No. 321924-III

WASHINGTON STATE COURT OF APPEALS
DIVISION III

In the Matter of:

ESTATE OF BETTY L. LOWE,

Deceased,

AARON L. LOWE, Son of Defendant,

Petitioner/Appellant,

vs.

LONNIE D. LOWE, Individually and as Personal Representative of the Estate of BETTY L. LOWE, Deceased,

Respondent/Appellee,

RESPONDENTS' BRIEF

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1. Introduction.

Appellant Aaron Lowe and Respondent Lonnie Lowe are brothers. Their mother, Betty Lowe, died in 2011, leaving the majority of her estate and personal property to Lonnie,[1] who she also named as Personal Representative. Betty's will and written instruction for distribution of personal property had been executed in 2003 and 2007, respectively, with the assistance of attorney Robert Lamp. Aaron filed a petition for a will contest, which he later amended, but which asserted his mother's property should be distributed to him, as opposed to distribution in accordance with the terms of these testamentary documents.

Aaron challenged the distribution by claiming a myriad of alleged acts of misconduct by Lonnie, which remain somewhat difficult to discern, but appear primarily based on a claim that precious metals collected by his father Donald Lowe should have been distributed to Aaron. However, the substantial evidence at trial established that Betty had inherited **all** of Donald's assets when he died in 2003, and that estate had been long closed and was not subject to being reopened. Betty also had directed the sale

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[1] First names of the parties will often be used to avoid confusion; this Response brief is submitted on behalf of both Lonnie Lowe individually and as Personal Representative of the Estate of Betty Lowe represented by Greg M. Devlin, and on behalf of the Estate represented by William O. Etter. All references to "Lonnie" or Respondents include both Lonnie and the Estate.

and use of funds from the sale of some of the precious metals while she was alive, and left whatever remained to Lonnie. No sufficient evidence was presented that Lonnie had wrongfully taken any of his mother's property, either before or after her death, or that he had failed to properly conduct himself as a fiduciary or Personal Representative. The trial court's findings and conclusions were thus not erroneous, nor did they misapply the relevant law, and Aaron's appeal should fail.

2. Statement of the Case.

2.1 Procedure.

Aaron Lowe initiated this action on February 22, 2012, by filing a "Verified Petition for a Will Contest," asserting that his mother Betty Lowe lacked capacity to execute her will and/or subsequent written instructions distributing personal property; that Betty was subject to the undue influence of her son Lonnie in the will and instructions; that Lonnie tortiously interfered with Aaron's right to inherit; that Lonnie engaged in misconduct in failing to properly account for and inventory Betty's assets; and seeking Lonnie's removal as Personal Representative. (Respondents' Supp. CP ___; Superior Court Docket #13)[2]

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[2] Respondents have supplemented the Clerk's Papers with some additional pleadings and trial exhibits; index numbers were not available at the time of filing.

On November 2, 2012, Aaron filed an "Amended and Supplemental Petition" which similarly claimed that Lonnie breached fiduciary duties in his inventory and accounting obligations; exerted undue influence relating to his mother's written instructions for the distribution of personal property, which he also claimed she lacked capacity to execute; that Lonnie tortiously interfered with Aaron's right to inherit; and that Lonnie be removed as Personal Representative. (CP 11-23)

On August 23, 2013, less than three weeks from the start of trial, Aaron moved the court to file a "Second Amended and Supplemental Petition," which now also claimed that the assets in the estate of Donald Lowe, whose probate was completed in 2004, were distributed in error to Betty, and should instead be traced and paid to Aaron; and that Lonnie "financially abused" his mother in violation of the Vulnerable Adult Act, which would preclude any inheritance under the "Inheritance Rights of Slayers or Abusers" Act. (CP 168-171, 37-53) The Respondents opposed that motion. (Respondents' Supp. CP ___; Superior Court Docket #78) The court denied this motion and the matter proceeded to trial. (CP 54-55) After trial, but before the court ruled, Aaron sought discretionary review herein, which was denied on October 17, 2013; the Commissioner ruled that Aaron failed to allege or establish proof the trial court committed obvious or probable error necessitating review under RAP 2.3(b).

2.2 Facts.

Betty Lowe died testate on October 1, 2011. (CP 1) She had executed her will on September 15, 2003, naming her son Lonnie as Personal Representative. (CP 1) Lonnie was not present when his mother signed the will, which was drafted by long time estate planning attorney Robert Lamp. (VRP 385) She also executed a Power of Attorney naming Lonnie at the same time. (VRP 386) As was Mr. Lamp's practice, he verified that Ms. Lowe had sufficient capacity to execute the documents. (VRP 383-390) He found her to be competent; she was "totally appropriate," knew what her assets were, and where she wanted them to go. (VRP 389-390) Betty's will left 20% of her estate to her grandchildren, and 80% divided among her three sons, Aaron, Larry, and Lonnie. (VRP 157-158)

On September 3, 2007, Betty wrote out written instructions for the distribution of some of her personal property; she gave them to Lonnie, who referred her to her attorney Robert Lamp to insure they were properly executed. (VRP 246-249) Mr. Lamp formalized the instructions, and on September 11, 2007, Betty signed them. (VRP 439-432) Lonnie was not present. (VRP 442) Those instructions left "any and all silver coins and bars" to Lonnie to distribute or retain for himself. (Trial Exs. R-102, R-103) Mr. Lamp again verified she had the capacity to execute the written

instructions. (VRP 441-443) No evidence was presented that Lonnie drafted, encouraged or influenced Betty in the execution of this document; in fact, Lonnie testified that he did not influence her in any way in relation to this document. (VRP 101-104)

A nurse practitioner who saw Betty for some medical issues from 2002 to 2011 also testified that she was alert, oriented, well groomed, and not displaying any confusion during the time she saw her. (VRP 416-418) Betty worked cleaning houses for most of her life, drove up until the time of her death, cared for grandchildren 2-3 days a week, and lived independently in her own home. (VRP 176-177, 242, 250-251, 295-296) While Aaron testified generally that his mother had abused prescription pills and drank alcohol in the 60's, (but was not an alcoholic), Aaron was not present when Betty signed her will or the written instructions for personal property. (VRP 132-134, 177-178)

Betty Lowe's husband Donald had predeceased her in 2003. (Trial Ex. R-118) His will did not leave his residuary estate (other than specific bequests) to any named individual, but instead to his "Personal Representative"; the first Personal Representative named was Aaron, with his ex-wife Denise being the first alternate, and Lonnie being the last alternate. (Trial Ex. P-31) All three filed declinations to serve as Personal Representative, and Aaron filed an Affidavit nominating his mother Betty

to serve as personal representative. (Trial Exs. P-118, R-119, R-120) As a result of the lack of a named individual to inherit the residuary estate, it passed via the laws of intestacy; Attorney Robert Lamp filed the petition to administer Donald's estate with Betty Lowe as Administrator. (Trial Ex. P-118, VRP 396-397, 437-438. All property was community, and thus was distributed entirely to Betty by law. (Trial Ex. R-122, VRP 397, 435) Donald Lowe's probate was completed and closed without objection in 2004. (VRP 400-401, 438)

Testimony at trial established that Donald Lowe had collected a variety of metals in the form of silver bars, silver coins and other collectable coins and currency. (VRP 117) Aaron testified he had seen over 20 silver bars in Donald's possession when Aaron was 14 or 15 years old. (VRP 117) Another witness, Donald Poindexter, also testified that he helped move 22 silver bars and bags of coins to the fireplace flume in the Lowe home approximately 35-40 years ago, possibly in the early '80s. (VRP 217-218) Mr. Poindexter was not in the house again, except during that two week period when he helped move the silver and other coins. (VRP 219-220) Neither Aaron nor Mr. Poindexter testified they had seen any of the silver bars since that time; Aaron speculated that his father did not dispose of any of them, but admitted he did not know where they all were, or whether his father had accessed the silver in the many years

before he died. (VRP 174-175) These metals were not specifically listed in the probate of Donald's estate, but it is undisputed the entirety of the estate went to Betty as community property. (VRP 438)

Lonnie, at his mother's direction and in her presence, removed silver bars and bags of silver coins from her home on three or four occasions between 2004 and 2007. (VRP 68-69, 253-261) One silver bar weighed approximately 1000 ounces. (VRP 94) Betty directed that it be sold, and the money was utilized for various expenses Betty incurred, including a new roof, other work on her house, and the purchase of an automobile. (VRP 94-95, 261-262, 265-267) The silver was stored at Lonnie's home, again at his mother's direction. (VRP 263-264) Lonnie did not inventory or account for the silver his mother directed him to remove while she was living, nor did he keep track of what she sold or spent. (VRP 97-98)

Over the course of his mother's life, Betty gifted cash to Lonnie at various times, but that he did not exercise any powers under the Power of Attorney to obtain any of his mother's assets during her life. (VRP 95, 263-264) He did not gift himself any of her property, either proceeds from the sale of the silver, the silver itself, or from her bank accounts, on which he was a signator. (VRP 245-246, 263-264, 267) No contrary evidence was presented, and Aaron admitted he had no documentary evidence to

establish any of his claims. (VRP 155) Similarly, no evidence was presented that Lonnie improperly influenced or controlled Betty in her decisions on the distribution of her assets in her will or the written instructions.

After his mother's death, in accordance with the written instructions, Lonnie sold some of the silver coins and retained the money for himself. (VRP 80-85) He inventoried the silver and other assets of the estate in the necessary pleadings in the probate, including the silver he had sold for himself. (CP 5-10, VRP 279)

Based on this evidence, the trial court issued a Memorandum Opinion and then Findings of Fact and Conclusions of Law finding no basis for Aaron's myriad of claims. (CP 134-147, CP 182-189)

Aaron has filed an appeal listing seven Assignments of Error, many of them appearing to be interrelated, and based largely on unsupported allegations regarding the existence of undiscovered assets, and the claims that the property was usurped by Lonnie and should have gone to Aaron via his father's wishes. However, it is undisputed Aaron's father's estate had been long since distributed to Betty and no challenge to it was properly made here. The evidence and law instead established that Betty's estate was properly distributed, and no basis existed to find that Lonnie engaged in any misconduct in relation to his mother while she was

`alive, nor in his relation to her estate after she died. As a result, no basis exists to overturn the trial court's findings and conclusions.

3. Law.

A trial court's findings of fact are subject to the "clearly erroneous" standard of review; a finding of fact is clearly erroneous when, although there is some evidence to support it, a review of all the evidence leads to a "definite and firm conviction that a mistake has been committed." Schryvers v. Coulee Community Hosp., 138 Wn.App. 648, 654, 158 P.3d (2007). The Court of Appeals defers to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness and credibility of witnesses. Norcon Builders, LLC v. GMP Homes VG, LLC, 161 Wn.App. 474, 498, 254 P.3d 835 (2011). A question of law is reviewed de novo. Id.

Here, Aaron challenges both findings of fact and legal conclusions, but provides no basis for this court to find error below. There is a presumption in favor of the trial court's findings, and the party claiming error has the burden of showing that a finding of fact is not supported by the substantial evidence. Norcon, 161 Wn.App. at 497. An appellant also has the burden to support its assignment of error of law with authority and legal argument. Riksem v. City of Seattle, 47 Wn.App. 506, 513, 736 P.2d 275 (1987). Aaron has not met these burdens; while many of Aaron's

claims are interrelated and thus continually duplicate the same underlying inaccuracies, Lonnie will address what appear to be the issues in the order of the Assignments of Error for the Court's convenience.

3.1 The trial court did not err in finding that the written instructions left by Betty Lowe properly distributed all her silver to Lonnie Lowe. [Assignment of Error No. 1]

Aaron fails to properly state the terms of the "separate writing" statute; by law, Betty Lowe's will and additional writing could (and did) dispose of any precious metals in her estate, including silver bars and coins.

RCW 11.12.260(1) provides that a will may refer to a writing that directs disposition of "tangible personal property" not specifically disposed of by the will. To be effective, the decedent's will must refer to the writing; the writing must be signed by the testator; and the writing must describe the items and the recipient "with reasonable certainty." RCW 11.12.260(1). "Tangible personal property" is broadly defined to include:

> **...precious metals in any tangible form, for example, bullion or coins**. The term includes articles even if held for investment purposes and encompasses tangible property that is not real property. The term does not include...intangible property, for example, money that is normal currency or normal legal tender... (Emphasis added)

RCW 11.12.260(4).

It is undisputed that Betty Lowe's will properly referred to a written list of instructions for disposition of tangible personal property. (Trial Ex. P-15) It is further undisputed that the written instructions were signed by Betty Lowe on September 11, 2007, and left "to Lonnie O. Lowe any and all silver coins and bars to distribute as he shall determine or retain for himself." (Trial Ex. R-103) Thus, it is simply a matter of statutory interpretation to determine whether the instructions could leave the silver to Lonnie. See, Scheib v. Crosby, 160 Wn.App. 345, 350, 249 P.3d 184 (2011) (when an action turns on the correct interpretation of a statute, the standard of review is de novo).

The statute specifically allows precious metals to be distributed via such written instructions, even if in "coin" form; only "normal money" is exempted by statute. Contrary to Aaron's assertion that the silver coins are "legal tender," which could not be included in the written instructions, Washington's statute expressly includes them as tangible personal property. The coins were not "normal money" which had face value, but were instead investment type property not used as legal tender.

Aaron further asserts that the written instructions did not sufficiently identify the silver or the recipients, and thus the trial court erred by finding they were properly distributed under the written instructions. The writing itself identifies "any and all" silver coins and

bars; the use of the term "any and all" does not create any uncertainty or ambiguity. "Any" can include "some"; an "indefinite number"; and is often synonymous with "all" or "every"; "all" is defined as "the whole of." Black's Law Dictionary (5th ed.) Use of the terms together is broadly inclusive and could only mean each and every item of silver that existed at the time.[3] This is what Betty intended, and what her attorney drafted to accomplish. (VRP 447) No inventory or listing is necessitated when the description is so inclusive. Moreover, Lonnie did inventory and identify the silver he sold after his mother's death, as well as that which remains in his possession. (CP 5-10)

Further, the recipient is sufficiently and specifically identified as Lonnie Lowe; that he was also given the right to distribute to others if he chose does not render the identification of the beneficiary unclear. It is a valid testamentary disposition to leave property to be disposed of at the discretion of another. See, In re Lidston's Estate, 32 Wn.2d 408, 418, 202 P.2d 259 (1949). Thus, the trial court did not err in finding the written instructions were enforceable under the relevant statute to pass all existing silver to Lonnie.

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[3] Any silver Betty disposed of during her lifetime would not be included in the distribution to Lonnie in accordance with the written instructions, and is irrelevant to the determination of this issue. (See, VRP 499)

3.2 No evidence exists that Lonnie Lowe tortiously interfered with his brother Aaron's right to inherit, or that the law supports such a claim. [Assignment of Error No. 2]

Washington has not explicitly applied the tort of economic interference to probate cases where a petitioner's claim for interference with an inheritance expectancy essentially works the same result as a will contest–overriding a will.[4] Even if this Court were to recognize the tort of economic interference with respect to an inheritance expectancy, Aaron's burden of proof should remain that of a will contest–clear, cogent, and convincing,[5] and no such evidence existed here. In fact, no quantum of proof was presented.

To succeed in a standard claim for tortious interference with economic expectancy, there must be clear, cogent, and convincing evidence: (1) the existence of a valid contractual relationship or business expectancy; (2) that the claimed interferer had knowledge of that relationship or business expectancy; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) that the claimed interferer interfered for an improper

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[4] See, In re Estate of Hendrix, 2006 WL 2048240, at *16 (Wn. App. Div. 1). This case is not being cited for precedential value, but rather is offered merely to show how other Washington courts have addressed this claim.

[5] Id. at *18.

purpose or used improper means; and (5) resulting damage. WPI 352.01; Hudson v. City of Wenatchee, 94 Wn. App. 990, 998, 974 P.2d 342 (1999).

The evidence at trial failed to show any of these required elements. While the Appellant's Brief discusses how such a claim may or may not be handled in other states or by other treatise writers, and what the burdens of proof may be in those instances these authorities are irrelevant here. Aaron fails to present any evidence of the necessary elements of tortious interference under Washington law, including any wrongful interference, or improper motive, to establish that the trial court erred. Aaron apparently bases his claim "on the entire record" and asserts that Lonnie "diverted 80% of the parents community assets to Lonnie." (Appellant's Brief, p. 62) However, he fails to establish that Lonnie took Betty's assets for his own use prior to her death, or did anything other than accept the distributions made to him in his mother's will and written instructions after her death. At trial, it was this conduct that Aaron claimed gave rise to his tortious interference claim:

> Q. Now, you know in this case that we've alleged tortious interference...[w]hat's your facts that you know of thinking that Lonnie interfered?
>
> A. Well, he took the - - funds that I was supposed to have to have to look after my mother, and he used

> them for himself. And that's how he interfered with the whole situation.

(VRP 148)

This evidence does not establish that Aaron had any lawful expectancy in his mother's assets, or that there was improper interference with her desired distribution. Betty was entitled to execute testamentary documents leaving her assets as she chose, and it is her choice of which Aaron complains. Barring evidence to support the necessary elements of the claim, the trial court did not err in concluding no proof was offered to establish intentional interference.

3.3 The trial court did not abuse its discretion in denying Appellant's motion to amend his petition two weeks before trial to add claims based on reopening his father's estate, which had been closed for over 10 years, or for new statutory claims of financial abuse. [Assignments of Error Nos. 3, 4, 6 and 7]

On August 23, 2013, Aaron filed, along with his trial brief, a Motion to file a Second Amended and Supplemental Petition, which alleged, for the first time, facts relating to the Estate of Donald E. Lowe and the purported rights of the parties thereunder, requesting that Donald's estate be reopened and assets distributed to Aaron. (CP 166-171; CP 37-53) It further alleged that Lonnie "cannot inherit from Betty L. Lowe as he is disqualified as her Abuser," apparently attempting to add claims under the "Vulnerable Adult Act," and the "Inheritance Rights of Slayers

and Abusers," RCW 11.84.010 et seq., and RCW 74.34.010 et seq. (CP 47-49)

Lonnie opposed the motion to amend because it was untimely, unfairly prejudiced him, and was futile, as it related to Donald's estate, which could not be reopened. (Respondents' Supp. CP ___; Superior Court Docket #78) The trial court properly denied leave to amend, which eliminated Aaron's claims relating to his father's estate, and Lonnie's alleged "financial abuse" of his mother to preclude inheritance. (CP 55-56) The fact that the probate of Donald's estate was not at issue undermines the majority of Aaron's claims of error, which are based in large part on his claim that he was entitled to have inherited his father's property, and that his mother never had proper possession of it, and thus she could not use or distribute it via testamentary documents.

At trial, the court allowed some testimony regarding Donald's estate to confirm that there existed no basis to reopen it. These findings were properly supported by the evidence; while not necessarily before the court, this evidence further establishes the lack of any basis for Aaron to claim the right to his mother's property obtained in the probate of his father's will.

(a) The motion to amend was properly denied.

A trial court "should" deny a motion to amend a pleading if the amendment would prejudice the opposing party. Ives v. Ramsen, 142 Wn.App. 369, 387, 174 P.3d 1231 (2008). In determining whether prejudice would result, the court can consider potential delay, unfair surprise, or the introduction of remote issues. Karlberg v. Otten, 167 Wn.App. 522, 529, 280 P.3d 1123 (2012).

The trial court has discretion to deny a motion to amend when it is made close to trial. See, Ensley v. Mollmann, 155 Wn.App. 744, 230 P.3d 599 (2010) (motion to amend denied when made after significant motions, 10 months after depositions, and two months before scheduled trial); Tex Enterprises, Inc. v. Brockway Standard, Inc., 110 Wn.App. 197, 39 P.3d 362 (2002), rev'd on other grounds, 149 Wn.2d 1014 (2003) (motion to amend denied when made one week after discovery closed and two weeks before trial); Elliott v. Barnes, 32 Wn.App. 88, 92, 645 P.2d 1136 (1982) (leave to amend properly denied when motion came one week before trial date).

When a party has already determined and disclosed its witnesses, and its defenses were based on the original claims, the trial court does not abuse its discretion in denying a motion to amend made less than three

months before the trial date. See, Donald B. Murphy Contractors, Inc. v. King County, 112 Wn.App. 192, 199-200, 49 P.3d 912 (2002).

The prejudice to Lonnie and the Estate was apparent. They could not meet and challenge the new claims and allegations made in the Second Amended Petition less than three weeks before trial. The claims relative to the Vulnerable Adult Act and Inheritance Rights of Slayers and Abusers statute had multiple elements of proof, necessary findings, defenses, significantly different discovery, potential experts, different witnesses, different legal research and preparation, and the potential for dispositive motion practice prior to trial. See, RCW 11.84.010 et seq.; RCW 74.34. et seq.

The same was true of any new claims surrounding the disposition of Donald Lowe's Estate. Dispositive motions would have needed to be entertained, and evidence regarding that distribution would have needed to be established. Respondents could not be required to face an entirely different case than the one currently scheduled for trial in three weeks.

Moreover, a court may consider whether an amendment is futile. Ino Ino, Inc. v. City of Bellevue, 132 Wn.2d 103, 142, 937 P.2d 154 (1997). And when it is obvious from the record why an amendment would have been futile, the trial court does not abuse its discretion in denying it. Snohomish Regional Drug Task Force v. 414 Newberg Rd., 151 Wn.App.

743, 761, 214 P.3d 928 (2009). Donald Lowe's probate closed in 2004, and the statute of limitations has long since run on any claims relative to the distribution of that estate. A challenge to the distribution of an estate's assets must be made within four months of such probate. RCW 11.24.010; In re Estate of Kordon, 157 Wn.2d 206, 214, 137 P.3d 16 (2006) (court has no jurisdiction to hear probate contest begun after time fixed in statute has expired). Adding any claim relative to the distribution of Donald's estate assets to his wife Betty was thus futile, and would have been subject to dismissal.

Aaron's attempt to add claims that Lonnie could not inherit as an "abuser" of a vulnerable adult was similarly futile. A cause of action for damages under the Vulnerable Adult Act is limited to defendants providing home or facility health type care, and is to be brought **by** the vulnerable adult. See, RCW 74.34.200. Lonnie was not a health or services care provider, and Betty could not bring the action. Moreover, under the "Abuser Inheritance" Act," one of the necessary elements is to have a "vulnerable adult" as defined by RCW 74.34.010(17). Aaron's Second Amended Petition did not sufficiently plead that Betty qualified by being functionally, mentally or physically unable to care for herself, was under guardianship, or receiving other skilled care. Id. Instead, it generally pled that she had not been allowed to manage finances by her

husband, who died in 2003. Betty was not "vulnerable" as defined by the statute and the claim would be futile.

Thus, Aaron's Second Amended Petition was untimely, would have prejudiced the opposing parties, and was likely futile. There simply existed no good cause to allow it. As a result, the court did not abuse its discretion in denying the Second Amended and Supplemental Petition, and claims regarding the improper distribution of Donald's estate were not before the trial court.

(b) The trial court did not err in its findings regarding the events of Donald Lowe's estate, or in concluding no basis existed to reopen that estate.

While not directly before the trial court based on the denial of Aaron's motion to amend, the trial court did not err in refusing to find that property belonged to Aaron based on his father's estate distribution.

The undisputed evidence was that Donald Lowe's estate closed in 2004. (VRP 437) After all three Personal Representatives declined to serve, the estate was administrated as an intestate estate with Betty Lowe, Donald's wife of 60 years, as the administrator. (Trial Ex. P-118) The laws of intestacy pass all community property and half the separate property to the surviving spouse. RCW 11.04.015. The attorney handling Donald's estate testified the property was all community and passed lawfully to Betty. (VRP 437-438)

The undercurrent of all of Aaron's complaints about Lonnie's position as Betty's heir revolve around a letter Donald wrote indicating his wishes were for Aaron to have his estate to look after Betty, and the lack of inventory of the silver at the time of Donald's death. (Trial Ex. P-35) The letter was not a testamentary document, and did not impact the distribution of Donald's estate. (VRP 458, 487-488) Moreover, the entirety of property passed to Betty, and thus the lack of inventory of different property would not have impacted the distribution. And ultimately, no challenge to the distribution was timely filed.

3.4 No basis existed to find that Lonnie Lowe breached any fiduciary obligations, or should have been removed as Personal Representative. [Assignment of Error No. 5]

First, Aaron confuses and interrelates Lonnie's obligations as the Personal Representative of his mother's estate with Betty's use of her own funds prior to her death. Lonnie was Betty's fiduciary prior to her death as her son and power of attorney, but did not have obligations to control her use of property while she was alive, and this did not breach any standard of care of a fiduciary, which proximately caused damage, proof of which Aaron was required to establish. See, Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP, 110 Wn. App. 412, 433, 40 P.3d 1206 (2002).

The uncontroverted testimony at trial was that Lonnie never removed any property, including silver, from his mother's home while she

was alive without her consent, presence, and direction to do so. (VRP 68-69) It is similarly undisputed that Lonnie stored the property in his home at his mother's direction, and did not take it, sell it, or spend it for his own use prior to her death. (VRP 94-95, 253-267) Lonnie did not exercise any authority under the "Power of Attorney" in relation to Betty's property prior to death, nor did he gift any of her assets to himself. (VRP 95, 245-246, 263-264, 267) Betty directed the sale of some of the property and used the money for various expenditures including a new roof on her house, a car, and remodeling work. (VRP 94-95, 261-262, 265-267)

There was simply no evidence offered that Lonnie "secreted" the property without her knowledge or "stole" it from her. While she was alive, the property was hers to use at her discretion, and there existed no requirement that she (or Lonnie) inventory or account for her use of her own property. All of the authorities cited by Aaron relate to the obligations of a Personal Representative after the death of the testator, and create no basis to allege breach of Lonnie's obligations in doing as his mother directed prior to her death. (They are also based on the Vulnerable Adult/financial abuser statutes, which are not before the court.)

Next, the claim that Lonnie breached his fiduciary duties owed to the Estate as Personal Representative by failing to maintain accurate

records of Betty's assets after her death and failing to file an accounting was not supported by any evidence at trial.

Instead, evidence at trial established that Lonnie maintained sufficient records of the estate, and that he prepared an inventory and appraisement of the estate as required by statute. Lonnie filed an initial inventory and appraisement on February 6, 2012, and filed an amended inventory and appraisement on September 24, 2012. (CP 5-10) Lonnie did as he was advised by Robert Lamp regarding the appropriate steps to probate an estate. (VRP 279, 455-456)

Further, the trial court properly refused to find a basis to remove Lonnie as Personal Representative. The Court's power to do so is found in RCW 11.68.070. To remove a Personal Representative, the court must have reason to believe, based on valid evidence, that the Personal Representative "has wasted, embezzled, or mismanaged, or is about to waste, or embezzle the property of the estate committed to his or her charge, or has committed, or is about to commit a fraud upon the estate, or is incompetent to act, or is permanently removed from the state, or has wrongfully neglected the estate, or has neglected to perform any acts as such personal representative, or for any other cause or reason which to the court appears necessary..." RCW 11.28.250; In re Estate of Jones, 152 Wn.2d 1, 10, 93 P.3d 147 (2004).

No evidence at trial satisfied the requirements of RCW 11.28.250. The wrongful conduct alleged by Aaron appear to relate to claims that Lonnie improperly removed assets from the home prior to Betty's death to which Aaron claims some right, and speculation on the amount of silver which remained from a "hoard" which Aaron witnessed 30 of 40 years before Betty's death. However, Betty had complete ownership of the property, including that from Donald's estate, and Lonnie was the beneficiary of the silver after Betty's death. There is thus no evidence that Lonnie "wasted," "mismanaged" or "embezzled" any estate property after Betty's death or failed in his obligations in any way that injured the estate. Aaron cannot claim mismanagement of assets **before** Betty's death caused any basis to remove the Personal Representative appointed upon death, nor is there any evidence that anyone but Lonnie was entitled to the silver, the asset about which Aaron primarily argues. The inventories of the assets of the estate are of record and no evidence suggests they are inaccurate. (CP 5-10) All of Aaron's conclusory allegations are based on his own misperceptions and are not grounded in any facts or evidence.

3.5 No evidence existed that Lonnie Lowe "financially abused" his mother Betty by undue or improper influence over Betty.[6] [Assignment of Error No. 7]

To the extent Aaron's claims of undue influence or "financial abuse" of Betty remain even without the second amended pleading, the trial court properly found no facts to support such claims, and concluded that Lonnie did not engage in misconduct relative to Betty's finances when she was alive, or in the execution of her testamentary documents. There was no proof that Lonnie gifted any of Betty's assets (silver, money, real property, bank accounts, etc.) to himself. The uncontroverted evidence was instead that Lonnie did as directed by his mother, who had the capacity to make her own decisions.

There is similarly no evidence that Lonnie exerted control or influence over Betty in her decisions regarding her Will or written instructions. Betty sought legal counsel on both, who verified she was competent to execute them. (VRP 385-390, 439-443) Lonnie was not present for either documents execution and did not draft either of them. (VRP 246-249, 385, 439-442) Witnesses testified they saw no evidence of control or coercion by Lonnie. (VRP 420-421, 439)

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[6] In some of Aaron's brief, he continues to note that Lonnie influenced his mother improperly, and challenges the trial court's finding as to undue influence in Assignment of Error No. 7. While it is unclear whether this remains an issue, Respondent will address it briefly here.

To establish claims of undue influence, there should be evidence of actions that are "so importunate, persistent, or coercive" that they take away the testator's "freedom of action". In re Estate of Marks, 91 Wn.App. 325, 333, 957 P.2d 235 (1998) (giving advice or persuasion is insufficient). Moreover, the court can consider the health or mental vigor of the testator, and whether the beneficiary actively participated in the preparation or procurement of the Will, and whether the distribution appeared "natural." In re Melter, 167 Wn.App. 285, 299, 273 P.3d 991 (2012). The trial court properly analyzed the evidence to reach its conclusion on the lack of the necessary quantum of proof of any undue influence. See, In re Meller, 167 Wn.App. at 299 (burden of proof of party claiming undue influence is "clear, cogent and convincing").

3.6 The trial court did not err in finding that Lonnie had not improperly accepted or retained gifts during his mother's lifetime under his Power of Attorney. [Assignment of Error No. 8]

Aaron further argues that inter vivos gifts from Betty to Lonnie were instead transfers Lonnie made to himself using Betty's power of attorney. An unexplained transfer of money from a parent to a child raises the presumption that the parent intended a gift; a party may rebut the presumption only by proof that leaves no reasonable doubt as to this

intent. In re Estate of Miller, 134 Wn. App. 885, 895, 143 P.3d 315 (2006).

The only evidence at trial established that Betty would from time to time give Lonnie gifts of cash. (VRP 95, 263-264) Lonnie did not utilize his Power of Attorney in accepting such cash, nor did he exercise his Power of Attorney to obtain any of Betty's property prior to her death. (VRP 95, 263-264) The silver Lonnie removed from Betty's home was accomplished at Betty's direction, with the last removal occurring in approximately 2007. (VRP 253-261) The trial court properly ruled that no such conduct occurred, and thus all the cases cited regarding the obligations of one exercising a Power of Attorney are inapplicable. No erroneous Finding of Fact or Conclusion of Law was made.

3.7 The trial court properly awarded attorney fees to Lonnie Lowe as the prevailing party, and this court should award fess on appeal. [Assignment of Error No. 9]

Washington's probate statute (Title 11 RCW) gives this Court great discretion in awarding costs and attorney's fees to parties in probate proceedings. RCW 11.96A.150. The statute does not even restrict attorney's fees to prevailing parties. See, In re Estate of Burmeister, 70 Wn.App. 532, 540, 854 P.2d 653 (1993), rev'd on other grounds, 124 Wn.2d 282 (1994). The court can order the costs and fees be paid

from (a) any party, (b) the assets of the estate or trust, or (c) any nonprobate asset subject to the proceedings. RCW 11.96A.150(1). The statute permits an award of fees and costs against an individual party to the litigation even if there is no substantial benefit to the estate. McDonald v. Moore, 57 Wn. App. 778, 783, 790 P.2d 213 (1990). The court may, in its discretion, order the costs and fees "be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate..." RCW 11.96A.150(1). Further, if a will contest is brought without probable cause or without good faith, costs may be assessed against Petitioner. RCW 11.24.050.

Under TEDRA, the appellate court can review an award of fees under the abuse of discretion standard. In re Guardianship of Lamb, 173 Wn.2d 173, 198, 265 P.3d 876 (2011). Similarly, the Court of Appeals will not interfere with an allowance of attorney fees in a probate matter unless there are facts "clearly showing an abuse of the trial court's discretion." In re Estate of Marks, 91 Wn.App. at 337.

Here, the trial court's findings and conclusions found that each and every claim made by Aaron was factually incorrect, and provided no basis for relief under the law. The trial court thereafter ruled that each and

every claim implicated disposition of probate property and thus an award of fees was proper. (CP 315-317) The trial court exercised its discretion to find that fees were properly awarded to Lonnie who properly took all legitimate steps to uphold Betty's testamentary documents, and no proof of improper conduct was presented, and as a result, the litigation resulted in no substantial benefit to the estate. (CP 316) There is no basis to find that the trial court abused its discretion in this regard.

Aaron's assertion that fees were improperly granted ignores the substantive rulings regarding his claims, and asserts a conflict of interest between Lonnie and the estate, which he asserts somehow prohibits the trial court from exercising discretion to award fees. All of the claims relative to the trial court's substantive holdings will not be reargued, but the result made clear that Lonnie thoroughly prevailed and incurred fees which did not benefit the estate.

Moreover, the evidence fails to establish any conflict in Mr. Devlin's representation of Lonnie, and Aaron misrepresents attorney Robert Lamp's testimony in this regard. For example, Aaron claims that Mr. Lamp and Lonnie's testimony "conflict" regarding the necessity to document or record gifts, which Lonnie admits he did not keep specific track of. (See, Appellant Brief, pp. 31-32) However, the record actually reflects that Mr. Lamp testified that a Power of Attorney who gifts the

property (i.e. gifts to himself from the property of the principal) may want to keep a record; if the gift was made individually, no necessity would require such records. (VRP 460-461) And Mr. Lamp's testimony relating to a potential conflict was in regards to questions about Donald Lowe's estate, not Mr. Devlin's representation of Lonnie in his capacities here. (VRP 490-491) Further, the estate was also separately represented by William O. Etter.

As a result, the court properly exercised discretion and no abuse of that discretion has been established.

3.8 Respondent is entitled to attorney fees incurred in the appeal.

Lonnie further requests fees incurred in this appeal, pursuant to RAP 18.1; In re Estate of Hayes, ___ P.3d ___, 2015 WL 344249 (Wash.App. January 27, 2015) (when applicable law grants a party the right to recover attorney fees on appeal, the party must request the fees in its brief). The TEDRA statute provides the court with discretion to award attorney fees on appeal. RCW 11.96A.150(1); In re Estate of Wright, 147 Wn.App. 674, 688, 196 P.3d 1075 (2008). Here, Lonnie thoroughly prevailed below and was entitled to fees for that effort. The same basis exists to award fees incurred here. As Personal Representative, he is charged with properly enforcing the testamentary documents Betty

prepared, and distributing her assets in accordance with her wishes. This appeal continues to challenge that distribution and fails to benefit the estate by making unfounded charges of misconduct. Lonnie incurred additional fees in having to respond to the appeal, which he should be awarded here.

4. Conclusion.

For the foregoing reasons, Respondents request that the trial court's judgment be affirmed, and that Respondents be awarded attorney fees incurred in this appeal.

DATED this 9 day of February, 2015.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on the 9 day of February, 2015, at Spokane, Washington, the foregoing was caused to be served on the following person(s) in the manner indicated:

Robert Kovacevich Robert E. Kovacevich, P.L.L.C. 818 W. Riverside, Suite 525 Spokane, WA 99201	**VIA REGULAR MAIL** ☐ **VIA CERTIFIED MAIL** ☐ **HAND DELIVERED** ☒ **BY FACSIMILE** ☐ **VIA FEDERAL EXPRESS** ☐
William O. Etter Witherspoon Kelley 422 W. Riverside Ave., Suite 1100 Spokane, WA 99201-0302	**VIA REGULAR MAIL** ☐ **VIA CERTIFIED MAIL** ☐ **HAND DELIVERED** ☒ **BY FACSIMILE** ☐ **VIA FEDERAL EXPRESS** ☐

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