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NO. 67255-0-I

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

SHARON DROWN,

Appellant,

vs.

JANELL BOONE as Personal Representative of THE ESTATE OF RANDAL J. LANGELAND,

Respondent/Cross Appellant.

BRIEF OF RESPONDENT/CROSS APPELLANT

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Randal Langeland (Mr. Langeland) and Sharon Drown (Ms. Drown) made the conscious decision to remain unmarried for the duration of their relationship. During their relationship, Mr. Langeland and Ms. Drown were meticulous in their efforts to maintain separate bank accounts and assets, share all expenses equally, and preserve the separate character of their assets and property. After three days of trial, the trial court correctly determined that Ms. Drown was not entitled to a distribution of Mr. Langeland's separate assets and that there were no jointly acquired assets between Mr. Langeland and Ms. Drown that would create community like assets subject to an equitable distribution.

Finally, the trial court correctly awarded attorney's fees to the Estate of Randal Langeland ("the Estate"). Both the award of the fees and the amount awarded should be affirmed by this Court. However, should the trial court's decision with regard to the IRA be reversed, this court should add back in the attorney's fees to Ms. Boone for the time expended on the IRA issue, which time was deducted from the initial fee award. This Court should also award Ms. Boone's fees on appeal.

On the Estate's cross appeal the trial court erred in holding that Ms. Drown was entitled to retain the alleged gift of Mr. Langeland's IRA despite her failure to provide substantial evidence to overcome her high

burden of proof. Ms. Drown had the burden of proving by evidence which was "clear, cogent, and convincing" that Mr. Langeland had the intent and capacity to make the gift of the IRA. Evidence presented at trial showed that Ms. Drown filled out the documents which transferred the IRA and changed the beneficiary designation to name her as the primary beneficiary. Furthermore, expert testimony showed that the signature on the document was not that of Mr. Langeland. Further, Ms. Drown presented no evidence to rebut the presumption of undue influence. The trial court's decision with regard to the IRA should be reversed.

II. RESPONDENT/CROSS APPELLANT'S ASSIGNMENTS OF ERROR ON CROSS APPEAL

Respondent/Cross Appellant, Janell Boone (Ms. Boone) as Personal Representative of the Estate, assigns error to the following decisions of the trial court:

1. The trial court erred, on May 26, 2011, when it made and entered the interlineation of Finding of Fact number 15, and failed to enter finding of fact number 15 as proposed by the Estate. Finding of Fact No.15, as proposed, read, "Ms. Drown filled out Exhibit 31 to transfer Mr. Langeland's Fidelity IRA (formerly Enloe Medical Center IRA) on 8-24-08 to a Fidelity account that she created online that named herself as beneficiary. The signatures on Exhibit 31 are not those of Mr.

Langeland." Clerks Papers ("CP") 50. Finding of Fact No. 15 as interlineated reads, "Ms. Drown filled out Exhibit 31 to transfer Mr. Langeland's Fidelity IRA (formerly Enloe Medical Center IRA) on 8-24-08 to a Fidelity account that she created online that named herself as beneficiary. The signatures on Exhibit 31 are **[deemed to be]** those of Mr. Langeland." CP 50. (Interlineations in bold).

2. The trial court erred, on May 26, 2011, when it made and entered the interlineation of Conclusion of Law number 5, and failed to enter Conclusion of Law number 5 as proposed by the Estate. CP 51. Conclusion of Law number 5, as proposed, read, "There is insufficient evidence to support Ms. Drown's claim by clear, cogent, and convincing evidence that decedent gifted to her his Fidelity IRA (formerly Enloe Medical Center IRA) and Ms. Drown is required to return the $56,982.60 to the Estate forthwith." CP 51. Conclusion of Law number 5 as interlineated reads, "**Ms. Drown is entitled to the funds in the fidelity IRA.**" CP 51.

3. The Trial Court erred, on May 26, 2011, when it made and entered the interlineation of Conclusion of Law number 7, and failed to enter Conclusion of Law number 7 as proposed by the Estate. CP 52. Conclusion of Law number 7, as proposed, reads, "Ms. Drown should be entitled to an offset against the return of the IRA money of $56,982.60 for

(a) $3,000 that she paid for decedent's funeral; and (b) $6,650 that she accidentally deposited in decedent's account." CP 52. Conclusion of Law number 7 as interlineated reads, "Ms. Drown should be **[reimbursed by the estate]** for (a) $3,000 that she paid for decedent's funeral; and (b) $6,650 that she accidentally deposited in decedent's account." CP 52.

4. The Trial Court erred, on May 26, 2011, when it made and entered the interlineation of Order paragraph 2, and failed to enter Order paragraph 2 as proposed. CP 52. Order paragraph 2, as proposed, reads, "Sharon Drown must return $50,782.60 to the Estate by deposit in the court registry within 7 days." CP 52. Order paragraph 2 as interlineated reads, "The estate shall pay $9,500 to Sharon Drown (which may be offset from the funds in #5, below)." CP 52

5. The Trial Court partially erred, on May 26, 2011, when it made and entered the interlineation of Order number 6, and failed to enter Order paragraph 6 as proposed. CP 53. Order paragraph 6, as proposed, reads, "Sharon Drown is ordered to pay the reasonable attorney's fees and costs for Janell Boone in an amount to be determined at a later hearing." CP 53. Order number 6 as interlineated reads, "Sharon Drown is ordered to pay the reasonable attorney's fees and costs for Janell Boone in an amount to be determined at a later hearing; **[and not to include fees or costs related to the Fidelity IRA.]**" CP 53.

III. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

The Estate reframes the issues pertaining to the Appellant's Assignments of Error as follows:

1. Should this Court affirm the trial court's decision to uphold long standing and repeatedly reaffirmed Washington State authority limiting spousal statutory rights of succession to those who affirmatively make the decision to be married?

2. Should this Court affirm the trial court's decision to uphold long standing and repeatedly reaffirmed Washington State authority allowing unmarried individuals to maintain the separate character of their assets through affirmative actions to do so?

3. Should this Court affirm the trial court's decision to uphold the express terms of the loan agreement between Mr. Langeland and Ms. Drown, when Ms. Drown only made payments sufficient to acquire an ownership interest of 24.7% in the real property located at 3946 Lakemont Street?

4. Should this Court affirm the trial court's holding that unmarried individuals may enter into a valid contract to loan each other money, and that such a contract should not be considered a "marital

contract" by simple virtue of the existence of a Committed Intimate Relationship[1] (CIR) between the parties?

5. Should this Court affirm the trial court's award of attorney's fees and costs to the Estate for defending against Ms. Drown's failed attempt to establish "new law," and award additional fees and costs to the Estate on appeal?

6. Should this Court add back in the award of fees and costs associated with the recovery of the Fidelity IRA?

7. Should this Court affirm the trial court's order holding that Ms. Boone did not waive the protection of RCW 5.60.030 as to statements and transactions with Mr. Langeland beyond the statements with regard to sharing of expenses as described in the admitted interrogatories?

8. Should this Court affirm the trial court's decision to admit Exhibit 33, the amortization schedule?

IV. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ON CROSS APPEAL

1. Did the trial court err when, despite unrebutted expert analysis that the IRA transfer document was not signed by Mr. Langeland,

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[1] Previously referred to as "Meretricious" relationships, the term "Committed Intimate Relationship" has been substituted to refer to such relationships. *Olver v. Fowler* 131 Wn. App. 135, 140 n. 9, 126 P.3d 69 (2006); upheld by *Olver v. Fowler* 161 Wn. 2d 655, 658 n. 1, 168 P.3d 348 (2007).

the trial court "deemed" the signature to be Mr. Langeland's valid signature.

2. Did the trial court err when, despite Ms. Drown's failure to present any evidence that Mr. Langeland made a gift of the IRA to her, the trial court found that Ms. Drown had met her burden of proving the validity of the alleged gift by evidence which was "clear, cogent, and convincing?"

3. Did the trial court err in denying the Estate's attorney fees and costs related to the Fidelity IRA?

V. STATEMENT OF FACTS

A. Separation Of Assets

Mr. Langeland and Ms. Drown originally met in Chico, California in 1983. RP 68-69. In 1991, while still residing in Chico, Ms. Drown moved into Mr. Langeland's home, and they continued to co-habitate in a Committed Intimate Relationship ("CIR") until the time of Mr. Langeland's death on January 9, 2009. CP 274; RP 52. The existence of the CIR is not in dispute as the Estate stipulated to the existence of such a relationship months before trial. CP 274.

Beginning in 1991, and throughout the duration of their relationship, Mr. Langeland and Ms. Drown were exceedingly careful to split all expenses equally, and never comingled or pooled their separate

assets. RP 216-220; Exhibit 23. In order to maintain the complete separation of their assets, they would meticulously determine each others proportionate share of all the normal household expenses, including the requirement that Ms. Drown pay her portion of rent. RP 216-220; RP 177-179; Exhibit 23; Exhibit 27 (interrogatory no. 23).

Ms. Drown's check register shows the high degree of precision they employed to keep their assets separated. Exhibit 23. Ms. Drown testified that she would make a list of all of her obligations to the household such as groceries, rent, appliances, home office supplies, meals, and all other expenses. RP 216-220; Exhibit 23. Ms. Drown would then determine whether she or Mr. Langeland had initially paid for each individual expense out of his or her separate account, and credit either herself or Mr. Langeland half of the value of the item in order to ensure that they split the cost precisely in half. *Id.* At the end of each month, Ms. Drown would calculate the difference between her obligations to mutual expenses, and the credits she received for paying for items with her separate assets. *Id.* Ms. Drown would then subtract what she had already paid from what she owed to the community, and write a check to Mr. Langeland to cover the remainder of her share of expenses. *Id.* The process was very meticulous and precise, and Ms. Drown and Mr. Langeland followed this same formula each month for the duration of their

relationship. *Id.*

This separation of living expenses by Mr. Langeland and Ms. Drown went beyond a simple equal division of all bills. Mr. Langeland and Ms. Drown were also very careful to prevent any co-mingling of assets and made it a point to never share a common bank account. RP 216-220; RP 328. Ms. Drown testified that she and Mr. Langeland maintained separate bank accounts throughout their relationship. RP 328. The only document which was in both of their names was the home equity line of credit used to pay off Mr. Langeland's boat loan. However, Ms. Drown testified that all of the money to repay that loan came out of Mr. Langeland's separate bank account. RP 328. Mr. Langeland did not name Ms. Drown as co-owner or pay on death beneficiary on any accounts, instead naming his mother or daughter as residual beneficiaries. RP182; Exhibit 1; Exhibit 2. In fact, Mr. Langeland did not even execute a durable power of attorney naming Ms. Drown as his attorney-in-fact, thus preventing her from having any access to his finances. RP 243-244.

B. Disposition Of Separate Property.

1. J. Randle and Associates, Inc.

Mr. Langeland owned a small business known as J. Randall and Associates, Inc. that he ran out of his home. Ex. 1; Ex. 3. The estate inventory, which was not challenged under RCW 11.44.035, valued minor

cash and receivables but instead no physical assets and valued the good will at zero. No other evidence of value was introduced at trial. This business represented his primary source of income, which as described above, was kept meticulously separated from Ms. Drown's income. RP 216-220. Although Ms. Drown claims to have spent 700 hours working for J. Randall Associated without receiving compensation, she has no documentation or third party testimony to support this claim. RP 114. Ms. Drown's only offered proof was contained in Exhibit 17, which was rejected because it was simply a compilation of material containing self serving hearsay statements. RP 132-133.

2. Mr. Langeland's Sailboat.

In 1998 Mr. Langeland purchased a sail boat in Oregon. RP 79. Ms. Drown testified that Mr. Langeland purchased the boat using his own separate assets, and that the boat was registered in his name only. RP 245; RP 79. Notably, he named the boat "Janell" after his only child, Respondent herein. RP 245. Ms. Drown further testified that, after the couple took out a home equity line of credit to pay off the original boat loan, Mr. Langeland repaid the entire home equity line of credit using his own separate assets. RP 328.

3. Bellingham Property.

When the couple moved to Washington in 1999, they purchased

the home located at 3946 Lakemont Street in Bellingham for $158,500. RP 177-179; Exhibit 30. The couple did not contribute equal assets to the purchase of the property. *Id.* Ms. Drown agreed to contribute $50,000 over 15 years to pay up to a 31.7% interest in the property, and Mr. Langeland paid all of the cash (a 98.6% ownership) which over time would be paid down to an anticipated 68.3% interest in the property. *Id.* To fulfill her obligation, Ms. Drown paid $10,000 and borrowed the additional $40,000 from Mr. Langeland. *Id.* The loan was memorialized in a promissory note requiring her to pay Mr. Langeland $40,000 over 15 years at 7% interest with a monthly payment of $359.54. *Id.*

After borrowing the money from Mr. Langeland, Ms. Drown's monthly payments previously classified as "rent," were replaced with her monthly payments on the promissory note. RP 177-179. These payments were made by Ms. Drown out of her separate assets to repay her contractual loan obligation to Mr. Langeland, and did not result in any comingling of assets or acquisition of property rights over and above those specifically allowed by the loan contract. *Id.* Ms. Drown testified that she continued to make payments until December 2008, which was just prior to Mr. Langeland's death. At the time of trial, she had made payments totaling $17,565.29 in interest and $29,144.71 in principal. RP 325; RP 316; Exhibit 33. As explained by CPA Bernadette Holiday at trial, Ms.

Langeland's proportional share of the home in relation to the payments actually made, resulted in a 24.7% ownership interest for Ms. Drown at the time of Mr. Langeland's death. RP 316; Ex. 33.

C. Drown Changes The Beneficiary On His IRA

During the last few years of his life, Mr. Langeland's health began to deteriorate due to complex medical problems. RP 54; RP 108. Mr. Langeland suffered from multiple ailments including decreased vision which required him to use a magnifying glass to read. RP 244. According to Ms. Drown, his eyesight was so poor that she would write checks for him because he was not capable of doing so himself. RP 244. In May of 2008 Mr. Langeland's Enloe Medical Center IRA was transferred to Fidelity by Ms. Drown and she named herself as beneficiary. RP 250-252. Ms. Drown testified that she filled out the form required to transfer the account from Enloe to Fidelity. RP 252. She further testified that she went online to set up the new Fidelity account into which the Enloe funds were transferred. *Id.* Ms. Drown testified that she entered all of the information, including her name as residual beneficiary, into the computer to set up the Fidelity account. *Id.* The documents purporting to effect the change were full of mistakes and misspellings regarding the names of Mr. Langeland's family members. Exhibit 31. No admissible document or testimony was admitted at trial to prove any involvement by Mr.

Langeland in these changes, or to prove any intent to make a gift.

However, unrebutted, expert testimony provided by David Sterling, a handwriting expert, demonstrated that Mr. Langeland did not even sign the critical beneficiary change documents which purported to make Ms. Drown the beneficiary of the Fidelity account. RP 385. Mr. Sterling stated the following:

> In my professional opinion, we determined that the signatures were not the signatures of Randal Langeland. The up strokes, the down strokes, the connective strokes, specific letter formations, connected strokes between various letters inside the name Langeland, the final stroke of the small letter "d" in the last name Langeland, various comparisons of capital letters all were inconsistent in size, alignment, formation, length, with other indications that were quite specific as to quality of line, suspect documents signatures represented and displayed a significant amount of tremor, pen pooling, ink transfer to the documents that were highly identifiable and, therefore, it was reduced to a finding that it was highly probable that those indications led to the determination that we have established. RP 385 (emphasis added).

Mr. Langeland did not sign the documents making Ms. Drown the beneficiary of the Fidelity account. The purported signatures were forgeries, leaving her purported transfers to herself invalid.

IV. LEGAL ARGUMENT AND AUTHORITY

On review, challenged findings of fact must be supported by substantial evidence. *Miller v. City of Tacoma*, 138 Wn.2d 318, 323, 979

P.2d 429 (1999). Substantial evidence is evidence that is sufficient to persuade a rational, fair-minded person of the truth of the finding. *Id.*

A trial court's award of attorney's fees will be reviewed for an abuse of discretion. *Emmerson v. Weilep*, 126 Wn. App. 930, 940, 110 P.3d 214 (2005). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. *Id.*

A. Ms. Drown Has Failed To Meet Her Burden Of Proving The Validity Of The Alleged IRA Gift By Evidence Which Is Clear, Cogent, And Convincing.

Where a confidential relationship exists between the donor of an intervivos gift and the recipient, the recipient has the burden of proving by "clear, cogent, and convincing evidence" that the gift was valid, and not the produce of undue influence. *Pedersen v. Bibioff*, 64 Wn. App. 710, 720, 828 P.2d 1113 (1992); *In re Melter*, 167 Wn. App. 285, 273 P.3d 991 (2012); *McCutcheon v. Brownfield,* 2 Wn. App. 348, 467 P.2d 868 (1970); *Doty v. Anderson*, 17 Wn. App. 464, 563 P.2d 1307 (1977); *Estates of Palmer*, 145 Wn. App. 249, 187 P.3d 758 (2008); *In re Estate of Haviland*, 162 Wn. App. 548, 559, 255 P.3d 854 (2011). This "clear, cogent, and convincing" burden of proof has been applied by each Division of the Court of Appeals. *McCutcheon,* 2 Wn. App. 348 (Division 1); *Doty*, 17 Wn. App. 464 (Division 3); *Palmer*, 145 Wn. App. 249 (Division 2). When a finding made under the "clear, cogent, and

convincing" burden of proof is appealed, the question to be resolved is not merely whether there is substantial evidence to support the finding, but whether there is substantial evidence in light of the "highly probable" test. *In re Melter*, 167 Wn. App. at 301; *In re Sego*, 82 Wn.2d 736, 739, 513 P.2d 831 (1973).

1. Ms. Drown and Mr. Langeland were in a confidential relationship, and Ms. Drown has the burden of proving the validity of the gift, and the absence of undue influence.

Ms. Drown and Mr. Langeland were in a confidential relationship. As a result of that confidential relationship, Ms. Drown has the burden of proving by "clear, cogent, and convincing evidence" that the alleged gift transfer of the IRA by Mr. Langeland was intended, and was not the product of undue influence. *Palmer*, 145 Wn. App. 249.

The 2008 case of *Estates of Palmer* is instructive. *Estates of Palmer*, 145 Wn. App. 249. In *Palmer*, the daughter, Dawn Golden, transferred money from her mother's account to a new stock brokerage account on which she had named herself as Joint Tenant with Right of Survivorship. *Id.* After her mother died, the daughter converted the proceeds. *Id.* The daughter alleged that it was a gift, and that the donor, her mother, was presumed to have had "capacity." *Estates of Palmer*, 145 Wn. App. at 261. The Court of Appeals rejected the daughter's arguments and held:

> But this presumption (of capacity) does not apply when an agent claims that certain inter vivos transfers to him from the principal were gifts. Rather, the common law of gifts applies. First, the agent [Ms. Drown] must prove by clear, convincing, strong, and satisfactory evidence that the transaction was actually a gift. Second, where the parties were in a confidential relationship (here, a durable power of attorney relationship), the agent [Ms. Drown] also has to prove by clear, cogent, and convincing evidence that she did not exert undue influence on the principal.

Id. (emphasis added) (internal citations omitted).

Ms. Drown, as a member of a CIR, occupied a confidential relationship with Mr. Langeland such as the one in *Palmer*. Mr. Langeland and Ms. Drown had been co-habitating since 1991, and it has been stipulated that they were involved in an intimate committed relationship. RP 52; CP 188-189. Furthermore, at the time the gift was alleged to have occurred, Mr. Langeland was dependent upon Ms. Drown for his care, and she was actively assisting him with writing checks and managing some financial matters. RP 244. The relationship of the couple, combined with Ms. Drowns admitted actions with regard to Mr. Langeland's health care and control of his paperwork, establishes the existence of the confidential relationship.

2. Ms. Drown has the burden of providing substantial evidence demonstrating that it was "highly probable" the alleged gift was valid, and not the product of undue influence.

Whether or not the burden of production of evidence has been met is reviewed under a substantial evidence standard. *In re Melter*, 167 Wn. App. at 301. When a finding made under the "clear, cogent, and convincing" burden of proof is appealed, the courts will apply the "highly probable" test. *Id.*; *Sego*, 82 Wn.2d at 739. The "highly probable" test requires the appellate court to account for the difference between evidence that is sufficiently "substantial" to support an ultimate fact in issue based upon a "preponderance of the evidence" burden of proof, as compared to evidence that is sufficiently "substantial" to support an ultimate fact in issue when proof must be established by evidence which is "clear, cogent, and convincing." *Id.*

Under the "highly probable" test, the evidence necessary to support the ultimate fact in issue, here that there was a lack of undue influence, must be significantly greater than merely "substantial." *Haviland*, 162 Wn. App. at 558. For example, in *Haviland*, the court of appeals confirmed the trial court's finding of undue influence where the testator's wife failed to present evidence to show that it was "highly probable" that no undue influence was involved. *Id.* at 563-564. The court found that evidence suggested the testator was suffering from physical and mental illness sufficient to make him susceptible to undue influence. *Id.* The wife was the testator's primary means of care and support, and actively

participated in the procurement of the gift. *Id.* These factors, combined with the wife's lack of evidence to show no undue influence, led the appeals court to conclude that the wife had failed to meet her burden of proof to show that it was "highly probable" that no undue influence occurred. *Id.*

3. The Court applies the "highly probable" test is to its review of Ms. Drown's attempt to meet her burden of *production*, as well as her burden of *persuasion.*

Ms. Drown has the burden of production, as well as the burden of persuasion to show that it was "highly probable" the alleged gift was valid, and not the product of undue influence. *In re Melter*, 167 Wn. App. at 314 (Judge Kulik and Judge Sweeney concurring opinion). The burden of production tests whether there is a sufficient quantity of evidence fit to be considered by the trier of fact, and is a question of law to be reviewed de novo. *Id.* The burden of persuasion tests the quality of evidence, and specifies the degree of certainty that a trier of fact must find to make a particular finding of fact. *Id.* at 301. The burden of persuasion will be reviewed for abuse of discretion. *Id.*

a. *As a matter of law, Ms. Drown has failed to meet her burden of production based on the applicable "highly probable" test.*

As a matter of law, Ms. Drown's failure to produce any evidence of a lack of undue influence is fatal, and the trial court's decision should

be overturned. Ms. Drown had the burden of producing a quantity of evidence that was "clear, cogent, and convincing" to show that the alleged gift of the IRA was valid. *Pedersen*, 64 Wn. App. at 720; *In re Melter*, 167 Wn. App. 285. In the absence of such evidence, she is deemed to have failed to meet her burden of proof. *Haviland*, 162 Wn.App. at 559.

Ms. Drown presented no evidence to show that Mr. Langeland had the knowledge or intent to make the alleged gift to her, nor to show that the alleged gift was made without the undue influence of Ms. Drown. The only evidence presented at trial demonstrated that Mr. Langeland was not involved with the transaction, and was otherwise too sick and enfeebled to have executed the transaction himself. RP 54; RP 108; RP 244. Ms. Drown testified that she filled out the forms and entered the information on the computer to transfer the IRA account and name herself as beneficiary. RP 250-252. David Sterling, a handwriting expert, presented unrebutted testimony that the signature on the transfer document was not the signature of Mr. Langeland. RP 385. Furthermore, Ms. Drown testified that Mr. Langeland was incapable of executing the documents required for the transfer due to his infirmities and loss of eye sight. RP 244; RP 108. Without presenting any evidence in support of her burden of proving a lack of undue influence, Ms. Drown has failed to meet her burden of production and the gift should be invalidated as a matter of law.

b. *Ms. Drown has not produced substantial evidence to meet her burden of persuasion based on the applicable "highly probable" test.*

Without any witness or any document, is not reasonable that the trier of fact could have been persuaded by the evidence presented at trial that it was "highly probable" the alleged gift was valid, and not the product of undue influence. *Pedersen*, 64 Wn. App. at 720; *In re Melter*, 167 Wn. App. 285. In determining if the burden had been met, the *McCutcheon* court explicitly stated that the recipient of an alleged gift must show that the donor had the capacity and intent to make a gift. To illustrate the elements necessary to meet this burden the court stated:

> If a confidential relationship exists between [donor] and [donee], then evidence to sustain the gift between such persons must show that the gift was made freely, voluntarily, and with a full understanding of the facts... If the judicial mind is left in doubt or uncertainty as to exactly what the status of the transaction was, the donee must be deemed to have failed in the discharge of his burden and the claim of gift must be rejected.

McCutcheon, 2 Wn. App. at 356 (citing to 38 Am.Jur.2d Gifts s. 106 (1968)) (emphasis added).

The evidence produced at trial does not support Ms. Drown in her attempt to meet her burden of proving the absence of undue influence. Mr. Langeland played no role in filling out or signing the form that transferred the IRA and made Ms. Drown the residual beneficiary. She

introduced no statements to either Enloe Medical or Fidelity or of any third party lay witness. Ms. Drown testified that she actively participated in the procurement of the gift by filling out all the forms and making changes to the account online in order to name herself as beneficiary. RP 250-252. The signature on the document was revealed to be a forgery, and such testimony was unrebutted. RP 385. There was no demonstrated historic pattern of gifting, in fact---to the contrary, they each paid to the penny their obligations to the other. There was no evidence offered of any other account ever put in her name.

Ms. Drown not only actively participated in procurement of the gift, she took all the actions necessary to procure the gift without providing any evidence that Mr. Langeland was even aware of her activities. Furthermore, Mr. Langeland had deteriorating age, physical health, and mental health at the time the beneficiary designation was changed. RP 54; RP 108. See *Dean v. Jordan,* 194 Wash. 661, 671-662, 79 P.2d 331 (1938). He was totally reliant on Ms. Drown for his care. This reliance made him particularly susceptible to her undue influence, as he could not have even read the transfer documents.

The only evidence presented by Ms. Drown to meet her burden of persuasion, was an alleged conversation with decedent, which was properly excluded as self serving statements in violation of the Dead

Man's Statute. Ms. Drown has failed to meet her burden of persuasion to show that it was "highly probable" Mr. Langeland made the alleged gift freely, voluntarily, and with full understanding of the facts. The trial Court's decision with regard to the IRA should be reversed.

B. The Trial Court Correctly Awarded Fees And Costs To The Estate At Trial, And The Estate Should Be Awarded Additional Fees And Costs On Appeal.

1. The Trial Court's award of attorney's fees to the Ms. Boone was not an abuse of discretion.

The trial court applied RCW 11.96A.150 when awarding attorney fees and costs to Ms. Boone. RCW 11.96A.150 states:

> (1) 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.

Although the Estate incurred total fees and costs of $113,083.05, pursuant to court order it was not awarded fees and costs associated with the Fidelity IRA in her request, thus reducing the requested fees and costs

to $98,035.80. The trial court further equitably reduced the fees and costs awarded to Ms. Boone by $28,035.80 to a total award of $70,000.

An award of attorney's fees in the interest of justice is left to the discretion of the trial court and will not be overturned absent a clear showing of abuse of discretion. *Matter of Estate of Niehenke*, 117 Wn.2d 631, 648, 818 P.2d 1324 (1991). Discretion is abused when it is exercised in a manner that is manifestly unreasonable, on untenable grounds, or for untenable reasons. *In re Estate of Black*, 116 Wn. App. 476, 489, 66 P.3d 670 (2003). "Because of the 'almost limitless sets of factual circumstances that might arise in a probate proceeding,' the legislature 'wisely' left the matter of fees to the trial court, directing only that the award be made 'as justice may require.'" *Id.*; citing *In re Estate of Burmeister*, 70 Wn. App. 532, 539, 854 P.2d 653 (1993).

The trial court appropriately used its discretion to award Ms. Boone attorney's fees and costs at trial. In making the award, the court carefully considered the equities involved in this matter. The court determined that equitably, the Estate was entitled to reimbursement of $70,000 of her total fees of $113,083.05. This is a reduction of $43,083.05 from the total fees incurred by the Estate in defending against all of Ms. Drown's claims.

Ms. Drown would argue that the award of fees was not based on equity and was a type of sanction against Ms. Drown, but she fails to support this argument. The court found that Ms. Drown advanced numerous legal arguments that were unsupported by Washington State authority, and that in equity, Ms. Boone should not be responsible for paying the costs associated with defending against Ms. Drown's unsupported legal theories. CP 50-52 (Finding of Fact #17, Conclusion of Law #9). Counsel for Ms. Drown admitted at trial that Ms. Drown was arguing to "make new law." RP 426-427. Ms. Drown's attempt to make new law failed. The court determined that it would not be equitable for the Estate or Ms. Boone to absorb all the costs for Ms. Drown's failed attempt to establish new law. This determination by the court was not an abuse of discretion, has a sound basis in law and fact, and should not be overturned.

2. If the Trial Court's decision with regard to the IRA is overturned, Ms. Boone should be awarded her additional fees associated with recovery.

The trial court erroneously determined that Mr. Langeland made a valid gift of his IRA to Ms. Drown, and required Ms. Boone to exclude fees associated with the IRA from her fee request. The fees incurred by the Estate with regard to the IRA totaled $12,258.65. If this court

overturns the trial court's decision with regard to the IRA, it should award the Estate her attorney's fees and costs.

3. Ms. Boone should be awarded fees and costs on appeal.

If Ms. Boone prevails on appeal, then she asks to be awarded her fees and costs. The party that substantially prevails at appeal shall be entitled to an award of costs. RAP 14.2. The prevailing party may also be granted fees on appeal if they are allowed under relevant authorities. RAP 18.1 (a).

Here, attorney's fees are authorized under RCW 11.96A.150. The Estate was awarded fees at trial, and may therefore recover fees on appeal as well. *Landberg v. Carlson*, 108 Wn. App. 749, 758, 33 P.3d 406 (2001). The Estate has been forced to defend an appeal which is based entirely on Ms. Drown's argument that over 100 years of Washington State Law should be overturned. Her ongoing pursuit of those claims has caused this small Estate to incur significant attorney's fees. It is now equitable to award the Estate attorney's fees for defending against this appeal.

C. The Trial Court Correctly Ruled That Ms. Drown Is Not Entitled To A Distribution Of Mr. Langeland's Separate Property, And There Is No Community Property To Be Equitably Divided.

1. The trial court correctly ruled that the property and assets of Mr. Langeland, including his boat and business, were

> properly classified as his own separate property in the estate inventory.

The separate assets of Mr. Langeland are not subject to equitable distribution, and there was no pooling of time, effort, or financial resources sufficient to create "community" assets. *In re Marriage of Pennington*, 142 Wash.2d 592, 607, 14 P.3d 764 (2000); *Olver v. Fowler* 131 Wn. App. 135, 144, 126 P.3d 69 (2006); upheld by *Olver v. Fowler* 161 Wn.2d 655, 668-669, 168 P.3d 348 (2007); *Peffley-Warner v. Bowen*, 113 Wn.2d 243, 252, 778 P. 2d 1022 (1989); *Connell v. Franscisco*, 127 Wn.2d 339, 349-50, 898 P.2d 831 (1995). In summing up the evolution of the equitable principles, the Supreme Court in *Olver,* 161 Wn.2d at 667-668, stated:

> "Then relying in part on *Peffley-Warner* [113 W2d 243, 244 (1989)] we later clarified that while a spouse's community and separate property is subject to equitable division, where a couple remains unmarried, only the property acquired jointly during the relationship can be equitably divided to prevent unjust enrichment. *Connell v. Francisco*, 127 Wn.2d 339, 349-50, 898 P2d 831 (1995). Thus we limited equitable distribution to property that would have been community property had the partners been married; separate property cannot be reached by the non-title holding partner. *Id.* at 350"

Id. at 667-668. (emphasis added)

The *Connell* court refused to make the "new law" that has motivated Ms. Drown in these proceedings, stating as follows:

> Until the Legislature, as a matter of public policy, concludes meretricious relationships are the legal equivalent to marriages, we limit the distribution of property following a meretricious relationship to property that would have been characterized as community property had the parties been married.

Conell, 127 Wn.2d at 350 (emphasis added).

Where a couple does not jointly pool their time, effort, or financial resources, no equitable distribution of property is required. *Pennington*, 142 Wn.2d at 607. In *Pennington*, the court reviewed two separate appeals involving alleged CIR's (the Pennington/Van Pavanage appeal, and the Chesterfield/Nash appeal). The Supreme Court found that in both cases, the relationships lacked the necessary pooling of resources to require an equitable distribution of assets. With regard to the Pennington and Van Pevanage relationship, the court stated:

> The trial court found Van Pevenage spent money for food, household furnishings, carpeting and tile, and some kitchen utensils. The court also found she cooked meals, cleaned house, and helped with interior decoration. While the evidence establishes the parties shared some living expenses, under *Connell* these facts are not sufficient to show a significant pooling of resources and services for joint projects.

In re Marriage of Pennington, 142 Wn.2d at 604-605.

With regard to the Chesterfield and Nash relationship, the Supreme Court reversed the earlier decision to make an equitable distribution of assets, stating:

> The trial court found Chesterfield and Nash had a joint checking account for living expenses, into which they both deposited money. During their period of continuous cohabitation, Nash assisted Chesterfield with some work-related travel logs. Chesterfield assisted Nash with his office emergencies, his accounts payable, his role as secretary for his study club, and his office correspondence. The court found the parties resided in Chesterfield's home and shared the mortgage payments. However, the parties maintained separate bank accounts. They also purchased no property jointly. Each maintained his or her own career and financial independence, contributing separately to their respective retirement accounts. When these facts are examined as a whole, the trial court's findings do not fully establish the parties jointly pooled their time, effort, or financial resources enough to require an equitable distribution of property, as contemplated by *Connell*.

Id. at 607.

Pennington is instructive in the present matter. Mr. Langeland and Ms. Drown manifested an intent to maintain the separate character of their property, and there was no pooling of time, effort, or financial resources sufficient to require an equitable distribution of property. *See Pennington*, 142 Wn.2d 592. Like Chesterfield and Nash in the *Pennington* case, throughout their relationship, Mr. Langeland and Ms. Drown split every expense equally between the two of them. RP 216-220; RP 177-179; Ex. 11; Ex 27 (interrogatory no. 23). They kept meticulous accountings and records to ensure that they maintained the separate character of their

finances. *Id.* As in *Pennington*, Mr. Langeland and Ms. Drown maintained entirely separate bank accounts, and except for several deposits that were placed by Ms. Drown into Mr. Langeland's account by mistake and then later refunded, they never comingled any of their assets. RP 216-220; RP 328; RP 234. Under the ruling by the Supreme Court in *Pennington*, Ms. Drown is not entitled to any equitable distribution of Estate assets.

Ms. Drown told the trial court she intends, in this appeal, to create "new law". RP 426-427. However, public policy supports the present state of the law as described in *Pennington*. Couples in a CIR should be permitted to maintain the separate character of their finances, including income, by manifesting an intent to do so through the type of separation of income and expenses maintained by Mr. Langeland and Ms. Drown. Mr. Langeland, while he was vital and alert could have done nothing more to preserve his separate estate and keep it from Ms. Drown. The trial court found as a Fact that Mr. Langeland took substantial and persistent steps to preserve his separate estate from Ms. Drown:

> "The parties received their earnings in their own name; they scrupulously deposited their own earnings into their own accounts titled in their own names; they carefully did not jointly acquire any assets of significance; they meticulously divided, to the penny, all expenses equally; and decedent did not add Sharon Drown to any of his bank accounts; and only allowed

> her to acquire an interest in the residence by making payments with interest as provided in Exhibit 30. Decedent did not marry Sharon Drown nor did he execute a will in her favor."

Finding of Fact No. 18. The trial court concluded paragraph in Conclusions of Law 8 that this conduct rebutted any presumption.

The sailboat and the funds in Mr. Langeland's business are his separate property because he used his separate assets to obtain them and titled them in his name only. In testimony at trial, Ms. Drown stated that Mr. Langeland purchased the boat with his own funds. RP 245. As described above, the parties were meticulous in maintaining the separate character of their assets, and because Mr. Langeland used his separate assets to purchase the boat, the boat remained a separate asset. *Olver*, 161 Wn.2d at 667-669. Likewise, Ms. Drown's limited contributions to Mr. Langeland's business did not result in a corresponding right of ownership in said business. *Pennington*, 142 Wn.2d at 607. Like *Pennington*, where there was no equitable interest when one partner assisted the other partner with "work related emergencies, his accounts payable, his role as secretary for his study club, and his offices correspondence," there was no recovery. Here, Ms. Drown's similarly and allegedly performed limited activities for J. Randal and Associates that should not provide her with a right to an equitable interest in the business. *Pennington*, 142 Wn.2d at 607.

Although a committed intimate partner may under some circumstances be entitled to a right of reimbursement where community efforts resulted in an increase in the value of separate property, without such an increase, no equitable distribution is permitted. *Connell*, 127 Wn.2d. at 351. Even where such an equitable interest has been found, a court may offset the "community's" right of reimbursement against any reciprocal benefit received by the "community" for its use and enjoyment of the individually owned property. *Id.* Here, Ms. Drown presented no evidence the business increased in value, nor that any of the time or effort she allegedly contributed to cleaning the boat caused a corresponding increase in value such that she should be entitled to a right of reimbursement. Even if she had been able to demonstrate such an increase in the value of the boat, such an increase was offset by her use and enjoyment of the boat. *Id.* Under *Pennington*, and *Connell*, Ms. Drown is not entitled to an equitable distribution of assets over and above that which is described in the estate inventory, as awarded by the trial court.

2. The trial court correctly ruled that Sharon Drown was not a spouse, and is not entitled to a surviving spouse's share of Mr. Langeland's separate property under Washington intestate statutes.

Statutory interpretation is a question of law that will be reviewed *de novo*. *State v. J.P.*, 149 Wn.2d 444, 449, 69 P.3d 318 (2003). The

rules of statutory interpretation require courts to determine and give effect to the legislature's intent and purpose in passing a law. *Id.* at 450. If the plain language of the statute is capable of only one meaning, the legislative intent is apparent, and courts will not construe the statute otherwise. *Id.*

In Washington State, the legislature intentionally included only married spouses and state registered domestic partners as potential intestate beneficiaries of the decedent's separate estate:

> 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…

RCW 11.04.015 (emphasis added).

The current intent of the Washington State legislature is to maintain a distinction between CIR's and marriages. The plain language of the above statue states that only spouses and state registered domestic partners are entitled to a share of the decedent's separate assets under intestacy. Had the legislature intended to provide a share of the decedent's separate assets to a surviving partner in a CIR, the legislature

would have included surviving partners from a CIR along with "surviving spouse or state registered domestic partner."

Washington courts have consistently held that a CIR is not the equivalent of marriage. *Peffley-Warner*, 113 Wn.2d at 252; *Connell*, 127 Wn.2d at 348; *Olver*, 164 Wn.2d at 668; *Marriage of Pennington*, 142 Wn.2d at 601. The *Peffley-Warner* court in ruling on this precise issue, held that Ms. Peffley-Warner could not take an intestate share of Mr. Warner's estate because she was neither a surviving spouse nor an heir. *Peffley-Warner*, 113 Wn.2d at 252. The legislature has not adopted legislation making CIR's the equivalent of marriage, and under the existing statute and Supreme Court case law such as *Peffley-Warner*, surviving partners from a CIR are not entitled to any share of the decedent's separate estate through intestacy.

Ms. Drown asks this court to modify Washington statute and ignore numerous decisions of the Washington State Supreme Court. Ms. Drown's suggestion that applying community property law by analogy should result in a distribution of separate assets under intestacy statutes fails to recognize the distinction between separate and community property. While community property is subject to an equitable distribution at the end of a CIR, separate property is not. *Olver*, 161 Wn.2d at 668; *Connell*, 127 Wn.2d at 350; Pennington, 142 Wn.2d at 601.

Ms. Drown is not entitled to any distribution of Mr. Langeland's separate assets under the current law.

Ms. Drown's discussion of RCW 11.02.070 with regard to distribution of "community property" assets is irrelevant. RCW 11.02.070 provides for distribution of one-half of a couple's community assets to a surviving spouse or domestic partner, and allows the decedent to direct the disposition of his or her own one-half share. This statute does not apply to Ms. Drown because, as the trial court correctly ruled, there are no community property assets to divide.

Ms. Drown is not entitled to any distribution of assets beyond those identified as jointly owned under the estate inventory. CP 276-283; See § IV B *supra*. The estate inventory was based on Ms. Drown's own description of jointly and separately acquired property. Ms. Drown reaffirmed her characterization of the couples jointly and separately acquired property in her answers to interrogatories. (See Exhibit 27, her interrogatory answers 11, 12, and 17). RCW 11.02.070 does not create any additional right of recovery for a partner in a CIR independent from the rights already present under Washington State case law. As discussed *supra*, Ms. Drown and Mr. Langeland maintained the separate character of their assets, and the trial court correctly ruled that Ms. Drown is not entitled to any of Mr. Langeland's separate assets.

3. The trial court correctly awarded a 24.7% interest in the estate real property to Sharon Drown.

Mr. Langeland and Ms. Drown entered into a valid contractual loan agreement containing unambiguous terms, and Ms. Drown stopped making payments when he was on his death bed. The essential elements of a valid contract are competent parties, a legal subject matter, and a valuable consideration. *Lager v. Berggren*, 187 Wn. 462, 467, 60 P.2d 99 (1936). A court's primary task in interpreting a written contract is to determine the intent of the parties. *U.S. Life Credit Life Ins. Co. v. Williams*, 129 Wn.2d 565, 569, 919 P.2d 594 (1996). It is undisputed that the contract between Mr. Langeland and Ms. Drown is an unambiguous contract between two competent parties to extend and receive credit for value at a legal interest rate.

The loan agreement between Mr. Langeland and Ms. Drown is not a pre-marital contract and is not subject to the higher contractual standards required with respect to pre-marital agreements. To constitute a pre-nuptial or post-nuptial agreement, the parties must enter into the contract in contemplation of a marriage, or must be married at the time of contracting. *Friedlander v. Friedlander*, 80 Wn.2d 293, 299, 494 P.2d 208 (1972). "A pre-nuptial agreement is one entered into by prospective spouses Prior [sic] to marriage but in contemplation and in consideration

thereof." *Id.* "[P]ost-nuptial agreements or settlements are made after marriage Between [sic] couples still married." *Id.* According to Ms. Drown's testimony, Mr. Langeland and Ms. Drown were not married, nor were they engaged to be married at the time of contracting. RP 68. The loan agreement was not a "marital" agreement.

The contract entered into between Ms. Drown and Mr. Langeland was a simple loan agreement. Mr. Langeland and Ms. Drown paid a total of $158,500 for the property located at 3946 Lakemont in Bellingham, Washington. RP 81-82; RP 177-179; CP 50; Exhibit 27; Exhibit 30. Mr. Langeland contributed $148,500 of his separate assets to acquire his 94.6% interest in the property that would, over time, be paid down to 68.3%. *Id.* Ms. Drown agreed to contribute $50,000 of her separate assets, over time, to obtain a 31.7% interest in the property. *Id.* At the time of purchase, she paid $10,000 cash, and promised to pay Mr. Langeland the additional $40,000. *Id.*

The loan to Ms. Drown was memorialized by the promissory note admitted at trial as Exhibit 30. *Id.* The promissory note required Ms. Drown to repay $40,000.00 over 15 years at 7% interest with a payment amount of $359.54 per month. Exhibit 30. Ms. Drown testified that she ceased making payments on the promissory note in November 2008. RP 326. At trial, the Estate's expert witness, Bernadette Halliday, CPA,

presented testimony and an amortization chart showing that the payments made by Ms. Drown, including the $10,000 down payment, and total payments made on the promissory note in the amount of $17,565.29 in cumulative interest and $29,144.71 in principal, equate to a 24.7% ownership interest in the home. RP 316; Exhibit 33. Ms. Drown is not entitled to an interest in the property over and above what she paid, based upon "new law."

The separate loan transaction whereby Mr. Langeland and Ms. Drown jointly borrowed $65,000 as a home equity line of credit to pay off the sailboat, did not alter the couple's ownership interest in the property. Ms. Drown's reliance on *Douglas v. Hill*, 148 Wn. App. 760, 199 P.3d 493 (2009) is misplaced, and she presents no other authority to support her position.

In *Douglas*, a parcel of property became community property when the husband executed a quit claim deed giving an interest in the property to his wife in order to obtain refinancing. *Id.* at 770. Here, Mr. Langeland did not execute any document purporting to pass any of his separate ownership interest in the Bellingham property or the sailboat to Ms. Drown. Ms. Drown was merely added as a signatory to the home equity loan after the initial application was signed. RP 246-247. Exhibit 9. Significantly, Ms. Drown testified that Mr. Langeland made all of the

payments on the loan himself, and repaid the loan in full without Ms. Drown contributing any of her own assets. RP 254-256. Because Ms. Drown was not placed on title and did not contribute her separate assets to repayment of the boat loan, she did not obtain an interest in the boat or the home under *Douglas*.

4. The trial court correctly ruled that Ms. Drown was barred by the Dead Man's Statute from testifying to conversations she had with Mr. Langeland regarding the home.

The trial court correctly applied the Dead Man's Statute to bar Ms. Drown from discussing conversations she had with Mr. Langeland regarding the house and the IRA, and even if the court's ruling was error, such error was harmless as measured by her offer of proof. The adverse party does not waive the protection of the Dead Man's Statute by taking the deposition of, or submitting interrogatories to, the interested party. *Lennon v. Lennon*, 108 Wn. App. 167, 175, 29 P.3d 1258 (2001); *Diel v. Beekman*, 7 Wn. App. 139, 499 P.2d 37 (Div. 1 1972) (overruled on different point by, *Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984)) (the answering of interrogatories by the adverse party does not waive the protection of the statute). The adverse party waives the protection of the statute only by testifying about statements or transactions that would be inadmissible if the interested party sought to testify about them. *Bicknell v. Guenther*, 65 Wn.2d 749, 762-763, 399 P.2d 598 (1965).

The adverse party does not waive the protection of the statute by testifying about matters that would not be barred by the Dead Man's Statute in the first place. *Id.* (defendant did not waive protection of statute by testifying to matters which were unrelated to any transaction between plaintiff and decedent). Id.

The testimony presented by the Estate, including the Drown interrogatory answers contained in Exhibit 27, did not waive the Dead Man's Statute because the evidence presented by the Estate was not barred by the Dead Man's Statute. *Lennon*, 108 Wn. App. at 175; *Bicknell*, 65 Wn.2d at 762-763. The evidence presented with regard to the ownership of the home was limited to authentication of the loan documents signed by Ms. Drown and Mr. Langeland. The Dead Man's Statute does not bar documentary evidence. *Laue v. Estate of Elder*, 106 Wn. App. 699, 706, 25 P.3d 1032 (2001); nor the identification of signatures. *Wildman v. Taylor*, 46 Wn. App. 546, 553, 731 P.2d 541 (1987).

In this case, the protections of the Dead Man's Statute were not waived because Ms. Drown was merely asked to identify the existence of the loan agreement documented in Exhibit 30. Exhibit 27; RP 212-213. Her testimony about the existence of the agreement, and identification of her signatures on the document, did not present testimony in violation of the Dead Man's Statute. *Id.* Because testimony presented by the Estate

did not violate the Dead Man's Statute, the Estate did not waive the protections of the statute with regard to further testimony about the transaction. *Lennon*, 108 Wn. App. at 175; *Bicknell*, 65 Wn.2d at 762-763.

Even if Ms. Drown's offer of proof were to have been admitted into evidence, it would not have affected the decision of the trial court. Ms. Drown's attorney made the following offer of proof for her:

> 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.

Ms. Drown's offer of proof is merely testimony regarding her subjective legal conclusion that the home belonged to her. There was no testimony by anyone corroborating Ms. Drown's allegation.

The contract entered into between Ms. Drown and Mr. Langeland shows that she could have obtained up to a 31.7% interest in the home had she repaid the money loaned to her by Mr. Langeland. The loan was memorialized by the $40,000 promissory note. Exhibit 30. Ms. Drown's uncorroborated testimony that she thought she was going to receive the

entire house when Mr. Langeland died is contrary to the terms of the loan agreement, purchase and sale agreement, deed, insurance contract, and law. Exhibit 30. Had it been admitted, her testimony regarding her legal conclusions would not have affected the decision of the trial court.

V. CONCLUSION

The trial court correctly ruled that Ms. Drown was not entitled to any of Mr. Langeland's separate property and there was no community property to be equitably divided. The trial court correctly ruled that under Washington law, Ms. Drown is not entitled to a distribution of the separate assets of Mr. Langeland upon his death. Furthermore, the trial court correctly ruled that Mr. Langeland and Ms. Drown meticulously maintained the separate character of their income and assets so that there was no accumulation of community assets from which an equitable division could be made. The trial courts decision to uphold current Washington law allowing only an equitable distribution of community assets, should be upheld.

The trial court correctly awarded fees and costs to the Estate at trial. The Estate was forced to defend against Ms. Drown's failed attempts to establish "new law," and the trial court correctly ruled that she should not be required to pay all of her own fees in this defense. The trial courts decision should be upheld. Furthermore, Ms. Boone should be awarded

her fees and costs associated with recovery of the IRA, as well as the fees and costs incurred on appeal.

Finally, the trial court erroneously ruled that Ms. Drown met her burden of providing "substantial evidence" that was "clear, cogent, and convincing" to rebut the presumption that the IRA was procured by undue influence. The testimony presented at trial showed that Ms. Drown filled out the IRA transfer form and beneficiary designation making her the beneficiary of the IRA. Testimony further showed that Mr. Langeland did not sign the IRA transfer form. Ms. Drown presented no rebuttal evidence thus failing to meet her burden of proof, and the trial court's erroneous decision with regard to the IRA should be reversed.

HELSELL FETTERMAN LLP

By: 

Michael L. Olver, WSBA No. 7031
Christopher C. Lee, WSBA No. 26516
Kameron L. Kirkevold, WSBA No. 40829

CERTIFICATE OF SERVICE

I, MICHELLE N. WIMMER, hereby declare and state as follows:

1. I am over the age of majority, competent to testify and make the following statements based upon my own personal knowledge and belief.

2. I am now and at all times herein mentioned employed by the offices of Helsell Fetterman LLP, 1001 4th Avenue, Suite 4200, Seattle, WA 98154.

3. I did on the date written below (1) cause to be filed with this Court the Brief of Respondent; (2) cause the Brief of Respondent to be delivered via messenger, to the following recipients: Mr. Douglas R. Shepherd, Shepherd and Abbot, 2011 Young St Ste 202, Bellingham, WA 98225-4052; and via email to Mr. Douglas Robertson, Belcher Swanson Law Firm, 900 Dupont Street, Bellingham, WA 98225.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

DATED: July 27, 2012

Michelle Wimmer
MICHELLE N. WIMMER