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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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GLORIA PETELLE,

Appellant,

v.

MICHELLE ERSFELD-PETELLE,

Respondent.

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APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE KENNETH L. SCHUBERT

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BRIEF OF RESPONDENT

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## I. INTRODUCTION

Less than three months before his death, Michael Petelle and his wife, respondent Michelle Ersfeld-Petelle, entered into a separation contract dividing and distributing community assets and terminating the community estate as of the date of separation. The spouses never sought a decree of dissolution; they remained legally married and were attempting to reconcile when Michael died intestate, leaving no children. Michelle asserted that she was entitled to a share of his separate estate as his surviving spouse under RCW 11.04.015. Michael's mother, appellant Gloria Petelle, petitioned for an order terminating Michelle's right to take under the intestate succession statute, arguing that Michelle had waived any inheritance from Michael's estate by entering into the separation contract.

RCW 11.02.005(17) provides that a person qualifies as a surviving spouse for purposes of intestate succession unless the legal "status of spouses" has been terminated, dissolved, or invalidated. Michelle did not expressly or impliedly waive her right to be considered a "surviving spouse" for purposes of intestate succession by entering into the separation contract. The trial court therefore properly denied Gloria's petition, and this Court should affirm.

## II. RESTATEMENT OF FACTS

### A. **Michael Petelle and Michelle Ersfeld-Petelle entered into a separation contract, but did not seek a decree of dissolution.**

Respondent Michelle Ersfeld-Petelle and decedent Michael Petelle married on May 20, 2011 and separated on January 27, 2017, when Michael filed a petition for dissolution in King County Superior Court. (CP 44, 63) On February 14, 2017, Michelle and Michael entered into a “Separation Contract and CR 2A Agreement.” (CP 43-53) The separation contract expressly provided that the “parties are not contracting to legally separate or dissolve their marriage, but agree if a decree of legal separation or decree of dissolution is obtained, this contract shall be incorporated in said decree and given full force and effect thereby.” (CP 43)

The separation contract terminated the community estate as of January 27, 2017 and divided Michael and Michelle’s assets and liabilities. (CP 44) Both parties released claims against “[a]ll disclosed property not otherwise awarded or assigned in this agreement,” and agreed that “[a]ll property which shall hereafter come to either party shall be his or her separate property and neither party shall hereafter have any claim thereto.” (CP 46) The separation contract became “final and binding upon the execution of

both parties, whether or not a legal separation or decree of dissolution is obtained.” (CP 43-44) The contract’s property distribution and obligations “remain valid and enforceable against the estate of either party” upon death. (CP 48) Neither party to this proceeding contests the enforceability of the separation contract. (RP 6-7)

**B. Following Michael’s death, his mother Gloria unsuccessfully contested Michelle’s right to inherit a share of Michael’s estate as his surviving spouse.**

Michael died intestate, with “no will and no issue,” on May 1, 2017. (CP 63) At the time of his death, the trial court had not entered a decree of dissolution.<sup>1</sup> (CP 63) On May 10, 2017, Michelle petitioned the court for letters of administration, appointment as administrator, an order of solvency, and nonintervention powers. (CP 63) The trial court initially granted, but then revoked, Michelle’s nonintervention powers, as Michael’s estate consisted only of separate property after execution of the separation contract. (CP 63-64)

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<sup>1</sup> The trial court had before it evidence that Michelle and Michael had been attempting reconciliation. On April 2, 2017, Michael sent an email to his attorney asking her to “postpone the closing date” of the marriage dissolution “an additional six months” while he and Michelle decided whether or not to reconcile. (CP 14, 17) Michael’s friends attested to his love for Michelle and his desire “to make his marriage work.” (CP 1-2, 4-8)

Michael's mother, appellant Gloria Petelle, filed a TEDRA petition under RCW ch. 11.96A to terminate Michelle's right to take by intestate succession, arguing that Michelle "waived all her statutory and common law rights as a surviving spouse . . . when she executed the Separation and CR2A Agreement dated February 14, 2017." (CP 18-27) The trial court denied Gloria's petition, finding that Michelle did not waive her right to intestate inheritance under the plain language of the separation contract. (RP 17-19; CP 111-12) Gloria appeals.

### III. ARGUMENT

**A. Michelle is entitled to take by intestate succession as the "surviving spouse" because her marriage to Michael was never invalidated, dissolved, or terminated.**

The "purpose of statutory interpretation is to determine and give effect to the enacting body's intent." *Ley v. Clark Cnty. Pub. Transp. Benefit Area*, 197 Wn. App. 17, 24, ¶ 19, 386 P.3d 1128 (2016). This Court "first look[s] to the plain language of the statute, considering the text of the provision, the context of the statute, related provisions, and the statutory scheme as a whole." *Ley*, 197 Wn. App. at 24-25, ¶ 19. "[I]f, after this inquiry, the statute remains susceptible to more than one reasonable meaning, the statute is ambiguous and it is appropriate to resort to aids to construction,

including legislative history.” *State, Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002). This Court “will not add language to an unambiguous statute even if [it] believe[s] the legislature intended something else but did not adequately express it.” *Am. Cont’l Ins. Co. v. Steen*, 151 Wn.2d 512, 518, 91 P.3d 864 (2004).

The plain language of RCW 11.02.005(17) unambiguously provides that only the termination of the legal “status of spouses” precludes the decedent’s (former) spouse from inheriting under RCW 11.04.015. Blatantly disregarding this plain language, Gloria instead attempts to read an ambiguity into RCW 11.02.005(17) by arguing that a surviving spouse in a “defunct” marriage is not entitled to take a share of the estate under RCW 11.04.015. (App. Br. 12-16) This Court should reject Gloria’s attempt to rewrite the statute in contravention of its plain language.

- 1. Michelle is entitled to take a portion of Michael’s net separate estate as his “surviving spouse” under the plain language of RCW 11.04.015 and 11.02.005(17).**

Because Michael died intestate with no children, Michelle is entitled to inherit three-quarters of Michael’s net separate property estate as his “surviving spouse.” Under RCW 11.04.015, the “surviving spouse” shall receive “[a]ll of the decedent’s share of the

net community estate” and “[t]hree-quarters of the net separate estate if there is no surviving issue, but the intestate is survived by one or more of his or her parents.” RCW 11.04.015(1)(a), (c). The decedent’s surviving parent(s) (in this case, appellant) receives the remaining quarter of the net separate estate. RCW 11.04.015(2)(b).

The separation contract here disposed of Michael’s “share of the net community estate” by converting “[a]ll disclosed property not otherwise awarded or assigned” under the contract – including that which was acquired “during any period of separation” – into “the sole property of the party in whose possession or control it presently is.” (CP 46; RP 16: Michelle concedes “the agreement says these things are his separate property . . . . that makes up his estate”). There is, therefore, no “net community estate” to which Michelle would otherwise be entitled under RCW 11.04.015(1)(a). However, because Michael had no children and is survived by a parent, Michelle is entitled to three-quarters of his net separate estate as his surviving spouse under RCW 11.04.015(1)(c).

A “surviving spouse” eligible to take under RCW 11.04.015 “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). It is undisputed that

Michelle and Michael’s marriage was never invalidated or dissolved. (See RP 13-14) Nor was their marriage terminated: even if they had legally separated (which they did not), “[a] decree of separation that does not terminate the status of spouses or domestic partners is not a dissolution or invalidation for purposes of” RCW 11.02.005(17). Michelle and Michael remained legally married at the time of his death. Michelle therefore is the “surviving spouse” entitled to three-quarters of his net separate estate.

**2. Michelle and Michael did not “terminate” their marriage by acknowledging that it was defunct.**

**a. An agreement or finding that a marriage is “defunct” does not affect the legal status of spouses and is not a “termination” under RCW 11.02.005(17).**

A “defunct” marriage is not a “terminated” marriage under RCW 11.02.005(17). (App. Br. 12-16) Declaring a marriage “defunct” does not legally terminate the marital status; it only has the consequence of causing property acquired and liabilities incurred thereafter to be considered separate in nature – the precise effect of the separation contract here. By specifying that a “decree of separation that *does not terminate the status of spouses . . .* is not a dissolution or invalidation for purposes of this subsection,” the statute makes clear that a “surviving spouse” is determined solely by

marital status. RCW 11.02.005(17) (emphasis added). This Court must reject Gloria's strained application of *Peters v. Skalman*, 27 Wn. App. 247, 617 P.2d 448, *rev. denied* 94 Wn.2d 1025 (1980) (App. Br. 12-14), which has no relevance given the plain statutory language of RCW 11.02.005(17). *Skalman* addresses only whether a defunct marriage has terminated *the community* so that one spouse can adversely possess the other spouse's half-interest in community property.

In *Skalman*, the decedent and his wife, whose "marriage had always been stormy," moved with their children to a parcel of land at Mill Plain. 27 Wn. App. at 248. After separating "for the last time in 1943," the decedent "held himself out as a single man" until his death nearly 30 years later, in 1972, when "it was discovered that he and [his wife] might never have been divorced." 27 Wn. App. at 248-50. During the quarter-century separation, the decedent gave one of the parties' sons, John, the east half of the Mill Plain property in 1959, and the west half in 1972. 27 Wn. App. at 249. Following his death, the decedent's heirs, including his estranged wife, sued John for quiet title and ejectment from the Mill Plain property.

The trial court found that John had obtained title to the east half of the property by adverse possession, and that by 1972 the

decedent “had obtained titled to the west half of the Mill Plain property by adversely possessing [his wife’s] community interest.” *Skalman*, 27 Wn. App. at 250-51, 254. After considering the “statutory duty to manage and control community assets for the benefit of the community,” a duty that “continues until the marriage ceases to exist,” *Skalman* held that “termination of the marriage relieves the managing spouse of his or her duty to act for the benefit of the lapsed community.” 27 Wn. App. at 251-52.

*Skalman* does not and cannot stand for the proposition that a defunct marriage is a legally terminated marriage for purposes of RCW 11.02.005(17). (App. Br. 14) The only consequence of declaring a marriage defunct is that “after such time the community was effectively dissolved” and the spouses were “relieved of [their] duties to deal with the property of the formal marital community for the common good.” *Skalman*, 27 Wn. App. at 253. To that end, Michelle and Michael’s separation contract is entirely *consistent* with *Skalman*. Upon their acknowledgment that their marriage was “defunct,” Michael and Michelle converted their community estate into separate property and agreed that all property thereafter acquired by either would be that spouse’s sole property. Doing so

had no bearing on their legal “status of spouses” under RCW 11.02.005(17).

Indeed, that a defunct marriage might dissolve the community without terminating the marriage is entirely consistent with Washington law, which “distinguishes between a ‘marital’ and a ‘community’ relationship, the latter concept encompassing more than mere satisfaction of the legal requirements of marriage.” *Aetna Life Ins. Co. v. Bunt*, 110 Wn.2d 368, 372, 754 P.2d 993 (1988). *See, e.g., Rustad v. Rustad*, 61 Wn.2d 176, 180, 377 P.2d 414 (1963) (“the *community* property laws will not be applied to a defunct marriage”) (emphasis added); *Estate of Bachmeier*, 147 Wn.2d 60, 68, 52 P.3d 22 (2002) (refusing to imply a “termination clause” to a community property agreement (“CPA”) should the parties’ marriage become defunct; “[a]lthough some parties might wish the CPA to terminate upon the underlying marriage becoming defunct, it is equally possible that they might not”); *Seizer v. Sessions*, 132 Wn.2d 642, 649, 940 P.2d 261 (1997) (“when a husband and wife live separate and apart, their marriage may be defunct” so that “all earnings and accumulations are the acquiring spouse’s separate property”).

In contrast, “[m]arriage is a personal, *legal status*, which is distinguishable ‘from the rights and privileges that are incidents of a

marriage.” *Tostado v. Tostado*, 137 Wn. App. 136, 142, ¶ 10, 151 P.3d 1060 (2007) (emphasis added) (quoted source omitted). Where a legitimate and valid marriage exists, the “married couple are husband and wife until divorced.” *State v. Gillaspie*, 8 Wn. App. 560, 562, 507 P.2d 1223 (1973).<sup>2</sup>

In *Gillaspie*, the trial court dismissed an action against a stepfather for nonsupport of his stepchild after the father and mother separated. Under the family abandonment statute in effect at the time, however, the obligation to support stepchildren ceased only “upon termination of the relationship of husband and wife.” *Gillaspie*, 8 Wn. App. at 561 (citing former RCW 26.20.030(1) (amended 1984)). “The trial court decided that the relationship of husband and wife within the purview of the statute was terminated

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<sup>2</sup> The importance of the spouses’ legal status is reflected in the treatment of the surviving partner of a committed intimate relationship when the other cohabitant dies intestate. The surviving partner in a committed intimate relationship is not entitled to take under RCW 11.04.015 as a surviving spouse because “[s]uch a relationship is not a marriage.” *Peffley-Warner v. Bowen*, 113 Wn.2d 243, 778 P.2d 1022 (1989). In *Bowen*, the surviving partner of a 22-year “unmarried cohabitating relationship” sought a share of the decedent’s estate under RCW 11.04.015. The Court recognized that “[b]y common definition, a spouse is a marriage partner or a wife or husband,” and the partners “were neither.” 113 Wn.2d at 252. Although the partners had a committed intimate relationship, “[s]uch a relationship is not a marriage. They were not spouses. They were not husband and wife.” 113 Wn.2d at 252-53. “Therefore, because appellant is not a ‘spouse,’ she cannot receive a share of the estate . . . under the intestate succession laws.” 113 Wn.2d at 253.

on separation and dismissed the action.” *Gillaspie*, 8 Wn. App. at 561. This Court reversed, holding that “the legislative words, ‘termination of the relationship of husband and wife,’ as commonly understood, mean a legal end to the marriage either by divorce or death.” *Gillaspie*, 8 Wn. App. at 562-63.<sup>3</sup>

Because separated spouses – even those in a “defunct” marriage, as Gloria argues at length (App. Br. 12-16) – have not relinquished or terminated their “status of spouses,” they remain “surviving spouses” under RCW 11.02.005(17) and 11.04.015.

**b. The legislature amended RCW 11.02.005(17) to add “terminated” to the definition of “surviving spouse” solely to recognize nonjudicial termination of domestic partnerships.**

The legislature did not, over a quarter of a century after that case had been decided, amend RCW 11.02.005(17) “to affirm and codify the reasoning of *Skalman*.” (App. Br. 18) In 2007, the legislature first defined “surviving spouse” “to exclude a decedent’s spouse if the marriage has been dissolved or invalidated, unless there

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<sup>3</sup> The legislature clearly agreed with, and in fact expanded, this Court’s interpretation that separation does not constitute “termination” of a marital relationship by subsequently clarifying that the “provisions of RCW 26.20.030 . . . are applicable *regardless of the marital or domestic partnership status* of the person who has a child dependent upon him or her.” RCW 26.20.080; Laws of 1984, ch. 260, § 28.

has been a subsequent remarriage.” Final Bill Report, H.B. 2236, 60<sup>th</sup> Leg., Reg. Sess. (Wash. 2007). In doing so, the legislature made clear from RCW 11.02.005(17)’s inception<sup>4</sup> that “[a] decree of separation is not a dissolution or invalidation unless the decree *has terminated the husband and wife status.*” Final Bill Report, H.B. 2236 (emphasis added). A year later, in 2008, the legislature amended the statute to include “terminated” not to “bring it within the ruling of *Skalman*” (App. Br. 18), but in response to the legislature’s creation of the “domestic partnership registry.” Final Bill Report, 2 S.H.B. 3104, 60<sup>th</sup> Leg., Reg. Sess. (Wash. 2008); see also Laws of 2007, ch. 156, § 27 (RCW 11.04.015(1) amended several months earlier solely to ensure a “state registered domestic partner” was entitled to inherit by intestate succession).

The domestic partnership registry “specified eligibility requirements for same-sex couples and qualifying different-sex couples to register, and granted certain rights and responsibilities to registered domestic partners,” including “areas of law dealing with . . . the death and burial of a domestic partner.” Final Bill Report, 2 S.H.B. 3104. The registry also significantly changed the “process for

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<sup>4</sup> The definition of “surviving spouse” was first codified as RCW 11.02.005(18) until 2014, when it was recodified as its current subsection. See Laws of 2014, ch. 58, § 18.

terminating a domestic partnership”: a “domestic partnership is no longer automatically terminated if the parties enter into a marriage with another person.” Final Bill Report, 2 S.H.B. 3104. Instead, domestic partners either must “file a petition for dissolution in superior court and follow the same procedures applicable to dissolution of marriages,” or, if they qualify, “to use the nonjudicial *termination* process.” Final Bill Report, 2 S.H.B. 3104 (emphasis added). That termination process included filing a notice of termination with the Secretary of State.<sup>5</sup> Final Bill Report, 2 S.H.B. 3104.

In direct response to the creation of the domestic partnership registry, the legislature amended RCW 11.02.005(17) in 2008 to incorporate domestic partners and domestic partnerships into the statute. Laws of 2008, ch. 6, § 901. RCW 11.02.005(17) initially provided that a “[s]urviving spouse’ does not include an individual whose marriage to the decedent has been dissolved or invalidated . . .” Laws of 2007, ch. 475, § 1. Under the 2008 amendments, RCW 11.02.005(17) similarly provided that a “[s]urviving spouse’ or

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<sup>5</sup> “As of 2009, the Secretary of State no longer processes termination documents for state registered domestic partnership[s].” Secretary of State, “Domestic Partnerships, Frequently Asked Questions,” *available at* <https://www.sos.wa.gov/corps/domesticpartnerships/faq-2014.aspx>.

‘surviving domestic partner’ does not include an individual whose marriage to *or state registered domestic partnership* with the decedent has been *terminated*, dissolved, or invalidated . . .” Laws of 2008, ch. 6, § 901 (emphasis added). The legislature clearly included “terminated” to the statute’s definition solely and specifically to account for the “nonjudicial termination process” of domestic partnerships.<sup>6</sup>

**B. Michelle did not waive her right to intestate succession by entering into the separation contract.**

“Waiver is the intentional relinquishment of a known right.” *Wagner v. Wagner*, 95 Wn.2d 94, 102, 621 P.2d 1279 (1980). “It is necessary that the person against whom waiver is claimed have intended to relinquish the right, advantage, or benefit and his action must be inconsistent with any other intent than to waive it.” *Wagner*, 95 Wn.2d at 102. Michelle does not disagree that a party *can* waive their right to inherit under RCW 11.04.015. (App. Br. 7-

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<sup>6</sup>This interpretation of “terminated” is not only entirely consistent with the legislative history of RCW 11.02.005(17), but with the plain language of RCW 11.07.010(2)(a). RCW 11.07.010(2)(a) revokes the right of a “former spouse or state registered domestic partner” to receive the decedent’s interest in a nonprobate asset “[i]f a marriage or state registered domestic partnership is dissolved or invalidated, *or a state registered domestic partnership terminated.*” (emphasis added). See *Umpqua Bank v. Shasta Apartments, LLC*, 194 Wn. App. 685, 693, ¶ 19, 378 P.3d 585 (this Court may determine legislative intent from “the context of the statute, and related statutes”), *rev. denied*, 186 Wn.2d 1026 (2016).

10) However, none of her actions – including entering into the separation contract, which did not mention either spouse’s inheritance rights – were “inconsistent with any other intent than to waive” her right to intestate succession. Accordingly, she did not expressly or impliedly waive her right to inherit three-quarters of Michael’s net separate estate.

1. ***Brown and Lindsay* address only the right to a homestead allowance when a decedent has made a will.**

Gloria relies heavily on two cases, *Brown’s Estate*, 28 Wn.2d 436, 183 P.2d 768 (1947) and *Estate of Lindsay*, 91 Wn. App. 944, 957 P.2d 818 (1998), *rev. denied* 137 Wn.2d 1004 (1999), to argue that Michelle waived her right to intestate succession by entering into the separation contract. (App. Br. 7-12) Michelle conceded, 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 under these cases, which address homestead rights when a decedent has made a will excluding an estranged spouse. (RP 16, 19) But neither *Brown* nor *Lindsay* found or support an implied waiver of the right to intestate succession.

In *Brown*, the parties, who married when “both were elderly people,” entered into a property settlement intended to “be final and

conclusive between the parties hereto, regardless of whether or not either party hereto may die before the Interlocutory Decree of Divorce shall become final.” 28 Wn.2d at 437-38. The husband died less than six months later, after the trial court entered an interlocutory decree of divorce but before a final decree of dissolution was entered, leaving a will that excluded the wife as a beneficiary. 28 Wn.2d at 438-39.

*Brown* held that the wife waived her right to a homestead allowance from the husband’s estate by entering into the settlement agreement. In so holding, *Brown* focused on two primary considerations. First, that the parties expressly and clearly “had in contemplation the possibility of death and obviously that they meant to waive any rights which might accrue upon death, one of which rights would be the homestead right.” 28 Wn.2d at 440. Second, “the actions of the parties immediately after the agreement was executed” gave “additional force” to their intent. 28 Wn.2d at 440. “Both parties sold their separate interest in the real estate to a third party” the day after signing the settlement agreement, and “executed and delivered real estate contract and deed, which were placed of record.” 28 Wn.2d at 440-41. The “language of the agreement *and* the actions of the parties to that agreement reflect[ed] the intent of

the parties to waive each and every right . . . one could exercise as to the property of the other if the division of the property was to be affected by the death of either party before the interlocutory decree of divorce became final.” 28 Wn.2d at 441 (emphasis added).

Similarly, in *Lindsay*, the parties “signed a separation agreement dividing their real and personal property” and “relinquished any claim to the other’s property acquired after October 1, 1991,” the date of execution. 91 Wn. App. at 947. Subsequent to the separation agreement, both parties revoked their prior reciprocal wills and executed new wills excluding the other as a beneficiary. 91 Wn. App. at 947. Although the parties “regularly saw each other, talked and continued a sexual relationship,” they lived in different cities, and often times, states, for the majority of their separation. 91 Wn. App. at 947. After the husband died in 1995, the wife applied for an award in lieu of homestead. The trial court denied the homestead allowance, finding “that the parties had renounced their marriage and thereby effectively waived any right to a surviving spouse’s award in lieu of homestead.” 91 Wn. App. at 947-48.

In affirming the trial court, Division Three recognized that the “agreement clearly reflect[ed] an intent to give up those rights which would normally follow legal spouses” based on “all of the

circumstances surrounding the transaction, including the subject matter *together with the subsequent acts of the parties* to the instrument.” *Lindsay*, 91 Wn. App. at 951 (emphasis added) (quoted source omitted). The parties “never rescinded, revoked, or altered” the separation agreement. 91 Wn. App. at 952. Nor did they live together in the four years between when they entered into the agreement and when the husband died. 91 Wn. App. at 952. Crucially, during that time, both parties also rescinded their reciprocal wills and “executed wills leaving nothing to the other.” 91 Wn. App. at 952.

**2. Neither the language of the separation contract nor the actions of the parties reflect an intent to waive the right to intestate succession inheritance.**

In finding that the surviving spouses had waived their right to a homestead allowance, both *Brown* and *Lindsay* relied not only on the language in the parties’ separation contracts, but their subsequent conduct demonstrating their intent to waive that statutory right. Here, in contrast, neither the “language of the agreement” nor “the actions of the parties” reflect any similar intent to waive any and all “rights which might accrue upon death.” *Brown*, 28 Wn.2d at 440-41.

**a. Nothing in the language of the separation contract waives Michelle’s right to intestate succession.**

This Court “determine[s] the parties’ intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties.” *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, ¶ 20, 115 P.3d 262 (2005). Because this Court “impute[s] an intention corresponding to the reasonable meaning of the words used,” the “subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used.” *Hearst*, 154 Wn.2d at 503-04, ¶ 20. Accordingly, this Court “do[es] not interpret what was intended to be written but what was written.” *Hearst*, 154 Wn.2d at 504, ¶ 20. This Court will not “redraft or add to the language” of a contract. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 697, 974 P.2d 836 (1999); *Hearst*, 154 Wn.2d at 511, ¶ 40 (“generalized public policy concerns cannot be used to rewrite a clear and lawful contract”).

As the trial court correctly recognized, the separation contract makes no mention of intestate succession or the distribution of either spouse’s estate upon his or her death. (RP 8-10; CP 43-53) Nor does the “reasonable meaning of the words used” in the “Full Satisfaction

of All Claims” provision waive either spouse’s right to inherit from the other. (App. Br. 18-21) That provision recites in full:

All disclosed property not otherwise awarded or assigned in this agreement, whether acquired before the relationship, during the relationship or during any period of separation, shall be, and remain, the sole property of the party in whose possession or control it presently is, free and clear of any claim on the part of the other. All property which shall hereafter come to either party shall be his or her separate property and neither party shall hereafter have any claim thereto. Except as defined in this agreement, each party is hereby released from any and all claims by the other party for injuries or losses, known or unknown, foreseen and unforeseen, which have accrued through the date of execution of this agreement, arising out of the marriage or any other relationship between the parties.

(CP 46)

The settlement contract provides only that “[s]hould either party die after execution of this contract, the distribution of property and obligations agreed *herein* shall be and remain valid and enforceable against the estate of either party insofar as applicable law permits.” (CP 48) (emphasis added) Indeed, the separation contract was a “final settlement of all their marital and property rights and obligations on the *following* terms and conditions” in the contract (CP 43) (emphasis added) – not on “*any* rights which might accrue upon death.” *Brown*, 28 Wn.2d at 440 (emphasis added).

The provision that “[a]ll property which shall hereafter come to either party shall be his or her separate party and neither party shall hereafter have any claim thereto” (CP 46; RP 12) does not “terminate[] *all* claims in *all* property of either party from the moment of execution of the Separation Contract” and constitute an implied waiver of intestate succession. (App. Br. 21) (emphasis added) The sentence clearly states only that “neither party shall hereafter have any claim” to “property which shall hereafter come to either party.” (CP 46) The trial court found, and Michelle agreed, that this language waived only “any claim to property hereafter that would come to them. And . . . that’s essentially what is at issue in a homestead” under RCW 11.54.010.<sup>7</sup> (RP 12, 16)

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<sup>7</sup> The trial court’s finding that the “contract shall be read as of the time of death” (CP 112) is irrelevant and cannot be reversible error (App. Br. 22) because even reading the contract at the time of execution does not terminate or waive Michelle’s right to intestate succession. The trial court recognized that while “certain things had been released . . . as of the time they signed” the contract, other assets “had been characterized and divided, but the actual distribution of those assets had not occurred and would only occur in the future upon the finalization of the parties’ dissolution proceeding.” (RP 23) Because there was no dissolution decree, the trial court reasonably used Michael’s date of death to give effect to the remaining distribution of assets based on “the parties’ intent and understanding in this document.” (RP 23) The “legal significance of this statement” (App. Br. 22) is to clarify that Michelle waived her right to claim a homestead exemption: the trial court specifically included that finding “to make clear that the hereafter language on line eight of page four of the CR 2A, that is what waives the exemption – the homestead exemption. Because that claim only arises upon death, i.e., hereafter.” (RP 24)

Nor is the final sentence of the full satisfaction of claims provision as broad as Gloria contends. It does not “terminate[] any and all claims arising out of the marriage that occurred prior to the execution of the agreement.” (App. Br. 21) “Except as defined in this agreement,” the third sentence releases each party “from any and all claims by the other party *for injuries or losses*, known or unknown, foreseen and unforeseen, which have accrued through the date of execution of this agreement, arising out of the marriage or any other relationship between the parties.” (CP 46) (emphasis added) This language is not a blanket release of all claims against either’s property. The trial court correctly recognized that “the only waiver in terms of being free and clear of any claim on the part of the other is all disclosed property not otherwise awarded [or] assigned in this agreement.” (RP 12-13; *see* CP 46: “All disclosed property not otherwise awarded or assigned in this agreement . . . is free and clear of any claim on the part of the other.”)

Regardless, even under Gloria’s interpretation of the full satisfaction provision (App. Br. 18-21), any “hereafter” acquired property by Michael would simply be part of his separate estate – three-quarters of which Michelle is entitled to as his surviving spouse. Indeed, as Michelle conceded below, “the agreement says

these things are his separate property . . . that makes up his estate,” and she, “as his surviving spouse, is entitled to inherit under the intestacy statute.” (RP 16)

**b. The parties’ actions do not demonstrate an intent to waive the right to intestate succession.**

“[T]o constitute a waiver, other than by express agreement, there must be unequivocal acts or conduct evincing an intent to waive.” *Wagner*, 95 Wn.2d at 102. “Intent cannot be inferred from doubtful or ambiguous factors.” *Wagner*, 95 Wn.2d at 102; *Vehicle/Vessel, L.L.C. v. Whitman County*, 122 Wn. App. 770, 778, 95 P.3d 394 (2004) (“Implied waiver will not be inferred; the party claiming waiver must present unequivocal acts or conduct that show an intent to waive.”). The trial court here properly rejected Gloria’s claim that Michelle impliedly waived her right to intestate inheritance; indeed, the record is devoid of any “unequivocal acts or conduct” demonstrating any such intent.

Both *Lindsay* and *Brown* emphasized that the mere act of entering into a separation agreement itself is insufficient to constitute a waiver of a statutory right such as a homestead allowance. *Brown*, 28 Wn.2d at 440 (in addition to “the wording of the instrument itself,” the Court must “consider all of the

circumstances surrounding the transaction . . . together with the *subsequent* acts of the parties to the instrument”); *Lindsay*, 91 Wn. App. at 951 (implied waiver exists if “the parties through their actions have exhibited a decision to renounce the community with no intention of ever resuming the marital relationship”; courts must consider “the *subsequent* acts of the parties”) (emphasis added) (internal quotation marks and quoted source omitted).

Those “subsequent acts” in *Brown* and *Lindsay* – rescinding reciprocal wills and executing new wills leaving nothing to the other, living separately for years, immediately selling their property to a third party – “clearly reflect[ed] the intent of the parties to waive each and every right – including the right of homestead.” *Brown*, 28 Wn.2d at 440-41; see *Lindsay*, 91 Wn. App. at 951-52 (the parties’ “actions showed an intent to prevent, waive, and abandon what a surviving spouse could normally take”). Unlike here, the decedent in both *Brown* and *Lindsay* *intentionally* excluded his surviving spouse from receiving part of the estate by disinheriting the spouse from his will. That is the very reason both surviving spouses sought a statutory homestead award; neither was entitled to any other inheritance under the decedent’s will.

Indeed, while the “intent of the testator is a fundamental maxim, the first and greatest rule, the sovereign guide, the polar star, in giving effect to a will,” *Estate of Hook*, 193 Wn. App. 862, 872, ¶ 33, 374 P.3d 215 (internal quotation marks and quoted source omitted), *rev. denied*, 186 Wn.2d 1014 (2016), there first must be a valid will for the decedent’s intent to govern. Because the decedents in both *Brown* and *Lindsay* had executed wills, the Court was obligated by the “polar star” of the testator’s intent to exclude his estranged surviving spouse from inheriting any part of his estate. But Michael died intestate, and this Court should not proceed down the slippery slope of attempting to gauge his intent from a separation contract that does not affirmatively and clearly waive the spouses’ right to intestate succession.

In any event, neither spouse’s conduct here demonstrates any intent to disinherit the other or to waive his or her right to inherit under RCW 11.04.015. The spouses were separated for less than four months before Michael died, and there was evidence that the parties were seeking to reconcile. (CP 1-2, 4-8, 14, 17) Neither executed a will intentionally excluding the other from inheriting their estate or otherwise took any affirmative action to expressly ensure that the survivor would not receive any property upon the death of the other.

Finding that Michelle impliedly waived her right to intestate succession on this record would go well beyond the holdings of both *Brown* and *Lindsay*, and would require this Court to impermissibly infer intent “from doubtful or ambiguous factors.” *Wagner*, 95 Wn.2d at 102.

Even if this Court adopted *Lindsay*’s implied waiver test for purposes of intestate succession, it must remand to the trial court to determine whether Michael and Michelle intended to reconcile, which would be a question of fact. *Lindsay*, 91 Wn. App. at 951. Because Michelle produced evidence that she and Michael agreed to “postpone the closing date” of their marriage dissolution for at least six months, as the spouses wanted to decide whether they “want to be married” or continue with the dissolution (CP 17), the trial court would be required to conduct an evidentiary hearing to determine the parties’ “[i]ntent to reconcile.” *Lindsay*, 91 Wn. App. at 951.

**C. This Court should award Michelle her attorney fees incurred in the trial court and on appeal.**

“Either the superior court or any court on appeal” may award “to any party” their reasonable attorney fees incurred in an action under RCW ch. 11.96A, to be paid by “any party to the proceedings,” “from the assets of the estate . . . involved in the proceedings,” or “from any nonprobate asset that is the subject of the proceedings.”

RCW 11.96A.150(1); RAP 18.1(a). This Court has substantial discretion to award fees “in such amount and in such manner as the court determines to be equitable.” RCW 11.96A.150(1). In awarding fees, this Court “may consider any and all factors that it deems to be relevant and appropriate,” which “need not include whether the litigation benefits the estate.” RCW 11.96A.150(1). *Estate of Evans*, 181 Wn. App. 436, 451, ¶ 43, 326 P.3d 755 (2014) (“RCW 11.96A.150(1) allows a court to consider any relevant factor, including whether a case presents novel or unique issues.”).

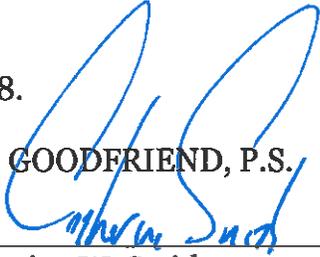
Gloria has not advanced any “novel or unique issues.” Rather, Gloria has forced Michelle to incur additional attorney fees, first in the trial court and now before this Court, to defend – in the trial court’s words (RP 4) – a “straightforward” issue: Michelle’s statutory right to intestate succession as provided by the unambiguous plain language of RCW 11.04.015 and RCW 11.02.005(17). While the trial court reserved ruling “on an award of attorneys’ fees and costs under RCW 11.96A.150” (CP 111), this Court should direct the lower court to award Michelle her reasonable attorney fees incurred in responding to this action both in the trial court and on appeal, to be paid by Gloria.

#### IV. CONCLUSION

This Court should affirm and award respondent her fees incurred in the trial court and on appeal.

Dated this 30<sup>th</sup> day of March, 2018.

SMITH GOODFRIEND, P.S.

By:  \_\_\_\_\_

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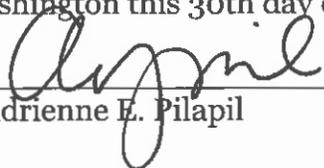
**DECLARATION OF SERVICE**

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

That on March 30, 2018, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

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\_\_\_\_\_  
Andrienne E. Pilapil

**SMITH GOODFRIEND, PS**

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