3-21-2018

Matter of Estate of Smith Appellant's Reply 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 REPLY BRIEF

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

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

The magistrate court exceeded the scope of its jurisdictional authority in its decision to set aside the 2012 Transfers. The magistrate court compounded this error in its erroneous application of the law to its determination that the February 14, 1990 Will of Victoria was the result of undue influence by Vernon.

Joseph concedes that Vernon's recitation of the facts, while "unduly prolix," "contains no glaring factual inaccuracies." Respondent's Brief ("R. Brief"), p. 2. The same does not apply to the facts averred by Joseph, many of which (1) lack any evidentiary support (2) are taken out of context, or (3) rely upon inadmissible hearsay. Attached hereto as Addendum 1 is a summary of statements made by Joseph, a citation to the record upon which Joseph relied, and a separate line for context or comment. This summary is not exhaustive and is intended to illustrate the fallacy of many of the arguments advanced by Joseph. In addition to factual inaccuracies, Joseph fails to apply well-settled Idaho law upon the elements of a claim of undue influence in his repeated reliance upon events far removed from the execution of the Will.

Recognizing the appellate standard of review, and with due deference to the magistrate court, Vernon submits that this case presents the unusual scenario wherein the court's findings of fact and conclusions of law should be vacated upon a lack of substantial or competent evidence. In summary, the following findings are erroneous:

1. The magistrate court erred as a matter of law and fact when it overrode the intent of Victoria H. Smith and set aside her Will without competent evidence of undue influence.
2. The magistrate erred in its *sua sponte* application of the presumption of undue

influence without evidence of a nexus between the execution of the Will and a fiduciary duty.

3. Even if the presumption did apply, the magistrate court nevertheless erred in its determination that Vernon failed to rebut the presumption. The magistrate court's error consisted of allowing inadmissible testimony and making clearly erroneous findings with regard to material facts.
4. Idaho law is clear that the existence of undue influence must be established as of the date of the creation of the Will. The magistrate court erred as a matter of law in its consideration of events far removed from the execution of the Will as a substitute for evidence of any undue influence operating at the time the Will was executed.
5. The court erred as a matter of law when it exceeded its jurisdiction to enter summary judgment in favor of Joseph upon the 2012 Transfers. Joseph's Brief is demonstrably silent upon the court's lack of jurisdiction because, as even Joseph must concede, VHS Properties, LLC, the present owner of the real properties at issue, was deprived of due process by these proceedings.

II. ARGUMENT

A. THE WILL CLEARLY AND UNAMBIGUOUSLY EXPRESSED THE INTENT OF VICTORIA H. SMITH FOR THE DEVOLUTION OF HER PROPERTY.

Joseph does not dispute that the Will complied with all of the formalities required by Idaho Code § 15-2-503. The Will was handwritten by Victoria, specifically stated that it was a "holographic will," and disposed of the entirety of Victoria's estate. Joseph also concedes that

Victoria had full testamentary capacity when she executed her Will. TT. p. 153, l. 7 – p. 154, l. 18. Thus, Joseph acknowledges that Victoria was of sound mind and that she had "sufficient strength and clearness of mind and memory, to know, in general, without prompting, the nature and extent of the property of which [she] is about to dispose, and nature of the act which [she] is about to perform, and the names and identity of persons who are to be the objects of [her] bounty, and [her] relation towards them." *In re Estate of Conway,* 152 Idaho 933, 943–44, 277 P.3d 380, 390–91 (2012).

Rather than controvert Vernon's statement of facts illustrating Victoria's independence or intellectual capacity, Joseph complains that Victoria's choice to execute a holographic will was ill-advised. Joseph's argument is advanced in a vacuum with no reference to the Will at issue. Victoria's holographic Will was remarkably similar to her late husband's holographic will and disposed of almost exactly the same real property. Joseph's current reliance upon the value of the real property making the disposition of the same by a holographic will improvident was equally applicable to Vernon Sr.'s own holographic will. Vernon Sr. was a well-respected attorney who chose to utilize a holographic will (Ex. 200); that his wife would elect to follow in his footsteps is not suspicious or otherwise susceptible to attack merely because Joseph claims, without citation to authority, that Victoria's election to handwrite her own Will should be eschewed. *See* R. Brief, p. 27; S*ee also* p. 33 (citing Vernon's failure to counsel Victoria to seek estate planning advice because the estate was worth $20,000,000.00 as evidence of Vernon's "disposition").[1]

[1] This argument also assumes, without evidence, that estate planning advice would have impacted Victoria's intent for the disposition of Victoria's estate.

Joseph's reliance upon the intent of the legislature 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" is made without citation to any authority. R. Brief, p. 27. The reliance upon the testimony of Lyman Belnap to support this proposition is misplaced. Mr. Belnap's testimony was limited to a generalized comment upon the circumstances in which he has personally recommended use of a holographic will with no reference to the holographic will at issue in this case. TT. at p. 224, l. 19 – p. 225, l. 23.

Victoria's Will was a handwritten and signed statement of her intention for the disposition of her estate. Idaho law has long recognized that a testator has the right to dispose of her property as she chooses. *Mollendorf v. Derry*, 95 Idaho 1, 3, 501 P.2d 199, 201 (1972) (citing *Turner v. Gumbert*, 19 Idaho 339, 114, p. 33 (1911), among other cases). The mere influence of affection and attachment, or the mere desire to reward a party for years of service or support will not vitiate a testamentary act unless the act was the result of coercion or importunity beyond the testator's power to resist. *Gmeiner v. Yacte*, 100 Idaho 1, 7, 592 P.2d 57, 63 (1979); *Mollendorf*, 95 Idaho at 5, 501 P.3d at 203. Herein, as developed more fully below, there was no evidence that Victoria's free agency was destroyed by Vernon on February 14, 1990. *See In re Lunders' Estate*, 74 Idaho 448, 454-55, 263 P.2d 1002, 1006-07 (1953) (citations omitted) (defining 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.").

B. JOSEPH'S "STATEMENT OF FACTS" IS REPLETE WITH ERRONEOUS LEGAL CONCLUSIONS AND IS NOT AN ACCURATE REFLECTION OF THE EVIDENCE.

Under a heading titled "Statement of Facts," Joseph identifies several key findings made

by the magistrate court, together with a reference to the evidence Joseph contends supports the court's findings. As illustrated more fully in Addendum 1, Joseph's citations to the evidentiary record are incomplete and inaccurate.

1. The magistrate court's finding that Vernon was not credible is not supported by competent evidence.

Vernon recognizes that the magistrate court is in the best position to evaluate the credibility of witnesses appearing before it. Nevertheless, Vernon submits that the trial court's determination upon his lack of credibility was not supported by competent evidence.[2] As Joseph notes, the magistrate court found that three events were indicia of Vernon's lack of credibility: (1) the "shady" Raymond Street Purchase and Vernon's request that the IRS perform an audit; (2) the 2008 POA and the 2012 Transfers; and (3) Vernon's testimony regarding Joseph's knowledge of the Will. R. Brief, p. 6-7.

As briefed in the Appellant's Opening Brief at p. 31, the magistrate court's alleged knowledge of standard IRS audit procedures finds no support in any evidence adduced at trial. Joseph offers no citation to evidence or authority to the contrary. Upon the issue of the Raymond foreclosure sale, the magistrate court's conclusion that "this evidence 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" is erroneous. R 1574. Idaho Rule of Evidence 404(b), provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person to show action in conformity therewith." *See also Thorn Springs Ranch, Inc. v. Smith*, 137 Idaho

[2] Notwithstanding the magistrate court's determination that Vernon lacked credibility, the court and Joseph selectively rely upon the testimony of Vernon to support material findings.

480, 486, 50 P.3d 975, 981 (2002) (applying Rule 404(b) in a civil proceeding). R 1574. As briefed previously, the circumstances surrounding the Raymond foreclosure were not in dispute: Vernon does not deny that he asked his brother to bid on the home; he does not deny that he did not want his wife to claim an interest in the home; and he did not deny that called Joseph disloyal. Joseph did not dispute that Victoria volunteered to purchase the home. Simply put, there was no contrary testimony offered by Joseph upon which a credibility determination was necessary. Rather, the magistrate court relies upon this event as pure propensity evidence to conclude that, in her opinion, Vernon's conduct was "shady" and evidenced a willingness to commit fraud. The court's reliance upon its "credibility" determination as a substitute for evidence of undue influence in or around February 14, 1990 is prohibited by Idaho Rule of Evidence 404(b).

Similarly, Joseph's claim that in 2012 Vernon "abused" the 2008 POA which "supports the Magistrate's finding that Vernon was not a credible witness and possessed the disposition to engage in undue influence" is not based upon any evidence presented at trial. See R. Brief, p. 7. This same argument is repeated on page 8 and 9 of Joseph's brief. Vernon did not deny that he relied upon the 2008 POA to transfer real and personal property in 2012 which actions he stated were consistent with the desires of Victoria. There was no evidence to the contrary. As with the Raymond foreclosure, there was no dispute in the evidentiary record that Vernon relied upon the 2008 POA to transfer Victoria's property to VHS Properties, LLC, in 2012. Vernon asserted that the 2008 POA empowered him to make this transfer; the court ruled that, as a matter of law, the 2008 POA did not. The magistrate court's inclusion of this issue as evidence of "credibility" ignores that there was no conflicting testimony upon which a credibility determination was

necessary. The magistrate court erred in holding that the 2012 Transfers establish that Vernon was not "credible" and the subsequent and repeated reliance upon the 2012 Transfers for nearly every element of the undue influence claim as evidence of Vernon's propensity or "disposition" to unduly influence Victoria was inconsistent with Rule 404(b), Idaho Rules of Evidence. Moreover, the 2012 Transfers were more than twenty years removed from the execution of the Will and were not relevant to any fact in dispute with respect to the February 14, 1990, Will. I.R.E. 401, 402; *Swaringen v. Swanstrom*, 67 Idaho 245, 247–48, 175 P.2d 692, 693 (1946) (citation omitted) (holding that "in a contest on the ground of undue influence, it must be shown that such undue influence existed and was operating *at the time of the execution of the will.*).

Finally, in defense of the magistrate court's conclusion that Vernon lacked credibility because the court did not believe Vernon's claim that Joseph knew about the Will, Joseph cites to his own self-serving testimony upon the topic. R. Brief, p. 7. Both the court and Joseph ignore the letters Joseph sent to his mother that suggest, if not expressly admit, that Joseph was aware of his mother's intention to disinherit him. *See e.g.* Exs. 224 ("Sharon and I felt staying out of your life was your desire. You have never told me to stay out of your life in actual words. … Since I was about 10 years old, I thought I as a part of my father and mothers scenario. I realize of now you have the power and control to null and void my roots."); *See also* Exs. 231, 234.

In sum, the magistrate court's determination that Vernon was not a credible witness was erroneous. This predicate finding to the magistrate court's Findings of Fact and Conclusions of Law ("FFCL") sets the tone for the remainder of the magistrate court's result-driven findings.

2. The court's conclusion that Vernon provided his mother with legal advice in the preparation of her Will does not find support in the record.

In support of the proposition that Vernon provided Victoria with legal advice in the preparation of her Will, Joseph merely cites to a block-quote from the magistrate court's FFCL. R. Brief, p. 7-8; *see also* Addendum 1. Rather than identify portions of the record that support the magistrate's findings, Joseph cites to the portion of the trial transcript wherein Vernon testified that he did not discuss with his mother whether to consult an estate planning professional.[3] *Id.* Joseph provides no substantive response to Appellant's recitation of the facts evidencing Victoria's sophistication or intelligence; nor does he identify any authority to support the proposition that the terms utilized by Victoria in drafting her Will had "special legal gloss" or were beyond the comprehension of a lay person, let alone Victoria. The magistrate court's finding that Victoria was intellectually incapable of drafting her Will lacked competent or substantial evidence and should be reversed.

3. The magistrate court erred in finding that there was any evidence of susceptibility.

In support of the magistrate court's conclusion that Victoria was susceptible to Vernon's influence, Joseph restates the magistrate's findings that "in 1990 Vernon persuaded his mother to bid at a foreclosure"; "Between August 1989 and March 1990, Mrs. Smith gave Vernon over $40,000.00"; and "Mrs. Smith was making Vernon's child support payments and paying his

[3] Although omitted by Joseph's citation to the transcript, Vernon previously stated: "Because my mother didn't ask for it. She wanted to do a holographic will." TT p. 338, l. 25 – p. 229, l. 1. Vernon also testified "My mother owned all the property. She was the sole heir of my father's holographic will. And she did not want any other involvement in any estate planning. She knew what she was going to do and she did what she did." TT p. 342, ll. 15-19.

office expenses." As previously briefed, these findings do not find support in the evidence. With respect to the Raymond Street foreclosure sale, it was undisputed that during a conversation between Joseph, Vernon, and Victoria, Joseph refused to bid on the Raymond property and Victoria volunteered to do so. TT. p. 236, L 9-25; see also p. 162, l. 11 – p. 164, l. 21. *Cf. Gmeiner*, 100 Idaho at 5, 592 P.2d at 61:

> It follows from the very nature of the thing that evidence to show undue influence must be largely, in effect, circumstantial. It is an intangible thing, which only in the rarest instances is susceptible of what may be termed direct or positive proof. The difficulty is also enhanced by the fact, universally recognized, that he who seeks to use undue influence does so in privacy. He seldom uses brute force or open threats to terrorize his intended victim, and if he does he is careful that no witnesses are about to take note of and testify to the fact. He observes, too, the same precautions if he seeks by cajolery, flattery, or other methods to obtain power and control over the will of another, and direct it improperly to the accomplishment of the purpose which he desires...

The reliance upon a group conversation, the totality of which can be summarized as Joseph saying "no," Vernon calling Joseph "disloyal," and Victoria volunteering to purchase the home, as evidence of susceptibility or disposition is, in a word, meritless. Joseph did not testify that Vernon pressured, persuaded, or otherwise overbore the will of his mother. Rather, Joseph simply stated that Vernon called him "disloyal" "and that is where it all started." TT p. 162, l. 13 – p. 164, l. 16.

The court's reliance upon gifts to Vernon is also misplaced. The evidence established a long and continuing pattern of gifts and loans by Victoria to each of her children, and especially Joseph and Vernon. *See e.g.* Exs. 202, 203, 204, 205, 206, 207, 210, 211, 213, 215.

Upon the topic of child support, Joseph selectively relies upon the 1991 Affidavit of Victoria wherein she states:

To date I have loaned all funds to my son to pay any child or spousal support because of

> Sharon's theft of all office receipts, the IRS seizures, uncollectible nature of his accounts and the financial complications he is experiencing. I am reluctant to loan more funds without absolute security or assignment of assets.

Ex. 269, p. 6-7.

> The passage in the 1991 Affidavit cited by Joseph is preceded by Victoria's statement:
>
> 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.

Id. Joseph's selective reliance upon the 1991 Affidavit to establish that Victoria was paying Vernon's child support, to the exclusion of Victoria's statement "[n]o one tells me who will inherit my property" is consistent with the result-driven analysis that plagued the court's FFCL. Joseph asks this Court to ignore direct evidence of Victoria's lack of susceptibility because, in his words, "the affidavit *tends* to support the existence of susceptibility." R. Brief, p. 32 (emphasis added). The support Joseph identifies for this argument is a claim that (1) the affidavit was signed at the request of Vernon or his attorney; (2) Victoria's willingness to lend Vernon $10,000.00 in response to his request indicates susceptibility; (3) Victoria's statement that she permitted Vernon to use her property is evidence of susceptibility; and, (4) Victoria's loans to Vernon. These arguments contain inferences that cannot reasonably be drawn from the Affidavit. First, Bry Behrmann is the attorney listed on the first page of the Affidavit. Ex. 269. There is no reference to Bry Behrmann being Vernon's attorney; nor does the Affidavit state that it was prepared at Vernon's request. *Id.* The conclusion that Vernon procured this Affidavit is simply not supported by any fact in evidence. The reliance upon loans to Vernon is likewise

inapposite.[4] During the same time frame, Victoria made considerable gifts or loans to Joseph. *See e.g.* Exs. 202, 203, 204, 205, 210, 211, 213, 215. Finally, the claim that Victoria's *permissive* use of her property is evidence of "susceptibility" ignores that Victoria specifically stated:

> He was to pay for any improvements made, and he was to receive the benefits of deductions available through the tax considerations of those costs as he had all rights to use it, subject to my right to terminate whenever I should desire. ... 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.

Ex. 269; *see also* TT p. 142, l. 8 – p. 143, l. 10; (Ms. Puckett: "she was very set in her ways. If she wanted something done it was done. I saw her chew [Vernon] out on various occasions and he would just say yes, mother. Yes, mother. Because he knew better than to argue with her opinion and what she wanted done.") p. 144, ll. 10-17. (Ms. Puckett: "She acted as her own woman. She was very stubborn and set in her ways, and she was very intelligent.").

Joseph's contention that Exhibit 269 document supplies evidence to support the magistrate court's determination of susceptibility is, like the magistrate court's finding itself, erroneous.

4. The magistrate court erred as a matter of law and abused its discretion in its adoption of Joseph's theory of isolation and estrangement.

According to Joseph, he and his family continued to enjoy a close relationship with Victoria as of February 1990. *See e.g.*, TT. p. 153, l. 7 – p. 154, l. 18. Joseph initially claimed that he had a good relationship with Victoria until 1992 and that in 1992 things changed. TT. p.

[4] Joseph's reliance upon Exhibit 65 to support this argument lacks support. Exhibit 65 was admitted for illustrative purposes only; it is not itself evidence and the reliance thereon is misplaced.

73, l. 25 – p. 74, l. 4. Into 1992, Joseph and his family were still actively engaged in providing transportation support to Victoria. At trial, Joseph initially conceded that the breakdown in his relationship with Victoria occurred in 1992 and later offered that the breakdown *started* as early as June 1990. *See* TT p. 97, l. 5 – p. 98, l. 2; p. 158, l. 3 – p. 164, l. 16; p. 164, l. 22 – p. 167, l. 21.

Joseph blamed Vernon for the break-down in his [Joseph's] relationship with Victoria. In the nearly two decades that preceded the trial, however, Joseph consistently took the position that Victoria's feelings and decisions were her own:

> 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).

> 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). Joseph himself conceded that the relationship broke down over a business dispute. Ex. 219; TT. p. 98, l. 3 – p. 100, l. 4.5 Victoria "fired" Joseph from his

[5] In this regard, the magistrate court's finding that "beginning in late 1991, Vernon *persuaded* his mother to reject Joseph's management decisions" is erroneous. The magistrate court cites Exhibits 219 and 220 to support this claim. Those exhibits are letters drafted by Joseph wherein he notifies a third party that Victoria has selected Vernon to manage a lease. There was no evidence of "persuasion," or pressure upon Victoria. Joseph himself conceded that with respect to the fence repairs, Joseph convinced Victoria to accept repairs that he found to be "close to satisfactory" "not first class work." TT. p. 160, l. 8-p. 162, l. 2. Joseph reported that Vernon disagreed

position as a manager in 1992. TT p. 160, l. 8 – p. 162, l. 2. Joseph's hurt feelings over Victoria's decision are repeatedly expressed in his letters. *See e.g.* Exs. 231, 234, 238. The letters do not support Joseph's present claim that Vernon engaged in a pattern of conduct which isolated or alienated Joseph from Victoria's life.

The magistrate court's conclusion that Vernon engineered the breakdown in the relationship between Joseph and his family ignored substantial and competent evidence to the contrary and, in any event, was expressly related to a time period two-years removed from the execution of the Will. The court itself concluded "[i]n 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." R. 1585.

As previously cited, it is well-established Idaho law that "in a contest on the ground of undue influence, it must be shown that such undue influence existed and was operating *at the time of the execution of the will.*" *Swaringen v. Swanstrom*, 67 Idaho 245, 247–48, 175 P.2d 692, 693 (1946) (citation omitted) (emphasis in original). There was no evidence of alienation or isolation in February 1990 and the trial court erred as a matter of law and fact in relying upon events occurring in 1992 and beyond to support a finding that Victoria's Will was the product of undue influence by Vernon.

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with Joseph's recommendation to accept the repairs and Victoria ultimately removed Joseph from his position as manager after *Joseph refused* to tell the tenant to fix the repairs. *Id.* Joseph's recitation of Victoria's agreement and subsequent rejection of his proposed course of action was hearsay, subject to a timely objection, which objection was overruled in so far as the court permitted the testimony for the limited purpose of Victoria's "state of mind." Moreover, the fact that Victoria changed her mind is not evidence of pressure or persuasion and is readily explained as a business decision to reject sub-par repairs. Joseph was fired after he refused Victoria's request to tell the tenant to re-do a portion of his work. C.f., TT p. 142, ll. 10-15 (Ms. Puckett: "I saw her chew [Vernon] out on various occasions and he would just say yes, mother. Yes, mother. Because he knew better than to argue with her opinion and what she wanted done.")

5. The magistrate court's reliance upon a lack of evidence regarding Converse was erroneous.

It was undisputed that Converse did not appear for her mother's funeral; nor did she join in Joseph's Petition to set aside the Will. She did, however, send a long email to her brothers explaining her choices, Exhibit 257, which letter was erroneously refused into evidence.[6] In addition, the evidence was undisputed that 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. Joseph himself acknowledged, only after being impeached, that in 1991, that Converse and Victoria "had enough of a conversation that [Converse] left and never came back." TT. p. 49, l. 17 – p. 50, l. 21. Although the court was critical of a lack of estrangement in 1990, the record was discernably silent upon any evidence of a loving or close relationship between Converse and Victoria in 1990, or ever for that matter.

6. The magistrate court's reliance upon the testimony of Father Faucher was not consistent with Idaho law.

Joseph's final "Statement of Fact" recites that the magistrate court correctly relied upon

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[6] *See* Appellant's Opening Brief, p. 43-44. Joseph responded to Vernon's argument by simply repeating the magistrate court's conclusion for the proposition that this document was not "relevant." Questions of relevance are reviewed de novo. Exhibit 257 contains repeated assertions by Converse that she and her mother had no relationship -ever. The magistrate court made material findings that Vernon failed to establish a rational justification for Victoria to disinherit Converse. Converse herself readily supplies this justification and, while her writing was 20 years removed, it expressed decades worth of hurt feelings over the fact that "THERE HAD NEVER BEEN A RELATIONSHIP BETWEEN MOTHER AND ME." Ex 257. Converse continues "AS A CHILD AND TEENAGER, I OFTEN WISHED AND HOPED THAT DADDY WOULD DIVORCE MOTHER AND REMARRY. I FIGURED THAT WAY I'D HAVE A 50/50 CHANCE OF HAVING A STEPMOTHER LIKING ME AND BEING NICE TO ME BECAUSE MY OWN MOTHER TREATED ME LIKE A STEP DAUGHTER ANYWAY." Ex 257. The magistrate court erred in its decree that this document was not relevant which error resulted in significant prejudice to Vernon.

the testimony of Father Faucher to establish that Victoria was susceptible to Vernon's influence. The reliance upon Father Faucher's testimony, taken out of context, and relating to an event or events nearly two decades removed from the execution of the Will, does not support Joseph's premise and is inconsistent with Idaho law. *Swaringen,* 67 Idaho at 247–48, 175 P.2d 693. Father Faucher testified that Victoria was open to giving a gift, which testimony was the subject of an objection for hearsay. The court failed to apply well settled-Idaho law in its decision to overrule a timely objection to the testimony of Father Faucher. *In re Conway*, 152 Idaho at 941, 277 P.3d at 388 (holding that statements of a decedent are typically inadmissible unless they pertain to her mental condition "to prove his inability to resist the influence of others" rather than to prove the truth of those statements ... provided they are not too remote to throw light upon the mental condition of the testator at the time of the execution of the will."). *See also* Section F, below.

The court erroneously permitted Father Faucher to testify to conversations with the decedent, or with other unnamed people, nearly twenty years removed from Victoria's execution of her Will. Joseph and the court both relied upon this hearsay testimony to conclude that Victoria wanted to give a sizeable gift to the church and that Vernon prevented her from doing so. Father Faucher's testimony is neither competent nor substantial evidence of "susceptibility" to Vernon and the court erred in its failure to apply Idaho law to refused its admission.

Moreover, the reliance upon Father Faucher for the proposition that Victoria "had a deep appreciation for strong men" and "had a desire to please" such figures, is specious. R. Brief, p.

11.[7] (citing TT p. 420, l. 18 – p. 421, l. 2). Thus, Joseph argues, Victoria was susceptible to Vernon's influence. The recitation of Father Faucher's testimony is incomplete in material respects and is taken out of context. Notably, Father Faucher specifically listed the persons in whom he felt Victoria reposed a deep appreciation – all of which were men of the church. TT. p. p. 420, l. 18 – p. 421, l. 2. It was uncontested that Victoria was devoutly Catholic; that she would have an elevated level of respect for her pastor and other men of the church does not establish a unique susceptibility to Vernon. The magistrate court's finding that Vernon "is a formidable and persuasive man" is inapposite.

C. THE MAGISTRATE COURT ERRED AS A MATTER OF LAW IN ITS APPLICATION OF THE PRESUMPTION OF UNDUE INFLUENCE.

Conclusions of law are freely reviewed. *In re Estate of McKee*, 153 Idaho 432, 436, 283 P.3d 749, 753 (2012). The court's determination upon factual issues must be set aside if not supported by substantial, competent evidence. *Green v. Green*, 161 Idaho 675, 681, 389 P.3d 961, 967 (2017). Similarly, 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.*

The court's decision to apply the presumption of undue influence was made *sua sponte*, prior to trial. *See generally*, Tr. p. 187, l. 19–p. 188, l. 8. In a hearing two-months prior, the

[7] This same argument and citation is found at p. 23, R. Brief, as well.

magistrate court cautioned Vernon "You have an uphill battle" while at the same time denying his request for a continuance so that he could secure counsel. Tr. p. 102, ll. 5-13. The trend continued with the evidentiary rulings at trial and with the first two pages of "findings" in the court's decision dedicated to the court's perception of Vernon's "shady" dealings as evidence of a lack of "credibility." For Vernon, the uphill battle was lost long before it started.

1. There is no evidence of a nexus between Vernon's role as Victoria's attorney and Victoria's preparation of her Will.

As Joseph recognizes, in order to apply the presumption, two conditions must exist: (1) a fiduciary relationship between the testator and the beneficiary, and (2) the beneficiary must have had some role in the *preparation* of the Will. *Wooden v. Martin (In re Conway)*, 152 Idaho 933, 938-39, 277 P.3d 380, 385-86 (2012); *Green v. Green*, 161 Idaho 675, 681, 389 P.3d 961, 967 (2017). The magistrate court's decision to apply the presumption was announced during a hearing held October 14, 2016, upon the court's finding that "based upon the information set forth in the pleadings by Mr. V.K. Smith himself, there is a rebuttable presumption that the 1990 holographic will was the result of Vernon K. Smith , Jr's undue influence, since his own pleadings provide a basis for ruling that he was the sole beneficiary." Tr. p. 192, ll. 11-18. The magistrate court's pretrial decision hinged upon the existence of a fiduciary relationship but failed to take into account the required nexus between the fiduciary duty and the preparation of the Will. Joseph's current reliance upon trial testimony regarding advice for the safekeeping of the Will to establish a nexus ignores that the court's ruling upon the application of the presumption of undue influence occurred *prior* to trial.

Similarly, Joseph's citation to other incidents he claims are evidence of "legal advice"

from Vernon to his mother to support the magistrate court's imposition of the presumption of undue influence is both factually inaccurate and irrelevant. *See* R. Brief, p. 22; Addendum 1, Item 15. The attempt to blend these purported instances of "legal advice" with the court's application of the presumption of undue influence does not present a cogent argument to support the court's decision.

2. Joseph's effort to distinguish this case from *Swaringen* from the case at bar falls flat.

In support of the argument that *Swaringen* is distinguishable, Joseph cites the testimony of Father Faucher that Victoria "had a deep appreciation for strong men" and "had a desire to please" such figures. R. Brief, p. 23 (citing TT p. 420, l. 18 – p. 421, l. 2). *See* Section B.6., above. Joseph further attempts to distinguish *Swaringen* upon the ground that the beneficiary/attorney in *Swaringen* did not participate in the preparation of the Will and the testator had the benefit of independent legal advice in the drafting of the Will. For the reasons previously discussed, there was no evidence that Vernon participated in the preparation of the Will. Upon Joseph's last point, that the testator in *Swaringen* was "strong-minded" and not susceptible to being influenced, it was undisputed, and the court reluctantly conceded, that Victoria was, generally speaking, strong willed. R. 1594.

The attempt to distinguish *Green* is likewise inapposite. *Green* was cited for the proposition that Idaho law requires proof of a nexus between the fiduciary duty and the act of preparing a will. 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,* 67 Idaho at 248, 175 P.2d at 695.

Under *Green* and its progeny, the magistrate 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. As discussed more fully below, the court's subsequent conclusion that Vernon actively participated and procured the Will through undue influence does not find support in any evidence adduced at trial.

D. THE MAGISTRATE COURT'S CONCLUSION THAT VERNON PARTICIPATED IN THE PREPARATION OF THE WILL IS CLEARLY ERRONEOUS.

The magistrate court concluded that Vernon must have participated in the preparation of the Will because "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. Vernon briefed the lack of evidentiary support for the court's conclusions at length in his opening brief. Appellant's Opening Brief, pp. 24-27. In response, Joseph simply asserts without citation to any evidence "Mrs. Smith, who was not an attorney, used testamentary language and concepts which typically originate only from the mind of an attorney." R. Brief, p. 23. Joseph then restates the court's conclusion that the phrases "executor without bond," "real and personal property," and "holographic will" have "special legal gloss. R. Brief, p. 24. There was no evidence, however, that Victoria lacked the capacity or intelligence to draft the Will she

personally penned on February 14, 1990, which Will was remarkably similar to that of her late husband. Joseph's bare reliance upon the court's unsupported conclusion, rather than a single citation to the evidentiary record, illustrates the fallacy in this argument.

Moreover, the reliance upon post-will participation by Vernon in "testamentary" matters to supplant a lack of evidence upon any undue influence operating on February 14, 1990 is misplaced. Vernon did not deny that he drafted the 2008 POA. Victoria signed the 2008 POA. The 2008 POA recited that Victoria wanted Vernon to inherit her estate "because of his commitment, dedication, and devotion to my best interests, welfare and financial well being." Ex. 4, p. 2. The nearly two pages of Joseph's Brief dedicated to Vernon's alleged "abuse" of the 2008 POA in 2012 as evidence of "disposition," and an "arrogant disregard" for Victoria's testamentary aspirations is not supported by a single citation to Idaho law. Similarly, the magistrate court's inclusion of nearly seven (7) pages expressly dedicated to this issue, an issue upon which summary judgment was previously granted as a matter of law, was erroneous. *See* R. 1577-1583. The 2012 Transfers also find their way into nearly every finding rendered by the court. The magistrate court exceeded the bounds of its discretion and Idaho law in its reliance upon the 2012 transfers to establish material elements of Joseph's claim of undue influence.

E. VERNON READILY REBUTTED AT LEAST ONE ELEMENT OF A CLAIM OF UNDUE INFLUENCE AND THE MAGISTRATE COURT ERRED IN REFUSING TO HOLD JOSEPH TO HIS BURDEN OF PROOF TO ESTABLISH ALL FOUR ELEMENTS.

The claim of undue influence asserted by Joseph has been an evolving target. 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."). In written discovery, Joseph was asked to identify the factual basis for his claim that the Will was the product of undue influence. Joseph responded: Vernon K. Smith Jr. was present when his mother executed the will, the will itself. There were no other witnesses of record to the execution of the will and that it leaves everything to only one of Victoria H. Smith's' three children. TT p. 154, l. 19 – p. 157, l. 13.

At trial, however, Joseph relied upon four primary incidents which he contends support his claim of undue influence: (1) an issue with a well easement in April 1992 whereby Joseph claimed that Victoria agreed to give him an easement to her well and that she later changed her mind; (2) a dispute with a fence repair in 1992; (3) the Raymond foreclosure sale in June of 1990 and finally, (4) an issue with the Hamer property in 1992. *See* TT p. 158, l. 3 – p. 174, l. 6. The magistrate court erred as a matter of law and abused its discretion in adopting and exceeding Joseph's speculative, innuendo and hearsay laden testimony, to conclude that Vernon failed to rebut even one element of a claim of a claim of undue influence.[8]

1. Victoria was not susceptible to *Vernon's* influence.

As briefed in Appellant's Opening Brief, as of February 14, 1990, Victoria was not aged, sick, or enfeebled. She was, however, strong-willed and intelligent. 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

[8] The court's reluctant qualifier that "*even if* Vernon had rebutted the presumption with minimal evidence, Joseph directly or through Vernon's own witnesses and evidence presented a preponderance of evidence that Victoria's will ... was the product of Vernon's undue influence" as a predicate to the court's findings does not find support in the court's own decision wherein the court expressly found that Vernon failed to rebut each and every element of Joseph's claim of undue influence. R 1592.

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. Simply put, Victoria was not susceptible to influence.

None of the nearly five pages dedicated to "susceptibility" in Joseph's Brief acknowledge or attempt to address the factors this Court has decreed are relevant to the susceptibility as an element of a claim of undue influence:

> 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. Joseph's brief does not acknowledge these factors, let alone make any effort to apply them. The magistrate court committed the same error in its analysis.

In his briefing upon the element of susceptibly, Joseph offers that *Gmeiner* identified isolation and alienation as "red flags." In material part, however, the *Gmeiner* Court holds that isolation and alienation are relevant to the fourth element of a claim for undue influence, a result indicating undue influence: "A property disposition which departs from the natural and expected is said to raise a 'red flag of warning.' " *Id.* at 7, 592 P.2d at 63 (citing *In re Culver's Estate*, 22

Wis.2d 665, 126 N.W.2d 536, 540 (1964)). *See also* Section E.4. below.

Joseph next identifies four incidents he claims are relevant to the element of "susceptibility." (Raymond; the fence repairs; well-easement; and Hamer). Of these incidents, none preceded Victoria's execution of her Will and only one, the Raymond foreclosure sale, was even remotely close in time. The Raymond foreclosure sale and the lack of evidence to support a claim of undue influence is addressed more fully in Section B.1., above. The magistrate court's reliance upon the Raymond foreclosure as evidence of "susceptibility" was clearly erroneous.

In addition to these four events, Joseph also claims that Vernon's alleged control over Victoria's charitable giving suggests that Victoria was susceptible to Vernon's influence. The sole support identified for Joseph's claim that Vernon intercepted and prevented Victoria's charitable aspirations was a citation to Father Faucher's inadmissible hearsay testimony. *See also* Section B.6. above. Contrary to Joseph's claim, competent and substantial evidence disproves the assertion that Vernon intervened in Victoria's charitable giving. Exhibits 265 through 268 are the check registers maintained by Victoria from 1989 to 1998. They detail regular donations to her church, St. Mary's, as well as several other charities, such as the Special Olympics, the Idaho Democratic Party, the Boise Police Department, the Ada County Sheriff's Employees Association, the Catholic Women's League, the Professional Firefighters Association, Disabled American Veterans, Father Flanagan's Home for Boys, the Friends of the Boise Public Library, St. Labre Indian School, the Monastery of St. Gertrude, and others.

In brief, Joseph offers conclusions, not evidence, to support his claim that Victoria was susceptible to Vernon's influence. Each of the examples cited occurred at least six months, if not years or decades, after Victoria authored her Will, and each contains an inaccurate or incomplete

reference to the evidentiary record and/or relies exclusively upon inadmissible hearsay.

The magistrate court erred in its consideration of these events as evidence of "susceptibility" in so far as there was no evidence that Victoria was pressured, or that her will was ever overborne, by Vernon. This fact is readily borne out by Victoria's own words: "No one tells me who will inherit my property." Ex. 269 (emphasis added). The magistrate court's finding that Victoria was uniquely susceptible to Vernon's influence was erroneous. Vernon produced a quantum of evidence tending to showing that Victoria was not susceptible to any influence, thus shifting the burden of proof to Joseph upon his claim of undue influence.

2. Vernon did not have an opportunity to influence Victoria in the drafting of her Will because it was prepared prior to Vernon's appearance at her home on February 14, 1990.

Upon the element of opportunity, Joseph asserts that "Vernon's position as manager of his mother's financial and business affairs, together with the trust she had in him, gave Vernon the opportunity to influence her in the disposition of her estate." R. Brief, p. 33. As of 1990, however, this same argument is equally applicable to Joseph who, by his own testimony, was involved in Victoria's business affairs until 1992 and lived 600 feet from Victoria's home. TT. p. 334, l. 22–p. 335, l. 3; p. 169, l. 1–p. 171, l. 5.

3. Vernon was not disposed to unduly influence Victoria and the magistrate court's findings upon this element were erroneous.

The magistrate court's conclusion that Vernon had a disposition to exert undue influence upon Victoria was erroneous in law and in fact. Upon the issue of disposition, the magistrate court relied upon a finding that Vernon (1) 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. Vernon addressed the factual deficiencies in these findings in his Opening Brief. See Appellant's Opening Brief, pp. 33-37. In response, Joseph does not rebut Vernon's arguments or citations to evidence (or a lack thereof) but instead cites several other events he claims are indicative of "disposition."

Under this element, the Court "examines the character and activities of the alleged undue influencer to determine whether his conduct was designed to take unfair advantage of the testator." *Gmeiner*, 100 Idaho at 8, 592 P.2d 57, 64 (1979). The Court in *Gmeiner* also holds:

> Another broad area of judicial concern in dealing with the element of "disposition" is the alleged influencer's attempts at undermining bequests to the natural heirs. 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. Upon this element, Joseph, simply repeats the magistrate court's erroneous finding that Vernon was active in procuring the Will. Joseph next cites to Vernon's failure to counsel his mother to secure estate planning advice and cites to testimony of Lyman Belnap. *See* Section A, above. Finally, Joseph cites to several post-will events that he claims are evidence of "disposition," namely, the 2012 Transfers, Vernon's failure to convey property back to the Estate in 2016, and "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." R. Brief, p. 34. The "direct" evidence Joseph identifies is actually inadmissible hearsay, together with Joseph's innuendo and conjecture. *See also* Addendum 1, Items 13, 14 and 15. The only "direct" evidence of Victoria's intent and free-will is contained in three documents: (1) her Will; (2) her

1991 Affidavit; and (3) the 2008 POA. Additional circumstantial evidence of mother's ability to resist Vernon is contained in Joseph's own letters wherein he repeatedly refers to his mother as a fighter, together with an acknowledgement that her choices are her own.

The magistrate court's reliance upon isolation and alienation to support its determination that Vernon had a "disposition" to exert undue influence is erroneous. Upon the issue of isolation and alienation, there was no evidence of isolation or alienation in February 1990. Joseph's own exhibits disprove the claim that Victoria was isolated. Joseph's Exhibit 2 contains photocopies of cards sent by Victoria to her great grandchildren and grandchildren. She sent cards to her great granddaughter Jessica each year from 1990 to at least 1998. The card sent in 1998 states "call me and tell me when you can come by sometime." Ex. 2 (9-B). She also sent cards regularly to her grandson, Joseph Jr., and even remarked in her Christmas 2003 card stating, "There will be no gifts from you or me since our property taxes have raised exorbitantly."

In the March 1992 birthday party photos Victoria is seen enjoying a grandchild's birthday with Joseph's family. Ex. 25 (1-A and B). Other photos simply show Victoria enjoying family get togethers in 1991 and 1990. Simply put, they rebut the idea Victoria was isolated in or around the time the will was drafted. *See* e.g. Ex 25(2) – 25 (7B). The photos from 1989 and earlier show the Smith family through the years but are hardly relevant to the issues at bar. *See e.g.* Ex. 25(8) – 25(22-A).

The lack of evidence of isolation and alienation is further borne out by the fact that Vernon continued to take Victoria to church regularly until 2007 and that Joseph Jr. continued to visit Victoria regularly until 2003, at which time *Joseph Jr.* discontinued his visits because

Victoria said she did not want to give him gifts anymore. Joseph himself continued to negotiate loans directly from Victoria after 1990. At least twice, Joseph requested Victoria sell or gift him real or personal property after 1990, in 1994 and 2001 respectively. *See e.g.*, Ex. 234, 235, 248, 249. *Victoria* responded to each request in the negative. *See Id.*

The magistrate court's conclusion that Vernon failed to produce a quantum of evidence tending to rebut the element of "disposition" is erroneous. The magistrate court's alternative conclusion that Joseph sustained his burden of proof to produce a preponderance of evidence upon the same lacks support in the court's FFCL and the evidentiary record.

4. The Result of Victoria's Will was consistent with a lifetime of disparate treatment of her children.

The magistrate court concluded that Victoria's decision to leave her estate to Vernon was indicative of undue influence. Joseph simply argues, without citation to law or evidence, that "a will which entirely cuts out two of the decedent's three children is 'unnatural, unreasonable, and unjust." R. Brief, p. 35. From this argument, Joseph states "the only reasonable explanation is that the Will was the product of Vernon's undue influence." This ipse dixit logic is consistent with the court's erroneous conclusion that Vernon failed to produce a quantum of evidence tending to show that the Will accurately reflected Victoria's personal desires for the disposition of her estate. The court's decision hinged upon a finding that there was no evidence of estrangement between Victoria and Joseph or Converse at the material timeframe, February 14, 1990. This finding is erroneous in law and in fact. As this Court held in *Gmeiner*:

> A result is suspicious if it appears unnatural, unjust or irrational. A property disposition which departs from the natural and expected is said to raise a "red flag of warning," and to cause the court to scrutinize the entire transaction closely.

> On the other hand, apparently unnatural dispositions may be sufficiently explained. Indeed, the law must respect even an "unequal and unjust disposition" once it is determined that such was the intent of the grantor or testator. Thus, for example, the grantee may be particularly deserving by reason of long years of care and the fact that the grantor was motivated by affection or even gratitude does not establish undue influence. The fact that the grantor's natural heirs received sizable bequests will make it difficult for them to challenge grants to another. And the fact that the grantor was known to be displeased with those who were disinherited will serve to explain why they were cut off, whereas a sudden shift in the object of the grantor's choice coincidental with the creation of a confidential relation with the new beneficiary will merit strict court scrutiny.

100 Idaho at 7, 592 P.2d at 63 (internal citations and quotations omitted). The magistrate court's myopic emphasis on the lack of evidence of estrangement in February, 1990, to the exclusion of the remainder of the *Gmeiner* factors, does not comport with Idaho law. Applying the above-quoted standard, this case did not present a factual scenario whereby a testator drafted a will leaving her estate to her children in equal shares which will was later modified to leave the entirety of the estate to only one of the three children. The magistrate court's conclusion assumes, without evidence, that Victoria wanted her children to share equally in her estate. There was no evidence that Victoria treated her children equally and wanted them to share equally in her estate. In fact, the record was replete with evidence of disproportionate gifts and vastly different contributions and relationships. For example, in December 1989, Victoria gave a "tax-free" gift to Joseph in the amount of $9,999.00. Ex. 205. At the same time, Victoria gave $9,999 to Vernon and only $3,000.00 to Converse. Exs 206 and 207. There was evidence of repeated gifts and loans to Vernon and to Joseph in the late 1980s and continuing until the mid-1990s. Apart from the $3,000.00 in December 1989, there was no evidence of similar gifts or loans to Converse. Joseph was the only child to receive multiple gifts of real property – a home in 1963, followed by an acre of ground in 1975, followed by additional ground in 1986. TT. p.

64, l. 6 – p. 65, l. 4.

The evidence further established that Victoria chose to leave her estate to Vernon out of gratitude for his efforts and contributions to her over the decades following the untimely death of Vernon Sr. *See* Ex. 204; *see also* TT p. 141, l. 1 – p. 144, l. 9.[9] Idaho law recognizes that gratitude or a desire to reward Vernon's efforts does not establish undue influence and the court's election to ignore competent evidence explaining Victoria's decision to leave her estate to Vernon was erroneous.

Joseph now asks this Court to sustain the magistrate court's findings upon a per se standard that lacks support in Idaho law, *i.e.*, that it is per se unreasonable for a testator to disinherit their children absent proof of estrangement. This proposition is not supported by Idaho law; nor does it find support in the record.

In essence, contrary to well-settled Idaho law, the court required Vernon to prove that Victoria disinherited Converse and Joseph out of spite in 1990. *See Gmeiner, infra.* Vernon produced more than a quantum of evidence that Victoria's intent accurately reflected her desire to reward his efforts; not to punish Joseph or Converse, thus shifting the burden to Joseph to prove each of the four elements of his claim of undue influence.[10] Applying the entirety of the

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[9] The magistrate court held 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. The magistrate court's finding that Vernon produced no relevant evidence is erroneous. In addition to the 2008 POA signed by Victoria expressing Victoria's desire to reward Vernon for his efforts, Ms. Puckett acknowledged that in the early 1990s, Victoria made her testamentary 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. 17.

[10] 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

factors set forth in *Gmeiner*, there was ample competent evidence that Victoria's disparate treatment of her children was consistent with *her* wishes and the magistrate court erred in failing to hold Joseph to his burden of proof to prove otherwise.

F. THE MAGISTRATE COURT ERRED IN ITS CONSIDERATION OF EVIDENCE FAR REMOVED FROM THE EXECUTION OF THE WILL.

Joseph's reliance upon the magistrate court's conclusion that hearsay evidence, though far removed, is admissible is, like the magistrate court's conclusion itself, erroneous. The magistrate court failed to apply Idaho law when it concluded, that "very remote evidence" is admissible and that the lapse of time is a factor in the "weight" to be given to that evidence. *See Montgomery v. Montgomery*, 147 Idaho 1, 9-10, 205 P.3d 650, 658-59 (2009) (holding that the magistrate judge exceeded its discretion in weighing inadmissible evidence and further holding that statements of a decedent are hearsay and are inadmissible unless "such statements relate to the execution, revocation, identification, or terms of his will."); *see also In re Conway*, 152 Idaho at 941, 277 P.3d at 388:

> All hearsay is inadmissible as evidence unless otherwise provided by Idaho rule. I.R.E. 802. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." I.R.E. 801(c). Accordingly, this Court has upheld the admission of out-of-court "declarations of a testator pertaining to his mental condition ... to prove his inability to resist the influence of others" rather than to prove the truth of those statements. *King v. MacDonald*, 90 Idaho 272, 278, 410 P.2d 969, 972 (1965). Further, "[d]eclarations not confined to the time of the execution of the will, including those made both before and after, may be received provided they are **not too remote** to throw light upon the mental condition of the testator at the time of the execution of the will." *Id.* at 278–79, 410 P.2d at 972.
>
> As evident from the above, the admission of statements made by the decedent are hearsay

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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.

and are inadmissible with limited exception. Joseph, nor the court, identified any controlling Idaho law that would support the admission of Victoria's alleged statements two, if not nearly twenty years, removed from the execution of her Will, upon incidents or events that have nothing to do with Victoria's mental condition at the time of the execution of her Will.

G. Joseph's Reliance upon Public Policy to Support his Arguments is Unsupported.

Joseph's final argument rests upon a claim that public policy favoring testacy has no applicability in cases involving claims of undue influence.[11] Joseph's citation to *In re Corwin's Estate*, 86 Idaho 1, 5, 383 P.2d 339 (1963), to support this proposition is in error. *In re Corwin* holds that the intent of the testator should control. Herein, the intent of the testator could not have been more clear: Victoria wanted Vernon to have her estate in its entirety. The magistrate court erred in its decision override Victoria's intent and invalidate her Will absent proof of undue influence by Vernon.

H. Joseph Failed to Rebut the Argument that the Magistrate Court Erred in Granting Summary Judgment on the Issue of the 2012 Transfers.

1. Joseph had no standing to contest the 2012 Transfers.

In Appellant's Opening Brief, *In re Edward J. Burke Estate*, 2016 WL 4217752 at *5 (Del.Ch., August 10, 2016), was cited in support of the proposition that Joseph did not have standing under I.C. § 15-12-116 to challenge the 2012 POA transfers because that statute permitted petitions for judicial relief to be made by interested persons only while the principal

[11] Joseph's statement "Were the Court to find that either Joseph or Converse, but not both, was the victim of undue influence, the entire Will would have to be invalidated" is demonstrative of the entitlement to which Joseph clung through these proceedings. Joseph was not a victim; Converse was not a victim. Although Joseph may feel an entitlement to Victoria's estate ("I paid my dues to justify those thoughts") (Ex 231), Victoria disagreed and had every right to dispose of her estate in the manner in which she deemed appropriate.

was still alive. Appellant's Opening Brief, pp. 16-17. When Joseph brought his challenge on June 1, 2016, the principal, Victoria H. Smith, had been dead for almost three years and therefore, by definition, she was no longer in need of the protection provided by that specific statute.

Joseph has alleged in his response that the Delaware Chancery decision has been superseded by the decision of the Delaware Supreme Court in *Matter of Estate of Burke*, 170 A.3d 778 (table), 2017 WL 3624263 (full text) (Aug. 24, 2017). The Delaware Supreme Court affirmed the above-cited decision of the Delaware Chancery Court by application of the doctrine of ademption, and in did not address the standing issue. 2017 WL 3624263 at *1.

Idaho Code § 15-12-114(8) directly speaks to this question by specifically declaring that, "upon death of the principal" either a "personal representative" or a "successor in interest" is authorized to request certain disclosures from an agent under a power of attorney. It is undisputed that Joseph is not the personal representative of his mother's estate, leaving "successor in interest" as the sole possible justification for his challenge to the 2012 POA transfers. The phrase, "successor in interest," is not defined in the Idaho Uniform Probate Code, although the word "successor," is defined for purposes of that Code to mean, "those persons, other than creditors, who are entitled to the property of a decedent under his will or this code." I.C. § 15-1-201(50). At the time this challenge to the POA was brought in June 2016 Joseph had no entitlement to any of the property of Victoria H. Smith under her will, having being expressly disinherited by her in that will.

In sum, and as more fully discussed in Appellant's Opening Brief pp. 15-18, Joseph lacked standing to challenge the 2012 POA transfers by his petition filed in June 2016.

Therefore, the magistrate court's order setting aside those 2012 POA transfers should be vacated.

2. Joseph's claim is barred because he dismissed a claim based upon the same facts and theories.

In his brief, Joseph misses the point. R. Brief, p.18. He dismissed a conversion claim against Vernon based on the same factual allegations and theories. His motion for summary judgment on the transfers was premised on the same facts and theories. If not barred by res judicata for want of a final judgment, the claim should be barred by the doctrine of judicial estoppel. *See McAllister v. Dixon*, 154 Idaho 891, 894, 303 P. 3d 578, 581 (2013).

3. Joseph has offered no rebuttal to the argument the 2008 power of attorney was coupled with an interest.

Joseph fails to respond to the law and facts establishing that, at a minimum, Vernon had an equitable interest in the property of the estate as of time of the 2008 execution of the power of attorney by Victoria. The power was therefore "coupled with an interest," and, as a result, the 2008 POA was exempt from the application of the provisions of the Idaho Uniform Power of Attorney Act. I.C. § 15-12-103(a),

The evidence in the record on this appeal establishes that in 2008 Vernon moved into the old farmhouse located on the Smiths' Chinden property, which he had begun remodeling in 1989, and which has remained his primary residence since that time. R. 60, 95 ("In December, 1989, Victoria made gifts of $9,999 to Joseph and to Vernon. Joseph kept his and Vernon reinvested his check into a remodel of the farmhouse - Victoria's farmstead home." R. 1388). In 2007, the Ada County Highway District 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 a portion of that real property was taken for the widening of Chinden Blvd. R. 748-752.

4. The 2012 transfers were not a gift.

Joseph makes only the barest conclusory reference to the magistrate court's decision setting aside the 2012 POA transfers as based upon "gifting." R. Brief p. 19. Even assuming the 2008 POA is governed by the UPAA, Vernon was authorized to effect the transfers by the plain terms of the 2008 POA. *See* Appellant's Opening Brief, pp. 19-20. In addition, the transfers were supported by consideration as explained in the undisputed evidence of Vernon's investment and service provided to Victoria and the property.

5. Joseph ignores the argument that the magistrate lacked jurisdiction over the property and personal jurisdiction over VHS Properties, LLC.

The magistrate lacked the authority to effectively transfer real and personal property from a third party, VHS Properties LLC, into the Estate. Joseph cites *Pincock v. Pocatello Gold Mining Co.*, 100 Idaho 325, 597 P.2d 215, 217 (1979), wherein the Court discussed the authority of the probate court to decide property title issues "between Estate heirs." R. Brief, p. 15. The issue here, however, is whether the magistrate court had subject matter jurisdiction to compel a non-party, an Idaho legally recognized LLC, to transfer property to the Estate. *Pincock* holds it does not. *Id.*; *see also Ruzicka v. Ruzicka*, 635 N.W.2d 528, 538 (Neb. 2011); *Boldridge v. Keimig's Estate*, 564 P.2d 497, 502 (1977) (probate court lacked jurisdiction to quiet title to real property; such an action should be brought in district court). See also Appellant's Opening Brief, pp. 13-20; *Appellant's Brief in Opposition to Motion to Dismiss Appeal of Order Granting Partial Summary Judgment,* Supreme Court Docket No. 45313-2017.

III. 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 21 day of March, 2018.

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

By: _____
WILLIAM A. FUHRMAN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21 day of March, 2018, a true and correct copy of the above and foregoing document was forwarded addressed as follows:

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_____
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:

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DATED this 21 day of March, 2018.

William A. Fuhrman

ADDENDUM 1

1. Quote/Comment	R. Brief, p. 5: Block quote of Vernon's testimony "on the circumstances surrounding the execution of the handwritten Will on February 14, 1990."
Citation	Tr. p. 209, L. 20; Tr. p. 212, L. 5
Context/Comment	The quoted portion of those pages is accurately reflected in R. Brief, however, there are material omissions from the excerpt cited. Read in its entirety, the gap in the above-quoted portion of the transcript contains the following testimony: Q. Prior to February 14th, 1990, had she told you she was contemplating making a will? A. No. Q. And prior to arriving at your mom's home on February 14th, 1990, did you know that she was going to name you as the sole heir of this will? A. I did not. Q. Did you have a discussion with her on that day about that fact? A. We did. I spoke to her about that and she explained to me her reasons why. Mr. Ellis: Your honor, this is – I think this is hearsay. I am not sure it is state of mind. Mr. Jones: I believe it is state of mind. And we are only asking the court to take it as such. The Court: I'm going to allow him to testify.... Q. By Mr. Jones: Thank you. And you started to say what she told you? A. I did. What she told me was the reason she was leaving it to me was because if but for me she would not have anything to leave for anyone. She wanted to show her respect and appreciation for what all I had done and my loyalty to her. We spoke about Vicki and, of course, there is very hard feelings there with Vicki. We spoke about Joe and she made it quite clear, as she had to be and to Joe then, before and thereafter, that Joseph is a taker. He is a user. She would refer to him as a thief. She had very strong opinions about Joseph. Mr. Ellis: Same objection. The Court: I am going to take it only for what he claims is her state of mind at the time. Not for the truth of the matter asserted. ...
2. Quote/Comment	R. Brief, p. 6: "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."
Citation in Support:	Tr. p. 236, L 9-25: Q. By Mr. Jones: As a result of what the IRS did, did you seek the assistance of your brother in your mother's presence? A. Yes. What I did. Q. That is a yes or no.

	A. Then it would be a yes. Q. And did Joe agree to do what you asked him to? A. No. Q. And did your mom volunteer to do that? A. Yes. Q. And did she then appear at the tax sale and become the owner? A. She did bid and became the owner. Q. And thus satisfying the obligation to the IRS? A. It did do that.
Context/Comment	The above quoted portion of the trial transcript does not support the reference to Vernon's ex-wife or her separate property. Additional discussion of the character of the Raymond Street foreclosure and testimony regarding the IRS audit may be found at TT. p., 229 – p. 236; see also p. 367, l. 14 – p. 369, l. 9.
3. Quote/Comment	R. Brief p. 6: "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 in this scheme to prevent his wife from arguing that the residence became community property upon sale to him.
Citation	Tr. p. 332, L. 4-9: The Witness (Vernon): I was going through a divorce so if I were to have purchased the property it would then be concluded or argued to be a community interest. And so I did not want to get back involved in it. I wanted that tax lien resolved with the money she took.
Context/Comment	No portion of the excerpt cited supports the premise that Vernon "requested" Mrs. Smith participate and the suggestion that Vernon persuaded his mother to engage in a "scheme" is unsupported by the evidence adduced at trial.
4. Quote/Comment	R. Brief, p. 6-7: 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.
Citation	Tr. p., 232, L. 18-23 to p. 233 L. 1. Q. And you [Vernon] asked the IRS to conduct a forensic audit? A. I did. Q. And as a result the IRS prepared a tax lien? A. They indeed did. Q. And that tax lien was foreclosed against the Raymond Street Property? A. It was.
Context/Comment	There is no evidentiary support for the statements ascribed to be derived from the excerpt. The Transcript continues, however with the *court's* cross-examination of Vernon upon the topic of the IRS audit: The Court: So let me get this straight. The tax lien was – okay. Your testimony is the IRS just because you asked them to do a forensic audit came in and audited your books, correct? Yes or no?

	The witness: I asked the IRS to come and audit the accounts, yes. The court: Okay. I am sorry. I am having a bit of a problem with that. I would like to see the request, personally. Because I have never heard of the IRS coming in for a private citizen and doing an IRS audit. The witness: Do you know Nicoli Karl? The court: No. And I don't want to. I don't want to get off on a tangent. So they did an audit of your accounts? The witness: Yes. TT. p. 233, l. 6-22. Additional discussion between the court and Vernon regarding the tax lien and the IRS audit continues at p. 233, l. 23 – p. 236, l. 7.
5. Quote/Comment	R. Brief, p. 7: Vernon's testimony is not credible that Joseph was aware of the Will's existence prior to Mrs. Smith's death.
Citation	Tr. pp. 37, L. 24-p. 38, L. 5: Q. By Mr. Jones: Now, you testified in your deposition that you first saw your will in December, 2013? A. [Joseph] I believe it was the 18th of December 2013. The day after my mother's funeral. Q. And you had never seen it before that? A. That is correct.
Context/Comment	This citation of the trial record contains Joseph self-serving testimony which testimony was inconsistent with the letters he authored commencing in 1992. For additional context, the testimony continues: Q. Had its contents ever been disclosed to you prior to that? A. [Joseph] Never. Q. Did you ever ask your mother whether she had a will? A. Never. TT, p. 38, ll. 6-11.
6. Quote/Comment	R. Brief, p. 7: Vernon testified that he was Mrs. Smith's attorney from the day he was admitted to the Bar until her death and beyond. See also R. Brief p. 33.
Citation	Tr. p. 335, L. 4-10: 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
Context/Comment	*See also* TT p. 337, LL 15-18: Q. [Mr. Ellis] You testified you are her attorney, right? A. [Vernon] In matters that she wants me to represent her in. This testimony did not establish that he was her attorney for all purposes or that she routinely sought legal advice from him in any way.
7. Quote/Comment	R. Brief, p. 8: Contains a block quote from the magistrate court's FFCL, together with two citations to the trial transcript to support an argument that the magistrate court's finding that Vernon "provided his mother legal advice in drafting and preparing the holographic Will."
Citation	FF/CL, pp. 9, 10, Tr. p. 36, LL 4-10: Mr. Jones: Your Honor, I offer Exhibit 200. [Vernon Sr's Will]

	Mr. Ellis: No objection. The Court: Without objection, Exhibit 200 – now, 200 does include other documents that are attached. Is there any objection to those other documents? Mr. Ellis: One second, Your Honor. No. Tr. p. 337, LL 15-18: Q. [Mr. Ellis] You testified you are her attorney, right? A. [Vernon] In matters that she wants me to represent her in.
Context/Comment	TT p. 337, continues: Q. So you didn't see yourself functioning as an advisor at the time you witnessed her sign the holographic will? A. No. She didn't advice for my advise (sic) in February 14, 1990. She asked me to witness the execution of her will. Q. From time to time a client doesn't ask for advise (sic) but sets out a proposed way to doing something. You have no responsibility to her to say, Mother, I think we should have a more formal will rather than a holographic will? That never occurred to you? A. I didn't say that to her and it didn't occur to me to say that to my mother on February 14, 1990. Q. Even though you see that – you agree that the holographic will was not the best way to do things? Mr. Jones. I object to the form. That assumes facts not in evidence. The Court: Overruled. The witness: No, I never said I would agree that a holographic will is not the best way to do things. My father did one and my mother did one. Q. By Mr. Ellis: So you disagree with that. You think holographic wills are preferable? A. I am saying if I do a will it is typically a 10-15 page document, not a single page document. Q. Why didn't you make a recommendation in this case? A. Because my mother didn't ask for it. She wanted to do a holographic will. TT. p. 337, l. 19 – p. 339, l. 1.
8. Quote/Comment	R. Brief, p. 8: "Vernon testified that he did not discuss with his mother whether to consult an estate planning professional (Tr. p. 342, L. 20-22), and one was not consulted.
Citation	Tr. p. 342, L. 20-22: Q. [Mr. Ellis] Did you ever recommend an estate planner? A. I did not.
Context/Comment	For additional context, the following dialogue immediately preceded the quoted testimony: Q. [Mr. Ellis] I am asking why you did not consult an estate planning expert given the fact that you had two estates? I am not asking about Judge Bieter. A. [Vernon] My mother owned all the property. She was the sole heir of

	my father's holographic will. And she did not want any other involvement in any estate planning. She knew what she was going to do and she did what she did. TT. p. 342, ll. 11-19.
9. Quote/Comment	R. Brief, p. 9: "Additionally, Mrs. Smith was making Vernon's child support payments and paying his office expenses."
Citation	FF/CL, p. 18; R. p. 1584, and Tr. p. 272, L 22: The Court: And that he couldn't pay his
Context/Comment	The quoted portion of the transcript actually refers to one line of commentary from the magistrate. The entirety of this line of testimony related to the admission of Exhibit 269. Exhibit 269 is the February 6, 1991 Affidavit of Victoria H. Smith.
10. Quote/Comment	R. Brief, p. 10: "There is evidence by the testimony of Mrs. Smith's granddaughter Kate Laxon and Father Faucher that Vernon was instrumental in orchestrating this estrangement [referring to estrangement commencing in late 1991]."
Citation	Tr. p. 448, L. 9-13: A. [Kate Laxon] Conversations that I had with my grandma always were surrounding "I have to ask Vernon." "I need to check with Vernon." "I don't know, I will have to talk with Vernon." And Those didn't make sense to me. Tr. p. 409, L. 13-18: A.[Fr. Faucher] I don't remember whether it was the next weekend, but it was certainly within two or three weekends of that that she stopped coming to church. Now it was winter. It was very unusual for her not to come to church, she never came back after that.
Context/Comment	With respect to the excerpt from Ms. Laxon's testimony, the testimony continued: The Court: What was the time frame for these conversations? The Witness: After 1990. TT. p. 448, l. 16-18. Ms. Laxon's testimony was offered without context, over repeated objections for hearsay and lack of foundation. The majority of the testimony from Ms. Laxon related to events in 2009. With respect to Fr. Faucher, the testimony continued: Q. So this was in **2007**. Did you have occasion to see Vicki again any time between then and 2013? A. No, I never saw her. TT. p. 409, l. 19-22.
11. Quote/Comment	R. Brief, p. 11: "Father W. Thomas Facuher was Mrs. Smith's priest for thirteen years and had known the Smith family since 1950."
Citation	Tr. p. 401, L 20-23: Q. [Mr. Troupis] Okay. And were you – how long have you known the Smith family? A. Since first grade, which would be approximately 1950.

Context/Comment	Fr. Faucher was not Mrs. Smith's priest for 13 years Q. [Mr. Troupis] And what was – when did you first become the pastor at St. Marys? A. November the 2nd, 2002. ... Q. Now going back to the period where you were the pastor in 2002 area after that. You said that Victoria didn't drive, so do you know how she got to church. A. Her son, Vernon K. Junior, Blue, would bring her every Sunday, every weekend, to mass. ... Q. Okay. And did she attend church from 2002, was there ever a period of time that she stopped attending the church? A. She stopped attending the church in the winter of 2007 and never came back again. TT. p, 401, l. 17 – p. 404, l. 16. Fr. Faucher was Victoria's priest for approximately **5** years between 2002 and 2007, not the 13 years claimed by the Respondent, and he was not Victoria's priest in any timeframe germane to the execution of her Will. Prior to 2002, there is no evidence of a personal relationship between Fr. Faucher and Victoria H. Smith of any kind.
12. Quote/Comment	R. Brief, p. 11: "Mrs. Smith responded that she would like to make such a donation."
Citation	Tr., p. 405, L. 3-13: [Fr. Faucher] So when we got ready in 2007, 2006-7, we were getting ready to plan the renovation and expansion of St. Mary's church. I said to her, and I know she is being called Victoria in this proceeding, but I also called her Vicki. 'Vicki, would you be open to the possibility of a memorial gift, a rather substantial memorial gift, to the building fund as a memorial to your husband, Vernon K. Senior and yourself?' And she said "Yes, I would be very open to that. I would like that."
Context/Comment	The transcript continues: Mr. Jones: Your honor, I object on the basis of relevance and hearsay. TT, p. 405, ll. 14-15. A long discussion next transpires upon the admissibility of the alleged statements of Victoria. The magistrate court ultimately overruled the objection to hearsay, speculation, and relevance upon a conclusion that *Conway* and *Gmeiner* support introduction of evidence that "suggest they are isolating that person and preventing them from interacting with the community." TT., p. 407, l. 18 – p. 408, l. 3.
13. Quote/Comment	R. Brief, p. 11: "Father Faucher began calling the house and was advised that Mrs. Smith was ill but not available for him to administer the sacrament of the sick."
Citation	No citation is provided for this statement.
Context/Comment	Upon this theme, the transcript contains the following: Q. Did you attempt to contact Vicki [after 2007]?

	A. I did. After a couple of weeks, a normal thing, if somebody doesn't come to church you call. I called the house and somebody said, 'Well, she's lying down. She doesn't feel good.' And I said, ' Could you have her call me?' 'Well, yes.' And this went on – I suppose I called every two or three weeks and never got anywhere. And there was always some reason she couldn't talk to me. ' Well, I could like to come out and see her.' 'Well, I don't think that is a good idea,' whoever answered the phone would say. Mr. Jones: Your Honor, now we are talking about what unnamed people said to him on the phone. I renew my objection to the hearsay recitations within the witness's testimony. ... The Court: I am going to overrule the objection. It is being offered for the effect on the listener and state of mind, not offered for the truth of the matter asserted. TT, p. 409, l. 25 – p. 411, l. 6. The court's admission of hearsay to show the effect on the listener constituted a clear abuse of discretion.
14. Quote/Comment	R. Brief, p. 11: "According to Father Faucher, Mrs. Smith 'had a deep appreciation for strong men.'"
Citation	Tr. p. 420, L. 18 to p. 421, L. 2: A. [Fr. Faucher]Yeah. Yeah. My experience with Vicki was that she would be – she had a deep appreciation for strong men. And a strong male figure like Monsignor Kregan, or Father Riffle or Father Shoemaker or myself could influence her and could – she had a desire to please us, so if somebody asked something she would say yes. And that is why when I asked her for the money, I wanted to make sure she went back to Blue [Vernon] and made sure it was okay with him.
Context/Comment	As evident by the context, the statement that Victoria "had a deep appreciation for strong men" was followed by a list of men to whom the response applied: men of the cloth. Victoria was a devout Catholic.
15. Quote/Comment	R. Brief, p. 22: "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).
Citation	The citations are interlineated with the examples of "legal" advice provided by Respondent.
Context/Comment	With one exception for the Hamer property, the examples cited by Joseph of instances of "legal advice" are simply false. Upon the topic of the well easement, Joseph did not identify any "legal advice" Vernon purportedly

	gave Victoria (in April 1992). TT p. 158, l. 3 – p. 160, l. 7. Joseph's reliance upon the fence dispute as evidence of "legal advice" in late 1991 is also misplaced. The fence dispute involves a fence repair done in 1992 by a third-party that Joseph found to "be close to satisfactory" and that he told Victoria that although the repairs are not "first class, they will work" and "let's accept it." TT. p. 160, l. 8 – p 162, l. 2. Joseph claims Victoria agreed with Joseph's plan and subsequently changed her mind after talking to Vernon and directed Joseph to reject the work. Joseph claims he refused, at which point Victoria "fired" him. *Id.* Joseph also relies upon the Raymond foreclosure as evidence of "advice" Vernon provided to Victoria. Upon the record submitted herein, it is incredible to suggest that Vernon was providing "legal advice" to his mother when he asked Joseph to buy a house, he refused, and Victoria volunteered. TT p. 236, L 9-25. As to the Hamer property, the testimony was undisputed that Joseph and Victoria were sued in July 1992; Joseph wanted to settle the claim; Vernon disagreed and agreed to fight the matter with government; Joseph thus demanded indemnity for his role in the property from Victoria and Victoria executed an indemnity agreement in Joseph's favor. TT p. 85, l. 6 – 16; p. 103, l. 10 – p. 105, l. 23; Ex. 222.
16. Quote/Comment	R. Brief, p. 22-23: "In contrast [to *Swaringen*], 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.
Citation	Tr. p. 420, L. 18 to p. 421, L. 2. (quoted above)
Context/Comment	As noted above, Fr. Faucher's testimony related to his perception of Victoria's appreciation for strong church figures in or around 2002-2007. In no way did Fr. Faucher testify that in 1990, Victoria was susceptible to influence by *Vernon*.
17. Quote/Comment	R. Brief, p. 27: Contains a block quote of testimony offered by Lyman Belnap to support the proposition that "[t]he 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 ... :"
Citation	TR., p. 221, L. 5-15: A. The instances when 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.
Context/Comment	The quote actually continues: And I think that's probably the only time I have recommended them even though I have explained to people that they are normally a valid instrument and recognized by the Court. TT. p. 221, L 11-15.

	Mr. Belnap offered no testimony as to any standard of care for attorneys in general or the intent of the legislature in passing Idaho Code § 15-2-503. His testimony lacked context and was offered in a vacuum because, as he conceded, Mr. Belnap was unaware of the facts of this case. TT. p 224, l. 19 – p. 225, l. 8.
18. Quote/Comment	R. Brief, p. 34: "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."
Citation	Tr. p. 414, L. 10 to p. 415, L. 16: Q. By Mr. Troupis: Now, you were – how close were you with Vicki, would you say? Mr. Jones: In what time frame? Mr. Troupis: In 2002 to 2007 The Witnesses [Father Faucher]: She was an elderly parishioner, but more than that, she had been a very close friend of my mother's. So she had I guess a special place in my heart. And I was close to her. She was very pleased that I was the pastor and she felt a certain warmth and depth towards me. Q. By Mr. Troupis: So how important is it for a devout Catholic to receive the sacraments of the sick before they pass away? A. Oh, extremely important? Q. Is that part – the church teaches that? A. The church teaches that. Mr. Jones: Objection. Relevance. The Court: Overruled. The Witness: The church teaches that, yes. ... Mr. Troupis: Were you ever called by Vernon K. Smith to anoint – to go out and see his mother and give her the sacrament of the sick? A. No.
Context/Comment	There was no "direct" (or even circumstantial) evidence that Vernon overrode Mrs. Smith's charitable aspirations; nor was there any evidence that he "frustrated Father Faucher's attempts to contact his mother, even for pastoral care."