

68724-7

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No 68724-7

**IN THE COURT OF APPEALS OF WASHINGTON  
DIVISION I**

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**LOWELL CHRISTIAN**

*Petitioner/Appellant*

**v.**

**ESTATE OF CAROLE STEVENSON CHRISTIAN**

*Respondent.*

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Appeal from King County Superior Court  
Cause No. 10-4-04506-3

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**RESPONDENT'S REPLY BRIEF**

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M. Sadie Sage/WSBA 43006  
Attorney for PRs  
Charles Esposito  
Angela Esposito  
914½ 23<sup>rd</sup> Avenue East  
Seattle, WA 98111  
Tel: 206-595-5275



## TABLE OF CONTENTS

|  |    |
|--|----|
| INTRODUCTION .....   | 1  |
| STATEMENT OF ISSUES .....  | 2  |
| STATEMENT OF THE CASE .....  | 3  |
| A. Background .....  | 3  |
| B. Ms. Christian’s Relationship with Appellant .....   | 3  |
| C. Parties’ Relationships with Others .....  | 5  |
| D. Events Following Ms. Christian’s Death .....  | 5  |
| E. Ms. Christian’s Separate Property .....   | 7  |
| F. Sole Marital Asset .....  | 7  |
| RESPONSE TO RESPONDENT’S STATEMENT OF THE CASE.....  | 9  |
| ARGUMENT.....  | 10 |
| A. Did the Trial Court deny Appellant due process by considering affidavits of two witnesses who were unable to testify in person at trial?..... | 11 |
| B. Did the Trial Court err in finding a defunct marriage between the Appellant and Ms. Christian? .....  | 13 |
| C. Did the Trial Court err when it failed to determine that the estate was intestate as to the Appellant? .....                                  | 14 |
| 1. Valid Will Execution .....  | 14 |
| 2. Omitted Heir Statute Inapplicable .....   | 15 |
| D. Did the Trial Court permit fraud on the court by failing to award community property to the Appellant? .....                                  | 16 |

E. Did the Trial Court tolerate and approve a fraud on the court by failing to award one-half of Ms. Christian’s separate property to the Appellant? .....18

F. Did the Trial Court err in finding the Appellant’s petition frivolous and without merit and awarding the estate attorney’s fees and costs? .....19

G. Was the Appellant’s request for a family allowance properly denied .....19

H. Should respondent be awarded reasonable attorney’s fees and costs incurred on appeal? .....21

CONCLUSION .....21

## TABLE OF AUTHORITIES

### Washington Cases

|   |    |
|---|----|
| <b>In re Dand’s Estate</b> , 41 Wash.2d 158, 247 P.2d 1016 (1952).....                                | 18 |
| <b>In re Estate of Campbell</b> , 87 Wash.App. 506, 942 P.2d 1008 (1997)....                          | 11 |
| <b>In re Estate of Crawford</b> , 107 Wn.2d 493, 502 P.2d 675 (1986).....                             | 20 |
| <b>In re Estate of Elmer</b> , 91 Wash.App. 785, 959 P.2d 701 (1998).....                             | 11 |
| <b>In re Estate of Garwood</b> , 109 Wn. App. 811, 813 (2002).....                                    | 20 |
| <b>In re Estate of Jones</b> , 152 Wash.2d 1, 8, 93 P.3d 147 (2004).....                              | 10 |
| <b>In re Estate of Poli</b> , 27 Wn.2d 670, 674, 179 P.2d 704 (1947).....                             | 20 |
| <b>In re Estate of Riley</b> , 78 Wn.2d 623, 665, 479 P.2d 1 (1970).....                              | 14 |
| <b>In re Estate of Scheldt</b> , 13 Wn.App. 570, 572, 536 P.2d 4 (1975).....                          | 20 |
| <b>In re Marriage of Short</b> , 125 Wn.2d 865, 871, 890 P.2d 12 (1995).....                          | 17 |
| <b>Matter of Estate of Lint</b> , 135 Wash.2d 518, 957 P.2d 755 (1998).....                           | 18 |
| <b>McCleary v. State</b> , 173 Wash.2d 477, 269 P.3d 227 (Wash 2012).....                             | 10 |
| <b>Peters v. Skalman</b> , 27 Wn.App. 247, 252, 617 P.2d 448 (1980).....                              | 17 |
| <b>State ex re. Case v. Superior Court of Grant County</b> , 23 Wn.2d 250<br>(Wash. 1945).....        | 20 |
| <b>State v. Hill</b> , 123 Wash.2d 641, 644, 870 P.2d 313 (1994).....                                 | 10 |
| <b>Sunnyside Valley Irrigation Dist. v. Dickie</b> , 149 Wash.2d 873, 879, 73<br>P.3d 369 (2003)..... | 10 |
| <b>White v. White</b> , 33 Wash.App. 364, 655 P.2d 1173 (1982).....                                   | 18 |

Statutes

RCW 11.02.070 ..... 16

RCW 11.12.010 ..... 14

RCW 11.12.090 ..... 15

RCW 11.12.091 ..... 15

RCW 11.12.095 ..... 15

RCW 11.12.230 ..... 11, 16

RCW 11.20.020 ..... 14

RCW 11.24. 010 ..... 18

RCW 11.54.010 ..... 19, 20

RCW 11.54.040 ..... 20

RCW 11.54.070 ..... 20

RCW 11.96A.100 (7) ..... 12

RCW 11.96A.150 ..... 19

RCW 26.16.140 ..... 17

RCW Ch. 11.96A ..... 12

Miscellaneous

R.A.P. 18.1 ..... 21

## INTRODUCTION

This case arises from an alleged ‘mistake’ made by the decedent, Carole Stevenson Christian (hereinafter referred to as “Ms. Christian”) in drafting her Will and naming her ‘husband,’ the Appellant, Lowell E. Christian (hereinafter referred to as “Lowell” or the “Appellant”) as “deceased” rather than disinheriting him. Overwhelming evidence in the trial record shows that Ms. Christian’s intent was abundantly clear – the Appellant was dead to her. As a result, Ms. Christian drafted her will to intentionally disinherit Lowell and prohibit him from receiving any assets from her estate. This is a fact even the Lowell has not denied.

Not only did Ms. Christian die testate with no statutory exceptions empowering a court to award Lowell a share of her Estate by means of intestate succession, their marriage was ‘defunct’ under Washington law. To give an example of the faulty analysis used in bringing this matter before the trial court and this court, Lowell attempts to rely on the omitted spouse doctrine. However, such statute applies only to marriages that occur after a will is executed, not, as is the case here, to a marriage dating back twenty-four years prior to the Will’s execution.

Other large gaps in Lowell’s argument are discussed below. The record is clear that Ms. Christian died with only one community property asset, proceeds from stock she and Lowell purchased together in 1968 for

which he has admittedly already received his one-half interest. The remaining assets of the Estate were the separate property of Ms. Christian and are, thus, appropriately, distributable to whomever she so desired.

The trial court's decision to dismiss Lowell's Petition and award the Estate a judgment against him for the Estate for attorney's fees and costs should be affirmed.

### **STATEMENT OF ISSUES**

The trial court did not err in dismissing Lowell Christian's petition with prejudice and entering judgment against him. The issues presented by this appeal are appropriately stated as follows:

1. Did the trial court properly find that Ms. Christian died with a valid Will and, consequently, did not die intestate as to Appellant?
2. Did the Appellant prove by clear, cogent and convincing evidence that any community property assets remained in Ms. Christian's Estate?

It will be demonstrated herein that Ms. Christian most definitely died with a validly executed Last Will and Testament and that the Appellant failed to produce any evidence on the record that any community property assets remained in the Estate at the time of Ms. Christian's death.

## **STATEMENT OF THE CASE**

### **A. Background.**

Ms. Christian died on July 10, 2010 with a validly executed Last Will and Testament (“Will”) dated January 16, 1992. Finding 4, 5 and 6 at CP 62, CP 7, Ex. 2, Ex. 8. Ms. Christian’s Will appoints her friend Charles Esposito (“Mr. Esposito”), a Utah resident, as Personal Representative and sole beneficiary of her Estate. Finding 7 at CP 62, CP 3, CP 7, Ex. 8, RP 71. Angela Esposito (“Ms. Esposito”), Mr. Esposito’s daughter, was appointed as co-Personal Representative to manage the Estate locally. CP 9, RP 68, 71, 81. It is undisputed that Ms. Christian was legally competent during the time the Will was executed. Finding 6 at CP 62, Ex. 8.

### **B. Ms. Christian’s Relationship with Lowell.**

Lowell testified that he met Ms. Christian in 1966 and the two married in Reno, Nevada on April 13, 1968. Finding 9 at CP 62, Ex. 1, RP 38. Ms. Christian and Lowell cohabitated for a few years, however, witnesses testified that, when meeting Ms. Christian in or after 1971 she lived alone and held herself out to be single. RP 40, 78, 93-94, 98, 103-104. It is undisputed by Lowell that the parties physically separated in the early 1970s. Finding 10 at 62, RP 39, 40.

Lowell testified that from the time he and Ms. Christian began living separate and apart until the time of Ms. Christian's death he and Ms. Christian spoke, at most, a couple of times a year about 'general life' (RP 40) and even this very limited communication ceased around 1994, approximately sixteen years prior to Ms. Christian's death. RP 41. Lowell also testified that since he began living separate and apart from Ms. Christian neither he nor Ms. Christian offered emotional or financial support to the other and, for that reason, he testified that her death caused no financial hardship on him. RP 64. Lowell agreed that in every other way except for formally dissolving their marriage he and Ms. Christian had ended their union when they began living separate and apart. RP 65.

Witnesses knowing Ms. Christian for the past four decades testified that they were aware that Ms. Christian had been married but never met her 'former spouse' and assumed, as Ms. Christian occasionally insinuated, that he had died or that they had divorced. RP 43, 68, 78-81, 92, 103, 105.

Mr. Esposito testified that he met Ms. Christian in 1971 at Highline Community College where he and Ms. Christian took accounting classes together. RP 92. Ms. Christian held herself out as single and was living alone at this time and throughout the time that Mr. Esposito knew Ms. Christian. RP 78, 93, 98. Similarly, Ms. Esposito testified that she

met Ms. Christian when she was a child in the early-1970s when Ms. Christian would attend parties at her parents' home and she never met or heard of Lowell. RP 78. Richard Dahlke, Ms. Christian's long-time friend and neighbor, correspondingly, testified that he met Ms. Christian in 1976 and never knew her to live with the Lowell. RP 103-104.

**C. Parties' Relationships with Others.**

Ms. Christian held herself out as a single woman since her separation from Lowell over four decades ago. Finding 20 at CP 62, RP 93-94. Lowell testified that he entered into several long-term relationships and has, for the past seventeen (17) years, lived with his girlfriend of eighteen (18) years, Roberta Arehart ("Ms. Arehart"). Finding 22 at CP 62, RP 48, 53-54, 57. Lowell and Ms. Arehart own a home together. RP 52, Ex. 15-16. Lowell represented himself as a single person when he acquired his home with Ms. Arehart. Ex. 15-16. On the deed for this home, Lowell is accurately described as a 'single person.' Ex. 15-16, RP 48, 55, 56.

**D. Events Following Ms. Christian's Death.**

Ms. Christian's Will, drafted in 1992, states that she had been married and that her husband, Lowell, was deceased. Finding 11 at CP 62, CP 7, Ex. 8. As Lowell testified, it is "absolutely" possible that Ms. Christian intentionally stated that he was dead, knowing that he was alive.

RP 58-59. At the time Ms. Christian executed her Will and at the time of her death she knew Lowell was alive. Finding 12 at CP 62. Ms. Esposito, the resident PR, testified that she found no contact information for Lowell among Ms. Christian's personal belongings and, as a result, had no reason to believe that the Lowell was not deceased. RP 81-82.

Lowell testified that he learned that Ms. Christian was deceased in May of 2011, approximately ten (10) months after her death. RP 42, 64. On June 1, 2011 Lowell entered a Notice of Appearance and filed a Special Notice of Proceedings through his attorney Peter Kram. CP 15. In August of 2011 Lowell brought a motion in the Superior Court to be appointed as Personal Representative of Ms. Christian's Estate. Because no community property existed the court denied his motion. CP 20.

Ms. Esposito testified that upon examining files and documents in Ms. Christian's home, in pursuit of her efforts to inventory the Estate, she came across several documents drafted in 1973 by a Seattle law firm. RP 81, 82, 90. Ms. Esposito reviewed these documents and found two interoffice memos, a letter addressed to Ms. Christian, and a draft of a last will and testament. RP 82, 87-89. Ms. Esposito testified at trial as to her interpretation of the documents drafted in 1973. RP 86. She testified that it was her belief that the documents addressed the fact that Ms. Christian had expressed to the Seattle law firm her desire to specifically disinherit

Lowell and prevent him from receiving any portion of her estate. RP 86, 87-89.

**E. Ms. Christian's Separate Property.**

The primary asset in Ms. Christian's Estate is real property that she purchased as a "single woman" in May of 1972 after she and Lowell began living separate and apart. Finding 13, 14, 15 at CP 62, RP 62-63, 96, Ex. 14, 19. Witnesses testified that Ms. Christian purchased the vacant property with proceeds from an inheritance and, later, built a duplex on the property to house her elderly relatives. Finding 14 at CP 62, RP 96. Lowell testified that he does not know what funds were used to finance the purchase or construction of the duplex and that he did not contribute a dime to buy or construct the duplex on the property. Finding 16 at CP 62, RP 61.

**F. Sole Marital Asset.**

The sole marital asset of Ms. Christian and Lowell was Sara Lee Corporation stock purchased in 1968 during their short union. Finding 17 at CP 62, RP 41, 57, Ex. 3, 19. The Appellant presented no evidence regarding the value of the stock at the time it was purchased or in later years. RP 41, 57-58.

In the performance of her duties as co-Personal Representative of the Estate Ms. Esposito learned that \$29,057.85 was being held in Ms.

Christian's name at the Washington State Unclaimed Property Department, representing Ms. Christian's one-half share of the stock proceeds from the Sara Lee Corporation and that the other one-half (\$29,084.81) had been collected by Lowell. RP 45, 47, 57, Ex. 3 19.

Lowell testified that when he collected his one-half share of the Sara Lee stock proceeds he did not tell Ms. Christian that there was approximately \$29,000 being held in her name because he and Ms. Christian had not spoken in approximately fifteen years. RP 48, 57-58. Ms. Christian's one-half interest in the proceeds of the Sara Lee Corporation stock was held in Ms. Christian's name as her separate property until the Estate's Personal Representatives contacted the Unclaimed Properties division for collection. RP 47, 57. A check was received and deposited in the Estate's account in the amount of \$29,057.85. Ex. 19.

## **RESPONSE TO APPELLANT'S STATEMENT OF THE CASE**

Before proceeding with Argument, Respondents wish to address specific statements in the Appellant's Statement of the Case that are inaccurate, misleading and/or contrary to certain unchallenged Findings of Fact.

In the first full paragraph of p. 5 and again on p. 9, paragraph 2 and p. 10, paragraph 1 the Appellant states that he and Ms. Christian owned a home in the Des Moines, Washington area during their marriage, which was later sold without Lowell's knowledge or consent and that Lowell received none of the proceeds from such sale. No testimony or evidence was offered regarding the purchase, purchase price or the sale of such property.

On p. 7, paragraph 1 and on pp. 7, 8 and 10 the Appellant sets forth in his statement of the case arguments better suited for the argument section his brief. These arguments will be addressed by Respondents in Sections A and D of Respondent's argument.

## ARGUMENT

Our Supreme Court has once again reaffirmed the significance of the trial court's findings of fact in *McCleary v. State*, 173 Wash.2d 477, 269 P.3d 227 (Wash. 2012).

### STANDARD OF REVIEW

On review, unchallenged findings of fact are verities on appeal. *In re Estate of Jones*, 152 Wash.2d 1, 8, 93 P.3d 147 (2004) (citing *State v. Hill*, 123 Wash.2d 641, 644, 870 P.2d 313 (1994)). An appellate court will uphold challenged findings of fact and treat the findings as verities on appeal if the findings are supported by substantial evidence. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wash.2d 873, 879, 73 P.3d 369 (2003). Substantial evidence is evidence that is sufficient to persuade a rational, fair-minded person of the trust of the finding. *Id.*

A careful review of the Findings, Conclusions and the Appellant's Assignments of error show that only four of the twenty-four Findings, are being challenged (Findings 2, 18, 23 and 24). Each of the challenged findings were supported with substantial evidence. Lowell's main arguments are legal; they revolve around the application of the omitted heir statute, or whether there existed any community property at the time of Ms. Christian's death.

It is important to remember that 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. RCW 11.12.230. The purpose and duty of the court in construing a will is to give effect to the testator's intent. *In re Estate of Campbell*, 87 Wash.App. 506, 942 P.2d 1008 (1997). Although a will speaks at the time of death, the testator's intentions, as viewed through surrounding circumstances and language, are determined as of the time of the execution of the will. *In re Estate of Elmer*, 91 Wash.App. 785, 959 P.2d 701 (1998). Thus, this case hinges on two primary issues:

- 1) Whether Ms. Christian died with a valid Will; and
- 2) Whether any community property assets remained in Ms. Christian's Estate.

The next several pages will demonstrate that the Appellant's assignments of error are unfounded and that Ms. Christian died with a validly executed Will. Finally, it will be shown that the Lowell failed to produce any evidence on the record that any community property assets remain in the Estate.

**A. Did the Trial Court deny the Appellant due process by considering declarations of two witnesses unable to testify in person at trial?**

The Appellant desires for this court to find that he was denied due process because the trial court considered declarations of two witnesses unable to testify in person at trial, namely: Ms. Julie Codd, Ms. Christian's

former attorney, and Robert Stevenson, Ms. Christians cousin who resides in Canada. Dec. 1 and Dec. 2. at CP 56B.

In Washington, disputes involving trust and estate issues are subject to the Trust and Estate Dispute Resolution Act (RCW Chapter 11.96A (“TEDRA”). In judicial proceedings under TEDRA, the court may take testimony by way of affidavit or declaration. RCW 11.96A.100(7). Declarations were prepared and submitted in proper form for all five of the Estate’s witnesses: Charles Esposito, Angela Esposito, Richard Dahlke, Julie Codd, and Robert Stevenson to ensure that the testimony of each could be presented to the court in the event any of them were unavailable for trial. CP 56B.

Contrary to what the Appellant states in the *Amended and Corrected Brief of Appellant* all five declarations submitted by the Estate were identified in the Estate’s Exhibit List (CP 56B) and all five declarations were provided to the Appellant and filed with the court on August 5, 2011, 4-months prior to trial. CP 32.

Further, contrary to Appellant’s statements in his brief, Appellant had the opportunity to cross examine three of five of the Estate’s witnesses for whom declarations were submitted.

While it is agreed that the Will speaks for itself and is a valid Will the court properly considered testimony and other evidence relevant to issues raised by the Appellant.

Even if the Estate was unable to submit declarations pursuant to TEDRA, the Appellant has in no way been prejudiced by the trial court's consideration of the declarations of Ms. Codd and Mr. Stevenson because there was overwhelming and substantial evidence to support the court's findings without consideration of their declarations.

**B. Did the Trial Court err in finding a defunct marriage between the Appellant and Ms. Christian?**

While the marriage between Ms. Christian and Lowell was in effect defunct, the court did not make a specific finding of a defunct marriage as alleged by the Appellant. What the court found is that Ms. Christian and Lowell lived separate and apart since 1971 and, subsequent to that time, provided no financial or emotional support to one another. Finding 10 at CP 62. Further, the trial court found that Ms. Christian and Lowell's conduct after they separated over four decades ago clearly revealed their mutual acquiescence to end their union. Finding 20 at CP 62.

**C. Did the Trial Court err when it failed to determine that the Estate was intestate as to the Appellant?**

**1. Valid Will Execution.**

Clearly Ms. Christian did not die intestate. Valid will execution requires that the executor be of sound mind and have attained the age of eighteen (18). RCW 11.12.010. The person must also understand the purpose of the Will, know that he or she has property, and intend for that property to pass to those persons who are named. *In re Riley Estate*, 78 Wn.2d 623, 479 P.2d 1 (1970).

Washington has also placed specific requirements on the way in which a will must be prepared to prove its validity. Every will must be in writing and signed by the Testator (or by some other person under this individual's direction and in the person's presence) and must be attested to by two or more competent witnesses. RCW 11.20.020.

It is undisputed that Ms. Christian was competent at the time she executed her Will. Finding 6 at CP 62. Further, Ms. Christian's mind and memory were attested to by two witnesses as "sound and disposing." CP 7. As a result, Ms. Christina died on July 10, 2010 with a validly executed Will and did not die intestate. Finding 4, 5 and 6 at CP 62, CP 7, Ex. 2, Ex. 8.

## **2. Omitted Heir Statute Inapplicable.**

In support of his argument that the court erred in determining the Estate was not intestate, Appellant essentially argues for the court to find that the Appellant was an omitted heir.

The date of death generally governs the applicable law of succession. The pretermitted heir statute, RCW 11.12.090, entitled: "Intestacy as to pretermitted children," was enacted to protect illegitimate children. However, said statute was repealed as of January 1, 1995. Former RCW 11.12.090 read: "If any person makes his last will and dies leaving a child or children not named or provided for in such will, although born after the making of such will or the death of the testator, every such testator, as to such child or children not named or provided for, shall be deemed to die intestate, and entitled to such proportion of the estate of the testator, real and personal, as if he had died intestate, and the same shall be assigned to them, and all the other heirs, devisees and legatees shall refund their proportional part."

The pretermitted heir statute was replaced by RCW 11.12.091 regarding an omitted child and RCW 11.12.095 regarding an omitted spouse. Under Washington's omitted spouse statute, if a will fails to name or provide for a spouse whom the decedent marries after the will's execution and who survives the decedent, the spouse shall receive a

portion of the decedent's estate unless it appears either from the will or from other clear and convincing evidence that the failure was intentional. RCW 11.12.095.

Because Ms. Christian and Lowell married prior to Ms. Christian executing her 1992 Will, the omitted spouse statute is inapplicable and the Lowell is, therefore, not entitled to an intestate share of Ms. Christian's estate. Finding 5 and 9 at CP 62, Ex. 8.

**D. Did the Trial Court permit fraud on the court by failing to award community property to the Appellant?**

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. RCW 11.12.230.

Upon the death of a decedent, a one-half share of any community property shall be confirmed to the surviving spouse, and the other one-half share shall be subject to testamentary disposition by the decedent. RCW 11.02.070. In short, a decedent is free to dispose via a will, all of her separate property and one-half (1/2) of any established community property to whomever she wishes.

When a husband and wife are living separate and apart, their respective earnings and accumulations shall be the separate property of

each. RCW 26.16.140. Further, a “defunct marriage” exists where it can be determined by the spouses’ conduct that they no longer have a will to union. *Peters v. Skalman*, 27 Wn.App. 247, 252, 617 P.2d 448 (1980). The test is whether the parties have exhibited a decision to renounce the community with no intention of continuing the marital relationship. *Id.* at 252-53. Where a spouse acquiesces in the separation, a marriage is considered defunct so that RCW 26.16.140 applies and all property accumulated after the date of separation is considered the separate property of each. *In re Marriage of Short*, 125 Wn.2d 865, 871, 890 P.2d 12 (1995).

Despite the fact the fact that Ms. Christian and Lowell never formally dissolved their marriage, they separated over four decades prior to Ms. Christian’s death and revealed a mutual acquiescence to end their union. Finding 20 at CP 62. As a result, the property accumulated by each after their separation is not community property but, rather, the separate property of each. At the time of Ms. Christian’s death Lowell had already received his one-half share of the only community property asset, his one-half share of the Sara Lee Corporation stock. Finding 17 at CP 62, Ex. 3, 19. As a result, Ms. Christian’s Estate was comprised of entirely separate property assets and she was entitled to leave her entire Estate to whomever she wished. Finding 18 at CP 62.

**E. Did the Trial Court tolerate and approve a fraud on the court by failing to award one-half of Ms. Christian's separate property to the Appellant?**

The Appellant seeks to have this case remanded to the trial court based on fraud in the execution. This argument is without merit.

Fraud in execution (or inducement), as a ground of vitiating a will, consists of willfully false statements of fact other than those relating to the nature of contents of instrument, *made by beneficiary under will* which is thus induced, which are intended to deceive testator, which do deceive testator, which induce testator to make will, and without which he would not have made such will." *In re Dand's Estate*, 41 Wash.2d 158, 247 P.2d 1016 (1952) (*citing* RCW 11.24.010). Only then may a will may be set aside based on grounds of fraud. *Matter of Estate of Lint*, 135 Wash.2d 518, 957 P.2d 755, 763, (1998); *In re Dand's Estate*, 41 Wash.2d 158, 247 P.2d 1016 (1952). In order for a will to be set-aside on the basis that it was procured by fraud, all elements of fraud must be shown by clear, cogent, and convincing evidence. RCW 11.24.010. Only if so proved does the burden shift to the respondent to come forward with sufficient evidence to rebut such presumption. *White v. White*, 33 Wash.App. 364, 655 P.2d 1173 (1982).

Not once piece of evidence has been presented to even suggest a claim of fraud in inducement or execution. To the contrary, it is

undisputed that Ms. Christian's Will was validly executed and that she was competent at the time she executed her Will on January 16, 1992. Finding 5 at CP 62, CP 7.

**F. Did the Trial Court err in finding Appellant's petition frivolous and without merit and awarding the estate attorney's fees and costs?**

Contrary to Appellant's claim, the trial court did not award attorney's fees and costs to the Estate based upon a finding that Appellant's claim was frivolous. Instead, the trial court awarded the Estate reasonable attorney's fees and costs pursuant to RCW 11.96A.150. Under RCW 11.96A.150 the Superior Court may, in its discretion, order attorney fees and costs to be awarded to any party.

The Appellant has no legal or equitable basis upon which attorney's fees should be awarded to him. To the contrary, the trial court properly ordered Lowell to pay the Estate's costs and attorney's fees incurred in upholding Ms. Christian's Will.

**G. Was appellants request for a family allowance properly denied?**

The right to petition for a family allowance during the progress of the settlement of the estate is a statutory right governed by RCW 11.54.010. Only a surviving spouse, or in the absence of a surviving spouse, minor children, may petition for an award of the decedent's

property. RCW 11.54.010. The award, however, must not be inconsistent with the decedent's intentions. RCW 11.54.040.

Traditionally, the purpose of the family support statute has been to protect the homesteader and his dependents in the enjoyment of their residence. *In re Estate of Poli*, 27 Wn.2d 670, 674, 179 P.2d 704 (1947); *In re Estate of Garwood*, 109 Wn. App. 811, 813 (2002). It enables the support and maintenance of families after a death occurs. *In re Estate of Scheldt*, 13 Wn.App. 570, 572, 536 P.2d 4 (1975). The law favors such awards as a matter of right for the protection of the surviving spouse and as a measure of fairness. *In re Estate of Crawford*, 107 Wn.2d 493, 502 P.2d 675 (1986).

The object of the family allowance statute is only to temporarily support those who are dependent upon the decedent for support during the time the estate is being probated. RCW 11.54.070 and *State ex re. Case v. Superior Court of Grant County*, 23 Wn.2d 250 (Wash. 1945).

Ms. Christian and Lowell have not shared a familial home in four decades and Lowell has failed to establish any emotional or financial dependence on Ms. Christian. Findings 10, 20, and 21 at CP 62, RP 64. Accordingly, Lowell was properly denied a family allowance.

**H. Should Respondents be awarded reasonable attorney's fees and costs incurred on appeal?**

R.A.P. 18.1 provides for attorney's fees and costs on appeal to the prevailing party if there is an applicable law granting such right to the prevailing party. As stated above, RCW 11.96A.150 provides that this court may, in its discretion, order costs including reasonable attorney fees to any party and to a decedent's estate if they are deemed the prevailing party on appeal. Respondent, the Estate of Carole Stevenson Christian respectfully requests it be awarded attorney's fees and costs of appeal.

**CONCLUSION**

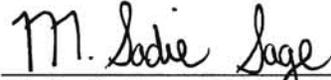
The trial court properly dismissed the Appellant's petition and, for the foregoing reasons, this Court should affirm the trial court's order dismissing Lowell Christian's petition with prejudice.

The evidence is overwhelming that Ms. Christian and Lowell had no remaining community property at the time of Ms. Christian's death and her intent to disinherit Lowell was clear. Absent a bona fide challenge to the Will, Ms. Christian's Will must be accepted as a valid expression of how she intended to leave her separate property Estate and no part of her Will should be vitiated.

Finally, it is requested that this court award respondent reasonable attorney's fees and costs incurred in this appeal. Sustaining the trial

court's decision, without proper allocation of the unfortunate but necessary expenses of this litigation would create an injustice.

Respectfully submitted this 15<sup>th</sup> day of November, 2012.

A handwritten signature in cursive script that reads "M. Sadie Sage".

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M. Sadie Sage, WSBA 43006  
Attorney for PRs, Charles Esposito  
and Angela Esposito  
914½ 23<sup>rd</sup> Avenue East  
Seattle, WA 98112  
Tel: 206-595-5275

**DECLARATION OF SERVICE**

I certify under penalty of perjury that today I mailed, via USPS, a copy of Respondent's Brief to:

Peter Kram  
Kram & Wooster  
1901 South I Street  
Tacoma, WA 98405

  
\_\_\_\_\_  
M. Sadie Sage, WSBA 43006  
Attorney for PRs, Charles Esposito  
and Angela Esposito  
914½ 23<sup>rd</sup> Avenue East  
Seattle, WA 98112  
Tel: 206-595-5275

RECEIVED  
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