

No. 291928

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

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*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

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**BRIEF OF APPELLANTS**

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Frank J. Gebhardt  
Robert F. Greer  
JP. Diener  
FELTMAN, GEBHARDT, GREER & ZEIMANTZ, P.S.  
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## **INTRODUCTION**

Appellant, John D. Melter, appeals the judgment of the trial court that the 2003 will of Mary Virginia Melter should be set aside as the product of undue influence. Several of the trial court's findings of fact are not supported by substantial evidence. Further, the trial court wrongly placed the burden of proof on John D. Melter, rather than on the Petitioner and will contestant, William Melter. The record does not contain clear, cogent and convincing evidence that the 2003 will was the result of undue influence. Consequently, the decision of the trial court should be reversed and the 2003 will of Mary Virginia Melter should be declared valid.

## **ASSIGNMENTS OF ERROR**

1. The trial court erred in entering that portion of Finding of Fact No.

17 which reads:

John D. demanded that attorney Jolley change his mother's will (executed in December 2002). John D. demanded that the will be changed to bequeath everything to John D. (CP 111)

2. The trial court erred in entering that portion of Finding of Fact No.

20 which reads:

...John D. shared his anger and disappointment with William, with his mother. John located an attorney for his mother (attorney Rohr), who would do what attorney Jolley refused to do, i.e. disinherit William. John D. drafted

letters for his mother to sign. These letters directed attorneys to draft estate planning documents that disinherited his brother William. (CP 111-112)

3. The trial court erred in entering Finding of Fact No. 26, which reads as follows:

John D. and Sandra “fueled the fire” of Mary’s disappointment in William. John D. manipulated the situation and made direct demands on Mary’s attorneys. (CP 112)

4. The trial court erred in entering Finding of Fact No. 30, which reads as follows:

Mary [sic] final will, providing that John D. should inherit 99% of her estate was the result of overreaching on the part of John D. (CP 112)

5. The trial court erred in entering Finding of Fact No. 31, which reads as follows:

The evidence does not [sic] provide sufficient evidence that Mary intended to make a series of inter vivos gifts to John D., that would result in his capture of almost her entire estate before her death. (CP 112)

6. The trial court erred in entering Conclusion of Law No. 1, in so far as it holds that John D. came before the court with unclean hands. (CP 118)

7. The trial court erred in entering Conclusion of Law No. 2, which reads as follows:

The May 2003 will drafted by attorney Rohr and executed by Mary is invalid. (CP 118)

8. The trial court erred in entering Conclusion of Law No. 4, which reads as follows:

The burden is on John D. to establish that he did not exercise undue influence. There is clear, cogent, and convincing evidence that John D. exercised undue influence over his mother in regard to the May 2003 will and any purported inter vivos gifts. (CP 118)

9. The trial court erred in entering Conclusion of Law No. 5, which reads as follows:

John D. failed to prove he did not exercise undue influence. Indeed the evidence that he did exercise undue influence is overwhelming. (CP 118)

10. The trial court erred in entering Conclusion of Law No. 6, which reads as follows:

The validity of the inter vivos gifts is not supported by evidence. (CP 118)

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

##### **ISSUE NO. 1: Assignment of Error No. 1**

Whether there is substantial evidence to support the trial court's Finding of Fact No. 17.

**ISSUE NO. 2: Assignment of Error No. 2**

Whether there is substantial evidence to support the trial court's Finding of Fact No. 20.

**ISSUE NO. 3: Assignment of Error No. 3**

Whether there is substantial evidence to support the trial court's Finding of Fact No. 26.

**ISSUE NO. 4: Assignment of Error No. 4**

Whether there is substantial evidence to support the trial court's Finding of Fact No. 30.

**ISSUE NO. 5: Assignment of Error No. 5**

Whether there is substantial evidence to support the trial court's Finding of Fact No. 31.

**ISSUE NO. 6: Assignments of Error Nos. 6, 7, 8, 9**

Whether the Respondent, William Melter, met his burden of proof by clear, cogent and convincing evidence that the 2003 will was a product of undue influence by the Appellant, John D. Melter.

**ISSUE NO. 7: Assignments of Error Nos. 6, 7, 8, 9**

Whether the trial court failed to properly consider John D.'s rebuttal evidence that the 2003 will was not a product of undue influence.

**ISSUE NO. 8: Assignment of Error No. 10**

Whether the Respondent, William Melter, met his burden of proof by clear, cogent and convincing evidence that the inter vivos transfers of assets from Mary Virginia Melter to John D. Melter were a direct result of undue influence by John D. Melter.

**ISSUE NO. 9: Assignments of Error Nos. 8, 9**

Whether the trial court wrongly placed the burden of proof on John D. Melter to prove that he did not engage in undue influence.

**ISSUE NO. 10: Assignment of Error No. 10**

Whether the trial court abused its discretion by addressing the matter of inter vivos gifts to John D. Melter, even though they had not been pled as an issue by William Melter, and were not raised by William Melter until trial.

**STATEMENT OF FACTS**

This case involves a dispute between two brothers, the Appellant, John D. Melter (age 58), and the Respondent, William R. Melter (age 51), over the distribution of their mother's estate. The saga of the Melter family has been a tragic one since 2002. In that year, the Melters lost two beloved members, Mary Jane and John Russell. Mary Jane, loving sister to John D. and William R. ("Bill"), was the first to pass. RP 31. She succumbed to a battle with cancer in May 2002, and her funeral was

attended by John D. and Bill, as well as her parents John Russell and Mary Virginia. RP 51. EX 1

Just over two months after the loss of Mary Jane, John Russell, a retired officer in the United States Air Force, passed away at a VA Hospital in Florida. RP 55. Father to John D. and Bill, and husband to Mary Virginia, his death so soon after Mary Jane's was very hard for the family to bear. The losses were particularly hard on the matriarch of the family, Mary Virginia. (I will refer to her as Virginia, since that is how she was known to her family and friends).

In the weeks following the death of her husband, Virginia was worn out, weak and tired. RP 56. Bill testified that during those weeks, his mother was easily upset and she often contradicted herself. RP 96. John D. testified that when his mother moved in with him in October 2002, she was a physical and emotional wreck. RP 485. Jennifer Bohlman, daughter of Mary Jane, testified that at the time of Mary Jane's funeral, Virginia was very tired and upset, and appeared to be under considerable stress. RP 567. Sandra Melter, John D.'s wife, also observed that when Virginia first moved in with her and John D., Virginia was very emotional, weak, frail, and not totally coherent. RP 645.

In spite of Virginia's frail, emotional and incoherent state, Bill Melter ensured that she changed her will shortly after John Russell's death. RP 83. Bill drove her to Patrick Air Force Base in Florida, and had her meet with Judge Advocate General (JAG) officers there. RP 83. Those JAG officers drafted a new will for Virginia that gave Bill the Florida home where John Russell and Virginia had lived for many years. They also drafted a Power of Attorney making Bill his mother's attorney-in-fact. RP 83. Bill was allowed to meet with a JAG officer, prior to the will being drafted and signed. RP 84. Bill was physically present when Virginia signed this will in September 2002. RP 83.

Once Bill had his mother sign the will that he wanted, Bill's plan was to move Virginia to Kent, Washington, where he and his wife resided, and to then move Virginia into an assisted living facility there, even though she had no desire to live in such a facility. RP 78, 126. Bill knew that his mother could not live with him because he had a tri-level house and she had difficulty negotiating the stairs. RP 78, 126. Nevertheless, Bill's plan was always to move Virginia into the assisted living facility in Kent, and had all of her personal belongings (including her legal documents, bank records and medical records) shipped to Kent for that purpose. RP 136.

Before bringing her back to Kent with him, however, Bill had to leave Virginia with John D. and Sandra Melter in Spokane because Bill and Janet Melter were taking a trip to Hawaii. RP 88 – 89. Virginia's stay with John D. in Spokane lasted longer than first anticipated, however, because while in Hawaii, Bill suffered a heart attack. RP 91.

While living with John D. and Sandra, Virginia decided she would prefer to stay with them rather than move to Kent and face the possibility of an assisted living facility. During her time with them, Virginia's condition improved dramatically. RP 646. She began to come out of her long, incoherent dazes and perked up quite a bit. RP 646. She improved emotionally and physically, and appeared happy and secure, with very few worries. RP 513. Her granddaughter, Jennifer Bohlman testified that when she visited Virginia in the Spring of 2003 in Spokane, Virginia was much improved, and she had a lot more energy than she had at Mary Jane's funeral. RP 568. Virginia's friend, Teresa Maxfield, testified that while Virginia was living at John D. and Sandra's house, her spirits were very good and her memory was strong. RP 458. Her grandson, John R. Melter, testified that when he was around her in John D. and Sandra's home, Virginia's memory was good, and she was usually in good spirits. RP 468.

In December of 2002, after living with her son John D. for two months, Virginia told him that she wanted to make a new will and have him appointed Power of Attorney. RP 505. John D. contacted attorney Steve Jolley on Virginia's behalf and scheduled a time for Virginia to meet with him. John D. drove her to the appointment, but he did not meet with Mr. Jolley. RP 505. John D. was never involved in any of the appointments that Mr. Jolley had with Virginia and had no independent interaction with Mr. Jolley prior to the signing of the will in December 2002. RP 265, 266. Mr. Jolley testified Virginia knew the object of her bounty and had a general idea of what she owned. RP 261. He further testified that he had no reason to believe that John D. was influencing Virginia to do anything that wasn't in her best interest. RP 268. On the other hand, Mr. Jolley testified that Bill Melter called him on multiple occasions complaining about the changes that Mr. Jolley had made to Virginia's will and expressing his dissatisfaction with the fact that Bill was no longer going to receive the Florida home, and demanding that Mr. Jolley give Bill the Florida home. RP 283, 284.

During this time, the winter of 2002-2003, Virginia requested that Bill return all of her personal possessions that he had shipped to Kent, including legal documents, bank records and medical records. Bill refused

to send the records and possessions. CP 111. It wasn't until Mr. Jolley sent Bill a letter requesting the documents that Bill finally sent Virginia anything, and even then all he sent were several of Virginia's old formal gowns, and later a box of unorganized documents. RP 508, 617. When Virginia received those items in such a fashion from Bill, she became distraught and cried. RP 655.

John D. made several attempts to take his mother to Kent to collect her belongings. Some of those attempts were foiled by bad weather. RP 541. Other attempts were ruined by Bill, who demanded that when she came to Kent, Virginia would meet with his own personal attorney and his attorney's brother (also an attorney) to discuss estate planning issues. RP 541. These demands made Virginia cancel the trips because she did not want to meet the attorneys that Bill had picked out for her. RP 541. When John D. and Virginia finally did make it to Kent to collect her possessions, they found that several of her items had been taken by Bill, including two therapeutic chairs, a mattress, a roll top desk, a dining room table, and a china hutch. RP 511.

These actions by Bill, including his reprehensible actions in making her draft a new will so soon after the deaths of her daughter and her husband, caused Virginia to rethink her estate planning. In March of

2003, John D. typed a letter on behalf of his mother to Steve Jolley asking him to make changes to her will. RP 512. John D. typed the letter because at that point his mother's handwriting was very difficult to read, and she did not use computers. RP 512. Virginia is the only one who signed the letter. RP 512. However, after the execution of Virginia's will and trust, between December 2002 and March 2003, John D. and attorney Steve Jolley had discussed John D.'s legal matters related to his construction business, and Mr. Jolley felt that these conversations created a conflict of interest that would not allow him to draft the changes that Virginia requested. RP 274. At no point did Steve Jolley testify, nor is there any other evidence in the record to indicate, that Mr. Jolley refused to make the changes because of any reason beside the apparent conflict of interest. In fact, Mr. Jolley testified that it is not unusual to have a child written out of a will, so that alone would not have deterred him. RP 279.

Mr. Jolley referred Virginia to attorney Pam Rohr, and John D. called Ms. Rohr's office and scheduled an appointment for Virginia to meet with her. RP 514. At the time that Ms. Rohr met with Virginia in the Spring of 2003, Ms. Rohr had been practicing law for more than 20 years in the areas of estate planning and probate. RP 411. When she testified at trial, Ms. Rohr stated she could remember her entire office

conference with Virginia. RP 412. John D. did not communicate with Ms Rohr prior to the drafting of the May 2003 will, and he was not involved nor present at any of Ms. Rohr's meetings with Virginia. RP 413, 414. There is also no evidence that Ms. Rohr ever saw Virginia's letter to Steve Jolley, which was typed by John D. Ms. Rohr testified that Virginia knew exactly what changes she wanted to make to her will, and was always consistent in what she said and what she wanted. RP 416. Virginia was consistent in the facts she gave and she presented herself as a competent person. RP 416. Virginia did not seem uncertain about her decision, and definitely understood the things that Ms. Rohr communicated to her. RP 417, 421.

Virginia told Ms. Rohr that she was very unhappy with her son Bill, particularly based on those things that he did during the late summer and early fall of 2002 in making her change her estate documents. RP 418, 422. She was also upset by the fact that Bill had refused to send any of her documents and possessions, and what he did send was sent in such a poor fashion. RP 418. Virginia explained that she was very happy with John D. and Sandra, and she wanted to make sure that they received her money because they were taking care of her. RP 420, 424. Ms. Rohr was absolutely certain that Virginia understood the transaction in which she

was engaged when she executed the 2003 will. RP 426-427. She comprehended the nature and extent of the property that constituted her estate. RP 426-427. Ms. Rohr observed no evidence that indicated John D. interfered with Virginia's free will, and she saw nothing to indicate that Virginia was prevented from exercising her own judgment and choice. RP 427, 429. Had there been any inkling at all that John D. was exercising undue influence over Virginia, Ms. Rohr would not have advised Virginia to proceed. RP 428.

In contrast, Ms. Rohr testified that she did see evidence of undue influence on the part of Bill Melter. RP 433-434. Bill called Ms. Rohr and went on at length about the decisions he had made for Virginia and the decisions he thought should still be made for her. RP 433-434. Bill told Ms. Rohr how he thought she should do Virginia's estate planning and what provisions she should make. RP 433-434. To Ms. Rohr, Bill's behavior only validated the things that Virginia had told her and confirmed that Virginia was remembering things as they had actually happened. RP 433-434.

One of the things that Virginia discussed with both Mr. Jolley and Ms. Rohr was gifting portions of her estate to John D. to avoid probate. RP 280, 423. She also discussed with Ms. Rohr that she wanted to

compensate John D. and Sandra for taking such good care of her. RP 420, 423. Virginia did gift the majority of her estate to John D. prior to her death by transferring her assets into joint bank accounts with rights of survivorship to John D. RP 627. William Melter did not challenge the inter vivos transfers until the time of trial, and John D. objected to the trial court's consideration of the challenge as being unfairly prejudicial. CP 92-93. Virginia made no other changes to her estate planning documents over the last years of her life, and passed away in 2007.

#### **STANDARD OF REVIEW**

An appellate court reviews a trial court's decision following a bench trial to determine whether the findings are supported by substantial evidence and whether those findings support the conclusions of law. *Dorsey v. King County*, 51 Wn. App. 664, 754 P.2d 1255 (1988). "Substantial evidence" is the quantum of evidence sufficient to persuade a rational, fair-minded person the premise is true. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (2000). An appellate court reviews a trial court's legal conclusions de novo. *In re Knowles*, 135 Wn. App. 351, 143 P.3d 864 (2006).

## ARGUMENT

### **A. The Evidence Does Not Support a Finding That John D. Engaged in Undue Influence**

#### **1. The Law**

To constitute undue influence, “there must have been undue influence at the time of the testamentary act, which interfered with the free will of the testator and prevented the exercise of judgment and choice.” *In Re Estate of Reilly*, 78 Wn.2d 623, 646, 479 P.2d 1 (1970). Influence becomes undue only when it overcomes the will of the testator, when the act of making the will is the result of such coercion that free agency is destroyed. *In Re Bottger’s Estate*, 14 Wn.2d 676, 700, 129 P.2d 518 (1942). Washington courts have long recognized that “influence exerted by giving advice, arguments, persuasions, solicitations, suggestions or entreaties is not considered undue unless it is so importunate, persistent or coercive and operates to subdue and subordinate the will of the testator and take away his or her freedom of action.” *In re Reilly*, 78 Wn.2d at 662. The Washington Supreme Court found that the most common situations giving rise to true undue influence are those where a) the testator had little to no mental capacity; b) the testator was greatly physically impaired; c) the testator disinherited someone who was near and dear to them; and d) the main portion of the estate was

bequeathed to someone to whom the testator had no close ties. In Re Estate of Smith, 68 Wn.2d 145, 411 P.2d 879 (1966).

There are certain factors that the court will examine to determine if there is a possibility of undue influence. The most important of these include 1) a fiduciary or confidential relationship between the testator and the beneficiary; 2) active participation by the beneficiary in preparing or procuring the will, and 3) the beneficiary's receipt of an unusually or unnaturally large part of the estate. In Re Knowles, 135 Wn. App. 351, 357, 143 P.3d 864 (2006). However, these are not conclusive proof of undue influence, and merely raise a presumption of undue influence. That presumption may be overcome by rebuttal evidence that shows a reasonable explanation for why the decedent made the choices he/she made. Id. This rebuttal evidence need only be sufficient to "balance the scales," and need not rise to the level of clear and convincing evidence, or even preponderance of the evidence. 135 Wn. App. at 356.

If rebuttal evidence is provided, the will challengers still have the burden of proving undue influence by clear, cogent and convincing evidence. Id. To discourage will contests, the law requires a high degree of proof to sustain a challenge. In Re Estate of Crane, 9 Wn. App. 853, 856, 515 P.2d 552 (1973) review denied 83 Wn.2d 1006 (1974). The

contestant must prove the invalidity of the will's execution and contents by clear, cogent, and convincing evidence. In Re Estate of Black, 153 Wn.2d 152, 161-63, 102 P.3d 796, 802 (2004).

Clear, cogent and convincing evidence is “weightier and more convincing” than the evidence necessary to establish something by a preponderance of the evidence. See In re Disciplinary Proceeding Against Deming, 108 Wn.2d 82, 736 P.2d 639 (1987). Black's Law Dictionary defines clear and convincing evidence as “evidence indicating that the thing to be proved is highly probable or reasonably certain.” Gardner, Black's Law Dictionary, 7<sup>th</sup> Ed. (1999); see also Tiger Oil Corp. v. Yakima County, 158 Wn. App. 553, 242 P.3d 936 (2010) (holding that the clear, cogent and convincing standard requires a quantum of evidence to convince the finder of fact that the issue is “highly probable”).

A 2006 case decided by Division Two of the Court of Appeals proves exceptionally instructive for resolution of this matter: In re Knowles, 135 Wn. App. 351, 143 P.3d 864 (2006). In that case, Randy Knowles was accused of engaging in undue influence over his father's will. Three years before his father, Merle, passed away, Randy aided in the drafting of his father's will by handwriting the material provisions on a preprinted will form. The will made Randy the personal representative,

and gave to Randy the bulk of the estate. 135 Wn. App. at 354. The other heirs contested the will, after Merle's death, alleging undue influence. The trial court found that the petitioners put on enough evidence to raise the presumption of undue influence. 135 Wn. App. at 355.

Randy submitted rebuttal evidence, including his own declaration stating that he had completed the will at his father's request. There was also testimony from people who knew Merle that said he was a strong willed man who would not easily be influenced by anyone, and that Randy had a closer relationship with his father than did the other heirs. Further, there was evidence to show that the decedent's relationship with the petitioners was bitter and strained in his final years. *Id.* The trial court held that, due to this rebuttal evidence, the petitioners had not met their burden of proving the invalidity of the will by clear, cogent and convincing evidence. The Court of Appeals affirmed. 135 Wn. App. at 356.

In *Knowles*, the Court of Appeals found that there was sufficient rebuttal evidence to overcome the initial presumption of undue influence. 135 Wn. App. at 358. The sufficient rebuttal evidence was held to include the following: 1) substantial evidence that Merle voluntarily signed the

will; 2) Merle was not vulnerable, as he had a strong mind and mental capacity. In coming to this conclusion, the court relied on the testimony of Merle's attorney, who stated that Merle could not be led to do things he did not want to do; and 3) the will dispositions were a natural result of the relationships with his children. The Court held that "a disparately large gift to one beneficiary does not necessarily denote undue influence if there is a natural explanation for it." This applies even where a fiduciary participates in drafting the will and receives a large gift from it. 135 Wn. App. at 358-359.

## **2. The Evidence Does Not Give Rise to a Presumption of Undue Influence**

The trial court correctly pointed to the three primary factors to review in determining whether the initial presumption of undue influence has been raised by the petitioners. CP 113-114. As discussed above, those include: 1) a fiduciary or confidential relationship between the testator and the beneficiary; 2) active participation by the beneficiary in preparing or procuring the will, and 3) the beneficiary's receipt of an unusually or unnaturally large part of the estate. The trial court found that all three factors were present in this case, but the evidence does not support a finding of the second factor.

Bill Melter provided no evidence that showed John D. was an active participant in preparing or procuring the 2003 will. The best evidence available on that subject is the testimony of attorney Pamela Rohr, who met with Virginia and prepared the will on her behalf. Ms. Rohr testified that she had no communication with John D. prior to the execution of the 2003 will, and there is no evidence that she ever saw the letter that was typed by John D. on behalf of his mother and sent to Steve Jolley. RP 413-414. In fact, there is no evidence in the record that John D. played any role whatsoever in the preparation of the will, direct or indirect. Furthermore, Ms. Rohr testified that Virginia appeared quite competent and aware of what she was doing. RP 416. Ms. Rohr stated that she saw no indication that John D. had interfered with Virginia's free will, and believed wholeheartedly that Virginia was exercising her own judgment. RP 427, 429. There is no evidence in the record to contradict Ms. Rohr's testimony, and the trial court found no fault with Ms. Rohr or her memory.

John D. did receive the vast majority of Virginia's estate. But as discussed in *Knowles*, Washington courts have recognized that a disparately large gift, standing alone, does not denote undue influence. No

evidence beyond that single fact was presented to the trial court to support a finding of undue influence.

In making its finding that John D. prepared or procured the 2003 will, the trial court relied on the “wealth of writings he created.” CP 114. The majority of writings by John D. in evidence are communications that John D. had with his brother. These writings may prove that the brothers did not get along, but they show little beyond that. There is nothing in those writings to indicate that John D. was exerting any kind of undue control over his mother, or that he was making her do anything she did not want to do. The writings simply show an ongoing dispute between the brothers, arising largely from Bill’s poor treatment of Virginia, and his refusal to send her personal belongings. There is no evidence to show that Virginia was a part of these writings, that she read them, or was in any way influenced by them.

The trial court also based its finding on “the fact that John D. enlisted the assistance of a new attorney and fired Mary’s prior attorney, Steve Jolley, after he would not make the changes that John D. had requested.” CP 115. This statement by the trial court directly contradicts the testimony of Steve Jolley. Mr. Jolley testified that the reason he declined to make the changes to Virginia’s estate planning documents was

because of a conflict of interest. RP 274. Apparently, after drafting the December 2002 estate documents for Virginia, Mr. Jolley advised John D. on some matters related to John D.'s business. RP 274. There is no evidence to show that Mr. Jolley believed the requested changes were wrongful or a bad idea, and he did not advise John D. or Virginia not to make the changes. Instead, Mr. Jolley referred Virginia to a very competent and experienced estate planning attorney, Pamela Rohr. RP 514. The finding that John D. "fired" Mr. Jolley is simply erroneous.

In *Knowles*, the son who received the bulk of the estate actually hand-wrote portions of his father's will. In this case, we have nothing of the sort. The evidence shows only that John D. complied with his mother's wishes to find her an attorney so she could change her estate planning documents. RP 512. Based on the evidence, no reasonable person can conclude that John D. engaged in preparing or procuring the 2003 will. Therefore, the trial court erred when it found that the presumption of undue influence had been successfully raised.

### **3. Rebuttal Evidence Is Sufficient to Overcome Presumption of Undue Influence; the Trial Court Misapplied the Burden of Proof**

#### **a. John D. Provided Substantial Rebuttal Evidence**

Even if there was a presumption of undue influence, that presumption was successfully rebutted by the uncontroverted evidence

that Virginia voluntarily signed her will, that she was strong willed and had sufficient capacity, and that the exclusion of Bill Melter from her will was the natural result of her poor relationship with Bill in the last several years of her life. Yet the trial court does not address this rebuttal evidence, and that failure to consider and analyze the rebuttal evidence is a material mistake of law.

It is not disputed that Virginia signed her will and did so voluntarily, just like the testator father in *Knowles*. Also like *Knowles*, there is evidence that at the time the 2003 will was executed, Virginia was competent, happy, and strong willed; this evidence is also uncontroverted. RP 458, 468, 513, 568, Finally, John D. provided evidence of why Virginia chose to eliminate Bill from her will. Even the trial court found that Bill came to the court with unclean hands, and that his behavior in procuring the September 2002 will amounted to undue influence. CP 118. Bill harassed Virginia's attorneys, Mr. Jolley and Ms. Rohr, and for many months he refused to send Virginia her personal items. CP 111; RP 283-284, 433-434. When Bill talked with his mother on the phone, she would often become distraught and unhappy. In contrast, the evidence shows that Virginia was extremely happy with John D. and Sandra, and that they

took excellent care of her. RP 420, 424. All of this provides adequate reason for Virginia to leave nearly her entire estate to John D.

According to Washington law, as discussed in detail above, this rebuttal evidence overcomes any initial presumption of undue influence. As such, the burden then remained on Bill Melter to provide clear, cogent and convincing evidence that John D. engaged in undue influence, and that the 2003 will was a direct product of that undue influence. Bill Melter failed to do so. There is simply no evidence in the record, in light of John D.'s rebuttal evidence, to prove undue influence. And there is certainly nothing that rises to the standard of clear, cogent and convincing evidence. It is not reasonable to say that the evidence makes it "highly probable" that the 2003 will is a product of undue influence.

**b. The Trial Court Incorrectly Placed the Burden of Proof on John D.**

The trial court does not sufficiently address this high standard of clear, cogent and convincing evidence. Instead, the court shifted the burden of proof to John D. In its fourth Conclusion of Law, the trial court states: "The burden is on John D. to establish that he did not exercise undue influence." CP 118. This is a misstatement of the law, and it is clear that the trial court did not properly place the burden of proof on Bill Melter to prove undue influence by clear, cogent and convincing evidence.

John D. was not required to and did not endeavor to disprove undue influence by such a standard, but merely sought to provide sufficient rebuttal evidence, which he did.

The trial court misapplied the burden of proof also in regard to whether the inter vivos gifts to John D. from Virginia were the result of undue influence. The trial court states that John D. had the burden to prove the gifts were not products of undue influence, but in fact the burden is on the party contesting the gifts to prove undue influence. Furthermore, in his original Petition, Bill Melter did not allege that the inter vivos transfers of assets were the result of undue influence, and neither party addressed the issue at any length prior to or even during the trial. The trial court brought up the issue of undue influence in relation to the inter vivos transfers *sua sponte*.

However, even if undue influence concerning the inter vivos gifts had been an issue for the trial court's consideration, any presumption of undue influence was successfully rebutted by the evidence that Virginia discussed avoiding probate with both Steve Jolley and Pamela Rohr. RP 280, 423. There is evidence that Virginia considered gifting as a way to avoid probate, and her actions in transferring assets prior to her death are commensurate with the desire she expressed to avoid probate. Given such

evidence, the burden was then on Bill Melter to prove by clear, cogent and convincing evidence that the transfers were a result of undue influence, but he provided no such proof.

It was a clear misapplication of the law and obvious error by the trial court to place the burden of proof on John D., and to ignore application of the significant rebuttal evidence on record.

**B. The Trial Court's Findings of Facts Are Not Supported by Substantial Evidence**

The trial court's errors in its legal conclusions are compounded by its failure to adequately consider and analyze the facts in evidence. As discussed above, the trial court's findings of fact must be supported by substantial evidence. See e.g. *Dorsey v. King County*, 51 Wn. App. 664, 754 P.2d 1255 (1988). Several of the trial court's findings fail to meet this standard, and each has a significant impact on the outcome of the case.

**1. John D. Did Not Demand That Steve Jolley Change Virginia's Will**

In the trial court's seventeenth (17<sup>th</sup>) finding of fact, Judge Tari Eitzen states that "John D. demanded that attorney Jolley change his mother's will (executed in December 2002). John D. demanded that the will be changed to bequeath everything to John D." CP 111. The uncontroverted evidence shows, however, that John D. wrote to Steve

Jolley regarding changes to Virginia's will at the request of Virginia. RP 512. The reason that he typed the letter himself was because Virginia's handwriting was very poor due to arthritis. RP 512. Furthermore, it is uncontroverted that the letter was signed by Virginia, and not by John D. There is no evidence that John D. forced Virginia to sign the letter, or that he signed it on her behalf. None of the evidence supports a finding that John D. was making demands on Steve Jolley. RP 268. Instead, the evidence shows that John D. was only communicating to Steve Jolley his mother's wishes.

**2. John D. did not Speak Poorly of Bill to his Mother; John D. did not Hire Pam Rohr Because he Knew She Would Disinherit Bill**

The trial court states, in its twentieth (20<sup>th</sup>) finding of fact, that "John D. shared his anger and disappointment with William, with his mother." CP 111. There is no evidence in the record to support this finding of fact. No one testified that John D. spoke poorly about his brother to Virginia. There are no exhibits that show communication between John D. and Virginia regarding Bill Melter. As a result, not only does this finding fail for lack of substantial evidence, it fails for lack of any evidence at all.

Also in that finding of fact, the trial court indicates that John D. searched for and found an attorney who would willingly disinherit Bill. It further states that John D. drafted letters for his mother to sign and directed “attorneys” to draft estate planning documents that disinherited Bill. First, the evidence shows that attorney Steve Jolley referred Virginia to Pamela Rohr, the attorney who drafted Virginia’s final will in 2003. RP 514. John D. did not search out Pamela Rohr, but only accepted Mr. Jolley’s suggestion. RP 514. Second, the only evidence of a letter from John D. to an attorney is the one to Steve Jolley, which the evidence shows he typed at his mother’s request, and which Virginia voluntarily signed. RP 512. The evidence further shows that attorney Pamela Rohr did not have any communication with John D., written or otherwise, prior to the execution of Virginia’s will. RP 413-414. There is no evidence in the record that Pamela Rohr reviewed any other written communication from John D. before the execution of the 2003 will.

**3. John D. and Sandra Melter Did Not “Fuel the Fire” of Virginia’s Disappointment in William; John D. Did Not Manipulate Pamela Rohr**

In Finding of Fact No. 26, the trial court states “John D. and Sandra ‘fueled the fire’ of Mary’s disappointment in William. John D. manipulated the situation and made direct demands on Mary’s attorneys.”

CP 112. There is no evidence in the record that John D. or Sandra Melter made any disparaging remarks to Virginia about William. No one testified that such a thing occurred, and there is no record of written communication between John D. or Sandra and Virginia regarding negative feelings toward Bill Melter. The idea that either of them “fueled the fire” of Virginia’s feelings toward Bill is at best speculative, and is definitely not supported by substantial evidence.

As discussed above, the only evidence of John D. communicating with Virginia’s attorneys is the letter to Steve Jolley in March of 2003 communicating Virginia’s desire to change her estate planning. The evidence shows that the reason Steve Jolley did not make these changes is because he perceived a conflict of interest. RP 274. Mr. Jolley’s testimony shows that the reason he declined to further represent Virginia was because of some intervening work he did on behalf of John, unrelated to Virginia’s estate. RP 274. Pamela Rohr was the attorney who drafted the 2003 will, and her uncontroverted testimony shows that she did not have any communication with John D. prior to the execution of the 2003 will. RP 413-414. John D. never spoke with or directly communicated with Pamela Rohr prior to the drafting and execution of the 2003 will. RP

413-414. Therefore, this finding of fact is not supported by substantial evidence.

**4. Virginia's 2003 Will Was Not the Result of Overreaching by John D.**

The trial court's thirtieth (30<sup>th</sup>) Finding of Fact states that Virginia's 2003 will was a result of overreaching on the part of John D. This finding contradicts the evidence in the record which proves that John D. was not involved in the drafting or execution of the 2003 will. The attorney who met with Virginia and drafted the 2003 will, Pamela Rohr, testified that she had no communication with John D. prior to the execution of the will. RP 413-414. She also testified that she believed Virginia was acting with her full mental capacity, and there was no evidence of undue influence. RP 417, 421, 427, 429.

The evidence shows that Virginia had good reason to leave Bill out of her estate. In fact, the evidence shows a substantial amount of overreaching on the part of Bill.

- Bill took Virginia to have her will changed during a time when Virginia was not fully competent, due to the grief over the recent loss of her daughter and husband. Bill was present during the execution of this will. RP 83-84.
- Bill tried to make Virginia live in a retirement home, clearly against Virginia's wishes. RP 78, 126.

- After Virginia moved in with John D., Bill refused to send her belongings, including her legal documents and medical records. RP 508, 617.
- Once Bill found out about the December 2002 will, where he no longer received the Florida home, Bill constantly pestered Virginia, against her wishes, to come to Seattle and meet with Bill's attorney to draft new estate planning documents. RP 541.
- Bill called both Steve Jolley and Pamela Rohr and engaged in long, drawn out conversations where he made demands on both attorneys to change Virginia's estate planning documents in his favor. RP 283-284; RP 433-434.

All of these things speak of overreaching and undue influence by Bill. However, there is no corresponding evidence against John D. The evidence of Virginia's relationship with John D. shows that it was a good one, and that she was happy living with him and his family. RP 420, 423. There is no evidence of John D. pressuring Virginia to take any steps regarding her estate planning, and instead the evidence shows that John D. only acted to help Virginia carry out her own wishes.

**5. Virginia Intended to Gift John D. His Portion of Her Estate Prior to Her Death**

In Finding of Fact No. 31, the trial court states that there is not sufficient evidence to find that Virginia wanted to make inter vivos gifts to John D. of his portion of the estate. In fact, the testimony of both Steve Jolley and Pamela Rohr shows that Virginia asked about ways to avoid probate, and specifically asked if gifting the assets of her estate would

accomplish this goal. RP 280, 423. Obviously, Virginia did not want the majority of her estate passing through probate, and instead took steps to ensure that John D. would receive his portion of the estate outside of probate. RP 627. She also asked Ms. Rohr about giving John D. and Sandra monthly payments, to compensate them for all they did in seeing to her care. RP 420, 423.

Transferring her assets into joint accounts with rights of survivorship, and gifting those assets directly to John D. allowed for the avoidance of probate, and compensated John D. and Sandra pursuant to Virginia's wishes. It is entirely logical and reasonable to believe that someone interested in avoiding probate of their estate would take the steps that Virginia did prior to her death.

### **CONCLUSION**

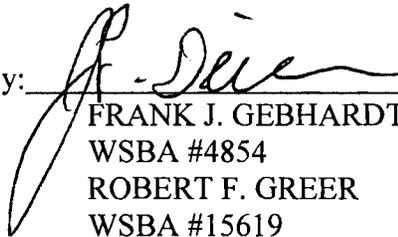
The record does not contain clear, cogent and convincing evidence that the 2003 will of Mary Virginia Melter is the product of undue influence. The trial court erred in its Findings of Fact, Nos. 17, 20, 26, 30 and 31, as those were not supported by substantial evidence. The trial court also erred as a matter of law when it placed the burden of proof on John D. Melter to show there was no undue influence. These are material errors that led to the wrong decision by the trial court. John D. Melter

respectfully requests that this court vacate the ruling of the trial court, which held that the 2003 will was the product of undue influence, and order that the 2003 will of Mary Virginia Melter is valid and supersedes all prior wills.

DATED this 17 day of January, 2011.

FELTMAN, GEBHARDT, GREET  
& ZEIMANTZ, P.S.

By: \_\_\_\_\_



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JP. DIENER, WSBA #36630

Attorneys for Appellants

# APPENDIX

# Descendants of John Russell Melter

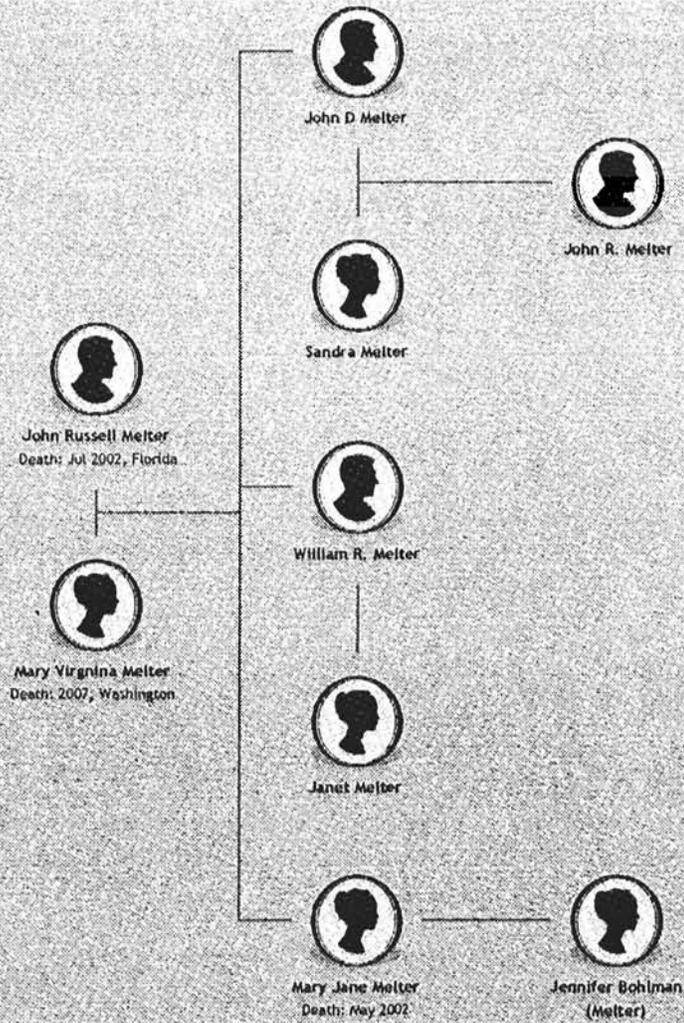


EXHIBIT 1