NO. 46337-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Estate of:

CHARLES ROBERT THORNTON,

Deceased

APPELLANT MARTIN THORNTON'S OPENING BRIEF

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A. Assignments of Error.

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2. The trial court committed reversible error when it entered the September 7, 2012 Order Granting Personal Representative's Motion for Summary Judgment which dismissed Marty's Constructive Trust claim pursuant to a statute of limitations found in Chapter 11.11 RCW.

3. The trial court committed reversible error when it entered the Court's written decision re: Attorney's Fees and Costs to the extent that said decision granted attorney's fees and costs to the Personal Representative related to the September 7, 2012 Orders referenced above;

4. The trial court committed reversible error when it entered the May 9, 2014 Final Order Regarding All Claims Between Martin Thornton, The Estate of Charles Thornton and Mary Heberlein to the extent said order confirmed previous orders which constitute reversible error.[1]

[1] Marty only appeals the May 9, 2014 Order insofar as it confirms the September 7, 2011 Orders on summary judgment. In order to perfect his appeal, a final order from the trial court was necessary and the May 9, 2014 Order constituted that final order.

B. Issues Pertaining to Assignments of Error.

1. Whether or not the Court committed reversible error when it granted summary judgment dismissing Marty Thornton's Will contest when Marty was entitled to a presumption of undue influence the presumption of fraud in the inducement and significant questions of material fact exist on both issues.

2. Whether or not the Court committed reversible error when it dismissed Marty Thornton's constructive trust claim by either applying the incorrect statute of limitations or failing to account for a tolling period where Marty had been deprived of information by the Personal Representative on non-probate assets such that application of the Chapter 11.11 RCW statute of limitations was inequitable.

3. Whether the trial court erred in granting attorney's fees and costs based on the decisions appealed herein.

II. STATEMENT OF THE CASE

A. Factual History.

Marty Thornton is the Petitioner in the trial court matter and Appellant in this Appeal. It is undisputed that he is the only child of Charles Thornton who is the Decedent. CP 1-7.

It is further undisputed that on or about March 11, 1988, Charles Thornton executed a Last Will and Testament in which he bequeathed his entire estate to his son Marty. Id. It is also undisputed that Charles Thornton's estate plan remained in place for the next 22 years until

October 18, 2010 – approximately five weeks before his death - when a new will was signed bequeathing everything to Charles Thornton's girlfriend, Ms. Heberlein. Id.

In her own deposition, Ms. Heberlein described the execution of the new will as a marathon like session with the attorney. There is further no dispute that at that time, Charles Thornton was also physically suffering from the effects of his metastatic kidney cancer. Perhaps most importantly, though, Marty filed Declarations with the Court describing how he was eliminated from contact with his father during the time that the new will was executed and why the purported reasons for the new will were, flatly, incorrect. CP 154-169; 170-234.

As more fully described in the Declarations filed by Marty Thornton in support of his opposition to the Personal Representative's motion for summary judgment, after Charles Thornton began his relationship with Ms. Heberlein, she began to interfere with Charles's relationship with Marty and Marty's family. Ms. Heberlein took various actions to keep the Thornton family and Decedent apart – both physically and emotionally. Only Ms. Heberlein's testimony was used to try and rebut these factual allegations. CP 239-240; 241-242; *See also Declarations of Jessica Thornton, Irma Thornton, Mia Thornton and Kimberly Thornton.*[2]

[2] Marty is contemporaneously designating these declarations as Clerk's Papers. They were unintentionally omitted from Marty's first designation of Clerk's papers.

Instead, the Personal Representative asserted that Charles Thornton desired to change his Will because he detested his only son Marty and that (1) Charles felt he had already "given enough" to Marty and Marty's family because Marty was "gifted" a house owned by Charles; and (2) that Marty was a "bad seed" due to Marty's criminal history. However, these two "reasons," are factually unsupported by the record and the Declarations submitted by Marty in opposition to the Personal Representative's Motion for Summary Judgment, at a minimum, create genuine issues of material fact which should have barred entry of summary judgment.

The evidence before the trial court was that Marty Thornton and his wife, Irma, purchased the house owned by Charles from Charles; they were not gifted the residence. CP 396-404. In fact, there was a substantial amount of litigation at the trial court over this issue. Ms. Heberlein sought to enforce a Deed of Trust that Charles had recorded against the property which she felt was still outstanding against Marty. Marty opposed that effort and obtained an Order on Summary Judgment which dismissed Ms. Heberlein's claim in that regard. CP 396-404.

Second, the alleged "criminal history" on which Ms. Heberlein as Personal Representative relied upon occurred *before* Marty was adopted by Charles and before Charles made his 1988 Will which named Marty as the sole beneficiary. If the "criminal history" was really an issue, Marty would not have been adopted and the 1988 Will would not have been made. Third, even if the two rebuttal assertions by the Personal

Representative were to be considered, it makes no sense that Decedent would not even consider the Thornton grandchildren in his estate plan given that there are no facts which establish that he had nothing but a phenomenal relationship with them.

B. Facts regarding the trial court's dismissal of Marty's Claim for Constructive Trust

Charles Thornton died on December 5, 2010. There is no dispute that although Ms Heberlein had orally claimed that Charles had done a will naming her as Personal Representative, she took no action to initiate a probate of Charles Thornton's estate. There is also no dispute that on July 27, 2011, with no response from Ms. Heberlein about whether she intended to probate this later dated Will and after eight months had passed from the date of Charles Thornton's death, Marty filed a Petition to probate the 1988 Will but, notably, advised the Court of the existence of the claimed later dated will.

The matter was continued by the trial court to September 13, 2011, and Ms. Heberlein was ordered to file an inventory of the estate and to complete her own petition to admit the later dated will to probate.

There is no dispute that on September 6, 2011, Ms. Heberlein filed a Petition for Order Granting Nonintervention Powers At Time of Appointment of Personal Representative with the trial court and attached to that was a pleading entitled "Application for Letters of Administration." CP 133-153. Under paragraph 5 of that document, Ms. Heberlein asserted

that the decedent had "stocks, bonds, cash" in the amount of "0.00." Marty had no reason not to believe that representation. Also attached to that document was an "Inventory" which made the same representation and also listed, "bank accounts and money" as "$0.00." Id. Marty had no reason not to believe that assertion either.

On January 11, 2011, when Marty Thornton filed his TEDRA Petition to challenge the will that had been admitted to probate, he had no knowledge of any non-probate assets of Charles Thornton. Marty acknowledges that his TEDRA Petition was filed one year after his father passed away. In his Petition, he included a claim for constructive trust as his fifth cause of action asserting as follows:

> To the extent there have been any distributions of any property of the decedent, whether said property be real or personal or consist of bank accounts or other financial accounts including but not limited to live [sic] insurance or investment proceeds that were owned by the Decedent and subsequently distributed to any person upon the Decedent's death, Mr. Thornton [Marty] asserts that said assets are held under a constructive trust for his benefit.

CP 1-7..

The Court ultimately dismissed Marty's claim for constructive trust pursuant to a statute of limitations found in Chapter 11.11 RCW which Marty believes was in error.

III. SUMMARY OF ARGUMENT

The trial court committed reversible error when it granted summary judgment to the Personal Representative and dismissed Marty's

will contest. Genuine issues of material fact existed and the Court improperly granted summary judgment as a result.

Additionally, the trial court committed reversible error when it granted summary judgment to Ms. Heberlein and dismissed Martin Thornton's constructive trust claim pursuant to the statute of limitations found in Chapter 11.11 RCW.

Lastly, if this Court reverses either decision of the trial court, it should reverse the trial court's corresponding award of attorney's fees and costs against Marty.

IV. ARGUMENT

A. Standard of Review.

This Court reviews motions for summary judgment de novo and engages in the same inquiry as the trial court. *Cole v. Laverty*, 112 Wn. App. 180, 184, 49 P.3d 924 (2002). The Personal Representative never set forth the summary judgment standard in her briefing to the trial court but summary judgment is only appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985) (emphasis added) (citing *Herskovits v. Group Health Coop. of Puget Sound*, 99 Wn.2d 609, 613, 664 P.2d 474 (1983)). "**When reasonable minds could reach but one**

conclusion, questions of fact may be determined as a matter of law." *Hartley v. State*, 103 Wn.2d at 775 (emphasis added). Therefore this Court must ask itself when deciding the Personal Representative's Motion whether reasonable minds could only come to one conclusion about the facts of what occurred in this case and in doing so, the Court must assume the facts in a light most favorable to Mr. Thornton, the non-moving party. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). More specifically, Mr. Thornton "is entitled to all favorable inferences that may be deduced from the varying affidavits." *Estate of Lennon v. Lennon*, 108 Wn. App. 167, 29 P.3d 1258 (2001).

1. The trial court applied the wrong evidentiary standard in reviewing the motion for summary judgment requiring reversal

In this case, the Personal Representative asserted to the trial court that in the motion for summary judgment it should apply a "clear, cogent and convincing" evidence standard. *Motion for Summary Judgment* at 20. This was directly contrary to Washington law. In *Estate of Lennon v. Lennon*, Division One of the Court of Appeals, reversed a trial court's grant of summary judgment in an action to obtain certain funds a decedent's stepson obtained after he sold decedent's stock. In reversing summary judgment, Division One of the Court of Appeals stated:

> Roger [stepson] will bear the heavy burden at trial of proving that a gift occurred by clear, cogent, and

> convincing evidence. **However, this standard is not applicable for purposes of summary judgment. Rather, the nonmoving party "is entitled to all favorable inferences that may be deduced from the varying affidavits." Consequently, we hold that Roger has introduced sufficient evidence to create a genuine issue of material fact for trial on this issue.**

Id. (citations and footnoted omitted, emphasis added).

To the extent the trial court applied the clear, cogent and convincing standard to the evidence presented by Marty, doing so constituted reversible error.

2. It was the Personal Representative's Burden to Prove no factual dispute exists.

It was the Personal Representative's burden to prove that no factual dispute exists. *Allstate Ins. Co. v. Raynor*, 143 Wn.2d 469, 475-76, 21 P.3d 707 (2001) (citing *Grange Ins. Co. v. Brosseau*, 113 Wn.2d 91, 103, 776 P.2d 123 (1989)). Summary judgment must be denied if the record shows any reasonable hypothesis which entitles Mr. Thornton to relief. *White v. Kent Medical Center, Inc.*, 61 Wn. App. 163, 175, 810 P.2d 4 (1991) (citing *Mostrom v. Pettibon*, 25 Wn. App. 158, 162, 607 P.2d 864 (1980)).

Under the applicable standard, the evidence already obtained by Marty and produced in opposition to the Personal Representative's Motion for Summary Judgment met any evidentiary standard and demonstrated that there was (and is) a factual dispute and summary judgment should not have been entered overturning 20 years of estate planning.

B. The presumption of undue influence applies and bars summary judgment dismissal of Marty's claims of undue influence and fraud in the inducement.

In *Estate of Lint*, 135 Wn.2d 518, 957 P.2d 755 (1998),[3] our State Supreme Court recognized that despite the "rather daunting burden" placed on Will contestants, a presumption of undue influence can be raised by showing certain suspicious facts and circumstances. Our State Supreme Court held:

> [C]ertain facts and circumstances bearing upon the execution of a will may be of such nature and force as to raise a suspicion, varying in its strength, against the validity of the testamentary instrument. The most important of such facts 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 combination of facts shown by the evidence in a particular case may be of such suspicious nature as to raise a presumption of fraud or undueinfluence and, in the absence of rebuttal evidence, may even be sufficient to overthrow the will.**

Estate of Lint, 135 Wn.2d at 535-536 (emphasis added, citations omitted).

In this case, the presumptions of fraud and undue influence clearly should have applied to bar entry of summary judgment dismissal of

[3] *Estate of Lint* was a case that was tried, not decided on summary judgment.

Marty's TEDRA Petition. The combination of facts of this case is sufficient to overthrow the Will, let alone reverse the trial court's summary judgment.

1. Ms. Heberlein "almost" admits that she occupied a fiduciary relationship to Decedent.

It was difficult to tell from her Motion whether the Personal Representative actually admits to occupying a fiduciary relationship to Decedent. She definitely comes as close as one possibly can to admitting stating in her motion is "almost certain" that she maintained a confidential relationship to the Decedent.[4] Marty is certain that Ms. Heberlein occupied a fiduciary relationship to Decedent for the purposes of imposing the presumption of undue influence.

Ms. Heberlein, however, wanted it both ways. When considering her claims regarding meretricious relationship or "omitted spouse," that she had previously put before the Court, Ms. Heberlein was certain she had a "confidential relationship" with Charles Thornton. *Motion for Summary Judgment* at 20. However, when it comes to considering whether she occupied a fiduciary relationship to Charles Thornton for purposes of imposing the presumption of undue influence, Ms. Heberlein

[4] Why is Ms. Heberlein "almost certain" she maintained a confidential relationship to Decedent? Why is she not "absolutely" certain or "positively" certain or why not just acknowledge, in fact, that she maintained such a confidential relationship to Decedent? Because Ms. Heberlein is hedging her bets. She is afraid to admit this fact because it is one of the single most important factors in determining whether the presumption of undue influence applies.

asserts, without any legal support, that her fiduciary relationship be discounted because "anyone with a close personal or business relationship would fall within the definition." M*otion for Summary Judgment* at 13. There is no such thing as a "discounted" fiduciary relationship in Washington law. Suggesting such a thing exists demonstrates the Personal Representative's willingness to bend the law in an effort to get what she wants.

Prior to the execution of the Will some six weeks before Charles Thornton died, Ms. Heberlein was not married to Decedent nor was she registered as a domestic partner of Decedent. She alleges, however, that at that time she was Decedent's business partner and his girlfriend. She was also Decedent's attorney-in-fact pursuant to a power of attorney. CP 170-234 (*Morgan Declaration*, **Exhibit A**). According to her testimony in her deposition, Ms. Heberlein also assisted Mr. Thornton in check-writing. CP 170-234 (*Morgan Declaration*, **Exhibit B**.) In sum, there can be no legitimate dispute that Ms. Heberlien occupied a fiduciary relationship to Decedent for purposes of imposing the presumption of undue influence nor can there be any legitimate dispute that the law somehow "discounts" the weight of this factor in the legal analysis as the Personal Representative suggests it does. This alleged "discounted" fiduciary relationship was improper legal argument to the trial court and led to the error claimed herein.

With respect to Ms. Heberlein's power of attorney, our Court of Appeals has held the following regarding the fiduciary relationship under

a power of attorney, "the fiduciary relationship requires 'not honesty alone, but the punctilio of an honor the most sensitive[.]" *Keene v. Board of Accountancy*, 77 Wn. App. 849, 858, 894 P.2d 582 (1995) (quoting *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 62 A.L.R. 1 (1928)). Ms. Heberlein clearly occupied a fiduciary relationship to Charles Thornton barring summary judgment in this matter.

2. The overwhelming evidence shows that Ms. Heberlein participated in the preparation and procurement of the eleventh-hour Will.

Ms. Heberlein denies participating in the procurement of the October, 2011 Will, but the documents obtained from Ms. Hosannah's office and Ms. Heberlein's own description of what occurred during the signing of the Will indicate otherwise.

Again, with no citation to authority in her Motion for Summary Judgment, the Personal Representative stated that the preparation of a Will is not enough to meet the active participation requirement. However, the Personal Representative was actively engaged in the procurement of the Will. The Personal Representative accompanied Decedent to the attorney's office. She also filled out the entire informational form for Decedent. CP 170-234 (*Morgan Declaration*, **Exhibit C** (Exhibit 2 to Heberlein Deposition)). There was never any advice by the attorney to Charles Thornton that representing both he and Ms. Heberlein may be a conflict of interest nor was there any waiver of any conflict of interest signed.

The Personal Representative's story about her participation in the preparation of the Will has also changed over the course of time. In a Declaration filed with the trial court, the Personal Representative stated that Charles Thornton told the attorney that he did not want his son to be Personal Representative of his Estate. CP 17-41 (*Declaration of Mary Ellen Heberlein.*) However, during her deposition, the Personal Representative stated that she was not in the room when the attorney had discussions with Decedent about his estate plan:

> Q: Since you were not in the room when Desiree Hosannah and Bob were discussing making the will in October of 2010 —
>
> A: Correct.
>
> Q: How is it that you came to sign a declaration stating that Bob told Desiree Hosannah, when the will was being prepared, that he didn't want Marty to be the Personal Representative?

CP. 170-234 (*Morgan Declaration*, **Exhibit D**).

What followed was an extremely long-winded answer from the Personal Representative in which she took several minutes to come up with the solution to the problem. The solution appeared to be that there was an initial consultation with both Decedent and the Personal Representative present where, in fact, it appears that all aspects of the Will were discussed. *Id.* This description of events is noticeably absent from Ms. Hosannah's Declaration in support of the Motion for Summary

Judgment where she took great pains to describe the separate meeting(s) that took place between she and Decedent. CP 81-83.

Moreover, the entire meeting(s) and execution of the Will at issue took place in one single day with both Ms. Heberlein and Decedent present. Ms. Heberlein described the experience as lasting what seemed like an "eternity":

> Q: Okay. And the meetings that you had with Desiree Hosannah, the meetings that you and Bob had with Desiree Hosannah, and the signing of the wills and the healthcare directives and the power of attorney all took place on the same day; is that right?
>
> A: Yes. We had arrived in her office in the afternoon and **I remember us being there for what seemed like an eternity. It took hours.** Because she kept meeting with us independently and together, and asking, I felt like to me anyway, and I don't know in her private sessions with Bob what she was asking him but she was asking me point direct questions about my family and my siblings and my mom, and who, in the event of my passing, should the beneficiaries be and why.
>
> Almost to the point where it was frustrating for me because it was taking too long for me personally. I'd already said what I wanted to have done with my will, and it was - she was just, I don't know — continual and constant with it.
>
> Q: Did Ms. Hosannah ever issue a bill?
>
> A: She did actually. When we were done meeting with her hours later, she produced a bill.

CP 170-234. (*Morgan Declaration*, **Exhibit E**).

Obviously, Ms. Heberlein participated in the procurement of the Will at issue in the case. By her own testimony she was involved in joint meetings with Decedent and the attorney where the issues of beneficiaries and personal representatives were discussed, including the reasons behind the choosing of beneficiaries. Ms. Heberlein filled out the pre-meeting informational paperwork. Ms. Heberlein wrote the check for the attorney's bill for the services that were rendered. There could be no other, better set of facts that one person was involved in the procurement of another's Will other than had Ms. Heberlein drafted the Will herself. To assert that she had no participation in the drafting of the Will as she does now is wholly inaccurate. As a result, the Court should have imposed the presumption of undue influence and not granted the Personal Representative's Motion for Summary Judgment.

3. Ms. Heberlein received an unnaturally large portion of the Estate considering that at the time the Will was drafted, she was not married to Decedent, was not a domestic partner of Decedent, and Decedent's previous 22 yearlong estate plan had his entire Estate going to his only child — especially when that estate plan encompassed all but 40 days of Decedent's relationship with Ms. Heberlein.

As noted above, for approximately 20 years, Marty Thornton was the sole beneficiary of his father's Will. Within the course of the 40 days prior to Decedent's passing and while he was suffering from the effects of metastatic kidney cancer, headaches, shortness of breath, fatigue in the

afternoons and coughing up blood, Marty Thornton was completely eliminated from his father's estate plan.

It was completely natural for Marty Thornton to be his father's sole beneficiary under his estate plan. He had a relationship with his father that spanned his lifetime. Marty Thornton vehemently disputes the facts that were alleged against him regarding that relationship -- facts which are unsupported by any corroborating evidence and facts which are totally opposed by the Declarations filed in support of Marty Thornton's position on that issue. Because this matter came to the trial court on the Personal Representative's motion for summary judgment, these facts must be viewed in the light most favorable to Marty. Marty Thornton helped his father and his father helped him. They worked together and enjoyed life together as many fathers and sons do.

Obviously, the late change Will substantially increased Ms. Heberlien's interest in the Estate. Ms. Heberlein went from 0% to 100% in one long day that "seemed like an eternity" to her and she was not the one suffering from metastatic kidney cancer. Ms. Heberlein couldn't get done fast enough as far as she was concerned.

Ms. Heberlein asserted in her Motion for Summary Judgment that in "all cases finding the gift to a beneficiary unnaturally large, the beneficiary in question has received all or virtually all of the testator's estate." Ms. Heberlein does receive all of Charles Thornton's Estate under the Will. In fact, she was to receive none of Decedent's Estate less than a few short weeks before Charles died.

4. The "remaining factors" regarding undue influence absolutely support that the presumption of undue influence and should have barred any imposition of summary judgment dismissal of Marty's TEDRA Petition.

One of the "remaining factors" to be considered in the imposition of the rebuttable presumption of undue influence is the "age or condition of health and mental vigor of the testator, and the nature and degree of relationship between the beneficiary and the opportunity for exerting undue influence, and the naturalness or unnaturalness of the will." *In re Estate of Lint, supra.* Marty demonstrated the unnaturalness of the eleventh-hour Will and the marathon-like session that occurred in order to obtain its execution. The eleventh-hour Will goes against the grain of Decedent's entire estate plan for over 20 previous years and the evidence also shows that Ms. Heberlein had every opportunity to exert undue influence over Charles — especially excluding him from his friends and family and his only beneficiary in his previous estate plan. *See e.g., Estate of Lint, supra.*

The issue of a decedent's "health and vigor" is whether or not the decedent was vulnerable to undue influence because of health. Decedent passed away approximately 40 days after allegedly executing the eleventh-hour Will. It has to be acknowledged by Ms. Heberlein knew that at the time of the execution of the eleventh-hour Will, Decedent was suffering from metastatic kidney cancer. By his own writing, Decedent acknowledges that starting some two months prior to the executive of the Will, he was "very tired" by noon of each day. Approximately one month

prior to the execution of the Will, he was experiencing daily afternoon headaches, shortness of breath and was coughing. Beginning October 1, 2010, shortly before the Will was executed, Decedent was coughing up blood. CP 170-234 (*Morgan Declaration*, **Exhibit F**). While Marty voluntarily dismissed his claim regarding lack of testamentary capacity and does not raise these concerns to argue lack of testamentary capacity, it cannot be ignored that his father was vulnerable to being unduly influenced to change his Will. Marty asks the Court to keep in mind that his father had the same estate plan for over twenty years and it was only changed when he was experiencing these conditions and separated from Marty and his grandchildren. These facts show that the Court erred in "reaching but one conclusion" to dismiss Marty's TEDRA Petition.

5. Relationship between Decedent and Ms. Heberlein.

Ms. Heberlein next argues that the her relationship with Decedent should be considered including stating "since Heberlein was the decedent's registered domestic partner, it makes complete sense that she would have been the beneficiary of the decedent's will." *Personal Representative's Motion for Summary Judgment* at 15 and citing *Burkland's Estate*, 8 Wn. App. 153, 159, 504 P.2d 1143 (1972)). The Court of Appeals in *Burkland's Estate* notably upheld a successful will contest. In discussing the factors set forth above, the Court in *Burkland's Estate* held in part:

> The weight of any 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 scrutinize the evidence offered to establish the will.

Id., at 159.

There is nothing in the Court's opinion in *Burkland's Estate* which, as Ms. Heberlein argued, that required the Court to consider her "relationship" with Charles. Ms. Heberlein desires to use her domestic partnership registration to her benefit, but she and Mr. Thornton were not registered as domestic partners until October 19, 2011 which was after the Will was signed. However, Ms. Heberlein appears to desire that the Court have the impression that she and Decedent were registered domestic partners for much longer than the six weeks prior to his passing. CP 170-234 (*Morgan Declaration*, **Exhibit G**).

Furthermore, contrary to the assertions that Charles was handling all of his affairs on his own, that was not the case with the registration of the domestic partnership. In fact, Ms. Heberlein testified at her deposition that the reason for the domestic partnership was so that she could not be removed from the hospital during Charles's illness and that a friend of theirs had to process the domestic partnership paperwork because of Charles's illness:

> Q: Is that why you became registered domestic partners?
>
> A: From my perspective, absolutely. That was my primary initiative, is to be sure I would not be excluded

from being with Bob during his doctors' appointments or in the hospital.

CP 170-234 (*Morgan Declaration*, **Exhibit H**).

6. Ms. Heberlein had every opportunity to influence the terms of the Will.

The Personal Representative also argued that there is no evidence that she influenced the terms of the Will. Marty disagrees. In fact, it appears that the entire Will signing, as well as the signing of multiple other legal documents took place during the course of one day. Mr. Thornton had one estate plan in place for over 20 years. He had, allegedly, almost ten years of a relationship with Ms. Heberlein to consider changing his Will and did nothing. Yet, while obviously physically suffering from the symptoms of metastatic kidney cancer and shortly before his death he made a radical change to his estate plan to completely eliminate his only son. All of the initial paperwork with the drafting attorney was filled out by Ms. Heberlein and this all occurred during a time when Decedent was being sequestered from his son and son's family as the Declarations on file establish. That is the main reason the law allows the presumption of undue influence to apply in situations like these when the decedent's main beneficiary is being denied access to him and this is the main reason why summary judgment should not have been granted dismissing Marty's TEDRA Petition. Ms. Heberlein even went so far as to cremate Decedent without allowing Mr. Thornton an opportunity to see his father and say goodbye.

Charles was sequestered from Marty, his only son and the person he eliminated from his estate plan after having Marty as his only beneficiary.

C. The same analysis applies to Mr. Thornton's claim of fraud in the inducement. Ms. Heberlein cannot negate the presumption should be applied in this case and the facts set forth above indicate that not only was Decedent being unduly pressured into eliminating Mr. Thonrton, but he was apparently not being told the truth about Mr. Thornton outside of Mr. Thornton's presence. Summary Judgment should not have been granted to the Personal Representative.

Our State Supreme Court has to say about the relationship between fraud and undue influence in matters involving wills: "**Fraud and undue influence, although distinct concepts, are closely related and the findings of the trial court that support its conclusion of fraud provide additional support for its conclusion that there was undue influence.**" *Estate of Lint*, 135 Wn.2d at 537. As a result, all of the above described facts set forth by Marty also support entry of partial summary judgment imposing the presumption of fraud in the inducement in this matter.

One critical factor in the analysis of *Estate of Lint*, *supra*, was that the party benefitting from the will change had isolated the decedent from her family, just as Ms. Heberlein did. In *Estate of Lint*, the Court held:

> We are satisfied, though, that the findings of the trial court clearly, cogently, and convincingly establish that **[the defendant] isolated [the decedent] from her family and friends and, thereafter, falsely represented to [the decedent] that her family wanted to put her in a home in order to get their hands on her estate. The trial court**

> **was justified also in concluding that [the defendant] made these representations in an effort to reduce [the decedent's] reliance on them and . . .** the culmination of this fraudulent enterprise was [the decedent's] signing of the will . . . an act which damaged [the decedent] in that it radically altered plans for the distribution of her estate that she had made at a time when she was not under [the decedent's] influence.

Estate of Lint, 135 Wn.2d at 534-535 (emphasis added).

The evidence in this matter establishes that Ms. Heberlein desired and wanted control. She controlled Decedent's availability to his son and son's family as demonstrated by the declarations Mr. Thornton has filed in this matter and the culmination of this effort to control was the signing of the Will which radically altered Decedent's plan of distribution for approximately 20 years.

Additionally, one can tell by the reasons that are given to support the Will change that Decedent was being fed false information about Mr. Thornton. The alleged main reason given for the Will change is that Charles supposedly felt that he had "given enough" to Marty over his lifetime, yet there is no evidence of any such gifts that is proffered by the moving party other than the allegation of the same – no evidence whatsoever. As a result, the Personal Representative did not meet her burden of proof to establish no genuine issue of material fact exists and should not have been granted summary judgment.

Ms. Heberlein asserts that Decedent "gave" Mr. Thornton the home that Mr. Thornton currently resides in. That is not the case. Mr. Thornton and his wife purchased that home from Decedent. CP 170-234

(*Morgan Declaration*, **Exhibit I.**) There was simply no evidence of the massive gift giving alleged by Ms. Heberlein and the evidence that she did rely upon (the alleged gift of the house) was false. There are no documents supporting the same.

As with *Lint*, *supra*, Ms. Heberlein only became the object of Decedent's bounty to this degree in the January 20, 2010, Will as a consequence of what are clearly concerted efforts to isolate and estrange Decedent from Marty and his family and to control every facet of his life. *Lint*, *supra*, at 534-535. There is no difference between the representations decedent made in *Lint* (that decedent's family wanted to put her in a home in order to get their hands on her estate) and the representations made in this case — that Marty and his family only desired Charles's money and that Charles's interactions with Marty and Marty's family were summarily ended. If they were not ended, Ms. Heberlein certainly would have at least consulted Mr. Thornton on whether or not he wanted to say a final goodbye to his father.

As a result, summary judgment should have never been granted to the Personal Representative. The presumption of undue influence and fraud in the inducement should have been applied to bar summary judgment and even if the presumption was not applied, material issues of fact exist which should have barred entry of summary judgment.

D. The trial court erred when it granted summary judgment to Mrs. Heberlein on the non-probate accounts of the decedent pursuant to Chapter 11.11 RCW.

Charles passed away on December 5, 2010. No Will was admitted to probate in this matter until September 13, 2011. As identified above, the reason why no Will was admitted to probate until such a time was due to Ms. Heberlein's well documented delays and refusal to respond to Mr. Thornton's inquiries. Mr. Thornton further agrees that he filed his Petition in this matter on January 11, 2012. The claim which the Personal Representative references in the Petition, however, is a claim for constructive trust, not a claim for entitlement to bank accounts because he is a testamentary beneficiary as that term is defined in the applicable statute.

As noted above, on August 16, 2011, the trial Court ordered the Personal Representative to file an inventory in this matter. The Personal Representative never filed any separate inventory. The Personal Representative attached a document entitled "inventory" to a Petition she filed with the Court on September 2, 2011. That "inventory" stated that there were no bank accounts or money in the Decedent's name when he died.

A subsequent deposition of the Personal Representative revealed that the "inventory" that was attached to the September 2, 2011 Petition was wholly inaccurate and that bank accounts in the Decedent's name:

> Q: And did Bob [decedent] have an separate accounts?
> A: Yes.

Q: Where?
A: Bank of America and Columbia.

CP 133-153 (*Declaration of Stuart C. Morgan in Support of Marty Thornton's Supplemental Opposition to Personal Representative's Motion for Summary Judgment Regarding Non-Probate Assets* ("Morgan Declaration"),(**Exhibit A.**)

The same summary judgment legal analysis applies to this issue as applies to the issue regarding the dismissal of Marty's will contest. Originally, Marty questioned why Ms. Heberlein even brought a motion for summary judgment on this issue.. If her representations in her "inventory" were truthful, then there were no bank accounts at issue. However, the deposition makes clear that she was not truthful in her "inventory" and a significant amount of bank accounts at issue exist. The Personal Representative was directed to file an inventory with the Court. The court directed filed inventory now appears to be untruthful. The Personal Representative cannot: (a) fail to meet her statutory obligations in filing an original will of the decedent; (b) file an untruthful court-directed inventory; and (c) then attempt to hide behind a statute of limitations after leading everyone astray.

In such situations, Courts will not apply statutes of limitation to bar claims. This is known as the "discovery rule" regarding statutes of limitations. "The discovery rule operates to toll the date of accrual until the plaintiff knows or, through the exercise of diligence, should have known all the facts necessary to establish a legal claim." *Giraud v. Quincy Farm and Chemical*, 102 Wn. App. 443, 6 P.3d 104 (2000)

(holding that the discovery rule tolled a statute of limitations and denying summary judgment to the defendant on that basis).

In this case, the record clearly shows that Marty made every effort to determine what was happening with the probate of his father's estate. In fact, the Court previously sanctioned the Personal Representative for her dilatory actions by awarding Marty his attorney's fees and costs related to instituting the probate of his father's estate when it was the Personal Representative's statutory obligation to do so. Moreover, it is now apparent that the Personal Representative misled Marty and, perhaps, others, as to the existence of any bank accounts through the "inventory" that she attached to the September 2, 2011 Petition.

Chapter 11.11 RCW is commonly known among practitioners as the "Super Will" statute. Chapter 11.11 RCW essentially allows a testator who has previously made pay-on-death designations with her financial institutions to re-designate the beneficiaries of such accounts through the testator's will. If a dispute arises between the pay-on-death beneficiary designated through the financial institution and the "testamentary beneficiary" (i.e., the person designated in the Decedent's last will and testament) to receive the account or accounts in general), then RCW 11.11.070 provides a time limit by which to bring the claim.

The statute, by its plain language applies only to a "testamentary beneficiary." This statute would only apply in this case if Marty was named in his father's Will; the will provided for him to receive funds in bank accounts; and the will was properly filed in a timely manner as the

statutes require. Had that been the case, a "testamentary beneficiary" would have notice of the situation and be able to file the claim.

In this case, though, Marty does not become a "testamentary beneficiary" as that term is defined in the statutes unless and until the current will admitted to probate is invalidated and the previous 1988 will is admitted to probate. It would be at that time that Marty would have the benefit of the time period found in RCW 11.11.070.

Marty most definitely complied with the statute insofar as he filed a claim related to such accounts within six months of the admission of a will to probate. The 10 month period from the date of the Decedent's death during which the Personal Representative failed to get a will admitted to probate should not be counted against Marty. Mr. Thornton did everything he could to get the probate of his father's estate started and by invoking this statute of limitations against him, the Court would be countenancing the Personal Representative's deceitful actions and allowing her to benefit from her own intentional delay and her refusal to comply with her statutory duties to begin the probate.

Moreover, when the Personal Representative filed an Answer and Affirmative Defenses to Marty's claim for constructive trust in his TEDRA Petition this matter on January 31, 2012, she did not plead the statute of limitations as an affirmative defense. CP 8-12 (Personal Representative's Answer to petition for Judicial Proceedings). The defense, even if applicable is waived as a result of her failure to plead it.

In re Estate of Palmer, 145 Wn. App. 249, 187 P.3d 758 (2008), making summary judgment the trial court granted in error.

What the Respondent does not provide to the Court is the statutory definition of the term, "testamentary beneficiary" which is found in RCW 11.11.010(10) which defines the term, "Testamentary Beneficiary" as, "a person named under the owner's will to receive a non-probate asset under this chapter, including but not limited to the trustee of a testamentary trust." By statutory definition, Mr. Thornton is NOT a "testamentary beneficiary" yet. Mr. Thornton is not named in the October, 2010 will which has been admitted to probate to receive a non-probate asset of the Decedent. In fact, Mr. Thornton is not named under the October, 2010 Will to receive anything. Moreover, if the Personal Representative's inventory that she filed in this matter is to be believed, no such accounts even existed.

By its own statutory definition, the statute the Personal Representative seeks to apply to Mr. Thornton does not apply. Even so, Mr. Thornton most definitely complied with the statute insofar as he filed a claim related to such accounts within six months of the admission of a will to probate. The 10 month period from the date of the Decedent's death during which the Personal Representative failed to get a will admitted to probate should never be counted against Mr. Thornton. The Personal Representative would then be benefiting from her own intentional delay and her refusal to comply with her statutory duties to begin the probate.

Additionally, the Personal Representative filed an Answer and Affirmative Defenses in this matter on January 31, 2012. She did not plead the statute of limitations as an affirmative defense to Mr. Thornton's claims of constructive trust. The defense, even if applicable is waived as a result of her failure to plead it. *Estate of Palmer*, 145 Wn. App. 249, 187 P.3d 758 (2008).

In his TEDRA Petition, Marty asserted a claim for constructive trust. A constructive trust is an equitable remedy imposed by the Court when, in fairness, someone should not be allowed to retain property. *Goodman v. Goodman,* 128 Wn.2d 365, 907 P.2d 290 (1995). Because so much time had elapsed between Charles's death and the time that issues were being put before the Court and there was an actual duty of disclosure by the Personal Representative, Marty did not know whether the Personal Representative had distributed estate assets to herself or others.

A claim of constructive trust is subject to a three year statute of limitations. RCW 4.16.080. *See also, Viewcrest Coop. Ass'n v. Deer*, 70 Wn.2d 290, 294-95, 422 P.2d 832 (1967). The three year statute of limitations on a constructive trust begins to run when the beneficiary discovers or should have discovered the wrongful act which gave rise to the constructive trust. *Goodman, supra,* at FN. 2. Frankly, Marty did not discover wrongful representation regarding the bank accounts until he deposed Ms. Heberlein. Regardless, the Court should have applied the three year statute of limitations found in RCW 4.16.080 to Marty's constructive trust claim rather than the statute of limitations found in

Chapter 11.11 RCW. The Court applied the wrong statute of limitations and the order granting summary judgment to Ms. Heberlein on that issue should be reversed.

E. The Court should reverse the orders of attorney's fees granted against Marty

The Court entered orders granting attorney's fees and costs against Marty. In the case of Marty's Will contest, Marty acknowledges that the Court's decision was not an abuse of discretion but instead argues that if this Court reverses the summary judgment entered dismissing Marty's will contest, the Court should reverse any award of attorney's fees and costs against Marty on that issue.

With respect to the trial court's grant of an award of attorney's fees and costs against Marty on the summary judgment dismissal of Marty's constructive trust claim, the Court should most definitely reverse the trial court's award of attorney's fees and costs to Ms. Heberlein on that issue. The trial court simply applied the incorrect statute of limitations requiring reversal. If this Court holds that the limitation provisions of Chapter 11.11 RCW somehow apply to a constructive trust claim, that will be the first Washington case deciding that issue. As a result, Marty should not suffer an award of attorney's fees and costs against him because the Court has created new law or a new interpretation of existing law.

Finally, Marty requests an award of attorney's fees and costs pursuant to RAP 18.1 and RCW 11.96A.150 related to this appeal.

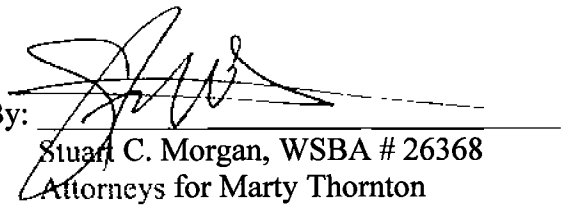
V. CONCLUSION

For the reasons stated above, Marty respectfully requests that the Court reverse the trial court's entry of summary judgment orders dismissing Marty's TEDRA Petition for a Will contest and his claim of constructive trust. The trial court should have imposed the presumption of undue influence and presumption of fraud in the inducement given the facts. That presumption and the facts provided establish that the Personal Representative was not entitled to judgment as a matter of law and that genuine issues of material fact exist; particularly when the facts are viewed in a light most favorable to Marty as they are required to be.

Moreover, this Court should reverse the trial court's grant of summary judgment dismissal of Marty's constructive trust claim pursuant to a Chapter 11.11 RCW analysis. First and foremost, the answer to Marty's TEDRA Petition never pled statute of limitations as an affirmative defense. Second, the trial court applied the wrong statute of limitations as claims for constructive trust are subject to the 3-year, discovery-related statute of limitations. Third, Marty would not become a "testamentary beneficiary" until the October, 2010 Will was revoked and then and only then, a Chapter 11.11 RCW statute of limitations may begin to run.

RESPECTFULLY SUBMITTED this 22nd day of October, 2014.

EISENHOWER & CARLSON, PLLC



By: _____
Stuart C. Morgan, WSBA # 26368
Attorneys for Marty Thornton

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below:

Mr. C. Tyler Shillito Smith Alling, P.S. 1515 Dock St., Suite 3 Tacoma, WA 98402	☑ U.S. First Class Mail, postage prepaid ☐ Via Legal Messenger ☐ Overnight Courier ☑ Electronically via email ☐ Facsimile

DATED this 22nd day of October 2014 at Tacoma, Washington.

Amy Jean Shackelford

Amy Jean Shackelford, PLS
Legal Assistant to Stuart C. Morgan

EISENHOWER & CARLSON

October 22, 2014 - 4:58 PM

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Court of Appeals Case Number: 46337-7

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Comments:

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