

No. 45069-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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In re Estate of:

EVA JOHANNA ROVA BARNES,

Deceased.

VICKI ROVA MUELLER, KAREN BOW, MARSHA ROVA,  
AND JOHN ROVA,

Respondents,

v.

MICHELLE WELLS and DENNIS WELLS,

Appellants.

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APPEAL FROM THE SUPERIOR COURT  
FOR KITSAP COUNTY  
THE HONORABLE BROOKE TAYLOR

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AMENDED BRIEF OF RESPONDENTS

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## I. INTRODUCTION

A 94-year old woman, physically infirm and suffering from cognitive impairment, changed her will within three months of her death to leave her entire estate to her mail carrier, upon whom she was entirely dependent, and who encouraged the testatrix's paranoid delusion that her nieces and nephew wanted to "throw her under the bus." After carefully considering the credibility of 16 witnesses, and weighing the probative value of 90 exhibits over the course of a five day trial, Judge Brooke Taylor invalidated the will of Eva Johanna Rova Barnes, entering 83 unchallenged findings of fact, and ultimately concluding that the will contestants, her nieces and nephew, produced clear, cogent, and convincing evidence that Eva's will was the product of undue influence by her longtime mail carrier, Michelle Wells. (Appendix A)

Michelle brings a factual appeal dressed up as a challenge to Judge Taylor's legal analysis. Although Michelle does not challenge any of the trial court's findings of fact, her sanitized statement of the case ignores the facts that lie at the heart of the trial court's ultimate finding that the Rovas' met their burden of proving undue influence by clear and convincing evidence.

Michelle concedes that Judge Taylor correctly applied the analytical framework articulated in *Dean v. Jordan*, 194 Wash. 661, 672, 79 P.2d 331 (1938), in concluding that a rebuttable presumption can be raised by “suspicious” facts. She also concedes that suspicious facts sufficient to create a presumption of undue influence abound here.

Contrary to Michelle’s argument on appeal, the trial court found not only that Michelle failed to rebut the presumption of undue influence with credible evidence, but that the Rovas established that Michelle exercised undue influence over Eva by clear, cogent, and convincing evidence. There was no legal error. This Court should affirm the trial court’s judgment and award the Rovas attorney fees on appeal.

## **II. RESTATEMENT OF ISSUES**

A. Should this Court defer to the trial court’s unchallenged findings that Michelle failed to present sufficient evidence to rebut the *Dean* presumption of undue influence?

B. Do the trial court’s unchallenged findings of fact support its conclusion that there was clear, cogent, and convincing evidence that Eva’s will was the product of undue influence on the part of Michelle?



### III. RESTATEMENT OF THE CASE

#### A. Restatement of Facts.

Michelle's one-sided statement of facts spins and distorts a small portion of the record to tell the story Michelle wishes were true. The Honorable Brooke Taylor (sitting in Kitsap County Superior Court) ("the trial court") rejected Michelle's sanitized version of her relationship with Eva after carefully considering all of the evidence and weighing the credibility of the witnesses.

Because Michelle does not challenge any of the trial court's findings of fact (Appendix A), they are verities on appeal. This restatement of the case properly presents the evidence supporting those findings and all reasonable inferences from that evidence, in the light most favorable to the Rovas, the prevailing parties below:

- 1. The respondents are the surviving nieces and nephew of Eva Barnes. Appellant is her former mail carrier.**

Eva Barnes was born on July 17, 1916, in Bellingham, Washington. (FF 1, CP 1127) She died on June 27, 2011 at her home at 94 years of age, just a few weeks before her 95<sup>th</sup> birthday. (FF 1, CP 1127) Eva was survived by her brother Victor's wife, Marian Rova and Marian Rova's children, respondents Marsha

Rova, Vicki Mueller, John Rova and Karen Bow (“the Rovas”). (FF 3, CP 1128)

The Rovas grew up in Poulsbo near Eva, and spent a significant amount of time at Eva’s property that has been known for decades locally as the Rova Property. (FF 4, CP 1128) The Rova Property was homesteaded by Eva’s parents when Eva was two years old. (FF 5, CP 1128) Eva lived there from 1918 until her death in 2011. (FF 5, CP 1128-29) The Rovas are direct lineal descendants of the homesteaders. (FF 5, CP 1128-29) The Rova Property consists of acreage, Eva’s residence, and a small rental house. (FF 5, CP 1128) After her brother’s death in 1993, Eva owned a one half interest in the rental property and her brother’s adult children, the Rovas owned the other half interest. (RP 27, 74, 118)

Eva lived on the Rova property with her husband Ray Barnes and their only child, Karolyn. (FF 2, CP 1128) Eva’s husband Ray died at the age of 96 in 2005. (FF 2, CP 1128) Eva’s daughter Karolyn passed away at the age of 48 in 2004. (FF 2, CP 1128)

Appellant Michelle Wells met Eva in 1997 through her employment as a rural mail carrier for the United States Postal Office. (FF 39, CP 1136; RP 625-26) Michelle is 51 years younger

than Eva. (FF 40, CP 1136) Michelle and her husband Dennis Wells are not related to Eva. (FF 40, CP 1136) Michelle and Eva engaged in friendly conversation when Michelle brought Eva her mail. (FF 39, CP 1136) After Ray died, Michelle's visits with Eva increased both in frequency and duration. (FF 39, CP 1136)

**2. The Rovas had a close and loving relationship with their father's sister, their Aunt Eva.**

As children, the Rovas visited their aunt and uncle frequently and played with Karolyn. (FF 4, CP 1128; RP 129) They went on camping trips together. (RP 168) As adults, the Rovas maintained a close and loving relationship with Eva. (FF 3, CP 1128) Following Ray's and Karolyn's deaths, they provided care for Eva, checked in on her frequently, celebrated holidays and special events together, and traveled together. (FF 12, CP 1130; RP 32-36, 43, 168-69, 202) They also jointly owned the rental house on the Rova Property. (FF 5, CP 1128-29)

Karen Bow and her two daughters saw Eva frequently; Eva took them to Seattle, to dinner at the Space Needle, and spoiled the girls at the Disney Store. (RP 169) John, who lived only ten minutes away, helped with maintenance and property repairs on the farm. (RP 205) Vicki visited with Eva every month. (RP 43)

On July 17, 2006, Eva celebrated her 90<sup>th</sup> birthday at Marsha Rova's home in Kitsap County. (FF 12, CP 1130; RP 40) Each of the Rovas and their respective families attended the large and successful celebration. (FF 12, CP 1130) Eva celebrated with the Rovas on Christmas Eve. (RP 43)

**3. Eva's prior wills left her estate to her nieces and nephew, the Rovas, as her only surviving relatives.**

Eva executed her first known will when her husband Ray and her daughter Karolyn were both alive, on March 4, 2004. (FF 6, CP 1129) Under this will, Eva's entire estate was to be distributed upon her death (1) to her husband, Ray; (2) if Ray predeceased Eva, then to her daughter, Karolyn, in trust, to be managed by Vicki Mueller, as trustee; (3) if both Ray and Karolyn predeceased Eva, in four equal shares, one share to each of the Rovas. (FF 6, CP 1129) Eva also executed a durable power of attorney on March 4, 2004. (FF 7, CP 1129) Eva and Ray were named as each other's primary attorney in fact. (FF 7, CP 1129) Vicki Mueller was named as the alternate attorney in fact for both Eva and Ray. (FF 7, CP 1129)

Within eighteen months of the first will, both Ray and Karolyn had passed away. (FF 2, CP 1128) On September 26, 2005, Eva executed a second will that directed her entire estate be

distributed in four equal shares, one share to each of the Rovas — Vicki, Marsha, Karen, and John. (FF 8, CP 1129) This second will nominated Vicki to serve as Eva's personal representative, and Marsha as the alternate personal representative. (FF 8, CP 1129) Eva also executed an individual durable power of attorney on September 26, 2005, which was effective immediately. (FF 9, CP 1129) Eva named Vicki as her attorney in fact, and Marsha as the alternate attorney in fact. (FF 9, CP 1129-30)

**4. Eva and the Rovas stayed close following Eva's surgery in 2006.**

Following the successive deaths of her husband and daughter, Eva exhibited signs of depression. (FF 2, CP 1128; RP 203) On April 29, 2006, Eva had major bowel obstruction surgery at Harrison Medical Center in Bremerton. (FF 10, CP 1130) The medical professionals treating Eva suspected that she was suffering from depression. (FF 10, CP 1130) Eva's physician, Dr. Kina, prescribed an antidepressant. (FF 10, CP 1130) She brightened and was appreciative when her nieces brought her purse and clothes to the hospital following surgery. (RP 38-39, 131)

On May 8, 2006, Eva was discharged from Harrison and admitted to a rehabilitation facility, Martha & Mary, to recover from

the bowel obstruction surgery. (FF 11, CP 1130) She was discharged from Martha & Mary on May 23, 2006, and returned to her home. (FF 11, CP 1130)

The Rovas maintained their close relationship with Eva through 2008. Vicki was in frequent contact with her aunt, speaking with Eva on the phone when she couldn't visit because of work demands. (RP 43) Eva frequently called Vicki at work. (RP 43) Marsha, who lived only 15 minutes away, brought her boys to visit Eva on a regular basis. (RP 130-32) Because of snow, Eva did not want to travel to the family Christmas Eve celebration in 2008, but insisted that Vicki come by her home to pick up presents for the rest of the family. (RP 43)

**5. Eva's mental and emotional health deteriorated significantly after Eva suffered a fall at her home.**

In 2009, Eva began exhibiting unusual behavior that caused the Rovas to become concerned about their aunt's well being. She became forgetful and confused. (RP 44) Eva allowed her home to reach a level of clutter that the Rovas found disturbing. Newspapers, mail, magazines and personal possessions were piled throughout the house, making the halls narrow and difficult to pass through. (RP 44-45, 49)

On March 26, 2009, Eva suffered a serious fall in the kitchen of her home. (FF 13, CP 1130) She was alone and unable to get up off the floor to summon assistance. (FF 13, CP 1130) Eva lay helpless on her kitchen floor for two and a half days before a neighbor looked in the window to find Eva on the floor. (RP 384)

Emergency responders broke into Eva's home and rushed her to Harrison Medical Center. (FF 14, CP 1131) Eva was severely dehydrated and in critical condition. (FF 14, CP 1131) She remained at Harrison Medical Center for three days. (FF 15, 1131) While at the hospital, Eva was confused about her own finances, and could not remember why she had written a check for over two thousand dollars. (RP 48, 135) The medical professionals at Harrison observed and documented significant cognitive impairment. (FF 15, CP 1131)

The fire department personnel, who transported Eva to the hospital, found the condition of Eva's home so extreme that they would not allow Eva to return home unless changes were made. (FF 25, CP 1133; RP 346) The clutter, stacked from floor to ceiling, made it impossible to get from the living room to the bedroom. (RP 164) Stacks of magazines and papers were near heat sources including the baseboards and wood stove. (FF 27, CP 1133) They

found a dead mouse and cat food bags that were ripped open. (RP 50, 164)

As Eva became hydrated and rested, her strength returned and in less than a week she had sufficiently recovered from her fall to be moved to Martha & Mary for rehabilitation on April 1, 2009. (FF 16, CP 1131) The Rovas visited with Eva regularly during her twelve day stay at Martha & Mary. (FF 18, CP 1131-32) They feared for Eva's health and safety, as did all of the medical professionals that treated her after her fall. (FF 18, 1131-32) The medical professionals that treated Eva during her stay at Martha & Mary, including her physician Dr. Kina, agreed that Eva was not strong or healthy enough to return home and that it would be in her best interest to temporarily reside at some kind of assisted living facility. (FF 18, 32; CP 1131-32, 1134) They also noted her cognitive impairment. (FF 17, CP 1131; Ex. 1 at 201, 226, 230, 267)

The medical staff at Martha and Mary documented the first responders' concerns that her home was "a complete disaster,' with corridors just a few inches wide between piles of newspapers and magazines, rotting food inside the refrigerator and out, . . . [and] smelling overwhelming of bodily wastes." (Ex. 1 at 201) A social worker at Martha & Mary recommended the Rovas make a referral



to Adult Protective Services based on the condition of Eva's home. (FF 24, CP1132; Ex. 1 at 199)

Eva was a strong minded individual. (FF 19, CP 1132) Despite the recommendations of the medical staff at Martha & Mary, Dr. Kina, and the Rovas, Eva demanded that she be allowed to return home. (FF 19, CP 1132) Eva's medical records reflect the Rovas' deep concern for Eva while recovering at Martha & Mary. (FF 23, CP 1132) A Martha & Mary social worker noted "[f]amily expresses desperation in their efforts to help res[ident]. . . . We don't know what to do!" (Ex. 1 at 199) Dr. Kina reluctantly discharged Eva from Martha & Mary. (FF 20, CP 1132; RP 680-86)

John Rova, with the assistance of Michelle, frantically tried to make Eva's home safe for her return. (FF 26, CP 1133) They threw away rotting food and garbage, bagged the stacks of newspapers and magazines that lined the hallways and took them to recycling in order to allow sufficient space to pass through the corridors. (FF 28, CP 1133; RP 210-11) John and Marsha drove Eva to her home from Martha & Mary on April 13, 2009. (FF 21, CP 1132)

After Eva's discharge from Martha & Mary until the time of her death, she met with Dr. Kina on approximately nineteen

different occasions. (FF 35, CP 1135) Throughout the course of his treatment of Eva, Dr. Kina's records reflect Eva's gradual mental deterioration. (FF 36, CP 1135) Starting in 2009, he repeatedly used the term "mild cognitive impairment" in describing Eva's mental condition. (FF 36, CP 1135; Ex. 1 at 892)

**6. As Eva became increasingly dependent upon her mail carrier, Michelle, she grew increasingly distant from her nieces and nephew.**

Between 2009 and the time of Eva's death, Michelle and Dennis were financially struggling. (FF 40, CP 1136) Michelle borrowed \$400 from Eva during 2009 because her husband was having surgery. (RP 761) Michelle was convicted of Theft in the Third Degree in Mason County District Court on June 29, 2009. (FF 40, CP 1136)

Following Eva's return home, Michelle became much more involved in Eva's life, while Eva grew more distant from her family. (FF 39, CP 1136) After her discharge in April 2009, Eva stopped calling the Rovas, stopped answering their phone calls, and refused to let them inside her home when they visited. (RP 73, 76-77, 98) Michelle changed Eva's phone service, further isolating Eva from her family and friends. (FF 69, CP 1144) Eva, who was living alone,

widowed, depressed, socially isolated, estranged from her family, frail, living in fear of a change to her living situation, and suffering from serious cognitive impairments, became increasingly dependent on Michelle, who became the only person Eva saw on a daily basis. (FF 38, 70, CP 1135, 1144) Michelle typically arrived at Eva's home in the morning before work, then would spend her lunch hour with Eva, and return at the conclusion of her shift. (FF 38, CP 1135; RP 653)

Following up on the referral it received while Eva was recovering at Martha & Mary, an Adult Protective Services caseworker repeatedly tried to interview Eva in April 2009, but she would not respond. (CP 522; RP 89) It was Michelle who answered all of the caseworker's questions until finally agreeing to set up a meeting with Eva, at which Michelle was present. (CP 522-23)

Eva was particularly suspicious of the Rovas. Eva felt her privacy had been invaded by John's attempt to make her home suitable for her return. (FF 30, CP 1134) Eva repeatedly accused the Rovas of deliberately destroying her address book, but there is no evidence that they did or had any motive to do so. (FF 31, CP 1134) Eva's accusations ignored the fact that Michelle was also

involved in cleaning her home to prepare for her return. (FF 30, CP 1134)

Eva, who had always been affectionate to her grand nieces and nephews, called Marsha's two teenage sons terrible names when they arrived to help maintain Eva's yard. (RP 145) Eva became furious with John after he questioned her request to dig up and replace a 1500 yard length of pipe in a ditch dating from the 1930's to connect the well to Eva's house. (RP 206)

Eva believed that the Rovas were committed to removing her from her home and placing her in a nursing home for the rest of her life. (FF 32, CP 1134) This belief was also untrue. (FF 32, CP 1134) There is no evidence that the Rovas, or anyone, recommended that Eva be resigned to a nursing home or assisted living facility for the rest of her life. (FF 33, CP 1134) Eva's fear and suspicions of the Rovas developed into an acute paranoia. (FF 34, CP 1134-35)

In July 2009, while visiting Eva, Karen Bow noticed that the electric frying pan was plugged in on a little wooden stool by a wood stove in the family room, and that Eva was cooking her eggs in the coffee pot. (RP 179) Eva's hearing had also greatly deteriorated, and eventually Eva could not hear the phone ring five feet away. (RP 369) In 2010, another family member, Jerilee Swearengin,

wrote to Dr. Kina to share her concern about Eva's mental well being, the condition of the house, and the lack of food. (RP 371-72) Dr. Kina considered performing a mental status exam. (RP 668) He never did. (RP 668)

In May 2010, Eva stopped driving. (FF 51, CP 1140) Eva became solely dependent on Michelle for transportation. (FF 51, CP 1140) In the last year of her life, Michelle drove Eva to every meeting Eva had with Dr. Kina and her attorney, Jeff Tolman. (FF 51, CP 1140) From this time forward, Dr. Kina never met with Eva outside the presence of Michelle. (FF 51, CP 1140) Around this same time, Eva was victimized by a young neighbor boy, who stole cash and checks from Eva. (Ex. 21 at 9, 21; RP 373; CP 520)

On July 31, 2010, Michelle's husband drove Eva to the wedding of Karen's daughter, a major family event. (FF 44, CP 1137-38) She was confused about the time, arriving three hours early. (RP 67-68) When the Rovas tried to involve Eva in the wedding festivities, Eva showed no interest, and isolated herself from her family, sitting by herself. (FF 44, CP 1137-38; RP 70, 180) She did not recognize her nephew John. (RP 316-17) After the wedding, the gap between Eva and the Rovas continued to grow. (FF 44, CP 1137-38) The Rovas felt that Eva's lack of involvement

was Eva's choice. (FF 44, CP 1137-38) Michelle claimed that Eva felt ostracized by her family at the wedding. (FF 44, CP 1137-38)

Eva's letters to the Rovas and other family members and friends became increasingly incoherent, illegible, and irrational. (FF 53, CP 1140-41) In Eva's writings, her thoughts were scattered and she ranted. (FF 53, CP 1140) She called the Rovas all manner of horrible names and accused them of an array of misdeeds, some small, some horrendous, but none of them true. (FF 53, CP 1140-41) In one, Eva called Vicki a drunk and accused her of stealing. (RP 78-79; Ex. 69-71) John Rova got a letter from Eva bizarrely addressed to "Ebenezer Old Folks Home, Bed No. 3" with a photo of John. She called him fat, drunk and a bastard. (RP 326)

**7. Michelle encouraged Eva's hostility toward the Rovas by falsely accusing them of seeking to sell the jointly owned rental property.**

The Rovas and Eva had enjoyed a good working relationship as co-owners in the rental property. (FF 42, CP 1136-37) Eva was always fastidious, organized, responsible, and prompt with the business and financial matters relating to the rental property. (FF 42, CP 1137) Eva had managed the jointly owned rental, paying the taxes and insurance, collecting rent from the tenants, and

distributed it to herself and the Rovas, after accounting for expenses. (FF 42, CP 1137)

During 2010, Eva stopped tending to the rental property, (FF 42, CP 1136), and stopped forwarding to the Rovas their share of the rental income. (FF 43, CP 1137) Eva missed paying part of the property taxes for the rental property and the Rovas could not determine if the rental property was still insured. (FF 43, CP 1137) The Rovas assumed that the property was vacant or the tenants were not paying rent. (FF 43, CP 1137)

On October 30, 2010, Marsha and her husband Scott went to the rental property and discovered to their surprise that the current tenants were a couple that had previously rented the house and after some years had moved back. (FF 45, CP 1138) They had previously paid their rent on time. (FF 45, CP 1138) The tenants told Marsha and Scott that, as before, they consistently paid their rent to Eva. (FF 45, CP 1138) But Eva was not passing the rent on to the Rovas as she had in the past. (FF 45, CP 1138)

The tenants told Marsha and Scott that they were frustrated with Eva, who had falsely accused them of not paying rent and of stealing items. (RP 795) Eva had sent Michelle to the rental property to confront the tenants about not paying rent. (RP 795)

Michelle told the tenants that the Rovas intended to evict them so they could sell the land and develop the property. (RP 796; Ex. 78) Michelle told the tenants that she would go to court and fight for Eva because the Rovas were greedy villains. (FF 46, CP 1138-39; Ex. 78) Marsha documented the tenants' statements in an email sent that day to her siblings. (Ex. 78) Michelle's accusations were not true and further poisoned Eva's relationship with the Rovas. (FF 47, CP 1139)

**8. Eva substituted Michelle for Vicki as Eva's attorney-in-fact. In a meeting with Eva's attorney to discuss Eva's power of attorney, Michelle repeated the false accusation that the Rovas destroyed Eva's address book.**

In November 2010, Eva notified her lawyer Jeff Tolman that she wanted to remove Vicki as her attorney in fact and name Michelle in her place. (FF 48, CP 1139) Tolman set up a meeting for November 17, 2010. (FF 48, CP 1139) Vicki had previously talked to Tolman regarding Eva's power of attorney following her 2009 hospitalization and she reported to Tolman that Eva was suffering from dementia. (RP 573) Tolman believed he could mediate the differences between Eva and Vicki. (FF 49, CP 1139) Vicki readily agreed to meet with her aunt at Tolman's office. (RP 576) She was happy for Tolman's offer to mediate, believing that



Michelle was a good friend to Eva who would encourage a reconciliation. (RP 576)

Although Tolman told Eva in advance that he would be inviting Vicki to attend the meeting, Eva expressed shock and anger when she arrived to find Vicki present. (FF 48, CP 1139) Eva told Tolman that she wanted nothing to do with any type of reconciliation with Vicki or her siblings. (FF 49, CP 1139)

Michelle, who had driven Eva to the meeting, was also present. (FF 50, CP 1140) In Eva's presence, Michelle told Tolman that the Rovas threw out Eva's address book: "Eighty years of memories-imagine gone!" (FF 50, CP 1140; RP 119) These comments further upset Eva, who continued to direct her anger towards Vicki. (FF 50, CP 1140)

On December 10, 2010, Michelle drove Eva to Tolman's office where Eva executed the new durable power of attorney naming Michelle as Eva's attorney in fact. (FF 52, CP 1140) Eva's new power of attorney did not list an alternate attorney in fact. (FF 52, CP 1140)

Vicki relayed Michelle's statement and Eva's anger toward her to her siblings. (RP 88) They met with an attorney, who suggested making a referral to Adult Protective Services. (RP 88-

89) A caseworker again attempted to visit Eva's residence on numerous occasions but Eva did not answer at the door or return the caseworker's phone calls. (FF 70, CP 1144) Michelle conceded that the case worker who sought to interview Eva felt that Michelle was obstructing access to Eva. (RP 546, 752)

On Christmas Eve 2010, Marsha Rova's husband, Scott Morgan, and their two sons, visited Eva at her home. (RP 350-51) When they knocked on the door, however, Eva gave them a vacant look; there was no facial or verbal recognition for about two to three minutes. (RP 351) The only person close to Eva on a consistent basis during this time was Michelle. (FF 70, CP 1144)

**9. Eva directed her attorney to prepare a new will leaving her entire estate to Michelle.**

Eva asked her attorney Tolman to prepare a new will that left everything to Michelle. (FF 63, CP 1143; RP 581-82) Tolman repeatedly put her off, but finally scheduled a meeting with her for March 1, 2011. (RP 581-82) Before going to Tolman's office, Michelle first drove Eva to see Dr. Kina for treatment of a lesion on her left leg. (FF 55-56, CP 1141; Ex. 1 at 875) Dr. Kina referred to Michelle as Eva's guardian. (FF 56, CP 1141) Dr. Kina was concerned about infection and recommend hospital admission and

inpatient care. (Ex. 1 at 877) When Eva adamantly refused, Dr. Kina gave her an injection of penicillin and instructed Michelle about further treatment at home. (Ex. 1 at 877)

Michelle drove Eva from Dr. Kina's office to meet with Tolman to execute her new will. (FF 57, CP 1141-42) Eva was not feeling well after receiving the injection. (FF 57, CP 1141) Eva could not remember one of her niece's names, and Tolman was concerned about her competency. (FF 57, CP 1141-42) He asked her to come back another day when she was feeling better. (FF 57, CP 1141-42)

On March 3, 2011, Eva once again saw both Dr. Kina and Tolman. (FF 58, CP 1142) Dr. Kina noted "mild cognitive impairment" and that Michelle "reported concerns about forgetfulness. . . . She has some difficulty with working out her will with her lawyer as she had difficulty remembering the date of her birth." (Ex. 1 at 879) Michelle asked Dr. Kina if he would prescribe Eva "a medication for [Eva's] memory." (Ex. 1 at 879) Dr. Kina noted that "[p]atient was not herself too concerned about memory or cognitive difficulties," and that Eva's "[m]ental status was not formally assessed on this visit as she had to leave for an appointment in a few minutes." (Ex. 1 at 880-81) Dr. Kina prescribed Eva Aricept. (FF 59, CP 1142)

Immediately following her meeting with Dr. Kina, Michelle drove Eva to Tolman's office. (FF 60, CP 1142) Still concerned about her competence, Tolman engaged Eva in a significant colloquy before allowing Eva to execute her new will. (FF 60, CP 1142)

Unlike any of her previous wills, this will contained no provision for the Rovas, who were completely disinherited. (FF 63, CP 1143) Eva's new will named Michelle and her husband as the sole beneficiaries. (FF 63, CP 1143) The March 3, 2011 will also designated Michelle to act as personal representative and her husband as the alternate. (FF 63, CP 1143) Because of what he described as "the elephant in the room," (RP 584), Tolman prepared a memorandum for Eva's signature which set forth what he believed to be Eva's reasons for the radical departure from her prior estate plans. (FF 62, CP 1143)

**10. Michelle, who was paying her friends and family using Eva's power of attorney, accused the Rovas of "throwing Eva under the bus."**

In January 2011, Michelle began writing Eva's checks as her attorney in fact. (FF 54, CP 1141) Michelle wrote checks from Eva's account to a number of family and friends who assisted Michelle in caring for Eva, including her husband, her brother, her son, and a

friend named Sarah Stevens. (RP 748-49) Michelle received many gifts from Eva prior to Eva's death, including her husband Ray's ring, a new dress, a purse, and cash. (RP 751)

The Rovas knew that Eva had executed a new durable power of attorney, but they were not aware of Eva's new will. (FF 67, CP 1144) In an attempt to reach out and reestablish, at the very least, a workable business relationship with Eva, the Rovas wrote a letter to Eva about the rental property on March 22, 2011. (FF 66, CP 1143-44) The letter ended: "Please let us know of anything that we may help you with. We love you, and want to help you as much as we can. Love, John, Karen, Marsha & Vicki." (FF 66, CP 1143-44; Ex. 89) It is unknown whether Eva ever saw this letter. (FF 68, CP 1144)

On May 2, 2011, Michelle drove Eva to Eva's church, First Lutheran Church, in Poulsbo for a recorded interview about church history. (Ex 12; FF 71, CP 1145) In the interview, Eva was often confused and her statements suggest that she was significantly impaired. (FF 71, CP 1145) Had Eva executed her last will on May 2, 2011, instead of two months earlier, the recording would have established by clear, cogent, and convincing that she lacked testamentary capacity. (FF 71, CP 1145)

Eva obtained substantial assistance from Michelle in the recorded interview. (FF 72, CP 1145) At times, Michelle corrected Eva, filled in numerous blanks in Eva's memory and spoke for Eva. (FF 72, CP 1145) At one point in the interview, Michelle told the interviewer that Eva's nephew, John, had tried to "throw [Eva] under the bus a few times," and that the Rovas were trying to put Eva in a nursing home. (FF 72, CP 1145; RP 506)

**11. Eva died on June 27, 2011, two days after Michelle wrote a check on Eva's account to pay Michelle's home mortgage.**

On May 25, 2011, Eva fell on the sidewalk outside her home. (FF 74, CP 1146) Eva refused to go to the hospital or to see Dr. Kina at his office. (FF 74, CP 1146) From May 25, 2011, to the date of her death, Eva was unable to walk. (FF 74, CP 1146)

Dr. Kina made a house-call to examine Eva on May 25, 2011, noting that Eva "has had long-standing mild cognitive impairment. This seems to be gradually progressing. Probably early Alzheimer's dementia." (FF 74, CP 1146; Ex. 1 at 891) Vicki visited Eva after her fall, but Eva was unable to recognize her. (RP 105) On June 22, 2011, Dr. Kina made a certification of terminal illness and believed hospice care was appropriate as Eva was close to death. (FF 76, CP 1146)

On June 25, 2011, Michelle wrote a check for \$2,641.94 from Eva's personal bank account. (FF 77, CP 1146-47) The check was payable to Chase Financial for Michelle's mortgage payment. (FF 77, CP 1146-47) The payment posted on June 27, 2011, the same day Eva passed away. (FF 78, CP 1147)

**B. Procedural History**

Eva's March 3, 2011 will was admitted to probate on July 1, 2011 in Kitsap County Superior Court. (CP 1-2) Michelle was appointed personal representative and given nonintervention powers. (FF 1, CP 1127-28; CP 7)

The Rovas petitioned to set the will aside for lack of testamentary capacity and as the product of undue influence. (CP 9-11) Judge Haberly granted Petitioners' motion to remove Michelle as personal representative and she was replaced by her husband. (FF 1, CP 1127-28; CP 1368-70)

The Honorable Brooke Taylor presided over a five day trial, beginning on February 11, 2013. In a fifteen-page oral decision, Judge Taylor found that Eva had the capacity to make a will on March 3, 2011, but that the will was a product of Michelle's undue influence. (RP 857-72)

The trial court found the issue of capacity a close one. Given Eva's obvious cognitive impairment two days before she signed the will, and several weeks later in the recorded interview at the church, Judge Taylor found that the Rovas likely established Eva's lack of testamentary capacity by a preponderance of the evidence. But he recognized that that the clear, cogent and convincing standard required more, and that the Rovas had failed to meet that burden. (RP 868) Judge Taylor placed great weight on the testimony of Eva's attorney Jeff Tolman:

I find that I must defer to the judgment of Mr. Tolman, who was there, who knows this person, who I never met, who is smart and experienced as a lawyer, who is a [consummate] professional and who took extreme care in the execution of this Will. I cannot find, based on his testimony and all of the other evidence, that she lacked the capacity to make the Will on March the 3rd, 2011.

(RP 868)

Judge Taylor analyzed the issue of undue influence separately, recognizing that the Rovas had the burden of proving by clear, cogent and convincing evidence that influence was "exerted at or close to the time of the Will and it must interfere with the free will of the person making the Will and prevent that person from exercising his judgment and choice." (RP 869) Applying the factors identified by the Court in *Dean v. Jordan*, 194 Wash. 661, 79



P.2d 331 (1953), he found that Michelle served as a fiduciary, that she actively participated in the preparation and procurement of the will by providing all of the transportation, and that she received an unnatural distribution. (RP 869) In addition, he found that Eva was in failing health, her mental vigor was “certainly borderline” and expert evidence established that she was “extremely vulnerable to influence.” (RP 870) He found that Michelle, as Eva’s “caregiver heavily involved in her daily life,” had the “opportunity for influence . . . around the clock.” (RP 870)

Judge Taylor recognized that Michelle was a “true friend” to Eva, but as Michelle’s “financial circumstances became desperate,” she “fanned the flames” further alienating Eva from her family:

I think you started out with the best of intentions. I think you were a true friend to this lady and I think many of the things you did were motivated by the highest of motives, but I think you got caught up in a situation where as your financial circumstances became desperate, as this lady became alienated from her family based on things that you knew were not true, . . . I think you fed the fire. I think you fanned the flames. I think you made it easier and easier for this lady to believe all these horrible things that she said about her nieces and nephews.

(RP 872) Judge Taylor cited several specific events in which Michelle alienated Eva from her family to support his finding:

Otherwise, you wouldn’t have said the things you said to the tenants. You wouldn’t have said the things you said to the

interviewer at the church and you had the opportunity – you had the fiduciary relationship – you were in charge the last few months and I think the Will was heavily influenced by your involvement.

(RP 872-73)

The trial court entered Findings of Fact and Conclusions of Law on June 5, 2013. (CP 1127-54) (App. A) At the presentation hearing, Michelle specifically objected to conclusion of law 21: “Clear cogent and convincing evidence establishes that the will signed by Ms. Barnes on March 3, 2011 was the product of ongoing undue influence by Michelle Wells.” (CP 1187) Michelle argued, as she does on appeal, that “the Court did not make this finding.” (CP 1373) Judge Taylor disagreed:

Although I didn’t specifically state that in my oral opinion, it was my intention to do so. I do find that to be the case, and I am going to leave that as currently written. Again, keeping in mind that when I made the decision to rule from the bench, I was doing that to accommodate the parties.

(6/5 RP 9)

The trial court denied the Rovas’ motion for attorney fees, and ordered Dennis Wells to provide an accounting. (CP 1189) Michelle has appealed.<sup>1</sup>

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<sup>1</sup> The Rovas have dismissed their cross appeal.

#### IV. ARGUMENT

- A. Standard of review: As all of the trial court's unchallenged findings are verities on appeal, the trial court's judgment must be affirmed if the findings support its conclusion that Michelle exercised undue influence.**

The trial court concluded not only that Michelle failed to rebut the presumption, but that the Rovas established by clear and convincing evidence that Eva's will was the product of undue influence. Once this Court properly disposes of Michelle's contention that the trial court's decision was based *solely* on the presumption of undue influence, this Court's review is limited to determining whether the unchallenged findings of fact, viewed in the light most favorable to the Rovas, support the trial court's conclusion that Eva's will was invalid based on *either* of the two grounds articulated by the trial court. *See Holohan v. Melville*, 41 Wn.2d 380, 400, 249 P.2d 777 (1952) ("judgment, although based upon an erroneous ground, will nevertheless be sustained if correct upon any ground."); *In re Kessler's Estate*, 35 Wn.2d 156, 163, 211 P.2d 496 (1949) (reversing invalidity of will for lack of capacity, but affirming because will was product of undue influence).

Here, Michelle has not assigned error to any of the findings of fact, which are now verities on appeal. *In re Estate of Lint*, 135

Wn.2d 518, 533, 957 P.2d 755 (1998). This Court's review is therefore limited to determining whether those unchallenged findings support the trial court's conclusions of law. *Fuller v. Employment Sec. Dep't of State of Wash.*, 52 Wn. App. 603, 605, 762 P.2d 367 (1988).

This Court reviews not only the findings, but all reasonable inferences from the evidence that supports them, in the light most favorable to the Rovas, the prevailing parties. *Scott's Excavating Vancouver, LLC v. Winlock Properties, LLC*, 176 Wn. App. 335, 341, ¶ 11, 308 P.3d 791 (2013), *rev. denied*, 179 Wn.2d 1011 (2014). This Court does not hear or weigh evidence, find facts, or substitute its opinions for those of the trier-of-fact, *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, ¶ 16, 225 P.3d 266 (2009), *rev. denied*, 168 Wn.2d 1041 (2010), and the trial court's credibility determinations cannot be reviewed on appeal. *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003). The weight given to the testimony of an interested party is peculiarly within the province of the trial court:

When an interested party testifies, the rate at which that evidence is discounted, if at all, should be determined by the trial judge, who is far better qualified to make that judgment than we.

*In re Snyder's Welfare*, 85 Wn.2d 182, 188, 532 P.2d 278 (1975).

**B. The trial court correctly applied the burden shifting framework established in *Dean v. Jordan* in setting aside Eva's will.**

The trial court correctly followed the law. In *Dean v. Jordan*, the Court identified several facts which may give rise to a presumption of undue influence: (1) the beneficiary occupied a fiduciary or confidential relation to the testator; (2) the beneficiary actively participated in the preparation or procurement of the will; and (3) the beneficiary received an unusually or unnaturally large part of the estate. 194 Wash. at 672.

Those factors are not exclusive. The trial court may also consider the age, the health and mental vigor of the testator; the nature or degree of relationship between the testator and the beneficiary; the opportunity for exerting undue influence; and the naturalness or unnaturalness of the will. *Dean*, 194 Wash. at 672. No single *Dean* factor is determinative. *In re Estate of Haviland*, 162 Wn. App. 548, 560, ¶ 28, 255 P.3d 854 (2011). Instead, *Dean* requires that each case be decided based upon a "combination of facts shown by the evidence in a particular case to be of such a suspicious nature as to raise a presumption of undue influence."

*Haviland*, 162 Wn. App. at 560, ¶ 28 (emphasis and quotation omitted).

In the absence of credible rebuttal evidence, the “combination of facts” may be sufficient to overthrow the will. *In re Estate of Lint*, 135 Wn.2d 518, 536, 957 P.2d 755 (1998). But even if, after weighing the evidence, the trial court finds sufficient evidence to “balance the scales,” the court may set aside the will upon finding that the contestants established by clear and convincing evidence the “ultimate fact” – that the will was the product of undue influence. *In re Estate of Pflagher*, 35 Wn. App. 844, 847, 670 P.2d 677 (1983), *rev. denied*, 100 Wn.2d 1036 (1984).

Michelle erroneously argues that the court must identify additional evidence of undue influence “apart from” that establishing the presumption. (App. Br. 3) She ignores that the “ultimate fact” of undue influence may be proved by the very same evidence used to establish the presumption under the *Dean* factors, even if that evidence is entirely circumstantial. *See Pflagher*, 35 Wn. App. at 847. This is because “undue influence is rarely provable by direct evidence.” *Matter of Esala’s Estate*, 16 Wn. App. 764, 771, 559 P.2d 592 (1977).

In making this assessment, it is peculiarly the trial court's job to "judge credibility and weigh the probative value of the conflicting testimony." *Estate of Lint*, 135 Wn.2d at 542. "Anything more requires that this court of review weigh the evidence, pass on the credibility of witnesses and generally assume the function of the trier of fact who presided over the trial." *In re Melter*, 167 Wn. App. 285, 316, ¶ 70, 273 P.3d 991 (2012) (Sweeny, J., concurring).

Judge Taylor's findings and his oral decision both reflect his accurate enunciation of the principles and careful consideration of the factors established by the Court in *Dean*. Michelle makes no argument that the trial court did not properly identify the applicable principles of law.

Michelle also concedes that the evidence was sufficient to raise a presumption of undue influence. (App. Br. 15; CP 49; RP 842) This Court must reject her challenge to the trial court's resolution of the "ultimate fact" of undue influence because it is supported by overwhelming and unchallenged evidence.

**C. The trial court's findings support its conclusion that Michelle failed to rebut the presumption of undue influence.**

As Michelle concedes, once the Rovas established a presumption of undue influence, the burden shifted to Michelle to

produce credible evidence sufficient to “balance the scales and restore the equilibrium of evidence touching the validity of the will.” *Dean*, 194 Wash. at 672. But she ignores that the weight of that evidence, and the decision whether it has “balance[d] the scales” under *Dean*, is vested in the finder of fact, not the appellate court.

Here, Michelle presented no evidence to rebut the following *Dean* factors:

<b><i>Dean</i> Factor:</b>	<b>Rebuttal Evidence:</b>
Michelle occupied a fiduciary relation to Eva.	→ None.
Michelle actively participated in the procurement of the will.	→ None. <sup>2</sup>
Michelle received an unusually or unnaturally large part of the estate.	→ None.
Eva was elderly and in poor physical health.	→ None.
Michelle had the opportunity for exerting undue influence.	→ None.
Michelle was not related to Eva and the will was unnatural.	→ None.

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<sup>2</sup> Michelle argues that she did not “procure” the Will by driving Eva to all appointments with Eva’s lawyer and participating in a mediation with Vicki and Eva. (App. Br. 30) She ignores that this factor, like all the other *Dean* factors, depends upon “the facts and circumstances with which it is connected,” a factual determination that is exclusively within the province of the trial court. *Haviland*, 162 Wn. App. at 566, ¶ 39.



Michelle argues that she rebutted the presumption and “restored the equilibrium,” citing testimony that Eva was a “strong minded” character, that Eva’s lawyer believed that the Will was the product of Eva’s free volition, and that she and Eva had a genuine friendship. (App. Br. 18-20) At its essence, Michelle’s argument is a factual one that invites this Court to reweigh the evidence and judge for itself the relative credibility of the witnesses.

Judge Taylor considered Eva’s stubbornness (FF 19, CP 1132), and the fact that Michelle was a “true friend” to Eva. (RP 872) He also gave considerable weight to both Jeff Tolman’s and Dr. Kina’s opinions that Eva was competent to make her Will on March 3, 2011, but appropriately recognized that they were not privy to Michelle’s undue influence. (RP 868; FF 64, 81-82; CP 1143, 1147)<sup>3</sup> While Michelle argues that there is substantial evidence to support Tolman’s memorandum regarding Eva’s competence (App. Br. 19-26), this court is tasked with reviewing Judge Taylor’s decision, not Tolman’s. Where, as here, “[t]he trial judge weighed th[e] conflicting evidence and chose which of it to

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<sup>3</sup> See *Phlegar*, 35 Wn. App. at 851 n.1 (McIntruff, J. concurring in part), in which the decedent’s longtime lawyer, who drafted the will, expressed a similar belief that his “strong-willed” client “knew what he was doing.”

believe[, t]hat is the end of the story.” *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, ¶ 17, 225 P.3d 266 (2009), *rev. denied*, 168 Wn.2d 1041 (2010).

Michelle’s argument also ignores that Washington courts have held that evidence substantially similar to that offered by Michelle and considered by Judge Taylor is insufficient to rebut the presumption of undue influence. For instance, in *Haviland*, the proponent of the will also presented testimony of legal professionals and disinterested witnesses that the decedent was alert and in good mental health at the time of the will signing. Division One affirmed the trial court’s finding that the evidence was not sufficient to rebut the presumption, particularly in light of the testator’s age, declining mental acuity and complete dependence on the proponent of the will:

[D]iscrepancies in the record regarding testamentary capacity do not necessarily rebut the presumption of undue influence, especially where, as here, overwhelming evidence demonstrates that the testator suffered at least some decline in his mental faculties and depended on the beneficiary for his care.

162 Wn. App. at 567-68, ¶ 43. Similarly, in *Esala*, evidence of the decedent’s “strong personality and apparent testamentary capacity” were insufficient to rebut the presumption of undue influence. 16 Wn. App. at 770-71.

The same is true here. Evidence of Eva’s strong personality does not equate to “strength of mind” at the time she executed her will. As in *Haviland*, all of the witnesses agreed that Eva had suffered some decline in her mental faculties and completely depended on Michelle for her care.

The *Dean* Court instructed that “each case be decided based upon the combination of facts established in that case.” *Haviland*, 162 Wn. App. at 568 (*citing Dean*). Michelle urges this Court to ignore that instruction and engage in a de novo weighing of the evidence that the trial court found unpersuasive. As the court stated in *Esala*, “[t]his case is another striking example of the wisdom of the rule that the trial court, having the witnesses before it, is in a better position to arrive at the truth than is the appellate court.” 16 Wn. App. at 770.

Here, the trial court was in the best position to evaluate all of the evidence and the record indicates that it did so with care. As the court stated in *Quinn*, “[t]hat is the end of the story.” 153 Wn. App. at 717, ¶ 17.

**D. The trial court properly found by clear and convincing evidence that Eva’s will was the product of Michelle’s undue influence.**

**1. The trial court expressly found by clear and convincing evidence that Eva’s will was the product of undue influence.**

The trial court weighed the evidence and set aside the will after finding by clear and convincing evidence that Michelle exercised undue influence. The trial court’s express conclusion of law refutes Michelle’s argument that the trial court set aside Eva’s will “based solely” on a presumption:

Clear, cogent and convincing evidence establishes that the will signed by [Eva] on March 3, 2011 was the product of ongoing undue influence by Michelle Wells.

(CL 21, CP 1152)

The trial court’s findings and its oral decision make clear that Judge Taylor found Michelle’s actions “controlled the volition of the testator, interfered with her free will, and prevented an exercise of her judgment and choice,” regardless whether he used those specific words. (App. Br. 16, quoting *Estate of Lint*, 135 Wn.2d at 535) Refusing to sacrifice common sense by elevating the form of a trial court’s findings over its substance, the Washington Supreme Court rejected a similar argument in *Lint*.

In *Lint*, the trial court cited to *Dean* in its conclusions of law and set forth the *Dean* factors and the correct burden of proof, but failed to find that undue influence was established by clear, cogent and convincing evidence. *Lint*, 135 Wn.2d at 537. The Supreme Court affirmed, holding that the trial court's ultimate finding was "implicit from its citation to *Dean* where the correct burden of proof is set forth." 135 Wn.2d at 537.

Here, the trial court specifically cited the controlling law in its conclusions:

The influence must, at the time of the testamentary act, have controlled the volition of the testator, interfered with his or her free will, and prevented an exercise of his or her judgment and choice. *In re Estate of Lint*, 135 Wn.2d 518, 535, 957 P. 2d 755 (1988).

(CL 8, CP 1149) In addition, Judge Taylor correctly stated the standard of undue influence in his oral decision:

[A] will is invalid if it is the result of undue influence. Not just influence. Everybody is influenced by the people and things around them, but undue influence. Not just mere influence. The influence needs to be exerted at or close to the time of the Will and it must interfere with the free will of the person making the Will and prevent that person from exercising his judgment and choice.

(RP 869) See *Archer v. Willoughby*, 4 Wn. App. 596, 597, 484 P.2d 465 (1971) (oral decision may be read together with the findings of

fact to clarify trial court's findings) As in *Lint*, Judge Taylor was aware of the applicable legal standard and correctly applied it in his oral decision and his findings.

Judge Taylor reiterated his conclusion that the Rovas satisfied their burden of proving undue influence by clear and convincing evidence, in addition to finding that Michelle failed to sufficiently rebut the presumption, in the hearing on presentation of the findings. (6/5 RP 8-9) There was nothing "flawed" (App. Br. 29) about the trial court's legal analysis of undue influence.

**2. In concluding that Eva's will was the product of undue influence the trial court applied the proper legal standard and its conclusion is supported by overwhelming direct and circumstantial evidence.**

Recognizing that Conclusion of Law 21 is fatal to her assertion of legal error, Michelle alternatively argues that the trial court's findings of fact do not support its conclusion that there was clear, cogent, and convincing evidence that Eva's last will was the product of undue influence by Michelle because it was dependent on "assumptions and presumptions." (App. Br. 11) This argument is equally without merit.

Again, "[u]ndue influence is not usually exercised openly in the presence of others[.]" *Estate of Kessler*, 35 Wn.2d at 162. Thus,

Washington courts properly acknowledge that undue influence is almost always established through circumstantial evidence. See *Kessler*, 35 Wn.2d at 162; *Foster v. Brady*, 198 Wash. 13, 19, 86 P.2d 760 (1939); *Estate of Bush*, 195 Wash. 416, 425, 81 P.2d 271 (1938); *Estate of Esala*, 16 Wn. App. at 771. Michelle ignores that “the law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts . . . One is not necessarily more or less valuable than the other.” 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 1.03.

Here, however the trial court relied on *both* direct and circumstantial evidence in entirely unchallenged findings of fact to support its conclusion that Eva’s will was the product of undue influence by Michelle. Michelle’s contention that the trial court relied primarily on the “unnaturalness” of Eva’s testamentary disposition (App. Br. 11) ignores its other findings that are verities here:

**a. Michelle isolated Eva.**

Michelle’s s assertion that “there is no evidence that Eva was isolated by Michelle” (App. 31) ignores the trial court’s unchallenged finding:

After Ms. Barnes' fall in March of 2009, she became increasingly difficult to reach either by telephone or in person. Her friends and family would call and the phone would often ring continuously without being answered. Michelle Wells had changed Ms. Barnes' long distance calling plan. This isolated Ms. Barnes from her family and long time close friends.

(FF 69, CP 1144)

**b. Michelle was a constant presence.**

Michelle was constantly present with Eva. (FF 39, 70; CP 1136, 1144) Michelle was present whenever Karen and Marsha visited Eva (RP 156, 192). The APS investigator never spoke with Eva outside of Michelle's presence. (RP 546) Michelle was present for nearly all of Eva's medical appointments with Dr. Kina. (FF 51, 56, 59, CP 1140-42) Michelle accompanied Eva on her last four visits to her attorney where she discussed and then changed her Power of Attorney and then her Will. (FF 51, 52, 57, 60, CP 1140-42) Michelle accompanied Eva to her interview at Eva's church. (FF 51, 71, 72, CP 1140, 1145) Michelle's constant presence, coupled with Eva's complete dependence on Michelle, created the opportunity for Michelle to exert undue influence over Eva.

**c. Michelle struggled financially .**

Between 2009 and the time of Eva's death, Michelle and her husband were struggling financially. (FF 40, CP 1136) Michelle



was convicted of theft in 2009. (FF 40, CP 1136) In 2010, Eva began writing checks payable to Michelle and her family for various services and reimbursements. (FF 41, CP 1136) On June 25, 2011, when Eva was two days away from death, Michelle wrote a check from Eva's account for her personal mortgage payment. (FF 77, CP 1146-47)

**d. Michelle poisoned Eva's mind against the Rovas.**

Michelle made false statements to third parties, sometimes in the presence of Eva, that perpetuated Eva's unfounded paranoia, fear, and anger toward the Rovas. (FF 73, CP 1145-46) Michelle told the tenants of the rental property the Rovas were "greedy villains" and that the Rovas intended to evict them so they could sell the land, develop the properties, and become millionaires. (FF 46, CP 1138-39) Michelle told Eva's attorney, in the presence of Eva, that the Rova's had thrown out Eva's address book. (FF 50, CP 1140) During Eva's recorded interview at the church, Michelle told the interviewer that Eva's nephew, John Rova, had "tried to throw [Eva] under the bus a couple times, and that the [Rovas] were trying to put [Eva] in a nursing home." (FF 72, CP 1145)

Not one of these statements was true (FF 31, 47, 72, CP 1134, 1139, 1145), and they “made it easier for Ms. Barnes to believe all the horrible things she had said about the [Rovas]” and “fanned the flame and operated to perpetuate [Eva’s] anger toward the [Rovas].” (FF 73, CP 1145-46)

Michelle argues that “fanning the flames” is not undue influence, but the Washington Supreme Court found similar evidence of “poisoning” sufficient in *In re Dand’s Estate*, 41 Wn.2d 158, 162, 247 P.2d 1016 (1952). In *Dand*, the proponent of the will poisoned the testator’s mind against her other daughters with “untruths.” 41 Wn.2d at 162. That is what the trial court found here.

**e. Eva suffered from periods of confusion and impairment at the time of the will signing.**

While not legally incompetent, Eva was suffering from periods of confusion and impairment at the time she signed her Will. (FF 57, CP 1141-42) Beginning in 2009 to the time of her death, Dr. Kina repeatedly used the term “mild cognitive impairment” to describe mental state. (FF 36, CP 1135) Two days before she signed her last will, Eva could not recall the name of one of her nieces. (FF 57, CP 1141-42) The same day she signed her

Will, Dr. Kina prescribed medication to assist Eva with memory problems. (FF 59, CP 1142) Eva's medical records from her hospitalization and recovery in 2009 are replete with concerns from medical professionals regarding Eva's judgment, insight, failure to cooperate, memory and orientation. (RP 225; FF 15, 17; CP 1131)

Eva began hoarding to the point that her home became unhygienic, unsafe, and unsuitable for living. (FF 25, 27; CP 1133) Eva's hoarding, coupled with her loss of insight, was a "hallmark . . . of emerging dementia." (RP 252) Eva began writing incoherent, illegible and scattered letters to her family, containing irrational rants in which she called the Rovas vile names and falsely accused them of horrible things. (FF 53, CP 1140-41) Dr. Meharg characterized her writings as "delusional." (RP 255)

The trial court carefully considered the expert and lay testimony, finding that although Eva was competent to make a new will, her cognitive impairment contributed to Michelle's ability to unduly influence her in poisoning Eva's view of her nieces and nephew. (FF 83, CP 1148) As in *Dand*, "[t]wo different theories were presented. The trial court rejected one and accepted the other. After an examination of the record, we cannot say that the evidence preponderates against the findings." 41 Wn.2d at 163.

**f. Eva was vulnerable to undue influence.**

The trial court found that Eva was highly vulnerable to influence at the time of the will signing due to her physical and mental impairments and total dependence on Michelle for her basic care. (FF 83, CP 1148) Eva was physically frail, hard of hearing, elderly, widowed, and alone. She lacked a social support system, had anxiety about being taken out of her home, was completely dependent on Michelle, and had a substantial estate. In addition, APS noted Eva's vulnerability in 2010 when a young neighbor boy conned her into paying him twice. (CP 519-20)

Combined with her cognitive impairment and strong paranoid feelings toward her own family Eva's situation created an "excellent 'recipe' for vulnerability, exploitation, and undue influence." (Ex. 19 at 29) The trial court gave credence to expert testimony that Eva's strong personality would not shield her from undue influence. (RP 302)

Michelle relies on Division Three's decision in *In re Estate of Melter*, 167 Wn. App. 285, 273 P.3d 991 (2012), which supports the Rovas, not Michelle, and is distinguishable in at least two key respects. First, unlike here, the appellant in *Melter* challenged several of the trial court's key factual findings underlying its undue

influence determination. 167 Wn. App. at 300, ¶ 31. On review, the court found that there was insufficient evidence to support the trial court's key factual findings. 167 Wn. App. at 303-08, ¶¶ 31-51. Of course, here, Michelle does not challenge any of the trial court's findings of fact.

Second, the will contestants in *Melter* did not present any evidence that: (a) the testator was mentally vulnerable or of unsound mind at the time she executed her will; (b) that the testator's will was unnatural; (c) that the testator had been isolated; (d) that the testator was vulnerable to undue influence; or (e) that the testator had been poisoned by untruths. Here, the trial court made findings based on abundant evidence of each of these factors.

In reaching its conclusion, the trial court weighed the evidence and credibility of the witnesses and found that clear cogent and convincing evidence established that Eva's will was the product of undue influence by Michelle. In making his finding, Judge Taylor stated incisively:

You [Michelle] got caught up in a situation where as your financial circumstances become desperate, as this lady [Eva] became alienated from her family based on things that you knew were not true, that . . . you fed the fire. I think you fanned the flames. I think you made it easier and easier for this lady [Eva] to believe all these horrible things that she said about

her nieces and nephew. . . . [Y]ou had the fiduciary relationship – you were in charge the last few months and I think the Will was heavily influenced by your involvement and that is my finding and this is the conclusion I reach from the evidence and I am very comfortable with that.

(RP 872-73)

This was not error. This court should defer to the trial court's assessment of the evidence and refuse to substitute its judgment for that of the trier of fact.

**E. The Rovas should be awarded their attorneys' fees on appeal.**

RCW 11.96A.150 and RCW 11.24.050 authorize this Court to award the Rovas their attorneys' fees on appeal as the Court deems equitable. *See Haviland*, 162 Wn. App. at 569, ¶¶ 48-49 (affirming trial court's award of attorney's fees to will contestants and awarding will contestants attorney's fees on appeal). It would be equitable to award attorneys' fees to the Rovas on appeal because Michelle's factual challenge to the trial court's determination that she exercised undue influence lacks merit.

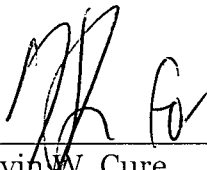
**V. CONCLUSION**

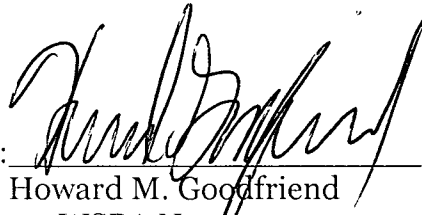
This Court should affirm the judgment and award the Rovas reasonable attorneys' fees and costs for this appeal.

Dated this 23 day of April, 2014.

SANCHEZ, MITCHELL,  
EASTMAN & CURE, PSC

SMITH GOODFRIEND, P.S.

By:   
\_\_\_\_\_  
Kevin W. Cure  
WSBA No. 34409

By:   
\_\_\_\_\_  
Howard M. Goodfriend  
WSBA No. 14355

Attorneys for Respondents

**DECLARATION OF SERVICE**


The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on April 23, 2014, I arranged for service of the foregoing Amended Brief of Respondents, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division II 950 Broadway, Suite 300 Tacoma, WA 98402	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Kevin W. Cure Sanchez, Mitchell & Eastman 4110 Kitsap Way, Suite 200 Bremerton, WA 98312-2401	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Kenneth W. Masters Masters Law Group PLLC 241 Madison Ave N Bainbridge Island, WA 98110-1811	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
David P. Horton Law Office of David P. Horton, Inc. P.S. 3212 NW Byron Street, Suite 104 Silverdale, WA 98383	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

COURT OF APPEALS  
 DIVISION II  
 TACOMA, WA  
 APR 24 11:10 AM '14

**DATED** at Seattle, Washington this 23rd day of April, 2014.

  
 \_\_\_\_\_  
 Victoria K. Vigoren



1 RECEIVED AND FILED  
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3 DAVID W. PETERSON  
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7 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
8 IN AND FOR THE COUNTY OF KITSAP

9 In re the Estate of:

NO. 11-4-00455-3

10 EVA JOHANNA ROVA BARNES,

COURT'S FINDINGS OF FACTS  
AND CONCLUSIONS OF LAW

11 Deceased.

(As Proposed by Petitioners)

12  
13  
14 This matter was tried before the undersigned Court, commencing on February  
15 11, 2013. The matter was tried without a jury. The Petitioners Vicki Rova Mueller,  
16 Karen Bow, Marsha Rova, and John Rova appeared at the trial and were represented  
17 by Kevin W. Cure of Sanchez, Mitchell and Eastman. The Respondents Michelle  
18 Wells and Dennis Wells appeared at trial and were represented by David P. Horton of  
19 The Law Office of David P. Horton, Inc. P.S.

20 **I. FINDINGS OF FACT**

- 21  
22 1. Eva Johanna Rova Barnes ("Ms. Barnes") was born on July 17, 1916, in  
23 Bellingham, Washington. She died on June 27, 2011 at her home at 94  
24 years of age, just a few weeks before her 95<sup>th</sup> birthday. Ms. Barnes' will was

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW-1

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Bremerton, Washington 98312-2401  
Telephone (360) 479-3000

1 admitted to probate on July 1, 2011. Michelle Wells was appointed personal  
2 representative and given nonintervention powers. The Court granted  
3 Petitioners' motion to remove Michelle Wells as personal representative  
4 and she was replaced by her husband, Dennis Wells.

5 2. Ms. Barnes' husband, Ray Barnes, died at the age of 96 in 2005. Their only  
6 daughter, Karolyn, passed away in 2004 at the age of 48. The loss of her  
7 husband and child so close in time was a major blow to Ms. Barnes. She  
8 was treated for depression in 2006 and there were indications of depression  
9 from that date going forward.

10 3. Ms. Barnes was survived by her brother Victor's wife, Marian Rova. Marian  
11 Rova's children are the Petitioners in this case. The Petitioners are Marsha  
12 Rova, Vicki Mueller, John Rova and Karen Bow. After the death of Ray and  
13 Karolyn, Ms. Barnes' close family consisted of the Petitioners.

14 4. The Petitioners are adults with families of their own. The Petitioners grew  
15 up in Poulsbo near Ms. Barnes, and spent a significant amount of time at  
16 Ms. Barnes' property. Ms. Barnes' residence is located on Rova Road in  
17 Poulsbo, Washington, and has been known for decades locally as the Rova  
18 Property.

19 5. The Rova Property consists of acreage, Ms. Barnes' residence, and a small  
20 rental house. Ms. Barnes owns a one half interest in the rental property  
21 and the other one half interest is owned by the Petitioners. The Rova  
22 Property was homesteaded by Ms. Barnes' parents and Ms. Barnes resided  
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1           there from 1918 until the time of her death. The Petitioners are direct  
2           lineal descendents of the homesteaders.

3           6. On March 4, 2004, Ms. Barnes executed her first known will. At the time  
4           this will was made, Ray and Karolyn were still alive. Under this will Ms.  
5           Barnes' estate was to be distributed upon her death as follows: (1) her  
6           entire estate to her husband, Ray; (2) If Ray predeceased Ms. Barnes,  
7           then her entire estate to her daughter, Karolyn, in trust, to be managed  
8           by Vicki Mueller, as trustee; (3) If both Ray and Karolyn predeceased Ms.  
9           Barnes, her entire estate was to be divided in four equal shares, one  
10          share to each of the Petitioners.

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12          7. On March 4, 2004, Ms. Barnes and Ray executed a durable power of  
13          attorney. Ms. Barnes and Ray were named as each other's primary  
14          attorney in fact. Vicki Mueller was named as the alternate attorney in  
15          fact for both Ms. Barnes and Ray.

16          8. On September 26, 2005, after both Ray and Karolyn had passed away,  
17          Ms. Barnes executed a second will. This will provided that upon her  
18          death, her entire estate was to be distributed in four equal shares, one share  
19          to each Petitioner. This will nominated Vicki Mueller to serve as Ms.  
20          Barnes's personal representative, and Marsha Rova as the alternate  
21          personal representative.

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23          9. On September 26, 2005, Ms. Barnes executed an individual durable  
24          power of attorney, which was effective immediately. Ms. Barnes named

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Vicki Mueller as her attorney in fact, and Marsha Rova as the alternate attorney in fact.

10. On April 29, 2006, Ms. Barnes had a bowel obstruction surgery at Harrison Medical Center ("HMC") in Bremerton, Washington. This was a major medical event. The medical professionals that treated Ms. Barnes during this time suspected that she was suffering from depression. Ms. Barnes' physician, Dr. Kina, prescribed an antidepressant medication for her.

11. On May 8, 2006, Ms. Barnes was discharged from HMC and admitted to a nursing home, Martha & Mary, to recover from the bowel obstruction surgery. She was discharged from Martha & Mary on May 23, 2006, and returned to her home.

12. On July 17, 2006, Ms. Barnes celebrated her 90<sup>th</sup> birthday. The celebration occurred at Marsha Rova's home and each of the Petitioners and their respective families were present. By all accounts, the birthday celebration was large and successful.

13. On March 26, 2009, Ms. Barnes fell in the kitchen of her home. She was unable to get up off the floor on her own, and she was unable to summon help. Ms. Barnes laid helpless on her kitchen floor for two and a half days before she was discovered. It is unknown how she fell.

1 14. On March 29, 2009, 911 was called. Ms. Barnes was found on her kitchen  
2 floor by emergency responders and was rushed to HMC. Ms. Barnes was  
3 severely dehydrated and was in critical condition.

4 15. Ms. Barnes was hospitalized at HMC for three days. During her stay at  
5 HMC, the medical professionals noted observations of Ms. Barnes'  
6 cognitive impairment. These observations were charted in Ms. Barnes'  
7 medical records relating to her stay at HMC during this time.

8 16. On April 1, 2009, Ms. Barnes was discharged from HMC and admitted to  
9 Martha & Mary for recovery. From a physical standpoint, Ms. Barnes  
10 recovered fairly quickly from her fall. As she became hydrated and  
11 rested, her strength returned.

12 17. Ms. Barnes spent approximately twelve days recovering at Martha & Mary.  
13 During Ms. Barnes' stay at Martha & Mary, the medical professionals  
14 noted their observations of her cognitive impairment and physical  
15 limitations. These observations were charted in Ms. Barnes' medical  
16 records relating to her stay at Martha & Mary during this time.

17 18. All the medical professionals that treated Ms. Barnes during her stay at  
18 Martha & Mary agreed that Ms. Barnes was not strong or healthy enough  
19 to return home. The medical professionals, including her physician, Dr.  
20 Kina, concurred that Ms. Barnes needed additional time to recover and it  
21 would be in her best interest to temporarily reside at some kind of assisted  
22 living facility. The Petitioners, who visited her regularly during her stay at  
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1 Martha & Mary, also agreed that she was not ready to return home and  
2 advocated that she remain in an assisted living facility until she could fully  
3 recover.

4 19. Ms. Barnes was a strong minded individual. Despite the recommendations  
5 of the medical staff at Martha & Mary, Dr. Kina, and the Petitioners, Ms.  
6 Barnes demanded that she be allowed to return home.

7 20. Dr. Kina did not feel he could deny Ms. Barnes' request to return home or  
8 force her to do something different. On April 13, 2009, Dr. Kina reluctantly  
9 discharged Ms. Barnes from Martha & Mary.

10 21. On April 13, 2009, John Rova and Marsha Rova drove Ms. Barnes to her  
11 home from Martha & Mary.

12 22. Ms. Barnes' medical records relating to her treatment at Martha & Mary  
13 are not only helpful in understanding what was happening from a medical  
14 perspective, but also shed light on what was happening between Ms.  
15 Barnes and her family.

16 23. A social worker at Martha & Mary described the Petitioners as being  
17 "desperate" to help Ms. Barnes and noted their grave concerns about Ms.  
18 Barnes returning home. Ms. Barnes' medical records reflect that the  
19 Petitioners were extremely concerned about Ms. Barnes during this time.

20 24. A social worker at Martha & Mary recommended the Petitioners make a  
21 referral to Adult Protective Services ("APS") based on the condition of Ms.  
22 Barnes' home.  
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1 25. The emergency responders that had rescued Ms. Barnes from her kitchen  
2 floor on March 29, 2009, indicated that the condition of Ms. Barnes' home  
3 was so extreme that the fire department would not allow her to return  
4 home unless changes were made. As members of the fire department,  
5 they were in a position to keep Ms. Barnes from returning home as they  
6 did not feel it was safe for her to return in its present condition.

7 26. As a result of the condition of Ms. Barnes' home, the Petitioners,  
8 primarily John Rova, with the assistance of Michelle Wells, frantically  
9 tried to make Ms. Barnes' home safe for her return. There was very little  
10 time to accomplish this.

11 27. Ms. Barnes's home was filled with piles and stacks of newspapers,  
12 magazines and other things that she had hoarded. Ms. Barnes'  
13 belongings were stacked from floor to ceiling and left only narrow  
14 pathways throughout the house. Some of the stacks of magazines and  
15 papers were near heat sources including the baseboards and wood stove.  
16 The condition of her home at the time of her fall was not safe.

17 28. John Rova, Michelle Wells and others, did the best they could to make  
18 Ms. Barnes' home suitable for her return. Old newspapers and magazines  
19 were discarded in the process.

20 29. On April 13, 2009, when Ms. Barnes returned home from Martha and  
21 Mary, she appeared to do fairly well in the succeeding months. But, in  
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1 terms of Ms. Barnes' relationship with the Petitioners, her return home  
2 was decidedly the beginning of the end.

3 30. Ms. Barnes felt her privacy had been invaded by John Rova's attempt to  
4 make her home suitable for her return. For some reason, Ms. Barnes  
5 singled out John Rova and the Petitioners and seemed to ignore the fact  
6 that Michelle Wells was also involved in the cleaning of her home.

7 31. Ms. Barnes alleged that the Petitioners had deliberately destroyed her  
8 address book. This allegation was untrue. The address book may have  
9 been misplaced or destroyed by mistake, but there is no evidence that the  
10 Petitioners had a motive to destroy it.

11 32. Ms. Barnes also believed that the Petitioners were committed to  
12 removing her from her home and placing her in a nursing home for the  
13 rest of her life. This belief was also untrue. The Petitioners and all the  
14 medical professionals that treated her after her fall in March 2009  
15 recommended that Ms. Barnes transition from Martha & Mary to an  
16 assisted living facility until she could regain full mental and physical  
17 strength and return home safely.

18 33. There is no evidence that the Petitioners, or anyone, recommended that  
19 Ms. Barnes be resigned to a nursing home or assisted living facility for  
20 the rest of her life.

21 34. Ms. Barnes' fear of not being able to return home or being removed from  
22 her home to a nursing home or assisted living facility is understandable.  
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1 It is very common. She was desperately afraid of being put in a nursing  
2 home or assisted living facility. Ms. Barnes's fear in this regard  
3 developed into paranoia and caused her to be suspicious of the  
4 Petitioners.

5 35. After Ms. Barnes' discharge from Martha & Mary until the time of her  
6 death, she met with Dr. Kina on approximately nineteen different  
7 occasions. Dr. Kina found Ms. Barnes to be a capable reporter of her  
8 health status and that she was usually in good humor.

9 36. Throughout the course of his treatment of Ms. Barnes, Dr. Kina's records  
10 reflect his observations of Ms. Barnes' gradual mental deterioration, but  
11 at no time did he diagnose her with dementia. Starting in 2009, the term  
12 "mild cognitive impairment" is used throughout Ms. Barnes' medical  
13 records.

14 37. Against all odds, Ms. Barnes was able to maintain reasonably good  
15 health after she returned home. This was perhaps due in part to her  
16 strong will and determination, but also in part due to the efforts of  
17 Michelle Wells.  
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19 38. After Ms. Barnes returned home on April 13, 2009 and until the time of  
20 her death, Michelle Wells became increasingly involved with Ms. Barnes.  
21 Michelle Wells visited Ms. Barnes once or more every day and Ms.  
22 Barnes became increasingly dependent on Michelle Wells.  
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1 39. Michelle Wells first came to know Ms. Barnes through her employment  
2 as a rural mail carrier for the United States Postal Office. Her  
3 relationship with Ms. Barnes began as a professional and friendly one.  
4 After Ray and Karolyn died, Michelle Wells and Ms. Barnes became  
5 friends. In the last couple years of Ms. Barnes' life, Michelle Wells  
6 became increasingly involved in Ms. Barnes' care and her life.  
7 Ultimately, Michelle Wells became Ms. Barnes' caretaker. And while that  
8 was happening, Ms. Barnes became less and less involved with  
9 Petitioners. It was not the Petitioners' choice to be less involved with Ms.  
10 Barnes, but it was Ms. Barnes' choice.  
11

12 40. Michelle and Dennis Wells are not related to Ms. Barnes. Michelle Wells  
13 is 51 years younger than Ms. Barnes. Michelle Wells was convicted of  
14 Theft in the Third Degree in Mason County District Court on June 29,  
15 2009. Between 2009 and the time of Ms. Barnes' death, Michelle and  
16 Dennis Wells were financially struggling.  
17

18 41. In April 2010, Ms. Barnes began writing checks from Ms. Barnes' account  
19 payable to Michelle Wells and Michelle Wells' family members. The  
20 checks were for various services and for reimbursement for various  
21 expenses. During this time, the gap between Ms. Barnes and the  
22 Petitioners was widening.  
23

24 42. In 2010, Ms. Barnes stopped tending to her business related to the rental  
property. Historically, the Petitioners and Ms. Barnes enjoyed a good

1 working relationship regarding their respective interests in the rental  
2 property. Ms. Barnes had always managed the jointly owned rental.  
3 Among other things, Ms. Barnes always paid the taxes and insurance  
4 and collected the rent from the tenants. Once she had collected the rent  
5 she would divide it appropriately and distribute it among herself and the  
6 Petitioners. Ms. Barnes was always fastidious, organized, responsible,  
7 and prompt with the business and financial matters relating to the rental  
8 property.

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10 43. In 2010, the Petitioners' share of the rental income was not being  
11 forwarded to them as it had in the past. The property taxes for the rental  
12 property were not being paid and it was difficult to determine if the  
13 rental property was insured. The Petitioners did not know who the  
14 tenants were or if there even were tenants. The Petitioners assumed the  
15 current tenants were not paying rent because their share of the rental  
16 income was not being forwarded to them as it had in the past. All of these  
17 changes were a significant departure from Ms. Barnes prior reliability in  
18 that regard.

19  
20 44. On July 31, 2010, Karen Bow's daughter was married. This was a major  
21 family event. Ms. Barnes was invited and attended, but was not very  
22 involved with her family at that time. The Petitioners felt Ms. Barnes'  
23 lack of involvement was her choice. Ms. Barnes later told Michelle Wells  
24 that she felt ostracized by her family at the wedding. The evidence

1 indicates that the Petitioners tried to involve Ms. Barnes in the wedding  
2 festivities, but Ms. Barnes showed no interest, and isolated herself from  
3 her family by sitting by herself. After the wedding, the gap between Ms.  
4 Barnes and the Petitioners continued to  
5 grow.

6 45. On October 30, 2010, Marsha Rova and her husband Scott, went to the  
7 rental property. The Petitioners assumed the current tenants, if any,  
8 were not paying rent because Ms. Barnes had not forwarded the  
9 Petitioners their share of the rental income for a significant amount of  
10 time. When Marsha and Scott arrived at the rental property, they were  
11 shocked to discover that the current tenants were known to them. They  
12 had been tenants of the rental property in the past and had always paid  
13 rent on time. Marsha and Scott learned that the current tenants had in  
14 fact been paying rent to Ms. Barnes, but Ms. Barnes was not passing it  
15 through to the Petitioners as she had in the past.  
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17 46. The tenants informed Scott and Marsha that they were frustrated with  
18 Ms. Barnes. Ms. Barnes had accused them of not paying rent and of  
19 stealing items. Ms. Barnes had sent Michelle Wells to the rental property  
20 to confront the tenants about not paying rent. Michelle Wells told the  
21 tenants that the Petitioners intended to evict them so they could sell the  
22 land, develop the properties, and become millionaires. Michelle Wells told  
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the tenants that she would go to court to fight for Ms. Barnes because the Petitioners were greedy villains.

47. Immediately after the meeting with the tenants, Marsha drafted an email that summarized their conversations with the tenants and sent it to her siblings. The court cannot find any reason that Marsha would say anything but what she understood to be the truth in this email. The statements that Michelle Wells made to the tenants of the rental property were not true and acted to further poison Ms. Barnes' relationship with the Petitioners.

48. On November 17, 2010, a meeting was held at Ms. Barnes' attorney's office. Ms. Barnes was represented by Jeff Tolman. Ms. Barnes desired to remove Vicki Mueller as her attorney in fact and name Michelle Wells in her place. Mr. Tolman invited Vicki Mueller to attend the meeting with Ms. Barnes. Ms. Barnes was told that Vicki Mueller would be present at the meeting, but expressed shock and anger when she discovered Vicki Mueller was present.

49. At the meeting, Mr. Tolman attempted to mediate the differences between Ms. Barnes and the Petitioners. Ms. Barnes made it clear that she wanted nothing to do with any type of reconciliation with Vicki Mueller and/or any of the Petitioners. Ms. Barnes was demonstrably angry with Vicki Mueller and ranted at her about all the ways she believed the Petitioners had done her wrong.

1 50. Michelle Wells was also present at the November 17, 2010 meeting at Mr.  
2 Tolman's office. She had provided Ms. Barnes with transportation to the  
3 meeting and was invited by Mr. Tolman to participate in some of the  
4 meeting. During the meeting, Michelle Wells told Mr. Tolman, in the  
5 presence of Ms. Barnes and Vicki Mueller, that the Petitioners had  
6 thrown out Ms. Barnes' address book. This comment further upset Ms.  
7 Barnes and Ms. Barnes continued to direct her anger toward Vicki  
8 Mueller.

9  
10 51. In May 2010, Ms. Barnes stopped driving. As a result, Ms. Barnes was  
11 solely dependent on Michelle Wells for transportation. From May 2010 to  
12 the time of her death, Michelle Wells provided Ms. Barnes with  
13 transportation to every meeting Ms. Barnes had with Mr. Tolman and  
14 Dr. Kina. From this time forward, Dr. Kina never met with Ms. Barnes  
15 outside the presence of Michelle Wells.

16 52. On December 10, 2010, Ms. Barnes met with Mr. Tolman at his office.  
17 Michelle Wells provided Ms. Barnes with transportation to the meeting.  
18 There, Ms. Barnes executed a new durable power of attorney. The new  
19 durable power of attorney named Michelle Wells as Ms. Barnes' attorney  
20 in fact. Ms. Barnes did not list an alternate attorney in fact. From this  
21 point on, Michelle Wells was Ms. Barnes' attorney in fact.  
22

23 53. In 2010 and 2011, Ms. Barnes was writing letters to the Petitioners,  
24 other family members, and friends. The handwritten letters began

1 reasonably well organized and rational, but became increasingly  
2 incoherent, illegible and irrational. In her writings, Ms. Barnes' thoughts  
3 were scattered and contained irrational rants where she would call the  
4 Petitioners horrible names and accused them of horrible things, none of  
5 which were true.

6 54. In January 2011, Michelle Wells began assisting Ms. Barnes by writing  
7 Ms. Barnes' checks. Michelle Wells signed some of the checks as Ms.  
8 Barnes attorney in fact.

9 55. March 1, 2011, Ms. Barnes saw both Dr. Kina and Mr. Tolman.

10 56. Dr. Kina's records from Ms. Barnes' March 1, 2011 visit note Michelle  
11 Wells' presence and refer to her as Ms. Barnes' guardian. Dr. Kina's  
12 records from this visit did not note anything remarkable about Ms.  
13 Barnes mental condition. Dr. Kina testified that on March 1, 2011, Ms.  
14 Barnes appeared reasonably well both mentally and physically.

15 57. On March 1, 2011, immediately following her meeting with Dr. Kina, Ms.  
16 Barnes met with Mr. Tolman. The purpose of the meeting was to execute  
17 her new will. Michelle Wells provided her transportation to this meeting.  
18 Mr. Tolman believed that Ms. Barnes was not feeling well as she had just  
19 come from Dr. Kina's office and had received an injection of some kind.  
20 Ms. Barnes acknowledged that she was not feeling well. Mr. Tolman  
21 testified that Ms. Barnes could not remember one of her niece's names.  
22 Mr. Tolman asked her to come back another day when she was feeling  
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1 better. Ms. Barnes did not execute her new will or any other documents  
2 and left with Michelle Wells.

3 58. March 3, 2011, Ms. Barnes saw both Dr. Kina and Mr. Tolman.

4 59. Dr. Kina testified that he did not recall anything unusual about Ms.  
5 Barnes mental status on that day that would have made him question  
6 her capacity. Dr. Kina's records from that visit indicate that Michelle  
7 Wells was present and requested that Dr. Kina prescribe a medication to  
8 help Ms. Barnes with her memory problems. Dr. Kina prescribed Aricept.  
9 Dr. Kina's records from this visit listed "mild cognitive impairment" as an  
10 active problem and as the reason for the visit.  
11

12 60. On March 3, 2011, immediately following her meeting with Dr. Kina, Ms.  
13 Barnes returned to Mr. Tolman's office to execute her new will. Michelle  
14 Wells had provided Ms. Barnes transportation to the meeting. The new  
15 will had been prepared by Mr. Tolman at Ms. Barnes' request. Mr.  
16 Tolman engaged Ms. Barnes in a significant colloquy about her new will.  
17 After the colloquy, Ms. Barnes executed her new will.

18 61. The March 3, 2011 will appeared to be validly executed and in proper  
19 format. It was witnessed appropriately by Mr. Tolman and his assistant,  
20 Susan Peden. Michelle Wells did not accompany Ms. Barnes to the  
21 conference room where the will was signed by her. Mr. Tolman did not  
22 video tape the will signing or consult with Dr. Kina prior to the will  
23 signing.  
24



1 62. Mr. Tolman was extremely careful in his representation of Ms. Barnes.  
2 Contemporaneous to the preparation of the will, he prepared a  
3 memorandum for Ms. Barnes' signature which set forth what he believed  
4 to be Ms. Barnes' reasons for what can only be described as a radical  
5 departure from her prior estate plans. This was the first time Mr. Tolman  
6 had taken this extra precautionary step in more than thirty years of  
7 practice.

8  
9 63. The March 3, 2011 will was a radical departure from Ms. Barnes' prior  
10 wills. Unlike each of her previous wills, it contained no provision for the  
11 Petitioners. The new will completely disinherited the Petitioners and  
12 named Michele Wells and her husband as the sole beneficiaries. The  
13 March 3, 2011 will also named Michelle Wells to act as personal  
14 representative, and her husband as the alternate.

15 64. Dr. Kina and Mr. Tolman testified that on March 3, 2011, Ms. Barnes  
16 appeared to have the necessary capacity to make her will.

17 65. Ms. Barnes saw Dr. Kina next on March 7, 2011. In Dr. Kina's medical  
18 records from this visit, he again noted mild cognitive impairment. Dr.  
19 Kina testified that he believed Ms. Barnes continued to have sufficient  
20 capacity on this day to make her will.

21  
22 66. On March 22, 2011, the Petitioners wrote a letter to Ms. Barnes about  
23 the rental property. The letter described what the Petitioners had  
24 discovered in regard to the current tenants and their concerns about the

1 insurance, the sharing of rental income, and the payment of property  
2 taxes. The letter demonstrated an attempt by the Petitioners to reach out  
3 to Ms. Barnes and reestablish, at the very least, a workable business  
4 relationship with Ms. Barnes. The letter ended as follows: "Please let us  
5 know of anything that we may help you with. We love you, and want to  
6 help you as much as we can. Love, John, Karen, Marsha & Vicki."

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8 67. By March 22, 2011, the Petitioners were aware that Ms. Barnes had  
9 executed a new durable power of attorney, but it is not clear whether  
10 they were aware of Ms. Barnes' new will.

11 68. It is unknown whether Ms. Barnes ever saw the March 22, 2011 letter.  
12 The letter expresses the sentiments of the Petitioners toward Ms. Barnes  
13 as of late March 2011.

14 69. After Ms. Barnes' fall in March of 2009, she became increasingly difficult  
15 to reach either by telephone or in person. Her friends and family would  
16 call and the phone would often ring continuously without being  
17 answered. Michelle Wells had changed Ms. Barnes' long distance calling  
18 plan. This isolated Ms. Barnes from her family and long time close  
19 friends.

20 70. APS visited Ms. Barnes' residence on numerous occasions. Often there  
21 would be no answer at the door and their phone calls would not be  
22 returned. The only person close to Ms. Barnes on a consistent basis  
23 during this time was Michelle Wells.  
24

1 71. On May 2, 2011, Michelle Wells drove Ms. Barnes to Ms. Barnes' church,  
2 First Lutheran Church, in Poulsbo, Washington. At the church, a church  
3 member interviewed Ms. Barnes for the purpose of recording the history  
4 of the church and of its members. The interview was recorded and a wide  
5 range of topics were discussed. During the course of the interview, Ms.  
6 Barnes was often confused. The recorded statements made by Ms. Barnes  
7 and her notable confusion suggest that she was significantly impaired on  
8 May 2, 2011. Had Ms. Barnes executed her last will on this day, the  
9 evidence would have been clear, cogent, and convincing that she lacked  
10 testamentary capacity.  
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12 72. During the recorded interview, there was substantial involvement from  
13 Michelle Wells. Michelle Wells filled in numerous blanks in Ms. Barnes'  
14 memory and appeared to speak for Ms. Barnes at certain times. In the  
15 presence of Ms. Barnes, Michelle Wells made comments about the  
16 Petitioners to the interviewer. Michelle Wells told the interviewer that  
17 her nephew, John Rova, had tried to throw Ms. Barnes under the bus a  
18 couple times, and that the Petitioners were trying to put Ms. Barnes in a  
19 nursing home. Michelle Wells' statements were not true and acted to  
20 further poison Ms. Barnes's relationship with the Petitioners.  
21

22 73. The comments made by Michelle Wells at the November 17, 2010  
23 meeting at Mr. Tolman's office, the comments she made to the tenants of  
24 the rental property, and the comments she made to the interviewer on

1 May 2, 2011 made it easier for Ms. Barnes to believe all the horrible  
2 things she had said about the Petitioners. Michelle Wells' comments  
3 fanned the flame and operated to perpetuate Ms. Barnes' anger toward  
4 the Petitioners.

5 74. On May 25, 2011, Ms. Barnes fell on the sidewalk outside of her home.

6 This was the beginning of end in terms of Ms. Barnes' physical well  
7 being. Ms. Barnes refused to go the hospital or to see Dr. Kina at his  
8 office. From May 25, 2011 to the date of her death, Ms. Barnes was  
9 unable to walk.

10 75. On May 25, 2011, Dr. Kina made a house-call and examined Ms. Barnes.

11 During this visit, Dr. Kina noted in his records that Ms. Barnes "has had  
12 long-standing mild cognitive impairment. This seems to be gradually  
13 progressing. Probably early Alzheimer's dementia."

14 76. Ms. Barnes remained at her home until the time of her death. On June

15 22, 2011, Dr. Kina made a certification of terminal illness and believed  
16 hospice care was appropriate as Ms. Barnes' end was likely near. Ms.  
17 Barnes consented to in-home hospice care.

18 77. On June 25, 2011, Michelle Wells wrote a check in the amount of

19 \$2,641.94 from Ms. Barnes' personal bank account. The check was made  
20 payable to Chase Financial and was made to pay Michelle Wells' personal  
21 house payment. This represented the first time any expenditure of that  
22 kind had been made exclusively for the benefit of Michelle Wells and it  
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was done at a time when Ms. Barnes was in, or very close to being in, a coma. The payment to Chase Financial posted on June 27, 2011.

78. Ms. Barnes died on June 27, 2011.

79. The Petitioners' medical expert, Dr. Meharg, provided a retrospective analysis on whether Ms. Barnes had dementia or impaired cognitive ability as of the date of the signing of the March 3, 2011 will.

80. Dr. Meharg never met Ms. Barnes or had the opportunity to examine her. Dr. Meharg relied on objective evidence of Ms. Barnes' physical and mental condition, her ability (or lack thereof) to perform certain tasks, and collateral source information regarding third party observations of Ms. Barnes.

81. However, the evidence is inconclusive as to Ms. Barnes' condition at the time of the March 3, 2011 will signing. Specifically, those individuals who are professionals and who were expressly charged with observing Ms. Barnes' condition did not note substantial impairment. This included attorney Mr. Tolman, witness Susan Peden, and Dr. Kina.

82. The testimony is very conflicting. There is substantial evidence that raises questions about Ms Barnes' mental competency, but there is not clear and convincing evidence that as of the will signing on March 3, 2011, that Ms. Barnes suffered from dementia and thus lacked testamentary capacity.

1 83. Dr. Meharg testified that Ms. Barnes was highly vulnerable to influence  
2 at the time of the will signing due to her physical and mental  
3 impairments and total dependence on Michelle Wells for basic care. ~~Dr.~~  
4 ~~Meharg also testified that Ms. Barnes lacked the ability to form~~  
5 ~~independent thoughts sufficient to overcome the influence of Michelle~~  
6 ~~Wells.~~

7 Based upon the foregoing Findings of Fact, the Court makes the following:  
8

9 **II. CONCLUSIONS OF LAW**

- 10 1. The right to dispose of one's property by will is not only a valuable right,  
11 but is one assured by law. *Points v. Nier*, 91 Wn.20, 28, 157 P.44 (1916); *In*  
12 *re Murphy's Estate*, 98 Wash. 548, 555, 168 P. 175, 178 (1917); *In re*  
13 *Tiemens' Estate*, 152 Wash. 82, 88, 277 P. 385-387 (1929).
- 14 2. To exercise that right one must, of course, possess testamentary capacity.  
15 To have testamentary capacity, a testator must have sufficient mental  
16 functioning to understand the transaction in which she is engaged, to  
17 recollect the objects of her bounty, and to recall in general the nature and  
18 extent of her estate.
- 19 3. Petitioners have the burden of proving testamentary incapacity and they  
20 must meet their burden by clear, cogent and convincing evidence.
- 21 4. There is not clear, cogent, and convincing evidence establishing that Ms.  
22 Barnes lacked testamentary capacity when she signed the will on March 3,  
23 2011. The evidence was inconclusive that Ms. Barnes had dementia at the  
24

1 time of the will-signing and thus there is no inference that she was  
2 sufficiently cognitively impaired at the time of the will signing to invalidate  
3 the will for lack of capacity. The testimony of lay witnesses, was  
4 inconsistent and inconclusive, and did not clearly and convincingly  
5 establish that Ms. Barnes did not have sufficient mental capacity to  
6 understand the will that she signed on March 3, 2011.

7  
8 5. The March 3, 2011 will was a radical departure from Ms. Barnes' prior  
9 wills which created an inference that it was the product of an unsound  
10 mind. This inference, alone, is not sufficient to overcome the clear, cogent,  
11 and convincing standard of proof.

12 6. There was significant amount of evidence regarding Ms. Barnes' cognitive  
13 impairment, but the Petitioners did not meet their burden in establishing  
14 that Ms. Barnes lacked testamentary capacity on March 3, 2011.

15 7. The will that Ms. Barnes executed on March 3, 2011 is not invalid because  
16 she lacked testamentary capacity.

17 8. A beneficiary's exercise of undue influence over a testator who otherwise  
18 possesses testamentary capacity operates to void a will. The influence  
19 must, at the time of the testamentary act, have controlled the volition of the  
20 testator, interfered with his or her free will, and prevented an exercise of  
21 his or her judgment and choice. *In re Estate of Lint*, 135 Wn.2d 518, 535,  
22 957 P.2d 755 (1988).  
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1 9. The evidence necessary to establish undue influence must be clear, cogent  
2 and convincing. This burden can be met with circumstantial evidence.

3 10. A presumption of undue influence can be raised by showing certain  
4 suspicious facts and circumstances. In *Dean v. Jordan*, 194 Wn. 661, 79  
5 P.2d 371 (1938), the court identified several facts which may give rise to a  
6 presumption of undue influence. A presumption of undue influence can  
7 arise where (1) the beneficiary was the decedent's fiduciary; (2) the  
8 beneficiary participated in the preparation or procurement of the will; and  
9 (3) the beneficiary's share of the estate was unnaturally large. Added to  
10 these may be other considerations, such as the age or condition of health  
11 and mental vigor of the testator, the nature or degree of relationship  
12 between the testator and the beneficiary, the opportunity for exerting  
13 undue influence, and the naturalness or unnaturalness of the will. *Id.* at  
14 672.  
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16 11. Clear, cogent, and convincing evidence supports a presumption that the  
17 will executed by Ms. Barnes on March 3, 2011 was the product of undue  
18 influence by Michelle Wells.

19 12. Michelle Wells was Ms. Barnes' fiduciary. She was her attorney in fact and  
20 her caregiver at the time the March 3, 2011 will was signed. This was not  
21 disputed by Michelle Wells.  
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13. Michelle Wells participated in the procurement of the March 3, 2011 will.  
Michelle Wells provided Ms. Barnes with transportation to the last four meeting she had with Mr. Tolman and participated in one of the meetings.
14. The March 3, 2011 will gave Michelle Wells an unnaturally large share of Ms. Barnes' estate. Michelle Wells and her husband are unrelated to Ms. Barnes and it gave them the entire estate.
15. Ms. Barnes was also extremely vulnerable to undue influence due to physical limitations, some degree of cognitive impairment, and the fact that Michelle Wells was Ms. Barnes' primary caregiver.
16. All of the "other considerations" listed by the court in *Dean* support a finding that the will executed by Ms. Barnes on March 3, 2011 was the product of undue influence by Michelle Wells.
17. There is no dispute that Ms. Barnes was elderly. She died just weeks shy of her 95<sup>th</sup> birthday. The evidence supports the fact that Ms. Barnes' health began deteriorating both physically and mentally after her fall in March of 2009. Ms. Barnes required more and more care involving her activities of daily living, including the handling of her business and finances affairs.
18. Ms. Barnes' mental vigor was borderline when she executed her March 3, 2011 will.
19. Michelle Wells and Dennis Wells were unrelated to Ms. Barnes. Michelle Wells' daily involvement and Ms. Barnes' dependence on her created the opportunity to exert undue influence over Ms. Barnes. Ms. Barnes was

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isolated from family and friends and completely dependent on Michelle Wells.

20. The unnaturalness of the March 3, 2011 will was a critical factor for this Court. The March 3, 2011 will was a radical departure from all of Ms. Barnes' prior wills. Ms. Barnes' estate consisted of homesteaded property that had been in the Rova family since the early 1900's. The Court cannot conceive of Ms. Barnes disinheriting the Petitioners and making this absolutely radical and unnatural change to her prior wills unless she was subjected to undue influence that the evidence suggests she was vulnerable to.

21. Michelle Wells did not produce evidence that this Court finds sufficient to "at least to balance the scales and restore the equilibrium of evidence touching the validity of the will." *In re Estate of Burkland*, 8 Wash.App. 153, 158-59, 504 P.2d 1143 (1972), review denied, 82 Wash.2d 1002 (1973). Clear, cogent and convincing evidence establishes that the will signed by Ms. Barnes on March 3, 2011 was the product of ongoing undue influence by Michelle Wells.

22. The evidence that was presented on behalf of Ms. Wells was not sufficient to overcome the presumption of undue influence, based not only on the fiduciary relationship, the active participation in procuring the Will and the unnatural disposition, but on all of the other considerations that the Supreme Court says are appropriate to consider, age, health, incapacity, mental vigor, nature and degree

1 of relationships, opportunity for influence and the unnaturalness of the  
2 disposition. The will that Ms. Barnes executed on March 3, 2011 is invalid  
3 because it was the product of undue influence by Michelle Wells.

4 23. The letters testamentary of the current personal representatives shall be  
5 canceled, and Vicki Rova Mueller shall be appointed in his place.

6 Based on the foregoing, the Court ORDERS, ADJUDGES AND DECREES as follows:

7 **III. ORDER**

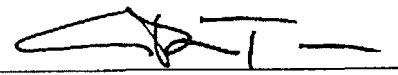
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- 9 1. The relief requested in the Petition to Contest Will shall be and hereby is  
10 GRANTED.
  - 11 2. The will signed by Ms. Barnes on March 3, 2011 and admitted to probate  
12 on July 1, 2011 shall be and hereby is declared invalid, and the probate of  
13 the March 3, 2011 will is hereby revoked.
  - 14 3. Clerk's Action Required: Dennis Wells is removed as personal  
15 representative and letters testamentary issued to him are hereby  
16 CANCELED.
  - 17 4. Vicki Rova Mueller is hereby appointed to serve as personal representative  
18 of the estate, with non intervention powers, and to serve without bond.
  - 19 5. Dennis Wells shall not be discharged as personal representative except  
20 upon court approval, after notice, of his account of his actions as personal  
21 representative. His account shall identify all probate assets of which he  
22 took possession and all probate liabilities, as of the date of death, shall  
23 itemize all receipts and disbursements in respect of such assets and  
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liabilities and in respect of the administration of the estate, and shall state  
the balance of probate assets and liabilities delivered to their successor.

DATED: June 5, 2013

CLALLAM COUNTY SUPERIOR COURT

By:   
The Honorable Brooke Taylor  
Superior Court Judge

6. Dennis Wells' accounting as required above shall be  
submitted to counsel for petitioners within 30 days  
from June 5<sup>th</sup> 2013. Petitioners shall have 30 days  
from the date it receipt of Mr. Wells Accounting to  
object. If the ~~probate~~ petitioners fail to timely  
object, Dennis Wells shall be discharged as  
personal representative.

DW  
KWL