

FILED

APR 19 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

No. 291928

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

*In the Matter of the Trust and Estate of
Mary Virginia Melter, Deceased,*

WILLIAM R. MELTER,

Respondent

v.

JOHN D. MELTER and SANDRA L. MELTER,
husband and wife,

Appellants

REPLY BRIEF OF APPELLANTS

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JP. Diener
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INTRODUCTION

Respondent's Brief does not point to sufficient facts to show that Appellant, John D. Melter ("John D.") actively participated in preparing or procuring the estate documents in question. Nor does Respondent, Bill Melter ("Bill"), present a convincing argument that there is clear, cogent, and convincing evidence of undue influence. The court ignored several of its own Findings of Fact, which clearly show that John D. presented copious rebuttal evidence as to why Mary Virginia Melter ("Virginia") wanted to exclude Bill from her estate. Those Findings of Fact also prove that Virginia had testamentary capacity and knew what she was doing when she changed her estate documents in 2003. In spite of the evidence on the record, the trial court found that John D. engaged in undue influence, but it could only do so by improperly placing the burden of proof on John D.

ARGUMENT

1. The Evidence Does Not Raise a Presumption of Undue Influence

John D. stands by his original argument that a presumption of undue influence was not raised by Bill, because Bill failed to show that John D. actively participated in preparing or procuring the estate

documents. In his responsive Brief, Bill points out five items that he argues show John D. prepared or procured the estate documents:

- John D. drove Virginia to her appointments with the attorneys;
- Steve Jolley referred Virginia to Pamela Rohr;
- When Bill told Virginia he wanted her to come to Seattle to meet with his attorneys, she declined;
- John D. typed Virginia's letters for her;
- John D. wrote a letter on his mother's behalf to Steve Jolley asking for changes to the estate documents.

Taking each of those one at a time, it is clear that none of the items, individually or collectively, amount to actively preparing or procuring the estate documents.

First, of course John D. drove his mother to the appointments with attorneys. She did not drive, and therefore would have had a difficult time getting there on her own. If she had taken a cab, would it be reasonable to say that the cab driver had actively participated in preparing or procuring her estate documents? Of course not, and the same is true for whoever drove her to the appointment.

Second, receiving a referral from one attorney to another attorney can hardly be called preparing or procuring estate documents. When a

trusted individual makes a suggestion or a referral, that referral is often going to be accepted.

Third, Virginia had good reason to not want to meet with Bill's attorneys, considering that just months earlier he took advantage of her weakened and vulnerable state to get her to change her estate documents in his favor. CP 110; RP 83-84. This does not mean that she did not want to meet with an attorney, but only that she did not want to meet with the attorney(s) who Bill selected.

Fourth, the evidence is uncontroverted that John D. had to type Virginia's letters for her because she could not write legibly due to arthritis and she did not know how to use a computer. RP 512.

Fifth, the letter to Steve Jolley that Bill points to was typed on Virginia's behalf, but more importantly, Attorney Rohr never saw that letter and thus it played absolutely no part in the drafting of the estate planning documents. RP 413-414.

When one examines each of these points in light of the evidence presented at trial, it cannot be said that they show John D. played any role in preparing or procuring the estate documents. John D. never communicated with the attorney who drafted the changes prior to those

changes being made, and thus cannot be said to have played a part in the preparation of the estate documents.

2. John D. Provided Sufficient Rebuttal Evidence

Bill argues that he successfully raised a presumption of undue influence and that the burden of proof then switched to John D. to prove by clear, cogent and convincing evidence that he did not engage in undue influence. As is apparent by the law cited in Appellant's Brief, the burden of proof does not shift, but remains on the will contestant throughout the trial. Once a presumption of undue influence is raised, the defendant must provide rebuttal evidence that is sufficient to balance the scales, but in no reported Washington case is the rebuttal evidence required to meet the clear, cogent and convincing standard. As a result, the trial court materially erred when it placed the burden on John D. to prove by clear, cogent and convincing evidence that he did not engage in undue influence.

Even if the presumption of undue influence was successfully raised, John D. provided extensive evidence that Virginia had a good and rational reason for changing her estate documents to exclude Bill, and the trial court incorporated all of these into its Findings of Fact. Virginia was unhappy with Bill for the way he took advantage of her in Florida and coerced her to change her estate documents in his favor. CP 112; RP 418,

422. She was also unhappy with the way he kept trying to get her to come to Seattle to meet with his personal attorneys, and with his refusal to send her personal belongings, medical records, and financial records to her. CP 112; RP 418. These are the reasons she enumerated to Attorney Rohr, and Attorney Rohr found them to be reasonable explanations for the changes.

Bill argues in his Brief that the rebuttal evidence was not supported by facts, but this is clearly not the case. The trial court found each of these reasons to be true and supported by substantial evidence, and said so in its Findings of Fact:

- Findings of Fact 5, 6 and 7 show that Bill unduly influenced his mother to make those Sept. 2002 changes to her estate documents (CP 110);
- Finding of Fact 9: William purposefully withheld Virginia's financial and medical documents from her (CP 110);
- Finding of Fact 12: Virginia wanted to change the Sept. 2002 will. Bill refused to send her legal documents to her despite repeated requests (CP 111);
- Finding of Fact 15: Bill refused to return her estate planning, medical and financial documents to her. He also refused to send her personal possessions (CP 111);

- Finding of Fact 24: Virginia was disappointed and upset with Bill for a number of reasons which she was able to articulate (CP 112);
- Finding of Fact 25: Virginia had testamentary capacity when making the April 2003 changes. She had clearly articulated reasons for wanting to disinherit Bill (CP 112);
- Finding of Fact 38 and 39: Bill's credibility is suspect and he comes before the court with unclean hands (CP 112).

The trial court made 10 different findings of fact that support John D.'s rebuttal evidence and that support a logical and reasonable basis for Virginia making the 2003 changes to her estate documents. This makes the court's final conclusions of law even more baffling, but it also shows that the rebuttal evidence presented by John D. was persuasive and factual.

What both the trial court and Bill have failed to recognize is that once such rebuttal evidence is presented, the burden remains on the will contestant to provide clear, cogent and convincing evidence that undue influence existed. The burden was never John D.'s to bear, but rather remained on Bill to prove undue influence by clear, cogent and convincing evidence. Bill failed to provide such evidence, yet the trial court paid no mind to this failure because it erroneously held that the burden of proof was actually on John D.

In his Brief, Bill sets forth 28 points that he claims add up to clear and convincing evidence of undue influence, but of those 28 points, only five were incorporated into the trial court's Findings of Fact. The remaining points noted by Bill have no bearing on a finding of undue influence, as the court clearly did not consider them in reaching its conclusions of law. Even if it had, those points are largely irrelevant and do not go to the legal issue of undue influence.

The five points noted by Bill that the trial court did include in its findings of fact are as follow:

- Number 10: A mental evaluation was performed on Virginia by Dr. Rob Neils. CP 112. The only thing this shows is that Virginia had testamentary capacity at the time the evaluation was performed. It was never settled at trial the exact date of the evaluation, though John D. did, at the trial court's request, provide documentation after trial which showed when the evaluation took place. In any case, the trial court found that Virginia had testamentary capacity at the time she executed the 2003 estate documents. CP 112.
- Number 12: The evidence is clear regarding the timeline in which Virginia executed her different estate planning documents.

- Number 14: The court did find that John D. made a request of Steve Jolley to amend the December 2002 will. CP 111. However, John D. continues to dispute that it was his request, but maintains that he was simply communicating Virginia's request, and there is no evidence in the record to dispute this contention.
- Number 21: Most of these statements were not proven at trial, but the court did find that Jennifer Bohlman received \$10,000 from Virginia's estate. CP 112. Like most of the points listed by Bill, this has no bearing on the issue of undue influence.
- Number 22: The trial court made a finding of fact that evidence did not show it was clearly Virginia's intent to make inter vivos gifts to John D. CP 112. However, John D. continues to dispute this finding of fact, as there is clear evidence in the record and cited in Appellant's Brief that Virginia wanted to have the bulk of her estate pass outside of probate, and she queried both Steve Jolley and Pamela Rohr on how to do so. RP 280, 423.

In addition to these largely irrelevant 28 points, Bill tries to call into doubt Attorney Rohr's credibility. However, the trial court found no fault with Rohr's credibility. In fact, the trial court found Rohr's testimony to be "straightforward" and held Rohr not to be at fault in any

way. CP 115. Bill seems to think her testimony should be disregarded because Attorney Rohr claimed to remember everything about her meeting with Virginia, but Rohr explained her good memory on cross examination, stating that she remembers it because she took special precautions to make sure that Virginia understood what she was doing. RP 435.

3. Some Findings of Fact Are Not Supported by Substantial Evidence

John D. stands by the argument made in his Brief that several of the trial court's Findings of Fact were not supported by substantial evidence. In Bill's responsive Brief, he makes statements in regard to these findings of fact that are also not supported by evidence. Some of these statements have been addressed above, but those that have not are addressed here.

a. Finding of Fact No. 17

Bill states that the trial court determined that the letter John D. wrote to Steve Jolley was not written at the request of Virginia. There is no specific Finding of Fact that says this, and no evidence was provided at trial that John D. wrote the letter without his mother's knowledge or approval.

b. Finding of Fact No. 20

There is no evidence in the record that Virginia saw the emails between John D. and Bill, and there is also no evidence that John D. referred to Bill in a derogatory manner to Virginia.

Bill states that John D. “searched for and found an attorney who would willingly draft documents to disinherit Bill.” This is not only completely at odds with the evidence in the record, but it also directly contradicts Bill’s earlier statement on page 16 of his Brief, where he admits that Attorney Rohr was enlisted as a result of a referral from Steve Jolley. The evidence shows that Steve Jolley made the referral to Attorney Rohr. RP 514. John D. did not undertake a search for an attorney who would do exactly what he wanted her to do. Virginia accepted Steve Jolley’s referral, and that is all there was to it.

4. Substantial Evidence Show’s Virginia’s Intent to Avoid Probate

The issue of whether or not Virginia intended to gift her estate to John D. prior to her death is irrelevant so long as her 2003 will is determined to be valid. In any case, John D. provided evidence that Virginia had a desire to avoid probate, and gifting her estate to its intended beneficiary was a way to do that. Further, since Virginia’s estate planning

documents had already given the bulk of her estate to John D. upon her death, it is not logical that John D. would have felt the need to exert undue influence to get Virginia to turn those assets over prior to her death. This is especially true given that there is no evidence that John D. touched any of his mother's assets prior to her death. When one examines the evidence, it is plain that the purpose of the inter vivos transfer was only to avoid probate.

In determining whether an inter vivos gift is a product of undue influence the court must look at several factors including: the donor's age and mental condition; her prior intentions and concerns as to the disposition of her property; the size of the gift, and the financial condition in which it leaves the donor; her knowledge and understanding of the terms of the gift; and the presence or absence of independent advice to the donor prior to the gift. See *McCutcheon v. Brownfield*, 2 Wn. App. 348, 467 P.2d 868 (1970). If one examines the evidence in the record, it is apparent that there is no proof of undue influence in regard to the gifting.

It is undisputed that Virginia was in good mental condition; the trial court said so in its 25th Finding of Fact, and Bill never provided evidence to disprove the fact. CP 112. The trial court also found that Virginia understood the object of her bounty and knew what she was

doing. CP 112. The evidence shows that Virginia was interested in avoiding probate, and she asked both Steve Jolley and Pamela Rohr about how to avoid probate when she met with them, so she received independent advice from two separate attorneys on the subject. RP 280, 423. The gifting left John D. in the same condition he would have been if her estate documents had been probated, and he did not touch the assets prior to Virginia's death. Thus, all of the factors listed in *McCutcheon* point to an absence of undue influence on the inter vivos gifting involved in this case.

5. Attorney's Fees

RAP 18.1 allows the Court of Appeals to award attorney fees in particular instances. The Appellant is due his attorneys fees and costs pursuant to RCW 11.96A.150, which allows either the trial court or the Court of Appeals to award attorney fees in actions brought under the Trusts and Estate Dispute Resolution Act (RCW 11.96A et seq.). John D. respectfully requests that this court award to him his reasonable attorney fees and costs incurred on appeal.

CONCLUSION

The trial court made a material error of law by putting the burden of proof on John D. to show there was no undue influence by clear, cogent

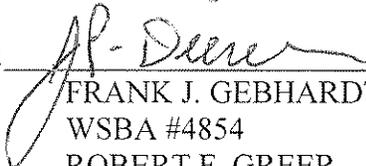
and convincing evidence. Under Washington law, the burden never shifted to John D., but remained always on Bill, the will contestant. Obviously, if John D. had believed he had the burden of proof, he would have approached the trial differently; rather than gathering evidence simply to rebut Bill's claims, John D. would have gathered and presented evidence sufficient to meet the burden. But he did not approach the trial that way, because the burden of proof was not legally his to bear.

John D. provided rebuttal evidence to show that Virginia had good and rational reasons for changing her estate documents, and the trial court found this evidence to be true and factual, as it was incorporated into 10 separate Findings of Fact. Such evidence was more than sufficient to balance the scales, but the trial court did not require Bill to then provide clear, cogent and convincing evidence that, in spite of the rebuttal evidence, the estate documents were changed as a direct result of undue influence.

The evidence in the record does not support many of the trial court's Findings of Fact, nor its Conclusions of Law. As a result, this Court should reverse the decision of the trial court and find in favor of the Appellant, John D. Melter.

DATED this 18 day of April, 2011.

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