No. 99567-2

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

In Re Matter of Mary J. Green, Vulnerable Adult

Appellant Jerome Green's Petition for Review to Supreme Court

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I. IDENTITY OF PETITIONER

Petitioner Jerome Green asks this court to review the Division III opinion and order denying motion for reconsideration designated in Part B.

II. PART B

Petitioner requests that this court review the opinion dated Feb. 9, 2019 and order denying Green motion dated March 4, 2010 attached hereto in the appendix.

III. ISSUES PRESENTED FOR REVIEW

1. The judgment entered on Feb. 22, 2019 against Jerome Green is null, void and without any legal effect due to lack of jurisdiction based on defective service of process on Mary J. Green.

2. Commissioner High-Edward's order to have Mary Green "re-served" with a second set of VAPO pleadings was an unlawful attempt to "bootstrap" jurisdiction for a case that was without jurisdiction at the inception due to defective service of process.

3.The majority opinion fails to state how it came to the conclusion that the VAPO statutes, RCW 74.34 et seq have "broad jurisdictional authority" even though these statutes involve "summary proceedings" and their interpretation must be "strictly construed" by the courts. This should be reviewed by this court as a matter of continuing and substantial public interest per RAP 13.4(b)(4)

4.The majority conclusion that RCW 74.34.130(4) allows Jerome Green to be summarily evicted from his own house (as a joint tenant) without that being a violation of the "takings clause" of the Fifth Amendment to the US constitutions needs to be reviewed. This should be reviewed by this court as a matter of continuing and substantial public interest per RAP 13.4(b)(4). This should also be reviewed by this court since it

involves a significant question of law under the constitution of the United States per RAP 13.4(b)(3)

IV. INTRODUCTION

This case involves a black family. Jerome Green is the 56 year old youngest child of Mary J. Green. Jerome has lived with his blind mother Mary Green who purchased a residence at 1704 E. 11th Ave. in Spokane, WA. in 1969. Mary and Jerome had both resided continuously together at the home.No other family members remained at the house but chose to move away and lead their own lives. Mary Green was blind and has other debilitating medical issues which required extensive care and supervision. For the past twenty years or so, Jerome has taken care of his mother while they both shared the expenses and upkeep of their home.

Mr. Green has worked in numerous fields including diesel mechanic, intercity bus driver, civil aviation security specialist at the Spokane International Airport and as a weight station operator In Idaho. Jerome has attended the Washington State Patrol Academy and was placed on a roster for WSP commercial vehicle enforcement sections. Jerome served as a Special Deputy with the Spokane County Sherriff's Office and has received extensive law enforcement training including crisis response and non-violent crisis intervention training. Mr. Green has also operated his own private investigation business, Alpha Investigations, where he did

skip tracing and service of process. At one time he owned and operated a bus touring company, Spokane Scenic Tours. Jerome has also worked at various construction jobs operating heavy equipment (including firefighting equipment) and had been regularly in demand for his skills.

Jerome has three sisters and a brother who live in Spokane but they all decided that the responsibility for caring for Mary Green should belong to Jerome alone and refused to contribute time or money to the care of their disabled mother Mary J. Green. Betty Farley, a neighbor and one time care giver for Mary, confirmed this in her letter dated Nov. 13, 2014 wherein Betty opined that Mary's other children "seem to be too busy to come over and assist with their mother and don't seem really to want to that much." In 2014 Jerome realized that if he were to be able to continue working that he would have to hire (out of his own pocket) a private care giver (neighbors) who would care for his mother while he was working. One of these private care givers being paid by Jerome was Betty Farley who was eventually hired and paid by the Department of Social and Health Services. According to DSHS records Ms. Farley failed to complete the training requirements and was terminated as a paid caregiver. From that point on Jerome was forced to rely upon professional caregiver services contracted for his mother by DSHS.

DSHS originally authorized only 10 hours per week and Jerome was concerned that this was not enough hours (due to the severity of her conditions) and so he sent his first "public record act" request/letter dated July 28, 2016 via his attorney Robert Critchlow to, among other things, obtain information on how DSHS calculated these hours and what rights Jerome and his mother would have to challenge these assessments. This initial request from attorney Critchlow was the only public record act request that DSHS answered and all the subsequent letters which were sent to DSHS by Jerome Green himself (pro se) were simply ignored.

On Sept. 27, 2012, Mary Green, recognizing that her son Jerome was the only one that was looking after her well being delivered a quit claim deed to him in consideration of "love and affection from mother to son" making Jerome a joint tenant owner of the residence at 1704 E. 11th Ave, Spokane, WA. [CP 205-209]. At the direction and advice of his attorney Robert Critchlow, this deed was subsequently filed with the Spokane County Auditor's Office on March 28, 2019.

V. STATEMENT OF THE CASE

On Jan. 31, 2019 AAG Dawn Vidoni and APS investigator Tonya Claiborne signed, attested to and caused to be served an ex parte temporary VAPO order upon Jerome Green at his residence without any

prior notice to him [CP 1-28, 31-33] By letter dated January 30, 2019 DSHS also commenced a parallel administrative proceeding against Jerome alleging these same issues about improperly feeding his mother

The judicial VAPO petition and declaration from Vidoni and Claiborne alleged that 1) Mary Green was being abused by her son Jerome in that Mary Green's children were going back and forth having Mary sign/revoke alternative powers of attorney and that 2) Jerome was feeding and providing liquids to his mother that put her at risk of aspiration. [CP 1-28, 31-33] There was never any proof that Jerome had ever caused his mother to choke. This petition also alleged that DSHS was going to file a petition for a "professional" guardianship of Mary J. Green [CP 1-28, 31-33] even though Mary Green had previously indicated to DSHS in writing on Feb. 6, 2019 that she did not want a guardianship. [CP 217-20] At the hearing on Feb. 22, 2019 Commissioner High-Edward made a finding of neglect and abuse on the part of Jerome Green.[CP 78-96]

The commissioner made findings of "abuse" and "neglect" as to Mr. Green's inability or unwillingness to follow feeding instructions for his mother although he never received any such training from DSHS. [RP 51, lines 9-10, May 13, 2019 hearing]As to Mr. Green's intent, Comm. High-Edward ruled that "don't think you did it with intent to harm your

mom because **I absolutely don't think you have that intent**." [CP 78-96 pg 14, lines 2-4)]

Since AAG Vidoni had alleged in the VAPO petition that DSHS was going to filed a guardianship petition and the commissioner ordered Vidoni to file the guardianship petition the following Monday Feb. 25, 2019.[CP 62-64] Despite being court ordered to file the petition the following Monday, Feb. 25, 2019 Vidoni left the VAPO hearing and presented her petition (ex parte) that very same day Friday, Feb. 22, 2019 to Commissioner Tony Rugel who signed an ex parte order appointing Dianna Evans as guardian ad litem for Mary Green. Vidoni did this without giving Jerome Green or his attorney Robert Critchlow an opportunity to appear and contest the appointment of a guardian ad litem.

After the Feb. 22, 2019 VAPO hearing, Jerome Green filed a motion to revise commissioner High-Edward's ruling and and Judge Moreno granted the motion to revise and remanded the case because there was an **"unresolved issue regarding Mary Green's inability to consent as well as the burden of proof."** [CP 193-194]

On March 26, 2019 AAG Vidoni filed a motion to modify the VAPO order of Feb. 22, 2019 [CP 107-123] requesting, inter alia, that the court make a finding of "financial exploitation" on the part of Jerome

Green. DSHS alleged that Mr. Green had opened a new bank account with Washington Trust Bank, had deposited a $3500.00 check therein and had been making regular and unauthorized withdrawals for the benefit of himself and not for the benefit of his mother Mary Green. [CP 107-123] DSHS offered no support for these allegations other than financial records showing certain deposits and withdrawals. In other words, it was pure speculation on the part of Vidoni, Claiborne and DSHS that Jerome Green had been engaging in "financial exploitation" of his mother Mary J. Green. [CP 107-123]

On April 11, 2019 a status hearing was held and the court for the first time ordered [CP 141-142] APS investigator Tonya Claiborne to provide discovery (DSHS records) to attorney Critchlow's office by April 17, 2019. The court also ordered that Jerome Green **"may not remove any documents or any other items from her home"** [CP 141-142] Jerome Green filed his response on April 25, 2019 [CP 160-170, 146-159] in which he explained that 1) his attorney Robert Critchlow had advised him to open the new bank account due to the continuing interference by his sisters with the Umpqua Bank account and 2) the $3500 check was for a personal injury settlement received from attorney Larry Kuznetz and that Kuznetz had advised Jerome (pg.3) to "pay it down" (on household expenses, etc) to reduce the amounts that exceeded

the Social Security rules on a how many assets a recipient could maintain in their accounts and still be eligible for services. Jerome went on to explain all the purchases he made for the benefit of Mary Green (maintenance and repairs, etc) Due to the April 11, 2019 order prohibiting him from retrieving (any items) his financial records and receipts from his home and principal place of business Jerome was only able to provide one invoice dated April 3, 2019 from AAA Drain Pros [CP 145-159]

By her letter to the parties dated April 30, 2019 [CP 171] Commissioner High-Edward stated that she had reviewed the court file and there was no evidence that Mary Green had ever been personally served with the original petition (including the notice of rights) and **"without this I am unable to make a finding of consent when I am unsure if Mrs. Green was notified of her right to object."** Commissioner High-Edward then ordered that "the **Department is required to serve Mrs. Green with the original petition and her notice of rights a**nd provide a return of service to this effect before the hearing date."[CP 171]

After receiving Jerome's declaration about the allegations of "financial exploitation" AAG Vidoni and APS/DSHS withdrew their

request to modify the VAPO to include a finding of "financial exploitation" [CP 179-181 and on, page, lines 23-24) and AAG Vidoni stated that "is it best handled administratively." Vidoni then turned the alleged financial exploitation issues over to the Office of Administrative Hearings to pursue these matters. In the superior court VAPO modification hearing of May 13, 2019 Commissioner High Edward ruled that Mary Green **"did not consent"** to the VAPO petition and that the correct burden of proof for the Feb. 22, 2019 VAPO hearing was the **"preponderance of evidence"** standard. [CP 193-194]

V. ARGUMENT OF WHY REVIEW SHOULD BE ACCEPTED

1.The judgment entered on Feb. 22, 2019 against Jerome Green is null and void without any legal effect due to lack of jurisdiction based on defective service of process on Mary Green.

2.Commissioner High-Edward's order to have Mary Green "re-served" with a second set of VAPO pleadings was an unlawful attempt to "bootstrap" jurisdiction for a case that was without jurisdiction at the inception.

On Jan. 19, 2019 a VAPO proceeding was ostensibly commenced in Spokane County Superior Court. Jerome and Mary Green were served VAPO pleadings but the service on Mary Green was defective. After a couple of continuances the matter was set for an evidentiary hearing on Feb. 22, 2019. Jerome Green was unaware at that time that the initial

service of process on his mother Mary Green was defective. Commissioner High-Edward noted the defective service on Mary Green when she reviewed the file and issued her letter to the parties dated April 30, 2019. The commissioner was reviewing the file due to prepare for Judge Moreno's order of remand and a hearing was scheduled for May 13, 2019.

RCW 74.34.120 (3) provides as follows:

> When a petition under RCW 74.34.110 is filed by someone other than the vulnerable adult, notice of the petition and hearing ***must be personally served upon the vulnerable adult*** not less than six court days before the hearing. In addition to **copies of all pleadings filed by the petitioner**, the petitioner shall provide a written notice to the vulnerable adult **using the standard notice form developed** under RCW 74.34.115. (Emphasis added in bold and underline)

In this case the first declaration of service for Mary Green [CP 34-37] the SPD officer shows that he failed to serve Mary Green the "notice of rights for Vulnerable Adult" (RCW 74.34.305) as well as "other pleadings" required by RCW 74.34.120(3). In her letter dated April 30, 2019 [CP 171] Commissioner High-Edward pointed out this defective service of process and directed DSHS to essentially "recommence" this cause of action by having Mary Green served again this time with the "original petition" and the "notice of rights for vulnerable adults." At the May 13, 2019 modification hearing after Mary Green had been "re-served" with a

second set of VAPO pleadings on May 5, 2019 (RP 56, lines 19-20) commissioner High-Edward stated:

> Sure. I don't think they filed a new petition. They just **re-served the original petition**, but yes the return of service generally you would get a copy.(Emphasis in bold and underline)[RP p.57, lines 14-16]

Thus the commissioner allowed DSHS to have a "do over" instead of dismissing this case for lack of subject matter jurisdiction which she should have done, sua sponte, at this May 13, 2019 hearing when the jurisdiction issue was raised and discussed.

The Div.III majority opinion of Feb. 9, 2021 states that this second service of process on Mary Green was authorized by RCW 74.34.120(4) and conferred jurisdiction on this case because it allows the court to "continue the case to allow for adequate service" (Op.5). The problem with the majority analysis is that the evidentiary hearing on Feb. 22, 2019 had already occurred before commissioner High-Edward discovered the defective service on Mary Green and shared this information with the parties via her letter of April 30, 2019. In effect then, the horse was already out of the barn. Testimony had been heard and oral and written findings were made by the court and a judgment was entered against Jerome Green on Feb. 22, 2019

First and basic to any litigation is jurisdiction and first and basic to jurisdiction is service of process. *Dobbins v. Mendoza,* 88 Wn. App. 862 (Div. III, 1997) citing *Scott v. Goldman,* 82 Wn. App. 1, 6 (1996) When a court lacks in personam jurisdiction for a party any such judgment entered is void. *Dobbins, supra.*The failure to accomplish personal service of process is not a defect that can be cured by amendment of paperwork. Errors in the form of original process are however, generally viewed as amendable defects so long as the defendant is not prejudiced thereby. *Sammamish Point Homeowners Assn. v, Sammamish Point LLC,* 116 Wn.App.117 (Div. I, 2003) citing *Whitney vs. Knowlton,* 33 Wash 319, 322 (1903)

FORM VS. SUBSTANCE-The amendment of service in this case was not a matter of mere form but was in fact a matter of great substance. Commissioner High-Edward was particularly concerned that Mary Green was not served her "notice of rights" as required by the VAPO statute.

SUBSTANTIAL RIGHTS AND PREJUDICE-Secondly Jerome Green's substantial rights had already been prejudiced since the evidentiary hearing had already been held on Feb. 22, 2019 and

adverse findings and a judgement had already been entered against Jerome Green.

BOOTSTRAPPING-Indeed Division III is on record as disallowing litigants to "bootstrap their own otherwise untimely claim." See published opinion of *Curtin v. City of East Wenatchee,* 12 Wn.Appp.2d 218 (Div. III, 2019), accord, *Ace Novelty Co. v. M.W. Kasch Co.,* 82 Wn.2d 145 (1973)[can't bootstrap jurisdiction] In this case Commissioner High-Edward improperly "bootstrapped" jurisdiction from the **second service of process** upon Mary Green which was done on May 5, 2019 well after this Feb. 22, 209 judgment thereby "rubberstamping" the findings and judgment that were entered against Mr. Green on Feb. 22, 2019.

3.The majority opinion fails to state how it came to the conclusion that the VAPO statutes, RCW 74.34 et seq have "broad jurisdictional authority" even though these statutes involve "summary proceedings" and their interpretation must be "strictly construed" by the courts. This should be reviewed by this court as a matter of continuing and substantial public interest per RAP 13.4(b)(4).

The majority opinion in this case states that these VAPO statutes have "broad jurisdictional authority to adjudicate the petition."(Op. 5). The majority does this <u>without</u> stating any supporting reasoning or citing legal authorities. In his Opening

Brief (pg. 17) Jerome Green set forth extensive argument and legal authorities showing that since these VAPO statutes involve "summary proceedings" they must be "strictly construed" and not broadly construed as concluded by the majority' opinion. Although there is no reported opinion directly addressing this, Jerome Green has argued that Washington's Vulnerable Adult Protection Act is legislation involving **summary proceedings** and, as such, must be "strictly construed." For example Div. III in *Commonwealth Real Estate Services v. Padilla*, 149 Wn. App. 757 (Div. III, 2009) held that RCW 59.12 (unlawful detainer) involved summary proceedings which required the court to **"strictly construe"** these statutes. *Padilla, id* citing *Hartson Partnership v. Goodwin*, 99 Wn. App. 227, 235-36 (2000) Further in *Corning and Sons v. McNamara*, 8 Wn. App. 441 (1973) Div. III reviewed a temporary restraining order that had been served (pursuant to RCW 7.40.050) on the petitioner without prior notice and opportunity to be heard before his liberty and property interests were impacted by such an order. The petitioner had filed a motion to quash this TRO at the trial court level but his motion was denied. The Petitioner argued that the trial court erred in granting the ex parte restraining order prior to a contested hearing when "no emergency was alleged" and

that by doing so the petitioner was deprived of due process of law in the manner of *Sniadach v. Family Fin. Corp.* 395 U.S. 337 (1969); *Fuentes v. Shevin*, 407 U.S. 67 (1972) and *Lucas v. Stapp*, 6 Wn. App. 971 (1972). In his concurring opinion in *Corning and Sons v. McNamara*, *supra* Division III Judge Munson further held that there was not even a need to reach the constitutional issues for a reversal since simply failing to strictly comply with the statutory requirements (of RCW 7.04.050) alone was sufficient to warrant a reversal. Judge Munson took this position because these TRO statutes involve **"summary proceedings"** and, as such, are "**narrowly construed**" and there must be strict compliance with statutory requirements. *Barr v. Young*, 187 Wn. App. 105 (Div. III) citing *Munden v. Hazelrigg* 105 Wn.2d 39, 45 (1985).

CONTINUING AND SUBSTANTIAL PUBLIC INTEREST-To determine whether the issue involves a matter of continuing and substantial public interest three factors are considered: 1) the public or private nature of the question presented 2) the desirability of an authoritative determination for the future guidance of public officers. *State v. Beaver* 184 Wn.2d 321 (2015) The continuing and substantial public interest exception has been used in cases dealing with constitutional interpretation, the validity of statutes or

regulations and matters that are sufficiently important to the appellate court. *Id at 331*

4.The majority opinion and their conclusion that RCW 74.34.130(4) allows Jerome Green to be summarily evicted from his own house (as a joint tenant) without that being a violation of the "takings clauses" of the Fifth Amendment of the US constitution is wrong. The Fifth Amendment as applied to the facts of this case was violated when a joint tenant was evicted from his own house without just compensation. This should be reviewed by this court as a matter of continuing and substantial public interest per RAP 13.4(b)(4). This should also be reviewed by this court since it involves a significant question of law under the constitutions of the United States per RAP 13.4(b)(3)

DSHS has been, at all times relevant to this case, providing in home care services for Mary Green at her residence. Their hours vary but these DSHS contracted professional care providers, are a continuous physical presence in the Jerome and Mary Green home and are acting on behalf of and for the benefit of their employer, DSHS. The Jan. 31, 2019 ex parte VAPO order and the Feb. 22, 2019 VAPO order among other restrictions unlawfully evicted Jerome Green from his residence since he was no longer allowed to "stay overnight" in his own home

The majority opinion states that "nothing in the record indicates the state has invaded Mr. Green's home or appropriated his property for public use and that RCW 74.34.130(2) allows the

court to evict him from his own property and that doing so does not constitute a government taking within the meaning of the "takings clauses" (Op.9) of our federal constitution.

The 5th Amendment to the US Constitution states, inter alia, that "nor shall private property be taken for public use without just compensation." .A **"physical invasion"** or **"occupation"** of his or her property is compensable no matter how weighty the public purpose behind it or how minute the intrusion. *Guimont v. Clarke* 121 Wn.2d 586 (1993) citing *Lucas v. South Carolina Coastal Coun.*, 120 L.Ed.2d 798, at 812. The court labeled this category as a "total taking." *Guimont v. Clarke supra* citing *Lucas v. South Carolina Coastal Coun.*, 120 L.Ed.2d 798, at 822 Further, **an as-applied challenge** to the constitutional validity of a statute is characterized by a party's allegation that the application of the statute in the specific context (joint tenants) of the party's actions is unconstitutional." *City of Seattle v. Evans,* 184 Wn.2d856 (2015) citing *State v. Hunley* , 175 Wn.2d 901, 916 (2012) quoting *City of Redmond v. Moore* 151 Wn.2d 664, 668-69 (2004). "Holding a statute unconstitutional as applied prohibits future application of the statute in a similar context but the statute is not totally invalidated." *Id* quoting *Moore* 151 Wn. 2d at 669.

Jerome and Mary Green were "joint tenants" in their home since Sept. 27, 2012. Mary Green needed round the clock medical care and the caregivers hired by and acting as agents of DSHS were a constant presence in Mary and Jerome Green's house. Not only was Mr. Green evicted from his own house, he was also prevented from taking any of his personal possessions such as tools and video equipment which he needed for his work. He was thereby made homeless and had to survive financially as well as he could in these circumstances, which to his credit he did.

RCW 74.34.130(2) cited by the majority states the court can enter an order "excluding the respondent from the vulnerable adult's residence." It says nothing about a residence that is "jointly owned" by the parties but rather refers to the "vulnerable adults residence." Since these are "summary proceedings" which require strict construction of these statutes that particular section should not have applied to Jerome Green under the facts "as applied" to this case. Further, in interpreting these VAPO statutes RCW 74.34.005(6) states that any order issued must contain the "least restrictive environment" appropriate to the vulnerable adult.

Finally, it goes without saying that a state (VAPO) statute cannot supersede or take precedence over the "takings clauses" of the US constitution.

VI. CONCLUSION

Jerome Green requests this court to review Div. III opinion and determine that the Feb. 22, 2019 judgment entered against Mr. Green was in fact null and void due to lack of jurisdiction (service of process) on Mary Green. There are continuing matters of substantial public interest so that the court should review these VAPO statutes to provide future guidance for public officers.

Jerome Green requests that this court review these VAPO statutes to determine whether they involve "summary proceedings" and if so to determine whether these various sections should be "strictly construed." There are continuing matters of substantial public interest so that the court should review these VAPO statutes to provide future guidance for public officers.

Jerome Green requests this court to review RCW 74.34.130(2) "as applied" to him as a joint tenant and determine whether it is a violation of the 5th Amendment of the US constitution.

Mr. Green also requests and award of costs and reasonable attorney fees.

RESPECTFULLY SUBMITTED THIS 10 day of March. 2021

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DECLARATION OF SERVICE

I, Robert W. Critchlow hereby declare under penalty of perjury of the laws of the State of Washington here in Spokane County, WA. that I served Jerome Green's motion for reconsideration via regular mail on the following:

AAG Dawn Vidoni-attorney for DSHS/APS
WASH ATTORNEY GENERALS OFFICE
W. 1116 Riverside Ave, Suite 100
Spokane, WA. 99201-1106

DECLARED THIS 10th day of March, 2021

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APPENDIX TABLE OF CONTENTS

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February 9, 2021

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CASE # 368564
In the Matter of the Vulnerable Adult Petition for: Mary J. Green
SPOKANE COUNTY SUPERIOR COURT No. 192005429

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 of this decision by the Washington 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 that the moving party contends this court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration that merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of a decision. RAP 12.4(b). Please file the motion electronically through this court's e-filing portal. 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 the decision (should also be filed electronically). RAP 13.4(a). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates each is due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:btb
Attachment

c: **E-mail** Honorable Jacquelyn M. High-Edward

c: Jerome Keith Green
P.O. Box 4996
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FILED
FEBRUARY 9, 2021
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

In the Matter of the Vulnerable Adult Petition for: MARY JEWEL GREEN. THE DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondent, v. JEROME KEITH GREEN, Appellant.	)	No. 36856-4-III UNPUBLISHED OPINION

PENNELL, C.J. — Jerome Green appeals a vulnerable adult protection order (VAPO) prohibiting him from sleeping overnight at a home he jointly owns with his mother and visiting his mother without another adult being present, and invalidating his status as his mother's attorney-in-fact. We affirm.

FACTS

Mary Green is Jerome Green's mother. She is 100 years old, blind, and suffers from dementia. She is unable to walk on her own or provide self-care, and requires constant supervision. Ms. Green also has a narrowed esophagus that places her at risk of

choking. Her doctors have recommended she eat sitting up and be monitored for 30 minutes after eating. Ms. Green's food must be chopped into small pieces and she is to avoid foods that present choking hazards such as nuts and grapes. Signs around Ms. Green's home inform caregivers and family members of Ms. Green's dietary needs.

Mr. Green lived with his mother and helped with her caregiving. Mr. Green has a sister who lives nearby and the two were often in conflict over their mother. Between July and December 2018, the siblings obtained numerous alternating powers of attorney from their mother. When this case began, Mr. Green was the holder of his mother's power of attorney.

The Department of Social and Health Services petitioned for a VAPO, alleging Mr. Green was placing his mother at risk by neglecting her needs. Of concern were Mr. Green's failure to abide by his mother's dietary restrictions and his tendency to leave her home alone, unattended.

A superior court commissioner held a hearing on the petition. The court considered various exhibits along with testimony from Mr. Green and a Department representative.[1]

[1] A transcript of the evidentiary portion of the hearing has not been made part of the record. The parties disagree about the extent to which exhibits played a role at the hearing. Because there is no transcript, we cannot discern the importance of the documentary evidence considered at the hearing.

The court found Mr. Green's failure to comply with his mother's dietary restrictions constituted neglect. The court issued a VAPO prohibiting Mr. Green from being in his mother's house without another adult present, from providing her food, and from sleeping overnight in the home. The court also revoked the power of attorney. The court's order indicated Mr. Green could petition to remove his restrictions once he demonstrated an awareness of his mother's dietary needs.

Mr. Green sought revision of the commissioner's order. A superior court judge granted revision in part and remanded on the issue of Ms. Green's ability to consent or object to the VAPO.

On remand, the commissioner questioned whether the Department had perfected service of the petition on Ms. Green and adequately provided notice to Ms. Green of her rights in the VAPO proceedings. The court ordered the Department to address the issues of service and notice, and continued the matter to allow for Ms. Green's input. Ultimately, Ms. Green did not respond to the petition or assert her position. When court reconvened, the commissioner found Ms. Green lacked capacity to consent to the VAPO and that she had not voiced an objection to the VAPO. The commissioner then reaffirmed the court's prior findings, which were supported by a preponderance of the evidence.

Jerome Green filed this timely appeal from the VAPO proceedings in the superior court.

ANALYSIS

The Abuse of Vulnerable Adults Act (AVAA), chapter 74.34 RCW, was enacted to protect vulnerable adults from abuse, neglect, financial exploitation, or abandonment. RCW 74.34.005(1). A "vulnerable adult" includes a person "[s]ixty years of age or older who has the functional, mental, or physical inability to care for [themselves]." RCW 74.34.020(22)(a). The Department is charged with protecting vulnerable adults. RCW 74.34.005(6). One method of protection is to file for a VAPO. RCW 74.34.110, .150.

Adequacy of service / notice

Mr. Green claims the commissioner lacked subject matter jurisdiction over the vulnerable adult petition based on the flaws with service on Ms. Green. We disagree.

When the Department petitions for a VAPO on behalf of a vulnerable adult, it must serve the petition not only on the respondent but also the vulnerable adult. RCW 74.34.120. The Department must also serve a separate notice on the vulnerable adult explaining the purpose and nature of the petition and the rights of the vulnerable adult to participate in the proceedings, and the right to either support or object to the

petition. RCW 74.34.115(1)(c). The AVAA states service on the vulnerable adult shall take place "not less than six court days before" a hearing on the petition. RCW 74.34.120(3). But the AVAA's deadlines are not absolute. If the service of process deadlines are not met, the court may continue the case to allow for adequate service. RCW 74.34.120(4).

Here, the commissioner followed the AVAA's guidance and continued final disposition of the VAPO petition to allow for satisfaction of the AVAA's notice requirements. The court did not lose its broad jurisdictional authority to adjudicate the petition.

Standard of proof

Mr. Green asserts the commissioner incorrectly held the Department to a preponderance of evidence standard of proof. According to Mr. Green, the court should have applied the higher clear and convincing evidence standard. We disagree.

To enter a VAPO, the court must find an adult has been abandoned, abused, exploited, or neglected. *See* RCW 74.34.110(2). This court has held the standard of proof generally applicable at VAPO proceedings is "a preponderance of the evidence." *Kraft v. Dep't of Soc. & Health Srvs.*, 145 Wn. App. 708, 716, 187 P.3d 798 (2008). But when the alleged vulnerable adult contests the petition, the standard of proof is more rigorous.

In those situations, a VAPO must be justified by clear and convincing evidence. *In re Vulnerable Adult Petition for Knight*, 178 Wn. App. 929, 939-40, 317 P.3d 1068 (2014).

Mary Green did not contest the VAPO petition. She remained silent. Given this circumstance, the higher burden of proof was not triggered. The superior court correctly decided the petition by using the preponderance of the evidence standard.

We reject Mr. Green's claim that because he held a power of attorney, he could validly object to the petition on his mother's behalf. As the holder of the power of attorney, Mr. Green owed his mother a fiduciary duty not to place his interests in conflict with hers. RCW 11.125.140(2)(b). Here, there was a clear conflict. Mr. Green had an interest in avoiding a VAPO; his mother's interest was to be protected from neglect. Mr. Green's power of attorney did not, therefore, permit him to object to the petition on his mother's behalf. An objection that constitutes a breach of fiduciary duty carries no legal weight. Instead, any objection had to come from Ms. Green herself.

Adequacy of findings

Mr. Green complains the superior court did not make any findings about whether he abused or neglected his mother. We disagree. The court made clear it found Mr. Green committed acts of neglect. At the outset of the hearing, the court identified the issue in the case as whether Mr. Green had committed "neglect." Clerk's Papers (CP) at 81. During

the hearing, the court stated it had "made a finding of neglect." *Id.* at 94. And when the court entered its written findings, it underlined the word "neglect" on the court's standard VAPO form, thereby signifying it had found Mr. Green had committed acts of neglect.[2] The record unequivocally shows the court made a finding of neglect, not abuse. Mr. Green's complaint about the adequacy of the findings fails.

Revocation of power of attorney

Under the AVAA, superior courts have broad authority to order relief as "necessary for the protection of the vulnerable adult." RCW 74.34.130. This provision amply justified revoking Mr. Green's power of attorney. As noted by the superior court, Mr. Green and his sister took advantage of Ms. Green by "tromping her out to attorney's offices" to sign alternating powers of attorney. CP at 82-83. In addition, Mr. Green violated his fiduciary duty under the power of attorney by attempting to use his status as his mother's attorney-in-fact to further his personal interest in avoiding the VAPO.

[2] The standard VAPO form provides the following proposed finding: "Respondent committed acts of abandonment, abuse, neglect, and/or financial exploitation of the vulnerable adult." The court underlined the word "neglect." *Id.* at 62. This sufficiently clarified that the court's finding was limited to neglect. It was not necessary for the court to also delete the other possible alternative findings.

A power of attorney is a potent document. It authorizes the holder to make significant decisions on behalf of the principal. As a matter of common sense, an individual found to have abused, neglected, exploited, or abandoned a vulnerable adult generally should be barred from serving as the adult's agent through a power of attorney. Mr. Green's case presents no reason for departing from this general rule. The power of attorney was properly revoked.

Constitutional claims

For the first time on appeal, Mr. Green raises a variety of constitutional challenges to the VAPO. Mr. Green claims the law enforcement officers who served him with the petition for a VAPO engaged in an unconstitutional search; he argues he was denied substantive due process when the Department failed to treat him similar to a paid caregiver; and he contends he was the victim of an unconstitutional takings because he was forced out of his home. The current record[3] fails to demonstrate a manifest constitutional error warranting appellate review of Mr. Green's complaints. *See* RAP 2.5(a). We briefly address Mr. Green's constitutional claims as follows:

[3] Again, the record on review does not include the evidentiary portion of the original VAPO hearing. When it comes to his constitutional claims, most of the factual allegations contained in Mr. Green's brief are not accompanied by references to the record. *See* RAP 10.3(a)(6).

- Unconstitutional search. The record does not clarify the manner in which the alleged search took place, what sort of information may have been obtained, or how an allegedly illegal search pertains to the VAPO. Mr. Green does not cite any authority explaining why a protection order should be invalidated based on an allegedly illegal search.
- Due process. Mr. Green fails to show he was treated arbitrarily. The superior court determined Mr. Green was provided sufficient information to care for his mother, but he refused to take protective measures. It is not unfair or irrational to seek a VAPO in such circumstances.
- Unconstitutional taking. Nothing in the record indicates the State has invaded Mr. Green's home or appropriated his property for public use. This case raises the common scenario of what to do when the subject of a protection order and a protected party reside in a shared home. In such circumstances, the subject of the order may be required to move out. RCW 74.34.130(2). Doing so does not deprive either party of their financial interests in the property. There is no governmental taking.

CONCLUSION

The superior court's orders are affirmed. Mr. Green's request for attorney's fees is denied.

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.

Renee S. Townsley
Clerk/Administrator

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Division III

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March 4, 2021

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CASE # 368564
In the Matter of the Vulnerable Adult Petition for: Mary Jewel Green
SPOKANE COUNTY SUPERIOR COURT No. 192005429

Counsel:

Enclosed is a copy of an order denying the appellant's motion for reconsideration of this Court's February 9, 2021, opinion.

A party may seek discretionary review by the Washington Supreme Court of a Court of Appeals' decision. RAP 13.3(a). A party seeking discretionary review of the February 9, 2021, opinion must file a petition for review in this Court within 30 days after the 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

Renee S. Townsley
Clerk/Administrator

RST:btb
Attachment

c: Jerome Keith Green
PO Box 4996
Spokane, WA 99220-0996

FILED
MARCH 4, 2021
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

In the Matter of the Vulnerable Adult Petition for:	)	No. 36856-4-III
MARY JEWEL GREEN.	)	ORDER DENYING MOTION FOR RECONSIDERATION
THE DEPARTMENT OF SOCIAL AND HEALTH SERVICES,	)	
Respondent,	)	
v.	)	
JEROME KEITH GREEN,	)	
Appellant.	)	

THE COURT has considered appellant Jerome Keith Green's motion for reconsideration of our February 9, 2021, 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

ROBERT W. CRITCHLOW

March 10, 2021 - 2:59 PM

Filing Petition for Review

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Appellate Court Case Title:	In re: Mary J. Green v. Jerome Keith Green (368564)

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