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No. 91488-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON


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IN RE THE 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 RESPONDENTS

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ORIGINAL

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INTRODUCTION

This Court should affirm. Simply put, the trial court's findings were contrary to its conclusions. The trial court found that the Wells did not put forth enough evidence to rebut the *Dean* presumption. But its own findings rebut the presumption. This error is independently sufficient to reverse the trial court's order.

Because the presumption was rebutted, the burden shifted back to the Rovas. The trial court had to find by clear and convincing evidence "something more than mere influence. There must have been an 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." *Dean v. Jordan*, 194 Wash. 661, 671, 79 P.2d 331 (1938). The trial court's findings fall short of this standard.

Rather, the trial court relied on the presumption to find undue influence. But no findings support its conclusion that at the time of making the will, the Wells interfered with Eva Barnes' free will and prevented her exercise of judgment and choice. Her attorney and doctor agreed that Eva was very independent and of sound mind. Nothing contradicts that testimony.

The real issue here is whether elderly persons of sound mind can ever change their wills. This Court should say they still can.

ARGUMENT

A. The *Dean* presumption was rebutted.

The Rovas do not challenge the Court of Appeals' holding that the Wells' evidence rebutted the *Dean* presumption. The appellate court opinion identifies the trial court's findings that support its holding. (Opinion at 8). This correct holding is independently sufficient to affirm the Court of Appeals.

B. The trial court's findings cannot support the conclusion that the will was the product of undue influence.

The Rovas argue that the evidence that supported the presumption supports a finding of undue influence. Amended BA 32. But none of the findings show, directly or circumstantially, that the Wells' actions overcame Ms. Barnes' free will at the time she executed her will. The findings do not support the conclusion.

A trial court's conclusions regarding undue influence present a mixed question of fact and law. *In re Trust & Estate of Melter*, 167 Wn. App. 285, 300, 273 P.3d 1991 (2012). Because there are no challenged findings, the trial court's findings are verities. See, e.g., *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992). The trial court's legal conclusions are reviewed *de novo*. *Wenatchee Sportsmen Ass'n v. Chelan Cnty.*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

The *Dean* court required “positive” evidence, whether direct or circumstantial. *Dean*, 194 Wash. At 673. The Court of Appeals adopted that language from *Dean*. Opinion at 9. Because no evidence supports overweening undue influence, the Court of Appeals held that the trial court’s conclusion was unsupported. *Id.*

The Rovas are correct that they established the *Dean* presumption. Opinion at 7. But they posit that the facts relied on to establish the presumption can also be relied upon to establish undue influence. Amended BA 32. Therefore, they assert, they have proven undue influence. *Id.* at 33.

While evidence used to establish the *Dean* presumption hypothetically could meet this burden, here it does not. The evidence that established the presumption in this case does not establish, even circumstantially, undue influence. BR 17-28. To support a conclusion of undue influence, the trial court must find that Ms. Wells “controlled the volition of the testator, interfered with h[er] free will, and prevented an exercise of h[er] judgment and choice.” *In re Estate of Lint*, 135 Wn.2d 518, 535, 957 P.2d 755 (1998) (quoting *In re Estate of Bottger*, 14 Wn.2d 676, 700, 129 P.2d 518 (1942)). Because the law presumes that the testator had testamentary capacity and that the will speaks her wishes, *Bottger*, 14 Wn.2d at

685, a will contestant has a high burden. Clear, cogent, and convincing evidence is required to overcome this strong legal presumption. See, e.g., *In re Estate of Reilly*, 78 Wn.2d 623, 646, 479 P.2d 1 (1970); *In re Estate of Johanson*, 178 Wash. 628, 629-30, 35 P.2d 52 (1934).

The findings do not meet this evidentiary standard because they are equally (if not more) supportive of upholding the will. BR 17-28. Eva was strong minded. FF 19, CP 1095. She believed that the Rovas were committed to removing her from her home and placing her in a nursing home; Eva's fear was understandable. FF 32, 34, CP 1097-1098. But due (in part) to the Wells' efforts, Eva could maintain reasonably good health at home "[a]gainst all odds." FF 37, CP 1098. At a family wedding, she showed no interest in the festivities and isolated herself from the family. FF 44, CP 1100-01. There was no finding, and no evidence, that the Wells played any part in her behavior.

At a meeting at her very-experienced estate-planning lawyer's office, Eva was upset and clarified that she wanted nothing to do with any reconciliation with the Rovas. FF 49, CP 1102. While Michelle Wells made a comment at the meeting that "further upset" Eva, her anger was already there. FF 49-50, CP 1102-03.

The trial court found that her attorney, Jeff Tolman, was “extremely careful” in representing Ms. Barnes. 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.

Two days before she changed her will, her long-time physician reported that she appeared “reasonably well both mentally and physically.” FF 56, CP 1104.

Despite these findings that Ms. Barnes was competent, strong-willed, and estranged from her nieces and nephew, the Rovas argue that because Michelle spent a good deal of time with her and “fanned the flames” of her “paranoia,” the findings support a conclusion of undue influence. They are incorrect.

The Rovas argue that because Michelle changed Eva’s calling plan (FF 69, CP 1107) she “isolate[ed]” Eva. Petition at 6. But the trial court’s finding refers to phone contact. The Rovas conceded that Michelle never prevented their contact with Eva. RP 125, 162, 193-195, 338. John Rova admitted that Michelle not only did not prevent him from seeing her, but Michelle actually encouraged him to visit Eva. RP 337, 338.

The Rovas rely on the fact that the Wells “struggled financially.” Petition at 6. But there is no direct or indirect link from this fact to causing Ms. Barnes to do something she would not have otherwise done. Michelle was continually employed by the U.S. Postal Service. FF 39, CP 1099. But as with the majority of Americans during the Great Recession, she struggled from 2009. FF 40, CP 1099. “Mere 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, 302-03, 273 P.3d 991 (2012).

The Rovas' allegation that Michelle “poisoned” Evas' mind is unsupported by evidence or findings. Petition at 12. The Rovas mention Michelle's statements to Eva's tenants. Petition at 7 (citing FF 46-47, CP 1101-02; Ex. 78). But there is no evidence, and no finding, that Eva heard those statements, knew about them, or was influenced by them. RP 795-96. The Rovas also cite Michelle telling Attorney Tolman (in Eva's presence) that the Rovas had thrown out her address book. Petition at 7 (citing FF 50, CP 1103). This is not evidence of undue influence, where the trial court did not find that this idea originated with Michelle. FF 31, CP 1097.

The Rovas also cite to Michelle's statement to 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." Petition at 13 (citing FF 72, CP 1108). These statements do not evidence undue influence because they were made several months after the contested will was executed, and because John admitted that he was already estranged from Eva at this point. RP 314-15, 317, 405; CP 6.

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 ability or duty to correct Eva. She was "strong minded." FF 19, CP 1095. Vicki Mueller, her niece, testified that Eva "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 she had no duty to do so.

These examples are given by the Rovas to demonstrate their narrative that Michelle was "fanning the flames" of Ms. Barnes' discontent with her nieces and nephews. Petition at 12. The trial court's findings sufficiently explain why Eva was discontented with the Rovas. CP 1090-1117. But even if they did not, "fanning the

flames” is not undue influence. “[S]uch things as advice, arguments, persuasions, solicitations, suggestions, or entreaties are not enough to establish undue influence.” *Melter*, 167 Wn. App. at 313. More is required. For influence to be undue, the result must be produced by means that seriously impaired Eva’s free and competent exercise of judgment. *In re Estate of Jones*, 170 Wn. App. 594, 607, 287 P.3d 610 (2012). No such evidence exists here.

C. This Court should not award attorney’s fees on appeal.

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 then dismissed their cross-appeal. This Court should not award attorney’s fees on appeal for the same reason that trial court denied them: they are unwarranted under the circumstances.

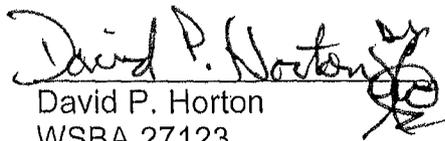
CONCLUSION

For the reasons stated, this Court should affirm.

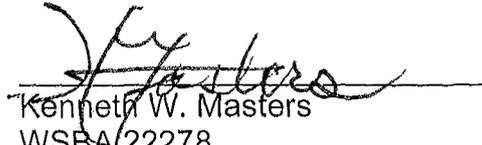
RESPECTFULLY SUBMITTED this 5 day of October, 2015.

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SUPPLEMENTAL BRIEF OF RESPONDENTS

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THANK YOU.

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