

66828-5

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NO. 66828-5-I

COURT OF APPEALS DIVISION I
OF THE STATE OF WASHINGTON

DONNA M. KELLAR,

Appellant,

v.

THE ESTATE OF KENNETH L. KELLAR,

Respondent.

REPLY BRIEF OF RESPONDENT / CROSS-APPELLANT

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STATE OF WASHINGTON

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I. Introduction

This Court should conclude that the prenuptial agreement entered into between Donna and Ken Kellar is enforceable against Donna Kellar. This Court should also conclude that because of her challenge to prenuptial agreement, she is disinherited from Ken Kellar's will. And this Court should conclude hold that the Estate of Ken Kellar is entitled to attorney fees and costs it incurred defending her challenge.

In her reply, Donna Kellar has (1) made unsupported or false assertions of fact and incorrect statements of law, (2) raised new issues that were not raised before and to which she did not assign error, and (3) attempted to malign (supported by nothing more than conjecture) the reputation of yet another person: Ron Morgan, who mediated the prenuptial agreement before Donna and Ken entered into it. Though the Estate will address these issues, they merely distract from the real issues in this appeal, which are as follows: 1) whether the trial court correctly denied Donna's motion for summary judgment regarding the substantive fairness of the prenuptial agreement; 2) whether the trial court erred when it denied the Estate's motion for summary judgment regarding the procedural fairness of the prenuptial agreement; 3) whether the trial court correctly held that Donna was estopped from challenging the validity of the prenuptial agreement; 4) whether the trial court correctly awarded the

Estate its attorney fees and costs; 5) whether the trial court erred when it granted Donna's motion for summary judgment and denied the Estate's motion for summary judgment regarding the no-contest clause in Ken Kellar's will.

II. Portions of Donna's reply brief should be struck.

Donna was required to make reference in her brief to the record for "each factual statement."¹ Her argument needed to include "references to relevant parts of the record."²

This Court may strike portions of a brief that fail to comply with these rules.³ It should do so. Several statements in her brief, as well as some entire sections, should be stricken for failing to provide accurate, cogent citations to the record.

First, Donna's new factual statement, the "Clarification of Facts" section in the Reply / Response Brief of Appellant, is replete with (1) fabricated statements that have no reference to the record and (2) statements with reference to the record that do not support the statement. These should be struck. The Estate has included an Appendix (Appendix A) identifying, statement by statement, each statement in her "Clarification of Facts" that either lacks support or is not supported by the

¹ RAP 10.3(a)(5).

² RAP 10.3(a)(6).

reference she makes. The entirety of her “Clarification of Facts” section should be struck.

In addition, Donna creates a timeline that she argues shows the series of events involved in the negotiation of the prenuptial agreement, found at pages 30-31 of her reply brief. But this timeline is plagued with (1) fabrications that have no reference to the record, and (2) statements with references to the record that do not support the statements. The Estate also addresses these in Appendix A. The entirety of this timeline should be struck.

III. The Dead Man’s Statute

Donna’s reply raises a new argument not raised before the trial court or her opening brief.⁴ She claims for the first time in reply that the Estate waived the protection of the Dead Man’s Statute by introducing unrelated testimony. This argument was not properly raised and should not be considered. But in an abundance of caution, the Estate responds below.

A. The standard of review of an evidentiary ruling

Washington cases are unclear on the standard of review when a trial court makes an evidentiary determination in the context of a summary judgment motion. As the Estate pointed out in its opening and response

³ RAP 10.7.

⁴ *Appellant’s Opening Brief* at 2–5 (Assignments of Error and Issues Pertaining to Assignments of Error) and 41–48 (argument regarding Dead Man’s Statute).

brief,⁵ such decisions sometimes are reviewed de novo,⁶ and sometimes for abuse of discretion.⁷ But as this court has held, when the circumstances are such that the trial court's decision on an evidentiary issue comes after a hearing and there is an indication that the court would make the same decision at trial, the standard of review is for abuse of discretion.⁸

In this case, the trial court ruled on statements in a specific declaration, but gave no indication that that ruling was limited to the summary judgment proceeding for which the declaration was submitted. It would be illogical for the court to bar the statements on summary judgment, but then to allow them at trial. Therefore, the standard for the review of this decision should be for abuse of discretion. However, the result is the same even if the de novo standard were to apply. As discussed below, the trial court correctly held that the Dead Man's Statute barred Ms. Kellar from testifying to: 1) her assertion that Ken Kellar did not make a financial disclosure to her; and 2) her assertion that Ken Kellar made statements to her that put "pressure" on her to enter into the prenuptial agreement.

⁵ Brief of Resp. / Cross-App. at 22–23 and n.6.

⁶ *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).

⁷ *Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 744, 87 P.3d 774 (2004); *Sunbreaker Conco. Ass'n v. Travelers Ins. Co.*, 79 Wn. App. 368, 372, 901 P.2d 1079 (1995).

B. The Estate did not waive the protections of the Dead Man’s Statute.

1. Donna’s new waiver argument was raised first in her reply, so it should not be considered.

In her opening brief, Donna argued that the Estate had waived the protection of the Dead Man’s Statute merely by relying on the representation and warranty made by Donna at the time the agreement was entered into, contained within the agreement itself, and that she specifically initialed.⁹ Now, for the first time in reply, she argues that because the Estate introduced various testimony from her and others in the trial court, the Estate waived the protection of the Dead Man’s Statute entirely.¹⁰ As the Washington Supreme Court has stated, “an issue raised and argued for the first time in a reply brief is too late to warrant consideration.”¹¹ Her new argument of waiver based on the Estate’s introduction of testimony is too late to be considered.

Even if the Court were to consider her argument, it fails. The *Johnson* opinion,¹² upon which she relies, held only that when an adverse party offers testimony from a witness about a transaction with the

⁸ *Warner v. Regent Assisted Living*, 132 Wn. App. 126, 135–36, 130 P.3d 865 (2006).

⁹ Appellant’s Opening Brief at 45–48.

¹⁰ Reply/Response Brief of Appellant at 12; *see also id.* at 11–17.

¹¹ *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809 (1992).

¹² *Johnson v. Peterson*, 43 Wn.2d 816, 264 P.2d 237 (1953).

deceased that would otherwise be barred by the statute, the party waives the protection of the statute with respect to additional “explanatory testimony” about the same transaction, which the court described as “all facts pertinent to *the matters developed from the witness.*”¹³ Washington opinions before and after *Johnson* have been clear: when the statute is waived by examining a witness about a transaction or conversation that would be protected by the statute, the waiver “does not extend to unrelated transactions and conversations.”¹⁴ A “transaction” for purposes of the Dead Man’s Statute is defined as an act by and between the parties for the benefit or detriment of one or both of the parties. The test of what constitutes a transaction with the deceased is whether deceased, if living, could contradict the witness of his own knowledge.¹⁵

Here, the Estate offered no testimony from Donna or from Ron Morgan (or any other witness) about which the Estate sought to bar her testimony: 1) Ken Kellar’s financial disclosure to her; and 2) Ken Kellar’s

¹³ *Johnson*, 43 Wn.2d at 818–19.

¹⁴ *Carter v. Curlew Creamery Company, Inc.*, 16 Wn.2d 476, 490–91, 134 P.2d 66 (1946) (“although the statute may have been waived as to those particular transactions opened up by appellant, the waiver does not extend to unrelated transactions.”); *Bentzen v. Demmons*, 68 Wn. App. 339, 345, 842 P.2d 1015 (1993) (“a waiver by introduction of testimony about one transaction does not extend to unrelated transactions and conversations.”); *In re Estate of Malloy*, 57 Wn.2d 565, 568, 358 P.2d 801 (1961) (“A waiver as to one transaction or conversation does not extend to unrelated transactions or conversations The proof offered by the petitioners did not pertain to any transaction or conversations about which Mr. Swan testified.”).

¹⁵ *In Re Estate of Wind*, 27 Wn.2d 421, 426, 179 P.2d 731 (1947).

statements to her or actions in preparing for their wedding. The list of testimony that she identifies sorts into one of four categories: 1) testimony that the Estate did not offer or rely upon (Donna ignores the Estate's specific designations of testimony in an effort to inaccurately imply that the Estate offered testimony that it did not offer); 2) testimony the Estate offered in the context of its motion to strike *only to show what testimony should be struck*; 3) testimony the Estate offered about matters that are not transactions between she and Ken Kellar; and 4) testimony the Estate offered about transactions between she and Ken Kellar other than those transactions about which the Estate sought to bar her testimony (Ken Kellar's disclosure to her and Ken Kellar's statements to her or actions in preparing for their wedding). She provided four pages of single-spaced references of testimony that she argues constitutes a waiver. The Estate's Appendix B shows which category each statement sorts into.

a. Testimony the Estate did not rely upon

When the Estate submitted deposition testimony to the trial court, it specified in its briefing, by page and line number, the testimony it relied upon. In most cases, it also specifically marked on the copy of the deposition transcript submitted to the trial court the portions that it relied upon. Several of Donna's references are to testimony that appears on the pages that the Estate submitted to the trial court, but that the Estate very

clearly did not rely upon or cite to. The Estate has not waived the protection of the Dead Man's Statute by specifically identifying the lines of testimony it offered even though pages upon which that designated testimony appears includes other information that the Estate did *not* offer or rely upon.¹⁶

- b. Testimony the Estate offered only in the context of its motion to strike or to give context to the Estate's other motions.

In its motion to strike, the Estate referred to Donna's declaration for specific testimony to be stricken, and also gave examples of her deposition testimony that said the same thing. CP 1894:5–8. The Estate did so to avoid Donna circumventing an order on her declaration by simply offering the same testimony through her deposition transcript. CP 1981:9–10 and n.27. By identifying for the trial court the specific testimony and the type of testimony that should be stricken, the Estate did not waive its right to ask the trial court to strike such testimony. Instead, the entire purpose of the motion to strike was to specifically identify testimony that was barred by the Dead Man's Statute. Likewise, the Estate provided testimony of Donna to provide context for its argument regarding ratification and estoppel. CP 612:1-7. To argue that waiver

¹⁶ Asking questions in discovery or depositions does *not* waive the protection of the Dead Man's Statute. *Estate of Lennon v. Lennon*, 108 Wn App. 167, 175, 29 P.3d 1258 (2001);

occurred by a movant citing to the objectionable testimony, or to provide context for a legal argument is far fetched to say the least.

- c. Testimony of Donna Kellar about matters other than transactions between her and Ken Kellar.

Donna refers to many portions of her testimony that simply do not implicate a transaction or conversation between Donna and Ken, but implicate actions that Donna took independent from Ken, or transactions between Donna and individuals other than Ken. The Estate's offering of testimony that does not implicate transactions or conversations between Donna and Ken is not a waiver of the Dead Man's Statute.

- d. Testimony of transactions between Donna and Ken Kellar other than the two transactions about which the Estate sought to bar Donna's testimony.

It is important to remember at this point the definition of "transaction" in the context of the Dead Man's Statute:

To be a transaction in such a case, the matter concerning which the testimony is given must involve some act by and between the parties for the benefit or detriment of one or both of the parties. It has been held, and properly so, that the test of transactions with deceased within a statute excluding testimony concerning transactions with deceased, is whether deceased, if living, could contradict the witness of his own knowledge.¹⁷

McGugart v. Brumback, 77 Wn.2d 441, 463 P.2d 140 (1969).

¹⁷ *In Re Estate of Wind*, 27 Wn.2d 421, 426, 179 P.2d 731 (1947).

That definition explains the legislative purpose behind the Dead Man's Statute. If the deceased could not contradict the proffered testimony from his grave by virtue of his own testimony, then the proffered testimony must be struck. That is all the Estate sought.

The Estate moved to prevent Donna from offering testimony on two transactions: 1) Ken's supposed lack of any financial disclosure to her before they entered the prenuptial agreement (which she offered to specifically contradict a clear and unambiguous writing), and 2) Ken's supposed plans for their marriage. These were the only two transactions that the Estate sought to bar her testimony on. These were also the only two transactions the Estate is aware of for which there is no corroborating or contradicting evidence from witnesses other than Donna, so the purpose of the Dead Man's Statute is therefore served by excluding Donna's testimony about these transactions because Ken, who is deceased, cannot contradict her. The Estate offered and relied upon evidence of transactions or conversations between Donna and Ken other than these two instances. By doing so, it did not waive the protection for other transaction, specifically the two transactions about which it sought to prevent Donna's uncorroborated testimony.

- e. Testimony of Ron Morgan, who is not an interested party under the Dead Man's Statute.

The Dead Man's Statute only prohibits testimony from a "party in interest or to the record."¹⁸ Ron Morgan was a mediator who mediated the terms of the Kellars' prenuptial agreement. He is not an interested party, so his testimony is not barred by the Dead Man's Statute. Because it was not barred, the introduction of Mr. Morgan's testimony could not also waive the protection of the Dead Man's Statute. Even if it could, the Estate did not seek to bar Donna from testifying about the mediation, which was itself a separate transaction from Ken Kellar's financial disclosure to her and from Ken Kellar's supposed statements to her regarding their wedding that she claims "pressured" her to sign the prenuptial agreement.

IV. Law applicable to prenuptial agreements

Donna states that for a prenuptial agreement to be valid and enforceable, it must be **both** substantively and procedurally fair.¹⁹ This is not the law. Washington courts have repeatedly explained that the evaluation of the validity of a prenuptial agreement is a two-step process. The Washington Supreme Court in *In Re Marriage of Matson*²⁰ said it

¹⁸ RCW 5.60.030.

¹⁹ Reply/Response Brief of Appellant at 9 n.1, 22,

²⁰ 107 Wn.2d 479, 482-83, 730 P.2d 668 (1986).

most clearly: First, the court evaluates the substantive fairness of the agreement by determining if it provides “a fair and reasonable provision for the party not seeking enforcement of the agreement.”²¹ If it is substantively fair, “then the analysis ends and the agreement may be validated.”²² If it is not substantively fair, then it is still valid if it is procedurally fair, which is determined by evaluating whether full disclosure was made and whether the agreement was entered into fully and voluntarily on independent advice and with full knowledge by both spouses of their rights.”²³ The Washington Supreme Court in *In Re Marriage of Bernard* explained precisely the same thing.²⁴ Therefore, Donna is flat wrong when stating that the Estate must prove that the agreement is **both** substantively fair and procedurally fair.²⁵

V. Substantive fairness

Donna argues that the Estate “failed to meet its burden of proof to

²¹ *Matson*, 107 Wn.2d at 482–83.

²² *Id.* at 482.

²³ *Id.* at 483.

²⁴ *In Re Marriage of Bernard*, 165 Wn.2d 895, 902, 204 P.3d 907 (2009).

²⁵ Donna acknowledged in her opening brief that the law in Washington is that either substantive or procedural fairness renders a prenuptial agreement enforceable. *Appellant's Opening Brief* at 16. In light of the fact that she earlier explained, acknowledged, and adopted this accurate statement of Washington law, her inaccurate statements of the law—not just once, but twice in her reply brief—is surprising, and disturbing.

show that the agreement was substantively fair.”²⁶ It is unclear from Donna’s brief what burden she would place on the Estate in this procedural context with respect to substantive fairness. At the trial court, Donna moved for summary judgment on substantive fairness; the Estate did not. The trial court denied her motion for summary judgment on substantive fairness.

To defeat Donna’s motion for summary judgment, the Estate was not obligated to prove its case on this issue; it was only obligated to show that there are questions of fact or that judgment as a matter of law in her favor was not warranted. It did so. There were significant questions of fact as to the extent of Donna’s financial estate when she entered into the prenuptial agreement with Ken: a federal income tax return does not show all property or assets owned by a person, nor does it in any way provide a complete financial picture of an individual. Other burdens would have been burdens applicable at trial, not at the summary judgment stage, and will be, if necessary, supported by additional evidence.²⁷

Donna argues (without any authority) that a financial disclosure

²⁶ Reply/Response Brief of Appellant at 22.

²⁷ Donna continues to state that provisions in the prenuptial agreement are unilateral when they are not. Those she identifies are clearly bilateral. CP 640–45, specifically ¶¶ 2, 3, 4, 5, and 6.

“goes directly to the heart of substantive fairness.”²⁸ This confuses the two prongs of an inquiry into the validity of a prenuptial agreement: substantive fairness and procedural fairness. Contrary to Donna’s argument, the *Matson* opinion, among others, clearly explained that the first step is to determine whether the agreement made a fair and reasonable provision for the party not seeking to enforce it; if it did not, then the court moves to the second step, which involved determining whether there was full disclosure and whether the agreement was entered into fully and voluntarily.²⁹ Disclosure is an element of *procedural* fairness, not *substantive* fairness. It need not and should not be considered in determining whether the trial court correctly denied Donna’s motion for summary judgment on substantive fairness.³⁰

Donna repeatedly asserts that Ken Kellar was worth \$93 million when they entered into the prenuptial agreement. But the only document that supports that assertion is a document that is stamped “Preliminary” and, as the Estate has repeatedly pointed out, lacks any indicia whatsoever of authenticity. CP 448-452. The Estate was provided this document by Richard Pluimer as part of the documents he kept during his representation

²⁸ Appellant’s Response / Reply Brief at 24.

²⁹ *In re Marriage of Matson*, 107 Wn.2d 479, 482–83, 730 P.2d 668 (1986).

³⁰ Again, she misstates the law in Washington without attempting to explain the difference.

of Donna in connection with her application for gaming licenses in South Dakota. CP 479-80, 565-69. The full document shows that Donna (not Ken Kellar) sent this to Mr. Pluimer on November 25, 2005. CP 448.³¹ In her correspondence with Mr. Pluimer, Donna did not state where she obtained the document. CP 448. In her own declaration later, she only states that one of Ken's employees gave it to her. CP 1593, ¶11(h). Yet in her own deposition, she claims she received it from Ken. CP 581:25–582:2. She never offered testimony from anyone who created this document who could attest to its authenticity. The Estate explained to the trial court that this document lacked any indicia of authenticity. CP 369. It simply may not be relied upon for the proposition that Ken Kellar was worth \$93 million at the end of 2001. (It may, however, be relied upon to show that Donna believed, before she testified to the South Dakota Gaming Commission, that Ken was worth that much in 2001.)

Finally, Donna's new argument that payments over time are somehow disproportionate or substantively unfair is just that: another new argument, raised for the first time on appeal, in her reply. Again, this Court need not address arguments raised for the first time on reply. Even if this argument were to be entertained, it leads to the conclusion that there continue to be questions of fact about issues related to the substantive

³¹ CP 448–52 is the same document as CP 565–69.

fairness of the agreement, and that the trial court was correct to deny Donna's motion for summary judgment on substantive fairness.

VI. Procedural fairness

A. Timing and pressure

Courts become concerned with undue pressure related to time when a prenuptial agreement is presented on the eve of a scheduled wedding date.³² No time pressure can exist when there is no scheduled wedding date when the prenuptial agreement is presented. That necessary condition precedent is absent here. Contrary to the assertion in Donna's briefing, she presented no evidence that a wedding date was scheduled when the prenuptial agreement was negotiated or entered into. To the contrary, the only evidence regarding this is Donna's own testimony to the effect that when she and Ken left Washington for South Dakota on the trip that they would get married on, she did not even know if they would get married on that trip. CP 1669:25–1670:3 (underlined portions).

What is also notable is the lack of any corroborating testimony to this alleged time pressure. Her own lawyer never testified or was asked to testify that she was under some kind of time pressure to sign the agreement. CP 1701–1721; 153-171; 421-436. It would be curious if she felt as though she was under this pressure, but did not share it with her

³² *E.g., In re Marriage of Bernard*, 165 Wn.2d 895, 204 P.3d 907 (2009).

lawyer. The mediator also did not testify that either Ken or Donna mentioned or appeared to be under any time pressure. CP 1748–1768; 192–208; 460–468. It would be curious that Donna and Ken would not inform the mediator that they needed to finalize their agreement by a certain time because their wedding was just around the corner if that was indeed the case. These absences are telling. Without any evidence that a wedding date was scheduled when they negotiated and entered into the prenuptial agreement, and without any corroborating evidence of any such time pressure, her argument collapses.

B. There is no evidence whatsoever that the mediation was a sham.

Donna now impugns noted Bellingham family law mediator Ron Morgan, speculating (for the first time) that he and Ken Kellar worked together as “car salesmen” putting Donna in a “hot box” so that they could do a “fast shuffle” to sell her a “lemon” of a prenuptial agreement. This is absurd. There is no evidence whatsoever that Ken Kellar and Ron Morgan knew each other, let alone communicated with each other, before this mediation. In fact, her own lawyer, Matt Peach, testified that using Ron Morgan as a mediator was something that he, Mr. Peach, would have suggested. CP 157. There is no evidence that Ron Morgan and Ken Kellar conspired to surprise or deceive Donna. These fictional and unsupported

allegations are just that, and should be ignored.³³

She draws this preposterous inference from the use of two phrases during Mr. Morgan's deposition: a reference to getting Donna "comfortable," and a reference to the mediation "certainly" not being a "negotiation."³⁴ The full context of his testimony makes it clear that what she suggests is not correct:

Q: . . . So when you say you have a memory of getting Donna comfortable, do you mean getting Donna comfortable that the agreement she was entering into was one she was satisfied with?

A: Yeah, the points. And I don't remember -- I don't recall at all if the dollar part of it was part of that, because I kind of think the dollar part of it was proposed by Ken.

Q: Okay.

A: I think it was going through the steps of what will happen here, what will happen if this happens, that sort of thing. But other than that, I certainly don't remember it being a negotiation.

Q: Okay. So what --

A: Except on points of safety. I mean, just on points of how this would take place. What's going to happen if this happens? What does this really mean to her? And then I think to some degree there might have been some talk -- I just -- again, I'm speculating at this point.

Q: When you say "points of safety," what do you mean by that?

A: Well, what happens if they divorce? What happens if she dies? What happens -- how is something set up to

³³ Again, the "Clarification of Facts" section of her brief, in which these utterly unsupported allegations are made, should be stricken.

³⁴ Reply/Response Brief of Appellant at 31, 3rd full bullet.

protect her, and that sort of thing. You know how will this agreement play out if any of these things happen?

CP 201:7-202:7.

So what Mr. Morgan was doing was precisely what would be expected of a mediator working with a party during a mediation: ensuring that the party is comfortable with their understanding of the terms of the agreement and is in agreement to the terms; in other words, ensuring that there is a meeting of the minds. Mr. Morgan's reference to getting Donna "comfortable" was no more sinister than this. Mr. Morgan expressly testified that there *was* a negotiation between Donna and Ken on what he called "points of safety," which he used to refer to the things that would happen if Donna and Ken divorced or if she died—key terms of the prenuptial agreement. These references do not show, or even suggest, that Mr. Morgan and Ken Kellar conspired to dupe Donna Kellar into signing an agreement that she neither understood nor desired.

C. Donna incorrectly describes Mr. Peach's representation of her.

Not only does Donna mischaracterize Mr. Morgan's testimony to attempt to show that there was no negotiation, but she ignores testimony of her own lawyer and herself regarding his representation of her. (It should be noted that the Estate has not contended that Mr. Peach "negotiated" the agreement; nor is there a requirement that he do so.) Mr.

Peach represented Donna, reviewed the agreement with her, ensured that a change was made that favored her, and advised her regarding the agreement. It is this representation by independent counsel that is germane, not whether Mr. Peach engaged in any negotiations. She testified that she met with her lawyer, Matt Peach, either before or shortly after the mediation with Ron Morgan. CP 1884:7–20.³⁵ Mr. Peach testified that, in a meeting with Donna regarding the prenuptial agreement, he observed Donna in what she reported to him was a phone conversation with Ken Kellar regarding the financial terms of the agreement. CP 1709:25–1712:1. He reviewed a version of the agreement and wrote an explanatory letter to Mark Packer (Ken Kellar’s lawyer) explaining how the agreement should be revised because it did not match what Donna and Ken had agreed to during the mediation. CP 1708:20–1714:2; 1733–34. The change that Mr. Peach requested was, in fact, made. When Mr. Packer sent him a revised version of the agreement, he reviewed the revised agreement and advised Mr. Packer in writing that that the agreement was in Donna’s interest. CP 171; 189. He advised Donna to sign the agreement. CP 171:11–21. Her assertion that her own lawyer “did not do any negotiating on her behalf, and was not involved with the process until the document

³⁵ Given that Ron Morgan apparently knew to send Matt Peach the Addendum to the agreement, and in fact did, it is likely that Matt Peach and Donna Kellar met or spoke with each other before the mediation about the prenuptial agreement.

was a *fait accompli*” misses the point: he represented her, reviewed the agreement, advised her regarding the agreement, and obtained a change in the financial terms that benefitted Donna. The fact that this change was made shows that Donna received a benefit from Mr. Peach as her independent counsel. This representation and advice by independent counsel is what matters to an inquiry into the procedural fairness of a prenuptial agreement.

D. Donna misconstrues applicable law on whether assistance of counsel must be effective.

Although Division One of the Washington Court of Appeals, in *Bernard*, based its conclusion in part on poor, inaccurate, or incorrect advice that a wife who was challenging the validity of a prenuptial agreement was given by her lawyer,³⁶ the Washington Supreme Court, in its opinion in *Bernard*, specifically declined to address the issue of the adequacy of the wife’s counsel, saying:

The Court of Appeals appeared to rest at least some of its determination that there was procedural unfairness on a belief that Gloria’s counsel was inadequate. *Bernard*, 137 Wash.App. at 836, 155 P.3d 171. Gloria did not make such an argument before this court or any court below. A discussion of counsel’s adequacy is unnecessary to the resolution of this case because the trial court’s findings are supported by substantial evidence without resort to consideration of the adequacy of counsel. We decline to

³⁶ *In re Marriage of Bernard*, 137 Wn. App. 827, 836–37, 155 P.3d 171 (2007) (Under the heading “Full Knowledge of Rights,” the court highlighted several things that the wife’s lawyer advised her that were incorrect.).

entertain that question here.³⁷

Despite this, Donna asserts that it is “black letter law, as determined by the Washington State Supreme Court,” that for a prenuptial agreement to be valid, each party must receive effective assistance of independent counsel.³⁸ This is not the case. Not only did the Washington Supreme Court not determine this, but it specifically declined to address this issue in *Bernard*.³⁹ Moreover, even though Donna also cites *Matson* in this section (though it is unclear what the citation is meant to stand for), the Washington Supreme Court in *Matson* stopped short of imposing a requirement of independent counsel, explaining that whether independent counsel was required must be determined on a case-by-case basis because not all cases would require independent counsel to conclude that a prenuptial agreement was procedurally fair.⁴⁰ The Washington Supreme Court has not required independent counsel in all cases, let alone required “effective” independent counsel in all cases.

Moreover, for the reasons articulated in the Estate’s initial brief, requiring one party to inquire into, weigh, and evaluate the adequacy and

³⁷ *In re Marriage of Bernard*, 165 Wn.2d 895, 907 n.8, 204 P.3d 907 (2009).

³⁸ Reply/Response Brief of Appellant at 34.

³⁹ Donna’s attribution of the holding of the Court of Appeals to the Supreme Court belies either an extreme inattention to the law or a deliberate attempt to misstate the weight of controlling law.

⁴⁰ *In re Marriage of Matson*, 107 Wn.2d 479, 483, 730 P.2d 668 (1986)

effectiveness of the other party's counsel should not be the law. To require this would require parties involved in a discussion or negotiation of an agreement to invade the attorney-client privilege of the other, and to second-guess the legal advice given by the other party's counsel. This would defeat the notion that any advice of counsel is independent.

E. The only admissible evidence regarding disclosure conclusively proves that disclosure was made.

Donna asserts that the Estate argued that the representation and warranty in the parties' prenuptial agreement was a waiver of the disclosure requirement.⁴¹ It did not. The Estate's position is and has always been that both Donna and Ken made a full and complete financial disclosure to each other, and that the representation and warranty in the prenuptial agreement confirms that they had done so.

Donna also appears to argue that for a prenuptial agreement to be valid, a list of each party's assets must be attached to and made part of the agreement. She also appears to argue that for a prenuptial agreement to be valid, each party's counsel must be apprised of the other party's assets and financial position. She cites no legal authority for these propositions, and there is none.

What is required is for each party make a disclosure to the other of

⁴¹ Reply/Response Brief of Appellant at 24 (stating that "If a one sentence statement 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.”⁴² There is evidence of such a disclosure here, in the form of a representation and warranty, set out in a way to call attention to that important provision, and that Donna admits she initialed in addition to signing the agreement, that the disclosure occurred. Stripping away her statements that are barred by the Dead Man’s Statute, and setting aside all of the unsupported statements in her briefing, this is the only evidence regarding whether there was disclosure, and it conclusively shows that there was disclosure.

Donna has not claimed that she was defrauded into entering into the agreement. She has not claimed that she lacked capacity to enter into the prenuptial agreement. She has not claimed that she entered into the prenuptial agreement under duress. She freely, voluntarily, and after the advice of counsel signed the agreement, including initialing this representation and warranty that Ken had made the required disclosure.

disclosure is sufficient to avoid disclosure”).

⁴² *Friedlander v. Friedlander*, 80 Wn.2d 293,302, 494 P.2d 208 (1972).

F. The agreement is integrated, so parol evidence is not admissible to add to, subtract from, modify, or contradict its terms.

Donna raises yet another new argument not raised below or to which she assigned error: this time that the prenuptial agreement is not integrated, so parol evidence is admissible to determine whether it was. “The parol evidence rule precludes the use of extrinsic evidence to add to, subtract from, modify, or contradict the terms of a fully integrated written contract; that is, a contract intended as a final expression of the terms of the agreement.”⁴³ The prenuptial agreement includes an integration clause. CP 644 at ¶ 9. (She appears to assume that the agreement is not integrated because it does not include schedules of assets of either party, yet provides no argument or authority for the proposition that the disclosure required to find an agreement valid must be contained in the agreement itself; there is no such authority in Washington.) The agreement is integrated, so parol evidence is not admissible to modify or contradict its terms.

The agreement includes a clear representation and warranty, separately initialed by Donna, stating that disclosure was made. She would offer extrinsic evidence (solely in the form of her own testimony 10 years later) that no disclosure was made. Her testimony is in clear contradiction to the express representation and warranty of the agreement. She is not

⁴³ *Brogan & Anensen, LLC v. Lamphear*, 165 Wn.2d 773, 775, 202 P.3d 960 (2009).

arguing that there was a disclosure that she later learned was incomplete, or false, or fraudulent. Donna has repeatedly insisted, argued, and testified that there was no disclosure whatsoever. That contradicts the express representation and warranty in the agreement, and such testimony is barred by the parol evidence rule.

VII. Judicial estoppel

The positions that Donna took before the South Dakota Commission on Gaming and in this proceeding are in direct conflict. The conflict relates not just to a legal conclusion (whether the prenuptial agreement is valid) but to the factual underpinnings required to reach that conclusion. Before the Gaming Commission, Donna's testimony was directed at convincing the Gaming Commission that she and Ken were bound by a valid prenuptial agreement.

Every aspect of her testimony was designed to lead to that conclusion, because the Gaming Commission would not have done what it did (issue gaming licenses to her, separate and in addition to the licenses previously issued to her husband) unless the prenuptial agreement was valid. CP 486–546. Key to that testimony was not just that they had entered into the agreement, but that under the terms of the agreement they had maintained separate, non-community estates, and the Gaming Commission would not have issued her licenses without her testimony to

that effect. *Id.* That squarely conflicts with the position she is taking here: that the agreement was invalid from the moment she signed it. She simply cannot have it both ways.

VIII. Ratification

Contrary to Donna's curious assertion, the Estate did address ratification in its opening and response brief, specifically at page 47 at the start of Section F and footnote 59, and in the full paragraph on page 50. The effect of ratification is estoppel (a party that ratifies an agreement is then estopped from challenging its validity), so neither the trial court nor the Estate were incorrect in holding or arguing that Donna, through her actions before the South Dakota Commission on Gaming, ratified the agreement and was therefore estopped from challenging its validity in these proceedings. The Estate did not waive this argument.

IX. Attorney fees

The trial court's order on attorney fees was not based on an interpretation of the no-contest clause under the will. In fact, the trial court's order on attorney fees did not even mention the no-contest clause under the will. The order clearly stated that the basis for awarding attorney fees was twofold: 1) the Estate was the prevailing party on Donna's unsuccessful challenge to the prenuptial agreement, which contained a provision awarding attorney fees to the prevailing party; and 2) the trial

court exercised the discretion vested in it under TEDRA to award attorney fees in favor of or against any party in litigation brought under the statute.

To the extent that the trial court's comments can be read to mean that that awarded fees under TEDRA because Donna brought an unsuccessful claim against the Estate that caused the Estate to incur attorney fees and costs to the possible detriment of devisees, that is an entirely appropriate justification for the exercise of such discretion under TEDRA.⁴⁴ Moreover, when a trial court's oral comments conflict with the written order, the written order controls.⁴⁵ The trial court committed no error in awarding the Estate attorney fees and costs under TEDRA or as the prevailing party on a claim on the prenuptial agreement.

X. No-contest provision

A. Whether the no-contest clause applies depends first and foremost on the wording of the clause itself.

Donna cites cases for the proposition that a no-contest clause only applies to a will contest, and since her action was not a will contest, the no-contest clause in Ken's will cannot apply. Those cases each involved clauses much narrower than Ken's, and specifically limited their reach to

⁴⁴ RCW 11.96A.150(1) ("In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.").

⁴⁵ *Ferree v. Doric Co.*, 62 Wn.2d 561, 567, 383 P.2d 900 (1963).

will contests.⁴⁶ If a no-contest clause applies narrowly only to will contests, then it is not surprising that a court would hold that if an action was not a will contest, the no-contest clause would not apply. Even in *In re Chappell's Estate*, the Washington Supreme Court found that a challenge to the validity of a trust (rather than the will) triggered a no-contest clause that applied only to challenges to gifts under the will.⁴⁷

The no-contest clause here was not limited to will contests, but was broader than that. It applied to any action against the Estate or the Personal Representatives to “increase the share of the claimant in my estate.” CP 1562. Whether Donna’s actions constituted a statutory will contest is irrelevant. The pertinent question is whether Donna, through her actions, sought to increase her share in Ken’s estate. Because her share of his estate under his will was only those gifts specified in his will, and because her claimed share of his estate was to half of all of the entirety of all of his estate plus the gifts to her specified in his will, her challenge falls within the language of the no-contest clause. Donna ignores that the prenuptial agreement was central to Ken’s estate planning and does not acknowledge

⁴⁶ *E.g.*, *Boettcher v. Busse*, 45 Wn.2d 579, 585, 277 P.2d 368 (1954) (no-contest provision that applied to any beneficiary under a will who “shall attempt to break the terms and conditions of this Will”); *In Re Kubick's Estate*, 9 Wn. App. 413, 416, 513 P.2d 76 (1973) (no-contest provision that applied to any person who “shall contest this will or object to any of the provisions hereof”).

⁴⁷ *In re Chappell's Estate*, 127 Wash. 638, 639–40, 221 P. 336 (1923).

to this Court that the bequests under the will specifically acknowledge and are premised upon the validity of the prenuptial agreement. *E.g.*, CP 268 ¶ 2.7(c). By this challenge, Donna seeks to destroy the bedrock on which all of Ken's estate planning was established.

Donna attempts to make a curious comparison to ancient law regarding spousal elections between a community-property share and gifts under a will. Though the case she relied upon found that the spouse there was not forced to elect between these remedies, the Washington Supreme Court explained what circumstances would force a spouse to make such an election:

. . . the testamentary provision in her behalf must either be declared in express terms to be given to her in lieu of her own proprietary right and interest in the community property, or else an intention on his part that it shall be in lieu of such proprietary right must be deduced by clear and manifest implication from the will, founded upon the fact that the claim to her share of the community property would be inconsistent with the will, or so repugnant to its dispositions as to disturb and defeat them.⁴⁸

Though a different scenario is presented here, this statement gives guidance. Ken's will was clearly based on a presumption that he and Donna had no community property—it explicitly referred to their prenuptial agreement in which they each disclaimed community property rights. Some of his specific gifts to her were explicitly made to satisfy his

⁴⁸ *Herrick v. Miller*, 69 Wash. 456, 463, 125 P. 974 (1912).

obligations to her under the prenuptial agreement. Her attempt to invalidate the prenuptial agreement is therefore inconsistent with the will, and repugnant to the dispositions in the will. She seeks to overturn the testator's clear intent, which is the entire public policy purpose behind enforcement of no contest clauses.

B. Donna's challenge was not an attempt to vindicate a public policy.

The Washington Supreme Court in *Chappell* explained that if a challenge to a disposition contradicted the terms of a no-contest clause, the no-contest clause would apply. The Court explained the importance of public policy in this context, and examined with favor cases from other states that held that if a challenge to a will was brought to vindicate a public policy (for example, a challenge to a disposition that would violate the public policy interest in avoiding restraints on alienation), then a devisee could do so without fear of losing his or her rights of inheritance under the will because of a no-contest clause. The court added the second step of evaluating whether the challenge was in good faith, but it began with the notion that a no-contest clause would not defeat challenges that sought to vindicate a public policy.⁴⁹

Donna does not seek to vindicate a public policy. Prenuptial

⁴⁹ *Chappell*, 127 Wash. at 640–45.

agreements are not contrary to public policy, but instead are favored because they are conducive to marital harmony and because they help to avoid property disputes when a marriage ends by divorce or death.⁵⁰ Her challenge is not to a disposition or restriction or act that violates public policy. Her challenge therefore triggers the no-contest clause, regardless of whether it was brought in good faith.

C. **Donna's failure to disclose information in discovery precludes her from later relying upon it.**

The Estate has never argued that there is a “bad faith exception to good faith.” Instead, the Estate argued that Donna is precluded from relying upon information that she failed to provide in discovery as simply a straightforward and well-recognized consequence of litigation strategy. The Washington Court of Appeals clearly held in *Seattle Northwest Securities Corp. v. SDG Holding Co.* that when a party withholds information in discovery based on an assertion of the attorney-client privilege, the party must either waive that privilege before the close of discovery and disclose the information, or is barred from using it at trial.⁵¹ Donna failed to do so here. She knew that the issue of good faith would be raised: her own counsel raised it before filing her suit. CP 1515–18; 1523–

⁵⁰ *Hamlin v. Merlino*, 44 Wn.2d 851, 864, 272 P.2d 125 (1954); *Friedlander*, 80 Wn.2d at 301.

⁵¹ *Seattle Northwest Securities Corp. v. SDG Holding Co.*, 61 Wn. App. 725, 744, 812

25; 1530–31. She steadfastly refused to provide any information whatsoever on this issue in written discovery and in her deposition. CP 1453–54, 1451–52, 1459–67, 1470–72. Yet she then moved for summary judgment on this very issue, relying upon evidence that she had shielded from discovery by asserting the privilege, and for the first time disclosing two attorneys whose identities she had never before provided. CP 1589–1642, 1575–86, 1587–88. Because she withheld the information and never disclosed it until she used it affirmatively to seek relief, she should have been barred from introducing it.

If she is to be allowed to use this information, the Estate should have at least been permitted to conduct discovery regarding it once she waived the privilege and before the trial court granted summary judgment in her favor on this issue. The Estate asked to do so, requesting under Rule 56(f) that it be allowed to conduct discovery on these issues. It should have been allowed to do so.

Donna suggests that she was permitted to stand on the privilege until the trial court issued a ruling on the validity of the prenuptial agreement (an “unsuccessful contest,” in her parlance). But that is precisely what occurred, and after the trial court issued that ruling, and before Donna then filed a summary-judgment motion regarding the no-

P.2d 488 (1991).

contest provision and affirmatively arguing that she acted on the advice of counsel and therefore acted in “good faith,” she never provided the information that she had, until that point, withheld under claim of privilege. This kind of gamesmanship simply has no place in civil litigation.⁵²

Questions remain as to what Mr. Haigh knew when he brought the suit. Donna does not address this issue. Consequently, the trial court erred in failing to grant the Estate’s motion for a continuance under Rule 56(f) to allow the Estate to probe evidence that had not been disclosed until Donna used it to support a motion for summary judgment.

XI. Conclusion

The Court should affirm the trial court’s order striking portions of Donna’s testimony because her testimony was barred by the Dead Man’s Statute, and the Estate did not waive its protections as to the barred testimony. The Court should reverse the trial court’s denial of the Estate’s motion for summary judgment regarding the procedural validity of the prenuptial agreement because under the undisputed facts, the procedures leading to Ken and Donna entering into the agreement were

⁵² *Dike v. Dike*, 75 Wn.2d 1, 448 P.2d 490 (1968), which she cites, is inapposite. Donna’s lawyers were under no threat of imprisonment or contempt if they failed to disclose the information. They tactically hid the information, claiming it was privileged, until just the moment that it would help her, at which point she voluntarily waived the privilege. The situation in *Dike* did not address this kind of tactical maneuvering.

unquestionably fair. The Court should affirm the trial court's summary judgment in the Estate's favor estopping Donna from challenging the validity of the agreement because Donna held out the agreement as valid in obtaining gaming licenses for her own benefit. The Court should reverse the trial court's summary judgment in Donna's favor regarding the no-contest clause because Donna's challenge to the prenuptial agreement was an effort to obtain more of Ken's estate than he provided to her under his will, or alternatively remand for discovery and trial on whether her challenge was in good faith on the advice of counsel. The Court should affirm the trial court's award of attorney fees and costs to the Estate because the Estate incurred fees and costs in defending against Donna's claims.

Respectfully submitted on this 30th day of March, 2012.

SCHWABE, WILLIAMSON & WYATT, P.C.

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**Appendix A:
Response to Appellant’s Incorrect and
Unsupported Factual Assertions:**

This Appendix responds to each statement in the “Clarification of Facts” section at pages 1-5 and each statement in the bulleted timeline on pages 30-31 of the Reply/Response Brief of Appellant that either lacks a reference to the record or that includes a reference to the record but misconstrues or misstates evidence in the record that it refers to.

Quote From Clarification of Facts section at pages 1-5 of Reply/Response Brief of Appellant	Response
Although Ken Kellar (“Mr. Kellar”) initially asked Donna Kellar (“Mrs. Kellar”) to marry him approximately three months prior to the wedding, Mrs. Kellar did not consider the “proposal” to be sincere.	This statement lacks a citation to the record. There is no evidence in the record to support this statement.
The couple had been fighting and Mrs. Kellar had asked for a break from the relationship. CP 238-239.	Mrs. Kellar’s testimony here was that she could feel Ken “being distant,” not that they had been fighting.
In a desperate effort to win Mrs. Kellar back, Mr. Kellar made an impromptu “proposal” of marriage without presenting an engagement ring. <i>Id.</i>	Mrs. Kellar’s testimony here does not describe the proposal as “impromptu” and does not mention one way or another whether there was an engagement ring involved.
There was no engagement and Mrs. Kellar never considered the proposal to have been real. CP 239.	Mrs. Kellar’s testimony here does not say this.

<p>The actual marriage proposal did not occur until September 2, 2001, only 17 days prior to the date of marriage scheduled by Mr. Kellar. CP 390; CP 240.</p>	<p>These references are to a declaration by Mrs. Kellar and to her deposition. These do not state the date that Mr. Kellar proposed, and do not state that Mr. Kellar scheduled the date of their marriage.</p>
<p>By the time Mrs. Kellar knew they were going to get married, Mr. Kellar and his attorney's [sic] had been working on a prenuptial agreement for over three months. CP 317.</p>	<p>The reference is to a letter to Ken Kellar from Mark Packer, Ken Kellar's attorney, in which Mr. Packer provides Mr. Kellar with a form of a prenuptial agreement. This letter, by itself, does not establish that Mr. Kellar and his attorney "had been working on a prenuptial agreement for over three months."</p>
<p>In 2005, when Mr. Kellar first provided Mrs. Kellar with a breakdown of the assets he possessed in 2001, she received a document labeled "Kenneth L. Kellar Balance Sheet, December 31, 2001" that lists assets of approximately \$93 million at the time of their marriage. CP 449-453.</p>	<p>This document does not establish that 2005 was when Mr. Kellar "first provided" Mrs. Kellar with a breakdown of the assets he possessed in 2001.</p>
<p>Conversely, Mrs. Kellar did not have the opportunity to meet with her own attorney until sometime between September 6, 2001, and September 11, 2001 after "mediation" was completed and the "negotiations" had already taken place. CP 626; CP 391; CP 317.</p>	<p>The references are to Ms. Kellar's declaration, and appear to refer to portions struck by the trial court. Though she testified in that declaration that she met with her attorney "some time between September 6 and September 11, 2001," there is no evidence that she did not have the opportunity to do so earlier.</p>

<p>Mr. Kellar's attorney was not present, Mrs. Kellar had not yet retained counsel, the parties met face to face rather than in private rooms, and they did not send the mediator, nor each other any letters of position; nor was there any disclosure of assets. CP 433, 463.</p>	<p>The pages she refers to for these statements do not address any of these issues.</p>
<p>It would be more appropriately characterized as a "hot box" where two salesmen sell a lemon of a car to a customer.</p>	<p>This statement lacks a citation to the record, and there is no evidence that supports this characterization.</p>
<p>The "mediation" was Mr. Kellar's opportunity to present the terms that he and his attorney had prepared, and have the assistance of a "neutral" third party who could help in "getting Donna comfortable" with the terms of the agreement. CP 463.</p>	<p>This is not supported by Mr. Morgan's testimony.</p>
<p>In addition, Mr. Morgan testified that there was no discussion of assets at the mediation. CP 465.</p>	<p>Mr. Morgan's testimony was that he was "pretty sure" that a list of assets or properties were not discussed at the mediation because the focus of the mediation was "tweaking the offer," of financial terms of the agreement.</p>
<p>This was simply a "fast shuffle" of an attractive young waitress who was 39 years old, by a 73 year old multimillionaire business mogul skilled in negotiation and backed up by an army of professional advisors.</p>	<p>This statement lacks a citation to the record, and there is no evidence that supports these characterizations.</p>

<p>Mrs. Kellar’s attorney, Matthew Peach, did not do any negotiating on her behalf, and was not involved with the process until the document was a fait accompli. CP 305; CP 426.</p>	<p>Mr. Peach testified not that he did not negotiate the agreement, but that “I don’t remember negotiating it as much as I remember reviewing it and giving her my take on it.”</p>
<p>Mr. Peach did not review any evidence of Mr. Kellar’s assets with Mrs. Kellar prior to her signing the prenuptial agreement. CP 427.</p>	<p>Mr. Peach’s testimony was that he had no memory of these events, not that they did not occur.</p>
<p>The agreement was signed on September 14, only five days before the wedding and three to seven days after Mrs. Kellar first had an opportunity to see the document. CP 477; CP 455; CP 640.</p>	<p>The first citation is not to evidence, but to an ALI section that has not been adopted in any state, including Washington. Neither of the other citations establish when Donna Kellar “first had an opportunity to see the document.”</p>
<p>The matter of the South Dakota Gaming License was not for the benefit of Mrs. Kellar but was pursued by Mr. Kellar for his own benefit. CP 43-47.</p>	<p>This citation is to the affidavit of Richard Pluimer, the purpose of which was to establish that he jointly represented Donna Kellar and Ken Kellar in connection with Donna Kellar’s application for gaming licenses. In this, he describes that the <i>initial</i> purpose of the gaming licenses was to ensure that people close to Ken Kellar had licenses that they could use at his properties. Donna Kellar testified to the Gaming Commission, however, that though this was the initial purpose for her application for the licenses, she also had plans to use the licenses at facilities other than those owned by Ken Kellar. CP 503:13 – 504:4; 528:1 – 532:3.</p>

<p>After summary judgment had been granted by the trial court based on the Estate's allegation [sic] that the Gaming Commission hearing had been for Mrs. Kellar's benefit, the Estate submitted Mr. Pluimer's affidavit in support of its motion for attorney's fees.</p>	<p>The affidavit of Mr. Pluimer was inadvertently filed with the trial court; the Estate did not refer to, rely upon, or ask the trial court to rely upon this affidavit. It was attached to the Declaration of Terry L. Hofer in Support of Estate's Motion for Attorney Fees. That declaration refers to Exhibit 11 to that declaration, which was a reply brief filed in a proceeding in South Dakota; the reference specifically refers to the reply brief being attached "without exhibits or declarations." CP 884 ¶ 9. Counsel for the Estate inadvertently included the exhibits, which included Mr. Pluimer's affidavit, before filing. CP 991-1026. The Estate did not "submit" this affidavit to the trial court or ask that it rely upon it in support of its motion for attorney fees.</p>
<p>Not happy with this result, Mr. Kellar had Mr. Pluimer pursue a review of the decision under Mrs. Kellar's name and flew his young wife in to star in the dog and pony show they had scripted. CP 44-45.</p>	<p>The affidavit of Mr. Pluimer does not support this statement or the inflammatory and offensive description of Donna Kellar's involvement or testimony. It also does not support the notion that anything was "scripted."</p>
<p>The end result was that Mr. Kellar received the benefit of additional gaming licenses in Mrs. Kellar's name. CP 46.</p>	<p>The affidavit of Mr. Pluimer does not support this statement.</p>

Quote From the Bulleted Timeline at pages 30–31 of Reply/Response Brief of Appellant	Response
<p>Unbeknownst to Mrs. Kellar, it was about that time, three months prior to getting engaged, that Mr. Kellar began to discuss the prenuptial agreement with his attorney Mark Packer and develop a negotiation strategy to get Mrs. Kellar to sign the agreement. CP 317.</p>	<p>The document referred to is a letter from Mark Packer to Ken Kellar enclosing a form prenuptial agreement and providing information in a single, short paragraph about a prenuptial agreement. There is no evidence that Donna Kellar did not know about this. There is no evidence that Ken Kellar and Mark Packer were developing a negotiation strategy to get her sign the agreement.</p>
<p>After the engagement, Mr. Kellar told Mrs. Kellar that his attorney, Mark Packer, told him that they had to go meet with Ron Morgan for mediation. CP 575.</p>	<p>This portion of Donna’s deposition was submitted to the trial court in connection with the Estate’s motion for summary judgment regarding ratification and estoppel to show that Donna Kellar had previously submitted a declaration that purported to be based on personal knowledge when in fact she had no personal knowledge of the things she testified to in her declaration. CP 610, lines 7-9. When Donna Kellar offered similar information in her own declaration, the trial court struck it because it was barred by the Dead Man’s Statute. CP 78-85, specifically CP 79 lines 13-15.</p>

<p>At mediation on September 6, four days after the engagement, Ron Morgan and Mr. Kellar worked together without Mrs. Kellar's attorney present, on "getting Donna comfortable" with the terms that had been developed by Mr. Kellar and his attorney Mark Packer. CP 200-201.</p>	<p>Mr. Morgan's full testimony does not support this statement. CP 200-202.</p>
<p>Ron Morgan stated that it was "certainly" not a "negotiation" (CP 201)</p>	<p>Mr. Morgan's full testimony does not support this statement. CP 200-202.</p>
<p>Mr. Kellar controlled the mediation (CP 466)</p>	<p>Mr. Morgan testified that "Ken Kellar was very much a Type-A guy. You know, those types tend to control the situation around them."</p>
<p>After "mediation," just 8 to 12 days prior to the wedding, Mrs. Kellar met with her attorney, Mathew Peach, for the first time. It was then that she first saw a draft of the prenuptial document. CP 305; CP 391.</p>	<p>Neither reference supports this.</p>

<p>Mr. Peach's involvement was limited to a letter dated September 13, 2001, clarifying what Mrs. Kellar had understood to be the terms of the agreement as dictated to her at "mediation." CP 305.</p>	<p>Mr. Peach's letter, a portion of which appears at CP 305, does not support any of this statement. There is no evidence that terms of the agreement were "dictated" to Donna at the mediation. Moreover, other evidence shows that Mr. Peach's involvement not "limited" to this letter. Donna engaged him to advise her regarding the prenuptial agreement. CP 235, 237, 246, 1878. He and Donna met at least once either before or after the mediation to discuss the prenuptial agreement. CP 1884:7-20. He reviewed its terms with her. CP 160-62; 1885-89. She relied upon his advice regarding the agreement. CP 244, 1890. Mr. Peach wrote the letter referred to, requesting changes to the form of the agreement that Mr. Packer had sent to him. CP 305-06. Once those changes were made, Mr. Peach sent a letter to Mr. Packer stating that he had reviewed the changes to the agreement and that the agreement was in his client's interest. CP 295.</p>
<p>The next day, with the couple's departure for the wedding imminent and pressure to sign the document mounting, on September 14, 2011 [sic], the couple signed the document. CP 405</p>	<p>This reference is to the agreement itself. There is no evidence that when they signed the agreement, the wedding was imminent or pressure to sign the document was mounting.</p>

<p>Discussions and interactions between Mr. and Mrs. Kellar regarding business relations between Mrs. Kellar and Mr. Kellar. CP 498.</p>	<p>This testimony refers to the fact that, for the work that Donna Kellar performed for Ken Kellar's gaming businesses (described on CP 497), she was paid. This testimony also begins to describe Donna Kellar's motivation for applying for the gaming licenses that were the subject of her testimony before the Gaming Commission. Other than her statement that she was paid for work she performed for Ken Kellar's businesses, there is no testimony here regarding Donna Kellar's and Ken Kellar's "discussions" or "interactions" regarding "business relations" between them.</p>
<p><i>Excerpts from the Deposition of Donna M. Kellar Volume I, December 20, 2010.</i></p>	
<p>The Estate filed with the trial court Mrs. Kellar's testimony regarding discussions and interactions between Mr. Kellar and Mrs. Kellar regarding Mr. Kellar's proposal on September 2, 2001. CP 574.</p>	<p>The Estate offered and relied upon CP 574:9-20. This is simply her confirmation of a statement in her declaration that on September 2, 2001, Ken Kellar proposed to her. There is no testimony regarding "discussions" or "interactions" between them regarding the proposal.</p>

<p>The Estate filed with the trial court Mrs. Kellar’s testimony regarding discussions and interactions between Mr. Kellar and Mrs. Kellar as to Mr. Kellar’s attorney, Mark Packer, being the individual to suggest Ron Morgan as the mediator. CP 574-578.</p>	<p>The Estate provided the trial court with Donna Kellar’s testimony regarding a statement in a declaration she submitted to the trial court to show the trial court that Donna Kellar had already submitted incorrect testimony to the trial court. This is shown at CP 610, lines 6–9, where the Estate referred to her deposition testimony at 180:21–184:5 (found at CP 574-578). The Estate introduced this testimony <i>only</i> to show that her prior declaration submitted to the trial court was not accurate.</p>
<p>The Estate filed with the trial court Mrs. Kellar’s testimony in answer to the question of whether she thought Mr. Kellar was required to provide disclosure of his assets, she stated “I would think he was supposed to, but it didn’t happen.” CP 580.</p>	<p>The Estate only submitted and relied upon lines 1-5 and a portion of line 6 of this page. See also the Estate’s brief that referred to this testimony. CP 612, lines 3-4 and n.29. The testimony that the Estate submitted and relied upon dealt only and specifically with Ms. Kellar’s belief, and specifically excluded her inadmissible testimony about Mr. Kellar’s actions with her.</p>
<p>The Estate asked Mrs. Kellar, “Did Ken lie to you at the time you entered into the prenuptial agreement?” and Mrs. Kellar replied, “I don’t feel like he was completely honest with me.” The Estate asked, “What was he not honest with you about?” and Mrs. Kellar stated, “All of the assets of his and liabilities.” CP 1467.</p>	<p>The Estate offered and relied upon CP 1467:1-16, only to show that she steadfastly refused to answer questions by asserting the attorney-client privilege. CP 1544, lines 15–17 and n. 38. The Estate did not refer to, offer, or ask the trial court to rely upon the portions now referred to by Donna Kellar.</p>

<p>The Estate asked the following question, “So, is it your testimony today that Mr. Kellar did not disclose to you what he owned and the values of that property?” to which Mrs. Kellar answered, “Correct.” CP 1894.</p>	<p>The Estate offered this testimony of Donna Kellar to provide context to the trial court for the Estate’s motion to strike such testimony and to provide context for the Estate’s argument in its motion for partial summary judgment regarding the validity of the prenuptial agreement that the Dead Man’s Statue prohibited Donna Kellar from testifying to this transaction. CP 1981, lines 10-12 and n.27.</p>
<p>The Estate filed with the trial court Mrs. Kellar’s testimony regarding discussions and interactions between Mr. Kellar and Mrs. Kellar occurring in 2005 regarding Mr. Kellar’s finances in 2001. CP 582.</p>	<p>The Estate offered Donna Kellar’s testimony at CP 581:8–582:5 to show that Donna Kellar, as of 2005, had seen a document that led her to a belief as to Ken Kellar’s financial status as of 2001, when they married. The testimony here had only to do with a single interaction between Donna Kellar and Ken Kellar: her testimony that in 2005, Ken Kellar gave her a financial statement for 2001.</p>
<p>The Estate filed with the trial court Mrs. Kellar’s testimony regarding discussions and interactions between Mrs. Kellar and Mr. Kellar regarding the terms of the prenuptial agreement. CP 1459.</p>	<p>The Estate only offered and asked the trial court to rely on testimony on this page beginning at line 21. CP 1368:22–1369:2 and n.11; referring to CP 1459:21–1461:6. There is no testimony in the portions offered by the Estate regarding “discussions” or “interactions” between Donna Kellar and Ken Kellar regarding the terms of their prenuptial agreement.</p>

<p>The Estate filed with the trial court Mrs. Kellar's testimony regarding discussions and interactions between Mrs. Kellar and Mr. Kellar while negotiating the prenuptial agreement. CP 1467; CP 1877.</p>	<p>CP 1467: The Estate offered only lines 1-6 of this page. CP 1368, lines 19-22 and n.10, referring to CP 1459:21-1467:16. There is no testimony in the portions offered by the Estate regarding "discussions" or "interactions" between Donna Kellar and Ken Kellar while negotiating the prenuptial agreement.</p> <p>CP 1877: The Estate offered only lines 1-5 of this page. There is no testimony in the portions offered by the Estate regarding "discussions" or "interactions" between Donna Kellar and Ken Kellar while negotiating the prenuptial agreement.</p>
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The Estate filed with the trial court Mrs. Kellar's testimony regarding discussions and interactions between Mr. Kellar and Mrs. Kellar regarding his marriage proposals, planning of the wedding, and other matters related to the process of getting married and the pressures put on Mrs. Kellar to sign the prenuptial agreement prior to the wedding. CP 1875-1894.

The portions of the Donna Kellar's deposition testimony on these pages that the Estate offered and relied upon are clearly marked. None of the testimony that the Estate offered and relied upon related to the planning of the wedding, the "process of getting married," or the "pressures put on Mrs. Kellar to sign the prenuptial agreement prior to the wedding." References are to the Clerks Papers page numbers:

1875:19-25; 1876:12-1877:5: Donna Kellar's extramarital relationship with Mitch Wiese during the last couple of years of her marriage to Ken Kellar before Ken Kellar died.

1878:4-9: Matt Peach was her attorney and reviewed the prenuptial agreement with her.

1879:11-1881:9: Ken Kellar proposed marriage to Donna in June 2001.

1881:15-24: Ken Kellar made a second proposal of marriage to Donna a couple of weeks before they married.

1882:17-1883:1: Donna's mother, father, and sister did not attend the wedding, but two women who worked for Ken did.

1884:7-20: Donna does not recall whether her first meeting with her lawyer, Matt Peach, regarding the prenuptial agreement was before or after

	<p>the mediation with Ron Morgan.</p> <p>1885:16–23: Donna met with her lawyer, Matt Peach and discussed the agreement with him, and Mr. Peach advised her to sign it.</p> <p>1886:13–18: Donna reviewed the prenuptial agreement with her lawyer, Mr. Peach, by going to his office, sitting down, and discussing it with him.</p> <p>1887:13–24: In her discussions with her lawyer, Matt Peach, about the prenuptial agreement, Donna explained that the financial terms in the agreement should be changed.</p> <p>1888:6–1889:13: Donna discussed the prenuptial agreement with her lawyer, Matt Peach, including how property each party owned before marriage would be characterized and how property that each acquired during marriage would be characterized.</p> <p>1890:4–11: Donna would not have signed the prenuptial agreement without her lawyer, Matt Peach's, advice that the agreement looked fine and she could sign it.</p> <p>1891:7–1892:2: Donna and Ken Kellar acquired property together after their marriage, specifically a number of properties in Minnesota, and developed them as joint tenants with the right of survivorship, all of which is in Donna Kellar's name following Ken Kellar's</p>
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	<p>death.</p> <p>1892:12–16: Donna Kellar owns and obtains rent from those properties.</p> <p>1893:2–21: Donna Kellar received a copy of the prenuptial agreement before she signed it and had the opportunity to review it with her lawyer, Matt Peach, and have him explain its terms to her before she signed it. He did look it over before she signed it.</p> <p>1894:5–8: Donna Kellar would testify that Mr. Kellar did not disclose to her what he owned and the values of that property before they entered into the prenuptial agreement. This testimony was offered for context for the Estate’s motion to strike such testimony and to show the testimony that she would offer but that is barred by the Dead Man’s Statute.</p>
<p>The Estate filed with the trial court Mrs. Kellar’s testimony regarding discussions between Mr. Kellar and Mrs. Kellar regarding how they decided to characterize property during their marriage. CP 1892.</p>	<p>The Estate offered and relied upon CP 1892:1-2 and 12-16. The portions the Estate offered did not relate to alleged discussions between Donna and Ken Kellar regarding how they would characterize property they acquired during marriage.</p>

*Excerpts from the Deposition of Donna M. Kellar Volume II,
December 22, 2010.*

<p>The Estate filed with the trial court Mrs. Kellar's testimony regarding discussions and interactions between Mr. Kellar and Mrs. Kellar regarding the disclosure of assets prior to signing the prenuptial agreement. CP 1923; CP 586. For example:</p>	<p>The Estate offered and relied upon CP 1923:1-7 and CP 586:1-7. The Estate offered this once in support of its motion for partial summary judgment regarding ratification and estoppel to show that she claimed to have seen what purported to be a 2001 financial statement for Ken Kellar before she testified to the Gaming Commission, which was to provide context for the Estate's argument on this issue. CP 612:3-9 and n. 31.</p> <p>The Estate also offered this in support of its motion for partial summary judgment on the validity of the prenuptial agreement to show the kind of testimony that Donna Kellar was prohibited by the Dead Man's Statute from offering. CP 1981:9-10 and n.26.</p>
<p>In response to the Estate's question "Had you ever seen any of Ken's financial statements before November 2005?" Mrs. Kellar responded "No." And to the follow up question "You'd never seen a signal one before that point in time?" Mrs. Kellar responded "Never." CP 1923; CP 586.</p>	<p>See previous response.</p>

<p>The Estate filed with the trial court Mrs. Kellar's testimony regarding discussions and interactions between Mr. Kellar and Mrs. Kellar in 2005 regarding Mrs. Kellar's acquisition of Mr. Kellar's 2001 financial statement showing that he possessed approximately \$93,000,000 at the time the couple was married in 2001. CP 586; CP 590.</p>	<p>The Estate offered and relied upon only CP 586:1-6 and CP 590:1-4 and a portion of line 5.</p> <p>The portions offered by the Estate did not address these topics.</p>
<p>The Estate filed with the trial court Mrs. Kellar's testimony regarding discussions and interactions between Mrs. Kellar and Mr. Kellar regarding Mr. Kellar's estate plan and the no contest clause in his wills. CP 1323.</p>	<p>This portion of Ms. Kellar's deposition discusses her receipt of an email from Kristine Moe to Ken Kellar's two children discussing the no-contest clause in Ken Kellar's will. Nothing in Donna Kellar's testimony on this page is regarding "discussions" or "interactions" between Donna Kellar and Ken Kellar regarding Ken Kellar's estate plan and the no contest clause in his wills.</p> <p>To the extent that she testified that she did not discuss with Ken Kellar any interplay between the no-contest clause and her contest of the prenuptial agreement, that testimony concerns a different transaction than the ones at issue in the Estate's motion to strike.</p>

<p>The Estate filed with the trial court Mrs. Kellar's testimony regarding discussions and interactions between Mrs. Kellar and Mr. Kellar regarding when, how, and where the couple would get married. CP 1670; CP 1922.</p>	<p>The Estate offered and relied upon CP 1669:25 – 1670:3 for exactly what is stated: when Donna Kellar left for South Dakota on the trip on which she and Ken would ultimately marry, she did not know if they were doing to so get married.</p> <p>The Estate offered and relied upon CP 1922:9–10: for exactly what is stated: Donna and Ken Kellar married on September 19.</p> <p>The Estate offered and relied upon nothing more on these pages of Donna Kellar's deposition. Nothing in the portions offered and relied upon by the Estate dealt with "discussions" or "interactions" between Donna Kellar and Ken Kellar regarding when, how, and where they would marry.</p>
<p>The Estate filed with the trial court Mrs. Kellar's testimony regarding discussions and interactions between Mrs. Kellar and Mr. Kellar that may have caused Mrs. Kellar to feel pressure to get married. CP 1670.</p>	<p>The Estate offered and relied upon CP 1669:25 – 1670:3 for exactly what is stated: when Donna Kellar left for South Dakota on the trip on which she and Ken would ultimately marry, she did not know if they were doing to so get married. Nothing in the portions offered and relied upon by the Estate dealt with "discussions" or "interactions" between Donna Kellar and Ken Kellar that may have caused Donna Kellar to feel pressure to get married.</p>

<p>The Estate filed with the trial court Mrs. Kellar's testimony regarding discussions and interactions between Mr. Kellar and Mrs. Kellar during their marriage regarding the characterization of newly acquired property and how it should be owned during their marriage. CP 1914-1915; CP 1930-1933.</p>	<p>The Estate offered and relied upon CP 1914:3-1915:20. Donna Kellar's deposition testimony on these pages discussed how she and Ken Kellar treated property they acquired during their marriage. There is no testimony regarding any "discussions" or "interactions" between them regarding these properties or how they would be characterized.</p> <p>The Estate offered and relied upon CP 1930:17-1932:6 and 1932:21-1933:5. Donna Kellar's deposition testimony from 1930:17 - 1932:6 discussed property that she owned jointly with Mitch Wiese, not Ken Kellar. Her testimony from 1932:21 - 1933:5 was simply her identification of two joint tenancy properties that she acquired with Ken Kellar that she owned in her name only after his death. There is no testimony regarding any "discussions" or "interactions" between them regarding these properties or how they would be characterized.</p>
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<p>The Estate filed with the trial court Mrs. Kellar’s testimony regarding discussions and interactions between Mr. Kellar and Mrs. Kellar regarding the application process and Gaming Commission Hearing to obtain the gaming license in South Dakota. CP 1916-1917; CP 1933.</p>	<p>The Estate offered and relied upon CP 1916:22–1917:18. Donna Kellar’s deposition testimony here discusses the gaming licenses she obtained in South Dakota. The only reference to Ken Kellar is that she testified that he aided her in getting the license by paying for her attorney. There is no testimony regarding “discussions” or “interactions” between Donna Kellar and Ken Kellar regarding the application process or the hearing held on her application for gaming licenses.</p> <p>The Estate offered and relied upon CP 1933:1-5. These were referred to in the Estate’s motion for partial summary judgment regarding ratification and estoppel. CP 1976:16–19 and n.7. The Estate did not offer or rely upon the other portions on this page, which appears to be what Donna Kellar refers to by this reference.</p>
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<p>The Estate filed with the trial court Mrs. Kellar's testimony regarding her understanding of the prenuptial agreement at the time she signed it and the alleged waiver contained in paragraph 2 of the agreement. CP 1918-1921.</p>	<p>The Estate offered and relied upon CP 1918:21–1921:11. This testimony did not concern Donna Kellar's understanding of the prenuptial agreement at the time she signed it. This testimony, to the extent that Donna Kellar answered questions that were asked, confirmed that the only evidence she was aware of regarding the parties' financial disclosure before they entered into the prenuptial agreement were the representation and warranties initialed by the parties in the agreement itself and her proffered testimony.</p>
<p>The Estate filed with the trial court Mrs. Kellar's testimony regarding discussions and interactions between Mr. Kellar and Mrs. Kellar that provided Mrs. Kellar's knowledge of Mr. Kellar's assets through the relationship, what assets she was aware of and when she became aware of those assets. CP 1921.</p>	<p>The Estate offered and relied upon CP 1921:1-10. CP 1981:10–16 and nn.27, 29. The Estate did not offer or rely upon the other portions on this page, which appears to be what Donna Kellar refers to by this reference.</p>

<p>The Estate filed with the trial court Mrs. Kellar's testimony regarding discussions and interactions between Mr. Kellar and Mrs. Kellar regarding business transactions, and how they worked as partners in business situations. CP 1927; CP 1929; CP 1930-1933.</p>	<p>The Estate offered and relied upon CP 1927:1-3. CP 1976:19-21 and n.8. That testimony addressed her operation of casinos with another business partner of hers, not with Ken Kellar. The Estate did not offer or rely upon the other portions on this page, which appears to be what Donna Kellar refers to by this reference.</p> <p>The Estate offered and relied upon CP 1929:1-7 as a continuation of her testimony that began at CP1928:7. CP 1976:16-19 and n.7. That testimony addressed her operation of casinos with another business partner of hers, not with Ken Kellar.</p> <p>CP 1930-1933: Donna Kellar's deposition testimony from 1930:17 - 1932:6 discussed property that she owned jointly with Mitch Wiese, not Ken Kellar. Her testimony from 1932:21 - 1933:5 was simply her identification of two joint tenancy properties that she acquired with Ken Kellar that she owned in her name only after his death. There is no testimony regarding any "discussions" or "interactions" between them regarding business transactions or how they worked as partners in business situations.</p>
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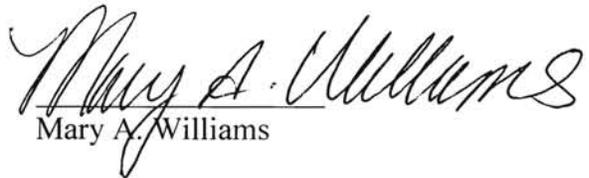
CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of March, 2012, I caused to be served the foregoing REPLY BRIEF OF RESPONDENT / CROSS-APPELLANT on the following party at the following address:

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by:

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| <input type="checkbox"/> | U.S. Postal Service, certified or registered mail,
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Mary A. Williams