

No. 368564

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

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

In Re Mary J. Green vs Jerome Keith Green

Appellant Jerome Green's Opening Brief on VAPO injunctions

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I. INTRODUCTION

This case involves a black family. Jerome Green is the 54 year old youngest child of Mary J. Green. Jerome has lived with his (now 100 year old) blind mother Mary Green who purchased a residence at 1704 E. 11th Ave. in Spokane, WA. in 1969. Jerome has five (living) brothers and sisters [CP 160-170, page 2, par 7] Mary and Jerome have both resided continuously together since that time. [CP 160-170, page 1, par 5] Mary Green is blind and has other serious debilitating medical issues (stage IV breast cancer) which require extensive care and supervision. [CP 160-170, page 1, par 4] For the past twenty years or so Jerome has taken care of his mother while they both shared the expenses and upkeep of their home. [CP 160-170, pg 3, par 21] Jerome and his mother Mary Green are very close and she has depended on him so that she could remain in her own home. [CP 160-170, pg 3 par 8] None of Jerome's siblings (Sherri Green, Debbie Green, Dannette Green, etc) were willing to help Jerome with Mary Green's day to day needs and so Jerome assumed these duties by himself. [CP 160-170, pg 2, par 9] Jerome drove his mother to her medical appointments and was with her when her health care providers examined her. [CP 160-170, pg 2, par 11] Since his mother is blind Jerome had to read the written instructions given by these medical care providers. [CP 160-170, pg 2, par 11] Jerome also provided meals for his

mother and was careful to cut her food into small pieces so that she could eat them without choking [CP 160-170, pg 2, par 12] In August of 2018 Jerome's sisters Sherri Green Dannette Hartman had Mary Green sign new Power of Attorneys (appointing them) and also a written statement that Jerome Green was no longer allowed to have any information about his mother's medical conditions[CP1-28, DSHS attachments # 3 and #6, CP 160-170, pg. 2, par. 13] Someone had posted a bunch of notes written with some type of magic marker, they were smeared, hard to read and Jerome could not really read these notes. [CP 160-170, pg. 2, par. 16] None of his siblings nor the care providers ever discussed with Jerome the need to "thicken" his mother's liquids [CP 160-170, pg. 3, par. 17] Jerome had his office in their home where he kept his business and personal records. [CP 160-170, pg. 3, par. 25]

Jerome has financially contributed consistently throughout his employment years to their household budget. Mr. Green has worked in numerous fields including diesel mechanic, intercity bus driver, civil aviation security specialist at the Spokane International Airport and as a weight station operator In Idaho. Jerome has attended the Washington State Patrol Academy and was placed on a roster for WSP commercial vehicle enforcement sections. Jerome served as a Special Deputy with the Spokane County Sherriff's Office and has received extensive law

enforcement training including crisis response and non-violent crisis intervention training. Mr. Green has also operated his own private investigation business, Alpha Investigations, where he did skip tracing and service of process. At one time he owned and operated a bus touring company, Spokane Scenic Tours. Jerome has also worked at various construction jobs operating heavy equipment (including firefighting equipment) and had been regularly in demand for his skills. [CP 243-280]

Jerome has also been involved with several non-profit organizations over the years (including those working with “at risk” children) and has regularly volunteered his time to these organizations. He had been working on video productions to be shown to children to get them interested in various occupations (firefighting, construction trades etc) but has, due to being evicted from his place of business/residence due to the extremely restrictive¹ VAPO had to “shelve” this project for the time being. Since he was made “homeless” Mr. Green had to get on food stamps and is currently on a waiting list for public housing. Since his eviction from his own home Mr. Green has been living in his vehicle. A

¹ Despite the language in RCW 74.34.005(6) stating that these VAPO orders should include conditions that should promote the “**least restrictive environment**” Jerome Green was ordered not to stay overnight in his own home. The Feb. 22, 2019 order [CP 62-64] had no restrictions on the times that Jerome could visit his dying mother. The most recent (May 13, 2019) modifications [CP 195-186] now limit Jerome to visiting his mother from 3-5 PM daily and he must not remove any of his personal items from his own home, including his tools, equipment and financial records.

court order dated April 11, 2019 [CP 141-142] issued by Commissioner High-Edward prohibits Mr. Green from removing any items (business records, tools, supplies, etc) from his own house making it impossible to complete any work projects as well as to begin work on future (paid) jobs.

On Sept. 27, 2012, Mary Green, recognizing that her son Jerome was the only one that was looking after her well being delivered a quit claim deed to him in consideration of “love and affection from mother to son” making Jerome a joint tenant owner of the residence at 1704 E. 11th Ave, Spokane, WA. [CP 281-84] At the direction and advice of his attorney Robert Critchlow, this deed was subsequently filed with the Spokane County Auditor’s Office on March 28, 2019.

Jerome has three sisters and a brother who live in Spokane but they all decided that the responsibility for caring for Mary Green should belong to Jerome alone and refused to contribute time or money to the care of their disabled mother Mary J. Green and they regarded it as Jerome’s responsibility [CP 16-170, pg 5, par. 43] Betty Farley, a neighbor and one time care giver for Mary, confirmed this in her letter dated Nov. 13, 2014 (CP 257] wherein Betty opined that Mary’s other children “seem to be too busy to come over and assist with their mother and don’t seem really to want to that much.” In 2014 Jerome realized that if he were to be able to

continue working that he would have to hire (out of his own pocket) a private care giver (neighbors) who would care for his mother while he was working. One of these private care givers being paid by Jerome was Betty Farley who was eventually hired and paid by the Department of Social and Health Services a state agency Jerome had contacted in 2014 for help caring for his mother. Since Jerome lived with his mother when Jerome contacted DSHS for services for his mother, DSHS counted Jerome as an **“unpaid health care provider”** when calculating how many care giver hours Mary Green was entitled to receive. [CP 160-170, pg. 4, par. 36] Jerome told DSHS that he had several jobs and could not be home with his mother 24 hours a day, seven days a week. [CP 160-170, pg. 4, par. 40] In some cases when Jerome had an appointment for a potential job he had to ask the employer if it was OK to bring his mother with him. [CP 160-170, pg. 4, par. 40] There were some jobs Jerome had to turn down because he had to stay with his mother. . [CP 160-170, pg. 4, par. 42]

According to DSHS records Ms. Farley failed to complete the training requirements and was terminated as a paid caregiver. DSHS originally authorized only 10 hours per week and Jerome was concerned that this was not enough hours (due to the severity of her conditions) and so he sent his first “public record act” request/letter dated July 28, 2016 via his attorney Robert Critchlow to, among other things, obtain

information on how DSHS calculated these hours and what rights Jerome and his mother would have to challenge these assessments. This initial request from attorney Critchlow was the only public record act request that DSHS answered and all the subsequent letters which were sent to DSHS by Jerome Green himself (pro se) [CP 269-73, CP 160-170, pg 5, par 4] were simply ignored or given facile responses.

APS and the Washington Attorney General Office never contacted Jerome to investigate these allegations by his sisters before they went and obtained an ex parte restraining order/injunction from the Spokane County superior court on Jan. 31, 2019. [CP 160-170, pg. 6, par. 57]

DSHS's records/responses to attorney Critchlow's letter explained that DSHS was still counting relatives (known as the "shared living rule") in their calculations as to how many in-home care hours his mother Mary Green was allowed to receive. This was still being done by DSHS despite the fact that this "**shared living**" rule was invalidated by the Washington State Supreme Court in the case of *Jenkins v. Wash. D.S.H.S.* 160 Wn.2d 287 (2007) and once again repudiated by the Washington State Supreme Court more recently in *Rekhter v. Wash. D.S.H.S.* 180 Wn.2d 102 (2014) For years Jerome had a Power of Attorney for his mother and was also listed as a signer on Mary J. Green's bank accounts so he could her pay her bills

and arrange for payment of other household expenses. [CP 160-170] Jerome began experiencing problems with his sisters going into Umpqua Bank and interfering with Jerome's abilities to discharge his fiduciary duties and so he and his mother were forced to go to the bank on June 12, 2017 to have Jerome's POA reinstated. [CP 160-170, pg. 6, par 55] Nevertheless Jerome's sisters continued to interfere with Jerome's abilities to pay his mother's bills and sisters Sherri Green and Danette Hartman eventually forced his mother to sign a document appointing them as POA's on August 20, 2018. [CP 1-28, DSHS attachment #3] Twice they tried to get their mother to change her Will dated Jan. 8, 2015 [CP 160-170, pg 4. Par. 31-34] so that Mary would leave her estate to them. Both times Mary Green refused to change her Will. Mary Green's Will [CP 238-41] clearly stated her intention that Jerome inherit her entire estate since (page 2, Art. IV) **"Jerome Green has devoted his life to my care and well being."** Jerome then had to have his mother Mary Green sign another document dated August 28, 2018 amending and reinstating his POA [CP 265-68] which his attorney Robert Critchlow then advised Mr. Green to file with the Spokane County Auditor's Office.

Mr. Green continued to serve his own (pro se) written requests (from 2016 to 2019) on the local DSHS office in an effort to more caregiver hours for his mother and also sought help from DSHS with

setting up a mediation with his family members to resolve their issues by providing DSHS Jerome's proposed mediation plan. Jerome was also concerned about the training requirements of these professional care givers since he had, on numerous occasions, observed very rough handling of his mother by these supposedly trained professional employees. DSHS informed Mr. Green that they did not have any such mediation programs for persons who were receiving "in home" care. Mr. Green's last letter to DSHS on January 17, 2019 [CP 271-73] asked DSHS for inter alia, "all of signatures done without the presence and approval of Mary J. Green's attorney-in fact Jerome Green", whether DSHS advised them of "any appeal rights to dispute the findings of the resignation notice to terminate care service" and "records of all home visits made to Mary Green without the presence of her attorney in fact Jerome Green and records signed by Mary Green without her attorney in fact." DSHS not only came by the house when Jerome was not present, but they came numerous times unannounced without obtaining the advance consent of Mary or Jerome Green. [CP 169-170] In his letter of Jan. 17, 2019 Mr. Green also asked for all the records of Beneficial In-Home Care including time sheets and training certificates/records. In his letter Mr. Green further questioned whether DSHS was violating the federal Older American's Act 42 U.S.C.

§ 3001 et seq. by failing to provide intervention/mediation programs for Mary J. Green. [CP 271-273]

Jerome had continually complained in his various communications to DSHS that “he was not trained as a health care provider” [CP 160-170, pg. 4, line 37] and that he was just a son taking care of his mother and that DSHS had not provided Jerome any formal training as a care provider². Jerome told DSHS that it was a violation of the US Constitution’s 13th Amendment ‘s prohibitions against “involuntary servitude” to consider him as an unpaid worker. Nonetheless, DSHS continued to count Jerome as an “unpaid care provider” while at the same time DSHS **never “ever offered to help me receive any training about how to care for my mother”** [CP 160-170, page 4, par. 38]

By letter dated Jan. 3, 2019 Beneficial In-Home Care [CP 274] notified Mary Jewel Green that Beneficial was terminating their services for her effective Jan. 17, 2019. After receiving this letter Jerome Green contacted DSHS multiple times about who was going to replace Beneficial as caregiver for Mary Green but no action was taken by DSHS to provide a replacement caregiver even though Linda Lane of Elder Services/DSHS was provided (cc’d) a copy of this same Beneficial termination letter.

² WAC 388-71-0520 states that the training requirements for individual providers are contained in WAC 388-71-0836 through 388-71-1006.

Indeed APS investigator Tonya Claiborne falsely attested in her VAPO declaration that Jerome had deprived his mother of a professional care giver (CP 1-28 petition/declaration pg 12 lines 14-17) and then used this emergency of their own making in order to get an ex parte order (without prior notice to Jerome) which required allegations of “irreparable harm”. Not only was this statement false, Tonya Claiborne and DSHS knew that it was false since the termination letter from Beneficial [CP 274] clearly stated that Beneficial was terminating their services to Mary Green due to **“ongoing difficulties with multiple parties** and increasing liability for our caregivers.”

This VAPO petition was done without the consent of Mary Green and DSHS falsely alleged that Mary Green was unable to consent or understand the petition/restraining order. [CP 1-28 petition/declaration pg 12, page 6, lines 19-21] Jerome was accused of being negligent in the way he provided food and liquids to his mother putting her at risk of asphyxiation (choking) [CP 1-28 petition for VA order and CP 160-170, page 3, par. 18] DSHS never offered any evidence that Jerome had actually harmed his mother. Indeed, Sherri Green was the one who had actually caused Mary Green to choke during her care of her mother on Sept 10, 2019 necessitating a trip to the Emergency Room [CP 160-170, page 3, line par.18 ,Exh #1]

On May 13, 2019 commissioner High-Edward ruled in her Order on Remand that Mary Green “did not have the capacity to consent” and in fact “did not consent.” Although no written consent for the VAPO was obtained from Mary Green or her legal representative Jerome Green, Mary Green apparently did have the capacity to consent and did tell DSHS in writing 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 state that she (Mary) did not want a guardianship [CP 217-220] At the Feb. 22, 2019 VAPO hearing Tonya Claiborne neglected to tell the court that Mary Green did in fact have the “capacity to consent.”

II. STATEMENT OF THE CASE

On Jan. 31, 2019 AAG Dawn Vidoni and APS investigator Tonya Claiborne signed, attested to and caused to be served an ex parte temporary VAPO order upon Jerome Green at his residence without any prior notice to him [CP 1-28, 31-33] APS investigator Tonya Claiborne failed to contact Jerome prior to initiating this ex parte proceeding to obtain Jerome Green’s side of the story. [CP 160-170, pg. 6 par. 57] By letter dated January 30, 2019 DSHS also commenced a parallel administrative proceeding [CP 208-216] against Jerome alleging these same issues about improperly feeding his mother and putting her at risk of

choking. That DSHS administrative hearing was recently held on Jan. 13, 2019 and the two primary witnesses Sherri and Debbie Green failed to appear and testify. No decision has yet been rendered for administrative hearing held by the ALJ.

The judicial VAPO petition and declaration from Vidoni and Claiborne alleged that 1) Mary Green was being abused by her son Jerome in that Mary Green's children were going back and forth having Mary sign/revoke alternative powers of attorney and that 2) Jerome was feeding and providing liquids to his mother that put her at risk of aspiration. [CP 1-28, 31-33] All of this supposed evidence was based on hearsay upon hearsay and pure speculation. The truth of the matter is that it was Jerome's sister Sherri Green was the one who actually caused her mother Mary J. Green to aspirate on September 10, 2018 necessitating a trip to the Emergency Room [CP 160-170, page 3, par. 18, Exh# 1] There was never any proof that Jerome had ever caused his mother to choke. This petition also alleged that DSHS was going to file a petition for a "professional" guardianship of Mary J. Green [CP 1-28, 31-33] even though Mary Green had previously indicated to DSHS in writing on Feb. 6, 2019 that she did not want a guardianship. [CP 217-220] In her rulings Commissioner High-Edward made a findings of neglect and abuse on the part of Jerome Green. [CP 62-64]

Only Jerome Green and APS investigator Tonya Claiborne testified at this Feb. 22, 2019 VAPO hearing which was concluded at 4:10 PM on that day [CP 65] ³ Sherri and Debbie Green failed to appear and testify at this hearing. The commissioner made findings of “abuse” and “neglect” as to Mr. Green’s inability or unwillingness to follow feeding instructions for his mother although Jerome never received any such “care giver” training from DSHS. [CP 160-170, page 4, par. 38 and RP 51, lines 9-10, May 13, 2019 hearing] As to Mr. Green’s intent, Comm. High-Edward ruled that “I 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 Feb. 22, 2019 verbatim report of proceedings, pg 14, lines 2-4) The commissioner also revoked Jerome Green’s Power of Attorney without making any findings whatsoever that he had, in any way, breached his fiduciary duties as Power of Attorney for Mary Green or that Jerome Green’s POA had been obtained via undue influence. [CP 78-96 Feb. 22, 2019 verbatim report of proceedings]

After the Feb. 22, 2019 VAPO hearing, Jerome Green filed a motion to revise commissioner High-Edward’s ruling and Judge

³ In her response to Jerome Green’s Motion to Modify Commissioner Ruling which she filed on Dec. 19, 2019 in the related Guardianship of Mary Green case COA #367746, AAG Vidoni (page 2, fn 1) falsely stated to this court of appeals that the (Feb. 22, 2019 VAPO) “**hearing did not conclude until nearly 5 PM**” which is not even close to the truth. The minutes of that hearing [CP 65] show that it concluded at 4:10 PM.

Maryann Moreno granted the motion to revise and remanded the case because there was an **“unresolved issue regarding Mary Green’s inability to consent as well as the burden of proof.”** [CP 193-194].

On March 26, 2019 AAG Vidoni filed a motion to modify the VAPO order of Feb. 22, 2019 [CP 107-123] requesting, inter alia, that the court make a finding of **“financial exploitation”** on the part of Jerome Green. DSHS alleged that Mr. Green had opened a new bank account with Washington Trust Bank, had deposited a \$3500.00 check therein and had been making regular and unauthorized withdrawals for the benefit of himself and not for the benefit of his mother Mary Green. [CP 107-123] DSHS offered no support for these allegations other than financial records showing certain deposits and withdrawals. In other words, it was pure speculation on the part of Vidoni, Claiborne and DSHS that Jerome Green had been engaging in “financial exploitation” of his mother Mary J. Green. [CP 107-123]

On April 11, 2019 a status hearing was held and the court for the first time ordered [CP 141-142] APS investigator Tonya Claiborne to provide discovery (DSHS records) to attorney Critchlow’s office by April 17, 2019. The court also ordered that Jerome Green **“may not remove any documents or any other items from her home”** [CP 141-

142] Jerome Green filed his responses on April 25, 2019 [CP 160-170 and CP 146-159] in which he explained that 1) his attorney Robert Critchlow had advised him to open the new bank account due to the continuing interference by his sisters with the Umpqua Bank account and 2) the \$3500 check was for a personal injury settlement received from attorney Larry Kuznetz and that attorney Kuznetz had advised Jerome [CP 146-59 pg.3] to “pay it down” (on household expenses, etc) to reduce the amounts that exceeded the Social Security rules on a how many assets a recipient could maintain in their accounts and still be eligible for services. Jerome went on to explain all the purchases he made for the benefit of Mary Green (maintenance and repairs, etc) Due to the April 11, 2019 order prohibiting him from retrieving his financial records and receipts from his home and principal place of business Jerome was only able to provide one invoice dated April 3, 2019 from AAA Drain Pros [CP 146-159]

By her letter to the parties dated April 30, 2019 [CP 171] Commissioner High-Edward stated that she had reviewed the court file and there was no evidence that Mary Green had ever been personally served with the original petition and **“without this I am unable to make a finding of consent when I am unsure if Mrs. Green was notified of her right to object.”** Commissioner High-Edward then directed that “the

Department is required to serve Mrs. Green with the original petition and her notice of rights and provide a return of service to this effect before the hearing date.”[CP 171]

After receiving Jerome’s declaration about the allegations of “financial exploitation” AAG Vidoni and APS/DSHS withdrew their request to modify the VAPO to include a finding of “financial exploitation” [CP 107-123] and AAG Vidoni stated that **“is it best handled administratively.”** [CP 179-181] Vidoni then turned the alleged “financial exploitation” issues over to the Office of Administrative Hearings to pursue these matters. [CP 208-216, DSHS administrative letter to Jerome Green dated May 31, 2019]. In the VAPO modification hearing of May 13, 2019 Commissioner High Edward ruled that Mary Green **“did not consent”** to the VAPO petition and that the correct burden of proof for the Feb. 22, 2019 VAPO hearing was the **“preponderance of evidence”** standard. [CP 193-194]

III. ASSIGNMENTS OF ERROR

A. Are the Feb. 22, 2019 VAPO order and May 13, 2019 VAPO modification order void for lack of subject matter jurisdiction since there was a failure by DSHS/APS to properly “commence” this cause of action when they failed to serve Mary Green her “notice of rights” and “other pleadings” per the requirements of RCW 74.34.120(3) ?

B. Did Commissioner High-Edward depart from accepted and usual course of judicial proceedings and so far sanction such a departure by

allowing the AG’s office and DSHS/APS to “recommence” this cause of action by allowing them to re-serve Mary Green with a copy of the original VAPO pleadings but this time with her “notice of rights” and other required documents instead of dismissing it at that time due to lack of subject matter jurisdiction?

C. Does the Vulnerable Adult Protect Act involve summary proceedings for which strict statutory construction is required?

RCW 74.34.120 (3) provides as follows:

When a petition under RCW 74.34.110 is filed by someone other than the vulnerable adult, notice of the petition and hearing *must be personally served upon the vulnerable adult* not less than six court days before the hearing. In addition to **copies of all pleadings filed by the petitioner**, the petitioner shall provide a written notice to the vulnerable adult **using the standard notice form developed** under RCW 74.34.115. (Emphasis added)

In this case the declaration of service [CP 34-37] filed by the officer shows that he failed to serve the “notice to the Vulnerable adult” as well as “other pleadings” required by the RCW 74.34.120(3). In her letter dated April 30, 2019 [CP 171] Commissioner High-Edward pointed out these deficiencies and directed DSHS to essentially “recommence” this cause of action by having Mary Green served again this time with the “original petition” and the “notice to vulnerable adults.” At the May 13, 2019 modification hearing commissioner High-Edward stated (RP p.56, lines 14-16:

Sure. I don’t think they filed a new petition. They just re-served the **original petition**, but yes the return of service generally you would get a copy. (Emphasis in bold)

Thus the commissioner allowed DSHS to have a “do over” instead of dismissing this case for lack of subject matter jurisdiction. DSHS re-served the original petition and the commissioner somehow thought that this action would correct the problems of lack of subject matter jurisdiction and lack of consent to the VAPO by Mary J. Green. It does not. Commissioner High-Edward at the May 13, 2019 modification hearing further stated:

Mr. Critchlow, that’s why I had them serve her so that her objection, if it came forward from the time of service till now, we could note that in the---[RP pg 57, lines 24-25]

Washington’s Vulnerable Adult Protection Act is legislation involving **summary proceedings** and, as such, must be “strictly construed.” In *Corning and Sons v. McNamara*, 8 Wn. App. 441 (1973) Division III of the Washington Court of Appeals reviewed a temporary restraining order that had been served (pursuant to RCW 7.40.050) on the petitioner without prior notice and opportunity to be heard before his liberty and property interests were impacted by such an order. The petitioner had filed a motion to quash this TRO at the trial court level but his motion was denied. The Petitioner argued that the trial court erred in granting the ex parte restraining order prior to a contested hearing when “no emergency was alleged” and that by doing so the petitioner was

deprived of due process of law in the manner of *Sniadach v. Family Fin. Corp.* 395 U.S. 337 (1969); *Fuentes v. Shevin*, 407 U.S. 67 (1972) and *Lucas v. Stapp*, 6 Wn. App. 971 (1972). In his concurring opinion in *Corning and Sons v. McNamara*, *supra* Division III Judge Munson held that there was not even a need to reach the constitutional issues for a reversal since simply failing to strictly comply with the statutory requirements alone was sufficient to warrant a reversal. Judge Munson took this position because these TRO statutes involve “**summary proceedings**” and, as such, are “**narrowly construed**” and there must be strict compliance with statutory requirements. *Barr v. Young*, 187 Wn. App. 105 (Div. III) citing *Munden v. Hazelrigg* 105 Wn.2d 39, 45 (1985).

The more recent case of *In Re Estate of Jepsen*, 184 Wn.2d 376 (2015) involved RCW 11.24.010 which sets forth the requirements for commencing a Will contest. In that case, Jepsen’s son filed a petition contesting his mother’s will. Instead of having the Personal Representative personally served as required by statute, the son’s attorney simply emailed the petition to the Personal Representative. The trial court and court of appeals ruled that this was a matter of “personal jurisdiction” and could be (and was) waived by not raising it in a timely manner. The Washington State Supreme Court disagreed finding that this defective service of the petition involved “**subject matter jurisdiction**” which can never be waived

since it involved the proper “commencement” of the cause of action. The court reasoned “Washington courts have always strictly enforced the requirements for commencing Will contest actions and we do so again today.” *In Re Estate of Jepsen*, 184 Wn.2d 376 (2015) citing *In Re Toth* 138 Wn.2d 650 at 656 (1999); *State Ex Rel Wood v. Superior Court*, 76 Wash. 27, 30-31 (1913) and *In Re Estate of Peterson*, 102 Wn. App. 456, 463 (2000). Finally, “because the court has an obligation to ensure subject matter jurisdiction is proper the parties may raise the issue at any point, no matter how later or how inequitable.” *In Re Estate of Jepsen*, 184 Wn.2d 376 (2015) citing *Henderson v. Shinseki*, 562 U.S. 428, 434 (2011).

Washington’s Vulnerable Adult Protect Act involves summary proceedings and their requirements for commencing actions must be strictly construed. DSHS failed to properly commence this cause of action and the court never acquired subject matter jurisdiction. Hence, the Feb. 22, 2019 VAPO order and the May 13, 2019 VAPO modification order were both “void ab initio” and/or voidable. As such, these VAPO restraining orders/injunctions should be dissolved and the case should be dismissed with prejudice

D. Did Comm. High-Edward commit error when she made a finding that Jerome Green committed acts of “abuse” on his Mother Mary Green without making specific findings that Jerome Green acted with

a “willful action to inflict injury” as required by the Vulnerable Adult Protection Act RCW 74.34.020?

In her Feb. 22, 2019 order the commissioner made a written finding that Jerome Green had committed “abuse” on his mother Mary Green for not properly providing her with food and drink .With regard to Jerome’s intent she 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, Feb. 22, 2019 transcript, pg.7 lines 2-4). This is 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). In this case DSHS never proved that Jerome had actually caused his mother to choke on the food and drink that he provided her. The only person who has been actually proven to cause Mary J. Green to choke was Jerome’s sister Sherri Green which may explain why Sherri refused to appear for this Feb. 22,2019 hearing. Further commissioner High-Edwards ruling clearly states her belief that Jerome Green had no intent to harm his mother Mary Green. As such, these VAPO restraining orders/injunctions should be dissolved and the case should be dismissed with prejudice

E. Did Commissioner High-Edward commit error when she failed to make proper findings that Jerome Green was guilty of “neglect” pursuant to RCW 74.34.020 (b)

RCW 74.34.020 (b) defines one type of neglect as follows:

An act or omission by a person or entity with a duty of care that demonstrates a serious disregard of consequences of such a magnitude so as to constitute a clear and present danger to the vulnerable adult’s health welfare and safety...

DSHS/APS could not proceed under RCW 74.34.020 (a) because that type of neglect requires them to prove that the V/A Mary J. suffered “mental or physical harm or pain” at the hands of Jerome Green and there was never any evidence showing that he caused any harm to his mother. Indeed it was Jerome’s sister Sherri Green who actually caused her mother Mary J. Green to choke necessitating a trip to the emergency room on Sept 10, 2018. There is nothing in commissioner High-Edwards written order dated Feb. 22, 2019 nor anything in her oral findings (incorporated by reference into the written order) that Jerome Green “demonstrated a serious disregard of such a magnitude so as to constitute a clear and present danger to the vulnerable adult’s health, welfare and safety. RCW 74.34.020 (b). This order is defective as a matter of law. As such, these VAPO restraining orders/injunctions should be dissolved and the case should be dismissed with prejudice

F. Did Comm. High-Edward commit error when she made a finding that Mary Green did not “consent” to the Vulnerable Adult Protection Order yet still held that the DSHS satisfied its burden of proof by “preponderance” of the evidence instead of using the “clear and convincing” standard?

Although DSHS alleged that Mary Green did not have the ability to consent the commissioner failed to make any such findings in her ruling. On March 29, 2019 Judge Moreno granted a motion to revise this commissioner ruling and ordered the commissioner to make findings on this issue and also determine what the burden of proof should be. At the May 13, 2019 modification hearing (transcript and order) the commissioner ruled that Mary Green did not have the ability to consent and in fact **“did not consent.”** Even though she made a finding that Mary Green did not consent, the commissioner still ruled that the burden of proof for such a situation was the “preponderance of evidence” standard rather than the “clear and convincing” standard. This is incorrect. When a vulnerable adult does not consent to VAPO proceedings the evidentiary standard to be applied is **clear and convincing**. See *In Re Vulnerable Adult Petition of Knight*, 178 Wn. App. 929 (Div. II, 2014) Commissioner High-Edward noted in her own letter [CP 171] that she (High-Edward) was not even sure if Mary Green ever received notice of the VAPO proceeding. In such a situation the *Knight* “clear and convincing” burden of proof must be applied and this case must be dismissed for applying the wrong burden of

proof. As such, these VAPO restraining orders/injunctions should be dissolved and the case should be dismissed with prejudice

G. Did commissioner High-Edward commit error when she revoked Jerome Green's Power of Attorney without making any findings whatsoever including findings that 1) Mary Green lacked the mental capacity to appoint Jerome Green as her POA and 2) Jerome Green had breached his fiduciary duties when acting as POA for his mother Mary Green?

Commissioner High-Edwards revoked Mary Green's Power of Attorney that she had granted to her legal representative Jerome Green (page 2, par 11 of Feb. 22, 2019 written order). The Commissioner had no legal authority to revoke this POA. Only Mary Green had the authority to do so and since this POA was filed with the Spokane County Auditor's Office any such revocation must also be filed there in order to become legally effective. See *Lazov v. Black*, 88 Wn.2d 883 (1977). Further and most importantly, there were no findings made by Commissioner High-Edwards that Mary Green lacked the mental capacity to sign the Jerome Green POA or that Jerome had breached his fiduciary duties. See eg. *Guardianship of Decker*, 188 Wn. App. 429 (Div. II, 2015)[commissioner made specific findings based on the "GAL's written report, a medical and psychological report" that the Ward lacked mental capacity to execute the POA and so ruled that the POA was "not in effect"] As such, these VAPO restraining orders/injunctions should be dissolved and the case should be dismissed with prejudice

H. Did DSHS/APS, based on the facts as applied in this case, violate Jerome Green’s right to be free from unlawful searches and seizures under the US Constitution’s Fourth Amendment when they authorized an unlawful entry into Jerome Green’s house without consent or a warrant and without any “civil standby” language in this restraining order/injunction?

The residence at 1704 E. 11th Avenue in Spokane, WA. is owned by Mary and Jerome Green. Her son Jerome Green also resides there and has done so since the house was purchased in 1969. On Sept. 27, 2012 Mary J. Green executed and delivered to Jerome Green a Quit Claim deed making Jerome a “joint tenant with right of survivorship.” Jerome filed this deed with the Spokane County Auditor’s Office on March 28, 2019. [CP 281-284]

Mary and Jerome were the only residents of this home at the time in question. When the officers (at the request and under the direction of DSHS/APS) came to serve this ex parte restraining order upon Jerome Green the officers entered their residence without any authorization from either residents Jerome or Mary Green. Further, this restraining order had no “civil standby” language authorizing law enforcement to enter this residence. The officers entered and remained in the home and waited inside the residence for Jerome Green to retrieve any possessions he deemed necessary for his absence. As such, DSHS/APS) violated the Fourth Amendment rights of Jerome and Mary Green to be free from unlawful intrusions. See generally *Osborne v. Seymour*, 164 Wn. App. 820 (Div. II, 2011) where the trial court

held that the Fourth Amendment was violated when officers made a “physical entry into a private home without authorization.” *Osborne, id* citing *Payton v. New York*, 445 U.S. at 585-86 quoting *United States v. U.S. Dist. Ct*, 407 U.S. 297 at 313. *Osborne, supra* involved a wife who had obtained a restraining order against her husband. Despite not having a warrant nor any language in the restraining order authorizing an officer to accompany the husband (“civil standby”) and enter the wife’s home, the officer and husband both made entry into the wife’s home in order for the husband to retrieve any possessions he might need in his absence. The wife sued for Fourth Amendment violations under 42 USC § 1983 and the trial court granted her summary judgment on this issue. On appeal Div. II upheld this ruling since there was no warrant authorizing entry into the residence, that the warrant requirement was “clearly established law” and that there was no language in the restraining order (“civil standby”) authorizing the officer to enter the wife’s home. These are the same facts as the case under review.

Based on the facts as presented in this case these orders/injunctions against Jerome Green should be dissolved and this case dismissed with prejudice.

H. Did these DSHS/APS injunctions/orders evicting Jerome Green from his own residence on Jan. 31, 2019 as applied to the facts in his case violate the “takings” clauses of the United States and Washington State constitutions which prohibit the government from taking a person’s private property without “just compensation.”?

DSHS has been, at all times relevant to this case, providing in home care services for Mary Green at her residence. Their hours vary but these DSHS contracted professional care providers, are a continuous physical presence in the Jerome and Mary Green home and are acting on behalf of and for the benefit of their employer, DSHS. The Jan. 31, 2019 ex parte VAPO temporary order/injunction and the Feb. 22, 2019 permanent order/injunction, among other restrictions, unlawfully evicted Jerome Green from his own residence since he was no longer allowed to “stay overnight” in his own home. [CP 62-64] Jerome Green has been homeless since that time and is currently on a very long waiting list for public housing. Jerome qualified for and is currently receiving foods stamps benefits.

The Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without just compensation. *Burton v. Clark County*, 91 Wn. App. 505, 515 (1998). Similarly, Washington Constitution article I, section 16 states that “no private property shall be taken or damaged for the public...use without just compensation having been first made.” A “**physical invasion**” or “**occupation**” of his or her property is compensable no matter how weighty the public purpose behind it or how minute the intrusion. *Guimont v. Clarke* 121 Wn.2d 586 (1993) citing *Lucas v. South Carolina Coastal*

Coun., 120 L.Ed.2d 798, at 812. The court labeled this category as a “total taking.” *Guimont v. Clarke supra* citing *Lucas v. South Carolina Coastal Coun.*, 120 L.Ed.2d 798, at 822. In either a “physical invasion” or “**total taking**” the owner has suffered a taking and is entitled to just compensation *regardless* of the public interest advanced in support of the restraint, unless the state can meet a rebuttal test. *Guimont v. Clarke, supra* citing *Lucas v. South Carolina Coastal Coun.*, 120 L.Ed.2d 798, at 812-13.

“An **as-applied challenge** to the constitutional validity of a statute is characterized by a party’s allegation that the application of the statute in the specific context of the party’s actions or intended actions is unconstitutional.” *City of Seattle v. Evans*, 184 Wn.2d856 (2015) citing *State v. Hunley* , 175 Wn.2d 901, 916 (2012) quoting *City of Redmond v. Moore* 151 Wn.2d 664, 668-69 (2004). “Holding a statute unconstitutional as applied prohibits future application of the statute in a similar context but the statute is not totally invalidated.” *Id* quoting *Moore* 151 Wn. 2d at 669.

When private property is taken for public use, our state and federal constitutions require the payment of **just compensation**. *Sinatra v. City of Seattle* , 131 Wn.2d 640 (1995) citing WASH. CONST. art I, § 16 (amend. 9) and U.S. CONST. amend V. In a conventional eminent domain

proceeding, property is not taken or damaged until just compensation is paid but in an inverse condemnation (citations omitted) property is taken before just compensation is paid. In these cases we have held that interest is necessary to compensate the property owner for the loss of the use of the monetary value of the taking or damage from the time of the taking until just compensation is paid. *Sinatra v. City of Seattle*, 131 Wn. 2d 640 (1995) citing *Smithrock Quarry Inc v. State*, 60 Wn.2d 387, 391 (1962); *In Re City of Anacortes*, 81 Wn.2d 166(1972); *Consolidated Diking Improvement Dist. 3 v. Davis* 36 Wn. App. 125 (1983) and *State v. Hallauer*, 28 Wn. App. 453 (1981)

Jerome Green has been a joint tenant (with right of survivorship) along with his mother Mary J. Green since Sept 27, 2012 and DSHS has not put forth any compelling reason why Jerome Green cannot reside in his own home in order to comply with the other restrictions that he not provide any food or drink to his mother until he gets some proper training in this area. As such, these restraining orders/injunctions are unconstitutional as applied to the facts of this case and should be dissolved and the case should be dismissed with prejudice

I. Did DSHS violate Jerome Greens due process rights as applied to the facts of his case when they 1) unlawfully counted him as an unpaid caregiver 2) failed to provide Jerome any training as a care giver 3) then accused him of violating his caregiver duties toward his mother

Mary J. Green 4) and went to court and got a restraining order evicting him from his residence and making him indigent/homeless and thus unable to afford any care giver training so he could come back and get the these restraining orders dissolved so that he would be allowed back into his own home?

In this case Jerome Green was being counted as an unpaid caregiver by DSHS in their calculations as to how many caregiver hours they would allocate to his mother Mary J. Green. Although Jerome Green was being counted as a caregiver by DSHS he was never provided any formal training by DSHS as to how to provide care for his mother Mary J. Green. DSHS filed a VAPO petition and on Feb. 22, 2019 they obtained an order/injunction that evicted Jerome Green from his residence and place of business and ordered him not to provide any food or drink to his mother. At the Feb. 22, 2019 hearing commissioner High-Edward ruled as follows:

He can bring it back to have the restrictions reviewed if the guardianship case provides evidence that he should be back in the home, or he provides any credible evidence that he understands what her eating restrictions are. [CP 78-96, transcript of Feb. 22, 2019 hearing, pg 13, lines 5-8]

Later at the May 13, 2019 VAPO modification hearing Mr. Critchlow complained that Dianna Evans the GAL in the guardianship case “indicated that she didn’t want anything to do with this vulnerable adult case” [May 13, 2019 transcript, RP 53, lines 5-6] and that “we’ve got this order here that’s almost literally impossible for Mr. Green to comply with.” [RP 53, lines 12-14] At this same modification hearing Jerome’s

attorney Mr. Critchlow further complained to the court that “Mr. Green has never received any training from DSHS on how to give care.”[RP pg 51, lines 9-10] As Jerome had previously explained in his declaration dated April 25, 2019, DSHS **never “ever offered to help me receive any training about how to care for my mother”** [CP 160-170, page 4, par. 38] At this Mar 13, 2019 VAPO modification hearing Mr. Critchlow finally observed as follows:

And so we’re in a sticky situation here because you said in your order that if he gets some type of training, or learns to how to do this care giving information that he could come back, you know maybe we could loosen up the restrictions or maybe even do away with it entirely. But he is impoverished. There is an In Forma Pauperis order in the file already and he cannot go to Spokane City College and pay \$500.00 to take this caregiver course. .”[RP pg 51, lines 12-20]

Commissioner High-Edward then restated that her ruling did in fact mean that Jerome **“does need to get some training from somebody.”** [RP 54, lines 4-5]

Government conduct may be so outrageous that it exceeds the bounds of fundamental fairness and violates due process. *State v. Martinez*, 121 Wn. App. 211 (Div. III, 2004) citing *U.S. v. Hunt*, 171 F.3d 1192, 1195 (8th Cir. 1999) and *State v. Lively*, 130 Wn.2d 1 (1996) The level of government misconduct needed to prove a violation of due process must shock the conscience of the court and the universal sense of

fairness. *Martinez, Id*, citing *Hunt, supra* at 1195 and *Lively, supra* at 19. For those who receive services from DSHS there is a due process right to “receive care, treatment and services consistent with **competent professional judgment.**” *Braam v. DSHS* 150 Wn.2d 689 (2003) quoting/citing *Jordan v. City of Philadelphia*, 66 F.Supp.2d 638,646 (E.D. Pa. 1999). There is a due process right “to be free from **unreasonable and unnecessary intrusions upon their physical and emotional well being**” *Braam v. DSHS* 150 Wn.2d 689 (2003) quoting *B.H. v. Johnson* 715 F. Supp. 1387, 1396 (N.D. Ill., 1989)

It is a violation of Jerome Green’s due process rights for DSHS to count him as an unpaid caregiver for his mother Mary Green but fail to train him how to carry out those duties then accuse him of violating those same duties and evict him from his own residence, impoverishing him and making him unable to afford any care giver training and then going to court and getting an order requiring him to obtain such training before he can be allowed back into his residence. This is clearly government misconduct so outrageous that it exceeds the bounds of fundamental fairness and violates due process. *State v. Martinez*, 121 Wn. App. 211 (Div. III, 2004) citing *U.S. v. Hunt*, 171 F.3d 1192, 1195 (8th Cir. 1999) and *State v. Lively*, 130 Wn.2d 1 (1996) As such, and as applied to the

facts of this case, these restraining orders/injunctions are unconstitutional and should be dissolved and the case should be dismissed with prejudice.

IV. JEROME GREEN REQUEST FOR ATTORNEY FEES

EXPENSES INCURRED IN DISSOLVING WRONGFULLY ISSUED INJUNCTIONS

Appellant Jerome Green is indigent [CP 174-177]. As such, he is unable to pay his attorney fees. Reasonable attorney fees incurred in procuring the dissolution of wrongfully issued injunctions are recoverable as damages where the sole issue wherein the attorney fees were incurred was whether the temporary injunction should be made permanent or dissolved. See *Cecil v. Dominy*, 69 Wn.2d 289, 291-94 (1966). In the case under review the restraining order was made permanent by Commissioner High-Edwards for a period of five (5) years from the date thereof. If not dissolved by this court of appeals Mr. Green's injunction/restraining order will be in effect until Feb. 22, 2024.

CONDUCT BY A PARTY WHICH CONSTITUTES BAD FAITH OR WANTONNESS

"A court may grant attorney fees to the prevailing party if the losing party's conduct constitutes bad faith or wantonness." *Miotke v. Spokane*, 101 Wn.2d 307 (1984) quoting *PUD 1 v. Kottsick*, 86 Wn.2d 388, 390 (1976). In the case under review, DSHS willfully, wantonly and recklessly

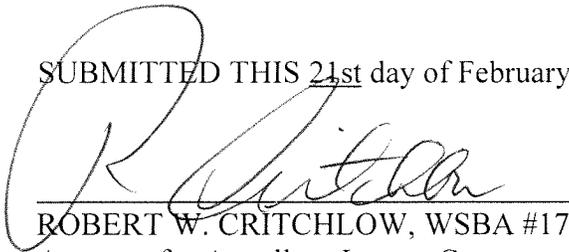
sought and obtained an injunction/restraining order evicting Jerome Green from his own home. Mr. Green has been homeless since Jan. 31, 2019 and this interference by DSHS with his constitutionally protected property rights by DSHS is ongoing. DSHS recklessly and wantonly sought these injunctions before first determining if Jerome Green was a joint tenant/owner of this property. Jerome is entitled to attorneys fee for having to retain a lawyer to enforce his constitutionally protected property rights which were proximately caused by the willful and wanton action of DSHS/APS.

RCW 4.84.080(2) STATUTORY ATTORNEY FEES-Jerome Green is entitled to \$200.00 statutory attorney fee per RCW 4.84.080(2).

V. CONCLUSION

Based on the facts as applied to his case appellant and the foregoing legal arguments Jerome Keith Green respectfully asks this court to dissolve all of these restraining orders/injunctions, enter a judgment dismissing this case with prejudice, and award him costs and attorney fees.

SUBMITTED THIS 21st day of February, 2020


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PROOF OF SERVICE

I HEREBY DECLARE under penalty of perjury of the laws of State of Washington that on Feb. 2020 I personally delivered Jerome Green's Opening Brief to the following principal place of business/residence for:

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