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This an appeal from the Superior Court of the State of Washington for Thurston County which on April 15, 2011 entered an Order on Petition for Review. CP 71 - 73 (Appx. 1 - 3). The Order denied Appellant's Motion to Vacate the Review Decision and Final Order of the Department of Social and Health Services Board of Appeals and Decision and Order and sustained and affirmed the decision and order of the Board of Appeals of the Department of Social and Health Services. The Department of Social and Health Services will hereinafter be known as "DSHS".

On May 4, 2011, Appellant filed the Notice of Appeal to the Court of Appeals, Division II. CP 74 - 78.

#### **I. PRELIMINARY STATEMENT**

Appellant, Thomas Goldsmith, III, will hereinafter be referred to as "Thomas III". His father, Thomas Goldsmith, also known as the "senior Thomas" sometimes Thomas, Sr. and Thomas, Jr. will hereinafter be known as "Thomas, Sr.".

Reference to the Agency Record is "AR" followed by the bates number assigned to the page or pages on the lower right hand corner of the page. Reference to the Transcription of the Hearing is "TR" followed by the page number designated in the middle of the top of the page. Reference to Clerks Papers is "CP" followed by the page number.

Appendix A 1-2 is a copy of the Order on Petition for Review entered by the Superior Court on April 15, 2011.

## II. ASSIGNMENTS OF ERROR

1. Thomas III assigns as error the making by the Administrative Agency and the entry of Finding of Fact 6 by the Administrative Agency which was adopted by the Superior Court in its order, and which reads as follows.

“6. The Appellant’s involvement in his parents’ financial concerns would bring him to Washington State from his home in Boston, Massachusetts, for periods lasting for a week or two at a time. The visits would occur four or five times per year. Initially, the Appellant and his father got along well. However, when the Appellant insisted on talking about his parents’ financial affairs, the discourse would often deteriorate into an intense shouting match. These arguments were numerous, lengthy (lasting up to two hours at a time), and often resulted in yelling between the Appellant and his father. Caregivers in the home during these incidents described them as “verbal fights” and would involve the Appellant pressuring his father about financial matters. These verbal altercations left Thomas, Sr. extremely agitated, upset, and would require efforts by both the caregiver and Helen to calm him down after the Appellant had left. At the end of one such altercation on October 17, 2008, Thomas, Sr. became so angry he ordered the Appellant to leave the house or he would call the police. When the Appellant continued to argue with his father, the caregiver had to intervene to get the Appellant to leave. It came to a point where Thomas, Sr. ceased to look forward to the Appellant’s visits, stating, “I wish he would not come” and “I don’t know what to do about it.” After some of these episodes, Thomas, Sr. would become very resistant to caregiver recommendations such as a reminder to use the bathroom, resulting in his soiling himself, or refusal to take his medications. Thomas, Sr.’s exhibited these emotions of anger, anxiety, and exacerbation only after he had been involved in verbal altercations with the Appellant. TR, p. 132, line 15 through p. 135, line 15 and p. 143, line 15 through p. 144, line 22. Thomas, Sr. was otherwise a “wonderful, calm person.” It was “not normal for him to

be this upset” as he would become after verbal exchanges with the Appellant. TR, p. 133, lines 18 - 24.”

AR000019 - AR000020.

2. Thomas III assigns as error the making by the Administrative Agency and the entry of Finding of Fact 7 by the Administrative Agency which was adopted by the Superior Court in its order, and which reads as follows.

“7. A meeting was held at Thomas, Sr.’s request on October 6, 2008, based on his concern over a disagreement with the Appellant regarding caregiver services provided for Thomas, Sr. and Helen. The meeting was attended by Thomas, Sr., his attorney, the Appellant, and the director and assistant director of CGS. The meeting became an escalating verbal altercation with the Appellant, at one point, making the comment that his life depends on his parent’s money. Thomas, Sr. responded by putting his head down and saying, “I can’t go [o]n like this. This is just too much. TR, p. 107, lines 5 - 18 and p. 109, lines 19 - 22.”

AR000020.

3. Thomas III assigns as error the making by the Administrative Agency and the entry of Finding of Fact 8 by the Administrative Agency which was adopted by the Superior Court in its order, and which reads as follows.

“8. Telephone conversations between the Appellant and his father in late 2007 and the mid-2008, regarding the extent of caregiver services needed, deteriorated into yelling matches. One such altercation resulted in Thomas, Sr. slamming his fist on a table in an effort to get the Appellant to hear him and to understand that he wanted the conversation to end. Thomas, Sr. finally stated, “I am

done” and hung up the phone. TR, p. 110, lines 5 - 20. another altercation occurred by speaker phone in October 2008, when the Appellant happened to call his father during a meeting Thomas, Sr. was having with his attorney and CGS. The Appellant insisted on knowing what the meeting was about and would not be put off by Thomas, Sr.’s promise to call him later. The exchange between the Appellant and his father escalated to the point where Thomas, Sr. shouted that he would call the Appellant back later and hung up the phone. TR, p. 153, lines 8 - 23.”

AR000020 - AR000021.

4. Thomas III assigns as error the making by the Administrative Agency and the entry of Finding of Fact 9 by the Administrative Agency which was adopted by the Superior Court in its order, and which reads as follows.

“9. The frequency and the intensity of the verbal altercations between the Appellant and his father escalated to the point where CGS believed it created a danger to the well-being of Thomas, Sr. and Helen and interfered with the caregivers’ ability to do their jobs in Thomas, Sr.’s and Helen’s home. All five caregivers assigned to the care of Thomas, Sr. and Helen reported yelling altercations between the Appellant and Thomas, Sr. TR, p. 112, lines 5 - 10. Such concerns led to Superior Court action setting parameters for the visits the Appellant would have with his parents and the issues that could be raised during such visits. Exhibits 7 and 11.”

AR000021.

5. Thomas III assigns as error the making by the Administrative Agency and the entry of Finding of Fact 10 by the Administrative Agency which was adopted by the Superior Court in its order, and which reads as follows.

“10. On October 30, 2008, the Department received a report of possible abuse of a vulnerable adult. Exhibit 1. the Department investigated this allegations and part of that investigation involved interviewing Thomas, Sr. on November 5, 2008, in his home. Thomas, Sr. acknowledged that a protection order would be in place for another couple of weeks, but he did not want any further protection orders. He did not want the Appellant’s visit to be for shorter periods of time. TR, p. 65, lines 11 - 16. Thomas[, Sr.] was asked about his earlier statements of frustration and resignation that he could not handle these interactions with his son any longer. Thomas [Sr.] responded by stating everything was just fine - that there was no problem. TR, p. 65, line 20 through p. 66, line 1. He further stated that his son may have raised his voice, but it was nothing more than that. TR, p. 77, lines 9 - 14. When asked if pressure had been exerted on him about finances by the Appellant, Thomas, Sr. responded, “No, nothing like that.” TR, p. 87, lines 1 - 7. and, Thomas, Sr. informed the investigator that the Appellant had not harassed him at all. TR, p. 87, lines 21 - 23. The Department investigator did not find Thomas, Sr.’s statements unusual even though they conflicted with other evidence and the declarations set forth in the referral. The investigator testified that, based on her experience, it was not unusual for a person in an abusive relationship to “re-cant” earlier accusations. TR, p. 66, lines 2 - 5. Based on her education in counseling, psychology, and abusive relationship training, the investigator drew conclusions in making her finding of abuse from the fact that Thomas, Sr. wanted shorter visitations with the Appellant. TR, p. 96, lines 17 - 24. Unfortunately, due to his demise, Thomas, Sr. was not available to testify at the hearing as to allow the parties’ representatives and the ALJ to question him regarding apparent inconsistencies in his contemporaneous statements and actions heard and observed by caregivers and other CGS employees and his later statements to the Department investigator.”

AR000021 - AR000022.

6. Thomas III assigns as error the making by the

Administrative Agency and the entry of Finding of Fact 11 by the Administrative Agency which was adopted by the Superior Court in its order, and which reads as follows.

“11. Based on its investigation, the Department made a substantiated finding of mental abuse. The Department sent the Appellant notice of the substantiated finding on February 20, 2009, by certified and regular mail. As indicated by the Appellant’s timely request for hearing, the Appellant actually received the notice of substantiated finding no later than February 25, 2009. The Founded Finding Letter explained:

From about April 2008 through October 2008 you yelled at and pressured a vulnerable adult about financial decisions which caused the vulnerable adult to be upset.

These actions met the definitions of mental abuse in RCW 74.34.020(2)(c):

. . . “**Mental Abuse**” [definition in RCW 74.34.020(2)(c)]. Exhibits 4, 5, and 6.”

AR000022 - AR000023.

7. Thomas III assigns as error the denial by the Superior Court of his Motion to Vacate Review Decision and Final Order of DSHS Board of Appeals and the Decision and Order Sustained thereby and to Dismiss Action. CP 50 - 52, 68 - 70, and CP 71 - 73.

8. Thomas III assigns as error the entry of the Order on Petition for Review entered on April 15, 2011 affirming the Final Decision of DSHS. CP 71 - 73.

### **III. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

The issue pertaining to the assignments of error is as follows:

1. Did the Hearings and Review Divisions of DSHS lose jurisdiction by reason of the death of Thomas, Sr.?

2. Did DSHS: (a) erroneously interpret or apply the applicable law; (b) is the order outside of the statutory authority for the agency; or (c) is the order of DSHS arbitrary or capricious; or (d) is the agency action of DSHS supported by substantial evidence.

### **IV. PROCEEDINGS IN THE SUPERIOR COURT**

These proceedings commenced with the filing of a Complaint with the Department of Social and Health Services. The Department made a determination against Thomas III who requested administrative review. The Department's determination was sustained on administrative review. Thomas III then petitioned the Thurston County Superior Court. The Superior Court sustained the order of the administrative agency. Thomas III then appealed to the above-entitled court.

### **V. FACTS**

(a) Background:

Thomas, Sr., sometimes Thomas, Jr. is the father of Thomas III.

Thomas, Sr. enjoyed a distinguished career as an Electrical Engineer. He made significant contributions to his professional field. During his career he amassed considerable wealth and retired to Panorama

City with his wife, Helen. As of November 2008, he was intellectually interactive with others, was aware of his environment, was responsive to questions, and had cognitive ability to participate in meetings, to form opinions, and to actively engage and express his opinions with others.

Thomas, Sr. had three adult children: Judson Goldsmith; Thomas Goldsmith, III; and Jinny Beckman. Judson Goldsmith's wife managed Thomas, Sr. and his wife's investment portfolio, which was substantial. This management ended with her untimely death on February 5, 2003. Later in 2003, Thomas, Sr. and his wife, Helen, asked Thomas III to help manage their considerable estate which was agreed to by Thomas III. Thomas III was retained by Thomas, Sr. and his wife to assist him in the management of the estate, including the investment portfolio. He was compensated for his services.

Jinny Beckman, the child with the greatest medical experience and medical background held a Healthcare Durable Power of Attorney for Thomas, Sr. and Helen. In March 2006, Thomas, Sr. executed a Durable General Power of Attorney naming Leesa Camerota in her role as Executive Director of Capital Guardian Services ("CGS") or successor as his attorney-in-fact. If Ms. Camerota became unable to or unwilling to serve in this capacity, then Thomas III was designated as successor attorney-in-fact. Since Thomas III lived in Massachusetts he would visit his parents periodically.

In 2008, a guardianship proceedings was commenced wherein Thomas, Sr. and Helen were alleged incompetents. The case was assigned No. 08-4-00614-4 by the Clerk of the Thurston County Superior Court. On February 10, 2009, an Order was entered creating a full guardianship of the estate of Thomas, Sr. and Helen. On June 29, 2009 a guardian of the person was appointed for Helen. Thomas, Sr. died on March 5, 2009.

In November 2008, a proceeding was commenced in the Superior Court for Thurston County under Cause No. 08-2-30754-6 seeking restraint of Thomas III from his father. Alleging that Thomas, Sr. was a vulnerable adult. An Order was entered in these proceedings in response to Thomas, Sr. request of dismissal of the Petition. The Dismissal Order provided “the request for full order is denied and petition is dismissed and any temporary orders expire at 9:10 \_M today”. The Order was signed at 9:10 AM on November 14, 2008.

AR000202 - AR000211.

(b) Summary of Witness Testimony:

(1) **Dr. Fred Kemp, Ph.D:** On January 26, 2009, Dr. Kemp prepared a medical/psychological report pertaining to Thomas, Sr. Dr. Fred Kemp, Ph.D. is a psychologist at the offices Quixote Consulting, Inc., Rochester, Washington. Presumably this evaluation was prepared in connection with the then pending guardianship proceedings. Exhibit M, AR000363 - AR000376.

The test is called an MMSE Test. The test results are as follows:

1. Cognitive Functioning is in the mildly impaired range, primarily because of his lack of orientation to time. In that context, it is noted that a dementia assessment dated January 16, 2009 resulted in a finding of “very mild”, and he was described on that date as “oriented times 3” **given his educational and vocational achievements and his overall quality of many of his answers reported below, the MMSE score may be an understatement of his cognitive abilities.**

(Emphasis ours.)

2. Based on the HOAT, Thomas, Sr. is capable of making medical decisions.

3. Based on the medical knowledge questionnaire, Thomas, Sr. does an above average job of defining medical terms.

4. Based on the medical understanding interview, Thomas, Sr. began the section of the evaluation by stating that he wishes he knew his health status better; and focused on his current broken hip.

5. Based on the financial questionnaire (cost estimates, short answer, and comprehension) Thomas, Sr. performed at an average or below average level. **Thomas, Sr. chose not to respond to the questions on the financial interview because “I don’t put that out**

freely". In the experience of this examiner, individuals who protect their financial information are generally function at a higher cognitive level and exhibit sounder judgment than those who freely provide such private information to a relative stranger. (Emphasis ours.) TR 60 - TR 90.

(2) **Jacqueline Heinselman:** Jacqueline Heinselman is an investigator social worker for DSHS, Adult Protective Services. Her formal education consists of a Masters Degree in Counseling/Psychology. There is no indication as to the university, if any, from which she received her degree and there is no indication of any licenses held by her. As a matter of fact, her qualifications, other than Masters Degree are nonexistent. TR 60.

After she had completed her visit, she described her interview of Thomas, Sr. The room in which the interview was conducted was filled, wall to wall with computers and what appeared to be recording equipment. Thomas, Sr. talked approximately forty-five minutes explaining the equipment and that he had done all of the commercials for Panorama City. He stated: (1) he had a Ph.D in Physics from Cornell University in 1930 and had helped to develop RADAR in the 1930's; (2) he had worked with developing television for many years; (3) had been a Professor teaching physics for many more; and (4) many of his works are in the Library of Congress. Exhibit 2 p. 3. His wife Helen was ninety-eight and he was

ninety-nine. He and his wife had resided in Panorama City for twenty years. He stated he was working on making a documentary of his life. His son, Thomas III was assisting him. Exhibit 2, pp. 3-4. TR 76.

In response to a question as to what had happened with Thomas III, he stated there had been a disruption in the house and someone had thought he was yelling. He continued to state that Thomas III may have raised his voice but it was nothing more than that. When asked if he was afraid of Thomas III and he responded that he was not. TR 77.

The witness then asked Thomas, Sr. if there was a Restraining Order. He responded that he believed that there was one. He stated that his attorney had filed the Order but that he no longer wanted the Order. He stated that he believed the Order was extended for two more weeks. The witness asked Thomas, Sr. if he had provided a statement or gone to court and he responded he had not.

In response to a question as to what happened, Thomas, Sr. stated: (1) there was no argument or problem; (2) Thomas III just raised his voice; (3) he wanted the Restraining Order dropped; and (4) he wanted Thomas III to visit the residence again. Thomas, Sr. stated that Thomas III had not been to the residence since the Restraining Order was put in place and that he misses Thomas III.

The witness asked Thomas, Sr. to sign the Consent for Services Form regarding the Protection Order. **Thomas, Sr. signed the form**

**declining assistance with a Protection Order against Thomas III.**

(Emphasis ours) Thomas, Sr. stated “**I want four things to happen: (1) I want him, Thomas III, to visit his mother; (2) I want him, Thomas III to visit me; (3) I want him, Thomas III to help me put together our family history; and (4) I want him to retain his rental house on 24<sup>th</sup> Avenue, Lacey.**” (Emphasis ours.) Exhibit 2, identified TR 11, admitted TR25.

In response to a question concerning **financial allegations,** **Thomas, Sr. stated “I take care of my own affairs on that score.”** (Emphasis ours) Thomas, Sr. stated that he has QuickBooks and that Thomas III has had access and helped him for a year. Thomas, Sr. stated that there have not been any problems with Thomas III being involved. The witness then asked Thomas, Sr. if Thomas III had been pressuring Thomas, Sr. for information or control of properties or management. Thomas, Sr. said no, nothing like that. Thomas, Sr. further stated that Thomas III “caught a couple of mistakes for me in the past”. **Thomas, Sr. stated that Thomas III has been helpful and there have not been problems and he stated that Thomas III hasn’t harassed him at all.** (Emphasis ours.) TR 82, 87.

In response to the questions to Thomas, Sr. if Thomas III had yelled or done anything to Helen. He stated “no, Thomas III is really good for her. She just loves his visits.” Exhibit 2, identified TR 11, admitted

TR25.

Jacqueline Heinselman (TR 60 - 97) when called as a witness testified as follows: (1) when she visited Thomas, Sr., she learned that there was a Protection Order in place at that time and that Thomas, Sr. thought it would be in place for another couple of weeks; (2) Thomas, Sr. did not want any further Protection Orders; (3) Thomas, Sr. did ask that the visits with Thomas III be for shorter periods of time; and (4) he was scared about his finances but that he was having no problem with his son.

Ms. Heinselman classified Thomas, Sr. as a vulnerable adult. The basis was that he had a caregiver who had asked to supervise him as he ambulated from the living room to the bathroom. He had asked for assistance. In response to the question “you are basing your findings that he was a vulnerable adult on his age and his inability to ambulate effectively. A physical function” and the answer was “yes”. In response to the question as to the intellectual capabilities of Thomas, Sr., Ms. Heinselman agreed that there was **nothing in her report of any intellectual incapacity.** (Emphasis ours) He was very responsive to all of the witnesses questions. He knew his history and he described to her his educational background and his professional accomplishments. In fact, he was a very well educated man and professionally accomplished. She acknowledged that Thomas, Sr. had mentioned a project relating to the development of the family history and that Thomas III had been

assisting him in that project. In response to the question “and wasn’t his response that he the alleged perpetrator may have raised his voice but it was nothing more than that?” The answer was “that is what Thomas, Sr. told me.” Ms. Heinselman has no evidence as to whether or not Thomas, Sr. wore hearing aids. Thomas, Sr. described his son as a swell guy. When Ms. Heinselman was asked if Thomas III had pressured Thomas, Sr. as to what he should say at the interview, Ms. Heinselman responded that there was no indication of such conduct. TR 78.

When asked whether or not pressure was being asserted, Thomas, Sr. responded to Ms. Heinselman “no, nothing like that”. Ms. Heinselman agreed with that response. Ms. Heinselman further acknowledged that Thomas, Sr. had stated that Thomas III had been helpful and there had not been problems. She further acknowledged that Thomas, Sr. stated Thomas III had not harassed him at all.

Thomas, Sr. further stated that if he could not see Thomas III that he would want to die or he would die. TR 88. Ms. Heinselman acknowledged that there was no name calling or berating in the conversations between father and son. If there was yelling it was yelling about financing. Thomas, Sr. would yell at Thomas III and Thomas III would so speak to Thomas, Sr.

Ms. Heinselman acknowledged that there are no medical records, no examination by physician or physician assistants talking about medical

consequences of the yelling between Thomas, Sr. and Thomas III. TR 91.

Ms. Heinselman did not review any guardianship files or court records pertaining to the relationship between Thomas, Sr. and Thomas III. TR 94.

**(3) Thomas Goldsmith, III:** Thomas III testified that he has a Bachelor of Arts and a Master of Business Administration. The Bachelor of Arts is from Lawrence University, Appleton, Wisconsin. The Master of Business Administration was received from the Harvard Business School. The core of his work experience included a lot of education with IBM in Sweden. He worked as a Systems Engineer specializing in financial reporting. He has an expertise in accounting. He became involved with his parent's estate in 2002 but his real involvement occurred after his sister-in-law, who had been helping his parents with investment planning, died quite suddenly, in 2003. He was retained by his father to provide assistance with respect to his father's finances. TR 172 - 177.

His parents' financial crisis became obvious when he noticed that his parent's wealth had diminished from a multi-million dollar estate to several real estate assets which had lost their value due to the declining market and only enough liquid assets to provide for eighteen months of care. One of the real estate assets, was an interest in a partnership development company, which owns real estate in California.

Unfortunately, it was subject to a \$200,000.00 - \$500,000.00 capital call. A capital call is that the development company says to the investors that they need more money and the investors either provide the money or lose a great share of their investment. The financial problem looming on the horizon was real. Thomas III sought to address the problem by discussing the same with his father. To simply say that the resources were there was not realistic. While the real estate may have been substantial, it was not liquid. A big mistake had been made earlier by the failure to get cash out of the real estate holdings when his parents had a chance to accomplish the same. The costs of care had increased substantially. Thomas III wanted to encourage his father to force the people managing the estate to take such action as would provide liquid funds for more than eighteen months. Once the liquid funds were gone his father and mother would be at the mercy of public assistance. TR 172 - 215.

The only times that either Thomas, Sr. or Thomas III raised their voices was when they were discussing the urgency of making adjustments to their long range financial planning to obtain adequate funds to maintain Thomas, Sr. and Helen in a comfortable condition for the remainder of their lives. Thomas III informed and explained to Thomas, Sr. that his financial house was on fire or that his financial ship was sinking.

**(4) Janet Franklin:** Janet Franklin was called as a witness. At the time of the hearing she was the Director of Capital

Guardianship Services which was providing the guardianship services to Thomas, Sr. and his wife Helen. She has been a licensed practical nurse in the State of California, a case manager for a rehabilitation facility, a pharmacy consultant for a long term pharmacy, and director of residential care for assisted living. She stated she was a consultant for a nation-wide long term care management agency. TR 160.

The medical conditions suffered by Thomas, Sr. are: (a) a heart condition; (b) the requirement to use oxygen; (c) the heart condition was due to the condition of a heart valve; (d) he had macular degeneration; (e) he was not as ambulatory as he could be and had to use a walker or a scooter; and (f) he wore a hearing aid. There is no evidence that Thomas, Sr. was wearing his hearing aid at any of the discussions with Thomas III. TR 102.

Ms. Franklin was aware that after the expiration of eighteen months, Thomas, Sr. and Helen would run out of money. TR 118.

In her opinion, Thomas, Sr. had the cognitive ability to call a meeting of financial advisors. He had the cognitive ability to participate in the meeting. He had the ability to have opinions on his finances explained to him and he had a disagreement with his son. There was a discussion and yelling between father and son because the son wanted his father to take care of his finances.

**(5) Beata Bryl:** Beata Bryl was called as a witness.

Thomas, Sr. and Thomas III had a good relationship except when they were discussing financing. [Thomas III] kept informing his father and mother that they were running out of money and they needed to sell the real estate they owned at Hart's Lake. TR 132.

In describing Thomas, Sr.'s mental condition Ms. Bryl stated that he was sharp. He knew about the things going on. When asked whether he understood the gist of the financial issues he answered yes to the best of my knowledge. When asked about whether there was any swearing in conversations with [Thomas III] she responded "there never was any swearing or threat of -- you know -- hitting anybody or killing anybody, nothing like that. No threats of any kind from either." When asked about the relationship between father and son, Ms. Bryl replied "they had a good relationship. Both Thomas, Sr. and his wife, love their children very much. When the restraining order took place, Thomas, Sr. was heartbroken. He wanted to see his son, Thomas III again." TR 136.

**(6) Ms. League:** Ms. League was called as a witness. Ms. League is a certified nursing assistant. She was employed by Thomas, Sr. and Helen through October 20, 2008. Thomas III would visit his father quite frequently, no set pattern. Averaged about every other month. Sometimes three or four months would go by and then sometimes he would be there for two months in a row. He tried to visit at least four or five times a year minimum.

When she first started working for Thomas, Sr., Thomas III and he got along quite well. But towards the end there were arguments over financing which arguments lasted as much as an hour and a half to two hours. The arguments were during financial discussions. Towards the end of the time she was working Thomas, Sr. and Thomas III would retire to a separate room to discuss these issues. TR 143 - 148.

(7) **Leesa Camerota:** Leesa Camerota was called as a witness. Thomas III requested a cash projection from her agency as to how long the money would last. She agreed it was true that the liquid assets would last about eighteen months. It was true that Thomas III had a legitimate concern about the liquid assets and how long they would last for his parents. His parents had real estate but it wasn't a liquid asset. TR 156 - 157.

Ms. Camerota also believed that Thomas, Sr. was upset by the tension between Thomas III and the daughter. She informed Thomas III and the daughter that the parents had stated that they would like to see the relationship between them change. TR 163.

In late 2006 early 2007 there was a meeting. The meeting did not go well. It ended up with shouting and the daughter leaving upset. The daughter threw a bottle of water at Thomas III. She testified that they knew there were issues with the real estate owned by the parties. They were also faced with the problem that the tax consequences of a sale prior

to the death of either of them could very well be substantial. TR 163 - 164.

## VI. SUMMARY OF ARGUMENT

1. The administrative agency lost jurisdiction when Thomas, Sr. died and no specific action was taken to restore jurisdiction.

2. The administrative agency decision affirmed by the Superior Court: (a) erroneously interpreted the law; (b) erroneously applied the law; (c) was arbitrary and capricious; and (d) the decision and order is not supported by the evidence which is substantial when viewed in light of the entire record.

## VII. ARGUMENT

1. **Jurisdiction:** Thomas III was informed of his right to an Administrative Hearing to challenge the finding of DSHS. He was informed of his rights as described in RCW 34.05 (The Washington Administrative Proceedings Act). Thomas III requested the hearing, which request was allowed. The first hearing was scheduled for June 23, 2009. Unfortunately, Thomas, Sr. died on March 5, 2009 several months prior to the date of the first hearing. Nevertheless, the Administrative Hearings Board proceeded with the hearings.

Jurisdiction is the power to hear and determine a cause or proceedings. Jurisdiction is a question of law which is reviewable de novo. *State v. Golden*, 112 Wn.App. 68, 47 P.3d 587 (2002) at pg. 72.

*Inland Foundry v. Air Pollution Authority*, 98 Wn.App. 123, 989 P.2d 102 (1999) at pg. 123.

Complete jurisdiction has three components: (i) jurisdiction over the subject matter; (ii) jurisdiction over the parties; and (iii) power to render the particular judgment. *State v. Golden*, supra at pg. 73.

A tribunals lack of subject matter jurisdiction may be raised by a party or the Court at any time in a legal proceedings. Without subject matter jurisdiction, a Court or administrative tribunal may do nothing other than enter an Order of Dismissal. *Inland Foundry v. Air Pollution Authority*, supra at pgs. 123-124, *Ricketts v. Board of Accountancy*, 111 Wn.App. 113, 43 P.3d 548 (2002) at pg. 116.

Under the definition section of RCW 74.34.020, the “Department” means the Department of Social and Health Services.

RCW 74.34.210 provides for protection or action for damages - standing - jurisdiction of proceedings under the Abuse of Vulnerable Adults statute. It provides as follows:

**Order for Protection or Action for Damages — Standing — Jurisdiction.** A petition for an order for protection may be brought by the vulnerable adult, the vulnerable adult's guardian or legal fiduciary, the department, or any interested person as defined in RCW 74.34.020. An action for damages under this chapter may be brought by the vulnerable adult, or where necessary, by his or her family members and/or guardian or legal fiduciary. The death of the vulnerable adult shall not deprive the court of jurisdiction over a petition or claim

brought under this chapter. Upon petition, after the death of the vulnerable adult, the right to initiate or maintain the action shall be transferred to the executor or administrator of the deceased, for recovery of all damages for the benefit of the deceased person's beneficiaries set forth in Chapter 4.20 RCW or if there are no beneficiaries, then for recovery of all economic losses sustained by the deceased person's estate.

A reading of this statute indicates there are five parts to the same.

They are as follows:

1. A petition for an order for protection may be brought by the vulnerable adult, the vulnerable adult's guardian, or legal fiduciary, the department, or any interested person as defined in RCW 74.34.020.

2. An action for damages under this chapter may be brought by the vulnerable adult, or where necessary, by his or her family members and/or guardian or legal fiduciary.

3. The death of the vulnerable adult shall not deprive the court of jurisdiction over a petition or claim brought under this chapter.

4. Upon petition, after the death of the vulnerable adult, the right to initiate or maintain the action shall be transferred to the executor or administrator of the deceased, for recovery of all damages for the benefit of the deceased person's beneficiaries set forth in Chapter 4.20 RCW.

5. Or if there are no beneficiaries, then for recovery of all economic losses sustained by the deceased person's estate.

The abuse of a vulnerable adult statute RCW 74.34 is another wrongful death statute. It incorporates parts of the wrongful death statute RCW 4.20 by reference.

*Schumacher v. Williams*, 107 Wn.App. 793, 28 P.3d 739 (2001), was an action seeking damages for injury to a disabled adult. Charles Schumacher was the brother of Maria Schumacher, a disabled resident of an adult boarding home who died as a result of hot water burns suffered at the hands of another resident. Charles Schumacher was not dependant upon Maria for support and therefore was not a statutory beneficiary under the State's wrongful death or survival action. The abuse of vulnerable adult statute is similarly restricted in its reach. It does not survive for the benefit of siblings who are not dependant upon the deceased for support.

The Court stated as follows: "at common law, no cause of action survived the death of an individual nor was there the right to recover for wrongful death.

Wrongful death actions in Washington are strictly statutory. Liberal construction of wrongful death statutes is appropriate only after the proper beneficiaries have been determined." *Schumacher v. Williams*, supra at p. 797.

The Court's principal objective in interpreting a statute is to effect the intent of the legislature. *Schumacher v. Williams*, supra at p. 799.

To interpret the phrase “or other heirs set forth in Chapter 4.20 RCW” to not include the dependency requirement for those “other heirs” would work a significant change in the law, would essentially amend Chapter 4.20 RCW by implication, and would require an interpretation of the abuse of vulnerable adult statute that is inconsistent with Chapter 4.20 RCW. Moreover, such an interpretation is not necessary to carry out the manifest object of the vulnerable adult statute. Without the disharmonious construction for which *Schumacher* argues, the vulnerable adult statute still accomplishes what it set out to do, create a new cause of action for abandonment, abuse, neglect of vulnerable adults. Survival of the action for the benefit of siblings who are not dependant upon the decedent is not necessary to the legislative purpose. *Schumacher v. Williams*, supra p. 802.

The Court of Appeals affirmed the summary judgment in favor of the defendants.

Justice Ellington in her concurring opinion stated in part as follows:

“Had Maria Schumacher survived her scalding bath, she would have had a cause of action under the statute. But when abuse or neglect results in death, instead of just injury, the wrong goes without remedy unless the deceased is survived by a spouse, a child or dependant parents or siblings.

“So her family is left without recourse, and those whose negligence allegedly lead to her death are left unaccountable.

“I none the less concur in the majority opinion, because courts must not, despite strong policy considerations, bend the rules of statutory construction to work an unstated change in the law.”

*Schumacher v. Williams*, supra at p. 805.

Appellant Thomas Goldsmith, III claims that the Administrative Hearings Board lost jurisdiction upon the death of Thomas, Sr.

Notwithstanding RCW 74.34.210, the death of Thomas, Sr. does not help the State of Washington. This is due to the fact that the statute transfers the right to bring an action under RCW 74.34 to the executor or administrator of Thomas Goldsmith, Jr.’s estate for the benefit of those beneficiaries set forth in Chapter 4.20 RCW. The statute transfers the damage claim to the personal representative. All other claims not mentioned including claims to brand people with the scarlet letter “A”, died with Thomas, Sr.’s death. The omission is governed by the principle *expressio unius est exclusio alterius* where a statute specifically designates things upon which it operates, there is an inference that the legislature intended all omissions. *Pers. Rest. of Acron*, 122 Wn.App. 886, 95 P.3d 1272 (2004) at p. 890 .

Even if the legislature did not intend to omit items from the statute, the courts must leave it to the legislature to correct the error. Appellant

courts do not supply omitted language even when the legislature's omission is clearly inadvertent, unless the omission renders the statute irrational. "To do so would (be) to arrogate to ourselves the power to make legislative schemes more perfect, more comprehensive and more consistent." Thus where the legislature's omission "did not undermine the purpose of the statute (but) simply kept the purpose from being effectuated comprehensively" the court will not read omitted language into the statute. *Pers. Rest. of Acron*, supra at p. 891.

Due to the loss of subject matter jurisdiction, the proceedings should have been dismissed at the administrative level.

Jurisdiction is lost for the State of Washington to proceed with this action by reason of the death of Thomas Goldsmith, Jr. Certainly, an action for protection ceased to have a reason to exist upon the death of Thomas Goldsmith, Jr.

**2. Review of Administrative Agency's Decisions:** The Appellate Court's review an agency order in an adjudicative proceedings is governed by RCW 34.05.570(3) which provides in part that the appellate court must grant relief if the agency has erroneously interpreted or applied the law, or if the order is unconstitutional, is outside the statutory authority or is arbitrary or capricious. When a party asserts that an agency action is not supported by substantial evidence, the court examines the record to determine if sufficient evidence exists to persuade

a fair-minded person of the correctness of the order. The court does not weigh witnesses credibility or substitute their judgment for the agency's findings of fact.

The court applies *de novo* review to the statutory interpretation questions. Legislative intent is determined primarily from the statutory language viewed in the context of the overall legislative scheme. If the statute's meaning is plain on its face the court gives effect to that plain meaning. *Brown v. DSHS*, 145 Wn.App. 177, 185 P.3d 1210 (2008) at pp. 182 - 183.

**3. Abuse of Vulnerable Adults:** The Abuse of Vulnerable Adults Act Chapter 74.34 RCW was enacted to protect vulnerable adults from abuse, financial exploitation and neglect. RCW 74.34.110. Abuse means willful action or inaction that inflicts injury. RCW 74.34.1020(2), *Brown v. DSHS*, supra at pp. 182-183. Mental abuse is defined as any willful action or inaction of mental or verbal abuse. RCW 74.34.020(2)(c).

The Washington State Department of Social and Health Services (hereinafter the "Department") maintains that the conversations between Thomas III and his father were a verbal assault. However, assault includes an element of intent to create in another apprehension and fear of bodily injury. *State v. Smith*, 159 Wn. 2.d 778, 154 P.3d 873 (2007).

The definition of abuse requires a willful action that inflicts injury.

Thomas III did not injure his father. He certainly did not willfully injure his father.

Although, it was concerned with the negligent infliction of emotional distress, the Washington court in *Snyder v. Med. Serv. Corp.*, 145 Wn. 2d 233, 35 P.3 1158 (2001) stated as follows:

A cause of action for negligent infliction of emotional distress does exist in Washington, but the court cautioned that “not every act which causes harm results in legal liability.” *Snyder v. Med. Serv. Corp.* supra at p. 243. The Court further stated “[a]s with any claim sounding in negligence, where a plaintiff brings suit based on negligent infliction of emotional distress ‘we test the plaintiff’s negligence claims against the established concepts of duty, breach, proximate cause, and damage or injury.’ ” *Snyder v. Med. Serv. Corp.* supra at p. 243.

Citing *Hunsley v. Giard*, 87 Wn. 2d 424, 433, 553 P.2d 1096 (1976), the court stated “[o]ur experience tells us that mental distress is a fact of life.”

In *Brown v. DSHS*, supra, the court held that the definition of “abuse” and “physical abuse” requires a willful action to inflict injury. The court stated that substantial evidence showed that Ms. Brown did not willfully injure the vulnerable adult nor did she unreasonably confine her.

The Court in *Brown v. DSHS*, supra, acknowledged that the appellate court reviews an agency order in an adjudicative proceedings

under RCW 34.05.570(3) which provides, in part that the appellate court must grant relief if the agency has erroneously interpreted or applied the law, or if the order is unconstitutional, is outside the statutory authority or is arbitrary or capricious. When a party asserts that an agency action is not supported by substantial evidence, the court examines the record to determine if sufficient evidence exists to persuade a fair-minded person of the correctness of the order. The court does not weight witness credibility or substitute their judgment for the agency findings of fact.

The court applies *de novo* review to statutory interpretation questions. Legislative intent is determined primarily from the statutory language viewed in the context of the overall legislative scheme. If the statute's meaning is plain on its face the court gives effect to that plain meaning. *Brown v. DSHS*, supra at p. 182.

The court held that the definition of "abuse" and "physical abuse" requires a willful action to inflict injury. The court stated that substantial evidence showed that Ms. Brown did not willfully injure the vulnerable adult nor did she unreasonably confine her. Under these circumstances deference to agency interpretation is inappropriate when the agency interpretation conflicts with the statute. *Brown v. DSHS*, supra at p. 183.

In the present case, the definition of abuse requires a willful action to inflict injury. The evidence shows that Thomas III did not willfully injure his father. Accordingly, no deference should be made to the

Department's interpretation of the statute, said interpretation being erroneous.

Thomas, Sr. needed to take action to prevent the sunset of his financial house. Thomas III informed his father that his financial house was on fire and required remedial action. Thomas, Sr.'s financial house was in dire jeopardy. The providing of this information to his father was part of the obligation owed by Thomas III to his father as his father's financial advisor. Accordingly, the Department (the Board of Appeals) entered an Order from which this appeal is taken which: (i) was outside of its authority; (ii) the Department engaged in an unlawful procedure or decision making process; (iii) the Department erroneously interpreted and applied the law; (iv) the Order is not supported by evidence that is substantial when viewed in light of the whole record before the Court; (v) the Order is an unlawful exercise of the Department's decision making process; and (vi) is arbitrary and capricious, and is clearly a violation of RCW 34.05.570(3).

Since Thomas III did not willfully injure his father there is no deference to the Department's interpretation.

**4. Proof of Injury:** Abuse requires a willful action to inflict injury. Was there any injury visited upon Thomas, Sr. by Thomas III? The answer is no.

The person asserting the injury is required to prove that the

conduct in a natural and continuous sequence, unbroken by an independent cause produced the injury complained of and without which the ultimate injury would not have occurred. *Conrad v. Alderwood Manor*, 119 Wn.App. 275, 78 P.3d 177 (2003) at p. 281. In the present case, there is a complete absence of any conduct producing any injury.

The question of injury and causation, is a question requiring medical testimony. There are fields of opinion testimony in which the expert must be licensed, and there are others where the expert need not be licensed. In the licensed field, the law presumes that the licensed witness is an expert and the non-licensed witness is not. Thus physicians and surgeons with unlimited licenses are competent to give expert testimony in the entire medical field. Physicians and surgeons of experience are presumed to be acquainted with all matters pertaining to their profession and to be competent to testify as to the same. *Kelly v. Carroll*, 36 Wn.2d 482, 219 P.2d 79 (1950), at p. 491.

Persons who are not licensed to practice medicine are not qualified to testify as to matters in the realm of medicine and surgery. *Kelly v. Carroll*, supra at pp. 490 - 491.

In the present case there is no testimony whatsoever that Thomas, Sr. suffered any injury as a result of his visits with his son, Thomas III. Again, the administrative agency erroneously interpreted or applied the law, and the evidence is not substantial in supporting the agency's

decision.

### VIII. CONCLUSION

Thomas III respectfully requests the Court to reverse the Order of the Superior Court and remand this case to the Superior Court for Thurston County with direction that the administrative decision be vacated and the action dismissed.

DATED this 16 day of August, 2011.

OWENS DAVIES FRISTOE  
TAYLOR & SCHULTZ, PS



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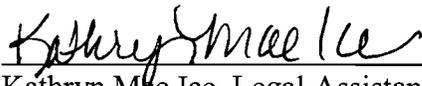
Don W. Taylor, WSBA No. 4134  
Attorneys for Thomas Goldsmith, III

A copy of this document was properly addressed and sent by ABC Legal Services, to the following individuals on August 16, 2011.

Court of Appeals, Division II  
950 Broadway  
Suite 300  
Tacoma, WA 98402-4454

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington

Date: August 16, 2011

  
\_\_\_\_\_  
Kathryn Mae Ice, Legal Assistant

**APPENDIX**

A. Order on Petition for Review.....A-1 to A-3

FILED  
SUPERIOR COURT  
THURSTON COUNTY, WA

2011 APR 15 PM 3:18

BETTY J. GOULD, CLERK

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EXPEDITE  
 No Hearing Set  
 Hearing is Set:  
Date: April 15, 2011  
Time: 1:30 PM  
Honorable: Lisa Sutton

STATE OF WASHINGTON  
THURSTON COUNTY SUPERIOR COURT

THOMAS GOLDSMITH, III,

Petitioner,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF SOCIAL  
AND HEALTH SERVICES,

Respondent.

NO. 10-2-01278-5

ORDER ON PETITION  
FOR REVIEW

I. BACKGROUND

Thomas Goldsmith, III, (the "Petitioner") filed a Petition for Judicial Review of an Administrative Decision (the "Petition") in this Court.

The Petitioner appealed the Department of Social and Health Services' (the "Department") Review Decision and Final Order issued by the Department's Board of Appeals on May 11, 2010. In the Review Decision and Final Order, the Board of Appeals entered an order affirming the Initial Order entered by the Office of Administrative Hearings, which affirmed the Department's substantiated finding of mental abuse.

II. HEARING

The issue before this Court was whether, under the standards of review of the Administrative Procedure Act ("APA"), the Board of Appeals properly affirmed the Initial Decision entered by the Office of Administrative Hearings.

*The petitioner renewed his motion to vacate the Review Decision & Final Order of DHS's Board of Appeals & the Decision & Order Sustained Thereof & To Dismiss Action*

ORDER ON PETITION FOR JUDICIAL REVIEW

ATTORNEY GENERAL OF WASHINGTON  
7141 Clearwater Dr SW  
PO Box 40124  
Olympia, WA 98504-0124  
(360) 586-6565

ORIGINAL

1 This matter was argued before this Court on April 15, 2011.

2 **III. RECORD**

3 The Court has considered the record of the administrative case, the Petition, the  
4 prehearing briefs of the Petitioner and the Department, and oral argument of counsel.

5 **IV. NO FINDINGS OF FACT**

6 The Court has made no independent findings of fact.

7 **V. CONCLUSIONS OF LAW**

8 1. Jurisdiction: This Court has jurisdiction of the Petitioner's appeal under the APA  
9 (RCW 34.05.542).

10 2. Court's Review of Administrative Decisions: Under RCW 34.05.570, this Court's  
11 task is to review the Department's actions, as encompassed in the Final Decision.

12 3. Scope of Review: The scope of this Court's review is defined in  
13 RCW 34.05.570(3).

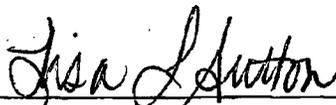
14 4. Administrative Decision Not Erroneous: The Final Decision is not reversible under  
15 any of the criteria in RCW 34.05.570. The Department properly affirmed the Initial Order of  
16 the Office of Administrative Hearings.

17 **VI. ORDER**

18 The Review Decision and Final Order is affirmed. *The Petitioner's Motion to Vacate is Denied.*

19 The Clerk of the Court shall enter this Order immediately following its signature.

20 DONE IN OPEN COURT this 15th day of April, 2011.

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24 LISA SUTTON  
25 Superior Court Judge  
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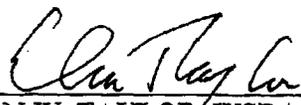
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Presented by:

ROBERT M. MCKENNA  
Attorney General

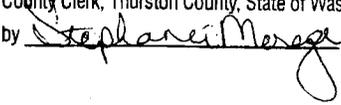
  
STEPHEN MANNING, WSBA No. 36965  
Assistant Attorney General  
Attorneys for Respondent

~~Approved as to Form:~~ *Copy received 9-15-2011  
to not re-act presentation was used.*

  
DON W. TAYLOR, WSBA No. 4134  
Attorney for Petitioner

GARY A. PREBLE, WSBA No. 14758  
Attorney for Petitioner

STATE OF WASHINGTON  
County of Thurston  
I, Betty J. Gould, County Clerk and Ex-officio Clerk of  
the Superior Court of the State of Washington, for  
Thurston County holding session at Olympia, do  
hereby certify that the foregoing is a true and correct  
copy of the original as the same appears on  
file and of record in my office containing three pages.  
IN WITNESS WHEREOF, I have hereunto set my hand and  
affixed the seal of said court

DATED: 8-2-11  
BETTY J. GOULD  
County Clerk, Thurston County, State of Washington  
by  Deputy

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<b>SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY</b>	
Thomas Goldsmith, III,	
	Appellant,
v.	
Washington State Department of Social and Health Services,	
	Respondent.

NO. 10-2-01278-5  
COURT OF APPEALS  
NO. 42070-8-II  
  
CERTIFICATE OF SERVICE

On this 16<sup>th</sup> day of August, 2011, I caused to be delivered, via the method indicated, a true and accurate copy of the Appellants' Opening Brief; and this Certificate of Service, to the following:

Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402

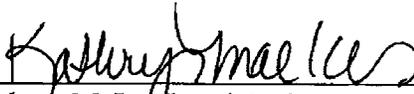
- U.S. Postal Service
- Overnight Delivery
- ABC Legal Messengers, Inc.
- Hand-Delivery

Mr. Stephen Sloan Manning  
Assistant Attorney General  
Attorney Generals Office  
P. O. Box 40113  
Olympia, WA 98504-0113

- U.S. Postal Service
- Overnight Delivery
- ABC Legal Messengers, Inc.
- Hand-Delivery
- Facsimile: (360) 586-6847

I declare under penalty of perjury under the laws of the State of Washington that the  
and correct.

1 DATED this 16<sup>th</sup> day of August, 2011, at Olympia, Washington.

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5 Kathryn M. Ice, Legal Assistant to  
6 Don W. Taylor  
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CERTIFICATE OF SERVICE - 2

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OWENS DAVIES FRISTOE  
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1115 West Bay Drive NW, Suite 302  
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