

COMMONWEALTH OF KENTUCKY<sup>5</sup>  
\_\_\_\_ JUDICIAL CIRCUIT  
\_\_\_\_ CIRCUIT COURT  
INDICTMENT NO. \_\_\_\_ -CR- \_\_\_\_

COMMONWEALTH OF KENTUCKY

PLAINTIFF

V.

DEFENDANT

**COMMONWEALTH'S MOTION IN LIMINE**

Comes now the Commonwealth, through undersigned counsel, does hereby make the following Motions in Limine:

1. Permit the Commonwealth to call in their case-in-chief defendant's spouse, Mary Doe, and disallow any assertion of privilege which may be made under KRE 504.
2. Admit expert testimony from Dr. Expert, Ph.D on the issue of undue influence.

**STATEMENT OF THE CASE**

The defendant is charged with a single count of exploitation of an adult, resulting in a total loss to the adult of more than three hundred dollars (\$300) in financial or other resources.

**STATEMENT OF FACTS**

Jane Doe is the mother of the defendant. Her date of birth is January 30, 1916. In 1986, Ms. Jane Doe moved to City to live with the defendant, his spouse, Mary Doe, and their children. At the time of the move, Ms. Jane Doe had more than \$100,000 in available cash and owned two pieces of real property. She also enjoyed about \$1,400 in monthly income from her late husband's retirement and social

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<sup>5</sup> Sample Motion, Citations need to be Shepardized before use in court.

security. The defendant and his family had little or no assets. Ms. Jane Doe was a simple woman with very little sophistication in matters of finance.

Between 1986 and 1998, the defendant was entrusted by his mother with assisting and advising her regarding the handling of her finances. Towards that end, defendant was on Jane Doe's bank accounts, acted on her behalf regarding management of a large life insurance contract, and entered into a series of financial transactions with her, including buying and selling of real estate, a \$70,000 "loan" against Ms. Jane Doe's life insurance, and writing checks to himself directly out of Ms. Jane Doe's account.

During this same twelve year period, Jane Doe's mental capacity was in noticeable decline. This was noted by her doctors, friends, family, and the defendant himself. By no later than 1994, defendant has acknowledged that his mother was no longer capable of handling her affairs and he was in complete control of her finances. Jane Doe was also in physical decline, and endured regular treatment and medications for a variety of conditions.

Through his position of trust, and by taking advantage of his mother's mental and physical deterioration, defendant converted thousands of dollars of his mother's assets for his own benefit. This occurred primarily in one of three ways: (1) defendant used his mother's assets to invest in various real properties and later removed her from the title, or failed to include her in the title altogether; (2) defendant took a series of "loans" from and against his mother's assets, none of which were ever repaid; (3) defendant wrote checks to himself and his family out of his mother's account.

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On June 2, 1998, Jane Doe went to live with defendant's sister in State. By this date, Ms. Jane Doe no longer had any real estate holdings, had only a few thousand dollars left in her bank account, and had about \$22,570 remaining cash value in a life insurance contract. The day before his mother left, defendant had her execute a General Power of Attorney making him Attorney-in-Fact for her property management. Defendant then used this Power of Attorney to cash in the remaining value on Ms. Jane Doe's life insurance and deposited the money in a pay-on-death account in his own name. Ms. Jane Doe was not named on the account. Defendant also added his spouse as a beneficiary to the proceeds in the account.

These facts led to the filing of a civil lawsuit against defendant for elder fiduciary abuse and fraud. In anticipation of the civil trial, defendant was deposed. Defendant was also called as a witness and testified regarding these matters at a subsequent jury trial. In his testimony, defendant admitted innumerable transactions which inured to his benefit, and defended himself by claiming the victim's consent to each and every transaction. Defendant's position throughout the litigation was that his mother owed him money for uncollected rents and that he always intended to repay the \$70,000 loan by distributing the money equally with his siblings upon his mother's death. The defendant suggested that the lawsuit was simply an effort by defendant's sister to use their mother to get defendant's money. After trial by jury, defendant was found liable and on August 6, 1999, judgment was entered in Jane Doe's favor in the amount of \$119,273.00. Soon thereafter the defendant's former business partner and brother-in-law heard defendant threaten, "I'll file bankruptcy before sister ever gets a dime."

On October 28, 1999, defendant indeed filed a Chapter 13 bankruptcy petition in the U.S. Bankruptcy Court for the Eastern District of Kentucky. Defendant's petition discloses that at the time of the filing he held assets valued at \$396, 947.59 including 11 vehicles and a boat worth a combined total of \$85,843 and \$2,765 respectively.

## ARGUMENT

### I.

#### **THE DEFENDANT'S SPOUSE IS NOT ENTITLED TO ANY ASSERTION OF THE SPOUSAL PRIVILEGES PROVIDED UNDER KRE 504.**

KRE 504, which relates to the competency of certain testimony, contains two distinct privileges. The first protects confidential marital communications from disclosure. The second provides that neither a husband nor wife can be compelled to testify for or against the other.

However, these spousal privileges do not apply in a criminal proceeding in which one spouse is charged "wrongful conduct against the person or property of an individual residing in the household of either." KRE 504(c)(2)(C).

The present case finds the defendant charged in a criminal proceeding with a crime against the property of his mother. The defendant's mother was residing in the household of the defendant when these crimes occurred. As such, KRE 504(c)(2)(C) is controlling and Mary Doe is subject to being called as a prosecution witness without the benefit of asserting any spousal privilege.

Moreover, the legislature has also enacted KRS 209.060, which is part of the Kentucky Adult Protection Act, to deal with situations such as the one here. This

statute provides that “neither the psychiatrist-patient privilege nor the husband-wife privilege shall be a ground for excluding evidence regarding the abuse, neglect, or exploitation of an adult or the cause thereof in any judicial proceeding resulting from a report pursuant to this chapter.”

This case is being prosecuted pursuant to KRS 209.990(5) and a report initiated pursuant to KRS 209.030 instigated the investigation of this case. As such, KRS 209.060 is applicable to this case.

A similar situation was addressed by the Supreme Court of Kentucky in *Mullins v. Commonwealth*, 956 S.W.2d 210 (Ky. 1997). In *Mullins*, Mullins' wife found him engaged in acts of sodomy with a 14-year-old babysitter. The wife telephoned police from a neighbor's home and gave testimony against her husband to the grand jury. By the time of trial, both Mullins and his wife claimed the husband and wife privilege. *Id.* at 211. The Supreme Court of Kentucky held that KRS 620.050 does not permit the exclusion of evidence because of a marital privilege in a case regarding an abused child. *Id.* The Court further stated that KRS 620.050 was enacted for a separate and distinct purpose from KRE 504.

Chapter 209 of the Kentucky Revised Statutes provides for the protection of adults who may be suffering from abuse, neglect, or exploitation, and to bring those cases under the purview of the Circuit or District Court. KRS 209.010(1)(a). KRS 209.060 abrogates the psychiatrist-patient privilege, as well as the marital privilege, if it is used in the case of abused, neglected or exploited adult.

The General Assembly may legislate in order to protect vulnerable adults, and it may determine that adult's rights are paramount when there is a conflict with the

privilege of an adult to exclude evidence regarding the abuse, neglect or exploitation. *Cf. Mullins*, at 212. KRS Chapter 290 meets the legislative purpose of safeguarding the interests of vulnerable adults. *Id.* The statute does not interfere with a judicial function, but rather it enhances it by refusing to allow a shield to a vulnerable adult abuser in the form of the husband-wife privilege and thereby improves the truth-finding function of the judicial process. *Id.*

The exceptions provided in KRE 504(c)(2) reflect the fact that the marital privilege is considered by many to be in disfavor as a result of abuses which prevent ascertaining the truth. *Id.* The privilege exists only to protect marital harmony. *Estes v. Commonwealth*, 744 S.W.2d 421 (Ky. 1987), is a pre-evidence Code case which was decided pursuant to KRS 421.210, the predecessor to the current KRE 504. *Estes, supra*, is a review of the marital privilege exception in general under the former statute. *Mullins, supra* at 212.

The courts have approached the privilege by narrowly and strictly construing it because it has the potential for shielding the truth from the court system. Many courts have determined that when the reason supporting the privilege, marital harmony, no longer exists, then the privilege should not apply to hide the truth from the trier of fact. *Id.*

In addition, one of the responsibilities of this Court is to harmonize the law so as to produce a consistent result. *Id.* KRE 504 and KRS 209.060 are not in conflict, and there is simply no reason why they cannot be applied uniformly and consistently in harmony with each other. *Cf. Mullins, supra.* Clear and unambiguous

words in any written document are to be enforced as written. *Id.* Here, the language is clear.

As such, KRE 504(c)(2)(C) is controlling and Mary Doe is subject to being called as a prosecution witness without the benefit of asserting any spousal privilege.

## II.

### **THE COURT SHOULD ADMIT EXPERT TESTIMONY ON THE ISSUE OF UNDUE INFLUENCE.**

Because of their particular vulnerability to abuse, the Kentucky Legislature has provided special protections for specific crimes against elder adults. In doing so, the legislature made a special finding that:

The General Assembly of the Commonwealth of Kentucky recognizes that some adults of the Commonwealth are unable to manage their own affairs or to protect themselves from abuse, neglect, or exploitation. Often such persons cannot find others able or willing to render assistance. The General Assembly intends, through this chapter, to establish a system of protective services designed to fill this need and to assure their availability to all adults.

KRS 209.090.

Thus, KRS 209.090(5) provides for prosecution of any person who exploits an adult, resulting in a total loss to the adult of more than three hundred dollars (\$300). Furthermore, this law is especially designed for, and concerned with, victims who are especially vulnerable to crime because of their inability to protect themselves from abuse, neglect, or exploitation.

Here, defendant was entrusted with management of his mother's financial affairs and wrongfully exploited his mother resulting in a loss of money and assets. In

his previous statement, defendant justifies his conduct by claiming the consent of the victim to each and every transaction. Of course, implicit in the charge of exploitation is the assumption that the victim did not consent to giving away her property. Thus, consent of the victim will be squarely at issue throughout the trial.

Consent is defined as “[a]greement, approval, or permission as to some act or purpose, esp. given voluntarily by a competent person; legally effective assent.”

Black's Law Dictionary (8th ed. 2004).

Consent and the victim's vulnerability to being manipulated through undue influence will be critical issues in this trial. For this reason, the Commonwealth intends to introduce evidence regarding the victim's mental capacity in the form of medical evidence, testimony of friends and family, and prior testimony of the defendant himself. Through this evidence it will be established that, but no later than 1994, Jane Doe was suffering from diminished mental capacity. The Commonwealth intends to introduce the testimony of Dr. Expert, Ph.D., on the issue of undue influence.

Dr. Expert is a licensed psychologist and geriatric specialist in private practice since 1985. Dr. Expert will give testimony regarding special issues with regard to the elderly, including dementia, and how the victim's mental decline and dependence on the defendant made her susceptible to being unduly influenced.

KRE 702 authorizes the use of expert opinion testimony: “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” Diminished capacity and undue influence are such subjects. Furthermore,



permitting expert testimony regarding diminished mental capacity and undue influence in an elder exploitation prosecution is consistent with the public policy sought to be advanced by the enactment of Chapter 209. Such testimony is relevant on the issue of consent, presents no danger of prejudice, and will not occupy an unwarranted amount of the court's time.

**CONCLUSION**

For all the foregoing reasons, the Commonwealth requests that the court:

(1) permit the Commonwealth to call in their case-in-chief defendant's spouse, Mary Doe, and disallow any assertions of privilege which may be made under KRE 504; and (2) admit expert testimony from Dr. Expert, Ph.D., on the issue of undue influence.

Respectfully submitted,

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(Name)  
(Address)  
Counsel for the Commonwealth