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 ORIGINAL

No. 68222-9-I

COURT OF APPEALS, DIVISION I,
FOR THE STATE OF WASHINGTON

IN RE THE MATTER OF THE ESTATE OF WILLIAM ROSS
TAYLOR,

Deceased.

PATRICIA CAIARELLI,

Respondent/Cross-Appellant,

v.

CHARLES E. TAYLOR II, REUBEN TAYLOR, JR., AND EMILY
TAYLOR, AND THE MARITAL COMMUNITY THEREOF, AND
ELIZABETH M. TAYLOR,

Appellants/Cross-Respondents.

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BRIEF OF RESPONDENT/CROSS-APPELLANT
PATRICIA CAIARELLI AND
ESTATE OF WILLIAM ROSS TAYLOR

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A. INTRODUCTION

This is the second time this case has been before this Court. In *In re Taylor*, 159 Wn. App. 1003, 2010 WL 5464751 (2010) (“*Taylor I*”), see Appendix, this Court reversed the trial court’s dismissal of the case brought by Patricia Caiarelli on behalf of A.C.T., the minor child of decedent William Ross Taylor and Caiarelli, with respect to certain life insurance policies and other nonprobate assets. Charles Taylor, William’s brother and the personal representative of his Estate, and Reuben Taylor, William’s father, claimed the insurance proceeds and investment accounts belonged to them. Charles¹ manifested a complete disregard for his duties as personal representative, mishandling the Estate and was removed from that position by the trial court.² This Court reversed a summary judgment on the ownership of one of the several assets.

On remand, the case was tried to a jury on the question of the assets’ ownership. Charles did not present any witnesses on his behalf, essentially reiterating his entitlement to the assets as a matter of law. The jury disagreed and concluded that William intended to name his son as beneficiary of his life insurance policies and other nonprobate assets and

¹ The Taylors are referenced by their first names for sake of clarity.

² It was only when new counsel for Caiarelli and A.C.T. was retained that Charles’ massive misconduct and self-dealing were revealed. *Taylor I* at *2.

that Charles, consistent with his past misconduct, exerted undue influence over William to subvert that intent.

The jury's verdict was supported by substantial evidence and should stand.³ The trial court's decision to dismiss Emily and Reuben Taylor, the parents of Charles and William, was error given the Taylor family's intensive relationship with William, and their effort to prevent A.C.T. from securing any assets from his father.

B. ASSIGNMENTS OF ERROR

Caiarelli and the Estate⁴ acknowledge Charles' assignments of error. The issues pertaining to those assignments of error are more appropriately formulated as follows:

1. Was the trial court correct in entering a judgment on the verdict of the jury where there was competent evidence supporting the verdict that William intended to name Charles as a beneficiary of his nonprobate assets in a trustee capacity for his three-year old son, given William's disposition of his assets in his will?

2. Was the trial court correct in entering a judgment on the verdict of the jury, in the alternative, that if William designated Charles as an actual beneficiary of his nonprobate assets, despite his intent to benefit his three-year-old son, there was competent evidence supporting the jury's verdict that Charles exerted undue influence over William?

³ Consistent with his efforts to escape responsibility, Charles has sought the protection of bankruptcy in Illinois, the home of the Taylor family. His protestations of poverty will be addressed in this brief *infra*.

⁴ The Estate has assigned its interests in the appeal to Caiarelli.

3. Did the trial court abuse its discretion in awarding attorney fees to Caiarelli and the Estate under TEDRA?

Caiarelli and the Estate assign error to the following trial court actions on cross-review:

1. The trial court erred in excluding the testimony of Amy Ainsworth.

2. The trial court erred in excluding the deposition testimony of Rueben Taylor.

3. The trial court erred in dismissing Emily on summary judgment as not being a necessary party before she testified at trial.

4. The trial court erred in dismissing Reuben before submitting the case to the jury.

The issues pertaining to the assignments of error on cross-review are as follows:

1. Did the trial court err in excluding Amy Ainsworth's testimony that was relevant to the issue of contacts between Emily and William, important evidence bearing on whether Emily had a confidential relationship with William and exerted undue influence over him? (Assignments of Error Numbers 1 and 3 on Cross-Review)

2. Did the trial court err in excluding Reuben's deposition testimony, testimony establishing the nature of the relationship between Reuben and William that bore on the undue influence exerted by Reuben over William? (Assignments of Error Numbers 2 and 4 on Cross-Review)

3. Did the trial court err in dismissing Reuben and Emily from the case where there was evidence that they exerted undue influence over William? (Assignments of Error Numbers 1-4 on Cross-Review)

C. STATEMENT OF THE CASE⁵

William Taylor and Patricia Caiarelli married in November 2001. *Taylor I* at *1. Their son, A.C.T., was born in May 2002. *Id.* In August 2002, William was placed on probation at Microsoft for below standard performance. RP (11-17-11) at 115. In January 2003, he was fired. *Id.* at 117. William's mental health deteriorated thereafter.⁶ *Id.* at 118-20; Ex. 8.

William and Caiarelli separated in April 2003 and a bitterly contested dissolution action followed. William was allowed only minimal visitation by the dissolution court with A.C.T. due to his erratic behavior. Ex. 12; CP 1085.

Jack Borland, William's business attorney, prepared two wills for William at the time the dissolution proceedings were pending that William signed; the two wills were essentially similar, reserving almost all of

⁵ Charles has provided an entirely one-sided, argumentative factual discussion in his Statement of the Case that omits crucial facts for this Court's consideration of the issues on appeal. Br. of Resp't at 4-13. RAP 10.3(a)(5) requires a fair recitation of the facts and procedure in the case without argument. His omission of key events below is glaring. This fairer and more complete recitation of what transpired below is necessary for this Court to have a complete picture of the facts in the case.

⁶ Charles makes no mention of this critical fact in his statement of the case.

William's assets in trust for his son. Ex. 49. Despite the pending dissolution, William's second Borland will provided as follows:

1. All his property to be held in trust for his son.
2. The house, his separate property, was to be available to Patricia to live in as long as A.C.T. lived with her, even if absent to college, until A.C.T. was 23. Then the house was to be sold and money put into trust for A.C.T.
3. There was to be a trust for A.C.T. Patricia was to be given an income from the trust equal to the amount of child support that he was ordered to pay in the then pending divorce.
4. Everything else was for A.C.T. in trust.

Id.

Borland became concerned about William's mental health. He contacted the Kirkland police on August 15, 2003 and filed a report, in which he told the police that William had done estate planning which Borland considered highly unusual in light of the heated pending divorce. Ex. 6.⁷ He told the police that William was missing at that time. Borland said that he had been in contact with Reuben and Emily. The police accepted a missing persons report. Ex. 6.

⁷ Not only is there a question about how Borland could reveal such client confidences, RPC 1.6, his representation may have been conflicted. RPC 1.7, 1.8, 1.9. After William's death, Borland served as the attorney to Charles when acting as personal representative of William's estate. At the same time, Borland served as personal attorney to Charles and Reuben in their individual capacity in their defense of this TEDRA action. CP 932. Charles' brief is also silent as to Borland's role in this case, not mentioning the two wills in particular.

On August 29, 2003 the police were called to William's house by Reuben and Emily, who were visiting. Ex. 6. William had taken Reuben's brief case and would not return it. The police forced him to give the brief case back to Reuben. Ex. 6. On September 1, 2003, the police were called again to the house by Reuben and Emily due to William's erratic behavior; he was very agitated and told police that the parents were trying to take control of his life and assets. William told the police his father had taken his important papers. Ex. 6.

On September 4, 2003, Emily filed a petition for William's guardianship. Ex. 7. Emily stated in a declaration her extreme concern for her son's mental health and his financial actions. Ex. 8; CP 1080-82.⁸ Later, in September, 2003, Emily hired attorney Craig Coombs to help William defend himself against the guardianship case she had started only 2 weeks earlier. RP (11-21-11 p.m.) at 53-54; RP (11-16-11 a.m.) at 50-51, 57.⁹ The guardianship was settled in November 2003. As a part of the settlement agreement, Coombs prepared a power of attorney which named

⁸ This was part of the reason the dissolution court later limited William's contact with A.C.T. Ex. 12; CP 1085. Based upon the reports from court-appointed experts, Joan Ward, MSW, and Dr. Stuart Greenberg, Ph.D., William was required throughout the dissolution lawsuit and through the summer of 2005 to have limited and scheduled supervised visitation with his son, A.C.T., and go to parenting classes. Exs. 10, 11, 12; CP 1085.

⁹ Emily paid for Coombs' services throughout the time at issue here for his work on the guardianship and William's estate planning. RP (11-21-11 p.m.) at 52-54, 75, 77.

Charles as William's attorney-in-fact, and Reuben as the alternate attorney-in-fact; it was signed by William on November 20, 2003. Ex. 56; RP (11-16-11 a.m.) at 53. William, who had a proclivity for disappearing for periods of time, RP (11-21-11 p.m.) at 63-64, was subject to such power of attorney if he did. Exs. 56 (p. 3), 57 (p. 3).

William never told Coombs that attorney Borland had prepared the two earlier wills for William. RP (11-16-11 a.m.) at 78. Coombs prepared two wills, one dated November 26, 2003 and another dated March 2, 2004. Exs. 2, 48. William executed both wills Coombs prepared.¹⁰ Coombs advised William that these wills were a stop-gap measure and that he needed to return after the dissolution was finalized to update it; William never did so. RP (11-16-11 a.m.) at 65-66. William's Coombs wills were essentially identical to his Borland wills in that the focus of all four was the provision of William's estate to his son, A.C.T. Exs. 2, 48, 49. The wills differed principally in their treatment of Caiarelli. *Id.* In his final will, William made two small bequests, but gave the residue of the estate to his son in trust. Ex. 2. The will then listed specific assets to be distributed to a trust for A.C.T.:

2.5 The Trust shall consist of The Sablewood house located at 4711 117th Place N.E., Kirkland, WA, 98033-

¹⁰ The two wills were essentially identical except for a reference to William's dissolution attorney. Exs. 2, 48.

8749, or its proceeds after sale. In addition, the Trust shall include all my monies and properties of Tailorized Industries, Inc. and Tailorized Properties, LLC, and from my Charles Schwab accounts (Schwab IRA's, Schwab One, etc.), my Fidelity accounts (401K, ESPP, etc.) and all other checking and savings accounts under my name.

Ex. 2. William's will also directed that all of his assets, which would include his life insurance policy proceeds, should be given to A.C.T. Ex. 2. Paragraph 7.3 of the will directed that A.C.T. was to be the beneficiary of a trust of all of William's community and separate property until age 25 if the pending dissolution was not final at the time of his death. *Id.*

William named his brother Charles to serve as his personal representative and trustee of A.C.T.'s trust, with Reuben as an alternate, and Emily as a second alternate. Ex 2 (¶ 5.2). Coombs testified that William wanted his assets to go only to his son, A.C.T.; thus, Charles, Reuben and Emily were never considered by William as beneficiaries of William's will. RP (11-16-11 a.m.) at 73. Coombs testified that under the trust provision, "if William died and his son was a minor, the funds would be held by a trustee for his [A.C.T.'s] benefit." RP (11-16-11 a.m.) at 62. William "wanted to make sure somebody would carry on on behalf of his son . . . in the event he [William] died." *Id.* at 65. He also testified that the will was designed to be temporary until the final division of the property in the dissolution. *Id.* at 65-66.

Charles was aware of his role in William's will. On two occasions, Coombs' paralegal sent copies of the draft will to Charles by email. *Id.* at 68-70; Ex. 3. Charles denied in his trial testimony that he had ever received any communications about William's estate planning from Coombs, despite these emails. RP (11-22-11 p.m.) at 38, 47. But communications clearly occurred. After Charles received a draft of William's will, William shortly thereafter wrote to Coombs telling him to change the will to make Charles' son (Charles III aka Chase) the will beneficiary if A.C.T. died. Ex. 3.

In the final decree in the dissolution in February 2005, William received five Northwestern Mutual life insurance policies ("Northwestern policies") that had been purchased by Reuben over many years for William. Ex. 14. Reuben and Emily were the policies' beneficiaries.¹¹ William was also awarded a Schwab IRA account ("Schwab IRA") that he started in 1990. *Taylor I* at *2. After William's death, the proceeds of all the policies were paid to Reuben. Ex. 102.

¹¹ Reuben later purchased a sixth policy on William's life, although William did not sign the application, as is required by the insurer. Ex. 101. Copies of the Northwestern policies purchased over several years from the time William was in the third grade until he was 34 years old, showed that in each case, the beneficiary designation was executed in exactly the same handwriting, handwriting that was not William's. Exs. 27, 101.

After the divorce, William started working for a new computer company in July 2005. *Taylor I* at *2. In July, in a short time period, he made significant changes to two financial assets he left to A.C.T. in his will: he assigned to Reuben his ownership of 5 Northwestern life policies, which had a combined death benefit of \$204,000, and he named Charles as primary beneficiary and Reuben as secondary beneficiary on his Fidelity rollover IRA (“Fidelity IRA”). *Id.*

William’s Fidelity IRA from his former employment at Microsoft was valued at approximately \$158,000. *Id.*; CP 93. On July 22, 2005, William rolled over the IRA to a new Fidelity account, requiring him to sign a new paper beneficiary designation, which had four choices of beneficiary relationship (spouse, non-spouse individual, trust, entity). Ex. 30 (p. 2). The word “trustee” was not one of the options. *Id.* That form showed that if an investor chose “trust,” then he/she must include the date of the trust and the federal tax identification number. *Id.* Since the trust did not yet exist (it would only arise on William’s death) and, thus, there was no federal tax identification number, William was unable to select the word “trust” on the form. *Id.* He named Charles as the primary beneficiary and Reuben as the secondary beneficiary. *Id.* This was the same as he had done in his will, i.e., naming Charles as the primary

trustee, and Reuben as the alternate trustee, for the testamentary trust to benefit A.C.T. Ex. 2 (¶ 5.1).

On July 25, 2005, William took out three AIG life insurance policies (“AIG policies”) obtained through his new employer, designating Charles as primary beneficiary and Reuben as contingent beneficiary. These policies had a combined value of \$692,000. *Taylor I* at *2. William completed the AIG beneficiary designation forms online. Ex. 34. AIG’s online form allowed a choice of 34 titles, in alphabetical order, to describe the relationship between the insured and the beneficiary. RP (11-21-11 a.m.) at 74; Ex. 47. Only thirty of those choices appeared on the first screen at one time, and in order for the last three to be seen, the viewer would have to scroll down near the bottom to see them. The word “trustee” was not on the list at all. Ex. 47. The word “trust” is number 33 on the list, followed by only one other choice. *Id.* William completed the AIG computer forms, designating Charles and Reuben respectively as the primary and contingent beneficiaries, identifying them as “brother” and “father.” Exs. 34 (p. 16), 35 (p. 4). As William did not return to Coombs to draft an updated will, William never received any consultation on the proper way to complete these life insurance or IRA beneficiary designations.

On September 11, 2005, less than two months after making these changes to his accounts, William drowned in a strange boating accident on Lake Washington.¹² Neither Charles, Reuben, nor Emily initiated any contact with A.C.T. after William's memorial service in September 2005. CP 940.

William's will was admitted to probate and Charles was appointed as personal representative. *Taylor I* at *2. Charles, Reuben, and Emily cleaned out William's home after his death. Ex. 67; RP (11-21-11 p.m.) at 59. Despite his obligation to protect A.C.T., Charles was deficient in his identification of estate assets, and engaged in a patent conflict of interest to his own advantage. *Taylor I* at *2.

In March 2006, Caiarelli brought a TEDRA action in the King County Superior Court seeking an order declaring that A.C.T. was entitled to the proceeds of all probate and nonprobate assets identified in the will and owned by William at the time of his death. *Id.* The case was assigned to the Honorable James Rogers. Caiarelli's attorneys withdrew, and a stipulation was entered in the probate and the TEDRA actions appointing attorney Bruce Moen as guardian ad litem ("GAL") for A.C.T. *Id.* The

¹² William took A.C.T. and two dogs out on a boat on Lake Washington. The dogs and A.C.T. wore life jackets. William did not. RP (11-22-11 p.m.) at 45. William jumped into the lake fully clothed with a coat when a dog jumped into the water. Although an expert swimmer from his days as an Eagle Scout, *id.* at 32, 45, William drowned. A.C.T. was only three years of age at the time. Ex. 15.

GAL filed a motion for partial summary judgment, opposed by Charles, seeking to have A.C.T.'s trust declared the beneficiary of William's Schwab IRA. The trial court granted the motion, ruling that the Schwab IRA should be distributed to Charles in his capacity as trustee of the testamentary trust for A.C.T. *Taylor I* at *2.

In December 2008, Caiarelli retained new counsel, Madeline Gauthier. The trial court consolidated the probate and TEDRA actions and continued the trial date. *Id.* Gauthier conducted discovery that revealed Charles' massive mishandling and abuse of William's estate, as well as misconduct by Reuben. *Id.* During the probate, Charles and Reuben submitted personal claims against the estate in amounts totaling approximately \$260,000, which was more than the ostensible value of the probate estate. *Id.* As personal representative, Charles accepted those claims without court approval, a blatant conflict of interest. *Id.*

The estate inventory Charles submitted did not include two of the three AIG policies or *any* of the Northwestern policies. It did not include an antique Lincoln touring car which was listed in the dissolution inventory just five months earlier. Ex. 14 (p. 2). It was later discovered to be in Charles' possession. CP 1068; Ex. 28. The signature on the document, transferring the Lincoln to Charles was not William's. *Id.*; Exs. 26, 27. Charles swore in his answers to interrogatories that William's

Lexus had been sold for fair market value. Ex. 19 (pp. 9, 24), Ex. 28 (Charles' depo. at 47-52).

Documents in Borland's files revealed that a Lexus automobile had been transferred to Reuben to satisfy a part of his claim against William's estate, but Reuben's claim was not reduced by the amount for which the Lexus sold. Ex. 28; CP 1067-68.

During Charles' three years as personal representative, no accounting was provided to the probate court, nor were any tax forms completed. Ex. 28 (p. 9); *Taylor I* at *2. In discovery, when he was asked for an accounting, Charles submitted two accountings. The first one, submitted on March 24, 2009 by Borland and accompanied by bank statements through September 12, 2008, stated that \$123,586.09 was in the account. Ex. 23. When Charles was questioned again, he submitted a second accounting with a balance of \$74,586.09, showing that \$49,000 had been removed. CP 24. Thereafter, on March 11, 2009, the estate's bank account statements showed that on October 1, 2005, Charles wired \$49,000 from the estate's account to Gamin Yacht Company in Florida for the purchase of an airplane. Ex. 25 (p. 4). Title to that airplane was in Charles' name. In his deposition, Charles testified that the sum in the account exceeded the FDIC insurance amount, so he put \$49,000 into another account. Ex. 28 (Charles' depo. at 38-41). He testified that it was

“in another institution at this point,” all the while knowing that he had purchased an airplane.¹³ *Id.* at 38, 54-56; CP 939.

On March 4, 2009, the court removed Charles as personal representative and denied all Taylor family members the right to serve as alternate representatives, but refused to change the April 2009 trial date. Ex. 29. The court subsequently appointed Michael Longyear as estate administrator. *Taylor I* at *3.

In March 2009, Charles filed two motions for summary judgment. On shortened time, the court granted both motions and held that Reuben was the personal owner of the five Northwestern policies and Charles was the personal beneficiary of the AIG policies and the Fidelity IRA. *Taylor I* at *3.

On appeal, this Court reversed the trial court’s decision on the Schwab IRA, awarding it to Charles in his personal capacity. *Id.* at *5. But the Court also reversed the trial court’s decision on the life insurance policies and the Fidelity IRA because William’s transfer of the Northwestern policies to his father and his designation of Charles as

¹³ Charles also misrepresented his use of the \$49,000 to buy his airplane on his second accounting statement, which explained the October 2008 withdrawal of those funds from the estate's bank account as "CET [Charles E. Taylor] advance, move funds out to stay under 100K limit." Ex. 24. Such withdrawal directly violated a 2006 stipulation and agreed order in this case in which Charles agreed to make "no withdrawals or distributions" from any estate account pending the case's resolution. CP 8.

beneficiary on the AIG policies and the Fidelity IRA after his 2004 will could be interpreted as being for A.C.T.'s benefit: “[a] jury could conclude that William intended to leave these assets to his son by entrusting them to his father and brother in a representative capacity.” *Id.* at *5-6.

On remand, the case was tried to a jury from November 10 to November 30, 2011. CP ___ (Sub. 459 at 2). Caiarelli and the Estate presented claims for undue influence by Reuben, Charles, Emily and Elizabeth, William's sister, and for a mistake in the designation of Charles and Reuben as the beneficiaries of three AIG life insurance policies and the Fidelity IRA. *Id.* There was a separate claim for undue influence and mistake/intent against Reuben in the transfer of William's ownership of five Northwestern policies to Reuben during William's lifetime. *Id.*

The trial court dismissed Reuben, Emily, and Elizabeth during the case. CP 41, 46. The trial court dismissed Reuben under CR 50(a) at the conclusion of Caiarelli's and the Estate's case. RP (11-23-11) at 103-04. The court dismissed Emily and Elizabeth before trial and *before* Emily testified in the case on the theory that they were “unnecessary parties.” CP 532. In what can only be described as a strange tactical move, Charles offered no testimony at trial. RP (11-23-11) at 107.

The jury determined that William intended to leave his AIG policies and the Fidelity IRA for the benefit of A.C.T. CP 878-80; RP (11-30-11) at 3-27. The jury also found that any gift of William's AIG policies and the Fidelity IRA to Charles was the product of undue influence. *Id.* See Appendix.

Charles subsequently moved for judgment notwithstanding the verdict,¹⁴ arguing insufficient evidence to support the jury's verdict. CP 778-808. The trial court denied the motion on December 20, 2011. RP (12-20-11) at 34-42; CP 894-95. Charles appealed that decision. CP 896. Caiarelli filed a cross-appeal. CP 58-66, 305-16.

D. SUMMARY OF ARGUMENT

On the issues of William's intent and Charles' undue influence, the trial court properly instructed the jury on those legal issues and ample competent evidence supports the jury's verdict, particularly where Charles called no witnesses to support his contentions.

On cross-review, the trial court erred in dismissing Caiarelli's argument that Reuben and Emily exerted undue influence over William's ownership transfers for the Northwestern policies and alternate beneficiary designation on the AIG policies. The Taylor family, Charles, Reuben, and Emily were close-knit. Reuben and Emily had historically exerted

¹⁴ A motion for judgment notwithstanding the verdict is now called a motion for judgment as a matter of law. CR 50(b).

significant influence over William, who, due to his mental and emotional problems, was particularly vulnerable to their influence. The trial court should not have prematurely dismissed Caiarelli's and the Estate's case against Reuben and Emily, particularly where the court did so before even hearing Emily's testimony.

The trial court did not abuse its discretion in awarding fees to Caiarelli and the Estate under TEDRA, RCW 11.96A.150. Charles has not argued the amount of fees was unreasonable.

Caiarelli and the Estate are entitled to reasonable fees on appeal from Charles, and Reuben and Emily.

E. ARGUMENT

Initially, Charles assigns error to Instruction Number 13, pertaining to undue influence, Br. of Appellant at 2. He does not assign error to Instruction Numbers 9, 10 and 11 relating to William's intent. *Id.* The central thrust of his appeal is his contention that the trial court erred in denying his CR 50(b) motion. Charles asserts that the standard of review is de novo. Br. of Appellant at 13. He glosses over the *high* burden he bears initially in seeking a new trial on the basis that the jury's verdict is not supported by the evidence. As stated in *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997), the party claiming that insufficient evidence supported the jury's verdict must prove that there is no

substantial evidence, or reasonable inference from that evidence, when viewed in a light most favorable to Caiarelli and the Estate that sustained the jury's verdict. A court must accept the truth of the nonmoving party's evidence and draw all favorable inferences therefrom. *Douglas v. Freeman*, 117 Wn.2d 242, 247, 814 P.2d 1160 (1991). "If there is any justifiable evidence upon which reasonable minds might reach conclusions that sustain the verdict, the question is for the jury." *Id.* (quoting *Lockwood v. AC & S, Inc.*, 109 Wn.2d 235, 243, 744 P.2d 605 (1987)). This Court applies that same standard. *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 530-31, 70 P.3d 126 (2003). Charles cannot meet this high burden, particularly where he offered *no witnesses* or documentary evidence in support of his position on either William's intent or undue influence.

(1) The Jury's Decision on William's Intent Was Supported by Substantial Evidence

Charles challenges the trial court's denial of his CR 50(b) motion. Br. of Appellant at 14-20. Charles starts his argument by quoting the court's Instructions Numbers 9 and 11, implying that these instructions were somehow erroneous. *Id.* at 14-15. Insofar as Charles did not assign error to them, or to Instruction Number 10, as required by RAP 10.3(g), they are the law of the case. *Millican of Wash., Inc. v. Wienker Carpet*

Serv., Inc., 44 Wn. App. 409, 413, 722 P.2d 861 (1986). *The jury here was properly instructed on the law relating to William's intent and ruled against Charles.*

Thus, the *only* issue in the case on William's intent was whether sufficient evidence supported the jury's verdict. Charles contends that the evidence presented at trial was insufficient to sustain the jury's verdict that when William completed the three AIG policy forms online and the Fidelity IRA application in the summer of 2005, he intended to designate Charles as trustee for the benefit of William's three-year-old son, A.C.T. Charles contends that "There was simply no evidence that William intended to name Charles Taylor in a 'trustee capacity' when he made the AIG policy designations and the Fidelity IRA account designations." Br. of Appellant at 19. That is not so. This contention is particularly inconsistent with William's *four wills* and uncontradicted testimony that William's overarching interest was to benefit his then three-year-old son. RP (11-16-11 a.m.) at 73.

In Washington, with respect to a will, the paramount function of the courts is to carry out the testator's intent. *In re Estate of Wright*, 147 Wn. App. 674, 680, 196 P.3d 1075 (2008), *review denied*, 166 Wn.2d 1005 (2009). Generally, the language of the will itself controls. *In re Estate of Price*, 73 Wn. App. 745, 754, 871 P.2d 1079 (1994). William's

intent in his multiple wills was utterly unambiguous. He wanted his assets to go to A.C.T., his three-year-old son. Exs. 2, 48, 49.

William's 2004 Coombs will, that was the last of *four* wills all evidencing an intent to leave his assets to his son, was admitted at trial. Ex. 2.¹⁵ As this Court previously recognized, the 2004 will is "strong evidence" of William's "intent to leave all his assets to his son." *Taylor I* at *4. This Court further opined, "It appears likely that William believed his will would accomplish this goal, and that he trusted his brother and father to ensure his intent was carried out." *Id.* This Court noted in the first appeal that in addition to the will itself, William's attorney, Craig Coombs, testified that William loved his son but disliked his ex-wife and was anxious to make sure she did not get any more of his assets. *Id.* Equivalent testimony was presented to the jury here. RP (11-16-11 a.m.) at 73; *id.* at 9-11. Coombs' testimony and that of William's friend Jennifer Coykendall that William never expressed an intent to make Charles or Reuben a beneficiary in his wills is particularly telling. RP (11-16-11 a.m.) at 29, 34, 73.

Jennifer Coykendall testified that William was still not himself in the summer of 2005, and showing signs of depression. RP (11-16-11 a.m.) at 13, 14, 16, 19, 22-24. Bruce Clouse testified that William talked

¹⁵ William's other three wills were of record. Exs. 48, 49.

with him in the summer of 2005 and William was antagonistic toward Patricia. RP (11-21-11 p.m.) at 30.¹⁶ Coombs wrote a will with a special provision that directed the attorney in the dissolution to secure all of William's property if he died during the dissolution proceedings and place it in trust for A.C.T. Ex. 2 (¶ 7.3). The testimony showed that William was a man who had emotional troubles and was focused on assuring that his ex-wife got nothing more. The inference is that he would take the bulk of his estate and put it in the hands of those he trusted to raise his child: his brother and his father, both named as guardians in his will and identified as trustees. Ex. 2. Testimony supported this pattern of behavior. William's intent was shown in multiple wills executed in 2003 and 2004. Exs. 2, 48. In each instance, William gave everything to his son and nothing to Charles and Reuben. *Id.*

Given William's clear intent expressed in his will to leave all his assets to his son, evidence of his desire to keep further assets from his ex-wife, RP (11-16-11 a.m.) at 73, and his trust and reliance upon his brother and father to carry out his wishes, the jury could reasonably have concluded, based on the evidence presented, that when William named Charles as beneficiary on the AIG policies and Fidelity IRA, acquired by William after executing his wills, that he intended Charles to hold such

¹⁶ This antagonism toward Patricia began after Charles and William took a 2-week car trip together in January 2003. RP (11-17-11 a.m.) at 57, 123-24.

assets as trustee for A.C.T. in accordance with William's will.¹⁷ Reuben stated that he did not intend to profit from his son's death, and that he intended the Northwestern policy purchases to help William develop one leg of his estate plan. RP (11-22-11 a.m.) at 78. Such a "plan" demonstrates that Reuben did not believe he was to receive the policy proceeds in a personal capacity.

Under Washington law, a decedent's change in life insurance beneficiary or other nonprobate asset will not be honored if it is contrary to the decedent's intent or an overarching public policy directive. *See, e.g., Baker v. Leonard*, 120 Wn.2d 538, 548, 843 P.2d 1050 (1993) (courts impose constructive trust where evidence established the decedent's intent that the legal title holder was not the intended beneficiary); *Francis v. Francis*, 89 Wn.2d 511, 573 P.2d 369 (1978) (community property); *Harris v. Harris*, 60 Wn. App. 389, 804 P.2d 1277, *review denied*, 116 Wn.2d 1025 (1991) (community property agreement); *Standard Ins. Co. v.*

¹⁷ The timing of the assets acquisition and beneficiary designations here (summer 2005), which occurred after A.C.T.'s birth and after William's express declaration of intent to leave all his assets to A.C.T. in his 2004 will, distinguishes the present case from the disposition of the Schwab IRA addressed in this Court's prior opinion. There, this Court held that William's will alone did not meet the substantial compliance test to change the named beneficiary on William's Schwab IRA, which had been established in 1990. William *did* intend for Charles to be the primary beneficiary when he and Charles started their Schwab IRAs in 1990, before William had a family. Given that history, this Court held that William had to show an actual effort to change the long established named beneficiary on the Schwab IRA. *Taylor I* at 4. By contrast, the facts of the present case do not support the notion that William *ever* intended Charles to be the primary beneficiary of the AIG policies and the Fidelity IRA (or any other assets) which were acquired after A.C.T.'s birth and the execution of his will.

Schwalbe, 110 Wn.2d 520, 755 P.2d 802 (1988) (change made in violation of court order).

Even in the face of a contrary beneficiary designation in a life insurance policy, a beneficiary designation will be overcome when it can be shown that the decedent did everything in his/her power to make a change to the designation as required by the insurer, and was still unable to make his intentions clear. The general rule in Washington and elsewhere as to attempted changes of beneficiaries in an insurance policy is that courts of equity will give effect to the intention of the insured when the insured has substantially complied with the provisions of the policy regarding that change. *Allen v. Abrahamson*, 12 Wn. App. 103, 105, 529 P.2d 469 (1974). Substantial compliance with the terms of the policy means that the insured has not only manifested an intent to change beneficiaries, but has done everything which was reasonably possible to make that change. *Id.* See also, *In re Estate of Freeberg*, 130 Wn. App. 202, 205, 122 P.3d 741 (2005).

Here, three people testified that William could not possibly fill out the beneficiary designation forms in a way that would allow him to describe Charles and Reuben as trustees.¹⁸ As noted *supra*, William could

¹⁸ Rachel Tyra, Branch Manager at Fidelity's Bellevue office, testified that the Fidelity IRA account application form on the beneficiaries designation area had "no space for trustees." RP (11-21-11 a.m.) at 25. Expert witness Don Kelley testified that

not readily effectuate his intent on either the AIG or Fidelity forms. Both companies' forms asked for the name of the beneficiary and a way to identify his status. In neither case did it make sense to identify Charles as a "trust" because that is a form of entity. And if William chose "trust" then he was required to give the date of the trust, and the tax identification number, neither of which is available until William's death. RP (11-21-11 a.m.) at 75. Expert Don Kelley told the jury that William could not indicate to AIG that he wanted to name Charles and Reuben as trustees if that was his intent.¹⁹ *Id.* at 73, 80-82. Both Rachel Tyra of Fidelity and Michelle Williams of AIG testified that their respective companies do not offer advice of any kind on how to fill out the forms. RP (11-21-11 a.m.) at 27, 39; RP (11-17-11) at 34. Coombs' testimony indicates that William did not ask him for advice on these forms. RP (11-16-11 a.m.) at 83.

This is not a case like *In re Trust and Estate of Melter*, 167 Wn. App. 285, 273 P.3d 991 (2012) where the testator had grounds to change his dispositive scheme as expressed in his wills. William was not "angry" at A.C.T. He loved him. He wanted him to have his estate. It is

the AIG online application contained no "trustee" selection option when designating a beneficiary. *Id.* at 74. Michelle Williams, of Compucom, testified to the same effect. RP (11-17-11 a.m.) at 33.

¹⁹ Kelley opined that in filling out the AIG and Fidelity forms, William substantially complied with the institutional requirements to express what he wanted. "[William] complied with [institutional] requirements to the extent that he completed the form . . . within the limitations imposed on him by the forms." RP (11-21-11 a.m.) at 82.

inconceivable that William would effectively disinherit A.C.T. by giving the overwhelming bulk of his estate to his brother and his father when he never expressed a desire for them or anyone else to receive his assets instead of his son.

Under the facts in this case, the jury drew an appropriate inference from the evidence presented at trial that William intended to name Charles as a trustee for A.C.T.'s benefit when filling out the AIG and Fidelity application forms following the execution of William's will. Under these circumstances, the trial court did not err in denying Charles's CR 50(b) motion.

(2) Charles Exerted Undue Influence Over William

On undue influence, Charles offers an analysis that is simply incorrect at the outset. Br. of Appellant at 20-40. He apparently wants to argue that Instruction Number 13 established the incorrect burden of proof on whether he and William had a confidential relationship in deciding whether he exerted undue influence over William. That instruction was entirely proper under Washington law and largely based on WPI 301.11. He further wishes to argue that insufficient evidence supported the jury's determination that he had a confidential relationship with William and that he exerted undue influence over William. The jury, however, was properly instructed in Instructions 14 and 15 on the definition of a

confidential relationship and undue influence; the jury ruled against Charles. Charles did not assign error to those instructions and they are *the law of the case*. The only issue was whether substantial evidence supported the jury's verdict on undue influence. It did.

Charles contends that "there was simply no evidence at all that Charles Taylor influenced William Taylor – let alone unduly influenced him" when William completed the three AIG life insurance policy forms (online) and the Fidelity account application in the summer of 2005. Br. of Appellant at 20. Charles is wrong, particularly where William was vulnerable mentally, and the treatment of these assets was so at odds with his will in which consideration for his son was foremost. Charles' present assertions fly directly in the face of his trial testimony. Charles actually testified that he and William were close, spoke all the time, and that he "could influence William ... more than anybody else." RP (11-21-11 p.m.) at 33, 40-41. The jury properly ruled that Charles exerted undue influence over William.

(a) Instruction Number 13 Properly Articulated the Burden of Proof on Undue Influence in This Case

When an intervivos transfer is made to a person in a fiduciary or confidential relationship, the donee like Charles must prove by clear, cogent and convincing evidence that the gift was intended and made

without undue influence. This rule found its genesis in *Meyer v. Campion*, 120 Wash. 457, 207 Pac. 670 (1922) and has never been altered by the Legislature. *See also, In re Estate of Melter, supra; Endicott v. Saul*, 142 Wn. App. 899, 922-23, 176 P.3d 560 (2008); *Lewis v. Estate of Lewis*, 45 Wn. App. 387, 389, 725 P.2d 644 (1986); *Koppang v. Hudon*, 36 Wn. App. 182, 672 P.2d 1279 (1983); *White v. White*, 33 Wn. App. 364, 368, 655 P.2d 1173 (1982); *McCutcheon v. Brownfield*, 2 Wn. App. 348, 356, 467 P.2d 868, *review denied*, 78 Wn.2d 993 (1970). In his brief, Charles implies that this high burden of proof somehow rests with Caiarelli and the Estate. Br. of Appellant at 13-14, 34-40. That is wrong. “Generally, one seeking to set aside an inter vivos gift has the burden of showing the invalidity thereof. The burden shifts, however, if the donor and donee shared a confidential relationship. The donee must then prove that a gift was intended and that it was not the product of undue influence.” *Lewis*, 45 Wn. App. at 389 (citation omitted). The burden was *on Charles* to prove the absence of undue influence.

The trial court’s language in Instruction Number 13 on burden shifting is from the long line of Washington cases referenced above, cases that have never been overruled. Charles asks this Court not to apply the salutary principle of those cases to undue influence exercised in changes in beneficiary designations of nonprobate assets. Instead, he asks that the

rule for undue influence exercised in a will or a joint bank account with the right of survivorship should be applied. Br. of Appellant at 35-40. He cites *no Washington case* directly on point for this proposition. In fact, *Melter*, the very case Charles cites, applies the shifting burden of proof rule, 167 Wn. App. at 296, in a case involving a son's transfer of funds from his mother to himself.

Charles' rationale for not applying the rule here is that the shifting burden is designed to prevent the loss of assets to the donor during the donor's life, whereas alteration in beneficiary designations are revocable. Br. of Appellant at 37-38. His argument mischaracterizes the rationale for the rule. The burden shifts precisely because of the special relationship of trust between the parties, as Caiarelli argued below in supplemental briefing for the trial court. CP 836-40, 1130-42. Beneficiary designations on nonprobate assets are more akin to *intervivos* gifts than testamentary bequests, where there is no burden shift as to undue influence. In fact, RCW 11.02.091 clearly states life insurance is not a testamentary asset, even though it has a beneficiary designation and such designation may be changed. Life insurance beneficiary designations are *intervivos* transfers subject to the burden shift as to undue influence.

The authorities cited by Charles in support of his position relate to will contests and joint bank accounts with the right of survivorship. Those

situations carry statutory burdens of proof. RCW 11.24.030 (will contests); RCW 30.22.100 (bank accounts). The Legislature has not seen fit to overrule the common law principle involving intervivos transfers as to life insurance policies or IRAs.²⁰

Finally, Charles' opposition to a burden shift also carries little weight when a trust for the benefit of a three-year old child is ultimately at stake. Charles, as is his obvious practice, *ignores* A.C.T.'s interests that are severely impacted here. Washington courts in a variety of settings regarding the exercise of equitable powers have evidenced a very special solicitude toward the protection of the interests of children. *See, e.g., Lizotte v. Lizotte*, 15 Wn. App. 622, 626, 551 P.2d 137 (1976) ("A parent's obligation to support and care for his or her child is a basic tenet of our society and law."); *In re Marriage of Mattson*, 95 Wn. App. 592, 603, 976

²⁰ It is noteworthy that the *Restatement (Third) of Property: Wills and Other Donative Transfers* § 8.3 cmt. f indicates that wills and other donative transfers are treated the same:

A presumption of undue influence arises if the alleged wrongdoer was in a confidential relationship with the donor and there were suspicious circumstances surrounding the preparation, formulation, or execution of the donative transfer, whether the transfer was by gift, trust, will, will substitute, or a donative transfer of any other type. The effect of the presumption is to shift to the proponent the burden of going forward with the evidence, not the burden of persuasion. The presumption justifies a judgment for the contestant as a matter of law only if the proponent does not come forward with evidence to rebut the presumption.

Charles never bore his burden of production as he never explained why William changed the life insurance policy beneficiary designations.

P.2d 157 (1999) (Legislature “intended the best interests of children to be the paramount priority.”). Specifically in the probate setting, our Supreme Court has indicated that in equitable actions involving a child's property, the courts will protect the child's interests. *In re Ivarsson*, 60 Wn.2d 733, 675 P.2d 509 (1962). A shifting of the burden here better comports with the special regard evidenced by the Legislature and the courts for the protection of children's interests.

The burden shifting rule, the law in Washington since 1922, should be applied on these facts, as the trial court did. Instruction Number 13 was a proper statement on law.²¹

(b) A Confidential or Fiduciary Relationship Existed between Charles and Williams

In Instruction Number 15, to which Charles did not assign error, the trial court properly instructed the jury on the definition of a fiduciary or confidential relationship as used in Instruction Number 13. *See* CP 874. It is entirely consistent with this Court’s definition of such a relationship:

A confidential or fiduciary relationship between two persons may exist either because of the nature of the relationship between the parties historically considered

²¹ Even if this Court were to determine that Instruction Number 13 on the shifting of the burden of proof were error, such error is harmless. *Blaney v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. No. 160*, 151 Wn.2d 203, 211, 87 P.3d 757 (2004) (erroneous jury instruction is harmless if it is not prejudicial to the substantial rights of the parties and in no way affected the final outcome of the case). Ample evidence supported the jury’s determination that Charles exerted undue influence over William.

fiduciary in character; *e.g.*, trustee and beneficiary, principal and agent, partner and partner, husband and wife, physician and patient, attorney and client; or the confidential relationship between persons involved may exist in fact. As stated in Restatement of Restitution § 166 d. (1937):

A confidential relation exists between two persons when one has gained the confidence of the other and purports to act or advise with the other's interest in mind. *A confidential relation is particularly likely to exist where there is a family relationship...*

McCutcheon, 2 Wn. App. at 356-57 (emphasis supplied) (citations omitted).

Charles appears to argue that brothers do not have a confidential or fiduciary relationship as a matter of law. Br. of Appellant at 27-34. The authorities he cites there do not support his position.²² Moreover, he *waived* any right to contest the legal definition of a fiduciary or confidential relationship because he did not object to Instruction Number 15 defining such a relationship, RP (11-29-11 a.m.) at 50, CP 874, nor did he assign error to it in his brief. Br. of Appellant at 2. Substantial

²² Charles cites *McGilligan's Estate v. McGilligan*, 25 Wn.2d 313, 170 P.2d 661 (1946), a case involving siblings. The Court concluded that there was no confidential relationship because the siblings had nothing more than a "normal relationship of brother and sister." *Id.* at 318. "Respondent never suggested to his sister what the contents of her will should be, nor is there any evidence that he ever acted for or advised his sister in the conduct of her business affairs." *Id.* at 317. "The testatrix never reposed any special confidence in her brother nor did he accept any trust on her behalf." *Id.* at 318. The facts here are *remarkably different*. Charles acknowledged that he influenced William "more than anybody else." RP (11-22-11 a.m.) at 40. He knew the contents of William's will. He assumed positions of trust for William, as his attorney-in-fact, personal representative, and trustee of A.C.T.'s testamentary trust.

evidence supported the jury's determination that Charles and William had a confidential relationship, beginning with their relationship as brothers. But there was more.

First, Charles was William's attorney-in-fact, possessing William's power of attorney. Exs. 56, 57. That was a direct fiduciary relationship.

Second, the record discloses that William placed great confidence in Charles entrusting critical responsibilities to him. William made Charles his personal representative and the trustee for his beloved son, A.C.T. Ex. 2.

Finally, Charles advised William on a variety of topics including business matters. RP (11-22-11 a.m.) at 34. Charles testified that the two brothers had no secrets from each other, and that "Will trusted Charlie." *Id.* at 34, 39. Charles attended the mediation in William's dissolution. RP (11-21-11 p.m.) at 54-55. He spoke on the phone with William weekly or every other week. RP (11-22-11) at 40. Charles described himself as able to influence William "more than anybody else." RP (11-22-11 p.m.) at 40. This is particularly critical given William's mental vulnerability.²³

All of these facts, in addition to being brothers, supported the jury's determination that Charles and William enjoyed a fiduciary or

²³ Charles asserts in his brief at 32 that there is no evidence that William was incompetent. Caiarelli and the Estate fully agree. However, there is ample evidence in this record of William's erratic behavior that culminated in Emily's petitioning for his guardianship. He *was* vulnerable and remained vulnerable.

confidential relationship, shifting the burden of proving an absence of undue influence to Charles.

(c) The Jury's Verdict that Charles and William Had a Confidential Relationship and That Charles Exerted Undue Influence Over William Was Supported by Substantial Evidence

Charles argues that there was insufficient evidence to support the jury's verdict on a confidential relationship, principally because he alleges he had no contacts with William. Br. of Appellant at 40-42. But Charles' argument fails in light of his burden and the evidence adduced below.

First, as noted above, given the fiduciary or confidential relationship between Charles and William, Charles bore the burden of demonstrating the *absence* of undue influence. Charles bore the burden of persuasion on undue influence by clear, cogent, and convincing evidence. *Melter*, 167 Wn. App. at 296. Thus, he had to prove the absence of undue influence by evidence that was "highly probable." *Id.* at 301. This he failed to do, particularly where he called no witnesses to testify. Charles never produced any evidence as to *why* William changed the beneficiary designations.

As the issue of undue influence is a mixed question of law and fact, it was an issue for the jury. *Id.* at 300-01. Thus, the question for this Court is whether substantial evidence supports the jury's determination on

undue influence. On review, Caiarelli and the Estate need only demonstrate that the converse of “highly probable” evidence existed to support the jury’s finding.

Undue influence is defined as “the influence which, at the time of the testamentary act, controlled the volition of the testator, interfered with his free will, and prevented an exercise of his judgment and choice . . . influence tantamount to force or fear which destroys the testator’s free agency and constrains him to do what is against his will.” *In re Estate of Lint*, 135 Wn.2d 518, 535, 957 P.2d 755 (1998).

Undue influence need not be shown by direct evidence; circumstantial evidence may also support a finding of undue influence. *In re Estate of Reily*, 78 Wn.2d 623, 647, 479 P.2d 1 (1970). In fact, Washington law on undue influence has historically looked to a set of factors set forth in *Dean v. Jordan*, 194 Wash. 661, 671-72, 79 P.2d 331 (1938) indicating that a testamentary instrument is presumptively the product of undue influence:

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. 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. The weight of any of such facts will, of course, vary according to the circumstances of the particular case. Any one of them may, and variously should, appeal to the vigilance of the court and cause it to proceed with caution and carefully to scrutinize the evidence offered to establish the will.

The combination of facts shown by the evidence in a particular case may be of such suspicious nature as to raise a presumption of fraud or undue influence and, in the absence of rebuttal evidence, may even be sufficient to overthrow the will.

The combination of facts shown by the evidence can be sufficient to create “a presumption . . . of such strength as to impose upon the proponent the duty to come forward with evidence sufficient at least to balance the scales and restore the equilibrium of evidence touching the validity of the will.”

In *In re Estate of Haviland*, 162 Wn. App. 548, 255 P.3d 854 (2011), a will contest between the wife of the decedent and his children from a prior marriage, the court said that no single *Dean* factor is determinative and that each case must be decided based upon a presumption of undue influence.

A combination of suspicious facts and circumstances may give rise to a rebuttable presumption of undue influence in a will. In *Lint*, for example, the testatrix suffered from a severe cancer that affected her brain. She took up with a man 18 years her junior who came to dominate her life and her finances. He even went through a mock wedding ceremony at a

Las Vegas chapel and subsequently obtained a marriage license. Ultimately, the trial court set aside the marriage and her will as having been procured by fraud and undue influence. The Supreme Court affirmed the trial court's decision and reaffirmed the *Dean* factors as to undue influence.

Here, Charles has not overcome the presumption of undue influence arising out of the *Dean* factors and he certainly has not carried his burden of persuasion that undue influence was not present. Plainly, he had a confidential or fiduciary relationship with his brother William. He actively participated in the procurement of the will in light of the Coombs testimony that he received copies of the draft will. William had no independent advice regarding the life insurance beneficiary designations. Most critically, Charles received an unnaturally large part of William's assets in the insurance policies,²⁴ given William's intent to benefit A.C.T., expressed in *four wills*. These factors coupled with William's mental and emotional vulnerability, Charles' ability to influence William as he testified at trial, and Charles' willingness to completely defraud the Estate

²⁴ Charles received more than \$1 million of William's estate. Ex. 203; CP 946. A.C.T. has received *nothing* from that estate to date, given the disposition of William's principal assets. Reuben and Emily have the benefit of the Northwestern policies' proceeds. RP (11-22-11 p.m.) at 13; CP 945-46. Notwithstanding any protestations by the Taylors of poverty, they have spent lavishly on fees in this case and in the Charles' bankruptcy to deprive A.C.T. of his entitlement to his father's assets. Ex. 24; CP 510.

and his three-year-old nephew all raise the presumption of undue influence.

In this case, the noted testimony and exhibits presented to the jury established undue influence. The jury's verdict on Charles' undue influence must stand.

(3) The Trial Court Erred in Dismissing Emily and Reuben

The trial court dismissed Reuben and Emily from the case. CP 41, 46. In doing so, the trial court granted a summary judgment motion as to Emily knowing she would testify at trial, and knowing of her extensive role in William's life. CP 41-43; RP (11-17-11 a.m.) at 81-82. Moreover, the trial court excluded relevant evidence on Reuben's and Emily's exertion of undue influence over William, particularly the testimony of Amy Ainsworth, and Reuben's deposition testimony that bore directly on such undue influence. That was an abuse of discretion. The trial court erred in dismissing Reuben and Emily from this action where the record is replete with their active involvement in William's life, William's mental and emotional vulnerability made him particularly vulnerable, and their exertion of influence over his decisionmaking.

(a) Ainsworth Testimony²⁵

²⁵ While this Court reviews a trial court's decision to admit or exclude evidence for abuse of discretion, *Thomas v. Wilfac, Inc.*, 65 Wn. App. 255, 262, 828 P.2d 597 (1992), such discretion is abused when it is exercised on untenable grounds or reasons. *In re Marriage of Muhammad*, 153 Wn.2d 795, 803, 108 P.3d 779 (2005).

The trial court erred in excluding a portion of Amy Ainsworth's testimony regarding a conversation she had with Emily in which Emily indicated that she had frequent (daily) and lengthy (hour long) telephone conversations with William from the time of his dissolution until his death. *See* RP (11-17-11 a.m.) at 12; Ex. 67.

Ainsworth was disclosed as a witness long before trial. However, before trial, Ainsworth did not disclose to Caiarelli's counsel the specific content of a conversation that she had with Emily and Reuben on the doorstep of William's house as they were cleaning out William's house shortly after his death. RP (11-17-11 a.m.) at 4-9. But during a break in Ainsworth's trial testimony, she divulged the relevant conversation to Caiarelli's counsel, who then sought to disclose the matter to opposing counsel and to seek a ruling from the trial court on its admissibility. *Id.* The court acknowledged that "This is obviously very relevant evidence" and "very important," and "a difficult decision" about whether to deny its admission. *Id.* at 9, 13, 87. The Taylors' counsel acknowledged that this aspect of Ainsworth's proffered testimony was "obviously a hugely important piece of evidence," *id.* at 6, but he argued that the late disclosure was unfair surprise and the testimony should be excluded. *Id.* at 9-10. Caiarelli's counsel argued that the evidence was new to him also and he

disclosed it as soon as he found out about it. *Id.* at 9. Caiarelli's counsel suggested that opposing counsel could depose Ainsworth on the matter in the evening and the witness could be called back tomorrow to complete her testimony. *Id.* at 11-12. The trial court acknowledged that such deposition was an option, but decided instead to exclude the testimony. *Id.* at 86-87.

Here, the trial court noted that the late discovery and disclosure of this evidence placed the court in a very difficult position requiring it to "balance" the "equities" of permitting Caiarelli to present obviously relevant and important evidence that specifically addressed Emily's contacts with William during 2005, against the prejudice to defendants of not having an opportunity to prepare a responsive strategy to such evidence prior to trial. *Id.* at 16-17. Difficult as such decision may have been, the result of the trial court's "balancing of equities" was untenable given the history of this case. Here, the trial court was well versed in this case's sordid past. The same trial court entered the order that removed Charles as personal representative (and trustee) of William's estate and barred the other Taylors from that position as well. *See Exs. 28, 39.*

This testimony also remains critical in light of the trial court's ruling that no evidence was presented of contacts between Reuben and William.

Given what the trial court knew about the case, the equities weighed in favor of permitting admission of relevant testimony proffered to protect estate assets for the innocent minor beneficiary rather than excluding relevant testimony in order to protect those with an established history of raiding William's estate for their own gain. Under these circumstances, barring Amy Ainsworth's relevant testimony was an abuse of discretion.

In effect, the trial court excluded Ainsworth's testimony as a discovery sanction without complying with the requisite standard established by our Supreme Court in *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.3d 1036 (1997) and *Rivers v. Wash. State Conf. of Mason Contractors*, 145 Wn.2d 674, 41 P.3d 1175 (2002) for exclusion of witnesses as a sanction. Exclusion of a witness is a heavy sanction. There was *no* showing here that Ainsworth's testimony was the product of willful or deliberate misconduct on the part of Caiarelli or the Estate, that Charles was substantially prejudiced in his trial preparation, or that the trial court considered a lesser sanction.²⁶ The trial court also failed to

²⁶ “[I]t is an abuse of discretion to exclude testimony as a sanction [for noncompliance with a discovery order] absent any showing of intentional nondisclosure, willful violation of a court order, or other unconscionable conduct.” *Burnet*, 131 Wn.2d at 494 (internal quotation marks and citations omitted). The trial court stated that it was “persuaded that there is a willful violation.” RP (11-17-11 a.m.) at 88. That determination is untenable where Caiarelli's counsel did not know about the particular encounter in question, had no reason to know of or suspect that the encounter had occurred, and disclosed particulars about the encounter to opposing counsel as soon as

make specific findings for Ainsworth's exclusion. *Blair v. Ta-Seattle East No. 176*, 171 Wn.2d 342, 25 P.3d 797 (2001). The trial court abused its discretion in excluding a portion of Ainsworth's testimony.

Moreover, equity required that the trial court protect A.C.T., the innocent child beneficiary, rather than excluding relevant and important evidence to the advantage of the bad actors who improperly raided the trust assets meant for the care of that child beneficiary. The trial court was aware of the history of this case. Excluding the evidence under these circumstances was an abuse of discretion.

(b) Reuben's Deposition

The trial court further abused its discretion by excluding Reuben's deposition testimony. Exhibit 28 contained Caiarelli's motion to remove Charles as the personal representative of William's estate that the court had previously granted. That motion, containing deposition testimony of Charles and Reuben, was relevant to the undue influence issue. Reuben's 2009 deposition testimony bore particularly on the issue of Reuben's

the witness disclosed such information to counsel. Willful means merely that the person knows what he is doing, intends to do what he is doing, and is a free agent. *Fiore v. PPG Industries, Inc.*, 169 Wn. App. 325, 348, 279 P.3d 972, *review denied*, ___ P.3d ___ (2012). Moreover, a "willful" violation of a court order means a violation without a reasonable excuse. *In re Estate of Foster*, 55 Wn. App. 545, 548-49, 779 P.2d 272 (1989). Here, there is no indication that counsel intended his disclosure to be late. Moreover, counsel acted reasonably, disclosing information as soon as he obtained it. There is no indication of improper or dilatory conduct. There is simply no unconscionable, willful, or intentional conduct present here warranting the severe sanction of excluding testimony.

contacts with and influence upon William from the time of William's 2003 marital troubles and subsequent divorce through his September 2005 death. The trial court excluded this exhibit, and thus the deposition evidence it contained, abusing its discretion.²⁷

Charles and Reuben moved to exclude exhibit 28 because the parties had entered into a settlement agreement that resolved claims based on Charles's misconduct while serving as the personal representative of William's estate. *See* CP 678. But that settlement agreement specifically excluded from its waiver those claims and the subject matter (assets) at issue in the appeal then pending before this Court. CP 703 (¶ 8). The subject matter of that appeal included the assets and issues regarding those assets that were remanded for trial, namely disposition of the Fidelity IRA, the AIG policies, and the Northwestern policies. Accordingly, the settlement agreement had no application with regard to the noted assets.²⁸

²⁷ Deposition testimony is admissible, CR 32, and is particularly useful for impeachment. CR 32(a)(1). *See also*, CR 32(a)(2); *Young v. Liddington*, 50 Wn.2d 78, 309 P.2d 761 (1957) (deposition of a party may be used by an adverse party for any purpose). Reuben's deposition testimony specifically impeaches his trial testimony in which he claimed as contacts with William after December 2004. *Compare* RP (11-22-11 a.m.) at 85 with CP 1072.

²⁸ The settlement agreement stated in relevant part: "The waivers set forth herein do not relate to the appeals that are pending in the Court of Appeals or to the nonprobate assets that are the subject of those appeals." CP 703 (¶ 8). The court's overly broad order precluded attorneys from offering the listed exhibits (including Ex. 28), precluded counsel from mentioning such excluded exhibits in front of the jury at the time of trial, and prohibited counsel from soliciting any testimony from any witness relating to such matters at the time of trial. CP 754.

Reuben's deposition was relevant and essential to Caiarelli's case. The deposition established Reuben's ongoing contacts and close relationship with William, and how Reuben and Emily tried to help William during his difficult divorce through to the late summer of 2005. Reuben's deposition noted Reuben and Emily's substantial financial assistance to William and repayment arrangements that Reuben negotiated with William in the summer of 2005. Reuben's deposition also demonstrates how Reuben and Emily worked together regarding William and his assets.

Reuben's deposition in part addresses a claim by Reuben's living trust against William's estate for \$232,997, for "[f]unds loaned or paid on behalf of William prior to his death." CP 1067 (Ex. 28, Reuben's attached depo. at 30). Reuben explained "I never thought of there being any difference between me and my living trust." *Id.* The basis of the claim included "divorce loan funds," and "[t]ime spent on multiple trips to work on the divorce . . . for Emily." *Id.* Reuben testified that "Emily spent months out here helping William." *Id.* Reuben explained that checks and electronic fund transfers went from Reuben's living trust to Emily and then to William because "she was with him [William] this entire time So it wouldn't have been out of order to send the money to her to use for these expenses." *Id.* at 1071. Reuben testified that he discussed these

amounts with William. *Id.* at 1070. Reuben said that he had a “conversation with William” about “every check” that Reuben gave to William. *Id.* at 1071. Reuben and William’s “understanding” was that Reuben was loaning William money “at 5 percent interest and at some future time, we’ll square up.” *Id.* Reuben called his accountant and verified that the allowable interest rate among family members permitted by the IRS was “5 percent.” *Id.* Reuben noted that among the items covered by the funds that he and Emily (“We”) disbursed to William were his divorce costs and his legal and professional fees. *Id.* Reuben described how he and William negotiated a promissory note for \$125,000 (this was during the post-divorce 2005 time period) regarding the money that William owed Reuben. *Id.* at 1072.²⁹

Reuben’s deposition shows that he had significant contacts with William from 2003 until William’s death in the fall of 2005. This evidence shows that Reuben was heavily involved in William’s financial affairs, loaning him money and negotiating terms of repayment. This evidence also shows that Emily and Reuben worked together to assist William and, thus, each parent’s contacts with William could be properly imputed to the other. This evidence clearly shows that both Emily and

²⁹ Reuben explained, “I said to William, I’d like some security on the funds that I’ve advanced. How much will you give me? The answer was \$125,000 . . . And I said fine.” CP 1072.

Reuben had a confidential relationship with William during this challenging time in William's life.

The trial court's exclusion of evidence regarding Reuben's contacts with William that showed an ongoing confidential relationship from the time of William's marital troubles and divorce until his death in 2005 was particularly prejudicial when seen in the light of the court's dismissal of Caiarelli's undue influence claim against Reuben because Caiarelli allegedly failed to provide any evidence of Reuben's contacts with William in 2005. RP (11-23-11) at 102; RP (12-20-11) at 40. Under these circumstances, the trial court's exclusion of Exhibit 28 was an abuse of discretion.

(c) Reuben and Emily Exerted Undue Evidence over William

The trial court here ruled: "Petitioners have not introduced even a scintilla of direct or circumstantial evidence of any direct or indirect contact between William Ross Taylor and Reuben Taylor at all during the year 2005," concluding that without some evidence of contact, there could not be evidence of an ongoing confidential or fiduciary relationship between Reuben and William when William transferred the Northwest polices to his father. CP 892. This was error.

On undue influence, the trial court should have undertaken the same analysis as it did with Charles. *See supra*. There was ample testimony in this record of a fiduciary or confidential relationship between Reuben/Emily and William that influenced William's decisionmaking in 2005. The court should have shifted the burden of proving the absence of undue influence to Reuben/Emily. The trial court erred in artificially limiting the issue of undue influence to whether there was direct evidence of contacts between William and his parents in the summer of 2005. The jury was entitled to determine if there was undue influence exerted by Reuben/Emily, given the ample evidence of both a confidential relationship and undue influence.

(i) Reuben Taylor

The trial court erred in granting Reuben's CR 50(a) motion, CP 764-65, particularly when all the evidence, both direct and circumstantial, and the reasonable inferences from that evidence, are considered. The trial court's artificial limitation of the analysis to direct contacts in a short time period (March to September 11, 2005) was improper.

As discussed *supra*, any absence of evidence regarding Reuben's contacts with William in the summer of 2005 is the result of the trial exclusion of Ainsworth's testimony and Exhibit 28, which contained Reuben's deposition, that attested to such contacts.

Moreover, the trial court applied the wrong standard. The trial court did not address whether Reuben had a confidential or fiduciary relationship with William. In addition to the parental relationship, William placed Reuben in fiduciary roles as alternate personal representative and trustee of his testamentary trust, and alternate attorney-in-fact. Exs. 2, 56, 57. As to a confidential or fiduciary relationship, plainly Reuben's and William's blood relationship was also important, but the more critical factor was Reuben's financial/personal relationship with William. *Collins v. Nelson*, 193 Wn. 334, 345, 75 P.2d 570 (1938) (to establish fiduciary relationship there must be not merely friendly relations or confidence in another's honesty and integrity, but something approximating business agency, professional relationship, or family tie impelling or inducing trusting party to relax care and vigilance he would ordinarily exercise).

Reuben testified that he came to his son's financial aid during William's hotly contested dissolution proceedings. Both Emily and Reuben were in contact with William's attorney, Jack Borland, and when William's mental health deteriorated Reuben and Emily made multiple trips from Chicago to assist William and paid attorney Borland his fees for William in his guardianship matter. RP (11-22-11 a.m.) at 91, 95-96; Ex. 6; CP 1071. Reuben gave William business advice. RP (11-22-11 a.m.) at

97-98. Reuben loaned William money when he was unemployed. *Id.* at 91; CP 1067, 1071. William named Reuben the alternate personal representative of his estate and the alternate trustee for A.C.T.'s testamentary trust. Ex. 2. He appointed Reuben as the alternate guardian for his son, if both Caiarelli and Charles were not able to serve. Ex. 2. William would not have named Reuben as the personal representative, as trustee, or as guardian of his very young son, if William did not have a confidential/fiduciary relationship with his father.

Contrary to the trial court's assertion that Caiarelli and the Estate had to show Reuben's undue influence near the time of the transfer of five Northwestern policies in order to have that issue submitted to the jury, Reuben had to prove the absence of undue influence, given his confidential fiduciary relationship with William. *White*, 33 Wn. App at 368-69, 371.

Just as Charles did not prove the absence of undue influence, *supra*, Reuben did not do so here. The *Dean* factors clearly applied. The trial court's dismissal of Caiarelli's undue influence claim against Reuben because of a perceived lack of direct evidence of contacts between William and Reuben (despite the circumstantial evidence presented and the inferences therefrom) for a particular time period March 2005 through

William's death on September 11, 2005) is simply wrong.³⁰ The case law outlining the elements showing a confidential or fiduciary relationship does not require a showing of direct contact during a short specific period of time. It is the history of the case and the facts over time, not an artificial short timeline, that demonstrate and determine the relationship between the parties, and the resulting confidential/fiduciary relationship. *See, e.g., McCutcheon*, 2 Wn. App. at 356-57. Here, the evidence presented at trial showed an ongoing confidential relationship between William and his parents before and during the summer of 2005.³¹

The trial court erred in granting Reuben's CR 50(a) motion.

(ii) Emily Taylor

A similar analysis applies to Emily's dismissal. Emily brought a summary judgment motion seeking dismissal, arguing that she had no interest in, and had received no proceeds from, the Fidelity IRA, the AIG policies, or the Northwestern policies. CP 540-41. The trial court granted

³⁰ The trial court ruled, "everything has to be tied to the issue of undue influence in 2005. That's the fulcrum by which I balance all evidence and its admissibility." RP (11-16-11 a.m.) at 9.

³¹ Additionally, as discussed *supra*, Reuben's deposition (Ex. 28), excluded by the trial court, established contacts and a confidential relationship between William and his parents during the summer of 2005. Reuben's deposition establishes that he and Emily acted in tandem as to contacts with and relationships to William. Accordingly, Emily's admitted regular phone calls with William could be fairly imputed to Reuben. RP (11-21-11 p.m.) at 57; RP (11-22-11 a.m.) at 25.

the motion, finding that Emily was “not a necessary party.” CP 42; RP (11-17-11) at 81. This was error.³²

Simply put, because Emily was a named beneficiary of the Northwestern policies, and the disposition of those policies is in dispute, Emily was “interested.”

To determine whether a party is a necessary party to an action, the court must decide whether the party’s absence from the proceedings would prevent the court from affording complete relief to the existing parties and whether the party’s absence would impair that party’s interest or subject any existing party to inconsistent or multiple liability.

Cordova v. Holwegner, 93 Wn. App. 955, 961-62, 971 P.2d 531 (1999).

Emily, as a policy beneficiary, was necessarily drawn into this controversy to protect her own interests. She was a named beneficiary in five of the Northwestern policies. Ex. 101. If William’s July 2005 ownership transfer of these policies to Reuben was invalid, as the result of undue influence, and if Reuben was thus not eligible to change the designations to himself, then Emily remained a policy beneficiary; like Charles and Reuben, she would be subject to William’s directives in his will with the funds to be put in a trust for A.C.T. Ex. 2. Thus, the issue

³² The trial court’s summary judgment determination is reviewed by this Court de novo. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). When considering such a motion, the Court must construe all facts and reasonable inferences in the light most favorable to Caiarelli and the Estate as the nonmoving parties. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000).

on summary judgment was not whether Emily received any insurance policy proceeds. The issue was whether the policy proceeds were intended for the named beneficiaries individually, or were to be held in trust for A.C.T.'s benefit.

Additionally, employing the proper undue influence analysis, Emily exerted undue influence over William, allowing insurance proceeds to go to Charles improperly. The record here clearly discloses her confidential or fiduciary relationship with William as an alternate personal representative, trustee, and attorney-in-fact. Exs. 2, 56, 57. She was actively involved in William's affairs, seeking a guardianship over him and paying his attorneys, as she testified *after* her dismissal.³³ The primary purpose of the guardianship was to control William and his assets. She attended the mediation session for William's dissolution. RP (11-21-11 p.m.) at 54-56. This was a family affair in directing William's life, to A.C.T.'s disadvantage.

Summary judgment was improper. Emily was necessary to the determination of William's intent and to the undue influence analysis.

(4) Caiarelli and the Estate Are Entitled to Their Fees from Charles, Emily, and Reuben under TEDRA at Trial and on Appeal

³³ She came to Seattle four times during William's dissolution, RP (11-21-11 p.m.) at 46; paid his attorney (Coombs), RP (11-16-11) at 75; helped him to buy a car, RP (11-22-11 a.m.) at 44; loaned him money and distributed Reuben's funds to him, CP 1072.

Charles contends in his brief at 42-43 that if he prevails on appeal, Caiarelli and the Estate are not entitled to a fee award. *Nowhere* does he specifically assign error to the trial court's findings and conclusions on fees. CP 908-25. Br. of Appellant at 2-3. *Nowhere* in his brief does he contest the amount of fees awarded to Caiarelli and the Estate. Where a party fails to assign error to findings, they are verities on appeal, RAP 10.3(g); *Fuller v. Employment Sec. Dep't of State of Wash.*, 52 Wn. App. 603, 605-06, 762 P.2d 367 (1988), and unchallenged conclusions of law are the law of the case, *King Aircraft Sales, Inc. v. Lane*, 68 Wn. App. 706, 716, 846 P.2d 550 (1993). Caiarelli and the Estate are entitled to their trial court fees.

Similarly, Caiarelli and the Estate are entitled to their fees on appeal. RAP 18.1. The fee award below was based on TEDRA. CP 918-25. TEDRA also affords a party the right to recover appellate fees. RCW 11.96A.150(1) specifically states that appellate courts may award fees under the statute. Caiarelli and the Estate are entitled to a fee award on appeal.

F. CONCLUSION

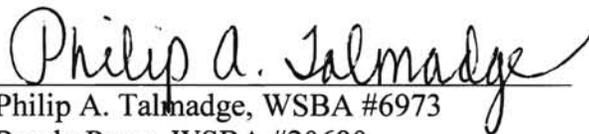
William Taylor wanted his son, A.C.T., to receive his assets, as evidenced by his four wills to that effect. Instead, William's family,

particularly his brother Charles, looted William's estate, to A.C.T.'s detriment. Charles, Reuben, and Emily exerted undue influence over William to circumvent A.C.T.'s inheritance of his father's assets. Such conduct was particularly reprehensible, taking money from a three-year-old child, as the jury properly determined.

This Court should affirm the judgment on the jury's verdict as to Charles. The Court should further find Reuben and Emily were improperly dismissed and remand the case for trial regarding the claims against Reuben and Emily on the Northwestern policies. Costs on appeal, including reasonable attorney fees, should be awarded to Caiarelli and the Estate against Charles, Reuben, and Emily.

DATED this 17th day of January, 2013.

Respectfully submitted,



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APPENDIX

Not Reported in P.3d, 159 Wash.App. 1003, 2010 WL 5464751 (Wash.App. Div. 1)
 (Cite as: 2010 WL 5464751 (Wash.App. Div. 1))

Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION, SEE RCWA
 2.06.040

Court of Appeals of Washington,
 Division 1.
 In the Matter of the ESTATE OF William Ross
 TAYLOR, Deceased.
 In the Matter of the Estate of William Ross Taylor,
 Deceased.

Nos. 63761-4-I, 63762-2-I, 63763-1-I, 63462-3-I.
 Dec. 20, 2010.

Appeal from King County Superior Court; Honorable James E. Rogers, J.

Jason W. Burnett, Michael J. Longyear, Reed Longyear Malnati & Ahrens PLLC, Seattle, WA, Madeline Gauthier, Attorney at Law, Bellevue, WA, for Appellant.

Brian Jeffrey Carl, Attorney at Law, Seattle, WA, for Respondent.

UNPUBLISHED OPINION

ELLINGTON, J.

*1 William Ross Taylor died unexpectedly when his only child, A.C.T., was three years old. This appeal arises from two linked cases regarding disputes about William's assets: rulings in the probate, and rulings in an action filed by A.C.T.'s mother, Patricia Caiarelli, under the Trust and Estate Dispute Resolution Act, chapter 11.96A RCW (TEDRA).

In the probate, the trial court granted partial summary judgment in favor of William Taylor's brother, Charles Taylor, and his father, Reuben Taylor, regarding ownership of certain retirement accounts and life insurance benefits. Caiarelli and the Estate appeal. On this issue, we reverse and re-

mand for trial.

In the TEDRA case, the court granted partial summary judgment in favor of A.C.T.'s guardian ad litem regarding the ownership of one of William Taylor's retirement accounts. Charles Taylor appeals. Here we reverse and remand for entry of summary judgment in favor of Charles Taylor as a matter of law.

BACKGROUND

William Taylor married Patricia Caiarelli in November 2001. Their son, A.C.T., was born in May 2002. William ^{FN1} and Caiarelli separated in April 2003. A bitterly contested dissolution action followed. During this time, William was the subject of a guardianship proceeding initiated by his mother, Emily. The guardianship was resolved in the fall of 2003 by an agreed order requiring William to execute a power of attorney in favor of his father, Reuben, which William did in late 2003.

FN1. We use the Taylor parties' first names for clarity. No disrespect is intended.

On March 2, 2004, while divorce proceedings were still underway, William executed a will prepared by his attorney, Craig Coombs. Coombs advised Taylor that the will was a stop-gap measure and that he needed to return after the dissolution was finalized to update it. William never did so.

In the will, William makes two small bequests to Stanford University and the University of Illinois, and gives the residue of the estate to his son:

2.3 Remainder of Estate. I give the rest, residue and remainder of my estate, including any real and personal property, to my son [A .C.T.].^[FN2]

FN2. Clerk's Papers (CP) at 422.

Not Reported in P.3d, 159 Wash.App. 1003, 2010 WL 5464751 (Wash.App. Div. 1)
(Cite as: 2010 WL 5464751 (Wash.App. Div. 1))

The will then lists specific assets to be distributed to a trust for A.C.T.:

2.5 The Trust shall consist of The Sablewood house located at 4711 117th Place N.E., Kirkland, WA, 98033-8749, or its proceeds after sale. In addition, the Trust shall include all my monies and properties of Tailorized Industries, Inc. and Tailorized Properties, LLC, and from my Charles Schwab accounts (Schwab IRA's, Schwab One, etc.), my Fidelity accounts (401K, ESPP, etc.) and all other checking and savings accounts under my name.^[FN3]

FN3. CP at 422.

Paragraph 7.3 describes how to proceed if the dissolution action was still pending at the time of death:

If Dissolution Action Pending At Time of My Death. In the event the dissolution action between PATRICIA J. CAIARELLI and I has not been finalized at the time of my death, I specifically authorize and direct my Personal Representative and Trustee to retain my current dissolution attorney ... or other appropriate attorney, at Estate or Trust expense, to represent my son [A.C.T.] and make sure all of my separate and community property is placed in a trust in his behalf until he reaches the age of twenty-five (25).^[FN4]

FN4. CP at 424.

*2 William named his brother Charles to serve as his personal representative and trustee, with his father Reuben as an alternate.

The divorce was finalized in February 2005. Assets distributed to William included five Northwestern Mutual life insurance policies. These had been purchased by his father over many years, beginning when William was in third grade and continuing until he was 34 years old. The named beneficiaries on those policies were William's parents,

Reuben and Emily. William was also awarded a Schwab IRA account he started in 1990.

After the divorce, William apparently continued to be fearful that his former wife would be able to access his financial assets. During the summer of 2005, William started working for a new company. In July, he made significant changes to two financial assets left to his son in his will: on July 5, 2005, he assigned to Reuben his Northwestern Mutual Life Insurance policies, which had a combined death benefit of \$204,000; on July 22, he named Charles as primary beneficiary and Reuben as secondary beneficiary on a Fidelity rollover IRA valued at approximately \$158,000. Then on July 25, William took out three AIG life insurance policies obtained through his new employer and designated Charles as primary beneficiary and Reuben as contingent beneficiary. These policies had a combined value of \$692,000.

On September 11, 2005, less than two months after making these changes to his accounts, William drowned in a boating accident. His will was admitted to probate and Charles was appointed as personal representative. Charles identified the Schwab IRA, the Fidelity IRA, and one of the AIG life insurance policies as nonprobate assets.

In March 2006, Caiarelli brought a TEDRA action seeking an order declaring that A.C.T. was entitled to the proceeds of all probate and nonprobate assets identified in the will and owned by William at the time of his death. Caiarelli's attorneys withdrew, and a stipulation was entered in the probate and the TEDRA actions appointing attorney Bruce Moen as guardian ad litem (GAL) for A.C.T. The GAL filed a motion for partial summary judgment seeking to have A.C.T.'s trust declared the beneficiary of William's Schwab IRA. Charles opposed the motion. Both parties agreed there were no issues of material fact and that the determination was a matter of law. On November 19, 2008, the trial court granted the motion, ruling that the Schwab IRA should be distributed to Charles in his capacity as trustee of the testamentary trust for A.C.T.

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(Cite as: 2010 WL 5464751 (Wash.App. Div. 1))

On December 4, 2008, Caiarelli retained new counsel. On February 25, 2009, the trial court consolidated the probate and TEDRA actions and continued trial to April 20, 2009.

Caiarelli's new attorney then conducted discovery, which revealed extensive mishandling of the Estate by Charles. During the course of the probate, Charles and Reuben submitted personal claims against the Estate totaling approximately \$260,000, which Charles accepted without court approval; the inventory submitted by Charles did not include several significant assets, including AIG life insurance policies, Northwestern life insurance policies, and two valuable cars; and Charles failed to provide an accounting during his three years as personal representative.

*3 On March 4, 2009, the court removed Charles as personal representative and denied all Taylor family members the right to serve as alternate representatives, but refused to change the April 20, 2009 trial date. On March 9, 2009, the court appointed Michael Longyear as estate administrator.

On March 13, 2009, Charles filed two motions for summary judgment. Hearings were held on April 3, 2009 over Caiarelli's objection. On April 10, 2009, the court granted both motions and held that Reuben was the personal owner of the five Northwestern Mutual life insurance policies and Charles was the personal beneficiary of the AIG policies and the Fidelity account.

Caiarelli appeals these summary judgment orders, and Charles appeals the previous summary judgment order placing the Schwab IRA in A.C.T.'s trust. We apply the usual standard of review for summary judgment.^{FN5}

FN5. The standard of review on summary judgment is *de novo*, with the court engaging in the same inquiry as the trial court. *TransAlta Centralia Generation LLC v. Sicklesteel Cranes, Inc.*, 134 Wn.App. 819, 825, 142 P.3d 209 (2006). Summary judg-

ment is proper if the pleadings, affidavits, depositions, and admissions on file demonstrate that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c).

DISCUSSION

Summary Judgment-Schwab IRA

William's Schwab IRA named his brother Charles and his sister Betsy as beneficiaries. In his will, however, William specified that the Schwab IRA should pass to the trust for his son created by the will.

The will does not automatically operate to transfer the IRA to the trust because the nonprobate assets statute does not apply. RCW 11.11.020(1) provides that "[s]ubject to community property rights, upon the death of an owner the owner's interest in any nonprobate asset specifically referred to in the owner's will belongs to the testamentary beneficiary named to receive the nonprobate asset, notwithstanding the rights of any beneficiary designated before the date of the will." Under RCW 11.11.010(7)(a)(iv), however, IRAs are excluded from the definition of nonprobate assets. Caiarelli therefore relies upon equitable doctrines.

"Washington permits courts, acting in equity, to enforce attempted changes in beneficiaries." ^{FN6} Thus, the issue is whether William's attempt to change the beneficiary of the Schwab IRA from his brother and sister to his son can be given effect. The rule requires that there be an attempt to make the change:

FN6. *In re Estate of Freeberg*, 130 Wn.App. 202, 205, 122 P.3d 741 (2005).

"The general rule in this jurisdiction and elsewhere as to attempted changes of beneficiaries on an insurance policy is that courts of equity will give effect to the intention of the insured *when the insured has substantially complied with the provisions of the policy regarding that change.*"¹

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FN7]

FN7. *Id.* (emphasis added) (quoting *Allen v. Abramson*, 12 Wn.App. 103, 105, 529 P.2d 469 (1974)).

“Substantial compliance requires that the insured has manifested an intent to change beneficiaries and done everything reasonably possible to make that change.”^{FN8} This rule applies to IRAs.

FN8. *Id.* at 205-06.

Several cases inform our analysis. In *Estate of Freeberg*, the unmarried decedent named his children as beneficiaries of his IRA.^{FN9} He subsequently remarried and sought to change the beneficiary of the IRA from his children to his wife. Freeberg personally went to the Edward Jones office and directed that his wife be designated as beneficiary on all his accounts, including the IRA. After Freeberg died, his widow discovered the change had never been made. An Edward Jones employee did not know that this happened, but remembered that Freeberg intended to designate his wife as beneficiary. This court affirmed the trial court's determination that Freeberg's wife was entitled to the IRA proceeds because he had done everything reasonably possible to change the beneficiary.^{FN10}

FN9. *Id.* at 204.

FN10. *Id.* at 207.

*4 In *Allen v. Abramson*, the decedent purchased life insurance and named his girlfriend as beneficiary.^{FN11} The insurance contract required the insured to submit a written request to change beneficiaries. He later delivered the insurance certificates to his parents and told them he was going to change the beneficiary designation to them. He died six weeks later without having tendered a written request to change beneficiaries or having contacted the insurance company or his employer about making a change. The court rejected the parents' claim, stating that Allen “never even attempted to comply

with the policy requirement of written notification.”

FN12

FN11. 12 Wn.App. at 104.

FN12. *Id.* at 108.

In *Rice v. Life Insurance Company of North America*, the decedent owned a life insurance policy naming his mother, brother, and sister as beneficiaries.^{FN13} He later submitted a form supplied by his employer entitled “Request for Voluntary Accident Insurance” in which he named his fiancée as beneficiary. He died three days later. The court held that the evidence, including the form and the fiancée's testimony, clearly established the decedent's intent to make her the beneficiary.^{FN14}

FN13. 25 Wn.App. 479, 480, 609 P.2d 1387 (1980).

FN14. *Id.* at 481.

In *Sun Life Assurance Company v. Sutter*, the decedent sent an unsigned letter to the insurance company requesting a change of beneficiary. The insurance company sent him the required forms to effect a change in beneficiary.^{FN15} He died without submitting the forms. The court held the decedent's letter constituted sufficient evidence of intent to change beneficiaries.

FN15. 1 Wn.2d 285, 289, 95 P.2d 1014 (1939).

Charles argues William's actions do not meet the test for substantial compliance because he took no steps to comply with the account requirements for a change of beneficiary. The IRA application stated that a change in beneficiary must be tendered to Schwab in writing. The only action William took to effect a change in beneficiaries was his 2004 will. In 2005, he contacted Schwab to confirm his beneficiary designations, and would presumably have known that he had made no change of beneficiary. Several weeks before he died, he contacted Schwab with investment instructions related to his

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account. Yet there is no evidence that he attempted to obtain a change of beneficiary form or even sent a copy of his will to Schwab.

Caiarelli and the personal representative contend that just as in *Freeberg*, *Sun Life*, and *Rice*, William memorialized his intent to change beneficiaries in writing, specifically through his will. They argue that *Allen* is distinguishable because there, the decedent made no written statement of his intent to change beneficiaries.

There certainly is strong evidence of William's intent to leave the Schwab IRA to his son. In addition to the will itself, his attorney testified that William loved his son but disliked his ex-wife and was anxious to make sure she did not get anything. The will indicates his intent to leave all his assets to his son. It appears likely that William believed his will would accomplish this goal, and that he trusted his brother and father to ensure his intent was carried out. Unfortunately, in the absence of an actual effort to change the named beneficiary on the IRA, the will alone does not meet the substantial compliance test.

*5 Caiarelli further argues that William's will meets the substantial compliance test because Schwab failed to provide an adequate procedure for changing beneficiary designations. She also argues for the first time on appeal that William might not have read or understood the terms of the agreement because the Schwab application form presented the beneficiary designation requirements in fine print. She acknowledges that William signed a beneficiary statement providing that any change or revocation in the beneficiary designation "must be tendered in writing as specified in the Disclosure Statement."^{FN16} However, because the Taylors failed to produce the disclosure statement, Caiarelli contends that William should not be subject to this requirement.

FN16. Resp't Caiarelli's Response Br. at 10.

These arguments are unpersuasive. William signed the beneficiary statement, the change of beneficiary procedure was not unclear or misleading, and we must assume that he read and understood it.

Although it does not change the result, we note that Jack Borland, who represented the Estate in the TEDRA action, simultaneously represented Charles and Reuben in their personal capacities and argued *against* the interests of the Estate. This clear conflict of interest is especially problematic in light of the fact that Charles was not acting properly in the interest of the Estate and was later removed as personal representative. But given that A.C.T. prevailed on the only summary judgment motion in which this conflict was present, there appears to have been no prejudice to the Estate resulting from the conflict.

We reverse the order awarding the IRA to Charles as trustee for A .C.T., and remand for an order awarding the IRA to Charles in his personal capacity.

Summary Judgment-Life Insurance Policies and Fidelity IRA

Caiarelli and the personal representative argue that the trial court erred in granting Charles and Reuben partial summary judgment and ruling that (a) Reuben was the beneficiary of the Northwestern Mutual life insurance policies and (b) Charles was the beneficiary of the AIG life insurance policies and the Fidelity Rollover IRA.

Substantively, the issue here is similar to that discussed above regarding the Schwab IRA, with one significant difference. With the Schwab IRA, there was no attempt to change beneficiary status to conform to the will. In contrast, William made his father the beneficiary of the Northwestern policies and his brother the beneficiary of the AIG policies and the Fidelity IRA after his will was executed. Under RCW 11.11.020(4), "[i]f the owner designates a beneficiary for a nonprobate asset after the date of the will, the specific provisions in the will that attempt to control the disposition of that asset

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do not govern the disposition of that nonprobate asset, even if the subsequent beneficiary designation is later revoked.”

Therefore, Caiarelli does not argue that William's will amounts to substantial compliance with the procedures for changing beneficiaries. Rather, she notes that there is a conflict between the names he placed on the change of beneficiary forms and his words and actions indicating his intent to provide for his son. According to Caiarelli, it is unclear whether William intended for Charles to be the beneficiary in his personal capacity or as trustee for A.C.T. Thus, she argues that summary judgment was improper because there is a material issue of fact regarding William's intent in designating his brother as beneficiary. Similarly, Caiarelli argues that there is a material issue of fact regarding William's intent in transferring his Northwestern life insurance policies to his father, given that his words and actions indicated his true intent to provide for his son. She also contends there is an issue of fact regarding whether the beneficiary designations were validly made by William.

*6 We agree. A jury could conclude that William intended to leave these assets to his son by entrusting them to his father and brother in a representative capacity.

Further, the trial court's disposition of these summary judgment motions, which were heard several months after the motion concerning the Schwab IRA, suffers from serious procedural irregularities.

First, and most significantly, the trial court allowed the Taylors to file preemptive summary judgment motions during a time when the Estate was not represented. Charles was removed as personal representative on March 5, 2009. The motions were filed on March 13 and Michael Longyear was not appointed until March 27—after the Estate's responses were due.

Allowing litigation to proceed while the Estate

had no representative was highly prejudicial. The personal representative is an interested party under TEDRA.^{FN17} Prior to final distribution, the personal representative has an affirmative statutory duty to locate and protect the assets of the estate.^{FN18} Thus, the personal representative is obligated to become involved in litigation when necessary to carry out these duties. Here, although the new personal representative's appointment became effective before the court ruled on the motions, the Estate was not properly served with the motions and was deprived of notice and a full opportunity to be heard. Longyear's appointment as personal representative became effective only seven days before the hearing and only 14 days before the court ruled on the motions.^{FN19}

FN17. RCW 11.96A.110(5), (6).

FN18. RCW 11.48.010.

FN19. According to the Estate's brief, the new personal representative did not even have access to the Estate's files until nearly two weeks after the hearing.

Second, the trial court considered and granted Reuben's motion for summary judgment with respect to the Northwestern Mutual life insurance policies even though Reuben was not yet a party in the TEDRA action. CR 24 requires that a prospective intervenor file a motion to intervene before becoming a party to the proceedings. A nonparty has no standing to seek relief before intervention is granted.^{FN20} Although Reuben was eventually added as a party by stipulation of the parties, this occurred after the trial court heard the summary judgment motion. Further, the motion was premature. The TEDRA petition did not lay claim to the Northwestern policies, and the parties had not yet directed discovery toward the question of whether they were estate assets.

FN20. See *River Park Square, LLC v. Mig-gins*, 143 Wn.2d 68, 80, 17 P.3d 1178 (2001) (holding that nonparty lacked

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standing to move for change of judge).

Third, the trial court scheduled the summary judgment hearing only 20 days after the motion was filed. CR 56(c) provides that a motion for summary judgment must be served and filed "not later than 28 days before the calendar hearing." Charles filed his motion on March 13, 2009, noting a hearing date of April 10, 2009. Due to vacation scheduling, the trial court moved the hearing to April 3, 2009, which was only 20 days after the motion was filed.

A trial court may shorten the 28-day period for a summary judgment motion as long as there is ample notice and time to prepare.^{FN21} Its decision is reviewed for manifest abuse of discretion.^{FN22} The opposing party must demonstrate prejudice by showing "a lack of actual notice, a lack of time to prepare for the motion, and no opportunity to submit case authority or provide countervailing oral argument."^{FN23} Although Caiarelli had an opportunity to submit authority and present arguments, the Estate did not. The shortened time schedule simply added to the other procedural irregularities.

^{FN24}

FN21. *State ex rel. Citizens Against Tolls v. Murphy*, 151 Wn.2d 226, 236, 88 P.3d 375 (2004).

FN22. *Id.*

FN23. *Id.* at 236-37.

FN24. Caiarelli, who obtained a 90-day continuance after retaining new counsel on December 6, 2008, argues that the trial court should have granted a longer continuance to allow new counsel to investigate numerous oversights and irregularities discovered during that 90-day period. Caiarelli did not, however, seek another continuance when this need became apparent. Nevertheless, it appears that neither Caiarelli nor the Estate had adequate time to prepare.

*7 We reverse the orders awarding the Northwestern Mutual life insurance policies to Reuben and the AIG insurance policy and Fidelity IRA to Charles, and remand for trial.

Attorney Fees and Costs

Both the personal representative of the Estate and Charles and Reuben Taylor request fees and costs for expenses incurred on appeal pursuant to RCW 11.96A.150 and RAP 18.1(a). RAP 18.1(a) permits fees on appeal "[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses on review." RCW 11.96A.150 provides that the court "may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to [the personal representative]." We decline to award fees and costs at this stage, and leave to the trial court on remand whether to award costs or fees in this appeal.

WE CONCUR: LAU and BECKER, JJ.

Wash.App. Div. 1, 2010.
In re Estate of Taylor
Not Reported in P.3d, 159 Wash.App. 1003, 2010 WL 5464751 (Wash.App. Div. 1)

END OF DOCUMENT

INSTRUCTION NO. 9

Petitioner claims that William Ross Taylor intended to leave the AIG insurance policies to his brother, Charles Taylor II, in trust for William's son Alexander Taylor, and to Reuben Taylor in trust for William's son Alexander Taylor as a contingent beneficiary/trustee, and did not intend to leave the AIG policies to Charles Taylor individually or to Reuben Taylor individually as a contingent beneficiary.

In order to prevail on this claim, the Petitioner has the burden of proving each of the following propositions:

1. The insured, William Ross Taylor intended, at the time he made the beneficiary designations, to designate Charles Taylor II as the primary trustee and Reuben Taylor as the contingent trustee for the benefit of William's son Alexander Taylor; and
2. William Ross Taylor substantially complied with the provisions of the AIG policy regarding that designation. "Substantial compliance" with the terms of the policy means that the insured has not only manifested an intent to designate a beneficiary in a particular manner, but has done everything which was reasonably possible to make that beneficiary designation.

If you find from your consideration of all of the evidence that each of these propositions has been proved, then your verdict should be for the Petitioner.

On the other hand, if any one of these propositions has not been proved, your verdict should be for the Respondents.

INSTRUCTION NO. 10

Petitioner claims that William Ross Taylor intended to leave the proceeds of the Fidelity IRA account to his brother, Charles Taylor II, in trust for William's son Alexander Taylor, and to Rueben Taylor in trust for William's son Alexander Taylor as a contingent beneficiary/trustee, and did not intend to leave the Fidelity account to Charles Taylor individually or to Reuben Taylor individually as a contingent beneficiary.

In order to prevail on this claim, the Petitioner has the burden of proving each of the following propositions:

1. The insured, William Ross Taylor intended, at the time he made the beneficiary designations, to designate Charles Taylor II as the primary trustee and Reuben Taylor as the contingent trustee for the benefit of William's son Alexander Taylor; and
2. William Ross Taylor substantially complied with the provisions of the account regarding that designation. "Substantial compliance" with the terms of the policy means that the insured has not only manifested an intent to designate a beneficiary in a particular manner, but has done everything which was reasonably possible to make that beneficiary designation.

If you find from your consideration of all of the evidence that each of these propositions has been proved, then your verdict should be for the Petitioner.

On the other hand, if any one of these propositions has not been proved, your verdict should be for the Respondents.

Instruction No. 18

The intent of a person is manifested by both what that person expresses in writing or orally or actions taken in a manner to achieve his end purpose.

INSTRUCTION NO. 13

Petitioner claims that Charles Taylor exercised undue influence over William Ross Taylor thereby causing him to designate the Charles Taylor the primary beneficiary of the Fidelity IRA account, and Reuben Taylor as the contingent beneficiary of the Fidelity IRA account, rather than designating Charles Taylor as trustee for Alexander Taylor, and Reuben Taylor as contingent trustee for Alexander Taylor.

The Petitioner has the burden of proving the initial proposition by clear, cogent and convincing evidence:

That at the time of the beneficiary designation there existed a confidential or fiduciary relationship between Charles Taylor II and William Ross Taylor.

1. If you determine from your consideration of all of the evidence that this proposition has been proved, then the burden shifts to Charles Taylor to prove by clear, cogent and convincing evidence, considering all of the evidence, that he did not use undue influence to cause William Ross Taylor to designate the Charles Taylor the primary beneficiary of the Fidelity IRA account, and Reuben Taylor as the contingent beneficiary of the Fidelity IRA account. In reaching this decision, you shall consider factors as further set out in these instructions.

If you determine from your consideration of all of the evidence that the Respondent Charles Taylor has met this burden, then you should answer "No" to Question 4.

On the other hand, if you determine that the Respondent Charles Taylor has not met his burden, then you should answer "Yes" to Question 4.

2. If you determine from your consideration of all of the evidence that at the time of the beneficiary designation that Petitioner has not carried the burden to prove that there was a

confidential or fiduciary relationship between Charles Taylor II and William Ross Taylor, then the burden of proof remains on Petitioner to prove by clear, cogent and convincing evidence, considering all of the evidence, that Charles Taylor II used undue influence to cause William Ross Taylor to designate the Charles Taylor the primary beneficiary of the Fidelity IRA account, and Reuben Taylor as the contingent beneficiary of the Fidelity IRA account, rather than designating Charles Taylor as trustee for Alexander Taylor, and Reuben Taylor as contingent trustee for Alexander Taylor. In reaching this decision, you shall consider factors as further set out in these instructions.

If you determine from your consideration of all of the evidence that the Petitioner Patricia Caiarelli has met this burden, then you should answer "Yes" to Question 4.

On the other hand, if you determine that the Petitioner has not met this burden, then you should answer "No" to Question 4.

Instruction No. 114

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Undue influence is defined as the influence that controlled the volition of William Ross Taylor, interfered with his free will, and prevented an exercise of his judgment and choice at the time that he made a gift, transfer, or beneficiary designation.

Instruction No. 15

A fiduciary relationship exists whenever one person occupies such a relation to the other party as to justify the latter in expecting that his interests will be cared for. A confidential relationship means (1) that a family member reposes some special confidence in another relation's advice and (2) that the relation purports to advise with his family member's interests in mind.

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COUNTY, WASHINGTON

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DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

In re the Estate of
 WILLIAM ROSS TAYLOR,
 Deceased.
 PATRICIA CAIARELLI,
 Petitioner,
 v.
 CHARLES E. TAYLOR II, REUBEN
 TAYLOR, Jr., EMILY TAYLOR, the marital
 community composed thereof, and
 ELIZABETH TAYLOR,
 Respondents.

CAUSE NO. 06-4-02116-6 SEA
 Consolidated with
 NO. 05-4-04707-8 SEA (Probate)
 SPECIAL VERDICT FORM

Please answer these questions in the order presented. Read the verdict form completely before answering.

QUESTION 1. In July 2005, when William Taylor completed the three AIG Life Insurance Policy forms, did William Taylor intend to:

(Please fill in one answer YES and one answer NO)

Designate Charles Taylor personally in his individual capacity as beneficiary and Reuben Taylor personally in his individual capacity as contingent beneficiary?

ANSWER: NO

ORIG

Designate Charles Taylor as trustee of a trust for the benefit of William's son, Alexander?

ANSWER: YES

QUESTION 2. In July 2005, when William Taylor completed his IRA account application, did William Taylor intend to:

(Please fill in one answer YES and one answer NO)

Designate Charles Taylor personally in his individual capacity as the beneficiary?

ANSWER: NO

Designate Charles Taylor as trustee of a trust for the benefit of William's son, Alexander Taylor ?

ANSWER: YES

QUESTION 3. In August 2005, when William Taylor designated Charles Taylor as beneficiary of three AIG Life Insurance Policies:

Did Charles Taylor unduly influence William Taylor to make that designation?

ANSWER: YES (Please write YES or NO)

QUESTION 4. In July 2005, when William Taylor designated Charles Taylor as beneficiary of his Fidelity IRA account:

Did Charles Taylor unduly influence William Taylor to make that designation?

ANSWER: YES (Please write YES or NO)

Dated 11/30/2011


Presiding Juror