. App. 252, 256 (November 22, 1994)

Even if we accept some ambiguity having been left by the adoption in 1984 of statutes dealing with restitution, statutes addressing the same subject are to be read in *pari materia*. See *Lillard v. Fairfax County Airport Auth.*, 208 Va. 8, 12, 155 S.E.2d 338, 342 (1967). In *pari materia* is the rule of statutory construction that "statutes which relate to the same subject matter should be read, construed

and applied together so that the legislature's intention can be gathered from the whole of the enactments." Black's Law Dictionary 791 (6th ed. 1990).

Applying this principal to the statutory scheme set out above requires a finding that the legislature intended to protect all persons alleged to require psychiatric hospitalization with both procedural and substantive rights to insure that their liberty interests are fully protected. As outlined above these rights are set out in great detail in Chapter 2 of Title 37.1 of the Virginia Code: "Admissions and Dispositions in General." In contrast the powers of a court appointed guardian are expressed in only the most general terms which establish only "a fiduciary relationship" between the incapacitated person and the guardian. As quoted above "statutes which relate to the same subject matter should be read, construed and applied together so that the legislature's intention can be gathered from the whole of the enactments." *Id.* As general principle of statutory interpretation where the legislature has been specific as to a certain issue and only spoken generally in another section, the explicit language is said to govern. Applying this principle it is clear that the legislature has outlined specific procedures which govern involuntary hospitalization and they have neither expressly nor by implication empowered a court appointed guardian to bypass these procedures.

Basic rules of statutory construction also require that statutory interpretations be made consistent with the public policy articulated by the legislature in passing such laws. In the instant case the legislature has expressly limited the power of the state to hospitalize persons with mental illness and has established both procedural and substantive rules which must be followed prior to depriving a person with mental illness of his or her liberty. The legislature's intent to preempt any general rule which might have otherwise conferred authority upon the state to

commit the mentally ill is underscored by Section 37.1-134.21.1.2. As discussed above this statute expressly prohibits a Circuit Court Judge from authorizing admission of a “person [who] is either incapable of communicating such a decision due to physical or mental disorder” to a psychiatric hospital as defined in Section 37.1-1.<sup>1</sup> It would certainly be inconsistent with this prohibition to infer that the Circuit Court, though prohibited from committing a person could by confer upon the guardian a power which the court, itself, it is prohibited from exercising.<sup>2</sup>

The Virginia legislature has carefully circumscribed the powers of the state to compel the in-patient treatment of persons with mental illness. It would violate this clearly expressed public policy to infer that the “fiduciary relationship” established by the appointment of a guardian confers upon such guardian the power to bypass these statutory procedures and thereby deprive the individual of their fundamental right to liberty.

#### CONCLUSION

Neither this Court nor a court-appointed guardian may “authorize in-patient treatment to establish a medication and treatment plan for the Respondent. Wherefore, the Respondent respectfully requests that the Petitioner’s request for such relief be stricken as a matter of law.

IRENE WARD, by Counsel

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<sup>1</sup>Pursuant to Section 37.1-67.6 a Circuit Judge is empowered to hear *de novo* the appeals of persons who have been involuntarily committed. In so doing the Judge must apply the criteria set out in Section 37.1- 67.3.

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**REPLY BRIEF****I.****The Commitment Statute and the Guardianship Statute  
Employ Very different Grounds for Relief.**

The Petitioner argues in his Brief in Opposition that the grounds for an involuntary commitment under Code §37.-63 are the same grounds that if proven will result in the appointment of a guardian under Code §37.135.6 *et. seq.* This is inaccurate. Code §37.-63.I. <sup>37.1-67.3.I.</sup> permits the involuntary hospitalization of an individual who "... has been proven to be so seriously mentally ill as to be substantially unable to care for himself and (ii) that alternatives to involuntary confinement and treatment have been investigated and deemed unsuitable and there is no less restrictive alternative to institutional confinement and treatment..." Code §37.135.6 *et. seq.* <sup>37.1-67.3.I.</sup> permits the appointment of a guardian if an individual is found to be an "incapacitated person." An "incapacitated person" is defined as an "adult who has been found by a court to be incapable of receiving and evaluating information effectively or responding to people, events or environments to such an extent that the individual lacks the capacity to (i) **meet the essential requirement for his health, care, safety** or therapeutic needs without the assistance or protection of a guardian..." The inability to receive and evaluate information effectively in order to meet the essential requirement of health, care, safety is significantly different from the commitment standard cited above. Clearly these statutes require distinct findings of fact. <sup>37.1-134.C</sup>

That a more stringent standard is required to commit an individual than to appoint a guardian for a person is readily seen in the words that the legislature has adopted. The guardianship statute focuses on the inability of the individual to give informed consent rendering the individual unable to provide for their "essential requirement of health, care, safety." The criteria "so seriously mentally ill as to be substantially unable to care for himself" which is employed by the commitment statute focuses on behavior rather than mental capacity. More importantly, even where the "commitment" criteria is met the legislature does not permit involuntary confinement if a less restrictive alternative to such confinement exists. Clearly the Virginia Legislature has not adopted "the same grounds" for relief as argued by the petitioner.

## II.

### **Code Section 37.1-67.3 Does Not Exempt Persons Adjudicated "Incapacitated."**

Petitioner argues that "on its face it is apparent that provisions of Code §37.1-67.3 were not intended to apply to a person with a court appointed guardian." Again this assertion is incorrect. What is apparent is that in adopting §37.1-67.3 the legislature did not explicitly exempt "incapacitated persons" from its application nor its protections. Nor has the legislature implicitly done so. Code§37.1-67.3.B. requires the judge to offer to an individual before him the opportunity to volunteer if such individual "is then willing and capable of seeking voluntary admission..." If a person expresses a desire to be "voluntarily" committed a judge may not do so if the individual lacks the capacity to "volunteer". Once a finding of incapacity has been made the judge must hold the hearing in order to determine if the commitment standard has been met.

The statute does not confer upon a court appointed guardian the authority to “volunteer” an incapacitated person for confinement in a hospital as a result of mental illness.

**III.  
The Fiduciary Powers Granted a Guardian  
Do Not Encompass the Deprivation of Liberty.**

Petitioner argues that “once a guardian has been appointed for a person, his or her liberty has already been taken away” and there is no need for further court proceedings. This argument greatly distorts the nature of the guardianship proceedings. While protective in nature, the guardianship proceeding is essentially a process whereby the court empowers a “guardian” to give “substitute consent” for a person found incapable of doing so for themselves. While there is a “liberty interest” in retaining the right to make personal decisions (where to reside, whether to consent to surgery, whether to marry) these general liberty interests do not rise to the level of protection that society provides in matters of involuntary confinement as a result of mental illness.

We see this clearly in statutes pertaining to the involuntary commitment of minors. As with the incapacitated adult, a minor child is deemed to be unable to receive and evaluate information effectively. Unless otherwise proscribed by law, the parents or guardians of a minor child are authorized to provide “informed consent” in all matters to meet the essential requirement of the health, care and safety of the child. As with the commitment of adults, the Virginia legislature has seen fit to circumscribe the common law “fiduciary” role of the parent by prohibiting the involuntary commitment of a minor. The legislature has set out in Virginia Code § 16.1-335 *et. seq.* “Psychiatric Inpatient Treatment of Minors Act” detailed procedures which

govern the involuntary hospitalization of minors for psychiatric reasons. If the child is over the age of 14 and objects to psychiatric hospitalization the Virginia legislature has adopted a statutory scheme which closely parallels the adult commitment statutes. As with the “incapacitated adult” the authority of the guardian or parent to involuntarily commit a child to a psychiatric facility has been significantly limited by the Virginia legislature.

**IV.**  
**Code Sections 37.1-134.6 et. seq., do not**  
**set out all of the limitations on a Guardian**

Petitioner argues that the guardianship “statute very clearly states what limitations are on a guardian’s authority, that is, what decisions require prior court authorization ... [t]he statute places no limitation on the type of medical treatment a guardian may authorize for his ward.” However, the legislature did not intend that the guardianship statute be comprehensive in this regard. In addition to the commitment statutes which are at issue in the instant case, the Virginia legislature has carved out at least one other exception to the general fiduciary authority of the Guardian. In Code §54.1-2976 “*Sterilization operation for certain adults incapable of informed consent*” the legislature requires that judicial authorization be obtained in order to perform a non-therapeutic sterilization. As with the commitment statutes the legislature has created detailed procedures and substantive criteria which must be met prior to the authorization of the sterilization. Among other things, this statutory scheme requires that the person has been “legally adjudged to be incapacitated in accordance with ... §37.1-134.6 et. seq., and that certain standards have been met prior to authorizing the procedure. As with the commitment process the Virginia legislature has explicitly guaranteed that the “liberty interest” in procreation be

protected. No guardian may authorize the sterilization of a ward unless and until the statutory criteria has been met and a court order to that effect has been signed. As with the issue of commitment, the guardianship statute itself is silent on the matter of sterilization. However there is no doubt that the legislature has limited the guardian's fiduciary power.

#### CONCLUSION

Neither this Court nor a court-appointed guardian may "authorize in-patient treatment to establish a medication and treatment plan for the Respondent. Wherefore, the Respondent respectfully requests that the Petitioner's request for such relief be stricken as a matter of law.

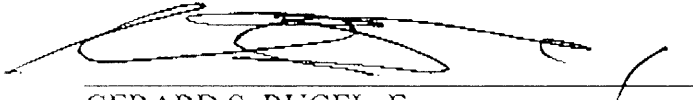
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed postage prepaid on March 5, 2005 to Joseph A. Barsanti, Esq., Guardian ad litem, 3900 University Drive, #320, Fairfax, VA 22030 and Jean Galloway Ball, Counsel for the Petitioner, 10306 Eaton Place, Suite 150, Fairfax, VA 22030.



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