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No. 691422-I
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

GEORGE PLANCICH o/b/o MITCHELL PLANCICH,
Respondent,

v.

IVY MARGARET LITTLE,
Appellant.

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STATE OF WASHINGTON
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ON APPEAL FROM WHATCOM COUNTY SUPERIOR COURT
Honorable Ira Uhrig

OPENING BRIEF OF APPELLANT

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 ORIGINAL

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I. INTRODUCTION

The overall issue presented in this case is whether a vulnerable adult protection order can issue pursuant to RCW 74.34 where the conduct alleged does not meet the statutory definitions in RCW 74.34.020. Ivy Little requests that this Court reverse the protection order that the trial court entered against her which is based on a finding that she abandoned, abused, neglected, or financially exploited Mitchell. George Plancich, Mitchell Plancich's brother, obtained the order on Mitchell's behalf.¹ The court used the improper legal standard in finding that Ivy abandoned, abused, neglected, or financially exploited Mitchell, terms which are defined in RCW 74.34.020. The court did not find that she improperly exercised control of Mitchell's resources for the benefit of herself or another party (statutory requirements for a finding of financial exploitation), or that she willfully acted to injure Mitchell (statutory requirements for a finding of abuse).

In early 2012, Mitchell faced eviction from his mobile home park. Mitchell and Ivy were neighbors, and Ivy, a former drug abuse and prevention counselor, tried to help him. Mitchell wanted to stay in his home. In prior months, he had expressed other concerns as well regarding

¹ In this brief, counsel will hereinafter refer to the parties by their respective first names for clarity. No disrespect is intended.

where his money was going. Ivy contacted APS to have them investigate Mitchell's financial situation, went with him to the Northwest Justice Project to obtain an attorney, showed him how to obtain and review his bank records and assisted him in getting set up with a non-profit payee. But in doing these acts, the court found that, even though Ivy may have thought she was doing a "good turn" for Mitchell, she caused problems for him. The court further found that this was a type of exploitation and then entered a vulnerable adult protection order pursuant to RCW 74.34. This is not the standard set out in RCW 74.34, and Ivy respectfully requests reversal of the commissioner's order and of the order denying revision.

II. ASSIGNMENTS OF ERRORS

No. 1: The court erred in granting a vulnerable adult protection order on the basis of "exploitation" where the legal standard of exploitation was not met, and where exploitation cannot be the basis of a protection order absent a showing of willful injury to the vulnerable adult. CP 50.²

No. 2: The court erred in finding that Ivy committed financial exploitation where the court did not find that Ivy improperly exercised control over Mitchell's resources or benefitted financially from her interactions with Mitchell. CP 61.

² These assignments of errors pertain to the conclusions of law that the trial court entered and verbal findings. The trial court did not make written findings of fact to support its orders. CP 3-4, 61-63.

No. 3: The court erred and denied Ivy due process when it prohibited her from testifying in response to Marsha, a new witness for the petitioner, and did not allow her to view or respond to new documents presented at the hearing March 5, 2012. CP 48-51.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS

No. 1: Has a person committed abuse of a vulnerable adult if the person caused problems but the court does not find the person acted willfully to injure the vulnerable adult? (Assignment of Error 1.)

No. 2: Has a person committed financial exploitation of a vulnerable adult if the person did not improperly exercise control over the vulnerable adult's resources or financially benefit from their interactions with the vulnerable adult? (Assignment of Error 2.)

No. 3: Is the respondent in an order of protection hearing denied due process when the petitioner is allowed to present a new witness and documents during the hearing and the court does not allow the respondent to respond to the witness testimony or to view or respond to the new documents presented at the hearing? (Assignment of Error 3.)

IV. STATEMENT OF THE CASE

In February 2012, George petitioned for a vulnerable adult protection order on behalf of his brother, Mitchell, against Mitchell's neighbor, Ivy. CP 83-89. George's petition alleged that Ivy committed acts of abandonment,

abuse, neglect and/or financial exploitation against Mitchell. CP 83. These terms are defined in RCW 74.34.020. See Appendix A-6. Mitchell had executed a durable power of attorney for George's wife, Marsha, around September 2011. CP 34. George stated that he and his wife had been managing Mitchell's affairs before that time but they had not needed a power of attorney before because "[e]verything was smooth." CP 34. Mitchell's bank records show that prior to September 2011, Mitchell and Marsha were named on a joint account, almost the full amount of Mitchell's income was withdrawn at the beginning of each month in July 2011-September 2011, and that Mitchell had a balance of \$10.00 in his account as of September 20, 2011. CP 70. Mitchell began speaking to his neighbor, Ivy, about his money concerns by the fall of 2011. CP 35.

Eviction In February 2012, around the time of the petition, Mitchell was facing eviction from his mobile home and strongly wanted to remain in his home. CP 26, 88. According to Mitchell, George and Marsha did not want Mitchell to remain in his home. CP 26. His attorney appeared at the March 5th hearing mainly to protect his interests in the eviction. CP 26. As his neighbor, Ivy knew about Mitchell's situation and he spoke with her about the eviction, frustrations he had in where his money was going, and other day-to-day concerns. CP 67-68. George stated in his petition that when Mitchell was asked to leave the park, "Ivy told him he didn't need to do anything, that he

had rights.” CP 88. However, George’s petition also acknowledges that Ivy found the Northwest Justice Project and went with Mitchell there in January 2012 to help him obtain counsel and defend the eviction.³ CP 88. George stated in his Petition that when Ivy involved herself in the eviction dispute, Mitchell stopped calling George. CP 88.

Durable Power of Attorney In early 2012, Mitchell executed a power of attorney naming Ivy as his attorney-in-fact, although George did not allege that she had used this power of attorney to transfer any assets or income or for the benefit of anyone other than Mitchell. CP 88. Ivy stated that she used the power of attorney to get information regarding Mitchell’s bank accounts but she did not use it to obtain any of Mitchell’s assets or income. CP 18-19. Ivy admitted that she helped Mitchell get set up with Whatcom Financial Services. CP 39. She stated that it was a non-profit agency recommended by the Social Security Administration and would provide an itemized list of Mitchell’s expenses. CP 39, 69. George alleged in his petition that he did not know what was going on financially or medically with Mitchell. CP 89. He apparently became aware by the time of the hearing that Mitchell’s finances were being managed by Whatcom Financial Services because he acknowledged this to Mitchell’s attorney at the hearing on March 5, 2012.

³ George stated in his petition, “As far as my wife and I can tell, Ivy then took Mitchell to talk to someone at Northwest Justice Project, who sent a letter to the Manager at the RV park informing the manager of proper notice that needed to be given when rules and regulations have been violated.” CP 88.

CP 34, ln. 21-24. Mitchell seemed content with having his money remain with WFS and the court did not find whether or not doing so would harm him. CP 54. As the hearing concluded, Mitchell asked where his money was going and his attorney stated “Whatcom Financial Services,” he asked further, “They don’t have nothing to do with that?” CP 54. His attorney replied, “They don’t...they don’t handle your money any more right now.” Mitchell replied, “Good.” CP 54. The court stated, “I’m not addressing that in here. I’m...that’s up to you guys.” CP 54.

Groceries/EBT Card George also claimed that Ivy kept changing Mitchell’s pin to his EBT card, and the woman who had been using the card to get groceries for Mitchell quit in frustration because of that and because the last time she arrived at Mitchell’s home to buy groceries, she found his refrigerator “stocked up” and Ivy had already gone grocery shopping with him. CP 88. George claimed that this alienated Mitchell from his family and old friends. CP 88. Ivy stated she helped Mitchell change his EBT number so that he could remember it and do his own grocery shopping when he wanted. CP 18, 66. George did not allege that Ivy bought herself food with Mitchell’s EBT card, and Ivy stated that she only used the card with Mitchell on two occasions when she was with him at the grocery store and that she did not buy food for herself with Mitchell’s EBT card. CP 18.

The woman who had been doing the grocery shopping for Mitchell

was taking food in exchange for gas money, and the court warned Marsha that she needed to keep better track of the food and where it went because if a guardianship proceeding went forward, Mitchell would be entitled to a Guardian ad Litem. CP 37, 52-53. Ivy claimed that Mitchell complained to her that he wasn't getting the type of food that he wanted, which was Slavic food. CP 36. When the court asked Marsha whether Mitchell complained about getting enough to eat, Marsha stated, "No. He wanted...he wanted Croatian cooking and I cooked something for him. I feel he's probably lost his taste for food and I thought well, I'm not going to do this is [sic] you're not going to eat it." CP 44.

Adult Protective Services At some point before George filed the petition, Ivy called Adult Protective Services regarding Mitchell because of Mitchell's complaints to her and concerns she had regarding his finances and living situation. CP 28. George stated during the March 5th hearing that he had been contacted by APS as a result of Ivy's complaint. CP 28. He claimed that APS advised him to do the protection order process but stated that he did not make a complaint about Ivy to APS. CP 28. No one from APS appeared at the hearing and no evidence was admitted regarding any investigation conducted by APS. In its verbal ruling at the March 5th hearing, the court stated that it appreciated that when Ivy had concerns regarding George, she contacted APS, "the agency charged with looking into these situations." CP

50.

Procedural Summary of Orders Issued At the hearing March 5th, the court found that Ivy had abandoned, abused, neglected or financially exploited Mitchell and issued a Vulnerable Adult Protection Order for one year. CP 61-63. The court found that Ivy was not credible on a number of things and specified that it did not think George said he wanted Mitchell to be on the street and evicted. CP 51. The court stated that, even though Ivy thought she was doing a good turn for Mitchell and the court could not find she financially benefitted from her acts, she caused problems and in that sense, she exploited Mitchell. CP 50. The court also ordered both parties to provide an accounting. CP 52. Ivy filed a motion for revision on March 14th. CP 59-60. The honorable Judge Uhrig made a verbal ruling denying the motion on March 30th, and then signed a written order on June 22nd denying the motion for revision and incorporating the March 5th findings and order into his order. CP 3-4. This appeal is from both of those orders, which are included in the Appendix at A-1 and A-4.

V. ARGUMENT

A. Standard of Review

The appellate court reviews a lower court's decision to grant or deny a protection order using an abuse of discretion standard. Hecker v. Cortinas, 110 Wn. App 865, 869, 43 P.3d 50 (2002). A trial court abuses its discretion

when its decision is manifestly unreasonable, based on untenable grounds, or when untenable reasons support the decision. A discretionary decision rests on "untenable grounds" or is based on "untenable reasons" if the trial court relies on unsupported facts or applies the wrong legal standard. Mayer v. Sto Industries, Inc., 132 P.3d 115, 156 Wn.2d 677, 684 (Wash. 2006). The appellate court applies the de novo standard of review to questions of law in the context of a protection order. Scheib v. Crosby, 249 P.3d 184, 160 Wn.App. 345 (Wash.App. Div. 3 2011). Further, statutory interpretation involves questions of law that the appellate court reviews de novo. Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wash.2d 1, 9, 43 P.3d 4 (2002).

B. The Abuse of Vulnerable Adults Act

RCW 74.34.110 created an action whereby a vulnerable adult or other interested party can petition the court for an order of protection in cases of abandonment, abuse, financial exploitation, or neglect of a vulnerable adult. RCW 74.34.110 further outlines what is required to petition for a vulnerable adult protection order. These requirements, along with the standard forms mandated by RCW 74.34.115, make it very clear that before a court issues such a protection order, it must first make a finding that the respondent either abandoned, abused, financially exploited,

or neglected a vulnerable adult or threatened to do so.⁴ CP 61-63.

The statute defines the terms that form the basis of a vulnerable adult protection order, and two of these statutory definitions are key in this case.⁵ First, *financial exploitation* is defined in RCW 74.34.020(6) as:

“[T]he illegal or improper use, control over, or withholding of the property, income, resources, or trust funds of the vulnerable adult by any person or entity for any person's or entity's profit or advantage other than for the vulnerable adult's profit or advantage. ‘Financial exploitation’ includes, but is not limited to: (a) The use of deception, intimidation, or undue influence by a person or entity in a position of trust and confidence with a vulnerable adult to obtain or use the property, income, resources, or trust funds of the vulnerable adult for the benefit of a person or entity other than the vulnerable adult; (b) The breach of a fiduciary duty, including, but not limited to, the misuse of a power of attorney, trust, or a guardianship appointment, that results in the unauthorized appropriation, sale, or transfer of the property, income, resources, or trust funds of the vulnerable adult for the benefit of a person or entity other than the vulnerable adult; or (c) Obtaining or using a vulnerable adult's property, income, resources, or trust funds without lawful authority, by a person or entity who knows or clearly should know that the vulnerable adult lacks the capacity to consent to the release or use of his or her property, income, resources, or trust funds.”

Secondly, RCW 74.34.020(2) defines *abuse* in pertinent part as:

“[T]he willful action or inaction that inflicts injury, unreasonable confinement, intimidation, or punishment on a vulnerable adult. In instances of abuse of a vulnerable adult who is

⁴ RCW 74.34.115 provides that the standard petition and order for protection forms are mandatory for all petitions filed and orders issued under RCW 74.34 after October 1, 2007.

⁵ See Appendix at A-6 for full text of RCW 74.34.020 definitions. Because the court did not make written findings of fact and made limited verbal findings, it is not clear under which basis the court made its ruling- abuse, neglect, abandonment, or financial exploitation. However, because the court used the word “exploitation” (which is contained in the definition of abuse) in its verbal findings and because George’s counsel only addressed financial exploitation at the hearing on revision, these two possible bases are addressed.

unable to express or demonstrate physical harm, pain, or mental anguish, the abuse is presumed to cause physical harm, pain, or mental anguish. Abuse includes sexual abuse, mental abuse, physical abuse, and exploitation of a vulnerable adult, which have the following meanings: ...(d) exploitation means an act of forcing, compelling, or exerting undue influence over a vulnerable adult causing the vulnerable adult to act in a way that is inconsistent with relevant past behavior, or causing the vulnerable adult to perform services for the benefit of another.”

Exploitation does not stand on its own as a basis to issue a protection order, but rather it is part of the definition of abuse. Because abuse also requires that the injurious act be “willful,” it should be noted that the Washington Administrative Code defines “willful.” WAC 388-111-0001 states, “Willful means the deliberate, or nonaccidental, action or inaction by an individual that he or she knew or reasonably should have known could cause a negative outcome, including harm, injury, pain or anguish.”

The legislature gave particular consideration to the definitions contained in RCW 74.34 and amended those definitions in 1999 so that they were consistent with other statutory schemes and agency regulations designed to protect vulnerable adults. RCW 74.34.005. The intent of these amendments and of the statute as a whole is that the state’s vulnerable adult population be better served in the provision of protective services and legal remedies. RCW 74.34.005.

C. The legal standard for exploitation was not met and even if it had been, a person does not commit abuse of a vulnerable adult absent a showing of willful conduct causing injury to the

vulnerable adult

The court's finding that causing problems is a type of exploitation and can therefore be the basis of a vulnerable adult protection order is not a correct statement of the law. CP 50. The statutory definitions of both exploitation and abuse, make it clear that 1) the standard for exploitation requires more than causing problems and 2) exploitation is only one of the elements required to prove abuse of a vulnerable adult, and willfulness and injury must also be proven. Appendix A-6.

The evidence does not show that Ivy exploited Mitchell where it does not show she forced, compelled, or exerted undue influence over him or caused him to act in a way inconsistent with past behavior or caused him to perform services for the benefit of another. RCW 74.34.020. The court made no factual findings to suggest this standard was met and the record does not support such a conclusion. The court could find based on the evidence that Mitchell was susceptible to undue influence, as a general proposition. But the record is devoid of examples of where Ivy actually exerted undue influence.

Undue influence is not defined with RCW 74.34.020, but our courts have fully developed the legal standard for it within the context of estate and probate decisions. In this context, undue influence does not automatically exist because a person is vulnerable and susceptible to

influence or relies on the advice of others, but rather it is "...influence tantamount to force or fear which destroys the testator's free agency and constrains him to do what is against his will." Matter of Estate of Lint, 957 P.2d 755, 135 Wn.2d 518 (1998), citing In re Estate of Bottger, 14 Wash.2d 676, 700, 129 P.2d 518 (1942). Here, there was no evidence that Ivy used force or fear to destroy Mitchell's free will or that the actions she took were against Mitchell's wishes. Most of Ivy's actions took were centered around the desires that Mitchell expressed as to housing and finances- Mitchell wanted to remain in his home and wanted to have a better understanding of how his money was spent. His attorney stated at the beginning of the hearing that Mitchell wanted to stay in his residence and when it was confirmed to him at the end of the hearing that his money was with Whatcom Financial Services and not with "them" (referring to Marsha and George), he said that was good. CP 26, 54. In order to show undue influence George would have to prove more than that this is not true; he would have to show that Ivy overcame Mitchell's desires to essentially get her own way and have Mitchell do what he otherwise would not have done. There is simply no factual basis for such a finding.

Even if there was a basis for the court's finding that Ivy somehow exploited Mitchell, exploitation does not stand on its own as the basis of a vulnerable adult protection order; it is part of the definition of abuse, which

requires a willful act that causes injury to the vulnerable adult. In Goldsmith v. State, Dept. of Social & Health Services, Mr. Goldsmith appealed an administrative determination, as affirmed by the superior court, that he had mentally abused his father. 280 P.3d 1173 (Wash.App. Div. 2 2012). The evidence showed Mr. Goldsmith had repeatedly yelled at his father in person and over the phone over an extended period of time, that these matches would last sometimes up to two hours, and that this behavior caused the father to cry, refuse to take medication, and become angry and non-complaint with caregivers, to the point where the father suffered from depression and self-neglect. *Id.* at 1175. The court upheld the agency's determination, and in doing so addressed the willfulness and injury components required by the statute.⁶ *Id.* at 1179. As to the requirement that Mr. Goldsmith's actions be willful, the court noted that he admitted to yelling at his father, and so the conduct was deliberate and stated, "A reasonable person would know that lengthy and repeated yelling matches with a 98-year-old in declining health amounted to mental abuse that could cause harm or injury." *Id.* Additionally, the court found that the department has shown the "injury" component through caregiver and other testimony regarding the physical and mental distress that the father suffered due to Mr.

⁶ The court in Goldsmith addressed the willfulness and injury components required to support a finding of mental abuse, but because mental abuse is a subcategory of abuse as defined in the statute, the requirements as to willfulness and injury appear to be the same. RCW 74.34.020(2)

Goldsmith's actions. *Id.*

Here, in contrast to the decision in Goldsmith, the court did not find that Ivy acted willfully or that she injured Mitchell. From George's petition, he does not even appear to allege that Ivy injured Mitchell but rather, Ivy inserted herself into an eviction dispute where Mitchell wanted to remain in his home, Mitchell consequently had less contact with George and George petitioned to find out what was going on with his brother. CP 88-89. The court found that Ivy thought she was doing a good turn but caused problems and that this conduct was exploitation which formed the basis of the order; however, absent a willful act by Ivy and actual injury to Mitchell, even exploitation is not enough for the court to issue an order under RCW 74.34.020. CP 50. The court noted actions Ivy took that it did not fault Ivy for and which were of possible benefit to Mitchell, such as calling APS, and helping him obtain an attorney at the Northwest Justice Project. CP 50-51. But the court did not state what actions actually injured Mitchell and it is difficult to find any support in the record for the injury component. Mitchell's finances were indisputably with a non-profit payee where he would receive itemized statements. CP 34. He had an attorney to represent him in the eviction and had an upcoming mediation. If anything, Ivy's actions were of benefit to Mitchell, although she does not have to meet that evidentiary burden in order to avoid a vulnerable adult protection order.

D. A person does not commit financial exploitation of a vulnerable adult absent a showing that the person improperly exercised control over the vulnerable adults' resources for the benefit of another or threatened to do so.

A finding of financial exploitation requires a finding that Ivy improperly exercised control over Mitchell's resources for the benefit of someone besides Mitchell or that she threatened to do so. See RCW 74.34.020, Appendix at A-6. Here, the evidence does not show Ivy acted improperly, that she exercised control over Mitchell's resources, or that she caused Mitchell's resources to be used for the benefit of another. In fact, the court's verbal ruling is in contrast to a finding of financial exploitation because the court stated that it could not find either way that Ivy had financially benefitted from her interactions with Mitchell. CP 50. The parties were in agreement at the hearing that Ivy did not have control over Mitchell's income but rather it was being managed by Whatcom Financial Services. CP 34. Ivy did comply with the order to provide an accounting, but in it, she simply reaffirmed what no party had actually disputed, which is that she did not control Mitchell's financial resources. CP 18-19. Further, George's allegations regarding Mitchell's EBT card were that Ivy helped him stock his fridge, not that she used his grocery money. CP 88.

E. The court denied Ivy due process when it prohibited her from testifying in response to Marsha, a new witness for the petitioner, and did not allow her to respond to new documents

presented at the hearing.

At the hearing on March 5, 2012, Ivy alleged to the court that George told her he was not going to pay rent in order to have Mitchell evicted. CP 41. The court asked her, “You’re saying that this gentleman told you specifically, I’m not going to pay Mitchell’s rent because I want him to be evicted?” to which Ivy responded in the affirmative. CP 41. The court asked George whether this was true. He did not deny it at first. He answered, (inaudible) “could you talk....could you talk to my wife about that?” CP 42. The court then swore in Marsha, who testified that she did not want Mitchell evicted. CP 45. But during this testimony, the court reviewed two documents submitted by Marsha and asked Marsha questions regarding the documents and advised her to show them to Mitchell’s counsel. CP 47-48. Mitchell’s attorney questioned Marsha about notices from social security and her management of Mitchell’s finances. After the court asked George again whether he said he was going to stop paying rent in order to get Mitchell evicted, he answered, “No.” CP 48. Ivy tried to speak after Marsha’s testimony, but the court stopped her and advised her that Marsha’s testimony was rebuttal and she was not entitled to “sur-rebuttal.” CP 49. After Ivy’s attempted interruption, Marsha testified that she did tell Ivy that she wasn’t paying rent. CP 30. Marsha explained, “...because I wasn’t. I was paying after the fact....I have an arrangement with the office. They had evicted him,

so why would I pay the rent?” CP 49. She then explained that as it became apparent Mitchell was staying for a couple of weeks and then through the month, she paid the rent late. CP 49. Ivy asked to speak again after this testimony and after the court was part of the way through its order. The commissioner stated, “Not now. You had your opportunity. We’re done.” CP 51.

The court’s refusal to allow Ivy to testify in response to Marsha’s testimony is error and denied Ivy due process of law. “The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'” Mathews v. Eldridge, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), citing Armstrong v. Manzo, 380 U.S. 545, 552 (1965). The Supreme Court in Eldridge cited to three factors that should generally be considered in determining the process due to individuals; “first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” Our Supreme Court has stated the important of due process many times and over many years, and it was stated with particular poignancy in Hagar v.

Reclamation Dist. where the Court held, "Due process of law is [process which], following the forms of law, is appropriate to the case and just to the parties affected....and whenever necessary to the protection of the parties, *it must give them an opportunity to be heard respecting the justice of the judgment sought.* Any legal proceeding enforced by public authority, whether sanctioned by age or custom or newly devised in the discretion of the legislative power, which regards and preserves these principles of liberty and justice, must be held to be due process of law." 111 U.S. 701, 708 (1884). Emphasis added.

Here, all of the Eldridge factors point toward allowing Ivy to respond to witness testimony. She used to be a drug abuse prevention counselor and has training in that field, and having such an order on her record makes a statement to the public that she took advantage of a vulnerable adult and is dangerous to the physical safety of that person. CP 61-63, 65. This has obvious implications for her ability to work in a school or other setting using her training even on a volunteer basis. Also, it is a very small burden on the court, relative to the effect of a protection order, to allow a respondent to actually respond to allegations as they arise in a hearing.

The vulnerable adult protection statute itself contemplates that a respondent will be given an opportunity to respond to the allegations

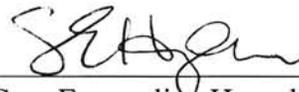
against her because the statute requires that the petition “stat[e] the specific facts and circumstances which demonstrate the need for the relief sought” and be served on the respondent at least six days prior to the hearing. RCW 74.34.110 and RCW 74.34.130. It is clearly within the court’s authority to allow verbal testimony at a hearing and allow additional witnesses who have not done declarations to testify and submit evidence; however, when the court allows a witness to testify and introduce documents and does not allow the respondent to respond, due process is violated and the purpose of the underlying hearing, which is to allow the court to make a determination considering all of the relevant evidence, is thwarted.

The court here reasoned that since Marsha was a rebuttal witness, Ivy had no right to rebut Marsha’s testimony. CP 49. But Marsha did not simply rebut Ivy’s testimony. She testified regarding notices she received from social security, the basis of Mitchell’s eviction, medical information from Mitchell’s doctor, etc., and she submitted documentation to the court. CP 42-48. It is difficult to determine based on the court’s verbal findings whether the court relied on Marsha’s testimony or the additional documents presented to the court. But to the extent that the court relied upon such evidence, it was not proper and deprived Ivy of the right to full notice of the allegations against her and to respond accordingly in the action.

VI. CONCLUSION

For the aforementioned reasons, this Court should grant the Appellant's appeal and reverse the Vulnerable Adult Protection Order against Ivy Little.

Dated this 4th day of January, 2013.



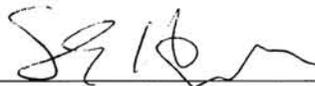
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Email: sara@gsjoneslaw.com

CERTIFICATE OF SERVICE

I certify under penalty of perjury of the laws of the state of Washington that I deposited in the U.S. Mail postage prepaid a copy of the foregoing Brief of Appellant on the 4th day of January, 2013 along with a copy of the Transcript of Proceedings for June 22, 2012, to the following parties at the following addresses:

Attorneys for Respondent
Attorney Phillip Buri
1601 F Street
Bellingham, WA 98225-3011

Mitchell Plancich
c/o Marsha Plancich
2311 36th Street
Bellingham, WA 98229



Sara Evangeline Humphries, WSBA 36499
Counsel for Appellant

State of Washington,) SS.
 County of Whatcom)

I, Clerk of Whatcom County Superior Court, do hereby certify that the foregoing/following instrument is a true and correct copy of the original, consisting of three pages, now on file in my office, and that the undersigned has the custody thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand at my office at Bellingham, WA this 5 day of March 2012

By Diana C. [Signature]
 Deputy Clerk

FILED IN OPEN COURT
3-5 2012
WHATCOM COUNTY CLERK

 Deputy

**Superior Court of Washington
 For Whatcom County**

In re the Matter of:
GEORGE ANTHONY PLANCICH obo
MITCHELL JAMES PLANCICH
 A Vulnerable Adult (Protected Person)
IVY MARGARET LITTLE
 Respondent (Restrained Person)

**Order for Protection –
 Vulnerable Adult**

No. 12-2-00453-2
 Court Address: 311 Grand Avenue, Ste 301
 Bellingham, WA 98225
 Telephone Number: (360) 676-6777
 (Clerk's Action Required) (ORPRTVA)

Violation of Restraint Provisions 1, 3, 4, or 5 With Actual Notice of its Terms is a Criminal Offense Under Chapter 26.50 RCW and Will Subject a Violator to Arrest. RCW 74.34.145

Petitioner is:

- the vulnerable adult.
- GEORGE ANTHONY PLANCICH, who filed on behalf of the vulnerable adult and is:
 - the vulnerable adult's guardian or legal fiduciary.
 - an interested person as defined in RCW 74.34.020(9).
 - WA Dep't of Social and Health Services.

Respondent Identification:

Sex	Race	Hair
F	W	BRO
Height	Weight	Eyes
5 5	180	BRO

Respondent's Distinguishing Features:

Access to weapons: yes no unknown

The Court Finds Based Upon the Court Record:

The court has jurisdiction over the parties and the subject matter and respondent has been provided with reasonable notice and an opportunity to be heard. Notice of this hearing was served on the respondent by

- personal service service by mail pursuant to court order service by publication pursuant to court order
- other _____

This order is issued in accordance with the Full Faith and Credit provisions of VAWA: 18 U.S.C. § 2265. Respondent committed acts of abandonment, abuse, neglect and/or financial exploitation of the vulnerable adult.

The court also finds that the respondent represents a credible threat to the physical safety of the vulnerable adult, and that the relationship of the respondent to the vulnerable adult is spouse or former spouse parent of a common child current or former cohabitants and intimate partners Other: neighbor

The court concludes as a matter of law the relief below shall be granted.

Court Order Summary:

- The respondent is restrained from committing acts of abuse as listed in restraint provision 1, on page 2.
- No-contact provisions apply as set forth on the following pages.

Order for Protection – Vulnerable Adult (ORPRTVA) - Page 1 of 3
 WPF VA-3.015 Mandatory (10/2007) - RCW 74.34.130

[] Additional provisions are listed on the following pages.

The terms of this order shall be effective immediately and for five years from today's date, unless stated otherwise here (date):

March 5, 2013

It is Ordered:

- 1. The respondent is **Restrained** from committing or threatening to commit physical harm, bodily injury, assault, including sexual assault against the vulnerable adult and from molesting, harassing, or stalking the vulnerable adult.

(If the respondent's relationship to the vulnerable adult is that of spouse or former spouse, parent of a common child, or former or current cohabitant as intimate partner, then effective immediately, and continuing as long as this protection order is in effect, the respondent may not possess a firearm or ammunition. 18 U.S.C. § 922(g)(8). A violation of this federal firearms law carries a maximum possible penalty of 10 years in prison and a \$250,000 fine. An exception exists for law enforcement officers and military personnel when carrying department/government-issued firearms. 18 U.S.C. § 925(a)(1).)
- 2. Respondent is **Restrained** from committing or threatening to commit acts of abandonment, abuse, neglect, or financial exploitation against the vulnerable adult.
- 3. The respondent is **Excluded** from the vulnerable adult's residence. The vulnerable adult's address is confidential. [] The vulnerable adult waives confidentiality of the address which is:
- 4. The respondent is **Restrained** from coming near and from having any contact with the vulnerable adult, in person or through others, by phone, mail, or any means, directly or indirectly, except through an attorney, or mailing or delivery by a third party of court documents.
- 5. Respondent is **Prohibited** from knowingly coming within, or knowingly remaining within 25 ft of the vulnerable adult's residence workplace day program; [] the premises of the long-term care facility where the vulnerable adult resides.

[] Other:
- 6. The respondent is **Required** to provide an accounting of the disposition of the vulnerable adult's income or other resources by March 30, 2012 (date) *and providing it to petitioner and to Mitchell Plancich's attorney.*
- [] 7. The respondent is **Restrained** from transferring the vulnerable adult's property for _____ (up to 90) Days.
- [] 8. The respondent is **Restrained** from transferring respondent's property for _____ (up to 90) Days.
- [] 9. Petitioner is granted judgment against the respondent as set forth in the judgment filed on _____ (date).
- [] 10. The bond posted is exonerated or the petitioner may apply ex parte for an order to disburse other security.
- 11. Other:
Petitioner shall also prepare an accounting of funds the petitioners managed for Mitchell Plancich for the last 12 months and file it under seal

Warnings to the Respondent: Violation of restraint provisions 1, 3, 4 and 5 of this order with actual

in this action + provide a copy of it to Mr. Mitchell's attorney.

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notice of its terms is a criminal offense under chapter 26.50 RCW and will subject you to arrest. If the violation of the protection order involves travel across a state line or the boundary of a tribal jurisdiction, or involves conduct within the special maritime and territorial jurisdiction of the United States, which includes tribal lands, you may be subject to criminal prosecution in federal court under 18 U.S.C. §§ 2261, 2261A, or 2262.

Violation of restraint provisions 1, 3, 4, and 5 of this order is a gross misdemeanor unless one of the following conditions apply: Any assault that is a violation of this order and that does not amount to assault in the first degree or second degree under RCW 9A.36.011 or 9A.36.021 is a class C felony. Any conduct in violation of this order that is reckless and creates a substantial risk of death or serious physical injury to another person is a class C felony. Also, a violation of this order is a class C felony if you have at least two previous convictions for violating a protection order issued under Titles 7, 10, 26 or 74 RCW.

If you are convicted of an offense of domestic violence, you will be forbidden for life from possessing a firearm or ammunition. 18 U.S.C. § 922(g)(9); RCW 9.41.040.

You Can Be Arrested Even if the Person or Persons Who Obtained the Order Invite or Allow You to Violate the Order's Prohibitions. You have the sole responsibility to avoid or refrain from violating the order's provisions. Only the court can change the order upon written application.

Pursuant to 18 U.S.C. § 2265, a court in any of the 50 states, the District of Columbia, Puerto Rico, any United States territory, and any tribal land within the United States shall accord full faith and credit to the order.

It is further ordered that the clerk of the court shall forward a copy of this order on or before the next judicial day to the Whatcom County Sheriff's Office *Where the Protection Person Lives* which shall enter it in a computer-based criminal intelligence system available in this state used by law enforcement to list outstanding warrants.

Service

Petitioner shall arrange for service of this order on:

- Respondent.
- Vulnerable Adult.
- Vulnerable Adult's guardian *attorney*

The following persons appeared, further service is not required:

- Respondent.
- Vulnerable adult.
- Vulnerable adult's guardian *attorney*

Law Enforcement Assistance

Pursuant to RCW 74.34.140, Whatcom County Sheriff's Office shall assist petitioner with *SERVICE* and as follows:

This Order is in Effect Until the Expiration Date on Page One.

Dated: March 5, 2012 at 10:05 am/p.m.

M. H. Ros
Judge/Commissioner

Presented by: *George Plonard* 3/5/2012
Petitioner Date

I acknowledge receipt of a copy of this Order:
Ly 3/5/2012
Respondent Date

A Law Enforcement Information Sheet (LEIS) must be completed.

SCANNED
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FILED IN OPEN COURT
06-22 2012
WHATCOM COUNTY CLERK

By [Signature]

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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WHATCOM

In re:)
PLANCICH, GEORGE ANTHONY, ET AL)
Petitioner,)
and)
LITTLE, IVY MARGARET,)
Respondent.)

No. 12-2-00453-2

ORDER DENYING MOTION FOR
REVISION

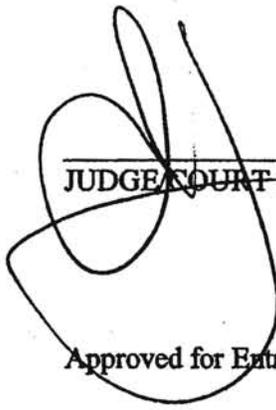
THIS MATTER HAVING come before the Court on the Respondent's request for revision of the commissioner's ruling, and the Court having reviewed the files and records herein and deeming itself fully advised, now, therefore, makes the following findings:

The Commissioner's Findings and Ruling from March 5, 2012 are incorporated into this Order and adopted by this Court;

It is hereby ORDERED, ADJUDGED and DECREED that the respondent's motion for revision is DENIED.

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DATED: 6/22/12



JUDGE/COURT COMMISSIONER

Presented by:


Ivy Margaret Little
Respondent

Approved for Entry/Copy Received:

Did not appear

George ANTHONY Petitioner

Did not appear

Mitchell Plancich Marsha Petitioner



RCW 74.34.020

Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Abandonment" means action or inaction by a person or entity with a duty of care for a vulnerable adult that leaves the vulnerable person without the means or ability to obtain necessary food, clothing, shelter, or health care.

(2) "Abuse" means the willful action or inaction that inflicts injury, unreasonable confinement, intimidation, or punishment on a vulnerable adult. In instances of abuse of a vulnerable adult who is unable to express or demonstrate physical harm, pain, or mental anguish, the abuse is presumed to cause physical harm, pain, or mental anguish. Abuse includes sexual abuse, mental abuse, physical abuse, and exploitation of a vulnerable adult, which have the following meanings:

(a) "Sexual abuse" means any form of nonconsensual sexual contact, including but not limited to unwanted or inappropriate touching, rape, sodomy, sexual coercion, sexually explicit photographing, and sexual harassment. Sexual abuse includes any sexual contact between a staff person, who is not also a resident or client, of a facility or a staff person of a program authorized under chapter [71A.12](#) RCW, and a vulnerable adult living in that facility or receiving service from a program authorized under chapter [71A.12](#) RCW, whether or not it is consensual.

(b) "Physical abuse" means the willful action of inflicting bodily injury or physical mistreatment. Physical abuse includes, but is not limited to, striking with or without an object, slapping, pinching, choking, kicking, shoving, prodding, or the use of chemical restraints or physical restraints unless the restraints are consistent with licensing requirements, and includes restraints that are otherwise being used inappropriately.

(c) "Mental abuse" means any willful action or inaction of mental or verbal abuse. Mental abuse includes, but is not limited to, coercion, harassment, inappropriately isolating a vulnerable adult from family, friends, or regular activity, and verbal assault that includes ridiculing, intimidating, yelling, or swearing.

(d) "Exploitation" means an act of forcing, compelling, or exerting undue influence over a vulnerable adult causing the vulnerable adult to act in a way that is inconsistent with relevant past behavior, or causing the vulnerable adult to perform services for the benefit of another.

(3) "Consent" means express written consent granted after the vulnerable adult or his or her legal representative has been fully informed of the nature of the services to be offered and that the receipt of services is voluntary.

(4) "Department" means the department of social and health services.

(5) "Facility" means a residence licensed or required to be licensed under chapter [18.20](#) RCW, assisted living facilities; chapter [18.51](#) RCW, nursing homes; chapter [70.128](#) RCW, adult family homes; chapter [72.36](#) RCW, soldiers' homes; or chapter [71A.20](#) RCW, residential habilitation centers; or any other facility licensed or certified by the department.

(6) "Financial exploitation" means the illegal or improper use, control over, or withholding of the property, income, resources, or trust funds of the vulnerable adult by any person or entity for any person's or entity's profit or advantage other than for the vulnerable adult's

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profit or advantage. "Financial exploitation" includes, but is not limited to:

(a) The use of deception, intimidation, or undue influence by a person or entity in a position of trust and confidence with a vulnerable adult to obtain or use the property, income, resources, or trust funds of the vulnerable adult for the benefit of a person or entity other than the vulnerable adult;

(b) The breach of a fiduciary duty, including, but not limited to, the misuse of a power of attorney, trust, or a guardianship appointment, that results in the unauthorized appropriation, sale, or transfer of the property, income, resources, or trust funds of the vulnerable adult for the benefit of a person or entity other than the vulnerable adult; or

(c) Obtaining or using a vulnerable adult's property, income, resources, or trust funds without lawful authority, by a person or entity who knows or clearly should know that the vulnerable adult lacks the capacity to consent to the release or use of his or her property, income, resources, or trust funds.

(7) "Financial institution" has the same meaning as in RCW 30.22.040 and 30.22.041. For purposes of this chapter only, "financial institution" also means a "broker-dealer" or "investment adviser" as defined in RCW 21.20.005.

(8) "Incapacitated person" means a person who is at a significant risk of personal or financial harm under RCW 11.88.010(1) (a), (b), (c), or (d).

(9) "Individual provider" means a person under contract with the department to provide services in the home under chapter 74.09 or 74.39A RCW.

(10) "Interested person" means a person who demonstrates to the court's satisfaction that the person is interested in the welfare of the vulnerable adult, that the person has a good faith belief that the court's intervention is necessary, and that the vulnerable adult is unable, due to incapacity, undue influence, or duress at the time the petition is filed, to protect his or her own interests.

(11) "Mandated reporter" is an employee of the department; law enforcement officer; social worker; professional school personnel; individual provider; an employee of a facility; an operator of a facility; an employee of a social service, welfare, mental health, adult day health, adult day care, home health, home care, or hospice agency; county coroner or medical examiner; Christian Science practitioner; or health care provider subject to chapter 18.130 RCW.

(12) "Neglect" means (a) a pattern of conduct or inaction by a person or entity with a duty of care that fails to provide the goods and services that maintain physical or mental health of a vulnerable adult, or that fails to avoid or prevent physical or mental harm or pain to a vulnerable adult; or (b) an act or omission that demonstrates a serious disregard of consequences of such a magnitude as to constitute a clear and present danger to the vulnerable adult's health, welfare, or safety, including but not limited to conduct prohibited under RCW 9A.42.100.

(13) "Permissive reporter" means any person, including, but not limited to, an employee of a financial institution, attorney, or volunteer in a facility or program providing services for vulnerable adults.

(14) "Protective services" means any services provided by the department to a vulnerable adult with the consent of the vulnerable adult, or the legal representative of the vulnerable adult, who has been abandoned, abused, financially exploited, neglected, or in a state of self-neglect. These services may include, but are not limited to case management, social casework, home care, placement, arranging for medical evaluations, psychological evaluations, day care, or referral for legal assistance.

(15) "Self-neglect" means the failure of a vulnerable adult, not living in a facility, to provide for himself or herself the goods and services necessary for the vulnerable adult's physical or mental health, and the absence of which impairs or threatens the vulnerable adult's well-being. This definition may include a vulnerable adult who is receiving services through home health, hospice, or a home care agency, or an individual provider when the neglect is not a result of inaction by that agency or individual provider.

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(16) "Social worker" means:

(a) A social worker as defined in RCW 18.320.010(2); or

(b) Anyone engaged in a professional capacity during the regular course of employment in encouraging or promoting the health, welfare, support, or education of vulnerable adults, or providing social services to vulnerable adults, whether in an individual capacity or as an employee or agent of any public or private organization or institution.

(17) "Vulnerable adult" includes a person:

(a) Sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself; or

(b) Found incapacitated under chapter 11.88 RCW; or

(c) Who has a developmental disability as defined under RCW 71A.10.020; or

(d) Admitted to any facility; or

(e) Receiving services from home health, hospice, or home care agencies licensed or required to be licensed under chapter 70.127 RCW; or

(f) Receiving services from an individual provider; or

(g) Who self-directs his or her own care and receives services from a personal aide under chapter 74.39 RCW.

[2012 c 10 § 62. Prior: 2011 c 170 § 1; 2011 c 89 § 18; 2010 c 133 § 2; 2007 c 312 § 1; 2006 c 339 § 109; 2003 c 230 § 1; 1999 c 176 § 3; 1997 c 392 § 523; 1995 1st sp.s. c 18 § 84; 1984 c 97 § 8.]

Notes:

Application -- 2012 c 10: See note following RCW 18.20.010.

Effective date -- 2011 c 89: See note following RCW 18.320.005.

Findings -- 2011 c 89: See RCW 18.320.005.

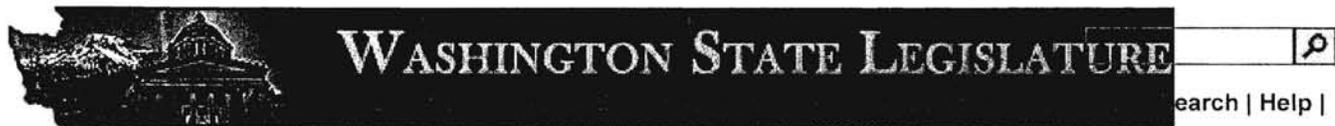
Intent -- Part headings not law -- 2006 c 339: See notes following RCW 70.96A.325.

Effective date -- 2003 c 230: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [May 12, 2003]." [2003 c 230 § 3.]

Findings -- Purpose -- Severability -- Conflict with federal requirements -- 1999 c 176: See notes following RCW 74.34.005.

Short title -- Findings -- Construction -- Conflict with federal requirements -- Part headings and captions not law -- 1997 c 392: See notes following RCW 74.39A.009.

Conflict with federal requirements -- Severability -- Effective date -- 1995 1st sp.s. c 18: See notes following RCW 74.39A.030.


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[Beginning of Chapter](#) << [74.34.005](#) >> [74.34.020](#)

RCW 74.34.005

Findings.

The legislature finds and declares that:

- (1) Some adults are vulnerable and may be subjected to abuse, neglect, financial exploitation, or abandonment by a family member, care provider, or other person who has a relationship with the vulnerable adult;
- (2) A vulnerable adult may be home bound or otherwise unable to represent himself or herself in court or to retain legal counsel in order to obtain the relief available under this chapter or other protections offered through the courts;
- (3) A vulnerable adult may lack the ability to perform or obtain those services necessary to maintain his or her well-being because he or she lacks the capacity for consent;
- (4) A vulnerable adult may have health problems that place him or her in a dependent position;
- (5) The department and appropriate agencies must be prepared to receive reports of abandonment, abuse, financial exploitation, or neglect of vulnerable adults;
- (6) The department must provide protective services in the least restrictive environment appropriate and available to the vulnerable adult.

[1999 c 176 § 2.]

Notes:

Findings -- Purpose--1999 c 176: "The legislature finds that the provisions for the protection of vulnerable adults found in chapters [26.44](#), [70.124](#), and [74.34](#) RCW contain different definitions for abandonment, abuse, exploitation, and neglect. The legislature finds that combining the sections of these chapters that pertain to the protection of vulnerable adults would better serve this state's population of vulnerable adults. The purpose of chapter [74.34](#) RCW is to provide the department and law enforcement agencies with the authority to investigate complaints of abandonment, abuse, financial exploitation, or neglect of vulnerable adults and to provide protective services and legal remedies to protect these vulnerable adults." [1999 c 176 § 1.]

Severability -- 1999 c 176: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1999 c 176 § 36.]

Conflict with federal requirements -- 1999 c 176: "If any part of this act is found to be in conflict with federal requirements that are a prescribed condition to the allocation of federal funds to the state, the conflicting part of this act is inoperative solely to the extent of the conflict and with respect to the agencies directly affected, and this finding does not affect the operation of the remainder of this act in its application to the agencies concerned. Rules adopted under this act

must meet federal requirements that are a necessary condition to the receipt of federal funds by the state." [1999 c 176 § 37.]