No. 91488-5

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 45069-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re Estate of:

EVA JOHANNA ROVA BARNES,

Deceased.

VICKI ROVA MUELLER, KAREN BOW, MARSHA ROVA, AND JOHN ROVA,

Petitioners,

v.

MICHELLE WELLS and DENNIS WELLS,

Respondents.

PETITION FOR REVIEW

SANCHEZ, MITCHELL, EASTMAN & CURE, PSC

By: Kevin W. Cure
WSBA No. 34409

4110 Kitsap Way, Suite 200
Bremerton, WA 98312-2401
(360) 479-3000

SMITH GOODFRIEND, P.S.

By: Howard M. Goodfriend
WSBA No. 14355

1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974

Attorneys for Petitioners

TABLE OF CONTENTS

I. INTRODUCTION. 1

II. IDENTITY OF PETITIONERS. 2

III. COURT OF APPEALS DECISION. 2

IV. ISSUES PRESENTED FOR REVIEW. 2

V. STATEMENT OF THE CASE. 3

A. Eva's 2004 and 2005 wills left her estate to her nieces and nephew, with whom she jointly owned a portion of the Rova property homesteaded by Eva's parents. 3

B. Michelle Wells, Eva's postal carrier, isolated Eva from her family and fanned the flames of her paranoia. By 2010, Eva had become completely dependent on Michelle. 6

C. Michelle obtained Eva's power of attorney and then, less than four months before Eva's death at age 95, became the sole beneficiary of Eva's 2011 will. 8

D. After a six day trial, the trial court found by clear and convincing evidence that Eva's will was the product of Michelle's undue influence. 10

E. Substituting its own view of the unchallenged findings for the trial court's, Division Two reversed on the grounds the trial court had failed to identify "positive evidence" of undue influence. 11

VI. ARGUMENT WHY REVIEW SHOULD BE GRANTED 11

A. The Court of Appeals opinion conflicts with this Court's precedent in rejecting the trial court's extensive unchallenged findings as insufficient "positive evidence" of undue influence. 11

1. The Court of Appeals' new requirement that the trial court identify "positive evidence" of undue influence conflicts with *Riley, Kessler* and *Foster*. 14

2. The Court of Appeals misapplies *Dean v. Jordan* because the same evidence supporting the presumption may establish clear and convincing evidence of undue influence. 16

3. The Court of Appeals decision fails to defer to the trial court's first hand assessment of the weight of conflicting evidence. 18

VII. CONCLUSION. 20

TABLE OF AUTHORITIES

CASES

Bland v. Mentor, 63 Wn.2d 150, 385 P.2d 727 (1963) 15, 18

Dean v. Jordan, 194 Wash. 661, 79 P.2d 331 (1938) 10, 13, 16-18

Estate of Esala, 16 Wn. App. 764, 559 P.2d 592 (1977) 18

Estate of Lint, 135 Wn.2d 518, 957 P.2d 755 (1998) 17-18

Estate of Pfleghar, 35 Wn. App. 844, 670 P.2d 677 (1983), *rev. denied*, 100 Wn.2d 1036 (1984) 16

Foster v. Brady, 198 Wash. 13, 86 P.2d 760 (1939) 14-15

In re Bush's Estate, 195 Wash. 416, 81 P.2d 271 (1938) 14-15

In re Dand's Estate, 41 Wn.2d 158, 247 P.2d 1016 (1952) 18

In re Kessler's Estate, 35 Wn.2d 156, 211 P.2d 496 (1949) 14-15

In re Martinson's Estate, 29 Wn.2d 912, 190 P.2d 96 (1948) 20

In re Melter, 167 Wn. App. 285, 273 P.3d 991 (2012) 18-19

Myers v. Little Church by the Side of the Road, 37 Wn.2d 897, 227 P.2d 165 (1951) 15

Robel v. Roundup Corp., 148 Wn.2d 35, 59 P.3d 611 (2002) 3

Sears v. Int'l Bhd. of Teamsters, Chauffeurs, Stablemen & Helpers of Am., Local No. 524, 8 Wn.2d 447, 112 P.2d 850 (1941) 15

Thorndike v Hesperian Orchards, Inc., 54 Wn.2d 570, 343 P.2d 183 (1959).....18

RULES AND REGULATIONS

RAP 13.4.....1, 13-15, 17-18, 20

I. Introduction.

After presiding over a six day trial, the trial court entered 83 findings of fact, finding both a basis for a presumption of undue influence and that the decedent's nieces and nephew established by clear, cogent and convincing evidence that the will of their 95-year old aunt, executed less than 4 months prior to her death, was the product of the undue influence of her financially-strapped postal carrier, who isolated the aunt, exploited her paranoia and suspicion, and poisoned her mind with untruths, falsely characterizing the nieces and nephew as greedy and uncaring.

The postal carrier challenged none of these findings on appeal. The Court of Appeals nevertheless reversed and remanded for a new trial, holding that "the trial court did not . . . make any findings of fact of 'positive evidence' of undue influence to specify what constituted . . . undue influence," and "wholly relied on the presumption." Division Two's holding fundamentally misreads this Court's undue influence jurisprudence. This Court should accept review of Division Two's decision substituting its own view of the facts for that of the trial court, who considered the testimony first hand and resolved issues of credibility, under RAP 13.4(b)(1) and (4).

II. Identity of Petitioners.

The petitioners are Eva Barnes' nieces and nephew, Marsha Rova, Vicki Rova Mueller, John Rova and Karen Bow ("the Rovas"), respondents in the Court of Appeals.

III. Court of Appeals Decision.

The Court of Appeals issued its decision on February 24, 2015. (Appendix A).

IV. Issues Presented for Review.

A. This Court has repeatedly held that undue influence can be established entirely by circumstantial evidence. Did the Court of Appeals err by holding that the trial court's unchallenged findings that the sole beneficiary of a will isolated the decedent from her family and made false accusations that the decedents' nieces and nephews were greedy and uncaring were insufficient "positive evidence" of undue influence?

B. Must a trial court separately identify in its findings those facts supporting its determination that clear and convincing evidence establishes that the will is the product of undue influence from those facts that support a presumption of undue influence?

C. May the appellate court substitute its judgment for the trial court's determination that its findings of undue influence meet the clear, cogent and convincing standard of persuasion?

V. Statement of the Case.

These facts are taken from the unchallenged findings of fact and from evidence supporting the trial court's judgment after a six day trial that the Rovas established by clear and convincing evidence that their aunt's 2011 will was the product of the undue influence of her mail carrier, Michelle Wells. (Appendix B) Michelle did not assign error to any of the trial court's 83 findings of fact, and they are verities on appeal. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002).

A. Eva's 2004 and 2005 wills left her estate to her nieces and nephew, with whom she jointly owned a portion of the Rova property homesteaded by Eva's parents.

Eva Barnes died June 27, 2011, just a few weeks shy of her 95th birthday. (FF 1, CP 1090) Eva was survived by her brother Victor Rova's wife Marian and by Victor and Marian's children, Marsha, Vicki, John and Karen (the Rovas). (FF 1-3, CP 1090-91)

As children, the Rovas spent significant time at the Rova farm, which was jointly owned by Eva and her brother Victor, and originally homesteaded by their parents in 1918. (FF 4-5, CP 1091-

92) The Rovas maintained a close and loving relationship with their Aunt Eva well into their adulthood. (FF 3-4, CP 1091; RP 129) After her brother Victor's death in 1993, Eva and the Rovas also each owned a half interest in a rental house on the Rova property. (FF 5, CP 1091; RP 27, 74, 118) Following the deaths of Eva's only child Karolyn in 2004, and of Eva's husband Ray in 2005, the Rovas cared for Eva, checked in on her frequently, and traveled and celebrated holidays and special events with her. (FF 2-3, 12, CP 1091, 1093; RP 32-36, 43, 168-69, 202)

Eva's first known will, from March 4, 2004, left her estate to her husband Ray, then to her daughter Karolyn, in a trust to be managed by Vicki Rova Mueller as trustee, then, if both predeceased Eva, to the Rovas, in four equal shares. (FF 6, CP 1092) After Ray and Karolyn died, Eva executed a second will, on September 26, 2005, that left her entire estate to the Rovas in four equal shares and nominated Vicki to serve as Eva's personal representative, with Marsha Rova as the alternate PR. (FF 8, CP 1092) Eva also named Vicki as her attorney in fact and Marsha as the alternate, effective immediately. (FF 9, CP 1092-93)

Eva became depressed after the deaths of her husband and daughter. (FF 2, CP 1091; RP 203) Her physician prescribed an

antidepressant when she was hospitalized in April 2006 for bowel obstruction surgery. (FF 10, CP 1093) By 2009, Eva had become forgetful and confused. (RP 44) Always a fastidious housekeeper, Eva began hoarding newspapers, mail, magazines and personal possessions, which she piled throughout the house. (FF 27, CP 1096)

On March 26, 2009, Eva suffered a serious fall in her kitchen, and was not found for over two days. (FF 13, CP 1093) During her hospitalization and then upon her discharge to a rehabilitation facility, medical professionals documented significant cognitive impairment. (FF 15-17, CP 1094; Ex. 1 at 201, 226, 230, 267) Eva's physician and the other health care professionals believed she was not strong or healthy enough to return home, and that it would be in her best interest to temporarily reside at an assisted living facility. (FF 18, CP 1094-95) Based on the condition of Eva's home, a social worker recommended that the Rovas make a referral to Adult Protective Services. (FF 24, CP 1095; Ex. 1 at 199)

Eva stubbornly insisted that she be allowed to return home. (FF 18-19, CP 1094-95) When her physician reluctantly assented, the Rovas attempted to make Eva's home safe to the satisfaction of

the emergency responders, who would not allow Eva to return in its current condition. (FF 20, 25-28, CP 1095-96; RP 346, 680-86)

B. Michelle Wells, Eva's postal carrier, isolated Eva from her family and fanned the flames of her paranoia. By 2010, Eva had become completely dependent on Michelle.

Michelle Wells met Eva in 1997 on her route as a rural mail carrier for the United States Postal Service. (FF 39, CP 1099; RP 625-26) Michelle's visits increased after Eva's husband died in 2005. (FF 38-39, CP 1098-99) Michelle and her husband struggled financially. (FF 40, CP 1099) In 2009, Michelle borrowed money from Eva and was convicted of an unrelated misdemeanor theft. (FF 40, CP 1099; RP 761) Following Eva's return home in April 2009, Michelle increasingly involved herself in Eva's life, typically arriving at Eva's home in the morning before work, spending her lunch hour with Eva, and returning at the conclusion of her shift. (FF 38, CP 1098; RP 653) Michelle changed Eva's phone service, further isolating Eva from her family and her friends. (FF 69, CP 1107) Eva stopped driving, and became dependent on Michelle for transportation. (FF 51, CP 1103)

Eva resented the Rovas' attempt to make her home suitable for her return, considering their efforts a violation of her privacy.

(FF 30, CP 1097) Even though Michelle had also been involved in cleaning her home to prepare for Eva's return, Eva accused the Rovas of deliberately destroying her address book. (FF 30-31, CP 1097) Eva developed an acute and unjustified paranoia that the Rovas wanted to place her in a nursing home or assisted living facility. (FF 33-34, CP 1097-98) She wrote incoherent, irrational letters to the Rovas and other family members and friends, and, uncharacteristically, neglected the rental property. (FF 42-43, 45, 53, CP 1099-1101, 1103-04; RP 78-79, 326; Ex. 69-71) Her physician diagnosed "mild cognitive impairment." (FF 36, CP 1098; Ex. 1 at 892)

The trial court found that Michelle fueled Eva's paranoia, further isolating her from her family. (RP 872; FF 73, CP 1108-09) Michelle falsely accused the Rovas of wanting to sell the Rova property and "become millionaires," telling the tenants the Rovas were "greedy villains." (FF 46-47, CP 1101-02; Ex. 78)

In November 2010, Eva drove Michelle to the office of Eva's attorney Jeff Tolman. (FF 50, CP 1103) Michelle told Tolman in Eva's presence that the Rovas had thrown away Eva's address book – a "violation" that particularly incensed Eva. (FF 50, CP 1103) Michelle knew the accusation was false, and she knew how much

the loss of the address book had upset Eva. (FF 50, CP 1103; RP 119, 872)

C. Michelle obtained Eva's power of attorney and then, less than four months before Eva's death at age 95, became the sole beneficiary of Eva's 2011 will.

Tolman questioned Eva's decision to give Michelle her power of attorney. However, after Tolman's attempt at reconciliation with the Rovas failed, Michelle drove Eva to Tolman's office again, and Eva executed a new Power of Attorney appointing Michelle in December 2010. (FF 48-49, 52, CP 1102-03) Less than a month later, Michelle began writing Eva's checks as her attorney in fact, paying Michelle's family and friends she had enlisted to provide care for Eva. (FF 54, CP 1104; RP 748-49)

Eva directed Tolman to prepare a new will leaving her entire estate to Michelle and disinheriting the Rovas completely. (FF 60, CP 1105) On March 1, 2011, Michelle drove Eva to Tolman's office. (FF 57, CP 1104) Tolman refused to allow Eva to execute the will because she could not remember the name of one of her nieces. (FF 57, CP 1104-05) Two days later, on March 3, 2011, Michelle drove Eva to her physician and asked if he would prescribe Eva "a medication for her memory." (Ex. 1 at 879) Eva's doctor prescribed

Aricept. (FF 59, CP 1105) Michelle then drove Eva from her doctor directly to Tolman's office. (FF 60, CP 1105) After engaging Eva in a lengthy colloquy, Tolman documented his conclusion that Eva was sufficiently competent to execute a new will that appointed Michelle personal representative and left Michelle her entire estate. (FF 60, CP 1105)

On May 2, 2011, Michelle drove Eva to Eva's church in Poulsbo, to give a recorded interview. (FF 71, CP 1108) Eva was often confused during the interview, and Michelle frequently corrected Eva and spoke for her. (FF 71-72, CP 1108; Ex. 12) In the recorded interview, Michelle falsely stated that Eva's nephew John had tried to "throw [Eva] under the bus a couple times," and that the Rovas were trying to put Eva in a nursing home. (FF 72, CP 1108; RP 506)

Eva's mental and physical health continued to fail in the weeks after this interview. Her physician noted that Eva's "long-standing mild cognitive impairment . . . seems to be gradually progressing. Probably early Alzheimer's dementia." (FF 74-75, CP 1109; Ex. 1 at 892; RP 105) On June 27, 2011, two days after Michelle used her power of attorney to write a $2,641.94 check

from Eva's personal bank account to make Michelle's mortgage payment, Eva passed away. (FF 77-78, CP 1109-10)

D. After a six day trial, the trial court found by clear and convincing evidence that Eva's will was the product of Michelle's undue influence.

The Honorable Brooke Taylor presided over a six day trial on the Rovas' will contest alleging both lack of testamentary capacity and Michelle's undue influence. (CP 9-11) Judge Taylor found that, while the issue was a close one, the Rovas failed to prove by clear and convincing evidence that Eva lacked the capacity to make a will on March 3, 2011. (CL 4, CP 1111-12; RP 868) However, applying the factors identified by this Court in *Dean v. Jordan,* 194 Wash. 661, 79 P.2d 331 (1938), Judge Taylor found that the Rovas had established that the will was a product of Michelle's undue influence. (RP 857-72)

The trial court found the Rovas had established a presumption of undue influence and that Michelle had failed to rebut the presumption. (CL 10-20, CP 1113-15) But the trial court went further, specifically finding that the Rovas satisfied their burden of proving undue influence by clear, cogent and convincing evidence, and rejecting Michelle's argument that its decision was

based solely on Michelle's failure to rebut the presumption. (CP 1373; 6/5 RP 9; CL 21, CP 1115)

E. Substituting its own view of the unchallenged findings for the trial court's, Division Two reversed on the grounds the trial court had failed to identify "positive evidence" of undue influence.

The Court of Appeals reversed, finding that Michelle had rebutted the presumption of undue influence with evidence that Eva's will was the product of her own volition. (Op. 8) The Court of Appeals held that the trial court had failed to "make any findings of fact of 'positive evidence' of undue influence to specify what constituted Michelle's undue influence" and remanded "for a new trial." (Op. 9)

VI. Argument Why Review Should Be Granted.

A. The Court of Appeals opinion conflicts with this Court's precedent in rejecting the trial court's extensive unchallenged findings as insufficient "positive evidence" of undue influence.

The trial court not only found that Michelle failed to rebut a presumption of undue influence but that the Rovas sustained their ultimate burden of proving that Eva's will was the product of Michelle's "ongoing undue influence," by "clear, cogent and convincing evidence." (CL 21, CP 1115) The trial court's

unchallenged findings are based on both direct and circumstantial evidence supporting its conclusion that Eva's will was the product of Michelle's undue influence. Michelle, who struggled financially, was convicted of theft (FF 40, CP 1099), and misused her power of attorney to pay her mortgage from Eva's account (FF 77, CP 1109-10), was a constant presence isolating Eva from her family and friends (FF 38, 69-70, CP 1098, 1107), accompanying Eva to her medical appointments (FF 51, 56, 59, CP 1103-05) and estate planning meetings with Eva's lawyer. (FF 51, 52, 57, 60, CP 1103-05)

Most critically, when Eva was "highly vulnerable to influence . . . due to her physical and mental impairments and total dependence," (FF 83, CP 1111), Michelle poisoned Eva against her nieces and nephew, making false statements that fed Eva's unfounded paranoia against the Rovas, the natural beneficiaries of her will. Michelle "fanned the flame and operated to perpetuate [Eva's] anger," making it "easier for [Eva] to believe all the horrible things she had said about the [Rovas]." (FF 73, CP 1108-09) Michelle told the Rovas' tenants the Rovas were "greedy villains," falsely claiming that the Rovas intended to evict them so they could sell the land, develop the properties, and "become millionaires."

(FF 46, CP 1101-02) Knowing how upset Eva was about the loss of her address book, Michelle told Eva's attorney, in Eva's presence, that the Rovas had thrown it out. (FF 50, CP 1103) Michelle told the church interviewer that Eva's nephew had "tried to throw [Eva] under the bus a couple times, and that the [Rovas] were trying to put [Eva] in a nursing home." (FF 72, CP 1108) And Michelle knew these statements about the Rovas, the natural beneficiaries of Eva's estate under her previous wills, *were not true*. (RP 872)

This Court should accept review because the Court of Appeals' decision reversing the trial court despite these undisputed findings misapplies *Dean v. Jordan*, 194 Wash. 661, 79 P.2d 331 (1953), and conflicts with this Court's consistent precedent. Division Two's new requirement of "positive evidence" ignores not just the trial court's findings, but this Court's decisions recognizing that circumstantial evidence is not only sufficient to raise a presumption of undue influence, but when identified in detailed findings can establish clear and convincing evidence of undue influence. RAP 13.4(b)(1). The Court of Appeals' substitution of its judgment for that of the trial court that heard the testimony and made credibility determinations, and its refusal to defer to the fact finder's assessment of the evidence that it found to satisfy a party's

burden of proof, wrongly harkens to a bygone era of *de novo* review of will contests that calls for this Court's review under RAP 13.4(b)(4).

1. The Court of Appeals' new requirement that the trial court identify "positive evidence" of undue influence conflicts with *Riley*, *Kessler* and *Foster*.

By requiring a trial court to identify "positive evidence" of undue influence, the Court of Appeals opinion conflicts with this Court's consistent holdings that undue influence, which by its very nature is exerted in secret, may be established entirely by circumstantial evidence. *In re Kessler's Estate*, 35 Wn.2d 156, 162, 211 P.2d 496 (1949) ("[u]ndue influence is not usually exercised openly in the presence of others"); *Foster v. Brady*, 198 Wash. 13, 19, 86 P.2d 760 (1939) ("ordinarily undue influence can be established only by circumstantial evidence"); *In re Bush's Estate*, 195 Wash. 416, 425, 81 P.2d 271 (1938) ("undue influence can hardly ever be shown in any way other than by circumstantial evidence"). This Court should accept review and hold that undue

influence, like many other wrongful acts,[1] does not require proof by "positive" evidence.

In *Kessler's Estate,* this Court deferred to the trial court's assessment of circumstantial evidence establishing that the decedent was taken advantage of while in a weakened physical and mental state. 35 Wn.2d at 161-62. In *Bush's Estate,* the Court affirmed the trial court's decision that the decedent was "peculiarly susceptible to the influence of a daughter who was acting as his housekeeper, and upon whom he was to a great extent dependent for his comfort." 195 Wash. at 422-23. And in *Foster,* the Court reversed the dismissal of the contestant's petition, holding that circumstantial evidence "sufficiently establishes the fact of undue influence." 198 Wash. at 20. The Court of Appeals decision conflicts with this precedent and this Court should accept review under RAP 13.4(b)(1).

---

[1] *See Bland v. Mentor,* 63 Wn.2d 150, 155, 385 P.2d 727 (1963) ("fraud need not be established by direct and positive evidence. It may be proved, in whole or in part, by circumstantial evidence."); *Myers v. Little Church by the Side of the Road,* 37 Wn.2d 897, 903, 227 P.2d 165 (1951) ("It was not necessary to establish negligence by direct and positive evidence."); *Sears v. Int'l Bhd. of Teamsters, Chauffeurs, Stablemen & Helpers of Am., Local No. 524,* 8 Wn.2d 447, 452, 112 P.2d 850 (1941) ("Conspiracies need not be established by direct and positive evidence, and are seldom susceptible of such proof. They may be proven by circumstantial evidence, or be established by inferences like any other disputed fact.").

2. The Court of Appeals misapplies *Dean v. Jordan* because the same evidence supporting the presumption may establish clear and convincing evidence of undue influence.

A trial court may weigh the evidence and set aside a will upon finding that the contestants established by clear and convincing evidence the "ultimate fact" – that the will was the product of undue influence. *Estate of Pfleghar*, 35 Wn. App. 844, 847, 670 P.2d 677 (1983), *rev. denied*, 100 Wn.2d 1036 (1984). Nothing in *Dean* or any other appellate decision requires a party to prove the ultimate fact of undue influence with "positive" evidence, as the Court of Appeals held here.

The *Dean* Court identified several non-exclusive "suspicious" factors that may give rise to a presumption of undue influence, including the age, health and mental vigor of the testator; nature or degree of relationship between the testator and the beneficiary; whether the beneficiary actively participated in the will's procurement or had other opportunity for exerting undue influence; and the unnaturalness of the will. *Dean*, 194 Wash. at 672. The *Dean* presumption requires the proponent of the will "to come forward with evidence that is at least sufficient to balance the scales and restore the equilibrium," but does not "relieve the contestants

from the duty of establishing their contention by clear, cogent and convincing evidence." *Estate of Lint*, 135 Wn.2d 518, 536, 957 P.2d 755 (1998) (internal quotation omitted).

Here, the Court of Appeals' refusal to affirm the trial court's finding of that "ultimate fact" conflicts with established precedent. RAP 13.4(b)(1). The *Dean* Court held not only that the decedent's niece, who had cared for her aunt for over 15 years and took charge of her estate at the request of others had rebutted the presumption, but noted that the challengers, the children and grandchildren of the aunt's husband, had produced *no* evidence, "positive" or circumstantial, that could satisfy their ultimate burden. *Dean*, 194 Wash. at 673.

Contrary to Division Two's reasoning in substituting its judgment for the trial court's, *Dean* thus does not require the trial court find evidence different from the circumstantial evidence it relied upon in establishing the presumption of undue influence in the first instance. Nor does any other authority. To the contrary, this Court defers to the trial court's factual findings. In *Estate of Lint*, for instance, the trial court did not specifically find that undue influence was established by clear, cogent and convincing evidence, but this Court nevertheless affirmed because the trial court's

finding of clear and convincing evidence was "implicit from its citation to *Dean* where the correct burden of proof is set forth." 135 Wn.2d at 537. This Court should accept review and reinstate the trial court's judgment under RAP 13.4(b)(1), (2).

3. The Court of Appeals decision fails to defer to the trial court's first hand assessment of the weight of conflicting evidence.

Regardless of the burden of persuasion or the nature of the evidence, "the constitution does not authorize this court to substitute its findings for that of the trial court." *Thorndike v Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959). Particularly in fact-intensive inquires of undue influence, "the trial court, having the witnesses before it, is in a better position to arrive at the truth than is the appellate court." *Estate of Esala*, 16 Wn. App. 764, 770, 559 P.2d 592 (1977); *In re Dand's Estate*, 41 Wn.2d 158, 162-63, 247 P.2d 1016 (1952). *See Bland*, 63 Wn.2d at 154 ("whether the evidence in a given case meets the standard of persuasion, designated as clear, cogent, and convincing, necessarily requires a process of weighing, comparing, testing, and evaluating-a function best performed by the trier of the fact"); *In re Melter*, 167

Wn. App. 285, 314-15, ¶¶ 68-69, 273 P.3d 991 (2012) (Sweeney, J., concurring).

As Judge Sweeney noted in *Melter,* "we do not pass on the persuasiveness of evidence to meet other burdens of persuasion preponderance or beyond a reasonable doubt." 167 Wn. App. at 316, ¶ 71. Here, the Court of Appeals did not overturn any one of the 83 findings of fact entered by Judge Taylor after hearing six days of testimony, including his finding that Michelle was not credible. (RP 872-73) In remanding for a new trial, the Court of Appeals adds to the confusion, noted by Judge Sweeney, on the proper scope of appellate review of findings establishing undue influence, and harkens an improper return to *de novo* review of will contests alleging undue influence.

Even when *de novo* review was the standard, this Court recognized the wisdom of deferring to the trial court's assessment of conflicting evidence of undue influence:

> A trial judge is much more than a commissioner named to take and collect evidence in a case. He is a judicial officer provided for by our constitution, and the laws of this state. He has had years of experience as a trial lawyer, and as a judge. He is a student of human beings who come to testify on the witness stand and give their stories. He had the opportunity, and it was his duty, to study the witnesses. In determining the credibility of the various witnesses,

> and the weight to be given to their testimony, he took into consideration their conduct and demeanor while testifying, their temper, feeling of bias, if any, their fairness, or lack of fairness, their conduct and appearance while on the witness stand, and while in the courtroom, the reasonableness or unreasonableness of the story they told, their opportunity, or lack of opportunity of knowing that about which they testified, the apparent capacity and intelligence of the respective witnesses, and their capability to correctly observe and report the matters testified to by them. He gave such credit and weight to the testimony of each witness, which, under all the circumstances, he deemed that witness, and his, or her testimony, was entitled to receive. The credibility of the witnesses, and the force of their testimony, and the weight that should be attached to it, are all matters concerning which the trial judge is the best judge.

In re Martinson's Estate, 29 Wn.2d 912, 920-21, 190 P.2d 96 (1948). This Court should accept review to address when the Court of Appeals can substitute its own judgment for the "ultimate fact" of undue influence, a recurring issue of substantial public concern, under RAP 13.4(b)(4).

VII. Conclusion.

This Court should reinstate the trial court's decision.

Dated this 26th day of March, 2015.

SANCHEZ, MITCHELL, EASTMAN & CURE, PSC

By:_____
Kevin W. Cure
WSBA No. 34409

SMITH GOODFRIEND, P.S.

By:_____
Howard M. Goodfriend
WSBA No. 14355

Attorneys for Respondents

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:

That on March 26, 2015, I arranged for service of the foregoing Petition for Review, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division II 950 Broadway, Suite 300 Tacoma, WA 98402	___ Facsimile ___ Messenger ___ U.S. Mail X E-File
Kevin W. Cure Sanchez, Mitchell & Eastman 4110 Kitsap Way, Suite 200 Bremerton, WA 98312-2401	___ Facsimile ___ Messenger ___ U.S. Mail X E-Mail
Kenneth W. Masters Masters Law Group PLLC 241 Madison Ave N Bainbridge Island, WA 98110-1811	___ Facsimile ___ Messenger X U.S. Mail X E-Mail
David P. Horton Law Office of David P. Horton, Inc. P.S. 3212 NW Byron Street, Suite 104 Silverdale, WA 98383	___ Facsimile ___ Messenger X U.S. Mail X E-Mail

DATED at Seattle, Washington this 26th day of March, 2015.

V. Vigoren

Victoria K. Vigoren

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

IN RE ESTATE OF

EVA JOHANNA ROVA BARNES,

Deceased.

No. 45069-1-II

UNPUBLISHED OPINION

SUTTON, J. — Michelle Wells[1] and Dennis Wells (collectively "the Wells") appeal the trial court's order on the petition of the Rovas, invalidating Eva Johanna Rova Barnes's 2011 will for undue influence.[2] The Wells argue that (1) they presented sufficient evidence to rebut the presumption of undue influence; (2) the trial court's findings of fact of undue influence were not based on clear, cogent and convincing evidence; and (3) the trial court erred as a matter of law in invalidating Barnes's will. We agree and reverse and remand for a new trial.

[1] Michelle Wells, one of the appellants, became Barnes's caretaker. We refer to Michelle Wells as Michelle for clarity. We intend no disrespect.

[2] The respondents are Barnes's nieces and nephew: Vicki Rova Mueller, Karen Bow, Marsha Rova, and John Rova. We collectively refer to them as "the Rovas." We intend no disrespect.

FACTS[3]

I. BARNES'S RELATIONSHIP WITH THE ROVAS AND MICHELLE

Barnes died on June 27, 2011 at 94 years old. Barnes's surviving family included her brother's four children, the Rovas. Barnes came to know Michelle as her rural mail carrier and, by the end of Barnes's life, Michelle had become her caretaker.

In March 2009, emergency medical responders found Barnes on her kitchen floor, where she had fallen two and a half days earlier. After she recovered, medical professionals believed that Barnes should temporarily reside at an assisted living facility; the Rovas concurred, as they were "'desperate'" to help Barnes. Clerk's Papers (CP) at 1132 (Finding of Fact (FF) 23). Barnes refused to comply with this advice, and Dr. George Kina, her physician, did not believe he could deny her demand to return home. Before the fire department would allow her to return home, however, Barnes's home needed to be made safe due to her hoarding. In response to the fire department's order, the Rovas and Michelle cleared and discarded newspapers and magazines from walkways and heat sources.

Barnes returned home, but this event was "the beginning of the end" of her relationship with the Rovas. CP at 1134 (FF 29). Barnes felt that her privacy had been invaded, she believed that the Rovas had destroyed her address book, and that the Rovas wanted to place her in a nursing home for the rest of her life, which she feared.[4] Barnes became paranoid and suspicious of the Rovas.

---

[3] Because this case was tried as a bench trial, we derive these facts from the trial court's findings of fact.

[4] The trial court found that Barnes's beliefs about the Rovas were not true.

From April 2009 until her death, Barnes grew increasingly dependent on Michelle. The "gap" between Barnes and the Rovas widened and Barnes told Michelle that she felt ostracized by the Rovas. CP at 1136 (FF 41). After May 2010, Michelle provided all of Barnes's transportation and took her to every appointment with Dr. Kina and Barnes's attorney, Jeff Tolman. Michelle became the only person consistently available and close to Barnes. Barnes was a "strong-minded" woman, and she chose not to maintain her relationship with the Rovas. CP at 1132 (FF 19).

II. BARNES'S ESTATE PLANNING

Barnes's property was homesteaded by her parents, and she lived there from 1918 until her death. In 2005, after her husband and child died, Barnes executed a will providing that upon her death her estate was to be distributed to the Rovas in four equal shares; she also named Vicki Rova Mueller as her attorney in fact.

In November 2010, Barnes decided that she wanted to remove Mueller as her attorney in fact. On November 17, Tolman set up a meeting in which he acted as mediator between Barnes and Mueller in an attempt to resolve Barnes's dispute with the Rovas, but Barnes did not want to reconcile. In December 2010, Barnes named Michelle her new attorney in fact and in January, 2011, Michelle began writing checks for Barnes.

Tolman had invited Michelle to participate in the November 17 mediation meeting, where Michelle stated in Barnes's presence that the Rovas had thrown out Barnes's address book; this upset Barnes further. Michelle's comments at the mediation meeting and subsequently to others

"fanned the flame" of Barnes's anger toward the Rovas.[5] CP at 1146 (FF 73).

On March 1, 2011, Barnes met with Tolman to execute a new will, but Tolman believed that Barnes was not feeling well so he sent her home when she could not remember the name of one of her nieces. Two days later, Barnes returned to Tolman's office.[6] Before Barnes executed her new will, Tolman engaged in a colloquy with her and he prepared a memorandum that Barnes signed, setting forth her reasons for changing her will. Both Tolman and Dr. Kina, who Barnes had visited just before coming to her appointment to change her will, believed that Barnes had the necessary mental capacity to execute her will that day. Barnes's new will completely disinherited the Rovas and named "Dennis Wells and Michelle Wells" as her sole beneficiaries. CP at 3 (capitalization omitted).[7]

III. PROCEDURE

Shortly after Barnes's death, the Rovas petitioned the trial court to invalidate Barnes's 2011 will, claiming that Barnes lacked the necessary mental capacity to execute it and that the will was the product of the Wells' undue influence. The Rovas' petition was tried without a jury. After a

[5] Michelle made derogatory comments about the Rovas on at least two other occasions in addition to the meeting with Tolman: The Rovas and Barnes jointly owned a rental house located on Barnes's property. In October 2010, Barnes had accused the renters of not paying rent and sent Michelle to confront them. Michelle told the renters that the Rovas wanted to "evict them so that they [the Rovas] could sell the land, develop the properties, and become millionaires," which was not true. CP at 1138 (FF 46). In May 2011, Michelle stated during an interview at Barnes' church that John Rova tried to "throw [Barnes] under the bus a couple times." CP at 1145 (FF 72).

[6] Michelle provided Barnes transportation to the meeting but was not present when Barnes' executed the will.

[7] Michelle was named as the personal representative, with Dennis Wells designated as the alternate personal representative.

lengthy bench trial, the trial court entered 83 findings of fact and 23 conclusions of law. The trial court ruled that Barnes had the mental capacity to execute the 2011 will, but invalidated the will as the product of Michelle's undue influence.

ANALYSIS

I. STANDARD OF REVIEW

The Wells do not challenge any of the trial court's findings of fact. Unchallenged findings of fact are verities on appeal. *In re Estate of Lint*, 135 Wn.2d 518, 533, 957 P.2d 755 (1998). Accordingly, we accept as true all of the trial court's findings of fact.

Though the Wells do not challenge the findings of fact, they assign error to conclusions of law 11, and 13 through 22. We review conclusions of law de novo and our review is limited to whether the unchallenged findings of fact support the conclusions of law. *In re Estate of Haviland*, 162 Wn. App. 548, 561, 255 P.3d 854 (2011); *Fuller v. Emp't Sec. Dep't*, 52 Wn. App. 603, 605, 762 P.2d 367 (1988). We consider the findings in the light most favorable to the prevailing party, here the Rovas. *Scott's Excavating Vancouver, LLC v. Winlock Props., LLC*, 176 Wn. App. 335, 342, 308 P.3d 791 (2013), *review denied*, 179 Wn.2d 1011 (2014).

II. UNDUE INFLUENCE

The law presumes that a facially rational, legally executed will is valid. *Dean v. Jordan*, 194 Wash. 661, 668, 79 P.2d 331 (1938). The trial court's function is not to assess the soundness of the testator's disposition of his or her property because the testator is allowed to dispose of property in any lawful manner. *In re Bottger's Estate*, 14 Wn.2d 676, 708, 129 P.2d 518 (1942).

A trial court may set aside a will, however, if a will contestant proves with clear, cogent, and convincing evidence that the will is a product of undue influence. *Haviland*, 162 Wn. App. at

558. Clear, cogent, and convincing evidence must convince the trier of fact that the fact is highly probable by weighing and evaluating evidence and making credibility determinations. *Haviland*, 162 Wn. App. at 558.

To invalidate a will for undue influence, a will contestant must show more than "mere influence." *Dean*, 194 Wash. at 671. Undue influence is influence that controlled the testator's volition, interfering with the testator's free will and destroying free agency. *Haviland*, 162 Wn. App. at 557-58; *Bottger's Estate*, 14 Wn.2d at 700. The influence must be "'tantamount to force or fear which destroys the testator's free agency and constrains him to do what is against his will.'" *Lint*, 135 Wn.2d at 535 (quoting *Bottger*, 14 Wn.2d at 700). The mere fact that the will proponent offered "advice, arguments, persuasions, solicitations, suggestions or entreaties [is] not enough to establish undue influence." *In re Melter*, 167 Wn. App. 285, 313, 273 P.3d 991 (2012).

The seminal *Dean* opinion outlined "certain facts and circumstances" that may raise a rebuttable presumption of undue influence:

> The most important of such facts are: (1) That the beneficiary occupied a fiduciary or confidential relation to the testator; (2) that the beneficiary actively participated in the preparation or procurement of the will; and (3) that the beneficiary received an unusually or unnaturally large part of the estate. Added to these may be other considerations, such as the age or condition of health and mental vigor of the testator, the nature or degree of relationship between the testator and the beneficiary, the opportunity for exerting an undue influence, and the naturalness or unnaturalness of the will. The weight of any of such facts will, of course, vary according to the circumstances of the particular case. Any one of them may, and variously should, appeal to the vigilance of the court and cause it to proceed with caution and carefully to scrutinize the evidence offered to establish the will.

Dean, 194 Wash. at 671-72.

Significantly, the will proponent does not have the burden to *disprove* undue influence to overcome the presumption. *Kitsap Bank v. Denley*, 177 Wn. App. 559, 578-79, 312 P.3d 711

(2013). To rebut this presumption, the will proponent must produce evidence "sufficient at least to balance the scales and restore the equilibrium of evidence" regarding the will's validity. *Dean*, 194 Wash. at 672. The presumption does not shift the ultimate burden of proving undue influence, which remains with the will contestant. *Melter*, 167 Wn. App. at 299. The will contestant must provide "positive evidence" to support its claim of undue influence and cannot rely on the "force of the presumption" alone. *Dean*, 194 Wash. at 673.

III. REBUTTING THE PRESUMPTION OF UNDUE INFLUENCE

The trial court correctly concluded that there was sufficient evidence to support a presumption of undue influence. The trial court also entered conclusions of law 21 and 22, both of which concluded that the Wells did not produce sufficient evidence to overcome the presumption of undue influence. Conclusions of Law 21 and 22 stated as follows:

> 21. Michelle Wells did not produce evidence that this Court finds sufficient to "at least to balance the scales and restore the equilibrium of evidence touching the validity of the will." *In re Estate of Burkland*, 8 [Wn.]. App. 153, [160], 504 P.2d 1143 (1972), [*review denied*], 82 [Wn].2d 1002 (1973). Clear, cogent and convincing evidence establishes that the will signed by Ms. Barnes on March 3, 2011 was the product of ongoing undue influence by Michelle Wells.
>
> 22. The evidence that was presented on behalf of Ms. Wells was not sufficient to overcome the presumption of undue influence, based not only on the fiduciary relationship, the active participation in procuring the Will and the unnatural disposition, but on all of the other considerations that the Supreme Court says are appropriate to consider, age, health, incapacity, mental vigor, nature and degree of relationships, opportunity for influence and the unnaturalness of the disposition. The will that Ms. Barnes executed on March 3, 2011 is invalid because it was the product of undue influence by Michelle Wells.

CP at 1152-53 (Conclusions of Law 21, 22). The Wells argue that the trial court's findings of fact do not support these conclusions. We agree.

In order to rebut the presumption of undue influence, to "balance the scales and restore the equilibrium of evidence," the Wells had to come forward with evidence that supported an equally plausible explanation for Barnes's testamentary disposition. *Dean*, 194 Wash. at 672. The trial court's unchallenged findings of fact contain more than sufficient evidence that Barnes changed her will for a valid reason, unaffected by undue influence: that she had grown apart from, was suspicious of, and disliked the Rovas.

As Barnes's mental and physical condition deteriorated after her fall in 2009, Barnes became "increasingly involved" and "increasingly dependent" on Michelle. CP at 1135 (FF 38). Michelle became Barnes's "caretaker" while Barnes became "less involved" with the Rovas. CP at 1136 (FF 39). Michelle was the "only person close to [Barnes] on a consistent basis." CP at 1144 (FF 70). Michelle provided all of Barnes's transportation needs because Barnes stopped driving. Barnes became "suspicious" of the Rovas after they cleaned her home and after they suggested that Barnes should enter into an assisted living facility, which Barnes was "desperately afraid" of doing. CP at 1134-35 (FF 34). Barnes told Michelle that she "felt ostracized" from the Rovas. CP at 1137 (FF 44). The Rovas did not choose to become less involved in Barnes's life. Instead, "it was [Barnes's] choice" to become "less involved" with the Rovas. CP at 1136 (FF 39). Barnes was a "strong-minded" woman. CP at 1132 (FF 19). These facts are sufficient evidence to rebut the presumption of undue influence under *Dean* to at least "balance the scales" compared to the Rovas' evidence that created the presumption. *Dean*, 194 Wash. at 672.

The Rovas argue that the trial court's conclusion of law 22, that the will was the product of Michelle's undue influence, is supported by sufficient evidence. The trial court did not, however, make any findings of fact of "positive evidence" of undue influence to specify what constituted Michelle's undue influence. *Dean*, 194 Wash. at 673. Instead, the trial court wholly relied on the presumption in making its conclusions of law regarding undue influence. This reliance on the presumption was error.

The trial court's conclusions of law 21 and 22, stating that the 2011 will was the product of undue influence and that the Wells had failed to overcome the presumption, are not supported by the findings of fact. We hold that conclusions of law 21 and 22 were made in error as a matter of law. Accordingly, we reverse and remand for a new trial.

IV. ATTORNEY FEES

The Rovas request that we award them attorney fees under RCW 11.24.050 and RCW 11.96A.150. They argue that such an award would be equitable because the Wells' "factual challenge" is meritless. Br. of Resp't at 48. Because the Wells' appeal is not meritless, we deny the Rovas' request for an award of attorney fees.

We reverse and remand for a new trial, holding that the trial court erred as a matter of law

in determining that the Wells did not rebut the presumption of undue influence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Sutton, J.

We concur:

Johanson, C.J.

Maxa, J.

RECEIVED AND FILED

JUN - 5 2013

DAVID W. PETERSON
KITSAP COUNTY CLERK

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

In re the Estate of: EVA JOHANNA ROVA BARNES, Deceased.	NO. 11-4-00455-3 COURT'S FINDINGS OF FACTS AND CONCLUSIONS OF LAW **(As Proposed by Petitioners)**

This matter was tried before the undersigned Court, commencing on February 11, 2013. The matter was tried without a jury. The Petitioners Vicki Rova Mueller, Karen Bow, Marsha Rova, and John Rova appeared at the trial and were represented by Kevin W. Cure of Sanchez, Mitchell and Eastman. The Respondents Michelle Wells and Dennis Wells appeared at trial and were represented by David P. Horton of The Law Office of David P. Horton, Inc. P.S.

I. FINDINGS OF FACT

1. Eva Johanna Rova Barnes ("Ms. Barnes") was born on July 17, 1916, in Bellingham, Washington. She died on June 27, 2011 at her home at 94 years of age, just a few weeks before her 95th birthday. Ms. Barnes' will was

SANCHEZ, MITCHELL & EASTMAN
Attorneys at Law
4110 Kitsap Way, Suite 200
Bremerton, Washington 98312-2401
Telephone (360) 479-3000

admitted to probate on July 1, 2011. Michelle Wells was appointed personal representative and given nonintervention powers. The Court granted Petitioners' motion to remove Michelle Wells as personal representative and she was replaced by her husband, Dennis Wells.

2. Ms. Barnes' husband, Ray Barnes, died at the age of 96 in 2005. Their only daughter, Karolyn, passed away in 2004 at the age of 48. The loss of her husband and child so close in time was a major blow to Ms. Barnes. She was treated for depression in 2006 and there were indications of depression from that date going forward.

3. Ms. Barnes was survived by her brother Victor's wife, Marian Rova. Marian Rova's children are the Petitioners in this case. The Petitioners are Marsha Rova, Vicki Mueller, John Rova and Karen Bow. After the death of Ray and Karloyn, Ms. Barnes' close family consisted of the Petitioners.

4. The Petitioners are adults with families of their own. The Petitioners grew up in Poulsbo near Ms. Barnes, and spent a significant amount of time at Ms. Barnes' property. Ms. Barnes' residence is located on Rova Road in Poulsbo, Washington, and has been known for decades locally as the Rova Property.

5. The Rova Property consists of acreage, Ms. Barnes' residence, and a small rental house. Ms. Barnes owns a one half interest in the rental property and the other one half interest is owned by the Petitioners. The Rova Property was homesteaded by Ms. Barnes' parents and Ms. Barnes resided

SANCHEZ, MITCHELL & EASTMAN
Attorneys at Law
4110 Kitsap Way, Suite 200
Bremerton, Washington 98312-2401
Telephone (360) 479-3000

there from 1918 until the time of her death. The Petitioners are direct lineal descendents of the homesteaders.

6. On March 4, 2004, Ms. Barnes executed her first known will. At the time this will was made, Ray and Karolyn were still alive. Under this will Ms. Barnes' estate was to be distributed upon her death as follows: (1) her entire estate to her husband, Ray; (2) If Ray predeceased Ms. Barnes, then her entire estate to her daughter, Karolyn, in trust, to be managed by Vicki Mueller, as trustee; (3) If both Ray and Karolyn predeceased Ms. Barnes, her entire estate was to be divided in four equal shares, one share to each of the Petitioners.

7. On March 4, 2004, Ms. Barnes and Ray executed a durable power of attorney. Ms. Barnes and Ray were named as each other's primary attorney in fact. Vicki Mueller was named as the alternate attorney in fact for both Ms. Barnes and Ray.

8. On September 26, 2005, after both Ray and Karolyn had passed away, Ms. Barnes executed a second will. This will provided that upon her death, her entire estate was to distributed in four equal shares, one share to each Petitioner. This will nominated Vicki Mueller to serve as Ms. Barnes's personal representative, and Marsha Rova as the alternate personal representative.

9. On September 26, 2005, Ms. Barnes executed an individual durable power of attorney, which was effective immediately. Ms. Barnes named

SANCHEZ, MITCHELL & EASTMAN
Attorneys at Law
4110 Kitsap Way, Suite 200
Bremerton, Washington 98312-2401
Telephone (360) 479-3000

Vicki Mueller as her attorney in fact, and Marsha Rova as the alternate attorney in fact.

10. On April 29, 2006, Ms. Barnes had a bowel obstruction surgery at Harrison Medical Center ("HMC") in Bremerton, Washington. This was a major medical event. The medical professionals that treated Ms. Barnes during this time suspected that she was suffering from depression. Ms. Barnes' physician, Dr. Kina, prescribed an antidepressant medication for her.

11. On May 8, 2006, Ms. Barnes was discharged from HMC and admitted to a nursing home, Martha & Mary, to recover from the bowel obstruction surgery. She was discharged from Martha & Mary on May 23, 2006, and returned to her home.

12. On July 17, 2006, Ms. Barnes celebrated her 90th birthday. The celebration occurred at Marsha Rova's home and each of the Petitioners and their respective families were present. By all accounts, the birthday celebration was large and successful.

13. On March 26, 2009, Ms. Barnes fell in the kitchen of her home. She was unable to get up off the floor on her own, and she was unable to summon help. Ms. Barnes laid helpless on her kitchen floor for two and a half days before she was discovered. It is unknown how she fell.

SANCHEZ, MITCHELL & EASTMAN
Attorneys at Law
4110 Kitsap Way, Suite 200
Bremerton, Washington 98312-2401
Telephone (360) 479-3000

14. On March 29, 2009, 911 was called. Ms. Barnes was found on her kitchen floor by emergency responders and was rushed to HMC. Ms. Barnes was severely dehydrated and was in critical condition.

15. Ms. Barnes was hospitalized at HMC for three days. During her stay at HMC, the medical professionals noted observations of Ms. Barnes' cognitive impairment. These observations were charted in Ms. Barnes' medical records relating to her stay at HMC during this time.

16. On April 1, 2009, Ms. Barnes was discharged from HMC and admitted to Martha & Mary for recovery. From a physical standpoint, Ms. Barnes recovered fairly quickly from her fall. As she became hydrated and rested, her strength returned.

17. Ms. Barnes spent approximately twelve days recovering at Martha & Mary. During Ms. Barnes' stay at Martha & Mary, the medical professionals noted their observations of her cognitive impairment and physical limitations. These observations were charted in Ms. Barnes' medical records relating to her stay at Martha & Mary during this time.

18. All the medical professionals that treated Ms. Barnes during her stay at Martha & Mary agreed that Ms. Barnes was not strong or healthy enough to return home. The medical professionals, including her physician, Dr. Kina, concurred that Ms. Barnes needed additional time to recover and it would be in her best interest to temporarily reside at some kind of assisted living facility. The Petitioners, who visited her regularly during her stay at

SANCHEZ, MITCHELL & EASTMAN
Attorneys at Law
4110 Kitsap Way, Suite 200
Bremerton, Washington 98312-2401
Telephone (360) 479-3000

Martha & Mary, also agreed that she was not ready to return home and advocated that she remain in an assisted living facility until she could fully recover.

19. Ms. Barnes was a strong minded individual. Despite the recommendations of the medical staff at Martha & Mary, Dr. Kina, and the Petitioners, Ms. Barnes demanded that she be allowed to return home.

20. Dr. Kina did not feel he could deny Ms. Barnes' request to return home or force her to do something different. On April 13, 2009, Dr. Kina reluctantly discharged Ms. Barnes from Martha & Mary.

21. On April 13, 2009, John Rova and Marsha Rova drove Ms. Barnes to her home from Martha & Mary.

22. Ms. Barnes' medical records relating to her treatment at Martha & Mary are not only helpful in understanding what was happening from a medical perspective, but also shed light on what was happening between Ms. Barnes and her family.

23. A social worker at Martha & Mary described the Petitioners as being "desperate" to help Ms. Barnes and noted their grave concerns about Ms. Barnes returning home. Ms. Barnes' medical records reflect that the Petitioners were extremely concerned about Ms. Barnes during this time.

24. A social worker at Martha & Mary recommended the Petitioners make a referral to Adult Protective Services ("APS") based on the condition of Ms. Barnes' home.

SANCHEZ, MITCHELL & EASTMAN
Attorneys at Law
4110 Kitsap Way, Suite 200
Bremerton, Washington 98312-2401
Telephone (360) 479-3000

25. The emergency responders that had rescued Ms. Barnes from her kitchen floor on March 29, 2009, indicated that the condition of Ms. Barnes' home was so extreme that the fire department would not allow her to return home unless changes were made. As members of the fire department, they were in a position to keep Ms. Barnes from returning home as they did not feel it was safe for her to return in its present condition.

26. As a result of the condition of Ms. Barnes' home, the Petitioners, primarily John Rova, with the assistance of Michelle Wells, frantically tried to make Ms. Barnes' home safe for her return. There was very little time to accomplish this.

27. Ms. Barnes's home was filled with piles and stacks of newspapers, magazines and other things that she had hoarded. Ms. Barnes' belongings were stacked from floor to ceiling and left only narrow pathways throughout the house. Some of the stacks of magazines and papers were near heat sources including the baseboards and wood stove. The condition of her home at the time of her fall was not safe.

28. John Rova, Michelle Wells and others, did the best they could to make Ms. Barnes' home suitable for her return. Old newspapers and magazines were discarded in the process.

29. On April 13, 2009, when Ms. Barnes returned home from Martha and Mary, she appeared to do fairly well in the succeeding months. But, in

SANCHEZ, MITCHELL & EASTMAN
Attorneys at Law
4110 Kitsap Way, Suite 200
Bremerton, Washington 98312-2401
Telephone (360) 479-3000

terms of Ms. Barnes' relationship with the Petitioners, her return home was decidedly the beginning of the end.

30. Ms. Barnes felt her privacy had been invaded by John Rova's attempt to make her home suitable for her return. For some reason, Ms. Barnes singled out John Rova and the Petitioners and seemed to ignore the fact that Michelle Wells was also involved in the cleaning of her home.

31. Ms. Barnes alleged that the Petitioners had deliberately destroyed her address book. This allegation was untrue. The address book may have been misplaced or destroyed by mistake, but there is no evidence that the Petitioners had a motive to destroy it.

32. Ms. Barnes also believed that the Petitioners were committed to removing her from her home and placing her in a nursing home for the rest of her life. This belief was also untrue. The Petitioners and all the medical professionals that treated her after her fall in March 2009 recommended that Ms. Barnes transition from Martha & Mary to an assisted living facility until she could regain full mental and physical strength and return home safely.

33. There is no evidence that the Petitioners, or anyone, recommended that Ms. Barnes be resigned to a nursing home or assisted living facility for the rest of her life.

34. Ms. Barnes' fear of not being able to return home or being removed from her home to a nursing home or assisted living facility is understandable.

SANCHEZ, MITCHELL & EASTMAN
Attorneys at Law
4110 Kitsap Way, Suite 200
Bremerton, Washington 98312-2401
Telephone (360) 479-3000

It is very common. She was desperately afraid of being put in a nursing home or assisted living facility. Ms. Barnes's fear in this regard developed into paranoia and caused her to be suspicious of the Petitioners.

35. After Ms. Barnes' discharge from Martha & Mary until the time of her death, she met with Dr. Kina on approximately nineteen different occasions. Dr. Kina found Ms. Barnes to be a capable reporter of her health status and that she was usually in good humor.

36. Throughout the course of his treatment of Ms. Barnes, Dr. Kina's records reflect his observations of Ms. Barnes' gradual mental deterioration, but at no time did he diagnose her with dementia. Starting in 2009, the term "mild cognitive impairment" is used throughout Ms. Barnes' medical records.

37. Against all odds, Ms. Barnes was able to maintain reasonably good health after she returned home. This was perhaps due in part to her strong will and determination, but also in part due to the efforts of Michelle Wells.

38. After Ms. Barnes returned home on April 13, 2009 and until the time of her death, Michelle Wells became increasingly involved with Ms. Barnes. Michelle Wells visited Ms. Barnes once or more every day and Ms. Barnes became increasingly dependent on Michelle Wells.

SANCHEZ, MITCHELL & EASTMAN
Attorneys at Law
4110 Kitsap Way, Suite 200
Bremerton, Washington 98312-2401
Telephone (360) 479-3000

39. Michelle Wells first came to know Ms. Barnes through her employment as a rural mail carrier for the United States Postal Office. Her relationship with Ms. Barnes began as a professional and friendly one. After Ray and Karolyn died, Michelle Wells and Ms. Barnes became friends. In the last couple years of Ms. Barnes' life, Michelle Wells became increasingly involved in Ms. Barnes' care and her life. Ultimately, Michelle Wells became Ms. Barnes' caretaker. And while that was happening, Ms. Barnes became less and less involved with Petitioners. It was not the Petitioners' choice to be less involved with Ms. Barnes, but it was Ms. Barnes' choice.

40. Michelle and Dennis Wells are not related to Ms. Barnes. Michelle Wells is 51 years younger than Ms. Barnes. Michelle Wells was convicted of Theft in the Third Degree in Mason County District Court on June 29, 2009. Between 2009 and the time of Ms. Barnes' death Michelle and Dennis Wells were financially struggling.

41. In April 2010, Ms. Barnes began writing checks from Ms. Barnes' account payable to Michelle Wells and Michelle Wells' family members. The checks were for various services and for reimbursement for various expenses. During this time, the gap between Ms. Barnes and the Petitioners was widening.

42. In 2010, Ms. Barnes stopped tending to her business related to the rental property. Historically, the Petitioners and Ms. Barnes enjoyed a good

SANCHEZ, MITCHELL & EASTMAN
Attorneys at Law
4110 Kitsap Way, Suite 200
Bremerton, Washington 98312-2401
Telephone (360) 479-3000

working relationship regarding their respective interests in the rental property. Ms. Barnes had always managed the jointly owned rental. Among other things, Ms. Barnes always paid the taxes and insurance and collected the rent from the tenants. Once she had collected the rent she would divide it appropriately and distribute it among herself and the Petitioners. Ms. Barnes was always fastidious, organized, responsible, and prompt with the business and financial matters relating to the rental property.

43. In 2010, the Petitioners' share of the rental income was not being forwarded to them as it had in the past. The property taxes for the rental property were not being paid and it was difficult to determine if the rental property was insured. The Petitioners did not know who the tenants were or if there even were tenants. The Petitioners assumed the current tenants were not paying rent because their share of the rental income was not being forwarded to them as it had in the past. All of these changes were a significant departure from Ms. Barnes prior reliability in that regard.

44. On July 31, 2010, Karen Bow's daughter was married. This was a major family event. Ms. Barnes was invited and attended, but was not very involved with her family at that time. The Petitioners felt Ms. Barnes' lack of involvement was her choice. Ms. Barnes later told Michelle Wells that she felt ostracized by her family at the wedding. The evidence

SANCHEZ, MITCHELL & EASTMAN
Attorneys at Law
4110 Kitsap Way, Suite 200
Bremerton, Washington 98312-2401
Telephone (360) 479-3000

indicates that the Petitioners tried to involve Ms. Barnes in the wedding festivities, but Ms. Barnes showed no interest, and isolated herself from her family by sitting by herself. After the wedding, the gap between Ms. Barnes and the Petitioners continued to grow.

45. On October 30, 2010, Marsha Rova and her husband Scott, went to the rental property. The Petitioners assumed the current tenants, if any, were not paying rent because Ms. Barnes had not forwarded the Petitioners their share of the rental income for a significant amount of time. When Marsha and Scott arrived at the rental property, they were shocked to discover that the current tenants were known to them. They had been tenants of the rental property in the past and had always paid rent on time. Marsha and Scott learned that the current tenants had in fact been paying rent to Ms. Barnes, but Ms. Barnes was not passing it through to the Petitioners as she had in the past.

46. The tenants informed Scott and Marsha that they were frustrated with Ms. Barnes. Ms. Barnes had accused them of not paying rent and of stealing items. Ms. Barnes had sent Michelle Wells to the rental property to confront the tenants about not paying rent. Michelle Wells told the tenants that the Petitioners intended to evict them so they could sell the land, develop the properties, and become millionaires. Michelle Wells told

SANCHEZ, MITCHELL & EASTMAN
Attorneys at Law
4110 Kitsap Way, Suite 200
Bremerton, Washington 98312-2401
Telephone (360) 479-3000

the tenants that she would go to court to fight for Ms. Barnes because the Petitioners were greedy villains.

47. Immediately after the meeting with the tenants, Marsha drafted an email that summarized their conversations with the tenants and sent it to her siblings. The court cannot find any reason that Marsha would say anything but what she understood to be the truth in this email. The statements that Michelle Wells made to the tenants of the rental property were not true and acted to further poison Ms. Barnes' relationship with the Petitioners.

48. On November 17, 2010, a meeting was held at Ms. Barnes' attorney's office. Ms. Barnes was represented by Jeff Tolman. Ms. Barnes desired to remove Vicki Mueller as her attorney in fact and name Michelle Wells in her place. Mr. Tolman invited Vicki Mueller to attend the meeting with Ms. Barnes. Ms. Barnes was told that Vicki Mueller would be present at the meeting, but expressed shock and anger when she discovered Vicki Mueller was present.

49. At the meeting, Mr. Tolman attempted to mediate the differences between Ms. Barnes and the Petitioners. Ms. Barnes made it clear that she wanted nothing to do with any type of reconciliation with Vicki Mueller and/or any of the Petitioners. Ms. Barnes was demonstrably angry with Vicki Mueller and ranted at her about all the ways she believed the Petitioners had done her wrong.

SANCHEZ, MITCHELL & EASTMAN
Attorneys at Law
4110 Kitsap Way, Suite 200
Bremerton, Washington 98312-2401
Telephone (360) 479-3000

50. Michelle Wells was also present at the November 17, 2010 meeting at Mr. Tolman's office. She had provided Ms. Barnes with transportation to the meeting and was invited by Mr. Tolman to participate in some of the meeting. During the meeting, Michelle Wells told Mr. Tolman, in the presence of Ms. Barnes and Vicki Mueller, that the Petitioners had thrown out Ms. Barnes' address book. This comment further upset Ms. Barnes and Ms. Barnes continued to direct her anger toward Vicki Mueller.

51. In May 2010, Ms. Barnes stopped driving. As a result, Ms. Barnes was solely dependent on Michelle Wells for transportation. From May 2010 to the time of her death, Michelle Wells provided Ms. Barnes with transportation to every meeting Ms. Barnes had with Mr. Tolman and Dr. Kina. From this time forward, Dr. Kina never met with Ms. Barnes outside the presence of Michelle Wells.

52. On December 10, 2010, Ms. Barnes met with Mr. Tolman at his office. Michelle Wells provided Ms. Barnes with transportation to the meeting. There, Ms. Barnes executed a new durable power of attorney. The new durable power of attorney named Michelle Wells as Ms. Barnes' attorney in fact. Ms. Barnes did not list an alternate attorney in fact. From this point on, Michelle Wells was Ms. Barnes' attorney in fact.

53. In 2010 and 2011, Ms. Barnes was writing letters to the Petitioners, other family members, and friends. The handwritten letters began

SANCHEZ, MITCHELL & EASTMAN
Attorneys at Law
4110 Kitsap Way, Suite 200
Bremerton, Washington 98312-2401
Telephone (360) 479-3000

reasonably well organized and rational, but became increasingly incoherent, illegible and irrational. In her writings, Ms. Barnes' thoughts were scattered and contained irrational rants where she would call the Petitioners horrible names and accused them of horrible things, none of which were true.

54. In January 2011, Michelle Wells began assisting Ms. Barnes by writing Ms. Barnes' checks. Michelle Wells signed some of the checks as Ms. Barnes attorney in fact.

55. March 1, 2011, Ms. Barnes saw both Dr. Kina and Mr. Tolman.

56. Dr. Kina's records from Ms. Barnes' March 1, 2011 visit note Michelle Wells' presence and refer to her as Ms. Barnes' guardian. Dr. Kina's records from this visit did not note anything remarkable about Ms. Barnes mental condition. Dr. Kina testified that on March 1, 2011, Ms. Barnes appeared reasonably well both mentally and physically.

57. On March 1, 2011, immediately following her meeting with Dr. Kina, Ms. Barnes met with Mr. Tolman. The purpose of the meeting was to execute her new will. Michelle Wells provided her transportation to this meeting. Mr. Tolman believed that Ms. Barnes was not feeling well as she had just come from Dr. Kina's office and had received an injection of some kind. Ms. Barnes acknowledged that she was not feeling well. Mr. Tolman testified that Ms. Barnes could not remember one of her niece's names. Mr. Tolman asked her to come back another day when she was feeling

SANCHEZ, MITCHELL & EASTMAN
Attorneys at Law
4110 Kitsap Way, Suite 200
Bremerton, Washington 98312-2401
Telephone (360) 479-3000

better. Ms. Barnes did not execute her new will or any other documents and left with Michelle Wells.

58. March 3, 2011, Ms. Barnes saw both Dr. Kina and Mr. Tolman.

59. Dr. Kina testified that he did not recall anything unusual about Ms. Barnes mental status on that day that would have made him question her capacity. Dr. Kina's records from that visit indicate that Michelle Wells was present and requested that Dr. Kina prescribe a medication to help Ms. Barnes with her memory problems. Dr. Kina prescribed Aricept. Dr. Kina's records from this visit listed "mild cognitive impairment" as an active problem and as the reason for the visit.

60. On March 3, 2011, immediately following her meeting with Dr. Kina, Ms. Barnes returned to Mr. Tolman's office to execute her new will. Michelle Wells had provided Ms. Barnes transportation to the meeting. The new will had been prepared by Mr. Tolman at Ms. Barnes' request. Mr. Tolman engaged Ms. Barnes in a significant colloquy about her new will. After the colloquy, Ms. Barnes executed her new will.

61. The March 3, 2011 will appeared to be validly executed and in proper format. It was witnessed appropriately by Mr. Tolman and his assistant, Susan Peden. Michelle Wells did not accompany Ms. Barnes to the conference room where the will was signed by her. Mr. Tolman did not video tape the will signing or consult with Dr. Kina prior to the will signing.

SANCHEZ, MITCHELL & EASTMAN
Attorneys at Law
4110 Kitsap Way, Suite 200
Bremerton, Washington 98312-2401
Telephone (360) 479-3000

62. Mr. Tolman was extremely careful in his representation of Ms. Barnes. Contemporaneous to the preparation of the will, he prepared a memorandum for Ms. Barnes' signature which set forth what he believed to be Ms. Barnes' reasons for what can only be described as a radical departure from her prior estate plans. This was the first time Mr. Tolman had taken this extra precautionary step in more than thirty years of practice.

63. The March 3, 2011 will was a radical departure from Ms. Barnes' prior wills. Unlike each of her previous wills, it contained no provision for the Petitioners. The new will completely disinherited the Petitioners and named Michele Wells and her husband as the sole beneficiaries. The March 3, 2011 will also named Michelle Wells to act as personal representative, and her husband as the alternate.

64. Dr. Kina and Mr. Tolman testified that on March 3, 2011, Ms. Barnes appeared to have the necessary capacity to make her will.

65. Ms. Barnes saw Dr. Kina next on March 7, 2011. In Dr. Kina's medical records from this visit, he again noted mild cognitive impairment. Dr. Kina testified that he believed Ms. Barnes continued to have sufficient capacity on this day to make her will.

66. On March 22, 2011, the Petitioners wrote a letter to Ms. Barnes about the rental property. The letter described what the Petitioners had discovered in regard to the current tenants and their concerns about the

SANCHEZ, MITCHELL & EASTMAN
Attorneys at Law
4110 Kitsap Way, Suite 200
Bremerton, Washington 98312-2401
Telephone (360) 479-3000

insurance, the sharing of rental income, and the payment of property taxes. The letter demonstrated an attempt by the Petitioners to reach out to Ms. Barnes and reestablish, at the very least, a workable business relationship with Ms. Barnes. The letter ended as follows: "Please let us know of anything that we may help you with. We love you, and want to help you as much as we can. Love, John, Karen, Marsha & Vicki."

67. By March 22, 2011, the Petitioners were aware that Ms. Barnes had executed a new durable power of attorney, but it is not clear whether they were aware of Ms. Barnes' new will.

68. It is unknown whether Ms. Barnes ever saw the March 22, 2011 letter. The letter expresses the sentiments of the Petitioners toward Ms. Barnes as of late March 2011.

69. After Ms. Barnes' fall in March of 2009, she became increasingly difficult to reach either by telephone or in person. Her friends and family would call and the phone would often ring continuously without being answered. Michelle Wells had changed Ms. Barnes' long distance calling plan. This isolated Ms. Barnes from her family and long time close friends.

70. APS visited Ms. Barnes' residence on numerous occasions. Often there would be no answer at the door and their phone calls would not be returned. The only person close to Ms. Barnes on a consistent basis during this time was Michelle Wells.

SANCHEZ, MITCHELL & EASTMAN
Attorneys at Law
4110 Kitsap Way, Suite 200
Bremerton, Washington 98312-2401
Telephone (360) 479-3000

71. On May 2, 2011, Michelle Wells drove Ms. Barnes to Ms. Barnes' church, First Lutheran Church, in Poulsbo, Washington. At the church, a church member interviewed Ms. Barnes for the purpose of recording the history of the church and of its members. The interview was recorded and a wide range of topics were discussed. During the course of the interview, Ms. Barnes was often confused. The recorded statements made by Ms. Barnes and her notable confusion suggest that she was significantly impaired on May 2, 2011. Had Ms. Barnes executed her last will on this day, the evidence would have been clear, cogent, and convincing that she lacked testamentary capacity.

72. During the recorded interview, there was substantial involvement from Michelle Wells. Michelle Wells filled in numerous blanks in Ms. Barnes' memory and appeared to speak for Ms. Barnes at certain times. In the presence of Ms. Barnes, Michelle Wells made comments about the Petitioners to the interviewer. Michelle Wells told the interviewer that her nephew, John Rova, had tried to throw Ms. Barnes under the bus a couple times, and that the Petitioners were trying to put Ms. Barnes in a nursing home. Michelle Wells' statements were not true and acted to further poison Ms. Barnes's relationship with the Petitioners.

73. The comments made by Michelle Wells at the November 17, 2010 meeting at Mr. Tolman's office, the comments she made to the tenants of the rental property, and the comments she made to the interviewer on

SANCHEZ, MITCHELL & EASTMAN
Attorneys at Law
4110 Kitsap Way, Suite 200
Bremerton, Washington 98312-2401
Telephone (360) 479-3000

May 2, 2011 made it easier for Ms. Barnes to believe all the horrible things she had said about the Petitioners. Michelle Wells' comments fanned the flame and operated to perpetuate Ms. Barnes' anger toward the Petitioners.

74. On May 25, 2011, Ms. Barnes fell on the sidewalk outside of her home. This was the beginning of end in terms of Ms. Barnes' physical well being. Ms. Barnes refused to go the hospital or to see Dr. Kina at his office. From May 25, 2011 to the date of her death, Ms. Barnes was unable to walk.

75. On May 25, 2011, Dr. Kina made a house-call and examined Ms. Barnes. During this visit, Dr. Kina noted in his records that Ms. Barnes "has had long-standing mild cognitive impairment. This seems to be gradually progressing. Probably early Alzheimer's dementia."

76. Ms. Barnes remained at her home until the time of her death. On June 22, 2011, Dr. Kina made a certification of terminal illness and believed hospice care was appropriate as Ms. Barnes' end was likely near. Ms. Barnes consented to in-home hospice care.

77. On June 25, 2011, Michelle Wells wrote a check in the amount of $2,641.94 from Ms. Barnes' personal bank account. The check was made payable to Chase Financial and was made to pay Michelle Wells' personal house payment. This represented the first time any expenditure of that kind had been made exclusively for the benefit of Michelle Wells and it

SANCHEZ, MITCHELL & EASTMAN
Attorneys at Law
4110 Kitsap Way, Suite 200
Bremerton, Washington 98312-2401
Telephone (360) 479-3000

was done at a time when Ms. Barnes was in, or very close to being in, a coma. The payment to Chase Financial posted on June 27, 2011.

78. Ms. Barnes died on June 27, 2011.

79. The Petitioners' medical expert, Dr. Meharg, provided a retrospective analysis on whether Ms. Barnes had dementia or impaired cognitive ability as of the date of the signing of the March 3, 2011 will.

80. Dr. Meharg never met Ms. Barnes or had the opportunity to examine her. Dr. Meharg relied on objective evidence of Ms. Barnes' physical and mental condition, her ability (or lack thereof) to perform certain tasks, and collateral source information regarding third party observations of Ms. Barnes.

81. However, the evidence is inconclusive as to Ms. Barnes' condition at the time of the March 3, 2011 will signing. Specifically, those individuals who are professionals and who were expressly charged with observing Ms. Barnes' condition did not note substantial impairment. This included attorney Mr. Tolman, witness Susan Peden, and Dr. Kina.

82. The testimony is very conflicting. There is substantial evidence that raises questions about Ms Barnes' mental competency, but there is not clear and convincing evidence that as of the will signing on March 3, 2011, that Ms. Barnes suffered from dementia and thus lacked testamentary capacity.

SANCHEZ, MITCHELL & EASTMAN
Attorneys at Law
4110 Kitsap Way, Suite 200
Bremerton, Washington 98312-2401
Telephone (360) 479-3000

83. Dr. Meharg testified that Ms. Barnes was highly vulnerable to influence at the time of the will signing due to her physical and mental impairments and total dependence on Michelle Wells for basic care. ~~Dr. Meharg also testified that Ms. Barnes lacked the ability to form independent thoughts sufficient to overcome the influence of Michelle Wells.~~

Based upon the foregoing Findings of Fact, the Court makes the following:

II. CONCLUSIONS OF LAW

1. The right to dispose of one's property by will is not only a valuable right, but is one assured by law. *Points v. Nier*, 91 Wn.20, 28, 157 P.44 (1916); *In re Murphy's Estate*, 98 Wash. 548, 555, 168 P. 175, 178 (1917); *In re Tiemens' Estate*, 152 Wash. 82, 88, 277 P. 385-387 (1929).
2. To exercise that right one must, of course, possess testamentary capacity. To have testamentary capacity, a testator must have sufficient mental functioning to understand the transaction in which she is engaged, to recollect the objects of her bounty, and to recall in general the nature and extent of her estate.
3. Petitioners have the burden of proving testamentary incapacity and they must meet their burden by clear, cogent and convincing evidence.
4. There is not clear, cogent, and convincing evidence establishing that Ms. Barnes lacked testamentary capacity when she signed the will on March 3, 2011. The evidence was inconclusive that Ms. Barnes had dementia at the

SANCHEZ, MITCHELL & EASTMAN
Attorneys at Law
4110 Kitsap Way, Suite 200
Bremerton, Washington 98312-2401
Telephone (360) 479-3000

time of the will-signing and thus there is no inference that she was sufficiently cognitively impaired at the time of the will signing to invalidate the will for lack of capacity. The testimony of lay witnesses, was inconsistent and inconclusive, and did not clearly and convincingly establish that Ms. Barnes did not have sufficient mental capacity to understand the will that she signed on March 3, 2011.

5. The March 3, 2011 will was a radical departure from Ms. Barnes' prior wills which created an inference that it was the product of an unsound mind. This inference, alone, is not sufficient to overcome the clear, cogent, and convincing standard of proof.

6. There was significant amount of evidence regarding Ms. Barnes' cognitive impairment, but the Petitioners did not meet their burden in establishing that Ms. Barnes lacked testamentary capacity on March 3, 2011.

7. The will that Ms. Barnes executed on March 3, 2011 is not invalid because she lacked testamentary capacity.

8. A beneficiary's exercise of undue influence over a testator who otherwise possesses testamentary capacity operates to void a will. The influence must, at the time of the testamentary act, have controlled the volition of the testator, interfered with his or her free will, and prevented an exercise of his or her judgment and choice. *In re Estate of Lint*, 135 Wn.2d 518, 535, 957 P.2d 755 (1988).

SANCHEZ, MITCHELL & EASTMAN
Attorneys at Law
4110 Kitsap Way, Suite 200
Bremerton, Washington 98312-2401
Telephone (360) 479-3000

9. The evidence necessary to establish undue influence must be clear, cogent and convincing. This burden can be met with circumstantial evidence.

10. A presumption of undue influence can be raised by showing certain suspicious facts and circumstances. In *Dean v. Jordan*, 194 Wn. 661, 79 P.2d 371 (1938), the court identified several facts which may give rise to a presumption of undue influence. A presumption of undue influence can arise where (1) the beneficiary was the decedent's fiduciary; (2) the beneficiary participated in the preparation or procurement of the will; and (3) the beneficiary's share of the estate was unnaturally large. Added to these may be other considerations, such as the age or condition of health and mental vigor of the testator, the nature or degree of relationship between the testator and the beneficiary, the opportunity for exerting undue influence, and the naturalness or *unnaturalness* of the will. *Id.* at 672.

11. Clear, cogent, and convincing evidence supports a presumption that the will executed by Ms. Barnes on March 3, 2011 was the product of undue influence by Michelle Wells.

12. Michelle Wells was Ms. Barnes' fiduciary. She was her attorney in fact and her caregiver at the time the March 3, 2011 will was signed. This was not disputed by Michelle Wells.

SANCHEZ, MITCHELL & EASTMAN
Attorneys at Law
4110 Kitsap Way, Suite 200
Bremerton, Washington 98312-2401
Telephone (360) 479-3000

13. Michelle Wells participated in the procurement of the March 3, 2011 will. Michelle Wells provided Ms. Barnes with transportation to the last four meeting she had with Mr. Tolman and participated in one of the meetings.

14. The March 3, 2011 will gave Michelle Wells an unnaturally large share of Ms. Barnes' estate. Michelle Wells and her husband are unrelated to Ms. Barnes and it gave them the entire estate.

15. Ms. Barnes was also extremely vulnerable to undue influence due to physical limitations, some degree of cognitive impairment, and the fact that Michelle Wells was Ms. Barnes' primary caregiver.

16. All of the "other considerations" listed by the court in *Dean* support a finding that the will executed by Ms. Barnes on March 3, 2011 was the product of undue influence by Michelle Wells.

17. There is no dispute that Ms. Barnes was elderly. She died just weeks shy of her 95th birthday. The evidence supports the fact that Ms. Barnes' health began deteriorating both physically and mentally after her fall in March of 2009. Ms. Barnes required more and more care involving her activities of daily living, including the handling of her business and finances affairs.

18. Ms. Barnes' mental vigor was borderline when she executed her March 3, 2011 will.

19. Michelle Wells and Dennis Wells were unrelated to Ms. Barnes. Michelle Wells' daily involvement and Ms. Barnes' dependence on her created the opportunity to exert undue influence over Ms. Barnes. Ms. Barnes was

SANCHEZ, MITCHELL & EASTMAN
Attorneys at Law
4110 Kitsap Way, Suite 200
Bremerton, Washington 98312-2401
Telephone (360) 479-3000

isolated from family and friends and completely dependent on Michelle Wells.

20. The unnaturalness of the March 3, 2011 will was a critical factor for this Court. The March 3, 2011 will was a radical departure from all of Ms. Barnes' prior wills. Ms. Barnes' estate consisted of homesteaded property that had been in the Rova family since the early 1900's. The Court cannot conceive of Ms. Barnes disinheriting the Petitioners and making this absolutely radical and unnatural change to her prior wills unless she was subjected to undue influence that the evidence suggests she was vulnerable to.

21. Michelle Wells did not produce evidence that this Court finds sufficient to "at least to balance the scales and restore the equilibrium of evidence touching the validity of the will." *In re Estate of Burkland*, 8 Wash.App. 153, 158-59, 504 P.2d 1143 (1972), review denied, 82 Wash.2d 1002 (1973). Clear, cogent and convincing evidence establishes that the will signed by Ms. Barnes on March 3, 2011 was the product of ongoing undue influence by Michelle Wells.

22. The evidence that was presented on behalf of Ms. Wells was not sufficient to overcome the presumption of undue influence, based not only on the fiduciary relationship, the active participation in procuring the Will and the unnatural disposition, but on all of the other considerations that the Supreme Court says are appropriate to consider, age, health, incapacity, mental vigor, nature and degree

SANCHEZ, MITCHELL & EASTMAN
Attorneys at Law
4110 Kitsap Way, Suite 200
Bremerton, Washington 98312-2401
Telephone (360) 479-3000

of relationships, opportunity for influence and the unnaturalness of the disposition. The will that Ms. Barnes executed on March 3, 2011 is invalid because it was the product of undue influence by Michelle Wells.

23. The letters testamentary of the current personal representatives shall be canceled, and Vicki Rova Mueller shall be appointed in his place.

Based on the foregoing, the Court ORDERS, ADJUDGES AND DECREES as follows:

III. ORDER

1. The relief requested in the Petition to Contest Will shall be and hereby is GRANTED.
2. The will signed by Ms. Barnes on March 3, 2011 and admitted to probate on July 1, 2011 shall be and hereby is declared invalid, and the probate of the March 3, 2011 will is hereby revoked.
3. Clerk's Action Required: Dennis Wells is removed as personal representative and letters testamentary issued to him are hereby CANCELED.
4. Vicki Rova Mueller is hereby appointed to serve as personal representative of the estate, with non intervention powers, and to serve without bond.
5. Dennis Wells shall not be discharged as personal representative except upon court approval, after notice, of his account of his actions as personal representative. His account shall identify all probate assets of which he took possession and all probate liabilities, as of the date of death, shall itemize all receipts and disbursements in respect of such assets and

SANCHEZ, MITCHELL & EASTMAN
Attorneys at Law
4110 Kitsap Way, Suite 200
Bremerton, Washington 98312-2401
Telephone (360) 479-3000

liabilities and in respect of the administration of the estate, and shall state the balance of probate assets and liabilities delivered to their successor.

DATED: June 5, 2013

CLALLAM COUNTY SUPERIOR COURT

By: _____
The Honorable Brooke Taylor
Superior Court Judge

6. Dennis Wells' accounting as required above shall be submitted to counsel for petitioners within 30 days from June 5th, 2013. Petitioners shall have 30 days from the date of receipt of Mr. Wells Accounting to object. If the probate petitioners fail to timely object, Dennis Wells shall be discharged as personal representative. DF

SANCHEZ, MITCHELL & EASTMAN
Attorneys at Law
4110 Kitsap Way, Suite 200
Bremerton, Washington 98312-2401
Telephone (360) 479-3000

SMITH GOODFRIEND PS

March 26, 2015 - 9:26 AM

Transmittal Letter

Document Uploaded: 5-450691-Petition for Review.pdf

Case Name: In re Estate of: Eva Johanna Rova Barnes
Court of Appeals Case Number: 45069-1

Is this a Personal Restraint Petition? Yes ● No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

● Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Victoria Vigoren - Email: victoria@washingtonappeals.com

A copy of this document has been emailed to the following addresses:

howard@washingtonappeals.com
kwc@spinnakerbldg.com
ken@appeal-law.com
dhorton@davidhortonlaw.com