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On appeal from Pierce County Cause No. 13-4-01206-8

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**IN THE COURT OF APPEALS**  
**OF THE STATE OF WASHINGTON**  
**DIVISION II**

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In re the Estate of MARY-LOUISE KORSTEN,

Deceased,

vs.

LOUANNE MARIE WHEELER,

Appellant,

vs.

MARIANNE V. RIOS, Personal Representative of the Estate of  
Mary-Louise Korsten,

Respondent.

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

Petitioner Louanne Wheeler is asking this Court to do what it cannot do: namely, to overturn the findings of the trial court that are supported by substantial evidence merely because of the existence of some evidence that conflicts with the evidence relied upon by the trial court. In determining whether substantial evidence exists, appellate courts need only consider evidence favorable to the prevailing party, and in evaluating the persuasiveness of the evidence and the credibility of witnesses, the appellate court must defer to the trial court. Moreover, if substantial evidence exists, an appellate court will not substitute its judgment for that of the trial court, even if there is conflicting evidence.

The trial court's finding that the testator had capacity to execute her Will in 2012 is supported by the testimony of four witnesses, including two witnesses who observed the testator sign the Will and who worked with the testator on a daily basis. Because substantial evidence exists, this Court should reject the Appellant's suggestion to engage in a balancing test weighing this evidence against the evidence offered by the Appellant.<sup>1</sup> Such a balancing test is contrary to Washington law.

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<sup>1</sup> See App. Br. at 20, discussed at Section IV.B.2 below.

Furthermore, the Petitioner mischaracterizes Washington law by incorrectly claiming that the Personal Representative has the burden of establishing the testator's *competency* by clear, cogent and convincing evidence.<sup>2</sup> Because the trial court correctly applied Washington law and held that the Petitioner failed to meet her burden of establishing the testator's *incompetency* by clear, cogent and convincing evidence, this Court should ignore Petitioner's request to apply the wrong standard. For these reasons, the Court should affirm the trial court's conclusion that the testator possessed testamentary capacity to execute her Will in 2012.

Similarly, the Petitioner failed to produce clear, cogent, and convincing evidence to support her undue influence claim. Because there was substantial evidence in the record that the Respondent did not exert undue influence over the testator, the trial court's decision should be affirmed. In addition, this Court should award the Respondent her attorneys' fees and costs incurred in defending this action on appeal.

## **II. RESTATEMENT OF ISSUES**

1. Did the trial court correctly hold that the Petitioner failed to meet her burden of presenting clear, cogent, and convincing evidence of the testator's incompetency, where the trial court's findings of the testator's

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<sup>2</sup> See Appellant Brief at 16-17. *See also* Section IV.B.2 of this brief.

competency were supported by substantial evidence, as in this case where the trial court's findings were supported by the testimony of four witnesses, where the testator directed the disinheriting of the Petitioner because of the Petitioner's repeated misconduct, and where the disinheritance was consistent with the testator's prior treatment of the Petitioner?

2. Did the trial court correctly hold that the Petitioner failed to meet her burden of presenting clear, cogent, and convincing evidence to support her undue influence claim, where there was substantial evidence in the record that the Respondent did not exert undue influence over the testator and where the trial court's findings of no undue influence were supported by the testimony of three witnesses?

### **III. COUNTERSTATEMENT OF THE CASE**

#### **A. The Tumultuous History Between Mrs. Korsten and Ms. Wheeler**

In April 2012, Mary Lou Korsten contacted her long-time attorney, Eugene Hammermaster, and asked him to revise her Will. Report of Proceeding ("RP") at 358:25-360:12. At that time, Mrs. Korsten informed Mr. Hammermaster that she wanted nothing in the Will to go to her daughter, Petitioner Louanne Wheeler. RP at 360:8-12.

This was not the first time that Mrs. Korsten had revised her estate planning with regard to Ms. Wheeler's inheritance. In 1993,

Mr. Hammermaster drafted a Will for Mrs. Korsten. RP at 317:2-8; Ex. 1.<sup>3</sup> One year later, Mrs. Korsten executed a codicil to that Will to change distributions to her son, Jack Korsten, and to Ms. Wheeler. RP at 319:6-10; Ex. 2. The codicil reduced the bequest to Ms. Wheeler by half and directed that the remaining bequest to Ms. Wheeler – one-fourth of the balance of the estate – be held in trust until Ms. Wheeler reached the age of 55 years old. Findings of Fact (“FoF”) No. 10.<sup>4</sup> Mr. Hammermaster testified that Mrs. Korsten changed the distribution scheme to her daughter because she and her husband “had serious concerns about how [Ms. Wheeler] would dissipate money.” RP at 319:18-19. Mrs. Korsten’s husband subsequently passed away in 1998, and Mr. Hammermaster handled the probate of his Will and the administration of his estate. RP at 320:2-6; FoF No. 12.

In 2009, Mr. Hammermaster drafted a power of attorney for Mrs. Korsten naming her son Jack and her daughter Louanne as her agents. RP at 321:11-15. Mrs. Korsten then revoked that power of attorney from her daughter because of the Petitioner’s conduct. RP at 321:21-322:11.

Specifically, Ms. Wheeler had contacted an investment advisor seeking to withdraw \$800,000 from one of Mrs. Korsten’s accounts. RP at

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<sup>3</sup> Exhibits 1, 2, 3, 4, 5, 6, 8, 9, 15, 17, 18, 20 and 21 were all admitted at the same time. RP at 15:9-13.

<sup>4</sup> The Trial Court’s Order (with Findings of Fact and Conclusions of Law), filed December 30, 2019, is attached as an Appendix to this brief.

322:15-21. Alarmed, the investment advisor reported this attempt to Mr. Hammermaster's office, who informed Mrs. Korsten of the attempted withdrawal. RP at 322:19-323:1. Mrs. Korsten immediately requested that Ms. Wheeler's power of attorney be revoked. RP at 322:25-323:1; Ex. 3.

Shortly thereafter, Mr. Hammermaster met with Ms. Wheeler, who told him that she wanted the \$800,000 for a house and that she intended to repay the money from the proceeds of a lawsuit within 90 days. RP at 331:20-334:8, Ex. 34. Because Mr. Hammermaster could not find any pending lawsuits, he concluded "that there was really no way she could possibly replace the \$800,000," and he informed Mrs. Korsten of his conclusion. RP at 334:3-8, Ex. 34. Mrs. Korsten revoked Ms. Wheeler's power of attorney in September 2009 and then executed a new power of attorney with her son Jack as the sole attorney in fact. RP at 321:23-322:6, 323:9-22; Exs. 3, 4.

After Ms. Wheeler acknowledged her inappropriate conduct, a reconciliation occurred between her and Mrs. Korsten. RP at 326:17-25. As a result, Mrs. Korsten executed a new power of attorney in June 2010 naming Ms. Wheeler as her attorney in fact. RP 326:1-10; Ex. 5. And, in September 2010, Mrs. Korsten terminated a trust that had been setup in Louanne's name, resulting in \$250,000 and a house being distributed to Ms. Wheeler. RP at 231:3-232:23; Ex. 6; FoF No. 20.

The reconciliation between Ms. Wheeler and Mrs. Korsten, however, did not last long.

In April 2011, Ms. Wheeler improperly withdrew \$55,000 from Mrs. Korsten's bank account. RP at 336:10-18; FoF Nos. 25, 26. Ms. Wheeler's unauthorized withdrawal triggered an investigation by the police and Adult Protective Services. RP at 336:16-337:15; Exs. 13, 14; RP at 339:5-11. After the \$55,000 was returned to Mrs. Korsten's bank account, the investigation by the police and APS ceased. RP at 338:25-339:13.

After Ms. Wheeler's unauthorized withdrawal, Mrs. Korsten revoked her power of attorney in April 2011. RP at 326:10-17; Ex. 9. At the same time, Mrs. Korsten executed a new power of attorney, naming her son Jack as the sole attorney in fact. RP at 328:3-9; Ex. 8. Mr. Hammermaster testified that the April 2011 power of attorney, and the simultaneous revocation of the Petitioner's power of attorney, were both at the direction of Mrs. Korsten. RP at 326:14-20.

Moreover, Mrs. Korsten did not speak with her daughter after the unauthorized withdrawal. RP at 216:6-13; 217:16-19. Nor did Ms. Wheeler see Mrs. Korsten after April 2011. FoF No. 40. In fact, Ms. Wheeler was no longer allowed to visit Mrs. Korsten at the facility where Mrs. Korsten lived, the Cedar Ridge Assisted Living Facility. RP at 48:22-49:3.

In addition, Mr. Hammermaster sought the return of several vehicles from Ms. Wheeler. RP at 235:20-236:3. The vehicles were not returned. *Id.*

**B. Mrs. Korsten Acts To Disinherit Ms. Wheeler.**

Following Ms. Wheeler's unauthorized withdrawal, Mrs. Korsten directed Mr. Hammermaster to revise her Will to disinherit Ms. Wheeler. RP at 359:22-360:12. Mrs. Korsten wanted to remove her daughter from the Will because of the problems that she had caused for the past several years. RP at 360:8-12. Indeed, Mrs. Korsten had previously considered disinheriting Ms. Wheeler on many occasions. RP at 361:10-17.

This time, however, Mrs. Korsten instructed Mr. Hammermaster to actually remove Ms. Wheeler from the Will. RP at 360:8-12. Indeed, Mr. Hammermaster testified that "removing Louanne was [Mrs. Korsten's] immediate intent, no question about it." RP at 360:17-18.

Mr. Hammermaster and Mrs. Korsten also discussed who would replace Ms. Wheeler in the Will. RP at 360:14-22. Ultimately, Mrs. Korsten told Mr. Hammermaster to include her next closest relative, her granddaughter Marianne Rios, in her Will. RP at 360:22-361:4. Mr. Hammermaster added that Mrs. Korsten "was quite forceful in wanting to have that take place." RP at 361:8-9.

At the same time, Mrs. Korsten requested that Mr. Hammermaster draft a new power of attorney naming Marianne to serve as attorney in fact, along

with Mrs. Korsten's son, Jack. RP at 357:16-20, Ex. 15. On April 20, 2012, Mrs. Korsten signed the power of attorney in the presence of Mr. Hammermaster. RP at 358:25-359:2; Ex. 15.

Mrs. Korsten also met with Mr. Hammermaster in April 2012 to discuss changes that she wanted made to her Will, including removing Ms. Wheeler and adding Ms. Rios to the Will. RP at 391:2-392:18; Ex. 16. Mr. Hammermaster's office drafted a memo summarizing these changes on May 25, 2012. Ex.16.

Shortly thereafter, Mr. Hammermaster drafted a revised Will in accordance with Mrs. Korsten's directive to remove Louanne from the Will and to replace her with Mrs. Korsten's granddaughter Marianne. RP at 359:22-361:4; 390:10-23, Exs. 16, 17. Mr. Hammermaster sent the new Will to the Cedar Ridge facility where Mrs. Korsten was residing. RP at 410:6-10, Ex. 16.

Mrs. Korsten signed the revised Will on July 2, 2012, and her execution of that Will was witnessed by two employees of Cedar Ridge, Jami Pitman and Amanda Wenz. RP at 40:1-9, 77:7-10; Ex. 17. Ms. Pitman, Ms. Wenz, and Ms. Rios testified that Mrs. Korsten's mental functioning was sharp at the time she executed her Will and that she intended to disinherit Louanne. RP at 50:21-53:13, 68:1-13, 87:3-90:9, 101:3-9.

After Mrs. Korsten executed her Will she continued to communicate with Mr. Hammermaster. RP at 365:7-15. On January 1, 2013, for example, Mrs. Korsten sent a handwritten note to him with instructions on the handling and depositing of her checks. RP at 365:7-366:14, Ex. 18. In these communications with Mrs. Korsten, Mr. Hammermaster observed no signs of any dementia or anything else that would indicate that she lacked capacity to execute her Will in 2012. RP at 366:21-367:22.

Indeed, when asked if Mrs. Korsten had the capacity to execute her Will, Mr. Hammermaster did not waiver in his response:

Q. In your opinion, did Mrs. Korsten have capacity to execute the 2012 Will?

A. Oh, no question about it at all. No change in her demeanor and approach to things during the entire time I knew her.

RP at 367:2-6.

**C. The Trial Court Rejects the Petitioner's Will Contest.**

Mrs. Korsten died on July 11, 2013. Following Mrs. Korsten's death, a petition for the probate of her Will was filed on August 5, 2013. Clerk's Papers ("CP") at 1-7. The court issued an order admitting the Will into probate and appointing Marianne Rios as Personal Representative on August 6, 2013. CP at 12-13. Ms. Wheeler filed a petition contesting the validity of the Will on December 2, 2013. CP at 20-21.

Trial before the Honorable Michael E. Schwartz occurred on November 18, 19 and 25, 2019. CP at 165. Testimony was heard from 8 witnesses and over 30 exhibits were admitted at trial. On December 9, 2019, the court issued its oral decision denying Ms. Wheeler's petition:

[T]his Court finds that petitioner, Louanne Wheeler, has failed to meet her burden of presenting clear, cogent and convincing evidence to establish either that Mrs. Korsten lacked capacity to execute her Last Will & Testament, or that Mrs. Korsten was unduly influenced when she executed her Will.

RP at 482:18-23.

The trial court subsequently entered findings of fact and conclusions of law consistent with its oral decision on December 30, 2019. CP at 145-59. Judgment dismissing the Will contest was filed on January 7, 2020. CP at 160-61. Ms. Wheeler timely filed her Notice of Appeal on January 31, 2020. CP at 162-82.

#### **IV. ARGUMENT**

##### **A. Standard of Review**

In a will contest, the appellate court determines whether the trial court's findings are supported by substantial evidence. *In re Estate of Barnes*, 185 Wn.2d 1, 9, 367 P.3d 580 (2016). The appellate court views the evidence in the light most favorable to the prevailing party and defers to the trial court's determinations of the weight and credibility of the evidence

and witness testimony. *Weyerhaeuser v. Health Dep't*, 123 Wn. App. 59, 65, 96 P.3d 460 (2004); *Barnes* at 9.

If the trial court's findings are supported by substantial evidence, the appellate court then determines whether the findings support the trial court's conclusions of law. *Bank of America, N.A. v. Wells Fargo Bank, N.A.*, 126 Wn. App. 710, 714, 109 P.3d 863 (2005). The trial court's conclusions of law, including any conclusions mischaracterized as findings of fact, are reviewed de novo. *McCleary v. State*, 173 Wn.2d 477, 514, 269 P.3d 227 (2012); *In re Estate of Haviland*, 162 Wn. App. 548, 561, 255 P.3d 854 (2011).

Substantial evidence exists if the record contains "evidence of sufficient quality to persuade a fair minded rational person of the truth of the declared premise." *World Wide Video, Inc. v. City of Tukwila*, 117 Wn.2d 382, 387, 816 P.2d 18 (1991). In determining whether substantial evidence exists, the appellate court need only consider evidence favorable to the prevailing party. *Endicott v. Saul*, 142 Wn. App. 899, 909, 176 P.3d 560 (2008). In evaluating the persuasiveness of the evidence, and the credibility of witnesses, the appellate court must defer to the trier of fact. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 108, 864 P.2d 937 (1994). If the substantial evidence standard is satisfied, an appellate court will not

substitute its judgment for that of the trial court. *In re Riddell*, 138 Wn. App. 485, 492, 157 P.3d 888 (2007).

Unchallenged findings of fact are verities on appeal. *Estate of Barnes*, at 9. In addition, the appellate court “will not ‘disturb findings of fact supported by substantial evidence even if there is conflicting evidence.’” *McCleary*, 173 Wn.2d at 514 (citation omitted).

**B. The Burden of Proof in a Will Contest Requires that Ms. Wheeler Establish the Will’s Illegality Through Clear, Cogent, and Convincing Evidence**

Washington law states that “[a]ny person of sound mind who has attained the age of eighteen years may, by last will, devise all of his or her estate, both real and personal.” RCW 11.12.010. The right to dispose of one’s property by will is not only a valuable right but is one assured by law. *Dean v. Jordan*, 194 Wash. 661, 668, 79 P.2d 331 (1938).

In a Will contest, the “order of the court probating ... such will shall be prima facie evidence of the legality of such will.” RCW 11.24.030. In addition, “the burden of proving the illegality of such will, if probated, ... shall rest upon the person contesting such probation ... of the will.” *Id.*

Furthermore, “[w]here a will, rational on its face, is shown to have been executed in legal form, the law presumes that the testator had testamentary capacity and that the will speaks his wishes.” *Dean*, 194 Wash. at 668-69. Based on these principles, Washington courts have long held that

the party challenging the validity of a will bears the burden of proving the will's illegality by "clear, cogent, and convincing" evidence. *In re Estate of Barnes*, 185 Wn.2d at 10 (citing *Dean v. Jordan*).

"Clear, cogent, and convincing" evidence is a quantum of proof that is more than a preponderance of the evidence, but less than what is needed to establish proof beyond a reasonable doubt. *Estate of Barnes*, 185 Wn.2d at 10 (citing *Bland v. Mentor*, 63 Wn.2d 150, 154, 385 P.2d 727 (1963)). The clear, cogent, and convincing standard contains two components: the burden of production, and the burden of persuasion. *Colonial Imports, Inc. v. Carlton NW., Inc.*, 121 Wn.2d 726, 734–35, 853 P.2d 913 (1993). To meet the burden of production, there must be "substantial evidence." *Colonial Imports*, 121 Wn.2d at 734–35 (emphasis added). "Substantial evidence" is the quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. *Wenatchee Sportsmen Association v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). The other component, the burden of persuasion, is met if the trier of fact is convinced that the fact in issue is "highly probable." *Endicott*, 142 Wn. App. at 909-10 (citing *Colonial Imports*, 121 Wn.2d at 734–735).

**1. The trial court correctly held that Ms. Wheeler bears the burden of establishing the illegality of the 2012 Will through clear, cogent and convincing evidence.**

Here, the court issued an order admitting the Will into probate on August 6, 2013. CP at 12-13; Conclusion of Law (“CoL”) No. 4. Thus, as the trial court concluded, the Petitioner “Louanne Wheeler bears the burden of proving the illegality of the Will by ‘clear, cogent, and convincing evidence’”. CoL No. 6. The Appellant did not assign error to this conclusion. *See* App. Br. at 3-9. The trial court then correctly concluded that Ms. Wheeler failed to meet her burden of proving that Mrs. Korsten lacked capacity to execute the Will. CoL No. 27.

**2. The Appellant misstates the burden of proof by incorrectly suggesting that the Personal Representative bears the burden of establishing competency through clear, cogent, and convincing evidence.**

On pages 16-17 of her brief, Ms. Wheeler incorrectly states that Mrs. Korsten’s *competency* must be established by clear, cogent, and convincing evidence:

The relevant inquiry is whether there is substantial evidence that Mrs. Korsten had the ability to understand the nature, terms and effect of the July 2012 Will. *See Page v. Prudential Life Ins. Co.*, 12 Wn.2d 101, 109, 120 P.2d 527 (1942) (stating “[t]he rule relative to mental capacity to contract . . . is whether the contractor possessed sufficient mind or reason to enable him to comprehend the nature, terms and effect of the contract in issue”). **The quantum of proof required to prove competency is clear, cogent and convincing evidence.** *Id.* at 109; *accord Grannum v. Berard*, 70 Wn.2d 304, 307, 422 P.2d 812 (1967) (citing *Page*,

*supra*). This requires evidence that is more substantial than an ordinary civil case where requisite quantum of proof is only a preponderance of the evidence. *See, e.g. B.P. v. H.O.*, 186 Wn.2d 292, 313, 376 P.3d 350 (2016).

App. Br. at 16-17 (emphasis added). The suggestion that the Personal Representative must establish Mrs. Korsten's competency through clear, cogent, and convincing evidence is incorrect.

Rather, Washington law holds that it is Ms. Wheeler who has the burden of establishing Mrs. Korsten's *incompetency* through clear, cogent, and convincing evidence. Indeed, the very cases cited by Ms. Wheeler underscore the inaccuracy of her statement.

For example, the *Page v. Prudential Life Insurance Company* case, cited on page 16 of Ms. Wheeler's brief, does not support the Appellant's assertion that competency must be established by clear, cogent, and convincing evidence. Here is the actual passage from the *Page* case that is cited in the Appellant's brief:

The rule relative to mental capacity to contract, therefore, is whether the contractor possessed sufficient mind or reason to enable him to comprehend the nature, terms, and effect of the contract in issue. In applying this rule, however, it must be remembered that contractual capacity is a question of fact to be determined at the time the transaction occurred, 17 C.J.S. 483, § 133; that *everyone is presumed sane; and that this presumption is overcome only by clear, cogent, and convincing evidence*. *Roberts v. Pacific Tel. & Tel. Co.*, 93 Wash. 274, 160 Pac. 965. That he was perhaps eccentric and excitable is not denied. Moreover, that he exercised poor business judgment, likewise, cannot be contradicted. Yet

even though these are conceded, they do not spell mental incapacity to contract.

*Page v. Prudential Life Ins. Co.*, 12 Wn.2d 101, 109, 120 P.2d 527 (1942) (emphasis added). Thus, competency is presumed, and it is the lack of competency that must be proved by clear, cogent, and convincing evidence.

On page 17 of her brief, Ms. Wheeler also cites *Grannum v. Berard* as being in accord with the assertion that the quantum of proof required to prove competency is clear, cogent and convincing evidence. Here is the actual passage from *Grannum*:

It is well settled that the law will presume sanity rather than insanity, competency rather than incompetency; it will presume that every man is sane and fully competent until satisfactory proof to the contrary is presented. 29 Am. Jur. *Insane And Other Incompetent Persons* § 132, p. 253. In Washington we have held that the standard of proof required to overcome this presumption, in civil cases, is that of clear, cogent and convincing evidence. *Page v. Prudential Life Ins. Co. of America*, 12 Wn.2d 101, 120 P.2d 527 (1942); *Roberts v. Pacific Tel. & Tel. Co.*, 93 Wash. 274, 160 Pac. 965 (1916).

*Grannum v. Berard*, 70 Wn.2d 304, 307, 422 P.2d 812 (1967). And in *In re Parental Rights to B.P.*, 186 Wn.2d 292, 312-13, 376 P.3d 350 (2016), cited on page 17 of the Appellant's brief, the court held that the State had failed to meet its burden of establishing the unfitness of a parent through clear, cogent, and convincing evidence.

Remarkably, Ms. Wheeler then states that there is "no evidence" from any witness that Mrs. Korsten "was of a sound mind" when she signed

her Will. App. Br. at 17. On the contrary, three witnesses, Mr. Hammermaster, Jami Pitman, and Amanda Wenz, all testified that Mrs. Korsten was competent when she signed her Will.

Indeed, the Appellant herself acknowledges this fact three pages later when she states that “the testimony of Mr. Hammermaster, Ms. Pitman, and Ms. Wenz” should be “balanced against” the evidence offered by Ms. Wheeler. App. Br. at 20. The balancing test advocated by Ms. Wheeler is contrary to Washington law.

As discussed in Section IV.A above, an appellate court, in determining whether substantial evidence exists, needs only to consider evidence favorable to the prevailing party. *Endicott*, 142 Wn. App. at 909. In addition, in evaluating the persuasiveness of the evidence and the credibility of witnesses, the appellate court must defer to the trier of fact. *Burnside*, 123 Wn.2d at 108. If substantial evidence exists, an appellate court will not substitute its judgment for that of the trial court. *In re Riddell*, 138 Wn. App. 492; *McCleary*, 173 Wn.2d at 514 (the appellate court will not disturb findings of fact supported by substantial evidence even if there is conflicting evidence.) Thus, the Appellant’s request that this Court engage in a balancing test is contrary to Washington law.

As discussed in the following section, there is abundant evidence in the record of Mrs. Korsten’s competency when she executed her Will. Also,

the trial court correctly held that Ms. Wheeler failed to meet *her* burden of establishing Mrs. Korsten's incompetency by clear, cogent, and convincing evidence. CoL Nos. 10, 27.

**C. Mrs. Korsten Had Testamentary Capacity When She Executed Her Will.**

Ms. Wheeler asserts that her mother's Will should be held invalid because Mrs. Korsten lacked the requisite capacity to make a will. App. Br. at 16-22. This contention is based primarily on a diagnosis of dementia that was made sometime in 2010 by a doctor who once treated Mrs. Korsten. Such diagnosis did not preclude Mrs. Korsten from having sufficient cognitive function and presence of mind to make and execute a will. *See In re Estate of Kessler*, 35 Wn.2d 156, 157, 211 P.2d 496 (1949) (dementia does not necessarily result in mental incapacity to make a will).

Rather, Washington courts assess testamentary capacity according to the following principles:

[A] person is possessed of testamentary capacity if at the time he assumes to execute a will he has sufficient mind and memory to understand the transaction in which he is then engaged, to comprehend generally the nature and extent of the property which constitutes his estate and of which he is contemplating disposition, and to recollect the objects of his bounty.

*In re Bottger's Estate*, 14 Wn.2d 676, 685, 129 P.2d 518 (1942); *see also In re Estate of Kessler*, 95 Wn. App. 358, 371, 977 P.2d 591 (1999). While testamentary capacity is determined as of the time the will is made, evidence

related to the testator's mental condition during a reasonable time before and after the making of the will is relevant and admissible even if remoteness affects its weight. *Estate of Kessler*, 95 Wn. App. at 371.

**1. The trial court finds that Ms. Korsten had the capacity to execute the 2012 Will.**

The trial court entered detailed findings of fact supporting Mrs. Korsten's competency, including the following:

51. Mr. Hammermaster, testified that Mrs. Korsten remained intellectually sharp in the last few years of her life and that at the time she was conferring with Mr. Hammermaster with regard to the revisions he was making to her Will, she knew who her family was and she was actively engaged in decision-making both with regard to the management of her estate and with regard to her estate planning.

52. Mr. Hammermaster also testified that, in the course of drafting her 2012 Will, he spoke or met with Mrs. Korsten on several occasions to get her input with regard to the terms of that Will and that she was actively engaged in decision-making concerning her estate.

53. Mr. Hammermaster also testified that he saw no indication that Marianne Rios was exerting any influence — undue or otherwise — over Mrs. Korsten.

54. Mr. Hammermaster testified that Mrs. Korsten made the decision to disinherit Louanne Wheeler because Mrs. Korsten was deeply troubled by Louanne Wheeler's infidelity and her repeated attempts to wrongfully appropriate Mrs. Korsten's monies.

55. On July 6, 2012, four days after Mrs. Korsten executed her 2012 Will, records from the Cedar Ridge facility where Mrs. Korsten was residing noted "[e]vidence of short-term memory loss," that Mrs. Korsten "is not

oriented to ... time," and that her "[a]bility to make decisions about daily life is poor, requires reminders, cues and supervision in planning daily routines."

56. Despite those findings, Jami Pitman, the Care Coordinator for Mrs. Korsten at the Cedar Ridge facility, and Amanda Wenz, a medical technician who attended to Mrs. Korsten's medications, both testified that, in their respective opinions, Mrs. Korsten was as sharp and attentive as ever and understood what she was doing when she executed her 2012 Will.

57. Both Jami Pitman and Amanda Wenz testified that Mrs. Korsten was particularly memorable because she was such a strong-willed woman.

58. Amanda Wenz testified that Mrs. Korsten would scrutinize the medications that Ms. Wenz would prepare for her and would notice — and comment — if one or more of her pills was missing.

59. Both Jami Pitman and Amanda Wenz testified that Mrs. Korsten would read the newspaper daily.

60. Finally, Marianne Rios testified that, while Mrs. Korsten suffered from several physical injuries and challenges such as being exceptionally hard of hearing, she retained her cognitive capabilities and was able to clearly communicate her ideas and intentions up until the time she passed away, over one year after she had executed the 2012 Will.

CP at 153-54. Because Findings of Fact Nos. 57 through 60 were not challenged by Ms. Wheeler, these findings are verities on appeal.

As the following section demonstrates, the trial court's findings regarding Mrs. Korsten's capacity are supported by substantial evidence.

**2. Substantial evidence supports the trial court’s findings that Mrs. Korsten had testamentary capacity to execute her 2012 Will.**

As the trial court concluded, the Will executed by Mrs. Korsten was rational on its face and in its legal form, and Ms. Rios was properly appointed to serve as Personal Representative. CoL Nos. 4-5. Thus, the trial court correctly held that Ms. Wheeler bears the burden of proving the illegality of the Will by “clear, cogent, and convincing” evidence. CoL No. 6. In addition, the Appellant did not assign error to Conclusions of Law 4, 5, or 6. *See* App. Br. at 3-9.

Moreover, there was abundant evidence in the record to support the trial court’s conclusion that Mrs. Korsten possessed testamentary capacity to execute her Will on July 2, 2012. CoL No. 10.

**a) The testimony of Attorney Eugene Hammermaster supports the trial court’s findings of Mrs. Korsten’s competency.**

Mr. Hammermaster was Mrs. Korsten’s long-time attorney, representing her and her husband for approximately 40 years. RP at 315:21-24. At trial, Mr. Hammermaster testified about Ms. Korsten’s competency in April 2012 when she signed her power of attorney naming her son Jack and her granddaughter Ms. Rios as her attorneys in fact in the presence of Mr. Hammermaster:

Q. ... Now, in April of 2012 did Mrs. Korsten sign the power of attorney in your presence?

A. Yes, she did.

Q. Okay. And in preparing that, did you consult with her?

A. She instructed me to do it, yes, uh-huh.

...

Q. Did Mrs. Korsten appear to understand what was being done by the preparation of this new power of attorney?

...

THE WITNESS: Yes, she did.

RP at 358:25-359:17.

In April 2012, Mr. Hammermaster also discussed in person with Mrs. Korsten, the changes that she wanted to make to her Will and the reason for these changes:

Q. At the time that you prepared that power of attorney, were you working on any other estate planning for Mrs. Korsten?

A. Yes.

Q. Can you tell me what that was?

A. An updated Will.

...

Q. Did she state why she wanted to update her Will?

A. She wanted to take Louanne off of the Will, Ms. Wheeler.

Q. And did she explain why she wanted to do that?

A. Partially all of these things that had been ongoing over the past several years.

Q. Did you try to dissuade her from doing that?

A. I made no comment about it at all. I did inquire what did she have in mind with the Will if she took Louanne off, and that was probably the biggest part of the discussion. Our discussion about removing Louanne was her immediate intent, no question about it.

RP at 360:8-18.

Mr. Hammermaster also testified that Mrs. Korsten instructed him to put Ms. Rios into her new Will and of her reasons for wanting to disinherit Ms. Wheeler in the past:

Q. Did you suggest to Mrs. Korsten that she include Marianne Rios in her Will?

A. She told me.

Q. And did she make any other direction to you with regard to that Will that you recall?

A. Not other than get with it and get it done. Once she had made up her mind on something, she was quite forceful in wanting to have that take place.

Q. ... Had Mr. or Mrs. Korsten ever spoken to you previously about disinheriting Louanne?

A. Many times.

Q. And did they provide a basis or a reason for their desire to do that?

A. Her conduct primarily, and again, their concern about her management of funds as well.

RP at 361:2-17.

Mr. Hammermaster also testified about his conversations with Mrs. Korsten after she signed the 2012 Will. RP at 365:7-15. Mrs. Korsten even sent him a handwritten note in January 2013. RP at 365:20-23, Ex. 18. Mr. Hammermaster continued to communicate with Mrs. Korsten on a regular basis up to April 2013. RP at 365:24-366:14.

And when asked about Mrs. Korsten's diagnosis of dementia, Mr. Hammermaster testified that he saw no signs of the condition and that Mrs. Korsten unequivocally had the capacity to execute her 2012 Will:

Q. What, if anything, did you observe about Mrs. Korsten that might have manifested indications of dementia?

A. I saw nothing that would do that.

Q. In your opinion, did Mrs. Korsten have capacity to execute the 2012 Will?

A. Oh, no question about it at all. No change in her demeanor and approach to things during the entire time I knew her.

Q. When you were preparing the 2012 Will, did you believe that Mrs. Korsten knew who her family members were?

A. Absolutely.

Q. When you were preparing the 2012 Will, did Mrs. Korsten appear to generally be aware of what her assets were?

A. In my opinion, yes. We specifically discussed the house at that time, and discussed financial issues generally at that time. And even this last note in January of 2013 indicates that she was aware of her Bank of America bank account.

...

Q. In your opinion did the 2012 Will express Mrs. Korsten's wishes with regard to distribution of her estate upon her death?

A. It did.

RP at 366:24-367:23.

As discussed in the following sections, the testimony of Mr. Hammermaster is consistent with the testimony of Jami Pitman and Amanda Wenz, who witnessed Mrs. Korsten's execution of her Will in 2012 and who worked at the Cedar Ridge facility where Mrs. Korsten lived.

**b) The testimony of Jami Pitman supports the trial court's findings of Mrs. Korsten's competency.**

From August 2011 until June 2013, Ms. Pitman was the resident care coordinator at the Cedar Ridge facility where Mrs. Korsten resided. RP at 40:1-9. As the resident care coordinator, Ms. Pitman was responsible for coordinating the care plan for Mrs. Korsten. RP at 41:17-21. Ms. Pitman testified that she did not do "a whole lot" for Mrs. Korsten because "she still was able to do a lot of the things on her own." RP at 41:24-42:2.

Ms. Pitman conversed frequently with Mrs. Korsten because her office was right across the hall from Mrs. Korsten's apartment. RP at 42:11-15. Ms. Pitman noted that Mrs. Korsten would go out shopping and that she herself would pay her rent. RP at 46:12-14. When asked about Mrs. Korsten cognitive functioning, Ms. Pitman responded: "She knew what was going on around her and what we would talk about." RP at 47:4-5.

Ms. Pitman also witnessed Mrs. Korsten sign her 2012 Will. RP at 42:6-7; Ex. 17. At trial, Ms. Pitman testified about Mrs. Korsten's capacity to execute her 2012 Will, noting that she knew what she was doing when she signed the Will and that she understood the nature and extent of the property that constituted her estate. RP at 52:1-18.

Ms. Pitman also testified that from the Will signing to shortly before she died, Ms. Pitman never observed a decline in Mrs. Korsten's ability to communicate "mentally" with her. RP at 52:19-53:2. Ms. Pitman added that Mrs. Korsten was a memorable woman because of her feistiness:

Q. ... I think at one point you had said she was a memorable woman. Why did you say that?

A. Just because she was very feisty. She was very --- she didn't -- she liked things her way, and no other way. So she let her needs be known and how she wanted things to be done, and if they weren't done that way, she would let you know.

Q. Did that feistiness continue during the time that you knew her?

A. She was always feisty.

RP at 53:4-13.

In response to questions from the court, Ms. Pitman elaborated upon the 2012 Will signing and Mrs. Korsten's capacity:

THE COURT: And when the Will was executed, where was Mrs. Korsten in the room? Was she in bed, sitting at the table?

THE WITNESS: She was sitting in her wheelchair at the table.

THE COURT: ... Around that particular time period, in your opinion, was she capable of problem solving on her own?

THE WITNESS: Yes.

THE COURT: Give me an example of that.

THE WITNESS: If she had a problem, she knew how to solve it. Like, okay, so if she needed help finding something in her apartment, she knew how to push the call button and get someone to come and help her. If she needed new Depends, she knew to tell her family, I'm getting low on supplies, or can you call my granddaughter or can you get me some. She knew how to go about getting what she needed.

RP at 67:21-68:22.

c) **The testimony of Amanda Wenz supports the trial court's findings of Mrs. Korsten's competency.**

Ms. Wenz was employed by Cedar Ridge as a medication technician who administered medications to residents, including Mrs. Korsten. RP at

77:7-19. In the course of her employment, Ms. Wenz had daily interactions with Mrs. Korsten. RP at 101:3-9.

At trial, Ms. Wenz testified that Mrs. Korsten read the newspaper daily and that she interacted intelligently with Mrs. Korsten and easily carried on conversations with her, as long as you spoke loudly enough. RP at 78:22-79:2, 81:6-11. Ms. Wenz also stated that she never observed any signs of dementia. RP at 79:16-21.

Ms. Wenz added that Mrs. Korsten could articulate what she needed, that she would get irritated if she did not get it and that: “She was a woman that knew what she wanted and she wasn't going to stop until she got what she wanted.” RP at 81:19-82:5.

Ms. Wenz also witnessed the execution of 2012 Will. RP at 87:3-5. At trial, she testified about Mrs. Korsten mental state during the Will signing:

Q. ... [C]an you describe Mrs. Korsten's state of mind at that time?

A. I feel like she was just like any other day. She was full of spit and vinegar.

Q. Did she appear to be of sound mind when she signed the Will?

A. Yes.

RP at 87:10-16.

Regarding the 2012 Will signing, Ms. Wenz testified that no one forced Mrs. Korsten to sign the Will, RP at 89:3-7, and that she understood what she was signing:

Q. At that time that you witnessed the Will, is it your opinion that Mrs. Korsten understood what she was signing?

A. Yes.

Q. And as far as you know, it represented her intentions?

A. Yes.

RP at 90:3-7.

When asked about the basis for her opinion that Mrs. Korsten was of a sound mind, Ms. Wenz cited her daily interactions with her:

Q. And inside of the Will you indicate she was of sound mind. What are you basing that on? Your prior experience with her or something that happened that day?

A. No, just my daily visits with her. I mean, I gave her her meds in the morning. I helped her, you know, get dressed if she needed it, I handed her her paper, got her her meals.

RP at 101:3-9.

**d) The testimony of Marianne Rios supports the trial court's findings of Mrs. Korsten's competency.**

At trial, Ms. Rios testified that Mrs. Korsten retained her cognitive abilities up until shortly before she died. RP at 252:6-252:4. Ms. Rios also

stated that she was able to communicate with Mrs. Korsten until shortly before she passed away:

Q. Were you able to talk to her on the phone?

A. Yes.

Q. How often?

A. She called me quite often asking me or my children, her great grandchildren, to bring things to Cedar Ridge that she wanted.

Q. How long before her death was she able to do that?

A. I actually got a voicemail three days before her passing.

...

Q. When was the last time you had a conversation by phone with her?

A. Maybe 20 days prior, real brief. And you know, I will be the first to admit, it was hard to have a conversation with her on the phone, but if you raised your voice real well she did okay.

Q. Was she able to understand the subject that you were talking about?

A. Yes.

RP at 253:23-253:18.

The testimony of Mr. Hammermaster, Ms. Pitman, Ms. Wenz, and Ms. Rios establishes that the trial court's findings of Mrs. Korsten's capacity to execute the 2012 Will are supported by substantial evidence. In

addition, the trial court's findings regarding her capacity support the court's conclusions of law that Mrs. Korsten had testamentary capacity to execute the 2012 Will, and that Ms. Wheeler failed to meet her burden of presenting clear, cogent, and convincing evidence that Mrs. Korsten lacked capacity. CoL Nos. 10, 27.

Moreover, because the trial court's findings regarding Mrs. Korsten's competency are supported by substantial evidence, this Court need not even consider Ms. Wheeler's argument that Mrs. Korsten lacked capacity. *See McLeary*, 173 Wn.2d at 514 ("We will not 'disturb findings of fact supported by substantial evidence even if there is conflicting evidence.'"); *In re Riddell*, 138 Wn. App. at 492 (if the substantial evidence standard is satisfied, "we will not substitute our judgment for that of the trial court even though we may resolve a factual dispute differently.")

Nevertheless, even a brief discussion of Ms. Wheeler's argument that Mrs. Korsten lacked capacity underscores the flaws in her argument.

**3. Ms. Wheeler's arguments regarding Mrs. Korsten's capacity are without merit.**

Faced with the evidence of Mrs. Korsten capacity, Ms. Wheeler primarily relies upon the testimony of a single witness, Traci Mancuso. App. Br. at 20-21. Ms. Mancuso, a nurse practitioner, met with Mrs. Korsten only one time before Mrs. Korsten signed the 2012 Will. RP at 127:12-18.

Furthermore, in four *unchallenged* findings of fact, the trial court correctly described the limitations that lessen the weight afforded Ms. Mancuso's testimony:

46. Ms. Mancuso had met with Mrs. Korsten only once prior to the date Mrs. Korsten executed her 2012 Will, and that meeting lasted at most forty-five minutes.

...

48. Ms. Mancuso noted that Mrs. Korsten had been diagnosed with "dementia" and some short-term memory impairment, but she declined to say that Mrs. Korsten suffered from Alzheimer's disease, which Ms. Mancuso said requires special screening and a specific diagnosis.

49. Ms. Mancuso initially testified at trial that she had conducted a cognitive assessment of Mrs. Korsten by administering a Mini Mental Status Exam at her first meeting with Mrs. Korsten, but when on cross-examination she referred to the transcript of her deposition testimony, she admitted that she had not in fact administered a Mini Mental Status Exam, nor had she performed any other formal assessment of Mrs. Korsten's cognitive function.

50. Ms. Mancuso was not present when Mrs. Korsten signed her Will on July 2, 2012.

FoF Nos. 46, 48, 49, 50. (CP at 152-53). Ms. Wheeler did not assign error to these findings. *See* App. Br. at 3-9. Thus, these findings are verities on appeal. *See Estate of Barnes*, at 9.

Ms. Wheeler briefly cites the testimony of two friends to support her contention that Mrs. Korsten lacked capacity. App. Br. at 21. In two other unchallenged findings of fact, however, the trial court pointed out the

weaknesses in the friends' testimony: neither witness could specify when they visited Mrs. Korsten and neither witness could be specific regarding any loss of her cognitive deficits. FoF Nos. 43-44. Because these findings are unchallenged, they are verities on appeal.

In addition, Ms. Wheeler claims that her "sudden disinheritance" provides evidence of Mrs. Korsten's lack of capacity. App. Br. at 22. While a radical departure from a prior testamentary scheme may support an inference of incapacity. *Estate of Kessler*, 95 Wn. App. at 371, such an inference is not appropriate here.

Far from a radical departure, Mrs. Korsten had previously slashed Ms. Wheeler's inheritance, discussed disinheriting Ms. Wheeler on many occasions, and previously revoked her powers of attorney naming Ms. Wheeler because of Ms. Wheeler's misconduct:

- In 1994, Mrs. Korsten executed a codicil to her Will to reduce the bequest to Ms. Wheeler by half and to provide one-fourth of the balance of the estate would be held in trust until Ms. Wheeler reached the age of 55 years old. RP at 319:6-10; Ex. 2.
- On many occasions, Ms. Korsten discussed disinheriting Ms. Wheeler with her long-time attorney because of Ms. Wheeler's conduct. RP at 361:2-17.
- Mrs. Korsten revoked Ms. Wheeler's powers of attorney in 2009 and 2011 because of Ms. Wheeler's conduct. *See* Ex. 36 and Section III.A above.

As this evidence demonstrates, Mrs. Korsten's disinheritance of Ms. Wheeler in 2012 was not a radical departure for Mrs. Korsten.

Because substantial evidence supports the trial court's findings of Mrs. Korsten's capacity to execute the 2012 Will, the decision of the trial court should be affirmed.

**D. There Is No Actual Evidence of Any Person Exerting Undue Influence Over Mrs. Korsten.**

To set aside a testamentary act because of undue influence, the Petitioner must show that Mary-Louise Korsten's "free will" had been subverted and that she acted against her will:

“[T]here must be something more than mere influence. *There must have been undue influence at the time of the testamentary act*, which interfered with the free will of the testator and prevented the exercise of judgment and choice.” [citations omitted] Undue influence has been described as “tantamount to force or fear which *destroys the testator's free agency and constrains him to do what is against his will.*” [citations omitted] Actions such as “giving advice, arguments, persuasions, solicitations, suggestions or entreaties” generally do not amount to undue influence unless such actions are so importunate, persistent, or coercive that they effectively subdue and subordinate the will of the testator and take away his or her freedom of action. [citation omitted]

*In re Melter*, 167 Wn. App. 285, 306-07, 273 P.3d 991 (2012) (emphasis added). The party claiming undue influence must establish it at trial by “clear, cogent, and convincing evidence.” *In re Melter* at 299; *In re Estate of Eubank*, 50 Wn. App. 611, 619, 749 P.2d 691 (1988).

Under *Dean*, a presumption of undue influence may arise if certain factors exist. *Dean*, 194 Wash. at 671-72. Even if a presumption exists, however, the party claiming undue influence still bears the burden of establishing it by clear, cogent, and convincing evidence. *In re Melter*, 167 Wn. App. at 299.

Here, the trial court applied the *Dean* factors and concluded that a presumption of undue influence existed. CoL Nos. 13-20. The trial court, however, held that Ms. Wheeler did not meet her burden of presenting clear, cogent, and convincing evidence that Mrs. Korsten was unduly influenced when she executed the 2012 Will. CoL No. 27.

At trial, Ms. Wheeler presented no evidence that Ms. Rios, or anyone else, exerted undue influence over Mrs. Korsten. Indeed, the Appellant’s brief states only that Ms. Rios had the “opportunity to exert undue influence,” App. Br. at 25, while failing to offer *any* evidence of undue influence actually asserted by Ms. Rios. *See* App. Br. at 24-29.

Even more remarkably, Ms. Wheeler’s brief fails to acknowledge that she has the burden of establishing undue influence by clear, cogent, and convincing evidence.<sup>5</sup> Instead, Ms. Wheeler claims that Ms. Rios failed to

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<sup>5</sup> The phrase “clear, cogent, and convincing”—which is the standard governing the Appellant’s burden in this case—appears only twice in the Appellant’s brief: once when she quotes the trial court’s Conclusion of Law No. 27, App. Br. at 8, and once when she incorrectly asserts that Ms. Rios

present sufficient evidence of no undue influence, while simultaneously devoting four pages to discussing the testimony of Mr. Hammermaster on this subject. *See* App. Br. at 26-29.

Moreover, there was substantial evidence at trial that Ms. Rios did not exert undue influence over Mrs. Korsten.

First, Mr. Hammermaster testified that:

- Ms. Rios was not involved in the drafting of the 2012 Will. RP at 367:17-19;
- He never spoke with Ms. Rios regarding the contents of the Will. RP at 368:7-11.
- He never saw Ms. Rios lobby Mrs. Korsten to be included in the Will. RP at 369:1-3.
- Mrs. Korsten never appeared to be acting under any duress, fraud, menace or undue influence. RP at 369:8-11.
- Mrs. Korsten disinherited Ms. Wheeler because of her conduct and “inappropriate use of funds.” RP at 369:12-14.
- Mrs. Korsten told him to include Ms. Rios in her Will. RP at 361:2-4.
- Mrs. Korsten had discussed disinheriting Ms. Wheeler with him on many occasions. RP at 361:10-13.
- He never discussed money or estate plans with Ms. Rios. RP at 371:9-11.

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has the burden of proving competency through clear, cogent, and convincing evidence. App. Br. at 16-17. (The fallacy of this last assertion is addressed at Section IV.B.2 of this brief.)

Consistent with Mr. Hammermaster's testimony, Ms. Pitman also testified that she never observed Mrs. Korsten being subjected to undue influence:

Q. Did you ever witness Mrs. Korsten being subjected to duress, menace, fraud or undue influence?

A. No.

Q. By any party?

A. No.

RP at 51:2-6.

Similarly, Ms. Wenz testified that no one exerted undue influence over Mrs. Korsten:

Q. And do you know what undue influence is?

A. Somebody influencing her to sign something.

Q. ... So what you were saying here [in witnessing the 2012 Will] was that she was not acting under any undue influence. Is that your testimony today as well?

A. Yes.

Q. So she was -- when she signed it, she signed it of her own will?

A. Yes.

Q. And no one was forcing her to sign it; is that correct?

A. No.

RP at 88:19-89:4.

In addition, unlike Ms. Wheeler, no one accused Ms. Rios of attempting to misappropriate funds when Ms. Rios had the power of attorney for Mrs. Korsten. FoF No. 68. Indeed, there is no actual evidence in the record of Ms. Rios asserting undue influence over Mrs. Korsten, an assertion that is not disputed by the Appellant's brief.

Buttressed by the testimony of Mr. Hammermaster, Ms. Pitman and Ms. Wenz, the trial court issued 10 separate findings of fact regarding the lack of evidence supporting Ms. Wheeler's undue influence claim. *See* FoF Nos. 61 through 70. Nevertheless, Ms. Wheeler argues that the trial court did not enter enough findings to support the trial court's conclusion that Ms. Wheeler failed to meet her burden of proving of undue influence. *See* App. Br. at 9, 26, 29.

Because the trial court Findings of Fact Nos. 61 through 70 are supported by substantial evidence and because the Petitioner failed to meet her burden of establishing undue influence through clear, cogent, and convincing evidence, the trial court's order should be affirmed.

**E. The Court Should Enter an Award of Attorneys' Fees and Costs Against the Appellant.**

Under RCW 11.24.050, a court has the discretion to award attorney's fees and costs against a party contesting a will, unless the party acted with probable cause and in good faith.

In *In re Estate of Starkel*, 134 Wn. App. 364, 134 P.3d 1197 (2006), this Court held that RCW 11.24.050 gave it the discretion to award attorney's fees:

Because we affirm the trial court's ruling sustaining Pauline Starkel's 2001 will, RCW 11.24.050 gives us discretion to award attorney fees to Wright, *unless* it appears that Thomas acted with both probable cause and in good faith.

*In re Estate of Starkel*, 134 Wn. App. at 375-76. Concluding that the contestant failed to act with probable cause or in good faith, the court awarded the respondent reasonable attorney fees and costs incurred in defending the will contest on appeal. *Id.* at 376.

In addition, RCW 11.96A.150 grants an appellate court discretion to award attorneys' fees in estate dispute in an amount "the court determines to be equitable." See also RAP 18.1.

Here, Ms. Wheeler has challenged a Will drafted by her mother's long-term attorney at her mother's direction. On appeal, Ms. Wheeler failed to acknowledge the substantial evidence supporting the trial court's finding, urged this Court to engage in a balancing test that is contrary to Washington law, failed to acknowledge her burden of establishing the illegality of the Will through clear, cogent, and convincing evidence, and failed to note that this standard also governs her undue influence claim.

For these reasons, Ms. Rios requests that this Court award her the reasonable attorneys' fees and costs that she incurred in this appeal, pursuant to RCW 11.24.050, RCW 11.96A.150, and RAP 18.1.

## V. CONCLUSION

Because the trial court's findings are supported by substantial evidence and because the findings support the trial court's conclusions that Ms. Wheeler failed to meet her burden of proving lack of capacity by Mrs. Korsten or undue influence by Ms. Rios, the Court should affirm the trial court's decision. In addition, the Court should award the Respondent her attorneys' fees and costs incurred in defending this action on appeal.

RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of July, 2020.

VANDEBERG JOHNSON &  
GANDARA, LLP

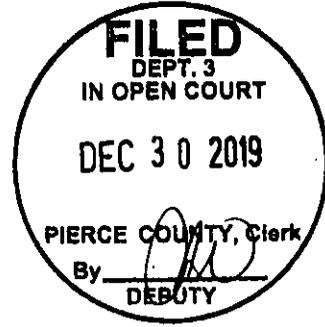
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**Appendix: The Trial Court's Order (with Findings of Fact and Conclusions of Law), filed December 30, 2019 (reprinted at CP 145-59)**

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# APPENDIX



## IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

ESTATE OF MARY-LOUISE KORSTEN,

Cause No: 13-4-01206-8

**ORDER**

(OR)

THIS MATTER having come on regularly for trial before the Court without a jury on November 18, 19, and 25, 2019, the Petitioner, Louanne Wheeler, being represented by Antoni H. Froehling, of the Froehling Law Office, and the Respondent, Marianne V. Rios, Personal Representative of the Estate of Mary-Louise Korsten, being represented by Scott D. Winship of the law firm of Vandenberg Johnson & Gandara, LLP; the Court having listened to the witnesses offered by the parties and having examined the documentary evidence admitted into evidence; the Court having rendered its oral decision on December 9, 2019; and being otherwise fully advised in the premises, the Court now makes the following Findings of Fact and Conclusions of Law:

### FINDINGS OF FACT

1. Decedent Mary-Louise Korsten ("Mrs. Korsten") died on July 11, 2013.
2. The Decedent's Last Will and Testament, dated July 2, 2012 (Exhibit 17, the "2012 Will"), which is a writing signed by Mrs. Korsten, the testator, attested by two competent witnesses, Jami Pitman and Amanda Wenz, while in the presence of Mrs. Korsten, was admitted to probate by Order entered in this matter on August 5, 2013.

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1 3. Mrs. Korsten's son, Jack Korsten, was nominated in Mrs. Korsten's Will to serve as  
2 Personal Representative, but he filed a Declination to act as Personal Representative, waived  
3 notice of the hearing on the Petition to probate the Will, and joined in the Petition to appoint  
4 Marianne V. Rios as Personal Representative of the estate of Mary-Louise Korsten

5 4. Consequently, the Order admitting the 2012 Will to probate appointed Mrs. Korsten's  
6 granddaughter, Respondent Marianne V. Rios as Personal Representative of the probate estate.

7 Mrs. Korstens' Estate Planning:

8 5. Mary-Louise Korsten's Last Will and Testament was prepared for her by Sumner  
9 attorney A. Eugene Hammermaster, who had previously represented Mrs. Korsten and her  
10 husband in various legal matters over the course of several decades.

11 6. In 1992, Mr. Hammermaster prepared, and Mr. and Mrs. Korsten executed, a Trust for  
12 Louanne Wheeler (the "Louanne Korsten Serjeant Trust").

13 7. In 1993, Mr. Hammermaster prepared Mrs. Korsten's previous Will, which she executed  
14 on April 27, 1993 (Exhibit 1, the "1993 Will").

15 8. Under the terms of Paragraph Third of the 1993 Will, if Mrs. Korsten's husband, Bernard  
16 Korsten, did not survive Mrs. Korsten by one hundred and eighty days, the balance of her estate  
17 (with the exception of certain specifically-devised tangible property and a certain parcel of real  
18 property, which was to be devised to her son, Jack Korsten) was to pass to her two children, Jack  
19 Korsten and Louanne Wheeler (designated Louanne Marie Korsten in the 1993 Will), share and  
20 share alike, with the proviso that Louanne Wheeler's share of the estate was to be held in trust  
21 for her until such time as she reached the age of fifty-five (55) years, at which time the Trustee,  
22 Jack Korsten, was directed to distribute the balance of the funds held in trust to her.

23 9. In 1994, Mr. Hammermaster prepared a Codicil to the 1993 Will, which Mrs. Korsten  
24 executed on October 17, 1994 (Exhibit 2, the "1994 Codicil").

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1 10. The 1994 Codicil modified the distribution scheme of the 1993 Will (as set forth in the  
2 preceding paragraph), reducing the bequest to Louanne Wheeler by half and directing that one-  
3 fourth (1/4) of the balance of Mrs. Korsten's estate was to be devised to Jack Korsten, as Trustee  
4 for the benefit of Louanne Wheeler, until such time as she reached the age of fifty-five (55)  
5 years, at which time the Trustee was directed to distribute the balance of the funds held in trust to  
6 her.

7 11. Under the terms of the 1994 Codicil, the other quarter (1/4) of Mrs. Korsten's estate that  
8 was to be devised in trust to Louanne Wheeler pursuant to the terms of the 1993 Will was instead  
9 to be devised to Jack Korsten, as Trustee, and used for charitable purposes.

10 12. In 1998, Mrs. Korsten's husband, Bernard Korsten, died and Mr. Hammermaster handled  
11 the probate of Mr. Korsten's Will and assisted with the administration of his estate.

12 13. On August 14, 2009, Mrs. Korsten executed a durable Power of Attorney that appointed  
13 Jack Korsten and Louanne Wheeler as agents, each independent of the other.

14 14. In September, 2009, after learning that Louanne Wheeler had improperly used the  
15 authority granted her by the August 14, 2009 Power of Attorney in an attempt to withdraw  
16 approximately \$800,000 from Mrs. Korsten's account at Morgan Stanley, Mrs. Korsten signed a  
17 Revocation of Power of Attorney (Exhibit 3, prepared by the Hammermaster Law Offices) that  
18 would have revoked the authority of both Jack Korsten and Louanne Wheeler but for the fact that  
19 Mrs. Korsten crossed out Jack Korsten's name on the Revocation (and initialed the change),  
20 leaving Jack Korsten as the sole remaining agent under her August 14, 2009 Power of Attorney.

21 15. Shortly thereafter, Louanne Wheeler met with attorney A. Eugene Hammermaster and  
22 informed him that she wanted to borrow \$800,000 from Mrs. Korsten to purchase a house and  
23 that she would repay the loan using the proceeds of a pending lawsuit.

24 16. In response to that request, Mr. Hammermaster investigated Louanne Wheeler's report of  
25 a pending lawsuit, but upon finding no evidence of such lawsuit, he informed Mrs. Korsten by

1 letter dated October 2, 2009 (Exhibit 34) that Louanne Wheeler's request for a \$800,000 loan  
2 should be denied, and no such loan was made.

3 17. On October 8, 2009, Mrs. Korsten executed a new Durable Power of Attorney (Exhibit  
4 4), which had been prepared at her direction by the Hammermaster Law Office naming Jack  
5 Korsten as Mrs. Korsten's sole authorized agent.

6 18. In June, 2010, after learning that Jack Korsten had used his authority under the October 8,  
7 2009 Power of Attorney to transfer around \$500,000 in funds from Mrs. Korsten's account at  
8 Frontier Bank to another account in his own name at the Boeing Employees' Credit Union, Mrs.  
9 Korsten executed a new Durable Power of Attorney (Exhibit 5) that removed Jack Korsten as  
10 Agent and again named Louanne Wheeler as Mrs. Korsten's Agent.

11 19. In September, 2010, Mrs. Korsten terminated the Louanne Korsten Serjeant Trust  
12 (established by Mr. and Mrs. Korsten in 1992) and on September 30, 2010, Louanne Wheeler  
13 acknowledged receipt of the Trust assets, which had been distributed to her (Exhibit 6).

14 20. Among the assets distributed to Louanne Wheeler when Mrs. Korsten terminated the  
15 Louanne Korsten Serjeant Trust was a residence and real property located at 1407 Rainier Street  
16 in Sumner, Washington, and over \$250,000 in funds that had been held in an investment account.

17 21. In the early spring of 2011, after learning that Louanne Wheeler had misappropriated  
18 funds from Mrs. Korsten's bank account, Mrs. Korsten directed Mr. Hammermaster to prepare a  
19 new Durable Power of Attorney, once again appointing her son Jack Korsten as her Agent, and  
20 to revoke the June 11, 2010 Power of Attorney under which Louanne Wheeler was her Agent.

21 22. On April 22, 2011, Mrs. Korsten went to Mr. Hammermaster's office and executed the  
22 new Durable Power of Attorney (Exhibit 8) that Mr. Hammermaster had prepared for her naming  
23 Jack Korsten as her Agent.

24 23. That same day, Mrs. Korsten also signed a Revocation and Termination of her June 11,  
25 2010 Power of Attorney (Exhibit 9).

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1 24. On April 24, 2011, in front of Marianne Rios and other witnesses, Mrs. Korsten  
2 confronted Louanne Wheeler and told her that she had revoked the June 11, 2010 Power of  
3 Attorney and that Louanne Wheeler was not to get into her accounts anymore. (Exhibit 13, p.  
4 R012)

5 25. On April 27, 2010, Louanne Wheeler, using the authority granted by the revoked June 11,  
6 2010 Power of attorney, withdrew \$55,000 from Mrs. Korsten's account at Union Bank in  
7 Sumner.

8 26. A complaint was filed with the Sumner Police Department as a result of Louanne  
9 Wheeler's unauthorized withdrawal from Mrs. Korsten's bank account, and an investigation of  
10 that incident was undertaken (Exhibits 13, 14, and 32).

11 27. Although Louanne Korsten provided evidence that she deposited the \$55,000 she had  
12 withdrawn from Mrs. Korsten's account at Union Bank, Mrs. Korsten never again made Louanne  
13 Wheeler her Agent under her Power of Attorney.

14 28. During the remainder of 2011 and into 2012, Mrs. Korsten and Mr. Hammermaster  
15 engaged in correspondence and dialogue as to how Mrs. Korsten would respond to Louanne  
16 Wheeler's misdeeds, and Mr. Hammermaster suggested that Mrs. Korsten could pursue criminal  
17 prosecution or she could consider amending her estate planning documents.

18 29. In late 2011 or early 2012, Mrs. Korsten informed Mr. Hammermaster that she desired to  
19 change her Will, and in April, 2012, she sent a note (which she signed and dated April 10, 2012)  
20 to Mr. Hammermaster instructing him to make certain changes to her estate planning, including  
21 adding Marianne Rios as an Agent under her Power of Attorney for "all and any medical  
22 purposes and decision making," removing Louanne Wheeler as a beneficiary under her Will, and  
23 replacing Louanne Wheeler with Marianne Rios as a beneficiary. The note itself was not  
24 authored by Mrs. Korsten. Indeed, based on the evidence this court heard, the court is of the  
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1 opinion that Mrs. Rios drafted the note to the attorney. Mrs. Rios' claims not to have been aware  
2 of the note lacks credibility. (Exhibit 29).

3 30. On several occasions in the spring of 2012, Mr. Hammermaster met with Mrs. Korsten  
4 and spoke with her on the phone to discuss the changes that she wanted to make to her estate  
5 planning, which changes were consistent with the changes she had previously requested in the  
6 April 10, 2012, note that was sent to Mr. Hammermaster.

7 31. On April 20, 2012, in front of Mr. Hammermaster, Mrs. Korsten executed a new Power  
8 of Attorney naming Jack Korsten and Marianne V. Larson Rios as her Agents, each independent  
9 of the other. (Exhibit 15).

10 32. Mr. Hammermaster then prepared a revised Last Will and Testament for Mrs. Korsten  
11 that incorporated the changes that she had directed, and when the draft of the Will was finished,  
12 Marianne Rios picked up the Will and transported it to the Cedar Ridge assisted living facility  
13 where Mrs. Korsten was residing.

14 33. When Marianne Rios arrived at Mrs. Korsten's residence on July 2, 2012, with the final  
15 draft of Mrs. Korsten's new Will, two of Mrs. Korsten's caregivers, Jami Pitman and Amanda  
16 Wenz, volunteered to witness Mrs. Korsten's execution of the Will.

17 34. Marianne Rios testified that at no time did she discuss the terms or provisions of the Will  
18 with Mrs. Korsten, but this court finds she lacks all credibility on this issue. Mrs. Rios was in the  
19 company of Mrs. Korsten on a daily basis, and the change being made to Mrs. Korsten's estate  
20 was dramatic, disinheriting her daughter, while leaving her granddaughter half her estate.  
21 Moreover, Mrs. Korsten's frequent contacts with the Hammermaster law office to discuss the  
22 change in the will demonstrates it was important to her. For Mrs. Rios to assert that she knew  
23 nothing about this strains all credulity. Indeed, the evidence revealed that Mrs. Rios, and only  
24 Mrs. Rios contacted the law office in order to ensure the will was drafted. Mrs. Rios went to the  
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1 law office to pick up the will and took it to her grandmother for her signature. After Mrs. Korsten  
2 executed the Will, Marianne Rios returned the document to Mr. Hammermaster's office.

3 35. On July 11, 2013, Mary Louise Korsten passed away.

4 36. On August 6, 2013, Mrs. Korsten's Last Will and Testament, which she had executed on  
5 July 2, 2012, was admitted to probate and Marianne V. Rios was appointed Personal  
6 Representative after Jack Korsten declined to serve.

7 37. Marianne Rios testified that she learned that she was a beneficiary of Mrs. Korsten's Will  
8 about one month after Mrs. Korsten died. This court finds that testimony to lack credibility.

9 Mrs. Korsten's Capacity to Execute the 2012 Will:

10 38. Mrs. Korsten's medical records from September 30, 2010 (Exhibit 24) state that she had  
11 "memory problems, probable early Alzheimer's dementia" and also reflect treatment for that  
12 diagnosis was recommended in the form of a "trial of Aricept" (the trade name for donepezil  
13 hydrochloride, a drug that is often prescribed to improve cognition and behavior of people with  
14 dementia) at five milligrams per day, "increasing to 10 mg in a month."

15 39. Mrs. Korsten's medical records (Exhibit 24) also report that a Mini Mental Status  
16 examination had been administered and that Mrs. Korsten had scored 25 out of 30 points, a score  
17 indicating Mrs. Korsten had normal cognition when she took that exam.

18 40. Louanne Wheeler testified that Mrs. Korsten's cognitive abilities declined from late 2010  
19 and got worse up until the time Mrs. Korsten passed away, although Louanne Wheeler did not  
20 see Mrs. Korsten at any time after April, 2011, because the administration of the Cedar Ridge  
21 assisted living facility barred Louanne Wheeler from coming in to that facility. While no direct  
22 evidence of who specifically informed Cedar Ridge that Mrs. Wheeler was not permitted in the  
23 facility, there was testimony that the instructions could have come from the family, that is, Mrs.  
24 Rios.

25

1 41. The increased dosage of Aricept (donepezil hydrochloride) recommended in Exhibit 24  
2 was never implemented, however, and Mrs. Korsten continued taking five milligrams of Aricept  
3 daily at least through June, 2012, as evidenced by the Prescription for Mary Korsten prepared by  
4 ARNP Traci Mancuso on June 25, 2012 (Exhibit 25).

5 42. Although she had not seen Mrs. Korsten in over a year and was not present at the time  
6 Mrs. Korsten executed her Last Will and Testament on July 2, 2012, Louanne Wheeler testified  
7 that she did not believe that Mrs. Korsten had the capacity necessary to execute the Will.

8 43. Louanne Wheeler presented testimony from Neil Van Lierop and Bill Dugger, two long-  
9 time friends of Mr. and Mrs. Korsten, but neither was specific as to when they visited with Mrs.  
10 Korsten, although Mr. Van Lierop recalled that his visit(s) with Mrs. Korsten were made in the  
11 last several months before she passed away.

12 44. Both Mr. Van Lierop and Mr. Dugger testified in about Mrs. Korsten's cognitive ability,  
13 noting that she had declined in her late years. But neither witness was specific about the loss of  
14 cognitive deficits.

15 45. Louanne Wheeler also presented testimony from Traci Mancuso, a Nurse Practitioner  
16 who acted as Mrs. Korsten's primary care provider during the last year of Mrs. Korsten's life.

17 46. Ms. Mancuso had met with Mrs. Korsten only once prior to the date Mrs. Korsten  
18 executed her 2012 Will, and that meeting lasted at most forty-five minutes.

19 47. At her deposition, Ms. Mancuso stated that she didn't think Mrs. Korsten "would have  
20 the wherewithal at that stage of dementia to be able to correctly make a sound decision."

21 48. Ms. Mancuso noted that Mrs. Korsten had been diagnosed with "dementia" and some  
22 short-term memory impairment, but she declined to say that Mrs. Korsten suffered from  
23 Alzheimer's disease, which Ms. Mancuso said requires special screening and a specific  
24 diagnosis.

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1 49. Ms. Mancuso initially testified at trial that she had conducted a cognitive assessment of  
2 Mrs. Korsten by administering a Mini Mental Status Exam at her first meeting with Mrs.  
3 Korsten, but when on cross-examination she referred to the transcript of her deposition  
4 testimony, she admitted that she had not in fact administered a Mini Mental Status Exam, nor  
5 had she performed any other formal assessment of Mrs. Korsten's cognitive function.

6 50. Ms. Mancuso was not present when Mrs. Korsten signed her Will on July 2, 2012.

7 51. Mr. Hammermaster, testified that Mrs. Korsten remained intellectually sharp in the last  
8 few years of her life and that at the time she was conferring with Mr. Hammermaster with regard  
9 to the revisions he was making to her Will, she knew who her family was and she was actively  
10 engaged in decision-making both with regard to the management of her estate and with regard to  
11 her estate planning.

12 52. Mr. Hammermaster also testified that, in the course of drafting her 2012 Will, he spoke or  
13 met with Mrs. Korsten on several occasions to get her input with regard to the terms of that Will  
14 and that she was actively engaged in decision-making concerning her estate.

15 53. Mr. Hammermaster also testified that he saw no indication that Marianne Rios was  
16 exerting any influence – undue or otherwise – over Mrs. Korsten.

17 54. Mr. Hammermaster testified that Mrs. Korsten made the decision to disinherit Louanne  
18 Wheeler because Mrs. Korsten was deeply troubled by Louanne Wheeler's infidelity and her  
19 repeated attempts to wrongfully appropriate Mrs. Korsten's monies.

20 55. On July 6, 2012, four days after Mrs. Korsten executed her 2012 Will, records from the  
21 Cedar Ridge facility where Mrs. Korsten was residing noted "[e]vidence of short-term memory  
22 loss," that Mrs. Korsten "is not oriented to . . . time," and that her "[a]bility to make decisions  
23 about daily life is poor, requires reminders, cues and supervision in planning daily routines."

24 56. Despite those findings, Jami Pitman, the Care Coordinator for Mrs. Korsten at the Cedar  
25 Ridge facility, and Amanda Wenz, a medical technician who attended to Mrs. Korsten's

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1 medications, both testified that, in their respective opinions, Mrs. Korsten was as sharp and  
2 attentive as ever and understood what she was doing when she executed her 2012 Will.

3 57. Both Jami Pitman and Amanda Wenz testified that Mrs. Korsten was particularly  
4 memorable because she was such a strong-willed woman.

5 58. Amanda Wenz testified that Mrs. Korsten would scrutinize the medications that Ms.  
6 Wenz would prepare for her and would notice – and comment – if one or more of her pills was  
7 missing.

8 59. Both Jami Pitman and Amanda Wenz testified that Mrs. Korsten would read the  
9 newspaper daily.

10 60. Finally, Marianne Rios testified that, while Mrs. Korsten suffered from several physical  
11 injuries and challenges such as being exceptionally hard of hearing, she retained her cognitive  
12 capabilities and was able to clearly communicate her ideas and intentions up until the time she  
13 passed away, over one year after she had executed the 2012 Will.

14 Undue Influence:

15 61. Mr. Hammermaster testified that he never observed Marianne Rios or any other person  
16 engage in any discussion with Mrs. Korsten regarding her estate planning or exhibit any  
17 menacing or threatening behavior directed at Mrs. Korsten.

18 62. Mr. Hammermaster also testified that Marianne Rios did not attend any of the meetings  
19 that he had with Mrs. Korsten to discuss the provisions that Mrs. Korsten wanted to incorporate  
20 into her 2012 Will.

21 63. Mrs. Korsten lived at the Cedar Ridge assisted living facility from 2010 through her  
22 death in July, 2013, and apart from the ban imposed on Louanne Wheeler by the Cedar Ridge  
23 administration, Mrs. Korsten's friends and family were not prevented from visiting Mrs. Korsten.

24 64. There was no testimony at trial that Marianne Rios had ever encouraged Mrs. Korsten to  
25 mistreat or mistrust Louanne Wheeler.

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1 65. At the time of the testamentary act, there was evidence that Marianne Rios had inserted  
2 herself into the daily affairs of Mrs. Korsten, and likely played an influential role in her decision-  
3 making. However, this record lacks sufficient evidence that Mrs. Rios interfered with Mrs.  
4 Korsten's free will and prevented the exercise of her judgment and choice.

5 66. This record also lacks sufficient evidence to find that Marianne Rios' actions were so  
6 importunate, persistent, or coercive that they effectively subdued and subordinated Mrs.  
7 Korsten's will and took away her freedom of action.

8 67. Mrs. Korsten did not depend solely on Marianne Rios as most of Mrs. Korsten's daily  
9 living matters were provided by the staff at Cedar Ridge where she lived.

10 68. There was no testimony at trial that Marianne Rios had ever attempted to misappropriate  
11 any of Mrs. Korsten's funds or that Marianne Rios had taken any of Mrs. Korsten's money for  
12 her own use.

13 69. While Mrs. Korsten chose to reside in the Cedar Ridge assisted living residence because  
14 of physical challenges, the two caregivers working at Cedar Ridge, Jami Pitman and Amanda  
15 Wenz, testified that she remained mentally sharp throughout her entire life, including into 2013.

16 70. Ms. Pitman and Ms. Wenz both testified that Mrs. Korsten was very independent in her  
17 decision-making and did not appear to be vulnerable to undue influence.

18 71. The revisions Mrs. Korsten made in her 2012 Will were a radical departure from a prior  
19 testamentary scheme; despite the reduction in Mrs. Wheeler's testamentary share earlier, the  
20 2012 will disinherited her entirely.

21 72. Mrs. Korsten had executed a Codicil in 1994 that made a substantial change to the  
22 distribution scheme established in her 1993 Will, confirming an outright gift of one-half of Mrs.  
23 Korsten's estate to Jack Korsten, but cutting the gift to Louanne Wheeler established in the 1993  
24 Will by half to one-quarter of Mrs. Korsten's estate, with the remaining one-quarter to be given  
25 to Jack Korsten, in trust, for charitable purposes.

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1 73. Although Mrs. Korsten changed her Will in 2012 to disinherit Louanne Wheeler, she had  
2 already made substantial provision for Ms. Wheeler when, in 2010, Mrs. Korsten terminated the  
3 Trust she and her husband had established for Louanne Wheeler in 1992 and distributed a house  
4 and approximately \$250,000 in investments from that Trust to Louanne Wheeler.

5 CONCLUSIONS OF LAW

6 1. This court has jurisdiction over the parties and over the subject matter of this action.

7 2. Venue is proper in Pierce County Superior Court.

8 3. This matter was tried to the court on November 18, 19, and 25, 2019.

9 4. The Last Will and Testament of Mary-Louise Korsten is rational on its face, is in legal  
10 form, was duly witnessed, and was properly admitted to probate in this matter by Order entered  
11 on August 6, 2013.

12 5. Marianne V. Rios was properly appointed to serve as Personal Representative of Mrs.  
13 Korsten's estate by the Order entered in this matter on August 6, 2013.

14 6. Because Mrs. Korsten's Will was properly admitted to probate, the Petitioner in this  
15 matter, Louanne Wheeler, bears the burden of proving the Will's illegality by "clear, cogent, and  
16 convincing" evidence.

17 7. "Clear, cogent, and convincing" evidence is a quantum of proof that is more than a  
18 preponderance of the evidence, but less than what is needed to establish proof beyond a  
19 reasonable doubt.

20 8. While testamentary capacity is determined as of the time the will is made, evidence  
21 related to the testator's mental condition during a reasonable time before and after the making of  
22 the will is relevant and admissible even if remoteness affects its weight.

23 9. Failure of memory alone is not enough to create testamentary incapacity, unless it  
24 extends so far as to be inconsistent with the sound and disposing mind and memory requisite for  
25 all wills.

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1 10. At the time she executed her Last Will and Testament on July 2, 2012, Mary-Louise  
2 Korsten possessed testamentary capacity to execute such Will.

3 11. At the time Mrs. Korsten sought to revise her Will in the spring of 2012, Marianne Rios  
4 had a fiduciary relationship with Mrs. Korsten by virtue of the fact that Mrs. Korsten had  
5 appointed Marianne Rios as an Agent under the terms of Mrs. Korsten's April 20, 2012 Power of  
6 Attorney.

7 12. When challenging the validity of a will, the will contestant bears the burden of proving  
8 the will's illegality by "clear, cogent, and convincing" evidence. *Dean v. Jordan*, 194 Wash. 661,  
9 671, 79 P.2d 331 (1938). Circumstantial evidence may be used to establish suspicious facts that  
10 raise a presumption of undue influence. *In re Estate of Martinson*, 29 Wn.2d 912, 914-15, 190  
11 P.2d 96 (1948). If the presumption is raised, the will proponent must produce evidence to rebut  
12 the presumption. *Dean*, 194 Wash. at 672. The absence of rebuttal evidence may be sufficient to  
13 set aside a will, but the contestant retains the ultimate burden of proof. *Id.*

14 13. The court in *Dean* identified certain suspicious facts and circumstances that could raise a  
15 presumption of undue influence:

16 14. The most important of such facts are (1) that the beneficiary occupied a fiduciary or  
17 confidential relation to the testator; (2) that the beneficiary actively participated in the  
18 preparation or procurement of the will; and (3) that the beneficiary received an unusually or  
19 unnaturally large part of the estate. Added to these may be other considerations, such as the age  
20 or condition of health and mental vigor of the testator, the nature or degree of relationship  
21 between the testator and the beneficiary, the opportunity for exerting an undue influence, and the  
22 naturalness or unnaturalness of the will. *Id.* Whether the existence of the so-called *Dean* factors  
23 raises a presumption of undue influence is a highly fact-specific determination that requires  
24 careful scrutiny of the totality of the circumstances. *Id.*

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1 15. This legal framework continues in will contests alleging undue influence to this day. *See,*  
2 *Mueller v. Wells*, 185 Wash.2d 1, 367 P.3d 580 (2016)

3 16. The Respondent has conceded she had a fiduciary relationship with Mrs. Korsten, by  
4 virtue of the fact that she was her attorney- in- fact, pursuant to the Power of Attorney signed by  
5 Mrs. Korsten on April 20, 2012.

6 17. This court also finds that there is substantial circumstantial evidence that Mrs. Rios  
7 actively participated in the procuring of the changes will. She left messages for the law office  
8 requesting the changed will be completed, she picked up and dropped off the signed will, and as  
9 this court has already found, likely wrote the note regarding the changes to Mrs. Korsten's estate.  
10 (Ex. 29).

11 18. It is also true that Mrs. Rios received an unusually large part of the estate – half, after not  
12 being mentioned in previous versions of the will at all.

13 19. Mrs. Rios also testified that she was with her grandmother on a nearly daily basis  
14 throughout 2011 to 2013, when Mrs. Korsten died, giving Mrs. Rios the opportunity to exert  
15 undue influence. During this period, Mrs. Wheeler was excluded from Cedar Ridge, likely by a  
16 member of the family.

17 20. Finally, Mrs. Korsten was in her nineties, suffered from dementia and relied on others for  
18 her daily needs.

19 21. Having found that the facts presented here gives rise to the presumption of undue  
20 influence, the burden shifts to the respondent to rebut such a presumption.

21 22. The respondent largely relies on the testimony of Mrs. Korsten's lawyer, Mr.  
22 Hammermaster, to rebut the presumption Hammermaster testified that he saw no indication that  
23 Marianne Rios was exerting any influence – undue or otherwise – over Mrs. Korsten.

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23. Mr. Hammermaster testified that Mrs. Korsten made the decision to disinherit Louanne Wheeler because Mrs. Korsten was deeply troubled by Louanne Wheeler's infidelity and her repeated attempts to wrongfully appropriate Mrs. Korsten's monies.

24. Mr. Hammermaster also testified that, in the course of drafting her 2012 Will, he spoke or met with Mrs. Korsten on several occasions to get her input with regard to the terms of that Will and that she was actively engaged in decision-making concerning her estate. None of those meetings included Mrs. Rios.

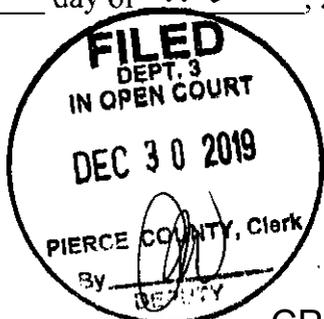
25. Finally, the court notes that mere influence over a person who makes changes to a last will and testament is not sufficient to invalidate the will. Rather, it is undue influence, that which is extraordinary and overcomes the free will of the testator.

26. This court has no doubt that Mrs. Rios influenced Mrs. Korsten throughout the last weeks and months of her life. In one sense that is to be expected given their closeness and the estrangement between Mrs. Korsten and Mrs. Wheeler. But the record before this court is not sufficient to find her influence was of such a nature that it can reasonably be said that Mrs. Korsten's free will was overborne by Mrs. Rios.

27. Petitioner Louanne Wheeler has failed to meet her burden of presenting clear, cogent, and convincing evidence to establish either that Mrs. Korsten lacked capacity to execute her Last Will and Testament or that Mrs. Korsten was unduly influenced when she executed her Will.

28. Judgment should be entered in accordance with these Findings of Fact and Conclusions of Law.

29. Any Conclusion of Law which is properly a Finding of Fact and is to be treated as such.  
DATED this 30 day of Dec, 20 19.



M. A. Schwartz  
JUDGE Michael E. Schwartz

**CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date I caused to be [ ] mailed, [ ] delivered by Legal Messenger Service, [X] sent via email, a true copy of this document to attorneys Stephanie Bloomfield and Robert Wilke, counsel for Appellant.

Dated this 13<sup>th</sup> day of July, 2020, at Tacoma, Washington.

  
Scott D. Winship

**VANDEBERG JOHNSON & GANDARA**

**July 13, 2020 - 2:25 PM**

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**Appellate Court Case Title:** The Estate of Mary-Louise Korsten  
**Superior Court Case Number:** 13-4-01206-8

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