No. 91488-5

No. 45069-1-II

IN THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION II

IN RE THE ESTATE OF:
EVA JOHANNA ROVA BARNES,

Deceased.

VICKI ROVA MUELLER, KAREN BOW, MARSHA ROVA, AND
JOHN ROVA,

Respondents,

v.

MICHELLE WELLS and DENNIS WELLS,

Appellants.

REPLY BRIEF OF APPELLANT

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INTRODUCTION

The Rova's brief ignores over a dozen unchallenged findings rebuting the ***Dean***[1] presumption. These same undisputed facts contradict the trial court's conclusion that Eva's will was produced by undue influence. The trial court erred.

The trial court also improperly shifted the burden of proof to Michelle, relying on the ***Dean*** presumption to establish undue influence. The facts the Rovas and the trial court rely upon do not support a conclusion of undue influence. Again, the trial court erred.

The bottom line in this appeal is that the trial court did not believe Eva should have left "the Rova Property" to the Wells. But it is undisputed that Eva was competent when she did so. No evidence established that undue influence caused this strong-willed, independent woman to change her will. This Court should reverse.

ARGUMENT

A. The trial court's unchallenged findings contradict its conclusion that the *Dean* presumption went unrebutted.

While the Rovas are correct that this Court must view the facts in a light most favorable to the judgment, it cannot ignore the trial court's undisputed findings that rebut the ***Dean*** presumption. As the

[1] ***Dean v. Jordan***, 194 Wash. 661, 79 P.2d 331 (1938)

Rovas concede, the Wells had only to put forward "credible rebuttal evidence" to rebut the presumption. BR 32 (citing ***In re Estate of Lint***, 135 Wn.2d 518, 536, 957 P.2d 755 (1998)). Not only did they do so, but the trial court made explicit findings that rebut the presumption. It made no credibility findings.

The trial court found that Eva's' good relationship with the Rovas began deteriorating in 2009. FF 29, CP 1096-1097. As explained in the Wells' opening brief, this finding is consistent with the Rovas' testimony that they were estranged from Eva. BA 20-22. This finding establishes Eva's motivation for changing her will as something other than undue influence: her estrangement from the Rovas. There is no evidence in the record, and no finding, that Michelle caused this early estrangement. Finding of Fact 29 itself rebuts the ***Dean*** presumption.

But the trial court went further, finding that the estrangement was "Ms. Barnes' choice." FF 39, CP 1099. The fact that Eva chose to estrange herself from the Rovas strongly rebuts the ***Dean*** presumption. The trial court erred.

The trial court also found that Eva felt that John Rova invaded her privacy and that Eva singled him out, even though Michelle too was involved in cleaning Eva's home. FF 30, CP 1097. This finding

too shows an alternative motivation for Eva to change her will besides undue influence. There was no evidence and no finding that Michelle caused Eva's feelings about her home being invaded. Finding of Fact 30 further rebuts the ***Dean*** presumption.

Similarly, the trial court found that Eva believed the Rovas deliberately destroyed her address book. FF 31, CP 1097. This finding too shows an alternative motivation for Eva changing her will. The trial court did not find that Michelle created or planted this belief, and no such evidence existed. Finding of Fact 31 also rebuts the ***Dean*** presumption.

The trial court found that Eva believed the Rovas were committed to removing her from her home and placing her in a nursing home and that her fear was understandable. FF 32, 34, CP 1097-1098. While the trial court believed that their intent was benevolent and that Eva misunderstood them, this finding shows Eva's personal motivation for changing the will. There is no finding that Michelle was the source of this motivation.

While the trial court believed Eva's fear developed into a paranoia, it did not find that she was incompetent or that Michelle caused her fear or paranoia. Eva's fear of dying in a nursing home,

and her belief that the Rovas were pushing her there, rebut the ***Dean*** presumption.

While the Rovas try to paint Eva as being demented at or near the time of her will, the trial court's findings stand out in stark contrast to that false portrait. The court found that Eva's primary care physician, Dr. Kina, met with her on nineteen different occasions; that she was a capable reporter of her health status; and that he never diagnosed her with dementia. FF 35-36, CP 1098. Rather, she had "mild cognitive impairment." FF 36, CP 1098. The Rovas' own expert witness, Dr. Meharg, defined mild cognitive impairment in his testimony, stating that three of the criteria for this condition are normal general cognitive functioning, intact activities of daily living, and a non-demented mind. RP 285-86. Two days before Eva changed her will, Dr. Kina reported that she appeared "reasonably well both mentally and physically." FF 56, CP 1104. These findings by the trial court rebut the ***Dean*** presumption.

The trial court found that, in part due to the Wells' efforts, Eva was able to maintain reasonably good health at home "[a]gainst all odds." FF 37, CP 1098. Taken in context with Eva's fear of institutionalization, her belief that the Rovas wanted her

institutionalized, and the Wells' efforts to keep her healthy at home, this finding also rebuts the ***Dean*** presumption.

The trial court found that at a family function Eva showed no interest in the wedding festivities and isolated herself from the family. FF 44, CP 1100-01. There was no finding, and no evidence, that Michelle played any part in her behavior. This further rebuts the ***Dean*** presumption by again showing that Eva chose to distance herself from her family for her own reasons.

The trial court found that at a meeting at her lawyer's office, Eva was upset and made it clear that she wanted nothing to do with any reconciliation with the Rovas. FF 49, CP 1102. While Michelle made a comment at the meeting that "further upset" Eva, her anger was already there. FF 49-50, CP 1102-03. Eva was independently upset at the Rovas, further rebutting the presumption.

The trial court found that Mr. Tolman was "extremely careful" in representing Eva. FF 62, CP 1106. He carefully documented her reasons for changing her will. *Id.* He believed Eva was competent and independent in her decision making. FF 64, CP 1106; RP 610, 614. This further rebuts the ***Dean*** presumption.

In sum, the trial court's conclusion that the ***Dean*** presumption was not sufficiently rebutted is contradicted by many of its own

findings. In addition, the undisputed evidence cited in the Wells' opening brief strongly rebuts the ***Dean*** presumption (*e.g.*, the litany of facts cited by Eva in Mr. Tolman's memorialization for her desire to change her will – and the Rovas' agreement that those facts were true; the testimonies of Mr. Tolman, Dr. Kina, the Adult Protective Services worker, and of Eva's close friend, Norma Bailey).

The Rovas' fundamental misunderstanding of the ***Dean*** presumption is demonstrated by their chart at BR 34. This chart conflates rebutting the presumption with disproving undue influence. Because the initial factors were indisputably met, the Wells conceded that the presumption applied. But just because the ***Dean*** factors were present does not mean the Wells failed to rebut the presumption. Rebutting the presumption involves putting forth evidence to show the will was not a product of undue influence. As set forth above, the trial court's uncontested findings show that Eva was estranged from the Rovas, that she was angry at them, and that this estrangement and anger were not caused by Michelle, but by Eva's independent perceptions. This rebuttal evidence is dispositive: the presumption was rebutted.

B. The trial court's undisputed findings show that it improperly shifted the burden of proof to the Wells.

The trial court essentially took the ***Dean*** factors to establish an irrebuttable presumption. Under the trial court's analysis, the fact that Eva gave "homestead" property to a non-family member was simply unthinkable absent undue influence. RP 871. This is contrary to long-standing precedent.

Decades of precedent honor the strong policy behind the burden of proof: that a competent testator should be able to dispose of her property as she sees fit. In 1942, our Supreme Court recognized this principle in similar circumstances, where the trial court took the suspicious circumstances that triggered the ***Dean*** presumption to evidence undue influence. ***In re Bottger's Estate***, 14 Wn.2d 676, 703-04, 129 P.2d 518 (1942). The Court recognized that suspicion, opportunity, and indirect evidence could be sufficient to establish undue influence, but only in the absence of rebuttal evidence like the Wells presented:

> Mere suspicion of undue influence is not enough.... although we have recognized that in a particular case the facts may be of such a suspicious nature as to raise a presumption of fraud or undue influence, and that unless this presumption is met by evidence to the contrary, it may suffice to overthrow the will..... We are not convinced that, by the standards established in those cases, a presumption of fraud or undue influence arose here, but even if it be assumed that it did and

> that as a consequence the burden of going forward with the evidence shifted to appellant, we are still convinced that the evidence to the contrary is not only sufficient to rebut the presumption, but actually goes further and by a preponderance establishes the absence of fraud or undue influence.

Bottger's Estate, 14 Wn.2d at 703-04 (internal citations omitted). The trial court erred in ruling that the presumption went unrebutted. By doing so, it shifted the ultimate burden of proof to the Wells. This Court should reverse and remand for dismissal.

C. The trial court was aware of the correct legal standard, but misapplied it.

The Rovas criticize the Wells for arguing that the trial court did not make a finding that Michelle actually influenced Eva's decision. BR 28. They quote the trial court's reaffirmance of its <u>conclusion</u> that the findings supported undue influence. *Id.* But this quote does not support the Rovas' argument.

Rather, it highlights the flaw in the trial court's analysis. The Rovas truncate the Wells' argument, stating only that they argued "the Court did not make this finding." BR 28 (referring to C/L 21). But the Rova's oversimplify what was said:

> [T]he Court did not make this finding. The Court found that the Wells did not overcome the (in this case very strong) presumption of undue influence, and therefore, the will was invalid. The Court did not make any findings as to what constituted the actual undue influence – other than the factors and strong presumption. While the Wells disagree that the

> presumption was strong, and that they did not overcome it, this was the finding of the Court and this is what the written findings should reflect.

CP 1373-74. Instead of addressing this issue – and identifying what facts proved undue influence – the trial court simply stated that it was leaving the conclusion as it was drafted. 6/5 RP 8-9. It made no findings regarding undue influence.

The Rovas also rely on ***Lint***, 135 Wn.2d 518. There, as here, the trial court identified the burden of proof, but failed to state what facts met it. But there the similarities end.

In ***Lint***, the will proponent assigned error to a multitude of findings without addressing those findings. 135 Wn.2d at 531-32. Here, the Wells did not dispute a single finding, but rather relied upon the uncontested findings rebutting the ***Dean*** presumption. These facts are, in large part, drawn from the trial court's own findings and from the Rova's testimony.

In ***Lint***, the trial court made specific findings to establish that the will was a product of fraud, and in addressing the lack of undue influence findings, the Supreme Court stated they were unnecessary, where "[f]raud and undue influence, although distinct concepts, are closely related and the findings of the trial court that support its conclusion of fraud provide additional support for its

conclusion that there was undue influence." 135 Wn.2d at 537. But here, no fraud occurred. ***Lint*** does not help the Rovas.

D. The findings do not support a conclusion of undue influence.

The Rovas identify the findings they believe support the trial court's conclusion. BR 41-48. But these findings do not provide sufficient support for the trial court's conclusion. Read in context, they do not support the Rovas.

1. "Michelle isolated Eva" refers to changing Eva's calling plan.

Michelle changed Eva's calling plan. FF 69, CP 1107. The court found that this had the effect of isolating Eva from phone contact. *Id.* But the court's finding was limited to phone contact. The Rovas conceded that Michelle never prevented their contact. RP 125, 162[2], 193-195, 338. John Rova admitted that Michelle not only did not prevent him from seeing Eva, but she encouraged him to visit her. RP 337, 338.

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[2] Mueller never saw or heard anything from Michelle that furthered the rift. Presumably, if Michelle had excluded her from the home, that would have furthered he rift.

2. "Michelle was a constant presence" raises the presumption, but does not prove undue influence.

Eva was in her nineties and did not want to reside in a nursing home. FF 1, CP 1090; FF 34, CP 1097-98. She needed help caring for herself. Michelle was there for her. The trial court found that Eva's relatively good health was partially attributable to Michelle's good work. FF 37, CP 1098. Michelle never prevented the Rovas from trying to care for Eva. RP 125, 193-95, 338. Due to the rift however, they chose not to do so. RP 97-98, 115, 161, 314-15, 317. While Michelle was a constant presence in Eva's life, this does not prove undue influence.

3. "Michelle struggled financially" during the Great Recession, like everyone else.

Michelle was continually employed by the U.S. Postal Service. FF 39, CP 1099. But as was the case with the majority of Americans during the Great Recession, she struggled from 2009. FF 40, CP 1099. "[M]ere suspicion, even when accompanied by opportunity and motive, is insufficient to raise a substantial inference of undue influence." ***In re Melter***, 167 Wn. App. 285, 273 P.3d 991 (2012). Here, the Rovas focus on Michelle's "opportunity" when spending time with Eva and point to an alleged motive – that the Wells were financially struggling. But this is not proof of undue influence. Nor

does her theft conviction matter where the trial court made no credibility findings.

E. The Rova's characterizations are unsupported.

1. "Michelle poisoned Eva's mind against the Rovas" is unsupported by evidence or findings.

This statement is not supported by evidence or findings. None of the Rova's examples evidence undue influence. First, the Rovas cite to Michelle's statements to Eva's tenants. BR 43 (citing FF 46, CP 1138-39). But there is no evidence, and no finding, that Eva heard those statements, knew about them, or was influenced by them.

The Rovas also cite to Michelle telling Eva's attorney (in Eva's presence) that the Rovas had thrown out Eva's address book. BR 43 (citing FF 50, CP 1140). This is not evidence of undue influence, where the trial court did not find that the idea the Rovas threw out her address book originated with Michelle. FF 31, CP 1097.

Finally, the Rovas say Michelle told an interviewer that John Rova "tried to throw [Eva] under the bus a couple of times, and that the [Rovas] were trying to put [Eva] in a nursing home." BR 43 (citing FF 72, CP 1145). These statements cannot be taken as evidence of undue influence, where they were made in May 2011 (several months after Eva's new will was executed) and where John admitted

he was already estranged from Eva at that point. RP 314-15, 317, 405; CP 6.

The Rovas admit that, at one point, they wanted to put Eva in an assisted living facility. FF 18, CP 1094-1095. The trial court told Michelle, "this lady became alienated from her family based on things you knew were not true." RP 872. But Michelle had no duty to correct Eva's "distorted" world view. Eva was "strong minded." FF 19, CP 1095. As Mueller testified, Ms. Barnes "always knew best and, even in the end, when she didn't know best, she thought she knew best." RP 37. In light of this undisputed evidence, Michelle could not have prevented Eva's alienation from her family, and had no duty to do so.

2. "Eva suffered from periods of confusion and impairment at the time of the will signing," but was competent.

This statement is untrue, distorting and ignoring the trial court's findings. While Eva may have suffered from bouts of confusion and impairment (she was in her nineties) the only findings regarding her mental state on the date of the will signing say that she was not confused. She met with Dr. Kina on the date of the will signing, and he recalled nothing unusual about her mental status that day. FF 59, CP 1105. Immediately thereafter, Eva met with Mr. Tolman, who had prepared the will "at Ms. Barnes' request." FF 60,

CP 1105. "Mr. Tolman engaged Ms. Barnes in a significant colloquy about her new will." *Id.* "Mr. Tolman was extremely careful." FF 62, CP 1106. The findings regarding the will signing show Eva was not confused or impaired.

3. Eva's vulnerablity to undue influence does not prove undue influence.

Eva was old and physically impaired. But no action or statement by Michelle drove Eva to change her will. The burden of proof was on the Rovas. They failed to meet it.

The Rovas attempt to distinguish ***Melter***, *supra*, on the basis that those will proponents challenged key findings, whereas Michelle does not. But Michelle need not challenge findings that support her position and rebut the presumption. ***Melter*** is apposite, particularly in light of the evidence of Mr. Tolman's care in drafting the memorandum that Eva signed, and to which the Rovas agreed.

> It is not [the courts'] function to assess the soundness of [Eva's] reasons, for the law permits one to dispose of [her] property by will in any lawful manner [s]he may wish, and it would be without precedent or reason to hold that a will may be invalidated simply because it is unusual or even unjust.

Bottger's Estate, 14 Wn.2d at 708. This Court should reverse, and reinstate Eva's will.

F. The Court should not award attorney's fees

The Rovas sought an attorney's fee award in the trial court, which was denied. 6/5 RP 14, 21. Although they cross-appealed that denial, they have dismissed their cross-appeal. This Court should not award attorney's fees on appeal for the same reason the trial court declined: they are unwarranted.

CONCLUSION

The trial court's judgment should be reversed and the case remanded to the trial court with instructions to dismiss the Rovas' petition.

RESPECTFULLY SUBMITTED this 7th day of May, 2014.

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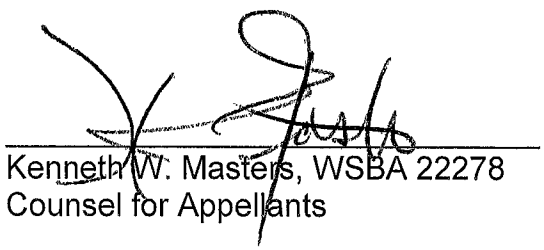

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