

**FILED**

No. 344193

MAR 27 2017

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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

---

In Re the ESTATE OF DENNIS OTTMAR, Deceased.

---

RESPONDENTS' ANSWER

---

Robb E. Grangroth  
Douglas R. Dick  
Attorneys for Respondents  
Phillabaum Ledlin Matthews & Sheldon, PLLC  
1235 N. Post Street, Suite 100  
Spokane, WA 99201  
(509) 838-6055  
WSBA Nos. 31103 & 46519

## TABLE OF CONTENTS

I. INTRODUCTION .....	1
II. ASSIGNMENTS OF ERROR .....	1
III. STATEMENT OF THE CASE .....	2
IV. ARGUMENT .....	11
A. Standard of Review .....	11
B. The Trial Court Made Necessary Findings in its Memorandum Opinion. ....	12
C. The Trial Court Did Not Improperly Shift the Burden of Proof .....	15
D. Dennis Ottmar Did Not Possess Testamentary Capacity When He Executed His Last Will and Testament. ....	17
E. Appellant’s Expert Could Not Articulate His Opinion On Dennis’ Capacity Under the Applicable Legal Standard. .....	20
F. Plaintiff Established Prima Facie Evidence of Undue Influence .....	26
1. The sole beneficiary Elizabeth Ottmar occupied a fiduciary or confidential relation to the testator. .....	28
2. The sole beneficiary Elizabeth Ottmar actively participated in the preparation or procurement of the will. ....	29
3. Elizabeth Ottmar received an unusually or unnaturally large part of the estate. ....	33
4. Dennis Ottmar’s age, mental vigor and condition of health made him infirm and vulnerable to undue influence. ....	35
5. Elizabeth Ottmar had the opportunity for exerting an undue influence on Dennis. ....	37
G. The Trial Court Properly Applied the Presumption of Undue Influence Based on the Evidence Presented. ....	39
H. Dennis Ottmar’s 2005 Will Was Available to Elizabeth Ottmar. .....	42

I. The Distinction of Community Property vs. Separate Property  
Does Not Assist the Court to Determine Whether the 2015  
Will Was Unnatural . . . . . 43

J. The 2015 Will Does Not Address or Acknowledge Dennis’  
Unsolidified Desire to Auction Off His Firearms. . . . . 44

K. Attorney Fees. . . . . 44

V. CONCLUSION . . . . . 45

**TABLE OF AUTHORITIES**

*Bowman v. Webster*, 42 Wn.2d 129, 253 P.2d 934 (1953) . . . . . 13

*Dean v. Jordan*, 194 Wash. 661, 79 P.2d 331 (1938) . . . 15, 17, 27, 28, 39

*Dickson v. U.S. Fid. & Guar. Co.*, 77 Wn.2d 785, 466 P.2d 515 (1970)  
 . . . . . 13

*Gerberg v. Crosby*, 52 Wn.2d 792, 329 P.2d 184 (1958) . . . . . 20

*Hoglund v. Morgan*, 60 Wn.2d 770, 375 P.2d 506 (1962) . . . . . 21

*In re Bottger's Estate*, 14 Wn.2d 676, 129 P.2d 518 (1942) . . . . . 18

*In re Estate of Haviland*, 162 Wn. App. 548, 255 P.3d 854 (2011)  
 . . . . . 11, 12, 26, 30, 33, 39

*In re Estate of Lint*, 135 Wash.2d 518, 957 P.2d 755 (1998) . . . . . 16

*In re Hastings' Estate*, 4 Wn. App. 649, 484 P.2d 442 (1971) . . . . . 21

*In re Landgren's Estate*, 189 Wash. 33, 63 P.2d 438 (1936) . . . . . 33

*In re Melter*, 167 Wn. App. 285, 273 P.3d 991 (2012) . . 11, 12, 14, 15, 33

*In re Miller's Estate*, 10 Wn.2d 258, 116 P.2d 526 (1941) . . . . . 33

*In re Tresidder's Estate*, 70 Wash. 15, 125 P. 1034 (1912) . . . . . 27

*Kinnear v. Graham*, 133 Wash. 132, 233 P. 304 (1925) . . . . . 12

*Lamm v. McTighe*, 72 Wn.2d 587, 434 P.2d 565 (1967) . . . . . 21

*Mueller v. Wells*, 185 Wn.2d 1, 367 P.3d 580 (2016)  
 . . . . . 11, 12, 15, 16, 26, 28, 31, 39, 41

*Pfaff v. State Farm Mut. Auto. Ins. Co.*, 103 Wn. App. 829, 14 P.3d 837 (2000) ..... 20

*Prentice Packing & Storage Co. v. United Pac. Ins. Co.*, 5 Wn.2d 144, 106 P.2d 314 (1940) ..... 21

*Shulkin v. Zappone*, 63 Wn.2d 201, 386 P.2d 133 (1963) ..... 13

*Todd v. Superior Court, King Cty., Juvenile Court*, 68 Wn.2d 587, 414 P.2d 605 (1966) ..... 13

**Statutes**

RCW 11.96A.150 ..... 44

**Rules**

RAP 18.1 ..... 44

## **I. INTRODUCTION**

This appeal follows a successful will contest in Spokane County Superior Court. Dennis Ottmar signed a will while in the Intensive Care Unit of the hospital while suffering from septic shock, kidney failure, and aggressive cancer. The will completely disinherited his only son and named Elizabeth Ottmar, Dennis' second wife, as the sole beneficiary. Dennis Ottmar never spoke with an attorney about preparing the will and never met with an attorney alone regarding the will. After a full trial the Superior Court found that there was clear, cogent and convincing evidence that Dennis Ottmar lacked testamentary capacity and that the will was the result of undue influence. The trial court should be affirmed.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court, as the trier of fact, did not fail to make sufficient findings and did provide a factual basis for its decision which should be affirmed.
2. The trial court did not improperly shift the burden onto Elizabeth Ottmar.
3. There is substantial evidence in the record to support and show by clear, cogent and convincing evidence, that Dennis Ottmar lacked

testamentary capacity and the trial court's decision should be affirmed.

4. There is substantial evidence in the record to support and show by clear, cogent and convincing evidence, that Dennis Ottmar's February 9, 2015 will was the product of undue influence and the trial court's decision should be affirmed.

### **III. STATEMENT OF THE CASE**

Dennis Ottmar ("Dennis") was married to Elizabeth Ottmar ("Elizabeth<sup>1</sup>") in July 1987 with each having one child prior to their marriage. VRP 575, 586. They did not have any additional children between them after they were married. VRP 586. Tom Ottmar ("Tom") is Dennis' only child, and is married with children of his own. VRP 587. Dennis owned a barber shop on the corner of Monroe and 15<sup>th</sup> and cut hair for his career. VRP 529. During Dennis' marriage to Elizabeth, each of them maintained separate bank accounts, with their own earnings being deposited into accounts managed and controlled by each other individually. VRP 756. They shared or split household expenses equally between them. VRP 759. A few weeks prior to marriage Dennis purchased a home from his cousin. VRP 756. Elizabeth and

---

<sup>1</sup>This case relies upon testimony of individuals with the same last name and the members of the Ottmar family will each be referred to by their first names to avoid any confusion. No disrespect is intended.

Dennis have lived in the home since they were married. Id. Only Dennis' name is on the deed. Id.

In 2007, Dennis was diagnosed with Chronic Inflammatory Demyelinating Polyneuropathy (CIDP). VRP 700-701. Elizabeth, who is a registered nurse, tended to Dennis' care and recovery. Id. During this illness, Dennis lost half of his body weight and had difficulty walking or standing and traveled in a wheelchair. VRP 700. This illness was serious and resulted in Dennis' early retirement. VRP 700-704. Dennis sold his barbershop following the diagnosis and treatment of his CIDP condition. VRP 704. Once Dennis recovered he began offering haircuts again, but from his home. VRP 65.

Dennis was a lifelong collector of firearms, machinery for working on guns, and all types of reloading machinery. VRP 97. Dennis was concerned about Initiative 594 and sent emails to friends and family to fight the initiative. VRP 97-98. Eventually, the Initiative passed and became law in November 2014. Dennis was concerned with his ability to transfer firearms to others as well as family members. Id. Dennis contacted a gun auction company and was considering selling his collection. VRP 466, 677. No contracts were ever signed and no sale occurred. VRP 752.

Byron Powell was a lifelong friend to Dennis. VRP 59-60. It was at the barbershop where Dennis first met Mr. Powell when he came in for a haircut. Id. Mr. Powell was a licensed attorney and developed an attorney-client relationship with Dennis beginning in the late seventies that continued uninterrupted until Mr. Powell's retirement in 2010. VRP 60. Mr. Powell handled all of Mr. Ottmar's legal matters, both business and personal. Id. Over the course of their relationship Mr. Powell prepared several Last Will and Testaments for Dennis Ottmar, with the last Will being prepared in 2005. VRP 60-61, 72, 75.

Mr. Powell considered Dennis Ottmar one of his closest friends. VRP 59-60. They communicated regularly even after Mr. Powell's retirement. VRP 68. Mr. Powell still received haircuts from Dennis even after Dennis retired, but only after Dennis recovered from his CIDP condition. VRP 64-65. The haircuts would occur at Dennis' home and afterward they sometimes would share lunch that was prepared by Dennis or go out to eat. VRP 65, 69. The last haircut Mr. Powell received from Dennis, was in November 2014. VRP 65.

On December 24, 2014, Dennis and Elizabeth were planning to attend a holiday dinner at his son Tom's home, but cancelled because Dennis was

not feeling well. VRP 711. Instead Dennis went to the hospital and learned he had an enlarged prostate. VRP 710-711. Dennis was sent home while they waited for test results. VRP 711. On January 29, 2015 Dennis was readmitted to the hospital one last time. VRP 716. The doctors discovered Dennis was suffering from aggressive cancer in his abdomen. VRP 717. Initially, Dennis elected to fight the cancer. VRP 716-718, 720.

Byron Powell called and spoke with Dennis on January 29th, which would be the last time Mr. Powell and Dennis would have a conversation. VRP 70. During the phone call Dennis never asked Mr. Powell about seeing a copy of his Will nor was there any discussion regarding prior estate planning he had performed for Dennis. VRP 70-71.

On February 6, 2015 Mr. Powell called Dennis' cell phone hoping to speak with Dennis, but no one answered. VRP 82. Mr. Powell left a message asking Dennis to return his call. VRP 82-83. Elizabeth had possession of Dennis' cell phone and would bring it with her to the hospital for Dennis. VRP 717-718. Later that same day Elizabeth Ottmar called Mr. Powell and Mr. Powell asked how Dennis was doing. VRP 83. Dennis was not doing very well and could not talk on the phone. VRP 768. Mr. Powell asked to come see Dennis at the hospital, but was told that Dennis did not want any

visitors. VRP 84. They had a brief conversation about Elizabeth looking for a new attorney and Mr. Powell named Mr. Grangroth, an attorney who was a former office partner of Mr. Powell's. VRP 112. Mr. Powell's purpose for calling was to come see Dennis, but was told that he could not visit. VRP 83, 106-107, 111. After the phone call Elizabeth told Dennis that Mr. Powell did not have a copy of his prior will and that she could not find the original will. VRP 765-766, 768. Elizabeth knew the 2005 will was located in the gun safe at home. VRP 766-768. Elizabeth knew, "no bones there was a will." VRP 766.

Mr. Powell denied that Elizabeth asked if he had a copy of Dennis' 2005 will. VRP 85. When Mr. Powell retired, he arranged storage of all his former wills. VRP 57. When asked, Mr. Powell delivered a copy of the 2005 will, which was obtained from storage, to Tom Ottmar a few weeks after his father's death. VRP 75, 78, 86-87.

On February 7, 2015, the day after Mr. Powell and Elizabeth's phone conversation, Elizabeth approached her neighbor William Etter Sr., knowing he was an attorney, to ask him if he knew someone that could help Dennis with some urgent estate planning needs. VRP 518-520. Elizabeth told Mr. Etter Sr., that she could not find Dennis' will and that his prior attorney did

not have a copy. Id. Mr. Etter Sr., recommended his son William Etter, Jr., to assist with their estate planning needs and that he would have Mr. Etter, Jr., give her a call. VRP 520-521.

Mr. Etter, Jr., called Elizabeth on February 8, 2016 to discuss preparing a new will for Dennis. VRP 168. Mr. Etter, Jr., was unable to talk on the phone with Dennis, despite his understanding that Elizabeth was sitting next to Dennis and it was Elizabeth who provided the instructions on how to draft Dennis' new will. VRP 171, 182. Elizabeth told Mr. Etter, Jr., that she could not find the original will and that the old attorney did not have a copy of his prior will. VRP 168-171, 183. Mr. Etter, Jr., understood there was urgency to prepare a new will and agreed to have it ready the following day, February 9th. VRP 168, 172-173. Mr. Etter Jr., was surprised to see a copy of Dennis' 2005 will when it was produced. VRP 183-184.

The evening of February 8th and early morning of the 9th Dennis' blood pressure began dropping causing hypotension. VRP 296, 298, 305-306. The medical staff gave Dennis multiple IV fluid bolus' to counteract his falling pressure, the IV therapy was not effective. VRP 304-305. When the pressure would not stabilize Dr. Swiggum came to examine Dennis. VRP 288-290. Dr. Swiggum noted increased potassium, increased creatinine,

falling blood pressure, and a pH of 7.26, noting that the metabolic process was consistent with Dennis' known acute kidney injury. VRP 296, 298-299, 303-304. Dr. Swiggum ordered a culture looking for the source of possible sepsis. VRP 302-303, 309. Dr. Swiggum participated in transferring Dennis from the 11th floor to the Intensive Care Unit ("ICU"), so that Dennis could receive a higher level of care. VRP 300. Dr. Swiggum arranged for a renal consultation by Dr. Musa and ordered an ultrasound of his abdomen. VRP 299, 301-302, 311-312.

Dr. Musa arrived later to examine Dennis and noted that the lactic acid level was at 4.8 and had concerns his condition was involving a sepsis syndrome, meaning the cells are not able to utilize oxygen with higher lactic acid levels, which means less transfer of oxygen to the vital organs. VRP 313-315. Dr. Musa noted that Dennis was somnolent and unable to coherently have a conversation on an ongoing basis. VRP 316. There was a lengthy discussion with the patient and his wife. VRP 316-317. Dr. Musa was not clear of Dennis' current ability to participate in the conversation. Ex. 1 pg. 24. Dr. Musa suspected acute tubular necrosis process related to hypotension and not a mechanical issue or blockage. VRP 318-320.

On Monday February 9, 2016 Mr. Etter, Jr., woke up very ill and was

unable to attend the Will signing scheduled for later that day. VRP 172. Mr. Etter, Jr., asked his father Mr. Etter, Sr., to assist as a witness in his place. VRP 174-175. Mr. Etter, Jr., never spoke with Dennis about the contents of the Will. VRP 173.

Mr. Etter, Sr., along with a notary from Mr. Etter, Jr.'s, office went to the hospital ICU early mid-afternoon on February 9th. VRP 522. Mr. Etter, Sr., does not practice estate planning and was not acting as Dennis' attorney during this visit. VRP 534. When Mr. Etter, Sr., arrived he asked the ICU nurse, Laura Denier, if she would be willing to assist as a witness when Dennis signed his will, she agreed. VRP 523. Mr. Etter, Sr., then entered Dennis' hospital room and was greeted by Dennis and Elizabeth. VRP 524. After some brief conversation, Mr. Etter, Sr., asked Elizabeth to read the entire Will to Dennis. VRP 531. After Elizabeth finished reading the Will Mr. Etter, Sr., asked if Dennis wanted to sign the document and Dennis said yes. Id. Laura Denier was then invited into the room to witness Dennis sign his Will. VRP 210-211, 538. The Will was signed in front of Mr. Etter, Sr., acting as a witness, Laura Denier, acting as a witness, and a paralegal from Mr. Etter, Jr.'s office, acting as a notary. VRP 211, 522. After the Will was signed Mr. Etter and the paralegal left the hospital. VRP 531-532. Dennis

Ottmar was immediately given sleeping medication following the will signing. VRP 735. Sometime the same day Elizabeth had Dennis sign a beneficiary designation form naming her as the sole beneficiary on a financial account with DA Davidson, that was listed to be given to Tom pursuant to the 2005 will. VRP 758.

About 4 p.m. on the 9th, Nurse Denier noted, Dennis was exhibiting confusion, disorientation, impulsivity, and a medication called Levophed was prescribed to help stabilize Dennis' low blood pressure that had persisted all day. VRP 213, 215, 217-219, 294. Levophed is a powerful medication used to stabilize a patient's falling blood pressure. VRP 322-323, 325.

The following day, February 10th, Dr. Swiggum examined Dennis and noted that he was delirious, with changes in his mental status throughout the night and early morning and confirmed Dennis was in fact suffering from septic shock on the 9th. VRP 320-322.

On February 11th, Dennis called his son Tom to speak with him. VRP 740. Tom could not understand what his father was saying. VRP 741. Elizabeth texted Tom to tell him that Dennis wanted to say goodbye. Id. Tom went to the hospital to see his father. Id. Elizabeth met him and told him that he could not see his father. VRP 743. That same day palliative care is elected

by Dennis and Elizabeth and on February 14th Dennis passed away. VRP 740, 745.

#### **IV. ARGUMENT**

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

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. *Mueller v. Wells*, 185 Wn.2d 1, 10, 367 P.3d 580, 584 (2016). Substantial evidence is that quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. *In re Estate of Haviland*, 162 Wn. App. 548, 561, 255 P.3d 854, 861–62 (2011). Where there is conflicting evidence, the court needs only to determine whether the evidence viewed most favorable to respondent supports the challenged finding. *Id.*

In determining whether the evidence meets the ‘clear, cogent, and convincing’ standard of persuasion, the trial court makes credibility determinations and weighs and evaluates the evidence. *Id.* at 558. The evidence and all reasonable inferences are viewed in the light most favorable to the prevailing party and defer to the trier of fact on issues of credibility. *In re Melter*, 167 Wn. App. 285, 301, 273 P.3d 991, 1000 (2012). Appellate

courts do not review the trial court's credibility determinations. *In re Estate of Haviland*, 162 Wn. App. 548, 558, 255 P.3d 854, 860 (2011).

Appellate courts review any finding of fact that are challenged applying the clear, cogent, and convincing standard of proof and review de novo whether the supported and uncontested findings amount to undue influence. *In re Melter*, 167 Wn. App. 285, 301, 273 P.3d 991, 1000 (2012). However, unchallenged findings are verities on appeal. *Mueller v. Wells*, 185 Wn.2d 1, 9, 367 P.3d 580, 583 (2016).

In this case the trial court found that Plaintiff Tom Ottmar provided “overwhelmingly clear, cogent, and convincing evidence” that the 2015 will signed in the ICU was signed under the weight of undue influence and that Dennis Ottmar “clearly lacked testamentary capacity to sign it.” CP 669. The evidence and all reasonable inferences on appeal are therefore viewed in the light most favorable to Plaintiff Tom Ottmar.

**B. The Trial Court Made Necessary Findings in its Memorandum Opinion.**

The purpose of findings is to enable this court to review the questions upon appeal, and when it clearly appears what questions were decided by the trial court, and the manner in which they were decided, we think that the requirements have been fully met. *Kinnear v. Graham*, 133 Wash. 132, 133,

233 P. 304, 305 (1925). Formal findings, although preferable, are not the sole method of obtaining the knowledge of the factual foundation for the trial court's decision. *Dickson v. U.S. Fid. & Guar. Co.*, 77 Wn.2d 785, 791, 466 P.2d 515, 519 (1970). Appellate courts have referred to written memorandum decisions or stenographic transcriptions of oral decisions in order to determine the factual basis for trial court decisions. *Todd v. Superior Court, King Cty., Juvenile Court*, 68 Wn.2d 587, 592, 414 P.2d 605, 608 (1966). A trial court is not required to make findings in regard to every item of evidence introduced in a case. *Bowman v. Webster*, 42 Wn.2d 129, 134, 253 P.2d 934, 937 (1953).

The trial court's assessment of the evidence may be conveyed into the record by way of its memorandum opinion, and findings of fact and conclusions of law in such circumstances would be considered superfluous. *Shulkin v. Zappone*, 63 Wn.2d 201, 206, 386 P.2d 133, 136 (1963). If the trial court, after considering and weighing the whole evidence makes clear its views of the facts by way of a detailed and comprehensive memorandum opinion appellate courts on review will accept the memorandum opinion in lieu of formal findings and conclusions. *Shulkin v. Zappone*, 63 Wn.2d 201, 206-07, 386 P.2d 133, 136 (1963). Appellate courts review the evidence and

all reasonable inferences in the light most favorable to the prevailing party and defer to the trier of fact on issues of credibility. *In re Melter*, 167 Wn. App. 285, 301, 273 P.3d 991, 1000 (2012).

It is clear from the court's opinion that the trial court weighed the evidence, assessed both parties evidence under the clear, cogent and convincing standard and concluded that a new will was signed under the weight of undue influence and that Dennis lacked testamentary capacity to sign the will. CP 650-669. The trial court's analysis section clearly shows the factual foundation of the trial court's decision. CP 661-669. It also shows how the trial court assessed the evidence and the weight it gave to each parties' evidence. *Id.* The appellate court also has the benefit of the Order Revoking Letters Testamentary where the trial court makes the explicit findings that Dennis Ottmar lacked the capacity to sign, and that Ms. Ottmar procured Dennis' signature by undue influence. CP 700-702. The trial court's opinion is sufficient to enable this Court to intelligently review relevant questions upon appeal, to know what questions were decided by the trial court, and to know the manner in which they were decided. It is also sufficient to show Plaintiff presented substantial evidence of undue influence and lack of capacity to meet its clear, cogent and convincing burden.

### **C. The Trial Court Did Not Improperly Shift the Burden of Proof**

Defendant focuses on a single sentence of the trial court's opinion to argue that the court shifted the burden of proof with regard to testamentary capacity. An examination of that sentence shows that the court is referencing the burden shift that occurs with respect to the Plaintiff establishing prima facie evidence supporting undue influence. CP 663. When there is a claim of undue influence the combination of facts shown by the evidence can be sufficient to create "a presumption . . . of such strength as to impose upon the proponent the duty to come forward with evidence sufficient at least to balance the scales and restore the equilibrium of evidence touching the validity of the will." *In re Melter*, 167 Wn. App. 285, 299, 273 P.3d 991, 999 (2012) quoting *Dean v. Jordan*, 194 Wash. 661, 672, 79 P.2d 331. If the facts raise a presumption of undue influence, the burden of production shifts to the will proponent, who must then rebut the presumption, however, the will contestant retains the ultimate burden of proving undue influence. *Mueller v. Wells*, 185 Wn.2d 1, 15, 367 P.3d 580, 586 (2016).

Plaintiff met the burden in his case in chief which raised a presumption of undue influence. Proof that Plaintiff had met his initial burden is confirmed by the trial court's denial of Defendant's motion to

dismiss Plaintiff's claims at the close of Plaintiff's evidence.<sup>2</sup> VRP 557-573. Even if the court had inappropriately shifted the burden of proof with respect to *testamentary capacity*, which Plaintiff denies occurred, the overwhelming evidence of *undue influence* in this case is still sufficient to invalidate the will because a will executed by a person with testamentary capacity may be invalidated if undue influence existed at the time of the testamentary act. *Mueller v. Wells*, 185 Wn.2d 1, 9, 367 P.3d 580, 583 (2016) citing *In re Estate of Lint*, 135 Wash.2d 518, 535, 957 P.2d 755 (1998) (it was not necessary to reach a conclusion regarding testamentary capacity because the will was null and void as the product of fraudulent misrepresentation and undue influence).

Additionally, when the burden does shift as a result of a presumption, the case law is clear that the will contestant retains the ultimate burden. *Mueller v. Wells*, 185 Wn.2d 1, 15, 367 P.3d 580, 586 (2016). There can be no error then when the burden is retained by the contestant which is what occurred in this case. The court's analysis and conclusions show that with regard to capacity specifically Dennis "did not have sufficient mind and memory to understand the transaction in which he was engaged, nor could he

---

<sup>2</sup>The Defendant does not appeal the trial court's denial of her motion as an error.

comprehend generally the nature and extent of the property which constitutes his estate and could not make a decision on its disposition under these circumstances presented". CP 669.

The trial court did not commit error and did not impose a burden of disproof on Defendant as that burden always remained with Plaintiff. Defendant's appeal should be denied and the trial court's decision should be upheld.

**D. Dennis Ottmar Did Not Possess Testamentary Capacity When He Executed His Last Will and Testament.**

The right to dispose of one's property by will is not only a valuable right but is one assured by law, but to exercise that right one must possess testamentary capacity. *Dean v. Jordan*, 194 Wash. 661, 668, 79 P.2d 331, 334 (1938). The possession of testamentary capacity involves an understanding by the testator of the transaction in which he is engaged, a comprehension of the nature and extent of the property which is comprised in his estate, and a recollection of the natural objects of his bounty. *Dean v. Jordan*, 194 Wash. 661, 668, 79 P.2d 331, 334 (1938). 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, 522 (1942) (emphasis added). This is the standard by which courts must measure the facts of each case to determine whether the testator lacked capacity to make a valid testamentary disposition of his property. *Id.*

It is not clear whether Dennis understood what he was doing when he executed his February 9, 2015 will. Defendant's claim that the 2015 will is consistent with Dennis' unsolidified desire to auction off his firearms, but looking at the will itself there is no mention whatsoever of Dennis' extensive firearms collection or how the new will alleviates the restrictions imposed by Initiative 594. Ex. 6. While there is evidence that Dennis had concerns about Washington's gun laws there is no evidence of testamentary intent to do anything about it. The only evidence in the record is that Dennis was looking into the possibility of selling his collection *before* his death because of his emotional reaction to Initiative 594 passing. He never signed any paperwork, he never made any agreements and nothing official was done regarding his firearms. There is no evidence from the will itself, or the testimony at trial that Dennis took steps to protect his wife with regard to the firearms he

owned and the will does nothing to alleviate the perceived burden on Elizabeth.

While Dennis did communicate with some individuals during his hospitalization, he did not communicate with anyone regarding the nature and extent of his property and how he wanted it distributed. Elizabeth was the only person telling others that the will could not be found and that Dennis wanted a new will. VRP 168-171, 182-183, 520, 537-538, 768. He did not discuss his desires with an attorney or prompt an attorney to prepare a new will. It is also evident that Dennis did not seek advice from an attorney regarding Washington's new gun laws. Dennis did not make any specific provision with regard to his firearms or Washington's new gun laws in his final will. See Ex. 6. The fact that he did not do these things is evidence of his lack of capacity to understand the transaction.

Additional evidence of lack of capacity is supported by the fact that Dennis' will disinherited his only son Tom. This is direct evidence of the fact that Dennis lost sight of the objects of his bounty. Numerous witnesses testified, and the trial court found, that there was no evidence presented that Dennis and Tom had any falling out. CP 668. Witnesses also testified that Dennis would want Tom to have many of his guns. CP 666. There is no

evidence or explanation, other than lack of capacity and undue influence, for Dennis to disinherit his only son.

One primary problem for Defendant is that the trial court was not provided with witness testimony evidence that explained if Dennis understood how to formulate a plan. Dennis was not advised by an attorney and it was Elizabeth who was the only person talking with the attorney drafting the will. We have no evidence if Dennis understood what his options were, or the consequences of a particular plan over another. Finally, Dennis was operating, at best, with the mistaken belief that his original will was missing and his prior attorney did not have a copy.

**E. Appellant's Expert Could Not Articulate His Opinion On Dennis' Capacity Under the Applicable Legal Standard.**

The purpose of court trials is to ascertain the truth and rightness of the matters in issue, and the purpose of expert opinion testimony is to instruct and aid the fact finder in ascertaining that truth, whether it be the ultimate fact or some minor evidential fact. *Gerberg v. Crosby*, 52 Wn.2d 792, 799, 329 P.2d 184, 188 (1958). When the trial court sits as trier of fact it has discretion to find what evidence preponderated. *Pfaff v. State Farm Mut. Auto. Ins. Co.*, 103 Wn. App. 829, 834, 14 P.3d 837, 840 (2000).

Expert testimony is to be considered and weighed by the same tests

as other testimony. *In re Hastings' Estate*, 4 Wn. App. 649, 651, 484 P.2d 442, 444 (1971). Opinion evidence is not generally conclusive, but is accorded such weight as reasonably attaches to it; with contrary opinions being weighted by the trier of fact. *Id.* As a general rule, opinion evidence is not binding on the trier of fact. *Id.* Opinions of expert witnesses are of no weight unless founded upon facts in the case. *Prentice Packing & Storage Co. v. United Pac. Ins. Co.*, 5 Wn.2d 144, 164, 106 P.2d 314, 323 (1940).

When a case is tried to the court sitting without a jury, the findings of fact made by the trial court cannot be disturbed by the appellate court, if there is substantial evidence to support such findings, even though as a trier of fact the appellate court might have made different findings. *Lamm v. McTighe*, 72 Wn.2d 587, 589, 434 P.2d 565, 567 (1967), see also *Hoglund v. Morgan*, 60 Wn.2d 770, 773, 375 P.2d 506, 508 (1962). The fact that the evidence may be subject to differing connotations does not authorize a reviewing court to re-evaluate the evidence or substitute its own factual interpretation for that of the trial court. *Lamm v. McTighe*, 72 Wn.2d 587, 591, 434 P.2d 565, 568 (1967).

The trial court found Nurse Susan Colliflower's testimony and opinion to be of greater weight and importance than the opinion of Dr. Green.

CP 663. Nurse Colliflower was able to describe in detail Dennis' medical condition on the evening before and the day he signed his will. CP 663. Her testimony was based on an evaluation of Dennis' uncontested medical records. CP 280-281. Her review of the medical symptoms and medical records lead the court to conclude that Dennis' medical condition at the time he signed the new will impacted his ability and mental state sufficiently that he lacked mental capacity to make any estate planning decisions. CP 663.

This conclusion is supported in the record by evidence that Dennis was combating low blood pressure with very high lactic acid build up that resulted in lower amounts of oxygen being transferred to his organs. VRP 288, 305. This would not allow his organs to function properly. *Id.* Dennis' blood pressure was very low, went up briefly, but fell again on the day he signed the will. VRP 327-328. The medical records also show that Dennis was not able to track a conversation, suffered delirium, was confused and forgot he was in the hospital, why he was in the hospital, and had a change in his mental status. VRP 316-317, 321-323, 331-333. This evidence is substantial and forms a sufficient basis for the Court to conclude Dennis' mental state was impaired at the time the will was executed.

Dr. Green's testimony was insufficient to convey a contrary position

because he could not establish through cogent testimony a persuasive basis for his opinion. CP 663. Dr. Green agreed that Dennis was at times confused and had a tendency to not be able to stay on track, and at times there was a diminishment in cognitive functioning. VRP 632, 637. There are also notes where the doctor was “not entirely clear of [Dennis’] ability to participate in a conversation.” VRP 638. Dr. Green also agreed that looking at the records there were times when capability would wax, wane and fluctuate. VRP 647, 662-664.

Appellant’s expert could not provide an opinion that was beneficial to the court in determining whether Dennis had testamentary capacity. The trial court specifically found “Dr. Green could not establish through testimony a persuasive basis for his opinion as to how Dennis could have had sufficient mind and memory to understand the transaction, to comprehend the nature and extent of the property which constitutes his estate and of which he was contemplating disposition or even remember the objects of his bounty.” CP 663. The court determined Dr. Green’s testimony was not useful to answer the legal question of testamentary capacity. Id. Moreover, Dr. Green could not provide a different perspective of the medical record or address the biological processes occurring at the time the will was signed. VRP 662.

No other witnesses could provide independent factual evidence of Dennis' testamentary capacity at the time he signed the will applying the applicable legal standard. Dennis was never alone with someone for the purpose of evaluating his capacity. Dennis was never alone with his attorney to determine he had testamentary capacity. No attorney was able to determine whether Dennis had an understanding of the transaction he was engaged in, whether he comprehended the nature and extent of his property, or whether he had a recollection of the natural objects of his bounty.

Mr. Etter, Sr. assumed that if Dennis did not understand what he was doing or what the will was doing, he would have asked some questions or objected. VRP 542. This is not what Washington requires to support testamentary capacity. It is the responsibility of the attorney who drafted the will to ensure the client has capacity to enter the transaction. Mr. Etter, Sr. did not ask Dennis questions to determine if Dennis had sufficient mind and memory to understand the transaction, to comprehend the nature and extent of the property which constitutes his estate and the objects of his bounty. Mr. Etter, Jr., the drafter of the will, also did not ask such questions of Dennis because he never spoke with Dennis directly regarding the will and only communicated with Elizabeth.

Nurse Dinier was with Dennis on February 9th from the time he entered the ICU until 7:30 p.m.. VRP 221-222. She testified that Dennis was intermittently confused and disoriented. VRP 217. She also documented that on February 9th his neurological function was not within normal limits. VRP 215. She could not testify as to whether Dennis understood the will or if he knew that he was giving his estate to his wife as his sole beneficiary. CP 664.

Without a contemporaneous independent evaluation of testamentary capacity, the trial court relied upon the uncontested medical record and explanatory testimony that concluded Dennis' physical ability necessary to formulate mind and memory was lacking and he therefore lacked testamentary capacity.

The trial record does not contain evidence or testimony that shows Dennis had testamentary capacity. The record shows that Dennis was in a weakened state both physically and mentally and that his new will does not recognize the objects of his bounty or an understanding of the transaction he was entering into. Because Dennis was never alone with an attorney to discuss his will or to question Dennis to ensure he had capacity, the trial court properly looked at all of the evidence in the record and determined that

Dennis lacked capacity. The trial court's decision is supported by substantial evidence in the record and its decision should be affirmed.

**F. Plaintiff Established Prima Facie Evidence of Undue Influence.**

When reviewing a will contest, the appellate court's function is to determine whether the trial court's findings are supported by substantial evidence. *Mueller v. Wells*, 185 Wn.2d 1, 9, 367 P.3d 580, 583 (2016). The appellate court also defers to the trial court's determinations of the weight and credibility of the evidence. *Mueller v. Wells*, 185 Wn.2d 1, 9, 367 P.3d 580, 583 (2016). Appellate courts do not review the trial court's credibility determinations. *In re Estate of Haviland*, 162 Wn. App. 548, 558, 255 P.3d 854, 860 (2011).

An appellate court's role is to review findings supporting the conclusions the trial court *did* reach, not to look for evidence supporting an alternate conclusion the court *could have* reached. *Mueller v. Wells*, 185 Wn.2d 1, 15–16, 367 P.3d 580, 586 (2016) (emphasis in original).

From the very nature of things, undue influence can rarely be proved by direct evidence and the relations of the parties, surrounding circumstances, the habits and inclinations of the testator, his purposes and wishes, expressed at times when his words were clothed with likelihood or truth, all furnish

competent sources for the guidance of the court. *In re Tresidder's Estate*, 70 Wash. 15, 19, 125 P. 1034, 1036 (1912).

Courts look at a number of factors when considering undue influence. The most important factors are: (1) that the beneficiary occupied a fiduciary or confidential relation to the testator; (2) that the beneficiary actively participated in the preparation or procurement of the will; and (3) that the beneficiary received an unusually or unnaturally large part of the estate. *Dean v. Jordan*, 194 Wash. 661, 672, 79 P.2d 331, 336 (1938). Other considerations include the age or condition of health and mental vigor of the testator, the nature or degree of relationship between the testator and the beneficiary, the opportunity for exerting an undue influence, and the naturalness or unnaturalness of the will. *Dean v. Jordan*, 194 Wash. 661, 672, 79 P.2d 331, 336 (1938). The weight of any of such facts will vary according to the circumstances of the particular case and any one of them may, and variously should, appeal to the vigilance of the court and cause it to proceed with caution and carefully to scrutinize the evidence offered to establish the will. *Dean v. Jordan*, 194 Wash. 661, 672, 79 P.2d 331, 336 (1938). A will executed by a person with testamentary capacity may be

invalidated if “undue influence” existed at the time of the testamentary act. *Mueller v. Wells*, 185 Wn.2d 1, 9–10, 367 P.3d 580, 583 (2016).

In this case, the trial court considered the numerous factors that support undue influence and came to the correct conclusion that the will was signed under the weight of undue influence. Once prima facie evidence establishes undue influence, the Defendant has the opportunity to rebut the established presumption. The direct evidence that was presented to the court was more than enough to support the presumption of undue influence and the totality of the evidence proved by a clear, cogent and convincing standard lead the court to properly conclude there was undue influence and invalidate the will.

**1. The sole beneficiary Elizabeth Ottmar occupied a fiduciary or confidential relation to the testator.**

There is no question, and Defendant does not dispute, that Elizabeth Ottmar occupied a fiduciary or confidential relation to Dennis. *Appellate’s Opening Brief*, p. 35. Defendant would like to focus on the nature or degree of relationship but that is just another consideration for the court to consider and is not as important as whether the beneficiary occupied a fiduciary or confidential relation to the testator. See *Dean v. Jordan*, 194 Wash. at 672.

There is no dispute that Dennis and Elizabeth built a life together, however, her fiduciary and confidential relationship with Dennis gave her the opportunity to exert undue influence over Dennis in his weakened state. Elizabeth was the person telling others, including Dennis, that the will could not be found. VRP 168-171, 182-183, 520, 537-538, 768. She later admitted that the will was in their safe. VRP 765-767, 768. She claimed she was unable to open the gun safe because her hands were shaking too much. VRP 721. Her fiduciary and confidential relationship made her the only other person who had access to that safe.

Through her fiduciary and confidential relationship she knew that Dennis' will was in the safe, and she used that knowledge and the fact no one else would have access to the safe to go about telling others that she could not find the will and that a new one needed to be drafted. She then used her fiduciary and confidential relation to procure the new will.

**2. The sole beneficiary Elizabeth Ottmar actively participated in the preparation or procurement of the will.**

There is no dispute and the record is full of clear, cogent and convincing evidence that Elizabeth was the only person who participated in the preparation and procurement of the new will. The fact that a beneficiary actively participated in the preparation or procurement of the will is

undoubtedly a suspicious fact. *In re Estate of Haviland*, 162 Wn. App. 548, 560, 255 P.3d 854, 861 (2011). The relevant inquiry is not whether Elizabeth involved herself to the same degree as any other spouse, but whether her participation in the preparation and execution of the will, in connection with other facts and circumstances, supports a presumption of undue influence. *In re Estate of Haviland*, 162 Wn. App. 548, 568, 255 P.3d 854, 865 (2011).

At no time did an attorney discuss the contents of the will with Dennis to make sure it was his wishes and not Elizabeth's. CP 667, VRP 171, 173-174, 178, 187, 539. Elizabeth admitted that the attorney who drafted the will never spoke with Dennis. VRP 770. The court found "the attorney who prepared the will and its contents did so at Elizabeth's direction and command". CP 666. "That attorney never spoke to Dennis or confirmed what was relayed to him through Elizabeth." *Id.* The court also found that the attorney who drafted the will "could not verify that the document he prepared was Dennis' intent". *Id.* The trial court also had great concern "that the only beneficiary of the will was the one sitting over his hospital bed and reading each page to him" and that Elizabeth remained in the room the entire time for the signing of the new will. CP 667. Since Dennis was under the belief from Elizabeth that his 2005 will was lost this raised sufficient doubt

as to whether the will was Dennis' intent or Elizabeth's. CP 667.

Dennis Ottmar was never alone with his attorney or his will, and he did not emphatically express his desire regarding how he wanted the property to be distributed. The only evidence presented to the Court, which no one denies, is that Elizabeth was the individual to contact the attorney, the only individual who told the attorney what to put into the will, and the person who stood over Dennis and read him the will. There was no time before or after the will's execution where Dennis had the opportunity to review the will on his own or to discuss the will privately with his attorney.

Defendant's arguments focus on whether it was Dennis that decided not to allow visitors in an attempt to disregard Elizabeth's role in preparation and procurement of the will. *Appellant's Opening Brief*, 36-39. They err in doing so because the purpose of this appeal is to review findings supporting the conclusions the trial court *did* reach, not to look for evidence supporting an alternate conclusion the court *could have* reached. *Mueller v. Wells*, 185 Wn.2d 1, 15–16, 367 P.3d 580, 586 (2016) (emphasis in original). The trial court was well aware of the evidence presented regarding the decision to not allow visitors. It is clear from the court's opinions that Elizabeth would not let Tom see his father. CP 665. This finding is also supported by a reference

to the admitted exhibit R-114; CP 665.

Defendant's focus is also misplaced because it does not matter who was keeping visitors from Dennis since the important factor is whether Elizabeth, as the sole beneficiary, actively participated in the preparation or procurement of the will. Whether it was Dennis' decision or Elizabeth's, she used the denial of visitors to exert influence and procure a new will.

It is clear from the evidence, and the trial court agreed, that Dennis was in a position to be persuaded and influenced by Elizabeth. CP 665, 668. Elizabeth's participation was constant and affected every act of the preparation and procurement of the will. She controlled all the information that came to Dennis in ICU and the information that allegedly came from Dennis to other parties. All information regarding Dennis' wishes were not stated directly by Dennis and were only ever stated by Elizabeth as to what *she said* Dennis allegedly said. By her position she controlled the flow and access of information to such a degree that she influenced all interactions with Dennis. This position also allowed her to receive an unnaturally large part of the estate when compared to Dennis' 2005 will.

**3. Elizabeth Ottmar received an unusually or unnaturally large part of the estate.**

Whether a will is natural or unnatural is a question to be determined in each case as warranted by the facts. *In re Miller's Estate*, 10 Wn.2d 258, 267, 116 P.2d 526, 531 (1941). A will is unnatural when it is contrary to what the testator, from his known views, feelings, and intentions would have been expected to make. *In re Estate of Haviland*, 162 Wn. App. 548, 566, 255 P.3d 854, 864–65 (2011). When courts have found that a will was not unnatural the testator was clear about how they wanted the estate distributed and had clearly articulated the reasons for wanting to disinherit someone. *In re Melter*, 167 Wn. App. 285, 310, 273 P.3d 991, 1004 (2012). It is proper to consider the previously expressed wish of the alleged testator and 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 Wash. 33, 38, 63 P.2d 438, 440 (1936).

Dennis and Elizabeth were married on July 15, 1987. VRP 583-584. They were married for more than 17 years when Dennis executed a will on May 24, 2005. Plaintiff's Exhibit 7 (Ex. 7). In his 2005 will, Dennis gave part of his estate to Elizabeth and part of his estate to his son. Ex. 7. This

was a natural gift that provided for his wife of 17 years and his only son, both objects of his bounty. The 2005 will is the type of bequest that would be expected of a person with a second wife and one son from a prior marriage. Furthermore, Dennis and Elizabeth had both met with Mr. Powell to prepare wills. VRP 766.

The 2015 will is unnatural in that it removed a beneficiary that was closely related to the testator by ties of blood. The trial court found that giving everything to Elizabeth and nothing to Tom “certainly qualifies as an unusual amount considering there was no testimony that Dennis had any issues with his son, other than Dennis’ wish that he could spend more time with Tom.” CP 668. There was no evidence presented that Dennis and Tom had any falling out. *Id.* Their relationship was such that Dennis had planned on visiting Tom and his family on Christmas Eve as he had traditionally. CP 711. Dennis’ friends testified they believed Dennis and Tom got along well and shared a strong love of guns. CP 668. Witnesses presented no explanation why Dennis would disinherit Tom.

It is unchallenged that Elizabeth was the only person to talk with the attorney drafting the will and directing what the will should contain. The result of that will was unnatural in that the changes to the estate resulted in

Elizabeth receiving all of her husband's estate and none of his estate would go to his only child. There is no guarantee that under the new will, Elizabeth would ever share part of her inherited estate with Tom. This is contrary to what Dennis had intended which is evident in his prior will and from testimony from his lifelong attorney and close friend Mr. Powell.

The prior will is a natural bequest because it provides for his wife to remain comfortable with a home and a life estate but ensures that his only son will also receive a portion of the estate as his inheritance. The close relationship of Dennis and Tom is not questioned and the sudden disinheritance is not consistent with the testimony showing the strong bond between father and son. The new will conflicts with Dennis' reputation for having a close relationship with his son. From this evidence the trial court appropriately concluded that there was clear, cogent, and convincing evidence that the 2015 will was unnatural.

**4. Dennis Ottmar's age, mental vigor and condition of health made him infirm and vulnerable to undue influence.**

Dennis was not just in the hospital when he signed his will, he was in the ICU suffering from septic shock, kidney failure, and aggressive cancer. Dennis' physical condition is sufficient to show that Dennis was infirm and vulnerable when he signed his will. The medical records and the testimony

of Nurse Colliflower are informative as to how severe and vulnerable Dennis' condition actually was when he signed the will.

The medical records and the experts to this case agree that Dennis was not always able to track a conversation, suffered delirium, was confused and forgot he was in the hospital and why he was in the hospital, had a change in his mental status and that looking at the records there were times when Dennis' capability would wax, wane and fluctuate . VRP 316-317, 321-323, 331-333, 632, 637-638, 647, 662-664. Nurse Dinier also testified that Dennis was intermittently confused and disoriented and that his neurological function was not within normal limits. VRP 215, 217, 221-222. The court also found the fact that Dennis was in ICU and was not well enough to make calls on his own factored into his position to be influenced by Elizabeth. CP 665.

Defendant argues that three days prior to and then two days after signing the will Dennis was making medical decisions and therefore not infirm or vulnerable. *Appellant's Opening Brief*, p. 33-34. Her argument completely ignores the actual day that he signed the will. The day he signed the will was his first day in the ICU. VRP 221-222, Ex. 6. He needed ICU admission that day because of the probability he was suffering from septic shock, which required a higher level of care. On the day Dennis signed his

will his body was fighting aggressive cancer and had developed a raging infection that was attacking his vital organs, which diminished the cellular ability to carry oxygen to the vital organs and remove toxic waste.

Dennis' age and condition of health on the day he signed the will made him infirm and vulnerable. The physiological aspects of his illness reduced his mental vigor as documented in the medical records and explained by Ms. Colliflower. These factors permitted Dennis to be influence by Elizabeth which the trial court noted: "the circumstances of his physical and mental conditions including being weak, in pain, in a hospital's intensive care unit, and knowing that he was not going home this time screams excessive undue influence." CP 667. The trial court's conclusion is fully supported by witness testimony and the medical record.

**5. Elizabeth Ottmar had the opportunity for exerting an undue influence on Dennis.**

Defendant spends considerable time trying to support her argument that it was solely Dennis' desire not to see people. *Appellant's Opening Brief*, p. 36-39. Her argument misses the focus of the court's consideration of whether Elizabeth had the opportunity for exerting an undue influence. Whether it was Elizabeth's or Dennis' decision to keep visitors out of the hospital, the fact everyone but Elizabeth was excluded from visiting Dennis

gave Elizabeth the opportunity to exert undue influence.

It is uncontested that Elizabeth was the only family member with Dennis in his last days in ICU and is the only person benefitting from the new will. CP 664. It is also uncontested that Elizabeth was the only person telling others, and Dennis, that Dennis' prior will could not be found. The record shows that all communications with Dennis were either facilitated through Elizabeth or she was present when the communication occurred. See CP 665. "Once Dennis was admitted to ICU he was not well enough to make calls on his own, and Elizabeth at time helped Dennis dial the phone and speak with both his brother Bruce and Tom from his room. Since Dennis saw only Elizabeth since entering ICU, this strengthens Tom's argument that Dennis was in a position to be persuaded and influenced by Elizabeth." CP 665.

Elizabeth's position as the only person seeing and talking to Dennis in his last days gave her the opportunity for exerting an undue influence on Dennis. She used that opportunity to tell Dennis that his will could not be found and that he needed to sign a new one that she had prepared. Elizabeth used the opportunity of being able to control information going to and from Dennis to be the only person talking to the attorney who drafted the will and

the only person to ever say what Dennis' wishes allegedly were.

**G. The Trial Court Properly Applied the Presumption of Undue Influence Based on the Evidence Presented.**

When a petitioner presents prima facie evidence to raise a presumption of undue influence, the burden then shifts to the defendant to come forward with evidence sufficient at least to balance the scales and restore the equilibrium of evidence touching the validity of the will. *Dean v. Jordan*, 194 Wash. 661, 672, 79 P.2d 331, 336 (1938). However, the will contestant retains the ultimate burden of proving undue influence by “clear, cogent, and convincing” evidence. *Mueller v. Wells*, 185 Wn.2d 1, 15, 367 P.3d 580, 586 (2016) citing *Dean v. Jordan* at 671. In the absence of rebuttal evidence, the evidence raising the presumption may be sufficient to invalidate the will. *In re Estate of Haviland*, 162 Wn. App. at 558–59.

Defendant made a motion to dismiss Plaintiff's claims at the close of Plaintiff's case. VRP 556-568. The trial court denied the motion and stated “there is enough to move forward on the case.” VRP 568. This alone establishes that the burden shifted to the Defendant to come forward with rebuttal evidence sufficient to at least balance the scales touching the validity of the will. The Defendant failed to do so. In reality Defendant's presentation of witnesses presented additional evidence of undue influence.

Elizabeth Ottmar appeared as a witness and her testimony further established her exercise of undue influence on Dennis. While prior witnesses had testified they were told by Elizabeth that she could not find the prior will, Elizabeth acknowledged that she had located the 2005 will in their safe at home. CP 664. Through Elizabeth's testimony the trial court found that "[s]ince Elizabeth was the one who controlled who could see Dennis, Tom was unable to visit with him." CP 665. The undue influence claim was also strengthened since Dennis saw only Elizabeth since entering the ICU, which put Dennis in a position to be persuaded and influenced by Elizabeth. CP 665.

Additional evidence showed that while Dennis had concerns about the new gun laws and was considering selling his guns to an auction house, his intent to sell "was never solidified by Dennis prior to his death". CP 665-666. From the discussion around the firearm collection it was evident that Dennis would want Tom to have many of his guns yet in the new will Tom was not to receive anything. CP 666. Elizabeth then testified that she told Tom if he was "good", she would allow him to come over the day the auctioneer was packing the firearms, and he could take a "few" firearms, meaning one or two. CP 666.

The only other witnesses called by the Defendant after her motion to dismiss was Dr. Duane Green, Wayne Derrick and James Burris. Wayne Derrick and James Burris provided no evidence regarding a lack of undue influence. As discussed earlier, Dr. Green's review of the evidence in this case and his opinion were not sufficient to rebut the testimony of Nurse Colliflower and the descriptions of Dennis' medical circumstances. CP 663. This is because "Dr. Green could not establish through testimony a persuasive basis for his opinion as to how Dennis could have had sufficient mind and memory to understand the transaction, to comprehend the nature and extent of the property which constitutes his estate and of which he was contemplating disposition or even remember the objects of his bounty." CP 663.

Trial courts need not delineate which evidence went to any particular proposition because evidence of the presumption can be considered as direct or circumstantial evidence of actual undue influence. *Mueller v. Wells*, 185 Wn.2d 1, 17, 367 P.3d 580, 587 (2016). Defendant's witnesses were unable to produce evidence to overcome the presumption and, in the case of Elizabeth's testimony, provided additional evidence to support the claim of undue influence. The evidence in the record was sufficient to meet the

burden to create the presumption and to show by clear, cogent and convincing evidence that the new will was signed under the weight of undue influence. CP 669. The trial court clearly articulated its findings in coming to this conclusion. CP 661-669.

**H. Dennis Ottmar's 2005 Will Was Available to Elizabeth Ottmar.**

Defendant claims that Elizabeth Ottmar participated in the will's procurement due to a genuine belief that Dennis' prior will was insufficient. *Appellant's Opening Brief*, p. 36-39. This claim is without merit and not supported by the evidence in the case. Byron Powell provided a copy of the will immediately upon Tom's request. VRP 75, 78, 86-87. Elizabeth admitted she had the 2005 will in their safe at home the entire time. VRP 768. Elizabeth stated, "no bones there was a will." VRP 766.

The trial court found that "Dennis was under the belief from Elizabeth that his current will was lost." CP 667. This fact is supported by the testimony of Elizabeth, as well as Etter, Sr. and Etter, Jr., who were told by Elizabeth that the will was lost. VRP 168-171, 183, 520, 768. This fact alone raised sufficient doubt as to whether it was Dennis' intent or Elizabeth's intent to draft a new will. CP 667. Elizabeth also admits she was acting because of *her* belief the 2005 will would be inadequate. *Appellant's*

*Opening Brief*, p. 37.

The only information coming to Dennis was through Elizabeth. VRP 785. Whether it was Dennis' decision to not permit visitors or Elizabeth's decision makes no difference to the fact that *only* Elizabeth was telling Dennis he had no will and only Elizabeth could talk to Dennis. Elizabeth admitted that only she was allowed to see Dennis in ICU and she told Tom "his father would not see him." VRP 776-778, CP 667. Dennis' circumstances of being in ICU, his physical and mental conditions including being weak and in pain and knowing that he was not going home were all elements affecting the court's determination of undue influence. CP 667.

**I. The Distinction of Community Property vs. Separate Property Does Not Assist the Court to Determine Whether the 2015 Will Was Unnatural.**

Discussions on community property are not necessary to determine whether the 2015 will was unnatural. The primary concern for the trial court was that when comparing the 2005 will with the 2015 will it left nothing to Dennis' only son. Ex. 6 & 7. Dennis' 2005 will does not eliminate Elizabeth's entitlement to her portion of community property. Therefore, a discussion about community property vs. separate property is irrelevant.

**J. The 2015 Will Does Not Address or Acknowledge Dennis' Unsolidified Desire to Auction Off His Firearms.**

While it is clear that Dennis had concerns about Initiative 594's passage and the effect it might have on gun owners, evidence of that concern and any attempts to deal with that concern are noticeably absent from the 2015 will itself. Defendant claims Dennis "executed a revised will so that his wife of 30 years could put his plan into action" but there is no plan mentioned in the will. Ex. 6. The words firearm and gun do not appear in the will. Ex. 6. Dennis did not take any steps to protect his wife from what Defendant characterizes as a "nightmare and quagmire." Defendant's argument is without merit.

**K. Attorney Fees.**

Under RAP 18.1, a party may recover reasonable attorney fees and expenses on review if applicable law grants attorney fees or expenses. RCW 11.96A.150 allows an appellate court to award fees and other costs in its discretion to any party in an estate dispute proceeding governed by RCW Title 11.

The trial court awarded Plaintiff his attorneys' fees and costs against Defendant individually and not against the estate. Defendant's appeal has forced Tom Ottmar to expend considerable money in attorneys' fees on

appeal. Plaintiff respectfully requests an award of attorney fees and reasonable costs incurred in this appeal against Defendant individually.

#### V. CONCLUSION

Plaintiff met his burden at the trial court and established by clear, cogent and convincing evidence that Dennis Ottmar lacked testamentary capacity and that the will was the product of undue influence. Defendant's appeal is without merit as the trial court has not made any error, has made the necessary findings and conclusions in its memorandum opinion, and that the record contains substantial evidence supporting the trial court's findings. Plaintiff requests Defendant's appeal be denied, the decision of the trial court affirmed, and an award of attorney fees and costs.

RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of March, 2017.



---

Robb E. Grangroth, WSBA No. 31103  
Douglas R. Dick, WSBA No. 46519  
Attorneys for Respondent