

RCW 74.34

ABUSE OF VULNERABLE ADULTS

**VULNERABLE ADULT PROTECTION
ORDERS (VAPO'S): A TOOL FOR THE
PROTECTION OF VULNERABLE ADULTS**

Wednesday, February 16, 2011
2:10pm – 3:15pm

Judge Diane M. Woolard
CLARK COUNTY SUPERIOR COURT
Department #8
1200 Franklin Street
Vancouver, WA 98660

JUDGE DIANE M. WOOLARD received her BA from the University of Washington and began her first career as a caseworker in child protective services with the State of Washington Department of Social and Health Services. She is a graduate of Northwestern School of Law at Lewis and Clark. Admitted to the WSBA in January 1986. She began her law career at the Clark County Prosecutor's Office and entered into private practice in 1987. She was appointed to the Clark County Superior Court Bench in July 2000. The seminars she has recently attended as a participant or trainer are: Current Issues in Family Law; Washington State Association of Drug Court Professionals Fall Conferences; Enhancing Judicial Skills in Domestic Violence; National Association of Drug Professionals – 9th Annual Adult Drug Court Training Conference; National Judicial College – Co-Occurring Mental and Substance Abuse Disorders; National Drug Court Institute – Comprehensive Drug Court Judicial Training; Joint Task Force on Child Safety SHB 215 6-member; Washington State Coordinated Domestic Violence Protocol – Trainer Region 6; Governor's Committee Child Safety WSD – Chair; Enhancing Judicial Skills in Elder Abuse Cases; National Judicial College – Ethics for Judges – Participated as discussion Leader.

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JAMES D. SENESCU received his B.A. in English and a double major emphasis in Environmental Policy from the University of Washington in 1993. He is a 1997 graduate from Gonzaga University School of Law. Beginning his career with the Spokane County Prosecutor's Office in 1996, he handled mostly domestic violence person's crimes in their newly-formed Domestic Violence Unit. Joining the Clark County Prosecutor's Office in 1998, he was involved directly in the creation of Clark County's "Domestic Violence Court," a founding member of the City/County Domestic Violence Prosecution Center in 2001 and served as Unit Coordinator from 2003-2005. Having prosecuted over a hundred domestic violence, child abuse and person crimes to jury trial, he finished his ten year career as a prosecutor assigned to the Major Crimes Unit handling homicides and major felonies, including crimes involving physical or sexual abuse of vulnerable adults. He is now in private practice as a partner of Dimitrov & Senescu, PLLC emphasizing in litigation of cases involving financial exploitations of vulnerable adults. He is a current member of the Clark County Vulnerable Adult Task Force and has presented numerous trainings statewide on familial abuse issues to law enforcement, prosecutors, clerks, doctors, attorneys, judges and other local groups.

I. HISTORY OF “ABUSE OF VULNERABLE ADULTS” ACT – RCW 74.34

The Vulnerable Adult Protection Act [“VAPA”] enacted by the Washington Legislature in RCW 74.34 specifically recognized that “Some adults are vulnerable and may be subjected to abuse, neglect, financial exploitation, or abandonment by a family member, care provider, or other person who has a relationship with the vulnerable adult” in RCW 74.34.005(1) (emphasis added.)

For purposes of immediately protecting a Vulnerable Adult from further physical or financial harm by someone who has an existing and ongoing relationship with the victim, the heart of VAPA is its provision for a Vulnerable Adult Protection Order [“VAPO”], contained in RCW 74.34.110.¹ The idea behind the VAPO is to provide an immediate stop-gap measure that will remove the Vulnerable Adult from harm’s way, maintain the status quo with regard to the Vulnerable Adult’s finances, and put the perpetrator on notice that further acts of abuse, neglect, exploitation, etc. will be criminally prosecuted as contempt of Court.

Prior to 2007 the statute was very difficult to navigate and utilize. The vulnerable adult had to pay the \$200.00 filing fee, there were no forms to use, the Court staff (or any other person or advocate) could not assist the vulnerable adult with the paperwork, and they were only good for one year (causing the need to renew it if necessary). The very people who were allegedly “vulnerable” held the burden to file, pay for and litigate these actions. In the 7 years prior to 2007, only 42 of these actions were even filed in Clark County, as opposed to 48 in the year

¹ VAPA also contains provisions for maintaining a civil action for damages in certain circumstances that are not covered within the scope of this article.

following the recent amendments to the statute, making it much more user friendly. See Exhibit “A” below.

In 2007, several substantive and procedural changes were enacted that made that VAPA user-friendly, economical and effective, including:

1. Creation of uniform mandatory forms that are available on line at <http://www.Courts.wa.gov/forms> and in all county Courthouses free of charge, together with a handbook to describe in simple terms how to obtain a VAPO;
2. Waiving the filing fee (previously \$200.00) in all cases;
3. Broadening the number of people who can petition for a VAPO to include any “interested person”. Previously, only the Vulnerable Adult and certain other individuals were allowed to petition for a VAPO;
4. Authorizing Adult Protective Services and other governmental entities, such as law enforcement personnel, to petition for a VAPO even if against the Vulnerable Adult’s stated wishes in certain circumstances; and
5. Enabling non-attorneys to assist a petitioner in obtaining a VAPO without violating Washington’s laws against practicing law without a license.

There are certain basic criteria and procedural steps that must be followed in order for a VAPO to be an appropriate tool and the scope and effectiveness of

its provisions must be fully recognized and appreciated by the individual seeking to take advantage of it.

First and foremost, the person for whom protection is sought must be a “Vulnerable Adult” as that term is statutorily defined in RCW 74.34.020(15). A “Vulnerable Adult” is:

- Sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself; **or**
- Found incapacitated under RCW 11.88 [the Guardianship statutes]; **or**
- Developmentally disabled as defined under RCW 71A.10.020; **or**
- Admitted to any “facility” (see RCW 74.34.929 (5) for full definition of “facility”; includes adult family homes and nursing homes); **or**
- Receiving services from home health, hospice, or home care agencies licensed under RCW 70.127; **or**
- Receiving services from an individual provider under contract with Department of Social and Health Services. (See RCW 74.34.020(8) RCW 74.34.021 for the full definition of an “individual provider”.)

The fact that these definitions are stated in the alternative means that any one of these factors is sufficient to confer jurisdiction under RCW 74.34. The degree that a person over the age of 60 who is not receiving in-home or institutional care has to be unable to care for him or herself is not clearly defined under the statute, but there likely has to be some actual level of reliance on others for assistance in activities of daily living before the Act would apply. This is not to say that the Vulnerable Adult would have to be actually receiving such

assistance, as very often the reason the Vulnerable Adult is the victim of abuse, exploitation, etc. is because they are in need of such assistance but are not being provided it by the perpetrator. The petitioner for a VAPO should, however, have a good understanding of the functional, physical and/or mental abilities of the Vulnerable Adult who is not receiving care in the event that there is a challenge to their entitlement to protection under the definitional section of the VAPA.

The type of harm that a VAPO seeks to prevent or protect against is abandonment, abuse, financial exploitation or neglect or the threat thereof as defined in RCW 74.34.020. "Abuse" includes physical, sexual or mental abuse.

Proceedings under RCW 74.34 are supplemental to any other criminal or civil remedies and may be sought at the same time as other remedies. For example, a law enforcement officer, who observes what he in good faith believes is a prohibited act under RCW 74.34 could petition the Court for a VAPO, in addition to pursuing a criminal investigation and prosecution if the officer felt that it was necessary for the victim to obtain immediate relief that would not otherwise be available in the absence of a VAPO. Since many times family members are the alleged perpetrators of abuse, a Vulnerable Adult may also seek relief under a domestic violence protection order if the provisions of that statute are satisfied and the vulnerable adult is self-petitioning. RCW 74.34.160. Relief requested under the domestic violence statutes (RCW 26.50) include mandatory arrest provisions and many times are more likely to be investigated/prosecuted under the domestic violence laws and policies. In order to request relief under RCW 26.50 there must be a family or household relationship between the

Petitioner and Respondent. Further, in domestic violence actions, the Court has broad authority to order treatment and other case specific requirements, which can be helpful to the underlying causes leading to the need for Court intervention.

The persons who may file a petition for a VAPO include the following:

- The Vulnerable Adult may petition for a VAPO unless a Court has already determined the Vulnerable Adult to be incapacitated. The Vulnerable Adult is presumed to be competent even if they are otherwise “vulnerable”. In the event the Vulnerable Adult cannot file the petition without assistance, another person may assist the Vulnerable Adult in filling out the pleadings, filing them with the Court and otherwise assisting the Vulnerable Adult and such activity is not considered the practice of law.
- The Department of Social and Health Services (Adult Protective Services) may file with either the Vulnerable Adult’s consent or without consent, if it has reason to believe the Vulnerable Adult lacks the ability or capacity to consent. This is usually accomplished by the Attorney General’s office filing the Petition for a VAPO.
- The Guardian or legal fiduciary of a Vulnerable Adult may petition for a VAPO; however, if they have not been adjudicated as fully incapacitated and the Petition has been filed without the Vulnerable Adult’s consent, the Vulnerable Adult may object or move to modify the VAPO. If the Vulnerable Adult is the subject of a guardianship, consider specifying in

the Order Appointing Guardian whether or not the Guardian has the right to file a VAPO without obtaining the consent of the ward.

- An “interested person” may petition for a VAPO. This is similar to the scope of persons who may petition for a guardianship. Any person who demonstrates to the Court’s satisfaction that the person is interested in the welfare of the vulnerable adult, that the person has a good faith belief that Court intervention is necessary, and that the Vulnerable Adult is unable, due to incapacity, undue influence, or duress at the time the petition is filed, to protect his or her own interests may petition for a VAPO on behalf of a Vulnerable Adult. This section may require a separate hearing if the Vulnerable Adult has not consented, there are concerns about the Vulnerable Adult’s ability to consent or there are concerns about the good faith of the Petitioner.
- If a guardianship action is pending, RCW 11.88.045(5) provides that the petitioner in the guardianship or “any person” may file for temporary relief under RCW 7.40.

The process of obtaining a permanent VAPO begins with the filing of a petition and requesting the imposition of an immediate temporary VAPO. The Petitioner should make specific and tangible allegations in the Petition and should consider attaching any supporting documentation, including in a separate declaration. For example, if the Vulnerable Adult is alleging that the Respondent has financially exploited the Petitioner through the improper use of a power of attorney, has wrongfully converted the Vulnerable Adult’s assets to their own use, etc., such documentation should be attached.

If the allegations concern physical abuse or abandonment, it may be appropriate to attach medical records or photographs to substantiate the abuse.² The reason for this is it gives the Court broader discretion in fashioning the temporary relief that it will be willing to issue prior to notice to the Respondent and the necessity and amount of any bond that may be required. Many times, time is of the essence, so not all documentation will be able to be attached.

In many counties, the Petitioner takes the Petition and supporting pleadings, proposed temporary Vulnerable Adult Protection Order, Law Enforcement Information Sheet (one for each Respondent), and Confidential Information Form (one for each respondent) to a judge or commissioner on an ex parte basis. Each county may have slightly different procedures, however. The Judge or Commissioner signs the Temporary Order and sets the date for the hearing on the petition for no earlier than 6 days, but no later than 14 days after the entry of the Temporary Order. Practice note – you may want to secure a means of service (and law enforcement can be ordered to assist) prior to getting the Temporary Order in place, since the service provisions are a tight timeline to meet. E.g. Specific case of a Vulnerable Adult residing in Washington with Respondent residing in Illinois necessitating coordination with Illinois authorities.

In Clark County, the following procedure applies:

1. Petitioner or Petitioner's Attorney obtains packet of forms from the Superior Court Clerks office (free of charge);

² If the Petitioner submits medical or financial records that are confidential pursuant to GR 22, the Petitioner must redact appropriate information and/or file the documents with a cover sheet designating the documents as sealed or confidential.

2. Applicant turns in completed and signed forms before 11:00 a.m. the day petitioner (interested party) can be present for the 1:00 p.m. ex-parte presentation to the Ex Parte Judge;

3. After the Judge signs the temporary order at ex-parte, petitioner returns to the Superior Court Clerk's office to get conformed copies of paperwork for service;

4. It should be repeated that the law requires the Clerk/Court set the hearing no sooner than 6 days from the date the Temporary Order is entered, and no later than 14 days from the date the Temporary Order is entered. This can sometimes be difficult to navigate, however, often times the hearing can be set within the time limitations, commenced and issues of urgency can be addressed first, while other issues can be set over or “continued” to a later hearing date.

The mandatory uniform forms provide for the following potential relief that can be entered in a temporary VAPO. The following section is taken directly from the mandatory form:

It is Ordered:

<input type="checkbox"/> 1. The respondent is <i>Restrained</i> from committing or threatening to commit physical harm, bodily injury, assault, including sexual assault against the vulnerable adult and from molesting, harassing, or stalking the vulnerable adult. (If the respondent's relationship to the vulnerable adult is that of spouse or former spouse, parent of a common child, or former or current cohabitant as intimate partner, then effective immediately, and continuing as long as this protection order is in effect, the respondent may not possess a firearm or ammunition. 18 U.S.C. § 922(g)(8). A violation of this federal firearms law carries a maximum possible penalty of 10 years in prison and a \$250,000 fine. An exception exists for law enforcement officers and military personnel when carrying department/government-issued firearms. 18 U.S.C. § 925(a)(1).)
<input type="checkbox"/> 2. Respondent is <i>Restrained</i> from committing or threatening to commit acts of abandonment, abuse, neglect, or financial exploitation against the vulnerable adult.
<input type="checkbox"/> 3. The respondent is <i>Excluded</i> from the vulnerable adult's residence. <input type="checkbox"/> The vulnerable adult's address is confidential. <input type="checkbox"/> The vulnerable adult waives confidentiality of the address which is:
<input type="checkbox"/> 4. The respondent is <i>Restrained</i> from coming near and from having any contact with the vulnerable adult, in person or through others, by phone, mail, or any means, directly or indirectly, except through an attorney, or mailing or delivery by a third party of Court documents.
<input type="checkbox"/> 5. Respondent is <i>Prohibited</i> from knowingly coming within, or knowingly remaining within _____ (distance) of the vulnerable adult's <input type="checkbox"/> residence <input type="checkbox"/> workplace <input type="checkbox"/> adult day program; <input type="checkbox"/> the premises of the long-term care facility where the vulnerable adult resides. <input type="checkbox"/> other:
<input type="checkbox"/> 6. The respondent is <i>Required</i> to provide an accounting of the disposition of the vulnerable adult's income or other resources by _____ (date).
<input type="checkbox"/> 7. The respondent is <i>Restrained</i> from transferring the vulnerable adult's property for _____ (up to 90) Days.
<input type="checkbox"/> 8. The respondent is <i>Restrained</i> from transferring respondent's property for _____ (up to 90) Days.
<input type="checkbox"/> 9. Petitioner is granted judgment against the respondent as set forth in the judgment filed on _____ (date).
<input type="checkbox"/> 10. The bond posted is exonerated or the petitioner may apply ex parte for an order to disburse other security.
<input type="checkbox"/> 11. Other:

The committee that created the mandatory forms that were adopted and are now in use concluded that the Court must either require that a bond be posted or be waived due to certain limited circumstances, as set forth in section 9 of the order above. The requirement for a bond may be problematic in some circumstances, particularly if the Vulnerable Adult has been financially exploited by the Respondent and is without the access to resources to post a bond. However the Court has discretion in the amount of the bond to be posted. Again, this is the reason why it is so important to substantiate the specific allegations of abuse and to document it, if possible, in the Petition and supporting declarations so that the Court is not merely taking the allegations at face value and imposing drastic relief. The Court may require that a bond be posted for the period of time between the issuance of the temporary order and the entry of the permanent order—especially if the temporary order provides for the freezing of the Respondent’s assets or some other action that could financially harm the Respondent if the temporary order is entered in error. RCW 74.34.110(7), on the other hand, clearly provides that a petitioner is not required to post bond to obtain relief after the hearing on the permanent order. For purposes of determining the need for a bond, see RCW 7.40.080.

Notice of the hearing on the Petition for permanent relief must be personally served not less than 6 days before the hearing upon the respondent. If the Vulnerable Adult is not present at the time the petition is filed, even if the Vulnerable Adult consented to it being filed on his or her behalf, the same notice, along with a written notice of rights, must be served on the Vulnerable Adult. The Temporary VAPO also has provisions for service upon the respondent by law enforcement, which may be a very

effective method of sending a “message” about the seriousness of the proceeding to the Respondent. In the event that service cannot be achieved prior to the hearing, the Court has the authority to extend the hearing date to accommodate additional service attempts. Service can also be made by mail, if the court orders it. There is a uniform mandatory form available for seeking substitute service. The hearing must be scheduled no later than 14 days from the filing of the petition.

The hearing on the issuance of a permanent VAPO is often the only hearing that will be held unless the Court requires follow-up hearings to ascertain whether the Respondent has complied with the specific portions of the permanent VAPO. If the Vulnerable Adult challenges the issuance of a VAPO, the Court may dismiss all or part of the petition, take additional evidence, or order additional evidentiary hearings as to the Vulnerable Adult’s alleged incapacity, duress or undue influence. At the conclusion of the hearing, the Court may issue broad relief that protects the Vulnerable Adult from further harm or abuse, including permanently removing the Respondent from the Vulnerable Adult’s residence; freezing the Respondent’s or the Vulnerable Adult’s assets for a period of up to 90 days; requiring the Respondent to provide an accounting; or entering restraining orders for a period of up to 5 years.

Prior to the hearing, the Petitioner should consider the full panoply of relief that the Vulnerable Adult would benefit from, even if the Court may not have the express authority to grant the relief requested, and be prepared to ask for it at the hearing. In some cases, the Respondent may agree to return real or personal property belonging to the Vulnerable Adult; turn over the Vulnerable Adult’s documents, financial information,

and mail; or stipulate to other forms of relief that the Court could not, or might not, otherwise order routinely.

Practice Tip: Often times VAPO hearings will involve Pro Se or inexperienced litigants. However, arguing the Evidence Rules may not be in your favor as Evidence Rule (ER) 1101 states in part:

“ . . .

(c) When Rules Need Not Be Applied. The rules (other than with respect to privileges, the rape shield statute and ER 412) need not be applied in the following situations:

. . .

(4) Applications for Protection Orders. Protection order proceedings under RCW 7.90 [Sexual Assault Protection Orders], 10.14 [Anti-Harassment Orders], 26.50 [Domestic Violence Orders] and 74.34 [VAPO Actions]. . . .”

[Emphasis Added]. Therefore, the Judge has virtual total discretion in allowing what evidence he/she may admit and rely upon.

Once the permanent VAPO has been entered, the Petitioner should consider if there are other immediate steps that need to be taken next to assure that assets are recovered, restored or otherwise returned to the Vulnerable Adult if financial exploitation has occurred. As stated above, the Court only has the authority to issue a restraint on the Respondent’s assets for a period of 90 days. If any sort of permanent relief is sought beyond that 90 day period, including the recovery of assets, the Petitioner may need to file a quiet title action, an action under RCW 11.94, an action under RCW 11.96A, a lawsuit for conversion or other tort, or a similar type of action to seek recovery.

For a flow chart showing all of the potential events that could occur during the course of a VAPO, see attached Exhibit “B.”

KEY CASE TO BE AWARE OF IN VAPO LITIGATION

Endicott vs. Saul, 142 Wn. App. 897 (2008) (Emma Endicott, Samantha and Robert Saul, and Linda and Vernon Gabelein challenge the trial Court's decision to establish a limited guardianship for Emma under the guardianship act, chapter 11.88 RCW, and to issue a protective order under the abuse of vulnerable adults act (AVA), chapter 74.34 RCW. After a 10-day bench trial that took place over the course of three months, the trial Court concluded clear, cogent, and convincing evidence established that Emma was at significant risk of personal and financial harm and that the Sauls and the Gabeleins unduly influenced and exploited Emma. Because substantial evidence supports the trial Court's determination that Emma is incapacitated as to her person and as to her estate, that Emma is a vulnerable adult under the AVA, and that the Sauls and the Gabeleins exploited and unduly influenced Emma to sell her Whidbey Island view property to them for significantly below fair market value, we affirm.

II. OTHER APPLICABLE RESOURCES TO BE CONSIDERED

- a. 74.34 – Emergency Relief
 - i. www.Courts.wa.gov – for instructions and the statewide forms
- b. APS – Notify them
- c. DSHS – Notify them
- d. Unlawful Practice of Law]– Make referrals
- e. 11.88 – Guardianships to protect for the future while still alive
- f. 11.92 and 11.94 – Requirement of Guardian and Demands for Accounting
- g. 11.48.070 – Great seldom used statute in litigation
- h. 11.96A – TEDRA - Court of Equity

- i. 9A.56 – Theft Statutes often apply
- j. Mediation – often times can resolve the issues to the satisfaction of the parties (formal or informal)

III. CONCLUSION

There are so many different aspects to consider when trying to protect a vulnerable adult from harm. The VAPO is one of those tools which should not be considered the “end all, be all” by any means. It should be used as a stop gap measure when other options do not exist, or in clearly emergent situations to, in effect, “stop the bleeding.”

IV. POST 2007 LEGISLATIVE CHANGES

RCW 74.34.300

Vulnerable adult fatality reviews.

(1) The department may conduct a vulnerable adult fatality review in the event of a death of a vulnerable adult when the department has reason to believe that the death of the vulnerable adult may be related to the abuse, abandonment, exploitation, or neglect of the vulnerable adult, or may be related to the vulnerable adult's self-neglect, and the vulnerable adult was:

(a) Receiving home and community-based services in his or her own home, described under chapters 74.39 and 74.39A RCW, within sixty days preceding his or her death; or

(b) Living in his or her own home and was the subject of a report under this chapter received by the department within twelve months preceding his or her death.

(2) When conducting a vulnerable adult fatality review of a person who had been receiving hospice care services before the person's death, the review shall provide particular consideration to the similarities between the signs and symptoms of abuse and those of many patients receiving hospice care services.

(3) All files, reports, records, communications, and working papers used or developed for purposes of a fatality review are confidential and not subject to disclosure pursuant to RCW 74.34.095.

(4) The department may adopt rules to implement this section.

[2008 c 146 § 10.]

NOTES:

Findings -- Intent -- Severability -- 2008 c 146: See notes following RCW 74.41.040.

CLARK COUNTY SUPERIOR COURT

**VULNERABLE ADULT PROTECTION ORDER
FILINGS**

FROM YEARS 2000 to 2010

Case File Date - Year	VULNERABLE ADULT PROTECTION
2000	2
2001	9
2002	3
2003	2
2004	11
2005	6
2006	9
2007	20
2008	28
2009	44
2010	44
2011 ³	5
TOTALS: 00-10	183

EXHIBIT A

³ 2011 represents January 1, 2011 through January 26, 2011

Filing for Vulnerable Adult Protection Order

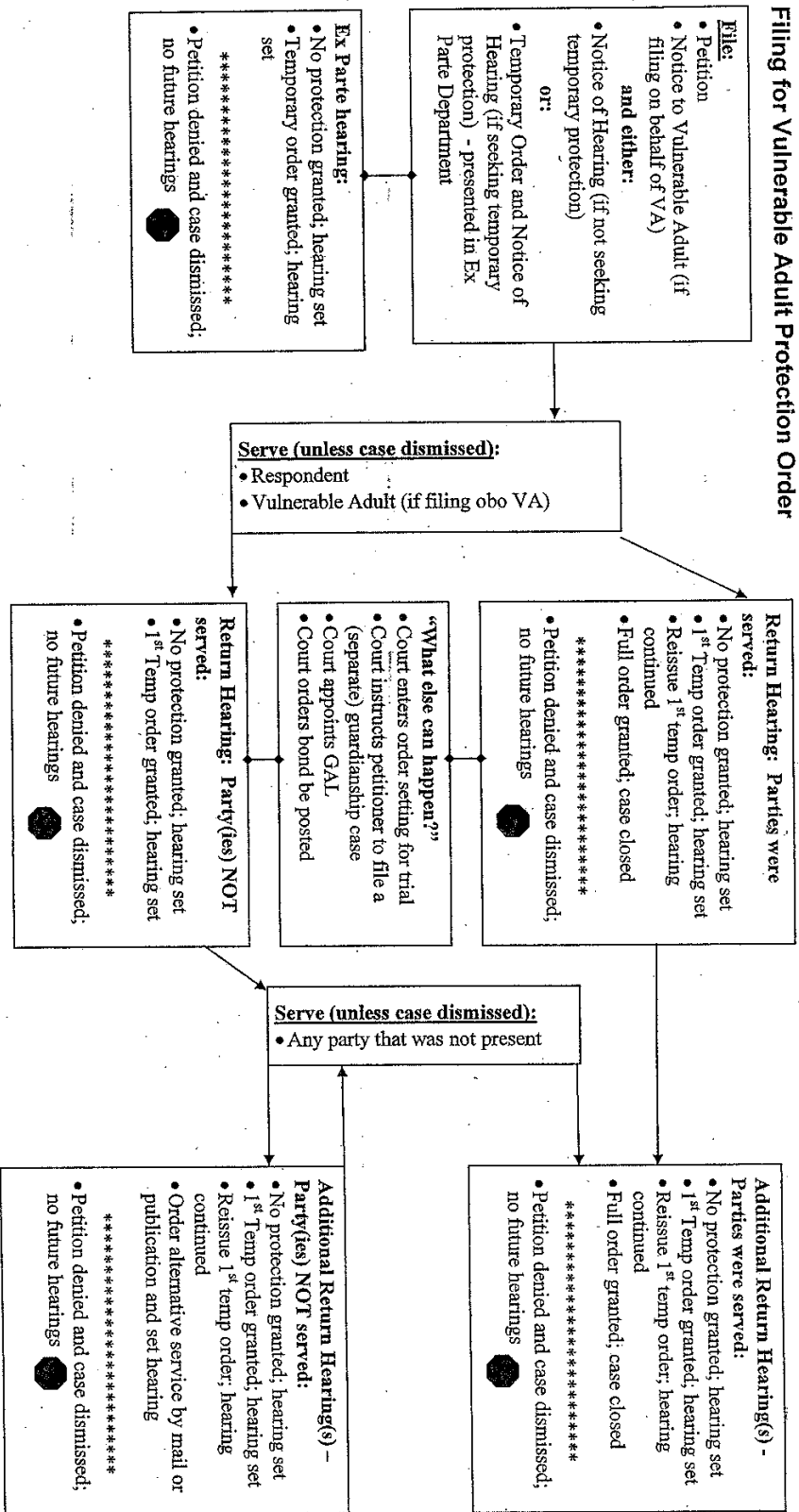


EXHIBIT B