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NO. 67255-0-I

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

SHARON DROWN,

Appellant,

vs.

JANELL BOONE as Personal Representative of THE ESTATE OF RANDAL J. LANGELAND,

Respondent/Cross Appellant.

REPLY BRIEF OF CROSS APPELLANT

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I. REPLY ARGUMENT

If Randal J. Langeland (Mr. Langeland) and Sharon Drown (Ms. Drown) were in a "confidential relationship" then Ms. Drown has the burden of proving the validity of the alleged gift of the IRA by evidence which is "clear, cogent, and convincing." Ms. Drown alleges in no uncertain terms that this court should make new law and award decedent's entire estate to her as if she were his spouse (Brief of Appellant at 24) because they were in a Committed Intimate Relationship[1] but draws a strained distinction as she attempts to avoid her burden of proof by baldly alleging that she and Mr. Langeland were not in a "confidential relationship." Ms. Drown was required to produce substantial evidence to met her burden of proof. She produced exactly no evidence, and has failed to establish the validity of the alleged gift.

A. Mr. Langeland And Ms. Drown Were In A "Confidential Relationship."

Ms. Drown's denial of the "confidential relationship" which existed between herself and Mr. Langeland not only lacks legal and factual authority, it is entirely antithetical to Ms. Drown's basic legal position regarding the nature of her relationship with Mr. Langeland. Mr.

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[1] Previously referred to as "Meretricious" relationships, the term "Committed Intimate Relationship" has been substituted to refer to such relationships. *Olver v. Fowler* 131 Wn. App. 135, 140 n. 9, 126 P.3d 69 (2006); upheld by *Olver v. Fowler* 161 Wn. 2d 655, 658 n. 1, 168 P.3d 348 (2007).

Langeland and Ms. Drown were not married, but it has been stipulated that they were in a CIR. CP 274. She has alleged elements of their relationship that gave rise to a "confidential relationship," and Ms. Drown now has the burden to prove by "clear, cogent, and convincing" evidence that the alleged gift of the IRA was (a) valid, and (b) not the product of fraud or undue influence. *McCutcheon v. Brownfield*, 2. Wn. App. 348, 357, 467 P.2d 868 (1970) (*review denied*, 78 Wn.2d 993 (1970)); *citing Meyer v. Campion*, 120 Wash. 457, 207 P. 670 (1922); *In re Hamilton's Estate*, 26 Wn.2d 363, 174 P.2d 301 (1946); *Whalen v. Lanier*, 29 Wn.2d 299, 186 P.2d 919 (1947).

Washington courts have set legal standards for determining when a "confidential relationship" exists between two people:

> A confidential or fiduciary relationship between two persons may exist either because of the nature of the relationship between the parties historically considered fiduciary in character; E.g., trustee and beneficiary, principal and agent, partner and partner, husband and wife, physician and patient, attorney and client; or the confidential relationship between persons involved may exist in fact. As stated in Restatement of Restitution s 166d. (1937):
>
> A confidential relation exists between two persons when one has gained the confidence of the other and purports to act or advise with the other's interest in mind.

McCutcheon, 2. Wn. App. at 356-357.

Beyond the general rule stated above, there are specific instances

applicable to the present case where courts have found the existence of a "confidential relationship."

A "confidential relationship" has been held to exist between partners in a CIR. *In the Matter of the Estate of Burkland*, 8 Wn. App. 153, 156, 159-160, 504 P.2d 1143 (1973) (surviving partner in CIR held to have been in "confidential relationship" with decedent "...as they were constantly together."). Where one party is unable to read or write, and relies and trusts on another to assist him or her in paying bills and taking care of business matters, a "confidential relationship" has been held to exist. *Pedersen v. Bibioff*, 64 Wn. App. 710, 719, 828 P.2d 1113 (1992) (where father was otherwise competent, but could not read or right in English, son found to have a confidential relationship with father when son aided father in paying bills and handling business matters). A "confidential relationship" has been held to exist between a caretaker and an infirmed person who is wholly dependent on his or her care. *In re Estate of Esala*. 16 Wn. App. 764, 767, 559 P.2d 592 (1977) (fiduciary relationship existed where testator lived in same building as caretaker who was his beneficiary, relied on her for help in his daily affairs, and placed great trust in her during the last months of his life).

Despite Ms. Drown's recent denial of the existence of a "confidential relationship," the preceding cases are very informative

because the holdings and facts apply very closely to the present controversy. First, like *Burkland*, Ms. Drown acknowledges that the parties co-habitated and were involved in a CIR for nearly eighteen years. *Burkland*, 8 Wn. App. at 159-160; Report of Proceedings (RP) 68-69. Second, like *Pedersen*, Ms. Drown acknowledges that Mr. Langeland's eyesight would not allow him to read or write, and that she would assist him in paying bills and taking care of business matters. *Pedersen*, 64 Wn. App. 719; (RP) 244. Finally, like *Esala*, Ms. Drown's testimony, and the testimony of her witnesses, during the period time when she transferred the IRA to herself, demonstrated the existence of a "confidential relationship" by showing that Mr. Langeland was wholly dependent upon her for care and support, and placed his trust in her during the final months of his life. *In re Estate of Esala*, 16 Wn. App. at 767.

The only admissible testimony at trial was that Ms. Drown filled out the form required to transfer the account from Enloe to Fidelity. RP 252. She testified that she went online to set up the Fidelity account into which the Enloe funds were placed. *Id.* She testified that she entered all of the information, including her name as residual beneficiary, into the computer to set up the Fidelity account. *Id.* In a confidential relationship the above testimony in no way imaginable meets the burden of proving the validity of the alleged gift by evidence which is "clear, cogent, and

convincing."

B. Ms. Drown Has Failed To Provide "Clear, Cogent, And Convincing Evidence" That Undue Influence Did Not Exist.

It is undisputed by Ms. Drown that where a "confidential relationship" exists between the donor of an intervivos gift and the recipient, the recipient has the burden of proving by "clear, cogent, and convincing evidence" that (1) the gift was valid, and (2) not the product of undue influence. *Pedersen*, 64 Wn. App. at 720; *In re Melter*, 167 Wn. App. 285, 273 P.3d 991 (2012); *McCutcheon*, 2 Wn. App. 348; *Doty v. Anderson*, 17 Wn. App. 464, 563 P.2d 1307 (1977); *Estates of Palmer*, 145 Wn. App. 249, 187 P.3d 758 (2008); *In re Estate of Haviland*, 162 Wn. App. 548, 559, 255 P.3d 854 (2011). It is further undisputed by Ms. Drown that when a finding made under the "clear, cogent, and convincing" burden of proof is appealed, the question to be resolved by the appellate court is not merely whether there is substantial evidence to support the finding, but whether there is substantial evidence in light of the "highly probable" test. *In re Melter*, 167 Wn. App. at 301; *In re Sego*, 82 Wn.2d 736, 739, 513 P.2d 831 (1973).

Evidence which is "highly probable," is evidence that is sufficiently "substantial" to support an ultimate fact in issue when proof must be established by evidence which is "clear, cogent, and convincing."

Id. On this appeal, Ms. Drown has the burden to prove that it is "highly probable" the alleged gift was valid, and not the product of undue influence. *In re Melter*, 167 Wn. App. at 314 (Judge Kulik and Judge Sweeney concurring opinion).

1. Ms. Drown failed to produce evidence to prove the validity of the alleged gift.

Ms. Drown produced no evidence at trial with regard to the question of undue influence, and she points to no such evidence in her briefing for this appeal. The trial court's only finding of fact with regard to the IRA states:

> 15. Ms. Drown filled out Exhibit 31 to transfer Mr. Langeland's Fidelity IRA (formerly Enloe Medical Center IRA) on 8-24-08 to a Fidelity account that she created online that named herself as beneficiary. The signatures on Exhibit 31 are deemed to be those of Mr. Langeland.

May 26, 2011, Findings of Fact and Conclusions of Law (Emphasis Added).

Significantly, the finding states that, other than the signature, every act required to transfer the IRA to Ms. Drown was executed by her alone, with no corresponding findings that Mr. Langeland intended to make any gift. There was no evidence that decedent knew of her actions, nor understood what he had allegedly signed. There was no history of gifting. She was never listed as a joint tenant with right of survivorship or pay-on-

death beneficiary on any of his 15 accounts. (Drown Answer to Interrogatory No. 9, Exhibit 27; Estate Inventory and Appraisement Ex. 1; and CP 282-283. Nor did Ms. Drown testify that she listed decedent on any of her **10** accounts as joint tenant with right of survivorship or pay-on-death beneficiary. (Drown Answer to Interrogatory No. 8, Exhibit 27.) The Court made no other findings with regard to the IRA, and there was no evidence presented by Ms. Drown at trial to meet her burden of proof. Where "there is no express finding upon a material fact, the fact is deemed to have been found against the party having the burden of proof." *McCutcheon*, 2 Wn. App. at 356; *citing Ingle v. Ingle*, 183 Wash. 234, 48 P.2d 576 (1935) (Emphasis added). It is undisputed that Ms. Drown had the burden of proof, and in the absence of an express finding upon such a material fact, Ms. Drown must be deemed to have exerted undue influence on Mr. Langeland in procuring the alleged gift.

As detailed in the Estate's cross appeal, and undisputed by Ms. Drown in her responsive briefing, Ms. Drown had the burden of producing evidence that was "clear, cogent, and convincing" to show that the alleged gift of the IRA was valid. *Pedersen*, 64 Wn. App. at 720; *In re Melter*, 167 Wn. App. 285. In the absence of such evidence, she is deemed to have failed to meet her burden of proof. *Haviland*, 162 Wn. App. at 559.

Ms. Drown's lack of available supporting evidence is made clear

by her failure to address the issue in her responsive briefing. On page 9 of her Reply/Response brief, Ms. Drown cites generally to RP 363-365 (Dr. William E. Lombard testimony) and RP 316-324 (Mr. Jerry Ringel testimony) as alleged evidence that there was no undue influence. However, the testimony of these witnesses relates in no way to Ms. Drown's burden of showing an absence of undue influence. Dr. Lombard testified that Mr. Langeland was very sick and was totally dependent upon Ms. Drown for his care and support. There was no testimony regarding gifting, intent, or undue influence, and the testimony is more relevant to establishing Mr. Langeland's vulnerability to undue influence than to aiding Ms. Drown in overcoming her burden of proving the absence of undue influence. Mr. Ringel's testimony was also primarily related to Mr. Langeland's deteriorating health and his total reliance on Ms. Drown. Furthermore, Mr. Ringel had little or no contact with Mr. Langeland at or about the time of the IRA transfer in May 2008, making his testimony mostly irrelevant to the question of undue influence.

The evidence presented at trial, and cited by the Estate in this and prior briefing, supports a finding of undue influence in procurement of the alleged gift. While the case of *Dean v. Jordan*, 194 Wash. 661, 79 P.2d 331 (1938) defined the factors giving rise to a presumption of undue influence in the creation of a will (which involves a different burden of

proof than intervivos gifts), the indicia of undue influence described in *Dean* add greatly to the analysis in this case. In describing the factors indicating the presumption of undue influence, the *Dean* court made the following statement:

> The most important of such factors are: (1) That the beneficiary occupied a fiduciary or confidential relation to the testator; (2) that the beneficiary actively participated in the preparation or procurement of the will; and (3) that the beneficiary received an unusually or unnaturally large part of the estate. Added to these may be other considerations such as the age or condition of health and mental vigor of the testator, the nature or degree of relationship between the testator and the beneficiary, the opportunity for exerting an undue influence, and the naturalness or unnaturalness of the will. The weight of any of such facts will, of course, vary according to the circumstances of the particular case. Any one of them may, and variously should, appeal to the vigilance of the court and cause it to proceed with caution and carefully to scrutinize the evidence offered to establish the will.

Dean, 194 Wash. at 672.

All of the suspicious factors described in *Dean* are found in the present matter. There was a fiduciary and "confidential relationship." Ms. Drown testified to actively participating in procurement of the gift, and in fact took all of the required actions to procure the gift for herself. The gift represented a significant change to Mr. Langeland's estate plan, which originally left everything to his mother and his daughter. Mr. Langeland

suffered from very poor health and mental vigor, causing him to be totally reliant upon Ms. Drown for his care and support. Ms. Drown had ample opportunity to exert the undue influence as Mr. Langeland could not see well enough to do his own bills and paperwork, so she would handle such items for him. Ms. Drown has provided no evidence to overcome the seven suspicious factors and the presumption of undue influence, which, "in the absence of rebuttal evidence may even be sufficient to over throw the will." *Dean* at 672. Note that, as the trial court was dealing with an intervivos gift in a Confidential Relationship the burden already weighed heavy upon Ms. Drown even without the *Dean* analysis.

2. The trial court's erroneous holding regarding the authenticity of Mr. Langeland's signatures is not dispositive as to Ms. Drown's use of undue influence to obtain the alleged gift.

The unrebutted expert testimony at trial established that the IRA transfer signatures were not those of decedent. RP 385. But, regardless of whether or not Mr. Langeland's signature was forged, Ms. Drown had the burden to produce evidence that would persuade a fact finder that it was "highly probable" she did not exert undue influence. Although a forged signature renders the document invalid, a finding that the signature is authentic is not dispositive as to the question of undue influence. *Doty*, 17 Wn. App. 464 (undue influence found to exist even where signature on

pay on death beneficiary designation for bank account was authentic).

C. Ms. Drown's Offer Of Proof Regarding Mr. Langeland's Signature Is Inadmissible.

Ms. Drown attempts to admit her offer of proof suggesting that Mr. Langeland signed the IRA transfer document. Drown Reply/Response Brief, pg 8. This statement was offered at trial and ruled to be in violation of the Dead Man's Statute, RCW 5.60.030 and was held to be inadmissible by the trial court. Ms. Drown has not assigned error to this decision of the trial court, and the alleged statement by decedent is not properly before this court on appeal. RAP 2.4.

II. CONCLUSION

Mr. Langeland was dying, and Ms. Drown was desperate to ensure that she would be financially provided for after his death. She knew that he depended on her to assist him with his paperwork and bills, and that he would never know about the change in beneficiary designation on his IRA. She testified to filling out the documents, mailing them in, and changing the beneficiary designation to herself on the IRA. Ms. Drown was Mr. Langeland's sole care provider, and he was completely dependent upon her for everything. Ms. Drown felt entitled to the assets contained in the IRA. She had the motive and opportunity to transfer those assets to herself, and she took advantage of her position of confidence to do so.

Ms. Drown can cite to no evidence to substantiate her burden of proving the validity of the alleged gift. A finding that Mr. Langeland's signature was valid is not dispositive on the issue of undue influence. The testimony of Ms. Drown and her witnesses establishes only that Mr. Langeland was vulnerable to undue influence, and does nothing to support her attempts to overcome her high burden of proof with regard to the validity of the alleged gift.

Ms. Drown was required to cite this court to the record of "highly probable evidence" that met her burden of proof based on a "clear, cogent, and convincing" standard. She cited to no such evidence, and this court should reverse the erroneous decision of the trial court and hold the transfer of the IRA invalid.

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CERTIFICATE OF SERVICE

I, MICHELLE N. WIMMER, hereby declare and state as follows:

1. I am over the age of majority, competent to testify and make the following statements based upon my own personal knowledge and belief.

2. I am now and at all times herein mentioned employed by the offices of Helsell Fetterman LLP, 1001 4th Avenue, Suite 4200, Seattle, WA 98154.

3. I did on the date written below (1) cause to be filed with this Court the Reply of Cross Appellant; (2) cause the Reply of Cross Appellant to be delivered via messenger, to the following recipient: Mr. Douglas R. Shepherd, Shepherd and Abbot, 2011 Young St Ste 202, Bellingham, WA 98225-4052; and via email to Mr. Douglas Robertson, Belcher Swanson Law Firm, 900 Dupont Street, Bellingham, WA 98225.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

DATED: Oct. 31, 2012

MICHELLE N. WIMMER