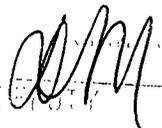


NO. 42402-9

DIVISION II, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

FILED  
APR 15 2015  
BY 

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CHRISTINE SPIRZ, Personal Representative  
for the ESTATE OF BRYAN W. JOHNSON,

Respondent,

v.

DOUGLAS M. JOHNSON,

Appellant.

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ON APPEAL FROM CLALLAM COUNTY SUPERIOR COURT  
(Hon. George L. Wood)

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**BRIEF OF RESPONDENT**

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Robert N. Tulloch, WSBA #9436

GREENAWAY, GAY & TULLOCH  
829 East Eighth Street, Suite A  
Port Angeles, WA 98362-6452  
Telephone: (360) 452-3323  
Facsimile: (360) 452-3724

Michael B. King, WSBA #14405  
Gregory M. Miller, WSBA #14459  
Justin P. Wade, WSBA #41168

CARNEY BADLEY SPELLMAN, P.S.  
701 Fifth Avenue, Suite 3600  
Seattle, WA 98104-7010  
Telephone: (206) 622-8020  
Facsimile: (206) 467-8215

*Attorneys for Respondent*

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## I. INTRODUCTION

Bryan Johnson made a will on March 16, 2006 (the Will). He left most of his estate to Christine Spirz (Chris), the sister with whom he was the closest. Bryan's brother, Doug Johnson (Doug), who did not visit Bryan in Port Angeles during his last illness, contested the validity of Bryan's Will. Doug claimed that Chris exercised undue influence over Bryan by actively participating in the making of his March 16 Will. Doug's case rested on the testimony of his star witness, Mark Johnson (Mark), Chris's son and Bryan's nephew, who claimed to have witnessed this participation on March 16 and who testified (although not live because of a warrant out for his arrest in Washington) about Bryan's alleged contrary intentions.

Mark, however, repeatedly admitted that he had a bad memory and could not remember specific dates. Mark's claim to have been present on March 16 was contradicted by documentary evidence and the testimony of three witnesses. The trial court found that Mark was not credible when testifying about the events on March 16. The trial court accordingly found that Chris did not actively participate in the making of Bryan's Will. The trial court also found that Chris did not act as Bryan's advisor and that Chris did not receive an unnaturally or unusually large share of the estate.

Those findings support the trial court's conclusion that the Will was not the product of undue influence, which supports the trial court's judgment upholding the Will's validity. Doug fails to demonstrate that any of the trial court's challenged findings of fact are unsupported by

substantial evidence. Those findings support the conclusion that Doug failed to establish even a presumption of undue influence, and Doug fails to show otherwise on appeal. Instead, Doug's appeal strategy appears to rest on an impermissible attempt to re-try the case before this Court. As for Doug's argument that the trial court admitted evidence that should have been barred under the Deadman's Statute, he waived review of that issue by failing to object at the time when the evidence was offered. Under these circumstances, the trial court's judgment can only be affirmed.

## **II. RESTATEMENT OF THE ISSUES**

1. Where a trial court's findings of fact are largely unchallenged, with the few challenged findings being supported by substantial evidence, and where those findings support the trial court's conclusions of law, should this Court affirm the judgment of the trial court?
2. Where a trial court concludes that a party fails to establish a presumption of undue influence, and where that conclusion is supported by the trial court's findings which are in turn supported by substantial evidence, is any additional evidence required to rebut the non-existent presumption?
3. Where a trial court reserves ruling on the admissibility of evidence under the Deadman's Statute and where the party seeking the protection of the statute fails to object during trial to any of the

statements now complained of on appeal, has that party waived appellate review of the issue?

4. Where a trial court makes a credibility determination and enters findings supported by substantial evidence, should this Court abstain from reviewing that credibility determination and uphold both the unchallenged findings and any challenged findings that are supported by the evidence viewed most favorably to respondent?
5. Where the will contestant fails to establish a presumption of undue influence regardless of the admission of the statements challenged on appeal, and where that will contestant fails to object to the admission of evidence that could rebut a presumption (had such a presumption been established), is that will contestant unharmed by the admission of such evidence?

### III. STATEMENT OF THE CASE<sup>1</sup>

#### A. Bryan Johnson Was an Independent Spirit.

Bryan Johnson passed away in his Port Angeles, Washington home on April 14, 2006, at the age of 65. CP 124 (FoF 2). He was unmarried and did not have any children. RP (3/1/11) at 164. He was survived by his four siblings: Christine Spirz (Chris), who lived in Port Angeles, Washington; Douglas Johnson (Doug), who lived in New Mexico; Ivan Johnson (Ivan), who lived in Australia; and Shirley Tehan, who lived in California. CP 124 (FoF 6); RP (3/1/11) at 6.

Bryan had a close relationship with his sister Chris. CP 124 (FoF 5). They bought adjacent Port Angeles properties for their homes and lived together in Sequim while those homes were being built. CP 124 (FoF 5). They also put their respective properties and bank accounts in joint tenancy with right of survivorship to each other. CP 124 (FoF 5).

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<sup>1</sup> The purportedly “Uncontested Facts” set forth by Appellant actually contain contested facts, factual statements unsupported by citations to the record, “facts” not supported by the evidence in the record, and conclusions of law the trial court never made.

For example, in Section II.D, Doug asserts that Chris “had and maintained a ‘confidential’ or ‘fiduciary’ relationship of mutual trust and reliance both before, during, and after” Bryan’s hospitalization. Brief of Appellant at 3. Doug’s conclusion about the legal implications of Bryan and Chris’s relationship — i.e., that it was ‘confidential’ or ‘fiduciary’ — is not a factual statement at all, and it is certainly not uncontested. Instead, it is an argument in favor of a conclusion the trial court never made. The Court should disregard this sentence under RAP 10.3(a)(5) because it contains argument about a conclusion Doug claims the trial court should have made and because it does not have any citation to the record. Doug makes a similarly impermissible argument in Section II.J. Brief of Appellant at 4.

Sections II.C, II.D, II.E, II.F, the first sentence of II.G, II.I, II.J, II.K & II.L, Brief of Appellant at 3-5, should all be disregarded under RAP 10.3(a)(5) for failure to cite to the record.

Witnesses testified about Bryan's independence. Doug himself, for example, considered Bryan an independent spirit who took care of his own business. RP (2/28/11) at 65, 68. He had a "mind of his own," said Larry Colwell, the developer of the subdivision where Bryan lived. RP (3/2/11) at 8-9. Mr. Colwell told the story of Bryan disregarding both the neighborhood covenants and Chris when choosing a color to paint his house. *Id.* Chris told Bryan the neighborhood would make him repaint the house if he did not get the color approved; Bryan painted his house the color he wanted anyway. *Id.* Another time, when Mr. Colwell asked Chris why Bryan was not helping do her landscaping, she told him that Bryan has a mind of his own and does what he wants. RP (3/2/11) at 11. If Bryan had a visitor overstay his welcome, he was not reluctant to make his wishes known: he would buy the guest a one-way ticket home, like he had once done with Doug, or ask the guest to leave, like he did when Ivan was staying with him during his last illness. RP (3/2/11) at 9-10, 46-47.

**B. When Bryan Was Hospitalized in January 2006 in the Beginning of His Last Illness, He Made a Hasty Will From His Hospital Bed Intended to Last Only Through the Surgery. Only Two of His Siblings, Chris and Ivan, Visited Him.**

Bryan was hospitalized in Seattle in January of 2006. CP 124 (FoF 7). Chris and Chris's son, Mark, went to stay with Bryan in Seattle. RP (2/28/11) at 38-39. Ivan made the trip from Australia to be with Bryan in the hospital. *Id.* Chris called Doug to tell him that Bryan was hospitalized. *Id.* at 37. Doug did not visit Bryan in the hospital. *Id.* at 37-39. Doug did not visit Bryan at any time during his last illness, even

though “the indications were that I would have to come up there and see him.” *Id.* at 38. Doug did, however, travel from New Mexico to attend this trial in Port Angeles. RP (2/28/11) at 2, 30; RP (3/1/11) at 2; RP (3/2/11) at 2.

While Bryan was hospitalized and waiting to have an angioplasty performed, either he or Ivan prepared a handwritten will (the Hospital Will). CP 124 (FoF 7); RP (2/28/11) at 77-78, 82-83. This will was the product of a pre-surgery, hospital-bed decision. CP 124 (FoF 7-8); RP (2/28/11) at 77-78. Bryan told Ivan the will was null and void after the surgery. RP (2/28/11) at 84-85. After Bryan’s discharge, Ivan took the Hospital Will back to Australia and, not seeing any reason to keep it, threw it out. CP 124 (FoF 7); RP (2/28/11) at 79. Chris did not have anything to do with its destruction. CP 124 (FoF 7); RP (3/1/11) at 31. The Hospital Will apparently divided Bryan’s estate equally among his four siblings, except that Chris was also to receive Bryan’s pickup truck. CP 124 (FoF 8); RP (2/28/11) at 103.

**C. Chris, and Her Son Mark, Helped Bryan When He Returned Home to Hospice Care. Mark Admittedly Could Not Remember When He Was at Bryan’s House, But He Claimed to Be There on March 16.**

At some point after Bryan returned to his Port Angeles home on January 21, 2006, Mark moved in with him. RP (3/1/11) at 64. Mark’s move-in date was disputed at trial. Doug intended to call Mark as a live witness, but Mark apparently would not come to Washington because he had a warrant out for his arrest. RP (2/28/11) at 66. Accordingly, Mark’s

testimony was elicited by reading selected portions of his deposition into the record.<sup>2</sup>

Mark testified that he moved in with Bryan “as soon as” Bryan came home from the hospital, which was January 21, 2006. RP (2/28/11) at 93, 97. But Mark also remembered that he had not yet been evicted by that point and that he had invited Ivan over for dinner and offered for Ivan to stay at his apartment after Bryan asked Ivan to leave. RP (2/28/11) at 94-95.<sup>3</sup> So Mark ultimately testified that he moved in with Bryan, at the latest, “a few days after Ivan” returned to Australia although it is not clear when exactly that was. RP (2/28/11) at 123-24. While living with Bryan, Mark testified that he cared for him 24 hours per day, 7 days per week, with only 4-5 hours off one day per week. RP (2/28/11) at 108. Mark claimed that, after moving in, he stayed with Bryan every night until the day he died. RP (2/28/11) at 126.

Jayne Johnson (Jayne), Mark’s wife at the time, testified that Mark did not move in with Bryan until February 24, 2006. RP (2/28/11) at 188. She came up with that date because she and Mark had to be out of the apartment from which they were evicted by February 22, and Mark also stayed at her daughter’s house after they were evicted. RP (2/28/11) at 188.

Mark admitted that he was not any good with dates:

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<sup>2</sup> And Mark’s entire deposition was admitted as Exhibits 10 & 11 during the presentation of Doug’s case. See RP (2/28/11) at 92.

<sup>3</sup> Ivan, however, was not about to “stay with drunk Mark and Jayne,” and he returned to Australia. RP (2/28/11) at 95.

- “[D]ates and times I don’t really pay attention to, . . . .”  
RP (2/28/11) at 93;
- “Like I said, I don’t really have a good memory for dates. I don’t remember dates.” RP (2/28/11) at 94;
- “I know what I said but like I said I don’t have a good memory for dates and times.” RP (2/28/11) at 95;
- “Well, like I said, okay, the only thing — I don’t remember dates, okay. So if you’re trying to nail me down to a day you can’t do it.” RP (2/28/11) at 98;
- “If you’re trying to prove I had a bad memory, it’s easy to do, I’ll tell you.” RP (2/28/11) at 98;
- “Well I told you from the beginning I stated that I don’t have a good memory for dates so if you’re trying to pin me down on dates and stuff and try to get me to remember a specific date it’s probably going to be wrong, I’ll state that right now, okay?” RP (2/28/11) at 98-99;
- “I have a terrible memory for dates and times.” RP (2/28/11) at 108;
- “No I don’t like I said, I don’t [know] the date. I don’t even know what the date is today.” RP (2/28/11) at 138;
- “I can’t remember dates.” RP (2/28/11) at 145.

Mark nevertheless testified that he was present at Bryan’s house on the precise date of March 16, 2006, and that Chris met with Bryan alone for several hours that morning to prepare the Will contested by Doug in this

action. CP 125 (FoF 10); RP (2/28/11) at 136-38. Yet Chris testified that Mark was not at Bryan's house on March 16. RP (3/1/11) at 76, 126.

**D. Substantial Evidence, in Addition to Mark's Own Admissions, Contradicted the Claims He Made Under Oath About His Presence at Bryan's House When Bryan Made His Final Will.**

Chris put forward evidence at trial exposing other inconsistencies in Mark's story. Mark claimed to remember spreading loads of dirt from "Angelo's" with Bryan's tractor at Bryan's house on March 16, 2006. CP 125 (FoF 11). But receipts from "Anjo's" Soils show that no landscaping soil was delivered to Bryan's yard before April 7, 2006. CP 125 (FoF 11); RP (3/1/11) at 83-86; Exs. 17-18. When asked why the Will was dated March 15 if Chris "procured" it on the 16th, Mark explained he actually did not know the date when he supposedly witnessed Chris participating in the making of Bryan's Will. RP (2/28/11) at 138. Mark also said he loaded Bryan's "wheelchair" into Chris's car on March 16, 2006. CP 125 (FoF 10). Bryan's home hospice care nurse testified that Bryan did not yet have a wheelchair in his home five days after that, on March 21, 2006. RP (3/1/11) at 166. Chris testified that they drove Bryan's pickup that day and that Bryan did not have a wheelchair before hospice care started (on March 21). RP (3/1/11) at 76, 79.

Testimony from the hospice care employees also contradicted Mark and Jayne's testimony about the date Mark moved in with Bryan. The home hospice care nurse from Assured Hospice first visited Bryan on March 21, 2006, at his home. RP (3/1/11) at 160; Ex. 27. Mark was not there. RP (3/1/11) at 156; Ex. 27. Bryan was then still living alone,

according to the nurse who was paying attention to who would have been in the home to provide care. RP (3/1/11) at 164-65; CP 127 (FoF 19). This was confirmed by the medical social worker who visited on March 22, 2006. RP (3/2/11) at 27; CP 127 (FoF 20). It was not until March 27 that the hospice nurse received any indication that Mark would be spending the night at Bryan's. RP (3/1/11) at 166.

**E. Bryan Was Alert When He Made His Final Will. Chris Did Not Participate.**

On March 16, 2006, Bryan and Chris walked into Olympic Peninsula Title, where Bryan asked the branch manager for witnesses to the signing of his Will and to prepare a quit claim deed to give his interest in his property to Chris. CP 125 (FoF 12); RP (3/1/11) at 104. Bryan knew exactly what he was requesting. CP 126 (FoF 14); RP (3/1/11) at 105. He understood what he was doing when he signed the Will. RP (3/1/11) at 102. At the branch manager's request, two Olympic Peninsula Title employees witnessed Bryan sign his Will and a document titled "My Wishes" that was filed with the Will. CP 126 (FoF 13); Exs. 25-26. Chris remained in the background during the signing and did not actively participate in the execution of the will. CP 126 (FoF 15).

After the meeting at Olympic Peninsula Title, Chris took Bryan to an appointment with his cancer doctor who found Bryan "alert and fully able to discuss his condition and respond to all of my questions." CP 126 (FoF 16); Ex. 30. Bryan was also alert and able to discuss his condition when his cancer doctor saw him for the last time on March 20. Ex. 30.

Bryan's hospice care workers agreed that he was alert, oriented, and mentally sound as of March 21, 2006. RP (3/1/11) at 161-62; Ex 27; CP 126 (FoF 18).

In his Will, Bryan designated Chris executrix and bequeathed to her his pickup truck, real estate, and house (and its contents). CP 729. A document attached to the Will, entitled "My Wishes," provided \$25,000 to Mark paid out at \$500 per month, \$5,000 each to Doug, Shirley, and Ivan, and \$3,000 each to another couple of relatives. CP 729-30.

**F. Mark Claimed That Bryan Did Not Actually Want His Estate Divided as He Set Forth in His Final Will. But Mark Was a Liar with Reasons to Get Back at Chris for Upholding Her Duties as Executrix and a Desire to Receive \$25,000 as a Lump-Sum Payment.**

Two days after Bryan died, Mark and Jayne attempted to move into Bryan's house. RP (3/1/11) at 90. Then they came back the day after that and started "hammering" at Chris about moving in to Bryan's house. RP (3/1/11) at 92. Mark submitted a \$23,040 bill to the estate for services rendered during Bryan's last illness, but accepted \$2,000. RP (3/1/11) at 86-89; Ex. 21. Mark got the idea to submit a claim against the estate because Chris was being "rude, mean, and cruel" in her actions as executrix of the estate by not permitting Mark to have personal use of Bryan's house and yard tractor immediately after his death. RP (3/2/11) at 38.<sup>4</sup> Mark's dispute with Chris over use of the tractor and Chris's disapproval of Mark's drinking were among the factors that caused Mark

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<sup>4</sup> Mark started booking jobs that he could perform with Bryan's tractor before he had bought it from the estate. RP (2/28/11) at 110.

to struggle in his relationship with Chris. RP (2/28/11) at 109-10. Mark was also angry with Chris because she would not help out when his car was repossessed. RP (3/1/11) at 15-16.

Doug and Mark started talking a lot after Bryan died, with Mark complaining about Chris's treatment of him. RP (2/28/11) at 109. Mark was "very unhappy" that his \$25,000 gift under the "My Wishes" document would be doled out at \$500 per month. RP (3/1/11) at 16. Doug promised Mark that he would still receive \$25,000 if Bryan's will was invalidated, and under this side-deal Doug would pay Mark the \$25,000 as a lump sum. RP (2/28/11) at 53-55, 111.

Mark claimed that Bryan told him his intent was for the house to be sold, with the proceeds split between his siblings and with Chris to receive the truck. RP (2/28/11) at 103, 132. Mark also testified that Bryan told him he was being left enough money to buy Bryan's tractor. RP (2/28/11) at 134. Mark claimed that when Chris returned home with Bryan on March 16 (or maybe the next day), she stated, apparently in reference to her siblings, that "she really screwed them good this time." RP (2/28/11) at 163-65.

Ivan's deposition testimony about Mark's reputation for untruthfulness was read into the record at trial without objection. According to his uncle, Mark was "a f--ing liar. He wouldn't tell the truth if you put a gun to his head. . . . [b]ecause he's drug affected. He's been to prison.<sup>5</sup> He's drug affected and anything that comes out of his mouth is

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<sup>5</sup> Approximately 50 times by Mark's estimation. Ex. 10, at 27.

drug induced.” RP (2/28/11) at 89. Emails from Ivan, admitted as Exhibit 4, further demonstrate Ivan’s opinion that Mark has a reputation for untruthfulness. CP 127 (FoF 21); Ex. 4.

By way of crediting Bryan for the lessons he had passed on, Mark admitted to having lied often — his Uncle Bryan taught him to “respect his elders, always tell the truth, don’t lie to your family, don’t steal, don’t cheat, don’t lie *which I did a lot of, all that stuff, and [Bryan] was not happy about it.*” RP (2/28/11) at 154 (emphasis added). Mark also admitted to making a “bad deal” with Bryan on a go-cart, which Bryan held against him for a long time. RP (2/28/11) at 154.

**G. The Trial Court Rejected Doug’s Contest to the Final Will.**

On September 13, 2006, Doug filed a contest to the validity of Bryan’s will, alleging, in summary, that Bryan was not competent and that Chris exerted undue influence over Bryan. CP 706-08. The case was tried to Clallam County Superior Court Judge George Wood on February 28, March 1, and March 2, 2011.<sup>6</sup> The trial court filed a Memorandum Opinion on March 23, 2011. CP 161-70, and issued its Findings of Fact and Conclusions of Law on June 3, 2011. CP 123-31. The trial court concluded that Bryan had testamentary capacity on March 16, 2006, when he signed his Will, and that Doug failed to prove that Chris exercised undue influence over Bryan during the making of the Will. CP 128-30 (CoL 2 & 9). The trial court entered its judgment and order sustaining the March 16 Will in its entirety on June 24, 2011. CP 49-50.

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<sup>6</sup> The trial setting was bumped four times. CP 236-37.

#### IV. STANDARD OF REVIEW

In an attempt to retry the merits of this case on appeal, Doug claims that review is *de novo* because the “Trial Court’s opinion and this appeal involve mixed questions of law and fact.” Brief of Appellant, at 40. Doug’s assertion is incorrect. Not only is review not *de novo*, but deference is given to the trier of fact who heard the testimony and made credibility determinations. This appeal is not a forum to re-try this case and decide which witnesses to believe and how much weight should be given to various pieces of evidence.

Challenged findings of fact are reviewed for substantial supporting evidence. *Estate of Bussler*, 160 Wn. App. 449, 460, 247 P.3d 821 (2011), citing *Wenatchee Sportsmen Ass’n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).<sup>7</sup> “Evidence is substantial if it is sufficient to persuade a rational, fair-minded person of the factual finding.” *Bussler*, 160 Wn. App. at 460, citing *Wenatchee Sportsmen Ass’n*, 141 Wn.2d at 176. If that standard is satisfied, the reviewing court will not substitute its judgment for that of the trial court. *Id.* at 460. “[W]here there is conflicting evidence, the court needs only to determine whether the evidence viewed most favorable to respondent supports the challenged finding.” *Bussler*, 160 Wn. App. at 461, citing *Estate of Lint*, 135 Wn.2d

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<sup>7</sup> Oddly, Doug appears to ask this Court to review the trial court’s Memorandum Opinion and to reverse the Memorandum Opinion. See Brief of Appellant at 8, 11. But a “finding or conclusion stated in either an oral or memorandum has no binding effect unless it is incorporated in the formal findings or conclusions.” *City of Walla Walla v. \$401,333.44*, 164 Wn. App. 236, 253-54, 262 P.3d 1239 (2011), citing *Huzzy v. Culbert Constr. Co.*, 5 Wn. App. 581, 583, 489 P.2d 749 (1971). That was not done here. See CP 123-31. “[A]ssignments of error addressed to oral or memoranda opinions are improper.” *Huzzy*, 5 Wn. App. at 583.

518, 532, 957 P.2d 755 (1998). The trier of fact “may believe entirely the testimony of one party and disbelieve the testimony of the other party” where the evidence is conflicting. *Bland v. Mentor*, 63 Wn.2d 150, 155, 385 P.2d 727 (1963).

“It is incumbent on counsel to present the court with argument as to why specific findings of the trial court are not supported by the evidence and to cite to the record to support that argument.” *Lint*, 135 Wn.2d at 532, citing RAP 10.3.

Strict adherence to the aforementioned rule is not merely a technical nicety. Rather, the rule recognizes that in most cases, like the instant, there is more than one version of the facts. If we were to ignore the rule requiring counsel to direct argument to specific findings of fact which are assailed and to cite to relevant parts of the record as support for that argument, we would be assuming an obligation to comb the record with a view toward constructing arguments for counsel as to what findings are to be assailed and why the evidence does not support these findings. This we will not and should not do.

*Lint*, 135 Wn.2d at 532. In the absence of a proper challenge, appellate courts will treat findings of fact as verities on appeal. *Lint*, 135 Wn.2d at 533 (reviewing only those findings that were properly challenged).

Where the findings are supported by substantial evidence (or are unchallenged), the appellate court then reviews whether the trial court’s findings of fact support the conclusions of law and the judgment. *See City of Tacoma v. State*, 117 Wn.2d 348, 361, 816 P.2d 7 (1991). Unchallenged conclusions of law become the law of the case. *King Aircraft Sales, Inc. v. Lane*, 68 Wn. App. 706, 716-17, 846 P.2d 550 (1993). A trial court’s credibility determinations are not reviewable. *In re*

*Sego*, 82 Wn.2d 736, 739-40, 513 P.2d 831 (1973); *Estate of Knowles*, 135 Wn. App. 351, 356, 143 P.3d 864 (2006); *Estate of Haviland*, 162 Wn. App. 548, 558, 255 P.3d 854 (2011).

## V. ARGUMENT

### A. **The Trial Court’s Determination That Doug Failed to Prove, or Even Raise a Suspicion of, Undue Influence, Should Be Affirmed.**

The “will of a person who otherwise possesses testamentary capacity may be set aside upon a showing that a beneficiary exercised undue influence over the testator.” *Lint*, 135 Wn.2d at 535, citing *Dean v. Jordan*, 194 Wash. 661, 79 P.2d 331 (1938).<sup>8</sup> The will contestant bears the burden of proving undue influence by clear, cogent, and convincing evidence. *Estate of Riley (aka “Reilly”)*, 78 Wn.2d 623, 646-47, 649, 479 P.2d 1 (1970), citing *Dean*, 194 Wash. at 671 and *Estate of Bottger*, 14 Wn.2d 676, 685, 129 P.2d 518 (1942). This standard requires evidence that convinces the trier of fact that the fact in issue is “highly probable.” *Haviland*, 162 Wn. App. at 558 (quotations and citations omitted). That is a “daunting burden.” *Lint*, 135 Wn.2d at 535. The high burden is imposed to protect the valuable right to dispose of one’s property by will. *Riley*, 78 Wn.2d at 649, quoting *Bottger*, 14 Wn.2d at 685-86.

“A will is the product of undue influence when a party interferes with the testator’s free will, preventing the testator from exercising his

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<sup>8</sup> Doug does not assign error to or otherwise challenge the trial court’s conclusion that Bryan had testamentary capacity on March 16, 2006, when he signed his Will. CP 128 (CoL 2). Nor is there any evidence to the contrary.

own judgment and choice.” *Knowles*, 135 Wn. App. at 357, citing *Estate of Smith*, 68 Wn.2d 145, 153, 411 P.2d 879 (1966). “The undue influence which operates to void a will must be something more than mere influence, but rather influence which at the time of the testamentary act, controlled the volition of the testator, interfered with his free will, and prevented an exercise of his judgment and choice . . . influence tantamount to force or fear which destroys the testator’s free agency and constrains him to do what is against his will.” *Lint*, 135 Wn.2d at 535, quoting *Bottger*, 14 Wn.2d at 700.

In other words, the person accused of dominating the testator must have imposed his wishes upon the latter, not by persuasion directed to his intellect or by appeal to sentiment, but by coercion of his mind by threats, force, or unbearable insistence, so that the testament, though in form that of the testator, is in fact that of another who has established ascendancy over the mind of the former.

*Bottger*, 14 Wn.2d at 701.

Mere suspicion of undue influence, even when accompanied by opportunity and motive, is insufficient to raise a substantial inference of undue influence. *Smith*, 68 Wn.2d at 157, quoting *Estate of Hansen*, 66 Wn.2d 166, 172, 401 P.2d 866 (1965). *See also Bussler*, 160 Wn. App. at 469 (A will contestant does not meet his burden of proving undue influence by clear, cogent, and convincing evidence by showing nothing more than the opportunity to exert influence). Evidence of solicitations, suggestions, or entreaties to make a will is not sufficient to show undue influence without a further showing that the influence exerted was

persistent and coercive enough to subordinate the testator's will and take away her freedom of action. *Riley*, 78 Wn.2d at 661-62.

Under the test set forth in *Dean*, “[c]ertain circumstances may raise a question about undue influence, including (1) a fiduciary or confidential relationship between the testator and the beneficiary, (2) active participation by the beneficiary in preparing or procuring the will, and (3) the beneficiary's receipt of an unusually or unnaturally large part of the estate.” *Bussler*, 160 Wn. App. at 466, citing *Smith*, 68 Wn.2d at 153 & *Dean*, 194 Wash. at 671-72. Other considerations include, “the age or condition or mental vigor of the testator, the nature or degree of relationship between the testator and the beneficiary, the opportunity for exerting undue influence, and the naturalness or unnaturalness of the will.” *Riley*, 78 Wn.2d at 647.

The combination of facts may be of such a nature and force to raise a suspicion, varying in strength, against the validity of the testamentary instrument, and, “in the absence of rebuttal evidence, may even be sufficient to overthrow the will.” *Dean*, 194 Wash. at 672. But the existence of suspicion-raising facts does not relieve will contestants of the duty to establish undue influence by clear, cogent, and convincing evidence. *Bussler*, 160 Wn. App. at 466, citing *Riley*, 78 Wn.2d at 663.<sup>9</sup> *Accord Knowles*, 135 Wn. App. at 357-60 (applying requirement that will

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<sup>9</sup> “Unlike in the gift context, the existence of these cautionary circumstances does not shift the ultimate burden of proof[]” in a will contest. *Estate of Melter*, \_\_ P.3d \_\_, 2012 WL 1085814, \*7 (March 20, 2012).

contestant prove undue influence by clear, cogent, and convincing evidence even when the presumption is raised).<sup>10</sup>

Here, the trial court concluded that Doug failed to establish even a rebuttable presumption of undue influence. CP 129 (CoL 8). This is because Chris “did not act as an ‘advisor’ to Bryan, did not receive an unnatural portion of Bryan’s estate, and did not participate in the preparation or procurement of the Will.” *Id.* As noted in Section IV, Doug really seeks to re-try the case on appeal *de novo*. This he cannot do. To the extent the trial court’s conclusions are properly challenged, they are supported by the trial court’s findings of fact, which are both largely unchallenged and also supported by substantial evidence in the record.

**1. Doug Failed to Prove Bryan and Chris Had a Fiduciary or Confidential Relationship.**

The existence of a “fiduciary or confidential” relationship between testator and beneficiary is one of the factors identified in *Dean* for determining whether the circumstances raise a suspicion of undue influence. *See Dean*, 194 Wash. at 671-72. Bryan and Chris’s relationship as brother and sister is not the type of relationship historically considered fiduciary or confidential. Nor did they have a confidential or fiduciary relationship in fact.

Relationships historically considered confidential and fiduciary in character include: trustee and beneficiary; principal and agent; partner and

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<sup>10</sup> Thus, Doug’s attempt to flip the burden of proof based on a presumption he never established, *see* Brief of Appellant at 29, 34-35, is incorrect, as well as irrelevant, and need not be addressed further.

partner; husband and wife; physician and patient; and attorney and client. *Liebergsell v. Evans*, 93 Wn.2d 881, 890, 613 P.2d 1170 (1980), citing *McCutcheon v. Brownfield*, 2 Wn. App. 348, 356-57, 467 P.2d 868 (1970). Such a relationship may also exist in fact where “one party ‘occupies such a relation to the other party as to justify the latter in expecting that his interests will be cared for . . . .’” *Liebergsell*, 93 Wn.2d at 889-90, quoting Restatement of Contracts § 472(1)(c).

“A simple reposing of trust and confidence in the integrity of another *does not alone make of the latter a fiduciary*. There must be additional circumstances, or a relationship that induces the trusting party to relax the care and vigilance which he would ordinarily recognize for his own protection.” *Moon v. Phipps*, 67 Wn.2d 948, 954, 411 P.2d 157 (1966) (emphasis added). “A confidential relation exists between two persons when one has gained the confidence of the other and purports to act or advise with the other’s interest in mind.” *McCutcheon*, 2 Wn. App. at 357.

Doug failed to prove by clear, cogent, and convincing evidence that the relationship between Chris and Bryan was fiduciary or confidential. Rather, Doug claims that the existence of such a fiduciary and confidential relationship was undisputed and cites to Chris’s deposition at page 24, lines 14-20. Brief of Appellant at 29. But the cited testimony tends to show only that Chris and Bryan had trust and confidence in each other. *See* Ex. 6, pg. 24:14-20. This evidence supports the trial court’s finding that Chris held a position of trust and confidence

with Bryan. CP 127 (FoF 23). Mere trust and confidence, however, *is not sufficient* to make their relationship “fiduciary” in nature. *See Moon*, 67 Wn.2d at 954.

In order for Doug to prove that Bryan and Chris in fact had a fiduciary relationship, he bore the burden of showing that Bryan justifiably relied on Chris to take care of his interests. Here, the trial court did not find any additional circumstances beyond mutual trust and confidence that would have supported a conclusion that Chris was Bryan’s fiduciary. In the absence of a finding on a factual issue, this Court must “indulge the presumption that the party with the burden of proof failed to sustain their burden on this issue.” *Bussler*, 160 Wn. App. at 465, quoting *Welfare of A.B.*, 168 Wn.2d 908, 927, n.42, 232 P.3d 1104 (2010). Moreover, the evidence here showed the exact opposite of Bryan relying on Chris to look after his interests. For example, Bryan refused to heed Chris’s warning that he would have to repaint his house if he did not have the color pre-approved. RP (3/2/11) at 8-9. Doug failed to prove the existence of a fiduciary relationship.

Neither did Doug prove the relationship was confidential. As stated, a “confidential relation exists between two persons when one has gained the confidence of the other *and purports to act or advise with the other’s interest in mind.*” *McCutcheon*, 2 Wn. App. at 357 (emphasis added). Here, the trial court concluded that Chris *did not* act as an advisor to Bryan. CP 129 (CoL 8). Doug does not assign error to the findings supporting this conclusion or otherwise argue that the trial court erred by

concluding that Chris did not act as Bryan's advisor. This conclusion becomes the law of the case. *King Aircraft Sales, Inc.*, 68 Wn. App. at 716-17.

Even if Doug had not waived this issue, there is ample evidence in the record to support the trial court's conclusion that Chris was not Bryan's advisor. For example, even Doug testified that Bryan was an independent spirit. CP 127 (FoF 22)<sup>11</sup>; RP (2/28/11) at 65, 68. Bryan demonstrated this independence during his last illness by turning down his doctor's advice to consider whole brain irradiation. Ex. 30. The testator's strength of mind and independent spirit factors against a finding that the will was a product of undue influence. *See Knowles*, 135 Wn. App. at 358-59. Since Doug failed to offer evidence that Chris purported to act with Bryan's interests in mind, there would have been no basis for the trial court to conclude that Chris was Bryan's advisor. And even if Doug had offered evidence sufficient to support this theory, the trial court would have been well within its discretion to weigh that evidence against the evidence of Bryan's independence and determine that Chris was not acting as Bryan's advisor and that the relationship was not confidential. This Court need not even reach those issues since Doug did not assign error to the findings supporting the trial court's conclusion that Chris was not Bryan's advisor. Doug further failed to assign error to that conclusion or to otherwise argue that the trial court erred in making that conclusion.

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<sup>11</sup> This unchallenged finding is a verity on appeal.

**2. Doug Failed to Prove That Chris Actively Participated in Preparing or Procuring the Final Will.**

Active participation by the beneficiary in preparing or procuring the will is another one of the factors identified in *Dean* for determining whether the circumstances raise a suspicion of undue influence. *See Dean*, 194 Wash. at 671-72. Here, the trial court both found and concluded that Chris *did not* actively participate in the preparation of procurement of the will. CP 127 (FoF 24-25 & CoL 8). Doug does not assign error to this finding and conclusion. Thus, he waives any challenge to these issues.

Even if Doug had not waived this issue, he failed to prove by clear, cogent, and convincing evidence that Chris actively participated in Bryan's preparation of his Will. Mark claims that on March 16, 2006, Chris went into Bryan's room alone to, as Mark put it, "procure" the Will. RP (2/28/11) at 136-38, 172. Doug's theory that Chris procured Bryan's Will rests entirely on Mark's testimony that he was at Bryan's house on the morning of March 16 and witnessed this supposed procurement.

The trial court, however, found "Mark's testimony as to what happened on March 16 *is not credible*, as he was not present that day." CP 125 (FoF 10) (emphasis added). The trial court also found incredible Mark's claim that on March 16 he was at Bryan's house moving a load of delivered soil. CP 125 (FoF 11). A trial court's credibility determinations are not reviewable. *Haviland*, 162 Wn. App. at 558; *Knowles*, 135 Wn. App. at 356. Since the trial court found Mark not credible when he claimed that he was at Bryan's house on March 16, Doug has no evidence

to support his claim that Chris met alone with Bryan to actively participate in the preparation of his Will.

Even if this Court could review the trial court's credibility determination, which it cannot, there is overwhelming evidence of Mark's lack of credibility in the record. Mark's claim that Chris prepared Bryan's Will rests on his recollection of his whereabouts on a certain date; yet Mark himself admitted no fewer than nine times during trial that he could not remember dates. RP (2/28/11) at 93-95, 98-99, 108, 138, 145. Mark also admitted to lying. RP (2/28/11) at 154. Ivan confirmed that Mark had a reputation for untruthfulness. RP (2/28/11) at 89; Ex. 4. Disinterested hospice care workers contradicted both Mark's claim that he was living with Bryan before March 16 and his claim that Bryan had a wheelchair by that date. *See* RP (3/1/11) at 156, 164-66; RP (3/2/11) at 27; CP 126-127 (FoF 19-20). Receipts contradicted Mark's claim that he was spreading a delivery of topsoil in Bryan's yard. RP (3/1/11) at 83-86; Exs. 17-18. Finally, Chris testified that Mark was not at Bryan's house on March 16. RP (3/1/11) at 76, 126. That is more than sufficient evidence to persuade a fair-minded, rational person that Mark was not at Bryan's house on March 16, in addition to destroying Mark's credibility on all other matters.<sup>12</sup>

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<sup>12</sup> Doug argues that Mark had no motive to lie, but the record shows that Mark was angry that the "My Wishes" document allocated \$25,000 in monthly installments and that if he succeeded in helping Doug invalidate the Will he would get a lump sum payment of \$25,000. *See* RP (3/1/11) at 16; RP (2/28/11) at 53-55, 111. *See also* RP (2/28/11) at 87-88. The record also shows that Mark was upset with Chris for carrying out her duties as the executrix of the estate and thwarting his attempt to move into Bryan's house with his then-wife. *See* RP (3/2/11) at 38; RP (3/1/11) at 90-92.

Doug essentially argues that there were differing accounts of the events related to Mark's credibility and absence on March 16 that the trial court should have resolved those conflicting accounts differently. Brief of Appellant at 14-28. But those, too, are unreviewable decisions. Appellate tribunals "are not entitled to weigh either the evidence or the credibility of witnesses." *In re Sego*, 82 Wn.2d at 739-40. Instead of re-weighing conflicting evidence as Doug requests,<sup>13</sup> this Court is to determine "whether the evidence viewed most favorable to the respondent supports the challenged findings." *Lim*, 135 Wn.2d at 532. As is laid out above, there is sufficient evidence to support the trial court's finding that Mark was not at Bryan's house on March 16. And there is sufficient evidence to support the trial court's finding that Mark was not credible, even if that credibility determination were reviewable, which it is not.

Other than Mark's discredited testimony about Chris's actions on March 16, Doug's evidence tends to show nothing more than that Chris suggested for Bryan to make out a will and that Chris drove Bryan to his March 16 errands, one of which was to have the Will witnessed. *See* RP (2/28/11) at 160-61. Chris's suggestion that Bryan make a will is not

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<sup>13</sup> For example, Doug asks this Court to provide more weight to Mark's ex-wife's testimony, which Doug claims the trial court ignored. *See* Brief of Appellant at 26. Not only may this Court not re-weigh the evidence, but Doug's claim that the trial court did not address Jayne's testimony is false. *See* RP (3/2/11) at 80 (Trial court: "I think Ms. [Jayne] Johnson, her testimony really doesn't deal with the 16th. I mean she's got some other things that may affect my decision on credibility *but she really doesn't describe that day because she wasn't there . . .*") (emphasis added). Further, the trial court was not required to address or credit Jayne's testimony: the "trier of fact, where the evidence is conflicting, may believe entirely the testimony of one party and disbelieve the testimony of the other party." *Bland v. Mentor*, 63 Wn.2d 150, 155, 385 P.2d 727 (1963).

undue influence, *see Riley*, 78 Wn.2d at 662, particularly here where Bryan had already told Ivan that the earlier will was “null and void.” Like in *Riley*, where no undue influence was found, there was no testimony that anyone told the testator here what the provisions of his will should contain. *See Riley*, 78 Wn.2d at 657-658. “Influence exerted merely by means of advice, argument, persuasion, solicitation, suggestion, or entreaty is not undue influence.” *Id.* Doug’s evidence is insufficient to raise even a suspicion of active participation or undue influence.

**3. Doug Failed to Prove That Chris Received an Unusually or Unnaturally Large Portion of the Estate.**

Whether the beneficiary receives an unusually or unnaturally large part of the estate is another *Dean* factor considered in determining whether the will contestant has raised a suspicion of undue influence. “A will is unnatural when it is contrary to what the testator, from his known views, feelings and intentions would have been expected to make.” *Riley*, 78 Wn.2d at 648 (citation and quotation omitted). “Whether a will is natural or unnatural is a question to be determined in each case as warranted by the facts.” *Riley*, 78 Wn.2d at 648 (citation and quotation omitted). “A disparately large gift to one beneficiary does not necessarily denote undue influence if there is a natural explanation for it.” *Knowles*, 135 Wn. App. at 359. Cases holding undue influence generally involve “the exclusion of one near and dear to the testator and the majority of the estate going ‘to the one with whom the testator had no close ties.’” *Knowles*, 135 Wn. App. at 359-360, quoting *Smith*, 68 Wn.2d at 154.

Here, the trial court found that Chris did not “receive an unusually or unnaturally large part of the estate in light of the relationship between the two of them.” CP 127 (FoF 26). Instead, when the trial court considered Bryan’s close relationship with Chris and the fact that they put their respective properties in joint tenancy with right of survivorship at various times, the trial court found that it would have been ‘unnatural’ for Bryan *not* to leave Chris the majority of his estate.” CP 124-25 (FoF 5 & 8) (emphasis added).<sup>14</sup>

Doug argues that the trial court erred by not finding the Will unnatural since it was different than the Hospital Will made out (and then declared “null and void”) some four months earlier. But the trial court addressed this, finding that will to be a bad indicator of Bryan’s intentions since it was a “hasty, hospital bed decision and does not reflect the ‘natural’ result of [Bryan’s] affection and does not reflect his love and esteem for Chris demonstrated by his actions related to his assets prior to and after that date.” CP 124-25 (FoF 8).<sup>15</sup> Doug conceded during opening argument that Bryan’s Hospital Will was “hurriedly” prepared with the assistance of other people. RP (2/28/11) at 19-20. In addition to being unchallenged on appeal, substantial evidence also supports the trial court’s finding that the Hospital Will did not reflect Bryan’s true intentions. This evidence shows that Bryan made this will right before a major surgery, that Ivan participated in the drafting of it, and that Bryan intended the will

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<sup>14</sup> These findings are verities on appeal since Doug has not assigned error to them.

<sup>15</sup> This finding is a verity on appeal since Doug has not assigned error to it.

to be null and void after the surgery, according to Ivan. *See* RP (2/28/11) at 77-85.<sup>16</sup>

Mark testified that Bryan's expressed intentions regarding the division of his estate were contrary to the division memorialized in his Will. RP (2/28/11) at 149-52. To the extent Mark's testimony on other subjects is any more credible than his testimony about the events of March 16, this evidence simply conflicts with other evidence admitted at trial. *See Lint*, 135 Wn.2d at 532 (“[W]here there is conflicting evidence, the court needs only to determine whether the evidence viewed most favorable to respondent supports the challenged finding.”). For example, the evidence showed that Bryan made Chris a joint tenant with the right of survivorship to both his house and bank account at various times — this shows Bryan's intent for the house and bank account to go to Chris upon his death. CP 124-25 (FoF 5 & 8).<sup>17</sup> He also deeded his house to her on March 16, 2006 (although this transfer had to be undone for tax reasons). CP 125 (FoF 12)<sup>18</sup>; RP (3/1/11) at 53.

Thus, there is sufficient evidence for the trial court to find that the provisions in Bryan's Will were consistent with his prior actions regarding the ownership of his house and bank account should he die. CP 127 (FoF 26). These unchallenged findings, also supported by substantial evidence, in turn support the conclusion that Chris did not receive an unusually or

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<sup>16</sup> Ivan had no financial interest in his testimony since he stood to receive more under the Hospital Will's purported terms than under the Will accepted by the trial court.

<sup>17</sup> This finding is a verity on appeal since Doug has not assigned error to it.

<sup>18</sup> This finding is a verity on appeal since Doug has not assigned error to it.

unnaturally large portion of the estate. CP 129 (CoL 8). This conclusion is consistent with case law. For example, in *Dean*, the will was “perfectly natural” where the beneficiary who received a large portion of the estate was closely related to testator, where there was close companionship, and where the beneficiary lived nearby and cared for the testator. *Dean*, 194 Wn.2d at 673. Doug does not show any error by the trial court in concluding that Chris did not receive an unnatural or unusually large part of the estate.<sup>19</sup>

**B. Applying the Deadman’s Statute Would Not Have Changed the Outcome Even if Doug Had Made Timely Objections and Not Otherwise Waived the Protections of the Statute.**

Doug claims that the Deadman’s Statute should have barred evidence rebutting the alleged presumption of undue influence. Specifically, he argues that the trial court erred in admitting nine statements that the trial court then allegedly relied on to find the absence of undue influence. *See* Brief of Appellant at 13-14. Without those supposedly inadmissible statements, Doug argues Chris would have been unable to rebut the presumption of undue influence he claims to have established.

**1. The Deadman Statute Issues Need Not Be Reached.**

This Court, however, need not reach any issues related to the application of the Deadman’s Statute. This is because Doug’s failure to

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<sup>19</sup> The trial court did not find that Doug satisfied any of the additional *Dean* factors that could suggest undue influence. In the absence of a finding on a factual issue, this Court must “indulge in the presumption that the party with the burden of proof failed to sustain their burden on this issue.” *Bussler*, 160 Wn. App. at 465.

make out a presumption of undue influence is *entirely independent* from the nine challenged statements. In other words, the trial court ruling that Doug failed to raise a presumption of undue influence stands without considering any testimony from Chris about any transactions or conversations with Bryan. For example, Section V.A. of this brief, demonstrating that the trial court correctly found no presumption of undue influence, does not rely on any evidence the admission of which Doug presumes to contest under the Deadman's Statute. So even if all the contested statements had been excluded, Doug still would have failed to establish a presumption of undue influence.

**2. Doug's Deadman Statute Arguments Also Fail, Both Procedurally and Substantively.**

Even if this Court deems it necessary to consider Doug's arguments that the trial court admitted evidence in violation of the Deadman's Statute, Doug's actions at trial preclude review of that issue for two reasons. First, Doug failed to make timely objections during trial. Second, Doug waived the protections of the Deadman's Statute by introducing testimony regarding conversations and transactions with Bryan.

The Deadman's Statute, RCW 5.60.030, provides that:

[I]n an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative of any deceased person, or as deriving right or title by, through or from any deceased person, ... then a party in interest or to the record, shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased . . . person  
.....

“The purpose of the statute is to ‘prevent interested parties from giving self-serving testimony about conversations or transactions with the decedent.’” *Erickson v. Kerr*, 125 Wn.2d 183, 187, 883 P.2d 313 (1994), quoting *Wildman v. Taylor*, 46 Wn. App. 546, 549, 731 P.2d 541 (1987). A party claiming protection under the statute is free to provide evidence concerning a transaction with the deceased, but once the protected party has opened this door, the Deadman’s Statute is waived and the opposing interested party is entitled to rebuttal. *Thor v. McDearmid*, 63 Wn. App. 193, 202, 817 P.2d 1380 (1991). In other words, the “statute may be waived if the adverse party introduces testimony on direct or cross examination regarding the transaction in question. *Erickson*, 125 Wn.2d at 187-88 (emphasis added).

Before trial, Doug moved in limine for a blanket ruling preventing Chris from testifying. CP 206-09. The trial court heard argument on the motion and reserved ruling because it needed to know the context for the challenged statements and whether Doug would waive the protection of the statute in the course of putting on his case:

There may be some issue there with regard to whether that’s a transaction that involves her that she can testify about ***so I think when we get there you just make your arguments at that time.***

It’s hard for me to make a motion in limine without the context and I think the other issue is waiver, one of waiver.

If Mr. [Doug] Johnson is going to present testimony with regard to the deeds or he’s going to present testimony with regard to the will and those types of things he may in fact be waiving any objections he may have to the Dead Man’s [Statute]

So you may want to look at the waiver issue because that's a big issue in regards to these as well.

So I think what we'll do is just, I mean, I'm not going to grant the motion in limine at this point, *we'll just see how the testimony comes in and at what point and I'll just try to make rulings and make objections at that time, okay?*

RP (2/28/11) at 15 (emphasis added).

Doug does not argue that the trial court erred by reserving ruling on his motion, but instead complains that the trial court improperly admitted nine statements during the trial. *See* Brief of Appellant, at 13-14. Under RAP 2.5(a), a “party who fails to raise an issue at trial normally waives the right to raise that issue on appeal.” *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 441, 191 P.3d 879 (2008); *Lennon v. Lennon*, 108 Wn. App. 167, 176, 29 P.3d 1258 (2001) (“Failure to timely object to the testimony of an interested party waives the bar of the deadman’s statute.”). “The reason for this rule is to afford the trial court with an opportunity to correct errors, thereby avoiding unnecessary appeals and retrials.” *Wilson & Son Ranch, LLC v. Hintz*, 162 Wn. App. 297, 303, 253 P.3d 470 (2011).

Doug did not contemporaneously object to a single one of the nine statements he claims were erroneously admitted. In fact, he elicited one of the statements he argues the trial court should not have admitted. *See* RP (3/1/11) at 33. By failing to object, Doug never gave the trial court the opportunity to correct the alleged errors by, for example, striking the objectionable material. Further, there is no ruling for this Court to review with regard to the admissibility of the nine statements challenged by

Doug. Moreover, Doug failed to object to any statements in Chris's deposition, which was admitted in its entirety and without objection as Exhibit 6. RP (3/1/11) at 5.<sup>20</sup> This issue has been waived.<sup>21</sup>

Doug appears to argue that no objections were necessary because he made a motion in limine and was relying on the trial court to raise objections during Chris's testimony after it reserved ruling on his motion. Doug's argument that he was relying on the trial court to make objections is directly contradicted by his actions at trial: at least once during Chris's testimony, Doug found it necessary to object on the basis of the Deadman's Statute. *See* RP (3/1/11) at 51. This objection was sustained. *Id.*<sup>22</sup> And in any event, the duty to make timely objections rested with Doug after the trial court reserved ruling on his motion in limine. *See Eagle Group Inc. v. Pullen*, 114 Wn. App. 409, 416-17, 58 P.3d 292 (2002) ("When a trial court makes a tentative ruling before trial, error is not preserved for appeal unless the party objects to admission of the evidence when it is offered, . . ."), *citing Sturgeon v. Celotex Corp.*, 52 Wn. App. 609, 623, 762 P.2d 1156 (1988); *Marriage of Monaghan*, 78 Wn. App. 918, 929, 899 P.2d 841 (1995) ("Generally, after a trial court

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<sup>20</sup> The Trial Court took the admission of Chris's deposition into account when dismissing issues related to the Deadman's Statute at the end of trial. RP (3/2/11) at 78-79.

<sup>21</sup> Doug also fails to assign error to any findings of fact where the trial court may have relied on otherwise objectionable evidence. Thus, those findings are verities on appeal.

<sup>22</sup> Doug also argues that the trial court apparently misunderstood the standard for excluding testimony under the Deadman's Statute. *See* Brief of Appellant at 12-13. This is an odd argument because the record shows the cited misstatement of the law *actually came from Doug's counsel*, not the trial court. RP (3/1/11) at 51 (Mr. Codd: "She can answer questions about a transaction but she cannot talk about conversations.").

has made a tentative ruling on a matter or has refused to rule entirely, the party requesting the ruling is obligated to raise the motion again to ensure that there is an adequate record on appeal.”). Where Doug failed to object when the evidence was offered, he waived his right to challenge on appeal the admissibility of any of Chris’s statements that may have been excludable under the Deadman’s Statute.

Even if Doug had raised timely objections to the nine statements he claims should have been excluded, he also waived any protection under the Deadman’s Statute during trial by eliciting evidence of conversations and transactions with Bryan. The “deadman’s statute may be waived when the protected party introduces evidence concerning a transaction with the deceased.” *Lennon*, 108 Wn. App. at 175. “Once the protected party has opened the door, the interested party is entitled to rebuttal.” *Id.* Here, Doug testified about conversations he had with Bryan about his supposed intentions for the division of his estate. *See* RP (2/28/11) at 46, 56. Doug also provided testimony from Mark and Jayne regarding their conversations and transactions with Bryan. *See* RP (2/28/11) at 103, 117-18, 132, 148-49, 177, and 190.<sup>23</sup> Having provided evidence of conversations and transactions with Bryan, Doug opened the door to rebuttal evidence from Chris regarding those conversations and transactions. *Thor*, 63 Wn. App. at 201-202; *Lennon*, 108 Wn. App. at 175. While this issue was discussed during trial, the trial court never

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<sup>23</sup> Doug offered Mark’s entire deposition at trial as Exhibits 10 and 11, which were admitted. RP (2/28/11) at 92.

actually had to rule on the whether the statements would still be admissible under a waiver theory because no objections were made to the admissibility of the statements.

Since Doug failed to invoke the Deadman's Statute by making timely objections during trial, there was no occasion or reason for the trial court to consider whether those specific statements would nevertheless be admissible due to a waiver. Had Doug properly objected to any of the statements complained of during trial, the trial court would have been within its discretion to find a waiver depending on which of the statements had garnered an objection. Doug's failure to make timely objections ultimately precludes review of this issue, an issue this Court need not even address since Doug failed to establish a presumption of undue influence independent of the nine statements he attempts to challenge on appeal.

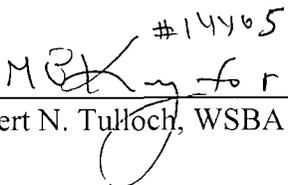
## VI. CONCLUSION

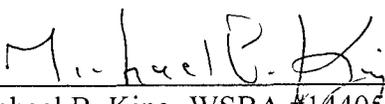
For the forgoing reasons, this Court should affirm the judgment of the trial court.

Respectfully submitted this 17<sup>th</sup> day of April, 2012.

**GREENAWAY, GAY & TULLOCH**

**CARNEY BADLEY SPELLMAN, P.S.**

By  #14405  
Robert N. Tulloch, WSBA #9436

By   
Michael B. King, WSBA #14405  
Gregory M. Miller, WSBA #14459  
Justin P. Wade, WSBA #41168

*Attorneys for Respondent*

NO. 42402-9

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

FILED  
BY *AM*  
JUL 17 2012

CHRISTINE SPIRZ, Personal  
Representative for the ESTATE  
OF BRYAN W. JOHNSON,

Respondent,

v.

DOUGLAS M. JOHNSON,

Appellant.

DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the state of Washington that I am now and at all times herein mentioned a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date stated below, I caused to be delivered in the manner indicated a copy of *Brief of Respondent* and this *Declaration of Service* on the following parties:

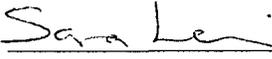
Robert N. Tulloch  
Greenaway, Gay and Tulloch  
829 East Eighth St., Suite A  
Port Angeles, WA 98362-6452  
rtulloch@earthlink.net

- U.S. Mail
- Messenger
- Fax
- Email

W. Tracy Codd  
15401 First Ave. S., Suite A  
Burien, WA 98148-1075  
wtcodd@comcast.net

U.S. Mail  
 Messenger  
 Fax  
 Email

DATED this 17<sup>th</sup> day of April 2012 in Seattle, Washington.

  
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Sara Leming, Legal Assistant