46337-7-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

In re the Estate of:

CHARLES ROBERT THORNTON,

Deceased.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Respondent, Mary Heberlein, is the longtime girlfriend and domestic partner of the decedent, Charles Robert ("Bob") Thornton.[1] As early as 2003, Mary and Bob had a committed intimate relationship where they lived together as a couple, shared joint bank accounts, and expenses. Bob and Mary were also business partners. To those that knew them, Bob and Mary were a couple. They were confidants, the closest companions, and Mary was known to others as "Bob's significant other." They would spend time with Bob's friends, and it was known to Bob's friends and family that he wanted to "take care of Mary" when he died.

In October 2010, Bob was diagnosed with cancer and only given two to six months to live with a 5% chance of survival. Being still mentally sound, Bob immediately asked a friend for a referral to an attorney; he wanted a Will and Health Care Directive to get his affairs in order. Bob and Mary also registered as domestic partners in October 2010 so that Bob could always have Mary by his side during treatment. On October 18, 2010, Bob executed a Will revoking his 1988 Will and leaving his entire estate to Mary.

After the initial shock of his diagnosis, immediate arrangements were made with regard to Bob's affairs; he did, however, return to work

[1] Because two parties share a surname, we refer to all parties by their first names for clarity. No disrespect is intended

until undergoing a medical procedure in Seattle on November 29, 2010. Bob never recovered from that procedure and died in the hospital on December 5, 2010. Everyone who was in contact with Bob during the October through December 2010 period stated that he was mentally coherent until his death.

Martin Thornton, Bob's adopted son, has attempted to characterize Bob's Revoked 1988 Will as a "22 year estate plan." This over-exaggeration suggests a situation where Bob's relationship and plans for Martin remained the same between 1988 and 2010. To the contrary, as early as 2003, which was nearly eight years (8) years before he revised his Will, Bob had begun to add Mary as a joint tenant with right of survivorship to his accounts. The October 2010 Will was merely the final culmination of a change in Bob's testamentary intent dating back to 2003 when his committed intimate relationship with Mary began. As Bob stated to friends, he felt he had a need to "get his affairs in order" after he received his poor diagnosis.

Martin filed the present TEDRA action seeking to invalidate the October 2010 Will. The trial court granted Mary's summary judgment motion and dismissed Martin's claims as they relate to undue influence, fraud in the inducement, and the non-probate assets. Martin appeals the order granting summary judgment.

II. RESTATEMENT OF ISSUES ON APPEAL

1. Can the court grant summary judgment on a claim for undue influence under a TEDRA petition when the non-moving party presents insufficient evidence to support a presumption of undue influence, or that presumption was sufficiently rebutted? **Yes.**

2. Can the court grant summary judgment when the non-moving party does not present any evidence of fraud to support a claim for fraud in the inducement for the formation of a Will? **Yes.**

3. Can the court grant summary judgment and dismiss a claim relating to non-probate assets when the claim is barred by the statute of limitations set forth in RCW 11.11.070, and the personal representative raised the defense in the answer to the petition? **Yes.**

4. Can the court award attorneys' fees to the personal representative when the court grants summary judgment dismissing the TEDRA petition? **Yes.**

III. RESTATEMENT OF THE CASE

A. Bob Thornton's and Mary Heberlein's Relationship.

Bob and Mary began their relationship in 2003. CP 17, 67. They lived and worked together from that time until Bob died in December 2010. *Id.* The relationship constituted a committed intimate relationship. Their friends considered Mary as Bob's "significant other." CP 96. When

Bob became ill, he and Mary registered as domestic partners to ensure that Mary would not be excluded from the hospital room and she could always be by Bob's side. CP 86. After his diagnosis, Bob told numerous people that he wanted to take care of Mary and get his affairs in order to begin preparing for treatment. CP 77, 92; 97.

Despite Bob's expressed love and affection for Mary, he was never known to be influenced by her. His close personal friend, Judy Johnson, described Bob as "very smart and firm" and a man "who would not be influenced" in a way he did not want to be. CP 73-74. Ms. Johnson described Bob as "never one to be easily influenced, especially by women." *Id.* Another close friend of Bob, Joe Holbrook, described any allegation that Bob lacked any capacity or was influenced by anyone, including Mary, as "bullshit." CP 97. These friends knew Bob for many years, and described no change in his manner, even days before his death.

B. Bob Learns He Is Ill, But Returns to Work.

In October 2010, Bob had been suffering from a cough that would not go away. CP 68. At Mary's insistence, Bob went to the doctor. He learned that he was suffering from renal cell carcinoma, which had spread to several organs. Bob was told he had a 5% chance of surviving, and was only given an estimated two to six months to live. *Id.* Even immediately after his diagnosis, Bob only took Advil to alleviate his pain. *Id.* The only

other medication he took until hospitalized was Spiriva, an oral inhalant prescribed by his doctor to assist with his breathing problems. *Id.*

Upon receiving his diagnosis, Bob made clear to several people that he wanted to get his affairs in order. CP 79, 92, 96-97. Bob called long-time friend Joe Holbrook and asked him and his wife, Sue, to file Bob and Mary's domestic partnership registration with the State of Washington in Olympia. The Holbrooks had been friends with Bob for nearly thirty years. Both Mr. and Mrs. Holbrook remember Bob to be lucid, and with full capacity to make his own decisions, even after his diagnosis. CP 94, 97.

Bob remained lucid, coherent, and as mentally capable as he ever was to his friends and sister. Bob's sister, Doris Ellison, was a nurse for 30 years, who was licensed and credentialed at the time of Bob's death. CP 92. Ms. Ellison visited Bob in the hospital and remembers him talking normally and showing no signs of mental problems, even up until his death. *Id.* His breathing problems caused by the cancer had no impact on his lucidity and coherence. *Id.* He was never confused, and could always maintain a conversation. *Id.*

After his diagnosis, Bob continued to speak with his close friend and business associate, Paul Henderson. CP 79. Bob and Mr. Henderson had worked together since 1999. *Id.* When Bob returned to work after his

diagnosis, he began working his normal schedule, except for his doctor's appointments. *Id.* Bob did this for over a month, before he left for Seattle for his treatment on November 29, 2010. *Id.* At the point Bob left for treatment in Seattle he transferred his files to Mr. Henderson to oversee while he was receiving treatment. *Id.* Bob had always been known for keeping well organized files for his clients. *Id.* The files he turned over to Mr. Henderson were no different. *Id.* Until he was hospitalized, nothing in Bob's work or his daily interactions showed any mistakes, or that he did not know what he was doing. *Id.*; CP 68. Even in the hospital in Seattle, Bob would work from his hospital bed making phone calls and working on his laptop. CP 68.

In October and November 2010, Bob helped Mr. and Mrs. Johnson sell their home in Fircrest, Washington. CP 73. At the time, Bob helped the purchaser remove a bathroom that would not pass inspection so that the house sale could close. *Id.* Bob not only was involved in listing and selling the property, but closed the sale on November 22, 2010. *Id.*

Up until Bob left for his procedure on November 29, 2010, he continued to work in the yard and maintain the home he shared with Mary. CP 68. At the time Bob entered the hospital, he was still only taking Advil and Spiriva. CP 90. Even though he began taking other medications in in-patient care, Bob's mental status nor judgment were not

impaired by any medications when he drafted the 2010 Will. *Id.* Bob was happy to see his sister when she visited him in the hospital and he was able to talk normally and showed no signs of mental problems. CP 92. Bob died on December 5, 2010.

C. Bob Executes the October 18, 2010 Will Alone with His Attorney.

After being diagnosed with cancer, Bob called his longtime friend Sue Holbrook looking for an attorney referral to draft his will, Ms. Holbrook recommended attorney Desiree Hosannah; and Bob and Mary each contacted Ms. Hosannah directly. CP 94. Bob specifically told Ms. Holbrook that he wanted to "take care" of Mary. CP 95.

In October 2010, Bob told Mr. Henderson that he was creating a new Will in light of the "grim prognoses he had received from his doctors." He stated the Will was to "put his affairs in order." CP 79. This was consistent with Bob's statements to his sister that he wanted to "get his house in order." CP 92. On the day Bob signed his Will, he asked Mr. Henderson to go to the attorney's office to witness the Will. CP 79. "At no point before, during, or after the will signing did [Mr. Henderson] perceive any change in his mental condition. [Bob] was completely lucid, aware and interactive before, during and after the will signing. Bob certainly understood the fact that he was signing a will." *Id.* Bob went to

Ms. Hosannah's office with Mary and Mr. Henderson. CP 81. Ms. Hosannah is an attorney who had practiced for over 16 years, and has counseled numerous clients on estate planning. *Id.* Both Mary and Bob were going to draft Wills that day. *Id.* Although both Mary and Bob met with Ms. Hosannah together at the beginning, Ms. Hosannah met with each client individually. *Id.* Bob indicated that he wanted a new estate plan because of his upcoming medical procedures. *Id.* In a one-on-one meeting, Ms. Hosannah asked Bob who he wanted as his beneficiaries. *Id.* Outside of the presence of Mary, Bob stated he wanted his primary beneficiary to be Mary, and his contingent beneficiary to be his sister. *Id.* When asked about his adopted son Martin, still outside the presence of Mary, , Bob stated to Ms. Hosannah that he had "already given Martin all he was going to get," and that Martin was a "bad seed." *Id.*

Ms. Hosannah met with Bob individually. Both Bob and Mary expressed their desire to ensure that Bob and Mary could be together during Bob's medical procedures. CP 199. Mary stated, "My particular interest was with the healthcare directive because I didn't want to be separated from Bob at all during his illness. And so she met with us independently." *Id.* Ms. Hosannah expressly met with Bob independently so that Bob was able to speak freely. CP 95. Mary did not instruct Ms. Hosannah as to any terms of Bob's estate plan in any respect. CP 96.

Mary and Bob both had met with Ms. Hosannah to draft their own individual wills. They were in Ms. Hosannah's office that day for about two or three hours, and then returned to work.

Bob was clear from the beginning as to what he wanted the Will to state. This was not a "rush job" as Martin attempts to categorize it. Ms. Hosannah clearly describes the meeting:

> During our meeting Bob appeared completely lucid and competent when I met with him. He knew exactly what he wanted and clearly told me who he wanted to inherit under the will. Bob clearly knew he was having a will created, since he asked specifically for it. He also clearly knew he was signing it. Bob clearly knew who his family and close relations were since he listed them to me. Finally, Bob knew what his assets were since he explained to me that he had already taken care of some assets by putting them in joint ownership with Ms. Heberlein and that his will was to take care of all remaining assets.

CP 82. All of the things Bob told Ms. Hosannah, and ultimately put into his Will, were consistent with his comments to family and friends during October and November 2010. They were also entirely consistent with his intent as far back as 2003, when Bob and Mary's relationship began and he started transferring assets to her and into joint accounts with rights of survivorship.

When the October 18, 2010 Will was drafted, Bob was not impaired by his illness. By all accounts, Bob was coherent, aware of all around him, lucid, and clearly functioning. Bob only suffered to the

extent the cancer caused problems for his breathing. Bob's friends and family recount him as mentally coherent before the drafting of the Will and after, until the time of his death. At no point does anyone indicate Bob had anything but a clear mind during his last few months.

D. Bob Was Well Known for His Rocky Relationship with Martin.

Bob told multiple people (friends and family), including Ms. Hosannah, that he thought he had given enough to Martin. CP 92, 95. Bob thought of Martin as a "bad seed," and knew he wanted to care for Mary. CP 82; CP 95.

Bob had adopted Martin. CP 92. Bob's 1988 Will identified Martin as his beneficiary. The revoked 1988 Will remained untouched until Bob learned he was ill. In 1996, Bob gave Martin a house worth $136,000. CP 67.

Over the years, Bob would often talk about his extremely difficult relationship with Martin. CP 92. Bob would share with his sister that he "felt he had given Martin everything he could possibly give." *Id.* Bob also expressed his frustration with Martin multiple times with Judy Johnson, a friend of Bob's since the 1960's. CP 72.

On November 29, 2010, Mary called Martin to inform him that Bob was in the hospital, and that Martin should come visit Bob. CP 69.

Martin indicated he would not go to the hospital that day. *Id.* Martin never visited Bob in the hospital.

E. Bob and Mary Had Shared Ownership of Assets As Early As 2003.

When Bob and Mary began dating in 2003, they began establishing joint bank accounts at that time. CP 250-51. Bob and Mary had joint ownership of corporations, they owned bank accounts as joint tenants with rights of survivorship. Bob added Mary to *his* bank accounts, and as the beneficiary to *his* bank and retirement accounts in 2003, and then again in 2007, 2008, and 2009. CP 151-52, 254, 256-58, 266-68, 269-80. In 2003, Mary sold her home in Northwest Landing at a significant profit, all of which was shared by Bob and Mary. *See* CP 151-52. In addition, Bob and Mary owned the home they lived in together as joint tenants with right of survivorship.

In November 2003, Mary added Bob to *her* KeyBank account that she originally opened in 1997. CP 251. The account was expressly established so that Bob and Mary were co-owners as joint tenants with rights of survivorship. *Id.*

Arising out of their joint business operations, Bob and Mary had three business bank accounts with Columbia Bank. The following were the joint business bank accounts: (1) opened in 2006 named "Mary

Heberlein Real Estate Account"; (2) and two accounts named "Res Inc." opened in 2009. *Id.* Res Inc. was a real estate brokerage business. Both Mary and Bob were officers of the corporation, and both signed the signature cards for the accounts. *Id.* In 2007, Mary changed the beneficiary designation on her Edward Jones retirement account where she named Bob the primary beneficiary. CP 252. Similarly, Bob designated Mary as the primary beneficiary on both of his retirement accounts with Van Kampen Investments on December 12, 2008. *Id.* Bob did this without notifying Mary. CP 149. This further demonstrates an estate plan of Bob's to have Mary named as the beneficiary of his assets and likewise with Mary naming Bob as her beneficiary.

IV. RESPONSE ARGUMENT

A. Standard of Review is De Novo.

Summary judgment is reviewed de novo—the inquiry on appeal is the same as at the trial court. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). The facts, and all reasonable inferences to be drawn from the facts are viewed in the light most favorable to the non-moving party. *In re the Estates of Harvey L. Jones and Mildred L. Jones*, 170 Wn. App. 594, 603, 287 P.3d 610 (2012). A material fact is one that the outcome of the litigation depends on, in whole or in part. *Atherton Condo Apartment Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506,

516, 799 P.2d 250 (1990). If a moving party, a defendant, meets the initial showing of absence of an issue of fact, the inquiry shifts to the party with the burden of proof at trial. *Young v. Key Parm. Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If the party with the burden at trial "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, then the court should grant the motion." *Id.* (internal citations omitted).

B. The Trial Court Applied the Proper Summary Judgment Standard.

Martin claims that the trial court improperly considered the higher standard of "clear, cogent, and convincing evidence," which is the burden of proof under Martin's undue influence claim, because the matter was resolved on summary judgment. First, Martin points to nothing in the record to suggest the court applied anything but the proper standard on summary judgment of an undue influence claim, other than his own speculation. Martin's argument fails to recognize the established principle that for a claim of undue influence, the court, while still viewing facts and inferences in the light most favorable to the non-moving party, does consider the higher burden. The court does not ignore that a claim for undue influence must be met by clear, cogent, and convincing evidence,

merely because the motion is for summary judgment. If there are no genuine issues of material fact, and the non-moving party cannot meet that heightened burden, summary judgment is appropriate.

In the context of a claim for undue influence, where a party is required to establish its case by "clear, cogent, and convincing evidence," the general summary judgment principles are supplemented by two other principles. *Estate of Jones*, 170 Wn. App. at 603. First, the Court considers the summary motion with an eye toward the clear, cogent, and convincing standard by determining if there is "substantial evidence" under the "highly probable test."

> When a challenged factual finding is required to be proved at trial by clear, cogent, and convincing evidence, [the court] incorporates the standard of proof in conducting substantial evidence review. A party claiming undue influence must prove it by clear, cogent and convincing evidence. *In re Eubank*, 50 Wn. App. 611, 619, 749 P.2d 691 (1988). When such a finding is appealed, the question to be resolved is not merely whether there is substantial evidence to support it but whether there is substantial evidence in light of the "highly probable" test. *In re Welfare of Sego*, 82 Wn.2d 736, 739, 513 P.2d 831 (1973); *In re Estate of Reilly*, 78 Wn.2d 623, 640, 479 P.2d 1 (1970) (recognizing that "[e]vidence which is 'substantial' to support a preponderance may not be sufficient to support the clear, cogent, and convincing" standard). [The court] still view[s] the evidence and all reasonable inferences in the light most favorable to the prevailing party, *Woody v. Stapp*, 146 Wn. App. 16, 22, 189 P.3d 807 (2008) and, as in all matters, defer to the trier of fact on issues of credibility. *In re Welfare of L.N.B.-L.*, 157 Wn. App. 215, 237 P.3d 944 (2010).

Id. (citing *In re Melter*, 167 Wn. App. 285, 301, 273 P.3d 991 (2010)). On summary judgment, a party claiming undue influence must show that it is highly probable that an undue influence claim will prevail at trial. *Kitsap Bank v. Denley*, 177 Wn. App. 559, 312 P.3d 711 (2013).

The second principle supplementing general summary judgment standards is that the trial court is granted "plenary powers" under TEDRA. *In re Irrevocable Trust of McKean*, 144 Wn. App. 333, 343, 183 P.3d 317 (2008). *See* RCW 11.96A.020; 11.96A.060. This express intent of the legislature was to authorize the trial court with "full power and authority to proceed with such administration and settlement in any manner and way that to the court seems right and proper, all to the end that the matters be expeditiously administered and settled by the court." RCW 11.96A.020(2). With these plenary powers, the trial court is granted the authority to grant summary judgment under a TEDRA claim of undue influence.

Here, the trial court properly considered the facts in the light most favorable to Martin, the non-moving party. Martin produced no evidence on the shifted burden to demonstrate a genuine issue of material fact. No facts were produced to suggest that Mary influenced Bob, let alone unduly influence him. Martin's failure to present an issue of fact meant that he could not show by substantial evidence that it was highly probable that he

would prevail at trial. The motion for summary judgment was properly granted.

C. The Trial Court Properly Granted Summary Judgment on the Undue Influence Claim.

Martin produced no evidence to create a genuine issue of material fact as to whether Mary influenced Bob's disposition under his 2010 Will, let alone any influence that was undue. Undue influence is an unfair persuasion that seriously impairs the free and competent exercise of judgment. *In re Infant Child Perry*, 31 Wn. App. 268, 272-73, 641 P.2d 178 (1982). A claim of undue influence must be proven by clear, cogent, and convincing evidence. *In re Estate of Eubank*, 50 Wn. App. 611, 619, 749 P.2d 691 (1988). To constitute undue influence, the influence over the testator must be such that it overcomes a testator's free will and substitutes it for the will of the person exercising the influence. *In re Bottger's Estate*, 14 Wn.2d 676, 701, 129 P.2d 518 (1942). If the testator remains a free agent and does not act under some irresistible restraint or compulsion, the testamentary disposition is valid. *Id.*

The court turns to seven factors when examining whether undue influence existed.

> Nevertheless certain facts and circumstances bearing upon execution of a will may be of such nature and force as to raise a suspicion, varying in its strength, against the validity of the testamentary instrument. The most important of such

> facts are (1) that the beneficiary occupied a fiduciary or confidential relation to the testator; (2) that the beneficiary actively participated in the preparation or procurement of the will; and (3) that the beneficiary received an unusually large part of the estate. Added to these may be other considerations, such as [4] the age or condition of health and mental vigor of the testator, [5] the nature or degree of relationship between the testator and the beneficiary, [6] the opportunity for exerting an undue influence, and [7] the naturalness or unnaturalness of the will. The weight of any such facts will, of course, vary according to the circumstances of the particular case. Any one of them may, and variously should, appeal to the vigilance of the court and cause it to proceed with caution and carefully to scrutinize the evidence offered to establish the will.
>
> The combination of facts shown by the evidence in a particular case may be of such a suspicious nature as to raise a presumption of fraud or undue influence and, in the absence of rebuttal evidence, may even be sufficient to overthrow the will.

Dean v. Jordan, 194 Wash. 661, 671-72, 79 P.2d 331 (1938). The presence of three factors may create a rebuttable presumption of undue influence: (1) a confidential or fiduciary relationship between the beneficiary, (2) the beneficiary's active participation in the transaction, and (3) whether the beneficiary received an unusually large part of the estate. *In re Trust and Estate of Melter*, 167 Wn. App. 385, 273 P.3d 991 (2012). These factors are important, but not to be considered alone. *Id.*

Importantly, even if the presumption of undue influence is applied, this is a rebuttable presumption. The beneficiary can produce sufficient evidence to demonstrate that the presumption is rebutted because despite

the relationship, or the amount received from the estate, the beneficiary did not have any undue influence over the testator. "[E]ven if the presumption of undue influence existed, the judge [is] permitted under TEDRA to weigh that presumption against the noted evidence of competency and no undue influence and summarily decide the case without setting the matter to the trial docket." *Estates of Jones*, 170 Wn. App. at 611.

Unlike in the gift context, the existence of these cautionary circumstances does not shift the ultimate burden of proof. That the elements exist to create a rebuttable presumption will not automatically invalidate a Will. *In re Estate of Bussler*, 160 Wn. App.449, 466, 247 P.3d 821 (2011).

> The combination of facts may be so suspicious as to raise a question of undue influence and, "in the absence of rebuttal evidence, may even be sufficient to overthrow the will." *Dean,* 194 Wash. at 672, 79 P.2d 331. But "the existence of [a question] does not relieve the contestants of the duty to establish ... undue influence by clear, cogent, and convincing evidence" that the presumptively valid will should be disregarded. *In re Estate of Reilly,* 78 Wash.2d 623, 663, 479 P.2d 1 (1970); *In re Estate of Lint,* 135 Wash.2d 518, 535, 957 P.2d 755 (1998).

In re Melter, 167 Wn. App. at 299.

The presence of these elements will not shift the ultimate burden of proof; rather, they "appeal to the vigilance of the court and cause it to

proceed with caution and carefully to scrutinize the evidence offered to establish the will." *Bussler,* 160 Wn. App. at 466, 247 P.3d 821 (quoting *Dean,* 194 Wash. at 672, 79 P.2d 331).

1. A Confidential Relationship Alone Is Insufficient to Show Undue Influence.

Martin argues that Mary was in a confidential relationship with Bob so as to suggest that the presumption of undue influence should apply. A confidential relationship is only one factor when determining whether the presumption of undue influence applies. Even still, with the existence of a confidential relationship, the presumption is still rebuttable. The mere existence of a confidential relationship is not enough to show undue influence, and is meaningless unless it co-exists with other factors, such as, and especially, procurement of the Will. *White v. White*, 33 Wn. App. 364, 655 P.2d 1173 (1982).

Martin attempts to argue that the registration of the domestic partnership or the existence of the Health Care Directive demonstrate the relationship between Mary and Bob and is the foundation of a presumption of undue influence. In contrast, the record is undoubtedly clear that Mary was a business partner and considered Bob's "significant other" for years before Bob ever learned he was sick. The change in their relationship, to obtain a registered domestic partnership, and a power of

attorney, was to ensure that Mary could be with Bob at the hospital and during all medical procedures. CP 86. Undisputedly, Mary and Bob had a longstanding relationship, memorialized to protect both parties' wishes as Bob became ill—but that fact alone is insufficient to apply the presumption of undue influence.

2. The 2010 Will Was Procured by Bob — Mary's Presence Did Not Constitute Participation.

Nothing produced by Martin refutes the evidence that *Bob* independently sought a referral from one of *his* friends for an attorney to draft his new Will, that he knew to whom he wanted to leave his assets, and that Bob alone met with the attorney to discuss the terms he wanted in his Will. Bob's motivation was expressly to get his affairs in order after learning that he had two to six months to live with his cancer. This Will was not an "eleventh-hour" Will in the context that Martin attempts to portray. Bob learned that he had very little time to live, and immediately and independently sought to ensure that his final wishes were carried out.

Moreover, Martin's claims lack any authority that Mary's presence at the attorney's office is sufficient to demonstrate that she participated in the drafting of the 2010 Will. Even if Bob had not unilaterally told multiple friends, family and his attorney (in private) that he wanted Mary to be his beneficiary, Mary went to the attorney's office to draft her own

Will, and was not involved in the drafting of Bob's. The attorney met with both Mary and Bob individually throughout that afternoon. Outside of the presence of Mary, Bob stated that Mary was to be his beneficiary, and that he expressly did not want to include Martin in the Will. Regardless, Mary's presence at the attorney's office, without direct involvement in the terms of the Will at all, is insufficient to constitute participation for purposes of undue influence.

Again, Mary was not in the room when Bob discussed the terms of his will with his attorney, she was only in the same office because she was also having her will drafted. Nevertheless, even if she were, case law requires much more. If a beneficiary is in the room with the testator when the testator dictates the terms of the Will to the attorney, it is still not a determining factor unless the beneficiary is actively engaged in the transaction. "Participation in the transaction sufficient to support a presumption of undue influence requires that the beneficiary actively dictated the terms of transaction, purportedly on behalf of the decedent." *Kitsap Bank v. Denley*, 177 Wn. App. 559, 312 P.3d 711 (2013) (citing *In re Estate of Haviland*, 162 Wn. App. 548, 555-66, 255 P.3d 854 (2011) (decedent's wife participated in the transaction by advising decedent's attorney about the changes decedent wanted to make to his will, wrote the letter dictating the terms of the new will, and accompanied decedent to his

attorney's office to sign the new will); *Doty v. Anderson*, 17 Wn. App. 464, 468, 563 P.2d 1307 (1977) (beneficiary participated in the transaction because the beneficiary personally signed the signature cards designating her as the joint tenant on decedent's bank account and was at the bank with the decedent when she changed the designation on the account).

Mary never informed the attorney who should be Bob's beneficiaries. Her conversations with the attorney were to establish her own beneficiaries in her own Will. Bob, on his own, clearly expressed that he knew what assets he had, what family he had, and that Mary was to be his primary beneficiary. That the Will drafting only took a day is also irrelevant: Bob knew before he called the attorney (as reflected by representations to his family and friends) that he wanted Mary to be his beneficiary.

3. Mary's Receipt under the 2010 Will Was Not Unnaturally Large.

Bob drafted the 2010 Will because he learned he was very sick with only months to live. Prior to that, however, Bob had been sharing assets with Mary as early as 2003, and had been transferring ownership interests in other non-probate assets as early as 2004. Martin's argument that Mary went from receiving none of Bob's property to all of Bob's property in the last months of his life is simply wrong (as well as

unsupportable by any evidence). Bob began commingling assets with Mary as early as 2003. CP 250-52. In 2003, Mary listed Bob as a joint tenant with rights of survivorship on her deposit account at Key Bank. This was listed as joint tenants with rights of survivorship on accounts they had each acquired before meeting, thus ensuring the survivor of each would receive the separate property of the first to die. In 2006 and 2009 they opened joint checking accounts to operate their business at Columbia Bank. In 2007 and 2008, Mary and Bob listed each other as the primary beneficiaries on their respective retirement accounts. Bob added Mary as the beneficiary to his retirement and investment accounts, as detailed above without notifying her. Even without the 2010 Will, Mary was to receive significant interests in Bob's property. There is nothing unnatural about Bob leaving his final assets in his estate to Mary when he had been transferring assets to Mary, and naming her as the beneficiary or joint tenant with rights of survivorship since their relationship began in 2003. Under the 2010 Will, Mary will receive assets worth far less than the $143,103 balance in the probate estate after the costs of administration are factored in. When compared to what Martin has already received during his life (assets worth $136,000), there is no unnaturally large disposition of the decedent's estate. During this matter, Martin has attempted to argue that he paid for the $136,000 house but presented absolutely no evidence

to that effect. There is no evidence of any payments to Bob from Martin in the record or otherwise.

The evidence demonstrated that the 2010 Will was not the change to a long term estate plan that Martin has attempted to characterize. Instead, it was a series of actions consistent with the progression of the relationship between Bob and Mary, and consistent with the transfers of property interests that Bob had made for years. Moreover, Bob and Mary had established a committed intimate relationship years earlier, then memorialized their relationship in a registered domestic partnership. Given the formality of their personal and romantic relationship, Mary *was* the natural object of Bob's bounty.

Not only did Bob and Mary commingle assets for years, but Mary would take half of Bob's estate under the omitted spouse doctrine even if the 2010 Will was invalidated and the 1988 Will reinstated. The registered domestic partnership was valid and has never been challenged. Washington State's Omitted Spouse statute RCW 11.12.095 provides, in relevant part, that:

> (1) If a will fails to name or provide for a spouse or domestic partner of the decedent whom the decedent marries or enters into a domestic partnership after the will's execution and who survives the decedent, referred to in this section as an "omitted spouse" or "omitted domestic partner," the spouse or domestic partner must receive a

> portion of the decedent's estate as provided in subsection (3) of this section...
>
> (3) The omitted spouse or omitted domestic partner must receive an amount equal in value to that which the spouse or domestic partner would have received under RCW 11.04.015 if the decedent had died intestate...

If the 1988 Revoked Will is reinstated, then Mary is entitled to half of the separate and all of the community property. She is also entitled to keep all of the non-probate assets naming her as a beneficiary because the 1988 Will is *not* a "superwill" and even if it were, a "superwill" does not supersede beneficiary designations made *after* the "superwill" is executed. RCW 11.11.020(1)-(4). Under Martin's best case scenario assuming that all the decedent's probate assets are separate, and not community, the total property of the probate estate constituted $132,615.86. The difference between one-half of $132,615.86 ($66,307.93) is not unnaturally disproportionate from the amount that Mary receives under the 2010 Will. No evidence supports the argument that Mary takes an unnaturally large disposition under the Will. As such, the "unnaturally large" factor is not met, the presumption of undue influence does not apply, and summary judgment was appropriate.

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4. No Other Remaining Factors of Undue Influence Exist.

Consideration of the other *Dean* factors reflects that no genuine issue of material fact exists as to whether the undue influence was present with the 2010 Will.

Mental and Physical Condition: Although Bob had been diagnosed with cancer, he was still as mentally sound as ever. His only limitation was his breathing. Moreover, Bob sought to create the 2010 Will immediately after his diagnosis (on October 18) and did not wait until he was hospitalized, or experiencing any side effects of his treatment. The fact that Bob suffered from cancer did not impair his cognitive abilities, his clarity, or coherence. The declarations of Bob's friends, sister, and doctor all recall Bob as coherent, lucid, and capable of working up until his death. Unlike the decedent in *Estate of Lint*, Bob was not suffering cognitively from his cancer.

Relationship between Testator and Beneficiary: There is no evidence to dispute that Bob and Mary had anything but a loving, long term, committed relationship. Not only were Bob and Mary known as each other's "significant others," they were business partners and shared a home and resources. Martin attempts to discredit the relationship between Mary and Bob by discounting the purpose of the domestic partnership registration. Mary testified that this registration was to ensure she could

be with Bob at all doctor appointments, and during medical procedures and hospital stays. CP 86. This motivation certainly does not undercut the loving and committed nature of Bob and Mary, but instead substantiates the strength of their relationship. Bob clearly intended to provide for Mary with the 2010 Will.

Opportunity to Influence the Will: No evidence suggests that Mary took part in the drafting of, or acted in any manner to influence, let alone unduly influence, the 2010 Will. As discussed above, she was present at the attorney's office but was not involved in communicating any of the information to the attorney and, in fact, Bob in his one-on-one meeting identified the beneficiaries of his estate. No evidence suggests Mary asked for certain provisions in the Will, suggested modifications, acted as a liaison or interpreter for the attorney. The attorney met with Bob privately, drafted the Will that day, and it was consistent with his expression made to friends and family to "take care of Mary."

Naturalness of the Will: A question of what is an unnatural disposition depends on the relationship of the testator with those persons who would ordinarily be the natural objects of his bounty, because it is perfectly natural for a testator to disinherit even close relatives which whom he has not been on good terms. *In re Jordan's Estate*, 123 Wn. 609, 219 P. 2 (1923). *In re Jordan's Estate* is informative for this matter

since in that case Jordan had been estranged from his children for many years and his estate plan was not considered unnatural when he left his estate to his friends and not his children. The court also considers it quite natural for a testator to leave property to a spouse instead of children, especially if the testator had given inter vivos gifts to any of the excluded children. *In re Estate of Mitchell*, 41 Wn.2d 326, 249 P.2d 385 (1952).

Mere suspicion of undue influence, which is really the only evidence that Martin has presented in this case, is not enough to set aside a Will. *Id. In re Estate of Mitchell* is a perfect example of why undue influence would not apply in this matter. In that case, the court found that an elderly gentleman who gave the majority of his estate to a certain set of his children, as opposed to another set of his children, was completely within his right to do so, even though he was, in his last years, in the care and control of the children to whom he gave the majority of his estate. *Id.* at 328-30; 336-37. The *Mitchell* court identified that since the children who did not receive under the Will had already received substantial gifts from their father during their life, the court would not find an inference of undue influence, and therefore sustained the Will. *Id.* at 353.

In fact, in this case the decedent, while certainly having the right to do as he chooses with his assets, chose to give his adopted son (Martin) substantial assets during his lifetime. The court's consideration is not

what is "fair" or in accord with our society's view of a proper disposition, as long as no undue influence is ultimately found to have been exercised. *In re Sinclair's Estate*, 8 Wn.2d 611, 113 P.2d 65 (1941). Nor will a court rewrite a testator's Will because there are surviving relatives that have the opinion that they deserve more than they received. *In re Smith's Estate*, 68 Wn.2d 145, 155, 411 P.2d 879, corrected 416 P.2d 124 (1966). No evidence suggests that the 2010 Will was unnatural, or that any basis of undue influence existed.

Given that the weight of the *Dean* factors in consideration of the facts of this case do not favor a finding of undue influence, the trial court properly granted summary judgment.

D. No Genuine Issue of Material Fact Existed as to Whether Fraud in the Inducement Occurred.

With regard to fraud, Martin advocates for a presumption that does not exist under Washington law. Second, he cannot suggest any actual misrepresentation on the part of Mary that could constitute fraudulent inducement. *See Estate of Lint*, 135 Wn.2d 518, 522, 957 P.2d 755 (1998). Like any fraud claim, Martin's fraud in the inducement claim would have required proof by clear, cogent and convincing evidence. *Pedersen v. Bibioff*, 64 Wn. App. 710, 828 P.2d 1113 (1993). The elements of fraud are: (1) representation of an existing fact, (2)

materiality of the representation, (3) falsity of the representation, (4) knowledge of the falsity or reckless disregard as to the truth of it, (5) intent to induce reliance on the representation, (6) ignorance of the falsity, (7) reliance on the truth of the representation, (8) justifiable reliance, and (9) resulting damages. The general rule is that fraud is never presumed. *Beckendorf v. Beckendorf*, 76 Wn.2d 457, 457 P.2d 603 (1969).

> Fraudulent inducement is identified as conduct that:
>
> > ... consists of willfully false statements of fact other than those relating to the nature or contents of the instrument, made by a beneficiary under the will which is the induced, which are intended to deceive testator, which do deceive him, which induce him to make a will, and without which he would not have made such will.
> >
> > *In re Bottger's Estate*, 14 Wn.2d 676, 701-702, 129 P.2d 518 (1942) (quoting Atkinson, Wills (1937) 221, § 99) (internal quotes omitted).
> >
> > Expressed otherwise, the representations must be with reference to extrinsic facts, and must be made to the testator by, or on behalf of, a person benefiting under the will; the statements must be false and must be known to be so by the person making them (although in some circumstances mere suppression of the facts may be sufficient to constitute fraud); and the facts misrepresented must be material and must induce the making of the will in question.

Id. See also In re Dand's Estate, 41 Wn.2d 158, 163-164, 247 P.2d 1016 (1952). Courts applying these rules will not nullify a Will which was allegedly induced by fraud if the facts alleged to support the fraud claim were merely opinions, and not statements of fact. *In re Estate of Mumby*,

97 Wn. App. 387, 393, 982 P.2d 1219 (1999). No evidence suggests any representations made to Bob were false, let alone that they induced Bob to make the 2010 Will. The only evidence offered by Martin is that Martin says the decedent "was not himself."

1. Martin Advocates for a Non-existent Presumption of Fraud.

The general rule is that fraud is never presumed. *Beckendorf v Beckendorf*, 76 Wn.2d 457, 457 P.2d 603 (1969). Martin relies solely on *In re Estate of Lint* for support on his theory of fraud. In *Lint*, the decedent was known as a "private and independent person who maintained a carefully chosen circle of confidents." 135 Wn.2d at 522. In 1983, after the death of her husband of 30 years, the decedent had a sizeable estate. In 1991, the decedent began dating a man 18 years her junior, Christian Lint. *Id.* She executed a Will in 1993 dividing her estate into three equal shares: (1) Jim Murphy, (2) her brother-in-law, and (3) to other certain named relatives. In 1995, the decedent was diagnosed with metastasized carcinoma in her lungs. Over the course of the year, she learned that she had metastasized lesions in her brain that caused her to be confused and oriented only to herself. She suffered from moderate-severe aphasia that affected her comprehension. Christian "systematically and persistently isolated" the decedent from her friends and family, and deceived and

terminated hospice and nursing care providers. Ultimately, Christian married her in a sham wedding in Las Vegas. At the time near her death, the decedent was found to be parroting and feeding "word salads" when interviewed by anyone outside the control of Christian. After trial, the court concluded that the facts clearly, cogently, and convincingly established the nine elements of fraud. *Id.* at 534. The decedent was isolated from friends and family, given misrepresentations that her family wanted to put her in a home to get their hands on her estate, and that these representations caused reliance on Lint. *Id.* Those specific findings of fraud, sufficient to establish the traditional nine elements of fraud, were also sufficient to lend themselves to a finding of undue influence.

Lint did not create a presumption of fraud in the inducement. There, the trial court simply found by clear, cogent, and convincing evidence that the nine elements of fraud were met. *In re Lint*, 135 Wn.2d at 534. Martin argues, "...all of the above described facts set forth by Marty also support entry of partial summary judgment imposing the presumption of fraud in the inducement in this matter."[2] Appellant's Brief at 22. The authority which Martin relies on to support a presumption of

[2] Respondent is confused by this statement because Martin never filed a cross-motion for partial summary judgment. The trial court was not asked to enter an order granting summary judgment finding that Mary committed fraud. Instead, the trial court properly granted summary judgment dismissing the claim that Mary committed fraud in the inducement.

fraud exists states, "Fraud and undue influence, although distinct concepts, are closely related and the findings of the trial court that support its conclusion of fraud provide additional support for its conclusion that there was undue influence." *Estate of Lint*, 135 Wn.2d at 537. However, the *Lint* court did not create a presumption of fraud in the inducement based upon the factors giving rise to the presumption of undue influence set forth in *Dean*. Instead, the *Lint* court recognized that the facts giving rise to the conclusion of fraud in *Lint*, also supported a conclusion of undue influence. *Id.* The full holding from the portion cited by Martin states:

> While counsel for appellant correctly observes that the trial court did not indicate, as it did in concluding that Christian fraudulently induced the will, that there was clear, cogent, and convincing evidence to support its conclusion of undue influence, that conclusion seems implicit from its citation to *Dean* where the correct burden of proof is set forth. The implied conclusion also flows from the trial court's holding that clear, cogent, and convincing evidence supported the conclusion that the will was procured by fraud. Fraud and undue influence, although distinct concepts, are closely related and the findings of the trial court that support its conclusion of fraud provide additional support for its conclusion that there was undue influence.

Estate of Lint, 135 Wn.2d at 537. This standard does not create a presumption of fraud. Unlike the doctrine of undue influence, no set of circumstances so suspicious in nature can give rise to a rebuttable presumption of fraud. Even if such presumption could arise, however, Ms. Heberlein offered sufficient evidence to overcome any presumption.

Ultimately, no alleged misrepresentations made by Ms. Heberlein were ever identified, let alone enough to support the argument that any alleged misrepresentations were the basis of Bob's disposition of assets under the 2010 Will. There are no genuine issues of material fact as to whether Ms. Heberlein fraudulently induced Bob to sign the 2010 Will.

2. Martin Presented No Evidence to Create a Genuine Issue of Material Fact.

Martin advocates that this case is factually like *Lint*, but has no support for this contention. Martin does not even identify any fact suggesting a misrepresentation made by Mary. Other than a bare assertion that Bob was isolated from his family, Martin produced no evidence to support this position. In fact, the overwhelming evidence produced by Mary reflects that Bob often spent time with longtime friends (those who he had been friends with since the 1960s), and often expressed his frustration with Martin to numerous sources. Bob was coherent until his death. There is absolutely no evidence to suggest that any misrepresentation or isolation was the cause of Bob's decision to identify Mary as his beneficiary. The two shared a loving relationship for eight years prior to his death. Mary was known by his closest friends as his "significant other." Bob expressly informed his family and friends that he wanted to take care of Mary. Bob expressly told his attorney drafting this

Will, outside of the presence of Mary, that he wanted Mary to be his sole beneficiary. Bob also indicated he wanted his sister, and not Martin, to be his contingent beneficiary should Mary predecease him. Nothing produced by Martin demonstrates that Bob was susceptible to any such fraud in the inducement like the decedent in *Lint*. The egregious systematic efforts to isolate and defraud a person deteriorating from lesions in the brain, as in *Lint*, are far different from the facts of this case.

The evidence supports that Bob felt he had given enough to Martin. Bob's friends and attorney were told by Bob that this was his belief. This could not form the basis of a misrepresentation made to Bob to constitute fraud. This was Bob's own proclamation, and no evidence supports that such a statement was any type of misrepresentation made by Mary to cause such a statement to be made. Indeed, at the time Bob gave Martin the house (whether outright or at a substantial discount), Mary and Bob had not even met yet. Mary had no knowledge, absent what she too heard Bob say from time to time, about the gift. Moreover, the weight of the evidence reflects that Bob was coherent and lucid at the time of the 2010 Will signing. Bob knew he wanted a Will, sought out an attorney on his own, and knew who he wanted his beneficiaries to be. Bob was not induced by fraud or any other means to make the 2010 Will.

Other than Martin's unsupported assertions, no evidence suggests that Mary controlled Bob's access to Martin, or any other person. To the contrary, Mr. Henderson declared that he was with Bob multiple times when Bob called Martin and left him messages regarding his cancer diagnosis. CP 78. Mary called Martin to come visit Bob in the hospital, but he never did. The wealth of evidence produced by Mary demonstrates that she and Bob had a loving, committed relationship for years before he learned he was ill; that Bob's illness motivated him to "get his affairs in order;" and that Bob unequivocally wanted to "take care of Mary." CP 79, 92, 96. Martin produced no shred of evidence to suggest that any sort of misrepresentation was the basis of fraud to induce Bob to leave his assets to Mary. Martin simply did not produce any evidence to create a material issue of fact relating to the claim of fraud. As such, the trial court properly granted summary judgment on the issue of Martin's fraud in the inducement claim.

E. The Trial Court Properly Granted Summary Judgment Dismissing Martin's Claims Regarding the Non-Probate Assets.

Martin presents several theories as to why the trial court erred in granting summary judgment dismissing his claims to the non-probate assets. He claims that the statute of limitations did not begin to run unless and until the 2010 Will was invalidated because he was not a testamentary

beneficiary, despite his petition to probate the Revoked 1988 Will. Martin further claims that the trial court should have applied the discovery rule, and the proper statute of limitations was the statute of limitations for constructive trusts (3 years). All of these arguments fail, and the trial court properly granted summary judgment dismissing Martin's claims.

1. Martin's Objections to the Inventory Have No Bearing on the Statute of Limitations.

Martin contends that the trial court should not have granted summary judgment on the non-probate asset claims because of objections he makes to Mary's accounting. Even if the inventory had an impact as to the distribution of the nonprobate assets, the discovery rule does not apply in the manner Martin presents. The inventory was filed pursuant to Mary's obligations as the personal representative under the 2010 Will pursuant to RCW 11.44.015. That statute does not require an inventory of non-probate assets in this case. Non-probate assets of joint accounts or accounts containing beneficiary designations do not pass under wills. *See e.g.* RCW 11.02.005(10) ("Nonprobate asset" means those rights and interests of a person having beneficial ownership of an asset that pass on the person's death under a written instrument or arrangement other than the person's will). As such, these assets did not need to be included in the

probate inventory, nor in the updated inventory, because they were not assets of the estate. CP 141-42.

Moreover, Martin's contention with regard to the inventory is made without authority. Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none. *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

This is not an issue of application of the discovery rule. The discovery rule cannot toll the statute of limitations when the person "knows or, through the *exercise of diligence*, should have known all facts necessary to establish a legal claim." *Giraud v. Quincy Farm and Chem.*, 102 Wn. App. 443, 6 P.3d 104 (2000). Martin's first petition was filed on July 27, 2011. Martin can point to no evidence that he undertook any efforts to discover the existence of non-probate assets. Without any citation to the record or support, Martin claims to have made every effort to determine what was happening with the probate of Bob's estate. Appellant's Brief at 32. Martin did not exercise diligence, even a year and a half after he filed his first petition.

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2. Martin's Interpretation of the Timing of When the Statute of Limitations Should Begin to Run is Wrong.

Martin incorrectly argues that the statute of limitations contained in RCW 11.11.070 could not have applied to him because he was not a "testamentary beneficiary" unless and until the 2010 Will was invalidated. He argues that if the 1988 Will was Bob's last will and testament, this will would then become a "superwill," purporting to distribute nonprobate assets through a will. Martin is wrong. RCW 11.11.070(3) prevents the beneficiary designated in the will from making a claim against a beneficiary designated in the nonprobate asset six months after the will is admitted to probate or one year after the decedent's date of death. *See Kitsap Bank*, 177 Wn. App. at 567, n.3.

However, nonprobate assets are not governed by wills *unless* the will is actually a superwill. To constitute a superwill, the language of the will must meet certain criteria in RCW 11.11.020. Martin's argument regarding the nonprobate assets fails because the 1988 Will does not contain the necessary superwill language contained in RCW 11.11.020. It is not a superwill by definition:

> (1) Subject to community property rights, upon the death of an owner the owner's interest in any nonprobate asset specifically referred to in the owner's will belongs to the testamentary beneficiary named to receive the nonprobate asset, notwithstanding the rights of any beneficiary designated before the date of the will.

> (2) A general residuary gift in an owner's will, or a will making general disposition of all of the owner's property, does not entitle the devisees or legatees to receive nonprobate assets of the owner.
>
> (3) A disposition in a will of the owner's interest in "all nonprobate assets" or of all of a category of nonprobate asset under RCW 11.11.010(7), such as "all of my payable on death bank accounts" or similar language, is deemed to be a disposition of all the nonprobate assets the beneficiaries of which are designated before the date of the will.
>
> (4) If the owner designates a beneficiary for a nonprobate asset after the date of the will, the specific provisions in the will that attempt to control the disposition of that asset do not govern the disposition of that nonprobate asset, even if the subsequent beneficiary designation is later revoked. If the owner revokes the later beneficiary designation, and there is no other provision controlling the disposition of the asset, the asset shall be treated as any other general asset of the owner's estate, subject to disposition under the other applicable provisions of the will. A beneficiary designation with respect to an asset that renews without the signature of the owner is deemed to have been made on the date on which the account was first opened.

RCW 11.11.020. Martin's claims for the nonprobate assets inherently rely on the superwill statute.

Apart from the fact that Martin could not successfully invalidate the 2010 Will, his claims to nonprobate assets lose on the merits. A determination as to the validity of the 2010 Will was not necessary for the court to dismiss the claim for the nonprobate assets.

In the event that the 2010 Will were found to be invalid Mary still receives the non probate assets since (1), the 1988 Will is simply not a superwill since it simply does not have the correct language, and (2) Mary was designated as a beneficiary on nonprobate assets after the 1988 Will was drafted. RCW 11.11.020 (4)("If the owner designates a beneficiary for a nonprobate asset after the date of the will, the specific provisions in the will that attempt to control the disposition of that asset do not govern the disposition of that nonprobate asset, even if the subsequent beneficiary designation is later revoked").

Even if the 1988 Will contained the requisite language, Martin's argument fails since Mary was named as the beneficiary of the nonprobate assets after the 1988 Will was written. Mary and Bob each named the other as the beneficiaries of several jointly held accounts, as well as accounts that each owned individually before they met. All this, however was done in the years 2003, 2005-2008. Under the statute, a superwill is created when the will identifies a named beneficiary to the nonprobate assets that had previously been designated to a different designated beneficiary through joint ownership or the like. RCW 11.11.020.

Martin's claims fail on the merits even if the statute of limitations would not bar his claim for nonprobate assets because the Revoked 1988 Will does not constitute a superwill, and he is not entitled to those assets.

The trial court was well within its broad authority under RCW 11.96A.020, and the plenary powers granted therefrom, to dismiss Martin's claim for nonprobate assets.[3] Martin's claim of status as a testamentary beneficiary binds him to the statutory language of RCW 11.11.020 and the statute of limitations contained in RCW 11.11.070. Pleading as a constructive trust does not change that Martin is claiming to be a testamentary beneficiary under the superwill statute. The Revoked 1988 Will does not constitute a superwill and Martin's TEDRA petition was filed more than a year after Bob's death, and thus is barred by the clear statute of limitations.

Martin presented no viable theory to defeat summary judgment as it relates to those assets. The Revoked 1988 Will was not a superwill, and even if Martin could have succeeded in invalidating the 2010 Will, he would have not prevailed with regard to the nonprobate assets. The trial court properly dismissed Martin's claim.

3. The Statute of Limitations Defense Was Never Waived.

If the court were to resolve the issue of the nonprobate assets based on the statute of limitations, Mary preserved this defense when she plead it in her answer. Martin's reliance on *Estate of Palmer*, 145 Wn. App. 249,

[3] Even if Martin is correct on the statute of limitations argument, the claim can be dismissed now to avoid remanding on a statute of a limitations issue when the claim ultimately fails on the merits.

187 P.3d 758 (2008), ignores a critical difference between *Palmer* and this matter: Mary did plead the defense in her answer. She affirmatively plead in her answer that Martin's claim was time barred. She also moved for summary judgment to dismiss Martin's claims before the issuance of a case schedule and the setting of a trial date, unlike in *Palmer*, where the motion to dismiss was made on the last day of trial. *Id.* There was no waiver of this defense.

4. The Statute of Limitations for a Constructive Trust Does Not Apply.

For the first time on appeal, Martin argues that the trial court should have applied a three-year statute of limitations based on a theory of a constructive trust. This is not an alternative to the statute of limitations set forth in RCW 11.11.070. Martin attempts to seek the benefits of the statute by arguing he is a testamentary beneficiary, but attempts to avoid the application of the statute of limitations. Martin's argument on the application of the statute of limitations for a constructive trust theory is not only improper before the court for the first time on appeal, but an improper application of the statute of limitations as it relates to non-probate assets under RCW 11.11.070. *See Western Wash. Cement Masons Health & Sec. Trust Funds v. Hillis Homes, Inc.*, 26 Wn. App. 224, 612 P.2d 436 (1980).

In fact, Martin's claim for the nonprobate assets is not that Mary was not named as the pay on death beneficiary, and thus constructive trustee of any proceeds, but rather that the superwill statute should apply. His reliance on RCW 11.11.070 to effectuate his effort to obtain the proceeds from the nonprobate assets inherently requires that the entirety of that statutory provision apply to his claim—including the statute of limitations. Martin cannot cherry pick one theory to claim entitlement to pay on death assets, but refute the portion of that theory which would bar his claim. As such, the trial court properly applied the statute of limitations contained in RCW 11.11.070 to dismiss Martin's claim.

Even if the trial court erred in applying the statute of limitations to dismiss the constructive trust claim, Martin cannot succeed on the merits, and the trial court was well within its authority to dismiss the claim pursuant to RCW 11.96A. Martin's constructive trust claim, however, similarly fails for the reasons stated above as to why the Revoked 1988 Will was not a superwill. Martin's constructive trust claim presumes that the beneficiary designation on the non-probate assets could somehow be overturned. Because nonprobate assets are not controlled by will, his claims of undue influence and fraud in the inducement were insufficient to establish a constructive trust for the nonprobate assets. As such, the constructive trust claim relies upon Martin's argument that the superwill

statute should apply to state that a testamentary beneficiary should take under the will, rather than a beneficiary designated on the asset.

Again, this analysis fails because the Revoked 1988 Will is not a superwill. Martin would never have been determined a testamentary beneficiary, and as such, the nonprobate assets passed to Mary, the named beneficiary.

F. The Trial Court Properly Awarded Attorney's Fees.

The trial court properly dismissed Martin's petition as it relates to claims of undue influence, fraudulent inducement, and non-probate assets. There was no genuine issue of material fact to deny summary judgment dismissing these claims, and the statute of limitations was properly applied to the non-probate asset claims. As such, the trial court properly awarded attorney's fees under RCW 11.96A.150 and RCW 11.24.50.

G. Attorney's Fees on Appeal.

Mary should be awarded attorney's fees on appeal. The trial court properly granted summary judgment, and this Court is respectfully asked to affirm the trial court's rulings. As such, Mary should be entitled to attorneys' fees and costs under RAP 18.1, RCW 11.96A.150 and RCW 11.24.50.

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V. CONCLUSION

Martin produced no evidence to create a genuine issue of material fact, let alone to show by substantial evidence that it was highly probable that he would prevail at trial. As such, summary judgment was properly granted. Similarly, Martin produced no evidence to create a genuine issue of material fact to support his fraudulent inducement claim. There was no evidence to show that Martin could meet the nine elements of fraud at trial. Lastly, the trial court properly applied the statute of limitations for the claims regarding the non-probate assets. The trial court applied the correct statute of limitations under Chapter 11.11 RCW. For these reasons, the trial court properly dismissed the TEDRA petition and awarded attorneys' fees against Martin pursuant to RCW 11.96A.150 and RCW 11.24.50.

Mary respectfully requests that this Court affirm the trial court and award her attorneys' fees and costs on appeal.

DATED this 5th day of December, 2014.

SMITH ALLING, P.S.

By _____
C. Tyler Shillito, WSBA #36774
Morgan K. Edrington, WSBA #36774
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of December, 2014, I caused to be served a true and correct copy of [this] Brief of Respondent upon counsel of record, via the methods noted below, properly addressed as follows:

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DATED this 5th day of December, 2014.

Joseph M. Salonga, Legal Assistant