

**FILED**

JAN 24 2017

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

COA No. 344193

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

---

In Re the ESTATE OF DENNIS OTTMAR, Deceased.

---

**APPELLANT'S OPENING BRIEF**

---

MATTHEW W. DALEY, WSBA # 36711  
WITHERSPOON · KELLEY  
422 West Riverside Avenue, Suite 1100  
Spokane, Washington 99201  
Phone: (509) 624-5265

SAMUEL C. THILO, WSBA # 43221  
EVANS, CRAVEN & LACKIE  
818 West Riverside Avenue, Suite 250  
Spokane, Washington 99201  
Phone: (509) 455-5200

Counsel for the Appellant

## TABLE OF CONTENTS

	Page
I. INTRODUCTION & RELIEF REQUESTED .....	1
II. STATEMENT OF THE ISSUES & ASSIGNMENTS OF ERROR .....	2
III. STATEMENT OF FACTS .....	3
A. DENNIS OTTMAR LIVED, WORKED, AND DIED IN THE SPOKANE AREA.....	3
B. DENNIS OTTMAR AND ELIZABETH OTTMAR MET, COURTED, AND WERE MARRIED.....	4
C. DENNIS AND ELIZABETH OTTMAR PURCHASED A HOME TOGETHER. ....	5
D. DENNIS OTTMAR WAS AN AVID FIREARM COLLECTOR, AND FIREARMS WERE AN IMPORTANT PART OF DENNIS AND ELIZABETH’S RETIREMENT PLANNING. ....	6
E. DENNIS OTTMAR BECAME CONCERNED ABOUT CHANGES IN WASHINGTON STATE LAW AND CHOSE TO SELL THE FIREARM COLLECTION.....	8
F. DENNIS OTTMAR RESOLVED TO AUCTION OFF THE FIREARM COLLECTION.....	9
G. DENNIS OTTMAR FELL ILL AND PASSED AWAY.....	10
IV. STATEMENT OF THE CASE .....	11
A. DENNIS OTTMAR HAD A WILL PREPARED IN 2005.....	11
B. AFTER FALLING ILL, DENNIS OTTMAR SOUGHT TO GET HIS AFFAIRS IN ORDER.....	12
C. A NEW WILL WAS PREPARED FOR DENNIS OTTMAR.....	14
D. ON FEBRUARY 9, 2015, DENNIS OTTMAR EXECUTED THAT NEW WILL. ....	15

E. A PROBATE ACTION WAS OPENED, THOMAS OTTMAR MADE A SUCCESSFUL WILL CONTEST, AND ELIZABETH OTTMAR FILED A TIMELY NOTICE OF APPEAL. ....	16
V. ARGUMENT .....	16
A. THIS APPEAL PRESENTS MIXED QUESTIONS OF FACT AND LAW, WHICH ARE REVIEWED FOR SUBSTANTIAL EVIDENCE AND <i>DE NOVO</i> . ....	16
B. THE TRIAL COURT FAILED TO MAKE NECESSARY FINDINGS OF FACT. ....	17
C. THE TRIAL COURT IMPROPERLY SHIFTED THE BURDEN OF PROOF ONTO ELIZABETH OTTMAR. ....	19
D. DENNIS OTTMAR WAS FULLY POSSESSED OF TESTAMENTARY CAPACITY WHEN HE EXECUTED HIS LAST WILL AND TESTAMENT. ....	21
1. <i>There Was No Direct Evidence to Establish That         Dennis Ottmar Lacked Testamentary Capacity.</i> ....	23
2. <i>Direct Evidence Established That Dennis Ottmar         Fully Understood and Was Fully Engaged in the         Will's Execution.</i> ....	24
3. <i>Thomas Ottmar Failed to Present Sufficient         Medical Evidence to Demonstrate That Dennis         Ottmar Lacked Testamentary Capacity.</i> ....	25
a. The trial court misstated the evidence regarding testamentary capacity.....	26
b. Dr. Green's testimony demonstrated that Dennis Ottmar had sufficient capacity. ....	28

E. THE TRIAL COURT ERRED BY IMPOSING A PRESUMPTION OF UNDUE INFLUENCE.....	30
1. <i>Dennis Ottmar Was Not Infirm or Vulnerable</i> .....	33
2. <i>The Trial Court Misapplied Washington Law in Evaluating Dennis and Elizabeth Ottmar’s Relationship</i> . ....	35
3. <i>Elizabeth Ottmar Participated in the Will’s Procurement Due to a Genuine Belief That Dennis’ Prior Will Was Insufficient</i> . ....	36
4. <i>The Trial Court Erred in Concluding That Elizabeth Ottmar Received an Unnaturally Large Portion of Dennis Ottmar’s Estate</i> . ....	39
a. The 2015 will is consistent with the realities of Dennis’ and Elizabeth’s community property. ....	40
b. The 2015 will is consistent with Dennis Ottmar’s expressed desire to auction off the firearm collection.....	42
VI. ATTORNEYS’ FEES ON APPEAL .....	44
VII. CONCLUSION .....	45

## TABLE OF AUTHORITY

### CASES

<i>Bowman v. Webster</i> , 42 Wn.2d 129 (1953) .....	17
<i>Bryant v. Joseph Tree, Inc.</i> , 119 Wn.2d 210 (1992).....	18
<i>Colley v. Peacehealth</i> , 177 Wn. App. 717 (2013) .....	29
<i>Federal Signal Corp. v. Safety Factors, Inc.</i> , 125 Wn.2d 413 (1994).....	17
<i>In re Adams' Estate</i> , 120 Wn. 189 (1922).....	31
<i>In re Binge's Estate</i> , 5 Wn.2d 446 (1940) .....	41
<i>In re Bottger's Estate</i> , 14 Wn.2d 676 (1942).....	passim
<i>In re Custody of Z.C.</i> , 191 Wn. App. 674 (2015) .....	17, 18
<i>In re Estate of Haviland</i> , 162 Wn. App. 548 (2011).....	passim
<i>In re Estate of Kessler</i> , 95 Wn. App. 358 (1999) .....	22
<i>In re Estate of Knowles</i> , 135 Wn. App. 351 (2006).....	39
<i>In re Estate of Riley</i> , 78 Wn.2d 623 (1970) .....	20, 32, 33
<i>In re Hansen's Estate</i> , 66 Wn.2d 166 (1965) .....	20, 21, 22
<i>In re Landgren's Estate</i> , 189 Wn. 33 (1936).....	40
<i>In re Larsen's Estate</i> , 191 Wn. 257 (1937) .....	19, 22
<i>In re Marriage of Horner</i> , 151 Wn.2d 884 (2004) .....	18
<i>In re Melter</i> , 167 Wn. App. 285 (2012).....	16, 17
<i>In re Riley's Estate</i> , 163 Wn. 119 (1931) .....	22, 23
<i>In re Smith's Estate</i> , 68 Wn.2d 145 (1966) .....	32
<i>Mueller v. Wells</i> , 185 Wn.2d 1 (2016).....	17

<i>Satomi Owners Ass’n v. Satomi, LLC</i> , 167 Wn.2d 781 (2009).....	18
<i>Schoonover v. Carpet World, Inc.</i> , 91 Wn.2d 173 (1978) .....	18
<i>Schwarz v. Schwarz</i> , 192 Wn. App. 180 (2016) .....	40
<i>WESCO Distribution, Inc. v. M.A. Mortenson Co.</i> , 88 Wn. App. 712, (1997) .....	17
<i>White v. White</i> , 105 Wn. App. 545 (2001).....	40, 41

**STATUTES**

RCW 11.96A.150.....	44
RCW 11.96A.150(1).....	45
RCW 26.16.010 .....	42

**RULES**

RAP 18.1.....	44
---------------	----

## **I. INTRODUCTION & RELIEF REQUESTED**

This appeal arises from a successful will contest in Spokane County Superior Court. The trial court's decision contained significant legal errors and is not supported by substantial evidence.

The trial court held that Dennis Ottmar lacked testamentary capacity, when he executed the will at issue. No expert testimony supported that decision. Though Dennis Ottmar was quite ill when he executed the will (he made the decision to forego any further medical treatment a few days later), Mr. Ottmar was of more than sufficient mind to justify the requirements for testamentary capacity. In fact, the sole expert who testified on the issue unambiguously opined that Dennis Ottmar enjoyed testamentary capacity throughout the relevant time.

The trial court also held that Elizabeth Ottmar, Mr. Ottmar's wife of nearly three decades, procured the will through undue influence. The evidence, however, supports neither an inference or finding of undue influence. Dennis Ottmar's February 9, 2015 will is the most natural of wills – he bequeathed his property to his wife.

This will contest was instigated and prosecuted by Dennis Ottmar's adult son, Thomas Ottmar. Dennis and Elizabeth Ottmar's family home and extensive firearm collection lie at this case's heart. Both the home and the firearm collection raise significant community property

issues. Nonetheless, Thomas Ottmar believes himself entitled to all his late father's property.

Unfortunately, the trial court agreed with Thomas Ottmar. The trial court improperly shifted the burden onto Mrs. Ottmar to affirmatively prove that Dennis Ottmar had testamentary capacity. The trial court improperly relied upon speculative nursing testimony. And the trial court disregarded expert testimony demonstrating that Mr. Ottmar was fully vested with testamentary capacity. With respect to undue influence, the trial court improperly raised a presumption of undue influence and held that presumption to be sufficient to carry Thomas Ottmar's clear, cogent and convincing burden. Elizabeth Ottmar respectfully asks the Court of Appeals to reverse and remedy those errors.

## **II. STATEMENT OF THE ISSUES & ASSIGNMENTS OF ERROR**

1. When acting as a trier of fact, the trial court is required to make specific findings of fact, sufficient to inform the appellate court of the basis for the trial court's decision. In this matter, the trial court failed to make sufficient findings to provide a factual basis for the trial court's decision. Should the Court of Appeals, therefore, remand the matter for retrial?

2. The party claiming a lack of testamentary capacity bears the burden of proving incapacity by clear, cogent and convincing

evidence. In this case, the trial court improperly shifted the burden onto Elizabeth Ottmar to affirmatively prove capacity. Should the trial court's decision, therefore, be reversed?

3. A trial court's determination regarding testamentary capacity must be supported by substantial evidence. There was insufficient evidence to show, by clear, cogent and convincing evidence, that Dennis Ottmar lacked testamentary capacity. Should the trial court's decision, therefore, be reversed?

4. A trial court's determination regarding undue influence must be supported by substantial evidence. There was insufficient evidence to show by clear, cogent, and convincing evidence that Dennis Ottmar's February 9, 2015 will was the product of undue influence. Should the trial court's decision, therefore, be reversed?

### **III. STATEMENT OF FACTS**

#### **A. DENNIS OTTMAR LIVED, WORKED, AND DIED IN THE SPOKANE AREA.**

Dennis Ottmar was born on September 28, 1941 at Deaconess Hospital in Spokane, Washington; he grew up on a family farm in Davenport, Washington. *See* VRP 37. R-117, DMC 0401. He worked as a barber, starting at the barber shop on Fairchild Airforce Base and

ultimately working at his own shop (along with a partner) on Spokane's South Hill. VRP 578-79.

Dennis Ottmar married for the first time in the early 1960s; in 1987, that marriage ended in divorce. *See* VRP 37, 406-07, 580-82. The Petitioner/Appellee, Thomas Ottmar, was born of that marriage. VRP 405-06. Thomas Ottmar was approximately 53 years old when Dennis Ottmar passed away. *See* VRP 406.

**B. DENNIS OTTMAR AND ELIZABETH OTTMAR MET, COURTED, AND WERE MARRIED.**

Elizabeth Ottmar is a registered nurse. VRP 576-77. She works as a Field Occupational Nurse Consultant for the Washington State Department of Labor and Industries. VRP 574. Elizabeth Ottmar worked as a nurse before her marriage to Dennis Ottmar, throughout their nearly 30-year marriage, and she continued work in nursing after Dennis Ottmar died. VRP 587-89.

By 1987, Elizabeth Ottmar's first marriage had ended as well. VRP 575-76, 580-82. Elizabeth had been taking her young son to get his hair cut by Dennis Ottmar for some time, and it was at one such haircut visit that Dennis first expressed romantic interest in Elizabeth. VRP 580-82. The couple courted briefly and were married.

**C. DENNIS AND ELIZABETH OTTMAR PURCHASED A HOME TOGETHER.**

By April 1987, Dennis Ottmar's cousin (Dave Stevens) decided to sell his south Spokane house. VRP 575, 582-86. Though Dennis and Elizabeth Ottmar were not yet married, they moved into that house and made it their family home, along with Elizabeth Ottmar's son, who was eight or nine years old. *Id.*

Between April and June 1987, the family lived in Mr. Stevens' house pursuant to an informal agreement. VRP 584-85. On July 1, 1987, Messrs. Stevens and Ottmar executed documents transferring the house to Dennis Ottmar. *Id.* Those documents placed title to the house in Dennis Ottmar's name. VRP 756.

Dennis and Elizabeth Ottmar married approximately two weeks after purchasing their home from Mr. Stevens. VRP 584. The couple was married July 15, 1987. *Id.*

Until 1993, Dennis and Elizabeth Ottmar made monthly payments directly to Mr. Stevens. *Id.* In 1993, Mr. Stevens asked that Dennis and Elizabeth Ottmar obtain bank financing. *Id.* Dennis and Elizabeth Ottmar did so; both their names were on the mortgage. VRP 585-86.

The mortgage was for approximately \$67,000. VRP 586. The couple made their monthly mortgage payments from their regular

barbering and nursing income. *See id.* When Dennis and Elizabeth Ottmar married, Dennis had business bank accounts, and for portions of their marriage, Dennis and Elizabeth Ottmar had separate bank accounts. VRP 415-16, 595-96.<sup>1</sup> However, mortgage payments were made from both Dennis Ottmar's and Elizabeth Ottmar's accounts. VRP 586, 759.

At the time of Dennis Ottmar's death, the couple owned their home free and clear. *See* VRP 586. At some point during the marriage, Elizabeth Ottmar received a monetary inheritance. VRP 125-26.<sup>2</sup> At that time, approximately \$40,000 remained due and owing on the mortgage. *See* VRP 586. Elizabeth Ottmar used that inheritance money to pay off the debt on the family home. *Id.*

**D. DENNIS OTTMAR WAS AN AVID FIREARM COLLECTOR, AND FIREARMS WERE AN IMPORTANT PART OF DENNIS AND ELIZABETH'S RETIREMENT PLANNING.**

Firearms were an important part of Dennis Ottmar's life. *See* VRP 505, 685-86, 809. Dennis Ottmar enjoyed firearms, gunsmithing, and ammunition reloading.<sup>3</sup> VRP 62, 97, 413, 686, 808. Dennis Ottmar

---

<sup>1</sup> By 2007 or 2008 the couple's accounts were fully merged. VRP 596.

<sup>2</sup> There was also evidence that Dennis Ottmar received an inheritance in 1991; however, there was no evidence regarding what Dennis did with any of that money. VRP 247, 252, 759, 835.

<sup>3</sup> Dennis Ottmar was a man of deep and varied interests; he was an accomplished cook and jewelry maker as well. VRP 591-92.

developed a reputation as a knowledgeable and talented gunsmith and a well-informed firearm collector, purchaser, and seller. *See id.*

When Dennis and Elizabeth Ottmar married (1987), Dennis owned somewhere between 50 and 75 firearms. VRP 707. It was not until approximately ten years later that Dennis Ottmar began amassing firearms in earnest. *Id.* By the time of his death, the collection consisted of approximately 350 firearms. Exhibit R-102, *see also* VRP 598.

Dennis Ottmar's barbering career ended by 2008. *See* VRP 704. In the autumn of 2007 and through the 2007/2008 winter, Dennis began to suffer from medical issues. VRP 700. He had lost substantial weight and he suffered weakness, numbness, shooting pains and difficulty balancing. *Id.* Dennis Ottmar was diagnosed with a neurological condition known as Chronic Inflammatory Demyelinating Polyneuropathy ("CIDP"). *Id.* Dennis was treated with regular in-hospital infusions of medication. VRP 701.

Throughout most of 2008, Dennis Ottmar was incapable of caring for himself (dressing, bathing, grooming, etc.). VRP 701-05. During that time, Elizabeth Ottmar cared for Dennis and provided him daily and ongoing assistance while he recovered. *Id.* Though Dennis recovered, he never returned to work in the barber shop. VRP 704, 596. Dennis continued to cut a few friends' hair, but he did so out of the home and

never returned to work after his recovery from CIDP. *Id.*, *see also* VRP 64-5, 789-90.

After Dennis Ottmar recovered from CIDP, he devoted more of his time to collecting firearms. VRP 707. Thus, the clear majority of the gun collection was amassed during Dennis and Elizabeth's marriage, and the most active period of Dennis' collecting occurred at a time during which Elizabeth's nursing income was the family's only income. *Id.*, VRP 598. Dennis Ottmar considered the firearm collection to be part of his and Elizabeth's retirement planning. VRP 688.

**E. DENNIS OTTMAR BECAME CONCERNED ABOUT CHANGES IN WASHINGTON STATE LAW AND CHOSE TO SELL THE FIREARM COLLECTION.**

By September 2014, Dennis Ottmar became concerned regarding potential changes in Washington State law. Exhibit R-104; VRP 465, 484, 673. Specifically, Dennis was concerned that Initiative 594 would pass and would make firearm collecting difficult, expensive, and would criminalize regular practices. *See id.* Dennis Ottmar sent family and friends several email communications regarding the impending changes to Washington State law. *Id.* Dennis Ottmar's emails focused on the extraordinary difficulties that a widowed spouse would face with respect to a firearm collection:

I 594 is a widows [sic] worst nightmare.

Initiative 594, page 13 requires that upon the death of a firearm owner, the spouse has 60 days to take any and all of the diseased [sic] spouse's firearms to a dealer to have a background check run on her for each firearm. If this doesn't take place, she is in non-compliance with the law.

\* \* \*

I 594 is just a legal land mine that's going to criminalize more folks than people believe. A few firearms is the last item of importance when a spouse is confronted with a sudden death, they are overwhelmed with grief, and more problems than most can imagine.

I 594 is a surviving spouse's worst nightmare designed to entrap him or her in a legal quagmire . . .

Exhibit R-104, p. 16. Dennis Ottmar was extraordinarily disappointed when Initiative 594 became law; he told his friends that selling the firearm collection was his only remaining option. VRP 484, 673.

**F. DENNIS OTTMAR RESOLVED TO AUCTION OFF THE FIREARM COLLECTION.**

By Thanksgiving 2014, Dennis Ottmar had decided to auction off the firearm collection. VRP 673,677, 679-80. Dennis Ottmar contacted a California auction company and planned for the firearm collection to be auctioned off. VRP 465-68, 677; CP 116-30.

During autumn 2014, Dennis Ottmar contacted Carol Watson and expressed an interest in selling the firearm collection. Ms. Watson is the owner and operator of a California auction house specializing in firearms.

CP 116-17. In November and December 2014, Dennis Ottmar and Carol Watson exchanged phone calls discussing the process to auction off the firearm collection. CP 117.

On January 8, 2015, Dennis Ottmar sent Ms. Watson an inventory of the firearms that he wanted to auction off. *Id.* That list included more than 300 items. CP 117, 122-29. Upon receipt of that inventory, Ms. Watson began to make arrangements to travel to Spokane on February 6, 2015 to collect the firearms for auction. CP 117-18. However, Dennis Ottmar's failing health prevented that plan from coming to fruition. *Id.*

**G. DENNIS OTTMAR FELL ILL AND PASSED AWAY.**

By December 2014, Dennis Ottmar began to experience significant medical symptoms. VRP 710-13. Dennis Ottmar reported to the emergency room and underwent a series of tests. *See id.*

By January 29, 2015, however, Dennis Ottmar's condition required him to be admitted to the hospital. R-117, DMC 0401-04. Unfortunately, Mr. Ottmar was never discharged from the hospital. *Id.* at DMC 0793.

On February 11, 2015, Dennis Ottmar made the difficult decision to forego further medical care. *Id.* at DMC 0581. For the next few days, hospital personnel provided comfort care to Mr. Ottmar. *See id.* at DMC 0791-93. Dennis passed away on February 14, 2015 at 73 years of age. *Id.* at DMC 0784, 0793.

#### IV. STATEMENT OF THE CASE

##### A. DENNIS OTTMAR HAD A WILL PREPARED IN 2005.

Retired Spokane attorney Byron Powell was a long-time friend of Dennis and Elizabeth Ottmar. VRP 56, 50-60. In 2001, Mr. Powell prepared a will for Elizabeth Ottmar, and in 2005, Mr. Powell prepared a will for Dennis Ottmar. VRP 72-74.

Mr. Ottmar's 2005 will gave all of Dennis Ottmar's property to his son, Thomas Ottmar. Exhibit P-7; CP 18-21. The 2005 will provided Elizabeth only a life estate in the home that Elizabeth and Dennis purchased together and had shared since 1987. *Id.* Dennis Ottmar's 2005 will also contained a provision referencing a Tangible Personal Property Memorandum; however, no such memorandum was prepared. *See* CP 19, *see also* VRP 107. Lastly, the 2005 will provided that Dennis Ottmar's estate should pass to Julie Ottmar (his daughter-in-law) in the event that Thomas Ottmar predeceased him. *Id.*

Mr. Powell retired from the practice of law in 2008. CP 19. However, he continued to press Mr. Ottmar to update and complete his estate planning, noting that Mr. Powell believed the estate planning to be incomplete. *See* VRP 80, 107.

**B. AFTER FALLING ILL, DENNIS OTTMAR SOUGHT TO GET HIS AFFAIRS IN ORDER.**

On or about February 6, 2015, one of Dennis Ottmar's physicians advised Dennis and Elizabeth that Dennis' condition was dire and that they should ensure that Dennis' worldly affairs were in order. *See* VRP 717-19. That recommendation set in motion events leading to the February 9, 2015 Last Will and Testament by Dennis Ottmar.

Elizabeth Ottmar searched the family home for a copy of Dennis Ottmar's 2005 will. VRP 720-22. She was unable to locate a copy of the will. *Id.* She believed that a copy of Dennis' 2005 will may have been in a large gun safe at their home; however, Elizabeth Ottmar was unable to open the safe. *Id.*

Being unable to locate a copy of Dennis Ottmar's 2005 will, Elizabeth Ottmar telephoned Byron Powell. *Id.* It is undisputed that Elizabeth Ottmar called and spoke with Byron Powell on February 6, 2015. *Id., see also* VRP 82-85. However, Mrs. Ottmar and Mr. Powell have differing recollections of what was said during that telephone call.

Elizabeth Ottmar testified that she contacted Byron Powell because she could not locate a copy of Dennis' 2005 will; she asked Mr. Powell if he had access to the original or to a copy. VRP 720-22. Mrs. Ottmar testified that Mr. Powell responded that he had closed his office, that he

did not have access to the will, but that he suggested that Elizabeth Ottmar check with the Spokane County Courthouse. *Id.* Mrs. Ottmar also testified that Mr. Powell told her that the 2005 will would be deficient even if it was located. *Id.* Lastly, Mrs. Ottmar testified that she asked for a referral for a lawyer to prepare a will for Dennis and that Mr. Powell recommended his former partner, Rob Grangroth (Thomas Ottmar's counsel in this matter). *Id.*

Mr. Powell's recollection of his discussion with Mrs. Ottmar was different. He denied that Mrs. Ottmar expressed any difficulty in locating the 2005 will and/or that Mrs. Ottmar asked for any assistance in locating the 2005 will. VRP 82-85, 112. Mr. Powell also denied that he expressed any insufficiency in the 2005 will. *Id.* Mr. Powell, however, acknowledged that he suggested that Elizabeth contact Rob Grangroth. VRP 112.

Thus, despite the differing recollections regarding the February 6, 2015 discussion between Elizabeth Ottmar and Byron Powell, there was no testimony or evidence to challenge the genuineness of Elizabeth Ottmar's beliefs and understanding. Thus, the evidence demonstrates that (as of February 6, 2015) Elizabeth Ottmar genuinely and honestly believed that no one could locate Dennis' 2005 will and the 2005 will would be

insufficient to administer Dennis' property. In fact, Mrs. Ottmar's contemporaneous email communications confirm her beliefs:

Well, things haven't been very good here. I found out the attorney that did our wills doesn't practice any longer & knew there was a problem with Dennis'. So Monday I have to get into the Safety Deposit Box & find an attorney. I thought for sure that was handled.

R-108, p. 2.

**C. A NEW WILL WAS PREPARED FOR DENNIS OTTMAR.**

For approximately 27 years, Elizabeth and Dennis Ottmar lived as a neighbor to William F. Etter and his family; the Ottmars knew Mr. Etter to be a well-known Spokane attorney. VRP 174, 515, 535, 542; CP 104-05. On February 8, 2015, Elizabeth Ottmar asked Mr. Etter for assistance; she told him about her discussion with Mr. Powell and Dennis Ottmar's need and desire to execute a new will. VRP 519-21. Mr. Etter noted that he did not do estate work, but that his son (who is also named "William" and who was also well known to the Ottmars) was an attorney who specialized in wills and estates. *Id.*

Later that afternoon, the younger Mr. Etter spoke on the phone with Elizabeth. VRP 167-74. Elizabeth explained that Dennis wanted to ensure that he had a will in place before he passed away. *Id.* The younger Mr. Etter inquired of Dennis' assets and; Elizabeth relayed that information. *Id.*

The younger Mr. Etter prepared a will for Dennis Ottmar per Elizabeth Ottmar's directions. *Id.* That will left all of Dennis Ottmar's property to his surviving spouse, Elizabeth Ottmar. *Id.*, *see also* Exhibit R-101.

**D. ON FEBRUARY 9, 2015, DENNIS OTTMAR EXECUTED THAT NEW WILL.**

The younger Mr. Etter was quite ill with influenza when he spoke with Elizabeth Ottmar and prepared Dennis' will. VRP 172-78. The younger Mr. Etter was, therefore, unable to be present in the hospital for the will's execution (Dennis Ottmar was in the Intensive Care Unit ("ICU") at the time). *Id.* Therefore, the younger Mr. Etter prepared the will, and the elder Mr. Etter took the will to the hospital for Dennis to execute. *Id.*, *see also* VRP 522-32, 541-42. The elder Mr. Etter was accompanied by a paralegal and notary from the younger Mr. Etter's office. *Id.*, *see also* CP 100-02. When the elder Mr. Etter and the paralegal arrived at Dennis' hospital room, Mr. Etter asked a nurse to witness the will's execution. *Id.*

The elder Mr. Etter asked Elizabeth Ottmar to read the will to Dennis. VRP 540-42. Elizabeth did so. *Id.* Dennis then executed the will, initialing each page and signing the last. CP 101. The witnesses

(Mr. Etter and the nurse) signed the will as witnesses, and the signatures were notarized. *Id.*

**E. A PROBATE ACTION WAS OPENED, THOMAS OTTMAR MADE A SUCCESSFUL WILL CONTEST, AND ELIZABETH OTTMAR FILED A TIMELY NOTICE OF APPEAL.**

Following Dennis Ottmar's death, Elizabeth Ottmar initiated a probate action in Spokane County Superior Court. CP 1-3.

Approximately two months later, Thomas Ottmar initiated a TEDRA action to invalidate Dennis Ottmar's will based upon a lack of capacity and undue influence. CP 13-16. The matter was tried to the bench in February and March 2016. *See generally* VRP. On April 22, 2016, the Spokane County Superior Court entered an order invalidating Dennis Ottmar's February 9, 2015 will. CP 650-69. On May 3, 2016, Elizabeth Ottmar filed a timely notice of appeal. CP 670-91.

**V. ARGUMENT**

**A. THIS APPEAL PRESENTS MIXED QUESTIONS OF FACT AND LAW, WHICH ARE REVIEWED FOR SUBSTANTIAL EVIDENCE AND *DE NOVO*.**

Questions of testamentary capacity and undue influence present mixed questions of fact and of law. *In re Melter*, 167 Wn. App. 285, 300-01 (2012). "Mixed questions involve the application of legal precepts to a particular set of factual circumstance"; in this case, those precepts involve testamentary capacity and undue influence. *See id.* The Court of Appeals,

therefore, reviews the trial court's findings of fact for substantial evidence, applying the clear, cogent, and convincing burden of proof. *Id.* And the trial court's conclusions of law are reviewed *de novo*. *Id.* Thus, the Court of Appeals applies *de novo* review to determine whether the facts of this case satisfy the legal requirements for a lack of testamentary capacity and/or undue influence. *Mueller v. Wells*, 185 Wn.2d 1, 9 (2016).

**B. THE TRIAL COURT FAILED TO MAKE NECESSARY FINDINGS OF FACT.**

Since at least 1854, Washington's trial courts have been required to make findings of fact in all cases that are tried to the bench (that is, without a jury). CR 52; *Bowman v. Webster*, 42 Wn.2d 129, 133 (1953). Though findings of fact need not take any specific form, the trial court **must** make sufficient findings on all material issues. *Federal Signal Corp. v. Safety Factors, Inc.*, 125 Wn.2d 413, 422 (1994); *WESCO Distribution, Inc. v. M.A. Mortenson Co.*, 88 Wn. App. 712, 715-16 (1997).

Sufficient findings of fact are necessary for appellate review. *See In re Custody of Z.C.*, 191 Wn. App. 674, 696 (2015). Findings must be sufficient "to enable an appellate court to intelligently review relevant questions upon appeal, and only when it clearly appears what questions were decided by the trial court, and the manner in which they were

decided, are the requirements met.” *In re Marriage of Horner*, 151 Wn.2d 884, 895-96 (2004) (quoting *Schoonover v. Carpet World, Inc.*, 91 Wn.2d 173, 177 (1978)).

In the absence of sufficient findings, the Court of Appeals “may independently review” the evidence and make such findings as are necessary. *Satomi Owners Ass’n v. Satomi, LLC*, 167 Wn.2d 781, 808 (2009); *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 222 (1992); *Custody of Z.C.*, 191 Wn. App. at 696. In doing so, the Court of Appeals owes the trial court’s views no deference. *Bryant*, 119 Wn.2d at 222-23. And if the Court of Appeals is unable to make the necessary findings from the material that the trial court provided, the Court of Appeals has no alternative but to reverse and remand the matter for an appropriate determination. *See Satomi*, 167 Wn.2d at 808.

The trial court did not make sufficient findings of fact to facilitate appellate review. In fact, the trial court’s April 22, 2016 “opinion” does not make any direct or specific findings of fact. CP 650-61, *see also* CP 700-01. Instead, the portion of the trial court’s opinion that it entitled “Factual Background” merely recounts some of the testimony that was offered, noting instances wherein witnesses disagreed with one another, but making no determinations. *Id.* The trial court’s recitation is contrary to the evidence that was offered at trial and omitted important testimony

that was received at trial. In short, the trial court provided no findings to justify its determination that Dennis Ottmar lacked testamentary capacity and/or was subject to undue influence when he executed his February 9, 2015 will. CP 650-61, *see also* CP 700-01.

The Court of Appeals is, therefore, placed in the unenviable position of being required to make findings based upon the evidence that is of record or remanding this matter for a fair and thorough resolution. Mrs. Ottmar respectfully asks the Court of Appeals to review the record and hold that Thomas Ottmar failed to carry his burden to prove his claims by clear, cogent, and convincing evidence.

**C. THE TRIAL COURT IMPROPERLY SHIFTED THE BURDEN OF PROOF ONTO ELIZABETH OTTMAR.**

The right to dispose of one's property by will has long been recognized as "a valuable incident of ownership." *In re Larsen's Estate*, 191 Wn. 257, 259-60 (1937). Additionally, the right to execute a new will and to change one's testamentary plan – as often or as frequently as the testator wishes – remains throughout the testator's life, so long as he or she is possessed of testamentary capacity. *Id.* at 262. Therefore, the testator's intent, as expressed in the will, "should not be rendered ineffective unless the facts clearly require" the will to be invalidated. *Id.* at 259-60.

So long as it is executed in accord with the legal formalities, a will is presumed valid. RCW 11.24.030. “Where a will, rational on its face, is shown to have been executed in legal form, the law presumes testamentary capacity in the testator, and that the will speaks his wishes.” *In re Estate of Riley*, 78 Wn.2d 623, 646 (1970) (citations omitted). Therefore, the party contesting a will must establish the will’s invalidity through **clear, cogent and convincing evidence** that testamentary capacity was lacking when the will was executed. *In re Hansen’s Estate*, 66 Wn.2d 166, 168 (1965). Due to the high standard of proof required “merely suspicious circumstances are not sufficient to nullify a will.” *Id.* The clear, cogent and convincing standard requires the petitioner to present evidence sufficient to “convince the trier of fact that the fact in issue is **highly probable.**” *In re Estate of Haviland*, 162 Wn. App. 548, 558 (2011) (emphasis added; quotations & citations omitted).

Contrary to established Washington State law, the trial court imposed a burden on Elizabeth Ottmar to affirmatively prove that Dennis had testamentary capacity. The trial court held:

[Thomas Ottmar] asserts that the will should be vacated as his father did not have testamentary capacity to sign a new will because of his medical condition at the time. He bolsters this claim through the testimony of Nurse Susan Colliflower as she was able to describe in detail Dennis’ medical condition on the evening before and the day he signed his new will while in the ICU . . . **Her testimony**

**was sufficient to shift the burden to [Elizabeth Ottmar]** to demonstrate that Dennis' medical condition at the time he signed the new will was not influenced and that he had the medical capacity to make the decision.

CP 683 (emphasis added). There is no provision in Washington State law that permits the trial court to shift the burden of proof with respect to testamentary capacity. Instead, the petitioner (Thomas Ottmar) must produce evidence sufficient to persuade the trier of fact under the heightened clear, cogent, and convincing standard. See *Hansen's Estate*, 66 Wn.2d at 168.

It was clear error for the trial court to impose a burden of disproof on Mrs. Ottmar. That error requires a decisive remedy by the Court of Appeals.

**D. DENNIS OTTMAR WAS FULLY POSSESSED OF TESTAMENTARY CAPACITY WHEN HE EXECUTED HIS LAST WILL AND TESTAMENT.**

As the State Supreme Court phrased it: "one does not have to be a literarian, a financial genius, an athlete, or an expert cook in order to qualify as possessing capacity to make a will." *In re Bottger's Estate*, 14 Wn.2d 676, 687 (1942). "[N]o act can be more simple than the gift of his property by an old man to the members of his immediate family; and it ought not be considered . . . to be an act requiring strong mind or considerable capacity." *Id.* at 691. Neither advanced age, profound

illness, or impending death are sufficient to establish the lack of testamentary capacity. *Larsen's Estate*, 191 Wn. at 261-62. Importantly, the fact that a person is “occasionally forgetful or confused” is not sufficient to make him or her incompetent to make a will. *Hansen's Estate*, 66 Wn.2d at 171.

Testamentary capacity requires very little.

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 [or her] bounty**.

*Bottger's Estate*, 14 Wn.2d at 679 (emphasis added); *see also In re Estate of Kessler*, 95 Wn. App. 358, 371 (1999). Testamentary capacity, therefore, requires nothing more than the testator know that he or she is making a will, know what he or she has, and remember his or her family members.

The State Supreme Court's decision in *In re Riley's Estate*, 163 Wn. 119, 127-28 (1931), is instructive. In that case, the Court affirmed a trial court's dismissal of a will contest (based upon capacity) and wrote:

The witness stated that at the time Mr. Riley entered the hospital in April, 1929, he (the doctor) **did not expect that Mr. Riley would recover**. Dr. Melgard furnished the **only medical testimony in the record**, and his opinion as to Mr. Riley's condition is, of course, entitled to great weight. The

doctor states that **Mr. Riley was at times fit to transact business, and that at other times he was not; that he would sometimes carry on a connected, intelligent conversation; and that at other times his mind was not functioning normally.** The patient was old and very ill, and there is nothing unusual in the fact that at times his mind was not normally clear. Such a situation is far from indicating testamentary incapacity . . . Dr. Melgard stated that **he on one occasion told Mr. Riley that ‘if he had any financial matters to settle it was best to settle them now,’ and that Mr. Riley appeared to understand the doctor, and indicated that he would follow the doctor’s advice. The doctor also mentioned this matter to respondent Gertrude Shields. The will now before us was evidently executed pursuant to this suggestion.**

*Id.* at 127-28. As demonstrated herein, Dennis Ottmar’s case bears incredibly close parallels to Mr. Riley’s.

***1. There Was No Direct Evidence to Establish That Dennis Ottmar Lacked Testamentary Capacity.***

As noted above, testamentary capacity requires the person making a will to know: what he is doing, what property he has to dispose of by a will, and who the members of his family are. *Bottger’s Estate*, 14 Wn.2d at 679. Thomas Ottmar did not present any evidence directly bearing on any of those elements.

There was no evidence offered to demonstrate that Dennis Ottmar did not know what he was doing when he executed his February 9, 2015 will. Similarly, there was no evidence to show that Dennis Ottmar ever lost sight of the nature and extent of his property or failed to remember his

family members. In fact, there was substantial evidence to show that Dennis Ottmar communicated with members of his family, including Thomas Ottmar, during his hospitalization. VRP 243-44, 416-18, 799. Dennis specifically called Thomas after making the decision to forego further medical care; Dennis made that call to say goodbye to his son. VRP 416-18.

There is simply no evidence to even imply – much less establish by clear, cogent, and convincing evidence – that Dennis Ottmar failed to understand that he was executing a will, failed to understand what that will’s effects were, failed to recall the nature and extent of his property, or failed to recall the objects of his bounty.

**2. *Direct Evidence Established That Dennis Ottmar Fully Understood and Was Fully Engaged in the Will’s Execution.***

On February 9, 2015, the will was presented to Dennis Ottmar by the elder Mr. Etter, who had been Dennis’ neighbor for nearly 30 years. CP 105; VRP 522-32, 538-42. Mr. Etter was accompanied by Jennifer Kay, a paralegal who notarized the necessary signatures. *Id.*, see also CP 100-02. The will was witnessed by Mr. Etter and by Laura Diener, a nurse who had attended to Mr. Ottmar. CP 100-02, 110-11; VRP 530.

Dennis Ottmar greeted the elder Mr. Etter by name when he arrived in Mr. Ottmar’s hospital room. CP 106; VRP 524-25. Before

executing the will, Mr. Etter asked Dennis Ottmar to verbally confirm that he understood that they were about to execute a will and that the purpose of that will was to reflect Dennis' last wishes for the disposition of his property. CP 100-01, 106-07; VRP 525-28. Dennis did so. *Id.* Ms. Kay asked Dennis to initial each page and to sign the will if it properly reflected his wishes. *Id.* Dennis did so. *Id.* Ms. Kay also asked Dennis if he understood the document that he was signing, and Dennis confirmed that he did. *Id.* Finally, both Mr. Etter and Ms. Kay asked Dennis if he had any questions. *Id.* Dennis responded that he had no questions. *Id.*

Mr. Etter and Ms. Diener signed the will as witnesses. *Id.*, *see also* CP 110-11; VRP 210-11, 227-28, 230, 232, 235. Both witnesses testified that Dennis Ottmar appeared to understand the will and appeared to be executing the will as his voluntary and intelligent act. *Id.*<sup>4</sup>

**3. *Thomas Ottmar Failed to Present Sufficient Medical Evidence to Demonstrate That Dennis Ottmar Lacked Testamentary Capacity.***

As the trial court observed, Thomas Ottmar's arguments regarding testamentary capacity were based upon the testimony of Nurse Susan

---

<sup>4</sup> The trial court placed weight on Ms. Diener's later testimony that she did not, at the time, understand that she was serving as a witness to Mr. Ottmar's capacity as well as the fact of his signature. CP 663; VRP 210-11. However, Ms. Diener remained consistent in her testimony that Dennis was alert, oriented and appeared to understand the will and its execution and that she did not believe that Dennis was under any coercion. VRP 227-28, 230, 232, 235, *see also* CP 110-11.

Colliflower. CP 650-69. The Court of Appeals will observe that Nurse Colliflower's testimony was the sole basis for Thomas Ottmar's claim regarding testamentary capacity. *See id.* Nurse Colliflower's testimony, however, was insufficient and inadequate to satisfy Thomas Ottmar's burden to prove by clear, cogent, and convincing evidence that his father lacked testamentary capacity on February 9, 2015.

**a. The trial court misstated the evidence regarding testamentary capacity.**

Though she was retained as an expert, Nurse Colliflower admitted that she had no familiarity with the standard for testamentary capacity and had not previously testified regarding testamentary capacity. VRP 274, 283. On the other hand, Elizabeth Ottmar presented expert testimony from Dr. Duane Green, a board-certified psychologist. VRP 607-65. Dr. Green is intimately familiar with testamentary capacity; he has conducted evaluations for testamentary capacity on many occasions; and he has testified as an expert on testamentary capacity in multiple prior cases. VRP 611-15.

Dr. Green testified regarding the hierarchy of capacities. VRP 619-20. Specifically, Dr. Green testified that differing levels of capacity are required for different types of decisions. *Id.*

On this issue, the trial court's opinion incorrectly states that Dr. Green testified that "testamentary capacity is somewhere in the middle between the lowest cognitive level of being able to make medical decisions for oneself and the highest cognitive level where one makes financial decisions." CP 658. That is directly contrary to Dr. Green's testimony.

Dr. Green was clear that medical decision-making requires a markedly higher level of capacity than does testamentary capacity; Dr. Green testified:

I would rank order certain financial decision would be the highest, and the next going down would be medical decision making, and then at the simpler or the lower end of that particular list I would put testamentary capacity.

VRP 620. Thomas Ottmar did not refute that testimony; it was, therefore, undisputed that medical decision-making requires a greater level of capacity than testamentary capacity. *See id.*

By misstating Dr. Green's testimony, the trial court imposed too high a standard for testamentary capacity. *See* CP 650-69. That error was central to the trial court's improper decision in this matter.

Dennis Ottmar's medical records demonstrated that he remained capable of his own medical decisions to the very end. R-117, DMC 0581, *see also* VRP 626. That fact should have been determinative of this

matter. The trial court's error regarding the relative hierarchy of decision-making capacities requires this matter to be reversed.

**b. Dr. Green's testimony demonstrated that Dennis Ottmar had sufficient capacity.**

There is no dispute regarding the fact that Dennis Ottmar was incredibly ill. *See generally*, R-117, *see specially* DMC 0498-582. His condition waxed and waned. *Id.*, *see also* VRP 367, 375-77, 628-47. He had periods where he had trouble staying awake, and he had periods of alert and engaged wakefulness. *Id.* The trial court, however, failed to conduct a sufficiently detailed analysis of the period during which Dennis Ottmar's will was executed; instead, the trial court relied upon the mere fact of his illness and subsequent death to establish that he lacked capacity. *See* CP 650-69. Analyzing the specific medical facts and the specific period during which the will was executed demonstrates that Dennis Ottmar was vested with sufficient capacity. Dr. Green's testimony did just that. *See* VRP 628-29, 632-34, 637-39.

Nurse Colliflower's testimony was general and nonspecific. Nurse Colliflower simply recounted Dennis Ottmar's vital signs and reported symptoms and then provided generalized opinions regarding the effect that

those vital signs and symptoms could have on the human body. *See* VRP 273-385.<sup>5</sup>

Nurse Colliflower, however, could not comment on any of the specifics. Nurse Colliflower admitted that she did not know when the will was signed. VRP 283. Nurse Colliflower admitted that Dennis responded positively to the treatment provided in the ICU. *See* VRP 346, 365, 374. Critically, Nurse Colliflower acknowledged that she was not able to testify about Dennis Ottmar's mental state "at the time he signed the will." VRP 353. And Nurse Colliflower acknowledged that Dennis remained capable of making medical decisions for himself throughout the relevant time, and it was undisputed that medical decisions require a higher level of capacity than do testamentary decisions. VRP 379.

In short, Nurse Colliflower's testimony was based upon speculation and failed to satisfy the traditional requirement that medical testimony be based upon probabilities, rather than mere possibilities. *See Colley v. Peacehealth*, 177 Wn. App. 717, 728-29 (2013). Nurse Colliflower's testimony was insufficient.

---

<sup>5</sup> Importantly, Dr. Green testified that there is no medical literature to support Nurse Colliflower's core contention that there exists a reliable correlation between a patient's vital signs and his or her mental capacity. VRP 622.

On the other hand, Dr. Green analyzed the medical records and testimony from witnesses involved in the will's execution. Dr. Green analyzed the record and confirmed that Dennis Ottmar executed his will between 2:15 pm and 2:45 pm on February 9, 2015, which is consistent with the elder Mr. Etter's testimony. VRP 522, 623, 631, *see also* CP 106. That time is, therefore, the relevant period to direct analysis regarding Dennis Ottmar's capacity. Based upon the specific medical facts, Dr. Green determined that Dennis Ottmar had sufficient capacity to execute a will during the relevant period. VRP 616-50, *see specially* 616-18.

The trial court erred in elevating Nurse Colliflower's generalized and speculative testimony over Dr. Green's specific and concrete testimony. Elizabeth Ottmar respectfully asks the Court of Appeals to reverse the trial court's error.

**E. THE TRIAL COURT ERRED BY IMPOSING A PRESUMPTION OF UNDUE INFLUENCE.**

Influence over a testator is not sufficient to invalidate a will; influence may be legitimately exerted upon a testator in the form of "advice, persuasion, or even importunity, directed to the end of affecting the testamentary disposition of his property without in any way invalidating the will induced by these means." *Bottger's Estate*, 14 Wn.2d at 699 (citations and quotations omitted). To invalidate a will, far more

than influence is required; to reach the level of undue influence, the facts must show that “at the time of the testamentary act, [the influencer] **controlled the volition** of the testator, **interfered with his free will**, and **prevented an exercise of his judgment** and choice.” *Id.* at 700 (emphasis added).

To invalidate a will, undue influence must be “**tantamount to force or fear** which **destroys the testator’s free agency** and **constrains him** to do what is against his will.” *Id.* (citing *In re Adams’ Estate*, 120 Wn. 189, 195-96 (1922)) (emphasis added). Summing the issue up eloquently, the State Supreme Court wrote:

the influence allegedly exerted over the testator must have been such as to override his will power and substitute the will of the person exercising the influence. In other words, the person accused of **dominating the testator** must have imposed [her] wishes upon the latter, **not by persuasion directed to [the testator’s] intellect or by appeal to sentiment**, but by coercion of [the testator’s] 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 [testator]**.

*Id.* at 701 (emphasis added). The standard for undue influence is extraordinarily high and does not apply to the customary, gentle and mutual influence that long-time spouses necessarily have with one another.

Like a lack of testamentary capacity, the party asserting undue influence bears the burden of proving its existence by clear, cogent and convincing evidence. *Estate of Riley*, 78 Wn.2d at 663. Unlike capacity, however, Washington law allows a presumption of undue influence in cases where the will's facts and circumstances indicate the type of "ascendency over the mind of the testator" that is necessary for an undue influence claim. *Id.*; *In re Smith's Estate*, 68 Wn.2d 145, 153 (1966). Washington cases identify factors to guide the Court's determination regarding whether to impose a presumption of undue influence:

- Whether the testator was vulnerable and infirm;
- The nature and degree of the testator's relationship with the accused influencer, including whether the accused occupied a "fiduciary or confidential relation to the testator";
- Whether the accused influencer participated in the will's "procurement"; and
- Whether the accused "received an unusually large part of the estate."

*Estate of Haviland*, 162 Wn. App. at 558.

Once a presumption of undue influence is imposed, the respondent bears the burden of coming forward with evidence sufficient to "balance the scales." *Id.* at 558-59. In the absence of rebuttal evidence, a

presumption of undue influence **may** be sufficient (in an appropriate case) to justify the will's invalidation. *Id.* However, that would require a presumption sufficient to carry the petitioner's burden of proving undue influence by clear, cogent, and convincing evidence. *See Estate of Riley*, 78 Wn.2d at 663.

Thomas Ottmar did not present any direct evidence of undue influence. His claim, and the trial court's decision, was based entirely on a presumption of undue influence. *See* CP 650-69. The imposition and reliance upon a presumption of undue influence, however, was error. The evidence presented did not show – much less prove by clear, cogent and convincing evidence – that Elizabeth Ottmar dominated her husband, usurped his will, or otherwise exerted control over her husband's decisions.

***1. Dennis Ottmar Was Not Infirm or Vulnerable.***

Looking to the first factor identified above, the evidence showed that Dennis Ottmar was strong-willed; he was proud, and he was possessed of a commanding presence. *See Estate of Haviland*, 162 Wn. App. at 558; VRP 108-09, 257-58, 405, 434-35, 796-97. That strength of will continued throughout Dennis' hospital stay, and that strength of will was apparent when Dennis made the decision to stop receiving treatment and to die in peace. On February 6, 2015 (three days before the will's

execution), Dennis and his physicians discussed treatment options. R-117, DMC 0500. The physician's note highlights Dennis' fortitude and strength of mind:

We discussed these options in general, and with input and support from his wife, the patient feels that he is not ready to "give up" by having comfort care. He would like to proceed with palliative chemotherapy, understanding that it is not intended to be curative and the benefits are hard to predict.

*Id.* To the very end, Dennis' independent and iron will was clear. On February 11, 2015, Dennis made the decision to forego further treatment. R-117, DMC 0581. Again, the physician's note shows that the decision was Dennis' and Dennis' alone:

Patient was seen in his ICU bed, wife present. He is clear and consistent in his decision to stop interventions and have a natural death . . . wife is supportive . . . [Dennis is] alert, awake, conversant, clear, oriented, is fully capable of medical decision making.

*Id.* Though the trial court's failure to make specific findings makes understanding the trial court's reasoning difficult, it appears that a mistaken belief that Dennis was vulnerable and infirm was a driving force for the trial court's opinion. *See* CP 650-69. That belief was in error, and that error tainted all other aspects of the trial court's analysis.

2. ***The Trial Court Misapplied Washington Law in Evaluating Dennis and Elizabeth Ottmar's Relationship.***

Washington's case law identifies the nature of the relationship between the testator and the beneficiary as a relevant factor to determining whether undue influence existed; the case law specifically asks whether the beneficiary occupied a fiduciary position with respect to the testator. *Estate of Haviland*, 162 Wn. App. at 558. Of course, Elizabeth Ottmar occupied a fiduciary position with respect to Dennis – she was his wife of nearly 30 years. VRP 583-84. Yet, the trial court mechanically checked the box for a fiduciary position. CP 667. However, whether a relationship is fiduciary is not the inquiry's true aim; the case law is clear that the purpose of the factor is to examine the nature of the parties' relationship. *See Estate of Haviland*, 162 Wn. App. at 558.

The evidence showed that Dennis and Elizabeth Ottmar were partners and teammates – neither dominated the other, and the influence that they exerted with one another was the love and companionship that comes from 30 years of building and living a life together. *See* VRP 591-96. Dennis and Elizabeth shared hobbies; they cared for and took pride in their home together; and they shouldered the burdens and expenses of life together – including the economic expenses of purchasing and maintaining a home. *Id.*

While Dennis was in the hospital, his physicians observed and recorded the closeness of Dennis and Elizabeth's partnership. On February 6, 2015, Dennis was facing the difficult decision regarding whether to pursue chemotherapy. R-117, DMC 0498. Elizabeth was not present when Dennis first faced that decision, and his physician noted that Dennis wanted to discuss that decision with his family prior to making it. *Id.* As quoted above, Elizabeth supported and assisted Dennis with his decision to pursue chemotherapy. *Id.* at DCM 0500. And when Dennis made the decision to forego further treatment, he did so with Elizabeth's input and support. *Id.* at DMC 0581.

The evidence, therefore, does not support the trial court's conclusion that Dennis and Elizabeth Ottmar's relationship supported a presumption of undue influence. To the contrary, the relationship was a decades-long partnership of mutual support.

**3. *Elizabeth Ottmar Participated in the Will's Procurement Due to a Genuine Belief That Dennis' Prior Will Was Insufficient.***

Of course, Elizabeth Ottmar's participation in the will's procurement is a relevant part of the analysis. *Estate of Haviland*, 162 Wn. App. at 558. Unfortunately, the trial court's analysis of the issue provides little clarity.

As noted early in this brief, there was disputed testimony between Elizabeth Ottmar and Byron Powell. The trial court noted that dispute, but made no finding of fact to resolve the dispute, nor did the trial court analyze how that disputed testimony affected the decision. CP 651-52. Regardless of the disputed testimony, there was no indication – much less evidence – that Elizabeth Ottmar acted from anything but a genuine and honestly held belief that Dennis Ottmar’s 2005 will could not be located and, even if located, would be inadequate.

In addition, the trial court’s decision was clearly motivated by a belief that Elizabeth Ottmar refused to permit others to see Dennis while he was in the hospital. CP 665. That belief is completely unsupported by the evidence.

The evidence demonstrated, beyond peradventure, that Dennis Ottmar made the decision that he did not want anyone to see him in the hospital; the evidence is also clear that Dennis Ottmar communicated his wishes to several people. VRP 70, 108 (Dennis told Byron Powell that Dennis did not want to see Mr. Powell); VRP 257-58 (Dennis’ brother Bruce Ottmar acknowledged that Dennis’ pride caused him to eschew visitors); VRP 435 (Thomas Ottmar acknowledged that his father “didn’t want people to see him with diminished capacity or hoses and tubes”); VRP 811 (Dennis’ friend Jim Burris acknowledged that Dennis did not

want anyone to see him sick). Thomas Ottmar acknowledged that Dennis was the one who refused to permit Thomas to come to the hospital:

Q . . .when your dad was in the ICU, I believe you had a phone conversation with him; is that correct?

A When Julie [Thomas' wife] was with me, yes.

Q He wouldn't tell you too much on that phone call; is that right?

A Right.

Q He did tell you he was miserable?

A Yes.

**Q He didn't want you to see him like that; is that correct?**

**A Yes.**

**Q You even insisted that you wanted to come back and see him, but he refused that request, right?**

**A Yes**

VRP 469-40 (emphasis added).

Perhaps most importantly, Dennis Ottmar told the hospital's nursing staff that he would not accept any visitors. Even on February 13, 2015 (the day before his death), Dennis insisted that no one see him. R-

117, DMC 0793. The hospital chart recorded that fact: “[w]ife at bedside. Visitor restriction continued per [Dennis’] request.” *Id.*

Dennis Ottmar chose to deny all visitors but his beloved wife. Thomas Ottmar being hurt by that choice is understandable. However, the evidence was clear that Dennis made the choice. And the evidence was clear that Dennis communicated that choice to Thomas Ottmar and others.

In short, the trial court improperly and without any evidence to support it, implied ill motives in Elizabeth’s Ottmar’s assistance to her husband. *See* CP 650-69. That error ran throughout the trial court’s opinion, and that error requires the trial court’s decision to be reversed.

**4. *The Trial Court Erred in Concluding That Elizabeth Ottmar Received an Unnaturally Large Portion of Dennis Ottmar’s Estate.***

The final part of the undue influence analysis asks whether Elizabeth Ottmar received an unnaturally large portion of Dennis’ property. *See Estate of Haviland*, 162 Wn. App. at 558. “[C]ases holding undue influence have generally involved the exclusion of one near and dear to the testator and the majority of the estate going to one with whom the testator had no close ties.” *In re Estate of Knowles*, 135 Wn. App. 351, 359-60 (2006).

In evaluating the naturalness of Dennis’ will, the Court must consider the fact that Dennis’ conduct, while alive, demonstrated his

intent. “If he has on previous occasions expressed a settled purpose concerning the testamentary disposition which he desires to make of his property, such statements are entitled to consideration.” *In re Landgren’s Estate*, 189 Wn. 33, 38 (1936).

Dennis Ottmar’s February 2015 will was as natural a disposition of property as can be imagined. Unlike the 2005 will, the 2015 will was consistent with the community property realities of the Ottmars’ marriage. And the 2015 will was consistent with Dennis’ clear wishes for the firearm collection.

**a. The 2015 will is consistent with the realities of Dennis’ and Elizabeth’s community property.**

Pursuant to Washington State law, any property earned during a marriage is presumed to be community property. RCW 26.16.010; *Schwarz v. Schwarz*, 192 Wn. App. 180, 188 (2016). Certain types of property, including inheritances, are excluded from that presumption. *White v. White*, 105 Wn. App. 545, 550 (2001).

Despite Washington’s community property laws, Dennis Ottmar’s 2005 will purported to give **all** of Dennis Ottmar’s property to Thomas Ottmar. P-7, *see also* VRP 128-30. In fact, the 2005 will purported to provide Elizabeth with nothing more than a life estate in the home that she and Dennis bought and paid for. *Id.* The 2005 will was, therefore,

extraordinarily unnatural – it failed to acknowledge that Elizabeth Ottmar held substantial community property rights.

The evidence presented at trial showed that Dennis and Elizabeth Ottmar purchased a home together. VRP 582-86. Though only Dennis' name appeared on the deed, all of the mortgage payments were made with community property. VRP 756; *see also In re Binge's Estate*, 5 Wn.2d 446, 485-86 (1940) (Recognizing that community property rights exist in property that is purchased before a marriage where community assets are used to pay the mortgage on the property). Furthermore, Elizabeth Ottmar paid off the house using inheritance money that she received – Elizabeth's inheritance paid nearly 60% of the total mortgage. VRP 125-26; 586. Therefore, pursuant to settled Washington State law, Dennis Ottmar did not own the house that his 2005 will purported to give to Thomas Ottmar. *See White*, 105 Wn. App. at 551 (Recognizing that a spouse has separate property rights with respect to a community property home, where that spouse used a separate property inheritance to pay off the mortgage).

Similarly, the evidence presented at trial showed that the firearm collection was amassed – by and large – during the marriage. Dennis Ottmar owned 50 to 75 firearms prior to his marriage to Elizabeth. VRP 707. During the marriage, Dennis and Elizabeth acquired approximately 300 more. R-102, VRP 598. Those firearms are, therefore, presumed to

be community property. *See* RCW 26.16.010. In fact, the evidence at trial was clear that Dennis Ottmar's most active firearm buying and purchasing period occurred after his retirement (2008), and during that time the couple's only regular source of income came from Elizabeth's work as a nurse. *See* VRP 707.

By purporting to give the couple's home and the firearm collection to Thomas Ottmar, the 2005 will was in dissonance and discord with long-settled community property principles. On the other hand, the 2015 will is in complete harmony with Washington's law on community property. The trial court, however, completely disregarded these important community property principles. CP 668. The trial court's decision that the 2015 will provided an unnatural bequest is clear error and should be reversed.

**b. The 2015 will is consistent with Dennis Ottmar's expressed desire to auction off the firearm collection.**

Lastly, the 2015 will is consistent with unrefuted evidence that Dennis Ottmar had chosen to auction off the firearm collection due to the uncertainty caused by Initiative 594's passage. The trial court's analysis ignored that relevant and undisputed evidence. CP 665-66. Specifically, the trial court's opinion asserts that Dennis Ottmar's intent to auction off

the firearm collection “was never solidified by Dennis prior to his death.”

*Id.* The trial court’s decision is simply incorrect.

Elizabeth Ottmar presented direct and unrefuted testimony from the auction company that Dennis Ottmar had contacted and with whom Dennis had made specific and concrete arrangements to auction off the firearm collection. CP 116-19. That testimony offered by Carol Watson was clear:

- Dennis Ottmar contacted Ms. Watson’s auction company seeking to auction off approximately 300 firearms. *Id.*
- Dennis Ottmar spoke with the auction company on multiple occasions between November 2014 and January 2015. *Id.*
- Dennis Ottmar and Ms. Watson made concrete and specific plans for Ms. Watson to travel to Spokane and to gather up the firearms for auction in California. *Id.*
- And lastly, Dennis Ottmar’s sudden illness and death was the only reason that those specific and concrete plans did not come to fruition. *Id.*

Dennis Ottmar was concerned that changes in Washington State gun laws would threaten liability and forfeiture; he made a plan to auction off the firearm collection to avoid the risk of liability and forfeiture; his health prevented him from finalizing that plan; and he executed a revised

will so that his wife of 30 years could put his plan into action. Dennis' thoughts regarding the impending changes to Washington law were unambiguous; he described it as a widow's "worst nightmare" and a "legal quagmire." R-104, p. 16. Dennis took steps to protect his wife from that nightmare and quagmire. Nothing could be more natural. More importantly, there is absolutely no evidence to demonstrate that Dennis Ottmar's February 9, 2015 will was not the natural expression of his Last Will and Testament. The trial Court's decision must, therefore, be reversed.

There was no direct evidence of undue influence, and the facts of this case do not justify a presumption of undue influence. The trial court's determination to the contrary was in error.

#### **VI. ATTORNEYS' FEES ON APPEAL**

RAP 18.1 allows for the recovery of attorneys' fees on appeal where the applicable law allows for an award of attorneys' fees. Washington's probate statute (Title 11 RCW) gives this court great discretion in awarding costs and attorneys' fees to parties in probate proceedings. RCW 11.96A.150. The court may, in its discretion, order the costs and fees "be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section,

the court may consider any and all factors that it deems to be relevant and appropriate ...” RCW 11.96A.150(1).

Thomas Ottmar’s petition and the trial court’s error forced Elizabeth Ottmar to expend considerable money in attorneys’ fees on appeal. Elizabeth Ottmar respectfully asks the Court of Appeals to award her reasonable costs and attorneys’ fees incurred in this appeal.

#### **VII. CONCLUSION**

Thomas Ottmar did not carry his burden to prove by clear, cogent and convincing evidence that Dennis Ottmar lacked testamentary capacity on February 9, 2015. Thomas Ottmar did not carry his burden to prove by clear, cogent and convincing evidence that Dennis Ottmar’s will was the product of undue influence. The trial court erred in holding that Thomas Ottmar had met his burden. Elizabeth Ottmar respectfully asks the Court of Appeals to reverse the trial court’s error.

///

///

///

///

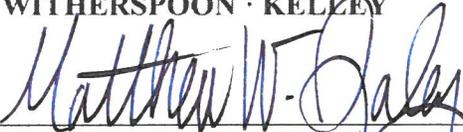
///

///

///

RESPECTFULLY SUBMITTED, this 24th day of January, 2017.

**WITHERSPOON · KELLEY**

  
MATTHEW W. DALEY, WSBA # 36711

**EVANS, CRAVEN & LACKIE**

  
SAMUEL C. THILO, WSBA # 43221

Counsel for the Appellant

**CERTIFICATE OF SERVICE**

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 24th day of January, 2017, the foregoing was delivered to the following persons in the manner indicated:

<p>Robb E. Grangroth Phillabaum Ledlin Matthews &amp; Sheldon, PLLC 1235 North Post Street, Suite 100 Spokane, Washington 99201 Email: <a href="mailto:robb@spokelaw.com">robb@spokelaw.com</a></p> <p><i>Counsel for the Appellee, Thomas Ottmar</i></p>	<p><input checked="" type="checkbox"/> By Hand Delivery <input type="checkbox"/> By U.S. Mail <input type="checkbox"/> By Overnight Mail <input type="checkbox"/> By Facsimile <input type="checkbox"/> By Electronic Mail</p>
---	--

  
LAURI PECK, Legal Assistant