

No.63719-3-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

ESTATE OF SHIRLEY A. HARTY, J. PATRICK HARTY,
BENJAMIN HARTY AND JASON HARTY

Plaintiffs-Appellants,

v.

GREG HARTY,

Defendant-Respondent.

RESPONDENT'S BRIEF

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I. PROCEDURAL HISTORY

This is a controversy between family members, concerning ownership of the proceeds of five bank accounts maintained at Boeing Employees' Credit Union ("BECU"). Shirley Harty (the deceased and mother of Pat, Greg, and Doug) passed away on October 20, 2005. That same day, in the last conversation they would have before the filing of this lawsuit by the Petitioners, Pat Harty said to his brother Greg, he would sue "just to F with you." RP Vol VI, pp 134-35, 159.

Pat's comment was a horrible thing for anyone to say to his brother. This is especially true considering that Pat described Greg as his "best friend". RP Vol II, p. 13, 59-60. Notably, this threat/promise was not motivated by Shirley Harty's changes to her financial estate to favor Greg. Pat did not learn about the changes to the BECU accounts until more than eight months later, after he was appointed Personal Representative of her probate estate in June of the following year.

Pat obviously felt very strongly about something; so much so that he was willing to forfeit his relationship with Greg, and cause his brother and "best friend" grievous harm. By December, 2005 -- less than two months after Shirley's death, and still six months before Pat would subpoena bank records to learn that Shirley had changed her financial

estate to favor Greg -- Pat had engaged an attorney to conduct business with his brother and "best friend". Trial Exhibit 9.

The will Shirley Harty executed in 1998, named Greg to be the Personal Representative to her estate, and to serve as the trustee to a trust for her then-living husband, if she were to predecease him. Trial Exhibit 1. Greg is not the oldest son - Pat is. Greg did not live the closest to his mother - Pat did. In fact, Greg did not even live in Washington; he lived more than 250 miles away, in Oregon. But Greg was consulted by his mother about her estate planning back in 1998, and he accompanied her to visit attorney Sean Bleck, who prepared the document. RP Vol. VI, p. 124, 133-34. It is not surprising, in light of Pat's threat and his subsequent behavior, that Greg declined to engage in a legal battle with his brother Pat. RP Vol. VI, pp 159-60. Instead, without contest or advice from attorneys, Greg allowed Pat to have himself appointed as personal representative.

Various procedural filings occurred 'when' and 'where' the Petitioners assert in their brief. But the sworn deposition testimony of Pat Harty provides a crystal clear window into 'who' was representing whom during the course of the filings by the Petitioners, what was

motivating them, and ‘why’ these filings occurred. In December of 2008, barely a month prior to the commencement of trial, and **almost three years** after Pat first filed his TEDRA petition, Pat Harty testified that he believed his mother had left the large majority of her financial estate to his two sons. Pat claimed to have seen BECU records that confirmed his belief and that Shirley’s long time friend, Sheryl Thole had told him that Shirley had designated Pat’s two sons as beneficiaries to her two CD accounts at BECU (which totaled almost \$300,000).¹ Respondent’s Reply in Support of Findings of Fact and Conclusions of Law, Appendix A at 4-9.² Pat’s deposition testimony was given on December 1, 2008, **almost three years after he first commenced his lawsuit** against his brother and **barely a month before trial**.

At trial, Pat testified that he really had nothing more than “a suspicion” that his mother had left money for his two sons. RP Vol. II, pp. 131-34, 176-77. But just one month before trial, he testified that he had seen confirming records with his own two eyes BECU records

¹ Sheryl Thole denied ever telling Pat any such thing. RP Vol IV, p. 157.

² RAP permits a Respondent to Supplement the Designation of Clerk’s Papers at any time through the date of filing Respondent’s Brief. Greg Harty has filed a Supplemental Designation of Clerk’s Papers with the filing of this Brief. For the Court’s ease of reference, the additional Clerk’s Papers are attached Appendices A (Reply in Support of Findings and Conclusions) and B (Second Declaration of J. Patrick Harty) and C (Declaration of David Lawyer in Support of Supplemental Judgment).

confirming his belief, and that Sheryl Thole had told him his mother had left the two CD accounts, totaling almost \$300,000, for his two sons. In his deposition, Pat was asked what the objective of this lawsuit was. He testified:

Q: So that goal is gone. So now let's talk about this dispute with Greg.

What's the outcome that in your mind is the right outcome? What's supposed to happen?

A: What's supposed to happen? My mother, for whatever reason, chose to name some people as beneficiaries on her account – on her accounts. She did that for some reason. I believe she did that because of my children's devotion to her. And by "devotion," I mean both of my children with both of my parents, my father and my mother. They were devoted to her. They had a very special relationship. And from my viewpoint, much closer than any of the children did; that's Gregory, Douglas and myself. A very close relationship. I believe that she intended to set aside some money for them, and I believe that she did that.

Now, beyond that, that was, in my mind, the most important goal. That was my mother looking at my children. That was the most important part to me. Now, that's on a personal level.

Appendix A at 8-9.

Pat was not going to allow anything or anyone to stand in the way of the money going to his two sons who were not even mentioned in Shirley Harty's will – not one line, not one word. Pat, with active participation and assistance from his wife Christine, used the probate

estate as a tool to wage a battle against his brother Greg. At his deposition, Pat displayed his belief that out of a combined \$336,000 in the BECU accounts, \$335,000 of that money rightfully belonged to his two sons (not to the probate estate), and that Greg had somehow managed to usurp that inheritance.

Pat and Christine's decision to sue Greg was motivated by anger, based on incorrect information, and the goal was to get money into the possession of their two sons (neither of whom was a beneficiary to the estate). As Pat testified, **“that was, in my mind, the most important goal. ... That was the most important part to me.”** As a matter of form, the petitioners at trial argued that the majority of the BECU account balances should go into the probate estate. But they did that when they finally recognized that there is no evidence to support Pat's erroneous belief that Shirley had left majority of her financial estate to her grandsons. Pat and Christine Harty's personal motivation was completely revealed in Pat's deposition testimony.

In March of 2006, the Petitioners commenced a civil action under the Trusts and Estates Dispute Resolution Act (“TEDRA”). CP 1-9. Pat Harty, and his sons Jason and Ben Harty (without characterizing

themselves as acting in any particular “capacity”) sued Greg Harty. It was not fashioned as an action brought “by” the estate of Shirley Harty, for the plain reason that it was commenced before the probate estate of Shirley A. Harty was opened. It was a civil lawsuit brought by the Pat Harty family, against Pat’s brother, Greg. The original TEDRA petition was never served on Greg Harty. The Petitioners served Greg with an amended TEDRA petition that was filed eighteen months later, in September, 2007. CP 28-36.

Petitioners assert that when the Shirley Harty added her son Greg to her BECU accounts as a joint tenant with a right of survivorship in July, 2005, Shirley either (a) had an intent contrary to the legal effect of the document she signed, or (b) was the victim of undue influence by Greg. CP 32-35. The Petitioners did not prove these claims, and the court entered an order dismissing the TEDRA petition under CR 41(b)(3), after the Petitioners rested at the end of their case in chief. RP Vol. VII, pp. 38-40. The court then entered judgment against the Petitioners, jointly and severally, for the costs and attorneys fees Greg Harty reasonably incurred in defending himself. CP 313-316. Petitioners now appeal, arguing that the trial court misplaced the burden

of proof, that it improperly found waivers of the protections under the Deadman's Statute, that various findings of fact are not supported by evidence, that the court improperly imposed a fee award upon the J. Patrick Harty marital community, and that the court improperly imposed the fee award upon Jason and Ben Harty joint and severally, instead of in proportion to their arithmetic financial interest in the outcome.

II. COUNTER-STATEMENT OF THE CASE

Shirley Harty had four sons, the eldest of whom lost his life during the Vietnam conflict. RP Vol II, p. 10; Vol. III, p. 35. At the time of her death, was survived by sons, J. Patrick Harty ("Pat"), Greg, and Douglas Harty ("Doug"). Of her sons, only Pat has had children, grandsons Jason and Benjamin.

Shirley was a fiercely independent woman. RP Vol. II, p. 96; Vol. III, p. 58; Vol. V, p. 27, 45, 56, 103; Vol. VI, p. 112, 114 . Shirley was also an intensely private woman, who tended not to reveal her emotions or her innermost feelings. RP Vol. II, pp. 32-33, 103, 106; Vol. III, p. 71; Vol. IV, p. 117; Vol. VI, p. 7, 24, 55, 85. Shirley was not particularly affectionate. RP Vol. II, pp. 9, 12, 32; Vol. VI, p. 38. Until she suddenly took ill in October of 2005, for what was later diagnosed as a "subarachnoid hemorrhage" that was not medically

predictable, Shirley's health was generally good. RP Vol. III, p. 58-59; Vol. VI, 160; Vol. VII, p. 5, 16. She had had a transient ischemic attack (a type of mild stroke) in approximately 2003 that temporarily affected her speech, but it was believed that she had fully recovered. RP Vol. III, p. 52. Shirley suffered from moderate arthritis, but her prescription for the medication Enbrel was effectively managing her symptoms. RP Vol. III, pp. 58-59.

Shirley was predeceased by her husband Benjamin Harty. She was the primary care provider for her husband Ben as he suffered for years and finally died in a care facility from Alzheimer's disease. RP, Vol. II, pp. 17, 36, 83. She knew what it meant to provide end-of-life care for a loved one. She had done that very thing for her husband of fifty years as he suffered from Alzheimer's. Shirley knew that this end-of-life care was a commitment that grows over time. As the abilities of the person being cared for diminishes, the involvement of the caregiver increases. Her once-able husband was completely dependent on others at the end of his life. RP Vol. IV, pp. 100-01; Vol. V, p. 21. Shirley knew that personal needs become secondary to the needs of the person being cared for, and burden is significant. RP Vol. II, p.61

Shirley knew that the person being cared for might not be able to say “thank-you” at the end of his or her life. Shirley knew that it did not matter how hard the caregiver worked or the level of sacrifice made, the end result would always be the same – the person being cared for would die. An incredible investment in time and energy that would invariably be rendered meaningless. Shirley knew the long term feeling of emptiness and loss that overcomes the caregiver when this happens. It is separate from and additional to other feelings of loss. RP Vol. IV, p. 84. Shirley knew that, financially, depending on the length and type of care required, an ‘adequate’ estate might turn out to be ‘no estate at all’ at the end of a person’s life. RP Vol. II, p.19.

In the will she executed in 1998, Shirley designated Greg to be her Personal Representative, and the trustee of a contingent trust set up to benefit her husband Ben, in the event she predeceased him. Trial Exhibit 1; RP Vol. II, pp 40-41; Vol V, pp 23-24. This tells everyone that Shirley and Greg had a special relationship that was not diminished by the distance between them.

For many years, Shirley and her husband had resided in the Fairwood area of Renton, Washington. Following her husband’s death,

Shirley continued to live in the Fairwood home for several years. Over time, the burdens associated with home ownership began to weigh on Shirley, and she began to give thought to “down-sizing,” and selling her home in favor of a condominium or apartment. To this end, Shirley visited several apartment complexes with her son Doug, but did not enter into any lease agreements. RP Vol. IV, p.88; Vol. V, p. 24, 31. Shirley entertained at least one offer to purchase her residence prior to 2004 for \$340,000, but declined the offer, because she wanted a higher price. RP Vol. II, pp 69-70. Confirming Shirley’s reputation as fiercely independent, and seeing herself as fully capable of living independently, Shirley did not want to live in a ‘facility’. RP Vol. IV, pp 149-50. She did not want to give up this independence. RP Vol. IV, p. 109; Vol. V, p. 25, 32-33.

In mid-2004, after Shirley was involved in a minor auto accident, Pat and Doug determined that she should forfeit the privilege of driving, and they resolved to take her car away from her when it was being repaired. RP Vol. V, pp 26-28. Shirley accepted that decision with resignation. RP Vol. V, p 29. Doug’s long term girlfriend purchased Shirley’s car. RP Vol. V, p 29. The Fairwood home was ill suited for

an elderly resident who does not have an automobile to run basic errands and chores. RP Vol. V, pp 26-27. It was located in a country club community, and local stores and services were not within easy walking distance for an 82-year-old woman, and whatever challenges Shirley was having with home ownership following her husband's death, those challenges became even more daunting without the use of a car. RP Vol. V, p 26.

Late in the summer of 2004, without discussion with her sons and about one month after her car was taken from her, Shirley accepted an unsolicited offer for the purchase of her home at a price of \$380,000. RP Vol. II, p 72. The price offered and accepted by Shirley was at least fair, under market conditions at that time. RP Vol. II, p 130. But the quick decision to sell placed some urgency for Shirley to find alternative living arrangements. RP Vol. II, p.26, 73. Shirley's son Pat quickly found a place for Shirley to relocate, having focused his investigations on facilities with cooking service and other helpful amenities included in the rent, or otherwise available. RP Vol. II, pp. 74-78. Pat found an assisted living facility near his home that had an immediate opening. RP Vol. II, p. 79. The facility, known as "The Garden Club," is located in

the Factoria neighborhood of Bellevue. Shirley was taken there to look at the facility, and described it as “nice”, but was never presented with any other options. RP Vol. II, p 80; Vol. Vol. V, p. 48-49. As Pat put it, “she did not object to it”. RP Vol. II, p. 24.

In September of 2004, just after she closed the sale of her house and was moved into the Garden Club, with the assistance of her long time friend who was in town visiting from New Jersey, Shirley traveled to BECU and made changes to some of her BECU accounts. Trial Exhibits 6, 7, 15; RP Vol. IV, p 128-130, 132-133, 139-140. On September 20, 2004, Shirley signed an account change form that added her son Doug as a “pay-on-death” beneficiary to one of her accounts. Trial Exhibit 15. The next day, she signed a form that removed her deceased husband, Benjamin, from the savings account that had been opened before Benjamin had passed away. Trial Exhibit 7. The third successive day, on September 22, 2004, Shirley went to BECU a third time, and made another account change, nominating her two grandsons, Jason and Ben, as pay-on-death beneficiaries to her savings account and her money market account at BECU. Trial Exhibit 8. Shirley had

approximately \$45,000.00 in those two accounts, combined, at that time.

Trial Exhibit 2.

After Shirley sold her home in September of 2004, her son Pat, in a rush, moved her into an assisted living facility in Bellevue. RP Vol. II, p. 26; Vol. V, pp. 30, 36-37, 44, 49. The court heard the testimony from Pat Harty, Laverna Johnson, Doug Harty, Sheryl Thole, Jason Harty, Patricia Hopson, and Christine Harty that even though Shirley was a very private person, and not prone to expressing herself emotionally, she was vocal about disliking the Garden Club. RP Vol. II, p. 94, 102, 106, 113-15, 163; Vol. IV, pp. 149-50; Vol. V, p. 42-43, 56, 70, 148-149; Vol. VI, p.12. Shirley perceived herself to be more active and more independent than the typical residents at the Garden Club. RP Vol. II, p. 94, 124. She was unfamiliar with the surroundings in the Factoria area, missed her regular activities in Renton, and felt distanced from her friends and acquaintances. RP Vol. IV, p. 150. In hopes of improving her mood, Pat made arrangements to have Shirley move to a different, quieter unit within the Garden Club. Unfortunately, the effort was unsuccessful, and Shirley's dissatisfaction persisted. RP

Vol. II, p 92. Despite her very private nature, Shirley did not hesitate to let it be known when she felt like her wishes were not being fulfilled.

Abundant evidence from multiple witnesses confirmed that Shirley was in charge of her own decision making. RP. Vol. I, p. 22; Vol. II, pp. 95-96,180; III, pp. 24, 128; Vol. V., p. 34; Vol. VI, p. 112; Vol. VII, pp. 5, 13-14. In January 2005, three months before her son Greg assisted her in moving to an apartment, Shirley visited her long-time, primary physician for a check-up, where she was found to be neurologically stable, and that her affect was good, with no gross motor or sensory deficits. Trial Exhibit 24. Dr. Mohai offered his opinion at trial that nothing about Shirley's health posed an obstacle to her ability to live independently. RP Vol. III, p. 58-59. Shirley visited Dr. Mohai again in mid-August 2005, a few weeks after she changed her BECU accounts. Dr. Mohai's records reveal nothing alarming in her physical condition. Trial Exhibit 24; RP Vol. III, p. 59. Dr. Mohai saw no signs of dementia or lack of concentration in Shirley. RP Vol. III, p. 61.

After determining there was no medical, mental, or physical reason to prevent Shirley from living independently as she desired, Greg met with his brothers to discuss helping their mother move to a new

residence. Greg tried to work cooperatively with his brothers to enlist their aid, but for their own personal reasons, Pat and Doug would not assist their mother. RP Vol. II, pp. 27-28; 96; Vol. V, pp. 57-58. After Shirley had spent more than six months unhappy in the assisted care facility, Greg assisted her in locating an apartment in Renton, the town where she had lived for over 50 years, and he assisted her in moving into this apartment. RP Vol. II, p. 28 Vol. III, 27. Shirley ultimately selected a unit at Burnett Station in downtown Renton, and she signed a rental agreement on April 15, 2005. Trial Exhibit 22. Shirley's desire to move was not based on a whim, and was consistent and unrelenting. Greg was willing to make a great sacrifice in his personal life to help his mother without the aid of his brothers. Just as Greg had spent enormous amounts of time assisting and caring for his elderly Aunt Joanie, from when she became ill in 1999, until her death in early November, 2004, Greg turned his full attention to his mother, and began to make plans to assist her in regaining some semblance of her independence and some measure of happiness. RP Vol. II, p. 23-24, 34.

Concerned for Shirley's care and comfort, Greg arranged for his mother to meet Lori Schmitt, the wife of his long-time personal friend,

to assist Shirley with chores, errands and companionship. Greg lived more than 250 miles away, and Pat and Doug were angry about the move from the Garden Club. RP Vol. II, pp 30-32; Vol. V, p. 5. Greg did not entrust the well-being of his mother to a stranger. By the same token, Shirley's mental and physical health was not a concern. RP Vol. IV, pp. 113-14. The uncontroverted trial testimony was that Shirley much preferred her new apartment and her reinstated independence. RP Vol. II, p. 126; Vol. IV, p. 150

After Shirley moved to her apartment, Greg made several regular trips each month to see his mother and to check on her welfare, even though he lived over 250 miles away in a different state. RP Vol. II, pp. 151-52. Greg felt a personal responsibility for his mother, and knew his brothers were not assisting or even checking on their mother. RP Vol. II, p. 129, 137, 153-54, 174-75. To at least some degree, visits from Pat and Doug decreased after Shirley moved back to Renton. RP Vol. III, pp. 25-26; Vol. V, p. 82; Vol. VII, p. 6. But access to Shirley was never restricted in any degree, and she actually began to see more of her friends after she moved back to Renton. Greg did not restrict other people's access to his mother in any way. Shirley was free to see anyone

she wanted, anytime she wanted. She was free to discuss anything with anyone, including her financial affairs. RP. Vol. II, p. 115; Vol. IV, p. 10; Vol. VI, p. 12. It would have been quite impossible for Greg to abuse or coerce his mother in any fashion. She regularly saw her friends and her personal assistant. Greg lived in Oregon, giving Shirley all the opportunity she needed to express her dissatisfaction with any aspect of her life to anyone she chose. There was a complete absence of evidence that Greg behaved in any way other than that of a loving son who was totally concerned with his mother's happiness and well-being.

Greg was willing to make great sacrifices in his personal life to allow his mother to lead her life the way she desired. RP Vol. II, pp. 151-52; Vol. VI, p. 146. The evidence shows that Pat and Doug were mad at Shirley and Greg. RP Vol. II, p. 120; Vol. III, p. 28; Vol. V., p. 4. Neither Pat nor Doug nor their families came over to visit Shirley on her birthday, July 28, 2005. Shirley and Greg went out to dinner alone. RP Vol. II, p. 170; Vol. VII, pp.9-10. On July 29, Shirley changed her accounts to favor her son Greg. Trial Exhibit 5. Shirley had completed this type of transaction before and was well-aware of the process and ramifications. Trial Exhibits 6,7, 16; RP Vol. II, p. 179;

Vol. IV, pp. 128-133. On July 29, Shirley also signed a broad Power of Attorney in favor of Greg. Trial Exhibit 28. Greg was given complete authority to conduct financial and medical transactions on Shirley's behalf. As Judge Yu stated in her oral decision, Shirley entrusted Greg with her medical and financial well-being. RP Vol. VII, p. 39.

When Shirley added Greg to her accounts, the only practical purpose served by the transaction was to express her gratitude. Shirley was not coerced when she made these transactions. She was fully aware and absolutely certain of what she was doing. RP IV, pp. 12, 39, 63-64. The transactions were processed by BECU just as Shirley intended them to be. RP Vol. IV, p. 5, 12, 18 22-24. Perhaps most important, Shirley never expressed regret or remorse to anyone about these transactions. Completely understandable in retrospect, Shirley asked Greg not to tell anyone about the transaction, and Greg honored her request. RP Vol. VI, p.162; Vol. VII, p 8. Just a few weeks after the transactions of July 29, 2005, Shirley had a regular medical check up with Dr. Mohai, during which she showed no signs of depression, anxiety, illness, dementia or lack of control. RP Vol. III, pp. 59-61. Despite her good health, on October 20, 2005, Shirley died as a result of a sudden,

unexpected and unpredictable cause. RP Vol III, pp. 65-66. This unexpected and sad occurrence was nobody's fault.

With strong animosities unresolved when Shirley passed away, the proceeds of the BECU accounts were delivered to Greg, in accordance with the designation Shirley had made on July 29, 2005. Later, Pat attempted to access the BECU accounts for his sons' benefit and learned from the bank that it had no authority to make disclosures to him, directing him to Greg. Appendix B, at 5-9. Angered, Pat and his sons initiated this lawsuit in March of 2006, filing a petition seeking, among other things, to have the July 29, 2005 transaction disregarded as being contrary to Shirley's true intent, or set aside as the product of undue influence.

III. ARGUMENT AND LEGAL AUTHORITY

A. STANDARD OF REVIEW ON APPEAL

1. Dismissal of Petitioners' Claims Under CR 41(b)(3) Was A Judgment On The Merits

The trial court granted Greg Harty's motion to dismiss all claims pursuant to the trial court's authority under CR 41(b)(3). In a nonjury trial, the trial court may pass upon a motion to dismiss at the close of plaintiff's case and grant the motion as a matter of law or fact. *Roy v.*

Goerz, 26 Wn. App. 807, 614 P.2d 1308 (1980).

[W]hen the trial court rules as a matter of fact, it may weigh the evidence in support of plaintiff's case and make "a *factual determination* that plaintiff has failed to establish a prima facie case by credible evidence, or that the credible evidence establishes facts which preclude plaintiff's recovery." [Citations omitted] If the trial court rules as a matter of fact, the court is required to enter findings of fact and conclusions of law.

Roy, supra at 810. That is what the court did in this case.

In such instances, the Court of Appeals determines whether there is substantial evidence to support the findings and, if so, whether those findings support the conclusions of law and judgment. *Enterprise Timber, Inc. v. Washington Title Ins. Co., 76 Wn.2d 479, 457 P.2d 600 (1969)*. It is settled principle that the trial court will be affirmed if there is any theory to support the judgment, even though the court of appeals may disagree with the basis enunciated by the trial court. *National Indem. Co. v. Smith-Gandy, Inc., 50 Wn.2d 124, 309 P.2d 742 (1957)*.

2. The Court of Appeals Employs A Deferential Standard of Review.

This court reviews the trial court's findings of fact and conclusions of law in two steps. First, it reviews findings of fact under a "substantial evidence standard". *Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 879, 73 P.3d 369 (2003)*. Applying this

deferential standard, the court views all reasonable inferences from the evidence in the light most favorable to the prevailing party. *Sunderland Family Treatment Servs. v. City of Pasco*, 127 Wn.2d 782, 788, 903 P.2d 986 (1995). Where there is substantial evidence, the Court of Appeals does not substitute its judgment for that of the trial court even though it might have resolved a factual dispute differently. *Sunnyside*, 149 Wn.2d at 879-80. Second, this court determines whether the findings of fact support the conclusions of law. *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999).

3. Any Reversible Error Would Require Remand to the Trial Court, for Completion of Greg Harty's Case.

Although the trial court committed no error in this case, least of all reversible error, the Petitioners nonchalantly misstate what would properly happen upon a reversal in this case.

Under CR 41(b)(3), a defendant who moves for dismissal does so without jeopardy to his right to present further evidence in support of his claims and defenses. See, e.g., *Lonsdale v. Chesterfield*, 91 Wn.2d 189, 588 P.2d 217 (1978). *Lonsdale* noted the anomaly that would be created where the court of appeals might determine issues before the defendant has presented all of its evidence.

If, in an action tried by the court without a jury, a dismissal made under this rule on defendant's motion is reversed on appeal the appellate court will remand the case to the district court for further proceedings and the defendant may then present any evidence he may have. . . . The court may proceed with the case as though defendant's motion for dismissal had been denied

5 J. Moore, *Federal Practice* ¶41.13[2] (2d ed. 1978). The *Lonsdale* court said, “[w]e agree with this application of the rule”, reversed the trial court decision and remanded the case. *Lonsdale, supra* at 192.³

B. THE TRIAL COURT PROPERLY CONSIDERED AND ALLOCATED THE BURDENS OF PROOF

1. Petitioners Failed to Shoulder Their Burden of Proof As to Their Legal Theory of “Contrary Intent”

The Petitioners may have abandoned their first theory of recovery (because they do not address it in their brief); namely, that Shirley Harty’s true intent when she executed the BECU Account Change Form, was not to designate Greg Harty as a joint account holder with a right of survivorship. Under this legal theory, the burden of proof rests upon the

³ It is also worth mentioning that one of Greg Harty’s witnesses testified out of order, during the Petitioners’ case in chief. This procedural note has no impact on the analysis, because a CR 41(b)(3) motion could be brought during the defendant’s case in chief, at any time after the plaintiff has rested. See, e.g., *Commonwealth Real Estate Services v. Padilla*, 149 Wn. App. 757, 205 P.3d 937 (2009)(motion to dismiss was granted after defendant had commenced, but before he concluded his case in chief).

party seeking to prove “contrary intent”. The standard of proof, per statute, is “clear and convincing proof”. RCW 30.22.100(3)

The evidence at trial showed that Shirley (i) was mentally sharp and very much in control of her financial decisions in the summer of 2005; (ii) was grateful to Greg for his assistance in her relocation and his pledge to assist her in the future; (iii) had made other changes to her bank accounts prior to July 29, 2005, and she was familiar with the process involved; (iv) effected the transaction with the attention and assistance of a trained BECU account manager; and (v) her primary care physician, and other friends and acquaintances believed that Shirley was of sound mind and good health, and that she was handling her own business affairs at the time of the transaction.

The Petitioners base their contrary intent theory purely on the fact that Pat and Chris Harty, Doug Harty, and Sheryl Thole disagree with what Shirley did. The Petitioners offered no evidence to support their legal theory of “contrary intent”. Under RCW 30.22.100(3), “[f]unds belonging to a deceased depositor which remain on deposit in a joint account with right of survivorship belong to the surviving depositors unless there is clear and convincing evidence of a contrary intent at the

time the account was created.” *In re Estate of Meyer*, 60 Wn. App. 39 47, 802 P.2d 148, 152 (1990). Placing or keeping funds in a joint account with right of survivorship raises a presumption of the depositor’s intent to vest an undivided one half interest in the funds in the joint tenant and, ultimately, ownership of all the funds in the survivor.

The Petitioners must overcome the presumption that Shirley intended to add Greg to her BECU accounts with evidence sufficient to prove, “clearly and convincingly”, that Shirley had a contrary intent at the time she added Greg to the account. RCW 30.22.100(3). The BECU form is not lengthy or complicated. There is little reason, and absolutely no evidence, to find that Shirley did not intend to make the appointment with a right of survivorship. *See Baker v. Leonard*, 120 Wn.2d 538, 843 P.2d 1050 (1993)(no contrary intent where decedent’s will expressly stated that any joint accounts were without intent to convey an interest to the joint signatory upon decedent’s death, where decedent signed documents creating such a joint account). *Id.*

This case is even stronger than the *Baker* case. Here, there is no evidence of any contrary intent on Shirley’s part. Shirley went to BECU in person and properly executed forms to change her accounts. Jemima

Pinto, a BECU account manager, supervised and assisted in the transaction. Ms. Pinto's testimony showed that (i) as a general practice, she explains transactions to customers, particularly in the case of elderly individuals; (ii) she was trained to look for signs of duress, undue influence, or incompetence on the part of an account holder; (iii) she would not complete a transaction if she saw signs that the account holder could not understand the transaction or if the account holder indicated that he or she desired a different type of account or transaction; and (iv) she was not alerted to "red flags" in Shirley's case.

Shirley had made three previous, recent account change transactions at BECU. Shirley opened a new account at Washington Mutual, naming Greg as a joint account holder with right of survivorship. Shirley was under regular care of her physician, Dr. Peter Mohai, MD, who saw no signs of dementia or mental incapacity. Shirley was of sound mind, in general good health, and was competent to manage her financial affairs. After the July 29, 2005 trip to BECU, Shirley continued to write her own checks, to pay her bills, and to manage her own affairs. Petitioners fell well short of proving by clear

and convincing evidence that Shirley had an intent that was contrary to the effect of the account change form she executed on July 29, 2005.

2. The Trial Court Properly Analyzed and Applied the Burden of Proof For Undue Influence

The claim of undue influence presents legal doctrines that are subtle, complex and highly nuanced. Petitioners have incorrectly analyzed this case under the rule derived from the common law of gifts, which differs from the rule that derives from challenges to wills. Petitioners cite *McCutcheon v. Brownfeld*, 2 Wn. App. 348, 467 P.2d 868 (1970), *Doty v. Anderson*, 17 Wn. App. 464, 563 P.2d 1311 (1977), *Estates of Palmer*, 145 Wn. App. 249, 187 P.3d 758 (2008), *Koppang v. Hudon*, 36 Wn. App. 182, 672 P.2d 1279 (1983), and *Pederson v. Bibioff*, 64 Wn. App. 710 828 p.2d 1113 (1992). With the very important exception of *Doty* (explained in further detail below), each of the cases relied upon by Petitioners was a “gift case”, where a person made an *inter vivos* transfer to another person, and the transfer was challenged under allegations of undue influence. Under the common law of gifts, a donee has the burden of proving the transfer actually was a gift "by evidence which is 'clear, convincing, strong, and satisfactory.'" *Tucker v. Brown*, 199 Wash. 320, 325, 92 P.2d 221 (1939); *Whalen v.*

Lanier, 29 Wn.2d 299, 312, 186 P.2d 919 (1947). When a party challenges a purported gift under an argument of undue influence, courts have repeatedly stated the rule (incorrectly urged by Petitioners here) that, where a confidential or fiduciary relationship can be shown, the donee must prove by clear cogent and convincing evidence the **absence** of undue influence.

A different legal rule applies to cases where challenge is made to establishment of bank accounts that pass by designated right of survivorship. In these cases, the statutory presumption of intent arises under RCW 30.22.100(3), and its predecessor statute, RCW 30.20.015.

Doty v. Anderson perfectly illustrates the two rules in application side by side. In *Doty*, the donee was designated as a joint account holder with a right of survivorship to certain of the decedent's bank accounts and also received from the decedent, before her death, a purported gift in the form of a \$2,000 check. Both the joint account designation and the gift check were challenged as products of undue influence. Citing *Dean v. Jordan*, 194 Wash. 661, 671-72, 79 P.2d 331 (1938), the *Doty* court laid out the factors for determining undue influence that would invalidate a will, and then stated, "[t]hese factors are equally applicable in

determining whether there was a sufficient showing of undue influence to overcome the statutory presumption of RCW 30.20.015.”⁴ *Doty v. Anderson*, 17 Wn. App. 464, 467-68, 563 P.2d 1311 (1977). A challenge to a joint account with right of survivorship for undue influence is analyzed under the same legal standards as is employed in challenges to the validity of wills.

Turning to the gift check, the *Doty* court used the burden of proof applicable to the common law of gifts, requiring the donee to prove by clear, cogent and convincing evidence that she did not exert undue influence. *Doty v. Anderson*, supra at 468.

Even in the most extreme cases of challenges to wills for undue influence, Washington law does not go so far as to require a defendant to prove the absence of undue influence by clear cogent and convincing evidence. In *Dean v. Jordan*, the Washington Supreme Court said:

The combination of facts shown by the evidence in a particular case may be of such suspicious nature as to raise a presumption of fraud or undue influence and, in the absence of rebuttal evidence, may even be sufficient to overthrow the will. *In re Beck's Estate*, 79 Wash. 331, 140 Pac. 340.

⁴ RCW 30.20.015 has since been repealed, but its substantial equivalent is found at RCW 30.22.100(3).

Considering the matter in the light of these rules, we believe and hold that the facts in this case did raise a presumption of undue influence, and that the presumption was of such strength as to impose upon the proponent the duty to come forward with evidence sufficient at least to balance the scales and restore the equilibrium of evidence touching the validity of the will.

Dean v. Jordan, 194 Wash. 661, 672, 79 P.2d 331 (1938). *Dean* has been cited many times over the years, and always with approval. It has never been overruled. See, e.g., *Estate of Lint*, 135 Wn.2d 518, 479 P.2d 1 (1998); *Estate of Reilly*, 78 Wn.2d 623, 479 P.2d 1 (1970); *Estate of Hansen*, 66 Wn.2d 166, 401 P.2d 866 (1965); *Estate of Schafer*, 8 Wn.2d 517, 113 P.2d 41 (1941); *Estates of Palmer*, 145 Wn. App. 249, 187 P.3d 758 (2008); *Estate of Kessler*, 95 Wn. App. 358, 977 P.2d 591 (1999).

Recently, in *Estate of Lint*, the Washington Supreme Court clarified the rule:

The undue influence which operates to void a will must be something more than mere influence but, rather, influence

which, at the time of the testamentary act, controlled the volition of the testator, interfered with his free will, and prevented an exercise of his judgment and choice.

. . . influence tantamount to force or fear which destroys the testator's free agency

and constrains him to do what is against his will.

In re Estate of Bottger, 14 Wn.2d 676, 700, 129 P.2d 518 (1942) (citations omitted). The evidence to establish undue influence must be clear, cogent, and convincing. *In re Estate of Mitchell*, 41 Wn.2d 326, 249 P.2d 385 (1952).

Despite the rather daunting burden that is placed on will contestants, a presumption of undue influence can be raised by showing certain suspicious facts and circumstances. This was noted and discussed by Justice Steinert in his scholarly opinion for this court in *Dean* where he said:

Nevertheless certain facts and circumstances bearing upon the execution of a will may be of such nature and force as to raise a suspicion, varying in its strength, against the validity of the testamentary instrument. The most important of such facts are (1) that the beneficiary occupied a fiduciary or confidential relation to the testator; (2) that the beneficiary actively participated in the preparation or procurement of the will; and (3) that the beneficiary received an unusually or unnaturally large part of the estate. 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 an undue influence, and the naturalness or unnaturalness of the will

Dean, 194 Wash. at 671-72.

The existence of the presumption imposes upon the proponents of the will the obligation to come forward with

evidence that is at least sufficient to balance the scales and ". . . restore the equilibrium of evidence touching the validity of the will'; it does not, however, relieve the contestants from the duty of establishing their contention by clear, cogent, and convincing evidence." *In re Estate of Smith*, 68 Wn.2d 145, 154, 411 P.2d 879, 416 P.2d 124, 19 A.L.R.3d 559 (1966).

Estate of Lint, 135 Wn.2d 518, 535-36, 957 P.2d 755 (1998).

The Petitioners did not present evidence sufficient to sustain their claim that Shirley added Greg to her BECU accounts as a result of undue influence. It is the Petitioners, not the trial court, who misunderstand the burden of proof. Under the totality of the evidence, the trial court did not find evidence sufficient to establish undue influence. Greg did not exert influence on Shirley "tantamount to force or fear". Shirley did not lack free will when she added Greg to her BECU accounts. To be classified as "undue," influence must place the decedent in the attitude of saying, "[t]hough it is not my will, I must do it anyhow." *In re Murphy's Estate*, 98 Wash. 548, 555-556, 168 P. 175, 178 (1917). One must act under such coercion, compulsion, or constraint that one's own free agency is destroyed. *Id.*

When facts and circumstances raise a presumption of undue influence, the proponent of the decedent's action has the burden to present evidence to "restore the equilibrium of evidence". *Dean v.*

Jordan, 194 Wash. 661, 670, 9 P.2d 331 (1938). The presence of the factors set forth in *Dean* s only “appeals to the court to proceed with caution and to carefully scrutinize the evidence offered to establish the validity of the decedent’s actions.” *Id.* at 672. The evidence presented must be the personal knowledge of witnesses; not a general impression of how a person would behave in the decedent’s situation. *In re Estate of Meyer*, 60 Wn. App. 39, 48, 802 P.2d 148 (1990).

Greg had a close relationship with his mother, he drove her to the bank on July 29, 2005, he filled out a portion of the Account Change Form at BECU, and he received a larger share of Shirley’s financial estate than Pat or Doug as a result. If this was sufficient to raise suspicion, or even a presumption of undue influence (which is not conceded), Greg Harty presented sufficient evidence to restore the equilibrium of evidence. The trial court was satisfied that (i) Shirley was fiercely independent; (ii) Shirley was in good health and of sound mind; (iii) Shirley was unhappy with her other sons, for “warehousing” her in an assisted living facility despite her protests, for refusing to assist her in relocating, and for reducing their visits and assistance to her after she moved out of the assisted living facility; (iv) Shirley was pleased with

Greg for listening to her wishes, for moving her out of the assisted living facility into her own apartment, and for making regular trips from his home in Oregon to assist her; (v) Shirley had no means to predict how soon she would die and how much money might be left to Greg as a result of the account change; (vi) neither a trained BECU account manager, Shirley's personal assistant, Shirley's close friends, nor Shirley's primary care physician were given any indication that Shirley was being unduly influenced by Greg; and (vii) Greg lived more than 250 miles away from Shirley and could not prevent her from communicating with others or from changing her mind, and her account designations again.

The trial court ultimately decided the case by elevating to its proper position Shirley's legal right to surprise and disappoint people.

The right of a decedent to dispose of her estate:

depends neither on the justice of [her] prejudices nor the soundness of [her] reasoning. [She] may do what [she] will with [her] own; and if there be no defect of testamentary capacity and no undue influence or fraud, the law will give effect to [her] will, even though its provisions are unreasonable and unjust."

In re Murphy's Estate, 98 Wash. 548, 555-556 (1917).

- a. **Greg maintained a close and confidential, but loving and healthy, relationship with Shirley⁵.**

“Confidential relations” are not confined to any specific relationships but refer to all those that are founded upon trust. West's Encyclopedia of American Law 2d (2008). Greg was especially close to his mother during childhood, and they remained close throughout the remainder of Shirley’s life. In 1998, Shirley executed a will that appointed Greg as the personal representative to her estate, even though Greg was not the eldest son, or the one who lived in closest proximity to her. Greg and Shirley talked often, and Greg regularly made the five-hour trip from Oregon to visit his mother in Washington. In the last ten months of Shirley’s life, Greg traveled up to see her approximately twice each month, staying with her on each such visit for several days. Petitioners argue that Greg’s and Shirley’s close relationship establishes a suspicion of undue influence. The close relationship here actually lends itself to the *absence* of suspicion. The evidence amply convinced the trial court that Shirley was not particularly vulnerable to undue

⁵ For efficiency, two of Washington’s factors for evaluating undue influence are combined in this section: (i) that the proponent occupied a fiduciary or confidential relationship to the decedent and (ii) the nature or degree of relationship between the decedent and the proponent.

influence, and that Shirley and Greg maintained a relationship consistent with the natural care and concern associated with a healthy and loving parent-child relationship.

It is logical that Shirley would bestow special favor upon Greg, as he showed her the compassion and dedication that was consistent with his loving relationship with her. Cases where courts have found undue influence generally involve situations where (a) the decedent excludes someone near and dear, and (b) the majority of the decedent's estate goes to someone with whom the decedent had no close ties. *See, e.g., In re Estate of Knowles*, 135 Wn. App. 351, 360, 143 P.3d 864 (2006); *In re Estate of Smith*, 68 Wn2d 145, 153, 411 P.2d 879 (1966); *In re Estate of Bush*, 195 Wash. 416, 418, 81 P.2d 271 (1938).

b. Greg Assisted Shirley in the BECU Transaction.

Greg drove Shirley to BECU. Shirley's car had been taken from her by Pat and Doug. Shirley relied on Greg and others to get around by car. During his visits to see his mother, Greg always drove her places. There is nothing probative about the fact that Greg drove the vehicle to BECU on July 29, 2005.

Greg also filled in portions of the Account Change Form that Shirley signed to add Greg to the accounts as a joint account holder with a right of survivorship. Sheryl Thole did the exact same thing in September of 2004, when Shirley designated her son Doug as a pay on death beneficiary to one of her accounts, and when Shirley designated Petitioners Jason and Ben Harty as pay on death beneficiaries to two of her accounts. Jemima Pinto found nothing alarming or unusual about the fact that the account holder only signs the account change form, and that someone else fills in its substantive information. It requires far more than a beneficiary filling in portions of the documents in question, at the request of the decedent, in order to find undue influence. *In re Estate of Knowles*, 135 Wn. App. 351, 354, 143 P.3d 864 (2006)(no undue influence where defendant filled out all of the handwritten parts of decedent's will and also received the bulk of the estate). *See also In the Matter of the Estate of Fred O. Peters*, 43 Wn.2d 846, 264 P.2d 1109, (1953)(no undue influence where defendant, prepared a memorandum for the decedent's attorney, detailing provisions for the attorney to use in creating the decedent's will).

Greg had no greater involvement than the Defendants in *Knowles* and *Peters*. He simply did what was required of him to assist Shirley in fulfilling her desire and request to add him to her accounts.

- c. **Shirley's decision to add Greg to her BECU accounts as a joint tenant with right of survivorship was natural, given the circumstances.⁶**

Pat and Doug are disappointed, surprised, and angry about Shirley's decision to add Greg as a joint account holder with a right of survivorship. Neither considers himself to have been a "bad son". But Shirley's decision was consistent with her feelings. "A disparately large gift to one beneficiary does not necessarily denote undue influence if there is a natural explanation for it. This principle applies even where a fiduciary participates in drafting the will and received an apparently unnaturally large gift." *In re Estate of Knowles*, 135 Wn. App. 351, 359, 143 P.3d 864 (2006).

Shirley was appreciative that Greg helped her move out of the assisted living facility that she so strongly disliked, and helped her move into an apartment she selected, in Renton, where she felt more at home.

⁶ For efficiency, two of Washington's factors for evaluating undue influence have been combined in this section: (i) an unusually or unnaturally large inheritance and (ii) the naturalness or unnaturalness of the decedent's actions.

Greg helped Shirley regain what she treasured most of all: independence. Shirley appreciated that Greg regularly made the five-hour drive from Oregon to visit her and to help her with errands, appointments and household chores. Conversely, Pat and Doug strongly opposed Shirley moving from the Garden Club assisted living facility, which had been chosen largely for their convenience. When Greg resolved to make it possible for Shirley to move, Pat and Doug would not be of help to their mother in the move. Because it was less convenient, Pat and Doug did not visit Shirley as often as they had when she lived nearby.

Shirley also knew she could rely on Greg for dedicated assistance as she declined. Greg had taken care of his aunt Joanie for many months, until her death in November, 2004. Shirley knew what a large sacrifice it was for a person to care for another person with a degenerative disease or condition. When Greg liberated Shirley from the Garden Club and pledged to help her as much as she needed help, Greg might have been committing himself to years of sacrifice. That Shirley passed away suddenly, from a brain hemorrhage that could not have been predicted, is irrelevant: Shirley knew what Greg had promised.

Under all these facts and circumstances, the trial court found that it was not “unnatural” that Shirley bestowed her generosity upon Greg.

d. Shirley was in Good Health and Sound Mind.

Despite Shirley’s advanced age, she was in good health and of sound mind. She was not especially vulnerable to undue influence. See *In re Estate of Lena M. Youngkin*, 48 Wn.2d 432, 434, 294 P.2d 426 (1956)(no undue influence despite elderly, frail, and physically ill decedent suffered occasional lapses in memory but was still able to handle her basic business affairs).

In contrast, in July of 2005, Shirley was not physically ill, was not particularly frail, and did not have trouble with her memory. She was still independent. Because Pat and Doug had taken her car away, Shirley needed assistance with transportation, and chores requiring strength or physical exertion. But Shirley’s age was not probative of her health or mental vigor. She was not particularly vulnerable to undue influence.

e. Greg had Little Opportunity to Exert Undue Influence Over Shirley.

Mere opportunity to exert undue influence is not sufficient to support a finding of undue influence, even though the circumstances

under which assets were designated might arouse suspicion. *In re Bradley's Estate*, 187, Wash. 221, 59 P.2d 1129 (1936)(suspicion aroused, but no undue influence where decedent left the bulk of her estate to a housekeeper who was unknown to the decedent prior to being hired only three months before her death). Compare *In re Estate of Bush*, 195 Wash. 416, 422-23, 81 P.2d 271 (1938)(undue influence found where decedent was practically blind and helpless and peculiarly susceptible to his daughter's influence, because he was dependent upon her for his daily physical care).

Greg had almost no opportunity to exert undue influence over his mother. Greg lived, and still lives, in Lebanon, Oregon. Shirley lived in Washington, on her own. Shirley was in contact with friends and relatives other than Greg, and gave no indications that her decision making was being controlled by Greg. Quite the opposite: Greg restored Shirley's independence. Shirley was not dependent on Greg physically, financially or emotionally. Shirley had her own friends in Renton with whom she enjoyed spending time, and who visited her more frequently after Greg arranged for her move. Pat, Doug, and Jason Harty all claimed that they resumed their consistent patterns of visiting

Shirley on at least a weekly basis and calling even more frequently than that.

If Shirley had felt pressured or threatened by Greg at any time, or if she felt guilty about not leaving her financial assets more evenly to her three sons, she could easily have had gone back to BECU, to have him removed from the accounts. She had almost limitless opportunity to report any concerns to friends or family members. The trial record is devoid of anything other than Shirley's complete satisfaction with her move from the Garden Club to her apartment in Renton. Greg made frequent social visits in his mother's last months, but he was not present on a daily basis. Simply as a matter of proximity and convenience, Pat and Doug had far greater opportunity to unduly influence Shirley. It was Shirley's desire for Greg to be a joint account holder with right of survivorship over her BECU accounts, and the trial record is absent of any evidence to the contrary.

The trial court found no undue influence because Greg did not unduly influence Shirley.

C. **THE TRIAL COURT CORRECTLY RULED THAT THE PROTECTIONS UNDER THE DEADMAN'S STATUTE HAD BEEN WAIVED**

1. **The Trial Court Properly Ruled That Use of Greg Harty's Sworn Statement in the Direct Examination of Jemima Pinto Constituted a Waiver of Previously Asserted Objections.**

The Petitioners waived the protections under RCW 5.60.030 (the "Deadman's Statute") when they introduced into the trial record certain testimony of Greg Harty, pertaining to the July 29, 2005 transaction between him, the decedent, and BECU. Once Petitioners "opened the door", the trial court could consider the substance of Greg Harty's testimony as to the events surrounding the transaction.

Some procedural background is helpful. In November of 2007, Greg Harty signed and filed a declaration in response to Petitioners' order, directing him to show cause why the relief requested in the Petitioners' amended petition should not be immediately granted, narrating in detail the events of July 29, 2005, when Shirley Harty executed the Account Change Form. Petitioners objected to the court's consideration of most of Greg Harty's declaration, claiming that his testimony was prohibited under the Deadman's Statute. CP 72 The

court never ruled on the objection, because the matter was held over for trial by commissioner's order dated December 7, 2007. CP 77-78.

Later, in a pre-trial discovery deposition of BECU employee Jemima Pinto, Ms. Pinto was asked whether Greg Harty's sworn declaration testimony, was consistent with her typical practices. In her deposition, Ms. Pinto's answer to the question was a one-word, unequivocal "yes". But before she answered, Petitioners lodged their objection a second time to "admission of anything from [Greg Harty's] declaration".

At trial, the Petitioners called Ms. Pinto. In direct examination, Petitioners requested that Ms. Pinto's deposition be published. Petitioners' counsel read into the record a passage from the deposition that included a verbatim quote from paragraph 2 of Greg Harty's declaration, to which they had twice before objected. The question read:

You see it's the declaration of Greg Harty.... it says, "Prior to signing the Account Change Form, the teller at BECU explained the different types of accounts to my mother and read the information about the accounts out loud and line-by-line. The teller was extremely careful to make sure that it was my mother's intent that the account passed to me upon her death." Does that generally describe your practice in completing the Account Change form?

Petitioners tried to get Ms. Pinto to agree that it was **not** her standard practice to do as Greg Harty had described. The Petitioners wanted to rebut Greg Harty's claim that Ms. Pinto ever actually knew Shirley Harty's intent when she executed the changes to the BECU accounts. Petitioners' goal was to elicit from Ms. Pinto testimony that would contradict Greg Harty's description of events. If the Petitioners could get Ms. Pinto to say she never actually does what Greg Harty says happened that day, they could impeach the testimony set forth in Greg Harty's Declaration, and challenge his veracity. By voluntarily offering into the trial record Greg Harty's sworn testimony concerning the transaction, the Petitioners waived the objection they had twice before asserted in connection with that same testimony.

Engaging in pretrial discovery, including taking depositions, does not waive the protections under the Deadman's Statute, *unless a representative of the estate introduces the deposition or interrogatories into evidence*. But the Deadman's Statute is waived when the protected party introduces evidence concerning a transaction with the deceased. *McGugart v. Brumback*, 77 Wn.2d 441, 450, 463 P.2d 140 (1969). Once the protected party has opened the door, the interested party is

entitled to rebuttal. *Johnson v. Medina Imp. Club, Inc.* 10 Wn.2d 44, 59-60, 116 P.2d 272 (1941).

The Petitioners did more than merely to have a disinterested witness testify about her recollections, or about her standard practices. They actually introduced Greg Harty's testimony about that transaction as part of their questioning, and attempted to get Ms. Pinto to contradict him, hoping to persuade the court that the transaction did not really take place as Greg describes it.

In *Estate of Lennon v. Lennon*, 108 Wn. App. 167, 29 P.3d 1258 -- a case fairly similar to this one -- personal representatives brought an action to recover proceeds from the sale of stock sold by one of the decedent's sons. The estate submitted redacted portions of the son's declaration and his pre-trial deposition in support of its argument that he converted the stock for his own benefit. The estate waived the Deadman's Statute, because even the redacted testimony included interaction between the respondent and the decedent on the subject of the very assets that the estate argued had been converted. It would be unfair to permit the estate to select portions of the respondent's testimony about a transaction with the decedent, use it against him in a court proceeding,

and then prohibit him from giving his own full explanation and recollections of the same transaction.

In *Bentzen v. Demmons*, 68 Wn.App. 339; 842 P.2d 1015 (1993), the Personal Representative (Demmons), introduced an affidavit in support of a motion for summary judgment, which included statements that denied the existence of an alleged agreement that Bentzen claimed to have had with the decedent. Introduction of this evidence by the estate waived Demmons' right to the protections of the Deadman's Statute.

... Demmons' statements ... constituted a waiver of the deadman's statute sufficient to overcome the bar imposed by the statute. Even though Demmons did not testify about the specific transaction, his negative testimony went to the heart of Bentzen's claims and the matters directly at issue in this case. He was testifying, in effect, that such an agreement did not exist and that no services were performed in reliance on it...Bentzen should also have been permitted to testify about such activities...

Merely introducing an affidavit that implied a transaction had not occurred because the decedent had never mentioned it was enough to waive the Deadman's Statute as it relates to the transaction, and allow the respondent to testify on his own behalf as to the transaction. The Petitioners in this case have done much more, by reading Greg Harty's testimony into the trial record, detailing the transaction, and then asking a witness to swear that the transaction could not have occurred as he

described it. The Petitioners waived the protection of the statute, permitting the court to consider Greg Harty's testimony about the transaction, including the quoted passage itself..

“It would ... be palpably unjust to permit the representative of a deceased person to use the adverse party to the extent that it might aid him in defeating a claim or in establishing an independent claim in favor of the estate, and then claim the benefit of the statute when the adverse party sought to qualify or explain his testimony.” *Robertson v. O'Neill*, 67 Wash. 121, 124, 120 P. 884 (1912); *see also Johnson v. Peterson*, 43 Wn.2d 816, 818, 264 P.2d 237 (1953) (plaintiff cannot use the testimony of defendant insofar as it might assist to establish the claim of the estate, and assert the Deadman's Statute to render defendant's explanatory testimony incompetent). It would be palpably unfair to permit the Petitioners to object to Greg Harty's recitation of facts contained in his declaration under the Deadman's Statute, then quote the same testimony to a third party witness at trial, and ask her to contradict Greg's narration of events, to persuade the court that the transaction occurred in a way that was contrary to Greg Harty's description, and turn around

and say the court cannot weigh and consider Greg's testimony. Under the law, a waiver occurred.

2. The Trial Court Properly Ruled That the Deadman's Statute Was Waived When Petitioners Inquired Into the Circumstances Leading Up to Shirley Harty's Execution of A Power of Attorney Appointing Greg Harty as her Attorney In Fact.

The Petitioners called Greg Harty to the stand, and in their examination about the power of attorney that Shirley executed appointing him as her attorney in fact, they aggressively attempted to characterize Mr. Harty's activities as sinister or deceptive. They asked one question too many. Noting that the power of attorney was executed on July 29, 2005, but that Greg claimed to have prepared it in May or June, Petitioners asked Greg why he did not have his mother sign it earlier. Greg replied, "You know, I left it out on the table so she could review it and talk to people, anybody she wanted to. If my brother came it was available for them to look at and comment on. It was not something I was rushing her into. It was something I felt she needed if I was going to help her in the fashion that she wished." RP Vol. VI, pp. 125-26.

By examining Greg about how the power of attorney was created, by whom, and when, and then by asking Greg Harty why he did not

have his mother execute the power of attorney immediately after he prepared it, intentionally or not the Petitioners, opened the door to inquiry of Greg Harty what the circumstances were that led to the execution of the power of attorney on July 29, 2005. The execution of the power of attorney was clearly a “transaction”. The Petitioners sensed (in error) that there was something sneaky about the gap in time between the preparation of the document and the execution of it. It was appropriate for the court to permit Greg Harty to explain exactly how it happened that Shirley Harty requested that Greg take her to BECU to have the power of attorney executed. On cross examination, the following exchange took place, without any renewal of the objection:

Q: Okay. In between whatever day it was that you left the document there at your mother’s apartment and in July 29, ’05, did the subject of this as yet unexecuted power of attorney come up again between you and your mother?

A. Yes, it did.

Q: Did it come up more than once?

A: I suspect it did. The exact number of times I couldn’t say.

Q: What would be the context? Were you pestering your mom to get her to sign this or was she occasionally asking you about it?

A: You know, the recollection I have is when she took her fall in the middle of July that I used that as an example where in the

future if she had been injured I would be able to use the power of attorney.

Q: Did your mom exhibit any reluctance to signing a document giving you these powers?

A: None whatsoever.

Q: So tell us now how it happened that on July 29th you wound up actually taking this document to BECU and then asking it be executed and having the signature notarized?

A: The discussion began that night before on July 28th, and it was right after we got back from having her birthday dinner. I walked in with the doggy bag, if you will, and went into the kitchen and put it in the refrigerator. She walked up and sat on the couch and that was in front of her, and she looked at it and she asked me are we going to take care of the power of attorney and get it signed while you're here this time. I replied yes, if that's something you would like to do. She says how do we do that. I said well, really all we need is your signature on it but that signature needs to be notarized. I said we can do that a lot of places. I thought maybe we just walk across the street to the Bank of America and get it done there.

She asked if we could go to BECU and have it done there and I responded sure. That's as good as any. Is there any particular reason you would like to go to BECU. She said yes, while we're there I would like to add your name to my accounts. My response was mom, with this power of attorney I don't need to have my name on your account. You are giving me the right to sign for you. She says yes, I know that, but I'd like you to be able to write yourself checks if you need money and I would like you to be able to have what's left in the accounts when I'm gone.

RP Vol. VI, 153-54

The court's impression of the events surrounding the decedent's admitted execution of the Account Change Form on July 29, 2005, is

central to the outcome of this case. At the beginning of trial, the Petitioners sought to protect an advantage by arguing that Greg Harty could not introduce his own testimony about the facts and events surrounding the execution of that Account Change Form, or statements made by the decedent that might support his claim that the form is consistent with the decedent's intent. Greg Harty would have been required to rely on the written document itself, and testimony of third party witnesses, whose testimony is not barred by RCW 5.60.030.

The Deadman's Statute is often criticized and is admittedly tricky in its application. Perhaps for that reason, numerous reported appellate decisions exist on the subject of waiver. The waiver does not have to be part of a carefully considered strategy.

Waivers occurred in this case. The Petitioners introduced into evidence testimony from Greg Harty's declaration, asked Greg on direct why he waited until late July to have Shirley sign the power of attorney, and failed to object to Greg's narration of his conversation with his mother on the evening of her birthday that precipitated the July 29, 2005 transactions. The court was permitted to consider Greg's testimony as to

the circumstances by which his mother asked to go to BECU and performed the transactions that happened that day.

D. THE TRIAL COURT PROPERLY AWARDED JUDGMENT JOINTLY AND SEVERALLY

The Petitioners brought this action under TEDRA, which gives courts broad discretion in dealing with disputes related to estates to fashion relief that is fair and equitable. In a regrettable, though poignant moment, at the time of Shirley's death, Pat told his brother Greg, "I will sue you just to f*** with you". This lawsuit is nothing more than Pat following through on his threat. The lawsuit has been emotionally draining, inconvenient, unpleasant, and very expensive. Pat's family should not be permitted to inflict this mischief without making Greg whole financially. It is appropriate and equitable for the Petitioners who commenced this action and put Greg to such expense be responsible for reimbursing him for the reasonable expenses he was forced to incur to defend himself.

Pat Harty resorts to sophistry to persuade the Court that judgment should be entered in a way that it will remain unpaid. The fairest outcome is to leave the members of Pat's family jointly and severally

liable, and to let them sort out the division of the expenses amongst themselves, and to reject the invitation to do injustice.

1. **Pat Did Not Commence This Action As PR To the Probate Estate**

Pat Harty plainly misrepresents his status as a Petitioner in this action. The original Petition was filed with the Court on March 22, 2006. CP 1-9. Had Pat Harty chosen to sue his brother Greg for fraud, conversion, replevin, or any other common law cause of action, he would have had no grounds to seek an award of attorneys' fees if his effort was successful. Pat Harty styled this action under TEDRA as part of a strategy. TEDRA actions give the trial court judge broad authority to decide whether or not to make a fee award, how much to award, and to enter a fee award as a judgment against any party to the proceeding. RCW 11.96A.150.

A petitioner need not be the PR to an estate to commence a TEDRA suit. Who are the "parties' to this proceeding?" The verification page to the original Petition contains the signatures of J. Patrick Harty, Jason Harty and Benjamin Harty, in which they certify that they are "the Petitioners." Pat Harty's signature is not followed by the designation of any representative capacity. It would have been quite

impossible for Pat to have filed this action as the PR of Shirley Harty's estate. Shirley Harty's will had not yet been admitted to probate when Pat first commenced his lawsuit against Greg.

The original Petition was never served upon Greg Harty. Pat let eighteen months pass before filing and serving an amended petition in September of 2007. During the intervening 18 months, Pat used the cause number in this lawsuit to subpoena records, and to perform research into facts that would support his claims. When Pat applied for a citation against Greg Harty in September of 2007, his supporting declaration makes no mention of his role as the PR to the estate. He refers to himself merely as one of the petitioners. CP 26-27. For Pat Harty to argue that he was pursuing his claims purely as an agent of the probate estate is legally frivolous. The cases cited by Petitioners interpreting when courts should make fee awards against PR's are all misplaced.

2. Pat Harty Commenced This Action In His Capacity As A Concerned Parent.

Pat Harty commenced this action in his own capacity, and not as PR. The court saw that this was a family undertaking, from its inception. Pat Harty's motivation to maintain this action against his brother Greg

was his bitter animosity toward his brother Greg. The trial court judge , when entering final judgment, added an unsolicited finding, in her own handwriting, that :

the Ct. found much of the testimony to be mean spirited and filed as a means to punish Greg Harty rather than one designed to resolve a genuine dispute re: Shirley Harty's intent. A fee award from the estate accomplishes what the Petitioners did not achieve through trial. Fundamental fairness and the court's prior findings require the entry of this order.

CP 316.

Pat Harty revealed that his primary goal in maintaining this action was not to enrich himself. In the "Second Declaration of J. Patrick Harty" dated December 5, 2007, Pat described his reasons for believing that Shirley Harty had identified Doug, Ben and Jason as her intended pay-on-death beneficiaries to her BECU accounts. Pat testified:

Before she set up the accounts, she asked me what I wanted. I told her I didn't want anything, and she should give my share to the boys, Ben and Jason. That is why my name is not on any of the accounts in issue in this matter. It was about this time that my mother had a conversation with Sheryl Thole and that my mother made her will and set up the CD accounts.

Appendix B, at p. 8.

These were not the actions of a personal representative or of a man trying to enhance his own individual inheritance. These were the actions of a father who believed - sincerely, though erroneously - that his sons were victims of an injustice. In response to Greg Harty's Motion for an Award of Attorneys' Fees, Pat Harty disclosed the terms of a settlement proposal that he made at mediation, and then withdrew. That offer would have required Greg to pay Doug Harty a sum of \$75,000, and to disclaim Greg's distributive share of the net probate Estate. CP 303-04. Such a settlement would have benefited Doug substantially, and Pat to a much lesser extent, but it would not have benefited Pat's sons, Ben and Jason, at all. Before Greg could accept the offer, Pat consulted with his wife and two sons, and upon their input, withdrew the settlement offer. CP 304-05. If Pat had been acting as a personal representative of the estate, he would not have withdrawn his settlement offer to pursue claims of non-beneficiaries. Pat Harty pursued this action in his capacity as a parent to Ben and Jason.

3. Christine Harty Was A Knowing, Willing And Motivated Participant and a Real Party In Interest.

Pat's involvement as a petitioner in this case was as a parent who is part of a marital community together with Christine Harty. In the

Motion for Issuance of a citation in December of 2007, the Petitioners made no reference to any personal representative capacity for Pat. Christine Harty submitted a Declaration in support of that motion. CP 69-71. Nowhere in her Declaration does Chris Harty make any mention of Shirley Harty's will, nor any of the issues surrounding the general administration of the probate Estate. Chris Harty is unconcerned about marshalling estate assets and collecting estate personal property, and otherwise attending to the smooth and efficient administration of the probate Estate. Her sole and exclusive goal was to see to it that her sons enjoy the inheritance to which she, like Pat, believed they were entitled.

Chris Harty's trial testimony was punctuated by vivid anger and animosity. RP Vol. VI, pp. 16-119. Ms. Harty's clearly sought to persuade the Court of her belief that Shirley Harty's true, abiding intention was to bestow generosity upon Ben and Jason Harty. Chris Harty offered no testimony concerning facts and events surrounding the July 29, 2005 transaction. Her purpose was to promote the interests of her sons to take ownership of non-probate assets.

This prosecution was a "family project", with unknowable agreements amongst the family members. Even relatively

unsophisticated clients know that, when they commence a lawsuit, they might lose, and they still have to pay their own lawyers. It bears mention that the legal expense incurred *by the petitioners* in pursuit of this lawsuit exceeded the value of the probate estate. Pat Harty admits that he has no separate assets, since he married immediately out of college, and amassed his assets as a member of a marital community. CP 306.

Liability for the payment of fees in connection with this lawsuit would obviously have to be paid by Pat and Chris's community assets, because those are the only assets they have. Pat's marital community was exposed to the downside risk of funding an unsuccessful litigation effort. While they were arguing to the trial court that judgment should not be entered against the Pat Harty marital community, on May 1, 2009, *both* Pat and Christine Harty executed and recorded a deed of trust in favor of their lawyers, pledging their *community* residence to secure their *community* obligation to pay for the fees and costs they incurred in this unsuccessful prosecution. Appendix C. Because the members of the marital community were motivated to fight for the perceived rights of their sons, and to risk community assets to do so, liability to Greg properly rests with the marital community.

The trial court properly concluded that this litigation was commenced by Pat Harty and his marital community, seeking to advance the interests of their sons.

4. Ben And Jason Harty Are Properly Characterized As Jointly And Severally Liable For The Judgment For Fees and Costs.

At all times during the pendency of this action, Ben and Jason Harty were, along with Pat Harty, co-Petitioners. No Petitioner had any formal position or status that was above or beneath any other. Pat Harty's sons are adults, and they had the right to decline to participate.

Pat advocates without any citation to legal authority that Ben and Jason's liability be limited to a pro rata share of the total obligation, in the proportion that their inheritance would have borne to the total amount of Shirley Harty's BECU accounts if they had succeeded. The argument is pure artifice, to reduce as much as possible Ben and Jason Harty's exposure, upon no principle whatsoever. The Petitioners went into commencement of their lawsuit believing that Ben and Jason were entitled to more than 99% of the recovery if they succeeded. Pat clung to that erroneous understanding of the facts as late as a month prior to trial. What logic would now compel a finding that Ben and Jason are only responsible for 13.4% of the judgment in favor of Greg?

Further, this dispute could have, and, but for involvement by Ben, Jason and Chris Harty would have, ended by voluntary settlement, with no liability to Greg for any fees. Pat made an offer to settle, and Greg was prepared to accept it. But Christine, Ben and Jason Harty persuaded Pat to withdraw the offer, forcing Greg to endure many thousands of additional dollars of expense. CP 304. Now, Pat argues that Ben and Jason were just bit players, along for the ride, who should be responsible for only a small fraction of the liability. The record shows that Ben, Jason and Chris convinced Pat that he should withdraw the settlement offer and proceed instead with trial. This is evidence that liability for Greg's fees and costs bears no relationship to any one Petitioner's potential economic gain.

Liability should not be based on what the Petitioners say, in hindsight, they might have received if they had won. We can only examine the family's beliefs from the start of the process (where they thought they would get everything for Ben and Jason) to the end of the process where their only remaining motivation was to punish their brother/uncle. The court correctly saw this case as a family project in

which each of the members participated to the best of his or her ability, regardless of any person's individual reward.

As a matter of simple chronology, Pat did not pursue this action in his capacity as the personal representative of the probate estate. And because he so adamantly put his own interests aside in favor of the interests of his sons, his choices and behavior in this proceeding were, in some ways, **contrary** to the interests of the probate estate and its beneficiaries. The trial court was correct in concluding that the real parties in interest in this case were Pat Harty and his marital community and his sons, Jason and Ben.

As a parent, Pat Harty is also a member of a marital community. The financial assistance that Pat and Chris Harty might offer to their two sons (in addition to all of the love, affection, tutoring, mentoring and companionship they undoubtedly give their sons), could be subsidized or eliminated if their two sons were to inherit a sum of money as large as Pat and Chris Harty believed -- as recently as December of 2008 -- they stood to inherit. Financial assistance that Pat and Chris Harty might give to their sons could instead be used for their own comfort and luxury if

they knew that their two sons were provided for through inheritance, as they sincerely, though erroneously, believed.

It is telling that Pat's "family" collectively persuaded him to withdraw the settlement offer made in mediation. Pat's strategy on appeal is obvious. If he can convince the Court to enter judgment against only his "separate estate", Greg Harty will never recover. Pat Harty has been married to Christine for more than 30 years. He has testified that he and Christine have no separate property. Pat's strategy is to get the Court to restrict the judgment (or the large majority of it) to his separate estate, and then to shield his community assets from enforcement. This is the same objective Pat had in his attempt to get the Court to make the fee award against the probate Estate. If Pat can convince the Court to structure the judgment against a judgment debtor that has nothing, it is as good as persuading the Court not to make a fee award in Greg's favor at all.

Given the mean-spirited nature of much of the testimony adduced at trial and the motivation to punish Greg Harty for receiving a disproportionate allocation of their mother's financial estate, and recognizing that Christine Harty was an active participant in that effort

with a clear unison of purpose, the Court should reject Pat's argument that a judgment for fees should be against his separate estate only. Greg's request for attorneys' fees will yield no windfall. Greg did not initiate this lawsuit. He was made to travel from his home in Oregon to Washington at his own expense on multiple occasions during the duration of this civil action, incurring still more unrecoverable expense. In addition to all the economic expense associated with this action that Greg Harty has no legal avenue for recovery, he will never be able to recover his loss of time, and the enormous emotional pain he has suffered as his brothers, his sister-in-law and his nephews have voiced their accusations and have recounted their unique individual perceptions.

The trial court entered a judgment that is the only sensible exercise of the court's discretion: a joint and several judgment against the members of the J. Patrick Harty family, who commenced this lawsuit, who risked their personal assets to fund this lawsuit; who collectively declined to settle this lawsuit, and who decided amongst themselves how the spoils of any victory in this lawsuit might be apportioned. It was a family effort, and so it is fitting that the liability be a joint and several liability amongst the family members.

E. GREG HARTY IS ENTITLED TO AN ADDITIONAL AWARD OF FEES AND COSTS ON APPEAL

Pursuant to RAP 18.1, a party must devote a section of its brief on appeal to the basis for a requested award of attorneys' fees on appeal.

RCW 11.96A.150 applies equally on appeal as it did at the trial court level. On appeal, besides making specific, though unavailing, arguments of legal error by the trial court, the Petitioners have also attempted a broad based assault on the sufficiency of the prevailing party's evidence.

This appeal involves application of complex and difficult legal principles involving different burdens of proof for cases involving the standard of review of a dismissal under CR 41(b)(3), and of gifts versus inheritances when challenged for undue influence, and the always cerebral consideration of waivers to the Deadman's Statute. These are not mundane, garden variety legal issues. To make matters, worse, Petitioners have forced the Respondent to comb through more than 800 pages of trial testimony, to demonstrate that the trial court's Findings of Fact are all amply supported by evidence in the trial record.

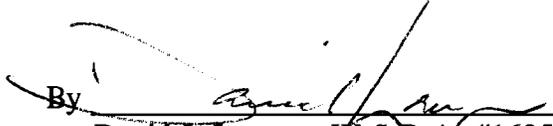
Unfortunately, putting the Respondent "through his paces" to protect his trial court victory has put him to significant additional

expense. It should not be ignored that the trial court was not merely marginally convinced that Greg Harty was the proper, intended object of his mother's generosity. Greg Harty extracted enough positive evidence in the Petitioners' case in chief that the trial court was persuaded of the correctness of his position before he actually put on his own case in chief. The trial court's unsolicited interlineation in the judgment entered April 10, 2009 shows how convinced the trial court was that Greg Harty is not guilty of the misbehavior of which he has been accused.

This court should, on appeal, affirm the trial court judgment, and make a further award of attorneys' fees and costs to Greg Harty, and against Pat Harty and his marital community, Jason Harty and Ben Harty.

RESPECTFULLY SUBMITTED this 3rd day of May, 2010.

INSLEE, BEST, DOEZIE & RYDER, P.S.

By 

David J. Lawyer, W.S.B.A. #16353
Attorneys for Petitioners

Appendix A

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

IN RE
ESTATE OF SHIRLEY A. HARTY

No. 06-4-02161-1 SEA

**SECOND DECLARATION OF
J. PATRICK HARTY**

The undersigned hereby certifies under penalty of perjury under the laws of the state of Washington that the following is true and correct:

1. I am one of the Petitioners in the above entitled action. I make this Declaration on the basis of personal knowledge, information and belief, am over the age of 18 years, and competent to testify herein. This declaration supplements the declaration I previously submitted in a relation to this matter.

2. On September 16, 1978 my wife, Chris, and I were married. On April 10, 1980 my oldest son, Jason, was born. Nearly eight years later on November 23, 1987 my youngest son, Benjamin, was born. Benjamin was named after his grandfather. Jason and Ben are my parents only grandchildren.

3. From the moment my oldest son was born my parents were actively involved in their lives. We shared every birthday and holiday with my parents. We visited with



1 my parents on most weekends while my children were growing up. We took numerous
2 family vacations with my parents including trips to Disneyland and Hawaii.

3 4. My mother was especially close to Jason. She took him to Washington D.C.
4 to see the sights and then to New Jersey where they met my mother's close friend
5 Sheryl Thole.

6 5. When Jason was younger, my mother watched him at every opportunity she
7 could including while Chris and I worked. My parents had a very hands-on relationship
8 with their grandsons.

9 6. My parents were equally involved with our son, Benjamin. My father would
10 watch Ben every other day before Ben started in school.

11 7. Eventually, my father began to show the degenerative effects of Alzheimer's.
12 We made arrangements with my mother for my father to come every day after school to
13 "watch" his grandchild, Ben. This provided a break for my mother from the rigors of
14 caring for my father. Even though Ben was 8 years old, he asked me "Is Grandpa
15 watching me or am I supposed to be watching him?"

16 8. Shortly after my father Benjamin Harty's death from Alzheimer's, my mother's
17 health deteriorated.

18 9. My mother had rheumatoid arthritis in both of her hands and both of her feet.
19 It was painful for her to walk and grip things. She had given up golf, one of her two
20 passions. On one occasion she called me, slurring her words and was unable to
21 comprehend what was happening. I called 911 and drove to her house and met the
22 EMTs. They took her to the hospital. After various tests were performed, it was

1 discovered that she had had a stroke and she had also suffered several strokes prior to
2 this event.

3 10. My mother's second passion was bridge. She was a Life Master in bridge.
4 She could no longer play bridge at a level that she considered appropriate and had
5 significantly reduced her play. She got lost trying to find the Fairwood Golf and Country
6 Club House where she had lived for many years while meeting her friends to play
7 bridge.

8 11. My mother's driving skills dropped off to the point where we were discussing
9 how to handle taking away this freedom. She had multiple car accidents and was no
10 longer capable of driving. We discussed with her that not only was her safety an issue
11 but also the safety of other people on the road. She had lost half her vision in one eye
12 and had blind spots in the other eye.

13 12. At this time my mother sold her house after someone walked up to her door
14 and offered to buy the house but she neglected to find herself another place to live. My
15 mother's health continued to decline. She had quit taking care of herself including
16 cooking her meals.

17 13. After the closing of the sale of her house I moved my mother to an
18 "independent living" residence, not a "nursing home" near my home and office. She
19 had her own apartment, with its own kitchenette. It was furnished and decorated with
20 her belongings. She did not ever cook at this facility that I observed. The residence also
21 provided meals to the residents.

1 14. The residence provided weekly shopping trips and driver service to doctors
2 and dentists. The residence provided other activities for the residents including day
3 trips.

4 15. The residence was located only a few minutes from my house and from my
5 work. It was just a few minutes from her grandson's high school.

6 16. We would visit my mother at least every a week. My wife Chris and I and
7 both of our sons would visit her at least once a week, with my son Jason visiting her
8 multiple times per week. My brother Doug would call her every weekday and visited her
9 at least once per week and would drive her wherever she wanted to go. From time to
10 time I would swing by after work and even during work when my mother needed
11 assistance. Rarely did Greg visit our mother.

12 17. My wife and I would take her shopping at the store every week after taking
13 her to Sunday breakfast. We would have her walk with the cart as she refused to use a
14 walker. My mother could not operate a debit machine at the grocery store. On more
15 than one occasion, when she would go through the checkout line she would just hand
16 the checkout clerk her wallet. She would tell the clerk her pin number for her debit card.

17 18. On one occasion, my mother went to meet an old friend, Robert Nightingale.
18 She started walking and ended up a several blocks away. The nursing home called me
19 and said that "We have a wanderer."

20 19. My mother's health improved greatly at this facility and she became more
21 aware of her surroundings. She would complain about living with "old" people, but at
22 that time my mother was 82 years old.

1 20. My brother Greg, on one of his rare visits, to see our mother, asked for a
2 family meeting to discuss moving our mother to "her own apartment". My brother Doug,
3 my wife and I were all asked our opinion. We unanimously stated this was not a good
4 idea. That it was not in my mother's best interest. That it would be difficult for us to visit
5 and that she still was not cooking for herself. Greg was located in Oregon and moving
6 my mother to an apartment where she would have to fend for herself was not in my
7 mother's best interests. We were particularly concerned about the added time to visit
8 our mother due to the I-405 traffic in Renton for my brother Doug, my wife Chris and
9 myself. No longer was it possible for me to drop by and help her during lunch.

10 21. Greg announced that he was going to move our mother from this facility
11 anyway. I told him if he did this our mother would be dead in six months. He was
12 unmoved by this statement. She actually died just over six months after the move.

13 22. I also told Greg that there are waiting lists to get into independent living
14 facilities or assisted living facilities. That if mom's health declined, where was she going
15 to live? Never, did I hear Greg offer to take care of our mother at his house. Never did I
16 hear my mother say Greg made an offer to care for her in Oregon. However, my
17 mother would never have moved away from her grandchildren.

18 23. Greg stated that he would make arrangements to have someone take care of
19 her. Greg stated that this person would cook two meals a day for our mother. This
20 person would be there to take care of our mother everyday.

21 24. Immediately thereafter Greg moved our mother to an apartment in a rundown
22 part of downtown Renton across the street from a Tavern and next to the railroad
tracks. Her view was the roof of a house. This apartment was not located near our

1 mother's old neighborhood of Fairwood. All of my mother friends were also getting older
2 and my mother couldn't drive to see them.

3 25. The "professional" care provider turned out to be the wife of a long-term friend of
4 Greg's, whom I believe Greg has provided financial support over the years. She worked
5 limited hours Monday through Friday to begin with and provided minimal assistance to
6 my mother. Although Greg had promised me that meals would be prepared for our
7 mother, they were not prepared for her. She lost weight and her health deteriorated
8 while living on her own. The care provider was not available first thing in the morning or
9 late at night as this is the most difficult time of day for the elderly. There were no
10 emergency "hot lines".

11 26. Not surprisingly, one day my mother fell just walking on the sidewalk. She
12 was attempting to get to the grocery store and collapsed on the street. Some stranger
13 driving by saw her fall and called 911. My brother Doug went and picked her up at the
14 hospital. I met Doug with my wife and my mom back at her apartment. Doug had put
15 our mother to bed. There were prescriptions to be filled, but due to the late hour (after
16 midnight) I went down to the hospital while Doug and my wife waited with our mother. I
17 returned with the prescriptions later that night and Doug was still there. Chris and I left
18 to look after our children.

19 27. Even though my mother had fallen, the level of care being provided by Greg
20 did not increase, in fact it decreased. Towards the end of my mother's life, Lori had cut
21 her time spent caring for our mother.

22 28. Near the end of my mother's life my wife and I were going down to take her to
our regular Sunday breakfast. We called on our cell phone to let her know we were on

1 our way. Greg answered the phone and told us not bother to come down as our mother
2 was sick. She was sleeping at that time and had been throwing up. As it turned out our
3 mother had been in a near coma state for 4 days in Greg's care before he took her to
4 the hospital. She never recovered.

5 29. My mother always carried a picture of our older brother Tom in her purse. He
6 had died in Vietnam and she did not carry any pictures of Doug, Greg or myself. My
7 mother also carried pictures of her two grandchildren.

8 30. My mother was always concerned about Doug. She was concerned that
9 Doug did not have enough money, that he didn't have steady employment, etc. She
10 would ask me to look out for him. I would tell her that Doug was just fine, he was doing
11 great, that he was happy, lived with and liked his girlfriend Roxanne.

12 31. The source of our mother's greatest pride and delight was her grandchildren.
13 She enjoyed them greatly and looked forward to seeing them at every opportunity.

14 32. My mother from time to time would talk about her "success" in raising her own
15 children. She considered it a failure in her life that only one of the three remaining
16 children had gotten married and had children. She would say, "I must of done such a
17 bad job of raising my children that they didn't want to get married and have children." I
18 would point out to her how long both Greg and Doug had been with their girlfriends.
19 She would say "Only one out of three turned out.", in reference to her family.

20 33. She considered Greg taking care of our Aunt Joanie, instead of being with our
21 father while he suffered with Alzheimer's, a reflection of this failure. Our mother deeply
22 resented how she had been treated by my father's relatives in Richland, WA including
Joanie. She strongly disliked the attention they paid to Greg and Greg paid to them.

1 She put no value on Greg taking interest in Joanie's care later in life when her family
2 was in Richland and capable of providing care to her.

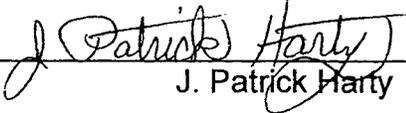
3 34. There is a reason my mother put Doug, Benjamin, and Jason on the BECU
4 accounts. As I mentioned already, my mother was always worried about Doug and
5 wanted to make sure he at least had something from her. She placed Ben and Jason
6 on accounts because she absolutely adored them and wanted to provide for them.
7 Before she set up the accounts, she asked me what I wanted. I told her I didn't want
8 anything and that she should give my share to the boys, Ben and Jason. That is why
9 my name is not on any of the accounts in issue in this matter. It was about this time that
10 my mother had a conversation with Sheryl Thole and that my mother made her Will and
11 set up the CD accounts.

12 35. Nothing in Greg's Declaration or in Lori Schmitt's Declaration gives any
13 reason why my mother would have changed the accounts to take money away from her
14 grandchildren. Nowhere in those declarations is there anything that demonstrates that
15 my mother was disappointed with them or that she had any reason whatsoever to
16 "disinherit" them.

17 36. For some time after my mother died, I wondered why Ben, Jason, and Doug
18 did not receive the money I knew my mother had set aside for them. It was not until
19 some time after her death that I learned that Greg had taken all of the money for
20 himself. It was even later in time, after I had to probate the Will since Greg failed to do
21 so, that I was able to gain copies of some of the bank documents in relation to the
22 accounts. Had Greg bothered to do his duty and tell the rest of us what was going on,

1 this matter might have been resolved prior to my mother's death or, at the very least,
2 much sooner than it has been.

3
4 DATED at Bellevue, Washington on December 5, 2007.

5
6 
7 J. Patrick Harty

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Appendix B

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

IN RE

THE ESTATE OF SHIRLEY A. HARTY.

NO. 06-4-02161-1 SEA

RESPONDENT'S REPLY IN SUPPORT
OF PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

Comes now the Respondent, Greg Harty, and hereby respectfully submits this reply in support of Respondent's Proposed Findings of Fact and Conclusions of Law.

In most respects, Petitioners seek entry of findings and conclusions that would undermine the Court's order of dismissal. In many details, the evidence introduced at trial was conflicting. Where a case is tried to the court, a motion to dismiss at the conclusion of the Petitioners' case-in-chief falls under CR 41(b)(3), which permits the trial court to render a judgment on the merits and enter findings of fact to support its decision. *Postema v. Pollution Control Hearings Board*, 142 Wn.2d 68, 120, 11 P.3d 729 (2000). The court considers all of the evidence and the credibility of witnesses. *Korst v. McMahon*, 136 Wn. App. 202, 206, 148 P.3d 1081 (2006). Thus, the evidentiary record need only contain substantial evidence to support one or another of the court's findings. The evidence does not have to be uncontradicted.

1 the record. They attempted unsuccessfully to get Ms. Pinto to recant her deposition
2 testimony. But Mr. Harty's sworn declaration testimony became part of the trial record as
3 to what transpired on July 29, 2005, and Ms. Pinto indicated that his description was
4 consistent with her general practice. Proposed Finding of Fact No. 37 essentially recites
5 those facts, and goes on to state that Ms. Pinto was trained to terminate the transaction if a
6 person appeared to be incompetent, confused, afraid or coerced.

7 The Petitioners are mainly commenting on how Ms. Pinto testified that it was not her
8 role or her practice to dispense estate planning advice or to make recommendations to
9 members about what they should or should not do with their financial assets. The challenged
10 proposed Finding No. 37 is supported by evidence in the record.

11 2. Evidence Pertaining to Shirley Harty's Intent

12 Petitioners quarrel with Proposed Finding No. 35, that "Shirley also explained to
13 Greg that she wanted to add him to her BECU accounts, to permit him to write himself
14 checks if he desired, and so that he would have whatever was left in the accounts upon her
15 death." This finding is nearly a direct quote of Greg Harty's cross examination testimony.
16 The testimony was not objected to, and followed two rulings by the court as to waiver of the
17 Deadman's Statute.¹ Greg was permitted to explain that he was visiting his mother on her
18 birthday, on July 28, 2005, that neither of her other two sons visited that day, and that he

19
20 ¹ The first waiver was the introduction of the above-quoted deposition testimony,
21 and the second was the Petitioners' questioning of Greg Harty on direct examination about
22 why so much time passed between his preparation of the Power of Attorney that appointed
him as Shirley's attorney-in-fact and the execution of it. The first waiver opened the door to
Greg testifying about the account change at BECU, and the second waiver allowed Greg to
testify as to the circumstances that gave rise to Shirley finally executing the power of
attorney on July 29, 2005, many weeks after Greg prepared it and delivered it to Shirley.

1 went to dinner with his mother that evening, after which, Shirley explained her desire to
2 change her accounts as described.

3 It is true that various other witnesses testified that they had no reason to know or to
4 suspect that Shirley changed her accounts, that they were surprised by the July 29, 2005
5 transaction, that her will left her residual probate estate assets to her three sons equally, etc.
6 But these other pieces of testimony do not support the court's decision; they undermine it.
7 All of that evidence was introduced by the Petitioners to persuade the court circumstantially
8 that Greg's version of factual events was unlikely. Their effort was not persuasive. The
9 petitioners forget that under CR 41(b)(3), the court's role is to make credibility
10 determinations from conflicting testimony. Proposed Finding No. 35 only points to evidence
11 in the trial record that tends to support the court's decision to dismiss.

12 3. Greg's Entitlement to An Award of Attorney's Fees

13 There is no disagreement between the parties as to the law governing the question of
14 a fee award. RCW 11.96A.150 is the governing statute, and authorizes the court, in its
15 sound discretion, to make a fee award. It authorizes the court to make an award against
16 "any party to the proceedings". The Petitioners argue that an award of fees against them
17 should not be entered. Respondent argues that it should be.

18 RCW 11.96A.150 also says the court may, in making its discretionary decision,
19 consider any and all factors that it deems relevant and appropriate. Greg believes that
20 appropriate factors exist for the court to make an award of fees against the petitioners, to
21 reimburse him for the expense he has incurred. First, this action was voluntarily
22 commenced by the petitioners, Pat, Ben and Jason Harty. This is not a case in which the

1 estate commenced an action. This is the case of a brother and two nephews suing their
2 brother and uncle. In the aftermath of Shirley Harty's death, Greg testified that Pat
3 threatened him with a lawsuit, stating "Doug may not have the money to sue you, but I do.
4 I'll sue you just to f___ with you."

5 Pat carried out his threat. The original petition in this case was filed on March 22,
6 2006, only five months after Shirley's death, and before Pat Harty was appointed personal
7 representative to the estate of Shirley Harty. The original petition was never served on
8 Greg. Some **eighteen months** later, on September 18, 2007, Pat amended the original
9 petition, and served it, with a summons, upon Greg, formally commencing this suit. As a
10 Petitioner in a civil action in the intervening months, Pat used the power of the subpoena to
11 gather financial records and medical records before Greg was ever served.

12 Greg stated in his trial brief that this action was fueled by Pat's anger, because he
13 believed that his two sons stood to inherit most of Shirley's estate, and that Greg had
14 somehow improperly caused that expectation to derail. Although he contends otherwise in
15 his objection to Greg's proposed Findings and Conclusions, Pat's motives were not pure and
16 in good faith pursuit of the estate's interests. A selection of testimony from Pat's deposition,
17 which was published at trial, is enlightening:

18 0086

19 4 Q. Now, the other three accounts combined have about
20 5 \$300,000 in them. So at least as a matter of arithmetic,
21 6 does it appear to you that the two accounts that Exhibit 2
22 7 says were identifying your two sons as beneficiaries, would
23 8 account for about \$36,500?

24 ...

13 A. Excuse me. If you say Exhibit 2 versus Exhibit 3?

14 Q. Correct.

1 15 A. Okay. The two account numbers listed on Exhibit
2 16 2, what is not blacked out says 0896, and what is not
3 17 blacked out says 1108.

4 18 Q. Okay. And then if we take those two account
5 19 ending numbers and look at Exhibit 3, it appears that the
6 20 combined balances of those two accounts in the month
7 21 immediately following your mother's death was about \$36,500,
8 22 right?

9 23 A. That's correct.

10 24 Q. Now, if we don't know anything more than what we
11 25 can see here between Exhibits 2 and 3, would it appear to
12 0087

13 1 you that this comment made by Greg, that your mother had
14 2 left the bulk of her estate to Jason and Ben, would seem
15 3 incorrect?

16 4 A. If this was the only information, yes.

17 5 Q. Okay. Do you have different information, or more
18 6 information, that would tend to make Greg's comment to you
19 7 an accurate comment, that the bulk of your mom's estate had
20 8 been designated to go to your two sons upon her death?

21 9 A. I believe we did, yes.

22 10 Q. Okay. What's the other information that you have?

23 11 A. I believe that there were other account documents.

24 12 Q. From BECU?

25 13 A. From BECU.

1 14 Q. Okay. And first of all, do you remember what
2 15 documents or kinds of documents you've seen, other than
3 16 these Exhibits 2 and 3?

4 17 A. I believe they were documents relating to the
5 18 accounts 4666 and 9723.

6 19 Q. So independent of Exhibits 2 and 3, it's your
7 20 belief that there are some other documents that identify the
8 21 two CD accounts as showing your two sons as beneficiaries to
9 22 those accounts?

10 23 A. Yes.

11 24 Q. And do you remember what kind of documents they
12 25 were?

13 0088

14 1 A. I believe they were documents from the bank, you
15 2 know. Yes.

16 3 Q. Okay. And how did you come into possession of
17 4 these other documents that identify your two sons as
18 5 beneficiaries to the CD accounts?



1 6 A. I believe, through discovery.

2 7 Q. So as part of a response to a subpoena, the bank
3 8 would have sent other documents in addition to what we see
4 9 as Exhibits 2 and 3?

5 10 A. Yes.

6 11 Q. Okay. So it's your understanding that at least
7 12 four of the five accounts shown on Exhibit 3 would have been
8 13 accounts that your two sons were identified as
9 14 beneficiaries?

10 15 A. Well, up until now, I believed that the two
11 16 accounts were the ones -- the two CD accounts, were the ones
12 17 that named my sons as beneficiary.

13 18 Q. Okay. And so up until now, your belief was that
14 19 your sons were beneficiaries to two of your mother's
15 20 accounts, but you believed it was the two CD accounts as
16 21 opposed to the savings and the money market account?

17 22 A. That is correct.

18 23 Q. Okay. Now, looking at Exhibit 2, it does appear
19 24 to you, doesn't it, that this was a document that would
20 25 identify your two sons as beneficiaries to the savings and
21 0089

22 1 the money market account, right?

23 2 A. That's right.

24 3 Q. And by date, meaning September 22, 2004, does
25 4 Exhibit 2 correspond in your recollection to the visit that
26 5 Cheryl Thole made with your mother?

27 6 A. That is correct.

28 7 Q. And did Cheryl, in her conversation with you, tell
29 8 you how many accounts your mother had decided to nominate
30 9 your two sons as beneficiaries on?

31 10 A. No.

32 11 Q. Did she say anything, meaning Cheryl, in that
33 12 conversation about the types of accounts that she, Cheryl,
34 13 thought your mother had used to identify your two sons as
35 14 beneficiaries?

36 15 A. Yes.

37 16 Q. What did she say?

38 17 A. CDs.

39 18 Q. And separately from the exhibits before us, you
40 19 believe you've seen other BECU documents that confirm what
41 20 Cheryl had told you?

42 21 A. Yes.

43 22 Q. Did the document or documents you're thinking of

1 23 resemble Exhibit 2?

2 24 A. Yes.

3 ...
4 0172

5 ...
6 Q. Now, previously in this deposition, you have
7 indicated that it was your belief that your mother had
8 designated the two CD accounts as accounts for which your
9 two sons would be beneficiaries.

10 A. That is correct.

11 Q. And although we have no documents here before us
12 today to confirm that belief, is that still your belief?

13 A. That's still my belief.

14 Pat's deposition testimony was given on December 1, 2008. This was almost three
15 years after he first commenced his lawsuit against his brother. And at that time, under oath,
16 Pat testified that he believed the majority of his mother's estate was supposed to go to his
17 two sons. He claimed that he had seen BECU records - records that Pat subpoenaed before
18 he ever served Greg with a summons - confirming his belief. And although he testified at
19 trial that he really had nothing more than a suspicion that his mother had left money for his
20 two sons, in his deposition Pat testified that Sheryl Thole had told him his mother had left
21 the two CD accounts, totaling \$300,000, for his two sons.

22 Pat was asked in his deposition what the objective of this lawsuit was. He testified:

23 0159

24 Q. Okay. So that goal is gone. So now let's talk
about this dispute with Greg.

What's the outcome that in your mind is the right
outcome? What's supposed to happen?

A. What's supposed to happen? My mother, for
whatever reason, chose to name some people as beneficiaries
on her account -- on her accounts. She did that for some
reason. I believe she did that because of my children's
devotion to her. And by "devotion," I mean both of my
children with both of my parents, my father and my mother.

1 12 They were devoted to her. They had a very special
2 13 relationship. And from my viewpoint, much closer than any
3 14 of the children did; that's Gregory, Douglas and myself. A
4 15 very close relationship. I believe that she intended to set
5 16 aside some money for them, and I believe that she did that.
6 17 Now, beyond that, that was, in my mind, the most
7 18 important goal. That was my mother looking at my children.
8 19 That was the most important part to me. Now, that's on a
9 20 personal level.

6 Pat used the probate estate as a tool to wage a battle against his brother Greg. In
7 theory, at the time he commenced his lawsuit, Pat believed that about \$300,000 of the BECU
8 bank account money was designated for his sons as pay-on-death beneficiaries. By the time
9 of his deposition, Pat was shown that his sons were designated pay-on-death beneficiaries for
10 the Money Market Account and the Savings Account, with combined balances of about
11 \$26,000. But he swore that he had seen other BECU documents and had been told by Sheryl
12 Thole that his sons were also beneficiaries to the two CD accounts. So, out of a combined
13 \$336,000 of BECU assets, Pat believed as recently as December 1, 2008 that \$335,000 of
14 that money rightfully belonged to his two sons, and that Greg had somehow managed to
15 usurp that inheritance. Pat's decision to sue Greg was motivated by anger, was based on
16 incorrect information, and the goal was to get that money into the possession of his two
17 sons. As a matter of form, the petitioners at trial sought to argue that the majority of the
18 BECU account balances should go into the probate estate, because they recognized that there
19 was no evidence to support Pat's erroneous belief that Shirley had left the CD accounts to
20 her grandsons. But Pat's personal motivation is completely revealed in his deposition
21 testimony. At trial, Pat's animosity toward Greg was obvious.

1 Late in the course of the lawsuit, Pat sought to use estate assets to pay the formidable
2 accumulation of attorneys fees he had generated suing his brother. As a result of a contested
3 motion, Judge Heller allowed the estate to pay Pat's fees, *but only to the extent that such*
4 *payment did not invade the distributive share of the net assets allocated to Greg.* In essence,
5 the court was saying that Pat and Doug were free to spend their own shares of Shirley's
6 estate suing Greg if they wanted to do so, but they must not use Greg's share in that effort.
7 Well, the aggregate value of the net probate estate assets is estimated to be between \$75,000
8 and \$100,000. That means Greg's share (which in theory has not been invaded by payment
9 of Pat's fees) is only a sum between \$25,000 and \$33,333. In their objection to Greg's
10 proposed findings, Pat readily admits that the value of Greg's share of the probate estate is
11 all that remains in the estate. It is utterly meaningless for the court now to make a fee award
12 in favor of Greg against the Estate, where the only assets left in the estate belong to Greg in
13 the first place, because the rest has been squandered in the unsuccessful lawsuit that gave
14 rise to Greg's fees!

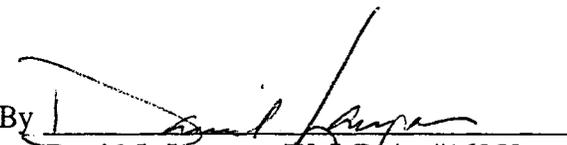
15 Pat elected to commence this action in his own name, motivated by anger and
16 suspicion toward his brother, Greg. Pat fashioned the petition as a TEDRA petition, under
17 RCW 11.96A precisely because that statute would give Pat an argument for an award of fees
18 against Greg personally in the event that Pat could successfully prove his case. Pat's
19 amended petition cites RCW 11.96A.150 and requests specifically that a fee award be made
20 in favor of the Petitioners and against Greg. Pat had the benefit of 18 months of subpoena
21 power to perform investigations and to review documents, interview witnesses and to get his
22 "ducks in a row" before Greg was even aware that a lawsuit had been commenced against

1 him. Once Greg was served, the Petitioners noted and took the depositions of at least eight
2 non-party witnesses, three of whom reside outside of Washington, and never called even one
3 of them to testify at trial.

4 The trial consisted of a journey reaching as far back as Shirley Harty's own
5 allegedly troubled childhood, to provide a circumstantial backdrop that would convince the
6 court that Shirley Harty could not possibly have intended to do what she did on July 29,
7 2005. The effort was unsuccessful. The process put Greg Harty through enormous financial
8 pain. The financial pain could have, and should been avoided. The circumstances justify
9 making a fee award to reimburse Greg for his attorneys fees in an amount to be determined
10 by the court, upon a motion to be noted for that purpose. The award can only be meaningful
11 if it is against the Petitioners, as is authorized by RCW 11.96A.150, and as the petitioners
12 themselves sought in their petition.

13
14 DATED this 4th day of February, 2009.

15 INSLEE, BEST, DOEZIE & RYDER, P.S.

16
17 By 
18 David J. Lawyer, W.S.B.A. #16353
19 Attorneys for Respondent Greg Harty

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of February, 2009, I caused to be served true and correct copies of the following documents:

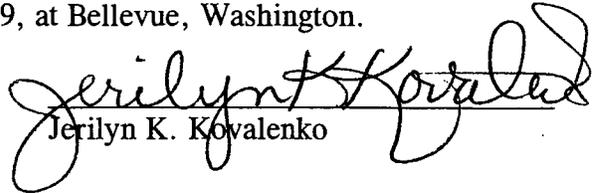
1. **RESPONDENT'S REPLY IN SUPPORT OF PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

to the individual(s) named below in the specific manner indicated:

Craig Blackstone
Oseran, Hahn, Spring & Watts
10900 NE 4th St., Suite 850
Bellevue, WA 98004

- Personal Service (Legal Messenger)
- U.S. Mail
- Certified Mail
- Hand Delivered
- Overnight Mail
- Fax #

DATED this 5th day of February, 2009, at Bellevue, Washington.


Jerilyn K. Kovalenko

Appendix C

HONORABLE MARY I. YU
CONSIDERATION REQUESTED: APRIL 23, 2010
WITHOUT ORAL ARGUMENT

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

In re the Estate of:

SHIRLEY A. HARTY

Deceased.

NO. 06-4-02161-1 SEA

DECLARATION OF DAVID J. LAWYER
IN SUPPORT OF MOTION FOR
SUPPLEMENTAL JUDGMENT FOR
ATTORNEYS' FEES

DAVID J. LAWYER, under penalty of perjury, states and declares as follows:

1. I am the attorney of record for the Respondent herein. I am over 21 years of age, and I am otherwise competent to testify in a court of law in the State of Washington.

The facts testified to herein are personally known to me to be true.

2. This Court entered Findings of Fact and Conclusions of Law on February 6, 2009. Petitioners' Motion for Reconsideration of the entry of findings and conclusions was denied by order dated March 11, 2009. Following the entry of findings and conclusions and the denied of Petitioners' Motion for Reconsideration, Respondent made a petitioner for an award of attorneys' fees and costs, and for entry of judgment against the Petitioners, jointly

MOTION FOR SUPPLEMENTAL JUDGMENT FOR
ATTORNEYS' FEES- Page 1

402086.1 | 361415 | 0001

1 and severally. The Respondent's Motion was opposed by Petitioners, and judgment was
2 entered over Petitioners' opposition on April 10, 2009.

3 3. Petitioners filed a Motion for Reconsideration of the entry of judgment on
4 April 16, 2009, and upon the Court's invitation, Respondent filed a response to the Motion
5 for Reconsideration on May 13, 2009. In their Motion for Reconsideration, the Petitioners
6 argued that (a) the Court should decline to make a fee award in any amount to any party; (b)
7 the Court should make a fee award in Respondent's favor only against the probate estate of
8 Shirley A. Harty; (c) the Court should limit any award in favor of Respondent Greg Harty to
9 statutory costs; and (d) to the extent that any award of costs and fees were to render the
10 probate estate insolvent, any such award should be deemed that of a general unsecured
11 creditor, lower in priority to administrative expenses of the probate estate.

12 4. In addition to the foregoing arguments, in his Motion for Reconsideration,
13 Patrick Harty argued that any judgment against him should be limited to a liability against
14 him in his separate estate, and not against his marital community.

15 5. By order dated May 26, 2009, the Court denied Patrick Harty's Motion for
16 Reconsideration.

17 6. In connection with collection efforts on his judgment, Greg Harty has
18 discovered that, on May 1, 2009, Patrick and Christine Harty, husband and wife,
19 encumbered their family residence by a Deed of Trust in favor of the law firm of Oseran
20 Hahn, as security for payment of the outstanding balance for attorneys' fees and costs
21 incurred in connection with this litigation. Attached hereto as Exhibit A and incorporated
22 herein by this reference is a printout of the King County property records showing the

1 recording of said Deed of Trust under King County Recording No. 20090501000887.
2 According to the King County website, the original Deed of Trust has not been scanned, and
3 an image of the instrument is therefore not currently available.

4 7. In his Motion for Reconsideration, Patrick Harty argued among other things
5 that the entire litigation undertaking was his separate undertaking, and was not the action of
6 his marital community. Yet, even as that argument was before this Court for its
7 consideration on Patrick Harty's Motion for Consideration, the marital community of J.
8 Patrick Harty and Christine Harty was pledging its community asset as security for payment
9 of the expenses associated with that very same undertaking.

10 8. Attached hereto as **Exhibit B** and incorporated herein by this reference is a
11 true and correct copy of a printout from my firm's time and billing software system known
12 as "Elite Enterprise." This printout shows all of the charges of time billed to this matter
13 from the initial review of Patrick Harty's Motion for Reconsideration through the review of
14 this Court's Order denying that Motion, including analysis, research, and preparation of a
15 response. The fees incurred in connection with those efforts were \$7,040.00.

16 9. After Patrick Harty filed his Declaration in Opposition to Greg Harty's
17 Motion for Attorneys' Fees, it was apparent that Mr. Harty possesses little or not separate
18 property, and that his marital community owns everything of any value in the Patrick Harty
19 value. Patrick Harty voluntarily applied his inheritance from the Shirley Harty probate
20 estate to the cost of prosecution against his brother Greg, substantially depleting the assets in
21 the probate estate to a level at which the estate could not possibly cover the judgment for
22 fees in costs in favor of Greg Harty.



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Sequence #: 0
Date Received: 05/01/2009 1:35:31 PM
Document Type: DEED OF TRUST
Book: 000
Page: 000
Image: Not scanned or not available online

Grantors

HARTY, J PATRICK
HARTY, CHRISTINE D

Grantees

OSERAN HAHN SPRING STRAIGHT & WATTS PS

Legal Records

#	Plat	Lot/Unit	Block/Building	Section	Township	Range	Q1	Q2	Tax Parcel
1	WHISPERING HEIGHTS DIV NO. 01	25							934690025

Related Documents

None found

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Worked Date: From To
 Billed Date:
 Invoice Number:

Date	Initials	Name / Invoice Number	Hours	Amount	Description
04/20/2009	011	David J. Lawyer	1.80	576.00	Review motion for reconsideration;
05/15/2009		Invoice=153109	1.80	576.00	correspondence with Greg re same; revise letter to attorney Watts re status of probate estate and lawsuit.
04/21/2009	011	David J. Lawyer	1.90	608.00	Revise letter to Watts re case status, probate
05/15/2009		Invoice=153109	1.90	608.00	estate and judgment; review supplement to reconsideration motion; correspondence with Greg re status and strategy.
05/04/2009	011	David J. Lawyer	1.20	384.00	Review Pat's motion for reconsideration and
06/12/2009		Invoice=153897	1.20	384.00	analyze issues.
05/07/2009	011	David J. Lawyer	3.40	1,088.00	Work on organizing arguments in opposition to
06/12/2009		Invoice=153897	3.40	1,088.00	motion for reconsideration; research issue of execution against community property assets for separate liability.
05/08/2009	011	David J. Lawyer	4.30	1,376.00	Work on response to motion for reconsideration;
06/12/2009		Invoice=153897	4.30	1,376.00	correspondence with Greg re same; interoffice conference re separate liability issue and ability to pursue community property assets.
05/11/2009	011	David J. Lawyer	3.20	1,024.00	Revise response of Pat's motion for
06/12/2009		Invoice=153897	3.20	1,024.00	reconsideration.
05/12/2009	011	David J. Lawyer	1.40	448.00	Correspondence with Greg re response to motion
06/12/2009		Invoice=153897	1.40	448.00	for reconsideration; revise motion with Greg's input.
05/13/2009	011	David J. Lawyer	1.50	480.00	Finalize response to motion for
06/12/2009		Invoice=153897	1.50	480.00	reconsideration; draft accompanying declaration with exhibits.
05/15/2009	011	David J. Lawyer	2.40	768.00	Review and analyze Pat's reply to motion for
06/12/2009		Invoice=153897	2.40	768.00	reconsideration.
06/01/2009	011	David J. Lawyer	0.90	288.00	Review order denying motion for reconsideration;
07/16/2009		Invoice=154910	0.90	288.00	correspondence with Greg re same and re strategy for collection and possibility of appeal.
BILLED TOTALS: WORK:			22.00	7,040.00	10 records
BILLED TOTALS: BILL:			22.00	7,040.00	

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

ESATTE OF SHIRLEY A. HARTY, J. PATRICK HARTY,
BENJAMIN HARTY AND JASON HARTY

Plaintiffs-Appellants,

v.

GREG HARTY,

Defendant-Respondent.

CERTIFICATE OF SERVICE

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*Filed
COA
5-3-10
KW*

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

ESTATE OF SHIRLEY A.
HARTY, J. PATRICK HARTY,
BENJAMIN HARTY AND
JASON HARTY,

Appellants,

vs.

GREG HARTY,

Respondent.

No.63719-3-I

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of May, 2010, I caused to be served true and correct copies of the following documents:

1. Respondent's Opening Brief;
2. Respondent's Request for Leave to File Overlength Respondent's Brief;
3. Respondent's Supplemental Designation of Clerk's Papers; and
4. Certificate of Service

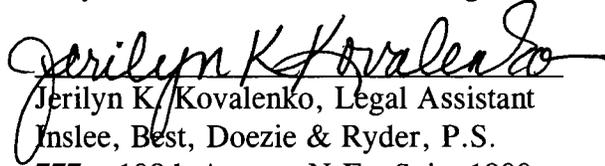
to the individual(s) named below in the specific manner indicated:

Attorneys for Petitioners

Charles "Ted" Watts
Oseran Hahn Spring Straight
& Watts, P.S.
10900 NE Fourth St. #850
Bellevue, WA 98004

- Personal Service (Legal Messenger)
 U.S. Mail
 Certified Mail
 Hand Delivered
 Overnight Mail
 Fax #
 Email

DATED this 3rd day of May, 2010, at Bellevue, Washington.



Jerilyn K. Kovalenko, Legal Assistant
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