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INTRODUCTION

Dawn Golden in her opening brief as set forth her statement of the case and will not repeat it here. This brief will reply to the brief of Donald Palmer.

ARGUMENT

I.

RAP 10.3

The Dawn Golden believes that she has substantially complied with **RAP 10.3**. She has set forth her position in detailing the nineteen assignments of error in her brief.

II.

RCW 11.11.070

RCW 11.11 covers non probate assets. There are no exceptions. Donald Palmer argues that **RCW 11.11.070** does not apply to the personal representative and requires that a specific beneficiary to a specific account be named for it to apply. Note that Donald Palmer petitioned as both personal representative and as beneficiary trustee. At no time did he specify that he was acting solely in one capacity or another.

Since stock brokers are covered by **RCW 11.11, RCW 11.11.010(6)**,

and the burden of overcoming a beneficiary designation is by clear and convincing evidence, **RCW 11.11.010(1)(b)**, Donald Palmer had a duty to, within 30 days, notify Edward Jones. He did not.

By Donald Palmer's and the court's reasoning, all joint accounts held by non financial institutions, those not covered by **RCW 30.22.100**, can be set aside with the burden of proof of more likely than not and the beneficiary has the burden of proving of that she/he is the recipient of the gift even though **RCW 11.11.010(6)** states that financial institutions include brokers and transfer agents.

The Donald Palmer cites **Doty v Anderson, 563 P.2d 1307(1977)** for authority that Dawn Golden had the duty to prove that there was not undue influence or fraud. However, in that case the beneficiary was not a legal heir of the decedent. Dawn Golden is the surviving daughter of Sarah Palmer and had a close relationship with her mother living two miles apart Rp 152 over the last 28+ years of her life. In addition, Sarah Palmer had opened a joint account with right of survivorship with Dawn Golden as beneficiary, without Dawn Golden's knowledge, sometime prior to 1999, Rp 161, the Evergreen Fund account. Ex 17.

Fraud and undue influence must be proven by clear, cogent, and

convincing evidence. Undue influence is not mere influence but influence that controls the behavior of the testator/owner. Estate of Kessier, 977 P.2d 591 (1999). The court held in the Estate of Marks 957 P.2d 235 (1998), **“Generally, influence exerted by giving advice, arguments, persuasions, solicitation, suggestion or entreaties is not considered undue unless it be so importunate, persistent or coercive and operates to subdue and subordinate the will of the testator and take away his or her freedom of action.”**

He did not claim undue influence and did not put any evidence claiming it. He did not claim lack of testamentary capacity. Donald Palmer claimed incompetence and submitted evidence as to her medical condition. However, incompetence is not a medical decision, it is a legal decision, RCW 11.88.01(1)©. There was no court finding Sarah Palmer incompetent. She could not live alone. However, no evidence was provided that she did not know Dawn Golden, Mrs. Kurz or Donald Carling, Dawn Golden’s husband. Dawn Golden is the daughter and as stated previously had a close relationship with her mother and there is no evidence that Sarah Palmer did not want Dawn Golden to have her funds. Velma Kurz testified that she over heard Sarah Palmer say to Mr. Duffy **“I would like my daughter to have this”** Rp

265. Mr. Duffy handles investments through Edward Jones. The only matter that this could refer to is the Edward Jones account.

The only point argued by the Donald Palmer is the 1997 will giving her estate to the Palmer Living Trust and whose primary beneficiary, 75%, is World Gospel Missions. World Gospel Missions has admitted that it drafted the will and the living trust. That issue, can the drafter of a living trust make itself a major beneficiary upon the death of the trustor or termination of the trust, is on appeal in this court at the present time. The issue was argued prior to trial before the preassigned judge in this matter but the decision was not entered until after the trial.

In addition, the court held that the personal representative is not bound by the one year rule of RCW 11.11.070(3). Donald Palmer filed the petition as both personal representative and trustee/beneficiary Rp 10. Is the beneficiary bared and not the personal representative? If the personal representative is not bound by RCW 11.11.070(3), all any beneficiary would need to do is convince the personal representative to bring the action to avoid being bared from filing a petition. This flies in the face of RCW 11.11.05(1) which states **“When construing sections and provisions of this chapter, the sections and provisions must: (a) Be liberally construed and applied**

to promote the purposes of this chapter; ... RCW 11.11.03.”

The court held that **RCW 11.11.070** is an affirmative defense when it is clearly a statute of repose, limiting the time the court has jurisdiction to hear such matter and jurisdiction can be plead at anytime even after judgment.

Donald Palmer cites as authority for this as an affirmative defense, **1000 Virginia Ltd. Partnership v. Vertec Corp., 146 P.3d 423(2006).** However, that case revolves around a statute, RCW 4.16.326 involving construction contracts. The court, at page 432, specifically held that it was neither a statute of repose nor a statute of limitations.

There is nothing in the case to over rule **Shoop v Kittitas County, 30, P.3d 529 (2001)** holding that jurisdiction can be raised at any time, even after judgment and even if the party raising the issue took part in the trial.

The trial court’s holdings, if up held, would put all stock brokerage accounts which are joint with right of survivorship, with the possible exception of husband and wife accounts, in the position where all the personal representative has to do is allege that a gift was not intended and make the beneficiary, bared from testifying by the deadman’s statute, prove that it was meant as a gift, up to three years after the death or by the trial

court's reasoning, three years from the date the personal representative became aware or should have become aware of the account. This would be a glaring exception to the principal stated in RCW 33.20.100, RCW 11.24.010, and RCW 11.40.051 limiting the time to take action to challenge and changing the burden of proof to more likely than not, rather than the normal statutory burden of clear and convincing in testamentary proceedings. This, Dawn Golden contends, would throw all accounts held in joint tenancy with right of survivorship not covered by RCW 33.20.100, with the exception of husband and wives, in havoc.

Dawn Golden is the natural heir of Sarah Palmer. That by itself does not make a confidential relationship. As stated before, Sarah Palmer's testamentary capacity was never challenged and lack of same must be proven by clear and convincing evidence. Estate of Watlick, 945 P.2d 1154 (1997).

III.

FINDING THE UNLAWFUL USE OF POWER OF ATTORNEY

As to the evidence that the Dawn Golden used her power of attorney to open the Edward Jones account, the only evidence presented to the court was the deposition testimony of Mr. Duffy even though he was present and able to testify. In his court testimony, he stated that Edward Jones would not

open a joint account with right of survivorship with a power of attorney when the attorney-in-fact was the beneficiary ,Rp 231, challenging his credibility as to his deposition testimony.

The court also considered as evidence the Evergreen Fund account Ex 17 which was a joint account with right of survivorship that Sarah Palmer opened at some unknown time in the past and the transfer of the funds in that account to Edward Jones just changed the holder of the funds, not the nature of the holding the funds, same owner and same beneficiary.

The evidence of the opening of the Sarah Palmer - Alfred Palmer joint account with right of survivorship with the power of attorney is not applicable. All of the Palmer's assets were community property and held in joint tenancy with right of survivorship. The transfer of the assets held in the previous accounts to Edward Jones merely changed the location of the assets. It did not change the manor in which they were held. The 1999 power of attorney, paragraph five, gave Dawn Golden the power to make investments with no restriction and paragraph eight reads "**To make deposits to and withdrawals from, and to open and close any savings or checking account or any certificate of deposit or money market fund in my name alone, or in the name and names of others, and to carry out the terms of**

this paragraph, to endorse my name on any check, draft or money order for the deposit into such account.” Cp 215-220.

In addition, the first power of attorney, dated April 3, 1997, sent to Edward Jones Ex 17 did not authorize Dawn Golden to do anything. The attorney-in- fact on the power of attorney was Alfred Palmer. The first alternate was Donald Palmer. The second alternate was Douglas Palmer who was living at the time and the third alternate was Dawn Golden. Neither of the sons formally refused to serve in writing. Therefore, on December 22, 2000, Edward Jones had no signatures or authorizations from any attorney-in-fact.

In addition, Dawn Golden contends that Donald Palmer had the duty to prove that what he alleged, the opening of the joint account with right of survivorship with the attorney-in-fact as beneficiary, using a power of attorney is possible. **RCW 11.94.010** clearly takes away any immunity of the institution for relying on a power of attorney if it opens an account using a power of attorney where the attorney-in-fact is the beneficiary if the power of attorney does not allow making gifts to the attorney-in-fact. No testimony or document was presented to the court that Dawn Golden could or would be allowed to open the account.

Dawn Golden has been put in the position by Donald Palmer and the court of having to prove a negative(s). That she didn't instead of Donald Palmer proving she could have. Dawn Golden believes that Donald Palmer had the requirement to prove it was possible.

Therefore, there is not even enough evidence to be more likely than not. All but Mr. Duffy's conflicting testimony are not relevant because they only changed the location of assets, not the form they were held.

IV.

GIFT

Dawn Golden has addressed the issue of having her prove a gift.

V.

BURDEN OF PROOF

&

EXCLUSION OF EVIDENCE

The issue of the Edward Jones records is frustrating. Dawn Golden subpoenaed the Edward Jones account records by subpoena dated August 1, 2006. Out of the 445 pages of records received as a result of the subpoena, none were the records of the opening of the account. Dawn Golden's attorney tried to talk to Edward Jones to find out what the records were for

and how and when required. Dawn Golden's attorney was unable to talk to Edward Jones until he was given the phone number of the Edward Jones legal department by a representative not related to the issues in this case. after the discovery cutoff Cp 316-319.

Upon learning what language in the subpoena might help, Dawn Golden's attorney issued a second subpoena, after the discovery cut off, and received hard copies of the Edward Jones electronic records of opening. Donald Palmer's attorney received the same records, which he had subpoenaed in December, 2006, a day after Dawn Golden's attorney. The Edward Jones General Counsel also sent a note, dated January 19, 2007 (Friday), apologizing for not sending them in answer to the first subpoena. Cp321.

Dawn Golden's counsel immediately moved the court, preassigned judge, for an order allowing the addition of the documents the list of exhibits which had already been filed. Cp316-328. Donald Palmer objected to the addition and the preassigned judge denied the motion but found that Dawn Golden's attorney used due diligence but the wrong procedural form. Grp 12. The records clearly show that the Edward Jones account was not opened with a power of attorney on December 22, 2000. Cp325. The case schedule is not

required to and should not be used to keep out relevant evidence of the issues before the court if the delay was caused by a third party and the offering party used due diligence.

Donald Palmer has cited the case of **State v. Kinard, 696 P.2d 603 (1985)** for the position that Dawn Golden had the duty to attempt to have the Edward Jones records entered at trial. However, the court in that case ruled that the prosecution could renew its opposition to the motion in limine at trial if circumstances dictated. That was not the case of the court's ruling on Dawn Golden's motion. The court said no! The only recourse of Dawn Golden at that time would be a motion for discretionary appeal. The trial was ten days away (Friday to Monday). The other case cited by Donald Palmer is **Eagle Group, Inc. v. Pullen 58 P.3d 292 (2002)**. That case involves the court's refusal to grant a motion in limine. The court held in that set of facts the appellant had to object at trial to the entry of evidence. The court in this matter said no to addition of the Edward Jones records because of the case schedule. **PCLR 5(f)** requires court approval to add witnesses and by implication the exhibits after the cut off date.

Dawn Golden would call the court's attention to the fact that Donald Palmer filed the original petition without any proof of how the account was

opened. It is clear from the record that the Donald Palmer, since the Dawn Golden had a power of attorney and there was an account opened, concluded that she used the power of attorney to open it. He could have simply subpoenaed Edward Jones records and discovered how the account was opened. He did not. This is not really a matter for trial. There is no allegation of undue influence or fraud. The allegation is the account was opened using a power of attorney. It was not. The records state how it was opened. There is no question of what the records state. Cp 316-328. Sarah Palmer opened the account. They are business records kept in the normal course of business. Dawn Golden's attorney should not have been required to subpoena them. Donald Palmer should have obtained them before filing his petition.

VI.

GIFTS AND LOANS

The issue of the loans and gifts made by Dawn Golden raises an issue that Dawn Golden has not been able to find a case applicable to. Whom has the burden of proving that the grantor of the power of attorney did not approve of the gifts and loans? She is bared by the deadman's statute from testifying. This raises the issue again that an attorney-in-fact can, by the

court's ruling, follow the instructions of the grantor and after the grantor's death, have the personal representative challenge the attorney-in-fact's actions and not be able to defend him/herself. That puts the attorney-in-fact in a position of never following the instructions of the grantor if it involves a gift or loan. The 1999 power of attorney gives Dawn Golden the power to make gifts in good faith and loans without any requirements as to interest or security. Cp 216,217.

VII.

MISSING ASSETS

As to the issue of the missing assets, there are no records available with the companies involved because of the time lapse and mergers. Donald Palmer's attorney stated in his opening statement Rp 24 and in his closing statement Rp 286 that he was unable to determine where the funds from certain assets went as set forth in his trial brief. Cp 47-49. There would be no reason for Dawn Golden to assume that the six or seven years later, she would have to produce these records. Dawn Golden contends that simply not being able to state what happened to the funds, she was paying for the Palmer's nursing home care at the time, is not sufficient evidence to charge her with misappropriation and make her liable for the unaccounted funds.

There is no evidence that the funds were misappropriated. Donald Palmer should be required to prove they were not used for the benefit of the Palmers.

VIII.

DONALD PALMER AS TRUSTEE

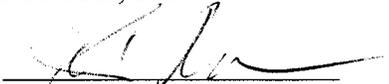
Donald Palmer claims he was not the trustee of the Palmer Trust until Sarah Palmer died. However, he sold trust property and invested the proceeds prior to her death, Rp 81,82.

In addition, the Palmer Trust provides that if Sarah Palmer became unable to handle her affairs, Donald Palmer became the trustee. If he did not realize it, it was wilful. Alternately, he by lack of action, affirms her testamentary capacity and her ability to give instruction and approval of Dawn Golden's action.

CONCLUSION

WHEREFORE, Dawn Golden requests that her appeal be granted as to the 19 allegations of error as set forth in her opening brief.

Respectfully submitted the 24th day of October, 2007

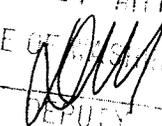

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Attorney for the Dawn Golden,
Appellant

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COURT OF APPEALS DIV II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
BY 
DEPUTY

In re Estates of)	
)	No. 36339-9-II
ALFRED S. PALMER and SARAH)	
L. PALMER,)	
Deceased.)	DAWN GOLDEN'S REPLY
Respondent)	
)	DECLARATION OF
)	SERVICE
DAWN PALMER GOLDEN,)	
Appellant,)	

The undersigned hereby declares: That he is now and at all times herein mentioned was a citizen of the United States and a resident of the State of Washington, over the age of eighteen, not a party to nor interested in the above entitled action, and is competent for be a witness therein.

That on the 24TH day of October, 2007, declarent duly served a REPLY BRIEF in the above entitled action upon JAMES HANDMACHER, attorney for the respondent, Donald Palmer, by then and there personally delivering a true and correct copy thereof into his office at:
820 A STREET, SUITE 600
TACOMA, WA 98401

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

SIGNED AT GIG HARBOR, WASHINGTON, THIS 24TH DAY OF OCTOBER, 2007.


John A. Korem WSBA #4069