

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES

BOARD OF APPEALS

In Re:) Docket Nos. 10-2012-L-1666
) 10-2012-L-1667
)
[APPELLANT'S NAME 1] and) **REVIEW DECISION AND FINAL ORDER**
[APPELLANT'S NAME 2])
)
Appellants) Adult Protective Services

I. PROCEDURAL HISTORY

1. The Department of Social and Health Services (Department) received allegations that [APPELLANT'S NAME 1] and [APPELLANT'S NAME 2] (Appellants) had mentally abused a vulnerable adult. After investigation and review, the Department determined that the allegations of mental abuse were substantiated. The Appellants each requested a hearing to contest the Department's substantiated findings of mental abuse. The matters were consolidated. Administrative Law Judge (ALJ) Debra H. Pierce held an administrative hearing on February 26 – 28, 2013, and issued an Initial Order on April 23, 2013. She affirmed the Department's substantiated findings of mental abuse.

2. The Appellants timely filed a Petition for Review of the Initial Decision on May 9, 2013.

3. The Department timely filed a Response to the Appellants' Request for Review on May 20, 2013.

II. FINDINGS OF FACT

The undersigned has reviewed the record of the hearing, the documents admitted as exhibits, the Initial Order, the Petition for Review of the Initial Decision, and the Response to the Appellants' Request for Review. The following necessary findings of fact were relevant and supported by substantial evidence in the record.

1. These matters, In re [APPELLANT'S NAME 1], Docket No. 10-2012-L-1666, and In re [APPELLANT'S NAME 2], Docket No. 10-2012-L-1667 were consolidated because the

allegations involve the same facts and circumstances, and the same allegations of mental abuse of the alleged victim, [NAME 1]¹.

2. [NAME 1]'s mental impairments include dementia and depression. She has short term memory deficits, and needs cuing for memory. Her level of cognition varies, and she is easily upset. The severity of symptoms varies. Sometimes, she does not remember events which occurred the same day, or within hours; she may forget events which occurred weeks ago, or she may recall events which occurred within those same time frames. Her long term memory is intact. Physically, [NAME 1] has osteoporosis, osteoarthritis, and has undergone total shoulder and knee replacements, among other things. She needs supervision for safety, contact guard and personal care and assistance with her activities of daily living. She is incapable of independent living. [NAME 1] was eighty-three (83) years old at the time of the relevant events in this matter. She has been married to her [SPOUSE], [NAME 2], for approximately sixty-four years, and five surviving [RELATIVES] were born of that relationship. [NAME 2] was eighty-six (86) years old during the time material to the matter. He suffers from dementia, and physical challenges.

3. The [RELATIVES] of [NAME 2] and [NAME 1] are [NAME 3], [NAME 4], [NAME 5], [NAME 6], and [APPELLANT'S NAME 2], who is one of the alleged perpetrators in this matter. [NAME 2] has an adult [RELATIVE] of a prior relationship, [NAME 7].

4. [APPELLANT'S NAME 2] has been married to [APPELLANT'S NAME 1] for four years.

5. [NAME 1] and [NAME 2] lived on a farm most of their [RELATED] lives, but sold the farm and moved to a small town near [CITY 1], [ANOTHER STATE] several years ago. In 2011, when the [RELATIVES] began experiencing more mental and physical challenges, they moved to an accessible home in [CITY 1], and a care giver was arranged with the help of their

¹ In order to protect her privacy, only the first name of the alleged victim will be used in this order. No disrespect is intended.

[RELATIVES], primarily [APPELLANT'S NAME 2]. When that arrangement still proved difficult, the [RELATIVES]'s [RELATIVES] began discussing the next level of care and living arrangements for the [RELATIVES]. Exhibit E.

6. By December 2011, [APPELLANT'S NAME 2] proposed that her [RELATIVE 1], [NAME 1], could live with her at a cost of \$3,500.00 per month, and would become a resident of her Adult Family Home when [APPELLANT'S NAME 2] received her licensing for that facility. Exhibit E. [APPELLANT'S NAME 2] is an Occupational Therapist, and had provided in-home care to others who were not capable of independent living. The Appellants and the other [RELATIVES] of [NAME 2] and [NAME 1] recognized that [NAME 1] was not capable of independent living, and that [NAME 2] could not provide the care she needed, since he needed care himself, although on a different level

7. Instead of separating, with [NAME 1] moving to live with the Appellants, the [RELATIVES] moved to an assisted living facility in January 2012. This move was arranged by their [RELATIVE], [NAME 6]. Because of her proximity, [NAME 6] was the family member primarily assisting the [RELATIVES] with their daily needs at that time

8. By early March 2012, [NAME 2] insisted he move back to his own home. [NAME 1] was going to move too, but she decided to stay in the facility. She became upset, disconsolate, and agitated. She began calling family members asking to be taken in. In the meanwhile, [NAME 2] was calling [NAME 1] repeatedly. The [RELATIVES]'s belongings were moved back to the home with [NAME 2], and [NAME 1] remained in a furnished apartment at the facility with her [PET], but little else.

9. The Appellants suggested that [NAME 2] and [NAME 1] divorce as a way for the family to manage [NAME 2] and [NAME 1]'s separate care needs. The Appellants viewed divorce as a method of obtaining half of [NAME 2] and [NAME 1]'s assets for [NAME 1] so those funds could then be used to pay for [NAME 1]'s care at the Appellants' home without [NAME 2]'s interference.

10. Without advance notice to other family members, the Appellants went to [CITY 1], [ANOTHER STATE] on March 15, 2012, to pick up [NAME 1], and move her to [CITY 2], Washington. [APPELLANT'S NAME 2] told [NAME 1] that the only way the Appellants could help her was if [NAME 1] would file for divorce from [NAME 2]. [NAME 1] agreed to do so, and the Appellants assisted [NAME 1] in filing for divorce from [NAME 2] before moving her to [CITY 2] to live in their home (which, by that time, was a licensed Adult Family Home).

11. At that time, [NAME 1]'s mental health was such that she could not even recall events from the previous day. She was crying, and she was heavily medicated. She needed assistance with activities of daily living, and supervision. The Appellants moved [NAME 1] from the assisted living facility to their home to provide that care.

12. Although [NAME 1]'s mental health and dementia were notable when she first moved to [CITY 2], a physical therapist, [NAME 8], observed that the dementia progressed over the summer. In the beginning, when she came to [CITY 2], [NAME 1] was more upset, but she could recall more clearly, but as time progressed she became less upset yet her dementia had progressed.

13. [APPELLANT'S NAME 2]'s [RELATIVES] were concerned about the decision to file for divorce for [NAME 1] and [NAME 2]. [APPELLANT'S NAME 2] wrote an e-mail advising them, "Any of you may call her ([NAME 1]) any time you want. However, if you are going to badger her about [NAME 2] and upset her, there is no point in that and I won't let you do that."

14. The Appellants' adult family home employed care givers. Care givers were instructed not to allow [APPELLANT'S NAME 2]'s [RELATIVES], or [NAME 2], to speak to [NAME 1] when the Appellants were not home. If the staff saw that the telephone call was from a [ANOTHER STATE]'s number, it would not be answered.

15. [NAME 3] saw his [RELATIVES] regularly when they lived in [ANOTHER STATE]. He found it difficult to talk with [NAME 1] by telephone because she forgot the conversation as they spoke. His conversations with [NAME 1] were not restricted. He knew his

[RELATIVES] were having difficulty communicating with [NAME 1], and were restricted in their communications with her because the Appellants did not approve of the conversations they were having. He therefore avoided subjects he knew might cause his communication to be blocked or impeded by the Appellants as well. He asked [NAME 1] if she wanted to live with [NAME 2], and she said she didn't think she could. On Mother's Day, 2012, he couldn't speak to [NAME 1] because each time he attempted to call, someone picked up the telephone, but then hung up.

16. [NAME 5] spoke to her [RELATIVE 1], [NAME 1], about once a week after [NAME 1] moved into the Appellants' home. She also visited [NAME 1] at the Appellants' home. However, her conversations were always monitored by [APPELLANT'S NAME 1]. She tried to avoid subjects she knew were not approved by the Appellants because she did not want her communication with her [RELATIVE 1] to be blocked by the Appellants. [APPELLANT'S NAME 1] controlled communication with [NAME 1] when it was permitted. [NAME 5] could not talk freely with her [RELATIVE 1]. When she talked to [NAME 1] about [NAME 2], she was reprimanded by [APPELLANT'S NAME 2]. Her telephone calls were monitored, and [APPELLANT'S NAME 1] would talk over her, or become verbally abusive if the conversation was more than "chitchat." When that happened, she would hang up.

17. [NAME 2] complained to [NAME 5] that he could not contact [NAME 1] (his [SPOUSE]), and the Appellants would not permit him to speak to her. When [NAME 5] talked to [NAME 1], [NAME 1] had no memory of the events which had transpired and which brought her to live with [APPELLANT'S NAME 2] and [APPELLANT'S NAME 1]. Without [NAME 5] broaching the subject, [NAME 1] would ask [NAME 5] about [NAME 2], and when [NAME 5] responded, [NAME 1] would become upset. [NAME 1] would say, "Well, he could call me." [NAME 1] did not recall that she had asked for a divorce from [NAME 2], and indicated she did not want one.

18. [NAME 1] had an address book, or a book for notes. [NAME 1] was able to make telephone calls on her own when she was in [CITY 1]. She did not make calls when she was at the Appellants'. If she made calls, she was assisted in doing so. She asked for assistance to call her [RELATIVE 2], and to call a friend.

19. [NAME 6] spoke to [NAME 1] a few times a day and saw her [RELATIVE 1] every day when [NAME 1] and [NAME 2] lived in [CITY 1], [ANOTHER STATE]. She talked to [NAME 1] a total of four times between March, 2012, when [NAME 1] was taken to live with the Appellants, through September, 2012 when [NAME 1] left the Appellants' home. The first time she spoke to [NAME 1] after she moved to the Appellants' home was on [DATE 1], 2012, [NAME 1]'s birthday. [APPELLANT'S NAME 2] initiated the calls to her [RELATIVES] that day. However, in April 2012, [APPELLANT'S NAME 1] told [NAME 6] that she could not speak freely to [NAME 1], and that she needed to watch what she said. Her calls were monitored by the Appellants. [NAME 1] asked how [NAME 2] was. When [NAME 6] started to answer, [APPELLANT'S NAME 1] interrupted, said "there would be none of that," and hung up.

20. [NAME 6] was caring for [NAME 2] after he moved back into his home. He attempted to contact [NAME 1] constantly, but was not permitted to speak to her. He asked [NAME 6] to call for him. She initiated a call in May 2012, and [APPELLANT'S NAME 1] told her that the call was being recorded, and she should watch what she said, but then allowed her to talk to [NAME 1]. When [NAME 1] asked [NAME 6] about [NAME 2], she put [NAME 2] on the telephone. [NAME 2] said, "Hello, Honey, how are you, when are you coming home?" [APPELLANT'S NAME 1] interrupted in a rude manner and terminated the call. [APPELLANT'S NAME 1] then called [NAME 6] and profanely reprimanded her for allowing [NAME 2] to talk to [NAME 1].

21. When [NAME 6] attempted a conversation with her [RELATIVE 1] in September 2012, [APPELLANT'S NAME 1] permitted her to speak to [NAME 1], but stayed on the line during the conversation. He interrupted the conversation, and even told [NAME 1] that

[NAME 6] had taken her money. When [NAME 1] asked him to stop, he continued until [NAME 6] finally ended the call. [NAME 6] had difficulty obtaining telephone contact with her [RELATIVE 1], and was monitored, harassed, recorded, spoken to rudely and profanely, and was intimidated by the Appellants. She knew that her [RELATIVES] had the same difficulty, as well as some other family members. She was so intimidated that she did not go to the Appellants' home to visit her [RELATIVE 1] in person; she feared for her safety based on the telephone conversations and other actions of [APPELLANT'S NAME 1].

22. [NAME 4] spoke to her [RELATIVE 1], [NAME 1], about once a week before [NAME 1] moved to the Appellants' home. She lives in [ANOTHER STATE 2]. She only talked to [NAME 1] five times from March, 2012 through September, 2012. When she called the [APPELLANT]'s home to speak to [NAME 1], the Appellants would hang up on her; usually the telephone was picked up, and then hung up. The telephone conversations between [NAME 4] and her [RELATIVE 1] were monitored, and the Appellants, who were listening in, would interrupt the conversation. [NAME 1] would comment on the background noise she heard, and [NAME 4] explained to [NAME 1] it was because [APPELLANT'S NAME 1] was listening in on the phone.

23. [APPELLANT'S NAME 1] often became belligerent when [NAME 4] called. He called her "an asshole," and would say, "Fuck you," and hang up. While monitoring calls, he would say [NAME 4] was lying to [NAME 1], and that she was abusive to [NAME 1] by lying, and because [NAME 4] wanted [NAME 1] to live with [NAME 2]. When she did talk to [NAME 1], [NAME 4] asked how she was, and if she knew "what was going on." When that happened, the Appellants would say that she was upsetting [NAME 1] and hang up. [NAME 4] never heard [NAME 1] getting upset during a conversation with her.

24. [NAME 1] did not express a desire for divorce from [NAME 2] to [NAME 4], or that she did not want to talk to him. When [NAME 4] told [NAME 1] that [NAME 2] wanted to hear from her, [NAME 1] went to get a pencil and paper to write the number. As she began

writing the number, she said, "Now whose number is this?" [APPELLANT'S NAME 2] then said that [NAME 4] upset [NAME 1] and ended the call. Exhibit 13, page 2. [NAME 1] was not upset.

25. Ellen Rapkoch, Adult Protective Services investigator, became involved in the matter, based on allegations of exploitation of [NAME 1] by the Appellants. She interviewed [NAME 1] on June 18, 2012. [NAME 1] was not sure how her move from [CITY 1] to [CITY 2] came about, but said that her [SPOUSE], [NAME 2], did not want to come with her, so she came without him. While indicating that [NAME 2] could be rude to her, she explained that the only way she could get money was to divorce him. While she said she enjoyed living with her [RELATIVE], [APPELLANT'S NAME 2], and could not continue to live as she had in [CITY 1], she missed her other [RELATIVES], and she was "still pretty upset" about the move from [CITY 1]. She said [APPELLANT'S NAME 2] would not let her talk to [NAME 2]. She could not recall [APPELLANT'S NAME 1]'s name at that time. On June 26, 2012, [NAME 2] was allowed to speak to [NAME 1], although his conversation was monitored and recorded. Exhibit 8, page 6.

26. Attorney Frances R. Stern was appointed as Guardian Ad Litem (GAL) for [NAME 1] in the [ANOTHER STATE]'s divorce case. She filed her report on July 10, 2012. Exhibit 10. A guardianship action was also filed, regarding both [NAME 2] and [NAME 1] (Exhibit 11) and Ms. Stern was appointed Guardian Ad Litem for both of them in those matters. As GAL for [NAME 1] in the divorce case, her role was to determine if [NAME 1] was competent to institute the action, and had the capacity to make the decision to request dissolution of her marriage.

27. Ms. Stern made telephone contact with [NAME 1], and was concerned that the conversation was being monitored by [APPELLANT'S NAME 1], and it was difficult to speak with [NAME 1]. She interviewed [NAME 1] in person. [NAME 1] told her that during the day, [NAME 2] and a care provider were taking care of her. She first said that it was her idea to file for divorce because of "the abuse," which she described as "the talking." She then told

Ms. Stern that she was not abused. Exhibit 10, page 3.

28. Ms. Stern interviewed [NAME 1]'s [RELATIVES]. [APPELLANT'S NAME 2] admitted that she was not allowing certain siblings to talk to [NAME 1], and explained she did this for [NAME 1]'s best interest.

29. Ms. Stern determined that there was good cause for concern that [NAME 1] did not have the capacity to make decisions without a guardian. Ms. Stern recommended that an action for guardianship of [NAME 1] be instituted because [NAME 1] clearly needed a guardian and conservator. Ms. Stern recommended [NAME 1]'s [RELATIVES] [NAME 6] and [NAME 4], and her [RELATIVE] [NAME 3] as guardians. Exhibit 10.

30. [NAME 4] was appointed temporary guardian of [NAME 1] by order of the [NUMBER] Judicial District Court of [COUNTY] County, [ANOTHER STATE] entered August 17, 2012. Exhibit 11. [NAME 4], [NAME 3] and [NAME 6] were appointed co-conservators of [NAME 2] and [NAME 1]'s assets.

31. When a GAL was appointed, the action for dissolution was stayed. When that occurred, [APPELLANT'S NAME 2] called [NAME 6] to accuse her of blocking the divorce for [NAME 1] and [NAME 2], and she and [APPELLANT'S NAME 1] both threatened [NAME 6].

32. On August 27, 2012, [NAME 4] and [NAME 5] went to visit [NAME 1] at the Appellants' adult family home facility. [NAME 1] was eating lunch with other residents of the home, and the care giver who answered the door allowed them to speak to her. [NAME 4] told [NAME 1] about the difficulty she and [NAME 1]'s other [RELATIVES] were having calling her, and [NAME 1] commented that she had wondered why no one ever called. When [NAME 4] told [NAME 1] that [APPELLANT'S NAME 1] was accusing [NAME 2] of sexually abusing her, she said, "Well, where did he get that!" [APPELLANT'S NAME 1] then appeared and demanded that [NAME 5] and [NAME 4] leave. [NAME 1] asked why, and [NAME 4] said she had a right to visit her [RELATIVE 1]. [NAME 1] said she agreed with [NAME 4]'s statement. [NAME 1] wanted to leave with her [RELATIVES], but [APPELLANT'S NAME 1] told her she could not

because she was a ward of the State of Washington. [APPELLANT'S NAME 1] insisted that the [RELATIVES] leave, or he would call the police, and [NAME 1] became upset, insisting, "They don't have to leave!" To avoid conflict, [NAME 4] and [NAME 5] began to leave.

[APPELLANT'S NAME 1] shouted profanities after them. Exhibit 14. The testimony of [NAME 4] and [NAME 5] recounting this incident is credible. Where it conflicts with [NAME 4]'s and [NAME 5]'s testimony, the testimony of [APPELLANT'S NAME 1] regarding this incident is not credible.

33. The initial allegations that [APPELLANT'S NAME 2] had exploited [NAME 1] were assigned to Ellen Rapkoch for investigation, through the Adult Protective Services intake process on or about June 4, 2012. Exhibits 5 and 6. The allegation was made by [NAME 2]. He alleged that [NAME 1] had been kidnapped, and that he could not talk to [NAME 1]. He complained that [APPELLANT'S NAME 2] wanted a divorce for him and [NAME 1], and money. Another allegation and intake report was made, adding mental abuse of [NAME 1] by the Appellants. During the course of her investigation into the allegations against [APPELLANT'S NAME 2], [APPELLANT'S NAME 1] was added as an alleged perpetrator.

34. Ms. Rapkoch made contemporaneous notes of information she collected as her investigation progressed. Exhibit 7 and 8. During the course of her investigation, she spoke to both [APPELLANT'S NAME 1] and [APPELLANT'S NAME 2]. [APPELLANT'S NAME 2] told Ms. Rapkoch that she was restricting telephone contact between [NAME 1] and her [RELATIVE 3], [NAME 2]. She also said she was restricting telephone contact between [NAME 1] and her [RELATIVES] [NAME 4] and [NAME 6] because they were helping [NAME 2] fight the divorce, and she alleged that [NAME 4] badgered [NAME 1]. Exhibit 7, page 8.

35. On September 26, 2012, the Department of Social and Health Services Home and Community Services (HCS) which oversees licensing and operation of adult family homes in the State of Washington summarily suspended the license to operate [ADULT FAMILY HOME 1] and removed the residents of the adult care facility whose care was State paid. At

that time, [NAME 5] was contacted by an HCS representative and she picked up [NAME 1] and took her to her home. Ultimately, [NAME 1] and [NAME 2] went to live together with [NAME 4] and her family in [ANOTHER STATE 2]. [APPELLANT'S NAME 2] could, but has not, contacted her [RELATIVE 1] since.

36. Ms. Rapkoch submitted her reports and findings to the Adult Protective Services panel for review. The panel found the allegation of mental abuse of [NAME 1] by [APPELLANT'S NAME 2] and [APPELLANT'S NAME 1] to be substantiated.

37. Letters dated October 15, 2012, advising the Appellants that a substantiated finding of mental abuse of [NAME 1] had been made against them were served on the Appellants. Exhibits 1 and 2. The Appellants timely requested an administrative hearing to dispute the Department's findings. Exhibits 3 and 4.

38. [NAME 1] participated in activities with [APPELLANT'S NAME 2] and her [RELATIVE], as well as with others. She was provided excellent physical care and assistance by the capable care givers at [ADULT FAMILY HOME 1]. She was not typically unhappy or afraid while at the Appellants home. She expressed to others that she enjoyed living at the Appellants' home. Some family members were permitted to call and visit with [NAME 1] without restriction. She had friends among the residents of the adult family home.

39. [NAME 1] became upset after talking to [NAME 2] on the telephone on at least one occasion. The reason she became upset after that telephone call is unknown, and she told a care giver she did not recall why she was upset. She also became upset after a three-way call with a [RELATIVE 4] and her [RELATIVE], [NAME 4], but the reason is unknown. There is no evidence that she became upset because of what the caller said, or because she did not wish to speak to the individual, or because the call was interrupted or ended by the Appellants.

40. [NAME 1] told one care giver that her [SPOUSE] could be mean. When [NAME 2] sent her flowers sometime in August or September, she commented that [NAME 2] did not love her, and she did not love him. [NAME 8]'s testimony that [NAME 1] told her, "I don't

want to talk to that bastard, I like it here” is not credible. [NAME 8] visited the home every week or two for approximately forty-five minutes each time. This statement attributed to [NAME 1] is not logically consistent with the majority of the evidence.

41. In a recorded telephone call with [NAME 1], [NAME 2], [APPELLANT’S NAME 2], [APPELLANT’S NAME 1] and the lawyers for [NAME 1] and [NAME 2], [NAME 1] told [NAME 2] she wanted a divorce. Exhibit ZAA. However, she continued to ask about his welfare, expressed concern for him, and asked to speak to him when talking with her other [RELATIVES]. She was unable to clearly express a reason for dissolution of the marriage, or identify abuse which occurred other than “the talking.” She expressed surprise when advised by [NAME 5] and [NAME 4] that [APPELLANT’S NAME 1] alleged she was sexually abused. The weight of the evidence, together with [NAME 1]’s tone and manner on the call, suggests that [NAME 1]’s statements in the telephone call were scripted.

42. The testimony of [APPELLANT’S NAME 1] and [APPELLANT’S NAME 2] that telephone calls between [NAME 1] and family members were restricted, monitored and recorded because [APPELLANT’S NAME 2]’s [RELATIVES] and [NAME 2] were abusive to [NAME 1] is not credible. The testimony and statements of [NAME 3], [NAME 5], [NAME 6] and [NAME 4] are consistent among their statements, consistent with prior statements to others, including APS investigators, and more credible where it conflicts with the testimony of [APPELLANT’S NAME 1] and [APPELLANT’S NAME 2].

III. CONCLUSIONS OF LAW

1. The Petition for Review was timely filed and is otherwise proper.² Jurisdiction exists to review the Initial Order and to enter the final agency order.³

2. Pursuant to WAC 388-02-0220, ALJs and Review Judges must first apply the Department of Social and Health Services (DSHS) rules adopted in the Washington

² WAC 388-02-0560 through -0585.

³ WAC 388-02-0215, -0530(2), and -0570.

Administrative Code (WAC). If no DSHS rule applies, the ALJ or Review Judge must decide the issue according to the best legal authority and reasoning available, including federal and Washington State constitutions, statutes, regulations, and court decisions.

3. In an adjudicative proceeding involving a finding of physical and mental abuse of a vulnerable adult, the undersigned Review Judge has the same decision-making authority as the ALJ to decide and enter the Final Order, in the same way as if the undersigned had presided over the hearing.⁴ This includes the authority to make credibility determinations and to weigh the evidence. Because the ALJ is directed to decide the issues *de novo* (as new), the undersigned has also decided the issues *de novo*. In reviewing the Findings of Fact, the undersigned has given due regard to the ALJ's opportunity to observe the witnesses, but has otherwise independently decided the case.⁵ The undersigned reviewing officer does not have the same relationship to the presiding officer as an Appellate Court Judge has to a Trial Court Judge; and the case law addressing that judicial relationship does not apply in the administrative hearings forum.

4. The Washington Administrative Procedure Act directs Review Judges to personally consider the entire hearing record.⁶ Consequently, the undersigned has considered the adequacy, appropriateness, and legal correctness of all initial Findings of Facts and Conclusions of Law, regardless of whether any party has asked that they be reviewed.

5. It may help to explain briefly at the outset the unique characteristics, and specific limitations, of the administrative hearing process. An administrative hearing is held under the auspices of the executive branch of government and neither the ALJ nor the Review Judge enjoy the broad equitable authority of a Superior Court Judge within the judicial branch of government. It

⁴ WAC 388-02-0217(3).

⁵ WAC 388-02-0600. The Department's Response at page 2 corrects its rule citation, **but still argues that review factors that were eliminated from this rule effective March 3, 2011, are in effect.**

⁶ RCW 34.05.464(5).

is well settled that administrative agencies, such as the OAH and the Board of Appeals, are creatures of statute, without inherent or common law powers, and, consequently, they may exercise only those powers expressly granted in enabling statutes or necessarily implied therein.⁷

6. Department regulations address what standard of proof is to be used in these types of hearings, providing that, "The ALJ shall decide if a preponderance of the evidence in the hearing record supports a determination that the alleged perpetrator committed an act of abandonment, abuse, financial exploitation, or neglect of a vulnerable adult."⁸ The "preponderance of the evidence" standard is required under the regulations relevant to this proceeding. This standard means that it is more likely than not that something happened or exists.⁹

7. Chapter 74.34 of the Revised Code of Washington (RCW) is titled "Abuse of Vulnerable Adults." The Department has implemented chapter 74.34 RCW by adopting WAC chapter 388-71-0100 through - 01280, entitled "Home and Community Services and Programs-Adult Protective Services." Administrative hearings conducted under these regulations are controlled by statutes and regulations found at RCW 34.05 and WAC 388-02, respectively.¹⁰

8. The statute defines "vulnerable adult" to include a person sixty (60) years of age or older who has the functional, mental, or physical inability to care for himself or herself; a person found incapacitated under RCW 11.88; a person with a developmental disability as defined under RCW 71A.10.020; a person admitted to any facility; a person receiving services from a home care agency licensed under RCW 70.127; or a person receiving services from an

⁷ *Skagit Surveyors & Eng'rs, L.L.C. v. Friends of Skagit County*, 135 Wn.2d 542, 558 (1998), and *Taylor v. Morris*, 88 Wn.2d 586, 588 (1977). See also WAC 388-02-0216 which provides, "The authority of the ALJ and the review judge is limited to those powers conferred (granted) by statute or rule. The ALJ and the review judge do not have any inherent or common law powers."

⁸ WAC 388-71-01255(1).

⁹ WAC 388-02-0485.

¹⁰ WAC 388-71-01245.

individual provider.¹¹ [NAME 1] is a person sixty (60) years of age or older who has the functional, mental, or physical inability to care for herself. She was dependent upon the Appellants for care when they moved her into their home in March, 2012, because she has dementia, depression, osteoporosis, osteoarthritis, and has undergone total shoulder and knee replacements, among other things. She is eighty-three (83) years old. She needs supervision for safety and personal care, and assistance with her activities of daily living. She is incapable of safe, independent living. [NAME 1] is impaired in making decisions because of her mental impairments, and there is no evidence on which it might be concluded that she is able to live independently or care for herself. It is concluded that she was a vulnerable adult during the time period at issue, as defined by the statute, and was entitled to the protections provided therein.

9. RCW 74.34.020 defines "mental abuse" as "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."¹² In this matter, the Appellants intentionally monitored [NAME 1]'s conversations with her family members. The Appellants intentionally restricted [NAME 1]'s contact with her [SPOUSE] and some of her [RELATIVES]. [NAME 1] was isolated from members of her family by the actions of the Appellants in limiting, restricting, monitoring, recording, and at times refusing family members' contact with [NAME 1]. The preponderance of the evidence does not support a finding that isolating [NAME 1] from family members was appropriate. Appellants' actions in isolating [NAME 1] from certain family members was an intentional, willful action. Appellants' action were designed to prevent some family members from communication with [NAME 1]. Appellants' knew, or should have known that such isolation could cause harm, injury or a negative outcome for [NAME 1]. The ALJ and the Review Judge conclude that the isolation was not done in

¹¹ RCW 74.34.020(13).

¹² Emphasis supplied. RCW 74.34.020(2)(c).

response to any safety concerns regarding [NAME 1]'s contact with her family members, and therefore was not appropriate.

10. The Appellants comment on 35 of the 43 Initial Findings of Fact. In some cases they cite to additional facts in the record that could be included in the Findings, without explaining why those additions would be relevant or material.¹³ Other Findings that are challenged as speculation have a factual basis in the testimony of the Appellants'.¹⁴ Other Findings are reported to be accurate.¹⁵ There is substantial evidence supporting the initial Findings of Fact, and this order adopts them, with the minor editing and additions included in the Final Findings of Fact. These are the facts that this Final Order relies on. There is no error.

11. The ALJ resolved any alleged conflicts in testimony with the determination that the testimony of [NAME 3], [NAME 5], [NAME 6], and [NAME 4] were not only consistent, but more credible where it conflicted with the testimony of the Appellants. The Appellants are simply trying to assign error because they disagree with the ALJ's determinations, not because actual errors exist.

12. The Department met its burden of proof to show that the Appellants mentally abused [NAME 1].

13. The undersigned has considered the Initial Order, the Petition for Review of the Initial Decision, the Response to the Petition for Review of the Initial Decision, and the entire hearing record. The initial Findings of Fact are adopted pursuant to the modifications outlined above. The initial Conclusions of Law cited and applied the governing law correctly and they are adopted and incorporated as conclusions for this decision. Any arguments in the Petition for Review of the Initial Decision that are not specifically addressed have been duly considered, but are found to have no merit, or to not substantially affect a party's rights. The procedures and

¹³ See, for example, Findings of Fact 2, 6, 7, 8, 9,

¹⁴ See, for example, Findings of Fact 10 and 11.

¹⁵ See, for example, Findings of Fact 12 and 14.

time limits for seeking reconsideration or judicial review of this decision are in the attached statement.

IV. DECISION AND ORDER

1. The Initial Order is **affirmed**.
2. The Department's determinations that the Appellants each **mentally** abused a vulnerable adult are **affirmed**.

Mailed on the 24th day of October, 2013.

MARJORIE R. GRAY
Review Judge

Attached: Reconsideration/Judicial Review Information

Copies have been sent to: [APPELLANT'S NAME 1], Appellant
[APPELLANT'S NAME 2], Appellant
Rebecca Coufal, Appellants' Representative
Molly H. Ray, Department's Representative, MS: B32-37
Vicky Gawlik, Program Administrator, MS: 45600
Debra H. Pierce, Administrative Law Judge, [CITY 2] OAH