

64401-7

64401-7

NO. 64401-7-1

Court of Appeals, Division I  
State of Washington

Estate of Mary Wicks,  
Plaintiff / Respondent

v.

Edward R. Howard  
Defendant / Appellant

Appellant's reply brief

~~X~~  
FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
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## I. Identity of Appellant

I, Edward Howard, am the last born son of Mary Wicks, and have always had a close, loving relationship with my mother. My sons, Samuel and Alexander are the only grandchildren whose births were witnessed by my mother. They were very, very close to their grandmother and experienced a great loss when she passed away.

Mary's husband died on September 22, 2005. She was very lonely and invited the boys and I to move in with her.

## II Reply to Respondents brief.

I understand that even though I feel we were very poorly represented, the evidence submitted in my opening brief will not be accepted. I will not submit new evidence, but rely on evidence already accepted by the court. To do my duty, to the best of my ability, which is to uphold my mother's last wishes, I must show that her will is sincere and her mental capability to make such a will was sound.

### III, Will - Validity - Testamentary Capacity.

To begin, I have read and reviewed evidence submitted by the respondent, and nowhere is it stated that my mother was legally incapable of making her will. Her ill-health was well known, but as many of reports submitted from Skagit Valley Hospital, Mary knew who she was talking to, able to take information and direction from the attendants and recognized all family members. Kelli D. Anderson, a Notary Public for the state of Washington, interviewed Mary on

October 4, 2007 and determined that Mary was of sound mind to do a durable power of Attorney for Healthcare and did notarize the document. October 4, 2007 is the day that Mary signed her will.

The respondent states that Mary was senile and incapable of making such decisions on this date. However, the respondent did try as late as October 8, 2007, to have Mary change her mind about her previous decisions. Mary elected not to change this paperwork even though hospital staff explained it was her right to do so.

I believe that my mother's intentions were clearly understood by my sisters, and their anger

and greed has brought us to this situation we now face. My sister presented me with a four-page letter, titled "A will for my things". She found this letter under my mothers mattress, in her home in Arlington. The handwriting is smooth and her wishes are made clear several times in its contents. It can only be presumed that my mother wrote and signed this letter some time before she entered the hospital. I believe this letter validates my mother's will signed on October 4, 2007. I submit to you my mother's letter in her handwriting and a typed copy for ease of reading.

My Well for my things

My Home is to  
go to Sam & Brother  
& Ed & you are to take  
take of my cat & Dog  
as long as they live  
I Love all all you so  
much But you didn't want  
me around to talk to because  
of things you did want  
me to know about it when  
Don Dad in Love & Love &  
my House is to go to  
Sam So they have a

to live & go to school.  
I saved all of you  
But you didn't care.  
About me to help me when  
your Dad Seizes a note  
we could have help yet  
But instead you turned on  
each other. There so  
after I need your help But  
no one cared I help no  
one wanted help I didn't  
need money I need some  
one to care me + you.  
My false gas go  
I am + Brother Ed

6

It up to Ed what he  
 wants to do he can  
 along for long & the boys  
 & Ed where they only come  
 to help sled of you who doing  
 to others just not love to  
 help each other & leave the  
 house & cases to the  
 Sam & Brother & Dad Ed.  
 Jane Mother  
 Mary Wicks  
 mother  
 Mary

5c

4

Servant ann + Cynthia  
to have dolls

- the only ones who care about  
me who's Ed + children  
I now wish now if  
the house is the only  
thing I have now he  
need none for Bay  
to self. I'm sorry  
for so many things but  
all I now see I've done all  
of you now much  
more

## My Will for my thing (things?)

My home is to go to Sam and Brother and Ed and you are to take take (care?) of my cat and dogs as long as they live. I love all all you so much but you didn't want me aroung (around?) to talk to because of drugs. you did (not?) want me to now (know?) about it when Don died I'm lose (lost?) and lone (alone?) and my house is to go to Sam so they have a (place?) to live and go to school. I loved all of you but you didn't care about me to help me when your Dad left us a none (alone?). We could have help (illegible) but instead you turned on each other. Then so often after I need your help but no one called (to?) help no one worried(wanted?) to help I didn't need money I need some one to call (care?) me and you. My house cars go Sam and Brother and Ed. It up to Ed what he wants to do. I've been along (alone?) for long and the boys and Ed were the only ones to help instead of you working together and (feud?) not love and help each other. I leave the house and cars to the Sam and Brother and Dad Ed.

Love mother Mary Wicks Mother Mary

I want Ann and Cynthia to have dolls.

The only one who care about me whos (was?) Ed and children. I now (know?) right now is the house is the only thing I have now he need home for boys and self. I'm sorry for so many thing but all I now (know?) I've loved all of you now much. Mom.

#### IV Conclusion.

Your Honors: My mother was a kind and loving person. Her will is not unusual or out of character. She did not love her daughters less she merely only had one home to give and since her daughters had homes of their own, she left her ~~home~~ home to my sons and I.

I believe she was happy and enjoyed our companionship and help during her last years. She, I'm sure, would be very unhappy to know of the hardship her grandson's and I have endured since her passing.

It is because of the letter, found by my sister, that I continue to pursue my mom's wishes. I believe that this is what she would want me to do, since she is not present to speak to her daughter's.

I respectfully request your consideration of this matter on behalf of my mother, myself and my sons,

- a. The testimony was unsubstantiated. no professional witnesses just heresay. Our attorney did nothing to defend or object.

- b. Dr. Fish's records show a woman alert, awake, who knew the people and conditions around her.
- c. Dr. ZyLstra gave no specification as to the extent of her problems, except she was continually stable
- d. Mary was in hospital and had no undue pressure until October 8, 2007. We know she remembered Oct. 4, 2007 and didn't want to change anything, we presume that also meant will, and that the social worker felt she was competent to do so, same as the notary public on Oct. 4, 2007.

- e. Our lawyer did nothing to object or offer defence or offence to the testimonys given, substantiated or not. As to my mother's condition, we do have substantiated witnesses: nurses, social worker, and notary as can be seen by signed statements.
- f. Mother's "will for her things" was written before her illness and was backed up by second will and activities on October 8, 2007 substantiate this. As stated mom was not in a position to be influenced during time period. My man was always boss in her home.

- g. We are asking that her will be done. We are sorry we couldn't afford Lawyer and we obviously were not represented properly. We were never privy to Dr.'s records by Mr. Hall.
- h. We are saying that the defence was inadequate, that we were not properly represented. We believe the judge's decision was influenced by lack of defence of offence. That the evidence didn't qualify according to rules of evidence. My mother was competent by records.

i. I am including these exhibits for your consideration.

6 of 32 DOCUMENTS

**In the Matter of the Estate of M. Josephine Reilly, Deceased. Frances  
Reilly Estill et al., Respondents and Cross-appellants, v. Sisters of  
Charity of the House of Providence et al., Appellants**

\* Reported in 479 P.2d 1.

No. 39235

**SUPREME COURT OF WASHINGTON**

78 Wn.2d 623; 479 P.2d 1; 1970 Wash. LEXIS 339; 48 A.L.R.3d 902

**December 31, 1970**

**SUBSEQUENT HISTORY:** [\*\*\*1] Petition for Rehearing Denied July 9, 1971.

**SUMMARY:**

Cross-appeals from a judgment of the Superior Court for King County, No. 176652, Frank D. James, J., entered July 25, 1966. *Affirmed in part; reversed in part.*

Probate proceedings. Appeals taken from a judgment substantially in favor of contestants of a will.

**HEADNOTES**

WASHINGTON OFFICIAL REPORTS  
HEADNOTES

**[1] Wills -- Validity -- Evidence -- Burden of Proof** Contestants of a will who allege lack of testamentary capacity or undue influence, must establish these allegations by clear, cogent, and convincing evidence.

**[2] Appeal and Error -- Findings of Fact -- Review -- Higher Degree of Proof -- Effect**

Evidence might not constitute "substantial evidence" so as to support a factual determination on an issue which must be proved by clear, cogent, and convincing evidence, even though such evidence would support a finding when the degree of proof required was only a preponderance.

**X [3] Wills -- Validity -- Testamentary Capacity -- What Constitutes** In order to validly execute a will, a testator must have sufficient mind and memory to intelligently understand the nature of the business in which he is engaged, to comprehend generally the nature and extent of the property which constitutes his estate and which he intends to dispose [\*\*\*2] of, and to recollect the objects of his bounty. Testamentary capacity of a testator is presumed when a will, rational on its face, is executed in legal form.

**X [4] Wills -- Validity -- Undue Influence -- Factors** In order for undue influence to vitiate a will, it must interfere with the free will of the testator and prevent the exercise of judgment and choice at the time of execution. The presence of certain factors may raise a suspicion of

undue influence, and undue influence can be shown by circumstantial evidence, but there must be *proof* beyond mere suspicion.

**[5] Wills -- Validity -- Undue Influence -- Unnatural Will -- Exclusion of Kin** 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. Whether or not a will is natural is to be determined on the facts of each case. A will can be natural and still exclude one's kin.

**[6] Wills -- Evidence -- Opinion Evidence -- Expert Testimony -- Basis for Opinion of Competency** Expert medical testimony as to a testator's mental condition bearing on competency to make a will is extremely weak, where the expert [\*\*\*3] had no opportunity to examine the testator near the time of making the will and based his testimony merely on hypothetical questions.

**[7] Appeal and Error -- Findings of Fact -- Review** An appellate court may not substitute its factual findings for those of the trial court.

**[8] Appeal and Error -- Findings of Fact -- Review -- When Based on Deposition** An appellate court may disregard a trial court's findings relating to deposition testimony and enter its own findings, where the witness involved did not personally appear in the trial court and offered his testimony only by such deposition.

**[9] Wills -- Validity -- Undue Influence -- Solicitation** Advice, argument, persuasion, solicitation, suggestion, or entreaty is not, by itself, undue influence upon a testator; the questioned activity must be so importunate, persistent, or coercive as to make the will speak the intent and desire of one other than the testator.

**[10] Executors and Administrators -- Compensation -- Defending Will Contest** An executor is to take all legitimate steps to uphold a testamentary instrument; if he does so in good faith, he is entitled to an allowance out [\*\*\*4] of the estate for his costs and reasonable attorney fees necessarily incurred by him, regardless of whether or not he is successful in his defense against the will contest.

**COUNSEL:** *Bogle, Gates, Dobrin, Wakefield & Long*, by *Thomas L. Morrow* and *William M. Gingery, Wettrick, Toulouse, Lirhus & Hove*, by *George J. Toulouse, Jr.*, and *Orly J. Sorrel* (of *Nicolai, Montgomery & Sorrel*), for appellants.

*Ferguson & Burdell* (*W. Wesselhoeft*, of counsel) and *John R. Stair*, for respondents and cross-appellants.

**JUDGES:** En Banc. Donworth, J. + Rosellini, Hale, Neill, and Stafford, JJ., concur. Finley, J. (dissenting). Hunter, C. J., and Hamilton, J., concur with Finley, J. Sharp, J. (dissenting).

+ Justice Donworth is serving as a justice pro tempore of the Supreme Court pursuant to Const. art. 4, § 2(a) (amendment 38).

**OPINION BY: DONWORTH**

**OPINION**

[\*624] [\*\*2] This is an appeal from a judgment entered July 25, 1966, by the superior court in a will contest in which the purported will of Miss M. Josephine Reilly executed [\*\*3] May 8, 1964, was declared [\*\*\*5] to be invalid because of lack of testamentary capacity and also undue influence.

In order to decide the important issues presented by this appeal, it is necessary to consider in some detail the background

Within four months following probate of a will, an interested person may petition the court and claim the will was procured by fraud. If it can be shown that the will was induced by the fraudulent representation of a beneficiary, the will may be set aside. *Lint v. Murphy*, 135 Wn.2d 518, 957 P.2d 755 (1998).

Fraud in execution of will is grounds for will contest. *In re Zimmerli's Estate*, 162 Wash. 243, 298 P. 326 (1931); *Bottger v. Bottger*, 14 Wn.2d 676, 129 P.2d 518 (1942); *In re Dand's Estate*, 41 Wn.2d 158, 247 P.2d 1016 (1952).

Fraud in validity of will at time it was executed and fraud affecting probate are grounds for contest. *Estate of Hoscheid v. Bartholet*, 78 Wash. 309, 139 P. 61 (1914); *Nielsen v. Schulte*, 198 Wash. 124, 87 P.2d 298 (1939).

#### -- GOOD FAITH.

The lack of success of a will contest does not indicate bad faith or lack of probable cause in making the challenge. *Potter v. Pacific Nat'l Bank*, 9 Wn. App. 413, 513 P.2d 76, review denied, 83 Wn.2d 1002 (1973).

#### -- GROUNDS.

Section only permits questions to be raised in will contest or probate proceedings relative to (1) testamentary capacity (2) undue influence (3) fraud (4) any cause effecting genuineness or legal sufficiency of will under attack. *Richardson v. Danson*, 42 Wn.2d 149, 253 P.2d 954 (1953).

#### X -- INSANE DELUSIONS.

To invalidate will on grounds that testator was laboring under insane delusions, the evidence must show that insane delusions materially affected dispositions made in will. *National Bank of Commerce v. Miracle*, 60 Wn.2d 691, 375 P.2d 148 (1962).

#### -- NEGLECTING RELATIVES.

Cutting off relatives in favor of charitable institutions may be basis for contest. *Bremer v. Old Nat'l Bank & Union Trust Co.*, 10 Wn.2d 258, 116 P.2d 526 (1941).

#### -- OBJECTIONS.

Interested party may object to admission to probate by raising issue that court lacks jurisdiction. *Gordon v. Seattle First Nat'l Bank*, 49 Wn.2d 728, 306 P.2d 739 (1957).

#### -- PARTICIPANTS.

One who acts on the advice of an attorney in contesting a will or a provision thereof is deemed to be acting in good faith and for probable cause only if all material facts have been fully and fairly presented to the attorney. *Potter v. Pacific Nat'l Bank*, 9 Wn. App. 413, 513 P.2d 76, review denied, 83 Wn.2d 1002 (1973).

The original petitioner for admission of a will for probate may not contest its rejection under the general will contest statute. *In re Estate of Rynning*, 1 Wn. App. 565, 462 P.2d 952 (1969), review denied, *In re Rynning*, 78 Wn.2d 992 (1970).

A person who had previously litigated the admissibility of a will as the original petitioner, and was thereby precluded from contesting the will's rejection under the will contest statute, could not relitigate the issue by bringing a will contest in a representative capacity where all rights and interests in the representative capacity were the same as in the individual capacity, and were fully liti-

gated and protected in the prior proceeding and involved in the decision. In re Estate of Rynning, 1 Wn. App. 565, 462 P.2d 952 (1969), review denied, In re Rynning, 78 Wn.2d 992 (1970).

This section may be invoked only by interested parties whose rights have not been determined and who appear for first time following determination of petition for probate. Miller v. Hall, 34 Wn.2d 830, 210 P.2d 406 (1949).

To contest will, one must have direct pecuniary interest. Lynch v. O'Brien, 13 Wn.2d 581, 126 P.2d 47 (1942); Romano v. Romano, 40 Wn.2d 796, 246 P.2d 501 (1952).

Executor named in will rejected in probate is not an interested person under this section. Lynch v. O'Brien, 13 Wn.2d 581, 126 P.2d 47 (1942); Romano v. Romano, 40 Wn.2d 796, 246 P.2d 501 (1952).

Executor has duty to take all legitimate steps to uphold contested will. In re Estate of Jolly, 3 Wn.2d 615, 101 P.2d 995 (1940); Redhead v. Lang, 28 Wn.2d 456, 183 P.2d 518 (1947).

Under this section, one who appears within six months after probate of will and contests its validity is a will contestant. In re Estate of Jolly, 3 Wn.2d 615, 101 P.2d 995 (1940).

Proponent of later will is contestant within meaning of this section. In re Estate of Jolly, 3 Wn.2d 615, 101 P.2d 995 (1940).

State seeking escheat may bring contest under this section. State ex rel. Pemberton v. Havens, 187 Wash. 183, 60 P.2d 19 (1936).

Right to contest will survives to heirs or personal representatives of testator's heirs. Drury v. Moulton, 70 Wash. 374, 126 P. 912 (1912); Ingersoll v. Gourley, 72 Wash. 462, 130 P. 743 (1913).

Widow who, without instituting will contest within prescribed time, makes settlement with her husband's executors as to will is estopped to question validity of will or probate. Rader v. Stubblefield, 43 Wash. 334, 86 P. 560 (1906).

Allegation that contestants believe they were legally adopted by testator does not show required interest. In re Renton's Estate, 10 Wash. 533, 39 P. 145 (1895).

#### -- PROCEDURE.

Although an individual timely filed her petition for a will contest, the petition was dismissed because the individual did not serve a citation as required by RCW 11.24.020 until two years after the petition was filed. In re Estate of Kordon, 157 Wn.2d 206, 137 P.3d 16 (2006).

Within six months after ex parte probate, any interested person may institute contest, whereupon all interested parties are required to be brought in. State ex rel. Pemberton v. Havens, 187 Wash. 183, 60 P.2d 19 (1936).

There shall be only one will contest under this section to avoid multiplicity of suits. State ex rel. Pemberton v. Havens, 187 Wash. 183, 60 P.2d 19 (1936).

#### -- SUBSEQUENT WILL.

The offer of a later will does not constitute a contest of a prior will within the meaning of the probate code. Day v. Maquire, 46 Wn.2d 292, 280 P.2d 686 (1955).

#### X -- UNDUE INFLUENCE.

Mere suspicion, even when accompanied by opportunity and motive, is insufficient to raise a substantial inference of undue influence. In re Estate of Smith, 68 Wn.2d 145, 411 P.2d 879 (1966), modified on other grounds, 68 Wn.2d 903, 416 P.2d 124 (1966).

Where counsel makes no objection to the introduction of a will, and the pleadings raise no issue as to the validity of the will, it is an abuse of discretion for the court to adjudicate the issue of undue

influence and foreclose the right to contest the validity of the will on that ground. *Schamber v. Borman*, 50 Wn.2d 791, 314 P.2d 617 (1957).

Nature of relationship between testator and persons participating in preparing the will, and beneficiary's receiving disproportionately large share, are evidence of undue influence. *Dean v. Jordan*, 194 Wash. 661, 79 P.2d 331 (1938).

Employment by favored beneficiary of attorney to draft will for his grandmother is not illegal, against public policy, nor does it raise inference of undue influence. *Schirmer v. Nethercutt*, 157 Wash. 172, 288 P. 265 (1930).

Undue influence was not established where there was no propinquity or contact. *Dahmen v. Missionary Sisters of Sacred Heart*, 151 Wash. 436, 276 P. 86 (1926); *Wingate v. Gulstine*, 154 Wash. 675, 282 P. 920 (1929).

X Will drafted by beneficiary is not void for undue influence, if it conforms to testator's desires. *Sellers v. Root*, 112 Wash. 379, 192 P. 887 (1920).

Wife privileged to solicit making of will in her favor. *Jasinto v. Hamblen*, 79 Wash. 590, 140 P. 677 (1914).

To vitiate will, influence must be shown which at time of testamentary act controlled testator's volition, deprived him of free will and prevented his exercise of judgment and choice. *Patterson v. McWhirk*, 68 Wash. 377, 123 P. 515 (1912); *Olson v. Lane*, 191 Wash. 257, 71 P.2d 47 (1937); *Dean v. Jordan*, 194 Wash. 661, 79 P.2d 331 (1938); *In re Estate of Schafer*, 8 Wn.2d 517, 113 P.2d 41 (1941); *Bottger v. Bottger*, 14 Wn.2d 676, 129 P.2d 518 (1942); *In re Estate of Martinson*, 29 Wn.2d 912, 190 P.2d 96 (1948).

Undue influence may consist of coercion, imposition, fraud, or influence impelling fear, desire for peace, or something testator could not restrain. *In re Tresidder's Estate*, 70 Wash. 70, 125 P. 1034 (1912).

Undue influence in execution of will need not be shown by direct evidence, but it is competent to show the relations of the parties, the surrounding circumstances, habits and inclinations of testatrix, and fact that provisions for son had been made in four or five wills previously executed. *In re Tresidder's Estate*, 70 Wash. 15, 125 P. 1034 (1912).

Influence exerted by means of advice, arguments, persuasions, solicitations, suggestions, or entreaties not generally undue influence unless so importunate, persistent, or coercive, or otherwise so operates as to subdue testator's will. *Patterson v. McWhirk*, 68 Wash. 377, 123 P. 515 (1912); *Smith v. Saint Sure*, 120 Wash. 189, 206 P. 947 (1922); *Eidinger v. Mamlock Zelinsky's Estate*, 130 Wash. 165, 227 P. 507 (1924); *Olson v. Lane*, 191 Wash. 257, 71 P.2d 47 (1937); *Bottger v. Bottger*, 14 Wn.2d 676, 129 P.2d 518 (1942); *In re Estate of Martinson*, 29 Wn.2d 912, 190 P.2d 96 (1948).

To vitiate will contestant must show undue influence, not just influence. *Converse v. Mix*, 63 Wash. 318, 115 P. 305 (1911); *Roe v. Duty*, 115 Wash. 313, 197 P. 47 (1921); *In re Seattle's Estate*, 138 Wash. 656, 244 P. 964 (1926); *Schoen v. Shields*, 163 Wash. 119, 300 P. 159 (1931).

#### -- VALIDITY OF WILL.

In will contest, court may not consider validity of dispositions made by will. *Richardson v. Danson*, 42 Wn.2d 149, 253 P.2d 954 (1953).

State's objection to executor's distribution of estate as unauthorized is not a will contest. *Wright v. State*, 35 Wn.2d 178, 211 P.2d 721 (1949).

In this section "validity," refers to genuineness or legal sufficiency of will, not its operative effect. *Frankfurt v. Elliott*, 22 Wn.2d 334, 156 P.2d 427 (1945).

Patient: WICKS, MARY L  
Account #: K0000357535 Unit #: NO00095620

Date: 10/08/07 Time: 0944 By: SAR SARAH A ROBERTS Care Prov Type: SS  
Recorded: 10/08/07 0951 SAR SARAH A ROBERTS SS  
Category: Social Services

MSW note

Personal call with Chris McCarthy (416-7406). Per Chris, family will have conflict over this issue, if DPOA is not in chart it does not exist. If it is in chart, then validity should be determined by pt. mental status at time of DPOA authorization.

MSW to f/u with pt.  
Sarah Roberts, MSW

-----  
Addendum: 10/08/07 at 1000 by SARAH A ROBERTS  
-----

CPS Chris McCarthy requests she be notified when pt. is d/c from hospital. Copy of DPOA naming son as DPOA as of 10/4 is now in chart. Per RN, pt is alert, oriented, eating better, and currently away for x-ray.  
Sarah Roberts, MSW

Note Type	Description	Date	Time	Add
No Link		10/08/07	0944	

Date: 10/08/07 Time: 1112 By: LAC LUCIA A CULLUP Care Prov Type: RN  
Recorded: 10/08/07 1114 LAC LUCIA A CULLUP RN  
Category: Nurse

PAIN/ NUTRITION/ ACTIVITY

PT C/O HIP PAIN VICODIN EFFECTIVE. ONLY TAKING 20% OF MEAL AND APPETITE REMAINS POOR. UP TO CHAIR WITH MAX ASSIST ONE PERSON TRANSFER. DOESNT BARE A LOT WT ON LEGS.

Note Type	Description	Date	Time	Add
No Link		10/08/07	1112	

Date: 10/08/07 Time: 1142 By: SAR SARAH A ROBERTS Care Prov Type: SS  
Recorded: 10/08/07 1151 SAR SARAH A ROBERTS SS  
Category: Social Services

MSW note - Re:DPOA

MSW met with pt. and dtrs Cyndy and Ann. Pt. appeared alert and responsive. MSW reviewed with pt that she had made DPOA with son last week, that this document was now in chart, and that this meant he would make healthcare decisions on her behalf if she was unable. Pt. expressed understanding and stated that she

Patient: WICKS, MARY, L  
Account #: K0000857535  
Unit #: N000095620

Date	Time	By	Care Prov	Type (Continued)
Occurred: 10/08/07	1142	SAR, SARAH A ROBERTS	SS	
Recorded: 10/08/07	1151	SAR, SARAH A ROBERTS	SS	

Category: Social Services

remembered this, and was in agreement with this for now. MSW reviewed with pt that she could change this at any time, that it was important that she chose a person, even non-family member who she felt could represent her wishes the best. Pt. stated she would give it some thought.

MSW offered support as needed to pt. and family members.

Sarah Roberts, MSW

Note Type	Description	Date	Time	Add
No Link		10/08/07	1142	

Date	Time	By	Care Prov	Type
Occurred: 10/08/07	1144	SMH, SHARON M HOOEY	CM	
Recorded: 10/08/07	1145	SMH, SHARON M HOOEY	CM	

Category: Social Services

Case Management:

Referral to Sara R., MSW re: need for new DPOA? She will f/u with patient and daughters today. SS following.

Note Type	Description	Date	Time	Add
No Link		10/08/07	1144	

Date	Time	By	Care Prov	Type
Occurred: 10/08/07	2245	CRP, CASSANDRA R PETERSEN	RN	
Recorded: 10/08/07	2248	CRP, CASSANDRA R PETERSEN	RN	

Category: Nurse

PAIN

c/o pain in heels/coccyx, repositioned to good effect. heel boots in place. intermittent periods of dyspnea, esp. w/movement and pt states "when my heart goes fast". resolves when movement stops.

Note Type	Description	Date	Time	Add
Long-term Goal	RC: Maintain Optimal Oxygenation	10/08/07	2245	

N 095620  
K 357535

# DURABLE POWER OF ATTORNEY FOR HEALTH CARE

## Notice to Person Executing This Document

This is an important legal document. Before executing this document you should know these facts:

- This document gives the person you designate as your Health Care Agent the power to make MOST health care decisions for you if you lose the capability to make informed health care decisions for yourself. This power is effective only when you lose the capacity to make informed health care decisions for yourself. As long as you have the capacity to make informed health care decisions for yourself, you retain the right to make all medical and other health care decisions.
- You may include specific limitations in this document on the authority of the Health Care Agent to make health care decisions for you.
- Subject to any specific limitations you include in this document, if you do lose the capacity to make an informed decision on a health care matter, the Health Care Agent *GENERALLY* will be authorized by this document to make health care decisions for you to the same extent as you could make those decisions yourself, if you had the capacity to do so. The authority of the Health Care Agent to make health care decisions for you *GENERALLY* will include the authority to give informed consent, to refuse to give informed consent, or to withdraw informed consent to any care, treatment, service, or procedure to maintain, diagnose, or treat a physical or mental condition. You can limit that right in this document if you choose.
- A Health Care Agent can only act under state law. "Mercy killing" is not allowed under Washington state law. A Health Care Agent will *NEVER* be allowed to authorize "mercy killing," euthanasia or any procedure which would actually speed up the natural process of dying.
- When exercising his or her authority to make health care decisions for you when deciding on your behalf, the Health Care Agent will have to act consistent with your wishes, or if they are unknown, in your best interest. You may make your wishes known to the Health Care Agent by including them in this document or by making them known in another manner.
- When acting under this document the Health Care Agent *GENERALLY* will have the same rights that you have to receive information about proposed health care, to review health care records, and to consent to the disclosure of health care records.

### 1. Creation of Durable Power of Attorney for Health Care

I intend to create a power of attorney (Health Care Agent) by appointing the person or persons designated herein to make health care decisions for me to the same extent that I could make such decisions for myself if I was capable of doing so, as recognized by RCW 11.94.010. This designation becomes effective when I cannot make health care decisions for myself as determined by my attending physician or designee, such as if I am unconscious, or if I am otherwise temporarily or permanently incapable of making health care decisions. The Health Care Agent's power shall cease if and when I regain my capacity to make health care decisions.

### 2. Designation of Health Care Agent and Alternate Agents

If my attending physician or his or her designee determines that I am not capable of giving informed consent to health care, I Mary L. Wicks, designate and appoint:

Name EDWARD R HOWARD Address 19412 46TH AVE  
City ABINGTOWN State WA Zip 98223 Phone 360 422-0880

as my attorney-in-fact (Health Care Agent) by granting him or her the Durable Power of Attorney for Health Care recognized in RCW 11.94.010 and authorize her or him to consult with my physicians about the possibility of my regaining the capacity to make treatment decisions and to accept, plan, stop, and refuse treatment on my behalf with the treating physicians and health personnel.

In the event that \_\_\_\_\_ is unable or unwilling to serve, I grant these powers to  
Name \_\_\_\_\_ Address \_\_\_\_\_  
City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_ Phone \_\_\_\_\_

In the event that both \_\_\_\_\_ and \_\_\_\_\_  
are unable or unwilling to serve, I grant these powers to  
Name \_\_\_\_\_ Address \_\_\_\_\_  
City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_ Phone \_\_\_\_\_

Your name (print) Mary L. Wicks

**3. General Statement of Authority Granted.**

My Health Care Agent is specifically authorized to give informed consent for health care treatment when I am not capable of doing so. This includes but is not limited to consent to initiate, continue, discontinue, or forgo medical care and treatment including artificially supplied nutrition and hydration, following and interpreting my instructions for the provision, withholding, or withdrawing of life-sustaining treatment, which are contained in any Health Care Directive or other form of "living will" I may have executed or elsewhere, and to receive and consent to the release of medical information. When the Health Care Agent does not have any stated desires or instructions from me to follow, he or she shall act in my best interest in making health care decisions.

The above authorization to make health care decisions does not include the following absent a court order:

- (1) Therapy or other procedure given for the purpose of inducing convulsion;
- (2) Surgery solely for the purpose of psychosurgery;
- (3) Commitment to or placement in a treatment facility for the mentally ill, except pursuant to the provisions of Chapter 71.05 RCW;
- (4) Sterilization.

I hereby revoke any prior grants of durable power of attorney for health care.

**4. Special Provisions**

~~\_\_\_\_\_~~  
~~\_\_\_\_\_~~  
~~\_\_\_\_\_~~  
~~\_\_\_\_\_~~  
~~\_\_\_\_\_~~

DATED this 4th day of October, 2007  
(Year)

Mary Wicks  
GRANTOR

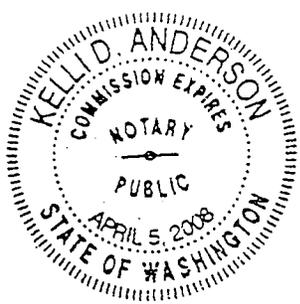
STATE OF WASHINGTON )  
(COUNTY OF Skagit) )

)ss.

I certify that I know or have satisfactory evidence that the GRANTOR, Mary Wicks  
signed this instrument and acknowledged it to be his or her free and voluntary act for the uses and purposes mentioned in the instrument.

DATED this 4th day of October, 2007  
(Year)

Kelli D Anderson  
NOTARY PUBLIC in and for the State of Washington,  
residing at Mt Vernon  
My commission expires 4-5-08



K0000357535 N000095620  
WICKS, MARY L  
10/06/1921 85 F 10/01/07  
Fish, Jonathan W MD  
[Barcode]

## MEMORANDUM

To: Roy  
From: Mark  
Re: Estate of Mary Wicks  
Date: December 4, 2007

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*Issue 1: Will the October 4, 2007 testamentary document likely meet statutory requirements to be valid and what role may the previous hand-written testamentary document play in validating the October 4, 2007 document?*

*Issue 2: Assuming that the October 4, 2007 testamentary document is valid, what procedural steps must be taken to enforce its provisions?*

### Issue 1

#### **Howard's Handwriting**

Opposing counsel ("Froese") has stated that the October 4, 2007 document ("Will") was forged. This a blatant mischaracterization that is meritless unless evidence is presented that the Will was not drafted at the direction of Wicks. Case law is clear that a party may draft a handwritten Will at the request or direction of the testator. *Knowles*, 135 Wa. App. 351, *Chambers*, 187 Wa. 417. Thus, the simple fact that the Will is not in Wicks' handwriting is not fatal. Likewise, handwritten wills are valid if all other statutory requirements are met. Finally, case law also allows for a beneficiary of the Will to assist with its drafting assuming the testamentary intent of the testator exists and the drafting is at the request of the testator. *Knowles*, *id.*

#### **Attestation**

Froese also challenges the Will on the grounds that the attestation of witnesses is improper. He may have two potential contentions. First, Froese may claim that the witnesses strict attestation writing did not meet statutory requirements. This argument will fail, as statute and case law allow for a simple witness signature without any formal attestation clause. *Chambers*, *id.* The Will need only the signatures. *Miller*, 146 Wa. 324.

Froese may also claim that he witnesses are not competent, based most likely on his contentions that one of the witnesses, Dolores Allen, is a known forger and despicable character. Character aside, the witness to a Will is just one who has personal knowledge that the Will was signed by the testator. *Prince*, 73 Wa. App. 745. Furthermore, competency to sign a Will is primarily based upon a witnesses ability to testify to the Testator's signature in a Washington Court of Law. *Mitchell*, 41 Wa. 2d 326. This standard has not proven to be difficult to meet.

shade his intent and his mother's wishes. As a specific example, undue influence has been ruled in a situation in which a person convinced an elderly and weak testator that his family felt hatred for him while at the same time prevented other family members from speaking with the testator. *Perry*, 122 Wa. 129. On the other hand, undue influence was not shown in cases where children on poor terms with the testatrix were omitted from the will, and in cases in which Will omissions and inclusions were the natural result of relationships. *Barbee*, 134 Wa. 418. *Knowles*, id.

A suspicion of undue influence may arise if the factors present in the following common test are met:

“(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; (3) and that the beneficiary received an unusually and unnaturally large part of the estate” *Dean v. Jordan*, 194 Wa. 661.

The above factors do not appear favorable for Howard; however, any circumstantial evidence to the contrary may be used to establish that Wicks acted under her own volition.

## Issue 2

If Howard wishes to proceed and challenge the daughter's claim that Wicks passed intestate, he must file a Contest of Rejection pursuant to RCW 11.24.010. This claim asserts that the daughter improperly instituted probate without recognizing a valid will. Howard has four months from the date that probate was entered, i.e. October 19, 2007, to contest the probate due to the existence of a valid Will. The following link offers more case law and information regarding statutes of limitations and jurisdiction. Suffice to generally say that if Howard act fairly soon, he will have standing and proper jurisdiction:

<http://www.washington-wills.com/Contesting/Will-Contest.htm>  
(Equally applicable to Contests of Rejection as to Contests of Wills)

RCW 11.24.010 requires that the contestant file a petition containing his or her objections to the rejection of the Will. The petition may include evidence surrounding testamentary intent, undue influence, etc. Litigation note: As the more common use of this statute is to contest a Will, I believe if we petition, we should simply state that the Will was validly executed to narrow the issue. If the response includes questions of intent and undue influence we can then address them in reply.

Roy, I am looking for a sample of a Contest of Rejection and will get that to you shortly.

As a last ditch effort, Froese may attempt to claim that Dolores' attestation is invalid because she is an interested party under the Will by virtue of her involvement with Howard. This tenuous argument fails on its face as well because beneficiaries are actually qualified to be witnesses. *Chambers*, id. and WA Law of Wills, Ch. 2, A.3.b, and *Schirmer*, 143 Wa at 580.

### **Wicks' Signature**

Regarding Wick's signature on the Will, a testator clearly satisfies the signature requirement by signing his or her name without assistance. The courts have been very liberal in their definition of signature as well. WA Law of Wills, Ch. 2, A.2, 297-99. In some cases, simple "X's" are valid as well as an illegible mark. Also, the signature requirement has been held to be valid even when another assists the testator with signing by physically helping move their hand. In our case, if there is an allegation that the signature is forged, Howard may be required to establish validity through an expert. If Howard has admittedly assisted Wicks with her signature however, thereby explaining the perception of forgery, the signature may be valid on its face without the potential need for an expert.

### **Testamentary Intent**

I think the most critical factor informing whether the Will is valid is evidence of Wicks' testamentary intent. In this regard, the Testator's actions may be used to prove intent. *Lint*, 135 Wa. 2d 518, 522-29. First and foremost, the previous hand-written testamentary document found under the mattress, although not a valid Will, can be used to show conformity with the October 4, 2007 document, supporting Wicks common intent to not leave anything to the daughter. As the courts have noted, Wills that are incongruent with past testamentary devices usually undergo the most scrutiny. *Kessler*, 95 Wa. App. At 371.

### **Undue Influence - Most Likely Claim**

The claim of Undue Influence militates against the existence of testamentary intent. Although not specifically threatened to date, this is likely the most viable claim Froese will employ should the matter proceed. The daughter must show by "clear, cogent and convincing evidence" that influence was undue. *WA Law of Wills, Ch. 3, C.1.* The Courts have allowed for "influence" in upholding Wills, but influence that alters the volition of the Testator serves to invalidate:

"It is not improper to advise, to persuade, to solicit, to importune, to entreat, and to implore. Hopes and fears and even prejudices may be moved. Appeals may be made to vanity and to pride; to the sense of justice and the obligations of duty; to ties of friendship, of affection, and of kindred; to the sentiment of gratitude...His views may be radically changed, but so long as he is not overborne and rendered incapable of acting finally upon his own motives..."  
*Converse*, 63 Wa. At 321.

In our case, the language of the previous document, and the potential testimony of the client and girlfriend, support the fact that Wicks was gracious for Howard's attention and care, and conversely, sought to dismiss the daughter for her lack thereof.

In most cases, undue influence claims are supported only by circumstantial evidence. Thus, our client must be candid with us about his interactions with Wicks, the family history, and any event that may

Certificate of  
Service

I, Edward Howard do  
hereby certify that on this  
30th day of September 2010,  
I deposited in the U.S. Mail  
an envelope containing a  
copy of Appellants Reply  
Brief to C. Thomas Moser,  
attorney for Respondent,  
411 Main St. Mt Vernon WA.  
98273.



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COURT OF APPEALS  
STATE OF WASHINGTON  
2010 OCT - 1 AM 10:38