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

In Re:

MARY JEWEL GREEN,
Vulnerable Adult,

v.

JEROME KEITH GREEN,
Respondent/Appellant.

BRIEF OF DSHS

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I. INTRODUCTION

Mary Green is a 99 year old blind woman with senile dementia and advanced breast cancer. She has a narrowed esophagus, which causes her to choke and puts her at risk of asphyxiation if she drinks unthickened liquids or eats anything other than soft foods cut into very small pieces. She must eat and drink sitting up and must be observed for 30 minutes after eating to ensure she does not choke. In addition, Ms. Green requires speech therapy, occupational therapy, and perineal care. Ms. Green's dementia renders her unable to understand basic information or make sound judgments about her daily activities.

Ms. Green has eight children, including Jerome Green. Mr. Green claims that he is the only one of his siblings that cares for Ms. Green or that provides her with financial support. On numerous occasions, Mr. Green's siblings and Ms. Green's professional caregivers have witnessed Mr. Green provide food and drink to his mother contrary to her dietary requirements. Mr. Green knew, or should have known, that disregarding medical direction put Ms. Green at increased risk of choking and asphyxiation.

II. COUNTERSTATEMENT OF FACTS

On January 31, 2019, the Department of Social and Health Services (DSHS or "Department"), through its Adult Protective Services (APS) Investigator, Tanya Claiborne, filed a petition for Vulnerable Adult Protection

Order (VAPO) of Mary Green. CP 1-28. Ms. Claiborne's declaration alleged that Ms. Green has a narrowed esophagus, which causes Ms. Green to have difficulty swallowing and frequently choke when she is eating or drinking. CP 5. In September 2018, Ms. Green aspirated twice and was taken to the emergency room on both occasions. CP 5. On one of those occasions, Ms. Green turned blue and required life-saving intervention. CP 5. After this incident, Ms. Green's doctors placed her on a strict, limited diet. They directed that Ms. Green should only consume soft-foods and should avoid nuts, berries, and grapes. CP 5. She could only consume food cut into small pieces and drink thickened liquids to reduce her risk of aspiration and choking. CP 5.

Because of her medical conditions, Ms. Green requires supervision twenty-four hours per day, seven days per week. RP 35-36. She receives speech therapy, occupational therapy, and perineal care services. RP 35. When Ms. Green eats, she must do so in an upright position and chew each bite of food several times before swallowing. RP 35-36. Observers are required to monitor her for thirty minutes after she eats, with no talking or distractions, to ensure she does not choke. RP 35-36. The petition was supported by a law enforcement report that Jerome Green could not be located during a time he was expected to care for his mother, as well as a report from Mary Green's physician, Dr. Gleason, that she suffered from senile dementia resulting in poor insight and decision-making capabilities. CP 39-58.

The petition also included five competing Power of Attorney documents drafted between July and December 2018 that alternately appointed Jerome Green or his sister Sherri Green as Ms. Green's Attorney-in-Fact. CP 8-28; RP 35-36. Because Ms. Green was diagnosed with dementia with resulting cognitive limitations, it was unclear to what extent Ms. Green had the capacity to execute these documents. CP 46-53; RP 15. Ms. Claiborne noted that she also expected to file a petition for guardianship of Ms. Green. CP 2.

Despite Ms. Green's dietary requirements, Mr. Green has given her food such as grapes, shredded wheat cereal, and other foods that explicitly contradict medical direction. CP 5. He is aware that Ms. Green requires extensive in-home care and supervision, but he frequently leaves her alone without arranging for an alternate caregiver to sit with her. CP 5. Jerome Green states he is the only one of his siblings that has cared for his mother. CP 9. He reports that he took her to medical appointments and "was with her when her health care providers examined her and explained her medical needs and treatment." CP 161. He also states that his mother is "blind and unable to read written instructions." CP 161.

The petition for VAPO was filed on January 31, 2019. CP 1. A return of service was filed on February 4, 2019, by law enforcement attesting that Ms. Green was served with the temporary order on February

2, 2019. CP 34-35. The temporary order imposed a number of restrictions on Mr. Green and set a full hearing on February 14, 2019. CP 31-33. The hearing was ultimately continued to February 22, 2019, and Ms. Green was provided notice of the new date. CP 36-37. An evidentiary hearing took place over three hours and included the testimony of Ms. Claiborne and Mr. Green as well as the admission of several supporting exhibits.¹ Mr. Green's Power of Attorney was revoked, he was ordered not to provide any food or liquids to Ms. Green, not to visit her unless another person was present in the home, and not permitted to be in the home overnight. CP 63. Mr. Green then filed a motion to revise and the hearing on his motion took place on March 29, 2019. CP 97. On March 26, 2019, the Department filed a motion to modify the February 22, 2019, order to impose time limits on Mr. Green's contact with Ms. Green because he was disrupting her care routine, agitating her, and taking care of personal matters rather than spending time with her. A hearing was set for April 11, 2019. CP 107-23.

While Mr. Green asked to revise nearly everything about the VAPO procedure and order, the matter was remanded to the commissioner only to determine whether Ms. Green was able to consent to the VAPO and the

¹ Although counsel requested a transcript of the February 22, 2019, hearing in order to adequately respond to Mr. Green's appeal, Mr. Green has yet to provide a copy to Respondent. It does not appear that a verbatim report of proceedings has been filed with this court.

burden of proof required depending on the outcome of that decision.
CP 138.

On April 11, 2019, the commissioner imposed additional temporary restrictions on Mr. Green's contact with Ms. Green and freedom to be in her home. CP 141. The order also included a hearing date of May 1, 2019, to fully address the Department's motion to modify. CP 141.

In a letter dated April 30, 2019, the Commissioner advised the parties that the Return of Service on the VAPO did not indicate that Ms. Green was served with the petition for VAPO or the Notice to Vulnerable Adult. CP 171. She reissued the April 11, 2019, order and set a new hearing on May 13, 2019. CP 171. The commissioner directed the Department to serve Ms. Green with the missing documents and file a Declaration of Service before the hearing on May 13, 2019. CP 171. Ms. Claiborne served Ms. Green with the petition for VAPO and the Notice to Vulnerable Adult on May 2, 2019. CP 178. She filed a Declaration of Service for the same on May 6, 2019. CP 178.

At the modification hearing on May 13, 2019, Ms. Claiborne testified that the petition, notice to vulnerable adult, and temporary order were typically served by the Spokane Police Department. RP 29. She was not given a copy of the Return of Service, but believed it was filed with the court by the serving officer. RP 29. She also testified that even though the

Return of Service did not show that the officer had served all of the required paperwork, Ms. Claiborne believed Ms. Green had notice of the petition and hearing because one of Ms. Green's daughters called asking about the paperwork. RP 27.

In a May 13, 2019 ruling, the commissioner advised that she had reviewed the record from the entire February 22, 2019, hearing. RP 14. On February 22, 2019, Ms. Claiborne testified that when she spoke to Ms. Green, Ms. Green appeared very confused. RP 15. Ms. Claiborne explained the VAPO petition to Ms. Green six times to help her understand what it meant, but Ms. Claiborne did not believe she was able to understand. RP 15. The court also referred to a report from Dr. Gleason that was entered as an exhibit at the February 22, 2019 hearing. RP 15. Dr. Gleason wrote that Ms. Green "has poor insight and decision making capabilities due to dementia." RP 15.

III. COUNTERSTATEMENT OF ISSUES

- 1. Did DSHS comply with statutory rules and procedures when it filed the petition for VAPO?**
- 2. Did the commissioner make findings that Mr. Green abused Ms. Green?**

- 3. Is preponderance of the evidence the correct burden of proof when a vulnerable adult has not objected to a VAPO?**
- 4. Did the trial court act within its discretion under RCW 74.34.130 when it limited Mr. Green's contact with Ms. Green and revoked the Power of Attorney?**
- 5. Is DSHS the proper party to respond to Mr. Green's claims that he was not properly served by law enforcement?**
- 6. Should this court address Mr. Green's administrative claims when they do not fall within the scope of RCW 74.34?**
- 7. Should this court deviate from the American Law and award Mr. Green attorney's fees when there has been no showing of bad faith or statutory authority?**

IV. LAW AND ARGUMENT

- A. DSHS properly filed the VAPO according to the rules set forth by RCW 74.34 and timely corrected any service deficits.**

The legislature enacted RCW 74.34 to address the abuse of vulnerable adults. The legislature found that some adults may be vulnerable and subject to abuse, neglect, financial exploitation, or abandonment by family members or others. RCW 74.34.005(1). The legislature also determined that the vulnerable adult may lack the ability to perform or obtain services necessary to maintain his or her well-being because he or she lacks the capacity for consent and directed DSHS to provide protective services accordingly. RCW 74.34.005(3), (6)

RCW 74.34.120(3) states that when a petition under RCW 74.34.100 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. RCW 74.34.120(3). If timely service cannot be made, “the court shall continue the hearing date until the substitute service approved by the court has been satisfied.” RCW 74.34.120(4). Thus, the remedy for imperfect service is continuation of the VAPO hearing, not dismissal of the petition.

When law enforcement initially served Ms. Green, the officer only noted that he or she gave Ms. Green the Temporary Order for Protection and Notice of Hearing. CP 34-35. By letter on April 30, 2019, the trial court commissioner alerted the parties to the discrepancy and directed the Department to correct the matter before the hearing on May 13, 2019. CP 171. On May 2, 2019, Ms. Claiborne served Ms. Green with the petition for VAPO, the Notice to Vulnerable Adult, and a copy of the order setting the hearing on May 2, 2019; the Declaration of Service was filed on May 6, 2019. CP 178.

In spite of the anomaly in proof of service, it was apparent that Ms. Green was aware of the VAPO proceeding prior to May 2, 2019. On February 22, 2019, Ms. Claiborne testified that she explained the petition to Ms. Green six times, but that Ms. Green appeared to be very confused.

RP 15. Even if Ms. Green did not receive all of the documents required by RCW 74.34.120 prior to February 22, 2019, the error was rectified because she received them more than six days before the May 13, 2019 hearing. Ms. Green did not object to entry of the VAPO after May 2, 2019, nor did she object after January 31, 2019, when Officer Lynch notified her a temporary order was in place. CP 34-35.

Mr. Green argues that the court lacked subject matter jurisdiction because of the initial defect in service of process on Ms. Green. Even assuming service on Ms. Green, rather than himself, is an issue he may raise, there is no reason to address his contention that the court lacked jurisdiction as result. If the vulnerable adult is not the petitioner, and “[i]f timely service cannot be made” on the vulnerable adult, then “the court shall continue the hearing date until the substitute service approved by the court has been satisfied.” RCW 74.34.120(4). Had the legislature intended a service defect to warrant dismissal of a VAPO petition with prejudice, rather than require a continuance of the hearing until timely service was achieved, the legislature would have said so. *See State v. Keller*, 143 Wn.2d 267, 277-79, 19 P.3d 1030 (2001) (recognizing we should assume the legislature knows

what it means and means what it says). Thus, continuing the hearing here was not only the appropriate remedy, it was necessary.

B. The court did not find that Mr. Green abused Ms. Green; rather, the court's findings were limited to a determination that Mr. Green neglected Ms. Green.

RCW 74.34.005 provides that the courts may step in to protect vulnerable adults from situations of alleged abandonment, abuse, financial exploitation, or neglect. The petition may be filed by a wide array of entities, but most importantly for purposes of this appeal, by DSHS:

The department of social and health services, in its discretion, may seek relief under RCW 74.34.100 through 74.34.140 on behalf of and with the consent of any vulnerable adult. When the department has reason to believe a vulnerable adult 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 on behalf of any persons under this section.

RCW 74.34.150.

A petition may be brought by someone other than the vulnerable adult, but it must be accompanied by a declaration, signed under penalty of perjury, that states the specific facts or circumstances which demonstrate the need for the relief sought. RCW 74.34.110(2).

In order to satisfy the tenets of RCW 74.34.110 the petitioner must demonstrate that the vulnerable adult has been abandoned, abused,

neglected, or financially exploited. Here, the Department alleged and the court found that Mr. Green neglected Ms. Green by providing food and drinks to her contrary to specific medical orders he knew or should have known about. RCW 74.34.20 defines neglect as:

"Neglect" means (a) a pattern of conduct or inaction by a person or entity with a duty of care that fails to provide the goods and services that maintain physical or mental health of a vulnerable adult, or that fails to avoid or prevent physical or mental harm or pain to a vulnerable adult; or (b) 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 as to constitute a clear and present danger to the vulnerable adult's health, welfare, or safety, including but not limited to conduct prohibited under RCW 9A.42.100.

RCW 74.34.20(16).

The court began its ruling on February 22, 2019, by clarifying that the Washington Administrative Code does not apply and that the statute at issue is RCW 74.34. CP 81. The court then stated that, "In order to grant this petition...the Department has to show by a preponderance of the evidence that [Mary Green] suffered neglect as "an action or inaction by a person with a duty of care that demonstrates a serious disregard of the consequences to such a degree as to constitute a clear and present danger to the vulnerable adult." At no point in the ruling did the court discuss abuse or suggest it was considering whether Mr. Green abused his mother under RCW 74.34.020(2).

The court summarized the DSHS' allegations against Mr. Green as improperly leaving Ms. Green unsupervised, exerting undue influence over her to change her Power of Attorney, and improperly feeding her such that he put her at risk of choking and aspirating. CP 82. The commissioner was concerned that Mr. Green, his sister Sherri Green, or both, were taking advantage of Ms. Green by revoking and reinstating multiple Powers of Attorney, so she revoked Mr. Green's ability to act as Attorney-in-Fact. CP 83-84. The commissioner also found that Mr. Green assumed a duty of care when he chose to provide meals to Ms. Green. CP 83. The commissioner believed Mr. Green understood that his mother had certain emergent health requirements with regard to intake of food and liquids. CP 83. She found that he chose not to follow the instructions of Ms. Green's medical providers and "blatantly disregarded" anything his siblings advised him to do. CP 84. The commissioner found that Mr. Green lacked insight into Ms. Green's conditions and expressed her concern for Ms. Green's imminent safety. CP 84.

Nowhere in the ruling did the court address abuse, nor was there a finding of abuse. Instead, the court expressly stated it was going to "restrain [Jerome Green] from continuing to commit acts of *neglect* against [Mary Green]." RP 7 (emphasis added). Because there has been no showing that a

finding of abuse was part of the trial court's order, this assignment of error is improper and this court should deny it.

C. Substantial evidence supports the findings below and preponderance of the evidence is the appropriate burden of proof when there was no showing that the vulnerable adult objected to the protection order.

The Abuse of Vulnerable Adults Act (Act) was enacted to protect vulnerable adults who “may be subjected to abuse, neglect, financial exploitation, or abandonment by a family member.” *In re the Matter of Knight*, 178 Wn. App. 929, 937-38, 317 P.3d 1068, 1072 (2014). Under RCW 74.34.135(4),

If the court determines that the vulnerable adult is not capable of protecting his or her person or estate in connection with the issues raised in the petition or order, and that the individual continues to need protection, the court shall order relief consistent with RCW 74.34.130 as it deems necessary for the protection of the vulnerable adult.” RCW 74.34.135(4). If entry of the order is inconsistent with the expressed wishes of the vulnerable adult, the court's order shall be governed by the legislative findings contained in RCW 74.34.005.

RCW 74.34.135(4).

Unless the vulnerable adult objects to the petition for a protection order, the standard of proof for the court to grant the petition is preponderance of the evidence. “In civil cases a preponderance of the evidence is all that is required.” *State v. Superior Court In & For Pac. Cnty.*, 139 Wn. 1, 4, 245 P. 409 (1926) “And as the Department points out, the

preponderance of the evidence standard generally applies in civil cases.”
See Dep't of Labor & Indus. v. Rowley, 185 Wn.2d 186, 208, 378 P.3d 139(2016). Appellate review is limited to determining whether the trial court's findings are supported by substantial evidence and, if so, whether the findings in turn support the conclusions of law. *Goodman v. Darden, Doman & Stafford Assocs.*, 100 Wn.2d 476, 670 P.2d 648 (1983); *Willener v. Sweeting*, 107 Wn.2d 388, 393, 730 P.2d 45, 49 (1986).

In order to determine whether Ms. Green objected to the petition filed on her behalf, the court had to decide whether or not she had adequate notice of her right to object to the petition. As discussed *supra*, Ms. Green was served with a Temporary Order for Protection and Notice of Hearing on January 31, 2019 by Officer B. Lynch. CP 34-35. When the court discovered Ms. Green was not served with the Petition for VAPO or the Notice to Vulnerable Adult, she directed the Department to remedy the oversight by serving the documents to Ms. Green. CP 171. Ms. Claiborne served Ms. Green with the Petition for Vulnerable Adult Protection Order and the Notice to Vulnerable Adult on May 2, 2019 and filed a Declaration of Service of same on May 6, 2019. CP 178.

Once the court was satisfied that Ms. Green was properly served, it found that she could not understand the petition and lacked the ability to consent. RP 16. If the superior court “determines that the vulnerable adult

is not capable of protecting...her person or estate in connection with the issues raised in the petition or the order,...the court shall order relief consistent with RCW 74.34.130 as it deems necessary for the protection of the vulnerable adult.” *Knight*, 178 Wn. App. at 940 (citing RCW 74.34.135(4)).

RCW 74.34 does not state the necessary standard of proof for a VAPO, but it was enacted to protect those who are unable to care for themselves and whose physical or mental disabilities have placed the vulnerable adult in a dependent position. *Id.* at 937. The *Knight* court analogized VAPOs to guardianships because the legislative intent is similarly “to protect the liberty and autonomy” of all persons, including those with “incapacities” and unique needs. *Id.* at 939 (citing RCW 11.88.005). As such, the legislature restricted a person’s liberty and autonomy only to the minimum extent necessary to provide for their health and safety or to manage their financial affairs. *Id.* “Because ordering a guardianship for an incapacitated person affects the person’s liberty and autonomy, the legislature specifically stated the standard of proof in a contested guardianship proceeding is clear, cogent, and convincing evidence.” *Id.* at 939 (citing RCW 11.88.045). The *Knight* court recognized that VAPOs also implicate a person’s liberty and autonomy and found that just as in a guardianship contested by the alleged vulnerable adult, the

standard of proof should also be clear, cogent, and convincing evidence for VAPOs objected to by the vulnerable adult. *Id.* at 939-40.

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; indeed, clear, cogent, and convincing is necessary precisely because the alleged vulnerable adult is the party challenging the proposed limitation on his or her liberty and autonomy. *Id.* at 937. Furthermore, where vulnerable adults actually lack capacity to object or consent, like Ms. Green, requiring a preponderance of the evidence to establish a VAPO on her behalf better safeguards their interests rather than hurts them. In short, there is no reason that the usual burden of proof in civil cases – a preponderance of the evidence – as applied to Ms. Green’s case, and others like it, runs contrary to *Knight*. *Cf. Rowley*, 185 Wn.2d at 208; *Superior Court*, 139 Wn. At 4.

In *Knight*, the vulnerable adult actively contested the proceedings filed on her behalf by her son. 178 Wn App. at 933, 937, 940. In contrast here, there was no objection from Ms. Green. RP 14. Ms. Green did not appear at court either on her own behalf or with the assistance of an attorney. If the court orders relief *inconsistent* with the expressed wishes of the vulnerable adult, the court’s order shall be governed by the legislative findings contained in RCW 74.34.005. RCW 74.34.135. But here,

Ms. Green expressed no opinion to the court and the court found that it was unlikely she would have been able to given its finding that she lacked the capacity to understand the VAPO and ordered the Department to file a guardianship petition.

At no point does Mr. Green allege that his mother contested the entry of the VAPO. He raises procedural issues with the VAPO filing, but does not indicate that Ms. Green was opposed to the petition or the relief granted. The plain language of RCW 74. 34.110 and .120 proves the Department acted appropriately.

Ms. Green did not affirmatively express her wishes one way or the other about the protection order, but the evidence demonstrated that she was unable to fully understand or respond to the petition. When the restraint is not unwelcomed by the vulnerable adult, then there is no reason to treat this type of restraining order different from any other type where the burden of proof is a preponderance of the evidence. Because Ms. Green did not object to the petition or contest the relief requested by DSHS and granted by the court, a burden of proof higher than the usual preponderance of the evidence for civil cases is unwarranted.

D. The trial court acted within the discretion authorized by RCW 74.34.130 when it limited Mr. Green's contact with Ms. Green and revoked the Power of Attorney appointing Mr. Green as Attorney-in-Fact.

The Abuse of Vulnerable Adults Act explicitly authorizes the superior court to order relief as it deems necessary for the protection of the vulnerable adult. RCW 74.34.130. The commissioner properly exercised her broad powers to grant relief as necessary to protect Ms. Green from abuse, neglect, financial exploitation and abandonment. *See Calhoun v. State*, 146 Wn. App. 877, 889, 193 P.3d 188 (2008).

1. The trial court was correct in revoking the Powers of Attorney.

The trial court determined that Ms. Green did not have the capability to understand the protection order filed against her. RP 15-16. The court referenced with approval the report of Ms. Green's primary care physician that stated Ms. Green lacked insight and judgment. RP 15. She further concluded, "In regard to the power of attorney, I am concerned about you and [your sister] fighting over your mother...it may be that both of you are taking advantage of your mother by tromping her out to attorney's offices to revoke these powers of attorney. I don't know that anybody really knows what your mom wants at this point. I'm not sure your mom knows what she wants at this point." CP 82-83. The court acted appropriately to prevent exploitation of Ms. Green by revoking Mr. Green's Power of Attorney.

CP 82-83. The court is expressly given the authority to “order relief as it deems necessary for the protection of the vulnerable adult, including, but not limited to the following...” RCW 74.24.130 (emphasis added). The commissioner directed the Department to file the petition for guardianship of Ms. Green on the next court day. CP 90. The existence of and appropriateness of powers of attorney are addressed during the guardianship under RCW 11.88.030(1)(i), but the available information suggested that Ms. Green did not have the cognitive ability to designate an attorney in fact. The commissioner properly exercised her broad discretion by ordering relief consistent with the VAPO, which was to protect Ms. Green from Mr. Green, which the POA did not.

2. The trial court acted well within the confines of RCW 74.34.130 when it temporarily removed Mr. Green from his home, and nothing in the order invoked the taking of Mr. Green’s property by DSHS.

RCW 74.34.145(2) states that when an order of protection is issued that prohibits the respondent from having contact with the vulnerable adult, excludes him or her from a specified location, or prohibits the person from coming within a specified distance of a location, a violation of the provision shall be punishable under RCW 26.50.110 “*regardless of whether the person is a family or household member...*” RCW 74.34.145(2) (emphasis added).

The takings clause of the Fifth Amendment provides, “Nor shall private property be taken for public use, without just compensation.” U.S. Const. amend. V. This is reflected in state law as well, “No private property shall be taken or damaged for public or private use without just compensation having been first made.” Wash. Const. art. I, § 16. Neither constitutional claim applies to the facts of Ms. Green’s case.

In this case, Mr. Green demonstrated no understanding of the seriousness of Ms. Green’s condition and actively thwarted efforts of medical professionals and others to educate him on how to care for her without putting her at risk of substantial harm. CP 84; RP 48. RCW 74.34 contemplates that although a protection order may not expressly require a respondent move out of his house, it may effectively require him to do so if the respondent is prohibited from having contact with a person living in the house. *See Knight* 178 Wn. App. at 940. The superior court is not required to consider the impact on the respondent. Instead, the superior court's consideration is properly focused on the protection and well-being of the vulnerable adult: “The stated purpose of the [Act] is to protect vulnerable adults from abuse, financial exploitation, and neglect.” *Endicott v. Saul*, 142 Wn. App. 899, 919, 176 P.3d 560 (2008) (citing RCW 74.34.110)

Whether Mr. Green has an ownership interest in his mother’s residence is irrelevant for enforcing the protection order. The court, within

its discretion under RCW 74.34.130, restricted Mr. Green's contact with Ms. Green, and placed limits on the time he spent in her home and his conduct while there. RP 49, 51-53. The court provided Mr. Green with means of obtaining expanded and less restricted contact with his mother and even contemplated that he would be able to return to the home. CP 85; RP 51-53. Knowing that a guardianship petition would soon be filed, the court authorized the GAL to proffer recommendations as to Mr. Green's involvement with Ms. Green. CP 88. The only caveat for expanded contact was that Mr. Green avail himself of information readily available to him from his mother's medical providers. RP 52. The court expressly curtailed Mr. Green's protests that he did not have the financial ability to take specific classes or learn advanced caretaking skills. RP 51. Mr. Green needed only to demonstrate knowledge of his mother's condition and insight into the extreme risk to her if he did not strictly comply with the doctor's orders. CP 89-90; RP 49, 52. There was no expectation that Mr. Green perform the care, only that he not put Ms. Green at risk by giving her foods and liquids that she could not safely consume, like he had done several times in the past.

Mr. Green was ordered to temporarily vacate his residence and given direction on what he needed to do to return. CP 85-86, 89; RP 49-50, 51-53. The court properly found that Ms. Green was at imminent risk if Mr. Green remained in her home because Mr. Green admitted that he

continued to provide food and liquids to her that her narrowed esophagus did not allow her to tolerate. CP 84. Other than being unable to reside in the home until he demonstrates an understanding of Ms. Green's needs, Mr. Green's property interest remains unaltered. Prior to the modification order, the limitations on Mr. Green's actions were minimal, but according to family members and police reports, he was not complying with the original orders. CP 107-23. In the two months between the original VAPO hearing and the modification hearing, Mr. Green did not take any steps to further his knowledge about his mother's condition or needs. RP 52. He did not attend medical appointments, did not contact her doctor, and did not follow up with the hospital. RP 48-52. Instead, by all reports, when Mr. Green "visited" his mother, he largely ignored her. RP 48. He was often found in a different section of the house attending to his own hygiene needs and did not even let other family members know he was present until one of them inadvertently stumbled upon him. RP 47-48. When he did talk to his mother, he discussed legal matters and caused her to become agitated to the point that she refused to eat or allow others to care for her. RP 25. At no point was Mr. Green's temporary removal from the home used for any public or private interest. His interest in the home, whatever that may be, remains unchanged.

E. Law enforcement is authorized to serve documents per RCW 74.34.140, and DSHS has no control over the manner in which they do it.

RCW 74.34.140 provides that when an order for protection under RCW 74.34.130 is issued, the court may order a peace officer to assist in the execution of the order of protection. Here, a Temporary Protection Order was issued on January 31, 2019, due to the serious risks of potential harm raised in the petition. The order authorized service via law enforcement. The Appellant is incorrect when he states that “officers (at the request and under the direction of DSHS/APS) came to serve this ex parte restraining order upon Jerome Green.” Br. of Appellant 25. DSHS requested that law enforcement serve the order as authorized by RCW 74.34.140. The court authorized service to occur via law enforcement and DSHS had no part in serving Mr. Green. Under RAP 2.5(a) the appellate court may refuse to review any claim of error which was not raised in the trial. RAP 2.5(a). A party may raise a manifest error affecting a constitutional right for the first time, but the record must be sufficiently developed to consider the error raised. RAP 2.5(a). Mr. Green did not raise the issue of service below, nor was it part of the court’s ruling for which an assignment of error can be made as required under RAP 10.3. If Mr. Green takes issue with how he was served by law enforcement, he should address that with law

enforcement rather than DSHS. The court should disregard this portion of his argument.

F. Whether DSHS improperly counted Mr. Green as an unpaid caregiver is the subject of an administrative hearing. This issue is not properly before the court.

Mr. Green was prohibited from raising the complaints in section I of his brief in the lower court and should not be able to argue the merits for first time on appeal now. Br. of Appellant 29-34. Again, RAP 2.5(a) prohibits litigants from raising claims of error for the first time on review unless the claim is that the trial court lacked jurisdiction, there are not sufficient facts upon which relief can be granted, or the claimed error affects a constitutional right. RAP 2.5(a). There is no information in the record about whether or not DSHS counted Mr. Green as a caregiver, the impact that may have had on how additional service hours were allocated to Ms. Green, or the status of any payments owed to Mr. Green. He is conflating administrative actions with the superior court process. Despite multiple explanations to the contrary, Mr. Green refuses to accept that there are two distinct processes for addressing the numerous issues he raises. CP 80-81. Whether Mr. Green was counted as a caregiver or a family member or how that designation may have been used to calculate the number of caregiving hours allotted to his mother, or whether that entitled him to any training or compensation, is not the subject of this appeal.

Similarly, his due process argument is misplaced. The cases he cites are relevant to *those who receive services* from DSHS, as Mr. Green points out. Br. of Appellant at 32. See *Braam v. Dep't Soc. and Health Servs.*, 150 Wn.2d 689, 81 P.3d 851 (2003) (class action lawsuit involving rights of foster children). Mr. Green is not the beneficiary of DSHS services, Ms. Green is. Whether DSHS has violated Mr. Green's due process rights is not properly before this court as it was not addressed by the trial court. This appeal only focuses on entry of the VAPO.

G. Mr. Green does not establish a basis for the court to award attorney's fees.

“Washington follows the American rule in awarding attorney fees.” *Dayton v. Farmers Ins. Grp.*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994). Under the American rule, a court may award fees only when doing so is authorized by a contract provision, a statute, or a recognized ground in equity. *Hamm v. State Farm Mut. Auto. Ins. Co.*, 151 Wn.2d 303, 325, 88 P.3d 395 (2004). As addressed *supra*, DSHS acted appropriately to protect the rights of Ms. Green. Under RCW 74.34.150, DSHS 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 on behalf of any persons under this section. RCW 74.34.150. Mr. Green makes no

showing that DSHS acted in bad faith in taking action under this statute and instead misinterprets the plain meaning of the law. There is no authority that calls for deviation from the American law for awarding attorney's fees, even if Mr. Green prevailed, which he did not.

V. CONCLUSION

The trial court properly granted DSHS' petition for VAPO on behalf of Mary Green. The issues raised by Mr. Green are not supported by the record or statutory law and this court should deny his appeal.

RESPECTFULLY SUBMITTED this 10th day of April, 2020.

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CERTIFICATE OF SERVICE

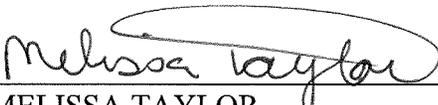
I certify that I served all parties, or their counsel of record, a true and correct copy of Brief of DSHS to the following addresses:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 10 day of April, 2020, at Spokane, Washington.



MELISSA TAYLOR
Legal Assistant 4

SPOKANE SHS

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