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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

No. 29827-2 - III

ESTATE OF EARLE T. KAZMARK & EARLE V. KAZMARK,

Appellants

vs.

CLINTON SHANE KRAG AND JASON S. KAZMARK,

Respondents

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

Notwithstanding the Respondents' characterization of this appeal as the pursuit of a "morally unconscionable claim" (Resp. Br. at 52), the Appellants' identification of trial court error remains valid. In their fifty-two page response brief, the Respondents chaotically attack the Appellants' legal arguments. Respondents also intersperse within their brief unprofessional *ad hominem* attacks on local attorney John Montgomery in attempt to bolster their point of view. (*See, e.g.*, Resp. Br. at 31-33.) The Respondents' arguments fail. The Appellants respectfully requests this Court REVERSE the trial court's findings of fact and conclusions of law and remand this case for dismissal of the Petitioners' Petition Contesting Validity of Will and for Injunctive Relief. (CP 1-6.)

II. ARGUMENT

In reply to the Respondents' various and disjointed arguments¹, the Appellants re-emphasize the following points: (1) the Kazmarks' community property agreement ("CPA") trumps the alleged oral agreement between them to make mutual wills; (2) the language in the Kazmarks'

¹ A minor point concerns the Respondents' erroneous application of the *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 22 (1990) rule regarding consideration of extrinsic evidence when interpreting contracts. (Resp. Br. at 41-42.) While the *Berg* rule applies in general contract cases, it does not apply to the interpretation of ambiguous wills. *See In re Estate of Price*, 73 Wn.App. 745, 754 n.5, 871 P.2d 10 (1994) ("...*Berg v. Hudesman* does not apply to the interpretation of an ambiguous will. Instead, *In re Estate*

2005 wills is inconsistent with the alleged oral agreement to make mutual wills; and (3) the testimony at trial was insufficient to support a finding of mutual wills. In all other material aspects, the Appellants rest on their Opening Brief.

A. The Kazmarks' CPA trumps a prior alleged oral agreement to make mutual wills.

The Kazmarks' executed reciprocal wills and a CPA on October 28, 2005. (CP 234, 246-241, 242-247; Exhibits P7, P8, R101.) The Respondents assert that the Kazmarks "orally agreed that on the death of the first spouse, everything would go to the survivor, and on the death of the second spouse [*sic*] would go 50% to Barbara's son, and 25% would go to each of Earle's two sons." (Resp. Br. at 36.)

The Respondents appear to agree with the Appellants that the Kazmarks' CPA "converted all of Barbara Kazmark's separate property into community property, and provided that on the death of the first spouse, everything went to the other spouse." (Resp. Br. at 37; Exhibit P7.)

When two contracts are in conflict, "the legal effect of a subsequent contract made by the same parties and covering the same subject matter, but containing inconsistent terms, 'is to rescind the earlier

of Bergau, 103 Wn.2d 431, 693 P.2d 703 (1985) controls.")

contract. It becomes a substitute therefor, and is the only agreement between the parties upon the subject.' " *Higgins v. Stafford*, 123 Wn.2d 160, 165, 866 P.2d 31 (1994) (quoting *Bader v. Moore Bldg. Co.*, 94 Wn. 221, 224, 162 P. 8 (1917)).

Although the Respondents seek to diminish the clear effect the Kazmarks' CPA had on an alleged oral agreement to make mutual wills, the plain language of the CPA reveals why the Respondents' argument is incorrect. Any oral contract between the Kazmarks prior to the execution of their CPA in October 2005 was superseded and replaced by the clear and unambiguous language of their CPA – that upon the death of one spouse, the other immediately obtained possession of all property. If the Kazmarks' had another intent regarding the distribution of their property, they obviously abandoned that intent and decided to execute the CPA instead. The Kazmarks' CPA supersedes any alleged oral agreement to make mutual wills. And the Kazmarks never revoked their CPA pursuant to RCW 26.16.120. This Court should reject the Respondents' arguments to the contrary.

B. The Kazmark's 2005 wills are inconsistent with the alleged oral agreement to make mutual wills.

Like the CPA, the plain language of the Kazmarks' October 2005 wills is inconsistent with and supersedes any alleged oral agreement to make mutual wills.

The dispositive provisions of the Kazmarks' 2005 wills are:

III.

Bequest

All the rest, residue and remainder of my estate of every kind, character and description, and wheresoever situate or found, I give, devise and bequeath unto my husband [wife], EARLE T. KAZMARK [BARBARA L. KAZMARK], providing he [she] survives me by thirty days.

[...]

V.

Residual Bequest

In the event that my husband [wife], EARLE T. KAZMARK [BARBARA L. KAZMARK], **does not survive me by thirty (30) days**, I give, devise and bequeath all the rest, residue and remainder of my estate [...] as follows:

[...]

(1) One-half (1/2) of my remaining estate
unto my son, CLINTON SHANE KRAG...

(2) One-half (1/2) of my remaining estate
equally unto my husband's sons, EARLE V.
KAZMARK and JASON S. KAZMARK ...

(CP at 237, 243; P8, R101) (emphasis added).

As stated above, the Respondents assert that the Kazmarks "orally agreed that on the death of the first spouse, everything would go to the survivor, and on the death of the second spouse [*sic*] would go 50% to Barbara's son, and 25% would go to each of Earle's two sons." (Resp. Br. at 36.)

A testator's intentions are determined *as of the time of the execution of the will*. *In re Estate of Bergau*, 103 Wn.2d 431, 436, 693 P.2d 703 (1985); *In re Robinson's Estate*, 46 Wn.2d 298, 300, 280 P.2d 676 (1955); *In re Phillips' Estate*, 193 Wn. 194, 197, 74 P.2d 1015 (1938); *Peiffer v. Old Nat. Bank & Union Trust Co.*, 166 Wn. 1, 4, 6 P.2d 386 (1931); *In re Estate of Sherry*, 158 Wn. App. 69, 76, 240 P.3d 1182 (2010); *In re Estate of Price*, 73 Wn. App. 745, 754, 871 P.2d 1079 (1994).

A mutual will is a will executed pursuant to a contract between the testators as to the manner of the disposition that will occur after both testators are deceased. *See Newell v. Ayers*, 23 Wn. App. 767, 769, 598

P.2d 3 (1979). The court must be persuaded to a "high probability," which is the clear, cogent and convincing evidentiary standard, that the parties entered into such an agreement at the time of the execution of the wills. *Id.*

Here, the residual bequests to contingent beneficiaries in Earle and Barbara's 2005 wills, only became operable if either spouse did not survive the other by thirty days. (CP 238, 244; P8, R101.)

Both Earle and Barbara left their entire estate to the other, conditioned only on survival by 30 days. (CP 237, 243; P8, R101.) Earle survived Barbara by 30 days. The Kazmarks' CPA had an identical effect (a 30-day provision). (CP 234; P7.) The language of the 2005 wills unequivocally conveys the intent of both Earle and Barbara – that upon death of one spouse, the other spouse would own everything. If their true intent was to leave everything to Clinton Shane Krag and Earle, Jr. and Jason Kazmark, this could have easily been effectuated, such as by making them unqualified rather than contingent beneficiaries. However, the Kazmarks chose not to execute such wills. Such an act speaks directly to their intent.

Again, a mutual will is a will executed pursuant to a contract between the testators as to the manner of the disposition that will occur

after both testators are deceased. *See Newell v. Ayers*, 23 Wn. App. 767, 769, 598 P.2d 3 (1979). The facts simply do not establish the elements of mutual wills.

The intent of the Kazmarks' is clear from their 2005 wills. The language clearly articulates their intent at the time they executed their 2005 wills. This manifestation of intent supersedes and replaces any prior oral agreement to make mutual wills. This Court should reject the Respondents' arguments to the contrary.

C. The testimony of witnesses at trial does not support the trial court's conclusion of mutual wills.

It bears repeating that the Respondents' witnesses who testified at trial had no first-hand knowledge of the Kazmarks' intent on October 28, 2005 when they executed their reciprocal wills:

- **Ronald McGuire**: No knowledge of Kazmarks' wills or Kazmarks' intentions until **after** the 2005 wills were executed. (VRP 82-83.) Has never seen the Kazmarks' 2005 wills. (VRP 83.) Did not know about the Kazmarks' CPA. (VRP 83.)
- **Elaine Forster**: Relayed discussion regarding the estate distribution **prior** to Kazmarks' execution of their 2005 wills. (VRP 130-132.) Has never seen the Kazmarks' 2005 wills. (VRP 141.) Was not present at the execution of the Kazmarks 2005 wills. (VRP 147.)

- **Karen McKinney**: Relayed discussion with Barbara Kazmark regarding estate distribution **prior** to the Kazmarks' execution of their 2005 wills. (VRP 263-64; 267.) Has never seen the Kazmarks' 2005 wills. (VRP 268.) Has no knowledge of the Kazmarks' CPA. (VRP 268.)
- **Lynn Sanchez**: Relayed discussion with Barbara Kazmark regarding estate distribution one or two years **after** the Kazmarks executed their 2005 wills. (VRP 280.) Has never seen the Kazmarks' 2005 wills. (VRP 283.) Has never seen a copy of the Kazmarks' CPA. (VRP 283.)
- **Leroy Warner**: Relayed discussion regarding estate distribution over one year **prior** to the Kazmarks' execution of their 2005 wills. (VRP 322, 327.)

This testimony does not prove intent to execute mutual wills and contributes nothing to aid in discerning the intent of the Kazmarks' at the time they executed their wills and CPA on October 28, 2005. The clear, unambiguous language of the 2005 wills provides the most reliable indication of the Kazmarks' intent. The diffuse expressions testified to do not support the existence of an oral contract as they are just as readily explained as an expression of the Kazmarks' **then intentions**, rather than as a recognition of an existing agreement between them. *Cook v. Cook*, 80 Wn.2d 642, 647-48, 497 P.2d 584 (1972). The trial court's findings are

not supported by substantial evidence and, consequently, its conclusion of law regarding the existence of mutual wills is erroneous. Clear, cogent, and convincing evidence of mutual wills is absent from the record.

Additionally, the Kazmarks' attorney John Montgomery testified clearly about the Kazmarks' intent at the time they executed their 2005 wills:

Q. I'm asking about their sense of a contract. Was their only sense of a contract was that on the first death, the spouse got everything.

A. That was the agreement between Barbara and Earle. That upon the death of either, and a survivorship by 30 days, the survivor would take everything.

Q. Okay. And did they have a similar agreement when the second spouse died?

A. I'm not aware of any agreement when the second spouse dies, unless it was within the 30-day period.

(VRP 244.) Mr. Montgomery testified there was no contract between the Kazmarks' to make mutual wills:

What I can do is I can tell you how we go through the community property agreement and how we mirror that in the first paragraph of the will. There's a contract between Barbara and Earle. He who survives takes everything, and there's no contract for a will, and there's no contract for the children to take anything else. Now, I would have made that painfully

clear. And neither Barbara or [sic] Earl are necessarily stupid people. They have been married for a period of time, and that was their contract between them, that whoever survived take all.

(VRP241-242) (quoting deposition testimony of John Montgomery).

The testimony of these witnesses supports only one conclusion – the Kazmarks' executed reciprocal, not mutual wills. The trial court's conclusion that that the Kazmarks intended to execute mutual wills is unfounded. Reversal is therefore warranted.

D. The Respondents misconstrue the Appellants' citation to common law precedent.

The Respondents accuse the Appellants of being "wrong on the law" regarding Washington cases upholding oral contracts to make mutual wills. (See Resp. Br. at 33-35.) Appellants do not dispute that oral contracts to devise or bequeath property or to make mutual wills are enforceable under some circumstances. Appellants contend, however, that the facts of prior cases upholding an oral contract to make mutual wills are distinguishable from the facts in this case. (See Appellants' Opening Br. at 32-33.)

Appellants have found only three² Washington cases in which an oral contract to make mutual wills was found to exist: *Auger v Shideler*, 23

² Respondents cite *Jennings v. D'Hooghe*, 25 Wn.2d 702, 172 P.2d 189 (1946) for the

Wn.2d 505, 161 P.2d 200 (1945); *Cummings v. Sherman*, 16 Wn.2d 88, 132 P.2d 998 (1943); and *In re Fischer's Estate*, 196 Wash. 41, 81 P.2d 836 (1938). Each is distinguishable.

In both *Auger* and *Cummings*, the attorney who drafted the wills testified to specific facts relating to the parties' intention to make mutual wills. In both *Auger* and *Cummings*, the attorney drafter was unequivocal as to the parties' intention to draft mutual wills. As the testimony of attorney John Montgomery reveals, this is not the case here.

While the court found an oral contract to make mutual wills existed in *In re Fischer's Estate*, the wills at issue are strikingly different from the clear general and residual bequests present in the Kazmarks' 2005 wills, reproduced above. *In re Fischer's Estate* involved mutual wills in which "each [spouse] bequeathed and devised to the other his or her entire estate and each appointed the other executrix or executor of their respective wills." *In re Fischer's Estate*, 196 Wash. at 43. There was no contingent beneficiary provision in the Fischers' wills, in contrast to the 30-day survivorship provision in the Kazmarks' 2005 wills. In addition,

proposition that "thirty-seven" other cases have been decided recognizing oral contracts to make wills and/or mutual wills. (Resp. Br. at 33.) However, as the Respondents undoubtedly recognized when reading the *Jennings* opinion, only three of the thirty-seven cases involved mutual wills, and in each of the three cases the court found no mutual wills existed. See *Jennings*, 25 Wn.2d at 713, 716-17 (citing *In re Edwall's Estate*, *McClanahan v. McClanahan*, and *Clark v. Crist*).

the terms of the oral contract between the Fischers were consistent with the provisions of their mutual wills. *Id.* at 43, 49. Here, the terms of the alleged oral contract to make mutual wills is entirely *inconsistent* with the unambiguous terms of the Kazmarks' 2005 CPA and wills. The Fischers also did not execute a written CPA, as the Kazmarks did in this case. *In re Fischer's Estate* is distinguishable and does not support the Respondents' position.

III. CONCLUSION

Based on the foregoing, the Appellants respectfully requests this Court REVERSE the trial court's findings of fact and conclusions of law and remand this case for dismissal of the Petitioners' Petition Contesting Validity of Will and for Injunctive Relief. (CP 1-6.)

DATED this 28th day of February, 2012.

EVANS, CRAVEN & LACKIE, P.S.

By 

EVERETT B. COULTER, JR., #6877

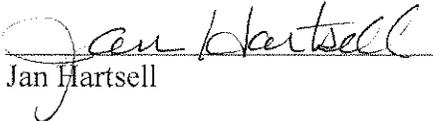
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CERTIFICATE OF SERVICE:

Pursuant to RAP 18.5, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 28th day of February, 2012, the foregoing was delivered to the following persons in manner indicated:

Carl J. Carlson Carlson & Dennett, PS 1601 Fifth Ave., Ste. 2150 Seattle, WA 98101	Via Regular Mail <input checked="" type="checkbox"/> Via Certified Mail <input type="checkbox"/> Via Facsimile 206/621-1151 <input type="checkbox"/> Hand Delivered <input type="checkbox"/>
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