

NO. 67212-6

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COURT OF APPEALS, DIVISION 1  
OF THE STATE OF WASHINGTON

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In Re: The Estate of:  
Warren F. Vaupel, Deceased.

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REPLY BRIEF OF APPELLANT

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FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2012 FEB 13 PM 2:30

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## **I. INTRODUCTION**

The Estate has employed a revisionist history of the facts in an effort to portray Mary Wolfgram (“Ms. Wolfgram”) as exploitative and financially abusive. Although all contemporary accounts of the relationship between Lt. Col. Warren Vaupel (“Lt. Col. Vaupel”) and Ms. Wolfgram describe the couple as caring and intimate partners living as though they were married, the Estate is now contorting the facts in an attempt to alter the court’s perception of Ms. Wolfgram. However, the Estate ignores the true history. Lt. Col. Vaupel was healthy and clear of mind for the vast majority of the relationship between he and Ms. Wolfgram, and all the evidence contained in the record points to his strong desire to love and provide for her for the rest of her life. The Estate’s revisionist history denigrates Warren F. Vaupel, an Army Lieutenant Colonel and multimillionaire that consciously chose his lifestyle and his loves. He tried in repeated writings, one of which is the codicil signed by two witnesses, to provide for the care of Ms. Wolfgram after his death, and the actions of the Estate are subverting his intent and his desires.

## **II. REPLY ARGUMENT**

The Estate has failed to present reasoned legal analysis to support its attempts to preclude admissible, probative, and highly relevant evidence. There is significant admissible evidence that was gathered prior

to Lt. Col. Vaupel's death that confirms his desire to provide for Ms. Wolfgram for the rest of her life.

All the evidence filed herein that was created contemporaneously with the relationship between Lt. Col. Vaupel and Ms. Wolfgram shows that they were involved in a Committed Intimate Relationship (CIR). Lt. Col. Vaupel dictated and signed several documents describing the closeness of his relationship with Ms. Wolfgram, and his desire to provide for her financially, including the documents dated May 11, 2006, November 17, 2007, April 5, 2008, and the codicil dated June 12, 2008, signed by two witnesses. CP 484-485; CP 486; CP 487; and CP341-343. Contemporaneous statements by Mr. Jardine, Liz Stephens, Joshua L. Brothers (Lt. Col. Vaupel's GAL), and Lt. Col. Vaupel's own attorney J. Roderik Stephens, provide supporting evidence of Lt. Col. Vaupel's desire to provide financial support to Ms. Wolfgram. CP 269-270; CP 319; CP 479-480; CP 676-705; CP 277-278.

Ms. Wolfgram contributed an economic benefit to the CIR through her extraordinary care and support that rose beyond mere "domestic services." She changed his diapers, assisted him with bathing and hygiene, monitored his medications, helped him to get dressed, and provided services far in excess of those usually performed as "domestic services." Additionally, she monitored his investments and worked

directly with the stock broker to convey buy and sell orders resulting in increased growth to the CIR estate. CP 690. The Estate's attempts to deny the true character of the relationship and the contributions of Ms. Wolfgram, lack evidentiary support.

The Estate's legal argument on the issue of the codicil is so tenuous that the Estate has been forced to rely almost exclusively on bare allegation that the document is a contract, without even analyzing the "dominant purpose of the document." (see § II C (1) *infra*). All the formalities to create and prove a testamentary document have been fulfilled with the codicil. The Estate's mischaracterization of the instrument as a contract, however, ignores the clear weight of legal authority that distinguishes the differences between a contract and a testamentary instrument. *See* Ms. Wolfgram's Opening Brief § V (A) (1); *See also* *infra* § II C (1).

**A. The Statements Contained In The Report Of Guardian Ad Litem And The Statements Regarding Lt. Col. Vaupel's Desire To Care For Ms. Wolfgram For The Rest Of Her Life Are Admissible.**

The statements and reports of a Guardian ad Litem (GAL) are admitted as a form of expert testimony by a neutral investigator, and are admissible regardless of whether those opinions were based on third party statements that would otherwise be hearsay. *In re Guardianship of Stamm*

v. *Crowley*, 121 Wn. App 830, 837, 91 P.3d 126 (2004) (A GAL is an agent of the court and may testify to his or her opinions, and may be permitted to state the basis of those opinions, including hearsay).

The GAL report is admissible because (1) it was submitted to the trial court by the Estate (CP 674), and (2) GAL reports are admissible, in spite of hearsay objections, to show how the GAL came to his or her conclusions. *See In re Guardianship of Stamm*, 121 Wn. App 830. If such reports were inadmissible their use in guardianship proceedings would become extremely limited. As the contemporaneous opinions of the GAL, who is deemed by the court to be an expert in regards to Lt. Col. Vaupel and his family relationships, the GAL's report and the basis upon which it relies is admissible pursuant to ER 702 and *In re Guardianship of Stamm. Id.* Also, as a document originally submitted by the Estate, the Estate may not now exclude the document as evidence. *See generally Sevener v. Northwest Tractor & Equipment Corp.*, 41 Wn.2d 1, 15, 247 P.2d 237 (1952).

The GAL report provides probative evidence demonstrating that nearly everyone who knew the couple recognized Ms. Wolfgram's importance to Lt. Col. Vaupel, and his strong desire to care and provide for her for the remainder of her life. This evidence explains Lt. Col. Vaupel's reasoning behind his intent to provide for Ms. Wolfgram after

his death, and the testator's intent is a critical fact in testamentary interpretation. RCW 11.12.230. After interviewing all relevant parties, the GAL determined that Ms. Wolfgram was "clearly the most significant person in [Lt. Col. Vaupel's] life" and that Ms. Wolfgram should be appointed as guardian. CP 698.

Similarly, the Estate cannot keep out the administrator John Jardine's sworn statement made while he was Lt. Col. Vaupel's guardian. In his verified response in support of establishing an \$800,000 annuity for Ms. Wolfgram out of Lt. Col. Vaupel's guardianship assets, Mr. Jardine stated that, "the outcome appears to be consistent with Mr. Vaupel's financial support of Ms. Wolfgram prior to his incapacity and his likely wish to continue providing financial support to her..." CP 270. The sworn statement clarifies Mr. Jardine's reasoning behind his opinion that Lt. Col. Vaupel wanted Ms. Wolfgram to receive an \$800,000 lifetime annuity. Mr. Jardine, as the Personal Representative, should be judicially estopped from now claiming that a different fact existed from that which he previously stated under oath regarding Lt. Col. Vaupel's testamentary intent to provide for Ms. Wolfgram after death. *Ashmore v. Estate of Duff*, 165 Wn.2d 948, 951, 205 P.3d 111 (2009) (judicial estoppel prevents a party from asserting one position in a judicial proceeding and later taking an inconsistent position to gain an advantage); *King v. Clodfelter*, 10 Wn.

App. 514, 521, 518 P.2d 206 (1974) (judicial estoppel applies to assertions of fact, not claims).

ER 408 does not preclude admission of evidence regarding the \$800,000 annuity because (1) the sworn responses of John Jardine and J. Roderik Stephens are pleadings, not settlement letters or mediation materials, and (2) this evidence was submitted to the trial court by the Estate. CP 30-33. In a declaration filed during the guardianship proceeding, Lt. Col. Vaupel's attorney J. Roderik Stephens stated that the purchase of an \$800,000 annuity for Ms. Wolfgram would be consistent with Lt. Col. Vaupel's past actions with regard to Ms. Wolfgram and his desire to provide for her for the remainder of her life. CP 278. ER 408 does not prohibit admission of this, nor the other statements regarding the \$800,000 annuity, and the Estate cites no authority to the contrary. The statements of John Jardine and J. Roderik Stephens are sworn statements from court pleadings filed in open court by the parties themselves. The sworn statements discuss the degree to which they thought it was the intent of Lt. Col. Vaupel to provide for Ms. Wolfgram. The statements were not made in confidence, nor in such a way as to prohibit admission as a settlement negotiation under ER 408. Additionally, the Estate may not now seek to prevent admission of evidence it has presented in this matter. CP 30-33.

**B. The Denial Of Ms. Wolfgram's Right To Trial On The Issue Of The CIR Would Establish A Precedent That Is Inequitable To A Significant And Vulnerable Class Of Citizens.**

The Estate asks this court to declare that if one partner in a CIR did not generate income during the relationship, said partner is not entitled to a trial on the equitable division of assets at the end of the relationship as a matter of law. The Estate acknowledges that Lt. Col. Vaupel received a monthly income of approximately \$6,367.00. Respondent Brief at 3. However, the Estate argues that, because this income is allegedly derived from assets accumulated prior to the relationship (which is disputed by appellant), Ms. Wolfgram is not entitled to a fair and equitable division of the assets, nor a portion of the assets growth of approximately \$1,552,318.59 during the relationship.<sup>1</sup> No case law has modified the *Connell* presumption to such an extent. *Connell v. Francisco*, 127 Wn.2d 339, 898 P.2d 831 (1995); *See* § II B (1) *infra*.

The Estate is attempting to draw a distinction between (1) a relationship in which one partner is a homemaker or is otherwise non-income generating and the other partner works for his or her income, and (2) a relationship where one partner is a homemaker or is otherwise non-income generating and the other partner receives income derived from

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<sup>1</sup> To the extent that the Estate contends that the IRS form 706, which provides one of the bases for this increases, shows only Versie Vaupel's one half of the Estate, the form on file is only a partial form that does not include schedules. Presentation of more evidence is required to verify the size of the estate in 1996.

dividends and interest on previously accumulated wealth. In either case the non-income generating partner provides the same significant benefits to the relationship. But according to the Estate, in only one instance is the non-income generating partner entitled to share in the mutual benefits of his or her efforts. Such a result is an injustice that harms a vulnerable class of individuals; specifically, those individuals who may not possess the influence in the relationship to ensure that they are treated fairly by the income generating partner. According to Harry M. Cross, “The fundamental premise of the community property system is that both spouses contribute to property acquisitions in a joint effort to promote the welfare of the relationship.” Harry M. Cross, *The Community Property Law in Washington*, 61 Washington L.R. 13, 27 (1986). As such, both partners’ contributions are accorded value as a matter of law and it was error to deny Ms. Wolfgram an opportunity to present evidence of such value.

1. Legal authority already supports an equitable distribution of assets between Lt. Col. Vaupel and Ms. Wolfgram.

The Estate argues against an equitable division of assets at the end of a CIR, but such a division of assets is already required under Washington State Law. *See Olver v. Fowler*, 161 Wn.2d 655, 168 P.3d 348 (2007); *see also Connell*, 127 Wn.2d at 898 (income and property

acquired during a CIR is presumed to be community in character, and should be analyzed in a similar manner as income and property acquired during marriage). As acknowledged by the Estate, the basis of the division of assets after a CIR is equity. *Id.* However, the Estate contends that it is unnecessary to have a trial on an equitable division of assets determining the value of the benefits received by Lt. Col. Vaupel during his over ten year relationship with Ms. Wolfgram.

Ms. Wolfgram is not seeking reimbursement for “domestic services;” she is seeking an equitable distribution from the estate based on the economic benefit she bestowed on the “community like property” throughout the relationship. Contributions of effort to the community may increase the value of assets separately held by one party and create community like interests in the increase. *Soltero v. Wimer*, 159 Wn.2d 428, 435, 150 P.3d 552 (2007). Ms. Wolfgram contributed an economic benefit of hundreds of thousands of dollars to the CIR. She was not merely cooking and cleaning, and performing domestic duties. For the last few years of Lt. Col. Vaupel’s life, Ms. Wolfgram spent 24 hours a day caring for him, changing his diapers, giving him baths, cutting his toenails, monitoring his medications, taking him to the hospital, helping him get dressed, helping him brush his teeth, and providing services far in excess of those generally performed as “domestic services” between

partners. In addition, she monitored the “family” investments and worked directly with the broker. CP 690. Had she not been willing to perform these extraordinary actions, Lt. Col. Vaupel would have been forced to spend hundreds of thousands of dollars on care providers and nursing home costs, suffer a much lower quality of life, and lose out on investment opportunities due to lack of attention to financial management.

To deny Ms. Wolfgram any distribution from the CIR is to proclaim that the significant contributions of any non-income generating partner, who provides a benefit above that of basic domestic services, are valueless in equity when compared with the financial contributions of the partner who possesses the means to financially support the family. To the extent that the quantification of this benefit is disputed by the Estate, it is a question of fact that must be determined by the trial court.

2. The Estate denies the existence of a CIR because the mere existence of a CIR would necessitate a trial to determine an equitable distribution of assets.

The Estate focuses heavily on trying to show that there was no CIR, and attempts to portray Ms. Wolfgram as nothing more than a hired care giver. The Estate spends so much time on this argument because if the court determines that a CIR existed, as the evidence shows it did, the case must be remanded for a trial to determine the distribution of assets.

*See Connell*, 127 Wn.2d 339.

The facts contained in the record indicate that the relationship was a CIR. First, the couple lived together long before Lt. Col. Vaupel required any type of personal care. He was not diagnosed with Parkinson's disease until 2005, nearly 7 years after the couple initially began to cohabit. CP 198. At the time they moved in together, Lt. Col. Vaupel was a strong competent man, a former Army Lieutenant Colonel, and he made a conscious decision to bring Ms. Wolfgram into his life and treat her as though she were his wife. Second, the couple spent all of their time together. CP 198-199. They vacationed together, dined together, relaxed together, and lived together as though they were a married couple. *Id.* Finally, they were faithful and fully committed to each other in a way that was in nearly every way indistinguishable from that of a married couple. The Estate has attempted to demean their relationship in an effort to avoid a trial on Ms. Wolfgram's contributions to the relationship and the issue of equitable distribution of assets.

The Estate has also misinterpreted how the courts are to review the five factors used to determine the existence of a CIR. (Please see the detailed discussion of the issue contained in Ms. Wolfgram's Opening Brief § V (C) (1)).

3. This matter should be remanded for trial because there are significant factual disputes regarding the amount of economic benefit contributed to the CIR by Ms. Wolfgram and the equitable distribution to which she is entitled.

The Estate's contention that there are no genuine issues of material fact related to the CIR is incorrect. The parties to this matter have submitted preliminary evidence regarding the existence of a CIR and the degree to which an equitable division of assets is required. This evidence shows that Ms. Wolfgram contributed an economic benefit to the CIR over and above that of a mere housekeeper, and that Lt. Col. Vaupel did not consider her as only a housekeeper. *See* documents signed by Lt. Col. Vaupel regarding care and support CP 484-487; *See also* Lt. Col. Vaupel's codicil CP 341-343. A trial is necessary to quantify Ms. Wolfgram's contribution to the CIR, and the amount of equitable distribution to which she is entitled. Because Summary Judgment was granted just before court ordered mediation was to occur, there is still evidence that needs to be gathered and presented which will create further questions of fact that must be determined by the trial court.

4. The trial court made insufficient findings of fact regarding the CIR, and this matter should be remanded so that further factual findings may be made.

The court has presented insufficient findings of fact relevant to the question of the existence of a CIR between Ms. Wolfgram and Lt. Col. Vaupel. There have been no factual determinations of whether Lt. Col.

Vaupel received income during the relationship, the extent to which Ms. Wolfgram contributed an economic benefit to the CIR, or to what extent Ms. Wolfgram is entitled to an equitable share of the income and estate under *Connell*. See *Connell*, 127 Wn.2d 339 (income and property acquired during a CIR should be characterized in a similar manner as income and property acquired during marriage). The trial court even refused to make a specific finding regarding the nature of the relationship as a CIR. CP 671. These factual issues must be addressed before a determination on the equitable division of assets can be made.

**C. The Estate Has Failed To Present Legal And Factual Authority To Support The Trial Court's Erroneous Decision To Preclude Admission Of The Codicil To Probate.**

In response to Ms. Wolfgram's detailed presentation of legal and factual authority to support the admission of the June 12, 2008, codicil, the Estate has presented only contorted facts and flawed legal analysis. The Estate's flawed legal analysis focuses almost entirely on labeling the instrument as a "contract" without any citation to legal authority, and only briefly touches on whether the codicil has met the formalities to be admitted to probate. This is because, if the instrument is ruled to be testamentary in character, the clear weight of legal authority and a reasoned analysis of the facts, demonstrates that the codicil was sufficiently executed, and a trial on the wholly separate issue of undue

influence is required by statute. RCW 11.12.160. If the minimal requirements are met for a codicil, then it is the charge of the court to fulfill Lt. Col. Vaupel's testamentary intent.

The Estate has attempted to present the facts in such a way as to suggest there is an issue of undue influence that is relevant to this appeal. However, for the purposes of the instrument's admission to probate, the wholly separate issue of undue influence is premature. Only after the codicil has been admitted to probate does the separate issue of undue influence become relevant. *See In re Estate of Black*, 153 Wn.2d 152, 171, 102 P.3d 796 (2004) (issue of admitting lost will to probate was a separate issue from contesting the validity of the will under theory of undue influence).

1. The Estate fails in its attempt to recharacterize the codicil as a contract because the Estate relies on flawed factual and legal analysis.
  - a. *The Estate contorts the facts in an attempt to mischaracterize the codicil as a contract.*

The Estate's description of the codicil in its Response Brief is only partially accurate. While the Estate stated that "Mary Wolfgram admits she wrote the document," it is more accurate to say that the document is in Ms. Wolfgram's handwriting transcribed at the direction of Lt. Col. Vaupel. Respondent's Brief at 13; CP 519. Additionally, the Estate stated that "[Ms. Wolfgram] signs the document as its maker and a party to the

transaction.” Brief of Respondent at 13. However, Ms. Wolfgram stated under oath that she signed it as a “witness,” and there is no contradictory evidence before this court stating otherwise. CP 344-345. Ms. Wolfgram is free to testify to her understanding with regard to the purpose of her signature without the bar of the Dead Man’s Statute. *Jacobs v. Brock*, 73 Wn.2d 234, 237-38, 437 P.2d 920 (1968). The relevance and effect of Ms. Wolfgram’s signature on the document is a question of law, and RCW 11.12.020 requires only a signature, not additional words of explanation. It is un rebutted that Ms. Wolfgram and Amanda Wolfgram witnessed Lt. Col. Vaupel’s signature and signed the instrument.

The Estate states that, “The document states it is not a will.” Respondent’s Brief at 13. However, this is incorrect. Nowhere within the instrument does it state that it is “not a will.” CP 341-343. Although the document purports to be recognition of an obligation of some sort, this is merely precatory language and identifies no actual agreement. Precatory language is irrelevant and does not determine the characterization of the document, which is dependent upon the language contained within the document itself. *See In re MacAdams’ Estate*, 45 Wn.2d 527, 530, 276 P.2d 729 (1954); *See also In re Murphy’s Estate*, 193 Wash. 400, 75 P.2d 916 (1938). If a document expresses intent to take effect after death, it is testamentary in character. *In re Murphy’s Estate*, 193 Wash. at 409; *see*

also § V (A) (1) of Ms. Wolfgram's Opening Brief for a more detailed discussion.

- b. *The Estate's application of case law related to the characterization of the instrument fails to analyze "dominant purpose."*

The Estate ignores Washington State law in trying to characterize the instrument as a contract. As detailed in Ms Wolfgram's opening brief, the primary issue when determining the characterization of an instrument as testamentary is whether the drafter's dominant purpose is to pass a present irrevocable interest during life, or whether such interest passes only after death. *In re Murphy's Estate*, 193 Wash. at 409; *Verbeek v. Verbeek*, 2 Wn. App 144, 150, 467 P.2d 178 (1970); *In re Lewis' Estate*, 2 Wn.2d 458, 469, 98 P.2d 654 (1940). For the document to be a contract there must be consideration and a present transfer of interest, or quantum of interest, that is immediately enforceable in the described property. *In re Lewis' Estate*, 2 Wn.2d at 468. Nothing about the codicil could have been enforced by Ms. Wolfgram in a court of law while Lt. Col. Vaupel was living, and the Estate is incapable of directing this court to any term of the instrument that was presently enforceable when it was first created.

The Estate cites *In re Lewis' Estate* as an analogous case. Respondent's Brief at 32-33. The facts in *In re Lewis' Estate* are dissimilar from our case because the document in question was a contract

for the purchase and sale of land, however, the case is very helpful in clarifying the distinction between a contract and a testamentary instrument. The issue in *In re Lewis' Estate* was whether a real estate contract was a testamentary instrument when it contained a clause calling for forgiveness of any outstanding balance owed at the death of the seller. *In re Lewis' Estate* 2 Wn.2d at 460. At the time the parties entered into the contract, the seller executed a warranty deed transferring his interest in the property to the buyer, and the deed was then duly recorded. *Id.* In exchange, the buyer made a down payment on the contract, and executed a promissory note and mortgage on the property in accordance with the terms of the contract. *Id.*

In determining the character of the document the court cited with approval *Atkinson on Wills*, and made the following distinction between contracts and testamentary documents:

The difference in effect between a contractual obligation and a testamentary disposition is that the former creates a present enforceable and binding right over which the promisor has no control without the consent of the promisee, while the latter operates prospectively, and not in praesenti and is wholly ambulatory and subject to change at the testator's wish, until his death.

*Id.* at 469 (emphasis added).

The *Lewis* court found that “In this case, it is clear from the initial agreement and all the subsequent instruments that the dominant purpose of

the decedent was to enter into a contract for the sale of his property on definitely expressed terms.” *Id* at 468 (emphasis added). The court further found that there was consideration for the contract, and mutual performance by the parties. *Id*. Because there were mutual promises and a present transfer of property evidenced by the recorded deed, the court found that the document represented a contract in spite of the fact that it called for a forgiveness of the remaining balance owing upon the death of the seller. *Id*. The forgiveness of debt was merely a bargained for contractual term. *Id*. In our case, the Estate fails to demonstrate how “the dominant purpose of the decedent,” as gleaned by the Estate from the document, results in a “present enforceable and binding right.” *Id*. at 468-469. Such failure is fatal to the Estate’s argument.

The Estate also attempts to analogize the case of *Verbeek* to our case, but that case is again distinguishable. Respondent’s Brief at 32-33. Like *In re Lewis’ Estate*, *Verbeek* involved a real estate contract in which a portion of the sales price would be forgiven upon the death of the seller. *Verbeek* at 148. The court found that “The contract purports to give the purchasers a right of immediate possession, subject to a retained or reserved right of occupancy on the part of the sellers.” *Id*. at 152 (emphasis added). This created a contractual obligation of performance

on both parties, and the sellers had no ability to unilaterally decide not to transfer the home in fulfillment of contract terms upon death. *Id.* at 153.

The courts' rulings in *In re Lewis' Estate* and *Verbeek* are instructive in that they show the contrast between a contract, such as those in *In re Lewis' Estate* and *Verbeek*, and a testamentary instrument, such as Lt. Col. Vaupel's codicil. For example, in our case there were no mutual promises. Although the document referenced Ms. Wolfgram's past loving care and support of Lt. Col. Vaupel, she made no promise to continue the care and support, thus resulting in no consideration. Likewise, Lt. Col. Vaupel made no commitment or obligation to presently deliver the \$830,000, and could have unilaterally destroyed or amended the codicil at any time. Unlike the deed making a present transfer of property in *In re Lewis' Estate*, there was no present transfer of interest in any of the assets described by Lt. Col. Vaupel in his codicil. The lack of a present transfer of assets is so glaring that the Estate can only avoid discussing the issue, which it did, because the lack of a present transfer is the primary critical fact when characterizing an instrument as either contractual or testamentary. *In re Murphy's Estate*, 193 Wash. at 409; *Verbeek*, 2 Wn. App at 150; *In re Lewis' Estate*, 2 Wn.2d at 469.

The Estate incorrectly argues that *In re Murphy's Estate* is inapplicable to the present case. Respondent's Brief at 32. A detailed

discussion of the case in Ms. Wolfgram's Opening Brief reveals that it is very instructive in describing how to characterize a document. Opening Brief V (A) (1). In *In re Murphy's Estate*, the instrument in question was described on its face as a lease, with a conditional transfer of the subject land upon the death of the lessor. *In re Murphy's Estate*, 193 Wash. at 406. However, because the lease agreement did not pass a present irrevocable interest in the land, it was determined that the portion of the agreement purporting to transfer the land to the lessee after the death of the lessor was testamentary in character. *Id.* at 420-421. The document had not been signed and witnessed by two individuals, and the post death property transfer was therefore determined to be invalid. *Id.* The distinction between the instrument *In re Murphy's Estate* and the present case, is that Lt. Col. Vaupel's codicil was witnessed by two witnesses and meets the requirements for a valid testamentary instrument. RCW 11.12.020.

As a final matter, the Estate references *In re Chamber's Estate*, 187 Wash. 417, 60 P.2d 41 (1936) in its discussion of characterization of a testamentary instrument, and suggests that Ms. Wolfgram has cited the case in regards to characterization of the instrument. Respondents Brief at 32. Although that case is significant in establishing that a beneficiary under a will may sign and attest to the will, even as an interested witness,

it has no relevance to the question of characterization of the document itself, and Ms. Wolfgram did not cite it for such purpose.

- c. *Contrary to the Estate's assertion, the attestation affidavits have no effect on the characterization of the instrument.*

The Estate spends an extraordinary amount of time attempting to argue that the attestation affidavits filed by Ms. Wolfgram and Amanda Wolfgram are "...an attempt to change the document into something it is not..." Respondent's Brief at 35. Ms. Wolfgram is not changing anything. The characterization of an instrument as either testamentary or contractual in nature is determined at the time of its creation, and is based solely on the instrument's provisions and intent. *See In re Murphy's Estate*, 193 Wash. 400. The attestation affidavits are routine pleadings standard to the probate process that address the minimal statutory requirements of RCW 11.12.020.

2. The Estate almost entirely fails to address the strong legal authority authorizing Ms. Wolfgram and Amanda Wolfgram to attest to Lt. Col. Vaupel's codicil.

Significant time was spent in Ms. Wolfgram's Opening Brief on an analysis of the over one hundred years of legal authority authorizing interested beneficiaries to witness the signing of a will. In short, RCW 11.12.160 authorizes interested witnesses to provide testimony in proof of a will or codicil, but creates a presumption of undue influence in the

procurement of the gift which must be overcome at trial. The trial court's decision to preclude testimony of Ms. Wolfgram under RCW 5.60.030 (Dead Man's Statute), was an error that contradicted the clear language of RCW 11.12.160. The misinterpretation by the trial court is due to an apparent conflict that was created in 1994 when RCW 11.12.160 was revised to allow an interested witness to keep his or her beneficial share of the estate if he or she could rebut the presumption of undue influence. This created a beneficial interest that was not present under the prior statute. The trial court determined that this newly established beneficial interest made the interested witness a "party in interest" subject to the limitations of the Dead Man's Statute. The result was a new application of the Dead Man's Statute to situations covered by RCW 11.12.160 that effectively invalidated the statute.

As it would not be the intent of the legislature to enact an invalid statute, the court should homogenize RCW 11.12.160 with the Dead Man's Statute, or rule that testimony in proof of a will by an interested witness is, by statute, not subject to the limitations of the Dead Man's Statute. The Estate has failed to respond to this carefully reasoned argument.

3. The Estate has twisted the facts in an attempt to portray Ms. Wolfgram as exploitative of Lt. Col. Vaupel.

In § “C” of the Estate’s “The Restatement of Facts,” the Estate spends significant time focusing on the level of financial support allegedly provided by Lt. Col. Vaupel to Ms. Wolfgram during his lifetime.

Contrary to the Estate’s argument that this somehow shows that Ms. Wolfgram was exploitative, or has already received all the benefit that she deserves, it very strongly demonstrates the clear pattern of love, financial support, and gifting between Lt. Col. Vaupel and Ms. Wolfgram because his gifting began and continued during a period when Lt. Col. Vaupel’s capacity is not in question. It is natural that Lt. Col. Vaupel would want to continue this pattern of support after his death by providing a testamentary gift.

4. The court may consider all of Ms. Wolfgram’s arguments on appeal.

Citing to RAP 2.5 (a) (3), the Estate contends that the arguments made by Ms. Wolfgram concerning the correlation of RCW 5.60.030 with RCW 11.12.160 were not raised before the trial court and are therefore not properly before this court on appeal. Respondent’s Brief at 36. However, this line of argument was properly presented to the trial court, and this issue is a pure question of law which the court will review de novo.

RAP 2.5 (a) (3) refers to failures to make objections or present specific issues at trial, and supports the policy that, in the interests of judicial efficiency, the trial court should address all issues before they reach the appellate courts. The rule does not limit a party from expansions of previously asserted legal arguments. Ms. Wolfgram's discussion regarding the correlation between the two statutes is merely an expansion and clarification of the arguments made to the trial court. At summary judgment, Ms. Wolfgram argued that RCW 11.12.160 permitted her to attest to her signature on the codicil, and that RCW 5.60.030 was inapplicable. Her arguments presented on appeal are merely an expansion and clarification of this previously asserted line of reasoning. The Estate's desperate attempt to prevent the appellate court from considering the argument, and its lack of responsive argument, reveals the weakness of the Estate's legal position.

### **III. CONCLUSION**

A multimillionaire army Colonel who has lived with women all his life is permitted to shape the last dozen years of his life in a manner that gives him pleasure without the pecuniary carping of strangers. The Estate has attempted to confuse the facts and law in an effort to deflect attention from its tenuous arguments in favor of institutional clients who had no relationship with Lt. Col. Vaupel during his life. Contrary to all

contemporary facts contained in the record, the Estate attempts to portray Ms. Wolfgram as a mere housekeeper who financially exploited Lt. Col. Vaupel. This is unsupported by fact and fair reason, as all evidence indicates Lt. Col. Vaupel's strong love for Ms. Wolfgram and his desire to care for her for the remainder of her life.

The primary questions before the court are the admissibility of Lt. Col. Vaupel's codicil, and the degree to which Ms. Wolfgram is entitled to an equitable distribution of property. Any allegations of undue influence and the scope of an equitable division of assets are questions for trial. This court should rule as a matter of law that the attestation is valid or remand to the court to determine a) Lt. Col. Vaupel's intent when he signed the codicil; b) whether he was unduly influenced to sign the codicil; c) whether a CIR existed; and d) what an equitable division should look like given the totality of the circumstances.

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**CERTIFICATE OF SERVICE**

I, CRAIG H. NIM, 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 a temporary employee in the offices of Helsell Fetterman LLP, 1001 4<sup>th</sup> Avenue, Suite 4200, Seattle, WA 98154.
3. In the appellate matter of In re Estate of Warren F. Vaupel, I did on February 13, 2012 (1) cause to be filed with this Court the Appellant's Reply Brief; (2) cause Appellant's Reply Brief to be delivered via legal messenger, to the following recipients: Richard L. Furman Jr, Aiken, St. Louis & Siljeg, P.S., 801 2nd Ave Ste 1200, Seattle, WA 98104-1571; Gail E. Mautner, Dawn S. Spratley, Lane Powell PC, 1420 5<sup>th</sup> Avenue, Ste 4100, Seattle, WA 98101; via Email and US Mail to Colleen G. Warren, Assistant Attorney General, Attorney General of Washington, P. O. Box 40100, Olympia, WA 98504-0100; and via Email to Beth A. McDaniel.

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: February 13, 2012

  
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CRAIG H. NIM