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No. 64303-7

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

In re the ESTATE OF JAMES W. HAVILAND,

Deceased.

DONALD HAVILAND, MARTHA CLAUSER,
and ELIZABETH HAVILAND,

Appellees,

v.

MARY HAVILAND, Beneficiary, and ROBERT VAN CITTERS, and
GEORGE PAUL COOK, Former Personal Representatives of the Estate
of James W. Haviland, Deceased,

Appellants.

APPELLANTS' REPLY BRIEF

Ladd B. Leavens, WSBA #11501
William K. Rasmussen, WSBA #20029
DAVIS WRIGHT TREMAINE LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
(206) 622-3150 Phone
(206) 757-7700 Fax

*Attorneys for Appellants Mary Haviland,
Robert Van Citters, and George Paul Cook*

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I. INTRODUCTION

A litigant who alleges the invalidity of a will as a consequence of undue influence in Washington bears the burden of proving by clear, cogent and convincing evidence that the testator acted under influence tantamount to force or fear. The respondents in this case asserted the invalidity of Jim Haviland’s 2006 Will based on the alleged undue influence of his wife, Mary. Citing *Dean v. Jordan*, 194 Wn.2d 661, 79 P.2d 371 (1938), the trial court invoked a *presumption* that the 2006 Will was the product of undue influence, saying that “[c]lear, cogent and convincing evidence supports a *presumption*” that the will was the product of undue influence by Mary. CL 9 (CP 755) (emphasis added). In support of its invocation of this presumption, the Court recited a number of factors that are salutary characteristics of relationships between happily married and devoted spouses – that Mary was Jim’s fiduciary, that she participated in Jim’s creation of the 2006 Will, and that she was Jim’s caregiver. The Court also concluded that Mary received an unnaturally large share of Jim’s estate in comparison to Jim’s prior estate plan, even though it is common for one spouse to leave everything to the other. The Court then imposed on Mary the burden of “balancing the scales” in the face of this presumption, and held that she had failed to carry this burden.

The application of the *Dean v. Jordan* presumption under the facts of this case, or of any case in which will contestants assert the undue influence of a spouse, will inevitably lead as it did here to a perverse result, in which the spouse is penalized for doing exactly the things that one spouse should do, and that society encourages one spouse to do, for the other. The Court's application of *Dean v. Jordan* placed Mary in the impossible position of having to explain and defend ten years of Jim's and her financial life, which had little if any relevance to the execution of the January 2006 Will.

Respondents in their Brief of Respondents ("Opp. Br.") unpersuasively defend this application of *Dean v. Jordan* to a married couple. They adopt a scattershot approach to describing ten years of Jim and Mary's financial affairs. They rely on a partial record, double count expenditures, and call the evidentiary jumble Mary's problem to unravel. They stretch the record and gratuitously attack Mary personally. The Court erred as a matter of law in applying the *Dean v. Jordan* presumption. There is no evidence, and clearly no substantial evidence on the record, that the 2006 Will was the product of undue influence.

II. ARGUMENT

A. The Court Misapplied the *Dean v. Jordan* Test.

Respondents argue that Washington courts have not reassessed *Dean v. Jordan* in the husband and wife context, but cite only two Washington cases in which undue influence by a spouse has been subsequently considered: *Estate of Lint*, 135 Wn.2d 518, 927 P.2d 755 (1998), and *Estate of Kinssie*, 35 Wn.2d 723, 214 P.2d 693 (1950). *Lint* presents an extreme case, in which the testator was diagnosed with terminal brain cancer and severe aphasia. The beneficiary of the challenged will had begun to assert dominion over her just eight months before she died, at age 64. He fired her housekeeper, took her out of a hospice, and isolated her from her friends and family. He hired caregivers who were employees of his company, and instructed them to falsify the logs of her care. The testator was completely incompetent – her speech was “word salad,” she buttered a photograph and attempted to eat it, she tried to brush her teeth with cleaning fluid. The beneficiary took the testator to Las Vegas, where he was able to obtain a marriage license and find someone to marry them. When they applied for the license, the testator could not fill out the marriage license or answer questions about her family, and wandered around the courthouse picking up pencils. The beneficiary then fired the testator’s long standing estate planning lawyer

and hired a new lawyer to write a new will. The new will, which the testator executed a month after the “marriage” and a month before her death, gave the beneficiary substantial gifts. The Court invalidated the will – on grounds of fraud, and also undue influence – and also invalidated the marriage itself. The question of the appropriateness of burden shifting presumptions was not presented or argued in the case.

The facts in *Estate of Kinssie* likewise did not present the issues here. *Kinssie* in fact supports Mary’s position, because the court in *Kinssie* obviously viewed the marital relationship between the testator and his wife as raising no presumption whatsoever, notwithstanding that the testator and his wife had been married for some eight years, and that the wife was the testator’s caregiver. Although the court in *Kinssie* cited *Dean v. Jordan*, it did not discuss presumptions at all, or suggest that the marriage relationship or the wife’s care responsibilities raised any presumption.

Respondents argue that modifying the application of *Dean v. Jordan* would “conflict with marital and fiduciary law,” Opp. Br. at 31. In fact, testamentary dispositions of property are governed by a separate set of principles, in light of the importance accorded to the testator’s right to dispose of his property according to his wishes, and in light of the fact that the testator is not alive to defend his decisions when his will is

challenged. The authorities that respondents cite in support of this proposition are inapposite. In *Peste v. Peste*, 1 Wn. App 19, 459 P.2d 70 (1969), a former spouse attacked a property settlement agreement entered into in connection with her divorce. The court cited RCW 26.16.210, upon which respondents rely, but did not overturn the challenged transaction. RCW 26.16.210 itself has never been cited in the testamentary context, but rather has been applied where creditors allege that one spouse has fraudulently transferred assets to the other in order to avoid creditors, *see, e.g., Jones v. Jones*, 56 Wn.2d 328, 353 P.2d 441 (1960), or, as in *Peste v. Peste*, where the marriage has broken apart and one spouse is alleging that the other has taken advantage in the dissolution transaction. *Bryant v. Bryant*, 125 Wn.2d 113, 882 P.2d 169 (1994) is entirely off point, holding only that a general power of attorney does not authorize a spouse (or anyone, for that matter) to make a gift of community property, or any other property, without specifically so stating. Modifying *Dean v. Jordan*, or overruling it entirely, would have no impact on, and would not conflict with, fiduciary or community property law.

Respondents argue that courts in other states have applied a presumption similar to that in *Dean v. Jordan* in the context of a marriage, and cite several cases in support of the proposition. Opp. Br. at 32-33. It is true that in some limited circumstances some courts have uncritically

applied a *Dean v. Jordan* type presumption in the context of a marriage relationship. It is also true, as Mary pointed out in her opening brief, that several courts have held that a *Dean v. Jordan* presumption should not be applied in the marriage context. Respondents' authorities generally offer no analysis; and in several of the cases dissenting judges make a convincing argument for the position that Mary advances here – that application of the presumption to a spouse fails to recognize the unique nature of the marital relationship and leads to perverse results. In *Estate of Teel*, 154 P.2d 384 (Cal. 1944), for example, a compelling dissenting opinion by four of the panel's judges defends the very proposition that Mary argues here:

A further restriction upon the rule giving the contestant of a will the benefit of a presumption of undue influence under the circumstances which have been stated was made by the District Court of Appeal when it declared: 'The instances will be found rare where our Supreme Court has permitted a will to be upset solely upon the ground of undue influence where the charges have been made against the husband or wife. No presumption is permitted to be indulged against this relation in this state, and it is not permitted in most other jurisdictions.' *In re Estate of Carson*, 74 Cal. App. 48, 65, 239 P. 364, 372. This conclusion was, in part, based upon the case of *Estate of Langford*, 108 Cal. 608, 41 P. 701, where it was said that a wife may justly influence the making of her husband's will for her own benefit so

long as she does not act fraudulently.
'Accordingly, the circumstance that the testator's wife urged upon him the propriety of leaving his property to her does not constitute undue influence to vitiate the Will. * * * And the mere fact that the will of the husband is changed to gratify the wishes of the wife does not raise a presumption of undue influence on her part. * * * In order to set aside a will for undue influence, *there must be substantial proof of a pressure which overpowered the volition of the testator at the time the will was made.* 108 Cal. at page 623, 41 P. at page 705.

Estate of Teel, 154 P. at 391 (emphasis added). The four judges ended their dissent by stating:

Moreover, a will that favors a spouse over an adult daughter is not necessarily unnatural. This is especially true, as in the present case, where the daughter is a married woman, living with her husband, is self supporting and not dependent upon her mother. *In re Estate of Stone*, 172 Cal. 215, 222, 155 P. 992.

Estate of Teel, supra, at 391-92.

In *Cook v. Huff*, 552 S.E.2d 83 (2001), there was no discussion in the majority opinion of any presumption of undue influence. As in *Estate of Teel*, the dissenting judges (three, in this case) persuasively argued that the evidence was not sufficient to support a finding of undue influence:

As noted in a preeminent treatise on Georgia law, it entirely permissible for spouses to

make entreaties to one another with regard to the dispositions of their respective wills:

The relation of a husband to his wife with whom he has lived many years is such that undue influence is difficult to conceive even where the greatest persuasion and importunity have been exercised . . . [and] the mere fact that the second wife is made a large beneficiary or the sole beneficiary to the exclusion of the children of the former marriage does not raise the presumption of undue influence.

This Court has previously recognized that spouses may consult each other with regard to their respective wills, and even attempt to influence one another with regard to the dispositions made therein. . . .

* * *

. . . [I]t is permissible for spouses to discuss their wills with each other, to state their opinions regarding each other's testamentary dispositions, and to seek favorable bequests from the other. Spouses can influence each other with regard to important issues such as estate planning and testamentary disposition. To characterize that influence as "undue" is contrary not only to well-established precedent from this Court, but also to sound public policy.

Cook v. Huff, supra, at 192-93.

In *Estate of Waters*, 629 P.2d 470 (Wyo. 1981), upon which respondents also rely, the dissenting justice observes that:

Any suggestion that bequests or devises to wife in this will are unnatural, unreasonable or unjust is entirely misplaced. Testator was appellant's husband. If there is an inference of undue influence from the mere fact of disposition of one's property to his wife, will contests are certainly going to multiply.

Id. at 477.

The other cases upon which respondents rely are similarly unhelpful to their position. In *Street v. Street*, 246 Ala. 683, 22 So.2d 35 (1945), there is no discussion of the appropriateness of the use of a presumption. In *Fields v. Mersack*, 83 Md. App. 649, 577 A.2d 376 (1990), the will contest was up on a second appeal, which concerned only the question of the allocation of fees. In *McKey v. Stoddard*, Or. App. 514, 780 P.2d 736 (1989), a widower with three children married a somewhat younger woman, who ultimately was determined to have unduly influenced him to make a will leaving his entire estate to her, by the execution of documents conveying to her survivorship interests in all of his property. (Nothing passed under the will.) The court mentioned that there was a confidential relationship between the husband and wife, but did not otherwise discuss the issue. In *In re Laper's Estate*, 181 Wis. 443, 195 N.W. 323 (1923), there is no discussion of any presumption arising as a consequence of the marriage of the testator husband and the wife. The facts are discussed only briefly, and one judge dissents. In

addition, the opinion indicates that the trial court decided the matter based upon lack of testamentary capacity, although it indicates that the trial judge also believed that the wife did influence the testator in the making of the will.

Finally, in *Howard v. Nasser*, 364 S.C. 279, 613 S.E.2d 64 (2005), the court reversed an order granting summary judgment in a will contest against the contestant and ordered that the matter be tried to a jury. Although the court discussed to some degree the question of whether a confidential relationship raises an inference of undue influence, when coupled with other factors, the question whether and to what extent a marital relationship is such a confidential relationship was not addressed.

Not only are the cases upon which respondents rely largely inapposite; respondents also fail to distinguish the cases cited in the appellants' opening brief. The court in *Jacobs v. Vaillancourt*, 634 So.2d 667, 672 (Fla. App. 1994), very plainly held that "the confidential relationship which exists between a husband and wife is not one which may be considered in the law governing will contests. *Tarsagian v. Watt*, 402 So.2d 471 (Fla. 3d DCA 1981)." In *Estate of Glogovsek*, 618 N.E.2d 1231 (Ill. App. 1993), the trial court had applied a presumption of undue influence to a married couple in light of both the fact of the marriage and other factors, such as the wife's participation in the procurement of the

will. Although the appellate court declined to announce (or reject) a flat rule that no presumption of undue influence may ever arise where the accusation is leveled against the spouse of a decedent, it nonetheless reversed, holding that the facts in that case did not merit a presumption.

The *Glogovsek* court observed that

. . . [T]he use of the presumption of undue influence must be applied with caution as to marital relationships, because of the unique relationship between spouses and the importance of marriages in our society.

Id. at 1237. And:

. . . [W]e can properly assume that, in the vast majority of marriages, spouses influence each other for better or for worse from the day they first date to the day they die or the divorce order is entered. We assume that good marriages involve give and take and compromises between spouses. The law does not and should not presume a spouse to be guilty of undue influence simply by reason of the marital relationship alone . . . [citation omitted] or because the spouse has been able throughout the marriage to have considerable influence on her spouse. If this were the case, the closer the spouse becomes to his or her mate, the more it could be said that the spouse is excessively, improperly, and illegally influencing the testator.

Id. at 1238.

B. Other Factors Upon Which Respondent Rely Do Not Justify the Application of a Presumption of Undue Influence.

Respondents erroneously argue that other factors in the marriage justified a presumption of undue influence. They argue first that Mary was co-trustee of the Living Trust from October 2000 until Jim's death, and that she was involved in every withdrawal of funds out of the Living Trust. Opp. Br. at 28. Mary became trustee by virtue of Jim's formal amendment to the Living Trust. Ex. 11. Jim's attorney Alan Kane prepared the amendment, which Jim executed in October 2000, VRP 137-38, long before the execution of the 2006 Will. Moreover, Jim, like Mary, was involved in every withdrawal from the Living Trust. FF 29 (CP 734). Respondents argue that it is atypical for a spouse to be co-trustee of a trust in which the other spouse is a beneficiary, but offer no authority or evidentiary support for that proposition. Notably, the trial court made no finding that this circumstance was unusual or suspicious. It is, if anything, an illustration of the closeness of their relationship from an early stage in their marriage, and is another example of the way in which the trial court's application of the presumption turned a close and loving relationship into a wrongful act.

The respondents argue that Mary's participation in the preparation of the will was unusual or suspicious. Opp. Br. at 27-28. But it is

common for spouses to participate in the preparation of each others wills – to discuss what each will do, to express opinions and desires, to cajole, to hire the same lawyer, to attend meetings with the lawyer together, and to be present when a spouse executes a will – far more involvement than the evidence shows that Mary had in the execution of the 2006 Will.

Respondents do not contest that Jim had arthritis (his handwriting had long been essentially illegible, *see, e.g.*, Ex. 235 at SB 0004 [1997]) and do not contend that he could have safely driven himself from Mercer Island to Alan Kane’s downtown office in January 2006. They also do not argue that Mary was present when Jim met with Mr. Kane, or when Jim signed the will in the presence of Mr. Kane, Ms. Rockett and Mr. Glase, or that Mr. Kane was not Jim’s long time estate planning attorney. Any spouse should and would have done what Mary did for Jim when he executed his 2006 Will. In this respect again, the actions of a devoted spouse become, in the trial court’s application of the *Dean v. Jordan* test, a wrongful act.

Especially egregious is the respondents’ accusation that Mary neglected Jim’s medical care. The only evidence that respondents offered in support of this proposition was the testimony of their expert, Dr. Elaine Peskind. It became clear during cross-examination, however, that Dr. Peskind had no knowledge whatsoever as to how Mary had cared for

Jim. VRP 1017-23. In contrast, numerous witnesses with actual personal knowledge testified that Mary was devoted to Jim. *See* Brief of Appellants at 37-40.

Respondents argue that the relationship between Jim and Mary started “in violation of Washington law,” citing RCW 43.43.842, and rely upon this “fact” as partial justification for the use of a presumption of undue influence. Opp. Br. at 30. Respondents do not explain how this allegation, even if it were true, could have any conceivable bearing on the circumstances of Jim’s execution of a will *ten years later*. In any event, the allegation finds no support in the record. RCW 43.43.842 merely prescribes licensing requirements for “agencies, facilities, and licensed individuals who provide care and treatment to vulnerable adults.” The record reveals no evidence that the facility that employed Mary, or that Mary herself, was subject to this licensure statute. There is also no evidence that Mary had ever concealed her criminal record – for which she received a Certificate of Rehabilitation in 1998 – from anybody.¹ Certainly Jim knew about her criminal record from the beginning. FF 19 (CP 732). The only evidence that Mary actually provided care for Jim at the facility in 1996 was her own testimony that she emptied his urinal

¹ The trial court ruled that Mary’s criminal history was not admissible under ER 404(b) for the purpose of showing a propensity to engage in wrongful conduct. VRP 2158-59.

once, and may have gotten a glass of water for him. VRP 1925-29.

Respondents will not let any good deed go unpunished.

Respondents argue that Mary gave false information to Jim's doctors about Jim's mental functioning. The respondents are grasping at straws. The Court found that, with respect to the first visit to Dr. Martin, in 2002, Jim indicated memory problems on his new patient registration form, and that Mary also filled out the same form but did not check the box regarding memory problems. FF 38 (CP 735-36). But the trial court made no finding, and there was no testimony, that Mary made any misrepresentation to Dr. Martin. Dr. Martin examined Jim but saw no mental problems in either 2002 or in 2006. *See* Ex. 261 at MJM 0006-7 (2002); Brief of Appellant at 12 (2006). Notably, Jim's form was filled out in advance, on June 7, 2002, and is in the medical record; Mary appears to have been asked to fill the same form out on the day of the visit, because her form is dated June 24, 2002. Ex. 261 at MJM 16, 13.

Respondents argue that the 2006 Will was "unnatural." A will that benefits solely the spouse, particularly when children are otherwise provided for, is not unnatural. "Mr. Kinssie's will cannot be characterized as unnatural. Many persons will their property to their spouses, with scant regard to adult children, who are capable of earning a good living." *Estate of Kinssies*, 35 Wn.2d 723, 733, 214 P.2d 693 (1950). Jim provided for

his children in the Will, requiring that Mary to permit them to use the Shaw Island property, and giving them an option to purchase the Shaw Island property at its assessed value should Mary ever decide to sell it. Ex. 1, at 3-4. While married to Mary, Jim completed the gift of the Canim Lake properties to his children. FF 32 (CP 734-35). They were also provided for as lifetime income beneficiaries in the Credit Shelter Trust, which was part of the mutual estate plan of Jim and Marion that went into effect on Marion's death. It is therefore inaccurate to say that Jim's children were "disinherited" in any sense. Although they did not receive monetary gifts under the 2006 Will, they were provided for by lifetime gifting, the Credit Shelter Trust, and, in the case of Donald, the extraordinarily lucrative (to him) sale and leaseback arrangement for the Mercer Island residence.

Finally, respondents argue that the evidence of undue influence need not relate to the execution of the will itself. Appellants concede that circumstantial evidence is admissible in a will contest, as in virtually every other evidentiary matter known to law. The burden of establishing undue influence, however, is high (clear, cogent and convincing evidence), and the right of a testator to leave his property to his spouse, or to leave it in any other manner he sees fit, is strongly protected by the law. As a consequence, the contestant must show that the influence in an undue

influence case was brought directly to bear on the testamentary act. *See, e.g., Estate of Hansen*, 66 Wash.2d 166, 168, 401 P.2d 866 (1966) (contestant must show that undue influence existed “at the time of the execution of the will”); *In re: Schafer’s Estate*, 8 Wn.2d 517, 520, 522, 113 P.2d 41 (1941) (“There must have been influence *at the time of the testamentary act . . .*” [emphasis in original] [at 520]; “ ‘Evidence must be produced that pressure was brought to bear directly upon the testamentary act’ ” [at 522]); *Mock v. Dowling*, 222 S.E.2d 773, 774 (S.C. 1976); 1 Wm. H. Page, *THE LAW OF WILLS* § 15.10, at 855-56 (2003 ed.) (“Undue influence does not render a will invalid unless it operates at the time that the will is made and causes its execution.”). It is not enough to say, as respondents essentially do in this case, that there was the *opportunity* for influence, and therefore that the 2006 Will itself, which effected what was basically a minor change in the existing dispositive plan, was by clear, cogent and convincing evidence the product of undue influence.

C. Findings of Fact 126, 128, and 135 Are Not Supported By Substantial Evidence; and the Evidence of Financial Transactions Does Not Show Undue Influence on the Will.

The thrust of Findings of Fact Nos. 126, 128, and 135 is that the financial transactions described at length in the Brief of Respondents

constitute unrefuted circumstantial evidence that Mary engaged in a decade-long effort to loot the estate of her husband Jim, that they create a presumption that the will was the product of undue influence, and that because Mary failed to “explain” each of these transactions to the trial court’s satisfaction, Mary failed to shift back to the respondents the burden of showing that the will was the product of undue influence.

Respondents have made no effort to analyze spending. Their strategy has been to set rabbits loose in a field and argue that it is Mary’s burden to catch all of them. Their facts, however, do not justify their conclusions. For example: Respondents argue that Jim’s Smith Barney IRA Account and his TIAA CREF account, both listed as assets on his Prenuptial Agreement (*see* Ex. 30, Sch. A), were cashed in. Opp. Br. at 6-7. Why these facts, if true, should fall at Mary’s feet is unexplained. Neither party elicited testimony from any witness about any Smith Barney account. Ex. 235, the one exhibit that reflects activity in a Smith Barney account, relates to a Smith Barney IRA account with a different account number than that shown listed on the Prenuptial Agreement. Jim opened the Ex. 235 account in August or September 1997, *see* Ex. 235 at SB 0004, and designated Mary his beneficiary on death. *Id* at SB 0009. Jim took this action not long after he was writing elegant and thoughtful letters to Alan Kane. Ex. 56. The account statements for the Ex. 235 account

show that the lion's share of the distributions from that account occurred in 1998. *See* Ex. 235 at SB 0011. The statements do not reflect the disposition of the distributed funds. (Mary is shown as a primary beneficiary, but not the distributee. *See* Ex. 235 at SB 0012.) It is possible that the funds were transferred into the Living Trust, but there was no evidence on the subject. If Jim in fact put the Smith Barney IRA distributions in the Living Trust, the respondents in their brief are double counting, because they also repeatedly refer to the amount of money transferred out of the Living Trust as an additional example of transfers allegedly for Mary's benefit.

There was also no testimony about transfers from the TIAA CREF account listed on Schedule A to the Prenuptial Agreement. The only exhibit reflecting a TIAA CREF account is Ex. 247, which shows transactions in a different account, established on September 15, 1999, two years after the execution of the Prenuptial Agreement. Jim and Mary were joint tenants on this account. *Id.* If the \$30,000 withdrawn from this account in May 2007 (*see* Ex. 247 at TIAA 0023) was transferred into the Living Trust, respondents would again be double counting. There is no evidence, however, as to the disposition of those funds.

Respondents argue that over the period from 2002 through Jim's death, more than \$6 million was deposited into the couple's joint account,

and more than \$6 million was withdrawn from the account, *see* Opp. Brf. at 19, and then argue that it was Mary's burden to explain ten years of transactions. Mary in fact offered substantial testimony that showed examples of how this sort of "analysis" constituted double-counting. She testified that she and Jim would transfer funds from their line of credit to their joint checking account, and use those funds for expenses, gifting, taxes, etc. VRP 2058-59. To pay off the line of credit, they sold assets in the Living Trust, transferred funds to the joint checking account, and then transferred those funds to the line of credit. In effect, this practice doubled the deposits and withdrawals – one deposit into the joint checking account from a line of credit, and a second deposit, from the Living Trust into the joint checking account, to pay off the balance on the line of credit.

Mary also testified to another example: She and Jim loaned Mary's son Jeremy Burden \$135,000 for the purchase of a house. At least \$100,000 of the funds came from the joint account on September 21, 2004, and were thus part of the \$6 million in transfers out of the joint account. Jeremy repaid the loan on August 23, 2006, with a payment of \$123,639.85, which was deposited into the joint account. This deposit was part of the \$6 million of transfers *into* the joint account. VRP 1892-95; FF 105 (CP 748). The transaction had no net effect on total assets of Jim and Mary.

Another example of the respondents' double counting appears in the Opp. Brf. at 28, where the respondents argue that

Mary was directly involved in moving more than \$2.2 million of Jim's separate property from the Living Trust to Jim and Mary's joint account, Mary's separate property accounts, and her church. . . . Also atypical, \$1,078,574 was transferred from Mary and Jim's joint account to Mary's separate accounts between 2002 and Jim's death, and more than \$6 million total was withdrawn from the joint account during this period.

The Living Trust was Jim and Mary's source of funds after mid-2002.

VRP 2057-58. The same funds transferred out of the joint account were first transferred into the joint account from the Living Trust, and comprised part of the total of \$6 million in transfers out of the joint account.

The amount of the transfers themselves does not suggest missing and unaccounted for funds. In Schedule A of the Prenuptial Agreement, Ex. 30, Jim scheduled assets having a value of about \$2.75 million, not including the principal assets in the Charitable Remainder Trusts, tangible personal property, and real property. Mary testified that after Jim revoked Trust B in 2002 (there was no evidence as to the disposition of the funds in Trust B, but presumably Jim used the Trust B assets to fund the Living Trust), the principal source of funds for Jim and Mary was the Living

Trust. VRP 2057-58. Respondents calculate that from 2001 through 2007, \$2,279,875 was transferred out of the Living Trust. Opp. Br. at 5-6, 18. During this same seven year period, taking the figures in the Opp. Br. at face value, Jim and Mary made \$293,189.76 in gifts to the Bible Baptist Church (*id.* at 23), \$456,750 in gifts to Mary's four children and their families (*id.* at 20), and \$323,000 in gifts to Mary's nieces, nephews, and her brother (*id.*). During 2001-2006 (the tax return for 2007 was not in evidence), they paid \$545,490 in federal income taxes, \$36,725 in real property taxes, and \$79,341 in medical expenses. Exs. 166-171. They spent at least \$211,395 on renovations to the Bremerton residence after moving there in 2006 (Ex. 505) (and according to Mary that figure did not include additional expenses incurred in early 2007 to bring the project to completion, *see* VRP 2061). These amounts (not including the 2007 renovation costs) total \$1,945,891, not much less than the amount that was withdrawn from the Living Trust. These figures do not include Jim and Mary's living expenses, and they do not include the \$3,000 per month in rent that Jim and Mary paid to the respondent Don for the Mercer Island residence, which would have totaled \$36,000 per year during their entire marriage, VRP 2061, until Don sold the property for \$2.5 million after Jim and Mary moved permanently to Bremerton in mid-2006. VRP 1640. The figures also do not include the costs of the modifications to the

Mercer Island home to accommodate Jim's physical needs, such as the installation of an elevator. VRP 1823-26. In addition, Mary testified that she and Jim had a life insurance policy on his life for a period of time, with substantial premiums. VRP 2062-63. All of these expenses were coming from funds in the Living Trust, of which Mary was ultimately the remainder beneficiary.

Respondents argue that substantial evidence supports FF 135, that "according to [Mary] herself, the lifetime Estate of Dr. Haviland was so depleted by Mary's transfer of funds that, after distribution of specific bequests, the total value of the Estate is negative \$45,834.38." The finding is either unsupported by substantial evidence, or is meaningless. The meaning of the term "lifetime Estate" is not made clear. If the purpose of the finding is to support the argument that Mary dissipated all of Jim's assets, the purpose is undermined by the respondents' argument that the term "lifetime Estate" means just the probate estate, and not assets that pass outside of probate. Mary testified, and respondents do not contest, that Jim left more than a million dollars in his Living Trust, VRP 1896, for the benefit of Mary, even after the transactions that the respondents describe. The Form 706, Jim's estate tax return, Ex. 145, reflects that the value of the Living Trust at Jim's death was \$1,068,125.70. Ex. 145 at BRG 510 [Sch. G(B)], and BRG 511-12, items

1-18. The Living Trust is not part of the probate estate, but rather passes outside of probate. (It is listed on the Form 706 because both probate and nonprobate assets may be subject to the federal estate tax.) Moreover, the respondents gloss over the fact that the negative \$45,834.38 is net of specific bequests. Jim and Mary owned the Bremerton residence as community property, and Jim owned the Shaw Island property free and clear, at his death. He made specific devises of both properties to Mary, beginning with the will he executed in 1997. Ex. 5. The fair market value of the Shaw Island property, according to the 706, was \$775,000, *see* Ex. 145, at BRG 503, and the Bremerton residence just over \$750,000, *id.* at BRG 501. The value of Jim's gross estate, including the principal value of the charitable remainder unitrusts that he had established during his life (and which paid him income until he died), and including the \$80,000 that his son the petitioner Donald Haviland still owed him at his death, was over \$4.2 million, and his indebtedness was less than \$450,000. Ex. 145, at BRG 500, 505.

It is also significant that Jim had converted virtually all of his accounts to joint accounts with right of survivorship *before* 2002, the earliest dates shown by the records. *See* VRP 1896-97; 1914-23. It is significant not because Mary acquired an immediate ownership interest in the assets in the accounts (as respondents characterize the argument), but

for two different reasons. First, the fact that the transfers were almost entirely from assets that would become Mary's when Jim died negates any notion that Mary had any incentive to remove assets from those accounts against Jim's will. Second, and most important, it shows that even before 2002, Jim was comfortable giving Mary the right and ability to participate in the management of their financial affairs, and had determined that she would have those assets when he died. Long before 2006, Jim had determined that Mary would receive virtually his entire estate.

The fact that Mary was involved in transactions in the couple's bank account transactions is hardly surprising. She and Jim were married. The evidence is that Jim was also involved in those transfers. It was not as a practical matter either necessary or possible to track back through ten years of marriage and explain every expenditure. Respondents after all claimed more than half a million dollars in fees. (CP 964) An effort to account for every expenditure would have tripled the expense.

D. Mr. Cook and Dr. Van Citters Should Not Be the Subject of Any Fee Award on Appeal.

The court below awarded attorneys' fees against Mary's share of probate and nonprobate assets, but not against her individually, and not against George Paul Cook or Dr. Robert Van Citters, whom Jim

nominated to be his executors under the Will. (CP ___)² The respondents did not appeal that decision. If this Court affirms the trial court, it should not, as the respondents in one sentence suggest, award fees in this Court against Mr. Cook and Dr. Van Citters. They were caretaker personal representatives and nominal parties below and in this Court. The trial court made no finding that they had acted wrongfully or were in any way culpable, and did not award fees against them. They have no personal interest in the outcome, and were under a duty to defend the will. *In re: Vaughan's Estate*, 149 Wash. 291, 293, 270 P. 1030 (1928). Mary in any event carried the burden of defending below. There is no evidence or contention that any estate assets were employed in the defense of the will contest.

III. CONCLUSION

Mary and Jim were married for 10 years. From an early point in their relationship, Jim resolved that he would give the greater part of his estate to Mary. He executed a will that gave her the Bremerton Residence and Shaw Island properties. He created the Living Trust for her benefit and within a short time had removed any cap on the amount she would inherit on his death. Within a few weeks of his marriage he had made

² Appellants have filed Appellants' Supplemental Designation of Clerk's Papers on Appeal, designating the trial court's order, filed December 17, 2009, and on the petition for an award of attorneys' fees, and the trial court's subsequent order, filed March 11, 2010, on respondents' (petitioners below) motion for reconsideration.

Mary the primary beneficiary on a Smith Barney IRA account. In 2000, still early in the marriage, he made her co-trustee of the Living Trust. By not later than 2002, he had made her a joint tenant with right of survivorship on nearly all of their assets. He paid for her nursing education. In 2001, long before his execution of the 2006 Will, Jim began gifting to Mary's children and other family members. Jim and Mary were devoted to each other in all matters. Mary cared for Jim through his significant physical disabilities. She made sure that he continued singing in his beloved choir, that he could attend Northwest Kidney Center board meetings, medical conferences, the opera, and the theatre, and that he could continue to see his friends and professional acquaintances. She went with him on several vacations abroad, notwithstanding his physical disabilities, enriching his life and hers. By all accounts Jim was devoted to Mary, and Mary was devoted to Jim.

When on numerous occasions before and after their marriage Jim sought estate planning assistance, he always went to his long time attorney Alan Kane at what is now K&L Gates. Eventually he decided to leave his entire probate estate to his wife, and went to Mr. Kane again. He discussed the will with Mr. Kane on the phone, and met with Mr. Kane outside the presence of Mary. Neither Mr. Kane nor the two witnesses to the will believed that Jim was impaired or acting under undue influence.

Mary and Jim lived together, and Mary ensured that Jim received her care until his death at the age of 96. Jim died with substantial assets to his name.

There is no evidence that Jim, in executing the 2006 Will, acted in response to pressure that amounted to force or fear. There is only evidence to the contrary – that when he discussed the matter alone with Alan Kane, and again in the presence of the witnesses, he said that the will reflected his wishes.

In the end, the trial court's erroneous application of the presumption of undue influence was decisive. All of the things that devoted husbands and wives do – that society wants them to do—became presumed acts of wrongdoing. Jim's placing of trust in Mary became a liability. Mary's devotion to Jim's care became a liability. The fact that she would write Jim's changes for him on a copy of a will, and drive him to see his long time lawyer, became a liability. The fact that Jim would leave his entire probate estate to his spouse, as millions of spouses do, became a liability. The application of the presumption effectively relieved the respondents of their burden of showing by clear, cogent and convincing evidence that there was undue influence, and instead placed an impossible burden on Mary to show a negative – the burden of showing

that each individual financial action in their decade-long marriage was expressly lacking in undue influence.

Where one spouse, in a true marriage like this one, leaves his or her estate to the other spouse, applying the burden shifting presumption of *Dean v. Jordan* works a perverse and unfair result, entirely unconnected to the actual circumstances under which the will was executed. And even if the *Dean v. Jordan* presumption is applied, Mary met her burden of restoring the equilibrium, and there is not substantial evidence in the record to support the trial court's finding. The decision below should be reversed.

RESPECTFULLY SUBMITTED this 7th day of June, 2010.

By 
Ladd B. Leavens, WSBA #11501
William K. Rasmussen, WSBA #20029
DAVIS WRIGHT TREMAINE LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
Telephone: (206) 622-3150
Fax: (206) 757-7700
E-mail: laddleavens@dwt.com;
billrasmussen@dwt.com;
*Attorneys for Appellants Mary
Haviland, Robert Van Citters, and
George Paul Cook*

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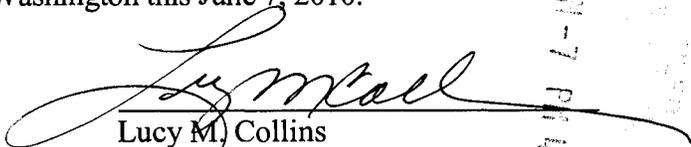
I, Lucy M. Collins, the undersigned, hereby certify and declare under penalty of perjury under the laws of the State of Washington that the following statements are true and correct:

On the June 7, 2010, I caused to be served a copy of the document to which this is attached by legal messenger to the following:

Suzanne C. Howle
Carol Vaughn
Thompson & Howle
One Convention Place
701 Pike Street, Suite 1400
Seattle, WA 98101

Richard L. Furman
Aiken, St. Louis & Siljeg, P.S.
801 Second Avenue, Suite 1200
Seattle, WA 98104-1571

Executed at Seattle, Washington this June 7, 2010.


Lucy M. Collins

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