

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court No. 86412-8

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

In the Matter of the Estate of James W. Haviland.

DONALD HAVILAND, ELIZABETH HAVILAND, and MARTHA
CLAUSER,

Appellants,

v.

MARY HAVILAND,

Respondent.

SUPPLEMENTAL BRIEF OF MARY HAVILAND

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

Attorneys for Respondent Mary Haviland

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I. INTRODUCTION

Mary Haviland (hereinafter “Mary”), the respondent in the Court of Appeals and the petitioner for discretionary review in this court, files this supplemental brief pursuant to RAP 13.7(e).

II. ARGUMENT

Due process is violated if the application of a statute deprives a citizen of a vested right. Mary’s husband of ten years, Jim Haviland, died on November 14, 2007. Mary’s rights of inheritance, whether under the laws of intestate succession or any valid will, vested as of that date. The legislature adopted the abuser amendments to the slayer statute some 17 months later, on April 22, 2009. The effective date of the amendments was July 26, 2009. The application of the abuser amendments to deprive Mary of her vested interest in her husband’s estate would be a violation of due process of law. It matters not whether the proposed application of the statute is characterized as retroactive or prospective. Logically, any statute that is applied to impair vested rights is necessarily operating retroactively, but however the application of the statute is characterized, if the application impairs vested rights, it violates due process.

A. **Applying a Law to Impair Vested Rights Is an Unconstitutional Deprivation of Due Process.**

A law that purports to reach back in time to take away vested rights violates the due process clause of the Washington constitution.

“Due process is violated if the retroactive application of a statute deprives an individual of a vested right.” *Marriage of MacDonald*, 104 Wn.2d 745, 750, 706 P.2d 1196 (1985). *See Gillis v. King Co.*, 42 Wn.2d 373, 376, 255 P.2d 546 (1953):

A statute may not be given retroactive effect, regardless of the intention of the legislature, where the effect would be to interfere with vested rights. Thus, a statute may not operate retroactively where the result would be to impair the obligation of a contract . . . or deprive one of his property without due process of law

Id. (citations omitted); *Washington State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 304-05, 174 P.3d 1142 (2007) (holding that the “legislature may not give an amendment retroactive effect ‘where the effect would be to interfere with vested rights’”). Vested rights are “entitled to due process protections from subsequently enacted legislation.” *Gregoire*, 162 Wn.2d at 305. *See also Lawson v. State*, 107 Wn.2d 444, 454-55, 730 P.2d 1308 (1986) (“ . . . a statute may not be given retroactive effect where the effect would be to interfere with vested rights.”); *Tonkoff v. Roche Fruit & Produce Co.*, 137 Wash. 148, 242 P. 3 (1926) (legislation limiting commission payable to apple broker will not be applied to existing contract under which the rate exceeds the permissible commission). “A retroactive statute is unconstitutional when

it ‘takes away or impairs vested rights acquired under existing laws, . . . or attaches a new disability, in respect to transactions or considerations already past[.]’” *In re Martin*, 129 Wn. App. 135, 145, 118 P.3d 387 (2005) (quoting *I.N.S. v. St. Cyr*, 533 U.S. 289, 321, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001)). “[T]he legislature may not interfere with or divest estates which have already become vested through the death of the testator” *Strand v. Stewart*, 51 Wash. 685, 687-88, 99 P. 1027 (1909).

B. Mary’s Interest in Her Husband’s Estate, Whether Under Any Valid Will or the Laws of Intestate Succession, Vested at the Date of His Death.

Mary’s interest in her husband’s estate vested when Jim died on November 14, 2007.¹ Mary was the beneficiary of real and personal property under all of the wills and codicils that Jim executed in 1997 and thereafter. *See* Brief of Respondent, at 6-8, and record citations therein. If

¹ Mary’s interest in certain nonprobate assets also vested as of the date of death. Mary was the beneficiary of a Living Trust that her husband created in 1997. The trust expressly provided that Mary became the sole beneficiary “[u]pon the death of James W. Haviland” Ex. 12. No subsequent act or event was a condition of the vesting of Mary’s interest in the Living Trust, and it therefore vested on the date of death. Mary and Jim were joint tenants with right of survivorship on certain accounts. *See, e.g.*, VRP 1896-97, 1914-18. Survivorship rights in jointly held accounts vest in the survivor upon the death of the co-owner (absent evidence of a contrary intent at the time the account was created). RCW 30.22.100(3); *see, e.g., Anderson v. Anderson*, 80 Wn.2d 496, 500-01, 495 P.2d 1037 (1972) (describing former statute). The accounts of which Mary was a joint tenant with right of survivorship therefore vested in her as of the date of her husband’s death. The Court of Appeals in its opinion addressed only the application of the statute to the distribution of the probate assets, that is, the assets that will pass pursuant to a will or the law governing intestate succession. The opinion did not hold that the abuser amendments could be applied to divest Mary of her interest in the nonprobate assets.

it were determined that none of these wills was valid or should be admitted to probate, then under the laws of descent and distribution Mary would inherit all of her husband's interest in their community property, and one-half of Jim's separate property, real and personal property alike. RCW 11.04.015(1)(a), (b).

The rights of a devisee under a will or of an heir under the laws of descent and distribution vest as of the date of the decedent's death.

RCW 11.04.250 provides as follows:

When a person dies seized of lands, tenements or hereditaments, . . . his title *shall vest immediately* in his heirs or devisees,² subject to his debts, family allowance, expenses of administration and any other charges for which such real estate is liable *under existing laws*. No administration of the estate of such decedent, and no decree of distribution or other finding or order of any court shall be necessary in any case to vest such title in the heirs or devisees, *but the same shall vest in the heirs or devisees instantly upon the death of such decedent*: PROVIDED, That no person shall be deemed a devisee until the Will has been probated. The title and right to possession of such lands, . . . so vested in such heirs or devisees, . . . shall be good and valid against all persons claiming

² Under RCW 11.02.005(6), the term "heirs" denotes those persons, including the surviving spouse, "who are entitled under the statutes of intestate succession to the real and personal property of a decedent on the decedent's death intestate." As RCW 11.04.250 indicates (" . . . no person shall be deemed a devisee until the Will has been probated . . ."), a devisee is a person designated to receive property by the decedent in a will.

adversely to the claims of any such heirs, or devisees, excepting only the personal representative when appointed, and person lawfully claiming under such personal representative

RCW 11.04.250 (emphasis added). RCW 11.04.290 further provides that

RCW 11.04.250 through 11.04.290 shall apply to community real property and also to separate estate; and upon the death of either spouse or either domestic partner, title of all community real property *shall vest immediately* in the person or persons to whom the same shall go, pass, descend or be devised, as provided in RCW 11.04.015, subject to all the charges mentioned in RCW 11.04.250 (emphasis added).³

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

Before Jim died, Mary's interest in her husband's estate could legitimately have been characterized as a "mere expectancy." Jim might have changed his will, or survived her; or the legislature might have prospectively changed the law governing future wills, intestate succession, trusts, and account ownership. When Jim died, however, Mary's property interest in her husband's estate vested. She immediately acquired legal

³ RCW 11.04.290 was amended in 2008 to substitute the words "spouse or either domestic partner" in place of "husband or wife," but otherwise was unchanged from the 1965 version. Laws of 2008, ch. 6, § 930.

title to the joint accounts and to the trust assets, and she immediately acquired equitable title to the probate assets, subject only to the administration of her husband's estate. Her property interest ceased to be a mere expectancy because the distribution of a decedent's estate is governed by the law and the testamentary instruments *as of the date of death*. See, e.g., *In re Ziegner's Estate*, 146 Wash. 537, 264 P. 12 (1928):

The will speaks as of the date of the testator's death, and must conform to the laws in force at that time. These rules are elementary and need no citation of authority in their support. While *the Legislature may not interfere with or divest estates which have already become vested through the death of the testator*, its power over wills, the manner of their execution, and the mode of carrying out their provisions, is absolute and supreme *until death occurs*.

Ziegner's Estate, at 540, quoting *Strand v. Stewart, supra*, 51 Wash. at 687-88 (emphasis added); see also *In re Nielsen's Estate*, 198 Wash. 124, 130, 87 P.2d 298 (1939) ("The will speaks as of the date of the testator's death, and the probate establishes its status as of that date," quoting *In re Hoscheid's Estate*, 78 Wash. 309, 320, 139 P. 61 (1914)); *In re Estate of Elmer*, 91 Wn. App. 785, 789, 959 P.2d 701 (1998) ("... a will speaks at the time of death . . ."); see also RCW 11.04.250 (the interest of an heir or devisee in real property vests immediately upon death "subject to his debts, family allowance, expenses of administration and any other charges

for which such real estate is liable *under existing laws.*" (emphasis added))

Although bare legal title is held by the personal representative, the personal representative serves as a fiduciary for the beneficiaries, collecting assets and paying the decedent's debts, and is obligated to distribute the decedent's assets under the terms of the decedent's valid will or, if there is none, under the laws of intestate succession. Mary acquired legal ownership of the nonprobate assets and a vested, equitable interest in the probate assets immediately upon Jim's death.

C. The Abuser Amendments to the Slayer Statute Change the Law Governing Wills, Intestate Succession, Trusts, Account Ownership, and Beneficiary Designations.

On April 22, 2009, more than 17 months after Jim Haviland died, the Washington legislature enacted Laws of 2009, ch. 525, the abuser amendments to the slayer statute. The effective date of the new legislation was July 26, 2009, more than 20 months after Jim died. The abuser amendments prevent a person who financially exploits a vulnerable adult from acquiring property or receiving a benefit as a consequence of the death of the vulnerable adult. RCW 11.84.020. The amendments provide, *inter alia*, that the abuser may not inherit property from the decedent under a will (RCW 11.84.040) or the laws of descent and distribution in the absence of a will (RCW 11.84.030). The amendments provide that an abuser may not take a beneficiary's interest in a state retirement system

benefit (RCW 11.84.025); may not take an interest previously owned by the decedent in a joint account with right of survivorship (RCW 11.84.050); may not take an interest in a trust if the trust provides that the person is to receive the interest on the death of the decedent (RCW 11.84.080); and may not, though properly designated as beneficiary, take proceeds of an insurance policy on the life of the decedent (RCW 11.84.100).

D. The Proposed Application of the Abuser Amendments to Mary, Whether or Not Characterized as a Retroactive Application, Would Unconstitutionally Deprive Mary of Her Vested Rights in Her Husband's Estate.

In the briefing to the Court of Appeals, the parties gave considerable attention to the question whether the proposed application of the abuser amendments was or was not a retroactive application. Whether the application of a particular statute is retroactive, and whether it impairs vested rights, are intertwined questions. When any statute is applied in such a way as to deprive a person of his or her previously vested rights, the application of the statute is at least in that sense retroactive. But however it is characterized, the application is unconstitutional.

Numerous cases analyze whether a particular application of a statute is or is not retroactive. *State v. T.K.*, 139 Wn.2d 320, 328 and n.2, 987 P.2d 63 (1999). This Court has held that in order to determine if a

proposed application of a statute is retroactive, a court must first identify the triggering or precipitating conduct, that is, the conduct that the statute was intended to regulate, and that if the regulated conduct occurred before the effective date of the statute, then the proposed application of the statute was retroactive. *See, e.g., In re Burns*, 131 Wn.2d 104, 110-12, 928 P.2d 1094 (1997); *State v. Belgarde*, 119 Wn.2d 711, 722, 837 P.2d 599 (1992); *Aetna Life Ins. Co. v. Washington Life & Disab. Ins. Guar. Ass's*, 83 Wn.2d 523, 535, 520 P.2d 162 (1974) (en banc); *see also Heidgerken v. DNR*, 99 Wn. App. 380, 387-89, 993 P.2d 934 (2000). It is not, however, always easy to find consensus on the identity of the conduct that the legislature intended to regulate. *See, e.g., State v. T.K., supra*. In the case of the abuser amendments, it seems self-evident that the legislature intended to regulate – that is, to discourage and punish – the financial exploitation of vulnerable adults. Judge Erlick in the trial court so found, *see* CP 137, and thus concluded that the proposed application of the abuser amendments here is retroactive, because the alleged financial exploitation occurred long before the effective date of the abuser amendments. The petitioners, however, have argued that the trigger for the application of the statute was the determination of whether someone engaged in financial exploitation, CP 116, or that the statute regulated only the consequences of financial exploitation, *see* Opening Brief of

Petitioners, at 19. The Court of Appeals concluded that the trigger for the application of the statute was the filing of the petition to enforce it. Court of Appeals Opinion, at 5. This Court should reject this interpretation. It will always be possible to characterize a statute as operating prospectively by identifying the “triggering event” or the “regulated conduct” as the enforcement mechanism under the statute – the trial, the commitment of someone to prison, the imposition of a fine, or in this case the petition for or actual disinheritance of an alleged abuser. This approach confuses the conduct that the legislature intends to target or regulate with the enforcement mechanism. It also leaves out of the analysis the critical determination of whether the statute unconstitutionally impairs vested rights acquired under existing laws.

In *State v. Pillatos*, 159 Wn.2d 459, 150 P.3d 1130 (2007), this court characterized the test of whether a proposed application of the statute is retroactive as requiring consideration of all factors, including, for example, whether the law takes away or impairs vested rights acquired under existing laws, or creates new obligations or imposes new duties, or attaches new disabilities, in respect to transactions or considerations already passed, and whether the statute gives fair warning that certain conduct carries specific consequences. The court quoted with approval the statement in *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269-70, 114

S. Ct. 1483, 128 L. Ed. 2d 229 (1994), that the determination of whether a proposed application of a statute is retrospective depends upon whether the statute attaches new legal consequences to events completed before the enactment of the statute, and that a conclusion that a proposed application is retroactive is a conclusion reached at the end of “a process of judgment” concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event. *Pillatos* at 471.

The Court of Appeals in this case held that the application of the abuser amendments is prospective, insofar as it applies to probate assets that had not yet been distributed from the estate when the petition was filed. But the Court of Appeals did not address whether Mary’s inheritance rights vested when her husband died in 2007, and thus failed to address the constitutional issue. If a will speaks as of the date of death, and the interests of the heirs and beneficiaries of an estate vest at the decedent’s death, then the application of the subsequently enacted abuser amendments to impair Mary’s rights of inheritance deprives her of a vested right, whether or not the application is characterized as retroactive or prospective. Put differently, any application of a statute that deprives a citizen of Washington of rights of inheritance that vested prior to the enactment of the statute, based on conduct that occurred prior to the date

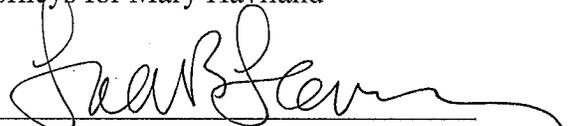
of death, is necessarily retroactive in application and violates the due process clause of the Washington constitution. *Pillatos*, at 471 (“A retrospective law, in the legal sense, is one which takes away or impairs vested rights acquired under existing laws . . .” quoting *Pape v. Dep’t of Labor & Indus.*, 43 Wn. 2d 736, 740-41, 264 P.2d 241 (1953)).

III. CONCLUSION

For the foregoing reasons, Mary Haviland requests that the Court reverse the decision of the Court of Appeals, enter an order affirming the decision of Judge Erlick dismissing the petition, and award Mary Haviland her attorneys’ fees incurred in the Court of Appeals and in this Court.

Respectfully submitted this 20th day of December, 2011.

DAVIS WRIGHT TREMAINE LLP
Attorneys for Mary Haviland

By: 

Ladd B. Leavens WSBA #11501

William K. Rasmussen WSBA #20029

PROOF OF SERVICE

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

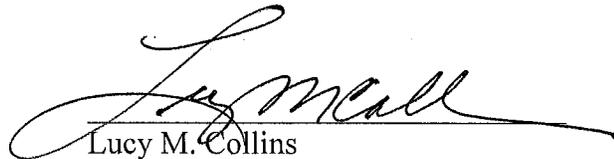
On the this day I caused a copy of the document to which this is attached to be served on counsel of record via messenger as follows:

Suzanne C. Howle
Carol Vaughn
Thompson & Howle
601 Union St., Suite 3232
Seattle, WA 98101

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

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

Executed at Seattle, Washington this 20th day of December, 2011.


Lucy M. Collins