

No. 64303-7

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

In re the ESTATE OF JAMES W. HAVILAND,

Deceased.

DONALD HAVILAND, MARTHA CLAUSER,
and ELIZABETH HAVILAND,

Appellees,

v.

MARY HAVILAND, Beneficiary, and ROBERT VAN CITTERS, and
GEORGE PAUL COOK, Former Personal Representatives of the Estate
of James W. Haviland, Deceased,

Appellants.

BRIEF OF APPELLANTS

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I. INTRODUCTION

Dr. James W. Haviland (“Jim”) and Mary Burden were married on August 30, 1997, in a ceremony conducted by two ministers and attended by many friends and family members. For the next 10 years, they lived as husband and wife – providing care, comfort and support to each other – until Jim died at 96 on November 14, 2007. During this time Jim executed four wills – in 1997, 1998, 2002 and 2006 – each prepared by his long-time attorney Alan Kane, of K&L Gates. Jim made substantial provision for Mary in every will. His last will left the bulk of his estate to Mary.

Jim had four children, all by his first wife. He provided for them in part by leaving them a lifetime income interest in a \$2.5 million trust. During his life, he had given them real property, cash, personal property, and family heirlooms. Nonetheless, three of his children petitioned to set aside his last will, alleging lack of testamentary capacity and that the will was the product of undue influence by his wife Mary.

After an April 2009 trial, the trial court ruled that the petitioners had failed to show that Jim lacked testamentary capacity. The court also ruled, however, that the will was the product of undue influence. The court set aside the will, appointed a new personal representative, and awarded petitioners \$436,781.14 in fees and costs, from Mary’s share of Jim’s probate and nonprobate assets. This Court should reverse the

judgment invalidating Jim's will as the product of undue influence for the following reasons:

First, the trial court erred in concluding that a presumption of undue influence arose. The generic *Dean v. Jordan* factors, on which the court relied, have no meaningful application between a husband and wife.

Second, the trial court erred in concluding that the respondents failed to present sufficient evidence to restore the equilibrium touching on the validity of the will. The record shows that respondents submitted abundant proof regarding the execution of the will and the closeness of the marital relationship between Jim and Mary to rebut any presumption of undue influence. Respondents also established the absence of numerous factors that might support a finding of undue influence.

Third, the trial court erroneously concluded that petitioners had proven by clear, cogent, and convincing evidence – an exacting and heavy burden – that Jim's will was the product of undue influence by Mary.

Under the trial court's application of the undue influence test, nearly every aging testator who remarries and subsequently provides for his or her spouse in a new will would be presumed to be acting under the spouse's undue influence, particularly where the testator relies on the benefitted spouse for care. Nothing in Washington law suggests that the undue influence doctrine sweeps that broadly.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in invalidating the will as the product of undue influence by Mary Haviland.

2. The trial court erred in making the following findings of fact:

a. Finding of Fact 125: The evidence is clear, cogent, and convincing that Dr. Haviland had advanced dementia as of November 2007, shortly before he died. CP 751.

b. Finding of Fact 127: Clear, cogent, and convincing evidence shows that Dr. Haviland was suffering from dementia prior to [the November 8, 2007] request [to pay his debt with principal from the Credit Shelter Trust]. CP 752.

c. Finding of Fact 128: The November 8, 2007 request was made by Mary Haviland to Paul Hennes ostensibly on behalf of Dr. Haviland at a time when Dr. Haviland clearly lacked capacity to make that decision. Mary Haviland's explanation that this is what Dr. Haviland had previously wanted strains credulity. Rather, the Court finds that the November 8, 2007 request to be corroborating evidence of Mary Haviland's overreaching and undue influence. The November 8, 2007, request for payment of all of Mary Haviland's debt from the Marion Haviland Credit Shelter Trust was part of Mary Haviland's steady, systematic, and persistent pattern of depleting Dr. Haviland's assets and the transfer of funds for the benefit of Mary Haviland and her designees. Mary Haviland offered no credible evidence to explain the consumption and transfer of such large sums of money from Dr. Haviland's assets, during the course of the marriage. CP 752.

d. Finding of Fact 129: The unexplained *inter vivos* transfer of Dr. Haviland's assets for the benefit of Mary and her designees is corroborating evidence of the undue influence exercised by Mary Haviland over Dr. Haviland. CP 752.

d. Finding of Fact 135: According to respondent herself, the lifetime Estate of Dr. Haviland was so depleted by Mary's transfer of funds that [according to the probate accounting] ... the total value of the Estate is a negative \$45,834.38 CP 753.

3. The trial court erred in awarding attorneys' fees and costs to petitioners.

4. The trial court erred in denying attorneys' fees and costs to Mary.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Did the trial court misapply the undue influence test by failing to account for the fact that Jim and Mary were husband and wife?
(Assignment of Error 1)

2. Did the petitioners present evidence sufficient to create a presumption that the will was the product of undue influence by Mary?
(Assignment of Error 1).

3. Did Mary Haviland present evidence sufficient to "balance the scales and restore the equilibrium of evidence touching the validity of the will"? (Assignment of Error 1).

4. Did petitioners present clear, cogent, and convincing evidence that the will was the product of undue influence by Mary Haviland? (Assignment of Error 1, 3, 4).

5. Are the disputed Findings of Fact, *supra*, supported by substantial evidence? (Assignment of Error 2).

IV. STATEMENT OF FACTS

A. The Decedent, Dr. James Haviland.

James W. Haviland (“Jim”) was born on July 18, 1911; he was a well-respected Seattle physician, with a home on Mercer Island. Finding of Fact (“FF”) 1 (CP 727), Ex. 544. He and his first wife, Marion, had four children: James M. Haviland (b. 1944); Elizabeth B. Haviland (b. 1946); Donald S. Haviland (b. 1948); and Martha Haviland Clauser (b. 1951). FF 2 (CP 727-28). Jim and Marion executed a series of wills over the course of their marriage, and created a revocable living trust, the last iteration of which was dated June 26, 1990 (the “1990 Trust Agreement”). Ex. 22. They also established several charitable remainder trusts, which benefitted numerous charities around the country. Exs. 27-29.

B. Jim’s Marriage to Mary Haviland.

Marion died in 1993. FF 6 (CP 728). Three years later, in 1996, Jim met Mary Burden at Providence Hospital, where he was recuperating from leg injury. FF 10 (CP 730). Mary was working as a nurse’s assistant, although she was not Jim’s nurse. *Id.* Mary was divorced from her first husband, Steven Burden, with whom she had four children:

Steven Burden II (b. 1979), Jeremy Burden (b. 1980), Joshua Cook (b. 1981), and Sarah Musson (b. 1983). FF 11 (CP 730).

Mary was 50 years younger than Jim. FF 1 (CP 727); VRP 1761. Jim sought approval to see Mary from Mary's brother, George Paul Cook, and her father. FF 12 (CP 730). She soon began accompanying Jim to social events. Jim met each of Mary's four children by early 1997. *Id.*

Jim and Mary announced their engagement in the spring of 1997, and received marriage counseling from pastor Richard Graves of Bible Baptist Church. FF 14 (CP 731). They were married on August 30, 1997, in a backyard ceremony at their Bremerton home before friends and members of both families. FF 18 (CP 732). Pastor Graves and Reverend Randall Gardner of Emmanuel Episcopal Church on Mercer Island presided over the wedding. *Id.* Jim and Mary exchanged their vows in front of 75-100 guests. *Id.*; VRP 1777; Ex. 507 (wedding photographs).

Mary had a prior criminal history, of which Jim was aware before their marriage. FF 19 (CP 732). She had served 18 months of a two-year sentence for shoplifting-related convictions in 1993-94. FF 8 (CP 729). Mary received a downward departure from the standard sentencing range because the court found that she "was the focus of a longstanding pattern of coercion and duress applied by [her first] husband which had the purpose and effect of gaining the cooperation of [Mary] in the husband's

schemes to commit theft.” *Id.*; Ex. 511. In 1998, Mary received a Certificate of Rehabilitation by the Kitsap County Trial Court. FF 8 (CP 729); Ex. 517. She later went on to earn a bachelor’s degree with high honors and a master’s degree in the science of nursing. FF 9 (CP 729); VRP 1766-67. At the time of the trial she was (and she still is) employed as a registered nurse at Harrison Medical Center in Bremerton, as well as an adjunct faculty/clinical instructor at the Seattle University College of Nursing. FF 9 (CP 729-30).

After their wedding, Jim and Mary lived together continuously as husband and wife for more than ten years, until Jim’s death on November 14, 2007. FF 20 (CP 732). They lived in their Bremerton home from 1997-98 with Mary’s four children, while those children continued to attend school in the area. *Id.* From 1998 through 2006, Jim and Mary lived in their Mercer Island home, but continued to make frequent visits to their house, church, friends and family in Kitsap County. FF 21 (CP 732). They then moved back to their Bremerton home in April 2006, where they lived until Jim died. *Id.*

During their ten-year marriage, Mary tended to Jim’s emotional and physical needs. Jim had arthritis and disabling peripheral neuropathy, VRP 1830; Ex. 524, 529, and was in a wheelchair for most of their marriage, but Mary ensured that his physical limitations did not prevent

him from participating in activities and maintaining relationships that he enjoyed. She took him to church, church choir practice, VRP 396, board meetings of the Northwest Kidney Foundation and the Seattle Historical Society, VRP 1822, and friends' parties, VRP 1725, 1744. She ensured that he would continue to see the world by accompanying him on trips to China and Alaska. VRP 1796-97; Ex. 507. They regularly attended the opera and theatre. VRP 1821. She organized large birthday parties for friends and family on his 90th and 95th birthdays. Ex. 506; VRP 1801. When his physical needs became more pronounced, she quit her job to care for him full-time. VRP 1830-33. In short, their ten years together were full of love, nurturing, friends, family and adventure.

C. Jim Executed a Series of Wills with his Long-Standing Attorney.

In 1985, Jim commenced what would become a 21-year attorney-client relationship with Alan Kane, an attorney at what is now K&L Gates LLP. FF 22 (CP 732). From the day before his marriage to Mary in August 1997 through his death, Jim executed four wills and a new living trust – all prepared by Mr. Kane – as follows:

The Living Trust. On April 28, 1997, Jim created the James W. Haviland Living Trust, for his benefit during his lifetime, and, upon his

death, to provide up to \$500,000 to Mary for her living and educational expenses. FF 13 (CP 730-31); Ex. 13.

The 1997 Will. On August 29, 1997, on the eve of his marriage to Mary, Jim executed a new will, which gave Jim's personal effects to Mary and devised to her the Bremerton residence, which he had purchased, and real property that he owned on Shaw Island. Ex. 5; FF 17 (CP 731). The 1997 Will made no charitable bequests. Ex. 5. It directed that the residue of the estate be distributed to "Trust B" of the 1990 Trust Agreement. *Id.*; FF 17 (CP 731-32) The lifetime income beneficiaries of Trust B were Jim's children; the remainder beneficiaries were various charities. FF 17 (CP 731-32); Ex. 22. At that time, the James W. Haviland Living Trust, created four months earlier, also provided that any balance remaining after the \$500,000 distribution to Mary was to be distributed pursuant to the 1990 Trust Agreement. FF 13 (CP 730-31).

The 1998 Will. On January 8, 1998, Jim executed a new will. FF 23 (CP 732-33). He did not change the principal dispositive provisions of the 1997 Will; rather, the changes acknowledged the intervening marriage of Jim and Mary, and included provisions for contingencies that did not arise. *Id.*; Ex. 4. The 1998 Will continued to (a) make a specific bequest of Jim's personal effects, as well as the Bremerton home and Shaw Island property, to his wife Mary, (b) make no specific charitable bequests, and

(c) leave the residue of the estate to be distributed under Trust B of 1990 Trust Agreement, as amended. FF 23 (CP 732-33); Ex. 4.

Amendment to Living Trust. Three months later, on April 30, 1998, Jim amended the Living Trust, removing the \$500,000 cap on the distribution to Mary. FF 25 (CP 733). He remained the sole beneficiary of the Living Trust during his lifetime. *Id.*

The 2002 Will. On August 13, 2002, after six years of marriage, Jim executed a new will. FF 40 (CP 736); Ex. 2. The 2002 Will continued to make specific bequests of personal effects, the Bremerton home, and the Shaw Island property to Mary, but added specific cash bequests totaling \$105,000 to eleven named individuals and charities. FF 40 (CP 736). The residue was to be distributed pursuant to the Marion B. Haviland Credit Trust (the “Credit Trust”) of the 1990 Trust Agreement, as amended. *Id.* The beneficiaries of the Credit Trust were Jim’s children and certain other issue, who hold a lifetime income interest, with the remainder to be distributed at their deaths to certain individuals and charities. Ex. 22 (Article X – decedent’s share).

The 2006 Will. On January 19, 2006, after eight years of marriage, Jim executed his last will (the “2006 Will”). Ex. 1. The 2006 Will preserved the gifts to Mary of Jim’s personal effects, the Bremerton home and the Shaw Island property. *Id.* The will made specific bequests

totaling \$50,000 to eight named charities; gave Mary the personal property in their Mercer Island home, and left the residue of the estate to the Living Trust, of which Mary was the remainder beneficiary. *Id.*

Jim suffered from arthritis, VRP 1830-31, and his handwriting was poor, *see, e.g.*, Ex. 11 (date and signature). The proposed changes to the 2002 Will in early 2006 were in Mary's handwriting on a copy of the 2002 Will. VRP 641-46; FF 75 (CP 742). Jim initialed the changes. Ex. 122; VRP 642-44. Mary then contacted Mr. Kane's office. Ex. 120; FF 75 (CP 742).

On January 11, 2006, Mr. Kane phoned Jim to discuss the changes that Jim wanted to make to his 2002 will. Ex. 123. Jim and Mr. Kane went through the proposed changes one by one, with Jim confirming that he wanted to make each change. FF 77 (CP 743). Mr. Kane prepared a contemporaneous memorandum to the file regarding his call with Jim, FF 78 (CP 743), in which he noted that Jim had given "careful thought" to changing his will to have the "bulk of his estate passing to Mary." Ex. 123. Jim "indicated that he understood ... and was comfortable with that change and that was in fact his intent and direction." *Id.* In short, Jim "seemed very cognizant of the changes he was requesting and indicated that they reflected his wishes." *Id.*

Jim executed the 2006 Will at Mr. Kane's offices on January 19, 2006. FF 89 (CP 745). Mr. Kane testified that Jim "seemed to understand exactly ... what I was talking about" when they discussed the changes, and that Jim "sp[oke] well in response to my questions." VRP 172-73. Mr. Kane "had no doubt ... that these were the changes [Jim] wanted to make to his estate planning." VRP 173; *see also* FF 98 (CP 747). While Mary had driven Jim to Mr. Kane's office, she was not present for his discussion with Mr. Kane or the will signing. FF 91 (CP 746); VRP 1869-70.

On January 16, 2006, three days before the execution of the 2006 Will, Dr. James Martin, Jim's doctor, gave Jim a physical examination. FF 87 (CP 745); Ex. 261. Dr. Martin's notes of that visit state: "He has no complaints. He is feeling well. His wife reports his mentation is good. His alertness is good." Ex. 261 (at MJM 00004); FF 87 (CP 745). Dr. Martin made no diagnosis of, or comment suggesting, dementia.

D. Admission of the 2006 Will to Probate and Will Contest.

Jim died at home on November 14, 2007, nearly 22 months after he executed the 2006 Will. FF 1 (CP 727); VRP 1885-86. Eight days earlier, Mary had taken Jim to the emergency room for dehydration and lethargy. FF 124 (CP 751). He received IV fluids and oxygen, and was released to go home with Mary. VRP 1878. Mary contacted Dr. Martin,

who sent a referral for hospice. VRP 1880. Hospice workers came to their home, but determined that Jim did not qualify for hospice care because he was not exhibiting symptoms of failure to thrive. VRP 1882-83, 1885. Mary cared for him until he died a few days later. VRP 1885.

The court admitted the 2006 Will to probate on December 19, 2007. As the will directed, Mary and Dr. Robert Van Citters were appointed co-personal representatives of the Estate. Ex. 1. On April 17, 2008, the petitioners commenced this will contest, alleging that Jim lacked testamentary capacity and that the will was the product of undue influence by Mary. CP 23-33. The petitioners also sought removal of Mary as co-personal representative of the Estate, on the grounds that her criminal convictions 15 years earlier disqualified her from serving, under RCW 11.36.010. In an amended petition filed on May 20, 2008, petitioners alleged that the 2006 Will differed from Jim's "prior estate plan" as reflected in "prior wills dated 1980, 1997, 1998 and 2002." CP 34-153. On May 28, 2008, Mary resigned as co-personal representative of the Estate. CP 166. George Paul Cook (Mary's brother), whom the 2006 Will nominated as successor co-personal representative, was eventually appointed to serve in her place.

E. Trial and Appeal.

The case was tried to the Honorable John Erlick in April 2009. The court heard testimony from Mary, the petitioners, family members, and many medical colleagues, professionals and friends who had known Jim well and had seen him often in the last years of his life. The trial court ultimately found that petitioners had failed to establish that Jim “had dementia at the time of the will-signing,” and therefore had failed to show that Jim lacked testamentary capacity when he signed the 2006 Will. Conclusion of Law (“CL”) 4, 5 (CP 754-55). The court nevertheless found that the 2006 Will “was the product of undue influence by Mary Haviland” because (a) Mary was Jim’s “fiduciary,” (b) Mary participated in the creation of the 2006 Will, (c) Mary received “an unnaturally large share of [Jim’s] estate in comparison to [his] prior estate plan,” (d) Jim was vulnerable due to physical disabilities and “some degree of cognitive impairment,” and (e) Mary had not adequately explained certain transfers of assets during the course of their 10-year marriage. CL 9 (CP 755-56). The court also awarded petitioners the right to recover attorneys’ fees and costs as the prevailing party. CP 758. On October 12, 2009, respondents filed a timely notice of appeal of the trial court’s final Findings of Fact and Conclusions of Law. CP 976-1010.

F. Award of Attorneys' Fees and Costs to Petitioners.

After the entry of the findings and conclusions, petitioners requested an award of attorneys' fees and costs in the amount of \$524,703.33. CP 964-75. On December 17, 2009, the trial court entered an order and judgment awarding petitioners attorneys' fees and costs in the amount of \$436,781.14, to be paid from Mary's share of the Estate. Supp. CP ____ (Doc. Sub. 290, Judgment Summary, Judgment and Order Approving Attorneys' Fees). Mary also challenges that order on appeal. RAP 7.2(i).

V. STANDARD OF REVIEW

This Court must "ascertain[] whether the findings of fact are supported by substantial evidence and, if so, whether the findings support the conclusions of law and the judgment." *City of Tacoma v. State*, 117 Wn.2d 348, 361, 816 P.2d 7 (1991). More specifically, factual findings must be "supported by substantial evidence from which a rational trier of fact could find the necessary facts by clear, cogent, and convincing evidence." *In re Dependency of K.S.C.*, 137 Wn.2d 918, 925, 976 P.2d 113 (1999). An attorney fee award is reviewed for an abuse of discretion. *DeAtley v. Barnett*, 127 Wn. App. 478, 485, 112 P.3d 540 (2005).

VI. ARGUMENT AND AUTHORITY

A. The Undue Influence Standard Creates a High Threshold.

“The right to make a will is a valuable right, and the deliberate exercise of that right, in due form of law, should not be set aside” without evidence “strongly support[ing]” its invalidation. *In re Kinssies’ Estate*, 35 Wn.2d 723, 733-34, 214 P.2d 693 (1950). Accordingly, will contestants seeking to invalidate a will based on undue influence face a “daunting burden.” *Estate of Lint*, 135 Wn.2d 518, 535, 957 P.2d 755 (1998).

First, undue influence is not mere influence or even strong influence, but rather “influence tantamount to *force or fear* which destroys the testator’s free agency and constrains him to do what is against his will.” *Lint*, 135 Wn.2d at 535 (emphasis added; quotations omitted); accord *Estate of Kessler*, 95 Wn. App. 358, 377, 977 P.2d 591, 602 (1999). To invalidate a will based on undue influence “there must be something *more* than mere influence.” *Dean v. Jordan*, 194 Wash. 661, 671, 79 P.2d 331 (1938) (emphasis added). Indeed, “many forms of influence, while very persuasive and difficult for the testator to resist, are perfectly natural and proper,” such as “the sentiment of gratitude.” MARK REUTLINGER, WASHINGTON LAW OF WILLS AND INTESTATE SUCCESSION

86 (2006) (quotations omitted). “Generally speaking, influence exerted merely by means of advice, arguments, persuasions, solicitations, suggestions, or entreaties, is not undue influence” *Estate of Riley*, 78 Wn.2d 623, 662, 479 P.2d 1 (1970).

Second, the undue influence must have occurred, “*at the time of the testamentary act*, which interfered with the free will of the testator and prevented the exercise of judgment and choice.” *Dean*, 194 Wash. at 671 (emphasis added). “[A]ctions by the beneficiary that occur *after* the will in question was executed are not sufficient to upset the will.” REUTLINGER, *supra*, at 87 (emphasis added); *accord In re Simpson’s Estate*, 169 Wash. 419, 424, 14 P.2d 1 (1932).

Third, a party seeking to invalidate a will must present “clear, cogent, and convincing” evidence of undue influence. *Dean*, 194 Wash. at 671. Evidence is clear, cogent, and convincing “when the ultimate fact in issue is shown by the evidence to be highly probable.” *In re Dependency of K.R.*, 128 Wn.2d 129, 141, 904 P.2d 1132 (1995) (quotations omitted). “[C]ertain facts and circumstances bearing upon the execution of a will may be of such nature and force as to raise a suspicion, varying in its strength, against the validity of the testamentary instrument.” *Dean*, 194 Wash. at 671-72. “The most important of such facts are:

(1) That the beneficiary occupied a fiduciary or confidential relation to the testator;

(2) that the beneficiary actively participated in the preparation or procurement of the will; and

(3) that the beneficiary received an unusually or unnaturally large part of the estate.”

Id. at 672. “Added to these may be other considerations such as

the age or condition of health and mental vigor of the testator,

the nature or degree of relationship between the testator and the beneficiary,

the opportunity for exerting an undue influence, and

the naturalness or unnaturalness of the will.”

Id. “The weight of any of such facts will, of course, vary according to the circumstances of the particular case.” *Id.*

Under Washington case law, if a will contestant presents evidence sufficient to raise a presumption of undue influence, the proponents of the will then have the obligation “to come forward with evidence that is at least sufficient to balance the scales and restore the equilibrium of evidence touching the validity of the will.” *Lint*, 135 Wn.2d at 536 (quotations omitted). Courts should be “[]mindful that ... it may well be difficult for one seeking to uphold a will to establish, by affirmative

evidence, the negative proposition that no undue influence was exerted in the procurement of the will.” *In re Dand’s Estate*, 41 Wn.2d 158, 162, 247 P.2d 1016 (1952) (quotations omitted). And at all times, even in the absence of rebuttal evidence, the burden of proof *remains on the will contestants* to prove undue influence by clear, cogent and convincing evidence. *Lint*, 135 Wn.2d at 536; *Kessler*, 95 Wn. App. at 378.

Here, the trial court went through the three steps and concluded that (a) petitioners presented evidence sufficient to raise the presumption of undue influence, CL 9 (CP 755-56), (b) respondents did not come forward with evidence to restore the equilibrium, CL 10 (CP 756), and (c) petitioners had met their burden of establishing by clear, cogent, and convincing evidence that Jim’s 2006 Will was the product of undue influence by Mary. CL 10, 11 (CP 756). The trial court erred in arriving at each of these conclusions.

B. The Trial Court Mechanically – and Erroneously – Applied the Undue Influence Test to a Married Couple.

The trial court applied some of the *Dean* factors and one factor of its own making to arrive at a presumption of undue influence: *First*, the court concluded that Mary was Jim’s fiduciary. CL 9 (CP 755). *Second*, the court found that Mary participated in the creation of the 2006 Will. *Id.* *Third*, the court found that Jim was “extremely vulnerable to undue

influence due to physical disabilities, some degree of cognitive impairment, and the fact that Mary Haviland was [his] primary caregiver.” CL 9 (CP 755-56). *Fourth*, the court modified a *Dean* factor and concluded that Mary received “an unnaturally large share of [Jim’s] estate in comparison to [his] prior estate plan.” CL 9 (CP 755). And, *fifth*, the trial court created and relied on a *new* factor – that Mary engaged in a “pattern of transferring assets from [Jim’s] estate, during his lifetime, for her own benefit and that of her designees.” CL 9 (CP 756).

The trial court erred in concluding that this evidence created a presumption of undue influence. Jim and Mary had been legitimately (and happily) married for more than eight years when Jim executed his will. Applying the factors in this context generates a perverse result, because the *Dean* “warning” factors are normal and salutary features of nearly *all* marital relationships, particularly if one spouse is of advanced age and in declining health. In the 72 years since the Supreme Court decided *Dean*, the trial court’s decision in this case is the first case (of which appellants are aware) in which a court has applied the *Dean* factors to a legitimately married couple to invalidate a will.¹

¹ In *Lint*, the Court invalidated a will signed by a very ill woman who was taken to Las Vegas by a man, where they married, and she subsequently signed a will leaving most of her very large estate to him. 135 Wn.2d at 525-28. In addition to invalidating the will based on undue influence, the Court *also* invalidated the marriage. *Id.* at 538-42.

1. A Common Trait of Marriage is that the Couple Enjoys a Fiduciary or Confidential Relationship.

The first *Dean* factor is whether “the beneficiary occupied a fiduciary or confidential relation to the testator.” 194 Wash. at 672. Washington courts have not distinguished between “confidential” and “fiduciary” relationships, but there is no dispute that Mary and Jim, as husband and wife, had a close and confidential relationship. Indeed, a close and confidential relationship is the hallmark of a marital union, protected by statute. *See* RCW 5.60.060(1) (spousal privilege). One Washington court that defined a “fiduciary relationship” could have also been describing a marital relationship: “relations which exist whenever one [person] trusts and relies upon another.” *Estate of Esala*, 16 Wn. App. 764, 767, 559 P.2d 592 (1977) (quotations omitted).

The “fiduciary or confidential relationship” described in *Dean* differs significantly from the close and confidential relationship in a marriage. *Dean* was concerned with a confidential or fiduciary relationship that carries with it an expectation that the fiduciary or confidant is acting and is expected to act selflessly (aside from, in the case of a paid fiduciary, reasonable compensation). In the case of a lawyer or an attorney in fact, it is understood that the principal may rely on and confide in the agent, but the fiduciary is nonetheless expected, and in

many cases required by law, to act selflessly. If the fiduciary or confidant does not do so, then a presumption arises that the fiduciary has taken unfair advantage of the principal.

A marriage is fundamentally different. The confidential and fiduciary relationship runs in both directions. Each spouse is expected to be a confidant and in some cases, collaterally, a fiduciary to the other, but there is no ordinary presumption that if one spouse benefits from the assets of the other, the benefitted spouse has acted wrongfully. Society (and the law) expects that each spouse will give to the relationship his or her time, skills, industry, emotion and assets, to form a marital community that is itself one entity, not one person being a fiduciary to another person. Spouses will and do influence each other in the conduct of their daily affairs. It is common, natural, and non-suspicious that one spouse will leave to the other all of his or her assets, perhaps in exchange for, and certainly in recognition of, the love, support, encouragement and care that the spouse has received and expects to continue to receive over the course of the marriage. It is therefore wrong to conclude, as the trial court did, that the existence of the confidential relationship between *spouses* gives rise to or supports a presumption that the benefitted spouse has acted wrongfully, or has overridden the will of the other. *Dean* suggested no such thing, nor has any other court in this State.

Recognizing that a close, trusting relationship is the foundation of a marital union, courts have held that the presumption of undue influence “cannot arise in the case of a husband and wife” because the “confidential relationship [that] exists between a husband and wife is not one [that] may be considered in the law governing will contests.” *Jacobs v. Vaillancourt*, 634 So. 2d 667, 672 (Fla. Dist. Ct. App. 1994). And even those courts that will entertain undue influence contests involving married couples hold that “[a] fiduciary relationship is not shown merely because the testator and beneficiary are husband and wife ... because in any proper sense, the spousal relationship betokens a reposed mutual confidence that engenders the flow of generosity and affection from one to the other.” *Morse v. Volz*, 808 S.W.2d 424, 432 (Mo. Ct. App. 1991); accord *Neill v. Brackett*, 126 N.E. 93, 94 (Mass. 1920). Accordingly, “the presumption of undue influence must be applied with caution as to marital relationships, because of the unique relationship between spouses and the importance of marriages to our society.” *In re Estate of Glogovsek*, 618 N.E.2d 1231, 1237 (Ill. App. Ct. 1993).

2. Most Spouses “Participate[] in the Preparation or Procurement of the Will.”

The trial court relied upon the second *Dean* factor – whether the “beneficiary participated in the preparation or procurement of the will” –

when it found that Mary participated in the “creation” of the 2006 Will. CL 9 (CP 755). But spouses frequently make wills jointly and routinely participate in the preparation and procurement of each other’s wills. Indeed, “[o]ne would naturally expect to find a spouse to be present at the execution of the will, present when the testator expresses a desire to make a will, knowledgeable about the contents of the will prior to its execution, involved in its safekeeping, and perhaps even involved in the recommendation of an attorney-prepare and consultation with an attorney-preparer.” *Tarsagian v. Watt*, 402 So. 2d 471, 472 n.1 (Fla. Dist. Ct. App. 1981). None of this is unusual or unnatural, and none of it can or should give rise to any suspicion that one spouse is exercising undue influence over the other. Likewise, it is not unusual for one spouse to drive the other to the attorney’s office to sign the will. The fact that a beneficiary drove a testator to and from the attorney’s office does “not interfere with the testator’s volition.” *In re Patterson’s Estate*, 68 Wash. 377, 383, 123 P. 515 (1912).

The trial court’s reliance on this factor was error: the “weight [of the prepared or procured factor] depends, not solely upon its character, but upon the facts and circumstances with which it is connected. In some cases it would have no weight at all.” *In re Beck’s Estate*, 79 Wash. 331, 334, 140 P. 340 (1914). For example, if “the testator had testamentary

capacity” – as Jim did – and “he dictated his will and knew its contents . . . , the mere fact that the will was written by the sole beneficiary would not be enough . . . taken alone, to cast the slightest suspicion on it.” *Id.* at 334-35; *see also In re Seattle’s Estate*, 138 Wash. 656, 662, 664, 244 P. 964 (1926).

Here, because the evidence of Mary’s participation in the preparation of the 2006 Will was incidental and usual for a spouse, the court should have given it “no weight at all.” *Beck’s Estate*, 79 Wash. at 334. The evidence showed that the draft changes interlineated on a copy of the 2002 will were in Mary’s handwriting. VRP 641-46. The evidence also showed, however, that Jim initialed the changes, VRP 642-44, and that he had arthritis in his hand. VRP 1830-31. Mary then contacted Mr. Kane, and, other than driving Jim to Mr. Kane’s office, had no further involvement. Mr. Kane discussed the changes on the phone with Jim. Mary was not present in the K&L Gates conference room with Jim when Mr. Kane again discussed the changes to the will or when Jim signed the will. VRP 184, 248, 1703. And there is *no* evidence that Mary “solicited or advised” Jim “in any manner . . . to make a will so as to make her a

more favored devisee than she had been made by the terms of the [earlier] will.” *Seattle’s Estate*, 138 Wash. at 662.²

Even putting aside the fact that Jim and Mary were married, the circumstances here are far removed from instances of a beneficiary’s participation in will creation that Washington courts have used to find undue influence. For example,

- the will’s beneficiary instructed the attorney to make changes to the will, picked up drafts of a new will from the attorney’s office, and had the testator sign them without involving the attorney, who did not intend the drafts to be final. *In re Estate of Eubank*, 50 Wn. App. 611, 615, 749 P.2d 691 (1988).
- the attorney who drafted the contested will had no previous relationship with testator. *Esala*, 16 Wn. App. at 768.
- the beneficiary terminated the testator’s long-standing attorney and took the testator to a new attorney of the beneficiary’s choosing. *Dand’s Estate*, 41 Wn.2d at 161; *Lint*, 135 Wn.2d at 528.
- no attorney was present at the will signing, and the beneficiary did not read the will to the testator. *Eubank*, 50 Wn. App. at 615; *Esala*, 16 Wn. App. at 768.
- the beneficiary was present at the will signing. *Lint*, 135 Wn.2d at 528.

In short, the only two facts on which the court could have relied to find that Mary participated in “creati[ng]” the 2006 Will were that the edits interlineated on the face of the 2002 will were in Mary’s handwriting

² Mary was asked at trial how the handwriting came to be on Ex. 122, the markup of the 2002 Will that led to the 2006 Will. VRP 1862. Counsel for the petitioners objected under the Deadman’s Statute, and the court sustained the objection. VRP 1863-1869.

– but initialed by Jim – and that Mary drove Jim to his attorney’s office. Under Washington law, such facts, standing alone do not give rise to a presumption of undue influence, and, when considered with all other pertinent facts – such as Mr. Kane’s testimony that he discussed each change with Jim without Mary present and that Jim understood and wanted the changes – it is not a close question.

3. Many Spouses Care For Each Other Through Physical Disabilities and Cognitive Impairment.

One of *Dean*’s self-described “other considerations” is the “age or condition of health and mental vigor of the testator.” 194 Wash. at 672. The trial court found that Jim “was ... extremely vulnerable to undue influence due to physical disabilities, some degree of cognitive impairment, and the fact that Mary Haviland was Jim’s primary caregiver.” CL 9 (CP 755-56).

Again, this factor reveals little if anything about possible undue influence in a marriage. One spouse often acts – indeed, society encourages and expects a spouse to act – as the primary caregiver for the other when he or she suffers from a physical disability or some level of cognitive impairment. A basic aspect of many marriages, reflected in the vows, is to care for someone *in sickness* and in health. The law should not

penalize spouses by presuming undue influence because they provide care and comfort to each other, particularly as they advance in years.

4. It is Natural for a Testator to Leave All of His Assets to His Spouse.

In finding a presumption of undue influence, the trial court also relied on the third *Dean* factor: whether the beneficiary's share of the estate was "unnaturally large." 194 Wash. at 672. The trial court did not find, however, that Mary's share of the estate under the 2006 Will was "unnaturally large" in and of itself. Nor could it. Spouses commonly leave their *entire* estates to the other spouse, even to the exclusion of their own children. *Kinssies*, 35 Wn.2d at 733. And it "is not at all unnatural" for a testator to favor a beneficiary who also cared for him in his advanced age. *Seattle's Estate*, 138 Wash. at 662; *Dean*, 194 Wash. at 673.

Instead, the trial court fashioned a modified version of the third *Dean* factor, concluding that "[t]he 2006 will gave Mary Haviland an unnaturally large share of Dr. Haviland's estate *in comparison to [his] prior estate plan.*" CL 9 (CP 755) (emphasis added). That conclusion rests on the erroneous premise that when a spouse remarries it is *unnatural* to change his or her "prior estate plan" to provide for the new spouse. In fact, prior estate plans often change when a spouse remarries to reflect their new life and commitment to each other.

Jim changed his estate plan several times during his marriage to Mary, leaving her incrementally more of his assets each time. His actions were measured and rational, and always implemented through Mr. Kane. His execution of the 2006 Will reflected a normal decision of a husband to leave his estate to his wife, and was a natural extension of the trend of his estate planning over the prior eight years.

5. Jim's and Mary's Financial Transactions Do Not Give Rise to a Presumption of Undue Influence.

In addition to the four *Dean* factors discussed above – which might exist in any marriage – the trial court arrived at a presumption of undue influence based upon evidence of monetary transfers in accounts of Jim and Mary that occurred during their marriage that it found were not satisfactorily explained. The court found that those transfers were evidence of Mary's undue influence over the 2006 Will. CL 9 (CP 756).

Not only is the Court's finding not supported by substantial evidence (*see, infra*, pp. 45-46), the mere fact that spouses transferred money during their marriage cannot, as a matter of law, give rise to a presumption of undue influence. The manner in which spouses spend their money is not identified as a factor in *Dean* or its progeny, and none of the Washington cases involving undue influence suggests that a surviving spouse must explain how a married couple spent their funds

over the course of a marriage – particularly over a 10-year span of marriage.

Moreover, these transfers – *none* of which the court found were the product of undue influence – are irrelevant to whether, at the time of the will signing in January 2006, Mary “exercised influence tantamount to *force or fear* which destroy[ed] [Jim’s] free agency and constrain[ed] him to do what [was] against his will.” *Lint*, 135 Wn.2d at 535 (emphasis added). The question is whether this influence occurred, “*at the time of the testamentary act*, which interfered with the free will of the testator and prevented the exercise of judgment and choice.” *Dean*, 194 Wash. at 671 (emphasis added).

The trial court relied on financial transactions – most of which were approved by Paul Hennes (Jim’s long-time trust officer at Wells Fargo) – to justify a presumption that Mary exercised undue influence over Jim in January 2006 during the will-signing for which she was not present. Notably, the trial court did not identify which transactions it found so egregious, how close in time they were to the will-signing, or even whether they were before or after the will-signing.

The trial court thus erred by creating a new factor and relying on ten years of a married couple’s financial transactions as creating a presumption of undue influence during the will-signing in January 2006.

In sum, the evidence showed that Jim married Mary willingly (and perhaps in part because he knew he would need someone to care for him); that she was devoted to him, and that she did in fact honor him in sickness, and care for him, for the rest of his ten years on earth; that after eight of these years he left his entire probate estate to her as husbands often do; that Jim's usual lawyer discussed the changes with him on the phone, prepared the new will, and went over the changes with Jim outside of Mary's presence; that Mr. Kane believed that Jim was competent and acting without duress; and that Jim spoke to Mr. Kane and executed the will outside of Mary's presence. Against all of this evidence, all the trial court could find was that over the course of the marriage there were transfers of funds that the court viewed as not having been satisfactorily explained. To conclude on these facts that there arose a presumption that Jim executed the will under influence tantamount to *force or fear* which destroyed his free agency, was error.

C. The Trial Court Erred in Finding that Respondents Failed to Rebut the Presumption of Undue Influence.

Even if petitioners had presented sufficient evidence to create a presumption that Mary exercised "influence tantamount to force or fear" that "destroy[ed]" Jim's "free agency," *Lint*, 135 Wn.2d at 535, the presumption could not carry the day – rather, it simply would shift to

respondents the obligation “to come forward with evidence that is at least sufficient to balance the scales and restore the equilibrium of evidence touching the validity of the will.” *Id.* at 536 (quotations omitted).

The trial court concluded that “Mary Haviland has not produced credible evidence . . . sufficient to ‘at least to balance the scales and restore the equilibrium of evidence touching the validity of the will.’” CL 10 (CP 756). In fact, respondents presented abundant evidence – including testimony from legal and medical professionals and numerous disinterested witnesses who all knew Jim – to “restore the equilibrium.” As in *Estate of Riley*, 78 Wn.2d 623, 479 P.2d 1 (1970), in which the Supreme Court reversed a finding of undue influence, here “practically all the witnesses who were well acquainted with [Jim] and saw [him] during the critical period involved in this case [January 2006] testified in substance that while [he had physical limitations], [he] was mentally alert.” *Id.* at 661. And there was no evidence that Jim “was told by anyone what provision or provisions [his] will should contain.” *Id.* at 662.

All the professionals who worked with and provided service to Jim (i.e., Mr. Kane, Mr. Glase, Dr. Edward Weber, Dr. Martin, and Mr. Hennes) testified to the soundness of Jim’s mind and the absence of any undue influence by Mary. These were not just professionals in the technical sense of the terms, but real *professionals* – experienced,

credentialed, and practicing at the tops of their professions – working for well-established law firms, financial institutions, and medical practices. Jim selected the highest caliber professionals to be his lawyers, his doctors, and his trust officers. Mary had nothing to do with the selection of any of these professionals. Their testimony plainly rebutted any presumption of undue influence.

Mr. Kane had represented Jim for more than 20 years. He prepared all four wills and the Living Trust executed during Jim and Mary's marriage. VRP 134, 277-97. Mary did not take Jim to a new attorney to accomplish a radical change in the testator's estate plan. Mr. Kane discussed the changes to the 2006 Will with Jim by telephone one-by-one, and Jim approved each one. VRP 296. They discussed the changes again at his office before Jim executed the will. VRP 1700. Mr. Kane testified that Jim was of sound mind when he executed the Will and understood and intended the changes he was making to his estate plan:

[Jim] seemed to understand exactly ... what I was talking about, ... that I wanted to discuss the changes to his will to make sure they were in accordance with his wishes, that he understood what they were, what the effect of the changes would be. He appeared to hear me well, to speak well in response to my questions. ... And – when I finished the conversation, I had no doubt in my mind but that these were changes he wanted to make to his estate planning.

VRP 172-73 (emphasis added).

Mr. Kane discussed the 2006 Will with Jim by telephone and in his office outside of Mary's presence. Jim executed the will in a K&L Gates conference room outside of Mary's presence. VRP 184, 248, 1703. *See In re Mitchell's Estate*, 41 Wn.2d 326, 353, 249 P.2d 385 (1952) (no undue influence where beneficiary "not present at the time the will was executed").

Mr. Glase, a senior K&L Gates estate planning partner who witnessed the will signing, testified that Jim and Mr. Kane discussed the changes to the 2006 Will, that Jim understood those changes, and that Jim executed the 2006 Will freely and voluntarily. Mr. Glase testified:

Kane initially asked [Jim] a few questions about some changes that had been made to the will from the prior draft and they discussed those. And *he ... was perfectly knowledgeable of exactly what those changes were and agreed that, yes, those were changes that he had desired.*

VRP 1700 (emphasis added). Mr. Glase signed an affidavit stating that he believed Jim "appeared to be of sound and disposing mind and not acting under duress, menace, fraud, undue influence or misrepresentation," Ex. 1, and he reaffirmed at trial that he did not see any evidence of those conditions in the will execution process. VRP 1705-06.³

³ Sandy Rockett, Kane's secretary, also witnessed the 2006 Will. Like Mr. Glase, she noticed nothing unusual about Jim, and testified that he did not need assistance communicating and had no difficulty hearing. VRP 184.

For several years prior to 2002, Jim's regular physician was Dr. Edward Weber. Dr. Weber never diagnosed Jim with any cognitive impairment. VRP 1279-1300; Ex. 261. Dr. Weber saw Jim a handful of times after 2002, and spoke with him at a medical conference in November 2005, two months before the execution of the will. VRP 1301-08. During the many times he saw Jim between 1992 and November 2005, Dr. Weber never thought he was mentally impaired. *Id.* at 1307.

In 2002, when Dr. Weber retired, he referred Jim to Dr. Martin. Dr. Martin saw Jim at least five times between 2002 and 2006. Only three days before the execution of the 2006 Will, Dr. Martin examined Jim. He observed no serious health issues and noted nothing negative about Jim's cognitive functioning. Dr. Martin's notes of that visit state: "He has no complaints. He is feeling well. His wife reports his mentation is good. His alertness is good." Ex. 261 (at MJM 00004). Dr. Martin explained that saying "[h]is alertness is good," was "positive He's alert, he's appropriate, he's interactive with the conversation. ... [It signifies] that I felt his cognitive functioning was good." CP 201-334 (Martin Dep. pp. 35-36).

Mr. Hennes, a trust officer at Wells Fargo, had been providing trust and financial services to Jim since 1985. VRP 733. Mr. Hennes and Jim had numerous telephone conversations over the years – generally on a

monthly basis. VRP 746. These calls continued at least up through 2006, and typically involved transferring money or taking direction from Jim in connection with the sale of an asset. VRP 747. Most of the time Jim initiated these calls. At times Mr. Hennes spoke to Mary, but would always confirm with Jim. VRP 778. Mr. Hennes executed numerous financial transactions for Jim and his trusts both before and after Jim signed the 2006 Will. In each case, Mr. Hennes testified that Jim was competent to make those financial decisions and that Mr. Hennes never thought they were the product of undue influence. VRP 749-53. In performing his duties as a trust officer, Mr. Hennes was mindful of the mental capacity of the testator and whether that person can become vulnerable to coercion or undue influence of third parties. VRP 736-37. Mr. Hennes met with Jim face-to-face generally twice a year. VRP 738. They discussed investments, capital gains issues, and Jim's desire to make charitable gifts of appreciated stock. VRP 743. They specifically discussed the gift that Jim was making to the church located in Kitsap County, a transfer that Jim "directed." VRP 744. During their face to face meetings, Mr. Hennes never thought Jim "was slipping cognitively" and never saw any signs that Jim was being influenced by other people. VRP 746. During their last meeting, Mr. Hennes thought that for his age, Jim

had a “very good knowledge of his – what his assets were and what he wanted to do with them and so forth.” VRP 767.

Other disinterested witnesses, some of them physicians themselves, offered powerful testimony of Jim’s mental acuity and his love for and closeness to his wife, Mary. Dr. William Spence had known Jim since the early 1980s, when they began singing together in the Emmanuel choir. VRP 1445. When Jim stopped driving, Dr. Spence would often drive him to medical society meetings and other events, occurring into the 2000s. VRP 1446-47. He spoke to Jim at his 90th and 95th birthday parties and did not discern any confusion on Jim’s part. VRP 1451-54. When Dr. Spence saw Jim on other occasions in 2006 and 2007 – all after the will signing – “his mind was always sharp.” VRP 1451. And his observation of the marriage was “[a]lways very favorable – a very strong love between the two of them.” VRP 1460.

Dr. Christopher Blagg had known Jim since 1971, when Dr. Blagg became executive director of the Northwest Kidney Center. VRP 847-48. Dr. Blagg saw and spoke with Jim in May and June 2007 at Northwest Kidney Center events, and at a party in the summer of 2006. Jim was not mentally impaired or confused. Jim even “made little joking comments about people” they both knew. VRP 849-55. Dr. Blagg visited Jim and Mary in their Mercer Island home numerous times, including in spring

VRP 1747. Regarding their marriage: “They seemed very loving and he was definitely proud of her ... and all that she achieved.” VRP 1748-49.

Tom Conway was a longtime friend of Jim’s from Emmanuel, dating back to the late 1960s or early 1970s. VRP 1481-82. They sang in the choir together. VRP 1483. Mr. Conway attended the 95th birthday party in 2006, spoke with Jim, and did not think that he was mentally impaired nor confused. VRP 1486-87. He also testified that Jim and Mary appeared happy together. VRP 1488.

Terry Ketchum is a retired state patrol officer and the choir master at Emmanuel. He saw Jim at choir practice and Sunday services on a regular basis from 2001 through early 2006. He testified that while Jim “was physically declining, ... [he] was mentally very active.” VRP 397. “He was alert and always aware.” VRP 398. Mary and Jim had “a wonderful, loving relationship. He doted on her and she watched out for him very, very carefully.” VRP 398-99. And, he “never saw anyone force [Jim] to do anything. He was very strong willed.” *Id.*

Richard Beuthel, whom the petitioners called as a witness, sang next to Jim for many years in the base section of the Emmanuel choir. He attested to Jim’s physical decline, but saw virtually no diminution in his mental abilities, clear up to the time that Jim moved to Bremerton and left the choir in April 2006. Mr. Beuthel testified that mentally “he [Jim] was

always still very sharp. He understood everything.” VRP 623.

Mr. Beuthel also performed handyman services at the Mercer Island home, at Mary’s request, for example installing a wheelchair ramp. VRP 614-15, 629-30. He attested to the strength of Mary and Jim’s relationship, observing that she was extremely caring for Jim, and that Jim was devoted to her. VRP 610-30.

Still more evidence belied the presence of undue influence. The circumstances of the execution of the 2006 Will are perhaps most telling. Mr. Kane, Jim’s personal attorney, prepared the new will and spoke to Jim about it outside of Mary’s presence, and Jim signed it outside of Mary’s presence, before disinterested witnesses. He signed the 2006 Will not on his deathbed, but some 22 months before he died.

The change in the 2006 Will was perfectly consistent with Jim’s desire, first expressed 10 years earlier, to provide substantial benefit to Mary. His estate plan was natural and rational. Petitioners, his children by his first marriage, are in their 50s and 60s. Only one has children. Martha Clauser had moved to Nevada in 2002. VRP 925. Elizabeth Haviland had moved to Wyoming in 2003. VRP 95. Jim was not particularly close to James Haviland, his oldest child, who did not join his siblings in the will contest. VRP 387. Mary, by contrast, was with Jim daily, cared for him constantly, and was younger than his children.

Moreover, Jim grew close to Mary's four children, and to Mary's other family members. Even after Mary's children left home to attend college and started families of their own, they continued to live nearby and remained a large part of Jim's life. VRP 1153-79; VRP 1203-10; VRP 1662-73.

Jim in any event did not ignore his children. In the 2006 Will he gave his Shaw Island property to Mary, but requested her to permit his children to use it, and gave them a right of first refusal in the event of sale. Ex. 1. They were the lifetime income beneficiaries of the Credit Shelter Trust created under Jim and Marion's 1990 Living Trust after Marion died. Ex. 22 (Article X – decedent's share). The Credit Shelter Trust had grown to \$2.5 million by the time of Jim's death. Ex. 538; VRP 757. Jim also gave his children the family's Canim Lake vacation property in British Columbia, VRP 1653-55, and cash gifts, VRP 94. They received personal property and family heirlooms over the course of their father's life, including in the last two years of Jim's life. Ex. 10; VRP 1211-21. Jim sold his Mercer Island home to his son Donald in 1989 for \$260,000, and then leased it back for 17 years, until 2006. After Jim moved out, Donald sold the property for \$2.5 million. Ex. 533; VRP 1658, 1640.

Mary did not isolate Jim, as one would expect if she were attempting to control him against his will. She organized birthday parties

at the Seattle Yacht Club for his 90th and 95th birthdays (the latter in 2006). Each was attended by over 100 guests. Jim's children and spouses were invited and attended. VRP 1787, 1801-08. Jim and Mary attended church together weekly – at Emmanuel Church on Mercer Island or Bible Baptist Church in Poulsbo. Jim continued to sing in the Emmanuel choir on a weekly basis. VRP 395-97. He actively participated in business affairs of the both churches over the relevant period. VRP 399, 1360-61, 1502-04. He continued to attend professional and social events: meetings of the Historical Society, VRP 1822; meetings of the “Diet” (a social club); meetings of Northwest Kidney Center board of directors; and assorted medical conferences. VRP 1305, 1449.

And while the trial court found that “clear, cogent, and convincing” evidence established that Jim had “advanced dementia as of November 2007, shortly before he died” (FF 125 (CP 751); *accord* FF 127, FF 128 (CP 752)), that finding was unsupported by substantial evidence. The *only* evidence to support the finding was a notation on Jim's medical records when he visited the emergency room for dehydration shortly before his death. Ex. 259. The record did not disclose what basis if any there was for the notation, and there was no evidence that anyone had examined Jim to assess his mental condition. The

unsupported notation falls short of showing that it was “highly probable,” that Jim had “advanced dementia” in November 2007. VRP 1122.

Finally, although respondents had no duty to explain how money was transferred or spent during the ten-year marriage, Mary presented substantial evidence not only accounting for the expenditures, but also showing that the transfers did not support a presumption that the 2006 Will was the product of “influence tantamount to force or fear” by her.

Transactions Performed Through Attorney Alan Kane. Jim’s decisions to make gifts to Mary, to set up the Living Trust with Mary as beneficiary, and to revoke the Trust B (Exs. 11-13, 52-58) were all made in consultation with Mr. Kane, who testified to Jim’s competence to take such actions of his own free will.

Transactions Performed Through Paul Hennes. Mr. Hennes executed the bulk of the monetary transfers discussed at trial. VRP 672-73. Many exhibits reflect these transfers. In each case, the transfers were signed solely by Jim (when he was the sole trustee of the Living Trust) or by Jim and Mary (after they became co-trustees of that trust).⁴ In particular, Hennes processed financial transfers around the time of the execution of the 2006 Will in January 2006 – on January 5, 2006 (Ex. 121); January 17, 2006 (Ex. 125); April 20, 2006 (Ex. 127); June 27, 2006

⁴ See Exs. 68-71, 73-74, 76, 80-81, 83-88, 91, 93, 96-97, 99-103, 105, 108-112, 115, 118, 121, 125, 127-129, 133-135.

(Ex. 128); September 18, 2006 (Ex. 129); January 3, 2007 (Ex. 133); April 3, 2007 (Ex. 134); and June 13, 2007 (Ex. 135). In every case, Mr. Hennes testified that at the time he executed these transactions, all of which were signed for by Jim, he thought Jim was mentally competent and *not* the victim of undue influence. VRP 749-53.

Gifts to Mary's Children. Jim and Mary paid for the college educations for Mary's four children and, beginning in 2001, also gave each child \$10,000 a year in cash gifts – up to the gift tax exclusion amount, a common estate planning practice. Steven Burden (VRP 1175-77), Sarah Musson (VRP 1214-16), and Joshua Cook (VRP 1669-71), each testified how they discussed these annual gifts and educational expenditures with Jim, that Jim was a believer in education, and that he was fully aware of how the gifts were being used. *Id.*

Gifts to Bible Baptist Church in Poulsbo. Jim began attending the Poulsbo church with Mary in 1997, and they attended often for the next two years. VRP 1354. Even after they moved to Mercer Island, they still attended Bible Baptist church about once a month. VRP 1355. After returning to Bremerton in 2006, Jim and Mary attended the church once or twice a week. VRP 1363. Jim had numerous discussions with church members about the business of the church, including contributing approximately \$200,000 for construction of a church parsonage. VRP

1360-61, 1502-04. All the testimony was that Jim was interested in the project, attended meetings to discuss the project, and knowingly and willingly made the contributions to the project. *Id.*

Charitable Donations. Jim and Mary's tax returns show \$638,472 in charitable contributions during their marriage. Exs. 161-71.

Taxes. Jim and Mary paid \$839,309 in income taxes during their marriage, and another \$103,039 in real estate and sales taxes. *Id.*

Remodeling Expenses for Bremerton House. A significant portion of the couple's expenditures went to remodel the their Bremerton home after they moved there in 2006. These expenditures were incurred to meet Jim's needs as his physical mobility decreased. VRP 1873; Ex. 505A.

It is significant that virtually all of the transfers after 2002 were transfers of funds that originally came from the Living Trust, which had long been designated to be Mary's upon Jim's death. *See, e.g.*, Exs. 96, 99, 100, 101, 102, 103, 105, 108. Many of these transfers were to the couple's joint checking account, Wells Fargo Acct. No. xx1814. Jim and Mary had held the xx1814 account as joint tenants with right of survivorship since at least 2002. Ex. 190; *see also* VRP 1896-97, 1914-23 (other assets had long been held in JTWROS form). The transfers that the petitioners contended showed undue influence were thus from accounts

that Jim had already, long ago, designated to be Mary's at his death, passing as nonprobate assets, outside of the probate estate.

As the above evidence shows, the trial court's finding that "Mary Haviland offered no credible evidence to explain the consumption and transfer of such large sums of money," and that she had a "steady, systematic, and persistent pattern of depleting [Jim's] assets" were unsupported by substantial evidence. FF 128 (CP 752); *accord* FF 129 (CP 752) ("unexplained *inter vivos* transfer[s]").⁵ Even if petitioners' evidence had been sufficient to justify a presumption of undue influence, respondents presented abundant evidence to "balance the scales and restore the equilibrium of evidence touching the validity of the will." *Lint*, 135 Wn.2d at 536. In holding to the contrary, the trial court erred as a matter of law.

D. The Court Erred in Finding that Petitioners Met Their Burden of Proving Undue Influence by Clear, Cogent, and Convincing Evidence.

As discussed above, the undue influence test set forth in *Dean v. Jordan* cannot be mechanically applied to a marital relationship, and the trial court erred in doing so. Even under that test, however, the court here erred in concluding that the petitioners' met their burden. A comparison

⁵ Finding of Fact 135 (CP 753), in which the Court found that transfers left Jim's lifetime estate in a position of having negative value, is unsupported by substantial evidence because it ignores the fact that the Living Trust, a *nonprobate* asset not includible in any estate accounting, held about a million dollars when Jim died. VRP 1895-96.

evidence that Jim was deeply attached to Mary and appreciative of the love and support she gave him over the last 10 years of his life.

In *Dean*, the testator “though old and feeble was nevertheless capable of understanding and did understand what she was doing.” *Id.*⁶ Here, testimony by Mr. Kane and Mr. Glase showed that Jim understood and voluntarily executed the 2006 Will. The objective medical evidence showed no diagnosis of cognitive impairment any time before January 2006. Abundant evidence by other witnesses attested to Jim’s ability to form his own opinion and his testamentary capacity in and around January 2006. Indeed, the trial court here rejected petitioners’ claim that the will should be invalidated on grounds of lack of testamentary capacity. CL 5 (CP 755).

In *Dean*, the court found that “[t]he will was perfectly natural. The beneficiary was closely related to the testatrix by ties of blood.” 194 Wash. at 673. Here, the relationship between Jim and Mary – as husband and wife – was even closer. Spouses commonly leave their entire estates to their spouses. In *Dean*, the niece “was the nearest in point of location to the testatrix, and there had been a close companionship between them for over 15 years.” *Id.* Here, Mary was Jim’s closest companion for the

⁶ On this point the *Dean* court relied in part on several letters, written by the testator, which the court found demonstrated a “reasonable” clearness of intellect. *Id.* at 666.

last ten years of his life, although he continued to see his many friends and professional acquaintances. In *Dean*, the niece “faithfully and affectionately ministered to her aunt in her declining years.” *Id.* Here, the overwhelming evidence was that Jim and Mary were devoted to each other, and that she faithfully honored her marital commitment.

The Supreme Court in *Dean* found that each of these factors **rebutted** the presumption of undue influence and held that the will was **not** product of undue influence. In every way that the presumption of undue influence was rebutted in *Dean*, it was (if it ever arose) rebutted in this case as well. It was in fact rebutted in this case by even more evidence than in *Dean*. Here, the attorney who drew the 2006 Will had drawn all of Jim’s wills and other estate planning documents for 25 years. And that attorney personally spoke to Jim to confirm his intentions. Here, Jim executed the will in the presence of his attorney and two other disinterested witness. In *Dean*, no lawyer was present at the execution. The niece appears to have organized and was present at the execution of the will. The will was witnessed by two of the niece’s neighbors.

In holding that petitioners met their burden to prove undue influence by clear, cogent, and convincing evidence, the trial court erred as a matter of law.

E. The Court Should Reverse the Award of Attorneys' Fees and Costs to Petitioners, and Remand to the Trial Court for a Fee Award to Respondents.

If this Court reverses the trial court's decision, the respondents will be the prevailing parties. In that case, this Court should then reverse the trial court's award of \$436,781 in fees and costs to petitioners. Moreover, respondents will be entitled to an award of attorneys' fees and costs incurred in the trial court, under RCW 11.24.050 and RCW 11.96A.150. The Court should remand to the trial court for a determination of respondents' reasonable fees and costs.

F. Respondents Should Receive Fees on Appeal.

If this Court reverses the trial court's judgment, it should award respondents their attorneys' fees on appeal under RCW 11.24.050 and RCW 11.96A.150 because they will be the prevailing party.

V. CONCLUSION

For the foregoing reasons, this Court should reverse the trial court and enter judgment in favor of respondents, upholding the validity of Jim's 2006 Will. The Court should also reverse the award of attorneys' fees and costs in favor of petitioners, award fees to respondents on appeal, and remand the action for a determination of the amount of fees and costs to be awarded to respondents for trial pursuant to RCW 11.24.050 and RCW 11.96A.150.

RESPECTFULLY SUBMITTED this 17th day of March, 2010.

By 

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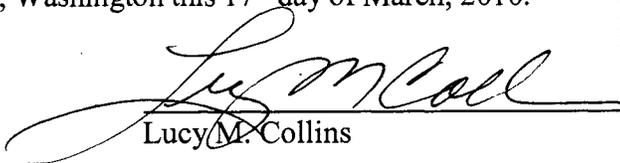
PROOF OF SERVICE

I, Lucy M. Collins, the undersigned, hereby certify and declare under penalty of perjury under the laws of the State of Washington that the following statements are true and correct:

On the 17th day of March, 2010, I caused to be served a copy of the document to which this is attached, titled BRIEF OF APPELLANTS, by legal messenger to the following:

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Executed at Seattle, Washington this 17th day of March, 2010.


Lucy M. Collins

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