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Court of Appeals, Division III No. 36554-9

Benton County Superior Court No. 17-2-02688-1

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**COURT OF APPEALS**  
**DIVISION III, STATE OF WASHINGTON**

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MATT THOMPSON,

Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES,  
BOARD OF APPEALS,

Respondent.

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**BRIEF OF APPELLANT**

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## I. INTRODUCTION

This matter arises from an administrative action wherein Adult Protective Services (“APS”) conducted an investigation and found that the Appellant, Matt Thompson, financially exploited his mother. Janet Thompson, the mother, only meets the definition of a ‘vulnerable adult’ because she is over 60 years old and resides in a nursing home. Janet Thompson is of sound mind and testified under oath, that she approved Matt Thompson’s expenditures as Power of Attorney.

After the administrative hearing, the ALJ found that Mr. Thompson did not exploit his mother, that the vulnerable adult credibly testified she was aware and approved of his actions. For argument sake, the ALJ stated even if Janet did not approve or later ratify his actions, there could be no breach of fiduciary duties as the amounts of the expenditures could reasonably be construed as compensation of services under the terms of the POA. Finally, the ALJ expressed extreme criticism of the Department investigator for pre-judging the events and looking to establish her judgment of ‘improper spending’ simply because Janet met the statutory definition. In the Initial Order, the ALJ found the investigator was not a credible witness. She appeared argumentative and significantly evasive at hearing to justify her determination that the son exploited his

mother. The ALJ boldly indicated “[this type of action is arrogant and violates the rights of the vulnerable adult and her family.]”

Dissatisfied with the result, the Department sought Review of the Initial Order. The Department’s Review Judge found the ALJ incorrectly concluded Matt Thompson had not financially exploited his mother, and Reversed the Initial Order. The Department’s determination that Matt Thompson exploited his mother was wrongfully affirmed by the Superior Court. This appeal follows.

## **II. ISSUES ON REVIEW**

1) Does the statute the Department relied upon in issuing the Final Order, violate Janet Thompson’s constitutional rights and protections?

2) Did Matt Thompson “financially exploit a vulnerable adult” as defined by RCW 74.34.020(7) when his competent mother consented and/or ratified all of Matt Thompson’s actions as Power of Attorney?

3) Under the Vulnerable Adult Act, may the conduct of Mr. Thompson be found “improper” if it is “protective, non-injurious or ill-intended”?

4) May a Power of Attorney duly authorized to act on behalf of an agent make discretionary decisions under the Power of Attorney, including compensation, which are expressly consented to by the executor?

5) Was DSHS required to show a specific breach of a particular fiduciary duty “that resulted in unauthorized appropriation, sale, or transfer of property”? See RCW 74.34.020(7)(b)?

6) May DSHS blatantly ignore the wishes and statements of its “victim” who is “competent” and who has repeatedly advised the investigator that her son had permission to act as he did, requested that the proceeding be dismissed, and corroborated those statements in her testimony at the hearing?

7) May the Review Judge disregard and/or plainly reject the ALJ’s comments concerning the “credibility” of witnesses?

### **III. FACTS & ADMINISTRATIVE HISTORY**

#### **A. The Allegations**

On August 25, 2016, the Department, by and through APS, advised Matt Thompson by certified mail that they had conducted an investigation concerning his mother’s financial affairs. CP 166. Based on said investigation, APS had determined that Mr. Thompson, “financially exploited a vulnerable adult”. *Id.* The formal notice/charges explained:

It is alleged that on or about May 2014 through July 2016, you, the vulnerable adult’s power of attorney, improperly used her funds. It is alleged that you did not report the sale of the vulnerable adult’s home to the state financial department, which resulted in her not being eligible for services for a period of one month. It is alleged that you failed to pay the vulnerable adult’s participation fees to the facility in which

she resides and that she owes over \$4,200. It is alleged that you paid 8 family members, including yourself, your wife and your children \$500 each for a total of \$4,000 to move the vulnerable adult, which she was not aware and did not authorize. It is alleged that you have used the vulnerable adult's funds to pay for the following which did not benefit her:

Tires; car washes and auto repairs for your vehicle; \$700 AT&T bill; Beaver Bark; Mirage Pool & Spa; PetCo; Nordstrom and numerous other retail stores; Sports Authority; Ace Hardware; Home Depot & Lowes; as well as multiple hotel, fast food and gas purchases made out of town. It is alleged that you took out two personal loans in the vulnerable adult's name and then also used her funds to repay one of them. However, none of the money from either of the loans was ever deposited into the vulnerable adult's account where there were a total of \$1,120 in overdraft and returned item fees charged to the vulnerable adult's account as well. When asked if you had used the vulnerable adult's money for yourself, you admitted that you had and that you were the sole user on her account, including all debits and ATM withdrawals. When the vulnerable adult was made aware of all the spending and the outstanding facility bills, she had an anxiety attack and was hospitalized for several days.

CP 166-167.

APS determined that these actions met the statutory definition of 'financial exploitation' as set forth in RCW 74.34.020. CP 167. Mr. Thompson timely requested a hearing. CP 173. The Administrative hearing was held on May 1, 2017 at the Kennewick Washington hearing location. CP 85

B. The Hearing Record

Matt Thompson testified that he had paid expenses directly out of his own account at times. (CP 366). The POA is allowed to reimburse himself for costs incurred in compensation for his time, although no set amount was ever established and has never been calculated. (CP 368). Matt Thompson was advised that in order to keep his mother eligible for COPES, he was required to spend down her income to less than \$2,000 per month. (CP 371). Twice, Matt Thompson had paid for his mother's assisted living residence, out of his own funds, because her retirement incomes were not available when the direct deposit occurred. (CP 380-81). Matt Thompson had deposited money into the joint account he shared with Janet Thompson and commingled their funds. (CP 381, 438). He also acknowledges that some of Janet's money benefitted him and/or his household. (CP 371).

Gina Meier, a Social Service Specialist 3, testified at the hearing. (CP 384). Ms. Meier completes assessments to determine functional eligibility for clients receiving Medicaid. *Id.* Janet Thompson is a client on her caseload. *Id.* Based on Janet's comments during the assessment that she "loves her son very much" Ms. Meier characterized the type of interaction between Matt and Janet as loving. (CP 390-91). Matt has never been inappropriate and he appears to treat his mother kindly. *Id.*

Ms. Meier did not have any role in the investigation nor was she interviewed by Ms. Wilkins. (CP 402).

Kathy Lloyd is a specialist with Home & Community Services which determines people's financial eligibility for long-term care services like COPES. (CP 408). Janet Thompson is in Ms. Lloyd's caseload as a COPES recipient. (CP 409). Ms. Lloyd explains to clients that a "spend down" of resources is when someone is applying for assistance they have to spend their resources down and remain below the \$2,000 per month threshold for eligibility. (CP 411). She routinely discusses with clients that they can spend their money any way they want, so long as it's for their needs or wants to get down to the \$2,000 monthly amount. (CP 411). Janet Thompson was already on COPES when she took over the caseload from her predecessor. (CP 412-413). As a result, Ms. Lloyd was not the case worker who gave any advice to Matt Thompson regarding the sale of Janet Thompson's home. (CP 413). Ms. Lloyd confirmed that it is standard for all financial advisors to describe the spend-down and keeping a balance below \$2,000 for purposes of eligibility. *Id.* Matt Thompson provided an explanation of where the proceeds were spent from the sale of Janet Thompson's home. (CP 415). Ms. Lloyd wanted more detail on the explanation. *Id.* Ms. Lloyd testified that some people (in her position) are "more accepting". (CP 416). Nevertheless, as a result of the questionable

documentation from Mr. Thompson, Ms. Lloyd did a referral to Adult Protection Services. (CP 416). Ms. Lloyd made the report to APS without seeking information from Janet about the purchases. (CP 419-20). Ms. Lloyd testified that she was not aware that the POA allowed for reimbursement or compensation for time spent performing services. (CP 418). Ms. Lloyd further testified that she had the option to issue a penalty period for the time Ms. Thompson's resources exceeded the \$2,000, but she decided to make an APS referral instead. (CP 421-22). Likewise, she did not discuss this with Janet before making the referral. (CP 421).

Beth Jensen testified as a receptionist for Brookshire, the assisted living residence of Janet Thompson. (CP 427). Ms. Jensen testified that Brookshire's account was not current for Ms. Thompson from May 2014 to October 2015. (CP 427). She testified that Matt Thompson would bring in checks. (CP 428). Ms. Jensen confirmed there was never any threat of eviction to Janet Thompson. (CP 428).

Sally Wilkins was the APS investigator in this matter. (CP 432). Immediately into her testimony, Ms. Wilkins was attempting to provide information beyond the question asked by the attorney for the Department and the objection was sustained. (CP 434). Avoiding questions to justify her actions/investigation was a routine exercise during her testimony

which often resulted in counsel's response: "[t]hat's not my question".

This occurred 16 times as follows:

- CP 448, lines 15 and 17
- CP 454, line 22
- CP 456, line 4
- CP 463, lines 4 and 18
- CP 470, line 21
- CP 476, line 20
- CP 477, lines 14 and 21
- CP 478, line 16
- CP 479, line 21
- CP 481, line 10
- CP 485, line 10
- CP 486, line 13
- CP 486, line 7

At one point, Ms. Wilkins attempted to gain control by quizzing opposing counsel, to which he responded, "I get to ask the questions". (CP 449, Line 13). Later, the ALJ had to instruct Ms. Wilkins to just answer the question. (CP 471, Line 8). Ms. Wilkins' behavior was so persistent, the ALJ instructed her to "stop arguing". (CP 471, Line 11-13).

During her first (and only) in person interview with the vulnerable adult, Ms. Wilkins testified that Janet appeared very upset about Matt's spending money (CP 435); that Janet would not have paid family \$500 per person because they wouldn't charge her (CP 436); that Janet told her family should assist without payment; (CP 437); that Janet recalled some purchases, but others she was not aware. (CP 437). When Ms. Wilkins

interviewed Matt, he admitted that he did spend Janet's money that way. (CP 437). Matt claimed that he commingled Janet's money with his own. (CP 438). Ms. Wilkins concluded the spending did not appear to be reimbursement to Matt pursuant to the POA. (CP 444-445). Ms. Wilkins testified he "compensated himself pretty well for being the Power of Attorney". (CP 445).

Ms. Wilkins testified that Janet was competent and scored a 26-30 on the MME. (CP 451). After her initial interview, Ms. Wilkins testified that Janet called her back and said she was upset with her, and that she wished she would get a flat tire on her way home. (CP 453). During the call, Ms. Wilkins testified that Janet told her Matt had taken good care of her and anything he used, he had permission to spend. (CP 454). Janet also told her that she saw the bank statements. (CP 454). Ms. Wilkins admits omitting the follow-up phone call from Janet in her summary investigative report. (CP 454). In fact, Ms. Wilkins testified that she discounted the follow up call and gave Janet's comments that Matt had permission considerably less weight. (CP 455). Ms. Wilkins testified the reason she gave it less weight was because during the first interview, Janet was upset and didn't think family needed to be paid to help her move. (CP 456). Ms. Wilkins did not follow up with Janet after that August phone call where

she said several unpleasant things. (CP 456). According to Ms. Wilkins, “she had all of her evidence”. (CP 456).

Ms. Wilkins did admit that Janet is capable of consenting to Matt’s expenditures. (CP 457). She was not aware of Janet Thompson’s previous diagnosis (after her stroke) “positive for confusion” and trouble remembering things. (CP 460-61). When presented with the medical record proving the diagnosis, Ms. Wilkins became agitated and flippant with opposing counsel. (CP 460-463). Nevertheless, Ms. Wilkins did admit that she was unaware that Janet Thompson suffered from confusion at the time she wrote her report. (CP 462). While Ms. Wilkins denies that she observed any confusion during her one-time meeting, she also admits that she never had seen or met Janet previously. (CP 463-4).

Ms. Wilkins further admitted in testimony that she thought Mr. Thompson could have compensated himself for the POA, but she thought “it would have been nice if Janet would have known about it in advance and agreed to it”. (CP 475). As the investigator, Ms. Wilkins admitted she had no evidence that the \$9,000 loan was for anything other than for Janet’s benefit. (CP 479). Ms. Wilkins admitted that the \$1,120 overdraft fees represented a 2-year period, and she was aware about the trouble with the two pension payments of Janet’s getting misdirected by the pension administrators. (CP 480). Because of Ms. Wilkins’ opinion in regards to

the “weight of the evidence”, there was no reference to the follow up call from Janet in August within the charting notice/letter. (CP 480).

Ms. Wilkins was asked and provided the following answers during her testimony:

Q: If he was just mistaken, is that the exploitation of a vulnerable adult?

A: Well, he was mistaken for a long time in a lot of - - lot of transactions.

Q: But I didn't ask you that, did I? I asked you if he was just mistaken about what he could do with the proceeds. That's not necessarily the exploitation of a vulnerable adult.

A: Umm - -

Q: I will agree with you right here and now, doing things perfectly versus imperfectly, we don't list so well. But you're charging him with exploiting a vulnerable adult, and I want to know if inadvertence on how to spend down the money is the exploitation of a vulnerable adult.

A: I - - I don't know. (CP 486, lines 9-23).

Q: If Janet comes into these proceedings and says that Matt had my authority to spend my money how he saw fit, do you maintain he is still exploiting her as a vulnerable adult?

A: The definition of financial exploitation is the illegal or improper use, control or withholding of property and financial resources, um, of the vulnerable adult. So I would have to say yes, that I'm going to stand by my finding of financial exploitation because he consistently spent her money, and I would feel that meets the definition of improper use. (CP 486-487, lines 25-10).

Marie Dixon is Janet's daughter and she testified at the hearing as well. (CP 496). Marie testified that Matt took their mother to appointments, would buy her groceries, get her medicine, make sure she was okay, go visit her 4 or 5 times a week and that this was both during the time she lived at home and since she had her stroke resulting in the assisted living facility. (CP 496-497). Matt was really the only one available locally so he was the sole caregiver for Janet. (CP 498). Marie Dixon did never spoke with the APS investigator, Sally Wilkins. (CP 498). Marie was aware that Matt Thompson had family members helping with the move and that family members were paid \$500 each to assist Janet in moving out of the home. (CP 499). Marie had no issues with the payments to Matt's family. *Id.* She believed that Matt and his family took time out of work, their mom was "a pack rat", and that there were a lot of clean up to do, yardwork to complete, and getting things into storage. *Id.* Matt, Janet, and Marie all had discussions about the idea of spending down their mother's money to ensure she stayed on COPES. (CP 500). Marie has spoken to her mom independently about the spending and Janet reported no concerns about it. (CP 504). Currently, Marie does the caretaking for mom now. (CP 504).

Janet Thompson also testified, under oath, that Matt had talked to her about the spending of the home proceeds and he had her permission.

(CP 513). Janet testified that the only time she saw the investigator, Sally Wilkins, “intimidated me immensely”. (CP 514). Janet testified that she told the investigator she didn’t know about the spending because it was “none of her business”. *Id.* Janet testified that she felt Sally Wilkins coerced her and intimidated her during the interview. (CP 154). Janet confirmed that she had called Sally Wilkins a couple months later and indicated that Matt had permission to spend everything. *Id.* Janet testified that someone living there told her that the woman had made comments about Mr. Thompson. (CP 515). Janet expressed that Sally Wilkins’ allegations that Matt didn’t have permission were simply wrong. *Id.* Janet testified that she believed she had the severe asthma attack that night because of Ms. Wilkins’ visit. *Id.* Ms. Wilkins intimidated her and this caused Janet to get upset. *Id.* She believed she has asthma attacks when she gets really upset. *Id.* Janet agreed that the spending at issue was not always for her benefit, but she knew about it and it was fine “because they were people I loved”. (CP 516). It was her testimony that Matt has always acted in her best interests. *Id.*

Matt Thompson testified that he has been a volunteer coach for 14 years and serves on the board for a local Good Kids Organization. (CP 527-528). He is also the head of an organization for coaches and kids and believes he will have to step down because of this finding of exploitation

of a vulnerable adult. *Id.* Matt testified that his mother's short-term memory loss was most impacted by the stroke. (CP 530). He would call her the night before to remind her of an appointment and then when he showed up the next morning, she would ask him why he was there. *Id.*

Matt testified that his mother was briefly removed from the program because he was delinquent on getting paperwork to them. (CP 545). The reason was not due to the sale of the home or any questionable spending. *Id.* Matt testified that he has a full-time job, he takes care of his mother, he volunteers for the Good Kids Organization, he has two kids of his own in school, and he teaches a class at night at the local college. (CP 546). All of these responsibilities have at times caused him to become delinquent with the bank accounts and care facility. *Id.* It was Matt Thompson's understanding that in order to stay qualified for COPES, the money had to be spent down and it was his understanding that the money could be spent on "whatever Janet wanted to spend it on". (CP 555). Matt did not have any good explanation as to why he was not checking his mother's account regularly, but claims likely just got busy with life. (CP 557). Matt testified that he took a week off of work to move his mother out of the trailer and prepare the home for sale. (CP 565). The home was a 1950 square foot residence that required a lot of work, for which he took out loans to ready the premises for sale, hiring professionals. *Id.* Matt

testified that he pretty much always asked his mom for each personal purchase he made. (CP 572).

C. The Initial Order

The Initial Order was issued by Administrative Law Judge, Stephen Leavell (ALJ) on June 20, 2017. CP 51. The findings of fact located in the Initial Order and the Final Order are largely consistent, except as indicated below. (See CP 10-14 and 51-54) Yet several Conclusions of Law (§§5.7 - 5.14) were rejected and removed by the Reviewing Judge, Thomas Sturges. (CP 23) The significant conclusions of the ALJ that were rejected by the Reviewing Judge were as follows:

5.7 The department did not believe the vulnerable adult when she told the investigator in the phone call that she was aware of the appellant's actions and had approved his actions. The vulnerable adult testified that she had not wanted to deal with the investigator when she was interviewed at the facility. She did not know who she was and didn't want to talk to her. She testified she just wanted to get rid because she didn't like her. The vulnerable adult's statement that she would rather die than deal with this was explained that she did not want to talk to the investigator. Her statement was about the investigator and not anything with the appellant.

5.8 **The vulnerable adult's testimony at the hearing conflicted with her statements to the investigator. In resolving this conflict in the vulnerable adult's testimony greater weight is given to her testimony at the hearing under oath and subject to perjury.** The vulnerable adult showed no evidence of dementia and is substantiated by the MMSE of the

investigator and the social worker. **The vulnerable adult's testimony that she just wanted to get rid of the investigator is credible given the vulnerable adult's reaction to the investigator at the hearing.** (Emphasis added)

5.9 **Given the credibility of the vulnerable adult's statements that she was aware of the appellant's actions, paying his family to clean and prepare her home for sale there could be no deception, intimidation or undue influence.** In addition to the vulnerable adult **the appellant sister also confirmed that she was aware of what the appellant was doing.** (Emphasis added).

5.10 The department relies upon the portion of the RCW that states: "for the benefit of a person or entity other than the vulnerable adult." However this provision is after establishing that there was deception, intimidation or undue influence. **If in fact the vulnerable adult was not deceived, intimidated or under undue influence then she is free to designate how her finances are spent.** The department failed to establish there was deception, intimidation or undue influence by presenting testimony that the vulnerable adult's MMSE scores were 25 or 26 out of 30 and that she was not incompetent. **The vulnerable credibly testified that she was aware of and approved of the appellant's actions.** (Emphasis added).

5.11 The appellant was the Attorney in fact based on a Power of Attorney (POA). The POA provides for the Appellant to be reimbursed and to receive compensation for his services. **Even if the vulnerable adult did not approve or ratify the appellant's actions and expenditures there is no breach of a fiduciary duty because the amounts of the expenditures could be construed to be compensation for his services.** (Emphasis added).

5.12 **The department in this case seeks to impose their judgment for an adult's judgment how to**

**spend her money with her family not because they believe she is not competent to make those decisions but simply because she meets the definition of a vulnerable adult by her age and residence and they believe they would have made a different decision.**

This type of action is arrogant and violates the rights of the vulnerable adult and her family. (Emphasis added).

5.13 The investigator, Ms. Wilkins appeared to have prejudged the events in this family and looked to establish her judgment in the matter. **When the vulnerable adult called her angry at what had transpired and explained that she was aware and had approved the appellant's actions, she ignored her because she believed the vulnerable adult was being taken advantage of by her son. She selectively sought evidence that supported her preexisting conclusion and ignored any other evidence. Ms. Wilkins was not a credible witness when she did not directly answer the appellant's attorney's questions but was argumentative to justify her decision.** (Emphasis added).

5.14 Based on the above the department has not proven by a preponderance of the evidence that the appellant financially exploited the vulnerable adult.”

#### D. Review Decision and Final Order

Review Judge issued the Review Decision and Final Order on September 7, 2017. (CP 10) In his Conclusions of Law, the Review Judge claims to have given due regard to the ALJ's Findings of Fact and opportunity to observe the witnesses, but “has otherwise independently decided the case” without further explanation. (CP 15) In the Final Order Factual Findings, the Review Judge oddly added “[t]here was no evidence presented to indicate that Janet specifically approved any of these

payments or purchases, or that any of these purchases were meant as a gift to the Appellant or his family by Janet.” (CP 13 §13) Nevertheless, Janet testified at the hearing she gave him permission for all of it. (CP ).

Additionally, the Review Judge further added that he relied more heavily upon the Investigator’s hearsay testimony that Janet told her, “*he should not have spent that money*” rather than Janet’s under oath testimony. (CP 14, §17) (Emphasis in original) The following Conclusions of Law are at issue in this appeal:

“12. As set forth above, the relevant statute defines “*financial exploitation*” as *[T]he illegal or improper use, control over, or withholding of the property, income, resources, or trust funds of the vulnerable adult by any person or entity for any person’s or entity’s profit or advantage other than for the vulnerable adult’s profit or advantage.* RCW 74.34.020(7). Under this definition, the Department is required to show, by a preponderance of the evidence, that the use, control over, and withholding of Janet’s property by the Appellant was improper or illegal, and also the withholding of the funds was for a person’s or entity’s profit or advantage other than the vulnerable adult’s profit or advantage. Admittedly, the definition is somewhat circular in that use of a vulnerable adult’s funds for another person’s or entity’s profit or advantage without the informed consent of the vulnerable adult is “*improper.*” (CP 19)

13. The term “*improper*” is a somewhat broad and general adjective. The Legislature’s use of the term disjunctively with the term “*illegal*” in defining “*financial exploitation,*” can reasonably be construed to mean the Legislature intended to include certain acts as financially

exploitive even if those same acts may not be “*illegal*.”  
CP 20.

14. The Appellant owed a fiduciary duty to his mother based on the Appellant’s status as Janet’s *Attorney in Fact*, based on the *Durable Power of Attorney* (POA) executed on January 14, 2014. The Washington State Supreme Court has ruled, “A *power of attorney is a written instrument by which one person, as principle, appoints another as agent and confers on the agent authority to act in the place and stead of the principal for the purposes set forth in the instrument.*” *Bryant v. Bryant*, 125 Wn.2d 113, 118 (1994). “*The agent becomes a fiduciary upon acquiring dominion and control over the principle’s property.*” *Bryant*, 125 Wn.2d at 118 citing *Moon v. Phipps*, 67 Wn.2d 948, 955 (1966). “*Loyalty is the chief virtue required of an agent. ... This loyalty demanded of an agent by the law creates a duty in the agent to deal with his principal’s property **solely for his principal’s benefit** in all matters connected with the agency.*” *Moon*, 67 Wn.2d at 954-55 citing Restatement (Second), Agency § 387 (1958). (*Emphasis in original.*)

15. When the Appellant took on the task of handling Janet’s funds, he became a “*fiduciary upon acquiring dominion and control over the principle’s [Janet’s] property.*” Under the cited case law, the Appellant had a fiduciary duty to divest or retain Janet’s assets for **Janet’s benefit alone**. When an agent with a fiduciary duty to a principle makes a gift of a principle’s property to themselves, **undue influence is presumed** and the agent-recipient has the burden of proving by clear, cogent, and convincing evidence that such generosity was not the product of undue influence. The agent has the burden of proving the gift “*...was made freely, voluntarily, and with full understanding of the facts ... If the judicial mind is left in doubt or uncertainty as to exactly what the status of the transaction was, the donee must be deemed to have failed in the discharge of [her] burden and the claim of gift must be rejected.* In this matter, there exists no formal documentation of gifting regarding the funds that

were taken by the Appellant from Janet's account to pay for the Appellant's purchases at AT&T, Beaverbark, Mirage Pool and Spa, Petco, Nordstrom and numerous other retail stores, Sports Authority, Ace Hardware, Home Depot, Lowes, and to make multiple hotel, fast food, and gas purchases for the benefit of the Appellant and his family. This lack of evidence, coupled with Janet's later assertions that she was unaware of these payments and purchase and "*he should not have spent that money,*" demonstrate that Janet had not "*freely, voluntarily, and with full understanding of the facts*" made a gift of her funds to the Appellant. Therefore, these actions by the Appellant breached his fiduciary duty to divest or retain Janet's assets for **Janet's benefit alone**, and constituted an improper use of Janet's resources.

16. Janet testified at hearing that the Appellant talked to her "*one time,*" regarding spending her money, and he had her permission to spend it. This statement was insufficient to demonstrate that Janet "*freely, voluntarily, and with full understanding of the facts*" made a gift of **each** of these payments to the Appellant. Additionally, Janet's testimony was insufficient to refute the presumption of undue influence assigned when an agent with a fiduciary duty makes a gift of a principle's property to themselves. CP 21.

17. Because this is not a criminal proceeding, the Department does not need to prove the Appellant "*intended*" to "*financially exploit*" his mother or had any other malevolent intentions toward her. The Department needs only to prove by a preponderance of the evidence that the Appellant intended to do so, and did do, acts that constitute financial exploitation. The Appellant's use of Janet's funds for anyone else's benefit other than Janet's was not accidental. It does not matter what the Appellant's intentions were in regards to his mother, only that his acts constituting financial exploitation were committed intentionally. CP 21-22.

18. Notwithstanding the ALJ's credibility determinations regarding the Appellant's version as to what had occurred regarding Janet's financial resources, it is by the Appellant's own admission that he spent money owned by Janet without her explicit consent as to the use of those specific funds. The fact that the funds may have been spent in an attempt to reduce Janet's resources in order to remain eligible for state services does not change the fact that the funds were spent without Janet's specific knowledge, prior approval, or to her **initial** benefit. Janet may have incurred some eventual benefit from the diminishment of her resources, but so did the Appellant. The Appellant convincingly argued that Janet was competent. With very little thought and with minimal consultation with Janet, the Appellant could have spent Janet's funds in ways that were **solely** for Janet's benefit. Therefore, the Appellant's decision to unilaterally deplete Janet's resources for his benefit, without consulting her as to how the funds would be spent, deprived Janet of the right to deplete these funds for **her** benefit. Any "*benefit or advantage*" Janet may have received through the diminishment of her resources was outweighed by the disadvantage of losing any say in how her cash funds were spent. CP 22.

19. Because the Appellant's inappropriate actions through the POA deprived Janet of the ability to decide how her monies were to be spent, which, by necessity, deprived her of the option to use the funds for her benefit or for some other purpose as **she** saw fit, the Appellant's actions constituted the improper use, control over, and withholding of Janet's resources for the Appellant's advantage and not for Janet's advantage, even though she may have eventually incurred some benefit from the diminished resources. Therefore, pursuant to RCW 74.34.020(7)(b), the Appellant's actions in taking Janet's funds and spending them without her specific approval of how the funds were spent, constituted financial exploitation of a vulnerable adult." CP 22.

#### IV. ARGUMENT & AUTHORITY

##### A. Standard of Review

In reviewing an administrative action, the Court of Appeals sits in the same position as the Superior Court, applying the standards of the Administrative Procedures Act (APA), Chapter 34.05 RCW. *Brighton v Washington State Department of Transportation*, 109 Wn. App. 855, 861-62 (2001) (citing Chapter 34.05 RCW; *Tapper v Employment Security Department*, 122 Wn.2d 397, 402 (1993)). The Court of Appeal applies these standards of the APA directly to the record before the agency.” *Tapper*, 122 Wn.2d at 402. To the extent they modify or replace the ALJ’s finding of fact and conclusions of law, a review judge’s findings and conclusions are relevant on appeal. *Id.* at 406. A substantial evidence standard is applied to an agency’s findings of fact but review de novo is applied to its conclusions of law. *Premera v Kreidler*, 133 Wn.App. 23, 31 (2006). Regarding the agency’s factual findings, substantial evidence is a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order. *Brighton*, 109 Wn. App. 855, 862 (2001).

Along these lines, it is RCW 34.05.570 which governs the judicial review of an agency order. Reviewing courts may grant relief only if the party challenging the agency order shows that the order is invalid for one

of the reasons set forth in RCW 34.055.570(3). Applicable here is as follows:

“The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

1. the order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;
2. the order is outside the statutory authority or jurisdiction of the agency conferred by any provisions of law;
3. the agency has engaged in unlawful procedure or decision-making process,
4. the agency has erroneously interpreted or applied the law;
5. the order is not supported by evidence that is substantial when viewed in the light of the whole record before the court, which includes the agency record for judicial review...;
6. the order is arbitrary or capricious.”

RCW 34.055.570(3)(a),(b),(d),(e)&(i).

An agency’s Conclusions of Law can be reversed or modified if “[t]he agency has erroneously interpreted or applied the law.” RCW 34.05.570(3)(d). While this court neither weighs the credibility of the witnesses, nor substitutes its judgment for that of the agency, it shall review the analysis within the Conclusions of Law to determine if the reviewing judge correctly applied the law. *Brighton*, 109 Wn. App. at 862 (citing *USW. Commc’ns, Inc. v. Utility and Transportation Commission*,

134 Wn.2d 48, 62 (1997); *Morgan v. Department of Social and Health Services*, 99 Wn. App. 148, 151 (2000).

Along these lines, RCW 34.05.464(4) provides that the Reviewing Judge “shall exercise all the decision making power that the reviewing judge would have had to decide and enter the final order had the reviewing judge presided over the hearing, except to the extent that the issue subject to review are limited by a provision of law.” When reviewing findings of fact by the presiding ALJ, the reviewing judge shall give due regard to the ALJ’s opportunity to observe the witnesses. See RCW 34.05.464(4).

B. “As Applied” the Final Order Issued by the Review Judge Violates Janet’s Constitutional Rights

While the issue was not raised previously below, a constitutional challenge may be raised for the first time on appeal. RAP 2.5(a), naturally, any constitutional challenge to a statute presents a question of law that this court also reviews de novo. *City of Bothell v Barnhart*, 172 Wash.2d 223, 229 (2011). A reviewing court presumes that a statute is constitutional, and the party challenging it bears the burden of proving otherwise beyond a reasonable doubt. *Morrison v Dep’t of Labor & Indus.*, 168 Wash.App. 269, 272 (2012). A party succeeds in an ‘as-applied’ challenge by proving that an otherwise valid statute is unconstitutional as applied to that party. *City of Redmond v Moore*, 151 Wash.2d at 668-69 (2004).

Janet Thompson has constitutional rights that are being violated by the Department's significant intrusion into her life. She executed a POA to have her son, Matt Thompson, assist her in her financial affairs on January 4, 2014 following a significant stroke. Due to her advanced age and current assisted living residence, Adult Protective Services has elected to investigate her finances and issue significant findings against her POA, against her wishes. The evidence included her competent, under oath testimony, that she consented to all of Matt Thompson's spending and decisions. This is not enough for the Department. The statute or rule upon which the Final Order is based, is in violation of constitutional provisions as applied to Janet Thompson.

- 1) The actions of the investigator were unwanted and improperly invaded Ms. Thompson's privacy interests afforded by Article 1, Section 7.

Article 1, section 7 states that "[n]o person shall be disturbed in his private affairs, or his home invaded, without the authority of law." Though similar, the protections afforded by this provision are broader than and qualitatively different from those protections afforded in the Fourth Amendment to the United States Constitution. *State v Gunwall*, 106 Wn.2d 54, 65 (1986); *City of Seattle v McCready*, 123 Wn.2d 260, 267 (1994). Article 1, section 7 necessarily includes those legitimate expectations of privacy protected by the 4<sup>th</sup> Amendment. *State v Garcia-*

*Salgado*, 170 Wn.2d 176, 183 (2010). Indeed, Janet Thompson, like every other citizen has a constitutional right to be free from unreasonable government intrusion, to designate her agent and to spend her funds how she wishes.

The analysis of Article 1 Section 7 breaks down into two parts – “private affairs” and “authority of law”. *In re Pers. Restraint of Maxfield*, 133 Wn.2d 332, 339 (1997). If a private affair is not disturbed, then there is no violation of article 1 section 7. *State v Miles*, 160 Wn.2d at 244 (2007). If a valid privacy interest has been disturbed, then the court must determine whether the disturbance was justified by authority of law. *Id.* Article I, section 7 protects “ ‘those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass.’ ” *Maxfield*, 133 Wn.2d at 339 (quoting *State v. Myrick*, 102 Wn.2d 506, 511 (1984)). To determine whether a privacy interest exists under article I, section 7, the court must examine whether a particular expectation of privacy is one that a citizen of this state should be entitled to hold. *McCready*, 123 Wn.2d at 270. Part of this inquiry focuses on what kind of protection has been historically afforded to the interest asserted, and part of it focuses on the nature and extent of the information that may be obtained as a result of government conduct. *State v Miles*, 160 Wn.2d 236, 244 (2007).

In *Miles*, our Supreme Court found that private bank records held by a third party could potentially reveal sensitive personal information. *Id.* at 246. Bank records can reveal where the person has traveled, the person's reading habits, and the person's financial condition. *Id.* at 246-47. After noting that bank records were historically protected, the High Court held that bank records are considered private affairs protected by the constitution. *Id.* at 247 (“Little doubt exists that banking records, because of the type of information contained therein, are within a person's private affairs.”). Thus, Janet's bank records are considered private affairs under Article I, section 7. The State invaded Janet's private affairs by secretly and coercively obtaining her bank records from a third party then using them to make a significant finding against her authorized agent and over her consent/authorization.

- 2) As applied, Ms. Thompson is being denied her basic constitutional right to equal protection under the law pursuant to Article 1, Section 12.

As in other contexts, administrative decisions are subject to equal protection scrutiny when basic equal protection principles are implicated. “A denial of equal protection may occur when a valid law is administered in a manner that unjustly discriminates between similarly situated persons.” *Stone v Chelan Cy. Sheriff's Dep't*, 110 Wash.2d 806, 811, 756 P.2d 736 (1988). Of course, no equal protection claim will stand unless the

complaining person can first establish that he or she is similarly situated with other persons. *Stone*, at 812, 756 P.2d 736. In other words, only after a litigant establishes membership in a class will a court engage in equal protection scrutiny. The due process inquiry asks whether the complained of treatment is so arbitrary or unfair so as to amount to a denial of due process, whereas the equal protection inquiry asks why similarly situated individuals are treated differently. *Bearden v Georgia*, 461 U.S. 660, 665 (1983). For example, when a litigant demonstrated that she was similarly situated to others receiving different treatment, *i.e.*, that she was a member of a specific class, our courts have invoked the equal protection rational basis test to determine whether a defendant's constitutional rights were violated. *State v. Judge*, 100 Wash.2d 706, 713 (1984). In this matter, both inquiries and/or types of constitutional violations are implicated. Janet Thompson is an elderly woman who is simply residing in an assisted living facility. She is treated differently by the State. Based solely upon where she resides, the State is the law allows a state agency to conduct investigation into her private financial affairs, impose arbitrary charges upon her POA, for actions she consented to, and ultimately subject her son and authorized POA to significant derogatory findings. Indeed, elderly men and women are disparately treated by the State based upon their residential preferences. Janet Thompson further claims the process,

whereby her competent testimony is discounted and/or not considered, violates her procedural due process rights afforded under Article 1, section 12.

The prohibition against discrimination stems from the constitutional requirement for equal protection. U.S. CONST. amend. XIV, § 1 (Equal Protection Clause); WASH. CONST. Art. I, § 12 (privileges and immunities, and equal protection). The aim and purpose of the special privileges and immunities provision of Art. I, § 12, of the state constitution and of the equal protection clause of the fourteenth amendment of the Federal constitution [are] to secure equality of treatment of all persons, without undue favor on the one hand or hostile discrimination on the other. *State ex rel. Bacich v. Huse*, 187 Wash. 75, 80, (1936), *overruled on other grounds by Puget Sound Gillnetters Ass'n v. Moos*, 92 Wash.2d 939, 603 P.2d 819 (1979). “Equal protection of the laws ... forbids all invidious discrimination.” *Aetna Life Ins. Co. v. Washington Life & Disability Ins. Guaranty Ass'n*, 83 Wash.2d 523, 528–29, (1974); *accord City of Everett v. Fire Fighters, Local No. 350*, 87 Wash.2d 572, 576 (1976). “[S]tatutes do not offend [the federal or state constitutions] unless they are invidiously discriminatory.” *Northshore Sch. Dist. No. 417 v. Kinnear*, 84 Wash.2d 685, 722, (1974), *overruled on other grounds by Seattle Sch. Dist. No. 1 v. State*, 90 Wash.2d 476, 585 P.2d 71

(1978). Thus, it follows naturally that to “show a violation of the equal protection clause, a party must first establish that the challenged act treats unequally two similarly situated classes of people.” *Cosro, Inc. v. Liquor Control Bd.*, 107 Wash.2d 754, 760 (1987). “Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.” *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, (1971) (discussing Title VII of the Civil Rights Act of 1964) (emphasis added). The Final Order and/or the statute as applied, violates the constitutional rights of Janet, as well as those similarly situated (i.e. competent in a nursing home).

C. The Review Judge Erroneously Interpreted and Applied the Laws

As demonstrated above, the Final Order issued by the Review Judge is not supported by substantial evidence in light of the whole record. The Order rejects significant testimony and replaces it with an inappropriate weight/reliance on hearsay statements to support the agency’s finding. Additionally, the Review Judge’s Final Order erroneously interprets and applies the law to the evidence. It is well settled that administrative rules cannot amend or change legislative enactments. *University of Washington v. Manson*, 98 Wash.2d 552, 562, 656 P.2d 1050 (1983). The plain and unambiguous language of RCW

34.05.464(4) states that the review judge “shall exercise all the decision-making power” the ALJ has to decide, “and enter the final order *had the reviewing officer presided over the hearing*”. (Emphasis added).

Moreover, “the reviewing officers shall give due regard to the presiding officer’s opportunity to observe the witnesses.” RCW 34.05.464(4); See also RCW WAC 388-02-0600(1). Unless a contrary legislative intent is clear, the use of the word “must” and “shall” in a statute is a mandatory directive. *Erection Co. v Dept of Labor and Indus.*, 121 Wash.2d 513, 518 (1993). Here, based upon the hearing record alone, there can be no dispute that the Reviewing Judge failed to give any regard, let alone “due regard”, to the ALJ’s credibility determinations. The ALJ very clearly indicated his conclusions were based largely on the credibility observations of the witnesses, namely Janet Thompson (the statutorily alleged vulnerable adult) and Sally Wilkins. Instead, the Reviewing Judge’s Final Order gave only lip service that he considered the credibility determinations as the overwhelming and very substantial evidence in the record suggests otherwise. The Reviewing Judge gave no suggestion he considered Ms. Wilkin’s evasiveness and argumentative behavior at all. The statutory provision mandating ‘due regard’ of the ALJ’s opportunity to observe is rendered entirely meaningless if a Reviewing Judge can simply state it occurred without actually giving such observations or conclusions any

weight. Indeed, the record shows the significant ‘weight’ of the evidence favors the ALJ’s conclusions.

The Review Judge further erroneously interpreted the Abuse of Vulnerable Adults Act. The purpose of the Act is identified in RCW 74.34.005 in which the legislature finds and declares “[s]ome adults are vulnerable and may be subjected to abuse, neglect, financial exploitation...”<sup>1</sup> Consequently, “[t]he department must provide protective services *in the least restrictive environment appropriate* and available to the vulnerable adult”. RCW 74.34.005(6) (emphasis added). This maintains the vulnerable adult’s dignity and right to make life’s choices. Good or bad. The statute does not afford the state a right to look over every adult’s shoulders. For this reason, the act defines various types of adults who may be more ‘vulnerable’. See RCW 74.34.005. Here, the Review Judge didn’t just look to the agency’s rules and regulations but looked to support his conclusions by citing to case law interpreting POAs with potentially different language and various factual patterns just to support the agency’s determination. (See CP 15-23).

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

Along these lines, the Reviewing Judge held that Matt Thompson breached his fiduciary duty in divesting Janet’s assets for Janet’s benefit alone which constituted improper use. (CP 21, §15). However, the statutory definition of “financial exploitation” includes breach of fiduciary duty which is the misuse of a power of attorney that results in the unauthorized appropriation of property, income, resources, or trust funds of the vulnerable adult for the benefit of a person other than the vulnerable adult. RCW 74.34.020(7)(b). The Review Judge mistakenly failed to notice that misuse or improper use is qualified by a resulting ‘unauthorized’ appropriation. Hence, similar to the ALJ’s analysis/conclusion set forth in §5.10 (which was rejected), “for the benefit of a person or entity other than the vulnerable adult” is placed secondary/after misuse “that results in the unauthorized appropriation.” *Id.* Since Janet authorized Mr. Thompson’s appropriate of her property, the Department failed to meet the statutory definition of financial exploitation. The Review Judge’s Final Order error interpreting Washington law as well as the spirit and purpose supporting the law.

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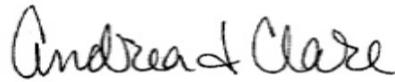
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## V. CONCLUSION

Based upon the foregoing reasons, the Final Order should be reversed and the Initial Order should be reinstated as a Final Order.

RESPECTFULLY SUBMITTED, this 13<sup>th</sup> day of June, 2019.

TELQUIST McMILLEN CLARE, PLLC



By: \_\_\_\_\_

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**CERTIFICATE OF SERVICE**

On the 13<sup>th</sup> day of June, 2019, I caused to be served a true and correct copy of the within document described as BRIEF OF APPELLANT to be served on all interested parties to this action as follows:

Jody Lee Campbell Assistant Attorney General 8127 W. Klamath Court, Suite A Kennewick, WA 99336	<input type="checkbox"/> Regular U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Electronic Delivery <input type="checkbox"/> Hand delivery <input type="checkbox"/> Facsimile to (360) 534-9959 <input checked="" type="checkbox"/> Via the Court's portal
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Dated this 13<sup>th</sup> day of June, 2019.

TELQUIST McMILLEN CLARE, PLLC



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KRISTI FLYG, *Legal Assistant*

**TELQUIST MCMILLEN CLARE, PLLC**

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