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No. 64303-7

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Estate of JAMES W. HAVILAND, Deceased.

DONALD HAVILAND, MARTHA CLAUSER,
and ELIZABETH HAVILAND,

Respondents,

v.

MARY HAVILAND, ROBERT VAN CITTERS,
and GEORGE PAUL COOK,

Appellants.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE JOHN P. ERLICK

BRIEF OF RESPONDENTS

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I. INTRODUCTION

This is an appeal from a will contest. After a 10-day trial, the experienced judge who heard this case invalidated the will of Dr. James Haviland (Jim).¹ When Jim signed the will, he was 94 years old, physically disabled, and suffering from periods of confusion and impairment. FF 126 (CP 751).² Based on 135 findings of fact, the trial court ruled that Jim's will was the product of undue influence by his second wife (Mary). Jim was totally dependent on Mary for his basic needs such as toileting and eating. Mary was also co-trustee over Jim's separate property and engaged in a remarkable number of self-interested transactions. In January 2006, Mary wrote the changes to Jim's will and contacted their attorney to have it signed. The will differed from Jim's prior wills by disinheriting his children from his long first marriage.

On appeal, Mary challenges the legal standard applied by the trial court and its weighing of the evidence. As shown below, the trial court correctly applied the analytical framework articulated by *Dean v. Jordan*, 194 Wash. 661, 672, 79 P.2d 331 (1938), whereby a rebuttable presumption can be raised by "suspicious" facts. The trial court found that Mary did not produce credible evidence to rebut the presumption and that

¹ Consistent with the appellants' brief, first names are used to avoid confusion. No disrespect is intended.

² The findings cited in this brief have not been challenged by the appellant except where noted.

undue influence was established by clear, cogent and convincing evidence. The judge heard the testimony of 41 witnesses, CP 562-5, judged their credibility, and carefully weighed the probative value of the testimony and the 293 exhibits admitted in evidence. CP 566-95. There was no error.

II. RESTATEMENT OF ISSUES

- A. Do the trial court's findings of fact survive challenge?
- B. Is there clear, cogent and convincing evidence supporting the trial court's conclusion that Jim's will was procured by undue influence on the part of his second wife Mary?
- C. Should the Court reject Mary's contention that *Dean v. Jordan* and its progeny do not apply to spouses?
- D. Were attorneys' fees properly awarded to the successful contestants pursuant to RCW 11.24.050 and RCW 11.96A.150?
- E. Should the appellants be ordered to pay attorneys' fees on appeal based on RCW 11.96A.150?

III. RESTATEMENT OF THE CASE

Mary challenges only five of the trial court's 135 findings of fact. The unchallenged findings are verities on appeal, *Moreman v. Butcher*, 126 Wn.2d 36, 39-40, 891 P.2d 725 (1995), and establish the following.

A. Jim's Longstanding Estate Plan Provided For His Children.

Jim executed wills in 1968, 1976, and 1980. FF 5 (CP 728). Each

will provided that Jim's residuary estate would pass to a trust for his children after the death of his first wife Marion. Ex. 7 p. 2, Ex. 8 p. 7, Ex. 9 p. 6. After Jim met Mary, he executed wills in 1997, 1998, and 2002 that provided his residuary estate would be put in trust for his children. FF 17 (CP 731-2), FF 23 (CP 732-3), FF 40 (CP 736). While Jim's children were never the sole object of his testamentary intent, they were a constant part of his estate plan for the 38 years preceding the contested will.

B. Guarding Against Undue Influence Was Important to Jim.

In 1980, Jim and his first wife Marion executed a revocable living trust, which included the following provision:

One of the principal purposes of this trust instrument is to provide common protection to the trustors against the effects of age and their increased susceptibility to the suggestions of others.

Ex. 26 p. 3. The identical provision appeared in the Revised and Restated Revocable Trust dated June 26, 1990 (the 1990 Trust) and was still in effect when Jim died. FF 5 (CP 728). The attorney who prepared the 1980 trust documented that "[b]ased on the intentions of the setlors [sic], this is probably the most critical paragraph of the trust." Ex. 47 p. 2.³

C. Mary Met Jim When He Was Receiving In-Patient Care at Providence Hospital.

Mary met Jim in 1996, three years after the death of Jim's first

³ Jim also expressed concern about "how subtly the ravages of age may impair judgment" in the retirement letter he sent to his patients in 1986. Ex. 270.

wife Marion, to whom he had been married 49 years. VRP 73. Jim was a patient at Providence Hospital and Mary was a nursing aide on his floor. FF 10 (CP 730). She had been released from prison two years earlier after serving time for Conspiracy to Commit First Degree Theft and 14 counts of Possession of Stolen Property in the First Degree.⁴ FF 8 (CP 729). In 1993, Mary was convicted of burglary and assault in Illinois; in 1983, it was shoplifting in Indiana; in 1980, it was shoplifting in Ohio.⁵ Mary performed care-giving functions for Jim and had social contact with him while he was hospitalized. FF 10 (CP 730); VRP 591-3, 1728.

D. A Dating Relationship and Large Gifts Started Almost Immediately After Jim’s Discharge.

Jim was hospitalized for several weeks. VRP 87. After his discharge, Mary would call Jim at home to ask for rides. VRP 369. This led to a romantic relationship despite a 50-year age difference. FF 12 (CP 730), CP 154. Within three months from Jim’s discharge, Mary was to receive \$100,000 for her education and a “nest egg” of \$300,000 - \$350,000 from Jim. FF 13 (CP 730).

E. In 1998, Jim’s Trusted Financial Advisor Resigned And His Estate Planning Attorney Began Representing Mary.

Jim and Mary wed in August 1997. In 1998, Jim’s longtime

⁴ Mary shoplifted and refunded “more than \$400,000 dollars in merchandise from fifteen major department store chains in fourteen states.” Ex. 511 p. 2.

⁵ CP 26 at ¶23, ¶24, ¶25; CP 124; CP 156; Ex. 263 p. MKH 000650.

financial advisor Mr. Nichols resigned. FF 16 (CP 731), FF 24 (CP 733). Also in 1998, Jim's estate planning attorney Mr. Kane started representing Mary, after which Mr. Kane's communications with Jim were no longer privileged from Mary. FF 23 (CP 733). After the resignation and joint representation, Jim transferred \$765,000 from his share of the 1990 Trust to his Living Trust and removed a \$500,000 cap on Mary's inheritance, which had been negotiated at the time their prenuptial agreement was signed. FF 25 (CP 733), FF 27 (CP 733-4).

F. In 2000, Mary Became Co-Trustee Over Jim's Living Trust and Started a Pattern of Self-Dealing Transactions Inconsistent With Jim's Prior Spending Habits.

After the marriage, despite the prenuptial agreement that maintained the separate nature of Jim's property and prohibited either spouse from giving away community property without express consent, Ex. 30 (CP 139-140), FF 15 (CP 731), Mary engaged in a "steady, systematic, and persistent pattern of depleting" Jim's assets "for the benefit of Mary Haviland and her designees." FF 128 (CP 752; challenged on appeal). Mary was appointed co-trustee over Jim's Living Trust on October 31, 2000. FF 29 (CP 734). Jim remained the sole beneficiary of the Living Trust until his death, which was funded exclusively with his separate property. Ex. 30 (CP 151), FF 13 (CP 730), FF 25 (CP 733). While Mary was co-trustee, she directly participated in transfers of

\$2,279,875 of Jim's separate property from the Living Trust to Jim and Mary's joint account, Mary's separate accounts, and her church.⁶

In addition to the \$2,279,875 transferred from the Living Trust, \$1,078,574 was transferred from Mary and Jim's joint account to Mary's separate accounts between 2003 and Jim's death.⁷ More than \$6 million was withdrawn from Jim and Mary's joint account between 2002 and 2007.⁸ In addition, two parcels of real property were converted from Jim's separate property to Mary's separate property in 2002 and 2005. FF 41 (CP 736), FF 64 (CP 740). In addition, Jim's Smith Barney IRA valued at \$280,564.87, FF 42 (CP 736), and his TIAA CREF account valued at \$30,000, FF 114 (CP 749), (both separate property, Ex. 30 (CP 151)),

⁶ This figure was derived by totaling the transfers established by the following findings of fact, which were unchallenged: FF 30 (CP 734), FF 45 (CP 737), FF 46 (CP 737), FF 50 (CP 738), FF 53 (CP 738-9), FF 61 (CP 740), FF 62 (CP 740), FF 63 (CP 740), FF 66 (CP 741), FF 71 (CP 741-2), FF 88 (CP 745), FF 103 (CP 748), FF 104 (CP 748), FF 106 (CP 748), FF 112 (CP 749), FF 113 (CP 749), FF 116 (CP 750). Of the \$2,279,875 that was transferred, \$172,000 was directed from Jim's Living Trust to Mary's separate accounts, FF 45 (CP 730), FF 62 (CP 740), and \$116,000 was directed to Mary's church (where her son is pastor). FF 71 (CP 741-2), FF 104 (CP 748). The rest went into the joint account that Jim and Mary maintained. Significantly, this total does not include the \$10,000 per month that was automatically transferred from Jim's Living Trust to the joint account from March 2002 through August 2003, FF 35 (CP 735), or the \$8000 per month that was automatically transferred from Jim's Living Trust to the joint account from September 2003 until Jim's death. Ex. 100. The monthly transfers totaled \$588,000 in addition to the \$2,279,875 previously mentioned.

⁷ This figure was derived by totaling the transfers established by the following findings of fact, which were unchallenged: FF 45 (CP 737), FF 46 (CP 737), FF 51 (CP 738), FF 52 (CP 738), FF 54 (CP 739), FF 55 (CP 739), FF 61 (CP 740), FF 64 (CP 740), FF 103 (CP 748), FF 106 (CP 748), FF 118 (CP 750).

⁸ FF 44 (CP 737), FF 49 (CP 738), FF 58 (CP 739), FF 70 (CP 741), FF 110 (CP 749), FF 122 (CP 750).

were cashed in. Gifts to Mary's church,⁹ children,¹⁰ friends,¹¹ nephews, nieces, and brother¹² totaled \$1,070,250 between 2001 and 2007. The source of funds for the gifts was Jim's Living Trust. VRP 2321-2. The pattern of spending that marked Jim's last years was inconsistent with the frugal, FF 123 (CP 750), "spartan," VRP 1731, and "conservative," VRP 79, pattern of spending Jim was known for.

G. In 2002, Mary Provided Incorrect Information To Jim's Doctor About Jim's Mental Functioning, and Jim Revoked his Share of the Trust He Created with his First Wife.

By 2002, Jim met the definition of vulnerable adult under RCW 74.34.020(15)(a), which includes any individual "[s]ixty years of age or older who has the functional, mental, or physical inability to care for himself or herself." Jim was 91, no longer ambulatory, incontinent, Ex. 261 p. 0006, and receiving in-home care.¹³ Mary's expert witness Dr. Lindsay also testified that by 2002 Jim was "vulnerable." VRP 1132.

When Jim changed doctors in June of 2002, he filled out a new patient registration form that noted he was having memory trouble. FF 37

⁹ Gifts to Mary's church totaled approximately \$290,500.00 in 2005, 2006 and 2007. FF 68 (CP 741), FF 71 (CP 741-2), FF 108 (CP 749), FF 120 (CP 750).

¹⁰ Gifts to Mary's children totaled \$456,750.00 between 2001 and 2007. FF 31(CP 734), FF 33 (CP 735), FF 43 (CP 736-7), FF 48 (CP 738), FF 57 (CP 739), FF 69 (CP 741), FF 109 (CP 749), FF 121 (CP 750).

¹¹ Gifts to Mary's friends totaled \$40,000.00 in 2004 and 2005. FF 57 (CP 739); FF 69 (CP 741).

¹² Gifts to Mary's nephews, nieces, and brother totaled \$283,000.00 between 2001 and 2007. FF 33 (CP 735), FF 43 (CP 736-7), FF 48 (CP 738), FF 57 (CP 739), FF 59 (CP 739), FF 69 (CP 741), FF 109 (CP 749), FF 121 (CP 750).

¹³ Homecare expenses of \$6814 were reported to the IRS in 2002 for the first time. Ex. 167 p. 1312.

(CP 735), Ex. 261 p. 0017. Jim's report was consistent with the observation of friends and family who noticed that by 2002 Jim was leaving stove burners on, VRP 348-9, calling people by the wrong name, VRP 458, 465-466, having difficulty carrying on a conversation, VRP 595-8, and forgetting people who were important to him. VRP 1421-2, 1436, 1438. At the same time, Mary filled out an identical new patient registration form for Jim, except she omitted Jim's report of memory trouble. FF 38 (CP 735-6), Ex 261 p. 0014. The doctor looked at the intake form filled out by Mary, but did not recall seeing Jim's report of memory trouble, and did not conduct any cognitive testing. *Id.*

In August 2002, Jim revoked the portion of the 1990 Trust that held his assets (Trust B). FF 6 (CP 729), FF 40 (CP 736). Marion's portion of the 1990 Trust was irrevocable, FF 6 (CP 729), and remained in existence. Because what remained of the 1990 Trust had been funded solely with Marion's property, FF 6 (CP 729), VRP 291, it is referred to as "Marion's Trust." Under the terms of Marion's Trust, Jim could receive discretionary distributions if he demonstrated financial need. Ex. 22, p. 10.

H. By 2005, Jim Was Dependent On Mary For All Basic Care, His Mental Functioning Was Worsening, and Large Unexplained Transfers of Jim's Assets Increased.

By 2004, Jim needed full-time care. FF 60 (CP 740).¹⁴ Mary hired

¹⁴ Home care costs of \$13,260 were reported to the IRS in 2004. Ex. 169 p. 1496.

her daughter Sarah, who had no formal training. FF 60 (CP 740), VRP 1236. In the summer of 2005, Mary quit work as a nurse to care full-time for Jim at home because under Sarah’s care Jim had refused to be helped to the bathroom or to be changed out of soiled clothing. FF 60 (CP 740). Mary described Jim’s condition in the spring and summer of 2005 as “confused” and “disoriented.” Ex. 131, VRP 102-3, 919, 1529-30, 2013.

In the 12 months that predated the challenged will, withdrawals totaling \$1,300,801 were made from Jim’s Living Trust as follows:

Date	Source of Instructions	Destination of Transfer	Amount	Citation to Record
3/15/2005	Mary	Joint Account	\$477,601	FF 61;CP 740
4/25/2005	Mary	Mary Checking	\$157,000	FF 62; CP 740
5/11/2005	Mary	Joint Account	\$157,000	FF 63; CP 740
9/2005	Mary & Jim	Joint Account	\$223,200	FF 66;CP 741
1/5/2006	Mary & Jim	Mary Church	\$86,000	FF 71 CP 741-2
1/17/2006	Mary	Joint Account	\$200,000	FF 88; CP 745

These figures do not include the automatic transfer of \$10,000 per month from the Living Trust to the joint account starting in 2002. FF 35(CP 735).

I. Three Days Before the New Will, Mary Took Jim to the Doctor After an Absence of 2½ Years and Inaccurately Described his Mental Functioning as “Good.”

Three days before the will signing, Mary took Jim to the doctor for the first time in over two years. FF 87 (CP 745). Jim had not seen his doctor since 2003. *Id.* Despite Mary’s reports to others in 2005 that Jim was disoriented and confused, Ex. 131, VRP 102-3, 919, 1529-30, 2013,

she told Jim's doctor in January of 2006 that Jim's "mentation" was "good." FF 87 (CP 745). The doctor documented Mary's report but did not document any objective measure of Jim's mental status. FF 87 (CP 745).

J. Mary Wrote the Changes to Jim's Will.

By 2006, Jim was 94 years old, physically disabled, dependent on Mary for everything, and "highly vulnerable to influence." FF 99 (CP 747), FF 99 (CP 747). He had "periods of lucidity and periods of confusion and impairment." FF 126 (CP 751-752).

In January 2006, Mary called Mr. Kane's office and told his legal assistant that Jim wanted to change his will. FF 72 (CP 742). Mary stated that Jim "doesn't really do well on the phone, but that they would like to make only 1 trip in to the office." Ex. 120. Mary then typed a letter to the lawyer concerning the changes and enclosed a marked up copy of Jim's last will, done in 2002. FF 73 (CP 742), Ex. 122. Mary wrote the changes to the 2002 will, which Jim initialed. *Id.* Mr. Kane spoke with Jim about the changes only once before Jim signed the new will, and that was by telephone. FF 76 (CP 742-743). But by 2006 Jim had become unable to carry on meaningful communication by telephone. FF 86 (CP 744-745).

At the signing, Mr. Kane saw Jim for only 5-10 minutes. FF 90 (CP 746). Mr. Kane noticed that Jim's mental functioning had declined moderately since the last time he could recall seeing him in 2002, FF 90

(CP 745-746), and that Jim was not the same person he was in 2002. VRP 254. Jim did not articulate any reason for the changes. Mr. Kane did not recall Jim saying anything during their phone call or meeting except “yes” in response to questions. FF 77 (CP 743), FF 93 (CP 746), VRP 171, 180.

K. The 2006 Will Disinherited Jim’s Children.

According to Mr. Kane, the 2006 will represented a significant change in Jim’s estate plan. FF 79 (CP 743). The effect of the 2006 will was to disinherit Jim’s children. FF 96 (CP 747). Two months after the will was signed, Mary moved Jim to Bremerton. FF 102 (CP 748).

L. After the New Will, Jim’s Mental and Physical Conditions Deteriorated, and Large Transfers Continued.

By 2007, Jim’s mental functioning worsened to the point where he did not recognize Mary 75% of the time and he could no longer perform simple tasks like brushing his teeth without prompting. FF 111 (CP 749). In August 2007, Mary and Jim went to Idaho for their anniversary. VRP 2027. While there, Jim believed he was in New York where he grew up. VRP 2033-34. When Jim was taken to the hospital on November 6, 2007, the doctor noted that Jim had “advanced dementia,” was bed-ridden at home, and was exhibiting “confusion, agitation, abnormal behavior and changes in his mental state.” FF 124 (CP 751).

Despite Jim’s deteriorating mental condition, large transfers and transactions relating to his assets continued. This included large transfers

from Jim's line of credit to the joint checking account, FF 101 (CP 748), from the joint account to Mary's line of credit, *id.*, FF 106 (CP 748), FF 118 (CP 750), from the Living Trust to the joint account, FF 103 (CP 748), FF 106 (CP 748), FF 112 (CP 749), FF 113 (CP 749), FF 116 (CP 750), and from the Living Trust to Mary's church. FF 104 (CP 748). A \$520,000 loan was obtained on Jim and Mary's Bremerton home in September 2007. FF 117 (CP 750). Jim's Edward Jones account valued at \$30,000 was cashed in on November 2, 2007 and transferred to the joint checking account. FF 119 (CP 750). Another \$50,000 was transferred from Jim's line of credit to the joint account on November 9, 2007. *Id.*

M. Jim Died Shortly After Mary Requested \$718,000 From Marion's Trust.

Six days before Jim died, Mary had him sign a request for distribution from Marion's Trust. Ex. 138, Ex. 139, FF 127 (CP 752). Mary requested \$718,000. Ex. 139. Two days earlier, medical staff described Jim as having "advanced dementia," being "essentially bed ridden," and exhibiting "memory impairment," "confusion, agitation, abnormal behavior and changes in his mental state." FF 124 (CP 751).

Jim died November 14, 2007. His cause of death was respiratory failure and pneumonia. Ex. 262. Shortly before Jim died, Dr. Martin (who had not seen Jim since March 2006, FF 102 (CP 748)) referred Jim to hospice based on the diagnosis "failure to thrive." Ex. 261 p. MJM0019.

N. The Trial Court Invalidated the Will for Undue Influence.

On September 14, 2009, the trial court invalidated the 2006 will, finding that it was the product of undue influence by Mary. CP 727-759. The trial court appointed an independent administrator of the estate. CP 757, 761. The independent administrator did not join this appeal.

IV. ARGUMENT

The trial court correctly analyzed the undue influence claim, finding that (1) the evidence raised a presumption of undue influence, (2) the presumption was not rebutted, and (3) clear, cogent, and convincing evidence established that the will was the product of undue influence. Mary agrees that the trial court applied the correct legal standard and the correct burden of proof. Appellants' Brief ("App. Brief") at 19.

A. The Standard of Review is Deferential to the Trial Court.

Mary's brief reads as if the standard of review is *de novo*. However, "[a]ppellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact." *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717 (2009). Where a court has evaluated evidence in a bench trial, appellate review is limited to determining whether the findings are supported by substantial evidence and whether the findings support the conclusions of law. *Estate of Knowles*, 135 Wn. App. 351, 356 (2006). The substantial evidence

standard is defined as the "quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." *Sunnyside Valley Irrig. Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). The reviewing court views the evidence and all reasonable inferences in the light most favorable to the prevailing party. *Korst v. McMahon*, 136 Wn. App. 202, 206, 148 P.3d 1081 (2006). "[W]here there is conflicting evidence, the [reviewing] court needs only to determine whether the evidence viewed most favorable to respondent supports the challenged finding." *Estate of Lint*, 135 Wn.2d 518, 532-3, 957 P.2d 755 (1998). The appellate court does not review credibility determinations or reweigh the evidence. *In re Estates of Palmer*, 145 Wn. App. 249, 266, 187 P.3d 758 (2008).

B. The Findings of Fact Are Supported by Substantial Evidence.

Mary challenges five of the 135 findings made by the trial court. Regardless of whether the burden of proof at trial is preponderance of the evidence; clear, cogent, and convincing evidence; or proof beyond a reasonable doubt, a reviewing court will not disturb a trial court's findings of fact if they are supported by substantial evidence. *Gerimonte v. Case*, 42 Wn. App. 611, 616 n.2, 712 P.2d 876 (1986).

1. Findings 125 and 127 that Jim had Dementia are Supported by Substantial Evidence.

Mary argues the record does not contain substantial evidence that Jim had advanced dementia in 2007 as found by the trial court. App. Brief

at 42. However, viewed most favorably to respondents, the Harrison Hospital record, Ex. 259, is substantial evidence that Jim had advanced dementia. Under *History of Present Illness*, the record states:

The patient is a retired 96-year-old physician who was accompanied by his wife, a registered nurse, because of dehydration and no urine output since last evening. The patient's wife is his primary and complete caregiver. She reported that he was more lethargic than usual and noted that he had not been eating or drinking much and she was very concerned that he was dehydrated and therefore oliguric. She did not report fever or chills. He does have advanced dementia. He is essentially bed ridden at home.

Ex. 259 (emphasis supplied.) Mary asserts that the record is not reliable because it fails to “disclose what basis if any there was for the notation.” App. Brief at 42. But the record states “The history is provided by the wife.” Ex. 259. Also supporting the diagnosis of advanced dementia are intake notes from the same hospital visit, which state that Jim had “memory impairment, and was exhibiting confusion, agitation, abnormal behavior, and changes in his mental state,” FF 124 (CP 751), which are symptoms of advanced dementia. VRP 969, 994-5, 970, 971, 995.

Second, Dr. Peskind, a geriatric psychiatrist and national expert on dementia, Ex. 264, testified that in her opinion Jim had advanced dementia in November 2007. VRP 1012, 1098. Expert testimony in support of a contested finding is substantial evidence sufficient to affirm the finding. *Marriage of Shui*, 132 Wn. App. 568, 580, 125 P.3d 180 (2005). Dr.

Peskind also testified that Jim's inability to remember Mary 75% of the time and to perform simple tasks was consistent with advanced dementia. FF 111 (CP 749), VRP 969, 994-5, 970. Mary's expert Dr. Lindsay also testified that Jim's symptoms in 2007 were consistent with advanced dementia. VRP 1131.

2. Finding 128 Is Supported by Substantial Evidence.

Mary's assignment of error to Finding 128 is without merit.

a. Jim lacked capacity to understand the request for distribution from Marion's Trust.

Finding of Fact 128 (CP 752) states in part:

The November 8, 2007 request was made by Mary Haviland to Paul Hennes ostensibly on behalf of Dr. Haviland at a time when Dr. Haviland clearly lacked capacity to make that decision.

Substantial evidence supports this finding. Jim saw the doctor two days before this request. The intake notes report that Jim was bedridden, had "memory impairment, and was exhibiting confusion, agitation, abnormal behavior, and changes in his mental state." FF 124 (CP 751); Ex. 259. Also by 2007, Jim did not recognize Mary 75% of the time and could no longer do simple tasks without cuing. FF 111 (CP 749). In August 2007, Jim was so confused that he believed he was in New York, when in fact he was in Idaho. VRP 2033-4. These and other symptoms were the basis of Dr. Peskind's opinion that Jim had advanced dementia when he died, FF 111 (CP 749), VRP 1012, 1098, as well as the hospital record. Ex. 259.

b. The trial court's finding that Mary's explanation strained credulity may not be reviewed.

Finding of Fact 128 (CP 752) further states:

Mary Haviland's explanation that this is what Dr. Haviland had previously wanted strains credulity.

The trial court's credibility finding cannot be disturbed on appeal.

c. The request from Marion's Trust constituted overreaching and undue influence by Mary.

Finding of Fact 128 (CP 752) further states:

"[T]he Court finds that the November 8, 2007 request to be corroborating evidence of Mary Haviland's overreaching and undue influence.

Substantial evidence supports this finding. Mary was not a beneficiary of Marion's Trust. Ex. 22. As the record has already shown, Jim was too sick and confused to understand the document that Mary prepared and had him sign, which requested a very large distribution that would directly benefit Mary by paying off a substantial portion of her debt. Ex. 138. At the time Mary had Jim sign this request, he had advanced dementia, did not know who she was most of the time, and was incapable of brushing his teeth without cuing. FF 111 (CP 749). After Jim died, Mary requested that the distribution of income from Marion's Trust continue even though she was not a beneficiary of that trust. Ex. 139. Viewed most favorably to respondents, the evidence shows that the November 8, 2007 request was the product of Mary's undue influence.

d. Mary engaged in a systematic and persistent pattern of depleting Jim's assets for her benefit.

Finding of Fact 128 (CP 752) further states:

The November 8, 2007 request for payment of all of Mary Haviland's debt from the Marion Haviland Credit Shelter Trust was part of Mary Haviland's steady, systematic, and persistent pattern of depleting Dr. Haviland's assets and the transfer of funds for the benefit of Mary Haviland and her designees.

Unchallenged findings establish:

TRANSFERS FROM LIVING TRUST FOR BENEFIT OF MARY

Date	Source of Instructions	Destination	Amount	Finding
4/16/2001	Unknown	Mary Brokerage	Unknown	30; CP 734
11/27/2001	Mary	Mary Checking	Unknown	30; CP 734
3/26/2003	Mary	Joint Acct.	\$100,000	45; CP 737
6/19/2003	Mary	Mary Credit	\$15,000	45; CP 737
12/29/2003	Mary & Jim	Joint Acct.	\$20,000	46; CP 737
1/7/2004	Mary	Joint Acct.	\$197,793	50; CP 738
9/21/2004	Mary & Jim	Joint Acct.	\$193,080	53; CP 738-9
3/15/2005	Mary	Joint Acct.	\$477,601	61; CP 740
4/25/2005	Mary	Mary Checking	\$157,000	62; CP 740
5/11/2005	Mary	Joint Acct.	\$157,000	63; CP 740
9/2005	Mary & Jim	Joint Acct.	\$223,200	66; CP 741
1/5/2006	Mary & Jim	Mary Church	\$86,000	71; CP 741-2
1/17/2006	Mary	Joint Acct.	\$200,000	88; CP 745
4/25/2006	Mary & Jim	Joint Acct.	\$102,000	103; CP 748
6/27/2006	Mary & Jim	Mary Church	\$30,000	104; CP 748
9/18/2006	Mary & Jim	Joint Acct.	\$105,000	106; CP 748
1/9/2007	Mary & Jim	Joint Acct.	\$96,201	112; CP 749
4/3/2007	Mary & Jim	Joint Acct.	\$60,000	113; CP 749
6/13/2007	Mary & Jim	Joint Acct.	\$60,000	116; CP 750
TOTAL			\$2,279,875	

TRANSFERS FROM JOINT ACCOUNT TO MARY

Date	Source of Instructions	Destination	Amount	Finding
2/19/2003	Unknown	Mary Checking	\$10,000	45; CP 737

Date	Source of Instructions	Destination	Amount	Finding
3/14/2003	Unknown	Mary Checking	\$15,000	45; CP 737
3/17/2003	Unknown.	Mary Credit	\$20,000	45; CP 737
8/11/2003	Unknown	Mary Checking	\$6000	46; CP 737
9/2/2003	Unknown	Mary Checking	\$5000	46; CP 737
10/10/2003	Unknown	Mary Checking	\$6000	46; CP 737
12/11/2003	Unknown	Mary Checking	\$6000	46; CP 737
1/9/2004	Unknown	Mary Credit	\$130,000	51; CP 738
1/9/2004	Unknown	Mary Checking	\$10,000	51; CP 738
7/19/2004	Mary	Mary Credit	\$150,000	52; CP 738
9/21/2004	Mary	Unknown	\$100,000	54; CP 739
2004	Unknown	Mary Checking	\$100,000	55; CP 739
3/16/2005	Mary	Mary Credit	\$206,574	61; CP 740
7/4/2005	Mary	Mary Checking	\$10,000	64; CP 740
4/20/2006	Mary	Mary Checking	\$40,000	103; CP 748
8/23/2006	Unknown	Mary Credit	\$40,000	106; CP 748
9/25/2006	Unknown	Mary Credit	\$80,000	106; CP 748
10/1/2006	Unknown	Mary Credit	\$120,000	118; CP 750
10/4/2007	Unknown	Mary Credit	\$5000	118; CP 750
11/8/2007	Unknown	Mary Credit	\$19,000	118; CP 750
TOTAL			\$1,078,574	

JOINT ACCOUNT ACTIVITY 2002-2007

Year	Deposit	Withdrawal	Finding/CP
2002	\$1,104,637	1,096,532	44; CP 737
2003	\$467,763	\$467,926	49; CP 738
2004	\$1,132,530	\$1,145,498	58; CP 739
2005	\$1,452,264	\$1,454,031	70; CP 741
2006	\$1,055,265	\$1,046,628	110; CP 749
2007	\$912,329	\$916,979	122; CP 750
Total	\$6,124,788	\$6,127,594	

GIFTS TO MARY'S CHILDREN

Date	Amount	Finding/CP
2001	\$40,000	FF 31; CP 734
2001	\$11,600	FF 33; CP 735
2001	\$3000	FF 33; CP 735
2001	\$9600	FF 33; CP 735
2002	\$40,000	FF 43; CP 736-7

Date	Amount	Finding/CP
2002	\$20,000	FF 43; CP 736-7
2002	\$14,650	FF 43; CP 736-7
2002	\$14,650	FF 43; CP 736-7
2003	\$40,000	FF 48; CP 738
2003	\$19,500	FF 48; CP 738
2004	\$40,000	FF 57; CP 739
2004	\$20,250	FF 57; CP 739
2005	\$40,000	FF 69; CP 741
2005	\$17,500	FF 69; CP 741
2005	\$23,000	FF 69; CP 741
2006	\$40,000	FF 109; CP 749
2006	\$23,000	FF 109; CP 749
2007	\$40,000	FF 121; CP 750
Total	\$456,750	

GIFTS TO MARY'S NIECES, NEPHEWS, BROTHER, AND FRIENDS

Date	Amount	Finding/CP
2001	\$5,000	FF 33 CP 735
2002	\$10,000	FF 43 CP 736-7
2003	\$5,000	FF 48 CP 738
2003	\$6,000	FF 48 CP 738
2004	\$90,000	FF 59 CP 739
2004	\$12,000	FF 57 CP 739
2004	\$20,000	FF 57 CP 739
2005	\$90,000	FF 59 CP 739
2005	\$12,000	FF 69 CP 741
2005	\$7,000	FF 69 CP 741
2005	\$20,000	FF 69 CP 741
2006	\$14,000	FF 109 CP 749
2006	\$6,000	FF 109 CP 749
2007	\$14,000	FF 121 CP 750
2007	\$12,000	FF 121 CP 750
Total	\$323,000	

Substantial evidence supports the finding that Mary was engaged in all of the above transfers. She signed every authorization relating to the transfers from the Living Trust. FF 29 (CP 734). She initiated many of

the transfers from the Living Trust¹⁵ with increasing frequency as Jim's condition deteriorated. VRP 729. The largest transfers from the joint account were done on-line.¹⁶ Jim could not use a keyboard. VRP 702. Mary was in charge of financial matters. VRP 438-9, 555, 689, Ex. 220-230, 268. Jim could not use the telephone or drive himself, FF 86 (CP 744-5), VRP 368, 371, 374, 441, 925; therefore, he was unable to engage in banking by himself. The source of the deposits into the joint account was Jim's income and assets. Mary brought no assets into the marriage according to the prenuptial agreement. Ex. 30. Mary's total income from 2002 through 2007 was \$61,892.¹⁷ The source of the gifts that were made to Mary's children, family and friends was Jim's Living Trust. VRP 2321-2. Mary wrote almost all of the checks on the joint account and maintained the check register. Ex. 198A, 198B, 197.

e. Mary did not credibly explain the consumption and transfer of Jim's assets.

Finding of Fact 128 (CP 752) further states:

Mary Haviland offered no credible evidence to explain the consumption and transfer of such large sums of money from Dr. Haviland's assets, during the course of the marriage.

Credibility findings are not subject to review. Mary did not challenge the

¹⁵ FF 30 (CP 734), FF 45 (CP 737), FF 50 (CP 738), FF 61 (CP 740), FF 62 (CP 740), FF 63 (CP 740), FF 88 (CP 745).

¹⁶ FF 52 (CP 738), FF 54 (CP 739), FF 61 (CP 740), FF 64 (CP 740), FF 103 (CP 748).

¹⁷ Mary earned \$10,506 in 2002, Ex. 167, p. 1310; \$9184 in 2003, Ex. 168 p. 1387; \$23,183 in 2004, Ex. 169 p. 1460; and \$19,019 in 2005, Ex. 170 p. 1509.

trial court's findings that there is little evidence in the record to explain the ultimate purpose of the more than \$6 million that was transferred from the joint account between 2002 and 2007.¹⁸ Therefore, the lack of explanation is a verity on appeal.

Furthermore, there is substantial evidence to support the trial court's finding that Mary did not credibly explain what happened to Jim's assets. Mary argues that she explained the large transfers by identifying five categories of expenses: (1) gifts to Mary's children; (2) gifts to Mary's church; (3) charitable donations; (4) taxes; and (5) remodeling expenses. App. Brief pp. 44 – 46. But even assuming all of these transfers were proper,¹⁹ they fail to explain the consumption and transfer of so much of Jim's estate during the marriage; in other words, there is still an awful lot that is unaccounted for. For example, in 2006, which is the only year that remodel expenses were incurred, Ex. 505A, \$1,055,265 was deposited into the joint account and \$1,046,628 was withdrawn from the joint account. FF 110 (CP 749). Remodel expenses totaled \$211,395.17, Ex. 505A; taxes totaled \$54,419;²⁰ gifts to charities other than Mary's church totaled \$2738;²¹ gifts to Mary's church totaled \$200,054; and gifts

¹⁸ FF 44 (CP 737), FF 49 (CP 738), FF 58 (CP 739), FF 70 (CP 741), FF 110 (CP 749), FF 122 (CP 750).

¹⁹ As shown below, unexplained transfers breached Mary's fiduciary duty.

²⁰ Ex. 171, p. 1571.

²¹ Total charitable contributions in 2006 were \$202,792. Ex. 171 at 1572. Of this amount, \$200,054.76 was given to Mary's church. Ex. 148.

to Mary's children totaled \$63,000. FF 109 (CP 749). Combined, these figures account for only about one-half of what was withdrawn from the joint account in 2006, leaving \$500,000 unexplained. An even greater discrepancy is reflected by Mary's contemporaneous documentation. In 2006, Mary estimated annual expenses to be \$204,770, including gifting, medical expenses, taxes, insurance and regular monthly expenses, when she requested distribution of income from Marion's Trust, Ex. 131, p. 86, leaving approximately \$800,000 unaccounted for.

The large gifts to Mary's church also were not adequately explained. During the last three years of Jim's life, 2005-2007, \$293,189.76 was given to Mary's church, which comprised 97% of all charitable gifts for that period. Ex. 148, 153, 170, 171. This represented a sharp increase in Jim's annual charitable giving. During the course of the marriage, Jim's annual charitable giving was as follows: 1997 (\$27,516); 1998 (\$25,362); 1999 (\$26,624); 2000 (\$30,500); 2001 (\$21,981); 2002 (\$36,915); 2003 (\$33,989); 2004 (\$29,739); 2005 (\$57,360);²² 2006 (\$202,792);²³ 2007 (\$41,684).²⁴ Mary argues that Jim attended the church and it was important to him. However, that does not explain the sharp increase in gifts that coincided with Jim's growing impairment.

²² Of this amount, \$52,500 was given to Mary's church. Ex. 170, p. 1554.

²³ Of this amount, \$200,054.76 was given to Mary's church. Ex. 148.

²⁴ Of this amount, \$40,635 was given to Mary's church. Ex. 153, p. 1112.

Mary failed to explain the discrepancy between their significant income and gifting and their request for distributions from Marion's Trust for "financial need." For example, reported income for 2004 was \$820,239.00. FF 56 (CP 739). Reported gifts to Mary's family in 2004 totaled \$162,250.00. FF 57 (CP 739), FF 59 (CP 739). Yet distributions from Marion's trust were sought and received due to financial need. FF 56 (CP 739). Similarly, in 2005, Mary and Jim asked for and received an increase in distributions of income from Marion's Trust based on claimed financial need. FF 65 (740-1). Their reported income for 2005 was \$1,498,191.00. *Id.* Their reported gifts to Mary's friends, family and church in 2005 totaled \$348,050. FF 57 (CP 739), FF 59 (CP 739), FF 69 (CP 741), FF 71 (CP 741-2). This discrepancy was never explained.

3. Finding of Fact 129 Is Supported by Substantial Evidence.

Finding of Fact 129 (CP 752) states in pertinent part:

The unexplained inter vivos transfer of Dr. Haviland's assets for the benefit of Mary and her designees is corroborating evidence of the undue influence exercised by Mary Haviland over Dr. Haviland.

There is substantial evidence for Finding 129. In addition to the evidence supporting Finding 128, the transfers increased as Jim's mental capacity declined, he became physically weaker, and he grew more dependent on Mary. Transfers from the Living Trust during the 12 months predating the

will, which totaled more than \$1.3 million, *see supra* at 9, are more than double the combined total for 2001-2004, which was \$525,873. FF 45 (CP 737), FF 46 (CP 737), FF 50 (CP 738), FF 53 (CP 738-9). The frequency that Mary initiated trust transactions increased in 2005. VRP 729. Transfers from the joint account to Mary's separate accounts and line of credit also rose as Jim's physical and mental condition deteriorated. *See supra* at 18-9. Large transfers benefitting Mary continued after Jim no longer recognized her 75% of the time. For example, between January and June 2007, over \$216,200 was transferred from Jim's Living Trust to the joint account. FF 112 (CP 749), FF 113 (CP 749), FF 116 (CP 750). Letters requesting these transfers were signed by Jim at a time when Jim could not brush his teeth without cuing. *Id.*, FF 111 (CP 749). The pattern of consumption described above and in the trial court's detailed findings differed significantly from Jim's historically frugal and conservative spending habits. *See supra* at 7.

4. Finding of Fact 135 relating to Mary's depletion of the estate is supported by substantial evidence.

Finding of Fact 135 (CP 753) states:

According to respondent herself, the lifetime Estate of Dr. Haviland was so depleted by Mary's transfer of funds that, after distribution of specific bequests, the total value of the Estate is negative \$45,834.38. That is, after deducting specific bequests (which are not part of the residue), the debts of the Estate (which are payable first from residue) exceeded the assets of the Estate by a reported \$45,834.38.

Mary argues that this finding was not supported by substantial evidence because Jim's Living Trust was not completely depleted at the time of his death. App. Brief p. 46. However, it is clear from the text of the finding that the trial court was referring to Jim's probate estate, not the Living Trust. Court orders are to be viewed in a "reasonable and commonsense manner, rather than hypertechnically," *State v. O'Neill*, 103 Wn.2d 853, 874 (1985), and should not be interpreted to conflict with the "clear import" of the trial court. *Refrigeration Eng'g Co. v. McKay*, 4 Wn. App. 963, 971 (1971). Finding 135 came from Mary's trial brief, which read:

An accounting shows that, after distribution of specific bequests, the total value of the Estate is negative \$45,834.38. That is, after deducting specific bequests (which are not part of the residue), the debts of the Estate (which are payable first from residue) exceeded the assets of the Estate by \$45,834.38.

CP 178. Mary's contention that it was error for the trial court to exclude the Living Trust from consideration in valuing Jim's estate also conflicts with her proposed finding 48, which read "The assets of Trust B and the Living Trust were not part of Dr. Haviland's estate." CP 659.

Finally, substantial evidence shows that Mary's transfers caused the estate to have negative value. As noted, the negative figure came from Mary's trial brief. It was based on subtracting the debt Jim owed at his death from the value of his assets. CP 178, Ex. 151 pp. 4-5, ll. 92, 97-99, 106, 109, 142-5. According to Mary's accounting, Jim's debt exceeded

\$700,000. *Id.*; *see also* Ex. 139. It was comprised of the mortgage on the Bremerton home and Jim’s line of credit, *id.*, which was used to fund the joint account along with the Living Trust. FF 101 (CP 748), FF 119 (CP 750). Jim’s debt increased as Mary transferred funds from the joint account. For example, on November 9, 2007, days before Jim died, \$50,000 in debt was incurred on Jim’s line of credit and transferred to the joint account, which was not part of the probate estate. FF 119 (CP 750).

C. The Legal Standard Should Not Be Changed.

Mary argues that the legal standard articulated by *Dean v. Jordan*, 194 Wash. 661 (1938) should not apply to spouses. *Dean, id.* at 671-2, identified factors that justify a rebuttable presumption of undue influence:

The most important of such facts are (1) that the beneficiary occupied a fiduciary or confidential relation to the testator; (2) that the beneficiary actively participated in the preparation or procurement of the will; and (3) that the beneficiary received an unusually or unnaturally large part of the estate. Added to these may be other considerations, such as the age or condition of health and mental vigor of the testator, the nature or degree of relationship between the testator and the beneficiary, the opportunity for exerting an undue influence, and the naturalness or unnaturalness of the will. The weight of any of such facts will, of course, vary according to the circumstances of the particular case.

As shown below, this standard should not be modified to exempt spouses.

1. Mary’s Conduct Was Not Typical of Most Spouses.

Mary argues that applying *Dean* to her case would lead to “perverse” results because it would mean that a presumption of undue

influence would apply to “nearly *all* marriages.” App. Brief p. 20.

However, the basis for the presumption in this case was neither the marriage nor typical spousal interactions.

As co-trustee over Jim’s Living Trust from October 2000 until his death, Mary was involved in every transaction relating to Jim’s separate property held by the Trust. FF 29 (CP 734). Mary was directly involved in moving more than \$2.2 million of Jim’s separate property from the Living Trust to Jim and Mary’s joint account, Mary’s separate property accounts, and her church. *See supra* at 18-20. A spouse, *qua* spouse, does not have this power. Also atypical, \$1,078,574 was transferred from Mary and Jim’s joint account to Mary’s separate accounts between 2002 and Jim’s death, and more than \$6 million total was withdrawn from the joint account during this period. *Id.* The level of activity and the volume of transfers that benefited Mary at the expense of Jim are not typical.

The record also does not support Mary’s contention that her participation in writing Jim’s will was typical of most spouses. Mary participated in the preparation of the 2006 will by “writing the changes on the 2002 will, preparing a cover letter for Dr. Haviland to sign, and contacting Alan Kane’s office concerning the changes.” FF 75 (CP 742). Mary calls this participation “incidental” and “usual.” App. Brief at 25. But the trial court did not make any such findings. Furthermore, the

contestants' estate planning expert testified that Mary's involvement in creating the will was not typical; in fact, he characterized it as "very unusual," VRP 1584, and a "red flag." VRP 1585.

Also atypical was Mary's neglect of Jim's medical care. From the start, Mary's role was that of caregiver in addition to spouse.²⁵ Jim's dependence on Mary grew as his physical condition worsened, his mental functioning declined, and his care needs increased. By the time of the will he was completely dependent on Mary to meet basic needs such as feeding and toileting. FF 60 (CP 740), FF 99 (CP 747). As Jim's caregiver, Mary failed to take Jim to the doctor on a regular basis, and when she did, she failed to accurately report Jim's cognitive decline.²⁶ Leading up to the January 2006 doctor's visit that predated the will by three days, Jim had not seen his doctor since 2003. FF 87 (CP); VRP 989; Ex. 261 p. 0005. The contestants' expert testified that the 2 ½ year gap was "alarming." VRP 989. Mary's expert agreed that the infrequency of doctor visits was not appropriate for a man Jim's age. VRP 989, 990, 1136. After the will

²⁵ Jim met Mary when he was a patient. She performed care-giving tasks for him while he was hospitalized. FF 10 (CP 730). The prenuptial agreement stated that Mary will care for Jim at home or arrange home-care for Jim as long as feasible. Ex. 30 p. 6. Jim's friend James Ellis testified that when Jim first told him about the marriage he described it as a "deal" whereby Mary was going to take care of Jim as long as he lived and Jim was going to pay for Mary's education and her children's educations. CP 535-6.

²⁶ Dr. Elaine Peskind testified: "[S]he [Mary] did not get him adequate medical care on a regular basis [and] [s]he did not seek a diagnosis for why he was having a progressive decline in his cognitive function." VRP 1020. "This is [was] an elderly gentleman with some significant health problems, who is [was] really not seeing a physician or a licensed practitioner at all for years in that time period." VRP 1086.

was signed, the lack of medical attention continued. FF 102 (CP 748).

Also distinguishing this case from “nearly all marriages” is the way that the relationship started – which was in violation of Washington law. Because of Mary’s criminal history, she should not have been allowed unsupervised contact with Jim while he was a patient at the hospital where she worked. RCW 43.43.842 prohibits persons convicted of crimes relating to financial exploitation, including theft, from having unsupervised contact with patients. In violation of this law, Mary performed care-giving functions for Jim, FF 10 (CP 730), was observed in his room by several witnesses in a care-giving role, VRP 485-6, 591-3, 1728, and engaged in social contact with Jim while he was a patient. FF 10 (CP 730). It was also improper for Mary to begin a social relationship with Jim while he was hospitalized. VRP 1136-7. Mary’s conduct, if it occurred today, would violate WAC 246-16-100, which prohibits health care providers, including nursing assistants, from starting romantic relationships with patients or clients “within two years after the provider-patient/client relationship ends.” WAC 246-16-100(3).²⁷

²⁷ WAC 246-16-100 was not in effect when Mary met Jim. Mary asserts that the regulation would not apply any way because Jim was not her patient. However, Mary performed “care-giving functions” for Jim while he was a patient on the floor where she worked. FF 10 (CP 730). Mary’s witness Mr. Wilson testified that he met Mary when “Jim was in Providence with a broken hip and Mary was looking after him in Providence.” VRP 1728. Other witnesses also testified that Mary appeared to be providing care to Jim and “helping him in his rehabilitation process” when they met in 1996. VRP 485-6, 591-3,

2. *Dean v. Jordan* Applies to Spouses.

Washington undue influence cases provide no support for Mary's contention that *Dean's* rebuttable presumption should not apply to spouses. *Dean* was decided in 1938 and has been cited with approval in scores of undue influence cases since that time. *Estate of Lint*, 135 Wn.2d 518, affirmed the trial court's application of the *Dean* factors to the conduct of a spouse and invalidated the will for undue influence. Although *Lint* also invalidated the marriage for fraud, the court did not suggest that a different standard for undue influence should apply to spouses. *Lint* expressly analyzed whether factors creating a presumption existed and then evaluated the evidence in order to determine whether the presumption had been rebutted, ultimately concluding that the husband had failed to rebut the presumption. *Estate of Kinssie*, 35 Wn.2d 723, 214 P.2d 693 (1950), cited *Dean* in concluding that the will was not the product of undue influence by the wife, also without announcing any special test that would apply for spouses.

3. Limiting *Dean v. Jordan* Would Conflict with Marital and Fiduciary Law.

Mary asserts without authority that spouses should be subject to less scrutiny than other beneficiaries. App. Brief p. 22. This argument is contrary to cornerstone principals of fiduciary and marital laws. Spouses are held to the highest standard of conduct and their good faith is not

presumed. “Both by statute and Supreme Court decision, the courts are required to carefully scrutinize transactions between spouses because of the confidential relationship existing between them.” *Peste v. Peste*, 1 Wn. App. 19, 22-3, 459 P.2d 70 (1969). “In every case, where any question arises as to the good faith of any transaction between spouses or between domestic partners, whether a transaction between them directly or by intervention of third person or persons, the burden of proof shall be upon the party asserting the good faith.” RCW 26.16.210. Furthermore, spouses are not exempted from the fiduciary duty of loyalty when they also serve in a fiduciary capacity as trustee or attorney-in-fact. See *Bryant v. Bryant*, 125 Wn.2d 113, 882 P.2d 169 (1994) (holding fiduciary duty of loyalty applied to spouse acting as agent under a durable power of attorney and prevented the gifting of community property).

4. Other States Apply the Presumption of Undue Influence to Spouses.

The weight of authority from other states contradicts Mary’s position. See, e.g., *Estate of Teel*, 154 P.2d 384 (Cal. 1944) (“A fiduciary relationship exists between husband and wife in respect to the issue of undue influence in a will contest, and where such fiduciary relationship is combined with unduly profiting by the will, and its being unnatural, and activity on the part of the proponent in procuring its execution, we have persuasive evidence of undue influence.”); *Cook v. Huff*, 274 Ga. 186,

187 (2001)(invalidating will for undue influence by wife of 57 years); *Estate of Waters*, 629 P.2d 470 (Wyo. 1981) (affirming undue influence by wife based on the traditional test); accord *Street v. Street*, 22 So.2d 35 (Ala. 1945); accord *Fields v. Mersack*, 577 A.2d 376 (Md. 1990); accord *McKee v. Stoddard*, 780 P.2d 736 (Ore. 1989); *Estate of Laper*, 195 N.W. 323 (Wisc. 1923)(affirming undue influence by second wife where evidence was conflicting); *Howard v. Nasser*, 613 S.E.2d 64 (S. Car. 2005) (presumption of undue influence applied against spouse).

5. The Cases Mary Relies On Are Not Persuasive.

Mary relies on a Florida case *Jacobs v. Vaillancourt*, 634 So.2d 667, 671 (Fla. Ct. App. 1994), to argue that a presumption of undue influence cannot arise in a case involving a husband and wife. *Jacobs* was unwilling to conclude that marriage alone established a confidential relationship. The only basis in *Jacobs* for a confidential relationship was the respondent's marriage to the testator. However, Mary's role as Jim's co-trustee and her control over his health care were independent reasons for finding a fiduciary or confidential relationship.

The other foreign authority cited by Mary undercuts her position. *Estate of Glogovsek*, 618 N.E.2d 1231, 1237 (Ill.Ct. App. 1993), held that a "sweeping refusal" to apply the presumption of undue influence to spouses could "cause an injustice under other facts and circumstances." In

Glogovsek, the court also noted that other evidence of a confidential or fiduciary relationship, like involvement in the testator's financial affairs, would provide a basis for applying the presumption.

D. The Trial Court Correctly Ruled That The 2006 Will Was The Product Of Undue Influence By Mary.

The facts of this unusual case were sufficient under well established case law to raise a presumption of undue influence. The trial court weighed the evidence and the credibility of the witnesses and ruled that Mary's evidence was not sufficient to rebut the presumption. Even without a presumption, the 135 findings of fact establish clear, cogent and convincing evidence that Jim's will was the product of undue influence.

1. Undue Influence is Almost Always Established by Circumstantial Evidence.

Mary incorrectly argues that the contestants could not meet their burden of proof with circumstantial evidence. However, "[u]ndue influence is not usually exercised openly in the presence of others[.]" *Estate of Kessler*, 35 Wn.2d 156, 162, 211 P.2d 496 (1949). Thus, Washington courts recognize that undue influence is almost always established through circumstantial evidence. *See id.*; *Estate of Schafer*, 8 Wn.2d 517, 522, 113 P.2d 41 (1941); *Foster v. Brady*, 198 Wash. 416, 425, 81 P.2d 271 (1938); *Estate of Bush*, 195 Wash. 416, 425, 81 P.2d 271 (1938); *Estate of Esala*, 16 Wn. App. 764, 771, 559 P.2d 591 (1977).

Also, as a general matter, “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 valuable than the other.” Washington Pattern Jury Instruction 1.03. Notably, even criminal convictions may be based entirely on circumstantial evidence.²⁸

2. The Presumption of Undue Influence was Correctly Raised and Applied.

The evidence raised a presumption of undue influence.

a. Mary was Jim’s fiduciary.

Mary was Jim’s fiduciary based on the fact that she was co-trustee of the trust that held his separate property. FF 97 (CP 747). The evidence justified a strong presumption of undue influence because 1) Mary engaged in many transactions as co-trustee over Jim’s separate property; 2) many of these transactions involved self-dealing; and 3) all of these transfers occurred after Jim was a vulnerable adult under Washington law. The volume of Mary’s activity is daunting. *See supra* at 18-20.

b. Mary actively participated in preparing and procuring the will.

It is a verity on appeal that “Mary Haviland participated in the preparation of the 2006 will by writing the changes on the 2002 will,

²⁸ *See, e.g., State v. Young*, 87 Wn.2d 129, 550 P.2d 1 (1976) (arson is rarely proved by anything other than circumstantial evidence due to the secretive nature of the crime).

preparing a cover letter for Dr. Haviland to sign, and contacting Alan Kane's office concerning the changes." FF 75 (CP 742). Mary relies on several cases to argue that her actions did not constitute participation; however, she does not challenge the trial court's finding.

The cases Mary relies on work against her. In *Tarsagian v. Watt*, 402 So.2d 471 (Fla. Ct. App. 1981), the wife's involvement in the will was limited to driving her husband to the law office and sitting in the waiting room. She also was not involved in her husband's finances. *Id.* at 472. Mary, however, did much more than drive Jim to Mr. Kane's office and wait for him. She wrote the changes, FF 75 (CP 742), which is direct -- not circumstantial -- evidence of her participation in changing the contents of the will. Mary also initiated contact with Mr. Kane's office about the changes and requested that Mr. Kane meet with Jim only once. Ex. 120.

Estate of Beck, 79 Wash. 331 (1914), decided 24 years before *Dean*, supports the presumption in this case. *Beck* held:

If the testator was well and strong, there arises no presumption of undue influence or fraud from the fact that the person who drew it up was favored by it. But if the testator was weak and the scrivener benefited, slight circumstances in addition may suffice to cast the burden upon him to show that there was no fraud practiced and no undue influence exercised.

79 Wash. at 335 (emphasis added). *Beck* reversed dismissal of a will contest because the testatrix did not understand English and only answered "yes" during the will signing. *Id.* at 333. Here, Jim was in a weakened

condition, FF 90 (CP 746), FF 126 (CP 751-2), the contents of the will were not explained to Jim during the will signing, FF 92 (CP 746), and Jim answered only “yes” in response to questions. FF 93 (CP 746). These unchallenged findings support a presumption based on *Beck’s* reasoning.

The other two cases relied on by Mary, *Estate of Seattle*, 138 Wash. 656 (1926), and *Estate of Patterson*, 68 Wash. 377 (1912), offer little guidance because they were decided 12 and 26 years before *Dean*. In *Patterson*, 68 Wash. at 379, 382, the beneficiary had no involvement in its creation other than to transport the “strong and vigorous” testator to the lawyer’s office, where the testator “furnished all data to his counsel for drawing the will.” Jim was far from strong and vigorous, and he did not furnish the information to Mr. Kane; Mary did. FF 75 (CP 742). Jim merely answered “yes” to Mr. Kane’s questions. FF 93 (CP 746). *Seattle*, 138 Wash. at 662, had facts more aligned with the present case. But it heavily relied on there being “no direct evidence” of influence, which conflicts with current law that undue influence is almost always shown by circumstantial evidence. *See supra* at 34-5. *Seattle* is a testament to why *Dean* was necessary – undue influence could not be proven without a presumption due to its covert nature:

Undue influence is generally difficult of direct proof. It is generally exercised in secret, not openly, and, like a snake crawling upon a rock, it leaves no track behind it, but its sinister and insidious effect must be determined from facts and

circumstances surrounding the testator, his physical and mental condition as shown by the evidence, and the opportunity of the beneficiary of the influenced bequest to mold the mind of the testator to suit his or her purposes.

Hyatt v. Wroten, 43 S.W.2d 726, 728 (Ark. 1931).

c. Jim was vulnerable to undue influence.

Jim's dependence and Mary's constant presence created a "perfect opportunity for exerting undue influence." *Estate of Lint*, 135 Wn.2d at 537. Jim was "extremely vulnerable to undue influence due to physical disabilities, some degree of cognitive impairment, and the fact that Mary Haviland was Dr. Haviland's primary caregiver." CL 9 (CP 756); FF 99 (CP 747). Jim also met the statutory definition of vulnerable adult, which includes anyone over 60 who is physically, functionally or mentally unable to meet their care needs. RCW 74.34.020(15). By 2006, Jim needed 24-hour care to assist him with basic tasks like toileting and feeding. FF 60 (CP 740). Jim could not be left alone and was always in the presence of Mary or individuals who she arranged to watch him. *Id.*, VRP 1398-9. Dr. Peskind testified that Jim was "highly vulnerable to influence at the time of the will signing," FF 99 (CP 747), and Mary's expert Dr. Lindsay agreed that Jim was "vulnerable" as far back as 2002. VRP 1132.

d. The will was unnatural.

The trial court correctly considered Jim's prior estate plan in assessing whether the 2006 will was unnatural. CL 9 (CP 755). Mary

asserts that a will favoring a spouse can never be unnatural because spouses commonly leave their entire estates to each other. But that is not the test. “A will is unnatural when it is contrary to what the testator, from his known views, feelings, and intentions would have been expected to make.” *Estate of Miller*, 10 Wn.2d 258, 267, 116 P.2d 526 (1941). Courts look at a testator’s prior wills in order to determine naturalness. *Estate of Esala*, 16 Wn. App. at 769 (“The ‘unnaturalness’ of the will is reflected in its inconsistency with the testator’s prior will and his intent, expressed only a month prior to his death”); *Estate of Dand*, 41 Wn.2d 158, 247 P.2d 1016 (1952) (affirming that a will was unnatural based on the testator’s family background, prior wills, and the attendant circumstances). Mr. Kane testified that the 2006 will “represented a significant change in Dr. Haviland’s estate plan.” FF 79 (CP 743). The 2006 will was inconsistent with all of Jim’s prior wills dating back 38 years because it disinherited his children. FF 96 (CP 747).²⁹ Also, the fact that Jim even was doing a will so late in life was inconsistent with his longstanding concern about the “ravages” of age on judgment and decision-making. Ex. 270.

²⁹ The 2006 will also differed from statements that Jim made to one of Mary’s witnesses Dr. James Spence. Dr. Spence testified that he would be “quite surprised” to learn that Jim had not left his children any monetary benefit under his will based on statements Jim had made to him. VRP 1467.

e. The trial court properly considered corroborating evidence.

The trial court found that Mary engaged in a systematic and persistent pattern of self-dealing that supported the presumption of undue influence and was corroborating evidence that Mary unduly influenced Jim. FF 128 (CP 752; challenged); CL 9 (CP 756). As previously argued, these findings were supported by substantial evidence. The trial court did not err in considering this evidence as Mary argues. App. Brief pp. 29-31.

First, Mary opened the door to inquiries about her depletion of Jim's assets by arguing at trial, CP 178, and at summary judgment, CP ____ (Sub No. 145), that the will contest should be dismissed because the probate estate had negative value.

Second, Mary's actions as fiduciary are directly relevant to the *Dean* test. A key question is whether the beneficiary was the testator's fiduciary. A fiduciary relationship presupposes "dominion and control over the principal's property." *Bryant v. Bryant*, 125 Wn.2d at 118. Thus, the conduct of the beneficiary is relevant for determining whether there was a fiduciary relationship and how much weight to give this factor.

Third, the unexplained transfers, self-dealing and request for funds from Marion's Trust corroborate undue influence relating to the will. Corroborating evidence is "Evidence supplementary to that already given and tending to strengthen or confirm it; additional evidence of a different

character to the same point. . . .” *Tyler v. Tyler*, 65 Wn.2d 102, 104 (1964) (citations omitted). The large unexplained transfers that increased as Jim grew weaker show that Mary controlled Jim and that she used her position of trust to benefit herself. The transfers also show that Mary’s control and self-dealing increased as Jim’s mental and physical conditions weakened, and that she was not deterred by Jim’s inability to understand what she was doing. The transfers reflect a plan and pattern to transfer Jim’s assets to Mary and people that she favored. It was for the trial court to decide how much weight to give this evidence.

Fourth, Mary’s argument that the trial court could not consider corroborating evidence lacks merit. Courts often consider corroborating evidence in applying *Dean* and in finding undue influence. *Estate of Jaaska*, 27 Wn.2d 433, 448 (1947), looked at “a whole series of suspicious circumstances which tend to strengthen the presumption of fraud and undue influence,” which did not fall within the presumption-raising factors identified in *Dean*. *Jaaska* also cited the incredible testimony offered by the proponent as support for the claim of undue influence. 27 Wn.2d at 450. Similarly, *Lint*, 135 Wn.2d at 537, held that evidence of fraud supported the trial court’s finding of undue influence.

Fifth, Mary’s argument that the evidence must be from January 2006 is specious. App. Brief at 30. *Estate of Dand*, 41 Wn.2d at 161, held

that keeping a will secret for seven years after its execution was evidence of undue influence. In *Dean*, 194 Wash. at 666, letters written by the decedent two years prior to the will's execution were considered evidence of the lack of undue influence. Mary herself offered letters and photographs from well before and after the will signing, Ex. 502, 506, 507, 540, 542, plus testimony from many witnesses about the wedding.

3. Mary Did Not Rebut the Presumption of Undue Influence.

The trial court did not err in finding that Mary failed to rebut the presumption of undue influence. CL 10 (CP 756). The trial judge was in the best position to evaluate all of the evidence. The record indicates that he did so with care. He found that the evidence tending to overcome the presumption was unconvincing. Much of Mary's brief is devoted to asking this Court to reweigh the evidence in violation of well-settled law:

It invades the province of the trial court for an appellate court to find compelling that which the trial court found unpersuasive. Yet, that is what appellant wants this court to do. There was conflicting evidence in this case. The trial judge weighed that conflicting evidence and chose which of it to believe. That is the end of the story.

Quinn v. Cherry Lane Auto Plaza, Inc., 153 Wn. App. at 717. *See also Estate of Esala*, 16 Wn. App. at 770 (holding that the proponent of the will failed to rebut the presumption of undue influence and that "[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.”).

a. Mary did not rebut that she engaged in self-dealing while she was Jim’s co-trustee.

Mary does not challenge finding 97 (CP 747) that she was Jim’s fiduciary at the time that the 2006 will was signed. Mary argues that she rebutted the evidence that she engaged in a systemic pattern of self-dealing transfers by explaining how a small portion of the funds were used. However, as shown *supra* 18-24, the trial court’s finding that Mary failed to explain the transfers is supported by substantial evidence.

Mary also claims that she rebutted evidence of her self-dealing by arguing the transactions were performed through Mr. Kane and Mr. Hennes. App. Brief p. 43. However, Mr. Kane testified that he “certainly wasn’t involved in the investment or payment of bills or reviewing accountings or anything like that,” VRP 143-144, and that he did not recall seeing Jim between 2002 and 2006. FF 90 (CP 745). Mr. Hennes testified that he did not carefully scrutinize transfers from the Living Trust because the bank was not trustee over the funds, VRP 775, and that he relied on Mr. Kane who did not see Jim between 2002 and 2006 to ensure that Jim was competent. VRP 778-9. Also, Mr. Hennes was misinformed about Mary and Jim’s financial circumstances, FF 83 (CP 744), was not aware of the large gifts to Mary’s brother and family, VRP 703, 705, and was not

sure when his last face-to-face meeting with Jim had occurred, testifying that the last time he saw Jim could have been prior to 2005. VRP 762-3. Also, Mr. Hennes did express concerns about Mary's undue influence with regard to her request for money from Marion's Trust. VRP 770.

Mary also argues that transferring Jim's assets during his lifetime was not improper because she was going to inherit them. App. Brief pp. 45-6. This position is contrary to law. The fiduciary duty of loyalty prohibits use of the principal's property for the benefit of the trustee. RESTATEMENT (THIRD) OF AGENCY, §8.05 (2006) ("An agent has a duty not to use property of the principal for the agent's own purposes or those of a third party."). Furthermore, a spouse cannot give away community property without consent of their spouse. RCW 26.16.030(2). Mary had no ownership interest in Jim's property prior to his death.³⁰ The burden of proof is on the fiduciary to demonstrate no breach of loyalty has been committed. *Wilkins v. Lasater*, 46 Wn. App. 766, 777-778 (1987). For each unexplained transfer from the Living Trust or the joint account that benefited Mary, she had the burden of proving by clear and convincing evidence (1) that the transactions were gifts; and (2) that she did not exert undue influence to obtain the gifts. *In re Estates of Palmer*, 145 Wn.

³⁰ *Estate of Murphy*, 193 Wash. 400, 409, 75 P.2d 916 (1938) (wills have no effect prior to death); *Kendall v. Kendall*, 43 Wn.2d 418, 424, 261 P.2d 422 (1953) (a remainder beneficiary's interest in a trust does not vest prior to termination of the trust); *Estrada v. McNulty*, 98 Wn. App. 117, 988 P.2d 492 (2000) (beneficiary of nonprobate asset has only an inchoate right prior to death).

App. at 261. If the recipient of an *inter vivos* gift has a confidential or fiduciary relationship with the donor, a presumption of undue influence arises and the recipient must prove the gift was intended and not the result of undue influence. *McCutcheon v. Brownfield*, 2 Wn. App. 348, 467 P.2d 868 (1970). There is no exception for spouses or heirs.³¹

Finally, Mary's entitlement defense cannot justify her efforts to obtain a large distribution from Marion's Trust several days before Jim died. Mary was never a beneficiary of Marion's Trust. Ex. 22.

b. Mary did not rebut her active participation in preparing and procuring the will.

Mary does not challenge finding 75 (CP 742) that she participated in the preparation of the will. She argues that her participation should be discounted because it was typical of spouses (a point already rebutted *supra* at 28-9) and it was incidental (a finding not made by the trial court). In short, Mary wants this Court to reweigh the evidence to reach different findings and inferences, which is not its role. *See supra* at 13-14.

Mary also argues that the trial court should have found that the testimony of Mr. Kane and Mr. Glase rebutted the presumption. But reweighing testimony is not the proper function of appellate court. Further,

³¹ See *Gerimonte v. Case*, 42 Wn. App. 611, 614 (1986) ("Relations that often fall within the rule [protecting individuals from undue influence relating to contracts and inter vivos gifts] include those of parent and child, husband and wife, clergyman and parishioner, and physician and patient.") (quoting RESTATEMENT (SECOND) OF CONTRACTS §177 cmt. a (1981)). (Emphasis added.) *See also* RCW 26.16.210.

the trial court had ample reasons for finding that their testimony was not sufficient to rebut the presumption. Both Mr. Kane and Mr. Glase had limited ability to observe Jim. Mr. Glase saw Jim only one time for approximately 12 minutes. FF 89 (CP 745). Mr. Kane spoke with Jim only once by telephone prior to the will-signing and Jim had trouble communicating by telephone.³² Mr. Kane spent only 5-10 minutes observing Jim. FF 90 (CP 745-6). Despite the passage of four years, Mr. Kane did not ask Jim about his family, his estate, or his trusts, FF 81 (CP 744), FF 84 (CP 744), FF 85 (CP 744), 92 (CP 746), and Jim did not say anything besides “yes” in response to questions. Mr. Kane also made several errors. He did not notice the memo to the file that documented Jim’s difficulty communicating by phone. FF 86 (CP 744-5). He misstated that Marion’s Trust was largely depleted. FF 78 (CP 743). Mr. Kane was unaware that Jim had inaccurately reported the size of his estate to Mr. Hennes. FF 83 (CP 744). Expert Thomas Keller testified that Mr. Kane’s work fell below the standard of care, and that Mr. Kane’s representation of both Jim and Mary compromised Mr. Kane’s ability to represent Jim’s interests. FF 100 (CP 748).

Also meritless is Mary’s argument that the absence of direct evidence that she told Jim what to put in the will rebuts the presumption.

³² Notably, Mr. Kane’s limited contact with Jim was at Mary’s request. Ex. 120.

App. Brief p. 32. As shown *supra* at 34-5, direct evidence is not required to invalidate a will. Moreover, Mary did more than tell Jim what to put in his will; Mary wrote the changes. FF 73 (CP 742).

c. Mary did not rebut that Jim was vulnerable to influence.

Mary argues that testimony about Jim’s mental functioning by a number of witnesses rebutted the presumption. App. Brief pp. 33-40. But “evidence of testamentary capacity is not inconsistent with the conclusion that undue influence had overmastered free agency.” *Estate of Esala*, 16 Wn. App. at 770. Although *Dean* identified lack of “mental vigor” as a relevant factor, it also specified age, “condition of health” and “the opportunity for exerting an undue influence” as relevant considerations. 194 Wash. at 672.³³ The trial court did not err in finding Mary’s evidence insufficient.

First, the testimony that Mary emphasizes in her brief does not rebut that Jim lacked “mental vigor” at the time of the will signing. It is a verity on appeal that “as of January 2006, Dr. Haviland appeared to have periods of lucidity and periods of confusion and impairment.” FF 126 (CP 751-2). Mr. Kane testified that Jim’s mental functioning had declined

³³ See also RCW 74.34.020(15(a)) (defining vulnerable adult as any individual sixty years of age or older who has “the functional, mental, or physical inability to care for himself or herself”); RCW 74.34.005(4) (“A vulnerable adult may have health problems that place him or her in a dependent position.”)

moderately since 2002. FF 90 (CP 745-6). Many of the witnesses who Mary relies on in her brief acknowledged that Jim’s mental functioning had waned. For example, Mrs. Wilson likened Jim’s mental condition to that of a baby.³⁴

Second, the testimony Mary emphasizes concerning mental functioning does not rebut the other factors that made Jim vulnerable to influence – advanced age, physical disabilities, and total dependence on Mary to provide basic care. Jim could not be left alone and needed others to care for him. These facts are not in dispute. FF 60 (CP 740). Even the witnesses whose testimony Mary relies on agreed that Jim had significant impairments that limited his functioning. For example, Dr. Blagg testified “physically he was impaired. And he – he was, as I say, he was deaf too.” VRP 861.

Third, Mary argues that the trial court should have given more weight to Mr. Kane and Mr. Hennes’ testimony. But reweighing testimony is not this Court’s job. Moreover, their testimony raised

³⁴ Mrs. Wilson testified as follows:

COURT: Anything else you noticed about Dr. Haviland that you associated with aging? I’m talking now about more the mental aspect, the physical aspects. We’ve gone over the physical aspect of his frailties.

MRS. WILSON: Yeah, I think it was mainly physical and his – I just never felt that his mind wasn’t always there. You have a baby sometimes you know they’ve got a mind in there and it’s thinking, but they can’t always put it into words and I think that’s how he was. I always thought of it like that. VRP 1759 (emphasis added).

additional concerns. According to Mr. Kane, he had a very brief (1 to 3 minute) conversation with Mr. Hennes to find out Mr. Hennes' opinion regarding Jim's competence. FF 79 (CP 743). However, the only conversations that Mr. Hennes recalled having with Mr. Kane concerning Jim's competence were ones where Mr. Kane reassured him that Jim's mental functioning was fine. VRP 778-9. But Mr. Kane did not see Jim between 2002 and 2006. FF 90 (745). Thus, Mr. Kane relied on Mr. Hennes, who relied on Mr. Kane, who had not seen Jim for four years.

Fourth, Mary asserts that the trial court should have given more weight to the testimony of Dr. Martin. But Dr. Martin had very limited opportunity to observe Jim. He saw Jim only three times prior to the will signing and always in the presence of Mary. FF 87 (CP 745). Dr. Martin did not see Jim for a stretch of 2½ years immediately preceding the will signing except for the January 16 visit when Mary reported that Jim's mentation was good, *id.*, despite her reports to others in 2005 that Jim was disoriented and refusing necessary care. Ex. 131, VRP 102-3, 919, 1529-30, 2013. Dr. Martin also received inaccurate information from Mary about Jim's cognitive functioning in 2002, FF 38 (CP 735), and his failure to do any cognitive testing fell below the standard of care according to the contestants' expert. FF 38 (CP 735), VRP 984-5.

Finally, Mary's reliance on *Estate of Reilly*, 78 Wn.2d 623 (1970)

is misplaced. App. Brief at 32. *Reilly* reversed the finding that a charity had unduly influenced a testator based on nearly unanimous testimony that the testator was “mentally alert.” *Id.* at 661. However, in the present case, the testimony was sharply divided on Jim’s mental functioning, FF 99 (CP 747), and the trial court’s unchallenged finding establishes that Jim had periods of confusion and impairment. FF 126 (CP 751-2).

d. Mary did not rebut that the will was unnatural.

Mary argues that the will was natural because 22 months passed between the will and Jim’s death; Jim was closer to her family than his own; Mary “was with Jim daily, cared for him constantly, and was younger than his children;” Jim’s children were beneficiaries under Marion’s Trust; and Mary was Jim’s wife. App. Brief 40-1.

First, the mere passing of time between the execution of a will and the testator's death does not necessarily support the will's validity. *Estate of Dand*, 41 Wn. 2d 158 (invalidating will that was executed seven years prior to the testator’s death). In the present case, Jim had no opportunity to change the will after it was signed because his mental functioning continued to decline, FF 111 (CP 749), and “Mary Haviland moved Dr. Haviland to Bremerton in March 2006”. FF 101 (CP 748).

Second, to the extent that Jim’s estate plan favored Mary’s children over the children, grandchildren and great grandchildren of Jim’s

49-year marriage to Marion, VRP 73, that is strong evidence of unnaturalness and Mary's control. Jim had a loving relationship with his granddaughters, Charlene and Christine, and his great grandson Jacob. VRP 456, 482-3, 884-5. He had previously stated his intent to assist his great grandchildren with college. VRP 903. Jim had a close relationship with his son Donald, who continued to be Jim's contact person for medical emergencies even after Jim remarried. Ex. 261, p. 0015, VRP 1522. Jim was proud of his daughter Elizabeth for getting her Ph.D. VRP 1455, 1468. Yet nobody from Jim's family was provided for in his will. Ex. 1. Consistent with Jim's frugal reputation, he never gave his grandchildren or great grandchildren large gifts, VRP 888-9, yet made huge gifts not only to Mary's children, but also to her brother, nephews and nieces, whom he had met only a few years before his death.

Third, the factors Mary argues justify her receiving Jim's entire estate – her constant presence, the total care she provided, and her much younger age – support finding undue influence because they highlight Jim's dependence and Mary's opportunity to influence him. *In re Estate of Eubank*, 50 Wn. App. 611, 749 P.2d 691 (1988), held that the testator's dependency and the beneficiary's control provided the opportunity to exert undue influence. Similarly, *In re Estate of Lint*, 135 Wn.2d at 537, cited the fact that the husband "had a "perfect opportunity for exerting undue

influence” as a factor supporting the finding of undue influence.

Fourth, the fact that Jim’s children were provided for under Marion’s Trust does not relate to the naturalness of Jim’s will. The contestants had always been provided for under Marion’s Trust; therefore, that fact does not justify a change in Jim’s estate plan. Moreover, Marion’s Trust did not hold any of Jim’s property. Marion’s Trust was funded solely with Marion’s property.

Fifth, a marriage alone does not establish naturalness. As shown *supra*, Washington courts do not define naturalness based solely on the status of the recipient. Similarly, *Cook v. Huff*, 274 Ga. 186, 187 (2001), invalidated a will for undue influence by a spouse of 57 years because the will was inconsistent with the husband’s “long-standing expression of the testamentary intent to leave equal shares to his wife and children.”

4. The Trial Court’s Findings Support Its Conclusion that the Will Was the Product of Undue Influence.

The trial court’s findings of fact support its conclusion that Jim’s will was the product of undue influence by Mary not Jim’s free choice. This was a highly impaired and dependent testator. FF 60 (CP 740). He made a “significant change,” FF 79 (CP 743), to his will at the age of 94 that had the effect of disinheriting all of his children. FF 96 (CP 747). A dementia expert testified that Jim was not capable of independent thought at the time of the will-signing, even if he was able to understand the

“bottom line” effect of the new will. FF 99 (CP 747), VRP 1004. It is unchallenged that Jim was suffering from “periods of confusion and impairment” at the time of the will signing, FF 126 (CP 752), and that there had been a “moderate decline” in his mental functioning since his last will signed in 2002. FF 90 (CP 746). His cognitive function was never properly assessed because he rarely was taken to the doctor, FF 87 (CP 745), and when he was, his wife Mary misrepresented his mental functioning. *Id.*, FF 38 (CP 735). Jim was found to have advanced dementia shortly before his death, FF 124 (CP 751), FF 125 (CP 751; challenged on appeal), and according to expert testimony had dementia or symptoms consistent with dementia at the time of the will signing. FF 99 (CP 747). One of Mary’s witnesses likened Jim’s mental state to that of a baby. VRP 1759. At the time of the will-signing, Jim was “extremely vulnerable to undue influence due to physical disabilities, some degree of cognitive impairment, and the fact that Mary Haviland was Dr. Haviland’s primary caregiver.” CL 9 (CP 756). Jim was not represented by independent counsel in making his will because the drafting attorney also represented Mary. FF 94 (CP 746), FF 100 (CP 748). The drafting attorney did not testify or document any reason given by Jim for the new will and could only recall Jim answering “yes” to questions. FF 89 (CP 745), FF 93 (CP 746). The changes were written by Mary, and Mary

initiated contact with the lawyer to have the changes signed. FF 72, 73, 74 (CP 742). Not a single witness testified that Jim articulated a reason for changing his will. The changes to Jim's will were made in the context of a "steady, systematic and persistent pattern of depleting" Jim's assets and funds "for the benefit of Mary Haviland and her designees." FF 128 (CP 752; challenged). In addition, Mary attempted to obtain a large distribution for her benefit from the trust of Jim's first wife at a time when Jim was too sick and confused to understand what Mary was doing or having him sign. *Id.* Mary's actions constituted a breach of fiduciary duty, CL 13 (CP 756), that corroborated the other evidence of Mary's control, influence, and overreaching. FF 128 (CP 752; challenged). The detailed findings establish clear, cogent and convincing evidence that the will was the product of undue influence by Mary and that it did not result from Jim's independent thought and choice.

Mary's final argument is that the facts of this case are different than *Dean v. Jordan*; therefore, the contestants failed to meet their burden of proof. App. Brief pp. 46-49. However, Washington courts recognize that each will contest turns on its own facts. *See, e.g., Estate of Denison*, 23 Wn.2d 699, 716, 162 P.2d 245 (1945); *Estate of Bush*, 195 Wash. 416, 418, 81 P.2d 271 (1938); *Estate of Mikelson*, 41 Wn.2d 97, 99, 247 P.2d 540 (1952); *Estate of Riley*, 163 Wash. 119, 125, 300 P. 159 (1931).

E. The Trial Court Did Not Abuse its Discretion In Awarding the Contestants Their Reasonable Attorneys' Fees And Costs.

Under RCW 11.24.050 and RCW 11.96A.150, a successful contestant may be awarded his or her reasonable attorneys' fees and costs. The trial court correctly applied this statutory authority and the lodestar measure to award the contestants their costs and reasonable attorneys' fees. On appeal, Mary did not assign error to any of the findings of fact that support the fees, challenge their reasonableness, or argue that the trial court did not have a statutory basis for awarding the fees.

F. The Contestants Should Receive An Award Of Attorneys' Fees On Appeal.

RCW 11.96A.150 and RCW 11.24.050 authorize the Court to award the contestants their attorneys' fees on appeal as the Court deems equitable. The Court has discretion to award the fees against any or all of the individual appellants. *Id.* It would be equitable to award fees to the contestants on appeal because Mary breached her fiduciary duties, CL 13 (CP 756), and committed undue influence. The fees should be awarded against the appellants – Mary Haviland, Robert Van Citters, and George Paul Cook – not the Estate. The current administrator did not join the appeal or participate in this appeal on behalf of the estate.

G. Even If The Trial Court Is Reversed, Mary Should Not Be Awarded Her Attorneys' Fees and Costs.

Attorneys' fees may be awarded against an unsuccessful contestant

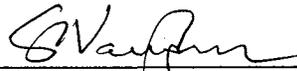
in a will contest only if the contestant lacked probable cause and good faith. RCW 11.24.050; *Estate of Kessler*, 95 Wn. App. 358, 977 P.2d 591 (1999) (reversing award of attorneys' fees against unsuccessful contestants because the record did not establish the absence of probable cause or good faith). In the present case, where the contestants prevailed before the trial court and successfully had the will invalidated, the claim that their action lacks good faith or probable cause is without merit.

V. CONCLUSION

The Respondents respectfully request that the Court affirm the trial court and award them reasonable attorneys' fees and costs for this appeal.

Respectfully submitted this 6th day of May, 2010.

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APPENDIX

RCW 11.24.050
Costs.

If the probate be revoked or the will annulled, assessment of costs shall be in the discretion of the court. If the will be sustained, the court may assess the costs against the contestant, including, unless it appears that the contestant acted with probable cause and in good faith, such reasonable attorney's fees as the court may deem proper.

[1965 c 145 § 11.24.050. Prior: 1917 c 156 § 19; RRS § 1389; prior: Code 1881 § 1366; 1860 p 177 § 69.]

Notes:

Rules of court: SPR 98.12W.

Personal representative
allowance of necessary expenses: RCW 11.48.050.
compensation -- Attorney's fee: RCW 11.48.210.

RCW 11.96A.150
Costs — Attorneys' fees.

(1) Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

(2) This section applies to all proceedings governed by this title, including but not limited to proceedings involving trusts, decedent's estates and properties, and guardianship matters. This section shall not be construed as being limited by any other specific statutory provision providing for the payment of costs, including RCW 11.68.070 and 11.24.050, unless such statute specifically provides otherwise. This section shall apply to matters involving guardians and guardians ad litem and shall not be limited or controlled by the provisions of RCW 11.88.090(10).

[2007 c 475 § 5; 1999 c 42 § 308.]

Notes:

Severability -- 2007 c 475: See RCW 11.05A.903.

RCW 26.16.030

Community property defined — Management and control.

Property not acquired or owned, as prescribed in RCW 26.16.010 and 26.16.020, acquired after marriage or after registration of a state registered domestic partnership by either domestic partner or either husband or wife or both, is community property. Either spouse or either domestic partner, acting alone, may manage and control community property, with a like power of disposition as the acting spouse or domestic partner has over his or her separate property, except:

(1) Neither person shall devise or bequeath by will more than one-half of the community property.

(2) Neither person shall give community property without the express or implied consent of the other.

(3) Neither person shall sell, convey, or encumber the community real property without the other spouse or other domestic partner joining in the execution of the deed or other instrument by which the real estate is sold, conveyed, or encumbered, and such deed or other instrument must be acknowledged by both spouses or both domestic partners.

(4) Neither person shall purchase or contract to purchase community real property without the other spouse or other domestic partner joining in the transaction of purchase or in the execution of the contract to purchase.

(5) Neither person shall create a security interest other than a purchase money security interest as defined in *RCW62A.9-107 in, or sell, community household goods, furnishings, or appliances, or a community mobile home unless the other spouse or other domestic partner joins in executing the security agreement or bill of sale, if any.

(6) Neither person shall acquire, purchase, sell, convey, or encumber the assets, including real estate, or the good will of a business where both spouses or both domestic partners participate in its management without the consent of the other: PROVIDED, That where only one spouse or one domestic partner participates in such management the participating spouse or participating domestic partner may, in the ordinary course of such business, acquire, purchase, sell, convey or encumber the assets, including real estate, or the good will of the business without the consent of the nonparticipating spouse or nonparticipating domestic partner.

[2008 c 6 § 604; 1981 c 304 § 1; 1972 ex.s. c 108 § 3; Code 1881 § 2409; RRS § 6892.]

Notes:

***Reviser's note:** Article 62A.9 RCW was repealed in its entirety by 2000 c 250 § 9A-901, effective July 1, 2001. For later enactment, see Article 62A.9A RCW.

Part headings not law -- Severability -- 2008 c 6: See RCW 26.60.900 and 26.60.901.

Severability -- 1981 c 304: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1981 c 304 § 46.]

Community property -- Homestead selection: RCW 6.13.020.

Descent and distribution of community property: RCW 11.04.015.

Quasi-community property defined: RCW 26.16.220.

Simultaneous death, uniform act: Chapter 11.05A RCW.

RCW 26.16.210

Burden of proof in transactions between spouses or domestic partners.

In every case, where any question arises as to the good faith of any transaction between spouses or between domestic partners, whether a transaction between them directly or by intervention of third person or persons, the burden of proof shall be upon the party asserting the good faith.

[2008 c 6 § 619; Code 1881 § 2397; RRS § 5828.]

Notes:

Part headings not law -- Severability -- 2008 c 6: See RCW 26.60.900 and 26.60.901.

RCW 43.43.842

Vulnerable adults — Additional licensing requirements for agencies, facilities, and individuals providing services.

(1)(a) The secretary of social and health services and the secretary of health shall adopt additional requirements for the licensure or relicensure of agencies, facilities, and licensed individuals who provide care and treatment to vulnerable adults, including nursing pools registered under chapter 18.52C RCW. These additional requirements shall ensure that any person associated with a licensed agency or facility having unsupervised access with a vulnerable adult shall not be the respondent in an active protective order under RCW 74.34.130, nor have been: (i) Convicted of a crime against persons as defined in RCW 43.43.830, except as provided in this section; (ii) convicted of crimes relating to financial exploitation as defined in RCW 43.43.830, except as provided in this section; or (iii) found in any disciplinary board final decision to have abused a vulnerable adult under RCW 43.43.830.

(b) A person associated with a licensed agency or facility who has unsupervised access with a vulnerable adult shall make the disclosures specified in RCW 43.43.834(2). The person shall make the disclosures in writing, sign, and swear to the contents under penalty of perjury. The person shall, in the disclosures, specify all crimes against children or other persons, all crimes relating to financial exploitation, and all crimes relating to drugs as defined in RCW 43.43.830, committed by the person.

(2) The rules adopted under this section shall permit the licensee to consider the criminal history of an applicant for employment in a licensed facility when the applicant has one or more convictions for a past offense and:

(a) The offense was simple assault, assault in the fourth degree, or the same offense as it may be renamed, and three or more years have passed between the most recent conviction and the date of application for employment;

(b) The offense was prostitution, or the same offense as it may be renamed, and three or more years have passed between the most recent conviction and the date of application for employment;

(c) The offense was theft in the third degree, or the same offense as it may be renamed, and three or more years have passed between the most recent conviction and the date of application for employment;

(d) The offense was theft in the second degree, or the same offense as it may be renamed, and five or more years have passed between the most recent conviction and the date of application for employment;

(e) The offense was forgery, or the same offense as it may be renamed, and five or more years have passed between the most recent conviction and the date of application for employment.

The offenses set forth in (a) through (e) of this subsection do not automatically disqualify an applicant from employment by a licensee. Nothing in this section may be construed to require the employment of any person against a licensee's judgment.

(3) In consultation with law enforcement personnel, the secretary of social and health services and the secretary of health shall investigate, or cause to be investigated, the conviction record and the protection proceeding record information under this chapter of the staff of each agency or facility under their respective jurisdictions seeking licensure or relicensure. An individual responding to a criminal background inquiry request from his or her employer or potential employer shall disclose the information about his or her criminal history under penalty of perjury. The secretaries shall use the information solely for the purpose of determining eligibility for licensure or relicensure. Criminal justice agencies shall provide the secretaries such information as they may have and that the secretaries may require for such purpose.

[2007 c 387 § 4; 1998 c 10 § 4; 1997 c 392 § 518; 1992 c 104 § 1; 1989 c 334 § 11.]

Notes:

Short title--Findings--Construction--Conflict with federal requirements--Part headings and captions not law -- 1997 c 392: See notes following RCW 74.39A.009.

RCW 74.34.005
Findings.

The legislature finds and declares that:

- (1) Some adults are vulnerable and may be subjected to abuse, neglect, financial exploitation, or abandonment by a family member, care provider, or other person who has a relationship with the vulnerable adult;
- (2) A vulnerable adult may be home bound or otherwise unable to represent himself or herself in court or to retain legal counsel in order to obtain the relief available under this chapter or other protections offered through the courts;
- (3) A vulnerable adult may lack the ability to perform or obtain those services necessary to maintain his or her well-being because he or she lacks the capacity for consent;
- (4) A vulnerable adult may have health problems that place him or her in a dependent position;
- (5) The department and appropriate agencies must be prepared to receive reports of abandonment, abuse, financial exploitation, or neglect of vulnerable adults;
- (6) The department must provide protective services in the least restrictive environment appropriate and available to the vulnerable adult.

[1999 c 176 § 2.]

Notes:

Findings -- Purpose--1999 c 176: "The legislature finds that the provisions for the protection of vulnerable adults found in chapters 26.44, 70.124, and 74.34 RCW contain different definitions for abandonment, abuse, exploitation, and neglect. The legislature finds that combining the sections of these chapters that pertain to the protection of vulnerable adults would better serve this state's population of vulnerable adults. The purpose of chapter 74.34 RCW is to provide the department and law enforcement agencies with the authority to investigate complaints of abandonment, abuse, financial exploitation, or neglect of vulnerable adults and to provide protective services and legal remedies to protect these vulnerable adults." [1999 c 176 § 1.]

Severability -- 1999 c 176: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1999 c 176 § 36.]

Conflict with federal requirements -- 1999 c 176: "If any part of this act is found to be in conflict with federal requirements that are a prescribed condition to the allocation of federal funds to the state, the conflicting part of this act is inoperative solely to the extent of the conflict and with respect to the agencies directly affected, and this finding does not affect the operation of the remainder of this act in its application to the agencies concerned. Rules adopted under this act must meet federal requirements that are a necessary condition to the receipt of federal funds by the state." [1999 c 176 § 37.]

RCW 74.34.020
Definitions.

***** CHANGE IN 2010 *** (SEE 6202-S.SL) *****

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Abandonment" means action or inaction by a person or entity with a duty of care for a vulnerable adult that leaves the vulnerable person without the means or ability to obtain necessary food, clothing, shelter, or health care.

(2) "Abuse" means the willful action or inaction that inflicts injury, unreasonable confinement, intimidation, or punishment on a vulnerable adult. In instances of abuse of a vulnerable adult who is unable to express or demonstrate physical harm, pain, or mental anguish, the abuse is presumed to cause physical harm, pain, or mental anguish. Abuse includes sexual abuse, mental abuse, physical abuse, and exploitation of a vulnerable adult, which have the following meanings:

(a) "Sexual abuse" means any form of nonconsensual sexual contact, including but not limited to unwanted or inappropriate touching, rape, sodomy, sexual coercion, sexually explicit photographing, and sexual harassment. Sexual abuse includes any sexual contact between a staff person, who is not also a resident or client, of a facility or a staff person of a program authorized under chapter 71A.12 RCW, and a vulnerable adult living in that facility or receiving service from a program authorized under chapter 71A.12 RCW, whether or not it is consensual.

(b) "Physical abuse" means the willful action of inflicting bodily injury or physical mistreatment. Physical abuse includes, but is not limited to, striking with or without an object, slapping, pinching, choking, kicking, shoving, prodding, or the use of chemical restraints or physical restraints unless the restraints are consistent with licensing requirements, and includes restraints that are otherwise being used inappropriately.

(c) "Mental abuse" means any willful action or inaction of mental or verbal abuse. Mental abuse includes, but is not limited to, coercion, harassment, inappropriately isolating a vulnerable adult from family, friends, or regular activity, and verbal assault that includes ridiculing, intimidating, yelling, or swearing.

(d) "Exploitation" means an act of forcing, compelling, or exerting undue influence over a vulnerable adult causing the vulnerable adult to act in a way that is inconsistent with relevant past behavior, or causing the vulnerable adult to perform services for the benefit of another.

(3) "Consent" means express written consent granted after the vulnerable adult or his or her legal representative has been fully informed of the nature of the services to be offered and that the receipt of services is voluntary.

(4) "Department" means the department of social and health services.

(5) "Facility" means a residence licensed or required to be licensed under chapter 18.20 RCW, boarding homes; chapter 18.51 RCW, nursing homes; chapter 70.128 RCW, adult family homes; chapter 72.36 RCW, soldiers' homes; or chapter 71A.20 RCW, residential habilitation centers; or any other facility licensed by the department.

(6) "Financial exploitation" means the illegal or improper use of the property, income, resources, or trust funds of the vulnerable adult by any person for any person's profit or advantage other than for the vulnerable adult's profit or advantage.

(7) "Incapacitated person" means a person who is at a significant risk of personal or financial harm under RCW 11.88.010 (1) (a), (b), (c), or (d).

(8) "Individual provider" means a person under contract with the department to provide services in the home under chapter 74.09 or 74.39A RCW.

(9) "Interested person" means a person who demonstrates to the court's satisfaction that the person is interested in the welfare of the vulnerable adult, that the person has a good faith belief that the court's intervention is necessary, and that the vulnerable adult is unable, due to incapacity, undue influence, or duress at the time the petition is filed, to protect his or her own interests.

(10) "Mandated reporter" is an employee of the department; law enforcement officer; social worker; professional school personnel; individual provider; an employee of a facility; an operator of a facility; an employee of a social service, welfare, mental health, adult day health, adult day care, home health, home care, or hospice agency; county coroner or medical examiner; Christian Science practitioner; or health care provider subject to chapter 18.130 RCW.

(11) "Neglect" means (a) a pattern of conduct or inaction by a person or entity with a duty of care that fails to provide the goods and services that maintain physical or mental health of a vulnerable adult, or that fails to avoid or prevent physical or mental harm or pain to a vulnerable adult; or (b) an act or omission that demonstrates a serious disregard of consequences of such a magnitude as to constitute a clear and present danger to the vulnerable adult's health, welfare, or safety, including but

not limited to conduct prohibited under RCW 9A.42.100.

(12) "Permissive reporter" means any person, including, but not limited to, an employee of a financial institution, attorney, or volunteer in a facility or program providing services for vulnerable adults.

(13) "Protective services" means any services provided by the department to a vulnerable adult with the consent of the vulnerable adult, or the legal representative of the vulnerable adult, who has been abandoned, abused, financially exploited, neglected, or in a state of self-neglect. These services may include, but are not limited to case management, social casework, home care, placement, arranging for medical evaluations, psychological evaluations, day care, or referral for legal assistance.

(14) "Self-neglect" means the failure of a vulnerable adult, not living in a facility, to provide for himself or herself the goods and services necessary for the vulnerable adult's physical or mental health, and the absence of which impairs or threatens the vulnerable adult's well-being. This definition may include a vulnerable adult who is receiving services through home health, hospice, or a home care agency, or an individual provider when the neglect is not a result of inaction by that agency or individual provider.

(15) "Vulnerable adult" includes a person:

(a) Sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself; or

(b) Found incapacitated under chapter 11.88 RCW; or

(c) Who has a developmental disability as defined under RCW 71A.10.020; or

(d) Admitted to any facility; or

(e) Receiving services from home health, hospice, or home care agencies licensed or required to be licensed under chapter 70.127 RCW; or

(f) Receiving services from an individual provider.

[2007 c 312 § 1; 2006 c 339 § 109; 2003 c 230 § 1; 1999 c 176 § 3; 1997 c 392 § 523; 1995 1st sp.s. c 18 § 84; 1984 c 97 § 8.]

Notes:

Intent -- Part headings not law -- 2006 c 339: See notes following RCW 70.96A.325.

Effective date -- 2003 c 230: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [May 12, 2003]." [2003 c 230 § 3.]

Findings -- Purpose -- Severability -- Conflict with federal requirements -- 1999 c 176: See notes following RCW 74.34.005.

Short title -- Findings -- Construction -- Conflict with federal requirements -- Part headings and captions not law -- 1997 c 392: See notes following RCW 74.39A.009.

Conflict with federal requirements -- Severability -- Effective date -- 1995 1st sp.s. c 18: See notes following RCW 74.39A.030.



1 of 1 DOCUMENT

Restatement of the Law, Third, Agency
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Case Citations

Chapter 8 - Duties of Agent and Principal to Each Other

Topic 1 - Agent's Duties to Principal

Title B - Duties of Loyalty

Restat 3d of Agency, § 8.05

§ 8.05 Use of Principal's Property; Use of Confidential Information

An agent has a duty

**(1) not to use property of the principal for the agent's own purposes or those of a third party;
and**

**(2) not to use or communicate confidential information of the principal for the agent's own
purposes or those of a third party.**

COMMENTS & ILLUSTRATIONS: Comment:

a. Scope and cross-references. This section states rules applicable to an agent's use of the principal's property and use or communication of the principal's confidential information. Comment *b* discusses an agent's duty to refrain from using property of the principal for purposes of the agent or a third party without the principal's consent. Comment *c* covers an agent's duties concerning confidential information, including trade secrets of the principal.

A principal may consent to action by an agent that would otherwise contravene the agent's duties as stated in this section. See § 8.06.

An agent is also subject to duties of management regarding the principal's property as stated in § 8.12.

Section 8.04 states an agent's duty to refrain from competition with the principal during an agency relationship.

For the standard applicable to directors and senior executives of a corporation, see *Principles of Corporate Governance: Analysis and Recommendations* § 5.04.

b. Use of principal's property. An agent who has possession of property of the principal has a duty to use it only on the principal's behalf, unless the principal consents to such use. See § 8.06. This rule is a specific application of an agent's basic fiduciary duty stated in § 8.01. See § 8.01, Comment *b*, for discussion. The rule is also a corollary of a principal's right, as an owner of property, to exclude usage by others. An agent is subject to this duty whether or not the agent uses property of the principal to compete with the principal or causes harm to the principal through the use. An agent may breach this duty even when the agent's use is beneficial in some sense to the property or to the principal. An agent is subject to liability to the principal for any profit made by the agent while using the principal's property when the use facilitates making the profit, or otherwise for the value of the use.

Illustrations:

Restatement of the Law, Third, Agency § 8.05

1. P, who owns a stable of horses, employs A to take care of them. While P is absent for a month, and without P's consent, A rents the horses to persons who ride them. Although being ridden is beneficial to the horses, A is subject to liability to P for the amount A receives for the rentals.

2. Same facts as Illustration 1, except that A permits A's friends to ride P's horses for free during P's absence. A is subject to liability to P for the value of the use made of the horses.

An agent's breach of the rules stated in subsections (1) and (2) often accompanies a breach of another fiduciary duty that the agent owes the principal, although no such breach is present in Illustrations 1 and 2. In particular, an agent may use a principal's property without the principal's consent in the course of breaching the agent's duty by competing with the principal, see § 8.04, or developing a business opportunity that should not have been taken personally by the agent, see § 8.02, Comment *d*. If an agent's use of a principal's property causes harm to the principal or the property, the agent is subject to liability to the principal. See § 8.01, Comment *d(1)*.

Termination of an agency relationship does not end an agent's duties regarding property of the principal. A former agent who continues to possess property of a principal has a duty to return it and to comply with the management and record-keeping rules stated in § 8.12.

Illustrations:

3. P Corporation, which manufactures carbon paper, employs A as production manager of a plant. A's supervisor, M, the plant's general manager, directs A to dismantle and scrap manufacturing equipment. After dismantling the equipment, A stores the pieces in a friend's warehouse instead of scrapping them. Later, after A determines to form a business to compete with P Corporation, A retrieves the pieces of equipment, reassembles them, resigns from P Corporation, and begins to manufacture and sell carbon paper in competition with P Corporation. A has breached A's duty to P Corporation. By not scrapping the dismantled equipment as M directed, A made use of it without P Corporation's consent. P Corporation's remedies against A include replevying the equipment.

4. Same facts as Illustration 3, except that A resigns from P Corporation prior to retrieving and reassembling the equipment. Same result.

An agent who wrongfully obtains or continues to possess property of a principal is not entitled to recover compensation for improvements the agent makes to the property. Thus, in Illustrations 3 and 4, the fact that A has improved the equipment does not bar P's right to recover possession of it, nor does it entitle A to compensation for the cost or value of the improvements.

For purposes of this rule, "property" of a principal is defined broadly and includes intangible as well as tangible assets.

Illustration:

5. P Corporation employs A as a manager. Disgruntled by the circumstances of A's employment at P Corporation, A, an alert reader of legal notices, discovers that the state in which P Corporation was incorporated has dissolved it because it neglected to file its annual report with the state. A files a document with the state reserving the name "P Corporation," for the purpose of increasing A's leverage in negotiations over the terms of A's employment. A knows that it will not be possible for P Corporation to reincorporate under its original name and anticipates that it will be expensive and commercially inconvenient for P Corporation to resume doing business using another name. A has breached A's duty to P Corporation. A misappropriated its name.

c. Confidential information. Many employees and other agents are given access by the principal to information that the principal would not wish to be revealed or used, except as the principal directs. Such information may pertain to the principal's business plans, personnel, nonpublic financial results, and operational practices, among a range of possibilities. The value of some types of confidential information is recognized by trade-secret law, which protects "any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others." *Restatement Third, Unfair Competition* § 39.

An agent may, additionally, acquire confidential information about a principal or otherwise in the course of an agency relationship that does not have competitive or other economic value. For example, in the context of a lawyer-

client relationship, confidential client information encompasses all information, not generally known, that relates to representation of the client. See *Restatement Third, The Law Governing Lawyers* § 59. An agent's relationship with a principal may result in the agent learning information about the principal's health, life history, and personal preferences that the agent should reasonably understand the principal expects the agent to keep confidential. An agent's duty of confidentiality extends to all such information concerning a principal even when it is not otherwise connected with the subject matter of the agency relationship.

An agent's duty of confidentiality is not absolute. An agent may reveal otherwise privileged information to protect a superior interest of the agent or a third party. Thus, an agent may reveal to law-enforcement authorities that the principal is committing or is about to commit a crime. An agent's privilege to reveal such information also protects the agent's revelation to a private party who is being or will be harmed by the principal's illegal conduct. Many statutes provide protection against termination to employees who engage in "whistle-blowing."

An agent's duties concerning confidential information do not end when the agency relationship terminates. An agent is not free to use or disclose a principal's trade secrets or other confidential information whether the agent retains a physical record of them or retains them in the agent's memory. If information is otherwise a trade secret or confidential, the means by which an agent appropriates it for later use or disclosure should be irrelevant. Feats of human memory, however commendable and intriguing in many respects, should not be privileged as instruments of disloyal conduct.

Illustrations:

6. P, who owns a commercial cleaning service, maintains a list of customers and prospective customers, noting particulars about each. P's list would be of competitive use to others. P maintains the list on a computer in P's office and restricts access to high-level employees within P's organization. A, P's general manager, who wishes to establish a competing cleaning service, retains a hard copy of the list that P gave to A to use in A's work. A resigns, taking the list and planning to use it to solicit business for A's new competing firm. A has breached A's duty to P.

7. Same facts as Illustration 6, except that A commits the list to memory, memorizing a portion each day and then typing that portion into A's home computer each evening. Same result.

An agent's use of the principal's confidential information for the agent's own purposes breaches the agent's duty as stated in subsection (2) although the agent's use of the information does not necessitate revealing it. Thus, it is a breach of an agent's duty to use confidential information of the principal for the purpose of effecting trades in securities although the agent does not reveal the information in the course of trading.

REPORTERS NOTES: REPORTER'S NOTES

a. *Relationship to Restatement Second, Agency, and codifications.* This section is the counterpart to Restatement Second, Agency §§ 395, 396, 398, and 404.

Under Ga. Code § 10-6-25 (2000 & Supp. 2005), "[t]he agent shall not make a personal profit from his principal's property; for all such he is bound to account." Section 10-6-27 provides that "[a] principal may follow his money deposited by an agent in the latter's name and recover the same wherever found, unless the rights of innocent third parties have intervened."

La. Civ. Code art. 3004 (2005) states that "[t]he mandatary is bound to deliver to the principal everything he received by virtue of the mandate, including things he received unduly. The mandatary may retain in his possession sufficient property of the principal to pay the mandatary's expenses and remuneration." Under art. 3005, "[t]he mandatary owes interest, from the date used, on sums of money of the principal that the mandatary applies to his own use."

b. *Use of principal's property.* Illustration 1 is derived from Restatement Second, Agency § 404, Illustration 1. For the basic point that unless the principal consents, an agent may not use property of the principal for the agent's own purposes or those of a third party, see, e.g., *Cwikla v. Sheir*, 801 N.E.2d 1103, 1111-1112 (Ill.App.2003) (corporation's treasurer breached fiduciary duty by diverting corporate funds to his mother-in-law). An agent's role and functions may shape how a court characterizes the agent's duty in handling property of the principal. Compare *Bridge-stone/Firestone, Inc. v. Recovery Credit Servs., Inc.*, 98 F.3d 13, 20 (2d Cir.1996) (collection agent for credit-card issuer who failed to remit monies collected on issuer's account owed no obligations beyond those fixed by contract; agent exercised no discretion and was not relied upon for advice) with *Moses v. Martin*, 360 F.Supp.2d 533, 543-544 (S.D.N.Y. 2004) (managing agency breached fiduciary duty to its principal, a celebrity wardrobe stylist, by retaining funds collected from styl-

ist's clients and misrepresenting whether monies were owed to stylist; in contrast to collection agent in *Bridge-stone/Firestone*, managing agency had discretion to negotiate terms with stylist's clients on basis of its superior knowledge of industry).

For discussion of the difficulties in defining "property," see Laura S. Underkuffler, *The Idea of Property: Its Meaning and Power* (2003).

Illustrations 3 and 4 are based on a simplified version of *FryeTech, Inc. v. Harris*, 46 *F.Supp.2d* 1144, 1157 (*D.Kan.*1999) (former employees violated duty to employer by surreptitiously procuring property of employer; employer legally entitled to possession of equipment, unlawfully detained by defendants; improvements made to equipment by former employees neither bar replevin nor entitle former employees to compensation, citing *Restatement of Restitution* § 158, Comment *d*). On an agent's duty to return property held on the principal's behalf, see also *Annesley v. Tricentrol Oil Trading, Inc.*, 841 *S.W.2d* 908 (*Tex.App.*1992), abrogated on other grounds, 35 *S.W.3d* 61 (2000) (agent who held seats on commodities exchange on principal's behalf had duty to transfer seats to principal's designate). See also *Foodcomm Int'l v. Barry*, 328 *F.3d* 300, 302 (7th *Cir.*2003) (sales employees used computers and PDAs provided by employer to prepare business plan to submit to employer's chief customer, whom employees approached with inquiry about its interest in employing them to set up business to compete with employer).

Illustration 5 is based on a variation of the facts in *Rexford Rand Corp. v. Ancel*, 58 *F.3d* 1215 (7th *Cir.*1995). In *Rexford Rand*, the corporation's name was reserved, following its administrative dissolution, by a minority shareholder who had been fired from his positions as an officer. The court observed: "[shareholder] may have been the victim of oppressive activity, and he may have believed that reserving the [corporation's] name for his own use would induce [other shareholders] to buy out his stock at a fair price. [Shareholder's] desire to obtain a fair buyout is not itself objectionable. . . . [t]he method by which he sought to induce a settlement, however, is troubling. By appropriating the corporate name, [shareholder] threatened to cause serious damage to the well-being of the corporation . . . as a shareholder in a close corporation, [shareholder] should have placed the interests of the corporation above his personal interests." *Id.* at 1220. For another application of the same point, see *Mid-List Press v. Nora*, 374 *F.3d* 690, 693 (8th *Cir.*2004) (president of not-for-profit publishing company, wishing to market self-published book of poetry through Internet merchant, affixes publisher's ISBN number and name to book without approval of any other officer or director of publisher and despite editors' refusal to publish book unless president-author submitted it for consideration under company's program for first-time poets; president's unauthorized use of publisher's name and ISBN number violated Lanham Act and constituted a self-dealing use of corporate property, court noting that "we can see how publication of the corporate president's own book without following normal procedures could seriously tarnish [publisher's] reputation as a nonprofit publisher, and thus run counter to the corporation's interests.").

c. Confidential information. For the basic point that an agent has a duty not to use confidential information acquired in the agent's employment with the principal to compete with the principal, either during their relationship or following its termination, see *ABKCO, Inc. v. Harrison's Music, Inc.*, 722 *F.2d* 988, 994 (2d *Cir.*1983); *Western Med. Consultants, Inc. v. Johnson*, 835 *F.Supp.* 554, 558 (*D.Or.*1993); *David Welch Co. v. Erskine & Tully*, 250 *Cal.Rptr.* 339 (*Cal.App.*1988). On the use of confidential information outside the context of competition with the principal, see, e.g., *Hollinger Int'l, Inc. v. Black*, 844 *A.2d* 1022, 1061 (*Del.Ch.* 2004), *aff'd*, 872 *A.2d* 559 (*Del.*2005) (controlling shareholder breached fiduciary duty of loyalty, inter alia, by "improperly using confidential information belonging to [corporation] to advance his own personal interests and not those of [corporation], without authorization from his fellow directors"; controlling shareholder used confidential advice and nonpublic financial information to negotiate sale to third party of key corporate assets without knowledge of fellow directors on corporation's board, with whom controlling shareholder had previously entered into restructuring agreement that contemplated transaction for the equal and ratable benefit of all shareholders).

Not all information about present or prospective customers is protected as a trade secret. See, e.g., *Western Med. Consultants*, 835 *F.Supp.* at 559 (former employee did not have "record of 'customer contacts'" as alleged by former employer; former employee found pool of potential customers for competing firm through yellow pages in phone book and listing maintained by state insurance division, both publicly accessible resources).

The result stated for Illustration 7 is not consistent with the position taken in *Restatement Second, Agency. Restatement Third, Unfair Competition* § 42, Comment *f*, states that general rules governing trade secrets apply to customer lists. Likewise, under the Uniform Trade Secrets Act, a customer list does not lose protection because it is taken through memorization and not in memorialized form. See *Ed Nowogroski Ins., Inc. v. Rucker*, 971 *P.2d* 936 (*Wash.*1999). In contrast, *Restatement Second, Agency* § 396, Comment *b*, stated a "memory rule": a former agent "is

normally privileged to use, in competition with the principal, the names of customers retained in his memory as the result of his work for the principal and also methods of doing business and processes which are but skillful variations of general processes known to the particular trade," although the former employer has kept the information secret from competitors. *Restatement Third, Unfair Competition § 42*, Comments *d* and *f*, characterize intentional memorization by an employee as evidence that information is a trade secret. Most recent cases do not follow the "memory rule," see *Ed Nowogroski Ins.*, 971 P.2d at 946-948. When an employee remembers information only through casual memory, as opposed to a deliberate exercise in memorization, that fact may weigh in a court's analysis of a trade-secret claim against a former employee. See *Leo Silfen, Inc. v. Cream*, 278 N.E.2d 636, 639 (N.Y. 1972). See also *North Atl. Instruments, Inc. v. Haber*, 188 F.3d 38, 46-47 & n.7 (2d Cir.1999) (suggesting that reference to "casual memory" in *Leo Silfen* does not amount to categorical treatment of trade secrets remembered casually and that "such a rule would almost surely prove unworkable in situations where, as here, there is evidence that although the employee may have committed some information to memory, he also physically took other information. The task of crafting an injunction permitting use of casually remembered information, while prohibiting the use of a list that the employee physically pilfered, would be virtually impossible as a practical matter.").

These developments post-Restatement Second, Agency, may reflect, among other things, that proficiency in memorization has declined as a trait enjoying cultural and social acclaim. In earlier eras, matters were viewed differently. See, e.g., Jonathan D. Spence, *The Memory Palace of Matteo Ricci* (1984) (wide-ranging narrative account of life of Jesuit who, in late 16th century, taught Chinese a set of mental constructs that could be used to remember vast amounts of information).

For the point that an agent breaches the agent's fiduciary duty by effecting trades in securities on the basis of confidential information of the principal, see *United States v. O'Hagan*, 521 U.S. 642 (1997) (lawyer purchases options to buy stock of takeover target identified by partner in law firm who represents bidder); *Diamond v. Oreamuno*, 248 N.E.2d 910 (N.Y.1969) (sales by corporate insiders on basis of nonpublic information constitute breaches of fiduciary duty). Not all states so characterize insider trading. See *Freeman v. Decio*, 584 F.2d 186 (7th Cir.1978) (predicting that Indiana would not follow *Diamond*).

Whistleblowing issues typically arise when an employee alleges that an employer's termination of the employee was wrongful because it constituted retaliation for the employee's whistleblowing. Many cases focus on employee claims of retaliatory discharge when the employee makes internal reports of suspected wrongdoing. In jurisdictions that recognize a public-policy exception to the employment-at-will doctrine, terminating an employee in retaliation for making such reports is wrongful if the subject matter of the employee's complaint or report concerns a matter of public policy. For representative examples, see *Green v. Ralee Eng'g Co.*, 78 Cal.Rptr.2d 16 (Cal.1998) (termination followed employee's internal reports concerning employer's alleged failure to comply with inspection practices mandated by regulations implementing Federal Aviation Act); *Rocky Mountain Hosp. & Med. Serv. v. Mariani*, 916 P.2d 519 (Colo. 1996) (CPA who managed human-resources department terminated in retaliation for complaints to supervisors concerning questionable accounting practices; state accountancy-board rules may constitute articulations of public policy for purposes of wrongful-discharge claim); *Sheets v. Teddy's Frosted Foods, Inc.*, 427 A.2d 385 (Conn.1980) (employer allegedly terminated quality-control director following director's internal reports of deviations from state labeling requirements for food products). A termination contravenes public policy, likewise, when it retaliates against an employee's threat to make a report to regulatory or law-enforcement authorities. See, e.g., *Sherman v. Kraft Gen. Foods, Inc.*, 651 N.E.2d 708 (Ill. App.1995) (employee allegedly terminated following reports of asbestos hazards in workplace to supervisor and stated intention to report hazard to OSHA); *McQuary v. Bel Air Convalescent Home, Inc.*, 684 P.2d 21 (Or.App.1984) (nursing-home employee allegedly terminated following threat to report claims of abuse of patient to state nursing-home regulator). A termination contravenes public policy when it retaliates against a report to law-enforcement or regulatory authorities external to the employer's organization. See *Prince v. Rescorp Realty*, 940 F.2d 1104 (7th Cir.1991) (applying Illinois law; chief engineer of high-rise apartment building stated claim of retaliatory discharge; believing that timer installed by employer's management on fire-safety system constituted a fire hazard, engineer stated concern to building manager and, receiving no response, to municipal officials; engineer terminated 2 years later). A claim of wrongful termination does not require that an employee establish an actual violation of law by the employer, only that the employee suspected illegal activity and had a reasonable basis for those suspicions. See *Green*, 78 Cal.Rptr. at 29. Some states recognize that public-policy claims may be based on nonlegislative sources, such as professional ethical codes in some circumstances. See *Rocky Mountain Hosp. & Med. Serv.*, 916 P.2d at 524-526 ("any public policy must serve the public interest and be sufficiently concrete to notify employers and employees of the behavior it requires"; rule directing an accountant to refrain from knowingly misrepresenting facts and not to subordi-

nate judgment to others "represents a clear mandate of public policy for purposes of establishing a claim for wrongful discharge in violation of public policy").

Separately, in many whistleblowing cases the dispositive question is whether an employee's conduct is covered by a statute that explicitly protects whistleblowing activity. For representative cases holding the employee's conduct to be protected, see, e.g., *Marques v. Fitzgerald*, 99 F.3d 1 (1st Cir.1996) (Rhode Island Whistle-blower's Act; municipal employee terminated following report to supervisor that employee would not continue to perform work assignment on boat that lacked life preserver because employee, who could not swim, feared boat would capsize); *Passaic Valley Sewerage Comm'rs v. Department of Labor*, 992 F.2d 474 (3d Cir.1993) (Clean Water Act; employee reported allegations of inadequate sampling system within organization and then threatened report to EPA); *Bechtel Constr. Co. v. Secretary of Labor*, 50 F.3d 926 (11th Cir.1995) (Energy Reorganization Act; carpenter laid off following questions to superiors about proper handling of tools contaminated with radiation); *Deneau v. Manor Care, Inc.*, 219 F.Supp.2d 855 (E.D.Mich.2002) (Michigan Whistle-blowers' Protection Act; nursing-home employee terminated after referring patients with significant weight loss to physicians contrary to management instructions and entering fact of referrals into data base submitted to state, as required by employee's job responsibilities); *Norris v. Hawaiian Airlines, Inc.*, 842 P.2d 634 (Haw.1992), aff'd, 512 U.S. 246 (1994) (Whistleblowers' Protection Act; airline mechanic contacted FAA to report problem on plane he serviced when he refused to sign off on plane contrary to supervisor's direction); *Abraham v. County of Hennepin*, 639 N.W.2d 342 (Minn.2002) (Whistleblower Act and Minnesota OSHA; employees alleged termination in retaliation for complaints to supervisor and to state OSHA that chemical fumes in workplace were making them ill); *Appeal of Bio Energy Corp.*, 607 A.2d 606 (N.H.1992) (Whistleblowers' Protection Act; employee discharged after bringing to supervisor's attention that employer's practice of deducting sick days from wages paid violated state law). For a comprehensive presentation and analysis of state statutes governing whistleblowers, see Victoria L. Donati & William J. Tarnow, *Whistleblowers and Other Retaliation Claims*, 34 Inst. on Emp. L. 1095 (2005).

The federal Sarbanes-Oxley Act prohibits any public company from discriminating against any employee who lawfully provides information or otherwise assists in an investigation of conduct that the employee "reasonably believes" constitutes a violation of the federal securities laws. See Sarbanes-Oxley Act of 2002, § 806(a), codified at 18 U.S.C. § 1514A(a)(1). For discussion, see Leonard M. Baynes, *Just Pucker and Blow?: An Analysis of Corporate Whistleblowers, the Duty of Care, the Duty of Loyalty, and the Sarbanes-Oxley Act*, 76 *St. John's L. Rev.* 875 (2002).

On disclosure of confidential information to a third party with legitimate reason to receive it, see *Hale Trucks, LLC v. Volvo Trucks N. Am., Inc.*, 224 F.Supp.2d 1010, 1025 (D.Md. 2002) (president of truck dealership did not breach fiduciary duty by informing customers that dealership was out-of-trust in handling financing monies because out-of-trust condition jeopardized availability of floor-plan financing, which would complicate delivery of new trucks to customers).

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Duties & Liabilities Care, Good Faith & Reasonable Skill Duty of Loyalty, Good Faith & Fair Dealing



1 of 1 DOCUMENT

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Case Citations

Rules and Principles

Chapter 7 - Misrepresentation, Duress and Undue Influence

Topic 2 - Duress and Undue Influence

Restat 2d of Contracts, § 177

§ 177 When Undue Influence Makes a Contract Voidable

(1) Undue influence is unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that that person will not act in a manner inconsistent with his welfare.

(2) If a party's manifestation of assent is induced by undue influence by the other party, the contract is voidable by the victim.

(3) If a party's manifestation of assent is induced by one who is not a party to the transaction, the contract is voidable by the victim unless the other party to the transaction in good faith and without reason to know of the undue influence either gives value or relies materially on the transaction.

COMMENTS & ILLUSTRATIONS: Comment:

a. Required domination or relation. The rule stated in this Section protects a person only if he is under the domination of another or is justified, by virtue of his relation with another in assuming that the other will not act inconsistently with his welfare. Relations that often fall within the rule include those of parent and child, husband and wife, clergyman and parishioner, and physician and patient. In each case it is a question of fact whether the relation is such as to give undue weight to the other's attempts at persuasion. The required relation may be found in situations other than those enumerated. However, the mere fact that a party is weak, infirm or aged does not of itself suffice, although it may be a factor in determining whether the required relation existed.

b. Unfair persuasion. Where the required domination or relation is present, the contract is voidable if it was induced by any unfair persuasion on the part of the stronger party. The law of undue influence therefore affords protection in situations where the rules on duress and misrepresentation give no relief. The degree of persuasion that is unfair depends on a variety of circumstances. The ultimate question is whether the result was produced by means that seriously impaired the free and competent exercise of judgment. Such factors as the unfairness of the resulting bargain, the unavailability of independent advice, and the susceptibility of the person persuaded are circumstances to be taken into account in determining whether there was unfair persuasion, but they are not in themselves controlling. Compare § 173.

Illustrations:

1. A, who is not experienced in business, has for years been accustomed to rely in business matters on the advice of his friend, B, who is experienced in business. B constantly urges A to make a contract to sell to C, B's confederate, a tract of land at a price that is well below its fair value. A is thereby induced to make the contract. Even though B's conduct does not amount to misrepresentation, it amounts to undue influence because A is justified in assuming that B will not act in a manner inconsistent with his welfare, and the contract is voidable.

Restatement of the Law, Second, Contracts, § 177

2. A, an elderly and illiterate man, lives with and depends for his support on B, his nephew. B tells A that he will no longer support him unless A makes a contract to sell B a tract of land. A is thereby induced to make the proposed contract. Even though B's conduct does not amount to duress, it amounts to undue influence because A is under the domination of B, and the contract is voidable by A.

c. Undue influence by a third person. If a party's assent has been induced by the undue influence of a third person rather than that of the other party to the contract, the contract is nevertheless voidable by the victim, unless the other party has in good faith either given value or changed his position materially in reliance on the transaction. The rule is similar to that for misrepresentation (see Comment *c* to § 164) and duress (see Comment *b* to § 175). Compare Illustration 1.

REPORTERS NOTES: This Section is based on former § 497. See 13 Williston §§ 1625-27B (3d ed. 1970).

Comment a. The existence alone of a confidential relationship between parties to a transaction does not raise a presumption of undue influence. *Brecht v. Schramm*, 266 N.W.2d 514 (Minn. 1978) (agreement transferring house from 79-year-old woman in poor health to niece who had cared for her and had held power of attorney -- no undue influence found despite presence of confidential relationship); *Herbolsheimer v. Herbolsheimer*, 46 Ill. App.3d 563, 5 Ill. Dec. 134, 361 N.E.2d 134 (1977) (will contest). Compare *Dobbins v. Hupp*, 562 S.W.2d 736 (Mo. App. 1978).

Comment b. Illustration 1 is based on Illustration 1 to former § 497; see also *Odorizzi v. Bloomfield School Dist.*, 246 Cal. App.2d 123, 54 Cal Rptr. 533 (1966); *Eldridge v. May*, 129 Me. 112, 150 A. 378 (1930); *Webber v. Phipps*, 95 N.H. 1, 56 A.2d 538 (1948); *Dobbins v. Hupp*, 562 S.W.2d 736 (Mo. App. 1978) (contractual joint wills between elderly brother and sister; sister very dependant upon brother who dominated their farm partnership; sister's will denied probate as procured by undue influence). Illustration 2 is based in part on Illustration 3 to former § 497; see also *Wilkie v. Sassen*, 123 Iowa 421, 99 N.W. 124 (1904); *Agner v. Bourn*, 281 Minn. 385, 161 N.W.2d 813 (1968); but cf. *Brecht v. Schramm*, *supra*.

CROSS REFERENCES: ALR Annotations:

Circumstances justifying delay in rescinding land contract after learning of ground of rescission. 1 A.L.R.3d 542.

Digest System Key Numbers:

Contracts 95, 98

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawDefensesDuress & Undue InfluenceGeneral Overview

WAC 246-16-100
Sexual misconduct.

(1) A health care provider shall not engage, or attempt to engage, in sexual misconduct with a current patient, client, or key party, inside or outside the health care setting. Sexual misconduct shall constitute grounds for disciplinary action. Sexual misconduct includes but is not limited to:

- (a) Sexual intercourse;
- (b) Touching the breasts, genitals, anus or any sexualized body part except as consistent with accepted community standards of practice for examination, diagnosis and treatment and within the health care practitioner's scope of practice;
- (c) Rubbing against a patient or client or key party for sexual gratification;
- (d) Kissing;
- (e) Hugging, touching, fondling or caressing of a romantic or sexual nature;
- (f) Examination of or touching genitals without using gloves;
- (g) Not allowing a patient or client privacy to dress or undress except as may be necessary in emergencies or custodial situations;
- (h) Not providing the patient or client a gown or draping except as may be necessary in emergencies;
- (i) Dressing or undressing in the presence of the patient, client or key party;
- (j) Removing patient or client's clothing or gown or draping without consent, emergent medical necessity or being in a custodial setting;
- (k) Encouraging masturbation or other sex act in the presence of the health care provider;
- (l) Masturbation or other sex act by the health care provider in the presence of the patient, client or key party;
- (m) Suggesting or discussing the possibility of a dating, sexual or romantic relationship after the professional relationship ends;
- (n) Terminating a professional relationship for the purpose of dating or pursuing a romantic or sexual relationship;
- (o) Soliciting a date with a patient, client or key party;
- (p) Discussing the sexual history, preferences or fantasies of the health care provider;
- (q) Any behavior, gestures, or expressions that may reasonably be interpreted as seductive or sexual;
- (r) Making statements regarding the patient, client or key party's body, appearance, sexual history, or sexual orientation other than for legitimate health care purposes;
- (s) Sexually demeaning behavior including any verbal or physical contact which may reasonably be interpreted as demeaning, humiliating, embarrassing, threatening or harming a patient, client or key party;
- (t) Photographing or filming the body or any body part or pose of a patient, client, or key party, other than for legitimate health care purposes; and
- (u) Showing a patient, client or key party sexually explicit photographs, other than for legitimate health care purposes.

(2) A health care provider shall not:

- (a) Offer to provide health care services in exchange for sexual favors;
- (b) Use health care information to contact the patient, client or key party for the purpose of engaging in sexual misconduct;
- (c) Use health care information or access to health care information to meet or attempt to meet the health care provider's sexual needs.

(3) A health care provider shall not engage, or attempt to engage, in the activities listed in subsection (1) of this section with a former patient, client or key party within two years after the provider-patient/client relationship ends.

(4) After the two-year period of time described in subsection (3) of this section, a health care provider shall not engage, or attempt to engage, in the activities listed in subsection (1) of this section if:

(a) There is a significant likelihood that the patient, client or key party will seek or require additional services from the health care provider; or

(b) There is an imbalance of power, influence, opportunity and/or special knowledge of the professional relationship.

(5) When evaluating whether a health care provider is prohibited from engaging, or attempting to engage, in sexual misconduct, the secretary will consider factors, including but not limited to:

(a) Documentation of a formal termination and the circumstances of termination of the provider-patient relationship;

(b) Transfer of care to another health care provider;

(c) Duration of the provider-patient relationship;

(d) Amount of time that has passed since the last health care services to the patient or client;

(e) Communication between the health care provider and the patient or client between the last health care services rendered and commencement of the personal relationship;

(f) Extent to which the patient's or client's personal or private information was shared with the health care provider;

(g) Nature of the patient or client's health condition during and since the professional relationship;

(h) The patient or client's emotional dependence and vulnerability; and

(i) Normal revisit cycle for the profession and service.

(6) Patient, client or key party initiation or consent does not excuse or negate the health care provider's responsibility.

(7) These rules do not prohibit:

(a) Providing health care services in case of emergency where the services cannot or will not be provided by another health care provider;

(b) Contact that is necessary for a legitimate health care purpose and that meets the standard of care appropriate to that profession; or

(c) Providing health care services for a legitimate health care purpose to a person who is in a preexisting, established personal relationship with the health care provider where there is no evidence of, or potential for, exploiting the patient or client.

[Statutory Authority: RCW 18.130.050 (1), (12) and 18.130.160. 06-18-045, § 246-16-100, filed 8/30/06, effective 9/30/06.]



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6 WAPRAC WPI 1.03

WPI 1.03 Direct and Circumstantial Evidence

6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 1.03 (5th ed.)

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Washington Pattern Jury Instructions--Civil
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Part I. General Instructions
Chapter 1. Introductory and General

WPI 1.03 Direct and Circumstantial Evidence

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

NOTE ON USE

This instruction should be given upon the request of any party when there is circumstantial evidence in the case. If it is appropriate that the jury also be instructed on the inference of negligence, WPI 22.01, *Res Ipsa Loquitur—Inference of Negligence*, should be used instead of this instruction.

COMMENT

This instruction has been revised for readability and juror comprehension. No substantive change is intended.

It is not error to refuse to give an instruction on circumstantial evidence if the case rests upon direct testimony, although there may be some circumstantial evidence in the case. *Kemp v. Leonard*, 70 Wn.2d 643, 424 P.2d 660 (1967). It is reversible error to instruct the jury that circumstantial evidence is to be regarded when it is strong and satisfactory and to be disregarded when it is not. *McKay v. Seattle Elec. Co.*, 76 Wash. 257, 136 P. 134 (1913).

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A-19

DECLARATION OF SERVICE

CHRISTINE JAMES certifies as follows:

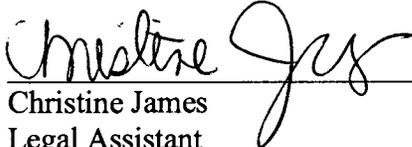
I am a legal assistant for the law firm of Thompson & Howle. I am over eighteen (18) years of age and make this declaration based on personal knowledge.

On May 6, 2010, I delivered by legal messenger the following documents to the law offices of the Appellants' attorneys Ladd Leavens and William Rasmussen, located at 1201 Third Avenue, suite 2200, Seattle, WA 98104; and to Personal Representative Richard Furman, located at 1200 Norton Building, 801 Second Ave., Seattle, WA 98104:

Brief of Respondents; Appendix; and this Declaration of Service.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on May 6, 2010.


Christine James
Legal Assistant