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NO. 68222-9-I  
(consolidated with No. 68224-5-I)

IN THE COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

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IN RE THE ESTATE OF WILLIAM ROSS TAYLOR

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BRIEF OF APPELLANT CHARLES TAYLOR II

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## I. INTRODUCTION

William Ross Taylor died in a boating accident that occurred in September of 2005. Mr. Taylor was survived by his 3-year-old son; his brother, Appellant Charles Taylor II; his parents, Emily Taylor and Reuben Taylor; and his sister Elizabeth Taylor. Roughly two and one-half months prior to his passing, William Ross Taylor made various designations on three life insurance policies that were taken out from the AIG Insurance Company as a result of his new employment at Compucom. On each of the AIG Life Insurance policies he designated his brother, Respondent Charles Taylor II, as his primary beneficiary. In addition, Mr. Taylor designated his brother, Charles Taylor II, as the beneficiary on an IRA account he was rolling funds into at Fidelity Investment Company.

Appellee Patricia Caiarelli (hereinafter "Caiarelli") is William Ross Taylor's ex-wife. Caiarelli claimed in the underlying proceedings that William Ross Taylor intended to name his brother, Appellant Charles Taylor II (hereinafter "Charles Taylor"), as beneficiary on the aforementioned policies in a representative capacity as a trustee for the benefit of their minor son. Caiarelli made the same assertion with respect to the Fidelity IRA account.

In addition to Caiarelli's contention that William Ross Taylor intended to name Charles Taylor as beneficiary in a representative capacity on the policies and IRA, she also alleged that Charles Taylor unduly influenced William Ross Taylor to name Charles Taylor in an individual capacity on those designations.

The matter went to trial by jury on November 16, 2011. Prior to submitting the case to the jury, Reuben Taylor, Emily Taylor and Elizabeth Taylor were all dismissed from the case. The case against Charles Taylor went to the jury and resulted in a jury verdict in favor of Caiarelli. This appeal ensued following the Trial Court's denial of Charles Taylor's motion for entry of judgment notwithstanding the verdict.

## **II. ASSIGNMENTS OF ERROR**

### **A. Assignments of Error**

1. The trial court erred in denying Respondent's motion for entry of judgment notwithstanding the verdict.
2. The trial court erred in giving Jury Instruction No. 13.
3. The trial court erred in entering its order on attorneys' fees and costs.

### **B. Issues Pertaining to Assignment of Error**

1. Was there substantial evidence to support the Jury's finding that William Ross Taylor intended to name Charles Taylor in a

representative capacity as a trustee on the beneficiary designations he made in July of 2005 ? (Assignment of Error No. 1)

2. Was there substantial evidence to support the Jury's finding that Charles Taylor unduly influenced William Ross Taylor when William Ross Taylor signed and/or made the beneficiary designations in July of 2005? (Assignment of Error No. 1)

3. Was there substantial evidence to support the Jury's finding that William Ross Taylor and Charles Taylor had a confidential relationship? (Assignment of Error No. 1)

4. When a claimant in a TEDRA action alleges undue influence in connection with the signing of a life insurance and/or IRA beneficiary designation, does the burden of proof shift to the respondent if a confidential relationship between the designator and respondent is established? (Assignment of Error No. 2)

5. Did Charles Taylor satisfy his burden of proof that he did not unduly influence William Ross Taylor when William Ross Taylor signed the beneficiary designations in July 2005? (Assignment of Error No. 1)

6. Did the Trial Court err in awarding attorneys' fees and costs to Caiarelli and the Personal Representative ? (Assignment of Error No. 3)

### III. STATEMENT OF THE CASE

#### A. Background

William Ross Taylor was married to Patricia Caiarelli on November 24, 2001. William was 34 years old at the time. They had one child (“A.C.T.”), who was born on May 5, 2002. The parties separated in April 2003, and Caiarelli petitioned for divorce. (Ex 13) The divorce was a contested and extremely acrimonious proceeding. (RP 11/21/11 PM, p.30, ll. 17-21)<sup>1</sup> During most of the divorce proceeding, Mr. Taylor was unemployed. On March 2, 2004, William Ross Taylor executed a will prepared by attorney Craig Coombs. (Ex 2) (the “March 2004 Will”) William Ross Taylor’s divorce from Caiarelli was finalized in February 2005. (Ex 14)

In the late spring or early summer of 2005, William Ross Taylor found employment with Compucom, a local software company. (RP 11/22/11 PM, p.42, l. 23 – p.43, l. 5.) As a benefit of his employment with Compucom, William Ross Taylor received term insurance on his life, as well as supplemental life and accidental death insurance from AIG Insurance. (Ex 34, p.7-8) In July of 2005, William Ross Taylor completed the AIG Insurance application on-line and designated his

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<sup>1</sup> The verbatim report of proceedings was provided in seven sections and will be designated by date (and by AM or PM session where indicated)

brother, Charles Taylor, as the primary beneficiary of each AIG life insurance policy. (Ex 34, p.16; Ex 50, p.5) Notably, William Ross Taylor was a graduate of Stanford University with a Master's Degree in Computer Science. (RP 11/21/11 AM, pp.90-91)

In addition to completing the Compucom Insurance policy information online in July of 2005, William Ross Taylor appeared at a Fidelity Investment office in July of 2005 and named his brother Charles Taylor as the beneficiary on a Fidelity Rollover IRA. (Ex 30, p.2) William Ross Taylor also had a Charles Schwab IRA account that he started in 1990, which, from its inception, listed Charles E. Taylor and Elizabeth Taylor (William's sister) as beneficiaries.

On September 11, 2005, William Ross Taylor died in a tragic boating accident. (Ex 16) At the time of his death, William was also insured under six NW Mutual life insurance policies. (Ex 101) (hereinafter the "NW Mutual Policies") Those policies had been purchased by his father on a semi-regular basis during William's lifetime dating back to 1976. (Id.) As of July 1, 2005, William was the owner of five of the six NW Mutual Policies.<sup>2</sup> (Id.) However, on July 13, 2005, William signed a change of Owner Designation form from NW Mutual

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<sup>2</sup> There was also a sixth policy on William's life, purchased earlier in 2005 by Reuben, on which Reuben was the owner and Reuben and Emily Taylor were the beneficiaries.

that named Reuben Taylor, his father, as the owner of all the policies. (Ex 101, last page) Reuben and Emily Taylor were the direct beneficiaries on four of the policies. (Ex 101, pp 4,8,13,31,41); Charles and Elizabeth Taylor were direct beneficiaries of one policy. (Ex 101, p.21). William had never named A.C.T. as a direct beneficiary on any of the NW Mutual Policies.

**B. Probate and TEDRA Action**

Following William's death on September 11, 2005, Charles Taylor filed a probate proceeding in King County Superior Court relying upon William's March 2004 Will. On September 20, 2005, William Ross Taylor's March 2004 Will was admitted to probate, and Charles Taylor was appointed as his personal representative. On March 20, 2006, Caiarelli, as guardian for A.C.T, filed a TEDRA action seeking an order that A.C.T. was entitled to receive all proceeds from the life insurance policies on William's life as well as several retirement and/or investment accounts. (CP 407-20)

**C. Summary Judgment on Schwab Account**

Attorney Bruce Moen was appointed attorney for the GAL. The GAL brought a motion for partial summary judgment seeking to have the proceeds from William Ross Taylor's Schwab IRA account distributed to A.C.T. under the legal theory that a provision in William's will superseded

the beneficiary designation on the IRA account, which designation had been made prior to the will provision. The court issued an order on November 21, 2008 agreeing with the GAL's position. The GAL did not seek to recover any other nonprobate assets for A.C.T. (the beneficiary designations on the remaining nonprobate assets were changed by William after the date of his will) and the matter was to proceed to trial on December 8, 2008.

**D. Continuation of Trial Date.**

Days before the trial date, attorney Madeline Gauthier appeared for Caiarelli, requesting that the court continue the trial date. On the motion of Caiarelli, an order was entered in March 2009 removing Charles Taylor as personal representative. Michael Longyear was appointed the successor personal representative by stipulation.

**E. Summary Judgment on AIG, Fidelity and NW Mutual Accounts**

In March 2009, based on the beneficiary designations that clearly gave the proceeds to Charles Taylor, Respondent Charles Taylor brought a summary judgment motion seeking an order that the proceeds of the Fidelity IRA and the AIG policies did not belong to A.C.T. At the same time, based on the assignment of the ownership of the policies to Reuben Taylor, and on the fact that A.C.T. was never named as a beneficiary on

any of those policies, Reuben Taylor brought a summary judgment motion seeking an order that the proceeds of the NW Mutual policies did not belong to A.C.T. (CP 809-15, 818-26)

On April 10, 2009, the court granted Respondents' motions for summary judgment. (CP 816-17, 829-30) Caiarelli and the Estate appealed those orders. Charles Taylor appealed the summary judgment order awarding the Schwab account to the Estate.

**F. Decision on Appeal**

On December 20, 2010 the Court of Appeals, Division I, entered its decision on the consolidated appeals under Cause No. 63462-3-I. The Court of Appeals reversed all the summary judgment orders, awarding the Schwab account to Charles and Elizabeth Taylor and remanding the issues on AIG, Fidelity and NW Mutual policies for trial. Also in December of 2010, the parties entered into a global settlement that effectively limited the issues that would remain for trial to those that were on appeal. (CP 657-700) The settlement agreement expressly resolved any and all claims to date [including attorney's fees and costs] except for those that pertained to the matters that were on appeal. (Id.)

**G. The Trial**

Following the Appeal, the case was remanded to the Trial Court for trial, which was initially set for September 26, 2011. On July 5, 2011

Caiarelli filed a Motion for Leave to Amend her TEDRA Petition to add additional Respondents, Emily Taylor and Elizabeth Taylor. (CP 395-440) On July 18, 2011, the Trial Court granted Caiarelli's Motion (CP 463-64), and on July 26, 2011, Caiarelli filed her Amended TEDRA Petition. (CP 465-71) The Successor Personal Representative effectively joined in the Amended Petition although he was never made a formal party. In all respects, from that point forward the Successor Personal Representative acted as a co-Petitioner.

Thereafter, in September of 2011, all Respondents moved to continue the trial to allow the newly joined respondents to submit discovery to Caiarelli, bring any pertinent dispositive motions and otherwise prepare for trial. On September 16, 2011 the Court granted Respondents' motion and trial was continued until November 15, 2011. (CP 520-25)

With the submission of her trial brief, Caiarelli set forth a new theory of liability with regard to both Charles Taylor and Reuben Taylor, claiming that they had unduly influenced William Ross Taylor to make certain beneficiary designations. (CP 831-44) These new claims were in addition to, and logically inconsistent with, the original claims against Charles Taylor and Reuben Taylor -- that William Ross Taylor intended

to name them in a representative capacity on the beneficiary designations at issue.

**H. Elizabeth and Emily Taylor's Dismissals.**

Prior to trial, Respondents' noted motions for summary judgment of dismissal of Respondents Emily and Elizabeth Taylor on the basis that they did not receive any of the proceeds from the policies and accounts that remained at issue, nor were any allegations directed at them in the Amended TEDRA Petition. (CP 532-659) After taking the matter under advisement, the court dismissed Elizabeth Taylor from the action prior to the start of trial. Emily Taylor was dismissed from the action shortly thereafter. (RP 11/17/11, p.81-82).

**I. Reuben Taylor is Dismissed**

On Wednesday, November 23, 2011 Caiarelli rested her case in chief. (RP 11/23/11, p.21, ll. 9) Thereafter, Charles Taylor and Reuben Taylor moved to dismiss Caiarelli's claims. (CP 758-98) The Court denied the motion to dismiss Charles Taylor. (RP 11/23/11, p.101, 14-16)

On this same date, the Trial Court dismissed the undue influence claim against Respondent Reuben Taylor and Caiarelli's claim to the sixth NW Mutual policy. (*Id.* at p. 103, ll. 6-8) As a result, remaining Respondent Charles Taylor rested without calling a witness. (RP 11/23/11, p. 106 ll. 15-16) On Monday November 28, 2011, the Court

*sua sponte* dismissed entirely all of the remaining claims against Respondent Reuben Taylor and correspondingly the remaining NW Mutual Policies. (RP 11/28/11, p.68, l.18 – p.69 l. 19) On December 1, 2011, the Court entered an Order on CR 50(a) Motion memorializing the November 23 and November 28 rulings. (CP 891-93)

**J. Jury Verdict**

Thereafter, the case went to the jury on the claims against Charles Taylor with regard to the AIG policies and the Fidelity account, as Charles had successfully defended himself on the Charles Schwab Account on the reversal on Appeal. The jury found that (1) William Ross Taylor intended to name Charles Taylor in a representative capacity with regard to the AIG and Fidelity account beneficiary designations, and (2) Charles Taylor had unduly influenced William Ross Taylor to name him individually as beneficiary of the accounts. (CP 878-80). Thereafter, Charles Taylor moved for entry of Judgment of dismissal notwithstanding the verdict. (CP 778-98)

**K. Motion for Entry of Dismissal Not Withstanding the Verdict**

On December 20, 2011, the court heard argument on Charles Taylor's motion for entry of dismissal notwithstanding the verdict and

denied the motion. (CP 894-95). Thereafter, Charles Taylor filed his notice of Appeal. (CP 896-902).

**L. Trial Testimony**

At trial, fifteen witnesses testified over the course of almost three weeks. The testimony and evidence relevant to this appeal can be summarized as follows:

1. The only evidence of William Ross Taylor's intent before the jury with respect to the July 2005 policy and account designations at issue were the application documents themselves. (See Exs 30 and 34). No testimony was proffered by Caiarelli on the intent issue.

2. There was no testimony or evidence that Charles Taylor discussed with William Ross Taylor [or was aware of] his brother's actions relating to the policy and account designations at issue in the summer of 2005 which resulted in William Ross Taylor designating Charles Taylor as beneficiary. The undisputed evidence was that Charles Taylor lived over 1700 miles away in Chicago at the time William Ross Taylor made the beneficiary designations at issue. There was no evidence offered at trial that Charles Taylor had even traveled to the State of Washington in 2005.

3. The only evidence offered at trial with respect to undue influence was the fact that Charles Taylor and William Ross Taylor were

brothers. Further, Charles Taylor had been designated as William Ross Taylor's attorney in fact under a power of attorney that was executed 16 months before his passing. (Ex 57) That power of attorney never became effective.

Despite the forgoing, on November 30<sup>th</sup> the jury returned a verdict in favor of Caiarelli on all counts. (CP 878-80)

#### IV. ARGUMENT

##### A. Standards of Review.

1. A challenge to a Trial Court's denial of a motion for judgment notwithstanding the verdict is reviewed de novo, viewing the evidence in the light most favorable to the nonmoving party and overturning the verdict and Trial Court's denial only if there is no substantial or justifiable evidence to sustain the jury's verdict. Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC, 139 Wn. App. 743, 767 n. 12, 162 P.3d 1153 (2007).

2. When a finding of undue influence is appealed, the question to be resolved is not merely whether there is substantial evidence to support it, but whether there is substantial evidence in light of the "highly probable" test. In Re Trust & Estate of Melter, 167 Wn. App. 285, 299, 301, 273 P.3d 991 (2012). The evidence must do more than be substantial enough to meet the "preponderance of the evidence" test, it

must be sufficient to support the “clear, cogent and convincing” standard. Id. (citing In Re Estate of Reilly, 78 Wn.2d 623, 640, 479 P.2d 1 (1970)).

3. An appellate court reviews jury instructions de novo. Singh v. Edwards Lifesciences, 151 Wn. App. 137, 150, 210 P.3d 337 (2009). “Jury instructions are sufficient when they...properly inform the trier of fact of the applicable law.” Id. at 150-51 (citing Keller v. City of Spokane, 146 Wn.2d 237, 249-50, 44 P.3d 845 (2002)).

**B. The Court Erred By Denying Charles Taylor’s Motion For Entry of Judgment of Dismissal Notwithstanding The Verdict.**

**1. There was insufficient evidence that William Ross Taylor intended to name Charles Taylor as a Trustee on the AIG insurance policies and Fidelity account application.**

The jury found that when William applied online for the AIG insurance and completed the Fidelity account application at issue, he intended to name Charles Taylor in a representative capacity as a trustee for the benefit of A.C.T. (CP 878-79) Caiarelli was required to prove that contention by a preponderance of the evidence. (CP 863, 866, Jury Instructions 6 & 9) There must be substantial evidence to support such a finding or the finding cannot stand.

Jury Instruction No. 9 instructs the jury that:

In order to prevail on this claim, Petitioner [Caiarelli] has the burden of proving each of the following propositions.

1. The insured, William Ross Taylor intended, at the time he made the beneficiary designations, to designate

Charles Taylor II as the primary trustee and Reuben Taylor as the contingent trustee for the benefit of William's son Alexander Taylor; and

2. William Ross Taylor substantially complied with the provisions of the AIG policy regarding that designation. "Substantial compliance" with the terms of the policy means that the insured has not only manifested an intent to designate a beneficiary in a particular manner, but has done everything which was reasonably possible to make that beneficiary designation.

In determining William's intent, the jury was instructed that

The intent of a person is manifested by both what that person expressed in writing or orally or actions taken in a manner to achieve his end purpose.

(CP 868, Jury Instruction No. 11)

Any analysis of William Ross Taylor's intent starts with the presumption that the beneficiary designations were valid as stated in the document itself – or that Charles Taylor was intended to be the beneficiary. Estate of Melter, supra, 167 Wn. App. at 298 (regarding wills). It is uncontested that William Ross Taylor made the AIG beneficiary designations online, that he typed in "Charles Taylor" as beneficiary and indicated in the "relationship" category that Charles Taylor was his [William's] "brother." (Ex 34, p.16, Ex 50, p.5) It is also uncontested that William Ross Taylor wrote in the name "Charles Taylor" on the Fidelity IRA application and checked the box for "Non-Spouse Individual".(Ex 30 p. 2) Finally it is undisputed that these beneficiary

designations are the only evidence of William Ross Taylor's intent with respect to these policies/account in summer of 2005.

There was no evidence offered by Caiarelli of any oral statements made by William Ross Taylor contrary to the above designations and/or other actions taken by William Ross Taylor at or around the time that these designations were made that indicated he intended to name Charles Taylor as a "trustee". Simply put, there was no evidence at all to support the jury's finding that William Ross Taylor intended anything other than what was reflected on the documents themselves when he made these decisions in July of 2005. Caiarelli argued, without any support, that William was confused by these documents. The uncontested evidence at trial was that William Ross Taylor was very intelligent man. He graduated with a Master's Degree in computer science from Stanford University (RP 11/21/11 AM, p. 90, l. 22 – p.91, l. 3); he held several patents (Id. p.91 ll. 4-12); and he was a software design engineer (RP 11/17/11, p.25, 10-16).

The instruction that tells the jury they must find that William substantially complied with the AIG forms for beneficiary designation, doing everything reasonably possible to effectuate his intent, comes from the case of Allen v. Abrahamson, 12 Wn. App. 103, 529 P.2d 469 (1974). In executing his beneficiary designations, William did not meet the

standard of “doing everything reasonably possible” if he wanted to name Charles Taylor the beneficiary as Trustee

Allen was a case in which the Court of Appeals ruled that there was insufficient proof of intent to change the beneficiary designation on an insurance policy. There, Allen purchased life insurance and named a girlfriend as beneficiary. The insurance contract provided that in order to change beneficiaries, a written request signed by the insured was necessary. After the relationship with his girlfriend “began to fade,” Allen delivered the insurance certificates to his parents and told them that he was going to change the beneficiary designation from his girlfriend to his parents. Allen died six weeks later, never having delivered a written change of beneficiary request or contacted the insurance company or his employer about such a change. Id. at 104. In a dispute between the girlfriend and the parents, the trial court ruled for the parents. Id.

The Court of Appeals reversed the trial court, finding insufficient proof of intent on Allen’s part to make the change, stating that Allen “...never even attempted to comply with the policy requirement of written notification...” Id. at 108. Allen is also clear that the standard of proof necessary in change of beneficiary cases is high:

Equity requires diligence. Therefore, where the insured failed to do all which might reasonably have been possible

to effectuate his wishes, as to change a named beneficiary, aid will be denied.

Id. at 106, citing In Re Estate of O'Neill, 143 Misc. 69, 76, 255 N.Y.S. 767, 775 (1932).

Therefore, even if there was some evidence that William Taylor intended to designate Charles Taylor as a Trustee, which there was not, William Taylor's actions do not rise to the level of compliance required by Allen. William was a very intelligent man, with knowledge and experience concerning wills, life insurance, IRAs and beneficiary designations. If he had intended to name Charles Taylor as a Trustee, he would have known that more was required than simply putting down Charles' name with "brother" as relationship.

Caiarelli argued at trial that William Ross Taylor's intent should be inferred from the March 2004 will, which creates a trust for A.C.T. However, such a grand leap is simply insufficient. The intent instruction required the jury to analyze William's intent at or around the summer of 2005, not 16 months earlier. Moreover, as stated in Allen at p. 106:

There is virtually no persuasive authority to support the . . . argument that a change in beneficiary is effective when the insured's intent at one time to make that change is proven.

In the case at bar, Caiarelli argued that intent should be inferred from actions that took place 16 months earlier rather than the expression of William's intent on the documents themselves. In fact, the only other

evidence at or around the time at issue relates to William's transfer of ownership of the NW Mutual Policies to his father. (Ex 102, last page) Such an action does not support Caiarelli's "intent" argument.

In fact, the overwhelming evidence was that William Ross Taylor had a lot of animosity toward Caiarelli. Bruce Clause, a neighbor of William's, testified that William felt that Caiarelli had "taken him to the cleaners" and that "he was not going to give her any more than what he had". (RP 11/21/11 PM, p. 30, 17-21)

Jennifer Coykendall testified that William was "very upset about the time he had lost with A.C.T," (RP 11/16/11, p. 19, ll. 22-23), that he was "very angry" (Id. at p. 22, l. 15), had "no warm feelings" for Caiarelli, (Id. at p. 38, ll. 8-10), and "did not trust" her. (Id., ll. 5-7) Craig Coombs testified that William did not want Caiarelli "to get a dime" and that he was very expressive and direct on that point.<sup>3</sup> (RP 11/16/11, p. 73, ll. 7-13)

There was simply no evidence that William intended to name Charles Taylor in a "trustee capacity" when he made the AIG policy designations and the Fidelity IRA account designation. Caiarelli had the

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<sup>3</sup> The divorce decree entered after a marriage that lasted less than two years (William and Caiarelli were married October 24, 2001 (Ex 107) and separated April 25, 2003 (Ex 13, p.2) includes a judgment against William in favor of Caiarelli for \$242,000 and an additional \$25,000 for attorney fees (Ex14).

burden of proof at trial that on a “more likely than not basis” William intended to name Charles as Trustee, or that William did everything reasonably possible to name Charles as Trustee; however, there is no question that she failed to carry this burden of proof, there was no evidence to support the jury’s decision.

**2. There was insufficient evidence that Charles Taylor unduly influenced William Ross Taylor when he executed/completed the AIG insurance documents and Fidelity account document at issue in July of 2005.**

As indicated above, the jury also found that Charles Taylor unduly influenced William Ross Taylor when he completed the AIG policy information and the Fidelity account information in July of 2005. Undue influence exists when an individual exerts influence over another such that the other person “controls the volition of the other” and “interferes with the free will” of the other and prevents the other’s “exercise of judgment and choice at the time that he made a gift, transfer, or beneficiary designation”. In re Estate of Haviland, 162 Wash. App. 548, 255 P.3d 854 (2011). (CP 873, Jury Instruction No. 14) Again, there was simply no evidence at all that Charles Taylor influenced William Taylor – let alone unduly influenced him at the time William made these decisions. In fact, there was no evidence that Charles Taylor was even aware of these

insurance policies and the IRA account and/or William's actions in the summer of 2005.

The undisputed evidence before the jury was that Charles Taylor was over 1700 miles away in Chicago when William Ross Taylor took the actions at issue. Further, there was no evidence that Charles Taylor was even aware of the AIG policy designations or the Fidelity account designation before William Ross Taylor passed. There was no evidence that William Ross Taylor ever spoke to Charles Taylor about the policies or account at issue. Moreover, Charles Taylor cannot find any authority to support Caiarelli's undue influence claim when the alleged influencer is over 1700 miles away.

Certain circumstances have been found to raise a question about undue influence, including (1) when a person has a fiduciary or confidential relationship with a beneficiary, or (2) when a person actively participates in preparing or procuring a will, and/or (3) when the beneficiary receives an unusually or unnaturally large part of the estate. In re Estate of Smith, supra, 68 Wn.2d at 145 (citing Dean v. Jordan, 194 Wash. 661, 671-72, 79 P.2d 331 (1938)). Other considerations that courts have looked at include "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 undue influence, and the

naturalness or unnaturalness of the will.” In Re Estate of Reilly, 78 Wn.2d 623, 647, 479 P.2d 1 (1970) (quoting In Re Estate of Schafer, 8 Wn.2d 517, 521, 113 P.2d 41 (1941)).

The presence of any or all of these elements would not automatically invalidate the beneficiary designation; rather, they would “appeal to the vigilance of the [jury] and cause it to proceed with caution and carefully to scrutinize the evidence offered regarding the [beneficiary designation].” Dean, supra, 194 Wash, at 672. The combination of facts may be so suspicious as to raise a question of undue influence and, “in the absence of rebuttal evidence, may even be sufficient to overthrow the [beneficiary designation].” Id. However, “the existence of [a question] does not relieve the contestants of the duty to establish undue influence by clear, cogent, and convincing evidence” that the presumptively valid beneficiary designation should be disregarded. Reilly, supra, 78 Wn.2d at 663.

A review of the evidence presented at trial, in light of the Dean factors, highlights the inadequacy of Caiarelli’s case. Jury Instruction No. 16 lists eight factors that the jury could consider in determining whether Charles Taylor exercised undue influence over William Ross Taylor. (CP 875, jury instruction 16)

The first factor, whether Charles Taylor occupied a confidential relationship to William, is addressed below in section B.3.

The second factor, whether Charles Taylor actively participated in the preparation or designation of the beneficiaries under the life insurance policies or IRA account at issue, can only be “no.” There is no evidence that such participation took place.

The third factor is whether Charles Taylor received an unusually large part of the estate. At the outset, it should be pointed out that the funds at issue were predominantly from multiple term life insurance policies and an accidental death policy. While one might not initially expect William Ross Taylor to leave such proceeds to his brother, the overwhelming evidence before the jury was that William had a significant motivation not to leave any funds in a manner that would allow Caiarelli to benefit from them. Perhaps more importantly, William Ross Taylor had for many years designated his parents and siblings as beneficiary of other insurance policies on his life. (Ex 102)

The fourth factor is the condition of health and mental vigor of William. There is no evidence that William was in poor health or did not possess full “mental vigor” when he made the designations at issue.

The fifth factor is the nature or degree of relationship between Charles Taylor and William Ross Taylor. Charles Taylor and William were, of course, brothers, but there is no evidence that a relationship existed in which William Taylor tended to rely on Charles Taylor.

The sixth factor is the opportunity for exerting undue influence upon William. The evidence is uncontroverted that Charles Taylor was not within 1700 miles of William Ross Taylor for at least six months before William Taylor signed the beneficiary designation at issue – in fact William Taylor did not even have his job at Compucom the last time Charles Taylor was in the area.

The seventh factor is the naturalness or unnaturalness of the [beneficiary designation], taking into account the history of the donor's family and moral equities and obligations. Any such analysis doesn't support the claims of Caiarelli.

The case of In Re Bussler, 160 Wn. App. 449, 247 P.3d 821 (2011) is similar to our case in many respects. In Bussler, a mother executed a will in 1977 that left her estate equally to her two daughters, Karen and Kathleen. In 2009, eight days before her death, the mother executed a new will leaving everything to Karen and disinheriting Kathleen. Kathleen brought a court action alleging that Karen had unduly influenced their

mother to make the 2009 will. Her allegations were based on evidence supporting the Dean factors, most importantly that Karen received an unnaturally large share of her mother's estate (in fact, the entire estate). There was a confidential relationship between Karen and her mother based on the fact that Karen was in a caretaking role for her mother in the last months of her life. For that reason, Karen also had the opportunity to unduly influence her mother. Karen assisted her mother with her business activities, acting as her attorney-in-fact. She participated in procuring her mother's new will. In addition, there was no animosity between Kathleen and her mother; in fact, Kathleen had spent an "amicable" month visiting her mother shortly before her mother's death. Id. at 467.

The trial court ruled that Kathleen did not prove undue influence and the Court of Appeals agreed. The Court of Appeals found that Kathleen did meet her burden of production by producing facts that raised a reasonable question about why the mother would disinherit Kathleen, even taking into account Karen's close relationship with their mother, her help in procuring the new will, and the fact that she received the entire estate.

However, the court also found that Kathleen did not meet her burden of persuasion. While Karen had an opportunity to influence her mother, Kathleen did not demonstrate that Karen "actually exerted

influence that controlled the volition of the testat[rix], interfered with h[er] free will, and prevented an exercise of h[er] judgment and choice.” Id. at 469 (citing Estate of Lint, 135 Wn.2d 518, 535, 957 P.2d 755 (1998)).

With regard to the Dean factors, the similarity between our case and In Re Bussler is that both claimants allege that the defendant/respondent received what could be considered an unnatural share of the estate/proceeds. The cases differ, however, in that, unlike Bussler, Charles Taylor did not have a caregiving relationship with William and, more importantly, he did not have the opportunity to unduly influence William.<sup>4</sup> When William signed the beneficiary designations, Charles Taylor was in Chicago and had not been closer than 1700 miles to William in over six months. Simply put, Caiarelli did not present any evidence that Charles Taylor actually controlled William’s volition and interfered with his free will, preventing William from exercising his own judgment and choice when making the designations at issue.

Caiarelli relies entirely on her interpretation that as beneficiary of William’s insurance policies Charles Taylor received an unusually large share of William’s assets. That was also the case in Bussler, but in

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<sup>4</sup> The only evidence of contact in 2005 was intermittent telephone calls made by Respondent Charles Taylor to William Taylor at that time. However, no reasonable inference can be drawn with high probability of the substance of those conversations. There was no evidence that Charles Taylor ever discussed the designations with William Taylor, before or after they were made.

Bussler, it was also coupled with evidence of the other undue influence factors. And yet, the court ruled there was insufficient evidence of undue influence. Here, the factors present in Bussler do not exist. No fair-minded person could conclude based on the evidence presented at trial that William Taylor was unduly influenced by Charles Taylor.

**3. There was insufficient evidence to support the jury's finding that Charles Taylor had a Confidential Relationship with William Taylor at the Time William Executed the Documents at Issue.**

As stated above, one factor that can pertain to undue influence relates to the existence of a confidential relationship. Caiarelli had the burden of proof with regard to establishing that a confidential relationship existed by clear, cogent and convincing evidence. In Re Trust & Estate of Melter, 167 Wn. App. 285, 298, 273 P.3d 991 (2012); (CP 871, Jury Instruction No. 13) The clear, cogent, and convincing burden of proof contains two components: the burden of production and the burden of persuasion. In Re Bussler, 160 Wn. App. 449, 465, 466, 247 P.3d 821 (2011). To meet the burden of production, there must be substantial evidence, *i.e.*, evidence sufficient to merit submitting the question to the trier of fact. Id. The burden of persuasion is met if the trier of fact is convinced that the fact at issue is "highly probable." Id. (quoting Colonial Imps., Inc. v. Carlton NW., Inc., 121 Wn.2d 776, 735, 853 P.2d 913

(1993). Said another way, when a finding of undue influence is appealed, the question to be resolved is not merely whether there is substantial evidence to support it, but whether there is substantial evidence in light of the “highly probable” test. Estate of Melter, *supra*, 167 Wn. App. at 301.

A fiduciary relationship is generally one that arises as a matter of law, such as the relationship between husband and wife, attorney and client, or doctor and patient. McCutcheon v. Brownfield, 2 Wn. App. 348, 356-57, 467 P.2d 868 (1970).<sup>5</sup> Such a relationship did not exist between Charles Taylor and William Taylor. While William Taylor’s March 2004 Will appoints Charles as trustee of a testamentary trust (Ex 2, p.2), no trust was ever established, and Charles Taylor never undertook the position as trustee. Caiarelli contended at trial that William Ross Taylor also named Charles Taylor as attorney-in-fact on a durable power of attorney. (Ex 57). However, that power of attorney would only become effective on William’s disability, and no such disability ever occurred. It was undisputed at trial that Charles Taylor never acted as William Taylor’s attorney-in-fact.

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<sup>5</sup> While a fiduciary relationship can arise in fact, the criteria for such a relationship are no different than the criteria for establishing a confidential relationship. Compare Liebergessell v. Evans, 93 Wn.2d 881, 891, 613 P.2d 1170 (1980) (listing as factors the “lack of business expertise on the part of one party and a friendship between the contracting parties,” and “[s]uperior knowledge and assumption of the role of advisor”) with the cases cited above for elements of a confidential relationship.

In an undue influence context, the essential elements of a confidential relationship are that one person places some special confidence in another's advice and that the other person intends to advise the other with the first person's interests in mind. Lewis v. Estate of Lewis, 45 Wn. App. 387, 391, 725 P.2d 644 (1986). See also McCutcheon, supra, 2 Wn. App. at 357 (A confidential relationship exists when "one person has gained the confidence of another and purports to act or advise with the other's interests in mind.") (citing Restatement of Restitution § 166 d. (1937)); Peterson v. Groves, 111 Wn. App. 306, 312, 44 P.3d 894 (2002) (A confidential relationship occurs when one acts as advisor or counselor to another so as to inspire confidence that he will act in good faith for the other's interest.); and Doty v. Anderson, 17 Wn. App. 464, 468, 563 P.2d 1307 (1977) (A confidential relationship is shown where recipient managed donor's financial affairs.)

Not surprisingly, the confidential relationship analysis often involves familial relationships, as those relationships frequently provide the opportunity for the existence of a confidential relationship. However, a familial relationship alone does not necessarily create a confidential relationship. There must be "something more." Lewis, supra, 45 Wn. App. at 391 (father and son); McGilligan's Estate v. McGilligan 25 Wash.2d 313, 170 P.2d 661 (1946) (brother and sister). The "something more" is

found where one person has a perceived need, such as care or financial advice, and is willing to rely on another person to supply that need; that other person provides what is needed, ostensibly with the first person's best interests in mind; and the opportunity exists to provide what is needed.

For example, a confidential relationship may arise where a parent becomes dependent on a child for support, care or protection in business matters, and the child, because of superior knowledge, assumes the role of adviser, which role is accepted by the parent. McCutcheon, supra, 2 Wn. App. at 357. That "something more," and therefore a confidential relationship, have been found where a mother relied upon her son almost exclusively for her care;<sup>6</sup> where two women gained a vulnerable adult's confidence and purported to act in her best interest as her friend, giving advice based on their superior knowledge;<sup>7</sup> where a father and son were living together, father was somewhat handicapped and required assistance to handle his daily affairs, and son handled father's business affairs;<sup>8</sup> and

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<sup>6</sup> In Re Trust & Estate of Melter, 167 Wn. App. 285, 292, 273 P.3d 991 (2012)

<sup>7</sup> Endicott v. Saul, 142 Wn. App. 899, 923-24 (2008)

<sup>8</sup> Pedersen v. Bibioff, 64 Wn. App. 710, 719, 828 P.2d 1113 (1992)

where a mother relied on daughter “to take care of all her business affairs and to explain those affairs to her because she didn’t understand them.”<sup>9</sup>

On the other hand, that “something more,” and a confidential relationship, were found not to exist where a mother and son lived together for 35 years and the mother often asked her children for advice;<sup>10</sup> where there was no direct evidence that the person alleged to have unduly influenced the decedent ever talked to decedent about her personal affairs;<sup>11</sup> and where a sibling cared for his sister through her last illness.<sup>12</sup>

In Lewis, supra, 45 Wn. App. 387), Gladys Lewis executed a deed to certain real property to her son Orin in 1973. Orin died in 1982. Gladys brought an action to set aside that deed, claiming she was unduly influenced by Orin, and that a confidential relationship existed between her and her son when she executed the deed. Id. at 388-89. The court found that Gladys and Orin lived together for 35 years, that her hearing was impaired, and that she often sought advice from her children; but that she was fully competent and not suffering from any physical or mental disability, was independent and never depended on Orin to make decisions

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<sup>9</sup> Estate of Randmel v. Pounds, 38 Wn. App. 401, 685 P.2d 638 (1984)

<sup>10</sup> Lewis v. Estate of Lewis, 45 Wn. App. 387, 725 P.2d 644 (1986)

<sup>11</sup> In re Malloy’s Estate, 57 Wn.2d 565, 358 P.2d 801 (1961)

<sup>12</sup> McGilligan’s Estate v. McGilligan, 25 Wash.2d 313, 170 P.2d 661 (1946)

for her. Id. at 390. The court therefore concluded that there was not a confidential relationship between Gladys and Orin.

Here, as in Lewis, there is simply no evidence that William Ross Taylor was not fully competent or that he was suffering from any disability; there is no evidence he was not independent and there was no evidence he depended on Charles Taylor to make decisions for him. In fact, there was no evidence of any discussion between William Ross Taylor and Charles Taylor with respect to insurance or IRA accounts.

In In Re Malloy's Estate, 57 Wn.2d 565, 358 P.2d 801 (1961), the Court of Appeals affirmed the trial court's determination that a will was not invalid due to undue influence. The will gave the residue of decedent's estate to two of her deceased husband's relatives and a third person, William Swan. Decedent's relatives claimed Swan unduly influenced decedent to name him in the will. In discussing whether there was a confidential relationship between decedent and Swan, the court found that to be a "matter of conjecture." There was no direct evidence that Swan ever talked to decedent about her personal affairs, and he denied that he did. There was no evidence that he participated in the preparation or procurement of the will, other than the fact that the attorney she used to draft the will was one of several recommended by Swan and that he drove her to the attorney's office when she signed the will. Id. at 570.

Here, even less than what was at issue Malloy's Estate, there is no evidence that Charles Taylor ever talked to William Taylor about beneficiary designations in general and/or specifically the AIG policy or Fidelity account.

In McGilligan's Estate v. McGilligan 25 Wn.2d 313, 170 P.2d 661 (1946), the testatrix named her brother who was assisting her in her final illness as a significant beneficiary of her estate instead of her husband. The designation was thereafter challenged following her passing. Despite the fact that the challenged sibling brother in McGilligan assisted his sister in her recovery and with the execution of her Will, no confidential relationship was found to have been established:

There is no evidence of any fiduciary or trust relationship between the testatrix and respondent which would raise a presumption of undue influence exercised by respondent upon the testatrix. Nothing is shown other than normal relation of brother and sister. . . .

Id. at 318.

Here, as in McGilligan, Charles Taylor and William Taylor were siblings. However, unlike McGilligan, Charles Taylor did not assist William Taylor in completing the beneficiary designations. Even with those facts, no confidential relationship was found in McGilligan and none can be found here.

4. **If the Court finds there was sufficient evidence to prove a confidential relationship, the trial Court erred in shifting the burden of proof to Charles Taylor as stated in Jury Instruction No. 13 regarding the burden of proof for undue influence.**

If, despite the above, the Court finds that there was sufficient evidence of a confidential relationship, the burden of proof should not have shifted to Charles Taylor to prove there was no undue influence, as Jury Instruction No. 13 provides. The Court instructed the jury on the burden of proof necessary for Caiarelli to prove that Charles Taylor unduly influenced William to name Charles as beneficiary of the AIG Life Insurance policies and the Fidelity IRA. ( CP 871 Jury Instruction No. 13)

The jury was instructed that if Caiarelli proved there was a confidential relationship between William Taylor and Charles Taylor, the burden shifted to Charles Taylor to prove there was no undue influence.

Id. The erroneous portion of Instruction No. 13 is as follows:

The Appellee has the burden of proving the initial proposition by clear, cogent and convincing evidence:

That at the time of the beneficiary designation there existed a confidential or fiduciary relationship between Charles Taylor II and William Ross Taylor.

1. If you determine from your consideration of all of the evidence that this proposition has been proved, then the burden shifts to Charles Taylor to prove by clear, cogent and convincing evidence, considering all of the evidence, that he did not use undue influence to cause William Ross Taylor to designate Charles Taylor the primary beneficiary of the Fidelity IRA account, and

Reuben Taylor as the contingent beneficiary of the Fidelity IRA account. In reaching this decision, you shall consider factors as further set out in these instructions.

The issue of the burden of proof with regard to undue influence in this case is significant. The jury instruction treats the burden of proof as if a beneficiary designation is an inter vivos gift, where the burden shifts to the alleged influencer if a confidential relationship is found. It is Charles Taylor's contention that the burden of proof should stay on the person alleging undue influence, even if a confidential relationship is found, as in the case of will contests. If the court finds that Jury Instruction No. 13 is erroneous, then the burden of proof remained on Caiarelli even if a confidential relationship was established, and Caiarelli would have been required to establish undue influence by clear, cogent and convincing evidence. In Re Trust & Estate of Melter, 167 Wn. App. 285, 299, 273 P.3d 991 (2012).

Undue influence can be a factor in both will contests and in cases involving inter vivos gifts. The contestant in both of those situations has the burden of proving the undue influence. However, the application of the burden of proof for each of those situations is different. The Trial Court erred by giving a jury instruction that equated the burden of proof for beneficiary designations with a burden of proof for inter vivos gifts.

The court should have given an instruction that equated the burden of proof for beneficiary designations with the burden of proof for wills.

In will contests, the burden of proof begins with and remains on the party seeking to show undue influence. Estate of Melter, *supra*, 167 Wn. App. at 299. With inter vivos gifts, the party seeking to set aside the inter vivos gift has the burden of showing that the gift is invalid. Lewis v. Estate of Lewis, 45 Wn. App. 387, 388, 725 P.2d 644 (1986). However, if the party seeking to set aside the inter vivos gift demonstrates that the recipient of the gift has a confidential or fiduciary relationship with the donor, the burden shifts to the recipient to prove that the gift was intended and not the result of undue influence. *Id.* at 389.

A beneficiary designation is sometimes referred to as quasi-testamentary. McNulty v. Estrada, 98 Wn. App. 717, 721, 988 P.2d 492 (1999). With quasi-testamentary instruments, the beneficiary has only an inchoate right, or a contingent interest, prior to the death of the designator, so long as the designator retains the right to change the beneficiary. *Id.* at 721-22. The issue of the burden of proof of undue influence in connection with a beneficiary designation on a life insurance policy, or on an IRA, has not been addressed by the courts in Washington.

The cases that allow for a shifting burden of proof for inter vivos gifts, however, make it clear that the reasons underlying a shifting burden

of proof for inter vivos gifts do not exist with regard to beneficiary designations. The policy for shifting the burden of proof in cases of inter vivos gifts is to protect donors from giving away assets that may be needed during the donor's life (as opposed to gifts given at death via will, which property is no longer useful to the donor.) White v. White, 33 Wn. App. 364, 370-71, 655 P.2d 1173 (1982). Because the donor is much less likely to give away property he may need in life, than to give the same property effective on his death, courts subject inter vivos gifts to higher scrutiny. Id. at 371. Those reasons for increased scrutiny are not present in a beneficiary designation situation. As with testamentary dispositions, that are revocable during the life of the testator and are solely within the testator's discretion, the designator of a beneficiary designation has given up nothing during his lifetime and has reserved the right to change the beneficiary designation whenever he wants.

The case of Francis v. Francis, 89 Wn.2d 511, 573 P.2d 369 (1978), recognized this distinction when it overruled Occidental Life Ins. Co. v. Powers, 192 Wash 475, 74 P.2d 27 (1937). In Powers, the court held that a non-consenting wife may void the designation of someone other than herself as beneficiary of a community owned life insurance policy. Id. at 488. However, Francis overruled Powers stating that the Powers' court "proceeded upon the incorrect assumption that a

designation of a life insurance beneficiary operates as an inter vivos gift of community property, failing to recognize that such a designation is merely a means of transmitting property at death.” Id. at 514. This statement highlights the difference between beneficiary designations and inter vivos gifts – there is no change in possession of property as the designator can change the beneficiary designation at any time.

Washington cases that address undue influence in the context of joint bank accounts with right of survivorship (“JTWROS” accounts) also support Charles Taylor’s position. The establishment of a JTWROS account is analogous to the execution of a beneficiary designation. The owner of a life insurance policy or a retirement account has the right to change the beneficiary at any time during his life. No present gift is being made. Any transfer of ownership takes place only on the death of the designator. By establishing a JTWROS account with another person, the owner of the funds in that account has, in effect, named a beneficiary for the funds remaining in the account on the owner’s death. During the owner’s lifetime, he has the right to manage those funds. By withdrawing the funds and providing for them to go to someone other than the joint tenant, the owner can, in effect, change the named beneficiary. No present gift is made by the establishment of a JTWROS account. Any transfer of ownership takes place only on the death of the account holder.

Upon the death of one joint tenant, any funds remaining on deposit in a JTWR0S account are presumed to belong to the surviving joint tenant, "...unless there is clear and convincing evidence of a contrary intent at the time the account was created." RCW 30.22.100(3). The statutory presumption of the depositor's intent will control unless someone challenges that intent and proves undue influence. See Doty v. Anderson, 17 Wn. App. 464, 466-67, 563 P.2d 1307 (1977). Thus, Washington law treats challenges to JTWR0S accounts based on undue influence in the same manner it treats will contests based on undue influence. Id. at 467-68. The burden of proof remains with the contestant of the account. The proponent of the alleged undue influence has the burden of proving the undue influence by clear, cogent and convincing evidence. Thus, the analysis is the same as for will contests. The burden of proof does not shift to the surviving account holder as is the case with inter vivos gifts. Id. See also, Estate of Randmel v. Pounds, 38 Wn. App. 401, 405, 685 P.2d 638 (1984) (Court of Appeals acknowledges that proponents of undue influence claim regarding JTWR0S accounts have burden of proof). Just as with JTWR0S account, beneficiary designations do not transfer property during a person's lifetime. The policy supporting a shifting burden of proof in the case of inter vivos gifts is not present in either JTWR0S accounts or beneficiary designations. Beneficiary

designations should be treated the same as JTWR0S accounts with regard to the non-shifting of the burden of proof.

**5. If the Court Rules That There Was Sufficient Evidence of a Confidential Relationship and That the Burden of Proof Does Shift to Charles Taylor, There Was Sufficient Evidence to Prove There Was No Undue Influence.**

If the court determines that Jury Instruction No. 13 was proper, and that somehow Caiarelli met the initial burden of proving a confidential relationship, and the burden shifted to Charles Taylor to prove, by clear, cogent and convincing evidence that he did not unduly influence William, Charles Taylor clearly met this burden. Every party is entitled to the benefit of the evidence whether produced by that party or another party. (CP 857, Jury Instruction No. 1). Charles Taylor rested his case without putting on any additional evidence. This was because the evidence, when taken as a whole, clearly showed that there was no undue influence.

The only two factors that Caiarelli even offered evidence upon were the assumed confidential relationship and the contention that the designation was somehow unnatural. Caiarelli contended that the designations were unnatural because in general a father would be expected to provide for his son rather than his brother. The argument was purportedly supported by the provisions of the Will drafted by Craig Coombs in early 2004 creating a trust for his son. Notably, the Will

doesn't address or provide even at that time that his insurance would be placed in the Trust. To the contrary, all of the policies on William's life at that time were designated to benefit his parents or siblings, not his son.

Further, Charles Taylor has found no cases in which the existence of those two alleged factors alone have resulted in a finding of undue influence. In all the cases that have found undue influence, there are significantly more factors present, particularly with regard to proximity of the influencer to the person influenced. In fact, Caiarelli can point to no case in which undue influence has been found where the persons involved were not in close proximity at the time of the act allegedly influenced.

Further, Caiarelli can cite no case in which there was no evidence that the person who is alleged to have exerted the undue influence had any knowledge of the acts at issue – and yet still was found to have unduly influenced the other person. In this case, there was no evidence that Charles Taylor was even aware that William was making the beneficiary designations at issue.

The evidence that supports a finding of no undue influence is as follows. The **only** contact between Charles Taylor and William in all of 2005 was intermittent telephone calls between Charles Taylor and William Taylor. Charles Taylor testified that he and William did not have discussion about Charles Taylor acting as guardian of A.C.T. in the event

of William's death. (p.47). That alone is sufficient to prove there was no undue influence. That is particularly true given the lack of evidence that Charles Taylor ever discussed the designations with William Taylor, before or after they were made. There is no evidence that Charles Taylor even knew William was making these designations and no evidence that Charles Taylor was even in the State of Washington in 2005 prior to William's passing.

The evidence at trial was that Charles Taylor was thousands of miles away from William for over six months prior to William signing the beneficiary designations. Even given a confidential relationship, there is simply no evidence of undue influence. From the evidence presented, it is highly probable that no undue influence occurred.

**C. The Order Awarding Attorney Fees to Appellee Should Be Remanded.**

On August 13, 2012, the court entered its order and judgment regarding attorney's fees and costs. (CP 926-30). The order incorporated the Findings of Fact and Conclusions of Law. Id.; (CP 907-25) Charles Taylor seeks review of the court's order and judgment pursuant to RAP 7.2(i).

Clearly, if the court reverses the trial court, the award of fees and costs and the Findings of Fact and Conclusions of Law on which the order

and judgment are based should be vacated and the matter remanded to the trial court for revision based upon the Court of Appeals' ruling.

**D. Charles Taylor Requests Attorneys' Fees For This Appeal.**

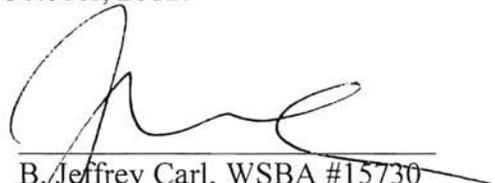
Charles Taylor requests attorneys' fees in connection with the appeal pursuant to RAP 18.1 and RCW 11.96A.150.

**V. CONCLUSION**

For the reasons set forth above, the court should reverse the trial court's decision denying Charles Taylor's motion for entry of judgment of dismissal notwithstanding the verdict.

DATED this 15 day of October, 2012.

  
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