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NO. 65101-3-I

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

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In re the Estate of James W. Haviland, Deceased,  
DONALD HAVILAND, ELIZABETH HAVILAND, and MARTHA  
CLAUSER,

Petitioners,

v.

MARY HAVILAND,

Respondent.

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DIVISION I

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BRIEF OF RESPONDENT

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Ladd B. Leavens, WSBA #11501  
William K. Rasmussen, WSBA #20029  
DAVIS WRIGHT TREMAINE LLP  
1201 Third Avenue, Suite 2200  
Seattle, WA 98101-3045  
(206) 622-3150 Phone  
(206) 757-7700 Fax

*Attorneys for Respondent Mary Haviland*

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## I. INTRODUCTION

Dr. James H. Haviland (“Jim”) and Mary Burden were married on August 30, 1997. Even before their marriage Jim made substantial provision for Mary at his death, through a new will, the purchase of a home for the two of them in Bremerton, and the creation of a Living Trust of which she was to be the beneficiary at this death. They lived together happily as husband and wife until Jim died on November 14, 2007.

On April 22, 2009, the Washington legislature enacted Laws of 2009, ch. 525, the abuser amendments to the slayer statute. The effective date of the new legislation was July 26, 2009. Three of Jim’s children by an earlier marriage now seek to apply the abuser amendments to divest Mary of her interest in Jim’s estate, and of her interest in the non-probate assets – joint accounts with right of survivorship, the Living Trust, and other assets – that vested in her immediately upon Jim’s death, 20 months before the effective date of the abuser amendments.

Under settled Washington law, the abuser amendments may not be applied retroactively, to Mary or anyone else. To do so would violate the U.S. and Washington constitutions. The trial court correctly refused to apply the abuser amendments to Mary Haviland. This Court should affirm that decision.

## **II. RESPONSE TO ASSIGNMENT OF ERROR**

The question presented in this case is whether the trial court erred in holding that the abuser amendments to the slayer statute do not apply retroactively in a case in which the alleged financial exploitation occurred, and the decedent died, *before* the effective date of the amendments.

In their Conclusion, Petitioners request that this Court “hold that financial exploitation occurring prior to July 26, 2009 [the effective date], may be the basis for disinheritance” under the abuser amendments. Opening Brief at 50. This case does not present that precise question. In this case, the alleged financial exploitation occurred, *and* the decedent died, before the effective date. As will be demonstrated below, the death of the decedent caused vesting of rights to occur, and provides additional grounds to sustain the trial court’s holding that the abuser amendments do not and cannot apply in this case.

## **III. STATEMENT OF THE CASE**

### **A. Facts of This Case.**

James W. Haviland was born on July 18, 1911. He was a well respected Seattle physician with a home on Mercer Island. FF 1 (CP 10). He and his first wife, Marion, had four children: James M. Haviland (b. 1944); Elizabeth B. Haviland (b. 1946); Donald S. Haviland (b. 1948); and Martha Haviland Clauser (b. 1951). FF 2 (CP 10-11).

Marion died in 1993. FF 6 (CP 11). Three years later, in 1996, Jim met Mary Burden at Providence Hospital, where he was recuperating from a leg injury. FF 10. She was working as a nurse's assistant, although she was not Jim's nurse. FF 10.<sup>1</sup> Mary was divorced from her first husband, Steven Burden, with whom she had had four children. FF 11 (CP 13).

Jim and Mary announced their engagement in the spring of 1997, and received marriage counseling from Pastor Richard Graves of Bible Baptist Church. FF 14 (CP 14). They were married on August 30, 1997, in a backyard ceremony in their Bremerton home before friends and members of both families. FF 18 (CP 15). Pastor Graves and Reverend Randall Gardner of Emanuel Episcopal Church on Mercer Island presided over the wedding. *Id.* Jim and Mary exchanged their vows in front of 75 to 100 guests. *Id.*

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<sup>1</sup> Petitioners assert that when Mary met Dr. Haviland, Dr. Haviland was a "vulnerable adult" under the vulnerable adults statute, citing the current definition in RCW 74.34.020(16)(d). Opening Brief at 4. While the issue is not relevant to this appeal, Petitioners are incorrect. Under the current statute, to which Petitioners refer, a "vulnerable adult" includes a person admitted to any "facility." *Id.* RCW 74.34.020(5) defines a "facility" to mean a facility licensed by the Department of Social and Health Services. RCW 74.34.020(5). There is no evidence in the record that Providence Hospital, where Dr. Haviland was recovering in 1996 (*see* FF 10; CP 13), was or was not licensed by the Department of Social and Health Services. In general hospitals (unlike, for example, adult family homes, *see* ch. 70.128 RCW) are licensed by the Department of Health, not DSHS. *See* RCW 70.41.010, *et seq.* In addition, the vulnerable adults statute in effect in 1996 defined "vulnerable adult" differently, including in the definition persons admitted to a long term care facility or receiving services from certain home care agencies, but not mentioning hospitals. Laws of 1995, 1st Spec. Sess., ch. 18, § 84. The trial court in fact refused to make any finding that Dr. Haviland was a "vulnerable adult" at any time before he died, because the issue was not litigated. *See* pp. 9-10 *infra*.

Mary had a prior criminal history, of which Jim was well aware before their marriage. FF 19 (CP 15). In 1993-94, she served 18 months for shoplifting-related convictions. FF 8 (CP 12). Mary received a downward departure from the standard sentencing range because the court found that there were mitigating circumstances. In 1998, Mary received a Certificate of Rehabilitation. She later went on to earn a Bachelor's degree with high honors and a Master's degree in the science of nursing. FF 8, 9 (CP 12-13). At the time of the trial of the will contest she was employed as a registered nurse at Harrison Medical Center in Bremerton, as well as an adjunct faculty/clinical director at the Seattle University College of Nursing. *Id.*

After their wedding, Jim and Mary lived together continuously as husband and wife for more than ten years, until Jim's death. FF 20 (CP 15). They lived in their Bremerton home from 1997 to 1998 with Mary's four children, while those children continued to attend school in the area. *Id.* From 1998-2006, Jim and Mary lived in their Mercer Island home. In April 2006, they moved back to their Bremerton home, where Jim died on November 14, 2007. FF 21 (CP 15).

During their ten year marriage, Mary tended to Jim's emotional and physical needs. Jim had arthritis (VRP 1830)<sup>2</sup> and peripheral neuropathy (VRP 1292), but Mary ensured that his physical limitations did not prevent him from participating in activities and maintaining relationships that he enjoyed. She took him to church, choir practice (VRP 625), board meetings of the Northwest Kidney Foundation and the Seattle Historical Society (VRP 1822), and friends' parties (VRP 1725, 1744). She accompanied him on trips to China and Alaska. VRP 1796-97. They regularly attended the opera and theatre. VRP 1821. She organized large birthday parties for friends and family on his 90th and 95th birthday. VRP 1801. When his physical needs became more pronounced, she quit her job to care for him full-time. VRP 1830-33.

In 1985, Jim commenced what would become a 21-year attorney-client relationship with Alan Kane, an attorney at what is now K&L Gates LLP. FF 22 (CP 15). From well before his marriage to Mary in August 1997 through his death, Jim executed four wills and a new living trust – all prepared by Mr. Kane – as follows:

The Living Trust. On April 28, 1997, Jim created the James W. Haviland Living Trust, for his benefit during his lifetime, and, upon his

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<sup>2</sup> References to the "VRP" are to the verbatim report of proceeds that is currently part of the record in the appeal of the trial court's decision in the will contest in this same probate, Court of Appeals No. 64303-7-I. Respondent has filed a motion asking that that report of proceedings be made part of the record in this case as well.

death, to provide up to \$500,000 to Mary for her living and educational expenses. FF 13 (CP 13-14); Ex. 13.<sup>3</sup>

The 1997 Will. On August 29, 1997, on the eve of his marriage to Mary, Jim executed a new will, which gave Jim's personal effects to Mary and devised to her the Bremerton residence, which he had purchased, and real property that he owned on Shaw Island. FF 17 (CP 14-15); Ex. 5.

The 1998 Will. On January 8, 1998, Jim executed a new will. FF 23 (CP 15-16); Ex. 4. He did not change the principal dispositive provisions of the 1997 Will; rather, the changes acknowledged the intervening marriage of Jim and Mary, and included provisions for contingencies that did not arise. *Id.*; Ex. 4. The 1998 Will continued to make a specific bequest of Jim's personal effects, as well as the Bremerton home and Shaw Island property, to Mary. *Id.*

Amendment to Living Trust. On April 30, 1998, Jim amended the Living Trust, removing the \$500,000 cap on the distribution to Mary. FF 25 (CP 16).

The 2002 Will. On August 13, 2002, after six years of marriage, Jim executed a new will. FF 40 (CP 19); Ex. 2. The 2002 Will continued to make specific bequests of personal effects, the Bremerton home, and

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<sup>3</sup> Exhibit references are to exhibits admitted into evidence in the trial of the will contest. Respondent has filed a Supplemental Designation of Clerk's Papers, designating these exhibits as part of the record in this appeal. They are already part of the record in the will contest appeal, No. 64303-7-I.

the Shaw Island property to Mary, but added specific cash bequests totaling \$105,000 to eleven named individuals and charities. *Id.* The residue was to be distributed pursuant to the Marion B. Haviland Credit Trust (the “Credit Trust”) of the 1990 Trust Agreement, as amended. *Id.* The beneficiaries of the Credit Trust were Jim’s children by his first marriage and certain other issue, who hold a lifetime income interest, with the remainder to be distributed at their deaths to certain individuals and charities. Ex. 22 (Article X – decedent’s share).

The 2006 Will. On January 19, 2006, after eight years of marriage, Jim executed his last will (the “2006 Will”); Ex. 1. The 2006 Will preserved the gifts to Mary of Jim’s personal effects, the Bremerton home and the Shaw Island property. *Id.* The will made specific bequests totaling \$50,000 to eight named charities; gave Mary the personal property in their Mercer Island home; and left the residue of the estate to the Living Trust, of which Mary was the remainder beneficiary. *Id.*

Jim died at home on November 14, 2007, nearly 22 months after he executed his last will. FF 1. His will was admitted to probate on December 19, 2007.

Under Jim’s 2006 Will, Mary would inherit Jim’s interest in their Bremerton residence, and the Shaw Island property. Were Jim to ultimately be held to have died without a will, she would inherit all of

Jim's community property, and one half of his separate property, under RCW 11.04.015. Irrespective of whether Jim died testate, on Jim's death Mary became the sole beneficiary of the Living Trust that Jim had created during his life. (The value of the assets in the Living Trust at his death was about one million dollars. VRP 1895-96; Ex. 12, 13.) She was also joint owner with right of survivorship of their joint checking account (VRP 1896-97), and beneficiary or joint owner with right of survivorship of other accounts with Jim, which vested in her on Jim's death (VRP 1914-23).

On April 17, 2008, the Petitioners commenced a will contest, alleging that Jim lacked testamentary capacity and that the 2006 Will was the product of undue influence by Mary. Petitioners filed an amended petition on May 20, 2008. (CP 62-72) The amended petition did not mention or assert claims under the vulnerable adults statute, RCW 74.34.005, *et seq.*, or any prospective amendments to the slayer statute, RCW 11.84.010, *et seq.*

The will contest was tried to the Honorable John Erlick over ten days, beginning on April 7, 2009, and concluding on April 22, 2009. Neither the vulnerable adults statute nor the then pending, proposed amendments to the slayer statute were mentioned during trial. The trial court ultimately found that Petitioners had failed to establish that Jim

lacked testamentary capacity when he signed the 2006 will, CL 4-5 (CP 37-38) , but found that the 2006 Will “was the product of undue influence by Mary Haviland.” CL 12 (CP 39).

The trial judge advised the parties on April 22, 2009, at the close of the trial proceedings, that he expected he would need 60 days to decide the matter. VRP 2343-44. On that schedule, the court would have issued a decision on June 21, 2009, five weeks before the July 26, 2009, effective date of the abuser amendments to the slayer statute. The court in fact issued its proposed order on July 30, 2009, *see* CP 105, five days after the effective date of the abuser amendments.

The trial court invited comment on its findings. Both sides submitted proposed modifications to the court’s proposed findings and conclusions. Petitioners in their proposed modifications requested a finding that Dr. Haviland had been a vulnerable adult within the meaning of RCW 74.34.020. CP 59-60, 106. The trial court entered the Court’s Findings of Fact and Conclusions of Law on September 14, 2009.<sup>4</sup> The court made no findings under the vulnerable adults statute. *See* CP 10-42, 54.

On November 20, 2009, Richard Furman, whom the trial court had appointed as successor personal representative of Jim’s estate, filed a

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<sup>4</sup> That decision is on appeal to this court, in appellate cause No. 64303-7.

Petition for Determination as to Sufficiency of the Record to Apply Slayer's Statute. CP 1-42. Mary filed a memorandum and a declaration of counsel opposing the petition. CP 45-106. Petitioners filed a short joinder. CP 43-44. Mr. Furman filed a reply. CP 107-12. The Petitioners also then weighed in with a reply to Mary's opposition. CP 113-27.

Judge Erlick heard argument on the petition on January 15, 2010. The day before the hearing, Petitioners submitted (but did not file) a lengthy proposed order, in which they proposed new, additional findings in addition to those set forth in the findings of fact and conclusions of law entered in the will contest. *See* CP 210-11, 214-19. Mary Haviland filed a motion to strike the proposed order. CP 210-13. She argued that the lengthy proposed findings were, in effect, additional briefing, and that they sought new relief – the entry of new findings and conclusions that were statutory predicates to *any* application of the abuser amendments – that Mr. Furman had not sought in his original petition. CP 211.

The trial court issued its letter opinion (CP 136-39) on January 27, 2010. The court found that the precipitating event for the application of the abuser amendments was financial exploitation, and that the proposed application was therefore retroactive, because any financial exploitation would have occurred *before* Dr. Haviland died in November 2007, and thus before the effective date of the abuser amendments. CP 137-38. The

court concluded that the legislature did not express an intent that the amendments should apply retroactively; and that because the amendments create a new substantive cause of action, are punitive, and would affect the defendant's substantive property interests, the court would not apply the amendments retroactively. CP 138-39. The trial court did not rule on the motion to strike the new proposed findings and conclusions, perhaps deeming the issue to be moot. This appeal followed.

**B. The Abuser Amendments.**

The abuser amendments prevent a person who financially exploits a vulnerable adult from acquiring property or receiving a benefit as a consequence of the death of the vulnerable adult. The amendments reach far beyond the abuser's interest in the decedent's estate. The amendments provide, *inter alia*, that the abuser may not inherit property from the decedent under a will, *see* RCW 11.84.040, or under the laws of descent and distribution, RCW 11.84.030; but also provide that an abuser may not take a beneficiary's interest in a state retirement system benefit, RCW 11.84.025; may not take an interest previously owned by the decedent in a joint account with right of survivorship, RCW 11.84.050; may not take an interest in a trust if the trust provides that the person is to receive the interest on the death of the decedent, RCW 11.84.080; and

may not, though properly designated as beneficiary, take proceeds of an insurance policy on the life of the decedent, RCW 11.84.100.

#### **IV. ARGUMENT**

##### **A. Summary of Argument.**

The abuser amendments impose a penalty on abusers unrelated to the amount of actual damages, if any, that the decedent incurred as a result of financial exploitation while the decedent lived. The amendments, when applied in the context of estates and nonprobate assets of decedents who died before the effective date of the amendments, deprive the alleged abusers of vested rights in property.

The application of the amendments in the current context would be retroactive, not prospective. The legislature did not express an intent that the amendments be applied retroactively. The amendments are not remedial or curative. They would impose a penalty, create new causes of action, and deprive persons of vested rights, and may not be applied retroactively under Washington law. To apply them retroactively would also deprive the alleged abusers of due process and violate the provisions of the U.S. and Washington constitutions that prohibit the enactment of ex post facto laws.

**B. Standard of Review.**

Respondent agrees that the standard of review on the issue decided by the trial court's letter opinion is *de novo*.

**C. General Framework.**

Under Washington law, where the legislature does not expressly provide that new legislation is to be applied retroactively, it is presumed that the legislature intended the new legislation to operate prospectively only. *State v. T.K.*, 139 Wn.2d 320, 329, 987 P.2d 63 (1999) (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 264-66, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994)); *In re Estate of Burns*, 131 Wn.2d 104, 110, 928 P.2d 1094 (1997); *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 30, 864 P.2d 921 (1993); *Miebach v. Colasurdo*, 102 Wn.2d 170, 180-81, 685 P.2d 1074 (1984); *In re Dissolution of Cascade Fixture Co.*, 8 Wn.2d 263, 272, 111 P.2d 991 (1941)). Retroactive application is disfavored because of the unfairness of creating new obligations with respect to past conduct. *Burns*, 131 Wn.2d at 110, and cases cited therein. "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly . . . ." *Landgraf v. USI Film Products et al.*, 511 U.S. 244, 265, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994).

The presumption of prospective application can be overcome if the amendment is 'curative,' *see, e.g., In re F.D. Processing, Inc.*, 119 Wn.2d 452, 461-62, 832 P.2d 1303 (1992); *Johnson v. Continental West, Inc.*, 99 Wn.2d 555, 559-62, 663 P.2d 482 (1983); *Marine Power & Equipment Co. v. Washington Human Rights Commission*, 39 Wn. App. 609, 615-16, 694 P.2d 697 (1985), or if the statute is 'remedial,' *see Densley v. Dep't of Retirement Systems*, 162 Wn.2d 210, 223, 173 P.3d 885, 891 (2007); *T.K.*, 139 Wn.2d at 332; *Marine Power*, 39 Wn. App. at 617-18.

A remedial statute is one that relates to practice, procedures and remedies. *In re F.D. Processing*, 119 Wn.2d at 462-63; *Miebach v. Colasurdo*, 102 Wn.2d at 180-81; *Marine Power*, 39 Wn. App. 617-18. A statute is not remedial and may not be applied retroactively if it affects a substantive or vested right, creates a new cause of action, or imposes a penalty. *Densley*, 162 Wn.2d at 223-24; *Johnston v. Beneficial Management Corp.*, 85 Wn.2d 637, 538 P.2d 510 (1975).

**D. The Application of the Statute to Mary Haviland Would Not Be a Prospective Application.**

Petitioners argue that the proposed application of the abuser amendments to take away Mary's inheritance and property rights is a

prospective, not a retroactive, application of the statute.<sup>5</sup> Opening Brief at 17-26. Under Washington law, the application of a statute is retroactive if the precipitating event that triggers the applicability of the statute occurs *before* the effective date of the statute. *See, e.g., In re Burns*, 131 Wn.2d at 110-11; *State v. Belgarde*, 119 Wn.2d 711, 722, 837 P.2d 599 (1992); *Aetna Life Ins. Co. v. Washington Life & Disab. Ins. Guar. Ass'n*, 83 Wn.2d 523, 535, 520 P.2d 162 (1974) (en banc); *Heidgerken v. DNR*, 99 Wn. App. 380, 993 P.2d 934 (2000). The precipitating event is the conduct that the statute regulates. *See In re Burns*, 131 Wn.2d at 112. In *Burns*, the issue was whether statutes governing the state's recovery of Medicaid payments from decedents' estates operated retroactively. Mrs. Burns had received Medicaid payments from 1986 through her death in 1993. In 1987, the legislature enacted former RCW 43.20B.140, authorizing the state to recover such payments from the recipient's estate. Mrs. Wheeler had received Medicaid payments from 1991 until her death in August 1993. Effective July 1993, the legislature enacted legislation that drastically reduced an estate's exemption of assets subject to repayment, and thus increased the estate's repayment obligation. The question in *Burns* was whether the *receipt* of the Medicaid payments, or

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<sup>5</sup> Respondent emphatically disagrees with the proposition that she financially exploited her husband. The question whether the abuser amendments may be applied retroactively, however, is not affected by whether she did or did not engage in financial exploitation.

alternatively the *death* of the recipients, was the precipitating event for the application of the statutes. The court held that the statutory provisions regulated the collection of a debt by characterizing the benefits received as a contingent debt, and that the precipitating event was therefore the *receipt* of payments. *Burns*, 131 Wn.2d at 115. The statute did not regulate the creation of the estates, and thus the fact that the decedents died and that their estates were created after the effective dates of the statutes could not increase their liability for repayment of benefits received *before the effective dates of the statutes*. The court concluded that the statutes “cannot be applied retroactively to impose on Medicaid recipients new obligations with respect to past transactions . . . .” *Id.* at 120. The court also observed that persons who are aware of statutory consequences can govern their conduct accordingly, and that there would be “unfairness [in] applying the challenged provisions to preenactment benefits.”<sup>6</sup>

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<sup>6</sup> By contrast, the court in *Heidgerken, supra*, held that a statute that increased the penalty for a violation of reforestation regulations was applied prospectively when applied to a failure to comply with a DNR reforestation order, even though the original failure occurred prior to the enactment of the statute. The court held that the precipitating event under the statute was Heidgerken’s violation of the renewed DNR order, and observed that the application was not unfair to him because he had had an opportunity to comply with the reforestation regulations *after* the statute was amended. *Heidgerken*, 99 Wn. App at 388-89. See also *State v. Varga*, 151 Wn.2d 179, 196-97, 86 P.3d 139 (2004) (statute that increased criminal penalty after a third conviction was applied prospectively, and fairly, where the statute was amended after Varga had two convictions but before he engaged in the conduct that led to his third conviction; court noted that Varga had the opportunity to avoid any consequences under the statute by not committing a subsequent crime).

“To determine which activity the challenged provisions regulate,” courts “turn to the plain language of the statute.” *In re Burns*, 131 Wn.2d at 112. Here the precipitating event – the conduct that the statute is intended to regulate – is plainly the financial exploitation of a vulnerable adult. The statute imposes new consequences for past conduct, and is thus retroactive. *See, e.g., In re Burns*, 131 Wn.2d at 110 (citing *Landgraf v. U.S.I. Film Prods., supra*, for the proposition that “a statute has genuinely retroactive effect if it . . . increases liability for past conduct . . .”). The definitions section, RCW 11.84.010, defines an “abuser” to be a person who participates in the financial exploitation of a vulnerable adult, and a “decedent” to be a deceased person who was the victim of financial exploitation. RCW 11.84.020, the core provision of the abuser amendments, then provides:

No . . . abuser shall in any way acquire any property or receive any benefit as a result of the death of the decedent, but such property shall pass as provided in the sections following.

This provision represents a dramatic departure from previous law, under which the rights of a person to inherit assets from another (subject to the terms of the slayer statute) were governed by the terms of the decedent’s will or by RCW 11.04.015 (the law of descent and distribution); and under which the rights of a person to receive other, nonprobate assets on the

death of a decedent were governed by, for example, laws governing joint ownership of accounts, the terms of retirement account or insurance policy beneficiary designations, and the manner of exercise of powers of appointment. One by one, the abuser amendments change all of those laws for a person found to be an “abuser.” *See, e.g.*, RCW 11.84.030 (overriding the laws of descent and distribution and the rights of a surviving spouse under a community property agreement, as to abusers); RCW 11.84.040 (overriding devises and legacies to an abuser under a will); RCW 11.84.090 (overriding the effect of the decedent’s exercise of a power of appointment in favor of an abuser); RCW 11.84.100 (overriding an insurance policy beneficiary designation naming the abuser as the beneficiary). It could not be plainer that the conduct the statute regulates, and punishes, is financial abuse.

In this case, the conduct that allegedly constituted financial exploitation necessarily occurred before November 14, 2007, the date of Dr. Haviland’s death. The effective date of the amendments was July 26, 2009, 20 months later. Applying the amendments to any abuser where the conduct – and the death of the decedent – occurred 20 months before the effective date plainly increases liability for past conduct. The precipitating event is the financial exploitation. The persons to whom the

statute would be applied would have had no notice of the statute and no opportunity to avoid its application by altering their conduct.

Petitioners attempt to escape this obvious result by arguing that the precipitating event – the conduct that the statute is intended to regulate – is not financial abuse, but rather a petition for an order determining that the statute applies. In other words, they argue in this case that the statute is intended to regulate the Personal Representative’s Petition for Determination as to Sufficiency of Record to Apply Slayer’s Statute, which Mr. Furman filed on November 20, 2009, four months after the effective date of the abuser amendments.

Petitioners’ argument finds no support in the language of the abuser amendments. The amendments do not even mention a petition or complaint. Rather, the amendments, where they refer at all to procedural devices, use much more general terms. RCW 11.84.130, for example, provides that a record of a conviction for certain crimes is admissible in a “civil proceeding arising under this chapter,” but leaves open what kind of proceeding that might be. RCW 11.84.160, which requires “clear, cogent, and convincing evidence” of willful financial exploitation as a condition of the application of the statute, refers only to “any claim or proceeding under this chapter.” In that portion of the abuser amendments that adds a line to TEDRA, RCW 11.96A.030, the amendment provides that an

“action or proceeding” under the abuser amendments is a “matter” over which a court has jurisdiction under TEDRA, but again makes no reference to a petition or to the type of proceeding that is necessary to invoke the statute.

Petitioners argue (Opening Brief at 21) that unless there is a petition in probate to disinherit pursuant to Ch. 11.84 RCW, the statute has no operational effect, and therefore that the purpose of the statute must be to regulate the petition, not the abuse. One could argue with equal force that absent an indictment, a law making it a felony to discharge oil into Puget Sound would have no operational effect, and therefore the purpose of the statute was to regulate indictments, not dumping oil. Moreover, nothing in the amendments requires that before a party is disinherited under the statute, someone must file a petition. Portions of the abuser amendments seem plainly self-executing. The principal, overarching substantive provision of the abuser amendments merely states that “no . . . abuser shall in any way acquire any property or receive any benefit as a result of the death of a decedent . . . .” RCW 11.84.020. There is no reference to the filing of a petition as a condition of the application of the statute. RCW 11.84.150 provides that a final judgment of conviction for theft, fraud, or extortion is *conclusive* for purposes of determining whether

a person is an abuser, and it makes no reference to the procedural mechanism by which the statute is invoked.<sup>7</sup>

Petitioners argue that the abuser amendments do not regulate financial exploitation any more than the slayer statute regulates homicide. The slayer statute surely does regulate homicide to a significant degree, since one of its purposes must be to act as an additional disincentive to persons contemplating homicide in order, for example, to collect insurance proceeds. But there is also a fundamental difference between the slayer statute and the abuser amendments. As pointed out in *Estate of Tyler*, 140 Wash. 679, 684-5, 250 P.2d 456 (1926), the person who kills in order to inherit would, absent the statute, directly benefit through the inheritance from his unlawful actions, would prevent the decedent from altering his estate plan in the future, and would ensure that he outlived the decedent so as to inherit. There is no such nexus between financial exploitation and inheritance.

Even if the court were to conclude that some portions of the abuser amendments regulate the procedure by which an abuser determination

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<sup>7</sup> Petitioners themselves occasionally stray from their theory that the abuser amendments regulate petitions rather than financial exploitation. Petitioners describe the abuser amendments as “the law that increased protections for vulnerable adults.” Opening Brief at 3. Likewise, when the Petitioners argue (Opening Brief at 39-43) that the state has a legitimate basis to exercise its “police power” to “protect vulnerable groups . . . from abuse . . .,” *id.* at 42, Petitioners are implicitly conceding that the purpose of the law is to regulate financial exploitation, not petitions.

might be made, it would not follow that the application of the abuser amendments in this case was prospective only. The application of the procedural sections might well be prospective, to the extent that they regulate proceedings that occur after the effective date of the amendments; but the operation of the substantive portions of the law would remain retroactive.

Petitioners' reliance upon *Rivard v. State*, 168 Wn.2d 775, 231 P.3d 186 (2010) is misplaced. *Rivard* had petitioned the superior court in 2006 for the restoration of his right to carry a firearm. His right to carry depended upon the effect of a 1997 conviction for vehicular homicide arising out of an incident in 1993. The relevant statutes in 1993-97 had not prohibited a person convicted of vehicular homicide from carrying a firearm. The statutes were amended in 2001, however, so that they arguably prohibited Rivard from carrying a gun because of his 1997 conviction. The court observed that the firearms possession statute was "a regulatory one," *id.* at 780, and held that the law to be applied in determining whether Rivard could carry a firearm in 2006 was the law in effect in 2006, not the law in effect in 1993, when he committed vehicular homicide, citing *State v. Schmidt*, 143 Wn.2d 658, 673-74, 23 P.3d 462 (2001). The Supreme Court's discussion of the issue in *Schmidt* was similarly sparse, but relied on *U.S. v. Huss*, 7 F.3d 1444 (9th Cir. 1993),

overruled in part on other grounds by *U.S. v. Sanchez-Rodriguez*, 161 F.3d 556 (9th Cir. 1998). *Schmidt*, 143 Wn.2d at 673-74 & n.61. The court in *Huss* concluded, on facts similar to those in *Schmidt*, that the statute constituted a bona fide regulation of present conduct – the carrying of guns – that the legislature had the power to regulate, and that the statute was not punishment for past conduct, even though past conduct played a part in determining who could currently carry a gun. *Huss*, 7 F.3d at 1447-48. The concurring opinion in *Schmidt* likewise clarifies that statutes that regulate the possession of firearms “*punish present conduct only* and, thus, the statutes are . . . not retroactive” and do not punish for past conduct (i.e., for the earlier, predicate convictions that, under the current statute, disqualify a person from carrying a gun). *Schmidt*, 143 Wn.2d at 678-79. The regulation of current conduct (particularly the regulation of who may carry a gun) “is a legitimate exercise of police power rationally related to governmental interest in securing public safety . . .,” *id.* at 679, and is therefore not an additional punishment for past conduct (i.e., the predicate conviction) even if it imposes an additional disability on a convict as a consequence of a retrospective look back at the convict’s previous conviction.

One cannot rationally argue that the abuser amendments are an exercise of a legitimate police power to regulate the current conduct of

beneficiaries of estates. The abuser amendments have a current impact on beneficiaries of a decedent's estate, but the amendments do not purport to regulate the current conduct of those beneficiaries in the exercise of the state's police power. The amendments only impose consequences for past conduct. The Petitioners' reliance on *Rivard* is therefore misplaced.

**E. The Abuser Amendments May Not Be Applied Retroactively.**

It is clear that the application of the adviser amendments would be retroactive. Retroactive application of a statute is disfavored. *In re Burns*, 131 Wn.2d at 110; *In re T.K.*, 139 Wn.2d at 329; *Heidgerken*, 99 Wn. App at 387. Under Washington law, however, a statute may be applied retroactively if the Legislature expressly or by implication provides that the statute is to be applied retroactively, or it is merely curative, or it is remedial; provided, however, that a statute may not be applied retroactively if it will affect substantive or vested right, create a new cause of action, or punish conduct that occurred before the effective date of the statute. *See* § IV.C. *supra*.

**1. The Legislature Did Not Expressly Provide That The Abuser Amendments Are to Be Applied Retroactively.**

The abuser amendments are silent as to on whether they are to be applied retroactively. The amendments say nothing specific about the date

of the actions or conduct that the legislature intended would trigger the application of the statute.

Petitioners argue that certain statutory language suggests a legislative intent that the statute be applied retroactively. For example, Petitioners argue that the definition of a “decedent” in RCW 11.84.010(2)(b) – “[a]ny deceased person who, at any time during life in which he or she was a vulnerable adult, was the victim of financial exploitation by an abuser” – indicates legislative desire for retroactive application. The phrase “at any time” however, means only that the statute can apply to financial exploitation that occurred any time before death (but *after* the effective date of the statute). It does not mean that the statute is to be triggered by conduct occurring years or decades before the enactment of the statute.

Other language in the statute suggests, contrary to Petitioners’ contention, that the statute is to be applied prospectively only. One obvious example is the definition of an abuser: “. . . any person who *participates* . . . in the willful and unlawful financial exploitation of a vulnerable adult.” RCW 11.84.010(1) (emphasis added). If the legislature had intended that the statute be applied retroactively, it would, at a minimum, logically have defined an abuser to be “any person who *has ever participated at any time* in the willful and unlawful exploitation . . . .”

Petitioners argue that the use in RCW 11.84.130 of the phrase “[a]ny record of conviction [without, as the Petitioners put it, limitation as to when the conviction occurred]. . . shall be admissible against a claimant of property in *any* civil proceeding” is evidence of a legislative desire for retroactive application. Opening Brief at 27. That the legislature might have intended to freight the term “any” with such meaning is belied by the fact that, in a similar section, RCW 11.84.150, the legislature provides only that: “A final judgment of conviction [not “*any* final judgment of conviction”] for conduct constituting financial exploitation . . . is conclusive . . . . [emphasis added]” The use of the terms “a” or “any” in these two similar paragraphs seems to be happenstance. If the legislature had intended expressly to make the amendments retroactive, it surely would have done so more directly than by the occasional, inconsistent use of the word “any.”

The abuser amendments also do not present a case in which retroactive application is necessary to avoid unfairness, as in *Johnson v. Continental West, Inc.*, 99 Wn.2d 555, 663 P.2d 482 (1983), upon which Petitioners rely. In *Johnson*, the court considered the retroactivity of 1982 legislation (“SBFM 4691”) that made technical corrections to the Tort Reform Act of 1981. The Tort Reform Act had substituted a statutory right of contribution among tortfeasors for the common law right of

indemnity, which the Tort Reform Act at the same time had abolished. Because of a quirk in the statutory scheme, however, the Tort Reform Act inadvertently left the alleged tortfeasor Johnson with *neither* a right of contribution nor a right of indemnity. SBFM 4691 corrected that mistake, but contained no language expressly making the technical corrections retroactive to the previous year. The court nonetheless held that the technical corrections should apply retroactively, so as not to single out a few for treatment at odds with the statutory purpose of the Tort Reform Act to replace contribution with indemnity. The court relied on the canon of statutory construction that “[i]f the amendment was enacted soon after controversies arose as to the interpretation of the original act, it is logical to regard the amendment as a legislative interpretation of the original act.” 1A C. Sands, *Statutory Construction* § 22.31 (4th ed. 1972). *Johnson v. Continental West, Inc.* is an example of a case in which an amendment to a recent statute was held to be retroactive because it was “curative” of errors in the original legislation. Here, in contrast, there is no argument that the abuser amendments were “curative” of any errors or oversights in recent related legislation.

## **2. The Abuser Amendments Are Not Remedial.**

A statute may be deemed to apply retroactively if it is “remedial in nature” and if retroactive application would further its remedial purpose.

*Bayless v. Community College Dist. No. XIX*, 84 Wn. App. 309, 927 P.2d 254 (1996) (citing *Macumber v. Shafer*, 96 Wn.2d 568, 570, 637 P.2d 645 (1981)). A statute is remedial if it relates to practice, procedure or remedies, and does not affect a substantive or vested right. *Id.*, quoting *In re F.D. Processing, Inc.*, 119 Wn.2d at 462-63 (quoting *In re Mota*, 114 Wn.2d 465, 471, 788 P.2d 538 (1990)). Remedial statutes “afford a remedy, or better or forward remedies already existing for the enforcement of rights and the redress of injuries.” *Haddenham v. State*, 87 Wn.2d 145, 148, 550 P.2d 9 (1976).

The abuser amendments are not remedial. They do not in any sense afford a “remedy” for financial exploitation, but rather punish the abuser, and confer benefits on others that are unrelated to the financial abuse. Moreover, the abuser amendments plainly create new substantive rights, and impair vested rights, and are also not remedial for that reason.

Prior to the adoption of the abuser amendments, the law already provided a complete array of remedies for financial exploitation. Under the vulnerable adults statute, RCW 74.34.005, *et seq.*, any interested person, and the Department of Social and Health Services, could seek relief on behalf of the vulnerable adult under RCW 74.34.110-.140. *See* RCW 74.34.110(1); RCW 74.34.015. The court, in an order for protection under RCW 74.34.130, could restrain a person from committing acts of

financial exploitation, could require a person to account for the vulnerable adult's income and other resources, and could restrain a person from transferring his or her property for 90 days. Violation of the order for protection is a criminal offense. *See* RCW 74.34.145; RCW 26.50.110. In addition, the financially exploited person, or some person acting on his or her behalf, as attorney-in-fact, guardian, or successor had complete common law remedies for damages, and for recovery of the proceeds of financial exploitation, under theories including fraud, conversion, unjust enrichment, and constructive trust.

The abuser amendments therefore did not in any sense fill a gap in the existing *remedial* scheme. *Compare Marine Power*, 39 Wn. App. At 617-18 (legislation giving the Human Rights Commission the power to award victims of discrimination monetary damages for humiliation and suffering affords victims of discrimination a supplemental remedy); *Haddenham v. State*, 87 Wn.2d 145, 147-48, 550 P.2d 9 (1976) (Crime Victims Compensation Act, which provided for crime victim remedies against the state, was remedial and could be applied retroactively). The abuser amendments are punitive. Under the abuser amendments, an abuser is presumptively disinherited and loses his rights as, inter alia, trust beneficiary, as surviving account holder of JTWROS accounts, and under insurance and retirement account beneficiary designations, *irrespective* of

the dollar amount of the financial exploitation. An abuser's financial exploitation may have originally caused a loss to the decedent, while alive, in the amount of \$10,000; and the abuser may have subsequently repaid the decedent and made him whole in every respect. Under the amendments the abuser will still forfeit all of his interest in the estate and the nonprobate assets, even if those assets are worth millions of dollars.<sup>8</sup>

This case is therefore on all fours with *Johnston v. Beneficial Management Corp. of America*, 85 Wn.2d 637, 538 P.2d 510 (1975). In *Johnston*, the Supreme Court considered whether the 1970 amendment to the Consumer Protection Act should be applied retroactively. Prior to 1970, the CPA made no provision for private suits for damages for violations of RCW 19.86.020. The court held that the 1970 amendments would *not* apply retroactively. The court acknowledged that in one sense, the amendments only created a new remedy for actions that were already unlawful under RCW 19.86.020, but also observed that the amendments also authorized an award of treble damages, thus not only creating a new

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<sup>8</sup> The impact of the amendments is capricious as well. Although the exploitation may have diminished the estate of the decedent, the amendments do not necessarily redirect the abuser's share to the decedent's estate. For example, a life insurance policy of which the abuser is the primary beneficiary goes to the secondary beneficiary, *see* RCW 11.84.100(1), thus giving the secondary beneficiary both a cause of action against the abuser that the secondary beneficiary did not have before the amendments, and a windfall payment of insurance proceeds. The amendments also treat different abusers differently, based purely on the fortuity of whether and how much an abuser might benefit upon the death of the decedent. One abuser may be unaffected by the statute; another abuser, a spouse, for example, may lose a very substantial benefit, again unrelated to the amount or nature of the triggering financial exploitation.

cause of action but also imposing a penalty. *Johnston*, 85 Wn.2d at 640. See also *Adcox v. Children's Orthopedic Hosp. and Medical Center*, 123 Wn.2d 15, 30, 864 P.2d 921 (1993) (statutes that impose penalties are to be applied prospectively only).

It is no answer to say that the court has the discretion under RCW 11.84.170 to “allow an abuser to acquire or receive an interest in property or any other benefit described in this chapter in any manner the court deems equitable.” Nothing in the amendments requires the court to invoke its equitable powers to ameliorate the harsh punitive effects; and the Petitioners here certainly did not propose that the court do so. The Supreme Court in *Johnston v. Beneficial Management Corp. of America*, *supra*, rejected the same argument, holding that the fact that the treble damages provision of the Consumer Protection Act amendments were discretionary did not change their punitive character and make them merely remedial. *Johnston, supra*, 85 Wn.2d at 642.<sup>9</sup>

**3. The Abuser Amendments May Not Be Applied Retroactively Because to Do So Would Impair Vested Rights.**

Retroactive application of the abuser amendments to Mary Haviland would impair her vested rights. Dr. Haviland died on

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<sup>9</sup> Petitioners cite House Bill Report SHB 1103 for the proposition that the abuser amendments are remedial and not punitive. Opening Brief at 15, 32. The report states on its face that the “analysis is not a part of the legislation nor does it constitute a statement of legislative intent.” Opening Brief, App. A-15.

November 14, 2007, 20 months before the effective date of the abuser amendments. In his 2006 Will, and in all previous wills executed after 1996, Mary Haviland was a principal beneficiary. Under the 2002 Will, Mary would inherit Dr. Haviland's interest in their Bremerton residence, and Dr. Haviland's Shaw Island property, which was his separate property. In addition, at the time of his death, Mary became the current beneficiary of Dr. Haviland's Living Trust, and was (and for a long time had been) the joint tenant with survivorship rights on a number of accounts. If no will were admitted to probate, then Mary would inherit all of their respective community property and one-half of Dr. Haviland's separate property pursuant to RCW 11.04.015(1). In the unlikely circumstance that a will that predated Jim's 1997 Will were admitted to probate, then Mary would be entitled to her intestate share as an omitted spouse, subject to the conditions of RCW 11.12.095. At the time of this appeal, the 2006 Will has been declared invalid; and no party has offered any other will for probate. If this circumstance continues, then Mary would be entitled to her intestate share, which would include both real property and personal property.

The rights of a beneficiary under a will or under the laws of descent and distribution vest as of the date of the decedent's death. RCW 11.04.250 provides as follows:

**When real estate vests – Rights of Heirs.**

When a person dies seized of lands, tenements or hereditaments, . . . his title shall vest immediately in his heirs or devisees, subject to his debts, family allowance, expenses of administration and any other charges for which such real estate is liable under existing laws. No administration of the estate of such decedent, and no decree of distribution or other finding or order of any court shall be necessary in any case to vest such title in the heirs or devisees, but the same shall vest in the heirs or devisees instantly upon the death of such decedent: PROVIDED, That no person shall be deemed a devisee until the Will has been probated. The title and right to possession of such lands, . . . so vested in such heirs or devisees, . . . shall be good and valid against all persons claiming adversely to the claims of any such heirs, or devisees, excepting only the personal representative when appointed, and person lawfully claiming under such personal representative

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RCW 11.04.250. RCW 11.04.290 further provides that

RCW 11.04.250 through 11.04.290 shall apply to community real property and also to separate estate; and upon the death of either spouse or either domestic partner, title of all community real property shall vest immediately in the person or persons to whom the same shall go, pass, descend or be devised, as provided in RCW 11.04.015,

subject to all the charges mentioned in RCW 11.04.250.<sup>10</sup>

The interest of an heir or beneficiary in personal property of an estate also vests as of the date of death. *See, e.g., In re Verchot's Estate*, 4 Wn.2d 574, 582, 104 P.2d 490 (1940); *In re Burns*, 131 Wn.2d 104, 118 n.4, 928 P.2d 1094 (1997).

Interests in nonprobate assets likewise vest immediately upon death. Beneficiary designations are effective immediately upon death, for example. The interest of a transfer on death or pay on death beneficiary of a brokerage account vests immediately upon the death of an account holder. RCW 21.35.035. Insurance policy proceeds normally vest in the beneficiary immediately upon the death of the insured. *See, e.g., Francis v. Francis*, 89 Wn.2d 511, 515, 573 P.2d 369 (1978); *Federal Old Line Ins. Co. v. McClintick*, 18 Wn. App 510, 513-14, 569 P.2d 1206 (1977). Survivorship rights in jointly held accounts vest in the survivor upon the death of the co-owner (absent evidence of a contrary intent at the time the account was created). RCW 30.22.100(3); *see, e.g., Anderson v. Anderson*, 80 Wn.2d 496, 500-01, 495 P.2d 1037 (1972) (describing former statute). The accounts of which Mary was a joint tenant with right of survivorship therefore vested in her as of the date of her husband's

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<sup>10</sup> RCW 11.04.290 was amended in 2008 to substitute the words "spouse or either domestic partner" in place of "husband or wife," but otherwise was unchanged from the 1965 version. Laws of 2008, ch. 6, § 930.

death. Mary became the sole beneficiary of the Living Trust “[u]pon the death of James W. Haviland . . . ,” *see* Ex. 12, and this interest therefore vested as of the date of death.

Petitioners erroneously argue that property interests cannot pass to heirs until an adjudication of intestacy occurs, citing RCW 11.04.015. That statute does not address or mention “adjudications of intestacy.” An adjudication of intestacy occurs upon the application of a person to be appointed administrator of the estate of a person dying intestate; it is the intestate equivalent of an order admitting a will to probate. These are the first events in any probate. While legal title cannot be transferred out of probate until a PR is appointed, the statute and case law cited above are clear that equitable title vests in the heirs and beneficiaries as of the date of death. A mere expectation of the continuance of the present general laws is insufficient to constitute a vested right for purposes of determining whether a statute may be applied retroactively, but a right is sufficiently vested to prevent retroactive application if

it has become a title, legal or equitable, to the present or future enjoyment of property . . . *Gillis v. King Cy.*, 42 Wn.2d 373, 377, 255 P.2d 546 (1953) (quoting 2 T. Cooley, *Constitutional Limitations* 749 (8<sup>th</sup> ed. 1927)). *See* 2 C. Sands, *Statutory Construction* § 41.06 (4th ed. 1973).

*Miebach v. Colasurdo*, 102 Wn.2d at 181. Mary’s rights under a will, or the law of descent and distribution, indisputably became, at a minimum, “equitable rights to future enjoyment of property” on Jim’s death. A survivor’s rights under trusts, beneficiary designations and JTWROS accounts are more than that; upon the death of the decedent, the survivor is immediately entitled to control and dispose to those funds.

Petitioners argue that inheritance rights vest at death subject only to the State’s “plenary power” and may therefore be affected by the retroactive application of new laws. In support of this proposition, Petitioners cite a number of cases, from early in the last century, which they characterize as approving the retroactive application of changes in inheritance tax rates. In fact, the cases do not do so. *Estate of Sherwood*, 122 Wash. 648, 211 P. 734 (1922), does not affirm, or even discuss, retroactive application of changes to Washington’s inheritance tax. In that case the decedents died in 1919, while the most recent law discussed in the case was enacted two years earlier, in 1917. In *Estate of Fotheringham*, 183 Wash. 579, 49 P.2d 480 (1935), the court addressed whether a 1935 act that increased inheritance tax rates could constitutionally be applied retroactively, where the legislature in very clear terms had described the partially retroactive effect of the statute. The court held that “an inheritance tax statute, when the statute clearly expresses the intent to so

operate, is not unconstitutional.” *Id.* at 483.<sup>11</sup> The court relied in part on the proposition that Washington’s inheritance tax is a tax on the right to receive property, not on the death of the decedent. *Id.* at 484. In addition, the statute in question provided that any pending estate could avoid the operation of the tax by paying the tax due under the previous statute, within ten months following the enactment of the new statute, *id.* at 482, thus arguably removing a principal objection to retroactive application. The courts in the subsequent cases of *In re Estate of Nogleberg*, 200 Wash. 652, 94 P.2d 488 (1939), and *In re Button’s Estate*, 190 Wash. 333, 67 P.2d 876 (1937), upon which Petitioners also rely, addressed the same 1935 statute, with the same 10 month “out” for taxpayers, and predictably reached the same result as in *Fotheringham*.

None of these inheritance tax cases addresses rights like those that Mary Haviland acquired in nonprobate assets on the date of death. So far as undersigned counsel is aware, no subsequent Washington case describes the State’s plenary authority to tax as justifying a departure from the normal presumption that statutes apply prospectively, and no Washington case extends the reach of those cases to statutes other than those that impose inheritance taxes. The Supreme Court in *In re Burns* in fact specifically confined the broad language of *Sherwood* to its facts, and

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<sup>11</sup> The court never specified the basis that counsel had articulated in support of the constitutional objections to the retroactive application of the statute.

limited the scope of *Sherwood*, *Fotheringham* and similar cases to the inheritance tax context:

. . . [G]eneral statements such as the one quoted above [from *Sherwood*] are to be confined to the facts and issues of that particular case. [citation omitted]  
Furthermore, the state has broad powers of taxation. Therefore, taxation of the transfer of decedent's property is significantly different from imposition of a claim or lien on an estate. The State has "plenary power over inheritance taxation; it is within the legislature's power to prescribe the nature, kind, extent and amount of such taxes, and to what degree the estate or the heirs may be taxed . . . as conditions of bequeathing, devising and inheriting property." *In re Estate of Toomey*, 75 Wash.2d 915, 919, 454 P.2d 420 (1969), citing [*Sherwood*].

*Burns*, 131 Wn.2d at 113-14 (underscoring added). The abuser amendments are not an exercise of the state's power to impose an inheritance tax; and the cases governing inheritance tax amendments do not apply.

The Petitioners cite *Burns* and tacitly recognize that the taxing authority presents a different case, but argue that the "police power" is analogous, citing *Shea v. Olson*, 185 Wash. 143, 53 P.2d 615 (1936). *Shea v. Olson* addressed, among other things, the constitutionality of the statute in question and relied in part on the state's police power, but did not hold, or even discuss the possibility, that legislation enacted pursuant

to the state's police power may be retroactively applied in disregard of the normal rules that presume prospective application. The court in *Shea* in fact specifically observed that "[t]he effective date of the act [which eliminated the liability of a negligent driver to a gratuitous passenger] was prior to the time of the accident." *Shea*, 185 Wash. at 156. *Shea* presented no issue regarding retroactive application of the statute.

Petitioners also argue that Mary's rights did not vest, by analogy from two cases that held that a court had the power in equity to enter a nunc pro tunc judgment, in one case, *Estate of Carter*, 14 Wn. App. 271, 540 P.2d 474 (1975) a judgment for a decree of divorce, and in the other case, *Estate of Storer*, 14 Wn. App. 687, 544 P.2d 95 (1975), a judgment converting a ceremonious marriage into a legal marriage. These cases are inapposite. In *Storer* the only question before the court was whether to give full faith and credit to a nunc pro tunc judgment issued by a California court. In *Carter*, the effect of the nunc pro tunc judgment was to change the date of a divorce decree from the date of actual entry to the date, three and one half months earlier, on which the court had orally granted the divorce. The effect was to validate the wife's subsequent marriage, in light of the fact that she and her new husband had in fact believed they were married and had lived together as husband and wife until he died.

Nunc pro tunc judgments are rarely entered. “The purpose of a nunc pro tunc order is to record some prior act of the court which was *actually performed* but not entered into the record at that time.” *State v. Rosenbaum*, 56 Wn. App. 407, 410-11, 784 P.2d 166 (1989) (emphasis in original). The authority of the court is limited to recording judicial action actually taken. *Id.* In the strictest sense, a nunc pro tunc judgment cannot divest any person of vested rights, because the judgment merely confirms what was, substantively, already the case. In addition, a nunc pro tunc judgment, if entered at all, is entered in the context of a particular case, among identifiable parties, after the court determines that the result is not inequitable to any identifiable party. *Carter*, 14 Wn. App. 274-75.

Finally, Petitioners claim that Mary’s rights in the estate have not vested because the estate has equitable claims against her, in particular for her alleged failure to account for Dr. Haviland’s assets. Petitioners omit any discussion of the facts. On September 5, 2008, about three months after she ceased acting as executrix, Mary (represented by K&L Gates) filed a motion for approval of her accounting. CP 149-62. She had earlier submitted a proposed accounting to Petitioners’ attorneys on June 19, 2008. *See* CP 150, 167. After receiving comments from counsel for Petitioners, Mary through counsel prepared a revised accounting and forwarded that to Petitioners’ attorneys on or about August 28, 2008.

CP 150, 167, 186-93. Mary had also undertaken to transfer to the successor personal representative all money, property, and all rights, credits, deeds, evidences of debt, and papers of every kind. CP 150. Petitioners objected to the accounting, and requested that the court defer ruling, without prejudice, until an independent personal representative was appointed. CP 167-170. Mary replied, defending the accounting. CP 194, 197-200; 204-06. The court on September 25, 2008, entered an order denying the motion for approval of the revised accounting without prejudice. The court interlineated that it had “unanswered questions and concerns,” but did not specify them, and stated that it considered approval to be premature. The court did not set the matter over for the trial of whatever objections the Petitioners had. CP 207-09.

Following the will contest trial, the trial court appointed a successor personal representative, Richard Furman. CP 40. Although nothing further appears in the record on this matter, Mary in fact (through undersigned counsel) submitted a new, thorough accounting to Mr. Furman, on or about April 2, 2010. Mr. Furman has not responded with comments on or objections to the accounting. Undersigned counsel does not know whether the new personal representative has shared the accounting with the Petitioners.

No one has asserted any claim against Mary for failure to account. Even if there were such equitable claims, they would not affect vesting, because the vesting of the beneficiary's interest in probate assets is always subject to claims of creditors, expenses of administration, and other claims arising in the context of the probate administration. The fact that someone may in the future sue a person, and may recover judgment against the person, does not make the person any less vested in his or her property, until such a suit is brought and succeeds. In addition, these are issues particular to this case, which do not bear upon the more general question whether the abuser amendments may be applied retroactively.

**4. Absent the Abuser Amendments, the Court Lacks Equitable Power to Terminate Inheritance Rights and Rights in Nonprobate Assets on Account of Previous Financial Exploitation of the Decedent.**

A continuing minor theme of the Opening Brief of Petitioners is the proposition that, even before the legislature's adoption of the abuser amendments, the trial court had the equitable power to do what Petitioners asked the trial court to do under the abuser amendments. The Petitioners state, for example, that the "effect of the amendments was to codify the authority of the courts in probate proceedings to prohibit financial abusers from inheriting . . . ," Opening Brief at 8, and try to draw similarities between the right of retainer and the abuser amendments, *id.* at 17, 34.

Petitioners' purpose appears to be both to undermine the proposition that an heir has vested rights in estate assets as of the date of death, and to suggest that the "remedy" of retainer was already available, and that this statute is equally remedial.

Petitioners misstate existing law. Both *U.S. v. Kwasniewski*, 91 F. Supp. 847 (E.D. Mich. 1950), and *Estate of Tyler*, 140 Wash. 679, 250 P. 456 (1926), upon which Petitioners rely, apply to the unique circumstance of a slayer seeking either an insurance benefit that otherwise would have been payable to the victim (in *Kwasniewski*) or an award in lieu of homestead from the separate property of the victim (in *Tyler*). The cases on which Petitioners rely in support of the existence of the doctrine of retainer are merely cases in which it is held that a personal representative may withhold from the distribution to an heir a sum equal to the heir's indebtedness to the decedent. See, e.g., *Boyer v. Robinson*, 26 Wash. 117, 66 P. 119 (1901) (when the heir owes the estate more than the value of his share, and does not pay his debt, the heir has no interest in the estate); *In re Hamilton's Estate*, 190 Wash. 646, 70 P.2d 426 (1937) (PR may set off, against beneficiary's share of the estate, the amount of the decedent's unpaid debt to the decedent); *In re Bowers' Estate*, 196 Wash. 79, 81 P.2d

813 (1938) (same).<sup>12</sup> The doctrine of retainer is in essence an alternative name for the right of setoff. Petitioners cite no case that stands for the proposition that, in circumstances outside of the slayer situation, a court may void an inheritance under a valid will (or under the laws of descent and distribution) and take away survivorship and beneficiary rights based on the conduct of the heir or beneficiary toward the decedent while the decedent was alive.

**5. The Abuser Amendments May Not Be Applied Retroactively Because They Create New Rights in Others.**

Under Washington law, a statute may not be applied retroactively if it affects a substantive or vested right. *Densley*, 162 Wn.2d at 223-24. A statute may fall into this category not only if it impairs vested rights, but if it creates new substantial rights as well. *Id.*; see also *Johnston v. Beneficial Management Corp.*, 85 Wn.2d at 640-42. The abuser amendments create new substantive rights in favor of beneficiaries other than the abuser. The abuser amendments provide, with respect to bequests under a will, that the bequest is to pass as though the abuser had predeceased the decedent. RCW 11.84.030. Imagine a will that provides, as many do, that the decedent makes a gift – say of \$1 million – to X, but

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<sup>12</sup> In *Estate of Bailey*, 58 Wn.2d 685, 699-700, 364 P.2d 539 (1961), which Petitioners also cite, the court mentioned but did not apply the right of retainer, holding that the beneficiary was not indebted to the estate at the time the order was entered.

if X predeceases, then to Y. Assume also that Y is not otherwise provided for in the will. The effect of the abuser amendments is to create a new substantive right in Y to petition the court for a determination that X is an abuser, and to inherit in place of X, even though Y was not affected by any financial exploitation of the decedent. Contingent beneficiaries of insurance policies are likewise given new substantive claims against the primary beneficiary under the abuser amendments. The amendments therefore may not be applied retroactively.

**6. Retroactive Application of the Abuser Amendments Would Violate Due Process.**

“A retroactive statute is unconstitutional when it takes away or impairs vested rights acquired under existing laws.” *In re Martin*, 129 Wn. App. 135, 145, 118 P.3d 387 (quoting *I.N.S. v. St. Cyr*, 533 U.S. 289, 321, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001)) (quotations omitted); *see also Wash. State Farm Bureau Fed’n v. Gregoire*, 162 Wn.2d 284, 304-05, 174 P.3d 1142 (2007) (holding that the “legislature may not give an amendment retroactive effect where the effect would be to interfere with vested rights”) (quotations omitted). Vested rights are “entitled to due process protections from subsequently enacted legislation.” *See Gregoire*, 162 Wn.2d at 305. A “vested right, entitled to protection from legislation, must be something more than a *mere expectation* based upon an

anticipated continuance of the existing law; *it must have become a title, legal or equitable, to the present or future enjoyment of property . . .*” *Id.* (quoting *Lawson v. State*, 107 Wn.2d 444, 455, 730 P.2d 1308 (1986)) (internal quotations omitted). “[T]he Legislature may not interfere with or divest estates which have already become vested through the death of the testator.” *Strand v. Stewart*, 51 Wash. 685, 687-88, 99 P. 1027 (1909). To apply these amendments retroactively would violate Mary’s substantive due process rights.

**7. Retroactive Application of the Abuser Amendments Would Violate the Constitutional Prohibition of *Ex Post Facto* Laws.**

Both the Washington State and federal constitutions prohibit “*ex post facto*” laws. Wash. Const., art. 1, § 23 (“No . . . *ex post facto* law . . . shall ever be passed.”); U.S. Const. art. 1, § 10, cl. 1 (“No State shall . . . pass any . . . *ex post facto* Law.”) A law violates the *ex post facto* prohibition if it is substantive, retrospective, and disadvantages the person affected by it. *State v. Wilson*, 117 Wn. App. 1, 9, 75 P.3d 573 (2003). The *ex post facto* clause pertains only to penal (criminal or punitive) statutes, not regulatory or civil statutes. *State v. Schmidt*, 100 Wn. App. 297, 300 & n.7, 996 P.2d 1119 (2000) (quotations omitted). Two factors determine whether a law is criminal or punitive: (1) the legislature’s intent, and (2) the law’s effect. *Id.* at 300 n.7 A “civil” label

is not dispositive; the statute's punitive effect may negate the legislature's intent to deem it civil. *See id.*

The trial court here correctly concluded that the abuser amendments are punitive. CP 137-38. The purpose of the amendments is not to grant a remedy that will restore a victim of abuse to the *status quo ante*. Rather, the amendments apply without regard to whether the abuser has fully compensated the vulnerable adult, or his estate, for whatever damages the financial exploitation caused. And the dollar amount of the penalty exacted by the abuser amendments is unrelated to the amount of the abuse. The court in *Johnston v. Beneficial Management Corp.*, 85 Wn.2d at 640, held that the treble damage provisions (even with a cap of \$10,000) under the 1970 amendments to the Consumer Protection Act constituted a penalty, even though they were closely related to the amount of the damages. The abuser amendments, with their potential for far larger, randomly imposed penalties, are clearly punitive and would violate the constitutional provision against ex post facto laws if applied retroactively.<sup>13</sup>

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<sup>13</sup> Prior to April 2, 1998, RCW 11.84.900 expressly provided that the slayer statute was not penal: "This chapter shall not be considered penal in nature, but shall be construed broadly in order to effect the policy of this state that no person shall be allowed to profit by his own wrong, wherever committed." Effective April 2, 1998, however, the Legislature amended RCW 11.84.900 (among other provisions of the slayer statute and other statutes) to **remove** the language stating that the slayer statute was not penal: "his chapter shall ~~not be considered penal in nature, but shall~~ be construed broadly in order to

**F. The Record Below Is Insufficient to Trigger Application of the Slayer Statute.**

Because it concluded that the abuser amendments could not be applied retroactively, the trial court did not reach the question whether the record in the will contest was sufficient to trigger the application of the abuser amendments to Mary. It was not.

**1. The Trial Court's Factual Findings in the Will Contest Do Not Meet the Requirements of the Abuser Amendments.**

The abuser amendments provide the standard for determining that a person is an abuser:

(1) In determining whether a person is an abuser for purposes of this chapter, the court must find by clear, cogent, and convincing evidence that:

(a) The decedent was a vulnerable adult at the time the alleged financial exploitation took place; and

(b) The conduct constituting financial exploitation was willful action or willful inaction causing injury to the property of the vulnerable adult.

RCW 11.84.160. A “superior court finding by clear, cogent, and convincing evidence that a person participated in conduct constituting financial exploitation against the decedent is conclusive for purposes of

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effect the policy of this state that no person shall be allowed to profit by his own wrong, wherever committed” Laws of 1998, ch. 292, S.S.B. 6181.

determining whether a person is an abuser under this section.”

RCW 11.84.150. The necessary superior court finding under RCW 11.84.150 incorporates the definitions of “financial exploitation,” “abuser,” and “decedent” (which in turn incorporate the definition of “vulnerable adult”). Therefore any “finding” that meets the requirements of RCW 11.84.150 must also meet the substantive requirements of RCW 11.84.160.

Only certain of the trial court’s findings meet the clear, cogent, and convincing evidence standard required by RCW 11.84.150. The trial court precisely identified four findings it made by clear, cogent, and convincing evidence:

[Finding] 125. The evidence is clear, cogent, and convincing that Dr. Haviland had advanced dementia as of November 2007, shortly before he died . . . .

[Finding] 127. . . . Clear, cogent, and convincing evidence shows that Dr. Haviland was suffering from dementia prior to [a request made on November 8, 2007].

[Conclusion] 9. Clear, cogent, and convincing evidence supports a presumption that the will executed by James Haviland on January 19, 2006 was the product of undue influence by Mary Haviland . . . .

[Conclusion] 11. . . . clear, cogent, and convincing evidence establishes that at the time of the 2006 will Mary Haviland “controlled the volition of the testator,

interfered with his free will, and prevented an exercise of his judgment and choice.”  
*Estate of Lint*, 135 Wn.2d 518, 535 (1998).

Not all of the trial court’s findings, nor all words in every paragraph in which the trial court used the phrase “clear, cogent, and convincing,” constitute trial court findings that meet the “clear, cogent, and convincing” evidentiary standard. Only the specific findings designated as such by the trial court are findings by clear, cogent, and convincing evidence.

In particular, the trial court expressly refused to find (by clear, cogent, and convincing evidence, or otherwise) that Dr. Haviland was a vulnerable adult as defined in RCW 74.34.020. Before entering its final ruling on the will contest, the trial court submitted its proposed findings of facts and conclusions of law to the parties. CP 59, 73-103. Those proposed findings and conclusions made no reference to the vulnerable adults statute. *Id.* In response to the court’s proposed findings and conclusions, Petitioners in the will contest asked the court to include an additional finding that “[c]lear, cogent and convincing evidence establishes that at the time of the 2006 will, Dr. Haviland was a vulnerable adult as defined by RCW 74.34.020.” CP 59-60, 105-06. The court refused to adopt this additional proposed finding.

The trial court’s findings do not address all elements necessary to determine if Mary Haviland was an abuser under the abuser amendments.

The four findings that do meet the clear, cogent, and convincing evidence standard determine only that Mary Haviland exerted undue influence on Dr. Haviland, and that Dr. Haviland suffered from dementia from November 2007 (the month he died). These findings do not satisfy the requirements of RCW 11.84.150 or .160 to determine that Mary Haviland was an “abuser.” The Legislature did not provide in the abuser amendments that anyone found to have exerted undue influence (financial or otherwise) on a testator is an “abuser.” The definitions in the abuser amendments are precise and narrow. The trial court findings do not support a finding that chapter 11.84 RCW applies.

**2. Because the “Abuser” and “Vulnerable Adult” Issues Were Not Litigated in the Will Contest, Res Judicata and Collateral Estoppel Do Not Apply.**

Even if the abuser amendments could be applied retroactively, they cannot be applied in these circumstances. The will contest petition filed in May 2008 makes no reference to “abusers.” CP 62-72. The definition of “abuser” is “any person who participates, either as a principal or an accessory before the fact, in the willful and unlawful financial exploitation of a vulnerable adult.” RCW 11.84.010(1). The will contest petition made only three claims: (1) that Dr. Haviland lacked testamentary capacity when he executed his 2006 Will; (2) that Dr. Haviland’s 2006

Will was the product of undue influence; and (3) that Mary Haviland should be removed as personal representative.<sup>14</sup> At no time have the Petitioners or anyone else ever filed an action asserting that Dr. Haviland was a vulnerable adult as defined in the vulnerable adults statute, or asserting that he was subject to financial exploitation as defined in that statute.

As a result, neither res judicata nor collateral estoppel can apply in these circumstances. Res judicata, or claim preclusion, “refers to the preclusive effect of judgments, including the relitigation of claims and issues that were litigated, or might have been litigated, in a prior action.” *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995) (quotations omitted). Among other requirements, res judicata requires that a subsequent action have the identical cause of action at issue as the prior action. *Id.* Because no cause of action under the abuser amendments (which did not then exist) was (or could have been) brought in the will contest, res judicata does not apply. Collateral estoppel, or issue preclusion, “prevents a second litigation of issues between the parties, even though a different claim or cause of action is asserted.” *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 306, 96 P.3d 957 (2004). While collateral estoppel does not require that the same

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<sup>14</sup> Mary Haviland resigned as personal representative. Therefore, this claim was not litigated in the underlying will contest.

cause of action have been asserted, it *does* require that “the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding.” *Id.* at 307. It applies only to “those issues that have actually been litigated and necessarily and finally determined in the earlier proceeding.” *Id.* (emphasis added). No issues under the vulnerable adults statute or the abuser amendments were litigated, nor was determination of those issues necessary to resolve the will contest. Moreover, the vulnerable adults statute and the abuser amendments do not contain all the same elements as claims of undue influence or lack of testamentary capacity. Therefore the issues cannot be identical as a matter of law. Collateral estoppel does not apply.

**G. The Court Should Award Mary Haviland Her Attorneys’ Fees on Appeal, Against Petitioners.**

Under RCW 11.96A.150, this Court has broad discretion to award fees and costs to Mary from any party “in such manner as the court determines to be equitable.” The Petition below was plainly brought under TEDRA. Petitioners joined in it, and both briefed and argued the petition below. Petitioners have vigorously pursued this appeal. Mary Haviland has incurred significant expense in responding to it. Mary Haviland asks the Court to exercise its discretion to order Petitioners (who joined with the PR in this Petition) to pay Mary Haviland’s fees and costs

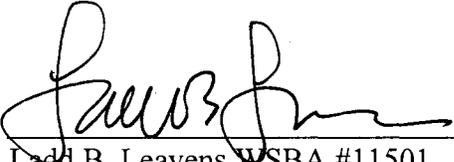
incurred in the appeal. In addition, to the extent that the PR has incurred fees and expenses in the appeal, Mary requests that the Petitioners be obligated to reimburse the estate, since the Petitioners alone have pursued the issue in this Court.

#### V. CONCLUSION

For the foregoing reasons, Mary Haviland requests that the Court affirm the order of the trial court denying the Petition for Determination as to Sufficiency of the Record to Apply Slayer's Statute, award Mary Haviland her attorneys' fees, against the Petitioners jointly and severally, and order the Petitioners to reimburse the estate for any expenses the estate incurred in connection with this appeal.

DATED this 2nd day of September, 2010.

DAVIS WRIGHT TREMAINE LLP  
Attorneys for Mary Haviland

By   
Ladd B. Leavens WSBA #11501  
William K. Rasmussen WSBA #20029  
1201 Third Avenue, Suite 2200  
Seattle, WA 98101-3045  
Telephone: (206) 622-3150  
Fax: (206) 757-7700  
E-mail: laddleavens@dwt.com;  
billrasmussen@dwt.com

PROOF OF SERVICE

The undersigned, hereby certify and declare under penalty of perjury under the laws of the State of Washington that the following statements are true and correct:

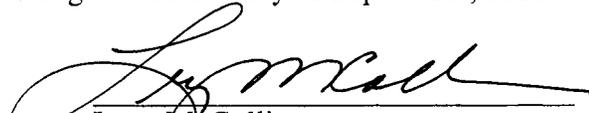
On the 2nd day of September, 2010, I caused to be served a copy of the document to which this is attached, by legal messenger on the following:

Suzanne C. Howle  
Carol Vaughn  
Thompson & Howle  
One Convention Place  
701 Pike Street, Suite 1400  
Seattle, WA 98101

Howard M. Goodfriend  
Edwards, Sieh, Smith & Goodfriend, P.S.  
1109 First Avenue, Suite 500  
Seattle, WA 98101-2988

Richard L. Furman  
Aiken, St. Louis & Siljeg, P.S.  
801 Second Avenue, Suite 1200  
Seattle, WA 98104-1571

Executed at Seattle, Washington this 2nd day of September, 2010.

  
Lucy M. Collins