

66828-5

66828-5

NO. 66828-5-I

COURT OF APPEALS DIVISION I  
OF THE STATE OF WASHINGTON

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DONNA M. KELLAR,

Appellant,

v.

THE ESTATE OF KENNETH L. KELLAR,

Respondent.

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BRIEF OF RESPONDENT / CROSS-APPELLANT

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**I. INTRODUCTION AND SUMMARY OF ARGUMENT**

This appeal concerns two broad issues: 1) whether a prenuptial agreement entered into between Donna Kellar and Ken Kellar is valid and enforceable; and 2) whether Donna Kellar's challenge to the validity of the prenuptial agreement triggered a no-contest clause in Ken's will, thereby disinheriting her from his will.

Ken Kellar was a business owner and philanthropist in Blaine, Washington. In 2001, he married Donna,<sup>1</sup> a financially independent woman who was working and owned at least four rental income properties at the time. Before they married, they entered into a prenuptial agreement. CP 640-46.

A prenuptial agreement is valid and enforceable if it is either substantively fair or procedurally fair. There are questions of fact about whether Donna and Ken's agreement was substantively fair. There is no question, however, that the agreement was procedurally fair. A prenuptial agreement is procedurally fair if the parties disclose their finances to each other and if the agreement is the product of a process that ensures that it was reached free from objectionable influence. This agreement met those criteria without question. It is valid.

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<sup>1</sup> The Estate refers to Ken Kellar and Donna Kellar by their first names. It is done for clarification and ease of identifying them, not out of disrespect for them, their counsel, or the Court.

Donna and Ken's agreement included a representation and warranty, specifically initialed by each of them, that the required disclosure was made:

Each of the parties individually own certain property, *the full nature and extent of which has been disclosed by each to the other*, and the parties by affixing their initials to this paragraph represent and warrant that *they have satisfied themselves as to the fullness and accuracy of the disclosure* of said assets each to the other and the respective values thereof. CP 640, Recital 2, emphasis added

The agreement was also the product of overwhelmingly fair procedures. Ken was represented by counsel. Donna was represented in the drafting and negotiation of the agreement by her own independent counsel, a lawyer who had represented her in her two prior divorces and who knew the requirements for a valid prenuptial agreement. Donna and Ken attended a mediation (without counsel) at which they reached an agreement on the financial terms of the agreement. Donna's and Ken's lawyers exchanged revisions to the agreement, with Donna's lawyer requesting changes that Ken's lawyer agreed to. It is unclear whether Donna and Ken had set a wedding date when they signed the agreement; after they signed it, Donna was not even certain that she and Ken would marry (though they would marry about a week after the agreement was entered into). The agreement was unquestionably procedurally fair.

During their marriage, Donna used the prenuptial agreement to her advantage, obtaining gaming licenses in South Dakota that she used to establish her own gaming businesses — licenses that she would not have been able to obtain in the agreement’s absence. Ken already had three retail gaming licenses (the maximum number of gaming licenses allowed), and South Dakota law prohibited a husband and wife from obtaining more licenses combined than either could obtain separately, on the assumption that a married couple’s community would benefit from either spouse’s ventures. To obtain licenses in her own right, Donna’s request for gaming licenses focused on the prenuptial agreement and that, because of it, Donna and Ken maintained separate estates and finances. CP 570–71, 548–60. Donna also testified under oath before the South Dakota Commission on Gaming (the “Gaming Commission”), explaining that she was bound by the agreement, that she wanted the agreement “to protect my assets,” and that she and Ken had acted and would continue to act consistent with the agreement. CP 486-546, specifically 216–17. Before she offered this testimony to the Gaming Commission, she had seen a draft financial statement purporting to show Ken’s net worth shortly after they married. As a result of her submission and sworn testimony, Donna obtained gaming licenses, and used them to open and operate her own gaming establishments.

Under the prenuptial agreement, Donna will receive \$700,000 because of Ken's death. Ken's last will left Donna substantial gifts above and beyond this (an estimated \$2.5 to 2.75 million). CP 1475. Ken's will also included a no-contest clause that disinherited anyone who tried to obtain a greater share of his estate than his will provided. CP 1562. After Ken's death in December 2009, Donna sued his estate, seeking to invalidate the agreement and to recover more than half of his estate, substantially more than she would have received under the prenuptial agreement and the will. Her challenge would deplete the residuary of his estate, which under his will is to go to the Kenneth L. Kellar Foundation, which has sponsored the Blaine Food Bank and provided scholarships to underprivileged children in Blaine, Washington and other locations meaningful to Ken. CP 1557-71.

On summary judgment, the trial court correctly ruled that because Donna used the prenuptial agreement to her advantage in a quasi-judicial proceeding to obtain a state-sanctioned benefit to which she was otherwise not entitled and took inconsistent positions regarding its validity, she was estopped from now challenging its validity. CP 71-73. Also on summary judgment, the trial court (1) incorrectly denied the Estate's motion on procedural fairness, even though procedural safeguards were in place to ensure that Donna entered into the agreement fairly and free from any of

Ken's influence, CP 74–77, and (2) incorrectly ruled that Donna's suit against the estate to increase her share of Ken's estate from what she would receive under the prenuptial agreement to more than half of Ken's estate did not trigger the no-contest clause, CP 1302–05. The trial court also correctly struck much of the testimony that Donna offered in connection with these motions as barred under the Dead Man's Statute, RCW 5.60.030. CP 75–85. Following these motions, the trial court awarded the Estate attorney fees and costs in accordance with an attorney-fee provision in the agreement and RCW 4.84.330, and the attorney-fee statute in the Trust and Estate Dispute Resolution Act (TEDRA), RCW 11.96A.150(1). CP 693–96; 2009–13.

## II. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

The Estate reframes the issues pertaining to Appellant's Assignments of Error as follows:

1. The procedural fairness test articulated in *Matson* requires parties to fully disclose their assets to the other party and requires that the agreement be entered into fully and voluntarily on independent advice and with full knowledge by each spouse of the individual rights of each party.<sup>2</sup> Is this test of *Matson* met as a matter of law when the parties to a

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<sup>2</sup> *In re Marriage of Matson*, 107 Wn.2d 479, 484 (1986).

prenuptial agreement: a) represent and warrant in the agreement that each party has made a full financial disclosure and that each are satisfied with the other's disclosure; b) mediate the terms of the agreement; c) are each represented by independent counsel; d) negotiate the terms of the agreement through counsel over a period of days and with revisions to the agreement; e) all at a time when there is no evidence that a specific wedding date had been set?

2. A party is barred by the doctrine of judicial estoppel from offering testimony before one tribunal and then offering contradictory testimony to another. Donna testified before the Gaming Commission that she and Ken had entered into a prenuptial agreement, that she was bound by it, that she wanted it to protect her own substantial assets, and that she and he acted, and would continue to act, consistently with it. Based on her testimony, the Gaming Commission determined the agreement was valid and awarded her gaming licenses that she would not have been entitled to in the absence of a valid prenuptial agreement. Is she now estopped from contesting the validity of the agreement?

3. Donna presented no facts or argument to the trial court or this Court regarding a theory of abandonment of the prenuptial agreement. Has she waived this argument?

4. Did the trial court correctly exclude as barred by the Dead

Man's Statute and the parol evidence rule Donna's proffered testimony of Ken's actions, of Donna's "act" of "listening" to Ken's statements, of Donna's otherwise inadmissible unexpressed impressions, and of Donna's testimony to contradict the clear terms of her representation and warranty in an agreement?

5. Donna moved for reconsideration not based on newly discovered evidence, but based on evidence that (1) had been in her possession for months and (2) she chose not to introduce because those documents were sealed in another proceeding to which she was a party. Was her motion properly denied?

6. Did the trial court abuse its discretion in awarding attorney fees when Donna sued unsuccessfully to invalidate an agreement that included a provision awarding attorney fees to the prevailing party, and when she sued unsuccessfully under TEDRA to challenge Ken's estate plan, causing the Estate to expend substantial resources to oppose her challenge?

### **III. ASSIGNMENTS OF ERROR ON CROSS-APPEAL**

The Estate cross appeals and assigns error as follows:

1. The trial court erred in denying the Estate's Motion for Partial Summary Judgment Regarding Validity of Prenuptial Agreement, by order entered February 11, 2011. CP 74-77.

2. The trial court erred in granting Petitioner's Motion for

Summary Judgment Re No Contest / Full Disclosure and denying the Estate's Motion for Partial Summary Judgment Re No-Contest Clause in Kenneth L. Kellar's Will, by order entered March 10, 2011. CP 1302-05.

**IV. STATEMENT OF ISSUES PERTAINING TO CROSS-APPEAL**

1. A prenuptial agreement is valid and enforceable if it is either substantively fair or procedurally fair. A prenuptial agreement is procedurally fair if (1) the parties disclose to each other the amount, character, and value of their respective estates, and (2) the agreement is entered into freely and voluntarily, upon independent advice, and with full knowledge by both spouses of their rights. The prenuptial agreement here included a specific representation and warranty that the parties fully disclosed their estates to each other. No other admissible evidence was presented regarding the parties' disclosure. Did the trial court err in failing to find that, on these undisputed facts, the disclosure had been made as a matter of law? (Assign't. of Error on Cross-Appeal No. 1)

2. A prenuptial agreement is procedurally fair if the agreement is entered into freely and voluntarily, upon independent advice, and with full knowledge by both spouses of their rights. Before Ken and Donna entered into the agreement, they attended a mediation where they negotiated its financial terms. Each had independent counsel advise them regarding the agreement. The parties' respective counsel exchanged versions of the

agreement with changes requested by Donna. All of this occurred at a time when there is no evidence that a specific wedding date had been set and there is no evidence that Donna was under any time pressure to sign the agreement. Based on these undisputed facts, did the trial court err in denying the Estate's motion for partial summary judgment seeking a declaration that the agreement was procedurally fair and therefore valid? (Assign't. of Error on Cross-Appeal No. 1)

3. The triggering of a no-contest clause in a will depends on the scope of the language of the no-contest clause. The no-contest clause in Ken's will was triggered by any action taken by a claimant to increase that claimant's share of Ken's estate. Did Donna's challenge to the validity of the prenuptial agreement, which would have resulted in her receiving more than half of Ken's estate instead of just what she would have received under the prenuptial agreement, trigger the no-contest clause? (Assign't of Error on Cross-Appeal No. 2)

4. No-contest clauses are not triggered by a challenge to an estate-planning provision that (1) is contrary to public policy or (2) affects the well-being of society. Donna's challenge was to a prenuptial agreement; prenuptial agreements are favored and not contrary to public policy. Does her challenge trigger the no-contest clause in Ken's will? (Assign't of Error on Cross-Appeal No. 2)

5. A challenge to an estate plan is brought in good faith if it is commenced on the advice of counsel. When a party raises advice of counsel as an issue in a case, it must provide discovery related to the advice of counsel, or is barred from introducing evidence on it. Donna raised the issue of advice of counsel even before she brought her suit, yet resisted discovery and provided no evidence regarding advice of counsel until she moved for summary judgment on the issue, shortly before trial. Should her evidence of advice of counsel have been struck? (Assign't of Error on Cross-Appeal No. 2)

6. Demonstrating good faith by showing that a party acted on advice of counsel requires that the party fully and fairly disclose to her counsel all material facts related to the lawsuit before her counsel files the suit. Here, Donna presented no clear, admissible evidence that she informed her counsel of the material fact that, before she testified to the Gaming Commission, she had in her possession a financial statement purporting to show what she now contends was Ken's net worth around the time they were married. Did the trial court err in determining that she nevertheless brought her suit in good faith? (Assign't of Error on Cross-Appeal No. 2)

7. The trial court relied upon declarations of Donna's counsel and an unsworn oral statement of her counsel at oral argument that was not

subject to cross-examination to conclude that she brought her suit in good faith. Did the trial court abuse its discretion in denying a continuance under Civil Rule 56(f) to allow the Estate to conduct discovery into this late-offered evidence? (Assign't of Error on Cross-Appeal No. 2)

## **V. STATEMENT OF FACTS**

### **A. The prenuptial agreement**

Donna and Ken married in September 2001, almost a year after they began dating and three months after Ken asked Donna to marry him. CP 1974, 390, 1879–1881. It was the third marriage for each of them. *Id.* When they married, Donna was 39 years old and Ken was 75 years old. *Id.* Ken was a longtime businessman with businesses in his hometown of Aitkin, Minnesota, Blaine, Washington, and Deadwood, South Dakota. *Id.* According to financial statements prepared by his personal and business accountant, his net worth at the end of 2001 (a few months after they married) was approximately \$15 million,<sup>3</sup> though the vast majority of this was in real estate and businesses that were difficult to value. CP 327–348. Donna also had business experience, having purchased and sold several income rental properties in the Blaine area. CP 215. When they married,

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<sup>3</sup> Donna claims repeatedly that Ken was worth \$93 million when they married. The sole support for this claim is a draft financial statement that Donna claims to have had for Ken for the end of 2001 that Donna (not Ken) provided to the lawyer representing her in connection with her application for gaming licenses. CP 448–52; 565–69. It lacks any indicia of authenticity or reliability. CP 369.

she owned and managed at least 4 (or about 6, depending on her recollection) income rental properties. CP 392, 215. She was also employed at a Blaine restaurant. CP 390. Donna's overall net worth and financial picture at the time that they were married is unknown, because in declarations submitted to the trial court, she provided only incomplete information about her financial position. CP 625–28, 390–92.<sup>4</sup>

Before they got married, Donna and Ken entered into a prenuptial agreement. As part of the negotiation of that agreement, they went to a private mediation on September 6, 2001, conducted by a well-respected family-law mediator in Whatcom County, Ron Morgan. CP 1754–1763. Neither Donna nor Ken had counsel with them at that mediation, though each had counsel who represented them during this process. CP 391. Donna's counsel, Matt Peach, had been Donna's lawyer in marital issues before; he was her lawyer for her two divorces. CP 247. Mr. Peach represented and advised Donna with respect to her prenuptial agreement with Ken, and knew the requirements for a valid prenuptial agreement. CP 237, 246, 166. Attorney Mark Packer was Ken's longtime legal advisor and advised Ken with respect to this prenuptial agreement with Donna. CP

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<sup>4</sup> For example, while she identifies properties she owned, she does not state that these are the only properties she owned, nor does she address whether she had any other assets or investments. In contrast, her own financial statement from May 2005, on the other hand, shows that less than 4 years after her marriage to Ken, she had a net worth of almost \$1.4 million. CP 1800, 1698, ¶6.

283, 285.

Mr. Morgan testified that Donna was “spirited” at the mediation and stuck up for herself. CP 1763–1764. Mr. Morgan also testified that he remains vigilant at mediations to ensure that one party does not take unfair advantage of the other, and will pull a party aside if he sees this and advise them to get a lawyer. CP 207–208. There is no indication that he did so here. CP 192–208.

The result of the mediation was a document titled “*Addition to Prenuptial Agreement*,” indicating that there was already a form of prenuptial agreement in existence by the time of the mediation. CP 210–211. (Mr. Morgan testified that he assumed he had seen a form of agreement before the mediation. CP 196–197.) This “Addition” set forth the financial terms of the prenuptial agreement. After the mediation, Mr. Morgan faxed the “Addition” to Donna’s lawyer, Mr. Peach, and to Ken’s lawyer, Mr. Packer. CP 196–197, 210–211.

Mr. Peach and Mr. Packer spent several days negotiating changes to the agreement. CP 1938–1960. They specifically discussed changes to the financial terms, to how community property would be created or treated, and other issues. CP 1951–52, 1943. At some point during the negotiations, Donna met with Mr. Peach, and during that meeting she called Ken, in Mr. Peach’s presence, to discuss specific financial terms of

the prenuptial agreement. CP 160–163. After a week of this back-and-forth negotiation between the parties and their counsel, Mr. Packer prepared a final form of agreement and sent it to Mr. Peach on September 13, 2001. CP 1943–1950. Mr. Peach responded to this draft in writing, stating the agreement “represents my client’s interests.” CP 1941. Donna and Ken signed the agreement on September 14, 2001, eight days after the mediation. CP 640–646.

The agreement treated both spouses equally in almost all respects, and it favored Donna in all others. As in most prenuptial agreements, the parties agreed that their separate property going into the marriage would remain separate property, in addition to any income from or increases to that separate property. CP 640–643 (Recital 4, ¶¶ 1, 2, and 4). Neither party was limited in any way in acquiring more separate property. CP 643 at ¶ 4. The parties agreed that everything that each of them acquired during marriage would be acquired as separate property unless they agreed to acquire it as community property or in some form of joint tenancy. CP 641–642 at ¶¶ 1, 2, 4, and 6. The agreement provided for Donna on their divorce or on Ken’s death. CP 642 at ¶ 3. Specifically, if they divorced after 4 years of marriage or after Ken’s death at any time, Donna would receive \$25,000 for each year of marriage plus \$500,000 payable in annual installments of \$25,000 each. *Id.* Because Ken died after they had been

married for eight years, she is to receive \$700,000. No reciprocal provision provides support or payments to Ken upon their divorce or Donna's death. CP 640–646.

The agreement included a clear representation and warranty that each of the parties had provided a full disclosure of their assets to the other, and that each was satisfied that the other had done so. CP 640, Recital 2, *supra* p. 2. This representation and warranty was on the first page of the agreement. *Id.* It was specifically set out in a way that physically distinguished it from other provisions, in that Donna and Ken each individually initialed this representation and warranty. *Id.* This was the only paragraph in the agreement that called for separate initials by the parties. CP 640–646. The agreement also included another separate, distinct confirmation by the parties that each had made a full financial disclosure to the other:

Both parties acknowledge that they have  
been advised of the entire estate of the other  
. . . CP 644 at ¶ 13.

**B. Donna applied for South Dakota retail gaming licenses, using the prenuptial agreement to her favor.**

Ken Kellar owned and operated several gaming businesses in Deadwood, South Dakota. In late 2004, Donna applied for her own set of gaming licenses. CP 570. The South Dakota Gaming Commission on

Gaming (“Gaming Commission”) regulates gaming in Deadwood, and restricts the number and type of gaming licenses that any single person may acquire. CP 570. Donna’s application was rejected because her husband, Ken, had already received the maximum number of gaming licenses. CP 547. The Gaming Commission took the position that because Ken and Donna were married, any licenses issued to Donna would inure to Ken’s financial benefit. CP 547. Because she disagreed with that position, in late 2005, Donna petitioned the Gaming Commission for declaratory relief to allow her to obtain gaming licenses in her own right because she had a prenuptial agreement with Ken that kept their financial affairs separate and ensured that Ken would not obtain a financial benefit from her licenses. CP 570–71. The specific issue she asked the Gaming Commission to decide was, as stated by her:

Is a spouse, whose financial affairs are separate and distinct, ***and subject to a prenuptial agreement***, barred from receiving up to three retail licenses, pursuant to SDCL 42-7B-26, because of marriage to another individual holding three retail licenses issued by the Commission? CP 571 (emphasis added).

Donna submitted a brief to that effect, relying almost solely on the prenuptial agreement for her position and attaching the prenuptial agreement as the only exhibit for the Gaming Commission to consider. CP 548–60.

The Gaming Commission held a hearing on Donna's request, and she testified under oath. CP 486–546. Before her brief was submitted and before testifying, Donna had access to, and reviewed, what appears to be a preliminary financial statement for Ken for the end of 2001, which Donna sent to the lawyer representing her in connection with her application for gaming licenses. CP 565–69, 588–90. Donna testified in this case that this document made her believe that Ken had not made an accurate disclosure to her of his financial position before they entered into the prenuptial agreement. CP 581. Yet despite believing this, Donna testified to the Gaming Commission about the prenuptial agreement, about its effect on Ken's and her finances, and about how they acted in accord with the prenuptial agreement. CP 486–546. She also made it clear that the agreement's purpose was not solely to protect Ken, but rather, that the purpose of the agreement was "To protect my assets and he wanted to protect his, so it was both of us protecting our own assets." CP 216. She also described the agreement as:

[A] prenuptial Ken and I had before we married so that we could each protect our own assets as there was—*it was very important to me to keep our financials separate and because of a prior marriage, I had financial problems and I didn't want that to happen again*, and because Ken had a substantial amount of money, I'm sure he wanted to protect his assets too." CP 216–

217, emphasis added.

Though she never used the word “valid” to describe the validity, her testimony was clearly designed to convince the Gaming Commission that she and Ken were bound by it, that it controlled and dictated how their finances were handled, that it restricted Ken’s access to gaming licenses she would obtain as her separate property, and that they at all times did and would continue to act in accordance with it, all the hallmarks of validity. CP 486–546.

The Gaming Commission relied upon Donna’s position and testimony and issued a declaratory ruling, stating that because she and Ken had separate and distinct financial estates and because each of their assets were protected and separated from the other’s “by a valid prenuptial agreement,” she could be awarded her own retail gaming licenses. CP 563–64. Donna received those gaming licenses, and used them to establish her own gaming businesses in Deadwood separate from Ken’s. CP 587.

**C. Ken’s estate plan and will**

The last three wills of Ken Kellar give insight into his testamentary intent, specifically toward his wife, Donna. In a version of Ken’s will dated December 22, 2003, he provided for Donna above and beyond what he was obligated to provide for her under their prenuptial agreement. *Compare* CP 640–46 with CP 1478–86. That earlier will also included a

narrow no-contest clause that only applied to contests to his *will*. CP 1474, 1485. In April 2005, Ken's longtime lawyer, who had drafted the earlier will, asked another lawyer, J. Bruce Smith, to review the will and revise it with the intent that it discourage anyone from "attempting to challenge the estate plan." CP 1475, 1497–1500. Mr. Smith advised that the prior no-contest clause was narrowly targeted, and would not prevent various challenges to an estate plan that were not challenges to the will itself. CP 1475, 1488–91. Accordingly, a new will, drafted by Mr. Smith and executed by Ken on January 13, 2006, included a broader no-contest clause:

If any person *brings any action, lawsuit, or claim against my estate*, my Personal Representative, or any other beneficiary under my Will, which requests a resolution that would, if successful, *increase the share of the claimant of my estate*, then I direct that the claimant shall forfeit all interest in my estate, and the share that such person would have received under my Will shall be distributed as if he or she had died before me, leaving no descendants.

CP 1505 at Art. 5. This provision carried through to his final will, which was executed on February 16, 2007. CP 1562.

Ken's final will refers to the prenuptial agreement and makes provisions for payments to Donna to satisfy obligations under the agreement, but it also includes bequests significantly above and beyond

this, including: a house in Minnesota (known as the Nord Lake house) free and clear and in her own name, CP 1558 at ¶ 2.7(a); the right to live in Mr. Kellar's home in Blaine, Washington on 16th Street for three years after Mr. Kellar's death, with his estate paying the expenses of insurance, taxes, utilities, and maintenance of the property while she lived there, CP 1558 at ¶ 2.7(b); various tangible personal property, CP 1557 at ¶ 2.2; \$25,000 for each year they were married, in satisfaction of an identical obligation under the prenuptial agreement, CP 1558 at ¶ 2.7(c); \$750,000 in satisfaction of an obligation under the prenuptial agreement (not \$500,000, as provided in the prenuptial agreement) to be distributed to her \$50,000 per year (not \$25,000 per year), CP 1558–59 at ¶ 2.8; and an additional annual distribution equal to five percent of the value of a charitable remainder trust funded with \$1,000,000 (\$50,000 per year initially, and subsequently more or less depending on the value of the fund) *for the rest of her life*, CP 1559–61 ¶ 2.9.

The will made provisions for Ken's other beneficiaries: he left specific gifts to his two children and to his granddaughter. CP 1558. He left the residuary of his estate to the Kenneth L. Kellar Foundation, which was a major contributor to the Blaine Food Bank and which provides scholarships to underprivileged children in the Blaine, Washington area, in Deadwood, South Dakota, and in the Aitkin, Minnesota area where Ken

grew up. CP 1557–71.

**D. Procedural history**

After Ken died, Donna Kellar filed three separate actions against the Estate or its personal representatives. These were consolidated into a single action under TEDRA. Before any discovery, Donna moved for partial summary judgment on the substantive fairness and procedural fairness of the prenuptial agreement. CP 393–404. The Estate moved successfully for a continuance of her motion under Rule 56(f), and the parties engaged in discovery. CP 1284. Subsequently, the Estate filed two motions for partial summary judgment: one on the procedural fairness of the agreement and one for dismissal on the grounds of estoppel. CP 1973–87, 603–14. At the hearing on these motions on February 8 and 9, 2011, the trial court denied Donna’s motion and the Estate’s motion regarding procedural fairness and granted the Estate’s motion dismissing Donna’s claims on estoppel grounds. CP 71–73, 74–77. The trial court also struck much of the declaration Donna submitted to support her motion. CP 78–85. The parties then each filed a motion for partial summary judgment on the impact of Donna’s suit on the no-contest clause in Ken’s will, and the Estate filed a motion for attorney fees. CP 1533–47, 1645–52, 1277–91. At a hearing on these motions on February 25, 2011, the trial court granted Donna’s motion for summary judgment on the no-contest clause, and

deferred a ruling on the Estate's motion for attorney fees. CP 1302-05; RP (Feb. 25, 2011) 35-36. On a second hearing on the Estate's motion for attorney fees on April 15, 2011, the trial court awarded fees of \$250,000 and \$9,861.61 in costs. CP 693-96. In a post-judgment hearing on August 26, 2011, the trial court issued supplemental findings of fact and conclusions of law regarding the award of fees. CP 2009-13. Both sides appealed.

## VI. ARGUMENT AND AUTHORITY

### A. Standards of review

The parties have appealed rulings on five summary-judgment motions that resulted in two orders. The standard of review for summary judgment is *de novo*, with the Court of Appeals reviewing the same record that was before the trial court.<sup>5</sup> Thus, the trial court's decisions on the parties' cross-motions for summary judgment are reviewed *de novo*.

The trial court's evidentiary rulings on the admissibility of evidence are reviewed for abuse of discretion.<sup>6</sup> Here, the trial court

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<sup>5</sup> *Bank of America, N.A. v. Owens*, \_\_\_ Wn.2d \_\_\_, 2011 Wash. LEXIS 826, ¶ 16 (No. 84044-0, Oct. 27, 2011).

<sup>6</sup> *Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn.App. 736, 744, 87 P.3d 774 (2004) (reviewing the trial court's decision on striking portions of declarations for abuse of discretion); *Sunbreaker Condo. Ass'n v. Travelers Ins. Co.*, 79 Wn. App. 368, 372, 901 P.2d 1079 (1995). The Estate is mindful that this Court has held that in some circumstances, evidentiary decisions made in connection with summary judgment are to be reviewed *de novo* because the standard of review of summary judgment is *de novo*. Those holdings, however, address the admissibility of expert reports submitted on summary judgment, not the admissibility of witness testimony that will be submitted not

exercised its discretion and struck portions of one of Donna's declarations because it was barred by the Dead Man's Statute and the parol evidence rule.

A trial court's denial of a motion for a CR 56(f) continuance is also reviewed for abuse of discretion.<sup>7</sup> Here, trial court abused its discretion in denying the Estate's motion for a continuance to depose witnesses not identified in discovery and not disclosed until Donna moved for summary judgment just before trial on the issue of the no-contest clause in Ken's will.

The trial court's denial of a motion for reconsideration of a summary judgment will not be reversed absent a manifest abuse of discretion.<sup>8</sup> A trial court abuses its discretion only if the decision was manifestly unreasonable or based on untenable grounds.<sup>9</sup> The trial court properly exercised its discretion and denied Donna's motion for reconsideration, because the motion was based upon a document that she

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just on summary judgment but at trial. *E.g.*, *Cotton v. Kronenberg*, 111 Wn. App. 258, 264, 266–67, 44 P.3d 878 (2002); *Seybold v. Neu*, 105 Wn. App. 666, 678, 19 P.3d 1068 (2001). Here, the evidentiary decision made by the trial court concerned whether Ms. Kellar's testimony was barred by the Dead Man's Statute, and was a decision that would apply not just at summary judgment, but also at trial. Thus, this Court's review of that decision, like its review of evidentiary decisions made at trial, should be for abuse of discretion. *Cf.* *Warner v. Regent Assisted Living*, 132 Wn. App. 126, 135–36, 130 P.3d 865 (2006) (when the trial court would have made the same evidentiary decision at trial as it did on summary judgment, review of that decision is for abuse of discretion).

<sup>7</sup> *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 369, 166 P.3d 667 (2007).

<sup>8</sup> *Anica v. Wal-Mart Stores, Inc.*, 120 Wn. App. 481, 488, 84 P.3d 1231 (2004).

had in her possession and was not newly discovered.

A trial court's award of attorney fees is reviewed for abuse of discretion.<sup>10</sup>

**B. Facts presented by Donna that are unsupported or inaccurate may not be relied upon.**

Donna's statement of the facts is inaccurate, incomplete, and misleading. Many of the statements lack any citation whatsoever to the record.<sup>11</sup> Many other statements have citations to the record, but are not accurate representations of the evidence that was submitted below.<sup>12</sup> And many of her factual assertions come only from only from her declaration, portions of which were correctly struck by the trial court as barred by Washington's Dead Man's Statute.<sup>13</sup> This Court may rely only upon

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<sup>9</sup> *Drake v. Smersh*, 122 Wn. App. 147, 151, 89 P.3d 726 (2004).

<sup>10</sup> *Humphrey Indus., Ltd. v. Clay St. Assocs., LLC*, 170 Wn.2d 495, 506, 242 P.3d 846 (2010).

<sup>11</sup> For example, she claims that before her marriage to Ken, the properties that she owned generated income barely sufficient to cover their expenses with a net worth of less than \$100,000, yet cites to nothing in the record to support this assertion. App. Br. at 10. As another example, she paints herself as an "unsophisticated person only having limited experience with legal matters," again without any reference to evidence in the record to support this. App. Br. at 12. Her statement of facts includes many more examples of statements of supposed fact for which there is no supporting evidence in the record. The Court should decline to consider facts recited in briefs but not supported by the record. *Sherry v. Fin. Indem. Co.*, 160 Wn.2d 611, 615, 160 P.3d 31 (2007); RAP 10.3(a)(5) ("Reference to the record must be included for each factual statement.").

<sup>12</sup> For example, she repeatedly states that Ken was worth \$93 million when they married, when her only evidence in support is an unauthenticated preliminary financial statement that *she* provided to her own counsel.

<sup>13</sup> For example, she states that Ken asked her to sign a prenuptial agreement within days of proposing to her (App. Br. at 7), she states that Ken suggested that they go to a mediator (App. Br. at 8), and that she did not inform anyone of her wedding plans because Ken told her not to (App. Br. at 9). All of this testimony, as well as much more,

statements of fact that are properly supported by the record.

C. **The trial court correctly struck much of Donna's declaration as barred by the Dead Man's Statute and the parol evidence rule.**

1. **Donna's statements were correctly struck under the Dead Man's Statute.**

Almost all of Donna's stated facts on appeal come from statements in declarations that the trial court struck as barred by the Dead Man's Statute. CP 78-85. Therefore, this issue is primary, because affirming this ruling affects several issues on appeal. The Dead Man's Statute states in full as follows:

No person offered as a witness shall be excluded from giving evidence by reason of his or her interest in the event of the action, as a party thereto or otherwise, but such interest may be shown to affect his or her credibility: PROVIDED, HOWEVER, That in an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative of any deceased person, or as deriving right or title by, through or from any deceased person, or as the guardian or limited guardian of the estate or person of any incompetent or disabled person, or of any minor under the age of fourteen years, then a party in interest or to the record, shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased, incompetent or disabled person, or by any

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was correctly struck by the trial court as inadmissible under the Dead Man's Statute. A copy of her declaration showing which of her statements the trial court struck is attached to the order striking portions of it, found at CP 78-85.

such minor under the age of fourteen years:  
PROVIDED FURTHER, That this exclusion  
shall not apply to parties of record who sue  
or defend in a representative or fiduciary  
capacity, and have no other or further  
interest in the action.<sup>14</sup>

The purpose of the statute is to “prevent frauds upon the estates of those who are no longer present to defend themselves.”<sup>15</sup> To accomplish this, the statute prevents “interested parties from giving self-serving testimony regarding conversations and transactions with the deceased because the dead person cannot respond to unfavorable testimony.”<sup>16</sup> Thus, the statute prevents a person interested in the outcome of litigation from testifying to conversations had with and transactions involving the deceased.

The statute also prevents an interested party from testifying that conversations and transactions with the deceased did *not* happen (called “negative inferences”). This is derived from the general principle that a witness may not testify indirectly to matters about which the witness is prohibited from testifying directly.<sup>17</sup> Thus, for example, the Washington Supreme Court held in the 1947 decision in *Martin v. Shean* that, where the delivery of a deed by the deceased to an interested person was at issue,

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<sup>14</sup> RCW 5.60.030.

<sup>15</sup> *McGugart v. Brumback*, 77 Wn.2d 441, 444, 463 P.2d 140 (1969); *Estate of Lennon v. Lennon*, 108 Wash. App. 167, 177, 29 P.3d 1258 (2001); see also *In re Findley's Estate*, 199 Wash. 669, 673, 93 P.2d 318 (1939).

<sup>16</sup> *In re Estate of Cordero*, 127 Wn. App. 783, 789, 113 P.3d 16 (2005); *Erickson v. Robert F. Kerr, MD, PS*, 125 Wn.2d 183, 187–88, 883 P.2d 313 (1994).

the interested person was barred from testifying that the deed was *not* delivered.<sup>18</sup>

The trial court correctly struck substantial portions of Donna's proffered testimony. Donna is an interested party because she is suing the Estate. She proffered testimony about specific conversations that she claims to have had with Ken as well as statements she claims Ken never made to her. CP 625–28, 390–92. Specifically, Donna suggested that before she entered into the prenuptial agreement, she did not know the details of Ken's assets or liabilities, with the indirect suggestion that Ken did not tell her these things despite her specific written warranty and representation that he did (a negative inference). CP 391–92 at ¶ 6. Ken, the deceased, is not here to contradict her testimony. The trial court was correct to strike these statements.<sup>19</sup>

2. **Donna's testimony as to her own "acts" was barred because her testimony is acts that are transactions with Ken.**

Donna argues that her act of receiving a disclosure is her own act,

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<sup>17</sup> *Martin v. Shean*, 26 Wn.2d 346, 349–53, 173 P.2d 968 (1946).

<sup>18</sup> *Id.*; see also *Botka v. Estate of Hoerr*, 105 Wn. App. 974, 980–82, 21 P.3d 723 (2001) (held that the statute barred an interested person from testifying about conversations that the interested person claimed did not occur between the interested person and the deceased; the court found that the Estate, however, had waived the protection of the statute by offering *testimony* about the same issue).

<sup>19</sup> Donna offered similar statements in support of her motion for summary judgment on the no-contest clause in Ken's will. CP 1589–94. The Estate similarly objected to and moved to strike these statements as well. CP 1369–70, 1380–85. Though the trial court did not explicitly rule on these statements, they should also have been struck for the same

which the Dead Man's Statute does not bar her from testifying about. An interested party may testify to her own acts, but under Washington law it is clear that this is limited only to acts of the interested party.<sup>20</sup> If it were otherwise, then the interested party could testify about something for which the deceased was present but cannot rebut.

For example in *Slavin v. Ackman*,<sup>21</sup> the issue was whether an interested party could testify about receiving a letter from the deceased and about her own actions in reaction to receiving that letter.<sup>22</sup> The court explained that because the interested party's receipt of the letter (the authenticity of which was apparently not questioned) and steps she took in reaction to receiving it were not "transactions" because they were all acts of the interested party alone, the Dead Man's statute did not bar testimony about them.<sup>23</sup> Similarly, in *Estate of Lennon v. Lennon*, the court repeatedly stated that the test for a "transaction" about which testimony is barred is "whether the deceased, if living, could contradict the witness of

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reasons.

<sup>20</sup> *Estate of Lennon*, 108 Wn. App. at 174–75 (the test for whether the Dead Man's Statute bars testimony about events is whether "the deceased, if living, could contradict the witness of his own knowledge;" because witnesses must be present to testify to their own knowledge, only testimony outside the presence of the deceased falls outside the scope of the statute); see also *Slavin v. Ackman*, 119 Wash. 48, 48–51, 204 P. 816 (1922) (testimony allowed as to actions of the witness alone, which the court determined were not transactions with the decedent).

<sup>21</sup> *Slavin v. Ackman*, 119 Wash. 48, 204 P. 816 (1922).

<sup>22</sup> *Id.* at 50–51.

<sup>23</sup> *Id.*

his own knowledge.”<sup>24</sup>

Donna’s proffered testimony that she did not receive a disclosure from Ken is not testimony of her actions alone; it is testimony of her interaction with Ken. She could not have received a disclosure from Ken without it being a transaction with Ken. If Ken were alive, he could rebut this testimony. It is therefore barred by the statute.

Donna’s suggestion that the statute should not bar her from testifying to her own act of *listening* is absurd. Such an exception would swallow the rule and permit any interested party to testify to claimed conversations with the deceased simply by testifying to what the interested party heard, as opposed to what the deceased said.

3. *Donna’s testimony about her “impressions” is inadmissible.*

Donna offered testimony about what she characterized as her impressions about various events. The Dead Man’s Statute does not bar a witness from testifying about her own unexpressed impressions because if the deceased person were alive, the deceased could not rebut the testimony from personal knowledge (one cannot have personal knowledge of another’s unexpressed impressions)<sup>25</sup> However, such impressions must

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<sup>24</sup> *Estate of Lennon*, 108 Wn. App. at 178.

<sup>25</sup> *Jacobs v. Brock*, 73 Wn.2d 234, 237-38, 437 P.2d 920 (1968) (because the deceased could not, from personal knowledge, contradict a witness’s testimony about the witness’s own impression, such testimony is not barred by the Dead Man’s Statute).

truly be impressions and not disguised testimony that would be otherwise barred.

In this case, Donna's purported impressions are nothing more than disguised attempts to offer testimony about Ken's statements. She offered her impressions as to the "pressure to get the agreement signed before the wedding." (App. Br. at 44) Any alleged "pressure" to sign before the wedding could not have been independent of her conversations or interactions with Ken, which are transactions with Ken that the Dead Man's Statute bars her from testifying about.

Even if testimony about her impressions were not barred by the Dead Man's Statute, it still must be otherwise relevant to be admissible.<sup>26</sup> For example, testimony by an interested party as to her impressions that, when she performed work for the deceased, she expected to be compensated is permitted because such impressions are relevant to a claim for an implied contract.<sup>27</sup> But such unexpressed impressions are rarely admissible. The Washington Supreme Court explained in *Dwelley v. Chesterfield*<sup>28</sup> that even though an interested party's testimony about her *unexpressed* impressions were not barred by the Dead Man's Statute, they were not admissible to prove an express contract because unexpressed

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<sup>26</sup> *Jacobs*, 73 Wn.2d at 238 (addressing the relevancy of testimony of impressions).

<sup>27</sup> *Jacobs*, 73 Wn.2d at 237–39.

impressions are not admissible for such a purpose.<sup>29</sup> Donna offers no explanation or argument why her unexpressed impressions on various issues are relevant to any issue in this case, and the trial court did not abuse its discretion in striking the evidence.

4. *The Dead Man's Statute does not bar the introduction of documents, but does preclude Donna's testimony about the documents and the transactions they record.*

The Dead Man's Statute does not preclude the introduction of documents or agreements.<sup>30</sup> Accordingly, the Dead Man's Statute bars neither the introduction of the prenuptial agreement nor reliance upon the representations and warranties that Donna and Ken committed to writing in the agreement.

The Dead Man's Statute does, however, prohibit interested parties from testifying about documents.<sup>31</sup> Therefore, to the extent that Donna offered testimony about her prenuptial agreement with Ken, such testimony is barred.

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<sup>28</sup> *Dwellely v. Chesterfield*, 88 Wn.2d 331, 590 P.2d 353 (1977).

<sup>29</sup> *Id.* at 335-336.

<sup>30</sup> *Laue v. Estate of Elder*, 106 Wn. App. 699, 706-07, 25 P.3d 1032 (2001).

<sup>31</sup> *Id.* (barring testimony about consignment agreements or what the deceased did after they were entered into); *see also Thor v. McDearmid*, 63 Wn. App. 193, 202, 817 P.2d 1380 (1991) (a letter from the deceased was not barred by the statute, but testimony about the letter was); *Wildman v. Taylor*, 46 Wn. App. 546, 553-54, 731 P.2d 541 (1987) (lease and letter from the deceased were admitted, but statute barred testimony about the meaning of the terms of the documents).

5. *The Estate did not waive the Dead Man's Statute by relying upon a document.*

Donna argues that the Estate has waived the protection of the Dead Man's Statute by introducing the prenuptial agreement and her own statements in it. As explained below, Washington law requires the Estate, as the party seeking to enforce the prenuptial agreement, to prove its validity (making this one of the only circumstances in which the defendant bears the burden of proof). It would be contrary to reason if the Estate bore this burden yet could not satisfy it by introducing Donna's own representations and warranties in the agreement itself without waiving the protection of the Dead Man's Statute. Such a conundrum would confound the purposes behind the statute. Fortunately, the case law does not create such an absurd result.

The cases provide that an estate waives the protection of the Dead Man's Statute by offering *testimony* of a transaction with a deceased person.<sup>32</sup> The same is not true when an estate offers documentary evidence. The Washington Supreme Court has explained this important distinction. In *Erickson v. Robert F. Kerr, M.D. P.S.*,<sup>33</sup> the estate sued the deceased's physician, and offered the physician's medical records to show

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<sup>32</sup> *Thor*, 63 Wn. App. at 202 ; *Botka*, 105 Wn. App. at 980–81 (waiver by the introduction of *testimony* through a declaration); *Bentzen v. Demmons*, 68 Wn. App. 339, 344–45, 842 P.2d 1015 (1993) (waiver by the introduction of *testimony* through an affidavit).

<sup>33</sup> *Erickson v. Robert F. Kerr, M.D. P.S.*, 125 Wn.2d 183, 883 P.2d 313 (1994).

that the physician had been negligent.<sup>34</sup> The physician argued that by doing so, the estate waived the protection of the statute so that he could testify about his conversations with the deceased.<sup>35</sup> The court disagreed, explaining that because the records themselves were reliable and admissible as business records, they were not barred by the Dead Man's Statute, and the estate did not waive the protection of the statute by introducing them.<sup>36</sup>

Likewise, the Estate here did not introduce *testimony* about Ken's disclosure to Donna. The Estate has introduced a document that Ms. Kellar signed and is bound to that includes a mutual representation and warranty that each made the required disclosure to the other and that each was satisfied with it. There are no questions about the authenticity, reliability, or admissibility of the prenuptial agreement. By introducing it, the Estate did not waive its right to bar Donna from testifying in a way that contradicts its terms.

6. **Donna's statements about disclosure are also barred by the parol evidence rule.**

Donna's proffered testimony that Ken did not disclose his estate to her before she signed the prenuptial agreement is parol evidence specifically

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<sup>34</sup> *Id.* at 186–87.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 186–89.

offered only to contradict the clear and unambiguous terms of their agreement. In the absence of fraud, accident, or mistake (none of which she asserts), “parol evidence is not admissible for the purpose of adding to, modifying, or contradicting the terms of a written contract.”<sup>37</sup> Donna’s offered testimony was not offered to explain the agreement or give context to it; instead, she attempts to modify or contradict the clear and unequivocal terms of the prenuptial agreement. The agreement is a fully integrated agreement (CP 644, ¶ 9) that clearly states that Ken made full disclosure to Donna, and that Donna was satisfied with that disclosure. The parol evidence rule bars her testimony contradicting the terms of the agreement.

**D. The trial court correctly denied Donna’s motion for summary judgment regarding substantive fairness.**

Prenuptial agreements are favored, as they are conducive to marital tranquility and help avoid disputes about the future disposition of property.<sup>38</sup> If a court finds that such an agreement provides a fair and reasonable provision for the party seeking to invalidate it, then it is substantively fair, the inquiry ends, and the agreement is enforceable.<sup>39</sup> If the court does not make such a finding, then it moves on to the second

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<sup>37</sup> *Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990) (quoting with approval *J.W. Seavey Hop Corp. v. Pollock*, 20 Wn.2d 337, 348–49, 147 P.2d 310 (1944)).

<sup>38</sup> *Friedlander v. Friedlander*, 80 Wn.2d 293, 301, 494 P.2d 208 (1972).

<sup>39</sup> *In re Marriage of Matson*, 107 Wn.2d 479, 482–83, 730 P.2d 668 (1986).

prong, determining whether the agreement was the product of a process that was “fair and free from objectionable influence” by the spouse seeking to enforce the agreement, in which case the agreement is enforceable.<sup>40</sup> In other words, fair procedure trumps substantive fairness.

These are factual inquiries, so if there is a question of fact, the trial court may not render summary judgment on the issue.<sup>41</sup> Thus, to avoid being bound by a prenuptial agreement, the challenging party moving for summary judgment must show, on undisputed facts, both that the agreement is substantively unfair and procedurally unfair.

Generally, agreements that are not substantively fair share these hallmarks:

- 1) The spouses have vastly disparate assets (not just different, but vastly different), with one spouse typically entering the marriage with nothing or close to nothing (a few thousand dollars);<sup>42</sup> *and*
- 2) One or both of the following:
  - a) The prenuptial agreement is one-sided: it prevents the accretion of community property;<sup>43</sup> allows only

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<sup>40</sup> *Matson*, 107 Wn.2d at 483 (quoting *Whitney v. Seattle-First Nat’l Bank*, 90 Wn.2d 105, 109, 579 P.2d 937 (1978)).

<sup>41</sup> *In re Marriage of Bernard*, 165 Wn.2d 895, 902, 204 P.3d 907 (2009); *In re Marriage of Foran*, 67 Wn. App. 242, 251 n.7, 834 P.2d 1081 (1992); *see also Matson*, 107 Wn.2d at 483.

<sup>42</sup> *Matson*, 107 Wn.2d at 481 (husband’s net worth of \$830,000; wife had only personal effects); *Friedlander*, 80 Wn.2d at 295–96 (husband had an ownership interest in a lucrative family business; wife had “virtually no separate property”); *Bernard*, 165 Wn.2d at 898 (husband’s net worth of \$25 million; wife’s of \$8,000); *Foran*, 67 Wn. App. at 246 (husband’s net worth of \$1.2 million; wife’s of \$8,200).

<sup>43</sup> *Hamlin v. Merlino*, 44 Wn.2d 851, 865–67, 272 P.2d 125 (1954) (agreement that

one spouse to benefit from community property;<sup>44</sup> or allows only the spouse with substantial premarital assets (typically the husband) to grow their assets, while *preventing* the other spouse from doing so;<sup>45</sup>

- b) The prenuptial agreement makes *no provision whatsoever* for the less-advantaged spouse upon the spouses' divorce or upon the death of the other spouse.<sup>46</sup>

A mere finding that the spouses have disparate assets at the start of marriage is never enough to invalidate the agreement—in agreements found to be substantively unfair, the disparity in their assets is typically a vast one, and one of the other two factors is always present. None of these factors are present here.

1. **Questions of material fact preclude a finding that the prenuptial agreement was substantively unfair as a matter of law.**

There is a question of fact as to whether the parties' estates were vastly disparate. Donna and Ken each entered into the marriage with

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provided that all property acquired by either spouse would be acquired as separate, not community, property); *Foran* 67 Wn. App. at 249–51 (agreement barred community property from being created, and wife waived all claims to what would have been community property);

<sup>44</sup> *Bernard*, 165 Wn.2d at 905 (agreement prevented wife from using community property to help her children).

<sup>45</sup> *Matson*, 107 Wn.2d at 486 (agreement allowed the husband to devote time to the management and reinvestment of his separate property while preventing the wife from seeking any rights in that property); *Friedlander*, 80 Wn.2d at 295 (agreement provided that each party's separate property would remain separate, including increases, and prohibited wife from making a claim against husband's separate property); *Bernard*, 165 Wn.2d at 905 (agreement limited wife's ability to accumulate her own separate property); *Foran*, 67 Wn. App. at 249–51 (wife waived all rights to husband's separate property)

<sup>46</sup> *Foran*, 67 Wn. App. at 249–51.

substantial property, and Donna’s net worth at the time of marriage is unknown. CP 390–92. Though their respective net worth was different, it was not vastly disparate. But because Donna failed to offer a complete picture of her net worth when she and Ken married, she failed to carry her burden of proving that their respective net worth was vastly disparate. Accordingly, the trial court properly denied summary judgment.

2. **The agreement was not one-sided and provided substantially for Donna.**

The prenuptial agreement was not one-sided in Ken’s favor. The agreement contained several limitations on the parties’ otherwise statutory or common-law rights, but each of these limitations applied *equally* to Donna and Ken. CP 640–46, specifically ¶¶ 1, 2, 4, 5, and 6. Though such reciprocal limitations can be construed as unilateral when one spouse has only “negligible” separate property entering marriage,<sup>47</sup> Donna had a substantial estate entering marriage, so the reciprocal limitations should not be read as unilateral.<sup>48</sup>

The agreement also made a substantial provision for Donna — at

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<sup>47</sup> *Cf. Foran*, 67 Wn. App. at 250 (only ignoring the fact that the husband made reciprocal promises because the wife’s separate estate before marriage was “negligible”).

<sup>48</sup> Moreover, the restriction that Donna highlights and attempts to portray as evidencing Ken’s overbearing financial control—the right to create community property or property in joint tenancy—was put to use by Donna and Ken during marriage to *Donna’s benefit*, not to Ken’s. Donna and Ken developed a number of properties in Minnesota, including a medical clinic and other medical facilities, as joint tenants with right of survivorship. Following Ken’s death, all of those properties are now in Donna’s name. CP 1891–92.

Ken's death or if they divorced after four years of marriage, Donna would receive \$25,000 for each year they had been married plus \$500,000 paid in 20 annual installments. CP 642 ¶ 3. Because Ken died after they had been married for eight years, she was to receive \$700,000. It cannot be said that the agreement made no provision for her.

Accordingly, the trial court properly denied Donna's motion for summary judgment regarding substantive fairness.

**E. The prenuptial agreement was procedurally fair as a matter of law.**

If (and only if) an agreement is substantively unfair, then a court evaluates whether it is the product of procedures designed to ensure that the agreement was reached free from objectionable influence.<sup>49</sup> If so, then it is valid and enforceable despite its substantive unfairness.

There are two aspects to procedural fairness: 1) whether there was full disclosure by the parties of the amount, character, and value of the property; and 2) whether the agreement was entered into freely and voluntarily, upon independent advice, and with full knowledge by both spouses of their rights.<sup>50</sup>

**1. Donna and Ken each made a full financial disclosure.**

Full disclosure does not mean that each spouse "must know the

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<sup>49</sup> *Matson*, 107 Wn.2d at 483.

exact financial status of [the other's] resources.”<sup>51</sup> Instead, the spouse challenging the prenuptial agreement “must at least have a full and fair disclosure of all material facts relating to the amount, character and value of the property involved so that she will not be prejudiced by the lack of information, but can intelligently determine whether she desires to enter the prenuptial contract.”<sup>52</sup>

Donna and Ken each fully disclosed their assets to the other before entering into the prenuptial agreement. We know this because their prenuptial agreement specifically states this in two places. First, each spouse specifically represented and warranted that the other had disclosed their assets, and that each was satisfied with the other's disclosure:

Each of the parties individually own certain property, *the full nature and extent of which has been disclosed by each to the other*, and the parties by affixing their initials to this paragraph represent and warrant that they have *satisfied themselves as to the fullness and accuracy of the disclosure* of said assets each to the other and the respective values thereof. CP 640 at ¶ 2 (emphasis added).

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<sup>50</sup> *Friedlander*, 80 Wn.2d at 302.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* The Court in *Friedlander* also quoted a treatise that suggests that the spouse seeking to enforce the agreement has the burden of proving either that the other spouse “had full knowledge of the value of her interest in the husband's property, *or that the circumstances were such that she reasonably should have had such knowledge.*” *Id.* at 300 (emphasis added). Whether Donna reasonably should have had such knowledge is clearly a question of fact and not an issue that could be proven on summary judgment; however, should this be remanded for trial, the Estate is prepared to prove that Donna had such knowledge.

Donna and Ken each initialed this paragraph. This is significant because it is the *only* paragraph in the entire agreement that calls for the parties' initials.

This was confirmed again at Paragraph 13 of the agreement: "Both parties acknowledge that they have been advised of the entire estate of the other. . . ." CP 644 at ¶ 13. Donna was represented by counsel who reviewed the agreement with both of these provisions and made no objection to the representation and warranty or to the agreement itself. CP 1943–50, 1941. It is clear from the agreement that full disclosure was made. Donna's proposed testimony that Ken did not make such a disclosure was correctly struck under both the Dead Man's Statute and the parol evidence rule. CP 78–85. Except for the struck testimony, there was no evidence to contradict the clear, unequivocal, signed representations and warranties that each spouse made. There was no other admissible evidence, and the trial court should have found as a matter of law that Ken made the required disclosure.<sup>53</sup>

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<sup>53</sup> Donna argues that there is a "*Friedlander* Presumption" that presumes "deliberate concealment" when a prenuptial agreement makes different provisions for a wife than for a husband. This misstates the law; there is no such "*Friedlander* presumption." The court in *Friedlander* briefly discussed which party bears the burden of proof of the validity of a prenuptial agreement. *Friedlander*, 80 Wn.2d at 300–01. In that discussion, the court quoted from a treatise, which included a reference to this presumption, which the court relied upon only to conclude that a party seeking to enforce a prenuptial agreement has the burden of proof with regard to procedural validity. *Id.* (quoting A. LINDEY, SEPARATION AGREEMENTS AND ANTE-NUPTIAL AGREEMENTS (1967)). The Estate does not contest that Washington's odd position places the burden of proving the procedural

2. *The parties took all possible steps to ensure that Donna freely and voluntarily entered into the agreement free from any objectionable influence.*

The undisputed facts demonstrated that the prenuptial agreement execution process was free from any objectionable influence:

- Donna and Ken dated for almost a year before they got married. CP 390 at ¶ 2.
- Ken asked Donna to marry him approximately three months before they got married. CP 238–40.
- Before they were married, Donna and Ken attended a mediation to negotiate the financial and other terms of the prenuptial agreement, conducted by a noted and respected marital-property mediator, Ron Morgan. CP 196–206.
- Donna engaged independent legal counsel, Matt Peach, to advise her regarding the prenuptial agreement. CP 235, 237, 246, 1878. Mr. Peach had represented her with respect to each of her two prior divorces. CP 247.
- Ken engaged independent legal counsel, Mark Packer, to advise him regarding the prenuptial agreement. Ken had used Mr. Packer for legal matters in the past. CP 283–85 at ¶¶ 2, 7.
- Donna’s attorney, Mr. Peach, had used Mr. Morgan for family-law mediations so often before this that he referred to Mr. Morgan as his “mediator of choice” for family law issues. CP 157. Ken’s attorney, Mark Packer, had never used Mr. Morgan as a mediator before. CP 193–94, 292–93.
- At the mediation, Mr. Morgan discussed with Donna and

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validity of the prenuptial agreement on the party seeking to enforce it. This burden shifting is contrary to the Uniform Premarital Agreement Act, and to many courts. Uniform Premarital Agreement Act, §6(a), 9C U.L.A. (2007). Neither *Friedlander* nor any other Washington court has ever held that there is a “presumption” of “deliberate concealment” based solely on the fact that an agreement makes different provisions for each spouse. There is no such presumption.

Ken the financial terms of the prenuptial agreement. CP 196–97, 210–11.

- The mediator, Mr. Morgan, would have pulled Donna aside and advised her to consult with her counsel if he thought she was being taken advantage of. He did not testify that he did so. CP 207–08.
- The mediator, Mr. Morgan, recalls that Donna Kellar was “spirited” and stood up for herself during the mediation. CP 206.
- As a result of the mediation, Mr. Morgan drafted an “Addition to Prenuptial Agreement.” Mr. Morgan sent copies of this to Mr. Peach and to Mr. Packer immediately after the mediation. CP 315–16, 158–59 & 173–74, 196–97, and 210–11.
- Mr. Peach, Donna’s independent counsel, knew the requirements for a valid prenuptial agreement. CP 154–55.
- There is no evidence that Mr. Peach raised any concerns or objections about the disclosure.
- After the mediation and before she entered into the prenuptial agreement, Donna met with Mr. Peach and discussed the prenuptial agreement. CP 160–62, 1885–89. Donna relied upon Mr. Peach’s advice regarding the prenuptial agreement. CP 244, 1890.
- Mr. Packer and Mr. Peach exchanged correspondence about and versions of a prenuptial agreement over the course of several days. Mr. Packer sent Mr. Peach a draft of the prenuptial agreement that incorporated the terms of the “Addition” prepared by Mr. Morgan. CP 307–14.
- Mr. Peach responded, requesting specific changes to the financial terms of the prenuptial agreement. CP 305–06.
- Mr. Packer made those changes and returned the revised agreement, with the changes clearly marked, to Mr. Peach. CP 296–305, 167–196, and 179–187.
- After the changes were made, Mr. Peach wrote to Mr. Packer, stating that the agreement was in Donna’s interests. CP 295, 171, and 189. The agreement he reviewed included

the mutual representation and warranty regarding disclosure. CP 1943–50.

- Donna and Ken each signed the prenuptial agreement and initialed the paragraph containing the representation and warranty about disclosure. CP 248, 256–63.
- Ken did not put time pressure on Donna to sign the agreement. CP 168, 245, 251.
- Several days passed between when Donna and Ken signed the prenuptial agreement and when they actually got married. After they signed the agreement, when they left on the trip that would result in their marriage, Donna did not know if she and Ken would actually get married. CP 253–54.

It is difficult to conceive of a series of events that could have been implemented to ensure procedural fairness, or that would better ensure that Donna would be free from any objectionable influence, or that could have provided Donna with more opportunity to evaluate and understand the agreement, than what transpired here. Each party had counsel. Each party's counsel reviewed, revised, amended, and approved the agreement. The agreement was the product of a mediation. This was an arms-length, fairly negotiated, bargained-for agreement, and a mutual meeting of informed minds advised by counsel. These efforts made it clear that Donna freely and voluntarily entered into the prenuptial agreement. Hence, the agreement is procedurally fair as a matter of law.

3. *Whether Donna received “effective” legal counsel has no bearing on the validity of the agreement.*

Donna relies upon *dicta* from the decision of the Court of Appeals

in *Bernard* to argue that for a prenuptial agreement to be valid, each party had to receive not just independent counsel, but also effective independent counsel.<sup>54</sup> This is not the law. The Washington Supreme Court specifically declined to address this issue for two reasons: 1) no party had asserted such an argument to the Washington Supreme Court or to any court below, including this Court; and 2) it was unnecessary because there were other bases for affirming the trial court's decision.<sup>55</sup>

The *dicta* in *Bernard* is not and should not be law. If it were, Ken would have been required to ask Donna about her conversations with her counsel and evaluate whether her counsel provided her with adequate advice, thereby invading her attorney-client relationship and the independence of such advice. If permitted, such inquiry would have eviscerated any notion that her counsel was independent. Given that there is not even a requirement that a spouse receive independent counsel in order to declare a prenuptial agreement valid,<sup>56</sup> requiring one spouse to ensure that his or her spouse's counsel is effective or competent is simply too great a burden to place on a spouse who otherwise takes all steps possible to ensure that an agreement is entered into freely and voluntarily.

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<sup>54</sup> *In re Marriage of Bernard*, 137 Wn. App. 827, 835–36, 155 P.3d 171 (2007).

<sup>55</sup> *Bernard*, 165 Wn.2d at 907 n.8.

<sup>56</sup> *Matson*, 107 Wn.2d at 483 (noting that whether independent counsel is required is determined on a case-by-case basis, because not all cases would require independent

Such a requirement would potentially throw every prenuptial agreement into controversy because at divorce or death, any spouse now unsatisfied could raise the ineffectiveness of his or her own counsel as a basis to invalidate an agreement.

4. **The timing of the prenuptial agreement is irrelevant in this case.**

There is nothing magical about timing. Washington cases show that the significance of the element of time is whether the circumstances gave the spouses *enough time to have an adequate opportunity to seek independent counsel*.<sup>57</sup> That is all.

Time to obtain the advice of independent counsel was not an issue here, because Donna was well-represented by counsel, and actually had independent legal advice regarding the agreement. She had enough time to (1) participate in a mediation, (2) meet with her counsel, (3) have her

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counsel).

<sup>57</sup> *Bernard*, 165 Wn.2d at 906 (“there was not enough time for Gloria or her attorney to adequately review the prenuptial agreement as evidenced by the late date at which a working draft was provided and the several distractions present for Gloria in the few days before the wedding”) (emphasis added); *In re Estate of Crawford*, 107 Wn.2d 493, 497–98, 730 P.2d 675 (1986) (the circumstances, including the timing, showed that the spouse did not have an opportunity to obtain the advice of independent counsel before signing the prenuptial agreement); *Matson*, 107 Wn.2d at 486–87 (spouse was given the agreement the night before the wedding, so “she had no reasonable opportunity to seek independent counsel for advice as to the legal consequences of the agreement.”); *Foran*, 67 Wn. App. at 255–56. (“although Peggy was advised of her right to seek independent counsel, albeit too late, under *Matson*, there was no explanation of why this was important.”). In *Friedlander*, though the court mentioned the time between signing the agreement and the wedding date, there is no discussion whatsoever of timing in the court’s analysis of the validity of the agreement, indicating it was not a factor that mattered to the court’s decision. 80 Wn.2d at 298-303.

counsel exchange drafts and negotiate revisions in the financial terms, and (4) have her counsel review and approve the agreement before execution. It is notable that there was enough time for Mr. Peach to review and approve the agreement and advise Donna to enter into it.

Timing can also create pressure to sign an agreement if it is first presented a short period before a planned wedding, so that the party receiving it has to face a choice of signing the agreement or facing the embarrassment of canceling or postponing a wedding.<sup>58</sup> Contrary to Donna's argument, that was not the case here because there is no evidence their wedding was planned for a specific date. Donna was under *no pressure whatsoever* to postpone or cancel their wedding.

Donna testified that she did not think the wedding was too soon after she signed the prenuptial agreement. CP 245. She testified that after she signed the prenuptial agreement, she was not sure that she and Ken actually would even get married. CP 253-254. She testified that no family attended the wedding, just two of Ken's employees and no other guests. CP 241-242, 1882-1883. When Donna was asked under oath whether the marriage in South Dakota put undue pressure on her that distracted her from negotiating the prenuptial agreement, she could not say that it did.

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<sup>58</sup> Thus, her situation was unlike the one faced in *Bernard*, which involved a wedding on a set date at the Seattle Tennis Club with over 200 guests, some of whom had come from out of town. *Bernard*, 165 Wn.2d at 899-900.

CP 254. When she was asked if she felt as though she had to marry Ken by the end of September 2001 or the marriage would not occur, she testified that she did not know. CP 168. She was under no time pressure.

F. **Donna is estopped from contesting validity, because she held out the prenuptial agreement before the South Dakota Gaming Commission and testified under oath as to its application, in order to receive benefits (which she actually received) from the State of South Dakota that, but for her testimony, she would not have received.**

When a party seeks to invalidate an agreement based on mistake or fraud, she cannot remain silent and *continue to reap the benefits of the contract* once the party learns information that gives rise to an argument that the agreement should be invalidated, and then later claim that the agreement has been invalid all along.<sup>59</sup> Moreover, Donna's actions form a clear basis for estoppel. The equitable doctrine of judicial estoppel precludes a party from asserting one position and later seeking an advantage by taking a clearly inconsistent position.<sup>60</sup> The doctrine

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<sup>59</sup> *Wilson v. Pearce*, 57 Wn.2d 44, 52–3, 355 P.2d 154 (1960). See also *Ebel v. Fairwood Park II Homeowners' Association*, 136 Wn. App. 787, 793–94, 150 P.3d 1163 (2007) (holding that members of a homeowners association who participated in association activities ratified amendments to the association's CCRs that were otherwise voidable); *Snohomish County v. Hawkins*, 121 Wn. App. 505, 510–11, 89 P.3d 713 (2004) (holding that a person who executed a quitclaim deed freely and voluntarily and thereafter took actions consistent with it ratified the validity of the deed that was otherwise voidable). Prenuptial agreements are subject to the same doctrines of contract law as other contracts. *In re Marriage of Burke*, 96 Wn. App. 474, 477, 980 P.2d 265 (1999) (“Prenuptial agreements are contracts, subject to contract law, but also subject to special rules formulated by the Legislature and the courts.”).

<sup>60</sup> *Arkinson v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007).

preserves respect for judicial proceedings without resorting to perjury statutes; bars a party from testifying contrary to sworn testimony that the party has given in prior proceedings; and avoids inconsistency, duplicity, and the waste of time.<sup>61</sup>

As an equitable doctrine, the application of judicial estoppel as a bar is not a concrete test. Courts are guided by three core factors to determine whether the equitable doctrine applies; these factors guide a court's decision, and there is no requirement that all three factors be satisfied for the doctrine to apply. The three guiding factors are: 1) whether a party has taken a position that is clearly inconsistent with its earlier position; 2) whether the court's acceptance of the later inconsistent position would create the perception that either the first court or the second court was misled; and 3) whether the party seeking to assert an inconsistent position would derive an unfair advantage *or* impose an unfair detriment on the opposing party if they were not estopped from asserting the inconsistent position.<sup>62</sup> The last guiding factor is disjunctive; either finding is sufficient. Though courts may also consider additional factors in the application of this equitable doctrine, these three factors guide the

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<sup>61</sup> *Seattle-First Nat. Bank v. Marshall*, 31 Wn. App. 339, 343, 641 P.2d 1194 (1982).

<sup>62</sup> *Arkinson*, 160 Wn.2d at 538–39.

court's application.<sup>63</sup>

In this case, Donna argues (only through testimony barred by the Dead Man's Statute) that the prenuptial agreement was invalid because, before entering into the agreement, Ken did not fully disclose to her the nature, character, and value of his assets. Donna testified, however, that at sometime in 2004 or 2005, in the context of her application to the Gaming Commission for retail gaming licenses in her own name, she saw a financial statement for Ken from year-end 2001. CP 588–90.<sup>64</sup>

Donna testified that this was the first time she had seen this financial statement. CP 581–82, 585–86. But after “learning” of Ken's financial status as of 2001, she proceeded with her applications to the Gaming Commission for gaming licenses. She argued to the Gaming Commission that the prenuptial agreement alleviated all concerns that the Gaming Commission should have about joint financial estates. CP 548–60. She testified before the Gaming Commission that she and Ken entered into a prenuptial agreement, that they kept their financial affairs separate, and that they would continue to keep their financial affairs separate if she was awarded the gaming licenses she sought. CP 486–546. This is important, because the Gaming Commission started with a presumption of

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<sup>63</sup> *Arkinson*, 160 Wn.2d at 539.

<sup>64</sup> Note also the financial statement was dated December 31, 2001—three months after

a shared marital estate. CP 547. Donna's sworn testimony overcame that presumption. But for the validity of the prenuptial agreement, which confirmed that Donna and Ken had separate estates and not a community estate, the Gaming Commission would not have approved her application for licenses. CP 547, 563–64.

In short, Donna represented to the Gaming Commission that she had a valid and enforceable prenuptial agreement and sought a state-sanctioned benefit—a gaming license—based on that prenuptial agreement, even though by that time she had learned about Ken's supposed net worth as of the end of 2001. After she learned this, she continued her application for gaming licenses, received those gaming licenses, and used those gaming licenses to establish her own, independent businesses in South Dakota. She has continued to reap the benefits of the prenuptial agreement through her gaming licenses. CP 587. By her actions, she ratified the validity of the agreement. The trial court correctly concluded that she is now estopped as a matter of law from attempting to invalidate an agreement that she essentially ratified and held out as binding in order to obtain financial and legal benefits

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the prenuptial agreement was signed.

1. *Donna has taken clearly inconsistent positions.*

Donna made a written submission and gave sworn testimony to the Gaming Commission, taking the unequivocal position that the prenuptial agreement was valid and enforceable. CP 486–546, 548–53. Again, without taking that position, she could not have otherwise obtained the licenses because she and Ken, as a marital community, held the maximum number of licenses allowable to a married couple. CP 547. In her written submission to the Gaming Commission, she stated that (1) she and Ken had entered into the prenuptial agreement and (2) under the terms of the prenuptial agreement, each of them released all rights they had to the other’s property, including the income and rights that arose under that separate property. CP 549.

She further stated that she and Ken *each* had “a *substantial* separate estate, and significant motivation for the prenuptial agreement.” CP 552. In fact, reading her submission to the Gaming Commission, it is clear that the *only* basis on which she based her request for gaming licenses was the fact that she and Ken had a valid prenuptial agreement.<sup>65</sup>

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<sup>65</sup> Though the word “valid” is not used to describe the prenuptial agreement in either Donna’s submission to the Gaming Commission or in her testimony before the Gaming Commission, it is impossible to read her submission or her testimony and not be thoroughly convinced that she was advocating the position that the prenuptial agreement was valid. She described it to the Gaming Commission, described why she wanted, described how it kept her finances separate from Ken’s, and asked the Gaming Commission to grant her licenses based on it. CP 486–546, 548–60. It would be the

Without that position, she had no ability to argue for the licenses.

In her sworn testimony to the Gaming Commission, she testified consistent with her position. She testified that she and Ken entered into a prenuptial agreement for this stated purpose: “*To protect my assets* and he wanted to protect his, so it was both of us protecting our own assets.” CP 492. She described the prenuptial agreement to the Gaming Commission as follows:

This is a prenuptial Ken and I had before we married *so that we could each protect our own assets* as there was—*it was very important to me to keep our financials separate* and because of a prior marriage, I had financial problems and I didn’t want that to happen again, and because Ken had a substantial amount of money, I’m sure he wanted to protect his assets as well. (CP 492-493, emphasis added)

The remainder of her testimony described how, because of the prenuptial agreement, she and Ken kept all finances and assets separate from each other. CP 486–546. In her deposition in this matter, Donna admitted that these two positions were inconsistent. CP 591–92.

2. ***Either the South Dakota Commission on Gaming or Washington courts will be misled.***

The Gaming Commission clearly relied on Donna’s position because it awarded her retail gaming licenses. Because of Donna’s sworn

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height of hypocrisy for her to now contend that she did *not* represent to the Gaming Commission that the prenuptial agreement was valid or was not calculated to cause the Commission to believe that the agreement was valid. In fact, the Commission entered a finding that it was “valid.” CP 563–64.

testimony, the Gaming Commission was convinced that Donna and Ken had a valid prenuptial agreement. This fact was determinative in reaching its decision to grant her retail gaming licenses. In its declaratory ruling on the issue, it stated that Donna and Ken had separate and distinct financial estates, and that “each party’s assets are protected and separated from the others by a *valid* prenuptial agreement.” CP 563–64. The trial court found that because of her testimony to the Gaming Commission, along with knowledge of what she believed was Ken’s financial statement as of December 2001, she was now estopped from challenging the validity of the agreement. The trial court stated clearly:

[You] cannot with knowledge of his assets say it’s valid and I want it enforced and I’m entitled to my gambling license, and then take a totally inconsistent position in front of this court. It would allow for either this court to do an injustice or the South Dakota authorities to do a legal injustice. They would be inconsistent positions. And it is for the integrity of the judicial system that this court believes that Ms. Kellar in law must be [ ] estopped from taking those inconsistent positions. RP (Feb. 9, 2011) at 25.

3. **Donna would derive an unfair advantage if permitted to maintain inconsistent positions.**

Based on her submission to, and testimony before, the Gaming Commission, Donna was awarded three retail gaming licenses. She then used those licenses to operate a casino in Deadwood, South Dakota. CP

587. If she were now to repudiate her position and claim that the prenuptial agreement was always invalid, she will have benefitted by obtaining casino income from perjured or disavowed testimony.<sup>66</sup>

Throughout their marriage, Donna and Ken did keep separate financial estates. It is clear from reading Ken's will that he relied on this to make specific gifts to Donna. If Donna were able to repudiate her position and claim the prenuptial agreement was always invalid, she will benefit by receiving more from Ken's estate than his will makes it clear he intended and that the prenuptial agreement indicates they both contemplated.<sup>67</sup> If her inconsistent positions are permitted, she will derive a remarkably unfair and inequitable advantage and subvert the basis for Ken's testamentary intent and his plans to dispose of his estate.

4. **The Markley factors need not all be met, and those that are applicable are met.**

There are only three core factors that guide a court's application of judicial estoppel: 1) whether a later position is clearly inconsistent with an earlier position; 2) whether judicial acceptance of the later position would create the perception that the first or second court was misled; and 3) whether the party seeking to assert inconsistent positions would derive an

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<sup>66</sup> Donna has never proposed turning those assets over to the estate.

<sup>67</sup> Because Donna will derive an unfair advantage from taking inconsistent positions, the Estate need not show that either Ken or the Estate have suffered a resulting detriment.

unfair advantage from doing so.<sup>68</sup> All three factors were met here.

Other considerations, if they are material to the situation at hand, can also help guide a court in deciding whether the doctrine of judicial estoppel applies.<sup>69</sup> They are not additional requirements, and they are not determinative. These considerations need not be proven in every case, especially in cases where, as here, they are inapplicable. For example, the Gaming Commission did not enter a document titled a “judgment,” but instead entered a “declaratory ruling,” which was the final determination on the issue of whether the existence, validity, and effect of the prenuptial agreement permitted Donna Kellar to obtain gaming licenses that the Gaming Commission would otherwise have not granted. The distinction Donna attempts to draw regarding the lack of a “judgment” elevates form over substance. Judicial estoppel applies here based on her acceptance of benefits and the three core *Atkinson* factors, all of which were satisfied here.

**G. Donna offered no argument or evidence regarding abandonment.**

Donna raised as an issue pertaining to an assignment of error the parties’ alleged abandonment of the prenuptial agreement.<sup>70</sup> She likewise

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<sup>68</sup> *Arkinson*, 160 Wn.2d at 538–39.

<sup>69</sup> *Markley v. Markley*, 31 Wn.2d 605, 614–15, 198 P.2d 486 (1948).

<sup>70</sup> Brief of Appellant, Issue 4.

offered little argument and no evidence to support it to the trial court. Because she did not present evidence, authority, or argument on this issue, she has waived it. This Court need not consider the issue.<sup>71</sup>

**H. The motion to reconsider was correctly denied because there was no newly discovered evidence.**

Donna moved for reconsideration of the Court's February 11, 2011 order granting summary judgment to the Estate, claiming she had "newly discovered" evidence under CR 59(a)(4).<sup>72</sup> Under Rule 59(a)(4), a court may reconsider an order after being presented with "newly discovered evidence" that is both "material" and that the party "could not without reasonable diligence have discovered and produced."<sup>73</sup>

Donna's "additional" evidence in support of her motion for reconsideration was a declaration that was filed in October 2010 by

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<sup>71</sup> *Cowiche Canyon Conservancy v. Bosely*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (appellate court will not consider arguments not supported by authority or citations to the record); *State v. Elliott*, 114 Wn.2d 6, 15, 785 P.2d 440 (1990) (appellate court need not consider claims that are insufficiently argued).

<sup>72</sup> At the trial court and here, she also referred to CR 59(a)(9), and requested reconsideration on the grounds that "substantial justice has not been done." At the trial court and here, she provided no argument for reconsideration under CR 59(a). Granting reconsideration under Rule 59(a)(9) should be rare. *Knecht v. Marzano*, 65 Wn.2d 290, 297, 396 P.2d 782 (1964); see also *Lian v. Stalick*, 106 Wn. App. 811, 825, 25 P.3d 467 (2001); *Kohfeld v. United Pacific Ins. Co.*, 85 Wn. App. 34, 41, 931 P.2d 911 (1997). And when a party invoked Rule 59, it must present "the specific reasons in fact and law as to each ground on which the motion is based." CR 59(b). Donna presented no argument supporting a request under Rule 59(a)(9) to the trial court or here. The trial court therefore correctly denied her motion for reconsideration under that rule.

<sup>73</sup> CR 59(a)(4); see also *Holaday v. Merceri*, 49 Wn. App. 321, 329–30, 742 P.2d 127 (1987) (setting forth the five factors that must be met to succeed on a motion for reconsideration under Rule 59(a)(4)).

Richard Pluimer, an attorney who represented her in South Dakota in her application to the Gaming Commission. CP 43–47. The declaration was filed in a South Dakota court in a proceeding that Donna initiated, in which she was seeking to remove Mr. Pluimer as a personal representative for Ken’s Estate in South Dakota. CP 882–85, 991–1025. It was discussed at a hearing that Donna attended in South Dakota on October 14, 2010, and that her Washington counsel in this action also attended. CP 13–14. The declaration was not newly discovered.

Just because the declaration was sealed in the South Dakota court, does not mean that it was new or undiscovered. Evidence that a party has, but chooses not to use, is not newly discovered.<sup>74</sup> The document was sealed from the public, not from Donna or her counsel. The orders to seal specifically provided that she could have it unsealed to use it. CP 38–41. Her decision not to do so does not make the document newly discovered.

Regardless, the evidence is not material. Mr. Pluimer’s declaration was entirely consistent with Donna’s own testimony before the Gaming Commission. *Compare* CP 498–99, 503–04, 528–32 *with* 43–7. Nothing

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<sup>74</sup> *Holaday*, 49 Wn. App. at 329–30 (declarations with information that was available to the party but not used was not newly discovered evidence for purposes of reconsideration); *Wagner Development, Inc. v. Fidelity and Deposit Co. of Maryland*, 95 Wn. App. 896, 900, 977 P.2d 639 (1999) (pleadings from an earlier action that a party chose not to rely on were not newly discovered evidence); *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 88–89, 60 P.3d 1245 (2003) (documents that a party did not receive until a day before a summary-judgment hearing were not newly discovered; the party could have moved for a continuance to evaluate them).

in the declaration supports her tale. It is not material. The trial court correctly denied Donna's motion for reconsideration.

**I. The trial court did not abuse its discretion in awarding the Estate attorney fees.**

An award of attorney fees is reviewed for abuse of discretion.<sup>75</sup>

The Estate moved for attorney fees on two grounds: 1) the prenuptial agreement included a provision awarding fees against the party who brings a suit contrary to the terms and intent of the agreement (CP 644 ¶12); and 2) the trial court has discretion under TEDRA to award attorney fees to any party in an action brought under TEDRA.<sup>76</sup> The trial court, after receiving multiple briefs and arguments from counsel, awarded fees and explained that the fees awarded were reasonable.<sup>77</sup>

The Estate detailed the actions taken during the litigation, the discovery and motions initiated by Donna or made necessary by Donna's conduct, and the Estate's efforts to obtain the evidence that was crucial to the trial court's summary judgment ruling over Donna's obstructive efforts

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<sup>75</sup> *Humphrey Indus., Ltd. v. Clay St. Assocs., LLC*, 170 Wn.2d 495, 506, 242 P.3d 846 (2010) (fees under statute); *QFC v. Mary Jewell T, LLC*, 134 Wn.App. 814, 817, 142 P.3d 206 (2006) (fees under contract and RCW 4.84.330).

<sup>76</sup> RCW 11.96A.150(1).

<sup>77</sup> The Estate moved and briefed the issue initially. CP 1277-92, 1045-1262, 1263-76, 882-1044) The trial court requested that the Estate provide a more detailed account of its fees. VR Feb 25 2011, 37-49. The Estate then submitted additional briefing and support for its request for fees. CP 884-60, 733-843. The trial court held another hearing and issued an order awarding fees. CP 693-96. The trial court supplemented that order with an order adding findings of fact and conclusions of law to support the award. CP 2009-13.

to sequester that evidence. CP 844–60, 733–47. The trial court considered this, entered an award of fees,<sup>78</sup> and subsequently entered specific findings of fact and conclusions of law to support and explain the award of fees. CP 2009–13. The trial court did not abuse its discretion in awarding the Estate its fees and costs. The award should be affirmed.

**J. The no-contest clause in Ken’s will bars Donna from gifts under the will.**

No-contest provisions in wills are enforceable under Washington law.<sup>79</sup> Ken’s will contained a no-contest provision:

If any person brings any action, lawsuit, or claim against my estate, my Personal Representative, or any other beneficiary under my Will, which requests a resolution that would, if successful, increase the share of the claimant of my estate, then I direct that the claimant shall forfeit all interest in my estate, and the share that such person would have received under my Will shall be distributed as if he or she had died before me, leaving no descendants.

CP 1562. The public policy for favoring such clauses includes their discouragement of litigation.<sup>80</sup> Honoring them is consistent with the

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<sup>78</sup> The Estate sought \$416,327.18 in attorney fees and \$36,191.75 in costs. CP 844 In contrast, the trial court awarded \$250,000 in attorney fees and \$9,861.61 in costs.

<sup>79</sup> *Boettcher v. Busse*, 45 Wn.2d 579, 585, 277 P.2d 368 (1954); *In Re Chappell’s Estate*, 127 Wash. 638, 221 P. 336 (1923).

<sup>80</sup> *Chappell*, 127 Wash. at 641 (citing *In Re Hite’s Estate*, 155 Cal. 436, 101 P. 443 (1909)).

statutory mandate of giving “due regard to the direction of the Will.”<sup>81</sup> Donna sued the Estate, seeking, through an invalidation of the prenuptial agreement, to increase her share of Ken’s estate. That triggered the no-contest clause, so that Donna receives nothing under Ken’s will.

1. **By challenging the validity of the prenuptial agreement, Donna takes nothing under Ken’s will.**

Whether a no-contest clause applies to a particular contest depends on the language of the no-contest clause itself. For example, in *Boettcher v. Busse* the Washington Supreme Court held that a narrow no-contest clause that only applied to challenges to a will was not triggered by an heir’s creditor’s claim, because creditor’s claims are not challenges to wills.<sup>82</sup> Similarly, in *In re Chappell’s Estate* it held that a broader no-contest clause that applied to challenges to the distribution of the testator’s estate was triggered by a challenge to the validity of a trust in which the majority of the testator’s assets were held.<sup>83</sup>

The no-contest clause in Ken’s will was broad. It was not limited to challenges to his will; it applied to any suit that requested a resolution that would “increase the share of the claimant in my estate.” CP 1562. In interpreting this clause, the trial court was required to focus on Ken’s

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<sup>81</sup> RCW 11.12.230.

<sup>82</sup> *Boettcher v. Busse*, 45 Wn.2d 579, 584–85, 277 P.2d 368 (1954).

<sup>83</sup> *Chappell*, 127 Wash. at 639–40.

intent as the testator. That intent can be divined from the terms of the will itself and from the testimony offered from his two lawyers who were involved in drafting the will as to their intent in the drafting. The will made specific gifts to Donna, satisfying Ken's obligations under the prenuptial agreement, and specifically referred to the prenuptial agreement, indicating that he understood the prenuptial agreement to be valid. He also made specific provisions for other family members, additional specific provisions for Donna, and gave the residuary of his estate to the Foundation. His will clearly contemplates that his estate, as he understood it, excluded anything that Donna now contends is community property. CP 1557-71.

Ken's attorneys, Mr. Packer and Mr. Smith, each provided testimony that it was Ken's intent to have the broadest, strongest enforceable no-contest clause possible. Ken's earlier will had a more limited no-contest clause that only applied to challenges to his will. His counsel broadened the provision, evidencing the testator's intent to broadly discourage challenges to his estate plan. CP 1474, 1513. Based on the bequests in the will, the language of the no-contest clause, and Ken's desire to change his will to broaden the reach of the no-contest clause, his intent was clear: anyone who challenged his estate plan would not take.

2. *A challenge of the type that Donna brings triggers the no-contest clause.*

The general rule in Washington is that no-contest clauses are enforceable.<sup>84</sup> A narrow exception exists for challenges to estate-planning provisions that affect the safety and well-being of society, that are void because they are contrary to law, or that violate public policy (provided they are brought in good faith, discussed below).<sup>85</sup> Thus, challenges to provisions that would have violated the rule against perpetuities, that restrained a legatee from marriage, that prescribed a legatee's specific religion, that prevented a legatee from engaging in commerce, that prevented a legatee from farming his own land, or that attempted to dispose of property in clear violation of state statutes all may be challenged without the risk of invoking a no-contest clause.<sup>86</sup> Challenges to a testator's attempts to control a legatee's behavior from the grave in a manner inconsistent with public policy will not be punished by disinheriting the legatee, and therefore do not trigger a no-contest clause in a will.

There is no provision in Ken's estate plan that violates public policy. Prenuptial agreements are not void as contrary to public policy, but

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<sup>84</sup> *Boettcher*, 45 Wn.2d at 485; *Chappell*, 127 Wash. at 639–40.

<sup>85</sup> *Chappell*, 127 Wash. at 644–45 (quoting with favor to cases in other jurisdictions).

<sup>86</sup> *Id.*

in fact are valid and accepted because they are conducive to marital harmony and the avoidance of property disputes.<sup>87</sup> Donna's challenge was not brought to avoid a provision in an agreement that is against public policy or that clearly violates applicable statutes, so her challenge triggers the no-contest clause (regardless of whether it was brought in good faith, discussed below). Summary judgment on that basis alone should have been granted.

3. **Donna's challenge was not made in good faith and with probable cause.**

The Washington Supreme Court in 1923 suggested that if a challenge to a will was the type of challenge that could be brought, such challenges did not trigger no-contest clauses only if they were brought in good faith on the advice of counsel.<sup>88</sup> Division Two of the Court of Appeals has explained that a party is deemed to have acted in good faith and with probable cause if she initiates an action on the advice of counsel, after fully and fairly disclosing all material facts to her counsel.<sup>89</sup> The rule should not be swallowed by this exception, however, and the exception was never intended to cloak any challenge to a will with immunity simply

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<sup>87</sup> *Hamlin*, 44 Wn.2d at 864; *Friedlander*, 80 Wn.2d at 301.

<sup>88</sup> *Chappell*, 127 Wash. at 646 (stating merely at the end of the opinion that there was no issue that the challenge was brought in good faith on the belief that California, not Washington, law applied to the matter).

<sup>89</sup> *In re Estate of Mumby*, 97 Wn. App. 385, 393, 982 P.2d 1219 (1999).

because the challenge was made after consultation with a lawyer. If that was the case, then no-contest clauses would be rendered meaningless unless a challenger proceeded *pro se*. A good faith exception still remains predicated on a challenge based on a valid public policy concern, but only those such challenges that are instituted on the advice of informed counsel escape the effect of a no-contest clause. To earn such a finding of good faith, the challenging party must show that she **fully** and **fairly** disclosed **all material facts** to her counsel before commencing the action.<sup>90</sup>

Here, even before filing this suit, Ms. Kellar's counsel asserted that she would show that her challenge was in good faith on the advice of counsel, so she placed it at issue even before filing her suit. CP 1515–18, 1523–25, 1530–31. The Estate propounded interrogatories and document requests about her consultation with lawyers before filing this action, and asked her in deposition about this. CP 1453–54, 1451–52, 1459–1467, 1470–72. Each time the Estate did so, she objected on grounds of attorney-client privilege. *Id.* After months of refusing to provide this information, she provided this information for the first time in the form of declarations from herself and two of her lawyers in support of her own motion for summary judgment on the no-contest clause, after discovery had closed,

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<sup>90</sup> *Mumby*, 97 Wn.App. at 393-395 (person challenging a will was not entitled to a finding of good faith because she did not fully and fairly disclose facts that were important to the trial court's decision);

and just two weeks before a scheduled trial date. CP 1589–1642, 1575–1586, 1587–1588.

Discovery is not a game. A party may not wait until trial (or the filing of a dispositive motion) to suddenly produce information for which the attorney-client privilege was asserted during discovery.<sup>91</sup> Because she placed the advice of counsel at issue, and because she steadfastly refused to answer discovery on this issue each time she was asked, she should not have been permitted to then introduce, in support of her motion for summary judgment and in opposition to the Estate’s motion for summary judgment, any evidence regarding the advice of counsel she received. Because it was her burden to prove good faith,<sup>92</sup> and because she should not have been permitted to offer evidence to support her burden (because she never disclosed it in discovery), the trial court should have granted the Estate’s motion for summary judgment.

Even if Donna had produced in discovery the evidence she ultimately produced, the defense still would not apply because Donna did

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<sup>91</sup> *Seattle Northwest Securities Corp. v. SDG Hlding Co.*, 61 Wn. App. 725, 744, 812 P.2d 488 (1991) (“Therefore, we hold that when a party is asserting the attorney-client privilege, that party must make an election prior to any deadline for completion of discovery as to whether or not the privilege will be voluntarily waived at trial and, if the privilege is to be waived, provide to opposing counsel a statement of the subject matter of the testimony.”).

<sup>92</sup> RCW 26.16.210; *Reagh v. Dickey*, 183 Wash. 564, 573, 48 P.2d 941 (1935) (applying the prior version of this statute beyond inter vivos transfers to post-death challenges).

not **fully** and **fairly** disclosed to her counsel **all material facts**.<sup>93</sup> In Donna's case, the material facts are those that the trial court relied upon in granting the Estate's motion for summary judgment. There were only two. First, in 2005, before testifying before the Gaming Commission, Donna acquired information that led her to believe that when she and Ken married, Ken was worth \$93 million and that Ken had not disclosed that to her before they entered into the prenuptial agreement. CP 565–69, 588–89, 581–82. Second, having acquired that information, she represented to the Gaming Commission, both in writing and in sworn in-person testimony, as being bound by and living in accordance with a valid prenuptial agreement, and that she therefore should be awarded retail gaming licenses that she would not have been awarded in the absence of the prenuptial agreement. CP 486–546.

The declarations that Donna provided in support of her motion and in opposition to the Estate's motion omitted any concrete statement that she told any of these lawyers that she had acquired this information, yet continued to use the prenuptial agreement to her advantage. There was no evidence that before filing this action, Ms. Kellar disclosed to Ms. Esp that she had applied to the Gaming Commission for gaming licenses, had testified before the Gaming Commission, and received gaming licenses as

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<sup>93</sup> *Mumby*, 97 Wn. App. at 393–94.

a result. There was no evidence that she disclosed to Ms. Esp that, before she testified to the Gaming Commission, she believed that Mr. Kellar was worth \$93 million. CP 1590 at ¶ 5, 1328–29.

There was no evidence that before filing this action, Ms. Kellar disclosed to Mr. Johnson that, before she testified to the Gaming Commission, she had what purports to be Mr. Kellar's financial statement from when she entered into the prenuptial agreement. CP 1590–91 at ¶ 7. There was no evidence that before filing this action, Ms. Kellar or Mr. Haigh disclosed to Ms. McCandlis that, before Ms. Kellar testified to the Gaming Commission, she had what purports to be Mr. Kellar's financial statement from when she entered into the prenuptial agreement. CP 1587 at ¶ 3, 1590–91 at ¶ 7(a–k), 1576 at ¶ 7(a–c), 1588 ¶ 5–6.

In his declaration, Mr. Haigh did not state that Donna told him that, before Ms. Kellar testified to the Gaming Commission, she had what she believed to be a copy of Mr. Kellar's 2001 financial statement that showed a net worth different from what Ken disclosed to her before they entered into the prenuptial agreement. CP 1575–76 at ¶¶ 2–3, 1590–91 at ¶ 7(a–j), ¶ 11. The vagueness of Mr. Haigh's declaration showed that Donna did not fully and fairly disclose these material facts to him before he filed this action on her behalf.

Although the trial court attempted to remedy this at the time of the

hearing, the attempt fell far short of what is required. The trial court simply asked Mr. Haigh to state, as an “officer of the court,” whether he was “aware that Ms. Keller had the financial statement of Mr. Kellar before the action was filed.” RP (Feb. 25, 2011) pp. 30–1. Though Mr. Haigh answered affirmatively, his answer was not under oath, and he was not subject to cross-examination. Cross-examination was crucial, because other documentary evidence indicated that Mr. Haigh did not have the key document or ascribe any significance to it until months after filing the suit.<sup>94</sup> The trial court’s question was also not specific enough to elicit the precise key facts discussed above. Because there was not sufficient evidence before the trial court to prove full disclosure to her lawyers before filing suit, Donna’s motion for summary judgment should have been denied and the Estate’s motion for summary judgment should have been granted.

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<sup>94</sup> The Estate laid out for the trial court a detailed history of the events of document gathering, production, and review by Mr. Haigh. CP 1374–77, 1316–62. A read of that detailed history leads to the very likely conclusion that Mr. Haigh did *not* have a copy of the crucial document when he filed this suit, and that Donna did not inform him of its existence. At a minimum, this history raised questions about the meaning of Mr. Haigh’s vague statement to the trial court. The Estate should have been permitted to conduct discovery and cross examination to clarify exactly what Donna told Mr. Haigh and when, given its importance to Donna’s defense of good faith.

4. *The trial court erred in denying the Estate's request for a continuance under CR 56(f) to depose new witnesses she first disclosed in opposition to the Estate's motion.*

Ms. Kellar's steadfastly refused to provide information in discovery regarding what she disclosed to her counsel before filing this action. She then offered evidence on very the issue of advice of counsel in support of her own motion for summary judgment regarding the no-contest clause. The Estate was denied a continuance under Rule 56(f) to depose the individuals who offered declarations on this issue.

This is virtually identical to the circumstances in *In re Estate of Kubick*.<sup>95</sup> There, the trial court summarily granted a challenge in an estate case, and then, without allowing the parties to present evidence of good faith, summarily concluded that the challenge was in good faith.<sup>96</sup> The court of appeals reversed, explaining that the other party had "not been given an opportunity to establish what facts were before counsel when and if he advised the suit in the face of the in terrorem clause."<sup>97</sup> It remanded to allow the party to do so.

Likewise, here, if the trial court considered the evidence presented by Donna and the non-testimonial statements by her counsel, it should

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<sup>95</sup> *In re Estate of Kubick*, 9 Wn. App. 413, 513 P.2d 76 (1973).

<sup>96</sup> *Id.* at 417-18.

<sup>97</sup> *Id.* at 420.

have allowed the Estate to conduct discovery to flesh out this issue and determine, through the time-honored right of cross-examination, whether that was indeed the case. The trial court abused its discretion by not allowing the Estate to depose Ms. Esp, Mr. Haigh, Ms. McCandless, and Mr. Johnson, the witnesses whose very identity and supposed testimonial knowledge had been hidden from the Estate until the hearing.

## VII. CONCLUSION

This Court should affirm the trial court's striking of portions of Donna's declaration. This Court should reverse the trial court's denial of the Estate's motion for summary judgment regarding the procedural validity of the prenuptial agreement. This Court should also affirm the trial court's summary judgment in favor of the Estate estopping Donna from challenging the validity of the agreement. This Court should reverse the trial court's summary judgment in Donna's favor regarding the no-contest clause and denying the Estate's motion for summary judgment regarding the no-contest clause and enforce the no-contest clause. In the alternative, this Court should remand for discovery and trial on the issue of the no-contest clause. This Court should also affirm the trial court's as a valid exercise of discretion in awarding of attorney fees and costs to the Estate.

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Respectfully Submitted on this 16<sup>th</sup> day of December, 2011.

SCHWABE, WILLIAMSON & WYATT, P.C.

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## CERTIFICATE OF SERVICE

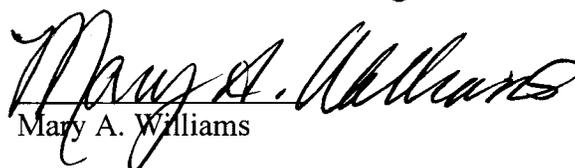
I hereby certify that on the 16<sup>th</sup> day of December, 2011, I caused to be served the foregoing BRIEF OF RESPONDENT/CROSS-APPELLANT on the following parties at the following addresses:

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