

FILED
SUPREME COURT
STATE OF WASHINGTON
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BY SUSAN L. CARLSON
CLERK

Supreme Court No. 99123-5
Court of Appeals No. 36554-9-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MATT THOMPSON, an individual,

Plaintiff-Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH
SERVICES, BOARD OF APPEALS,

Defendant-Respondent.

Appeal from the Superior Court for Benton County
Cause No. 17-2-02688-1

PETITION FOR REVIEW

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APPENDIX

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I. IDENTITY OF PETITIONER

Pursuant to RAP 13.4, Petitioner-Appellant Matt C. Thompson respectfully asks this Court to accept review of the Court of Appeals' decision terminating review.

II. COURT OF APPEALS' DECISION FOR REVIEW

Petitioner Thompson seeks review of the unpublished opinion entered in the above-referenced case by the Court of Appeals, Division III on July 23, 2020. The Division III Court of Appeals denied the Petitioner's Motion for Reconsideration and Motion for Publication on September 15, 2020. The Court of Appeals Opinion to be reviewed is included in the Appendix to this Petition.

III. ISSUES PRESENTED FOR REVIEW

1. Did the Review Judge arbitrarily and capriciously conclude that the competent vulnerable adult's sworn hearing testimony that she had given prior approval and/or subsequently ratified all of the Petitioner's actions "was insufficient to refute the presumption of undue influence assigned when an agent with a fiduciary duty makes a gift of a principle's property to themselves."

2. Did the Court of Appeals' erroneously determine that "[t]he Review Judge did not specifically disagree with the ALJ's credibility determinations" where the Review Judge entered findings of fact and conclusions of law that contradicted, conflicted with, and even expressly

rejected the express credibility determinations of the ALJ, as well as the ALJ's findings and conclusions that were substantially based on the credibility of evidence or demeanor of witnesses?

3. Did the Review Judge err by failing to give "due regard to the ALJ's opportunity to observe witnesses" as required by RCW 34.05.464(4) and WAC 388-02-0600(1) when by modifying, replacing, and rejecting the ALJ's factual findings and legal conclusions, particularly those findings and conclusions that were substantially and expressly based on the ALJ's express credibility determinations?

4. Did the Court of Appeals err by failing to apply a heightened level of scrutiny to the Review Judge's findings of fact and conclusions of law where the Review Judge found that the ALJ's "*Initial Findings of Fact were insufficient and are only adopted as modified above . . . Initial Conclusions of Law 5.7 through 5.14 contained errors of law or were based on previous erroneous Conclusions of Law or Findings of Fact and are not adopted and incorporated as conclusions for this decision*" ?¹

5. Did the Review Judge exceed his authority when he applied the incorrect legal framework to review and sustain the Department's initial finding that Matt Thompson financially exploited his mother?

¹ See *Tapper v. State Employment Sec. Dept.*, 122 Wn.2d 397, 405 n. 3, 858 P.2d 494 (1993) ("Some federal courts have suggested that where the reviewing officer ignores or reverses the credibility findings of the hearing officer, heightened scrutiny should apply to substantial evidence review of any substituted findings of fact. . . . Given the particular solicitude of RCW 34.05.464(4) for the credibility findings of the hearing officer, some such rule would seem warranted. However, since this is not a substantial evidence case we do not address the question of what such a rule would look like."); see also *Hardee v. State, Dept. of Social and Health Services*, 172 Wn.2d 1, 19 n. 11, 256 P.3d 339 (2011).

6. Did the Review Judge violate the Petitioner's Constitutional right to Due Process when it erroneously adopted and applied a common law legal framework to control his review of the Department's initial finding of financial exploitation which shifted the burden of proof from the Department to the Petitioner and increased the evidentiary burden from a preponderance of the evidence to clear, cogent, and convincing evidence?

7. Did the Review Judge violate the Petitioner's Constitutional right to Due Process applying an incorrect legal framework that was materially different and in direct conflict to the legal framework that was used by the Parties and Administrative Law Judge ("ALJ") to prepare the evidentiary record?

IV. STATEMENT OF THE CASE

This matter arises from a Department of Social and Health Services ("DSHS") Adult Protective Services ("APS") determination that the Petitioner, Matt Thompson, financially exploited his mother, Janet, by spending her money for his benefit without her approval. After DSHS notified Mr. Thompson of the APS determination, Mr. Thompson requested an administrative hearing to challenge the APS finding of financial exploitation. Office of Administrative Hearings ("OAH") Administrative Law Judge ("ALJ") presided over the May 1, 2017 evidentiary hearing and witnessed the live testimony of witnesses including the petitioner (Matt Thompson), the vulnerable adult (Janet Thompson), and the APS Investigator (Sally Wilkins).

The vulnerable adult and her three (3) children (including the Petitioner) testified that the Petitioner was aware of and approved of every financial transaction at issue in this case. The ALJ found that the testimony of DSHS employees confirmed that the vulnerable adult was competent and that expressly found the testimony of the vulnerable adult and her family members to be credible. The ALJ held that all of the financial transactions complained of by DSHS were authorized by the vulnerable adult's the power of attorney and the vulnerable adult, personally. The ALJ discredited most of the vulnerable adult's original statements to the APS Investigator because the vulnerable adult's hearsay statements to the investigator conflicted with her sworn hearing testimony and the vulnerable adult convincingly testified that "she did not want to deal with the investigator when she was interviewed at the facility." After properly applying the law and weighing the evidence, the ALJ ultimately concluded:

- 5.12 The department in this case seeks to impose their judgment for an adult's judgment how to spend her money with her family not because they believe she is not competent to make those decisions but simply because she meets the definition of a vulnerable adult by her age and residence and they believe they would have made a different decision. This type of action is arrogant and violates the rights of the vulnerable adult and her family.
- 5.13 The investigator, Ms. Wilkins appeared to have prejudged the events in this family and looked to establish her judgment in the matter. When the vulnerable adult called her angry at what had transpired and explained

that she was aware and had approved the appellant's actions, she [Ms. Wilkins] ignored her [the vulnerable adult] because she believed the vulnerable adult was being taken advantage of by her son. She [Ms. Wilkins] selectively sought evidence that supported her preexisting conclusion and ignored any other evidence. Ms. Wilkins was not a credible witness when she did not directly answer the appellant's attorney's questions but was argumentative to justify her decision.

- 5.14 Based on the above the department has not proven by a preponderance of the evidence that the appellant financially exploited the vulnerable adult.

On July 10, 2017, DSHS appealed the ALJ's Initial Order to a DSHS Review Judge. The Review Judge expressly acknowledged in his Final Order that he had modified, replaced, or rejected all of the ALJ's factual findings and all of the legal conclusions that were substantially based on the ALJ's express credibility determinations. The Review Judge also improperly applied a common law presumption that shifted and increased the burden of proof without notice or an opportunity to supplement the evidentiary record. Additionally, the Review Judge ignored the testimony of the vulnerable adult and all her children that Mr. Thompson did not financially exploit or otherwise abuse his mother. Ultimately, the Review Judge held that the Petitioner failed to overcome the presumption of undue influence and, consequently, affirmed the DSHS finding that the Petitioner financially exploited his mother.

On appeal, the Court of Appeals concurred with the Review Judge and applied the same improper legal framework and burden-shifting presumption. The Court of Appeals failed to evaluate whether the ALJ gave adequate deference to the ALJ's express credibility determinations, concluding that "the ALJ did not specifically disagree with the ALJ's credibility determinations" despite the Review Judge's admission that he did not accept any of the ALJ's factual findings or legal conclusions that were based on the ALJ's credibility determinations without modification. With little thought or discussion, the Court of Appeals upheld the Review Judge's erroneous decision on July 23, 2020 and denied the Petitioner's Motion for Reconsideration on September 15, 2020.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Court of Appeals' Decision Conflicts with This Court's Holdings and Published Holdings of the Courts of Appeals that an Agent's Act is Authorized if it is Approved or Ratified by the Principle.

The Court of Appeals erroneously upheld the Review Judge's determination that "Mr. Thompson's self-appropriations of his mother's resources were unauthorized" despite the vulnerable adult's sworn hearing testimony "that any money spent by Mr. Thompson was done with her permission."² The Court of Appeals decision directly conflicts with the holdings of this Court that "[t]he [principle's] ratification [of an agent's act] operates upon the act ratified precisely as though authority to do the act had

² CP_53.

been previously given.” *Williams v. Shoudy*, 12 Wn. 362, 368, 41 P. 169 (1895); *see also Nichols Hills Bank v. McCool*, 104 Wash. 2d 78, 85, 701 P.2d 1114, 1118 (1985). This Court has explained that “[t]o be charged by ratification with the unauthorized act of an agent, the principal must act with full knowledge of the facts, accept the benefits of the acts, or without inquiry assume an obligation imposed.” *Riss v. Angel*, 131 Wash. 2d 612, 636, 934 P.2d 669, 683 (1997) (citing *Stroud v. Beck*, 49 Wn.App. 279, 286, 742 P.2d 735 (1987)).

The Court of Appeals’ decision in this matter is in conflict with this Court’s interpretation and application of the legal principle of ratification, since it affirmed the Review Judge’s determination that the financial transactions were not authorized despite the vulnerable adult’s hearing testimony approving of the transactions with full knowledge of the material facts related thereto. Consequently, the Petitioner respectfully requests that the Court accept his Petition for Review.

B. The Appropriate Level of Deference that a Review Judge Owes to an ALJ’s Credibility Determinations and the Appropriate Level of Scrutiny for Judicial Review where a Review Judge modifies, ignores, or rejects the ALJ’s Credibility Findings are Issues of Substantial Public Interest That Should be Determined by the Supreme Court.

This Court has indicated in two (2) prior opinions that a heightened level of “scrutiny should apply to substantial evidence review of any substituted findings of fact. . . . Given the particular solicitude of RCW 34.05.464(4) for the credibility findings of the hearing officer.” However, the particular facts and issues before the Court in those cases did not afford

this Court the opportunity to establish the appropriate standard of review and, consequently, the question remains unanswered to this date. *See Hardee v. State, Dept. of Social and Health Services*, 172 Wn.2d 1, 19 n. 11, 256 P.3d 339 (2011).

The ALJ's Initial Order included several findings of fact and conclusions of law that were substantially based on the ALJ's determinations regarding the credibility of evidence and demeanor of witnesses, including:

- 5.7 The department did not believe the vulnerable adult when she told the investigator in the phone call that she was aware of the appellant's actions and had approved his actions. The vulnerable adult testified that she had not wanted to deal with the investigator when she was interviewed at the facility. She did not know who she was and didn't want to talk to her. She testified she just wanted to get rid because she didn't like her. The vulnerable adult's statement that she would rather die than deal with this was explained that she did not want to talk to the investigator. Her statement was about the investigator and not anything with the appellant.
- 5.8 The vulnerable adult showed no evidence of dementia and is substantiated by the MMSE of the investigator and the social worker. The vulnerable adult's testimony that she just wanted to get rid of the investigator is credible given the vulnerable adult's reaction to the investigator at the hearing.

5.9 Given the credibility of the vulnerable adult's statements that she was aware of the appellant's actions, paying his family to clean and prepare her home for sale there could be no deception, intimidation or undue influence. In addition to the vulnerable adult the appellant['s] sister also confirmed that she was aware of what the appellant was doing.

5.10 . . . The vulnerable [adult] credibly testified that she was aware of and approved of the appellant's actions.

...

1.13 The investigator, Ms. Wilkins appeared to have prejudged the events in this family and looked to establish her judgment in the matter. When the vulnerable adult called her angry at what had transpired and explained that she was aware and had approved the appellant's actions, she ignored her because she believed the vulnerable adult was being taken advantage of by her son. She selectively sought evidence that supported her preexisting conclusion and ignored any other evidence. Ms. Wilkins was not a credible witness when she did not directly answer the appellant's attorney's questions but was argumentative to justify her decision.

The Review Judge expressly admitted his Final Order rejected all of the ALJ's findings and the above-quoted legal conclusions. The Review Judge did not adequately justify his rejection or modification of the ALJ's express credibility determinations, nor did he sufficiently describe the deference afforded to the ALJ's credibility decisions before deciding to modify and/or reject them. The ALJ's credibility determinations provided substantial

support for the ALJ's decision to reverse the DSHS finding of financial exploitation and, therefore, the Court should take this opportunity to establish the appropriate level of deference and review procedures by accepting this Petition for Review.

C. The Appropriateness Review Judge's Adoption and Application of a New Legal Framework and Burden-Shifting Scheme that was Not Contemplated or Advocated by Either Party and Conflicts with the Controlling Statutes and Regulations Raises a Significant Question of Constitutional Law.

The Review Judge's erroneous conduct in this matter raises several significant questions of law under the State and Federal Constitutions – all of which merit this Court's review. This Petition for Review presents the following issues of Constitutional law and support a decision by this Court to accept this Petition for Review: that raise Constitutional questions are:

1. Did the Review Judge exceed his authority when he applied the incorrect legal framework to review and sustain the Department's initial finding that Matt Thompson financially exploited his mother?

2. Did the Review Judge violate the Petitioner's Constitutional right to Due Process when it erroneously adopted and applied a common law legal framework to control his review of the Department's initial finding of financial exploitation which shifted the burden of proof from the Department to the Petitioner and increased the evidentiary burden from a preponderance of the evidence to clear, cogent, and convincing evidence?

3. Did the Review Judge violate the Petitioner's Constitutional right to Due Process applying an incorrect legal framework that was materially different and in direct conflict to the legal framework that was used by the Parties

and Administrative Law Judge (“ALJ”) to prepare the evidentiary record?

Although some of these issues may not have been previously raised by the Petitioner or his attorneys, this Court has held that “[a] constitutional claim may be raised initially on appeal. *State v. Baeza*, 100 Wash. 2d 487, 488, 670 P.2d 646, 646 (1983).

Procedural due process imposes limits on governmental decisions that affect an individual’s liberty or property interests.” *In re A.W.*, 182 Wn.2d 689, 702, 344 P.3d 1186 (2015). “Procedural due process requires both notice and an opportunity to be heard ‘at a meaningful time and in a meaningful manner,’ appropriate to the case.” *Prostov v. State, Dep’t of Licensing*, 186 Wn. App. 795, 810, 349 P.3d 874, 882 (2015) (quoting *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 216, 143 P.3d 571 (2006)). “A fundamental tenet of due process is notice of the charges or claims against which one must defend.” *Mansour v. King Cty.*, 131 Wn. App. 255, 270, 128 P.3d 1241, 1249 (2006). “Principles of due process control what process is required, including the proper standard of proof.” *Prostov v. State, Dep’t of Licensing*, 186 Wash. App. 795, 810, 349 P.3d 874, 882 (2015). “A fundamental tenet of due process is notice of the charges or claims against which one must defend.” *Mansour v. King Cty.*, 131 Wash. App. 255, 270, 128 P.3d 1241, 1249 (2006). “[A]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action

and afford them an opportunity to present their objections.” *Mansour v. King Cty.*, 131 Wn. App. 255, 271 n. 42, 128 P.3d 1241, 1249 (2006) (quoting *City of Redmond v. Arroyo–Murillo*, 149 Wn.2d 607, 617, 70 P.3d 947 (2003)). Due Process also affords an individual the right to know exactly what an administrative agency must prove to substantiate a particular claim or charge against an individual before the any enforcement action arising from the claim or charge may be taken by the agency. *See Mansour v. King Cty.*, 131 Wn. App. 255, 272, 128 P.3d 1241, 1250 (2006).

VI. CONCLUSION

The Review Judge violated the Petitioner’s right to due process when he applied a common law presumption that deviated from the regulatory framework in WAC 388-71-01255 by increasing and shifting the burden of proof to the detriment of Petitioner. The Review Judge again violated the Petitioner’s right to due process by not providing notice and an opportunity to supplement the evidentiary record after deciding to apply the burden-shifting presumption and before entering factual and legal findings in this matter. Consequently, the Petitioner respectfully requests that this Court accept his Petition for Review.

Respectfully submitted this 15th day of October, 2020.

SCHLEMLEIN FICK & FRANKLIN, PLLC

By: s/ Allen R. Benson
Allen R. Benson, WSBA # 51137
Attorney for Appellant

PROOF OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I am employed by the law firm of Schlemlein Fick & Franklin, PLLC.

2. At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and am competent to be a witness herein.

3. On the date shown below, I served one true and correct copy of the foregoing on the following parties via the method(s) indicated:

William McGinty
Courtney Vale Lyon
Assistant Attorney General
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- WA SUP CT E-Filing Notification
- Legal Messenger
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s/ Laurel Barton

Laurel Barton, Legal Assistant

APPENDIX 1

Renee S. Townsley
Clerk/Administrator

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Division III*



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September 15, 2020

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CASE # 365549
Matt Thompson v. Dept. of Social & Health Services Board of Appeals
BENTON COUNTY SUPERIOR COURT No. 172026881

Counsel:

Enclosed is a copy of an order denying the respondent's motion for publication of this court's July 23, 2020, opinion.

A party may seek discretionary review by the Washington Supreme Court of a Court of Appeals' decision. RAP 12.3, 13.3. Review of the order denying the motion for publication may only be obtained by filing a motion for discretionary review in the Washington Supreme Court within 30 days after the filing of the order. RAP 12.3(b), 13.3(a)(2), (c); RAP 13.5(a), (c). A copy of the motion for discretionary review should also be filed in the Court of Appeals electronically through this court's e-filing portal.

Any motion for discretionary review must be received on or before the date it is due. RAP 18.5(c). The address of the Washington Supreme Court is: Temple of Justice, P.O. Box 40929, Olympia, WA 98504-0929.

Sincerely,

Renee S. Townsley
Clerk/Administrator

RST:btb
Attachment

FILED
SEPTEMBER 15, 2020
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE


MATT THOMPSON,)	
)	No. 36554-9-III
Appellant,)	
)	ORDER DENYING
v.)	MOTION FOR PUBLICATION
)	
DEPARTMENT OF SOCIAL AND)	
HEALTH SERVICES, BOARD OF)	
APPEALS,)	
)	
Respondent.)	

THE COURT has considered the respondent's motion for publication of our July 23, 2020, opinion; and the record and file herein.

IT IS ORDERED that the respondent's motion for publication is denied.

PANEL: Judges Pennell, Siddoway, and Lawrence-Berrey

FOR THE COURT:



REBECCA L. PENNELL
Chief Judge

APPENDIX 2

Renee S. Townsley
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September 15, 2020

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CASE # 365549
Matt Thompson v. Dept. of Social & Health Services Board of Appeals
BENTON COUNTY SUPERIOR COURT No. 172026881

Counsel:

Enclosed is a copy of an order denying the appellant's motion for reconsideration of this court's July 23, 2020, opinion.

A party may seek discretionary review by the Washington Supreme Court of a Court of Appeals' decision. RAP 12.3(a), 13.3(a). A party seeking discretionary review must file a petition for review in this court within 30 days after the attached order on reconsideration is filed. RAP 13.4(a). Please file the petition electronically through the court's e-filing portal. The petition for review will then be forwarded to the Supreme Court. The petition must be received in this court on or before the date it is due. RAP 18.5(c).

If the party opposing the petition for review wishes to file an answer, that answer should be filed in the Supreme Court within 30 days of the service on the party of the petition. RAP 13.4(d). The address of the Washington Supreme Court is Temple of Justice, P.O. Box 40929, Olympia, WA 98504-0929.

Sincerely,

Renee S. Townsley
Clerk/Administrator

RST:btb
Attachment

FILED
SEPTEMBER 15, 2020
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE


MATT THOMPSON,)	
)	No. 36554-9-III
Appellant,)	
)	ORDER DENYING MOTION
v.)	FOR RECONSIDERATION
)	
DEPARTMENT OF SOCIAL AND)	
HEALTH SERVICES, BOARD OF)	
APPEALS,)	
)	
Respondent.)	

THE COURT has considered appellant Matt Thompson’s motion for reconsideration of our July 23, 2020, opinion; and the record and file herein.

IT IS ORDERED that the appellant’s motion for reconsideration is denied.

PANEL: Judges Pennell, Siddoway, and Lawrence-Berrey

FOR THE COURT:



REBECCA L. PENNELL
Chief Judge

APPENDIX 3

Renee S. Townsley
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July 23, 2020

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CASE # 365549
Matt Thompson v. Dept. of Social & Health Services Board of Appeals
BENTON COUNTY SUPERIOR COURT No. 172026881

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or if in paper format, only the original need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley
Clerk/Administrator

RST:sh
Enclosure

c: **E-mail** Honorable Samuel Swanberg

FILED
JULY 23, 2020
In the Office of the Clerk of Court
WA State Court of Appeals Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

MATT THOMPSON,)	No. 36554-9-III
)	
Appellant,)	
)	
v.)	
)	UNPUBLISHED OPINION
DEPARTMENT OF SOCIAL AND)	
HEALTH SERVICES, BOARD OF)	
APPEALS,)	
)	
Respondent.)	

PENNELL, C.J. — Matt Thompson appeals a finding by the Department of Social and Health Services (Department) that he financially exploited his mother. The applicable standards of review compel us to affirm.

FACTS

Mr. Thompson’s mother moved into a residential facility after suffering a stroke. Her mental faculties remained largely intact and she signed a power of attorney, authorizing Mr. Thompson to handle her financial affairs. The power of attorney provided

that Mr. Thompson would exercise his authority under the power of authority in a “fiduciary capacity.” Clerk’s Papers (CP) at 323.

Two years after execution of the power of attorney, the Department’s Adult Protective Services (APS) program initiated a vulnerable adult investigation. The concern was Mr. Thompson had financially exploited his mother by mismanaging her finances and using her money for his own benefit. Mr. Thompson’s mother met the definition of a “vulnerable adult” because she was over 60 years of age and living in a residential care facility. RCW 74.34.020(22)(a).

APS interviewed Mr. Thompson’s mother as part of the investigation. The investigator shared what she had learned regarding the ways Mr. Thompson had been using his mother’s money. This information caused Mr. Thompson’s mother to be upset. She stated Mr. Thompson “should not have spent that money.” CP at 435. Mr. Thompson’s mother said she was “distressed to think that [Mr. Thompson] may be using her money for himself.” *Id.* at 121. She also said she felt “used and hated by her family.” *Id.* at 122.

Mr. Thompson’s mother soon had a change of heart. Shortly after APS interviewed Mr. Thompson’s mother, the investigator interviewed Mr. Thompson. The day after that interview, Mr. Thompson’s mother called APS to complain about what the Department

was doing to her son. She was concerned Mr. Thompson would be sued or thrown in jail. Mr. Thompson's mother accused the Department of lying and stated that any money spent by Mr. Thompson was done with her permission.

Despite the mother's changed position, the Department notified Mr. Thompson of APS's determination that he financially exploited a vulnerable adult as set forth in RCW 74.34.020(7). Mr. Thompson denied the allegation and requested a hearing before an administrative law judge (ALJ).¹

Several witnesses appeared at Mr. Thompson's hearing. In his testimony, Mr. Thompson agreed he spent his mother's money for his own benefit. But he claimed she wanted him to do so and that his actions helped keep her eligible for benefits. Mr. Thompson explained that he sometimes made deposits into his mother's account in order to help her pay expenses. However, he did not keep track of whether the money he personally spent from his mother's account was equal to his deposits. Although the power of attorney authorized Mr. Thompson to be compensated for work done on behalf of his mother, Mr. Thompson admitted he was never formally compensated for his services.

¹ A substantiated finding of financial exploitation results in placement of the abuser's name in a state registry. WAC 388-71-01280. Such placement can have adverse effects on employment and volunteer activities. *Crosswhite v. Dep't of Soc. & Health Servs.*, 197 Wn. App. 539, 545-46, 389 P.3d 731 (2017).

Mr. Thompson's mother testified at the hearing and maintained that she did not object to Mr. Thompson's use of her money. She emphasized her money belonged to the entire family. She claimed she was intimidated when the APS investigator first contacted her for an interview. She explained that her son handled her finances and that she deferred to him completely on such matters. She testified Mr. Thompson was authorized to spend her money "as he saw fit." *Id.* at 13.

The ALJ reversed the APS finding of financial exploitation. It found Mr. Thompson's mother credible and ruled Mr. Thompson had not engaged in deception, intimidation, or undue influence. The ALJ also found the APS investigator not credible. It determined the investigator had prejudiced the case by selectively seeking out evidence to support her initial theory of the case. According to the ALJ, the investigation into Mr. Thompson's actions was "arrogant" and violated the rights of Mr. Thompson's mother and her family. *Id.* at 56.

The Department appealed, and a board of appeals review judge reversed the ALJ. The review judge did not specifically disagree with the ALJ's credibility determinations. Instead, the review judge focused on the legal issue of Mr. Thompson's fiduciary duty to his mother. The review judge noted that, given the fiduciary relationship created by the power of attorney, the burden was on Mr. Thompson to prove that his self-gifting was not

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the result of undue influence. Because Mr. Thompson failed to satisfy this burden, the review judge sustained the Department's initial finding of financial exploitation under RCW 74.34.020(7)(b).

Mr. Thompson appealed to superior court. He admitted to sloppy bookkeeping, but argued his actions did not amount to financial exploitation because they were ratified by his mother. The court affirmed the review decision and final order.

Mr. Thompson timely appeals the superior court's determination to this court.

ANALYSIS

Standard of review

Judicial review of an agency's adjudicative order is governed by the Administrative Procedure Act, chapter 34.05 RCW. The Court of Appeals stands in the same position as the superior court. *Crosswhite v. Dep't of Soc. & Health Servs.*, 197 Wn. App. 539, 548, 389 P.3d 731 (2017). Our focus is the decision of the review judge, not the initial order issued by the ALJ. *Id.* A review judge has the power and authority of a fact-finder. RCW 34.05.464(4); WAC 388-02-0600(1). However, because review judges do not conduct in-person hearings, they are expected to give due regard to an ALJ's opportunity to observe witnesses. *Id.*

Review judge's finding of financial exploitation

Mr. Thompson challenges the review judge's decision on the basis that the judge misapplied the governing law and failed to accord respect to the ALJ's credibility determinations. *See* RCW 34.05.570(3)(d) (challenge based on legal error); RCW 34.05.570(3) (e) (challenged based on substantial evidence). We find no error.

The review judge based its decision on RCW 74.34.020(7)(b). This provision defines "financial exploitation" as illegal or improper use or control over a vulnerable adult's resources that occurs through a "breach of fiduciary duty." *Id.* A breach of fiduciary duty includes "the misuse of a power of attorney . . . that results in the unauthorized appropriation . . . of the . . . resources . . . of the vulnerable adult for the benefit of a person or entity other than the vulnerable adult." *Id.* "[A] fiduciary is bound to act with the utmost good faith and loyalty." *Bryant v. Bryant*, 125 Wn.2d 113, 118-19, 882 P.2d 169 (1994). When a gift is made from a principal to a fiduciary, there is a presumption of undue influence. *See McCutcheon v. Brownfield*, 2 Wn. App. 348, 356, 467 P.2d 868 (1970). The burden falls on the fiduciary to prove the absence of undue influence by clear, cogent and convincing evidence. *Id.* at 356-57. This burden involves showing the gift was made "freely, voluntarily, and with a full understanding of the facts." *Id.* at 356 (quoting 38 AM. JUR. 2d *Gifts* § 106 (1968)). The presumption of undue

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influence applies even when the principal and fiduciary have a parent-child relationship.

Id.

Substantial evidence supports the review judge's conclusion that Mr. Thompson failed to rebut the presumption of undue influence. There was no evidence Mr. Thompson carefully explained his self-gifting to his mother. While there was some evidence Mr. Thompson's mother approved of the gifts after the fact, the weight of this evidence was questionable given his mother's inconsistencies and the timing of her change of heart. In addition, there was little to no evidence that Mr. Thompson's mother was aware of and approved of each individual gift, either beforehand or afterwards.

The record as a whole supports the review judge's finding that Mr. Thompson's self-appropriations of his mother's resources were unauthorized due to undue influence and therefore a breach of fiduciary duty. This breach meets the definition of financial exploitation under RCW 74.34.020(7)(b).

Constitutional challenge

In addition to challenging the review judge's findings and conclusions, Mr. Thompson contends the Department's actions were unconstitutional because they violated his mother's right to privacy and equal protection. *See* RCW 34.05.570(3)(a) (challenge based on constitutional violation). We agree with the Department that Mr. Thompson

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lacks standing to bring this claim. *See City of Seattle v. Montana*, 129 Wn.2d 583, 598, 919 P.2d 1218 (1996), *abrogated on other grounds by Yim v. City of Seattle*, 194 Wn.2d 682, 451 P.3d 694 (2019) (A “party may challenge the constitutionality of a statute only as applied to the party and may not challenge it on the ground that the statute might be unconstitutional as applied to someone else.”). Mr. Thompson is the party to this appeal, not his mother. We will not review arguments raised on her behalf.

CONCLUSION

The agency order is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

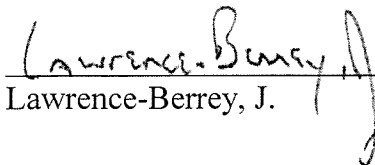


Pennell, C.J.

WE CONCUR:



Siddoway, J.



Lawrence-Berrey, J.

SCHLEMLEIN FICK & FRANKLIN, PLLC

October 15, 2020 - 4:40 PM

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