2-12-2018

Matter of Estate of Smith Appellant's Brief Dckt. 45313

IN THE SUPREME COURT OF THE STATE OF IDAHO

In the Matter of the Estate of Victoria H. Smith, Deceased	
VERNON K. SMITH, JR., individually, and in his capacity as the former attorney-in-fact, agent and/or fiduciary for Victoria H. Smith and/or the Estate of Victoria H. Smith, and in any other capacity relevant to these proceedings; and DOES 1-20, Plaintiff-Appellant-Appellant on Appeal, JOSEPH H. SMITH, an intestate heir of the Estate of Victoria H. Smith, Deceased, Defendant-Respondent-Respondent on Appeal, and NOAH G. HILLEN, in his capacity as Personal Representative of the Estate of Victoria H. Smith, Intervenor-Respondent on Appeal.	Supreme Court Docket No. 45313-2017 Ada County Magistrate Court No. CVIE-2014-15352

APPELLANT'S OPENING BRIEF

Appeal from the Magistrate Court of the Fourth Judicial District for Ada County, Honorable Cheri C. Copsey, Presiding

Rory R. Jones
William A. Fuhrman
Erika P. Judd
Jones ♦ Gledhill ♦ Fuhrman ♦ Gourley, P.A.
P.O. Box 1097
Boise, Idaho 83701
Attorneys for Vernon K. Smith Jr.

Allen B. Ellis
Ellis Law, PLLC
2537 W. State. St., Ste. 140
Boise, Idaho 83702
Attorney for Joseph H. Smith

Randall A. Peterman
Alex P. McLaughlin
Givens Pursley, LLP
P.O. Box 2720
Boise, ID 83701
Attorneys for Noah G. Hillen

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. STATEMENT OF THE CASE 1

A. Nature of the Case 1

B. Course of Proceedings 3

1. The Petition to Establish Breach of Fiduciary Duty and Conversion 4

2. Joseph's Motion for Partial Summary Judgment 4

3. Pretrial Motions and Motion to Vacate and Reset the Trial 6

C. Statement of the Facts 7

1. Victoria's Holographic Will 7

2. Victoria's Relationships with her Children 9

II. ISSUES PRESENTED ON APPEAL 13

A. Did the Magistrate Court Err in Granting Summary Judgment Upon the Issue of the 2012 Transfers and in its Order for an Accounting? 13

B. Did the Court Err in Invalidating the Holographic Will of Victoria H. Smith? 13

III. ARGUMENT 13

A. The Court Erred in Granting Summary Judgment on the 2012 Transfers 13

1. The magistrate erred as a matter of law in granting relief upon a claim that had already been dismissed 14

2. Joseph lacked standing to assert a claim for breach of the Power of Attorney 15

3. The magistrate court's application of the Uniform Power of Attorney Act to the 2008 Power of Attorney was inconsistent with Idaho law 18

4. The Magistrate Court erred in finding that the 2012 POA Transfers Constitute A "Gift" pursuant to Idaho Code § 15-12-201 *et seq.* 19

5. The Probate Court Lacked Both Subject Matter Jurisdiction Over the Property and Personal Jurisdiction over VHS Properties, LLC 20

B. The Magistrate Court's Determination of Undue Influence was Not Supported by Substantial or Competent Evidence 20

1. The magistrate court erred in applying the presumption of undue Influence 21

2. The magistrate court erred in its determination that Vernon failed to rebut the presumption 27

a. The magistrate court erred in concluding that Vernon failed to sustain his burden with respect at least one of the four elements of undue influence 28

i. The magistrate court's determination that Victoria was susceptible to Vernon's influence was not supported by competent evidence 28

ii. The magistrate court's conclusion that Vernon had an opportunity to exert undue influence upon Victoria lacks a basis in the record 32

iii. The magistrate court's conclusion that Vernon had a disposition to exert undue influence was based upon an erroneous application of established Idaho law 33

iv. Vernon readily rebutted the presumption that the result of the Will was unnatural 37

b. The court failed to apply the remaining Conway factors in a manner consistent with Idaho law 40

c. The court erred in the consideration and admission of evidence far removed from the execution of the Will 41

i. The 2012 Transfers were not material to any issue of fact relevant to a determination of undue influence 42

ii. The Testimony of Father Faucher was not material to any issue of fact relevant to a determination of undue influence 43

d. The Court Erred in Refusing to Admit Exhibit 257 43

IV. CONCLUSION 44

TABLE OF CASES AND AUTHORITIES

Cases

Estate of Laitinen, 483 A.2d 265 (1984) 36
Gill v. Gill, 254 S.E. 2d 122 (Va. 1979) 24, 25, 36
Gmeiner v. Yacte, 100 Idaho 1, 592 P.2d 57 (1979) ..... passim
Green v. Green, 161 Idaho 675, 389 P.3d 961 (2017) 21, 22, 23, 42
Haines v. Hayden, 54 N.W. 911 (1893 Mich.) 35, 36
In re Edward J. Burke Estate, (2016) Del.Ch. Lexis 121 17
In re Estate of Baker, 131 Cal.App. 3d 471 (App. 1982) 34, 36
In re Estate of Jones, 320 N.W.2d 167 (S.D. 1982) 35, 36
In Re Estate of Mooney, 453 NE.2d 1158 (Ill. App. 1983) 34, 36
In re Estate of Roll, 115 Idaho 797, 770 P.2d 806 (1989) 21, 22
In Re Ferrill, 640 P.2d 489 (N.M. App. 1981) 34, 36
In re Lunders' Estate, 74 Idaho 448, 263 P.2d 1002 (1953) 21

In re Wallace's Will, 265 N.Y.S. 898 (1933) 24
King v. MacDonald, 90 Idaho 272, 410 P.2d 969 (1965) 34
Kinghorn v. Clay, 153 Idaho 462, 465, 283 P.3d 779 (2012) 18
Krebs v. Krebs, 114 Idaho 571, 759 P.2d 77 (App. 1988) 28
Mac Tools, Inc. v. Griffin, 126 Idaho 193, 879 P.2d 1126 (1994) 21, 42
Pincock v. Pocatello Mining Co., 100 Idaho 325, 597 P.2d 211 (1979) 20
Pope v. Intermountain Gas Co., 103 Idaho 217, 646 P2d. 988, fn.7 (1982) 20
Ravallo v. Refrigerated Holdings, Inc., 2009 Lexis 233353 (S.D. N.Y 2009) 18
Skinner v. US Bank Home Mortgage, 159 Idaho 642, 365 P.3d 398 (2016) 22
State v. Bosier, 149 Idaho 664, 239 P.3d 462 (App. 2010) 20
State v. Miller, 151 Idaho 828, 264 P.3d 935 (2011) 20
Summerfield v. Pringle, 65 Idaho 300, 144 P.2d 214 (1943) 27
Swaringen v. Swanstrom, 67 Idaho 245, 175 P.2d 692 (1946) 23, 33
Taylor v. Riley, 403 P.3d 636 (Idaho 2017) 15
Wooden v. Martin (In re Conway), 152 Idaho 933, 277 P.3d 380 (2012) 21, 22, 28, 40, 41, 42

Statutes

I.C. § 15-12-101 *et seq* 5, 16, 17, 18, 19
12 Del. C. § 49-A-116 17
I.C. § 1-2208 20
I.C. § 15-2-302 26
I.C. §6-401 20
I.C. § 15-12-201(1)(b) 19
I.C. § 17-201 1

Other Authorities

28 ALR 2d 1243 § 2f 18
3AmJur 2d Agency § 59 18
79 AmJur2d Wills § 54 27
Restatement (Third) Agency § 3.12 18

Rules

Federal Rule of Civil Procedure 804(a)(5) 44
I.R.C.P. 56(c) 14
I.R.E. 401 42
I.R.E. 402 ..... 21, 41
I.R.E. 801(d)(2) 44
I.R.E. 804(b)(3) 44

The Appellant in this case is Vernon K. Smith, Jr. ("Vernon"). The Respondent is Joseph H. Smith ("Joseph").[1] Vernon, Joseph and Victoria Ann Converse ("Converse") are siblings, and Victoria H. Smith ("Victoria") and Vernon K. Smith, Sr. ("Vernon Sr.") are their parents. Victoria died September 11, 2013 and was predeceased by Vernon Sr. who died May 2, 1966.

I. STATEMENT OF THE CASE

This case arrives on appeal from the Findings of Fact and Conclusions of Law entered by the magistrate court on March 9, 2017.[2] Pursuant to Idaho Code § §17-201, "[a]n appeal may be taken to the district court of the county from a judgment, or order of the magistrates division of the district court in probate matters: ... [a]gainst or in favor of the validity of a will ...". While ordinarily an appeal from a magistrate's decision would proceed to the district court, this Court accepted the appeal upon an expedited basis.

A. NATURE OF THE CASE

This case involves the administration and disposition of the Estate of Victoria H. Smith. On February 14, 1990, Victoria handwrote and signed a holographic will (the "Will"). Ex 208.[3] Following a two-day court trial, on March 9, 2017, the court entered its FFCL, wherein the court set aside the Will upon the ground that it was the product of undue influence by Vernon. The

---

[1] Noah G. Hillen is the Personal Representative of the Estate of Victoria H. Smith. Mr. Hillen was not a party to the trial and was appointed as a "special administrator" pursuant to the court's March 9, 2017 Findings of Fact and Conclusions of Law and Order. Mr. Hillen was subsequently appointed as the Personal Representative. For reasons of judicial economy, issues relating to the supervised administration of this Estate are subject to the Order Granting Motion for Clarification and the stipulation of the parties.

[2] Amended Findings of Fact and Conclusions of Law were entered May 10, 2017, hereinafter "FFCL." R 1567-1603.

[3] The Record on Appeal contains four parts. Part 1 contains the pleadings that are part of the record on appeal and is consecutively paginated from 000001-001788, with a supplement at 001788-001830. Part 1 will be cited as "R __". Part 2 contains the transcripts of audiotaped hearings and is consecutively paginated from 1-349, and will be cited as "Tr __" Part 3 contains the trial transcripts and is consecutively paginated from 1-500 and will be cited as "TT__". Finally, Part 4 contains the trial exhibits and will be referred to by trial exhibit number and cited as "Ex__".

court thus ordered that Victoria died intestate.

The court, by its incorrect pretrial rulings, admission of irrelevant evidence at trial, and erroneous application of the law, reached a decision that was both result-driven and improper in multiple respects. Prior to the trial, the court improperly made numerous *sua sponte* rulings granting relief beyond the scope of the pleadings and beyond its jurisdictional authority. The court's FFCL were no exception to the trend of adverse rulings and cursory, if any, consideration of facts that were inconsistent with the court's predisposition to view Victoria as a "vulnerable" woman incapable of drafting her own Will. By its FFCL, the court decreed that Victoria was intellectually incapable of drafting the holographic Will and that the Will therefore was the result of Vernon's undue influence. The court's erroneous interpretation of Idaho law resulted in the admission of testimony and exhibits regarding events, activities, and statements that had no probative value upon whether or not the Will was the product of Victoria's freewill. The majority of the evidence presented at trial involved statements that were laced with speculation and innuendo and occurred years or decades after Victoria drafted her Will. The court's legal conclusions, its admission of irrelevant evidence, and its findings of fact and conclusions of law are reviewed by this Court de novo. These errors substantially prejudiced Vernon and thus constitute reversible error.

Vernon respectfully requests this Court vacate the FFCL and remand this case with instructions to the court to enter judgment in Vernon's favor, dismissing the Petitions of Joseph H. Smith. In addition, Vernon respectfully requests this Court reverse the court's Order Granting Partial Summary Judgment upon the 2012 Transfers, together with the June 2, 2017 Judgment on

Motion Under Rule 70(b) of the Idaho Rules of Civil Procedure. R 1733-1740.

The court further erred in its prevailing party determination and award of attorney fees and costs to Joseph upon the trial and in its decision to appoint a special administrator.[4] Vernon therefore respectfully requests the Court remand this case to the magistrate court to make a finding that Vernon is the prevailing party and is entitled to his costs, below and upon appeal.

B. COURSE OF PROCEEDINGS

This action commenced on August 13, 2014, upon the filing of a Petition for Appointment of Special Administrator and Assignment of Powers and Duties, by Sharon Bergmann ("Bergmann"). R 36-44.[5] Bergmann is an ex-spouse and alleged creditor of Vernon. On October 3, 2014, Joseph filed a Petition for Formal Adjudication of Intestacy and Formal Appointment of Personal Representative (I.C. § 15-3-302) ("Joseph's Will Petition"). R 45-48. Therein, Joseph averred that "[a]n original will, obtained by undue influence, is believed to be in the possession of Vernon K. Smith, II. Such original will has not been probated and is believed to be invalid." R 46. On October 24, 2014, Vernon filed his Application for Formal Probate of Will of Decedent Victoria H. Smith, and Formal Appointment of Personal Representative. R 194-199. On November 19, 2014, Joseph filed his objection to the same. R 200-202.

On April 30, 2015, Vernon filed his Joinder of an Indispensable Party as an Involuntary

---

[4] In so far as the appointment of a Special Administrator is addressed by the FFCL, Vernon notes that this Court's Order Granting Motion for Clarification reserves issues related to the Special Administrator's/Personal Representative's appointment and administration for adjudication following this Appeal. To the extent germane to the issues before the Court at this time, Vernon submits that there was no factual basis for the magistrate court's *sua sponte* decree that an "emergency" existed such that the appointment of a special administrator was legally supported. R 1602. The transfer of assets the court found to be so "egregious" occurred in 2012. No subsequent transfer of title was made and there was an existing court order prohibiting Vernon from transferring the properties.

[5] This Petition was withdrawn October 14, 2014. *See* R 3.

Petitioner Under Rule 19(a)(1), seeking to compel Converse to participate in these proceedings. R 283-285. A Motion to Join Involuntary Plaintiff was also filed by Joseph. R 337-338. On July 5, 2015, the court denied the motions to join Converse. Tr. p. 20, ll. 9-25.

1. The Petition to Establish Breach of Fiduciary Duty and Conversion:

On February 6, 2015, Joseph filed his Petition to Establish Breach of Fiduciary Duty and Conversion. R 205-210. Therein, Joseph alleged that Vernon induced Victoria to execute two durable powers of attorney and that Vernon "breached his fiduciary duty to decedent" by, *inter alia*, transferring real property into an LLC. R 206. In addition, Joseph made a claim for conversion of Victoria's property. *Id.*[6] Vernon filed a motion to dismiss Joseph's Petition on February 23, 2015 arguing that (1) Joseph lacked standing to pursue claims on behalf of Victoria; and (2) that any such claims were barred by the statute of limitations. R 210-211.[7]

The hearing upon Vernon's Motions to Dismiss was held July 5, 2015 before the Honorable Christopher Bieter, then presiding magistrate judge. Tr. p. 6-21. During the hearing, Joseph dismissed his claim for conversion. *Id.*, at p. 8, l. 21–p. 9, l. 8. Upon the remaining claims, Judge Bieter held that Joseph lacked standing to pursue the remaining claims raised in his Petition, but reserved entry of a final decision upon the issue pending the trial. Tr. p. 7, l. 24-p. 8, l. 6; p. 15, l. 20-p. 16, l. 15; p. 18, l. 13–p. 19, l. 2.[8]

2. Joseph's Motion for Partial Summary Judgment:

---

[6] On April 1, 2015, Joseph filed an Amended Petition to Establish Breach of Fiduciary Duty and Conversion. R 271-277. In material part, the Amended Petition added Count III, a claim for an accounting. *Id.*

[7] Vernon filed a motion to dismiss the Amended Petition on April 30, 2015. R 278-285.

[8] During a hearing held December 14, 2015, Judge Bieter announced that he had a personal relationship with a recently disclosed witness, W. Thomas Faucher, and invited the parties to consider a motion to disqualify. Tr. p. 49, l. 13-p. 50, l. 8. Vernon filed a motion to disqualify Judge Bieter on December 28, 2015, which motion was granted. *See* R 11-12. Judge Cheri Copsey was then assigned to preside over this matter. *Id.*

On June 1, 2016, Joseph filed a Motion for Partial Summary Judgment wherein he requested the court rule "the assets of decedent Victoria H. Smith were not gifted to VHS Properties, LLC, prior to her death in 2013." R 956-57. In support, Joseph claimed that "the decedent's 2008 power of attorney to respondent did not include authority to gift her property." *Id.* Vernon opposed the motion on the ground that: (1) pursuant to the court's prior ruling and Idaho law, Joseph lacked standing to assert a claim regarding the 2012 Transfers; and (2) VHS Properties, LLC, the owner of the properties at issue had not been named as a party. R 978-1006.

Following a hearing held July 11, 2016, the court entered its July 19, 2016 Order Granting Motion for Partial Summary Judgment. R 1056-1057.[9] The court's decision hinged upon her application of I.C. § 15-12-116.[10] The court thus concluded Joseph had standing to "request the Court review Vernon K. Smith, Jr.'s conduct and grant appropriate relief."[11] R 1058. The court also noted that it could award reasonable attorney's fees and costs to the prevailing party in a proceeding under this section. *Id.*[12] The court held: "In fact, the very purpose of this section is to protect vulnerable principals, or in this case, Victoria H. Smith, from

---

[9] On September 9, 2016, Vernon filed his Motion for Reconsideration of Order Entered July 19, 2016. R 1105-1191. Vernon's motion was denied during a hearing held September 26, 2016. Vernon also filed a motion, pursuant to Rule 54(b), Idaho Rules of Civil Procedure, to certify the issues decided by the court's Order Granting Partial Summary Judgment for appeal. The magistrate court also denied this motion. *See e.g.*, Brief in Opposition to Motion to Dismiss Appeal of Order Granting Partial Summary Judgment, Supreme Court Docket No. 45313-2017.

[10] The court's decision omits reference to section (2), I.C. § 15-12-116, which provides: "Upon motion by the principal, the court shall dismiss a petition filed under this section, unless the court finds that the principal lacks capacity to revoke the agent's authority or the power of attorney."

[11] By footnote, the court commented "The Court recognizes that Judge Bieter came to a different conclusion. However, in reviewing the hearing recordings and the record, it does not appear that anyone brought the appropriate statutory section to his attention. ... Joseph H. Smith would also qualify as a presumptive heir, *unless* the holographic will is declared valid." R 1058 (emphasis added).

[12] Neither of the Petitions filed by Joseph, nor the motion for summary judgment itself, included a request for an award of attorney fees. *See* R 205-208; 271-277; 956-957. Vernon timely objected to the request on August 1, 2016, on August 8, 2016, and on August 11, 2016. R 16-17.

financial abuse. This case is a classic example, crying out for a remedy." R 1058.

Pursuant to the court's July 19, 2016 invitation, on July 25, 2016, Joseph submitted his Memorandum of Costs and Attorney Fees. R 16. During a hearing held August 23, 2016, the magistrate court ruled that Joseph was entitled to an award of attorney fees and costs. Tr. p. 99, ll. 6-12. The court later awarded the entirety of the attorney fees sought by Joseph. R 1602.

3. Pretrial Motions and the Trial:

On August 19, 2016, Vernon filed a Motion to Vacate and Reset the Trial. *See* R 17. On August 23, 2016, the court denied Vernon's Motion to Vacate and Reset the Trial, stating "I have read all of the material, Mr. Smith. You have an uphill battle. I see no reason to change the trial date." Tr. p. 102, ll. 5-13. During the same hearing, the court *sua sponte* offered that the accounting thus far provided by Vernon was, in her estimation, inadequate. Tr. p. 99, l. 13–p. 100, l. 8. Vernon was not permitted to respond to the court's concern. *Id.* The court thus ordered Vernon to provide an accounting to the court within 10 days. Tr. p. 100, ll. 4-14.

On October 14, 2016, this matter came on for hearing upon various pretrial motions, among which was Vernon's motion in limine with respect to the application of the presumption of undue influence. Vernon asserted that the presumption did not arise because there was no evidence of a fiduciary relationship with respect to the execution of the Will. The court disagreed and ruled that the presumption of undue influence arose as a matter of law by virtue of Vernon's prior affidavits extolling his efforts to assist Victoria. Tr. p. 187, l. 19–p. 188, l. 8.

The case ultimately proceeded to trial on October 25, 2016. Evidence was presented over

the course of two days. The court's written FFCL followed on March 9, 2017.[13] The court thereafter entered its award of costs to Joseph, decreeing that he was the prevailing party.

C. STATEMENT OF THE FACTS

Victoria was born [redacted] in New York City. Ex 256. As a young woman, Victoria moved to Washington DC and was employed with the Veteran's Administration. *Id.* While in Washington DC working, she met Vernon Sr. Victoria and Vernon Sr. were married in June, 1938, and moved to Idaho where Vernon Sr. began his career as an attorney. *Id.* Victoria and Vernon Sr. had three children, Joseph, Victoria Converse, and Vernon. *Id.* Upon moving to Idaho, Victoria chose to quit working outside the home. *Id.* In 1966, Vernon Sr. died from a heart attack. TT p. 186, l. 24–p. 187, l. 1. Victoria never remarried. TT p. 187, ll. 2-3. At the time of Vernon Sr.'s death, Vernon Sr. had been generating roughly $300,000.00 per year through his law practice. TT p. 189, ll. 2-14. He and Victoria had amassed considerable real property including, but not limited to, 1280 acres in Hamer, Idaho ("Hamer Farm"), 520 acres in Ada County near Gowen Field, and approximately 176 acres on Chinden Blvd. in Boise, Idaho ("Ranch" or "Home Place"). Upon Vernon Sr.'s death, Victoria inherited her husband's estate pursuant to Vernon Sr.'s own holographic will. Ex 200 (a copy of which is attached hereto as Addenda A). *See also* TT p. 188, l. 19–p. 191, l. 23.

1. Victoria's Holographic Will

On February 14, 1990, Victoria handwrote and signed her Will. Ex 208 (a copy of which is attached hereto as Addenda B). Vernon witnessed Victoria's signature later that day. TT p.

[13] The FFCL includes a gratuitous reiteration and supplementation of the court's prior grant of summary judgment, as well as an award of attorney fees incident thereto.

209, l. 12–p. 212, l. 20; p. 337, l. 8–p. 339, l. 1. The Will remained in Victoria's exclusive control in her roll-top desk until 2010 when Vernon moved it to his law office because of the increased number of people visiting her home. *Id.*

For nearly twenty years after Victoria drafted her Will, she continued to live an independent lifestyle in her own home and with limited support of family members. For example, family members would drive her to appointments, to church, mobile libraries, and to bridge games. *See e.g* TT p. 403, ll. 3-13, TT p. 134, l. 11 – p. 136, l. 13. Victoria continued to attend church on a regular basis until 2007. TT p. 404, ll. 1-16. She lived alone until 2008, balancing her own checkbook, paying her bills, and personally contracting, supervising, and scrutinizing work on or around her home. Ex 265, 266, 267, 268; *see also* TT p. 292, l. 12 – p. 293, l. 23. During that time, Victoria regularly appeared for routine medical appointments where she was reported to be in relatively good health. TT p. 12, l. 4–p. 13, l. 10; p. 16, l. 10-13; p. 17, l. 1-11; p. 24, l. 19–p. 27, l. 3. Following a fall at her home in 2008, Vernon hired in-home assistance to help care for Victoria. TT p. 213, l. 1–p. 214, l. 3. Victoria continued to reside in her home on the Ranch until her death in 2013. Victoria was nearly 100 years old at her death.

Between 1990 and 2008, Victoria re-affirmed her intent to leave her estate to Vernon on at least several occasions and provided her reasons therefore both verbally and in writing. See TT p. 136, ll. 14-21 (Ms. Puckett); TT p. 300, l. 4–p. 301, l. 5 (Mr. Dillworth); Ex 4 at pg. 2. In addition, Victoria expressly disavowed any inference or claim of undue influence in the drafting of her Will in an Affidavit she executed February 6, 1991, wherein Victoria decreed "No one tells me who will inherit my property." Ex 269 (emphasis added).

2. Victoria's Relationships with her Children:

Victoria did not maintain a relationship with her daughter, Converse, before or after the Will was executed. *See e.g.*, TT p. 315, l. 2-11 (identifying arguments in and around 1985/1986). Converse resides in Oregon and has lived there since at least 1974. *See* R 46 at ¶6; TT p. 486, ll. 20-23. Converse was a devout, born-again Christian and Victoria was a Catholic. Consequently "they had a lot of disagreements on religion." TT p. 142, ll. 1-7; p. 315, ll. 2-11. Converse did not attend her mother's funeral. TT p. 38, l. 18–p. 39, l. 14. Converse, a putative heir, was provided with notice of these proceedings and nevertheless chose not to participate in the claims asserted by Joseph. Converse identified her rationale and refusal to become involved in these proceedings in a lengthy and scathing email she drafted to her brothers following her mother's death. Vernon sought to introduce the email as Exhibit 257 at trial, but the court refused.

Joseph was the oldest of Victoria's children. *See* R 197. Joseph pursued a career driving truck and he and Vernon managed Victoria's farm properties until 1992. TT p. 334, l. 22 – p. 335, l. 3. Joseph and his family members also provided rides and transportation to Victoria. *See e.g.*, TT. at p. 171, l. 15–p. 172, l. 16. Joseph did not provide any financial support to his mother. *See generally*, TT. Joseph did, however, receive many gifts and loans from his mother. For instance, Victoria gifted to Joseph real and personal property including, but not limited to, a piano, an acre of ground in 1976 adjacent to her own home on the Ranch property, a permanent easement to get to that ground in 1986, and a house in 1963. *See e.g.*, Ex 208, 201. Joseph was the only child to receive real property from Victoria. TT 64, ll. 6-24. Between 1988 and her death, Victoria also gave Joseph a number of gifts and loans. *See e.g.*, TT p. 65, l. 8–p. 68 l. 25;

Ex 202 (loan for $19,600 dated September 7, 1988), Ex 203 (loan for $2,000 dated October 21, 1988), Ex 204 (loan for $4,700 dated October 28, 1989), Ex 205 (gift of $9,999 dated December 8, 1989); Ex 210 (loan for $7,000 dated June 29, 1990); Ex 211 (loan for $1,500 dated July 30, 1990); Ex 213 (loan of $2,500 dated February 12, 1991); Ex 215 (loan for $6,000 dated April 1, 1991). Of these loans, four followed the execution of the Will and none were arranged with or involved Vernon. TT p. 77, ll. 8-18; p. 78, ll. 2-7; p. 79, ll. 10-20.

Joseph remained active in Victoria's business affairs until December, 1991. TT p. 74, ll. 3-10. In or around December 1991, Joseph acknowledged that Victoria preferred Vernon to handle her business dealings and transactions. TT p. 81, l. 16–p. 82, l. 11; Ex 218, 219; *see also* Ex 220 (letter from Joseph to Vernon: "I am withdrawing from all involvement of mother's business dealings and scenarios due to the simple fact mother prefers you and your style."). After 1992, Joseph's communication with his mother was primarily reduced to written communication. *See e.g.*, Exs 224, 229, 231, 234, 236, 238. These letters contain no claims that Vernon was the cause of the break down. Instead, they acknowledge that the "hateful words ... have come from your own heart." Ex 223 (September 23, 1992 letter from Sharon Smith to Victoria. Victoria did not share the letters or their contents with Vernon. TT p. 226, l. 16–p. 228, l. 2. Vernon was therefore not involved or informed of Victoria's communications or conversations with Joseph. TT p. 242, l. 16–p. 243, l. 1.

On August 23, 1994, Joseph authored a letter to his mother, tacitly conceding that he was aware of her intent to leave her estate to Vernon:

> As I have said in earlier correspondence, you have the power to thrust me and my family out of the scenario I helped to build. I have spent the last two years trying to accept the

> dispowerment of your wishes. That has been one of the largest assignments I have obligated to master. The second and equally difficult assignment I have had trouble mastering is accepting that you like me close to nothing.

Ex 231 (emphasis added). On October 19, 1994, Joseph authored a letter to Victoria, asking if he could buy additional real property from her. Ex 234. Therein, Joseph again acknowledged that "[a]pproximately two years ago, your apparent choices and desires surprised me to a point beyond imagination ... I am in need of a larger piece of property so I can park my trucks and my trailers and at the same time use the property to the north of my house for a horse corral." Ex 234 (emphasis added). Victoria responded by a letter dated October 31, 1994, denying his request for additional property. Ex 235. Joseph next wrote to Victoria on June 14, 1995:

> In the last 30 to 49 days, we have talked on the phone once and in person three or four times. ... You have jabbed and poked at me on each occasion when we were speaking in person. You are a war pony and a very talented one in that capacity. You are a little Rocky Marciano (maybe that is even a compliment. I am a peaceful person. You are not. You have an uncontrollable desire and need to fight. ... You cannot get past the dresser syndrome. ... Your choice is your choice. I hope you are happy with your choices. They look lonely to me.

Ex 238 (emphasis added). Nevertheless, Joseph claimed at trial that he did not know about Victoria's holographic Will until her death in 2013. His letters, however, paint a different picture. Despite living 600 feet from her home, Joseph did not visit Victoria and, apart from the letters detailed above, Joseph did not exchange correspondence with Victoria after 1992.

Joseph's wife, Sharon, also testified in this matter. In material part, Sharon identified family photographs and stated that the relationship with Joseph and her family broke down during the course of a dispute regarding the Hamer Farm in 1992. TT p. 487, l. 6 – p. 489, l. 18. Sharon made no claim and presented no testimony that the estrangement between Joseph,

herself, and Victoria was a result of Vernon's influence.

Joseph's son, Joseph Smith Jr. continued to visit Victoria multiple times each year and enjoyed a good relationship with her until 2003, when Victoria stated that she could no longer afford to send him gifts. TT p. 469, l. 1-p. 470, l. 8; p. 471, l. 23 – p. 474, l. 2. At that point, *Joseph Jr.* discontinued his relationship with Victoria. Tr. at p. 473, l. 23–p. 474, l. 2. Prior to that time, Joseph Jr. borrowed money in 1991 to purchase a home and also received a cash gift in 1993. TT p. 467, ll. 3–p. 468, l. 17. Victoria forgave the loan to Joseph Jr. in 1993. *Id.* As with Sharon, Joseph Jr. made no claim that the change in his relationship with Victoria in 2003 was a result of, or incident to, any alleged influence by Vernon. Joseph's daughter, Kate Laxon, believed she had a good relationship with Victoria until 1991. TT p. 440, l. 19–p. 441, l. 8.

Victoria sent many cards and gifts to Joseph's family over the years. Exs 209, 214, 217, 221, 225, 226, 230, 232, 233, 237, 239, 240, 241, 242, 246, 247, 250, 251, 252, and 253. While Victoria both remembered and made the effort to send cards and gifts or money to members of Joseph's family, the record was equally void of any reciprocal cards or gifts sent to Victoria during that timeframe by Joseph or any members of his family.

Vernon was the youngest of Victoria's children. Following his father's untimely death, Vernon worked to save the farm and real property from foreclosure and to make the same profitable. *See generally*, Tr. at p. 188, l. 19–p. 191, l. 23. From leafcutter bee boards, Vernon was able to produce sufficient income to save the Hamer Farm from foreclosure. Tr. at p. 190, l. 2-p. 191, l. 23. Between 1969 and 1976, Vernon generated a little over $250,000.00 with the bee boards and gave all of the money to Victoria. *Id;* see also p. 195, ll. 8–19; p. 196, l. 14–p. 197, l.

23. Vernon continued to provide services and support to his mother throughout the remainder of her lifetime. *See e.g.*, TT p. 208, ll. 2-17. For example, Vernon paid a $34,000.00 claim asserted by his father's sister against his father's estate. TT p. 274, l. 6–p. 276, l. 4. In 1989, Vernon reinvested a gift of $9,999.00 from his mother into a remodel of her home. TT p. 208, ll. 2-17.

Vernon assisted in the management of Victoria's business affairs before and after the Will was executed. In 2012, Vernon transferred Victoria's real property to an entity, VHS Properties, LLC ("VHS"), pursuant to a 2008 Power of Attorney, (hereinafter, the "2012 Transfers"). R 71-73; see also R 68-69 ("2008 POA"). Vernon reasoned that these transfers were consistent with his mother's intent that he inherit her property and also served an estate planning and tax purpose. R 71-73. Victoria and Vernon were equal member/managers in VHS Properties, LLC at the time of the transfer. R 67. Vernon did, however, transfer Victoria's membership interest to himself the following day. R 74-77. The transfers were recorded and VHS Properties, LLC was the record owner of the properties upon the death of Victoria. *See e.g.*, R 1733-1740. VHS Properties, LLC, was not a named party to this action.

II. ISSUES PRESENTED ON APPEAL

A. Did the Magistrate Court Err in Granting Summary Judgment Upon the Issue of the 2012 Transfers and in its Order for an Accounting?

B. Did the Court Err in Invalidating the Holographic Will of Victoria H. Smith?

III. ARGUMENT

A. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE 2012 TRANSFERS.

On July 19, 2016, the court improperly granted summary judgment to Joseph, decreeing that Vernon's transfer of real property pursuant to the 2008 POA "violated the Uniform Power of

Attorney Act, his fiduciary duty, and the 2008 Power of Attorney." R 1065. The court's decision exceeded the scope of relief requested and included findings of fact which were not supported by the record. Summary judgment is only 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." I.R.C.P. 56(c).

1. **The magistrate erred as a matter of law in granting relief upon a claim that had already been dismissed.**

By his Motion for Partial Summary Judgment, Joseph sought an "order that respondent Vernon Smith ("Vernon") has not gifted the entirety of the Smith Estate to an LLC owned by him." R 956-958. Joseph further alleged that Vernon's conduct in transferring real property violated the Idaho Uniform Power of Attorney Act ("UPAA") and that Joseph, as a "potential heir," had standing to challenge whether Vernon exceeded his authority.

Rule 56, I.R.C.P. provides a basis for a party to seek entry of judgment as a matter of law upon a "claim or defense, or the part of each claim or defense, on which summary judgment is sought ... if the movant shows that there is no genuine dispute as to any material fact." Here, Joseph's motion for summary judgment did not reference and was not based upon a valid or pending claim or defense. *See* R 956-957; 958-967. Joseph's Petition identified two causes of action with respect to the 2012 Transfers: (1) breach of fiduciary duty – *to the decedent*; and (2) conversion. R 273-274. The court previously ruled that Joseph lacked standing to pursue a claim for breach of fiduciary duty on behalf of the decedent *absent* adjudication of the claim of undue

influence. Tr. p. 7, l. 24-p. 8, l. 6; Tr. p. 15, l. 20-p. 16, l. 15.[14] Joseph's claim for conversion was previously dismissed because it lacked support in the law. Tr. p. 8, l. 21 – p. 9, l. 8. The claim for conversion alleged that Vernon "deprived decedent of the possession of her real property ... [and that Joseph] is a rightful heir of decedent and has standing to assert these claims because of his interest in decedent's estate." R 206. Similarly, the motion for summary judgment relied upon the same facts and theories as the claim for conversion and was barred by the doctrine of res judicata.[15] *Taylor v. Riley*, 403 P.3d 636, 641 (2017)("A claim for negligent misrepresentation based upon the content of the opinion letter is the same cause of action under a different theory, and so it too would be barred by the doctrine of res judicata."). The court erred as a matter of law in granting relief to Joseph upon the same facts alleged to give rise to a claim that was previously dismissed.

2. Joseph lacked standing to assert a claim for breach of the Power of Attorney.

On the most basic level, Joseph's motion was void of citation to law or authority which would give rise to a claim that he, absent being appointed as the Personal Representative, had standing to challenge the transfers that formed the basis for a breach of fiduciary duty claim. Rather, Joseph engaged in a tortured argument that Judge Bieter's ruling was limited to a claim regarding *management* of the estate assets, whereas the "current motion challenges the validity of the *transfer* of the entirety of Mrs. Smith's property to the LLC." R 1016 (emphasis added).[16]

---

[14] *See also* Tr., at p. 18, l. 13 – p. 19, l. 2.
[15] R 274 at ¶¶ 26-27
[16] For context, the Amended Petition alleges: "Standing in the position of a fiduciary, Respondent VK Smith breached his fiduciary duty to the decedent, by, among other things, *transferring* all of the decedent's real property into an LLC owned by Respondent and fully controlled by Respondent." R. 273, ¶17. None of the claims expressly

This argument does not find support in Idaho law, the prior ruling, or the pleadings at issue. The court exceeded its jurisdictional authority in supplying a basis for Joseph to assert a claim or defense upon which summary judgment could be entered. Specifically, during the hearing upon Joseph's motion, the court repeatedly acknowledged that Joseph lacked standing and instead focused upon whether Joseph's interests were adequately protected pending the trial, noting that Joseph had recorded a lis pendens. Tr. p. 73, l. 6 – p. 76, l. 4; p. 78, ll. 5-25. Joseph also requested the court grant his motion on the basis of economic efficiency. In response, the court correctly stated that Joseph had alternative grounds for relief following the adjudication of the undue influence claim. Tr. p. 73 – 82; *See also* Tr. p. 84, ll. 3-8.[17] The tacit admission that the claim was not ripe for adjudication is fatal to the court's subsequent entry of judgment as a matter of law wherein the court decreed that Vernon breached a fiduciary duty to the decedent.

The court granted Joseph's Motion for Partial Summary Judgment by order entered July 19, 2016.[18] R 1049-58. The court's analysis, however, contained an incomplete recitation of the UPAA. Moreover, the court's decision contained several findings of fact based upon policy considerations that were not shown to have a basis in the evidence.

First, the court did not apply the entire statute. Idaho Code § 15-12-116(2) delegates to the principal *individually*, and not to the principal's estate, the right to dismiss such a petition. It is clear those provisions, by design, are intended for the benefit of a living principal. *See e.g., In*

---

stated a claim for *management* of the estate; rather paragraphs 18, 19, and 20, each assert that "VK Smith also breached his fiduciary duty to the decedent by ...". *Id.*, at ¶¶18, 19 and 20.

[17] "COURT: I tend to agree with Mr. Ellis that if there's no potential for any assets to be in the estate, then we're wasting our time in probate court. And so that needs to be resolved. All right? So I will not rule on that."

[18] The July 11, 2016 Hearing is also the first instance wherein the court *sua sponte* ruled that Vernon bore the burden of rebutting the presumption of undue influence. Tr. p. 67, l. 14–p. 68, l. 6; p. 103, ll. 2-10.

re Edward J. Burke Estate, (2016) Del.Ch. Lexis 121 at *13-14 (construing nearly identical language contained in the Delaware Power of Attorney Statute, 12 Del. C. § 49-A-116, and holding "[w]ith one exception, the above statute contemplates petitions for judicial relief from interested persons while the principal is alive. The exception is for cases where the personal representative, trustee or beneficiary of the principal's estate might seek appropriate relief, *i.e.*, an accounting, under Section 49A-114(g)."). The time for Joseph to have sought such judicial relief was while Victoria was still alive and the court erred as a matter of law in its narrow application of I.C. § 15-12-116(1), to the exclusion of the remainder of the UPAA.

In addition, the remedy the court applied, i.e., to set aside the transfers to a third party, does not find support in Idaho law. Rather, Idaho law provides that an agent who violates the UPAA "is liable to the principal or the principal's successors in interest for the amount required to: (1) restore the value of the principal's property to what it would have been had the violation not occurred; and (2) reimburse the principal or the principal's successors in interest for the attorney's fees and costs, and other professional fees and costs, paid on the agent's behalf." I.C. § 15-12-117. Here, the court exceeded its authority to set aside transfers to a third party, VHS, who was not served or made a party to these proceedings, for the alleged benefit of a descendant who was not, at the time of the court's entry of summary judgment a "successor in interest."

In addition, because Joseph was neither the personal representative nor a successor in interest to his mother's estate, he lacked the requisite interest to demand either a disclosure or an accounting. Pursuant to Idaho Code § 15-12-114(8), only the "personal representative" or "successor in interest" may seek an accounting on behalf of the principal's estate. Joseph did not

have standing to request an accounting; nor did he request an accounting in conjunction with his motion for summary judgment. The court's *sua sponte* order for an accounting exceeded the statutory and jurisdictional authority of the court. *Kinghorn v. Clay*, 153 Idaho 462, 465, 283 P.3d 779, 782 (2012).

3. The magistrate court's application of the Uniform Power of Attorney Act to the 2008 Power of Attorney was inconsistent with Idaho law.

Pursuant to I.C. § 15-12-103(a), the UPAA does not apply to a power "coupled with an interest." Here, the court concluded that that Vernon had no property interest in Victoria's estate and thus, in 2008, Victoria H. Smith did not delegate a power to him 'coupled with an interest.'" R 1348. This conclusion is both legally and factually erroneous.

Pursuant to Idaho Code § 15-12-103(1), a power coupled with an interest is exempted from the application provisions of the UPAA. In reaching the conclusion that "the agent must have a property interest in the thing which is the subject of the agency," the court cited to the Restatement (Third) of Agency § 3.12 which expressly recognizes that the power is coupled with an interest when it is given to protect "a legal or equitable title to the subject matter of the power." *See also* 3AmJur 2d Agency § 59 (emphasis added); 28 ALR 2d 1243 § 2f; *Ravallo v. Refrigerated Holdings, Inc.*, 2009 Lexis 233353, at *10 (S.D. N.Y 2009). Based upon decades of support and service, Vernon provided sufficient evidence to raise a genuine issue of material fact as to whether he had an equitable interest in Victoria's estate. R 1110-1112. As detailed in the Affidavit of Vernon K. Smith in Support of Motion for Reconsideration, Vernon undertook extensive renovation and remodeling projects for the benefit of the Home Place. *Id.*; see also R

95.[19] Simply put, it would be inequitable to divest Vernon's interest in the subject matter of the Power of Attorney. It is not revocable. The magistrate court's conclusion that the UPAA applied to the 2008 POA attorney and the 2012 Transfers should thus be reversed.

4. The Magistrate Court erred in finding that the 2012 POA Transfers Constitute A "Gift" pursuant to Idaho Code §15-12-201 *et seq*.

As with the court's conclusion that the 2008 POA was not coupled with an interest, the court's conclusion that Vernon's transfer of property constituted a "gift" in violation of Idaho Code § 15-12-201(1)(b) lacked support in the law and facts. R 1059-1063; 1531-53. To reach this conclusion, the court held that there was no or insufficient consideration given for the transfer. See R 1351-53. As detailed above, the previously cited portions of the record in this case document the value in commitment, investment, and services, Vernon provided to Victoria.

In addition, the 2008 POA executed by Victoria expressly authorized Vernon to transfer Victoria's real and personal property to VHS Properties, LLC. R 68-69. Specifically, the 2008 POA empowered Vernon to "organize ... sell or dissolve any business interest" and to "otherwise manage or dispose of any or all of my real or personal property, or any interest therein; purchase, sell, mortgage, encumber, grant, option or otherwise deal in any way in any real property or personal property, tangible or intangible, or any interest therein". *Id.* The subsequent transfer of "member interests" in the LLC was also authorized by the express terms of the 2008 POA, which declared that Victoria specifically included "any rights and power I may acquire in the future." *Id.* Finally, the 2008 POA gave Vernon the authority to "act

[19] The Ada County Highway District (ACHD) considered Vernon's legal and equitable interest in the Chinden real property significant enough to require him to sign a waiver of his interest at the time in that portion of that real property that was taken for the Mountain View/Joplin Road extension on both sides of Chinden Blvd. R 748-752.

unconditionally with regard to any funds, stocks, bonds, shares, investments, interests, rights, benefits or entitlements I may now have or hereafter come to have and hold." *Id.* Vernon thus had express authority to transfer Victoria's real and personal property to VHS, for which valid consideration was given. R 68, 71-73, 74-76.

5. The Probate Court Lacked Both Subject Matter Jurisdiction Over the Property and Personal Jurisdiction over VHS Properties, LLC.

In addition to Joseph's lack of standing to challenge the 2012 Transfers, the court lacked both personal and subject matter jurisdiction over the transfers and VHS. First, the orders entered by the court were beyond the scope of authority granted a magistrate court under the provisions of I.C. § 1-2208(2). And, I.C. § 6-401 requires title disputes to originate in the district court. *See also Pincock v. Pocatello Mining Co.*, 100 Idaho 325, 329, 597 P.2d 211, 215 (1979). *See also* Brief in Opposition to Motion to Dismiss Appeal of Order Granting Partial Summary Judgment, Supreme Court Docket No. 45313-2017.

A defect in the subject matter jurisdiction of the court can be raised at any time, including on appeal. *State v. Miller*, 151 Idaho 828, 832, 264 P.3d 935, 939 (2011). A court's lack of subject matter jurisdiction cannot be waived by a party. *State v. Bosier*, 149 Idaho 664, 666, 239 P.3d 462, 464 (App. 2010). Because the court lacked subject matter jurisdiction, Vernon requests that this Court reverse the court's order of July 19, 2016, and the June 2, 2017 Rule 70(b) Order, transferring those property interests into the "Estate." VHS was never served or otherwise joined in the litigation. Without service of process, the court has no jurisdiction over VHS. *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P2d. 988, fn.7 (1982).

B. THE MAGISTRATE COURT'S DETERMINATION OF UNDUE INFLUENCE WAS NOT

SUPPORTED BY SUBSTANTIAL OR COMPETENT EVIDENCE.

The court's determination that Vernon exercised undue influence over Victoria in the execution of the Will must be set aside if not supported by substantial, competent evidence. *Green v. Green*, 161 Idaho 675, 681, 389 P.3d 961, 967 (2017). Vernon submits that there was scant, if any, evidence to support the court's finding of undue influence. Vernon also challenges the admission of certain evidence by the court. Decisions regarding the admission of evidence at trial are reviewed under an abuse of discretion standard. *See Mac Tools, Inc. v. Griffin*, 126 Idaho 193, 199, 879 P.2d 1126, 1132 (1994). However, "the question of relevancy under I.R.E. 402 is not a discretionary matter because there is no issue of credibility or finding of fact for the trial court to resolve prior to deciding whether to admit the evidence." *Id.* "Thus, this Court reviews the trial court's relevancy decisions under the de novo standard of review." *Id.*

1. The magistrate court erred in applying the presumption of undue influence.

The Idaho Supreme Court has defined undue influence as "domination by the guilty party over the testator to such an extent that his free agency is destroyed and the will of another person substituted for that of the testator." *In re Lunders' Estate*, 74 Idaho 448, 454-55, 263 P.2d 1002, 1006-07 (1953) (citations omitted). "A will may be held invalid on the basis of undue influence where sufficient evidence is presented indicating that the testator's free agency was overcome by another." *Wooden v. Martin (In re Conway)*, 152 Idaho 933, 938-39, 277 P.3d 380, 385-86 (2012) (citing *In re Estate of Roll*, 115 Idaho 797, 799, 770 P.2d 806, 808 (1989)).

In *Gmeiner v. Yacte*, 100 Idaho 1, 592 P.2d 57 (1979), the Idaho Supreme Court identified four elements that must be shown to support a claim that an instrument was the

product of undue influence: "(1) a person who is subject to influence; (2) an opportunity to exert undue influence; (3) a disposition to exert undue influence; and (4) a result indicating undue influence." 100 Idaho at 6-7, 592 P.2d at 62-63 (quotations omitted). Although there is no set order for evaluating these elements, all of them must be proven in order to support a claim of undue influence. *Green,* 161 Idaho at 680, 389 P.3d at 966 (citations omitted). Evidence relevant to the question of undue influence includes:

> the age and physical and mental condition of the one alleged to have been influenced, whether he had independent or disinterested advice in the transaction, the providence or improvidence of the gift or transaction, delay in making it known, consideration or lack or inadequacy thereof for any contract made, necessities and distress of the person alleged to have been influenced, his predisposition to make the transfer in question, the extent of the transfer in relation to his whole worth, failure to provide for his own family in the case of a transfer to a stranger, or failure to provide for all of his children in case of a transfer to one of them, active solicitations and persuasions by the other party, and the relationship of the parties.

In re Conway, 152 Idaho at 939, 277 P.3d at 386 (internal citations omitted). *Conway* continued:

> [A] rebuttable presumption of undue influence is created where a beneficiary of the testator's will is also a fiduciary of the testator. The proponent of the will bears the burden of rebutting the presumption. *Estate of Roll*, 115 Idaho at 799, 770 P.2d at 808. As this Court explained in *Roll*: To rebut the presumption, the proponent must come forward with that quantum of evidence that tends to show that no undue influence existed. Once that burden has been met, the matter becomes one for the trier of fact.

Id. at 938-39, 277 P.3d at 385-86. Prior to the trial, the court *sua sponte* ruled that the presumption of undue influence applied and shifted the burden of persuasion to Vernon. The court's decision was in error. To arrive at this finding, the court cited Vernon's prior affidavits and *Skinner v. US Bank Home Mortgage*, 159 Idaho 642, 647, 365 P.3d 398, 403 (2016). Tr. p. 185, ll. 4 – 20. In *Skinner*, the Idaho Supreme Court held as follows:

> As a general rule, mere respect for another's judgment or trust in this character is usually not sufficient to establish such a relationship. The facts and circumstances must indicate that the one reposing the trust has foundation for his belief that the one giving advice or presenting arguments is acting not in his own behalf, but in the interests of the other party.

Id. (internal citations omitted). There was no evidence presented in this case at trial that, with respect to the Will, Victoria reposed any trust in Vernon to act on her behalf.[20]

During the pendency of this case, the Idaho Supreme Court rendered its decision in *Green*. *Green*, like the case before us, involved a claim of undue influence and an allegation of fiduciary relationships between the parent and a child. Therein, the Supreme Court held that the mere existence of a fiduciary relationship was not sufficient to trigger a presumption of undue influence. 161 Idaho at 681, 389 P.3d at 967. Instead, the burden was on the contestant to "show some nexus between the fiduciary relationship and the execution of the donative instrument." *Id*; *see also Swaringen v. Swanstrom*, 67 Idaho 245 248, 175 P.2d 692, 695 (1946).

Under *Green* and its progeny, the court erred as a matter of law in *sua sponte* decreeing that the presumption of undue influence applied without reference to, or reliance upon, any facts establishing a nexus between any alleged trust Victoria reposed in Vernon and Victoria's decision to handwrite her Will in 1990. The court's FFCL, wherein the court decreed that Vernon was instrumental in soliciting the Will, has no support in the evidence. The court ignored the common perception that holographic wills, being handwritten by the testator, are generally

[20] In so far as the court relies upon Vernon's affidavits submitted prior to trial, Vernon raised a contemporaneous objection to the court's *sua sponte* notice that it intended to take judicial of the underlying court file and affidavits. TT p. 389, l. 6–p. 398, l. 9; p. 422, l. 1–p. 424, l. 5; p. 425, l. 6–p. 429, l. 6; p. 429, l. 23–p. 436, l. 12; p. 449, l. 21–p. 451, l. 3. The court agreed and stated that it would hold Joseph to his burden. *Id.* The court thereafter changed course and stated it was free to rely upon the affidavits. R 1813-16. Vernon submits that the court's reliance upon the Affidavits as a substitute for evidence at trial was in error.

not susceptible to undue influence for the simple reason that one has to conclude the testator's free will and ability to write were overcome by the influencer. *Gill v. Gill*, 254 S.E. 2d 122, 125 (Va. 1979) (overturning jury finding of undue influence in the execution of a holographic will where there was no evidence the testator was susceptible to influence or that the proponent of the will attempted to exert it, and further holding that "the will admitted to probate was written entirely in testator's own hand, a circumstance which tends to show a sedulous act of volition, deliberate and independent of external influence."); *See also In re Wallace's Will*, 265 N.Y.S. 898, 899 (1933) ("there is always difficulty in attacking a holographic will, the presumptions being very strong in its favor") (citation omitted)).

In support of its finding that Vernon was an active participant in the Will, the court engaged in "rank conjecture" to discredit and trivialize Victoria's intelligence. *Gill*, 254 E.2d at 125. For instance, the court found that Victoria lacked the intellectual capacity to draft a Will using the words "executor," "holographic," and "real and personal property." R 1408, *c.f.* R 1575-77. The court further remarked "it makes no sense she would not have relied on him here, especially given the language ... Victoria H. Smith was a lifetime housewife and mother. There was no evidence she had any studies beyond high school. She never even learned to drive and depended on others for transportation. No one produced any evidence that she was sophisticated in the law." R 1516. This myopic focus on Victoria's election to work at home, rather than pursue a career, in order to belittle Victoria's intelligence does not "[rise] above the level of suggestion, innuendo, or suspicion." *Gill*, 254 S.E. 2d at 125. In point of fact, the evidence was undisputed that, Victoria did, at one time, have a career working for the Department of Veteran's

Affairs in Washington, DC. Ex 256. The overwhelming evidence in this case suggests that Victoria was intelligent, well-read, strong-willed, paid attention to detail, and demanded mutual respect. *See e.g.,* TT p. 134, ll. 2-17, p. 136, ll. 7-13. The mere suggestion that "it makes no sense [to the court] that she would not have relied on him here" is not competent and blatantly ignores substantial evidence that Victoria did not rely upon Vernon to author a short, concise Will that was remarkably similar to her husband's. Ex 200; *c.f.* Ex 208.

In addition, the court does not identify any factual basis for its conclusions that use of the words in the Will were beyond Victoria's competence.[21] This conclusion followed the court's patronizing remark that Victoria was a housewife who "never even learned to drive." There was, however, simply no evidence that the use of the words "holographic," "executor" and "real and personal property" was beyond Victoria's competence.[22] Rather, as set forth more fully below, the evidence adduced at trial established that Victoria was particularly familiar with each of the terms the court concluded were evidence of Vernon's influence. For example, the use of the term "holographic will," was consistent with Vernon Sr.'s use of the same term in his will. The court's conclusion that Victoria was not "legally trained" and therefore incapable of formulating a will utilizing the term "holographic" rises to the level of "rank conjecture." *See Gill, supra.*

Similarly, the court's conclusion that a layperson, let alone Victoria, would not use the

---

[21] Certainly, no testimony was offered by Joseph or his proffered expert, Lyman Belnap, as to the contents of the Will or the "language and concepts" as having been of a nature that would typically "originate only from the mind of an attorney." In so far as Mr. Belnap's testimony was offered to suggest that holographic wills are not necessarily advisable, Mr. Belnap was unaware of the facts of this case, including the fact that Victoria inherited her estate from an attorney who had himself chosen to utilize a holographic Will. TT p. 224, l. 19–p. 225, l. 23.

[22] Victoria, though not an attorney, was engaged in the management of her own finances and utilized estate and tax planning principles. *See e.g.,* Exhibits 205, 207 (wherein Victoria scribed "tax free gift" in the subject line of the checks to her children.)

word "executor" is unfounded. Vernon Sr.'s estate was never closed, and from the time of his death in 1966 until her own death 47 years later in 2013, Victoria's personal checks all bore the title, "Executrix." R 51, 59, 92, 931-938. The issue is not what "laypersons" might know or not know; rather, the issue is what Victoria likely knew. The record on this appeal supports that Victoria was familiar with this particular identification.

The court went on to conclude that a "lifetime housewife" such as Victoria would not differentiate between real and personal property, but instead, might only refer to property as "land." R 1576. The suggestion that Victoria was too ignorant to know the distinction between real and personal property is grossly unfounded. Directly in contrast with the court's finding, Victoria was personally familiar with the distinction. *See* Ex 200.

Finally, the court's reliance upon Victoria's recitation that she made gifts of real and personal property to Joseph and personal property to Converse as evidence that Vernon interceded in the drafting of the Will, was without evidentiary support. R 1577. To be fair, Victoria's statement was accurate: prior to drafting her Will, she had given Joseph real and personal property and she had given Converse gifts of money. Joseph was the only child to receive real property from Victoria during her lifetime. To conclude that Victoria included these words as the result of undue influence is to engage in conjecture.[23]

An overriding factor, which appears to have been at issue here, was the court's unwillingness to accept that the Victoria would devise her entire estate to one child, *Vernon*,

[23] The court's conclusion that "only an attorney would recognize the significance of a testator clearly indicating the failure to provide for a child was intentional or that the child had been provided for during the testator's life" is both an incorrect statement of the law and an unsupported statement of fact. I.C. § 15-2-302 is written in terms of a failure to provide by will for a child "born or adopted after the execution" of the will. The accompanying official comment states that provision is directed at unborn children or children a testator mistakenly believes is dead.

while excluding the other two children. The general rule, however, is that persons can be disinherited for "any reason," or for "no reason" whatsoever. 79 AmJur2d Wills § 54 ; *see also*, *Summerfield v. Pringle*, 65 Idaho 300, 321, 144 P.2d 214, 224 (1943) (Ailshie, J, dissenting, "She had an undoubted right to disinherit her son if she desired to do so, for any reason or no reason, ... In other words, as I conceive the law to be, a parent has a right to disinherit any member of his or her family, with or without reason..."). As *Gmeiner* holds "[i]ndeed, the law must respect even an "unequal and unjust disposition" once it is determined that such was the intent of the grantor or testator. 100 Idaho at 7, 592 P.2d at 63 (citation omitted).

As demonstrated above, the court's conclusion that Vernon must have actively participated in the making of the Will is nothing more than "rank conjecture" lacking foundation in any articulable facts adduced at trial. Similarly, the court's analysis of the words and phrases used on the face of the Will does not withstand scrutiny. Thus, the court improperly applied the presumption of undue influence.

2. The magistrate court erred in its determination that Vernon failed to rebut the presumption.

The court's conclusion that Vernon failed to rebut the presumption of undue influence was based upon an erroneous application of the law to the evidence. The court based its decision on evidence that was not probative of any issue material to whether Victoria was devoid of free will in the making of her Will in 1990. The court further ignored substantial and competent evidence that Victoria's Will was an accurate reflection of Victoria's wishes for the distribution of her property. Upon the admission of a quantum of evidence that tends to show that no undue influence existed, the burden remained with the party seeking to invalidate the will, in this case,

Joseph, to prove all four elements to a claim of undue influence. *In re Conway, supra; see also Krebs v. Krebs*, 114 Idaho 571, 575, 759 P.2d 77, 81 (App. 1988).

Here, Vernon produced a quantum of evidence that the Will was the product of Victoria's free agency and, despite the court's tortured reasoning, there was no evidence presented by Joseph to sustain *his burden* of proving all four elements of a claim of undue influence. Joseph's own pleadings, in fact, readily established that there was no undue influence in the making of the Will. R 272-274. Joseph's Petition repeatedly asserted that any alleged undue influence or control began twenty years before Victoria's death, or 1993. *Id.* at ¶¶ 8, 29; see also ¶ 30 ("prior to 1999 [Vernon] had no actual authority to act on behalf of decedent with regard to any of her income."). Joseph's own pleadings were a tacit admission that Victoria's Will was the result of her own choices and, as explained more fully below, the court erred in its adoption of facts or theories that did not find support in the evidence.

a. The magistrate court erred in concluding that Vernon failed to sustain his burden with respect at least one of the four elements of undue influence.

i. The magistrate court's determination that Victoria was susceptible to Vernon's influence was not supported by competent evidence.

The undisputed evidence adduced at trial established that Victoria was more than capable of managing her own affairs and was not a person susceptible to influence by Vernon.

> Susceptibility, as an element of undue influence, concerns the general state of mind of the testator: whether he was of a character readily subject to the improper influence of others. ... The court will look closely at transactions where unfair advantage appears to have been taken of one who is aged, sick or enfeebled. In particular, the court will manifest concern for a grantor who has been proven incapable of handling his or her own business affairs, who is illiterate, or who has undergone marked deterioration of mind and body shortly before the grant, or who has suffered the trauma of recent death in the family.

Gmeiner, 100 Idaho at 7-8, 592 P.2d at 63-64 (internal citations omitted) (emphasis added).

The record presented during the trial of this matter unequivocally established that Victoria did not possess *any* of the factors articulated in *Gmeiner* for susceptibility. As of February 14, 1990, Victoria was not aged, sick, or enfeebled. Victoria relied upon many different people for transportation but she attended her doctor's appointments on her own; participated in and directed her own healthcare decisions; managed her finances; entertained and went to mobile book libraries; continued to attend the church of her choosing until 2007; sent gifts and cards to family members; and, participated and engaged in the care and upkeep of her personal home where she chose to live alone. *See e.g.* TT p. 16, ll. 10-13, p. 24, l. 19–p. 26, l. 12, p. 262, ll. 8-12, p. 264, ll. 1-9. By contrast, the facts and procedural history of *Gmeiner* are vastly different from the evidence presented during the trial of this case. *Gmeiner* involved a question of whether the Court erred in granting a directed verdict *in favor of* Yacte, the alleged influencer. The Court reversed, holding that the plaintiff made out a prima facie case of undue influence on the part of Yacte. Principal among those factors was the decedent's age and declining health. Yacte was unrelated to the decedent and had only befriended her in the last two years of her life at which time Yacte was 32 and the decedent was 70. Yacte was alleged to have moved into the decedent's home and isolated her from all contact with her relatives. This case could not be more readily distinguishable from *Gmeiner* and the "facts" the court relied upon to support the court's determination that Victoria was susceptible to Vernon's influence were neither competent nor substantial. The court concluded that Victoria, although generally strong-willed, had shown an inability to resist the influence of *Vernon* in five specific instances: (1) the preparation of the

Will; (2) the recitals contained in the 2012 Transfers; (3) Victoria's purchase of the Raymond Street Property; (4) Victoria's February 6, 1991 Affidavit; and (5) loans or gifts to Vernon in 1989 and 1990.

While often proven only through circumstantial evidence, the court here had the benefit of direct evidence of Victoria's ability to resist Vernon's influence, *i.e.*, Victoria's sworn Affidavit, executed February 6, 1991. Therein, Victoria stated:

> ... Affiant owns all of those real property assets, and I intend to live a very long time. I retain the right to terminate the use of any building at any time, and may elect to sell any of my property at any time I should choose. No one tells me who will inherit my property. Neither my son nor Sharon K. Smith has any interest whatsoever in any buildings I own and I will decide who and when they may be used. My son's permitted use of any building is discretionary on my part; not a decision imposed upon me by any Court.

Ex 269. As noted above, the court cited this Affidavit as evidence of Victoria's susceptibility to Vernon's influence in its FFCL. Upon the admission of Exhibit 269, the court cautioned "And I personally, in looking at this, I think it is a double-edged sword for both sides. And I say that because *it appears* that the argument *could be made* that Mr. VK Smith had the ability to exercise quite a bit of control over his mother to get this affidavit. So I am just throwing that out, that it is a two-edged sword." TT p. 286, l. 3 – p. 287, l. 10. There was, however, no testimony from Vernon or from Joseph regarding the Affidavit's creation. The court's remark that Vernon must have exercised control to obtain the sworn Affidavit does not find support in evidence and was pure speculation. The sworn Affidavit itself expressly disclaims any such inference.

Similarly, the court's reliance upon the Raymond Street purchase, or "straw-man" transaction as the court called it, was misplaced. This transaction, the court concluded, suggested

that "Vernon is willing to engage in 'shady' or blatantly dishonest behavior to accomplish his ends and to potentially commit a fraud on the court and on his ex-wife supports the Court's credibility determination." R 1574.[24] The court's reliance upon this transaction as credible evidence of "influence" however, assumes, without competent support, that Victoria was a reluctant participant in this "shady" scheme. The testimony established only that the property was the subject of a tax lien foreclosure sale. TT p. 376, l. 23 – p. 368, l. 3. The sale occurred during the pendency of Vernon's divorce and, since he was still married, he did not want to acquire the property and make it a community asset. TT p. 376, l. 23 – p. 368, l. 3. Vernon asked his brother to bid on the property in Victoria's presence. *Id.* When Joseph declined to buy the home, Victoria agreed to make the purchase. *Id.* She did and she was issued a deed to the property in June 1990. *Id.* The property remained in her name until the 2012 Transfers. There was no evidence that Vernon's request that Victoria purchase a home, mid-divorce, was "shady," nor was there any evidence that Victoria was influenced in any way to participate. Vernon's explanation was consistent with well-established Idaho law that property acquired during marriage is presumed to be community property. I.C. § 32-906. Victoria's personal motivations for assisting her son in a contentious divorce proceeding were not developed in the record, and the court's conclusion that Victoria's decision to assist was a result of "influence" by Vernon is not supported by competent, let alone substantial evidence.

[24] The court's credibility determination also hinged on a finding that the IRS is not the business of conducting audits at the request of taxpayers. R 1574. As with the court's conclusions regarding Victoria's lack of competence to draft the Will, the court's reliance upon undisclosed knowledge of the audit practices of the IRS does not find support in any evidence presented during the trial. Vernon stated the IRS performed an audit at his request because his ex-wife was stealing from him and no evidence was presented to the contrary.

Similarly, the court's reliance upon the 2012 Transfers as evidence that Victoria trusted Vernon is likewise inapposite. The issue before the court was whether Vernon unduly influenced Victoria to execute her Will. The 2012 Transfers were not signed by Victoria and occurred more than two decades after Victoria executed her Will. Vernon's statements in the 2012 Transfer documents are not material to whether Victoria, on February 14, 1990, was unduly influenced in the drafting of her Will. The court erred in consideration of evidence more than twenty-years removed from the execution of the Will to support the conclusion that Victoria relied upon Vernon's advice in drafting her Will.

Finally, the court's reliance upon the loans or gifts to Vernon in 1989 and 1990 is neither substantial nor competent evidence of undue influence. *See* R 1584. During that same time frame, Victoria made multiple gifts and loans to both Vernon and Joseph.[25] The conclusion that Victoria's gifts to Vernon were caused by a unique susceptibility to Vernon's influence lacked evidentiary support. Rather, substantial and competent evidence established that Victoria was in the habit of providing support and assistance to both of her sons before and after 1990.

ii. The magistrate court's conclusion that Vernon had an opportunity to exert undue influence upon Victoria lacks a basis in the record.

The magistrate court concluded that Vernon had an opportunity to influence Victoria. Vernon did not deny that he shared a close relationship with his mother and that he provided her with support. Vernon testified, and there was no evidence to the contrary, that he was called by

[25] The reliance upon the $9,999 gift to Vernon in 1989 as evidence of influence is particularly misplaced as it ignored competent evidence that Vernon utilized the money gifted to him for his mother's benefit by investing it in her home; not that he extorted the money out of her. TT p. 208, ll. 2-17. Joseph received a gift of $9,999 at the same time which Joseph kept for himself. As Vernon testified, these gifts were consistent with an article Victoria had read in a newspaper regarding estate planning. TT p. 208, ll. 2-17. Vernon's testimony was consistent with the documentary evidence wherein Victoria scribed "gift– tax free" or "tax free gift" upon the checks. Ex 205, 206, 207.

his mother after she had already drafted the Will and that he was asked to witness her signature. TT p. 209, l. 12 – p. 212, l. 20. The Will was a holographic instrument, handwritten by Victoria prior to Vernon's appearance at her home. The court's erroneous conclusions regarding the circumstances surrounding the execution of the Will are well addressed at pages 24-27, above. To the extent germane to the court's conclusion regarding Vernon's opportunity to exert undue influence, Vernon submits that no such opportunity existed because Vernon was not solicited for assistance in Victoria's decision to handwrite her own Will.

iii. The magistrate court's conclusion that Vernon had a disposition to exert undue influence was based upon an erroneous application of established Idaho law.

Disposition, like the other elements of a claim of undue influence, must be evaluated within the context of the timeframe surrounding the making of the Will. *See Swaringen*, 67 Idaho at 247, 175 P.2d at 693. The evidence supporting the court's conclusion that Vernon had a disposition to exert undue influence, however, included: (1) the fact that he received substantial sums of money and asked his mother to purchase property as a "straw man"; (2) the "illegal" 2012 transfers; (3) his efforts to isolate his mother; (4) his interactions with Father Faucher; and (5) and "other evidence." R 1598. Of the evidence relied upon by the magistrate, only the first alleged incident regarding Raymond Street is even marginally close in proximity to the execution of the Will in 1990, and even that event is grossly mischaracterized by the court.

The Raymond Street purchase is addressed more fully in section 2(a)(i), above. The remainder of the examples cited by the court relate to events that occurred years, if not decades, after Victoria executed her Will. Elsewhere in its decision, the court makes the unsupportable

legal claim that "events occurring after the wills execution may be compelling evidence that the proponent, Vernon K. Smith, Jr., had continuing control over his mother's thought process for a period prior to its execution and until her death." R 1572 (emphasis added). Doing so, the court ignored Idaho law which stands for the proposition that the evidence should not be "too remote to throw light on the mental condition of the testator at the time of the execution of the will." *King v. MacDonald*, 90 Idaho 272, 278-79, 410 P.2d 969, 972 (1965). The magistrate cites a few cases from other states in support of its statement that "remote evidence may be directly relevant to corroborate [its] conclusions." R 1592. Even assuming these cases are minimally consistent with Idaho law, they do not support the court's premise. For example, the court in *In re Estate of Baker*, 131 Cal.App. 3d 471, 481 (App. 1982), held that evidence prior to and one year after execution of the will was probative of undue influence, as was the fact the proponent had convinced the testator she, the proponent, was clairvoyant and could speak to the testator's dead relatives. *In Re Estate of Mooney*, 453 NE.2d 1158, 1162 (Ill. App. 1983), is also readily distinguishable as it involved allegations of the proponent's dominance and control of a testator with a mental defect, as well as a life threatening illness, at the time of execution of a will whose terms were directed by the proponent and which the evidence indicated the testator did not understand. *Id.* Similarly, *In Re Ferrill*, 640 P.2d 489, 497 (N.M. App. 1981), simply stated that evidence of the activities of the proponent a few months before and after execution of the will could be relevant. The evidence was not remote in time. *Id.*, at 496-97. Moreover, *In re Ferrill* involved proponents who, in May of 1979, had become care-givers to a woman long suffering

from cancer. The will disinheriting her family was executed in July 1979 while the testatrix was hospitalized and she died a few months later. *Id.*, at 489.

Another case relied upon by the magistrate is *In re Estate of Jones*, 320 N.W.2d 167, 170 (S.D. 1982). This decision is also easily distinguishable. First, the testator was found susceptible to undue influence due to his rapidly deteriorating health as he was being transferred back and forth between hospitals and care centers in 1979, the year he executed the will. *Id.* at 169. The proponent, a banker, had ample opportunity to exert influence and he began taking control of the testator's estate around the time the will was executed. One month after execution of the will, the banker induced the testator to execute a $35,000.00 withdrawal from a certificate of deposit. *Id.* The testator died a couple of months later. *Id.* Notably, the court cited an earlier South Dakota decision for the proposition that "Evidence of undue influence occurring subsequent to the execution of the will is admissible if it follows so closely to the time of execution of the will as to have evidentiary value." *Id.* (emphasis added).

The magistrate court also cites to an 1893 Michigan decision, *Haines v. Hayden*, 54 N.W. 911, 914-915 (1893 Mich.). This case involves a situation in which, either by virtue of "insane delusion" or by virtue of untruthful statements by the proponent that the contestant, her sister, was illegitimate, the testator wrote the contestant out of the will. *Id.* There was no viable evidence that the sister was indeed illegitimate. *Id.* The testator continued to operate under the delusion of illegitimacy of the sister until his death ten years after execution of the will, and the court allowed the evidence. *Id.* Nothing remotely similar exists here.

Finally, the magistrate relied on dicta from a Vermont case, *Estate of Laitinen*, 483 A.2d 265, 267 (1984). The quote cited by the magistrate is actually from another Vermont case, *Everett's Will*, 166 A. 827, 301 (1933). That case, somewhat similarly to *Haines*, mentioned that evidence subsequent to will execution can be relevant to establish that the proponent acquired control over the mind of the testator and retained such control. Again, there is no evidence of mind control at the time of execution, or thereafter. Again, to conclude otherwise, as one court knowingly stated, is to engage in "rank speculation." *Gill v. Gill*, 254 S.E.2d 122, 124-125 (Va. 1979) ("undue influence should not be lightly inferred from circumstances which are capable of innocent construction" and "it cannot be based on innuendo or suspicion").

As demonstrated above, the court's reliance upon events far removed from Victoria's execution of the Will finds no support in Idaho law, the law cited by the magistrate court, or the facts that were introduced during the trial. Rather, the very facts that distinguish this case from the authority cited by the court aptly illustrates the lack of support for the court's conclusions in this case. Victoria was not influenced by a clairvoyant - *Baker*; nor did she suffer from a mental defect – *Mooney*; she did not have a life-threatening illness *Mooney*, *Ferrill,* and *Jones*; or die shortly after drafting her Will – *Ferrill* and *Jones*; nor did she leave her estate to a third-party who had only recently become acquainted with her – *Ferrill* and *Jones*.

Moreover, there was no admissible evidence suggesting that Vernon isolated Victoria. Instead, the evidence demonstrated that Victoria continued to attend church until approximately 2007; that Joseph Smith Jr., continued to visit her multiple times each year until 2003; and that Joseph was himself responsible for his decision to stay away from his mother. *See e.g.*, TT p.

404, ll. 1-1; p. 469, l. 1-p. 470, l. 8; Ex 224. Joseph lived approximately 600 feet from his mother's home. TT p. 169, l. 1–p. 171, l. 5. To get to his home, Joseph would go past Victoria's house two or three times per day and would watch to see what was going on. Joseph testified at trial that "[a] lot of the years she would be outside, especially in the summertime. I would keep an eye on her. ... She was basically okay, you know, between '90, '95, '97 and that. She got around pretty good." TT p. 180, ll. 2-12. Any claim that Vernon isolated Victoria in order to exert his influence upon her was not supported by the record and the court's conclusion in that regard should be overturned.

iv. Vernon readily rebutted the presumption that the result of the Will was unnatural.

The disposition of Victoria's estate to one child, Vernon, to the exclusion of her other children, was readily explained by the complicated relationships she had with each of her children. The undisputed evidence established that Victoria was of strong will and mind, and that she was more than capable of making, and fighting for, her own decisions. Victoria did not have a relationship with her daughter, Converse, a devout born-again Christian. TT p. 315, l. 6-15. Victoria was verbally abusive to Converse. TT p. 315, l. 16 – p. 316, l. 1. Joseph also recognized that the relationship between Victoria and Converse was non-existent: "[W]e were all aware of that fact in 1991, I believe it was, she and my mother had enough of a conversation that our sister left and never came back." TT p. 49, l. 17 – p. 50, l. 13. The court nevertheless stated that "there is no explanation for [Victoria's] decision in 1990 to disinherit her two other children. Vernon introduced no relevant evidence to rebut this presumption. All of the evidence he cites is

very remote in time." R 1599.[26] The court's conclusion is erroneous as a matter of law and in fact. Vernon bore a burden of proof to rebut at least one element of a claim of undue influence which he readily satisfied by producing a quantum of evidence tending to show that Victoria was not susceptible to influence, from which point forward the burden rested with Joseph to prove the existence of undue influence. The court erred as a matter of law in requiring Vernon to "rebut the presumption that the result was unnatural, unjust, or irrational". R 1598. In any event, Vernon readily satisfied the court's arbitrary imposition of such a burden by producing a quantum of evidence that the result of the Will did not indicate undue influence. *See Gmeiner*, 100 Idaho at 6-7; 592 P.2d at 62-63. The 2008 POA, executed by Victoria, states that she chose to leave her estate to Vernon out of gratitude. Ex 4 at pg. 2; *see also Gmeiner*, 100 Idaho at 7, 592 p.2d at 63 ("the grantee may be particularly deserving by reason on long years of care and the fact that the grantor was motivated by affection or even gratitude does not establish undue influence." (internal quotation omitted)). In addition, Vernon produced testimony from two disinterested witnesses that during the mid-1990s, Victoria re-affirmed her intent to leave her estate to Vernon on at least several occasions and provided her reasons therefore. TT p. 136, ll. 14-21; p. 300, l. 4–p. 301, l. 5. The court's focus on a lack of evidence of "estrangement" as of February 14, 1990, ignores substantial, competent, and direct evidence that Victoria's decision was not a hasty decision made by an enfeebled woman on her deathbed to benefit a younger, unrelated man, but

[26] That Victoria's relationship with Joseph declined two years after she executed her Will is irrelevant to the determination of any fact at issue in this case. Victoria's Will was motivated by her own wishes and gratitude, not animus toward Joseph. *See* Ex 4. As Victoria stated in 1994, she continued to love Joseph but did not like his actions. Exhibit 235. The shift in her feelings toward Joseph were not sudden or contemporaneous with her decision to leave her estate to Vernon. She continued to make gifts to Joseph and to his children for years after she drafted her Will without any involvement by or from Vernon.

was a rational decision made by a healthy, strong-willed and intelligent woman more than twenty years before she died. *C.f. Gmeiner.*

Moreover, the court's conclusion that there was no relevant evidence of estrangement between Victoria and Converse as of February 14, 1990, ignored competent evidence that Victoria and Converse were estranged by at least 1985 or 1986. TT p. 513, ll. 6-11.[27] Joseph himself recognized that the relationship between Victoria and Converse was non-existent: "that we were all aware of that fact in 1991, I believe it was, she and my mother had enough of a conversation that our sister left and never came back." Tr. at p. 49, l. 17–p. 50, l. 13. Thus, the court's decree that Vernon failed to produce relevant evidence of estrangement must also fail.

"[T] law must respect even an "unequal and unjust disposition" once it is determined that such was the intent of the grantor or testator. *Gmeiner*, 100 Idaho at 7, 592 P.2d at 63 (citation omitted). The court erred as a matter of law in requiring to prove that the result was not "unjust" and further erred as a matter of fact in decreeing that Vernon failed to provide evidence to rebut the same. Although Joseph may feel an entitlement to Victoria's estate ("I paid my dues to justify those thoughts"), Victoria disagreed and had every right to dispose of her estate in the manner in which she deemed appropriate.[28]

---

[27] To the extent the magistrate took issue with a lack of evidence regarding a failed relationship between Converse and Victoria as of 1990, the court refused admission of competent evidence, Exhibit 257, containing Converse's recitation of the reasons she loathed her mother and refused to come back to Idaho for Victoria's funeral. *See* Section C(2)(d), below, for additional analysis regarding the magistrate's exclusion of Exhibit 257.

[28] Victoria felt Joseph was a "taker." Joseph ratified Victoria's belief by initiating these proceedings. *See* TT p. 150, ll. 2-16 (Court: I just have a question. You indicated his mother was telling you that Joe was a taker and not a giver. That he would steal anything that wasn't nailed down. Ms. Puckett: That's correct. Court: Do you know when that occurred, when she began telling you that? Ms. Puckett: Oh, I would say probably in the 80s. She talked about it somewhat. Again, she was very – she repeated that several different times. It wasn't just a one time conversation. So over the time frame, I guess in the 80s and 90s, that she would talk about the different things that she felt he took from her that were not his.").

b. The court failed to apply the remaining *Conway* factors in a manner consistent with Idaho law.

In addition to Victoria's age and physical and mental condition, additional factors that may be relevant to whether undue influence existed pursuant to *In re Conway* include:

> ... whether [s]he had independent or disinterested advice in the transaction, the providence or improvidence of the gift or transaction, delay in making it known, consideration or lack or inadequacy thereof for any contract made, necessities and distress of the person alleged to have been influenced, h[er] predisposition to make the transfer in question, the extent of the transfer in relation to h[er] whole worth, failure to provide for h[er] own family in the case of a transfer to a stranger, or failure to provide for all of h[er] children in case of a transfer to one of them, active solicitations and persuasions by the other party, and the relationship of the parties.

Id. at 938-39, 277 P.3d at 385-86. (citations omitted).

In considering these factors and the evidence adduced at trial, Vernon submits that he has more than satisfied his burden to rebut any presumption of undue influence. To the extent not previously addressed, the court's application of the above-quoted *Conway* factors lacked substantial, competent evidence. For instance, the court's conclusion that Victoria did not notify people of the Will was not supported by substantial or competent evidence. The 2008 Power of Attorney, duly executed by Victoria, expressly stated:

> ... as it has been my long-standing intention and desire that my son, Vernon K. Smith Jr., shall be the sole and exclusive heir of my entire estate, as I have so declared openly in the past many years, because of his commitment, dedication, and devotion to my best interests, welfare, and financial well-being.

Ex 4 at pg. 2. Ms. Puckett also acknowledged that in the early 1990s, Victoria made her wishes known to Ms. Puckett and specified that she was leaving her estate to "Blue" (Vernon). TT p. 136, l. 14 – p. 138, l. 18. Victoria also provided her reasoning for leaving the estate to Vernon,

as opposed to her other children, to Ms. Puckett. TT p. 141, l. 1 – p. 144, l. 9. Ms. Puckett knew about Victoria's Will "Because she said she had made the will. That she had handwritten a will out." TT p. 145, ll. 2-10. Similarly, Orin Dillworth stated that, in 1998, Victoria discussed her intent to leave her estate to Vernon. TT p. 300, l. 4 – p. 301, l. 6, p. 298, l. 6. Finally, Joseph's own letters contain repeated references that suggest Joseph was aware of his mother's intent:

> As I have said in earlier correspondence, you have the power to thrust me and my family out of the scenario I helped to build. I have spent the last two years trying to accept the dispowerment of your wishes. That has been one of the largest assignments I have obligated to master. The second and equally difficult assignment I have had trouble mastering is accepting that you like me close to nothing.

Ex 231 (emphasis added); See also Ex 234; Ex 224.

In light of the above, the court's conclusion that Victoria delayed in making her wishes known was not based upon substantial or competent evidence. The remaining factors articulated by *Conway* compel a finding that Joseph failed to sustain his burden to show undue influence as there was no evidence that Victoria was guided by necessity or that she failed to provide for Joseph or Converse by other means during their lifetimes. Victoria herself supplies ample evidence that she, and she alone, decided who would inherit her property. Ex 269.

c. The court erred in the consideration and admission of evidence far removed from the execution of the Will.

The trial of this matter occurred over the course of two days. The vast majority of the testimony related to events and statements far removed from the execution of the Will. While ordinarily decisions regarding the admission of evidence at trial are subject to an abuse of discretion standard, "the question of relevancy under I.R.E. 402 is not a discretionary matter because there is no issue of credibility or finding of fact for the trial court to resolve prior to

deciding whether to admit the evidence." *Mac Tools,* 126 Idaho at 199, 879 P.2d at 1132 (1994). "Thus, this Court reviews the trial court's relevancy decisions under the de novo standard of review." *Id.* (citations omitted). Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." I.R.E. 401.

i. The 2012 Transfers were not material to any issue of fact relevant to a determination of undue influence.

As discussed above, the court erred in granting summary judgment decreeing that the 2012 transfers made to VHS Properties, LLC, were void. The court's decision to admit Exhibit 5, the "Transfer, Conveyance, and Sale of All Property Interests from Victoria H. Smith to VHS Properties, LLC," over the relevance objection of Vernon, is reviewed de novo. *Mac Tools,* 126 Idaho at 199, 879 P.2d at 1132. The court's admission of Exhibit 5, and reliance thereon in the FFCL is in error for two reasons: (1) right or wrong, the 2012 Transfers ruling was previously adjudicated and not germane to the issues presented at trial; and (2) the 2012 Transfers were so remote in time as to serve no probative value as to the claim of undue influence in 1990.

There was no dispute that Vernon transferred Victoria's assets in 2012 and no question that Vernon did so pursuant to the 2008 Power of Attorney. The court's reliance upon the 2012 Transfers as evidence of Vernon's "undue influence" in 1990, was not germane to any of the factors identified by *Gmeiner*, *Conway*, and *Green*. The 2012 Transfers, nevertheless, made its way, either directly or indirectly, into more than sixteen (16) pages of the court's FFCL. *See* R 1568, 1571-1572; 1577-1583; 1588; 1598; 1599-1602. The court's concern regarding Vernon's actions in 2012 supplanted the lack of evidence of any undue influence over Victoria in 1990.

The court's order caused substantial prejudice to Vernon and the court's decision should be vacated in its entirety.

ii. The Testimony of Father Faucher was not material to any issue of fact relevant to a determination of undue influence.

Father Faucher was a pastor at St. Mary's Catholic church commencing in 2002, twelve (12) years after Victoria executed her Will. Father Faucher's testimony was the subject of repeated relevance and hearsay objections which were all overruled on the ground that the court viewed the testimony as relevant to Vernon's disposition to exert influence. *See e.g.*, TT p. 407, l. 13 – p. 408, l. 14. The focus of Father Faucher's testimony concerned a substantial gift he solicited Victoria to make to the Church in 2007. TT p. 404, ll. 15-16. As of 2008, Victoria was effectively home-ridden. Thereafter, Fr. Faucher stated that he called Victoria's house several times and left messages with her unnamed caretakers (not with Vernon), but that Victoria did not return his phone calls. TT p. 409, l. 19 – p. 411, l. 6. The fact that Victoria, for whatever reason, did not return Fr. Faucher's telephone calls is not relevant to whether Vernon unduly influenced Victoria when she drafted her Will in 1990. The court's decision to allow the testimony from Fr. Faucher, and her subsequent reliance thereon, was improper. The effect of the court's order caused substantial prejudice to Vernon and the court's decision should be vacated in its entirety.

d. The Court Erred in Refusing to Admit Exhibit 257

The court abused its discretion in refusing to admit Exhibit 257, a September 18, 2013 email from Converse to Joseph and Vernon regarding her relationship with her mother. Converse resides near Portland, Oregon, and refused to attend Victoria's funeral. TT 315, ll. 6-11. Vernon sought introduction of the email and Joseph objected to the extent the document contained

hearsay but conditioned that "to the extent it may reflect the decedent's state of mind, we would see that portion of it as admissible." TT p. 44, l. 2 – p. 45, l. 14. The court nevertheless refused admission of the email for any purpose, despite argument that Converse was arguably a party opponent and this was her statement. *See* I.R.E. 801(d)(2). Alternatively, Converse was an unavailable declarant and the email constituted a statement against interest and was admissible because of her status as a putative heir pursuant to I.R.E. 804(b)(3). Additional argument was presented the following day and admission was still denied, at least in part because the magistrate incorrectly believed that, if Converse could be subpoenaed, she was not "unavailable." TT 302 l. 6-313 l.18; *cf* Federal Rule of Civil Procedure 804(a)(5) (comments).

IV. CONCLUSION:

For all of the foregoing reasons, Vernon respectfully requests this Court vacate the FFCL entered by the court and remand this case with instructions to the magistrate court to enter judgment in Vernon's favor, dismissing the Petitions of Joseph H. Smith. In addition, Vernon respectfully requests this Court reverse the court's Order Granting Partial Summary Judgment upon the 2012 Transfers, as well as the June 2, 2017 Judgment on Motion Under Rule 70(b) of the Idaho Rules of Civil Procedure. R 1733-1740.

Moreover, the court erred in its prevailing party determination and in its award of attorney fees to Joseph on the summary judgment motion, its award of costs to Joseph upon the trial, and in its decision to appoint a special administrator. Vernon therefore respectfully requests the Court remand this case to the court to make a finding that Vernon is the prevailing party and is entitled to his costs below and upon this appeal.

DATED this 12th day of February, 2018.

Jones ♦ Gledhill ♦ Fuhrman ♦ Gourley, P.A.

By: _____
WILLIAM A. FUHRMAN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12 day of February, 2018, a true and correct copy of the above and foregoing document was forwarded addressed as follows:

Allen B. Ellis	[ ]	Hand Delivered
Ellis Law, PLLC	[X]	U.S. Mail
2537 W. State St., Ste. 140	[ ]	Facsimile (208) 345-9564
Boise, ID 83702	[X]	E-Mail *aellis@aellislaw.com*
Randall A. Peterman	[ ]	Hand Delivered
Givens Pursley, LLP	[X]	U.S. Mail
P.O. Box 2720	[ ]	Facsimile (208) 388-1300
Boise, ID 83701	[X]	E-Mail *rap@givenspursley.com*

_____
William A. Fuhrman

CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email addresses:

Idaho Supreme Court	sctbriefs@idcourts.net
Allen B. Ellis	aellis@aellislaw.com
Randall A. Peterman	rap@givenspursley.com

DATED this 12 day of February, 2018.

_____
William A. Fuhrman

In event of my death I give all my property to my wife Vivian N Smith with right to serve as Executrix without bond
Dated Dec 12, 196[illegible]

[signature]

#10

Holographic Will

STATE OF IDAHO }
COUNTY OF ADA } ss.

I, J. David Navarro, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the foregoing is a true and correct copy of the original on file in this office. In witness whereof, I have hereunto set my hand and affixed my official seal this 8th day of February, 20 17

J. DAVID NAVARRO, Clerk
[signature]

5

PETITIONER'S EXHIBIT 200
CV-IE-14-15352

In event of my death I give all my property, real and personal, to my son Vernon K. Smith Jr. with the right to serve as Executor without bond.

I have given my son Joseph H Smith real and personal property in my lifetime.

I have given my daughter, Victoria Converse, personal property in my lifetime.

Holographic Will.

Dated February 14, 1990.

Victoria K. Smith