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

KAREN ELIZABETH BUSSLER,

Respondent/Cross-Appellant,

v.

ESTATE OF JACQUELYN BUSSLER, deceased,

KATHLEEN BUSSLER,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR CLARK COUNTY
THE HONORABLE ROBERT HARRIS

BRIEF OF RESPONDENT/CROSS-APPELLANT

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I. INTRODUCTION

Jacquelyn Bussler, the mother of respondent Karen Bussler and appellant Kathleen Bussler, died in March 2009. Respondent Karen took over her mother's 24-hour care for nearly a year before she died, as the mother's health deteriorated. Appellant Kathleen, who was not employed, did not provide any care for their mother except during a one-month visit approximately three months before she died. Shortly before her death, the mother executed a new Will leaving her entire estate, consisting almost entirely of a rental home with a tax assessed value of $170,000, to Karen alone, revoking a 12-year-old Will that would have divided the estate equally between the daughters.

Substantial evidence supports the trial court's decision after trial rejecting Kathleen's claims that the mother lacked testamentary capacity and that Karen unduly influenced her. Instead, the trial court found that the mother's decision to make Karen her sole beneficiary was likely guided by the respondent "providing significant aid over a substantial portion of time," which led the mother to believe "that the [respondent] is more deserving." This was a wholly proper reason for the mother to favor her daughter

Karen in her Will, and the trial court was well within its discretion in enforcing the mother's intentions. This court should affirm the trial court's decision upholding the mother's 2009 Will. This court should reverse the trial court decision denying an award of attorney fees to Karen against Kathleen, and order Kathleen to pay Karen's attorney fees on appeal.

II. CROSS-APPEAL ASSIGNMENT OF ERROR

The trial court erred in awarding attorney fees to Karen Bussler against the mother's estate instead of against Kathleen Bussler, who brought the unsuccessful Will contest. (CP 62)

III. CROSS-APPEAL STATEMENT OF ISSUE

RCW 11.24.050 provides that if the trial court sustains a Will after a Will contest, it may impose attorney fees against the party contesting the Will. After upholding the 2009 Will, did the trial court abuse its discretion in failing to impose attorney fees against Kathleen Bussler, who contested the Will?

IV. RESTATEMENT OF FACTS

A. Shortly Before Her Death, The Mother Executed A Will Leaving Her Entire Estate To One Daughter, Revoking An Earlier Will That Had Left Nothing To Her Two Sons And Divided Her Estate Equally Between Her Two Daughters.

The decedent, Jacquelyn Bussler, is the mother of four children: two daughters, respondent Karen Bussler and appellant Kathleen Bussler, and two sons, James Robert Ryan III and Michael John Ryan. (RP 114; Ex. 20) Jacquelyn died on March 22, 2009, at age 72. (RP 69; Ex. 7)

At the time of her death, Jacquelyn's daughter Karen had been living with her full-time for nearly one year, providing around-the-clock care. (RP 83-84) Jacquelyn's other daughter, Kathleen, lived in Hayden, Idaho. (RP 114) She visited Jacquelyn twice in the two years before her death, and for the last time approximately three months before her mother died. (RP 115-16) Jacquelyn's sons, who are not parties to this action, appeared to have had little or no contact with Jacquelyn over the last few years.

On March 14, 2009, a week before her death, Jacquelyn executed a new Last Will and Testament. (Appendix A (Ex. 20)) Jacquelyn executed the Will in her home in Vancouver, Washington, with two neighbors, Michael and Barbara Meyer, as

witnesses. (RP 17, 20, 22, 38; Ex. 20) Marlys Cameron, a legal assistant for the attorney who prepared Jacquelyn's Will, notarized their signatures. (RP 38) The Will met all the requirements under RCW 11.12.020 for a valid will. (*See* Appendix A)

This 2009 Will revoked an earlier Will that Jacquelyn had executed on September 29, 1997. (Ex. 18) The 1997 Will eliminated the two sons as beneficiaries of the mother's estate, and left the daughters as equal beneficiaries to "share and share alike." (Ex. 18 at 3) The 1997 Will also eliminated Jacquelyn's four stepchildren as beneficiaries of her estate. (Ex. 18 at 3)

The 1997 Will had named Jacquelyn's husband as the personal representative of her estate, and daughter Kathleen as the alternate representative. (Ex. 18 at 1) In February 2000, Jacquelyn executed a codicil to her 1997 Will, replacing Kathleen as the alternate personal representative with daughter Karen.[1] (Ex. 19) Jacquelyn's husband died in September 2000. (RP 116-17) In December 2003, Jacquelyn executed a Durable Power of Attorney designating Karen as her attorney-in-fact. (Ex. 17) By its terms,

[1] The codicil refers to a 1995 Will, but the attorney who prepared the codicil testified that it was an error and the codicil was intended to reference the 1997 Will. (RP 9)

the power of attorney "became effective upon the disability or incompetence of the Principal." (Ex. 17)

In her 2009 Will, Jacquelyn bequeathed her entire estate to her daughter Karen, and appointed her as personal representative. (Ex. 20 at 2) On the same day she executed the Will, Jacquelyn executed a Warranty Deed conveying to Karen her interest in certain real property with a taxed assessed value of $170,000. (CP 16) The only other assets of Jacquelyn's estate were a $1,358 bank account and personal property. (Ex. 12, 15) Jacquelyn also had a life insurance policy with a value of $2,200. (RP 97) In 2001, Jacquelyn had named Karen as the primary beneficiary of this policy, with Kathleen as the contingent beneficiary. (Ex. 11)

B. After Karen Filed The 2009 Will With The Court, Kathleen Filed A Petition To Probate The 1997 Will And Invalidate The 2009 Will. The Trial Court Upheld The 2009 Will.

After Jacquelyn died on March 22, 2009, Karen filed the 2009 Will with the Clark County Superior Court on March 31, 2009, but did not file a petition to probate the Will. (CP 2) Karen also recorded the Warranty Deed that Jacquelyn executed on the same day as her Will, on March 30, 2009. (RP 41; CP 16)

On April 10, 2009, Kathleen filed a petition asking the court to probate the 1997 Will and to invalidate the 2009 Will, based on her claim that the 2009 Will was "executed without competency, capacity and under undue influence." (CP 1-2) On April 21, 2009, Karen filed a petition asking the court to revoke the 1997 Will in light of the execution of the March 14, 2009 Will, which specifically revoked all earlier Wills, and asked the court to probate the 2009 Will. (CP 21)

The parties appeared before Clark County Superior Court Judge Robert Harris on July 8, 2009 for a trial to determine the validity of the 2009 Will. Among other witnesses, the trial court heard testimony from Karen and Kathleen, from the two neighbors who witnessed Jacquelyn execute the 2009 Will, and from the notary public who notarized the 2009 Will. After hearing the testimony of the witnesses, the trial court rejected Kathleen's claims that Jacquelyn lacked the testamentary capacity to execute her March 14, 2009 Will, and that Karen had exercised undue influence over Jacquelyn. (CP 57-58) The trial court held that the March 14, 2009 Will was valid and accepted that Will for probate. (CP 61)

Although Karen sought attorney fees from Kathleen, the trial court awarded Karen attorney fees from Jacquelyn's estate. (CP 62)

1. Although The Mother Was Ill When She Executed Her Will, There Was Substantial Evidence That She Had The Testamentary Capacity To Execute Her Will.

The trial court acknowledged that Jacquelyn had been ill over the last several months of her life, including when she executed her Last Will and Testament. (Finding of Fact (FF) 4, CP 60) Nevertheless, the trial court found that "based upon the testimony of witnesses and despite ill health, the court gave weight to the time that went into explanation of the second Will and that [Jacquelyn] did understand her testamentary act." (FF 12, CP 61) There is substantial evidence to support this determination:

When Jacquelyn executed her will, her health was in decline, and she was suffering from Chronic Obstructive Pulmonary Disease (COPD). (RP 118) On March 12, 2009, two days before Jacquelyn executed her Will, she was interviewed for hospice care. (Ex. 10 at 540) According to the hospice notes, Jacquelyn was described as "alert" and "oriented to person [and] place." (Ex. 10 at 541)

The same day as the hospice interview, Karen contacted the office of attorney William Miles on behalf of her mother. (CP 39; RP 90) Karen had earlier attempted to contact attorney Gilbert Kalaweno, who had prepared the mother's 1997 Will and 2000 codicil, but was unable to reach him. (RP 7-8, 9, 89) Karen explained to Mr. Miles' legal assistant that Jacquelyn was diagnosed with COPD, congestive heart failure, and emphysema, and was interested in having a new Will prepared. (CP 39) The following day, on March 13, 2009, Attorney William Miles visited Jacquelyn at her home to collect information to prepare a new Last Will and Testament. (CP 42) They met alone. (CP 42) Based on this meeting, Mr. Miles prepared a Will that left Jacquelyn's entire estate to her daughter Karen. (CP 42, Ex. 20) Mr. Miles also prepared the Warranty Deed that gifted certain real property owned by Jacquelyn to Karen. (CP 16, 42)

On March 14, 2009, Mr. Miles' legal assistant, Ms. Cameron, came to Jacquelyn's home to go over the terms of the prepared Will and Deed and to have Jacquelyn sign the documents if she agreed. (RP 38-39) Ms. Cameron testified that Jacquelyn looked ill, but that she did not appear medicated, and was "alert," "cognizant," and

"patient" while they reviewed the terms of the Will and Deed. (RP 38, 45, 47) Ms. Cameron testified that she spent approximately one hour going over both the Will and the Deed with Jacquelyn. (RP 47) Although Karen was present at the home, Ms. Cameron and Jacquelyn were alone while Ms. Cameron reviewed the Will with her. (RP 38-39) When they finished reviewing the Will and Deed together, Ms. Cameron asked Jacquelyn if the documents were prepared as she wanted and Jacquelyn agreed. (RP 39) Ms. Cameron testified that at no point did Jacquelyn express any disagreement with the Will and the Deed as they were prepared. (RP 38)

Michael and Barbara Meyers, who had been Jacquelyn's neighbors for nearly thirty years, came to the house to witness Jacquelyn sign her will. (RP 14, 22) Both witnesses described Jacquelyn as knowing who they were and knowing that they were there to witness her signing her Will. (RP 14-15, 22) Mrs. Meyer testified that Jacquelyn had no trouble signing the Will, except that she needed someone to point out where she should sign. (RP 16) Mr. Meyer testified that Jacquelyn's hand appeared to be "shaky" when she signed the Will. (RP 23) When Jacquelyn executed the

Will, the Meyers swore that she "appeared to be of sound and disposing mind, and not acting under duress, menace, fraud, undue influence or misrepresentation." (Ex. 20 at 4)

2. The Mother's Decision To Make Karen The Sole Beneficiary Of Her Estate Was Based On Her Affection Towards Her Daughter In Light Of Her Support During The Mother's Final Illness, And Not Due To Any Undue Influence.

After finding that Jacquelyn had the testamentary capacity to execute her Will, the trial court also found that Jacquelyn's decision to make Karen the sole beneficiary of her estate was not a result of undue influence. (*See* CP 57) The trial court found that the mother was "estranged" and "alienated" from Kathleen. (FF 10, CP 60) The trial court also found that Jacquelyn's decision to make Karen her sole beneficiary was likely due to the fact that Karen provided "significant aid over a substantial portion of time," which lead to Jacquelyn "feeling that [Karen] is more deserving." (CP 57) There is substantial evidence to support the trial court's determination:

Karen had lived continuously with Jacquelyn since April 2008 until her death on March 22, 2009. (RP 83) Karen had left her job in Illinois to live with her mother and care for her. (RP 152-53) During Jacquelyn's final year, Karen served as her primary

caregiver. (RP 84) Karen provided care for Jacquelyn every day except for Sunday mornings while she went to church. (RP 84) On those occasions, Karen's boyfriend provided care. (RP 84) Although the Division of Heath and Social Services authorized payment from Jacquelyn to Karen for her care, Karen never accepted any funds from Jacquelyn while she was alive. (RP 100) Karen did accept direct payments from DSHS that amounted to approximately $5,000. (*See* RP 86) DSHS sought to recoup those payments and filed a creditor's lien in the probate. (RP 86)

Shortly before Jacquelyn executed her 2009 Will, a hospice administrator noted that both Jacquelyn and Karen "discussed [Karen]'s commitment to provide her mother with end of life care at home." (Ex. 10 at 542) The hospice administrator noted the concern that both Karen and Jacquelyn expressed for each other. Jacquelyn expressed "concern[ ] that [Karen] is having a difficult time accepting and dealing with [Jacquelyn's] impending death." (Ex. 10 at 545) Karen expressed concern that Jacquelyn was only just then coming to terms with her terminal illness. (Ex. 10 at 545)

The hospice administrator also noted that a "risk to the bereavement process" was that there was "family discord," because

"Jacquelyn is estranged from her daughter Kathy, and refuses to talk to Kathy, who calls the patient often." (Ex. 10 at 542, 545) The estrangement may have resulted from the fact that Kathleen provided minimal care to Jacquelyn during her final year. Kathleen has lived in Hayden, Idaho for the last 15 years. (RP 114) While Kathleen testified that she was in regular telephone contact with her mother, Kathleen visited infrequently, even though she was not employed. (RP 114-15) Kathleen visited her mother once in 2007 and once in 2008. Each visit was a little over one month long. (RP 115-16) Kathleen did not always stay in Jacquelyn's home during these visits. (RP 116) Sometimes she stayed with other family members and sometimes with friends. (RP 116) Kathleen last saw Jacquelyn on December 1, 2008. (RP 115) Although Kathleen testified that she knew that Jacquelyn's health deteriorated after she left, Kathleen did not return to Vancouver until after she learned of her mother's death. (*See* RP 115, 126)

The trial court entered its order and findings upholding the 2009 Will on August 21, 2009. (CP 59-62) Kathleen appeals. Karen cross-appeals the trial court's decision making the mother's estate, rather than Kathleen, responsible for her attorney fees.

V. ARGUMENT

A. Appellant Failed To Show By Clear And Convincing Evidence That The Mother Lacked The Testamentary Capacity To Execute Her Will.

"The disposition by will of one's property is a valuable right which is assured by law." ***Estate of Miller***, 10 Wn.2d 258, 266, 116 P.2d 526 (1941). "[T]he law presumes testamentary capacity in the testator or testatrix and that the will speaks his or her wishes. In order to set aside a will the evidence must be cogent and convincing." ***Miller***, 10 Wn.2d at 267. The burden is on the party alleging a lack of testamentary capacity "to show, by evidence which is clear and convincing, that for some reason the will against which the contest was instituted should be set aside." ***Estate of Kinssies***, 35 Wn.2d 723, 734, 214 P.2d 693 (1950). Here, Kathleen fails to meet her burden of producing clear, cogent, and convincing evidence that the mother lacked the testamentary capacity to execute her 2009 Will. The trial court properly upheld the 2009 Will and its findings in support of its determination are supported by substantial evidence.

1. There Is Substantial Evidence That The Mother Understood The Terms Of Her 2009 Will Making Respondent The Sole Beneficiary Of Her Estate.

Kathleen failed to show by clear and convincing evidence that the mother lacked the testamentary capacity to execute her Will. Instead, based on the evidence presented, the trial court found that the mother in fact "did understand her testamentary act." (FF 12, CP 61) The trial court based its determination, in part, on the testimony of the notary public who testified that she spent an hour with the mother going over the terms of her Will, during which time the mother was "listening and alert." (RP 47) The trial court found that the notary public "reviewed the Will page-by-page with the decedent determining it to be as decedent requested." (FF 8, CP 60)

The trial court's "[f]indings of fact will be upheld on review if they are supported by substantial evidence in the record." ***Estate of Kessler***, 95 Wn. App. 358, 369, 977 P.2d 591 (1999). Here, there is substantial evidence to support the trial court's finding that the mother had the testamentary capacity to execute her will. (*supra* §IV.B.1) In fact, Kathleen does not assert that there was no evidence to support the trial court's findings. Instead, she

challenges the weight that the trial court gave to the notary public's testimony, asserting that "nothing in [the notary public]'s testimony seems to indicate she had anything more than 'yes' or 'no' answers to her questions, nor does it appear that [the notary public] engaged in any conversation with Jacquelyn." (App. Br. 9)

But this court must "defer to the finder of fact on issues of credibility and weight of the evidence." ***Grundy v. Brack Family Trust***, 151 Wn. App. 557, 570, § 26, 213 P.3d 619 (2009), *rev. denied*, 168 Wn.2d 1007 (2010). Further, "[w]here there is conflicting evidence, the reviewing court need only determine whether the evidence most favorable to the responding party supports the challenged findings." ***Kessler***, 95 Wn. App. at 369. Here, viewing the evidence in the light most favorable to Karen, there was substantial evidence that the mother had testamentary capacity and understood, and desired, that Karen be the sole beneficiary of her estate. This court should affirm.

2. The Respondent's Use Of The Mother's Power Of Attorney To Assist Her In Executing Documents When The Mother Was Physically Unable To Legibly Sign Her Name Was Not Clear And Convincing Evidence Of The Mother's Lack Of Testamentary Capacity.

Kathleen claims that Karen's use of the mother's Durable Power of Attorney at various times between December 2008 and March 2009 was evidence that the mother lacked testamentary capacity. (App. Br. 9) But the trial court found that Karen's use of the power of attorney was not "evidence of decedent's lack of cognitive ability to manage her own affairs," and not a "ground[ ] to set aside the Will decedent signed on March 14, 2009." (FF 13, CP 61) The trial court noted that the power of attorney "is in the alternative to dealing with mental capacity and/or physical ability to care for one's needs, which clearly from the medical evidence was deteriorating at the time it was used." (CP 58) In other words, the power of attorney became effective on either the mother's mental incompetence *or* physical disability.

Karen testified that she only signed for the mother using her power of attorney because of the mother's physical disabilities, not because the mother was incompetent. (RP 98-99) For example, Karen testified that she often wrote checks on behalf of her mother

because the mother's "shakiness" often made it difficult for her to sign documents legibly. (RP 103) Karen also testified that the mother was present every time that Karen signed any document on the mother's behalf. (RP 81)

There was substantial evidence to support the trial court's determination that Karen's use of the power of attorney was not evidence of a mental incompetence but as a result of a physical disability, which did not affect the mother's testamentary capacity. In fact, Mr. Meyers, one of the witnesses to the 2009 Will, testified that the mother was "shaky" when signing the Will (RP 23), but was nevertheless of "sound and disposing mind." (Ex. 20 at 4) While Kathleen claims a different inference from the evidence, when "there is conflicting evidence, the reviewing court need only determine whether the evidence most favorable to the responding party supports the challenged findings." ***Estate of Kessler***, 95 Wn. App. at 369.

3. The Mother's Illness And Use Of Pain Medication Alone Is Not Clear And Convincing Evidence That The Mother Lacked The Testamentary Capacity To Execute Her Will.

Kathleen also claims that the mother's deteriorating physical condition was evidence of her lack of testamentary capacity. (App.

Br. 9-10) But the fact that the mother was ill is not, in and of itself, clear and convincing evidence that she lacked the testamentary capacity to make her Will. *See* ***Estate of Ellis***, 143 Wash. 142, 144, 254 P. 837 (1927).

In ***Ellis***, the appellate court affirmed the trial court's determination that the decedent had testamentary capacity to make her Will even though there was evidence that "the deceased was a very sick person at the time she made her will, and some of the testimony shows that during the three or four weeks before her death she was at times suffering much pain, was flighty, and had very poor memory." ***Ellis***, 143 Wash. at 144. The trial court in ***Ellis*** based its determination on testimony from other persons, including those who witnessed the execution of the Will, that the decedent was generally mentally sound, knew what she was doing, and knew how she wanted her estate divided. 143 Wash. at 144. Here too, although the mother had been ill in the months leading up to her death, there was also evidence that showed that around the time the mother executed her Will that she was "alert," "cognizant," and understood the terms of the Will that she signed. (RP 38, 39, 47; Ex. 20 at 4)

Furthermore, the fact that the mother was on various medications also does not, in and of itself, constitute clear and convincing evidence of a lack of testamentary capacity. As our Supreme Court has stated: "It often happens that, after receiving a physical injury or while sick, a person desires to make a will. If for such a sufferer a physician prescribes a sedative or some medicine to ease pain or reduce nervousness, the fact that such a drug has been administered is not, of itself, proof or even weighty evidence of testamentary incapacity." ***Estate of Kinssies***, 35 Wn.2d at 734; *see also* ***Estate of Mikelson***, 41 Wn.2d 97, 99, 247 P.2d 540 (1952) ("The ministration of narcotics was but one of the evidentiary facts of the whole case, and is not, of itself, proof or even weighty evidence of testamentary incapacity").

4. The Mother's Decision To Make Respondent The Sole Beneficiary Of Her Estate Was Not Such A "Radical Departure" That Would Warrant An Inference Of An "Unsound Mind."

The fact that the 2009 Will leaving the estate to Karen was different from the 1997 Will leaving Karen and Kathleen as equal beneficiaries is not such a "radical departure" that would create an "inference that the later will is the product of an unsound mind." (App. Br. 11, *citing* ***Estate of Kessler***, 95 Wn. App. 358, 372, 977

P.2d 591 (1999)) The mother had previously disinherited her two sons in her 1997 Will. (*See* Ex. 18) Thus, the fact that the mother then disinherited her daughter Kathleen twelve years after executing her 1997 Will is not the "radical departure" that Kathleen asserts. This is particularly true in light of Kathleen's lack of in-person contact with her mother during the final three months of the mother's life. There also was evidence that during the years since executing her 1997 Will, the mother appeared to be closer with Karen than with Kathleen, including the fact that the mother's 2000 codicil replaced Kathleen with Karen as the alternate personal representative of her estate (Ex. 19); that in 2001, the mother made Karen the primary beneficiary of her life insurance (Ex. 11; RP 96-97); and that in 2003, the mother appointed Karen as her attorney-in-fact in the event of her physical disability or mental incompetence. (Ex. 17)

"[W]here a will, rational on its face, is shown to have been executed in legal form, the law presumes testamentary capacity in the testator or testatrix and that the will speaks his or her wishes." ***Estate of Miller***, 10 Wn.2d 258, 266, 116 P.2d 526 (1941). The mother's will making Karen the sole beneficiary of her estate was

"rational" in light of the fact that Karen provided around-the-clock care during the last year of the mother's life and was the daughter with whom she appeared to be closer. Because Kathleen failed to show clear and convincing evidence that the mother lacked testamentary capacity when she executed her Will, the trial court properly found the 2009 Will was valid. This court should affirm.

B. Appellant Failed To Show By Clear And Convincing Evidence That The Mother's Will Was The Product Of Undue Influence.

Kathleen is correct that she "bore the burden of proving the invalidity of the March [14], 2009 Will by clear, cogent, and convincing evidence." (App. Br. 12, *citing* ***Estate of Riley***, 78 Wn.2d 623, 649, 479 P.2d 1 (1970)) Even if there were evidence that might support a finding of undue influence under the factors set forth in ***Dean v. Jordan***, 194 Wash. 661, 672, 79 P.3d 331 (1938),[2] cited by Kathleen (App. Br. 12), this does "not relieve the contestant

[2] "The most important of such facts are: (1) That the beneficiary occupied a fiduciary or confidential relation to the testator; (2) that the beneficiary actively participated in the preparation or procurement of the will; and (3) that the beneficiary received an unusually or unnaturally large part of the estate. Added to these may be other considerations such as the age or condition of health and mental vigor of the testator, the nature or degree of relationship between the testator and the beneficiary, the opportunity for exerting an undue influence, and the naturalness or unnaturalness of the will." ***Dean v. Jordan***, 194 Wash. 661, 672, 79 P.2d 331 (1938).

from establishing their contention by clear, cogent, and convincing evidence." ***Estate of Kessler***, 95 Wn. App. at 378. Thus, Kathleen was required to show not only that there was presumption of undue influence under ***Dean v. Jordan***, but that there was clear and convincing evidence to "establish influence tantamount to force or fear" over the mother on the part of Karen. ***Kessler***, 95 Wn. App. at 379.

In other words, Kathleen was required to show not just that Karen had influence over the mother, but that such influence was "undue." "To be classed as undue, influence must place the testator in the attitude of saying, 'It is not my will, but I must do it.'" ***Converse v. Mix***, 63 Wash. 318, 320-321, 115 P. 305 (1911). Kathleen had to show that the mother acted "under such coercion, compulsion, or constraint that [her] own free agency is destroyed." ***Converse***, 63 Wash. at 321. Kathleen had to show that the mother became "the tutored instrument of a dominating mind which dictates to [her] what [s]he shall do, compels [her] to adopt its will instead of exercising [her] own, and by overcoming [her] power of resistance impels [her] to do what [s]he would not have done had [s]he been free from its control." ***Converse***, 63 Wash. at 321.

Here, there was no such evidence, especially no "clear, cogent, and convincing evidence" that due to Karen's influence, the mother's "free agency was destroyed." ***Converse***, 63 Wash. at 321. Instead, as the trial court recognized in its memorandum decision, the evidence showed that the mother's 2009 Will was not the product of undue influence but was likely guided by the fact that Karen "provid[ed] significant aid [to the mother] over a substantial portion of time," which likely led to the mother's determination that Karen was "more deserving." (CP 57)

"A testator's favor expressed in a will may be won by devoted attachment, self-sacrificing kindness, and the beneficent ministrations of friendship and love. These influences are not undue." ***Converse,*** 63 Wash. at 318. When one child undertakes a greater burden during the parent's life to care for that parent, "it is not surprising nor unnatural, therefore, that she should make him the object of her greatest bounty." ***Converse***, 63 Wash. at 320. While a parent's "affection" for one child may have influenced the parent to remember that child in the parent's will to the exclusion of another child, "it is not that character of influence that is classed by the law as undue influence, or that character of influence that

authorizes the courts to vacate and hold for naught last wills and testament." ***Converse***, 63 Wash. at 320.

Because Kathleen failed to show clear and convincing evidence that Karen exerted undue influence over the mother in executing her Will, the trial court properly found the 2009 Will was valid. This court should affirm.

C. This Court Should Award Attorney Fees To The Respondent Under RCW 11.24.050 In Defending Against This Appeal Of An Order Sustaining The Mother's 2009 Will.

This court should deny Kathleen's request for attorney fees and instead, award attorney fees to Karen under RCW 11.24.050 for defending against Kathleen's appeal challenging the 2009 Will. RCW 11.24.050 provides the court with discretion to assess attorney fees against a contestant to a Will if the Will is sustained. Below and on appeal, Kathleen failed to meet her burden in proving a basis to set aside the 2009 Will by clear, cogent, and convincing evidence. This court should award attorney fees to Karen.

VI. ARGUMENT IN SUPPORT OF CROSS-APPEAL

A. The Trial Court Erred In Failing To Award Attorney Fees To The Respondent From Appellant Under RCW 11.24.050.

RCW 11.24.050 allows for the award of reasonable attorney fees and costs against the party contesting if the will is sustained:

> If the will be sustained, the court may assess the costs against the contestant, including, unless it appears that the contestant acted with probable cause and in good faith, such reasonable attorney's fees as the court may deem proper.

RCWA 11.24.050. Here, the trial court erred in failing to assess Karen's attorney fees and costs against Kathleen after it found that the 2009 Will was valid and rejected the 1997 Will, which Kathleen sought to probate.

Kathleen did not have "probable cause" to contest the 2009 Will. It was undisputed that Karen had been the mother's primary caregiver over the last year, with minimal support from Kathleen. Kathleen had made no attempt to visit the mother during the last three months of the mother's life even though Kathleen knew that the mother's health was deteriorating. Kathleen knew that in the past, the mother had no qualms in disinheriting her children if it so pleased her, thus the mother's 2009 Will disinheriting her due to their estrangement should have been no surprise to Kathleen.

Because Karen was forced to defend against Kathleen's will contest, Kathleen, not the mother's estate, should have been responsible for the incurred attorney fees under RCW 11.24.050. Making the estate responsible for the attorney fees results in a reduced award to Karen from the mother's estate, which under the circumstances is not equitable. *See* ***Gwinn v. Church of Nazarene***, 66 Wn.2d 838, 849, 405 P.2d 602 (1965) (holding that the executor should personally be responsible for the heirs attorney fees, otherwise "respondent will not fully receive what the testator intended to bequeath to it"). This court should reverse and remand to the trial court with directions to award attorney fees to Karen against Kathleen.

VII. CONCLUSION

This court should affirm the trial court's decision upholding the mother's 2009 Will because appellant failed to meet her evidentiary burden to prove by clear, cogent, and convincing evidence that the mother lacked the testamentary capacity to execute her Will and that the respondent unduly influenced the mother in making her Will. This court should reverse the trial court's decision imposing the award of attorney fees to the

respondent against the mother's estate. This court should award attorney fees to the respondent for having to respond to this appeal.

Dated this 2 day of April, 2010.

EDWARDS, SIEH, SMITH & GOODFRIEND, P.S.

By: _____
Catherine W. Smith
WSBA No. 9542
Valerie Villacin
WSBA No. 34515

MILES & MILES, P.S.

By: _____
William L. Miles
WSBA No. 8160

Attorneys for Respondent/Cross-Appellant

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on April 2, 2010, I arranged for service of the foregoing Brief of Respondent/Cross-Appellant, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division II 950 Broadway, Suite 300 Tacoma, WA 98402	___ Facsimile ___ Messenger X U.S. Mail ___ Overnight Mail
William L. Miles Miles & Miles, P.S. 1220 Main St., Suite 455 Vancouver WA 98660	___ Facsimile ___ Messenger X U.S. Mail ___ Overnight Mail
Suzan L. Clark Attorney at Law 1101 Broadway St., Suite 250 Vancouver, WA 98660	___ Facsimile ___ Messenger X U.S. Mail ___ Overnight Mail

DATED at Seattle, Washington this 2nd day of April, 2010.

Carrie O'Brien

FILED
COURT OF APPEALS
10 APR -5 AM 9:32
STATE OF WASHINGTON
BY
DEPUTY

Last Will and Testament

OF

JACQUELYN I. BUSSLER

I, ***JACQUELYN I. BUSSLER***, of Vancouver, Washington, being of legal age, do make, publish and declare this my Last Will and Testament as follows, hereby revoking all Wills and Codicils previously by me made, that is to say:

1. DECLARATIONS

1.1 Family Status. I declare that I am single. I have four children, namely: JAMES ROBERT RYAN III, MICHAEL JOHN RYAN, KATHLEEN IRENE BUSSLER and KAREN ELIZABETH BUSSLER.

1.2 Obligations. I hereby direct and order that all just debts for which proper claim is filed against my estate and all expenses of my last illness and funeral be paid by my Personal Representative out of the assets of my estate, as soon after my death as is practicable; provided, however, that this direction shall not authorize any creditor to require payment of any debt or obligation except at a normal time in the reasonable handling of my estate.

1.3 Taxes. I direct that all estate, inheritance and succession taxes imposed by the federal government, or by any state, district, territory or foreign country, and occasioned or payable by reason of my death, whether attributable to properties subject to probate administration or to outside transfers, shall be paid out of the residue of any estate disposed of by this Will without apportionment, deduction or reimbursement therefore, and

without adjustment thereof among the residuary beneficiaries, if the net benefit to my heirs herein is greater than any alternate action.

2. PROBATE ADMINISTRATION

2.1 **Personal Representative**. I hereby appoint KAREN ELIZABETH BUSSLER of Vancouver, Washington, to be my Personal Representative to administer my Will and to act without bond and with the nonintervention powers granted in paragraph 2.2.

2.2 **Nonintervention Powers.** I direct that my Personal Representative act without the intervention of any court, except as may be required under the laws of the state where probated. My Personal Representative shall have full power: to sell, convey, and encumber, without notice or confirmation, any assets of my estate, real or personal, at such prices and terms as may seem just to my Personal Representative; to mortgage or pledge any estate property; to continue any or all of my business operations; to invest or reinvest any assets of my estate; to advance funds and borrow money, secured or unsecured, from any source; and to select any part of the estate in satisfaction of any partition or distribution thereunder, in kind, in money or both. Such powers may be exercised whether or not necessary for the administration of my estate.

4. PRIMARY BENEFICIARIES

I give, devise and bequeath all of my estate to my daughter, KAREN ELIZABETH BUSSLER, or to her children by right of representation.

5. CAVEAT

I wish to inform my personal representative I have made buriel arrangements with Cascadia Funeral Homes in Vancouver, Washington for the preparation of my bodily remains. Frank Abel Memorial Cemetery in Woodland, Washington will my final resting place and placement of my remains.

To my children, JAMES ROBERT RYAN III, MICHAEL JOHN RYAN, and KATHLEEN IRENE BUSSLER, I leave no part of my estate, either real or personal, except my love and affection.

6. **WITNESS AFFIDAVIT**

I request that the attesting witnesses to my Will make an affidavit before a Notary Public stating such facts as they would be required to testify to a Court in order to prove such Will.

IN WITNESS WHEREOF, I have hereunto subscribed my name this 17 day of March, 2009.

JACQUELYN I. BUSSLER

STATE OF WASHINGTON)
: ss.
COUNTY OF CLARK)

The undersigned, of lawful age and competent to testify, being duly sworn, each for himself testifies as follows:

The foregoing document was executed by the Testatrix on the date it bears.

The Testatrix declared the document to be her Last Will and Testament and requested us to sign the same as witnesses. At the request of and in the presence of the Testatrix and in the presence of the Notary Public and each other, the other witnesses and I subscribed our names as witnesses hereto.

At the time of executing the document, Testatrix and witnesses were of the age of majority and the Testatrix appeared to be of sound and disposing mind, and not acting under duress, menace, fraud, undue influence or misrepresentation.

Subscribing Witness Barbara J. Meyer

Subscribing Witness MICHAEL J. MEYER

SUBSCRIBED AND SWORN to before me this 14th day of March, 2009.

M.A. CAMERON
NOTARY PUBLIC in and for the State of Washington, residing at Vancouver.
My commission expires: 9-09-11

M. A. CAMERON
COMMISSION EXPIRES
NOTARY
PUBLIC
SEPTEMBER 9, 2011
STATE OF WASHINGTON