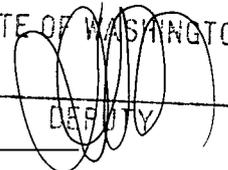


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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

No. 43282-0-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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KITSAP BANK, a Washington Financial Institution,  
Respondent,

v.

BANK OF AMERICA, a Washington Financial Institution;  
CHARLENA M. LANTERNO,

Respondents,

and

GAIL DENLEY, as Personal Representative of the  
CONSOLIDATED ESTATES OF HELEN M. CORRELL AND  
JAMES F. CORRELL,

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
FOR KITSAP COUNTY  
THE HONORABLE LEILA MILLS

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REPLY BRIEF OF APPELLANT

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## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	REPLY ARGUMENT .....	2
	A. This Court Should Reverse The Trial Court's Dismissal On Statute Of Limitations Grounds, A Ruling Respondent Makes No Attempt To Defend. ....	2
	B. The Trial Court Erroneously Granted Summary Judgment To Lanterno Where The Admissible Evidence Raised A Question Whether Lanterno's Receipt Of Funds Was the Result Of Undue Influence And Lanterno Failed To Meet Her Burden Of Showing That She Was The Owner Of The Funds. ....	3
	1. Lanterno Improperly Relies On Her Own Statements Regarding Transactions With The Decedent, Which The Trial Court Struck As Violative Of The Deadman's Statute.....	3
	2. The PR's Evidence Was Not Speculative, But Raised An Inference That Someone Other Than Helen Correll Directed The Transfer Of A \$400,000 Check From Her Chase Account To Kitsap Bank, Largely Into An Account Benefitting Lanterno. ....	5
	3. Lanterno's Undue Influence Presents A Triable Issue Of Fact.....	10
	C. The Trial Court Did Not Have Authority To Award Attorney Fees Under TEDRA In This Non-TEDRA Dispute Brought Under The Financial Institution Individual Account Deposit Act.....	15
III.	CONCLUSION.....	17

## TABLE OF AUTHORITIES

### CASES

<i>Doty v. Anderson</i> , 17 Wn. App. 464, 563 P.2d 1307 (1977).....	12
<i>Federal Old Line Ins. Co. v. McClintick</i> , 18 Wn. App. 510, 569 P.2d 1206 (1977).....	5, 10
<i>In re Estate of Haviland</i> , 162 Wn. App. 548, 255 P.3d 854 (2011) .....	12
<i>In re Estate of Jones</i> , 170 Wn. App. 594, 287 P.3d 610 (2012) .....	12-14
<i>Kellar v. Estate of Kellar</i> , ___ Wn. App. ___, 2012 WL 6734707 (66828-5-I Dec. 31, 2012).....	4
<i>Marvik v. Winkelman</i> , 126 Wn. App. 655, 109 P.3d 47 (2005) .....	4

### STATUTES

RCW 4.20.046.....	16
RCW 5.60.030.....	3, 11
RCW Title 11 .....	2, 15-17
RCW 11.02.005.....	16
RCW 11.11.010.....	3
RCW 11.11.070.....	2-3
RCW 11.40.060.....	16
RCW 11.96A.030 .....	16
RCW 11.96A.150 .....	15-17
RCW 30.22.040.....	6
RCW 30.22.210.....	1-2, 15-17

**RULES AND REGULATIONS**

RAP 2.4 ..... 4

**OTHER AUTHORITIES**

DeWolf & Allen, *25 Wash. Prac., Contract Law  
And Practice* § 9:18 (1998) ..... 14

Tegland, *3 Wash. Practice: Rules Practice* 41  
(7<sup>th</sup> Ed. 2011) ..... 2

7 C. Wright & A. Miller, *Fed. Pract & Proc.* §  
1714 (1972)..... 6

## I. INTRODUCTION

Charlena Lanterno mischaracterizes herself as a defendant below, defending against an undue influence claim brought by the personal representative of Helen Correll's estate, appellant Gail Denley. Kitsap Bank was the actual plaintiff below, suing under the banking statute, RCW 30.22.210, to prevent the disposition of \$400,069.21 from Helen Correll's checking account until "a court of proper jurisdiction" could adjudicate the competing claims of Lanterno and the Personal Representative. (CP 16)

The trial court granted Lanterno's claim and rejected the Personal Representative's arguments on two grounds, neither of which withstands appellate review. Lanterno makes no attempt to defend the trial court's flawed holding that the Personal Representative's challenge to Lanterno's claim was barred by the Super Will statute of limitations, a ruling that must be reversed as a matter of law. Lanterno now relies on inadmissible evidence that the trial court excluded under the Deadman's Statute to support the trial court's alternative ruling that the circumstances under which Lanterno deposited \$400,000 into an account benefitting Lanterno do not raise a triable issue of undue influence. The trial court erred because Lanterno could not satisfy her burden of establishing a

right to the disputed funds and failed to rebut the presumption of undue influence arising when two months before Helen Correll's death, the personal banker of this 94-year old woman placed Helen's funds into an account in which she was the pay on death beneficiary.

Because this action was brought under RCW 30.22.210, and neither a TEDRA claim nor any other claim governed by Title 11 RCW was before the court, the trial court erred in awarding attorney fees. This court should remand for trial on the PR's claim of undue influence and reverse the award of attorney fees.

## II. REPLY ARGUMENT.

### A. **This Court Should Reverse The Trial Court's Dismissal On Statute Of Limitations Grounds, A Ruling Respondent Makes No Attempt To Defend.**

The trial court erroneously held that the Personal Representative's assertion that the estate and not Lanterno was the rightful owner of the decedent's account was "time barred under RCW 11.11.070." (3/30 RP 4-5) (See App. Br. 8-12) As Lanterno has made no argument to support that decision, this court must reverse. See Tegland, 3 *Wash. Practice: Rules Practice* 41 (7<sup>th</sup> Ed. 2011) (where respondent elects not to respond to appellant's

argument, court will decide case “based upon the arguments and record before it.”).

The “Super Will” statute, RCW 11.11.070(3), has no application to the Personal Representative’s assertion of her right to nonprobate assets in a financial institution that are not subject to a Super Will. (App. Br. 8-12) The Last Will and Testament of Helen Correll was not a “Super Will.” It made no disposition of nonprobate assets. The Personal Representative was not a “testamentary beneficiary claiming a nonprobate asset” for purposes of the statute of limitations. RCW 11.11.070(3). See RCW 11.11.010(10) (defining “testamentary beneficiary”). The trial court’s reliance on the statute of limitations to bar the PR’s challenge to Lanterno’s claims to Helen’s funds was indisputably error.

**B. The Trial Court Erroneously Granted Summary Judgment To Lanterno Where The Admissible Evidence Raised A Question Whether Lanterno’s Receipt Of Funds Was the Result Of Undue Influence And Lanterno Failed To Meet Her Burden Of Showing That She Was The Owner Of The Funds.**

**1. Lanterno Improperly Relies On Her Own Statements Regarding Transactions With The Decedent, Which The Trial Court Struck As Violative Of The Deadman’s Statute.**

The trial court struck as violative of the Deadman's Statute, RCW 5.60.030, Lanterno’s declaration in support of summary

judgment. (CP 197; see CP 68-72) Lanterno has not cross-appealed nor made any argument that the trial court erred in refusing to consider her self-serving statements concerning her relationship with Helen Correll. She nonetheless relies extensively on the stricken declaration to support her contentions that Helen Correll designated Lanterno the pay on death beneficiary as a natural consequence of their “close, familial friendship,” that she “never asked Helen to designate her as a POD beneficiary,” or that Helen did not disclose Lanterno’s survivorship interest in Helen’s funds. (Resp. Br. 5, 6)

In the absence of a cross-appeal or any argument that the court’s exclusion of Lanterno’s self serving declaration was error, this court must refuse to consider it and ignore each of Lanterno’s many factual assertions that are based upon it. See RAP 2.4(a); ***Marvik v. Winkelman***, 126 Wn. App. 655, 661 n.3, 109 P.3d 47 (2005). Lanterno cannot defeat a presumption of undue influence arising from Helen Correll’s establishment of a survivorship account by alleging facts that Ms. Correll “if living could contradict.” See ***Kellar v. Estate of Kellar***, \_\_ Wn. App. \_\_, 2012 WL 6734707, ¶ 22 (66828-5-I Dec. 31, 2012) (“The purpose of the statute is to prevent interested parties from giving self-serving testimony

regarding conversations and transactions with the deceased because the dead cannot respond to unfavorable testimony.”)

**2. The PR’s Evidence Was Not Speculative, But Raised An Inference That Someone Other Than Helen Correll Directed The Transfer Of A \$400,000 Check From Her Chase Account To Kitsap Bank, Largely Into An Account Benefitting Lanterno.**

Neither Lanterno nor Kitsap Bank’s representatives could explain how a \$400,000 Washington Mutual check from Helen Correll’s account resulted in a \$400,000 “gift” to Helen’s personal banker at Washington Mutual, respondent Lanterno. Lanterno’s characterization of the handwriting evidence as “speculative” ignores the undisputed fact that someone other than Helen Correll directed a deposit of most of the \$400,000 into an account in which Lanterno was the designated pay on death beneficiary. While it is true that a contestant generally bears the burden of proving undue influence, the Estate was not challenging a testamentary disposition or even a contract, but was contesting Lanterno’s claim to the funds deposited into the court registry by Kitsap Bank. (CP 1) Lanterno had the burden of proving a right to disputed funds and failed to meet that burden. ***Federal Old Line Ins. Co. v. McClintick***, 18 Wn. App. 510, 516, 569 P.2d 1206 (1977) (in an interpleader action “each claimant has the burden of establishing

his or her right to the stake by a preponderance of the evidence.”), *citing* 7 C. Wright & A. Miller, *Fed. Pract & Proc.* § 1714 at 442 (1972).

As Lanterno concedes, in order to create a bank account and designate an individual as the pay on death beneficiary, the account holder must sign a designation form. (Resp. Br. 13)<sup>1</sup> Yet there was no evidence before the trial court on summary judgment of any account contract or any documentation of the terms under which Helen Correll purportedly established the account into which \$365,000 was deposited by Lanterno. Lanterno’s assertion that “Helen followed all the proper procedures to designate Charlena as the POD beneficiary of her checking account” (Resp. Br. at 15) is based exclusively on a handwritten letter purportedly from Helen Correll, giving instructions to make Lanterno the account beneficiary. But Lanterno was not able to offer any evidence that the handwriting was genuine.

After reviewing various exemplars, handwriting expert Timothy Nishimura was not able to reach a conclusion regarding the genuineness of the questioned signature:

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<sup>1</sup> Under the Banking Act, an “account” is the “contract of deposit between a depositor or depositors and a financial institution.” RCW 30.22.040(1).

At this point, I cannot conclusively determine whether the cursive writing and the signature on Exhibit C are the genuine handwriting of Helen M. Correll. Ms. Correll cannot be identified as the writer of the questioned document nor can she be excluded.

There are characteristics in the signature and the cursive writing in Exhibit C which point to or suggest that they are genuine but until I am able to review more samples of known genuine handwriting and signatures of Helen Correll, I cannot reach a conclusion as to the genuineness of the writing and the signature. Some characteristics of the signature on Exhibit C are consistent with known signatures of Helen M. Correll, but other characteristics are inconsistent. I do not have enough known samples of Ms. Correll's signature to determine whether the inconsistencies are the result of a different writer or the result of natural variations in the writing of the writer.

(CP 164-65)

One inference of Mr. Nishimura's testimony, and in particular his conclusion that some characteristics of the questioned signature are inconsistent with known signatures of Helen Correll, is that the questioned signature is not genuine. For purposes of summary judgment, the non-moving party, PR Gail Denley, was entitled to the benefit of that inference. Without the account beneficiary designation form in evidence and without any evidence of the genuineness of the signature on the handwritten letter, respondent

Lanterno failed to establish that she is in fact the designated beneficiary of Helen Correll's checking account.

Lanterno criticizes this aspect of Nishimura's expert testimony as "speculative" but ignores the undisputed evidence that Helen Correll did not fill out the check and that someone other than Ms. Correll determined that \$400,000 should be transferred from Chase Bank to new accounts at Kitsap Bank. Lanterno offers no explanation of how the Chase Bank check payable to Kitsap Bank ended up in the checking account in which Lanterno was the pay on death beneficiary. Neither Kitsap Bank, nor Ms. Correll's lawyer (nor, for that matter, Lanterno in her stricken declaration) was able to offer any explanation of the reason for that deposit.

The record reflects only that on or about December 15, 2010, a check in the amount of \$400,000 was drawn on Ms. Correll's account at Chase Bank, where Ms. Lanterno worked, and deposited the same day at Kitsap Bank. (CP 70, 168) Kitsap Bank employee April Ihde, identified four deposit slips whereby the \$400,000 check was split among four separate accounts at Kitsap Bank, including a deposit of \$365,000 into Ms. Correll's checking account. (CP 101, 103, 106, 109) However, Ms. Ihde was unable to identify the Kitsap Bank employee who prepared the deposit

slips and, more importantly, was unable to identify any instructions, written or oral, directing Kitsap Bank to deposit \$365,000 into the checking account of Helen Correll in which Lanterno was the pay on death beneficiary. (CP 93-94, 172-73)<sup>2</sup>

The PR obtained a copy of the \$400,000 check in discovery, submitted it to the trial court in opposition to summary judgment, and provided a copy to handwriting expert Nishimura for examination. (CP 168) Mr. Nishimura was not able to determine the genuineness of the signature because the check is a poor quality photocopy, but he was able to definitely conclude that all the other handwriting on the check was *not* written by Helen Correll.

Helen M. Correll, however, can be excluded as the writer of the check face writing, except for the signature. Ms. Correll did not have the writing skill to produce the check face writing.

(CP 164)

In other words, someone other than Helen Correll wrote the amount of the check and the payee of the check, Kitsap Bank. There is no evidence in the record establishing, or even suggesting,

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<sup>2</sup> The bank's vice president, whose declaration was submitted in support of the Bank's interpleader motion to freeze the funds until the competing claims could be adjudicated, did not provide any documentation supporting her statement that Helen Correll "instructed" Kitsap Bank to deposit \$400,000 into the POD account after purchasing three certificates of deposit totaling \$35,000. (CP 7-9)

that Helen Correll wished to draw a \$400,000 check from her savings at Chase Bank and deposit that amount at Kitsap Bank. One inference of the handwriting of an unidentified person on this check is that the unidentified person made the decisions regarding the amount of the check and the payee of the check.

The trial court erred in resolving disputed issues of fact regarding the PR's and Lanterno's respective right to the interpleaded funds against the PR on summary judgment. *Fed. Old Line Ins. Co.*, 18 Wn. App. at 516. This court should reverse and remand for trial on the competing claims in this interpleader action.

**3. Lanterno's Undue Influence Presents A Triable Issue Of Fact.**

Even if the PR bore the burden of defeating Lanterno's claim to the funds, she met that burden by establishing a host of suspicious circumstances justifying a presumption of undue influence that Lanterno could not rebut. Ninety-four year old Helen Correll's banker asserted that she was the pay on death beneficiary of an account containing \$400,000 that had been on deposit at the bank where she worked a mere two months before Ms. Correll's death. Setting aside her self-serving statements barred by RCW

5.60.030, Lanterno asserted title to the Kitsap Bank account by virtue of a letter of questioned authenticity, and a check that save for the signature line (also of questioned authenticity) was written by someone other than Helen Correll. This court should reject Lanterno's attempt to support the trial court's determination that the PR failed to make a "satisfactory showing of undue influence."  
(3/30 RP 3)

As Lanterno concedes, the close and confidential relationship between Helen Correll and Lanterno, standing alone, may be sufficient to give rise to a presumption of undue influence. (Resp. Br. 16) Although Lanterno's concession of a confidential relationship is enough to justify a presumption, Lanterno was also 94-year old Helen Correll's personal banker, who actively participated in the events leading to the \$400,000 transfer. Lanterno concedes she delivered the transferred funds from Chase Bank to Kitsap Bank and delivered signature cards purportedly signed by Helen Correll to Kitsap Bank. (Resp. Br. 3) The fact that the \$400,000 check was handwritten by an unidentified person, and the lack of any documentation regarding the decision to deposit \$365,000 in Helen Correll's pay on death checking account at Kitsap Bank provide additional "suspicious facts and

circumstances” that give rise to a presumption of undue influence. ***In re Estate of Haviland***, 162 Wn. App. 548, 558, 255 P.3d 854 (2011).

The presumption of undue influence also arises out of the large amount of the purported gift to Lanterno. See ***Doty v. Anderson***, 17 Wn. App. 464, 469, 563 P.2d 1307 (1977) (that the beneficiary received an unusually large amount of money is a factor favoring a presumption of undue influence). While there was evidence before the trial court that Helen Correll purportedly directed bequests of \$10,000, \$20,000, and \$5,000 to three friends, by naming them as beneficiaries on other accounts, (CP 103, 106, 109), the stark contrast between these relatively small bequests and the \$400,000 claimed by Ms. Lanterno, who actively participated in the transactions, strongly supports the presumption of undue influence. These are questions for the trier of fact. Lanterno’s summary judgment motion should have been denied.

In arguing that she rebutted the presumption, Lanterno relies on ***In re Estate of Jones***, 170 Wn. App. 594, 287 P.3d 610 (2012), in which Division Three held that the daughters of the decedent failed to show undue influence in a transaction in which the sons acquired by gift from the mother shares of stock in the corporation

that owed the family farm. The court affirmed the dismissal of the undue influence claims on the ground that the sons rebutted any inference of undue influence (1) by showing that the transaction at issue was fair and “did not show an unbalanced deal” because the mother was relieved of a substantial debt obligation and was able to stay in her own home, (2) because the transaction was structured with the assistance of a financial consultant who “explained the concept to her [and] . . . saw no signs of inappropriate influence,” and (3) because the trial court considered the case exercising its “broad powers under TEDRA,” which authorized it to “resolve the matter by weighing the evidence. . .” 170 Wn. App. at 608-11, ¶¶ 29-37.

Those factors are not present here. In the absence of any evidence or testimony that Helen Correll directed the deposit of \$365,000 into her checking account, there was insufficient evidence to rebut the presumption of undue influence. First, this was no fair and bargained for transaction, but what purports to be an unusually large and outright gift by a ninety-four year old woman to her personal banker. There is no question of that the transaction was completely one-sided.

Second, Lanterno confuses the issue of competency with that of undue influence, citing her attorney's testimony that Helen was competent to make a will and designate Lanterno her attorney in fact. While the mentally infirm may be more susceptible to the influence of those in whom they have placed their trust and confidence, "a competent person may be subjected to undue influence and his or her conduct governed thereby." DeWolf & Allen, 25 *Wash. Prac., Contract Law And Practice* § 9:18 (1998). Helen's intent to make a new will (in which she left the residue of her estate to her brother, and not to Lanterno) or to designate Lanterno her attorney in fact, simply provides no inference supporting her purported intent to gift Lanterno \$365,000, while gifting only \$35,000 to her other three friends.

Third, Lanterno concedes this matter was heard on summary judgment and that the standard of review is de novo. (Resp Br. 11) This was not a TEDRA action; the trial court was exercising its limited authority under CR 56 to enter summary judgment only if there were no dispute of material fact. *Compare Jones*, 170 Wn. App. at 611, ¶ 37 (trial court authorized to weigh conflicting evidence under TEDRA).

For purposes of summary judgment, the non-moving party PR Gail Denley was entitled to the inference that the operative decision to deposit \$365,000 in an account in which Lanterno was designated the pay on death beneficiary was not made by Helen Correll, but by Lanterno. The trial court erred in resolving these fact issues against the PR and in favor of Lanterno in holding as a matter of law that there was no undue influence. This court should reverse and remand for trial.

**C. The Trial Court Did Not Have Authority To Award Attorney Fees Under TEDRA In This Non-TEDRA Dispute Brought Under The Financial Institution Individual Account Deposit Act.**

This was not a “matter” under Title 11 to which TEDRA applies but a dispute under a banking statute, RCW ch. 30.22.210. The trial court erred in awarding Lanterno attorney fees under TEDRA.

TEDRA’s attorney fee statute “applies to all proceedings *governed by this title*, including but not limited to proceedings involving trusts, decedents estates and properties, and guardianship matters.” RCW 11.96A.150 (emphasis added). This action, in which Kitsap Bank sought an adjudication of competing claims to funds on deposit, was not “governed by” title 11 RCW, but

was “governed by” the banking statute, RCW 36.22.210. With the exception of the now-abandoned argument that the “Super Will” statute of limitations applied, and Lanterno’s argument for fees under RCW 11.96A.150 (CP 42), no party has cited any provision of Title RCW 11 in the trial court or on appeal in asserting their respective rights to the Kitsap Bank account.

Lanterno argues that attorney fees must be available because the funds held by Kitsap Bank were “nonprobate assets,” as defined by RCW 11.02.005(10), bringing the parties’ claims within the scope of TEDRA’s broad definition of a “matter.” But all nature of civil claims may implicate decedents’ estates or involve nonprobate assets. For instance, under RCW 11.40.060 an ordinary negligence claim against an insured defendant who has died may be brought without asserting a creditor’s claim. And a personal representative whose rights and obligations are governed by Title 11 is the proper party in any action in which the decedent would be the party had he or she survived. RCW 4.20.046. Under Lanterno’s reasoning a prevailing party in all such actions would be entitled to fees because the action involves the administration of estates or nonprobate assets under TEDRA, RCW 11.96A.030(1).

This court should reject such a sweeping exception to the American Rule prohibiting awards of attorney fees absent a definitive statement by the Legislature. RCW 11.96A.150, as currently written, applies to cases that are “governed by” Title 11, not to any cases in which estate or nonprobate assets may be involved. This court should reverse the trial court’s award of fees in this interpleader action brought under RCW 30.22.210.

### III. CONCLUSION

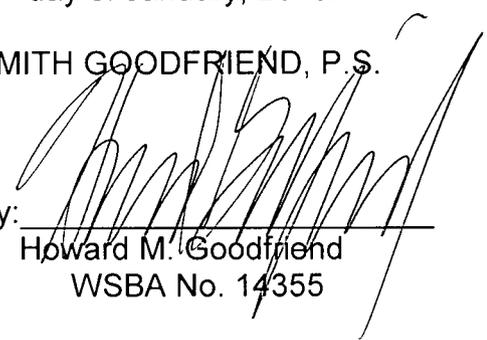
This court should reverse and remand for trial on the parties’ competing claims to the funds of Helen Correll held by Kitsap Bank. Regardless of its resolution of that issue, however, the court should reverse the award of fees to Lanterno as this action fell outside the scope of RCW 11.96A.150.

Respectfully submitted this 11<sup>th</sup> day of January, 2013.

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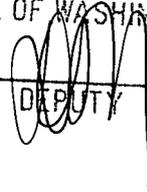
Attorneys for Appellant

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STATE OF WASHINGTON

**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

BY  DEPUTY

That on January 11, 2013, I arranged for service of the foregoing Reply Brief of Appellant, to the court and to the parties to this action as follows:

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**DATED** at Seattle, Washington this 11<sup>th</sup> day of January, 2013.

  
Victoria K. Isaksen