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No. 97463-2

SUPREME COURT  
OF THE STATE OF WASHINGTON

No. 77556-1

COURT OF APPEALS, DIVISION 1  
OF THE STATE OF WASHINGTON

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GLORIA PETELLE,

Respondent,

vs.

MICELLE ERSFELD-PETELLE,

Petitioner.

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*AMICUS CURIAE MEMORANDUM IN SUPPORT OF REVIEW*  
(RAP 13.4(h))

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## I. IDENTITY AND INTEREST OF AMICUS CURIAE

Karen E. Boxx is a Professor at the University of Washington School of Law. Her areas of teaching and research include wills and trusts, community property, elder law, and conflict of laws. She has been active throughout her legal career in legislative review and reform in Washington, most recently chairing a Task Force revising the Washington trust laws (adopted in 2011 and revised in 2013) and assisting in the adoption of the Washington Uniform Power of Attorney Act in 2016. She is the co-editor of the most recent edition of the Washington State Bar Association Community Property Deskbook.

Professor Boxx appears in this court as *amicus curiae* on a pro bono basis and in her individual capacity. She does not appear as the representative of her employer or either the petitioner or respondent.

In this case, the Court of Appeals held that a general waiver of marital and property rights in a property settlement agreement, entered into in connection with a marital dissolution action, was sufficient to waive the rights of a surviving spouse under RCW 11.04.015 to take a share of the intestate estate of a deceased spouse. The Court of Appeals correctly held that the legislative scheme of distribution of an intestate estate is not affected because a married couple's relationship is "defunct" before death, where there has been no final dissolution of the marriage. This Court should

accept review to clarify what is required for spouses to waive statutory marital rights, in light of the approach of other jurisdictions. The Court of Appeals' decision raises concerns about protection of parties who have no or minimal representation in pursuing dissolution of their marriages.

## II. STATEMENT OF THE CASE

*Amicus curiae* adopts the facts as set out in the petition for review.

## III. ARGUMENT

### **A. Waiver of significant rights, particularly where parties may be unrepresented, should be established with evidence that such waiver was knowing and intended.**

The Court of Appeals held that the waiver in the Petelle's property settlement agreement, that referred to "all marital and property rights," was sufficiently broad to include the intestacy distribution scheme of RCW 11.04.015, which would give Michelle Ersfeld-Petelle one-half of Mr. Petelle's separate property. The Court of Appeals looked no further than the language in the agreement for this conclusion. By contrast, courts in other jurisdictions have looked more closely at the parties' intent. In *Hempe v. Hempe*, 54 Or. App. 490 (1981), the parties had entered into a property settlement agreement but before the dissolution was finalized the husband died. The court stated that "It is undisputed that property settlement

agreements, whether prenuptial or postnuptial, may provide for termination of a spouse's statutory inheritance rights if they clearly and explicitly so provide.... [T]he intention of the parties controls." 54 Or. App. at 493. Because there was no evidence the agreement addressed what would happen if a party died before the final dissolution, the wife was confirmed as the surviving spouse with rights under intestacy. In *Estate of Smid*, 756 N.W.2d 1 (S.D. 2008), the wife had waived rights as a surviving spouse in an agreement signed hours before the husband's death, and after his death she claimed that the waiver was not enforceable under S.D. C.L. 29A-2-402, which requires that a surviving spouse's waiver of property rights pass the general fairness test applicable to prenuptial agreements. The court held that the agreement was not enforceable, since she had no legal advice and was not informed of her statutory rights as a surviving spouse.

The Uniform Probate Code directly addresses the requirements for a property settlement agreement to waive intestacy rights. Section 2-213(h) of the Uniform Probate Code provides:

(h) Unless an agreement under subsection (b) provides to the contrary, a waiver of "all rights," or equivalent language,

in the property or estate of a present or prospective spouse or a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights of elective share, homestead allowance, exempt property, and family allowance by the spouse in the property of the other spouse and a renunciation of all benefits that would otherwise pass to the renouncing spouse by intestate succession or by virtue of any will executed before the waiver or property settlement.

There are two noteworthy points about the UPC provision. First, section 2-213 requires procedural fairness, such as disclosure of property and legal advice, in order for waivers of spousal rights to be enforceable. Second, the issue is addressed by statute rather than being left to court interpretation, which implies that a statute may be necessary or preferable to give notice that contractual language will be interpreted to waive the statutory intestacy scheme.

The approach of the Court of Appeals, to conclude that a general waiver of “all rights” in a property settlement agreement is sufficient to waive intestate succession rights, raises concerns. It is common for parties to be unrepresented in dissolution proceedings, or to have access to minimal legal assistance. See Wash. Sup. Ct., 2015 Washington State Civil Legal Needs Study Update. A lay person without full legal counsel on the import of general waivers in a

property settlement agreement could easily assume language such as the language in the Petelle agreement only refers to division of property as between the two spouses. A survey conducted by Professor Adam Hirsch of the University of San Diego School of Law, of persons in the midst of divorce showed mixed results in those persons' preferences with respect to their spouses' inheritance rights while the divorce action was pending. Adam Hirsch, *Inheritance on the Fringes of Marriage*, 2018 U. Ill. L. Rev. 235, 259-60. He concluded, based on his data, that if legislators moved revocation of inheritance rights back to date of filing, then they should allow extrinsic evidence of contrary intent to rebut any presumption of disinheritance. *Id.* at 260. The Court of Appeals' approach would impose a conclusive presumption of waiver without consideration of the parties' circumstances or intent. This Court should accept review to consider whether boilerplate language in a property settlement agreement, without more, is sufficient to override the intestacy scheme prescribed by the legislature, or whether such override should require either a showing of knowing waiver, after legal advice, or intent. Because the Court of Appeals decision has the potential to

affect numerous pro se litigants who would have no advance notice of its holding, the issue is worthy of consideration by this Court.

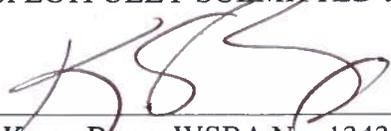
**B. The sweeping interpretation of marital and property rights made by the Court of Appeals may cause confusion and litigation.**

Rights of a surviving spouse extend beyond the spouses' respective rights in property that is being divided at dissolution of the marriage and include rights under the wrongful death statute, RCW ch. 4.20, rights to Social Security survivor benefits, rights under the Employee Retirement Income Security Act, 29 U.S. Code ch. 18, and rights to control disposition of remains under RCW 68.50.160. The Court of Appeals' broad interpretation of "marital and property rights" leaves open the possibility that a general waiver in a property settlement agreement may or may not apply to those rights as well.

#### IV. CONCLUSION

This Court should accept review to consider the requirements of an effective waiver of intestacy rights as a surviving spouse and the proper determination of the scope of a general waiver of property rights in a property settlement agreement.

RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of September, 2019.



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**DECLARATION OF SERVICE**

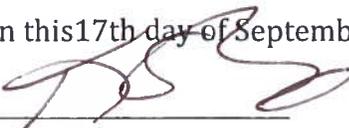
The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on September 17, 2019, I arranged for service of the foregoing Amicus Curiae Memorandum in Support of Review, to the court and to the parties to this action as follows:

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**DATED** at Seattle, Washington this 17th day of September, 2019.

  
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Karen Boxx

**KELLER ROHRBACK LLP**

**September 17, 2019 - 10:22 AM**

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