No. 44340-6-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

LARRY D. CHRISTENSEN, Respondent,

v.

JENNIFER ROACH, Appellant

On Appeal from Kitsap County Superior Court
Cause No. 12-2-02397-4
HON. JEANETTE DALTON

RESPONDENT'S BRIEF

Jason W. Burnett, WSBA# 30516
Counsel for Michael J. Longyear,
WSBA# 18424, CPG# 4870,
Successor Guardian of the Person &
Estate of Larry D. Christensen

REED, LONGYEAR, MALNATI &
AHRENS, PLLC
1415 Norton Building
801 Second Avenue
Seattle, WA 98104-1522
(206) 624-6271

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I. RE-STATEMENT OF THE CASE

Larry Christensen executed a Durable Power of Attorney on October 17, 1996 appointing Richard Sutherland as his general durable attorney-in-fact if Mr. Christensen became disabled or incompetent, including an inability to manage his property and affairs effectively for reasons including mental deficiency, physical illness or disability, and advanced age. CP 16, 15.

Mr. Christensen suffers from Parkinson 's disease and dementia ("impaired cognition"). CP 47. He has been widowed since 1996. CP 149. He hired Jennifer Roach in 2009 at the rate of $100 per day. Ms. Roach's job duties were amorphous and fluid; the first year of her employment she spent a lot of time sorting and cleaning Mr. Christensen's house and garage, going to doctors' visits and eating meals with Mr. Christensen, and home maintenance/repair. CP 231. Ms. Roach moved into Mr. Christensen's house in 2010 or so, and apparently assumed an expanded role as a caregiver, "[Mr. Christensen's] exercise buddy, walking assistant, exercise organizer, his Parkinson's researcher, his motivator, his roller skating spotter, his secretary, his personal assistant, his gardener, his house keeper...sometimes his auto mechanic, his dance parter [sic]...." Ms. Roach testified that she pressure washed the deck, cleaned his cars, checked and cleaned his BiPAP every day, and became "[Mr. Christensen's] confidant, his constant companion, and the person he wants 3 hugs from before he will go to sleep." CP 231-32.

Ms. Roach traveled to Scandanavia with Mr. Christensen and a "girlfriend" of hers in the summer of 2012. CP 124.

Mr. Christensen fell backwards down the stairs in his house on September 24, 2012. CP 148. He hit his back against a table and struck the back of his head. CP 148. Ms. Roach testified that Mr. Christensen's house was "cluttered." CP 124. She admitted that there was a box on the stairs that contributed to Larry's fall, but went on to blame Larry for failing to walk around it instead of trying to step over it. CP 125.

Mr. Christensen was admitted to Evergreen Hospital on September 24, 2012, where he was diagnosed with a T12/L1 compression fracture and "Normal Pressure Hydrocephalus." CP 115, 146. Mr. Christensen underwent the placement of a right frontal ventriculoperitoneal shunt on September 28, 2012 to relieve the "normal pressure hydrocephalus," and he was discharged on October 3, 2012. CP 148-153.

On October 6, 2012, Mr. Christensen moved in with Rick and Loretta Sutherland, friends of over two decades, in order to recuperate. VRP 11:10. Between October 6 and October 20, 2012, at least three separate people witnessed Ms. Roach yelling at Mr. Christensen on four occasions. VRP 11:12; CP 90, 91, 94, 124.

On October 20, 2012, Mr. Christensen experienced a medical episode at the Sutherland's house in which he became incoherent and lost

consciousness. After EMTs revived Mr. Christensen Mr. Sutherland took him to a hospital in Bremerton, where Mr. Christensen's nephew, Marlin Pilcher, met Jennifer Roach. Ms. Roach told Mr. Pilcher that "Rick was taking over and not doing what she wanted...." CP 81. Ms. Roach seemed upset when Mr. Pilcher stated that Larry should recuperate at the Sutherlands until his house could be made safe for him. CP 81. When they left the hospital, Mr. Christensen was fatigued and requested a wheelchair, but Ms. Roach forced him to walk to the car instead. CP 82.

Back at the Sutherland's house, the Sutherlands, Marlin and Collette Pilcher, and Larry Christensen and Jennifer Roach all sat down to create a course of action for the care and security of Mr. Christensen. CP 82. Concerns were expressed regarding the amounts and frequency of ATM withdrawals from Mr. Christensen's bank account. It became apparent that Ms. Roach had withdrawn $6,800 from Mr. Christensen's bank account in the month of September alone, including $2,500 when Mr. Christensen was hospitalized related to his fall down the stairs. CP 123. Ms. Roach was unable to explain what any money was withdrawn for other than to pay for meals. She claimed she was paid in cash and that Mr. Christensen claimed her as a dependent to help with taxes. She became upset and complained she was being attacked. She began crying and yelling, which upset Mr. Christensen.

Ms. Roach claimed that Mr. Christensen owed her money related to the Scandinavian trip they took earlier that year. Mr. Christensen spoke up and said he had agreed to pay half of the trip expenses. Ms. Roach contradicted him and repeatedly "reminded" Mr. Christensen that he had agreed to pay all of the expenses. CP 82. Ms. Roach also claimed that Mr. Christensen owed her money as "back pay." CP 82.

Part of the course of action for the care and security of Mr. Christensen required Ms. Roach to write down exercises, medications, doctor's appointments and other information pertinent to the care of Mr. Christensen. CP 82-83. Ms. Roach became very emotional at this time, screaming at Mr. Christensen and eventually storming out of the room. CP 82-83. Though she eventually returned and began supplying information, she eventually devolved into screaming proclamations of love to Mr. Christensen and descriptions of herself as a victim of attacks by the Sutherlands and Pilchers. CP 82-83.

Mr. Christensen apparently had an unexpected bowel movement at some time in the night or early next morning, and Mr. Pilcher assisted in cleaning feces from Mr. Christensen's bed, the bedroom, the hallway and the restroom. Ms. Roach watched television and did not help. CP 83. The Sutherlands, the Pilchers, Mr. Christensen and Ms. Roach eventually sat back down at the table and resumed their discussions of the night before. Mr.

Sutherland eventually informed Ms. Roach that she needed to remove herself and her possessions from the premises, a decision based on the excessive amount of tension, mistrust, disagreements and manipulation by Ms. Roach toward Mr. Christensen and observed by the Sutherlands and the Pilchers. Ms. Roach began crying and repeatedly screamed to Mr. Christensen proclamations of love and complained that "this has happened before and the girlfriend gets nothing." CP 83. Ms. Roach shuffled Mr. Christensen into his bedroom, and when he returned, he was asking questions about his Will and who was in charge. CP 83. Mr. Christensen apparently believed that he was in his house in Woodinville, not the Sutherland's house in Port Orchard, and believed that the ventriculoperitoneal shunt was actually an injury from his fall down the stairs. CP 83.

Mr. Sutherland and Mr. Pilcher drove from Port Orchard to Woodinville to fetch Larry's bed, extra clothing, bills and personal documents, and other items for his care and comfort. CP 83. While at his house, the men observed leaking and moldy skylights, a filthy, urine-stained, malodorous master bathroom, a filthy kitchen notable for rodent feces on sticky counters, garbage on the floor, and a broad state of disarray, clutter, and debris-strewn walkways throughout the house. CP 83-84. The men also noticed rough cut firewood in the driveway, which Ms. Roach apparently forced Mr. Christensen to step over as exercise. CP 84. When they returned

to the Sutherlands' in Port Orchard, Ms. Roach had already left after giving Mrs. Sutherland and Pilcher the "middle finger salute." CP 84.

Over the next few days, Ms. Roach accused the Sutherlands of kidnapping Mr. Christensen, CP 84, and refused to leave Mr. Christensen's house without an order evicting her, threatened to change the locks on his house, and tampered with Mr. Christensen's bank and credit accounts, prompting institutions to lock the accounts. CP 20.

Mr. Sutherland filed a Petition for Vulnerable Adult Order for Protection (a "Vulnerable Adult Protection Action" ("VAPA")) on November 2, 2011. CP 1. A Temporary Order for Protection and Notice of Hearing were issued by the Kitsap County Superior Court, and Ms. Roach was ordered, among other things, to "provide an accounting of the disposition of the vulnerable adult's income or other resources." CP 13-14.

Ms. Roach hired an attorney and submitted approximately 500 pages of documents the day before the hearing on Mr. Sutherland's VAPA Petition. VRP 2:19. At the hearing, Judge Dalton specifically referenced a letter signed by Mr. Christensen and dated November 18, 2012. VRP 4:1; CP 352. Mr. Christensen claimed responsibility for the letter and its contents and refused to disavow or contradict any assertion or statement in the letter. VRP 5:12.

The "accounting" documents submitted by Ms. Roach were aggressively redacted by hand and had numerous handwritten comments and

explanations on copies of bank statements belonging to Mr. Christensen and Ms. Roach. CP 2129-345. Daily, resulting, and monthly balances were redacted. Ms. Roach's address was redacted. The Court stated that "[i]t's the messiest type of accounting I think that I have ever seen submitted by an individual who allegedly has absolutely nothing to hide. And I am not impressed. In fact, I find it to be very disconcerting." VRP 31:14-15. Judge Dalton found Ms. Roach's accounting not credible. VRP 30:9, 31:3-16.

Judge Dalton specifically found that none of Ms. Roach's submittals were credible, other than her initial submittal with respect to why she began to work for Mr. Christensen. VRP 30:9.

Judge Dalton found that Ms. Roach neglected Mr. Christensen and created an unsafe situation where he fell down the stairs. Judge Dalton further found that Ms. Roach neglected Mr. Christensen by failing to keep a clean or maintained house, either herself or by hiring a housecleaner and exterminators. Ms. Roach's neglect exposed Mr. Christensen to growing mold, rodent feces and tripping hazards. VRP 32:12-33:9.

Judge Dalton specifically found as credible Mr. Sutherland's statements that Ms. Roach yelled at Mr. Christensen in an abusive manner. VRP 36:19-23; CP 90, 91, 94, 124. Judge Dalton also specifically referenced what she observed in the two court appearances involving Ms. Roach and Mr. Christensen:

> At the last court hearing, it was manifestly apparent to me that Mr. Christensen had a deep and abiding and very vulnerable affection for Ms. Roach. It was very clear to me that when Ms. Roach began to cry, it upset Mr. Christensen greatly. Mr. Christensen, in fact, was bewildered as a result. He was confused as a result of her tears in the courtroom. He couldn't understand why he couldn't call her, because he has such great affection for her. I don't discount breaking someone's heart as having an effect on their welfare. I find that Ms. Roach's conduct was not emotionally nurturing. In fact, it was emotionally abusive. There is nothing that I have seen in this record that would evidence any tenderness toward Mr. Christensen, any responsible affection towards Mr. Christensen. So for that reason, I do find exploitation and neglect.

VRP 37:3-18.

The Court entered a five-year Order for Protection. CP 374. Ms. Roach appealed.

II. ARGUMENT

A. The trial court did not err in finding that Ms. Roach's rate of pay was exorbitant

Judge Dalton properly weighed Ms. Roach's compensation against the work Ms. Roach performed and employed her own knowledge of caregiver rates to judge the fairness of the compensation. Ms. Roach failed to demand a trial by jury, and thus assumed the risks inherent in any sort of factual argument to the bench, namely that the jurist has seen the movie before and knows the plot. Judges judge, and use their personal knowledge

and experience to do so. Judge Dalton stated from the bench that she was familiar with rates of pay for caregivers and that in her estimation, $100 per day was excessive. Pay rates for gofers and/or personal companions is not a subject that requires "scientific, technical, or other specialized knowledge" to understand. Rather, the trial court was operating well within its discretion in concluding that $100 per day was excessive, given the testimony of Ms. Roach and the evidence before the Court regarding the effect and value of her services: A housekeeper and personal assistant who allows her vulnerable principal to live in a house with sticky counters covered with rodent feces, garbage on the floor, moldy, filthy bathrooms and cluttered, dangerous stairs is not worth $100 per day. No expert is needed to reach that conclusion, and there was no error.

B. Rules of Evidence do not apply to VAPA proceedings

The Rules of Evidence do not apply to Vulnerable Adult Protection Act proceedings. *See* ER 1101(c)(4) ("The rules...need not be applied in the following situations:....Protection order proceedings under RCW...74.34.") *See also Blackmon v. Blackmon*, 155 Wn.App. 715, 722, 230 P.2d 233 (Div. II 2010) (holding, in part, that "competent evidence sufficient to support the trial court's decision to grant or deny a petition for a ... protection order may contain hearsay or be wholly documentary...."). There was no error in failing

to employ rules of evidence that, by their very terms, do not apply to a particular proceeding.

Furthermore, to preserve a claim that statements in a supporting affidavit are inadmissible as evidence, a party must object to the specific deficiency or must move the trial court to strike the affidavit before entry of judgment. *See Parkin v. Colocousis*, 53 Wn.App. 649, 652, 769 P.2d 326 (1989). Failure to object to an affidavit before the entry of judgment waives the objection. *Bonneville v. Pierce Co.*, 148 Wn.App. 500, 509, 202 P.2d 309 (Div. II 2008). Counsel for Ms. Roach did not object, nor did counsel move to strike any evidence. He tepidly noted what he perceived as deficiencies in the Petitioner's evidence, never objected and never moved to strike. To the extent any rule of evidence does apply to a proceeding under RCW 74.34, Ms. Roach's counsel waived any claim of error by failing to object or move to strike the evidence.

Appellant may have obliquely raised an argument about the sufficiency of the evidence necessary to support the issuance of an Order for Protection. *See* Appellant's Brief, Assignment of Error II. However, Appellant fails to identify the proper standard of review, which is whether "substantial evidence" supports Judge Dalton's finding that "Respondent committed acts of abandonment, abuse, neglect and/or financial exploitation of the vulnerable adult." CP 374; *See In re Marriage of Rideout*, 150 Wn.2d 337,

351, 77 P.3d 1174 (2003) (holding "the substantial evidence standard of review should be applied ... where competing documentary evidence ha[s] to be weighed and conflicts resolved. The application of the substantial evidence standard in cases such as this is a narrow exception to the general rule that where a trial court considers only documents, such as parties' declarations, in reaching its decision, the appellate court may review such cases de novo ....").

Rideout involved a motion for contempt based on a failure to comply with a parenting plan. The parties submitted numerous declarations in support and opposition of the motion and the motion was heard before the Thurston County Superior Court, without testimony but with the argument of counsel, exactly as occurred in this case. The *Rideout* Court specifically addressed and rejected that argument that "the appellate court is in as good a position to judge credibility of witnesses when the record is entirely documentary...." *Rideout*, 150 Wn.2d at 351. The *Rideout* Court recognized that "trial judges and court commissioners routinely hear family law matters. In our view, they are better equipped to make credibility determinations." *Rideout*, 150 Wn.2d at 352.

The *Rideout* logic, and subsequently its holding, is not limited to family law matters. Rather, the holding applies to any hearing where a trial court is tasked with judging the credibility of written submissions, or when

trial court enjoys the advantage of seeing witnesses before it who submit written evidence. "[T]he general rule relating to de novo review applies only when the trial court has not *seen* or heard testimony requiring it to assess the credibility of the witnesses." *Rideout*, 150 Wn.2d at 351 (citing *Progressive Animal Welfare Soc'y*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994)).

With no disrespect intended, Judge Dalton clearly enjoyed an advantage over this Court when it comes to assessing the credibility of the witnesses. Judge Dalton specifically referenced her *in curia* observation of the parties, both at the initial hearing on November 15, 2012, and at the final hearing on November 30, 2012. Judge Dalton personally observed Ms. Roach, Mr. Christensen, and Mr. Sutherland and specifically noted Mr. Christensen's emotional attachment to Ms. Roach, his confusion, and his anxiety at Ms. Roach's court performance on November 15, 2012. VRP 37:3-10.

Judge Dalton was tasked with assessing the credibility of witnesses and written submissions. She did so, and this Court should treat her assessment with deference. The appellant has failed to identify any evidence (or lack thereof) in the record that would justify reversal on the basis of insufficient evidence, especially when this Court grants Judge Dalton's credibility determinations the respect and deference to which they are entitled.

C. A Jury was Neither Demanded nor Required

Neither Ms. Roach nor Mr. Christensen demanded a jury trial on the VAPA Petition, and the statute that creates the action in the first place, RCW 74.34, does not create or even mention the right to a jury trial. Furthermore, this essential issue has already been decided by this Court: A defendant is not constitutionally-entitled to a jury trial in a Domestic Violence Protection Act proceeding because that type of case was within the exclusive equitable jurisdiction of state courts when the state constitution was adopted: "[W]hen a person petitions the court solely for a ...protection order, neither [the Petitioner] nor the party she seeks to have restrained is entitled to have a jury decide whether a judge should issue a protection order." *Blackmon,* 155 Wn.App. at 721-22. There is no right to a trial by jury when an action is purely equitable in nature. *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 365, 617 P.2d 704 (1980). A Petition for an Order for Protection for a Vulnerable Adult is obviously a petition for a protective order, which is an equitable proceeding, and there is no right to a jury trial on a VAPA Petition. The trial court did not err.

D. The Court Made Findings of Fact

Judge Dalton used the Order for Protection-Vulnerable Adult created by the Pattern Forms Committee and the Washington Administrative Office of the Courts. The first page of the form Order includes an automatic finding

that "Respondent committed acts of abandonment, abuse, neglect and/or financial exploitation of the vulnerable adult." CP 374. One need only to read the Order itself to see the finding of fact, which is "baked into" the Order. Upon execution and issuance of the Order for Protection, the Court simultaneously found as a fact that Ms. Roach committed acts of abandonment, abuse, neglect and/or financial exploitation of Mr. Christensen. The Order cannot be issued without such a finding of fact, and so the finding inheres, literally and by implication, when any VAPA Order of Protection is issued. The trial court did not err.

E. Appellant Waived Alleged Errors Regarding Venue & Standing by Failing to Raise Them Below

The trial court did not err in hearing the VAPA action when the Respondent failed to object on the basis of venue, responded to the action on its merits, and when venue was proper in the first place because the Vulnerable Adult was moved from his prior county of residence due to neglect. Additionally, the trial court did not err in hearing a VAPA brought by Mr. Christensen's Durable Attorney-in-Fact when an alleged conflict of interest was not raised to the trial court in the first place and had nothing to do with the merits of the Petition in the first place.

"The appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a). The only claimed errors an

appellant can raise for the first time on appeal are "(1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right." RAP 2.5(a). Furthermore, the Division Two Court of Appeals has been very clear about its position regarding briefing that offers no legal authority for a position: "Under RAP 10.3(a)(6), we consider an assignment of error waived where the party presents no argument and cites to no relevant legal authority on the issue in its brief." *State v. Miller*, 181 Wn.App. 201, 324 P.3d 791 (2014) (citing *State v. Harris*, 164 Wn.App. 377, 389 n. 7, 263 P.3d 1276 (2011) ((citing *Smith v. King*, 106 Wn.2d 443, 451–52, 722 P.2d 796 (1986))). Neither is this position limited to matters involving criminal law; this Court regularly employs RAP 10.3(a)(6) in civil matters as well. *See Erdman v. Chapel Hill Presby. Church*, 156 Wn.App. 827, 234 P.3d 299 (Div. II 2010), *rev'd on other grounds by Erdman v. Chapel Hill Presby. Church*, 175 Wn.2d 659, 286 P.3d 357 (2012). The Supreme Court is equally unwilling to act like a litigant. *See Cowiche Canyon Conserv. v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (stating "the ... grounds argued are not supported by any reference to the record nor by any citation of authority; we do not consider them") (citing *McKee v. Am. Home Prods. Corp.*, 113 Wn.2d 701, 705, 782 P.2d 1045 (1989)). This Court should decline the implicit invitation offered by Appellant to do her work.

Even if this Court reaches the merits of these arguments made *sans* authority, the result is the same as if the Court declined to address them at all. "[A] challenge to a court's venue, unlike its jurisdiction, is waived if not raised below." *A & W Farms v. Cook*, 168 Wn.App. 462, 469, 277 P.3d 67 (2012) (citing *State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988) (holding, in part, that failure of proof of venue not error of constitutional magnitude that can be raised for first time on appeal)). "If initial venue is not proper as to the defendant, the defendant may ... waive their objection to the erroneous venue by failing to object...." *Eubanks v. Brown*, 180 Wn.2d 590, 595, 327 P.3d 635 (2014) (citing 327 P.3d 635 (2014) (citing *Yonker v. Douglas Co.*, 162 Wn.App. 448, 459-60, 258 P.3d 60 (2011)). Neither Ms. Roach nor her counsel ever objected to venue in Kitsap County, thereby waiving the objection and alleged error.

Furthermore, there can be no relief afforded to party who fails to show prejudice. *See Lincoln v. Transamerica Inv. Corp.*, 89 Wn.2d 571, 573 P.2d 1316 (1978) (holding that successful post-trial challenge to venue requires showing of prejudice because justice presumably applied equally across Washington). Not only has the appellant failed to show prejudice, she failed to even *allege* prejudice. Appellant offers no factual or legal basis to support a reversal or a remand.

Appellant's argument regarding Mr. Sutherland's alleged conflict of interest is at least equally, if not more flawed. In addition to failing to raise or brief the argument below, Appellant fails to cite any authority for the argument on appeal. In fact, there is no such authority in Washington. Chapter 11.94 RCW—POWER OF ATTORNEY—disqualifies only a person's physician, the physician's employees, and the owners, administrators or employees of a health care facility where the person resides from serving as an attorney-in-fact. *See* RCW 11.94.010(3)(b). An agent's potential for pecuniary gain at the expense of a principal does not render the appointment of the agent invalid.

Furthermore, Chapter 11.94 RCW explicitly provides a procedure for an "interested party" to petition a court for an order determining the validity of a power of attorney, or an order restraining, modifying the power of, or removing an attorney-in-fact. *See* RCW 11.94.090. Ms. Roach failed to avail herself of this procedure and failed to raise this issue for the Court. The trial court did not err in any respect regarding Mr. Sutherland's standing as the attorney-in-fact for Mr. Christensen.

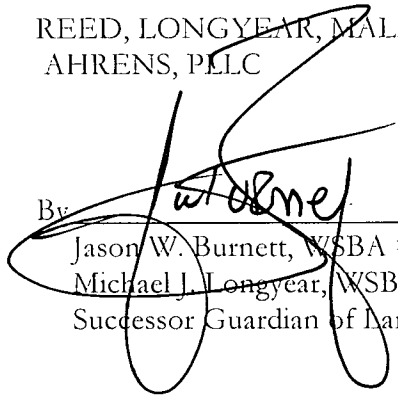
III. CONCLUSION

The trial court did not err in any respect in this matter and properly exercised its discretion and unique ability to discern and judge credibility. Respondent respectfully submits that this Court should deny the appeal and

affirm the trial court's actions in every respect, in published opinion that will provide desirable guidance to trial courts and practitioners concerning credibility determinations in VAPA proceedings as well as the proper standard of review in an appeal from the issuance of a VAPA Order for Protection.

DATED this 16th day of December, 2014.

REED, LONGYEAR, MALNATI, &
AHRENS, PLLC



By _____
Jason W. Burnett, WSBA #30516, Attorney for
Michael J. Longyear, WSBA #18424, CPG #4870
Successor Guardian of Larry Dale Christensen

No. 44340-6-II

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v.

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CERTIFICATE OF SERVICE

I declare under penalty of perjury, under the laws of the State of Washington, that on December 17th, 2014 I caused true and correct copies of the RESPONDENT'S BRIEF, and this Certificate of Service, to be served to the parties and counsel of record as follows:

Person / Address	*Via*
F. Michael Misner 3007 Judson Street Gig Harbor, WA 98335	☐ U.S. Postal Service (1st Class) ☑ Legal messenger ☐ Facsimile ☐ E-mail ☐ Hand delivery

DATED this 17th day of December, 2014.

Melissa R. Macdonald, Paralegal