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**NO. 68724-7
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

Estate of Carole S. Christian,)	
)	
Lowell Christian, Appellant,)	King County Cause 10-4-04506-3 KNT
)	
Charles Esposito, Respondent.)	
_____)	

APPELLANT'S REPLY BRIEF

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The Appellant submits this Reply Brief to the Respondent's Brief dated November 15, 2012, and received November 16, 2012.

I. INTRODUCTION

In its Introduction the estate describes an alleged 'mistake' made by the decedent Carole S. Christian. Respondent's brief, P. 1. This is far more than a mistake, it is fraud in the preparation of the document, fraud on this court and fraud on the surviving spouse. It was a statement of fact upon which the decedent expected the court to rely and upon which Julie Codd, the Executor and the court in fact acted. As will be abundantly clear, Carole Christian knew at the time she prepared her Will, for the years after that and within three years of her death that Mr. Christian was alive, well and living in the Puget Sound region. Previously she had sold a home owned by herself and Mr. Christian by forging his name on a deed to convey the house. This is consistent with her desire to defraud Mr. Christian of community property. The trial court's approach to this issue ignores the fact that she had express religious convictions against divorce. She refused to avail herself of the very simple solutions of either a dissolution of marriage or an action for legal separation available in this state. To now call this deliberate action a mistake glosses over what is clearly fraud and endorses the fraudulent act. Deciding that he is dead in her mind does not make him dead. It is unclear what more clear, cogent

and convincing evidence could be provided by Mr. Christian than his appearing in court and testifying.

II. STATEMENT OF THE CASE

The Appellant adopts his previous Statement of the Case contained in his opening brief. While the court found that Ms. Christian was competent at the time she executed her Will, it does not address the issue of her deliberate and intentional act of fraud and its part of a pattern and course of conduct of fraud as to Lowell Christian.

III. ARGUMENT

1. Relying on the Will language that Lowell Christian was dead perpetrates a fraud on the court because no witness produced by the estate had any actual knowledge of or acquaintance with Lowell Christian, the surviving spouse.

The estate refers to testimony received from Charles Esposito, the person who stands to gain the most from this estate. Mr. Esposito claims that he never met Mr. Christian nor did he ever speak with Mr. Christian until they had a brief telephone conversation. RP 45, 71-72. His conversations with Carole Christian were excluded by the court precisely because he stood to gain the most from this Will and the conversations were properly excluded under the Dead Man's Statute, RCW 5.60.030. As for Angela Esposito, she never met Mr. Christian prior to her deposition nor did she ever see any divorce papers in the personal effects

of Ms. Christian. RP 67-69. The lack of divorce or legal separation paperwork corroborates the testimony that Carole Christian consciously decided not to obtain a divorce or legal separation. The estate now claims that Ms. Christian “occasionally” insinuated that Mr. Christian had died or that they had been divorced. In fact Mr. Christian’s testimony was that Carole Christian refused to file for divorce for religious reasons. RP 42: 1-4; 64: 18-25; 65: 1-11. This testimony was strikingly clear through the testimony Roland Schloer. RP 33-34. Mr. Esposito had no knowledge of Mr. Christian and never met him. RP 71-72. He had no basis for concluding that the parties were divorced because he never saw any paperwork. Furthermore, his testimony or his understanding as to the marital status is barred by the Dead Man’s Statute because of the obvious profit he derives from this Will. RP 72: 12-16, RCW 5.60.030.

As for Ms. Esposito, she had no knowledge of Mr. Christian at all. She only met him at her deposition. RP 67-69. The flaw in the estate’s argument and the trial court’s decision is that both Charles and Angela Esposito accepted at face value the Will’s representation that Mr. Christian was deceased. His appearance in court must have been a bad dream for them. The testimony of Lowell Christian that Ms. Christian misidentified him as dead makes this no less fraud. RP 58-59. The estate now concedes that in the unchallenged Findings of Fact demonstrates that

Carole Christian knew Lowell Christian was alive at the time she executed her Will and up until the time of her death. It is simply inconsistent for the court to find that Carole Christian knew Lowell Christian was alive and then go on to say that Angela Esposito could find no evidence that he was alive. The trial court found that Carole Christian knew that Lowell Christian was alive. CP 62: 204-207, Finding No. 12. Whether Angela Esposito found his address or reference to him is immaterial. It is a fraudulent statement upon which the trial court erroneously based its decision.

Mr. Christian testified about a home the parties acquired and owned during marriage and located in Des Moines, Washington. RP 50-51. No countervailing testimony was ever offered. Mr. Christian's testimony stands un rebutted. The fact that the estate does not like the testimony makes it no less true or relevant. Interestingly the estate does not discuss whether the Findings of Fact are inherently contradictory as stated in the Appellant's Opening Brief at pages 18-22. The estate's position is that the trial court made these findings so they must be true regardless of the uncontradicted testimony and the inherently contradictory statements contained in the Findings of Fact and Conclusions of Law. The estate's position is not the law. In State v. Hill, 123 Wn. 2d 641, 647, 870 P.2d 313 (1994), the court addressed the issue of findings of fact. An appellate

court is not required to roll over and accept all findings of fact. As the court stated, 123 Wn. 2d at 647:

“A trial court’s erroneous determination of facts, unsupported by substantial evidence, will not be binding on appeal.”

This is precisely the case here. Finding that Ms. Christian knew that her husband was alive, had taken no steps to divorce him, obtain a legal separation or otherwise dealing with him, coupled with selling a house out from under him, all are supported by substantial evidence. They are entirely consistent with the fraudulent act of declaring him dead. The courts also addressed a determination of whether the evidence clearly preponderates against the findings of fact made by the trial court. In Re: Dand’s Estate, 41 Wn. 2d 158, 162 P.2d 1016 (1952). In this case Mr. Christian committed no fraud and as defined in the Dand Estate, 41 Wn. 2d at 163-64. How the court can determine Ms. Christian’s intent when the only predicate of her alleged disinheritance is that Mr. Christian is dead remains unanswered.

Unlike Marriage of Short which involved the filing of an actual divorce decree, neither party filed for divorce or legal separation. In Re: Marriage of Short, 125 Wn. 2d 865, 890 P.2d 12 (1995). The defunct marriage rule is simply inapplicable here when the unrebutted testimony is that Carole Christian had a religious reason for not filing divorce. As Mr.

Weber said in his treatise, “A spouse is a spouse is a spouse.” K. Weber, 19 Washington Practice: Family and Community Property Law, Sec. 6.16.2, at 114 (West Publishing, St. Paul, MN 1977).

The standard of proof for the trial court is the substantial evidence test, citing McLeary v. State, 173 Wn. 2d 477, 269 P.3d 227 (2012).

McLeary is the Supreme Court’s decision on school funding. Defining substantial evidence the Supreme Court held, 269 P.3d at 245:

Substantial evidence is “defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true.”

The court should have made an award to Lowell Christian. At page 11 of its brief the estate cites In Re: Estate of Elmer, 91 Wash. App. 785, 959 P.2d 701 (1998). Elmer concerned a Will which sought to disinherit a granddaughter of a predeceased child. In discussing these cases, the appellate court awarded property to the granddaughter even though her father had died before the testator. In awarding funds to the granddaughter by representation through her deceased father the Court again stated the public policy of protecting family members who would otherwise inherit under intestacy laws. The court held that the intentions of the testator are viewed at the time of the execution and derive from the Will, 91 Wash. App. at 789. The court went on to reaffirm the strong

public policy of protecting those branches of the family. The court stated,
91 Wash. App at 791; 791-92:

“Strong evidence is required before assuming a testator intended to disinherit a branch of the testator’s family. Lack of clarity will weigh against disinheritance....”

“Where there is room for construction, that mean which favors those who would inherit under the laws of intestacy will be adopted.”

In Re: The Estate of Poli, 27 Wn. 670, 674, 179 P. 2d 704 (1947)

dealt with an award in lieu of homestead that was asserted six years after the Will and was upheld by the court. The Poli court held that homestead allowances and other allowances are favored in law. When these two cases are read together it is apparent that Washington policies support the award of property to family members particularly where there is a lack of clarity or lack of candor, or in this case, a lack of truthfulness in the Will. Those who would take under intestacy are favored and family awards are also favored awards. The trial Court ignored each of these strong public policies in its Findings, Conclusions and Judgment. The trial court should be reversed.

2. The trial court erred when it admitted declarations that added nothing to the language of the Will and prevented any cross examination of the declarants.

The court’s admission of declarations in a trial was error. The Respondent claims that this was a TEDRA action without actually having

served a summons or notice of TEDRA action. RCW11.96A.100. In fact this was a trial of disputed facts. The declarations admitted at trial were done without any demonstration that the witnesses were not available and afforded no opportunity for cross-examination. Using declarations as substantive evidence in a trial deprives Mr. Christian of his right to confront witnesses. The estate had refused to provide any discovery. CP 43 & 48. The estate now concedes that the Will speaks for itself. If it does, the admission of the Julie Codd and Richard Dahlke Declarations was error. If the will is ambiguous or unclear then the Elmer case requires that the evidence, not the wish of Mr. Esposito, controls.

3. The court's determination of a defunct marriage was an error.

Both at trial and here the estate sought to determine that this marriage was defunct. They now claim that is not what they wanted but their briefing and argument all refer to defunct marriages, RP 136-145. This was an intact marriage that was never dissolved by either party. The trial court recognized that living separate and apart does not make a marriage defunct in its statement at RP 144-45. If living separate and apart makes a marriage defunct there is no need for a decree of legal separation, decree of legal separation or temporary orders. Adopting this approach would allow Mr. Esposito or any heir to manipulate the facts as they see

fit and depending what suits their purposes. It ignores the plain language of the dissolution statutes which require a decree in order to dissolve a marriage or alternatively a decree of legal separation to separate the property of the parties. No where does the estate address this or recognize that a companion policy is to require that testators tell the truth in their Wills, protect their family members and not commit fraud. The Estate's position also ignores the public policy of recognizing marriages as intact until some affirmative steps are taken by one of the parties during life to break up a marriage.

The intact status of this marriage was known to Carole Christian and she simply ignored the steps she could have taken to segregate out her property. Carole Christian failed to take any of the following steps to confirm that her marriage was over:

1. Not claim in the Will executed under oath and upon which a court is expected to rely that Mr. Christian was dead;
2. Not make claims to neighbors that Mr. Christian was dead;
3. Commence a dissolution of marriage proceeding;
4. Commence a legal separation proceeding;
5. Arrange an agreement with Mr. Christian as to the status of property;

6. Obtain a waiver from him as to the status of property and not lie to the underlying lenders as to her marital status.

It is interesting that the estate now takes the position that Ms. Christian was competent at the time of the execution of the Will. If she was competent she committed fraud. If she is not committing fraud then the statement that Mr. Christian was dead was either not competent or deliberately fraudulent. The law does not allow a “competent” fraud.

4. The deliberate omission of Lowell Christian from the Will means that the estate is intestate as to him.

The deliberate omission of Mr. Christian makes this estate in that omission of a person for the proposition that neither the pretermitted heir statute nor the omitted spouse statute applies. Let us consider this scenario. This approach treats spouses acquired after the execution of the Will differently from spouses and marriages that occurred prior to the execution of the Will. In other words, the spouse who comes into the picture after the execution of the Will can now claim a portion of the estate because the Will was not revised. However, the estate’s construction would ignore the spouse who actually existed at the time the Will was executed and who was declared dead, not by a coroner, not by a physician but by the testatrix, precluding the spousal claim even though there is clear and convincing evidence that the failure was intentional. In

this case clear and convincing evidence exists through the testimony of Lowell Christian, Roland Schloer and Richard Duicus. None of that testimony was ever rebutted by any witness offered by the estate. They never knew these people existed and Carole Christian perpetuated this fraud intentionally in her Will and in her discussions with others. She perpetuated the fraud intentionally by not listing Mr. Christian. If this court accepts this approach divorce can now be achieved simply by writing something down and having it notarized with no need to observe the troublesome requirements of Title 26. People can now declare themselves divorced. Can they now declare themselves married and create a valid marriage?

This approach also allows testators to omit family members by declaring them dead when in fact they are alive. This certainly would affect minor children, spouses who may be out of the country or on military service, spouses whose employment may take them to another state or who are suffering from a disability or other heirs who naturally benefit from the decedent's estate and would be entitled to benefit under the intestacy laws. The estate cites Peters v. Skalman, 27 Wn. App. 247, 617 P.2d 448 (1980). Their claim is that Carole Christian intended to renounce their marriage and community property. However, Carole Christian never did renounce the marriage. In fact her actions were

precisely opposite as described Lowell Christian. They remained married and when directly confronted with this issue Carole Christian did nothing to change the status quo. See the testimony of Roland Schloer, RP 29-35.

A focus on the nature of the property, whether separate or community, glosses over the fact that the statutory arrangement for intestate distribution applies. Allowing the court to continue this sleight of hand is not the law in Washington. The estate cites In Re: Dand's Estate, 41 Wn. 2d 158, 247 P.2d 1016 (1952). There is no demonstration that Mr. Christian participated in any sort of fraud here. In fact the only fraud perpetrated on the court was that by Carole Christian. Mr. Christian did not unduly influence her or attempt to have her write a Will solely in his favor.

The estate cites White v. White, 33 Wn. App. 364, 655 P.2d 1173 (1982) and In Re: Marriage of Lint, 135 Wn. 2d 518, 957 P.2d 755 (1998). In Marriage of Lint the court described a void marriage due to the lack of solemnization. That case is simply inapplicable here. In the Lint case the decedent was ravaged by cancer and the claimant, Kristin Lint, attempted to obtain property from the estate. Interestingly the Lint case outlines the elements of fraud, 135 Wn. 2d at 533, fn.1:

“The elements of fraud are: (1) representation of an existing fact; (2) materiality of representation; (3) falsity of the representation; (4) knowledge of the falsity or reckless

disregard as to its truth; (5) intent to induce reliance on the representation; (6) ignorance of the falsity; (7) reliance on the truth of the representation; (8) justifiable reliance; and (9) damages.”

Every one of these elements is met by the action of Carole Christian. She represented that Mr. Christian was dead when in fact he was not. Of course this is material. If the estate wants to bootstrap that into a conclusion that Ms. Christian intended to disinherit Mr. Christian, in fact she could have said “I leave Mr. Christian one dollar but no not intend to leave him any of my other property.” What she did do was clearly false . She knew it was false at the time it was executed and at least three years before here death. There was no evidence that she had any facts before her that would lead to the conclusion that Mr. Christian was in fact dead. Given her knowledge it was a reckless disregard for truth. None of the witnesses for the estate testified that they spoke with Mr. Duicus or Mr. Schloer, friends of both of Carole and Lowell Christian. In some ways Mr. Esposito was a willing participant because he ignored the presence of Mr. Christian once he learned of Mr. Christian’s survival. Evidently he made no inquiry as to Mr. Christian even after he learned of his existence. The court is asked to rely on decedent’s statement but the reliance is not justifiable by anyone. The damages to Mr. Christian are that he is now cut out of property in an estate which is intestate as to him.

If he is entitled to half of the separate property his share of the estate is estimated at \$200,000 plus the \$29,000 in the community stock shares. No more clear and convincing evidence could be imagined than the presence and testimony of Mr. Christian at trial. How they can wipe that out of the record remains unexplained.

IV. ATTORNEY FEES

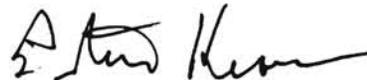
The estate has requested attorney's fees, estate's brief at page 21. If Mr. Christian is successful in his appeal Mr. Christian requests attorney's fees for having to address the issues and obtain redress which was denied by the estate co-executors and the trial court. To do otherwise shifts the entire cost of this onto Mr. Christian for no legal reason. Furthermore, given the conflicts in the evidence and the inability of the estate to articulate reasons for the fraud perpetrated by the testatrix, it cannot be said that Mr. Christian's appeal was frivolous and without merit. At a very minimum this court should deny an award of attorney's fees to the estate and reverse the award of attorney's fees against Mr. Christian.

V. CONCLUSION

In this case the court erred because it construed a Will created by the decedent which on its face states that Lowell Christian is deceased. The estate's position is that all of the Will is correct except for this one little, tiny error. At the same time, they want the court to read the

entire Will. If the entire Will is read then there could be no more substantial evidence than Lowell Christian testifying live in person that he is alive, that they never divorced, and had neither a legal separation nor property settlement agreement. The estate essentially wants to cut out parts of the Will they do not like or that do not support their position. Neither the trial court nor this court can parse in this fashion. The quantum of evidence is against the estate and the decedent on this issue and thus it is a fraud committed on the court. This court cannot turn a blind eye to the fraud regardless of the policy. Even if the policy is to uphold the Will of a testator, it cannot do so at the expense of truth.

RESPECTFULLY SUBMITTED this 13th day of December
2012.



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