69214-3

No. 69214-3-I
COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION ONE

In the Matter of the Estate of:

CALVIN H. EVANS, SR., Deceased

SHARON EVANS, VICKI SANSING, and KENNETH EVANS,

Respondents

v.

CALVIN H. EVANS, JR.

Appellant

REPLY BRIEF OF APPELLANT CALVIN H. EVANS, JR.

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I. INTRODUCTION

"The right of testamentary disposition of one's property as an incident of ownership, is by law made absolute. It is a valuable right, closely protected by statute and judicial opinion." *In re Kinssies' Estate,* 35 Wn.2d 723, 734, 214 P.2d 693 (1950). Recognizing this, the Legislature built six crucial safeguards into its extension of abuse of a vulnerable adult into the Slayer Statute: (1) the requirement of willfulness, RCW 11.84.160(1)(b); (2) the requirement that financial exploitation be "at the time" that the decedent was a vulnerable adult, *id.* §.160(1)(a); (3) the burden of showing "clear, cogent, and convincing evidence," *id.* §.160(1); (4) the provision permitting ratification by the elder of the use of his/her resources, *id.* §.170(1); (5) equitable moderation of the extreme penalty of total disinheritance, *id.* §.170(2); and (6) the special rule that "financial exploitation" be for "illegal or improper" profit of the exploiter, RCW 74.34.020(6). *Each and every one* of these safeguards are expressly set forth in statutory language, and are necessary to prevent the broad protections for abuse of vulnerable adults from undermining the right of testamentary disposition.

The implications of Respondents (hereafter "Eaden") arguments are staggering. If accepted by this Court, they would destabilize the testamentary plans of aging parents throughout the state, and demonize

adult children for stepping up to care for their parents and to preserve their property. Under Eaden's interpretation of the amended Slayer Statute, in which the six key safeguards against disinheritance are minimized, elders' consent counts for nothing, willfulness is reduced to the simple equation of "did Son/Daughter intentionally write that check?", "clear, cogent and convincing" proof is reduced to he said / she said, and thousands of acts of love and devotion throughout Washington would be slandered as "financial abuse," resulting in broad court power to rewrite wills to disinherit of the very children who stepped up when care was needed. To avoid this frightening scenario, it is incumbent on this Court to issue a decision that enforces the six safeguards set forth by the Legislature.[1]

II. REPLY ARGUMENT

A. There is No Clear, Cogent and Convincing Evidence that Cal JR Willfully Intended to Inflict Financial Injury on Cal SR

1. The "Willfulness" Requirement Means an Intentional Act with the Purpose of Harming the Elder

Eaden begins her assault on the safeguards built into the extended Slayer Statute by telling this Court what she thinks "willful action or

[1] Eaden accuses Cal JR of making arguments without citation to the record. *BR* at 13. Cal JR meticulously cited to the record for all the facts material to this appeal in his detailed Statement of the Case. *BA* at 4-30. When the same fact comes up again in argument, we did not always repeat the record citation, but there is no material fact that is not supported, and Eaden has not pointed to any. Eaden approved Cal JR's Statement of the Case by omitting one from her own brief, which is permitted only when "respondent is satisfied with the statement in the brief of appellant . . .." RAP 10.3(b).

willful inaction causing injury to the property of a vulnerable adult," RCW 11.84.160(1)(b), *does not mean,* but she never offers any workable definition of what it *does mean.* According to Washington Practice, in the section titled "Intentional torts – Act and intent requirements":

> Common to all intentional torts is the requirement that the defendant commit a voluntary act and that the harm suffered by the plaintiff be the result of the defendant's intentional conduct....
>
> The "intent" element requires proof that the defendant acted *with a purpose to achieve the result of his act, or that he believed that the consequences were substantially certain to result from it.* Intent is broader than a desire to bring about physical results. Rather, it is *an intent to bring about a result that will invade the interests of another in a way that the law will not sanction.*

16 D. DeWolf & K. Allen, *Washington Practice – Tort Law and Practice* §14.2 (Sept. 2014) (footnotes omitted; emphasis added).

The issue is not the criminal law concept of specific intent, but the meaning and proper application of the statutory language, "willful action or willful inaction causing injury to the property of a vulnerable adult . . .," in this civil-law context. RCW 11.84.160(1)(b). Under the law quoted above, the proper interpretation of the statute is that the adult child using the parent's resources must be shown by clear, cogent and convincing evidence to be intentionally using those resources for the purpose of achieving an unlawful result, such as failing to use the funds to care for the elder and his/her property. Thus, this statutory language charges the trial court with the obligation to find, with respect to any alleged instance

of financial abuse, that the adult child did not merely use his or her parent's assets, but that in the context of the care provided such use willfully caused injury. It is the willful causing of injury, not just the willful use of the elders' resources, that constitutes financial exploitation. The very definition of "abuser" in the context of financial exploitation makes this clear: "'Abuser' means any person who participates, either as a principal or an accessory before the fact, in **the willful and unlawful** financial exploitation of a vulnerable adult." RCW 11.84.010(1) (emphasis added). An adult child paying bills for a parent, or permissively using parental funds to maintain the parent's property, acts willfully in using those funds, but surely is not automatically made into an abuser and financial exploiter by doing so. It is only when the intention shifts from protective action to the causing injury, that the acts become "unlawful" and the extreme penal consequences of the Slayer Statute might apply.[2]

2. Application of Willfulness to Cal JR's Acts

The many actions that Cal JR took to maintain the Sultan horse farm and to keep it competitive, which were taken with the consent – and

[2] Eaden argues that the "willfulness" issue is waived as not presented below. *BR* at 3. It was presented when Mr. Swanson, in his trial brief, quoted RCW 11.84.160 to the trial court, CP 627, 637, 649, but even if it had not been, waiver does not apply here because willfulness is an essential element of *Eaden's burden on her claim that was pled by Eaden in her TEDRA Petition, and therefore raised.* CP 737 ¶4.3. The applicable rule, RAP 2.5(a), expressly permits a party to raise for the first time on appeal "failure to establish facts upon which relief can be granted ...." RAP 2.5(a)(2). Without proof of willfulness, relief cannot be granted under RCW 11.84.010(1) and 11.84.160(1)(b).

often with the shared excitement – of Cal SR, 9 VRP 1320/13-24; *BA* at 14-15, 17-19, 21-22, 23-26, 34-35, cannot come close to meeting the statutory standard of willful infliction of injury. Cal JR honestly believed that his father "wasn't incompetent ever." 8 RP 1227/6-9. The record supports the fact that Cal SR's cognitive functioning appeared good to an untrained observer, so that even if an expert could determine that he was a "vulnerable adult" prior to the formal imposition of guardianship in June 2008, a loyal son whose background was construction and farming could reasonably and honestly believe he was doing the right thing by relying on his father's consent and instructions as to use of his property, rather than relying on the views of outsiders that he should disregard his father's express wishes. For example, the GAL, who visited with Cal SR in January, February and April, 2006, stated in his report that, "Having visited with Calvin Evans, Sr. on three occasions, I am also impressed with the degree to which he can manage his own life." Ex. 6 p.18. Dr. Eisenhauer found that, given Cal SR's intact attention skills, he would, on the surface, look more functional than he was. CP 198 (FF #109). "[O]n subjects of greater interest to him, such as airplanes, ranches, and land values," Cal SR "spoke knowledgeably, articulately and cogently to Dr. Eisenhauer." CP 199 (FF #121). The doctor noted that "Mr. Evans was coherent and expressed himself in a linear manner. He used a good range

of vocabulary. He was able to process simple questions at a normal rate and could answer them without needing repetition of the question." 4 RP 447/21-25. Mr. Diesen, Cal SR's attorney of 35 years, testified that Cal SR was "always competent." 11 RP 1707/10-16, 1713/16-23, 1714/12-14.[3]

Applying the proper statutory standard of "willfulness" to this record, there is only one instance in which the trial court could arguably have found by clear, cogent and convincing evidence, that Cal JR may have intended injury: the social security checks. Even that is questionable, and requires remand on proper instructions. Cal JR did not go on a fancy vacation or purchase jewelry with these funds – he did what he always did, and put the money into the ranch by using it to purchase hay and alfalfa to feed the horses belonging to Cal Sr. and himself. 5 RP 666-68/10-15. That is not improper usage or harm; that is in accordance with the agreement made in 2005 for Cal JR to tend to the ranch, using Cal SR's funds. CP 189 (FF#31); CP 205 (FF#170); 7 RP 991-92/21-2; 8 RP 1068/1-6; 9 RP 1287/3-6, 1289-90/19-4, 1298/6-15. Furthermore, Social Security issued

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[3] Eaden contests our assignment of error to FF #120, BR at 9, which states that Cal SR "did continue to decline in functioning following his examinations by Dr. Eisenhauer." CP 199. The reason for this challenge is that the finding is not sufficiently specific, since Dr. Eisenhauer states that, "[s]ubsequent to stroke, an individual is apt to show improvement during the first six months post-stroke with some continuing improvement for the next six months." 14 RP 1973/17-20. Certainly Cal SR did decline *some time* "following his examinations," but the key issue here is when – in November 2006?, June 2008?, 2009?, 2010? This finding falls short of the requirement that "the court must find by clear, cogent, and convincing evidence that: (a) The decedent was a vulnerable adult **at the time** the alleged financial exploitation took place . . .." RCW 11.84.160(1)(a).

replacement checks to Cal SR, and Cal JR has already repaid Social Security, CP 207 (FF #192), so Cal Sr.'s estate is not out the money. Contrary to Eaden's argument, Cal SR was not deprived of needed funds at the time – he was living in a house in Kent with all his needs met by his guardianship estate, and when Cal JR asked SR if he wanted the checks, he said just hold on to them. CP 202 (FF #140); 5 RP 664-65/23-3.

This Court would do a grave injustice were it to affirm the decree of complete disinheritance on the basis of the social security checks alone, because the total value of those checks was $4,685, as compared to a disinheritance ordered here of approximately one million dollars ($1,000,000.00). CP 207 (FF #191); CP 208 (FF #194). If this one isolated incident is deemed sufficient to affirm a finding of financial abuse, then this case is a poster child for application of RCW 11.84.170(2), quoted at page 45 of our brief. At a minimum, remand should be made with instructions to apply RCW 11.84.170(2).[4]

[4] Eaden argues that ratification and lesser penalty under RCW 11.84.170 were not argued to the trial court, and are therefore waived. *BR* at 23-24. Even if this Court were to agree, ratification is not the same as contemporaneous consent, and there was plenty of evidence and argument about the latter. *E.g., BA* at 14-15, 17-19, 21-22, 23-26, 34-35; 13 VRP 1890, 1907-08 (closing arguments re: consent by Cal SR). But ratification and lesser penalty were argued by Cal JR's trial brief, where his attorney acknowledged that there is little case law on the newly-amended Slayer Statute, CP 636-37, but he laid before the trial court the applicable statutory provisions – ***including*** 11.84.170 (which contains the ratification and lesser penalty provisions), and stated that "RCW 11.84.170 discusses what property a court-determined abuser may get from the estate." CP 637, 649-50. This sufficiently submitted all statutory issues of this untested statute to the trial court for decision, including whether Cal JR could recover based on ratification under RCW

3. Cal JR's Contributions of Time and Money Negate any Alleged Willful Intent to Inflict Harm

The evidence that Cal JR put $174,000 of his own money, as well as unending hours of backbreaking labor, into Cal SR's ranch, must be considered as a crucial element of determining "clear, cogent, and convincing evidence" of willful intent to unlawfully invade Cal SR's rights. Yet the trial court erroneously brushed this evidence aside. The evidence includes the lengthy testimony detailed in the Brief of Appellant at pp.14-22, and pp.23-25, as well as the dissolution decree in which the court found that $174,000 in Cal JR's community funds were invested in the Sultan ranch. Ex. 98; *BA* at 13.

Eaden argues that "understandably" the trial court here refused to adopt the dissolution finding "to which petitioners [meaning respondents

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11.84.170(1), or based on a lesser penalty under RCW 11.84.170(2). This argument fell under the heading, "Was Cal SR [*sic.* – should be "JR"] an Abuser of Cal SR as Set Forth in RCW 11.84?", CP 636 – a question that could not be answered without determining ratification under RCW 11.84.170(1). In the alternative, if this Court believes that either of these RCW 11.84.170 issues were not sufficiently raised below, then nonetheless RAP 2.5(a) is phrased in terms of "*may* refuse to review," and therefore finding waiver is *discretionary. Obert v. Environmental Research and Development Corp.,* 112 Wn.2d 323, 333, 771 P.2d 340 (1989) ("The rule precluding consideration of issues not previously raised operates only at the discretion of this court."); *accord, e.g.,* 1 WSBA Appellate Practice Deskbook § 17.2(1) at 17-5 (3d ed. 2011) ("RAP 2.5(a) clearly allows the appellate court discretion to consider an issue that has been raised for the first time on review."). One recognized basis for exercising the discretion to hear an issue not raised below is *fundamental justice:* "Washington courts have allowed issues to be considered for the first time on appeal when fundamental justice so requires." *State v. Card,* 48 Wn. App. 781, 784, 741 P.2d 65 (1987); *accord, Greer v. Northwestern National Ins. Co.,* 36 Wn. App. 330, 338-39, 674 P.2d 1257 (1984). Here, fundamental justice requires that this new, untested statute not be applied to destroy Cal SR's testamentary plan and totally disinherit his favored son without considering and applying all its safeguards.

on appeal] were not a party." *BR* at 26. There is nothing self-evident about this. The dissolution decree was admitted ***without any objection.*** If Eaden thought it was not admissible evidence, she needed to object at that time, or her objection was waived. *State v. Frederick,* 45 Wn. App. 916, 922, 729 P.2d 56 (1986). Had she done so, Cal JR would have been put on notice that it was necessary to re-prove that which had already been proven in a different court. It is unfair to permit Eaden to lull Cal JR into a false sense that the issue has been proven without objection, and then to assert an objection on appeal when it is too late to fix the trial court record.

The fact that Eaden was not party to the dissolution only means that she cannot be bound as a matter of collateral estoppel or res judicata to the decree – it does not mean that the decree was not *valid evidence* of the amount expended. *Rains v. State,* 100 Wn.2d 660, 663, 665, 674 P.2d 165 (1983). In fact, the dissolution decree was *uncontested evidence* of the amount expended, and the trial court had no disputed evidence upon which to base its challenged finding of fact that there was no accounting of funds contributed. CP 208 (FF #199).

Even without regard to the exact amount expended, Eaden makes no effort to contest the detailed record of labor and funds Cal JR invested in Cal SR's property, *BA* at13-22, 23-24, and therefore on this record it is *undisputed that Cal JR expended substantial funds and labor to maintain*

Cal SR's property. The trial court completely failed to weigh this in determining the willfulness or lack of willfulness of the alleged financial abuse. The trial court committed fundamental prejudicial error by failing to weigh Cal JR's personal financial contributions to Cal SR's property when considering the question of willful financial abuse.

B. Cal SR's Apparent Abilities Show Prejudicial Error by Failing to Match Alleged Abuse with Cal SR's Condition "At the Time" of the Expenditures

The second key safeguard imposed by the Legislature on use of the Slayer Statute for elder abuse is the requirement that the alleged "financial exploitation" be "at the time" that the decedent was a vulnerable adult. RCW 11.84.160(1)(a). We have already demonstrated that most of the alleged acts of "abuse" occurred before there was "clear, cogent and convincing evidence" that Cal SR was a vulnerable adult. That is certainly true for the Cessna transactions in 2004, and for the substantial repairs and renovations on the ranch, completed in 2005.

Eaden essentially admits that the trial court failed to tie expenditures to actual proof of Cal SR's vulnerability, by falling back on the argument that this Court can affirm based solely on "facts that arose in and after 2006." *BR* at 1, 10. That's not accurate, because inclusion of all this essentially irrelevant evidence about expenditures in 2004 and 2005 has materially prejudiced Cal JR. As already detailed, the vast majority of

the dealings on which Eaden tried her case of financial abuse occurred in 2004 (Cessna) and 2005 (upgrades to the Sultan ranch). The case has an entirely different cast if it is confined to actions taken after the stroke of November 2006, or after entry of the guardianship order on June 25, 2008 (Exhibit 35). This Court should not affirm a case that bears little resemblance to the case tried before the trial judge.

1. The Alleged Guardianship "Stipulation" Is not Determinative of When SR became a Vulnerable Adult

Eaden asserts that "any argument over Mr. Evans' capacity was . . . rendered moot in May of 2006, when in response to Sharon Eaden's petition for guardianship, the parties stipulated to facts sufficient to establish a guardianship over both the person and estate of Mr. Evans." *BR* at 8-9. There are four fatal flaws to this argument: (1) the cited exhibit – Exhibit 82 – does not support it; (2) the alleged stipulation does not determine "willfulness" under the amended Slayer Statute; (3) at most, such a stipulation could be one piece of evidence of willfulness, but would not be binding; and (4) it is contrary to Eaden's own admissions.

First, exhibit 82 (order of 5/11/06 establishing the less restrictive alternative), on its face *does not recite any stipulation,* states that Cal SR's disturbed executive functioning is "alleged," *id.* ¶2.1, and *shows no indication that Cal JR was present or represented.* Ex. 82 (Appendix C).

Second, even if we assume such a stipulation was made it does not determine "willful" financial abuse because there is no evidence that it was made by Cal JR, that he understood it, that he was even aware of it, or that it would affect him in his real-world day-to-day dealings with his father. Cal SR was very angry about the guardianship, and, according to Cal JR's ex-wife Debbie, said "[t]hat he can take care of himself and his finances, and no one else should be telling him what to do." 8 VRP 1101/13-24. The testimony of the GAL was that he recommended a less restrictive alternative to guardianship, "[g]iven the fact that [Cal SR] had abilities. He was living in an upstairs flat . . . and getting help with his food and so forth." 2 VRP 34-35/22-12. In the first guardianship hearing, the court ordered a less restrictive alternative to the guardianship. CP 201 (FF #134). From the perspective of a layman, this means that Cal SR "won" the first round – no guardianship was imposed. Since Cal SR was adamant that he could manage his own affairs, it is unreasonable to expect his loyal son Cal JR to treat him like an invalid, and to stop honoring his requests. Stated differently, after the first guardianship hearing there is no clear, cogent and convincing evidence that Cal JR did not honestly believe he could take direction from his father regarding use of SR's funds. Under these circumstances, using SR's money to work on SR's property with SR's consent cannot amount to willful and unlawful financial abuse.

Third, if such a stipulation was ever made, it could not bind Cal JR in connection with the issue of financial exploitation – at most, it could be one piece of evidence on the issue. Cal JR was not a party to the guardianship, so he would not be bound by collateral estoppel or res judicata. *Rains v. State, supra,* 100 Wn.2d at 663, 665. Furthermore, neither doctrine applies because the subject-matter of the guardianship – Cal SR's competencies and need for protection – are different than the subject-matter of this action – Cal JR's alleged willful and unlawful exploitation of his father. *Id.* at 663-65.

Fourth, any stipulation that might have been made was very weak evidence at best, because it was not treated as binding by the parties to the guardianship. As admitted by Eaden in her trial brief filed in this matter:

> The Guardianship Petition *was contested by Senior* and ultimately came for *trial before Judge Farris on May 20, 2008*. The trial took several days, but *Judge Farris ultimately concluded that Senior was incapacitated* within the meaning of the statute and that the alternatives to a guardianship were not working and that a Guardian was necessary.

CP 678 (emphasis added). There would have been no need for a multiple day trial and contested determination by Judge Farris in May 2008 if this issue was already settled by stipulation.

The record supports Cal JR's arguments that there is no clear, cogent and convincing evidence that Cal SR was a "vulnerable adult" until the imposition of guardianship by the order of June 25, 2008. Ex. 35.

2. There is No Clear Cogent and Convincing Pre-2006 Evidence of Willful Elder Abuse

Eaden argues that Cal SR was a vulnerable adult in 2004 and 2005 because he had dental problems, some weight loss, and there was one incident where he could not find the starter on some heavy equipment. BR at 14. These few items in isolation cannot be separated from all the evidence quoted above tending to show that Cal SR was apparently in control of his faculties in 2005. Even Sharon Eaden herself admitted this, when she wrote in her diary for August 22, 2005, after spending the whole day with Cal SR going over his estate: "I felt that he was completely understanding everything we discussed. It was clear his health and mental endurance had improved." Ex. 51, p.9; 5 RP 586-87/17-8. Cal SR had his second stroke in March 2005, and not another stroke until November 2006. CP 190 (FF #35); 2 RP 60-61/15-2. Because "an individual is apt to show improvement" after stroke, 14 RP 1973/17-20, Eaden has failed to prove when Cal SR was vulnerable and when he was not.

Tooth loss at an advanced age can be caused by a wide range of factors, and in this case Sharon Eaden admitted that there was no evidence

that Cal SR's dental problems were the result of any lack of care by Cal JR. 3 VRP 369/9-13. The weight loss was secondary to the dental problems; there is plenty of evidence that Cal SR had food available and that Debbie served him meals every day. 5 VRP 581/11-16; 6 VRP 847/1-6; 8 VRP 1082-83/10-7; 8 VRP 1168/2-16. In the normal division of responsibilities that occur between adult children for their aging parents, Sharon took on primary responsibility for taking her father to the dentist, 2 VRP 157-58/22-2, although she conceded that Cal JR went along some of the time. 3 VRP 369/21-23, 380/7-8.

The "gentleman farmer" argument is a generality employed by Eaden to imply that Cal SR was dragged kicking and screaming into a vast ranch renovation to which he did not consent. Nothing could be further from the actual evidence. The actual evidence is that Cal SR was fully informed about the renovations in 2005, and agreed to them. 9 VRP 1320/13-24; *BA* at 14-15, 17-19, 21-22, 23-26, 34-35. Before Cal JR and his family moved in, Cal SR was alone on a huge and unwieldy horse farm that he no longer had the physical stamina to maintain. After Cal JR and his family moved in, Cal SR was fully engaged in family activities, and in the things he loved – construction and earth-moving, horses and cattle, heavy equipment and airplanes. Cal SR was fed home-cooked meals – the same meals the family ate – by Debbie Evans, and included in a wide

range of recreational activities. *See detail in §II(C) below.* Thanks to Cal JR, Cal SR achieved his goal of becoming a "gentleman farmer" because he got to enjoy the benefits of the ranch without being responsible for the crushing burden of the labor.

Eaden relies on the Cessna transaction for evidence of financial abuse in 2004. *BR* at 15-16. Sharon Eaden's husband David first testified in the rebuttal case that the Cessna engine worked perfectly and therefore the engine replacement was not necessary. 12 VRP 1735/6-17, 1740/14-20. This caught Cal JR by surprise, because he had testified that Mr. Eaden told him on a flight to Spokane that he felt an engine vibration, that Ben Tuttle of Tuttle Aviation confirmed it in tests, and that Cal SR decided to replace the engine after talking to Mr. Tuttle. 12 VRP 1824/15-24, 1827/12-15, 1830/16-19. Obviously the trial court believed Mr. Eaden over Cal JR. CP 188 (FF #17). But on reconsideration, Cal JR presented **objective documentary evidence** of an engine test on the Cessna showing that one cylinder's pressure was dangerously low. CP 283-84, 286; *BA* at 26.[5] Especially in light of the severity of the penalty of total

[5] Eaden asserts that Cal JR failed to show that the objective evidence confirming Cal JR's testimony that the Cessna engine was defective could have been timely discovered and produced at trial. *BR* at 28. That is not accurate. Dave Eaden first denied that he felt an engine vibration in rebuttal testimony on March 28, the very last day of evidence in a case that began March 14. *Compare,* 12 VRP *with* 2 VRP. In his Declaration in Support of Motion for Reconsideration, Cal JR swore to the following:

disinheritance, and the clear, cogent and convincing evidence standard, the trial court abused its discretion by not reconsidering that portion of its decision that appears to attribute financial exploitation to Cal SR's independent decision, based on objective evidence, to replace the defective engine on the aircraft he had just sold to his son Cal JR. This Court should not overlook the objective documentary evidence of an engine defect in deciding whether there is any clear, cogent and convincing evidence of financial exploitation in 2004.

C. Cal JR Carried Out His Agreement with Cal SR, and Cal SR Ratified that Agreement and the Ranch Improvements

1. Cal JR's Use of Cal SR's Resources was Part of the Agreement, not Financial Exploitation

The fourth safeguard built into the expanded Slayer Statute is the provision permitting ratification by the elder of the use of his/her resources, RCW 11.84.170(1), and the sixth is the special rule applicable to "financial exploitation" that it be for "illegal or improper" profit of the exploiter. RCW 74.34.020(6). Cal JR's use of Cal SR's resources was legal and proper under these provisions.

> Regarding newly-discovered evidence, at the time of the trial in this case, when I became aware of the lies by David Eaden regarding the airplane, I immediately attempted to contact Ben Tuttle, the man who had been involved with the airplane, and who has provided information and documentation for my motions. I was unable to locate Mr. Tuttle while trial was ongoing. I even had to hire someone to find him. I was finally able to make contact with Mr. Tuttle, but it wasn't until after the trial was completed.

CP 275-76 ¶¶2-3.

In shifting ground to argue its case based on expenditures after 2006, Eaden asserts that Cal JR "did not assign error to virtually any of the findings of fact regarding Cal, Jr.'s use of his father's money or resources," and that allegedly unchallenged findings "detail examples of the financial exploitation that occurred in and after 2006." *BR* at 10. The first flaw in this argument is that they don't.[6] The second flaw is that Cal JR was operating under an oral contract with Cal SR permitting these uses:

> Cal SR said that Cal JR and his family could take over the main part of the house and that he would move to the large apartment over the garage, that he had lots of money so they wouldn't have to worry about money again, that Cal JR would receive "a business income from the operation of the ranch, which was expected to be in excess of $3,000 a month," and that Cal JR would run the ranch and ultimately get the ranch.

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[6] (1) FF 153-154, 183 and 184 deal with rents collected by Cal JR at unspecified times, and FF 176 deals with ranch income and operating expenses, all of which fall under the oral agreement with his father to labor on the ranch in exchange for the income; (2) FF #159-161 concern alleged nonpayment of taxes and insurance, and Sharon's ejectment action against Cal JR, which was discontinued by Cal SR's death on April 5, 2011, all of which is now a matter between Cal JR and ranch title-holder Cal SR's Estate; (3) FF ##162-163 have nothing to do with use of Cal SR's resources; (4) FF #171 deals with Cal SR's 2006 purchase of a motorscooter for $6,300, which Karen Herring said Cal SR bought to impress his daughter Vicki and her husband, 6 VRP 843/1-3, which was totally Cal SR's idea, and for which Cal JR talked him down from a 900 Kawasaki to a smaller motorscooter with safety features, 7 VRP 1029-31/3-13; (5) FF 179 deals with sale of the Kenworth Dump Truck at some unspecified date for $8,000, and since Cal JR's investment in this truck was $6,500, 8 RP 1219-20/15-25, 1221/4-6, 1221-22/23-3, perhaps there was $1,500 due to Cal SR, but this is between the Estate and Cal JR; (6) FF ##185-188 deal with scrapping equipment littering the ranch that was all old, rusty, and non-functional, 10 RP 1429-33/7-17; and (7) FF #203, 205-207 are not unchallenged, *BA* at 3, and do not establish 2006 and later expenditures that were not otherwise briefed: (a) FF #203 simply has the wrong year for establishment of the guardianship (2007 instead of 2008), (b) FF #205 is a conclusion of law about exertion of undue influence at some unspecified time, which is too uncertain to support any finding under the Slayer Statute, RCW 11.84.160(1)(a); and (c) FF ##206-207 are conclusions of law pertaining to the $75,000 "loan" (Sonny Sachs contract) that was pre-2006, and the social security checks, discussed elsewhere.

CP 189 (FF#31); CP 205 (FF#170); 7 RP 991-92/21-2; 8 RP 1068/1-6; 9 RP 1287/3-6, 1289-90/19-4, 1298/6-15.

BA at 11-12.

Eaden repeatedly asserts that there was "no evidence" of a promise by Cal SR to provide funds for ranch maintenance, BR at 1-2, 18-19, and that use of his funds was not unauthorized. That misrepresents the record:

Mr. Swanson: What specifically did [Cal SR] say in his conversations with you about your coming over to live on the Sultan property?
Cal JR: He said that Debbie and I could move onto the property. We could have the house. He would take over the apartment above the garage. *He said that he had plenty of money. I didn't have to worry about money again.*

7 VRP 991-92/21-1 (emphasis added); *accord,* 9 VRP 1289-90/25-2 ("[Cal SR] wanted us to move in. He wanted us to take care of him. He said I wouldn't have to worry about money once I got there."). Undisputed evidence shows an oral contract that includes an expected *minimum* income of $3,000 per month, and the statement that Cal SR "had lots of money so they wouldn't have to worry about money again," which a reasonable person would understand to mean that Cal SR would fund most of the ranch expenses. CP 189 (FF#31); CP 205 (FF#170); 7 RP 991-92/21-2; 8 RP 1068/1-6; 9 RP 1287/3-6, 1289-90/19-4, 1298/6-15; *see,* BA at 10-12. Cal SR repeatedly ratified this agreement by consenting to expenditures on the ranch. *BA* at 14, 15, 17, 18, 19, 21, 23-24, 24-25, 34-35. Cal SR also ratified this agreement in March 2006, by fulfilling his

promise to make a will leaving the ranch to Cal JR. RCW 11.84.170(1). Unchallenged findings and conclusions demonstrate that the will ratifying their agreement was the product of a competent testator, and was not the product of undue influence. CP 196 (FF#97), CP 209 (CL ##2, 3).

Cal JR is not ashamed of or trying to hide his use of a small portion of Cal SR's resources to maintain the ranch they both loved. *It was done with consent, pursuant to a lawful agreement, for the protection of Cal SR's property, and was not financial abuse as a matter of law.* [7]

2. The Record Shows that Cal JR Properly Cared for Both the Ranch and Cal SR

Respondent argues that Cal SR's "care" didn't require the expenditures made on the ranch. *BR* at 18. This misunderstands the scope of the agreement between Cal SR and Cal JR, and the nature of ranching. The deal was not only to care for Cal SR, but also to care for the ranch itself – a huge property that needed endless hours of labor to maintain.

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[7] Eaden argues that the contractual benefit argument was made for the first time on appeal, and is waived. *BR* at 18. That is not accurate. In closing argument, Cal JR's trial counsel argued that Cal JR was doing nothing wrong because of the agreement with Cal SR that even Sharon Eaden admitted existed, and that Cal JR was not legally entitled to the ranch and therefore he was not the one who was legally profiting from the work. 13 VRP 1904/17-25, 1919-20/12-2. That sufficiently raises the contractual benefit argument. Cal JR raised it again on reconsideration, arguing over and over that Cal JR was not legally entitled to the ranch, so various improvements benefited the legal owner, Cal SR. CP 143 re: FF#173, CP 144 re: FF#178, CP 276¶4, CP 278-79 ¶6. Although not necessary here in light of the closing argument, the law is that issues may be preserved for appeal based on arguments made in reconsideration. *Newcomer v. Masini,* 45 Wn. App. 284, 287, 724 P.2d 1122 (1986).

E.g., 7 VRP 988/1-2 ("[Cal SR] invited me to come over. He wanted me to move onto the horse ranch and take over."); 9 VRP 1298/6-11 (Cal JR discussed with Cal SR "income that he offered me, shutting down my business, me solely running the ranch."). Cal JR running the ranch was squarely within the scope of the father/son agreement. Sharon admitted that of all the family members, only Cal JR was working on the ranch. 3 VRP 339/10-12. The reality is that a ranch like this falls quickly into ruin if not regularly maintained. The value of Cal SR's property was preserved by Cal JR, and Cal JR alone, and without his efforts Cal SR would have had no "farm" over which to play the role of "gentleman farmer".

Respondent argues that Cal JR and his family did not properly care for Cal SR. *BR* at 21-22. That is false. The trial court found that Cal SR wanted to move to the apartment over the garage. CP 189 (FF #31). The GAL testified that Cal SR liked this set up, liked being on the ranch, and that he (the GAL) saw no indication that Cal SR was not being housed in a suitable environment, or that he was deprived in any way. 2 VRP 50/2-22. The GAL questioned Karen Herring, Cal SR's friend and housekeeper since 1984, 6 VRP 827/18-22, to ask if she saw any indications of neglect or abandonment of Cal SR, and she said "no." 2 VRP 53/4-18. John Jardine, a professional fiduciary, confirmed that during his involvement from the summer of 2008 until the time that Cal SR was removed from the

ranch by Sharon Eaden, Cal JR's wife Debbie was providing Cal SR with meals and coordinating his medical appointments. 5 VRP 581/11-16. Karen Herring testified that Cal SR was routinized as to his eating:

> Sandwiches for lunch. He always had cornflakes in the morning, a peanut butter and jelly sandwich for lunch. A pizza or frozen dinner for dinner. As long as I have known the man, that is what he ate.

6 VRP 847/1-6. Debbie Evans testified that for dinner, Cal SR would eat what Debbie made for the family – meatloaf, potatoes, vegetables, family meals; that Cal SR was always invited to eat with the family but he often declined because he liked watching the History Channel, so she would bring his meals up to him. 8 VRP 1082-83/10-7. Cal JR testified that his father mostly ate what they ate, but he liked his TV dinners and it took a while to get him used to eating home cooked meals. 8 VRP 1168/2-16.

Eaden also overlooks the crucial dimension of emotional support. Before Cal JR and his family moved in, Cal SR was a lonely man. After they moved in, he was part of a vibrant farm family. The record is replete with evidence of barbeques, horse events, 4-wheeler rides, cow competitions, bonfires, and other farm activities, that included Cal SR with the rest of the family. 8 VRP 1080/2-20; 10 VRP 1364/5-13; 9 VRP 1255-56/19-3, 1265/20-24. As testified to by a neighbor, Dallas Larsen:

Mr. Swanson: Besides barbeques, any other things you were seeing going on?

Dallas Larsen: Yeah. We did a lot of fencing over there, putting up corrals and outdoor arena and just kind of became a neighbor project. Everybody would come over and do a little bit of work and we'd have barbeques afterwards. Cal [SR] would be joining us there along with Junior.
Q: Was Calvin, Sr. doing any of the work or was he –
A: No. He would more or less mill around and talk to everybody and having a good time with everybody.

9 VRP 1255-56/19-3.

Q: [F]rom the point of time that Calvin, Jr. and his family came to the ranch, . . . do you recall Calvin, Sr. ever making any comments, good or bad, about his life on the ranch?
A: I just took it for granted that everything was great. *He was always smiling.* . . .
Q: Besides smiling, anything else that you saw that led you to believe that everything was okay?
A: Yeah, interaction. It was just like one big family.
Q: Did you see interaction between Senior and Calvin, Jr.?
A: Yeah, they were talking just like everybody else at barbeques.
Q: How about Debbie Evans and Senior?
A: She was very caring.

9 VRP 1262/3-23. Cal SR's involvement in family and ranch activities was confirmed by another neighbor, Geraldine Rohlman, who testified that Cal SR loved the ranch and loved watching the horses, and that he was "very happy" there. 9 VRP 1275/17-22; 1277/14-17. Ms. Rohlman described the interactions she witnessed between Cal SR and Cal JR:

> Father and son, talking, laughing. Cal, Jr. would get things for his dad at the get-togethers. He was attentive. Just regular family stuff.

9 VRP 1277/18-25. Ms. Rohlman also confirmed that, "Debbie was very attentive to Cal, Sr., taking care of him, making sure he had what he

needed, talking, laughing, again, family-types of stuff." 9 VRP 1278/8-10. In addition, Cal JR's move meant that Cal SR got to spend time with his grandchildren quite often. 9 VRP 1278/11-19. Because Cal JR sold his home and business in Idaho to answer his father's call for help, Cal SR got to truly enjoy his last years at the ranch and, as the trial court found, he wanted to stay there as long as possible. CP 204 (FF #164).

That was not in the cards, in part due to Sharon Eaden's controlling nature. 4 VRP 483-84 (providing "talking points" to Cal SR for guardian interview, and snooping just around the corner). Eaden suggests that Cal JR did not fulfill his bargain because Cal SR died in Sharon Eaden's home in 2011, not at the ranch, *BR* at 22 – but the real reason is because **Sharon removed Cal SR from the ranch.** Sharon moved Cal SR to Kent in April 2008, she briefly returned him to Sultan because she got too sick to care for him, but she removed for the last time from the Sultan ranch in June 2009, after which he lived either with in-home care in Kent under the supervision of Sharon and Vicki, or later, with Sharon in Lynden. 3 VRP 274/7-10, 276/17-19, 279/7-9; 7 VRP 994/6-8; CP 202 (FF #140); CP 204 (FF #163). Cal JR called the then-guardian, Bruce Keithly, in September 2009, to try to get Cal SR back to the ranch, 4 VRP 479/12 & 480/15-19, so it was not Cal JR's choice to fail to continue to provide care to his father; that was up to the guardian.

Obviously, when Sharon became guardian in April 2010, there was no chance she would permit Cal SR to return to Sultan, and he never did again after June 2009, even for a visit. CP 203 (FF #156); 7 VRP 994/6-8.

III. CONCLUSION

Had the trial court properly applied the six statutory safeguards for extension of elder abuse into the Slayer Statute, it would never have destroyed Cal SR's testamentary plan by disinheriting the favored son who answered the call to care for Cal SR and his beloved horse ranch. For all the foregoing reasons and the reasons stated in the Brief of Appellant, the judgment should be REVERSED outright; the designation of Cal JR as a financial exploiter VACATED; or alternatively the case should be remanded with instructions for more detailed findings and such further proceedings as are necessary; and costs and attorney fees on appeal should be awarded to Cal JR.

DATED this 10th day of March, 2015.

Michael T. Schein, WSBA #21646

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Appendix C

CL11477358

SUPERIOR COURT OF WASHINGTON COUNTY OF SNOHOMISH

In Re the Guardianship of: CALVIN H. EVANS, SR. An Incapacitated Person	CASE NO. 05-4-01558-1 ORDER APPROVING LESS RESTRICTIVE ALTERNATIVE TO GUARDIANSHIP

THIS MATTER came on regularly for hearing on a Petition for Appointment of Guardian for CALVIN H. EVANS, SR., the Alleged Incapacitated Person.

The Alleged Incapacitated Person was present in Court;

The Guardian ad Litem was present. The following other persons were also present at the hearing: CHARLES F. DIESEN, attorney for the AIP; and THOMAS L. COOPER, attorney for the Petitioner

The Court considered the written report of the Guardian ad Litem and the Medical/ Psychiatric Report of Dr. Renee Eisenhauer, the testimony of witnesses, remarks of counsel, and the Documents filed herein. Based on the above, the Court makes the following:

I.

FINDINGS OF FACT

1.1 Notices:

All notices required by law have been given and proof of service as required by statute is on file. Notice, if required, was provided to the Regional Administrator of DSHS pursuant to RCW 11.92.150, but DSHS neither

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appeared at this hearing nor responded to the Petition.

1.2 Jurisdiction:

The jurisdictional facts set forth in the petition are true and correct, and the Court has jurisdiction over the person and/or estate of the Alleged Incapacitated Person.

1.3 Guardian ad Litem:

The Guardian ad Litem appointed by the Court has filed a report with the Court. The report is complete and complies with all requirements of RCW 11.88.090.

1.4 Alternative Arrangements Made By The Alleged Incapacitated Person:

Prior to the guardianship petition being filed, the AIP has executed Powers of Attorneys naming as co-attorneys-in-fact his daughter, SHARON EADEN and his son, CALVIN H. EVANS, JR., to take effect upon proof of his incapacity. The AIP has since revoked those powers of attorney. Other than that, no other alternative arrangements had been made prior to the filing of the petition for guardianship.

1.5 Medical Report:

The medical report dated February 11, 2006 by Dr. Renee Eisenhauer and her addendum thereto dated February 27, 2006, indicate that there were serious issues regarding the AIP's executive functioning, his vulnerability to undue influence, and his own personal decision making including health care decisions. The petition for guardianship was filed in good faith.

1.6 Capacity:

Evidence suggests that Calvin H. Evans Sr. has cognitive deficits which are subtle and exist amid many intact cognitive abilities. The most significant cognitive deficits are in the area of executive functioning, which involves the ability to think abstractly and to plan, initiate, sequence, monitor and stop complex behavior. Mr. Evans, Sr. needs to have information presented simply and concretely. If presented conceptually, abstractly or with much detail, he will have difficulty grasping it.

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He has difficulty with initiation of tasks and is apt to leave crucial tasks undone.

Due to his problems with cognitive functioning, Mr. Evan's Sr. needs assistance with his finances. Because of his diminished recall, his inability to process complex information, his lack of critical thinking and poor judgment, Mr. Evans Sr. would not be able to understand the fine details of financial agreements nor would he be able to exercise fully informed decisions. His cognitive limitations are such that he could be misled by others who provide him with a skewed simplistic picture. He is vulnerable to undue influence. He needs assistance from an informed neutral party who does not have a stake in his assets.

Mr. Evans is 73 years old. As an independent business man, he accumulated significant assets which require some degree of sophistication to manage. As a result of a medical condition known as polycythemia, Mr. Evans has suffered minor strokes from which he has partially recovered. Despite the effects of the strokes, Mr. Evans is able to read, cook and attend to his own personal hygiene needs.

Mr. Evans has four adult children, all of whom are Washington residents. Conflicts have developed between the children concerning the management of their father's affairs and his health condition. The AIP has indicated a desire to reside on the acreage purchased in Sultan, Washington.

Beginning in the early 1970's, Mr. Evans has employed his attorney Charles F. Diesen. Throughout these proceedings, Mr. Evans has express a desire that Mr. Diesen be his advisor and act as a buffer when conflict arise between the AIP and his children. The children accept attorney Diesen as one who has their father's best interest in mind.

At the present time Mr. Evans Sr. has the capacity to execute less restrictive alternatives to either a limited guardianship or full guardianship. He could execute a revocable living trust into which his financial assets could be placed. He could serve as a trustee along with a non-family member Co-Trustee, a

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person who did not have a stake in his assets. He could also execute a Power of Attorney for health care.

These arrangements should be reviewed in one year by the Court. The Guardian ad Litem appointed in this case should not be discharged and should file a report with the Court evaluating for the Court how the less restrictive alternatives are working and whether or not they should be revoked in favor of either a limited guardianship or a full guardianship.

1.7 Guardian ad Litem Fees and Costs:

The Guardian ad Litem was appointed at estate expense and shall submit a motion for payment of fees and costs pursuant to the local rules.

The Guardian ad Litem has requested a fee of $ 10,393.50 for services rendered and reimbursement of $ 907.51 for costs incurred while acting as Guardian ad Litem. Fees in the amount of $ 10,393.50 and costs in the amount of $ 907.51 are reasonable and should be paid as follows: BY MR CALVIN EVANS SR OR THE TRUSTEES WITHIN TWO WEEKS OF THIS ORDER.

1.8 Petitioner's Costs and Fees:

The Petitioner's actions in bringing the petition for guardianship were made in good faith and she has incurred costs of $ 283.91 and attorneys fees of $ 4,788 and said fees and costs shall be paid as follows: BY MR EVANS SR INDIVIDUALLY OR BY THE TRUSTEES WITHIN TWO WEEKS OF THE DATE OF THIS ORDER

II. CONCLUSIONS OF LAW

2.1 Because of ~~his~~ alleged significant disturbance in executive functioning and because he is vulnerable to undue influence, Calvin Evans Sr. is at significant risk of financial harm within the meaning of RCW 11.88.010(1)(b). Because his cognitive deficits are subtle and exist amid many intact cognitive abilities, Calvin Evans Sr. has the capacity to execute a revocable living trust into which he would transfer his assets where he could serve as a Trustee with another neutral individual, a non-family member, who would serve as a Co-Trustee. As a safeguard, this trust arrangement should be reviewed in one year to

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determine if it is adequately protecting Calvin Evans Sr. from financial exploitation.

III.

ORDER

It is hereby ordered:

3.1 Trust:

At the recommendation of the Guardian ad Litem, less restrictive alternatives to a guardianship shall be put in place for one year subject to Court review. The revocable living trust presented to the Court at the hearing on this guardianship petition is hereby approved by the Court and may be executed by Calvin Evans Sr. Calvin Evans Sr. shall transfer his assets into a living trust within two weeks of the date of this Court Order. This revocable living trust shall be reviewed in one year by the Court to determine if it should remain in effect or if it should be revoked and replaced by either a limited or full guardianship of the estate.

The Court also approves the medical Power of Attorney dated MARCH 7, 2006 and executed by Calvin Evans Sr. as a less restrictive alternative to either a limited guardianship or full guardianship of the person. This medical Power of Attorney shall also be reviewed in one year by the Court to determine if it should remain in effect or if it should be replaced by either a limited guardianship of the person or full guardianship of the person.

The petition for guardianship shall not be dismissed at this time. The Court shall retain jurisdiction for approximately one year until the review hearing has been held.

The Guardian ad Litem shall not be discharged. He shall prepare a report in approximately one year and evaluate for the Court how the revocable living trust and the medical Power of Attorney are working and whether or not they should be continued as less restrictive alternatives or whether they should be replaced by either a limited guardianship or full guardianship.

3.2 Guardian ad Litem Fees and Costs:

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The fees and costs of the guardian ad Litem are reasonable in the total amount of $ 11,301.01 and shall be paid by MR CALVIN EVANS SR INDIVIDUALLY OR BY THE TRUSTEES WITHIN TWO WEEKS OF THE DATE OF THIS ORDER

3.3 **Legal Fees:** The legal fees and costs of the petitioner in the total amount of $ 5,071.91 are reasonable and shall be paid ~~from~~ BY MR. CALVIN EVANS SR INDIVIDUALLY OR BY THE TRUSTEES WITHIN TWO WEEKS OF THE DATE OF THIS ORDER

3.4 **~~Other:~~**

DATED AND SIGNED IN OPEN COURT this 11 day of May, 2006.

Ronald A Enlow
~~Judge~~/Court Commissioner Pro Tem

Presented by:

NEWTON KIGHT, L.L.P.

By _____
THOMAS L. COOPER, WSBA #8336
Attorneys for Petitioner

Copy received and approved by:

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CERTIFICATE OF SERVICE

I, Michael T. Schein, Attorney for Appellant, hereby certify that on the date set forth below I caused a copy of the within REPLY BRIEF OF APPELLANT to be sent by U.S. Mail, first class postage prepaid, and by email, to counsel of record for Respondents and the Estate and to all interested parties at the following addresses:

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DATED this 10th day of March, 2015.

Michael T. Schein, WSBA 21646