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Supreme Court No. 86412-8

86412-8

In re the Estate of James W. Haviland, Deceased.

DONALD HAVILAND, ELIZABETH HAVILAND, and MARTHA
CLAUSER,

Appellants,

v.

MARY HAVILAND,

Respondent.

ANSWER TO PETITION FOR REVIEW

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ORIGINAL

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I. IDENTITY OF RESPONDING PARTY

Respondents are Donald Haviland, Elizabeth Haviland and Martha Clauser, the adult children of the decedent, Dr. James Haviland ("Haviland").¹ They were the appellants in the Court of Appeals.

II. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

The issues properly stated are:

1. Did the Court of Appeals misapply Supreme Court precedent when it relied on the amendments' plain language to determine whether they applied prospectively in the present case?
2. Was Mary denied "fair warning" that her conduct if found to be financial exploitation could result in disinheritance?
3. Was it unconstitutional for the State to enact legislation limiting inheritance by abusers from the estates of their victims?
4. Does limiting inheritance by abusers from the estates of their victims violate public policy?

III. RESTATEMENT OF THE CASE

Mary's Statement of the Case gives a one-sided and misleading recitation of the facts that ignores the trial court's extensive findings.

¹ The Petitioner, Mary Haviland, is referred to as "Mary" to be consistent with the Petition for Discretionary Review. No disrespect is intended.

A. Mary Engaged in a Lengthy Campaign of Financial Exploitation at a Time When Haviland's Mental and Physical Health was Declining.

Mary Haviland unduly influenced her aged, vulnerable and mentally compromised husband into changing his will in 2006. “[T]he 2006 will revision [came] on the heels of nearly a decade-long campaign of draining Haviland's estate and at a time when Haviland's mental and physical faculties were clearly declining.”² Mary's conduct was summarized by the Court of Appeals when affirming the trial court's findings in the companion will contest as follows:

Over the course of their marriage, millions of dollars of Haviland's separate assets were transferred from the Living Trust into the couple's joint checking account, Mary's separate checking account, or Mary's separate line of credit. In turn, bank statements document the withdrawal of millions of dollars from the joint checking account. The trial court found little evidence as to the ultimate purpose for which the money withdrawn from the joint checking account was used. Haviland also conveyed two parcels of his separate real property to Mary as her separate property. In addition, Haviland's retirement accounts were cashed in, and substantial sums of money were gifted to Mary's children from a previous marriage and to other designees. Haviland did not make comparable gifts to his own children.

Estate of Haviland, 162 Wn. App. at 554.

² Estate of Haviland, 162 Wn. App. 548, 566, 255 P.3d 854 (2011) (upholding the trial court's decision to invalidate the decedent's 2006 will for undue influence by Mary Haviland). The trial court's decision in the will contest was the subject of a separate appeal. More than 30 days have passed since the will contest appeal was decided and no petition for discretionary review has been filed. The will contest opinion is in the Appendix at pp. 1 through 10.

While this systematic depletion occurred, Haviland's physical and mental health substantially deteriorated. "Haviland experienced substantial physical disabilities, exhibited symptoms of dementia as early as 2000, required Mary's full-time care in 2005, and had advanced dementia at the time of his death in 2007." *Id.* at 567.

These facts illustrate several characteristics of financial abuse that support the Court of Appeals' interpretation of the amendments. Financial exploitation is difficult to detect and may occur for years before the vulnerable adult dies: "Like other forms of abuse, financial abuse most often occurs in a private setting, which makes it very difficult to detect." Carolyn Dessin, *Financial Abuse of the Elderly*, 36 IDAHO L. REV. 203, 222 (2000).³ Victims are frequently unaware of the abuse due to physical and mental impairments, and because the evidence is not readily visible, unlike bruises and other manifestations of physical abuse. *Id.* at 214; Appellants' Opening Brief at App. 23. "Sometimes the elderly simply do not realize that anything is amiss. Police officers and financial institutions are unlikely to recognize or understand financial abuse, leaving the abused undetected and the abusers unapprehended." Shelby Moore & Jeanette Schaefer, *Remembering the Forgotten Ones: Protecting the Elderly from*

³ This article appears in the appendix of the Appellants' Opening Brief filed with the Court of Appeals. *See* appendix pp. 26-27.

Financial Abuse, 41 SAN DIEGO L. REV. 505, 509-512 (2004) (internal citations omitted). See Appellants' Opening Brief at App. 40.

B. At the Time Mary Depleted Haviland's Estate, her Conduct was Unlawful.

Mary's conduct was unlawful under the Vulnerable Adult Protection Act and common law at the time she acted. Enacted in 1984, Washington's Vulnerable Adult Protection Act, RCW 74.34, prohibited the financial exploitation of vulnerable adults. At the time that Mary engaged in her campaign of dissipating Haviland's assets, and at the time the Court of Appeals issued its ruling, financial exploitation was defined as "the illegal or improper use of the property, income, resources, or trust funds of the vulnerable adult by any person for any person's profit or advantage other than the vulnerable adult's profit or advantage." RCW 74.34.020(6).⁴ "Vulnerable adult" was defined by RCW 74.34.020(16) as any person:

- (a) Sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself; or
- (b) Found incapacitated under chapter 11.88 RCW; or
- (c) Who has a developmental disability as defined under RCW 71A.10.020; or
- (d) Admitted to any facility; or

⁴ Recent amendments that took effect July 1, 2011 clarified the definition of financial exploitation. A copy of RCW 74.34 appears in the appendix at 11 – 30.

- (e) Receiving services from home health, hospice, or home care agencies licensed or required to be licensed under chapter 70.127 RCW; or
- (f) Receiving services from an individual provider.

As a nurse, Mary was a mandated reporter under the Vulnerable Adult Protection Act; thus she also had actual knowledge that financial exploitation was wrongful and actionable.⁵

In addition, Washington courts have long recognized common law actions for undue influence, fraud, conversion and breach of fiduciary duty. See McCutcheon v. Brownfield, 2 Wn. App. 348, 467 P.2d 268 (1970) (setting aside a deed for undue influence); Davenport v. Wash. Educ. Ass'n, 147 Wn. App. 704, 721-22, 726, 197 P.3d 686 (2008) (explaining the common law origins of actions for conversion, restitution, and unjust enrichment); Endicott v. Saul, 142 Wn. App. 899, 176 P.3d 560 (2008) (prohibiting the recipients of an *inter vivos* gift from transferring or encumbering the property of a vulnerable adult); McSorley v. Bullock, 62 Wash. 140, 145, 113 P. 279 (1911) (imposing constructive trust based on conversion and awarding damages equal to the market value of the converted property and interest dating from the time of the conversion).

⁵ See RCW 74.34.020(11) (defining mandated reporter to include health care providers).

C. During the Pendency of Haviland's Probate, the Legislature Amended RCW 11.84 to Create Procedures that Allow Disinheritance for Financial Exploitation.

Washington's Legislature passed Substitute House Bill 1103 by unanimous votes of the House and Senate on April 22, 2009 and April 17, 2009, respectively. The new law amended RCW 11.84, RCW 26.16.120, RCW 41.04.273, and RCW 11.96A.030 and took effect July 26, 2009.⁶ At the time the amendments went into effect, Haviland's estate was still subject to an ongoing probate proceeding and will contest, and had not been distributed.

The Legislature directed courts to apply the 2009 amendments to the estate of "[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." RCW 11.84.010(2)(b). They regulate the benefits that persons who financially exploit vulnerable adults may receive after probate from the estates of their victims. RCW 11.84.020 provides "No slayer or abuser shall in any way acquire any property or receive any

⁶ Laws of 2009, ch. 525. Chapter 525 appears in the appendix of the Petition for Discretionary Review at App. 13 – App. 21. RCW 11.84.180 states "The provisions of this act are supplemental to, and do not derogate from, any other statutory or common law proceedings, theories, or remedies including, but not limited to, the common law allocation of the burden of proof or production among the parties." Chapter 11.84 of the Revised Code of Washington in its entirety appears in the appendix of the Petition for Discretionary Review at App. 10-12.

benefit as the result of the death of the decedent, but such property shall pass as provided in the sections following.” The provisions that define “vulnerable adult” and “financial exploitation” are from the Vulnerable Adult Protection Act, RCW 74.34.020, which was enacted in 1984 and was in effect at the time of Mary’s conduct in this case. *See* RCW 11.84.010(3), (6).

The amendments authorize courts in probate proceedings to prohibit financial abusers from inheriting from their victims, pursuant to petitions filed by interested parties under the procedures set forth in Washington’s Trust and Estate Dispute Resolution Act (TEDRA), RCW 11.96A.⁷ The amendments are part of the probate code (Title 11 RCW), and according to their preamble, relate to “the estates of vulnerable adults.”⁸ Probate is an *in rem* procedure “to determine the status of the decedent’s property.” *In re Estate of Pugh*, 22 Wn.2d 514, 523, 156 P.2d 676 (1945). The amendments set standards and procedures for determining whether a person is an abuser and whether a person found to be an abuser may receive any benefits from the decedent’s estate.

The amendments, by their terms, apply to “any person”

⁷ One of the provisions enacted in 2009 clarified that petitions filed under RCW 11.84 are matters governed by TEDRA, RCW 11.96A. RCW 11.96A.030(2)(e).

⁸ The preamble of legislation is “indicative of the legislature’s intent and may be properly considered as such.” *Godfrey v. State*, 84 Wn.2d 959, 966, 530 P.2d 630 (1975).

adjudicated to be an abuser, RCW 11.84.010(1), “any deceased person, who at any time during life in which he was a vulnerable adult, was the victim of financial exploitation by an abuser,” RCW 11.84.010(2)(b), and all civil proceedings arising under RCW 11.84. RCW 11.84.130.

One aspect of the amendments that Mary disregards is RCW 11.84.170. Under this provision, a person adjudicated to be an abuser may still receive benefits from their victim’s estate, if the court finds there was clear, cogent, and convincing evidence that the decedent knew of the financial exploitation and “subsequently ratified his or her intent to transfer the property interest or benefit to that person.” RCW 11.84.170(1). Courts also have discretion 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.” RCW 11.84.170(2). To determine what is equitable, courts may consider among other things the decedent’s dispositive scheme, decedent’s likely intent, and the “degree of harm resulting from the abuser’s financial exploitation of the decedent.” *Id.*⁹ RCW 11.84.170 furthers the statute’s equitable origins, *see In re Estate of Kissinger*, 166 Wn.2d 120, 131, 206 P.2d 665 (2009)

⁹ RCW 11.84.170(2) illustrates the absurdity of the hypothetical set forth in the Petition for Review at 6, where it is argued that a person theoretically could be disinherited for misusing \$100 of funds from a vulnerable adult’s bank account, and as a consequence lose an inheritance totaling hundreds or thousands of times that amount.

(holding “the slayer statute is not a criminal statute. Its origins are in equity.”), and the paramount goal of probate law, which is to fulfill decedents’ intent as to the disposition of their property. In re Estate of Wright, 147 Wn. App. 674, 681, 196 P.3d 1075 (2008).

D. The Petition for Application of RCW 11.84 was Brought After the Effective Date of the Amendments Before Distribution of Haviland’s Estate.

The Personal Representative filed a petition to determine whether RCW 11.84 could be applied based on the record from the will contest. The trial court did not reach the merits of the petition, because it ruled that the amendments could not be applied to financial exploitation occurring prior to July 26, 2009. The Court of Appeals for Division 1 reversed, holding that the amendments regulated the receipt of benefits from vulnerable adults after they die, the triggering event was the filing of the petition to apply RCW 11.84, the petition was filed before distribution of Haviland’s estate occurred after the amendments took effect; therefore, the amendments applied prospectively to the present case.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

The Court of Appeals ruled correctly in a straightforward case of statutory interpretation that does not implicate the constitutional rights of people who committed financial exploitation prior to July 26, 2009 or violate public policy.

A. The Court of Appeals Properly Applied Supreme Court Precedent in Holding that the Amendments Apply Prospectively to Petitions Filed After Their Effective Date.

Mary previously argued that the triggering event of the amendments was financial exploitation; therefore application of the statute to her conduct would be impermissibly retroactive. She now appears to have abandoned that argument, arguing instead that she did not receive “fair notice” of the consequences of her allegedly unlawful conduct.

1. The Court of Appeals correctly discerned the “triggering event” of the legislation from the plain language of the statute.

The Court of Appeals correctly analyzed the statute consistent with Supreme Court precedent, including the case that Mary relies on State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130 (2007). “A statute operates prospectively when the precipitating event for operation of the statute occurs after enactment, even when the precipitating event originated in a situation existing prior to enactment.” In re Estate of Burns, 131 Wn.2d 104, 110-111, 928 P.2d 1094 (1997), *quoted in* Pillatos, 159 Wn.2d at 471. To identify the precipitating event for operation of the statute, courts look first to the “plain language” of the statute. Burns, 131 Wn.2d at 112; Pillatos, 159 Wn.2d at 471.

The Court of Appeals in this case followed the example of Burns and Pillatos. It determined that the triggering event for application of the

statute was the petition filed under RCW 11.84 in the probate because “the language in the amendments indicates a legislative focus on preventing the abuser from benefitting from any financial exploitation after the exploited person dies, rather than regulating the financial exploitation itself.”¹⁰ The Court of Appeals gave particular weight to RCW 11.84.020 (Decision p. 3), which Mary had argued was the “core provision” of the statute:¹¹

No slayer or 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.

The Court of Appeals also emphasized RCW 11.84.900 which requires that the chapter “shall be construed broadly,” as well as the definition of abuser, and the statutory procedures governing adjudications. (Dec. p. 4)

The Court of Appeals engaged in a text book application of statutory interpretation rules consistent with State v. Pillatos, 159 Wn.2d 459. In Pillatos, this Court analyzed a new criminal law that gave juries the responsibility of determining whether to apply an upward deviation from sentencing guidelines. Pillatos held the new law applied prospectively to two defendants who had not yet pled guilty or started trial, even though the alleged criminal acts and filing of the criminal case

¹⁰ The decision appears in the appendix of the Petition for Review. See Court of Appeals Decision, p. 5; Petition for Review Appendix at 5.

¹¹ Respondent’s Brief to the Court of Appeals at 17-18.

occurred before the effective date of the new law. This holding is entirely consistent with the analysis of the Court of Appeals in this case. The fact that the alleged financial exploitation and commencement of probate predated the amendments does not make application retroactive, because the statute is concerned with distribution of the estate, based on its plain language, and distribution has not yet occurred.

Notably, Mary does not argue that the Court of Appeals misapplied the “triggering event” analysis, but that it erred in not considering additional factors considered by Pillatos. However, the Court of Appeals expressly relied on two of the same cases quoted in Pillatos (Estate of Burns, 131 Wn.2d 104, and Aetna Life Ins. Co. v. Washington Life & Disability Ins. Guaranty Ass’n, 83 Wn.2d 523, 535, 520 P.2d 162 (1974)), and was guided by the language of the statute, just as Pillatos directs. ¹²

2. Mary was not denied “fair warning” that her conduct could result in disinheritance.

Mary contends that she lacked “‘fair warning’ that the alleged financial abuse ‘carrie[d] specific consequences,’” and that the Court of

¹² While Pillatos is a criminal case, and some of the statutes that it applied are expressly limited to criminal cases, see RCW 10.01.040 and RCW 9.94A.345, the Court of Appeals’ analysis falls squarely within the criminal law rules discussed in Pillatos. The Pillatos Court reiterated that RCW 10.01.040 “generally requires that crimes be prosecuted under the law in effect at the time they were committed.” 159 Wn.2d at 472. The petition filed in this case sought to apply the definition of financial exploitation that existed at the time of Mary’s conduct.

Appeals' failure to consider this issue conflicts with existing Supreme Court precedent, namely Pillatos. Petition for Review at 14. There is no merit to these arguments.

a. Financial exploitation was wrongful when Mary acted.

Mary complains that her conduct occurred “long *before* the effective date of the [abuser] statute” (Petition for Review at 14; emphasis in original); however, the statute defining “financial exploitation” was enacted long *before* Mary began draining millions out of Haviland’s trust and bank accounts. Mary had “fair warning” that her conduct was wrongful at the time she acted, and that is the cornerstone of the fairness analysis she argues was missing from the Court of Appeal’s decision.

b. Disinheritance was a possible consequence when Mary acted.

Mary also had “fair warning” that wrongful conduct could result in her disinheritance at the time she acted. Mary argues that “new disabilities for past conduct” cannot be imposed. Petition for Review at 14. However, disinheritance is not a “new disability” or a “new consequence.” Haviland had the right to disinherit Mary. She had no “vested right” to inherit Haviland’s estate at the time she engaged in a decade-long campaign of dissipating his assets. An heir’s rights do not vest until the testator’s death. Estate of Burns, 131 Wn.2d at 118 n. 4

(citations omitted). *See also Irving Trust Co. v. Day*, 314 U.S. 556, 562, 62 S. Ct. 398, 86 L.Ed. 452 (1941) (“Expectations or hopes of succession, whether testate or intestate, to the property of a living person, do not vest until the death of that person.”) Furthermore, as illustrated by the will contest companion to this case, misappropriation of large sums can be a basis for invalidating a testator’s will. Estate of Haviland, 162 Wn. App. at 568 (“Moreover, a decade-long campaign of financial exploitation corroborates a finding of undue influence, especially where the beneficiary engaged in a large number of self-dealing transactions that exhausted a substantial estate without any credible explanation.”)

c. Mary had no “vested” right to engage in financial exploitation prior to Haviland’s death.

Because Mary had no right to inherit Haviland’s estate at the time she allegedly committed financial exploitation, her contention that title vested in her at his death is irrelevant. Rights that may have accrued when Haviland died have no bearing on whether it is fair to apply new law to her dissipation of Haviland’s assets prior to his death.

Mary argues that courts disfavor retroactivity, but they do so only when it is unfair to upset reasonable expectations that were premised on the law as it existed at the time the conduct occurred. “Courts disfavor retroactivity because of the unfairness of impairing a vested right or

creating a new obligation with respect to past transactions.” Estate of Burns, 131 Wn.2d at 110 (emphasis supplied; citing Landgraf v. USI Film Prods., 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994)).

Thus, the relevant inquiry is not whether Mary had any vested rights when Haviland died, but whether she had any vested rights at the time of her allegedly wrongful conduct that would be impaired by application of the new law. For example, Estate of Burns, 131 Wn.2d 104, was concerned with the rights of Medicaid recipients at the time they applied for benefits, not at their death; Godfrey v. State, 84 Wn.2d at 962, analyzed whether tortfeasors had a “vested right” in asserting the defense of contributory negligence “at the time of the tort;” Hammack v. Monroe Street Lumber Company, 54 Wn.2d 224, 339 P.2d 684 (1959), analyzed the tortfeasor’s immunity from suit at the time of the tort; Landgraf v. USI Film Prods., 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994), held that amendments to Civil Rights Act creating a right to compensatory and punitive damages and jury trial could not apply retroactively because employers had the right to know the consequences of their discrimination at the time of their conduct; Densley v. Dept. of Retirement Systems, 162 Wn.2d 210, 173 P.3d 885 (2007), focused on the rights that the plaintiffs had at the time they rendered the services in question; State v. Scheffel, 82 Wn.2d 872, 878-79, 514 P.2d 1052 (1973), held that habitual traffic

offenders had no vested right to be free from retroactive application of the Habitual Traffic Offenders Act based on the law in effect at the time the habitual criminals acted. As the Court of Appeals adhered to this Court's precedent, there is no basis for review under RAP 13.4(b)(1).

B. The Amendments do not Deprive Mary of Constitutionally Protected Property Rights or Violate Ex Post Facto Laws.

Because the Court of Appeals held that the amendments operate prospectively, its decision did not address Mary's constitutional arguments, which assume that the statute operates retroactively. There is no basis for review under RAP 13.4(b)(3). Nonetheless, Mary cannot meet her burden in proving any impairment to a constitutionally protected interest. *See State v. Hennings*, 129 Wn.2d 512, 919 P.2d 580 (1996) ("A party challenging the statute has the burden of proving it unconstitutional beyond a reasonable doubt.") (citations omitted).

1. Due process is satisfied.

Notice and a meaningful opportunity to be heard are the cornerstones of due process. *Gourley v Gourley*, 158 Wn.2d 460, 467, 145 P.3d 1185 (2006). Because the amendments apply prospectively in this case, Mary will have the opportunity to respond to the petition filed under RCW 11.84, and assert any defenses she may have. She has not been deprived of these procedural safeguards.

Mary also has not shown that the petition process under RCW 11.84 involves state action. “Simple enactment of a statute permitting, but not requiring, private conduct with no further significant participation by the state is not state action.” Long v. Chiropractic Society of Washington, 93 Wn.2d 757, 762, 613 P.2d 124 (1980). Here, the state has not initiated any action against Mary Haviland.

Moreover, Mary has no “vested rights” that give rise to constitutional protections, even if this Court accepts Mary’s contention that the amendments apply retroactively, instead of prospectively as the Court of Appeals held. Any “rights” that abusers have in the estates of their victims exist because the victims were powerless to change their estate plans due to the conditions that made them vulnerable adults and due to the nature of financial exploitation, which frequently occurs without the victim’s knowledge.¹³ Such rights are not “vested.”

Furthermore, the vesting of title that occurs at death, even if it had validly vested in Mary, is not immune from changes in the law affecting the distribution of decedents’ estates. Since inheritance rights are a creation of the legislature, they can be amended by legislation. *See, e.g.*,

¹³ *See* Carolyn Dessin, *Financial Abuse of the Elderly*, 36 IDAHO L. REV. 203, 214-5 (2000); Shelby Moore & Jeanette Schaefer, *Remembering the Forgotten Ones: Protecting the Elderly from Financial Abuse*, 41 SAN DIEGO L. REV. 505, 509-12 (2004).

Washington State Farm Bureau v. Gregoire, 162 Wn.2d 284, 302, 174 P.3d 1143 (2007) (because the state expenditure limit is a “creature of statute,” the legislature was free to amend the expenditure limit retroactively); Estate of Fotheringham, 183 Wash. 579, 585, 492 P.2d 480 (1935) (the state is free to amend or regulate the privilege of succession). *See also* Resp. Opening Brief at 38.

Finally, “‘vested right’ . . . is merely a conclusory label” because “the proper test of the constitutionality of retroactive legislation is whether a party has changed position in reliance upon the previous law or whether the retroactive law defeats the reasonable expectations of the parties. . .” In re Marriage of Giroux, 41 Wn. App. 315, 320, 704 P.2d 160 (1985) (quoting In re Santore, 28 Wn. App. 319, 324, 623 P.2d 702 (1981)). Washington’s Supreme Court and the Ninth Circuit have adopted the same test for whether retroactive legislation is permissible, focusing on “whether a party has changed position in reliance upon the previous law or whether the retroactive law defeats the reasonable expectations of the parties[.]” State v. Hennings, 129 Wn.2d 512, 528-529, 919 P.2d 580 (1996) (retroactive application of changes to criminal restitution statute did not impermissibly impair vested rights); Boykin v. Boeing Co., 128 F.3d 1279, 1283 (9th Cir. 1997) (retroactive application of amendment to the Minimum Wage Act did not impair any vested rights). If Mary is

found to have financially exploited Haviland, then her expectation that she will receive additional property from his estate after his death was as unreasonable at the time that exploitation occurred as it is unreasonable, now under the amendments. Her expectation to benefit from illegal conduct is not an interest that is protected under the constitution.

2. The Amendments Do Not Violate Ex Post Facto Laws.

Respondents addressed below Mary's naked assertion that application of the amendments to Haviland's estate would violate the ex post facto clause. *See* Reply Br. at 23-35. The Pillatos case, upon which Mary now relies, held that the Ex Post Facto Clause was not offended by application of new law on exceptional sentencing to criminal conduct committed prior to its effective date. State v. Pillatos, 159 Wn.2d 459 (2007). Like the criminal defendants in Pillatos, Mary had adequate notice of the potential consequences of her arguably wrongful conduct; therefore, ex post facto laws are not violated.

C. Limiting Inheritance by Abusers from the Estates of their Victims does not Violate Public Policy.

The State and its citizens have a strong interest in protecting vulnerable adults from financial exploitation. Mary asserts that applying the amendments to the estates of decedents who died before July 26, 2009 would violate public policy by disrupting decedents' estate plans. Petition for Review at 19. This argument disregards RCW 11.84.170. If a

decedent knew of the financial exploitation and intended to benefit the abuser under his or her will any way, courts are directed to implement the decedent's "estate plan." Where financial exploitation is established, however, and no such ratification is shown, the law recognizes that what Mary refers to as the testator's "estate plan" does not represent the testator's true intent.

"[P]ublic policy is to be declared by the Legislature, not the courts." Bird-Johnson Corp. v. Dana Corp., 119 Wn. 2d 423, 428, 833 P.2d 375 (1982). The Court of Appeals' decision properly implements the public policy to protect the vulnerable from financial exploitation based on a reasoned analysis of statutory language and legislative intent. It presents no grounds for review under RAP 13.4(b)(4).

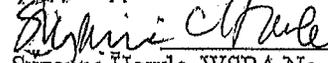
V. CONCLUSION

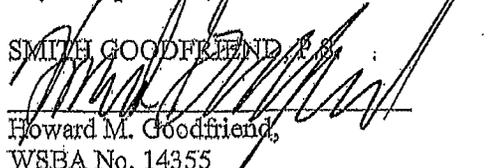
Preventing individuals who financially exploited vulnerable adults from inheriting property from their victims is neither unfair to abusers nor unconstitutional. The Supreme Court should deny review.

Respectfully submitted this 7th day of September, 2011.

THOMPSON & HOWLE

SMITH GOODFRIEND P.S.


Suzanne Howle, WSBA No. 12977
Carol Vaughn, WSBA No. 16579


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WSBA No. 14355

Attorneys for Petitioners Donald Haviland, Elizabeth Haviland
and Martha Clauser

PROOF OF SERVICE

The undersigned hereby certifies and declares under penalty of perjury under the law of the State of Washington that the following statements are true and correct:

On the 7th day of September, 2011, I caused a copy of the document to which this is attached to be served on counsel of record via messenger as follows:

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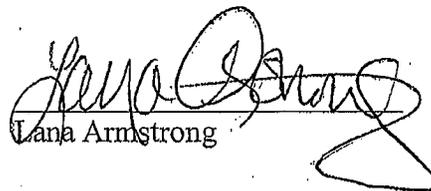

Lana Armstrong

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RCW 74.34	App. 11



In the Matter of the Estate of JAMES W. HAVILAND. DONALD HAVILAND ET AL., Respondents, v. MARY HAVILAND ET AL., Appellants.

NO. 64303-7-1

COURT OF APPEALS OF WASHINGTON, DIVISION ONE

162 Wn. App. 548; 255 P.3d 854; 2011 Wash. App. LEXIS 1564

January 14, 2011, Oral Argument
July 11, 2011, Filed

PRIOR HISTORY: [**1]

Appeal from King County Superior Court. Docket No: 07-4-06508-1. Judgment or order under review. Date filed: 09/14/2009. Judge signing: Honorable John P Erlick.

In re Estate of Haviland, 161 Wn. App. 851, 251 P.3d 289, 2011 Wash. App. LEXIS 1182 (2011)

SUMMARY:

WASHINGTON OFFICIAL REPORTS SUMMARY

Nature of Action: Action to contest a will. The plaintiffs alleged that the testator lacked testamentary capacity when he signed the will and that the will was the product of undue influence.

Superior Court: The Superior Court for King County, No. 07-4-06508-1, John P. Erlick, J., on September 14, 2009, entered a judgment in favor of the plaintiffs, ruling that the will was the product of undue influence, admitted the testator's prior will to probate, removed the testator's wife as personal representative, and appointed a new administrator of the testamentary estate.

Court of Appeals: Holding that the trial court applied the correct legal standard in deciding the question of undue influence and that the record supported the trial court's findings of fact and conclusions of law, the court *affirms* the judgment.

HEADNOTES

WASHINGTON OFFICIAL REPORTS HEADNOTES

[1] **Wills -- Validity -- Presumption -- Rational Will.** The law presumes the validity of a rational will.

[2] **Wills -- Contest -- Undue Influence -- Test.** A will executed by a testator who otherwise possesses testamentary capacity may be set aside if a will beneficiary exercised undue influence over the testator's making of the will. To invalidate a will on the basis of undue influence, a court must find that the beneficiary exerted sufficient influence at the time of the testamentary act to have controlled the testator's volition, to have interfered with the testator's free will, and to have prevented the testator from exercising the testator's own judgment and choice.

[3] **Wills -- Contest -- Undue Influence -- Burden of Proof -- Degree of Proof.** A party challenging the validity of a will on the ground of undue influence must prove undue influence by clear, cogent, and convincing evidence.

[4] **Evidence -- Standard of Proof -- Clear, Cogent, and Convincing -- What Constitutes -- In General.** The clear, cogent, and convincing evidence standard of proof requires evidence that convinces the trier of fact that the fact in issue is "highly probable." In determining whether the evidence meets the clear, cogent, and convincing standard of persuasion, the trier of fact must make credibility determinations and weigh and evaluate the evidence.

[5] **Evidence -- Weight -- Credibility of Witnesses -- Review.** A trial court's evidence and witness credibility determinations are not reviewed by an appellate court.

[6] **Wills -- Contest -- Undue Influence -- Presumption -- How Established -- Effect.** A combination of suspi-

cious facts and circumstances may give rise to a rebuttable presumption that a testator's making of a will was the product of undue influence by a will beneficiary, including the testator's spouse. The most important suspicion-raising facts include (1) that the beneficiary occupied a fiduciary or confidential relation to the testator, (2) that the beneficiary actively participated in the preparation or procurement of the will, and (3) that the beneficiary received an unusually or unnaturally large part of the estate. Added to these may be other considerations, such as the age or condition of health and mental vigor of the testator, the nature or degree of relationship between the testator and the beneficiary, the opportunity for exerting an undue influence, and the naturalness or unnaturalness of the will. Once the evidence raises this presumption, the burden shifts to the will proponent to produce rebuttal evidence sufficient at least to balance the scales and restore the equilibrium of evidence touching the validity of the will. In the absence of rebuttal evidence, the evidence raising the presumption may be sufficient to invalidate the will.

[7] Courts -- Stare Decisis -- Supreme Court Holding -- Compliance by Court of Appeals -- Necessity. The Court of Appeals is bound by a Supreme Court precedent if the Court of Appeals is not provided with a persuasive basis for distinguishing the Supreme Court's holding.

[8] Wills -- Contest -- Undue Influence -- Presumption -- Factors -- Single Factor -- Sufficiency. No single factor for raising the presumption that a will was the product of undue influence by a will beneficiary is dispositive. A claim of undue influence is decided on the basis of a combination of facts shown by the evidence in the particular case to be of such a suspicious nature as to raise a presumption of undue influence.

[9] Wills -- Contest -- Undue Influence -- Presumption -- Factors -- Nonspouse Beneficiary. The factors for raising the presumption that a will was the product of undue influence by a will beneficiary does not put a spouse beneficiary at a substantially greater risk of a will being set aside than a nonspouse beneficiary.

[10] Appeal -- Findings and Conclusions -- Review -- Standard of Review. When a trial court's findings of fact actually are conclusions of law or are mixed findings of fact and conclusions of law, an appellate court reviews the factual components under the substantial evidence standard and the conclusions of law, including those mistakenly characterized as findings of fact, de novo. Substantial evidence is that quantum of evidence sufficient to persuade a rational, fair-minded person the premise is true. Where there is conflicting evidence, the reviewing court needs only to determine whether the evidence

viewed most favorable to the respondent supports the challenged finding.

[11] Appeal -- Findings of Fact -- Failure To Assign Error -- Effect. A trial court's unchallenged findings of fact are verities on appeal.

[12] Fiduciaries -- Fiduciary Duty -- Loyalty -- Use of Principal's Property for Own Benefit. The fiduciary duty of loyalty prohibits the fiduciary from using the principal's property for the fiduciary's own benefit.

[13] Fiduciaries -- Fiduciary Relationship -- Spouse -- Effect. A spouse is not relieved of fiduciary duties when serving as a trustee for the other spouse.

[14] Wills -- Contest -- Undue Influence -- Presumption -- Factors -- Participation in or Procurement of Will -- Determination. The "participation in or procurement of the will" factor for raising the presumption that a will was the product of undue influence depends not solely on the character of the participation or procurement but on the facts and circumstances with which the participation or procurement is connected. The relevant inquiry is whether the beneficiary's participation in the preparation and execution of the will, in connection with other facts and circumstances, supports a presumption of undue influence.

[15] Wills -- Contest -- Undue Influence -- Presumption -- Factors -- Unusually or Unnaturally Large Bequest -- What Constitutes -- Determination. For purposes of the "unusually or unnaturally large bequest" factor for raising the presumption that a will was the product of undue influence, a will is "unnatural" when it is contrary to what the testator, from the testator's known views, feelings, and intentions, would have been expected to make. Courts determine naturalness by looking to a testator's prior wills.

[16] Wills -- Contest -- Undue Influence -- Presumption -- Proof -- Sufficiency. It may be presumed that a testator's spouse who is a beneficiary of the testator's will exerted undue influence over the testator where it is shown that the spouse was the testator's fiduciary, participated in the creation of the will, and received an unnaturally large share of the testator's estate in comparison to the testator's earlier estate plans; that the testator was extremely vulnerable to undue influence due to physical disabilities, to some cognitive impairment, and to the spouse's position as the testator's primary caregiver; and that the spouse depleted the testator's estate through a systematic, persistent, and largely unexplained pattern of transferring assets from the testator's estate for the

spouse's benefit and for the benefit of the spouse's children and other designees.

[17] Wills -- Contest -- Undue Influence -- Presumption -- Rebuttal -- Proof -- Testamentary Capacity.

Evidence of a testator's testamentary capacity is not necessarily inconsistent with the conclusion that undue influence overmastered the testator's free agency. Discrepancies in the record regarding testamentary capacity do not necessarily rebut the presumption of undue influence, especially if there is overwhelming evidence demonstrating that the testator suffered at least some decline in mental faculties and depended on the beneficiary for care.

[18] Wills -- Contest -- Undue Influence -- Factors -- Exclusivity. A court may consider any relevant factors when determining whether a will might have been the product of undue influence.

[19] Wills -- Contest -- Undue Influence -- Factors -- Financial Exploitation of Testator -- Self-Dealing Transactions by Beneficiary -- Asset Depletion. A trial court's finding that a will beneficiary unduly influenced the testator's making of the will may be supported by evidence demonstrating that the beneficiary engaged in a decade-long campaign of financial exploitation of the testator involving a large number of self-dealing transactions by the beneficiary that exhausted the testator's substantial estate without any credible explanation.

[20] Wills -- Contest -- Attorney Fees -- On Appeal -- Nonprevailing Personal Representative -- Payable as Personal Obligation -- Discretion of Court. Under *RCW 11.96A.150* and *RCW 11.24.050*, an appellate court has the discretion to order the personal representative of a decedent's testamentary estate to personally pay appellate attorney fees to a prevailing will contest plaintiff for responding to the personal representative's appeal.

COUNSEL: *Ladd B. Leavens* and *William K. Rasmussen* (of *Davis Wright Tremaine LLP*), for appellants.

Suzanne C. Howle and *Carol S. Vaughn* (of *Thompson & Howle Downtown Office*), for respondents.

JUDGES: AUTHOR: J. Robert Leach, J. WE CONCUR: Stephen J. Dwyer, C.J., Mary Kay Becker, J.

OPINION BY: J. Robert Leach

OPINION

[*551] ¶1 LEACH, J. -- Mary Haviland appeals a trial court's decision invalidating her deceased husband's will as the [*552] product of her undue influence. Mary

¹ claims that the trial court should not have applied the factors identified in *Dean v. Jordan* ² because they "have no meaningful application between a husband and wife." She also assigns error to the court's findings of fact and conclusions of law. Because our Supreme Court has applied *Dean* to analyze a claim of a spouse's undue influence, the trial court did not err by applying it here. And because substantial evidence in the record supports the trial court's written findings of fact and the conclusions [**2] that flow from them, we find no error and affirm.

1 To avoid confusion, Mary Haviland will be referred to by her first name.

2 194 Wash. 661, 79 P.2d 331 (1938).

FACTS

¶2 Haviland was born on July 18, 1911. He enjoyed a long and distinguished medical career. From the 1940s to the 1970s, he was a leader at the University of Washington School of Medicine, serving as an assistant dean, a clinical professor, and an associate dean, while maintaining a successful private medical practice. In 1962, he cofounded the Northwest Kidney Centers. Haviland and his first wife, Marion, had four children together.

¶3 When Marion died in 1993, the couple's assets were distributed according to the James W. Haviland and Marion B. Haviland Revised and Restated Revocable Trust, dated June 26, 1990 (the 1990 trust agreement). A primary purpose of this trust was "to provide common protection to the trustors against the effects of age and their increased susceptibility to the suggestions of others."³

3 They also established a number of charitable trusts that paid income during their lifetimes.

¶4 Pursuant to the 1990 trust agreement, \$600,000 of Marion's separate property funded a Credit Shelter Trust, Haviland's separate [**3] property and his half of the community property funded a Survivor's Trust, and the balance of Marion's separate property funded a Marital Trust. Upon [*553] Marion's death, the Credit Shelter Trust and Marital Trust became irrevocable, although Haviland could withdraw 100 percent of the principal from the Marital Trust. The Survivor's Trust remained revocable. The Credit Shelter Trust provided that upon the surviving spouse's death, the three trusts would continue for the benefit of the Haviland children and grandchildren until the death of all the children or until the youngest grandchild turned 30, whichever occurred later. Any remainder would be distributed to charitable beneficiaries.

¶5 In 1996, while recuperating at Providence Hospital from a leg injury, then 85-year-old Haviland met then

35-year-old Mary, a hospital nurse assistant. Haviland and Mary continued to see each other after his release from the hospital. A short time later, Haviland gave \$10,000 to Mary to help pay for her education and living expenses. Three months later, Haviland agreed to pay \$100,000 toward Mary's educational expenses and an additional \$300,000 to \$350,000 as a "nest egg." Another three months later, Haviland [**4] created the James W. Haviland Living Trust (Living Trust), naming himself as the beneficiary during his lifetime. Upon his death, the trust was to pay up to \$500,000 to Mary for her education and living expenses and distribute the balance, if any, according to the 1990 trust agreement.

¶6 Haviland and Mary married in August 1997. The couple executed a prenuptial agreement that maintained the separate nature of Haviland's property. According to this agreement, Haviland had assets valued at more than \$3 million, including real property on Shaw Island, Bremerton, and Canim Lake, plus retirement accounts, the Survivor's Trust, charitable remainder trusts, the Living Trust, and various bank accounts. He also received substantial income from the trusts that he and Marion had established. Mary had negligible assets.

¶7 The following year, Haviland removed the limit on Mary's inheritance under the Living Trust, thereby eliminating the Survivor's Trust as the remainder beneficiary of [*554] that trust. Then, in 1999, Haviland transferred \$765,000 from the Survivor's Trust to the Living Trust. Haviland's children were the remainder beneficiaries of the Survivor's Trust; Mary was the remainder beneficiary [**5] of the Living Trust.

¶8 The following year, Haviland amended the Living Trust to add Mary as a cotrustee. Haviland remained the sole beneficiary of that trust, and he continued to fund it with his separate property, the only source of funds for that trust. After this amendment, Haviland and Mary jointly approved all transactions relating to the Living Trust.

¶9 Over the course of their marriage, millions of dollars of Haviland's separate assets were transferred from the Living Trust into the couple's joint checking account, Mary's separate checking account, or Mary's separate line of credit. In turn, bank statements document the withdrawal of millions of dollars from the joint checking account. The trial court found little evidence as to the ultimate purpose for which the money withdrawn from the joint checking account was used. Haviland also conveyed two parcels of his separate real property to Mary as her separate property. In addition, Haviland's retirement accounts were cashed in, and substantial sums of money were gifted to Mary's children from a previous marriage and to other designees. Haviland did not make comparable gifts to his own children.

¶10 Meanwhile, Haviland's physical health substantially [**6] deteriorated. In 2002, Haviland changed primary care physicians and indicated on the new patient registration form that he was having memory problems. Mary also filled out a new patient registration form for Haviland identical to the one Haviland completed, except she omitted any indication of his memory impairment. The new physician testified that he likely relied on the form Mary provided because that form contained that physician's signature. This physician did not evaluate Haviland's mental state at that time.

[*555] ¶11 In 2005, Mary quit her job to care full time for Haviland. Mary explained that Haviland began refusing care from Mary's daughter, who had been hired to care for Haviland while Mary was at work. Mary reported that

[Haviland] would go all day without eating or exercising in my absence. Also, [Haviland] began falling as he attempted to do things for himself that were beyond his physical strength and ability, and his skin integrity became compromised as he refused to use the toilet unless I was there to assist him. Within a short period of time, he became more-and-more irritated and disoriented simply because I was not there to care for his needs.

Mary claimed that these symptoms [**7] abated within two weeks of her staying home to care for Haviland.

¶12 Before his marriage to Mary, Haviland was known as a "frugal" man, who made generous gifts to education, the arts, and charitable organizations. During his marriage to Mary, he made four revisions to his estate plan. Each change resulted in a greater portion of his estate going to Mary and less going to his children and designated charities.

¶13 The last major revision occurred in 2006, when Mary phoned Alan Kane, an attorney at K&L Gates LLP, to advise him that Haviland wished to change his will. After the phone call, Mary typed a letter to Kane and enclosed a copy of Haviland's 2002 will with requested revisions. Mary's handwritten revisions, initialed by Haviland, provided that (1) she would inherit the personal property in the Mercer Island residence, previously given to Haviland's children; (2) the remainder of Haviland's estate would pass to the Living Trust for Mary's benefit and not to the Credit Shelter Trust; (3) \$55,000 of the previous \$105,000 given to specific individuals and charities would be eliminated; and (4) certain waiting periods would be reduced from four months to two months. These changes effectively [**8] disinher-

ited Haviland's children, leaving them with only a right of first refusal for the Shaw Island residence.

¶14 Three days before Haviland signed the 2006 will, Mary took him to his physician. This was his first visit with [*556] his physician since 2003. Mary informed the physician that Haviland's "mentation was good."

¶15 On the day of the will signing, Mary brought Haviland to Kane's office. Kane testified that he met with Haviland for five minutes before the will signing but that he did not discuss with him his family, the objects of his bounty, or ask Haviland questions about the nature and extent of his estate. Kane recalled having last met with Haviland in 2002, and Kane noticed a moderate decline in Haviland's mental functioning. According to Kane, the only thing Haviland said during this meeting was "yes" in response to questions about the signing. Nevertheless, Kane testified to his opinion that Haviland possessed testamentary capacity.

¶16 By 2007, Haviland's mental condition deteriorated to the point that he could not recognize Mary 75 percent of the time. On November 6, Haviland visited the emergency room for dehydration. The emergency room consultation report describes Haviland as suffering [**9] from advanced dementia. A few days later, Mary prepared a request, signed by Haviland, to pay his debts, including debts owed jointly with Mary, with principal from the Credit Shelter Trust. The trust manager denied this request. Haviland died approximately one week later.

¶17 After the court admitted Haviland's 2006 will to probate, three of Haviland's children commenced this will contest. They alleged that Haviland lacked testamentary capacity at the time he signed the 2006 will and that the will was a product of undue influence. A lengthy bench trial followed.

¶18 At trial, Dr. Elaine Peskind, a geriatric psychiatrist, testified about her review of Haviland's records and her "retrospective" analysis. In her professional opinion, Haviland began exhibiting symptoms of Alzheimer's disease as early as 2000 and had progressed to the early stages of the disease by 2002. Peskind identified witness statements indicating that by 2004, Haviland required cueing for his basic daily activities. Peskind stated that Haviland could [*557] not perform the most basic activities of daily living without assistance. Peskind also testified that Haviland lacked the ability to form independent thoughts and likely suffered [**10] from severe, advanced Alzheimer's at the time of his death.

¶19 The trial court concluded that respondents failed to meet their burden of proof on the issue of testamentary capacity. However, the court determined that clear, co-

gent, and convincing evidence established that the 2006 will was the product of undue influence by Mary. The court set that will aside, admitted the 2002 will into probate, removed Mary as personal representative, and appointed a new administrator of Haviland's estate.

¶20 Mary appeals.

ANALYSIS

Undue Influence

¶21 Mary asserts that the trial court used the wrong legal standard to determine whether the 2006 will was a product of undue influence. We review this legal question de novo.⁴

4 See *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003) (questions of law and conclusions of law reviewed de novo).

[1-3] ¶22 "The law presumes the validity of a rational will."⁵ However, a will executed by a person who otherwise possesses testamentary capacity may be set aside if the beneficiary exercised undue influence over the testator.⁶ To invalidate a will on this basis, the court must find that the beneficiary exerted sufficient influence at the time of the testamentary [**11] act to have "controlled the volition of the testator, interfered with his free will, and prevented an exercise of his judgment and choice."⁷ The party challenging [*558] the will must prove undue influence by clear, cogent, and convincing evidence.⁸

5 *In re Estate of Eubank*, 50 Wn. App. 611, 617, 749 P.2d 691 (1988).

6 *In re Estate of Lint*, 135 Wn.2d 518, 535, 957 P.2d 755 (1998).

7 *Lint*, 135 Wn.2d at 535 (quoting *In re Estate of Bottger*, 14 Wn.2d 676, 700, 129 P.2d 518 (1942)).

8 *Lint*, 135 Wn.2d at 535.

[4, 5] ¶23 The clear, cogent, and convincing standard requires evidence that convinces the trier of fact that the fact in issue is "highly probable."⁹ "In determining whether the evidence meets the 'clear, cogent, and convincing' standard of persuasion, the trial court must make credibility determinations and weigh and evaluate the evidence."¹⁰ We do not review the trial court's credibility determinations.¹¹

9 *Endicott v. Saul*, 142 Wn. App. 899, 910, 176 P.3d 560 (2008) (quoting *Colonial Imps., Inc. v. Carlton Nw., Inc.*, 121 Wn.2d 726, 734-35, 853 P.2d 913 (1993)).

10 *Endicott*, 142 Wn. App. at 910 (citing *Bland v. Mentor*, 63 Wn.2d 150, 154, 385 P.2d 727 (1963)).

11 *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

[6-9] ¶24 In [**12] *Dean*, our Supreme Court announced that a combination of suspicious facts and circumstances may give rise to a rebuttable presumption of undue influence.¹² The "most important" suspicion-raising facts include

(1) that the beneficiary occupied a fiduciary or confidential relation to the testator; (2) that the beneficiary actively participated in the preparation or procurement of the will; and (3) that the beneficiary received an unusually or unnaturally large part of the estate. Added to these may be other considerations, such as the age or condition of health and mental vigor of the testator, the nature or degree of relationship between the testator and the beneficiary, the opportunity for exerting an undue influence, and the naturalness or unnaturalness of the will.¹³

Once the evidence raises this presumption, the burden shifts to the will proponent to rebut it with "evidence sufficient at least to balance the scales and restore the [*559] equilibrium of evidence touching the validity of the will."¹⁴ In the absence of rebuttal evidence, the evidence raising the presumption may be sufficient to invalidate the will.¹⁵

12 *Dean*, 194 Wash. at 671-72.

13 *Dean*, 194 Wash. at 672.

14 *Dean*, 194 Wash. at 672.

15 *Dean*, 194 Wash. at 672.

¶25 Here, [**13] the trial court applied *Dean* and invalidated the will as the product of Mary's undue influence. It found that Mary was Haviland's fiduciary, participated in the creation of the 2006 will, and received an unnaturally large share of Haviland's estate in comparison to his earlier estate plans. It also found that Haviland was extremely vulnerable to undue influence due to physical disabilities, some cognitive impairment, and Mary's position as his primary caregiver. Finally, it found that Mary depleted his estate through a systematic, persistent, and largely unexplained pattern of transferring assets from Haviland's estate for her benefit and that of her children and other designees.

¶26 Mary argues that the *Dean* factors should not apply when a will contestant asserts undue influence

against a spouse. Mary bases her claim upon two observations: that a common trait of marriage is that each spouse occupies a fiduciary relationship with respect to the other and that spouses routinely participate in the preparation and procurement of each other's wills.

¶27 Mary's argument does not persuade us to depart from *Dean* for two reasons. First, Mary's argument cannot be reconciled with *In re Estate of Lint*. [**14]¹⁶ In *Lint*, our Supreme Court described *Dean* as a scholarly opinion and affirmed the trial court's use of the *Dean* factors to determine whether the decedent's spouse exerted undue influence to procure her will. The *Lint* court specifically discussed the suspicion-raising factors *Dean* identified as most important.¹⁷ Because we are bound by *Lint* and Mary [*560] provides no persuasive basis for distinguishing it, we conclude that the *Dean* factors apply here.

16 135 Wn.2d 518, 957 P.2d 755 (1998).

17 *Lint*, 135 Wn.2d at 537-38.

¶28 Second, precedent contradicts Mary's suggestion that spouses are at greater risk than other beneficiaries of having a will invalidated under *Dean*. In the case of *In re Estate of Beck*,¹⁸ which *Dean* relies upon, our Supreme Court explained, "No presumption of undue influence invariably arises from the fact that a [beneficiary actively participated in the preparation or procurement of the will]." Rather, "[i]t is a fact to be considered with other facts. It is undoubtedly a suspicious fact, but its weight depends, not solely upon its character, but upon the facts and circumstances with which it is connected."¹⁹ *Dean*, and the case law interpreting it, makes clear that the same [**15] analysis applies to each *Dean* factor. Consequently, no single *Dean* factor is determinative. Instead, *Dean* requires that each case be decided based upon a "combination of facts shown by the evidence in a particular case [to] be of such [a] suspicious nature as to raise a presumption of ... undue influence."²⁰ Without such evidence, an undue influence challenge will fail.²¹ Accordingly, *Dean* does not put spouses at a substantially greater risk of a will being set aside than nonspouse beneficiaries.

18 79 Wash. 331, 334, 140 P. 340 (1914) (quoting 1 H.C. UNDERHILL, A TREATISE ON THE LAW OF WILLS § 137, at 195 (1900)).

19 *Beck*, 79 Wash. at 334 (quoting 1 UNDERHILL, § 137, at 195).

20 *Dean*, 194 Wash. at 672 (emphasis added).

21 See, e.g., *In re Estate of Kinssies*, 35 Wn.2d 723, 734, 214 P.2d 693 (1950) (reversing a trial court decision invalidating a will because record did not contain clear and convincing evidence showing that will should be set aside).

¶29 We therefore hold that the factors and presumption identified in *Dean* apply when assessing the conduct of a spouse in a will contest.

Findings of Fact and Conclusions of Law

¶30 Mary assigns error to 5 of the trial court's 135 findings of fact, arguing [**16] that substantial evidence does not support them. She also assigns error to 3 conclusions of law.

[*561] [10] ¶31 Where, as here, some findings are actually conclusions of law or mixed findings of fact and conclusions of law, we review the factual components under the substantial evidence standard and the conclusions of law, including those mistakenly characterized as findings of fact, *de novo*.²² Substantial evidence is that "quantum of evidence sufficient to persuade a rational fair-minded person the premise is true."²³ "[W]here there is conflicting evidence, the court needs only to determine whether the evidence viewed most favorable to respondent supports the challenged finding."²⁴

22 *In re Welfare of L.N.B.-L.*, 157 Wn. App. 215, 243 & n.27, 237 P.3d 944 (2010).

23 *Sunnyside*, 149 Wn.2d at 879.

24 *Lint*, 135 Wn.2d at 532.

¶32 Mary challenges the following findings of fact:

125. The evidence is clear, cogent, and convincing that Dr. Haviland had advanced dementia as of November 2007, shortly before he died. The source of this information in the medical record at Harrison Hospital is unclear. However, it was either a medical professional at Harrison who observed and noted it or Mary Haviland herself, who is [**17] also a trained nurse, who reported it to medical personnel.

...

127. On November 8, 2007, Dr. Haviland purportedly wrote to Paul Hennes requesting that all of his debt, including any debt jointly held with Mary Haviland, be paid by the principal of the Marion Haviland Credit Shelter Trust. He noted this was his "last wish" and asked Mr. Hennes to work out the details with Mary Haviland. The request was denied. Clear, cogent, and convincing evidence shows that Dr. Haviland was suffering from dementia prior to this request.

128. The November 8, 2007 request was made by Mary Haviland to Paul Hennes ostensibly on behalf of Dr. Haviland at a time when Dr. Haviland clearly lacked capacity to make that decision. Mary Haviland's explanation that this is what Dr. Haviland had previously [*562] wanted strains credulity. Rather, the Court finds that the November 8, 2007 request to be corroborating evidence of Mary Haviland's overreaching and undue influence. The November 8, 2007, request for payment of all of Mary Haviland's debt from the Marion Haviland Credit Shelter Trust was part of Mary Haviland's steady, systematic, and persistent pattern of depleting Dr. Haviland's assets and the transfer of [**18] funds for the benefit of Mary Haviland and her designees. Mary Haviland offered no credible evidence to explain the consumption and transfer of such large sums of money from Dr. Haviland's assets, during the course of their marriage.

129. The 2006 will was consistent with Dr. Haviland's prior wills in that it reflected a steadily increasing transfer of his estate to Mary Haviland. The unexplained *inter vivos* transfer of Dr. Haviland's assets for the benefit of Mary and her designees is corroborating evidence of the undue influence exercised by Mary Haviland over Dr. Haviland.

...

135. According to respondent herself, the lifetime Estate of Dr. Haviland was so depleted by Mary's transfer of funds that, after distribution of specific bequests, the total value of the Estate is a negative \$45,834.38. That is, after deducting specific bequests (which are not part of the residue), the debts of the Estate (which are payable first from residue) exceeded the assets of the Estate by a reported \$45,834.38.

To the extent that these challenged findings contain factual determinations, substantial evidence in the record supports them.

[11] ¶33 Here, Haviland was admitted to the emergency room for dehydration [**19] on November 6, 2007. The emergency room consultation states,

"[Haviland has] advanced dementia. He is essentially bed ridden [sic] at home." It also indicates that Mary was his primary and complete caregiver and that she provided Haviland's medical history. Unchallenged finding of fact 124 states,

[*563] The intake notes explain that Dr. Haviland had memory impairment, and was exhibiting confusion, agitation, abnormal behavior, and changes in his mental state. Mary Haviland requested that Dr. Haviland not be admitted, and that she administer saline solution at home. The physician ... noted that Dr. Haviland had no local primary care provider. Mary Haviland was Dr. Haviland's sole caregiver.

Unchallenged findings are verities on appeal.²⁵ Thus, these findings, together with the testimony of Dr. Peskind described earlier, when viewed most favorably to the Haviland children, provide ample support for a finding that Haviland suffered from advanced dementia before his death. And because the request to pay debt with the principal from the Credit Shelter Trust came two days after Haviland's admission to the emergency room, it also sufficiently supports a finding that Haviland "was suffering from [*20] dementia prior to th[at] request" and that Mary made the request "at a time when Dr. Haviland clearly lacked capacity to make that decision."

²⁵ *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

¶34 Abundant evidence in the record also supports the court's finding that Mary depleted Haviland's assets. The parties do not dispute that Haviland's separate property provided the only funding for the Living Trust, and numerous unchallenged findings of fact detail the large sums repeatedly transferred to Mary from the Living Trust and the joint checking account with no credible explanation as to how she used the money.

¶35 Similarly, the 2006 will reflected a steadily increasing share of Haviland's estate being gifted to Mary and away from his children and charities. In Haviland's 1997 will, he devised the Shaw Island property to Mary, provided that she did not predecease him. If she did, the property passed to his children. The residue of his estate passed to the Survivor's Trust in accordance with the 1990 trust agreement. Haviland's children and various charities were the lifetime beneficiaries of that trust. But in 1998, [*564] Haviland executed a new will. That will devised the Bremerton home and [*21] Shaw Island property to Mary, stipulated that Mary's children would

inherit the Shaw Island property even if she predeceased Haviland, and eliminated certain charitable bequests. Then, in 2002, Haviland withdrew his assets from the Marital Trust, revoked the Survivor's Trust, and transferred those assets to the Living Trust for Mary's benefit. Haviland also executed a will that devised the residue of his estate to the Credit Shelter Trust. Haviland's children were the beneficiaries of that trust. But in 2006, Haviland executed a will that devised the residue of his estate to the Living Trust, thereby effectively disinheriting his children, and cut bequests to charitable organizations by nearly half, increasing the remainder bequest to Mary.

¶36 For the foregoing reasons, we are satisfied that the findings of fact are supported by substantial evidence. Because the remaining challenged findings are not necessary to the undue influence determination, we do not address them.

[12-19] ¶37 Next, we examine the findings in view of the factors set forth in *Dean* to determine whether the court erred in entering the challenged conclusions of law. The challenged conclusions state,

9. Clear, cogent, and convincing [*22] evidence supports a presumption that the will executed by James Haviland on January 19, 2006 was the product of undue influence by Mary Haviland. Mary Haviland was the decedent's fiduciary. She participated in the creation of the will. The 2006 will gave Mary Haviland an unnaturally large share of Dr. Haviland's estate in comparison to Dr. Haviland's prior estate plan. Dr. Haviland was also extremely vulnerable to undue influence due to physical disabilities, some degree of cognitive impairment, and the fact that Mary Haviland was Dr. Haviland's primary caregiver. Mary Haviland also engaged in a systematic and persistent pattern of transferring assets from Dr. Haviland's estate, during his lifetime, for her own benefit and that of [*565] her designees. These transfers of extremely large sums, in their totality, were not credibly explained.

10. Mary Haviland has not produced credible evidence that this Court finds sufficient to "at least to balance the scales and restore the equilibrium of evidence touching the validity of the will." *In re Estate of Burkland*, 8 Wn. App. 153, 158-59, 504 P.2d 1143 (1972), review denied, 82 Wn.2d 1002 (1973). Clear, cogent and convincing evidence establishes [*23]

that the will signed by Dr. James Haviland on January 19, 2006 was the product of ongoing undue influence by Mary Haviland.

11. Based on this Court's weighing, comparing, and evaluating of the evidence, it concludes that 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, 957 P.2d 755 (1998).

After reviewing the findings, we are satisfied that they support the conclusions of law.

¶38 Notably, conclusion of law 9 succinctly addresses the *Dean* factors. The first *Dean* factor requires that Mary be Haviland's fiduciary. The fiduciary duty of loyalty prohibits the use of the principal's property for the benefit of the trustee.²⁶ A spouse is not relieved of fiduciary duties when she serves as a trustee for her husband.²⁷ Finding of fact 29 states that Mary was a cotrustee on the Living Trust and [*566] that Haviland was the only named beneficiary of that account. Therefore, clear, cogent, and convincing evidence establishes that Mary occupied a fiduciary relationship to Haviland.

²⁶ RESTATEMENT (THIRD) OF AGENCY § 8.05 [*24] (2006).

²⁷ See *Bryant v. Bryant*, 125 Wn.2d 113, 118-19, 882 P.2d 169 (1994) (fiduciary duty of loyalty applies to spouse acting as agent under a durable power of attorney); *In re Marriage of Matson*, 107 Wn.2d 479, 484, 730 P.2d 668 (1986) (explaining that the demise of the rule that the husband manage the community property estate did not end the fiduciary duties of the marriage); *Whitney v. Seattle-First Nat'l Bank*, 90 Wn.2d 105, 108, 579 P.2d 937 (1978) (parties to an antenuptial agreement "must exercise the highest degree of good faith, candor and sincerity in all matters bearing on the proposed agreement" (internal quotation marks omitted) (quoting *Hamlin v. Merlino*, 44 Wn.2d 851, 864, 272 P.2d 125 (1954))); RCW 26.16.210 ("In every case, where any question arises as to the good faith of any transaction between spouses or between domestic partners, whether a transaction between them directly or by intervention of third person or persons, the burden of proof shall be upon the party asserting the good faith.").

¶39 The second inquiry under *Dean* is whether Mary participated in the procurement of the 2006 will. As indicated before, the weight of this factor "depends, not solely upon its [*25] character, but upon the facts and circumstances with which it is connected."²⁸ And although there may be circumstances in which the beneficiary's mere participation in the procurement of the will is insufficient to cast suspicion upon it,²⁹ such is not the case here. Finding of fact 72 states that Mary called Kane to inform him that Haviland wanted to make revisions to his 2002 estate plan. Finding of fact 73 indicates that Mary typed a letter to Kane and enclosed a copy of the previous will upon which Mary interlined draft changes. Mary does not challenge these findings of fact. Further, the 2006 will revision comes on the heels of nearly a decade-long campaign of draining Haviland's estate and at a time when Haviland's mental and physical faculties were clearly declining. Thus, Mary's participation in the drafting of the 2006 will supports the conclusion that there is clear, cogent, and convincing evidence of her undue influence.

²⁸ *Beck*, 79 Wash. at 334 (quoting 1 UNDERHILL, § 137, at 195).

²⁹ See, e.g., *Beck*, 79 Wash. at 334-35 (quoting 1 UNDERHILL, § 137, at 195).

¶40 The third *Dean* factor examines whether the 2006 will was unnatural in comparison to earlier estate plans. "A will [*26] is unnatural when it is contrary to what the testator, from his known views, feelings, and intentions would have been expected to make."³⁰ Courts determine naturalness by looking to a testator's prior wills.³¹ In this case, it is clear that each change to Haviland's estate plan resulted in Mary receiving more of his estate while less went to his children and designated charities. The 2006 will also reduced bequests [*567] to charitable organizations for Mary's obvious benefit, conflicting with Haviland's reputation for charitable giving. We therefore conclude that there is clear, cogent, and convincing evidence that the 2006 will was unnatural.

³⁰ *In re Estate of Miller*, 10 Wn.2d 258, 267, 116 P.2d 526 (1941).

³¹ *In re Estate of Esala*, 16 Wn. App. 764, 769, 559 P.2d 592 (1977).

¶41 The remaining *Dean* factor, whether additional justification exists for setting aside a will as product of undue influence, is also present. Here, the court relied on two considerations: (1) that Haviland was extremely vulnerable to Mary's undue influence and (2) that Mary engaged in a systematic and persistent pattern of draining assets from Haviland's estate for her own benefit. Both are supported by clear, cogent, and [*27] convincing evidence. Haviland experienced substantial physical dis-

abilities, exhibited symptoms of dementia as early as 2000, required Mary's full-time care in 2005, and had advanced dementia at the time of his death in 2007. Unchallenged findings describe in detail the many large asset transfers without explanation as to their purpose.

¶42 In summary, the petitioners presented sufficient evidence to raise a presumption of undue influence. The burden then shifted to Mary to produce credible evidence sufficient to "balance the scales and restore the equilibrium of evidence touching the validity of the will." ³² Mary challenges the trial court's determination that she failed to do so. She submits she presented testimony from legal professionals and numerous disinterested witnesses sufficient to restore the equilibrium.

³² *Dean, 194 Wash. at 672.*

¶43 Specifically, Mary argues she presented evidence that Haviland was alert and in good mental health at the time of the will signing. But this argument does not survive scrutiny. "[E]vidence of testamentary capacity is not inconsistent with the conclusion that undue influence had overmastered free agency." ³³ Thus, discrepancies in the record regarding ³³ testamentary capacity do not necessarily rebut the presumption of undue influence, especially where, as ³³ here, overwhelming evidence demonstrates that the testator suffered at least some decline in his mental faculties and depended on the beneficiary for his care.

³³ *Esala, 16 Wn. App. at 770.*

¶44 Next, Mary alleges that her participation in the procurement of the 2006 will was no more than would be expected of any spouse under similar circumstances. The relevant inquiry, however, is not whether Mary involved herself to the same degree as any other spouse, but whether her participation in the preparation and execution of the will, in connection with other facts and circumstances, supports a presumption of undue influence. Mary's analysis of this factor in isolation ignores *Dean's* instruction that each case be decided based upon the combination of facts established in that case. Thus, her argument fails.

¶45 Mary also claims that that the 2006 will is consistent with Haviland's desire, stated 10 years earlier, to provide substantial benefit to her. While it is true that Haviland provided for Mary in earlier estate plans, it is also true that those plans devised the majority of his estate to his ³⁴ children and various charities. For this reason, Mary's claim that Haviland wished to provide substantial benefit to Mary is insufficient to rebut the presumption of undue influence.

¶46 Lastly, Mary argues that the trial court erred by relying on a pattern of asset depletion because that factor is not listed among the *Dean* criteria. But nothing in *Dean* suggests that its list of suspicion-raising factors is comprehensive or exclusive. To the contrary, *Dean* specifically states that the circumstances identified are "the most important" and that "other considerations" may be taken into account. ³⁴ Moreover, a decade-long campaign of financial exploitation corroborates a finding of undue influence, especially where the beneficiary engaged in a large number of self-dealing transactions that exhausted a substantial estate without any credible explanation.

³⁴ *Dean, 194 Wash. at 672.*

[*569] ¶47 Conclusion of law 11 states that clear, cogent, and convincing evidence establishes that at the time of the 2006 will Mary exerted undue influence over Haviland. We agree. There is clear, cogent, and convincing evidence in the record that Mary "controlled the volition of the testator, interfered with his free will, and ³⁵ prevented an exercise of his judgment and choice."³⁵

³⁵ *Lint, 135 Wn.2d at 535* (quoting *Bottger, 14 Wn.2d at 700*).

Attorney Fees

¶48 Mary asks this court to reverse the trial court's award of attorney fees and costs. She makes this request contingent on her success in this appeal. Because she does not prevail, we affirm the trial court's award of fees and costs in favor of the respondents.

[20] ¶49 The respondents request attorney fees on appeal and ask that the fees be paid by Mary rather than the estate. *RCW 11.96A.150* and *RCW 11.24.050* grant this court discretion to award fees in this case. Because it is equitable to do so, we grant their request. The respondents are awarded their reasonable fees and costs upon compliance with the applicable Rules of Appellate Procedure.

CONCLUSION

¶50 Because the trial court properly applied the *Dean* factors when analyzing the undue influence claim asserted against Mary and because substantial evidence in the record supports the trial court's written findings of fact and the conclusions that flow from them, we find no error and affirm.

DWYER, C.J., and BECKER, J., concur.

Annotated Revised Code of Washington by LexisNexis

Chapter 74.34 RCW
Abuse of vulnerable adults

RCW Sections

- 74.34.005 Findings.
- 74.34.020 Definitions.
- 74.34.021 Vulnerable adult -- Definition.
- 74.34.025 Limitation on recovery for protective services and benefits.
- 74.34.035 Reports -- Mandated and permissive -- Contents -- Confidentiality.
- 74.34.040 Reports -- Contents -- Identity confidential.
- 74.34.050 Immunity from liability.
- 74.34.053 Failure to report -- False reports -- Penalties.
- 74.34.063 Response to reports -- Timing -- Reports to law enforcement agencies -- Notification to licensing authority.
- 74.34.067 Investigations -- Interviews -- Ongoing case planning -- Conclusion of investigation.
- 74.34.068 Investigation results -- Report -- Rules.
- 74.34.070 Cooperative agreements for services.
- 74.34.080 Injunctions.
- 74.34.090 Data collection system -- Confidentiality.
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- 74.34.110 Protection of vulnerable adults -- Petition for protective order.
- 74.34.115 Protection of vulnerable adults -- Administrative office of the courts -- Standard petition -- Order for protection -- Standard notice -- Court staff handbook.
- 74.34.120 Protection of vulnerable adults -- Hearing.
- 74.34.130 Protection of vulnerable adults -- Judicial relief.
- 74.34.135 Protection of vulnerable adults -- Filings by others--Dismissal of petition or order -- Testimony or evidence -- Additional evidentiary hearings -- Temporary order.
- 74.34.140 Protection of vulnerable adults -- Execution of protective order.
- 74.34.145 Protection of vulnerable adults -- Notice of criminal penalties for violation -- Enforcement under RCW 26.50.110.
- 74.34.150 Protection of vulnerable adults -- Department may seek relief.
- 74.34.160 Protection of vulnerable adults -- Proceedings are supplemental.
- 74.34.163 Application to modify or vacate order.
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- 74.34.170 Services of department discretionary -- Funding.
- 74.34.180 Retaliation against whistleblowers and residents -- Remedies -- Rules.
- 74.34.200 Abandonment, abuse, financial exploitation, or neglect of a vulnerable adult -- Cause of action for damages -- Legislative intent.
- 74.34.205 Abandonment, abuse, or neglect -- Exceptions.
- 74.34.210 Order for protection or action for damages -- Standing -- Jurisdiction.
- 74.34.215 Financial exploitation of vulnerable adults.
- 74.34.220 Financial exploitation of vulnerable adults -- Training -- Reporting.

74.34.300 Vulnerable adult fatality reviews.

74.34.900 Severability -- 1984 c 97.

74.34.901 Severability -- 1986 c 187.

74.34.902 Construction -- Chapter applicable to state registered domestic partnerships -- 2009 c 521.

Notes:

Domestic violence prevention, authority of department of social and health services to seek relief on behalf of vulnerable adults: RCW 26.50.021.

Patients in nursing homes and hospitals, abuse: Chapter 70.124 RCW.

74.34.005

Findings.

The legislature finds and declares that:

(1) Some adults are vulnerable and may be subjected to abuse, neglect, financial exploitation, or abandonment by a family member, care provider, or other person who has a relationship with the vulnerable adult;

(2) A vulnerable adult may be home bound or otherwise unable to represent himself or herself in court or to retain legal counsel in order to obtain the relief available under this chapter or other protections offered through the courts;

(3) A vulnerable adult may lack the ability to perform or obtain those services necessary to maintain his or her well-being because he or she lacks the capacity for consent;

(4) A vulnerable adult may have health problems that place him or her in a dependent position;

(5) The department and appropriate agencies must be prepared to receive reports of abandonment, abuse, financial exploitation, or neglect of vulnerable adults;

(6) The department must provide protective services in the least restrictive environment appropriate and available to the vulnerable adult.

[1999 c 176 § 2.]

Notes:

Findings -- Purpose--1999 c 176: "The legislature finds that the provisions for the protection of vulnerable adults found in chapters 26.44, 70.124, and 74.34 RCW contain different definitions for abandonment, abuse, exploitation, and neglect. The legislature finds that combining the sections of these chapters that pertain to the protection of vulnerable adults would better serve this state's population of vulnerable adults. The purpose of chapter 74.34 RCW is to provide the department and law enforcement agencies with the authority to investigate complaints of abandonment, abuse, financial exploitation, or neglect of vulnerable adults and to provide protective services and legal remedies to protect these vulnerable adults." [1999 c 176 § 1.]

Severability -- 1999 c 176: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1999 c 176 § 36.]

Conflict with federal requirements -- 1999 c 176: "If any part of this act is found to be in conflict with federal requirements that are a prescribed condition to the allocation of federal funds to the state, the conflicting part of this act is inoperative solely to the extent of the conflict and with respect to the agencies directly affected, and this finding does not affect the operation of the remainder of this act in its application to the agencies concerned. Rules adopted under this act must meet federal requirements that are a necessary condition to the receipt of federal funds by the state." [1999 c 176 § 37.]

74.34.020
Definitions.

*** CHANGE IN 2011 *** (SEE

5020-S.SL) ***

*** CHANGE IN 2011 *** (SEE 5042-S.SL) ***

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Abandonment" means action or inaction by a person or entity with a duty of care for a vulnerable adult that leaves the vulnerable person without the means or ability to obtain necessary food, clothing, shelter, or health care.

(2) "Abuse" means the willful action or inaction that inflicts injury, unreasonable confinement, intimidation, or punishment on a vulnerable adult. In instances of abuse of a vulnerable adult who is unable to express or demonstrate physical harm, pain, or mental anguish, the abuse is presumed to cause physical harm, pain, or mental anguish. Abuse includes sexual abuse, mental abuse, physical abuse, and exploitation of a vulnerable adult, which have the following meanings:

(a) "Sexual abuse" means any form of nonconsensual sexual contact, including but not limited to unwanted or inappropriate touching, rape, sodomy, sexual coercion, sexually explicit photographing, and sexual harassment. Sexual abuse includes any sexual contact between a staff person, who is not also a resident or client, of a facility or a staff person of a program authorized under chapter 71A.12 RCW, and a vulnerable adult living in that facility or receiving service from a program authorized under chapter 71A.12 RCW, whether or not it is consensual.

(b) "Physical abuse" means the willful action of inflicting bodily injury or physical mistreatment. Physical abuse includes, but is not limited to, striking with or without an object, slapping, pinching, choking, kicking, shoving, prodding, or the use of chemical restraints or physical restraints unless the restraints are consistent with licensing requirements, and includes restraints that are otherwise being used inappropriately.

(c) "Mental abuse" means any willful action or inaction of mental or verbal abuse. Mental abuse includes, but is not limited to, coercion, harassment, inappropriately isolating a vulnerable adult from family, friends, or regular activity, and verbal assault that includes ridiculing, intimidating, yelling, or swearing.

(d) "Exploitation" means an act of forcing, compelling, or exerting undue influence over a vulnerable adult causing the vulnerable adult to act in a way that is inconsistent with relevant past behavior, or causing the vulnerable adult to perform services for the benefit of another.

(3) "Consent" means express written consent granted after the vulnerable adult or his or her legal representative has been fully informed of the nature of the services to be offered and that the receipt of services is voluntary.

(4) "Department" means the department of social and health services.

(5) "Facility" means a residence licensed or required to be licensed under chapter 18.20 RCW, boarding homes; chapter 18.51 RCW, nursing homes; chapter 70.128 RCW, adult family homes; chapter 72.36 RCW, soldiers' homes; or chapter 71A.20 RCW, residential habilitation centers; or any other facility licensed by the department.

(6) "Financial exploitation" means the illegal or improper use of the property, income, resources, or trust funds of the vulnerable adult by any person for any person's profit or advantage other than for the vulnerable adult's profit or advantage.

(7) "Financial institution" has the same meaning as in RCW 30.22.040 and 30.22.041. For purposes of this chapter only, "financial institution" also means a "broker-dealer" or "investment adviser" as defined in RCW 21.20.005.

(8) "Incapacitated person" means a person who is at a significant risk of personal or financial harm under RCW 11.88.010 (1) (a), (b), (c), or (d).

(9) "Individual provider" means a person under contract with the department to provide services in the home under chapter 74.09 or 74.39A RCW.

(10) "Interested person" means a person who demonstrates to the court's satisfaction that the person is interested in the welfare of the vulnerable adult, that the person has a good faith belief that the court's intervention is necessary, and that the vulnerable adult is unable, due to incapacity, undue influence, or duress at the time the petition is filed, to protect his or her own interests.

(11) "Mandated reporter" is an employee of the department; law enforcement officer; social worker; professional school personnel; individual provider; an employee of a facility; an operator of a facility; an employee of a social service, welfare, mental health, adult day health, adult day care, home health, home care, or hospice agency; county coroner or medical

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examiner; Christian Science practitioner; or health care provider subject to chapter 18.130 RCW.

(12) "Neglect" means (a) a pattern of conduct or inaction by a person or entity with a duty of care that fails to provide the goods and services that maintain physical or mental health of a vulnerable adult, or that fails to avoid or prevent physical or mental harm or pain to a vulnerable adult; or (b) an act or omission that demonstrates a serious disregard of consequences of such a magnitude as to constitute a clear and present danger to the vulnerable adult's health, welfare, or safety, including but not limited to conduct prohibited under RCW 9A.42.100.

(13) "Permissive reporter" means any person, including, but not limited to, an employee of a financial institution, attorney, or volunteer in a facility or program providing services for vulnerable adults.

(14) "Protective services" means any services provided by the department to a vulnerable adult with the consent of the vulnerable adult, or the legal representative of the vulnerable adult, who has been abandoned, abused, financially exploited, neglected, or in a state of self-neglect. These services may include, but are not limited to case management, social casework, home care, placement, arranging for medical evaluations, psychological evaluations, day care, or referral for legal assistance.

(15) "Self-neglect" means the failure of a vulnerable adult, not living in a facility, to provide for himself or herself the goods and services necessary for the vulnerable adult's physical or mental health, and the absence of which impairs or threatens the vulnerable adult's well-being. This definition may include a vulnerable adult who is receiving services through home health, hospice, or a home care agency, or an individual provider when the neglect is not a result of inaction by that agency or individual provider.

(16) "Vulnerable adult" includes a person:

- (a) Sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself; or
- (b) Found incapacitated under chapter 11.88 RCW; or
- (c) Who has a developmental disability as defined under RCW 71A.10.020; or
- (d) Admitted to any facility; or
- (e) Receiving services from home health, hospice, or home care agencies licensed or required to be licensed under chapter 70.127 RCW; or
- (f) Receiving services from an individual provider.

[2010 c 133 § 2; 2007 c 312 § 1; 2006 c 339 § 109; 2003 c 230 § 1; 1999 c 176 § 3; 1997 c 392 § 523; 1995 1st sp.s. c 18 § 84; 1984 c 97 § 8.]

Notes:

Intent -- Part headings not law -- 2006 c 339: See notes following RCW 70.96A.325.

Effective date -- 2003 c 230: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [May 12, 2003]." [2003 c 230 § 3.]

Findings -- Purpose -- Severability -- Conflict with federal requirements -- 1999 c 176: See notes following RCW 74.34.005.

Short title -- Findings -- Construction -- Conflict with federal requirements -- Part headings and captions not law -- 1997 c 392: See notes following RCW 74.39A.009.

Conflict with federal requirements -- Severability -- Effective date -- 1995 1st sp.s. c 18: See notes following RCW 74.39A.030.

74.34.021

Vulnerable adult — Definition.

*** CHANGE IN 2011 *** (SEE
5042-S.SL) ***

For the purposes of this chapter, the term "vulnerable adult" includes persons receiving services from any individual who for compensation serves as a personal aide to a person who self-directs his or her own care in his or her home under chapter 336, Laws of 1999.

[1999 c 336 § 6.]

Notes:

Finding -- Intent -- 1999 c 336: See note following RCW 74.39.007.

74.34.025

Limitation on recovery for protective services and benefits.

The cost of benefits and services provided to a vulnerable adult under this chapter with state funds only does not constitute an obligation or lien and is not recoverable from the recipient of the services or from the recipient's estate, whether by lien, adjustment, or any other means of recovery.

[1999 c 176 § 4; 1997 c 392 § 304.]

Notes:

Findings -- Purpose -- Severability -- Conflict with federal requirements -- 1999 c 176: See notes following RCW 74.34.005.

Short title -- Findings -- Construction -- Conflict with federal requirements -- Part headings and captions not law -- 1997 c 392: See notes following RCW 74.39A.009.

74.34.035

Reports — Mandated and permissive — Contents — Confidentiality.

(1) When there is reasonable cause to believe that abandonment, abuse, financial exploitation, or neglect of a vulnerable adult has occurred, mandated reporters shall immediately report to the department.

(2) When there is reason to suspect that sexual assault has occurred, mandated reporters shall immediately report to the appropriate law enforcement agency and to the department.

(3) When there is reason to suspect that physical assault has occurred or there is reasonable cause to believe that an act has caused fear of imminent harm:

(a) Mandated reporters shall immediately report to the department; and

(b) Mandated reporters shall immediately report to the appropriate law enforcement agency, except as provided in subsection (4) of this section.

(4) A mandated reporter is not required to report to a law enforcement agency, unless requested by the injured vulnerable adult or his or her legal representative or family member, an incident of physical assault between vulnerable adults that causes minor bodily injury and does not require more than basic first aid, unless:

(a) The injury appears on the back, face, head, neck, chest, breasts, groin, inner thigh, buttock, genital, or anal area;

(b) There is a fracture;

(c) There is a pattern of physical assault between the same vulnerable adults or involving the same vulnerable adults; or

(d) There is an attempt to choke a vulnerable adult.

(5) When there is reason to suspect that the death of a vulnerable adult was caused by abuse, neglect, or abandonment by another person, mandated reporters shall, pursuant to RCW

68.50.020, report the death to the medical examiner or coroner having jurisdiction, as well as the department and local law enforcement, in the most expeditious manner possible. A mandated reporter is not relieved from the reporting requirement provisions of this subsection by the existence of a previously signed death certificate. If abuse, neglect, or abandonment

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caused or contributed to the death of a vulnerable adult, the death is a death caused by unnatural or unlawful means, and the body shall be the jurisdiction of the coroner or medical examiner pursuant to RCW 68.50.010.

(6) Permissive reporters may report to the department or a law enforcement agency when there is reasonable cause to believe that a vulnerable adult is being or has been abandoned, abused, financially exploited, or neglected.

(7) No facility, as defined by this chapter, agency licensed or required to be licensed under chapter 70.127 RCW, or facility or agency under contract with the department to provide care for vulnerable adults may develop policies or procedures that interfere with the reporting requirements of this chapter.

(8) Each report, oral or written, must contain as much as possible of the following information:

- (a) The name and address of the person making the report;
- (b) The name and address of the vulnerable adult and the name of the facility or agency providing care for the vulnerable adult;
- (c) The name and address of the legal guardian or alternate decision maker;
- (d) The nature and extent of the abandonment, abuse, financial exploitation, neglect, or self-neglect;
- (e) Any history of previous abandonment, abuse, financial exploitation, neglect, or self-neglect;
- (f) The identity of the alleged perpetrator, if known; and
- (g) Other information that may be helpful in establishing the extent of abandonment, abuse, financial exploitation, neglect, or the cause of death of the deceased vulnerable adult.

(9) Unless there is a judicial proceeding or the person consents, the identity of the person making the report under this section is confidential.

[2010 c 133 § 4; 2003 c 230 § 2; 1999 c 176 § 5.]

Notes:

Effective date -- 2003 c 230: See note following RCW 74.34.020.

Findings -- Purpose -- Severability -- Conflict with federal requirements -- 1999 c 176: See notes following RCW 74.34.005.

74.34.040

Reports — Contents — Identity confidential.

The reports made under *RCW

74.34.030 shall contain the following information if known:

- (1) Identification of the vulnerable adult;
- (2) The nature and extent of the suspected abuse, neglect, exploitation, or abandonment;
- (3) Evidence of previous abuse, neglect, exploitation, or abandonment;
- (4) The name and address of the person making the report; and
- (5) Any other helpful information.

Unless there is a judicial proceeding or the person consents, the identity of the person making the report is confidential.

[1986 c 187 § 2; 1984 c 97 § 10.]

Notes:

*Reviser's note: RCW 74.34.030 was repealed by 1999 c 176 § 35.

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74.34.050**Immunity from liability.**

(1) A person participating in good faith in making a report under this chapter or testifying about alleged abuse, neglect, abandonment, financial exploitation, or self-neglect of a vulnerable adult in a judicial or administrative proceeding under this chapter is immune from liability resulting from the report or testimony. The making of permissive reports as allowed in this chapter does not create any duty to report and no civil liability shall attach for any failure to make a permissive report as allowed under this chapter.

(2) Conduct conforming with the reporting and testifying provisions of this chapter shall not be deemed a violation of any confidential communication privilege. Nothing in this chapter shall be construed as superseding or abridging remedies provided in chapter

4.92 RCW.

[1999 c 176 § 6; 1997 c 386 § 34; 1986 c 187 § 3; 1984 c 97 § 11.]

Notes:

Findings -- Purpose -- Severability -- Conflict with federal requirements -- 1999 c 176: See notes following RCW 74.34.005.

Application -- Effective date -- 1997 c 386: See notes following RCW 13.50.010.

74.34.053**Failure to report — False reports — Penalties.**

(1) A person who is required to make a report under this chapter and who knowingly fails to make the report is guilty of a gross misdemeanor.

(2) A person who intentionally, maliciously, or in bad faith makes a false report of alleged abandonment, abuse, financial exploitation, or neglect of a vulnerable adult is guilty of a misdemeanor.

[1999 c 176 § 7.]

Notes:

Findings -- Purpose -- Severability -- Conflict with federal requirements -- 1999 c 176: See notes following RCW 74.34.005.

74.34.063**Response to reports — Timing — Reports to law enforcement agencies — Notification to licensing authority.**

(1) The department shall initiate a response to a report, no later than twenty-four hours after knowledge of the report, of suspected abandonment, abuse, financial exploitation, neglect, or self-neglect of a vulnerable adult.

(2) When the initial report or investigation by the department indicates that the alleged abandonment, abuse, financial exploitation, or neglect may be criminal, the department shall make an immediate report to the appropriate law enforcement agency. The department and law enforcement will coordinate in investigating reports made under this chapter. The department may provide protective services and other remedies as specified in this chapter.

(3) The law enforcement agency or the department shall report the incident in writing to the proper county prosecutor or city attorney for appropriate action whenever the investigation reveals that a crime may have been committed.

(4) The department and law enforcement may share information contained in reports and findings of abandonment, abuse, financial exploitation, and neglect of vulnerable adults, consistent with RCW

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74.04.060, chapter 42.56 RCW, and other applicable confidentiality laws.

(5) The department shall notify the proper licensing authority concerning any report received under this chapter that alleges that a person who is professionally licensed, certified, or registered under Title 18 RCW has abandoned, abused, financially exploited, or neglected a vulnerable adult.

[2005 c 274 § 354; 1999 c 176 § 8.]

Notes:

Part headings not law -- Effective date -- 2005 c 274: See RCW 42.56.901 and 42.56.902.

Findings -- Purpose -- Severability -- Conflict with federal requirements -- 1999 c 176: See notes following RCW 74.34.005.

74.34.067

Investigations — Interviews — Ongoing case planning — Conclusion of investigation.

*** CHANGE IN 2011 *** (SEE

5042-S.SL) ***

(1) Where appropriate, an investigation by the department may include a private interview with the vulnerable adult regarding the alleged abandonment, abuse, financial exploitation, neglect, or self-neglect.

(2) In conducting the investigation, the department shall interview the complainant, unless anonymous, and shall use its best efforts to interview the vulnerable adult or adults harmed, and, consistent with the protection of the vulnerable adult shall interview facility staff, any available independent sources of relevant information, including if appropriate the family members of the vulnerable adult.

(3) The department may conduct ongoing case planning and consultation with: (a) Those persons or agencies required to report under this chapter or submit a report under this chapter; (b) consultants designated by the department; and (c) designated representatives of Washington Indian tribes if client information exchanged is pertinent to cases under investigation or the provision of protective services. Information considered privileged by statute and not directly related to reports required by this chapter must not be divulged without a valid written waiver of the privilege.

(4) The department shall prepare and keep on file a report of each investigation conducted by the department for a period of time in accordance with policies established by the department.

(5) If the department has reason to believe that the vulnerable adult has suffered from abuse, neglect, self-neglect, abandonment, or financial exploitation, and lacks the ability or capacity to consent, and needs the protection of a guardian, the department may bring a guardianship action under chapter 11.88 RCW.

(6) When the investigation is completed and the department determines that an incident of abandonment, abuse, financial exploitation, neglect, or self-neglect has occurred, the department shall inform the vulnerable adult of their right to refuse protective services, and ensure that, if necessary, appropriate protective services are provided to the vulnerable adult, with the consent of the vulnerable adult. The vulnerable adult has the right to withdraw or refuse protective services.

(7) The department may photograph a vulnerable adult or their environment for the purpose of providing documentary evidence of the physical condition of the vulnerable adult or his or her environment. When photographing the vulnerable adult, the department shall obtain permission from the vulnerable adult or his or her legal representative unless immediate photographing is necessary to preserve evidence. However, if the legal representative is alleged to have abused, neglected, abandoned, or exploited the vulnerable adult, consent from the legal representative is not necessary. No such consent is necessary when photographing the physical environment.

(8) When the investigation is complete and the department determines that the incident of abandonment, abuse, financial exploitation, or neglect has occurred, the department shall inform the facility in which the incident occurred, consistent with confidentiality requirements concerning the vulnerable adult, witnesses, and complainants.

[2007 c 312 § 2; 1999 c 176 § 9.]

Notes:

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Findings -- Purpose -- Severability -- Conflict with federal requirements -- 1999 c 176: See notes following RCW 74.34.005.

74.34.068**Investigation results — Report — Rules.**

(1) After the investigation is complete, the department may provide a written report of the outcome of the investigation to an agency or program described in this subsection when the department determines from its investigation that an incident of abuse, abandonment, financial exploitation, or neglect occurred. Agencies or programs that may be provided this report are home health, hospice, or home care agencies, or after January 1, 2002, any in-home services agency licensed under chapter

70.127 RCW, a program authorized under chapter 71A.12 RCW, an adult day care or day health program, regional support networks authorized under chapter 71.24 RCW, or other agencies. The report may contain the name of the vulnerable adult and the alleged perpetrator. The report shall not disclose the identity of the person who made the report or any witness without the written permission of the reporter or witness. The department shall notify the alleged perpetrator regarding the outcome of the investigation. The name of the vulnerable adult must not be disclosed during this notification.

(2) The department may also refer a report or outcome of an investigation to appropriate state or local governmental authorities responsible for licensing or certification of the agencies or programs listed in subsection (1) of this section.

(3) The department shall adopt rules necessary to implement this section.

[2001 c 233 § 2.]

Notes:

Finding -- 2001 c 233: "The legislature recognizes that vulnerable adults, while living in their own homes, may be abused, neglected, financially exploited, or abandoned by individuals entrusted to provide care for them. The individuals who abuse, neglect, financially exploit, or abandon vulnerable adults may be employed by, under contract with, or volunteering for an agency or program providing care for vulnerable adults. The legislature has given the department of social and health services the responsibility to investigate complaints of abandonment, abuse, financial exploitation, or neglect of vulnerable adults and to provide protective services and other legal remedies to protect these vulnerable adults. The legislature finds that in order to continue to protect vulnerable adults, the department of social and health services be given the authority to release report information and to release the results of an investigation to the agency or program with which the individual investigated is employed, contracted, or engaged as a volunteer." [2001 c 233 § 1.]

74.34.070**Cooperative agreements for services.**

The department may develop cooperative agreements with community-based agencies providing services for vulnerable adults. The agreements shall cover: (1) The appropriate roles and responsibilities of the department and community-based agencies in identifying and responding to reports of alleged abuse; (2) the provision of case-management services; (3) standardized data collection procedures; and (4) related coordination activities.

[1999 c 176 § 10; 1997 c 386 § 35; 1995 1st sp.s. c 18 § 87; 1984 c 97 § 13.]

Notes:

Findings -- Purpose -- Severability -- Conflict with federal requirements -- 1999 c 176: See notes following RCW 74.34.005.

Conflict with federal requirements -- Severability -- Effective date -- 1995 1st sp.s. c 18: See notes following RCW 74.39A.030.

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**74.34.080
Injunctions.**

If access is denied to an employee of the department seeking to investigate an allegation of abandonment, abuse, financial exploitation, or neglect of a vulnerable adult by an individual, the department may seek an injunction to prevent interference with the investigation. The court shall issue the injunction if the department shows that:

- (1) There is reasonable cause to believe that the person is a vulnerable adult and is or has been abandoned, abused, financially exploited, or neglected; and
- (2) The employee of the department seeking to investigate the report has been denied access.

[1999 c 176 § 11; 1984 c 97 § 14.]

Notes:

Findings -- Purpose -- Severability -- Conflict with federal requirements -- 1999 c 176: See notes following RCW 74.34.005.

**74.34.090
Data collection system — Confidentiality.**

The department shall maintain a system for statistical data collection, accessible for bona fide research only as the department by rule prescribes. The identity of any person is strictly confidential.

[1984 c 97 § 15.]

**74.34.095
Confidential information — Disclosure.**

(1) The following information is confidential and not subject to disclosure, except as provided in this section:

- (a) A report of abandonment, abuse, financial exploitation, or neglect made under this chapter;
- (b) The identity of the person making the report; and
- (c) All files, reports, records, communications, and working papers used or developed in the investigation or provision of protective services.

(2) Information considered confidential may be disclosed only for a purpose consistent with this chapter or as authorized by chapter

18.20, 18.51, or 74.39A RCW, or as authorized by the long-term care ombudsman programs under federal law or state law, chapter 43.190 RCW.

(3) A court or presiding officer in an administrative proceeding may order disclosure of confidential information only if the court, or presiding officer in an administrative proceeding, determines that disclosure is essential to the administration of justice and will not endanger the life or safety of the vulnerable adult or individual who made the report. The court or presiding officer in an administrative hearing may place restrictions on such disclosure as the court or presiding officer deems proper.

[2000 c 87 § 4; 1999 c 176 § 17.]

Notes:

Findings -- Purpose -- Severability -- Conflict with federal requirements -- 1999 c 176: See notes following RCW 74.34.005.

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74.34.110**Protection of vulnerable adults — Petition for protective order.**

An action known as a petition for an order for protection of a vulnerable adult in cases of abandonment, abuse, financial exploitation, or neglect is created.

(1) A vulnerable adult, or interested person on behalf of the vulnerable adult, may seek relief from abandonment, abuse, financial exploitation, or neglect, or the threat thereof, by filing a petition for an order for protection in superior court.

(2) A petition shall allege that the petitioner, or person on whose behalf the petition is brought, is a vulnerable adult and that the petitioner, or person on whose behalf the petition is brought, has been abandoned, abused, financially exploited, or neglected, or is threatened with abandonment, abuse, financial exploitation, or neglect by respondent.

(3) A petition shall be accompanied by affidavit made under oath, or a declaration signed under penalty of perjury, stating the specific facts and circumstances which demonstrate the need for the relief sought. If the petition is filed by an interested person, the affidavit or declaration must also include a statement of why the petitioner qualifies as an interested person.

(4) A petition for an order may be made whether or not there is a pending lawsuit, complaint, petition, or other action pending that relates to the issues presented in the petition for an order for protection.

(5) Within ninety days of receipt of the master copy from the administrative office of the courts, all court clerk's offices shall make available the standardized forms and instructions required by RCW

74.34.115.

(6) Any assistance or information provided by any person, including, but not limited to, court clerks, employees of the department, and other court facilitators, to another to complete the forms provided by the court in subsection (5) of this section does not constitute the practice of law.

(7) A petitioner is not required to post bond to obtain relief in any proceeding under this section.

(8) An action under this section shall be filed in the county where the vulnerable adult resides; except that if the vulnerable adult has left or been removed from the residence as a result of abandonment, abuse, financial exploitation, or neglect, or in order to avoid abandonment, abuse, financial exploitation, or neglect, the petitioner may bring an action in the county of either the vulnerable adult's previous or new residence.

(9) No filing fee may be charged to the petitioner for proceedings under this section. Standard forms and written instructions shall be provided free of charge.

[2007 c 312 § 3; 1999 c 176 § 12; 1986 c 187 § 5.]

Notes:

Findings -- Purpose -- Severability -- Conflict with federal requirements -- 1999 c 176: See notes following RCW 74.34.005.

74.34.115**Protection of vulnerable adults — Administrative office of the courts — Standard petition — Order for protection — Standard notice — Court staff handbook.**

(1) The administrative office of the courts shall develop and prepare standard petition, temporary order for protection, and permanent order for protection forms, a standard notice form to provide notice to the vulnerable adult if the vulnerable adult is not the petitioner, instructions, and a court staff handbook on the protection order process. The standard petition and order for protection forms must be used after October 1, 2007, for all petitions filed and orders issued under this chapter. The administrative office of the courts, in preparing the instructions, forms, notice, and handbook, may consult with attorneys from the elder law section of the Washington state bar association, judges, the department, the Washington protection and advocacy system, and law enforcement personnel.

(a) The instructions shall be designed to assist petitioners in completing the petition, and shall include a sample of the standard petition and order for protection forms.

(b) The order for protection form shall include, in a conspicuous location, notice of criminal penalties resulting from violation of the order.

(c) The standard notice form shall be designed to explain to the vulnerable adult in clear, plain language the purpose and

nature of the petition and that the vulnerable adult has the right to participate in the hearing and to either support or object to the petition.

(2) The administrative office of the courts shall distribute a master copy of the standard forms, instructions, and court staff handbook to all court clerks and shall distribute a master copy of the standard forms to all superior, district, and municipal courts.

(3) The administrative office of the courts shall determine the significant non-English-speaking or limited-English-speaking populations in the state. The administrator shall then arrange for translation of the instructions required by this section, which shall contain a sample of the standard forms, into the languages spoken by those significant non-English-speaking populations, and shall distribute a master copy of the translated instructions to all court clerks by December 31, 2007.

(4) The administrative office of the courts shall update the instructions, standard forms, and court staff handbook when changes in the law make an update necessary. The updates may be made in consultation with the persons and entities specified in subsection (1) of this section.

(5) For purposes of this section, "court clerks" means court administrators in courts of limited jurisdiction and elected court clerks.

[2007 c 312 § 4.]

74.34.120

Protection of vulnerable adults — Hearing.

(1) The court shall order a hearing on a petition under RCW

74.34.110 not later than fourteen days from the date of filing the petition.

(2) Personal service shall be made upon the respondent not less than six court days before the hearing. When good faith attempts to personally serve the respondent have been unsuccessful, the court shall permit service by mail or by publication.

(3) When a petition under RCW 74.34.110 is filed by someone other than the vulnerable adult, notice of the petition and hearing must be personally served upon the vulnerable adult not less than six court days before the hearing. In addition to copies of all pleadings filed by the petitioner, the petitioner shall provide a written notice to the vulnerable adult using the standard notice form developed under RCW 74.34.115. When good faith attempts to personally serve the vulnerable adult have been unsuccessful, the court shall permit service by mail, or by publication if the court determines that personal service and service by mail cannot be obtained.

(4) If timely service under subsections (2) and (3) of this section cannot be made, the court shall continue the hearing date until the substitute service approved by the court has been satisfied.

(5)(a) A petitioner may move for temporary relief under chapter 7.40 RCW. The court may continue any temporary order for protection granted under chapter 7.40 RCW until the hearing on a petition under RCW 74.34.110 is held.

(b) Written notice of the request for temporary relief must be provided to the respondent, and to the vulnerable adult if someone other than the vulnerable adult filed the petition. A temporary protection order may be granted without written notice to the respondent and vulnerable adult if it clearly appears from specific facts shown by affidavit or declaration that immediate and irreparable injury, loss, or damage would result to the vulnerable adult before the respondent and vulnerable adult can be served and heard, or that show the respondent and vulnerable adult cannot be served with notice, the efforts made to serve them, and the reasons why prior notice should not be required.

[2007 c 312 § 5; 1986 c 187 § 6.]

74.34.130

Protection of vulnerable adults — Judicial relief.

The court may order relief as it deems necessary for the protection of the vulnerable adult, including, but not limited to the following:

(1) Restraining respondent from committing acts of abandonment, abuse, neglect, or financial exploitation against the vulnerable adult;

- (2) Excluding the respondent from the vulnerable adult's residence for a specified period or until further order of the court;
- (3) Prohibiting contact with the vulnerable adult by respondent for a specified period or until further order of the court;
- (4) Prohibiting the respondent from knowingly coming within, or knowingly remaining within, a specified distance from a specified location;
- (5) Requiring an accounting by respondent of the disposition of the vulnerable adult's income or other resources;
- (6) Restraining the transfer of the respondent's and/or vulnerable adult's property for a specified period not exceeding ninety days; and
- (7) Requiring the respondent to pay a filing fee and court costs, including service fees, and to reimburse the petitioner for costs incurred in bringing the action, including a reasonable attorney's fee.

Any relief granted by an order for protection, other than a judgment for costs, shall be for a fixed period not to exceed five years. The clerk of the court shall enter any order for protection issued under this section into the judicial information system.

[2007 c 312 § 6. Prior: 2000 c 119 § 27; 2000 c 51 § 2; 1999 c 176 § 13; 1986 c 187 § 7.]

Notes:

Application -- 2000 c 119: See note following RCW 26.50.021.

Findings -- Purpose -- Severability -- Conflict with federal requirements -- 1999 c 176: See notes following RCW 74.34.005.

74.34.135

Protection of vulnerable adults — Filings by others — Dismissal of petition or order — Testimony or evidence — Additional evidentiary hearings — Temporary order.

- (1) When a petition for protection under RCW

74.34.110 is filed by someone other than the vulnerable adult or the vulnerable adult's full guardian over either the person or the estate, or both, and the vulnerable adult for whom protection is sought advises the court at the hearing that he or she does not want all or part of the protection sought in the petition, then the court may dismiss the petition or the provisions that the vulnerable adult objects to and any protection order issued under RCW 74.34.120 or 74.34.130, or the court may take additional testimony or evidence, or order additional evidentiary hearings to determine whether the vulnerable adult is unable, due to incapacity, undue influence, or duress, to protect his or her person or estate in connection with the issues raised in the petition or order. If an additional evidentiary hearing is ordered and the court determines that there is reason to believe that there is a genuine issue about whether the vulnerable adult is unable to protect his or her person or estate in connection with the issues raised in the petition or order, the court may issue a temporary order for protection of the vulnerable adult pending a decision after the evidentiary hearing.

(2) An evidentiary hearing on the issue of whether the vulnerable adult is unable, due to incapacity, undue influence, or duress, to protect his or her person or estate in connection with the issues raised in the petition or order, shall be held within fourteen days of entry of the temporary order for protection under subsection (1) of this section. If the court did not enter a temporary order for protection, the evidentiary hearing shall be held within fourteen days of the prior hearing on the petition. Notice of the time and place of the evidentiary hearing shall be personally served upon the vulnerable adult and the respondent not less than six court days before the hearing. When good faith attempts to personally serve the vulnerable adult and the respondent have been unsuccessful, the court shall permit service by mail, or by publication if the court determines that personal service and service by mail cannot be obtained. If timely service cannot be made, the court may set a new hearing date. A hearing under this subsection is not necessary if the vulnerable adult has been determined to be fully incapacitated over either the person or the estate, or both, under the guardianship laws, chapter 11.88 RCW. If a hearing is scheduled under this subsection, the protection order shall remain in effect pending the court's decision at the subsequent hearing.

(3) At the hearing scheduled by the court, the court shall give the vulnerable adult, the respondent, the petitioner, and in the court's discretion other interested persons, the opportunity to testify and submit relevant evidence.

(4) If the court determines that the vulnerable adult is capable of protecting his or her person or estate in connection with the issues raised in the petition, and the individual continues to object to the protection order, the court shall dismiss the order or may modify the order if agreed to by the vulnerable adult. If the court determines that the vulnerable adult is not capable of protecting his or her person or estate in connection with the issues raised in the petition or order, and that the individual continues to need protection, the court shall order relief consistent with RCW 74.34.130 as it deems necessary for the

protection of the vulnerable adult. In the entry of any order that is inconsistent with the expressed wishes of the vulnerable adult, the court's order shall be governed by the legislative findings contained in RCW 74.34.005.

[2007 c 312 § 9.]

74.34.140

Protection of vulnerable adults — Execution of protective order.

When an order for protection under RCW

74.34.130 is issued upon request of the petitioner, the court may order a peace officer to assist in the execution of the order of protection.

[1986 c 187 § 8.]

74.34.145

Protection of vulnerable adults — Notice of criminal penalties for violation — Enforcement under RCW 26.50.110.

(1) An order for protection of a vulnerable adult issued under this chapter which restrains the respondent or another person from committing acts of abuse, prohibits contact with the vulnerable adult, excludes the person from any specified location, or prohibits the person from coming within a specified distance from a location, shall prominently bear on the front page of the order the legend: VIOLATION OF THIS ORDER WITH ACTUAL NOTICE OF ITS TERMS IS A CRIMINAL OFFENSE UNDER CHAPTER

26.50 RCW AND WILL SUBJECT A VIOLATOR TO ARREST.

(2) Whenever an order for protection of a vulnerable adult is issued under this chapter, and the respondent or person to be restrained knows of the order, a violation of a provision restraining the person from committing acts of abuse, prohibiting contact with the vulnerable adult, excluding the person from any specified location, or prohibiting the person from coming within a specified distance of a location, shall be punishable under RCW 26.50.110, regardless of whether the person is a family or household member as defined in RCW 26.50.010.

[2007 c 312 § 7; 2000 c 119 § 2.]

Notes:

Application -- 2000 c 119: See note following RCW 26.50.021.

74.34.150

Protection of vulnerable adults — Department may seek relief.

The department of social and health services, in its discretion, may seek relief under RCW

74.34.110 through 74.34.140 on behalf of and with the consent of any vulnerable adult. When the department has reason to believe a vulnerable adult lacks the ability or capacity to consent, the department, in its discretion, may seek relief under RCW 74.34.110 through 74.34.140 on behalf of the vulnerable adult. Neither the department of social and health services nor the state of Washington shall be liable for seeking or failing to seek relief on behalf of any persons under this section.

[2007 c 312 § 8; 1986 c 187 § 9.]

74.34.160

Protection of vulnerable adults — Proceedings are supplemental.

Any proceeding under RCW

74.34.110 through 74.34.150 is in addition to any other civil or criminal remedies.

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[1986 c 187 § 11.]

74.34.163**Application to modify or vacate order.**

Any vulnerable adult who has not been adjudicated fully incapacitated under chapter

11.88 RCW, or the vulnerable adult's guardian, at any time subsequent to entry of a permanent protection order under this chapter, may apply to the court for an order to modify or vacate the order. In a hearing on an application to dismiss or modify the protection order, the court shall grant such relief consistent with RCW 74.34.110 as it deems necessary for the protection of the vulnerable adult, including dismissal or modification of the protection order.

[2007 c 312 § 10.]

74.34.165**Rules.**

The department may adopt rules relating to the reporting, investigation, and provision of protective services in in-home settings, consistent with the objectives of this chapter.

[1999 c 176 § 18.]

Notes:

Findings -- Purpose -- Severability -- Conflict with federal requirements -- 1999 c 176: See notes following RCW 74.34.005.

74.34.170**Services of department discretionary — Funding.**

The provision of services under RCW *

74.34.030, 74.34.040, 74.34.050, and **74.34.100 through 74.34.160 are discretionary and the department shall not be required to expend additional funds beyond those appropriated.

[1986 c 187 § 10.]

Notes:

Reviser's note: *(1) RCW 74.34.030 was repealed by 1999 c 176 § 35.

** (2) RCW 74.34.100 was recodified as RCW 74.34.015 pursuant to 1995 1st sp.s. c 18 § 89, effective July 1, 1995. RCW 74.34.015 was subsequently repealed by 1999 c 176 § 35.

74.34.180**Retaliation against whistleblowers and residents — Remedies — Rules.**

(1) An employee or contractor who is a whistleblower and who as a result of being a whistleblower has been subjected to workplace reprisal or retaliatory action, has the remedies provided under chapter

49.60 RCW. RCW 4.24.500 through 4.24.520, providing certain protection to persons who communicate to government agencies, apply to complaints made under this section. The identity of a whistleblower who complains, in good faith, to the department or the department of health about suspected abandonment, abuse, financial exploitation, or neglect by any person in a facility, licensed or required to be licensed, or care provided in a facility or in a home setting, by any person associated with a hospice, home care, or home health agency licensed under chapter 70.127 RCW or other in-home provider, may remain confidential if requested. The identity of the whistleblower shall subsequently remain confidential unless the

department determines that the complaint was not made in good faith.

(2)(a) An attempt to expel a resident from a facility, or any type of discriminatory treatment of a resident who is a consumer of hospice, home health, home care services, or other in-home services by whom, or upon whose behalf, a complaint substantiated by the department or the department of health has been submitted to the department or the department of health or any proceeding instituted under or related to this chapter within one year of the filing of the complaint or the institution of the action, raises a rebuttable presumption that the action was in retaliation for the filing of the complaint.

(b) The presumption is rebutted by credible evidence establishing the alleged retaliatory action was initiated prior to the complaint.

(c) The presumption is rebutted by a review conducted by the department that shows that the resident or consumer's needs cannot be met by the reasonable accommodations of the facility due to the increased needs of the resident.

(3) For the purposes of this section:

(a) "Whistleblower" means a resident or a person with a mandatory duty to report under this chapter, or any person licensed under Title 18 RCW, who in good faith reports alleged abandonment, abuse, financial exploitation, or neglect to the department, or the department of health, or to a law enforcement agency;

(b) "Workplace reprisal or retaliatory action" means, but is not limited to: Denial of adequate staff to perform duties; frequent staff changes; frequent and undesirable office changes; refusal to assign meaningful work; unwarranted and unsubstantiated report of misconduct under Title 18 RCW; letters of reprimand or unsatisfactory performance evaluations; demotion; denial of employment; or a supervisor or superior encouraging coworkers to behave in a hostile manner toward the whistleblower. The protections provided to whistleblowers under this chapter shall not prevent a facility or an agency licensed under chapter 70.127 RCW from: (i) Terminating, suspending, or disciplining a whistleblower for other lawful purposes; or (ii) for facilities licensed under chapter 70.128 RCW, reducing the hours of employment or terminating employment as a result of the demonstrated inability to meet payroll requirements. The department shall determine if the facility cannot meet payroll in cases in which a whistleblower has been terminated or had hours of employment reduced because of the inability of a facility to meet payroll; and

(c) "Reasonable accommodation" by a facility to the needs of a prospective or current resident has the meaning given to this term under the federal Americans with disabilities act of 1990, 42 U.S.C. Sec. 12101 et seq. and other applicable federal or state antidiscrimination laws and regulations.

(4) This section does not prohibit a facility or an agency licensed under chapter 70.127 RCW from exercising its authority to terminate, suspend, or discipline any employee who engages in workplace reprisal or retaliatory action against a whistleblower.

(5) The department shall adopt rules to implement procedures for filing, investigation, and resolution of whistleblower complaints that are integrated with complaint procedures under this chapter.

(6)(a) Any vulnerable adult who relies upon and is being provided spiritual treatment in lieu of medical treatment in accordance with the tenets and practices of a well-recognized religious denomination may not for that reason alone be considered abandoned, abused, or neglected.

(b) Any vulnerable adult may not be considered abandoned, abused, or neglected under this chapter by any health care provider, facility, facility employee, agency, agency employee, or individual provider who participates in good faith in the withholding or withdrawing of life-sustaining treatment from a vulnerable adult under chapter 70.122 RCW, or who acts in accordance with chapter 7.70 RCW or other state laws to withhold or withdraw treatment, goods, or services.

(7) The department, and the department of health for facilities, agencies, or individuals it regulates, shall adopt rules designed to discourage whistleblower complaints made in bad faith or for retaliatory purposes.

[1999 c 176 § 14; 1997 c 392 § 202.]

Notes:

Findings -- Purpose -- Severability -- Conflict with federal requirements -- 1999 c 176: See notes following RCW 74.34.005.

Short title -- Findings -- Construction -- Conflict with federal requirements -- Part headings and captions not law -- 1997 c 392: See notes following RCW 74.39A.009.

74.34.200**Abandonment, abuse, financial exploitation, or neglect of a vulnerable adult — Cause of action for damages — Legislative intent.**

(1) In addition to other remedies available under the law, a vulnerable adult who has been subjected to abandonment, abuse, financial exploitation, or neglect either while residing in a facility or in the case of a person residing at home who receives care from a home health, hospice, or home care agency, or an individual provider, shall have a cause of action for damages on account of his or her injuries, pain and suffering, and loss of property sustained thereby. This action shall be available where the defendant is or was a corporation, trust, unincorporated association, partnership, administrator, employee, agent, officer, partner, or director of a facility, or of a home health, hospice, or home care agency licensed or required to be licensed under chapter

70.127 RCW, as now or subsequently designated, or an individual provider.

(2) It is the intent of the legislature, however, that where there is a dispute about the care or treatment of a vulnerable adult, the parties should use the least formal means available to try to resolve the dispute. Where feasible, parties are encouraged but not mandated to employ direct discussion with the health care provider, use of the long-term care ombudsman or other intermediaries, and, when necessary, recourse through licensing or other regulatory authorities.

(3) In an action brought under this section, a prevailing plaintiff shall be awarded his or her actual damages, together with the costs of the suit, including a reasonable attorney's fee. The term "costs" includes, but is not limited to, the reasonable fees for a guardian, guardian ad litem, and experts, if any, that may be necessary to the litigation of a claim brought under this section.

[1999 c 176 § 15; 1995 1st sp.s. c 18 § 85.]

Notes:

Findings -- Purpose -- Severability -- Conflict with federal requirements -- 1999 c 176: See notes following RCW 74.34.005.

Conflict with federal requirements -- Severability -- Effective date -- 1995 1st sp.s. c 18: See notes following RCW 74.39A.030.

74.34.205**Abandonment, abuse, or neglect — Exceptions.**

(1) Any vulnerable adult who relies upon and is being provided spiritual treatment in lieu of medical treatment in accordance with the tenets and practices of a well-recognized religious denomination may not for that reason alone be considered abandoned, abused, or neglected.

(2) Any vulnerable adult may not be considered abandoned, abused, or neglected under this chapter by any health care provider, facility, facility employee, agency, agency employee, or individual provider who participates in good faith in the withholding or withdrawing of life-sustaining treatment from a vulnerable adult under chapter

70.122 RCW, or who acts in accordance with chapter 7.70 RCW or other state laws to withhold or withdraw treatment, goods, or services.

[1999 c 176 § 16.]

Notes:

Findings -- Purpose -- Severability -- Conflict with federal requirements -- 1999 c 176: See notes following RCW 74.34.005.

74.34.210**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.

[2007 c 312 § 11; 1995 1st sp.s. c 18 § 86.]

Notes:

Conflict with federal requirements -- Severability -- Effective date -- 1995 1st sp.s. c 18: See notes following RCW 74.39A.030.

74.34.215

Financial exploitation of vulnerable adults.

(1) Pending an investigation by the financial institution, the department, or law enforcement, if a financial institution reasonably believes that financial exploitation of a vulnerable adult may have occurred, may have been attempted, or is being attempted, the financial institution may, but is not required to, refuse a transaction requiring disbursement of funds contained in the account:

- (a) Of the vulnerable adult;
- (b) On which the vulnerable adult is a beneficiary, including a trust or guardianship account; or
- (c) Of a person suspected of perpetrating financial exploitation of a vulnerable adult.

(2) A financial institution may also refuse to disburse funds under this section if the department, law enforcement, or the prosecuting attorney's office provides information to the financial institution demonstrating that it is reasonable to believe that financial exploitation of a vulnerable adult may have occurred, may have been attempted, or is being attempted.

(3) A financial institution is not required to refuse to disburse funds when provided with information alleging that financial exploitation may have occurred, may have been attempted, or is being attempted, but may use its discretion to determine whether or not to refuse to disburse funds based on the information available to the financial institution.

(4) A financial institution that refuses to disburse funds based on a reasonable belief that financial exploitation of a vulnerable adult may have occurred, may have been attempted, or is being attempted shall:

- (a) Make a reasonable effort to notify all parties authorized to transact business on the account orally or in writing; and
- (b) Report the incident to the adult protective services division of the department and local law enforcement.

(5) Any refusal to disburse funds as authorized by this section based on the reasonable belief of a financial institution that financial exploitation of a vulnerable adult may have occurred, may have been attempted, or is being attempted will expire upon the sooner of:

(a) Ten business days after the date on which the financial institution first refused to disburse the funds if the transaction involved the sale of a security or offer to sell a security, as defined in RCW

21.20.005, unless sooner terminated by an order of a court of competent jurisdiction;

(b) Five business days after the date on which the financial institution first refused to disburse the funds if the transaction did not involve the sale of a security or offer to sell a security, as defined in RCW 21.20.005, unless sooner terminated by an order of a court of competent jurisdiction; or

(c) The time when the financial institution is satisfied that the disbursement will not result in financial exploitation of a vulnerable adult.

(6) A court of competent jurisdiction may enter an order extending the refusal by the financial institution to disburse funds based on a reasonable belief that financial exploitation of a vulnerable adult may have occurred, may have been attempted, or is being attempted. A court of competent jurisdiction may also order other protective relief as authorized by RCW 7.40.010 and 74.34.130.

(7) A financial institution or an employee of a financial institution is immune from criminal, civil, and administrative liability

for refusing to disburse funds or disbursing funds under this section and for actions taken in furtherance of that determination if the determination of whether or not to disburse funds was made in good faith.

[2010 c 133 § 3.]

74.34.220**Financial exploitation of vulnerable adults — Training — Reporting.**

(1) A financial institution shall provide training concerning the financial exploitation of vulnerable adults to the employees specified in subsection (2) of this section within one year of June 10, 2010, and shall thereafter provide such training to the new employees specified in subsection (2) of this section within the first three months of their employment.

(2) A financial institution that is a broker-dealer or investment adviser as defined in RCW

21.20.005 shall provide training concerning the financial exploitation of vulnerable adults to employees who are required to be registered in the state of Washington as salespersons or investment adviser representatives under RCW 21.20.040 and who have contact with customers and access to account information on a regular basis and as part of their job. All other financial institutions shall provide training concerning the financial exploitation of vulnerable adults to employees who have contact with customers and access to account information on a regular basis and as part of their job.

(3) The training must include recognition of indicators of financial exploitation of a vulnerable adult, the manner in which employees may report suspected financial exploitation to the department and law enforcement as permissive reporters, and steps employees may take to prevent suspected financial exploitation of a vulnerable adult as authorized by law or agreements between the financial institution and customers of the financial institution. The office of the attorney general and the department shall develop a standardized training that financial institutions may offer, or the financial institution may develop its own training.

(4) A financial institution may provide access to or copies of records that are relevant to suspected financial exploitation or attempted financial exploitation of a vulnerable adult to the department, law enforcement, or the prosecuting attorney's office, either as part of a referral to the department, law enforcement, or the prosecuting attorney's office, or upon request of the department, law enforcement, or the prosecuting attorney's office pursuant to an investigation. The records may include historical records as well as records relating to the most recent transaction or transactions that may comprise financial exploitation.

(5) A financial institution or employee of a financial institution participating in good faith in making a report or providing documentation or access to information to the department, law enforcement, or the prosecuting attorney's office under this chapter shall be immune from criminal, civil, or administrative liability.

[2010 c 133 § 5.]

74.34.300**Vulnerable adult fatality reviews.**

(1) The department may conduct a vulnerable adult fatality review in the event of a death of a vulnerable adult when the department has reason to believe that the death of the vulnerable adult may be related to the abuse, abandonment, exploitation, or neglect of the vulnerable adult, or may be related to the vulnerable adult's self-neglect, and the vulnerable adult was:

(a) Receiving home and community-based services in his or her own home, described under chapters

74.39 and 74.39A RCW, within sixty days preceding his or her death; or

(b) Living in his or her own home and was the subject of a report under this chapter received by the department within twelve months preceding his or her death.

(2) When conducting a vulnerable adult fatality review of a person who had been receiving hospice care services before the person's death, the review shall provide particular consideration to the similarities between the signs and symptoms of abuse and those of many patients receiving hospice care services.

(3) All files, reports, records, communications, and working papers used or developed for purposes of a fatality review are confidential and not subject to disclosure pursuant to RCW 74.34.095.

(4) The department may adopt rules to implement this section.

[2008 c 146 § 10.]

Notes:

Findings -- Intent -- Severability -- 2008 c 146: See notes following RCW 74.41.040.

74.34.900

Severability — 1984 c 97.

If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

[1984 c 97 § 18.]

74.34.901

Severability — 1986 c 187.

If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

[1986 c 187 § 12.]

74.34.902

Construction — Chapter applicable to state registered domestic partnerships — 2009 c 521.

For the purposes of this chapter, the terms spouse, marriage, marital, husband, wife, widow, widower, next of kin, and family shall be interpreted as applying equally to state registered domestic partnerships or individuals in state registered domestic partnerships as well as to marital relationships and married persons, and references to dissolution of marriage shall apply equally to state registered domestic partnerships that have been terminated, dissolved, or invalidated, to the extent that such interpretation does not conflict with federal law. Where necessary to implement chapter 521, Laws of 2009, gender-specific terms such as husband and wife used in any statute, rule, or other law shall be construed to be gender neutral, and applicable to individuals in state registered domestic partnerships.

[2009 c 521 § 181.]

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Hello,

Attached please find the Answer to Petition for Review.

Case: In re the Estate of James W. Haviland, Deceased. Donald Haviland, Elizabeth Haviland, and Martha Clauser, Appellants, v. Mary Haviland, Respondent.

Case Number: 86412-8

Attorney Filing:

Suzanne C. Howle,

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Pre-approval for electronically filing an Appendix more than 25 pages received via telephone on September 6, 2011.

Thank you,

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