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NO. 67212-6

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COURT OF APPEALS, DIVISION 1  
OF THE STATE OF WASHINGTON

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In Re: The Estate of:  
Warren F. Vaupel, Deceased.

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BRIEF OF APPELLANT

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COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
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## I. INTRODUCTION

Petitioner, Mary Wolfgram is the long time friend and surviving partner of the Decedent, Warren F. Vaupel. They were in a Committed Intimate Relationship (“CIR”). Respondent John Jardine is the court appointed Administrator of the Estate of Warren F. Vaupel and has been joined in this action by various charitable organizations that are beneficiaries under Mr. Vaupel’s 1996 will. Prior to Mr. Vaupel’s hospitalization in June of 2009, Ms. Wolfgram and Mr. Vaupel had been cohabitating together for ten years. During this time they lived together as though they were married, but never formalized their relationship.

In 1996, just prior to the death of his wife due to cancer, Mr. Vaupel executed a last will and testament. He and his wife had no children or close family, and his will left the bulk of his estate to various charitable organizations. At the time of the death of Mr. Vaupel’s wife (Versie), he, his wife, and Ms. Wolfgram had been close friends for over fifteen years. In the years following the death of his wife, Mr. Vaupel and Ms. Wolfgram’s relationship became increasingly close and they moved in together in 1999.

Six years later in 2005, Mr. Vaupel was diagnosed with Parkinson’s Disease. Ms. Wolfgram continued to live with him and take care of him until his eventual hospitalization in 2009. On June, 18, 2008,

Mr. Vaupel directed Ms. Wolfgram to transcribe an instrument addressed to “the administrator of the estate of Warren F. Vaupel.” The instrument described the relationship between Mr. Vaupel and Ms. Wolfgram, and directed the administrator of his estate to give Ms. Wolfgram \$830,000. The instrument was signed by Mr. Vaupel, and witnessed by Ms. Wolfgram, and Ms. Wolfgram’s daughter, Amanda Wolfgram. Said instrument has been filed with the Probate Court as a Codicil to the 1996 will of Mr. Vaupel. The Respondent, joined by the charitable beneficiaries, contested the document’s admittance.

Respondent John Jardine brought two motions for partial summary judgment. One motion sought summary judgment that Mr. Vaupel and Ms. Wolfgram were not in a Committed Intimate Relationship (“CIR”). The second sought summary judgment that the June 18, 2008, instrument was not a codicil. Despite genuine issues of material fact on the former and contrary legal authority on the latter, the trial court granted both motions.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred when it granted Respondent’s Motion for Partial Judgment and refused to admit the codicil even though the instrument was testamentary in nature and executed with all the required formalities.

2. The trial court erred by granting Respondent's April 12, 2011, motion which ordered a blanket prohibition of all testimony by Mary Wolfgram as to any transaction had by her with Mr. Vaupel when such a determination should only be made when such testimony is presented after consideration of the specific facts and many exceptions relevant to RCW 5.60.030 ("Dead Man's Statute").

3. The trial court erred in Granting the Administrator's Motion for Partial Summary Judgment Re: CIR Claim of Mary Wolfgram when there were genuine issues of material fact regarding the existence of a Committed Intimate Relationship; a demonstrated increase in the value of "community" assets; and the question of an equitable distribution should have been referred for trial.

4. Was "good cause" shown to go forward with the summary judgment motions when a mediation had been noticed and scheduled?

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. When the Legislature revised RCW 11.12.160 in 1994, regarding the effect of an interested person witnessing a will, did the Legislature intend for RCW 5.60.030, commonly known as the Dead Man's Statute, to be interpreted in such a way as to effectively invalidate the newly amended RCW 11.12.160?

2. Should a trial court enter an order precluding future

testimony when any such preclusions are more properly addressed through objection at the time such testimony is presented; there is little threat of prejudice to the objecting party if the testimony is properly objected to at trial; and the objectionable testimony has not been identified with sufficient precision for the court to know what testimony is being precluded?

3. Should the determination of the equities involved in along term Committed Intimate Relationship be decided by the trial court on summary judgment in a situation where the relationship between the parties that lasted over 10 years; was both complicated and contested; where there is ongoing discovery of relevant facts which were not available at the time of the motion on summary judgment; and the available evidence showed an increase of \$1.5 million in “community assets” requiring an equitable distribution?

#### **IV. STATEMENT OF FACTS**

1. Mr. Vaupel passed away as a result of medical conditions associated with Parkinson’s Disease on July 7, 2010, leaving an estate worth over two million dollars. Clerks Papers (“CP”) 147 & CP 567.

2. Mr. Vaupel had known Ms. Wolfgram since 1976, when he and his wife owned a home next door to Ms. Wolfgram and her children. CP 197.

3. Mr. Vaupel and his wife, Versie Vaupel, had no children of their own, and developed a very close relationship with Ms. Wolfgram and her two daughters. CP 197.

4. Mr. Vaupel and Versie Vaupel were very concerned for the welfare of Ms. Wolfgram and her children, and they were generous in providing such support or help that they could give. They enjoyed being able to help her out as a single mother, and liked to spend time with her and her children. CP 221.

5. In 1995, Mr. Vaupel's wife became terminally ill, and on January 18, 1996, in anticipation of her death, she and Mr. Vaupel executed wills. CP 197. Mr. Vaupel had no children and few close family members, so his 1996 will devised the majority of his estate to various charitable organizations. CP 197. At the time the will was drafted, Mr. Vaupel's relationship with Ms. Wolfgram was still one of friendship, and their relationship had not yet developed into the Committed Intimate Relationship that it would eventually become. CP 197.

6. Shortly after the death of Mr. Vaupel's wife, Ms. Wolfgram, understanding the depth of Mr. Vaupel's loss and his complete lack of familial support, took it upon herself to provide care and support to Mr. Vaupel in his time of need. CP 197. Although the relationship was initially one of close friendship, Mr. Vaupel and Ms. Wolfgram spent as

much time together as possible. CP 197. As the relationship progressed over the next few years, the relationship evolved beyond friendship into one of mutual love and support for one another. CP 197.

7. Ms. Wolfgram moved into Mr. Vaupel's home in 1999, and they lived together in a marital like relationship for the rest of Mr. Vaupel's life. CP 197. During their time together, Mr. Vaupel and Ms. Wolfgram lived a very ordinary and happy life. They enjoyed spending time together doing a variety of things such as dining, shopping, talking, watching television, visiting with friends, and doing many of the things that typical married couples do. CP 197.

8. They cared for each other very much, and Mr. Vaupel continued to enjoy providing support for Mary and, to a lesser extent, her daughter Amanda Wolfgram. CP 223. Mr. Vaupel was always generous and open in his desire to take care of Mary. CP 199. He would help her pay for expenses of daily living, and ensured that she was as comfortable as possible. CP 199. For her part, Mary acted as a devoted spouse, maintaining the home, cooking, and cleaning, and offering all the love and support that a spouse could provide. CP 199. Although certain limitations precluded the relationship from becoming sexual, they lived life in every other respect as though they were husband and wife. CP 198.

9. As the relationship grew, Mr. Vaupel began to discuss

changing his Will to provide for Ms. Wolfgram when he died. CP 252-253. On September 26, 2005, Liz Stevensen, Mr. Vaupel's niece through his deceased wife, wrote a letter to Mr. Vaupel and Ms. Wolfgram, from which the following excerpt is taken:

... Warren, I was going to send you a separate note but decided not to since I know you and Mary certainly don't have any secrets. When we were sitting on the park bench up there, you mentioned to me that you had not made a new will for your estate since Aunt Versie died but you were thinking about it. I really did not give you any advice since I thought it was none of my business, but after thinking about it, I do have a couple of comments.

I think it would be a good idea for you to make a new will because lots of things have changed in the last 10 years. You do need to consider Mary's future and be sure she will be well taken care of if something happens to you....

CP 252-253 (emphasis added)

Thus, it was apparent in 2005 that the Mr. Vaupel had intentions of making a testamentary disposition for Ms. Wolfgram.

10. In 2005, Mr. Vaupel suffered a serious medical set back following a fall down some stairs. CP 198. At that time, he was diagnosed with Parkinson's disease. CP 198. Mr. Vaupel also suffered from an enlarged prostate, and he eventually become incontinent and began wearing disposable underwear in 2008. CP 198. He required significant personal assistance from Ms. Wolfgram to help him change.

Ms. Wolfgram took care of Mr. Vaupel, which also included his daily physical therapy following his accident and diagnosis with Parkinson's. CP 198.

11. Since 1999, Mr. Vaupel had paid for all their combined expenses, including those to maintain Ms. Wolfgram's house, insurance, medical and dental care, and gifts of money. CP 199. Ms. Wolfgram contributed to the relationship by loving and caring for Mr. Vaupel, assisting him with financial decisions, including management of investments and homes, shopping, cooking, cleaning, paying bills, entertaining his relatives from out of town, and facilitating the remodeling that was done to Mr. Vaupel's houses so that the residence would be more accommodating to his increasing disabilities. CP 199. As Mr. Vaupel's medical condition deteriorated, her caretaking increased to include bathing, dressing, changing diapers, assisting with medications, and assisting with other activities of daily living. CP 199.

12. In 2009, Ms. Wolfgram and Mr. Vaupel moved into Mr. Vaupel's remodeled house. CP 199. It was intended to only be a temporary move until their original home together could be remodeled, and they could move back. CP 199.

13. Their plan to return to their original home together was placed on hold when Mr. Vaupel was hospitalized again in May 2009. CP

199. Mr. Vaupel had contracted pneumonia and Ms. Wolfgram called 911. CP 199. Unfortunately, Mr. Vaupel would not be able to return to his home with Ms. Wolfgram and he was eventually moved into an adult family home. CP 199. Ms. Wolfgram continued to visit him regularly during his stay there, although she felt the loss of her constant companion of the past thirteen years.

14. Prior to his move from the hospital into an adult family home, guardianship proceedings were commenced by the hospital where Mr. Vaupel had been admitted. CP 199. Joshua Brothers, the Guardian ad Litem for the matter In the Guardianship of Warren F. Vaupel, King County Superior Court Cause No 09-4-02837-8 KNT (please note this matter later changed to a SEA designation), conducted an extensive investigation regarding the appointment of a guardian for Mr. Vaupel. *See* Report of GAL, CP 676-705.

15. Eventually, Mr. Brothers recommended Mary Wolfgram be appointed Warren Vaupel's guardian. CP 700. Mr. Brothers stated that Mr. Vaupel told him that he wanted Ms. Wolfgram to help him. CP 680. According to Mr. Brothers, at the time of his report, Ms. Wolfgram was the most significant person in Mr. Vaupel's life. CP 698.

16. Ms. Wolfgram was appointed Limited Guardian of the Person and Full Guardian of the Estate of Warren F. Vaupel on July 21,

2009. CP 39. The Court, however, sua sponte raised the issue of a possible claim by Ms. Wolfgram against Mr. Vaupel's estate due to their extended co-habitation and committed intimate relationship. CP 200. John Jardine, of Unlimited Guardianship Services, a certified professional guardian, was appointed as Limited Guardian of the Estate "for the limited purpose of representing the Estate of Warren Vaupel in an action to determine the nature of Mary Wolfgram and Warren Vaupel's relationship." CP 39. (Mr. Jardine would later be appointed as the full guardian of the Estate when Ms. Wolfgram resigned as guardian of the Estate). CP 200.

17. Mr. Jardine and Ms. Wolfgram, through their respective counsel, agreed that there would be a CR2A Agreement by which Ms. Wolfgram would release any and all claims against Mr. Vaupel and his estate in exchange for an annuity for Ms. Wolfgram that would cost \$800,000. CP 200. The annuity would be for Ms. Wolfgram's benefit during her lifetime, and for Mr. Vaupel thereafter if Ms. Wolfgram predeceased him. CP 200. Upon the death of the survivor, the remainder would go to select charities. CP 200. On March 17, 2010, Ms. Wolfgram filed a petition seeking, inter alia, approval of the proposed settlement. CP 258.

18. In response to Ms. Wolfgram's petition, Mr. Jardine

informed the court that he agreed with the settlement because “the outcome appears to be consistent with Mr. Vaupel’s financial support of Ms. Wolfgram prior to his incapacity and his likely wish to continue providing financial support to her.” CP 270. Mr. Jardine also stated in his response:

2. There is nevertheless ample evidence that Warren Vaupel provided for and financially supported Mary Wolfgram for at least 10 years prior to the guardianship. CP 271.

3. Moreover, to the extent it can be determined, it is likely Mr. Vaupel wishes or would wish to continue his financial support of Mary Wolfgram. At a minimum, there is no evidence to suggest that Mr. Vaupel intended to discontinue his financial support of Ms. Wolfgram. CP 271.

19. Mr. Jardine approved the purchase of a \$800,000 annuity to provide income of \$4,000 per month to Ms. Wolfgram for the rest of her life. CP 271. Thus, at that time apparently, there was enough evidence and reason for the guardian of Mr. Vaupel’s estate to approve an \$800,000 annuity as a gift to Ms. Wolfgram.

20. Mr. Vaupel’s court appointed attorney, J. Roderik Stephens, also filed a declaration in support of financially providing for Ms. Wolfgram, and stated:

Since the last court hearing in the matter, I have been actively involved in working with Mr. Furman, legal counsel for Mr. Jardine, and Ms.

McDaniel as it relates to the resolution of potential claims being advanced by Ms. Wolfgram predicated on her thirteen (13) year relationship with Mr. Vaupel. During the course of this process, we determined that the matter could be resolved through the purchase of an annuity that would pay Ms. Wolfgram the sum of \$4,000 per month for life. Out of the \$4,000 amount, Ms. Wolfgram, who by all reports has been Mr. Vaupel's companion for at least thirteen (13) years, would have to pay income taxes on the amounts received. The authority for this transfer is RCW 11.92.140. Given the size of Mr. Vaupel's estate, his past care for Ms. Wolfgram, and his projected future needs, I am in agreement with this the disposition as proposed in return for a release of any claims that Ms. Wolfgram may have against Mr. Vaupel's estate.

CP 278.

21. All the beneficiaries under Mr. Vaupel's 1996 will received notice of the motion. CP 201. The hearing on Ms. Wolfgram's motion was continued following the appearance of the charitable beneficiaries. CP 201. The issue before the Court was whether the guardian should approve a gift to Ms. Wolfgram from the guardianship estate, but the charitable beneficiaries of Mr. Vaupel's will objected to the gift. CP 202.

22. On May 4, 2010, the Court held a hearing on Ms. Wolfgram's Petition to approve the gift. CP 202. The Court directed all the parties to return to court on May 27, "but prior to that date the parties shall mediate with Tom Keller with regards to the issue of how much and the structure the gift shall be." CP 137.

23. The mediation was continued twice to accommodate the scheduling problems of parties other than Ms. Wolfgram, and was last set to occur on July 7, 2010, with the hearing before the court set for July 21, 2010. CP 202.

24. On the morning of July 7, 2010, Mr. Vaupel passed away. The mediation was never held and the parties never mediated “how much and the structure the gift shall be” to Mary Wolfgram. CP 202.

25. The Guardianship proceeding was dismissed on November 18, 2010, following final report and motions related to the payment of fees. CP 202.

26. This probate proceeding had been commenced on October 19, 2010. CP 152. Ms. Wolfgram appeared by counsel, Beth McDaniel, in the probate proceeding on January 11, 2011. CP 202. On December 30, 2010, Michael Olver of Helsell Fetterman LLP filed an association of counsel with Ms. McDaniel and filed a Request for Special Notice of Proceedings and Request for Inventory and Appraisements. CP 202.

27. On January 25, 2011, Mr. Jardine, as administrator of the Estate of Mr. Vaupel, filed a Petition for Determination of Rights or Legal Relations with Respect to Estate. CP 163.

28. In February, 2011, Ms. Wolfgram discovered the instrument which has been submitted for probate as a Codicil to Mr.

Vaupel's will. CP 336. Mr. Vaupel signed said instrument on June 18, 2008. The instrument is addressed, "To the administrator of the estate of Warren F. Vaupel." CP 341. The instrument states that,

"It is of the very utmost importance to me, Warren that Mary is to be provided for by me, Warren for the rest of her life in the event of my passing."

CP 341. In the instrument, Mr. Vaupel explains that he wanted to transfer certain bank accounts to Ms. Wolfgram, but was unable to do so as a result of administrative complications. CP 341. In addition, Mr. Vaupel states that he has "... been unable to find my will, therefor [sic] I cannot change my will to put Mary in it, if I had my will I would change it as follows..."

CP 341. The document then goes on to describe gifts totaling \$830,000 for Ms. Wolfgram and that, "Whatever financial gifts I have give [sic] to Mary and Amanda in the past or in the future or checks, cash or other gifts were given with my full intent and knowledge of these gifts." CP 342.

29. The third and last page of the June 12, 2008, instrument is a paragraph stating that Mr. Vaupel had "read and reread many times" the document and had full knowledge of the fact that the full amount of the testamentary gift is \$830,000. CP 343.

30. After the document was drafted, Mr. Vaupel, Ms. Wolfgram, and Ms. Wolfgram's daughter, Amanda Wolfgram, gathered together. The document was again reviewed by Mr. Vaupel before he

subscribed his signature on the document. CP 344-347. After Mr. Vaupel signed the document, it was subscribed by both Mary Wolfgram and Amanda Wolfgram at his request. CP 344-347.

31. After the document was signed in 2008, it was put away for safe keeping. However, between the time that it was signed and the death of Mr. Vaupel, the document was misplaced. CP 519. Finally, Ms. Wolfgram was able to locate the document and on February 11, 2011, filed it for probate as a Codicil to Mr. Vaupel's will. CP 336.

32. At the time the document was filed, both Ms. Wolfgram and her daughter, Amanda Wolfgram, signed Affidavit's of Attesting Witnesses which were filed in conjunction with the Codicil. CP 344-347. After the Codicil was filed with the court, the Respondent filed an objection to admission of the codicil and was joined by the Charities. CP 358.

33. Respondent, John Jardine, filed a Motion in Limine re: Testimony Subject to the Dead Man's Statute on February 17, 2011, and a hearing on the matter was held on March 8, 2011. CP 351. The court commissioner did not make a ruling on the Motion in Limine, instead certifying the matter for trial. CP 536.

34. On March 3, 2011, Ms. Wolfgram filed a Notice of Intent to Mediate, and mediation was set for May 4, 2011. CP 531.

35. On March 25, 2011, in spite of the pending mediation, Respondent filed Notice of Hearing on Motion in Limine to be heard without oral argument. The resulting Order, which granted a blanket preclusion of any testimony by Ms. Wolfgram regarding transactions with Mr. Vaupel, was granted on April 12, 2011, without regard to the many exceptions to the Dead Man's Statute. CP 581.

36. On March 31, 2011, Respondent filed separate Motions for Partial Summary Judgment to be heard on April 29, five days prior to the scheduled mediation. The motions were (a) Administrator's Motion for Summary Judgment Re: CIR Claim of Mary Wolfgram, (CP 544); and (b) Administrator's Motion for Summary Judgment Re: Alleged Codicil (CP 571). The Administrator's Motions for Summary Judgment were granted on April 29, 2011. CP 667 and CP 670.

## **V. ARGUMENT**

The standard of review for summary judgment orders is *de novo*. *Hadley v. Maxwell*, 144 Wn.2d 306, 310, 27 P.3d 600 (2001). Summary judgment is proper only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). When reviewing an order of summary judgment, the court engages in the same inquiry as the trial court, considering the facts and all reasonable inferences from the facts in the light most favorable to the nonmoving

party. *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 381, 46 P.3d 789 (2002). Factual issues may be decided on summary judgment “ ‘when reasonable minds could reach but one conclusion from the evidence presented.’ ” *Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 47, 846 P.2d 522 (1993) (quoting *Cent. Wash. Bank v. Mendelson-Zeller, Inc.*, 113 Wn.2d 346, 353, 779 P.2d 697 (1989)).

A. THE TRIAL COURT IMPROPERLY GRANTED THE RESPONDENT’S MOTION FOR SUMMARY JUDGMENT RE: ALLEGED CODICIL

1. The trial court incorrectly determined that the June 18, 2008, document is not testamentary in nature.

The question of whether an instrument is testamentary in nature is determined not by the title of the instrument, but by the instrument’s provisions and intent. *See In re Murphy’s Estate*, 193 Wash. 400, 407-408, 75 P.2d 916 (1938); *see also Verbeek v. Verbeek*, 2 Wn. App 144, 149, 467 P.2d 178 (1970). “The indicia of intent of paramount importance in determining whether the instrument is testamentary is the fact that if the instrument creates an interest in praesenti rather than an instrument to take effect at the death of the testator, the instrument is nontestamentary.” *Verbeek* at 150. That is to say that, “...whether the instrument is, in form, a deed or a contract, if the transfer of the property depends and is

conditioned upon the death of the grantor and no present estate passes, the instrument will be held to be a will.” *Murphy* at 409.

The case of *In re Murphy’s Estate* provides guidance on how an instrument should be interpreted when determining its testamentary character. In *Murphy*, the decedent owned land which he leased to a camp for the YMCA. *Id.* at 406. The lease contained certain requirements regarding maintenance and improvements which the YMCA was obligated to perform during the life of the lease. *Id.* Upon the death of the Decedent, the lease was to terminate. *Id.* Paragraph 24 of the lease agreement stated in summary that, upon the death of Mr. Murphy, if the YMCA had fulfilled the terms of the lease agreement, the executor of Mr. Murphy’s estate was directed to deed the property to the YMCA without further consideration. *Id.*

The heirs of Mr. Murphy’s estate argued that such a transfer was testamentary in nature, and because the lease had not been signed with the due formalities associated with a testamentary instrument, the transfer was not valid. *Id.* at 407.

The court applied the rules stated above while interpreting the lease agreement. The court found that, “The contract does not disclose any intention on the part of Murphy to transfer to the respondent any present interest other than the leasehold interest, and that interest

terminated the instant Murphy died.” *Id.* at 415. The court went on to state that, “The direction of Murphy in the lease to his executor to exact the necessary conveyances to vest title in the respondent lessee is a recognition on the part of Murphy that no title was to vest until his death.” *Id.* at 419. As a result, the court held that the document was testamentary in nature, and that the transfer was invalid because it had not been executed with the due formalities required by statute for a will. *Id.* at 420-421.

Applying the above rules to our present case, the instrument in question is clearly testamentary in nature. The first line of the instrument says, “To the administrator of the estate of Warren F. Vaupel.” This very first line of the document is analogous to *In re Murphy’s Estate*, as in each case the instrument directs the executor of the estate to transfer the property described in the instrument, thus demonstrating that the document was prepared in contemplation of death. In addition, Mr. Vaupel states that, “It is of the very utmost importance to me, Warren that Mary is to be provided for by me, Warren for the rest of her life in the event of my passing.” The document goes on to state that, “I, Warren or Mary have been unable to find my will, therefore I cannot change my will to put Mary in it, if I had my will I would change it as follows...” Each of these statements shows that Mr. Vaupel executed the instrument in

contemplation of death with the intent that it act as a will. To the extent that he states his desire to change the will, and not create an entirely new will, the instrument should be construed as a codicil.

Finally, and most conclusively, the instrument does not purport to pass a present interest in the property at the time of execution. As described above, the primary factor in determining the testamentary character of an instrument is whether there is an intent to make a present transfer of property. Without intent to make a present transfer, as was the case in *In re Murphy's Estate*, the document must be interpreted as a testamentary document. Here, it is clear from the instrument that Mr. Vaupel intended for Ms. Wolfgram to receive the described gifts after he died. Thus, as was the result in *In re Murphy's Estate*, the document must be interpreted as testamentary in nature and, therefore, be executed with all due formalities required when signing a will.

2. The intent of the testator is controlling, and the intent of Mr. Vaupel was to make a testamentary gift of \$830,000 to Mary Wolfgram.

“All courts and others concerned in the execution of last wills shall have due regard to the direction of the will, and the true intent and meaning of the testator, in all matters brought before them.” RCW 11.12.230. “The purpose and duty of the court in construing a will is to give effect to the testator’s intent.” *In re Estate of Campbell*, 87 Wn. App.

506, 510, 942 P.2d 1008 (1997). This intent should be determined as of the time of the will's execution. *In re Estate of Price*, 73 Wn. App. 745, 754, 871 P.2d 1079 (1994). "This intent should, if possible, be garnered from the language of the will itself." *Id.* "The will should be considered in its entirety and effect be given to every part." *Id.* "Because a testator employs language in the will with regard to facts within his knowledge, the court must consider all the surrounding circumstances, the objects sought to be obtained, the testator's relationship to the parties named in the will, his disposition as evidenced by provisions to be made for them and the general trend of his benevolences as disclosed by the testament." *Matter of Estate of Bergau*, 103 Wn.2d 431, 436, 693 P.2d 703 (1985).

Here, the clear and unambiguous intent of Mr. Vaupel was to provide Mary Wolfgram with a testamentary gift of \$830,000. The instrument itself is clear, it describes the reasons Mr. Vaupel desires to make the gift, it describes the amount of the gift, and it instructs the administrator of his estate to execute the gift. In addition, the surrounding circumstances also support Mr. Vaupel's intent to make a gift to Mary Wolfgram. Mr. Vaupel and Ms. Wolfgram had been committed intimate partners for 13 years. Throughout that time Mr. Vaupel had provided financial support and gifts to Ms. Wolfgram on a consistent basis. Ms. Wolfgram had provided love, support, and care to Mr. Vaupel for that

entire time. It is entirely natural that Mr. Vaupel would desire to leave a testamentary gift to Ms. Wolfgram. Thus, because the clear intent of Mr. Vaupel was to provide a gift of \$830,000 to Ms. Wolfgram, it is the duty of the courts give due regard to that intent.

3. The June 18, 2008 instrument satisfies the requirements for a codicil.

The requirements for valid will execution have been reduced to a minimum in Washington. *In re Estate of Price*, 73 Wn. App 745, 751, 871 P.2d 1079 (1994). The bare requirements are that, “Every will shall be in writing signed by the testator or by some other person under the testator's direction in the testator's presence, and shall be attested by two or more competent witnesses, by subscribing their names to the will ...” RCW 11.12.101. The requirements for a valid codicil are the same as those for a will. *In re Estate of Ricketts*, 54 Wn. App 221, 222, 773 P.2d 93 (1989). The trial court erred in finding that Mary Wolfgram and Amanda Wolfgram were not competent to testify in proof of Mr. Vaupel’s codicil, thus rendering the instrument invalid.

- a. Under RCW 11.12.160 Mary Wolfgram is competent to testify as a witness in proof of the codicil, and she is entitled to a trial so that she may rebut the presumption of duress, menace, fraud or undue influence in the procurement of her gift.

The trial court effectively held that RCW 5.60.030, also known as the Dead Man’s Statute, superseded RCW 11.12.160, and that as a result,

Mary Wolfgram and Amanda Wolfgram were incompetent to testify in proof of Mr. Vaupel's codicil. This ruling is clearly erroneous, as it invalidates RCW 11.12.160, and goes against over 80 years of established Washington State Supreme Court authority. *See State ex rel. Schirmer et al. v. Superior Court for Spokane County et al.*, 143 Wn. 578, 255 P. 960 (1927) (in which the witness to the will was held to be competent even though he was both the executor and a beneficiary under the will); *see also In re Chambers' Estate*, 187 Wn. 417, 60 P.2d 41 (1936) (in which, after the death of the testator, the interested witness was found competent to testify in proof of the handwritten will which did not contain an attestation clause).

RCW 11.12.160 states:

(1) An interested witness to a will is one who would receive a gift under the will.

(2) A will or any of its provisions is not invalid because it is signed by an interested witness. Unless there are at least two other subscribing witnesses to the will who are not interested witnesses, the fact that the will makes a gift to a subscribing witness creates a rebuttable presumption that the witness procured the gift by duress, menace, fraud, or undue influence.

(3) If the presumption established under subsection (2) of this section applies and the interested witness fails to rebut it, the interested witness shall take so much of the gift as does not exceed the share of the estate that would be distributed to the witness if the will were not established.

(4) The presumption established under subsection (2) of this section has no effect other than that stated in subsection (3) of this section.

RCW 11.12.160 (emphasis added)

The trial court, however, based its decision on an erroneous application of RCW 5.60.030, and such application places RCW 5.60.030 in conflict with RCW 11.12.160. RCW 5.60.030 states:

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 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.

RCW 5.60.030

The trial court's erroneous application of RCW 5.60.030 is clearly contrary to the express language of RCW 11.12.160 which states that, "A will or any of its provisions is not invalid because it is signed by an

interested witness.” RCW 11.12.160 (2). By erroneously holding that Ms. Wolfgram was incompetent to testify under the Dead Man’s Statute, thus preventing the admission of Mr. Vaupel’s codicil to probate, the trial court ignored over 80 years of Washington State Supreme Court authority and effectively invalidated the language of RCW 11.12.160(2).

RCW 11.12.160 was amended by the Washington State Legislature in 1994. Prior to 1994 the statutory language had remained unchanged since before Washington was admitted as a State. Law of 1881, Code of Washington, published in Olympia by C.B. Bagley, Public Printer (1881), Ch XCVII, Sec. 1331, pg. 236. (Statutory title changed multiple times, but the language was not amended until 1994.) The cases of *Schirmer* and *In re Chambers’ Estate* (supra) are both based on the same pre 1994 statutory language cited below. This language remained the same from at least 1881 until the 1994 amendment to RCW 11.12.160 which revised the statute into its present form. Prior to 1994 the statute read as follows:

All beneficial devises, legacies, and gifts whatever, made or given in any will to a subscribing witness thereto, shall be void unless there are two other competent witnesses to the same; but a mere charge on the estate of the testator for the payment of debts shall not prevent his creditors from being competent witnesses to his will. If such witness, to whom any beneficial devise, legacy or gift may have been made or given, would have been entitled to any share in the testator’s estate in case the will is not established, then so much of the estate as would have descended or would

have been distributed to such witness shall be saved to him as will not exceed the value of the devise or bequest made to him in the will; and he may recover the same from the devisees or legatees named in the will in proportion to and out of the parts devised and bequeathed to him.

Rem. Comp. Stats. §1408 (*In re Chamber's Estate* was based on Rem. Rev. Stats. § 1408, which is identical to the previous version).

In both *Schirmer* and *In re Chamber's Estate*, the courts were faced with the question of whether an interested witness was competent to testify in proof of a will. In *Schirmer*, the witness in question was both a beneficiary and executor under the will. *Schirmer* at 579. In determining whether someone who is both beneficiary and executor under a will could be a competent witness, the *Schirmer* court analyzed Rem. Comp. Stats. §1408, and stated that,

“If it were not the purpose of this statute to render the witness competent, there could have been no reason for its enactment. The construction placed on statutes such as this by the courts generally is that the competency of the witness is restored by the statute, and his legacy is voided by the statute.”

*Id.* at 581 (emphasis added).

Thus, under this statute the competency of an interested witness is restored, the only question then being the benefit the witness would be allowed to receive under the properly admitted will.

The court in *In re Chambers' Estate* arrived at the same conclusion

as the *Schirmer* court in analyzing the competency of an interested witness. The facts in *In re Chambers' Estate* differed slightly from those in *Schirmer* in that there were three witnesses to the signing of the will, but two of the witnesses were beneficiaries under the will. This slight difference did not, however, affect the analysis in the case because the will had to be witnessed by two individuals, thus by necessity one of the witnesses had to be an “interested witness”.

The remainder of the substantive facts in *In re Chambers' Estate* were similar to those in *Schirmer* and very nearly the same as those of our present case. First, the will contained no attestation clause and was handwritten by one of the witnesses at the dictation of the testator. *In re Chambers' Estate* at 422. The names of the persons who signed the will as witnesses were also applied to the document, without any indication as to the purpose with which they signed or what particular significance they attached to the act of signing the document, either by themselves or the testator. *Id.* at 420. Two of the three witnesses were also beneficiaries under the will. *Id.* at 419. One of those witnesses was the brother of the decedent, and he argued that the will was invalid because there was only one uninterested witness. *Id.* His goal was to invalidate the will because he would receive a greater share of the estate through intestacy than he would through the will. *Id.*

After reviewing the facts and the law, the Washington State Supreme court held that an interested witness to a will which does not contain an attestation clause is competent to testify in proof of the will after the death of the testator. *In re Chamber's Estate* at 420. The basic requirements for a properly executed will and the proof necessary to admit it to probate were the same at the time of *In re Chambers' Estate* as they are today. *See Id.* at 423. The court stated in its analysis that,

“The document now before us contains no attestation clause whatsoever, but, if competent witnesses present before the court testify that they subscribed their names to a document in the presence of the testator, and to facts which amount in law to an attestation, under the law of this jurisdiction it is not essential that formal words of attestation be attached to the will.”

*Id.* at 423. As to whether the interested witnesses were competent to testify under the statute, the court stated that, “Under Rem. Rev. Stat. § 1408, questions may arise as to what a witness who is also a beneficiary may receive under a will, but such a witness may undoubtedly testify in support of a document offered for probate.” *Id.* at 420 (emphasis added). Thus, although an interested witness may lose his or her beneficial share under the will, he or she is permitted to testify in proof of the will.

In the present case, the facts are very nearly the same as those in *In re Chambers' Estate*. First, in both cases the document was a handwritten instrument signed by witnesses without any formal words of attestation.

In both cases there was one disinterested witness to the will or codicil, and the testimony of an interested witness was necessary to provide the required second witness to prove the will or codicil for probate. In both cases, the interested witness had not signed an attestation clause and was forced to provide testimony in proof of the will or codicil after the death of the testator. However, whereas in *Shirmer* and *In re Chambers' Estate* the interested witnesses were found competent and the will was admitted to probate, here, the trial court erroneously refused to allow the testimony of Mary Wolfgram in proof of the codicil. As was the case in *Shirmer* and *In re Chamber's Estate*, the codicil should have been admitted to probate, with the only question being what gift Ms. Wolfgram would be allowed to receive under the codicil.

The primary difference between Ms. Wolfgram's case, and the cases of *Schirmer* and *In re Chamber's Estate*, is what gift the interested beneficiary may be legally entitled to receive through the will or codicil. By virtue of the statute as it was written at that time, the interested beneficiaries in *Schirmer* and *In re Chambers Estate* were only permitted to receive assets equivalent to what they would have received through intestacy. However, under RCW 11.12.160 in its present form, beneficiaries such as Mary Wolfgram, who would not otherwise receive a gift through intestacy statutes, are given the opportunity to retain a

beneficial share of the estate by rebutting a presumption that the gift was obtained by duress, menace, fraud, or undue influence. RCW 11.12.160. Thus the statute serves the dual purpose of protecting the estate against duress, menace, fraud, or undue influence, while preventing the inequities inherent under the statute in its prior form.

The trial court's holding erroneously created a conflict between RCW 11.12.160 and RCW 5.60.030, by holding that RCW 5.60.030 prevented Mary Wolfgram and Amanda Wolfgram from testifying in proof of the codicil as an interested witness, thus superseding and invalidating RCW 11.12.160(2).

Statutory interpretation is a question of law that will be reviewed de novo. *State v. J.P.*, 149 Wn.2d 444, 449, 69 P.3d 318 (2003). The rules of statutory interpretation require courts to determine and give effect to the legislature's intent and purpose in passing a law. *Id.* at 450. If the plain language of the statute is capable of only one meaning, the legislative intent is apparent, and courts will not construe the statute otherwise. *Id.* "The courts will not so construe different provisions of the law as to create a conflict when any other course is reasonably possible." *Rosenoff v. Cross*, 95 Wn. 525, 531, 164 P. 236 (1917). The courts "read provisions of a statute together to determine the legislative intent underlying the entire statutory scheme to achieve a harmonious and

unified statutory scheme.” *State v. Rice*, 159 Wn. App 545, 564, 246 P.3d 234 (2011). The courts “read statutes relating to the same subject as complementary, instead of in conflict with each other.” *Id.* Here, the Court must review the statutes related to will execution and the Dead Man’s Statute in order to correct the trial court’s error.

This court can glean the intent of the 1994 amendment vis-à-vis the Dead Man’s Statute from the comments to the Uniform Probate Code that gave birth to the language.

The 1994 revisions to RCW 11.12.160 were based on the Uniform Probate Code § 2-205 which reads as follows:

- (a) An individual generally competent to be a witness may act as a witness to a will
- (b) The signing of a will by an interested witness does not invalidate the will or any provision of it.

The comments to UPC § 2-205 go on to state the following:

This section carries forward the position of the pre-1990 Code. The position adopted simplifies the law relating to interested witnesses. Interest no longer disqualifies a person as a witness, nor does it invalidate or forfeit a gift under the will. Of course, the purpose of this change is not to foster use of interested witnesses, and attorneys will continue to use disinterested witnesses in execution of wills. But the rare and innocent use of a member of the testator’s family on a home-drawn will is not penalized.

This approach does not increase appreciably the opportunity for fraud or undue influence. A substantial devise by will to a person who is one of the witnesses to

the execution of the will is itself a suspicious circumstance, and the devise might be challenged on grounds of undue influence. The requirement of disinterested witnesses has not succeeded in preventing fraud and undue influence; and in most cases of undue influence, the influencer is careful not to sign as a witness, but to procure disinterested witnesses.

UPC § 2-205 and comments thereto (emphasis added).

It is clear from the comments to the UPC that the two primary purposes of the statute are to ensure that the use of an interested witness does not invalidate a will and disinherit the non-witness beneficiaries, and to provide any interested witness with the opportunity to retain his or her gift under the will. First, by allowing an interested witness to testify in proof of a will, the statute prevents the inequity upon the non-witness beneficiaries that would result if the will was thrown out simply because it was witnessed by a beneficiary. This has been a primary purpose of the statute for a substantial period of time. For instance, in our case, had there been other beneficiaries under Mr. Vaupel's codicil, those beneficiaries would have been disinherited under the trial court's erroneous holding. Such a result is the type of injustice this statute is specifically intended to prevent.

Second, the revised statute prevents the injustice that arises when an interested witness is summarily disinherited from the estate without any actual evidence of fraud, duress, or undue influence in the procurement of

the gift, and without the opportunity to prove the absence of fraud, duress, or undue influence. As the commentators to UPC § 2-205 suggest, the purpose of disinheriting an interested witness under the old statute was to prevent the threat of fraud or undue influence in the procurement of a testamentary gift. However, as is noted in the comments, such a requirement did little to fulfill its intended purpose, while inflicting a potentially significant injustice upon those individuals who desire to make a legitimate testamentary instrument but lack disinterested witnesses for the execution of their will. Thus, a statute disinheriting an interested witness often did great harm while failing to effectively fulfill its intended purpose of protecting against the threat of fraud, duress, or undue influence.

Under RCW 11.12.160(2), the Washington State Legislature, in an effort to limit the risk of fraud or undue influence while preventing the inherent inequities of the prior statute, added the requirement that the interested witness overcome a rebuttable presumption that the gift was obtained through duress, menace, fraud, or undue influence. RCW 11.12.160. Thus, for purpose of admitting a will to probate, the question of whether a witness to the will is also a beneficiary, is immaterial. The interested nature of a witness is only important in determining what benefit he or she will be entitled to receive under the will. Such a

determination is a question of fact that would have to be determined by the trial court after the admittance of the will and a challenge thereto under RCW 11.24 et seq..

The trial court's ruling creates a conflict between RCW 11.12.160(2) and RCW 5.60.030, effectively finding that RCW 5.60.030 supersedes and invalidates RCW 11.12.160. The 1994 amendment to RCW 11.12.160 gives the interested witness the opportunity to reacquire his or her gift if he or she is able to overcome the presumption that said gift was obtained by duress, menace, fraud, or undue influence. The purpose of this savings clause is not only to benefit the interested witness, but to allow for the will to be probated for the benefit of the other heirs under the will, and fulfill the honest intent of the testator.

To hold that the Dead Man's Statute supersedes RCW 11.12.160, and invalidates the will by precluding an interested witness from testifying in proof of the will, creates a serious and unacceptable injustice for those beneficiaries under the will who were not interested witnesses. The trial court's ruling could establish a precedent that destroys countless testamentary bequests for legitimate beneficiaries simply because a witness to the will was also a beneficiary. This would result in a regression of the law to the time when the use of an interested witness achieved just such an

inequity. Well before Washington even became a state, the law was changed in order to prevent such an injustice.

There should be no distinction between a situation where there are multiple beneficiaries of which one is an interested witness, and a situation where the only beneficiary is an interested witness. A comparison of the following three examples helps to illustrate this point. First, is a situation where there are multiple beneficiaries and one of the beneficiaries is a witness, thus leaving one interested witness and one non-interested witness. Second, is a situation where there are multiple beneficiaries and two of the beneficiaries are interested witnesses, thus leaving no non-interested witnesses. Third, is a situation where there is only one beneficiary, and that beneficiary is an interested witness (along with a non-interested witness). In the first two examples, it is clear that the will must be probated to prevent the injustice to the non-witness beneficiaries that would arise if the will was thrown out. This has been the result that the courts have arrived at since before Washington was a state. In the third example where the only beneficiary of the will is also a witness, the result should be precisely the same under RCW 11.12.160 as the prior examples. For the purpose of meeting statutory requirements to admit the will to probate, and under RCW 11.12.160, there should be precisely the same outcome under each of the examples. After the will is admitted there may

be questions as to what the interested witnesses would receive, but in each case the will must be admitted.

To the extent that the RCW 11.12.160 may appear to conflict with RCW 5.60.030, RCW 11.12.160 must be read in harmony with RCW 5.60.030 for the purposes of presenting testimony in proof of a will. *See State v. Rice* at 564. Any limitations that RCW 5.60.030 may impose on the testimony that an interested witness may give pursuant to RCW 11.12.160 only affect the testimony that may be given while attempting to rebut the presumption of duress, menace, fraud, or undue influence. Mary Wolfgram has always acknowledged that she will have to overcome these presumptions with admissible evidence presented at trial. However, the trial court's apparent lack of consideration of RCW 11.12.160(2) and its disregard for established case law from the Washington State Supreme Court, must first be corrected to allow the codicil to be admitted for probate.

- b. Sufficient evidence exists, which is not prohibited by RCW 5.60.030, to establish the proof necessary to admit the codicil to probate.

Even if the court determines that RCW 11.12.160(2) does not permit Mary Wolfgram to testify as an interested witness, there is sufficient admissible evidence for the court to find that Mr. Vaupel's codicil was validly executed.

Amanda Wolfgram is not a “party in interest” as that term is defined by RCW 5.60.030. “For purposes of the dead man’s statute, a witness is a party in interest if he or she stands to gain or lose from the judgment.” *In re Estate of Miller*, 134 Wn. App. 885, 893, 143 P.3d 315 (2006). The fact that Amanda Wolfgram is the daughter and potential heir of Mary Wolfgram has no relevance as to her status as a “party in interest” under the Dead Man’s Statute. *See Murante v. Rizzuto*, 46 Wn.2d 800, 804, 285 P.2d 560 (1955) (in action on rejected claim against estate of decedent for funds allegedly held by decedent belonging to plaintiff, testimony of plaintiff’s son-in-law, who was not party in interest, was admissible, and fact that such witness was related to plaintiff would affect only weight of his testimony and not its admissibility). Amanda’s relationship to her mother does not make her a party in interest under the Dead Man’s Statute.

Likewise, the testator’s ratification of past gifts to Amanda Wolfgram in his codicil does not make Amanda a “party in interest”. To qualify as a party in interest, “The interest must be a direct and certain interest in the outcome of the proceeding.” *Estate of Miller* at 893. “To make this determination, the court asks whether the witness will gain or lose by the direct legal operation of the judgment rendered in the litigation at hand.” *Id.* Here, the ratification contained in the codicil does not direct

a post death transfer of assets that is dependent upon the validity of the instrument as a testamentary document. Said statements are simply evidence of the testator's past gifts. As such, whatever benefit Amanda may receive from said statements, such benefit is not dependent on the validity of the instrument as a codicil. Her benefit will be the same whether the document was found to be a will, a contract, or simply a letter. Therefore, because Amanda has nothing to gain or lose from a ruling admitting the codicil to probate, she is not a "party in interest".

The testimony of Amanda Wolfgram as a disinterested witness is the only testimony required to prove the codicil for probate:

The subsequent incompetency from whatever cause of one or more of the subscribing witnesses, or their ability to testify in open court or pursuant to commission, or their absence from the state, shall not prevent the probate of the will. In such cases the court shall admit the will to probate upon satisfactory testimony that the handwriting of the testator and of an incompetent or absent subscribing witness is genuine or the court may consider such other facts and circumstances, if any, as would tend to prove such will.

RCW 11.20.040 (Emphasis added.)

The above statute addresses the specific question of what occurs when one or more witnesses to a testamentary document become incompetent or unable to testify. The statute states that it "shall not prevent the probate of the will." *Id.* Testimony need only be provided, which it has in this case, that Mary Wolfgram's signature is genuine.

Thus, as if Mary Wolfgram were deceased or unavailable to testify, Amanda Wolfgram may testify to the authenticity of Mary Wolfgram's signature. Even if Mary Wolfgram is deemed incompetent to testify after Mr. Vaupel's death under the Dead Man's Statute, she was competent to witness the signing of the codicil at the time it was signed, and Amanda Wolfgram may now attest to the validity of Mary Wolfgram's signature under RCW 11.20.040 as a disinterested witness.

If both Mary Wolfgram and Amanda Wolfgram were deemed incompetent to testify under the Dead Man's Statute, RCW 11.20.040 still allows for other evidence to be presented in proof of the will. The statute specifically states that the subsequent incompetency of one or more witnesses may be overcome by evidence that the handwriting of the testator and the absent or incompetent witnesses is genuine. *Id.* The statute even allows for the court to consider "other facts and circumstances" in determining whether to admit the will to probate. *Id.*

Mary Wolfgram may identify the validity of her own signature without violating the Dead Man's Statute. The identification of signatures does not come within the terms of the statute because such identification is not a transaction with the deceased or statement made by him.

*Goldsworthy v. Oliver*, 93 Wn. 67, 69, 160 P. 4 (1916); *see also Jewett v. Budwick*, 145 Wn. 405, 260 P. 247 (1927). Thus, pursuant to RCW

11.40.040 Mary Wolfgram's identification of her own signature, combined with Amanda Wolfgram's affidavit, is sufficient to allow the court to admit the Codicil for probate.

B. THE TRIAL COURT IMPROPERLY GRANTED RESPONDENT'S MOTION IN LIMINE PRECLUDING TESTIMONY PURPORTED TO BE SUBJECT TO THE DEAD MAN'S STATUTE.

1. Questions regarding the admissibility of evidence potentially barred by the Dead Man's Statute should only be determined at trial when such evidence is presented.

Pretrial motions to exclude evidence are designed to simplify trials and avoid the prejudice which often occurs when a party is forced to object in front of the jury to the introduction of inadmissible evidence. *Fenimore v. Donald M. Drake Const. Co.*, 87 Wn.2d 85, 89, 549 P.2d 483 (1976). The *Fenimore* decision was later distinguished and strengthened when the court in *State v. Sullivan*, 69 Wn. App 167, 847 P.2d 953 (1993) re-emphasized that the complaining party must make objection to preserve its right to appeal. The court stated, "We, therefore, hold that in the absence of any unusual circumstances that makes it impossible to avoid the prejudicial impact of evidence that had previously been ruled inadmissible, the complaining party at the time must make a proper objection in order to preserve the issue for appeal." *Id.* at 173 (emphasis added). Therefore, a trial court should grant a motion in limine only if it describes the evidence which is sought to be excluded with sufficient

specificity to enable the trial court to determine that it is clearly inadmissible under the issues as drawn or which may develop during the trial, and if the evidence is so prejudicial in its nature that the moving party should be spared the necessity of calling attention to it by objecting when it is offered during the trial. *Id.* at 91.

Here, the court improperly granted the motion in limine because this is a bench trial with little risk of prejudice, and because the excluded evidence was not described with sufficient specificity. First, the purpose of a motion in limine is to prevent the jury from being influenced by the mere act of the objecting party being forced to object. The judge has to hear the objectionable evidence regardless of when it occurs, whether in a pretrial motion or upon offer of proof at trial. When decisions on such objections to evidence are made in a bench trial, as would be the case in this matter, it is presumed that the court has the ability to ignore inadmissible evidence when making rulings on the objection, and more importantly for the purposes of a motion in limine, the court will not be unduly influenced by the mere act of making objection. Thus, there is little to no potential for prejudicial effect in a bench trial if the party is required to make objection at trial, and pretrial exclusion of the evidence is therefore improper.

Second, the trial court's decision to grant the motion in limine was

improper because the motion lacked sufficient specificity in describing the evidence which was to be excluded. The motion granted a very broad blanket prohibition on any testimony that may be excluded by RCW 5.60.030. The order did not describe with any specificity what anticipated testimony would be excluded, and did not in any way take into account the many exceptions and intricate nuances associated with what testimony is actually barred under RCW 5.60.030. *See Goldsworthy v. Oliver*, 93 Wn. 67, 69, 160 P. 4 (1916) (the **identification of signatures** does not come within the terms of the statute because such identification is not a transaction with the deceased or statement made by him); *see Jacobs v. Brock*, 73 Wn.2d 234, 437 P.2d 920 (1968) (testimony regarding **one's own impressions** is not barred by the Dead Man's Statute) *see Estate of Lennon*, 108 Wn. App 167, 29 P.3d 1258 (2001) (testimony regarding **ones own acts** is not barred by the Dead Man's Statue); *see Richards v. Pacific National Bank of Washington*, 10 Wn. App 542, 519 P.2d 272 (1974) (testimony as to **expectation of payment** is not barred by the Dead Mans Statute); *see Slavin v. Ackman*, 119 Wn. 48, 204 P. 816 (1922) (testimony regarding the **receipt of documents** from decedent not barred by the Dead Man's Statute). As can be seen, there is significant case law on what evidence is prohibited or not prohibited by the Dead Man's Statute. In each case, the specific facts must be applied to the specific law

to determine the admissibility of the specific evidence. It is entirely inappropriate, and significantly prejudicial to the party attempting to admit the evidence, to issue a blanket preclusion without knowing with some specificity what evidence is being offered.

Finally, the protections of the Dead Man's Statute are not an automatic prohibition, but an objection that must be made, and may be waived under a number of various situations, including the simple failure to object at trial. *Stranberg v. Lasz*, 115 Wn. App 396, 63 P.3d 809 (2003) (“[T]he deadman's statute may be waived by the failure to object to the evidence, by cross-examination that is not within the scope of direct examination, or by presenting testimony favorable to the estate ...”). It is up to the respondent to avoid offering evidence at trial that opens the door and to make objections at trial if and when appropriate. Any failure to object, or by offering such evidence, will waive the Dead Man's Statute.

C. THE TRIAL COURT ERRED WHEN IT ENTERED AN ORDER GRANTING THE ADMINISTRATOR'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE: CIR CLAIM OF MARY WOLFGRAM.

1. The trial court erred by failing to consider all relevant factors in determining whether a CIR exists, and whether an equitable division of property is required.

A meretricious relationship, now known as a Committed Intimate

Relationship (CIR)<sup>1</sup>, is a stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist. *Connell v. Francisco*, 127 Wn.2d 339, 346, 898 P.2d 831, 834 (1995). Relevant factors establishing a CIR include, but are not limited to: continuous cohabitation; duration of the relationship; purpose of the relationship; pooling of resources and services for joint projects; and the intent of the parties. *See Vasquez v. Hawthorne*, 145 Wn.2d 103, 33 P.3d 735 (2001) (emphasis added).

“The equitable law governing the property of committed intimate partners has evolved over the past 90 years.” *Olver v. Fowler*, 161 Wn.2d 655, 664, 168 P.3d 348 (2007). “...[O]ver the years, several cases have considered property distribution where one partner has died, the deceased partner was titleholder to property, and the living partner asserted an equitable interest in that property.” *Id.* “...[O]ver the past 90 years, when dealing with property distributions between partners in a committed intimate relationship, Washington common law has evolved to look beyond how property is titled, requiring equitable distribution of property that would have been community property had the partners been married.” *Id.* “Finally, as the law of committed intimate relationships has developed, [the courts] have not objected to its application even where the

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<sup>1</sup> *Olver v. Fowler*, 131 Wn. App. 135 (2006)

relationship at issue terminated with the death of one partner, rather than the dissolution of the relationship.” *Id.* Thus, the equitable laws related to the distribution of property at the end of a CIR continue to progress as a law that favors an equal and equitable distribution of property upon the termination of a CIR.

In his summary judgment motion, John Jardine cited *Vasquez*, *supra.*, for the proposition that, “Although these five factors are not meant to be exclusive, **they are each essential elements of a CIR.**” CP 549 (emphasis in original). However, the Court in *Vasquez*, did not state that the elements discussed were “essential”, explaining that they are simply, “... ‘factors’ to guide the court’s determination of the equitable issues presented, these considerations are not exclusive, but are intended to reach all relevant evidence.” *Vasquez* at 108. In the next sentence, the Court states that such determinations “...should seldom be decided by the court on summary judgment.” *Id.* (emphasis added). The *Connell* factors are neither exclusive nor hyper technical, and the Court should look at the totality of the circumstances surrounding each individual relationship to determine whether a CIR existed. *See Pennington v. Pennington*, 142 Wn.2d 592, 602, 14 P.3d 764 (2000). The trial court erred in failing to do so when making its ruling on the CIR.

In applying the *Connell* factors to the present case, it is apparent

that Ms. Wolfgram and Mr. Vaupel were involved in a CIR and that Ms. Wolfgram is entitled to an equitable share of the estate. Mr. Vaupel and Ms. Wolfgram cohabitated continuously for a duration of ten years, thus meeting the first two prongs of the *Connell* test. While such a long term relationship is not required to establish a CIR, the *Connell* Court considers such a “long term” commitment as a significant factor. *Connell* at 346. Consider that the Court in *Connell* found that six years was more than sufficient to establish a Committed Intimate Relationship in that case, and that under the proper circumstances as little as two years could be sufficient. *Connell* at 346; citing *Matter of Marriage of Lindsey*, 101 Wn.2d 299, 304-305, 678 P.2d 328 (1984). When the duration of the relationships in *Connell* and *Lindsey* are compared to the ten years of cohabitation, and 13 years of intimacy, between Ms. Wolfgram and Mr. Vaupel, the duration of this relationship is a very significant factor in demonstrating their relationship as a CIR.

In addition to the relationship’s duration and continuous cohabitation, all of the remaining *Connell* factors are also met. The purpose of Mr. Vaupel and Ms. Wolfgram’s relationship was indistinguishable from a similarly situated married couple enjoying retirement. They shared an intimate companionship that involved activities such as dining together, talking together, vacationing together,

holding common friendships, caring for one another's needs, and all the other normal activities couples enjoy during the twilight of their lives. As a couple, they shared their assets and services to achieve common goals. Note that in looking at a CIR, the discussion includes a pooling of assets and services. Where the trial court focused on the assets, this is only a small factor in the overall determination. Here, Ms. Wolfgram committed significant time and services to the care of Mr. Vaupel, the management of his assets, and the renovation of his home all of which resulted in significant emotional and financial benefits to Mr. Vaupel. Finally, the evidence indicates that it was the intent of Mr. Vaupel and Ms. Wolfgram to care for one another financially, emotionally, and physically for the rest of their lives.

Overall, it is clearly apparent that the couple lived and acted as though they were husband and wife. The clear intent of the parties was that they would enjoy each other's company as though they were a married couple, sharing all the normal intimacies and activities of a similarly situated married couple. Therefore, this matter must be remanded for a determination on the equitable division of assets.

2. The trial court erred by failing to allow evidence to be presented at trial in order to allow a complete review of all the complex equities involved in this matter.

The *Connell* court stated that, "We hold income and property

acquired during a meretricious relationship should be characterized in a similar manner as income and property acquired during marriage. Therefore, all property considered to be acquired during a meretricious relationship is presumed to be owned by both parties.” *Connell* at 351. Upon Mr. Vaupel’s death, Ms. Wolfgram was entitled to an equitable distribution of his property. *Olver v. Fowler*, 161 Wn.2d 655, 168 P.3d 348 (2007). After a court determines that a CIR exists, then the court will apply community property law by analogy: property acquired jointly during the relationship will be equitably divided between the partners, even if only one partner held title. *Id.* at 666. This right to equitable distribution survives death, and upon the death of one party, the survivor is entitled to an equitable distribution of all jointly acquired property. *Id.* at 668. Furthermore, when the funds or services owned by both parties are used to increase the equity or to maintain or increase the value of property that would have been separate property had the couple been married, this may establish a right of reimbursement in the “community”. *Connell* at 351.

There are many complex and competing equities involving all parties to this dispute. All the parties have claimed that the equities favor a greater distribution of the estate to themselves, and even the Decedent, Mr. Vaupel himself, has submitted a codicil evidencing that he felt

\$830,000 was a just and equitable distribution of the estate assets to Ms. Vaupel. The trial court's failure to allow a trial on these issues was error, and this case must be remanded for a review of the numerous complicated facts which are relevant to a determination of what is equitable in the present situation.

The trial court erred by focusing entirely on the financial contributions of each party in this relationship. The trial court should have applied *Connell* to characterize the 13 year's receipt of income to be community income and then looked to the co-related elements of pooling of assets and community efforts to determine a just and equitable distribution of the property. Ms. Wolfgram contributed significant community services that resulted in financial and emotional gains to the property. First, according to witnesses, she contributed significant efforts to the renovations of Mr. Vaupel's home. CP 236-240. Second, per Mr. Maloney's statements to the GAL in the guardianship matter, she helped manage Mr. Vaupel's investments. CP 690. Third, the care provided by Ms. Wolfgram was a key factor in limiting the amount of money Mr. Vaupel was forced to spend on a nursing home, in home care, or assisted living facility. When looking at the average cost of nursing home care in Washington State, this could reasonably be a benefit to the Estate of over \$100,000 per year.

Finally, during the relationship the assets grew by \$1,552,318.59. (See *infra*). This matter must be remanded for trial so that evidence can be gathered and presented to determine the extent of the economic benefit conferred by Ms. Vaupel on the Estate, and the equitable distribution she should be entitled to receive.

Ms. Wolfgram's contributions must also be viewed in light of the immense emotional benefit Mr. Vaupel received from her love, care, and companionship. Without Ms. Wolfgram's love and affection, Mr. Vaupel would have likely died depressed and alone, spending the last few years of his life in a nursing home being cared for by strangers. Not only would this have been a significant expense to the Estate, it would have been an immensely depressing way for Mr. Vaupel to spend his final years in this world.

Here, during the time that Mr. Vaupel and Ms. Wolfgram were involved in the CIR, they amassed wealth that is subject to an equitable distribution between Ms. Wolfgram and the Estate. When Versie Vaupel died in 1996, her estate tax form 706 indicated that the total gross estate was \$1,056,878.25. CP 285. When Mr. Vaupel died in 2010, the Estate inventoried his assets at \$2,609,196.84, an increase in value of **\$1,552.318.59** from 1996. CP 567. Ms. Wolfgram and Mr. Vaupel's CIR lasted from shortly after Versie Vaupel's death, until the death of Mr.

Vaupel. Because this increase in assets occurred during the CIR, Ms. Wolfgram is entitled to an equitable share of the \$1,552,318.89 in an amount to be determined and it was error to arbitrarily set that amount at zero, on summary judgment

3. The trial court erred in granting summary judgment in a situation where the relationship between the parties is both complicated and contested.

“In a situation where the relationship between the parties is both complicated and contested, the determination of which equitable theories apply should seldom be decided by the court on summary judgment... the trial court must weigh the evidence to determine whether [the claimant] has established his claim for equitable relief.” *Vasquez* at 108 (emphasis added). The burden of showing that there is no issue of material fact falls upon the party moving for summary judgment; all reasonable inferences must be resolved against the moving party, and the motion should be granted only if reasonable people could reach but one conclusion. *Hash by Hash v. Children's Orthopedic Hosp. and Medical Center*, 110 Wn.2d 912, 915, 757 P.2d 507, 508 (1988).

Here, the Trial Court erred in granting summary judgment because John Jardine failed to meet his burden of showing that there are no questions of material fact, and the Washington State Supreme Court has provided guidance that complicated and contested matters such as this

should seldom be decided by the court on summary judgment. *Vasquez* at 108 (emphasis added). The questions of whether Ms. Wolfgram and Mr. Vaupel were involved in a CIR, and what equitable distribution of Estate property Ms. Wolfgram is entitled to receive, are entirely dependent upon the facts which surround their very long relationship. *Id.* All of the evidence presented thus far clearly demonstrates the existence of a very caring, loving, marriage like relationship between Ms. Wolfgram and Mr. Vaupel. The Respondent failed to meet his burden of establishing that there are no issues of material fact and the trial court erred in ruling otherwise.

D. THE TRIAL COURT ERRED IN FAILING TO GRANT A STAY OF THE SUMMARY JUDGEMENT HEARING BECAUSE JUDICIAL RESOLUTION IS UNAVAILABLE UNTIL COMPLETION OF MEDIATION.

RCW 11.96A.280 requires that matters set for mediation under TEDRA, must go to mediation before further contested hearings are permitted:

A party may cause the matter to be presented for mediation and then arbitration, as provided under RCW 11.96A.260 through 11.96A.320. If a party causes the matter to be presented for resolution under RCW 11.96A.260 through RCW 11.96A.320, the judicial resolution of the matter, as provided in RCW 11.96A.060 or by any other civil action, is available only by complying with the mediation and arbitration provisions of RCW 11.96A.260 through RCW 11.96A.320. [Emphasis added.]

As discussed below, mediation is mandatory unless “good cause” is shown. RCW 11.96.300(3).

Applied to this case, RCW 11.96A.280 required that this matter be mediated prior to any judicial resolution such as the granting of a summary judgment motion. The court commissioner directed the parties to conduct mediation. RCW 11.96A.280 states that once a party has caused the matter to be resolved through mediation, “judicial resolution through RCW 11.96A.060 or by any other civil action” is unavailable until the mediation is complete. RCW 11.96A.280 (emphasis added).

The legislative reasoning for this is conveniently set forth in RCW 11.96A.260 Findings – Intent, which states:

The legislature finds that it is in the interest of the citizens of the state of Washington to encourage the prompt and early resolution of disputes in trust, estate, and nonprobate matters. The legislature endorses the use of dispute resolution procedures by means other than litigation. The legislature also finds that the former chapter providing for the nonjudicial resolution of trust, estate, and nonprobate disputes, chapter 11.96 RCW, has resulted in the successful resolution of thousands of disputes since 1984. The nonjudicial procedure has resulted in substantial savings of public funds by removing those disputes from the court system. Enhancement of the statutory framework supporting the nonjudicial process in chapter 11.96 RCW would be beneficial and would foster even greater use of nonjudicial dispute methods to resolve trust, estate, and nonprobate disputes. The legislature further finds that it would be beneficial to allow parties to disputes involving trusts, estate, and nonprobate assets to have

access to a process for required mediation followed by arbitration using mediator and arbitrators experienced in trust, estate, and nonprobate matters. Finally, the legislature also believes it would be beneficial to parties with disputes in trusts, estates, and nonprobate matters to clarify and streamline the statutory framework governing the procedures governing these cases in the court systems. (emphasis added).

Ms. Wolfgram served and filed a notice of intent to mediate pursuant to RCW 11.96A.300(3). The same statutory provision provides that the Court shall direct the parties to mediation, over the objections of any other party, unless “good cause” is shown why mediation should not be ordered. The statute also specifically provides that “Such order shall not be subject to appeal or revision.” If the Court does not direct the parties to mediation then the statute directs the court to dispose of the matter by: “(a) Deciding the matter at that hearing, (b) requiring arbitration, or (c) directing other judicial proceedings.” Here, the court ordered the parties to mediation and did none of the latter options provided in RCW 11.96A.300(3).

By ruling on the Respondent’s motions for summary judgment, the trial court violated the express terms of RCW 11.96A.280. Instead, as the statute directs, the trial court should have stayed the hearing on the summary judgment motions so that the parties could complete mediation.

## **VI. CONCLUSION**

For the reasons set forth above, Ms. Wolfgram respectfully

requests that the Court of Appeals find that the trial court erred in granting John Jardine's motions for summary judgment and motion in limine and remand the case to the trial court for further proceedings.

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**CERTIFICATE OF SERVICE**

I, MICHELLE N. WIMMER, hereby declare and state as follows:

1. I am over the age of majority, competent to testify and make the following statements based upon my own personal knowledge and belief.
2. I am now and at all times herein mentioned employed by the offices of Helsell Fetterman LLP, 1001 4<sup>th</sup> Avenue, Suite 4200, Seattle, WA 98154.
3. In the appellate matter of In re Estate of Warren F. Vaupel, I did on September 12, 2011 (1) cause to be filed with this Court the Appellant's Brief; (2) cause Appellant's Brief to be delivered via ABC Legal Messengers, Inc. to the following recipients: Richard L. Furman Jr, Aiken, St. Louis & Siljeg, P.S., 801 2nd Ave Ste 1200, Seattle, WA 98104-1571; Gail E. Mautner, Dawn S. Spratley, Lane Powell PC, 1420 5<sup>th</sup> Avenue, Ste 4100, Seattle, WA 98101; via Email and US Mail to Colleen G. Warren, Assistant Attorney General, Attorney General of Washington, P. O. Box 40100, Olympia, WA 98504-0100; and via Email to Beth A. McDaniel.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

DATED: September 12, 2011

  
MICHELLE N. WIMMER