SC#93521-1

Court of Appeals No. 46778-0-II

SUPREME COURT OF THE STATE OF WASHINGTON

THE ESTATE OF DANA BRUCE MOWER,

Deceased.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner is Linda Turner, the Personal Representative of the Estate of Dana Bruce Mower (the "Estate").

II. COURT OF APPEALS DECISION

The Court of Appeals decision for which review is sought is appended to this Petition for Discretionary Review as **Appendix A** and the order decision denying reconsideration is attached as **Appendix B**.

III. ISSUES PRESENTED FOR REVIEW

1. A bequest to an ex-spouse's family members is a bequest in favor of the ex-spouse and revoked as a matter of law upon dissolution unless there is independent evidence that the testator intended to provide for the ex-spouse's relatives in the event of dissolution. Should this Court hold that a bequest "in favor of" a former spouse's relatives is revoked as a matter of law and that Dana's bequest to his former brother-in-law and sister-in-law is revoked when (1) there is no evidence Dana intended to provide for the Schulers in the event of his dissolution from Christine, (2) Dana's bequest to the Schulers is based on his marriage to Christine, (3) the Schulers stand to inherit only because they are Christine's siblings, and (4) Dana had no relationship with the Schulers after his dissolution? **Yes.**

2. Attorney fees are not appropriate under TEDRA when each side prevails on a major issue and the Estate presented good faith, reasonable arguments. Did the trial court abuse its discretion in awarding attorney fees to Dana's former in-laws when they were not the substantially prevailing party? **Yes**.

3. Should this Court award Ms. Turner and the Estate their attorney fees under RAP 18.1 and RCW 11.96A.150(1)? **Yes.**

IV. STATEMENT OF CASE

Dana Mower was one of six siblings.[1] Dana's siblings included four brothers, Larry Mower, Steve Mower, Greg Mower, and Scott Mower, and one sister, Linda Turner.[2] During his life, Dana married Christine Schuler. Christine had two brothers, Peter Schuler and Eric Schuler, and a sister-in-law, Theresa Schuler, Eric's wife.[3]

In 2005, shortly before Dana underwent serious heart surgery, Dana and Christine executed reciprocal wills leaving their estates to each other, or jointly to their siblings if their spouse did not survive them.[4] In Article 1 of Dana's Last Will and Testament ("Will"), titled "IDENTIFICATION OF FAMILY," he identified his "immediate family" as his then-wife Christine Leiren Mower.[5] Dana went on to explain that "[e]xcept as provided below, I make no provision in this Will for any of my family, whether named herein or not, nor for the descendants of any family member who does not survive me; and specifically, *I make no provision in this Will for my brother-in-law Peter Schuler.*"[6] This section does not include any non-family heirs and Dana made no provision for any non-family member. In Article 4, Dana bequeathed his personal property to his then surviving siblings.[7] In

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[1] *See* Clerk's Papers ("CP") at 4.
[2] CP at 4.
[3] CP at 43.
[4] CP at 43.
[5] CP at 2.
[6] CP at 2 (emphasis added). Christine's Will included a similar exclusion for Peter Schuler.
[7] CP at 4–5.

Section 5, Dana bequeathed the residue of his Estate to Christine.[8] As an alternate disposition of his residue, Dana stated:

> In the event my spouse fails to survive me by a period of thirty (30) days, I hereby give, devise, and bequeath the residue of my estate to the following individuals in the following percentages:
>
> a. Fifty percent (50%) of the residue of my estate to my then-surviving siblings equally (currently consisting of Larry Mower, Steve Mower, Greg Mower, Linda Turner, and Scott Mower); provided, however, in the event that all of my siblings predecease me, said residuary bequest shall be to my then-surviving nieces and nephews equally; and
>
> b. Fifty percent (50%) of the residue of my estate to Theresa Schuler and Eric Schuler; provided, however, in the event either predecease me, the survivor of the two shall receive this entire residuary bequest. In the event both Theresa and Eric predecease me, I hereby give, devise, and bequeath fifty percent (50%) of the residue of my estate equally to their then-surviving children.[9]

Dana never named the Schulers as pay-on-death beneficiary designees for any of Dana's non-probate assets or as secondary beneficiaries.[10] Clearly, the import of this provision was to provide for a scenario where, while married, Dana and Christine died within 30 days of one another. This is evident by the plain language of the provision.

In 2012, Christine petitioned for dissolution and a Stipulated Decree of Dissolution was entered on November 13, 2012.[11] Tragically, Dana

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[8] CP at 5–8.
[9] CP at 8.
[10] CP at 363.
[11] CP at 72.

passed away just two days after learning that his dissolution was final, on November 28, 2012, from a heart attack. CP at 72.

Dana's alternative bequest to the Schulers was based solely on his marriage to Christine, and not a personal relationship and frankly it was based on the concept that, while married, Christine did not survive more than 30 days after Dana's death. In reality, the only actual evidence before the Court was Dana did not like his in-laws. David Allan was a close friend and confidant of Dana's.[12] Mr. Allan worked with Dana since 2004 and served as the chief operating officer of Dana's company, DBM Investments, LLC, since 2007.[13] Mr. Allan is not an heir under Dana's Will. As Mr. Allan testified, "[d]uring [his] interactions with Dana during his life, [Mr. Allan] believed and understood that Dana did not have a good relationship with Eric Schuler. [Mr. Allan] repeatedly sensed that Dana was frustrated with the negative effect Eric's behavior would have towards himself, Christine, and the Schuler family. [Mr. Allan] remember[s] many instances and conversations [he] had with Dana where Dana would express his animosity and dislike towards Eric."[14] Moreover, "Dana had no contact whatsoever with Eric Schuler or Theresa Schuler from November 13, 2012, the date Dana's divorce was finalized with Christine, to November 28, 2012, the date of Dana's death."[15]

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[12] CP at 110.
[13] CP at 110–11.
[14] CP at 111.
[15] CP at 111.

In fact, one of the sources of Dana's intense dislike of Eric Schuler stemmed from his financial exploitation of Eric and Christine's mother. In 2008, Eric was responsible for managing his mother, Dorin's, affairs. Dorin suffered from Alzheimer's and Eric was trying to decide whether or not to buy Dorin a $1,000,000 house.[16] Eric and Theresa had lived with Dorin rent free for many years and he was angling to keep living in a house at his mother's expense, even though Dorin suffered from Alzheimer's and had no need for a house that expensive. In 2008, Dana wrote to Charles E. Hallett, CPA, discussing the issue:

> This is really a sad situation for Christine and Dorin. You can see what Chris[tine] is up against. Her brother is constantly verbally abusive to her, he is an idiot when it comes to financial matters of any kind. . . . Never mind that they have lived entirely rent and cost free in the most expensive and exclusive zip code in the U.S. for the past 30 years. That is entirely irrelevant to them. There is no question in my mind that whatever part of the estate Eric ends up with he will spend in short order because he has no money management skills.[17]

Eric's abusive treatment of his own sister disgusted Dana.

> Terry and Eric's strategy to get control of the estate is to keep Christine away from Dorin[,] which they are through shear intimidation and screaming at Christine. That appears to be the only thing Eric is good at. Screaming at his sister. I have seen her become physically ill after many of Eric's screaming sessions.[18]

Dana also expressed frustration at the Schulers' inability to put their mother's interests first:

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[16] CP at 258.
[17] CP at 258.
[18] CP at 258.

> They could care less about what is good for Dorin or Christine. It just doesn't make sense for an 85 year old woman who is 75% gone to Alzheimer's to buy a house in any price range. The only reason [Eric called Mr. Hallett] is because they are doing their best to keep living rent and cost free off Dorin's and Christine's estate. . . . The bottom line is that what Eric is suggesting is categorically not in Dorin's best interest but only theirs.[19]

Given Dana's well-known feelings for the Schulers after execution of the Will and his subsequent dissolution with Christine, it is clear that Dana had no actual intent or desire that the Schulers inherit from his Estate outside of their relationship to Christine and outside of the concept that Dana and Christine, while married, died within 30 days of one another. In fact, shortly after Dana's death, Christine called Mr. Allan and "expressed her discontent that Eric Schuler and Theresa would inherit anything under Dana's will because she believed such a result was directly opposite to Dana's wishes."[20]

Following Dana's passing, the Pierce County Superior Court admitted his Will to probate and appointed his sister, Linda Turner, as Personal Representative of his Estate.[21]

On February 27, 2013, Ms. Turner filed a Petition for Declaratory Judgment to Adjudicate Beneficiaries under Will, in which she argued that under RCW 11.12.051, RCW 11.07.010, Restatement (Third) of Property, and cases from jurisdictions with similar statutory law, the dissolution of Dana's marriage to Christine also operated to revoke the bequests to her

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[19] CP at 258.
[20] CP at 111–12.
[21] CP at 24–38.

relatives as well as to Christine.[22] The Schulers appeared and opposed.[23] The parties brought cross-motions for summary judgment, and the trial court granted summary judgment to the Schulers and denied Ms. Turner's cross-motion for summary judgment.[24] Additionally, the trial court awarded the Schulers attorney fees and costs as the prevailing party.[25]

On May 3, 2016, in a split decision, the Division II Court of Appeals held that not all bequests to a spouse's family are automatically "in favor of or granting any interest or power" to the former spouse.[26] Construing RCW 11.12.051, the Court reasoned that the phrase "in favor of" was ambiguous, meaning both direct bequests to a spouse and something more ambiguous, such as bequests that were a "favor" to a spouse.[27] "Because the legislature chose to include ["in favor of" in RCW 11.12.051], it must refer to some benefit other than a direct grant of power."[28] The Court held that "[i]n some cases, gifts to the former spouse's family members may confer some benefit on the former spouse. Whether a particular will provision benefits the testator's former spouse would be a factual question for the trial court to resolve."[29] This Court then found that the bequest to the Schulers did not confer a benefit on Christine and affirmed.

Ms. Turner moved for reconsideration, asking the Court to remand the case for fact-finding as to whether Dana's bequest to the Schulers was

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[22] CP at 42–51.
[23] CP at 176–184.
[24] CP at 329–33.
[25] CP at 416–18.
[26] **Appendix A** at 5 – 6.
[27] **Appendix A** at 7.
[28] **Appendix A** at 11.
[29] **Appendix A** at 11.

intended to confer a benefit, direct or indirect, on Christine.[30] Because of the Schulers' early summary judgment motion, no fact-finding was done to determine Dana's intent when he and Christine drafted reciprocal Wills in 2005 shortly before his heart surgery.[31] No fact-finder has determined whether Dana and Christine intended the reciprocal Wills to confer a benefit on each other, providing for each other's siblings in the event the other did not survive. When the evidence of Dana's lack of friendship with the Schulers after drafting his Will is considered, his intent in executing the Will becomes even more important to determine. There are facts to suggest that Dana executed the bequests to the Schulers only as a favor (i.e., a benefit) to his wife and as part of an agreement to draft reciprocal Wills to provide for each other's families. In another split decision, the Court of Appeals denied reconsideration on July 27, 2016.[32]

V. ARGUMENT

A. Standard of review.

This Court accepts review of decisions that involve an issue of substantial public interest that should be determined by the Supreme Court and when the Court of Appeals' decision conflicts with other Washington cases.[33]

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[30] *Motion for Reconsideration* at 7.
[31] *Motion for Reconsideration* at 7.
[32] **Appendix B**.
[33] RAP 13.4(b)(2), (4).

B. It is an issue of substantial public interest whether a decedent's dissolution from his spouse operates to revoke any bequest to his ex-spouse and his ex-spouse's family.

It is an issue of first impression in Washington whether RCW 11.12.051 operates to disinherit the relatives of a former spouse following dissolution absent an express intent otherwise. In this instance, Dana's bequest to the Schulers was based on their status at the time he made his Will as his in-laws through his marriage to Christine. Dana had no independent relationship with the Schulers, whom he actively disliked, and did not reaffirm his bequest to them after his dissolution. Moreover, if the Schulers are allowed to inherit, Christine's family will have taken 75 percent of Dana's assets and Christine stands to benefit by later inheritance through her siblings.[34] The Court of Appeals acknowledged that a bequest can benefit a former spouse and that whether it does so is a factual question for the trial court to resolve. However, the Court of Appeals then decided that factual issue on review of a summary judgment order.

Washington courts have authority to determine the construction and interpretation of wills.[35] Courts "shall have full and ample power and authority under this title to administer and settle . . . [a]ll matters concerning the estates and assets of incapacitated, missing, and deceased persons, including matters involving nonprobate assets and powers of attorney . . ."[36]

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[34] As part of the dissolution, Christine received 50 percent of Dana's assets, and if the Schulers are allowed to inherit, they will receive 50 percent of what remains.
[35] RCW 11.96A.020; RCW 11.96A.030; RCW 11.12.230.
[36] RCW 11.96A.020; *see also* RCW 11.12.230 ("All courts and others concerned in the execution of last wills shall have due regard to the direction of the will, and the true intent and meaning of the testator, in all matters brought before them").

Under RCW 11.12.051, the dissolution, invalidation, or termination of a marriage revokes all provisions in a testator's will in favor of the former spouse. Specifically, RCW 11.12.050 states that

> If, after making a will, the testator's marriage or domestic partnership is dissolved, invalidated, or terminated, all provisions in the will in favor of or granting any interest or power to the testator's former spouse or former domestic partner are revoked, unless the will expressly provides otherwise. Provisions affected by this section must be interpreted, and property affected passes, as if the former spouse or former domestic partner failed to survive the testator, having died at the time of entry of the decree of dissolution or declaration of invalidity. Provisions revoked by this section are revived by the testator's remarriage to the former spouse or reregistration of the domestic partnership with the former domestic partner. Revocation of certain nonprobate transfers is provided under RCW 11.07.010.[37]

Similarly, an ex-spouse is treated as having predeceased the decedent as to any nonprobate assets.[38]

It is an issue of first impression whether a bequest to an ex-spouse's family is a bequest in favor of an ex-spouse as a matter of law. It is a matter of public interest whether the dissolution statute operates as a matter of law or whether it is dependent on the facts of each case. If each case must be analyzed by a fact-finder, the result is contrary to TEDRA's purpose of encouraging resolution of matters under Title 11 by non-judicial means.[39] Revocation of a testator's bequest in favor of a former spouse, including the spouse's in-laws, should occur as a matter of law.

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[37] RCW 11.12.051.
[38] RCW 11.07.010.
[39] RCW 11.96A.010.

RCW 11.12.051 provides certainty in the probate of estates and ensures that a testator's intent is honored even if the testator passed away without being able to make a change to his or her will. This prevents the unfortunate result of a testator accidentally being tied to estate planning that occurred during a marriage that has ended.

The Schulers had argued that a dissolution had no effect on a testator's bequest to a spouse's relatives, only the spouse. The Court of Appeals disagreed, and recognized that "in favor of" included "all will provisions that benefit a former spouse without directly conveying any power or property interest, as long as those provisions would be effectively revoked by treating the former spouse as predeceasing the testator."[40] That is, the Court held that direct and indirect benefits to a former spouse are revoked by dissolution depending on the facts of a case, not as an operation of law.

Leaving the operation of RCW 11.12.051 to a factual determination undermines the certainty that RCW 11.12.050 is intended to convey in estate planning, which will cause confusion and extra cost in the estate administration, contrary to TEDRA.

Disinheriting former in-laws as a matter of law because the bequest was "in favor" of a former spouse is logical because during the "divorce process or in the aftermath of the divorce, the former spouse's relatives are likely to side with the former spouse, breaking down or weakening any former ties that may previously have developed between the transferor and

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[40] *Estate of Mower*, 193 Wn. App. 706, 716, 374 P.3d 180 (2016).

the former spouse's relatives, seldom would the transferor have favored such a result."[41]

As a result, many jurisdictions apply their respective revocation by dissolution statutes to bequests to former relatives absent a showing to the contrary. The application operates as a burden-shifting law, requiring those persons affected by the revocation to demonstrate some evidence that would militate against it, such as a continued relationship with the former spouse's relatives after dissolution or a will executed after dissolution.[42]

In this instance, the inequity of not disinheriting the Schulers as a matter of law is clear. Dana made his Will while married to Christine and just before a major heart surgery. Christine executed a reciprocal Will in which they both left their assets to their siblings. Dana made no bequest for non-relatives, and specifically excluded his "brother in law," Peter Schuler. Dana passed away over the Thanksgiving holiday just two weeks after finding out that his dissolution with Christine had been finalized. Dana has a well-documented history expressing his dislike and distrust of his in-laws. After his dissolution, Dana did not maintain a relationship with the Schulers. In fact, Dana's close friend and employee, David Allan, expressly recalls Dana making statements expressing animosity and dislike towards the Schulers.[43] Christine called David Allan shortly after Dana's death and

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[41] UPC § 2-804, cmt. (2011).
[42] *See Friedman v. Hannan*, 412 Md. 328, 345, 987 A.2d 60 (2010).
[43] CP at 111.

stated that Dana did not want the Schulers to inherit anything under his Will.[44]

There is evidence that the Will was created as a favor to Christine and in exchange for her reciprocal Will to leave her assets to the couple's siblings. The revocation of this bequest should operate as a matter of law, not an issue of fact. The Court of Appeal's decision impacts public interest by encouraging litigation over estate issues rather than simple resolution of disputes. This Court should hold that bequests to former in-laws are "in favor of" a spouse and apply RCW 11.12.051 to revoke bequests to former in-laws upon dissolution.

1. Other jurisdictions, especially other community property states, have resolved the issue in favor of revocation of the bequests to relatives of the former spouse.

Other states with similar statutory language have also determined that a dissolution's revocation of bequests relating to or in favor of an ex-spouse includes bequests to the ex-spouse's family. When a statute revokes a bequest to a spouse after a dissolution,[45] it also revokes bequests to the ex-spouse's family.[46] Statutory revocation of a bequest to a former spouse may include bequests to a former spouse's family members.[47] Generally, when a testator provides for his spouse's family, he normally

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[44] CP at 111–12.

[45] Maryland's statute states that, "By an absolute divorce of a testator and his spouse or the annulment of the marriage, either of which occurs subsequent to the execution of the testator's will; and all provisions in the will relating to the spouse, and only those provisions, shall be revoked unless provided in the will or decree." ET § 4-105(4).

[46] *Friedman*, 412 Md. At 338–39 ("whether a particular bequest is one 'relating to the spouse,' is not limited to bequests to or for the benefit of the spouse").

[47] *Friedman*, 412 Md. at 339.

intends to exclude the ex-spouse's family after dissolution, unless a contrary intention is indicated elsewhere in his will.[48] The basis for this reasoning is that "during the dissolution process or in the aftermath of the dissolution, the former spouse's relatives are likely to side with the former spouse, breaking down or weakening any former ties that may previously have developed between the transferor and the former spouse's relatives."[49]

In *Jones*, the testator's will included a residuary clause in favor of "my stepdaughter . . . Kathy Hardie" in the event his wife "does not survive me."[50] California's statutory scheme mirrors Washington's and revokes bequests to a spouse upon dissolution and prevents property "from passing to a former spouse . . . as if the former spouse failed to survive the testator."[51] The Court noted that the statute does not address the effect of divorce on bequests to a former spouse's child.[52]

The *Jones* court rejected the ex-stepdaughter's argument that the use of her name, rather than just her class (stepdaughter) in the will displayed an intent to provide for her after divorce.[53] "It seems more likely the testator was not contemplating divorce when he prepared his last will and testament six years before the divorce."[54] The Court rejected her argument that she was not claiming any rights as her mother's heir, but on her own right as a named beneficiary. The Court held that "she was named in the will in the

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[48] *In re Estate of Hermon*, 39 Cal. App. 4th 1525, 1531 (1995); *In re Estate of Jones*, 122 Cal. App. 4th 326, 331 (2004).
[49] *Hermon*, 39 Cal. App. 4th at 1532.
[50] 122 Cal. App. 4th at 332.
[51] *Jones*, 122 Cal. App. 4th at 332.
[52] *Jones*, 122 Cal. App. 4th at 332.
[53] *Jones*, 122 Cal. App. 4th at 334.
[54] *Jones*, 122 Cal. App. 4th at 335.

first place only because her mother was married to the testator. She would take only in the event of her mother's death."[55]

Similarly, this Court should find that a bequest to an ex-spouse's family is "in favor" of the ex-spouse and thus revoked upon dissolution. There is no evidence that Dana intended to provide for the Schulers in the event that he divorced Christine. Dana and Christine executed reciprocal Wills in which they agreed to provide for each other or, if they did not survive the other, each other's siblings. Dana provided a potential bequest for the Schulers only because of his marriage to Christine and they stood to inherit only in the event of their sister's death.[56]

Moreover, although Dana did not refer to the Schulers by their class (siblings-in-law), it is clear from his designation that their inclusion is based on their status as his then-in-laws.[57] Dana provided half of his Estate to his siblings, and half to the Schulers, two of Christine's siblings. To argue that the equal provision for his and Christine's siblings was not a class gift simply because Dana did not use the term "in-laws" in Section 5 ignores the plain language of Dana's Will and trumpets form over substance. In the section entitled "Identification of Family," Dana specifically excluded from his identification of "family," family members that do not survive him and "my brother-in-law Peter Schuler." Dana had no obligation to address

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[55] *Jones*, 122 Cal. App. 4th at 336.

[56] *See also Friedman*, 412 Md. 328 (bequests by decedent to former spouse's family members related to the spouse, and thus bequests were revoked pursuant to statute); *Estate of Marchwick*, 356 Mont. 385, 387 (2010) (bequest in pour-over will to children of divorced individual's former spouse revoked by statute); *Hermon*, 39 Cal.App.4th at 1531.

[57] *See Cryder v. Garrison*, 387 Pa. 571, 576 (1957) ("The proposition that a gift to several individuals described by their respective names, may be construed as a gift to a class, if it is apparent from the will that the testator so intended").

Peter's exclusion but for his intention to honor his wife's wishes and leave his assets to a class of persons – his in-laws minus Peter. Due to a family dispute, Christine also excluded Peter from her Will. Dana's intent was to honor his wife's identification of her family and provide for the remaining Schulers in the context of their familial relation to him through Christine.

Additionally, because Peter Schuler is another of Christine's brothers, Dana's specific exclusion shows that he was including the Schulers solely because of their familial relationship through Christine. If Dana did not consider Peter Schuler, and thus all the Schulers, as his family, he would have no reason to specifically disinherit Peter Schuler. Dana had no obligation under the law to provide for Peter Schuler and there was no instance in which Peter Schuler would inherit through intestate succession. Rather, Dana set a class of individuals for which he was providing – his "family" – which included some family members through Christine. Dana included his brother-in-law and sister-in-law only as a result of his marriage to Christine. He excluded Peter because of Peter's dispute with Christine.

Dana's separate treatment of the Schulers based on their status as his in-laws is evidenced in other sections of his Will. Dana designated his sister, Ms. Turner, as an alternate personal representative in the event Christine was unable to fulfill that role. Dana did not include either of the Schulers as a possible personal representative. Additionally, in the event that Christine did not inherit under the Will, Dana left his personal property to his siblings alone. There is no provision for the Schulers to receive any of Dana's personal property. Had Dana viewed the Schulers as his family

or friends, rather than his in-laws, Dana would arguably have provided the Schulers with some personal bequest. Additionally, if Dana had viewed the Schulers as equal members of his family, he would arguably have bequeathed his Estate to his siblings and the Schulers to "share and share alike." Dana made no such provision for the Schulers. The structure of Dana's Will and the bequests therein demonstrate that Dana provided for the Schulers only to the extent they were his in-laws through Christine.

Moreover, Dana's lack of relationship with the Schulers independent of his marriage to Christine supports a conclusion that he did not intend to provide for the Schulers after his dissolution. Dana did not have any contact with the Schulers after his dissolution from Christine. Dana had a strained relationship with the Schulers because of their greed, mistreatment of Christine, and financial exploitation of their mother. Any bequest for the benefit of Christine's siblings had to be rooted in Dana's respect for his then-wife.

The Schulers are no longer Dana's family. Upon Dana's dissolution from Christine, his familial relationship with the Schuler family ended. Dana's provision for the Schulers depended entirely on this familial relationship and the gift is properly classified as a gift to a class – his wife's siblings minus the specifically excluded Peter Schuler.

C. The Court of Appeals decision conflicts with other Washington Cases to the extent it decides disputed factual issues on summary judgment.

At a minimum, the Court of Appeals' decision is contrary to other Washington cases that disputed issues of material fact should not be

resolved on summary judgment.[58] The Court of Appeals' decision recognized that whether a bequest was "in favor of a spouse," directly or indirectly, is a factual issue, but then weighed the evidence and concluded that the bequest to the Schulers was not a factual issue. Neither party had argued for treating the issue as a question of fact and the record below was not developed on this issue. At a minimum, this Court should remand to the trial court for further findings on whether Dana's bequest was "in favor of" Christine, either directly or indirectly.[59]

D. The trial court abused its discretion granting attorney fees and costs to the Schulers.

The superior court has considerable discretion in ruling on a request for attorney fees under RCW 11.96A.150.[60] The court's decision to award or deny fees is based on equitable considerations and in "exercising its discretion under this section, the court may consider any and all factors that it deems relevant and appropriate . . . ."[61]

The Schulers are not the substantially prevailing party because they prevailed on only one issue, the probate assets, while the Estate prevailed on the second issue, the non-probate assets. The Schulers also failed on their motion to remove Ms. Turner as the Personal Representative.

Washington State follows the American Rule for attorney fees in which each party generally bears the cost of their attorney fees unless an

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[58] CR 56(c); *Ranger Ins. Co. v. Pierce Cnty.*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).
[59] In *In re Estate of Barnes*, this Court held it was reversible error for the Court of Appeals to weigh factual evidence. *In re Estate of Barnes*, Case No. 91488-5, Slip Op. at 14 (Wash. Sup. Ct. Jan. 28. 2016).
[60] *In re Estate of Black*, 116 Wn. App. 476, 489, 66 P.3d 670 (2003), *aff'd on other grounds*, 153 Wn.2d 152, 102 P.3d 796 (2004).
[61] RCW 11.96A.150(1).

exception applies. Attorney fees are not awarded unless expressly authorized by contract, statute, or recognized equitable exception.[62] The general rule in determining who is the "prevailing party" for the purpose of awarding attorney fees is the "substantially prevailing" or "net affirmative judgment" rule, meaning that the prevailing party is the one who receives an affirmative judgment in his favor.[63] If neither party wholly prevails, then the party who *substantially* prevails is the prevailing party.[64] "[I]f both parties prevail on major issues, both parties bear their own costs and fees."[65]

Here, the Schulers have failed on multiple claims. They have failed to establish any right to non-probate assets, despite their earlier request that this Court rule in their favor in regard to non-probate assets. In addition, they failed in their attempts to remove Ms. Turner as the Personal Representative of the Estate. Although TEDRA does not limit attorney fees to just the prevailing party, under RCW 11.96A.150, this Court can consider all relevant factors in determining an attorney fee award. That the Schulers did not substantially prevail is a relevant factor.

E. The Estate requests its attorney fees and costs on appeal.

Attorney's fees and expenses incurred on appeal can be awarded if applicable law, a contract, or equity permits an award of such fees and expenses.[66] The Court may award a party costs, including reasonable attorney fees, pursuant to applicable Washington law in

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[62] *Pierce Cnty. v. State*, 159 Wn.2d 16, 50, 148 P.3d 1002 (2006).
[63] *Riss v. Angel*, 131 Wn.2d 612, 633, 934 P.2d 669 (1997).
[64] *JDFJ Corp. v. Int'l Raceway, Inc.*, 97 Wn. App. 1, 8, 970 P.2d 343 (1999).
[65] *Phillips Bldg. Co., Inc. v. An.*, 81 Wn. App. 696, 702, 915 P.2d 1146 (1996).
[66] RAP 18.1(a).

RCW 11.96A.150(1). This action benefits Dana's Estate in correctly identifying his heirs and giving effect to his true intent. Ms. Turner requests attorney fees and costs against the Schulers related to this action.

VI. CONCLUSION

Law and equity mandate that a decedent's dissolution from his ex-spouse operates to revoke any bequest in favor of the spouse, which includes a bequest to the ex-spouse's family. Here, Dana's bequest to the Schulers as alternate beneficiaries was based solely on their relationship to him through Christine. Dana had no contact with the Schulers following his dissolution and never reaffirmed his bequest to the Schulers after his dissolution. Accordingly, this Court should reverse the trial court's orders on summary judgment and award Ms. Turner the Estate's attorney fees and costs associated with this matter.

RESPECTFULLY SUBMITTED this 26 day of August, 2016.

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Attorneys for Linda Turner, Personal Representative of the Estate of Dana Bruce Mower

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below:

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DATED this 26th day of August 2016, at Tacoma, Washington.

Amy Jean Shackelford

Amy Jean Shackelford, PLS
Legal Assistant to Chrystina R. Solum

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

May 3, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Estate of:	No. 46778-0-II
DANA MOWER,	PUBLISHED OPINION
Deceased.	

BJORGEN, A.C.J. — Linda Turner, personal representative of the estate of Dana Mower, appeals the trial court's grant of summary judgment declaring Eric and Theresa Schuler (the Schulers) residuary beneficiaries under Dana's[1] will. The Schulers are the brother and sister-in-law of Dana's former spouse, Christine Mower. Turner argues that (1) the bequest to the Schulers should be revoked under RCW 11.12.051 as a provision "in favor of" a testator's former spouse, (2) the bequest to the Schulers fails because its conditions precedent have not been met, and (3) the assets covered by the bequest to the Schulers should pass via intestacy. Turner also argues that the trial court erred in awarding attorney fees to the Schulers, and both parties request attorney fees on appeal.

[1] To avoid confusion, we refer to Dana Mower and Christine Mower by their first names. No disrespect is intended.

We hold that (1) a provision "in favor of" a testator's former spouse under RCW 11.12.051 is one that benefits the former spouse without directly conferring a property interest or power, and the bequest to the Schulers does not qualify as such a provision, (2) operation of RCW 11.12.051 to revoke the primary residuary bequest in Dana's will satisfies the condition precedent to the bequest to the Schulers, and (3) the will, not the law of intestacy, governs distribution of Dana's residuary assets. We therefore affirm the trial court's order granting summary judgment to the Schulers. We also affirm the trial court's award of attorney fees and we award attorney fees on appeal to the Schulers, to be paid from the estate.

FACTS

Dana executed his will in 2005, at which time he was married to Christine. The will included residuary provisions conditioned on whether Christine survived him by at least 30 days. If Christine survived him, part of the residue of his estate would go to her directly and the rest would go into a trust set up for her benefit. If Christine did not survive him, half of the residue would be split equally among his siblings, and the other half would go to the Schulers.

In 2012, Dana and Christine decided to divorce. They filed a stipulated decree of dissolution on November 13 of that year, finalizing the divorce. Dana died unexpectedly from an apparent heart attack 16 days later. Dana did not revise his will or execute a new will before his death.

Dana's will named Christine as the personal representative of his estate, with Turner named as the preferred alternate. Because Christine was his former spouse, and powers conferred on her by Dana's will would be revoked pursuant to RCW 11.12.051, Turner offered

the will for probate and was appointed as the personal representative of Dana's estate in January 2013.

In February 2013, Turner petitioned the trial court for a declaratory judgment that the Schulers were not beneficiaries under the will. Turner argued that under RCW 11.12.051 testamentary gifts to relatives of a testator's former spouse should be revoked, and she presented extrinsic evidence that Dana had intended to disinherit the Schulers after his divorce from Christine, but had not had an opportunity to change his will before he died. In response, the Schulers claimed that Eric Schuler and Dana had been friends before Dana married Christine.

The Schulers moved for summary judgment adjudicating them beneficiaries both under the will and of certain nonprobate assets. Turner then cross-moved for summary judgment, arguing that the bequest to the Schulers should fail because it was conditioned on Christine's death and Christine was still alive. The trial court granted the Schulers' motion, but withheld a final ruling on the nonprobate assets. The trial court denied Turner's cross motion. The Schulers later moved for a final order after determining that they were not named beneficiaries of any nonprobate assets. The trial court granted their motion and awarded them reasonable attorney fees, to be paid by Dana's estate.

Turner appeals.

ANALYSIS

Turner first argues that the residuary bequest to the Schulers in Dana's will should be revoked under RCW 11.12.051. Turner argues in the alternative that the bequest fails because its conditions precedent have not been satisfied. In either case, Turner asserts that the bequest should not be given effect and the assets covered by the bequest should pass by intestacy.

We review de novo a trial court's order granting summary judgment, performing the same inquiry as the trial court. *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 922, 296 P.3d 860 (2013). We view all evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *Id.* If there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law, we will affirm the trial court's order of summary judgment. *Id.* We may do so on any grounds supported by the record. *Pac. Marine Ins. Co. v. State ex rel. Dep't of Revenue*, 181 Wn. App. 730, 737, 329 P.3d 101 (2014).

I. REVOCATION OF TESTAMENTARY GIFTS TO A FORMER SPOUSE'S FAMILY MEMBERS

According to Turner, we should interpret RCW 11.12.051 as providing for automatic revocation of testamentary gifts to a former spouse's family members upon dissolution of the marriage between the testator and the former spouse. We disagree with this interpretation of RCW 11.12.051.

1. Principles of Statutory Interpretation

In interpreting statutes enacted by our legislature, we determine and give effect to the legislature's intent. *Jametsky v. Olsen*, 179 Wn.2d 756, 762, 317 P.3d 1003 (2014). To do so, we first look to the plain language of the statute. *Id.* "When the legislature has expressed its intent in the plain language of a statute, we cannot substitute our judgment for the legislature's judgment." *Protect the Peninsula's Future v. Growth Mgmt. Hr'gs Bd.*, 185 Wn. App. 959, 972, 344 P.3d 705 (2015). To assess the meaning of the plain language, we consider the text of the provision in question, the context of the statute in which the provision is found, and related statutes. *Id.* Where a statutory term is not expressly defined in the statute, we look to its usual

and ordinary meaning. *Id.* If the plain meaning of a statute is unambiguous, we must apply that plain meaning as an expression of legislative intent without considering extrinsic sources. *Jametsky*, 179 Wn.2d at 762. We will not add language to an unambiguous statute under the guise of interpretation. *Kilian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002).

However, we must construe ambiguous statutory provisions. Statutory language is ambiguous when it is "'susceptible to more than one reasonable interpretation.'" *Seven Sales LLC v. Otterbein*, 189 Wn. App. 204, 208, 356 P.3d 248 (2015) (quoting *Stephenson v. Pleger*, 150 Wn. App. 658, 662, 208 P.3d 583 (2009)). To construe such ambiguous language, we look to the legislative history, relevant case law, and established principles of statutory construction to discern legislative intent. *Anthis v. Copland*, 173 Wn.2d 752, 756, 270 P.3d 574 (2012). Moreover, "policy considerations may provide a valuable rule of statutory construction in interpreting an ambiguous statute." *Allan v. Dep't of Labor & Indus.*, 66 Wn. App. 415, 418, 832 P.2d 489 (1992).

2. Interpretation of RCW 11.12.051

Turner argues that the trial court should have revoked Dana's testamentary gift to the Schulers because the gift was "in favor of" Christine within the meaning of RCW 11.12.051. Br. of Appellant at 12. We disagree and hold that testamentary gifts to family members of a former spouse are not necessarily gifts in favor of the former spouse.

RCW 11.12.051(1) provides:

> If, after making a will, the testator's marriage or domestic partnership is dissolved, invalidated, or terminated, all provisions in the will *in favor of or granting any interest or power to the testator's former spouse* or former domestic partner are revoked, unless the will expressly provides otherwise. *Provisions affected by this section must be interpreted, and property affected passes, as if the former spouse*

> *or former dome77stic partner failed to survive the testator*, having died at the time of entry of the decree of dissolution or declaration of invalidity.

(Emphasis added.) Because the statute is in derogation of the common law, we construe its provisions strictly. *See Peiffer v. Old Nat'l Bank & Union Tr. Co.*, 166 Wash. 1, 6, 6 P.2d 386 (1931).

By its plain language, the statute requires courts to apply the legal fiction that a former spouse predeceased the testator when interpreting will provisions that specifically give an interest in property or a power to the former spouse or that operate "in favor of" the former spouse. Here, the will provision bequeathing half of Dana's residual estate to the Schulers neither conveys an interest in property to Christine nor confers any power on her. However, Turner argues that the bequest was included due to the Schulers' familial relationship with Christine and therefore constitutes a provision "in favor of" Christine. Thus, the primary interpretive question before this court is what "in favor of" means in RCW 11.12.051.

A. Ambiguity

To begin our interpretive analysis, we must determine whether the phrase "in favor of" is ambiguous as used in RCW 11.12.051. We conclude that it is.

The usual and ordinary meaning of the phrase "in favor of" is "to the special advantage or benefit of." WEBSTER'S THIRD NEW INT'L DICTIONARY at 830 (1969). This meaning seems to require that a provision in favor of a party confer some direct benefit on that party. However, among the usual and ordinary meanings of the verb "favor" are "to do a kindness for or oblige," WEBSTER'S, *supra* at 830, and "to show partiality or unfair bias towards," BLACK'S LAW DICTIONARY, at 738 (4th ed. 1968); *see also* WEBSTER'S, *supra* at 830 (noting a secondary meaning of "in favor of" as "in accord or sympathy with"). These meanings show that it is at

least reasonable to believe that a testator could execute a will provision in favor of a party by including that provision at the party's behest or to satisfy that party's desire, even if the provision itself confers no direct benefit on the favored party. Therefore, the term "in favor of" as used in RCW 11.12.051 is susceptible to more than one reasonable interpretation and is ambiguous.

B. Resolution of Ambiguity

Because the phrase "in favor of" is ambiguous, we must resolve the ambiguity. To do so, we may look to principles of statutory construction, legislative history, relevant case law, and public policy to discern the legislature's intent. We hold that the phrase "in favor of" as used in RCW 11.12.051 includes all will provisions that benefit a former spouse without directly conveying any power or property interest, as long as those provisions would be effectively revoked by treating the former spouse as predeceasing the testator.

i. Legislative History

Turner argues that because the Uniform Probate Code (UPC) recommends revoking testamentary gifts to family members of a testator's former spouse, our legislature must have similarly intended that RCW 11.12.051 would revoke gifts to such former relatives. The Schulers argue that the provisions of RCW 11.12.051 and the UPC are dissimilar, indicating that the legislature intentionally took a path different from that advocated by the UPC. We agree with the Schulers.

Turner asserts, without citing to any authority, that RCW 11.12.051 was "modeled after the first [UPC] § 2-508." Br. of Appellant at 12. That model statute provided:

> If after executing a will the testator is divorced or his marriage annulled, the divorce or annulment *revokes any disposition or appointment of property* made by the will *to the former spouse*, *any provision conferring a general or special power of appointment on the former spouse*, and *any nomination of the former spouse as*

> *executor, trustee, conservator, or guardian*, unless the will expressly provides otherwise. Property prevented from passing to a former spouse because of revocation by divorce or annulment passes as if the former spouse failed to survive the decedent, and other provisions conferring some power or office on the former spouse are interpreted as if the spouse failed to survive the decedent. . . . For purposes of this section, divorce or annulment means any divorce or annulment which would exclude the spouse as a surviving spouse within the meaning of Section 2-802(b). A decree of separation which does not terminate the status of husband and wife is not a divorce for purposes of this section. No change of circumstances other than as described in this section revokes a will.

Prior UPC (1969) § 2-508, 8 pt. 2 U.L.A. 535 (2013) (emphasis added).[2] The official comment to the section explained that

> [t]he section deals with what is sometimes called revocation by operation of law. It provides for revocation by a divorce or annulment only. No other change in circumstances operate to revoke the will. . . .

8 U.L.A. at 535 cmt. Neither the text of the section nor the comment discuss family members of a former spouse, and both expressly state that the section contemplates "[n]o other change [of] circumstances." Therefore, if anything, these UPC provisions indicate that our legislature intended to restrict the application of RCW 11.12.051 to former spouses only.

Turner cites to the revised UPC section 2-804 as well, but that model statute notably contrasts with RCW 11.12.051. The revised section 2-804 expressly revokes testamentary gifts to relatives of the testator's former spouse:

> [P]rovisions of a governing instrument are given effect as if the former spouse *and relatives of the former spouse* disclaimed all provisions revoked by this section or, in the case of a revoked nomination in a fiduciary or representative capacity, as if the former spouse and relatives of the former spouse died immediately before the divorce or annulment.

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[2] The revised version of section 2-508 provides only that "[e]xcept as provided in Sections 2-803 and 2-804, a change of circumstances does not revoke a will or any part of it." 8 pt. 1 U.L.A. 266. Section 2-803 governs the effect of homicide on will provisions, and therefore is unrelated to the question before this court. *Id.* at 323-25. Section 2-804 concerns, inter alia, revocation of wills by dissolution of marriage. *Id.* at 330-32.

Revised UPC § 2-804(d) (amended 2010), 8 pt. 1 U.L.A. 331. The official comment to that section further clarifies the UPC position:

> Given that, during divorce process or in the aftermath of the divorce, the former spouse's relatives are likely to side with the former spouse, breaking down or weakening any former ties that may previously have developed between the transferor and the former spouse's relatives, seldom would the transferor have favored such a result. This section, therefore, also revokes these gifts.

Revised UPC § 2-804, at 333 cmt. 2.

Unlike revised UPC section 2-804, RCW 11.12.051 includes no express provision revoking gifts to relatives of a former spouse, and the statute generally does not resemble the language or structure of the UPC section. Although the revised version of the UPC was available to our legislature when it enacted RCW 11.12.051 in 1994, *see* 8 pt. 1 U.L.A. 333 cmt. 1, the legislature chose not to enact the language of the UPC or similar language. Therefore, comparison with the UPC weighs toward interpreting RCW 11.12.051 as applying strictly to testamentary gifts to former spouses, not gifts to their relatives.

ii. Relevant Case Law

Two older Washington cases, *In re Estate of McLaughlin*, 11 Wn. App. 320, 523 P.2d 437 (1974), and *In re Estate of Harrison*, 21 Wn. App. 382, 585 P.2d 187 (1978), addressed testamentary gifts to relatives of a testator's former spouse. The Schulers argue that because those cases predated enactment of the language of RCW 11.12.051, the legislature's subsequent choice not to expressly provide for revocation of gifts to such former relatives indicates that such gifts are not necessarily revoked under RCW 11.12.051. We agree.

In both *McLaughlin* and *Harrison*, the courts construed will provisions as precluding gifts to relatives of a testator's former spouse. However, the courts in both cases applied former RCW 11.12.050 (1978), *repealed by* LAWS OF 1994, ch. 221, § 72, which provided:

> If, after making any will, the testator shall marry and the spouse shall be living at the time of the death of the testator, such will shall be deemed revoked as to such spouse, unless provision shall have been made for such survivor by marriage settlement, or unless such survivor be provided for in the will or in such way mentioned therein as to show an intention not to make such provision, and no other evidence to rebut the presumption of revocation shall be received. A divorce, subsequent to the making of a will, shall revoke the will as to the divorced spouse.

This language differs from that of RCW 11.12.051, revoking will provisions as "to the former spouse" and including no provision that courts treat a former spouse as predeceasing the testator.

This distinction is critical because in both *McLaughlin* and *Harrison* the key issue was whether the testator's former spouse predeceased him, thereby triggering will provisions conditioned on the former spouse's death. *McLaughlin*, 11 Wn. App. at 321; *Harrison*, 21 Wn. App. at 387-88. This court presumes that in subsequently enacting RCW 11.12.051, the legislature knew the case law construing the earlier statute. *See Bob Pearson Constr., Inc. v. First Cmty. Bank of Wash.*, 111 Wn. App. 174, 179, 43 P.3d 1261 (2002). With this presumed knowledge, the legislature abrogated the case law by enacting an express requirement that courts treat a former spouse as predeceasing the testator. Yet it added no language concerning relatives of the former spouse, even though both *McLaughlin* and *Harrison* involved such relatives. Therefore, the legislature's action in the face of the case law indicates that it did not intend to necessarily revoke testamentary gifts to such former relatives.

iii. Principles of Statutory Construction

Turner directs this court's attention to a Maryland case *Friedman v. Hannan*, 412 Md. 328, 987 A.2d 60 (2010), which turned in part on the principle that a court must give effect to all language included in a statute and should not treat any as surplusage. We apply that same principle here.

Washington courts, like the Maryland court, observe "the rule against surplusage, which requires this court to avoid interpretations of a statute that would render superfluous a provision of the statute." *Veit, ex rel. Nelson v. Burlington N. Santa Fe Corp.*, 171 Wn.2d 88, 113, 249 P.3d 607 (2011). The legislature chose to include in RCW 11.12.051 language revoking will provisions "in favor of" a former spouse, as well as provisions "granting any interest or power to the testator's former spouse." In order to avoid subsuming the former provision within the latter, and thereby rendering the phrase "in favor of" superfluous and redundant, we must interpret the phrase "in favor of" to mean something distinct from the conveyance of power or property interests. Because the legislature chose to include the language, it must refer to some benefit other than a direct grant of power or property.

As noted above, we construe RCW 11.12.051 strictly because it is in derogation of the common law of wills. *Peiffer*, 166 Wash. at 6. Applying the rule against surplusage, we hold that the legislature indicated its intent that RCW 11.12.051 generally revoke provisions benefitting the former spouse by providing for revocation of will provisions that are "in favor of" the testator's former spouse, while distinguishing provisions that grant power or property to that former spouse. In some cases, gifts to the former spouse's family members may confer some

benefit on the former spouse. Whether a particular will provision benefits the testator's former spouse would be a factual question for the trial court to resolve.[3]

However, RCW 11.12.051 expressly provides a particular manner of revocation: construction of the will as if the testator's former spouse predeceased him. If that language is to be given effect, a will provision in favor of a former spouse should only fall within the scope of RCW 11.12.051 if it would be effectively revoked by the death of the former spouse. A will provision that confers only an attenuated, indirect benefit on the testator's former spouse—for example, a bequest to a person from whom the former spouse might later inherit the bequeathed asset—would not be revoked by pretending that the former spouse predeceased the testator. In contrast, a will provision conferring some personal benefit on the former spouse—for example, a provision setting up a trust to care for the former spouse's pet as long as the former spouse lived—would not survive if that former spouse were considered deceased. Therefore, construing RCW 11.12.051 strictly, a will provision "in favor of" a former spouse must be one that would be effectively revoked by treating that former spouse as predeceasing the testator.

iv. Policy Considerations

Turner argues that public policy considerations should lead us to construe RCW 11.12.051 broadly and hold that it revokes testamentary gifts to relatives of a former spouse.

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[3] The Maryland court in *Friedman* reached a similar conclusion after applying the rule against surplusage, although the language of the Maryland revocation-on-dissolution statute was notably different. 412 Md. at 337-38, 348. The court interpreted the phrase "relating to" broadly and held that the statute "is not limited in its effect to provisions for the direct benefit of the spouse." *Id.* at 348. The court further held that it is a factual question whether a will provision is one "relating to" a former spouse. *Id.*

However, the policy views of this court should not supersede the indications in the legislative history that our legislature intended not to enact a law like that suggested by revised UPC 2-804.

To support her policy argument, Turner directs this court's attention to the *Restatement (Third) of Property*, which addresses language identical to that used in RCW 11.12.051:

> The dissolution of the testator's marriage, including divorce or annulment, is a change in circumstance that presumptively revokes any provision in the testator's will in favor of his or her former spouse. The term "provision in the testator's will in favor of his or her former spouse" not only encompasses a dispositive provision in favor of the former spouse, but also a provision nominating the former spouse to act in any fiduciary or representative capacity (such as personal representative, executor, trustee, conservator, agent, or guardian), a provision conferring a general or nongeneral power of appointment on the former spouse, and other provision of similar import.
>
> . . . .
>
> Most revocation statutes, including the Original UPC, limit the scope of the revocation to provisions in favor of the *former spouse*. Under Revised UPC § 2-804, dissolution of the testator's marriage also revokes any provision in the testator's will in favor of a relative of the former spouse who, after the dissolution, is no longer related to the testator by blood, adoption, or affinity.
>
> The revoked provisions pass as if the former spouse—and, under the Revised UPC, relatives of the former spouse—predeceased the testator.

RESTATEMENT (THIRD) OF PROPERTY § 4.1, cmt. o (1999) (alteration in original). The Reporter's Note on this comment further explains that

> where the controlling revocation-upon-divorce statute provides that the devise to the former spouse alone is revoked, the case law generally holds that *the testator's estate passes under the alternative devise, even if the alternative devise favors relatives of the former spouse.* [Citation omitted.] However, even if the controlling revocation statute provides only that the devise to the former spouse is revoked, *the court should feel free to effectuate the purpose of the statute by extending its terms to revoke the devise to the former spouse's children.* The rationale for extending the statute is that the deceased spouse, the testator, would not want his or her estate to be divided between the testator's children and the former spouse's children.

RESTATEMENT (THIRD) OF PROPERTY, § 4.1, Rep. Note 10 (1999) (emphasis added).

According to Turner, a similar rationale applies to testamentary gifts to any relative of the former spouse. As noted above, the revised UPC explains this idea:

> Given that, during divorce process or in the aftermath of the divorce, the former spouse's relatives are likely to side with the former spouse, breaking down or weakening any former ties that may previously have developed between the transferor and the former spouse's relatives, seldom would the transferor have favored such a result.

UPC § 2-804, 8 pt. 1 U.L.A. at 333 cmt. 2. Some courts in other jurisdictions have quoted this language approvingly. *E.g.*, *Estate of Hermon*, 39 Cal. App. 4th 1525, 1532, 46 Cal. Rptr. 2d 577 (1995). The Maryland court in *Friedman* was also in accord:

> [D]ivorce is often acrimonious, with the acrimony spilling over to the former spouse's family. Also, it is common in writing wills during a marriage that two spouses divide their assets between their respective family members because they have agreed that is fair. Even without acrimony, this viewpoint is likely to change upon divorce.

412 Md. at 345.

The *Restatement* and UPC suggest presumptive revocation of gifts to a former spouse's relatives because dissolved unions rend the relationships that usually underlie such gifts. This may or may not be sound public policy. However, we will not construe RCW 11.12.051 to achieve such a policy goal without some indication that the legislature had that purpose in mind. Indeed, the fact that the legislature has not moved to amend or repeal RCW 11.12.051 in light of the more recent policy suggestions embodied in the *Restatement* and UPC indicates that the legislature did not have this policy in mind. Therefore, despite the apparent trend seen in the *Restatement* and UPC toward revoking testamentary gifts to relatives of a testator's former spouse, we must refrain from broadly interpreting RCW 11.12.051 on policy grounds.

v. Conclusion

As concluded above, principles of statutory construction counsel that the phrase "in favor of" as used in RCW 11.12.051 refers to any testamentary gifts that benefit the former spouse in some manner other than direct conveyance of a power or property interest and that would be effectively revoked by treating the former spouse as predeceasing the testator.

Turner argues that because Dana's property would go to Christine's family, she would ultimately benefit from the bequest. Turner also appears to argue that because Dana had no relationship with the Schulers that would warrant their inclusion in his will, he must have included them to benefit Christine. However, even if Dana's bequest to the Schulers indirectly benefits Christine, it would not be effectively revoked by applying the fiction of law that she predeceased Dana. Therefore, the alternative will provision bequeathing half of the residue of Dana's estate to the Schulers was not a provision in favor of Christine within the meaning of RCW 11.12.051.

II. SATISFACTION OF THE CONDITION PRECEDENT

Turner claims that Christine's disinheritance under RCW 11.12.051 should not satisfy the condition precedent for the alternative will provision bequeathing half of the residue of Dana's estate to the Schulers. She presents two bases for this claim: (1) the residuary provisions in Dana's will were conditioned on his continued marriage to Christine and (2) Christine's literal death was required to satisfy the condition that she predeceased Dana by at least 30 days. We disagree.

1. Condition Precedent: Continued Marriage to Christine

In interpreting the provisions of a will, our job is to determine the testator's intent. *In re Estate of Burks*, 124 Wn. App. 327, 331, 100 P.3d 328 (2004). If possible, this intent is to be gleaned from the four corners of the will. *Id.* To do so, we follow the objective manifestation theory used in contract interpretation, imputing an intention corresponding to the reasonable meaning of the words used. *In re Estate of Bernard*, 182 Wn. App. 692, 697, 332 P.3d 480, *review denied*, 339 P.3d 634 (2014). Terms expressly defined should be interpreted in accordance with the express definition. *See Black v. Nat'l Merit Ins. Co.*, 154 Wn. App. 674, 679-80, 226 P.3d 175 (2010).

In a section entitled "Identification of Family," Dana's will specifies that "[t]he term 'my spouse' as used in this Will shall mean and refer to Christine Leiren Mower." Clerk's Papers (CP) at 2. Numerous provisions throughout the will refer to either "my spouse" or "my spouse, Christine Leiren Mower." CP at 2-8. Sections 5.2 and 5.3 of the will, governing the disposition of the residue of the estate, are structured as alternative sets of provisions conditioned on whether "my spouse survives me by a period of thirty (30) days." CP at 7-8. The bequest to the Schulers, part of the second alternative set of provisions, is operative only "[i]n the event my spouse fails to survive me by a period of thirty (30) days." CP at 8.

The will defines "my spouse" as Christine personally. The definition includes no caveat altering its meaning in the event that Dana and Christine are no longer married. Moreover, the provisions of section 5.2 include no reference to Dana's marriage to Christine and no language altering the definition of "my spouse." Therefore, we interpret the alternative residuary bequests as conditioned on whether Christine survived Dana by a period of 30 days. Under the terms of

the will, the bequest to the Schulers is not conditioned on whether Christine in fact remained Dana's spouse at the time of his death.

2. Condition Precedent: Literal Death of Christine

Turner also argues that the gift to the Schulers was conditioned on Christine's literal death, and that operation of RCW 11.12.051 is insufficient to satisfy the condition. We disagree.

As discussed above, Dana's will clearly conditions the residuary bequest to the Schulers on Christine's failure to survive Dana by at least 30 days. However, RCW 11.12.051(1) expressly provides that

> [p]rovisions affected by this section must be interpreted, and property affected passes, as if the former spouse or former domestic partner failed to survive the testator, having died at the time of entry of the decree of dissolution or declaration of invalidity.

Therefore, to the extent the residuary provisions of Dana's will are affected by RCW 11.12.051, we construe them as though Christine predeceased Dana.

As noted above, the residuary provisions of the will are set up as alternatives based on Christine's survival. Under the first alternative, if Christine survives Dana by at least 30 days she receives a portion of the residue directly. Under RCW 11.12.051, those provisions must be construed as though Christine predeceased Dana, triggering the second set of alternative provisions containing the bequest to the Schulers.

Turner contends that RCW 11.12.051 is inapplicable because *McLaughlin* and *Harrison* established as a matter of common law that the literal death of the testator's former spouse is required to give effect to a substitutional gift conditioned on that former spouse's nonsurvival. In both *McLaughlin* and *Harrison*, our court did hold that will provisions conditioned on the death of the testator's former spouse were not satisfied by dissolution of the testator's marriage

to that former spouse. *See McLaughlin*, 11 Wn. App. at 321; *Harrison*, 21 Wn. App. at 387-88. However, RCW 11.12.051 had not yet been enacted when those cases were decided, and both cases construed the earlier statute. The legislature later specifically added the statutory language requiring courts to treat a former spouse as predeceasing the testator. We presume that the legislature was aware of the earlier cases and acted accordingly. *See Bob Pearson Constr.*, 111 Wn. App. at 179. Therefore, to the extent that RCW 11.12.051 is inconsistent with the earlier holdings, the statute abrogates those holdings.

III. Operation of Intestacy Laws

Turner argues that because the residuary provision benefitting the Schulers should either be revoked or rendered inoperative by failure to satisfy a condition precedent, half of the residue of Dana's estate should pass via intestate succession to Dana's mother. Because we hold that the provision is not revoked and the condition precedent is satisfied, Turner's position cannot be sustained.

IV. Attorney Fees

Turner argues that the trial court erred by awarding attorney fees and also requests attorney fees on appeal. The Schulers request attorney fees on appeal as well. We hold that the trial court did not err in awarding attorney fees to the Schulers, and we award the Schulers reasonable attorney fees on appeal to be paid for by the estate.

1. Attorney Fees Awarded by the Trial Court

Turner argues that the trial court erred by awarding the Schulers attorney fees because they did not substantially prevail. We disagree.

Under the attorney fees award provisions of the Trusts and Estate Dispute Resolution Act (TEDRA), chapter 11.96 RCW, the trial court has discretion to award fees and other costs to any party in an estate dispute proceeding governed by Title 11 RCW. RCW 11.96A.150. The court may award any amount it "determines to be equitable." RCW 11.96A.150(1). "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." RCW 11.96A.150. We review a trial court's decision to award attorney fees under TEDRA for an abuse of discretion. *In re Estate of Black*, 153 Wn.2d 152, 173, 102 P.3d 796 (2009).

The trial court expressly declared that "the Schulers are the prevailing party on the Estate's and Ms. Turner's respective petitions to adjudicate beneficiaries," CP at 417, and granted both of the Schulers' motions for summary judgment while denying Turner's cross motion. Yet Turner argues on appeal, without citation to the record, that the Schulers "prevailed on only one issue, the probate assets, while the Estate prevailed on the second issue, the non-probate assets." Br. of Appellant at 26. Turner may be referring to the fact that the Schulers admitted in their second motion that after discovery they were not named beneficiaries on any nonprobate assets. However, the trial court granted the Schulers' motion, so they technically prevailed.

Regardless, RCW 11.96A.150 does not require that a party substantially prevail to be entitled to an attorney fees award. Instead, it expressly gives the trial court discretion to grant such an award to "any party." RCW 11.96A.150(1). Where a will beneficiary prevails on a claim raised by the personal representative of an estate, an attorney fees award may be

appropriate. *See McDonald v. Moore*, 57 Wn. App. 778, 783, 790 P.2d 213 (1990). Here, Turner brought this action and forced the Schulers to defend their position as beneficiaries of the will. Because that position had merit, the trial court did not err by awarding attorney fees.

The trial court ordered that the award for the Schulers' attorney fees be paid by the estate. "The touchstone of an award of attorney fees from the estate is whether the litigation resulted in a substantial benefit to the estate." *In re Estate of Black*, 116 Wn. App. 476, 490, 66 P.3d 670 (2003). However, a trial court does not necessarily abuse its discretion by awarding fees from an estate even without a substantial benefit. *Id.* Here, there was arguably a substantial benefit to the estate, as the action adjudicated the proper beneficiaries. Moreover, the trial court did not want to penalize Turner personally for raising potentially meritorious policy arguments and advocating for a change in Washington law. These considerations warranted ordering the award to be paid by the estate.

2. Attorney Fees on Appeal

Both Turner and the Schulers request attorney fees and costs on appeal. We award the Schulers attorney fees and costs to be paid by the estate.

We may grant an award of reasonable attorney fees on appeal to a party that requests it in its opening brief, as long as applicable law provides for such an award. RAP 18.1. RCW 11.96A.150 applies not only to trial courts, but also to "any court on an appeal." Therefore, like the trial court, this court has discretion to award reasonable attorney fees in estate disputes. We may order such an award paid by "any party to the proceedings" or "the assets of the estate or trust involved in the proceedings." RCW 11.96A.150(a)-(b). In exercising its discretion, we may consider whatever factors we deem appropriate. RCW 11.96A.150(1).

We award the Schulers attorney fees on appeal, to be paid from the estate. We encourage parties to raise and defend against legitimate issues of statutory interpretation, so that such issues may be resolved for the public benefit. As the trial court noted, this case involved a legitimate issue of statutory interpretation. Therefore, we award attorney fees to the prevailing party, to be paid from the estate. Even if this case were not of substantial benefit to the estate, the litigation involved an important estate dispute and it is most equitable to have the estate bear the burden of the appeal.

CONCLUSION

We affirm the trial court's summary judgment order in favor of the Schulers, affirm the award of reasonable attorney fees to the Schulers at trial, and award the Schulers their reasonable attorney fees on appeal, both fee awards to be paid from the estate.

Bjorgen, C.J.
BJORGEN, C.J.

I concur:

Sutton, J.
SUTTON, J.

MELNICK (dissenting) — The majority and I rely on the same facts, the same principles of statutory construction, and the same statute. However, because we differ on the interpretation of the relevant statute and its applicability to the facts of this case, I respectfully dissent.

At issue in this case is the interpretation of RCW 11.12.051(1). In relevant part it reads:

> If, after making a will, the testator's marriage or domestic partnership is dissolved, invalidated, or terminated, *all provisions in the will in favor of or granting any interest or power to the testator's former spouse or former domestic partner are revoked*, unless the will expressly provides otherwise. *Provisions affected by this section* must be interpreted, and property affected passes, as if the former spouse or former domestic partner failed to survive the testator, having died at the time of entry of the decree of dissolution or declaration of invalidity.

RCW 11.12.051(1) (emphasis added).

I agree with the majority that the provision at issue in Dana's will is not "in favor of" Christine,[4] and we do not use the legal fiction that she "died at the time of entry of the decree of dissolution."[5] For this reason, I believe the sentence that begins, "Provisions affected by this section . . ." is inapplicable.[6] If none of the provisions of the will is "in favor of" the testator's prior spouse, then there cannot be any provisions of the will affected by this portion of the statute. For this reason, I would hold that Dana died intestate. I would also hold that the award of attorney fees to the Schulers is in error.

Melnick, J.

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[4] Majority at 15,

[5] *See* RCW 11.12.051(1).

[6] *See* RCW 11.12.051 (1).

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ESTATE OF DANA MOWER

No. 46778-0-II

ORDER DENYING MOTION FOR RECONSIDERATION

APPELLANT moves for reconsideration of the Court's May 3, 2016, opinion. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Bjorgen, Melnick, Sutton,

DATED this 27th day of July, 2016.

FOR THE COURT:

Bjorgen, C.J.
CHIEF JUDGE

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I dissent from decision denying reconsideration.

Melnick, J.
JUDGE

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