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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

In Re Mary J. Green vs Jerome Keith Green

Appellant Jerome Green's Reply Brief to DSHS Brief

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I.INTRODUCTION

On April 10, 2020 AAG Dawn Vidoni filed her Brief of DSHS.

This Jerome Green Reply Brief will address some of the legal issues and misstatements of the record raised in this DSHS Brief.

II. DID COMMISSIONER HIGH-EDWARD MAKE FINDINGS THAT JEROME GREEN ABUSED HIS MOTHER MARY GREEN?

On page 10, section B of the DSHS brief AAG Vidoni argues that Commissioner High-Edward did not make any findings that Jerome Green “abused” his mother. Although the commissioner made no such findings in her oral ruling, her type written order (pg 1) clearly states “abuse” Next to “abuse” there was a typewritten “neglect” which the commissioner had underlined. Although she underlined “neglect” she did not strike out nor line out the previous typewritten word “abuse.”

In the DSHS brief on page 12 AAG Vidoni wrongfully and falsely states that the oral ruling included findings that Mr. Green was “**exerting undue influence of her to change her power of attorney.**” No such finding was made by Commissioner High-Edward and she just perfunctorily revoked Mr. Green’s power of attorney. Since Commissioner High-Edward failed to strike out or line out the typewritten word “abuse” on page one of her order it is fair for a reasonable person to assume that she had some sort of “abuse” in mind. If so, such abuse requires “intent”

on the part of Jerome Green and he cannot be guilty of “abuse” since the commissioner specifically found that Mr. Green had no intent to harm his mother.

RCW 74.34.020 (2) defines abuse as the willful action or inaction that inflicts injury, unreasonable confinement or punishment on a vulnerable adult.” In speaking about Jerome’s intent commissioner High-Edward opined that **“don’t think you did it with intent to harm your mom because I absolutely don’t think you have that intent.”** [CP 78-96, transcript, pg.7 lines 2-4). This is clearly insufficient to support a finding of “abuse” under the Vulnerable Adult Protection Act since RCW 74.34.020 (2) defines abuse as the willful action or inaction that inflicts injury, unreasonable confinement or punishment on a vulnerable adult.” There can be no abuse under this statute when the actions are “not injurious or ill intended.” *Brown v. Dep. of Soc. & Health Services*, 145 Wn. App. 177, 180 (Div. III, 2008). There are no findings nor any evidence in this case to support any lawful revocation of Jerome Green’s power of attorney nor any proper findings that Jerome Green is guilty of “abuse.”

III. AN AFFIRMATIVE OBJECTION BY THE VULNERABLE ADULT VERSUS LACK OF CONSENT BY THE VULNERABLE ADULT IS A DISTINCTION WITHOUT A DIFFERENCE AND THE CLEAR AND CONVINCING EVIDENCE BURDEN OF

PROOF SHOULD APPLY ESPECIALLY BECAUSE MARY GREEN DID AFFIRMATIVELY OBJECT TO THIS PROTECTION ORDER VIA HER “ATTORNEY IN FACT” JEROME GREEN.

On page 16 of her DSHS Brief AAG Vidoni states that **“if the vulnerable adult does not affirmatively object, however the policy reasons articulated in *Knight* that call for a burden of proof greater than a preponderance of the evidence are lacking.”** On this same page AAG Vidoni states **“Mrs. Green did not appear at court on her own behalf or with the assistance of an attorney.”** This is not true. Jerome Green appeared on behalf of his mother as her current¹ “attorney in fact” and vigorously contested the imposition of this VAPO order. Mrs. Green is 100 years old, blind and has severe mobility problems which made her appearance at this VAPO hearing highly impracticable if not nearly impossible. Plus, there was no need for Mary Green to appear since Jerome Green was present at the hearing to adequately protect Mary Green’s interests. The record is clear that Jerome Green as Mary Green’s “attorney in fact” (with the most current POW) did appear at this hearing and did object on Mary Green’s behalf. This amended durable power of attorney [CP 1-28, attachment #5 to DSHS petition] signed by Mary Green gave such authority to Jerome on page two (2) par.VI as follows:

¹ The undisputed facts are that at the time of and during the Feb. 22, 2019 hearing Jerome Green had the most current Power of Attorney for his mother Mary Green which was dated August 28, 2018 and still in effect until the end of the hearing when it was revoked.

VI LEGAL PROCEEDINGS

I give my agent (attorney in fact) [the right] to obtain and pay for and consult with legal counsel, **to initiate or defend legal and administrative proceedings on my behalf**, including actions against third parties who refuse, without cause, to honor this instrument. A failure to adhere to this Durable Power of Attorney document may result in the imposition of legal action. (Emphasis added in bold)

Under these facts there can be no distinction drawn in this case based on the fact that Mary Green herself did not personally appear and voice her objection to this restraining order. Her son Jerome Green was her designated legal representative at this hearing. As her current “attorney in fact” Jerome was representing Mary Green’s interest all the way through the hearing until the very end when the commissioner wrongfully revoked his Power of Attorney without making any findings whatsoever including whether Mr. Green had breached his fiduciary duties to his mother.

A trial court’s protection order is reviewed for an abuse of discretion. *Crystal Ugolini v. Frank Ugolini*, 11 Wn. App. 2d 443 (Div. III, 2019) citing *Vulnerable Adult Petition of Knight*, 178 Wn. App. 929, 936 (Div. II, 2014) Abuse of Discretion is found only when the decision is “manifestly unreasonable or exercised on untenable grounds or from

untenable reasons” *Ugolini, supra*, citing *State v. McCormick* 166 Wn.2d 689, 706 (2009) quoting *State ex rel Carrol v. Junker*, 79 Wn.2d 12, 26 (1971).Untenable reasons include errors of law. *Ugolini, supra* citing *Cook v.Turbert Logging Inc.* 190 Wn. App. 448, 461 (2015)

In the case under review there are multiple errors of law and this protection order should be dissolved since Mary Green (according to commissioner oral and written findings) did not consent to this protection order and the clear and convincing burden of proof should have been applied. Mary Green’s objections to this order were made by her “**attorney in fact**” Jerome Green. The burden of proof is clear and convincing evidence and not the preponderance of evidence standard. This restraining order must be dissolved due to the “untenable reasons” set forth by the trial court.

IV. DSHS IS NOT IMMUNE UNDER RCW 74.34.150 FROM HAVING TO PAY JEROME GREEN’S COSTS AND ATTORNEY FEES SINCE THAT SECTION REQUIRES THAT THE VULNERABLE ADULT CONSENT TO THE PETITION OR THAT THE VULNERABLE ADULT LACKS THE ABILITY TO CONSENT.

On page 25 of her DSHS Brief AAG Vidoni states “Neither the department of social and health services nor the state of Washington shall be liable for seeking or failing to seek relief on behalf of any persons under this section.” RCW 74.34.150 provides as follows:

The department of social and health services, in its discretion, may seek relief under RCW 74.34.110 through 74.34.140 on behalf of and with the **consent** of any vulnerable adult. When the department has reason to believe a vulnerable adults **lacks the ability or capacity to consent** the department, in its discretion, may seek relief under RCW 74.34.110 through 74.34.140 on behalf of the vulnerable adult. Neither the department of social and health services nor the state of Washington shall be liable for seeking or failing to seek relief under this section.(Emphasis added in bold).

At the Feb. 22, 2029 VAPO hearing commissioner High-Edward failed to make any findings that Mary Green lacked the ability to consent even though this had been plead by DSHS in their petition. As such, Mr. Green filed a motion to revise commissioner order to address this. Judge Maryann Moreno granted the motion to revise and remanded it for a determination as to whether Mary Green lacked the ability to consent and what the standard of proof would be [order granting motion to revise CP 62-64]

Although no written consent for the VAPO was obtained from Mary Green or her legal representative and “attorney in fact” Jerome Green, the record shows that Mary Green did have the “capacity to consent.” Mary Green informed DSHS in writing her decision on whether or not Mary wanted a guardianship. Mary Green clearly demonstrated to APS investigator Tonya Claiborne on Feb. 6, 2019 that she (Mary) did

have the capacity to consent and stated in writing that she (Mary) did not want a guardianship (CP 217-220]

On May 13, 2019 commissioner High-Edward ruled in her Order on Remand that Mary Green “did not have the capacity to consent” and also, at the same time, ruled that Mary Green “did not consent.” This ruling by commissioner High-Edward is non-sequitur. You can’t have it both ways: If Mary Green did not consent then by definition she had the ability to consent. Any other interpretation is a strained reading of this record and the applicable law. Mary Green did not consent to the VAPO order and RCW 74.34.150 does not preclude this court from awarding costs and attorney fees to Mr. Green for having to defend against and dissolve this wrongfully issued injunction.

V. RCW 4.92.090 HAS WAIVED THE SOVEREIGN IMMUNITY FOR THE STATE OF WASHINGTON AND DOES NOT PRECLUDE THIS COURT FROM AWARDING COSTS AND ATTORNEY FEES TO JEROME GREEN.

RCW 4.92.090 provides as follows:

Tortious conduct of State-Liability for damages

The state of Washington whether acting in its governmental or proprietary capacity shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.

The Washington legislature’s waiver of sovereign immunity is one of the broadest in the country. See generally “*The Value of Government Tort*

Liability: Washington States Journey from Immunity to Accountability” by Debra Stephens and Bryan Harnetiaux, 30 Seattle University Law Review, Vol 30:35, at 42. The immediate costs of imposing tort liability on governmental entities include direct litigation expenses and the payment of damages. “*The Value of Government Tort Liability: Washington States Journey from Immunity to Accountability*”, *id* at 59.

Jerome Green has requested an award of attorney fees under the equitable theory of *Cecil v. Dominy*, 69 Wn.2d 289, 291-94 (1966) for having to defend against this wrongfully issued injunction. Attorney fees as damages may be awarded for the costs of defending an action whose sole purpose is to impose an injunction. *James Talbot v. Gordon Gray*, 11 Wn. App. 807 (Div. I, 1974). The sole purpose of this litigation commenced by DSHS against Jerome Green was (and still is) to impose an injunction preventing Mr. Green from residing in his own house and severely limiting the time he can spend with his ailing 100 year old mother and his other activities on his own property. Mr. Green is entitled to costs and attorney fees for having to defend against this action and the state of Washington has waived any immunity it may have under RCW 4.92.090

VI. AAG VIDONI MADE SEVERAL FALSE AND MISLEADING REPRESENTATIONS IN HER DSHS BRIEF AND THESE STATEMENTS SHOULD BE STRICKEN FROM THE RECORD.

On page 4 of her Counterstatement of Facts section in her DSHS Brief AAG Vidoni falsely states that there was “**admission of several supporting exhibits.**” This is not true. In her courtroom minutes [CP 65] of this Feb. 22, 2019 VAPO hearing, Spokane County Deputy Clerk Kristy Harmon clearly states “**exhibits were discussed but not offered.**”

Secondly, during this appeal AAG Vidoni had previously filed a motion to have Jerome Green pay for pay additional transcripts of the testimonial part of the Feb. 22, 1019 hearing. Mr. Critchlow filed a response brief requesting that Vidoni be sanctioned since 1) she failed to timely object to the report of proceedings that had been filed by Appellant Green 2) she failed to serve her motion on the transcriber Robin Dean, 3) she had filed her motion in the court of appeals instead of the trial court as the rules require and 4) she was clearly using this motion for the purposes of delay and added expense for (indigent) Jerome Green. At the hearing in front of Commissioner Monica Wasson on April 8, 2020 Vidoni announced that 1) she had completed her brief and Vidoni also announced 2) that she was withdrawing her motion for additional transcripts. Since she had withdrawn the offending motion, the commissioner did not

sanction Vidoni. Nonetheless in her DSHS Brief Vidoni continues to reference these matters:

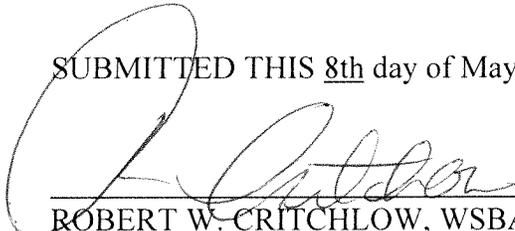
In footnote #1 on page four (4) of her DSHS Brief Vidoni states that she **“requested a transcript of the Feb. 22, 2019 hearing but that Mr. Green has failed to provide a copy to respondent.”** AAG Vidoni also falsely states in footnote # 1 that **“it does not appear that a verbatim report of proceeding has been filed with this court.”** This is not true. The transcript of the oral ruling of the Feb. 22, 2019 hearing was filed in the superior court and served on Vidoni March 15, 2019 pursuant to Mr. Green’s Motion to Revise Commissioner Ruling. This is now CP 78-96 of the record that was sent up to the court of appeals.

Finally, on page twelve (12) of the brief in her Counterstatement of Facts Vidoni falsely states that the trial court made findings including that Mr. Green was **“exerting undue influence of her to change her power of attorney.”** No such finding was made in the oral ruling of Commissioner High-Edward nor in her written order. None of the above statements by Vidoni should be considered by this panel and they should be stricken from the record and perhaps even some sanctions applied to deter such conduct in the future.

VI. CONCLUSION

Based on the forgoing facts, records and legal arguments Jerome Green requests that this court dissolve this wrongfully issued VAPO injunction and award him costs and reasonable attorney fees for having to defend against this permanent (5 years) injunction imposed by DSHS and the state of Washington.

SUBMITTED THIS 8th day of May 2020



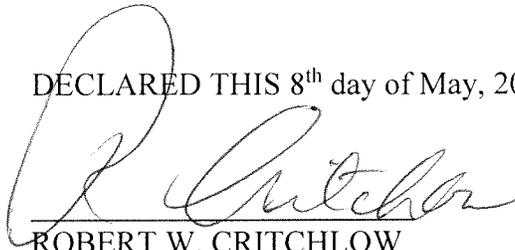
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PROOF OF SERVICE

I HEREBY DECLARE under penalty of perjury of the laws of State of Washington that on May 8th, 2020 I personally delivered Jerome Green's Reply Brief to the following principal place of business/residence for:

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DECLARED THIS 8th day of May, 2020.



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