Supreme Court No. 92295-1

Court of Appeals No. 46337-7 II

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Estate of

CHARLES ROBERT THORNTON,

Deceased.

ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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I. RELIEF REQUESTED BY RESPONDENT

Respondent Heberlein Mary Heberlein, respondent in the Court of Appeals, asks this Court to deny Martin Thornton's petition for review of Division Two's August 25, 2015 decision. Martin cannot articulate a basis for review of that decision, which is consistent with this state's common law, statutory law, and public policy. Mr. Thornton's argument attempts to create a conflict between the Divisions. No such divide exists, and this Court should deny review and award attorneys' fees to Ms. Heberlein under RAP 18.1(j).

II. RESTATEMENT OF THE CASE

A. Mary Heberlein and Bob Thornton[1] Had a Long-standing, Committed, Loving Relationship When He Was Diagnosed with a Terminal Illness.

Bob and Heberlein began their relationship in 2003. CP 17, 67. They lived and worked together from that time until Bob died in December 2010. *Id*; CP 21. The relationship constituted a committed intimate relationship. *See* CP 67. Their friends considered Heberlein as Bob's "significant other." CP 96. When Bob became ill, he and Heberlein registered as domestic partners to ensure that she would not be excluded from the hospital room and she could always be by Bob's side. CP 86. After his diagnosis, Bob told numerous people that he wanted to take care of Heberlein and get his affairs in order to begin preparing for treatment. CP 77, 92, 97.

[1] Charles Robert Thornton was known as "Bob" to his friends and family. Because Martin Thornton is the Petitioner, first names will be used with no intended disrespect.

Despite Bob's expressed love and affection for Heberlein, he was never known to be influenced by her. His close personal friend, Judy Johnson, described Bob as "very smart and firm" and a man "who would not be influenced" in a way he did not want to be. CP 73-74. Friends who knew Bob for many years described no change in his manner, even days before his death. CP 73, 79, 82, 90, 92, 94, 96.

B. Bob Thornton's Terminal Illness Did Not Affect His Cognitive Abilities.

In September 2010, Bob was experiencing a cough. CP 68. At Heberlein's insistence, Bob went to the doctor. *Id.* He learned that he was suffering from renal cell carcinoma. CP 68, 90. Bob was told he had a 5% chance of surviving, and was only given about two to six months to live. *Id.*

Upon receiving his diagnosis, Bob made clear to several people that he wanted to get his affairs in order. CP 79, 92, 96-97. Bob asked longtime friend Joe Holbrook to file Bob and Heberlein's domestic partnership registration in Olympia. CP 68, 96-97, 200-01. Both Mr. and Mrs. Holbrook remember Bob to be lucid, and with full capacity to make his own decisions, even after his diagnosis. CP 94, 97.

Bob's sister, Doris Ellison, was a nurse for over 30 years. CP 92. Ms. Ellison visited Bob in the hospital and remembers him talking normally and showing no signs of mental problems, even up until his death. *Id.* His breathing problems caused by the cancer had no impact on his lucidity and coherence. *Id.* He was never confused, and could always maintain a conversation. *Id.*

After his diagnosis, Bob continued to speak with his close friend and business associate Paul Henderson. CP 79. Bob and Mr. Henderson had worked together since 1999. *Id.* When Bob left for treatment in November 2010, he transferred his files to Mr. Henderson, which were organized and well maintained. *Id.* Even still, Bob worked from the hospital and showed no signs of mental problems. *Id*; CP 92.

C. On October 18, 2010, Bob Thornton Executed His Will Outside the Presence of Heberlein After It Was Prepared by an Attorney.

After being diagnosed with cancer, Bob called his longtime friend Sue Holbrook seeking an attorney to draft a new will. CP 94. Ms. Holbrook recommended attorney Desiree Hosannah; Bob thereafter contacted Ms. Hosannah directly. *Id.* Bob specifically told Ms. Holbrook that he wanted to "take care" of Heberlein. CP 95.

Bob and Heberlein went to see Ms. Hosannah as they both planned to execute new wills. *Id.* Although both Heberlein and Bob met with Ms. Hosannah together at the beginning of their visit, Ms. Hosannah met with Bob and Heberlein individually to craft and execute their wills. *Id.* Ms. Hosannah expressly met with Bob independently so that Bob could and would speak freely and honestly. CP 95. Heberlein did not instruct Ms. Hosannah as to any terms of Bob's estate plan in any respect.[2] CP 96.

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[2] In addition to drafting the will, Heberlein was particularly concerned about ensuring that the couple could remain together during Bob's medical procedures. CP 95-96, 199. Heberlein stated, "[M]y particular interest was with the healthcare directive because I

While meeting alone, Ms. Hosannah asked Bob who he wanted as his beneficiaries. *Id.* Outside of the presence of Heberlein, Bob stated he wanted his primary beneficiary to be Heberlein, and his contingent beneficiary his sister. *Id.* When asked point blank about his adopted son Martin, still outside the presence of Heberlein, Bob stated to Ms. Hosannah that he had "already given Martin all he was going to get," and that Martin was a "bad seed." *Id.* Bob had previously given Martin a house, although Martin categorized it as a sale because of a later deed of trust for a separate loan.

Ms. Hosannah further described the meeting:

> During our meeting Bob appeared completely lucid and competent when I met with him. He knew exactly what he wanted and clearly told me who he wanted to inherit under the will. Bob clearly knew he was having a will created, since he asked specifically for it. He also clearly knew he was signing it. Bob clearly knew who his family and close relations were since he listed them to me. Finally, Bob knew what his assets were since he explained to me that he had already taken care of some assets by putting them in joint ownership with Heberlein and that his will was to take care of all remaining assets.

CP 95.

In October 2010, Bob told Mr. Henderson that he was creating a new will in light of the "grim prognoses he had received from his doctors." CP 79. He stated the will was to "put his affairs in order."[3] *Id.*

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didn't want to be separated from Bob at all during his illness. And so she [Ms. Hosannah] met with us independently." CP 199.

[3] Bob often told friends that he wanted to create a new will so that he could put his affairs in order. CP 79, 92, 96-97.

On the day Bob signed his will, he asked Mr. Henderson to go to the attorney's office to witness the will. CP 79. "At no point before, during, or after the will signing did [Mr. Henderson] perceive any change in his mental condition. [Bob] was completely lucid, aware and interactive before, during and after the will signing. Bob certainly understood the fact that he was signing a will." *Id.* At that time, Bob was not taking any medication that could impair his mental status or judgment. CP 90. He was only taking Advil and Spiriva. *Id.*

D. Many People Knew of Bob's Relationship with Martin As Distant and Rocky

Bob told multiple people (friends and family) that he and Martin, his adoptive son, had a rocky relationship. CP 67, 82, 92, 95. Over the years, Bob would often talk about his extremely difficult relationship with Martin. CP 92. Bob also expressed his frustration with Martin multiple times with Judy Johnson. CP 72. Initially, Bob's first will – executed in 1988 – identified Martin as his beneficiary. CP 67. The revoked 1988 will remained untouched until Bob learned he was ill. *See* CP 24. In 1996, years before Bob and Heberlein began their relationship, Bob gave Martin a house. CP 67. Martin categorized it as a sale because of a later deed of trust for a separate loan. CP 203-13.

Bob would share with his sister that he "felt he had given Martin everything he could possibly give." *Id.* Bob repeated this sentiment to his attorney, Ms. Hosannah, saying again that he thought he had given enough to Martin. CP 92, 95. Around the time of his death, Bob thought of Martin as a

"bad seed" with a felony background and, instead, wanted to care for Heberlein. CP 81-82; CP 95.

On November 29, 2010, Heberlein called Martin to inform him that Bob was in the hospital, and that Martin should come visit. CP 69. Martin indicated he would not go to the hospital that day. *Id.* Martin never visited Bob in the hospital. *Id.*

E. Bob and Heberlein Co-Owned Assets as Early as 2003

When Bob and Heberlein began dating in 2003, they began establishing joint bank accounts at that time. CP 250-51. Those accounts remained opened even until after Bob's death. CP 250-52. Bob and Heberlein had joint ownership of businesses, they held bank accounts as joint tenants with rights of survivorship, and they pooled their earnings. *Id.* Arising out of their joint business operations, Bob and Heberlein had three business bank accounts with Columbia Bank. CP 250. Bob and Heberlein owned their home as joint tenants with right of survivorship.

As early as 2003, Bob and Heberlein opened joint bank accounts. CP 251-52. At the same time, they both added each other to their respective existing accounts. *Id.* This would be repeated to bank and retirement accounts in 2007, 2008, and 2009. *Id.* Bob designated Heberlein as the primary beneficiary on his retirement accounts in 2008. CP 252. He did not notify Heberlein before he made the change to his retirement account. CP 149.

In November 2003, Heberlein added Bob to her KeyBank account that she originally opened in 1997. CP 251. The account was expressly established so that Bob and Heberlein were co-owners as joint tenants with rights of survivorship. *Id.* Heberlein added Bob as the primary beneficiary to her retirement account in 2007. CP 252.

III. GROUNDS FOR DENIAL OF REVIEW

A. Division Two Applied the Proper Summary Judgment Standard on Martin Thornton's Undue Influence Claim.

The trial court granted summary judgment in favor of Heberlein and dismissed Martin's TEDRA Petition. He appealed. Now Martin petitions this Court for review arguing again that the Court of Appeals, like the trial court, erroneously applied the wrong standard on summary judgment. In doing so, Martin attempts to create a divide between the divisions of the Court of Appeals[4] where in reality none exists.

Under Washington law, an appellate court reviews a trial court's grant of summary judgment de novo. *Scriver v. Clark Coll.*, 181 Wn.2d 439, 444, 334 P.3d 541 (2014). Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.* When making this determination, an appellate court considers all facts and makes all reasonable, factual inferences in the light most favorable to the nonmoving party. *Id.*

[4] Despite arguing a divide between the divisions of the Washington Court of Appeals, Martin cites RAP 13.4(b)(4) as the basis for review, there is no argument as to any public policy impacted by the Appellate decision in this case.

"When a challenged factual finding is required to be proved at trial by clear, cogent, and convincing evidence, [a court will] incorporate that standard of proof in conducting substantial evidence review. A party claiming undue influence must prove it by clear, cogent, and convincing evidence."[5] *Kitsap Bank v. Denley*, 177 Wn. App. 559, 569, 312 P.3d 711 (2013); *see also Woody v. Stapp*, 146 Wn. App. 16, 22, 189 P.3d 807 (2008) ("However, when reviewing a civil case in which the standard of proof is clear, cogent, and convincing evidence, this court must view the evidence presented through the prism of the substantive evidentiary burden."); *Tiger Oil Corp. v. Yakima Cnty.*, 158 Wn. App. 553, 563, 242 P.3d 936 (2010) ("When weighing summary judgment in a civil case in which the standard of proof is clear, cogent, and convincing evidence, the court determines whether a rational trier of fact could find from the evidence in the record that the nonmoving party satisfied this evidentiary burden.").

1. The Summary Judgment Standard was Properly Applied to the Claim of Undue Influence.

Martin argues the Court of Appeals erroneously affirmed the trial court's ruling which applied the clear, cogent and convincing standard cited above. The argument fails for two reasons. First, Division Two applied the proper standard on a motion to dismiss an undue influence claim, because *Kitsap Bank* did not

[5] This Court should note, as the Court of Appeals recognized, an appellate court may affirm on any grounds established by the pleadings and supported by the record. *Truck Ins. Exch. v. Vanport Homes, Inc.*, 147 Wn.2d 751, 766, 58 P.3d 276, 284 (2002).

adopt a new summary judgment standard, as noted in the Appellate opinion on this case. Second, the dicta from *Estate of Lennon v. Lennon* cited by Martin considered a wholly different matter and therefore is not controlling here.

a. *The Trial Court and Court of Appeals applied the proper summary judgment standard.*

To begin, Division II applied the correct standard of review. The Court of Appeals reviewed the "evidence in the light most favorable to Martin" de novo, yet determined Martin failed to raise a material fact. Slip Op. at 8, 16.

> **Here we view the evidence in the light most favorable to Martin**. *Jones*, 146 Wn.2d at 300. Heberlein's summary judgment motion should be granted if there is no issue of material fact and reasonable persons could reach but one conclusion from all the evidence, that the will was not the product of undue influence or fraud by clear, cogent, and convincing evidence. *See Kitsap Bank*, 177 Wn. App. at 569-70. In order to defeat summary judgment dismissal of his will contest claims, Martin must show that there is a genuine issue of material fact as to whether Bob's 2010 will was the product of undue influence or fraud by clear, cogent, and convincing evidence.

Slip Op. at 8 (emphasis added); *see also Scriver*, 181 Wn.2d at 444 (appellate court "consider[s] all facts and make[s] all reasonable, factual inferences in the light most favorable to the nonmoving party"). At page 16, the Court of Appeals reiterated that Martin's failure was that he could not "present specific facts demonstrating that a material fact remained in dispute." The facts challenged by

Martin were not material.[6] The undisputed facts, even viewed in the light most favorable to Martin did not establish a presumption of undue influence.

Nevertheless, the thrust of Martin's argument is that Division I employs a different summary judgment standard for undue influence claims from that of Division II and III.[7] The crux of Martin's argument is that the Court of Appeals below applied the wrong summary judgment standard.

Despite Martin's contention, *Kitsap Bank* was not the only authority which supported the Appellate Court's statement of the summary judgment standard for an undue influence claim. Martin fails to reconcile the decades-old principal that a court considers the quantum of proof at trial as to whether or not there is a genuine factual dispute.[8] Further, Martin ignores a Division I case, *Sedwick v. Gwinn*, which similarly considers the *Anderson* "prism" approach to summary judgment dismissal of claims with heightened evidentiary burdens. "In addition, we 'must view the evidence presented through the prism of the substantive evidentiary burden [for purposes of summary judgment].'" *Sedwick*

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[6] For example, in its reasoning, the Court of Appeals recognized Martin brought a claim against Mary for undue influence. Yet Martin's declarations in support notes Heberlein sequestered Bob while he was in the hospital *after* Bob executed his new will and further that the uncontroverted evidence indicates Bob and Ms. Hosannah reviewed Bob's estate plan alone. Slip Op. at 11-12.

[7] This Court should note that *Woody v. Stapp*, *supra*, decided by Division III, applied the same standard on summary judgment as the Court of Appeals below. In effect, Martin actually argues Division I, in 2001, applied a different standard than Division III in 2008 and Division II in 2015. *Woody, supra*, was decided well before Martin's claim in 2011.

[8] This standard does not relieve the Court from examining the facts in the light most favorable to the non-moving party. Nevertheless, as noted above, the Court of Appeals below did review the evidence, de novo, in the light most favorable for Martin.

v. Gwinn, 73 Wn. App. 879, 885, 873 P.2d 528 (1994) (quoting *Adams v. Allen*, 56 Wn. App. 383, 393, 783 P.2d 635 (1989) (citing *Anderson, infra*).

Both the Court of Appeals below and the Court in *Kitsap Bank* relied upon *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505 (1986), in discussing the summary judgment standard. In *Anderson*, the United States Supreme Court applied the summary judgment standard to claims with a heightened evidentiary burden at trial with an eye toward that standard when determining whether a genuine issue of material fact existed:

> Progressing to the specific issue in this case, we are convinced that the inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits. If the defendant in a run-of-the-mill civil case moves for summary judgment or for a directed verdict based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict—"whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed." *Improvement Co. v. Munson*, 14 Wall. 442, 448, 20 L.Ed. 867 (1872).

Anderson, 477 U.S. at 252.

Shortly after *Anderson*, in 1986, Division II recognized that standard as applied to Washington law. *LaMon v. City of Westport*, 44 Wn. App. 664, 667 n.

1, 723 P.2d 470, 472 (1986). The *LaMon* Court remained consistent with the "usual rules of summary judgment" and noted "The United States Supreme Court recently decided that the summary judgment determination must be guided by the substantive evidentiary standards that apply to the particular case." *LaMon*, 44 Wn. App. at 667 n. 1 (citing *Anderson, supra*).

Moreover, other Washington cases support the Appellate Court's interpretation of *Kitsap Bank* as applied to this case. In *Woody v. Stapp, supra*, the plaintiff sued in part under a theory of civil conspiracy. The court of appeals affirmed the trial court's dismissal below:

> Initially, Mr. Woody argues his burden of proof is lowered because when we review a summary judgment order, we must construe all facts and reasonable inferences in a light most favorable to the non-moving party. *Hubbard*, 146 Wn.2d at 707. However, when reviewing a civil case in which the standard of proof is clear, cogent, and convincing evidence, this court "must view the evidence presented through the prism of the substantive evidentiary burden. *Anderson v. Liberty Lobby, Inc.*, 477 US 242, 254, 106 S.Ct. 2505, 91 L.Ed2d 202 (1986). Thus, we must determine whether, viewing the evidence in the light most favorable to the nonmoving party, a rational trier of fact could find that the nonmoving party supported his or her claim with clear, cogent, and convincing evidence.

Woody, 146 Wn. App. at 22.

Likewise, *In re Dependency of CB*, 61 Wn. App. 280, 810 P.3d 518 (1991), is instructive. In *In re CB*, the Court of appeals considered what burden of production was sufficient to support an ultimate fact in issue. 61 Wn. App. 280, 283, 810 P.2d 518 (1991). The court determined that the burden of

production sufficiently substantial to support an ultimate fact at issue under the preponderance test may not be sufficient production to support the burden of proof under a clear, cogent, and convincing evidence standard.[9] *Id.* at 283. The *In re CB* Court compared its ruling to a summary judgment motion in a civil proceeding:

> By analogy, the non-moving party in an ordinary civil case meets its burden of production by introducing evidence from which a rational trier of fact could find by a preponderance of the evidence the facts required by the substantive law defining its claim or defense. And by further analogy, a non-moving party in a civic case in which a rational trier of fact could find by clear, cogent, and convincing evidence the facts required by the substantive law defining its claim or defense.

61 Wn. App. at 285.

A trial court does not err when considering whether or clear, cogent, and convincing evidence exists on summary judgment when presented with a civil claim that requires a heightened evidentiary burden at trial. To the contrary, the trial court's review and consideration of the evidence, under the general summary judgment standard with an eye towards the clear, cogent, and convincing standard *is* the standard for summary judgment on claims such as Martin's. *Anderson*, 477 U.S. at 254 ("Thus, in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive

[9] The *Kitsap Bank* court recognized the rule from *In re CB*: "The same principle applies to summary judgment, and the party bearing the burden to prove the undue influence claim at trial must present sufficient evidence to make it highly probable that the undue influence claim will prevail at trial." *Kitsap Bank*, 177 Wn. App. at 569 (citing *In re Estate of Jones*, 170 Wn. App. 594, 603-04, 287 P.3d 610 (2012)).

evidentiary burden."). As demonstrated above, a dearth of Washington case law, decided well before *Kitsap*, applies the same standard that Martin decries. The *Anderson* standard as applied by the Court of Appeals below was proper as the standard has been the law both federally and in this State for nearly thirty years. The Court of Appeals below did not err but correctly applied the applicable standard for summary judgment. Martin's contention that *Kitsap Bank* created a whole new standard is baseless, and this Court should deny review accordingly.

b. *Lennon Does Not Illustrate a Divide Between the Divisions*

Martin also challenges the Court of Appeals' ruling as failing to reconcile *Kitsap Bank* with the *Estate of Lennon v. Lennon.*[10] Martin argues *Kitsap Bank,* decided by Division II, and *Lennon*, decided by Division I, illustrate a split in the divisions. Martin misapplies *Lennon* and its dicta.[11]

Notably, the *Lennon* Court did not affirm nor deny a trial court's motion for summary judgment on will contest claims, or any other claim that required a clear, cogent and convincing standard at trial. 108 Wn. App. 167, 173, 29 P.3d 1258 (2001). Instead, *Lennon* involved the application of Washington's Deadman Statute. *Id.* at 173. The trial court granted summary judgment in favor of the estate to recover funds and struck portions of the nonmoving party's testimony on the basis of the Deadman Statute. *Id.* The court of appeals reversed holding, on the facts presented, the Deadman Statute had been waived,

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[10] 108 Wn. App. 167, 173, 29 P.3d 1258 (2001).
[11] Again, Martin fails to reconcile *Sedwick v. Gwinn. supra*, which also applied *Anderson, supra* on summary judgment.

and the evidence that was stricken would have presented enough evidence to overcome summary judgment. *Id.* at 181-82.

The case at bar is factually distinguishable from *Lennon*. *Lennon* considered the application of the Deadman Statute as a matter of procedure and not whether the decedent had actually gifted property as a matter of substance. When read in context, the *Lennon* Court's holding applied to the evidence that went "to the heart of Roger's claim that Elise made an inter vivos gift of the stock certificates" which thereby created the genuine issue of material fact for trial. *Id.* The *Lennon* Court was not asked to consider whether the decedent bestowed the gifts, but simply merely whether the nonmoving party could introduce evidence otherwise barred by the Deadman Statute. By contrast, in this case, the central question was whether Martin could demonstrate, substantively, the existence of undue influence by Heberlein.[12] When read in context, *Lennon* does not create a divide between the divisions.[13] The summary judgment standard applied by the Court of Appeals in this case was proper, and review should be denied.

B. Martin Thornton's Claim for Constructive Trust Was Properly Dismissed When He Conceded That the Success of the Constructive Trust Claim Was Dependent on the Success of His Undue Influence Claim.

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[12] The Court of Appeals answered this question: "Mr. Thornton failed to show a genuine issue of material fact as to whether Bob's 2010 will was the product of undue influence or fraud by clear, cogent, and convincing evidence." Slip Op. at 8.

[13] To the extent *Lennon* does stand for the rule that Martin suggests, the decision as demonstrated above, does not comport with Washington and Federal case law dating from 1986.

The Court of Appeals described Martin's constructive trust claim as vague, and accepted his concession that "his constructive trust cause of action is dependent on the success of his will contest claims." Slip Op. 18. Under Martin's own theory, if the probated will is not invalidated, he has no basis to claim constructive trust of either the probate or non-probate assets. As explained by Martin in briefing, "his [constructive trust] claim was that the Court impose a constructive trust over any such assets if it is determined that the 2010 will is invalid." Reply Br. at 17. Accordingly, there is no basis to accept review.

C. Martin Thornton's Attempt to Revive His Constructive Trust Claim as to the Non-Probate Assets Relies on Several Faulty Premises.

Martin's argument in the Petition relating to the non-probate assets relies on three conflated and faulty premises, and sets forth no basis for which this Court should accept review under RAP 13.4.

First, Martin complains that Heberlein failed to list non-probate assets on the Inventory she filed as personal representative, and thus, the discovery rule tolled the statute of limitations. This is a red herring and a misapplication of the requirements imposed upon a personal representative to create an inventory. The non-probate assets Martin complains of listed Heberlein as the beneficiary. The inventory in this case was filed pursuant to Heberlein's obligations as personal representative under Bob's 2010 will. She was appointed pursuant to RCW 11.44.015. That statute does not require an inventory of non-probate assets in this case. Non-probate assets of joint accounts or accounts containing

beneficiary designations do not pass under wills. *See e.g.* RCW 11.02.005(10) ("Nonprobate asset" means those rights and interests of a person having beneficial ownership of an asset that pass on the person's death under a written instrument or arrangement other than the person's will). As such, these assets did not need to be included in the probate inventory, nor in the updated inventory, because they were not assets of the estate. CP 141-42. Martin's argument relating to tolling of the statute of limitations, or that the personal representative "hiding assets" fails in light of the obligations imposed upon Heberlein by statute.

The second faulty premise, is that the 1988 will was a superwill. Martin's argument relating to the constructive trust claim is predicated upon the position that the 1988 will was a superwill. His argument boils down to the following position: he would be a testamentary beneficiary under the 1988 will; Heberlein took the assets as the named beneficiary on the non-probate assets; as such, Heberlein held the non-probate assets in constructive trust. Because the 1988 will was not a superwill, the constructive trust claim fails on its face.

Martin is incorrect when he argues that he would not have "the benefit of the time period found in RCW 11.11.070"[14] unless and until the current will admitted to probate was invalidated. Even if the current will was admitted to

[14] RCW 11.11.070(3) prevents the beneficiary designated in the will from making a claim against a beneficiary designated in the nonprobate asset six months after the will is admitted to probate or one year after the decedent's date of death. *See Kitsap Bank*, 177 Wn. App. at 567, n.3.

probate, the 1988 will was not a superwill and RCW 11.11.070 would not have applied. Nonprobate assets are not governed by wills unless the will is actually a superwill. To constitute a superwill, the language of the will must meet certain criteria in RCW 11.11.020. Martin's argument regarding the nonprobate assets fails because the 1988 will does not contain the necessary superwill language contained in RCW 11.11.020. It is not a superwill by definition:

> (1) Subject to community property rights, upon the death of an owner the owner's interest in any nonprobate asset specifically referred to in the owner's will belongs to the testamentary beneficiary named to receive the nonprobate asset, notwithstanding the rights of any beneficiary designated before the date of the will.
>
> (2) A general residuary gift in an owner's will, or a will making general disposition of all of the owner's property, does not entitle the devisees or legatees to receive nonprobate assets of the owner.
>
> (3) A disposition in a will of the owner's interest in "all nonprobate assets" or of all of a category of nonprobate asset under RCW 11.11.010(7), such as "all of my payable on death bank accounts" or similar language, is deemed to be a disposition of all the nonprobate assets the beneficiaries of which are designated before the date of the will.
>
> (4) If the owner designates a beneficiary for a nonprobate asset after the date of the will, the specific provisions in the will that attempt to control the disposition of that asset do not govern the disposition of that nonprobate asset, even if the subsequent beneficiary designation is later revoked. If the owner revokes the later beneficiary designation, and there is no other provision controlling the disposition of the asset, the asset shall be treated as any other general asset of the owner's estate, subject to disposition under the other applicable provisions of the will. A beneficiary designation with respect to an asset that renews without the signature of the owner is deemed to have been made on the date on which the account was first opened.

RCW 11.11.020. Martin's claims for the nonprobate assets inherently rely on the superwill statute.

Accordingly, the trial court was well within its broad authority under RCW 11.96A.020, and the plenary powers granted therefrom, to dismiss Martin's claim for nonprobate assets.[15] Martin's claim of status as a testamentary beneficiary binds him to the statutory language of RCW 11.11.020 and the statute of limitations contained in RCW 11.11.070. Pleading as a constructive trust does not change that Martin is claiming to be a testamentary beneficiary under the superwill statute.

Third, even if Martin was correct that the 1988 will could constitute a superwill, Heberlein would still take the non-probate assets because she was named as a beneficiary after the 1988 will was executed. RCW 11.11.020(4) ("If the owner designates a beneficiary for a nonprobate asset after the date of the will, the specific provisions in the will that attempt to control the disposition of that asset do not govern the disposition of that nonprobate asset, even if the subsequent beneficiary designation is later revoked"). Heberlein was named as a beneficiary as early as 2003, which is still after the purported superwill. This Court should decline review of any aspect of the constructive trust claim.

D. The Court of Appeals properly affirmed the award of attorney's fees.

[15] Even if Martin is correct on the statute of limitations argument, the claim can be dismissed now to avoid remanding on a statute of a limitations issue when the claim ultimately fails on the merits.

Again, Martin fails to articulate a basis under RAP 13.4 to accept review as to any issue relating to attorneys' fees. Martin asks this Court to accept review of the trial court decision to award attorneys' fees against Martin. The Court of Appeals declined to award fees.

The trial court properly awarded attorney's fees. RCW Chapter 11 grants Washington's courts broad discretion to award costs and reasonable attorneys' fees. RCW 11.96A.150; *In re Guardianship of Matthews*, 156 Wn. App. 201, 213, 232 P.3d 1140 (2010).

Here, the trial court properly granted summary judgment and was within its discretion to award attorneys' fees. The Court of Appeals properly determined that there was no abuse of discretion. Martin's Petition for Review as to this issue should likewise be denied, and this Court should award Heberlein fees on appeal under RAP 18.1(j).

IV. CONCLUSION

For the reasons set forth herein, Respondent Heberlein respectfully requests this Court to deny review of the Petition and award her fees incurred in this Court under RAP 18.1(j).

RESPECTFULLY SUBMITTED this 23rd day of October, 2015.

SMITH ALLING, P.S.

By _____

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of October, 2015, I caused to be served a true and correct copy of [this] Answer upon counsel of record, via the methods noted below, properly addressed as follows:

Mr. Stuart C. Morgan Ledger Square Law, P.S. 710 Market St. Tacoma, WA 98402-3712 Phone: (253) 327-1900 Fax: (253) 327-1700 Email: stu@ledgersquarelaw.com	☒	Hand Delivery
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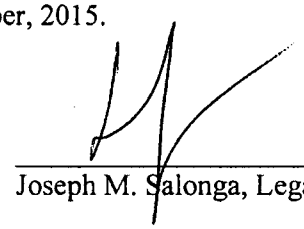
	☒	Email

DATED this 23rd day of October, 2015.



Joseph M. Salonga, Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Joseph Salonga
Cc: Tyler Shillito; Stu Morgan; Morgan Edrington
Subject: RE: Case # 92295-1 - In re the Estate of Charles Robert Thornton, Deceased

Received on 10-23-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Joseph Salonga [mailto:joseph@smithalling.com]
Sent: Friday, October 23, 2015 12:15 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Tyler Shillito <tyler@smithalling.com>; Stu Morgan <stu@ledgersquarelaw.com>; Morgan Edrington <morgane@smithalling.com>
Subject: Case # 92295-1 - In re the Estate of Charles Robert Thornton, Deceased

To the Clerk of the Court:

Please find attached hereto the Answer to Petition for Discretionary Review, for filing in the above-referenced matter. If you should require anything further, please do not hesitate to contact our office. Thank you in advance for your assistance.

Sincerely,
Joseph Salonga
Legal Assistant to C. Tyler Shillito

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