

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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Supreme Court No. 86412-8

(Court of Appeals No. 65101-3-1)

In the Matter of the Estate of James Haviland.

DONALD HAVILAND, ELIZABETH HAVILAND,  
And MARTHA CLAUSER

Petitioners,

v.

MARY HAVILAND,

Respondent.

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STATE OF WASHINGTON  
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*RESPONDENT*  
SUPPLEMENTAL BRIEF OF CO-PETITIONER RICHARD FURMAN

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## **I. IDENTITY OF RESPONDING PARTY**

This supplemental brief is filed pursuant to RAP 13.7(d) on behalf of Richard Furman, the Court-Appointed Administrator of the Estate of Dr. James Haviland (hereafter the “Administrator”). In the Court of Appeals, the Administrator entered a notice of appearance and joined in the petitioners’ motion for discretionary review. The petitioners before the Court of Appeals were Donald Haviland, Martha Clauser and Elizabeth Haviland, who are Dr. Haviland’s children (the “Haviland Children”). The Haviland Children are separately represented by Suzanne Howle and Carol Vaughn of Thompson & Howle. The Administrator files this supplemental brief to state his position on the issue independent of the Haviland Children and Mary Haviland.

The Administrator first raised this issue with his petition to the Superior Court for instruction on distribution of Dr. Haviland’s estate given the Superior Court’s finding that Mary Haviland financially exploited Dr. Haviland. In our judgment, the Court of Appeals correctly resolved the issue regarding the statute’s application. The statute is being applied prospectively to determine persons qualified to receive distributions. Moreover, although the Court of Appeals did not reach this

issue, the abuser amendments are remedial in nature and supplement common law remedies.

## II. SUPPLEMENTAL STATEMENT OF THE CASE

### A. Trial Court and Appellate History.

The litigation arising out of the Estate of Dr. James Haviland has resulted in two appeals producing two published opinions from Division I of the Court of Appeals. See, *In re Estate of Haviland*, 162 Wn. App. 548, 255 P.3d 854 (2011) (“the Will Contest”) and *In re Estate of Haviland*, 161 Wn. App. 851, 251 P.3d 289 (2011) (“Abuser Action”). The Will Contest resulted in findings that Dr. Haviland’s last will and testament was void because it had been procured as a result of the undue influence of his spouse Mary Haviland. (CP at 39). The trial court found that Mary Haviland had engaged in a decade-long pattern of systematically depleting Dr. Haviland’s assets and financially exploiting him. (CP at 35, 36 & 39). The Court of Appeals affirmed finding substantial evidence to support the findings and no error. *Estate of Haviland, supra* 162 Wn. App. at 569. Mary Haviland did not seek review by the Supreme Court.

The trial court decision in the Will Contest was rendered in September 2009. The Administrator was court-appointed on September 21, 2009. The Administrator succeeded George Paul Cook, as personal

representative. Mr. Cook is Mary Haviland's brother. Mr. Cook succeeded Mary Haviland as personal representative in June 2008 at the time the Will Contest proceeding commenced.

In November 2009, given the findings in the Will Contest, the Administrator filed a petition for an adjudication of whether Mary was an "abuser" as defined by the amendments to chapter 11.84 RCW. (CP 1-9). The trial court denied the petition, ruling that applying the statute, which became effective July 26, 2009, would result in an improper retroactive application. (CP 137-139).

The Haviland Children petitioned the Court of Appeals for discretionary review. The Administrator joined the petition. The Court of Appeals granted review and reversed.

The Court of Appeals reasoned that the purpose of the 2009 amendments was to determine persons entitled to distributions from the estate. *Estate of Haviland, supra* 161 Wn. App. at 856. The adjudication of entitlement applied the statute prospectively. *Id.* The Court of Appeals remanded to the Superior Court for a determination whether Mary Haviland was an "abuser" within the meaning of the statutory term and to provide the trial court opportunity to exercise its discretion as the fact-finder on the appropriate equitable remedy. *Id.* at 858.

B. Background Facts.

Dr. James Haviland was born in 1911 and had a distinguished medical career. (CP at 10-11). Dr. Haviland, and his first wife, Marion, had four children. *Id.* Together, James and Marion accumulated substantial wealth. In 1990, James and Marion placed their assets in trust “to provide common protection to the trustors against the effects of age and their increased susceptibility to the suggestion of others.” (CP at 11). Marion died in 1993. *Id.*

In 1996, the then 85 year-old Dr. Haviland met the 35 year-old Mary Burden (now Mary Haviland) at a hospital where he was being treated. (CP at 13). Mary had a criminal record, having been convicted of one count of Conspiracy to Commit First Degree Theft and 14 counts of Possession of Stolen Property in the First Degree on October 13, 1992. (CP at 12). Dr. Haviland and Mary married in 1997. (CP at 15). Dr. Haviland learned about Mary’s criminal record prior to their marriage. *Id.* Mary had negligible assets. (CP at 14).

During the ten-year marriage, Mary Haviland gained control over Dr. Haviland’s assets. She transferred, encumbered and spent millions for herself or the benefit of her designees. *Estate of Haviland, supra* 162 Wn. App. at 554; (CP at 16-33, 35). As the Court of Appeals correctly observed, she “exhaust[ed] a substantial estate without any credible

explanation.” *Estate of Haviland, supra* 162 Wn. App. at 568. Dr. Haviland died at the age of 96 on November 14, 2007. (CP at 10). At death, Dr. Haviland’s multi-million dollar estate had been so depleted of its assets that after distribution of specific bequests, the total value of the Estate was a negative \$45,834.38. (CP at 36). Remaining nonprobate assets passed to Mary pursuant to rights of survivorship or pursuant to trust provisions predominantly controlled by her. The result of Mary Haviland’s financial exploitation of Dr. Haviland’s assets, as described by the Court of Appeals in the Will Contest, was to effectively disinherit his children. *Estate of Haviland, supra* 162 Wn. App. at 555.

The degree of harm caused by this financial exploitation was extensive as evident from the trial court’s detailed findings in the Will Contest and from the Court of Appeals’ review of those findings. The Administrator was left with few assets for administration when he was court-appointed in September 2009. Although the asset inventory of the probate estate does not appear in the record, the Administrator was left with two parcels of real estate, one heavily mortgaged, and cash under \$100,000.00.

C. *The Abuser Amendments to the Slayer Statute.*

As counsel for the Haviland Children point out, studies indicate that the financial abuse of the elderly is pervasive. Brief of Petitioner at

29 citing Shelby Moore & Jeannette Schaefer, “*Remembering the Forgotten Ones: Protecting the Elderly from Financial Abuse*,” 41 San Diego L. Rev. 505, 509-512 (2004). Elder abuse is fairly common knowledge apart from studies. Schemers recognize the vulnerability of the aging population and readily victimize them. *Id.* Virtually every state has statutes against the abuse of elderly or vulnerable victims. *Id.*

In 1984, the Washington Legislature passed the Abuse of Vulnerable Adult Act, Chapter 74.34 RCW. Laws of 1984, Regular Session, c. 97. The Act provided for the reporting of elder abuse to public authorities who might investigate and provide protective services. *Id.* See also RCW 74.34.040; .050; .070; .080 & .090. In 1986, the Legislature provided for an “action known as a petition for an order for protection of a vulnerable adult in cases of abuse or exploitation . . . .” Laws of 1986, Regular Session, c. 187 § 5; RCW 74.34.110.<sup>1</sup>

In 1999, the Legislature provided a private civil cause of action for damages for abuse/exploitation *if the victim resided in a licensed care facility or was cared for at home by a licensed agency or an individual provider*<sup>2</sup>. RCW 74.34.200. This statutory cause of action was in

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<sup>1</sup> Non-exclusive relief under the 1986 legislation included restraining orders, no-contact orders, restraining the transfer of property and requiring an accounting. *Id.* at § 7; RCW 74.34.130.

<sup>2</sup> An “individual provider” means a person under contract with DSHS to provide services in the home. RCW 74.34.020(9).

“addition to other remedies available under law . . . .” *Id.* Thus, a victim not residing in a licensed care facility or cared for by a licensed agency or an individual provider, was left to his or her common law remedies for damages or equitable relief other than the protective order provided by the 1986 legislation.

In 1926, in *In re Tyler’s Estate*, 140 Wn. 679, 250 P. 456 (1926), this Court discussed fundamental principles of the common law relevant to this subject matter. This Court cited Rem. Comp. Stat., § 143, now codified at RCW 4.04.010, for the proposition that the “common law, so far as not inconsistent with the constitution and laws of the United States, or of the state of Washington, . . . shall be the rule of decision in all the courts of this state.” *Tyler’s Estate*, *supra* 140 Wn.2d at 684. This Court quoted the famous New York Court of Appeals decision in *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889) for the “fundamental maxim of the common law” that “[n]o one shall be permitted to profit by his own fraud, or take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime.” *Id.* at 684-85. “These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes.” *Id.* at 685. *These maxims without any statute giving them force or operation, frequently control the effect and nullify the*

*language of wills and the rules regarding succession to property rights.* *Id.* at 685-688. The common law rule is that “no one shall profit by his own wrong.” *Id.* at 687. Without recognition and enforcement of the common law rule by the courts, “their judgments would excite the indignation of all right-thinking people.” *Id.*

In *Hogan v. Martin*, 52 So.2d 806 (Fla. 1951), the Florida Supreme Court, using language like the Washington Supreme Court in *Tyler’s Estate*, observed that the common law rule “is applicable whether the claimant be a thief or a murderer. The idea of permitting a thief or a murderer to enjoy the fruits of his own crime is not only abhorrent to our courts but is calculated to excite just indignation of right thinking people. . . . The law places on these criminal acts its unqualified disapproval and condemnation.” *Id.* at 809.

“The maxims of the common law are made a part of our [Washington] laws by express statute of this state [RCW 4.04.010] adopting the common law.” *In re Tyler’s Estate, supra* 140 Wn. at 688. The common law has not been repealed, modified or annulled by the 1955 slayer statute or the 2009 abuser amendments. *Id.* In 1955, the Legislature, adopting the equitable maxim from *Tyler’s Estate*, provided in the Slayer Act that: **“This act shall not be considered penal in nature, but shall be construed broadly in order to effect the policy of**

**this state that no person shall be allowed to profit by his own wrong, wherever committed.”** 1955 Laws of Washington, Chapter 141, Section 14 (emphasis added). The statute was codified at RCW 11.84.900 in 1965. Since then, the statute has been modified to delete prolix language and add gender corrections.<sup>3</sup> Its present form is as follows: **“This chapter shall be construed broadly to effect the policy of this state that no person shall be allowed to profit by his or her own wrong, wherever committed.”** RCW 11.84.900. The 2009 Amendment expressly added the following: **“the provisions of this act are supplemental to, and do not derogate from, any other statutory or common law proceedings, theories, or remedies . . . .”** RCW 11.84.180.

Dr. Haviland recognized his potential vulnerability and expressed concern about it.<sup>4</sup> Yet, as his dependency advanced, not even he had

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<sup>3</sup> The phrase “not to be considered penal in nature, but shall” was deleted as well as the phrase “in order” by the 1998 amendments (effective June 11, 1998). Laws of 1998, c. 292, § 503. Mary Haviland suggests that the deletion of the former phrase evinces a legislative intent to make the law penal or punitive in nature. Brief of Respondent at 47 & n.13. Ms. Haviland cites no authority for the proposition.

The deleted language was redundant and verbose. When the statute provides that it is to be construed broadly to effect equitable principles, it is not necessary for the statute to state the obvious that it is not penal in nature. It could not be penal in nature when the express intent is to promote equitable policies.

Succinctly stated, the “slayer statute is not penal. It is to be construed broadly to effect the state’s policy that no person shall be allowed to profit by his own wrongdoing.” *Estate of Kissinger*, 142 Wn. App. 76, 79, 173 P.3d 956 (2007) (having reference to this 1998 version of RCW 11.84.900) *aff’d*, 166 Wn.2d 120, 206 P.3d 665 (2009).

<sup>4</sup> He expressed his concern about the effects of age and increasing susceptibility to the suggestion of others in the trust document he created in 1990. (CP 11).

protection against being easily victimized, demonstrating the insidious nature of this offense by those who will take advantage of the vulnerable elderly. The common law provided recourse for such offenses including, *if equitable*, “nullifying the language of wills” and the rules regarding succession to property rights. *In re Tyler’s Estate, supra* 140 Wn. at 684-690.

The 2009 abuser amendments supplement the common law remedies and give them greater force. However, the Washington Legislature, when enacting the 2009 abuser amendments, tempered their reach (consistent with the common law) by investing trial courts with discretion to adjust the consequences from the abuser determination in any manner the court deems equitable. RCW 11.184.170(2). In sum, the 2009 abuser amendments codify established common law rights and equitable remedies. In doing so, the amendments advance existing rights and remedies.

### **III. SUPPLEMENTAL LEGAL ARGUMENT**

#### ***A. The Abuser Amendments Apply Prospectively.***

The Court of Appeals *held* that the “2009 amendments to Washington’s slayer statute, chapter 11.84 RCW, which prohibits a person who exploits a vulnerable adult from benefiting from the vulnerable

adult's death, apply prospectively to probate petitions filed after the amendments' effective date even when the abuse and death occur before that date." *Estate of Haviland, supra* 161 Wn. App. at 852. The Court of Appeals' decision is correct because the statute governs how property shall pass in the future. The function of the amendments is to determine how property should be distributed when a decedent was the subject of financial exploitation by an heir.

The lawful distribution of Dr. Haviland's estate is a post-enactment duty of the personal representative. The application of the abuser amendments, to this inquiry as to how and to whom estate property should be distributed, is not a retroactive application of the statute. The amendments are being applied prospectively to the post-enactment petition for an adjudication of distribution rights.

The Court of Appeals succinctly presented this analysis. The Court of Appeals recognized that the legislative objective was the proper and just disposition of decedents' estates. *Estate of Haviland, supra* 161 Wn. App. at 856. This requires an adjudication of the persons eligible or qualified to receive distributions. *Id.* This determination is made prospectively during the administration of Dr. Haviland's estate under equitable principles adopted by the abuser amendments from the common law.

This approach is wholly consistent with Supreme Court analysis in other cases presenting retroactivity issues. The Court of Appeals cited *Aetna Life Ins. Co. v. Washington Life & Disability Ins. Guaranty Ass'n*, 83 Wn.2d 523, 520 P.2d 162 (1974) as analogous. In the *Aetna Life* case, the legislative attention was on the claims administration of receivership proceedings for insolvent insurers, similar to the legislative attention here on the probate administration of the estates of decedents. The statute in *Aetna Life* applied prospectively to receivership proceedings post-enactment just like the statute here applies prospectively to estate proceedings post-enactment. The statute is not being applied retroactively simply because some of the factual requisites for its application are drawn from a time prior to the passage of the legislation. See, *State v. Scheffel*, 82 Wn.2d 872, 879, 514 P.2d 1052 (1973) (A statute “is not retroactive because some of the requisites for its actions are drawn from a time antecedent to its passage . . .”). “Thus, the precipitating event was the probate petition because it determined the receipt of benefits [based upon the law at the time of the petition].” *Estate of Haviland, supra* 161 Wn. App. at 858.

The Court of Appeals did not make the determination that Mary Haviland was an “abuser.” Nor did the Court of Appeals determine the consequences of such a determination. The Court of Appeals remanded to

the Superior Court for those determinations. The Court of Appeals properly followed the legislative intent to allow the trial court to determine, in the first instance, in a fair and equitable manner (and to a heightened burden of proof) whether an individual is a financial abuser and whether disinheritance is an equitable remedy.

B. *The 2009 Abuser Amendments are Remedial.*

Moreover, although the Court of Appeals did not reach this issue, the 2009 abuser amendments are remedial. Mary Haviland's basic and very fundamentally flawed position is that "[t]he statute imposes new consequences for past conduct, and is thus retroactive." Brief of Respondent at 17. This reasoning is wrong because the abuser amendments do not impose any new consequences for abusive conduct. The abuser amendments advance the existing common law remedies described above for the redress of injuries to vulnerable adults.

The purpose of the abuser amendments is plainly remedial. RCW 11.84.180 sets forth the legislative intent to supplement and advance common law proceedings, theories or remedies. The amendments strengthen the laws against elder abuse, especially financial abuse. The amendments assist innocent victims of financial exploitation by providing a clear straightforward statutory remedy supplementing common law

remedies and without the need to pursue existing causes of action for fraud, conversion or other common law torts.

For example, constructive trusts arise in equity when there is clear, cogent, and convincing evidence of “wrongdoing.” *Baker v. Leonard*, 120 Wn.2d 538, 548, 843 P.2d 1050 (1993). “Wrongdoing, however, is not confined to a particular category, such as fraud, misrepresentation, or bad faith, although one of these usually forms the basis for imposition of a constructive trust. . . . Equity’s need for flexibility requires that wrongdoing not be so limited.” *Id.* In general, equity may impress a constructive trust whenever one has taken unconscionable advantage of another’s weakness, vulnerability or necessities. *Id.* at 547. In equity, the cause of action and the remedies are flexible enough to fairly address the circumstances of any case.

The abuser amendments implement these common law principles by giving them greater force specific to the circumstance of elder abuse that has become so increasingly pervasive in our society. As at common law, an abuser determination must rest on clear, cogent and convincing evidence. RCW 11.84.160. Furthermore, the statutory remedies are flexible like the common law remedies. As at common law, the amendments will permit nullification of testamentary language or succession to property rights but only if that result is equitable in the

circumstances. RCW 11.84.030 & .040; RCW 11.84.170(2). “[T]he court may . . . in its discretion 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).

Ms. Haviland overstates that the “amendments prevent a person who financially exploits a vulnerable adult from acquiring property or receiving a benefit as a consequence of the death of the vulnerable adult.” Brief of Respondent at 11. That may be the result under RCW 11.84.020, .030 or .040, but not necessarily and only if equitable. RCW 11.84.170(2), as stated above, authorizes the court in its discretion to allow an abuser to receive property or a benefit in any manner the court deems equitable notwithstanding RCW 11.84.040. Furthermore, even if disinheritance is the consequence, it is not a new consequence. Disinheritance always was a possible outcome under the common law equitable remedies.

The following quotes are examples of Ms. Haviland’s overreaching argument. “The abuser amendments impose a penalty on abusers unrelated to the amount of actual damages.” Brief of Respondent at 12. The amendments “impose a penalty, create new causes of action, and deprive persons of vested rights . . . .” *Id.* The abuser amendments represent “a dramatic departure from previous law . . . .” *Id.* at 17. “An

abuser's financial exploitation may have originally caused a loss to the decedent, while alive, in the amount of \$10,000; and the abuser may have subsequently repaid the decedent and made him whole in every respect. Under the amendments the abuser will forfeit all of his interest in the estate and the nonprobate assets, even if those assets are worth millions of dollars." *Id.* at 30.

The above arguments plainly distort the legislation beyond recognition. Under this legislation, disinheritance may occur but only if that is equitable to prevent unjust enrichment given the degree of harm from the financial exploitation and the totality of the circumstances. RCW 11.84.170. Ms. Haviland dismisses this point with argument that "[n]othing in the amendments requires the court to invoke its equitable powers to ameliorate the harsh punitive effects . . . ." Brief of Respondent at 31. But, nothing in the amendments prevents Ms. Haviland from compelling the Superior Court to exercise equitable powers to ameliorate any unjust result that she perceives and can satisfactorily establish. The legislature did not limit or restrict the trial court's discretion in any manner. The trial court may act in any manner that it deems equitable. Furthermore, any failure to exercise discretion is an abuse of discretion. *Bowcutt v. Delta North Star Corp.*, 95 Wn. App. 311, 320, 976 P.2d 643

(1999). If the court exercises its powers inequitably or not at all, then the court's actions are reviewable for abuse of discretion.

Ms. Haviland cites *Haddenham v. State*, 87 Wn.2d 145, 148, 550 P.2d 9 (1976) for authority that remedial statutes “afford a remedy, or better . . . remedies already existing for the enforcement of rights and the redress of injuries.” Brief of Respondent at 27. *Haddenham* and this description of remedial statutes support our position. In *Haddenham*, this Court stated that the “intent of the crime victims compensation act is to compensate and assist the residents of Washington who are the innocent victims of criminal acts. . . . Its purpose is patently remedial.” *Id.* at 148. Likewise, the abuser amendments better the remedies and assist innocent victims of elder abuse. Its purpose is patently remedial.

Ms. Haviland acknowledges the already existing common law rights and remedies. “. . . [T]he financially exploited person . . . [has] common law remedies for damages, and for recovery of the proceeds of financial exploitation, under theories including fraud, conversion, unjust enrichment, and constructive trust.” Brief of Respondent at 29. Yet, the prospect for recovery of damages or the stolen money from a thief or wrongdoer is a very unlikely possibility. In *Haddenham*, this Court similarly observed that the innocent victim of a criminal act has little chance of recovery for the financial hardship suffered as a consequence of

the criminal act. *Haddenham v. State*, *supra* 87 Wn.2d at 148. “The [crime victims compensation] act is an attempt to remedy that situation.” *Id.*

The same is true of the abuser amendments. The remedies under the abuser amendments supplement and advance the remedies under the common law because they provide a means for mitigating the effect of the financial exploitation in a manner that remains in the control of the victim’s estate. Thus, as in *Haddenham*, the abuser amendments remedy a situation where there is otherwise “little chance of recovery.” The amendments allow courts to withhold inheritances to offset misappropriated funds, and **redress the unthinkable inequity of distributing even additional property to financial abusers from their victims’ estates after death.**

C. *The Abuser Amendments Do Not Impair Vested Rights Nor Are They Punitive*

Ms. Haviland argues that the abuser amendments impair vested inheritance rights and violate constitutional prohibitions against ex post facto laws. This argument about impairment of vested rights is a re-run of past challenges to the slayer statute. The great majority of states have slayer statutes. *In re Estate of Blodgett*, 147 P.3d 702, 705 (Alas. 2006).

The remaining states have retained some form of the common-law slayer rule. *Id.*

The courts have consistently rejected challenges to either the common law rule or the slayer statute on the basis that the law impairs vested rights. This Court rejected the argument in *In re Tyler's Estate*, *supra* 140 at 691 (“This property was not his, and he is not being deprived of it. He has sought to acquire it [unlawfully]. He had no vested right or interest in it. It is, therefore, not . . . taking property from him which belonged to him.”). “. . . [C]ourts have noted that the application of the slayer rule does not actually cause forfeiture, because the offender did not own the property at the time of the homicide; he merely had an expectancy interest. By killing the decedent, the slayer prevents the property interest from vesting in himself.” *In re Estate of Blodgett*, *supra* 147 P.3d at 710 and authorities cited therein.

The same conclusion applies here. At most, Mary Haviland had an expectancy interest in Dr. Haviland's property upon his death. Instead, she sought to acquire all or most of his property unlawfully through financial exploitation so pervasive that she left his estate with a negative net worth to the detriment of his children. Financial abuse of this magnitude should prevent additional property from vesting in her.

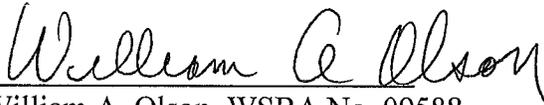
Furthermore, the abuser amendments are not punitive. They clearly and expressly apply in an equitable manner. The amendments certainly are not so manifestly punitive as to meet the “high level of proof necessary to overcome the presumption that civil statutes do not violate the ex post facto prohibition.” *In re Personal Restraint of Young*, 122 Wn.2d 1, 857 P.2d 989 (1993). Mary Haviland’s arguments to the contrary are unwarranted under this statutory scheme.

#### IV. CONCLUSION

This Court should affirm the Court of Appeals.

RESPECTFULLY SUBMITTED this 20th day of December 2011.

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