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No. 65101-3-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Estate of James W. Haviland, Deceased.

DONALD HAVILAND, ELIZABETH HAVILAND, and MARTHA
CLAUSER,

Petitioners,

v.

MARY HAVILAND,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY

REPLY BRIEF OF PETITIONERS

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	REPLY STATEMENT OF CASE	1
III.	REPLY ARGUMENT.....	2
A.	The Amendments Apply Prospectively in this Case	3
	1. The “triggering event” is not financial exploitation.	4
	2. Ruling that the amendments apply prospectively to pending cases regardless of when the financial exploitation occurred would not be unfair to abusers.....	7
B.	The Legislature Intended the Amendments to Apply to Financial Exploitation that Predated July 26, 2009.....	8
	1. Important statutory provisions use past tense.....	8
	2. “Any time” does not mean “any time before death (but <i>after</i> the effective date of the statute).”.....	11
	3. Retroactive application would prevent unfair results.....	12
C.	The Amendments are Remedial	13
	1. The amendments better existing remedies.....	13
	2. The amendments are not punitive.....	14
	3. The amendments do not create new substantive rights.	17
	4. Financial abusers’ “vested rights” do not preclude retroactive application of the statute	18

D.	The Amendments Do Not Violate Ex Post Facto Laws.....	23
IV.	CONCLUSION	25
APPENDIX		

TABLE OF AUTHORITIES

Cases

<u>Boykin v. Boeing Co.</u> , 128 F.3d 1279 (9th Cir. 1997)	19
<u>In re Estate of Burns</u> , 131 Wn.2d 104, 928 P.2d 1094 (1997)	7
<u>Calder v. Bull</u> , 3 U.S. 386, 1 L. Ed. 648 (1798)	20, 23
<u>Citizens Against Mandatory Bussing v. Palmason</u> , 80 Wn.2d 445, 495 P.2d 657 (1972)	22
<u>Dennis v. Heggen</u> , 35 Wn. App. 432, 667 P.2d 131 (1983)	2
<u>Densley v. Dept. of Retirement Systems</u> , 162 Wn.2d 210, 173 P.3d 885 (2007)	17
<u>Estate of Fotheringham</u> , 183 Wash. 579, 49 P.2d 480 (1935)	20
<u>Estate of Jones</u> , 152 Wn.2d 1, 93 P.2d 147 (2004).....	3
<u>Estate of Kissinger</u> , 166 Wn.2d 120, 206 P.3d 665 (2009)	25
<u>Estate of Nogleberg</u> , 200 Wash. 652, 94 P.2d 488 (1939)	20
<u>Estate of Pugh</u> , 22 Wn.2d 514, 156 P.2d 676 (1945)	4-5
<u>Estate of Tyler</u> , 140 Wash. 679, 250 P. 456 (1926)	20
<u>Estate of Wright</u> , 147 Wn. App. 674, 196 P.3d 1075 (2008)	14
<u>Ferndale v. Friberg</u> , 107 Wn.2d 602, 732 P.2d 143 (1987).....	9, 12
<u>Haddenham v. State</u> , 87 Wn.2d 145, 550 P.2d 9 (1976)	13
<u>Home Bldg. & Loan Ass'n v. Blaisdell</u> , 290 U.S. 398, 78 L. Ed. 413, 54 S.Ct. 231 (1934)	22-23

<u>Irving Trust Co. v. Day</u> , 314 U.S. 556, 62 S.Ct. 398, 86 L.Ed. 452 (1942).....	21
<u>Johnston v. Beneficial Management Corp. of America</u> , 85 Wn.2d 637, 538 P.2d 510 (1975)	10, 11, 13, 15
<u>Keyes v. Bollinger</u> , 31 Wn. App. 286, 640 P.2d 1077 (1982)	15
<u>Macumber v. Shafer</u> , 96 Wn.2d 568, 637 P.2d 645 (1981).....	22, 23
<u>Marriage of Giroux</u> , 41 Wn. App. 315, 704 P.2d 160 (1985)	18, 19
<u>Marriage of MacDonald</u> , 104 Wn.2d 745, 709 P.2d 1196 (1985)	22
<u>Mattson v. Dept. of Labor and Industries</u> , 176 Wash. 345, 29 P.2d 675 (1934)	22
<u>Niemann v. Vaughn Cmty. Church</u> , 154 Wn.2d 365, 113 P.3d 463 (2005)	16, 20
<u>In re Personal Restraint of Powell</u> , 117 Wn.2d 175, 814 P.2d 635 (1991).	23
<u>In re Personal Restraint of Young</u> , 122 Wn.2d 1, 857 P.2d 989 (1993)	24
<u>Proctor v. Huntington</u> , 169 Wn.2d 491 (2010).....	20
<u>Rhoad v. McLean Trucking</u> , 102 Wn.2d 422, 686 P.2d 483 (1984)	24
<u>In re Santore</u> , 28 Wn. App. 319, 623 P.2d 702 (1981).....	18, 19
<u>State v. Hennings</u> , 129 Wn.2d 512, 919 P.2d 580 (1996)	8, 19
<u>State v. Hodgson</u> , 108 Wn.2d 662, 740 P.2d 848 (1987)	22
<u>State v. Scheffel</u> , 82 Wn.2d 872, 514 P.2d 1052 (1973)	7
<u>State v. Varga</u> , 151 Wn.2d 179, 86 P.3d 139 (2004).....	7
<u>State v. Ward</u> , 123 Wn.2d 488, 869 P.2d 1062 (1994).....	23

<u>TCAP Corp. v. Gervin</u> , 163 Wn.2d 645, 185 P.3d 589 (2008)	22
<u>United States v. Ursery</u> , 518 U.S. 267, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996).....	16
<u>Vashon Island v. Boundary Review Bd.</u> , 127 Wn.2d 759, 903 P.2d 953 (1995)	22
<u>1000 Virginia Ltd. Partnership v. Vertecs</u> , 158 Wn.2d 566, 146 P.3d 423 (2006)	21

Statutes

RCW 11.04.250	4, 20
RCW 11.18.200	4, 20
RCW 11.24	20
RCW 11.36.010	2
RCW 11.84	<i>passim</i>
RCW 11.84.010	3, 25
RCW 11.84.010(2)	3
RCW 11.84.010(2)(b).....	10, 11, 12
RCW 11.84.020	1, 3, 5
RCW 11.84.030	5
RCW 11.84.040	5
RCW 11.84.090	5

RCW 11.84.100	5
RCW 11.84.130	5, 24
RCW 11.84.140	5
RCW 11.84.150	5
RCW 11.84.160	5, 9-10, 11
RCW 11.84.170	1, 16
RCW 11.84.170(1)	12, 15
RCW 11.84.170(2)	15
RCW 11.84.180	13
RCW 11.84.900	8
RCW 11.96A	5
RCW 11.96A.030(2)(e)	5
RCW 11.96A.100(1).....	5
RCW 11.96A.150	2
RCW 19.86	11
RCW 19.86.020	10, 11
RCW 19.86.030	10, 11
RCW 19.86.040	10, 11
RCW 19.86.050	10, 11
RCW 19.86.060	10, 11
RCW 19.86.090	11, 15

RCW 30.22.100(3)	20
RCW 41.04.273(4)(a)(ii)(iii)	24
RCW 41.04.273(4)(b).....	24
RCW 41.04.273(5)	24
RCW 41.04.273(7)	24
RCW 74.34	4
RCW 74.34.020(6)	12
RCW 74.34.020(16)(a).....	12

Other Authorities

RESTATEMENT (THIRD) OF TRUSTS § 66(1) (2010).....	16
Carolyn Dessin, <i>Financial Abuse of the Elderly</i> , 36 IDAHO L. REV. 203 (2000).....	18
Charles B. Hochman, <i>The Supreme Court and the Constitutionality of Retroactive Legislation</i> , 73 HARV. L. REV. 692 (1960).....	19
Shelby Moore & Jeanette Schaefer, <i>Remembering the Forgotten Ones: Protecting the Elderly from Financial Abuse</i> , 41 SAN DIEGO L. REV. 505 (2004).....	18
Mark Strasser, <i>Constitutional Limitations and Baehr Possibilities: On Retroactive Legislation, Reasonable Expectations, and Manifest Injustice</i> , 29 RUTGERS L. J. 271 (1998).....	18

I. INTRODUCTION

The amendments to RCW 11.84 prohibit distribution of property to abusers at the death of their victims unless the vulnerable adults knew of the financial exploitation and subsequently ratified their intent to give the abusers more property in addition to what was already misappropriated, or unless there are other circumstances that make the inheritance equitable. *See* RCW 11.84.020; RCW 11.84.170. There is nothing unfair about this. Abusers could have avoided the consequences of the legislation merely by complying with longstanding laws against financial exploitation of vulnerable adults. Abusers have no legitimate claim to receive more property when their victims die over and above what they already misappropriated. The amendments rightly presume that vulnerable adults, if given a choice, would not want to make testamentary gifts to individuals who financially exploited them. Any effect on interests that may have “vested” in abusers at the death of their victims is not punitive. It furthers the paramount goal of Washington’s probate laws, which is to fulfill the intent of decedents as to the distribution of their property, and furthers the important public policy of protecting vulnerable adults.

II. REPLY STATEMENT OF CASE

Because the trial court dismissed the petition on the pleadings, the factual allegations made by the petition should be accepted as true.

Dennis v. Heggen, 35 Wn. App. 432, 667 P.2d 131 (1983).¹

III. REPLY ARGUMENT

Three themes run through Mary Haviland's response: (1) the amendments to RCW 11.84 are punitive; (2) applying the amendments to abusers who committed financial exploitation prior to July 26, 2009 would be unfair; and (3) abusers have vested rights in receiving additional property from their victims when they die. These arguments erroneously presume that abusers have an entitlement to receive additional property from victims over and above what they misappropriated from their victims while they were alive. By enacting the amendments to RCW 11.84, Washington's legislature intended to prevent all abusers from inheriting the estates² of their victims, unless the victim knew of the financial abuse and nevertheless wanted to give the abuser more property at death. The legislation is triggered by the adjudication that an individual is an abuser,

¹ Mary Haviland's version of the facts contains one inaccuracy which cannot be ignored. She states: "Mary Haviland resigned as personal representative. Therefore, this claim was not litigated in the underlying will contest." Resp. Br. at 52, n. 14. In fact, on June 5, 2008, the trial court found that "Mary Haviland failed to provide the court with material information at the time she petitioned to be appointed personal representative of the estate;" ruled that Mary Haviland was "disqualified to serve as personal representative pursuant to RCW 11.36.010;" ordered that "Mary Haviland shall be and hereby is removed as personal representative of the Estate of James Haviland;" held that "Petitioners are the prevailing party with regard to the Petition for Removal;" and awarded Petitioners reasonable attorneys' fees against Mary Haviland pursuant to RCW 11.96A.150. CP __; Sub No. 44. *See* Petitioners' Supplemental Designation of Clerk's Papers filed herewith.

² Unless otherwise indicated, "estate" or "estates" refers to probate and nonprobate assets.

as defined by RCW 11.84.010 in reference to pre-existing law. It is remedial legislation serving important goals: protecting vulnerable adults, remedying financial exploitation, and fulfilling the intent of decedents as to the distribution of their property when they die.

A. The Amendments Apply Prospectively in this Case.

Mary Haviland asserts and Petitioners agree that the “core provision” of the amendments is RCW 11.84.020:

No slayer or abuser shall in any way acquire any property or receive any benefit as a result of the death of the decedent, but such property shall pass as provided in the sections following.

Resp. Br. at 17-18 (emphasis supplied). This “core provision” establishes that the subject matter regulated by the amendments is the distribution of decedents’ estates. The statute governs how the property of “decedents” as defined by RCW 11.84.010(2)³ “shall pass.”

Because distribution of Dr. Haviland’s estate did not occur prior to the effective date of the amendments, application of the amendments to this case would be prospective. Until a decree of distribution is entered, “the heirs may not treat estate real property as their own.” In re Estate of Jones, 152 Wn.2d 1, 14, 93 P.2d 147 (2004). The personal representative has the exclusive right “to possess and control estate property during the

³ Decedents include “(a) Any person whose life is taken by a slayer; or (b) Any deceased person who, at any time during life in which he or she was a vulnerable adult, was the victim of financial exploitation by an abuser.”

administration of the estate and has a right to it even against other heirs.” Id. at 17. Interests “vest” subject to claims of the personal representative and persons lawfully claiming under him. RCW 11.04.250. *See infra* at 20. A decedent’s nonprobate assets also are subject to payment of debts and administrative expenses of the estate while it remains open.⁴ *See* RCW 11.18.200.

The Personal Representative petitioned to determine how Dr. Haviland’s property should be distributed in light of findings from the will contest establishing financial exploitation by an heir. Applying law that took effect July 26, 2009 to an inquiry that has not yet occurred does not involve disfavored retroactive application as Mary Haviland argues.

1. The “triggering event” is not financial exploitation.

Mary Haviland argues that application of the statute would be retroactive because the conduct that the statute is intended to regulate “is plainly the financial exploitation of a vulnerable adult.” Resp. Br. at 17. However, the amendments are part of the probate code, not the Vulnerable Adult Protection Act, RCW 74.34, which defines financial exploitation and was not amended. Probate is an *in rem* procedure “to determine the status of the decedent’s property.” In re Estate of Pugh, 22 Wn.2d 514,

⁴ For example, in this case, Petitioners’ attorneys’ fees from the will contest, which were awarded against the estate, were ordered to be paid from Mary Haviland’s share of the decedent’s probate and nonprobate assets. CP 41.

523, 156 P.2d 676 (1945). A finding of financial exploitation under the Vulnerable Adult Act does not trigger application of RCW 11.84, because RCW 11.84 only applies after a victim dies. The “core provision” cited by Mary Haviland governs the distribution of victims’ property. The function of the amendments and of RCW 11.84, as illustrated by the provisions cited in Mary Haviland’s brief, is to determine how property should be distributed when a decedent is unlawfully killed or was the subject of financial exploitation by an heir. Resp. Br. at 18 (citing RCW 11.84.030, RCW 11.84.040, RCW 11.84.090, RCW 11.84.100).

In support of her contention that the amendments regulate financial exploitation, Mary Haviland incorrectly asserts that RCW 11.84.020 is “plainly self-executing” and can be applied without the filing of a petition. However, RCW 11.84.020, the “core provision of the abuser amendments” identified by Mary Haviland, cannot apply unless an individual is first adjudicated to be a slayer or an abuser, pursuant to the procedural provisions of RCW 11.84.130, .140, .150, and .160. Further, an “action or proceeding under chapter 11.84 RCW” is a matter governed by the Trust and Estate Dispute Resolution Act (TEDRA), RCW 11.96A *et seq.* RCW 11.96A.030(2)(e). Matters under TEDRA are “commenced by filing a petition with the court.” RCW 11.96A.100(1).

Mary Haviland also argues that the amendments regulate financial

exploitation because there is no causal nexus between financial exploitation and inheritance like there is between homicide and inheritance. Resp. Br. at 21. While financial exploitation is different from wrongful killing, in that it does not result in death and therefore does not trigger inheritance, respondent's reliance on this distinction undermines her argument that financial exploitation is the precipitating event for application of the amendments, which only apply after a victim dies. Financial exploitation is a prerequisite for application of the amendments, but so too are many other things, including death of the victim and the victim's vulnerability. What actually causes the disinheritance provisions of RCW 11.84 to apply to any particular case are the triggering events identified by the Petitioners – the filing of a petition under RCW 11.84 followed by the adjudication that the heir is a slayer or an abuser.

Finally, Mary Haviland argues that it is unfair to impose “new obligations with respect to past conduct,” and that “elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly.” Resp. Br. at 13. Petitioners agree that these are important considerations. However, the amendments impose no “new obligation” on abusers who committed financial exploitation prior to July 26, 2009. The obligation to not financially exploit vulnerable adults was not created or

changed by the amendments to RCW 11.84. Individuals who committed financial exploitation prior to July 26, 2009 “could have avoided the impact of the act by restraining themselves from breaking the law of this state.” State v. Varga, 151 Wn.2d 179, 196, 86 P.3d 139 (2004).

2. Ruling that the amendments apply prospectively to pending cases regardless of when the financial exploitation occurred would not be unfair to abusers.

Mary Haviland relies on In re Estate of Burns, 131 Wn.2d 104, 928 P.2d 1094 (1997), to argue that it would be unfair to apply the amendments to financial exploitation committed prior to July 26, 2009. Resp. Br. at 13, 16. Burns does not support Mary Haviland’s position.

The Burns Court observed that it would be unfair to apply a new statute to the receipt of “preenactment benefits” because the recipients had no notice that the receipt of benefits could result in liability. They therefore could not have avoided operation of the statute. Resp. Br. at 16 (quoting Burns, 131 Wn.2d at 119, 120.) But individuals who committed financial exploitation prior to July 26, 2009, by contrast, *did* have reason to know that their conduct was wrongful and that it could lead to adverse consequences, including but not limited to civil liability and even criminal prosecution. On the issue of fairness, the present case is more analogous to State v. Scheffel, 82 Wn.2d 872, 878-79, 514 P.2d 1052 (1973), where the

Court held that habitual traffic offenders had no vested right to be free from retroactive application of the Habitual Traffic Offenders Act because they “could have avoided the impact of the act by restraining themselves from breaking the law of this state.”

B. The Legislature Intended the Amendments to Apply to Financial Exploitation that Predated July 26, 2009.

Mary Haviland urges the most narrow construction conceivable to the statutory language by adding words the Legislature did not use and by disregarding words that the Legislature did use. Resp. Br. at 24-27. Her analysis violates the rules of statutory construction⁵ and the statute’s mandate that it be “construed broadly to effect the policy of this state that no person shall be allowed to profit by his or her own wrong, wherever committed.” RCW 11.84.900.

1. Important statutory provisions use past tense.

Without citation to authority, Mary Haviland argues that the Legislature’s intent is not clear because it used present tense in defining “abuser.” Resp. Br. at 25. Her reliance on this isolated use of the present tense ignores the statute as a whole and the Legislature’s use of the past

⁵ Courts may insert missing language into a statute only when the “omission created a contradiction in the statute that rendered the statute absurd and undermined its sole purpose.” State v. Hennings, 129 Wn.2d 512, 524, 919 P.2d 580 (1996).

tense in its most significant provisions applying present consequences to past conduct.

In Ferndale v. Friberg, 107 Wn.2d 602, 605, 732 P.2d 143 (1987), the Court held that even without express language indicating retroactive application, “[l]egislative intent [to apply a statute retroactively] may also be inferred from other evidence, such as the use of the past tense in the language of the statute, or a legislative statement of a strong public policy that would be served by retroactive application.” In Ferndale, a statute exempting farms from revenue assessments was held to apply retroactively because “the past tense is used in important provisions,” and “the Legislature’s intent to protect farms is clear.” *Id.* at 605-6. The same features – past tense and clear purpose – are present in this case.

For example, the amendments added a new section to RCW 11.84, which expressly makes evidence of prior financial exploitation admissible evidence in adjudications to determine whether individuals are abusers:

(1) In determining whether a person is an abuser for purposes of this chapter, the court must find by clear, cogent, and convincing evidence that: (a) The decedent **was a vulnerable adult** at the time the alleged financial exploitation took place; and (b) The conduct constituting financial exploitation **was willful action or willful inaction** causing injury to the property of the vulnerable adult.

(2) A finding of abuse by the department of social and health services is not admissible for any purpose in any claim or proceeding under this chapter.

(3) Except as provided in subsection (2) of this section, **evidence of financial exploitation is admissible if it is not inadmissible pursuant to the rules of evidence.**

RCW 11.84.160 (emphasis supplied). The only limitation on a court's consideration of past behavior as evidence of financial exploitation is that the evidence must be admissible under the rules of evidence and findings by DSHS cannot be considered. Id. Mary Haviland's interpretation renders this provision meaningless as well as the statute's use of past tense to define decedent as: "Any deceased person who, at any time during life in which he or she was a vulnerable adult, was the victim of financial exploitation by an abuser." RCW 11.84.010(2)(b).

The Legislature's intent to apply the amendments to conduct predating their effective date is illustrated by comparing the amendments to the statute interpreted by Johnston v. Beneficial Management Corp. of America, 85 Wn.2d 637, 641-2, 538 P.2d 510 (1975). Johnston held that changes to the Consumer Protection Act could not be retroactively applied in part because the statutory change was "couched in language expressed in the present and future tenses rather than the past tense[.]" The statute in Johnston provided in pertinent part:

Any person who **is injured** in his business or property by a violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, or any person so injured because **he refuses to accede**

to a proposal for an arrangement which, **if consummated, would be in violation** of 19.86.030, 19.86.040, 19.86.050, or 19.86.060, may bring a civil action in the superior court ...

RCW 19.86.090 (emphasis supplied.) RCW 19.86 addressed conduct that “if consummated, would be in violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060[.]” By contrast, the changes to RCW 11.84 apply to “conduct that was willful action or willful inaction causing injury to the property of the vulnerable adult,” RCW 11.84.160, and occurring “at any time during life in which he or she was a vulnerable adult.” RCW 11.84.010(2)(b). Unlike the statute interpreted by Johnston, important provisions of RCW 11.84 use past tense in defining the conduct intended to be actionable under the statute.

2. “Any time” does not mean “any time before death (but *after* the effective date of the statute).”

The Legislature defined a “decedent” as a “deceased person who, ***at any time*** during life in which he or she was a vulnerable adult, was the victim of financial exploitation by an abuser.” RCW 11.84.010(2)(b) (emphasis added). Mary Haviland rewrites the statute, arguing that the Legislature did not mean “at any time” but rather “at any time before death (but ***after*** the effective date of the statute).” Resp. Br. at 25 (emphasis in original). Her interpretation both includes words the Legislature did not use (“***after*** the effective date of the statute”) and

renders meaningless words that the Legislature did use. Further, the phrase “at any time” would be superfluous if all it was intended to connote was “before death” because RCW 11.84.010(2)(b) already includes the words “during life.”

3. Retroactive application would prevent unfair results.

Mary Haviland’s argument that application of the amendments to financial exploitation occurring prior to July 26, 2009 would not alleviate unfairness, Resp. Br. at 26, is wrong for two reasons. First, retroactive application is allowed when it would further a strongly stated public purpose, not only when necessary to correct unfairness. *See Ferndale v. Friberg*, 107 Wn.2d at 606, and the cases cited in Pet. Br. at 29-30. Second, application of the amendments to financial exploitation occurring prior to July 26, 2009 is necessary to prevent the inequity that results when abusers receive additional property through inheritance from vulnerable adults who they financially exploited. This Court should not lose sight of what financial exploitation is – misappropriating the property of persons who are incapable of caring for themselves due to functional, mental or physical impairments. *See* RCW 74.34.020(6), (16)(a). The amendments prevent abusers from receiving additional property from their victims, unless there is evidence that the victims knew of the abuse and still intended to make the testamentary gift. *See* RCW 11.84.170(1).

C. The Amendments are Remedial.

Mary Haviland correctly notes that “[r]emedial statutes ‘afford a remedy, or forward or better remedies already existing for the enforcement of rights and the redress of injuries.’” Resp. Br. at 28 (quoting Haddenham v. State, 87 Wn.2d 145, 148, 550 P.2d 9 (1976)). However, her argument against retroactive application is flawed because the amendments are not punitive but further existing remedies, and because abusers have no reasonable expectation to profit more from their victims.

1. The amendments better existing remedies.

Mary Haviland argues that the amendments cannot be applied retroactively because “the law already provided a complete array of remedies for financial exploitation.” Resp. Br. at 28. While it is true that financial exploitation was subject to a number of remedies prior to July 26, 2009, Mary Haviland cites no authority for the proposition that to be remedial a statute must “fill a gap in the existing *remedial* scheme.” Resp. Br. at 29. In fact, the case she relies on, Johnston v. Beneficial Management Corp. of America, 85 Wn.2d at 641, does not preclude the Legislature from retroactively supplementing existing remedies, as the Legislature did here. *See* RCW 11.84.180. Johnston held that changes to the Consumer Protection Act were not remedial because they created a new “right of action” that did not exist under common law.

The amendments are remedial because they augment and codify existing statutory and common law remedies for the financial exploitation of vulnerable adults. Prior to July 26, 2009, the probate code contained no provision specifically preventing the distribution of additional property to heirs from the estate of a victim of financial exploitation. For the first time, the Legislature explicitly recognized and codified among Washington's descent and distribution laws a remedy to address this growing societal problem. The amendments allow courts to withhold inheritances to offset misappropriated funds, and, by allowing courts to disinherit financial abusers, redress the inequity of giving financial abusers additional property from their victims' estates after they die.

2. The amendments are not punitive.

Mary Haviland argues that the amendments are punitive because they “impose a penalty on abusers unrelated to the amount of actual damages” (Resp. Br. at 12), which she quantifies as the value of the property misappropriated from the vulnerable adult. *Id.* at 29–30. Her argument ignores the fact that RCW ch. 11.84 and its amendments were enacted as part of Washington's probate code, and regulate the distribution of decedents' estates to slayers and abusers. A paramount goal of probate law is to fulfill decedents' intent as to the disposition of their property. In re Estate of Wright, 147 Wn. App. 674, 681, 196 P.3d 1075 (2008). Mary

Haviland fails to recognize that financial exploitation necessarily affects the victim's testamentary intent toward the abuser. In enacting the amendments, the Legislature presumed that decedents would not intend to give their estates to someone who financially exploited them while they were a vulnerable adult, whether or not the funds were repaid or the vulnerable adult had assets "worth millions of dollars." Resp. Br. at 30.

Disinheritance is therefore not analogous to the treble damages penalty that was cited by the Johnston Court as one reason changes to the Consumer Protection Act could not be applied retroactively. There was no question that the statutory change to the CPA imposed a penalty: "[T]he treble damage provision of RCW 19.86.090 is designed to punish the defendant and deter further violations," while indirectly providing a remedy for injured consumers. Keyes v. Bollinger, 31 Wn. App. 286, 297, 640 P.2d 1077 (1982). However, the purpose of disinheritance under the amendments to RCW 11.84 is not to punish conduct, but to remedy financial harm and fulfill the testator's intent. This is apparent from RCW 11.84.170, which (1) prohibits disinheritance if there is clear evidence that the decedent was aware of the financial exploitation and later ratified the testamentary act; and (2) identifies the decedent's intent and the degree of harm caused by the financial exploitation as factors courts may consider in determining whether disinheritance would be equitable.

Deviation from testamentary instruments was recognized as an equitable remedy prior to passage of the amendments and is not punitive. Courts “may modify an administrative or distributive provision of a trust, or direct or permit the trustee to deviate from an administrative or distributive provision, if because of circumstances not anticipated by the settlor the modification or deviation will further the purposes of the trust.” RESTATEMENT (THIRD) OF TRUSTS § 66(1) (2010). In Niemann v. Vaughn Cmty. Church, 154 Wn.2d 365, 381, 113 P.3d 463 (2005), the Supreme Court adopted and applied the equitable deviation doctrine, holding that it is consistent with Washington case law and reflects the “consistent aim of giving effect to the settlor’s intent.” “The objective is to give effect to what the settlor's intent probably would have been had the circumstances in question been anticipated.” Id. The same non-punitive goal is apparent in RCW 11.84.170, which does not allow disinheritance if the decedent knew of the financial exploitation and nevertheless intended to make the testamentary gift. It also identifies the decedent’s intent among the factors to consider in determining whether disinheritance would be equitable.

Finally, *in rem* proceedings are traditionally not considered punitive, even when they do impose civil penalties. *See, e.g., United States v. Ursery*, 518 U.S. 267, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996) (holding *in rem* civil forfeitures generally do not constitute punishment

because they are a remedial civil sanction). By making the disinheritance provisions part of Washington's probate code, the Legislature opted to remedy financial exploitation by regulating the status and distribution of victims' property. These proceedings are analogous to other civil *in rem* proceedings and are not punitive.

3. The amendments do not create new substantive rights.

The statute itself provides no support for Mary Haviland's assertion that the amendments give new substantive claims to contingent beneficiaries. Resp. Br. at 44. The amendments, therefore, are not at all analogous to the statute at issue in Densley v. Dept. of Retirement Systems, 162 Wn.2d 210, 173 P.3d 885 (2007), which expressly conferred public employees with credit for military service that they previously would not and could not have received under prior law. It did not have a remedial purpose and, contrary to public policy, would have codified disparities between classes of workers had it applied retroactively. By contrast, the amendments do not confer rights on any new group of beneficiaries. They address the status of decedents' property and the inheritance rights of abusers. Any effect on contingent beneficiaries is incidental and not part of the amendments' purpose or remedial scheme.

4. Financial abusers’ “vested rights” do not preclude retroactive application of the statute.

Mary Haviland’s conclusory characterization that her interests in Dr. Haviland’s estate “vested” when he died does not address the nature of the property interests affected and whether the inheritance she seeks to protect may be compromised by legislation intended to prohibit a financial abuser from profiting from her victim’s death. In asserting on behalf of abusers an entitlement in the estates of their victims that merits protection against retroactive changes in inheritance laws, respondent emphasizes the “rights” and the “substantial benefits” that abusers might lose by operation of the amendments. Resp. Br. at 30, n. 8. Any “rights” that abusers have in the estates of their victims exist because the victims were powerless to change their estate plans due to the conditions that made them vulnerable adults and due to the nature of financial exploitation, which frequently occurs without the victim’s knowledge.⁶ Such rights are not “vested.”

This Court has previously noted that the term “‘vested right’ . . . is merely a conclusory label” because “the proper test of the constitutionality of retroactive legislation is whether a party has changed position in reliance upon the previous law or whether the retroactive law

⁶ See Carolyn Dessin, *Financial Abuse of the Elderly*, 36 IDAHO L. REV. 203, 214-5 (2000); Shelby Moore & Jeanette Schaefer, *Remembering the Forgotten Ones: Protecting the Elderly from Financial Abuse*, 41 SAN DIEGO L. REV. 505, 509-12 (2004). Pet. Br. at 21 n. 6, 29 n. 8.

defeats the reasonable expectations of the parties. . .” In re Marriage of Giroux, 41 Wn. App. 315, 320, 704 P.2d 160 (1985) (quoting In re Santore, 28 Wn. App. 319, 324, 623 P.2d 702 (1981)).⁷ Washington’s Supreme Court and the Ninth Circuit have adopted the same test for whether retroactive legislation is permissible, focusing on “whether a party has changed position in reliance upon the previous law or whether the retroactive law defeats the reasonable expectations of the parties[.]” State v. Hennings, 129 Wn.2d 512, 528-529, 919 P.2d 580 (1996) (retroactive application of changes to criminal restitution statute did not impermissibly impair vested rights); Boykin v. Boeing Co., 128 F.3d 1279, 1283 (9th Cir. 1997) (retroactive application of amendment to the Minimum Wage Act did not impair any vested rights).

Retroactive application of the amendments defeats no justifiable reliance interests of abusers. The only “changed position” abusers can claim is that they would not have financially exploited their victims if they had known they might be disinherited. However, as Mary Haviland

⁷ See also Mark Strasser, *Constitutional Limitations and Baehr Possibilities: On Retroactive Legislation, Reasonable Expectations, and Manifest Injustice*, 29 RUTGERS L. J. 271, 302 (1998) (“The vested rights analysis is itself controversial, some claiming that it greatly helps explain the retroactivity doctrine and others claiming it is at best unhelpful because calling a right vested is simply a conclusory way of saying that the legislation is impermissible.”); Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 696 (1960), cited in In re Santore, 28 Wn. App. at 324.

acknowledges, financial exploitation was already wrongful; abusers had no right to commit financial exploitation before the amendments were enacted. Nor can abusers claim “reasonable expectations” in inheriting from their victims. It is not reasonable to expect that victims of financial exploitation would want to give their abusers additional property when they die. Further, while the timing of vesting relates back to death, inheritance interests are generally subject to numerous conditions.⁸

The vested interests that Mary Haviland claims derive from the “privilege of succession,” which the State has broad authority to regulate. Estate of Fotheringham, 183 Wash. 579, 585, 492 P.2d 480 (1935).

⁸ For example: interests vesting by will are conditioned on the will not being invalidated, *see* RCW 11.24; Calder v. Bull, 3 U.S. 386, 1 L. Ed. 648 (1798); survivorship clauses in wills (including Dr. Haviland’s *see* Exhibits 1, 2 (designated by respondent)) condition vesting on the heir surviving the decedent by a certain period of time; interests in joint tenancy with right of survivorship accounts are conditioned on the presumption of survivorship not being rebutted, *see* RCW 30.22.100(3); title to real property vests subject to the decedent’s debts, any family allowance, administrative expenses, and the claims of the personal representative and persons lawfully claiming under such personal representative, RCW 11.04.250; the interests of heirs vest subject to the Estate’s right of retainer, *see* Pet. Br. at 34; the interests of heirs do not vest until inheritance tax is paid, In re Estate of Nogleberg, 200 Wash. 652, 658, 94 P.2d 488 (1939); nonprobate assets vest “subject to the decedent’s liabilities, claims, estate taxes, and administration expenses,” RCW 11.18.200; property interests vest subject to equity, *see, e.g., In re Estate of Tyler*, 140 Wash. 679, 691, 250 P. 456 (1926) (holding that husband had no vested right in family support allowance because he killed his spouse (prior to enactment of slayer statute)); Proctor v. Huntington, 169 Wn.2d 491, 500 (2010) (“[E]quity has a right to step in and prevent the enforcement of a legal right whenever such an enforcement would be inequitable.”); Niemann v. Vaughn Cmty. Church, 154 Wn.2d at 384 (equitable deviation from trust instrument permitted).

When title vests is a creation of statute, *see* Opening Brief at 38, as is the privilege of succession itself: “Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction.” Irving Trust Co. v. Day, 314 U.S. 556, 562, 62 S.Ct. 398, 86 L.Ed. 452 (1942) (citations omitted). The State had authority to enact legislation to remedy financial exploitation, protect vulnerable adults and fulfill the intent of decedents, as well as to apply that legislation to the distribution of property in cases still pending, regardless of when the vulnerable adults died or when the financial exploitation defined under prior law occurred.

The tax cases cited by Petitioners in their Opening Brief stand for the proposition that rights created by statute, in particular inheritance rights, may be curtailed by the retroactive application of new law. Mary Haviland argues that these cases should be limited to the inheritance tax context. Resp. Br. at 38. But courts frequently uphold the Legislature’s authority to retroactively limit or eliminate rights created by statute. For instance, in 1000 Virginia Ltd. Partnership v. Vertecs, 158 Wn.2d 566, 146 P.3d 423 (2006), the Supreme Court distinguished between rights created by statute, which may be retroactively curtailed, and rights created by contract and common law, which are subject to greater protections, in holding that the retroactive abolition of a statutory cause of action does not

impair any vested right. Similarly, in State v. Hodgson, 108 Wn.2d 662, 740 P.2d 848 (1987), the Court held that because there was no common-law statute of limitations for criminal cases, the Legislature could change or repeal the statute of limitations and apply the change to all offenses that were not already time-barred when the new statute became effective. “[N]o one can have a vested right in any general rule of law or policy of legislation which entitles him to insist that it remain unchanged for his benefit.” Citizens Against Mandatory Bussing v. Palmason, 80 Wn.2d 445, 452-453, 495 P.2d 657 (1972).⁹

Although Mary Haviland has not asserted that any of her vested interests derive from contract, even if they did, retroactive limitation would be permissible. Relying on the State’s authority to regulate contracts and “to safeguard the vital interests of its people,” the Court permitted retroactive application of a statute that increased the homestead exemption statute and limited the contract rights of creditors. Macumber v. Shafer, 96 Wn.2d 568, 571, 637 P.2d (1981), (quoting Home Bldg. &

⁹ See also TCAP Corp. v. Gervin, 163 Wn.2d 645, 653, 185 P.3d 589 (2008) (“A judgment is neither a constitutional nor a vested right because it is a creature of statute and terminates when the statute says it does.”); Vashon Island v. Boundary Review Bd., 127 Wn.2d 759, 768, 903 P.2d 953 (1995) (laws governing the creation of cities may be retroactively amended); In re Marriage of MacDonald, 104 Wn.2d 745, 750, 709 P.2d 1196 (1985) (laws governing distribution of assets in divorce may be retroactively amended); Mattson v. Dept. of Labor and Industries, 176 Wash. 345, 348; 29 P.2d 675 (1934) (workman’s rights under the law existing at the time of the injury are purely statutory rights, and may be taken away at any time by the legislature.)

Loan Ass'n v. Blaisdell, 290 U.S. 398, 434, 78 L. Ed. 413, 54 S.Ct. 231, (1934) (other citations omitted). *See* Pet. Br. at 31. While the State has the same interest in regulating contracts in the instant case, the new law serves a more compelling public policy. Moreover, unlike the innocent creditors in Macumber, abusers could have avoided the consequences of the new law merely by refraining from wrongful conduct.

D. The Amendments Do Not Violate Ex Post Facto Laws.

Mary Haviland wrongly asserts that retroactive application of the amendments would violate the ex post facto clause. Resp. Br. at 46-47. The ex post facto clause forbids states from enacting laws which impose punishment for an act that was not punishable when committed, or increase the quantum of punishment connected to a crime when it was committed. In re Personal Restraint of Powell, 117 Wn.2d 175, 184, 814 P.2d 635 (1991). For over 200 years, the clause has been limited to laws that retroactively inflict criminal punishment. *See* Calder v. Bull, 3 U.S. 386, 1 L. Ed. 648 (1798) (change in statute governing probate hearing did not violate ex post facto clause); State v. Ward, 123 Wn.2d 488, 869 P.2d 1062 (1994) (retroactive application of sex offender registration act to persons who were convicted or who pled guilty prior to the effective date of the statute was not punitive and did not violate ex post facto clause). To overcome the presumption that civil statutes do not violate the ex post

facto prohibition, a party must show a “high level of proof” that the law is so punitive that it negates the presumption. In re Personal Restraint of Young, 122 Wn.2d 1, 857 P.2d 989 (1993).

The Legislature intended the amendments to be a civil remedy, not a criminal punishment. The amendments are part of the civil probate code. The statute and amendments expressly and repeatedly refer to the adjudication as a “civil proceeding.” See RCW 11.84.130, RCW 41.04.273(4)(a)(ii)(iii), RCW 41.04.273(4)(b), RCW 41.04.273(5), RCW 41.04.273(7). The amendments protect vulnerable adults, remedy financial exploitation, fulfill the intent of decedents, and preserve the integrity of Washington’s system of inheritance laws. These are not punitive goals or effects.

Finally, the fact that the 1998 Legislature removed from RCW 11.84 language disclaiming a “penal” interpretation of the statute does not constitute a “high level of proof” that the statute is punitive. Resp. Br. at 47, n. 13. Deletion of text from a statute is not evidence of legislative intent unless the change is “material.” Rhoad v. McLean Trucking, 102 Wn.2d 422, 427, 686 P.2d 483 (1984). The change in the slayer statute's purpose section referred to by Mary Haviland did not change any substantive rights or benefits conferred by the statute. Nor did it change any of the procedures for determining whether an individual was a slayer.

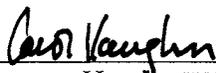
Moreover, the change occurred prior to In re Estate of Kissinger, 166 Wn.2d 120, 131, 206 P.2d 665 (2009), which held that “the slayer statute is not a criminal statute. Its origins are in equity.” *See* Pet. Br. at 46.

IV. CONCLUSION

Preventing individuals who financially exploited vulnerable adults from inheriting property from their victims is neither unfairly punitive nor unconstitutional. This Court should reverse and direct the trial court on remand to determine whether Mary Haviland is an abuser under RCW 11.84.010 and if so whether she should be disqualified from inheriting Dr. Haviland’s estate under the amendments to RCW 11.84 and related laws.

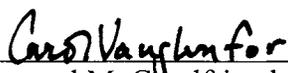
Respectfully submitted this 4th day of October, 2010.

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DECLARATION OF SERVICE

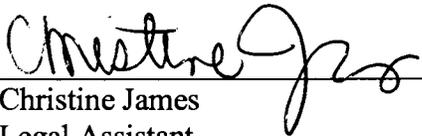
CHRISTINE JAMES certifies as follows:

I am a legal assistant for the law firm of Thompson & Howle. I am over eighteen (18) years of age and make this declaration based on personal knowledge.

On October 4, 2010, I delivered by legal messenger the following documents to the law offices of the Respondent's attorneys Ladd Leavens and William Rasmussen, located at 1201 Third Avenue, Suite 2200, Seattle, WA 98104; to Richard Furman, Personal Representative of the Estate of James Haviland, located at 801 Second Ave., Suite 1200, Seattle, WA 98104, and to Howard Goodfriend, located at 1101 First Avenue, Suite 500, Seattle, WA 98101: **Reply Brief of Petitioners; and this Declaration of Service.**

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on October 4, 2010.


Christine James
Legal Assistant

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APPENDIX

RCW 11.96A.030
Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Citation" or "cite" and other similar terms, when required of a person interested in the estate or trust or a party to a petition, means to give notice as required under RCW 11.96A.100. "Citation" or "cite" and other similar terms, when required of the court, means to order, as authorized under RCW 11.96A.020 and 11.96A.060, and as authorized by law.

(2) "Matter" includes any issue, question, or dispute involving:

(a) The determination of any class of creditors, devisees, legatees, heirs, next of kin, or other persons interested in an estate, trust, nonprobate asset, or with respect to any other asset or property interest passing at death;

(b) The direction of a personal representative or trustee to do or to abstain from doing any act in a fiduciary capacity;

(c) The determination of any question arising in the administration of an estate or trust, or with respect to any nonprobate asset, or with respect to any other asset or property interest passing at death, that may include, without limitation, questions relating to: (i) The construction of wills, trusts, community property agreements, and other writings; (ii) a change of personal representative or trustee; (iii) a change of the situs of a trust; (iv) an accounting from a personal representative or trustee; or (v) the determination of fees for a personal representative or trustee;

(d) The grant to a personal representative or trustee of any necessary or desirable power not otherwise granted in the governing instrument or given by law;

(e) An action or proceeding under chapter 11.84 RCW;

(f) The amendment, reformation, or conformation of a will or a trust instrument to comply with statutes and regulations of the United States internal revenue service in order to achieve qualification for deductions, elections, and other tax requirements, including the qualification of any gift thereunder for the benefit of a surviving spouse who is not a citizen of the United States for the estate tax marital deduction permitted by federal law, including the addition of mandatory governing instrument requirements for a qualified domestic trust under section 2056A of the internal revenue code, the qualification of any gift thereunder as a qualified conservation easement as permitted by federal law, or the qualification of any gift for the charitable estate tax deduction permitted by federal law, including the addition of mandatory governing instrument requirements for a charitable remainder trust; and

(g) With respect to any nonprobate asset, or with respect to any other asset or property interest passing at death, including joint tenancy property, property subject to a community property agreement, or assets subject to a pay on death or transfer on death designation:

(i) The ascertaining of any class of creditors or others for purposes of chapter 11.18 or 11.42 RCW;

(ii) The ordering of a qualified person, the notice agent, or resident agent, as those terms are defined in chapter 11.42 RCW, or any combination of them, to do or abstain from doing any particular act with respect to a nonprobate asset;

(iii) The ordering of a custodian of any of the decedent's records relating to a nonprobate asset to do or abstain from doing any particular act with respect to those records;

(iv) The determination of any question arising in the administration under chapter 11.18 or 11.42 RCW of a nonprobate asset;

(v) The determination of any questions relating to the abatement, rights of creditors, or other matter relating to the administration, settlement, or final disposition of a nonprobate asset under this title;

(vi) The resolution of any matter referencing this chapter, including a determination of any questions relating to the ownership or distribution of an individual retirement account on the death of the spouse of the account holder as contemplated by RCW 6.15.020(6);

(vii) The resolution of any other matter that could affect the nonprobate asset.

(3) "Nonprobate assets" has the meaning given in RCW 11.02.005.

(4) "Notice agent" has the meanings given in RCW 11.42.010.

(5) "Party" or "parties" means each of the following persons who has an interest in the subject of the particular proceeding and whose name and address are known to, or are reasonably ascertainable by, the petitioner:

- (a) The trustor if living;
 - (b) The trustee;
 - (c) The personal representative;
 - (d) An heir;
 - (e) A beneficiary, including devisees, legatees, and trust beneficiaries;
 - (f) The surviving spouse or surviving domestic partner of a decedent with respect to his or her interest in the decedent's property;
 - (g) A guardian ad litem;
 - (h) A creditor;
 - (i) Any other person who has an interest in the subject of the particular proceeding;
 - (j) The attorney general if required under RCW 11.110.120;
 - (k) Any duly appointed and acting legal representative of a party such as a guardian, special representative, or attorney-in-fact;
 - (l) Where applicable, the virtual representative of any person described in this subsection the giving of notice to whom would meet notice requirements as provided in RCW 11.96A.120;
 - (m) Any notice agent, resident agent, or a qualified person, as those terms are defined in chapter 11.42 RCW; and
 - (n) The owner or the personal representative of the estate of the deceased owner of the nonprobate asset that is the subject of the particular proceeding, if the subject of the particular proceeding relates to the beneficiary's liability to a decedent's estate or creditors under RCW 11.18.200.
- (6) "Persons interested in the estate or trust" means the trustor, if living, all persons beneficially interested in the estate or trust, persons holding powers over the trust or estate assets, the attorney general in the case of any charitable trust where the attorney general would be a necessary party to judicial proceedings concerning the trust, and any personal representative or trustee of the estate or trust.
- (7) "Principal place of administration of the trust" means the trustee's usual place of business where the day-to-day records pertaining to the trust are kept, or the trustee's residence if the trustee has no such place of business.
- (8) "Representative" and other similar terms refer to a person who virtually represents another under RCW 11.96A.120.
- (9) The "situs" of a trust means the place where the principal place of administration of the trust is located, unless otherwise provided in the instrument creating the trust.
- (10) "Trustee" means any acting and qualified trustee of the trust.

[2009 c 525 § 20; 2008 c 6 § 927; 2006 c 360 § 10; 2002 c 66 § 2; 1999 c 42 § 104.]

Notes:

Reviser's note: The definitions in this section have been alphabetized pursuant to RCW 1.08.015(2)(k).

Part headings not law -- Severability -- 2008 c 6: See RCW 26.60.900 and 26.60.901.

Clarification of laws -- Enforceability of act -- Severability -- 2006 c 360: See notes following RCW 11.108.070.

(7) Testimony of witnesses may be by affidavit;

(8) Unless requested otherwise by a party in a petition or answer, the initial hearing must be a hearing on the merits to resolve all issues of fact and all issues of law;

(9) Any party may move the court for an order relating to a procedural matter, including discovery, and for summary judgment, in the original petition, answer, response, or reply, or in a separate motion, or at any other time; and

(10) If the initial hearing is not a hearing on the merits or does not result in a resolution of all issues of fact and all issues of law, the court may enter any order it deems appropriate, which order may (a) resolve such issues as it deems proper, (b) determine the scope of discovery, and (c) set a schedule for further proceedings for the prompt resolution of the matter.

[2001 c 14 § 1; 1999 c 42 § 303.]

RCW 30.22.100

Ownership of funds after death of a depositor.

Subject to community property rights and subject to the terms and provisions of any community property agreement, upon the death of a depositor:

(1) Funds which remain on deposit in a single account belong to the depositor's estate.

(2) Funds belonging to a deceased depositor which remain on deposit in a joint account without right of survivorship belong to the depositor's estate, unless the depositor has also designated a trust or P.O.D. account beneficiary of the depositor's interest in the account.

(3) Funds belonging to a deceased depositor which remain on deposit in a joint account with right of survivorship belong to the surviving depositors ~~unless there is clear and convincing evidence of a contrary intent at the time the account was created.~~ If there is more than one individual having right of survivorship, the funds belong equally to the surviving depositors unless the contract of deposit otherwise provides. If there is more than one surviving depositor, the rights of survivorship shall continue between the surviving depositors.

(4) Funds remaining on deposit in a trust or P.O.D. account belong to the trust or P.O.D. account beneficiary designated by the deceased depositor unless the account has also been designated as a joint account with right of survivorship, in which event the funds remaining on deposit in the account do not belong to the trust or P.O.D. account beneficiary until the death of the last surviving depositor and the rights of the surviving depositors shall be determined by subsection (3) of this section. If the deceased depositor has designated more than one trust or P.O.D. account beneficiary, and more than one of the beneficiaries survive the depositor, the funds belong equally to the surviving beneficiaries unless the depositor has specifically designated a different method of distribution in the contract of deposit; if two or more beneficiaries survive, there is no right of survivorship as between them unless the terms of the account or deposit agreement expressly provide for rights of survivorship between the beneficiaries.

(5) Upon the death of a depositor of an agency account, the agency shall terminate and any funds remaining on deposit belonging to the deceased depositor shall become the property of the depositor's estate or such other persons who may be entitled thereto, depending upon whether the account was a single account, joint account, joint account with right of survivorship, or a trust or P.O.D. account.

Any transfers to surviving depositors or to trust or P.O.D. account beneficiaries pursuant to the terms of this section are declared to be effective by reason of the provisions of the account contracts involved and this chapter and are not to be considered as testamentary dispositions. The rights of survivorship and of trust and P.O.D. account beneficiaries arise from the express terms of the contract of deposit and cannot, under any circumstances, be changed by the will of a depositor.

[1981 c 192 § 10.]

RCW 41.04.273

Prohibition of retirement benefits passing to slayer or abuser beneficiary — Determination by department of retirement systems — Duties upon notice — Payment upon verdicts — Admissibility of evidence — Immunity.

(1) For purposes of this section, the following definitions shall apply:

(a) "Abuser" has the same meaning as provided in RCW 11.84.010.

(b) "Decedent" means any person who is entitled to benefits from the Washington state department of retirement systems by written designation or by operation of law:

(i) Whose life is taken by a slayer; or

(ii) Who is deceased and who, at any time during life in which he or she was a vulnerable adult, was the victim of financial exploitation by an abuser, except as provided in RCW 11.84.170.

(c) "Slayer" means a slayer as defined in RCW 11.84.010.

(2) Property that would have passed to or for the benefit of a beneficiary under one of the retirement systems listed in RCW 41.50.030 shall not pass to that beneficiary if the beneficiary was a slayer or abuser of the decedent and the property shall be distributed as if the slayer or abuser had predeceased the decedent.

(3) A slayer or abuser is deemed to have predeceased the decedent as to property which, by designation or by operation of law, would have passed from the decedent to the slayer or abuser because of the decedent's entitlement to benefits under one of the retirement systems listed in RCW 41.50.030.

(4)(a) The department of retirement systems has no affirmative duty to determine whether a beneficiary is, or is alleged to be, a slayer or abuser. However, upon receipt of written notice that a beneficiary is a defendant in a civil lawsuit or probate proceeding that alleges the beneficiary is a slayer or abuser, or is charged with a crime that, if committed, means the beneficiary is a slayer or abuser, the department of retirement systems shall determine whether the beneficiary is a defendant in such a civil proceeding or has been formally charged in court with the crime, or both. If so, the department shall withhold payment of any benefits until:

(i) The case or charges, or both if both are pending, are dismissed;

(ii) The beneficiary is found not guilty in the criminal case or prevails in the civil proceeding, or both if both are pending; or

(iii) The beneficiary is convicted or is found to be a slayer or abuser in the civil proceeding.

(b) If the case or charges, or both if both are pending, are dismissed or if a beneficiary is found not guilty or prevails in the civil proceeding, or both if both are pending, the department shall pay the beneficiary the benefits the beneficiary is entitled to receive. If the beneficiary is convicted or found to be a slayer or abuser in a civil proceeding, the department shall distribute the benefits according to subsection (2) of this section.

(5) Any record of conviction for having participated in the willful and unlawful killing of the decedent or for conduct constituting financial exploitation against the decedent, including but not limited to theft, forgery, fraud, identity theft, robbery, burglary, or extortion, shall be admissible in evidence against a claimant of property in any civil action arising under this section.

(6) In the absence of a criminal conviction, a superior court may determine:

(a) By a preponderance of the evidence whether a person participated in the willful and unlawful killing of the decedent;

(b) By clear, cogent, and convincing evidence whether a person participated in conduct constituting financial exploitation against the decedent, as provided in chapter 11.84 RCW.

(7) This section shall not subject the department of retirement systems to liability for payment made to a slayer or abuser or alleged slayer or abuser, prior to the department's receipt of written notice that the slayer or abuser has been convicted of, or the alleged slayer or abuser has been formally criminally or civilly charged in court with, the death or financial exploitation of the decedent. If the conviction or civil judgment of a slayer or abuser is reversed on appeal, the department of retirement systems shall not be liable for payment made prior to the receipt of written notice of the reversal to a beneficiary other than the person whose conviction or civil judgment is reversed.

[2009 c 525 § 19; 1998 c 292 § 501.]

Notes:

Application -- 1998 c 292: "Sections 501 through 505 of this act apply to acts that result in unlawful killings of decedents by slayers on and after April 2, 1998." [1998 c 292 § 506.]

Conflict with federal requirements -- 1998 c 292: "If any part of sections 501 through 505 of this act is found to be in conflict with federal requirements, the conflicting part of sections 501 through 505 of this act is hereby declared to be inoperative solely to the extent of the conflict, and such finding or determination does not affect the operation of the remainder of sections 501 through 505 of this act. Rules adopted under sections 501 through 505 of this act must meet federal requirements." [1998 c 292 § 507.]

Part headings and section captions not law -- Effective dates -- 1998 c 292: See RCW 11.11.902 and 11.11.903.