5-16-2013

In re Estate of Taylor Respondent's Brief 1 Dckt. 40479

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF THE ESTATE OF: DONALD LEE TAYLOR.

JEFFREY L. TAYLOR,

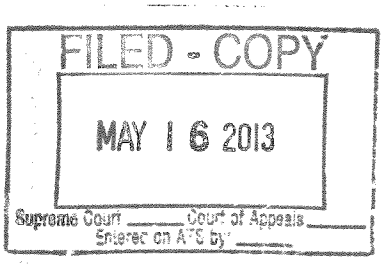
Petitioner-Appellant/Cross Respondent,

vs.

MICHAEL JOSEPH TAYLOR, Personal Representative of the Estate of Donald Lee Taylor,

Respondent-Cross Appellant.

Docket No. 40479



RESPONDENT-CROSS APPELLANT'S BRIEF

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada

Honorable Kathryn A. Sticklen Presiding

ATTORNEYS FOR PETITIONER-APPELLANT/CROSS RESPONDENT Jeffrey Taylor

Allen B. Ellis
Ellis Law, PLLC
12639 W. Explorer Drive, Suite 140
Boise, Idaho 83713
Telephone: (208) 345-7832
ISB No. 1626

ATTORNEYS FOR RESPONDENT-CROSS APPELLANT Michael Taylor

Joseph H. Uberuaga, II (juberuaga@eberle.com)
Eberle, Berlin, Kading, Turnbow & McKlveen, Chartered
1111 West Jefferson Street, Suite 530
Post Office Box 1368, Boise, Idaho 83701
Telephone: (208) 344-8535
Facsimile: (208) 344-8542
ISB No. 2348

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF THE ESTATE OF: DONALD LEE TAYLOR. --- JEFFREY L. TAYLOR, Petitioner-Appellant/Cross Respondent, vs. MICHAEL JOSEPH TAYLOR, Personal Representative of the Estate of Donald Lee Taylor, Respondent-Cross Appellant.	Docket No. 40479

RESPONDENT-CROSS APPELLANT'S BRIEF

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada

Honorable Kathryn A. Sticklen Presiding

ATTORNEYS FOR PETITIONER-APPELLANT/CROSS RESPONDENT Jeffrey Taylor

Allen B. Ellis
Ellis Law, PLLC
12639 W. Explorer Drive, Suite 140
Boise, Idaho 83713
Telephone: (208) 345-7832
ISB No. 1626

ATTORNEYS FOR RESPONDENT-CROSS APPELLANT Michael Taylor

Joseph H. Uberuaga, II (juberuaga@eberle.com)
Eberle, Berlin, Kading, Turnbow & McKlveen, Chartered
1111 West Jefferson Street, Suite 530
Post Office Box 1368, Boise, Idaho 83701
Telephone: (208) 344-8535
Facsimile: (208) 344-8542
ISB No. 2348

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

CASES

STATUTES

RULES

STATEMENT OF THE CASE

1. Nature of the Case

This is a will contest stemming from the death of Donald Lee Taylor ("Donald") on December 4, 2010. Donald's Last Will dated August 2, 2010, was admitted to probate and Michael Joseph Taylor ("Michael"), the Respondent-Cross Appellant herein, was appointed Personal Representative of the estate of Donald Lee Taylor, deceased.

Jeffrey Louis Taylor ("Jeffrey"), the Appellant-Cross Respondent herein, initiated a will contest alleging that Donald lacked testamentary capacity at the time he executed his Last Will and that Donald was unduly influenced by Michael at the time he executed his Last Will.

Michael filed a motion for summary judgment as to Jeffrey's claims. At the hearing, Jeffrey abandoned his claim of undue influence. After the hearing, the Magistrate Court granted summary judgment in favor of Michael.

Jeffrey appealed the summary judgment ruling of the Magistrate Court to the District Court as to the issue of testamentary capacity. After the hearing, the District Court affirmed the decision of the Magistrate Court.

Jeffrey filed a Notice of Appeal of the decision of the District Court on the issue of testamentary capacity. Michael filed a Notice of Cross-Appeal on the District Court's denial of attorney's fees.

2. Course of the Proceedings

On December 21, 2010, Donald's Last Will was admitted to probate and Michael was appointed Personal Representative of the estate of Donald Lee Taylor, deceased.

On December 30, 2010, Jeffrey initiated a will contest alleging that Donald lacked testamentary capacity at the time he executed his Last Will and that Donald was unduly influenced by Michael at the time he executed his Last Will.

On June 7, 2011, Michael filed a motion for summary judgment as to Jeffrey's claims. At the hearing Jeffrey abandoned his claim of undue influence. After the hearing, the Magistrate Court granted summary judgment in favor of Michael on August 8, 2011, and entered the following Order, stating in relevant part:

> 4. Pursuant to Idaho Code § 15-3-407, Jeffrey Taylor, as the contestant of the decedent's last will, has the burden of establishing lack of testamentary capacity and undue influence;
>
> 5. The requirements for testamentary capacity are well established under Idaho law, *see, e.g., In re Goan's Estate*, 83 Idaho 568, 573, 366 P.2d 831, 834 (1961), and Jeffrey Taylor presented no evidence showing any genuine issue of material fact that the decedent lacked testamentary capacity on August 2, 2010, the date of execution of his Last Will and Testament;
>
> 6. Counsel for Jeffrey Taylor acknowledged in Court that Jeffrey Taylor abandoned his claim of undue influence; and
>
> 7. There is no triable issue as to any material fact. Michael Joseph Taylor, personal representative of the above-captioned estate, is therefore entitled to judgment as a matter of law.
>
> Accordingly, it is, ORDERED that the motion of Michael Joseph Taylor, personal representative of the above-captioned estate, for an order for summary judgment is hereby GRANTED and any

> claims of Jeffrey Taylor that the decedent lacked testamentary capacity at the time he executed his Last Will and Testament and that the execution of the Last Will and Testament was procured by the undue influence of Michael Joseph Taylor are hereby DISMISSED.

The District Court affirmed the decision of the Magistrate Court on October 16, 2012, and entered the following Memorandum Decision and Order, stating in relevant part:

> While Jeffrey submitted evidence indicating that the decedent was suffering from cognitive problems arising from dementia, he did not submit any evidence that this dementia caused the decedent to lack testamentary capacity on August 2, 2010, when he executed his will, as Judge Bieter found. Dr. Ward specifically stated that he did not know whether the decedent lacked testamentary capacity.
>
> * * * * *
>
> In sum, since Jeffrey did not submit any evidence that the decedent lacked testamentary capacity at the time of the execution of his will, Judge Bieter's grant of summary judgment will be affirmed.

On November 9, 2012, Jeffrey filed a Notice of Appeal of the decision of the District Court on the issue of testamentary capacity. On November 20, 2012, Michael filed a Notice of Cross-Appeal on the District Court's denial of attorney's fees.

3. Statement of the Facts

Donald and Bernice M. Taylor ("Bernice") were married until Bernice's death on October 30, 2009. Affidavit of Michael Taylor (R., p. 72-75). They had eleven living children of their marriage, namely, in order of birth, Debra Ann Powell, David Lee Taylor, Linda Marie Bjornberg, Sandra Elaine Johnson, Laureen Elizabeth Maul, Terri Jo Taylor, Tobi Jean Giannone, Timothy John Taylor, Jeffrey Louis Taylor, Gina Michelle Trisciuzzi, and Michael

Joseph Taylor. Michael is the youngest of the eleven children, almost eleven years younger than Gina Michelle Trisciuzzi. (R., p. 72-73).

In June of 2006, Donald, Bernice, and Michael moved to Idaho. Donald was a retired captain with the San Francisco Police Department. At the time of the move, Donald was 73 years old while Bernice was 71. Michael lived with and took care of his parents, who had their share of health problems. (R., p. 73).

Donald had macular degeneration in both eyes and had an operation to have a girdle placed around his aorta since it was swollen and in danger of rupturing. Bernice was diagnosed with rheumatoid arthritis, hypertension and scleroderma, which is an autoimmune disease that affects the blood vessels and connective tissue. (R., p. 73).

In 2007, Bernice fell, broke her hip, and required hip replacement surgery. After the surgery, Bernice developed pneumonia. Due to the scleroderma, Bernice developed sores on her toes and foot and the wounds were not healing before scabs formed over them. Michael was primarily responsible for cleaning her wounds and changing the bandages on her feet every other day. Bernice's doctors discovered that the poor circulation in the arteries of her leg were not allowing any of the wounds on her foot to heal. As a result, in July of 2009, Bernice had surgery in an attempt to rebuild the main artery in her leg. The surgery was unsuccessful and Bernice's leg was amputated at the knee. After the surgery, Bernice again developed pneumonia and also had a liver malfunction. Bernice never fully recovered and died on October 30, 2009. After Bernice's death, Michael continued to live with and care for Donald. (R., p. 73).

Prior to Bernice's death, Michael met and began dating Sarah Keller ("Sarah"). Sarah assisted Michael in the care of his parents by preparing meals for them. Sarah and Michael were married on June 4, 2010. After they were married, Sarah moved in with Michael and assisted him in the care of Donald. (CR., p. 73).

On July 16, 2010, Donald met with attorney Steven F. Scanlin to have a will drafted. (R., p. 76-79). On August 2, 2010, Donald met with Mr. Scanlin a second time, during which he reviewed and executed his Last Will and Testament. (R., p. 77).

Donald was diagnosed with bladder cancer in August of 2010 and died four months later on December 4, 2010. (R., p. 73).

ADDITIONAL ISSUE ON APPEAL

Whether Michael is entitled to attorneys fees against Jeffrey pursuant to Idaho Code § 12-121 and Rule 41 of the Idaho Appellate Rules.

ARGUMENT

1. Summary Judgment Standard of Review.

"Summary judgment is proper 'if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Flying Elk Investment, LLC v. Cornwall*, 149 Idaho 9, 13, 232 P.3d 330, 334 (2010) (citing I.R.C.P. 56(c)). "The moving party carries the burden of proving that there is no genuine issue of material fact." *Id.*

The non-moving party's responsibility in opposing a motion for summary judgment was outlined by the Idaho Supreme Court in *Berg v. Fairman*, 107 Idaho 441, 690 P.2d 896 (1984), wherein the Court stated:

> If a party resists summary judgment it is his responsibility to place in the record before the trial court the existence of controverted material facts which require resolution by trial. A party may not rely on its pleadings nor merely assert that there are some facts which might or will support his legal theory, but rather he must establish the existence of those facts by deposition, affidavit or otherwise. Failure to so establish the existence of the controverted material facts exposes the party to risk of a summary judgment.

Id. at 444, 690 P.2d at 899. The Idaho Court of Appeals has reiterated that "a non-moving party cannot rest on mere speculation, and must present opposing evidence." *Butterfield v. MacKenzie*, 132 Idaho 62, 64, 966 P.2d 658, 660 (Ct. App. 1998). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue of fact for trial. *Harpole v. State*, 131 Idaho 437, 439, 958 P.2d 594, 596 (1998).

"When an action will be tried before the court without a jury, the trial court as the trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences." *Flying Elk Investment, LLC,* at 13, 232 P.3d at 334. "Drawing probable inferences under such circumstances is permissible because the court, as the trier of fact, would be responsible for resolving conflicting inferences at trial." *Losee v. Idaho Co.*, 148 Idaho 219, 222, 220 P.3d 575, 578 (2009).

"[The district court] freely reviews the entire record to ascertain if either party was entitled to judgment as a matter of law and determines whether the record reasonably supports the inferences drawn by the [magistrate] judge." *Flying Elk Investment, LLC,* at 13, 232 P.3d at 334. "Summary judgment is appropriate where the nonmoving party bearing the burden of proof fails to make a showing sufficient to establish the existence of an element essential to the party's case." *Cantwell v. City of Boise*, 146 Idaho 127, 133, 191 P.3d 205, 211 (2008).

The standard of review by the Supreme Court is similar. As stated in *Estate of Conway v. Martin,* 152 Idaho 933, 938, 277 P.3d 380, 385 (2012):

> "On appeal of a decision rendered by a district court while acting in its intermediate appellate capacity, this Court directly reviews the district court's decision." *In re Doe,* 147 Idaho 243, 248, 207 P.3d 974, 979 (2009). However, to determine whether the district court erred in affirming the magistrate court, independent review of the record before the magistrate court is necessary. *Id.* "If the magistrate court's findings of fact are supported by substantial and competent evidence and the conclusions of law follow from the findings of fact, and if the district court affirmed the magistrate's decision, [this Court] will affirm the district court's decision." *Hausladen v. Knoche,* 149 Idaho 449, 452, 235 P.3d 399, 402 (2010) (citing *Losser v. Bradstreet,* 145 Idaho 670, 672, 183 P.3d 758, 760 (2008)).

In response to Michael's motion for summary judgment, Jeffrey failed to present any evidence that Donald lacked testamentary capacity on the date of execution of his Last Will and Testament.

2. Legal Standard for Testamentary Capacity.

A contestant of a will bears both the ultimate burden of persuasion and the initial burden of establishing a "lack of testamentary intent." Idaho Code § 15-3-407.

Testamentary capacity is a legal standard. To have testamentary capacity, an individual must "know, in general, without prompting, the nature and extent of the property of which he is about to dispose, and nature of the act which he is about to perform, and the names and identity of the persons who are to be the objects of his bounty, and his relation towards them." *In re Goan's Estate*, 83 Idaho 568, 573, 366 P.2d 831, 834 (1961) (quoting *In re Heazle's Estate*, 74 Idaho 72, 76, 257 P.2d 556, 558 (1953)). In other words, at the time of signing the will, a testator must know what property he owns, to whom he wishes to give the property, and how the will disposes of the property. *In re Heazle's Estate*, 74 Idaho at 76, 257 P.2d at 558.

A diagnosis of dementia is not sufficient to prove a lack of testamentary capacity. *See Neumeyer v. Estate of Penick*, 180 Ohio App.3d 654, 661, 906 N.E.2d 1168, 1173 (Ohio App. 5 Dist. 2009) ("Evidence that the decedent suffered from dementia or Alzheimer's disease on the day she executed her will, standing alone, is insufficient to raise a fact issue as to a lack of testamentary capacity without some evidence that the disease rendered her incapable of knowing her family or her estate or understanding the effect of her actions.").

As this Court recently stated in *Estate of Conway v. Martin,* 152 Idaho at 943, 277 P.3d at 390:

> Testamentary capacity is a question of fact to be determined upon the evidence in the individual case. No general rule can be devised which would be a satisfactory standard for the determination of the issue in all cases. This court has held that 'if a man is able to transact business, * * * he is clearly competent to make a will, but he may be competent to make a will and still not be able to transact business.'

> *In re Heazle's Estate,* 74 Idaho 72, 76, 257 P.2d 556, 558 (1953) (quoting *Schwarz v. Taeger,* 44 Idaho 625, 630, 258 P. 1082, 1084 (1927)).

As the contestant of Donald's Last Will, Jeffrey had the burden of proof to establish a lack of testamentary capacity.

Jeffrey's case, in a nutshell, is as follows:

> The diagnosis of progressive dementia coupled with anecdotal evidence of decedent'[s] bizarre behavior create a genuine issue of material fact which required the denial of Michael's motion for summary judgment.

(Appellant's Brief, p. 6).

Jeffrey's general allegations of competency or lack thereof, contain no facts that would support a finding of lack of testamentary capacity. Jeffrey's allegations presented in opposition to Michael's motion for summary judgment, even if assumed to be true, do not address the necessary elements of the standard of testamentary capacity. Jeffrey's argument appears to be that if a person at times in the past had exhibited bouts of questionable behavior, those facts alone should be enough to avoid entry of summary judgment and require a trial on the issue. This argument is not supported by the law. Jeffrey presented no evidence that at the time Donald signed his Will (or in fact any other time in the past) he did not know his family, the nature and extent of his property or to whom he wished to give his property, nor how the Will disposes of the property. This complete failure was recognized by both the Magistrate Court and the District Court in ruling that Jeffrey failed to present evidence showing any genuine issue of material fact

that Donald lacked testamentary capacity on August 2, 2010, the date of execution of his Last Will.

Even if Michael had a duty to prove testamentary capacity, the following testimony of Steven F. Scanlin, John C. McKay, Esther Halone, and Dr. Ward is undisputed and overwhelmingly established that Donald possessed the requisite testamentary capacity at the time he signed his Last Will on August 2, 2010.

Steven F. Scanlin, the attorney who drafted Donald's Last Will, testified in his affidavit as follows:

> 2. I am an attorney duly licensed in the state of Idaho. I have over 26 years of experience practicing law.
>
> 3. I am a member of Scanlin Law Offices, PLLC located in Boise. My practice primarily consists of estate planning, probate and elder law.
>
> 4. I have a Bachelor of Science in Education degree from Montana State University-Billings, a Master of Social Work degree from Portland State University, and a Juris Doctor degree from the University of Idaho.
>
> 5. My past professional experience includes positions as a Deputy Attorney General, Legislative Assistant to United States Senator Max Baucus, Special Representative to the Office of the Governor, State Representative in the Idaho Legislature, Director of Hospital Social Services at West Valley Medical Center, Psychiatric Social Worker, and Hospital Corpsman in the United States Navy.
>
> 6. I am a National Business Institute faculty member and have taught numerous courses on estate planning, probate, and elder law issues. I have taught seminars on "Determining Mental Capacity of an Elder Client" and "Representing a Client with Alzheimer's or Dementia."

7. I first met Donald Taylor on July 16, 2010. Donald was a neat guy and I remember him well. The meeting was at my law office in Boise. Donald was accompanied by his son Michael Taylor who drove him there.

8. Before the meeting began, I asked Donald if he wanted Michael present during the meeting. Donald said yes. Donald made it very clear that he wanted Michael present.

9. During the meeting Donald explained that Michael was his son, that they lived together, and that Michael took care of him. Based upon my observations and perceptions, Donald seemed pleased with Michael and their living arrangement.

10. During the meeting Donald said that he wanted to "end his living trust" because he didn't like its terms. Donald asked me to draft a will that left his house and entire estate to Michael.

11. Although Donald appeared to be an average sized man, he struck me as a "tougher guy." Donald did not seem frail; however, given his age I asked Donald if he had any health problems. Donald said yes, but did not elaborate. I then proceeded to ask Donald questions about his family and his property. Donald said that he had 11 children, and named each one without any assistance. Donald said that his primary assets included a house, vehicles, some money in bank accounts, and a police retirement pension.

12. During the meeting I asked Donald if he was sure about leaving his house and entire estate to Michael. Donald said yes. Donald was adamant about leaving everything to Michael. I explained to Donald that he could leave certain tangible personal property items to his other children and I provided him with a tangible personal property form that he could complete at a later date. Michael then commented that his siblings could have whatever they wanted. Donald replied, no, and said again that he wanted everything to go to Michael.

13. During the meeting Donald talked about being a retired captain in the San Francisco Police Department.

14. On August 2, 2010, I met with Donald a second time to review the estate planning documents that I drafted. Donald was again accompanied by Michael who drove him there.

15. During the second meeting I reviewed with Donald his last will, living will, health care power of attorney, and financial power of attorney. I stated to Donald that his last will left everything to Michael. I specifically asked Donald if that was exactly what he wanted. Donald said yes.

16. Also present during the second meeting was John C. McKay, a licensed clinical social worker that I had asked to serve as a witness to the will signing. I observed Mr. McKay and Donald conversing with each other while I stepped out of the conference room to make copies.

17. During the second meeting Donald responded appropriately to my questions and had very few questions of his own. Donald was consistent with what he wanted in his last will during the first meeting and the second meeting.

18. Based upon my observations and perceptions, Donald clearly understood the provisions of his will and that it left his entire estate to Michael.

19. Based upon my observations and perceptions, Donald was not under any pressure or influence from Michael, or anyone else for that matter, to sign his last will.

20. Prior to my attorney-client relationship with Donald, if I had even the slightest doubt as to the mental competency of a client, I would send the client to a professional for a psychometric examination. With Donald, I had absolutely no concerns about his mental competency during both meetings. There is no doubt in my mind that Donald had the requisite testamentary capacity at the time he signed his last will.

21. Based upon my observations and perceptions, Donald and Michael appeared to be happy during both meetings and extremely devoted to each other.

(Scanlin Aff., R., p.76-80).

John C. McKay, M.S.W., a licensed clinical social worker present while Mr. Scanlin reviewed with Donald his Last Will, and who witnessed the will signing on August 2, 2010, testified in his affidavit as follows:

2. I am a licensed clinical social worker with an office located at 1514 Shoshone Street, Boise, Idaho 83705.

3. I have a Bachelor's degree from Boise State University and a Master of Social Work degree from Our Lady of the Lake University, San Antonio, Texas.

4. I have over 35 years of experience as a licensed clinical social worker and over 15 years of experience serving as a court-appointed court visitor in guardianship and conservatorship cases.

5. On August 2, 2011, I met Donald Taylor and his son Michael Taylor at Scanlin Law Offices, PLLC located in Boise.

6. I was asked by attorney Steven F. Scanlin and agreed to serve as a witness in Donald's will signing ceremony.

7. Prior to the signing ceremony, I was present while Mr. Scanlin reviewed with Donald his last will and other estate planning documents.

8. During the meeting, both Mr. Scanlin and Donald mentioned several times that Donald was leaving his entire estate to Michael.

9. Based upon my observations and perceptions, Donald responded appropriately to the questions posed to him by Mr. Scanlin during the meeting. Based upon my observations and perceptions, there was no question that Donald clearly understood

his will, that he knew what he was doing, that it was his intention to leave his entire estate to Michael, and that the entire process was pretty straightforward and uncomplicated.

10. Based upon my observations and perceptions, Donald did not appear to be stressed, hurried or uncomfortable during the entire meeting while I was present.

11. During the meeting I had the opportunity to visit with Donald. Donald talked about his time living in California and working for the San Francisco Police Department. Donald also talked about having other kids besides Michael.

12. During the meeting Donald appeared to be a pretty vital man. He had good eye contact and seemed sharp and alert. He did not appear to be frail, fragile or dull.

13. Based upon my observations and perceptions, there were never any issues with regard to Donald's mental competency.

(Clerk's Certificate of Exhibits, p. 278, Confidential Exhibit 1, Aff. of John C. McKay).

Esther Halone, a caregiver for Donald, testified in her affidavit as follows:

3. I first met Donald Taylor, Michael Taylor, and Sarah Taylor at the end of June or early July of 2010.

4. Michael and Sarah were newlyweds living with and caring for Donald, who was in his late '70s and had recently lost his wife. I was hired to provide caregiver services for Donald and to provide Michael and Sarah with a temporary break from the responsibility of providing daily care. I started work on July 4, 2010.

5. I provided caregiver services to Donald four to six hours per day, three to four days per week. My caregiver services included companionship, conversation, meal preparation, light housekeeping, and activities such as going on drives, walks, and visiting parks, nurseries, and garden stores to look at plants and flowers.

6. I also drove Donald whenever he had to attend Sunday mass or run errands because Michael told me that Donald was diagnosed with macular degeneration and was not supposed to drive per his doctor's orders. Donald said that because of his macular degeneration some things appeared blurry to him. Other than that, Donald said he could still see fine.

7. In my opinion, based upon my observations and perceptions, I would describe Donald as "strong-willed" and "sharp as a whip."

8. In my opinion, based upon my observations and perceptions, there were never any issues with regard to Donald's mental capacity. Donald and I often had long conversations about our personal lives. Donald talked about his deceased wife Bernice, his time living in Sonoma, and being a captain with the San Francisco Police Department. When asked, Donald would also tell me the names of all 11 of his children, in their birth order, stated where each of his children lived, who they were married to, what they liked and disliked, and whether his children had children of their own and the names of those children. Donald always responded appropriately to my questions.

9. Michael and Sarah never complained to me about taking care of Donald. From my experience, Donald was a very picky eater and I observed Sarah cooking special meals just for him. I also observed Michael as being very kind, patient, gentle, and attentive to Donald. For example, if Donald asked Michael to go to the store to get something, Michael would drop or quickly finish whatever he was doing and go. I was amazed that Michael and Sarah could keep going above and beyond. In my opinion, based upon my observations and perceptions, Michael and Sarah are very special people.

10. In my opinion, based upon my observations and perceptions, Donald and Michael got along very well. They had a nice, peaceful, compatibility, and seemed happy being together. The relationship between them was not about materialistic things. Donald and Michael genuinely loved each other.

> 11. With regard to Donald's other children, I remember one of Donald's children named Gina calling Donald sporadically. I also remember Donald's oldest child, Debbie, calling to talk to Donald. Debbie also visited Donald while I was working as a caregiver. I do not remember any of Donald's other children calling or visiting Donald while I worked as Donald's caregiver up until his date of death.
>
> 12. On one particular day, when Donald and I were alone, I remember him saying to me that he and Mike went to see a lawyer and that he had signed some papers. In my opinion, based upon my observations and perceptions, Donald seemed happy after he told me this information.

(Affidavit of Esther Halone, R., p. 81-84).

Clay H. Ward, Ph.D., examined Donald on June 16, 2010, approximately seven weeks prior to the date Donald signed his Last Will, and testified at his deposition as follows:

> Q: So according to your report, Mr. Taylor indicated that he had 11 children; is that right?
> A: Yes, that -- and I don't know if that was during -- yeah, I think it was during our conversation, but it's also on the form.
>
> * * * * *
>
> Q: Did you question Mr. Taylor, Donald Taylor, as to the nature and extent of his assets?
> A: No, I did not.
> Q: Did you question Mr. Taylor about the nature of the act of making a will or trust?
> A: No, I did not.
> Q: Did you question Mr. Taylor about the disposition of his property in a will or trust?
> MR. ELLIS: Objection. Asked and answered.
> A: No, I did not.
>
> * * * * *

Q: Do you know if Donald's condition impacted his ability to know his family, to know his property, and to know whom he wished to leave his property on August 2, 2010?
MR. ELLIS: Objection. Asked and answered.
A: I believe he would definitely know his family based on where he was at on June 16th. The rest of that, I would not know.

(Affidavit of Eric R. Glover, Ex. "A", R. p. 85-91).

Dr. Ward did not testify that Donald lacked any of the elements of testamentary capacity. Rather, Dr. Ward testified that Donald knew his family and acknowledged that he did not ask Donald any questions concerning his property or estate planning.

There is no evidence to support Jeffrey's claim that Donald lacked testamentary capacity. Thus, there is no genuine issue of material fact. Michael was and is entitled to judgment as a matter of law.

3. Attorneys Fees on Appeal.

The Magistrate Court found that the requirements for testamentary capacity are well established under Idaho law and that Jeffrey presented no evidence showing any genuine issue of material fact that Donald lacked testamentary capacity on August 2, 2010, the date of execution of his Last Will and Testament. This ruling was affirmed by the District Court. Although the District Court determined that "Jeffrey did not submit any evidence that the decedent lacked testamentary capacity at the time of the execution of his will," the Court on the issue of attorneys' fees stated it "is not left with the abiding belief that the issue was not fairly debatable or colorable." Hence, in denying Michael's request for attorneys' fees, the District Court found that the appeal was not frivolous, nor was it brought unreasonably or without foundation.

Jeffrey again argues in this appeal that there is a genuine issue of material fact as to Donald's testamentary capacity on August 2, 2010, without addressing the elements or presenting any evidence required to show a lack of testamentary capacity. Accordingly, it is clear that Jeffrey has brought and pursued this appeal frivolously, unreasonably and/or without foundation and Michael respectfully requests an award of attorneys' fees against Jeffrey pursuant to Idaho Code § 12-121 and Rule 41 of the Idaho Appellate Rules.

CONCLUSION

The record clearly supports the findings of fact and conclusions drawn by the Magistrate Court and affirmed by the District Court that there was no triable issue as to any material fact as to the issue of whether Donald lacked testamentary capacity at the time he executed his Last Will. Therefore, the decision of the District Court should be AFFIRMED as to Donald's testamentary capacity. Further, Michael requests that this Court award attorneys fees against Jeffrey, since Jeffrey did not submit any evidence that Donald lacked testamentary capacity at the time of the execution of his Will.

DATED this 16th day of May, 2013.

EBERLE, BERLIN, KADING, TURNBOW & McKLVEEN, CHARTERED

By: _____
Joseph H. Uberuaga, II, of the Firm

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16th day of May, 2013, I caused to be served **two (2)** true and correct copies of the foregoing document upon the following individual(s)/entity(ies), by the method indicated, and addressed as follows:

Allen B. Ellis Ellis Law, PLLC 12639 W. Explorer Drive, Suite 140 Boise, Idaho 83713	[x] U.S. Mail, Postage Prepaid [ ] Hand Delivery [ ] Facsimile

Joseph H. Uberuaga, II