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MAR 05 2018
SUPREME COURT
COURT OF APPEALS

IN THE SUPREME COURT OF THE STATE OF IDAHO

In the Matter of the Estate of Victoria H. Smith, Deceased.

Supreme Court Docket No. 45313-2017

VERNON K. SMITH, JR., et al,

Plaintiff-Appellant-Appellant on Appeal,

v.

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.

Ada County Magistrate Court
No. CVIE-2014-15352

RESPONDENT'S BRIEF

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

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Comes now Contestant/Respondent Joseph H. Smith, through his attorney of record, and submits the herein Respondent's Brief.

STATEMENT OF THE CASE'

Nature of case: This case is ancillary to the probate of the Estate of Victoria H. Smith. It presents the issue, *inter alia,* whether the decedent's holographic Will (Exhibit 208) was procured by the undue influence of her son, Appellant Vernon K. Smith, Jr. ("Vernon"). Vernon was the decedent's only attorney and was the sole beneficiary in the Will. At the time of her death, Mrs. Smith's heirs in the event of intestacy were her three children: Vernon, Respondent Joseph H. Smith ("Joseph"), and Victoria Converse ("Ms. Converse"). Respondent Joseph has challenged the validity of the Will.

Subsequent to the execution of the 1990 Will, Mrs. Smith, in her 95th year, executed a 2008 Power of Attorney (Exhibit 4) in favor of Vernon. In 2012, utilizing this document, Vernon conveyed the entirety of Mrs. Smith's assets to his limited liability company, VHS Properties, LLC. Mrs. Smith died in 2013. At the time Vernon transferred all of Mrs. Smith's assets to his LLC, her prospective estate had a value in excess of $20,000,000. A second issue, thus presented, is whether this gifting was authorized by Mrs. Smith's Power of Attorney. If it was a valid conveyance, there are no estate assets to be probated, and the validity of the Will is academic.

Except for repeated disparagement of the Magistrate's decision as "cursory", "result-driven", and "rank conjecture", Appellant's Brief contains no glaring factual inaccuracies. But Appellant is unduly prolix. The herein statement is intended to provide the reader with comprehensive but digestible information required by Rule 35, I.A.R.

Course of proceedings below: After Mrs. Smith's demise, her eldest son, the Respondent Joseph, filed a Petition for Formal Adjudication of Intestacy. (R. p. 45) In Vernon's response, Vernon objected on the grounds that there were no assets to be probated because of the transfer of these assets to his LLC in 2012, utilizing Mrs. Smith's Power of Attorney ("POA"). See Response and Objection to Petition for Formal Adjudication of Intestacy (R. p. 87). Two weeks later, however, Vernon filed Application for Formal Probate of Will, seeking to probate Mrs. Smith's 1990 holographic Will (R. p. 194).

Joseph's petition for fiduciary breach: Joseph filed a petition seeking an accounting and asserting that Vernon committed fiduciary breach in management of Estate assets (R. p. 205). In response to Vernon's motion to dismiss the petition, the Honorable Christopher Bieter "reserved decision" on Joseph's petition pending litigation of the undue influence allegations (Tr. p. 16, L. 20 to p. 17, L. 15), i.e., "so let's talk about when we can try that. I'm going to reserve decision on the motion to dismiss Counts I and III [breach of fiduciary duty and accounting] but to (sic) let you contest the will". *Id.*

Partial summary judgment: Prior to trial in this matter, Respondent Joseph filed a motion for partial summary judgment seeking an adjudication that Vernon's pre-death conveyance of Mrs. Smith's assets to his LLC was invalid as exceeding the scope of the POA. This motion was based on the absence of gifting authority in the POA. The Magistrate Court agreed and set aside this 2012 inter-vivos conveyance:

> Because the 2008 Power of Attorney did not contain a specific, express grant of authority to gift Victoria H. Smith's property., Vernon K. Smith, Jr., had no authority to gift her property to anyone or to himself - .

> The Court further orders all property returned to the estate and that no party transfer any of that property without order of this Court.

Order Granting Partial Summary Judgment, pp. 12, 17, entered July 19, 2016 (emphasis in original). (R. pp. 1060, 1065)

Trial: The matter proceeded to a two-day court trial before the Honorable Cheri C. Copsey, sitting as a Magistrate Judge. After taking evidence and written argument, the Court concluded, by written decision, that the holographic Will was the product of Vernon's undue influence. This decision had two independent procedural bases: (1) Vernon's failure to rebut the presumption of undue influence, and (2) a preponderance of the evidence established the existence of undue influence:

> Based on the evidence presented at the court trial, the Court finds that Vernon failed to introduce "that quantum of evidence that tends to show that no undue influence existed".
>
> The Court further finds that even if Vernon had rebutted the presumption with minimal evidence, Joseph directly or through Vernon's own witnesses and evidence produced a preponderance of evidence that Victoria's will leaving all her earthly possessions to Vernon was the product of undue influence. Therefore, the Court finds her holographic will is invalid and Victoria H. Smith died intestate.

FF/CL, p. 26, (R. p. 1592) (emphasis in original).

Now Vernon appeals the Order Granting Partial Summary Judgment (R. p. 1049) and the Amended Findings of Fact and Conclusions of Law[2] (R. p. 1567).

---

[2] Although there is no judgment in place, the appealability of these two decisions is based on Idaho Code § 17-201, a 19th century statute which authorizes an immediate appeal from an "order of the magistrates (sic) division of the district court in probate matters:... 3. Against or in favor of the validity of a will" and "5. Against or in favor of directing the . . . conveyance of real property". *Id., §* 17-201(3) and § 17-201(5). See *Missoula Mercantile Co. v. Whelan,* 6 Idaho 78, 81, 53 P. 2 (1898).

STATEMENT OF FACTS

Vernon's testimony as to the circumstances surrounding Mrs. Smith's execution of the holographic Will: Vernon testified as follows on the circumstances surrounding the execution of the handwritten Will on February 14, 1990:

> Q. What happened on that day?
>
> A. On that day I was called at the office late afternoon. My mother said she would like for me to stop by. I came out to the ranch and came into **the** house because she wanted me to witness her sign her will. And **I** said I would do that.
>
> Q. And so you went to her house?
>
> A. **I** went to her house that evening. Probably between 6:00 and 7:00. And she had the will on a piece of paper, the Court has the original, on the Magnavox. And she said come here. And I went there and I watched her sign her name to the will that she had already fully made out.
>
> Q. BY MR. JONES: Now, did you take the will with you or did it stay at her house?
>
> A. My mother gave it — she offered for me to take it to the office for safekeeping and **I** said mother, why don't we just leave it here in your rolltop desk in your living room.

Tr. p. 209, **L.** 20; Tr. p. 212, L. 5.

The Will: The Will recited as follows, in its entirety:

> In event of my death I give all my property, real and personal, to my son Vernon with right to serve as Executor without bond.
> I have given my son Joseph real and personal property in my life time. **I** have given my daughter, Victoria Converse, personal property in my life time.
> Holographic Will. Dated February 14, 1990.
>
> Victoria H. Smith

Exhibit 208.

The Will conformed to the requisite formalities of Idaho Code § 15-2-503, pertaining to holographic wills.

Breakdown of the Magistrate's factual findings: In the Magistrate's Findings of Fact, she separated her findings into the following categories: (1) the members of the Smith family; (2) Vernon's credibility; (3) the authorship of decedent's holographic Will; (4) Mrs. Smith's Power of Attorney and Vernon's transfer of all her assets to his **LLC;** (5) Mrs. Smith's susceptibility to Vernon's influence in 1990, the year the Will was made; (6) pre-Will relationship between Mrs. Smith and Joseph's family; (7) the absence of a factual basis explanatory of Mrs. Smith's disinheritance of her daughter; and (8) the testimony of Father Faucher. (FF/CL, pp. 7 - 22). (R. **pp. 1483-1498)**

The highlights of the Amended Findings of Fact are set forth below, in accordance with the Magistrate's factual categories, with citations to the record or trial transcript.

Magistrate's finding that Vernon lacked credibility:

(1) In the presence of Mrs. Smith, Joseph refused Vernon's request to participate as a buyer at the IRS foreclosure and auction of the residence which was owned by Vernon's soon-to-be ex-wife as her separate property (FF/CL, p. 7; Tr. p. 236, **L.** 9-25; R. p. 1483).

(2) Upon Joseph's refusal, Vernon requested Mrs. Smith participate in the auction and buy his wife's residence with her own money, which she did. Vernon testified that he engaged this scheme to prevent his wife from arguing that the residence became community property upon sale to him (FF/CL, p. 7; Tr. p. 332, L. 4 - 9; R. p. 1483).

(3) Vernon requested that the IRS perform a forensic audit on his law office accounts in an attempt to persuade the Magistrate that his ex-wife "had been stealing from him". Vernon

failed to present credible evidence that the IRS performs forensic audits at a taxpayer's request (FF/CL, p. 8;Tr. p. 232, L. 18-23.) (R. p. 1484).

(4) Vernon abused his mother's 2008 Power of Attorney by the conveyance of all her assets to his limited liability company, VHS Properties, LLC. (FF/CL, p. 8)(R. p. 1484); Order Granting Motion for Partial Summary Judgment) (R. p. 1049). This abuse of the Power of Attorney supports the Magistrate's finding that Vernon was not a credible witness and possessed the disposition to engage in undue influence.

(5) Vernon's testimony is not credible that Joseph was aware of the Will's existence prior to Mrs. Smith' death. (FF/CL, p. 8; Tr. pp. 37, L. 24 - 38, L. 5.) (R. p. 1484). See contrary testimony by Joseph and his wife Sharon (Tr. p. 37, L. 24 to p. 38, L. 5; Tr. p. 492, L. 23 to p. 493, L. 2)

Vernon testified that he was Mrs. Smith's attorney from the day he was admitted to the Bar until her death and beyond.

> Q. BY MR. ELLIS. You were Mrs. Smith's attorney, correct?
>
> A. I was from—since **I** graduated and passed the Bar examination in 1971 I was the attorney whenever she needed me. . .

Tr. p. 335, L. 4 - 10.

In a footnote, the Magistrate identified a lawsuit which Vernon filed naming Mrs. Smith as plaintiff after her passing (FF/CL, p. 8, fn. 7) {R. p. 1484).

According to the Magistrate, Vernon "provided his mother legal advice in drafting and preparing the holographic Will" (FF/CL, p. 11; R. p. 1487).

The Magistrate found Vernon's testimony implausible that the format of Mrs. Smith's Will was influenced solely by her husband's 1960 holographic will (R. p. 1486), i.e., "[b]oth the Will's

language and its circumstances give rise to the inference that she had some legal advice in its preparation" (FF/CL, p. 10). (R. p. 1486)

> Vernon was the only person present and as he repeatedly and proudly proclaimed throughout this case, she [Mrs. Smith] relied heavily on him for legal advice and had done so since 1971. It makes no sense she would not have relied on him here, especially given the language, his presence and other circumstances.
>
> Victoria Smith was a lifetime housewife and mother . . No one produced evidence that she was sophisticated in the law. . . The court finds that the language in her will does not mirror Vernon K. Smith, Sr.'s holographic will language, and the language is not that of a layperson. Based on the evidence, testimony, Vernon's lack of credibility, and the holographic will's language itself, the Court concludes that, contrary to his testimony, Vernon provided his mother legal advice in drafting and preparing her will.

FF/CL, pp. 9, 10 (Tr. **p.** 36, LL. 4-10; p. 337, L. 15-18). (R. pp. 1485-6).

Vernon testified that he did not discuss with his mother whether to consult an estate planning professional (Tr. p. 342, Ll. 20- 22), and one was not consulted.

The Magistrate's above description of Victoria Smith was that she was a "housewife" without evidence that she had "sophistication in the law". Contrary to the Appellant's Brief, the Magistrate did not cast Mrs. Smith in a pejorative light, i.e., the Magistrate did not "trivialize her intelligence", suggest that Mrs. Smith was "too ignorant", "belittle" her intelligence, or otherwise engage in "rank conjecture" as to Mrs. Smith's mental abilities. See Appellant Brief, pp. 24 - 26.

The Magistrate invalidated Vernon's transfer of the entirety of Mrs. Smith's property to his LLC as a breach of his fiduciary duty: "Again, Vernon offered no credible evidence his mother had any idea that he was transferring all of her earthly possessions effectively to either VHS properties or ultimately to himself" (FF/CL p. 13; R. p. 1579). And: "Therefore, he violated this Act [the Uniform Power of Attorney Act], his fiduciary duty, and the 2008 Power of Attorney" *(Id.,*

R. p. 1065). This abuse of Mrs. Smith's Power of Attorney supports the Magistrate's finding that Vernon was not a credible witness and had the disposition to engage in undue influence.

In the year of the Will (1990) and beyond, the Magistrate ruled that the evidence supports the finding that Mrs. Smith was susceptible to Vernon's persuasion: As noted above, in 1990 Vernon persuaded his mother to bid at a foreclosure on his soon-to-be ex-wife's property which purchase was made with Mrs. Smith's money (FF/CL, p. 17; R. p. 1583). Between August 1989 and March 1990, Mrs. Smith gave Vernon over $40,000 **(FF/CL,** p. 18; R. p. 1584; Exhibit 265). Additionally, Mrs. Smith was making Vernon's child support payments and paying his office expenses. (FF/CL, p. 18; R. p. 1584; Tr. p. 272, L. 22). Also, see incidents reflecting Mrs. Smith's susceptibility set forth at pages 30 through 34 below.

In the months prior to and subsequent to the Will's execution, the Magistrate found that Joseph and his family had a good relationship with. Mrs. Smith:

According to the Magistrate's findings:

> There is no evidence that Joseph and his family were estranged from his mother at the time she executed her holographic will. In fact, all of the evidence, up until late summer, early fall 1992 (more than two years later), proved that Victoria enjoyed a good and loving relationship with Joseph and his family. *See* Exs. 25, 265, 266, 267, 268. She continued participating in family gatherings and sending cards and gifts. There is no evidence to suggest that some estrangement between Joseph and his mother had anything to do with her uncommunicated decision to disinherit him or his family. There was no estrangement during the relevant time frame.

FF/CL, p. 18; R. p. 1584. Also, see Tr. p. 487, L. **6-10.**

According to the Magistrate, Vernon is responsible for Joseph's and Mrs. Smith's subsequent estrangement: In late 1991, nearly two years after execution of the Will, Victoria terminated Joseph as manager of her properties, and her relationship with Joseph and his family

spiraled downward and into estrangement (FF/CL, p. 8; R. p. 1574; Tr. p. 74, L. 8). There is evidence by the testimony of Mrs. Smith's granddaughter Kate Laxson and Father Faucher that Vernon was instrumental in orchestrating this estrangement (Tr. p. 448, L. 9-13 and Tr. p. 409, L. 13-18.) As found by the Magistrate:

> In early fall 1992, over two years after Victoria executed her holographic will, something drastic happened to the relationship between his mother and Joseph and his family. *Based on the evidence and Vernon's behavior in court, the Court concludes that Vernon actively engaged in damaging his mother's feelings about Joseph's family. Vernon's negative influence on his mother resulted in isolation from her family.*

FF/CL, p. 19; R. p. 1585 (emphasis added).

> And:
>
> The Court concludes from the evidence and testimony, Vernon was actively alienating his mother from Joseph's family in an attempt to isolate her. The Court further concludes that Victoria did not disinherit Joseph **H.** Smith because they were estranged when she made the will or that she thought he was a "thief and a liar".

FF/CL, p. 20; R. p. 1586 (emphasis in original).

The Magistrate found there was an absence of evidence explaining Mrs. Smith's disinheritance of her daughter Mrs. Converse: Although Mrs. Smith disapproved of Mrs. Converse' adoption of "born again" Christianity, "that disapproval does not explain why she chose to completely disinherit Victoria Converse on February 14, 1990" (FF/CL, p. 20) (R. p. 1586). Up until at least December 1999, Mrs. Smith continued to recognize the Converse children's birthdays and Christmas with checks. See Exhibits 265 through 268. Two months prior to the date of the Will, Mrs. Smith gave Mrs. Converse a $3000 gift (Tr. p. 69, L. 11 to p. 70, L. 2; Exhibit 205); in December 1990, ten months after the Will was executed, Mrs. Smith gave her daughter a $3000

monetary gift. (*Id;* Tr. p. 239, L.4 to p. 240, L.2).

According to the Magistrate, the relevance of Father Faucher's "credible" testimony (R. p.1586) ran to three elements of undue influence: (1) Mrs. Smith's *susceptibility* to Vernon's undue influence (2) Vernon's *opportunity*, to influence, and (3) *disposition* to engage in such conduct. Father W. Thomas Faucher was Mrs. Smith's priest for thirteen years and had known the Smith family since 1950 (FF/CL, p. 20; R. p. 1586; Tr. p. 401, L. 20-23). His testimony may be summarized as follows:

In 2007, Father Faucher approached Mrs. Smith respecting a "substantial memorial gift" to the Church (Tr. p. 405, L. 3-13). Mrs. Smith responded that she would like to make such a donation. *Id.* Father Faucher recommended that she discuss the matter with Vernon, knowing that Vernon was involved in his mother's financial decisions. Thereafter, according to Father Faucher, Mrs. Smith, a regular attendee at Sunday services, stopped attending church. Father Faucher began calling her house and was advised that Mrs. Smith was ill but not available for him to administer the sacrament of the sick. Father Faucher called Vernon's office several times without reaching him. Finally, he arranged to have coffee with Vernon who advised that there would be no charitable contribution. He never saw or spoke to Mrs. Smith during the remaining six years of her life (Tr. pp. 401-413; FF/CL p. 21; R. p. 1587) This incident reflects Mrs. Smith's susceptibility to Vernon's influence as well as Vernon's "disposition" to exploit this susceptibility by isolating Mrs. Smith.

According to Father Faucher, Mrs. Smith "had a deep appreciation for strong men" (Tr. p. 420, L. 18 to p. 421, L.2). The Magistrate found that Vernon "is a formidable and persuasive man" who conceded that his mother followed his advice (FF/CL, p. 21; R. p. 1587).

ADDITIONAL ISSUES PRESENTED ON APPEAL

(1) Referencing the Order Granting Partial Summary Judgment, which invalidated Vernon's conveyance of real property, whether the Notice of Appeal (R. 1517) was timely in view of immediate appealability of probate court orders which are "against the . conveyance of real property", per Idaho Code § 17-201(5) and Rule 83(a)(2)(F), I.R.C.P. See Motion for Partial Dismissal of Appeal and supporting brief, incorporated herein by reference, which this Court has previously denied.

(2) In the event Respondent Joseph is the prevailing party in this appeal, whether he is entitled to attorney fees pursuant to Idaho Code §§ 12-121 and 15-8-208 and Rule 54(e)(2), I.R.C.P., on the grounds that the prosecution of this appeal was brought frivolously, unreasonably or without foundation.

ARGUMENT

STANDARD OF REVIEW

Findings of fact and conclusions of law: A recent decision of this Court is consistent with multiple Idaho decisions that an appellate court "will not disturb findings of fact that are supported by substantial and competent evidence". As to conclusions of law, these are "freely reviewed" and, thus, subject to the appellate court "drawing its own conclusions from the facts presented in the record".

> On review by this Court, a trial court's conclusions following a bench trial will be limited to a determination of whether the evidence supports the trial court's findings of fact, and whether those findings support the conclusions of law. *Oregon Mut. Ins. Co. v. Farm Bureau Mut. Ins. Co. of Idaho,* 148 Idaho 47, 50, 218 P.3d 391, 394 (2009). This Court will "liberally construe the trial court's findings of fact in favor of the judgment entered, as it is within the province of the trial court to weigh conflicting evidence and testimony and judge the

> credibility of witnesses." *Id;* see also *Beckstead v. Price,* 146 Idaho 57, 61, 190 P.3d 876, 880 (2008) (regarding findings of fact in view of the trial court's role as trier of fact). *This Court will not disturb findings of fact on appeal that are supported by substantial and competent evidence, even if there is conflicting evidence at trial. Panike & Sons Farms, Inc. v. Smith,* 147 Idaho 562, 565-66, 212 P.3d 992, 995-96 (2009). Only erroneous findings will be set aside. *Id.* at 565, 212 P.3d at 995. Also, this Court has always held that its view of the facts will not be substituted for that of the trial court. *See Weitz v. Green,* 148 Idaho 851, 857, 230 P.3d 743, 749 (2010). Finally, conclusions of law are freely reviewed by this Court, drawing its own conclusions from the facts presented in the record. *Griffith v. Clear Lakes Trout Co.,* 146 Idaho 613, 619, 200 P.3d 1162, 1168 (2009).

Green River Ranches, LLC, v. Silva Land Co., LLC, 162 Idaho 385, 397 P.3d 1144, 1148 (2017), quoting *Watkins Co, LLC, v. Storm,* 152 Idaho 531, 535, 272 P.3d 503, 507 (2012) (emphasis added).

In the probate context, this same standard of review prevails both as to the issue of undue influence and whether the presumption of undue influence should be invoked. See *Estate of Conway,* 152 Idaho 933, 277 P.3d 380, 385 (2012).

Summary judgment: Respondent Joseph concurs with the standard of review for summary judgments set forth in Appellant's Brief (p. 4). That is, the issue presented, i.e., the scope of the Power of Attorney, is a pure question of law and does not implicate questions of material fact.

Evidentiary rulings: Any error in the admission of evidence that does not affect the substantial rights of the parties will be disregarded, i.e., an "abuse of discretion" standard is applied. *Howell v. Eastern Idaho Railroad, Inc.,* 135 Idaho 733, 24 P.3 d 50, 55 (2001); I.R.E., Rule 103. The appellate review of a trial court's decision as to the relevancy of evidence is a de novo review. *Id.*

RESULT SOUGHT AND SUMMARY OF ARGUMENT

Result sought: As a preliminary issue, Respondent Joseph seeks a dismissal of this appeal as it pertains to the Order Granting Partial Summary Judgment. The motion to dismiss (previously denied by the Court) is sought based upon Appellant's failure to file a timely notice of appeal.

Assuming the motion to dismiss remains denied, Respondent Joseph seeks an affirmance of the entry of partial summary judgment against Appellant Vernon, which concluded that he lacked the authority to make pre-death conveyances of Estate property. Respondent Joseph also seeks an affirmance of the trial court's Amended Findings of Fact and Conclusions of Law (R. p. 1567) that the subject holographic Will was invalidated by the undue influence of its sole beneficiary Vernon, Mrs. Smith's undisputed attorney and fiduciary.

Summary of argument:

(1) Partial summary judgment: The Magistrate correctly invalidated Vernon's 2012 conveyance of Mrs. Smith's assets to his LLC in its Order Granting Partial Summary Judgment. Mrs. Smith's 2008 POA (Exhibit 4), did not include gifting authority and, therefore, did not authorize Vernon's 2012 conveyance to his limited liability company, VHS Properties, LLC. (Exhibit 5) As the Magistrate ruled as a matter of law:

> Because the 2008 Power of Attorney did not contain a specific, **express** grant of authority to gift the Victoria H. Smith property, Vernon K Smith had no authority to gift her property to anyone or to himself.

Order Granting Partial Summary Judgment, p. 12 (bolded in original), citing Idaho Code § 15-12-201(1)(b). (R. p. 1060)

That is, there is no genuine issue of material fact which requires litigation. Rule 56(c), I.R.C.P. The Estate assets remain intact and are subject to probate following Mrs. Smith's demise in 2013.

(2) Existence of undue influence: Whether by invocation of the presumption or by a preponderance of the evidence, the holographic Will was procured by undue influence: the Amended Findings of Fact and Conclusions of Law, which invalidated the holographic Will, should be affirmed

based upon: (1) upon the existence of "substantial and competent evidence" of undue influence. (2) appellate deference to the Magistrate's weighing of conflicting evidence, and (3) its judging the credibility of witnesses. *Watkins Co., LLC, v. Storms,* 152 Idaho at 535, 272 P.3d at 507 (2012).

THE MAGISTRATE'S SUMMARY JUDGMENT CORRECTLY RULED, AS A MATTER OF LAW,- THAT VERNON'S PRE-DEATH CONVEYANCE OF ESTATE ASSETS TO HIS LLC WAS INVALID IN THE ABSENCE OF GIFTING AUTHORITY IN MRS. SMITH'S POWER OF ATTORNEY.

Vernon, the sole principal of VHS Properties, LLC, was a litigant before the Magistrate which conferred jurisdiction to invalidate Vernon's deed to VHS as exceeding his Power of Attorney: The Idaho Supreme Court has recognized the "conclusive" power of probate courts to adjudicate questions of title to real property as between Estate heirs. *Pincock v. Pocatello Gold,* 100 Idaho 325, 597 P.2d 211, 215 (1979).

The evidence is undisputed that prior to Mrs. Smith's death Vernon, utilizing his Power of Attorney, conveyed the Estate real property to his limited liability company, VHS Properties, LLC. Vernon became the sole owner of this LLC when, the next day, he conveyed Mrs. Smith's membership in the LLC to himself. See Appellant Brief, page 13, referencing "R 74-77".

As a result of this transfer of real estate, Vernon saw himself as the recipient of a gift from his mother, although transferred to himself by his invocation of her Power of Attorney, i.e., "[s]he wanted me to have the entire Estate, and I chose to take it by deed transfer as opposed to testamentary disposition" (Tr. p. 352, L. 5-12). As is observed in Appellant's Brief: "Vernon reasoned that these transfers were consistent with his mother's intent that he inherit her property and also serve an estate planning and tax purpose". *Id.,* p. 13. In ruling upon the validity of Vernon's transfer pursuant to the Power of Attorney, the Magistrate was adjudicating and settling the heirs' interest in the subject real property. *Pincock v. Pocatello Gold,* 597 P.2d at 215. Such adjudication was clearly within the

Magistrate's subject matter jurisdiction.

Respondent Joseph's standing to challenge Appellant Vernon's 2012 conveyance of Mrs. Smith's real property: Utilizing the 2008 Power of Attorney ("POA") (Exhibit 4), Appellant Vernon conveyed the entirety of Mrs. Smith's assets to his limited liability company, VHS Properties, LLC (Exhibit 5; R pp. 1577-83). Under the authority of the Uniform Power of Attorney Act ("UPAA"), Idaho Code § 15-12-116(1), respondent Joseph had standing to challenge the validity of the conveyance in his motion for summary judgment: "The following persons may petition a court to construe a power of attorney or review the agent's conduct and grant appropriate relief: . . . (d) The principal's spouse, parent or descendant; (e) an individual who would qualify as a presumptive heir of the principal . . ." In her summary judgment order, the Magistrate cited this statute which acknowledged Joseph's standing, as both a descendant and presumptive heir, to request the Court review Vernon's conduct under the POA and "grant appropriate relief' (R. p. 1058).

Ignoring the standing which a "descendant" or "presumptive heir" has under the UPAA, Vernon argues that only a "living principal" can invoke the remedies imposed by the UPAA: "It is clear that those provisions, by design, are intended for the benefit of a living principal . . .The time for Joseph to have sought such judicial relief was while Victoria was still alive [3] (Appellant's Brief, p. 16, 17). This argument trashes the plain language of the statute and severely dilutes the protections afforded a principal by limiting such protections to a pre-death invocation.

The Official Comment to § 15-12-116 confirms that section (1) "sets forth broad categories of persons who have standing to petition the court for construction of the power of attorney or review the agent's conduct ." The succeeding section (§ 15-12-117) confirms the standing of a presumptive heir or descendant to challenge an agent's conduct under a POA, whether the principal

is living or dead: "An agent that violates this chapter is liable to the principal *or the principal's successor in interest . . ."* (emphasis added).

Appellant's cited case law fails to support the contention that an agent's abuses cannot be addressed after the death of the principal: Vernon cites *In re Burke Estate,* Del.Ch. Lexis 121 (2016) as authority for the proposition that petitions for judicial relief challenging an agent's actions can only be made during the lifetime of the principal. First, this decision, by the Court of Chancery, has been superseded by the Supreme Court of Delaware in *Burke v. Burke,* 082417 DESC. 48 (2017). Secondly, this case has no relevance to the case at bench. In *Burke,* the agent in a power of attorney was also the residuary beneficiary under the subject will. Therefore, the proceeds in question would go to her in any event, i.e., there was no justiciable controversy. Thirdly, the Chancery Court decision cited a Delaware statute in footnote 14 which appears to track Idaho's UPAA and provides that an agent is required to present an accounting when so requested by the beneficiary or personal representative "upon the death of the principal". See Idaho Code § 15.42-114(8).

The doctrine of res judicata did not bar Joseph's motion for partial summary judgment 'invalidating Vernon's conveyance of Mrs. Smith's assets to his limited liability company: In general terms, Judge Bieter's treatment of Joseph's petition alleging fiduciary breach was neither dispositive nor did it involve the same issues as Joseph's summary judgment motion. Joseph's petition sought damages for Vernon's fiduciary breach in the handling of Estate assets; Joseph also sought an accounting (R. p. 271). By contrast, in the summary judgment motion, he alleged that Vernon acted outside the power of attorney and sought an order that Mrs. Smith's assets be transferred back to the Estate.

More to the point from a res judicata standpoint, Judge Bieter did *not* rule but "reserved" a

decision: "So let's talk about when we can try that. I'm going to reserve decision on the motion to dismiss Counts I and III [breach of fiduciary duty and accounting] but to let you (sic) contest the will" (Tr. P. 15, L. 20 to p. 16, L. 15) (bracketed material explanatory).

The elements for the application of res judicata do not exist here. First, there was no "valid final judgment" which preceded the summary judgment proceedings. Secondly, the issue presented in Joseph's petition, i.e., fiduciary breach in the mishandling of Estate assets, was different than the summary judgment issue, i.e., the validity of Vernon's gift of all Estate assets to his limited liability company. See *Lohman v. Flynn,* 139 Idaho 312, 319, 78 P.3d 379 (2003).

Vernon's invocation of the "coupled with an interest" exclusion is both irrelevant and inapplicable to his "interest" as merely an expectant heir: Section 15-12-103 (1) of the UPAA excludes from the Act "a power to the extent it is coupled with an interest . . ." , citing as an example "a power given to or for the benefit of a creditor . . ."

First, the "coupled with an interest" provision goes to the revocability of a POA, not the scope of the POA, which is the issue here. As noted by the Magistrate in her Order Denying Reconsideration:

> "[I]n order that a power may be irrevocable because coupled with an interest, it is necessary that the interest shall be in the subject matter of the power, and not in the proceeds which will arise from the exercise of the power".

Id, p. 17 (R. p. 1346), quoting *What Constitutes Power Coupled with an Interest within Rule as to Termination of Agency,* 28 A.L.R. 1243 §2(a).

Secondly, Vernon's interest in Mrs. Smith's Estate in 2012, at the time he made the transfer to his limited liability company, was a mere expectant interest, i.e., a prospective heir who had no enforceable interest against the assets of the Estate. As observed by the Magistrate:

> Thus, in order for the agent's power to be "coupled with an interest", the agent must have a property interest in the thing which is the subject of the agency [authority cited]. Vernon K. Smith, Jr., did not have a property interest in the subject matter of the 2008 Power of Attorney.

Order Denying Reconsideration, p. 18 (R. p. 1347).

Even if Vernon did hold an enforceable interest in the Estate, i.e., a "coupled interest", this feature does not expand the scope of the POA to endow him with gifting powers.

The Magistrate's invalidation of 2012 Vernon's "gifts" to his LLC is based upon the ineffective Power of Attorney: Based upon Joseph's standing, the applicability of the UPAA, and the absence of gifting authority in the POA, the Magistrate correctly concluded that the 2012 conveyances of Mrs. Smith's entire estate to Vernon's limited liability company were invalid as a matter of law: "Nothing in this power of attorney specifically or expressly authorizes the holder to gift Victoria H. Smith's property" (R. p. 1052).

And:

> The Court grants partial summary judgment to Joseph H. Smith. finding there is no dispute of any fact material to this issue. The Court sets aside all "gifts or transfers Victoria H. Smith's property made pursuant to the 2008 Power of Attorney, effective immediately. The Court further orders all property returned to the estate and that no party transfer any of that property without order of this Court. Finally, the Court orders Vernon K. Smith. Jr. provide an accounting, receipts, etc. to the Court within 30 days of this Order.

R. p. 1065

By the Magistrate's Order of Partial Summary judgment, Mrs. Smith's property was retained by her Estate, to be distributed in accordance with prospective probate orders.

THE ELEMENTS OF UNDUE INFLUENCE AND THE NECESSARY RELIANCE ON CIRCUMSTANTIAL EVIDENCE.

Elements of undue influence: The existence of undue influence is determined through proof

of four elements: (a) a testator who is *susceptible* to undue influence; (b) an *opportunity* to exert undue influence on the testator; (c) the *disposition* and character of the beneficiary as consistent with a person who would exert undue influence; and (d) a testamentary *result* indicating undue influence. *Gmeiner v. Yacte,* 100 Idaho 1, 6, 592 P.2d 57, 62 (1979); *In re the Estate of Conway,* 152 Idaho 933, 938, 277 P.3d 380 (2012); *Green v. Green,* 161 Idaho 675, 389 P.3d 961, 966 (2017).

Alienation and isolation: classic signposts of decedent' susceptibility and of Vernon's opportunity and disposition to unduly influence: In *Gmeiner,* Court noted two circumstances which support the existence of undue influence and which exist in this record, i.e., beneficiary-induced alienation of family members and isolation of the testatrix:

> **The** court **will** look closely at situations where the recipient of a deed or bequest has apparently been responsible for *alienating* the affections of the testator-grantor from the other members of his or her family. The situation is further exacerbated if the grantee has *isolated the grantor* from all contact with family or with disinterested third parties.

Id, 100 Idaho at 8 (emphasis added).

Necessary reliance on factual inferences: The *Gmeiner* Court recognized the long held view that "direct evidence as to undue influence is rarely obtainable and, hence, a court must determine the issue of undue influence by inferences drawn from all the facts and circumstances" *(Id.,* 100 Idaho at 5). Also see *In re Lunders ' Estate,* 74 Idaho **448,** 263 P.2d 1002, 1006, (1953) citing *In re Hannam's Estate,* 236 P.2d 208, 210 (1951). As opined in *King v. McDonald,* 90 Idaho 272, 410 P.2d 969 (1965):

> In *Estate of Randall,* 60 Idaho 419, 93 P.2d 1, 5 we held that in order to show undue influence it is not necessary to prove circumstances of either actual domination or coercion; that the only positive and affirmative proof required is of facts and circumstances from which undue influence may be reasonably inferred, for instance, that the beneficiary was active in the preparation and execution of the will.

Id., 410 P.2d at 973.

As one Court observed, it is "universally recognized" that "one who seeks to use undue influence does so in privacy". *In re Estate of Randall,* 60 Idaho 419, 429, 93 P. 2d 1, 5 (1939) (quoting *Blackman v. Edsall,* 68 P. 790, 792 (Colo. 1902). Based upon the usual lack of direct evidence of undue influence, the courts have recognized the utility of circumstantial evidence and the inferences to be drawn therefrom.

THE RECORD SUPPORTS THE PRESUMPTION THAT THE DECEDENT'S WILL WAS THE RESULT OF UNDUE INFLUENCE.

Conditions creating the presumption: In order for there to be a presumption, two conditions must exist: (a) a fiduciary relationship between the testator and the beneficiary; and (b) the beneficiary/fiduciary must have had some role in the preparation of the Will:

> [A] "presumption of undue influence" arises from proof of the exercise of a confidential relation between the testator and such a beneficiary, "coupled with activity on the part of the latter in the preparation of the will. The confidential relation alone is not sufficient. *There must be activity on the part of the beneficiary in the matter of the preparation of the will.*

In re Lunders ' Estate, 74 Idaho 448, 263 P.2d 1002, 1006 (1953), citing *Estate ofHiggins,* 104 P. 6, 8 (Cal. 1909) (emphasis added).

By Vernon's own testimony, he witnessed Mrs. Smith's execution of the Will and offered advice as respects its safekeeping (Tr. p. 209, L. 20 to p. 212, L. 5). He also acknowledges his role as Mrs. Smith's attorney and fiduciary. Order Granting Partial Summary Judgment, p. 8 (R. p. 1056).

(a) Fiduciary role: The evidence is undisputed that appellant Vernon was his mother's sole attorney and fiduciary since 1976. In 2012, by reason of a 2008 POA in his favor, drafted by him (Exhibit 4) and executed by Mrs. Smith (at age 95), Vernon transferred all her assets to an LLC owned

by him. (Exhibit 5) As the Court found in the underlying summary judgment proceedings:

> Vernon K. Smith, Jr., was the Attorney of Record for his father's estate continuously since 1976. According to Vernon K. Smith, Jr., he acted exclusively for Victoria H. Smith's benefit in managing and preserving all matters of ownership of all her interests. He admitted he had a fiduciary relationship with his mother. Thus Victoria H. Smith's estate include Vernon K Smith, Sr.'s estate and assets.

Order Granting Partial Summary Judgment, p. 8. (R. p. 1056)

As the Idaho Supreme Court has held, the attorney/client relationship "is one of trust, binding an attorney to the utmost good faith in fair dealing with his client, and obligating the attorney to discharge that trust with complete fairness, honor, honesty, loyalty and fidelity. *Blough v. Wellman,* 132 Idaho 424, 426, 974 P.2d 70 {1999).

The record is replete with legal advice from Vernon to his mother which, *inter alia,* adversely impacted Joseph's relationship with his mother: (1) the legal controversy surrounding the Hamer property (Tr. pp. 200-204); (2) the issue of the well easement {Tr. pp. 237, 238; pp. 159-160); (3) the dispute over the fence repairs (Tr. pp. 243, 244); (4) and advising his mother respecting Joseph's refusal to participate in the foreclosure of his ex-wife's Raymond St. property (Tr. p. 164, L. 6-21; p. 236, L. 9-25). See generally below, pp. 30, 31.

Vernon has placed great reliance on *Swaringen v. Swanstrom,* 67 Idaho 245, 175P.2d 692 (1946). There the Court ruled that the mere fact that the beneficiary was the testator's attorney was insufficient to raise a presumption of undue influence against the beneficiary. *Swaringen* is distinguishable from the case at bench for three reasons: (1) the beneficiary/attorney did not participate in the preparation of the will; (2) the testator had the benefit of independent legal advice in the drafting of the will; and (3) the undisputed evidence was that the testator was "strong-minded" and not susceptible to being influenced *(Id.,* 167 Idaho at 248). In contrast, as testified by Father Faucher, Mrs.

Smith "had a deep appreciation for strong men" and "had a desire to please" such figures (Tr. p. 420, L. 18 to p. 421, L. 2).

Likewise, *Green v. Green,* 161 Idaho 675, 389 P.3d 961 (2017) has no application here {Appellant Brief, p. 23). In *Green* involving an amendment to a trust, the grantors' attorney prepared an amendment to the trust which made James, one of five siblings, the sole beneficiary upon the grantors' deaths. The other siblings alleged the amendment was the result of beneficiary James' undue influence which influence was enabled by James' status as a fiduciary. In affirming the district court's summary judgment in favor of James, the alleged undue influencer, the Supreme Court held that James' fiduciary duty as a director of the family corporation was an insufficient connection to the execution of the donative instrument (trust amendment) to raise a presumption of undue influence {389 P.3d at 968), i.e., the beneficiary James was not a fiduciary to the grantors, his parents.

The case of *Gill v. Gill,* 254 S.E.2d 122 (Va. 1979) is likewise distinguishable. In *Gill,* the beneficiary did not have a fiduciary relationship with the testator and was not present when the will was drafted. Also, there were two witnesses to the will.

(b) Vernon's testamentary participation: A second condition precedent to invocation of the presumption of undue influence is that the beneficiary have some role in the preparation of the will.

As set forth above (page 5,6), Vernon testified that he witnessed Mrs. Smith's execution of the Will per her request and counseled her to keep it in her rolltop desk at home (Tr. pp. 209, 210).

Mrs. Smith, who was not an attorney, used testamentary language and concepts which typically originate only from the mind of an attorney. The Will provides (in its entirety):

> In the 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 life time (sic). I have given my daughter, Victoria Converse, personal property in my life time (sic). Holographic will dated February 14, 1990.

Exhibit 208

That is, the following phrases have a special legal gloss: "executor without bond", "real and personal property" and "holographic will". The acknowledgment that Vernon's siblings have already received something anticipates (erroneously) the issue ofpretermitted heirship, not an issue that readily springs into the lay mind.[3]

Vernon's "fingerprints" are all over the holographic will. The Magistrate correctly concluded that Mrs. Smith "had some legal advice in [the Will's] preparation" (FF/CL, p. 10; R. p. 1576).

(c) Vernon's post-Will participation in testamentary matters: Vernon drafted a power of attorney for his appointment which contained the following concluding paragraph bizarrely referencing Mrs. Smith's testamentary intentions:

> This Durable Power of Attorney is irrevocable and shall remain in full force and effect, having been coupled with adequate consideration, and shall not be affected, altered or impaired by the event of my death or disability, and shall continue in effect for all time, 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.

Exhibit 4, p. 2. (emphasis added)

The POA (Exhibit 4) drafted by Vernon (Tr. p. 351, L. 3-5), further implicates him in the testamentary affairs of his mother which supports the imposition of the presumption of undue

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[3] Prior to 1971, "pretermitted" heir included a living intestate heir who was omitted from the will. Subsequent to 1971, a pretermitted heir is an heir at law who was born subsequent to the execution of the will. Idaho Code § 15-2-302. That is, Joseph/Converse would not be deemed pretermitted.

influence. More significantly, the POA (a document actually signed by Mrs. Smith) omits reference to the holographic Will but speaks of her "long standing intention" to make Vernon her sole heir. By contrast, the transfer document, drafted and signed *only* by Vernon (Exhibit 5; Tr. 349, p. 2-3) which conveyed all of Mrs. Smith's assets to Vernon's LLC, makes specific reference to the holographic will.

This conduct is relevant to the element of "disposition", i.e., Vernon's propensity to unduly influence is exemplified by his abuse of the 2008 POA. See discussion regarding "disposition" below, pp. 34, 35. Upon the realization that Joseph was undertaking a serious challenge to the validity of the holographic Will, Vernon requested that (1) the Court ignore the Will (which he had previously proffered to probate) and (2) the Court confirm his ownership of Estate assets notwithstanding his *ultra vices* use of the 2008 Power of Attorney to gift the entire Estate to his limited liability company, leaving the Estate with no assets. As he argued in summary judgment briefing:

> . . . Vernon has never conceded or waived the fact that there are no assets to be found in any estate to be opened, as he has disclosed all assets were transferred on July 4, 2012 and there would be no assets to inventory in any potential estate that may or may not be formed.

R. p. 986.

Vernon's arrogant disregard of Mrs. Smith's testamentary aspirations set forth in the 2008 POA underscores his "disposition" to engage in undue influence. Vernon testified:

> Q. BY MR ELLIS: I am trying to understand how your conveyance to the LLC and then the conveyance of your mother's membership to yourself is consistent with the power of attorney which talks about her testamentary intentions.
>
> A. She wanted me to have the entire estate, and I chose to take it by deed transfer as opposed to the testamentary disposition.

Tr. p. 352, L. 5-12.

VERNON HAS FAILED TO REBUT THE PRESUMPTION OF UNDUE INFLUENCE.

By the presumption of undue influence, Vernon is burdened with producing evidence of the non-existence of at least one of the four elements of undue influence. *Bongiovi v. Jamison*, 110 Idaho 734, 718 P.2d 1172 (1986). Although Vernon has asserted that he has produced that "quantum" of evidence sufficient to rebut the presumption (Appellant Brief, p.28), he failed to identify that evidence.

Vernon has presented insufficient evidence to rebut "at least one" of the four elements of undue influence: (1) "susceptibility", (2) "opportunity", (3) Vernon's "disposition", and (4) the testamentary "result" of the holographic Will. *Id.* That is, there is an absence of rebuttal evidence from which the trier of fact could "reasonably" conclude that even one of the elements of undue influence does not exist. *Id.*

Vernon argues that his status as sole beneficiary is the natural "result" of Mrs. Smith's negative feelings toward Joseph and his sister Vicky (Appellant Brief, p. 37). However, the evidence, of Mrs. Smith's disappointment with Joseph arose *after* the execution of the Will and, in any event, was orchestrated by Vernon. See record cited below at pages 30 - 34. As to Ms. Converse, the record is barren of evidence indicating Mrs. Smith's antipathy toward her daughter.

The correspondence between Joseph's family and the testatrix commencing in 1992 (two years after execution of the holographic Will) reflects a deterioration in their relationship. There is no evidence that this deterioration existed pre-Will (pre-1990) which diminishes the evidentiary weight of such post-Will correspondence, if not its actual relevance. *Lehmkuhl v. Bolland*, 114 Idaho 503, 757 P.2d 1222, 1229 (1988).

In any event, such deterioration was the result of Vernon's efforts at alienating Joseph's family from the testatrix. The evidence in the record of Vernon's successful efforts at alienation is set forth

below (pp. 30-31). Prior to execution of the Will in 1990, the evidence supports the conclusion that the testatrix and Joseph's family experienced a normal familial relationship. See especially Group Exhibits 2 and 25 which are greeting cards exchanged and family photographs.

SUBSTANTIAL AND COMPETENT EVIDENCE SUPPORTS THE EXISTENCE OF UNDUE INFLUENCE!

Stopgap utility of **holographic wills:** The legislated emergence of the holographic will, recognized in most jurisdictions, was not intended to promote a do-it-yourself trend in will drafting. Rather, it was intended to provide individuals with a testamentary option where a terminal illness or exigent circumstances prevented access to counsel and the drafting of a conventional, printed will. As testified by Lyman Belnap, an attorney/expert called by respondent Joseph:

> The instances where I have been able to have input on holographic wills it's usually been a situation where people were leaving town and no time to sit down and do a formal will. Something in the interim to carry them until they could get back to town so they didn't have absolutely nothing as they traveled.

Tr., p. 221, L. 5 15.

In order to discourage fraudulent authorship, given the absence of signatory witnesses, the typical authorizing statute, e.g., Idaho Code § 15-2-503, requires that the holographic will be "in the handwriting of the testator". *Id.*

Quoting a 1933 case, *In re Wallace's Will,* 265 N.Y.S. 898, which, in turn, quoted from an undated English case *(Carroll v. Norton,* 3 Bradf. Sur 291, 318), appellant Vernon argues: "There is always difficulty in attacking a holographic will, the presumptions being very strong in its favor". (Appellant's Brief, p. 24). With all due respect to New York and English jurists, the legitimacy of a

[4]The Appellant Brief focuses on Vernon's rebuttal burden but, tellingly, fails to identify how Joseph's evidence of undue influence is neither competent nor substantial.

testatrix' handwritten will does not rest on it being an indicia of the free will of the testator. Rather, it has to do with discouraging fraudulently signed wills.

In order to confirm a signatory's identity, a will in her "handwriting" (LC. § 15-2-503) exists as such confli nation, in lieu of the two witnesses required in the conventional, printed will. That is, in order to discourage fraudulent wills, the Idaho Legislature imposed the requirement oftwo witnesses (LC. § 15-2-502) or, in the alternative, the requirement of a testatrix' "handwriting". Attesting witnesses, with the opportunity to observe a testator's demeanor (and that of the influencer, if present), are more effective in discouraging undue influence than an unwitnessed, handwritten will. In the latter case, the undue influencer has the opportunity to consummate his evil work in the absence of witnesses.

Susceptibility of the Testatrix to Undue Influence and Vernon's Exploitation thereof:

Susceptibility: In its Order Granting Motion for Partial Summary Judgment entered on July 19, 2016, the Magistrate made the following finding of fact:

> "In addition, Vernon K. Smith, Sr., Vernon K. Smith, Jr., Victoria Converse and Joseph H. Smith's father died at the age of 53 on May 2, 1966. According to Vernon K. Smith, Jr., he acted exclusively for Victoria H. Smith's benefit in managing and preserving all matters of ownership of all of her interests. He admitted he had a fiduciary relationship with his mother."

R. p. 1056.

In the pleadings filed in this case, Vernon admitted that his mother depended upon his legal and financial advice and deferred to his decision-making with respect to the management of all her business affairs. He handled all aspects of his mother's financial affairs from 1971 up to her death in 2013. Thus, in his Response & Objection to Petition for Formal Adjudication of Intestacy, he

admitted: "...as Respondent [Vernon] became the "Patriarch" for the family, after our Father died, as our Mother needed constant financial assistance..." R. p. 92

And:

> "That from 1971 on, Vernon K. Smith, Jr., had been the sole responsible individual for the management and control of all assets and interests owned by Victoria H. Smith, including the formation of all leasehold interest, whether written or oral, all business decisions and all transactions and transfers of any kind undertaken, and all investments and acquisitions made..."

Id., R. p. 94

In fact, Vernon cited his complete control of his mother's financial affairs as justification for the 2012 conveyance of all of her property to a limited liability company of which Vernon's wife is now the sole member. Tr. p. 352, LL. 10-12. The Magistrate's Order Granting Partial Summary Judgment quotes the document Vernon prepared and signed which is entitled: Transfer, Conveyance and Sale of All Property Interests from Victoria H. Smith to VHS Properties, LLC.

> "WHEREAS: VKS Jr. has always been the sole source of all management, maintenance, financial means, operation and control of all assets of Victoria H. Smith, beginning after his Father's death, and especially since and after his becoming an Attorney in 1971..." (p. 1)

Order Granting Partial Summary Judgment[5] (R. p.1053).

The *Gmeiner* Court identified "isolation" and "alienation" as classic red flags of undue influence. The sudden disruption of cordial family relations between Victoria and Joseph and Sharon is strong evidence of Vernon's disposition to utilize Mrs. Smith's susceptibility to his influence, i.e., his actions to keep the holographic Will intact and preserve his status as sole heir.

The evidence is undisputed that for at least twenty-five years prior to the execution of the

[5]An almost identical statement is also included in the "Assignment and Transfer of Membership Interest of: Victoria Smith in VHS Properties, LLC to Vernon K. Smith, Jr. confirming him to be the 100% member thereof' Exhibit 5 (page 7 of its Order Granting Partial Summary Judgment). R. p. 1055.

holographic Will, Joe and Sharon Smith took Victoria for grocery and other shopping, and drove her to her doctor, dentist and accountant appointments, to social events, and to church events (Tr. p. 171, L.11; p. 173, L.20; p. 475, L. 17; p. 476, L. 11). For twenty-five years prior to execution of the Will, and up to the time of his mother's death, Joseph and Sharon lived only 600 feet away from Victoria's home. (Tr. p. 168, L. 11 to p. 170, L. 22; p. 475, L. 11-16). Victoria socialized with Joseph and Sharon and their children, including family dinners, attending weddings and baby showers and remembered birthdays and special occasions. (Tr. p. 476, L.19 to p. 486, L.10). See Group Exhibits 2 and 25, greeting cards and photographs, respectively. Also, Mrs. Smith made several loans to Joseph and monetary gifts to her three adult children, Vernon, Joseph and Vicky Converse (Tr. p. 65, L.9 - p. 69, L.19).

Vernon's exploitation of Mrs. Smith's susceptibility: But then, commencing in 1990 just shortly after the Will's execution, Vernon created disruptions, causing a deterioration and breakdown in the relationship between Joseph and his mother. (Tr. p. 39, L.23 - 40, L.4; p. 74, L.12-14; p. 88, L.7-14; p. 109, L.19 -110, L.15; p. 173, L.21 - 175:16; 487:11-17). Vernon himself admitted that the relationship between Victoria and Joseph deteriorated *after* the Will was executed. (Tr. p. 341, L. 12-17). Vernon's disruptive conduct included:

(a) Implicating Joseph in Vernon's ex-wife's foreclosure sale. Vernon asked Joseph to bid in the foreclosure proceedings for his ex-wife's residence; using Victoria's money. Joseph refused to participate in the scheme. Vernon informed Victoria that by Joseph's refusal, he was being "disloyal" to the family. (Tr. p. 162, L. 3 to p. 164 L. 21; p. 369, L. 4-9).

(b) Impugning Joseph's faun management skills: As part of his duties as on-site manager of his mother's farm property, Joseph oversaw the home tenant's repair of fences. In 1991,

shortly after Vernon expressed his discontent with Joseph's management, Victoria relieved Joseph of all management duties and turned them over to Vernon. (Tr. p. 160, L.8 to p. 162, L.2; p. 81, LA6 to p. 82, L.11).

(c) Disparagement of Joseph' s well easement: In 1992, Joseph applied for a home equity loan. The bank requested that Joseph obtain a well easement to legalize his right to draw water from his mother's well. Joseph asked his mother to sign the easement, which she did. Vernon learned that Victoria had signed the well easement, and soon after that, Victoria told Joseph that Vernon had objected to the easement, and she demanded the return of the easement document (Tr. p. 159, L.3 to p. 160, L.7).

(d) Hamer lawsuit. In 1992, Vernon asked Joseph to sign some legal documents, pertaining to Mrs Smith's Hamer farmland. Joseph told his mother that he wanted an attorney to look them over before he signed them because he did not understand them. While Vernon waited in the car, Mrs. Smith came into the home and retrieved the documents. (Tr. p. 487, L.18 to p. 489, L. 5). After this event, Joseph and Sharon had little communication with Joseph's mother, although she lived only 600 feet away. (Tr. p. 489, L. 6 - 15).

(e) Vernon's control over Victoria's charitable gifting. A clear example of Victoria's susceptibility to Vernon's influence was Vernon's overriding Mrs. Smith's expressed interest in making a gift to her church.

Victoria was a member of St. Mary's Catholic Church. She had served on the Altar Society and other activities for the church since the 1950's, and was a regular attendee at weekly church services. Father Faucher became pastor of the church in 2002. (Tr. p. 402, L.19 to p. 403, L. 25). Since Victoria did not drive, Vernon would bring her to Sunday services until the winter of 2007. (Tr. p. 404, L. 1-16).

Father Faucher testified that he had a conversation with Victoria about making a substantial donation to the church as a memorial for herself and her husband, and Victoria said she would be very open to doing that. (Tr. p. 404, L.17 to p. 405, L.13). Father Faucher told her that before she made a decision she should discuss it with Vernon. (Tr. p. 408. L.17 to p. 409, L.10). Within a week or two, Victoria stopped attending St. Mary's Church, and Father Faucher never saw her again. (Tr. p. 409, L.11-24). Although Victoria was a devout Catholic and member of St. Mary's for over 60 years, she had no contact with the church for the last six years of her life.

Father Faucher attempted to contact Victoria but was never allowed to speak to her. When Vernon finally agreed to meet with him in fall of 2007 or early 2008, Vernon told Father Faucher that there would not be any memorial gift to the church. (Tr. p. 409, L.25 to p. 412, L. 24). According to Father Faucher Mrs. Smith "had a deep appreciation for strong men". (Tr. p. 420, L.18-24).

(f) Victoria's 1991 affidavit (Exhibit 269) reflects a degree of susceptibility to Vernon's wishes: Unfortunately, Victoria is not with us to provide the setting and confirm the authorship of this affidavit. The language, "[nod one tells me who will inherit my property" is helpful to Respondent on the issue of susceptibility. On the other hand, the Idaho Supreme Court recognizes that the style of undue influencers is not to dictate a testamentary result to the victim. More often, the desired result is obtained through "cajolery" and "flattery" *(In re Estate of Randall,* 60 Idaho 419, 429, 93 P.2d 1, 5 (1939).

The affidavit tends to support the existence of susceptibility: (1) the affidavit was signed at the request of Vernon or his attorney. Complying with this request may be viewed as being susceptible to Vernon wishes; (2) Victoria's willingness to lend Vernon $10,000 in response to his request does indicate a certain degree of susceptibility (Exhibit 269, p. 5); (3) also, evidence of Victoria's

susceptibility to Vernon's wishes is seen by "I permitted my son to take an existing building, owned by me, . . . and have use of it for his own partnership" (p. 6); (4) further evidence of Victoria's susceptibility is reflected in her loaning "all funds to my son to pay for any child or spousal support" (pp. 6, 7). Between 1989 and 1998, she paid Vernon $72,542 (Exhibit 65; Tr. p. 371:19-22).

(g) Witness testimony respecting Victoria's personality sheds no light on the susceptibility issue and, in the case of witnesses Puckett and Dillworth, Vernon's employees, is further impaired by bias. (Tr. p. 133, L. 22 to p. 134, L. 5; p. 290, L. 20 -23).

Opportunity to Influence the Testatrix: Vernon's position as manager of his mother's financial and business affairs, together with the trust that she had in him, gave Vernon the opportunity to influence her in the disposition of her estate. (Tr. p. 334, L.11-18). Vernon served as her attorney from 1976 until she died in 2013. (Tr. p. 335, L.4-10). In addition, he testified that he was the only person present at his mother's residence when she signed her holographic **Will,** (Tr. p. 154, L.25 to p. 155, L.25).

Disposition to exert undue influence: The following events and circumstances are consistent with Vernon's propensity to exert undue influence and consistent with the character of an undue influencer.

(a) Active participation in the preparation of the **Will** *(Gmeiner,* 100 Idaho at 8) and (Tr. p. 209, L.9 to p. 210, L. 19; p. 212, L.5-25) and injecting "legalese" into the Will unique to attorney-drafted documents (Exhibit 204). The Magistrate concluded that, with respect to the **Will,** Mrs. Smith had received "legal advice in its preparation" (FF/CL, p. 10; R. p. 1576)

(b) Failure to counsel Mrs. Smith to engage in estate planning measures despite the fact that her estate exceeded $20,000,000 in value. See Exhibit 51 and attorney Belnap testimony, (Tr. p.

221, L.1 to p. 222, L. 9). That is, Vernon never recommended that Mrs. Smith retain an estate planner, and the holographic Will naming him Mrs. Smith's sole beneficiary remained intact (Tr. p. 342, L. 20-22). Attorney Belnap testified, as an expert witness, that even people of ordinary financial means should eschew a holographic will (Tr. p. 222, L.10 to 223, L.1).

(c) Post-will conduct which reflected Vernon's disposition to influence his mother and to cast Joseph in a bad light, tending to alienate him from his mother. See pages 30-33 above.

(d) Vernon abused the 2008 POA (Exhibit 4) by gifting the entirety of Mrs. Smith's assets to his LLC without the power to do so. Order herein entered on July 19, 2016 (R. p.1049)

(e) In derogation of the Court's order entered July 19, 2016, Vernon has not conveyed the real property back to the Estate (R. p. 1049; Tr. p. 383, L.1 to 384, L.1; Exhibits 12 through 17)

(f) After requesting probate of the holographic Will (Exhibit 208), Vernon asserted that no assets remained in this Estate because of his 2012 conveyance to his limited liability company, VHS Properties, LLC. (Tr. p. 386, L. 2-23). This flip-flop was triggered by Joseph, a presumptive heir, recording a legitimate lis pendens on the Estate real property (Tr. p. 387, L. 3 - 25).

(g) As noted above (p. 11), there is direct evidence that Vernon overrode Mrs. Smith's charitable aspirations in 2007 and frustrated Father Faucher's attempts to contact his mother, even for pastoral care (Tr. p. 414, L.10 to p. 415, L.16).

Testamentary result indicative of undue influence:

The fourth and final element of undue influence is a testamentary result that indicates undue influence. *Conway,* 152 Idaho at 939. Idaho courts have previously held that "[i]n determining the legality of a will the instrument itself may be examined and if it appears unnatural, unjust or irrational, such fact may be taken into consideration. *In re Lunders Estate,* 74. Idaho 448, 451, 263 P.2d 1002,

1004 (Idaho 1953), citing *In re Heazle's Estate,* 74 Idaho 72, 257 P.2d 556 (1953); *In re Arnold's Estate,* 16 Cal.2d 573, 107 P.2d 25 (1940).

A will which entirely cuts out two of the decedent's three children is "unnatural, unreasonable and unjust", particularly where, prior to execution of the Will, there was a warm, loving relationship between Victoria and Joseph and Joseph's family. There is simply no evidence of estrangement or hostility between Victoria and Joseph or between Victoria and her daughter Vicky that would justify or explain the terms of her holographic Will at the time of its execution. The only reasonable explanation is that the Will was the product of Vernon's undue influence.

CIRCUMSTANTIAL EVIDENCE ARISING OUTSIDE THE FEBRUARY 14' WINDOW IS ADMISSIBLE.

An assessment of undue influence merely by taking a snapshot of the day of the Will's execution would be an incomplete assessment. Evidence relevant to "susceptibility" and "opportunity" is not rendered inadmissible by the passage of time: Appellant Vernon argues that the moment to assess the existence of undue influence is "at the time [Mrs. Smith] executed her holographic will in 1990" (Appellant Brief, p. 36). The Magistrate correctly ruled that the degree to which relevant evidence is remote in time to the execution of the Will goes to the *weight* of that evidence, not its admissibility:

> Again, I want to emphasize, and I went back and listened to some of what occurred yesterday, that the mere fact that I have allowed some very remote evidence in is not an indication that I think it has the same weight as those things which are much more more closer in time to the creation of the holographic will. And that — and my purpose, too, is to allow the parties to make argument as to why and what weight should be given to any of those things.

and:

> And I think I told the parties before that actions taken by Mr. V.K. Smith

> with respect to his mother's property, it may very well be relevant. We can certainly argue that the time issues that may be to weight, but they certainly are relevant.

Tr. p. 287, LL. 11-20; 346, LL.1-5.

The Magistrate's focus on post-Will events is relevant to the "opportunity" which Vernon had to influence Mrs. Smith, functioning as an ubiquitous presence in her affairs. See discussion below (pp. 37, 38) re *Krischbaum v. Dillon,* 567 N.E.2d 1291, 1301 (Ohio, 1991) and the ongoing opportunity an attorney/beneficiary may have to assure himself that the will is not revoked. As noted in the document he authored in which he sought to transfer the entirety of her assets to his limited liability company, Vernon was the "sole source . . . of control of all assets of Victoria H. Smith, beginning after his father's death . . ." (Exhibit 5, p. 1)

Instances of *alienation* include the following: (1) the well easement; (2) the fence dispute resulting in Joseph's management termination; (3) dispute over the Hamer property; and (4) Vernon's orchestrating the dispute over the foreclosure of his ex-wife's residence. See above, pages 30-31. These incidents are also probative of Mrs. Smith's susceptibility to Vernon's influence.

The record is devoid of evidence that Joseph or his wife, Sharon, acted with the intent to antagonize or otherwise alienate Mrs. Smith.

Instances of Vernon seeking to *isolate* his mother include the following: (1) Vernon made it "plain to [Joseph] that [he] wasn't to see [his] mother" (Tr. p. 179, L. 6-20). (2) In 2008, Mrs. Smith was hospitalized and Joseph and his family did not become aware of it until Mrs. Smith returned home (Tr. p. 176, L.1-3). (3) Victoria's granddaughter, Kate Laxon, testified how Vernon failed to consent to her visiting Victoria (Tr. p. 442, L. 8 to p. 445, L. 11); (4) Father Faucher was refused access to Victoria by Vernon, i.e., suspension of her years of faithful church attendance (Tr. p. 409, L.11 to 412,

L.24); and (5) Vernon failed to advise Mrs. Smith to consult an estate planning expert respecting tax issues with respect to her multi-million dollar estate. (Tr. p. 342, L. 20-22).

In the instance of an attorney/beneficiary, exploitation of the testatrix' susceptibility can persist until death: Unlike undue influence in the execution and delivery of a deed, constant vigilance by the undue influencer/beneficiary must be maintained over the testatrix because of her ability to revoke the will. Where the testatrix' attorney is named as a beneficiary, the Ohio Supreme Court views this circumstance as a "powerful disincentive" to be sensitive to the client's wishes which would "be a form of undue influence that could be exerted years after the execution of the will naming the attorney as a beneficiary":

> Not only is the testator particularly vulnerable to his attorney's influence, but also, the attorney, unlike others, will often be in a position to exercise that influence *even after the will has been executed.* A disinterested attorney could be expected to pick up cues, even fairly subtle cues, that **his** client's testamentary intentions may have changed since the will was executed. The disinterested attorney could then be expected to suggest that his client consider whether to amend the testamentary disposition by executing a codicil or a new will. On the other hand, an attorney who is named as a beneficiary in the **will,** like Dillon, **will** have an obvious and powerful disincentive to suggest to his client that it may be an appropriate time to consider revising the will. When the testator's attorney is a beneficiary of the will, like Dillon, there is even the possibility that the attorney might use his position as the testator's confidential advisor to frustrate a clearly expressed intention to alter the existing testamentary disposition. *This would be a form of undue influence that could be exerted years after the execution of the will naming the attorney as a beneficiary.*

Krischbaum v. Dillon, 567 N.E.2d at **1301** (emphasis added).

Thus here, "susceptibility" of the testatrix Victoria and "opportunity" for the attorney/beneficiary Vernon existed from the date of the will's execution and continued until her death. Temporal remoteness from the actual date of the Will's execution do not diminish the weight of this

evidence.

The Magistrate properly sustained the objection to the admission of appellant Vernon's Exhibit 257: Exhibit 257 is an emotion-laden email from Mrs. Converse sent shortly after her mother's death. The email is limited to Mrs. Converse' feelings toward her mother, and, apart from being *written post-death* and 23 years after the Will's authorship, is not relevant. That is, the email fails to shed light on her mother's susceptibility to undue influence or Vernon's opportunity and disposition to undertake undue influence. As the Magistrate opined:

> This (Exhibit 257) was written some 20 years after this will was put in place. The issue is what was--whether the mother was unduly influenced back in the early 90s when she—or just prior to her writing this holographic will. It is not relevant that this daughter upon her [mother's] death bed some 20 years later has certain feelings and is expressing it. . . . So I am going to sustain the objection and I am not going to consider it at all.

Tr. p. 47, L. 6 - 18 (bracketed material explanatory).

WHILE PUBLIC POLICY FAVORS TESTACY OVER INTESTACY, THIS POLICY IS LIMITED TO THE CONSTRUCTION OF WILLS, AND DOES NOT PERTAIN TO THE EXISTENCE, OR NOT, OF UNDUE INFLUENCE.

Were the Court to find that either Joseph or Ms. Converse, but not both, was the victim of undue influence, the entire Will would have to be invalidated. While the common law prefers testacy to intestacy, this does not give a court the authority to speculate as to the intentions of the decedent.

> Courts favor testacy rather than intestacy. . . However, in order to avoid, intestacy, either partial or complete, the court is not permitted to place on the will any construction not expressed in it, and which is based on supposition as to the intention of the testator in the disposition of his estate [cases cited].

In re Corwin's Estate, 86 Idaho 1, 5, 383 P.2d 339 (1963).

As can be seen by *Corwin,* the public policy favoring testacy over intestacy is limited to the

construction of wills and does not inform the common law in the undue influence context.

If this Court finds that only one of the disinherited children was the victim of undue influence, it would be inappropriate for the Court to reconstruct distribution under the Will so as to avoid intestacy. That is, the Court cannot speculate as to the testamentary intentions of Mrs. Smith where only a portion of the Estate that was devised to Vernon as a result of undue influence. Under this circumstance, the Will no longer controls the distribution of the Estate property, and it must all pass according to the laws of intestacy.

CONCLUSION

Based upon the following points, Respondent Joseph H. Smith respectfully requests that the Order Granting Partial Summary Judgment and the Amended Findings of Fact and Conclusions of Law be affirmed and the matter remanded to the Magistrate for completion of probate proceedings.

Invalidity of Vernon's 2012 conveyance: Given the absence of gifting authority in the Power of Attorney, there is no genuine issue of material fact, and Vernon's conveyance of Mrs Smith's assets to his limited liability company was invalid as a matter of law. The Order of Partial Summary Judgment should be affirmed which returned all assets to Mrs. Smith's Estate, allowing those assets to pass by testate or intestate succession.

Existence of undue influence: The presumption of undue influence arises from Vernon's fiduciary relationship with the testatrix Victoria and from his participation in the execution of the 1990 Will. In the Appellant Brief, he has failed to identify evidence in the record which rebuts the presumption. That is, Vernon did not meet his burden "of producing sufficient evidence of the nonexistence of at least one of the four prima facie elements of undue influence . . ." *Bongiovi v. Jamison,* 110 Idaho 734, 739, 718 P.2d 1172 (1986). Or stated differently, the record in this case does

not contain evidence from which the trial court "could reasonably find one or more elements of the *Gmeiner* test had not been met". *Id.*

Even absent the presumption, there is "substantial and competent evidence" which supports by a preponderance of the evidence the existence of undue influence. Additionally, appellate deference must be given to the trial court's assessment of conflicting evidence and witness credibility. The decision of the trial court should be affirmed, i.e., invalidation of the 1990 holographic Will.

By virtue of the invalidity of Vernon's 2012 conveyance and the invalidity of the 1990 holographic Will, the assets in the Smith Estate must pass by intestate succession to the decedent's children, Vernon, Joseph and Ms. Converse.

The frivolous prosecution of this appeal entitles the respondent Joseph to an award of attorney fees:

(1) There is not a scintilla of evidence that the scope of the subject Power of Attorney includes gifting authority, rendering appellant Vernon's conveyances under that authority invalid.

(2) It is undisputed that Vernon had a fiduciary relationship with the testatrix, was sole beneficiary in the Will, and participated in the Will's creation. These facts justify the presumption of undue influence. Appellant Vernon has not identified the "quantum" of evidence which rebuts the presumption as to even one element of undue influence (susceptibility, opportunity, disposition, or result).

(3) Finally, Vernon has failed to identify in what particulars there is an absence of "substantial and competent evidence" to support the existence of undue influence.

(4) Under these circumstances, the Idaho Code (§§ 12-121 and 15-8-208) and Idaho Rules of Civil Procedure (Rule 54(e)(2), I.R.C.P.) entitle the respondent Joseph to an award of attorney fees on

appeal. The frivolous prosecution of this appeal is exacerbated by Vernon's unfounded assertion that the Magistrate's thirty-seven page decision was "cursory" and "result-driven", i.e., accusing her, in effect, of both incompetence and bias.

Submitted this 5th day of March, 2018.

Allen Ellis
Attorney for Respondent, Joseph H. Smith

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 9th day of March, 2018, I caused to be served two true and correct copies of the foregoing document by the method indicated below, and addressed to the following:

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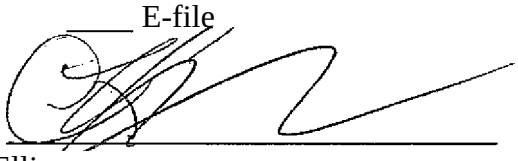

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