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JAN 09 2012

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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

**AMENDED/CORRECTED
APPELLANTS' OPENING BRIEF**
(Per Commissioner's January 4, 2012 Order)

EVERETT COULTER, WSBA 6877
JERRY P. SCHAROSCH, WSBA 39393
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Attorneys for Appellants

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	IDENTIFICATION OF THE PARTIES.....	2
III.	ASSIGNMENTS OF ERROR.....	2
	A. Assignments of Error	2
	B. Issues related to Assignments of Error.....	5
IV.	STATEMENT OF THE CASE.....	5
V.	ARGUMENT	9
	A. The trial court erred by failing to recognize the legal, binding effect the Kazmarks' CPA had on their property distribution.	10
	B. The trial court erred by considering extrinsic evidence to determine the intent of Earle and Barbara Kazmark in executing their 2005 wills.....	20
	C. The Statute of Frauds applies to mutual wills and invalidates the Kazmarks' purported oral agreement to make mutual wills, as claimed by the Petitioners.	24
	D. The record does not contain substantial evidence under the clear, cogent, and convincing evidentiary standard to support the existence of a separate agreement between Earle and Barbara Kazmark to make mutual wills, and the conclusions of law derived from those findings are therefore erroneous.	28
	E. The trial court impermissibly restricted Earle Kazmark's ability to alter or amend his testamentary dispositions toward his own children through its conclusion that the Kazmarks' 2005 wills were mutual wills.....	35
	F. Attorneys' Fees.....	36
VI.	CONCLUSION.....	38

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Agnew v. Lacey Co-Ply</i> , 33 Wn. App. 283, 654 P.2d 712 (1982).....	11
<i>Allen v. Dillard</i> , 15 Wn.2d 35, 129 P.2d 813 (1942).....	25
<i>Arnold v. Beckman</i> , 74 Wash.2d 836, 447 P.2d 184 (1968).....	30
<i>Auger v. Shideler</i> , 23 Wash.2d 505, 161 P.2d 200 (1945).....	29, 32, 34
<i>Clise v. Scott</i> , 180 Wn. 207, 210, 38 P.2d 1019 (1934).....	19
<i>Cook v. Cook</i> , 80 Wn.2d 642, 497 P.2d 584 (1972).....	26, 32
<i>Crofton v. Bargreen</i> , 53 Wn.2d 243, 332 P.2d 1081 (1958).....	21
<i>Cummings v. Sherman</i> , 16 Wn.2d 88, 132 P.2d 998 (1943).....	25, 32, 34
<i>DewBerry v. George</i> , 115 Wn. App. 351, 62 P.3d 525 (2003).....	27
<i>Dice v. City of Montesano</i> , 131 Wn. App. 675, 128 P.3d 1253 (2006).....	11
<i>Dickson v. Kates</i> , 132 Wn. App. 724, 133 P.3d 498 (2006).....	24
<i>Dragt v. Dragt/DeTray, LLC</i> , 139 Wn. App. 560, 161 P.3d 473 (2007).....	10

<i>Eller v. East Sprague Motors & R.V.'s. Inc.</i> 159 Wn. App. 180, 244 P.3d 447 (2010).....	20, 24
<i>Francis v. Francis,</i> 89 Wn.2d 511, 573 P.2d 369 (1978).....	35
<i>Harris v. Ski Park Farms, Inc.,</i> 120 Wn.2d 727, 844 P.2d 1006 (1993).....	14
<i>Higgins v. Stafford,</i> 123 Wn.2d 160, 866 P.2d 31 (1994).....	16, 17
<i>In re Brown's Estate,</i> 29 Wn.2d 20, 185 P.2d 125 (1947).....	12, 15, 16
<i>In Re Edwall's Estate,</i> 75 Wn. 391, 134 P. 1041 (1913).....	24, 25, 27
<i>In re Estate of Bachmeier,</i> 147 Wn.2d 60, 52 P.3d 22 (2002).....	11, 18
<i>In re Estate of Black,</i> 116 Wn. App. 476, 66 P.3d 670 (2003).....	37
<i>In re Estate of Black,</i> 153 Wash.2d 152, 102 P.3d 796 (2004).....	37
<i>In re Estate of Campbell,</i> 87 Wn. App. 506, 942 P.2d 1008 (1997).....	30
<i>In re Estate of Catto,</i> 88 Wn. App. 522, 944 P.2d 1052 (1997).....	11, 12, 13, 14
<i>In re Estate of Curry,</i> 98 Wn. App. 107, 988 P.2d 505 (1999).....	21
<i>In re Estate of Malloy,</i> 134 Wn.2d 316, 949 P.2d 804 (1998).....	35
<i>In re Estate of Price,</i> 73 Wn. App. 745, 871 P.2d 1079 (1994).....	21

<i>In re Estate of Sherry,</i> 158 Wn. App. 69, 240 P.3d 1182 (2010).....	17, 20, 30
<i>In re Estate of Whittman,</i> 58 Wn.2d 841, 365 P.2d 17 (1961).....	12, 13, 15
<i>In re Marriage of Schweitzer,</i> 132 Wn.2d 318, 937 P.2d 1062 (1997).....	29
<i>Lehrer v. State, Dept. of Social and Health Services,</i> 101 Wn. App. 509, 5 P.3d 722 (2000).....	21
<i>Lyon v. Lyon,</i> 100 Wn.2d 409, 670 P.2d 272 (1983).....	35
<i>Major Prods. Co., Inc. v. Nw. Harvest Prods., Inc.</i> 96 Wn. App. 405, 979 P.2d 905 (1999).....	11, 24
<i>Matter of Estate of Bergau,</i> 103 Wn.2d 431, 693 P.2d 703 (1985).....	20
<i>McLanahan v. McLanahan,</i> 77 Wn. 138, 137 P. 479 (1913).....	25
<i>Newell v. Ayers,</i> 23 Wn. App. 767, 598 P.2d 3 (1979).....	17, 29, 30
<i>Pardee v. Jolly,</i> 163 Wn.2d 558, 182 P.3d 967 (2008).....	29
<i>State v. Athan,</i> 160 Wn.2d 354, 158 P.3d 27 (2007).....	20
<i>Stranberg v. Lasz,</i> 115 Wn. App. 396, 63 P.3d 809 (2003).....	18, 19
<i>Sunnyside Valley Irr. Dist. v. Dickie,</i> 149 Wn.2d 873, 73 P.3d 369 (2003).....	29
<i>Wilkes v. O'Bryan,</i> 98 Wn. App. 411, 989 P.2d 594 (1999).....	17

Wilson Son Ranch, LLC v. Hintz,
162 Wn. App. 297, 253 P.3d 470 (2011).....28

STATUTES

RCW 11.02.005(9).....35
RCW 11.02.07035
RCW 11.12.01035
RCW 11.12.04035
RCW 11.12.23030
RCW 11.96A.15036, 37
RCW 26.16.12012, 16, 17

OTHER AUTHORITIES

RAP 18.1.....37
Reutlinger, Mark & Oltman, William C., *Washington Law of Wills
and Intestate Succession* (1985).....26, 27

I. INTRODUCTION

Intent of the testator is the bedrock upon which the judicial interpretation of wills is grounded. The best indication of intent is the written, clear, and unambiguous language in a will. Such is the case here.

Upset by the amount of their inheritance as dictated by their parents, the Petitioners Clinton Shane Krag and Jason S. Kazmark sought to invalidate a will executed in the absence of fraud, undue influence, or duress. In order to do this, they brought forth several witnesses to contradict the clear language of their parents' prior wills and to undermine the clear effect of their parents' community property agreement. The trial court misapplied the law, an error which allowed it to nullify the intent of the testators and decide the case based on extrinsic evidence. In its apparent zeal to enforce the ostensible intent of Barbara and Earle Kazmark, the trial court ironically and unjustifiably ignored the testamentary intent of Earle Kazmark in changing his will after his wife's death. This disregard of Earle Kazmark's testamentary intent offends equity and supports reversal.

The trial court also entered findings of fact unsupported by substantial clear, cogent, and convincing evidence, and ignored the effect

of a valid community property agreement. This is improper. Preservation of the decedents' intent requires reversal.

II. IDENTIFICATION OF THE PARTIES

The appellants are the Estate of Earle T. Kazmark and Earle V. Kazmark (collectively the "Estate" unless otherwise indicated). The Estate's Personal Representatives are Val Kaspar and George Gow. Earle V. Kazmark is a beneficiary of the Estate. The Respondents are the Petitioners Clinton Shane Krag and Jason S. Kazmark (collectively "Petitioners").

III. ASSIGNMENTS OF ERROR

A. Assignments of Error

The Estate asserts the following assignments of error to the trial court's decision:

- No. 1 – The trial court erred in not recognizing the independent legal validity and enforceability of Barbara and Earle Kazmark's Community Property Agreement.
- No. 2 – The trial court's finding of fact¹ #12 is not supported by substantial evidence under the clear, cogent, and convincing standard of proof.

¹ The trial court's findings of fact and conclusions of law are located at CP 262-269.

- Finding of Fact 12: "The evidence at trial was not just clear, cogent and convincing, but was overwhelming, that prior to meeting with Mr. Montgomery about their wills, Barbara and Earle Kazmark had reached an agreement as to how they would bequeath their estate after both were deceased, and had agreed to make wills to put their agreed-upon dispositions into effect."
- No. 3 – The trial court's finding of fact #17 is not supported by substantial evidence under the clear, cogent, and convincing standard of proof.
 - Finding of Fact 17: "Barbara Kazmark's execution of the Community Property Agreement on October 28, 2005 was consideration for Earle's execution of this October 2005 will."
- No. 4 – The trial court's finding of fact #18 is not supported by substantial evidence under the clear, cogent, and convincing standard of proof.
 - Finding of Fact 18: "The evidence is clear, cogent and convincing that it was Barbara and Earle Kazmark's intent, when they executed their October 2005 wills, to put into

effect their agreement as to how their estate was to be distributed after they both died."

- No. 5 – The trial court's finding of fact #27 is not supported by substantial evidence under the clear, cogent, and convincing standard of proof.
 - Finding of Fact 27: "Upon the death of the second to die, Barbara and Earle's October 2005 wills contained substantially identical provisions: other than \$1 bequests to certain disinherited children, Barbara and Earle both bequeathed a parcel of real property (valued in the Estate's preliminary inventory at \$169,000) to Barbara's son, Shane Krag, and a parcel of real property (valued in the Estate's preliminary inventory at \$185,000) to Earle's son, Earle V. Kazmark, leaving the rest, residue and remainder of their estate 50% to Shane Krag, and 50% to be divided equally between Earle's two sons, Jason Kazmark and Earle V. Kazmark."
- No. 6 – The trial court committed an error of law in entering the following conclusions of law: 1, 3, 4, 5, 6, 7, 8, 9, 10, and 12.

B. Issues related to Assignments of Error

In relation to the foregoing assignments of error, the Estate sets forth the following issues:

1. Did the trial court err failing to recognize the legal, binding effect of the Kazmarks' Community Property Agreement?
2. Did the trial court err by considering extrinsic evidence to determine the intent of Earle T. Kazmark and Barbara L. Kazmark in executing their community property agreement and their 2005 wills?
3. Was there a sufficient quantum of clear, cogent, and convincing evidence to support the trial court's conclusion of law that Earle T. and Barbara L. Kazmark's 2005 wills were mutual wills, supported by an oral agreement between them?
4. Did the trial court's determination that the Kazmarks' 2005 wills were mutual wills improperly infringe upon Earle Kazmark's statutory testamentary freedom?

IV. STATEMENT OF THE CASE

This case stems from simple facts. Earle T. Kazmark and Barbara L. Kazmark² married in 1985. (Clerk's Papers "CP" 263.) Both had

² Appellants may use first names throughout its opening brief for clarity. No disrespect is

children from previous marriages. (CP 263.) Prior to marrying Barbara, Earle had been married to Dixie Lee Kazmark for 20 years, with whom he had three daughters and two sons – Earle, Jr. and Jason Kazmark.³ Prior to marrying Earle, Barbara had three sons, one of whom was Clinton Shane Krag.⁴

Before Barbara married Earle, Barbara inherited three-quarters of her father's estate, which included substantial real estate holdings and other assets. (Verbatim Report of Proceedings "VRP" 99-101.) Barbara brought this separate property to her marriage with Earle. In contrast, Earle brought comparatively little separate property to the marriage. (CP 263.)

In 2005, Earle and Barbara contacted Spokane attorney John Montgomery to draft their wills. (CP 263.) Mr. Montgomery had previously began providing legal services to the Kazmarks in 2002-2003. (VRP 202.) The legal services included real property issues, collection issues, and business matters. (VRP 203.) Mr. Montgomery met with the Kazmarks in October 2005 to discuss the wills. (Exhibit P3; CP 222; VRP

intended. Appellants may also refer to "the Kazmarks" when describing Earle T. and Barbara L. Kazmark collectively.

³ Neither Dixie Kazmark nor Mr. Kazmark's three daughters were involved in the will contest litigation.

167.)⁵ At the meeting, the Kazmarks described how they wanted their estate distributed and the issue of a community property agreement ("CPA") was also discussed. (VRP 167, 168, 171-73; CP 218-220; P1, P2.) Mr. Montgomery then prepared drafts of the wills and the CPA and mailed them to the Kazmarks for review on October 26, 2005. (VRP 167; CP 222; P3.)

After making requested revisions, Mr. Montgomery drafted final versions of the wills. (VRP 176-177.) On October 28, 2005, Earle and Barbara Kazmark executed their wills and the CPA at Mr. Montgomery's office. (CP 234, 246-241, 242-247; P7, R101, P8; Exhibits P7, P8, R101.)

On October 28, 2005, Mr. Montgomery again reviewed and explained the CPA and the wills with the Kazmarks. (VRP 178-180.) Mr. Montgomery fully explained the effect of the CPA to the Kazmarks. (VRP 183, 217.) The Kazmarks never requested Mr. Montgomery to draft mutual wills and there were no indications that a mutual will was necessary. (VRP 193, 215.) The Kazmarks did not advise Mr. Montgomery that they had agreed not to change their wills after execution. (VRP 219.)

4 Barbara's two other sons were not involved in the will contest litigation.

5 Reference to exhibit numbers corresponds to those exhibits admitted by the trial court, which are part of the record. For ease of reference only, citation to all wills and the CPA also references the Clerk's Papers.

The wills executed by the Kazmarks on October 28, 2005 were reciprocal wills, in that upon the death of the one spouse, the entire estate passed directly to the other spouse, conditioned upon a 30-day survival provision. (CP 237, 243; P8, R101.) In the event **neither** spouse survived the other by thirty days, the entire estate of both Earle and Barbara passed to contingent beneficiaries Clinton Shane Krag (50%) and Earle, Jr. and Jason Kazmark (50%). (CP 238, 244; P8, R101.) Nothing in either Barbara's or Earle's will provided any bequest to another individual if the surviving spouse survived the decedent by thirty days. (CP 236-41, 242-47; P8, R101.)

Barbara died in February 2009. (CP 262.) Under the Kazmarks' 2005 wills and CPA, Barbara's entire estate passed to Earle. (CP 265-66.) After Barbara's death, Earle desired to change his will. (VRP 225-26.) Earle asked Mr. Montgomery to draft a new will for him and Earle executed the will on July 14, 2009 ("2009 will"). (VRP 186-187; CP 250-254; P9.) In Earle's 2009 will, the residual bequest went solely to his son Earle V. Kazmark. (CP 251; P9.) In contrast, the residuary in the Kazmarks' 2005 wills went to contingent beneficiaries Clinton Shane Krag (50%) and Earle Jr. and Jason Kazmark (50%). (CP 238, 244; P8, R101.) In both the Kazmarks' 2005 wills and Earle's 2009 will, specific bequests

of improved real property to Earle Jr. and Clinton Shane Krag were identical. (*Cf.* CP 238, 244 *with* CP 251; P8, R101, P9) (bequests of land and houses).

Earle died in late July 2009. (CP 262.) Mr. Montgomery subsequently began probate of Earle's 2009 will. (CP 248-249.)

On October 26, 2009, Petitioners Clinton Shane Krag and Jason S. Kazmark filed a petition contesting the validity of Earle's 2009 will. (CP 1-6.) The Petitioners initially challenged Earle's 2009 will based upon fraud, duress, and undue influence, but subsequently abandoned these claims. (*See* CP 1-6.) The sole ground on which the Petitioners challenged the validity of Earle's 2009 will at trial was that Earle's October 2005 will was specifically enforceable as a mutual will. (CP 266.) After a bench trial, Judge Kathleen O'Connor entered findings of fact and conclusions of law, ultimately invalidating Earle's 2009 will. (CP 262-269.) This appeal follows.

V. ARGUMENT

The trial court's error flows primarily from its disregard of the legal force and effect of Kazmarks' CPA. In the Petitioners' quest to cast the 2005 reciprocal wills of Barbara and Earle Kazmark as mutual wills, the Petitioners brushed aside the Kazmarks' CPA. The trial court similarly

misinterpreted the legal effect of the CPA, which provided it the opportunity to find the existence of mutual wills and to hold that the Kazmarks' alleged oral contract to make mutual wills somehow trumped a valid, enforceable CPA. This legal error also laid the foundation for the trial court's neglect of Earle Kazmark's testamentary intent vis-à-vis his 2009 will.

The trial court's error also stems from its consideration of extrinsic evidence to determine the intent of the Kazmarks in drafting their 2005 wills. Regardless of the admission of such evidence, however, the trial court's conclusion that clear, cogent, and convincing evidence supported the existence of a separate oral agreement between the Kazmarks to make mutual wills is erroneous. The trial court also misapplied the Statute of Frauds to the facts of this case. Reversal is warranted.

A. The trial court erred by failing to recognize the legal, binding effect the Kazmarks' CPA had on their property distribution.

In the proceeding below, the trial court avoided any analysis of the legal consequence of the Kazmarks' CPA. This neglect infected the entire proceeding. The trial court's disregard of the CPA essentially neutralized the effect of the CPA and invalidated its clear provisions. Such judicial intervention, even under the auspices of equity, is improper. *See Dragt v. Dragt/DeTray, LLC*, 139 Wn. App. 560, 573, 161 P.3d 473 (2007) ("A

court cannot, based on general considerations of abstract justice, make a contract for parties that they did not make for themselves."); *Agnew v. Lacey Co-Ply*, 33 Wn. App. 283, 288, 654 P.2d 712 (1982) (a court may not impose obligations which never before existed, or expunge lawful provisions agreed to and negotiated by the parties.)

"Contract interpretation is a question of law only when '(1) the interpretation does not depend on the use of extrinsic evidence, or (2) only one reasonable inference can be drawn from the extrinsic evidence.' " *Dice v. City of Montesano*, 131 Wn. App. 675, 684, 128 P.3d 1253 (2006) (quoting *Tanner Elec. Coop. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996)). The standard of review for questions of law is de novo. *Major Prods. Co., Inc. v. Nw. Harvest Prods., Inc.*, 96 Wn. App. 405, 411, 979 P.2d 905 (1999).

A community property agreement is an enforceable contract and is not governed by laws relating to wills. *In re Estate of Catto*, 88 Wn. App. 522, 526, 944 P.2d 1052 (1997). Courts function to "enforce contracts as drafted by the parties and **not to change the obligations of the contract the parties saw fit to make.**" *In re Estate of Bachmeier*, 147 Wn.2d 60, 68, 52 P.3d 22 (2002) (emphasis added).

On October 28, 2005, Earle and Barbara Kazmark executed a CPA that converted all property into community property, and further provided at the first death all property vested in the survivor in fee simple, subject to a 30-day survivorship provision. (CP 234, 265; P7.)

A CPA is a creation of statute, specifically RCW 26.16.120. *See In Re Estate of Catto*, 88 Wn. App. 522, 526, 944 P.2d 1052 (1997). RCW 26.16.120 and the Kazmarks' CPA allowed Earle and Barbara Kazmark to agree regarding the status of the property they currently owned and the disposition of their property at the first death. A CPA is an enforceable contract and the contract is completely executed at the death of a party to the contract. *See In re Estate of Catto*, 88 Wn. App. at 526; *In re Estate of Whittman*, 58 Wn.2d 841, 843, 365 P.2d 17 (1961); *In re Brown's Estate*, 29 Wn.2d 20, 185 P.2d 125 (1947).

RCW 26.16.120 provides in pertinent part:

... But such agreement may be made at any time by both spouses or domestic partners by the execution of an instrument in writing under their hands and seals, and be witnessed, acknowledged and certified in the same manner as deeds to real estate are required to be, under the laws of the state, **and the same may at any time thereafter be altered or amended in the same manner.** (emphasis added)

The statute provides that a CPA must be in writing, executed by husband and wife or current domestic partners under their hands and seals, and witnessed and acknowledged in the same manner as a deed for real estate. The statute also clearly dictates that a CPA must be "altered or amended in the same manner." The *In re Estate of Catto* court pointed out that a CPA, such as the Kazmarks' CPA, was like other contracts and is effective until it is rescinded or presumably amended or altered pursuant to the contract formality requirements. *In re Estate of Catto*, 88 Wn. App. at 527-28; *In re Estate of Whittman*, 58 Wn.2d at 843, 365 P.2d 17 (1961).

By asserting that the Kazmarks' 2005 wills were mutual wills pursuant to a separate oral contract, the Petitioners tacitly implied that the CPA was somehow orally amended by the Kazmarks. Amendments to the CPA are, by statute, required to be in writing, under seal, witnessed, acknowledged and certified in the same manner as a deed. There is no evidence in the record that the Kazmarks' CPA was so modified in writing. Further, an amendment or change to a CPA, like rescission of a CPA, requires an objective showing of mutual assent to the amendment. *See In re Estate of Catto* 88 Wn. App. at 527 (citing *In Re Estate of Lyman*, 7 Wn. App. 945, 949, 503 P.2d 1127 (1972)). No such mutual assent exists in the record.

The holding in *In re Estate of Catto* sets forth the legal authority that the rules of contract construction apply to CPAs. *In re Estate of Catto*, 88 Wn. App. at 528 (citing *In Re: Estate of Wahl*, 31 Wn. App. 815, 644 P.2d 1215 (1982)). The court's focus and obligation in construing a CPA is to put into effect the mutual intent of the parties' to the CPA. *See Harris v. Ski Park Farms, Inc.*, 120 Wn.2d 727, 742, 844 P.2d 1006 (1993). The rules for construction of a written CPA require a review of the written document and objective manifestations from the written agreement and/or the context in which the CPA was executed. *See In re Estate of Catto*, 88 Wn. App. at 528.

The proffered extrinsic evidence regarding the alleged oral agreement between Earle and Barbara Kazmark and their 2005 wills does not address the issue of whether or not they had some oral agreement to amend their CPA. In fact, the witnesses testified that they did not know of the Kazmarks' CPA. *See* Section D., *infra*. This is for good reason in that a change to the CPA, by statute, shall be in the same manner, namely in writing, as per execution of a deed. To accept the Petitioners' tacit assertion with respect to amendment of the CPA is to accept an argument that Earle and Barbara Kazmark executed the CPA with some secret agreement that invalidates the clear contract language of the agreement.

The Kazmarks' CPA is a valid enforceable contract, which exists independently from (but is complementary to) the Kazmarks' 2005 wills.

In addition to the foregoing, the CPA controls any conflicts between the Kazmarks' 2005 wills and the CPA. On October 28, 2005, Earle and Barbara Kazmark executed the CPA and reciprocal wills. As outlined above, the reciprocal wills had a survivorship provision wherein Earle had to survive Barbara by thirty days prior to the bequests taking effect. The CPA was effective upon death and transferred fee title and interest of all property to Earle Kazmark, subject only to the 30-day survivorship provision.

When a CPA and a will conflict, the CPA controls. *See In Re Estate of Whitman*, 58 Wn.2d 841, 365 P.2d 17 (1961); *In Re Brown's Estate*, 29 Wn.2d 20, 185 P.2d 125 (1947). *In re Estate of Whittman* involved a will probate and then the subsequent discovery and production of a CPA. *In re Estate of Whittman*, 58 Wn.2d at 842-43. The CPA had been executed a number of years prior to a will. *Id.* at 842. The court found there had been no rescission, revocation or amendment to the CPA and therefore the CPA controlled over a subsequent will. *Id.* at 845.

The court in *In Re Brown's Estate* addressed a similar issue wherein there had been a CPA and then a subsequent will that conflicted

with the CPA. The court reiterated the rule that a CPA was a contract between spouses and absent compelling evidence there was no finding of a rescission; thus, the CPA controlled over the will. *In Re Brown's Estate*, 29 Wn.2d at 29.

Additional authority is found in *Higgins v. Stafford*, 123 Wn.2d 160, 866 P.2d 31 (1994). This case dealt with a husband and wife executing a CPA and then later in time executing mutual wills. The issue was whether the conduct of the husband and wife constituted a rescission, not an amendment, of the prior CPA. *Higgins*, 123 Wn.2d at 164-165. The court found that there was sufficient evidence of rescission. *Id.* at 169-172. The court reiterated that RCW 26.16.120 provides the method by which a CPA may be altered or amended: "in the same manner at any time thereafter be altered or amended in the same manner." *Id.* at 165. The court focused on the fact that the statute did not address a rescission and then reiterated the rule that a CPA was a contract between the husband and wife and that **when contracts are in conflict, the legal effect of a subsequent contract made by the same parties and dealing with the same subject matter, but containing inconsistent terms, has the effect of rescinding the earlier contract, making the later contract the substitute for the earlier contract.** *See id* at 165, 166.

It cannot be over-emphasized that Petitioners' position is that Earle and Barbara executed mutual wills pursuant to a contract or agreement and that the contract or agreement was oral. The Estate denies the existence of the oral contract for mutual wills. Rather, on October 28, 2005, Earle and Barbara Kazmark entered into a contract, which was in writing – the CPA. Stated another way, in order for the 2005 wills to be mutual wills, they had to be subject to a written, binding, enforceable contract, and Petitioners readily argued the contract was oral. **The claimed oral contract for execution of mutual wills directly conflicts with the written CPA**, and as the *Higgins* court notes at page 165, 166, the subsequent contract controls and **the CPA in this case controls**. *Accord Wilkes v. O'Bryan*, 98 Wn. App. 411, 414-415, 989 P.2d 594 (1999) (stating "a CPA is a will substitute which allows a husband and wife to contract for the automatic vesting at death of their community property in the survivor without court administration.").

The paramount intent of a testator is that which existed **at the time of execution**. *See Newell v. Ayers*, 23 Wn. App. 767, 769, 598 P.2d 3 (1979); *In re Estate of Sherry*, 158 Wn. App. 69, 76, 240 P.3d 1182 (2010) (intent at the time of execution is paramount). Mutual wills cannot be supported through an alleged oral contract which has been affirmatively

superseded by a written, unambiguous CPA and unambiguous reciprocal wills executed subsequent to such an oral contract. The CPA controls the Kazmarks' estate distribution.

In *In Re Estate of Bachmeier*, 147 Wn.2d 60, 52 P.3d 22 (2002), the Washington Supreme Court faced a situation where a husband and wife had had executed a CPA. Some 21 years later, the parties separated and the wife executed a new will inconsistent with the terms of the CPA. *Id.* at 62-63. The wife then died and the question was whether there was an implied termination of the CPA. *Id.* at 63. The court rejected the argument that the CPA could be terminated by implication. *Id.* at 69. The court analyzed whether the CPA had been rescinded by mutual assent and found that there was not a rescission by mutual assent, nor was the CPA mutually abandoned.

In the more recent case of *Stranberg v. Lasz*, 115 Wn. App. 396, 63 P.3d 809 (2003), the Court of Appeals was faced with a married couple who had executed a CPA and then subsequently executed wills. The court found that there was no conflict between the earlier CPA and the subsequent will and therefore rescission was not appropriate. *Id.* at 404. The court reiterated the trial court's duty when interpreting a will, which is to determine the intent of the testator, and that such intent is to be garnered

from the language of the will itself unless there is a need to permit extrinsic evidence because there is a conflict or an ambiguity. *Id.* at 404, 405.

The foregoing authority supports the conclusion that no agreement existed between the Kazmarks to alter, amend, or rescind their 2005 CPA and that their reciprocal wills have no effect on the property distribution effected through the CPA upon Barbara's death. The Kazmarks' 2005 wills are consistent with their CPA. In stark contrast, **the ostensible oral contract to make mutual wills directly conflicts with the CPA and the plain language of the 2005 wills.** Insofar as a conflict is deemed to exist between the alleged oral contract to make mutual wills and the CPA, the CPA governs, as it was executed later in time and is in writing. *Clise v. Scott*, 180 Wn. 207, 210, 38 P.2d 1019 (1934) ("The execution of a contract in writing is deemed to supersede all the oral negotiations or stipulations concerning its terms and subject matter which preceded or accompanied the execution of the instrument, in the absence of accident, fraud, or mistake of fact...."). The trial court erred by failing to recognize the legal, binding effect of the Kazmarks' CPA. Reversal is warranted.

B. The trial court erred by considering extrinsic evidence to determine the intent of Earle and Barbara Kazmark in executing their 2005 wills.

Appellate courts review a trial court's decision to admit evidence for abuse of discretion and will not overturn the trial court's decision unless it was manifestly unreasonable or based on untenable grounds. *State v. Athan*, 160 Wn.2d 354, 382, 158 P.3d 27 (2007). Failing to apply the correct rule of law is an abuse of discretion. *Eller v. East Sprague Motors & R.V.'s, Inc.*, 159 Wn. App. 180, 189, 244 P.3d 447 (2010). The interpretation of a will is a question of law reviewed de novo. *In re Estate of Sherry*, 158 Wn. App. 69, 76, 240 P.3d 1182 (2010).

The paramount duty of the court is to give effect to the testator's intent when the will was executed. *In re Estate of Sherry*, 158 Wn. App. 69, 76, 240 P.3d 1182 (2010). If possible, the court must determine the testator's intent from the language of the will as a whole. *Id.*

"When upon a reading of the will in its entirety any uncertainty arises as to the testator's true intention, it is well accepted that extrinsic facts and circumstances may be admitted for the purpose of explaining **the language of the will.**" *Matter of Estate of Bergau*, 103 Wn.2d 431, 436, 693 P.2d 703 (1985) (emphasis added). *See also In re Estate of Sherry*, 158 Wn. App. 69, 82, 240 P.3d 1182 (2010) (If there is ambiguity as to the

testator's intent, extrinsic facts are admissible to explain the language in the will). However, extrinsic evidence may not be considered " 'for the purpose of proving intention as an independent fact, or of importing into the will an intention not expressed therein.' " *In re Estate of Curry*, 98 Wn. App. 107, 113, 988 P.2d 505 (1999) (quoting *In re Estate of Patton*, 6 Wn. App. 464, 467-68, 494 P.2d 238 (1972)). A court cannot read into a writing an ambiguity where none exists. *See Crofton v. Bargreen*, 53 Wn.2d 243, 251, 332 P.2d 1081 (1958); *Lehrer v. State, Dept. of Social and Health Services*, 101 Wn. App. 509, 515, 5 P.3d 722 (2000).

Before extrinsic evidence may be admitted to explain language in a will, an ambiguity must be one of three types: (1) latent—an ambiguity not apparent on the face of the document but apparent when applying the will to the facts as they exist; (2) patent—apparent on the face of the will; (3) equivocation—accurate description that applies equally to two or more people with the same name or things of the same description. *In re Estate of Price*, 73 Wn. App. 745, 754, 871 P.2d 1079 (1994) (citing *In re Estate of Bergau*, 103 Wn.2d 431, 436-37, 693 P.2d 703 (1985)).

Here the language of the Kazmarks' reciprocal wills could not be clearer. The relevant provision of the Kazmarks' 2005 wills states:

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.

(CP at 237, 243; P8, R101.) 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.) The Kazmarks' CPA had an identical effect. (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.

The Petitioners vigorously asserted that the 2005 wills were mutual wills because this was the only arguable method to disregard the Kazmarks' clear intent. Through their case-in-chief, the Petitioners paraded several of the Kazmarks' friends before the trial court to testify about an alleged oral "agreement" between the Kazmarks to dispose of their estate equally between Petitioners Clinton Shane Krag (50%) and Earle Kazmark, Jr. and Jason S. Kazmark (50%). (*See* VRP 75-76 – Ronald McGuire; VRP 131-132 – Elaine Forster; VRP 263-264 – Karen McKinney; VRP 279-280 – Lynn Sanchez; VRP 321-322 – Leroy Warner.) The trial court admitted this extrinsic evidence in spite of the unambiguous language in the Kazmarks' 2005 wills leaving the entire estate to the surviving spouse. The trial court impermissibly determined ambiguity existed in the Kazmarks' 2005 wills based upon diffuse statements of an alleged oral agreement. The intent of the Kazmarks in executing their 2005 wills, taken in conjunction with the CPA, is manifest from the plain language of the documents. The Petitioners' proffered extrinsic evidence may not be used to import into the 2005 wills an intention which was not expressed therein. The trial court's consideration of this evidence was an error of law and therefore was an abuse of

discretion. *Eller v. East Sprague Motors & R.V.'s, Inc.*, 159 Wn. App. 180, 189, 244 P.3d 447 (2010).

C. The Statute of Frauds applies to mutual wills and invalidates the Kazmarks' purported oral agreement to make mutual wills, as claimed by the Petitioners.

Even if the trial court did not abuse its discretion in admitting the extrinsic evidence cited above, any ostensible oral agreement between the Kazmarks regarding mutual wills was invalid under the Statute of Frauds.

Whether an agreement violates the statute of frauds is a question of law. *Dickson v. Kates*, 132 Wn. App. 724, 733, 133 P.3d 498 (2006). Thus, review is de novo. *Major Prods. Co., Inc. v. Nw. Harvest Prods., Inc.*, 96 Wn. App. 405, 411, 979 P.2d 905 (1999).

The Petitioners relied upon a claimed oral agreement between Earle and Barbara Kazmark to support the assertion that their 2005 wills were mutual wills. The estate documents, including the 2005 wills, Earle's 2009 will, and the Inventory of the Estate⁶ show that real property is a substantial portion of the Kazmarks' estate. Mutual wills involving real property are subject to the Statute of Frauds, which requires such a contract to be in writing. In the case of *In Re Edwall's Estate*, 75 Wn. 391, 134 P. 1041 (1913), the court concluded mutual wills were within the

⁶ See Petitioner's Exhibit 10.

Statute of Frauds and a court is not to recognize evidence that violates the Statute of Frauds. The rule in the *In re Edwall* case was reiterated shortly thereafter in *McLanahan v. McLanahan*, 77 Wn. 138, 137 P. 479 (1913), where the court held:

In that case (*In Re Estate of Edwall*) we held that the oral agreement was within the statute of frauds and was void, and that there was no part performance, and therefore affirm the judgment of the lower court.

In *Allen v. Dillard*, 15 Wn.2d 35, 129 P.2d 813 (1942), the court clearly and succinctly stated at pages 50, 51:

This court has definitely held that an agreement to make mutual wills is within the statute of frauds, if real property is involved, or real and personal property. **We have also held that the making of mutual wills is not sufficient performance to take the agreement without the statute of frauds**, in the absence of any other consideration. We have also definitely fixed the quantum of proof required to establish such a contract.

(Emphasis added.)

In *Cummings v. Sherman*, 16 Wn.2d 88, 132 P.2d 998 (1943), the Washington Supreme Court reviewed a case involving an alleged oral contract between a husband and wife to make a mutual will. The court held that an oral contract for execution of mutual wills was within the

Statute of Frauds and because the contract was oral and there was lacking part performance, the contract was void and unenforceable.

As recently as 1972, the Washington Supreme Court has held an oral agreement to contract for a will is subject to the Statute of Frauds. The court held thus in *Cook v. Cook*, 80 Wn.2d 642, 497 P.2d 584 (1972). The court noted that oral agreements to devise may be recognized, although not favored, and are **regarded with strong suspicion and enforced only upon the most compelling evidence.** *Cook*, 80 Wn.2d at 644. The court addressed the issue of the Statute of Frauds as follows:

To establish the agreement and to remove it from the operation of the statute of frauds, claimants must prove that (1) decedent agreed to will or leave claimant certain property; (2) the service or other performances contemplated as consideration for the agreement were actually performed; and (3) the services or acts were performed in reliance upon the contract.

Cook v. Cook, 80 Wn.2d at 644-45

Below, the Petitioners argued the Statute of Frauds is not applicable. Petitioners cited a treatise by Reutlinger, Mark & Oltman, William C., *Washington Law of Wills and Intestate Succession* (1985) as authority for their argument. The authors of this treatise indicate "generally will contracts involve real property, and are for that reason

within the statute." *Id.* at 292 (citing *In Re Fischer's Estate*, 196 Wn. 41 (1938); *In Re Edwall's Estate*, 75 Wn. 391, 397 (1913)). The authors go further and indicate:

Where the statute of frauds is involved, the mere making of the mutual wills is not sufficient part performance to remove it from the statute.

Id. at 306 (citing *Allen v. Dillard*, 15 Wn.2d 35, 129 P.2d 813 (1942)).

In this case, Petitioners claim there was an oral agreement between Earle and Barbara Kazmark to leave all their property, both real and personal, to the **contingent** beneficiaries in their 2005 wills. Outside the claimed diffuse oral statements to acquaintances, there is no writing evidencing this agreement. Therefore, no agreement existed by operation of the Statute of Frauds.

The trial court erroneously determined that there was "sufficient part performance of Barbara and Earle Kazmark's agreement as to the distribution of their estate, and the agreement to make wills putting that agreement into effect, to satisfy the Statute of Frauds." (CP 267) There is not sufficient evidence in the record to support this conclusion, especially under the clear, cogent, and convincing evidentiary standard.

The Petitioners failed to establish the partial performance exception to the Statute of Frauds below. *See DewBerry v. George*, 115

Wn. App. 351, 361-62, 62 P.3d 525 (2003) (doctrine of part performance of oral contracts requires (1) proof of a contract by clear, cogent, and convincing evidence, and (2) that the acts relied upon as constituting part performance must unmistakably point to the existence of the claimed agreement). The extrinsic evidence relied upon by the trial court does not satisfy the doctrine of partial performance because it directly contradicts the stated, express intent of the Kazmarks as manifested by their CPA and their 2005 wills. The act of the Kazmarks in executing their 2005 wills does not point to an alleged oral agreement for mutual wills. Instead, it, as well as the CPA, points in the opposite direction – that the surviving spouse acquires clear title to all property. The trial court's determination that the Statute of Frauds was satisfied is contrary to Washington law and the facts.

D. The record does not contain substantial evidence under the clear, cogent, and convincing evidentiary standard to support the existence of a separate agreement between Earle and Barbara Kazmark to make mutual wills, and the conclusions of law derived from those findings are therefore erroneous.

Findings of fact are reviewed under a substantial evidence standard, which requires that there be a sufficient quantum of evidence in the record to persuade a reasonable person that a finding of fact is true. *Wilson Son Ranch, LLC v. Hintz*, 162 Wn. App. 297, 253 P.3d 470 (2011).

However, substantial evidence must be “highly probable” where the standard of proof in the trial court is clear, cogent, and convincing evidence. *In re Marriage of Schweitzer*, 132 Wn.2d 318, 329, 937 P.2d 1062 (1997). If substantial evidence supports a finding of fact, an appellate court should not substitute its judgment for that of the trial court. *Pardee v. Jolly*, 163 Wn.2d 558, 566, 182 P.3d 967 (2008). Questions of law and conclusions of law are reviewed de novo. *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

The four findings of fact which underlie the trial court's conclusion of law that the Kazmarks' 2005 wills were mutual wills are: #12, 17, 18, and 27. (CP 264, 266, 267.) 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.*

Intent at the time of execution is the crucial factor in mutual wills. *See Auger v. Shideler*, 23 Wash.2d 505, 161 P.2d 200 (1945) (clear evidence of husband and wife's intent to make mutual wills at time of

execution was dispositive of the existence of mutual wills); *Arnold v. Beckman*, 74 Wash.2d 836, 447 P.2d 184 (1968) (insufficient evidence of intent to make mutual wills at the time of execution resulted in the conclusion that mutual wills did not exist). The intent at the time of execution regarding mutual wills is logical and is also consistent with the general rule that Washington courts must give effect to the testator's intent at the time of execution. RCW 11.12.230; *In re Estate of Campbell*, 87 Wn. App. 506, 510, 942 P.2d 1008 (1997).

As outlined above, the Petitioners rely solely on the testimony of the Kazmarks' acquaintances to support their contention that the Kazmarks had executed mutual wills. This testimony does not rise to the "highly probable" level of proof, especially when viewed in juxtaposition to the clear language of the Kazmarks' 2005 wills and their CPA. The testimony elicited from the Petitioners' witnesses is diffuse and does not illuminate an intent by the Kazmarks', at the time of execution on October 28, 2005, to execute wills which contained a binding contract provision not to revoke or change the wills. *See Newell v. Ayers*, 23 Wn. App. 767, 769, 598 P.2d 3 (1979); *In re Estate of Sherry*, 158 Wn. App. 69, 76, 240 P.3d 1182 (2010) (intent at the time of execution is paramount).

The Petitioners' witnesses 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 necessarily 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.

As far as the Estate can discern, only two Washington cases exist which support the proposition that mutual wills can arise from oral contracts: *Auger v Shideler*, 23 Wn.2d 505, 161 P.2d 200 (1945) and *Cummings v. Sherman*, 16 Wn.2d 88, 132 P.2d 998 (1943). In both cases, 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. This is not the case here.

Mr. Montgomery, the attorney who drafted the Kazmarks' 2005 wills and CPA, was in the best position to know their intentions. Mr. Montgomery testified clearly at trial that the Kazmarks recognized the CPA as a contract and that upon the death of either, the survivor would take everything, conditioned only upon the 30-day survivorship clause. (VRP 243-244.) They similarly recognized this disposition as the effect of their 2005 wills. (VRP 235.) There was no contract between Earle and Barbara to make mutual wills. (VRP 235, 244.) When pressed by the Petitioners' attorney, Mr. Montgomery unequivocally denied the existence of a contract between the Kazmarks to draft mutual 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.)

Similarly, the Kazmarks fully understood the import of the distribution of their estate through their 2005 wills and their CPA:

Q. But you didn't say mutual will to them because they didn't say mutual will to you; is that right?

A. They were very clear that by signing a community property agreement, that upon the death of one, the survivor would take the property. They were clear in the expression in their will that upon the death of one, the survivor would take everything. And the children were not in the picture under that scenario under that factual setting.

(VRP 234-35.) Unlike in *Auger* and *Cummings*, Mr. Montgomery, the attorney drafter, was unequivocal that the Kazmarks **did not** intend to draft mutual wills. None of the Petitioners' five witnesses were present with the Kazmarks and Mr. Montgomery at the time of execution on October 28, 2005. Their testimony as to the Kazmarks' intent is both unhelpful and unpersuasive. The trial court's finding regarding the existence of a separate oral agreement between the Earle and Barbara Kazmark to make mutual wills is not supported by clear, cogent, and convincing evidence.

E. The trial court impermissibly restricted Earle Kazmark's ability to alter or amend his testamentary dispositions toward his own children through its conclusion that the Kazmarks' 2005 wills were mutual wills.

Testamentary freedom encompasses one's right to dispose of his or her property, upon death, according to the dictates of his or her own desires. *In re Estate of Malloy*, 134 Wn.2d 316, 321, 949 P.2d 804 (1998).

The right of testamentary freedom is a statutory right. *Id.* Washington's Legislature has determined that the right of testamentary freedom includes the right to make a will, the right to change a will, and the right to revoke a will. *See* RCW 11.12.010, RCW 11.02.005(9), RCW 11.12.040.

Earle Kazmark had an absolute and unqualified right to dispose as he saw fit his one-half share of the community property after Barbara's death. RCW 11.02.070 ("...upon the death of a decedent, a one-half share of the community property shall be confirmed to the surviving spouse..."); *Francis v. Francis*, 89 Wn.2d 511, 516, 573 P.2d 369 (1978) ("the fundamental principles of community property law dictate that each spouse should upon his or her death have the right to dispose of his or her one-half interest in [...] community property"); *Lyon v. Lyon*, 100 Wn.2d 409, 414, 670 P.2d 272 (1983) (The deceased spouse's half interest in community property is subject to testamentary disposition).

In this case, Earle and Barbara had a blended marriage, each having children from previous marriages. The record reveals Earle Kazmark's ability to determine the devises and bequests to his children. (CP 219-220; CP 244; P2, R101; VRP 171-172.) In fact, Earle Kazmark indicated to Mr. Montgomery that his two daughters were not to take under his 2005 will. (VRP 172.)

After Barbara's death, Earle desired to exercise his testamentary freedom and change the testamentary bequests to his two daughters and his two sons. He effectuated this desire through his 2009 will. (*Cf.* CP 244 – dispositions in Earle's 2005 will *with* CP 251 – dispositions in Earle's 2009 will; R101, P9). It was Earle's statutory right and sole prerogative to change his testamentary dispositions to his children. When the trial court erroneously determined the Kazmarks' 2005 wills to be mutual wills, it automatically invalidated Earle's 2009 testamentary intent and unjustifiably restricted Earle's testamentary freedom. The trial court's error also unjustifiably abrogated Earle's "fundamental" right to dispose of his one-half interest in the community property. This error constitutes an additional reason supporting reversal.

F. Attorneys' Fees

RCW 11.96A.150 provides in part,

(1) Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings.

Below, the trial court entered an order approving attorneys' fees. (CP 273-74.) Where both parties in a will contest advance reasonable and good faith arguments in support of their respective positions, the court may order costs and fees to be chargeable against the estate, so that all the contesting parties bear the costs of the proceedings. *In re Estate of Black*, 116 Wn. App. 476, 491, 66 P.3d 670 (2003). Fees may be awarded to both parties where all of the beneficiaries are involved and where the litigation affects the rights of all the beneficiaries. *In re Estate of Black*, 153 Wash.2d 152, 173-174, 102 P.3d 796 (2004).

Here, all the beneficiaries were involved in the litigation. This appeal benefits the Estate because it will establish the final wishes of Earle Kazmark and establish which alleged beneficiaries have a right to his estate. *See id.* Pursuant to RCW 11.96A.150 and RAP 18.1, the Appellants and the Estate's Personal Representatives request an award of attorneys' fees against the Estate, for those fees incurred in the prosecution of this appeal.

VI. 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 9th day of January, 2012.

EVANS, CRAVEN & LACKIE, P.S.



By _____
EVERETT B. COULTER, JR., #6877

JERRY P. SCHAROSCH, #39393

Attorneys for Appellants

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 9th day of January, 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 [] Via Facsimile 206/621-1151 [] Hand Delivered []
Robert B. Crary Crary, Clark & Domanico, P.S. E. 9417 Trent Ave. Spokane, WA 99206-4285	Via Regular Mail [] Via Certified Mail [] Via Facsimile 924-7771 [] Hand Delivered <input checked="" type="checkbox"/>
Joseph Nappi, Jr. Ewing Anderson, P.S. 522 W Riverside, Suite 800 Spokane, WA 99201-0519	Via Regular Mail [] Via Certified Mail [] Via Facsimile 838-4906 [] Hand Delivered <input checked="" type="checkbox"/>
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Jan Hartsell