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NO. 67255-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

(Whatcom County Cause No. 09-4-00039-9)

IN RE THE ESTATE OF LANGELAND:

SHARON DROWN, an individual,

Appellant/Cross-Respondent,

vs.

JANELL BOONE, an individual,

Respondent/Cross-Appellant.

APPELLANT DROWN'S APPEAL BRIEF

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I – INTRODUCTION

In 1983, Sharon Drown was 20 years old, single, and living in California when she met and fell in love with Randall Langeland. At that time Mr. Langeland was 33 years old. In 1991, she accepted a ring from Mr. Langeland, moved in with him and they began a lasting intimate committed relationship.[1] There were no children born of the relationship. Mr. Langeland had one child, Janell Boone (Boone), from a prior marriage.

In 1994, Ms. Drown and Mr. Langeland started a business known as J. Randall and Associates, Inc. (J. Randall). At that time, both of them worked at NT Enloe Hospital in Chico, California. RP 69. In 1998, they purchased a 36 foot sailboat in Washington. RP 79. Title to the sailboat was taken in the name of Langeland. Ex. 6. In 1999, they moved to Bellingham, Washington. RP 68.

In December of 1999, they purchased a home in Bellingham, Washington. Title to the home was taken in the name of both Ms. Drown and Mr. Langeland. After moving to Bellingham, Mr.

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[1] "You and each of you will please take note that for the purposes of the proceedings herein, Janell Boone hereby stipulates that decedent and Sharon Drown were in an intimate committed relationship." CP 275.

Langeland worked only for J. Randall. Ms. Drown worked for PeaceHealth dba St. Joseph Hospital.

In 1999, Mr. Langeland broke his leg and for the next 10 years suffered a number of difficult injuries and illnesses, which eluded diagnoses and treatment. On January 9, 2009, Mr. Langeland died after a long, complicated and painful series of illnesses. CP 338. On January 23, 2009, Mr. Langeland's adult daughter, Boone, filed a probate which is the origin of all issues in this appeal. CP 339. In her initial pleadings, Boone alleged that Randall Langeland died intestate and that Sharon Drown was an heir, legatee and devisee. CP 340. Boone also petitioned the trial court as follows: "During their ICR (intimate committed relationship) decedent and Ms. Drown jointly acquired property that needs to be equitably divided." CP 247.[2]

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[2] "THE COURT: . . . I also, frankly, welcome to see what the Court of Appeals does with this. This, in my mind is, if there ever is a case to make new law, this might be the type of case to make it. This certainly was a committed intimate relationship. And I know many people in such committed intimate relationships who are perhaps more dedicated and more loving than some of the married persons that I know." RP 36, l. 16.

After trial, the trial court determined that Sharon Drown had no interest in the 36 foot sailboat, no interest in J. Randall, a 24.7% interest in the home and entered judgment in favor of the estate and against Ms. Drown for $70,000 for Boone's attorneys' fees and costs.[3] Two cars, acquired during the intimate committed relationship and titled in both names, are also the subject matter of this appeal. The trial court ordered both cars sold and the proceeds to be divided between Drown and Boone. 59-8-I (Second) CP 71.

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[3] "THE COURT: . . . . The one thing that I saw in these filings (sic) [findings] that was really, I hated seeing it, I do not want anything that I have done or said in this case at any time from which is (sic) [its] inception until now to lead anyone or to leave anyone with the impression that I am in any way attempting to punish or sanction Ms. Drown or Mr. Shepherd. That's clearly not the case. That may be how it feels. I certainly understand that. But certainly that's not my intention, not my goal, and has no part of my decision."

"As I said, if the Court of Appeals decides my decision was in error or simply decides this is the case and the time to change Washington law, to push it forward, um, then so be it. But there is, in my mind, there is absolutely nothing punitive in my ruling or any aspect of it, nor is any aspect of my ruling, or my, of my comments intended to in any way sanction Mr. Shepherd or his client. That's clearly, clearly not the case. . . ." RP 69-70.

II – ASSIGNMENTS OF ERROR

Sharon Drown assigns error to the following decisions of the trial court:

No. 1. The trial court erred when it entered an Order Determining Heirship and Referring Issues for Trial on March 5, 2010 and made the following erroneous finding of fact or conclusion of law: "3. That the Inventory on file herein is presumed to be correct . . . . and the burden of proof to show the contrary is on Ms. Drown." CP 201.

No. 2. The trial court erred when it entered an Order Determining Heirship and Referring Issues for Trial on March 5, 2010 and made the following erroneous finding of fact: "4. That the Administrator has filed an Inventory herein listing assets owned by decedent." CP 200.

No. 3. The trial court erred when it entered an Order on Motion for an Order in Limine, to Re-Appoint Sole Heir as Personal Representative of the Estate and to Order Sharon Drown to Pay Rent on April 29, 2011. CP 135-36.

No. 4. The trial court erred when it held that Boone had not waived the protection of the Dead Man's Statute by entering into evidence Exhibit 27. See Order on Deadman's Statute entered on May 26, 2011. CP 46-47.

No. 5. The trial court erred when it entered an Order Granting Motion for Attorney's Fees & Costs; Granting Non-Intervention Powers; and Granting Other Post Trial Motions on August 12, 2011. 59-8-I (Second) CP 9-16.

No. 6. The trial court erred when it entered its Judgment on attorneys' fees against Sharon Drown on August 12, 2011. 59-8-I (Second) CP 17-18.

No. 7. The trial court erred, on May 26, 2011, when it made and entered Finding of Fact number 7. CP 49.

No. 8. The trial court erred, on May 26, 2011, when it made and entered Finding of Fact number 8. CP 49.

No. 9. The trial court erred, on May 26, 2011, when it made and entered Finding of Fact number 9. CP 49.

No. 10. The trial court erred, on May 26, 2011, when it made and entered Finding of Fact number 10. CP 50.

No. 11. The trial court erred, on May 26, 2011, when it made and entered Finding of Fact number 11. CP 50.

No. 12. The trial court erred, on May 26, 2011, when it made and entered Finding of Fact number 12. CP 50.

No. 13. The trial court erred, on May 26, 2011, when it made and entered Finding of Fact number 13. CP 50.

No. 14. The trial court erred, on May 26, 2011, when it made and entered Finding of Fact number 14. CP 50.

No. 15. The trial court erred, in part, on May 26, 2011, when it made and entered Finding of Fact number 16; to wit, approving the accounting. CP 50.

No. 16. The trial court erred, on May 26, 2011, when it made and entered Finding of Fact number 17. CP 50.

No. 17. The trial court erred, on May 26, 2011, when it made and entered Finding of Fact number 18. CP 51.

No. 18. The trial court erred, on May 26, 2011, when it made and entered Conclusion of Law number 3. CP 51.

No. 19. The trial court erred, on May 26, 2011, when it made and entered Conclusion of Law number 4. CP 51.

No. 20. The trial court erred, on May 26, 2011, when it made and entered Conclusion of Law number 6. CP 51-52.

No. 21. The trial court erred, on May 26, 2011, when it made and entered Conclusion of Law number 8. CP 52.

No. 22. The trial court erred, on May 26, 2011, when it made and entered Conclusion of Law number 9. CP 52.

No. 23. If the trial court's Order, Judgment and Decree of May 26, 2011 are deemed either findings or conclusions, the trial court erred in making and entering Order number 1. CP 52.

No. 24. If the trial court's Order, Judgment and Decree of May 26, 2011 are deemed either findings or conclusions, the trial court erred in making and entering Order number 3. CP 52.

No. 25. The trial court erred in making and entering its Order, Judgment and Decree of May 26, 2011 denying Drown's challenge to the inventory and dismissing her petition. CP 52.

No. 26. If the trial court's Order, Judgment and Decree of May 26, 2011 are deemed either findings or conclusions, the trial court erred in making and entering Order number 5. CP 52.

No. 27. If the trial court's Order, Judgment and Decree of May 26, 2011 are deemed either findings or conclusions, the trial court erred in making and entering Order number 6, ordering Drown to pay reasonable attorney's fees and costs. CP 53.

No. 28. The trial court erred in making and entering its Order, Judgment and Decree of May 26, 2011 ordering Drown to vacate the home and authorizing Boone to sell the home. CP 53.

No. 29. To the extent that the trial court's Procedural Background, entered on its August 12, 2011 Order are deemed to be findings of fact, the trial court erred in making and entering Finding of Fact 1.1. 59-8-I (Second) CP 67.

No. 30. To the extent that the trial court's Procedural Background, entered on its August 12, 2011 Order are deemed to be findings of fact, the trial court erred in making and entering Finding of Fact 1.2. Id.

No. 31. To the extent that the trial court's Procedural Background, entered on its August 12, 2011 Order are deemed to be findings of fact, the trial court erred in making and entering Finding of Fact 1.3. Id.

No. 32. The trial court erred, on August 12, 2011, when it made and entered its Finding of Fact number 2.3. 59-8-I (Second) CP 68.

No. 33. The trial court erred, on August 12, 2011, when it made and entered its Finding of Fact number 2.4. Id.

No. 34. The trial court erred, on August 12, 2011, when it made and entered its Finding of Fact number 2.5. Id.

No. 35. The trial court erred, on August 12, 2011, when it made and entered its Finding of Fact number 2.6. 59-8-I (Second) CP 69.

No. 36. The trial court erred, on August 12, 2011, when it made and entered its Conclusion of Law number 3.2. 59-8-I (Second) CP 70.

No. 37. The trial court erred, on August 12, 2011, when it made and entered its Conclusion of Law number 3.3. Id.

No. 38. The trial court erred in admitting Trial Exhibit 33.

No. 39. The trial court erroneously applied the Dead Man's Statute, RCW 5.60.030, in this matter.

III - ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was the trial court's determination that Sharon Drown had no ownership interest in the 36 foot sailboat error? Assignments of Error No. 1, 2, 9, 10, 11, 18, 21 and 25.

2. Was the trial court's determination that Sharon Drown had no ownership interest in J. Randall error? Assignments of Error No. 1, 2, 9, 10, 11, 18, 21 and 25.

3. Should the trial court have applied, by analogy, the Washington intestate statutes, as regards community property, and awarded Sharon Drown, in equity, Randall Langeland's one-half interest in the cars, Bellingham home, the sailboat, and/or J. Randall? Assignments of Error No. 1, 2, 7, 8, 9, 10, 11, 12, 17, 18, 20, 21, 23, 24, 25, 28, 29 and 30.

4. Was the trial court's determination that Sharon Drown had only a 24.7% ownership interest in the real property located at 3946 Lakemont Street error? Assignments of Error No. 1, 2, 9, 10, 11, 12, 13, 14, 19, 21, 23, 25, 26, 28, 29 and 30.

5. Was the trial court's determination that Sharon Drown and Randall Langeland entered into an enforceable property

agreement as regards their home or any other asset error. Assignments of Error No. 12, 13, 14, 17, 19, 21, 29, 30 and 38.

6. Was the trial court's Order requiring Sharon Drown to pay $70,000 of attorneys' fees to the estate an abuse of discretion? Assignments of Error No. 5, 6, 11, 15, 16, 22, 26, 27, 29, 30, 31, 32, 33 and 34.

7. Did Boone waive the protection of RCW 5.60.030 by asking, in interrogatories, Sharon Drown to identify each and every agreement or understanding between her and Randall Langeland and at trial, offering and getting admitted into evidence Drown's answers to these interrogatories? Assignments of Error No. 4 and 39.

8. Did the trial court error in admitting Exhibit 33, the amortization schedule? Assignment of Error No. 38.

IV – STATEMENT OF THE CASE

Sharon Drown (Drown) and Randall Langeland (Langeland) began dating in 1983 while living in Chico, California. RP 68-69. In 1991, Drown received a ring from Langeland, moved in with him in California, and began a loving intimate committed relationship. RP 52; RP 69. They lived together in an intimate committed relationship from 1991 until Langeland's death on January 9, 2009. CP 275; RP 52.

In 1998, Drown and Langeland purchased a 36' Catalina sailboat in Washington. RP 79. The initial funds to purchase the sailboat came from money Langeland earned after 1991, during the intimate committed relationship. RP 80. Langeland titled the sailboat in his name. RP 80; Ex 6. From the date they purchased the sailboat, until the sale after Langeland's death, the sailboat was moored in Washington. The moorage cost was between $100 and $300 per month. Ex. 11. For more than a decade, during the entire time of ownership, Drown paid one-half of the monthly moorage. RP 81. Drown cared for and maintained the sailboat from the date of purchase until the date of sale. RP 80-81. Bills or

costs for work on or repair to the sailboat by third parties were usually paid equally by Drown and Langeland. RP 83-84; Ex. 7. After Langeland's death, Drown continued to care for and maintain the sailboat, at no cost to the estate. The sailboat was well maintained by her at all times. RP 81. It was sold before trial with the net proceeds from the sale being $75,246.00. Ex. 3.

In September 1999, Drown and Langeland moved to Bellingham, Washington. RP 68. They purchased a home in December of 1999. Ex. 30. Title to the Bellingham home was by Statutory Warranty Deed, which Deed described Langland (sic) as owning 68.3% and Drown as owning 31.7% of the home. None of the documents related to the purchase of the Bellingham home were prepared by Drown. RP 368. Drown took no document related to the purchase of the Bellingham house to an attorney to review. She had never bought or owned a home before the Bellingham home. RP 369. The circumstances related to the preparation and execution of the documents related to the purchase of the home were not discussed at trial. Boone marked Exhibit 30, had it admitted without any testimony to support the

Exhibit or the documents contained therein, and asked no questions regarding the documents. RP 246-50.

When they lived in California, Drown made payments to Langeland on his California house, beginning at $165 every month and ending in 1998 at $200 per month. When they moved to Bellingham, Drown paid Langeland $200 per month, beginning January 1, 2000 until January 1, 2001. Thereafter, Drown paid Langeland $450.00 per month, which was characterized as a "house payment" or "rent." Ex. 5; Ex. 11. Drown paid one-half of the real property taxes on the Bellingham house. Ex. 11; RP 82. Langeland did not declare any of the Bellingham house payments as income on his tax returns. Ex. 21. Drown did not declare any of the Bellingham house payments as interest payments on a home loan on her tax returns. Ex. 22. They shared equally in all expenses for the house. Drown did all of the maintenance. RP 82; RP 104-05.

In October of 2002, Drown and Langeland borrowed $65,000 from Peoples Bank, on a home equity loan, to pay off the sailboat and executed a Deed of Trust to Peoples Bank. RP 96; Ex.

8; Ex. 9; Ex. 10. Before his death, his daughter Janell Boone (Boone) had a conversation with Langeland. In that conversation Langeland informed Boone that Drown was to get the house, to which Boone said to her father: "Sharon can have the house." RP 208, l. 6.

Since 1991, their married friends described their relationship as "a very committed couple." RP 323. Drown and Langeland were seen as loving partners who did everything together. RP 323. During the last decade of his life, Langeland told his friends he was so lucky and very fortunate to have Drown as his "partner." RP 324.

In 1999, Langeland's health took a dramatic turn. RP 54; RP 323. Langeland felt very fortunate to have Drown help him while he was struggling with undiagnosed medical issues, seeing many doctors, and dealing with the frustration caused by his deteriorating health.[4] RP 323-24. Because of his health problems, Langeland

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[4] In his last year of life, his daughter Boone visited him for four to six days. She observed that he needed assistance in going to the bathroom, to be cleaned, to be moved, to be massaged, to be given items and to tend to bed sores. Boone, admitted that Drown, while working full time, did all the home health care work on a daily basis. RP 421-22.

was not able to assist Drown in taking care of the sailboat. RP 80-81. Additionally, Drown installed and maintained the entire landscaping for the home. RP 105.

Doctor William E. Lombard described Langeland as quite incapacitated the last two years of his life. RP 363. Dr. Lombard provided the following insight into Drown's role in caring for Langeland the last decade of his life:

- Langeland's very complicated medical condition required an immense amount of care by Drown. RP 362.
- Langeland was not easy to deal with and was a difficult patient. RP 363.
- Drown was extremely supportive of Langeland and provided balance. RP 364.[5]

During their intimate committed relationship Drown and Langeland acquired other property. That jointly acquired property

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[5] In a pretrial declaration, Dr. Lombard advised the court that Drown "at all times, continued to advocate for the best possible care for the decedent." And that Langeland "lived as long as he did because of the incredible excellent care and companionship provided to him by Ms. Drown."
CP 316

included cash ($19,257.47) in a corporation known a J. Randall Associates, Inc., two cars, several bank accounts, retirement accounts, and miscellaneous household goods. Ex. 2; Ex. 3. The 2002 Honda was licensed in the names of Drown and Langeland. Ex. 19. The 2007 Toyota Camry was licensed in the name of Drown and Langeland. Ex. 20. The only other property issues Drown appeals are the trial court's award of all the cash in the corporation to the Estate and its Order to sell the cars and divide the proceeds between Drown and Boone.

J. Randall and Associates, Inc. (J. Randall) began in 1994, three years after Drown and Langeland began their intimate committed relationship. RP 114. From its inception, Drown worked with Langeland for J. Randall without pay or compensation. RP 114. After they moved to Washington, Langeland was employed only by J. Randall. Ex. 21. As Langeland's health deteriorated, he spent less and less time working and Drown was required to spend more and more time working for J. Randall. RP 115. In addition to working full time at the hospital, Drown estimated that she spent more than 700 hours working for J. Randall creating invoices,

posting payments, doing the banking, talking with clients, programming, and preparing tax returns. Ex. 17; RP 141-42. The personal representative of Estate, Lenington, was assisted during the probate by Drown in understanding J. Randall, how it ran, and what was going on, again at no compensation to Drown. RP 25.

Langeland's net income was $13,000 in 2004, $14,300 in 2005, $15,800 in 2006, and $22,900 in 2007. He did not file a tax return for 2008. Ex. 21. After 2003, Drown produced most of the income for the two of them: $19,200 in 2004, $19,900 in 2005; $19,600 in 2006; $27,000 in 2007 and $28,000 in 2008. Ex. 22. The Court appointed Personal Representative, Lenington, had no knowledge as to the source of any of the funds in the Estate inventory, the source of the funds used to purchase the Bellingham home, the source of the funds to buy the sailboat or the source of funds for the two cars. RP 25-34. Lenington, did not know how any of the property was purchased or who paid for any of the property. RP 30, l. 21. The Estate made no attempt, at trial, to trace any funds.

At trial, Boone marked and entered into evidence, Drown's response to Interrogatory No. 21, which was:

> Identify each and every agreement or understanding between yourself and the decedent regarding or related to . . . Ownership of assets owned by your and/or the decedent; . . . The ownership of 3946 Lakemont Road, Bellingham, WA 98226; . . . The ownership, operation and management of J. Randall Associates, Inc.

Drown answered as follows:

> Randy and I owned our vehicles, home, furniture, etc. together. The boat was placed in Randy's name, however, we shared the boat equally. We each had our own checking, savings and other accounts, however, the funds were shared. . . .
> We owned our home together. The real property tax statements disclose us both as owners since closing. . . .
> Randy created a software business in 1995 after we were living together and had entered into a committed relationship. From day one, I worked with him creating the invoices, calling clients and traveling with Randy to help him set up clients. . . .
> We shared the debt and liabilities 50/50 a majority of the time on all home taxes, car insurance, house insurance, boat insurance, boat slip, utilities, etc.

Ex. 27; RP 213.

Drown traveled, for decades, with Langeland including the last decade of his life, as he slowly died from undiagnosed and untreatable medical complications. Until his death, she

gave her love, time and energy to him, their home, their business and their other possessions.

Although Boone stipulated that there was an intimate committed relationship, she alleged and argued that Drown had no equal interest in the home and no interest in any property in Langeland's name. In response to these allegations and arguments, Drown provided the trial court with evidence which demonstrated that Drown's uncompensated work on J. Randall, the sailboat, and the home likely exceeded $24,000. Ex. 32. Further, the personal care provided to Langeland, by Drown, likely exceeded $250,000 in value. Ex. 32. These sums did not include the benefit provided to Langeland by Drown, when she claimed, on January 23, 2007, Langeland as a "covered spouse" on her employment health insurance with PeaceHealth so that the costs of his very expensive health care would be fully covered. Ex. 12.

V – SUMMARY OF ARGUMENT

The trial court was provided a fact pattern not found in any Washington appellate court decision. By its comments, the trial court felt unfortunately constrained by *Olver*. Therefore, the trial court inappropriately and erroneously applied existing Washington law, thereby effectively bankrupting Drown. At the end, the trial court, on the record, invited this Court to look at the facts and the issues presented by those facts with fresh minds.

1. Equity's Jurisdiction

On October 28, 2010, Boone, through counsel, stipulated that "all of Ms. Boone's claims in the above noted action are equitable in nature." CP 156. The business, sailboat, home, and cars were acquired during the intimate committed relationship. All property acquired since 1991 is presumed to be owned jointly and is subject to a just and equitable distribution. *Connell v. Francisco,* 127 Wn.2d 339, 351, 898 P.2d 831 (1995). The Washington Supreme Court has never separated its analysis of the property issues raised by intimate committed relationships from its equitable

underpinnings. *In Re Pennington*, 142 Wn.2d 592, 602, 14 P.3d 752 (2000).

This case required the trial court to apply longstanding equitable concepts to the equitable distribution of property, which if married would be community, at the time of death. The trial court's erroneous application of equity led to the inequitable conclusion that Drown would have been much better off if she had abandoned Langeland before he died and sought a legal separation. To the contrary, Washington courts have since 1951, in equity, zealously protected "the rights of the innocent party in the property accumulated by the joint efforts of both." *Poole v. Schrichte*, 39 Wn.2d 558, 569, 236 P.2d 1044 (1951).

2. Presumption and Burden of Proof

On March 5, 2010, the trial court erroneously found that the initial inventory listing certain property as separate was presumed correct and placed on Drown the burden of proof to establish the contrary. CP 201. Washington favors "characterization of property as community property unless there is no question of its separate character." *Marriage of Mueller,* 140 Wn.App. 498, 504, 167 P.3d

568 (Div. I, 2007), *review denied* 163 Wn.2d 1043 (2007). The trial court's failure to apply the community-property-like presumption to the sailboat, the J. Randall bank account, and the Bellingham home erroneously placed the burden of proving the joint character of the property acquired during the relationship. *Connell v. Francisco,* 127 Wn.2d at 350.

3. Title is Not Determinative

"The fact title has been taken in the name of one of the parties does not, in itself, rebut the presumption of common ownership." *Connell v. Francisco,* 127 Wn.2d at 351. All property acquired during the relationship, except by gift or descent, is "presumed owned by both of the parties." *Id.* Property acquired during the relationship is presumed to be common or community property, unless it was acquired by bequest, devise, descent or gift. *Yesler v. Hochstettler*, 4 Wash. 349, 399, 30 P. 398 (1982). The presumption is so strong that *Yesler* indicates "the presumption can be overcome only by clear and convincing proof that the transaction falls within the scope of a separate property section."

61 Washington Law Review 13, The Community Property Law, p. 28 (1986).

4. Application of Community Property Law by Analogy

The trial court could have and should have applied, by analogy, Washington community property law. *Olver v. Fowler,* 161 Wn.2d 655, 666, 168 P.3d 348 (2007). Drown argued that a trial court could and should apply, by analogy, Washington community property law, including the rules of intestate succession found at RCW 11.02.070 and RCW 11.04.015.[6] The trial court did not apply the law, by analogy to the two cars. The trial court did not apply community property law to the sailboat, the business or the home because the trial court erroneously found them to be the separate property of Langeland.

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[6] "Except as provided in RCW 41.04.273 and 11.84.025, upon the death of a decedent, a one-half share of the community property shall be confirmed to the surviving spouse or surviving domestic partner, and the other one-half share shall be subject to testamentary disposition by the decedent, or shall descend as provided in chapter 11.04 RCW." RCW 11.02.070, in part. "The net estate of a person dying intestate, or that portion thereof with respect to which the person shall have died intestate, shall descend subject to the provisions of RCW 11.04.250 and 11.02.070, and shall be distributed as follows:
(1) Share of surviving spouse or state registered domestic partner. The surviving spouse or state registered domestic partner shall receive the following share: (a) All of the decedent's share of the net community estate; and (b) One-half of the net separate estate if the intestate is survived by issue . . . ." RCW 11.04.015.

5. Separate Property Agreements are Not Favored

The trial court erroneously determined that Drown and Langeland "entered into a [separate property] contract" regarding the nature of their interest in the Bellingham home. Finding 13, CP 50. Further, the trial court erroneously determined that Drown and Langeland "maintained the separate character" of the sailboat, business and the house. Finding 9, CP 49. The Estate had the burden of proving that the agreement was made, that it was presented in good faith and with full disclosure by Langeland, and that it was freely and intelligently entered into by Drown. *Friedlander v. Friedlander*, 80 Wn.2d 293, 301, 494 P.2d 208 (1972). As Drown did not have the benefit of independent counsel, any alleged agreements must be closely scrutinized. *Marriage of Matson*, 41 Wn.App. 660, 663-64, 705 P.2d 817 (Div III, 1985).

The person seeking to enforce any agreement as to the status of property acquired during a marriage or intimate committed relationship must prove the elements with "clear and convincing evidence." *Marriage of Mueller*, 140 Wn.App. at 504-505. "A spouse seeking to enforce ... [a separate property]

agreement, whether oral or written, that purports to convert community property into separate property must establish with clear and convincing evidence both (1) the existence of the agreement and (2) that the parties mutually observed the terms of the agreement throughout their marriage. *Kolmorgan v. Schaller*, 51 Wash.2d 94, 98, 316 P.2d 111 (1957)." *Marriage of Mueller*, 140 Wn.App. at 504.

6. Attorneys' Fees.

Courts have consistently refused to award attorneys' fees as part of the cost of litigation in absence of a contract, statute, or recognized ground of equity. *Haner v. Quincy Farm Chemicals, Inc.*, 97 Wn.2d 753, 757, 649 P.2d 828 (1982). RCW 11.96A.150 does not allow fees as sanctions.[7] In this matter, the trial court's

[7] "Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, **to be paid in such amount and in such manner as the court determines to be equitable**. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved. ' (Emphasis added). RCW 11.96A.150.

stated reason for awarding attorneys' fees included Drown's request for a jury trial, which request was promptly withdrawn after Boone stipulated that all issues were equitable.

Where there is novel, original or difficult issues "[a]n award of fees to either party is unwarranted." *In Re Estate of D'Agosto*, 134 Wn.App 390, 402, 139 P.3d 1125 (Div. I, 2006), *review denied,* 160 Wn.2d 1016 (2007). Under RCW 11.96A.150, an award of fees is not appropriate if the case presents unique issues. *Estate of Burks v. Kidd*, 124 Wn.App. 327, 333, 100 P.3d 328 (Div. II, 2004), *review denied,* 154 Wn.2d 1029 (2005).

VI – ARGUMENT

A. Standard of Review

Legal determinations of the trial court are reviewed de novo. *State v. Osman*, 168 Wn.2d 632, 639, 229 P.3d 729 (2010). "A trial court's characterization of property as community or separate is reviewed de novo." *Marriage of Chumbley*, 150 Wn.2d 1, 5, 74 P.3d 129 (2003). Review of the trial court's conclusions of law is

de novo. *In re Tragopan Properties, LLC*, 164 Wn.App. 268, 274, 263 P.3d 613 (Div. I, 2011). "Challenged findings of fact are reviewed under a substantial evidence standard, which requires that there be sufficient evidence in the record to persuade a reasonable person that a finding of fact is true." *Rec. Equip. Inc. v. World Wrapps*, 165 Wn.App. 553, 558, 266 P.3d 924 (Div. I, 2011).

The trial court's rulings related to the allowance of attorneys' fees are reviewed for an abuse of discretion. *Laue v. Estate of Elder*, 106 Wn.App. 699, 712, 25 P.3d 1032 (Div. I, 2001). A trial court abuses its discretion if it relies on unsupported facts, applies a wrong legal standard, or takes a position no reasonable person would take. *Mayer v. Sto Indus., Inc.,* 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

B. The trial court's classification of the sailboat and bank deposits for J. Randall as Langeland's separate property was error.

On October 22, 2010, Drown asked Boone to stipulate that all her claims were equitable. "If [Boone's counsel] can't represent to the court that what he said in his moving papers is correct, how

could he possibly ask the court to enter an order?" RP 503, l. 15. The trial court inquired: "I don't understand why Mr. Olver would have stated twice now in the documents filed before the court that the issues are entirely equitable in nature." RP 504, l. 6. Later, Boone stipulated that all Boone's claims were equitable. CP 156.

> We hold income and property acquired during a meretricious relationship should be characterized in a similar manner as income and property acquired during marriage. Therefore, all property acquired during a meretricious relationship is presumed to be owned by both parties. This presumption can be rebutted. All property considered to be owned by both parties is before the court and is subject to a just and equitable distribution. The fact title has been taken in the name of one of the parties does not, in itself, rebut the presumption of common ownership.

Connell v. Francisco, 127 Wn.2d at 351.

> While property acquired during the meretricious relationship is presumed to belong to both parties, this presumption may be rebutted. We have never divorced the meretricious relationship doctrine from its equitable underpinnings. For example, in both *Connell* and *Peffley-Warner,* we stated that 'property acquired during the relationship should be before the trial court *so that one party is not unjustly enriched* at the end of such a relationship.' If the presumption of joint ownership is not rebutted, the courts may look for *guidance* to the dissolution statute, RCW 26.09.080, for the fair and equitable distribution of property acquired during the meretricious relationship.

In re the Marriage of Pennington, 142 Wn.2d at 601-602.

> [E]quitable claims must be analyzed under the specific facts presented in each case. Even when we recognize 'factors' to guide the court's determination of the equitable issues presented, these considerations are not exclusive, but are intended to reach all relevant evidence."

Vasquez v. Hawthorne, 145 Wn.2d 103, 107-108, 33 P.3d 735 (2001).

Property acquired during the intimate committed relationship is presumed to belong to both parties. It was undisputed that the business, sailboat and home were acquired during the relationship. Lenington, on behalf of the Estate, was unable to identify the source of the money used to start the business, run the business, buy the sailboat, or buy the home. Lenington did not attempt to trace any of the funds to purchase the home. RP 26. She did not know where the funds came from to pay off the home equity loan used to pay for the sailboat. RP 26-27. She did not know the owner of or who placed any funds in any bank account. RP 27-28. She did not know who paid for the cars or the sailboat. RP 29. Lenington admitted that her pleadings, filed with the court, and Exhibit 1 was not her attempt

to represent to the court whether any item was joint, community, or separate property. RP 34, l. 8. Boone stipulated that she did not contribute any money to any of the assets listed in the inventory. RP 55-56. Boone similarly testified that she did not know the source of any of the funds in any bank account. CP 56-57. Boone provided no testimony related to the source of the funds to start J. Randall, buy the sailboat, or purchase the home. CP 51-57.

"All property acquired during a marriage is presumed to be community property. The law favors characterization of property as community property unless there is no question of its separate character." *Marriage of Mueller*, 140 Wn.App. at 504

> A presumption that an asset *possessed* by a married person is community property may arise even though the particular time of acquisition has not been established. . . . Mere assertion that the acquisition was by use of separate funds does not overcome the basic presumption, however; rather, there must be clear tracing of the separate funds into the asset in controversy. Placing the title in the name of one of the spouses neither controls nor has any particular significance in determining the character of ownership; therefore, it is of little use in rebutting the *Yesler* presumption.

Washington Law Review, Vo. 61, No.1, The Community Property Law in Washington (Revised 1985), Cross, p. 29. Neither the Estate nor Boone established the separate character of the business, sailboat or home by clear and convincing evidence. *Marriage of Mueller*, 140 Wn.App. at 504-505.

C. The trial court should have applied, by analogy, Washington intestate statutes and awarded Drown Langeland's one-half interest in all jointly owned property, including the cars, the sailboat, the home and the cash in J. Randall.

When an intimate committed relationship existed, the trial court should "**apply community property law by analogy** (and) property acquired jointly during the relationship could be equitably divided, between the partners, even if only one partner held title." (Emphasis added.) *Olver v. Fowler*, 161 Wn.2d at 666.

When joint ownership is established, if the parties were terminating the relationship before the death of one, trial court's look to the dissolution statutes for guidance in awarding a fair and equitable distribution of property. In this case, because the relationship lasted until death, and because the above facts regarding the relationship are not disputed, the trial court erred in

not looking to community property rules as contained in the probate statutes for its guidance.

> The net estate of a person dying intestate, or that portion thereof with respect to which the person shall have died intestate, shall descend subject to the provisions of RCW 11.04.250 and 11.02.070, and shall be distributed as follows:
> (1) Share of surviving spouse or state registered domestic partner. The surviving spouse or state registered domestic partner shall receive the following share:
> (a) All of the decedent's share of the net community estate; and (b) One-half of the net separate estate if the intestate is survived by issue . . .

RCW 11.04.015(1)(a) & (b).

> Except as provided in RCW 41.04.273 and 11.84.025, upon the death of a decedent, a one-half share of the community property shall be confirmed to the surviving spouse or surviving domestic partner, and the other one-half share shall be subject to testamentary disposition by the decedent, or shall descend as provided in chapter 11.04 RCW. The whole of the community property shall be subject to probate administration for all purposes of this title, including the payment of obligations and debts of the community, the award in lieu of homestead, the allowance for family support, and any other matter for which the community property would be responsible or liable if the decedent were living.

RCW 11.02.070.

The above statutory scheme was not addressed by the trial court in awarding the two cars, which admittedly were agreed to be joint property. In fact, the trial court ordered the two cars sold by Boone. Awarding all the jointly acquired property to Drown is consistent with *Olver v. Fowler,* 161 Wn.2d 655, 168 P.3d 348 (2007). In *Olver*, the Court clearly and appropriately held that jointly acquired property is analogous "to community property . . . (and the parties, at the time of death) had an undivided interest in the couple's jointly acquired property, even though it was titled in (only one name)." *Id.* at 670.

The trial court is tasked with division of the property as would "under all the circumstances be just and equitable." *Poole v. Schrichte,* 39 Wn.2d at 569. The Court is "not limited, under an equal partnership concept, to an even division of the property accumulated" by the parties. *Id.* at 569. "Equity requires that to be done which ought to have been done." *Paullus v. Fowler,* 59 Wn.2d 204, 214, 367 P.2d 130 (1961) (citing *Ketner Bros. v. Nichols,* 52 Wn.2d 353, 324 P.2d 1093 (1958)).

D. The trial court erred when it determined that the home was not equally owned, but was owned 24.7% by Drown.

The trial court erroneously ignored the above law and incorrectly found that Drown and Langeland "maintained the separate character of all property except property which was intentionally purchased jointly as described in the Estate Inventory and Appraisement." Finding 9, CP 49. The trial court incorrectly found that there was "no property" except the cars, "that was jointly acquired to be equitably divided." Finding 10, CP 49. The trial court incorrectly found that Drown and Langeland "entered into a contract" for Drown to "acquire" an interest in the Bellingham home as found in Exhibit 30. Finding 13, CP 50.

These findings are contrary to the testimony of Drown and Trial Exhibit 27 discussed above. The trial court erroneously refers to Trial Exhibit 30 as substantial evidence of the above agreement(s). Exhibit 30 was marked and offered by Boone. RP 246. After some confusion Exhibit 30 was admitted into evidence. RP 246-48. After Exhibit 30 was admitted into evidence, counsel for Boone advised the trial court: "I actually have no questions

with regard to Exhibit 30." RP 250, l. 4. Therefore, Drown was never examined as to the alleged agreement(s) or the signatures contained on any document.

Drown testified that when they moved to Bellingham, they purchased a home. RP 81-82. The home was put in both their names. RP 82. Expenses, taxes, and cost of maintenance were shared equally. RP 82. Exhibit 30 is a series of documents that demonstrate that the instructions to Chicago Title, as regards title to the Bellingham home, did not come from Drown. The form of the Promissory Note was not accepted and approved by Langeland. No Deed of Trust was prepared and filed to "secure" the note. The terms of the note were not followed by the parties. Langeland claimed none of the property payments from Drown as interest. The amortization schedule was prepared by Boone, after the death of Langeland, and for trial. Ex. 33. Exhibit 33 was erroneously admitted at trial, over Drown's objection. RP 311; RP 314, l. 10. The interest calculated on Exhibit 33, was never claimed by Langeland in any tax return. It is remarkable, that the trial court would be asked to find and would find that Langeland failed to

claim interest income, beginning in 1999 and continuing until 2009, which results in tax liabilities to the Langeland Estate, likely far in excess of Langeland's interest in the home.

"Spouses may change the status of the community property to separate property by entering into mutual agreements . . . . A spouse seeking to enforce an agreement, whether oral or written, that purports to convert community property into separate property must establish with clear and convincing evidence both (1) the existence of the agreement and (2) that the parties mutually observed the terms of the agreement throughout their marriage." *Marriage of Mueller*, 140 Wn.App. at 504-505.

An enforceable contract requires mutual assent and consideration. *Fire Protection Dist. v. Yakima,* 122 Wn.2d 371, 388-89, 858 P.2d 245 (1993). In addition to the elements of an ordinary contract, in the case of a separate property agreement, the spouse "must sign the agreement freely and voluntarily on independent advice with full knowledge of her rights." *Friedlander v. Friedlander*, 80 Wn.2d at 303.

For the Estate to prove an enforceable property agreement against Drown, the Estate was required to prove "good faith, candor and sincerity in all matters bearing upon the proposed agreement." *Marriage of Matson*, 41 Wn.App. at 663. "Generally, where the dependent spouse has not been represented by independent counsel, the parties' separation or property settlement agreement will be set aside by the courts, unless the supporting spouse can affirmatively demonstrate that he or she has dealt fairly with the dependent spouse." *Id.* at 664. And finally, the Estate, made no attempt to establish that "the parties mutually observed the terms of the agreement throughout their marriage." *Marriage of Mueller*, 140 Wn.App. at 504-505.

Even assuming that Exhibit 30 established the Bellingham home as separate property by agreement, the character was changed to community, when Drown and Langeland borrowed $65,000.00 on the home to pay off the sailboat loan in December of 2002 and executed a Deed of Trust on the home to secure that loan. Ex. 9; Ex. 10. Similarly, even if the sailboat was separate property, its character was transformed into joint property, when

accounting; (4) Drown's demand for a jury trial; (5) and Drown's filing of a creditor claim as a form of alternative equitable relief for her services rendered.

The first pleadings filed by Drown were the Declarations of Drown, Clark, Ringel and Watt. CP 296; CP 317; CP 310; and CP 323. In these declarations, Drown, and all her witnesses described her intimate committed relationship with Langeland, which relationship was later stipulated to by Boone. "Randy and I lived together, since 1991, in a loving, sexual, monogamous, relationship until his death three weeks ago (on January 9, 2009)." CP 297. The first pleadings filed by Boone, is the only pleading which alleged that Drown was an heir. CP 339. "Decedent was survived by the following heirs, legatees, and devisees: . . . Sharon Drown . . . Friend . . ." CP 340.

On June 25, 2009, Drown, pursuant to RCW 11.44.015(2), requested a copy of inventory and appraisement. RCW 11.44.015 requires every personal representative to make and file an accounting. Drown simply requested to be served with the document once it was completed. It was her legal right to request

a copy of that document. On July 15, 2010, similar to Boone, Drown petitioned the court to determine the ownership of the assets and for a fair and equitable division of the assets. CP 194. On July 21, 2010 Boone presented and had entered an Order Setting Trial for a Jury and Discovery Schedule. 59-8-I (Second) CP 334. On July 21, 2010, the trial court set this matter for a jury trial. CP 192. Until the stipulation was entered that all issues raised by Boone were equitable, Drown had a constitutional right to a jury trial. Further, by court rule that right remains inviolate. CR 38(a). Further, the trial court can order a jury trial in matters of equity. CR 39.

The trial court did not make any findings of fact that support an equitable claim for an award of attorneys' fees against Drown. CP 48-53. Equity cannot be offended by Drown's pleadings, arguments or requested equitable relief. The findings and conclusions entered by the trial court, however, demonstrate that attorneys' fees were awarded as sanctions. No fees were requested under Civil Rule 11 or RCW 4.84.185.

F. The trial court erred in prohibiting Drown from testifying as to conversations she had with Langeland regarding the home and in admitting Exhibit 33.

In interrogatories, Boone asked Drown to indentify the agreements between herself and Langeland as regards the house. The question and Drown's answers were offered by Boone admitted into evidence. Ex. 27; RP 212-13. At trial, the court prohibited Drown from explaining those answers or offering additional testimony regarding the home. Drown made the following offer of proof:

> If she were allowed to testify, she would testify that the house belonged to her. She would be foolish to be making house payments to herself and that Randy at all times told her that the house belonged to her and Randy repeated that the house belonged to her in front of Randy's daughter Janell Boone and Janell Boone agreed to that. It was her belief that the house belonged to her and it was foolish to make payments to herself at the time of his death.

RP 375. The Deadman's Statute can be waived by offering evidence regarding the agreement at the time of trial. *Stranberg v. Lasz*, 115 Wn.App. 396, 406, 63 P.3d 809 (Div. II, 2003).

Exhibit 33 was not relevant. The document was prepared for trial, by an accountant hired for trial purposes. No admitted document supported the exhibit and it was incorrectly used by the trial court to support its finding that Drown and Langeland kept meticulous records regarding their separate property. RP 311-316. The amortization schedule does not make any agreement between Drown and Langeland more probable or less probable. ER 401. Evidence which is not relevant is not admissible. ER 402.

G. Remand

> Remand is required where (1) the trial court's reasoning indicates that its division was significantly influenced by its characterization of the property, and (2) it is not clear that hat the court properly characterized the property, it would have divided it in the same way. In such a case, remand enables the trial court to exercise its discretion in making a far, just and equitable division on tenable grounds, that is, with the correct character of the property in mind.

Marriage of Shannon, 55 Wn.App. 137, 142, 777 P.2d 8 (Div. 1, 1989); *see also Baker v. Baker*, 80 Wn.2d 736, 746-47, 498 P.2d 315 (1972). "The court, in a divorce action, must have in mind the

correct character and status of the property as community or separate before any theory of division is ordered." *Baker v. Baker*, 80 Wn.2d at 745; *Blood v. Blood*, 69 Wn.2d 680, 419 P.2d 1006 (1966); *Shaffer v. Shaffer*, 43 Wn.2d 629, 262 P.2d 763 (1953). Upon remand, the trial court should be instructed that it can use the community property rules, as found in the intestate statues to assist it in determining whether its final division and award of the joint property is "fair, just and equitable under all the circumstances." *Baker v. Baker*, 80 Wn.2d at 745-746. For, it clearly was not.

VII – CONCLUSION

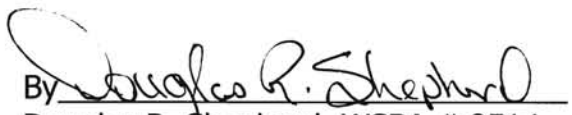
The trial court was apparently troubled by the particular fact pattern in this case. It incorrectly concluded it was constrained by *Olver*. Therefore, the trial court incorrectly categorized property acquired during the intimate committed relationship as Langeland's separate property, attached an agreement to the home which agreement was never followed, and determined that, in equity, Drown had no basis to ask for any property being probated except

for half the money from her cars ordered sold and 24.7% of the proceeds from the sale of her home, also ordered sold.

Further, the trial court erroneously required Drown to pay the Estate $70,000 for the privilege of finding out equity was willing to take everything she had acquired and give it to his adult daughter. Drown respectfully asks this court to reverse the errors of the trial court and return this matter, after appropriately classifying the home, bank account, and sailboat as joint property owned equally at the time of death, to be equally distributed using the intestate statutes by analogy.

Respectfully submitted this 21st day of May 2012.

SHEPHERD AND ABBOTT



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