

FILED

JAN 30 2012

**COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____**

298272

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

GEORGE GOW, VAL KASPAR and
EARLE V. KAZMARK
Appellants

And

THE ESTATE OF EARLE T. KAZMARK,
CLINTON SHANE KRAG and JASON KAZMARK
Respondents.

RESPONDENTS' BRIEF

1601 Fifth Avenue, Suite 2150
Seattle, WA 98101-1686
(206) 621-1111

CARLSON & DENNETT, P.S.

CARL J. CARLSON
Attorneys for Respondents, Clinton
Shane Krag and Jason Kazmark

ORIGINAL

FILED

JAN 30 2012

**COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON**
By _____

298272

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

GEORGE GOW, VAL KASPAR and
EARLE V. KAZMARK
Appellants

And

THE ESTATE OF EARLE T. KAZMARK,
CLINTON SHANE KRAG and JASON KAZMARK
Respondents.

RESPONDENTS' BRIEF

1601 Fifth Avenue, Suite 2150
Seattle, WA 98101-1686
(206) 621-1111

CARLSON & DENNETT, P.S.

CARL J. CARLSON
Attorneys for Respondents, Clinton
Shane Krag and Jason Kazmark

ORIGINAL

Table of Contents

	Page
I. STATEMENT OF ISSUES	1
II. STATEMENT OF THE CASE.....	2
A. Introduction and Overview.	2
B. Response to Appellants’ Statement of Facts.....	3
1. Incorrect identification of parties.....	3
2. Misleading reference to “parents.”	4
3. Mischaracterization of trial court’s actions below.....	5
4. Appellants misrepresent basic facts.....	5
C. Respondents’ Statement of Facts.....	6
1. Barbara and Earle Kazmark.....	6
2. Barbara’s son, Shane, and his family.....	7
3. Appellant Earle Kazmark, Jr.’s family.	8
4. Events leading up to execution of 2005 wills.	9
5. Barbara and Earle’s agreement on how to dispose of thir estate when both had passed away.....	10
6. Execution of Kazmarks’ 2005 Wills.....	11
7. Barbara’s 2009 death; Earle’s new will.....	15
8. Trial and trial court’s rulings.	16
III. ARGUMENT.....	17
A. The Law of Mutual Wills.....	17
1. Definitions—reciprocal wills, mutual wills.....	17
2. Contractual nature of mutual wills.....	18
3. The elements necessary to prove mutual wills are all questions of fact.....	19
4. Burden of Proof.....	20
B. The Trial Court’s Conclusions of Law are Supported by Its Findings of Fact Support.	21

C.	The Trial Court’s Findings of Fact are Supported by Substantial Evidence.	23
1.	The trial court’s Findings of Fact Nos. 12 and 13, that Mr. and Mrs. Kazmark had Reached an Agreement as to the Disposition of their Estate, are Supported by Substantial Evidence.....	23
2.	The Trial Court’s FF No. 18 (Kazmarks intended October 2005 wills to put agreement on disposition of estate into effect) is supported by substantial evidence.	27
3.	The trial court’s Finding of Fact No. 17, that Barbara Kazmark gave consideration for Earle Kazmark’s 2005 will, is supported by substantial evidence.....	29
4.	Barbara died after the Kazmarks executed their 2005 wills.	29
5.	The surviving testator received benefits from the parties’ agreement.....	30
6.	John Montgomery testimony.	30
D.	Appellants Frequently Are Wrong On the Law.....	33
E.	The trial court did not “fail to recognize the legal, binding effect the Kazmarks’ CPA had on their property distribution,” or “avoid analyzing the legal consequence of the Kazmarks’ CPA.” ...	35
1.	There is no conflict between the Kazmarks’ agreement on the disposition of their estate and their subsequent 2005 wills or CPA.....	36
2.	Even if there were some conflict—which there isn’t—the trial court could readily construe the Kazmarks’ agreements to fully effect both the CPA and the 2005 wills.....	37
3.	There is no issue about whether the Kazmarks’ oral agreement on the disposition of their estate “amended,” “rescinded,” or “altered” their subsequent CPA.	38
4.	Appellants confuse the facts and obscure the issues.....	39
5.	Appellants misstate the law on the relationship between community property agreements and other documents.	40
F.	The Trial Court did not Err in Considering the Circumstances Surrounding the Kazmarks’ Execution of their Wills.....	41

1.	Courts are to consider the circumstances surrounding the execution of a contract when determining the parties' intent.	41
2.	The trial court properly considered the circumstances surrounding the Kazmarks' execution of their 2005 wills....	42
3.	No ambiguity in the language of the 2005 wills was necessary in order for the trial court to consider the circumstances surrounding its execution.	44
G.	Statute of Frauds.	46
1.	Appellants fail to seriously challenge Conclusion of Law No. 4.....	46
2.	The trial court's Conclusion of Law No. 4 is supported by the court's Findings of Fact.	47
H.	The Court Should Award Respondents Their Attorney's Fees on Appeal	469

Table of Authorities

Cases	Page
<i>Alexander v. Lewes</i> , 104 Wash. 32 (1918).....	48
<i>Allen v. Dillard</i> , 15 Wn.2d 35 (1942).....	19, 46, 47
<i>Arnold v. Beckman</i> , 74 Wn.2d 836 (1968).....	20, 26, 34
<i>Auger v. Shideler</i> , 23 Wn.2d 505 (1945).....	19, 27
<i>Berg v. Hudesman</i> , 115 Wn.2d 657 (1990).....	41
<i>Cook v. Cook</i> , 80 Wn.2d 642 (1972).....	20
<i>Cummings v. Sherman</i> , 16 Wn.2d 88 (1943).....	26, 45, 47
<i>Estate of Fischer</i> , 196 Wash. 41 (1938).....	34
<i>Estate of Richardson</i> , 11 Wn. App. 758 (1974).....	17, 20
<i>Estate of Soesbe</i> , 58 Wn.2d 634 (1961).....	20
<i>Estate of Young</i> , 40 Wn.2d 582, 585 (1952).....	29
<i>Estates of Wahl</i> , 31 Wn. App. 815 (1982).....	38, 41, 42
<i>Estates of Wahl</i> , 99 Wn. 2d 828 (1983).....	38
<i>Henderson Homes, Inc. v. City of Bothell</i> , 124 Wn.2d 240 (1994).....	23
<i>Higgins v. Stafford</i> , 123 Wn.2d 160 (1994).....	40
<i>In re Estate of Black</i> , 116 Wn. App. 476 (2003).....	49
<i>Jennings v. D'Hooghe</i> , 25 Wn.2d 702 (1946).....	18, 33
<i>Lynch v. Higley</i> , 8 Wn. App. 903 (1973).....	43
<i>Mut. of Enumclaw Ins. Co. v. USF Ins. Co.</i> , 164 Wn.2d 411 (2008).....	41
<i>Newell v. Ayers</i> , 23 Wn. App. 767 (1979).....	17, 20
<i>Platts v. Arney</i> , 46 Wn.2d 122 (1955).....	38, 48
<i>Prince v. Prince</i> , 64 Wash. 552 (1911).....	19
<i>Rowe v. Vaagen Bros. Lumber, Inc.</i> , 100 Wn. App. 268 (2000).....	20
<i>Stranberg v. Lasz</i> , 115 Wn. App. 396 (2003).....	38
 Statutes	
RCW 11.96A.150.....	49
 Treatises	
Reutlinger, Mark and Oltman, William C., <i>Washington Law of Wills and Intestate Succession</i> (Butterworths, 1985, supp.1994) . .	17, 18, 19, 46

I. STATEMENT OF ISSUES

A. Did Barbara and Earle Kazmark have an agreement, when they executed reciprocal, wills in 2005, as to the disposition of their estate when both had died?

B. Did Barbara and Earle Kazmark intend, when they executed wills in 2005, to put their agreement as to the disposition of their estate into effect?

C. Did Barbara Kazmark give consideration to Earle Kazmark for his execution of his 2005 reciprocal will?

D. Were Barbara and Earle Kazmark's 2005 wills mutual wills?

E. Did the trial court err in considering the circumstances surrounding Barbara and Earle Kazmark's execution of their 2005 wills, or was the court limited to considering the four corners of the document in determining the testators' intent?

F. Did the trial court err in concluding that there was sufficient part performance of Barbara and Earle Kazmark's agreement as to the distribution of their estate to satisfy the Statute of Frauds?

II. STATEMENT OF THE CASE

A. Introduction and Overview.

Barbara Kazmark was wealthy, and Earle Kazmark had very few assets, when they met in 1980 and subsequently married several years later. They both had children by prior marriages, and none together. Barbara and Earle executed wills for the first time in October 2005. Barbara's assets, consisting largely of real estate, had generally retained their separate character, and when they prepared those wills most of their assets were Barbara's separate property.

It is undisputed that, before executing their 2005 wills, Barbara and Earle discussed between themselves disposing of their estate by giving a house to Barbara's son, Respondent Clinton Shane Krag ("Shane"), and another house to Earle's son, Appellant Earle V. Kazmark ("Earle Jr."), leaving everything to the other on the first death, and on the second death leaving the estate 50% to Barbara's son and 25% to each of Earle's two sons, Earle Jr. and Respondent Jason Kazmark. They then executed wills with those provisions.¹ The key question in this case is whether—as found by the trial court—Barbara and Earle had reached an *agreement* on this

¹ They also signed a community property agreement (CPA) at the same time, which immediately converted Barbara's separate property into community property

disposition of their estate, which they intended to put into effect when they executed those wills.

Barbara died in February 2009. Her entire estate went to Earle.² Just five months later, in July 2009, Earle changed *his* will to leave everything to Earle Jr. Earle died 9 days later. Earle Jr. had his father's 2009 will admitted to probate, and claimed the entire estate.

Earle's other son, Jason, and Barbara's son, Shane, commenced this action, contending that Barbara and Earle's 2005 wills were mutual wills which the survivor could not change after the death of the first spouse. Following a two day trial, Judge Kathleen O'Connor agreed, revoked the probate of Earle's 2009 will, revoked the authority of the co-personal representatives appointed under that will (George Gow and Val Kaspar), admitted Earle's 2005 will to probate, and appointed a new personal representative, Joseph Nappi, for the Estate. Earle Jr. and Messrs. Gow and Kaspar appealed.

B. Response to Appellants' Statement of Facts.

1. Incorrect identification of parties. Appellants misstate their status in this appeal, and confusingly refuse to use the correct terminology

² That is, most of Barbara's estate. Earle did not probate Barbara's will before he died. The CPA was not effective to transfer property in Idaho and Arizona which the Kazmarks owned. Following trial and the appointment of a

for referring to parties in an appeal. Appellants captioned their Notice of Appeal “*Estate of Earle T. Kazmark. . . , Appellants. vs. Clinton Shane Krag and Jason S. Kazmark.*” But the Estate is clearly not an appellant. The Clerk of this Court notified the parties of the correct alignment of the parties on appeal (Clerk’s letter dated April 14, 2011):

We have considered George Gow, Val Kaspar and Earle V. Kazmark as the appellants in this case and the Estate of Earle T. Kazmark, Jason Kazmark and Shane Krag are all considered respondents to the appeal.

Appellants ignored the Clerk’s direction, and identify the Estate as the appellant: “The *appellants* are the *Estate* of Earle T. Kazmark and Earle V. Kazmark”. Brief, at 2. They misrepresent that “The Estate's Personal Representatives are Val Kaspar and George Gow.” *Ibid.*

They confusingly refer to Shane Krag and Jason Kazmark throughout their Brief as “Petitioners” instead of Respondents, and to themselves as “the Estate” instead of “Appellants.”

2. Misleading reference to “parents.” Appellants add to the confusion early on by describing the genesis of this case as, “upset by the amount of their inheritance as dictated by *their parents*, Petitioners sought to invalidate a will. . . .” (Appeal Brief, at 1.) Respondents are not upset

new personal representative, ancillary probates were established in those states to transfer those additional assets into Earle’s name.

with what their *parents* did. It was what Earle Kazmark Sr., alone did, after one of those parents died.

3. Mischaracterization of trial court's actions below.

Appellants incorrectly represent that that “the trial court *avoided any analysis* of the legal consequence of the Kazmarks' CPA,” which “disregard” “neutralized its effect.” Appeal Brief, at 11. In fact, Judge O'Connor addressed the CPA repeatedly in her Findings of Fact (Nos. 14-17, 19-22, 24, 26, 28) and Conclusions of Law (Nos. 2, 3, and 7) (CP 262-269), and in her oral ruling very clearly explained her analysis of the legal consequences of the CPA. RP 67-69. The trial court did not disregard, or fail to analyze the effect of, the Kazmarks' CPA. Appellants ignore, and don't even try to address, the trial court's analysis.

4. Appellants misrepresent basic facts. Appellants complain that the trial court admitted testimony from Respondents' witnesses “about an alleged oral ‘agreement’ between the Kazmarks” to split their estate 50/50 between their children, contradicting the “unambiguous language in the Kazmarks' 2005 wills leaving the entire estate to the surviving spouse.” Brief, at 23. This is an inexcusable misrepresentation. Respondents' witnesses uniformly testified that Mr. and Mrs. Kazmark reached an agreement to leave the entire estate *to the surviving spouse* on the first death, then split it 50/50 between their two

sides of the family on the second death. Their 2005 wills provide for exactly the same thing. There was no “contradiction.”

C. Respondents’ Statement of Facts.

1. Barbara and Earle Kazmark. Earle Kazmark was married for 20 years and had 3 girls and 2 boys, before meeting Barbara Kazmark. Earle owned a tire shop in Deer Park, then became a maintenance man for the Deer Park school district, and finally was superintendent of the district’s bus garage. RP 1, 34/24-39/3. Around 1979 he and his wife bought a small tavern in Usk, which Earle ran. RP 35/9-13; 36/5-7. Earle left his wife and family around 1981, and was estranged from his 3 daughters after that (RP 1, 33/13-34/21; 40/18-24) but remained in contact with his two sons, Earle, Jr. and Jason.

Barbara Kazmark’s father was a real estate developer, and owned a substantial estate at the time of his death around 1978. Finding of Fact (“FF”) No. 3;³ RP 98/18-102/1. Between 1978-1980 Barbara inherited 75% of her father’s estate. FF 4. In 1980, she moved from Western Washington to Usk, Washington, where she bought a 60 acre ranch. FF 3; RP 102/22-103/15. Barbara had three sons by her first marriage, all of

³ The trial court’s findings and conclusions are located at CP 267-269. All Findings of Fact are undisputed except Nos. 12, 17, 18 and 27.

whom were grown by the time of the events at issue. One died in 1994, and she was estranged from another. RP 96/13-97/20.

Barbara met Earle in Usk around 1980. They married in 1985. FF 6. Barbara had a substantial amount of separate property when they married, while Earle “had relatively very little.” FF 8. None of their children lived with them after they met, and they had none together. FF 7.

2. Barbara’s son, Shane, and his family. Barbara’s third son, Shane, lived with his wife, Chris, and their daughter, Chelcie, in Deer Park. RP 105/17-106/11. Barbara was very close to Shane and Chris (RP 69/23-71/6; 106/13-23; 262/2-8; 278/24-279/18). She was the witness (and only person present) at their wedding. RP 111/25-112/5. “She thought the world of Chris,” (RP 1, 70/18-24), and called on Chris for assistance when she was sick. RP 1, 70/24-71/6; RP 1, 279/2-6. Elaine Forester testified.

Barbara was very close to Shane. It was—I think she was estranged from one son. She had lost one son, it was like the tragedy that had happened in her life with her other two children, made her really understand or draw closer or remain close to Shane. She was very devoted to Shane. She looked at Chris as the daughter she never had. RP 1, 127/19-25. . . .

Barbara was especially fond of Shane and Chris’ daughter, Chelcie. RP 71/7-23; 108/11- 111/4; 326/4-9; she was in the room with Chris and Shane when Chelcie was born (RP 109/1-5 RP I),

and chose the spelling of Chelcie's name (108/11-25). Barbara "adored" Chelcie." RP 1, 129/1-3. She attended Chelcie's birthdays and school events (RP 1, 71/7-23), got together with Chelcie on holidays (RP 109/1-111/4) and had special Christmas traditions with Chelcie. *Ibid.* "It was like Chelcie was the light of her life." (Elaine Forster, RP 128/20-129/4.) Barbara had considerable jewelry, including a "magnificent" diamond ring (RP 1, 129/4-110), appraised at about \$13,000-14,000 (RP 1, 76/6-25). She wanted her jewelry to go to Chris, and then ultimately to Chelcie (RP 76/6-77/19; RP 261/22-262/1; RP 1, 129/11-16; RP 1, 326/4-21).

3. Appellant Earle Kazmark, Jr.'s family. On the other hand, neither Barbara nor Earle had much contact with Appellant Earle Jr. In the 27-28 years Barbara and Earle were married, Earle Jr. got together with them just *once* for Thanksgiving or Christmas (he couldn't recall which). RP 1, 40/25-41/15. Neither Barbara nor Earle attended either of Earle Jr.'s two weddings (RP 1, 41/18-42/22), nor the weddings of any of his three stepdaughters. RP 1, 43/1-6. Barbara saw Earle's daughter, Heather, who was about 18 when Barbara died, only about once a year (RP 1, 41/7-42/5), and attended just one of her birthday parties. Asked at trial if he knew of any reason Barbara would want to leave 25% of her

estate to him, Earle Jr. testified, "I sure don't." RP 1, 47/20-22. But he seeks in this appeal to get all of her estate.

4. Events leading up to execution of 2005 wills. Prior to October 2005 Barbara and Earle Kazmark talked with a number of their closest friends about the need to prepare wills, which some of them had not yet done. RP 1, 321/25-322/10; RP 1, 279/23-280/4.

Karen McKinney, best friends with Barbara ever since they went to school together in Everett at age 12 (RP 251/8-18; RP 260/18-23), testified that she had encouraged Barbara to make a will since Barbara and Earle had separate families. RP 260/24-261/8; 270/8-23. Several witnesses testified that Barbara said she wanted to provide for, and protect, Shane and his family in her will. Lynn Sanchez had known Barbara since 1994, and they had become "fast friends." She and Barbara operated a gift and antique shop together for about 4 ½ years (RP 275/18-276/21), and they remained "really, really, close" after that, with an "almost sister-like relationship". RP 278/6-16. Ms. Sanchez testified,

Q. Did Barbara ever talk with you about her and Earl's wills?

A. Well, you know, she would talk about how she wanted to have her property taken care of at different times. . . . and *she always talked about wanting to protect Shane and Shane's family, because Shane's health wasn't always the best. And she always talked about that.* 279/23-280/8:

Elaine Forster's husband, Jack, was friends with Earle Kazmark since the two of them were high school freshmen. Earle lived with Jack's family for a time. RP 123/17-124/1. In 1989, shortly after she and Jack married, Ms. Forster met Barbara and Earle, and the two couples became very close friends. RP 124/4-127/13. Ms. Forster testified that Barbara

told me at one point that she went through some real financial difficulties before she had inherited from her father, and *she never wanted Shane or Shane's family to suffer some of those financial problems. She wanted to protect them financially, she wanted them secure.* She told me at one point that Shane had been diagnosed with some illness and so he had some health issues. And she never wanted Shane to go without because at some point he may become seriously ill and be unable to support his family. RP 1, 127/25-128/11.

See also Ms McKinney's testimony at RP 264/12-20 and 267/5-16.

5. Barbara and Earle's agreement on how to dispose of their estate when both had passed away. The linchpin of mutual wills is the existence of an agreement between testators on how they will dispose of their estate when both have passed away. *See infra*, at 17-19.

Multiple witnesses testified that Barbara and/or Earle told them they had reached such an agreement. Elaine Forster testified that, "one year in October, prior to their departure for Arizona," Barbara and Earle came to her and Jack's house, and asked if she would agree to be named the personal

representative in wills that they were preparing to execute. RP 1, 130/9-15.

Ms. Forster testified that Barbara and Earle said they had discussed, and agreed on, how they were going to dispose of their estate when both had passed away:

Well, what they told me was that they'd finally gotten around to working on their wills. And they had discussed all the details and *pretty much had everything worked out*. . . . RP 1, 130/19-22.

Basically the whole discussion about what was in their will was that *they had agreed* to divide their estate basically in the same manner that Barbara's parents had divided their estate. . . . RP 1, 131/18-21.

Mr. and Mr. Kazmark told Ms. Forster that on the first death, the entire estate would pass to the other (RP 1, 144/10-19) then,

because they had—each had children from a prior marriage, they had decided they would basically divide the estate in the same manner. What they told me was 50% of the estate would be left to Shane, and the remaining 50% would be divided between Earl's boys. . . . They both talked about—*they both talked about how they had discussed this and were in agreement*. . . .RP 1, 132/1-13.

The testimony of multiple other witnesses corroborating Ms.

Forster's testimony about an agreement presented in the Argument section, below.

6. Execution of Kazmarks' 2005 Wills. In October, 2005, after meeting with Jack and Elaine Forster, Mr. and Mrs. Kazmark asked attorney John Montgomery to prepare wills for them. FF 9. Mr.

Montgomery's practice emphasized real estate, but he also had a broad general practice and handled the preparation of simple wills (without tax implications). RP 154/1-155/21. The Kazmarks hadn't discussed wills with Mr. Montgomery before he met with them (RP 162/4-8). They were in a hurry to leave for Arizona, and wanted to just give him the information for their wills over the phone (RP 162/9-21), but he insisted that they come in, in person.

The Kazmarks did not ask Mr. Montgomery for a CPA when they came in. He testified, "I don't know if they knew what it was, quite frankly," but he brought the subject up because that was his standard practice "when there's a long-term marriage." RP 168/11-25. When he brought it up, the Kazmarks were interested because, apparently, it avoided the need for a probate on the first death, and also they liked the resulting privacy. RP 169/1-14; 114/22-225/6.

The Kazmarks' meeting with Mr. Montgomery was cursory. Other than the community property agreement, and addressing the specific terms to be in the wills, there was little discussion about anything. Mr. Montgomery explained that with Barbara and Earle, he didn't ask questions—they told him what to do, and he did it:

Other than explaining to them exactly what happened with the community property agreement, there was no other estate planning discussion, was

there? There was no discussion about taxes, or you didn't give them any counseling about trusts or about any other alternatives that they might do?

A. That's exactly true. But I have to explain my relationship with Mr. and Mrs. Kazmark. And very seldom was I able to tell them what to do, they told me what to do. And particularly Mr. Kazmark.

RP 188/8-18. The trial court found, in undisputed FF No. 13 that "Mr. Montgomery did not have any conversation with Mr. or Mrs. Kazmark about mutual wills, or the distinction between reciprocal wills and mutual wills."

Mr. Montgomery didn't determine whether the Kazmarks had prior wills. RP 165/10-15. He didn't ask any questions about their assets (FF 19; RP 162/22-25)⁴ because, he testified, "to be real candid, it may not—wasn't my business at that particular point in time." RP 163/14-20. Mr. Montgomery did not ask the Kazmarks whether they had separate property.⁵ FF 19; RP 163/20-164/6. He didn't know that the CPA he recommended would have a very one sided effect, converting over \$2 million of Barbara's separate property

⁴ Their assets were worth "well over \$2,000,000" (FF 10), and with the federal estate tax exemption in 2005 of only \$1,500,000, tax issues should have been discussed.

⁵ He said he had some idea about specific assets from having done legal work for them but he was wrong, erroneously thinking, for example, that the Deer Park radio station was community property (RP I, 165/2-9) when, in fact, the FCC license for the station belonged solely to Barbara. RP 1, 59/11-16.

into community property. FF 24. He didn't get basic information necessary to determine if a CPA was appropriate for them—such as (besides the extent of their separate property), whether they had property in other states (they did) (RP 191/23-192/20), or whether they had special items they might want to carve out from a CPA. (RP 189/10-190/2).⁶ Mr. Montgomery did not prepare any of the ancillary documents for the Kazmarks that an attorney typically prepares when drafting wills for a client, such as Directives to Physicians. RP 165/20-16.

Following their meeting, Mr. Montgomery drafted a CPA and wills for the Kazmarks. The CPA provided that (1) all of the Kazmarks' property immediately converted to community property, and (2) subject to a 30-day survivorship provision, on the death of either spouse, "title to all community property as defined in the preceding paragraph shall vest in fee simple in the survivor of them." Exh. P7.

⁶ Acknowledging that "Barbara and Earl didn't have any discussion with [him] about things they wanted to carve out"—like Barbara's jewelry—Mr. Montgomery volunteered, "we may have also talked about a personal property list, which would have been attached to the will, too." But nothing about any list of personalty was included in the Kazmarks' 2005 wills. RP I, 189/22-191/16, and Exhs. P8, R101.

The wills likewise provided that on the death of the first spouse, subject to a 30 day survivorship provision, everything went to the survivor. Exhs. P8, R101. The CPA did not address what happened on the death of the survivor, but the wills did: if the other spouse predeceased them,

- Earle, Jr. received the house his family was living in, which was owned by Barbara and Earle.
- Shane (or, if he was deceased, his wife) received the house his family was living in, also owned by Barbara and Earle.
- \$1.00 bequests were made to children who were being left out of the wills.
- 50% of the remainder of the estate went to Barbara's son, Shane, or his issue.
- 50% of the remainder was split equally between Earle's sons, Earle Jr. and Jason (or all went to the survivor of them, but not to their spouses or issue).

Exhs. P8, R101; FF 27. Consistent with the trial court's finding that Mr. Montgomery never spoke with the Kazmarks about the term "mutual wills," the 2005 wills did not expressly state that they were "mutual wills" or recite that they were being executed pursuant to an agreement by the testators.

7. Barbara's 2009 death; Earle's new will. Barbara died in February 2009, and Earle became the owner of her 50% share of their combined assets (located within Washington) pursuant to the terms of the parties' 2005 CPA. FF 28.

On July 14, 2009, Earle executed a new will. FF 29. That will contained the same provisions giving a house to each of Shane and Earle, Jr., but changed the residuary clause to bequeath everything else to Earle, Jr., alone. FF 30.

8. Trial and trial court's rulings. Respondents challenged the validity of Earle Kazmark's July 2009 will at trial on the ground that his October 2005 will was specifically enforceable as a mutual will. FF 32. The trial court, Judge Kathleen O'Connor presiding, found that "The evidence at trial was not just clear, cogent and convincing, but was overwhelming" that prior to meeting with Mr. Montgomery about their wills in October 2005, "Barbara and Earle 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." FF 12. As such, the 2005 wills were mutual wills. Conclusion of Law No. 5.

Judge O'Connor revoked the probate of Earle's 2009 will, revoked the appointment of George Gow and Val Kaspar as co-personal representatives under that will, and admitted Earle's 2005 will to probate. Gow, Kaspar and Earle Jr. appealed.

III. ARGUMENT

A. The Law of Mutual Wills.

1. **Definitions—reciprocal wills, mutual wills.** Reciprocal wills are simply wills having provisions that mirror each other. If two testators each unilaterally just happen provide for distributions of their estate that mirror each other, either party is free to change his or her will at any time, and the fact that the wills are “reciprocal” has no particular legal effect. Mutual wills, on the other hand, are a specie of reciprocal wills: wills which not only contain mirror provisions, but which are executed in order to put into effect an *agreement* between the testators on how their estate is to be distributed after both have died. *Newell v. Ayers*, 23 Wn. App. 767, 769 (1979) (“a mutual will is a will that is executed pursuant to an agreement between two individuals as to the manner of the ultimate disposition of their property after both are deceased”); *Estate of Richardson*, 11 Wn. App. 758, 760-761 (1974) (a mutual will is “. . . when two parties make an agreement as to the manner of the disposition of their property after both are deceased. . . , and thereafter make such wills”). Reutlinger, Mark and Oltman, William C., *Washington Law of Wills and Intestate Succession*,” at 290 (1985 and supp. 1994) (mutual wills “are really reciprocal wills made pursuant to a contract”).

As Reutlinger and Oltman explain, *supra*, at 305-306, it can be hard to distinguish a mutual will from a mere reciprocal will, because “even where a contract exists it rarely is incorporated into (or even mentioned in) the wills, so that reciprocal and mutual wills usually are identical in appearance.” That is the case here.

2. Contractual nature of mutual wills. A contract is simply an agreement supported by consideration. Oral agreements to make wills are contracts, with each party’s promise constituting the consideration for the other’s promise. If the fact of the agreement is sufficiently proven, oral agreements to make wills, including mutual wills, are fully enforceable. *See, e.g., Jennings v. D’Hooghe*, 25 Wn.2d 702, 734 (1946) (“This court has decided thirty-seven cases relative to oral contracts to make mutual wills, or wills in consideration of services to be rendered”). No formalities or writings are required, except when real property is involved and the Statute of Frauds applies. Appellants try to imply that something more formal is necessary, consistently using the phrase “contract to make mutual wills,”⁷ as if Mr. or Mrs. Kazmark had to say, “Hon, let’s enter into a

⁷ E.g.: “alleged oral contract to make mutual wills. . . (Appeal Brief, at 10); “pursuant to a separate oral contract” (*Id.*, at 13); “claimed oral contract for execution of mutual wills” (*Id.*, at 17); “the existence of the oral contract for mutual wills. . .” (*Id.*, at 17); “through an alleged oral contract which . . .” (*id.*, at 18); “the alleged oral contract to make mutual wills” (*Id.*, at 19); “the ostensible oral contract to make mutual wills. . .” (*Id.*, at 19).

contract to make mutual wills.” The parties don’t have to speak in terms of “contract”.

While a mutual will is a bilateral contract, it can be unilaterally revoked by either party while both testators are alive. *Allen v. Dillard*, 15 Wn.2d 35, 52 (1942); *Prince v. Prince*, 64 Wash. 552, 556-557 (1911). But once there is detrimental reliance, mutual wills become irrevocable:

If a contract is established, the wills themselves still can be revoked, but . . . only if there has been no detrimental change of position on the latter's part. . . . The usual example of detrimental change . . . is that if, upon the death of the first to die, the survivor accepts the benefits of the will Another way to view this result is that one party's making and keeping unrevoked his will until his death is performance of the full consideration for the contract, binding the other party.

Reutlinger & Oltman, *Washington Law of Wills, supra*, at 307. *Accord*, *Auger v. Shideler*, 23 Wn.2d 505, 509 (1945); *Prince v. Prince*, 64 Wash. 552, 558 (1911).

3. The elements necessary to prove mutual wills are all

questions of fact. The elements necessary to prove mutual wills are:

- The parties reach an *agreement* as to the disposition of their estate when both have died;
- The agreement is supported by consideration; and
- The parties execute wills *intending* to put their agreement into effect.

A fourth element is required in order to make mutual wills irrevocable: detrimental reliance by the party asserting relying on the mutual will.

Whether testators have reached an agreement to make wills providing for the disposition of their estate when both had passed away is a question of fact. *Newell v. Ayers, supra*, 23 Wn. App.; *Estate of Richardson, supra*, 11 Wn. App. at 761. Whether consideration supports that agreement is a question of fact. *Rowe v. Vaagen Bros. Lumber, Inc.*, 100 Wn. App. 268, 275 (2000). And, whether the testators intended to put their agreement into effect in executing their wills—is a question of fact. *Newell v. Ayers*, 23 Wn. App. 767, 769 (1979) “*Accord, Estate of Soesbe*, 58 Wn.2d 634, 636 (1961). The trial court entered Findings of Fact on each of those issues, discussed below.

4. Burden of Proof. Prior to 1972 Washington courts generally imposed an extreme burden of proof on parties claiming that wills had been executed pursuant to an oral agreement—“conclusive, definite, certain, and beyond all legitimate controversy.” *Arnold v. Beckman*, 74 Wn.2d 836, 840 (1968). The Supreme Court rejected that standard in 1972, replacing it with a burden of proof simply by “clear, cogent and convincing” evidence. *Cook v. Cook*, 80 Wn.2d 642 (1972). Care must be taken reading pre-1972 cases, to consider the different

standards of proof the courts applied when finding insufficient evidence to prove the existence of mutual wills.

B. The Trial Court's Conclusions of Law are Supported by Its Findings of Fact Support.

Appellants assign error to most of Judge O'Connor's Conclusions of Law, but they never discuss whether those Conclusions are supported by the Findings of Fact. Instead, they just challenge the sufficiency of the evidence "to support the existence of a separate agreement between Earle and Barbara Kazmark to make mutual wills," arguing that "the conclusions of law derived from those findings are therefore erroneous." Brief, at 28.

Conclusion of Law No. 5 is the ultimately dispositive legal conclusion: "Barbara and Earle Kazmark's October 2005 wills were mutual wills." CP 266. This Conclusion of Law is supported by the trial court's Findings of Fact:

[Agreement]

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.

13. [Undisputed.] Mr. Montgomery understood, when he met with Barbara and Earle, that they had jointly discussed and had agreed on how they wanted to bequeath their estates.

[Consideration]

10. [Undisputed.] When they consulted with Mr. Montgomery about preparing their wills, Barbara and Earle Kazmark had total combined assets worth well over \$2,000,000.

11. [Undisputed.] Those assets were largely Barbara's separate property. Very little, if any, of their combined assets were Earle's separate property at this time.

16. [Undisputed.] Mr. and Mrs. Kazmark met with Mr. Montgomery on October 28, 2005 and executed the Community Property Agreement and wills.

20. [Undisputed.] The Community Property Agreement converted, effective immediately upon signing, all of Mr. and Mrs. Kazmark's separate property and after-acquired property into community property.

17. [Error assigned, but not argued] Barbara Kazmark's execution of the Community Property Agreement on October 28, 2005 was consideration for Earle's execution of his October 2005 will.

[Intent to put agreement into effect]

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.

[Detrimental reliance]

20. [Undisputed.] The Community Property Agreement converted, effective immediately upon signing, all of Mr. and Mrs. Kazmark's separate property and after-acquired property into community property.

26. [Undisputed.] Barbara and Earle's October 2005 wills, and the Community Property Agreement, had the same effect upon the

death of the first to die: subject to the survival provision, their entire estate vested in fee simple in the surviving spouse

28. [Undisputed] Following Barbara's death in February 2009, Earle Kazmark became the owner in fee simple of 100% of Barbara's estate, pursuant to the terms of the parties' 2005 Community Property Agreement.

C. The Trial Court's Findings of Fact are Supported by Substantial Evidence.

Appellants assign error to only four of the trial court's Findings of Fact—Nos. 12, 17, 18 and 27 (Brief, at 3-5). But they never again mention, or argue the sufficiency of the evidence supporting, FF 17 (Barbara's execution of CPA provided consideration for Earle's execution of 2005 Will), FF 18 (Kazmarks' intent in executing wills was to put their agreement into effect), or FF 27 (setting forth terms of the 2005 wills), which are therefore verities on appeal. *Henderson Homes, Inc. v. City of Bothell*, 124 Wn.2d 240 (1994).

1. The trial court's Findings of Fact Nos. 12 and 13, that Mr. and Mrs. Kazmark had Reached an Agreement as to the Disposition of their Estate, are Supported by Substantial Evidence.

Appellants assign no error to FF No. 13 ("Mr. Montgomery understood, when he met with Barbara and Earle, that they had jointly discussed and had agreed on how they wanted to bequeath their estates"). That, alone, is conclusive proof of an agreement.

Neither do Appellants seriously address the evidence on which Judge O'Connor based FF No. 12. They just grotesquely "summarize" witnesses' trial testimony by omitting everything those witnesses said supporting the court's findings (Brief, at 30-31), and argue—based on those "summaries"—that the court should have weighed the evidence differently:

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. Appeal Brief, at 32.

Appellants ignore Elaine Forster's testimony about an agreement (*supra*, at 10-11), and the testimony by multiple additional witnesses that Mr. and Mrs. Kazmark said they had reached an agreement on how to dispose of their estate: Karen McKinney testified that Barbara called her in late 2005 and said they had "finally got it taken care of" (their wills) (RP 261/9-13), and that Barbara and Earle later talked about having reached an agreement on how to deal with their estate.:

[S]he told me that she had wanted Shane to have at least half of the estate, and then her – his [Earle's] two boys to have half. And I said why? And she said, "Because I think that's the fair thing to do." And she trusted Earl to do that.

Q. Did she say whether or not she had talked about that with Earl?

A. Yes. And also Earl was in the conversation many times, also, the two of them would talk about it. And they agreed on it. (RP 263/13-23).

Lynn Sanchez testified that Barbara also told her at one point, "Well, we've finally done it. We've gone in and we've gotten wills," continuing:

And we talk [sic] and talked about it at length and we've decided that upon both of our deaths, that Shane would get 50% of the properties, Earl Jr. would get 25%, and Jason would get 25%." And I said, "Barbara, I think you're being very generous to Earl's kids." And she said, "Well, we've talked about it and we think this is fair." RP 1, 279/19- 280/10.

LeRoy Warner, another of the Kazmarks' good friends to testify at trial, knew Earle since the early 1960's and had remained friends thereafter. RP 1, 314/18-320/20. When Mr. Warner retired, he and his wife would sometimes caravan together with the Kazmarks in their motor homes to Arizona for the winter. *Ibid.* Mr. Warner testified that Barbara and Earle talked to him, both before and after they did their wills, about having agreed to divide their estate 50% between each side of the family:

Q. Did they actually say that they had agreed on that?

A. Oh, yes. Yes. Yeah. *They agreed that that's the way it was, you know. And that's when I mentioned, too, that, you know, if something happened to me before Pat or vice versa, that we would do everything that we agreed to, you know, on our wills, too, you know. . . .*

RP 1, 321/25-323/9; 325/4- 326/3.

In addition to this direct testimony, the surrounding circumstances offer compelling evidence in support of FF 12:

- When they prepared their wills (and the CPA Mr. Montgomery suggested), most of Mr. and Mrs. Kazmark's substantial assets were Barbara's separate property.
- Barbara and Earle had children by prior marriages, and none together.
- Barbara cared deeply about, and wanted to provide financial security for, her son and his family.
- After maintaining the separate status of her inherited wealth for some 20 years, Barbara irrevocably gave Earle a 50% interest in her assets—on the exact same day as he signed a will providing that if she predeceased him (in which case he got the entire estate), half of his estate went to her son.
- Without an agreement on how their estate would be disposed of on the death of the second spouse, Barbara would have left her son's family exposed to being cut entirely out of her estate.

Courts have treated the character of a couple's assets, and the disposition that would be considered "natural" in light of that character, as an important factor in weighing whether or not testators had an agreement to make mutual wills. *See, Arnold v. Beckman, supra*, 74 Wn.2d at 843 (finding no agreement to make mutual wills when the effect would have been to divide assets that were 87.5% the wife's separate property equally between her children and her husband's children, which was "not equitable or what would naturally be expected"), citing *Cummings v. Sherman*, 16 Wn.2d 88, 100-104 (1943) ("the property bequeathed was all community and the disposition made of it was what might normally be expected") and

Auger v. Shideler, supra, at 842 (“again, the property to be disposed of was all community and both wills left it to the same natural heirs”).

FF No. 12 was supported by, as Judge O’Connor characterized it, not just “substantial” evidence, but by “overwhelming” circumstantial and direct evidence.

2. The Trial Court’s FF No. 18 (Kazmarks intended October 2005 wills to put agreement on disposition of estate into effect) is supported by substantial evidence. Appellants contend that there was no substantial evidence of an agreement in the first place, so they never bother to address the evidence that Mr. and Mrs. Kazmark intended to put that agreement into effect in their 2005 wills.

The most obvious support for FF 18 is the evidence that terms of Kazmarks’ 2005 wills are the same as the terms which multiple witnesses testified the Kazmarks had agreed to. *Compare* Exhibits P8 and R101 (2005 wills) with RP 143/23-144/14 (Elaine Forster), 263/11-24 (Karen McKinney), 280/5-8 (Sanchez), and 324/19-325/17 (LeRoy Warner). In addition, several witnesses directly testified that Barbara and Earle said they had put the terms of their agreement into their wills. RP 281/15-19, 145/2-8, 323/16-25. Even the drafting attorney, Mr. Montgomery, testified that he understood that Barbara and Earle intended their 2005 wills to put into effect an agreement they had reached:

Q. Do you know if [Barbara and Earle] had reached an agreement of what they wanted to do with their estate when they had you prepare the wills?

A. I believe they did.

Q. You think they agreed on what they wanted to do?

A. Well, they seemed to have some idea as to the nature and extent of their property and what they wanted to do, yes.

...
Q. Okay. When you prepared the wills, did you think that they were putting their agreement into effect in these wills? That these wills were to carry out what they had agreed to?

A. I prepared wills in accordance with what they had instructed me to do, and I believe that to be their agreement.

Q. *Okay. So these wills were to put their agreement into effect.*

A. *Yes.*

RP 195/11-196/6.

Instead of addressing this evidence of the Kazmarks' intent when they executed their 2005 wills, Appellants just declare — over and over and over— that the trial court just should not have considered it, but confined itself to the four corners of the document.⁸ Leaving aside this evidentiary

⁸ “intent is to be garnered from the language of the will itself. . .” (*Id.*, at 19); “The language of the 2005 wills unequivocally conveys the intent of both Earle and Barbara. . .” (*Id.*, at 22); “The intent of the Kazmarks. . . is manifest from the plain language of the documents” (*Id.*, at 23); “The extrinsic evidence relied upon by the trial court . . . directly contradicts the stated, express intent of the Kazmarks as manifested by their CPA and their 2005 wills” (*Id.*, at 28); “The clear, unambiguous language of the 2005 wills provides the most reliable indication of the Kazmarks' intent.” (*Id.* at 32).

issue (discussed *infra*, at 41-43), Appellants have failed to show that no substantial evidence supports the trial court's Finding of Fact No. 18.

3. The trial court's Finding of Fact No. 17, that Barbara Kazmark gave consideration for Earle Kazmark's 2005 will, is supported by substantial evidence. As noted above, Appellants fail to argue this FF 17. But in any event, it too is supported by substantial evidence: Barbara had more than \$2 million of separate property, and Earle little or none, when they executed their CPA and wills in October 2005; Barbara signing the CPA immediately gave Earle a 50% interest in her separate property, while at the same time he executed a will providing that if she died before him, he would give 50% of their combined estate to Barbara's son.

In addition, as a matter of law, each party's making of wills putting into effect their agreement as to the disposition of their estate constitutes, as a matter of law, consideration for the other party's making the same will. *Estate of Young*, 40 Wn.2d 582, 585 (1952).

4. Barbara died after the Kazmarks executed their 2005 wills. It was undisputed that Barbara Kazmark died after she and Earle executed their 2005 wills, and while he was still alive. FF 1.

5. The surviving testator received benefits from the parties' agreement. Neither was it disputed that Earle had enjoyed the benefits of his contract with Barbara. Unchallenged FF 20, 26, and 28.

6. John Montgomery testimony. The only evidence Appellants cite as contrary to the trial court's Findings and Conclusions was Mr. Montgomery's testimony that, as Appellants describe it,

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.) ... There was no contract between Earle and Barbara to make mutual wills. (VRP 235, 244.)

This does not negate the vast evidence supporting the trial court's Findings of Fact, but it's not even correct. The citations do not support Appellants' assertion that Mr Montgomery testified "there was no contract." Appellants continue,

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.)

That's not an "unequivocal denial." That's an "*I don't know* of any agreement."

Mr. Montgomery's failure to know of an agreement is a reflection of his inattention, and seeming intimidation when dealing with the Kazmarks, not evidence that no agreement existed. The circumstances screamed, "these people mean mutual wills." Mr. Montgomery testified that mutual wills come up "in situations where parties have had prior marriages and they have children by those prior marriages" (RP 214/25-215/14). He admitted that testators having separate children by prior marriages "might" be an indicator to an attorney that they should have mutual wills (RP 233/25-234/24), and one of the spouses having significantly more separate property than the other might be another such indicator (RP 234/10-15)—both of which were present here. He "understood, when he met with Barbara and Earle, that they had jointly discussed and had agreed on how they wanted to bequeath their estates" (FF 13)—the key indicator of an intent to have mutual wills. The Kazmarks came in asking for identical, reciprocal wills providing that if the other predeceased them, they bequeathed 50% of the estate to the other spouse's children. Yet Mr. Montgomery testified, "I recall nothing indicated—

indicating that they wanted mutual wills, or what I call mutual wills" (RP 220/1-3).

Mr. Montgomery ascribed his failure to mention mutual wills to the fact that the survivor inherited everything on the first death, which he seemed to think, eliminated any need to address the second death:

Q. If you had known that—or if it were the case that the great, great majority of Barbara and Earl's property were Barbara's separate property, and if, in fact, it were a substantial amount, might you have counseled them in connection with mutual wills?

A. I would normally prepare a mutual will if asked to do so.

Q. Okay. They had to ask you.

A. Well, I could have talked about it at the time. . . .But you have a community property agreement and you have the second paragraph — or actually the third paragraph in both wills giving the property to the surviving spouse.

Q. Right. But what about on the second death?

A. It doesn't address the second death, it was condition only on survivorship.

Q. Right. And that's what a mutual will is for, isn't it?

A. I would have done a mutual will if they had requested me to do so.

Q. But you didn't explain to them what a mutual will was, did you?

A. I probably did not give them a form or give them an example of one.

Q. Or you didn't use those words. You never mentioned mutual will, did you?

A. We would have done so if their wills had not stated a community property agreement. And paragraph 3 [in the will] that the surviving spouse takes all property, that's what they told me to do.

...

Q. [Y]ou didn't explain to them anything about a mutual will, did you?

A. I see no need to in view of the community property agreement and the third paragraph of the will [leaving all to the survivor, on the first death]. RP 192/21-195/6.

D. Appellants Frequently Are Wrong On the Law.

Appellants incorrectly assert that, “in order for the 2005 wills to be mutual wills, they had to be *subject to a written*, binding, enforceable contract, and [Respondents] readily argued the contract was oral.” (Brief, at 19). This is flat wrong. Washington law has always recognized oral contracts to make wills, and specifically, oral contracts to make mutual wills. *See, e.g., Jennings v. D'Hooghe*, 25 Wn.2d 74 Wn.2d Newell

702, 734 (1946) (“This court has decided thirty-seven cases relative to oral contracts to make mutual wills, or wills in consideration of services to be rendered”)

Appellants say they could find only two Washington cases “which support the proposition that mutual wills can arise from oral contracts.” Brief, at 32. In fact, a multitude of cases support the proposition that

mutual wills *can* arise from oral contracts (*see, Jennings v. D'Hooghe, supra; Arnold v. Beckman, supra*). While mutual will cases have been relatively infrequent, and under the extreme pre-1972 burden of proof were hard to prove, Appellants' research is incomplete. They conspicuously fail identify *Estate of Fischer*, 196 Wash. 41, 48-51 (1938), in which the Court upheld an oral contract to make mutual wills on the basis of evidence very much like the evidence in the Kazmarks' case. In *Fischer*,

[T]here was no written memorandum evidencing the contract. No evidence was produced. . . by anyone connected with, participating in, or present at the making of, the alleged oral agreement. . . .

[R]espondent was compelled to rely upon the testimony of numerous witnesses concerning statements made to them by Mrs. Fischer. . . .

The testimony of these witnesses related to conversations had with Mrs. Fischer in which she made definite statements concerning the understanding and agreement existing between herself and respondent respecting their property and wills. . . .

The substance of the testimony . . . is that Mrs. Fischer, upon numerous occasions, emphatically stated that, at about the time of their marriage, or shortly thereafter, she and respondent had agreed between themselves that they would put their separate properties together, to be considered and held as community property; that they would also make mutual wills, each willing his or her estate to the other; that at the death of one, the survivor was to receive the entire community property; and that, because they had thus arranged their affairs, they had nothing to worry about.

Emphasizing the trial court's role in assessing witnesses' credibility and weighing the evidence, the Supreme Court held that this evidence of an oral contract to make mutual wills met the "conclusive, definite, certain, and beyond all legitimate controversy" burden of proof.

Appellants also incorrectly assert that

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. (Brief, at 18.)

This is gibberish. A mutual will is by definition a reciprocal will executed *after* the testators have reached an agreement. And this misstates the facts: the terms of the 2005 wills and CPA were totally consistent with the terms of the Kazmarks' agreement; the trial court found (FF 18) that the Kazmarks, in executing their wills, put their agreement *into effect*.

E. **The trial court did not "fail to recognize the legal, binding effect the Kazmarks' CPA had on their property distribution," or "avoid analyzing the legal consequence of the Kazmarks' CPA."**

Appellants baldly and incorrectly assert that, "The claimed oral contract for execution of mutual wills directly conflicts with the written CPA (Brief, at 17) and "the ostensible oral contract to make mutual wills directly conflicts with the CPA and the plain language of the 2005 wills" (Brief, at 19). Appellants then equate the trial court enforcing the Kazmarks' mutual wills with "amending", "rescinding," or otherwise "altering" the terms of the

CPA, and argue that a CPA cannot be amended, etc., in that manner. Both assertions are specious, and Appellants' arguments based on a supposed conflict are entirely irrelevant to any issue in this case.

1. There is no conflict between the Kazmarks' agreement on the disposition of their estate and their subsequent 2005 wills or CPA. Appellants' assertion that "the ostensible oral contract to make mutual wills directly conflicts with . . . the plain language of the 2005 wills" is incorrect. The terms of the Kazmarks' agreement are the same as the terms in their 2005 wills, and are entirely consistent with the CPA. As discussed above, Appellants fail to challenge the sufficiency of the evidence supporting FF 18 (Kazmarks intended to put their agreement into effect in wills). Instead, they just ignore it, and without citation to the record contend the facts are different from what the trial court found them to be.

Neither do Appellants ever explain what conflict they believe exists between the terms of the Kazmarks' agreement on the disposition of their estate, and the terms of their CPA or 2005 wills. Mr. and Mrs. Kazmark orally agreed that on the death of the first spouse, everything would go to the survivor, and on the death of the second spouse would go 50% to Barbara's son, and 25% would go to each of Earle's two sons. They contacted Mr. Montgomery to draft Wills to that effect. Mr. Montgomery on his own

suggested that they also sign a community property agreement. The 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:

THIRD: That upon the death of either of the parties hereto, title to all community property as defined in the preceding paragraph shall vest in fee simple in the survivor of them.

FOURTH: Provided, however, that if neither party survives the other by at least thirty (30) days, the above paragraph, THIRD only, shall be null and void and of no effect.

Exhibit 7; FF 21. The Kazmarks' oral agreement did not include immediately converting Barbara's separate property into community property, but adding that term in the CPA creates no "conflict."

The Kazmarks' 2005 wills likewise provided that, contingent upon surviving the first spouse by 30 days, the second spouse took the entire estate on the first spouse's death. Exhibit 4, 101; FF 25. The Kazmarks' agreement and 2005 wills did have a term not included in the CPA, addressing the disposition of their estate on the death of the second spouse—but that created no "conflict" with the terms of the CPA, which simply does not address what happens upon the second death.

2. Even if there were some conflict—which there isn't—the trial court could readily construe the Kazmarks' agreements to fully effect both the CPA and the 2005 wills. It is black letter law that when several documents are executed at the same time, or are executed by

the same parties at different times but touch upon the same subject, the courts are to construe them together. *Platts v. Arney*, 46 Wn.2d 122, 127 (1955). The Court in *Estates of Wahl*, 31 Wn. App. 815 (1982), *aff'd*, *In re Estates of Wahl*, 99 Wn.2d 828 (1983), applied this principle in holding that a community property agreement and will codicils, executed at the same time, must be construed together to determine the decedents' intent. As long as wills and a community property agreement can be read together and both enforced, there is no "conflict." *Stranberg v. Lasz*, 115 Wn. App. 396, 403 (2003):

The community property agreement here is not inconsistent with the wills as . . . the community property agreement and the wills can be read together. In other words, contrary to the assertions of Ms. Stranberg, none of the wills has the legal effect of becoming the only agreement between the parties with regard to the disposition of the farmland in question.

The documents here are not in conflict because they can be read together. . . .

3. There is no issue about whether the Kazmarks' oral agreement on the disposition of their estate "amended," "rescinded," or "altered" their subsequent CPA. Notwithstanding that the Kazmarks' oral agreement on the disposition of their estate came *before*, not after, their 2005 wills and CPA, and that the all of the terms of the CPA were fully effected, Appellants equate enforcing the Kazmarks' oral

agreement (as embodied in their 2005 will) with “amending,” “rescinding” or “altering” the CPA. Brief, at 13-15.

Whatever legal issues this case may present, whether the Kazmarks’ prior oral agreement on the disposition of their estate could “amend” or otherwise “alter” the later CPA, is not one of them. Yet after setting up this straw horse, Appellant spends pages arguing against it. Brief at 13-19.⁹ None of those “arguments” are relevant to any issue in this case, because none of the terms of the CPA were changed in any way. It was put fully into effect.

4. Appellants confuse the facts and obscure the issues.

Appellants argue for pages about conflicts between community property agreements and wills, citing cases involving community property

⁹ “[A] CPA . . . is effective until it is rescinded or presumably amended or altered pursuant to the contract formality requirements. . . [and] there is no evidence that the Kazmarks’ CPA was so modified” (Brief at 13-14); “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” (*Id.*, at 13); “Further, an amendment or change to a CPA, like rescission of a CPA, requires an objective showing of mutual assent to the amendment. [Citations]. No such mutual assent exists in the record” (*Id.*, at 14); “[A] change to the CPA, by statute, shall be . . . in writing, as per execution of a deed” (*Id.*, at 15); Washington courts have “rejected the argument that [a] CPA could be terminated by implication” (*Id.*, at 18); “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 16); “[N]o agreement existed between the Kazmarks to alter, amend, or rescind their 2005 CPA” (*Id.*, at 19).

agreements and wills (Brief, at 13-19)¹⁰—then announce that the Kazmarks' CPA was *consistent* their 2005 wills—it just conflicted with their oral agreement on the disposition of their estate:

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. Brief, at 19.

So what does all of the preceding discussion about supposed conflicts between wills and CPAs have to do with the issues in this case?

5. Appellants misstate the law on the relationship between community property agreements and other

documents. Appellants again misstate the law when they assert,

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).

Besides being irrelevant, because there is no conflict here, neither of the cited cases supports the proposition that community property agreements, *per se*, necessarily prevail over conflicting wills. They simply say that community property agreements are construed and

¹⁰ “[T]he CPA controls any conflicts between the Kazmarks' 2005 wills and the CPA” (Brief, at 15); “When a CPA and a will conflict, the CPA controls. . .” (*Id.*, at 15); “The court . . . addressed a similar issue wherein there had been a CPA and then a subsequent will that conflicted with the CPA” (*Id.*, at 16); “*Higgins v. Stafford*. . . dealt with a husband and wife executing a CPA and then later in time executing mutual wills” (*Id.*, at 16); “. . . Court faced a situation where a husband and wife had had executed a CPA. Some 21 years later, the

enforced like any other contract. Indeed, in *Higgins v. Stafford*, 123 Wn.2d 160 (1994), cited by Appellants as “additional authority” for their position, mutual wills controlled over an inconsistent community property agreement.

F. The Trial Court did not Err in Considering the Circumstances Surrounding the Kazmarks’ Execution of their Wills.

1. Courts are to consider the circumstances surrounding the execution of a contract when determining the parties’ intent. The trial court held, in Conclusion of Law No. 3, that,

Barbara and Earle Kazmark’s 2005 Community Property Agreement and 2005 wills must be construed together, taking into account the circumstances surrounding the making of the wills, the subsequent acts and conduct of the parties, and the reasonableness of the respective interpretations advocated by the parties, in order to determine the intent of Barbara and Earle Kazmark.

Appellants argue that the court erred in considering “extrinsic evidence to determine the intent of the Kazmarks in drafting their 2005 wills.” Brief, at 9. But it is black letter law that the courts are to consider the circumstances surrounding the execution of a contract in determining the parties’ intent.

Mut. of Enumclaw Ins. Co. v. USF Ins. Co., 164 Wn.2d 411, 425 (2008); *In re Estate of Wahl, supra*, 31 Wn. App. at 818-819 (1982). Citing the seminal

parties separated and the wife executed a new will inconsistent with the terms of the CPA” (*Id.*, at 18).

case of *Berg v. Hudesman*, 115 Wn.2d 657, 667 (1990), the Supreme Court in *Mut. Of Enumclaw* stated the rule:

The meaning of contract provisions is a mixed question of law and fact because we ascertain the intent of the contracting parties ‘by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.’

In *Estate of Wahl*, a husband and wife had executed wills, then a number of years later a community property agreement with terms that apparently were different from their wills. The trial court held on summary judgment that the community property agreement controlled. The Court of Appeals reversed, citing the above rule of law¹¹, and holding “the community property agreement. . . , along with the wills and their codicils *and the surrounding circumstances*, must be construed together to determine the intent of Rose and Neal Wahl. This presents a question of fact.”

2. The trial court properly considered the circumstances surrounding the Kazmarks’ execution of their 2005 wills. Appellants appear to assume that the Kazmarks’ 2005 wills were integrated contracts, and appear to argue that since the wills do not expressly recite that they were

¹¹ “Determination of the intent of the contracting parties is to be accomplished by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the

executed pursuant to the testators' agreement as to the disposition of their estate, the trial court erred in "adding" that provision. It is well established that courts are to consider the circumstances surrounding the execution of contracts in order to determine if they are integrated in the first place, or if there may have been terms agreed to but not expressed in writing. *Lynch v. Higley*, 8 Wn. App. 903, 908-911 (1973), approving the "intent test" over the "mechanical test" to determine whether a contract is fully integrated:

[T]he "intent test," hold[s] that parol evidence is admissible to show whether the contract is in fact a fully integrated or partially integrated agreement, or to show in fact whether the agreement, purporting to be fully integrated, nevertheless was actually executed as part of a transaction of which a collateral agreement, oral or written, was also intended to be a part. . . .

Quoting 32 C.J.S. *Evidence* § 1013, at 1028:

"Where a written instrument, executed pursuant to a prior verbal agreement or negotiation, does not express the entire agreement or understanding of the parties, the parol evidence rule does not prevent the introduction of extrinsic evidence with reference to matters not provided for in the writing."

The trial court properly considered evidence outside the four corners of the document to determine if Mr. and Mrs. Kazmark had an agreement as to the disposition of their estate, which was not explicitly referenced within the four corners of their wills.

contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties."

3. No ambiguity in the language of the 2005 wills was necessary in order for the trial court to consider the circumstances surrounding its execution. Appellants argue that the trial court should have limited its analysis to the four corners of Mr. and Mrs. Kazmark's 2005 wills¹², because "before extrinsic evidence may be admitted to explain language in a will, an ambiguity must be one of three types. . . ." (Brief, at 21).

But the trial court did not consider the evidence surrounding the execution of the Kazmarks' 2005 wills in order to clarify any ambiguous language. It considered that evidence to determine if the Kazmarks had executed those wills pursuant to an agreement on the disposition of their estate, and if they intended to put their agreement into effect in those wills. Appellants completely fail to address the real issue here.

Indeed, there was no ambiguity in the language of the 2005 wills. Curiously, Appellants quote only the section of the 2005 wills

¹² "The best indication of intent is the written, clear, and unambiguous language in a will. Such is the case here" (Brief, at 1); ". . . intent is to be garnered from the language of the will itself. . ." (*Id.*, at 19); "The language of the 2005 wills unequivocally conveys the intent of both Earle and Barbara. . ." (*Id.*, at 22); "The intent of the Kazmarks in executing their 2005 wills. . . is manifest from the plain language of the documents" (*Id.*, at 23); "The extrinsic evidence relied upon by the trial court . . . directly contradicts the stated, express intent of the Kazmarks as manifested by their CPA and their 2005 wills (*Id.*, at

bequeathing each testator's estate to the other on the first death, as if that were the wills' only provision. *See*, Brief at 22. They just ignore the additional unambiguous language in Section V, providing:

In the event my wife BARBARA KAZMARK does not survive me by thirty (30) days, I give, devise and bequeath all the rest, residue and remainder of my estate. . . .

(1) One-half (½) . . . equally unto my sons, EARLE V. KAZMARK and JASON S. KAZMARK, or the survivor thereof.

(2) One-half (½) . . . unto my wife's son, CLINTON SHANE KRAG, or to his issue per stirpes.

This is the provision at issue upon Earle Kazmark's death—his wife did not survive him by 30 days. Respondents seek to *enforce* this term according to its plain language.

Put another way, the Kazmarks' intent in executing their 2005 wills—whether they intended so to put into effect an agreement they had reached as to the disposition of their estate—was ambiguous: the language in their wills did not address that question, either way. The trial court did not err in admitting evidence about the circumstances surrounding the Kazmarks' execution of their 2005 wills, in order to determine their intent.

28); "The clear, unambiguous language of the 2005 wills provides the most reliable indication of the Kazmarks' intent" (*Id.*, at 32).

G. Statute of Frauds.

The Kazmarks' estate included real property, so the Statute of Frauds applies to their oral agreement as to the disposition of that real estate.

Cummings v. Sherman, 16 Wn.2d 88, 102-103 (1943); *Allen v. Dillard*, 15 Wn.2d 35 (1942). Part performance of an oral agreement is sufficient to satisfy the Statute of Frauds, and full performance by the promisee alone is sufficient "part performance." *Ibid.*; Reutlinger & Oltman, *Washington Law of Wills, supra*, at 300. The trial court concluded here that,

There was sufficient part performance of Barbara and Earle Kazmark's agreement as to the distribution of their estate, and agreement to make wills putting that agreement into effect, to satisfy the Statute of Frauds. Conclusion of Law No. 4.

1. Appellants fail to seriously challenge Conclusion of Law

No. 4. Appellants don't argue that this Conclusion of Law is not supported by the court's Findings of Fact. Instead—without citation to anything in the record—they just conclusorily declare that "There is not sufficient evidence in the record to support this conclusion." Brief, at 27. But, it turns out, Appellants actually just disagree with the trial court's weighing of the evidence, as they proceed to explain:

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.

It is unclear just which “extrinsic evidence” Appellants mean to refer to, or how *evidence of part performance* can “contradict the Kazmarks’ intent.” Further disagreeing with Judge O’Connor’s weighing of the evidence, Appellants conclude:

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.

And that’s the extent of Appellants’ argument that Judge O’Connor’s legal conclusion is not supported by substantial evidence.

2. The trial court’s Conclusion of Law No. 4 is supported by the court’s Findings of Fact. Simply making reciprocal wills, *in the absence of any other consideration*, is not sufficient part performance to take an oral agreement out the Statute of Frauds. *Cummings, supra*, at 102-103; *Allen v. Dillard, supra*, 15 Wn.2d at 50. But making such wills can be a factor, and here Mr. and Mrs. Kazmark not only made reciprocal wills, but (1) the terms of those wills were the same as the terms that they had orally agreed to, and (2) the trial court found as a fact 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.” FF No. 18.

In addition, Barbara Kazmark fully performed: at the same time that Earle executed his 2005 Will, Barbara executed a CPA immediately giving him a 50% interest in her separate property (Finding of Fact 20), and a CPA and will giving her *entire* estate to him if she was the first to die. (Findings of Fact 10-16.) Executing the CPA was consideration for Earle's execution of his 2005 Will. (Finding of Fact 17.) The trial court was correct in construing the CPA and wills together for purposes of determining the terms of the Kazmarks' contract. *Alexander v. Lewes*, 104 Wash. 32 (1918) (father's will, and son's contract to care for elderly father, executed at the same time, construed together to prove consideration for oral agreement to devise: "That the will and the agreement go to the one transaction can hardly be denied. It is true that they do not refer the one to the other, but since the connecting link lies in the consideration, and since it is always competent to prove a consideration, it was competent to prove that the one paper was signed in consideration of the other"). *Platts v. Arney, supra*, 46 Wn.2d at 127 ("Several writings signed by the party to be charged may be construed together for the purpose of ascertaining the terms of a contract, and for the purpose of taking an action founded thereon out of the operation of the statute of frauds").

Then Barbara died (Finding of Fact 1), completing her performance. Upon her death Earle acquired her entire estate under the CPA and her 2005 Will. Findings of Fact 21, 25-28.¹³ The Court in *Cummings, supra* at 103, held that similar, less compelling, facts were sufficient to constitute performance satisfying the Statute of Frauds:

The oral contract made by Mr. and Mrs. Shinn was within the provisions of the above statute and, in itself, unenforcible. However, mutual wills were made by the Shinns in conformity with their oral agreement. [*The same applies to the Kazmarks' case*]. Thereafter, Mrs. Shinn probated her husband's estate and took his estate given to her by his will executed in 1931. The actions of the parties were sufficient part performance to take the contract from the statute of frauds.

H. The Court Should Award Respondents Their Attorney's Fees.

This Court has the discretion to award attorney's fees to any of the parties in a case of this nature, or even to all of the parties. RCW 11.96A.150; *In re Estate of Black*, 116 Wn. App. 476 (2003). Here, the Court should exercise that discretion to award fees against Appellants and in favor Respondents, because the equities and the merits of the two sides strongly favor Respondents.

1. This appeal verges on the frivolous. Appellants assigned error to nearly all of the trial court's Conclusions of Law, but then failed

¹³ As noted earlier, Earle apparently intended to rely on the CPA to acquire ownership of Barbara's estate, but he could take her interest in property outside the state of Washington only through her will.

to specifically address any of them. Appellants did not claim that the Conclusions of Law are not supported by the Findings of Fact. They relied solely on the argument that the Court's findings were not supported by substantial evidence.

2. Appellants assigned error to just four of Judge O'Connor's Findings of Fact. But other than FF 12 (agreement on disposition of estate), Appellants do refer specifically to any of them again, and do not attempt to address whether they are supported by substantial evidence.

3. Neither did Appellants address in good faith address FF 12, the critical finding that Mr. and Mrs. Kazmark

had reached an agreement as to [1] how they would bequeath their estate after both were deceased, and . . . [2] to make wills to put their agreed-upon dispositions into effect. (Subnumbers added.)

Appellants failed to accurately present the substance of the witnesses' testimony on those issues. See Brief, at 30-31. And they avoided addressing the court's specific factual findings in FF 12 at all, by recasting it as finding an agreement between Mr. and Mrs. Kazmark "to make mutual wills." Nothing suggests the Kazmarks had ever heard the term "mutual wills." An agreement to make mutual wills is the *legal effect* of the facts recited in FF 12. Appellant fails to even address the facts on which the court based its Conclusion of Law No. 5 that the Kazmark wills were mutual wills.

4. Appellants failed to accurately present the facts in the record. They calculatedly and confusingly misidentify the status of the parties in the appeal. They misrepresented what the trial court did (“the trial court avoided any analysis of the legal consequence of the Kazmarks’ CPA”). Brief, at 11. They confusingly spent pages discussing cases about conflicts between wills and community property agreements—then acknowledged that the Kazmarks’ 2005 wills and CPA were, in fact, *consistent*. They assumed it was a fact that there was some “conflict” between (as it turns out) what the Kazmarks had agreed to, and the terms of their wills and CPA, without ever identifying the supposed conflict nor citing anything in the record showing a conflict.

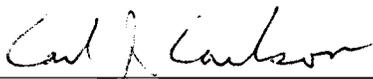
5. Appellants made repeated errors in stating the law and describing the correct holdings of cases.

6. Finally, the equities, like the evidence, overwhelmingly favor Respondents. Shane Krag’s mother (or, rather, his grandfather) was the source of virtually the entire estate at issue here. His mother generously offered to give 50% of her wealth to her husband’s two sons. Then one of those sons, Appellant Earle Kazmark, Jr., does his utmost to take it all. Appellants would gladly deprive Barbara’s son and granddaughter of their legacy, with no regard for elemental fairness.

7. Appellants' position below was wrong. Respondents prevailed at trial. The evidence wasn't close. The trial court was exceedingly generous treating them the same as the prevailing parties and ordering the Estate to pay all parties' fees—50% of which comes directly out of Shane Krag's inheritance. Appellants are wrong again on this appeal. And again, the merits of the appeal aren't close. Appellants should bear the expenses generated by their choice to doggedly pursue a morally unconscionable claim, in pursuit of an unjustified windfall.

Dated January 27, 2012

CARLSON & DENNETT. P.S.

By 
Carl J. Carlson, WSBA # 7157
Attorneys for Respondents