Washington State Supreme Court No. 99707-1
Division III Court of Appeals No. 374963

THE SUPREME COURT
OF THE STATE OF WASHINGTON

In Re:

MARY CHINEYE EZENWA,
Petitioner,

v.

ALAN PHILIP CARLIN,
Vulnerable Adult.

ANSWER OF RESPONDENT

DIANNA J. EVANS,
WSBA #45702
Attorney for Respondent
Law Office of Richard Perednia, Inc.
28 W. Indiana Ave., Suite E
Spokane, WA 99205
(509) 624-1369

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. ISSUES PRESENTED FOR REVIEW

A. Should the Supreme Court of the State of Washington grant discretionary review?

B. Did the trial court err in entering a VAPO pursuant to RCW 74.34?

1. **Is preponderance of the evidence the correct standard of proof when a vulnerable adult has not objected to a VAPO?**

2. **Did the trial court make findings of fact and conclusions of law based on substantial evidence that Mr. Carlin was a vulnerable adult pursuant to RCW 74.34?**

3. **Did the trial court make findings of fact and conclusions of law based on substantial evidence that Ms. Ezenwa isolated, emotionally abused, and personally and financially exploited Mr. Carlin?**

4. **Should the Court apply De Novo Review?**

C. Was the Appellate Court's opinion fairly and impartially decided on the merits of the case?

D. Was the Appellant afforded due process of law?

1. **Was the Appellant afforded the opportunity to call witnesses at hearing and should Appellant be allowed to re-litigate the matter through further witness testimony?**

E. Is the Respondent entitled to reasonable attorney's fees and costs on Appeal?

I. STATEMENT OF THE CASE

This case involves the entry of a Vulnerable Adult Protection Order in Spokane County, Washington, against Appellant Mary C. Ezenwa prohibiting her from contact with Alan Carlin. Peter Carlin is the son of Alan Carlin and was the petitioner in the Vulnerable Adult Protection Action. CP 5-40. A Permanent Order of Protection was ultimately granted by the court and remains in place today. CP 173-176; RP 26-33. Ms. Ezenwa appealed to the Court of Appeals, Division III, which affirmed the ruling of the trial court and deemed her appeal frivolous. She now seeks discretionary review.

II. LAW AND ARGUMENT

A. The Supreme Court of the State of Washington should not grant discretionary review.

"A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or United States is involved; or (4) If the petition involves an

issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b).

Here, Appellant does not provide or argue any basis for why this case is appropriate for Supreme Court review pursuant to RAP 13.4(b). Therefore, this case should be declined for discretionary review.

B. The trial court did not err in entering a VAPO pursuant to RCW 74.34.

Appellant argues the court erred in entering the VAPO due to insufficiency of the evidence.

Washington State Legislature enacted RCW 74.34 to address the abuse, neglect, financial exploitation, and abandonment of vulnerable adults "by a family member, care providers, or other person who have a relationship with the vulnerable adult." RCW 74.34.005(1). As part of its findings, the legislature recognized that "[a] vulnerable adult may have health problems that place him or her in a dependent position." RCW 74.34.005(4).

Here, Alan Carlin is exactly the person the legislature was intending to protect. *See* RP 26-33. After a substantial review of the evidence, the trial court found, and the appellate court properly affirmed, that there was not only a sufficient evidentiary basis, but a substantial one,

that a VAPO was necessary to protect Alan Carlin from Ms. Ezenwa. *See* Court of Appeals, Division III Opinion 20-21 and RP 26-33.

1. Preponderance of the evidence is the appropriate standard of proof when a vulnerable adult has not objected to a VAPO.

Unless the vulnerable adult objects to the petition for a protection order, the standard of proof is a preponderance of the evidence. *See Goldsmith v. Dep't of Soc. & Health Servs.,* 169 Wn. App. 573, 584, 280 P.3d 1173 (2012) (cases brought under RCW 74.34 are proved by preponderance of evidence); *Kraft v. Dep't of Soc. & Health Servs.,* 145 Wn. App. 708, 716, 187 P.3d 798 (2008) (standard of proof involving abuse of vulnerable adult under RCW 74.34 is preponderance of the evidence); *cf. In re the Matter of Knight,* 178 Wn. App. 929, 937, 317 P.3d 1068 (standard of proof is clear, cogent, and convincing evidence where petition is contested by the alleged vulnerable adult). Appellate review is limited to determining whether the trial court's findings are supported by substantial evidence and, if so, whether the findings in turn support the conclusions of law. *Goodman v. Darden, Doman & Stafford Assocs.,* 100 Wn.2d 476, 670 P.2d 648 (1983); *Willener v. Sweeting*, 107 Wn.2d 388, 393, 730 P.2d 45, 49 (1986).

Here, Alan Carlin had notice of the petition, hearing, and his rights as an alleged vulnerable adult. CP 5-40, 42-45, 50-53. In response to this notice, he filed two declarations expressing his support of the petition and desire to have a vulnerable adult protection order issued against Ms. Ezenwa. CP 176-77, 79-82. There was no evidence or testimony offered by Ms. Ezenwa to contradict this point during the hearing. CP 1-176; RP 6-33. Therefore, the proper standard in this case is preponderance of the evidence.

2. The trial court properly made findings and conclusions based on substantial evidence that Mr. Carlin was a vulnerable adult pursuant to RCW 74.34.

The legislature has defined a vulnerable adult as a person "who is sixty years of age or older who has the functional, mental, or physical inability to care for himself." RCW 74.34.020(22)(a).

The trial court found that Alan Carlin is a vulnerable adult. RP 26-33. The appellate court affirmed. *See* Court of Appeals, Division III Opinion 20-21. The Appellant does not offer any argument or point to any specific evidence in the record to contract this fact.

Here, the Spokane County Superior Court commissioner examined the evidence and concluded Mr. Carlin was a vulnerable adult. RP 28. The evidence consisted of the petition and statements therein, declarations of

medical providers and family members, as well as the police reports. RP 26-33. The court determined Mr. Carlin was eighty-two years of age and reviewed declarations from medical professionals (Dr. Jenkins, Mr. Carlin's primary care doctor, and Dr. Hillis, Mr. Carlin's neurologist), as well as from family members on the record. RP 28, 33. The declaration of Dr. Argyle Hillis, Mr. Carlin's neurologist, explained Mr. Carlin's diagnosis of CAA and the deficits it causes in his frontal lobe which put him at risk for exploitation. RP 28. The court also reviewed the declaration from Mr. Carlin's daughter, Danielle Roselin, who described in detail the condition in which she found her father when she met him in Cheney, Washington. RP 28. Therefore, the court properly weighed and considered all of the evidence and properly found Mr. Carlin was a vulnerable adult.

3. The trial court properly made findings and conclusions based on substantial evidence that Mr. Carlin was the victim of isolation, emotional abuse, and personal and financial exploitation pursuant to RCW 74.34.

The Vulnerable Adult Protection Act provides that courts may step in to protect vulnerable adults from situations of alleged abandonment, abuse, financial exploitation, or neglect. RCW 74.34.005. In these cases, the court may order relief as it deems necessary for the protection of the vulnerable adult. RCW 74.34.130. In seeking such relief, a petition must

be brought before the court, be accompanied by a declaration, signed under penalty of perjury, and must state the specific facts or circumstances which demonstrate the need for the relief sought. RCW 74.34.110(2).

In order to satisfy the tenets of RCW 74.34.110, the petitioner must demonstrate that the vulnerable adult has been in fact abandoned, abused, neglected, or financially exploited. *Id.* Here, the petitioner Peter Carlin alleged, and the court found after extensive review of the evidence, that Ms. Ezenwa isolated, emotionally abused, and personally and financially exploited Alan Carlin. RP 26-33. Appellant offers no evidence or argument to refute this fact. *See* Respondent's Response to Petition filed in the Court of Appeals Division III. Therefore, Appellant's request for discretionary review on these grounds shroud be denied.

4. **The appropriate standard of review is whether the trial court's decision is manifestly unreasonable or exercised on untenable grounds, or for untenable reasons.**

The acts and proceedings of superior court commissioners are, in the usual course, subject to revision by the superior court. RCW 2.24.050. Such revision may be made on the records of the case, the findings of fact, and conclusions of law by the court. *Id.* If a demand for revision is not filed "within ten days from entry of the order or judgment of the court commissioner, the orders and judgments ... become the orders and

judgments of the superior court, and appellate review thereof may be sought in the same fashion as review of like orders and judgements entered by the judge." *Id.*

The Court reviews the "superior court's decision to grant or deny a protection order to determine if the superior court's decision is manifestly unreasonable or exercised on untenable grounds, or for untenable reasons." *Knight*, 178 Wn. App. at 936, 317 P.3d 1068 (2014) (citing *Hecker v. Cortinas,* 110 Wn. App. 865, 869, 43 P.3d 50 (2002)). The Court reviews the superior court's findings of fact for substantial evidence. *Id. at* 937 (citing *Scott v. Trans-Sys., Inc.,* 148 Wn.2d 701, 707-08, 64 P.3d 1 (2003)). The Court defers "to the trier of fact on the persuasiveness of the evidence, witness credibility, and conflicting testimony." *Id.* (citing *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003); *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 108, 864 P.2d 937 (1994) (quoting *State v. O'Connell,* 83 Wn.2d 797, 839, 523 P.2d 872 (1974))). The Court reviews questions of law de novo. *Id.* (citing *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003)).

Here, the trial court considered the extensive record and evidence submitted by the parties. RP 26-33. It made substantial findings and considered the argument of counsel. *See* Court of Appeals, Division III

Opinion 20-21. In light of the facts, the trial court specifically found that Alan Carlin was a vulnerable adult and was a subject of Ms. Ezenwa's abuse. *See* Court of Appeals, Division III Opinion 22-23 and RP 26-33. Moreover, the Appellant argues that the court's decision was unreasonable or made on untenable grounds, however, Appellant does not offer any supporting legal basis to back this assertion. Therefore, Appellant's request for discretionary review should be denied.

C. The Appellate Court's opinion was fairly and impartially decided on the merits of the case.

A fair tribunal is a basic requirement of due process. *State v. Moreno,* 147 Wn.2d 500, 507, 58 P.3d 265 (2002) (citing *Tumey v. Ohio,* 273 U.S. 510, 532, 47 S. Ct. 437 (1927)). However, evidence of a judges's actual or potential bias must be shown before an appearance of fairness claim will succeed." *State v. Chamberlin,* 161 Wn.2d 30, 37, 162 P.3d 389 (2007); *State v. Post,* 118 Wn.2d 619, 826, 826 P.2d 172 (1992). "An assertion of an unconstitutional risk of bias must overcome a presumption of honesty and integrity accruing to judges." *Chamberlin,* 161 Wn.2d at 38, 162 P.3d 389; S*ee Withrow v. Larkin,* 421 U.S. 35, 47, 95 S. Ct. 1456 (1975) (presumption judges perform functions regularly and properly without bias or prejudice).

Here, there exists the presumption the Appellate Court rendered its opinion in the regular course and without bias or prejudice. Appellant argues that the Appellate Court's opinion was "dishonest," "maliciously maligned," "biased," and made with "prejudice," however offers no specific facts or supporting evidence to support this position. Therefore, Appellant's request for discretionary review on these grounds should be denied.

D. The Appellant was afforded due process of law and a fair hearing because she had proper notice of the hearing, was represented by counsel, had the opportunity to call witnesses, and was before a neutral tribunal.

Appellant argues her due process rights were violated. However, Appellant provides no facts to support this position.

The due process clause of the Fourteenth Amendment provides that no state may "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. "The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Matthews v. Eldridge,* 427 U.S. 319, 333, 96 S. Ct. 893 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187 (1965)). Due process is a flexible concept where varying situations can demand different levels of procedural protection. *Id.*

at 334, 96 S.Ct. 893. In evaluating the process due in a particular circumstance, the Court must generally consider "(1) the private interest involved, (2) the risk that the procedures will erroneously deprive the party of that interest, and (3) the government interest involved." *State v. Karas,* 108 Wn. App. 692, 699, 32 P.3d 1016 (2001) (citing *Matthews*, 424 U.S. at 335, 96 S. Ct. 893; *Spence v. Kaminski*, 103 Wn. App. 325, 335, 12 P.3d 1030 (2000)). A protection order may implicate several private interests, including exclusion from a dwelling, a particular location, or contact with a specific person. *Id.*; *see also Gourley v. Gourley,* 158 Wn.2d 460, 468, 145 P.3d 1185 (2006).

The due process requirements of being heard at a meaningful time and in a meaningful manner before a neutral magistrate are protected by the procedures outlined in RCW 74.34. The Vulnerable Adult Protection Act provides the following procedural protections: (1) a petition to the court, accompanied by an affidavit setting forth the facts under oath; (2) notice to the respondent within six days of the hearing; (3) a hearing before a judicial officer where the petitioner and respondent may testify; (4) a written order; (5) the opportunity to move for revision in superior court; (6) the opportunity to appeal; and (7) a five-year limitation on the the protection order. *See* RCW 74.34.110(1)-(3), .120(1)-(3), .130(1)-(7),

.135(1)-(4); RCW 2.24.050; *Gourley,* 158 Wn.2d at 460, 145 P.3d 1185; *Karas,* 108 Wn. App. at 700, 32 P.3d 1016; *Spence,* 103 Wn. App. at 334, 12 P.3d 1030.

Here, the above procedures were followed. RP 17-26. Moreover, Ms. Ezenwa was continuously represented by counsel at the trial court level. CP 75, 546. In this matter, Peter Carlin filed a petition with Spokane County Superior Court. CP 5-40. Notice was given to Ms. Ezenwa of the hearing the same day the petition was filed, which was fourteen days prior to the first scheduled hearing. CP 5-40, 42-45, 46-49, 50-53. The first hearing was conducted before a neutral court commissioner who continued the matter to afford more time for Ms. Ezenwa to prepare her case. CP 78. The second hearing was also conducted before a neutral court commissioner who issued a written order of protection, to which Ms. Ezenwa signed and of which she received a copy. CP 173-176. Ms. Ezenwa had the opportunity to seek revision but did not. CP 268-272. Ms. Ezenwa exercised her right to appeal. CP 280-446. Lastly, the order is only effective for a period of five years from its date of issuance. CP 173-176. Therefore, Ms. Ezenwa was afforded full due process of law.

1. **The Appellant had an opportunity to call witnesses and provide expert testimony at the hearing and should not be permitted to re-litigate the matter.**

"RAP 9.11 restricts appellate consideration of additional evidence on review." *Spokane Research & Defense Fund v. City of Spokane,* 155 Wn.2d 89, 98, 117 P.3d 1117 (2005) (citing *King County v. Cent Puget Sound Growth Mgmt. Hr'gs Bd,* 142 Wn.2d 543, 549, n.6, 14 P.3d 133 (2000)); RAP 9.11. RAP 9.11(a) allows for introduction of additional evidence on review if:

> (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through post judgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

RAP 9.11(a). RAP 9.11 allows supplementation of the record "only in extraordinary cases." *E Fork Hills Rural Ass'n v. Clark County*, 92 Wn. App. 838, 845, 965 P.2d 650 (1998). Each of the six requirements listed in RAP 9.11(a) must be satisfied. *Schreiner v City of Spokane*, 74 Wn. App. 617, 620-21, 874 P.2d 883 (1994).

Here, the Appellant argues that she was denied due process as she was not permitted to testify or call her two additional expert witnesses to

testify. CP 280-446, 447-530, 532-540, 541. However, at the evidentiary hearing, Ms. Ezenwa chose not to testify. RP 6-33. Additionally, Ms. Ezenwa did not attempt to call any lay or expert witnesses to testify in her case-in-chief; nor did she file or provide any expert witness materials, opinion, or evidence. CP 1-176; RP 6-33. Moreover, there is no evidence indicating that any witness was under a subpoena on her behalf. CP 1-176; RP 6-33. The nature of the testimony that she now claims she would have provided is unknown. CP 1-176. Further, it is doubtful the testimony of these purported expert witnesses would have changed the decision of the trial court, as those physicians most familiar with Mr. Carlin, his primary care provider and neurologist in Virginia, provided declarations that were considered by the court. CP 54-56, 61-62. The Appellant's due process rights were not violated and she should not be permitted to call additional witnesses to testify.

E. The Respondent is entitled to reasonable costs and attorney's fees due to the frivolous nature of this appeal.

RAP 18.9(a) provides, in part:

> [t]he appellate court … on motion of a party may order a party … who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has

> been harmed by the delay or the failure to comply or to pay sanctions to the court.

RAP 18.9(a). "The compensatory damages may include payment of the moving party's attorney fees." *Schreiner,* 74 Wn. App. at 625, 874 P.2d 883 (citing *Boyles v. Dept. of Retirement Sys.,* 105 Wn.2d 499, 506, 716 P.2d 869 (1986)). An appeal is frivolous for the purposes of RAP 18.9 "if, considering the record and resolving all doubts in favor of the appellant, the court is convinced the appeal presents no debatable issues on which reasonable minds could differ and it is so devoid of merit there is no possibility of reversal." *Id.* (citing *Boyles,* 105 Wn.2d at 506-07, 716 P.2d 869; *Ramirez v. Diamond,* 70 Wn.App. 729, 734, 855 P.2d 338 (1993)). "An appeal is not frivolous, however, if the appellant can cite a case supporting its position." *Id.* (citing *Van Dinter v. Kennewick,* 64 Wn. App. 930, 937, 827 P.2d 329 (1992), aff'd, 121 Wn.2d 38, 846 P.2d 522 (1993)). Lastly, Courts hold pro se litigants to the same standard as attorneys. *In re Marriage of Olson*, 69 Wn.App. 621,626, 850 P.2d 527 (1993).

Based on the unsubstantiated arguments of Appellant and the failure to provide any supporting evidence for her contentions, this appeal continues to be entirely frivolous and devoid of merit. The Appellant

be sanctioned again and ordered to pay the Respondent's additional costs and attorney's fees.

III. CONCLUSION

The trial court properly granted Respondent's petition for a VAPO on behalf of Mr. Alan Carlin and the Court of Appeals Division III properly reviewed the matter and terminated review. The issues raised by Appellant herein are additional attempts to review the same issues and none of her contentions are supported by the record or the law. This Court should deny review and impose additional costs and attorney's fees.

RESPECTFULLY SUBMITTED this 8th day of June 2021.

DIANNA J. EVANS
Attorney for Respondent Peter Carlin

DIANNA J. EVANS, WSBA #45702
Law Office of Richard Perednia PS, Inc.
28 W. Indiana Ave., Suite E
Spokane, WA 99205
(509) 509-624-1369

CERTIFICATE OF SERVICE

I, DIANNA J. EVANS, hereby certify that I served Mary C. Ezenwa, appellant pro se, via USPS regular mail, at the address indicated below, a true and correct copy of this Answer to Petition for Discretionary Review by the Supreme Court of the State of Washington, on file herein:

Mary C. Ezenwa
711 Commerce Way #13
Libby, MT 59923

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 8th day of June 2021, at Spokane, Washington.

DIANNA J. EVANS, WSBA #45702

LAW OFFICE OF RICHARD W. PEREDNIA

June 08, 2021 - 8:31 AM

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Appellate Court Case Title:	Peter Carlin v. Mary C. Ezenwa
Superior Court Case Number:	20-2-00391-8

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