NO. 42070-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

THOMAS GOLDSMITH, III

Appellant,

v.

WASHINGTON STATE
DEPARTMENT OF SOCIAL AND HEALTH SERVICES

Respondent.

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY
THE HONORABLE LISA SUTTON, JUDGE
THURSTON COUNTY SUPERIOR COURT CAUSE NO. 10-2-01278-5

# APPELLANTS' REPLY BRIEF

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## TABLE OF CONTENTS

I. JURISDICTION ..... 4

II. THOMAS SR.'S MENTAL COMPETENCY ..... 7

III. ABUSE ..... 10

IV. CONCLUSION ..... 10

## TABLE OF AUTHORITIES

*Inland Foundry v. Air Pollution Authority*, 98 Wn.App. 123, 989 P.2d 102 (1999) ..... 4

*Pers. Rest. of Acron*, 122 Wn.App. 886, 95 P.3d 1272 (2004) ..... 7

*Ricketts v. Board of Accountancy*, 111 Wn.App. 113, 43 P.3d 548 (2002) ..... 4

*State v. Golden*, 112 Wn.App. 68, 47 P.3d 587 (2002) ..... 4

## TABLE OF STATUTES

Chapter 4.20 RCW ..... 5

RCW 74.34.020 ..... 4, 5

RCW 74.34.020(2) ..... 10

RCW 74.34.020(2)(c) ..... 10

RCW 74.34.210 ..... 5

The following is Appellant's reply to Respondent's Brief.

## I. JURISDICTION

It is Appellant's position that jurisdiction with respect to this case was lost when Thomas Goldsmith, the father, also known as the "senior Thomas" sometimes Thomas, Sr. and Thomas, Jr. will hereinafter be referred to as "Thomas Sr." died on March 5, 2009, several months prior to the first hearing in these proceedings.

Jurisdiction is the power to hear and determine a cause or proceedings. Jurisdiction is a question of law which is reviewable *de novo*. *State v. Golden*, 112 Wn.App. 68, 47 P.3d 587 (2002) at pg. 72. *Inland Foundry v. Air Pollution Authority*, 98 Wn.App. 123, 989 P.2d 102 (1999) at pg. 123.

Complete jurisdiction has three components: (i) jurisdiction over the subject matter; (ii) jurisdiction over the parties; and (iii) power to render the particular judgment. *State v. Golden*, supra at pg. 73.

A tribunal's lack of subject matter jurisdiction may be raised by a party or the Court at any time in a legal proceedings. Without subject matter jurisdiction, a Court or administrative tribunal may do nothing other than enter an Order of Dismissal. *Inland Foundry v. Air Pollution Authority*, supra at pgs. 123-124, *Ricketts v. Board of Accountancy*, 111 Wn.App. 113, 43 P.3d 548 (2002) at pg. 116.

Under the definition section of RCW 74.34.020, the "Department"

means the Department of Social and Health Services.

RCW 74.34.210 provides for **protection or** action for damages - standing - jurisdiction of proceedings under the Abuse of Vulnerable Adults statute. It provides as follows: (Emphasis ours)

> **Order for Protection or Action for Damages — Standing — Jurisdiction. A petition for an order for protection may be brought by the vulnerable adult, the vulnerable adult's guardian or legal fiduciary, the department, or any interested person as defined in RCW 74.34.020**. An action for damages under this chapter may be brought by the vulnerable adult, or where necessary, by his or her family members and/or guardian or legal fiduciary. The death of the vulnerable adult shall not deprive the court of jurisdiction over a petition or claim brought under this chapter. Upon petition, after the death of the vulnerable adult, the right to initiate or maintain the action shall be transferred to the executor or administrator of the deceased, for recovery of all damages for the benefit of the deceased person's beneficiaries set forth in Chapter 4.20 RCW or if there are no beneficiaries, then for recovery of all economic losses sustained by the deceased person's estate. (Emphasis ours.)

A reading of this statute indicates there are five parts to the same. They are as follows:

1. A petition for an order **for protection** may be brought by the vulnerable adult, the vulnerable adult's guardian, or legal fiduciary, **the department**, or any interested person as defined in RCW 74.34.020. (Emphasis ours.)

2. An action for damages under this chapter may be brought by the vulnerable adult, or where necessary, by his or her family members and/or guardian or legal fiduciary.

3. The death of the vulnerable adult shall not deprive the court of jurisdiction over a petition or claim brought under this chapter.

4. Upon petition, after the death of the vulnerable adult, the right to initiate or maintain the action shall be transferred to the executor or administrator of the deceased, for recovery of all damages for the benefit of the deceased person's beneficiaries set forth in Chapter 4.20 RCW.

5. Or if there are no beneficiaries, then for recovery of all economic losses sustained by the deceased person's estate.

The Department's right to bring an action under RCW 74.34.210 is limited to actions for protection.

The subject matter of such an action in the present case was the protection of Thomas Sr. When Thomas Sr. died subject matter jurisdiction was lost. Without subject matter jurisdiction, the administrative tribunal and the court lost jurisdiction and may do nothing other than enter an Order of Dismissal.

A review of RCW 74.34.210, limiting the Department's right to bring an action for protection is governed by the principal *expressio unius est excluso alderius*. The starting point for the analysis is "where a statute

specifically designates things upon which it operates, there is an inference that the legislature intended all omissions." *Pers. Rest. of Acron*, 122 Wn.App. 886, 95 P.3d 1272 (2004) at p. 890.

Even if the legislature did not intend to omit items from the statute, the courts must leave it to the legislature to correct the error. Appellant courts do not supply omitted language even when the legislature's omission is clearly inadvertent, unless the omission renders the statute irrational. "To do so would (be) to arrogate to ourselves the power to make legislative schemes more perfect, more comprehensive and more consistent." Thus where the legislature's omission "did not undermine the purpose of the statute (but) simply kept the purpose from being effectuated comprehensively" the court will not read omitted language into the statute. *Pers. Rest. of Acron*, supra at p. 891.

## II. THOMAS SR.'S MENTAL COMPETENCY

**Dr. Fred Kemp, Ph.D:** On January 26, 2009, Dr. Kemp prepared a medical/psychological report pertaining to Thomas Sr. Exhibit M, AR000363 - AR000376. Cognitive functioning was indicated to be in the mildly impaired range. It was observed **given Thomas Sr.'s educational and vocational achievements and his overall quality of many of his answers reported below, the MMSE score may be an understatement of his cognitive abilities**. (Emphasis ours.)

Based on the HOAT, Thomas Sr. was capable of making medical

decisions.

Based on the medical understanding interview, Thomas Sr. began the section of the evaluation by stating that he wished he knew his health status better; and focused on his current broken hip.

Based on the financial questionnaire (cost estimates, short answer, and comprehension) Thomas Sr. performed at an average to below average level. **Thomas Sr. chose not to respond to the questions on the financial interview because "I don't put that out freely". In the experience of this examiner, individuals who protect their financial information are generally function[ing] at a higher cognitive level and exhibit sounder judgment than those who freely provide such private information to a relative stranger.** (Emphasis ours.) TR 60 - TR 90.

**Jacqueline Heinselman:** Jacqueline Heinselman is the investigator social worker for DSHS, Adult Protective Services, described her interview of Thomas Sr. The interview room was filled, wall to wall with computers and what appeared to be recording equipment. Thomas Sr. talked approximately forty-five minutes explaining the equipment and that he had done all of the commercials for Panorama City. He stated: (a) he had a Ph.D in Physics from Cornell University in 1930 and had helped to develop RADAR in the 1930's; (b) he had worked with developing television for many years; (c) had been a Professor teaching physics for many more; and (d) many of his works are in the Library of Congress.

Exhibit 2 p. 3.

In response to a question as to what had happened with his son the Appellant, he stated there had been a disruption in the house and someone had thought he was yelling. He continued to state that his son may have raised his voice but it was nothing more than that. When asked if he was afraid of his son he responded that he was not. TR 77.

In response to a question as to what happened, Thomas Sr. stated: (a) there was no argument or problem; (b) Thomas III just raised his voice; (c) he wanted the Restraining Order dropped (the Order entered by the Superior Court); and (d) he wanted his son to visit the residence again. T

When Thomas Sr. was asked to sign the Consent for Services Form regarding the Protection Order. **Thomas Sr. signed the form declining assistance with a Protection Order against his son.** (Emphasis ours)

When asked a question concerning financial allegations, Thomas Sr. stated **"I take care of my own affairs on that score."** (Emphasis ours) He further stated that his son had access and helped him. He further stated that there had not been any problems with his son being involved. When asked if his son had been pressuring him for information or control of properties or management. Thomas Sr. said "no, nothing like that". Thomas Sr. stated that his son has been helpful and there have not been problems and he stated that his son hasn't harassed him at all. TR 82, 87.

There was nothing in Ms. Heinselman's report of any intellectual

capacity on the part of Thomas Sr. He was very responsive to all questions. He knew his history and described to her his educational background and his professional accomplishments. In fact, he was a very well educated man and professionally accomplished. Thomas Sr. described his son as a swell guy. When Ms. Heinselman asked if Thomas III had pressured his father as to what he should say at the interview, Ms. Heinselman responded there was no indication of such conduct. He further stated that his son had not harassed him. He further stated that if he could not see his son he would want to die or he would die. TR 88. In short, there is no evidence that Thomas Sr. was anything but mentally competent.

## III. ABUSE

Abuse is defined as a willful action or inaction causing injury, unreasonable confinement, intimidation or punishment on a vulnerable adult. RCW 74.34.020(2). Abuse includes mental abuse. RCW 74.34.020(2)(c).

There is no evidence that Thomas Sr. was injured by his son. There is no evidence that Thomas Sr. was injured at all.

## IV. CONCLUSION

Thomas Goldsmith, III, the son, respectfully request the Court to reverse the Order of the Superior Court and remand this case to the Superior Court with direction that the Administrative Action be vacated

and the action dismissed.

DATED this 5 day of October, 2011.

OWENS DAVIES FRISTOE
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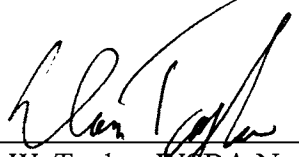

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A copy of this document was properly addressed and sent by ABC Legal Services, to the following individuals on October 5, 2011.

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I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington

Date: October 5, 2011

Kathryn Mae Ice, Legal Assistant

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BY