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No. 74636-7-I

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

KIMBERLY A. HANSEN as her separate estate,
formerly known as KIMBERLY ROZGAY, Appellant

v.

MARK A. ROZGAY, individually and in his capacity as Personal Representative Estate of BARBARA ROZGAY, Trustee of the CORDES TRUST, ROZGAY FAMILY INVESTMENTS, LLC, a Washington Limited Liability Company and the marital community of MARK ROZGAY AND BABBI ROZGAY, husband and wife, Respondents.

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COURT OF APPEALS
STATE OF WASHINGTON
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INTRODUCTION

A prosperous, but frail, couple signed 24 testamentary and non-testamentary documents when their son and the lawyer hired by the son visited the couple's home on December 27, 2010. These documents disinherited the Plaintiff (a daughter of the couple) and enlarged and accelerated the anticipated inheritance of the son, who is the primary Defendant. About seven weeks later, husband and wife were moved to a memory loss care institution. At their admission, a family member informed the staff that both suffered dementia.

In the months leading up to these events, live-in caregivers stayed with the couple around the clock. According to the caregivers, both husband and wife exhibited obvious confusion and diminished capacity long before the son and the lawyer he chose visited in late December with a fat package of documents for the couple to sign. For example, one caregiver found the husband pushing his lawnmower down the street, and she had to persuade him that he was not mowing his yard. The other caregiver noted that from one day to the next, the wife could not remember the daily physical-therapy exercises she had been performing for months. Both husband and wife told the caregivers that they could not understand the documents they signed.

Despite these and other dramatic examples of diminished capacity and undue influence, the trial court granted summary judgment and dismissed all of Plaintiff's claims. The trial court refused to consider the declaration of Plaintiff's expert on elder care and elder abuse because the trial court found that the expert was "not qualified to render medical opinions," although the expert did not express a medical opinion. The trial court dismissed claims based on an affirmative defense never pleaded by Defendants.

Plaintiff requests vacation of the trial court's summary judgment order, findings and conclusions, of the judgment for attorney's fees and costs and remand for trial.

ASSIGNMENTS OF ERROR

Assignments of Error Nos. 1-8: The trial court erred in making the following factual findings on Rozgay's CR 56 motion:

(1) That Hansen's evidence is not sufficient to show it is highly likely Hansen's undue influence claims will prevail at trial and it was error to dismiss that claim. (CP 1027)

(2) That Hansen's evidence challenging Barbara and Clarence Rozgay's documents for lack of capacity is not sufficient to show it is highly likely Hansen's claims will prevail at trial and it was error to dismiss that claim. (CP 1027)

(3) That Hansen's claims were time-barred by RCW 11.24.010.
(CP 1027)

(4) That Hansen lacks standing and evidence to petition for removal of Mark Rozgay as attorney-in-fact for Clarence Rozgay and it was error to dismiss that claim. (CP 1027)

(5) That Hansen lacks standing and evidence to claim Rozgay breached his duties as Trustee of the Cordes Trust and it was error to dismiss that claim. (CP 1027)

(6) That Hansen lacks standing and evidence to claim Rozgay willfully wasted and mismanaged Barbara Rozgay's probate estate and it was error to dismiss that claim. (CP 1027)

(7) That Hansen lacks standing and evidence to claim Rozgay breached his fiduciary duty regarding Rozgay Family Trust and the Hood Canal property and it was error to dismiss that claim. (CP 1027)

(8) That Hansen's expert's declaration (CP 596-614) is stricken as the expert was not qualified and not timely disclosed. (CP 1028)

Assignment of Error No. 9: The trial court erred by failing to rule on Rozgay's Motion to Amend. (CP 823-849, 1011)

Assignment of Error No. 10: The trial court erred by granting Defendant's Motion for Summary Judgment. (CP 1026-1028)

Assignment of Error No. 11: The trial court failed to designate all pleadings and documents presented on the CR 56 motion. (CP 1128-29)

Assignment of Error No. 12: The trial court erred in denying Hansen's Motion for Revision of Order Granting Summary Judgment, to strike findings on a CR 56 motion. (CP 1128-1129)

Assignment of Error No. 13: The trial court erred by awarding fees to Rozgay Family Investments, LLC. (CP 1461-1463)

Assignment of Error No. 14: The trial court erred by awarding fees without segregating claims for which fees may be awarded from other claims. (CP 1092-1104)

Assignment of Error 15: The trial court erred in entering each and every finding in the Findings of Fact and Conclusions of Law on Defendants' Motion for Fees and Costs. (CP 1122-1127)

Assignment of Error No. 16: The trial court erred by entering judgment against Hansen's marital community. (CP 1135-1136, 1461-63)

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Does Civil Rule 56(c) prohibit adjudication of fact issues on summary judgment? If a motion for summary judgment is decided on affidavits and without live testimony, is review de novo and without regard to the findings? (Assignments of Error 1 through 8.)

Issue 2: Does a physician's declaration that Hansen's parents knew who they were, knew their family members, and generally comprehended their estate overcome contrary evidence and establish both *testamentary* and *transactional* capacity? (CP 1459) Does the record present issues of fact as to *testamentary capacity*? Does the record present issues of fact as to *transactional capacity*? (Assignments of Error 2 and 8.)

Issue 3: Does a physician's declaration that Hansen's parents knew who they were, knew the identity of family members and generally comprehended their estate overcome evidence of *undue influence*? (CP 1459) (Assignments of Error 1 and 8.)

Issue 4: Do the depositions of the caregivers, of lay witnesses, or the declaration of Hansen's expert present genuine issues of material fact as to undue influence, elder abuse, or testamentary and transactional capacity? Did the trial court improperly refuse the declaration of Hansen's expert? (CP 1028) (Assignments of Error 1, 2, and 8.)

Issue 5: Does the four-month period to contest a will (RCW 11.24.010) apply to non-testamentary documents? (CP 969-71) (Assignment of Error 3.)

Issue 6: Did Rozgay breach his duty as trustee by holding non-income-producing property in the Rozgay Irrevocable Trust so that Rozgay could enjoy it as a vacation retreat? Did Rozgay breach his duty as

trustee by personally paying expenses of the Hood Canal house and treating Rozgay's payments as loans? (Assignment of Error 7.)

Issue 7: Rozgay testified that his mother gifted Cordes Trust money to Rozgay for repair of the Hood Canal house. Is Rozgay's testimony barred by RCW 5.60.030? (Assignment of Error 5.)

Issue 8: Did Rozgay misuse Cordes Trust assets to repair the Hood Canal house? Does a remainder beneficiary have standing to pursue claims for Rozgay's misconduct as trustee? (Assignment of Error 5.)

Issue 9: Does Hansen have standing to sue for damages and to pursue claims under vulnerable-adult statutes for protection of her father, and for proper management of her mother's estate? (Assignments of Error 1, 2, 4, 6, and 7.)

Issue 10: Is there any basis to award fees and cost to Rozgay Family Investments, LLC? (Assignment of Error 13.)

Issue 11: Where attorney's fees and costs are awardable on some claims but not all claims, must the trial court require segregation of fees and costs by claim? (Assignment of Error 14.)

Issue 12: Is Hansen's marital community liable under Judgment on Award of Fees when Hansen asserted claims on her separate behalf, and when Hansen's spouse was not joined? (Assignment of Error 16.)

FACTUAL STATEMENT OF CASE

Appellant Kim Hansen and Respondent Mark Rozgay are two of four children adopted by the marital community of Clarence “Doc” and Barbara Rozgay. (CP 72, 520)

Barbara’s parents, Herman and Harriet Cordes, conveyed their Hood Canal waterfront home to the Cordes Living Trust of 1979. Bank of America was trustee. (CP 4) In 1991, the Hood Canal house was conveyed to Barbara, *as her separate estate*. The Cordes Trust also owned a commercial building and investment portfolios. The Cordes Trust was intended to meet Barbara’s expenses for life. (CP 4) Upon Barbara’s death, the assets would be distributed to the four children as remainder beneficiaries. (CP 4) In 2004, Mark Rozgay became trustee of the Cordes Trust. (CP 5) The lawsuit brought by Hansen as a remainder beneficiary alleges Rozgay breached his duty as trustee of the Cordes Trust.

Clarence and Barbara suffered significant physical and mental health challenges. (CP 111) Clarence and Barbara received nurse visits until constant care was necessary. By early 2010, Debbie Loveless and Lisa Baker were hired to provide 24/7 in-home care. (CP 620) Loveless and Baker provided care until February, 2011. (CP 5-6)

In February 2011, Clarence and Barbara were institutionalized in the Memory Loss Care Unit of Overlake Terrace. Upon admission,

Rozgay's brother (Michael) informed the Memory Loss Care Unit that Clarence and Barbara had dementia. (CP 432-33)

On September 23, 2011, Barbara died. Rozgay became personal representative. Hansen received notice of Barbara's probate. (CP 462-64) The estate remains open. Clarence resided in the Memory Loss Care Unit until his death on May 25, 2016.

AUTHORITY & ARGUMENT

Issue: Does CR 56(c) prohibit adjudicating fact issues on summary judgment?

Answer: Yes, CR 56(c) prohibits adjudication of genuine issues of material fact. Fact issues must be resolved at trial.

Rozgay moved for summary judgment. During oral argument, Rozgay disregarded the correct standard for summary judgment and invited the trial court to weigh evidence and decide disputed facts:

Mr. Ellerby: Your Honor, this motion for summary judgment is highly unique in Washington law. Motions for summary judgment on the issues of *undue influence* and *lack of capacity* are treated differently than other types of motions for summary judgment. *The court is allowed to engage in an assessment of the evidence.* And the reason for that, Your Honor, is the Washington policies that discourage *will challenges*. The policy and the law has made it extremely onerous for parties to *challenge wills* both on claims of *undue influence* and *lack of capacity....*

So in order to avoid trials *on these cases*, Washington courts are allowed to weigh the evidence to determine whether or not it's highly probable that the challenger will likely prevail at trial. And that makes these motions really

unusual. We think, Your Honor, after you look at all of the evidence and based on the law governing both *undue influence* and *lack of capacity*, the evidence falls far short of the required showing under Washington law. (RP 4:7-5:6, emphasis supplied).

Rozgay previously told the trial court this was a “*general civil action*” and TEDRA statute (RCW 11.96A) did not apply. (CP 73-75) Rozgay admitted Hansen “tailored her complaint to avoid any specific mention of a challenge to her mother's will.” (CP 827) But during argument Rozgay told the trial court this is a *will contest*. Ignoring CR 56(c), Rozgay argued: In a *will contest*, the trial court can adjudicate *undue influence* and *lack of capacity*. The trial court ignored CR 56(c) and went far beyond *undue influence* and *lack of capacity* to decide fact issues concerning elder abuse, fiduciary duties, mismanagement claims, damage claims and claims for a constructive trust and quiet title. (CP 1027).

Issue: If there is any issue concerning the record on summary judgment, should it be resolved in Hansen’s favor?

Answer: Yes, the rules require the order on summary judgment itemize all pleadings called to the court’s attention. This requirement was not satisfied.

CR 56(h) requires: “The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered.” RAP 9.12 restates this requirement.

Rozgay's proposed order made generic reference to items considered on the CR 56 motion. (CP 1026-28) Hansen asked the Court to list items incident to the CR 56 motion. (CP 1032-34) Rozgay opposed compliance with CR 56(h) claiming generic reference was sufficient. Rozgay told the trial court:

The court's January 4, 2016, order granting defendant's motion for summary judgment complies with this rule because it states that the court considered "files and pleadings in this case, including without limitation" the summary judgment briefing and supporting documentation filed by both sides. These categories cover the items presented to – and considered by – the court when ruling on Defendants' motion for summary judgment. Thus the order complies with CR 56 (h). (CP 1087)

The trial court refused to itemize the record. (CP 1128-29). If this Court decides the order does not satisfy CR 56(h) or RAP 9.12, then Hansen's list at CP 1032-34 should be accepted as material compliance.

Issue: If summary judgment is decided only on affidavits and without live testimony, is review de novo?

Answer: When a motion is decided on affidavits and without live testimony, review is de novo and without regard to the trial court's findings.

Rozgay's CR 56 motion was decided on affidavits. There was no live testimony. A ruling on summary judgment is reviewed de novo. "We review summary judgment orders de novo, considering the evidence and

all reasonable inferences from the evidence in the light most favorable to the non-moving party.”¹

Issue: Did Hansen, as the non-moving party, present sufficient evidence that issues of capacity required trial?

Answer: Yes. The evidence creates genuine issues of fact concerning capacity for adjudication at trial.

The record shows Clarence and Barbara lacked capacity. During 2010, Baker and Loveless provided 24/7 care. Baker’s deposition attests toward the end of 2010 Clarence’s conversations did not make sense. (CP 622) During the last six months of 2010, Clarence wandered at night. He would open the door and set off the alarm. (CP 620, 629) A baby monitor was installed to warn that Clarence was out of bed. (CP 631) Clarence thought the way to dispose of Depends was to flush them down the toilet, causing backup into the bathtubs. (CP 621) Clarence lived in the same house for 40 years but by 2010 he could not remember how to find the bathroom. (CP 626-27) Clarence was not allowed to walk around the block for fear he would get lost. (CP 630) “He was not in his right mind to get behind the wheel of a vehicle.” (CP 628) He was that way the whole time Baker provided care. (CP 628) Clarence could no longer play cards; he would just go through the motions. (CP 630-31) During late 2010, Baker found Clarence running the lawnmower in the street. “He thought

¹ Keck v. Collins, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015.).

Regarding the envelope of documents, Barbara asked Loveless: “Well, what am I supposed to do with these? What are they?” (CP 671-72)

Regarding Clarence, Loveless testified: “I have never seen a man lay on a sofa day in and day out for weeks reading the same Newsweek.” (CP 656) When asked what he was reading, he could not remember. (CP 658) Regarding the documents signed December 27, 2010, Clarence told Loveless “I really don’t understand all of these documents” and, “Well, Barbie will figure it out.” (CP 671). The trial court ignored all this evidence and dismissed Hansen’s claims that Clarence and Barbara lacked of capacity. (CP 1027)

Issue: What documents were processed or signed by Clarence and Barbara on December 27, 2010?

Answer: Twenty-four documents were processed, including a community property agreement, a deed, wills, documents forming a limited liability company, irrevocable assignments of membership interests, a revocable trust, an irrevocable trust, a purchase and sale agreement, powers of attorney, a security agreement, health care directives, and a promissory note.

During a meeting in Clarence and Barbara’s home on December 27, 2010, the lawyer presented documents totaling 119 pages. (CP 613) The 24 documents were processed in about 30 minutes (CP 701) while Rozgay looked on. (CP 714)

Clarence and Barbara signed a non-dispositive Community Property Agreement that immediately and irrevocably conveyed Barbara's separate property Hood Canal house and her investment portfolios to her marital community.

Clarence and Barbara purportedly formed Rozgay Family Investments, LLC, naming Clarence and Barbara as 50/50 Members and Rozgay as Manager. Clarence and Barbara signed a deed immediately and irrevocably conveying the Hood Canal house to Rozgay Family Investments, LLC, in exchange for Membership Units. (CP 13)

Clarence and Barbara signed a declaration creating Rozgay Irrevocable Trust. (CP 1340-41) Rozgay was appointed trustee. Rozgay, brother Michael and their families were the beneficiaries. Clarence and Barbara were not beneficiaries. (CP 1340-41)

Having received Membership Units in Rozgay Family Investments, LLC, just minutes earlier, Barbara signed three assignments conveying the majority of her Units to Rozgay Irrevocable Trust. Clarence signed three Assignments conveying the majority of his Units to Rozgay Irrevocable Trust. These assignments were irrevocable, creating an immediate interest. These assignments did not convey all of Barbara's or Clarence's Units to Rozgay Irrevocable Trust. So, Clarence and Barbara signed a Purchase and Sale Agreement conveying their remaining Units to

Rozgay Irrevocable Trust. (CP 613) The Admission to Rozgay Family Investments, LLC shows Clarence and Barbara were immediately and irrevocably divested of all interest in Rozgay Family Investments, LLC, and divested of their interest in the Hood Canal house. (CP 1343) Rozgay Irrevocable Trust became the sole Member of Rozgay Family Investments, LLC, with Rozgay as Trustee. (CP 1345) Clarence and Barbara received a Promissory Note from Rozgay Irrevocable Trust for their Units. Rozgay claims the Promissory Note was never going to be paid; but by an oral agreement the Promissory Note would be satisfied “with gifts over the course of time.” (CP 715) The Promissory Note was collateralized by a Security Financing Agreement pledging the Units. (CP 613)

Another declaration was signed by Clarence and Barbara creating Rozgay Family Living Trust. (CP 11) If Clarence or Barbara were unable to serve as trustee, Rozgay was the successor trustee. (CP 1340-41)

On December 27, 2010, Clarence and Barbara each signed a Last Will & Testament for distribution of personal property. The wills provided: “*Except as provided herein and in the Rozgay Family Living Trust, I intentionally make no provision herein for any child or other descendent of mine.*” (CP 815) Upon the death of Clarence and Barbara, the personal property would pass to Rozgay and Michael. (CP 816)

On December 27, 2010, Clarence and Barbara signed General Durable Powers of Attorney. If Clarence or Barbara were unable to act for the other, then Rozgay would take control as attorney-in-fact. Clarence and Barbara each signed a Health Care Directive and a separate document appointing Rozgay as their health care decision maker.

On January 21, 2011, Clarence and Barbara deeded their Medina home to the Rozgay Family Living Trust. (CP 16)

A man who flushes Depends, gets lost walking around the block, cannot remember how to find the bathroom and who mows the street thinking he is in the back yard, lacks capacity to sign contracts, form a limited liability company, or make significant gifts. A woman unable to remember her physical therapy routine after months of practice, who was helpless to recall day-to-day demands without prompting, who could not remember a doctor appointment from one night to the next morning and who could not recall why the lawyer had visited, lacks capacity to sign contracts, form a limited liability company or make significant gifts. Despite their serious limitations, Rozgay arranged the creation of the 24 documents with help from those he hand-picked.

Issue: Were all the documents processed on December 27, 2010, testamentary?

Answer: No, many documents made immediate, irrevocable transfers and were not testamentary.

Distinguishing testamentary from transactional documents is crucial *because* (1) the test for capacity to execute a testamentary document is much lower than the test for capacity to execute non-testamentary documents and (2) the four-month period to challenge a will (RCW 11.24.010) does not apply to non-testamentary documents. Characterization of a document as testamentary is restricted by statute. RCW 11.02.091 *Written Instrument – Limit on Characterization as*

Testamentary provides in material part:

(1) An otherwise effective written instrument of transfer may not be deemed testamentary solely because of a provision for a non-probate transfer at death in the instrument.

(3) “Otherwise effective written instrument of transfer” as used in subsection (1) of this section means: ... a promissory note,... an account agreement, a community property agreement, a trust, a conveyance, a deed of gift; a contract or another written instrument of a similar nature that would be effective if it did not contain provision for a non-probate transfer at death.

RCW 11.02.091 should be sufficient: however, this excerpt from In re Verbeek's Estate, 2 Wn. App. 144, 467 P.2d 178 (1970), though lengthy, is on point and worthy of study.

A testamentary instrument, whether or not purporting to be a will, has three essential, although somewhat overlapping, characteristics: (1) It must be executed with testamentary intent; (2) **it is revocable or ambulatory during the testator's lifetime**, and (3) **it operates upon property existing at the date of death and is effective at his death.**

In determining whether the testamentary intent exists with respect to a particular instrument in a case when the maker's intention cannot be ascertained from the language used in that instrument, the name given to the instrument or to the legal relationship created, whether it be 'deed', 'contract', 'lease', or other relationship, is helpful but not controlling. One must look to the provisions of the instrument in order to determine whether the instrument is, in fact, testamentary. Resort may be had to so-called indicia of intention. Such indicia, particularly pertinent here, include the name of the writing given by the parties to the instrument, the form of the instrument, the manner of execution of the instrument, the acknowledgment of the instrument, the recording of the instrument, the way in which the instrument, has been treated by the parties, **the fact that the powers of revocation of sale or modification are not reserved in the seller**, the fact that **the conveyance is not conditional upon the purchaser surviving the seller**, the fact that there is no prohibition against recording the instrument until the seller's death, the fact that the possession of the instrument is not required to be retained by the seller. **These indicia of intention tend to show the nontestamentary character of the instrument and the intention to pass a present interest.** No one factor is necessarily controlling. **The indicia of intent is of paramount importance in determining whether the instrument is testamentary is the fact that if the instrument creates an interest in praesenti rather than an instrument to take effect at the death of the testator, the instrument is nontestamentary. ... Thus, if a deed passes a present interest merely postponing enjoyment thereof to the date of death, it is not a testamentary instrument.** We see no reason for not extending this doctrine to a contract, lease or other instrument.

The difference between an interest in praesenti and testamentary interest is stated as follows: An inter vivos transfer or transaction requires that some interest or control, however small, be surrendered and that some right in another party come into being at the time of the transaction.

If a purported inter vivos conveyance has no effect whatsoever until death and involves absolutely no surrender or divestiture of control, use, power or interest in the property involved, and creates no present duty or liability upon the maker and no rights in others, there exists no reason to consider it as inter vivos for it squarely meets the very definition of testamentary disposition and ought to come under the requirements of the statute of wills. It is a very common practice for courts to strike down illusory inter vivos transactions as void on the ground that they accomplish nothing until death, are testamentary in nature, and therefore should be denied effect for want of execution according to testamentary formalities. (Citations omitted; emphasis in bold face type supplied.)

The trial court, at Rozgay's urging, ignored this crucial distinction and improperly treated the entire case as a "will contest."

Issue: Does the declaration of Henry Williams, M.D., resolve issues concerning capacity?

Answer: No, Dr. Williams does not distinguish between testamentary and non-testamentary capacity. Dr. Williams speculates as to Clarence and Barbara's comprehension of documents Dr. Williams does not even claim to have seen.

Rozgay's CR 56 motion relies on Dr. Williams to eliminate every capacity issue. Based on "a mini mental status exam," Dr. Williams thought Clarence could provide informed consent and that his judgment was good **in 2009**. (CP 1459) He attested Clarence suffered "temporary worsening of dementia symptoms" but that there were also periods when Clarence could give "informed consent" and had "reasonably good

cognitive function.” (CP 1459) Dr. Williams claims Barbara Rozgay had no “cognitive functioning issues.” Dr. Williams concludes:

I understand that Clarence and Barbara Rozgay executed estate planning documents in December 2010. Based on my recollection and review of his medical records, I believe that Clarence was clearly capable of understanding the significance of signing such documents and fully knew who his family members were and the scope of his assets and their value. (CP 1459)

Dr. Williams fails to distinguish testamentary from transactional capacity. The standard for testamentary capacity is relatively low.

[A] person is possessed of testamentary capacity if at the time he assumes to execute a will he has sufficient mind and memory to understand the transaction in which he is then engaged, to **comprehend generally the nature and extent of the property which constitutes his estate and of which he is contemplating disposition**, and to recollect the objects of his bounty.² (Emphasis added)

The ability to “*comprehend generally*” does not establish transactional capacity. The higher standard for transactional capacity is:

“The rule relative to mental capacity to contract, therefore, is **whether the contractor possessed sufficient mind or reason to enable him to comprehend the nature, terms, and effect of the contract in issue**. In applying this rule, however, it must be remembered that contractual capacity is a question of fact to be determined at the time the transaction occurred.” (Emphasis supplied.)³

² In re Estate of Bottger, 14 Wn.2d 676, 129 P.2d 518 (1942).

³ Page v. Prudential Life Ins. Co., 12 Wn. 2d 101, 109, 120 P. 2d 527 (1942).

When Hansen's claims regarding capacity were dismissed (CP 1027), Hansen was improperly denied her right to confront Dr. Williams with medical records contradicting his declaration. Problems with Dr. Williams' conclusions are examined in the next section.

Issue: Should the trial court have considered the declaration of Hansen's expert?

Answer: Yes, the expert declaration should have been considered.

Although the testimony of caregivers Loveless, Baker and accountant McAuliffe (CP 676-77) is sufficient to present issues concerning capacity, Hansen engaged Jullie M. Gray, MSW. Gray is a Licensed Independent Clinical Social Worker. Gray's declaration was part of Hansen's response to Rozgay's CR 56 motion. (CP 596-614)

Rozgay told the trial court that: "the experts on which she (Hansen) relies ... were never disclosed during discovery." (CP 851:3-4) This representation does not match reality. Hansen's Primary Witness List of August 18, 2015, (CP 925) disclosed Gray as an expert to testify concerning capacity. Gray's extensive qualifications were attached to the Primary Witness List. (Same form as shown at CP 606-14)

Rozgay propounded interrogatories asking Hansen to identify evidence by which Hansen would support her contention Clarence and Barbara Rozgay lacked capacity. (CP 896) Hansen's answer disclosed

Gray as a witness that Clarence and Barbara lacked capacity. (CP 897) That response was provided **October 29, 2015**. (CP 897) It was wrong to tell the trial court on **December 14, 2015**, (CP 856) that Hansen's expert had "never been disclosed during discovery." (CP 851:3-4) Rozgay's summary judgment motion was filed November 20, 2015. (CP 520) Rozgay had plenty of time to depose Gray, but chose not to do so. Ignoring the Declaration of Gray on summary judgment was error.

In Re the Guardianship of Rose Bellanich v. Bellanich, 43 Wn. App. 345, 717 P.2d 307 (1986), overruled on other grounds, Brouillet v. Cowles Pub. Co., 114 Wn.2d 788 (1990), the estate urged the court to disregard affidavits first filed to support a motion for reconsideration after the ruling on summary judgment. Arguably, affidavits first submitted on reconsideration constitute new evidence. However, the court refused to disregard the new affidavits:

In addition, the affidavits . . . are further evidence of Rose's intent to give one-half interest in her home to her son Robert. The estate urges us to disregard these affidavits, which were submitted with Robert's motion for reconsideration, as untimely, and cites CR 56. **We decline to do so, not only because CR 56 provides no basis for such a ruling, but because we see no compelling reason to disregard otherwise competent evidence on the basis of a hypertechnicality, particularly in the context of a summary proceeding where the result might be to deny a litigant his opportunity to a trial on the merits of his claim.** (Emphasis supplied.)

Bellanich, 43 Wn. App. at 352. By tell the trial court that Hansen’s expert was never disclosed during discovery, Rozgay avoided trial.

Issue: Hansen’s expert does not have a doctorate degree. Does that preclude consideration of her expert opinions?

Answer: No, Hansen’s expert is eminently qualified. The trial court erred failing to consider her declaration.

Rozgay asserts Gray does not have a doctorate degree and that Gray lacks training necessary to render expert testimony. (CP 855, 1027)

ER 702 controls the testimony of experts.⁴ On summary judgment, the court engages in a two-part inquiry: “(1) does the witness qualify as an expert; and (2) would the witness's testimony be helpful to the trier of fact.” State v. Guilliot, 106 Wn. App. 355, 363, 22 P.3d 1266 (2001). “Under this rule, the trial court has discretion to admit expert testimony if the witness qualifies as an expert and if the expert testimony would be helpful to the trier of fact.” State v. Russell, 125 Wn.2d 24, 51, 882 P.2d 747 (1994); State v. Kalakosky, 121 Wn.2d 525, 541, 852 P.2d 1064 (1993). Once a witness is qualified as an expert, argument goes to the weight; not to the admissibility of the testimony. Keegan v. Grant County Pub. Util. Dist. No. 2, 34 Wn. App. 274, 283, 661 P.2d 146 (1983).

⁴ “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact at issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”

Expert witness qualification need not be based on academic credentials. Harris v. Robert C. Groth, M.D., P.S., 99 Wn.2d 438, 449, 663 P.2d 113 (1983).

“Practical experience may be sufficient to qualify a witness as an expert.” In State v. Ortiz, 119 Wn.2d 294, 310, 831 P.2d 1060 (1992), overruled on other grounds, State v. Condon, 182 Wn.2d 307 (2015)., a tracker’s qualification to testify as an expert was challenged. (The tracker testified to height, weight, mental state, and familiarity with terrain of defendant after reviewing crime scene.) The court reviewed the tracker’s experience, and found his experience and training to be extensive. Ortiz, 119 Wn.2d at 310. The court looked at the tracker’s 23 years with the United States Border Patrol, and his qualification as an expert tracker by National Search and Rescue. Id. The court found that he met the criteria for the admissibility: he was qualified, his testimony was reliable, and jurors could form their own opinions about the reliability of his conclusions. Id. at 311.

From 2004 to 2007 Gray was a Case Manager at Evergreen Hospice where she conducted *psychosocial assessments*. From 2001 to 2010 Gray “collaborated with providers to create evidence based chronic disease management tools for geriatric patients including dementia.” From 1995 to 2004 Gray was Lead Social Worker at Evergreen Emergency

Department where she provided crisis intervention, mental health evaluation and assessment of elder abuse. From 1998 to 2000 Gray was a Social Worker at Stevens Hospital in the Geropsychiatric Unit managing discharge planning and crisis intervention. In 2009 Gray's article "*Turning the Spotlight on Elder Abuse*" was published.

Gray examined records provided by Henry Williams, M.D., D. Gregory Gorman, M.D., Robert A. Wolman, M.D., Adel El-Ghazzawy, M.D., Evergreen Home Health and the records of the 24/7 in-home caregivers. Gray did not second-guess licensed diagnosticians. Gray relied on their records. Gray concluded: "As of December 2010 Clarence Rozgay and Barbara Rozgay had very serious cognitive problems such that they could not possibly have read and understood the content of the documents presented for their signatures on December 27, 2010." (CP 597-98)

Gray further concluded: "As of December 2010, Clarence and Barbara Rozgay qualified as 'vulnerable adults' because they lacked the ability to care for themselves and were receiving in-home care services." (CP 598) "As of December 2010 Clarence and Barbara Rozgay were particularly vulnerable to undue influence over the conduct of their personal affairs, including their financial affairs." (CP 598)

The records relied upon by Gray contradict Dr. Williams and create issues of fact. At trial, Dr. Williams will be cross examined by the use of these records. If Rozgay had any proof that Clarence and Barbara possessed minimal testamentary capacity, they lacked transactional capacity and they were “vulnerable adults” (CP 598) with heightened susceptibility to undue influence. Rozgay’s exploitation of Clarence and Barbara benefited Rozgay and directly damaged Hansen.

Issue: When Rozgay held a position of trust and when Rozgay was persistently involved in the creation of the documents Clarence and Barbara signed December 27, 2010, was it wrong for the trial court to dismiss Hansen’s claims for damage caused by undue influence?

Answer; Yes, it was wrong to dismiss Hansen’s claim for damage caused by Rozgay’s undue influence.

Rozgay admits his parents trusted him “completely.” (CP 583, 720) Rozgay was persistently present during the design of the documents. In October 2010, Rozgay asked his accountants (CP 686) to help Rozgay with Clarence and Barbara’s finances. Rozgay scheduled a meeting between Clarence and Barbara and Rozgay’s accountants. (CP 682, 686) Rozgay told his accountants Clarence and Barbara would attend. (CP 682) Rozgay wanted to discuss the Hood Canal house. (CP 687) Rozgay took only Barbara to the October 7, 2010 meeting. (CP 681, 709) Rozgay admits Clarence did not attend because Clarence lacked “interest”.

(CP 709-10) Rozgay does not even recall if Clarence was invited. (CP 710) Accountant Nordberg never previously met Barbara. (CP 687) Rozgay attended the entire meeting concerning the Hood Canal house and art collection. (CP 585) Nordberg recalls Barbara was “not real talkative” and that Rozgay was “pretty much driving the conversation.” (CP 689)

Rozgay asked his business associate David Hay for an attorney referral. (CP 708) Rozgay made the introductory call to attorney Kanoa Ostrem. (CP 585, 640) On December 21, 2010, Rozgay attended the meeting with Clarence, Barbara, attorney Ostrem and financial planner Jeff Eulberg. (CP 693) Rozgay gave his email address to Ostrem. (CP 722) By 8:19 p.m. that same day, Ostrem emailed Rozgay a summary of the plan and fee quote. (CP 755-56) Ostrem’s email to Rozgay advised Rozgay: “I (Ostrem) would be able to finish the Hood Canal portion this year and the remaining planning shortly after Mr. and Mrs. Rozgay make a decision about Kim’s share.[S]o you can take your time to get peace of mind.” (CP 756)

Between 8:19 p.m. Tuesday, December 21, 2010, and 10:06 a.m. on Wednesday, December 22, 2010, Rozgay went to Clarence and Barbara’s house. Rozgay claims he brought Ostrem’s email but he cannot recall if Clarence and Barbara read it. By 10:06 a.m. Wednesday, December 22, 2010, Rozgay reply emailed Ostrem “Please move forward

on all of this!” (CP 756) By 1:21 p.m. Ostrem emailed Rozgay requesting addresses and asking the name of the limited liability company. At 1:24 p.m. Rozgay reply emailed Ostrem providing addresses and the LLC name. At 3:51 p.m. December 23, 2010, Ostrem emailed Rozgay: “We should also set up a time to meet next week to review and finalize the documents with you and your parents.” At 4:09 p.m. Rozgay reply emailed that Rozgay “would prefer to meet on Monday or Tuesday if possible.” (CP 757) At 4:35 p.m. Ostrem emailed Rozgay asking whether Rozgay should be the “sole financial power of attorney.” At 4:44 p.m. Rozgay reply emailed Ostrem that Rozgay would be the sole financial power of attorney. (CP 745) Rozgay claims that one minute later at 4:45, Rozgay telephoned Ostrem about being the “financial power of attorney” and told Ostrem: “I will have to check with them and get back to you on Monday morning.” (CP 746) Thirty minutes later (5:15 p.m.) on December 23, 2010 Ostrem emailed Rozgay 20 attachments which Ostrem described as “a ton of paperwork.” Ostrem’s email to Rozgay stated: “Note also that your parents need to make a decision about Kim’s share. That is the only blank in the documents. I will plan to walk you through the documents on Monday... Sorry to give you so much to review in such a short time!” (CP 758-60)

Ostrem thinks he met with Clarence and Barbara on Friday, December 24, 2010. (CP 694, 869) Ostrem has no record of that meeting. (CP 586, 867) Disputing Ostrem's memory, the caregiver journal for December 24, 2010 notes that Clarence was up at 6:50 a.m. Barbara was not up and dressed until "Noon!" The journal notes meals consumed, gargling with salt water, visiting the post office, shopping at QFC, attending a Christmas Eve musical and Mass – but there is no mention of any meeting with Ostrem on December 24, 2010. (CP 764)

On December 27, 2010 Ostrem emailed Rozgay at 8:48 a.m. to schedule the signing. At 9:58 a.m. Rozgay reply emailed Ostrem setting the meeting. By 10:02 a.m., Ostrem emailed Rozgay confirming the 3:00 p.m. meeting. Notwithstanding this documentation, Rozgay told the trial court Rozgay never responded. Here is what Rozgay told the trial court:

Mr. Ellerby: Mark Rozgay, the facts are unrebutted that other than calling the lawyer and setting up the meeting with his parents and attending the **first meeting** and receiving e-mail copies of the estate documents, **to which he did not respond and which he offered no input on**, those facts are not sufficient to show the kind of influence that's necessary to show undue influence. (RP 7:1-7, emphasis supplied.)

Telling the trial court Rozgay **did not respond** was wrong. When questioned about the extensive email exchange, Rozgay swore he did not know why Ostrem was sending him emails about Clarence and Barbara. (CP 737)

Rozgay attended the first meeting and Rozgay was present December 27, 2010, (CP 714) when Clarence and Barbara processed 24 documents in about 30 minutes. (CP 701) Rozgay claims he was present at the December 27, 2010 signing just in case Clarence or Barbara had “any questions of me or anything.” (CP 714) This does not make sense. Rozgay was not there to answer questions; he had no answers. Rozgay confesses he did not know what a “revocable living trust” was. (CP 732) Rozgay “didn’t understand all the legal mumbo jumbo.” (CP 733) Rozgay doesn’t know if Clarence and Barbara even read the papers before they signed. (CP 750)

Telling the trial court Rozgay **attended the first meeting** (December 21, 2010), while technically accurate masks the truth: Rozgay also attended the December 27, 2010 document signing.

Rozgay also told the trial court Rozgay offered “**no input.**” Rozgay even filed a declaration that he “offered no comments or suggestions to my parents regarding their decision to disinherit Kimberly.” (CP 111) But a year later Rozgay’s December 23, 2011, email (CP 751-52) shows Rozgay DID offer input to Clarence and Barbara:

Concerning the Hood Canal house, I told Barb and Doc that they had to do a lot of deferred maintenance or the house would crumble. I gave them a list of items including, new roof, new gutters, new windows, new doors, remodel bathrooms, remodel kitchen, replace carpets, replace window coverings, paint the

exterior, etc. They asked if I would pay for it and I replied it was not my house. They asked if I wanted the house to stay in the family and of course I said yes. They said that if I wanted to pay for everything that they would give it to me since they could no longer go there. **I told them that they needed to at least include Michael since no one had heard from you (Kim) in quite a while....**” (CP 751) (Emphasis added/parenthetical supplied for clarity.)

Rozgay told Clarence and Barbara they should “at least include Michael” and that no one that heard from Hansen. Rozgay told Clarence (“Doc”) and Barbara that their house would crumble. Rozgay said he would not repair it because it was not his house. By this **input** it came to be that, via Rozgay Family Investments, LLC and Rozgay Irrevocable Trust, Rozgay and Michael got the Hood Canal house immediately, irrevocably and without waiting for Clarence or Barbara to die.

Jullie Gray addresses Rozgay’s involvement:

The facts and circumstances regarding development of the real estate plan and execution of the documents are exactly congruent with reliable indicators of undue influence in such matters. These facts and circumstances include: The confidential, fiduciary, trusting relationship between Mark and his parents, Mark’s selection of Attorney Ostrem for legal services, Mark’s facilitation of meetings between his parents and Attorney Ostrem, Mark’s attendance at meetings between his parents and Attorney Ostrem, Mark’s control of communication between Attorney Ostrem and his parents, and the enhancement of Mark’s share of the estate as a result of the December 27, 2010, estate plan. (CP 604)

Hansen is entitled to trial on issues that Rozgay exploited a confidential relationship (CP 602) by unduly influencing (CP 604) vulnerable adults (CP 598) to gain substantial personal benefit – the immediate, irrevocable and beneficial ownership of the Hood Canal house at the expense of Clarence, Barbara and Hansen.

Issue; Is Hansen entitled to the presumption of undue influence? Is Hansen entitled to all favorable inferences from the evidence on summary judgment?

Answer: Yes, Hansen is entitled to the presumption of undue influence. On summary judgment, Hansen is entitled to all favorable inferences from the evidence.

Direct evidence is rarely available to prove some types of misconduct. The law offers presumptions so claimants have a fair chance. A presumption shifts the burden of proof regarding undue influence. Dean v. Jordan⁵ explains the presumption.

Certain facts and circumstances bearing upon the execution of a Will may be of such a nature and force as to raise a suspicion, varying in strength, against the validity of the testamentary instrument. The most important of such facts are (1) that the beneficiary occupied a fiduciary or confidential relationship to the testator, (2) that the beneficiary actively participated in the preparation of 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 or mental health of the testator, the nature or degree of relationship between the testator and the beneficiary, the opportunity for exerting undue**

⁵ 194 Wn. 661, 672-73, 79 P. 2d 331 (1938).

influence and the naturalness or unnaturalness of the will. The weight of any such fact 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 to carefully scrutinize the evidence offered to establish a will.

Dean is not a three-prong test for undue influence. Dean lists many considerations that “should appeal to the vigilance of the court and cause it to proceed with caution and carefully scrutinize all the evidence”

It is undisputed: Rozgay had a confidential relationship; his parents trusted him completely. (CP 720) It is undisputed: Rozgay was persistently involved in the process that brought Clarence and Barbara to sign documents on December 27, 2010. Disinheriting Hansen increased Rozgay’s share. Rozgay and Michael got immediate, irrevocable and beneficial ownership of the Hood Canal house. Yet, Rozgay thinks the presumption does not apply *because* Rozgay did not receive an unnaturally large share.

Clearly, the undue influence presumption applies. But even without the presumption, inferences from evidence cannot be ignored. In Re Estate of Carpenter, 253 So.2d 697 (1971) confirms that on summary judgment, the presumption is independent from evidentiary inferences:

Having concluded that the presumption vanished from the case, the District Court determined that the evidence was insufficient as a matter of law to sustain a finding of undue

influence. In this regard, **we conclude that since the facts giving rise to the presumption of undue influence are themselves evidence of undue influence, those facts remain in the case and will support a permissible inference of undue influence.** Therefore, it was error for the District Court to hold that no evidence tending to show undue influence was before the trial judge.

Inasmuch as in the first instance the trial judge decided this case on the basis of the presumption, it will now be necessary for the cause to be remanded to the trial judge for determination of the issue of undue influence in accord with the greater weight of the evidence. (Emphasis supplied)

Rozgay must show there is no issue concerning capacity or undue influence. Even without the presumption, the evidence presents fact issues that cannot be decided without a trial.

Issue: Was it proper for the court to dismiss Hansen’s claims as barred by the four-month limitation when Rozgay failed to plead that affirmative defense and when the Court failed to grant leave to add the defense?

Answer: No, it is improper to dismiss claims on an affirmative defense never alleged and never added by amendment.

Rozgay failed to plead the four-month bar to challenge wills imposed by RCW 11.24.010 as a defense. (CP 138-57) Rozgay’s CR 56 motion demanded dismissal of Hansen’s claims concerning Barbara’s “*estate planning documents*” as barred by the four-month period set by RCW 11.24.010. Hansen’s response objected that Rozgay omitted this defense. When Hansen objected, Rozgay asked for leave to add the

defense. Rozgay's motion (CP 823-28) was Hansen's first notice of Rozgay's novel notion that when the legislature used the word "will" in RCW 11.24.010, the legislature really meant "*estate planning documents*."

Hansen opposed Rozgay's Motion to Amend. (CP 936-46) Hansen's discovery was not designed to meet this unexpected reading of the statute. No time remained for Hansen to bring a dispositive motion to challenge this defense. (CP 47) The trial court never entered any order granting or denying Rozgay's motion for leave to amend. (CP 1011) Rozgay's proposed amendment was never filed (except as an exhibit to Rozgay's motion, CP 830-49). Even though the defense had never been alleged, Hansen's claims challenging Barbara's estate related documents were dismissed by the trial court as follows:

Plaintiff's claims challenging Barbara Rozgay's will and estate planning documents are time barred by RCW 11.24.010. (CP 1027)

Rozgay's failure to plead RCW 11.24.010 as a defense violated CR 8(b), (c) and CR 12 (b) requiring a party plead all affirmative defenses, including statute of limitations. While the entry of dismissal on a defense never added to the case is improper, it makes no sense to remand so that the trial court can enter the missing order on Rozgay's motion to amend and so that Rozgay can file his proposed amended Answer. In the interest of judicial economy, Hansen proposes to proceed on the assumption that

leave was granted, the proposed amendment was filed and Rozgay's new defense was added. These assumptions will permit the four-month bar defense to be addressed on this appeal without delay.

Issue: Does the four-month challenge period imposed by RCW 11.24.010 apply to non-testamentary transactional documents?

Answer; No, the four-month bar does not apply to documents creating an immediate, irrevocable interest.

RCW 11.24.010 imposes a four-month period to challenge a will after receipt of notice. RCW 11.24.010 provides in material part:

If any person interested in any *will* shall appear within four months immediately following the probate or rejection thereof, and by petition to the court having jurisdiction contests the validity of said *will*, or appear to have the *will* proven which has been rejected, he or she shall file a petition containing his or her objections to said *will* or the rejections thereof, issues respecting the competency of the decedent to make a last *will* and testament or respecting the execution by a deceased of the last *will* and testament under restraint or undue influence or under fraudulent representation, or for any other cause affecting the validity of the *will* or a part of it, shall be tried and determined by the court.

If no person files and serves a petition within the time under this section, the probate or rejection of such *will* shall be binding and final. (Emphasis supplied.)

The statute applies to "wills." Notwithstanding restrictions imposed by RCW 11.02.091 as to documents that can be characterized as testamentary, Rozgay argues every document related to estate planning is

subject to the four-month bar. It is improper to apply the four-month period to non-testamentary documents such as deeds, LLC formation documents, assignments of LLC interests, a sales agreement, a security instrument, a promissory note, a revocable trust and an irrevocable trust. Dismissing Hansen's challenges to documents that are not "wills" and not subject to probate, not executed with testamentary formality is improper. The trial court applied the incorrect capacity test to these non-testamentary documents – documents that confuse even Rozgay.

As personal representative of Barbara's estate, Rozgay sent Notice of Appointment of Personal Representative and Pendency of Probate with a copy of the Will. That Notice stated:

RCW 11.24.010 provides among other things that **any action affecting the validity of a Will** is required to be filed with the court within four months after the date the Will was admitted to probate, otherwise the admission **of the Will** will be final and binding." (Emphasis supplied.)

That Notice (CP 462-64) is consistent with RCW 11.24.010. That Notice does not mention any other documents, just the Will.

During the four-month period to challenge Barbara's will Rozgay emailed Hansen and confessed his ignorance. By email of December 23, 2011, Personal Representative Rozgay told Hansen:

I believe you can contest the will but **I do not know whether that can take place now or when Doc passes away**. If that interests you then you should call Kanoa

Ostrem. **As personal representative of the estate, I do not know at this point what I can or cannot do.** (CP 753) (Emphasis supplied.)

Rozgay should not be permitted to assert that “will” means any related estate planning documents. Non-testamentary documents are not subject to the four-month limit imposed by RCW 11.24.010.

Issue: Did Rozgay demonstrate the absence of any issue that Rozgay breached fiduciary duties as personal representative, trustee of the Rozgay Irrevocable Trust and the Rozgay Family Trust or as attorney in fact for Clarence?

Answer: No, the record shows Rozgay breached his fiduciary duty.

Rozgay cannot name the beneficiaries of the Rozgay Revocable Living Trust. (CP 733-34) Rozgay, as trustee, cannot fulfill trustee duties without knowing to whom he owed a duty. Rozgay admits that it was a lot of paper and that he “couldn’t explain it.” (CP 747) Rozgay claims the Hood Canal house is owned by Rozgay Family Investments, LLC. Rozgay thinks he is a member. Rozgay’s declaration or record states:

The Hood Canal house is not “my” house as she (Hansen) repeatedly alleges, but rather owned by Rozgay Family Investments, LLC of which **I am only one of three surviving family members with an interest.** The transfer of title into Rozgay Family Investments, LLC, was made by my mother as a part of her overall estate plan and I had no involvement in this transfer. **There are three remaining members of the LLC: my father, my brother Michael, and myself.**” (CP 1388) (Emphasis and parenthetical supplied.)

Rozgay is not an LLC member. Rozgay is confused. To fix Rozgay's misunderstanding, one of Rozgay's attorneys filed a declaration attempting to explain Rozgay's misunderstanding:

Attached as Exhibit A is the "Agreement to Become a Member of Rozgay Family Investments, LLC" which shows that **Mark Rozgay as trustee of the Rozgay Irrevocable Trust**, was admitted as a member in Rozgay Family Investments, LLC. (CP 964) (Emphasis supplied.)

As Rozgay's attorney explains: Rozgay (personally) is not a member of Rozgay Family Investments, LLC. Rozgay Irrevocable Trust is the member; Rozgay is only the trustee. (CP 967) Under Rozgay's erroneous belief that Rozgay is an LLC Member, Rozgay used his own money to improve the Hood Canal house.

Michael testified: So far, Rozgay has used about \$200,000 of Rozgay's own money to improve the Hood Canal house (CP 590) and that Rozgay expects to be repaid:

- Q: Okay. Were you aware that Mark was putting his own money into the Hood Canal house?
- A: Yes.
- Q: Okay. How did you find that out?
- A: He told me.
- Q: When?
- A: As he was doing it. He said, "**We'll just subtract this from whatever your half of the payments are – or your half of the – so if we ever sell the place, we'll take care of it then.**"(CP 590-91) (Emphasis supplied.)

This is impermissible self-dealing. This is a breach of fiduciary duty.

But a trustee who engages in self-dealing or who mingles trust funds with the trustee's private funds breaches her fiduciary duty of loyalty, even where the trustee eventually replaces the funds and the trust suffers no loss. Citing In re Marriage of Petrie, 105 Wn. App. 268, 276, 19 P.3d 443 (2001) ("A trustee's comingling of personal funds and assets with the funds and assets of a beneficiary is a breach of fiduciary duty because it creates a conflict of interest for the trustee.")

...
Even if we accept that Denise intended to care for Theresa in the new home, she still breached her duty by mingling trust assets with her personal funds and failing to protect the trust assets with, for example, a security interest in the home. These protections are particularly important here, Denise knew of Theresa's fragile and deteriorating health and that Theresa would likely need full-time professional care. Finally, by transferring her assets, including the trust's investment, arguably to prevent the trust from recovering its investment, Denise was acting in direct conflict with her duty to protect trust assets.⁶

The conflict and breach of duty created by Rozgay's use of personal money to improve a trust asset is obvious. Rozgay is improving the Hood Canal house because Rozgay believes HE will someday own the Hood Canal House as his own. He believes the money he is advancing is a loan or equitable lien. Rozgay has become a creditor of the trust. Rozgay's interest as creditor conflicts with the interests of Clarence and Barbara as

⁶ Casterline v. Roberts, 168 Wn. App. 376, 383-84, 284 P. 3d 743 (2012).

creditors of the Rozgay Irrevocable Trust. Attorney Ostrem's email to Rozgay explained the plan:

On 1/1/2011 sell the remaining interest in the LLC to the Irrevocable Gifting Trust for approximately \$200,000. **At that point, the Trust will own 100% of the LLC and Mr. and Mrs. Rozgay will own a promissory note worth approximately \$200,000.** (CP 755) (Emphasis supplied.)

The Purchase and Sale Agreement was signed and Clarence and Barbara received a Promissory Note for \$206,000. The Rozgay Irrevocable Trust is the maker of the note. The Note calls for two annual payments. (CP 969) There is no evidence the Note was paid. There is no evidence the Note was forgiven. If the Note was forgiven, the forgiveness would have been granted by Rozgay as personal representative of Barbara's estate, thereby diminishing Barbara's estate. Alternatively, the forgiveness could have been granted by Rozgay as Clarence's attorney-in-fact. either way, forgiveness of the note would have benefitted the Rozgay Irrevocable Trust and its only beneficiaries, Mark Rozgay and Michael. Forgiving the note held by Clarence and Barbara would directly benefit Rozgay as the only other creditor of the Rozgay Irrevocable Trust.

Issue: Does Hansen have standing to request court protection of Clarence and the conservation of Barbara's estate? Does Hansen have standing to assert her own claim that Rozgay unduly influenced or exploited Clarence and Barbara to Hansen's damage and Rozgay's gain?

Answer: By statute, Hansen is vested with authority as an “interested person” and as a “family member”.

If Rozgay had not engineered personal, immediate benefit, capacity might be the only issue. Rozgay went too far when he influenced Clarence and Barbara to “include Michael” and exclude Kim Hansen “since no one had heard from her.” Rozgay’s abused his confidential relationship. Rozgay unduly influenced Clarence and Barbara for Rozgay’s gain causing damage to Hansen.

Rozgay argues: Hansen, albeit the daughter of Clarence and Barbara, is not an “interested person” under RCW 11.94.100 and lacks standing because of familial tension and Hansen’s limited contact with the family. (CP 533) Rozgay relies on an email Hansen sent nearly a year after the plethora of documents was signed. Hansen’s email expressed frustration and raging anger. (CP 533-34) Rozgay says Hansen made “hateful statements.” (CP 533) That email was sent after Barbara’s death. That email had no bearing on instructions provided to Ostrem to exclude Hansen. Attorney Ostrem’s first draft included Hansen. Sometime between December 23 and 27, 2010, a decision was purportedly made to disinherit Hansen. Everything points to Rozgay’s undue influence as causing Hansen’s damage. Rozgay does not want his own misconduct to light. So, Rozgay argues Hansen lacks standing.

Rozgay addresses standing under RCW 11.94 but fails to address standing under RCW 74.34 that prohibits abuse and financial exploitation of vulnerable persons. Nearly every claim Hansen alleges comes within RCW 74.34 because of the statute's expansive definitions of abuse, personal exploitation, and financial exploitation. The only claim alleged by Hansen not coming within RCW 74.34 is Hansen's claim as a beneficiary of Cordes Trust. RCW 74.34.020 defines an interested person:

“Interested person” means a person who demonstrates to the court's satisfaction that the person is interested in the welfare of the vulnerable adult, that the person has a good faith belief that the court's intervention is necessary, and that the vulnerable adult is unable, due to incapacity, undue influence, or duress at the time the petition is filed to protect his or her own interests.

Rozgay argues that Hansen is not an interested person under this definition because (a) she had little contact with Clarence and Barbara after Barbara's stroke and (b) following Barbara's death Hansen wrote a very angry email to Rozgay. (CP 117-20) Relying on Hansen's limited contact with the family and the email of wrath, Rozgay argues Hansen is not “interested in the welfare of the vulnerable adult.”

Assume *arguendo* Hansen's lack of contact and vitriolic email transformed her into an uninterested person. The issue is: Can an uninterested person become an interested person? Hansen's ranting email of December 11, 2011, concludes:

There can be no explanation as to “Barb’s reasoning” as to why she cut Lisa and I out of her will other than pure hatred. **I shudder to think of you having anything to do with it.** (CP 120) (Emphasis supplied.)

On December 23, 2011, Rozgay’s reply email confirmed Hansen’s suspicion, her worst fear. Rozgay wrote::

Concerning the Hood Canal house, **I told Barb and Doc** that they had a lot of deferred maintenance or the house **would crumble**. I gave them **a list** of items including, new roof, new gutters, new windows, new doors, remodel bathrooms, remodel kitchen, replace carpets, replace window coverings, paint the exterior, etc. They asked if I would pay for it and I replied **it was not my house**. They asked if I wanted the house to stay in the family and **of course I said yes**. They said that if I wanted to pay for everything they would give me it to me since they no longer could go there.

It told them that they needed to at least include Michael since noone (sic) had heard from you in quite a while... (CP 752-53) (Emphasis supplied.)

From other parts of this email Hansen learned Rozgay got the attorney and Rozgay was present at planning meetings. Hansen learned Rozgay obtained control and beneficial ownership of the Hood Canal house by scaring Clarence and Barbara to believe that their house “would crumble.” Rozgay’s email was a wakeup call prompting Hansen to seek documents and the truth. If an interested person can become uninterested, the converse also is true: An uninterested person can become very interested. Whether Hansen was “interested” (RCW 74.34.020) cannot be

resolved on summary judgment. When addressing standing, Rozgay also ignores RCW 74.34.210 **Order for Protection or Action for Damages – Standing** that provides:

A **petition for an order for protection** may be brought by the vulnerable adult, the vulnerable adult’s guardian or legal fiduciary, the department or any **interested person** defined in RCW 74.34.020.

If RCW 74.34.210 was only the above portion, the “interested person” issue must still be reserved for trial. But RCW 74.34.210 continues:

An action for damages under this chapter **may be brought by** the vulnerable adult, or where necessary by his or her **family members** and/or guardian or legal fiduciary. The death of the vulnerable adult shall not deprive the court of jurisdiction over a petition or **claim** brought under this chapter. Upon petition after the death of the vulnerable adult, the right to maintain the action shall be transferred to the executor or administrator of the deceased for recovery of all damages for the benefit of the deceased person’s beneficiaries as set forth in chapter 4.20 RCW or if there are no beneficiaries, then for the recovery of all economic losses sustained by the deceased person’s estate. (Emphasis supplied.)

The statute distinguishes a petition for an “*order of protection*” to be brought by “*any interested person*” from an “*action for damages*” brought by “*family members*”. The statute also distinguishes a “*petition*” from a “*claim brought under this chapter.*” If the legislature had intended to confine standing to “interested persons” it should have omitted “by his or her family members.” When different words are used in the same

statute, it is presumed those words have different meanings. Koenig v. City of Des Moines, 158 Wn.2d 173, 182, 142 P.3d 162 (2006).

Hansen has standing pursuant to RCW 74.34.210.

Issue: Did Rozgay demonstrate the absence of issues by submitting a declaration to prove a gift based on Rozgay's discussions with Barbara concerning use of Cordes Trust money? Does Hansen, a remainder beneficiary, have standing to assert a claim for mismanagement for breach of trustee duties?

Answer: Rozgay cannot testify as to his discussions with the decedent when the discussion would bestow direct benefit on Rozgay. Hansen has standing to pursue rights as a remainder beneficiary of the Cordes Trust.

After the Hood Canal house had been placed in the *Rozgay Irrevocable Trust*, Rozgay, as trustee of the Cordes Trust, used *Cordes Trust* money to improve the Hood Canal house. To defend Rozgay's diversion of Cordes Trust money to the Hood Canal beneficially held by Rozgay Irrevocable Trust. Rozgay tried to offer this testimony:

She (Barbara Rozgay) was the sole income beneficiary and had complete discretion to use that income in any manner she chose. **She directed me to use her trust income to pay for various Hood Canal property expenses,** and rather than issue two checks, one to my mother and then another to the tradesperson, I issued a single check for efficiency reasons. Again, there was nothing inappropriate in paying her expenses, **as she directed, from funds in which she had sole ownership**" (CP 794) (Emphasis supplied.)

By declaration Rozgay attempts to prove a conversation Rozgay had with his mother before she died. This testimony is inadmissible and

cannot be considered on summary judgment. RCW 5.60.030 prohibits a witness from testifying concerning a transaction with a decedent:

No person offered as a witness shall be excluded from giving evidence by reason of his or her interest in the event of the action, as a party thereto or otherwise, but such interest may be shown to affect his or her creditability; PROVIDED HOWEVER, that in an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative of any deceased person, or as deriving right or title by, through or from any deceased person, or as guardian or limited guardian of the estate or person of any incompetent or disabled person, or of any minor under the age of fourteen years, then a party to an interest or to the record, **shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased, incompetent or disabled person, or by any such minor under the age of fourteen years:** PROVIDED FURTHER, that this exclusion shall not apply to parties of record who sue or defend in a representative or fiduciary capacity, **and have no further interest in the action.**” (Emphasis supplied.)

Rozgay attempts to keep a purported gift that reduced the distributable share to Hansen. Rozgay claims this testimony is admissible because Rozgay is personal representative. Rozgay is wrong. Claiming and keeping a gift is self-serving. It is unrelated to personal representative duties. It is inadmissible. Rozgay is guilty of diverting Cordes Trust money. Rozgay admits Hansen is a beneficiary of the Cordes Trust. (CP 536) Rozgay advised the Court “*So if you’re a beneficiary of a trust, you have an interest in it obviously.*” (RP 14) Even after hearing this

statement, the trial court erred by finding Hansen lacked standing to claim Rozgay breached his duty as trustee of the Cordes Trust. (CP 1027)

Issue: Was it proper to award attorney fees and costs to Rozgay Family Investments, LLC?

Answer: No, the award was improper. The award was not supported by any basis at law or equity.

Rozgay Family Investments, LLC is named as a judgment creditor. (CP 1461-1463)

In applying for attorney fees and obtaining judgment, no attempt was made to segregate fees incurred in the defense of Rozgay Family Investments, LLC. (CP 1054-1066)

Attorney fees may be awarded only when authorized by contract, statute, or recognized ground in equity. Rorvig v. Douglas, 123 Wn. 2d 854, 861, 873 P. 2d 492 (1994). Gerken v. Mutual of Enumclaw Ins. Co., 74 Wn. App. 220, 229, 872 P. 2d 1108, review denied. 125 Wn. 2d 1005 (1994). No basis exists to award fees or costs to this Limited Liability Company.

Issue: Was it improper to award attorney fees/costs without requiring segregation of fees on an issue by issue basis?

Answer: Yes, Rozgay failed to segregate fees by issue or claim.

Rozgay's claim for an award of fees is primarily based on RCW 11.24.050 which is dependent upon characterizing the entire case as a

“will contest”. It should be clear this case is not a will contest and involves many claims that cannot be characterized as contesting a will. Rozgay did not segregate claims pertaining to the purported will contest from claims to quiet title, claims brought by Hansen as a remainder beneficiary of the Cordes Trust, challenges to deeds and other non-testamentary documents. “[T]he prevailing party should be awarded attorney fees only for the legal work completed on the portion of the claim permitting such an award...” (Underlining added). C-C Bottlers v. J.M. Leasing, 78 Wn. App. 384, 389, 896 P. 2d 1309 (1995). Segregation was requested by Hansen (CP 1101) but none was provided nor required by the trial court.

Issue: **When the action was brought by Hansen, concerning her separate property and when the marital community was not named or joined in the action, was it proper for the marital community to be named as a judgment debtor?**

Answer: **No, because the marital community was not joined and because the action only concerned Hansen’s separate estate, it was error to denominate the marital community as a judgment debtor.**

The judgment (CP 1461-1463) names Kim Hansen and her marital community as judgment debtor. Hansen timely objected to the form of proposed judgment. (CP 1135-1136) A judgment entered solely against one’s spouse is presumed to be a community obligation; however, the presumption can be overcome by showing that the judgment is based on a

separate obligation. Whitehead v. Satran, 37 Wn. 2d 724, 225 P. 2d 888 (1950). The entire case concerned Kim Hansen's separate property and claims. There is no basis to support entry of judgment against Hansen's marital community. Delano v. Tennent, 138 Wn. 39, 47, 828 P. 2d 582 (1926). Entry of judgment against Hansen's marital community was wrong.

CONCLUSION – STATEMENT OF RELIEF REQUESTED

Hansen respectfully requests vacation of the order granting summary judgment (CP 1026-1028); vacation of findings of fact and conclusions of law (CP 1122-1127); vacation of judgment awarding attorney fees and costs (CP 1461-1463) and remand for trial.

Dated this 6th day of July, 2016.

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

KIMBERLY A. HANSEN, as her separate
estate, formerly known as KIMBERLY
ROZGAY,

Plaintiff,

v.

MARK A. ROZGAY, individually and in his
capacity as Personal Representative Estate of
BARBARA ROZGAY, Trustee of the
CORDES TRUST, ROZGAY FAMILY
INVESTMENTS, LLC, a Washington
Limited Liability Company and the marital
community of MARK ROZGAY AND
BABBI ROZGAY, Husband and Wife,

Defendants.

No. 14-2-33748-5 SEA

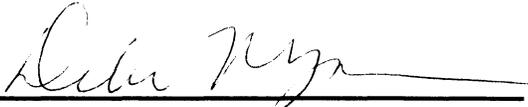
Court of Appeals, Division One
No. 74636-7-1

DECLARATION OF SERVICE

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I certify that on July 6, 2016, I sent a copy of the Brief of Appellant to Respondents' attorney Scott M. Ellerby, via email to sellerby@ballardlawyers.com. Counsel for the parties have stipulated to service of all pleadings and correspondence via email.

DATED this 6th day of July, 2016 at Redmond, Washington.


Debi Ryan, Legal Assistant

(07052016 Hansen Dec of Svc)

DECLARATION OF SERVICE

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