

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES

BOARD OF APPEALS

In Re:) Docket No. 01-2019-LIC-02491
)
[APPELLANT'S NAME]) REVIEW DECISION AND FINAL ORDER
)
Appellant) Adult Protective Services

I. PROCEDURAL HISTORY

1. The Department of Social and Health Services (Department or DSHS) received an allegation that this Appellant had financially exploited a vulnerable adult. After investigation and review, the Department determined that the allegation of financial exploitation was substantiated. The Appellant requested a hearing to contest the Department's substantiated finding. Administrative Law Judge (ALJ) Eliza Manoff held administrative hearings on September 30, 2019, and October 1, 2019. The ALJ issued an *Initial Order* on December 4, 2019, wherein she affirmed the Department's substantiated finding of financial exploitation.

2. The Appellant filed a *Petition for Review of Initial Decision (Appeal)* on December 26, 2019.

II. RESULT OF REVIEW

The ALJ in this matter correctly concluded that this Appellant had financially exploited a vulnerable adult. The *Initial Order* is **affirmed**. The Department's determination that this Appellant financially exploited a vulnerable adult is **affirmed**.

III. FINDINGS OF FACT

The undersigned has reviewed the record of the hearing, the documents admitted as exhibits, the *Initial Order*, and the *Petition for Review of Initial Decision (Appeal)*. The following necessary Findings of Fact were relevant and supported by substantial evidence in the record.

1. [VULNERABLE ADULT], the alleged vulnerable adult in this case, was between [AGE 1] ([AGE 1]) and [AGE 2] ([AGE 2]) years old at the time of the events relevant to this case. [VULNERABLE ADULT] is a kind and generous man who was a retired [CAREER 1], and had previously served in the [CAREER 2].

2. [VULNERABLE ADULT] was diagnosed with Parkinson's disease in 2010, became partially dependent upon others for assistance with the activities of daily living ("ADLs") in 2013, and was diagnosed with dementia in 2015. By July 2017, [VULNERABLE ADULT] needed someone to care for him twenty four (24) hours a day, could not drive, and was too confused to conduct his own financial transactions. By February 2018, he had advanced Parkinson's disease with associated dementia.

3. The Appellant is [VULNERABLE ADULT]'s [RELATIVE 1] and the alleged perpetrator in this case. She began residing with [VULNERABLE ADULT], in his home, in July 2013. The Appellant's [PARTNER], [NAME 1], began residing with the Appellant and [VULNERABLE ADULT] in 2016.

4. On June 11, 2014, [VULNERABLE ADULT] signed a General Durable Power of Attorney ("DPOA") designating the Appellant as his Attorney-in-Fact.

5. The DPOA contains various provisions relevant to this matter, including:

"Powers. *The Attorney-in-Fact, as fiduciary, shall have all powers of an absolute owner over the assets and liabilities of [[VULNERABLE ADULT]]... including, but not limited to:*

2.1.4 Financial Accounts. *The Attorney-in-Fact shall have the authority to deal with accounts maintained by or on behalf of the Principal with institutions, including, without limitations, banks, savings and loan associations, credit unions... This shall include the authority to maintain and close existing accounts, to open, maintain and close other accounts and to make deposits, transfers and withdrawals with respect to all such accounts...*

2.2 Gifting Power. *If I would be eligible for government assistance to pay the expenses of my long term care, my Attorney-in-Fact shall have the power to transfer my property by gift in accordance with the terms of my will, or if I have no will, by the laws of intestate succession, if deemed advisable by my Attorney-in-Fact to help preserve the my*

estate for my heirs. If my Attorney-in-Fact is also my heir, then my Attorney-in-Fact is among the permissible recipients of my property without limitation of RCW 11.95.100 or 11.95.110 or any similar law..."

6. Each month, [VULNERABLE ADULT] received approximately \$[INCOME 1] in Social Security income, \$[INCOME 2] in retirement, and \$[INCOME 3] in VA benefits. The total of this income is \$[INCOME TOTAL 1].

7. In October 2013, [NAME 3], Director of [COMPANY 1], became the federal fiduciary for [VULNERABLE ADULT]'s VA benefits. This occurred because the Veteran's Administration sent a field examiner out to talk to [VULNERABLE ADULT], and the examiner concluded that [VULNERABLE ADULT] needed assistance managing his money. [COMPANY 1] is an entity that performs fiduciary and protective payee services for the federal government on behalf of vulnerable adults and children who receive federal funds.

8. [NAME 3] does not think that [VULNERABLE ADULT] was able to make financial decisions for himself after October 2013. When she tried to talk to him about his finances, he did not understand what she was talking about.

9. During the time period at issue in this case, [COMPANY 1] paid for [VULNERABLE ADULT]'s mortgage, car payment, car insurance, medical expenses, utility bills, and maintenance of the house, including lawn care. These expenses were paid directly from [VULNERABLE ADULT]'s VA benefits to the payees. Neither the Appellant, nor [NAME 1] paid for any of these expenses.

10. [VULNERABLE ADULT]'s remaining income should have been sufficient to manage his remaining monthly expenses.

11. While living with the Appellant and [VULNERABLE ADULT], [NAME 1] worked odd jobs and performed handyman work for the local homeowner's association, earning approximately \$[INCOME 4] per month. For a period of six (6) months, he paid [VULNERABLE ADULT] \$[INCOME 5] a month in rent. He also performed various tasks around

[VULNERABLE ADULT]'s house, such as lawn care and maintenance, indoor cleaning, pushing [VULNERABLE ADULT]'s wheelchair on outings, and staying with and caring for [VULNERABLE ADULT] when the Appellant was not at home.

12. The Appellant did not work outside the home during the time period at issue in this case. For some of this time, she received \$[INCOME 6] per month from the VA, as payment for caring for [VULNERABLE ADULT].

13. The Appellant received \$[ASSISTANCE AMOUNT] per month in food assistance; [NAME 1] received the same amount. The total amount of their combined monthly income, including the \$[INCOME 6] from the VA, the food assistance, and [NAME 1]'s odd jobs, was \$[INCOME TOTAL 2].

14. The Appellant took [VULNERABLE ADULT] to casinos at his request. She made withdrawals from ATMs to get cash for gambling, also at [VULNERABLE ADULT]'s request. The Appellant testified that she and [NAME 1] did gamble with [VULNERABLE ADULT], but did not use his money for gambling; rather, they used their own money. [VULNERABLE ADULT] was known to say things like, "I have plenty of money, this is on me."

15. The Appellant used [VULNERABLE ADULT]'s debit card to, among other things, purchase food, obtain cash, pay for goods such as medications, and take [VULNERABLE ADULT] on trips, including a trip to [PLACE 1] and two (2) trips to [PLACE 2]. These trips were taken to give [VULNERABLE ADULT] a good quality of life. [VULNERABLE ADULT] enjoyed fishing and gambling at casinos. The Appellant took [VULNERABLE ADULT] "everywhere," including to the barbershop, grocery stores, restaurants, and similar places.

16. During the time periods relevant to this case, [VULNERABLE ADULT]'s cognitive state varied. Sometimes he was lucid, but sometimes he did not recognize people. [VULNERABLE ADULT] had "no concept of money."

17. [VULNERABLE ADULT] occasionally smoked marijuana. The Appellant and [NAME 1] would also smoke marijuana with [VULNERABLE ADULT]. The Appellant testified that she and [NAME 1] used their own money to purchase their own marijuana.

18. [NAME 2] is the Appellant's [RELATIVE 2]. He was suspicious of the Appellant's lack of transparency with respect to [VULNERABLE ADULT]'s finances. He did not believe that [VULNERABLE ADULT] had the ability to understand and manage his own money. He also felt that [VULNERABLE ADULT]'s monthly income should have covered his expenses. He believed that the Appellant "*browbeat*" [VULNERABLE ADULT] about money, and treated his money as if it were hers.

19. [NAME 4] is a Branch Services Officer at [COMPANY 2], where [VULNERABLE ADULT] had a bank account during the time period relevant to this case. [VULNERABLE ADULT] was the sole owner of the bank account, and the Appellant was listed as the power of attorney on the account.

20. The owner of a bank account is someone who has a signed signature card on file with the bank, is authorized to use the debit card associated with the account, and for whose benefit other entities (such as the Social Security Administration) may make direct deposits into the account. As the power of attorney, the Appellant was an authorized user of the account. An authorized user may use the money in the bank account for the benefit of the account's owner, but the money does not belong to the authorized user. An authorized user may not use the debit card associated with the account. [NAME 4] noticed that there were ATM withdrawals on the account at casino ATMs. However, it is not uncommon for someone of [VULNERABLE ADULT]'s age to have ATM withdrawals at casinos reflected on their bank account.

21. On October 3, 2017, the Appellant contacted [COMPANY 2] from [PLACE 2] to report that [VULNERABLE ADULT]'s ATM card was not working. This concerned [NAME 4]

because the Appellant was not the owner of the bank account and was not authorized to use that ATM card.

22. Several months later, [NAME 4] was contacted by another branch of [COMPANY 2] because the Appellant had attempted to negotiate a check from [VULNERABLE ADULT]'s account. The bank refused the transaction because the Appellant was not authorized to negotiate a check from [VULNERABLE ADULT]'s account. [NAME 4] considered this another "red flag," or cause for concern, about the account. At that time, [NAME 4] reviewed the account and became concerned about the overdraft fees.

23. Overdraft fees are incurred when a transaction causes an account to have a negative balance. [COMPANY 2] charges \$34.00 per overdraft. In addition, [COMPANY 2] charges daily overdraft fees of \$5.00 per day, when an account has a negative balance for more than three (3) days in a row. This fee is capped after fifteen (15) days.

24. During the period from July 16, 2017, through February 15, 2018, [VULNERABLE ADULT]'s bank account at [COMPANY 2] was overdrawn **every** month. Additionally, the account incurred a total of \$[AMOUNT 1], in overdraft fees during that time. The Appellant knew about the overdraft fees, but felt that incurring overdraft fees was analogous to taking out a payday loan.

25. A photo of the Appellant using [VULNERABLE ADULT]'s ATM card was taken on February 14, 2018. This concerned [NAME 4] because only the owner of an account is authorized to use a debit card associated with an account.

26. On February 9, 2018, APS received a report of potential financial exploitation of [VULNERABLE ADULT]. The identity of the reporter is confidential.

27. Meera Ramsingh-Seal is an APS investigator. She has worked for APS for four (4) years, and has completed approximately 400 investigations during that time. She received multiple types of training from APS, including the Department's Academy training.

28. Ms. Ramsingh-Seal interviewed [VULNERABLE ADULT] on February 20, 2018. Ms. Ramsingh-Seal observed that [VULNERABLE ADULT] was not able to remember things or to make his own decisions. He seemed confused and did not understand why she was there. When Ms. Ramsingh-Seal administered a *Mini-Mental State Examination* (“MMSE”), a test designed to measure cognitive impairment, [VULNERABLE ADULT] scored sixteen (16) points out of a possible thirty (30) points. An average MMSE score is between twenty three (23) points and twenty five (25) points.

29. [VULNERABLE ADULT] was not able to answer Ms. Ramsingh-Seal’s questions about his finances. He was otherwise pleasant, soft-spoken, and kind. She concluded from this conversation that [VULNERABLE ADULT] was not able to understand or manage his own finances.

30. Ms. Ramsingh-Seal requested records of [VULNERABLE ADULT]’s account at [COMPANY 2] from [NAME 4]. She examined the records, and was concerned because the account was overdrawn each month and had a negative balance. Additionally, she felt that some of the transactions did not appear to be transactions that [VULNERABLE ADULT] would have made, such as a transaction at a nail salon.

31. Ms. Ramsingh-Seal also spoke with the Appellant about [VULNERABLE ADULT]’s finances. She concluded that the Appellant felt that [VULNERABLE ADULT]’s money was her money, and that she could use it for things like fast food whenever she wanted to. The Appellant specifically told Ms. Ramsingh-Seal that [VULNERABLE ADULT] purchased medical marijuana, and that [VULNERABLE ADULT] bought “*medications*” for her, meaning marijuana. When asked about specific purchases/payments outlined in [VULNERABLE ADULT]’s bank statements, the Appellant stated that [VULNERABLE ADULT] had gifted her money to pay for a ticket she had incurred in [PLACE 2], and to pay for her nail and spa services.

32. Ms. Ramsingh-Seal provided the results of her investigation to a panel of APS employees, who substantiated a finding of financial exploitation against the Appellant.

33. On January 15, 2019, APS notified the Appellant that it had made an initial substantiated finding of financial exploitation of a vulnerable adult against her. The notice explained that the Appellant's actions from July 2017, through February 2018, constituted financial exploitation. The notice contained an explanation of the Appellant's administrative hearing rights.

34. On January 18, 2019, the Appellant requested an administrative hearing.

35. The Department's theory of the case is that the Appellant used [VULNERABLE ADULT]'s money as if it were hers, and not for the benefit of [VULNERABLE ADULT]. The Department contends that the Appellant and [NAME 1] were supporting themselves with [VULNERABLE ADULT]'s money. The Department also contends that the overdraft fees on [VULNERABLE ADULT]'s account support a substantiated finding of financial exploitation, as they constitute a breach of a fiduciary duty.

36. The Appellant's defense is that she used [VULNERABLE ADULT]'s money in ways that benefited him. The funds were spent on things that improved his quality of life. Additionally, [VULNERABLE ADULT] was generous and wanted her to use his money. She contends that the overdraft fees were analogous to a payday loan, and were not improper.

37. The Appellant testified at the hearing that she did not use [VULNERABLE ADULT]'s money to purchase marijuana for herself. However, Ms. Ramsingh-Seal testified that the Appellant told her that she used [VULNERABLE ADULT]'s money to buy her "*medications*," by which she meant marijuana.

38. Because the Appellant's statement to Ms. Ramsingh-Seal took place closer in time to the events at issue in this case, and is therefore more likely to be accurate, the ALJ found, and the undersigned concurs, that [VULNERABLE ADULT] paid for the Appellant's

marijuana.

IV. CONCLUSIONS OF LAW

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

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 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 financial exploitation 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.³ 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.⁴ 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.⁵ Consequently, the undersigned has considered

¹ WAC 388-02-0560 through -0585.

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

³ WAC 388-02-0217(3).

⁴ WAC 388-02-0600, effective March 3, 2011.

⁵ RCW 34.05.464(5).

the adequacy, appropriateness, and legal correctness of all initial Findings of Fact 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 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.⁶

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."⁷ 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.⁸

7. A Review Judge, in most cases, only considers evidence given at the original hearing.⁹ Evidence includes documents, objects, and the testimony of witnesses, that parties provide in order to prove their positions at hearing.¹⁰ Either party to a hearing may bring evidence to any prehearing meeting, prehearing conference, or hearing, or may send in

⁶ *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."

⁷ WAC 388-71-01255(1).

⁸ WAC 388-02-0485.

⁹ WAC 388-02-0565.

¹⁰ WAC 388-02-0390.

evidence before these events.¹¹ No more evidence may be taken without *good cause* after the record is closed.¹² Therefore, a Review Judge may only accept additional evidence on review under certain circumstances.¹³ These circumstances are generally limited to evidence that is newly discovered and could not have been presented at the hearing, highly reliable documents that are necessary to resolve the dispute, items to which both parties agree, or matters that affect jurisdiction to proceed.

8. “*Hearsay*” is a statement made outside of the hearing used to prove the truth of what is in the statement.¹⁴ While hearsay evidence would not ordinarily be admissible in Superior Court, it can be admitted in an administrative hearing so long as “*it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their own affairs.*”¹⁵ The ALJ or Review Judge may only base a finding on hearsay evidence if they find that the parties had the opportunity to question or contradict it.¹⁶ In this case, the hearsay evidence and the credible testimony elicited in the hearing were similar. Additionally, both the Department, and the Appellant, had opportunity at the hearing to question each hearing witness. Therefore, pursuant to RCW 34.05.452 and RCW 34.05.461(4), the initial ALJ, and undersigned Review Judge, were authorized to adopt or create Findings of Fact based on the hearsay testimony elicited during the hearing.

9. The statute defines “*vulnerable adult*” to include a person sixty 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

¹¹ WAC 388-02-0395.

¹² WAC 388-02-0510.

¹³ See *Messer v. Snohomish County Board of Adjustment*, 19 Wn. App. 780, 787, 578 P.2d 50 (1978); *State ex rel. Lige & Dickson v. Pierce County*, 65 Wn. App. 614, 618, 829 P.2d 217 (1992).

¹⁴ WAC 388-02-0475(3).

¹⁵ RCW 34.05.452.

¹⁶ WAC 388-02-0475(3).

under RCW 71A.10.020;¹⁷ 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 individual provider.¹⁸ The alleged victim in this matter, [VULNERABLE ADULT], had the functional, mental, and physical inability to care for himself, and required paid caregiving services from an individual provider. Therefore, it is concluded that [VULNERABLE ADULT] was a vulnerable adult during the time period at issue, as defined by the statute, and was entitled to the protections provided therein.

10. 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.¹⁹ Chapter 74.34 RCW establishes a system for reporting instances of financial exploitation of a vulnerable adult. *“Financial exploitation”* is specifically defined as the illegal or improper use of a vulnerable adult’s property by any person, for any profit or advantage other than for the vulnerable adult’s profit or advantage. Financial exploitation includes the wrongful withholding of a vulnerable adult’s property.²⁰ Although a *duty of care* is required to exist in finding abandonment or neglect of a vulnerable adult, it is not required in showing financial exploitation of a vulnerable adult. **Any person** can financially exploit a vulnerable adult, just as any person can sexually abuse a vulnerable adult.²¹

¹⁷ RCW 71A.10.020(5) defines “developmental disability” as “a disability attributable to intellectual disability, cerebral palsy, epilepsy, autism, or another neurological or other condition of an individual found by the secretary to be closely related to an intellectual disability or to require treatment similar to that required for individuals with intellectual disabilities, which disability originates before the individual attains age eighteen, which has continued or can be expected to continue indefinitely, and which constitutes a substantial limitation to the individual. By January 1, 1989, the department shall promulgate rules which define neurological or other conditions in a way that is not limited to intelligence quotient scores as the sole determinant of these conditions, and notify the legislature of this action.”

¹⁸ RCW 74.34.020(11).

¹⁹ WAC 388-71-01245.

²⁰ RCW 74.34.020(7).

²¹ See RCW 74.34.020(2) as opposed to (1) and (15).

11. RCW 74.34.020(7) defines “*financial exploitation*” as:

“the illegal or improper use, control over, or withholding of the property, income, resources, or trust funds of the vulnerable adult by any person or entity for any person’s or entity’s profit or advantage other than for the vulnerable adult’s profit or advantage. “Financial exploitation” includes, but is not limited to:

(a) The use of deception, intimidation, or undue influence by a person or entity in a position of trust and confidence with a vulnerable adult to obtain or use the property, income, resources, or trust funds of the vulnerable adult for the benefit of a person or entity other than the vulnerable adult;

(b) The breach of a fiduciary duty, including, but not limited to, the misuse of a power of attorney, trust, or a guardianship appointment, that results in the unauthorized appropriation, sale, or transfer of the property, income, resources, or trust funds of the vulnerable adult for the benefit of a person or entity other than the vulnerable adult; or

(c) Obtaining or using a vulnerable adult’s property, income, resources, or trust funds without lawful authority, by a person or entity who knows or clearly should know that the vulnerable adult lacks the capacity to consent to the release or use of his or her property, income, resources, or trust funds.”

12. As set forth above, the relevant statute defines “*financial exploitation*” as “[T]he *illegal or improper use, control over, or withholding of the property, income, resources, or trust funds of the vulnerable adult by any person or entity for any person’s or entity’s profit or advantage other than for the vulnerable adult’s profit or advantage.*”²² Under this definition, the Department is required to show, by a preponderance of the evidence, that the use, control over, and withholding of the vulnerable adult’s property by the Appellant was improper or illegal, and also the withholding of the funds was for a person’s or entity’s profit or advantage other than the vulnerable adult’s profit or advantage. Admittedly, the definition is somewhat circular in that use of a vulnerable adult’s funds for another person’s or entity’s profit or advantage without the informed consent of the vulnerable adult is “*improper.*”

13. The term “*improper*” is a somewhat broad and general adjective. The Legislature’s use of the term disjunctively with the term “*illegal*” in defining “*financial*

²² RCW 74.34.020(7).

exploitation,” can reasonably be construed to mean the Legislature intended to include certain acts as financially exploitive even if those same acts may not be “*illegal.*”

14. This Appellant owed a fiduciary duty to [VULNERABLE ADULT] based on the Appellant’s status as [VULNERABLE ADULT]’s *Attorney in Fact*, pursuant to a *General Durable Power of Attorney* (“DPOA”) executed on June 11, 2014. Regarding the fiduciary duty owed pursuant to a DPOA, the Washington State Supreme Court has ruled, “*A power of attorney is a written instrument by which one person, as principle, appoints another as agent and confers on the agent authority to act in the place and stead of the principal for the purposes set forth in the instrument.*” *Bryant v. Bryant*, 125 Wn.2d 113, 118, 882 P.2d 169 (1994) citing *Archweld Mfg. Co. v. Burney*, 12 Wn.2d 212, 221, 121 P.2d 350 (1942). “*The agent becomes a fiduciary upon acquiring dominion and control over the principle’s property.*” *Bryant*, 125 Wn.2d at 118 citing *Moon V. Phipps*, 67 Wn.2d 948, 955, 411 P.2d 157 (1966). “*Loyalty is the chief virtue required of an agent. . . . This loyalty demanded of an agent by the law creates a duty in the agent to deal with his principal’s property **solely for his principal’s benefit** in all matters connected with the agency.*” *Moon*, 67 Wn.2d at 954-55 citing *Restatement (Second), Agency § 387* (1958).
(emphasis added.)

15. When the Appellant took on the task of handling [VULNERABLE ADULT]’s funds, she became a fiduciary upon acquiring dominion and control over the principle’s [[VULNERABLE ADULT]’s] property. Under the cited case law, the Appellant had a fiduciary duty to divest or retain [VULNERABLE ADULT]’s assets for **his benefit alone**. When an agent with a fiduciary duty to a principle makes a gift of a principle’s property to themselves, **undue influence is presumed** and the agent-recipient has the burden of proving by clear, cogent, and convincing evidence that such generosity was not the product of undue influence. The agent has the burden of proving the gift “*. . . was made freely, voluntarily, and with full understanding of the facts. If the judicial mind is left in doubt or uncertainty as to exactly what the status of the*

transaction was, the donee must be deemed to have failed in the discharge of [her] burden and the claim of gift must be rejected."²³ In this matter, there exists no formal documentation of gifting regarding the funds that were taken by the Appellant from [VULNERABLE ADULT]'s account to pay for the Appellant's "medications," meaning marijuana, payments to an [PLACE 2] court for a ticket the Appellant had incurred, and payments for nail and spa services, that solely benefited of the Appellant. This lack of evidence, coupled with [VULNERABLE ADULT]'s cognitive difficulties regarding his finances during the time period at issue demonstrate that [VULNERABLE ADULT] had not "freely, voluntarily, and with full understanding of the facts" made a gift of his funds to the Appellant. Therefore, these actions by the Appellant breached her fiduciary duty to divest or retain [VULNERABLE ADULT]'s assets for **[VULNERABLE ADULT]'s benefit alone**, and constituted an improper use of [VULNERABLE ADULT]'s resources.

16. As correctly concluded by the ALJ in this matter, the Appellant's use of [VULNERABLE ADULT]'s property that resulted in constant overdraft fees also constituted a breach of her fiduciary duty to [VULNERABLE ADULT]. Pursuant to the DPOA, this Appellant had a fiduciary duty to use [VULNERABLE ADULT]'s finances for [VULNERABLE ADULT]'s sole benefit and **in his best interest**. Using these finances in a manner that resulted in a financial loss of \$[AMOUNT 1], to [VULNERABLE ADULT], without a showing that this loss was the result of an emergent need, was not in [VULNERABLE ADULT]'s best interest, and resulted in no benefit to [VULNERABLE ADULT]. Therefore, the Appellant's continuing irresponsible actions of incurring monthly overdraft fees, charged to [VULNERABLE ADULT]'s account, constituted a breach of her fiduciary duty to [VULNERABLE ADULT].

²³ See *Endicott v. Saul*, 142 Wn. App. 899, 922, 176 P.3d 560 (2008) citing *Lewis v. Estate of Lewis*, 45 Wn. App. 387, 389, 725 P.2d 644 (1986); *White v. White*, 33 Wn. App. 364, 368, 655 P.2d 1173 (1982); *McCutcheon v. Brownfield*, 2 Wn. App. 348, 356, 467 P.2d 868 (1970); and *Pedersen v. Bibioff*, 64 Wn. App. 710, 720, 828 P.2d 1113 (1991).

17. The Department has proven by a preponderance of the evidence that this Appellant improperly spent money owned by [VULNERABLE ADULT] for her benefit and not solely for [VULNERABLE ADULT]'s benefit. These inappropriate actions constituted the improper use, control over, and withholding, of [VULNERABLE ADULT]'s resources for the Appellant's advantage and not for [VULNERABLE ADULT]'s advantage. Pursuant to RCW 74.34.020(7)(b), the Appellant's use of [VULNERABLE ADULT]'s money to pay for the Appellant's "*medications*," payments to an [PLACE 2] court for a ticket the Appellant had incurred, payments for the Appellant's nail and spa services, and payments for overdraft fees incurred by the Appellant, using [VULNERABLE ADULT]'s funds, resulted in an improper breach of the Appellant's fiduciary duty to [VULNERABLE ADULT], were not for [VULNERABLE ADULT]'s sole benefit, and constituted financial exploitation of a vulnerable adult.

18. Because this is not a criminal proceeding, the Department does not need to prove the Appellant "*intended*" to "*financially exploit*" the vulnerable adult or had any other malevolent intentions toward him. The Department needs only to prove by a preponderance of the evidence that the Appellant intended to do, and did do, acts that constitute financial exploitation. The Appellant's use of the vulnerable adult's funds for anyone else's benefit other than the vulnerable adult was not accidental. It does not matter what the Appellant's intentions were in regards to [VULNERABLE ADULT], only that her acts constituting financial exploitation were committed intentionally.

19. The applicable statutory definition for financial exploitation does not place a quantitative amount that has to be met for financial exploitation to be proven. For this reason, any one dollar of the Appellant's withdrawals of [VULNERABLE ADULT]'s funds for her "*medications*," payments to pay for her ticket, payments for her nail and spa services, and payments for overdraft fees incurred by the Appellant, using [VULNERABLE ADULT]'s funds, constituted financial exploitation of a vulnerable adult.

20. The undersigned has considered the *Initial Order*, the *Petition for Review of Initial Decision (Appeal)*, and the entire hearing record. The initial Findings of Fact are adopted as Findings of Fact for this decision, pursuant to the modifications and additions outlined above. The initial Conclusions of Law cited and applied the governing law correctly and 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 time limits for seeking reconsideration or judicial review of this decision are in the attached statement.

V. DECISION AND ORDER

1. The *Initial Order* is **affirmed**.
2. The Department's determination that this Appellant **financially exploited** a vulnerable adult is **affirmed**.

Mailed on the 18th day of February, 2020.

THOMAS L. STURGES
Review Judge/Board of Appeals

Attached: Reconsideration/Judicial Review Information

Copies sent to: [APPELLANT'S NAME], Appellant
Legrand Jones, Department's Representative, MS: 45610
Vicky Gawlik, Program Administrator, MS: 45600
Eliza Manoff, ALJ, [PLACE 3] OAH