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DIVISION II

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STATE OF WASHINGTON

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON AT TACOMA

Clark County Superior Court Cause No: 13-4-00969-3

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IN THE MATTER OF THE ESTATE OF  
ROBERT T. RIDLEY,  
Deceased.

KIMLY PROM, individually,  
PETITIONER,

vs.

PHILIP CARVER, as personal representative of the Estate of Robert  
Ridley; RIVERVIEW COMMUNITY BANK, a Washington  
Financial Institution; JENNA SUY and PAULLA SUY, wife and  
husband and their marital community  
comprised thereof,  
RESPONDENTS.

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**RESPONDENT PHILIP CARVER'S RESPONSE TO  
APPELLANT KIMLY PROM'S BRIEF**

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## I. INTRODUCTION

Petitioner-appellant Kimly Prom is disappointed because, unlike her sister, respondent Jenna Suy, she was not on Robert Ridley's checking account as a "Pay on Death" (POD) beneficiary when died. After Mr. Ridley created a trust and a trust bank account, he transferred most of his funds into that trust bank account. He put \$200,000 back into his checking account to cover gift checks, and he Ridley died with \$139,865.89 left in the account, all of which went to Jenna Suy. Ridley left his trust mainly to charities, with some bequests to family members.

Ms. Prom sued Philip Carver, as Personal Representative of the Mr. Ridley's Estate, but not as Trustee of Mr. Ridley's Trust (Mr. Carver was both). The money transferred out of the checking account was not in the Estate, but in the Trust, and there is no evidence that Mr. Ridley wanted more in the checking account than what was left at his death, a sizable sum.

The trial court correctly granted summary judgment to Mr. Carver, as Personal Representative, and then correctly allowed Mr. Carver attorney fees under TEDRA.

## **II. RESPONSE TO ASSIGNMENTS OF ERROR**

1. The trial court correctly granted summary judgment in favor of respondent Carver.
2. The trial court correctly denied petitioner's motion to reconsider.
3. The trial court correctly granted Philip Carver's motion for attorney fees, and did not err in determining the reasonable amount of those fees.
4. The trial court correctly entered Findings of Fact 4-7, 11-12, and Conclusions of Law 2-5.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. When petitioner has not shown, on summary judgment, that she was on the POD account as a beneficiary, when she has not shown that Mr. Ridley intended more money to be in the account, when she has not shown facts supporting undue influence, and when she has not shown that the estate has any of the money she seeks, should the Court reverse the summary judgment and remand for trial? NO.
2. When petitioner has introduced no new material on her motion to reconsider, and when the same absence of fact remains, should the Court reverse the denial of the motion to reconsider? NO.
3. When the trial court correctly exercised its discretion in granting attorney fees and in determining the reasonable amount of those fees, should the Court reverse that award of fees? NO.
4. When the trial court correctly entered findings of fact and conclusions of law on the attorney fee award,

should the Court reverse those findings and conclusions? NO.

#### **IV. STATEMENT OF THE CASE**

##### **A. Facts**

Petitioner Kimly Prom and respondent Jenna Suy are sisters, born in Cambodia. CP 99. They immigrated to the United States and befriended Robert Ridley, an elderly man diagnosed with cancer in May, 2012. CP 100. Mr. Ridley died from that on July 8, 2012. CP 168. Ms. Prom and Ms. Suy were caregivers for Mr. Ridley before and at the time of his death, along with Paulla Suy, and others, Ramona and Nita. CP 131. Ms. Suy was a paid caregiver, as were others. CP 96, 100.

In June, 2012, Mr. Ridley retained attorney Sam Gunn to do estate planning. CP 100. Mr. Ridley had multiple checking accounts in several banks, including a checking account at respondent Riverview Community Bank (“Riverview”). CP 100. Mr. Gunn created a trust for Mr. Ridley, and assisted Mr. Ridley in consolidating those bank accounts into a trust account. CP 100-101. At one point in that process, Mr. Ridley’s personal checking account contained approximately \$569,000. CP 101.

There is no evidence that Mr. Ridley suffered from any mental problems or dementia. He had a master's degree in accounting. CP 133. He was very organized. CP 253. He was very knowledgeable about his accounts and how much was in each one. CP 256. "He was always in the driver's seat with his finances." (Tynan testimony CP 256).

Mr. Ridley had no children, and left the bulk of his trust to charity, with relatively small bequests to some grand nieces and nephews. CP 209. The bulk of his trust and estate goes to the Breast Cancer Research Foundation, the Cancer Research Institute, the Cure Search for Children's Cancer, and the Fisher Center for Alzheimer's Research Foundation. CP 209-210.

For purposes of the motions for summary judgment, and this appeal, the court may assume that Mr. Ridley, on July 2, 2012, signed an account agreement listing Ms. Suy and Ms. Prom as POD beneficiaries.<sup>1</sup> CP 103-104. The banker, Ms. Tynan, does not recall Mr. Ridley ever signing that account agreement. CP 104. Ms. Prom never saw that account agreement, nor did she ever see an account

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<sup>1</sup> Mr. Carver does not believe that first agreement ever was signed.

agreement with her name on it. CP 88. Ms. Suy testified that she was not sure whether Ridley signed or not, but then changed her testimony to say that Ridley did sign. CP 135. That first account agreement was shredded, and apparently no longer exists. CP 104-105.

On June 29, a Friday, Ms. Tynan, the banker, met with Mr. Ridley and Ms. Prom and got information from them essential to preparing the new account agreement. CP 101-102. She then left Mr. Ridley's house and went back to the bank to prepare the paperwork. CP 102. Ms. Tynan then brought the completed account agreement back to Mr. Ridley on Monday, July 2, to get it signed. CP 102. At that point, the discussion with Ms. Suy took place, wherein Ms. Suy suggested that only she should be a POD beneficiary. CP 103. There is no indication that the conversation was lengthy, and it was not in secret, because Ms. Tynan was there. Ms. Suy testified that she said her sister was old, and would not be able to make the money grow. CP 134. Ms. Tynan said that Mr. Ridley explained to her that he was concerned about Ms. Prom's state income benefits, or with reporting income to the Cambodian

government. He explained that Ms. Suy would take care of her sister, who was older. CP 262. Ms. Tynan did not remember any conversation about this with Jenna Suy. CP 263.

Mr. Ridley instructed that he wanted only one POD beneficiary, and Ms. Tynan returned to her bank to redo the paperwork. CP 104-105. She then came back to Mr. Ridley's house on July 2, and the ultimate account agreement was signed by Ridley. CP 105. There is no evidence that Mr. Ridley intended other than to make Jenna Suy the only POD beneficiary.

Also on July 2, another banker, Ms. Berrissoul, created and funded Mr. Ridley's trust bank account. CP 105. Mr. Ridley transferred most of the money out of his personal checking account and into the trust bank account. CP 107.

Mr. Ridley had made several gifts in late June, using checks written on his personal checking account. CP 108. Among those were \$10,000 checks to Jenna Suy and Paulla Suy (Jenna's husband), Cody Suy, and Kevin Suy. CP 534, 537, 538. Cody and Kevin are children of Jenna Suy. CP 129. He also gave Ms. Suy his Mercedes Benz. CP 143. When those checks began to clear, and

because those checks would have had a tendency to overdraw the account, the bank asked Mr. Ridley if he wanted to move money back into the account from the trust account, and they agreed to move \$200,000 back into the personal checking account. CP 469.

After the checks cleared, Mr. Gunn asked Mr. Ridley if he wanted to transfer more money back into the checking account from the trust account, and he responded in the negative, saying, “just leave it the way it is.” CP 88. No one ever informed Mr. Gunn that Ms. Prom ever had been on the account, or that Mr. Ridley wanted another POD beneficiary, such as Ms. Prom. CP 88.

Mr. Ridley died a few days later, on July 8, with \$139,865.89 in his checking account, all of which went to Ms. Suy. CP 109, 168. She made an additional claim against the estate and trust, and that was settled for \$75,000. CP 176-178.

There is no evidence that any of the money transferred out of the checking account into the trust account ever ended up in the estate. There is no evidence that any checking account money at the time of Mr. Ridley’s death went anywhere other than to Ms. Suy. Finally, there is no evidence of any undue influence exerted by Ms.

Suy, or anyone else.

**B. Procedural History**

Petitioner Prom filed a petition against respondent Carver, as Personal Representative of the Estate of Robert Ridley, and against Riverview Community Bank on 12/20/13. Ms. Prom also named her sister, Jenna Suy, and Jenna's husband, Paulla Suy, and the marital community. She sought to invalidate the POD checking account, and to recover funds transferred out of that checking account. Her remaining five claims are against her sister, trying to recover money that ultimately went to the Suys.

Respondent Carver filed his motion for summary judgment on 9/10/14. CP 86. Mr. Carver relied largely on the deadman's statute, not believing there was admissible evidence that Mr. Ridley ever had signed an account agreement with Ms. Prom's name on it. Respondent Riverview joined in that motion on 9/25/14.

Petitioner Prom opposed summary judgment motion on 9/29/14.

Riverview replied in support of summary judgment on 10/6/14.

Mr. Carver filed his reply on summary judgment on 10/8/14. CP 467. By that time there was some evidence in the record that an earlier account agreement may have existed for a few hours.

On 11/10/14, the court granted Mr. Carver's motion for summary judgment. CP 474-475.

Mr. Carver moved for attorney fees on 11/24/14.

On 12/3/14, The Honorable Barbara Johnson issued a letter ruling granting both respondents' motions for summary judgment.

Petitioner filed a motion to reconsider on 12/22/14.

Riverview moved for attorney fees on 12/29/14.

Riverview opposed the motion to reconsider on 12/29/14.

Petitioner opposed both attorney fee requests on 1/6/15.

The trial court denied the motion for reconsideration on 1/16/15.

On 3/4/15, the trial court entered findings of fact, conclusions of law, and orders on both respondents' requests for attorney fees, and filed a judgment in favor of respondents.

## V. ARGUMENT

### A. Summary Judgment

The trial court correctly granted summary judgment in favor of respondent Carver, and the Ridley Estate because petitioner Prom failed to introduce evidence to create any question of fact that Prom was not on the POD account at Mr. Carver's death, that any undue influence occurred, that Mr. Carver wanted more money in the checking account than was there, or that Mr. Carver, as Personal Representative of the Estate of Robert Ridley had any of the disputed money at the time of Mr. Carver's death. Any and all money at issue wound up with Jenna Suy.

Summary judgments are reviewed de novo. *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 517, 210 P.3d 318 (2009). A summary judgment is appropriate if the record demonstrates the absence of any genuine issue of material fact. CR 56(c). A material fact is "outcome determinative," and if the outcome is determined by a failure of any essential element, summary judgment is appropriate. *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990); *Celotex Corp.*

*v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). If plaintiff cannot prove any of many essential elements of her case, summary judgment should be granted. *Young v. Key Pharm. Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

**1. Ms. Prom Was Not on the Account**

It is undisputed that Ms. Prom was not on the checking account as a POD beneficiary when Mr. Ridley died. While no prior account agreement has come to light, and while Mr. Carver questions its existence at any time, the operative account agreement was the one signed by Mr. Ridley, in existence at the time of his death, and naming only Jenna Suy as POD beneficiary. A valid POD account requires a written and signed agreement, and the agreement in place at Mr. Ridley's death controls. *Estate of Brownfield ex rel. Schneiter v. Bank of America, N.A.*, 170 Wn. App. 553, 560, 285 P.3d 886 (2012). There is no dispute but that Mr. Ridley and Riverview agreed that any earlier draft agreement was to be canceled, and that the final agreement was to be operative. Mr. Ridley had several days, with banker and attorney meetings, to change that if he wished.

Funds in a POD account belong to the designated POD beneficiary. RCW 30.22.100(4). Riverview correctly paid the remaining \$139,865.89 to Jenna Suy.

**2. There is no Evidence of Undue Influence**

The only argument or evidence about supposed undue influence is the short conversation between Jenna Suy and Robert Ridley, with Colette Tynan from the bank present. Jenna Suy was one of Mr. Ridley's caregivers, as was petitioner Kimly Prom, and others.

Ms. Tynan said that Jenna Suy told Mr. Ridley that he should remove Suy's sister from the account card because it might make income reporting harder for Ms. Prom. Mr. Ridley said Suy said she would take care of Prom. CP 262. Ms. Suy testified that she told Mr. Ridley that Ms. Prom was "old," and that Prom would not be able to manage the funds well. CP 134. Mr. Ridley agreed and chose to go with only Suy on the POD account. All of this occurred while Ms. Tynan was there, and none of it in secret.

Petitioner must prove by clear, cogent, and convincing evidence that the contract or transaction is the product of undue

influence practiced by another. *In re Riley's Estate*, 78 Wn. 2d 623, 639, 479 P.2d 1 (1970).

Petitioner has not offered evidence of undue influence. She argues that Suy provided care for Mr. Ridley during his last month, but she, Prom, further argues that she provided care also. She offers no explanation for how Suy could have exerted undue influence over Mr. Ridley in a short oral transaction in the presence of the bank employee simply by suggesting that Mr. Ridley delete Prom from the account agreement. Mr. Ridley had several opportunities to put Prom back on the account over the next several days, speaking with the bank employees and his attorney, but he chose not to, and did not make that change.

Summary judgment is appropriate on undue influence claims. 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. *In re Estate of Jones*, 170 Wn. App. 594, 603–04, 287 P.3d 610 (2012) . A trial court may grant a summary judgment motion to dismiss if no rational trier of fact, viewing the evidence in the light most favorable to the nonmoving party, could find clear, cogent, and convincing evidence on each element. *In re Dependency of C.B.*, 61 Wn. App. 280, 285, 810 P.2d 518 (1991). In this case, petitioner has made no showing that would avoid summary judgment against her.

The determination of undue influence is a mixed question of law and fact. *Kitsap Bank v. Denley*, 177 Wn. App. 559, 569, 312 P.3d 711 (2013). In that case, the Court quoted from *In re Trust and Estate of Melter*:

“When a challenged factual finding is required to be proved at trial by clear, cogent, and convincing evidence, we incorporate that standard of proof in conducting substantial evidence review. A party claiming undue influence must prove it by clear, cogent, and convincing evidence. *In re Estate of Eubank*, 50 Wn. App. 611, 619, 749 P.2d 691 (1988). When such a finding is appealed, the question to be resolved is not merely whether there is substantial evidence to support it but whether there is substantial evidence in light of the “highly probable” test. *In re Welfare of Sego*, 82 Wn.2d 736, 739, 513 P.2d 831 (1973); [*In re Estate of Riley*, 78 Wn.2d 623, 640, 479 P.2d 1 (1970) ] (recognizing that “[e]vidence which is ‘substantial’ to support a preponderance may not be sufficient to support the clear, cogent, and convincing” standard). We still view the evidence and all reasonable inferences in the light most favorable to the prevailing party, *Woody v. Stapp*, 146 Wn. App. 16, 22, 189 P.3d 807 (2008). . . .”

167 Wn. App. 285, 301, 273 P.3d 991 (2012) (second alteration in original.) On summary judgment, the plaintiff must present sufficient evidence to make it highly probable that undue influence ruled the transaction.

Washington realizes that when the facts are murky or incomplete, a presumption of undue influence can arise, and that can be present with three factors or indicia of undue influence, 1) a confidential relationship, 2) participation in the preparation of the documents, and 3) a disproportionate gift. *Kitsap, supra.*, 177 Wn. App. at 571-78. A confidential relationship arises out of family, or when a testator is particularly vulnerable, lives with a beneficiary, or is heavily dependent on the beneficiary. If the testator (or account owner in this situation) believes that the beneficiary will act in his best interests in the transaction, a confidential relationship can exist. *Id.* at 572-73. In our situation, Mr. Ridley had several caregivers, including petitioner Kimly Prom, and others not related to Prom or Suy. Further, he was in the presence of his banker, and had ready access to his attorney, Mr. Gunn. The transaction did not occur in secret, or behind closed doors. The relationship here does not rise to the legal level for a presumption of undue influence.

Similarly, Ms. Suy did not participate in the preparation of the account agreement simply by voicing her opinion briefly. Minimal participation is not enough to make it highly probable that plaintiff will prove undue influence by clear, cogent, and convincing evidence. *Id.* at 577.

Finally, there is no evidence that the POD account left to Ms. Suy was unusually large or disproportionate. She ultimately received \$139,865.89, out of a trust worth several millions of dollars.

As in *Kitsap*, the amount left to Suy was significant, but there is no evidence that it was disproportionate, given the size of Mr. Ridley's trust. There is evidence that he had a dozen different accounts, and the checking account alone had over \$569,000 in it when it was transferred to the trust account. CP 185, 192.

Typically, once the object of the influence dies, and a contest begins, there is no one who has witnessed the transactions that allegedly were influenced unduly. In this case, however, we have an independent witness, Collette Tyson, the banker, and we have the benefit of Jenna Suy's testimony about the brief conversation that took place. A presumption will not be sufficient to defeat summary judgment when there is evidence of the actual transaction. *Kitsap, supra.*, 177 Wn. App. at 578-9.

In this case, Collette Tyson, the banker, took the typewritten account agreement to Mr. Ridley's house, and spoke with him about the agreement. At that point, Ms. Suy joined the conversation. Ms. Tyson then drove back to the bank, shredded the old agreement, and created a new agreement. She then took the agreement back to Mr. Ridley's house, spoke with him again, and he signed the agreement. Suy's participation was minimal.

### **3. There is no Evidence Mr. Ridley Wanted More Money in the Account**

Petitioner has claimed that she should receive more money than the funds that went to Jenna Suy. But there are no claims that

Mr. Ridley or Mr. Carver, as Personal Representative, removed money from the account wrongfully, or that Estate money exists that Mr. Ridley wanted in the personal account. Mr. Ridley was free during his life to move money in and out of his trust and his personal bank accounts, and he did so. Indeed, he could have changed the beneficiary of the account in his will. *Estate of Burks v. Kidd*, 124 Wn. App. 327, 100 P.3d 328 (2004); RCW 11.11.020.

All of the money in the checking account at the time of Mr. Ridley's death went to respondent Jenna Suy. Ms. Prom has claims against Ms. Suy for that money, and Prom's case against Jenna Suy persists at the trial level. There is no evidence that Mr. Ridley, after moving money from his checking account to the trust account, and back again, wanted more money in the checking account than was in there when he died 6 days later. It is undisputed that he told his attorney, Sam Gunn, "just leave it the way it is." CP 88. Because there is no evidence that more money should have been in the account, Ms. Prom's only claims are against Ms. Suy.

**4. There is no Evidence the Personal Representative has the Money.**

Petitioner Prom, in her summary judgment opposition, explained that she sought replevin of funds moved from the checking account, or to impose a constructive trust over funds moved wrongfully. CP 109, 112. An essential element to replevin is

a showing that defendant wrongfully detains the property or money to be replevied. *Apgar v. Great Am. Indem. Co.*, 171 Wn. 494, 498, 18 P.2d 46 (1933). In this case there is no showing that Ridley's Estate has money that Petitioner seeks or is entitled to. Respondent Suy may have some, but the Estate does not. Similarly, to justify a constructive trust, petitioner must show by clear and convincing evidence that a respondent is unjustly enriched or that he has unjustly asserted dominion over funds that he should not have. *Venwest Yachts, Inc. v. Schweickert*, 142 Wn. App. 886, 898, 176 P.3d 577 (2008). In this case, while petitioner argues that Suy came into money she should not retain, Ms. Prom has not shown that the Estate of Ridley has money it should not keep.<sup>2</sup>

Petitioner argues that this argument was sprung on her in Mr. Carver's reply brief. But petitioner knew, and argued in her opposition to summary judgment, that the funds were moved from the personal checking account to the newly formed Trust bank account, and not to another personal account. CP 100-101, 106-109.

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<sup>2</sup> For that matter, there is no evidence or legal basis that the Trust has money that belongs to Ms. Prom. If party A inflicts undue influence on party B, diverting money that should have gone to party C, party C's claim

Petitioner has always known that the funds went into a Trust account. The Estate would have received the funds only if they had gone into a personal account.

**5. Petitioner Made All the Arguments in her Responsive Memorandum that were the Subject of the Reply Memorandum.**

Petitioner argues that she was faced with new arguments brought up in Carver's reply memorandum on summary judgment. All of the arguments were addressed, however, in her responsive memo, and then she filed a lengthy motion to reconsider, raising all of her arguments again. The reply memorandum properly responded to petitioner's arguments.

If a petitioner felt that new arguments were made improperly, the solution was for petitioner to move to strike those new issues or to ask for a surreply. Petitioner did not make such any such motion or request. If a party makes no such motion, and if the issues all are addressed, either in the initial memoranda, or in a later motion to reconsider, the party has had ample time to address all the issues, and all the issues are before the court.

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is against the undue influencer who got the money, not the victim of the undue influence.

Petitioner argues that she only learned of the Trust, or Mr. Carver's status as Trustee, late in the game. But yet she discusses the Trust and the fact that the checking account money was moved to the Trust account at length in her responsive memorandum on summary judgment. CP 97, 98, 101, 105, 106, 107, 109, 115, 117, 122, 123. Petitioner knew of the Trust and the trust bank account when Ms. Lim deposed Sam Gunn on May 28, 2014—five months before the summary judgment proceedings. CP 186. Further, she knew that Mr. Carver was trustee, at least by the time she deposed Mr. Gunn. CP 205, 208. Finally, she knew in May, 2014 that it had been Mr. Ridley's intent to transfer all of the checking account to his trust bank account. CP 221.

In her responsive memorandum on summary judgment, petitioner states that her claims “implicate the Estate if the Estate is holding funds that Ms. Prom was unjustly deprived of.” CP 98. That would be true, but in Carver's reply, he points out that the Estate is not holding those transferred funds, because the funds were transferred to the Trust, as petitioner knew, and stated in her own memorandum. This is not a new argument.

Similarly, petitioner discusses facts and argues at length in her responsive memorandum on summary judgment that Mr. Ridley was unduly influenced by Jenna Suy. Mr. Carver addressed that in his reply memorandum because it had been addressed at length by petitioner in her response. That, too, is not a new argument on reply, but a proper reply to a responsive memorandum.

#### **B. Attorney Fees**

Fees were awarded pursuant to RCW 11.96A.150. The statute provides:

“Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the state or trust involved in the proceedings; or (c) from any nonprobate asset that is to be the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to 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, which factors may but need not include whether the litigation benefits the estate or trust involved.”

The Court of Appeals will review trial court's fee decision under this statute for abuse of discretion, meaning the court's decision will be upheld unless it is manifestly unreasonable or based

on untenable grounds or reasons. *In re Estate of Black*, 153 Wn.2d 152, 172, 102 P.3d 796 (2004).

The record shows the following facts regarding the case and the representation:

- The amount at stake was between \$250,000 and \$295,000, one half of the bank account in question at its higher points. CP 104, 107.
- Both sides correctly pled entitlement to fees, and had petitioner won at the trial level, she undoubtedly would have asked for fees, as she does now on appeal.
- Mr. Carver is an Oregon resident.
- The case involved extensive document discovery, including interrogatories. CP 630.
- The case involved several trips to Vancouver to meet with Mr. Gunn, two court appearances, and five depositions in Vancouver. CP 479-491.
- The case involved 6 depositions, Mr. Gunn, Ms. Prom, Ms. Suy, Ms. Berrisoul, Ms. Tynan, and Ms. Konopasek. The depositions were lengthy, involving

questions by four parties. One of the depositions was held in Seaside, Oregon, involving lengthy travel, 79 miles each way according to Google Maps. The other depositions were in Vancouver, about ten miles each way from counsel's office. CP 479-491.

- No doubling up occurred. Two attorneys, Nikki Swift and Jan Kitchel, were involved in the Tynan deposition, but they did not overlap. Swift left when Kitchel arrived. CP 483.
- Fees charged to the client and paid by the client at the trial level and before appeal were \$32,438.50. CP 477. No multiplier was sought. CP 631.
- There is ample evidence that the hourly rates charged were reasonable (although the trial court cut Kitchel's rate from \$375 to \$300 in its discretion, resulting a reduction in fees to \$25,950.40, a 20% cut). CP 477, 630-632.
- Respondent Carver prevailed totally at the trial level. Handling a case through discovery, multiple

depositions, multiple court appearances, and summary judgment, for \$26,000 is reasonably economical. The fee is only about ten percent of the money at issue.

In challenging the attorney fee award, petitioner has relied heavily on *Berryman v. Metcalf*, 177 Wn. App. 644, 312 P.3d 745 (2013). While instructive, *Berryman* is not a poster child for attorney fee analysis in the normal case. As this Court knows, *Berryman* involved a verdict of \$35,724 and an attorney fee award of \$291,950, containing a 2.0 multiplier. The court in that case focused heavily on the size of the fees compared to the size of the verdict, and on the use of the multiplier as a “contingency enhancement.” *Berryman* relied on other cases involving greatly disproportionate attorney fees, such as *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 859 P.2d 1210 (1993) (\$200,000 in fees on a \$20,000 controversy). In the case at bar, no multiplier was sought or used, and the fees are very much in proportion to the amount at stake.

While the issues here were not novel, and very elementary trust and estate matters, they were litigated very vigorously by

petitioner, forcing a defense that is ongoing on appeal. Rather than the beneficiary charities paying the fees, they should be shifted to petitioner, as they were.

The trial court correctly and adequately exercised its discretion in the attorney fee award.

#### **VI. ATTORNEY FEE REQUEST**

Respondent Carver requests attorney fees on appeal pursuant to RCW 11.96A.150 and RAP 18.1. The questions posed on appeal are not novel, and petitioner should have commenced an action against Mr. Carver as Trustee before pursuing this action on appeal against the Estate, which did not receive the funds Ms. Prom seeks.

#### **VII. CONCLUSION**

This Court should affirm the trial court summary judgment in favor of Mr. Carver and against petitioner. Petitioner cannot prevail against Mr. Carver, as Personal Representative, for all the reasons outlined above. Ms. Prom was not on the POD account when Mr. Ridley died. There is no evidence that Mr. Ridley wanted more money in that account. Petitioner has not met her burden of showing undue influence. The money sought is not in the hands of the Estate,

but in the hands of respondent Jenna Suy, and the case persists  
against her.

DATED this 18<sup>th</sup> day of August, 2015.

CABLE HUSTON LLP



Jan K. Kitchel, WSBA #13705  
Attorney for Respondent,  
Philip Carver

**CERTIFICATE OF SERVICE**

I hereby certify that on the 18<sup>th</sup> day of August, 2015, I caused to be served a true copy of the foregoing **RESPONDENT PHILIP CARVER'S RESPONSE TO APPELLANT KIMLY PROM'S BRIEF** on the following parties at the following addresses:

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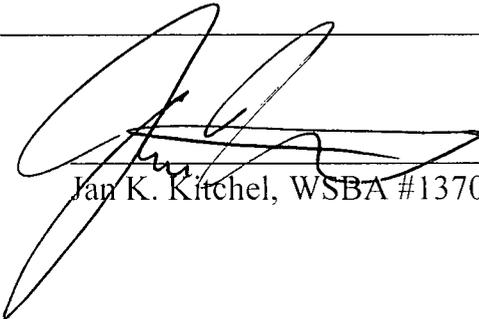
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