

ORIGINAL

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court No. 86412-8

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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**SUPPLEMENTAL BRIEF OF DONALD HAVILAND, ELIZABETH
HAVILAND AND MARTHA CLAUSER**

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I. INTRODUCTION

Amendments to Washington's Slayer and Abuser Statute (chapter 11.84 RCW), effective July 26, 2009, authorize a personal representative or other party interested in an estate to bring a civil lawsuit to disinherit a person who has profited from financially exploiting the decedent. The Court of Appeals properly held that the new provisions authorizing disinheritance of abusers apply to lawsuits commenced after the effective date of the legislation. This court should affirm and hold that the Slayer and Abuser Statute applies prospectively to this lawsuit that was commenced four months after the new law took effect. The Legislature enacted the 2009 amendments as remedial legislation to address the escalating problem of financial exploitation of vulnerable adults by regulating and restricting the circumstances under which persons adjudicated to be abusers can inherit from their victims. The amendments should be construed to fulfill this express legislative intent.

II. SUPPLEMENTAL ARGUMENTS

A. **The Court of Appeals Correctly Ruled that the Slayer and Abuser Statute Applies Prospectively in this Case.**

A "statute operates prospectively when the *precipitating event* for operation of the statute occurs after enactment, even when the precipitating event originated in a situation existing prior to enactment." State v. Pillatos, 159 Wn.2d 459, 471, 150 P.3d 1130 (2007) (emphasis in

original) (quoting Estate of Burns, 131 Wn.2d 104, 110, 928 P.2d 1094 (1997)). The Court of Appeals correctly ruled that the event triggering application of the Slayer and Abuser Statute was the filing of a lawsuit to adjudicate whether Mary Haviland is an abuser as defined by RCW 11.84.010(1). See Answer to Motion for Discretionary Review, pp. 10-12.

1. The triggering event is not death of the vulnerable adult.

This Court has repeatedly held that new law will apply prospectively in a given case if the event that triggers its application occurred after it took effect. See, e.g., State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130 (2007); Estate of Burns, 131 Wn.2d 104, 928 P.2d 1094 (1997); Aetna Life Ins. Co. v. Washington Life & Disability Ins. Guaranty Ass'n., 83 Wn.2d 523, 520 P.2d 162 (1974). Mary ignores this precedent in asserting that the Slayer and Abuser Statute cannot apply because of Washington's "long-established" principle that "distribution of a decedent's estate is governed by the law and the valid testamentary instruments *as of the date of death.*" Petition p. 18 (emphasis in original). The cases cited by Mary do not support her argument that the date of death must, in all circumstances, control the competing interests in an estate and defeat the Legislature's unambiguous language applying the amendments to lawsuits commenced after their effective date. Moreover, making death the triggering event would serve no rational purpose and would not further

the policies against “retroactive application” relied upon by Mary.

Mary cites four cases in support of the assertion that the law in effect at the decedent’s death governs the petition to disinherit her, rather than the law in effect at the time the petition was filed. Mary misrepresents two of the four cases. Her Petition for Review purportedly *quotes* Estate of Ziegner, 146 Wash. 537, 264 Pac. 12 (1928) and Strand v. Stewart, 51 Wash. 685, 99 Pac. 1027 (1909), as holding “*Any triggering event later than the date of death in effect modifies the law governing the distribution of a decedent’s estate after he or she dies and thus its application would be retroactive in effect.*” Petition p. 19 (emphasis in original). However, this critical sentence does not appear in the cited cases. It appears to have been written by Mary’s lawyers, not the Court.

Without the misquotation, Ziegner and Strand do not support the contention that the date of a decedent’s death determines whether the amendments to RCW 11.84 apply prospectively or retroactively. Ziegner held that new law providing that “A divorce, subsequent to the making of a will, shall revoke the will as to the divorced spouse,” applied to all wills offered for probate after its enactment, regardless of when they were executed. 146 Wash. at 541. Strand held that new statutory provisions governing notice to creditors applied in a lawsuit filed after enactment of the new law, regardless of when the decedent executed the will. 51 Wash.

at 687. Ziegner, in particular, stands for the proposition that legislative intent to apply a statute to events prior to a decedent's death can be inferred even when the legislature has not expressly stated the intent for the law to apply to past events. 146 Wash. at 541. Thus, Strand and Ziegner are examples of the principle, followed by this Court, that the law in effect when a court decides the case should govern:

Although we have long embraced a presumption against statutory retroactivity, for just as long we have recognized that, in many situations, a court should apply the law in effect at the time it renders its decision even though that law was enacted after the events that gave rise to the suit.

Landgraf v. USI Film Prods., 511 U.S. 244, 273-274, 114 S. Ct. 1483, 128 L. Ed.2d 229 (1994). See State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997) (changes to RCW 10.73.160 allowing appellate courts to order convicted indigent defendants to pay appeal costs could be applied to offenders whose appeals were pending when the statute was enacted).¹

Even were there some common law preference to apply the law existing at the date of death to distribution of decedents' estates, as Mary argues, this Court could not ignore the Legislature's plain and

¹ Neither In re the Estate of Nielsen, 198 Wash. 124, 87 P.2d 298 (1939), nor In re the Estate of Elmer, 91 Wn. App. 785, 959 P.2d 701 (1998), the other two cases cited by Mary, involves the application of new law. Nielson concerned a petition to revoke a final decree of distribution based on allegations of fraud. Elmer concerned construction of a will.

unambiguous language in RCW 11.84. *See In re Estate of Burns*, 131 Wn.2d at 112. “[W]here, as here, a statute is plain and unambiguous, it must be construed in conformity to its obvious meaning without regard to the previous state of the common law.” *State v. Bergeron*, 105 Wn.2d 1, 15, 711 P.2d 1000 (1985). The Slayer and Abuser Statute on its face applies without limitation to the estate of “[a]ny 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), and provides that “[n]o slayer or abuser shall in any way acquire any property or receive any benefit as the result of the death of the decedent, but such property shall pass as provided in the sections following.” RCW 11.82.020. This Court should not deviate from the plain meaning.

Using the date of death as the triggering event, not only contravenes the statutory language, but also fails to promote fairness to individuals accused of financial exploitation and is contrary to the Legislature’s goal to protect vulnerable adults. A decedent’s date of death has no logical nexus to the reasonable expectations of abusers at the time they acted. Mary’s perceived sense of injustice would be no different had Haviland died July 27, 2009, the day after the amendments took effect, and the personal representative sought to limit her inheritance based on the law in effect on the date of death. *See infra* at 6-8. Limiting the

amendments to estates in which the vulnerable adult died before their effective date would create a perverse result by benefitting abusers whose victims died sooner rather than later. Exempting abusers whose victims died prior to July 26, 2009 would frustrate the Legislature's intent and serve no rational purpose.

2. There are no "genuinely retroactive effects."

The main thrust of Mary's appeal is that she did not have "fair notice" of the new law. *See* Petition, pp. 12-15. But Mary cannot argue on this record that she lacked either notice of the standards that regulate conduct or notice of the consequences of the new law. Regarding conduct, "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." Estate of Burns, 131 Wn.2d at 110 (citing Landgraf, 114 S. Ct. at 1497). Regarding consequences, "if the changes to the statute do not alter the consequences to the crime then there is likely no relevant lack of notice." State v. Pillatos, 159 Wn.2d at 470. Estate of Burns, 131 Wn.2d at 110, explains that "a statute has a genuinely retroactive effect if it impairs rights a party possessed *when he acted*, increases his liability for past conduct, or imposes new duties with respect to completed transactions." (emphasis supplied). No genuinely retroactive effects will occur by applying the new law to the petition filed in this case.

First, at the time that Mary drained Haviland's estate,² she had a fair opportunity to conform her behavior to the law that prohibits the financial exploitation of vulnerable adults. This Court has authorized the application of new law to prior conduct when the conduct was unlawful under law in existence at the time of the act. *See, e.g., State v. Varga*, 151 Wn.2d 179, 196, 86 P.3d 139 (2004); *State v. Scheffel*, 82 Wn.2d 872, 878-9, 514 P.2d 1052 (1973). The amendments do not regulate conduct or change the law defining financial exploitation or vulnerable adult. Financial exploitation of vulnerable adults has been unlawful since the Vulnerable Adult Protection Act, RCW 74.34, was enacted in 1986. Mary could have avoided the impact of the abuser amendments by not engaging in conduct that was illegal when it occurred.

Second, the amendments to RCW 11.84 do not alter the consequences that could have been imposed against Mary at the time she dissipated Haviland's assets. Haviland had the right to disinherit Mary at the time she financially exploited him. *Estate of Ziegner*, 146 Wash. 537. Slayer statutes operate by doing on behalf of the victim that which the victim could have done while still alive, "includ[ing] revoking gifts under

² The Court of Appeals in the will contest described Mary's conduct as "nearly a decade-long campaign of draining Haviland's estate ... at a time when Haviland's mental and physical faculties were clearly declining." *In re Estate of Haviland*, 162 Wn. App. 548, 566, 255 P.3d 854 (2011). No petition for review was filed and this is a final reported decision.

a will or revocable trust, changing beneficiary designations under life insurance or payable on death bank accounts, and voiding any fiduciary nominations made by the victim on behalf of the killer.” Bradley Myers, *The New North Dakota Slayer Statute: Does It Cause a Criminal Forfeiture?* 83 N. DAK. L. REV. 997, 999 (2007). Underlying slayer statutes is the notion that had the victims known that they would be killed, they would have elected to prevent the killers from inheriting any of their property. *Id.* at 1005-1006. This is the same assumption underlying the abuser amendments to RCW 11.84, which allow disinheritance unless it can be shown that the decedent was aware of the exploitation and intended the inheritance any way. *See* RCW 11.84.170.

Third, the amendments do not impair any right that Mary had at the time she acted. The amendments apply only to interests that Mary would receive as a result of Haviland’s death, *see* RCW 11.84.020, not to any interests she had at the time she financially exploited him. The Slayer and Abuser Statute does not impair Mary’s share of any community property, *Armstrong v. Bray*, 64 Wn. App. 736, 741, 826 P.2d 706 (1992), or joint tenancy accounts. *See* RCW 11.84.050(1) (“One-half of any property held by the slayer or abuser and the decedent as joint tenants, joint owners or joint obligees shall pass upon the death of the decedent to his or her estate, and the other half shall pass to his or her estate upon the

death of the slayer or abuser, unless the slayer or abuser obtains a separation or severance of the property or a decree granting partition.”)

Fourth, the amendments do not increase liability for past conduct. The amendments allow exercise of the decedent’s right to disinherit an abuser after the decedent’s death, and thereby extend the time period for exercising this remedy. This is not the same as increasing liability because the date the conduct occurred is the relevant point of inquiry for determining if new law impermissibly increases the liability for past misconduct. State of Pillatos, 159 Wn.2d at 470.³ At the time abusers engaged in financial exploitation, they knew they could be disinherited by their victims. The nature and amount of the disinheritance that abusers face under RCW 11.84 has not changed. *See also State v. Hennings*, 129 Wn.2d 512, 526, 919 P.2d 580 (1996) (holding that increasing the time period during which a pre-existing restitution remedy could be calculated does not increase the amount of restitution.)

Fifth, the amendments do not impose any new duties with respect to completed transactions because the law defining financial exploitation

³ Pillatos held that changes to the criminal sentencing laws were not retroactive as applied to crimes committed prior to their effective date because “[a]t the time all of these defendants committed the crimes set forth above, Washington had a seemingly valid exceptional sentencing system which gave fair notice of the risk of receiving such a sentence.” 159 Wn.2d at 470.

at the time Mary acted is the same law that was pled in the petition to disinherit her. *See* CP 7. The disposition of Haviland's assets is not a "completed transaction," because the decedent's estate remains open and his probate and non-probate assets remain subject to the Court's legal and equitable jurisdiction. *See Estate of Pugh*, 22 Wn.2d 514, 523, 156 P.2d 676 (1945) (holding "the probate court obtains jurisdiction of the real and personal estate of the deceased"). Moreover, an abuser's inheritance could not be deemed a completed transaction in *any* estate involving financial exploitation, even estates that have been closed pursuant to final judicial decrees, because the estate could be reopened and the property reclaimed. *See In re the Estate of Nielson*, 198 Wash. at 130 (holding that final decrees of distribution are not binding on property fraudulently withheld from administration, but declining to reopen absent evidence of fraud.)

Mary would have this Court protect abusers from the known consequences of their misconduct, in derogation of the fundamental principle that one claiming equity must have "clean hands." *See Malo v. Anderson*, 62 Wn.2d 813, 816, 384 P.2d 867 (1963) (The equitable maxim, "he who seeks equity must do equity," may be applied "in every kind of litigation and to every species of remedy.") This Court should affirm the Court of Appeals.

B. The Abuser Amendments Are Important Remedial Legislation that Should Be Broadly Construed.

The 2009 amendments to RCW 11.84 are remedial legislation. This Court not only allows retroactive application of new law for remedial legislation, it presumes that is what the Legislation intended. *See, e.g., State v. Pillatos*, 159 Wn.2d at 473; *Haddenham v. State*, 87 Wn.2d 145, 148, 550 P.2d 9 (1976).⁴

1. The abuser amendments supplement common law remedies that were created to prevent wrongdoers from benefitting from their wrongful conduct.

The Legislature plainly stated its intent in amending RCW 11.84 to supplement other remedies, directing that the amendments be broadly construed to further the equitable goal of preventing slayers and abusers from profiting from their wrongful conduct. *See* RCW 11.84.180; RCW 11.84.900. The purpose of slayer statutes in general is not to punish wrongdoers or compensate victims, but to fulfill the equitable maxim that no person should be permitted to benefit from the consequences of his or her wrongdoing,⁵ and to fulfill the intent of decedents who the law

⁴ The issue of remedial legislation was addressed by both sides in the briefing below, but the Court of Appeals did not reach the issue. "If the Supreme Court reverses a decision of the Court of Appeals that did not consider all of the issues raised which might support that decision, the Supreme Court will either consider and decide those issues or remand the case to the Court of Appeals to decide those issues." RAP 13.7(b).

⁵ *In re Tyler's Estate*, 140 Wash. 679, 684-685, 250 Pac. 456 (1926).

presumes would have disinherited the slayer or abuser had they been able to.⁶ Almost every state has some form of slayer's statute.⁷ In re Estate of Kissinger, 166 Wn.2d 120, 126, 206 P.3d 665 (2009).

Mary conflates compensation with equity in arguing that the amendments are punitive merely because the amount lost by disinheritance could exceed the amount misappropriated. Petition pp. 5-6. Although compensating victims may be part of an equitable remedy, slayer statutes, including Washington's, primarily serve different equitable goals, which are to prevent wrongdoers from profiting from their conduct, *see* RCW 11.84.900, and to fulfill the testamentary intent of victims, *see* RCW 11.84.170, who the law assumes would not want to give their property at death to their slayer or abuser. The plain language,⁸ legislative history,⁹ and judicial interpretation of the Slayer and Abuser Statute¹⁰

⁶ See Bradley Myers, *The New North Dakota Slayer Statute: Does It Cause a Criminal Forfeiture?* 83 N. DAK. L. REV., at 999, 1006.

⁷ Many states also have other types of behavior-based disinheritance statutes that extinguish or limit the inheritance rights of persons deemed to be "unworthy heirs." Washington does not. See Seymour Moskowitz, *Golden Age in the Golden State: Contemporary Legal Developments in Elder Abuse and Neglect*, 36 LOYOLA OF LOS ANGELES LAW REVIEW, 589, 652-656 (2003).

⁸ See RCW 11.94.900 ("This chapter shall be construed broadly to effect the policy of his state that no person shall be allowed to profit by his or her wrong, wherever committed.")

⁹ See Final Bill Report SHB 1103, p. 2 ("The slayer statute is broadly construed by the courts to enforce the state's policy that no person should

make clear that it was intended to further the express and longstanding public policy “that no person shall be allowed to profit by his or her wrong, wherever committed.” RCW 11.84.900.

By definition, financial exploitation involves the victimization of the vulnerable – those who are incapacitated, institutionalized or unable to care for themselves, RCW 74.34.020(17), and therefore unlikely to be in a position either to know about or do anything about the financial exploitation. By targeting victims who are powerless to change their estate plans, those who financially exploit vulnerable adults interfere with the victims’ donative freedom. The amendments specifically address this consequence by allowing courts to disinherit abusers, unless it can be shown the vulnerable adult knew about the exploitation and wanted to make the testamentary gift anyway. RCW 11.84.170.

The Legislature closed a loophole in the remedial scheme by preventing abusers from inheriting recovered property that they previously stole. Prior to the amendments, even if the estate recovered assets that had been misappropriated from the vulnerable adult, the abuser heir would then be entitled to inherit what they had stolen. This Court should give

be allowed to profit by his or her wrongdoing.”) See Appendix to Petitioner’s Opening Brief to Court of Appeals p. 16.

¹⁰ See In re Estate of Kissinger, 166 Wn.2d at 125 (“The common law has long adhered to the maxim, *nullus commodum capere potest de injri sua propria*, or, no one should be allowed to profit from his own wrong.”)

effect to the Legislature's remedial intent to prevent abusers from profiting from their wrongful conduct. *See* House Bill Report SHB 1103 pp. 2, 4 (App. pp. 10, 12); Bill Analysis HB 1103, p. 2 (App. p. 2).

2. Related laws enacted to combat the growing problem of vulnerable adult abuse favor broad application of the amendments.

The amendments are part of a recent trend to bolster protections for vulnerable adults in the face of escalating and widespread abuse. Remedial statutes are to be liberally construed to further the legislative purpose. *See, e.g., Carlsen v. Global Client Solutions, LLC*, 171 Wn.2d 486, 496, 256 P.3d 321 (2011); *State v. Hennings*, 129 Wn.2d 512, 519, 919 P.2d 580 (1996) ("Statutes authorizing restitution must be interpreted broadly to allow restitution, thus carrying out the intent of the Legislature.") This Court should give effect to the Legislature's intent to address in a comprehensive manner the serious and worsening social problem of elder abuse.

In 2007, 2009, and 2011, Washington's legislature unanimously passed amendments to the Vulnerable Adult Protection Act and the Slayer Statute to redress the growing problem of vulnerable adult abuse. Changes to RCW 74.34 in 2007 expanded the maximum duration of vulnerable adult protection orders from one to five years, RCW 7.34.130, authorized third parties to petition for protection orders for vulnerable adults, RCW

74.34.135, and provided for the survival of actions to the personal representative of the vulnerable adult's estate. RCW 74.34.210.¹¹ In 2009, the amendments at issue authorized courts to limit the distribution of vulnerable adults' estates to individuals who financially exploited them. In 2011, the definition of financial exploitation under the Vulnerable Adult Protection Act, RCW 74.34.020(6), was clarified to provide detailed examples of prohibited conduct.¹² The Legislature took notice of the fact that financial exploitation of vulnerable adults has increased substantially in recent years;¹³ that the National Center on Elder Abuse reports financial exploitation is the fastest growing area of abuse, *id*; and that DSHS has reported an increase in the exploitation of vulnerable adults by their own family members.¹⁴

Mary's attempt to limit application of the amendments to those decedents dying after July 26, 2009 or to financial exploitation occurring only after that date is inconsistent with the express legislative intent to

¹¹ The 2007 law also clarified the definition of financial exploitation by adding "other than for the vulnerable adult's profit or advantage," which was implicit under the earlier definition. *See* Engrossed Substitute House Bill 1008, Appendix p. 2; RCW 74.34.020(6).

¹² The new definition is effective January 1, 2012.

¹³ House Bill Report ESHB 1008, p. 5 (Appendix p. 7); Final Bill Report SSB 5042, p. 1 (citing data from the Washington Department of Social and Health Services (DSHS)). Appendix p. 16.

¹⁴ House Bill Report SSB 5042, p. 3. *See* Appendix p. 20.

broadly apply RCW 11.84. RCW 11.84.900. Further, the interpretation urged by Mary would create a safe harbor for abusers whose victims died prior to July 26, 2009. This narrow construction would reward abusers whose victims died sooner rather than later. It would also create a loophole that would undermine recent legislative efforts, in particular the 2007 amendment to RCW 74.34.210, which permitted vulnerable adults' claims to survive to their personal representative, because any assets recovered by the estate would still be subject to inheritance by abuser heirs. This Court should avoid creating a loophole in a statutory scheme designed to protect vulnerable adults and remedy financial exploitation by narrowly interpreting the scope of remedial legislation. See Carlsen v. Global Client Solutions, LLC, 171 Wn.2d at 498 (Court should avoid creating loopholes by narrowly construing remedial legislation).

3. Abusers do not have vested rights in their victims' estates that preclude application of remedial legislation.

Mary's argument that title vests in an abuser at the death of his or her victim is a red herring because an abuser's rights in a victim's property are never protected from operation of new law. Mary's vesting argument is premised on the interests that she says passed to her by operation of law at Haviland's death. But the relevant timeframe for determining if new law impairs vested interests is the point at which the individual affected by

the new law acted. *See* Response to Petition pp. 14-16. Mary had no vested interest in Haviland's estate when she took his assets. She had instead merely an expectation that the assets would be hers when he died.

Furthermore, title "vests" under RCW 11.04.250 subject to the legislature's authority to change the law¹⁵ and subject to the rights of the estate that may be exercised through its personal representative and those claiming under him or her. In interpreting RCW 11.04.250, this Court has made clear that the interests of heirs are subservient to possession and control by the personal representative prior to final distribution¹⁶ and subject to claims asserted on behalf of the estate. *See In re Estate of Jones*, 152 Wn.2d 1, 13, 17, 93 P.3d 147 (2004) (citing *In re Estate of Peterson*, 12 Wn.2d 686, 734, 123 P.2d 733 (1942)). "[T]he administrator has the right of possession and the concomitant right to recover possession for the estate. This would include the right to any and all auxiliary and immediate and permanent equitable relief." *Wendler v. Woodward*, 93 Wash. 684, 685-86, 161 P. 1043 (1916).

Even if legal title may vest in an abuser at the death of the victim,

¹⁵ *See* Response to Petition for Review, pp. 17-18; Petitioners' Opening Brief to the Court of Appeals, p. 38. Under prior law, title to realty did not vest until distribution. *Id.*; *Balch v. Smith*, 4 Wash. 497, 30 P. 648 (1892).

¹⁶ *See also* RCW 11.48.020 (giving personal representative right to possession of property of the decedent, and to "receive the rents and profits of the real estate until the estate shall be settled or delivered over, by order of the court, to the heirs or devisees").

the wrongdoing precludes vesting of equitable title in the victim's assets.¹⁷ Under the common law, financial exploitation prevented the estate from fully vesting¹⁸ and subjected the wrongdoer's inheritance to the authority of the court to reclaim the property, even after entry of a final decree of distribution. See In re the Estate of Nielson, 198 Wash. at 130 ("A decree of distribution from which no appeal is taken ... is not conclusive ... as to property which has been fraudulently withheld from administration.") Thus, even before the amendments to RCW 11.84, interests that passed to abusers at the death of their victims were provisional and not fully vested as a matter of equity based on the abusers' prior misconduct. It has long been the province of equity to step in and prevent the enforcement of a legal right if enforcement would benefit a wrongdoer. Malo v. Anderson, 62 Wn.2d 813 (extinguishing legal title to real property conferred by RCW 6.24.100); In re Estate of Lint, 135 Wn.2d 518, 540, 957 P.2d 755 (1998) (extinguishing husband's right to inherit as an omitted spouse under RCW

¹⁷ This limitation applies equally to Haviland's nonprobate assets, which are subject to the jurisdiction of the court in the probate and payment of attorneys' fees that Haviland's children were awarded in the will contest. CP 39. The fact that Mary took possession when Haviland died does not establish entitlement to the assets, as property wrongfully withheld from administration can be reclaimed. See, e.g., Estate of Nielson, 198 Wash. at 130.

¹⁸ See Boyer v. Robinson, 26 Wash. 117, 121, 66 Pac. 119 (1901) ("It seems apparent that before the devisee can have a distributive interest in the estate his debt due the estate must be settled.")

11.12.090 by invalidating the marriage); In re the Guardianship of T.H., 398 N.J. Sup. 266, 942 A.2d 1 (2008) (extinguishing mother's right of inheritance by intestacy).

Finally, individuals accused of financially exploiting vulnerable adults do not have any fundamental rights at stake,¹⁹ but at most provisional interests derived from their victims after death, which are subject to the Legislature's authority to regulate, the courts' equitable powers to modify even in cases that do not involve wrongdoing by the putative heir,²⁰ and the estates' right to reclaim. Because alleged abusers receive substantial procedural protections, including the right to establish that they should be permitted to inherit based on equitable considerations, there is no due process issue here. *See* RCW 11.84.170.²¹ The few cases cited by Mary discussing retroactive application of new law to the estates

¹⁹ *Cf. Gourley v. Gourley*, 158 Wn.2d 460, 145 P.3d 1185 (2006) (a protection order hearing in which the accused parent lacks the right to cross examine the alleged victim was not unconstitutional, despite the fundamental interest at stake, because adequate notice and opportunity to be heard were provided.)

²⁰ *See In re Estate of Carter*, 14 Wn. App. 271, 540 P.2d 474 (1975) (a third party's interest in an inheritance does not constitute a vested right protected against entry of a nunc pro tunc judgment adversely affecting the interest.); Niemann v. Community Church, 154 Wn.2d 365, 113 P.3d 463 (2005) (courts may equitably deviate from trust terms to fulfill decedents' intent.)

²¹ *Cf. State v. Scheffel*, 82 Wn.2d at 876 (habitual traffic offenders could be subject to license revocation in proceedings filed after the effective date of new law based on traffic offenses predating the law because they could judicially contest that they accumulated the violations).

of decedents (none of which concern remedial legislation) do not protect the putative interests of heirs. Ziegner, 146 Wash. at 540, and Strand, 51 Wash. at 687, apply new probate laws to acts predating the changes because “[t]he right to make a testamentary disposition of property is neither a natural nor a constitutional right.”

C. No Public Policy Is Served By Protecting Abusers Whose Victims Died Before July 26, 2009.

Mary asserts that the Court of Appeals’ ruling “does violence to” “important public policies” that include her entitlement “to be free of post-death legislative actions that affect previously established and – by virtue of the decedent’s death – now immutable estate plans.” Petition p. 20. Protecting the inheritance rights of abusers has never been the public policy of this State.

III. CONCLUSION

The Supreme Court should affirm the Court of Appeals based on the plain meaning of the Slayer and Abuser Statute and the public policy underlying this remedial legislation.

Respectfully submitted this 21st day of December 2011.

THOMPSON & HOWLE

SMITH GOODFRIEND, P.S.



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Attorneys for Donald Haviland, Elizabeth Haviland and Martha Clauser

CERTIFICATION OF ENROLLMENT
ENGROSSED SUBSTITUTE HOUSE BILL 1008

Chapter 312, Laws of 2007

60th Legislature
2007 Regular Session

VULNERABLE ADULTS--PROTECTION

EFFECTIVE DATE: 07/22/07

Passed by the House April 17, 2007
Yeas 98 Nays 0

FRANK CHOPP

Speaker of the House of Representatives

Passed by the Senate April 11, 2007
Yeas 48 Nays 0

BRAD OWEN

President of the Senate

Approved May 3, 2007, 2:31 p.m.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Richard Nafziger, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is ENGROSSED SUBSTITUTE HOUSE BILL 1008 as passed by the House of Representatives and the Senate on the dates hereon set forth.

RICHARD NAFZIGER

Chief Clerk

FILED

May 7, 2007

Secretary of State
State of Washington

1 nursing homes; chapter 70.128 RCW, adult family homes; chapter 72.36
2 RCW, soldiers' homes; or chapter 71A.20 RCW, residential habilitation
3 centers; or any other facility licensed by the department.

4 (6) "Financial exploitation" means the illegal or improper use of
5 the property, income, resources, or trust funds of the vulnerable adult
6 by any person for any person's profit or advantage other than for the
7 vulnerable adult's profit or advantage.

8 (7) "Incapacitated person" means a person who is at a significant
9 risk of personal or financial harm under RCW 11.88.010(1) (a), (b),
10 (c), or (d).

11 (8) "Individual provider" means a person under contract with the
12 department to provide services in the home under chapter 74.09 or
13 74.39A RCW.

14 (~~(+8)~~) (9) "Interested person" means a person who demonstrates to
15 the court's satisfaction that the person is interested in the welfare
16 of the vulnerable adult, that the person has a good faith belief that
17 the court's intervention is necessary, and that the vulnerable adult is
18 unable, due to incapacity, undue influence, or duress at the time the
19 petition is filed, to protect his or her own interests.

20 (10) "Mandated reporter" is an employee of the department; law
21 enforcement officer; social worker; professional school personnel;
22 individual provider; an employee of a facility; an operator of a
23 facility; an employee of a social service, welfare, mental health,
24 adult day health, adult day care, home health, home care, or hospice
25 agency; county coroner or medical examiner; Christian Science
26 practitioner; or health care provider subject to chapter 18.130 RCW.

27 (~~(+9)~~) (11) "Neglect" means (a) a pattern of conduct or inaction
28 by a person or entity with a duty of care that fails to provide the
29 goods and services that maintain physical or mental health of a
30 vulnerable adult, or that fails to avoid or prevent physical or mental
31 harm or pain to a vulnerable adult; or (b) an act or omission that
32 demonstrates a serious disregard of consequences of such a magnitude as
33 to constitute a clear and present danger to the vulnerable adult's
34 health, welfare, or safety, including but not limited to conduct
35 prohibited under RCW 9A.42.100.

36 (~~(+10)~~) (12) "Permissive reporter" means any person, including,
37 but not limited to, an employee of a financial institution, attorney,

App. 2

HOUSE BILL REPORT

ESHB 1008

As Passed Legislature

Title: An act relating to the protection of vulnerable adults.

Brief Description: Protecting vulnerable adults.

Sponsors: By House Committee on Judiciary (originally sponsored by Representatives Moeller, Lovick, Kagi, Cody, Appleton, Conway, Morrell, Kenney, Simpson, B. Sullivan, Goodman and Lantz).

Brief History:

Committee Activity:

Judiciary: 1/17/07, 2/13/07 [DPS].

Floor Activity:

Passed House: 3/7/07, 97-1.

Senate Amended.

Passed Senate: 4/11/07, 48-0.

House Concurred.

Passed House: 4/17/07, 98-0.

Passed Legislature.

Brief Summary of Engrossed Substitute Bill

- Allows certain "interested persons" to petition for an order for protection of a vulnerable adult.
- Requires notice to the vulnerable adult when someone else files a petition for protection on behalf of the vulnerable adult and creates a process for resolving the petition if the vulnerable adult does not consent to the petition.
- Lengthens the maximum time period that an order for protection can extend to five years, and creates a process for a vulnerable adult to modify or terminate a protection order.
- Requires the Administrative Office of the Courts to develop and maintain standard forms, instructions, and a handbook on the protection order process.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

- Provides that a deceased vulnerable adult's cause of action for abandonment, abuse, exploitation, or neglect survives to the estate for recovery of the economic losses to the estate if the deceased vulnerable adult has no statutory beneficiaries.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 11 members: Representatives Lantz, Chair; Goodman, Vice Chair; Rodne, Ranking Minority Member; Warnick, Assistant Ranking Minority Member; Ahern, Flannigan, Kirby, Moeller, Pedersen, Ross and Williams.

Staff: Edie Adams (786-7180).

Background:

The Abuse of Vulnerable Adults Act provides a number of protections for vulnerable adults, including authorizing the Department of Social and Health Services (Department) and law enforcement agencies to investigate complaints of abandonment, abuse, financial exploitation, or neglect of vulnerable adults; requiring mandatory reporting and investigations; and allowing vulnerable adults to seek protection orders or file civil suits for damages resulting from abandonment, abuse, exploitation, or neglect.

A vulnerable adult includes a person who:

- is age 60 years or over who has a functional, mental, or physical inability for self-care;
- has been found to be incapacitated;
- has a developmental disability;
- resides in a licensed facility such as a nursing home, adult family home, or residential habilitation center; or
- is receiving hospice or home health services.

A vulnerable adult who is suffering from abandonment, abuse, financial exploitation, or neglect may petition the superior court for an order for protection. The court may order any relief it deems necessary to protect the vulnerable adult for a specified period of time that may not exceed one year. The types of relief the court may order include:

- restraining the respondent from committing acts of abuse, abandonment, exploitation, or neglect;
- prohibiting contact by the respondent;
- prohibiting the respondent from coming within a certain distance of particular locations;
- requiring the respondent to provide an accounting of the disposition of the vulnerable adult's income or resources; and
- restraining the sale of property for a specified time period.

The Department is authorized to file a petition for an order for protection on behalf of a vulnerable adult, but only if the vulnerable adult consents. In addition, there is a provision that states that "where necessary," a petition for a protection order or an action for civil damages may be brought by the vulnerable adult's family members and/or guardian or legal fiduciary.

The civil filing fee for a petition for an order for protection is \$200. The court may waive the filing fee in its discretion.

A vulnerable adult who has suffered abandonment, abuse, financial exploitation, or neglect while residing at a facility or while receiving care from a home health, hospice, or home care agency, may bring a cause of action for civil damages for his or her injuries, pain and suffering, and property loss. Upon the death of the vulnerable adult, the executor or administrator of the deceased may bring the action for damages for the benefit of the following statutory beneficiaries: spouse and children, or parents and siblings who were dependent on the vulnerable adult for support. If a deceased vulnerable adult has no surviving statutory beneficiaries, the estate does not have standing to bring the action, even for recovery of the economic losses to the estate.

Summary of Engrossed Substitute Bill:

A petition for an order for protection for a vulnerable adult may be brought by an interested person on behalf of the vulnerable adult. "Interested person" means a person who demonstrates to the court that he or she is interested in the vulnerable adult's welfare, has a good faith belief that intervention is necessary to protect the vulnerable adult, and that the vulnerable adult is unable to protect his or her own interests. An interested person must state in the petition why he or she qualifies as an interested person. The Department of Social and Health Services (Department) may bring a petition on behalf of the vulnerable adult without the consent of the vulnerable adult if the Department believes the vulnerable adult lacks the ability or capacity to consent.

When a petition for an order for protection is filed by someone other than the vulnerable adult, notice of the petition and hearing must be personally served on the vulnerable adult and must include a standard notice form developed by the Administrative Office of the Courts (AOC). If good faith attempts at personal service are unsuccessful, the court may authorize service by mail, or by publication if personal service or service by mail cannot be obtained.

Notice of a request for a temporary protection order must be provided to the respondent, and to the vulnerable adult if someone other than the vulnerable adult filed the petition, unless there would be immediate and irreparable injury, loss, or damage before notice could be provided.

A process is created for resolving a petition brought on behalf of the vulnerable adult where the vulnerable adult does not consent to the petition. If the vulnerable adult objects to the petition at the hearing, the court may dismiss the petition or the portions with which the vulnerable adult objects, or the court may take additional testimony or order an additional

hearing to determine whether the vulnerable adult is unable to protect his or her person or estate in connection with the issues raised in the petition due to incapacity, undue influence, or duress. The additional evidentiary hearing is not necessary if the vulnerable adult has been found to be fully incapacitated under the guardianship laws. The court may enter a temporary protection order pending the evidentiary hearing, which must be held within 14 days.

The court may enter a protection order against the wishes of a vulnerable adult if the court determines that the vulnerable adult is unable to protect his or her person or estate in connection with the issues raised in the petition due to incapacity, undue influence, or duress. If the court determines a vulnerable adult who does not consent to the petition is capable of protecting himself or herself, the court must dismiss the order or modify the order if agreed to by the vulnerable adult.

The remedies that the court may provide in an order for protection may extend for a maximum period of five years (rather than one year). The court may not charge a filing fee to the petitioner for a petition for an order for protection.

A process is created for a competent vulnerable adult or a vulnerable adult's guardian to petition for a modification or termination of a protection order.

The AOC must develop and maintain: standard petition, temporary order for protection, and permanent order for protection forms; a standard notice form to provide notice to a vulnerable adult if the vulnerable adult is not the petitioner; instructions; and a court staff handbook on the protection order process. The instructions must be designed to assist petitioners in completing the petition and must include a sample of the standard forms. The standard notice form must be designed to explain in clear, plain language the purpose of the petition and that the vulnerable adult has the right to participate and either support or object to the petition.

The AOC may prepare these documents in consultation with members of the Elder Law Section of the Washington State Bar Association, judges, the Department, the Washington Protection and Advocacy System, and law enforcement. In addition, the AOC must translate the instructions and standard forms into the languages spoken by the significant non-English-speaking or limited-English-speaking populations in the state.

Court clerks must make the standard forms and instructions available, free of charge, within 90 days of receiving them from the AOC. The standard petition and order forms must be used for all protection orders sought or issued after October 1, 2007.

A deceased vulnerable adult's cause of action for damages resulting from abandonment, abuse, financial exploitation, or neglect while residing at a facility or receiving care from a home health, hospice, or home care agency survives to the deceased vulnerable adult's estate for recovery of the economic losses to the estate if the deceased vulnerable adult has no surviving statutory beneficiaries.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony:

(In Support) This bill results from a Clark County Task Force on Vulnerable Adults. This bill is a first step in protecting the rights of the most vulnerable population of the state who currently have no voice. There has been a dramatic increase in the number of cases of abuse and exploitation of vulnerable adults. When individuals start declining in health and cognitive function, people start taking advantage of them. It is imperative that we have the ability for anyone to step in and help stop the abuse of the vulnerable adult or the theft of the vulnerable adult's property before it occurs.

The vulnerable adult protection order is a valuable tool for prosecutors, police, the Department, and private citizens. It is the only thing that can stop immediate exploitation of a vulnerable adult. This bill makes the process easier, which is important because the current law is cumbersome, inefficient, and expensive. Delays in obtaining protection can be insurmountable. If you are looking to prevent the sale of property or the depletion of a bank account by a family member, you have lost the battle if you can't quickly get a protection order. You won't be able to get the property or money back after it has been taken.

From the police perspective, it is important to have uniformity and clear forms like those in domestic violence cases, so a responding officer knows what is a violation of the order. People need help filling out the forms from a third party. They can't do it themselves so they have to hire an attorney which is expensive and creates a roadblock.

(In support with concerns) The Department should have the ability to seek relief for a vulnerable adult who lacks the ability or capacity to consent. The bill should provide notice to the vulnerable adult if someone else is seeking relief on his or her behalf. There may be situations where the vulnerable adult does not want the protection order and the person should be able to reject the petition if he or she has the capacity for independent judgment.

(Concerns) The bill allows any person to petition for a protection order. This is a significant change and creates a potential for many of these petitions to be brought between family members. This will result in an increased workload for the courts. The bill does not adequately balance the need to protect vulnerable adults and the rights of competent persons to make decisions for themselves.

(Opposed) There are already many protections in statute and in agency rules to protect vulnerable adults. Allowing any person to petition raises concerns. This could include a disgruntled employee who decides to file a petition to get back at the employer, or a neighbor who has dementia and is not aware of what is really happening, or an attorney who may benefit by filing a petition. The common law doctrine of standing requires that you have a personal stake in the outcome of the suit.

There is no definition of good faith in the bill which leaves a provider in the position of having to prove that the action is not brought in good faith. The cost to get frivolous cases dismissed is just another burden on an already under funded system and diverts resources from where the money is really needed.

Persons Testifying: (In support) Representative Lantz, prime sponsor; Gary Beagle, Beagle, Burke & Associates; Kathy Leitch, Department of Social and Health Services; Jeff Kipp, Vancouver Police Department; Jessica Dimitrov and James Senescu, Clark County Veteran's Administration Task Force; and John Barnett and Cecilia Saari, King County Long Term Care Ombudsman.

(In support with concerns) Loren Freeman; David Lord, Washington Protection Advocacy System; and Judge Vicki Churchill, Superior Court Judges Association.

(Opposed) Julie Peterson, Association of Housing and Services for the Aging; and Kathy Nevin, Washington Healthcare Association.

Persons Signed In To Testify But Not Testifying: None.

HOUSE BILL REPORT

SHB 1103

As Passed Legislature

Title: An act relating to the estates of vulnerable adults.

Brief Description: Concerning the estates of vulnerable adults.

Sponsors: House Committee on Judiciary (originally sponsored by Representatives Moeller, Green, Morrell and Kenney).

Brief History:

Committee Activity:

Judiciary: 1/22/09, 1/29/09 [DPS].

Floor Activity:

Passed House: 2/20/09, 94-0.

Senate Amended.

Passed Senate: 4/17/09, 45-0.

House Concurred.

Passed House: 4/22/09, 94-0.

Passed Legislature.

Brief Summary of Substitute Bill

- Prevents an abuser from inheriting property or receiving any benefit from a vulnerable adult who was the victim of financial exploitation.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 11 members: Representatives Pedersen, Chair; Goodman, Vice Chair; Rodne, Ranking Minority Member; Shea, Assistant Ranking Minority Member; Flannigan, Kelley, Kirby, Ormsby, Roberts, Ross and Warnick.

Staff: Courtney Barnes (786-7194)

Background:

Financial Exploitation of Vulnerable Adults.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

The Abuse of Vulnerable Adults Act provides a number of protections for vulnerable adults, including authorizing the Department of Social and Health Services and law enforcement agencies to investigate complaints of abandonment, abuse, financial exploitation, or neglect of vulnerable adults. A vulnerable adult who is suffering from abandonment, abuse, financial exploitation, or neglect may petition the superior court for an order for protection.

A vulnerable adult includes a person who:

- is age 60 years or older who has a functional, mental, or physical inability for self-care;
- has been found to be incapacitated;
- has a developmental disability;
- resides in a licensed facility such as a nursing home, adult family home, or residential habilitation center; or
- is receiving hospice or home health services.

Financial exploitation is defined as "the illegal or improper use of property, income, resources, or trust funds of the vulnerable adult by any person for any person's profit or advantage other than for the vulnerable adult's profit or advantage."

Inheritance Rights.

Under certain circumstances, an individual who takes the life of another is not entitled to inherit property or receive any benefit from the person he or she killed. This rule, in statute as part of the state's estate distribution laws, is commonly referred to as the "slayer statute." A "slayer" is a person who participates, either as a principal or an accessory before the fact, in the willful and unlawful killing of any other person. Rather than being punitive, the slayer statute is broadly construed to enforce the state's policy that no person should be allowed to profit by his or her own wrongdoing.

Summary of Substitute Bill:

An abuser may not inherit property or any benefit from a deceased person who, at any time during life in which the decedent was a vulnerable adult, was the victim of financial exploitation by the abuser. An abuser is defined as "a person who participates, either as a principal or an accessory before the fact, in the willful and unlawful financial exploitation of a vulnerable adult."

Disposition of Property.

In most cases, the decedent's estate is distributed according to the same scheme provided in the slayer statute.

Ratification.

An abuser may inherit property or benefits from the vulnerable adult's estate if the vulnerable adult:

- knew of the financial exploitation; and

- subsequently ratified his or her intent to transfer the property interest or benefit to the abuser.

The court must find by clear, cogent, and convincing evidence that the decedent ratified the abuser's conduct.

Abuser Designation.

A criminal conviction for conduct constituting financial exploitation against a decedent, including but not limited to theft, forgery, fraud, identity theft, robbery, burglary, or extortion, is conclusive for the purposes of determining whether a person is an abuser. In the absence of a criminal conviction, a court may find by clear, cogent, and convincing evidence that:

- the decedent was a vulnerable adult at the time the alleged financial exploitation took place; and
- the conduct constituting financial exploitation was willful action or willful inaction causing injury to the property of the vulnerable adult.

Findings made by the court are conclusive for the purpose of determining whether a person is an abuser.

Department of Social and Health Services Findings.

Findings of abuse made by the Department of Social and Health Services are not admissible in any claim or proceeding to determine whether a person is an abuser for inheritance purposes.

Common Law Remedies.

The provisions of the bill are supplemental to, and do not derogate from, other statutory or common law proceedings, theories, or remedies, including the common law allocation of the burden of proof or production among the parties.

Statute Cross-References.

The bill amends statutes cross-referenced by the existing slayer statute related to:

- joint community property agreements;
- retirement benefits; and
- the Trust and Estate Dispute Resolution Act.

Slayer Designation.

A criminal conviction for the willful and unlawful killing of a decedent is conclusive for the purposes of determining whether a person is a slayer. In the absence of a criminal conviction, a court may find by a preponderance of the evidence that a person participated in the willful and unlawful killing of the decedent.

Findings made by the court are conclusive for the purpose of determining whether a person is a slayer.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) The bill deals with inheritance, which is a very complicated issue. A number of stakeholders were involved in the bill drafting process. In most of the cases involving the abuse of vulnerable adults, family members of the vulnerable adult are the perpetrators. Many of these cases are not investigated or prosecuted. There are tools to fight the financial exploitation of vulnerable adults, including protection orders, guardianship, and a civil recovery action under the Trust and Estate Dispute Resolution Act. If the person who commits financial exploitation against a vulnerable adult is named in the vulnerable adult's will, there is nothing under the current law to prevent the perpetrator from inheriting property under the will. This bill provides a mechanism to prevent the perpetrator from inheriting from the vulnerable adult he or she financially exploited.

(With concerns) The bill should be clarified because there are some interpretative problems. For example, the bill references a conviction of financial exploitation, but there is no crime of financial exploitation. Financial exploitation is defined in the Vulnerable Adult Act, which is incorporated by reference into this bill. The Attorney General has plans to amend the definition of financial exploitation in the Vulnerable Adult Act to include attempted financial exploitation. Thus, a person attempting financial exploitation against a vulnerable adult may be prevented from inheriting from the vulnerable adult. The bill should be clarified to focus on actual financial exploitation of a vulnerable adult.

(Opposed) None.

Persons Testifying: (In support) Representative Moeller, prime sponsor; Jim Senescu, Attorney; Detective Allen Cook, Washougal Police Department and Clark County Vulnerable Adult Task Force; and Sarah Flohr, Beacon Trustee Services.

(With concerns) Jeff Crollard, Washington State Bar Association.

Persons Signed In To Testify But Not Testifying: None.

Judiciary Committee

HB 1103

Title: An act relating to the estates of vulnerable adults.

Brief Description: Concerning the estates of vulnerable adults.

Sponsors: Representatives Moeller, Green, Morrell and Kenney.

Brief Summary of Bill

- Prevents an abuser from inheriting property or receiving any benefit from a vulnerable adult who was the victim of financial exploitation.

Hearing Date: 1/22/09

Staff: Courtney Barnes (786-7194) and Lara Zarowsky (786-7123)

Background:

Financial Exploitation of Vulnerable Adults

The Abuse of Vulnerable Adults Act provides a number of protections for vulnerable adults, including authorizing the Department of Social and Health Services and law enforcement agencies to investigate complaints of abandonment, abuse, financial exploitation, or neglect of vulnerable adults. A vulnerable adult who is suffering from abandonment, abuse, financial exploitation, or neglect may petition the superior court for an order for protection.

A vulnerable adult includes a person who:

- is age 60 years or older who has a functional, mental, or physical inability for self-care;
- has been found to be incapacitated;
- has a developmental disability;
- resides in a licensed facility such as a nursing home, adult family home, or residential habilitation center; or
- is receiving hospice or home health services.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Financial exploitation is defined as "the illegal or improper use of property, income, resources, or trust funds of the vulnerable adult by any person for any person's profit or advantage other than for the vulnerable adult's profit or advantage."

Inheritance Rights

Under certain circumstances, an individual who takes the life of another is not entitled to inherit property or receive any benefit from the person he or she killed. This rule, in statute as part of the state's estate distribution laws, is commonly referred to as the "slayer statute." A "slayer" is a person who participates, either as a principal or an accessory before the fact, in the willful and unlawful killing of any other person. Rather than being punitive, the slayer statute is broadly construed to enforce the state's policy that no person should be allowed to profit by his or her own wrongdoing.

Summary of Bill:

An abuser may not inherit property or any benefit from a deceased person who, at any time during life in which the decedent was a vulnerable adult, was the victim of financial exploitation by the abuser. An abuser is defined as "a person who participates, either as a principal or an accessory before the fact, in the willful and unlawful financial exploitation of a vulnerable adult."

Disposition of Property

The decedent's estate is distributed according to the same scheme provided in the slayer statute.

Ratification

An abuser may inherit property or benefits from the vulnerable adult's estate if the vulnerable adult:

- knew of the financial exploitation; and
- subsequently ratified his or her intent to transfer the property interest or benefit to the abuser.

The court must find by clear, cogent, and convincing evidence that the decedent ratified the abuser's conduct.

Abuser Designation

A criminal conviction for financial exploitation of a decedent while the decedent was a vulnerable adult is conclusive for the purposes of determining whether a person is an abuser. In the absence of a criminal conviction, a court may find by clear, cogent, and convincing evidence that:

- the decedent was a vulnerable adult at the time the alleged financial exploitation took place; and
- the conduct constituting financial exploitation was willful action or inaction causing injury to the property of the vulnerable adult.

Findings made by the court are conclusive for the purpose of determining whether a person is an abuser.

Department of Social and Health Services Findings

Findings of abuse made by the Department of Social and Health Services are not admissible in any claim or proceeding to determine whether a person is an abuser for inheritance purposes.

Common Law Remedies

The provisions of the bill are supplemental to, and do not derogate from, other statutory or common law proceedings, theories, or remedies, including the common law allocation of the burden of proof or production among the parties.

Statute Cross-References

The bill amends statutes cross-referenced by the existing slayer statute related to:

- joint community property agreements;
- retirement benefits; and
- the Trust and Estate Dispute Resolution Act (TEDRA).

Slayer Designation

A criminal conviction for the willful and unlawful killing of a decedent is conclusive for the purposes of determining whether a person is a slayer. In the absence of a criminal conviction, a court may find by a preponderance of the evidence that a person participated in the willful and unlawful killing of the decedent.

Findings made by the court are conclusive for the purpose of determining whether a person is a slayer.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

FINAL BILL REPORT

SSB 5042

C 170 L 11

Synopsis as Enacted

Brief Description: Concerning the protection of vulnerable adults.

Sponsors: Senate Committee on Health & Long-Term Care (originally sponsored by Senators Keiser, Pflug, Chase, Kohl-Welles, Conway, Roach, Shin and McAuliffe; by request of Department of Social and Health Services).

Senate Committee on Health & Long-Term Care
House Committee on Judiciary

Background: Under current state law, the Department of Social and Health Services (department) has a duty to investigate allegations of abuse, abandonment, neglect, self-neglect, and financial exploitation of vulnerable adults. Within the department, Adult Protective Services (APS) handles cases where victims reside in their own home, and in facilities where there is an allegation of mistreatment by someone outside the facility. APS staff in six regions statewide, receive and investigate allegations of abuse and neglect, prioritizing action based on potential immediate harm to the alleged victim. The Residential Care Services (RCS) division handles cases when the victim resides in a long-term care facility licensed by the department.

In recent years, allegations of financial exploitation against vulnerable adults have increased substantially, according to the department. These allegations could include a wide variety of activities such as cashing an elderly person's checks without permission or forging signatures, stealing money or belongings, coercing a senior into signing an unfavorable will, or misusing legally obtained guardianships or powers of attorney.

There is concern that state law does not adequately clarify what constitutes financial exploitation and this results in difficulty prosecuting the offense. According to the National Center on Elder Abuse, this is the fastest growing area of abuse, and only a fraction of these cases are prosecuted.

Currently, APS and RCS initiate investigations on tribal lands when asked by tribes to do so. Once the investigations have been conducted, the cases are turned over to the tribal enforcement community to complete.

Summary: Financial exploitation is expanded to include the use of deception, intimidation, or undue influence by a person or entity who is trusted by the vulnerable adult, and using the

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

property, income, resources, or trust funds to benefit someone other than the vulnerable adult. Financial exploitation is the breach of fiduciary duty that results in unauthorized appropriation, sale, or transfer of property, income, resources or trust funds to benefit some person other than the vulnerable adult. It is also obtaining or using the vulnerable adult's property, income, resources, or trust funds without lawful authority by someone who knows or should know that the vulnerable adult lacks the capacity to consent.

Property is further defined as interest in real or personal property income, credit, identity, or resources that are held for the benefit of a vulnerable adult by a fiduciary or representative of the vulnerable adult, including trust accounts, conservatorships, guardianships or other accounts.

Language is added requiring that the department provide an alleged victim of abuse or the victim's guardian with a written statement of the victim's rights afforded under RCW 74.34 at the time when an investigation begins.

The department's adult protective services division may enter into agreements with federally recognized tribes to investigate reports of abandonment, abuse, financial exploitation, neglect or self-neglect of vulnerable adults on property over which a federally recognized tribe has exclusive jurisdiction. After the tribe assumes jurisdiction, the department is not liable for any action or inaction of the tribe, for any harm to the alleged victim, to the person to whom the allegations were made, or to other parties.

Votes on Final Passage:

Senate	49	0	
House	95	0	(House amended)
Senate	45	0	(Senate concurred)

Effective: July 22, 2011.

HOUSE BILL REPORT

SSB 5042

As Passed House - Amended:

April 4, 2011

Title: An act relating to protection of vulnerable adults.

Brief Description: Concerning the protection of vulnerable adults.

Sponsors: Senate Committee on Health & Long-Term Care (originally sponsored by Senators Keiser, Pflug, Chase, Kohl-Welles, Conway, Roach, Shin and McAuliffe; by request of Department of Social and Health Services).

Brief History:

Committee Activity:

Judiciary: 3/10/11, 3/17/11 [DPA].

Floor Activity:

Passed House - Amended: 4/4/11, 95-0.

**Brief Summary of Substitute Bill
(As Amended by House)**

- Prohibits wrongful control over or withholding of a vulnerable adult's property and gives examples of situations constituting financial exploitation.
- Requires the Department of Social and Health Services (Department) to provide a statement of rights to vulnerable adults whose cases are under investigation.
- Provides standards for the Department to agree with federally recognized tribes to investigate reported abuse or financial exploitation on tribal land.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass as amended. Signed by 12 members: Representatives Pedersen, Chair; Goodman, Vice Chair; Rodne, Ranking Minority Member; Shea, Assistant Ranking Minority Member; Chandler, Eddy, Frockt, Kirby, Klippert, Nealey, Orwall and Roberts.

Staff: Parker Howell (786-5793) and Edie Adams (786-7180).

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Background:

Protection of Vulnerable Adults.

Washington law prohibits abandonment, abuse, financial exploitation, and neglect of vulnerable adults and sets forth ways to stop abuse and compensate victims.

Vulnerable adults are people 60 years of age or older who cannot care for themselves, are legally incapacitated, have developmental disabilities, are admitted to facilities, or are receiving services from certain care agencies. The law covers boarding homes, nursing homes, adult family homes, residential rehabilitation centers, and other facilities licensed by the Department of Social and Health Services (Department).

A person commits abuse when he or she intentionally acts or fails to act in a way that causes injury, unreasonable confinement, intimidation, or punishment of a vulnerable adult. Financial exploitation occurs when a person illegally or improperly uses property, income, resources, or trust funds of a vulnerable adult for the exploiter's profit or advantage, rather than to benefit the victim.

Various statutes establish a system for the Department to receive reports of and investigate incidents of suspected abuse or financial exploitation of vulnerable adults. In addition, the Department or interested parties may request judicial protection orders to restrain someone from abusing or financially exploiting an adult.

Slayer Statute.

Washington's "slayer statute" (chapter 11.84 RCW) prohibits anyone who financially exploits a vulnerable adult or who kills a person from inheriting from his or her victim. The slayer statute refers to and incorporates the definition of "financial exploitation" found in the statute protecting vulnerable adults from abuse or financial exploitation.

Under the slayer statute, a party may bring a civil lawsuit to have an alleged abuser effectively disinherited. A defendant can be found to be an abuser if a fact finder determines that the person was convicted of committing certain crimes (such as theft, fraud, or identity theft) against the victim, or if the fact finder determines upon "clear, cogent, and convincing" evidence that the defendant participated in financial abuse. An abuser may still inherit if clear, cogent, and convincing evidence shows that the victim knew of the exploitation and still wanted that abuser to inherit.

Summary of Amended Bill:

The definition of "financial exploitation" is expanded beyond illegal or improper use of a vulnerable adult's property to include the illegal or improper control over or withholding of property by a person or an entity. Financial exploitation includes but is not limited to situations where a person:

- in a position of trust and confidence with a vulnerable adult uses deception, intimidation, or undue influence to obtain or use the vulnerable adult's property for that person's benefit;

- breaches a fiduciary duty, such as misusing the power of attorney, trust, or a guardianship appointment, resulting in unauthorized appropriation, sale, or transfer of property of a vulnerable adult for someone else's benefit; and
- who knows or clearly should know a vulnerable adult lacks the capacity to consent to the release of his or her property obtains or uses the vulnerable adult's property without lawful authority.

When the Department opens an investigation into suspected abuse or financial exploitation of an adult, it must provide a written statement of rights under existing law at the time of the initial interview. The statement must include the Department's name, address, and telephone number and may include other appropriate referrals.

The Department may agree with federally recognized tribes to investigate reports of abuse or financial exploitation of vulnerable adults occurring on property over which a tribe has exclusive jurisdiction. If the Department receives information that abuse is occurring on tribal land that is criminal or that creates a potential risk of personal or financial harm to the victim, the Department may notify tribal law enforcement or another tribal representative. The tribe may then take jurisdiction over the matter, in which case neither the Department nor its employees may participate in the investigation. Once a tribe assumes jurisdiction, the Department and its officers or employees are not liable for any action or failure to act on the part of the tribe for harm occurring to any party. The Department's jurisdiction and authority over facilities or entities that the Department licenses or certifies is not limited by these provisions.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Amended Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) The Department requested this legislation after seriously looking into problems with long-term care in the state. In particular, the Department was concerned about adult family homes after investigations revealed a few incidents of financial exploitation. There also has been an increase in exploitation of vulnerable adults by their own family members. The changes to the definition of "financial exploitation" give the state more leverage to sue those who exploit vulnerable adults. The requirement that victims be informed of their rights allows them to take action and to know that they are supported. If a report of abuse on tribal lands is referred to the Department, the Department asks permission to investigate and respects tribal sovereignty. The Confederated Tribes of the Colville Reservation is the only tribe that currently conducts their own investigations, although the Department expects more tribes will assume jurisdiction over future investigations. The liability language in Substitute House Bill 1104 is preferable and should be adopted in the Senate version of the bill.

(Opposed) None.

Persons Testifying: Senator Keiser, prime sponsor; Louise Ryan, Long-Term Care Ombudsman Program; Bill Moss, Department of Social and Health Services; and David Lord, Disability Rights Washington.

Persons Signed In To Testify But Not Testifying: None.