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AUG 20 2015

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

In re the Matter of

JAMES D. CUDMORE

And

JOHN C. BOLLIGER, Appellant

No. 320243

RESPONDENT'S BRIEF

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I. INTRODUCTION

This matter arises from the issuance of a vulnerable adult protection order restraining John Bolliger's (Bolliger) contact with James Cudmore (Cudmore). The vulnerable adult, Cudmore, was an 85 year old man living in an assisted living facility who suffered from moderate to severe Alzheimer's-like dementia. After a guardianship proceeding was initiated by Cudmore's long-time stepson Tim Lamberson (Lamberson), Bolliger unsuccessfully petitioned to be appointed attorney to represent Cudmore in the matter. Bolliger ignored the order of the court and continued to meet with Cudmore about the guardianship without permission from Cudmore's court-appointed attorney. Bolliger also continued to file motions in the guardianship, purportedly on Cudmore's behalf.

The trial court in this matter entered a vulnerable adult protection order restraining Bolliger's contact with Cudmore. The Court did not abuse its discretion in entering the order. Substantial evidence shows that Cudmore was a vulnerable adult as defined in RCW 74.34.020(17). Substantial evidence also shows that Bolliger engaged in abuse, financial exploitation, or neglect, of Cudmore or posed the threat thereof to Cudmore. Therefore, this Court should affirm the trial court's decision in this matter

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II. STATEMENT OF THE CASE

The trial court entered a vulnerable adult protection order restraining attorney Bolliger and protecting Cudmore. Cudmore was an 85 year old man living in an assisted living facility who suffered from moderate to severe Alzheimer's-like dementia. *CP at 26*. Lamberson is the step-son of Cudmore and has been since Cudmore married Lamberson's mother Annette in 1963. *CP at 95*. After Annette's disabling stroke in 2007, Cudmore asked Lamberson to handle financial responsibilities for him and his wife, Annette. *CP at 96*.

As a person of advanced age suffering from dementia, Cudmore's diminished mental health has manifested in multiple ways. All persons involved agreed that this included memory limitations. *See CP 144; RP, 9/27/2013 at 10-11* (took multiple visits before he remembered attorney, would call attorney by her maiden name, did not remember signing a recent declaration); *RP, 9/27/2013 at 13*. Mr. Cudmore also has deficiencies in recognizing appropriate behavior. *RP, 9/27/13 at 13*. Shortly before meeting with the guardian ad litem, Cudmore began to disrobe in the dining room of the assisted living facility. *RP, 9/27/13 at 13*. When discussing the incident with the guardian ad litem, Cudmore didn't understand why disrobing in the dining room was inappropriate. *RP, 9/27/13 at 13*.

In July 2013, Lamberson became aware that Cudmore had executed a power of attorney designating Bolliger, an attorney previously unknown to Lamberson, as Cudmore's attorney in fact for financial decision making. *CP at 28; CP at 14-22.* The power of attorney was effective immediately and gave Bolliger full control over the assets of Cudmore and Annette which totaled more than \$450,000.00. *CP at 14-22; CP at 25.* Because of this revelation, among others, Lamberson initiated a guardianship action. *CP at 26-31.*

In the guardianship proceeding, the guardian ad litem Wayne May petitioned the court to appoint attorney Rachel Woodard as counsel for Cudmore as the alleged incapacitated person. *CP at 34-35; see also RCW 11.88.090(5)(g); GALR 4(h)(1-2).* Bolliger filed a competing petition to be appointed attorney for Cudmore. *Id; CP at 8.* The court denied Bolliger's petition and granted the petition of the guardian ad litem appointing Woodard. *Id.* Bolliger moved for reconsideration of the order. *CP at 44-45.* Reconsideration was denied on July 22, 2013. *Id.* Undeterred, Bolliger drafted a will for Cudmore naming Bolliger as the personal representative of Cudmore's estate which was executed on July 26 2013—almost three weeks after the guardianship action was initiated and a week after the court appointed Woodard as Cudmore's attorney in the guardianship. *CP at 115; CP at 124.*

Despite having his petition to be appointed attorney for Cudmore denied, Bolliger continued to file motions and pleadings in the guardianship, purportedly on Cudmore's behalf. *CP at 10; see e.g. CP at 119-136.* Bolliger then issued subpoenas duces tecum to Cudmore's financial institutions seeking copies of Cudmore's account information. *CP at 65-68; CP at 70-72.* Bolliger did this despite not being a party or the attorney for a party in the guardianship action. *CP at 34-35.* Bolliger also refused to produce his client file or billing records to Woodard or the guardian ad litem despite being ordered to do so by the court. *CP at 52-54; CP at 56-58; CP at 60-63.*

Bolliger continued to contact Cudmore regarding the subject matter of the guardianship even though Bolliger knew Cudmore was represented by counsel. *CP at 10.* Despite not having permission from Woodard as required by RPC 4.2, Bolliger met with Cudmore on multiple occasions. *CP at 11; RP, 9/27/13 at 23.* Things came to a head on September 11, 2013, when Bolliger filed a declaration of Cudmore written by Bolliger and signed by Cudmore. *CP at 11; CP at 76-82.* The declaration was self-serving vis-à-vis Bolliger and his position in the matter. *CP at 11; see also CP at 76-82.* In a meeting with Woodard shortly after the declaration was filed, Cudmore did not recall signing the declaration. *RP, 9/27/13 at 10.*

The effect of Bolliger's actions on Cudmore's mental state was apparent. Woodard, as the attorney for Cudmore, met with him once a week. *RP, 9/27/13 at 9*. In those meetings, Cudmore's opinion on Bolliger would swing to extremes. *RP, 9/27/13 at 10*. Sometimes he would express that he wanted Bolliger as his attorney while other times he would be "very extremely upset" at Bolliger. *RP, 9/27/13 at 10; see also RP, 9/27/13 at 13-14*. The interactions resulted in stress to Cudmore. *RP, 9/27/13 at 11*. Cudmore would wake up in the middle of the night and think about "legal issues." *CP at 97*. Cudmore also believed that everyone at the assisted living facility was spying on him and taking notes to determine whether he was incapacitated. *Id.* It got to the point that Cudmore quit asking for the assistance of caregivers despite paying for a high level of care. *Id.*

The interactions with Bolliger also caused Cudmore to lash out at family members and the facility staff. After initiating the guardianship action, Lamberson continued to visit Cudmore at the facility. *CP at 96*. Their relationship was guarded but positive. *Id.* However, after meeting with Bolliger, Cudmore would become agitated and argumentative. *Id.* During one visit on September 5, 2013, Lamberson took Cudmore to visit Annette at the nursing home and then took Cudmore to Starbucks afterward. *Id.* The visit lasted several hours and at the end Cudmore thanked Lamberson for coming and said he would see him soon. *Id.* Two days later,

Cudmore called Lamberson saying that he would no longer visit Annette with or without Lamberson until he “dropped the charges against him.” *Id.*

When Lamberson visited again on September 9, 2013 to make sure he received Cudmore’s bills, Cudmore told Lamberson that he would have nothing to do with his bills by the end of the week and that there was going to be a court hearing that Lamberson wasn’t going to like. *Id.* Cudmore also wanted to report one of the caregivers who he had to call to his room after breaking a glass because Cudmore thought that the caregiver “wrote him up” and that the incident would be reported to the court to show he was incapacitated. *CP at 97.* However by the end of the visit, Cudmore was calm again and told Lamberson he would go to visit Annette. *Id.*

On September 15, 2013, the assisted living facility called Lamberson because Cudmore was lashing out at the caregivers. *CP at 169.* Cudmore wanted a caregiver to enter “911” on his phone so he could call the police if “somebody” came to see him. *Id.* After being unable to reach Cudmore on the phone, Lamberson went to the facility directly. *CP at 170.* When Lamberson met with Cudmore, Cudmore made threatening comments towards one of the staff members. *Id.* Cudmore told Lamberson that “they” told him that he should not go anywhere with Lamberson and that Cudmore should call the police if Lamberson came to see him. *Id.* By the end of the visit, Lamberson was able to calm Cudmore down to the point

where they parted with a hug. *Id.* However, Cudmore still believed he was not allowed to go anywhere with Lamberson. *Id.*

On September 13, 2013, the trial court issued a temporary order of protection restraining Bolliger from contact with Cudmore. *CP 162-64.* Cudmore received a copy of the petition along with a notice informing him of his right to attend the hearing, his right “to tell the judge that you agree or disagree with the petition,” and his right to seek help if he needed assistance understanding “court documents or to be part of the court hearing.” *CP 102-103; CP 167-68.* Cudmore met with his attorney in the guardianship matter to discuss the protection order prior to the hearing. *RP, 9/27/13 at 15.*

On September 27, 2013, the trial court held a hearing on the vulnerable adult protection petition. *RP, 9/27/13 at 1.* Present at the hearing was attorney Shea Meehan as the petitioner in the matter. *RP, 9/27/13 at 1.* Also present at the hearing was Cudmore’s guardianship attorney Woodard and the guardian ad litem Wayne May. *CP at 185.* At the hearing, both Woodard and May testified that they believed Bolliger’s continued interactions with Cudmore were harmful. *RP, 9/27/13 at 11; RP, 9/27/13 at 14.* Woodard further testified that she had met with Cudmore two days prior to the hearing. *RP, 9/27/13 at 15.* At the meeting, Woodard explained the purpose of the hearing to Cudmore. *RP, 9/27/13 at 15.* Cudmore told

Woodard that he did not want to come to the VAPO hearing. *RP, 9/27/13 at 15.*

After argument in the case, the court announced that this was “a straight-forward case.” *RP, 9/27/13 at 28.* The court entered an order prohibiting Bolliger from having contact with Cudmore based on the petition and the testimony taken. *RP, 9/27/13 at 29.* The court emphasized that Bolliger’s continued contact with Cudmore as a represented party in violation of RPC 4.2 was “very concerning.” *RP, 9/27/13 at 29.* The court entered the form order of protection as developed by the administrative office of the courts which restrained Bolliger from contacting Cudmore for a period of five years. *CP at 204-206; see also RCW 74.34.115.*

III. STATEMENT OF THE ISSUES

1. Whether the standard of proof at the trial court is preponderance of the evidence when the protection order is not opposed by the vulnerable adult.
2. Whether the substantial evidence before the trial court established that Cudmore is a vulnerable adult as defined by RCW 74.34.020(17).
3. Whether the substantial evidence before the trial court established that Bolliger imposed abuse,

financial exploitation, or neglect, or the threat thereof to Cudmore.

4. Whether the trial court properly exercised its discretion in awarding attorney fees to the petitioner as allowed by RCW 74.34.130(7).
5. Whether the Court should grant Meehan his attorney fees on appeal.

IV. ARGUMENT

This Court should affirm that the trial court properly exercised its discretion in entering a vulnerable adult protection order restraining Bolliger from contact with Cudmore. The proper standard of proof in this matter is whether Bolliger engaged in actions necessitating the issuance of a vulnerable adult protection order by a preponderance of the evidence. Further, regardless of the proper standard of proof at the trial court level, the substantial evidence supports the conclusion that Cudmore was a vulnerable adult and that Bolliger engaged in abandonment, abuse, financial exploitation, or neglect, or the threat thereof. Therefore, the Court should affirm the trial court in this matter.

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A. The Standard Of Review Is Abuse Of Discretion And The Standard Of Proof Is Preponderance Of The Evidence.

The Court should conclude that the standard of review on appeal is abuse of discretion and that the standard of proof is a preponderance of the evidence. This Court reviews the superior court's decision to grant or deny a protection order on an abuse of discretion standard: whether the decision is manifestly unreasonable or whether discretion was exercised on untenable grounds, or for untenable reasons. *Hecker v. Cortinas*, 110 Wn. App. 865, 869, 43 P.3d 50 (2002). Findings of fact are reviewed to determine whether they are supported by the substantial evidence. *Scott v. Trans-Sys., Inc.*, 148 Wn.2d 701, 707–08, 64 P.3d 1 (2003); *Endicott v. Saul*, 142 Wn. App. 899, 909, 176 P.3d 560, 566 (2008). “In determining the sufficiency of evidence, an appellate court need only consider evidence favorable to the prevailing party.” *Endicott*, 142 Wn. App. at 909 (citing *Bland v. Mentor*, 63 Wn.2d 150, 155, 385 P.2d 727 (1963)). In evaluating the persuasiveness of the evidence, and the credibility of witnesses, the Court, on review, must defer to the trier of fact. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 108, 864 P.2d 937 (1994).

The standard of review on appeal does not appear to be in question. Instead, Bolliger attempts to argue for the first time on appeal that the trial court failed to use the correct standard of proof. *Appellant's Brief* pg. 41.

The Court should reject this argument as Bolliger failed to preserve the issue for appeal. RAP 2.5. The record before the trial court supports the entry of an order in this matter regardless of whether the standard of proof is “preponderance of the evidence” or “clear, cogent and convincing evidence.” The Court should further reject Bolliger’s argument because the vulnerable adult in this matter did not appear and object to issuance of the order. Where the vulnerable adult does not object to the protection order, the proper standard of proof is preponderance of the evidence.

1. Appellant Failed To Preserve The Standard Of Proof For Appeal.

The Court should affirm the trial court’s entry of a protection order restraining Bolliger. As a preliminary matter, Bolliger failed to raise the standard of proof issue at the trial court level, and thus failed to preserve the issue for appeal. RAP 2.5(a). Challenges to the standard of proof on appeal only constitute manifest error if the order would infringe on a constitutional right of the appellant. *See e.g. Haueter v. Cowles Pub. Co.*, 61 Wn. App. 572, 577 n. 4, 811 P.2d 231, 234 (1991) (First Amendment speech protections required higher standard of proof in defamation action); *In re A.W.*, 182 Wn.2d 689, 700 n. 10, 344 P.3d 1186, 1192 (2015) (guardianship for dependent child implicated fundamental liberty interest of parents, but preponderance of evidence was the appropriate standard). Nowhere in his

petition has Bolliger asserted a constitutional injury to himself as appellant that would excuse his failure to preserve the issue for appeal. Further, “the appellant must ‘identify a constitutional error and show how the alleged error actually affected the [appellant]’s rights at trial.” *State v. O’Hara*, 167 Wn. 2d 91, 98, 217 P.3d 756, 760 (2009), *as amended* (Jan. 21, 2010) (*quoting State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007)). “‘Manifest’ in RAP 2.5(a)(3) requires a showing of actual prejudice.” *Kirkman*, 159 Wn.2d at 935 (emphasis added). Nowhere in his petition has Bolliger asserted a constitutional injury to himself as appellant that would excuse his failure to preserve the issue for appeal. Thus, the Court should apply the preponderance of the evidence standard of proof as the issue was not properly preserved for appeal. .

2. This Matter Is Not A “Contested” Protection Order Because Cudmore Did Not Advise “The Court At The Hearing That [He Did] Not Want All Or Part Of The Protection Sought In The Petition.”

The Court should conclude Division I’s recent decision *In re Knight* is inapplicable to the case at hand because Cudmore did not advise the trial court at hearing that he did “not want all or part of the protection sought in the petition.” RCW 74.34.135. In *In re Knight*, the court held that the proper standard of proof at the trial court when the alleged vulnerable adult appears to contest the order is clear, cogent, and convincing evidence. 178

Wn. App. 929, 937, 317 P.3d 1068, 1072 (2014). However, the court in *Knight* “specifically ma[de] no comment on the standard of proof when a petition is not opposed by the alleged vulnerable adult.” *Id.* at 937, n. 5. As Cudmore did not contest entry of the order in this matter, the standard of proof at the trial court level is preponderance of the evidence.

In *Knight*, 83 year old Dagmar Knight had two sons: Eric and Tor. *Id.* at 931. Tor lived at a guest house on his mother’s estate. *Id.* Eric filed a guardianship action over his mother and filed a vulnerable adult protection petition against Tor. *Id.* at 932. The basis of the petition was that Tor threatened physical violence on other family members, coerced Dagmar into giving him large sums of money, and was neglectful in caring for her after a recent surgery. *Id.* at 932-33. At the protection order hearing, both Tor and Dagmar appeared through separate counsel to contest the order. *Id.* at 934. At the hearing, the commissioner dismissed the vulnerable adult protection petition, concluding that the pending guardianship could address the concerns. *Id.* at 935. Eric moved for revision of the commissioner’s ruling. *Id.* At the hearing on revision, Dagmar and Tor made the court aware that it had to conduct an evidentiary hearing under RCW 74.34.135 based on Dagmar’s objection to the order. *Id.* The court revised the commissioner’s order based on the record before the commissioner and entered an order of protection. *Id.*

On appeal, Dagmar and Tor argued that because a contested vulnerable adult protection orders implicate the vulnerable adult's due process rights, the petitioner must prove the need for a protection order by clear, cogent, and convincing evidence. *Id.* at 937. The court of appeals noted that RCW 74.34 does not set forth a standard of proof. *Id.* at 938. In determining the proper standard, the court looked at the similar objectives of guardianship actions under 11.88. *Id.* at 938-39. Recognizing that "a contested vulnerable adult protection order case implicates the vulnerable adult's liberty and autonomy interests like a guardianship does, the standard of proof for a vulnerable adult protection order contested by the alleged vulnerable adult is clear, cogent, and convincing evidence." *Id.* at 940. However, the court specifically declined to comment "on the standard of proof when a petition is not opposed by the alleged vulnerable adult." *Id.* at 937, n. 1.

In this case, Cudmore did not contest the issuance of the vulnerable adult protection order. Cudmore was served with a copy of the petition and a notice of his rights as the alleged vulnerable adult. *CP 167-68*. Cudmore was informed of his rights, including "the right to go to the court hearing," "the right to tell the judge that you agree or disagree with the petition," and the right to ask for help "[i]f you have a disability that makes it hard for you to understand court documents or to be part of the court hearing." *CP 102-*

03. Prior to the hearing, Cudmore met with his guardianship attorney, Woodard, to discuss the protection order. *RP, 9/27/13 at 15*. At hearing, Bolliger elicited the following testimony from Woodard:

Bolliger: Have you met with Mr. Cudmore this week?

Woodard: Yes, I have.

Bolliger: When is the most recent occasion?

Woodard: Wednesday morning, probably around 10ish.

Bolliger: So two days ago?

Woodard: Yes.

Bolliger: What, if anything, did you tell him about today's hearing?

Woodard: We talked about today's hearing. He did not want to come. I told him he did not have to come but I was going to go and I would call him and let him know what had happened at today's hearing.

Bolliger: And what is your understanding of his understanding about what today's hearing was about?

Woodard: I think that's a little hazy in what I thought he thought he understood. I think he thought it was the VAPO action. He did not understand the subpoena that Mr. Meehan had this morning. I was very hard to get him to understand. So I quite frankly don't know if he understood.

Bolliger: Is there some reason why you didn't bring him to court today?

Woodard: He did not want to go, and he was extremely stressed, and I didn't want to add more stress to him,

extremely stressed, and he did not want; he did not wish to go.

Bolliger: Are you saying he did not wish to go with you?

Woodard: No, not at all.

RP, 9/27/13 at 15-16. Additionally, Cudmore was capable of using Dial-A-Ride bus service for transportation. *See CP 96; CP 144.*

Under RCW 74.34.135, the triggering event that converts the matter to a “contested” guardianship is when “the vulnerable adult for whom protection is sought advises the court at the hearing that he or she does not want all or part of the protection sought in the petition.” RCW 74.34.135(1) (emphasis added). Not only did Cudmore not advise the court at the hearing, the record shows that he had the ability to do so and chose not to. Therefore, unlike *Knight*, this matter is not a “contested” vulnerable adult protection order opposed by the vulnerable adult.

3. Where The Vulnerable Adult Protection Order Is Not Opposed By The Adult, The Proper Standard Of Proof Is Preponderance Of The Evidence.

The standard of proof for a vulnerable adult protection proceeding when the order is not opposed by the vulnerable adult is the preponderance of the evidence. The vulnerable adult protection statute does not set forth a specific standard of proof. *See Knight*, 178 Wn. App. at 938. Instead, “[t]he court may order relief as it deems necessary for the protection of the

vulnerable adult.” RCW 74.34.130 (emphasis added). There are several reasons to believe that “deems necessary” indicates a preponderance of the evidence standard when the protection order is not opposed by the vulnerable adult. First, orders for protection are considered a civil remedy. *City of Tacoma v. State*, 117 Wn.2d 348, 352, 816 P.2d 7, 9 (1991). Generally, the standard of proof in civil matters is proof by a preponderance of the evidence. *See Reese v. Stroh*, 128 Wn.2d 300, 312, 907 P.2d 282 (1995); *City of Tacoma*, 117 Wn.2d at 351–52.

Next, in setting forth the standard of review of vulnerable adult protection orders, courts have cited other cases involving different types of protection orders in support of their position. *See Knight*, 178 Wn. App. at 936 (citing *Hecker*, 110 Wn. App. at 869 (domestic violence protection order)). Some protection order statutes set forth an explicit standard of proof. *See* RCW 10.14.080(7) (anti-harassment protection order standard is “preponderance of the evidence”); RCW 7.90.090(1)(a) (sexual assault protection order standard is “preponderance of the evidence”). In contrast, the domestic violence protection statute does not set for a specific standard of proof. *See* RCW 26.50.060. Nonetheless, all the protection order statutes appear to have adopted the preponderance of the evidence standard. *See* RCW 26.50.060(3) (adopting preponderance of evidence standard to avoid renewal of domestic violence protection order).

Third, RCW 74.34 is not limited exclusively to vulnerable adult protection orders, it addresses abuse to vulnerable adults more broadly. Under this chapter, the Department of Social and Health Services is authorized to investigate allegations of vulnerable adult abuse. RCW 74.34.067; *Goldsmith v. State, Dep't of Soc. & Health Servs.*, 169 Wn. App. 573, 582, 280 P.3d 1173, 1177 (2012). At the conclusion of these investigations, an initial finding is made. WAC § 388-71-01205. The alleged perpetrator of vulnerable adult abuse can challenge a substantiated finding of abuse through an administrative hearing. WAC § 388-71-01235. In reviewing a finding by the Department, the ALJ determines the Department has established vulnerable adult abuse by “a preponderance of the evidence.” WAC § 388-71-01255; *Kraft v. Dep't of Soc. & Health Servs.*, 145 Wn. App. 708, 714, 187 P.3d 798, 801 (2008).

As a matter of first impression, this Court needs to decide the standard of proof necessary for a vulnerable adult protection order when the order is not opposed by the vulnerable adult. The Court should conclude the proper standard of proof is preponderance of the evidence because: (1) protection orders are a civil remedy and normal standard of proof in civil matters is preponderance of the evidence; (2) other types of protection orders using a similar procedure adopt the preponderance of evidence as the standard of proof; and (3) matters handled administratively under abuse to

vulnerable adults chapter utilize the preponderance of the evidence standard.

B. Cudmore Qualifies As A Vulnerable Adult Under RCW 74.34.020(17)¹ Because He Is Over The Age Of Sixty And Has A Functional, Mental, Or Physical Inability To Care For Himself And Because He Is A Resident Of A Residential Care Facility.

The Court should affirm the trial court because the substantial evidence shows Cudmore qualifies a vulnerable adult protected under RCW 74.34.020(17). Under RCW 74.34.110(1), “A vulnerable adult, or interested person on behalf of the vulnerable adult, may seek relief from abandonment, abuse, financial exploitation, or neglect, or the threat thereof, by filing a petition for an order for protection in superior court.”

“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.

¹ Effective July 24, 2015, RCW 74.34.020 was amended to include additional defined terms. While this amendment changed the numbering and changed “Exploitation” to “Personal Exploitation,” the amendments do not appear to alter the substantive content of the definitions relevant to this appeal. *Compare e.g.* RCW 74.34.020(17) (2013) *with* RCW 74.34.020(21) (2015). For consistency, Meehan will cite to 2013 version of statute.

RCW 74.34.020(17)(emphasis added).

“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.

RCW 74.34.020(5) (emphasis added).

In this case, there is no genuine dispute that Cudmore qualifies as vulnerable adult under the statute. Cudmore was the resident of The Manor at Canyon Lakes, an assisted living facility. *See CP 2; CP 30; CP 143; CP 167.*² This alone qualifies him as a vulnerable adult. RCW 74.34.020(17)(d).

Additionally, while not as objective, the substantial evidence clearly supports the conclusion that Cudmore is over the age of 60 and has a functional, mental, or physical inability to care for himself. At time the vulnerable adult protection action was commenced, Cudmore was 85 years old. *See CP 24.* Cudmore suffered from moderate to severe dementia. *CP 26; RP, 9/27/13 at 12-13.* Cudmore had not managed his personal finances

² In the initial petition, Meehan inadvertently checked the box stating Cudmore “[i]s receiving services from a home health, hospice or home care agency licensed or required to be licensed” instead of “[h]as been admitted to a boarding home, nursing home, adult family home, soldiers’ home, residential habilitation center or any other facility licensed by DSHS. *See CP 2.* However, the body of the petition states that “the vulnerable adult suffers from a moderate to severe Alzheimer’s type dementia and currently lives in an assisted living home.” *Id* (emphasis added). Based on this, Cudmore’s basis for qualifying as a vulnerable adult because he resided in an assisted living facility was properly pleaded. *See CR 8(a); CR 15(b).*

since 2007. *CP 96*. Cudmore did not understand why it was inappropriate to disrobe in the assisted living facility dining room. *RP, 9/27/13 at 13*. Cudmore did not have any recognition of his attorney or the GAL until after meeting them multiple times. *RP, 9/27/13 at 10; RP, 9/27/13 at 13*.

Bolliger does not dispute that Cudmore meets the statutory definition of vulnerable adult. *See Appellant's Brief pg. 42 n. 14*. Instead, he argues that the court in *Knight* remanded even though the factual recitation in the case supported the conclusion that Dagmar met the definition of a vulnerable adult. *Id.* This is incorrect for two reasons. First, as discussed *supra*, this matter is not a “contested” vulnerable adult protection order and thus *Knight* is inapposite.

Second, Bolliger’s argument is a misreading of *Knight*. When “the vulnerable adult for whom protection is sought advises the court at the hearing that he or she does not want all or part of the protection sought in the petition,” the inquiry before the trial court changes. RCW 74.34.135(1). The inquiry is no longer whether the alleged vulnerable adult qualifies as a vulnerable adult and whether they have been subjected to abuse or the threat thereof. Instead, question before the trial court becomes “whether the vulnerable adult is unable, due to incapacity, undue influence, or duress, to protect his or her person or estate in connection with the issues raised in the petition.” RCW 74.34.135(3); *see also Knight*, 178 Wn. App. at 940 (“We

remand to the superior court to determine if [petitioner] proved by clear, cogent, and convincing evidence that Dagmar is a vulnerable adult in need of a protection order under chapter 74.34 RCW”) (emphasis added).

Here, the substantial evidence, regardless of the standard of proof, supports the conclusion that Cudmore falls within the definition of a “vulnerable adult” under RCW 74.34.020(17). Cudmore was the resident of an assisted living facility. The substantial evidence also supports the conclusion that Cudmore was sixty years of age or older with a functional, mental, or physical inability to care for himself. Therefore, the Court should affirm the trial court’s entry of the protection order.

C. Substantial Evidence Supports The Trial Court’s Finding That Bolliger Subjected Cudmore To Exploitation, Financial Exploitation, Or The Threat Thereof.

The Court should affirm the trial court in this matter because substantial evidence shows Bolliger subjected Cudmore to mental abuse, exploitation, financial exploitation, or the threat thereof in violation of RCW 74.34. Under RCW 74.34.110(1), “A vulnerable adult, or interested person on behalf of the vulnerable adult, may seek relief from abandonment, abuse, financial exploitation, or neglect, or the threat thereof.”

“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.

RCW 74.34.020(2)(d). Changes in the vulnerable adult's mood and increases in stress and anxiety manifesting in erratic behavior is evidence of injury caused by abuse. *See Goldsmith*, 169 Wn. App. at 576; 585 (vulnerable adult would "cry, refuse to take his medication, and otherwise become noncompliant with caregiver instructions" after visits with son).

"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.

RCW 74.34.020(2)(c). Willful "means the deliberate, or nonaccidental, action or inaction by an alleged perpetrator that he/she knows or reasonably should have known could cause a negative outcome." WAC § 388-78A-2020.

"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 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.

RCW 74.34.020(6). Financial exploitation is broadly defined to include any improper use of the “vulnerable adult’s property for [their] own purpose in a way that does not benefit the vulnerable adult.” *Gradinaru v. State, Dep’t of Soc. & Health Servs.*, 181 Wn. App. 18, 23, 325 P.3d 209, 212 (2014), *rev. denied*, 181 Wn.2d 1010 (caregiver’s use of vulnerable adult’s morphine in suicide attempt constituted financial exploitation).

In *Goldsmith*, Thomas Goldsmith Sr. was a 98 year old vulnerable adult suffering from physical ailments and mild cognitive impairment. *Goldsmith*, 169 Wn. App. at 575-76. Thomas Sr. asked his son to assist in managing his estate. *Id.* at 576. Thomas Sr. and his son would have “heated discussions about finances.” *Id.* After these interactions Thomas Sr. would “cry, refuse to take his medication, and otherwise become noncompliant with caregiver instructions. The stress would become so great that the caregivers themselves felt threatened.” *Id.* Based on these interactions, the

son was found to have committed abuse of Thomas Sr. *Id.* at 579. In review, the court of appeals affirmed concluding that the evidence showed both injury and willfulness on the son's part as the interactions manifested in apparent "considerable stress." *Id.* at 585.

In this matter, the substantial evidence shows that Bolliger subjected Cudmore to actual and threatened abuse and exploitation. The record supports actual or threaten exploitation and mental abuse as follows:

- Despite having his motion to be appointed as attorney for Cudmore denied, Bolliger continued to file motions and memorandums in the guardianship action, purportedly on Cudmore's behalf. *CP 10; see e.g. CP 65-67; CP 70-71; CP 119-34.*
- Bolliger would meet with Cudmore and convince Cudmore that he, Bolliger, and not Woodard, was his attorney in the guardianship. *CP 96.*
- Bolliger continued to contact Cudmore about the guardianship without the permission of Cudmore's attorney Woodard in violation of RPC 4.2. *CP 74; RP, 9/27/13 at 22-23; 28-28.*
- Bolliger drafted and filed a declaration of Cudmore which self-serving vis-à-vis Bolliger and his position in the

matter. *CP 76-82*. Cudmore did not remember signing the declaration when he met with his attorney. *RP, 9/27/13 at 10*.

These actions showed coercion on the part of Bolliger constituting mental abuse or the exertion of “undue influence over a vulnerable adult causing the vulnerable adult to act in a way that is inconsistent with relevant past behavior” constituting exploitation. RCW 74.34.020(2)(d). The interactions also show that Bolliger engaged in an intentional, non-accidental course of action constituting willfulness. Bolliger ignored orders of the court. *CP 52-54*. He ignored the fact that his petition to be appointed as attorney for Cudmore was denied and ignored the fact that his motion for reconsideration had been denied. *CP at 8; CP 44-45*.

In addition to the evidence noted above, the record also shows that Bolliger subjected Cudmore to actual or threatened financial exploitation as follows:

- Cudmore met Bolliger for the first time on July 2, 2013. *CP 120*. Four days later, Cudmore executed a general durable power of attorney designating “John C. Bolliger of Bolliger Law Office, as [his] Attorney-in-Fact for Financial Decision Making, effective immediately.” *CP 14* (emphasis

added). Cudmore's assets totaled more than \$460,000.00.

CP 25.

- Cudmore appointed Bolliger as the personal representative under his new will which was executed weeks after the commencement of the guardianship. *CP 115; CP 126.*

- Bolliger refuses to comply with court order compelling him to produce a copy of his file including billing records to Cudmore's attorney Woodard and GAL May. *CP 52-54; CP 56; CP 60-62.*

- Bolliger sent subpoenas duces tecum to Cudmore's financial institutions when he is not a party to the action or the attorney for a party to the action. *CP 65-67; CP 70-71.*

Here, the record shows that despite minimal previous interaction, Bolliger was put in immediate and full control over Cudmore's substantial assets just days after their first meeting. He refused to comply with a court order compelling him to provide Cudmore's file to Cudmore's attorney, including billing records. This evidence is more than sufficient to show that Bolliger exercised "improper use" or "control over" of Cudmore's assets and property in a manner that threatened, if not constituted actual, financial exploitation of Cudmore as defined by RCW 74.34.020(6). This alone

shows the trial court did not abuse its discretion in entering a protection order under either the preponderance of the evidence standard or the clear, cogent and convincing evidence standard.

Bolliger's interactions with Cudmore not only meet the definition of abuse and exploitation, they also caused Cudmore stress and anxiety, to act inconsistently with relevant past behavior and to lash out at family and caregivers constituting injury to Cudmore:

- After meetings with Bolliger, Cudmore would become argumentative and angry. *CP 96.*
- On September 5, 2013, Lamberson met with Cudmore and they visited Annette in the nursing home together, later stopping at Starbucks which ended pleasantly. *Id.* Two days later, Cudmore called Lamberson saying that he would no longer visit Annette with or without Lamberson until he "dropped the charges against him." *Id.*
- Cudmore refused to attend doctor appointments with Lamberson. *Id.*
- On September 9, 2013, when Lamberson went to visit Cudmore and check on his bills, Cudmore told him that he wouldn't have anything to do with his bills by the end of the week and there was going to be a court hearing and

Lamberson wasn't going to like it. *Id.* Fortunately, Lamberson was able to calm Cudmore down and Cudmore agreed to go with Lamberson to visit Annette again. *CP 97.*

- Meetings with Bolliger caused Cudmore anxiety and prevented him from sleeping. *Id; see also RP, 9/27/13 at 11.* Cudmore would wake up at 1:00 or 2:00am and think about "legal issues." *Id.*

- Cudmore believed that all the caregivers were taking notes to determine whether he was incapacitated. *Id.*

- Cudmore refused to ask caregivers for help with anything despite paying for elevated assistance because he thought they were reporting to the court on him. *Id.*

- Cudmore wanted to report one of his caregivers because she was a "bitch." *Id.* Cudmore broke a glass in his room and needed assistance and he believed the caregiver "wrote him up" and that the court was going to find out. *Id.*

- On September 15, 2013, the Manor called Lamberson because they had never seen Cudmore so upset. *CP 169.* Cudmore was yelling at the caregivers and wanted them to enter 911 on his phone so he could call the police is "somebody" came to see him. *Id.* After meeting

Lamberson, Cudmore threatened a caregiver. *CP 170*. “They” told Cudmore that he shouldn’t go anywhere with Lamberson and that he should call the police if Lamberson showed up. *Id.* Even after calming down and ending with a handshake and hug, Cudmore still wasn’t sure he was allowed to go anywhere with Lamberson. *Id.*

- Cudmore’s opinion on Bolliger would swing to extremes. *RP, 9/27/13 at 10*. Sometimes he would express that he wanted Bolliger as his attorney while other times he would be “very extremely upset” at Bolliger. *RP, 9/27/13 at 10; see also RP, 9/27/13 at 13-14*.
- Woodard testified that she believed Bolliger’s continued involvement in the guardianship was harmful to her representation of Cudmore. *RP, 9/27/13 at 11*.
- GAL May testified that he believed Bolliger’s continued contact with Cudmore was harmful. *RP, 9/27/13 at 14*.

Here, the record overwhelmingly supports the trial court’s finding that Bolliger engaged in “abuse, financial exploitation, or neglect, or the threat thereof.” RCW 74.34.110(1). The trial court succinctly stated as follows:

You know, this, ladies and gentlemen, this, this is a straight-forward case in the Court's mind. And I have not only the guardian ad litem Mr. May, who has indicated that the continued involvement by Mr. Bolliger is harmful to Mr. Cudmore. I also have his attorney, who is in fact Miss Woodard. I appointed her in this case to represent Mr. Cudmore in the guardianship case. I have heard from the parties, based upon the information that I have been provided, that Mr. Cudmore is in advanced stages of dementia. [...] He doesn't know what he wants. That's why I have appointed a guardian ad litem. That's why I have appointed a disinterested party in Miss Woodard to do the representation. And, Mr. Bolliger, the fact that you have contacted Mr. Cudmore, who is represented, in violation of court rule RPC 4.2, knowing that he is in fact represented, is very concerning.

RP, 9/27/13 at 28-29.

Based on the foregoing, this Court should affirm the trial court. Substantial evidence shows that Bolliger engaged in abuse, exploitation, financial exploitation, or threat thereof. The evidence supports this finding under either the preponderance of the evidence standard or by the clear, cogent and convincing evidence standard. Therefore the trial court did not abuse its discretion in entering the order of protection.

D. The Court Did Not Abuse Its Discretion In Awarding Meehan Costs And Attorney Fees.

The Court should conclude that the trial court did not abuse its discretion in award Meehan costs and attorney fees under RCW 74.34.130(7). RCW 74.34.130 reads:

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.

Under this statute, the Court may award attorney fees to the petitioner directly against the respondent so that the protected person and the petitioner do not have to bear the expenses related to the respondent's malfeasance. In *Endicott*, the petitioners filed for a VAPO on behalf of their mother against her sister-in-law who convinced Ms. Endicott to engage in several real estate deals that were considerably below market value. *Endicott*, 142 Wn. App. at 908. The respondent sister-in-law and her daughter were the beneficiaries of the below-market deals and depleted Ms. Endicott's estate. *Id.* at 905-06. After reviewing the evidence, the court affirmed that the substantial evidence supported a protection order against the respondents. *Id.* at 929. Upon affirming the trial court, the court awarded the original petitioners attorney fees citing RCW 74.34.130. *Id.* As RCW 74.34.130 allows the Court to award costs and attorney fees in a vulnerable adult protection action, the Court did not abuse its discretion in awarding costs and fees.

The Court further did not abuse its discretion awarding fees to Meehan because the fees requested were reasonable. Regardless of

statutory authority, the fees requested by a party must be reasonable. *See Absher Const. Co. v. Kent Sch. Dist. No. 415*, 79 Wn. App. 841, 847, 917 P.2d 1086, 1089 (1995). The starting place for determining the reasonableness of fees is using the lodestar method. *Id.* at 847. The “lodestar” fee is determined by multiplying the hours reasonably expended in the litigation by each lawyer’s reasonable hourly rate of compensation. *Id.* (quoting *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 675 P.2d 193 (1983)). Fees are not penalties, but rather a cost of litigation. *Detonics “.45” Assocs. v. Bank of Cal.*, 97 Wn.2d 351, 354, 644 P.2d 1170 (1982). In this matter, Meehan did not request any multiplier and submitted a declaration providing a factual basis for the costs and fees requested. *CP 190-93*. This Court should affirm the trial court’s award of costs and attorney fees because the trial court had a legal basis for awarding fees and the fees requested were reasonable.

E. The Court Should Award Meehan His Costs And Attorney Fees On Appeal.

Pursuant to RAP 18.1, Meehan is requesting reasonable attorney fees and expenses related to the appeal. Under RAP 18.1, the court may award attorney fees as allowed by applicable law. *See* RAP 18.1. As discussed *supra*, under RCW 74.34.130, the court may award the petitioner is a vulnerable adult protection action their “costs incurred in bringing the

action, including a reasonable attorney's fee.” Pro se attorneys can recover attorney fees where fees are otherwise justified because they must take time from their practices to prepare and appear as any other lawyer would. *Leen v. Demopolis*, 62 Wn. App. 473, 487, 815 P.2d 269 (1991) (fees awarded to pro se attorney on appeal). Based on this, Meehan requests attorney fees if he is the prevailing party in the appeal.

V. CONCLUSION

This Court should affirm the trial court’s decision in this matter. The trial court did not abuse its discretion in entering an order of protection restraining Bolliger’s contact with Cudmore. Statutory law, regulatory law, and case law all support the conclusion that the proper standard of proof when the vulnerable adult does not appear and object to the order is the preponderance of the evidence. The substantial evidence shows that Cudmore was a vulnerable adult pursuant to RCW 74.34.020(17) and that Bolliger inflicted abuse, financial exploitation, exploitation or the threat thereof upon Cudmore. Therefore, the trial court did not abuse its discretion in entering the protection order and its decision should be affirmed.

DATED this 18th day of August, 2015



SHEA C. MEEHAN, WSBA #34087
Respondent, Pro Se
BRET UHRICH, WSBA #45595

I certify under penalty of perjury under the laws of the State of Washington that on this day, I mailed a true copy of this document to the Appellant in this matter by first class mail, postage prepaid to:

John C. Bolliger
5205 W. Clearwater Avenue
Kennewick, WA 99336

DATED this 18 day of August, 2015 at Richland, WA.


NATALIE A. DELAROSA