

No. 291928-III

**COURT OF APPEALS
STATE OF WASHINGTON
DIVISION NO. III**

**In re the Matter of the Trust and Estate of
MARY VIRGINIA MELTER, Deceased;**

WILLIAM R. MELTER,

Respondent

-vs-

**JOHN D. MELTER and SANDRA L. MELTER,
husband and wife; and JENNIFER LYNN MELTER,**

Appellants

BRIEF OF RESPONDENT

Michael M. Parker
POWELL, KUZNETZ & PARKER, P.S.
316 W. Boone Ave., Ste. 380
Spokane, WA 99201-2346
509-455-4151

Attorney for William R. Melter
Respondent

No. 291928-III

**COURT OF APPEALS
STATE OF WASHINGTON
DIVISION NO. III**

**In re the Matter of the Trust and Estate of
MARY VIRGINIA MELTER, Deceased;**

WILLIAM R. MELTER,

Respondent

-vs-

**JOHN D. MELTER and SANDRA L. MELTER,
husband and wife; and JENNIFER LYNN MELTER,**

Appellants

BRIEF OF RESPONDENT

Michael M. Parker
POWELL, KUZNETZ & PARKER, P.S.
316 W. Boone Ave., Ste. 380
Spokane, WA 99201-2346
509-455-4151

Attorney for William R. Melter
Respondent

TABLE OF CONTENTS

I. STATEMENT OF FACTS..... 1-13

II. STANDARD OF REVIEW..... 13-14

III. ARGUMENT

A. The evidence does support a finding that John D. engaged in undue influence. 15-24

B. The court correctly placed the burden of proof on John D. to rebut the presumption of undue influence. 24-27

C. The trial court’s Findings of Fact are supported by the evidence. 27-28

1. John D. demanded that attorney Steve Jolley change his mother’s Will executed in December 2002). John D. demanded that the Will be changed to bequeath everything to John D. (Finding of Fact No. 17; CP 111..... 28

2. John D. shared his anger and disappointment with William with his mother. (Finding of Fact No. 20; CP 111..... 28-29

3. John D. located an attorney for his mother (Attorney Pamela Rohr) who would do what Attorney Jolley refused to do, i.e., disinherit William. (Finding of Fact No. 20; CP 111)..... 29

4. John D. and Sandra Melter “fueled the fire” of (Virginia’s) disappointment in William; John D.

<u>manipulated the situation and made direct demands on Virginia’s attorneys. (Finding of Fact #26).....</u>	30-32
5. <u>Mary Virginia’s (Virginia) final Will providing that John D. should inherit 99% of her estate was the result of overreaching on the part of John D. (Finding of Fact No. 30; CP 112).....</u>	32-33
6. <u>Virginia’s alleged gifts to John D. prior to her death were the result of overreaching by John D. (Finding of Fact No. 31; CP 112).....</u>	33-34
D. <u>Bill is entitled to his attorney fees and costs pursuant to RAP 18.1, RCW 11.96A.150, and RCW 11.68.070.</u>	34-35
IV. CONCLUSION	35-37

TABLE OF AUTHORITIES

Caselaw

<i>Anderson v. Kurrell</i> , 28 Wn.2d 227, 182 P.2d 1 (1947).....	14
<i>Bartlett v. Betlatch</i> , 136 Wn. App. 8, 146 P.3d 1235 (2006), reconsideration den'd, rev. den'd, 162 Wn.2d 1004, 175 P.3d 1092 (2007).....	35
<i>Bering v. Share</i> , 106 Wn.2d 212, 721 P.2d 918 (1986).	27
<i>Davis v. Bader</i> , 57 Wn.2d 871, 350 P.2d 352 (1961)...	14
<i>Davis v. Dept. of Labor and Industries</i> , 94 Wn.2d 119, 615 P.2d 1279 (1980).....	17
<i>Estate of Kordon</i> , 157 Wn.2d 206, 137 P.3d 16 (2006).....	26
<i>Gordon v. Seattle-First National Bank</i> , 49 Wn.2d 728, 306 P.2d 739 (1952).....	26
<i>In re Bottinger's Estate</i> , 14 Wn.2d 676, 129 P.2d 518 (1942).....	24
<i>In re Coates Estate</i> , 55 Wn.2d 250, 347 P.2d 875 (1959).....	34
<i>In re Deming</i> , 188 Wn.2d 82, 736 P.2d 639 (1987) ...	17
<i>In re Estate of Beck</i> , 79 Wash. 331, 140 P.340 (1914).	25
<i>In re Estate of Black</i> , 116 Wn. App. 476, 66 P.3d 670 (2003), rev. den'd, 150 Wn.2d 1020, 81 P.3d 119, amended, rev. granted, affirmed on other grounds, 153 Wn. 2d 152, 102 P.3d 796 (2005).....	35
<i>In re Estate of Dand</i> , 41 Wn.2d 158, 247 P.2d 1016 (1952).....	14
<i>In re Estate of Lint</i> , 135 Wn. 2d 518, 957 P.2d 755 (1988).....	24

<i>In re Estate of Mitchell</i> , 41 Wn.2d 326, 249 P.2d 385 (1952).....	15
<i>In re Estate of Palmer</i> , 145 Wn. App. 249, 187 P.3d 758 (2008).....	13, 27
<i>In re Estate of Rielly</i> , 78 Wn.2d 623, 479 P.2d 1 (1970).....	15
<i>In re Estate of Smith</i> , 68 Wn. 2d 145, 411 P.2d 879 (1966).....	15
<i>In re Estate of Wegner</i> , 237 P.3d 387 (2010).....	35
<i>In re Irrevocable Trust of McKean</i> , 144 Wn.App. 333, 183 P.3d 317 (2008).....	27
<i>In Re Estate of Kleinleins</i> , 59 Wn. 2d 111, 366 P.2d 186 (1961).....	14, 24
<i>In re Knowles</i> , 135 Wn. App. 351, 143 P.3rd 864 (2006).....	16, 17, 23
<i>Johnson v. Harvey</i> , 44 Wn.2d 455, 268 P.2d 662 (1954).....	
<i>Lewis v. Estate of Lewis</i> , 45 Wn. App. 387, 725 P.2d 644 (1986).....	25, 33
<i>McCutcheon v. Brownfield</i> , 2 Wn. App. 348, 467 P.2d 868 (1970)	25
<i>Oium v. Fillion</i> , 129 Wash. 37, 223 Pac. 1060 (1924).....	14
<i>Pederson v. Bibioff</i> , 64 Wn. App. 710, 828 P.2d 1113 (1991).....	34
<i>Rogers Potato Service, LLC v. Countrywide Potato LLC</i> , 152 Wn.2d 387, 97 P.3d 745 (2004).....	27
<i>Stringfellow v. Stringfellow</i> , 56 Wn. 2d 957, 350 P.2d 1003, 353 P.2d 671 (1960).....	13

Thorndike v. Hesperian Orchards, Inc., 54 Wn.2d 570,
343 P.2d 183 (1959)..... 14

Willener v. Sweeting, 107 Wn.2d 388, 730 P.2d 45
(1986)..... 27

Other

RAP 18.1(a) & (b)..... 34

RCW 11.68.070..... 34

TEDRA, the Trust Estate Dispute Resolution Act,
RCW 11.96.010 et seq..... 26, 34

RCW 11.96A.020(1)(a)..... 27

RCW 11.96A.150..... 34

I.

STATEMENT OF FACTS

The basis of this appeal is John D. Melter's (hereinafter "John D.") objection to the trial court's ruling that he exercised undue influence and overreaching in obtaining over 99% of his mother, Mary Virginia Melter's (hereinafter "Virginia") estate, and thereby excluding his only sibling, William Melter (hereinafter "Bill") from receiving any portion of her estate.

John R. and Virginia Melter had three children. Bill, the youngest, was born in 1959 (RP 30); John D., was eight years older than Bill; and Mary Jane, the eldest, was 12 years older than Bill. (RP 31). John R. and Virginia Melter lived in the Midwest, including Wisconsin, while their children were growing up. (RP 31).

John D. graduated from high school in 1969 and permanently left the family home in 1970 when Bill was approximately 10 years old. (RP 33). John R. and Virginia Melter subsequently moved to Florida in 1973, where Bill graduated from high school in 1977. (RP 32). Although Bill moved out of the family home in approximately 1983, he visited his parents in Florida on a yearly basis from 1983 through 2002. (RP 49-50).

John R. and Virginia's daughter, Mary Jane Winkler, died in 2002. (RP 31). Shortly after Mary Jane's death, John R. Melter

passed away in Florida on July 30, 2002. (RP 49). Bill made the necessary funeral arrangements. (RP 58). Bill stayed with his mother in Florida after his father's death and took care of her. (RP 71).

John R. and Virginia Melter had executed joint reciprocal Wills in 1995 which provided that the surviving spouse would receive the entire estate and once the surviving spouse passed, the three children would receive equal shares of that estate. (RP 60-63). Consequently, on the passing of John R. Melter in July 2002, his entire estate transferred to Virginia. Bill was named the primary personal representative in both his mother's and father's Wills. (RP 60).

On September 8, 2002, Virginia executed a new Will in which she gave her Florida home to Bill, a specific \$5,000 bequest to her grandchildren, and the remaining assets of her estate were to be divided equally between Bill and John D. (RP 86-87).

Bill took primary responsibility in gathering his mother's assets together and transferring them to Kent, WA, where Bill lived. Bill stayed in Florida with Virginia from August to October of 2002 in order to accomplish this. (RP 71). Virginia's Florida home was leased to a third party for \$950 a month. (RP 73). Virginia did not want to sell the home. (RP 152-153, 283). Virginia wanted to live in Western Washington to be close to her husband's grave as well

as Bill and his wife, Janet. (RP 150). John D. acknowledged that in early October 2002, the plan was for Virginia to live with or near Bill in Kent, Washington. (RP 484).

Bill and Janet were required to attend a wedding of a relative in Hawaii in October of 2002. (RP 77). Consequently, Bill brought Virginia to stay with his brother and her son, John D., in Spokane on October 10, 2002. (RP 644). Virginia's stay with John D. and Sandra Melter (John D.'s wife) was to be approximately two weeks or so until Bill returned from the wedding. (RP 77-78, 644).

While in Hawaii, Bill suffered a heart attack requiring double bypass surgery. He was incapacitated through April or May of 2003. (RP 90).

Virginia was not informed of Bill's heart attack until months after the fact because Bill did not want to upset her. (RP 91-92). The last time Bill saw Virginia was in October of 2002 when he brought her to the Spokane airport to meet John D. (RP 179). After October 2002, Bill's contact with Virginia was limited to phone calls and exchange of cards and letters. (RP 179-180).

In late November and early December 2002, John D. commenced making requests and/or demands of medical and financial records of Virginia, including Virginia's existing Will. (RP 94, 494). In early December 2002, John D. informed Bill that he was concerned about his financial situation and didn't have any

jobs. (RP 166). John D. was adamant that be allowed to pick up financial documents and personal property items of his mother's that were being held in a storage unit. (RP 98). Bill, on more than one occasion and as early as December 3, 2002, indicated that those items were available to be picked up, but that because of his incapacitation, John D. would have to come to Seattle to get them. (RP 105, 499-500). John D. kept acknowledging that he would come over and get the items as early as December of 2002, but kept making excuses for not making the trip including weather and the fact that Bill wanted Virginia to see an independent attorney in Seattle. (RP 540-541). Bill never refused to provide the personal property of his mother to John D. (RP 541). John D. did not go to pick up the personal property items until March 10, 2003. (RP 509). Bill gave Virginia's vehicle to Kelly Melter, John D.'s daughter. (RP 74-75). Virginia was not physically able to drive.

John D. became increasingly demanding of the financial documents and for a copy of the September 8, 2002 Will that had been executed by Virginia in Florida. (RP 495, 498). John D. emailed Bill stating "we" wanted all the information concerning his dad's estate. (RP 583). Bill suggested that they meet with an attorney in Seattle to hash everything out. (RP 503). John D. did not want Bill to take Virginia to an attorney, indicating she decided she did not want to go to one. (RP 586). Almost simultaneously an

appointment was made for her with attorney Steve Jolley. (RP 585). John D. indicated he would prevent Bill from taking Virginia to an attorney. (RP 586, 611). Despite these assertions, without notice to Bill, John D. contacted attorney Steve Jolley concerning preparation of a new Will, Power of Attorney, and Trust for Virginia. (RP 259-260). In December 2002, Virginia executed an Durable Power of Attorney, a Revocable Trust, and Will. The terms of the Revocable Trust and Will basically provided that her estate would be divided equally between John D. and Bill. John D. was appointed primary attorney-in-fact under the Durable Power and Bill contingent attorney-in-fact. John D. was appointed personal representative and Bill contingent personal representative under the Will. (Finding of Fact No. 13). (CP 111).

John D. then requested from Steve Jolley that he write a letter to Bill demanding financial documents and personal property of Virginia's. (RP 288). Steve Jolley prepared the letter and sent it to Virginia to review and sign. Mr. Jolley did not review the letter with Virginia, nor did he see Virginia sign the letter. (RP 289). John D. delivered the signed letter to Mr. Jolley who then sent it on to Bill. (RP 289). Bill, within the next day or two, shipped all documents requested to Steve Jolley's office. (RP 173). The documents included the September 8, 2002 Will of Virginia which John D. saw for the first time in late January 2003. (RP 483).

Steve Jolley indicated that in his conversations with Virginia it was clear her desire was to divide her estate equally between her two sons. (RP 261, 283). It was Mr. Jolley's impression that Virginia loved both sons. (RP 266). In fact, Virginia inquired about having them be joint personal representatives, and Mr. Jolley suggested that might cause some problems so it was not done. (RP 264). Mr. Jolley also indicated it was clear Virginia did not want to sell her home in Florida, but wanted to retain it as a source of lease income. (RP 283).

Shortly after the documents were received from Bill, John D. prepared and sent a letter to Steve Jolley indicating that Virginia wanted to amend the Will, with provisions making the Will and Trust more favorable to John D. (RP 273-275). Steve Jolley refused to make the changes. (RP 274). Steve Jolley indicated that he would have had a very great concerns if Virginia wanted to favor one son over the other in her testamentary disposition. (RP 279). If Virginia had requested only one son was to receive her estate, Mr. Jolley indicated he would be concerned enough to do an independent verification of the facts. (RP 279). Virginia was taken to Mr. Jolley's office by John D. (RP 260). Bill received a copy of the testamentary documents drafted by Mr. Jolley in December 2002 or January 2003. (RP 116).

John D. has always been jealous of Bill. (RP 199). He has referenced Bill as “daddy’s boy” (RP 211), the “favorite son” (RP 198), and the “professional victim” (RP 592).

In May of 2003, John D. initiated contact with another attorney, Pamela Rohr, to draft testamentary document for Virginia, replacing the testamentary documents prepared by Steve Jolley and for purposes of eliminating Bill from Virginia’s estate. (RP 434-438). John D. expressed concern to Ms. Rohr and/or her staff that it did not want it to look like he was unduly influencing his mother. (RP 437-438). Pamela Rohr testified that she has prepared more than 1000 Wills, at the time of trial in May of 2010, and she specifically recalled the entire office conference with Virginia regarding her Will. (RP 412, 435).

John D. made a number of contacts with Pamela Rohr’s office concerning Virginia’s Will. (RP 437, 445). In May 2003, Ms. Rohr prepared of power of attorney naming John D. as attorney-in-fact, a revocation of the Trust written by Steve Jolley, and a new Will for Virginia which provided that 99% of her estate be transferred to John D. and 1% to her granddaughter, Jennifer Bohlmann. (Finding of Fact No. 19; CP 111). Sandra Melter was named as alternate attorney-in-fact and alternate beneficiary should John D. predeceased Virginia. (RP 444).

Ms. Rohr made no independent investigation as to Virginia's competency or any issues of overreaching that might exist, even though her changes to the will were "unusual" and raised a red flag. (RP 435-436). Ms. Rohr acknowledged that Virginia trusted John D. because he was providing her a place to live. (RP 448). Ms. Rohr indicated Virginia completely trusted John D. (RP 418). Ms. Rohr knew very little about the Will or Trust prepared by Steve Jolley and seemed to indicate that Virginia was concerned about revising the Florida Will made in September of 2002, and not Jolley's Will of December of 2002. (RP 440, 452). Ms. Rohr was unaware of the 1995 joint reciprocal wills executed by John R. and Virginia Melter. (RP 443). Ms. Rohr relied only on Virginia's statements and Mr. Jolley's documents in preparing Virginia's Will. (RP 436).

Bill did not receive a copy of the Will prepared by Ms. Rohr until after his Virginia's passing in March of 2007, and shortly before filing a complaint in the matter in December 2007. (RP 168, 189, 193). John D. specifically instructed Ms. Rohr not to send the executed Will to Bill and consequently it was never sent. (RP 176-177, 437). The only notice provided to Bill Melter was of the fact that the Trust drafted by Mr. Jolley had been revoked. (RP 430).

Jennifer Bohlmann, John D. and Bill's niece, visited Virginia only once for about three or four days in February 2003 while

Virginia resided at John D.'s home. (RP 571). The airline ticket for that trip was paid for by John D. (RP 567). In October of 2002, John D. gave some cash to Jennifer Bohlmann under the guise of a birthday present. (RP 574). Jennifer Bohlmann has not received gifts from John D. since that time. (RP 575).

Jennifer Bohlmann received \$10,000 from John D. after Virginia's death. (RP 569). She was surprised to receive it. (RP 577). Ms. Bohlmann never received an accounting or inventory of Virginia's estate. (RP 576). Jennifer Bohlmann acknowledged that this was more than 1% of Virginia's estate, but that John D. thought it was fair to send the additional monies. (RP 569).

Bill had concerns about John D. and his wife, Sandra, listening into his telephone conversations when he contacted Virginia at John D.'s home. (RP 211-212). After Virginia had been living in John D.'s home for a while, Sandra and John D. specifically forbade Bill's wife, Janet, from contacting Virginia by phone. (RP 129). Virginia, during the entire time she resided with John D. and Sandra was dependent upon them for food, clothing, a place to stay. (RP 518-523). This included transportation except outings she may have taken on a senior citizen bus to a local senior citizen center. (RP 657-659). Although Virginia was living with John D. and Sandra in the spring of 2003, she did not attend the graduation of John D.'s daughter, Kelly, held in Spokane. (RP

674). Even though John D. made at least one trip to Seattle with Virginia, he never took her to visit Bill. (RP 610). John D. did not take Virginia to Seattle when he picked up her personal property in March 2003. (RP 546).

John D.'s temperament has been described as arrogant, controlling, and negative (RP 298), as well as rude and vindictive. (RP 139). John D. prohibited Bill from coming to John D.'s daughter's wedding. (RP 196-197). Janet indicated the reason she and Bill did not physically go to visit Virginia in Spokane was that they were afraid of John D.'s temper and that John D. may exert violence upon them. (RP 138-139). Janet could not understand why John D. refused to send Virginia by plane to visit Bill and Janet in Seattle. (RP 139). This is despite the fact that Virginia rode in much smaller planes with John D. (RP 522).

On or about January 23, 2003, between the execution of the testamentary documents drafted by Mr. Jolley and the testamentary documents drafted by attorney Pamela Rohr, John D. contacted Dr. Rob Neils to perform a mental evaluation on Virginia. (RP 230-234). Dr. Neils was a friend and neighbor of John D. (RP 232). John D. instigated the contact with Dr. Neils. (RP 234). John D. paid for the evaluation as well. (RP 619). John D. was concerned the issue the execution of Virginia's Will might go to court according to Dr. Neils. (RP 234). Dr. Neils indicated that

Virginia was competent and she was satisfied with her testamentary disposition. (RP 241). At this time she had just executed the Will drafted by Steve Jolley which provided that each son receive one-half of her estate. (234). Dr. Neils noted that the entire evaluation took 10 to 15 minutes. The evaluation was done while Virginia was in bed. (RP 244). Virginia could not indicate to Dr. Neils the specific nature of her existing will, or when it was prepared. (RP 243).

Around the time that the May 8, 2003 Will was executed, John D. and Sandra Melter traveled to Florida to make arrangements to sell Virginia's home. (RP 451). John D. admitted that it was his choice to sell the Florida home owned by Virginia. (RP 609).

Shortly after execution of the December 2002 testamentary documents, John D. began transferring his mother's bank accounts into his name jointly with Virginia or in his name solely. (RP 537-539, 602-606, 625-626). The Florida home was sold in April 2005 and those proceeds were placed into one of those bank accounts in John's name. (RP 606). An estimate of Virginia's liquid assets after the sale of her home was approximately \$521,000. (RP 631-632). Virginia continued to receive over \$2600 per month while living with John D. (RP 600). She had little to no expenses and made no purchases over \$5000. (RP 600).

John D. eventually transferred all of Virginia's liquid assets into his name. (RP 628). His position was that it was his mother's intent that he receive all those items as a gift and was based upon tax advantages. (RP 627). No gift tax returns were ever filed concerning the transfer of the more than \$500,000 in these accounts to John D. and Sandra Melter. (RP 627-628).

Virginia passed away on March 21, 2007. (RP 534). John D. used one of his business vans to transport Virginia's body to Seattle for internment at Mt. Tahoma Cemetery. (RP 213). At his own election, John D. did not attend the funeral service for his mother, but sat in the van some distance away. (RP 215).

John D., in writing, admitted to Bill that Virginia had little memory in late 2002/early 2003 and anything that she did retain was short lived and rapidly forgotten. (RP 545).

John D., prior to his father's death, indicated that he would not take care of his parents unless they signed everything over to him. (RP 128). Upon his father's death in 2002, he indicated that he would cause no problems with the administration of his father's estate as long as he was given \$50,000 cash so he could build some houses. (RP 466). John R. Melter's entire estate, of course, went to Virginia.

In addition to the memory issues, Virginia was suffering from chronic anxiety in late 2002 and John D. gave her pills for the

anxiety. (RP 96). John D. acknowledged that Bill did not do anything inappropriate in handling his mother's funds and that Bill did not take any unauthorized funds from his mother's estate, nor retain any personal property of his mother's estate. (RP 547). This was confirmed by Bill. (RP 228, 320). John D. did not prepare an inventory or file a probate regarding Virginia's estate. (RP 189).

II.

STANDARD OF REVIEW

Will contest cases by their very nature are fact specific. John D. is attempting to enhance the weight of the evidentiary facts, which is not a function of the appellate review. See, *Stringfellow v. Stringfellow*, 56 Wn. 2d 957, 350 P.2d 1003, 353 P.2d 671 (1960).

It is not uncommon for there to be conflicting evidence on crucial, factual questions by interested witnesses. The problem which is therefore presented is credibility. Determination of credibility of witnesses and the weight of their testimony is a matter exclusively within the competence of the trial court. *In re Estate of Palmer*, 145 Wn. App. 249, 266, 187 P.3d 758 (2008). This is especially important when reviewing the testimony of the attorneys who drafted the two wills subject of this dispute, Steve Jolley and Pamela Rohr. An appellate court is not equipped, and

as a matter of longstanding decisional law, cannot pass upon the credibility of witnesses. *Davis v. Bader*, 57 Wn.2d 871, 350 P.2d 352 (1961); *Anderson v. Kurrell*, 28 Wn.2d 227, 182 P.2d 1 (1947). Simply put, the trial court is in a substantially better position to determine the credibility of witnesses and factual issues and apply the appropriate weight to that evidence than the appellate court. *Oium v. Fillion*, 129 Wash. 37, 223 Pac. 1060 (1924).

The appellate court should not substitute its factual opinions for that of the trial court. As stated in *In Re Estate of Kleinleins*, 59 Wn. 2d 111, 113, 366 P.2d 186 (1961), the appellate court's review authority is limited.

Our sole power is to ascertain whether the findings are supported by substantial evidence. The weight and credibility of the evidence are for the exclusive determination of the trial court.

supra, at 113.

The appellate court is not authorized to substitute findings for that of the trial court. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 343 P.2d 183 (1959). The trial court having the witnesses before it, is in a better position to arrive at the truth than is the appellate court. See *In re Estate of Dand*, 41 Wn.2d 158, 247 P.2d 1016 (1952).

III.

ARGUMENT

A. The evidence does support a finding that John D. engaged in undue influence.

Bill has the burden to show the May 8, 2003 Will, Durable Power of Attorney and Revocation of Trust were obtained as a result of undue influence and overreaching by John D. *In re Estate of Mitchell*, 41 Wn.2d 326, 249 P.2d 385 (1952). Bill met that burden at the trial court level.

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 Rielly, 78 Wn.2d 623, 646, 479 P.2d 1 (1970).

A will is a product of undue influence when a party interferes with the testator's free will preventing the testator from exercising his own judgment and choice. *In re Estate of Smith*, 68 Wn. 2d 145, 153, 411 P.2d 879 (1966).

On the issue of whether a party engaged in undue influence, you must look at the facts of each case. Factors to look at to determine if there is the possibility of undue influence include 1) a fiduciary, confidential relationship between the testator and the beneficiary existed; 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.3rd 864 (2006). These were the exact same factors the trial court applied in the present case when in making its decision.

Regarding the first element above, there is no dispute that John D. had a fiduciary relationship with his mother. As indicated by Pamela Rohr, Virginia had total trust in John D. (RP 418). From October 10, 2002 until her death on March 21, 2007, John D. and Sandra Melter had complete control over every aspect of Virginia's life. Virginia was totally dependent on John D. and Sandra for her necessities of life including housing, travel, medical care, etc. including food, shelter, medical care, transportation, etc. (RP 518-523). John D. was at the home constantly. (RP 25).

Concerning the second element, John D. was also actively involved in, initiated and participated in the preparation of the May 2003 Will. He drove Virginia to and from the appointment with Pamela Rohr. (RP 515). He initiated the contact with Ms. Rohr by obtaining the referral from Mr. Jolley. (RP 266-267). John D. indicated to Bill that their mother did not need an attorney in December of 2002, but yet then took her to two separate attorneys within a relatively short period of time. (RP 585-586). He drafted letters for Virginia's signature. (RP 512, 551). Under his own signature, John D. also requested amendments or changes to

Virginia's Will. (RP 588-589, 623-624). John D. told Pamela Rohr not to send the Will she had drafted to his brother Bill. (RP 437).

The third element has been met in that John D. received 99% of his mother's estate pursuant to the May 2003 Will. This was clearly inconsistent with all prior testamentary documents executed by Virginia in which her estate was shared equally between John D. and Bill. Such a distribution was also completely inconsistent with Virginia's intent as indicated in the Will and Trust prepared by Steve Jolley in December 2002, and from the testimony of Mr. Jolley at trial. One of the major factual distinctions between this case and *Knowles* is that in *Knowles*, the testator, and two daughters he disinherited, had no contact for 30 years. *Knowles*, at 360. In the instant case, Bill had more contact with Virginia than did John D., at least up until the few months immediately preceding the May 2003 Will.

A clear, cogent and convincing burden can be met in situations where it is one's word against another. *In re Deming*, 188 Wn.2d 82, 109, 736 P.2d 639 (1987). Clear, cogent and convincing evidence is evidence which is weightier and more convincing than a preponderance of the evidence, but which need not reach the level of "beyond a reasonable doubt." *Davis v. Dept. of Labor and Industries*, 94 Wn.2d 119, 126, 615 P.2d 1279 (1980).

Bill met his burden of proof at trial by clear, cogent and convincing evidence in that John D. exercised undue influence in procuring the 2003 Will of Virginia. Additional factual bases for undue influence shown at trial included:

1) John D.'s acknowledgement that at the time of execution of the Will that Virginia's memory was short lived, and things were rapidly forgotten. (RP 545).

2) John D.'s assertion prior to both parent's deaths that they could live with him "if they signed everything over to him.": (RP 128).

3) John D. terminated Janet's phone contact with Virginia. (RP 129).

4) John sold Virginia's home contrary to her stated wishes (RP 283), and based such sale on his wishes. (RP 609).

5) Elizabeth Hausfeld, Janet's mother, did not feel she was welcome at John D.'s home. (RP 158).

6) John D.'s job/employment security was in question around the time of the execution of the May 2003 Will. (RP 166).

7) No family member or relative of Virginia's (including Bill) had physical contact with her after October 2002. (RP 179). The only exceptions were Sandra Melter's family, John

D.'s children, and the one-time visit of Jennifer Bohlmann in February 2003. (RP 571).

8) Virginia and Bill were not allowed to meet on two separate occasions when such a meeting could have been possible, John D.'s daughter's graduation, and John D.'s daughter's wedding. (RP 197, 674).

9) Bill believed that John D. and Sandra were monitoring his phone conversations with Virginia. (RP 211-212).

10) John D. had a mental evaluation performed on his mother by his friend and neighbor, Dr. Rob Neils, shortly before the execution of the May 2003 Will. (RP 233-242).

11) Dr. Neils testified that John D. wanted a mental evaluation performed on Virginia in case there was litigation later on. (RP 234).

12) Virginia executed two separate Wills within five months of each other, and all within the first seven months that she resided with John D. (CP 11).

13) John D. prepared the letters for Virginia's signature. (RP 512).

14) John D. requested that Mr. Jolley amend the December 2002 Will, to make it more favorable to John D. (RP 273-274).

15) Mr. Jolley indicated Virginia was not upset with Bill in December of 2002 and in fact thought about making him a co-personal representative. (RP 264).

16) Mr. Jolley stated that Virginia loved both John D. and Bill and wanted to treat them equally. (RP 261, 266).

17) John D.'s personality was described as arrogant, controlling and negative. (RP 298).

18) John D. contacted Ms. Rohr's office at least two separate times, expressing concern to Ms. Rohr that it not look like he was influencing Virginia. (RP 437-438).

19) John D. admitted he individually wanted documents from Bill. (RP 495).

20) When demanding information/documents from Bill, John D. would use the plural "we" instead of indicating the Virginia wanted the items. (RP 501).

21) In February 2003, John D. paid for Jennifer Bohlmann to fly to Spokane to visit Virginia. (RP 567). John D. gave Jennifer a one-time cash present around that time. (RP 574). Jennifer was subsequently named as a beneficiary in the May 2003 Will and was surprised to receive \$10,000 from Virginia's estate. (RP 569, 577).

22) Shortly after December 2002 and through 2007, John D. transferred \$400,000-\$500,000 from Virginia's

separate accounts to joint accounts with Virginia and then finally into accounts under only he and Sandra's names. (RP 537-539, 602-606, 625-626).

23) John D. stated that the transfers were gifts, but there was no evidence that was the case. (RP 627, 628).

24) John D. never provided a copy of Virginia's, May 2003 Will to Bill. (RP 609).

25) John D. took Virginia to Seattle but did not take Virginia to visit Bill who lived in the area. (RP 610). John D. also refused to take Virginia to Seattle in March 2003 when he picked up some of her personal property. (RP 546).

26) John D. indicated he would stop Bill from taking Virginia to an attorney. (RP 611).

27) John D. was at home constantly. (RP 251).

28) John D.'s request after his father's death that he receive \$50,000, even though the entire estate was devised to Virginia. (RP 66).

The rebuttal evidence provided by John D. in establishing why Virginia executed her May 2003 Will is simply not based on the facts. As Pamela Rohr indicated in her testimony at trial, Virginia allegedly wanted a new will because 1) Virginia was allegedly unhappy with the 2002 Florida will; 2) Virginia had not received her personal property and documents from Seattle; and 3)

Virginia was unhappy where her husband had been interred. (RP 441). All three of those assertions were contradicted at trial: 1) the Florida will had already been revoked by the December 2002 will prepared by Mr. Jolley (CP 111); 2) all documents were delivered to Mr. Jolley by Bill in late January 2003 (RP 173), and all personal property was available in December 2002 (RP 105) but at John D.'s choice was not picked up until March 2003 (RP 546); and 3) Virginia never expressed dissatisfaction with her husband's burial at Mt. Tahoma Cemetery and in fact participated in that decision.

Also offered as rebuttal evidence at trial was Pam Rohr's testimony that Virginia had indicated Bill had taken money from her. (RP 450). Both Bill and John D. testified this was not the case and that no monies or property were improperly taken by Bill. (RP 228, 547). In fact, if Virginia believed these things were true the only persons who could have provided that misinformation would have been John D. and Sandra Melter. They had the most benefit to gain by instilling such false information to Virginia and this, combined with the fact that John D. and Sandra controlled every aspect of Virginia's life support the finding of undue influence.

The facts indicate that not only has Bill met his burden of clear, cogent and convincing evidence, there is no rebuttal evidence that support Virginia's desire to eliminate Bill from her estate.

This case is different factually than *In re Knowles*, 135 Wn. App. 351. The facts in this case are that John D. had substantially more control over Virginia than Randy had in Merle's life in the *Knowles* case. Unlike *Knowles*, there is no natural explanation for Virginia to disinherit Bill other than undue influence by John D. and Sandra.

Ms. Rohr's credibility was brought into question in a number of instances in drafting Virginia's Will. The first being that she remembered completely the conversations that she had with Virginia, although they had occurred more than seven years prior to trial. (RP 412, 455). Ms. Rohr could not keep straight in her testimony whether she was actually modifying the Florida Will of September 2002 or the Will drafted by Steve Jolley in December of 2002. (RP 440, 452). The reasons cited by Ms. Rohr to support Virginia's disinheriting Bill were not factually correct.

Furthermore, Ms. Rohr did not attempt any type of independent investigation even though she said it would be a cause for concern, and raise flags, if a party wanted to disinherit one child from their estate. (RP 435). Ms. Rohr found it to be "perfectly normal" that Virginia had executed three different wills between September of

2002 and May of 2003. (RP 443). Steve Jolley indicated that less than four months prior to Pamela Rohr's drafting of a will, it was clear Virginia loved both of her children and wanted her estate to go to them equally. (RP 261, 266, 283). He also indicated that if Virginia wanted one of the sons disinherited, he would have great concerns about that and would independently investigate. (RP 279). What could have happened over the next few months to cause such a drastic change in Virginia's disposition of her estate?

B. The court correctly placed the burden of proof on John D. to rebut the presumption of undue influence.

Once Bill met his burden of showing a presumption of undue influence by John D.; John D. had the burden to rebut that presumption of undue influence. See, *In re Estate of Lint*, 135 Wn.2d 518, 536, 957 P.2d 755 (1988). The burden shifts to the beneficiary to show the will was not procured by undue influence, and whether that presumption is overcome is a question for the trier of fact. *In re Estate of Kleinleins, supra*. It is true, of course, that in the very nature of things a charge of undue influence can rarely be proved by direct evidence and must be established if at all by circumstantial evidence. *In re Bottinger's Estate*, 14 Wn.2d 676, 703, 129 P.2d 518 (1942). The trial court properly set the burden on John D. John D. has failed to rebut that burden of proof.

Over 28 separate instances of undue influence by John D. were admitted into evidence at the trial court. See pp. 18-21 *ante*. Any one of or a combination of these factual situations may be so so suspicious as to raise a presumption of undue influence. Such suspicion “in the absence of rebuttable evidence may be sufficient to overthrow the will.” *In re Estate of Beck*, 79 Wash. 331, 334-335, 140 Pac. 340 (1914).

It is important to note that John D. has the burden of proof to show a lack of undue influence regarding the “gifting” or inter vivos transfer of more than \$400,000 of Virginia’s monies to him. *Lewis v. Estate of Lewis*, 45 Wn. App. 387, 725 P.2d 644 (1986). If the recipient of a gift has a confidential or fiduciary relationship with the donor, the burden is upon the donee to prove “a gift was intended and not the product of undue influence.” *Lewis*, at 389.

John D. must demonstrate

“the gift was made freely, voluntarily, and with full understanding of the facts. . . If the judicial mind is left in doubt, or uncertain as to exactly what the status of the transaction was, the donee must be deemed to have failed in the discharge of his burden, and the claim of gift must be rejected.”

McCutcheon v. Brownfield, 2 Wn. App. 348, 356, 467 P.2d 868 (1970).

John D. did not even meet his burden at trial to show that the purpose of the transfers of money made were intended to be

gifts, let alone whether the gifts were made absent undue influence.

Bill did raise the issue of the gifts at trial as evidenced by Bill's trial memorandum and argument contained therein (CP 66-69). Bill initiated this proceeding under the Trust Estate in Dispute Resolution Act (TEDRA) pursuant to RCW 11.96A.010 et seq. The court in a TEDRA action sits in equity and has jurisdiction to address all aspects and issues involving a person's estate. *Estate of Kordon*, 157 Wn.2d 206, 137 P.3d 16 (2006). It is an abuse of discretion by the trial court if it fails to entertain all issues regarding the validity of a will and the deceased person's estate at a probate proceeding. *Gordon v. Seattle-First National Bank*, 49 Wn.2d 728, 736-737, 306 P.2d 739 (1952).

No separate notice is required to be provided to John D. regarding issues of improper gifting of assets, as long as those gifted assets are the same assets which relate to the probate assets. In 2001, the legislature amended TEDRA "to provide that after a proceeding is commenced, future notice of matters in an existing judicial proceeding that relate to the same trust, estate or nonprobate asset need not be in the form of a summons." Comments to TEDRA technical corrections at 1, on S.B. 5052, 57th Leg., Reg. Sess. (Wash 2001), cited in *Estate of Kordon*, *supra* at page 211.

The trial court certainly has the authority in this matter to address probate as well as nonprobate assets of an individual. See RCW 11.96A.020(1)(a). *In re Irrevocable Trust of McKean*, 144 Wn.App. 333, 183 P.3d 317 (2008).

C. The trial court's Findings of Fact are supported by substantial evidence.

Appellate review is limited to determining whether the findings are supported by substantial evidence, and if so, whether the findings in turn support the conclusions of law. *Willener v. Sweeting*, 107 Wn.2d 388, 393, 730 P.2d 45 (1986). The appellate court will not reverse a trial court's findings of fact if substantial evidence supports it. *Rogers Potato Service, LLC v. Countrywide Potato LLC*, 152 Wn.2d 387, 391, 97 P.3d 745 (2004).

Substantial evidence exists if a rational fair-minded person would be convinced by it. *In re Estate of Palmer*, 145 Wn. App. 249, 265-266, 187 P.3d 758 (2008). The appellate court is not in a position to substitute its findings of fact for that of the trial court, especially when the trial court's findings are based upon live testimony. *Bering v. Share*, 106 Wn.2d 212, 220-221, 721 P.2d 918 (1986).

1. John D. demanded that attorney Steve Jolley change his mother's Will (executed in December 2002). John D. demanded that the Will be changed to bequeath everything to John D. (Finding of Fact No. 17; CP 111).

Testimony indicated that John D. authored the letter to Steve Jolley requesting a change to Virginia's Will. (RP 273-275, 623-624). Mr. Jolley did not feel comfortable changing the will. (RP 274). The factual issue is whether it was at the request of Virginia and the court determined it was not at the request of Virginia. The court has the independent authority to determine credibility and whether in fact the letter was at Virginia's request or not. The court determined it was not at her request. The probable reason for the court's position in this is that John D. prepared all correspondence whether on behalf of Virginia or not, in this matter. (RP 512).

2. John D. shared his anger and disappointment with William with his mother. (Finding of Fact No. 20; CP 111)

John D. did speak poorly of Bill. John D. sent emails to Bill which were derogatory and spoke poorly of him. (RP 581-582). These emails, as indicated by John D., were provided to his mother as well, because supposedly they were sent at her request. Testimony at trial indicated that John D. had referred to Bill as a "professional victim" (RP 592) and "daddy's boy" (RP 589), and "favorite son" (RP 198).

3. John D. located an attorney for his mother (Attorney Pamela Rohr) who would do what Attorney Jolley refused to do, i.e., disinherit William. (Finding of Fact No. 20; CP 111).

It is a correct statement of fact that John D. searched for and found an attorney who would willingly draft documents to disinherit Bill. Steve Jolley, in his testimony, indicated that he would not be comfortable in drafting a Will which provided other than equal distribution of the assets to Virginia's sons. (RP 279). John D. was the person who initiated the contact with Pamela Rohr. (RP 434-438). He is also the one who took his mother to Pamela Rohr's office. (RP 515). He contacted Ms. Rohr at least twice concerned that it might appear he was influencing Virginia. (RP 437-438). He prepared and sent to Pam Rohr a request for receipt of an amendment to the will (an amendment was never prepared). John D. instructed Ms. Rohr not to send the executed May 2003 Will to Bill. (RP 437). Pamela Rohr did no independent investigation to inquire more about why Virginia wanted to disinherit Bill or ever determine if the allegations for disinheriting him were true. (RP 435). Had Attorney Rohr investigated she would have determined the alleged reasons for disinheriting Bill did not factually exist. Attorney Rohr for reasons unknown stated it was perfectly normal to execute three wills within a few months. (RP 443). She acknowledged red flags existed but did nothing to investigate. (RP 435-436).

4. John D. and Sandra Melter “fueled the fire” of (Virginia’s) disappointment in William; John D. manipulated the situation and made direct demands on Virginia’s attorneys. (Finding of Fact #26)

Virginia was completely dependent upon John D. and Sandra. They controlled every aspect of her life. (RP 655-659). Bill’s contact with Virginia was limited to postcards and phone calls after Virginia moved in with John D. (RP 1790). Janet Melter’s phone contact with Virginia was terminated completely by John D. and Sandra. (RP 129). Virginia, according to Pamela Rohr’s testimony, wanted Bill disinherited because she wanted the September 2002 Florida will revoked, that Bill had allegedly failed to give her her possessions, and that she was unhappy with where her husband had been buried. (RP 441). All of these alleged bases were factually incorrect. The only possible way that Virginia would have received such disinformation was through John D. and Sandra. Virginia had no contact with any other persons with knowledge of those issues other than John D. and Sandra.

Steve Jolley indicated that Virginia had no animosity toward Bill (RP 266); and that John D.’s demand to him for change in the December 2002 Will only occurred after Bill had provided the financial documents to his mother and John D. (RP 273). A logical step by Ms. Rohr should have been to confirm the allegations allegedly made by contacting Steve Jolley, who prepared the

December 2002 will. Ms. Rohr did not contact Mr. Jolley about Virginia's will. (RP 277). Ms. Rohr claims she made no independent verification of Virginia's alleged statements. (RP 435). Virginia had no independent information other than what was provided and sifted through by John D. and Sandra with which to make her decisions. These allegations, including the impressions by Virginia, that Bill had been taking her money were all unfounded and could only have been fueled by John D. and Sandra. (RP 450).

John D. did manipulate Pamela Rohr and/or the situation. John D. specifically indicated to Pamela Rohr not to send a copy of the May 2003 Will to Bill. John D. drafted the letter to Pamela Rohr indicating not to send the Will to Bill. Also, John D. through his mother indicated that no further contact was to be made with Bill in regards to issues concerning the May 2003 Will. In fact, the only contact that Pamela Rohr had with Virginia was the meeting with her in her office and the signing of her Will in her office. (RP 437). John D. drove Virginia to Ms. Rohr's office. (RP 413). All other communications with Pamela Rohr went through John D., either having been authored by John D. or phone calls from John D.

Sandra Melter also was named as a contingent beneficiary and alternate personal representative in the 2003 Will. (RP 177).

Prior to the execution of this Will, Sandra had never been named as a beneficiary to Virginia's estate. (RP 447).

5. Mary Virginia's (Virginia) final Will providing that John D. should inherit 99% of her estate was the result of overreaching on the part of John D. (Finding of Fact No. 30; CP 112)

John D. was involved in all aspects of Virginia's May 2003 Will other than the actual signing. He contacted Pamela Rohr with concerns about overreaching. He indicated when or if the Will should have been sent to Bill. He took Virginia to and from Ms. Rohr's office. John D. refused to allow Virginia to go to an attorney suggested by Bill, indicating that in fact she did not need an attorney, however, then immediately Virginia was taken by John D. first to Steve Jolley, and then later to Pamela Rohr. Pamela Rohr's evaluation of Virginia was limited to an initial consultation, and then a second conference to sign the Will. (RP 437). Pamela Rohr made no attempt to verify if in fact Virginia's reasons for wanting her Will changed were in fact accurate.

The reasons cited in Appellants' Brief, at page 30, allege overreaching by Bill had no bearing on whether Virginia left Bill out of the estate or not. The issue before the court was whether Virginia's May 2003 Will was procured as a result of undue influence or overreaching by John B. The only reasons for removing Bill from Virginia's estate were the three previously cited

by Pamela Rohr. In fact, those arguments cited at pages 30-31 of Appellants' Brief as a basis for overreaching by Bill were not even mentioned by Virginia to Pamela Rohr as a reason for changing the Will. (RP 441). John D. contacted Pamela Rohr to set up the appointment for his mother to change her will. (RP 413). When a beneficiary procures an attorney to draw a will that is a material/substantial fact that goes to the issue of undue influence. *In re Estate of Beck*, 79 Wash. 331, 140 P.340 (1914); *McCutcheon v. Brownfield*, 2 Wn. App. 348, 467 P.2d 868 (1970). Again, 28 separate instances of overreaching by John D. have been previously identified at pages 18-21 *ante*.

6. Virginia's alleged gifts to John D. prior to her death were the result of overreaching by John D.
(Finding of Fact No. 31; CP 112)

Testimony by both Steve Jolley and Pamela Rohr was that Virginia was concerned about avoiding probate. (RP 286). Steve Jolley testified Virginia never indicated that it was her intent to gift all of her assets to John D. but to treat John D. and Bill equally. (RP 283).

John D. in fact filled out most of the forms and wrote to the various financial institutions in transferring Virginia's assets. (RP 512, 551). It is clearly the burden of John D. to show that it was Virginia's intent that she gift away all of her assets to John D. and Bill receive nothing. See, *Lewis v. Estate of Lewis*, *supra*. John D.

has the burden to demonstrate that by clear, cogent and convincing evidence. *Pederson v. Bibioff*, 64 Wn. App. 710, 720, 828 P.2d 1113 (1991). John D. failed to prove that in fact a gift occurred at all.

D. Bill is entitled to his attorney fees and costs pursuant to RAP 18.1, RCW 11.96A.150, and RCW 11.68.070.

Pursuant to RAP 18.1(a) and (b), Bill requests that this appellate court award to him his attorney fees and costs incurred in this matter.

There are two primary statutes that would apply to allow Bill to obtain his attorney fees in this matter. The first, under RCW 11.68.070, allows attorney fees to a party who successfully limits or restricts, removes or replaces the personal representative. That section provides in part:

In the event the court shall restrict the powers of the personal representative in any manner, it shall endorse the words “powers restricted” upon the original order of solvency together with the date of said endorsement, and in all such cases the costs of the citation, hearing, and reasonable attorney fees may be awarded as the court determines.

See *In re Coates Estate*, 55 Wn.2d 250, 347 P.2d 875 (1959).

The Probate and Trust Dispute Resolution statute, 11.96A.010, also has an attorney fee provision which would allow Bill’s fees. Specifically, RCW 11.96A.150 provides in part:

(1) Either the superior court or the court on appeal may in its discretion, order costs, including reasonable attorney’s fees, to be awarded to any party. . .

In re Estate of Black, 116 Wn. App. 476, 66 P.3d 670 (2003), rev. den'd, 150 Wn.2d 1020, 81 P.3d 119, amended, rev. granted, affirmed on other grounds, 153 Wn. 2d 152, 102 P.3d 796 (2005).

Attorney fees may be paid from the estate, nonprobate estate assets, or any of the parties. *In re Estate of Wegner*, 237 P.3d 387 (2010). The issues do not need to be limited to a will contest for attorney fees to be awarded in a TEDRA action. See *Wegner, supra. Bartlett v. Betlatch*, 136 Wn. App. 8, 146 P.3d 1235 (2006), reconsideration den'd, rev. den'd, 162 Wn.2d 1004, 175 P.3d 1092 (2007). It is requested all John D. and Sandra L. Melter be responsible for payment of Bill's attorney fees in this case.

IV.

CONCLUSION

Virginia Melter, like most mothers, loved her sons, John D. and Bill equally. This was despite the fact that they were more than eight years apart in age and of completely different personalities. John D. was controlling and arrogant while Bill was laid back and nonintrusive.

Virginia, throughout her testamentary dispositions prior to May 2003, executed wills that treated her sons for the most part equally. Her December 2002 Will prepared by attorney Steve Jolley reflected the ongoing intent by Virginia that her sons receive equal one-half shares of her estate. Virginia's estate at the time of her death would ultimately exceed \$500,000.

John D. had procured the services of another attorney, Pamela Rohr, because he wanted to change the disposition of

Virginia's estate in his favor. The change totally eliminated Virginia's son Bill, who had been active and involved with Virginia most of his life. In fact, Bill, up until October of 2002, had significantly more contact with his mother than did John D. Virginia changed her will eliminating a son whom she dearly loved and provide that her estate go substantially to the other son, and to a granddaughter who visited once during the last five years of her life.

The point is, there really is no natural reason for Virginia to have revised her December 2002 Trust and Will that other than the undue influence placed upon her by John D. and Sandra Melter. Virginia was not taken to visit Bill when she was brought to Seattle by John D.; Virginia and Bill were prevented from attending the same family functions, i.e., John D.'s daughter's wedding and her graduation.

John D. and Sandra wanted to keep Virginia from having any contact with Bill or anyone of whom they disapproved. They effectively did this from October of 2002 to March of 2007 when Virginia passed away. It is clear the trial court put more credibility onto Steve Jolley's testimony in this matter and less upon Pamela Rohr and her testimony. Red flags abound as to instances of overreaching and undue influence exerted by John D. and Sandra Melter on Virginia. Bill has more than met his burden of

demonstrating a presumption of undue influence by John D. John D. has put forward no set of facts to rebut this presumption. The facts establish that Virginia made an unnatural distribution of her estate for no apparent legitimate reason. The alleged reasons put forward by John D. to rebut the presumption had no factual basis. This includes the baseless allegation that Bill had absconded with monies of the estate.

Both circumstantial and direct evidence in this case support the trial court's finding of undue influence by John D. and Sandra Melter in pressuring Virginia to execute the May 2003 Will. The issue of alleged gifts of more than \$500,000 made by Virginia to John D. and Sandra simply were not proven by clear, cogent and convincing evidence by the appellants. Consequently, the gifts are void.

The trial court's decision should be affirmed in all respects.

Dated this 21st day of March, 2011.

Respectfully submitted:

POWELL, KUZNETZ & PARKER, P.S.

By 
Michael M. Parker, WSBA #16968
Attorney for Respondent