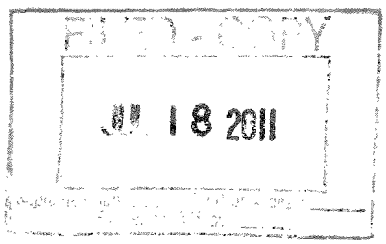
7-18-2011

In re Estate of Conway Appellant's Brief Dckt. 38430

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF THE ESTATE OF KATHLEEN R. CONWAY, DECEASED.	)	
TANYA WOODEN,	)	SUPREME COURT DOCKET NO. 38430-2011
Petitioner-Appellant,	)	
v.	)	
W. CECIL MARTIN, Personal Representative of the ESTATE OF KATHLEEN R. CONWAY and DEAN VIERS,	)	
Respondents-Respondents on Appeal,	)	
and	)	
TANYA S. VIERS,	)	
Respondent,	)	
and	)	
BRUCE BOYDEN, Chapter 7 Trustee,	)	
Intervenor-Appellant.	)	



APPELLANTS' BRIEF

Appeal from the District Court of the Second Judicial District for Nez Perce County

Honorable Carl B. Kerrick, District Judge Presiding

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I. STATEMENT OF THE CASE

A. NATURE OF THE CASE

Appellant-Petitioner, Tanya Wooden ("Ms. Wooden"), appeals a decision of the magistrate court in Nez Perce County, denying the claim of Ms. Wooden that a subsequently executed will was the product of undue influence.

For over fifty years, this Court has recognized the unique difficulty of establishing the existence of undue influence upon a testator of a will where the party alleged to have exerted the undue influence occupies the dual role of fiduciary and a beneficiary. In such circumstances, Idaho law imposes a presumption that the executed will was the product of undue influence. The burden is squarely placed on the fiduciary/beneficiary to rebut the presumption of undue influence. This rule serves to protect the infirm from exploitation and to safeguard the true intent of the testator; for as this Court has explained, the ability to demonstrate undue influence under these circumstances would be rare, if not impossible.

Ms. Wooden asks this Court to reaffirm the established rule and hold that a court's order premised upon findings of fact and conclusions of law that fail to apply the proper presumption cannot stand in this State. In this case, not only did the magistrate court fail to apply the proper presumption, but it then anchored its conclusion upon findings of fact that all parties agree to be erroneous. The prejudice to Ms. Wooden by the magistrate court's improper approach to the burden in this case is further exacerbated by several incorrect evidentiary rulings, including the exclusion of evidence as irrelevant or inadmissible hearsay and the reliance upon lay testimony to provide an expert opinion.

Having set forth the legal, factual and evidentiary errors of the magistrate court in this brief, Ms. Wooden asks the Court to remand this case for a new trial; a trial in which the recognized and established protection afforded to Ms. Wooden and the testator—that being the presumption of undue influence—shall be recognized by the trial court.

B. COURSE OF PROCEEDINGS

On March 15, 2009, Kathleen Conway died at the age of 84, after a long battle with dementia.[1] On June 9, 2009, Respondent Cecil Martin ("Mr. Martin") filed with the Court a will signed by the decedent, Ms. Conway on May 21, 2004.[2] On June 10, 2009, Mr. Martin was appointed personal representative in informal probate proceedings, and the May 21, 2004 Will was admitted to informal probate.[3] On June 15, 2009, Ms. Wooden filed a Notification of Competing Will. On June 24, 2009 Ms. Wooden filed a Petition for Formal Probate of Will claiming that the May 21, 2004 Will was invalidly executed as a result of lack of testamentary capacity and undue influence, leaving the January 25, 2001 Will as the last valid Last Will and Testament of Ms. Conway.[4]

On November 30, 2009, a trial was held on the issue of whether Ms. Conway had testamentary capacity to execute the May 21, 2004 Will and whether that Will was a product of undue influence.[5] On January 8, 2010, the trial court orally announced its findings of fact and conclusions of law in open court, denying Ms. Wooden's claims.[6]

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[1] R. Vol. I, p.12, L. 25-27, Exh. Tr. 11/30/09, p.43-47, & Pltf. Exh. 2, p. 31.
[2] R. Vol. I, p.12.
[3] R. Vol. I, p.15-16.
[4] R. Vol. I, p.33-40.
[5] Exh. Tr. 11/30/09 p.1, L.1.
[6] R. Vol. I, p.112, p.4 L.1.

Ms. Wooden appealed the magistrate court's decision to the district court on March 4, 2010.[7] After briefing, oral argument was held on September 14, 2010.[8] The District Court issued its opinion and order on November 29, 2010, affirming the magistrate court's determination.[9] Ms. Wooden timely filed a Notice of Appeal to the Idaho Supreme Court.

On June 2, 2011, the Supreme Court granted a Motion to Intervene filed by Chapter 7 Trustee, Bruce Boyden. Bruce Boyden served as the Trustee in a bankruptcy proceeding filed by Ms. Wooden. Pursuant to this Court's Order, the parties filed a Motion to Augment the Record with the docket from Ms. Wooden's bankruptcy case. That augmentation included a May 12, 2011 order by U.S. Bankruptcy Judge Patricia Williams, allowing Ms. Wooden and Mr. Boyden to continue pursuit of her claim in this matter.

II. STATEMENT OF FACTS

This case centers on whether Kathleen Conway was unduly influenced when she executed the May 21, 2004 will ("the 2004 Will"). Ms. Wooden asks this Court to determine whether the magistrate court failed to impose a presumption of undue influence and then refused to apply the evidence in accordance with the presumption. When determining the issue of undue influence, a court considers "all the facts and circumstances" and weighs them collectively. *See In re Lunders' Estate*, 74 Idaho 448, 454–55, 263 P.2d 1002, 1006 (1953) (internal citation omitted). Therefore, this Statement of Facts must begin long before the Ms. Conway executed the 2004 Will.

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[7] R. Vol. I, p.120-24.
[8] R. Vol. I, p.141-59
[9] *Id.*

Kathleen Ruth Conway was raised in Weiser, Idaho.[10] In 1946, she married Wayne Martin, whom she divorced in 1963.[11] While married to Wayne, Ms. Conway gave birth to three children: Tanya Viers, Kathye Ingram, and Cecil Martin.[12] Although these are Ms. Conway's only children, she also had a significant and close relationship with her niece, Ms. Wooden.[13] The close familial nature of this relationship is relevant to understanding the unusual character of the change in Ms. Conway's testamentary disposition.

Ms. Wooden was born in 1942 to Kathleen Conway's sister.[14] As a result of a bitter divorce proceeding, Ms. Wooden was sent to live with Ms. Conway as a young child.[15] In fact, Ms. Wooden's first memories are of living with her aunt.[16] Ms. Wooden also lived with Ms. Conway during her seventh grade year, her senior year and several summers.[17] Throughout her childhood, Ms. Wooden's "family situation wasn't good, and Kay [Ms. Conway] was always there to bail me out and take care of me."[18] Ms. Conway's care of Ms. Wooden was the foundation for a relationship that would last throughout Ms. Conway's life. When living with the Conways, Ms. Wooden would help around the house and farm.[19] Later, Ms. Conway and Ms. Wooden became adult friends and confidants.[20] Ms. Wooden helped Ms. Conway move

[10] Pltf. Exh. 2, p. 31.
[11] *Id.*
[12] Exh. Tr. 11/30/09, p.145, L.20-21 & p.16-17.
[13] *See id.* at p.14-18.
[14] *Id.* at p.14, L.20-24.
[15] *Id.* at p.15, L.7-12.
[16] *Id.*
[17] *Id.* at p.15, L.21-22.
[18] *Id.* at p.15, L.24-25.
[19] *Id.* at p.16, L.3-8.
[20] *Id.* at p.17, L.13-19.

after her divorce, cared for Ms. Conway after she had surgery, and would frequently visit Ms. Conway.[21]

Ms. Conway's actions demonstrate that she too felt a close relationship with Ms. Wooden. In addition to caring for Ms. Wooden throughout her childhood, Ms. Conway named her firstborn child, Tanya Viers, after Ms. Wooden.[22] From then on, Ms. Wooden would be known as "big Tanya" and Ms. Viers as "little Tanya".[23] Ms. Conway confided in Ms. Wooden, relied on her after surgery, and traveled to care for Ms. Wooden after her heart attack in 1988 and later after her open heart surgery in 1990.[24] Her actions revealed that she considered Ms. Wooden as a child, even making an equal allotment for Ms. Wooden with the rest of the children in the last will and testament she executed on January 25, 2001 (the "2001 Will").[25] The 2001 Will provided the following distributions: 80% of Ms. Conway's estate was to "be divided evenly, per stirpes, among my children, to wit: KATHYE INGRAM, CECIL MARTIN, and TANYA VIERS; and my niece, TANYA WOODEN so that each individual named receives 20% of my estate." The remaining 20% was to be divided equally among her grandchildren living at the time of her death.[26]

On January 4, 2001, just prior to signing the 2001 Will, Ms. Conway visited a doctor, concerned that she was experiencing a significant decrease in memory functioning, and trouble with her thinking.[27] Dr. Craig W. Beaver, a licensed psychologist of Boise, Idaho, found that

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[21] *Id.* at p.17-18.
[22] *Id.* at p.16, L.22-23.
[23] *Id.* at p.16-17.
[24] *Id.* at p.17-18.
[25] R. Vol. I, p.36-40.
[26] *Id.* at p.37, L.18-21.
[27] Pltf. Exh. 13, p.100042-45.

while Ms. Conway was currently functioning "in the upper range of low average for intellectual skills and abilities, with substantial deficits in executive problem solving and memory," "there [was] significant dementia."[28] Ms. Conway had a ventriculoperitoneal shunt system implanted on January 30, 2001 to relieve the buildup of fluid of the brain, in an attempt to counter some of the identified mental problems.[29]

Although the shunt provided some initial positive results, by January 2003 Ms. Conway's condition worsened despite adjustments made to her shunt.[30] In August 2003, she was assessed to be suffering from Alzheimer's Disease with dementia.[31] Ms. Conway's struggle with Alzheimer's Disease with dementia appears to have gone untreated from August 19, 2003 through the time at which she executed the 2004 will, approximately nine months' time.[32] Eventually, Ms. Conway's mental condition deteriorated to the point that on February 25, 2004, Respondent Mr. Martin, her son, filed a petition to be appointed as her guardian and conservator.[33]

On February 5, 2004, Altha M. Bish, a personal friend of Kathleen Conway, had also filed a Petition for Appointment of Guardian and Conservator in the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon, Case No. CV 04-1241, on behalf of Ms. Conway.[34] Attached to Petitioner's Exhibit 3 is the Affidavit of

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[28] *Id.*
[29] *Id.* at p.100041.
[30] *Id.* at p.100022, 38.
[31] *Id.* at p.100013.
[32] Exh. Tr. 11/30/09, p.43, L.10-14.
[33] Pltf. Exh. 5.
[34] Pltf. Exh. 3. Although at the trial the court sustained a hearsay objection to Ms. Wooden's Exhibit Nos. 1, 3, 6 and 7; the court later admitted those exhibits for the limited purpose of the support they provided for the opinion of the Petitioner's expert psychologist, Dr. Kevin Kracke. R. Vol. I, p.112, p.6, L.9-13.

Toni Thompson, an Adult Protection Worker for the Area III Agency on Aging, Adult Protection Services.[35] Ms. Thompson states, among other things, the following:

> 9. That Kathleen Conway has shown evidence of self-neglect in that she is unable to remember appointments with physicians. She is unable to cook for herself consistently and goes to the home of her friend, Altha Bish, for most meals.
>
> . . .
>
> 10. That Kathleen Conway is unable to manage her finances and has required others to assist with paying her bills and managing her financial accounts.
>
> 11. That Kathleen R. Conway shows inability to seek governmental or community services and she is unable to recall the information given to her or to follow through with appointments or requests for paperwork.
>
> . . .
>
> 13. That Kathleen R. Conway has specifically requested that her children not be appointed as her guardian. She has stated her relationship with them is considerably difficult and strained.

On February 25, 2004, two children of Ms. Conway, Kathye Ingram and Mr. Martin, filed a cross-petition for appointment of guardian and conservator, indicating that Ms. Conway was mentally incapacitated, unable to manage her personal and financial affairs, or make reasoned decisions as to health care.[36] Furthermore, Mr. Martin, through his attorney, filed the Affidavit of Megan Lowe on February 27, 2004 in Ms. Conway's guardianship and conservatorship proceeding.[37] Attached to that affidavit is a copy of the 2001 Will.[38] Mr. Martin

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[35] *Id.*
[36] Pltf. Exh. 5 & Exh. Tr. 11/30/09, p.160, L.1-10.
[37] Exh. Tr. 11/30/09, p.165, L.10-25 & Pltf. Exh. 1.

knew of the existence of the 2001 Will at the time of Ms. Conway's guardianship and conservatorship proceeding and actually used it to support his position to become guardian of Ms. Conway.[39] Mr. Martin was further aware that a physician's report had been filed in the guardianship and conservatorship proceeding, finding that Ms. Conway was incapacitated for the reason of dementia.[40]

Mr. Martin was also aware during the guardianship and conservatorship proceedings that a court appointed visitor, Mike Neher, a retired Idaho social worker, had filed a Visitor's Report that Ms. Conway "feels quite alienated from her three children . . .", that "[s]he seems to feel exploited and neglected by her three children," and "she does not trust her children to help in the management of her affairs; that she has indicated that, if it appears that they were appointed as guardians in her behalf, that they would not consult with her about things in which she might be otherwise wish to be involved in decision making."[41]

Based upon a stipulation of the parties in the conservatorship and guardianship proceeding, an Order of Limited Guardianship and Order Appointing Conservator was entered on March 31, 2004, appointing Mr. Martin as limited guardian of Ms. Conway and Tresco Trust and Estate Services Company as conservator for Ms. Conway.[42]

Soon after being appointed her guardian and conservator—sometime in early April 2004—Mr. Martin took Ms. Conway to visit attorney Michael Wasko.[43] The meeting with Mr. Wasko was set up by Cecil Martin, and although Mr. Martin and Mr. Wasko knew each

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[38] Exh. Tr. 11/30/09, p.165, L.10-25 & Pltf. Exh. 1.
[39] Exh. Tr. 11/30/09, p.165, L.25 & p.166, L.1-2.
[40] Exh. Tr. 11/30/09, p.161, L.1-6 & Pltf. Exh. 6.
[41] Exh. Tr. 11/30/09, p.161-64 & Pltf. Exh. 7.
[42] Pltf. Exh. 2.
[43] Exh. Tr. 11/30/09, p.152 L.7-15.

other since around the 1970s, Ms Conway had never met with Mr. Wasko before this meeting.[44] Mr. Martin attended the first 15 to 20 minutes of the meeting between Ms. Conway and Mr. Wasko.[45]

At the time Ms. Conway signed the 2004 Will, Mr. Wasko was unaware that she had been diagnosed with dementia, and he had not received either the Physician's Report or the Visitor's Report from Mr. Martin.[46] Nor did Mr. Martin disclose the facts of these proceedings to Mr. Wasko.[47] Mr. Wasko stated that, had he known about the content of the Visitor's Report, he would have preferred to have someone other than Ms. Conway's children present at the time he questioned her about her competency.[48] Finally, Mr. Wasko admitted to the possibility that his memory with regards to events that happened with Ms. Conway were not accurate due to a medical condition,[49] and that he could not render an opinion to a reasonable degree of professional certainty as to the capacity of Ms. Conway at the time she executed the 2004 Will.[50]

Rather than take Ms. Conway to her court appointed guardian ad litem and attorney, Julie DeFord, for changes to her estate plan, Mr. Martin instead took her to Mr. Wasko.[51] Neither did Mr. Martin take Ms. Conway to the attorney who drafted her prior Will. In fact, he did not inquire of Ms. Conway who her preferred estate planning attorney was at all.[52] When Mr. Wasko met with Ms. Conway on the day the Will was signed, he did not ask her questions

[44] Exh. Tr. 11/30/09, p74.
[45] Exh. Tr. 11/30/09, p.155, L.14-24.
[46] Exh. Tr. 11/30/09, p.87, L.16-25 & p.88, L.1-55 & p.91, L.8-25.
[47] Exh. Tr. 11/30/09, p.116, L.21-25 & p.117, L.1-10.
[48] Exh. Tr. 11/30/09, p.92-94 & p.93, L.9-13.
[49] Exh. Tr. 11/30/09, p.118, L.15-20.
[50] Exh. Tr. 11/30/09, p.94, L.8-25.
[51] Exh. Tr. 11/30/09, p.169, L.2-10.
[52] Exh. Tr. 11/30/09, p.170, L.3-6.

Mr. Wasko met with Ms. Conway on the day the Will was signed, he did not ask her questions regarding the extent of her property.[53]

The result of the 2004 Will is that Ms. Wooden's share of the estate was diminished from 20% to approximately 1.4% of the estate. Under the 2004 Will, Mr. Martin's share of the estate as a beneficiary is increased from 20% to 30%.

III. ISSUES PRESENTED ON APPEAL

1. Whether the Magistrate Court erred in its application of the legal presumption of undue influence to fiduciaries.

2. Whether the Magistrate Court erred in holding that statements made by the decedent, Ms. Conway, to the Petitioner constituted inadmissible hearsay or were otherwise irrelevant.

3. Whether the Magistrate Court erred in refusing to admit documents as inadmissible hearsay that were filed in Ms. Conway's guardianship and conservatorship proceeding.

4. Whether the Magistrate Court erred in relying upon the opinion of the preparer of the May 21, 2004 Will, Michael P. Wasko, as to Ms. Conway's testamentary capacity.

5. Whether the Magistrate Court erred in relying upon facts, which have no substantial and competent support in the record and are clearly erroneous.

[53] Exh. Tr. 11/30/09, p.121, L.3-6.

IV. ARGUMENT

A. STANDARD OF REVIEW.

"When reviewing a decision rendered by the district court in its appellate capacity under I.R.C.P. 83(a), this Court considers the record before the magistrate court independently of the district court, while giving due regard to the district court's analysis." *Leavitt v. Leavitt*, 142 Idaho 664, 668, 132 P.3d 421, 425 (2006). The Supreme Court exercises free review in determining the proper interpretation, construction and application of the law. *Lattin v. Adams County*, 149 Idaho 497, 500, 236 P.3d 1257, 1260 (2010). The Court reviews a trial court's decision to exclude evidence as hearsay under an abuse of discretion standard. *Jeremiah v. Yanke Machine Shop, Inc.*, 131 Idaho 242, 246, 953 P.2d 992, 996 (1998). Review of the trial court's findings of fact is limited to determining whether the findings are clearly erroneous. *Id.* Only if the trial court's findings of fact and conclusions of law are free from error may the reviewing court affirm the magistrate judge's decision. *See Montgomery v. Montgomery*, 147 Idaho 1, 5, 205 P.3d 650, 654 (2009).

B. THE MAGISTRATE COURT ERRED IN ITS APPLICATION OF THE LEGAL PRESUMPTION OF UNDUE INFLUENCE TO FIDUCIARIES.

Ms. Wooden challenges the magistrate court's refusal to apply the judicial presumption of undue influence in this case as legal error. "[W]here parties occupy the dual role of fiduciary and beneficiary, . . . Idaho law creates a rebuttable presumption of undue influence." *In re Estate of Roll*, 115 Idaho 797, 799, 770 P.2d 806, 808 (1989). Neither party disputes that the evidence produced at trial established two facts: (1) Mr. Martin occupies the role of a beneficiary of Kathleen Conway's estate; and (2) at the time of the execution of the 2004 Will, Mr. Martin

occupied the role of a guardian of Ms. Conway. As a guardian, Mr. Martin was a fiduciary of Kathleen Conway. Therefore, the magistrate court erred by failing to require Mr. Martin rebut the legal presumption of undue influence.

Undue influence will be held to exist when there has been sufficient evidence presented indicating the testator's free agency was overcome by another. *In re Estate of Roll*, 115 Idaho at 799, 770 P.2d at 808; *see also King v. MacDonald*, 90 Idaho 272, 279, 410 P.2d 969, 972 (1965). A court will rarely find "direct evidence" of undue influence, instead it "must determine the issue of undue influence by inferences drawn from all the facts and circumstances." *In re Lunders' Estate*, 74 Idaho at 454-55, 263 P.2d at 1006 (internal citation and quotation marks omitted). In cases where a fiduciary does *not* hold a position of unusual influence or control over the testator, the party seeking to challenge a will based on undue influence must prove: (1) the testator is subject to influence; (2) there was an opportunity to exert undue influence; (3) the person who purportedly influenced the testator had a disposition to exert undue influence; and (4) the result indicates undue influence. *Gmeiner v. Yacte*, 100 Idaho 1, 6-7, 592 P.2d 57, 62-63 (1979). However, where the suspect fiduciary *does hold* a position of unusual influence or control over the testator, the court's analysis begins elsewhere.

Idaho courts presume undue influence exists when either: (1) a party occupies the roles of both fiduciary and beneficiary, *or* (2) the fiduciary was actively involved in preparation of the will or served as a witness. *Estate of Roll*, 115 Idaho at 799, 770 P.2d at 808. The advent of the legal presumption of undue influence—like so many other developments in the law—arose from the courts' recognition of the realities and limitations of probate disputes. As this Court has explained, even under scenarios where the testator had no need for the assistance of others in his

or her testamentary affairs, "[d]irect evidence as to undue influence is rarely obtainable." *In re Lunders' Estate*, 74 Idaho 448, 454-55, 263 P.2d 1002, 1006 (1953) (internal citation and quotation marks omitted). If this is a true statement for such scenarios, then *a fortiori* it is true for situations in which a beneficiary also holds a position of unusual influence or control over the testator. Therefore, where the trial court finds that a beneficiary of the estate was also a fiduciary of the testator, the court must begin by holding the beneficiary-fiduciary to his burden of rebutting the presumption of undue influence.

Mr. Martin held the roles of fiduciary and beneficiary. In Mr. Martin's petition to be appointed as Kathleen Conway's guardian, he represented to the district court that his mother was an incapacitated person and that her "mental incapacity, her inability to manage her personal affairs, or to make reasoned decisions as to her health care" were grounds for his appointment.[55] The result of that proceeding was that the court recognized Ms. Conway as "the incapacitated and protected person," and appointed Mr. Martin as guardian of Ms. Conway.[56] The court limited the guardianship to matters concerning her health and well-being, including place of residence.[57] As her guardian, Mr. Martin held a position of trust, knowledge and control over Ms. Conway, her actions and her health; his relationship to her became that of a fiduciary. *See Wyman v. Dunne*, 83 Idaho 179, 187-88 359 P.2d 1010, 1015 (defining the term "fiduciary" by the nature of the relationship between the parties when determining whether undue influence was exerted).

[55] Pltf. Exh. 5 & Exh. Tr. 11/30/09, p.160, L.1-10.
[56] Pltf. Exh. 9.
[57] *Id.*

The record demonstrates that the magistrate court failed to apply the presumption of undue influence. First, the trial court decision does not state that it was applying the presumption of undue influence, nor does it provide any discussion as to whether Mr. Martin rebutted the presumption. Second, the legal analysis that can be inferred from the language of the decision indicates that the court did *not* apply the presumption. As set forth below, this inference arises out of the court's reliance upon an erroneous finding of fact and the absence of a discussion of the applicable legal standards.

The court begins its discussion of the presumption of influence by looking at the nature of Mr. Martin's guardianship over Ms. Conway. The court states that Mr. Martin was a co-guardian along with his sister, Tanya Viers.[58] This finding is clearly erroneous.[59] The court's reliance upon the finding demonstrates that it did not apply the presumption. Because the court found Tanya Viers to be a co-guardian, it found it relevant that "we never had any testimony of [Tanya Viers exerting undue influence]. It was all centered on Mr. Martin. And there's been nothing raised about her role in this instance."[60] The court's language demonstrates that if indeed Tanya Viers was a co-guardian as the Court believed, it would have required affirmative evidence by Ms. Wooden of undue influence rather than applying the presumption. The Court uses a similar approach with respect to Mr. Martin.

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[58] R. Vol. I, p.116, p.23, L.5-13.

[59] *See infra* Part F, pp. 26.

[60] R. Vol. I, p.116, p.23, L.5-13.

> THE COURT: "The thing that I think we need to look at initially is, this was a co-guardianship. That means that—and in this situation, presumably Tonya (sic) Viers had the same situation here where she received benefit from the change in the will, and presumably she also was exerting undue influence, if you read the estate of Roll. But we never had any testimony of that. It was all centered on Mr. Martin. And there's been nothing raised about her role in this instance."

The court stated that it found the limited nature of Mr. Martin's guardianship significant.[61] As above, this language demonstrates both the court's failure to apply the presumption and its misunderstanding of the nature of the limitation of Mr. Martin's guardianship. If the court was applying the presumption, there exists no plausible reason for it to state that it found the limited nature of the guardianship to be significant. Further, the guardianship order did not limit Mr. Martin's powers as guardian, but instead required him to (1) consider the wishes of his mother, and (2) respect her friendship with Altha Bish. Although the order's language was likely comforting to Ms. Conway and Ms. Bish, it did not circumscribe the power Mr. Martin could exercise as guardian under Idaho statute.

After the above two discussions, the trial court provided no further language regarding the presumption. Instead, the court proceeded to discuss the four factors for determining undue influence that apply when no presumption is found.[62] The language of the court's discussion evidences its understanding that Ms. Wooden carried the burden as to proving undue influence. Had the court applied the presumption, its focus would be on whether Mr. Martin offered evidence establishing that Ms. Conway was not unduly influenced.

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[61] R. Vol. I, p.116, p.23, L.14-25.

> THE COURT: "In this instance, the Court needs to look if there was a separation, too, of the roles of guardian and conservator. There's no proof that Mr. Martin knew the extent of the estate. I presume he had an idea because of the pleadings in the guardianship, but he was not directing management of the funds of the ward.
>
> So, I—it's significant in this instance that there was a limited guardianship. There may have been a fiduciary responsibility here, but I view—the Court finds that that fiduciary responsibility was limited by the very language of the guardianship, which provided for input in decision-making by Ms. Conway."

[62] R. Vol. I, p.117, p.24, L.1-9.

This Court has stated the difficulties with inferring a trial court's decision based upon non-specific findings and conclusions. *See The Highlands, Inc. v. Hosac*, 130 Idaho 67, 70, 936 P.2d 1309, 1312 (1997). If the Court must rely upon inference, the fact that the trial court did not discuss the presumption or the heightened level of scrutiny it required supports a holding that the trial court failed to apply the presumption. When a fiduciary relationship exists, the law will imply "a condition of superiority held by the one over the other so that in every transaction between them in the nature of a deed, gift, contract, or the like by which the superior party obtains a possible benefit, the existence of undue influence and the invalidity of the transaction is presumed." *In re Randall's Estate*, 64 Idaho 629, 132 P.2d 763, 772 (1942). Where the establishment of the confidential relationship coincides with a sudden shift in the testator's designation of beneficiary, strict scrutiny of the testamentary disposition is warranted. *Gmeiner*, 100 Idaho at 7, 592 P.2d at 63. Because courts typically have greater concern for testators who have been deemed incapable of handling their own affairs or who have "undergone marked deterioration of mind and body shortly before the grant," bequests made by a ward in favor of his guardian are particularly deserving of close review. *Id.* at 7-8, 592 P.2d at 63-64. The court's decision contains no discussion of these authorities or that it applied the standards contained therein to Mr. Martin.

Ms. Wooden established the only two facts necessary for application of the presumption of undue influence: (1) Cecil Martin was a fiduciary of Ms. Conway and (2) Cecil Martin was a beneficiary of Ms. Conway's estate. Instead of deciding whether or not Mr. Martin rebutted the presumption of undue influence, the court focused on the lack of testimony presented by Ms. Wooden and that "the record is void, again, of any solicitation on the part of the guardians to

Ms. Conway."[63] The court nowhere stated that the presumption applied to Mr. Martin or that he affirmatively produced evidence rebutting the presumption. With no explicit language, we are left to draw implications from the court's analysis. That analysis implies that the court decided the presumption should not be applied.

C. THE MAGISTRATE COURT ERRED IN HOLDING THAT STATEMENTS MADE BY MS. CONWAY TO MS. WOODEN CONSTITUTED INADMISSIBLE HEARSAY OR WERE OTHERWISE IRRELEVANT.

Ms. Wooden challenges the magistrate court's exclusion of statements made by Ms. Conway on grounds of hearsay and relevance as an abuse of discretion. Ordinarily, statements made by a testator before and after execution of the will are inadmissible hearsay if not part of the res gestae. *King v. MacDonald*, 90 Idaho 272, 278, 410 P.2d 969, 972 (1965). "However, declarations of a testator pertaining to his mental condition may be admissible to prove his inability to resist the influence of others." *Id.* At trial, Ms. Wooden sought to provide the court with declarations made by Ms. Conway proving her mental condition as to her children's control over her actions. This testimony was challenged at trial and, despite counsel for Ms. Wooden offering to submit authorities on this point subsequent to trial, the court sustained the objection and did not allow the testimony. Therefore, the magistrate court erred by refusing to allow testimony of the declarations of Ms. Conway pertaining to her mental condition to resist the influence of Mr. Martin on grounds of hearsay and relevance.

In *King v. MacDonald*, this Court held that an exception exists to the general rule of hearsay when (1) the issue in dispute is undue influence and (2) the offered out of court statement (a) was made by the testator and (b) is relevant to the testator's ability to resist the

[63] R. Vol. I, p.117, p.27, L.8-10.

alleged influence. *See id.* at 279, 410 P.2d at 972. The *King* Court proceeded to explain the relevant considerations to which the out of court statement must pertain:

> "The existence of undue influence or deception involves incidentally a consideration of the testator's *incapacity to resist pressure* and his *susceptibility to deceit*, whether in general or by a particular person. This requires a consideration of many circumstances, including his state of affections or dislike for particular persons, benefited or not benefited by the will; of his inclinations to obey or to resist these persons; and, in general, of his mental and emotional condition with reference to its being affected by any of the persons concerned."

Id. (quoting 6 Wigmore, Evidence § 1738 (3d ed. 1940) at p. 121) (emphases in original). The *King* Court then provided the guidance that should have been applied in this case:

> **"All utterances and conduct, therefore, affording any indication of this sort of mental condition, are admissible, in order that from these the condition at various times (not too remote) may be used as the basis for inferring his condition at the time in issue."**

Id. (quoting 6 Wigmore, Evidence § 1738 (3d ed. 1940) at p. 121) (emphasis added).

At trial, Ms. Wooden sought to offer testimony about statements made to her by Ms. Conway before, during and after the time in which she executed the 2004 Will. These statements concerned her "affections or dislike for" Mr. Martin, her "inclinations to obey or to resist" Mr. Martin, and her "mental and emotional condition with reference to its being affected by" Mr. Martin.[64] *See id.* These statements "are admissible" as evidence from which the court

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[64] Exh. Tr. 11/30/09, p.19, L.3-13:
[MR. GEIDL]: Q. Was there any point at which you noticed any significant changes in Miss Conway's behavior?

[MS. WOODEN]: A. I noticed prior -- just prior to the time and around the time of the competency hearing, that she was calling me all the time, being quite, I thought,

unreasonable and her expressing anger about her children and things that they had done to her – and that's all she wanted to talk about.

MR. JONES: Objection. Move to strike – to strike on the basis of hearsay.

THE COURT: Sustained.

Exh. Tr. 11/30/09, p.24, L.1-9:
Q. And what – what confusion did you observe?

A. She almost acted like she didn't know me. In fact, a couple of times, she didn't know me. She was confused about Cecil. She called him "that man." She was angry with him for hauling her around the countryside signing papers.

MR. JONES: Objection. Your Honor. This is hearsay.

THE COURT: Sustained.

Exh. Tr. 11/30/09, p.20, L.10-25; p.21, L.1-16; & p.22, L.3-8:
Q. Would she ever speak to you about her children?

A. Oh yeah.

Q. What would she tell you about them?

MR. JONES: Objection. Your Honor. Hearsay.

MR. GEIDL: Your Honor, I do believe that there is an exception to hearsay when it involves a decedent and the situations. This is what I –

THE COURT: You believe that, but where is it? I mean, what specifically are you -- I mean, I read both of your briefs. There's nothing in your brief about this exception. (CONTINUED)

MR. GEIDL: There isn't. I was not aware that those types of conversations between Ms. Conway and either her children or Ms. Wooden were going to be objected to on the basis of hearsay. I can get the Court some --

THE COURT: Well, let me – let's – excuse me for interrupting.

MR. GEIDL: That's fine.

THE COURT: I just want to redirect you a little bit. . . . What relevance is this to the ultimate issue of whether or not she -- I mean, I guess I look at this as, you know, I can be as angry as all get out at my boys, which I do frequently.

MR. GEIDL: Yeah.

THE COURT: But that doesn't mean that somehow I'm going to disinherit them.

may infer undue influence. *See id.* Therefore, the magistrate court abused its discretion when it ruled these statements to be inadmissible hearsay and irrelevant.

D. THE MAGISTRATE COURT ERRED IN REFUSING TO ADMIT DOCUMENTS AS INADMISSIBLE HEARSAY THAT WERE FILED IN MS. CONWAY'S GUARDIANSHIP CONSERVATORSHIP PROCEEDING.

Ms. Wooden challenges the magistrate court's exclusion of documents filed in Ms. Conway's guardianship proceeding on grounds of hearsay as an abuse of discretion. Idaho Rule of Evidence 201 governs judicial notice of adjudicative facts. Under Rule 201, a court "shall take judicial notice" "of records, exhibits, or transcripts from the court file in the same or a separate case" "if requested by a party and supplied with the necessary information." Idaho R. Evid. 201(d). Ms. Wooden requested the magistrate court take judicial notice of specific documents filed in the guardianship proceeding for Ms. Conway, held prior to the execution of the 2004 Will. The parties agreed to the authenticity of each of these documents, but the documents were challenged and excluded as hearsay. The magistrate court abused its discretion by excluding these requested documents.

Idaho Rule of Evidence 201 sets forth when a court may and when a court must take judicial notice of an adjudicative fact. "An adjudicative fact is a controlling or operative fact, rather than a background fact; a fact that concerns the parties to a judicial or administrative proceeding and that helps the court or agency determine how the law applies to those parties." *Martin v. Camas County ex re. Bd. of Comm'rs*, 150 Idaho 508, 248 P.3d 1243, 1247 (2011)

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* * *

THE COURT: You know, certainly [Ms. Wooden] indicated, and I've written down, that [Ms. Conway's] behavior changed. She was expressing more anger. I mean, that's well within the relevancy of this situation. But I'm sustaining the objection based upon hearsay and relevance.

(internal citation, quotation marks and alterations omitted). "[R]ecords, exhibits, or transcripts from the court file in the same or a separate case," including affidavits, fall within the definition of an adjudicative fact. Idaho R. Evid. 201(c) & (d); *see also Hill v. Bice*, 65 Idaho 167, 139 P.2d 1010, 1013-14 (1943). The court, in regards to such records, "*shall* take judicial notice if requested by a party and supplied with the necessary information." Idaho R. Evid. 201(d) (emphasis added). To provide the court with the necessary information, the offering party must (1) identify the specific court documents which she seeks to be notice; (2) demonstrate that those documents are records, exhibits, or transcripts; (3) from the same or a separate case.

Title 9 of the Idaho Code supports this plain language application of Idaho Rule of Evidence 201(d). Idaho Code § 9-101(3) states that courts take judicial notice of public and private official acts of the judiciary. Section 9-310 defines the "judicial record" as "the record or official entry of the proceedings in a court of justice, or of the official act of a judicial officer, in an action or special proceeding." All of the documents which Ms. Wooden sought to admit were filings from the guardianship proceeding that were on the judicial record in that action. Neither the Idaho Rules of Evidence nor Title 9 of the Idaho Code require a greater showing.

Ms. Wooden first sought to admit an affidavit of Megan Lowe, a grandchild of Ms. Conway, and the 2001 Will attached to that affidavit.[65] Mr. Martin's attorney agreed that the document was authentic, but objected that the statements made in the affidavit were hearsay.[66] By stipulating to the authenticity of the document, Mr. Martin agreed that the documents were not in dispute as to the fact that they had been filed with the guardianship court.

[65] Exh. Tr. 11/30/09, p.28, L.11-12.
[66] Exh. Tr. 11/30/09, p.28, L.13-22.

See Idaho R. Evid. 201(b). Ms. Wooden's attorney responded to the hearsay objection by representing to the magistrate court that the document was not being offered for the truth of the matters asserted in the affidavit, but for the truth that Mr. Martin's attorney filed the document with the guardianship court.[67] Because the document was not offered for the truth of the matter asserted, it was not excludable hearsay evidence under Idaho Rule of Evidence 801(c). Rather, it was a judicial document offered as evidence of a fact that was not one subject to reasonable dispute.

Ms. Wooden also sought to admit three other filings from the guardianship case:

(1) Exhibit 3: Petition for Appointment of Guardianship and Conservatorship of an Incapacitated Person by Altha Bish, and attached affidavit of Idaho Adult Protection Worker Toni Thompson;
(2) Exhibit 6: Physician's Report filed by Dr. Michael Djernes, M.D.; and
(3) Exhibit 7: Visitor's Report filed by Idaho Social Worker, Mr. Mike Neher.[68]

Mr. Martin did not question the authenticity of these documents, but objected on grounds of hearsay.[69] The magistrate court sustained this objection.[70] These exhibits were all filed in the guardianship proceeding and, therefore, are the proper subjects for judicial notice. Each of those documents were relevant in that they demonstrate Mr. Martin's knowledge and judicial position at an earlier point in time, and/or demonstrate that Ms. Conway's condition made her susceptible to the exertion of undue influence when she executed the 2004 Will.

[67] Exh. Tr. 11/30/09, p.28, L.23-25 & p.29, L.1-3.
[68] Exh. Tr. 11/30/09, p.41, L.22-23.
[69] Exh. Tr. 11/30/09, p.42, L.1-12.
[70] Exh. Tr. 11/30/09, p.42, L.13-25 & p.43, L.1-3. These exhibits were later admitted for the limited purpose of completing the record as to what information Dr. Kracke (Appellant's expert) relied upon for his opinions.

E. THE MAGISTRATE COURT ERRED IN RELYING UPON THE OPINION OF ATTORNEY MICHAEL P. WASKO RELATED TO MS. CONWAY'S TESTAMENTARY CAPACITY.

Ms. Wooden challenges the court's reliance upon Mr. Wasko's opinion as to Ms. Conway's testamentary capacity as an abuse of discretion. The magistrate court allowed Mr. Wasko to provide what amounted to an expert opinion as to Ms. Conway's testamentary capacity, despite the fact that he conceded in prior testimony that he was unable to render that opinion to a reasonable degree of professional certainty and had very limited knowledge of Ms. Conway's condition at the relevant time. These limitations render Mr. Wasko's opinion speculative or conclusory, requiring its exclusion under Idaho Rule of Evidence 403. Therefore, the magistrate court's refusal to exclude this testimony was an abuse of discretion.

Expert testimony is not without limitation. The party offering expert testimony carries the burden of showing that (1) "the expert is a qualified expert in the field," (2) "the evidence will be of assistance to the trier of fact," (3) "experts in the particular field would reasonably rely upon the same type of facts relied upon by the expert in forming his opinion," and (4) "the probative value of the opinion testimony is not substantially outweighed by its prejudicial effect." *Ryan v. Beisner*, 123 Idaho 42, 47, 844 P.2d 24, 29 (Ct. App. 1992). "An expert's opinion which is unsubstantiated by facts in the record, but which is speculative or conclusory, has little or no probative value, and therefore may be excluded [under Idaho Rule of Evidence 403]." *Id.*

Mr. Wasko sought to offer an opinion as to Ms. Conway's testamentary capacity at the time she executed the 2004 Will.[71] The foundation laid prior to providing this opinion regarded his knowledge and questioning of Ms. Conway at the time of the execution. Thus, Mr. Wasko's expertise was based on his personal knowledge of facts about this case and application of those facts to the legal standard of testamentary capacity. However, Mr. Wasko never explained what that legal standard to be, and never stated that the facts upon which he relied were those regularly relied upon by experts in his field. These omissions make the fact that he could not render an opinion within a reasonable degree of professional certainty even more troubling; experts can opine, but they may not speculate.

Mr. Wasko's testimony should not be rehabilitated because of the court's familiarity with the proper legal standard. Even if the magistrate court inserted its own knowledge of the legal standards and evidence upon which expert's in the legal community reasonably rely to determine testamentary capacity, Mr. Wasko's knowledge falls well short of the standard. At the time Mr. Wasko drafted the will and Ms. Conway signed the 2004 Will, Mr. Wasko was unaware that she had been diagnosed with dementia. He was unaware of the existence of findings of the Physician's Report or the Visitor's Report from the guardianship proceeding. He had no knowledge about the guardianship proceedings whatsoever. He did not inquire into the extent of her property. Furthermore, Mr. Wasko admitted that health issues had significantly impacted his ability to recall certain events accurately. In light of the fact that his opinion was based solely

[71] Exh. Tr. 11/30/09, p.109, L.18-25 & p.110, L.1-2.

upon his memory of Ms. Conway, that admission casts serious doubt on the reliability of his opinion.[72]

When Mr. Martin's attorney sought to illicit Mr. Wasko's opinion as to Ms. Conway's testamentary capacity as of the date of the 2004 Will, Ms. Wooden's counsel objected for lack of foundation.[73] Foundation had not yet been laid establishing (1) the relevant field of expertise, (2) Mr. Wasko's qualifications in that field, (3) the standards by which experts in that field rendered opinions, (4) the information reasonably relied upon by experts in that field, or (5) that Mr. Wasko gathered and relied upon such information. *See Ryan*, 123 Idaho at 47, 844 P.2d at 29. Even if the field of expertise and Mr. Wasko's qualifications in that field can be assumed, without further foundation his testimony amounts to expert speculation. The magistrate court abused its discretion when it overruled the foundation objection, and prejudiced Ms. Wooden by relying on that testimony in making its findings of fact and conclusions of law.[74]

F. THE COURT MADE SEVERAL SIGNIFICANT FINDINGS OF FACT THAT ARE NOT SUPPORTED BY ANY SUBSTANTIAL OR COMPETENT EVIDENCE IN THE RECORD AND ARE CLEARLY ERRONEOUS.

Ms. Wooden challenges the propriety of the court's decision, as it was premised upon several findings of fact that are clearly erroneous. The magistrate court made several clear errors in its findings of fact. Significant to its decision in this case, the magistrate court found that (1) Tanya Viers was a co-guardian with Mr. Martin over Ms. Conway; (2) Mr. Wasko inquired of Ms. Conway as to the extent of her property on the date she executed the 2004 Will; and (3) perhaps most importantly, Mr. Martin only received an addition 3.3% of the estate as a result

[72] For citations to the record, *see supra* Statement of Facts, pp.9-10.
[73] Exh. Tr. 11/30/09, p.108, L.8-13 & p.109, L.24-25.
[74] R. Vol. I, p.113, p.11, L.7-16.

of the change in wills. None of these three facts are supported by any substantial or competent evidence in the record.

1. Tanya Viers Was Never a Co-Guardian or a Guardian of any Sort for Ms. Conway.

The trial court in its oral findings of fact and conclusions of law goes to some length in its discussion of the presumption of undue influence in referencing its belief that Ms. Viers was a co-guardian over Ms. Conway.[75] There is no evidence in the record that Ms. Viers ever held a co-guardianship over Ms. Conway, and, in fact, the evidence shows that Mr. Martin was the only guardian appointed for Ms. Conway.[76] In and of itself this wouldn't necessarily be an issue, except here this erroneous finding of fact clearly illustrates the court's unwillingness to apply the presumption of undue influence to her or to Mr. Martin.

2. Mr. Wasko Did Not Inquire into Ms. Conway's Understanding of the Extent of her Property on the Date the May 21, 2004 Will was Executed.

The trial court in its Findings of Fact found that Mr. Wasko testified that Ms. Conway "was aware of the extent of her property."[77] Mr. Wasko actually testified at trial that he did not recall asking Ms. Conway questions about the extent of her property on May 21, 2004.[78] At Mr. Wasko's deposition, he states that he didn't ask Ms. Conway about the extent of her property on May 21, 2004.[79] The court's findings as to the extent of Mr. Wasko's inquiry affects the weight the trial court afforded Mr. Wasko's opinion regarding Ms. Conway's capacity. The trial court's determination as to capacity is directly relevant to its undue influence analysis,

[75] R. Vol. I, p.116, p.23, L.5-13; p.117, p.25, L.15-20; & p.117, p.26, L.21-25.
[76] Pltf. Exh. 9.
[77] R. Vol. I, p.113, p.11, L.20-22.
[78] Exh. Tr. 11/30/09, p.79, L.21-25 & p.81, L.5-10.
[79] Exh. Wasko Dep. p.60, L.1-10.

particularly regarding susceptibility of the testator. Insofar as the court found that Mr. Wasko inquired into the extent of Ms. Conway's property on the date that it would be relevant, it is clearly erroneous.

3. The Court Specifically Found that Mr. Martin only Received an Additional 3.3% of the Total Estate as a Result of the May 21, 2004 Will.

In its oral findings, the trial court found that Mr. Martin only received an additional 3.3% of the total estate under the 2004 Will.[80] The court found this significant because "it is looking at the conduct of the party allegedly exercising undue influence and whether or not they are being disproportionately benefited. In this instance, a three percent change, or just about a three percent change of the total estate assets does not appear, on its face, to be a disproportionate change in the will."[81] In reality, the 2001 Will only provided Mr. Martin with 20% of the estate,[82] while the 2004 Will grants Mr. Martin a 30% interest in the entire estate of Kathleen Conway.[83] This results in a 50% increase over Mr. Martin's share under the 2001 Will. On the other hand, Ms. Wooden's share of the estate was reduced from 20% to approximately 1.4% of the estate.[84] The significance of such a misunderstanding of fact calls into question the entirety of the court's decision in this matter.

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[80] R. Vol. I, p.117, p.25, L.15-20.
[81] R. Vol. I, p.117, p.26, L.1-7.
[82] "Eighty percent (80%) of my estate shall be divided evenly, per stirpes, among my children, to-wit: Kathye Ingram, Cecil Martin, and Tanya Viers; and my niece, Tanya Wooden, so that each individual named receives 20% of my estate." R. Vol. I, p.37 (2001 Will).

[83] "Ninety percent (90%) of my entire estate shall be divided equally between my three (3) children, Tanya S. Viers, L. Kathye Ingram and W. Cecil Martin, as each his/her sole and separate property, including income therefrom, with the issue of any deceased child to take the share the parent would have taken by right of representation. . . ." R. Vol. I, p.8 (2004 Will).
[84] *Cf.* R. Vol. I, p.8 *with* R. Vol. I, p.37.

V. CONCLUSION

For the foregoing reasons, Ms. Wooden asks this Supreme Court to remand this case for a new trial.

DATED this 15th day of July, 2010.

CREASON, MOORE, DOKKEN & GEIDL, PLLC

Tod D. Geidl, ISB# 5785
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of July, 2011, a copy of the foregoing APPELLANTS' BRIEF was served by the method indicated below and addressed to the following:

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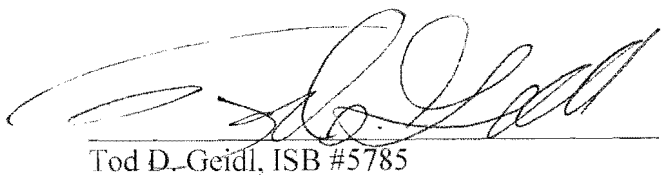

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