NO. 995672

SUPREME COURT OF THE STATE OF WASHINGTON

JEROME GREEN,

Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent.

ANSWER TO PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

DAWN VIDONI
Assistant Attorney General
WSBA #36753
1116 W. Riverside Avenue, Suite 100
Spokane, WA 99201
509 456-3123
OID # OC638509
DawnT.Vidoni@atg.wa.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

I. INTRODUCTION

As Mary Green neared a century of life, the level of care necessary to maintain her life became increasingly important. She required a highly specialized diet and was at frequent risk of choking and aspirating. Her son, Jerome Green, lived with her but ignored her health and dietary needs.

The State has an interest in protecting vulnerable adults such as Ms. Green. In February 2019, the trial court granted a vulnerable adult protection order ("VAPO") on behalf of Ms. Green against Mr. Green. The order required Mr. Green to leave the residence they shared until he could demonstrate that he understood her considerable dietary restrictions. He was permitted to visit Ms. Green, but could not stay in the home overnight, could not be present unless other adults were in the home, and could not provide food or liquids to Ms. Green.

The restrictions outlined in the VAPO were well within the authority of the court. Mr. Green did not lose his interest in the property simply because he was temporarily prohibited from residing there nor did the State use the property for itself or for public benefit.

This Court should deny review because the decision of the Court of Appeals is not in conflict with a decision of the Supreme Court nor another published decision of the Court of Appeals. The petition does not raise significant questions of constitutional law and no questions of substantial

public interest are raised. The Court of Appeals did not commit error under RAP 13.4(b) and review is therefore not warranted. Additionally, this Court should dismiss Mr. Green's petition, as this matter is now moot. In September 2020, Ms. Green passed away.[1] Accordingly, the VAPO is no longer effective and Mr. Green is no longer restrained.

II. COUNTER STATEMENT OF THE ISSUE

Whether the court acted within its authority to temporarily prohibit Mr. Green, through imposition of a vulnerable adult protective order (VAPO), from residing at the shared residence of the victim after the victim was properly served with the VAPO and raised no objection.

III. COUNTER STATEMENT OF THE FACTS

In January 2019, the Department of Social and Health Services ("DSHS"), filed a petition for a Vulnerable Adult Protection Order ("VAPO") to protect Mary Green. CP 1-28. The petition was based, in part, on a report by Ms. Green's physician that Ms. Green suffered from senile dementia resulting in poor insight and decision-making capabilities. CP 39-58. Her physician also stated that Ms. Green had a narrowed esophagus, causing Ms. Green to have difficulty swallowing and frequently choke when eating or drinking. CP 5. In September 2018, Ms. Green aspirated twice and was taken

[1] Her death occurred after the trial court proceedings closed; a separate motion to supplement the record with the notice of death has been filed.

to the emergency room on both occasions. CP 5. On one of those occasions, Ms. Green turned blue and required life-saving intervention. CP 5. After this incident, Ms. Green's doctors placed her on a strict, limited diet of only soft foods, avoiding items like nuts, berries, and grapes. CP 5. Her food needed to be cut into small pieces, and she could only drink thickened liquids to reduce her risk of aspiration and choking. CP 5.

Because of her medical conditions, Ms. Green required supervision twenty-four hours per day, seven days per week. RP 35-36. When Ms. Green ate, she had to do so in an upright position and chew each bite of food several times before swallowing. RP 35-36. Observers were required to monitor her for thirty minutes after she ate, with no talking or distractions, to ensure she did not choke. RP 35-36. In addition, she received speech therapy, occupational therapy, and perineal care services. RP 35.

At the time DSHS filed the petition, Ms. Green lived with Jerome Green, her son. CP 5. Despite Ms. Green's dietary requirements, Mr. Green gave her food such as grapes, shredded wheat cereal, and other foods that explicitly contradicted medical direction. CP 5. Mr. Green knew that Ms. Green required extensive in-home care and supervision, but frequently left her alone without arranging for an alternate caregiver to sit with her. CP 5. Mr. Green reported that he took her to medical appointments and "was with her when her health care providers examined her and explained her medical needs

and treatment." CP 161. He also stated that his mother is "blind and unable to read written instructions." CP 161.

Over the course of three months in early 2019, a number of hearings took place regarding the VAPO petition, including a full evidentiary hearing with testimony by Mr. Green and the DSHS investigator on February 22, 2019. *See* CP 1-28, 62-64, 107-23, 141-42, 182-92, 193-96. After the evidentiary hearing, the court issued a VAPO, restricting Mr. Green from spending the night at Ms. Green's residence, or providing any food or liquids to her. The court also revoked any powers of attorney Mr. Green held on behalf of his mother and ordered a guardianship petition be filed. CP 63. The court gave Mr. Green the opportunity for the VAPO to be reviewed if he could provide evidence he understood Ms. Green's medical and dietary needs. CP 62-64.

The Department moved for modification of the VAPO due to allegations that Mr. Green was frequently in the home without anyone present and often agitated his mother so that she refused to eat and accept care. CP 107-123. On April 11, 2019, the commissioner imposed additional temporary restrictions on Mr. Green's contact with Ms. Green and freedom to be in her home because the existing provisions of the order were not sufficiently protecting Ms. Green. CP 141. This order included a hearing

date of May 1, 2019, to fully address the Department's motion to modify the VAPO. CP 141.

In a letter dated April 30, 2019, the commissioner advised the parties that the return of service on the VAPO indicated Ms. Green was given the notice of hearing and temporary order of protection, but not the petition for VAPO or the notice to vulnerable adult as required by RCW 74.34.120. CP 171. The commissioner reissued the April 11, 2019 VAPO, set a new hearing for May 13, 2019, and directed the Department to serve Ms. Green with the missing documents and file a declaration of service before the new hearing. CP 171. Ms. Green was subsequently served with the petition for VAPO and the Notice to Vulnerable Adult on May 2, 2019, and a Declaration of Service for the same was filed four days afterwards. CP 178.

In its May 13, 2019 ruling, the commissioner advised that she had reviewed the record from the entire February 22, 2019, hearing. RP 14. The record showed that on February 22, 2019, the Department investigator testified that when she spoke to Ms. Green, Ms. Green appeared very confused. RP 15. The investigator explained the VAPO petition to Ms. Green six times to help her understand what it meant, but the investigator did not believe she was able to understand. RP 15. The court also referred to a report from Dr. Gleason. RP 15. Dr. Gleason wrote that Ms. Green "has poor insight and decision making capabilities due to dementia." RP 15. At

the conclusion of the hearing, the commissioner maintained the February 22, 2019 VAPO provisions that Mr. Green could visit the home, but could not provide food or liquids to his mother, or remain overnight, and added that Mr. Green was limited to visiting two hours each day, could not discuss legal matters with Ms. Green, could not take photos or video of her, and had to spend time with her, rather than going to other areas of the home. CP 62-64, CP 195-96. If Mr. Green could provide evidence that he understood the food and drink restrictions of Ms. Green, he was provided with a means of vacating the restrictions. CP 195-96.

Mr. Green appealed the court's ruling. The Court of Appeals, Division III, affirmed the decision of the trial court *in In the Matter of the Vulnerable Adult Petition for: Mary J. Green* No. 36856-4 (February 9, 2021). Mr. Green now petitions the Supreme Court for further review.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

Mr. Green has not met the criteria necessary for this Court to grant discretionary review. A petition for review will only be accepted by the Supreme Court

> (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 the 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). Mr. Green argues only the last two criteria, RAP 13.4(b)(3) and (4).[2] Br. of Appellant at 15-18; neither of these are met. In addition, because Ms. Green has passed away, Mr. Green's argument is moot.

A. This Case is Moot and Does Not Present Issues of Continuing and Substantial Public Interest.

Mary Green passed away in September 2020. The VAPO no longer prohibits Mr. Green from returning to the residence because Ms. Green is not there and the protection order no longer has any effect. There is no further relief this court can provide to him.

Appellate courts "do not typically review a case that is moot." *In re Welfare of B.D.F.*, 126 Wn. App. 562, 569, 109 P.3d 464 (2005). "Where only moot questions or abstract propositions are involved, . . . the appeal . . . should be dismissed." *Sorenson v. Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972). However, an appellate court may review a moot case if it presents issues of continuing and substantial public interest. *Marriage of Horner*, 151

[2] Although unclear, Mr. Green's argument regarding "bootstrapping" could be an attempt to show a conflict with other Washington cases, but the cases cited do not show a conflict because they concern jurisdiction over foreign defendants (*Ace Novelty Co. v. M.W. Kasch Co.*, 82 Wn.2d. 145, 508 P.2d. 1365 (1973) and statute of limitations (*Curtin v City of East Wenatchee,* 12 Wn.App.2d. 218, 457, P.3d. 470 (2020). See Br. of Appellant at 13.

Wn.2d 884, 891, 93 P.3d 124 (2004). To determine whether a matter of continuing and substantial public interest is involved, the court considers "whether the issues presented are public or private in nature, the desirability of an authoritative determination to provide guidance to public officers, and the likelihood that the issues will recur." *In re B.D.F.*, 126 Wn. App. at 569. The court may also "consider the likelihood that the issue will escape review because the facts of the controversy are short lived." *Id.* The above considerations should be rigorously examined and applied "to ensure that an actual benefit to the public interest in reviewing a moot case outweighs the harm from an essentially advisory opinion." *Hart v. Dep't of Soc. & Health Servs.*, 111 Wn.2d 445, 450, 759 P.2d 1206 (1988).

Whether an appeal is private in nature or a public dispute is a highly fact specific inquiry. In *In re Marriage of Horner*, this Court reviewed a moot relocation order because a question of statutory interpretation existed, the result of which could provide additional guidance to lower courts, and the issue was likely to reoccur given the frequency of divorce proceedings. *Marriage of Horner*, 151 Wn.2d 884, 892-893, 93.P.3d 124 (2004). Similarly, review was granted where the Department challenged the court's authority to order the specific placement of a child pursuant to a voluntary placement agreement. *In re Placement of R.J.*, 102 Wn. App. 128, 132, 5 P.3d 1284

(2000). Clarifying the powers and authority of the court was determined to be in the public interest. *Id.*

When the appellate courts granted review in the aforementioned cases, they did so to provide clarity or to interpret the requirements of a statute for the first time. That is not necessary here. The facts of Mr. Green's case are specific to him and do not raise public issues. Protection orders regularly require perpetrators to leave residences they share with their victims; to order otherwise would up-end the entire statutory scheme enacted to prevent domestic abuse. The law is already clear that removals from shared residences are permitted and no further guidance is necessary. When considering the relevant factors, a decision in this appeal would provide little guidance to public officers that does not already exist.

In addition, review of this case is not necessary because it is unlikely that the issue will evade review. Protection orders occur with some frequency, but there are multiple points of review. Petitions for restraining orders must be accompanied by affidavits signed under oath setting forth the actions warranting the relief requested. *See* Chapters 74.34, 26.50 RCW. Prior to issuing a protection order, an evidentiary hearing must be held. RCW 74.34.120, 26.50.050. Protection orders may be modified or vacated. RCW 74.34.163, 26.50.130. Additionally, protection orders are subject to review by appellate courts. There is little likelihood that this protection

order, or others like it, will evade review. Mr. Green's removal from his home does not warrant review. His removal from the home was temporary and Mr. Green had only to speak to any of the numerous medical providers caring for Ms. Green to learn the provisions of her care and return to the home. Now that Ms. Green has passed away, the protection order has no effect. This Court cannot provide relief to Mr. Green.

B. The Court Acted Within Its Authority When it Temporarily Prohibited Mr. Green from Residing at the Shared Residence of the Victim after Ms. Green was Properly Served with the VAPO and Raised No Objection

Mr. Green fails to show a question of law under the constitution meriting this Court's review because the trial court applied settled principles of law in issuing its order to protect a vulnerable adult.

RCW 74.34.110 allows petitions for protection of vulnerable adults to be filed when accompanied by an affidavit made under oath. RCW 74.34.110. A temporary order of protection may be granted until a hearing on the petition takes place. RCW 74.34.120(5). Regardless, whether a temporary order of protection is granted, the court must order a hearing on the petition no later than fourteen days from the date of filing the petition. RCW 74.34.120(1). RCW 74.34.120(3) states that when a petition under RCW 74.34.100 is filed by someone other than the vulnerable adult, notice of the petition and hearing must be personally served upon the vulnerable

adult not less than six court days before the hearing. RCW 74.34.120(3). If timely service cannot be made, "the court shall continue the hearing date until the substitute service approved by the court has been satisfied." RCW 74.34.120(4).

When law enforcement initially served Ms. Green, the officer only noted that he or she gave Ms. Green the Temporary Order for Protection and Notice of Hearing. CP 34-35. But, Ms. Green was subsequently served with the petition for VAPO, Notice to Vulnerable Adult, and notice setting a May 13, 2019 hearing on May 2, 2019. Even if Ms. Green did not receive all of the documents required by RCW 74.34.120 prior to the original hearing, the error was remedied because she received all of the documents within six days of the new hearing. Ms. Green did not object to entry of the VAPO. CP 193-194.

Mr. Green argues that the court lacked subject matter jurisdiction because of the initial defect in service of process on Ms. Green. Assuming for the sake of argument that Mr. Green may raise lack of service on a different party on appeal, there is no reason to address the argument that the court lacked jurisdiction as result. If the vulnerable adult is not the petitioner, and "[i]f timely service cannot be made" on the vulnerable adult, then "the court shall continue the hearing date until the substitute service approved by the court has been satisfied." RCW 74.34.120(4). Had the

legislature intended a service defect to warrant dismissal of a VAPO petition with prejudice, rather than require a continuance of the hearing until timely service was achieved, the legislature would have said so. *See State v. Keller*, 143 Wn.2d 267, 277-79, 19 P.3d 1030 (2001) (recognizing we should assume the legislature knows what it means and means what it says). Thus, continuing the hearing here was not only the appropriate remedy, it was necessary. Any service defects were timely corrected by continuing the hearing and re-serving Ms. Green. The statute was strictly complied with and the court did not lose jurisdiction. Thus, the remedy for imperfect service is continuation of the VAPO hearing, not dismissal of the petition.

C. A No Contact Order Was Necessary to Protect the Victim from Mr. Green and is Authorized by 74.34 RCW

The trial court acted within its discretion authorized by RCW 74.34.130 when it limited Mr. Green's contact with Ms. Green. The Abuse of Vulnerable Adults Act explicitly authorizes the superior court to order relief as it deems necessary for the protection of the vulnerable adult. RCW 74.34.130. The commissioner properly exercised her broad powers to grant relief as necessary to protect Ms. Green from abuse, neglect, financial exploitation and abandonment. *See Calhoun v. State,* 146 Wn. App. 877, 889, 193 P.3d 188 (2008).

RCW 74.34.145(2) states that when an order of protection is issued that prohibits the respondent from having contact with the vulnerable adult, excludes him or her from a specified location, or prohibits the person from coming within a specified distance of a location, a violation of the provision shall be punishable under RCW 26.50.110 "regardless of whether the person is a family or *household* member..." RCW 74.34.145(2) (emphasis added).

Here, Mr. Green demonstrated no understanding of the seriousness of Ms. Green's condition and actively ignored medical professionals and others to educate him on how to care for her without putting her at risk of substantial harm. CP 84; RP 48. RCW 74.34 contemplates that although a protection order may not expressly require a respondent move out of his house, it may effectively require him to do so if the respondent is prohibited from having contact with a person living in the house. *See In re Knight*, 178 Wn. App. 929, 940, 317 P.3d 1068 (2014) (son was effectively evicted from his separate residence on 26-acre estate because the protection order prohibited him from coming within 1,000 feet of the victim's residence which was also on the estate property). The superior court is not required to consider the impact on the respondent; instead, the superior court's consideration is properly focused on the protection and well-being of the vulnerable adult: "The stated purpose of the [Act] is to protect vulnerable

adults from abuse, financial exploitation, and neglect." *Endicott v. Saul,* 142 Wn. App. 899, 919, 176 P.3d 560 (2008) (citing RCW 74.34.110)).

Whether Mr. Green has an ownership interest in his mother's residence is irrelevant for enforcing the protection order. The court, within its discretion under RCW 74.34.130, restricted Mr. Green's contact with Ms. Green, and placed limits on the time he spent in her home and his conduct while there. RP 49, 51-53. The court provided Mr. Green with the means of obtaining expanded and less restricted contact with his mother and even contemplated that he would be able to return to the home. CP 85; RP 51-53. Knowing that a guardianship petition would soon be filed, the court authorized the GAL to proffer recommendations as to Mr. Green's involvement with Ms. Green. CP 88. The only caveat for expanded contact was that Mr. Green avail himself of information readily available to him from his mother's medical providers. RP 52. The court expressly rejected Mr. Green's protests that he did not have the financial ability to take specific classes or learn advanced caretaking skills. RP 51. Mr. Green needed only to demonstrate knowledge of his mother's condition and insight into the extreme risk to her if he did not strictly comply with the doctor's orders. CP 89-90; RP 49, 52. There was no expectation that Mr. Green perform the care, only that he not put Ms. Green at risk by giving her foods and liquids that she could not safely consume, like he had done several times in the past.

Mr. Green was ordered to vacate his residence temporarily and given direction on what he needed to do to return. CP 85-86, 89; RP 49-50, 51-53. The court properly found that Ms. Green was at imminent risk if Mr. Green remained in her home because Mr. Green admitted that he continued to provide food and liquids to her that her narrowed esophagus did not allow her to tolerate. CP 84. Other than being unable to reside in the home until he demonstrates an understanding of Ms. Green's needs, Mr. Green's property interest remains unaltered. Prior to the modification order, the limitations on Mr. Green's actions were minimal – he could not remain in the house overnight, nor provide food or liquid to Ms. Green, and another person needed to be present when he was in the home - but according to family members and police reports, he was not complying with the original orders. CP 107-23. In the two months between the original VAPO hearing and the modification hearing, Mr. Green did not take any steps to further his knowledge about his mother's condition or needs. RP 52. He did not attend medical appointments, did not contact her doctor, and did not follow up with the hospital. RP 48-52. Instead, by all reports, when Mr. Green "visited" his mother, he largely ignored her. RP 48. He was often found in a different section of the house attending to his own hygiene needs and did not even let other family members know he was present until one of them inadvertently stumbled upon him. RP 47-48. When he did talk to

his mother, he discussed legal matters and caused her to become agitated to the point that she refused to eat or allow others to care for her. RP 25. Because Mr. Green did not educate himself on Ms. Green's care, he continued to pose a danger to her and the restrictions imposed by the VAPO remained necessary.

D. A Protection Order That Temporarily Limits the Perpetrator from a Shared Residence Does not Effect a Takings

Mr. Green's claim that the VAPO effected a takings does not present a constitutional claim meriting this Court's review because the Court of Appeals properly concluded that there was no takings. The takings clause of the Fifth Amendment provides, "Nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. This concept is reflected in state law as well, "No private property shall be taken or damaged for public or private use without just compensation having been first made." Wash. Const. art. I, § 16. Neither constitutional claim applies to the facts of Mr. Green's case. In order to constitute a per se taking, the government must physically deprive the owner of economically viable use of the land. *U.S. v. General Motors Corp.*, 323 U.S. 373, 381, 65 S. Ct. 357 (1945).

There was no per se taking here because any impact on the property interest was temporary and limited, which does not amount to a taking. Mr.

Green provides no authority that excluding a person from their residence through a protection order constitutes a taking, and DSHS is aware of none. Indeed, such a rule would invalidate numerous laws established for the protection of vulnerable adults (RCW 74.34); domestic violence victims (RCW 26.50); and sexual assault victims (RCW 7.90, 7.92), not to mention no-contact orders protecting victims in criminal cases and restraining orders issued in family law cases.

And Mr. Green has not even established that he had a present possessory interest in the property. Although Mr. Green may have had an interest through the quit claim deed (if it was valid), Ms. Green retained a life estate in the property. Accordingly, Mr. Green did not have any current possessory interest and only future financial interest in the residence. *See* 17 Wash. Practice, Real Estate §1.4 (2d ed.) (updated May 20) (owner of life estate has exclusive right of possession during measuring life, with some limitations not applicable here); *In re Estate of Campbell*, 87 Wn. App. 506, 511, 942 P.2d 1008 (1997) ("The principle is well settled that a life tenant who is the holder of a present estate for life in real property is entitled to the possession and use of the property . . . .") (quoting 51 Am. Jur. 2d, *Life Tenants and Remaindermen*, §32, at 256 (1970)).

Furthermore, at no point was Mr. Green's temporary removal from the home used for any public use, nor was he prohibited from exercising a

private interest in the land since he did not currently have one. Mr. Green argues that the providers caring for Ms. Green in her home constituted a physical taking by the State. Br. of Appellant at 16. However, the providers were not DSHS employees, they were contracted providers available through Ms. Green's government benefits to assist her. They were essentially Ms. Green's providers, and were not engaging in "public use" of the residence. Mr. Green's interest in the home remains unchanged whether or not he physically resides on the property. There was no unconstitutional taking.

V. CONCLUSION

This Court should deny Mr. Green's petition for review. The Court of Appeals correctly affirmed the trial court's protection order when it found that the commissioner acted within the discretion authorized by RCW 74.34.130. Additionally, Mr. Green's appeal is moot and the law on these issues is clear. No further effective relief can be granted to Mr. Green.

RESPECTFULLY SUBMITTED this 8th day of April, 2021.

ROBERT W. FERGUSON
Attorney General

DAWN VIDONI
Assistant Attorney General, WSBA #36753
1116 W. Riverside Avenue, Suite 100
Spokane, WA 99201
(509) 456-3123

CERTIFICATE OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

ROBERT CRITCHLOW ATTORNEY AT LAW 208 E ROCKWELL AVENUE SPOKANE, WA 99207-1651	☒ US Mail ☐ Legal Messenger ☐ Hand delivered by_____ ☐ E-mail: _____

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

DATED this 9th day of April, 2021 at Spokane, Washington.

Haylie Barner

Legal Assistant

SPOKANE DIVISION - SHS / AGO

April 09, 2021 - 11:41 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	99567-2
Appellate Court Case Title:	In re: Mary J. Green v. Jerome Keith Green
Superior Court Case Number:	19-2-00542-9

The following documents have been uploaded:

- 995672_Answer_Reply_20210409112832SC590230_5788.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was 2021_04_09_DeptFinalizedBrief.pdf
- 995672_Motion_20210409112832SC590230_5991.pdf
  This File Contains:
  Motion 1 - Other
  The Original File Name was 2021_04_09_MotSupplementRecord.pdf

A copy of the uploaded files will be sent to:

- Karen.Casselman@atg.wa.gov
- Marcie.Bergman@atg.wa.gov
- critchie747@comcast.net
- sposhsunit@atg.wa.gov

Comments:

Motion to Supplement Record

Sender Name: Karen Casselman - Email: Karen.Casselman@atg.wa.gov
Filing on Behalf of: Dawn T Vidoni - Email: DawnT.Vidoni@atg.wa.gov (Alternate Email:)

Address:
1116 W. Riverside, Ste. 100
Spokane, WA, 99201-1106
Phone: (509) 456-3123

Note: The Filing Id is 20210409112832SC590230