No. 29192-8-III

Sweeney, J. (concurring) — The majority opinion is probably correct given case law precedent in this state. I concur specially to explain why I think that precedent is analytically flawed and to explain, why in this case in particular, the correct analysis (deferring to the trial judge's findings rather than revisiting those findings here on appeal) might well require that we affirm the judgment here.

Burden of Proof

In all cases, the burden of proof consists of two parts—a burden of production and a burden of persuasion. *Fed. Signal Corp. v. Safety Factors, Inc.*, 125 Wn.2d 413, 433, 886 P.2d 172 (1994); *In re Dependency of C.B.*, 61 Wn. App. 280, 282-83, 810 P.2d 518 (1991).

Burden of Production

The party with the burden of proof must meet its burden of production; that is, make out a prima facie case or be subject to summary dismissal. *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 149-50, 94 P.3d 930 (2004). A motion for summary dismissal (before, after or during the trial) tests whether the party with the burden of proof has satisfied its burden of production. *See In re Det. of Capello*, 114 Wn. App. 739, 747, 60 P.3d 620 (2002). Said another way, the burden of production tests whether there is the

"quantity of evidence fit to be considered by the trier of fact." *State v. Paul*, 64 Wn. App. 801, 806, 828 P.2d 594 (1992) (emphasis omitted). The test is "substantial evidence." It is always a question of law for the courts and as such suited for resolution by courts of review. *State v. Zamora*, 6 Wn. App. 130, 133, 491 P.2d 1342 (1971). That is because we can read the record, consider the elements of a crime or a cause of action or defense and then pass on whether the party with the burden of proof has made a sufficient showing (presented substantial evidence) to have warranted submitting the matter to a trier of fact. We need not, indeed, I will argue cannot, pass upon the credibility of the witnesses and the overall persuasiveness of the evidence produced because we have only the record of the proceedings. *Boeing Co. v. Heidy*, 147 Wn.2d 78, 87, 51 P.3d 793 (2002). It is a matter of institutional competency. Courts of review do not have the capacity.

Burden of Persuasion

The burden of persuasion is for the trier of fact and tests how persuasive the showing, the evidence presented, is. *Fed. Signal*, 125 Wn.2d at 433 ("The burden of persuasion is 'the burden of persuading the trier of fact that the alleged fact is true'. [Edward M. Cleary,] *McCormick on Evidence*, at 947 [(3d ed. 1984)]. It comes into play 'only if the parties have sustained their burdens of producing evidence and only when all

of the evidence has been introduced'. *McCormick on Evidence*, at 947."). The burden of persuasion specifies the degree of certainty that a trier of fact must find to make a finding of fact. *In re Det. of Skinner*, 122 Wn. App. 620, 629, 94 P.3d 981 (2004). The burdens of persuasion range from preponderance of the evidence to clear, cogent and convincing to beyond a reasonable doubt. *C.B.*, 61 Wn. App. at 282-83 ("Thus, depending on the type of case, the trier of fact must find that there is proof beyond a reasonable doubt, proof by clear, cogent and convincing evidence, or proof by a preponderance of the evidence. *McCormick*, at 956-64."). It is a test uniquely suited to the trier of fact since the trier of fact sees the witnesses, can watch their reactions, listen to them testify, and place all of the testimony and evidence in the context of the ongoing drama that is the trial of a lawsuit. *In re the Estate of Lint*, 135 Wn.2d 518, 542, 957 P.2d 755 (1998). It is a task for which courts of review are unsuited since we have only the written record and cannot therefore pass on the credibility of witnesses and necessarily then the persuasiveness of the evidence produced during the trial. We do not see the parties or their witnesses testify. We do not see their facial expressions or those of their lawyers or listen to their intonations or do anything to help us pass on just how convincing—persuasive—they were.

The correct analysis would then limit our inquiry to something we are competent

to do, that is pass on whether sufficient evidence was produced, *which if believed*, would then support facts that would, in turn, support the necessary legal conclusion, here, "undue influence." Anything more requires that this court of review weigh the evidence, pass on the credibility of witnesses and generally assume the function of the trier of fact who presided over the trial. Again, we do not have the institutional capacity to do that.

I then disagree with the statement (and necessarily the authorities supporting the statement) that: "When a challenged factual finding was required to be proved at trial by clear, cogent, and convincing evidence, we incorporate that standard of proof in conducting substantial evidence review." Majority at 17. Significantly, we do not pass on the persuasiveness of evidence to meet other burdens of persuasion—preponderance or beyond a reasonable doubt—even though the results of application of the beyond a reasonable doubt standard is frequently the loss of liberty. There is no analytical or historical justification for courts of review to decide how persuasive evidence in the superior court was, in this one single area of the law. Even an independent constitutionally-based review requires us to give due regard "to the trial judge's opportunity to observe the demeanor of the witnesses" and the trial court's determination as to credibility. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499-500, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984); *State v. Read*, 163 Wn. App. 853,

864, 261 P.3d 207 (2011).

Here specifically, then, if left to my own devices, I would opt for an analytical approach that would limit us to passing on whether William or ultimately John met his *burden of production* when the record is reviewed in a light most favorable to the prevailing party—that is, reviewed for evidence that supports the court's findings. *See In re Estate of Bussler*, 160 Wn. App. 449, 465-66, 470, 247 P.3d 821 (2011) (deferring to the trial court's conclusion that daughter challenging will had not met her burden of persuasion because the trial court's conclusion was based upon unreviewable credibility determinations).

The challenger to a will must *produce* sufficient evidence to find facts that support the conclusion of undue influence (the only claim here is of undue influence). RCW 11.12.160(2). Indeed, if the showing is sufficient, a presumption of undue influence attaches:

> "[C]ertain facts and circumstances bearing upon the execution of a will may be of such nature and force as to raise a suspicion, varying in its strength, against the validity of the testamentary instrument. The most important of such facts are (1) that the beneficiary occupied a fiduciary or confidential relation to the testator; (2) that the beneficiary actively participated in the preparation or procurement of the will; and (3) that the beneficiary received an unusually or unnaturally large part of the estate. Added to these may be other considerations, such as the age or condition of health and mental vigor of the testator, the nature or degree of relationship between the testator and the beneficiary, the opportunity for exerting an undue influence, and the naturalness or unnaturalness of the will . . . .

> The combination of facts shown by the evidence in a particular case may be of such suspicious nature as to raise a presumption of fraud or undue influence and, in the absence of rebuttal evidence, may even be sufficient to overthrow the will. *In re Beck's Estate*, 79 Wash. 331, 140 Pac. 340 [(1914)]."

Lint, 135 Wn.2d at 535-36 (second alteration in original) (quoting *Dean v. Jordan*, 194 Wash. 661, 672-73, 79 P.2d 331 (1938)).

The trial judge here, sitting as the trier of fact, could have easily presumed, as a matter of law, that the will was the product of undue influence.

John Melter had a fiduciary or confidential relationship with Virginia Melter. At the time the May 2003 will was executed, John was Virginia's attorney-in-fact and Virginia had been living with John and his wife for nearly seven months. John actively helped procure the May 2003 will. John wrote Steve Jolley directly to ask that he change Virginia's will. Exhibit 31. The trial court could also have inferred that John also wrote Virginia's letter to Mr. Jolley. Like most of the letters written by John, Virginia's letter ends with "Thanks for your time." *Compare* Exhibits 15 and 32, *with* Exhibits 32 and 24. And, Virginia's letter to Mr. Jolley echoes John's complaints about William Melter's mismanagement of their parents' affairs that John e-mailed to William repeatedly. There are certainly inferences that could be drawn both ways from these facts. But I would leave those inferences to the trier of fact. *Hizey v. Carpenter*, 119 Wn.2d 251, 271-72,

830 P.2d 646 (1992) ("'A directed verdict or judgment n.o.v. is appropriate if, when viewing the material evidence most favorable to the nonmoving party, the court can say, as a matter of law, that there is no substantial evidence or reasonable inferences to sustain a verdict for the nonmoving party.'" (quoting *Indus. Indem. Co. of Nw., Inc. v. Kallevig*, 114 Wn.2d 907, 915-16, 792 P.2d 520 (1990))).

John then received 99 percent of the estate's residue while William received nothing. This was a substantial change from Virginia's prior wills.

Other circumstantial evidence also supports the trial court's conclusion that John had undue influence over Virginia when she created her 2003 will. Virginia was aware of John's animosity toward William. John was controlling. The e-mails between John and William supported an inference that John was emotionally manipulative. The trial court could easily have inferred that Virginia executed the May 2003 will to appease John. Also, while the evidence shows Virginia was competent, she did not live with John and relinquish control over her financial affairs because she was in good health. She needed care for her everyday needs. She could not take care of herself. In sum, substantial evidence was produced to support findings that in turn support the conclusion that John exerted undue influence over Virginia when she executed her May 2003 will.

And the same conclusion might well follow on whether there was undue influence

over Virginia when she made her inter vivos gifts to him. There is substantial evidence that John actively participated in the procurement of those gifts. At the time of the gifts, John was Virginia's attorney-in-fact and capable of setting up accounts in both of their names. The evidence suggests that he took Virginia to an attorney to have her sign an affidavit gifting him $5,000 each month. And, the evidence shows that large amounts of Virginia's cash ended up in accounts belonging to John alone or John and his wife. The testimony showed that Virginia did not want to handle her own money, so the trial court could easily have inferred that John did the leg work to execute Virginia's gifts to him. And, again, John received an unnaturally large share of Virginia's estate—virtually all of her cash. There was sufficient evidence for the trial court to find that John had undue influence over Virginia when she gifted him nearly her entire estate.

Ultimately, I would opt for an analysis that would defer to the trial judge's findings based on what evidence was *produced* rather than an analysis that requires us to evaluate the *persuasiveness* of that evidence. But that, unfortunately, is not the current status of the law and I will therefore sign on to the majority opinion.

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Sweeney, J.