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SUPREME COURT
OF THE STATE OF WASHINGTON

In re Estate of:

EVA JOHANNA ROVA BARNES,

Deceased.

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

Petitioners,

v.

MICHELLE WELLS and DENNIS WELLS,

Respondents.

SUPPLEMENTAL BRIEF OF PETITIONERS

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A. Introduction.

Petitioners Marsha Rova, Vicki Rova Mueller, John Rova and Karen Bow (“the Rovas”), the nieces and nephew of decedent Eva Barnes, submit this supplemental brief pursuant to RAP 13.7(d).

After entering 83 findings of fact, each of which is unchallenged and a verity on appeal, the trial court found that “Clear, cogent and convincing evidence establishes that the will signed by Ms. Barnes on March 3, 2011 was the product of ongoing undue influence by Michelle Wells.” (CP 1187) (Appendix A) The trial court found not only that respondent Michelle Wells failed to rebut the presumption of undue influence, but also that the Rovas met their burden of establishing by clear and convincing evidence that the last will and testament of Eva Barnes, which disinherited her nieces and nephew and left her entire estate to Wells, was the product of Wells’ undue influence.

The trial court’s findings relied on both direct and circumstantial evidence that Wells isolated Eva from her family and took advantage of her frail state and advancing cognitive impairment to fuel animosity toward her family. This Court should reverse the Court of Appeals and reinstate the trial court’s judgment based upon the trial court’s unchallenged findings of fact.

B. Supplemental Statement of Issue Presented for Review

Are the trial court's unchallenged findings that the sole beneficiary of a will, while serving as caretaker and fiduciary, isolated an unusually susceptible decedent from her family and made false accusations that the decedents' nieces and nephews were greedy and uncaring, sufficient to establish clear and convincing evidence of the beneficiary's undue influence?

C. Supplemental Statement of the Case.

Suffering from depression and mild cognitive impairment, Eva Barnes at age 94 executed a new will (the "Wells will") that disinherited the Rovas, her nieces and nephew, and left her entire estate, including the family homestead where she and the Rovas' father were raised, to her postal carrier Michelle Wells. (FF 8, 63, CP 1092, 1106) Less than four months later, on June 27, 2011, Eva died. (FF 78, CP 1110)

The Rovas petitioned to set the Wells will aside for lack of testamentary capacity and as the product of undue influence. (CP 9-11) Judge Brooke Taylor ("the trial court") served as fact-finder in a five-day trial on the Rovas' will contest, entering 83 findings of fact in support of his conclusion that the Rovas had proved by clear,

cogent and convincing evidence that Eva's will was the product of Wells' undue influence. (CP 1162-89, reproduced as Appendix A)

Wells' briefing in the Court of Appeals and in this Court focuses on the trial court's findings that Eva was competent to make a will and chose to distance herself from her family, ignoring the trial court's critical findings that Wells, Eva's fiduciary, took advantage of Eva's mild cognitive impairment and unusual susceptibility to undue influence Eva and "fan the flame" of Eva's paranoia. This Court should reverse Division Two's decision conflating competency and undue influence and substituting its own view of the facts for the trial court's, whose unchallenged findings are summarized below:

- 1. In unchallenged findings of fact, the trial court found that Wells exercised undue influence over Eva.**

The Rovas are the children of Eva's brother, grew up in Poulsbo near Eva, and spent their childhood at the property on Rova Road outside Poulsbo that was homesteaded by Eva's parents and where Eva lived until her death in 2011. (FF 3-5, CP 1091-92) Eva's only daughter died in 2004; Eva's husband passed the next year. (FF 2, CP 1091) Eva remained close to the Rovas, her closest living relatives, well into her 90s - until the last two years of her life (FF 12,

CP 1093; RP 43, 130-32), when respondent Michelle Wells became her “only companion” under the following circumstances:

Eva was treated for depression after her husband died in 2005. (FF 2, CP 1091) Eva became a hoarder, filling the rooms and corridors of her home with newspapers, mail, magazines and personal possessions. (FF 27, CP 1096; RP 44-45, 49). After Eva fell there in April 2009, first responders would not let her return to her cluttered home – not just because of Eva’s frail condition, but because the home was unsafe. (FF 17-25, CP 1095-96) At the urging of Eva’s health care providers, the Rovas attempted to persuade Eva to move temporarily into assisted living. When she adamantly refused, the Rovas cleaned her residence in order to make it safe enough to allow their aunt to return home. (FF 25, 26, 28, 32, CP 1096-97)

Wells was Eva’s postal carrier. She befriended Eva after her husband’s death in 2005 (FF 39, CP 1099), and following Eva’s return home in April 2009 increasingly involved herself in Eva’s life, typically arriving at Eva’s home in the morning before work, spending her lunch hour with Eva, and returning at the conclusion of her shift. (FF 38, CP 1098; RP 653) In the last two years of Eva’s life, while Wells struggled financially (FF 40, CP 1136), she was Eva’s

only companion, spending nights at Eva's home and driving Eva to appointments. (FF 39, 51, 70, CP 1099, 1103, 1107; RP 776) Wells changed Eva's phone service, further isolating Eva from her family and her friends. (FF 69, CP 1107) Eva stopped calling the Rovas, stopped answering their phone calls, and refused to let them inside her home when they visited. (RP 73, 76-77, 98) Wells acted as the go-between when an Adult Protective Services worker tried to interview Eva following her fall in April 2009. (CP 522-23; FF 70, CP 1107) Wells drove Eva to her doctor's appointments and to meetings with Eva's lawyer, Jeff Tolman. (FF 51, 56, CP 1103-04)

Eva's falling-out with the Rovas had begun when they (along with Eva's health care providers) sought to convince her to temporarily move to assisted living in 2009. (RP 51) Eva became paranoid that the Rovas were trying to put her in a nursing home, and also believed that the Rovas had thrown out her address book while cleaning her home. Neither of these beliefs were true, and Wells knew it. (FF 30-33, 34, CP 1097-98; RP 872) Nevertheless, when Wells took Eva to Mr. Tolman's office in November 2010 so that Eva could replace her niece Vicki with Wells as her attorney-in-fact, Wells told the lawyer, in Eva's presence, that the Rovas had thrown out Eva's address book. (FF 50, CP 1140; RP 119)

This and other false accusations against the Rovas (*see, e.g.*, FF 72, CP 1145; RP 506) “fanned the flame” of Eva’s paranoia, “perpetuat[ing] Ms. Barnes’ anger toward the [Rovas].” (FF 73, CP 1109) For instance, Wells told the tenants at the rental house Eva owned with the Rovas that the Rovas intended to evict them, so they could sell the land and develop the property (RP 796; Ex. 78), and that she would fight for Eva in court, because the Rovas were “greedy villains.” (FF 46-47, CP 1138-39; Ex. 78)

Wells also took advantage of Eva in other ways. Armed with her power of attorney, Wells began writing Eva’s checks as her attorney-in-fact in January 2011, paying friends and family for their assistance in caring for Eva. (FF 54, CP 1104; RP 748-49) And two days before Eva died, while she lay in a coma, Wells wrote a check from Eva’s personal bank account to make Wells’ mortgage payment. (FF 77, CP 1146-47)

2. The trial court found the Rovas met their burden of proving by clear and convincing evidence that Eva’s will was the product of Wells’ undue influence.

After Wells was appointed personal representative with nonintervention powers (FF 1, CP 1127-28; CP 7), the Rovas petitioned to set the Wells will aside for lack of testamentary capacity and as the product of undue influence. (CP 9-11) After considering

the testimony and exhibits presented during a five-day trial, Judge Taylor analyzed the issues of capacity and undue influence separately:

The trial court found the issue of capacity a close one. Given Eva's inability to name her relatives only two days before she signed the March 3, 2011, Wells will, Judge Taylor found that the Rovas likely established Eva's lack of testamentary capacity by a preponderance of the evidence. (RP 868) And based on his review of a May 2, 2011, interview recorded at her church, Judge Taylor found that Eva's lack of capacity to make a will at that time was established by clear, cogent, and convincing evidence. (FF 71, CP 1145)

But Judge Taylor recognized that the law required clear, cogent and convincing proof of incapacity at the time of execution, and found that the Rovas had failed to meet that burden. (RP 868; FF 81-82, CP 1110) In doing so, Judge Taylor placed great weight on the testimony of Eva's attorney Jeff Tolman:

I find that I must defer to the judgment of Mr. Tolman, who was there, who knows this person, who I never met, who is smart and experienced as a lawyer, who is a [consummate] professional and who took extreme care in the execution of this Will. I cannot find, based on his testimony and all of the other evidence, that she lacked the capacity to make the Will on March the 3rd, 2011.

(RP 868)

The trial court correctly recognized, however, that the issue of undue influence was a separate one, on which the Rovas had the burden of proving by clear, cogent and convincing evidence that undue influence was “exerted at or close to the time of the Will and it must interfere with the free will of the person making the Will and prevent that person from exercising his judgment and choice.” (RP 869) Applying the factors identified by this Court in *Dean v. Jordan*, 194 Wash. 661, 79 P.2d 331 (1953), the trial court found that Eva was in failing health, her mental vigor was “certainly borderline,” and expert evidence established that she was “extremely vulnerable to influence.” (RP 870; CL 15-18, CP 1114) Further, the trial court found that Wells served as a fiduciary, that she actively participated in the preparation and procurement of the Wells will, that she had received an “unnatural distribution,” and that, as Eva’s “caregiver heavily involved in her daily life,” Wells had the “opportunity for influence . . . around the clock.” (RP 869-70; CL 19, CP 1114-15)

Judge Taylor recognized that Wells had been a “true friend” to Eva, but found that as Wells’ “financial circumstances became desperate,” she “fanned the flames” of Eva’s paranoia about the Rovas, further alienating Eva from her family:

I think you started out with the best of intentions. I think you were a true friend to this lady and I think

many of the things you did were motivated by the highest of motives, but I think you got caught up in a situation where as your financial circumstances became desperate, as this lady became alienated from her family based on things that you knew were not true, . . . I think you fed the fire. I think you fanned the flames. I think you made it easier and easier for this lady to believe all these horrible things that she said about her nieces and nephews.

(RP 872) Judge Taylor concluded that Wells failed to rebut the presumption of undue influence – to “produce evidence . . . sufficient to ‘at least to balance the scales and restore the equilibrium of evidence touching the validity of the will.’” (CL 21, CP 1115) But he went further, also concluding that “[c]lear cogent and convincing evidence establishes that the will signed by Ms. Barnes on March 3, 2011 was the product of ongoing undue influence by Michelle Wells.” (CL 21, CP 1115; *see also* CL 16, CP 1114)

At the presentation hearing, Wells objected to this second portion of Conclusion of Law 21, arguing “the Court did not make this finding” in his oral decision. (CP 1373) Judge Taylor disagreed, explaining this alternative ground for his decision:

Although I didn’t specifically state that in my oral opinion, it was my intention to do so. I do find that to be the case, and I am going to leave that as currently written. Again, keeping in mind that when I made the decision to rule from the bench, I was doing that to accommodate the parties.

(6/5 RP 9)

The Court of Appeals reversed, finding that Wells had rebutted the presumption of undue influence with evidence that Eva's will was the product of her own volition. (Op. 8) The Court of Appeals said the trial court had failed to "make any findings of fact of 'positive evidence' of undue influence to specify what constituted Michelle's undue influence" and remanded "for a new trial." (Op. 9) This Court granted the Rovas' petition for review.

D. Supplemental Argument.

- 1. Unchallenged findings of fact support the trial court's decision that "clear and convincing evidence establishes that the will . . . was the product of ongoing influence" – not just that Wells failed to rebut the *Dean* presumption.**

The trial court's findings support the "ultimate fact" that "clear, cogent and convincing evidence establishes that the will signed by Ms. Barnes on March 3, 2011 was the product of ongoing undue influence by Michelle Wells." (CL 21, CP 1115) *Matter of Estate of Pflagher*, 35 Wn. 844, 847, 670 P.2d 677 (1983) (findings supported by clear and convincing evidence proved "ultimate fact" of undue influence). Ignoring this alternative basis for its decision setting aside the Wells will, Wells argues only that the trial court erred in holding that Wells "had failed to rebut the *Dean* presumption of undue influence," (Answer to Pet. 8), quoting the

Court of Appeals' conclusion that "the trial court wholly relied on the presumption in making its conclusions law regarding undue influence." (Answer to Pet. 9, quoting Op. 9)

The *Dean* Court identified several facts that may give rise to a presumption of undue influence: (1) the beneficiary occupied a fiduciary or confidential relation to the testator; (2) the beneficiary actively participated in the preparation or procurement of the will; and (3) the beneficiary received an unusually or unnaturally large part of the estate. *Dean v. Jordan*, 194 Wash. 661, 671-72, 79 P.2d 331 (1938). The Court further held that other non-exclusive "suspicious" factors may support a finding of undue influence, including the age, health and mental vigor of the testator; nature or degree of relationship between the testator and the beneficiary; whether the beneficiary actively participated in the will's procurement or had other opportunity for exerting undue influence; and the unnaturalness of the will. *Dean*, 194 Wash. at 672.

Wells does not dispute the presence of all of these factors here, arguing that the trial court's findings establish only that she rebutted the presumption, or "balanced the scales." (Answer to Pet. 7) But the trial court's decision goes further. Judge Taylor cited "all of the other considerations listed by the court in *Dean* [that] support a

finding that the will . . . was the product of undue influence by Michelle Wells.” (CL 16, CP 1114) Further, as noted *supra* at 9, the trial court additionally found in the second sentence of Conclusion of Law 21 clear and convincing evidence of undue influence, *not* just a failure to rebut the presumption arising from Wells’ relationship with Eva. (CL 21, CP 1115) His statement upon entry of findings makes clear that Judge Taylor found not just a failure to rebut the presumption but also specifically found clear and convincing evidence of undue influence. (6/5 RP 9; quoted *supra* at 9). See *Goodman v. Darden, Doman & Stafford Associates*, 100 Wn.2d 476, 481, 670 P.2d 648 (1983) (appellate court “may look to the oral decision to clarify the theory on which the trial court decided the case”).

The Court of Appeals erred in reversing without fully addressing the trial court’s judgment that the Rovas had proven undue influence by clear, cogent and convincing evidence – not just that Wells, as a fiduciary, had failed to rebut the presumption of undue influence. Where, as here, the trial court’s decision is based on alternative grounds, this Court will affirm if any ground is supported by trial court’s findings and the law. *Tropiano v. City of Tacoma*, 105 Wn.2d 873, 876-77, 718 P.2d 801 (1986) (judgment will

be affirmed on any theory raised at trial and considered by the trial court). *See In re Kessler's Estate*, 35 Wn.2d 156, 211 P.2d 496 (1949) (affirming judgment setting aside will on ground of undue influence even though evidence was insufficient to establish that decedent lacked testamentary capacity). The Court should reverse the Court of Appeals and affirm the trial court's decision that "clear, cogent and convincing evidence establishes that the will signed by Ms. Barnes on March 3, 2011 was the product of ongoing undue influence by Michelle Wells." (CL 21, CP 1115)

2. The trial court's unchallenged findings are properly based on both direct and circumstantial evidence and support its ultimate finding of clear and convincing evidence of undue influence.

"[U]ndue influence can hardly ever be shown in any way other than by circumstantial evidence." *In re Bush's Estate*, 195 Wash. 416, 425, 81 P.2d 271 (1938). And while, as a consequence, circumstantial evidence alone is sufficient to support a finding of undue influence (*see* Petition 15, discussing *In re Kessler's Estate*, 35 Wn.2d 156, 211 P.2d 496 (1949); *Foster v. Brady*, 198 Wash. 13, 86 P.2d 760 (1939); *In re Bush's Estate*, 195 Wash. 416, 81 P.2d 271 (1938)), here the trial court's unchallenged findings were based on both direct and circumstantial evidence, including Wells' false statements to

witnesses that fed Eva's unfounded paranoia against the Rovas, the natural beneficiaries of her will. In contrast to *Dean*, where there was not "any direct evidence of any act or conduct from which an undue influence could be inferred," 194 Wash. at 673, here the trial court's findings, all verities on appeal, recite the clear and convincing evidence supporting its judgment that Eva's will was the product of Wells' undue influence. (CL 16, 21, CP 1114-15)

Wells was a constant presence, at a time when Eva was "increasingly dependent on Michelle" (FF 38, CP 1098) and "highly vulnerable to influence . . . due to her physical and mental impairments and total dependence." (FF 83, CP 1111) Wells "fanned the flame and operated to perpetuate [Eva's] anger," making it "easier for [Eva] to believe all the horrible things she had said about the [Rovas]." (FF 73, CP 1108-09) Wells told the Rovas' tenants the Rovas were "greedy villains," falsely claiming that the Rovas intended to evict them so they could sell the land, develop the properties, and "become millionaires." (FF 46, CP 1101-02) Knowing how upset Eva was about the loss of her address book, Wells falsely told Eva's attorney, in Eva's presence, that the Rovas had thrown it out. (FF 50, CP 1103) Wells told a church interviewer that Eva's nephew had "tried to throw [Eva] under the bus a couple times,

and that the [Rovas] were trying to put [Eva] in a nursing home.” (FF 72, CP 1108) And Wells knew these statements about the Rovas, the natural beneficiaries of Eva’s estate under her previous wills, were not true. (RP 872)

As the trial court noted, this direct evidence establishes that Wells alienated Eva from her family in order to influence her to change her will:

Otherwise, you wouldn’t have said the things you said to the tenants. You wouldn’t have said the things you said to the interviewer at the church and you had the opportunity – you had the fiduciary relationship – you were in charge the last few months and I think the Will was heavily influenced by your involvement.

(RP 872-73) The trial court’s findings distinguish this case from those where there is *no* direct evidence that the beneficiary actively encouraged the alienation of the testator from her family. *See, e.g., Dean*, 194 Wash. at 673; *In re Melter*, 167 Wn. App. 285, 302-03, 273 P.3d 991 (2012).¹

The trial court’s unchallenged findings also recite circumstantial evidence supporting its conclusion that Wells exercised undue influence – evidence that is no less probative than

¹ Although this distinction means the Court need not address the issue, Judge Sweeney’s concurrence in *Melter* reflects the proper deference to the trial court’s ultimate finding of undue influence. 167 Wn. App. at 316.

the direct evidence.² The trial court found that Wells struggled financially, was convicted of theft, and misused Eva's power of attorney to pay her mortgage from Eva's bank account. (FF 40, 77, CP 1099, 1109-10) Wells isolated Eva from her family and friends (FF 38, 69-70, CP 1098, 1107), identified herself as Eva's "guardian" at Eva's medical appointments, and, two days after Mr. Tolman had believed Eva to be incompetent to change her will, asked Eva's physician for "memory medication" on the very day the Wells will was ultimately executed. (FF 51, 52, 56, 57, 60, CP 1103-05; Ex. 1 at 879-81; RP 230, 674) As the trial court found (RP 870), Wells had a motive, she had the opportunity, and she in fact unduly influenced a highly vulnerable Eva, fueling her unjustified paranoia and animosity toward the Rovas, making her "madder and madder and more irrational . . ." (RP 871)

The trial court was cognizant of the correct legal standard, specially noting that "the evidence necessary to establish undue influence must be clear, cogent and convincing," and that "[t]his burden can be met with circumstantial evidence." (CL 9, CP 1113)

² "In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence," even when the standard of proof is beyond a reasonable doubt. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

See Matter of Estate of Lint, 135 Wn.2d 518, 537, 957 P.2d 755 (1998) (affirming trial court's finding of undue influence where trial court's reliance on clear and convincing standard of proof was not expressly stated but "implicit from its citation to *Dean*"). Demonstrating his sensitivity to the heightened standard of proof, the trial court rejected the Rovas' challenge to Eva's testamentary capacity, which he found could be satisfied by a preponderance of the evidence but not by the requisite clear and convincing burden of proof. (*See* CL 6, CP 1112; RP 868: "If the burden of proof were by a preponderance of the evidence, it might be a different result . . . She was not well and she had been deteriorating, but I could not find based on the standard of proof, that she did not have capacity . . .")

An appellate court may not decide for itself the weight to give conflicting evidence presented in a bench trial, regardless of the underlying burden of proof:

As an appellate tribunal, we are not entitled to weigh either the evidence or the credibility of witnesses even though we may disagree with the trial court in either regard. The trial court has the witnesses before it and is able to observe them and their demeanor upon the witness stand. It is more capable of resolving questions touching upon both weight and credibility than we are.

In re Sego, 82 Wn.2d 736, 739-40, 513 P.2d 831 (1973); *accord*, *In re Martinson's Estate*, 29 Wn.2d 912, 920-21, 190 P.2d 96 (1948) ("In

determining the credibility of the various witnesses, and the weight to be given to their testimony, [trial court] took into consideration their conduct and demeanor while testifying.”). Wells’ continued reliance on Mr. Tolman’s observation that after his discussions with Eva he believed that the Wells will was her “free and voluntary choice” (albeit on the second try, and only two days after Mr. Tolman declined to draw a new will when Eva first came to his office because of his concerns about her competency) does just that, emphasizing one piece of evidence and one witness to the exclusion of all others. (Answer to Pet. 5-6)

The trial court carefully evaluated Mr. Tolman’s testimony and observations of Eva, deferring to his judgment on the issue of capacity based on his “extreme care” in his colloquies with Eva. (RP 868; Ex. 88) But Judge Taylor also understood that “[u]ndue influence is not usually exercised openly in the presence of others,” *In re Kessler’s Estate*, 35 Wn.2d at 162, and unlike capacity, cannot always be detected in meetings with an attorney in which the testator is asked “test questions.” See, e.g., *Matter of Estate of Pflighar*, in which the Court of Appeals affirmed the trial court’s finding that a will was the product of undue influence even though the testator’s longtime lawyer, who had drafted the will, expressed a similar belief

that his “strong-willed” client “knew what he was doing.” 35 Wn. App. at 851, n.1 (McInturff, J. concurring in part).

In his two or three brief meetings with Eva (with Wells either present or waiting just outside), Mr. Tolman was not privy to the daily interactions between them, in which Wells, in dire financial straits, actively (and falsely) fueled the paranoia about her relatives that afflicted frail, isolated Eva. Judge Taylor, by contrast, heard five days of testimony from both interested and disinterested witnesses, and evaluated the entire course of Wells’ relationship with Eva. This Court should disapprove the Court of Appeals’ improper failure to defer to the trial court’s first hand assessment of the weight of conflicting evidence and affirm the trial court’s conclusion that Eva Barnes’ last will and testament was the product of Michelle Wells’ undue influence.

3. The proper relief if the trial court failed to identify necessary “positive evidence” of undue influence is not a new trial but a remand for additional findings.

This case was exhaustively tried over five days. If the trial court made a legal error in misapplying the clear and convincing standard of proof, the proper remedy is to remand for reconsideration, not for a new trial as ordered by the Court of Appeals. *See In re Dependency of Penelope B.*, 104 Wn.2d 643, 648-

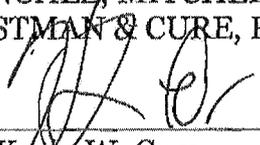
49, 709 P.2d 1185 (1985) (trial court's legal error in striking admissible evidence in bench trial mandates remand for reconsideration "and for the entry of new or additional findings, conclusions or decision if indicated"); RAP 12.2. Even if this Court affirms the Court of Appeals, it should remand to the trial court to clearly identify the "positive evidence" supporting its conclusion that "clear, cogent and convincing evidence establishes that the will signed by Ms. Barnes on March 3, 2011 was the product of ongoing undue influence by Michelle Wells," (CL 21, CP 1115), rather than to conduct a new trial.

E. Conclusion

This Court should reverse the Court of Appeals, reinstate the trial court's order setting aside the Wells will, and award the Rovas their attorney fees, as requested in the Court of Appeals. RAP 18.1(b). *See* Resp. Br. 48.

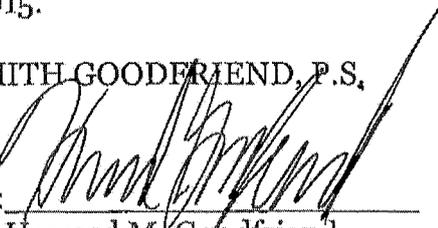
Dated this 5th day of October, 2015.

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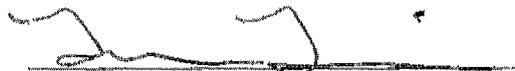
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on October 5, 2015, I arranged for service of the foregoing Supplemental Brief of Petitioners, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 5th day of October, 2015.



Tara D. Friesen

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KITSAP

In re the Estate of: EVA JOHANNA ROVA BARNES, Deceased.	NO. 11-4-00455-3 COURT'S FINDINGS OF FACTS AND CONCLUSIONS OF LAW (As Proposed by Petitioners)
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This matter was tried before the undersigned Court, commencing on February 11, 2013. The matter was tried without a jury. The Petitioners Vicki Rova Mueller, Karen Bow, Marsha Rova, and John Rova appeared at the trial and were represented by Kevin W. Cure of Sanchez, Mitchell and Eastman. The Respondents Michelle Wells and Dennis Wells appeared at trial and were represented by David P. Horton of The Law Office of David P. Horton, Inc. P.S.

I. FINDINGS OF FACT

1. Eva Johanna Rova Barnes ("Ms. Barnes") was born on July 17, 1916, in Bellingham, Washington. She died on June 27, 2011 at her home at 94 years of age, just a few weeks before her 95th birthday. Ms. Barnes' will was

FINDINGS OF FACT AND
CONCLUSIONS OF LAW-1

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admitted to probate on July 1, 2011. Michelle Wells was appointed personal representative and given nonintervention powers. The Court granted Petitioners' motion to remove Michelle Wells as personal representative and she was replaced by her husband, Dennis Wells.

2. Ms. Barnes' husband, Ray Barnes, died at the age of 96 in 2005. Their only daughter, Karolyn, passed away in 2004 at the age of 48. The loss of her husband and child so close in time was a major blow to Ms. Barnes. She was treated for depression in 2006 and there were indications of depression from that date going forward.

3. Ms. Barnes was survived by her brother Victor's wife, Marian Rova. Marian Rova's children are the Petitioners in this case. The Petitioners are Marsha Rova, Vicki Mueller, John Rova and Karen Bow. After the death of Ray and Karolyn, Ms. Barnes' close family consisted of the Petitioners.

4. The Petitioners are adults with families of their own. The Petitioners grew up in Poulsbo near Ms. Barnes, and spent a significant amount of time at Ms. Barnes' property. Ms. Barnes' residence is located on Rova Road in Poulsbo, Washington, and has been known for decades locally as the Rova Property.

5. The Rova Property consists of acreage, Ms. Barnes' residence, and a small rental house. Ms. Barnes owns a one half interest in the rental property and the other one half interest is owned by the Petitioners. The Rova Property was homesteaded by Ms. Barnes' parents and Ms. Barnes resided

FINDINGS OF FACT AND
CONCLUSIONS OF LAW-2

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there from 1918 until the time of her death. The Petitioners are direct lineal descendents of the homesteaders.

6. On March 4, 2004, Ms. Barnes executed her first known will. At the time this will was made, Ray and Karolyn were still alive. Under this will Ms. Barnes' estate was to be distributed upon her death as follows: (1) her entire estate to her husband, Ray; (2) If Ray predeceased Ms. Barnes, then her entire estate to her daughter, Karolyn, in trust, to be managed by Vicki Mueller, as trustee; (3) If both Ray and Karolyn predeceased Ms. Barnes, her entire estate was to be divided in four equal shares, one share to each of the Petitioners.

7. On March 4, 2004, Ms. Barnes and Ray executed a durable power of attorney. Ms. Barnes and Ray were named as each other's primary attorney in fact. Vicki Mueller was named as the alternate attorney in fact for both Ms. Barnes and Ray.

8. On September 26, 2005, after both Ray and Karolyn had passed away, Ms. Barnes executed a second will. This will provided that upon her death, her entire estate was to be distributed in four equal shares, one share to each Petitioner. This will nominated Vicki Mueller to serve as Ms. Barnes's personal representative, and Marsha Rova as the alternate personal representative.

9. On September 26, 2005, Ms. Barnes executed an individual durable power of attorney, which was effective immediately. Ms. Barnes named

FINDINGS OF FACT AND
CONCLUSIONS OF LAW-3

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Vicki Mueller as her attorney in fact, and Marsha Rova as the alternate attorney in fact.

10. On April 29, 2006, Ms. Barnes had a bowel obstruction surgery at Harrison Medical Center ("HMC") in Bremerton, Washington. This was a major medical event. The medical professionals that treated Ms. Barnes during this time suspected that she was suffering from depression. Ms. Barnes' physician, Dr. Kina, prescribed an antidepressant medication for her.

11. On May 8, 2006, Ms. Barnes was discharged from HMC and admitted to a nursing home, Martha & Mary, to recover from the bowel obstruction surgery. She was discharged from Martha & Mary on May 23, 2006, and returned to her home.

12. On July 17, 2006, Ms. Barnes celebrated her 90th birthday. The celebration occurred at Marsha Rova's home and each of the Petitioners and their respective families were present. By all accounts, the birthday celebration was large and successful.

13. On March 26, 2009, Ms. Barnes fell in the kitchen of her home. She was unable to get up off the floor on her own, and she was unable to summon help. Ms. Barnes laid helpless on her kitchen floor for two and a half days before she was discovered. It is unknown how she fell.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW-4

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- 1 14. On March 29, 2009, 911 was called. Ms. Barnes was found on her kitchen
2 floor by emergency responders and was rushed to HMC. Ms. Barnes was
3 severely dehydrated and was in critical condition.
- 4 15. Ms. Barnes was hospitalized at HMC for three days. During her stay at
5 HMC, the medical professionals noted observations of Ms. Barnes'
6 cognitive impairment. These observations were charted in Ms. Barnes'
7 medical records relating to her stay at HMC during this time.
- 8 16. On April 1, 2009, Ms. Barnes was discharged from HMC and admitted to
9 Martha & Mary for recovery. From a physical standpoint, Ms. Barnes
10 recovered fairly quickly from her fall. As she became hydrated and
11 rested, her strength returned.
- 12 17. Ms. Barnes spent approximately twelve days recovering at Martha & Mary.
13 During Ms. Barnes' stay at Martha & Mary, the medical professionals
14 noted their observations of her cognitive impairment and physical
15 limitations. These observations were charted in Ms. Barnes' medical
16 records relating to her stay at Martha & Mary during this time.
- 17 18. All the medical professionals that treated Ms. Barnes during her stay at
18 Martha & Mary agreed that Ms. Barnes was not strong or healthy enough
19 to return home. The medical professionals, including her physician, Dr.
20 Kina, concurred that Ms. Barnes needed additional time to recover and it
21 would be in her best interest to temporarily reside at some kind of assisted
22 living facility. The Petitioners, who visited her regularly during her stay at
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FINDINGS OF FACT AND
CONCLUSIONS OF LAW-5

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Martha & Mary, also agreed that she was not ready to return home and advocated that she remain in an assisted living facility until she could fully recover.

19. Ms. Barnes was a strong minded individual. Despite the recommendations of the medical staff at Martha & Mary, Dr. Kina, and the Petitioners, Ms. Barnes demanded that she be allowed to return home.

20. Dr. Kina did not feel he could deny Ms. Barnes' request to return home or force her to do something different. On April 13, 2009, Dr. Kina reluctantly discharged Ms. Barnes from Martha & Mary.

21. On April 13, 2009, John Rova and Marsha Rova drove Ms. Barnes to her home from Martha & Mary.

22. Ms. Barnes' medical records relating to her treatment at Martha & Mary are not only helpful in understanding what was happening from a medical perspective, but also shed light on what was happening between Ms. Barnes and her family.

23. A social worker at Martha & Mary described the Petitioners as being "desperate" to help Ms. Barnes and noted their grave concerns about Ms. Barnes returning home. Ms. Barnes' medical records reflect that the Petitioners were extremely concerned about Ms. Barnes during this time.

24. A social worker at Martha & Mary recommended the Petitioners make a referral to Adult Protective Services ("APS") based on the condition of Ms. Barnes' home.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW-6

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25. The emergency responders that had rescued Ms. Barnes from her kitchen floor on March 29, 2009, indicated that the condition of Ms. Barnes' home was so extreme that the fire department would not allow her to return home unless changes were made. As members of the fire department, they were in a position to keep Ms. Barnes from returning home as they did not feel it was safe for her to return in its present condition.

26. As a result of the condition of Ms. Barnes' home, the Petitioners, primarily John Rova, with the assistance of Michelle Wells, frantically tried to make Ms. Barnes' home safe for her return. There was very little time to accomplish this.

27. Ms. Barnes's home was filled with piles and stacks of newspapers, magazines and other things that she had hoarded. Ms. Barnes' belongings were stacked from floor to ceiling and left only narrow pathways throughout the house. Some of the stacks of magazines and papers were near heat sources including the baseboards and wood stove. The condition of her home at the time of her fall was not safe.

28. John Rova, Michelle Wells and others, did the best they could to make Ms. Barnes' home suitable for her return. Old newspapers and magazines were discarded in the process.

29. On April 13, 2009, when Ms. Barnes returned home from Martha and Mary, she appeared to do fairly well in the succeeding months. But, in

FINDINGS OF FACT AND
CONCLUSIONS OF LAW-7

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terms of Ms. Barnes' relationship with the Petitioners, her return home was decidedly the beginning of the end.

30. Ms. Barnes felt her privacy had been invaded by John Rova's attempt to make her home suitable for her return. For some reason, Ms. Barnes singled out John Rova and the Petitioners and seemed to ignore the fact that Michelle Wells was also involved in the cleaning of her home.

31. Ms. Barnes alleged that the Petitioners had deliberately destroyed her address book. This allegation was untrue. The address book may have been misplaced or destroyed by mistake, but there is no evidence that the Petitioners had a motive to destroy it.

32. Ms. Barnes also believed that the Petitioners were committed to removing her from her home and placing her in a nursing home for the rest of her life. This belief was also untrue. The Petitioners and all the medical professionals that treated her after her fall in March 2009 recommended that Ms. Barnes transition from Martha & Mary to an assisted living facility until she could regain full mental and physical strength and return home safely.

33. There is no evidence that the Petitioners, or anyone, recommended that Ms. Barnes be resigned to a nursing home or assisted living facility for the rest of her life.

34. Ms. Barnes' fear of not being able to return home or being removed from her home to a nursing home or assisted living facility is understandable.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW-8

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1 It is very common. She was desperately afraid of being put in a nursing
2 home or assisted living facility. Ms. Barnes's fear in this regard
3 developed into paranoia and caused her to be suspicious of the
4 Petitioners.

5 35. After Ms. Barnes' discharge from Martha & Mary until the time of her
6 death, she met with Dr. Kina on approximately nineteen different
7 occasions. Dr. Kina found Ms. Barnes to be a capable reporter of her
8 health status and that she was usually in good humor.

9 36. Throughout the course of his treatment of Ms. Barnes, Dr. Kina's records
10 reflect his observations of Ms. Barnes' gradual mental deterioration, but
11 at no time did he diagnose her with dementia. Starting in 2009, the term
12 "mild cognitive impairment" is used throughout Ms. Barnes' medical
13 records.

14 37. Against all odds, Ms. Barnes was able to maintain reasonably good
15 health after she returned home. This was perhaps due in part to her
16 strong will and determination, but also in part due to the efforts of
17 Michelle Wells.
18

19 38. After Ms. Barnes returned home on April 13, 2009 and until the time of
20 her death, Michelle Wells became increasingly involved with Ms. Barnes.
21 Michelle Wells visited Ms. Barnes once or more every day and Ms.
22 Barnes became increasingly dependent on Michelle Wells.
23
24

FINDINGS OF FACT AND
CONCLUSIONS OF LAW-9

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1 39. Michelle Wells first came to know Ms. Barnes through her employment
2 as a rural mail carrier for the United States Postal Office. Her
3 relationship with Ms. Barnes began as a professional and friendly one.
4 After Ray and Karolyn died, Michelle Wells and Ms. Barnes became
5 friends. In the last couple years of Ms. Barnes' life, Michelle Wells
6 became increasingly involved in Ms. Barnes' care and her life.
7 Ultimately, Michelle Wells became Ms. Barnes' caretaker. And while that
8 was happening, Ms. Barnes became less and less involved with
9 Petitioners. It was not the Petitioners' choice to be less involved with Ms.
10 Barnes, but it was Ms. Barnes' choice.
11

12 40. Michelle and Dennis Wells are not related to Ms. Barnes. Michelle Wells
13 is 51 years younger than Ms. Barnes. Michelle Wells was convicted of
14 Theft in the Third Degree in Mason County District Court on June 29,
15 2009. Between 2009 and the time of Ms. Barnes' death, Michelle and
16 Dennis Wells were financially struggling.
17

18 41. In April 2010, Ms. Barnes began writing checks from Ms. Barnes' account
19 payable to Michelle Wells and Michelle Wells' family members. The
20 checks were for various services and for reimbursement for various
21 expenses. During this time, the gap between Ms. Barnes and the
22 Petitioners was widening.
23

24 42. In 2010, Ms. Barnes stopped tending to her business related to the rental
property. Historically, the Petitioners and Ms. Barnes enjoyed a good

FINDINGS OF FACT AND
CONCLUSIONS OF LAW-10

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1 working relationship regarding their respective interests in the rental
2 property. Ms. Barnes had always managed the jointly owned rental.
3 Among other things, Ms. Barnes always paid the taxes and insurance
4 and collected the rent from the tenants. Once she had collected the rent
5 she would divide it appropriately and distribute it among herself and the
6 Petitioners. Ms. Barnes was always fastidious, organized, responsible,
7 and prompt with the business and financial matters relating to the rental
8 property.

9
10 43. In 2010, the Petitioners' share of the rental income was not being
11 forwarded to them as it had in the past. The property taxes for the rental
12 property were not being paid and it was difficult to determine if the
13 rental property was insured. The Petitioners did not know who the
14 tenants were or if there even were tenants. The Petitioners assumed the
15 current tenants were not paying rent because their share of the rental
16 income was not being forwarded to them as it had in the past. All of these
17 changes were a significant departure from Ms. Barnes prior reliability in
18 that regard.

19
20 44. On July 31, 2010, Karen Bow's daughter was married. This was a major
21 family event. Ms. Barnes was invited and attended, but was not very
22 involved with her family at that time. The Petitioners felt Ms. Barnes'
23 lack of involvement was her choice. Ms. Barnes later told Michelle Wells
24 that she felt ostracized by her family at the wedding. The evidence

FINDINGS OF FACT AND
CONCLUSIONS OF LAW-11

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indicates that the Petitioners tried to involve Ms. Barnes in the wedding festivities, but Ms. Barnes showed no interest, and isolated herself from her family by sitting by herself. After the wedding, the gap between Ms. Barnes and the Petitioners continued to grow.

45. On October 30, 2010, Marsha Rova and her husband Scott, went to the rental property. The Petitioners assumed the current tenants, if any, were not paying rent because Ms. Barnes had not forwarded the Petitioners their share of the rental income for a significant amount of time. When Marsha and Scott arrived at the rental property, they were shocked to discover that the current tenants were known to them. They had been tenants of the rental property in the past and had always paid rent on time. Marsha and Scott learned that the current tenants had in fact been paying rent to Ms. Barnes, but Ms. Barnes was not passing it through to the Petitioners as she had in the past.

46. The tenants informed Scott and Marsha that they were frustrated with Ms. Barnes. Ms. Barnes had accused them of not paying rent and of stealing items. Ms. Barnes had sent Michelle Wells to the rental property to confront the tenants about not paying rent. Michelle Wells told the tenants that the Petitioners intended to evict them so they could sell the land, develop the properties, and become millionaires. Michelle Wells told

FINDINGS OF FACT AND
CONCLUSIONS OF LAW-12

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the tenants that she would go to court to fight for Ms. Barnes because the Petitioners were greedy villains.

47. Immediately after the meeting with the tenants, Marsha drafted an email that summarized their conversations with the tenants and sent it to her siblings. The court cannot find any reason that Marsha would say anything but what she understood to be the truth in this email. The statements that Michelle Wells made to the tenants of the rental property were not true and acted to further poison Ms. Barnes' relationship with the Petitioners.

48. On November 17, 2010, a meeting was held at Ms. Barnes' attorney's office. Ms. Barnes was represented by Jeff Tolman. Ms. Barnes desired to remove Vicki Mueller as her attorney in fact and name Michelle Wells in her place. Mr. Tolman invited Vicki Mueller to attend the meeting with Ms. Barnes. Ms. Barnes was told that Vicki Mueller would be present at the meeting, but expressed shock and anger when she discovered Vicki Mueller was present.

49. At the meeting, Mr. Tolman attempted to mediate the differences between Ms. Barnes and the Petitioners. Ms. Barnes made it clear that she wanted nothing to do with any type of reconciliation with Vicki Mueller and/or any of the Petitioners. Ms. Barnes was demonstrably angry with Vicki Mueller and ranted at her about all the ways she believed the Petitioners had done her wrong.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW-13

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1 50. Michelle Wells was also present at the November 17, 2010 meeting at Mr.
2 Tolman's office. She had provided Ms. Barnes with transportation to the
3 meeting and was invited by Mr. Tolman to participate in some of the
4 meeting. During the meeting, Michelle Wells told Mr. Tolman, in the
5 presence of Ms. Barnes and Vicki Mueller, that the Petitioners had
6 thrown out Ms. Barnes' address book. This comment further upset Ms.
7 Barnes and Ms. Barnes continued to direct her anger toward Vicki
8 Mueller.
9

10 51. In May 2010, Ms. Barnes stopped driving. As a result, Ms. Barnes was
11 solely dependent on Michelle Wells for transportation. From May 2010 to
12 the time of her death, Michelle Wells provided Ms. Barnes with
13 transportation to every meeting Ms. Barnes had with Mr. Tolman and
14 Dr. Kina. From this time forward, Dr. Kina never met with Ms. Barnes
15 outside the presence of Michelle Wells.

16 52. On December 10, 2010, Ms. Barnes met with Mr. Tolman at his office.
17 Michelle Wells provided Ms. Barnes with transportation to the meeting.
18 There, Ms. Barnes executed a new durable power of attorney. The new
19 durable power of attorney named Michelle Wells as Ms. Barnes' attorney
20 in fact. Ms. Barnes did not list an alternate attorney in fact. From this
21 point on, Michelle Wells was Ms. Barnes' attorney in fact.
22

23 53. In 2010 and 2011, Ms. Barnes was writing letters to the Petitioners,
24 other family members, and friends. The handwritten letters began

FINDINGS OF FACT AND
CONCLUSIONS OF LAW-14

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1 reasonably well organized and rational, but became increasingly
2 incoherent, illegible and irrational. In her writings, Ms. Barnes' thoughts
3 were scattered and contained irrational rants where she would call the
4 Petitioners horrible names and accused them of horrible things, none of
5 which were true.

6 54. In January 2011, Michelle Wells began assisting Ms. Barnes by writing
7 Ms. Barnes' checks. Michelle Wells signed some of the checks as Ms.
8 Barnes attorney in fact.

9
10 55. March 1, 2011, Ms. Barnes saw both Dr. Kina and Mr. Tolman.

11 56. Dr. Kina's records from Ms. Barnes' March 1, 2011 visit note Michelle
12 Wells' presence and refer to her as Ms. Barnes' guardian. Dr. Kina's
13 records from this visit did not note anything remarkable about Ms.
14 Barnes mental condition. Dr. Kina testified that on March 1, 2011, Ms.
15 Barnes appeared reasonably well both mentally and physically.

16 57. On March 1, 2011, immediately following her meeting with Dr. Kina, Ms.
17 Barnes met with Mr. Tolman. The purpose of the meeting was to execute
18 her new will. Michelle Wells provided her transportation to this meeting.
19 Mr. Tolman believed that Ms. Barnes was not feeling well as she had just
20 come from Dr. Kina's office and had received an injection of some kind.
21 Ms. Barnes acknowledged that she was not feeling well. Mr. Tolman
22 testified that Ms. Barnes could not remember one of her niece's names.
23 Mr. Tolman asked her to come back another day when she was feeling
24

FINDINGS OF FACT AND
CONCLUSIONS OF LAW-15

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better. Ms. Barnes did not execute her new will or any other documents and left with Michelle Wells.

58. March 3, 2011, Ms. Barnes saw both Dr. Kina and Mr. Tolman.

59. Dr. Kina testified that he did not recall anything unusual about Ms. Barnes mental status on that day that would have made him question her capacity. Dr. Kina's records from that visit indicate that Michelle Wells was present and requested that Dr. Kina prescribe a medication to help Ms. Barnes with her memory problems. Dr. Kina prescribed Aricept. Dr. Kina's records from this visit listed "mild cognitive impairment" as an active problem and as the reason for the visit.

60. On March 3, 2011, immediately following her meeting with Dr. Kina, Ms. Barnes returned to Mr. Tolman's office to execute her new will. Michelle Wells had provided Ms. Barnes transportation to the meeting. The new will had been prepared by Mr. Tolman at Ms. Barnes' request. Mr. Tolman engaged Ms. Barnes in a significant colloquy about her new will. After the colloquy, Ms. Barnes executed her new will.

61. The March 3, 2011 will appeared to be validly executed and in proper format. It was witnessed appropriately by Mr. Tolman and his assistant, Susan Peden. Michelle Wells did not accompany Ms. Barnes to the conference room where the will was signed by her. Mr. Tolman did not video tape the will signing or consult with Dr. Kina prior to the will signing.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW-16

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62. Mr. Tolman was extremely careful in his representation of Ms. Barnes. Contemporaneous to the preparation of the will, he prepared a memorandum for Ms. Barnes' signature which set forth what he believed to be Ms. Barnes' reasons for what can only be described as a radical departure from her prior estate plans. This was the first time Mr. Tolman had taken this extra precautionary step in more than thirty years of practice.

63. The March 3, 2011 will was a radical departure from Ms. Barnes' prior wills. Unlike each of her previous wills, it contained no provision for the Petitioners. The new will completely disinherited the Petitioners and named Michele Wells and her husband as the sole beneficiaries. The March 3, 2011 will also named Michelle Wells to act as personal representative, and her husband as the alternate.

64. Dr. Kina and Mr. Tolman testified that on March 3, 2011, Ms. Barnes appeared to have the necessary capacity to make her will.

65. Ms. Barnes saw Dr. Kina next on March 7, 2011. In Dr. Kina's medical records from this visit, he again noted mild cognitive impairment. Dr. Kina testified that he believed Ms. Barnes continued to have sufficient capacity on this day to make her will.

66. On March 22, 2011, the Petitioners wrote a letter to Ms. Barnes about the rental property. The letter described what the Petitioners had discovered in regard to the current tenants and their concerns about the

FINDINGS OF FACT AND
CONCLUSIONS OF LAW-17

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1 insurance, the sharing of rental income, and the payment of property
2 taxes. The letter demonstrated an attempt by the Petitioners to reach out
3 to Ms. Barnes and reestablish, at the very least, a workable business
4 relationship with Ms. Barnes. The letter ended as follows: "Please let us
5 know of anything that we may help you with. We love you, and want to
6 help you as much as we can. Love, John, Karen, Marsha & Vicki."

7
8 67. By March 22, 2011, the Petitioners were aware that Ms. Barnes had
9 executed a new durable power of attorney, but it is not clear whether
10 they were aware of Ms. Barnes' new will.

11 68. It is unknown whether Ms. Barnes ever saw the March 22, 2011 letter.
12 The letter expresses the sentiments of the Petitioners toward Ms. Barnes
13 as of late March 2011.

14 69. After Ms. Barnes' fall in March of 2009, she became increasingly difficult
15 to reach either by telephone or in person. Her friends and family would
16 call and the phone would often ring continuously without being
17 answered. Michelle Wells had changed Ms. Barnes' long distance calling
18 plan. This isolated Ms. Barnes from her family and long time close
19 friends.

20
21 70. APS visited Ms. Barnes' residence on numerous occasions. Often there
22 would be no answer at the door and their phone calls would not be
23 returned. The only person close to Ms. Barnes on a consistent basis
24 during this time was Michelle Wells.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW-18

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71. On May 2, 2011, Michelle Wells drove Ms. Barnes to Ms. Barnes' church, First Lutheran Church, in Poulsbo, Washington. At the church, a church member interviewed Ms. Barnes for the purpose of recording the history of the church and of its members. The interview was recorded and a wide range of topics were discussed. During the course of the interview, Ms. Barnes was often confused. The recorded statements made by Ms. Barnes and her notable confusion suggest that she was significantly impaired on May 2, 2011. Had Ms. Barnes executed her last will on this day, the evidence would have been clear, cogent, and convincing that she lacked testamentary capacity.

72. During the recorded interview, there was substantial involvement from Michelle Wells. Michelle Wells filled in numerous blanks in Ms. Barnes' memory and appeared to speak for Ms. Barnes at certain times. In the presence of Ms. Barnes, Michelle Wells made comments about the Petitioners to the interviewer. Michelle Wells told the interviewer that her nephew, John Rova, had tried to throw Ms. Barnes under the bus a couple times, and that the Petitioners were trying to put Ms. Barnes in a nursing home. Michelle Wells' statements were not true and acted to further poison Ms. Barnes's relationship with the Petitioners.

73. The comments made by Michelle Wells at the November 17, 2010 meeting at Mr. Tolman's office, the comments she made to the tenants of the rental property, and the comments she made to the interviewer on

FINDINGS OF FACT AND
CONCLUSIONS OF LAW-19

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1 May 2, 2011 made it easier for Ms. Barnes to believe all the horrible
2 things she had said about the Petitioners. Michelle Wells' comments
3 fanned the flame and operated to perpetuate Ms. Barnes' anger toward
4 the Petitioners.

5 74. On May 25, 2011, Ms. Barnes fell on the sidewalk outside of her home.
6 This was the beginning of end in terms of Ms. Barnes' physical well
7 being. Ms. Barnes refused to go the hospital or to see Dr. Kina at his
8 office. From May 25, 2011 to the date of her death, Ms. Barnes was
9 unable to walk.

10
11 75. On May 25, 2011, Dr. Kina made a house-call and examined Ms. Barnes.
12 During this visit, Dr. Kina noted in his records that Ms. Barnes "has had
13 long-standing mild cognitive impairment. This seems to be gradually
14 progressing. Probably early Alzheimer's dementia."

15 76. Ms. Barnes remained at her home until the time of her death. On June
16 22, 2011, Dr. Kina made a certification of terminal illness and believed
17 hospice care was appropriate as Ms. Barnes' end was likely near. Ms.
18 Barnes consented to in-home hospice care.

19
20 77. On June 25, 2011, Michelle Wells wrote a check in the amount of
21 \$2,641.94 from Ms. Barnes' personal bank account. The check was made
22 payable to Chase Financial and was made to pay Michelle Wells' personal
23 house payment. This represented the first time any expenditure of that
24 kind had been made exclusively for the benefit of Michelle Wells and it

FINDINGS OF FACT AND
CONCLUSIONS OF LAW-20

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was done at a time when Ms. Barnes was in, or very close to being in, a coma. The payment to Chase Financial posted on June 27, 2011.

78. Ms. Barnes died on June 27, 2011.

79. The Petitioners' medical expert, Dr. Meharg, provided a retrospective analysis on whether Ms. Barnes had dementia or impaired cognitive ability as of the date of the signing of the March 3, 2011 will.

80. Dr. Meharg never met Ms. Barnes or had the opportunity to examine her. Dr. Meharg relied on objective evidence of Ms. Barnes' physical and mental condition, her ability (or lack thereof) to perform certain tasks, and collateral source information regarding third party observations of Ms. Barnes.

81. However, the evidence is inconclusive as to Ms. Barnes' condition at the time of the March 3, 2011 will signing. Specifically, those individuals who are professionals and who were expressly charged with observing Ms. Barnes' condition did not note substantial impairment. This included attorney Mr. Tolman, witness Susan Peden, and Dr. Kina.

82. The testimony is very conflicting. There is substantial evidence that raises questions about Ms Barnes' mental competency, but there is not clear and convincing evidence that as of the will signing on March 3, 2011, that Ms. Barnes suffered from dementia and thus lacked testamentary capacity.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW-21

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1 83. Dr. Meharg testified that Ms. Barnes was highly vulnerable to influence
2 at the time of the will signing due to her physical and mental
3 impairments and total dependence on Michelle Wells for basic care. Dr.
4 ~~Meharg also testified that Ms. Barnes lacked the ability to form~~
5 ~~independent thoughts sufficient to overcome the influence of Michelle~~
6 ~~Wells.~~

7 Based upon the foregoing Findings of Fact, the Court makes the following:
8

9 II. CONCLUSIONS OF LAW

- 10 1. The right to dispose of one's property by will is not only a valuable right,
11 but is one assured by law. *Points v. Nier*, 91 Wn.20, 28, 157 P.44 (1916); *In*
12 *re; Murphy's Estate*, 98 Wash. 548, 555, 168 P. 175, 178 (1917); *In re*
13 *Tiemens' Estate*, 152 Wash. 82, 88, 277 P. 385-387 (1929).
- 14 2. To exercise that right one must, of course, possess testamentary capacity.
15 To have testamentary capacity, a testator must have sufficient mental
16 functioning to understand the transaction in which she is engaged, to
17 recollect the objects of her bounty, and to recall in general the nature and
18 extent of her estate.
- 19 3. Petitioners have the burden of proving testamentary incapacity and they
20 must meet their burden by clear, cogent and convincing evidence.
- 21 4. There is not clear, cogent, and convincing evidence establishing that Ms.
22 Barnes lacked testamentary capacity when she signed the will on March 8,
23 2011. The evidence was inconclusive that Ms. Barnes had dementia at the
24

FINDINGS OF FACT AND
CONCLUSIONS OF LAW-22

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time of the will-signing and thus there is no inference that she was sufficiently cognitively impaired at the time of the will signing to invalidate the will for lack of capacity. The testimony of lay witnesses, was inconsistent and inconclusive, and did not clearly and convincingly establish that Ms. Barnes did not have sufficient mental capacity to understand the will that she signed on March 3, 2011.

5. The March 3, 2011 will was a radical departure from Ms. Barnes' prior wills which created an inference that it was the product of an unsound mind. This inference, alone, is not sufficient to overcome the clear, cogent, and convincing standard of proof.
6. There was significant amount of evidence regarding Ms. Barnes' cognitive impairment, but the Petitioners did not meet their burden in establishing that Ms. Barnes lacked testamentary capacity on March 3, 2011.
7. The will that Ms. Barnes executed on March 3, 2011 is not invalid because she lacked testamentary capacity.
8. A beneficiary's exercise of undue influence over a testator who otherwise possesses testamentary capacity operates to void a will. The influence must, at the time of the testamentary act, have controlled the volition of the testator, interfered with his or her free will, and prevented an exercise of his or her judgment and choice. *In re Estate of Lint*, 135 Wn.2d 518, 535, 957 P.2d 755 (1988).

FINDINGS OF FACT AND
CONCLUSIONS OF LAW-23

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9. The evidence necessary to establish undue influence must be clear, cogent and convincing. This burden can be met with circumstantial evidence.

10. A presumption of undue influence can be raised by showing certain suspicious facts and circumstances. In *Dean v. Jordan*, 194 Wn. 661, 79 P.2d 371 (1938), the court identified several facts which may give rise to a presumption of undue influence. A presumption of undue influence can arise where (1) the beneficiary was the decedent's fiduciary; (2) the beneficiary participated in the preparation or procurement of the will; and (3) the beneficiary's share of the estate was unnaturally large. Added to these may be other considerations, such as the age or condition of health and mental vigor of the testator, the nature or degree of relationship between the testator and the beneficiary, the opportunity for exerting undue influence, and the naturalness or unnaturalness of the will. *Id.* at 672.

11. Clear, cogent, and convincing evidence supports a presumption that the will executed by Ms. Barnes on March 3, 2011 was the product of undue influence by Michelle Wells.

12. Michelle Wells was Ms. Barnes' fiduciary. She was her attorney in fact and her caregiver at the time the March 3, 2011 will was signed. This was not disputed by Michelle Wells.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW-24

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- 1 13. Michelle Wells participated in the procurement of the March 3, 2011 will.
2 Michelle Wells provided Ms. Barnes with transportation to the last four
3 meeting she had with Mr. Tolman and participated in one of the meetings.
4 14. The March 3, 2011 will gave Michelle Wells an unnaturally large share of
5 Ms. Barnes' estate. Michelle Wells and her husband are unrelated to Ms.
6 Barnes and it gave them the entire estate.
7 15. Ms. Barnes was also extremely vulnerable to undue influence due to
8 physical limitations, some degree of cognitive impairment, and the fact that
9 Michelle Wells was Ms. Barnes' primary caregiver.
10 16. All of the "other considerations" listed by the court in *Dean* support a
11 finding that the will executed by Ms. Barnes on March 3, 2011 was the
12 product of undue influence by Michelle Wells.
13 17. There is no dispute that Ms. Barnes was elderly. She died just weeks shy of
14 her 95th birthday. The evidence supports the fact that Ms. Barnes' health
15 began deteriorating both physically and mentally after her fall in March of
16 2009. Ms. Barnes required more and more care involving her activities of
17 daily living, including the handling of her business and finances affairs.
18 18. Ms. Barnes' mental vigor was borderline when she executed her March 3,
19 2011 will.
20 19. Michelle Wells and Dennis Wells were unrelated to Ms. Barnes. Michelle
21 Wells' daily involvement and Ms. Barnes' dependence on her created the
22 opportunity to exert undue influence over Ms. Barnes. Ms. Barnes was
23
24

FINDINGS OF FACT AND
CONCLUSIONS OF LAW-25

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isolated from family and friends and completely dependent on Michelle Wells.

20. The unnaturalness of the March 3, 2011 will was a critical factor for this Court. The March 3, 2011 will was a radical departure from all of Ms. Barnes' prior wills. Ms. Barnes' estate consisted of homesteaded property that had been in the Rova family since the early 1900's. The Court cannot conceive of Ms. Barnes disinheriting the Petitioners and making this absolutely radical and unnatural change to her prior wills unless she was subjected to undue influence that the evidence suggests she was vulnerable to,

21. Michelle Wells did not produce evidence that this Court finds sufficient to "at least to balance the scales and restore the equilibrium of evidence touching the validity of the will." *In re Estate of Burkland*, 8 Wash.App. 163, 158-59, 504 P.2d 1149 (1972), review denied, 82 Wash.2d 1002 (1973). Clear, cogent and convincing evidence establishes that the will signed by Ms. Barnes on March 3, 2011 was the product of ongoing undue influence by Michelle Wells.

22. The evidence that was presented on behalf of Ms. Wells was not sufficient to overcome the presumption of undue influence, based not only on the fiduciary relationship, the active participation in procuring the Will and the unnatural disposition, but on all of the other considerations that the Supreme Court says are appropriate to consider, age, health, incapacity, mental vigor, nature and degree

FINDINGS OF FACT AND
CONCLUSIONS OF LAW-26

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of relationships, opportunity for influence and the unnaturalness of the disposition. The will that Ms. Barnes executed on March 3, 2011 is invalid because it was the product of undue influence by Michelle Wells.

23. The letters testamentary of the current personal representatives shall be canceled, and Vicki Rova Mueller shall be appointed in his place.

Based on the foregoing, the Court ORDERS, ADJUDGES AND DECREES as follows:

III. ORDER

1. The relief requested in the Petition to Contest Will shall be and hereby is GRANTED.
2. The will signed by Ms. Barnes on March 3, 2011 and admitted to probate on July 1, 2011 shall be and hereby is declared invalid, and the probate of the March 3, 2011 will is hereby revoked.
3. Clerk's Action Required: Dennis Wells is removed as personal representative and letters testamentary issued to him are hereby CANCELED.
4. Vicki Rova Mueller is hereby appointed to serve as personal representative of the estate, with non intervention powers, and to serve without bond.
5. Dennis Wells shall not be discharged as personal representative except upon court approval, after notice, of his account of his actions as personal representative. His account shall identify all probate assets of which he took possession and all probate liabilities, as of the date of death, shall itemize all receipts and disbursements in respect of such assets and

FINDINGS OF FACT AND
CONCLUSIONS OF LAW-27

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liabilities and in respect of the administration of the estate, and shall state
the balance of probate assets and liabilities delivered to their successor.

DATED: June 5, 2013

CLALLAM COUNTY SUPERIOR COURT

By: 
The Honorable Brooke Taylor
Superior Court Judge

6. Dennis Wells' accounting as required above shall be
submitted to counsel for petitioners within 30 days
from June 5th 2013. Petitioners shall have 30 days
from the date of receipt of Mr. Wells Accounting to
object. If the ~~probate~~ petitioners fail to timely
object, Dennis Wells shall be discharged as
personal representative.

DM
kw

FINDINGS OF FACT AND
CONCLUSIONS OF LAW-28

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Subject: RE: 91488-5 - In re the Estate of Eva Johanna Rova Barnes, Deceased

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Subject: 91488-5 - In re the Estate of Eva Johanna Rova Barnes, Deceased

Attached for filing in .pdf format is the Supplemental Brief of Petitioners, in *Estate of Eva Johanna Rova Barnes*, Cause No. 91488-5. The attorney filing this document is Howard M. Goodfriend, WSBA No. 14355, e-mail address: howard@washingtonappeals.com.

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