

FILED
COURT OF APPEALS
10 JUL 19 PM 12:10
STATE OF WASHINGTON
BY [Signature]
CLERK

No. 39880-0-II

IN THE COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

In Re:

MARGUERITE NICKLESS and JAMES NICKLESS,

Appellees/Plaintiffs,

and

RICHARD SORRELS,

Appellant/Respondent.

APPEAL FROM THE SUPERIOR COURT OF PIERCE COUNTY
THE BEVERLY GRANT, PRESIDING

BRIEF OF RESPONDENTS

CHRISTOPHER M. CONSTANTINE
Of Counsel, Inc., P.S.
WSBA 11650
Attorney for Respondents

P. O. Box 7125
Tacoma, WA. 98417-0125
(253) 752-7850

PH 1-0-10

ORIGINAL

I. TABLE OF CONTENTS

I. TABLE OF CONTENTS..... i

II. TABLE OF AUTHORITIES ii

III. STATEMENT OF THE CASE..... 1

 A. Facts 1

 B. Procedural History. 2

IV. ARGUMENT 4

 A. APPELLANT FAILED TO TIMELY APPEAL FROM THE
 TEMPORARY ORDER OF PROTECTION AND REISSUANCE
 OF TEMPORARY ORDER. 4

 B. THE TEMPORARY ORDER OF PROTECTION AND ORDER
 REISSUING TEMPORARY ORDER ARE RES JUDICATA
 AND PRECLUDE THIS APPEAL. 6

 C. THE TRIAL COURT’S FINDINGS ARE SUPPORTED BY
 SUBSTANTIAL EVIDENCE. 9

 1. STANDARD OF REVIEW 9

 2. THE TRIAL COURT’S FINDINGS ARE SUPPORTED BY
 SUBSTANTIAL EVIDENCE. 11

 D. THE TRIAL COURT DID NOT ERR IN CONSIDERING
 MATERIALS SUBMITTED BY RESPONDENT. 21

 E. APPELLANT’S ESTOPPEL ARGUMENT IS IMPROPER AS IT
 IS BASED ON MATTERS OUTSIDE THE RECORD ON
 APPEAL. 23

 F. RESPONDENT REQUESTS AN AWARD OF ATTORNEY
 FEES ON APPEAL. 24

V. CONCLUSION..... 25

VI. CERTIFICATE OF MAILING 26

II. TABLE OF AUTHORITIES

STATE CASES

<i>Binder v. Binder</i> , 50 Wn. 2d 142, 309 P. 2d 1050 (1957)	19
<i>Brown v. Safeway Stores, Inc.</i> , 94 Wn. 2d 359, 364, 617 P. 2d 704 (1980)	22
<i>Cotton v. City of Elma</i> , 100 Wn. App. 685, 691, 998 P. 2d 339 (2000)...	22
<i>Endicott v. Saul</i> , 142 Wn. App. 899, 909, 176 P. 3d 560 (2008). 11, 16, 17,	19
<i>Goucher v. Simplot</i> , 104 Wn. 2d 662, 665, 709 P. 2d 774 (1985).....	22
<i>Guijosa v. Wal-Mart Stores, Inc.</i> , 101 Wn. App. 777, 790, 6 P. 3d 583, affirmed, 144 Wash.2d 907, 32 P.3d 250 (2001).....	19
<i>Heath v. Uraga</i> , 106 Wn. App. 506, 516, 24 P. 3d 413 (2001).....	11
<i>Heikkinen v. Hansen</i> , 57 Wn. 2d 840, 845, 360 P. 2d 147 (1961).....	12
<i>In Re: Dependency of BSS</i> , 56 Wn. App. 169, 171, 782 P. 2d 1100, review denied, 114 Wn. 2d 1018 (1990)	10
<i>Keever & Associates, Inc. v. Randall</i> , 129 Wn. App. 733, 741, 119 P. 3d 926, review denied, 157 Wn. 2d 1009 (2006).....	23
<i>Kelly-Hansen v. Kelly-Hansen</i> , 87 Wn. App. 320, 330, 941 P. 2d 1108 (1997).....	8, 9
<i>Kemmer v. Kieski</i> , 116 Wn. App. 924, 932 n. 22; 68 P. 3d 1138 (2003)....	6
<i>Lutheran Day Care v. Snohomish County</i> , 119 Wn. 2d 91, 114, 829 P. 2d 746 (1992).....	6
<i>Mackey v. Champlin</i> , 68 Wn. 2d 398, 399, 413 P. 2d 340 (1966).....	5
<i>Marriage of Dicus</i> , 110 Wn. App. 347, 40 P. 3d 1185 (2002)	6
<i>Marriage of Rideout</i> , 150 Wn. 2d 337, 351, 77 P. 3d 1174 (2003).....	10
<i>Sherry v. Financial Indemnity Co.</i> , 160 Wn. 2d 611, 615 n.1, 160 P. 3d 31 (2007).....	23
<i>Silverdale Hotel Associates v. Lomas & Nettleton Co.</i> , 36 Wn. App. 762, 765 n. 2, 677 P. 2d 773, review denied, 101 Wn. 2d 1021 (1984)	12
<i>State v. Ramer</i> , 151 Wn. 2d 106, 113, 86 P. 2d 132 (2004)	10
<i>Structurals Northwest, Ltd. v. Fifth & Park Place, Inc.</i> , 33 Wn. App. 710, 715, 658 P. 2d 679 (1983).....	12
<i>Thomas v. French</i> , 99 Wn. 2d 95, 99, 659 P. 2d 1097 (1983).....	12
<i>Vo v. Pham</i> , 81 Wn. App. 781, 916 P. 2d 462 (1996).....	19

STATUTES

RCW 2.24.050 5, 8
RCW 74.34.020 17, 18, 19, 20
RCW 74.34.130 (7)..... 24
RCW 9A.72.085..... 15, 16

Rules

RAP 10.3 (a) (6)..... 22, 23
RAP 10.3 (g) 11
RAP 10.4 (c) 11
RAP 10.7 23
RAP 18.1 24
RAP 5.2 (a) 5

III. STATEMENT OF THE CASE

A. Facts

Marguerite Nickless is 90 years old. CP 2. Marguerite's son, James P. Nickless, is her attorney-in-fact under a power of attorney executed on or about June 29, 2009. CP 2.

Richard Sorrels is a nephew of Marguerite Nickless. CP 14. Mr. Sorrels held a power of attorney for Mrs. Nickless. CP 2. That power of attorney was revoked on June 29, 2009. RP I p. 16 l. 8-11.¹

Mrs. Nickless retired from Disneyland over 20 years ago. RP I p. 6 l. 25-p. 7 l. 3. Mrs. Nickless lives on social security and a small pension that she received from Disneyland. RP I p. 7 l. 2-3. Mrs. Nickless owns no property. RP I p. 7 l. 3-4. Mrs. Nickless doesn't have any savings. RP I p. 7 l. 4. Mrs. Nickless lived in an apartment complex for 13 years. RP I p. 7 l. 20-21. When she retired, Mrs. Nickless had outstanding credit and no debt. RP I p. 7 l. 24.

Recently, Mr. Nickless moved Mrs. Nickless into an independent living retirement home. RP I p. 7 l. 7-8. Mrs. Nickless now resides at Merrill Gardens in South Tacoma. RP I p. 19 l. 15-20 l. 7. Earlier, Mrs. Nickless' application to enter a retirement home in Gig Harbor was denied

¹ RP I refers to the report of proceedings for July 27, 2009 in the hearing before Commissioner Pro Tem George S. Kelley on the petition for vulnerable adult order of protection. RP II refers to the report of proceedings for September 11, 2009 in the hearing before the Honorable Beverly G. Grant on Mr. Sorrels' motion for revision.

because of bad credit. RP I p. 7 l. 8-13. This came as a surprise to Mrs. Nickless, as she knew that she did not have loans or bad property or bad credit. RP I p. 7 l. 22-23.

Upon appointment as her attorney-in-fact, Mr. Nickless inquired into Mr. Sorrels' actions regarding Mrs. Nickless. Mr. Nickless uncovered maze of transactions involving trusts, and conveyances to and from those trusts to Mr. Sorrels. One such transaction involved a parcel of real property in which Mrs. Nickless, purportedly as the trustee of the Marick Trust, conveyed Lot 11, Block 7, Lake Minterwood, for love and affection, to Mr. Sorrels, as trustee. CP 119. In another transaction, Mr. Sorrels and his girlfriend, Patrice Clinton, are suing Mrs. Nickless for \$350,000 for a parcel of real property, and Mrs. Nickless never received the money for that property. RP I p. 12 l. 13-18. Mrs. Nickless denies knowledge of those transactions, and she did not discover them until she applied for a place to live. RP I p. 10 l. 25-p. 11 l. 4.

B. Procedural History.

On July 1, 2009 Mrs. Nickless and Mr. Nickless filed a petition for vulnerable adult order of protection against Mr. Sorrels. CP 1-6. On that date, the court issued a temporary order for protection and notice of hearing. CP 7-9. Therein, the court restrained Mr. Sorrels from committing or threatening to commit physical harm, bodily injury, assault,

including sexual assault against the vulnerable adult, or to commit or threaten to commit financial exploitation against the vulnerable adult, excluded Mr. Sorrels from the vulnerable adult's residence, restrained Mr. Sorrels from having any contact with the vulnerable adult, prohibited from coming within 1000 feet of the vulnerable adult's residence, required Mr. Sorrels to provide an accounting, restrained Mr. Sorrels from transferring Mrs. Nickless' property. CP 7-8. The temporary order was effective until July 15, 2009. CP 7.

On July 13, 2009, the temporary order was reissued until July 27, 2009. CP 10.

On July 16, 2009, Richard Sorrels was served with the petition for order of protection, the temporary order and the reissuance of the temporary order. CP 48.

On July 23, 2009, Mr. Nickless filed a series of documents including records of court cases involving Mr. Sorrels, real estate excise tax affidavits for real estate transactions involving Mrs. Nickless and Mr. Sorrels, and copies of deeds and mortgages involving Mrs. Nickless and Mr. Sorrels. CP 49-182.

A hearing was held on July 27, 2009. RP I. On that date, the trial court entered the order for protection. CP 11-13. Therein, the commissioner found that personal service of notice of the hearing had

been served upon Mr. Sorrels. CP 11. The commissioner also found that Mr. Sorrels presented a credible threat to the physical safety of Mrs. Nickless. CP 11. The commissioner found that Mr. Sorrels had committed financial exploitation of Mrs. Nickless. CP 11. The commissioner ordered that Mr. Sorrels was excluded from Mrs. Nickless' residence at Merrill Gardens, and that Mr. Sorrels was restrained from having contact with Mrs. Nickless. CP 12.

Mr. Sorrels filed a motion for revision of the order of protection. CP 18-21. A hearing was held on September 11, 2009 on Mr. Sorrels' motion. RP II. On that dated the trial court entered an order denying revision. CP 24.

On October 12, 2009, Mr. Sorrels filed a notice of appeal. CP 25-33.

IV. ARGUMENT

A. APPELLANT FAILED TO TIMELY APPEAL FROM THE TEMPORARY ORDER OF PROTECTION AND REISSUANCE OF TEMPORARY ORDER.

Mr. Sorrels' notice of appeal was filed on October 12, 2009. CP 25-33. Therein, Mr. Sorrels sought review of the Temporary Order of Protection entered on July 1, 2009, and the Order Reissuing Temporary Protection Order entered on July 13, 2009. CP 7-10. Mr. Sorrels' notice of appeal was filed 103 days after the Temporary Protection Order and 91

days after the Order Reissuing Temporary Order. Mr. Sorrels did not seek revision of either order. Mr. Sorrels' motion for revision, filed on August 6, 2009, sought review of only the Order of Protection entered on July 27, 2009. CP 18-21.

Because Mr. Sorrels did not seek revision of either the Temporary Order of Protection or Order Reissuing Temporary Order, both of those orders became judgments of the Superior Court pursuant to RCW 2.24.050:

...[U]nless a demand for revision is made within ten days from the entry of the order or judgment of the court commissioner, the orders and judgments shall be and 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 judgments entered by the judge.

Mr. Sorrels had 30 days from entry of those orders to file a notice of appeal. RAP 5.2 (a) (“...[A] *notice of appeal must be filed in the trial court within the longer of ... 30 days after the entry of the decision of the trial court which the party filing the notice wants reviewed...*” Mr. Sorrels failed to do so. Mr. Sorrels' notice of appeal is therefore untimely as to the Temporary Order of Protection and the Order Reissuing Temporary Order. *Mackey v. Champlin*, 68 Wn. 2d 398, 399, 413 P. 2d 340 (1966).

B. THE TEMPORARY ORDER OF PROTECTION AND ORDER REISSUING TEMPORARY ORDER ARE RES JUDICATA AND PRECLUDE THIS APPEAL.

A judgment not appealed within 30 days is res judicata, and directly precludes all further proceedings in the same case. *Kemmer v. Kieski*, 116 Wn. App. 924, 932 n. 22; 68 P. 3d 1138 (2003).

The doctrine of res judicata applies to an order of a court commissioner that has neither been revised nor appealed. In *Marriage of Dicus*, 110 Wn. App. 347, 40 P. 3d 1185 (2002), the court affirmed the trial court's order denying, on the grounds of res judicata, the appellant's claim for social security offsets to court-ordered child support payments, due to appellant's failure to seek revision of, or to appeal, prior child support orders entered by the court commissioner. 110 Wn. App. 355-57.

While res judicata generally requires two proceedings, the doctrine may also apply to two rulings in the same case. *Lutheran Day Care v. Snohomish County*, 119 Wn. 2d 91, 114, 829 P. 2d 746 (1992).

The court addressed the effect of Mr. Sorrels' failure to seek revision of, or to appeal, either the Temporary Order of Protection or the Order Reissuing Temporary Order at the hearing on Mr. Sorrels' motion for revision. Mr. Sorrels acknowledged that he had not sought revision of those earlier orders:

THE COURT: So you acknowledge receipt of the July 16th—

MR. SORRELS: It was—the first—while they served both the 1st of July order and also the July 13th re-issuance order upon me on July 16th for a hearing that was to be held on July 27th.

THE COURT: Okay. So you received it on the 16th. You had 10 days to acknowledge—well, you had so many days to file a response. Did you file a response?

MR. SORRELS: No. On the eleventh day there was a hearing. It made no sense to file any sort of motion for revision on that.

THE COURT: All right.

MR. SORRELS: If I am allowed 10 days, and the hearing is on the eleventh day, why would I file a notation for a revision hearing on the following day?

RP II p. 30 l. 16-p. 31 l. 2.

Mr. Nickless' counsel pointed out Mr. Sorrels' failure to appeal the original findings, and the trial court agreed that revision was thereby precluded:

MR. LUCE: ...They gave him the notice, and he chose not to do anything. There's no appeal from these initial findings.

THE COURT: That's true. Because you didn't respond, there's nothing to appeal from.

RP II p. 32 l. 6-9.

In deciding whether to apply res judicata, the court considers whether the present and prior proceedings arise out of the same facts, whether they involve substantially the same evidence, and whether rights or interests established in the first proceeding would be destroyed or impaired by completing the second proceeding. *Kelly-Hansen v. Kelly-Hansen*, 87 Wn. App. 320, 330, 941 P. 2d 1108 (1997). Consideration of those factors compels application of that doctrine here. The Temporary Order of Protection and the Order Reissuing Temporary Order arose out of the same facts as support the Order of Protection. The evidence in support of the Temporary Order of Protection and the Order Reissuing Temporary Order is substantially the same as for the Order of Protection. CP 1-6. Marguerite Nickless right to be free from contact by Mr. Sorrels would be impaired if Mr. Sorrels were allowed to relitigate the findings of Marguerite Nickless' vulnerability or Mr. Sorrels' financial exploitation of her that were established in the Temporary Order of Protection and the Order Reissuing Temporary Order.

Application of res judicata here does not work an unfair advantage against Mr. Sorrels, as he could have prevented the Temporary Order of Protection and the Order Reissuing Temporary Order from becoming final judgments under RCW 2.24.050 by timely seeking revision after being

served with copies of those orders on July 16, 2009. CP 48. Instead, Mr. Sorrels made a conscious decision not to do so. RP II p. 30 l. 16-p. 31 l. 2.

Res judicata precludes any matter that could have been raised in the hearings on Temporary Order of Protection and the Order Reissuing Temporary Order. *Kelley-Hansen v. Kelley-Hansen*, 87 Wn. App. 329 (“*The court has also said, on numerous occasions, that res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at that time.*” (Fn. 22 omitted)). Therefore, Mr. Sorrels was precluded, either at the hearing on the Order for Protection or at the hearing on revision, from relitigating Marguerite Nickless’ status as a vulnerable person or Mr. Sorrels’ financial manipulation of her.

C. THE TRIAL COURT’S FINDINGS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

1. STANDARD OF REVIEW

The trial court, denied appellant’s motion for revision of the commissioner’s order without making separate findings of fact. CP 24. The trial court thereby implicitly adopted the findings of fact made by the court commissioner in the Order for Protection. CP 11-13. *In Re:*

Dependency of BSS, 56 Wn. App. 169, 171, 782 P. 2d 1100, review denied, 114 Wn. 2d 1018 (1990).

Having made its decision denying revision of the Order of Protection, appellant's appeal is from the trial court's decision, not the commissioner's order. *State v. Ramer*, 151 Wn. 2d 106, 113, 86 P. 2d 132 (2004).

The commissioner also took live testimony from Marguerite Nickless, the vulnerable adult. RP I p. 10 l. 19-p. 11 l. 9; p. 17 l. 21-15. The testimony of Marguerite Nickless played a significant role in the commissioner's decision to sign the Order for Protection:

So I'm going to sign this order for protection of vulnerable adult; Marguerite Nickless meets the definition as at least someone being over 60. She's 80. ***She expressed confusion over whatever business and real estate relationship that she's involved with Mr. Sorrels.*** (Emphasis added).

RP I p. 18 l. 15-20.

From the foregoing, it is apparent that the commissioner found Marguerite Nickless to be credible. Having made such a credibility determination on the basis of live testimony, review for substantial evidence is the appropriate standard of review before this Court. *Marriage of Rideout*, 150 Wn. 2d 337, 351, 77 P. 3d 1174 (2003) (“[W]here the proceeding at the trial court turned on credibility

determinations and a factual finding of bad faith, it seems entirely appropriate for a reviewing court to apply a substantial evidence standard of review.”).

The trial court’s findings are presumed correct; the party claiming error has the burden of establishing that that the findings were not supported by substantial evidence. *Heath v. Uraga*, 106 Wn. App. 506, 516, 24 P. 3d 413 (2001). Substantial evidence is evidence of sufficient quantum to lead a reasonable person to believe the truth of the matter asserted. *Endicott v. Saul*, 142 Wn. App. 899, 909, 176 P. 3d 560 (2008). In reviewing the sufficiency of evidence, the court need only consider evidence favorable to the prevailing party. *Ibid.* Credibility determinations are solely for the trier of fact. *Id.*

2. THE TRIAL COURT’S FINDINGS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

RAP 10.3 (g) provides, in pertinent part, as follows:

...A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

RAP 10.4 (c) provides, as follows:

If a party presents an issue which requires study of a statute, rule, regulation, jury

instruction, finding of fact, exhibit, or the like, the party should type the material portions of the text out verbatim or include them by copy in the text or in an appendix to the brief.

Mr. Sorrels argues that the findings are not supported by substantial evidence. BA 7. Mr. Sorrels fails to properly assign error to any of the findings, or to quote or append the findings that he wants reviewed. The trial court's findings therefore become the established facts of the case. *Silverdale Hotel Associates v. Lomas & Nettleton Co.*, 36 Wn. App. 762, 765 n. 2, 677 P. 2d 773, *review denied*, 101 Wn. 2d 1021 (1984); *Thomas v. French*, 99 Wn. 2d 95, 99, 659 P. 2d 1097 (1983).

In the Order for Protection, the court commissioner found that Mr. Sorrels had committed acts of financial exploitation against Mrs. Nickless. CP 11. Any ambiguity in that finding may be explained by looking to the court commissioner's oral decision. *Heikkinen v. Hansen*, 57 Wn. 2d 840, 845, 360 P. 2d 147 (1961); *Structurals Northwest, Ltd. v. Fifth & Park Place, Inc.*, 33 Wn. App. 710, 715, 658 P. 2d 679 (1983). In his oral ruling, the court commissioner at the hearing on the Order for Protection addressed Marguerite Nickless' vulnerability and Mr. Sorrels' financial manipulation of her:

THE COURT: ...So I'm going to sign this order for protection of vulnerable adult: Marguerite Nickless meets the

definition as someone being over 60. She's 80. She has expressed confusion over whatever business and real estate relationship that she's involved with Mr. Sorrels.

Mr. Sorrels probably can't explain, although given time maybe he could, as to what—this file is going back to 1997, some of which involves Mrs. Nickless, some of which doesn't have to do with this, but it sounds complex.

So I'm going to find that service, personal service was made, Going to find that respondent, Mr. Sorrels, represents a credible threat; thinking that financial exploitation, not abandonment, abuse or neglect of his aunt. I'm ordering that you be restrained from committing any acts of financial exploitation, which is somewhat general and vague. Also saying that there should be no contact between you and Mrs. Nickless.

RP I p. 18 l. 15-p. 19 l. 9.

Substantial evidence supports the trial court's findings that Marguerite Nickless was a vulnerable adult and that Mr. Sorrels had committed financial exploitation of her. In the Petition for Vulnerable Adult Order for Protection, petitioner, James Nickless, testified that his mother, Marguerite Nickless, was over 60 years old, she does not have the functional, mental or physical ability to care for herself, and that she has been admitted to a boarding home, nursing home, adult family home,

soldier's home, residential rehabilitation center or any other facility licensed by DSHS. CP 1. Mr. Nickless further testified therein that:

- Mrs. Nickless was 89 years old, and was highly influenced to manipulative financial exploitation, undue duress, and undue influence from Mr. Sorrels.
- Mr. Sorrels was a legal fiduciary of Mrs. Nickless.
- Mr. Sorrels had made recent appearances at Mrs. Nickless' residence in June, 2009.
- It was unknown whether there had been an accounting of Mrs. Nickless' resources by Mr. Sorrels.
- It was suspected that Mr. Sorrels had used his power of attorney for his own financial gains.
- There were numerous property transfers over the past 15 years involving Mrs. Nickless without her full knowledge of the reasons therefor.
- There had been involvement in foreclosures, evictions, loans, trust accounts, and court cases without Mrs. Nickless' knowledge, which resulted in Mr. Sorrels' gain and Mrs. Nickless' losses.
- Mr. Sorrels has access to bank, mortgage and trust accounts both known and unknown to Mrs. Nickless.

- Due to recent court cases, Mr. Sorrels may drain or change Mrs. Nickless' accounts, and buy, sell or transfer properties.
- Mr. Sorrels has been at Mrs. Nickless' home numerous times and acted in a harassing and manipulative environment.
- Mr. Sorrels abuses privileged and/or responsibilities to Mrs. Nickless for his personal gains.

CP 2, 4, 5, 6.

The petition for vulnerable adult order of protection recites under penalty of perjury that the statements made therein are true and correct, and is dated and signed by Mr. Nickless. CP 6. The petition satisfies the requirements of RCW 9A.72.085:

Whenever, under any law of this state or under any rule, order, or requirement made under the law of this state, any matter in an official proceeding is required or permitted to be supported, evidenced, established, or proved by a person's sworn written statement, declaration, verification, certificate, oath, or affidavit, the matter may with like force and effect be supported, evidenced, established, or proved in the official proceeding by an unsworn written statement, declaration, verification, or certificate, which:

- (1) Recites that it is certified or declared by the person to be true under penalty of perjury;
 - (2) Is subscribed by the person;
 - (3) States the date and place of its execution;
- and

(4) States that it is so certified or declared under the laws of the state of Washington. The certification or declaration may be in substantially the following form:
“I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct”:

(Date and Place) (Signature)

This section does not apply to writings requiring an acknowledgement, depositions, oaths of office, or oaths required to be taken before a special official other than a notary public.

The use of a declaration in the format in RCW 9A.72.085 is authorized by GR 13 (a):

(a) Unsworn Statement Permitted.

Except as provided in section (b), whenever a matter is required or permitted to be supported or proved by affidavit, the matter may be supported or proved by an unsworn written statement, declaration, verification, or certificate executed in accordance with RCW 9A.72.085....

In light of the foregoing, Mr. Nickless’ testimony in the petition for vulnerable adult order of protection constitutes substantial evidence.

Endicott v. Saul, 142 Wn. App. 909.

The court commissioner also heard testimony from Mrs. Nickless:

THE COURT: So you want to explain to me why you think that you should be protected from contact from Mr. Sorrels?

MRS. NICKLESS: Identity to myself. I worry about the future now because it all comes up so sudden on me, and I had no

idea that this was happening until just when I was finding a place to live. I want my credit back.

THE COURT: Mrs. Nickless?

MRS. NICKLESS: Yes. Things were going on behind my back. I never got anything: no information, no mail, no nothing of anything all during the time.

RP I p. 10 l. 22-p. 11 l. 4; p. 17 l. 21-25.

Mrs. Nickless' testimony constitutes substantial evidence.

Endicott v. Saul, 142 Wn. App. 909.

As the testimony of Mr. Nickless and Mrs. Nickless provides substantial evidence to support the trial court's findings, those findings may be upheld regardless of the materials submitted by Mr. Nickless at the hearing on July 27, 2009 on the Order of Protection.

At the hearing on July 27, 2009, Mr. Nickless offered a series of documents to corroborate Mrs. Nickless' testimony that she had no idea of Mr. Sorrels' actions. CP 49-182. Among those documents was the quit claim deed, purportedly executed on March 23, 2001 by Marguerite Nickless as trustee of the Marick Trust, conveying Lot 11, Block 7, Lake Minterwood, for love and affection, to Richard Sorrels, as trustee. CP 119.

Mr. Sorrels argues that the record does not support one of the factors in RCW 74.34.020 that defines a "*vulnerable adult*". BA 8. RCW 74.34.020 (16) provides as follows:

“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.

Also relevant here is the definition of a “*facility*” in RCW

74.34.020 (5):

“Facility” means a residence licensed or required to be licensed under chapter 18.20 RCW, boarding homes; 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 by the department.

In the petition for vulnerable adult order of protection, Mr.

Nickless testified under penalty of perjury that Mrs. Nickless was over 60 years old and does not have the functional, mental, or physical ability to care for herself, and that she has been admitted to a facility licensed by DSHS. CP 1. Mr. Nickless thereby established that Mrs. Nickless met the definition of vulnerable adult in RCW 74.34.020 (16) (a), (d).

Mr. Sorrels argues that mental capacity is presumed and incapacity must be proven by clear, cogent and convincing evidence. BA p. 8. The definition of a vulnerable adult in RCW 74.34.020 (16) permits, but does not require, proof of incapacity. Under RCW 74.34.020 (16) (a), a vulnerable adult is a person over 60 who has the functional, mental, or physical inability to care for himself or herself, whereas, under RCW 74.34.020 (16) (b), a vulnerable adult is a person incapacitated under chapter 11.88 RCW. RCW 74.34.020's use of the word "or" is disjunctive, absent clear evidence of contrary legislative intent. *Guijosa v. Wal-Mart Stores, Inc.*, 101 Wn. App. 777, 790, 6 P. 3d 583, *affirmed*, 144 Wash.2d 907, 32 P.3d 250 (2001). Therefore, Mrs. Nickless meets the definition of a vulnerable person in RCW 74.34.020 (16), if any one of its requirements is met.

Mr. Sorrels misplaces reliance upon *Vo v. Pham*, 81 Wn. App. 781, 916 |P. 2d 462 (1996) and *Binder v. Binder*, 50 Wn. 2d 142, 309 P. 2d 1050 (1957). BA p. 8. Neither *Vo* nor *Binder* involved any issue under the Abuse of Vulnerable Adults Act.

Endicott v. Saul does not support Mr. Sorrels' argument. In *Endicott*, evidence of the vulnerable person's incapacity under RCW Chapter 11.88 supported the trial court's conclusion that an 80-year old

woman was vulnerable. 142 Wn. App. 920-21. *Endicott* does not require proof of incapacity to establish that is person is a vulnerable adult.

Mr. Sorrels argues that there is no allegation of what he did or did not do. BA p 8-9. To the contrary, Mr. Nickless testified that Mr. Sorrels repeatedly appeared at Mrs. Nickless' residence, and acted in a harassing and manipulative manner, that Mr. Sorrels failed to account for the disposition of Mrs. Nickless' resources, that Mr. Sorrels abused his power of attorney for Mrs. Nickless for his own benefit, that Mr. Sorrels involved Mrs. Nickless in real estate transactions without her knowledge, and that Mr. Sorrels involved Mrs. Nickless in real estate foreclosures and litigation without her knowledge. CP 5-6. Mr. Sorrels' actions meet the definition of exploitation in RCW 74.34.020 (2) (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.”*).

Mr. Sorrels argues that Mrs. Nickless must be shown to have been vulnerable at the time of the exploitation. BA p. 8. Mr. Nickless testified that Mr. Sorrels appeared at Mrs. Nickless' house as late as June, 2009. CP 5. Mr. Nickless also testified that while at Mrs. Nickless' home, Mr. Sorrels acted in harassing and manipulative manner. CP 6. Mr. Nickless

also described Mrs. Nickless in July 2009 as 89 years old, and “*highly influenced to manipulative financial exploitation, undue duress and undue influence from relative (respondent).*” CP 2. Thus, the record establishes that Mrs. Nickless was vulnerable at the time of the exploitation in this case.

D. THE TRIAL COURT DID NOT ERR IN CONSIDERING MATERIALS SUBMITTED BY RESPONDENT.

Mr. Sorrels argues that materials submitted to the court commissioner were not provided to him. BA p. 9. On July 16, 2009, Mr. Sorrels was served with copies of the petition for order of protection, the temporary order of protection, and the reissuance of temporary order of protection and notice of hearing. CP 48.

On July 23, 2009, Mr. Nickless submitted documents to the court commissioner as working copies. CP 49-182. Included therein were court documents in other cases in which Mr. Sorrels was a party, real estate excise tax affidavits, including an affidavit for a real estate transaction allegedly involving Mrs. Nickless and Mr. Sorrels. CP 178, and mortgages and deeds, including a quit claim deed allegedly from Mrs. Nickless to Mr. Sorrels. CP 119.

On July 27, 2009, at the hearing on the motion for order of protection, Mr. Sorrels objected to the introduction of Mr. Nickless' documents as untimely. RP I p. 8-9.

The court commissioner gave Mr. Sorrels time to review the documents. RP I p. 9 l. 14-18. The time provided was sufficient to allow Mr. Sorrels an opportunity to respond to the documents. RP I p. 15 l. 23-p. 17 l. 7. The court commissioner thereby abated any prejudice to Mr. Sorrels. *Cotton v. City of Elma*, 100 Wn. App. 685, 691, 998 P. 2d 339 (2000); *Brown v. Safeway Stores, Inc.*, 94 Wn. 2d 359, 364, 617 P. 2d 704 (1980).

It is questionable whether Mr. Sorrels suffered any prejudice to begin with. The court commissioner noted that most of the documents submitted by Mr. Nickless had nothing to do with Mr. Sorrels' dealings with Mrs. Nickless. CP I p. 18 l. 21-25. In addition, Mr. Sorrels did not request a continuance of the hearing. Mr. Sorrels thereby waived any claim of prejudice. *Goucher v. Simplot*, 104 Wn. 2d 662, 665, 709 P. 2d 774 (1985).

Mr. Sorrels argues that additional evidence was presented at the hearing on his motion for revision. BA p. 9. Mr. Sorrels fails to cite any authority in support of his argument. RAP 10.3 (a) (6) ("*The brief of the appellant or petitioner should contain...[t]he argument in support of the*

issues presented for review, together with citations to legal authority and references to relevant parts of the record....”). Because he fails to do so, Mr. Sorrels’ argument should not be considered. *Keever & Associates, Inc. v. Randall*, 129 Wn. App. 733, 741, 119 P. 3d 926, *review denied*, 157 Wn. 2d 1009 (2006)

To the extent that his argument merits consideration here, Mr. Sorrels overlooks that the court at the revision hearing stated that it would consider only the matter of record before the court commissioner. “*And I will look only at that that had been presented before.*” RP II p. 25 l. 23-24.

E. APPELLANT’S ESTOPPEL ARGUMENT IS IMPROPER AS IT IS BASED ON MATTERS OUTSIDE THE RECORD ON APPEAL.

Mr. Sorrels invites the court to consider action taken by DSHS after entry of the orders appealed in this case. BA p. 9-10. Mr. Sorrels provides no citation to the record, and therefore his argument should not be considered. RAP 10.3 (a) (6). *Sherry v. Financial Indemnity Co.*, 160 Wn. 2d 611, 615 n.1, 160 P. 3d 31 (2007).

To the extent that his argument requires consideration of matters not of record in this appeal, Mr. Sorrels’ argument is improper and merits sanctions. Note RAP 10.7:

If a party submits a brief that fails to comply with the requirements of Title 10, the appellate court, on its own initiative or on the motion of a party, may (1) order the brief

returned for correction or replacement within a specified time, (2) order the brief stricken from the files with leave to file a new brief within a specified time, or (3) accept the brief. The appellate court will ordinarily impose sanctions on a party or counsel for a party who files a brief that fails to comply with these rules.

F. RESPONDENT REQUESTS AN AWARD OF ATTORNEY FEES ON APPEAL.

RAP 18.1 (a), (b) provides as follows:

(a) Generally. If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.

(b) Argument in Brief. The party must devote a section of its opening brief to the request for the fees or expenses. Requests made at the Court of Appeals will be considered as continuing requests at the Supreme Court. The request should not be made in the cost bill. In a motion on the merits pursuant to rule 18.14, the request and supporting argument must be included in the motion or response if the requesting party has not yet filed a brief.

RCW 74.34.130 (7) provides as follows:

The court may order relief as it deems necessary for the protection of the vulnerable adult, including, but not limited to the following:...

(7) Requiring the respondent to pay a filing fee and court costs, including service fees,

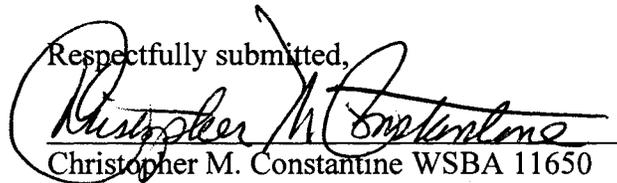
and to reimburse the petitioner for costs incurred in bringing the action, including a reasonable attorney's fee.

In the event that respondents prevail in this appeal, an award of costs and attorney fees would be appropriate. Neither Mr. Nickless nor Mrs. Nickless should be required to shoulder the expense of this appeal. Instead, Mr. Sorrels should be required to pay a reasonable attorney's fee to respondents.

V. CONCLUSION

The order of September 11, 2009, denying appellant's motion for revision should be affirmed. The court should grant respondents' request for attorney fees on appeal.

Respectfully submitted,



Christopher M. Constantine WSBA 11650
Attorney for Respondents

VI. CERTIFICATE OF MAILING

The undersigned does hereby declare that on July 8, 2010, the undersigned served upon Respondent a copy of BRIEF OF RESPONDENTS filed in the above-entitled case by depositing it into the United States mail, first-class postage addressed to the following person:

Richard Sorrels
9316 Glencove Rd
Gig Harbor, WA 98329

Dated: July 8, 2010



FILED
COURT OF APPEALS
10 JUL 13 AM 11:36
STATE OF WASHINGTON
BY _____
CLERK