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No. 97463-2

No. 77556-1-I

COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON

Gloria Petelle,
Appellant

v.

Michelle Ersfeld Petelle,
Respondent

On Appeal from King County Superior Court
Cause No. 17-4-05917-7 SEA
Hon. Kenneth Schubert

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	1
TABLE OF AUTHORITIES	ii
I. Reply.....	1
1. Michelle Waived Her Right to Intestate Succession.....	1
2. RCW 11.02.005(17) Excludes from Intestate Succession Individuals Whose Marriages or Domestic Partnerships Have Been Terminated, Dissolved or Invalidated	5
3. <i>Skalman</i> Stands for the Proposition that a Defunct Marriage can Terminate Spousal Rights.....	8
4. Trial Court Reserved Discretionary Fee Award Under RCW 11.96A.150.....	12
II. Conclusion	13

TABLE OF AUTHORITIES

CASES

<i>Bellevue Farm Owners Ass’n. v. Stevens</i> , 198 Wn. App. 464, 394 P.3d 1018 (2017).....	2
<i>Egelhoff v. Egelhoff</i> , 139 Wn.2d 557, 989 P.2d 80 (1999).....	8
<i>Egelhoff v. Egelhoff</i> , 532 U.S. 1414, 121 S.Ct. 1322, 149 L. Ed. 2d 264 (2001)	8
<i>Estate of Gardner</i> , 103 Wn. App. 557, 13 P.3d 655 (2000)	8
<i>Grogan v. Seattle Bank</i> , 195 Wn. App. 500, 379 P.3d 158 (2016).....	7
<i>In Re Brown’s Estate</i> , 28 Wn.2d 436, 183 P.2d 768 (1947).....	3, 4, 5
<i>In re Detention of Boynton</i> , 152 Wn. App. 442, 216 P.3d 1089 (2009).....	6
<i>In re Estate of Lindsay</i> , 91 Wn. App. 944, 957 P.2d 818 (1998).....	2, 3, 4, 5
<i>Keene Corp. v. United States</i> , 508 U.S. 200, 113 S.Ct. 2035, 124 L. Ed. 2d 118 (1993).....	7
<i>Mayer v. Pierce County Med. Bureau, Inc.</i> , 80 Wn. App. 416, 909 P.2d 1323 (1995).....	11
<i>Nishikawa v. U.S. Eagle High, LLC</i> , 138 Wn. App. 841, 158 P.3d 1265 (2007).....	11
<i>North Carolina v. Butler</i> , 441 U.S. 369, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979).....	1
<i>Peste v. Peste</i> , 1 Wn. App. 19, 459 P.2d 70 (1969).....	2, 3, 5
<i>Peters v. Skalman</i> , 27 Wn. App. 247, 617 P.2d 448 (1980).....	9, 10
<i>Public Employees Mut. Ins. Co. v. Sellen Constr. Co.</i> , 48 Wn. App. 792, 740 P.2d 913.....	11
<i>Rimov v. Schultz</i> , 162 Wn. App. 274, 253 P.3d 462 (2011)	11
<i>Russello v. United States</i> , 464 U.S. 16, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983).....	7
<i>Schuster v. Prestige Senior Mngmt., LLC</i> , 193 Wn. App. 616, 376 P.3d 412 (2016).....	2

<i>State v. Terrovona</i> , 105 Wn.2d 632, 716 P.2d 295 (1986)	1
<i>Steel v. Olympia Early Learning Ctr.</i> , 195 Wn. App. 811, 381 P.3d 111 (2016).....	2
<i>Wilson Court Ltd. P’ship v. Tony Maroni’s</i> , 134 Wn.2d 692, 952 P.2d 590 (1998).....	11
<i>Yates v. Dohring</i> , 24 Wn.2d 877, 168 P.2d 404 (1946).....	9

STATUTES AND COURT RULES

RAP 18.1(i).....	13
RCW 11.02.005(17).....	5, 6, 8, 10
RCW 11.04.015	1
RCW 11.07.010	7, 8
RCW 11.54.010	1
RCW 11.96A.150.....	13

I. REPLY

Michelle concedes that a party can waive her statutory right to intestate succession. She further concedes she impliedly waived her statutory right to family support, even though the separation contract makes no mention of homestead or family support rights: “Michelle does not disagree that a party can waive their right to inherit under RCW 11.04.015 Michelle concede[s], and the trial court agreed, that the separation contract waived her right to family support (which replaces the former homestead allowance) under RCW 11.54.010” Response at 15–16.

At the same time, Michelle argues she did not waive her statutory right to intestate succession because the separation contract makes no mention of intestate succession. Response, 20–24. Michelle’s arguments are irreconcilable with her concessions.

1. Michelle Waived Her Right to Intestate Succession

Waivers do not need to be explicit to be effective and enforceable. *North Carolina v. Butler*, 441 U.S. 369, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979) (holding U.S. Constitution Fifth Amendment privilege against self-incrimination can be impliedly waived); *State v. Terrovona*, 105 Wn.2d 632, 647, 716 P.2d 295 (1986) (affirming finding of implied waiver of U.S. Constitution Fifth Amendment

privilege against self-incrimination); *Bellevue Farm Owners Ass’n v. Stevens*, 198 Wn. App. 464, 481–82, 394 P.3d 1018 (2017) (holding attorney-client privilege can be impliedly waived and rejecting argument that implied waiver of attorney-client privilege is limited to legal malpractice claims); *Steel v. Olympia Early Learning Ctr.*, 195 Wn. App. 811, 824–25, 381 P.3d 111 (2016) (holding attorney-client privilege can be impliedly waived); *Schuster v. Prestige Senior Mngmt., LLC*, 193 Wn. App. 616, 630–49, 376 P.3d 412 (2016) (holding contractual right to compel arbitration can be impliedly waived). Michelle fails to distinguish the statutory right to intestate succession from any other right recognized in our system of justice, all of which can be waived by implication.

A waiver is merely a “voluntary act which implies a choice, by the party, to dispense with something of value or to forego some advantage.” *In re Estate of Lindsay*, 91 Wn. App. 944, 951, 957 P.2d 818 (1998) (quoting *Peste v. Peste*, 1 Wn. App. 19, 24, 459 P.2d 70 (1969)). “[T]he doctrine of waiver is applicable to transactions between spouses generally and in the divorce situation specifically, where, as here, the choice to waive is made freely and voluntarily, without fraud, undue influence, duress, concealments, or without the taking advantage of one’s weakness or necessities by the other.”

Peste, 1 Wn. App. at 24. “This doctrine is not new to the husband-wife relationship. It is well settled that by post-nuptial agreement, a wife may waive her right to inherit” *Peste*, 1 Wn. App at 25 (citing 9 A.L.R.3d 955).

Michelle fails to distinguish our separation contract from separation contracts that Washington law has long-established are sufficient to waive all marital rights. See *In Re Brown’s Estate*, 28 Wn.2d 436, 183 P.2d 768 (1947); *Estate of Lindsay*, 91 Wn. App. 944, 957 P.2d 818 (1998). Our separation contract meets all of the factors necessary to effect a waiver of all marital rights under *Brown* and *Lindsay*.

Like the separation contract in *Brown*, our separation contract states that it is a complete and final settlement of all marital and property rights. *Brown*, 28 Wn.2d at 438; CP 43, 49. Like the separation contracts in *Brown* and *Lindsay*, our separation contract identifies and divides all of the parties’ real and personal property into separate property. *Brown*, 28 Wn.2d at 437; *Lindsay*, 91 Wn. App. at 947; CP 44, 51. Like the separation contracts in *Brown* and *Lindsay*, our separation contract states that it is effective and binding upon execution, not entry of a final decree of dissolution. *Brown*, 28 Wn.2d at 438; *Lindsay*, 91 Wn. App. at 951; CP 43–44, 47, 48, 49.

Like the separation contract in *Brown*, our separation contract explicitly contemplates enforcement after death, even without a decree of dissolution. *Brown*, 28 Wn.2d at 438; CP 48. Like the separation contract in *Brown*, our separation contract explicitly resolves and waives all claims in the property of the other. *Brown*, 28 Wn.23d at 438; CP 51, 46.

The separation contract in *Lindsay* apparently did not even state that it was a complete and final settlement of all marital and property rights, nor did it explicitly contemplate enforcement after death. Nonetheless, the *Lindsay* court held that

[t]he agreement clearly reflect[ed] an intent to give up those rights which would normally follow legal spouses. [I]mplied waiver is enough. ‘The test is whether the parties through their actions have exhibited a decision to renounce the community ‘with no intention of ever resuming the marital relationship.’ Their actions showed an intent to prevent, waive, and abandon what a surviving spouse could normally take.

Lindsay, 91 Wn. App. at 951.

Our separation contract is even more explicit than the separation contract in *Lindsay*, which the court held “showed an intent to prevent, waive, and abandon what a surviving spouse would normally take.” *Lindsay*, 91 Wn. App. at 952. It was

“obvious” to the Washington Supreme Court that the parties in *Brown* meant to waive any rights which might accrue upon death. It is at least as obvious here that Mike and Michelle meant to waive any rights which might accrue death, since the separation contract they signed met every factor identified by *Brown* and *Lindsay* to effect a waiver of “those rights which would normally follow legal spouses[,]” including “any rights which might accrue upon death.” *Lindsay*, 91 Wn. App. at 951; *Brown*, 28 Wn.2d at 440.

Michelle’s argument that the *Brown* and *Lindsay* decisions were somehow compelled by the decedents’ wills is completely unsupported and was explicitly addressed and rejected by *Lindsay*: “[D]is inheriting a spouse does not deprive a spouse of a homestead allowance.” *Lindsay*, 91 Wn. App. at 949. The *Brown* opinion did not discuss or analyze Mr. Brown’s will at all, but merely mentioned that he left a will in which his wife was not mentioned. *Brown*, 28 Wn.2d at 439. The will is never discussed again in the opinion and is completely irrelevant to any analysis in *Brown*.

2. RCW 11.02.005(17) Excludes from Intestate Succession Individuals Whose Marriages or Domestic Partnerships Have Been Terminated, Dissolved or Invalidated

Respondent argues that the descriptor “terminated” in RCW 11.02.005(17) refers only to domestic partnerships and not to

marriages. Michelle’s argument requires this Court to ignore both the plain meaning rule and long-standing case law.

Surviving Spouse’ . . . does not include an individual whose marriage to or state registered domestic partnership with the decedent has been terminated, dissolved, or invalidated . . .

RCW 11.02.005(17).

The plain meaning rule requires a court to give effect to the plain meaning of a statute and ignore legislative history when a statute is unambiguous. *In re Detention of Boynton*, 152 Wn. App. 442, 452, 216 P.3d 1089 (2009).

RCW 11.02.005(17) plainly excludes from the definition of “surviving spouse” any person whose marriage to the decedent has been terminated, dissolved, or invalidated, and also excludes from the definition of “surviving spouse” any person whose domestic partnership to the decedent has been terminated, dissolved, or invalidated:

If the Legislature had intended to limit RCW 11.02.005(17) in the manner suggested by Michelle, it could easily have done so simply by using the same words in a different order: “*Surviving Spouse . . . does not include an individual whose marriage to the decedent has been dissolved or invalidated or whose state registered*

domestic partnership with [the decedent] has been terminated.” If the Legislature intended to limit the “terminated” descriptor to domestic partnerships, it could have easily done so. That it did not is compelling evidence the Legislature meant what it said: Individuals whose marriages have been terminated are not “surviving spouses.”

When the Legislature uses language in one portion of a statute that differs from language used in another it is generally presumed that the Legislature acts intentionally and purposefully. *See Grogan v. Seattle Bank*, 195 Wn. App. 500, fn9, 379 P.3d 158 (2016) (citing *Keene Corp. v. United States*, 508 U.S. 200, 208, 113 S.Ct. 2035, 124 L. Ed. 2d 118 (1993) (quoting *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983))).

Washington legislators are capable of understanding and limiting descriptors to achieve their goals. For example, RCW 11.07.010 addresses the fate of all nonprobate assets “held at the time of entry of a decree of dissolution of marriage or state registered domestic partnership or a declaration of invalidity or certification of termination of a state registered domestic partnership.” There, the Legislature ably demonstrated its ability to intentionally and purposefully delineate the union-rendering acts that will revoke a

non-probate beneficiary designation: dissolution or invalidation of a marriage, OR termination of a state-registered domestic partnership:

If a marriage or state registered domestic partnership is dissolved or invalidated, *or* a state registered domestic partnership terminated, a provision made prior to that event that relates to the payment or transfer at death of the decedent's interest in a nonprobate asset in favor of or granting an interest or power to the decedent's former spouse or state registered domestic partner, is revoked.

RCW 11.07.010(2)(a) (italics added).¹

3. *Skalman* Stands for the Proposition that a Defunct Marriage can Terminate Spousal Rights.

Respondent argues that *Skalman* “cannot stand for the proposition that a defunct marriage is legally terminated marriage for purposes of RCW 11.02.005(17).” Response at 9. *Skalman* plainly and unequivocally held that a marriage can be terminated when it can be found to be defunct, and this holding was pivotal to the ultimate disposition of *Skalman*. The Skalmans were married for twenty-three (23) years before they separated. They never made a separation

¹ This careful distinction is driven by the Employee Retirement Income Security Act of 1974, which largely preempts state law regarding the methods available to designate and change beneficiaries of certain retirement assets. See *Egelhoff v. Egelhoff*, 139 Wn.2d 557, 989 P.2d 80 (1999) (reversed by *Egelhoff v. Egelhoff*, 532 U.S. 1414, 121 S.Ct. 1322, 149 L. Ed. 2d 264 (2001)). See also *Estate of Gardner*, 103 Wn. App. 557, 13 P.3d 655 (2000).

contract, never filed for divorce, and never formally divided their community into separate property. Absent a holding that their marriage was “terminated” as a result of being defunct, it would have been impossible for Mr. Skalman to adversely possess against Mrs. Skalman.

The *Skalman* decision recognized that finding a marriage “defunct” and therefore “terminated” had more consequences than merely ending the community property presumption: A defunct, and therefore terminated marriage relieves the parties of all “all liabilities incident to the martial status, which are based upon the reciprocal aspects of the relationship.” *Peters v. Skalman*, 27 Wn. App. 247, 253, 617 P.2d 448 (1980) (citing *Yates v. Dohring*, 24 Wn.2d 877, 881, 168 P.2d 404 (1946)).

Contrary to Respondent’s assertion, the *Skalman* holding was never limited to “causing property acquired and liabilities incurred [after “termination”] to be considered separate in nature” Response at 7. In fact, the *Skalman* court specifically rejected that very premise by noting that the “precise nature of W.C. Peters’ and/or Marian Peters’ interest in the land prior to 1944 is in dispute and was not resolved by the trial court. *For the purposes of this opinion, we*

will assume the land was an asset of the community.” Skelman, 27 Wn. App. 247, n1 (italics added).

The *Skelman* decision predates the 2008 version of RCW 11.02.005(17) by over 27 years. The Legislature is presumed aware of judicial interpretations, and *Skelman* has been cited many times since 1980 without question. The amendment of RCW 11.02.005(17) to include individuals whose marriages have been “terminated” is a clear decision by the Legislature to exclude a party to a defunct marriage from the definition of “surviving spouse” under RCW 11.02.005(17).

Respondent claims the term “defunct” is used solely to determine whether the community property presumption has been terminated. However, the separation contract Michelle signed specifically identifies January 27, 2017, as the date of final separation when the date the marriage became legally defunct AND the date the community presumption was terminated: “Final separation defining when the marriage became legally defunct *and* the community presumption terminated is deemed to have occurred on or about January 27, 2017.” CP 44, 49 (italics added). Joining two dissimilar phrases: “the marriage became legally defunct . . . on or about January 27, 2017” and “the community presumption terminated . . .

on or about January 27, 2017” with the conjunction “and” necessarily implies two different things: (1) the marriage became defunct; and (2) the community presumption terminated. If the purpose was merely to define when the community presumption terminated the parties needed only to say: “*Final separation defining when the community presumption terminated is deemed to have occurred on or about January 27, 2017.*”

Courts must interpret contracts as a whole, giving reasonable effect to each of its parts. *Wilson Court Ltd. P’ship v. Tony Maroni’s*, 134 Wn.2d 692, 705, 952 P.2d 590 (1998) (citing *Public Employees Mut. Ins. Co. v. Sellen Constr. Co.*, 48 Wn. App. 792, 796, 740 P.2d 913 (in construing a contract, the court should apply construction that will give each part of the instrument some effect)). When construing an agreement, the Court should give effect to every word so as not to render any word superfluous.” *Rimov v. Schultz*, 162 Wn. App. 274, 282, 253 P.3d 462 (2011) (citing *Nishikawa v. U.S. Eagle High, LLC*, 138 Wn. App. 841, 849, 158 P.3d 1265 (2007)). The goal of a court interpreting a contract should be “to interpret the agreement in a manner that gives effect to all the contract’s provisions.” *Nishikawa*, 138 Wn. App. at 849 (citing *Mayer v. Pierce County Med. Bureau, Inc.*, 80 Wn. App. 416, 423, 909 P.2d 1323 (1995)).

Michelle's argument that "defunct" in the separation contract means the same thing as terminating the community presumption must be rejected if every word must be given meaning.

Likewise, Michelle's request for a remand to "find facts" should be similarly rejected, since the plain language of the contract says that it can be "terminated and modified only by a written document so reflecting, signed by both parties." CP 47. Both parties did not sign a written document reflecting the termination or modification of the separation contract, rendering a remand for fact-finding unnecessary.

4. Trial Court Reserved Discretionary Fee Award Under RCW 11.96A.150.

Michelle argues that she is entitled to her attorney's fees on appeal because this is a straightforward issue. While the issue is straightforward, it is not straightforward in her favor. Washington case law clearly provides for the implied waiver of marital rights that operate at death. The case law has so far only addressed homestead rights, but the facts of this case fall well within existing case law, of which Gloria Petelle seeks a predictable, reasonable good faith extension. In any event, the trial court reserved a fee award to either party, cryptically announcing that "I think that at the end of this when

we get this all done and over with – and you guys appear in front of me to make that happen under 11.96A.150, I’m going to award fees. But I’m reserving now so that we can hopefully put that day off, that hopefully you guys now have some clarity from the Court even beyond what you did the first time.” RP 20–21. No fees were awarded below, and no party is entitled to fees at all, since they are entirely a matter of judicial discretion under RCW 11.96A.150. Whether this Court reverses or affirms, it should direct the trial court determine the amount of fees and expenses to be awarded, pursuant to RAP 18.1(i).

II. CONCLUSION

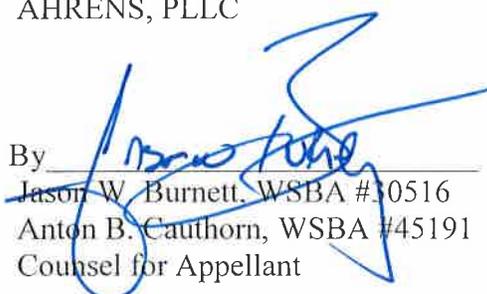
The Court should reverse the trial court in a published opinion and hold that Michelle waived the statutory right to intestate succession and right to claim a status as a “surviving spouse” under RCW 11.02.005(17) by executing a separation contract that purported to be a complete and final settlement of all marital and property rights; that identified and divided all of the parties’ real and personal property into separate property and released all claims thereto; that stated it is effective and binding upon execution, not entry of a final decree of dissolution; and that explicitly contemplated enforcement after death, even without a decree of dissolution.

The Court should further hold in a published opinion that parties to a separation contract that purports to be a complete and final settlement of all marital and property rights; that identifies and divides all of the parties' real and personal property into separate property and released all claims thereto; that states it is effective and binding upon execution, not entry of a final decree of dissolution; and that explicitly contemplates enforcement after death, even without a decree of dissolution "terminate" their marriage within the meaning of RCW 11.02.005(17).

The Court should remand this matter to the trial court with instructions to enter orders consistent with the Court's opinion.

RESPECTFULLY DATED this 30th day of April 2018.

REED, LONGYEAR, MALNATI, &
AHRENS, PLLC

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No. 77556-1-1

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

Gloria Petelle,

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v.

Michelle Ersfeld Petelle,

Respondent.

CERTIFICATE OF SERVICE

I declare under penalty of perjury, under the laws of the State of Washington, that on April 30, 2018, I caused true and correct copies of the APPELLANT'S REPLY BRIEF, and this Certificate of Service, to be served to the parties and counsel of record as follows:

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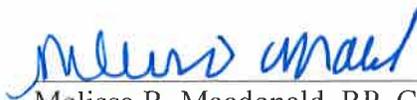
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