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No. 74636-7-I

**COURT OF APPEALS,
DIVISION I,
OF THE STATE OF WASHINGTON**

**KIMBERLY A. HANSEN as her separate estate,
formerly known as KIMBERLY ROZGAY, Appellant**

v.

**MARK A. ROZGAY, individually and in his capacity as Personal
Representative Estate of BARBARA ROZGAY, Trustee of the
CORDES TRUST, ROZGAY FAMILY INVESTMENTS, LLC, a
Washington Limited Liability Company and the marital community
of MARK ROZGAY AND BABBI ROZGAY, husband and wife,
Respondents.**

BRIEF OF RESPONDENTS

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A. ASSIGNMENTS OF ERROR

Respondents acknowledge the assignments of error in Kimberly Hansen's brief at page 2.

B. RESTATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Does Civil Rule 56(c) allow adjudication of facts where either reasonable minds could reach but one conclusion from the evidence presented or where there is a claim of undue influence and courts necessarily engage in a weighing of the evidence, and if so, what is the standard of review?

Issue 2: Does the party defending the validity of estate planning documents bear the burden of proving capacity, and if so, is it necessary to demonstrate testamentary or transactional capacity? Is the testimony of the allegedly incapacitated parties' treating physician accorded special consideration?

Issue 3: Does a will proponent bear the burden of proof of proving capacity where the contestant relies upon the presumption of undue influence? Does the testimony of the treating physician rebut the presumption of undue influence?

Issue 4: Do the depositions of caregivers, or of lay witnesses presented by Ms. Hansen, demonstrate clear, cogent, and convincing

evidence of undue influence, elder abuse, or lack of testamentary or transactional capacity in light of the special consideration given to the testimony of the decedents' treating physician? Was the declaration of Ms. Hansen's expert properly excluded?

Issue 5: Does the four-month period to contest a will (RCW 11.24.010) apply to interrelated and codependent documents executed in conjunction with a comprehensive estate plan?

Issue 6: Did Mark Rozgay breach his duty as trustee by performing necessary repairs related to the Hood Canal House in following the wishes of Barbara Rozgay? Did Mark Rozgay breach his duty as trustee by holding the Hood Canal House in the Rozgay Irrevocable Trust pursuant to the wishes of Barbara Rozgay?

Issue 7: Did the trial court properly admit Mark Rozgay's testimony on behalf of the estate pursuant to RCW 5.60.030?

Issue 8: Did Mark Rozgay misuse trust assets by expending in accordance with the wishes of the income beneficiary?

Issue 9: Does Ms. Hansen have standing as an interested person to challenge her parents' powers of attorney or to sue for damages and to pursue claims under vulnerable-adult statutes for the protection of her father, and for the proper management of her mother's estate, when she has estranged herself from the family for nearly a decade?

Issue 10: Did the trial court properly award attorney’s fees and costs to Rozgay Family Investments, LLC?

Issue 11: Were the prevailing parties required to segregate fees and costs by claim when prevailing on all claims and when all claims are interrelated and fall under the auspices of the Trust and Estates Dispute Resolution Act (“TEDRA”), RCW 11.96A, et seq.

Issue 12: Was judgment properly entered as against Ms. Hansen’s marital community where she has not presented clear and convincing evidence to refute the presumption of community obligation?

C. STATEMENT OF THE CASE

Clarence and Barbara Rozgay are the adoptive parents of four children, Appellant Kimberly Hansen, Defendant Mark Rozgay, Lisa Dahling, and Michael Blaine-Rozgay. (CP 4) While elderly, Barbara and Clarence lived independently, happily, and were both fully functional in the time immediately preceding the transactions challenged by Ms. Hansen. (CP 113) They were able to drive themselves to their vacation home, get themselves to their own doctor’s appointments, and do their own shopping through at least 2009. Id. Both Clarence and Barbara played cards with their close friends until Barbara’s death in 2011. Id. Their primary care physician, Henry Williams, MD, observed Clarence to be “clearly capable of understanding the significance of” estate planning

documents in 2010. (CP 1459) He also opined that Barbara “had no cognitive functioning issues” in 2010. Id.

Ms. Hansen withdrew from the family in approximately 2005/2006. (CP 120; CP 110-115)

In late 2010, Clarence and Barbara began to update their estate planning. They chose to meet with estate planning attorney Kanoa Ostrem. (CP 693-697; 714) Mr. Ostrem met with Clarence and Barbara on at least three occasions. See, Id. Ultimately Mr. Ostrem prepared 24 documents on behalf of Clarence and Barbara. The full list of documents is listed at CP 613. The documents primarily consisted of a Community Property Agreement, the Rozgay Family Living Trust, the Rozgay Irrevocable Trust, the Rozgay Family Investments, LLC Operating Agreement, General Durable Powers of Attorney for each Clarence and Barbara, Medical Powers of Attorney for each Clarence and Barbara, Health Care Directives for each Clarence and Barbara, and ancillary documents needed to effectuate to the foregoing documents. (CP 613) On December 27, 2010, Clarence and Barbara executed each of the 24 documents in the presence of two disinterested witnesses. (CP 701)

One effect of the 2010 estate plan was to disinherit Ms. Hansen. Notably, Mr. Ostrem had accidentally included a provision for Ms. Hansen which Clarence and Barbara requested that he remove. (CP 108-109)

Clarence and Barbara had previously disinherited their eldest daughter Lisa Dahling when she had withdrawn from the family. (CP 557; 730)

On December 11, 2011, Ms. Hansen wrote an email to Mark Rozgay and Michael Blaine-Rozgay wherein she states her belief that Clarence and Barbara Rozgay had decided years ago to disinherit her. (CP 117-120).

Ms. Hansen initiated suit on December 22, 2014. (CP 45) The trial court granted summary judgment in favor of the defendants on January 4, 2016. (CP 1026-1028) Findings and Facts and Conclusions of Law supporting the award of attorney's fees and costs to defendants were entered on February 8, 2016. (CP 1122-1127) Judgment on the attorney's fees and costs was entered as against Ms. Hansen and her marital community on April 5, 2016. (CP 1461-1463) Ms. Hansen appeals.

D. SUMMARY OF ARGUMENT

The resolution of this case can be summarized in appellant Ms. Hansen's own vituperative words:

I was criticized at every turn, nothing I ever did was good enough and I was always compared to someone else. How many times Barb would point out things she had promised me throughout the years, and then taunt me by telling me she was giving them to or had already given them to Babbi. Or to look at the nice plant Beth got her after they killed or threw out every plant I got them, and why wasn't I nice like Debbie? Who in there (sic) right mind would want to keep putting themselves through that kind of harassment,

belittlement and mind-fucking. By the way you know how bad and worthless I felt when Babbi said to me last time I was up that she and Mark discussed it and decided I should get grandma's dishes?! I know she was trying to be kind, but ... Why is a spouse of one of my sibling (sic) telling me what I may have of my own supposed parents? **It makes things more clear that I was not part of Barb and Doc's family and that they obviously had long ago made the decision to leave everything to you both.** How telling is it, the story Barb always told about when they adopted us, that after they got Michael she really didn't want any more children.

(CP 118) (emphasis added) In one paragraph, Ms. Hansen acknowledges her diminished role in the family, that her parents had themselves decided to disinherit her long ago, and that this case boils down to what she received, or did not receive, pursuant to her parents' estate planning documents.

Ms. Hansen made it clear to her family, including her parents, that she wanted no continuing relationship with them and wanted nothing from them. (CP 564). She also told her family that "these people [her parents] are dead to me and I do not want any of their money." (CP 1164)

Despite her prior admission that Barbara and Clarence Rozgay had 'long ago' decided to cut her out of their estate, Ms. Hansen now challenges her parents' estate planning. Her challenge focuses primarily upon the alleged undue influence of Mark Rozgay, as well as the alleged

mismanagement of her parents' assets by Mark Rozgay after the estate planning-related transfers were made.

Despite her many accusations, Ms. Hansen fails to present any direct evidence that Mark Rozgay or anyone else influenced Barbara and Clarence Rozgay's estate planning. She also fails to present any evidence that Mark Rozgay violated his duties as trustee of the Cordes Trust, the Rozgay Living Trust, or the Rozgay Irrevocable Trust.

E. ARGUMENT

1) Standard of review

This Court reviews the trial court's summary judgment order de novo. The Court will affirm a summary judgment order based on the statute of limitations "when the pleadings, depositions, interrogatories, admissions, and affidavits in the record demonstrate there is no genuine issue of material fact as to when the statutory period commenced." Young Soo Kim v. Choong-Hyun Lee, 174 Wn.App. 319, 323, 8300 P.3d 431 (2013). Because "[w]ill contests are statutory proceedings... courts must be governed by the provisions of the applicable statute" prescribing claims filing limitations, RCW Ch. 11.24. In re Estate of Toth, 138 Wn.2d 650, 653, 981 P.2d 439 (1999) (quotation omitted).

There is a heightened standard of review when considering claims for undue influence. "The determination of undue influence is a mixed

question of fact and law.” Kitsap Bank v. Denley, 177 Wash. App. 559, 569, 312 P.3d 711, 716 (2013) citing In re Trust and Estate of Melter, 167 Wn.App. 285, 300, 273 P.3d 991 (2012). The Melter court stated the appropriate standard of review for undue influence claims:

When a challenged factual finding is required to be proved at trial by clear, cogent, and convincing evidence, we incorporate that standard of proof in conducting a substantial evidence review. A party claiming undue influence must prove it by clear, cogent, and convincing evidence. When such a finding is appealed, the question to be resolved is not merely whether there is substantial evidence to support it but whether there is substantial evidence in light of the “highly probable” test. We still view the evidence and all reasonable inferences in the light most favorable to the prevailing party and, as in all matters, defer to the trier of fact on issues of credibility.

167 Wn.App. at 301 (citations omitted). The heightened burden principles announced in Melter also apply to review of a summary judgment. See Kitsap Bank v. Denley, 177 Wn.App. at 569.

- 2) The 24 documents signed by Clarence and Barbara Rozgay were all part of a cohesive and interrelated testamentary scheme

The relatively low bar for testamentary capacity and the four month statute of limitations set forth in RCW 11.24.010 are evidence of the courts’ and the legislature’s desire to promote the efficient administration of probates. Ms. Hansen attempts to avoid the unfavorable statutory and common law restrictions on will contests by characterizing the documents executed by Barbara and Clarence Rozgay on December

27, 2010 as something other than estate planning documents. Ms. Hansen's focus emphasizes form over function. A review of the documents and their purposes makes it clear that they are all component parts of a comprehensive and interdependent estate planning scheme enacted in light of Barbara and Clarence's significant assets. To unwind a portion of the estate plan under the mistaken formulation that it is non-testamentary would fundamentally interfere with the overall testamentary structure of the plan.

The full list of the 24 documents executed by Barbara and Clarence Rozgay on December 27, 2010 can be found at CP 613.

Of the 24 documents, several are easily categorized as estate planning documents, such as the Last Will and Testament for each of Barbara and Clarence. (CP 613) The Rozgay Living Trust is specifically referenced in the wills. (CP 815)

Ms. Hansen challenges the testamentary nature of Rozgay Family Investments LLC. What Ms. Hansen ignores is the fact that the LLC was established as means of funding the Rozgay Irrevocable Trust. Placing ownership of a vacation property into an LLC is standard fare in estate planning. Yet given the size of Barbara and Clarence's estate, merely placing the property into an LLC could have generated significant tax liability for the surviving spouse. Accordingly, it was prudent from a tax

standpoint to place ownership of the LLC into an irrevocable trust. Accomplishing this took another layer of paperwork, establishing the LLC and funding it. This was done by conveying the Hood Canal House to the LLC by way of a deed of trust. (CP 13)

The LLC named Barbara and Clarence as members with equal 50/50 membership interests. Id. There would be no tax advantage for them to retain the ownership interests as members. Placing the units into an irrevocable trust would have the intended tax benefits. It was therefore necessary to transfer their Units in the LLC to the Rozgay Irrevocable Trust. This transfer was accomplished by a mix of assignments and a secured purchase agreement. (CP 613) The foregoing transaction – which had the simple estate planning related purpose and effect of placing a significant asset into trust - accounts for 13 of the 24 challenged documents. Add the wills, the Rozgay Living Trust and the Rozgay Irrevocable Trust, and the character of 17 of the 24 documents as estate planning documents is made clear.

One of the remaining documents which Ms. Hansen challenges as being non-testamentary is the Community Property Agreement. (Appellant's Brief at 16-19) As with the LLC, while the Community Property Agreement may not in and of itself be a testamentary document, it is part of the interconnected chain of documents from which the removal

of any link would cause the testamentary dispositions of Clarence and Barbara to be rendered moot. For its part, the Community Property Agreement transferred the Hood Canal House to the LLC, which was of course a prerequisite for it being transferred to the Rozgay Irrevocable Trust. Had the Hood Canal House and separately held securities not been transferred from Barbara to the marital community, Clarence would have stood to take them upon Barbara's death if she predeceased (which she did) and thus face potentially adverse tax consequences.

Having addressed the Community Property Agreement, the only other documents executed on December 27, 2010 were Clarence and Barbara's general and medical powers of attorney and health care directives. Ms. Hansen does not make any direct challenge to the health care directives. Powers of attorney are routinely executed along with other estate planning documents. Moreover, as is discussed in Sec. E, 12, *infra*, Ms. Hansen lacks standing to challenge them.

3) Plaintiff's claims are time-barred pursuant to RCW 11.24.010

The trial court dismissed Kimberly A. Hansen's claims contesting Barbara Rozgay's estate planning documents based upon the statute of limitations for contesting a probate, codified at RCW 11.24.010. Ms. Hansen asserts that the trial court erred in dismissing her claims on this

basis. She first claims that RCW 11.24.010 does not apply due to the fact that it was not raised as an affirmative defense in the Respondents' Answer. (Appellant's Brief at 34-36) Second, she claims that RCW 11.24.010 does not apply because her claims are not characterized as a will contest. *Id.* at 36-38. Neither of these assignments of error is supported by the record or the applicable law.

The trial court properly dismissed Hansen's will challenge as time barred. RCW 11.24.01 sets a four-month limitations period for will contests, and provides in relevant part:

If any person interested in any will shall appear within four months immediately following the probate or rejection thereof, and by petition to the court having jurisdiction contest the validity of said will, or appear to have the will proven which has been rejected, he or she shall file a petition containing his or her objections and exceptions to said will, or to the rejection thereof. Issues respecting the competency of the deceased to make a last will and testament, or respecting the execution by a deceased of the last will and testament under restraint or undue influence or fraudulent representations, or for any other cause affecting the validity of the will or a part of it, shall be tried and determined by the court.

Our Supreme Court recently reaffirmed that the standards set forth in RCW 11.24.010 are strictly enforced: "Washington courts have always strictly enforced the requirements for commencing will contest actions, and we do so again today." *Miles v. Jepsen*, 184 Wn.2d 376, 381, 358 P.3d 403 (2015) citing *In re Estate of Toth*, 138 Wn.2d at 656; *State ex rel.*

Wood v. Superior Court, 76 Wash. 27, 30-31, 135 P. 494 (1913); In re Estate of Peterson, 102 Wn.App. 456, 463, 9 P.3d 845 (2000) rev. denied, 142 Wn.2d 1021 (2001). The trial court “has no jurisdiction to hear and determine a contest begun after the expiration of the time fixed in the statute; neither does a court of equity have power to entertain such jurisdiction.” In re Estate of Kordon, 157 Wn. 2d 206, 214, 137 P.3d 16, 20 (2006), as amended (July 24, 2006) quoting State ex rel. Wood, 76 Wash. at 30–31. “The four-month period is absolute.... If the Will contest is not filed prior to the expiration of the four-month period, the contest will be absolutely barred.” Toth, 138 Wn.2d at 656 (quoting Bruce R. Moen, Nat’l Bus. Inst., Inc., *Washington Probate: Beyond the Basics* 171 (1996)); Estate of Peterson, 102 Wn.App. at 467 (“the statute is unambiguous that the period for contesting a will begins at the date of probate and ends four months later”). The statute reflects the Legislature’s “long-standing preference for efficient administration and finality of judgments in probate matters.” Jepsen, 184 Wn.2d at 381 n.5, ¶11.

An action is considered a will contest where the fundamental thrust of the claim is to “determine issues affecting the validity of the will.” Cassell v. Portelance, 172 Wash. App. 156, 162, 294 P.3d 1, 3 (2012) quoting RCW 11.24.010. In Cassell, Division I considered a challenge to the validity of a will brought by a doctor who was the defendant in a

wrongful death lawsuit. See, 172 Wn.App. at 158-162. However, the challenge to the decedent's will was not characterized by the doctor as a will contest. See, Id. at 160. Rather, the defendant doctor brought his challenge to the will in the form of a motion to intervene in the decedent's probate. See, Id. The doctor used the motion to intervene to collaterally attack the appointment of the decedent's personal representative, all in an effort to invalidate the actions of the personal representative and ultimately dismiss the wrongful death claim on statute of limitations grounds. See, Id. at 165-166. The defendant doctor characterized his motion for intervention not as a will contest but as an attempt to rectify a fraud committed upon the court, pursuant to CR 60(b) and the common law. See, Id.

Division I held that “[a] court may treat a motion as a will contest even where the petitioner styles it otherwise.” See, Id. at 162 citing In re Estate of Palmer, 146 Wn.App. 132, 137-138, 189 P.3d 230 (2008), as amended (Aug. 26, 2008). In so holding, the court looked at the affirmative allegations brought by the doctor “that [decedent] lacked capacity to make a will on the day he signed it, that he had not signed the will, and that the will was not properly witnessed. . . .” and found them to be “. . . precisely what a court considers in a will contest under RCW

11.24.010.” Id. at 163. The court also noted that the requested relief was to invalidate the will. Id.

An action to invalidate estate planning documents executed in combination with a will is also deemed a will contest. See, In re Estate of Palmer, 146 Wn.App. at 137-38. In Palmer, husband and wife decedents established a trust of which World Gospel Mission was a 75 percent beneficiary. See, Id. at 134. The decedents also executed pourover wills to fund the trust. See, Id. The trust document was not contained in the wills, but rather was its own, free-standing and separately executed document. See, Id. The decedent’s daughter, Dawn Palmer Golden, moved the probate court to disqualify World Gospel Mission as a beneficiary of her parents’ trust. See, Id. at 133. Like the doctor in Cassell, Golden did not characterize her motion as a will contest, but rather challenged the beneficiary designation on the basis that World Gospel Mission drafted and witnessed the trust in violation of RPC 1.8(c). See, Id. at 133-134.

The probate court held that Golden’s claims were in essence a will contest and therefore time-barred pursuant to RCW 11.24.010. See, Id. at 135. On appeal, Golden contended that dismissal of her claims pursuant to RCW 11.24.010 was improper because her challenge was to the separately executed trust. See, Id. at 136. Division II affirmed the probate court. In so doing, the appeals court held that the challenge to the wills, and the

challenge to the trust funded thereby, were inseparable. See Id. at 137 (“ . . . Golden’s challenge is, in all important respects, a will contest. . .”)

Barbara Rozgay passed away on September 23, 2011. (CP 17) Hansen filed suit well after the expiration of the statute of limitations, on December 22, 2014. (CP 1) Hansen asserted seven causes of action in her complaint: (1) an accounting pursuant to RCW 11.94; (2) breach of duties; (3) quiet title; (4) invalidation of the Rozgay Family Living Trust and Rozgay Irrevocable Trust; (5) willful wasting or negligent mismanagement; (6) self-dealing or conflict of interest; and (7) financial abuse or exploitation of a vulnerable adult. (CP 1-44)

The requested relief from the various causes of action asserted by Hansen includes requests to “protect or restore the Probate Estate of Barbara Rozgay . . .” to issue judgment to her in an amount equal to her “rights and interest in the Cordes Trust . . .” to quiet title in the Hood Canal property . . .” and for entry of a judgment against Respondents for damages incurred by the alleged waste and mismanagement of assets which were not bequeathed, devised, or otherwise transferred or payable to Hansen. (CP 40-42) Each of the foregoing requests for relief would, if granted, have the effect of upsetting the dispositions made in Barbara Rozgay’s Will and other estate planning documents executed in concert with the Will (the Rozgay Family Living Trust, the Rozgay Family

Investments LLC, and the Rozgay Irrevocable Trust). If the effect of Hansen's requested relief is to **undo** Barbara Rozgay's estate planning documents, hers is a will contest **no matter** what she elects to call it or how she styles her claims in the complaint. See, Cassell at 162.

While Ms. Hansen challenges whether a limited liability company agreement can properly be considered an estate planning document, she previously acknowledged that Rozgay Family Investments, LLC is "In substance . . . owned by the Rozgay Irrevocable Trust." (CP 589) This acknowledgment demonstrates that Ms. Hansen is aware of the interconnectedness of all the estate planning documents executed by her parents, and attempted to circumvent the statute of limitations by the artifice of avoiding the use of an **explicit** will contest cause of action.

Hansen's second assignment of error with respect to the application of RCW 11.24.010 to her claims is based upon her allegation that Respondents' motion for leave to amend to assert RCW 11.24.010 as an affirmative defense was never granted by the trial court. To the contrary, Respondents' motion for leave to amend was heard with the motion for summary judgment, and the trial court noted that was granted in its Findings of Fact and Conclusions of Law on Defendants' Motion for Fees and Costs. (CP 1124-1125) In addition, the order granting summary judgment was expressly based in part on the application of the time bar,

making it patent that the motion to amend was granted.

4) Barbara Rozgay is Presumed to have Testamentary Capacity

“The possession of testamentary capacity involves an understanding by the testator of the transaction in which he is engaged, a comprehension of the nature and extent of the property which is comprised in his estate, and a recollection of the natural objects of his bounty.” Dean v. Jordan, 194 Wash. 661, 668, 79 P.2d 331, 334 (1938). The existence of testamentary capacity is presumed where a will is rational on its face and executed in legal form. See, In re Mitchell’s Estate, 41 Wn.2d 326 (1952).

To overcome the presumption of testamentary capacity the party contesting a will bears the burden of proof. See, In re Estate of Bottger, 14 Wn.2d 676, 685 (1942). The burden can only be met by clear, cogent, and convincing evidence that the will is invalid. See, Bottger, 14 Wn.2d at 686.

The presumption of testamentary capacity thus applies in this case if the Will is properly executed and rational on its face. Ms. Hansen does not assert any technical deficiencies in the execution of the Will, e.g., she does suggest that it was not self-proving and signed by Barbara Rozgay. Moreover, the Will is rational on its face and in line with Ms. Rozgay’s

prior estate planning, wherein she previously disinherited her eldest daughter. (CP 557; 730) The will shall not be disturbed unless Ms. Hansen establishes lack of capacity or undue influence by clear, cogent and convincing evidence. See Bottger, 14 Wn.2d at 686.

5) There is no clear, cogent, and convincing evidence of undue influence

To invalidate a will for undue influence, a will contestant must show more than mere influence standing alone. See, Dean, 194 Wash. at 668. The contestant must show that the influence was so controlling as to actually control the volition of the testatrix, to interfere with her free will, and prevent her from exercising her own judgment and choice. See, In re Estate of Haviland, 162 Wn.App. 548, 557, 255 P.3d 854 (2011) (citations omitted). The influence must be “tantamount to force or fear which destroys the testator’s free agency and constrains him to do what is against his will.” In re Estate of Lint, 135 Wn.2d 518, 535 (2012). Critically, offering advice, persuasions, solicitations, or suggestions are insufficient to establish undue influence. See, In re Trust and Estate of Melter, 167 Wn.App at 313.

The elements of undue influence must be proven by clear, cogent, and convincing evidence. Importantly, the clear, cogent, and convincing standard requires “substantial evidence” of undue influence *before* the

question of undue influence will be submitted to the trier of fact. See, In re Estate of Bussler, 160 Wn.App. 449, 465, 247 P.3d 821 (2011). The evidence presented by the will contestant must be sufficient to “make it highly probable that the undue influence claim will prevail at trial.” Kitsap Bank, 177 Wn.App. at 569 citing In re Estate of Jones, 170 Wn.App. 594, 603-604, 287 P.3d 610 (2012). The trial court may grant summary judgment dismissing a will contest “where no rational trier of fact, viewing the evidence in the light most favorable to the nonmoving party, could find clear, cogent, and convincing evidence *on each element*.” Id. at 570. (emphasis added) (citations omitted). The trial court’s summary judgment dismissal will be upheld if it is supported by substantial evidence. Id. at 569.

The evidence submitted in the motion for summary judgment demonstrated that Ms. Hansen fails to meet the clear, cogent, and convincing standard for each required element of her undue influence claim. She does not demonstrate that Respondents controlled the volition of Barbara Rozgay. She does not demonstrate that the Respondents interfered with Barbara Rozgay’s free will. She does not demonstrate that Respondents used force or fear to constrain her to do what was against her will. Rather, the evidence put forth by Hansen suggests at most that Mark Rozgay assisted his mother with her estate planning by facilitating her

hiring of a lawyer. But, he never offered advice or attempted to persuade Barbara Rozgay to take any specific actions. Even if Ms. Hansen had submitted evidence that Mark Rozgay had engaged in persuasion (which she did not present), none of that conduct, if proven, rises to the level of undue influence sufficient to challenge a will. See, Kitsap Bank, 177 Wn.App. at 577 (“Participation in the transaction sufficient to support a presumption of undue influence requires that the beneficiary actively dictated the terms of transaction, purportedly on behalf of the decedent.”).

6) The presumption of undue influence is rebutted by the uncontested facts

Under certain circumstances a rebuttable presumption of undue influence may arise. The following facts may give rise to a rebuttable presumption of undue influence:

(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.

Dean, 194 Wash. at 672. It is of critical importance to note that even if the presumption of undue influence is found to apply, the will contestant still

retains the burden of proving undue influence by clear, cogent, and convincing evidence. See In re Trust and Estate of Melter, 167 Wn.App. at 299.

Appellant argues that the presumption applies based on the alleged facts that Mark Rozgay held a confidential relationship with Barbara Rozgay, that he was involved in the process of preparing the estate planning documents, and that the disinheriting of Hansen increased Mark Rozgay's share. (Appellant's Brief at 33). Appellant also argues that the *Dean* factors ought to be considered even if the presumption fails, relying on the Florida case In re Carpenter's Estate, 253 So. 2d 697 (Fla. 1971).

In re Carpenter's Estate is not helpful to this Court as it is contrary to Washington precedent controlling the rebuttal of the presumption of undue influence. Where the proponent of the will rebuts the presumption of undue influence it has the effect of "restoring the equilibrium of evidence touching the validity of the will." In re Trust and Estate of Melter, 167 Wn.App. at 307 citing Dean, 194 Wash. at 673.

In Dean, the contestant presented evidence that the testatrix, at the time she executed the will, was elderly, infirm, and had previously been declared insane. Dean, 194 Wash. at 673. The proponent stood in a confidential relationship with the testatrix, had the opportunity to exercise undue influence, actively participated in the procurement of the will, and

had herself been substituted as primary beneficiary in preference to other relatives. Id.

The proponent overcame the presumption simply by showing that the testatrix “though old and feeble was nevertheless capable of understanding and did understand what she was doing,” and was “appreciative of what the [proponent] had done for her.” Id.

In Melter, the presumption was overcome by a showing that the testatrix was “disappointed and upset” with the contestant, that she had testamentary capacity at the time the will was made, was able to articulate her reasons for disinheriting the contestant, and that the will proponent had cared for her. 167 Wn.App. 308.

Like the contestant in Dean, Hansen relies exclusively on the presumption, and has failed to make any specific showing that Mark Rozgay interfered with Barbara Rozgay’s free will. Accordingly, the presumption of undue influence can be set aside based upon a minimal showing as it was in Dean. Respondents presented substantial evidence to the trial court that Barbara Rozgay managed her own finances up until her death, that she possessed testamentary capacity, that she had a strained relationship with Ms. Hansen (who had not seen her parents for years prior to Barbara Rozgay’s death), and that Barbara and Clarence Rozgay had previously disinherited an older daughter who had also become estranged

from the family. (CP 557; 730). The evidence submitted by Respondents to the trial court is more than enough to rebut the presumption of undue influence and restore the equilibrium of the evidence. The Court then returns to the stark question resolved by the trial court: did Ms. Hansen produce sufficient evidence showing that Mark Rozgay exerted influence over his mother that was so controlling as to actually control her volition, interfere with her free will, and prevent her from exercising her own judgment and choice. The evidence presented on summary judgment clearly did not come close to establishing any of these required facts, and the order granting summary judgment was appropriately entered.

7) The Declaration of Dr. Henry Williams, MD adequately established the capacity of Clarence and Barbara Rozgay

Ms. Hansen alleges that Dr. Williams' testimony does not establish capacity because tests were last performed in 2009 and he failed "to distinguish testamentary from transactional capacity." (Appellant's Brief at 20) Dr. Williams' testimony is medical evidence. "With respect to medical testimony, it has been held that special consideration should be given to the opinion of the attending physician." Matter of Estate of Eubank, 50 Wn.App. 611, 618, 749 P.2d 691, 695 (1988)(citations omitted). Ms. Hansen seeks to overcome the medical evidence of Dr. Williams with the lay testimony of Clarence and Barbara's caregivers. (CP

11-13) Dr. Williams unambiguously testified that he continued to act as the primary physician for both Clarence and Barbara Rozgay well after they had signed their estate planning documents, and that they had sufficient capacity to sign estate planning documents in December, 2010. (CP 1459)

Ms. Hansen also attempts to move the finish line, asserting that Clarence and Barbara Rozgay must be shown to have possessed both testamentary and transactional capacity. The definition of testamentary capacity is stated in Sec. E, 4, *supra*. The standard for transactional capacity is stated generally as follows:

The rule relative to mental capacity to contract, therefore, is whether the contractor possessed sufficient mind or reason to enable him to comprehend the nature, terms, and effect of the contract in issue.

Page v. Prudential Life Ins. Co., 12 Wn.2d 101, 109, 120 P.2d 527 (1942)

(citations omitted). The Page court discussed at length factors which *are not* considered sufficient to establish a lack of transactional capacity:

But mere mental weakness falling short of incapacity to appreciate the business in hand will not invalidate a contract; physical condition not adversely affecting mental competence is immaterial, and neither age, sickness, extreme distress, nor debility of body will affect the capacity to make a contract or a conveyance, if sufficient intelligence remains to understand the transaction.

Where a person possesses sufficient mental capacity to understand the nature of the transaction and is left to exercise his own free will, his contract will not be invalidated because he was of a less degree of intelligence than his co-contractor, because he was fearful or worried; because he was eccentric or entertained peculiar beliefs; or because he was aged or both aged and mentally weak, or insane.

Test of capacity and degree of incompetence. The test of mental capacity to contract is whether the person possesses sufficient mind to understand, in a reasonable manner, the nature and effect of the act in which he is engaged. *It is not necessary to show that a person was incompetent to transact any kind of business, but to invalidate his contract it is sufficient to show that he was mentally incompetent to deal with the particular contract in issue.* On the other hand, to avoid a contract it is insufficient to show merely that the party was of unsound mind or insane when it was made, but *it must also be shown that this unsoundness or insanity was of such a character that he had no reasonable perception or understanding of the nature and terms of the contract.* The extent or degree of intellect generally is not in issue, but merely the mental capacity to know the nature and terms of the contract.

Page v. Prudential Life Ins. Co. of Am., 12 Wn.2d at 108-109 (emphasis added).

The standard enunciated in Page directs the analysis right back to testamentary rather than transactional capacity, as the presence or absence of transactional capacity is made with reference to the particular type of contract at issue. Id. at 109. As is discussed at length in Sec. E, 2, *supra*

the contracts at issue are all part of a comprehensive estate plan. The so-called “non-testamentary” documents necessarily complement and are required to implement the testamentary dispositions. Thus the applicable standard is testamentary capacity rather than transactional.

It should also be pointed out that Dr. Williams’ testimony is not necessary to the resolution of this case. Ms. Hansen bears the burden of proof. She must demonstrate incapacity by clear, cogent, and convincing evidence in order to overcome the presumption of capacity afforded to testators. See, Sec. E, 4 *supra*. Ms. Hansen fails to overcome the presumption of capacity and thus Respondents bear no burden to make a positive showing of Clarence and Barbara’s capacity. Even if the Court is to assume *ad arguendo* that Respondents must make a showing of Clarence and Barbara’s capacity, Dr. Williams’ testimony clearly demonstrates that Clarence and Barbara had the requisite capacity to execute their estate planning documents.

Even without according Dr. Williams testimony with the special consideration that it must be given, it alone is clearly sufficient to establish capacity. With respect to Barbara Rozgay, Dr. Williams’ testimony is unequivocal that “Barbara Rozgay had no cognitive functioning issues” at the time she executed her estate planning documents. (CP 1459) One with no cognitive issues clearly has both testamentary and transactional

capacity.

Dr. Williams testified that, as of 2010 when the estate plan was executed, “Clarence was clearly capable of understanding the significance of signing such documents and fully knows who his family members were and the scope of his assets and their value.” (CP 1459)

Dr. Williams’ testimony establishes testamentary capacity, as he clearly states that Clarence could understand the transaction, its significance, and the property that comprised his estate and of which he was disposing. Dr. Williams testimony also demonstrates that Clarence possessed transactional capacity *with respect to the particular kinds of contracts being executed*, which so happen to bear upon the identity of his family, the scope and value of his assets, and how he would like his assets disposed of at death.

8) Ms. Hansen does not present facts giving rise to a claim for breach of fiduciary duty under Washington law

In support of her argument that Mark Rozgay breached his fiduciary duties regarding the Rozgay Irrevocable Trust and Rozgay Family Trust, Ms. Hansen alleges that (1) Mark Rozgay is confused about the property and beneficiaries of the trusts; (2) Mark Rozgay has used his own funds to improve the Hood Canal House; and (3) that Mark Rozgay was a creditor who expected the repayment of his personal investment in

the Hood Canal House. (Appellant's Brief 38-41) She also alleges that Mark Rozgay breached his fiduciary duties to the Cordes Trust by failing to provide accountings. None of the allegations with respect to the Rozgay Irrevocable Trust or Rozgay Family Trust rise to the level of a breach of fiduciary duty even if assumed to be true. There is no evidence in the record supporting Ms. Hansen's allegations with respect to the Cordes Trust.

Ms. Hansen does not cite, and Respondents are not aware of, any authority holding that it constitutes a breach of fiduciary duty for a trustee to not know all trust beneficiaries off the top of his head or to be confused at deposition about what property is in the trust. These allegations simply do not support a claim for breach of fiduciary duty. Given the complexity of the estate plan and the number and length of the estate planning documents, including the trust documents, it is understandable that Mr. Rozgay could not recite chapter and verse during his deposition. Trustees are allowed to rely on legal advice and assistance in carrying out their duties, and lawyers are better equipped to analyze and understand estate planning documents such as the ones involved in this case.

Ms. Hansen alleges that it is a fiduciary violation for Mark Rozgay to have used his own funds to improve the Hood Canal House. In making this argument she ignores the full ownership structure pertaining to the

Hood Canal House. The Hood Canal House is owned by Rozgay Family Investments, LLC. The Rozgay Irrevocable Trust's interest in the Hood Canal House is pursuant to its membership in the LLC. The LLC in turn is manager-managed. The manager is Mark Rozgay. As the manager of the LLC, Mark Rozgay "is an agent of the limited liability company and has the authority to bind the limited liability company with regard to matters in the ordinary course of its activities." RCW 25.15.154(2)(a). As the manager of the LLC, Mark Rozgay had a duty of care to the LLC. See, RCW 25.15.038(1)(a). Ms. Hansen admits that the Hood Canal House was in ill-repair. (CP 563) Mark Rozgay could not simply allow the Hood Canal House to deteriorate, as that inaction would breach his duties both as manager of the LLC and as Trustee of the Rozgay Irrevocable Trust. As the manager of the LLC, Mark Rozgay is expressly entitled to make improvements upon its sole asset, even if those improvements ultimately benefit him. See, RCW 25.15.038(4)("A manager or member does not violate a duty under this chapter or under the limited liability company agreement merely because the manager's or member's conduct furthers the manager's or member's own interest.")

Ms. Hansen cites to In re Marriage of Petrie in support of her claim that Mark Rozgay breached his fiduciary duty by "comingling" his personal assets with those of the trust. 105 Wn.App. 268, 276, 19 P.3d

443, 447 (2001), as amended (Apr. 10, 2001). In re Marriage of Petrie addresses the reverse situation from what is present here. In In re Marriage of Petrie, the trustee misappropriated trust assets and paid the trust back. 105 Wn.App. at 276. In re Marriage of Petrie has been cited in one other published opinion on the comingling holding, by Division II in Casterline v. Roberts 168 Wn.App. 376, 383, 284 P.3d 743, 747 (2012). In Casterline the alleged breach of fiduciary involved the trustee using trust assets for her own benefit --not the other way around. Id.

Here Mark Rozgay used his own money to improve a trust-owned asset. That simply is not a breach of fiduciary duty. The Western District of Washington recognized the distinction:

Mr. Vaughn relies on the Washington Court of Appeals' decision in Casterline v. Roberts for his contention that Ms. Montague's use of the trust's home was an abuse of discretion, but Casterline is inapposite. In Casterline, the trustee transferred funds from her mother's trust to build a home held in her own name then fraudulently transferred the home when her mother's guardian began an investigation. Here, there was no transfer of funds from the trust to pay for property held in Ms. Montague's name. Ms. Montague simply moved into and maintained the trust's house, which was well within her power under the terms of the Trust Agreement to care for the trust's property as an absolute owner would.

Vaughn v. Montague, 924 F. Supp. 2d 1256, 1265 (W.D. Wash. 2013).

Finally, Ms. Hansen alleges that Mark Rozgay failed to provide her with adequate accountings from the Cordes Trust. Mark Rozgay provided frequent oral reports to Ms. Hansen and other trust beneficiaries. (CP 1386) He kept meticulous financial records of his work as trustee. (CP 545, 551-552). Prior to Ms. Hansen's recent complaints, no beneficiary ever complained that Mark Rozgay failed to provide complete information regarding the management of the trust. (CP 1386) When Ms. Hansen requested formal reports, Mark Rozgay provided annual reports for each year that he served as trustee, and did so well prior to the filing of her lawsuit. Id. These reports included a detailed financial accounting of all income and expenditures of the trust prior to Ms. Hansen filing her lawsuit. (CP 1330, 1346-1377) Ms. Hansen has been provided with everything she is entitled with respect to the Cordes Trust. She has presented no further evidence raising any breach of fiduciary duty issue.

9) Plaintiff's expert testimony was properly stricken as untimely

A trial court's decision to strike expert testimony is reviewed for an abuse of discretion. See, Estate of Fahlander, 81 Wn.App. 206, 209, 913 P.2d 426, 428 (1996); King County Fire Prot. Dist. No. 16 v. Hous. Auth. of King County, 123 Wn.2d 819, 826, 872 P.2d 516 (1994). Respondents propounded an interrogatory request to Ms. Hansen

requesting that she disclose all expert witnesses and “state the subject matter on which the expert is expected to testify, state the substance of the facts and opinion to which the expert is expected to testify and a summary of the grounds for each opinion.” (CP 894) Ms. Hansen replied by referencing her Primary Witness List. *Id.* The Primary Witness List states simply that Ms. Gray “Will testify regarding capacity of Clarence and Barbara Rozgay. CV attached.” (CP 925) The reference to the Primary Witness List does not even come close to answering the interrogatory. It does not state the substance of Ms. Gray’s opinion. It does not state the facts relied upon. It does not state what Ms. Gray’s opinions are, or the grounds therefor. Ms. Hansen clearly did not fully respond to the interrogatory and the trial court properly exercised its discretion in striking Ms. Gray’s testimony.

“A court abuses its discretion in admitting or excluding expert testimony when its decision is manifestly unreasonable or based on untenable grounds or reasons.” Aubin v. Barton, 123 Wn.App. 592, 608, 98 P.3d 126 (2004). Plaintiff’s complete failure to disclose *any* opinion of Ms. Gray prior to her opposition to the motion for summary judgment provided a reasonable basis for the trial court to exclude the testimony.

10) Plaintiff's expert was not qualified and failed to properly state her opinion

Pursuant to ER 702, “a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify” regarding “scientific, technical, or other specialized knowledge.” Where an expert testifies on summary judgment, this Court reviews the expert’s qualifications de novo. Davies v. Holy Family Hosp., 144 Wn.App. 483, 494, 183 P.3d 283 (2008). “[T]he qualifications of an expert are judged by the trial court and the trial court’s determination will not be overturned absent an abuse of discretion.” Davies, 144 Wn.App. at 494. “[D]eclarations [that] do not affirmatively show that [the expert] was competent to render an opinion” are insufficient to defeat a summary judgment motion. Id. at 495.

Even in cases arising under Ch. 71.05 RCW, where a social worker may testify as to a person’s mental status pursuant to statute, such testimony must still meet the applicable “correlation between the facts and the expert’s opinion.” Matter of Det. of A.S., 91 Wn.App. 146, 160, 955 P.2d 836, 844 (1998) (citations omitted). For an assessment of mental status, that correlation must be made with reasonable medical certainty. Id. Thus even if a social worker is qualified to testify on mental capacity in contexts beyond Ch. 71.05 RCW, Ms. Gray’s testimony fails to meet the

applicable legal standard for the reasons set forth below.

Ms. Hansen submitted the Declaration of Jullie M. Gray to the trial court in support of her contention that Barbara and Clarence Rozgay lacked capacity to execute their estate planning documents. (CP 596-612) It was not an abuse of discretion to strike Ms. Gray's testimony based upon Ms. Gray's lack of qualifications. Ms. Gray is not a medical doctor or a psychologist. (CP 597) The trial court had the discretion to determine that Ms. Gray's credentials were not sufficient to render a medical opinion on mental capacity.

Even if the appellate court were inclined to consider Ms. Gray's declaration, it fails to meet the standards applicable to medical testimony. Ms. Gray states her opinion on the following correlation between the facts and the evidence: "Based on my knowledge, skill, experience, training, and education, in light of the resources I have reviewed, and in accordance with the standards of my profession, I have formed the following opinions: . . ." (CP 604) Ms. Gray never opines as to her degree of certainty. One cannot tell if her opinion is stated on a more probable than not basis or some lesser threshold. She never states that her opinion is based on a reasonable medical certainty as is required by Det. of A.S. Ms. Gray's declaration is therefore inadmissible on its face and was properly stricken by the trial court.

11) Resolution of factual issues at summary judgment is appropriate where reasonable minds cannot differ

Ms. Hansen alleges that the trial court erred by deciding factual issues at summary judgment. (Appellant's Brief at 8) The trial court's limited resolution of factual issues was proper in this instance. Long-standing Washington precedent provides that factual issues may be decided on summary judgment "when reasonable minds could reach but one conclusion from the evidence presented." Van Dinter v. City of Kennewick, 121 Wn.2d 38, 47, 846 P.2d 522 (1993) (quoting Cent. Wash. Bank v. Mendelson-Zeller, Inc., 113 Wn.2d 346, 353, 779 P.2d 697 (1989)). Moreover, a trial court is necessarily tasked with weighing evidence when resolving a motion for summary judgment in an undue influence case. See, Kitsap Bank, 177 Wn.App. at 569. The trial court appropriately weighed the evidence in determining that Ms. Hansen's evidence fell far short of the significant burden of demonstrating that Mark Rozgay completely dominated and subverted his parents' free will in executing their estate plan.

12) Plaintiff lacks standing to remove Mark Rozgay as Attorney-in-Fact for Clarence Rozgay

RCW 11.94.090(1)(f) provides grounds for the removal of an attorney-in-fact. Ms. Hansen alleges that Mark Rozgay failed to provide an accounting of his actions as attorney-in-fact and is unfit to perform his

fiduciary duties. (Appellant's Brief at 38-41) While these allegations, if true (which they are not), may satisfy RCW 11.94.090(1)(f), RCW 11.94.090(1) provides that only a person designated in RCW 11.94.100 has standing to petition for the removal of an attorney-in-fact. RCW 11.94.100(1) provides as follows:

A petition may be filed under RCW 11.94.090 by any of the following persons:

- (a) The attorney-in-fact;
- (b) The principal;
- (c) The spouse or domestic partner of the principal;
- (d) The guardian of the estate or person of the principal; or
- (e) Any other interested person, as long as the person demonstrates to the court's satisfaction that the person is interested in the welfare of the principal and has a good faith belief that the court's intervention is necessary, and that the principal is incapacitated at the time of filing the petition or otherwise unable to protect his or her own interests.

Ms. Hansen also relies upon being an interested person pursuant to RCW 74.34.020(12), which provides as follows:

“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.

Ms. Hansen acknowledges that she does not meet the criteria set forth in sub-parts (a) through (d) of RCW 11.94.100. Thus, she only has standing to petition for Mark Rozgay's removal as attorney-in-fact for Clarence Rozgay if she can meet each of the criteria set forth in subpart RCW 11.94.100(e) or the nearly identical standard set forth in RCW 74.34.020(12). She fails on every point.

Ms. Hansen is not an interested person. As demonstrated by her own words, Ms. Hansen has not shown any interest in the welfare of Clarence Rozgay or Barbara Rozgay for nearly a decade preceding filing suit. She referred to her estranged parents as "just plain delusional, mean, always trying to control and manipulative." (CP 118) She admits that she "pulled back from spending time with the family" because she "could not and cannot take the abusive, controlling, manipulative behaviors from any of you." (CP 120) Mark Rozgay testified that Ms. Hansen cut off contact with both Barbara and Clarence Rozgay in 2005/2006, a fact which Ms. Hansen acknowledges. (CP 120; CP 110-115) As of 2008 she was removed as an emergency medical contact for Clarence Rozgay. (CP 570)

Ms. Hansen's admitted dislike for Clarence and Barbara, her admitted withdrawal from the family, and her removal as an emergency medical contact for Clarence Rozgay, together demonstrate conclusively that Ms. Hansen was not interested in the welfare of Clarence Rozgay

[who died after this appeal was commenced]. Perhaps out of recognition that her own actions have shown her to be disinterested, on appeal Ms. Hansen makes the argument that having once been an interested person that status cannot be lost. That argument makes no sense. One either meets the statutory criteria at the time suit is filed or not. The United States Supreme Court discussed the concept of standing as being linked to the state of matters at the time of filing in Grupo Dataflux v. Atlas Glob. Grp., L.P.: “It has long been the case that the jurisdiction of the court depends upon the state of things at the time of the action brought. This time-of-filing rule is hornbook law (quite literally) taught to first-year law students in any basic course on federal civil procedure.” 541 U.S. 567, 570, 124 S. Ct. 1920, 1924, 158 L. Ed. 2d 866 (2004) quoting Mollan v. Torrance, 9 Wheat. 537, 539, 6 L.Ed. 154 (1824). While this is not a case governed by the Federal Rules of Civil Procedure, the United States Supreme Court’s discussion is helpful in clarifying the standing issue. Ms. Hansen was required to make a showing that she was an interested person at the time of filing. The record contains no such showing.

Even if one assumed *ad arguendo* that the admitted facts do not render Ms. Hansen disinterested, she must also demonstrate a good faith belief that court intervention is necessary. See, RCW 11.94.100(1)(e). Yet again Ms. Hansen’s words belie her stated aims for removing Mark

Rozgay as attorney-in-fact. Ms. Hansen's pre-suit communications show a person far more interested in **who** gets what from her parents than one with a good faith belief that court intervention is necessary to protect the interests of Clarence Rozgay:

That has been their standard game throughout our lives to control through manipulation and boy have they been making you dance like a marionette. Me as well, when they didn't like me living in Hawaii it was, "Kimberly, if you move home we will give you \$10,000.00 of your inheritance. We have already given the boys their checks" (sic) when I asked if they would just mail it to me they said I couldn't have it unless I moved home . . .

How many times Barb would point out things she had promised me throughout the years, and then taunt me by telling me she was giving them to or had already given them to Babbi [Mark Rozgay's wife] .

..

By the way you know how bad and worthless I felt when Babbi said to me last time I was up that she and Mark discussed it and decided that I should get grandma's dishes . . .

About a decade ago Barb stopped calling or sending Birthday cards to Tom [Ms. Hansen's husband] and knowing full well she had not stopped sending cards and money for that matter to either of you . . . Yes it has been 8 years since I have received a card or call and certainly no money. . .

That will was her last slap in the face while flipping the bird at Lisa and I and pitting the two of you against the two of us . . .

As many times as we were told that they (Doc and

Barb) wanted to be sure to leave us all, equally, an inheritance they were threatening to disown us for control...

(CP 118-120) Notably absent in Ms. Hansen's pre-suit communications are concerns relating to her parents' capacity or well-being.

13) Mark Rozgay's testimony concerning instructions from his mother was properly admitted into evidence

Ms. Hansen alleges that Mark Rozgay's beneficiary interest in the Cordes Trust and the Rozgay Irrevocable Trust disqualifies him from testifying on behalf of the estate in defense of her claims. Washington courts have long held that RCW 5.60.030 does not disqualify a witness interested in an estate from testifying on its behalf. See, McFarland v. Dep't of Labor & Indus., 188 Wash. 357, 362, 62 P.2d 714, 717 (1936) ("The object of that statute is to prevent persons whose interests are adverse to the estates of deceased or insane persons from testifying to transactions had with, or statements made by, such deceased or insane persons. But the statute does not seek to prevent, nor does it prohibit, an interested witness from testifying on behalf or in favor of the estate of a deceased or insane person."); Matter of Davis Estate, 23 Wn.App. 384, 386, 597 P.2d 404, 406 (1979) (testimony offered in favor of the estate was admissible, notwithstanding the fact that the witnesses were interested in the distribution of the estate).

Mark Rozgay's testimony, which is challenged by Ms. Hansen, was made in the form of a declaration generated for the specific purpose of defending Barbara Rozgay's estate from the claims made by Ms. Hansen. His testimony is therefore admissible regardless of the fact that he has an interest in the estate.

14) The trial court adequately itemized the documents and evidence considered on summary judgment

In its order granting summary judgment the trial court provided the following designation of the documents and other evidence called to its attention before granting summary judgment:

The Court has reviewed and considered the files and pleadings in this case, including without limitation, the following:

1. Defendants' Motion for Summary Judgment and all supporting declarations;
2. Plaintiff Hansen's Response to Defendant's (sic) Motion for Summary Judgment and all supporting declarations; and
3. Defendants' Reply in Support of Defendants' Motion for Summary Judgment and all supporting declarations.

(CP 1026-1027)

Civil Rule 56(h) provides: "The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered."

The failure by the trial court to specifically list all materials it considered is considered a harmless error where (1) it is clear from the record that the court considered all of the materials; and (2) all of the materials at issue “have been included before this court in the appeal record.” Citibank S. Dakota N.A. v. Ryan, 160 Wn.App. 286, 290, 247 P.3d 778, 780 (2011); see also W.R. Grace & Co.--Conn. v. State, Dep't of Revenue, 137 Wn. 2d 580, 591, 973 P.2d 1011, 1016 (1999)(“However, because the trial court indicated it had indeed read six of the seven affidavits, and the affidavits are included in the record before us, DOR's assertion that CR 56(h) and RAP 9.12 require the listing of such evidence in the judgment is of no moment. Because the affidavits are included in the record on appeal, any error in failing to list the affidavits in the summary judgment order is harmless.”)

The trial court's order clearly provides it reviewed all of the materials presented by the parties in conjunction with the summary judgment. Likewise, all of the materials considered have been provided to the Court in the Clerk's Papers. Accordingly, the failure to list each document with specificity is a harmless error and is not a basis for overturning the trial court's granting of summary judgment. Moreover, when viewing Ms. Hansen's motion to the trial court to supplement the order granting summary judgment, her motion was in essence an effort to

argue for a reconsideration of the court's ruling, and the rejection of her motion must be viewed in that context.

15) The award of fees and costs to Rozgay Family Investments, LLC was proper

As is discussed in Sec. E, 2, *supra*, Rozgay Family Investments, LLC was created as part of the integrated package of estate planning documents executed by Clarence and Barbara Rozgay. A challenge to the limited liability company necessarily constitutes a challenge to the Rozgay Irrevocable Trust – which is the LLC's only member. Rozgay Family Investments, LLC shared defense counsel with the other named defendants. Its defense costs were necessarily intertwined with the broader defense of the claims, and it would be both impossible and artificial to segregate fees amongst the defendants defending against the same claims. Each of the defendants were interested in defeating the claims of undue influence and lack of capacity. Their common defense required the expenditure of attorney fees that cannot be divided between them.

Moreover, the trial court has broad discretion to award fees and costs to the prevailing party in a dispute arising under TEDRA, RCW 11.96A.020(1). TEDRA broadly applies to all matters concerning the estates and assets of incapacitated, missing, and deceased persons,

including non-probate assets. TEDRA allows superior or appellate courts in Washington to order

. . . costs, including reasonable attorney's fees . . . to any party: (a) From any party to 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.

RCW 11.96A.150(1). The trial court's decision on attorney's fees and costs pursuant to RCW 11.96A.150(1) is reviewed for abuse of discretion. See, Bale v. Allison, 173 Wn.App. 435, 461, 294 P.3d 789 (2013); In re Estate of Black, 153 Wn.2d 152, 173, 102 P.3d 796 (2004). By its own terms, RCW 11.96A.150(1) provides the trial court with broad discretion, which was reasonably applied here when the LLC was sued as a party and had to defend itself

16) Segregation of fees and costs among claims was not necessary

Ms. Hansen assigns error to the trial court's award of attorney's fees and costs on the basis that the award was not segregated by claim. Segregation of fees and costs by claim was not necessary in this instance. Respondents prevailed on every claim. Each of Ms. Hansen's claims triggers an entitlement to a statutory award of attorney's fees incurred in

defending against them. *See*, RCW 11.94.050, RCW 11.94.120, and RCW 11.96A.150. Accordingly, Respondents were entitled to an award of all fees and costs incurred without segregation.

In addition, a trial court is not required to segregate fees where it determines that the various claims are intertwined and no reasonable segregation of claims can be made. Boguch v. Landover Corp., 153 Wn.App. 595, 620, 224 P.3d 795 (2009). The claims in this case were inextricably intertwined and inter-related, and it would have been impossible to divide the hours expended, either between claims or between defendants.

A trial court's decision regarding the segregation of attorney fees is reviewed on an abuse of discretion standard. Loeffelholz v. Citizens for Leaders with Ethics & Accountability Now (C.L.E.A.N.), 119 Wn.App. 665, 690, 83 P.3d 1199 (2004). The trial court did not abuse its discretion in rejecting a segregation of the attorney fee award.

17) Plaintiff's Marital Community was properly named as a judgment debtor

A debt incurred by either spouse during marriage is presumed to be a community debt. *See*, Oil Heat Co. v. Sweeney, 26 Wn.App. 351, 353, 613 P.2d 169 (1980); Douglass Northwest, Inc. v. Bill O'Brien & Sons Const. Inc., 64 Wn.App. 661, 828 P.2d 565 (1992). A judgment entered

solely against one spouse is presumed to be a community obligation, whether or not both spouses are named in the judgment. See, Whitehead v. Satran, 37 Wn.2d 724, 225 P.2d 888 (1950). A spouse seeking to overcome the presumption of community obligation may only do so by presenting “clear and convincing evidence” that the debt arose from a separate obligation. Oil Heat Co. v. Sweeney, 26 Wn.App. at 353. The burden of clear and convincing evidence cannot be met “[i]f there was any expectation of benefit to the community.” Beyers v. Moore, 45 Wn.2d 68, 70, 272 P.2d 626, 627 (1954)

The judgment was entered as against “Kimberly A. Hansen, formerly known as Kimberly Rozgay, and her marital community.” (CP 1461-1463)

Ms. Hansen challenges the imposition of community liability based solely upon the fact that her spouse was not named or joined in the action and the allegation that her claims concerned her separate property. (Appellant’s Brief at 50) Ms. Hansen fails to demonstrate by clear and convincing evidence that there was no expectation of benefit to her marital community when she brought her underlying suit. Ms. Hansen was thus unable to overcome the presumption of community obligation and the judgment was properly entered as against her marital community.

18) Defendants are entitled to an award of fees and costs on appeal

Pursuant to RCW 11.24.050, a court may award reasonable attorney's fees where a will is sustained against a will contest. Pursuant to RCW 11.96A.150(1) 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." "A party may recover attorney fees and costs on appeal when granted by applicable law." Oregon Mut. Ins. Co. v. Barton, 109 Wn.App. 405, 418, 36 P.3d 1065 (2001). Ms. Hansen's will contest has needlessly dissipated estate and trust assets. Accordingly, pursuant to RAP 18.1, RCW 11.24.050, and RCW 11.96A.150(1), Respondents are entitled to their fees and costs on appeal.

F. CONCLUSION

This Court should affirm the trial court's summary judgment order and award Respondents their attorney's fees and court costs.

Dated this 5th day of August, 2016

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on this date I caused to be served in the manner indicated a copy of the within and foregoing document upon the following persons:

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