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No. 65376-8-1 and 65970-7-1
Consolidated on Appeal

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

DYLAN THOMPSON WOOD,

Appellant

vs.

**MARY FRANCES WHEALEN, INDIVIDUALLY AND AS PERSONAL
REPRESENTATIVE OF THE ESATE OF JODY SCOTT WOOD,**

Respondent

**Orders and Judgments of the Superior Court for King County
Honorable Paris K. Kallas and Commissioner Carlos Y. Velategu
and Honorable Laura C. Inveen
Cause #08-4-00829-8 SEA**

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COURT OF APPEALS
STATE OF WASHINGTON
JF

APPELLANT'S REPLY BRIEF

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I. Mary Whealen's Motion for Summary Judgment in Tom Wood's Will Contest Should Never Have Been Granted.

Bearing in mind that the **Deadman Statute [RCW 5.60.030]** was **waived by the testimony of Mary Whealen at the court hearing of Jan. 28, 2008 [Tr., pgs. 1-31] [emphasis added]**, Judge Inveen and this appellate court in its de novo review should consider “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits (declarations)”. [See CR 56(c)]. Tom Wood filed declarations [CP2116-2149, 2457-2498], which included his Answers to Interrogatories [CP2343-2366], giving additional facts, including numerous telephone conversations and email exchanges with his mother, Jody Wood, which are exceptions to hearsay. These included proof of key allegations in his Will Contest that the Will of June 1, 2004 did not represent his mother's true testamentary intent and that it was not valid. [CP 2458] Judge Inveen later ruled in her Order Granting [Partial] Summary Judgment [CP2600-2601] that:

Wood's 30 page declaration is largely inadmissible hearsay as evidence and those portions are not considered by the court. Those portions that are argumentative, speculative, based on inadmissible hearsay, or lack of personal knowledge or foundation are inadmissible and have not been considered by the court. [NB. She did not identify any particular phrases from his Declaration]

However, she did not state any objection to the Answers to Interrogatories or the other Declarations that her Order says she considered.

Tom Wood filed a Motion for Reconsideration. [CP2602-2699], including a detailed analysis that these items of proof were exceptions to the

"hearsay rule" of ER 802.[See discussion below]. Without oral argument, Judge Inveen made no changes to her Order and denied Tom Wood's Motion for Reconsideration. [CP2700-2701] However, these facts, together with conflicting facts from Mary Whealen, create genuine issues of material fact and require Summary Judgment to be denied. CR 56(c).

A. Mary Whealen repeatedly alleges a "30 year meretricious relationship" with Jody Wood, but has repeatedly refused to allow Tom Wood to discover and introduce evidence of events occurring before 2004.

At pg.7 of Mary Whealen's Response Brief, her attorney, D. Douglas Titus, stated (without citation to the record on appeal) that:

In May 2008, [he] was contacted by John Flowers [attorney for Tom Wood] who rudely and offensively demanded that [Mary Whealen] furnish to him thirty years' worth of documents relating to the financial affairs of [Jody Wood] and [Mary Whealen]. [Mr. Titus] replied that his demand was unreasonable and that discovery is generally not allowed in probate proceedings.... [Emphasis added]

John Flowers' DID NOT RUDELly AND OFFENSIVELY DEMAND anything from Mr.Titus. All of Mr. Flowers' letters and e-mails were polite and professional [CP892, 894,903]. However, he and Mary Whaelen were not cooperative. [CP905-907] Discovery of events going back 30 or more years before Jody Wood's death is warranted because of the issues in our case. Just recently, for example, Mary Whealen offered into evidence at a court hearing a "cache"of letters [CP2099-2050], never produced in discovery, some going back over 25 years. Because these letters were in her Reply, Tom Wood was not allowed to respond. Tom Wood

disputes the nature, quality, and duration of this alleged “domestic partnership” [See CP2958, 2860, 2866, 2878, and 2933], thereby creating a genuine issue of material fact.

The apparent reason for these repeated assertions is that Mary Whealen claims some sort of rights, as a domestic partner, and that the challenged June 1, 2004 Will, is somehow “natural,” in an attempt to avoid a presumption of undue influence and fraud under the case of *Dean v. Jordan*, 194 Wash. 661, 672, 79 P.2d 331 (1938), cited and discussed at pg. 34 of Tom Wood’s Opening Brief. Also see the Declaration of attorney Michael Olver [CP2955-2973], reaching the same conclusion. One of the flaws in Mary Whealen’s arguments is that the title to Jody Wood’s house always remained in Jody’s sole name, as did her bank accounts and her reverse mortgage. Jody Wood never signed any bank authorization allowing Mary Whealen to sign checks or make withdrawals, transfer funds, or draws on Jody Wood’s reverse mortgage. In her deposition, Mary admitted these uncontested facts. [CP948-964 and 1010-1012]. Whether a Will is “natural” is also an issue of fact. See *In re Riley*, 78 Wn.2d 623, 648, 479 P.2d 1 (1970), cited by Mary Whealen on pg.33 of her Response Brief. This relationship is a genuine issue of material fact, along with many other genuine issues of material fact, which prevent Summary Judgment.

CR 26, concerning discovery, provides in part as follows:

(b) Unless otherwise limited by order of the court in

accordance with these rules, the scope of discovery is as follows:

(1) Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.... or reasonably calculated to lead to the discovery of admissible evidence. (Emphasis added)

A Will Contest is such a proceeding. See Trust and Estate Dispute Resolution Act [TEDRA], RCW 11.96A and RCW 11.24, on Will Contests.

II. Mary Whealen's claims of "lack of proof", if true, were caused by improper rulings on discovery and evidence by Judge Inveen and the vast amounts of competent, relevant evidence she and the trial court ignored and a presumption of undue influence and fraud which was not even considered.

A. In Tom Wood's Will Contest he gets the benefit of a presumption of undue influence and fraud.

Under the 3-prong test, i.e., that Mary Whealen was in a fiduciary (admitted by Mary. See her Response Brief, pg. 5), she actively participated in preparing the Will (admitted by her in court testimony [Tr. of Jan. 28, 2008, pgs. 1-31), and she received all but \$400 worth of personal property in Jody's \$600,000 Estate, Tom Wood gets the benefit of a presumption of undue influence and fraud. See *Dean v. Jordan, supra*. This point was raised and discussed in Tom Wood's Opposition to Summary Judgment (CP 2423), again in his Motion for Fees and Costs (CP2866-2867), and in Declaration of Michael Olver, Tom Wood's first attorney (CP2958), and on pg. 34 of his Opening Brief, but repeatedly ignored by Mary Whealen and the trial court.

B. Judge Inveen and Mary Whealen also appeared to have ignored the following competent evidence on the 6 alternative grounds of Tom Wood's Will Contest

Ground #1- Lack of Testamentary Intent:

As discussed in detail in Tom's Answers to Interrogatories [CP2343-2366], the many statements by Jody Wood in telephone and in-person conversations he had with his mother [which are exceptions to the hearsay rule. See ER 803(a)(3) and ER 804] clearly prove it or there is a reasonable inference that it was not her intent to disinherit her son (Tom), his wife, and his infant daughter, Jody made a promise to make a Will, and re-confirmed it many times, and give Tom 50% and Mary 50% of her Estate. [CP1137-1140]. It may also be inferred from other evidence. See, for example, the Declaration of Jody's neighbor, Ken Cottingham [CP2938-2941], and Tom's Answers to Interrogatories [CP2343-2366]. On Summary Judgment, the trial court and the appellate court view the evidence and all reasonable inferences in the light most favorable to the nonmoving party (Tom Wood). *American Mfrs. Ins. Co. v. Osborn*, 104 Wn.App. 686, 696, 17 P.3d 1229 (2001), cited by Whealen at pg. 34 of her Response Brief.

In addition to the above-cited evidence, Tom Wood's Answers to Mary Whealen's Interrogatories [CP2343-2366] listed witnesses and other evidence in support of each key allegation in his Will Contest.

Pursuant to CR 56(c) Judge Inveen should have denied Summary Judgment as there were numerous genuine issues of material fact.

C. Judge Inveen improperly denied Tom Wood's Motion to Compel Discovery of the contents of his mother's computer(s) and residence.

At pgs. 24-25 of her Response Brief, Mary Whealen cites *Harstad v. Metcalf*, 52 Wn.2d 239, 243, 351 P.2d 1037 (1960) for the proposition that:

Appellant has no right to a fishing expedition in [Mary Whealen's] private affairs.... [and it] clearly places an undue burden on [Jody Wood's] estate and [Mary Whealen] personally, a situation the protective order [CP3115-3116] was designed to avoid....

Her analysis completely omits the fact that, according to her own testimony on Jan. 28, 2008 [TR, pgs. 1-31], this computer was used to prepare the new [amended] dispositive paragraph of this “cut and paste” Will and was owned and used by Jody Wood; i.e., it was not Mary Whealen's computer. This was also the same computer used by Jody Wood to send and receive hundreds of emails with her son, Tom Wood [CP2857] and a reasonable inference that it probably contains some of Jody Wood's diaries, internet research on Wills, and other information about her estate plan.

Judge Inveen should have weighed and balanced the competing interests and fashioned her Protective Order, if granted at all, because of Mary's waiver of privacy by putting her personal information on Jody's personal computer and ER 106, concerning related documents. *See Snedigar v. Hoddersen*, 114 Wn.2d 153, 159, 786 P.2d 781 (1990), cited earlier by Tom Wood (CP 2627]. Mr. Titus' research acknowledges this needed weighing and balancing [CP2189 of his Response to our Motion to Compel], but Judge Inveen's Order [CP3115-3116] did not do that. **It is submitted that this error alone, because it is a manifest abuse of discretion in**

denying access by Tom Wood, his attorney, and his computer expert] to key items of discovery which are relevant to proving the testamentary intent of Jody Wood, and possible fraud and undue influence by Mary Whealen on Jody Wood, etc., is sufficient to reverse the Summary Judgment granted by Judge Inveen in Tom Wood's Will Contest [CP 2600-2601] See *Estate of Black*, 153 Wn.2d 152, 102 P.3d 796 (2004).

D. In her Order Granting Summary Judgment, Judge Inveen also improperly rejected Tom Wood's Declaration in Opposition to Summary Judgment.

Judge Inveen ruled [CP3121] that Tom Wood's 30-page declaration is largely inadmissible hearsay. However, ER 803(a) lists the following specific exceptions to the hearsay rule [ER 802]:

... Then Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will. (emphasis added) [Note: this exception is particularly relevant and helpful in Will Contests, such as that filed by Tom Wood.].

- (14) Records of Documents Affecting an Interest in Property. The record of a document purporting to establish or affect an interest in property....
- (15) Statements in Documents Affecting an Interest in Property.....

ER 804: Hearsay Exceptions (when) Declarant is Unavailable because of death:

Statement Against Interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another,

that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true.

For example, when Jody Wood repeatedly agreed with her son, Tom Wood, to make a Will and leave Tom 50% and Mary 50% of her Estate, based on the consideration he gave [CP1137-1140], this was a "statement against", because she was no longer free, as she was before the agreement, to make a new Will and give all but \$400 of her \$600,000 Estate to Mary.

E. Mary Whealen admits signing Jody Wood's signature on hundreds of documents, including checks, credit card charges, and tax returns, and utilizing draws on Jody Wood's reverse mortgage, but did not make any attempt to refute Tom Wood's proof that his mother did not need a reverse mortgage.

At pg. 4 of her Response Brief, Mary Whealen admits that the "reverse mortgage [had a] very high administrative cost.... of \$59,250.00 (CP2523). However, this does NOT provide Mary with a defense to her wrongfully inducing Jody Wood to obtain an unneeded reverse mortgage. It was Mary Whealen who gutted the equity of Jody Wood's home by utilizing draws on the reverse mortgage, which reached a balance of \$130,000 in just three years (2004-2007) to double her own lifestyle. During the same period of time, Jody Wood's lifestyle was not proven to have benefited from this infusion of \$130,000 of borrowed money. It seems to have markedly deteriorated, along with her health. . [See Tom Wood [CP1330-140], accountant Jake Hanes [CP 132-141, 676-680], and forensic CPA Shelly Drury [CP2947-2954] and Answers to Interrogatories. [CP2343-CP2366]

This evidence proves or there is a reasonable inference that Mary Whealen caused Jody Wood to believe that there wasn't enough money in Jody's bank accounts to pay their normal living expenses and that draws on the reverse mortgage were needed to finance these expenses. However, a review of the available records clearly proves that Jody Wood's income was enough for their normal, historical living expenses.

F. Mary Whealen admits utilizing draws on Jody Wood's reverse mortgage, without proving by clear, cogent, and convincing evidence that Jody Wood intended them as gifts to Mary.

As a fiduciary, Mary Whealen admitted in her deposition [CP956-964] and the above-cited accounting records prove or it can be inferred that she utilized draws from Jody Wood's reverse mortgage for her own benefit [i.e., gifts] over and above her free room and board, which are not contested. See the above-cited Answers to Interrogatories and the above-cited Declarations of Tom Wood, Jake Hanes, and Shelley Drury.

If it is shown that the recipient of the purported gifts is in a confidential relationship with the purported donor, the recipient (Mary) needs to establish by clear, cogent, and convincing evidence that the transfers were gifts and that she did not exert undue influence in obtaining them. *Koppang v. Hudon*, 36 Wn.App. 182, 185, 672 P.2d 1279 (1983). Mary Whealen has made no effort to do so. [See Opening Brief, pg. 27.]

G. As Personal Representative, Mary Whealen has multiple, serious, and irreconcilable conflicts of interest, which she has not denied, justified, or explained.

Mary Whealen had serious conflicts of interest in that she was a defendant in a civil action alleging she was the proximate cause of Jody Wood's death and destroyed and/or held back key evidence (documents and contents of computers) and was a Respondent in a Will Contest alleging undue influence, fraud, etc. [See Wood's Opening Brief, pg. 11]

Here, Mary Whealen spent at least \$130,000 of funds that originated from Jody Wood's reverse mortgage, Social Security, rental income, and property income- all for purposes that clearly did not benefit Jody Wood at all. This is financial elder abuse! The Estate should sue her to get it back. However, Mary Whealen, as Personal Representative, cannot be a plaintiff in a lawsuit when she would, as an individual, also be a defendant. [See Tom Wood's Opening Brief, pgs. 21-22]

Tom Wood served Mary Whealen with a REQUEST TO PERMIT ENTRY ON LAND, under CR 34(2), to videotape the premises and review the contents of Jody Wood's computer, used to write her purported Will. [CP909] She refused. Tom Wood made a Motion to Compel Discovery. [CP1977-2056, 2181-2194] If Mary Whealen were a neutral independent fiduciary, she would not be blocking access to the property or the computer. A reasonable inference is she must have something to hide, i.e., the residence is in disrepair and Jody Wood's computer contains data (evidence) helpful to Tom Wood. [CP889] [See Tom Wood's Opening Brief, pg. 25]

H. Mary Whealen and her attorney, D. Douglas Titus, have engaged in multiple instances of serious misconduct, which she has not denied, justified, or explained.

Without a Power of Attorney, Mary Whealen signed Jody Wood's signature on hundreds of checks, income tax returns, spent and/or transferred large amounts of money by telephone without a proper paper trail in and out of bank accounts solely in Jody Wood's name (i.e., trust funds) by impersonating Jody Wood without bank authority. See her Response Brief [pgs. 14-18] and in other court documents. She now denies this, claiming "20 errors", but this directly contradicts the above-cited testimony in her deposition. The above-cited Declarations of Tom Wood, Jake Hanes, and Shelley Drury carefully document their allegations and proved that Mary Whealen did not properly handle, spend and/account for Jody Wood's money. Specifically, accountant Jake Hanes concluded (CP1185):

For an elderly individual having a few passive activity investments, the inconsistent spending patterns, reverse mortgage activity, and multiple examples of unsubstantiated expenses and deposit activity in the bank accounts, coupled with the commingling of funds between Mary Whealen (who was in a fiduciary relationship with Jody Wood prior to the death of Jody Wood and is now the Personal Representative of Jody Wood's Estate) and Jody Wood, are material and suspect. Following our independent review of the records provided, my opinion is that these expenditures and transactions are unreasonable and should be an area of grave concern to the Court and the Court should require Mary Whealen to substantiate the legitimacy of these questioned activities.

Also, see Tom's Wood Third Supplemental Declaration [CP732-747], which shows how these acts of misconduct by Mary Whealen relate to both his Will Contest and his Petition to Remove her as Personal Representative.

The Estate should sue Mary Whealen for embezzlement of Jody Wood's money (i.e., trust funds). [See Tom Wood's Opening Brief, pgs. 8-9] Mary Whealen admitted improper record keeping of Jody's money (trust funds) during Jody's lifetime by failing to keep and organize bank statements and records, bouncing checks, not balancing Jody's checking account, not writing in check registers amounts of some checks and deposits, i.e., breaching fiduciary duties as a trustee. [See Tom Wood's Opening Brief, pgs.10-11]

Mary Whealen tricked Jody Wood into thinking she (Jody) needed a reverse mortgage (which Jody Wood did not need to pay her normal living expenses), drawing over \$130,000 on the reverse mortgage and then mispending it on non-essential items (engaging in big deficit spending with borrowed money with Jody Wood's house as collateral) while depriving Jody Wood of necessities of life, such as dental care, and subjecting Jody Wood to harassing calls from unpaid creditors [Tom Wood's Opening Brief, pgs.8-16]. Mary Whealen failed to perform her general duties in violation of RCW 11.48.010, by stalling, trying to run out the clock for a Will Contest, and not treating Jody's sole heir, Tom Wood, and attorney John Flowers in a fair, even-handed way. [See Tom Wood's Opening Brief, pg.11]

Mary Whealen created unnecessary friction in these probate litigation matters by allowing her attorney, D. Douglas Titus, to repeatedly engage in highly unprofessional behavior, such as name calling and intentionally

withholding clearly relevant evidence, stalling, trying to trick Tom Wood into waiving his “standing” in these probate litigation matters by delivering to his attorney personal property worth a total of \$400 [See Tom Wood’s Opening Brief, pgs.12-13], and repeatedly inserting “nunc pro tunc” in a proposed court order in an effort to waive Tom’s right to appeal. [CP2931]

Mary Whealen allowed a foreclosure proceeding on the Jody Wood’s house to go almost to auction on April 23, 2010, refused to keep Tom Wood informed of its status, and improperly transferred ownership of the house to herself and her mother with Deeds notarized by Mr. Titus, while the bank was still owed \$118,000 on its loan. [See Tom Wood’s Opening Brief, pg.13]

Tom Wood also later discovered that Mary Whealen may have switched some of the exemplars, making our handwriting expert’s report useless. [See Tom Wood’s Opening Brief, pg.15]

Mary Whealen has also failed to keep Jody Wood’s home in good repair. [See Tom Wood’s Opening Brief, pgs.22 -25]

Ms. Whealen has Jody’s credit card records and contents of Jody’s computers she refused to produce, claiming our request is “overly broad, is not relevant to the issues presented by Petition to Revoke Probate of Will [Will Contest], and is invasive of (her) privacy...” [CP1214] Clearly, such items are relevant to a Will Contest and Petition to Remove (Ms. Whealen as Personal Representative, and such refusal is another reason to remove her as Personal Representative. [See Tom Wood’s Opening Brief, pg.29]

Mary Whealen also repeatedly told Jody Wood that if Jody declined to go along with Mary's demands, that Mary would abandon Jody and take half of Jody's assets with her. Mary also led Jody to believe that they were running out of money, which led to undue influence, fraud, and mistake in Jody's purported Will. [See Wood's Opening Brief, pg. 35]

For the above stated reasons, in spite of this obfuscation by Mary Whealen and her attorney, Commissioner Carlos Velategui and Judge Paris Kalla should have removed her as Personal Representative of this Estate.

I. After not responding to many issues raised in Tom Wood's Opening Brief, many of the cases cited by Mary Whealen in her Response Brief are distinguishable, and many of the other cases she cites help Tom Wood more than they help her.

First of all, none of the Will Contest cases cited by Mary Whealan were decided by the trial court granting Summary Judgment. These Will Contests are cases appealed after a trial or hearing in the trial court, where the court or sometimes an advisory jury actually saw the witnesses testify and cross-examined, evaluated their testimony, and decided which witnesses to believe, and made findings of fact. They are of no help to Mary Whealen because a trial court is specifically prohibited by a long line of cases and CR56(c) from granting Summary Judgment Motion if there are "genuine issues of material fact."

After ignoring many of the cases and statutes cited in Tom Wood's Opening Brief, D. Douglas Titus, the attorney for Mary Whealen, cites

several cases announcing general rules, and seldom discusses whether their facts and procedures, especially a decision after a trial rather on a Motion for Summary Judgment, cause them to have an impact in our appeal. Also, he makes some references to the Clerk's Papers, but usually only in support of Mary Whealen's contentions in her Response Brief, and almost never cites competing facts proven by Tom Wood, thereby making Judge Inveen's Summary Judgment reversible error. See CR 56(c).

Mr. Titus ignores the evidence in Tom Wood's Declaration in Opposition to Summary Judgment, which Judge Inveen also ignored [CP3121], and both of them ignore the treasure trove of relevant information in Tom Wood's Answers to Interrogatories [CP2343-2366], and Jody Wood's computer, which Mary Whealen testified on Jan. 28, 2008 was used by them to write key portions of Jody's "cut and paste" Will.

Also, the following cases, which are cited by Mr. Titus, actually help Tom Wood more than Mary Whealen:

Mr. Titus cited *In re Bottger's Estate*, 14 Wn.2d 676, 700, 129 P.2d 518 (1942) on pgs. 27 and 30 of his Response Brief for the usual rules about undue influence in Will Contests, and cited facts supporting Mary Whealen's contentions, but left out the competing facts in the record (which create "genuine issues of material fact") that support Tom Wood's allegations of undue influence and other grounds of contest. Nor does he mention or discuss the presumption of undue influence which was discussed in Tom

Wood's Opening Brief at pg. 34. There is also a discussion of "fraud in the inducement" and "fraud in the execution" of a Will on pgs. 701-708 of *Bottger, supra*, which help Tom Wood. For example, see Tom Wood's Answers to Interrogatories [CP 2343-2366], where he discusses the many derogatory, untrue things Mary Whealen told Jody Wood about him (fraud in the inducement) and Tom Wood's Declaration [CP2872], discussing the many extra staple holes in the original June 1, 2004 Will, indicating that someone (probably Mary Whealen) had disassembled and reassembled the Will several times, giving her the opportunity to insert and remove pages (fraud in the execution).

At pgs. 28-30 of the Response Brief, Mr. Titus cites *Converse v. Mix*, 63 Wash. 318, 115 Pac. 47 (1911) for the usual rules about undue influence normally requiring coercion, and quotes from the Declarations in the record from several witnesses, including the two women who signed as witnesses to this purported Will, who claim in effect that Jody Wood could not be coerced or unduly influenced by anyone. [How would they know this from their own "personal knowledge", as required by CR 56(e)?] At pg. 28, he claims that:

There not a scintilla of evidence in the entire record of this case that would indicate that Jody Wood would be susceptible to this extreme level of influence and persuasion.

This claim by Mr. Titus IS ABSOLUTELY NOT TRUE. See, for example, Tom Wood's Answers to Interrogatories [CP2343-2366] where he discusses his concern that his mother was becoming dependent on Mary

Whealen, and Mary's threats to abandon his mother and not care for her in her old age (Jody was 37 years older than Mary) and where he discusses emails and telephone conversations with his mother about Mary's physical and financial mistreatment, which, under the reported cases, are often an aspect of undue influence, and the infidelity of Mary, which Mary admitted in her deposition. [CP1376] *Converse v. Mix, supra*, at pg. 322, discusses incidents from many years earlier, clearly demonstrating that early events can affect the Decedent's testamentary plans and his or her Will and are relevant.

On pgs. 26-27, Mr. Titus claims that Tom Wood's summary of facts is only "partially correct"... [E.g. he claims]. that [Mary Whealen] helped manage [Jody Wood's] assets, was her financial advisor, and gave Jody legal advice... is not supported by the evidence...." **AGAIN, THIS IS NOT TRUE!** Mary's own testimony in her deposition [Wood's Opening Brief, pgs. 8-9] and the Declarations of Tom Wood, Jake Hanes, and CPA Shelley Drury, cited above, provide proof that Mary was managing Jody's bank accounts and real estate. From testimony of Mary Whealen herself in the Court hearing of Jan. 28, 2008 and in her deposition it can be inferred Mary also acted as a financial advisor in assisting Jody in obtaining the reverse mortgage, doing research on the internet and writing the dispositive provision of this "cut and paste" Will using Jody's computer, thus creating genuine issues of material fact.

On pg 27, Mr. Titus alleged twice in a single paragraph (without

citation to the record) that Mary was in a “thirty year meretricious relationship” with and a “partner for life” of Jody and cites the case of *In re Ganjian’s Estate*, 55 Wn.2d 360, 347 P.2d 891 (1959). That case relies on a “record [on appeal that] shows a long history of intention on the part of [the decedent] Mrs. Ganjian to divide her property equally among her children and granddaughter....” While Mary introduced evidence from years ago [e.g., her own 1984 Will at the Jan. 28, 2008 hearing and a “cache” of letters, some of which were 25 years old (CP2099-2050)], she has repeatedly objected to Tom Wood referring to or seeking discovery of any evidence before 2004. [Wood’s Opening Brief, pg. 9].

In re Ganjian’s Estate, *supra*, at pgs. 362-363, also a helpful discussion of *Dean v. Jordan*, *supra* [cited and discussed at pg. 34 of Tom Wood’s Opening Brief], a leading case on presumption of undue influence in Will Contests, which Mr. Titus does not discuss in his Response Brief.

J. When Part of a Document is Introduced into Evidence by One Party, the Balance of the Document or Related Document Can Be Introduced by the Other Party.

ER 106 states:

When a writing or recorded statement (including computer records or data in a computer, such that in Jody Wood’s computers) or part thereof is introduced by a party (such as Mary Whealen in introducing a Will and research for the Will on a computer), an adverse party (such as Tom Wood) may require the party at the time to introduce any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it. [Emphasis added]

III. Attorney's fees were Improperly Awarded to Mary Whealen.

Austin v. U.S. Bank of Washington, 73 Wn.App. 293, 309-310, 869 P.2d 404 (1994), cited by Mary Whealen at pg. 22 of her Response Brief, held:

.... [When an attorney's] fee award is more than nominal... it should be based on more than an estimation or conjecture. (emphasis added) There were no affidavits (declarations) or time sheets of plaintiffs' counsel to support their request for fees. On remand, the trial court should redetermine the amount of fees....

In *Key v. Cascade Packing Co.Inc*, 19 Wn.App. 579, 584-586, cited by Mary Whealen at pg. 34 of her Response Brief, the appellate court held that:

The summary award of attorney's fees must be reversed. Since remand is necessary to determine the plaintiff's entitlement to an award of attorney's fees, we should also consider the amount to be allowed. The trial court awarded \$7,500 in attorney's fees.... The trial court did not take any evidence as to the reasonableness of the fees, nor did it elaborate on any underlying reasons for the amount of the award. Any attorney's fee award must be reasonable.... To facilitate (appellate) review, the trial court ought to state (its) reasons underlying the amount of the award, (including several factors such as) ... the time and labor required.... difficulty..... skills.... fee customarily charged.... amount involved and the results obtained.... (Emphasis added)

At pg. 33 of her Response Brief, Mary Whealen cites the 75-pg. case of *In re Riley*, 78 Wn.2d 623, 646, 479 P.2d 1 (1970). The case does not help her inasmuch as it was an appeal after a 4-week trial. It was not decided on Summary Judgment. However, it did consider the long history of the Riley family and decedent's relationship with a charity covering many years, and in

that context whether the Will was “unnatural,” which is a determination of fact (pg. 648), and that “undue influence” depends upon “the facts presented to the (trial) court” in each case. (pg. 662) It also contains a helpful discussion (pgs. 665-666) about attorney’s fees:

Since [Contestants, who lost the Will Contest] appear to have acted in good faith and have made a prima facie showing of probable cause for contesting the Will, costs (including attorney’s fees) in the superior court will not be assessed against them. *In re Chapman’s Estate*, 133 Wash. 318, 233 P. 657.

In re Estate of Lint, 135 Wn.2d 518, 957 P.2d 755 (1998), cited by Mary Whealen on pg.38 of her Response, is not a Summary Judgment case. After a lengthy bench trial, the Superior Court determined that the Will was invalid and that finding was affirmed on appeal. It also helps Tom Wood in that the Washington Supreme Court said at pg. 534 that:

[T]he trial court’s conclusion that [decedent’s companion’s] representations of love [to decedent] were fraudulent... [and that] was based in significant part on its finding that [the companion] was involved in a relationship with another woman... [and that fact had] considerable probative value.....

Likewise, in our case, Mary Whealen’s admission that she had sexual relations with three other women (CP1376) is probative evidence of fraud in our case, which should have prevented Summary Judgment.

At pg. 42 of her Response Brief, Mary Whealen cites *In re Estate of Mumby*, 97 Wn.App. 385, 394, 982 P.2d 1219 (1999), which helps Tom Wood, with a discussion of the issue of good faith and probable cause on the question of attorney’s fees in a Will Contest and on pg. 391 held that:

“Where a Will is attacked because (it was) induced by fraud, it may be avoided, not because the testator’s mind was coerced, but because his mind was deceived. [citing Estate of Bottger, supra, at pg. 710. [Emphasis added]

Secondly, **IT IS NOT TRUE THAT [TOM WOOD]**

PRESENTED NO FACTS WHICH WOULD SUPPORT HIS

RELIANCE ON THE “ADVICE OF COUNSEL” RULE. [pg. 43)] See

Declarations of Tom Wood [CP2854-2927] and John Flowers [CP2928-2937]

on this point. Also, see the detailed Answers of Tom Wood to Mary

Whealen’s Interrogatories [CP2343-2366] Another serious flaw in Mary

Whealen’s analysis of this point (Response Brief, pgs. 38-44) is the claim

that Tom’s first attorney [Michael Olver) did not know about her “thirty-year

relationship with [Jody Wood]”, but it was not Michael Olver who filed Tom

Wood’s Will Contest [CP1686-1692], it was Tom’s second attorney , John

Flowers, after a thorough investigation. In light of this extensive evidence of

Tom’s good faith and probable cause, Judge Inveen was certainly not

justified in finding:

“the sole design of [Tom Wood] was to harass [Mary Whealen] through litigation of no merit, and to obfuscate the truth. Such litigation produced no benefit to the estate, and served only to drain it.”

She abused her discretion in awarding attorney’s fees against Tom Wood.

Similar language of and an award of attorney’s fees by Commissioner

Velategui (Tr. of Jan. 20 and Feb. 24, 2010) against Tom Wood also were not

supported by the evidence presented.

A. Mary Whealen’s claims of lack of evidence of discrimination are not supported by applicable legal authority.

At pgs. 45 of her Response Brief, Mary Whealen claims that “[Tom Wood’s] evidence here consists of hyperbole and name-calling against [her] attorney, [D. Douglas Titus].” **THIS IS NOT TRUE.** Not only does Tom Wood’s evidence include his own Declaration [CP1538-1545] and that of his attorney, John Flowers [CP1506-1547], it includes Tom Wood’s claim at pg. 42 of his Opening Brief that:

“Court proceedings should be unbiased and fair and appear to be unbiased and fair. The proceedings described in this motion were not.”

At pgs. 45- 46 of her Response Brief, in discussing Art. I, Sec. 12, of the Washington State Constitution, Mary Whealen cites the municipal ordinance case of *Lenci v. City of Seattle*, 63 Wn.2d 664, 672, 388 P.2d 926 (1964) and the voting rights case of *Madison v. State*, 161 Wn.2d 85, 115, 163 P.3d 757 (2007) for the proposition that there is no constitutional problem if Tom Wood was treated (classified) like every other non-resident litigant who filed a lawsuit in King County Superior Court because his or her assets (to cover costs) would be outside the jurisdiction of the Court. However, this ignores the routine procedure for converting a Washington judgment to a California judgment under the Sister State Money Judgment Act [California Code of Civil Procedure, Section 1717.10, *et seq.*], making any a judgment for costs readily collectible.

In effect, Mary Whealen is arguing that the trial court under RCW

4.84.210 should require a plaintiff living outside of King County to post a bond for costs (including attorney's fees) because she fears, without proof, that he may not be able to pay a Judgment for costs if he loses his case. If that were the test, even if a plaintiff resided within King County, he could be required to post a cost bond if a defendant suspects that he did not have sufficient non-exempt assets to pay a Judgment for costs. Also, under RCW 4.84.210, a plaintiff living in Shoreline (King County) is not required to post a bond, while a plaintiff living in Lynnwood (Snohomish County), 10 miles away, is required to post a bond, or he could be denied access to justice in Court in King County. Tom Wood did not voluntarily choose King County. He was required to file his Will Contest here because his mother lived here, died here, and her probate Estate is pending here. To require him to post a bond in that situation denies him equal access to justice because he lives outside of King County. It also means that if a decedent's relative who lives outside King County (perhaps the only person with standing) cannot file probate litigation or a civil case in or against a King County probate Estate without filing one or more large, unaffordable bonds for costs, grave injustices and illegal behavior, such as this misconduct by Mary Whealen, would never be brought to the attention of the only court with jurisdiction. This is a clear violation of due process and equal protection of the laws. Contrary to other cases involving different charges for public services for residents and non-residents, allowable costs in Tom Wood's Will Contest

will be the same whether he is a resident or a nonresident of King County. In the context of our case, RCW 4.84.210 is manifestly arbitrary, unreasonable, inequitable, and unjust. *See Lenci v. City of Seattle, supra*, cited by Mary Whealen at pg. 45 of her Response Brief. *Cf. Faxe v. City of Grandview*, 48 Wn.2d 342, 294 P.2d 402 (1956), which upheld an ordinance that charged different amounts for water service for residents and nonresidents. No such situation exists in our case.

IV. Conclusion

We have been unable to find a reported case in Washington where the Personal Representative had engaged in so many instances of admitted and proven misconduct as Mary Whealen and has not been removed, or where there were so many genuine issues of material fact in a Will Contest and a Motion for Summary Judgment has been granted, without granting access to decedent's computer that was allegedly used to write the challenged "cut and paste Will", or where a \$50,000 pre-trial cost bond for a non-resident of King County has been required and forfeited without "proof", as required by RCW 4.84.210, that Mary Whealen is entitled to attorney's fees and the reasonable amount thereof, even if she defeated Tom Wood's Will Contest. These extraordinary events in King County Superior Court also bolster Tom Wood's argument that he has been the victim of reverse discrimination and that his state and federal constitutional rights of equal protection and due process have been violated.

This Court should not ignore numerous well-settled Washington legal precedent and statutes by agreeing with Mary Whealen's claims that no errors were committed in these probate litigation matters. It should reverse the Summary Judgment in Tom Wood's Will Contest and the Order Denying Petition to Remove Mary Whealen as Personal Representative, and reverse the two Judgments for Attorney's Fees and Costs totaling \$106,431.96 and award reasonable attorney's fees and costs in this Court and also order the trial court to award Tom Wood reasonable attorney's fees and costs in the trial court proceedings, and order Mary Whealen to refund forthwith to Tom Wood his \$50,000 cash bond the trial forfeited and paid to her attorney, D. Douglas Titus.

Dated: January 15, 2011.

Respectfully submitted,



John Flowers, WSBA#24315
Attorney for Appellant Tom Wood

No. 65376-8-1 and 65970-7-1
Consolidated on Appeal

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

DYLAN THOMPSON WOOD,

Appellant

vs.

**MARY FRANCES WHEALEN, INDIVIDUALLY AND AS PERSONAL
REPRESENTATIVE OF THE ESATE OF JODY SCOTT WOOD,**

Respondent

**Orders and Judgments of the Superior Court for King County
Honorable Paris K. Kallas and Commissioner Carlos Y. Velategui
and Honorable Laura C. Inveen
Cause #08-4-00829-8 SEA**

2011 JAN 18 11:15

COURT OF APPEALS
CLERK

Certificate of Service for APPELLANT'S REPLY BRIEF

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Telephone: (425) 760-2310**

The undersigned certifies that on January 18, 2011 he hand delivered a copy of APPELLANT'S REPLY BRIEF to the law office of Respondent's attorney, D.

Douglas Titus, at 6041 California Avenue SW, Seattle, WA 98136.

Dated: January 18, 2011.


John Flowers

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