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SUPREME COURT OF THE STATE OF WASHINGTON

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In Re: the Estate of James W. Haviland, Deceased.

DONALD HAVILAND, ELIZABETH HAVILAND, and MARTHA  
CLAUSER,

Appellants,

v.

MARY HAVILAND,

Respondent.

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**BRIEF OF AMICUS CURIAE  
WASHINGTON ASSOCIATION OF  
PROFESSIONAL GUARDIANS**

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Katherine George  
WSBA No. 36288  
HARRISON BENIS & SPENCE LLP  
2101 Fourth Avenue, Suite 1900  
Seattle, Wash. 98121  
Cell (425) 802-1052  
Attorney for WAPG

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**TABLE OF CONTENTS**

<b>I.</b>	<b>INTRODUCTION .....</b>	<b>1</b>
<b>II.</b>	<b>INTEREST AND IDENTITY OF AMICL.....</b>	<b>3</b>
<b>III.</b>	<b>DISCUSSION .....</b>	<b>4</b>
	A. Those Who Abused Vulnerable Adults Before Inheritance Restrictions Took Effect Have No Constitutional Right to Continue Profiting From the Vulnerability They Exploited .....	4
	B. Even “Vested” Rights are Subject to Challenge .....	7
	C. Estates Should Be Distributed Consistent with the Decedent’s Intent .....	11
<b>III.</b>	<b>CONCLUSION.....</b>	<b>11</b>

**TABLE OF AUTHORITIES**

**Cases**

*Ahern v. Ahern*, 31 Wash. 334, 71 P. 1023 (1903) ..... 9

*Giles v. California*, 554 U.S. 353, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008)  
..... 1

*In re Estate of Graley*, 183 Wn. 268, 48 P.2d 634 (1935)..... 8, 9, 10

*In re Estate of Haviland*, 162 Wn. App. 548, 255 P.3d 854 (2011) 1, 2, 4, 8

*In re Estate of Hyde*, 190 Wash. 88, 66 P.2d 856 (1937) ..... 10

*In re Estate of Little*, 127 Wn. App. 915, 113 P.3d 505 (2005), *rev. denied*  
156 Wn.2d 1019, 132 P.3d 1734 (2006)..... 10

*Gibson v. Chouteau*, 80 U.S. 92, 20 L. Ed. 534; 13 Wall. 92 (1872) ..... 9

*Horton v. Bd. of Educ. of Methodist Protestant Church*, 32 Wn.2d 99, 49  
P.2d 485 (1948)..... 11

*Johnston v. Jones*, 66 U.S. 209, 17 L. Ed. 117; 1 Black 209 (1862)..... 9

*Kromer v. Friday*, 10 Wash. 621, 39 P. 229 (1895) ..... 9

*Prudential Insurance Co. v. Hill*, 178 F.3d 473 (7th Cir. 1999)..... 11

*Reynolds v. United States*, 98 U.S. 145, 25 L.Ed. 244 (1879) ..... 1, 7

**Washington Statutes**

RCW 11.04.250 ..... 7

RCW 11.20.020 ..... 7

Chapter 11.84 RCW ..... 5, 6, 7, 11

RCW 11.84.010(1)..... 5

RCW 11.84.010(3).....	4
RCW 11.84.020 .....	7
RCW 11.84.030 .....	5
RCW 11.84.040 .....	5
RCW 11.84.050 .....	5
RCW 11.84.150 .....	5
RCW 11.84.170(1).....	5, 11
RCW 11.84.900 .....	6
RCW 11.88.005 .....	3
RCW 11.88.010(1).....	3
RCW 11.92.040(5).....	3
RCW 11.92.043(4).....	3
RCW 74.34.020 .....	4
RCW 74.34.020(17)(b) .....	4
RCW 74.34.110 .....	6
RCW 74.34.145 .....	6
RCW 74.34.200 .....	6

**Other Authorities**

Myers, B., <i>The New North Dakota Slayer Statute: Does it Cause a Criminal Forfeiture?</i> , 83 N. DAK. L. REV. 997 (2007).....	11
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## I. INTRODUCTION

For more than a century, courts in this nation have followed the principle that “no one should be permitted to take advantage of his wrong.”<sup>1</sup> As the United States Supreme Court said 133 years ago in *Reynolds v. United States*, 98 U.S. 145, 159, 25 L.Ed. 244 (1879):<sup>2</sup>

The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts.

The same principle should control this case in which James Haviland, who was 50 years older than his second wife and became increasingly demented and dependent upon her physical care, lost more than \$3 million in assets under her undue influence.<sup>3</sup> To borrow the words of *Reynolds*, “legitimate consequences” of financially exploiting a vulnerable adult quite properly include loss of testamentary gifts from that adult, because the vulnerable adult presumably would not have made the gifts to his abuser if he had known about the financial exploitation.

The late James Haviland was a prominent physician who co-founded the Northwest Kidney Centers and served as associate dean of the University of Washington School of Medicine. Long before dementia

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<sup>1</sup> *Giles v. California*, 554 U.S. 353, 366, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008).

<sup>2</sup> In the *Reynolds* case, the defendant was deemed to have waived the right to confront a witness at trial by preventing the witness from testifying. 98 U.S. at 148-150.

<sup>3</sup> *In re Estate of Haviland*, 162 Wn.App. 548, 553-556, 255 P.3d 854 (2011).

made him vulnerable to financial exploitation, he and his first wife (who predeceased him) set up a trust expressly designed to protect their assets “against the effects of age and their increased susceptibility to the suggestions of others.”<sup>4</sup> It is the role of the courts to honor such intentions, and to ensure – through the appointment of professional guardians, adjudication of will contests and enforcement of laws prohibiting abuse of vulnerable adults – that the “effects of age” are not exploited.

There is no right – vested or otherwise – to steal property or to strip a man of his dignity. Due process does not encompass enjoying the fruits of misdeeds. When abusers are allowed to inherit assets from the vulnerable adults whom they financially exploited without their knowledge, it violates the time-honored rule against wrongdoers profiting from their wrongs. To abuse a position of care and trust of an incapacitated person is an act of deception, and when the incapacitated person dies without realizing that an abuser stands to gain from his death through inheritance, the abuser profits from the deception. Moreover, efforts of professional guardians to recover misappropriated funds are rendered useless if the assets are handed over to abusers through the

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<sup>4</sup> *Haviland*, 162 Wn. App. at 552.

probate process. For these reasons, this Court should affirm the decision of the Court of Appeals.

## **II. INTEREST AND IDENTITY OF AMICI**

The Washington Association of Professional Guardians (WAPG) is the only organization representing the interests of Certified Professional Guardians who meet GR 23 certification standards established by the Washington Supreme Court. WAPG's mission includes enhancing the quality of professional guardian services in Washington. Its adopted goals include promoting awareness of the importance of advocacy and justice for incapacitated people.

Professional guardians are a voice for vulnerable adults who cannot speak for themselves. Washington courts appoint guardians to help incapacitated persons exercise their rights as well as meet their basic needs. RCW 11.88.005; RCW 11.88.010(1). A guardian of a person must "assert the incapacitated person's rights and best interests," not limited to personal care. RCW 11.92.043(4). The rights of vulnerable people include choosing who should inherit their assets when they die. In fact, a guardian of an estate has a duty to "protect and preserve the guardianship estate" and, when the guardianship ends, "to deliver the assets of the incapacitated person to the persons entitled thereto." RCW 11.92.040(5). If a vulnerable adult has bequeathed assets to a financial abuser without

realizing the abuse happened, then allowing the abuser to take the gift is a violation of the victim's right to make informed choices about wills. As advocates for vulnerable adults, guardians have an interest in ensuring that those adults' own true intent – not that of their abusers – is honored through the probate process.

Frequently, certified professional guardians are appointed in cases where vulnerable adults have been financially exploited. Under the inheritance statute at issue in this case, “financial exploitation” means the “illegal or improper use, control over, or withholding of the property, income, resources, or trust funds” of a “vulnerable adult” for another person's profit or advantage. RCW 11.84.010(3); RCW 74.34.020.<sup>5</sup> Every person subject to a guardianship meets the statutory definition of “vulnerable adult,” so the law being construed in this case is designed to protect the interests of the people served by WAPG members. RCW 74.34.020(17)(b). For these reasons, WAPG has an interest in seeing that the law, Chap. 11.84 RCW, is broadly construed and properly applied.

### III. DISCUSSION

#### A. **Those Who Abused Vulnerable Adults Before Inheritance Restrictions Took Effect Have No Constitutional Right to Continue Profiting From the Vulnerability They Exploited.**

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<sup>5</sup> This definition of financial exploitation was in effect during “nearly a decade-long campaign of draining Haviland's estate.” *Haviland*, 162 Wn. App. at 566.

Chap. 11.84 RCW restricts the inheritance rights of those who engage “in the willful and unlawful financial exploitation of a vulnerable adult.” RCW 11.84.010(1).<sup>6</sup> In the absence of a criminal conviction, a court must find by clear, cogent and convincing evidence that a person participated in financial exploitation before the court can restrict the person’s inheritance. RCW 11.84.150. Even if financial exploitation is proven, the abuser still can inherit from the victim if there is clear and convincing evidence that the victim knew about the exploitation and intended to make the gift anyway. RCW 11.84.170(1). Thus, a prospective heir has strong procedural protections against unfair or erroneous application of the inheritance restrictions.

Nevertheless, Mary Haviland argues that applying the statute to her would violate due process by depriving her of a “vested right” to inherit the remaining assets of her deceased husband over and above the property she took during his lifetime. Supp. Brf at pp. 1, 11-12. Under this reasoning, a right to inherit property through a vulnerable adult’s will or intestacy is locked in - without regard to prior misappropriation of assets which the vulnerable adult was incapable of controlling - on the date the

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<sup>6</sup> Such abusers cannot take through inheritance anything they did not already have a right to possess before their victims died. RCW 11.84.030, .040, .050, .170(1). In distributing a victim’s property, a probate court must treat an abuser as if she died before her victim did. RCW 11.84.030 and .040.

vulnerable adult dies. *Id.* at pp. 1, 3, 4, 11-12 (“[t]he rights of a devisee under a will or of an heir under the laws of descent and distribution vest as of the date of the decedent’s death”) (“any application of a statute that deprives a citizen of Washington of rights of inheritance that vested prior to the enactment of the statute, based on conduct that occurred prior to the date of death...violates the due process clause of the Washington constitution”). If this reasoning were sound, then the disinheritance of slayers codified by Washington and the 49 other states that have slayer statutes would be unconstitutional. It contradicts the principle announced more than a century ago – and embraced by RCW 11.84.900 – that wrongdoers may not profit from their wrongs.<sup>7</sup>

Moreover, financial exploitation already was considered wrongful at the time James Haviland’s estate was depleted. RCW 74.34.110 (authorizing protection orders against financial exploitation); RCW 74.34.145 (violation of a vulnerable adult protection order is a criminal offense); RCW 74.34.200 (imposing liability for damages from financial exploitation). Thus, it does not matter that the abuser inheritance restrictions took effect after his death, because they merely expanded the consequences for “willful and unlawful” exploitation that was already

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<sup>7</sup> The 2009 amendments to Chap. 11.84 RCW serve other important state interests, which are discussed in other briefing before the Court, in addition to the purpose stated in RCW 11.84.900.

wrong at the time it occurred. There is no constitutional right to avoid legitimate consequences of wrongful conduct. *Reynolds*, 98 U.S. at 159.

To prospectively allow abusers to receive inheritances from vulnerable adults whom they financially exploited simply based on whether the victims happened to die before July 26, 2009 – despite prior prohibitions against financial exploitation, and notwithstanding that accused abusers have a fair opportunity to prove that the 2009 inheritance restrictions do not apply to them – would twist the concept of due process in favor of abusers. It would conflict with the plain language of RCW 11.84.020 that *no* abuser shall “receive any benefit as the result of the death of” the financially exploited vulnerable adult. In sum, due process has never included a right to profit from, or avoid consequences of, conduct that was wrongful when it took place. And Chap. 11.84 RCW should be enforced regardless of the vulnerable victim’s date of death.

**B. Even “Vested” Rights are Subject to Challenge.**

RCW 11.04.250 says that when a landowner dies, “his or her title shall vest immediately in his or her heirs or devisees... PROVIDED, That no person shall be deemed a devisee until the will has been probated.” The will statute, in turn, says that an order probating a will “shall be conclusive **except in the event of a contest of such will.**” RCW 11.20.020 (bold added). Thus, the right to inherit under a will has always

been subject to challenge, as in this case, where the Court of Appeals affirmed a trial court finding that James Haviland's final will was invalid due to Mary's undue influence. *In re Estate of Haviland*, 162 Wn.App. 548, 552, 255 P.3d 854 (2011). That related Court of Appeals opinion illustrates that the probate process can strip an heir of presumptive inheritance rights even though they "vested" at death.

The probate petition at issue here, seeking to declare that Mary Haviland is an abuser for purposes of restricting inheritance rights, is like a will contest or any other probate proceeding. It is aimed at influencing the decree of distribution, which is the ultimate expression of title to inherited property. Courts have long recognized that a decree of distribution may "create" title for the first time, and may shift title away from the person in whom it "vested" at death. *In re Estate of Graley*, 183 Wn. 268, 274, 48 P.2d 634 (1935) (describing vesting of title in a "true heir" as only a "legal assumption"). A decree of distribution "is due process of law and binding upon all the world," whereas a title vested at death is a mere "legal theory" which may prove to be "untrue." *Id.* Thus, death is the beginning of the process of determining inheritance rights, not the end, as Mary Haviland argues.

"Vesting immediately at death" is a permutation of the equitable "relation back" doctrine, which "is a legal fiction invented to promote the

ends of justice.” *Graley* at 274, quoting *Johnston v. Jones*, 66 U.S. 209, 221, 17 L. Ed. 117; 1 Black 209 (1862). Under the doctrine, an act done at one time is considered to have been done at some antecedent period. *Gibson v. Chouteau*, 80 U.S. 92, 100-101, 20 L. Ed. 534; 13 Wall. 92 (1872). The “relation back” doctrine is not applied when it would work an injustice. *Ahern v. Ahern*, 31 Wash. 334, 338, 71 P. 1023 (1903); *Kromer v. Friday*, 10 Wash. 621, 39 P. 229 (1895) (“This doctrine of relation...will not be invoked to do injustice.”); *Johnston*, 66 U.S. at 221. Here, it would be unjust to hold that Mary Haviland acquired immutable title immediately when her husband died, before the will contest and the petition to declare her an abuser, because relating back to James Haviland’s death wipes out statutory protections against abusers profiting from abuse.

In *Graley*, this Court declined to apply the relation back doctrine when it interpreted Washington’s escheat statute, which provided that title to escheated property shall “immediately vest in the state of Washington.” 183 Wash. at 274-275. Despite statutory language that title vested immediately at death, *Graley* declined to apply the “doctrine of relation” to escheated property because to do so would have precluded the County from assessing taxes between the time of the owner’s death and the decree of escheat. The Court cautioned:

In connection with the matter of inheritance and of escheats, the law indulges in several legal theories or fictions... unless it is attempted to give them a weight and verity beyond the statutory intention.

*Id.* at 274-275.

The illusory quality of “vesting at death” is well illustrated by *In re Estate of Little*, 127 Wn. App. 915, 113 P.3d 505 (2005), *rev. denied* 156 Wn.2d 1019, 132 P.3d 1734 (2006), where a final decree of distribution was invalidated and an estate was reopened for failure to notify intestate heirs. Despite the fact that title “vested” when Mr. Little died in 1992, 13 years later, the identity of the persons entitled to receive the vested title was still not known. In this case, Dr. Haviland’s last will was invalidated for undue influence approximately two years after he died. Although title “vested” at death, it remains to be seen who the rightful recipients of the vested title are. Mary Haviland’s rights under the last will were extinguished; no earlier will has been admitted to probate;<sup>8</sup> and no order establishing that Dr. Haviland died intestate has been entered. Thus, despite her “vested” title, Mary Haviland’s inheritance rights are far from certain, and the probate court will provide all of the due process she is entitled to.

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<sup>8</sup> Although Dr. Haviland made earlier wills, none of those wills have been admitted to probate according to the facts alleged by the Petitioners below. CP 114. A will cannot be given in evidence as the foundation of a right or title unless it has been duly probated. *In re Estate of Hyde*, 190 Wn. 88, 92, 66 P.2d 856 (1937).

**C. Estates Should Be Distributed Consistent with the Decedent's Intent.**

No vesting rule may override the intent of the decedent. *Horton v. Bd. of Educ. of Methodist Protestant Church*, 32 Wn.2d 99, 110, 49 P.2d 485 (1948) (“the law favors the early vesting of estates” but this is “not a rule which would override the contrary intention of the testator”). The presumption underlying Chap. 11.84 RCW and similar statutes is that, if the victims had been aware of the wrongful conduct while living, “they would have elected to prevent the killers [or abusers] from inheriting any of their property.”<sup>9</sup> Consequently, the notion that an abuser would receive vested title in the victim’s estate immediately at death conflicts with one of the primary goals of probate, which is to fulfill decedents’ intent.

**IV. CONCLUSION**

For the foregoing reasons, this Court should affirm the Court of Appeals.

Dated this 10th day of May, 2012.

Respectfully submitted by:           s/Katherine A. George            
Katherine A. George, WSBA 36288

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<sup>9</sup> Myers, B., *The New North Dakota Slayer Statute: Does it Cause a Criminal Forfeiture?*, 83 N. DAK. L. REV. 997, 1002 (2007). *See also* RCW 11.84.170(1) (disinheritance is not permissible where the vulnerable adult knew of the financial exploitation and intended to make the testamentary gift any way); *Prudential Insurance Co. v. Hill*, 178 F.3d 473, 477 (7th Cir. 1999) (“what is at stake in ‘murdering heir’ cases is donative intent rather than deterrence.... the victim would not have made the murderer his heir (or the beneficiary of his life insurance policy) had he known what the future held.”) (Citations omitted.).

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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In re the Estate of

JAMES W. HAVILAND,  
Deceased.

DONALD HAVILAND,  
ELIZABETH HAVILAND, and  
MARTHA CLAUSER,

Appellants,

v.

MARY HAVILAND,

Respondent.

CERTIFICATE OF  
SERVICE

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The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on May 10, 2012, I caused a copy of the Brief of Amicus Curiae and Motion to File Amicus Curiae Brief to be served on counsel of record as stated below:

Ladd Leavens, via personal delivery  
William Rasmussen, via personal delivery  
Davis Wright Tremaine  
1201 Third Ave, Suite 2200  
Seattle, WA 98101-3045

Richard Furman, via electronic mail by agreement  
Aiken, St. Louis & Siljeg, P.S.  
801 Second Avenue, Suite 1200  
Seattle, WA 98104-1571

Suzanne C. Howle, via electronic mail by agreement  
Carol Vaughn, via electronic mail by agreement  
Thompson & Howle  
601 Union Street, Suite 3232  
Seattle, WA 98101

Howard M. Goodfriend, via electronic mail by agreement  
Edwards Sieh Smith & Goodfriend  
1109 First Avenue, Suite 500  
Seattle, WA 98101-2988

Barbara Isenhour, via electronic mail by agreement  
1200 Fifth Avenue, Suite 2020  
Seattle, WA 98101

Signed this 10<sup>th</sup> day of May 2012 at Seattle, Wash.

  
Katherine A. George

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**To:** Kathy George  
**Cc:** carolv@thompsonhowle.com; Suzanne Howle; furman@aiken.com; barbara@isenbleck.com; laddleavens@dwt.com; billrasmussen@dwt.com; howard@washingtonappeals.com  
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This filing is in Case No. 86412-8, *In re Estate of Haviland*. The person filing the documents is the undersigned attorney, WSBA No. 36288. Attached for filing are a Motion for Leave to File Amicus Curiae Memorandum, an Amicus Curiae Memorandum of Washington Association of Professional Guardians, and a certificate of service.

Thank you for your assistance.

Katherine A. George  
Of Counsel  
Harrison Benis & Spence LLP  
2101 Fourth Avenue, Ste 1900  
Seattle, Washington 98121  
Cell 425 802-1052  
Fax 206 448-1843