

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

In re the Matter of:

No. 39880-0-II

MARGUERITE M. NICKLESS, a vulnerable  
adult,

JAMES NICKLESS,

Respondent,

v.

RICHARD E. SORRELS,

Appellant.

UNPUBLISHED OPINION

Johanson, J. — Richard E. Sorrels argues that the superior court erred in entering a vulnerable adult protection order, chapter 74.34 RCW, because sufficient evidence does not support a finding that Marguerite Nickless was a vulnerable adult and because the petition did not contain sufficient allegations of wrongdoing. James Nickless, Marguerite’s<sup>1</sup> son, requests attorney fees on appeal. We affirm the superior court’s denial of Sorrel’s motion for revision and

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<sup>1</sup> To avoid confusion, we refer to the Nicklesses by their first names. We intend no disrespect.

grant James's request for attorney fees on appeal.

### FACTS

Richard Sorrels, Marguerite's nephew, had power of attorney for Marguerite until June 29, 2009, when it was revoked and given to James. In July 2009, Marguerite was 89 years old.

On July 1, James, on behalf of his mother Marguerite, petitioned for a vulnerable adult protection order. The petition alleged that Marguerite was over 60 years old and that she did not have the functional, mental, or physical ability to care for herself. The petition further alleged that Marguerite was vulnerable and unable to protect her interests because she was "highly influenced to [sic] manipulative financial exploitation[,], undue duress[,], and undue influence from [Sorrels]." Clerk's Papers (CP) at 2.

The petition listed four claims: (1) Sorrels's recent harassing appearances at Marguerite's residence in June 2009, (2) Sorrels's unknown disposition of Marguerite's resources, (3) Sorrels's exploitation of an ongoing superior court case for his personal gain, and (4) Sorrels's abuse of power of attorney for his personal gain. Past threats or incidents included claims of (1) numerous property transfers over the past 15 years involving Marguerite without her full understanding and (2) court involvement without Marguerite's knowledge, for Sorrels's personal financial gain.

James argued that a temporary restraining order needed to be issued immediately because (1) Sorrels had access to Marguerite's bank, mortgage, and trust accounts; (2) Sorrels could drain or change these accounts due to recent court cases; (3) Sorrels had recently visited Marguerite's residence and engaged in harassing and manipulative behavior; and (4) Sorrels abused his position for personal gain. The superior court commissioner entered a temporary protection order (TPO)

that same day, and it reissued the TPO on July 13.

On July 27, the court held a hearing on the final protection order. James explained that Marguerite had been living in an apartment complex. When considering relocating, a retirement home had denied Marguerite's application because of "bad loans" and evictions. Verbatim Transcript of Proceedings (VTP) (July 27, 2009) at 7. Marguerite had never been evicted and did not, to the best of her knowledge, have any loans or own property. James filed several documents with Sorrels's name on them in support of his allegations, and Sorrels objected, claiming that he had not previously received them. The commissioner continued the hearing for half an hour to permit Sorrels to review the documents. Marguerite testified that she was now worried about her future and that she had no idea what Sorrels had been doing.

On July 27, the commissioner entered a final vulnerable adult protection order. The commissioner found that Marguerite was a vulnerable adult because she was over 60 and "expressed confusion over whatever business and real estate relationship that she's involved with Mr. Sorrels." VTP at 18. The commissioner found Sorrels had committed acts of financial exploitation of a vulnerable adult and it restrained Sorrels from Marguerite's residence and from coming near or having contact with her.

On August 6, Sorrels timely moved for revision<sup>2</sup> of the commissioner's final order of protection. He complained that the TPO did not include specific allegations of wrongdoing and that James had filed 135 pages of documents without providing them to Sorrels beforehand. In

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<sup>2</sup> A commissioner's ruling or order is reviewable by the superior court; this process is called revision. RCW 2.24.050.

addition, Sorrels claimed that the final protection order did not include a finding that Marguerite met the “vulnerable adult” definition.

The superior court denied Sorrels’s motion for revision of the final protection order. The superior court found that, based on testimony during the revision hearing from an adult protective services investigator, Marguerite was vulnerable and that financial exploitation had occurred. Sorrels appeals.<sup>3</sup>

## ANALYSIS

### I. Vulnerable Adult Protection Order

First, Sorrels argues that there is insufficient evidence to support a finding that Marguerite was a vulnerable adult. Specifically, Sorrels contends that the evidence presented below does not support any of the statutory bases for finding Marguerite a vulnerable adult. We disagree.

On an appeal from the decision of a superior court upholding the superior court commissioner’s order, we review the superior court’s ruling. *State v. Ramer*, 151 Wn.2d 106, 113, 86 P.3d 132 (2004); see *In re Parentage of Hilborn*, 114 Wn. App. 275, 278, 58 P.3d 905

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<sup>3</sup> Sorrels attempts to appeal the TPOs as well as the final protection order. James argues that Sorrels may not seek appellate review of the TPO or order reissuing the TPO because he did not seek revision of those orders by the superior court within 10 days. RCW 2.24.050. He also claims res judicata bars this court’s consideration of the temporary orders.

Res judicata does not bar our consideration of Sorrel’s arguments surrounding the final order because the TPO was never tried. The TPO was entered based on ex parte representations. Furthermore, we do not consider Sorrels’s arguments regarding any error in the TPO or reissued TPO because they have been mooted by entry of the final order. A temporary order merges with the final judgment and any question as to the propriety of the temporary order becomes moot. *State ex rel. Carroll v. Simmons*, 61 Wn.2d 146, 149, 377 P.2d 421 (1962), cert. denied, 374 U.S. 808 (1963); see also *Ferry County Title & Escrow Co. v. Fogle’s Garage, Inc.*, 4 Wn. App. 874, 881, 484 P.2d 458, review denied, 79 Wn.2d 1007 (1971) (propriety of temporary restraining order rendered moot by final judgment containing permanent injunction).

(2002). We review the superior court's findings for substantial evidence. *Scott v. Trans-Sys., Inc.*, 148 Wn.2d 701, 707-08, 64 P.3d 1 (2003). We review the superior court's decision to grant or deny a protection order for an abuse of discretion. *Hecker v. Cortinas*, 110 Wn. App. 865, 869, 43 P.3d 50 (2002). We defer to the trier of fact on the persuasiveness of the evidence, witness credibility, and conflicting testimony. *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003); *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 108, 864 P.2d 937 (1994).

A vulnerable adult includes a person who is “[s]ixty years of age or older who has the functional, mental, or physical inability to care for himself or herself.” RCW 74.34.020(16)(a). Substantial evidence supports the superior court's finding that Marguerite was a vulnerable adult under RCW 74.34.020(16)(a). Marguerite was 89 years old. James explained that Marguerite did not know about Sorrels's financial dealings under her name, and that she had found out about them only when she tried to move into a retirement home. Marguerite testified that she was now worried about the future and that she had no idea what Sorrels had been doing. The adult protective services investigator testified at the superior court hearing that Marguerite cannot take care of herself because she requires assistance with her daily activities, meals, and finances. Substantial evidence supports the finding that Marguerite was a vulnerable adult.

Next, Sorrels claims that James's allegations were insufficient because “[i]t seems absurd that someone would say that someone has been exploiting someone for 15 years with real estate transactions. What would be the motive not to have acted many years ago with some specific instance where impropriety was noticed?” Br. of Appellant at 8-9. We disagree.

The petition must include specific facts and circumstances that demonstrated the need for

the relief sought. RCW 74.34.110(3). Here, the petition alleged that Sorrels manipulated Marguerite's finances for his personal gain, had failed to provide an accounting of the disposition of her resources, had exploited a superior court case for his personal gain, and had abused his power of attorney privileges. The petition further alleged that Sorrels had conducted numerous property transfers in the past 15 years without Marguerite's full knowledge and that he had been pursuing litigation in her name without her full knowledge. At the July 27 hearing, James provided more concrete examples. For instance, James explained that Sorrels and his girlfriend had sued Marguerite for \$350,000 for a piece of property even though Marguerite had never received any money for the property. James stated that Sorrels had purchased property in Marguerite's name and that he had quitclaimed the property to himself for no money. There are sufficient allegations in the record to alert Sorrels to the claims of financial exploitation.<sup>4</sup> Sorrels's argument fails.

Sorrels also argues that his due process rights were violated when the commissioner and trial court considered materials that had not been provided to him before the hearings. Unless a party objects to evidence on the grounds of surprise at the time it was offered and requests a continuance, the party waives any right to claim surprise as a ground for new trial. *Ward v.*

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<sup>4</sup> We note that the vulnerable adult statutory scheme, RCW 74.34, contains different definitions for "exploitation" and "financial exploitation."

"Exploitation", defined in a sub-definition of "Abuse" in the statutory scheme, means "an act of forcing, compelling, or exerting undue influence over a vulnerable adult causing the vulnerable adult to act in a way that is inconsistent with relevant past behavior, or causing the vulnerable adult to perform services for the benefit of another." RCW 74.34.020(2)(d).

"Financial exploitation" means "the illegal or improper use of the property, income, resources, or trust funds of the vulnerable adult by any person for any person's profit or advantage other than for the vulnerable adult's profit or advantage." RCW 74.34.020(6).

*Ticknor*, 49 Wn.2d 493, 495, 303 P.2d 998 (1956). Sorrels objected to the trial court’s considering the evidence, but he did not request a continuance. The court commissioner continued the hearing for at least half an hour so that Sorrels could review the documents, and it stated that most of the documents would be familiar to him “because [Sorrels’s] name is on most of them.” VTP at 9. When the parties reconvened, Sorrels did not request a continuance or object to the proceedings going forward. Accordingly, he waived any right to claim surprise.

Finally, Sorrels argues that collateral estoppel required the superior court to consider that Department of Social & Health Services (DSHS) later found James’s claims unsubstantiated. Nothing in the record indicates that DSHS later found any claims unsubstantiated. If Sorrels’s argument concerns a matter outside the record, we cannot consider it. *Weems v. N. Franklin Sch. Dist.*, 109 Wn. App. 767, 779, 37 P.3d 354 (2002); *see* RAP 9.2(b), 9.3, 9.5(a) (declaring appellant’s duty to perfect record for appeal).

## II. Attorney Fees

James requests attorney fees under RAP 18.1 and RCW 74.34.130(7). RAP 18.1 permits attorney fees on appeal if applicable law grants the party the right to recover reasonable attorney fees. RCW 74.34.130(7) permits the court to require the respondent “to reimburse the petitioner for costs incurred in bringing the [protection order] action, including a reasonable attorney’s fee.” The legislature’s provision that the person against whom the protection order is issued reimburse the protected person for “a reasonable attorney’s fee” “incurred in bringing the action” would be diminished if James could not also be reimbursed for “reasonable attorney’s fee[s]” incurred on appeal in defending the protection order against attack from Sorrels, the party that the trial court

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issued the protection order against. RCW 74.34.130(7). Accordingly, we grant James's request for attorney fees on appeal.



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Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Johanson, J.

We concur:

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Hunt, J.

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Penoyar, C.J.