

CASE NO. 67212-6-I

IN THE COURT OF APPEALS, DIVISION I
FOR THE STATE OF WASHINGTON

In re Estate of
WARREN F. VAUPEL,
Deceased;
Mary Wolfgram,
Appellant,

v.

John Jardine,
Respondent.

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BRIEF OF RESPONDENT

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I. INTRODUCTION AND NATURE OF THE CASE

This brief is filed on behalf of the Respondent John Jardine, the Administrator of the Estate of Warren F. Vaupel (the “Estate Administrator”). The King County Superior Court appointed Mr. Jardine to administer the Estate. Following his appointment, the Estate Administrator filed a petition seeking a declaration that the appellant Mary Wolfgram was not entitled to any distribution from the decedent’s estate. The Estate Administrator is a neutral professional fiduciary, who has no personal or pecuniary interest in the case.

Mary Wolfgram was a neighbor of Warren Vaupel, a widower who died at age eighty-six having suffered dementia and Parkinson’s Disease for a number of years. Ms. Wolfgram claimed to have a “committed intimate relationship” with Mr. Vaupel, whom she had isolated from his family in the years preceding his death. Based on this alleged relationship, she claimed entitlement to an equitable distribution of property from his estate.

She did not contribute financially to the alleged relationship. There were no assets jointly acquired during the relationship. The equitable underpinning of the CIR doctrine is to protect unmarried persons who jointly acquire property during the relationship so that

one party is not unjustly enriched at the end of such a relationship. This case did not present those facts. Ms. Wolfgram had no property interests of her own to protect. Accordingly, the lower court properly dismissed this claim as a matter of law.

Ms. Wolfgram filed a belated petition claiming, alternatively, that the decedent executed a codicil to his will providing for a distribution to her.¹ Mr. Vaupel's will provided for distribution of his estate to charities, namely: Barnes Hospital in St. Louis; Fred Hutchinson Cancer Research Center in Seattle; Laumeier Sculpture Park Foundation in St. Louis; and, Evergreen State College in Olympia. Although Ms. Wolfgram received generous benefits from Mr. Vaupel in the last years of his life, and his niece even raised with him the possibility of leaving something to Ms. Wolfgram in his will, he chose not to leave anything to her.

The alleged "codicil" is a handwritten document prepared by Mary Wolfgram and signed by her as the maker and as a party to an alleged *inter vivos* promissory transaction with Mr. Vaupel. It is one of a series of documents prepared by Ms. Wolfgram that recite Ms. Wolfgram's "entitlement" to Mr. Vaupel's surrender of hundreds of thousands of dollars and/or control of his assets to her.

¹ She had previously admitted that the 1996 will admitted to probate was Mr. Vaupel's last will and testament and "no new will was ever prepared." (CP 197).

The apparent purpose of the writing was to document an alleged contract or agreement Ms. Wolfgram had with Mr. Vaupel and to seek his confirmation of the agreement after the fact. The document on its face is non-testamentary and executed without will formalities. Accordingly, the lower court dismissed this secondary claim.²

II. RESTATEMENT OF THE FACTS

A. Background Facts and Procedural History.

The decedent Warren Vaupel was 86 years old on July 7, 2010 the date of his death. (CP 147; 155; 679). His wife, Versie Vaupel predeceased him in 1996. (CP 164). He had no children, but he had a number of nieces and nephews with whom he had been close. (CP 51, 318-19). He lived on retirement benefits, Social Security and capital gains from his investment accounts. Prior to his death, his monthly income was estimated at approximately \$6,367.00 from interest income on his investments, Social Security payments and retirement/pension benefits. (CP 35). Mr. Vaupel suffered from Parkinson's disease and dementia. (CP 34; 679).

² Ms. Wolfgram filed and presented a Creditor's Claim (to the Estate Administrator) alleging contract claims (CP 710-715), but those claims were not before the lower court pursuant to the two petitions identified above. The Creditor's Claim was rejected by the Administrator and no timely complaint, as required by RCW 11.40.100 was ever filed.

Mr. Vaupel left a Last Will and Testament dated January 18, 1996 (prepared shortly before his wife's death). (CP 1-7). His will leaves nominal bequests to certain individuals and then leaves the residue of his estate to charities mentioned above. (CP 1-7). His estate is worth approximately \$2.6 million. (CP 556). Investment and bank accounts total approximately \$2.0 million. (CP 559-570).

He also owned two parcels of residential real estate. One parcel is located at 1402 N. 2nd Street, Renton, Washington; the other parcel is located at 1210 N. 2nd Street, Renton, Washington. The probate inventory valued these two parcels of real estate at \$492,000.00 together. (CP 569). The final guardianship report states that the real property decreased in value by \$132,000 from 2009 to 2010. (CP 383; 557).

On May 21, 2009, Mr. Vaupel was admitted to Valley Medical Center suffering from excessive weakness and confusion. (CP 11). While Mr. Vaupel was at the hospital, Mary Wolfgram and her brother, John Wolfgram³, a former California attorney on inactive

³ On April 2, 2010, John Wolfgram filed a *pro se* Complaint with the King County Superior Court against John Jardine, Mary Wolfgram, and Beth McDaniel, and attached to that complaint four documents dated May 11, 2006, September 17, 2007, April 5, 2008, and July 8, 2008. (CP 481-488). These documents are all very similar in nature to the June 12, 2008 document that Ms. Wolfgram seeks to admit into probate. Like the June 12, 2008, document, each of the attached documents was hand-written in a spiral notebook, in Ms. Wolfgram's handwriting, then allegedly signed by Mr. Vaupel at the

disability status, apparently attempted to have Mr. Vaupel execute legal documents described as a new will, power of attorney, domestic partnership agreement and marriage license. (CP 11). The notary who had been called to Mr. Vaupel's hospital room refused to notarize the documents and reported her concerns to the hospital social worker. (CP 12). The hospital petitioned for the appointment of a guardian for Mr. Vaupel because of his incapacity. (CP 11).

On June 11, 2009, the appellant Mary Wolfgram filed a counter-petition in the guardianship action seeking to have herself appointed guardian for Mr. Vaupel and representing that she was Mr. Vaupel's unregistered domestic partner. (CP 34-37). On July 21, 2009, Warren Vaupel was adjudicated to be incapacitated as to his person and estate. (CP 39-48). Mary Wolfgram was appointed his guardian. (CP 41). John Jardine of Unlimited Guardianship Services of Washington, a certified professional guardianship agency, was appointed the 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 47).

bottom, at a time when he was a "vulnerable adult" within the meaning of RCW 74.34.020(16).

Ms. Wolfgram, in her guardian capacity, prepared a verified guardianship inventory dated September 24, 2009. (CP 128-133). She did not claim any partial interest in the assets as she now does pursuant to her CIR theory. She also did not list herself as a lienholder or creditor.

Mary Wolfgram asked to resign as the guardian of Mr. Vaupel's estate. (CP 13). On May 4, 2010, Unlimited Guardianship Services of Washington was appointed full guardian of the estate in her place. (CP 13). Mary Wolfgram was removed but not discharged as guardian of the estate, and she remained guardian of the person. (CP 134-135). Ms. Wolfgram did not object to the Final Report and Accounting of Unlimited Guardianship Services of Washington that did not show her as having any interest in Mr. Vaupel's assets. The lower court entered an order approving the final report and accounting on October 5, 2010. (CP 152-154).

Following Mr. Vaupel's death, Warren Vaupel's Will was admitted to probate, and John Jardine was appointed the Administrator with Will Annexed of the probate estate on October 19, 2010. (CP 155-162). In January 2011, Mr. Jardine filed a petition under TEDRA seeking an adjudication of Mary Wolfgram's claim against the estate based on an alleged committed

intimate relationship with Mr. Vaupel. (CP 8-29). In February 2011, Mr. Jardine filed a motion in limine seeking an order precluding Ms. Wolfgram from testifying in support of her claim based on the Deadman's Statute. (CP 324-328).

The lower court granted the motion in limine on April 12, 2011. (CP 581-82). "Mary Wolfgram is hereby PRECLUDED from offering any further testimony, directly or indirectly, in her own behalf as to any transaction had by her with, or any statement made to her, or in her presence, by the decedent Warren Vaupel." (CP 582). Ms. Wolfgram filed several sworn and unsworn statements with the lower court at various times. (CP 192-214); (CP 220-226); (CP 255-256); (CP 336-339); (CP 344-345); (CP 519-521). These statements are inadmissible to the extent precluded by the above order prohibiting any testimony on her behalf as to transactions with or statements made by the decedent.

The Estate Administrator filed a Motion for Partial Summary Judgment Re: The CIR Claim on March 31, 2011 and noted it for hearing on April 29, 2011. (CP 544-555). Likewise, the Estate Administrator's Motion for Partial Summary Judgment Re: Codicil Claim was filed on March 31, 2011 and noted for hearing on April

29, 2011. (CP 571-576). The lower court granted both summary judgment motions on April 29, 2011. (CP 667-669); (CP 670-672).

B. Ms. Wolfgram Has Cited Irrelevant and Inadmissible Evidence That is Misleading on the Merits.

In her statement of facts, Ms. Wolfgram refers to matters that are misstated, misleading and irrelevant to the issues. She makes reference to Liz Stevensen, Mr. Vaupel's niece living in Missouri, and suggests that Ms. Stevenson can testify that "Mr. Vaupel had intentions of making a testamentary disposition for Ms. Wolfgram." Brief of Appellant at 7. Ms. Stevenson is appalled that she is being used in this manner. (CP 466-67). She only knew Ms. Wolfgram as a friend and a care-giver. (CP 467). She did not recognize any "spousal-like" relationship. (CP 467). She was not aware of the tremendous amount of financial assistance Ms. Wolfgram received from her uncle. (CP 467). She believes Ms. Wolfgram prevented communication between her and her uncle after 2006. (CP 468). She does not support Ms. Wolfgram's claim. (CP 466-67).

Ms. Wolfgram offers the Guardian ad Litem Report (CP 673-705) containing hearsay interviews with Ms. Wolfgram, Mr. Vaupel and others. Brief of Appellant at 9. The Guardian ad Litem Report

is hearsay as to interviews with out of court witnesses if offered to establish the truth of the matter asserted. The Guardian ad Litem has no personal knowledge except as to his physical observations of Mr. Vaupel. The Estate Administrator objected to the use of the report in this manner for any purpose on the merits. (CP 641-642).

Ms. Wolfgram makes reference to proposals and discussions with John Jardine and others, during the guardianship proceeding before Mr. Vaupel's death, to settle or resolve Ms. Wolfgram's claim. Brief of Appellant at 10 – 13. There was no resolution pursuant to these proposals. This subject is not admissible under Evidence Rule 408 and is not relevant to the issues presented by this appeal. Mr. Vaupel died before material facts could be investigated and the subject mediated.

After Mr. Vaupel's death, the Estate Administrator received information clarifying the nature of the alleged relationship. Based on this information, it was the Estate Administrator's judgment that a CIR relationship did not exist (CP 25-26) and, as a result, he filed the petition seeking that determination. (CP 8-29).

C. The Alleged Committed Intimate Relationship.

Mary Wolfgram was a neighbor of Warren Vaupel. (CP 9). She alleges to have moved-in with Mr. Vaupel around 1999, after

his wife's death in 1996, and to have continued to live with him until 2009. (CP 9). In 1999, Ms. Wolfgram was 53 years old and Mr. Vaupel was 75 years old. Ms. Wolfgram had no means of supporting herself. She had no job or any assets except a house and a car. Public financial assistance had ended for her when her youngest daughter graduated from high school in 1998.

Her living expenses were funded by Mr. Vaupel. Mr. Vaupel paid all housing, medical, dental and personal expenses. (CP 58; 199). He funded repairs to her house which she estimated to cost \$15,200.00. (CP 57-58). Ms. Wolfgram claims he also gifted her about \$6,000 to \$6,500 annually. (CP 57). Additionally, she claims he gifted \$105,000 to her daughter Amanda between 2005 and 2008. (CP 59-71)⁴. She would write out the checks and he would sign them. Mr. Vaupel's bank statements show a systematic pattern of cash withdrawals during the period of the alleged relationship with Ms. Wolfgram. (CP 59-78).

Ms. Wolfgram acknowledges that she did not contribute financially to their alleged relationship. (CP 193; 199; 206-207). She had no means to do so. (CP 193). She had no income and no

⁴ This total includes three checks, totaling \$59,000, that were issued between February 2009, and April 2009, shortly before his hospitalization and immediately preceding the declaration of Mr. Vaupel's incapacity. (CP 69-71).

substantial property. They never married or registered as a domestic partnership. Mr. Vaupel never changed his will to provide for Ms. Wolfgram.

Ms. Wolfgram does not allege, and there is no dispute, that they did not pool financial resources or purchase assets together. The bank and investment accounts are exclusively Mr. Vaupel's funds. (CP 556-557). Ms. Wolfgram made no deposits of her own monies to these accounts. (CP 556-557). Mr. Vaupel's Social Security benefits and his retirement benefits were deposited to these accounts. (CP 556-557).

Mr. Vaupel purchased his real estate during his marriage long before this relationship. (CP 556-557). He paid for the real estate with his own funds. (CP 556-557). Ms. Wolfgram does not contend she invested financially in his homes. (CP 256). He funded all remodeling expenses to his home at 1402 N. 2nd Street, Renton, Washington. (CP 256). Ms. Wolfgram did not contribute financially to the improvement of Mr. Vaupel's real estate.

Summarizing, there was no "pooling" of financial resources or joint acquisition of assets. All monetary or financial considerations flowed exclusively from Mr. Vaupel to Ms. Wolfgram. Ms. Wolfgram did not have the means to contribute

anything financially to the alleged relationship. There were no assets jointly acquired during the relationship.

D. The Alleged Codicil.

On October 21, 2010, the Last Will and Testament of Warren Vaupel dated January 18, 1996 was admitted to probate with John Jardine appointed to serve as the Administrator with Will Annexed. (CP 155-162). On February 10, 2011, Ms. Wolfgram answered the Administrator's TEDRA petition. (CP 192-214). She admitted that Warren Vaupel died testate and that the January 18, 1996 will admitted to probate was his Last Will and Testament. (CP 194; 195). "It appears that no new will was ever prepared." (CP 197).

Inexplicably, eight days later on February 18, 2011, Mary Wolfgram produced a purported "agreement" or "contract" dated June 12, 2008, together with an affidavit signed by her and an affidavit signed by her daughter, Amanda, each dated February 16, 2011. (CP 336-347). The affidavits attest to the execution of what they contend was a "codicil" to the Last Will. Ms. Wolfgram petitioned for admission of the document to probate as a valid "codicil." (CP 336-338).

The alleged codicil is dated June 12, 2008. (CP 341). It is handwritten but not in Mr. Vaupel's handwriting. Mary Wolfgram admits she wrote the document. (CP 519). She signs the document as its maker and a party to the transaction.⁵ (CP 343). The document is witnessed by Amanda Wolfgram, Mary's daughter. (CP 343).

The document states it is not a will. It is addressed to the "administrator of the estate of Warren F. Vaupel" and, on the first page, states that it is descriptive of the "last agreement between me, Warren, and Mary." (CP 341). On the last page, the document states it is signed as a "contract and agreement." (CP 343).

Ms. Wolfgram filed a Creditor's Claim⁶, based on the alleged contract, but has not pursued it.⁷ She alleges in the Creditor's Claim that she had an express contract for "care, domestic services and management of Mr. Vaupel's finances." If not an express contract, then she alleges an implied contract. She contends the handwritten document, described above, is

⁵ The placement, context and introduction of Ms. Wolfgram and Amanda's signatures are significant as to the capacity in which they sign.

⁶ A copy of the Creditor's Claim is in the Clerk's Papers at CP 710-715.

⁷ The Estate Administrator has rejected the claim on March 4, 2011. (CP 528). The notice of rejection states that the claimant must bring suit against the Administrator within 30 days after notice of rejection or the claim is forever barred. (CP 528). To date, Ms. Wolfgram has not pursued the creditor's claim by bringing any action to enforce it.

confirmation of the contract claim. She attached it as an exhibit to her Creditor's Claim. (CP 713-715).

The handwritten document purports to give Ms. Wolfgram \$750,000.00 to invest; \$60,000.00 to remodel her home; \$20,000.00 to purchase a new car; and, money to pay her taxes and any legal fees. (CP 341-343); (CP 713-715). It purports to ratify past financial gifts to Ms. Wolfgram's daughter. (CP 342); (CP 714). The total amount for Ms. Wolfgram is \$830,000.00. (CP 343); (CP 715).

III. RESTATEMENT OF THE ISSUES

As to the CIR claim, the issue is whether Ms. Wolfgram produced substantial evidence in response to the summary judgment motion to meet the legal requirements for an equitable division of joint property pursuant to the CIR doctrine. In other words, did the lower court err in granting summary judgment given the undisputed facts that no "community-like" property was acquired during the relationship; Mr. Vaupel paid all living expenses; there were no joint bank accounts or investments; and no property was acquired jointly.

As to the codicil claim, the issue is whether Ms. Wolfgram's claim is precluded as a matter of law because the handwritten

document is not a will, does not purport to be a will, and is not executed with will formalities. A further issue is whether Mary and Amanda are disqualified from testifying after Mr. Vaupel's death to transactions with him in an effort to convert what is described as a contract into a will.

Ms. Wolfgram also argues that the lower court erred by granting the motion in limine excluding testimony barred by the Deadman's Statute. Brief of Appellant at 3-4. Yet, as to the CIR claim, Ms. Wolfgram's opening brief does not identify any material evidence that was excluded based on the Deadman's Statute. Nor is any legal authority bearing on the issue cited. Accordingly, the issue must be deemed waived as to the CIR claim because it is not argued or briefed. *Smith v. King*, 106 Wn.2d 443, 451-452, 722 P.2d 796 (1986).

As to the codicil claim, Ms. Wolfgram claims she is competent to testify under RCW 11.12.160 and that the Deadman's Statute is inapplicable. Brief of Appellant at 2-4. However, this Court does not get to this issue because the document is not a will codicil. A threshold issue is whether parol or extrinsic evidence is admissible to contradict the stated non-testamentary character of the document. The Deadman's Statute is only a secondary issue

presenting the question whether Ms. Wolfgram and Amanda may testify on the nature of the transaction after Mr. Vaupel's death.⁸ In other words, only if extrinsic evidence is admissible to change the character of the document, does the issue over Ms. Wolfgram and Amanda's competency become material.

Finally, Ms. Wolfgram raises an issue regarding whether the lower court has authority under TEDRA to decide the matter before mediation has taken place. Brief of Appellant at 3, 52-54. These issues are addressed below in that order.

IV. REBUTTAL ARGUMENT

A. Summary Judgment Principles.

A motion for summary judgment may be granted when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Civil Rule 56. A genuine issue is one on which reasonable minds may differ. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). A material fact is one on which the outcome of the

⁸ Ms. Wolfgram also asserts procedural error from the pretrial ruling on the application of the Deadman's Statute. Brief of Appellant at 3-4. This issue is moot if the summary judgments are proper on the merits. Furthermore, it is entirely proper for a trial court to rule on evidentiary issues in advance of trial to simplify the trial, clarify the course of proceedings and give instruction on evidentiary issues to avoid time with objections. *Fenimore v. Donald M. Drake Constr. Co.*, 87 Wn.2d 85, 89, 549 P.2d 483 (1976).

litigation depends. *Atherton Condo. Apt. Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

The moving party bears the initial burden of showing the absence of an issue of material fact. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). A moving defendant may meet the initial burden by showing that there is an absence of evidence to support the nonmoving party's case. *Id.* at 225 n.1 citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). If a defendant makes the initial showing, then the burden shifts to the plaintiff to establish that there is a genuine issue of material fact. *Id.* at 225.

The plaintiff may not rely on speculation or on having her own affidavits accepted at face value. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). She must put forth specific facts showing the existence of a triable issue. *Id.* "If . . . the plaintiff fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial, then the trial court should grant the motion. . . . In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the

nonmoving party's case necessarily renders all other facts immaterial." *Young, supra* at 112 Wn.2d at 225 quoting *Celotex, supra* 477 U.S. at 322-23.

B. Ms. Wolfgram Did Not Have Sufficient Evidence of a Committed Intimate Relationship

The Supreme Court has adopted the term "committed intimate relationship" for what was formerly known as a "meretricious relationship." *Olver v. Fowler*, 161 Wn.2d 655, 657 n.1, 168 P.3d 348 (2007).⁹ A CIR 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 (1995). The CIR doctrine evolved to protect unmarried parties who acquire property during their relationships "so that one party is not unjustly enriched at the end of such a relationship." *In re Marriage of Pennington*, 142 Wn.2d 592, 602, 14 P.3d 764 (2000). To assess whether a relationship is sufficiently "marriage-like" to support any "equitable division" claim, the Washington Supreme Court has

⁹ The Supreme Court chose to substitute "committed intimate relationship" for meretricious relationship because it regarded the latter term as having negative and derogatory connotations. Division III of the Court of Appeals chooses to use phraseology "equity relationship" as a "neutral, more accurately descriptive, substitute term in analyzing the common fact-equity issues found in this subject area." *In re Long*, 158 Wn. App. 919, 922, 244 P.3d 26 (2010). In this brief, the term "CIR" is used because that is the phrase last chosen by the Supreme Court.

identified the following list of non-exclusive factors: (1) continuous cohabitation; (2) duration of the relationship; (3) intent of the parties; (4) pooling of resources; and (5) a marriage-like purpose for the relationship. *In re Marriage of Lindsey*, 101 Wn.2d 299, 304-05, 678 P.2d 328 (1984). Although these five factors are not meant to be exclusive, **they are each essential elements of a CIR.** *Vasquez v. Hawthorne*, 145 Wn.2d 103, 108, 33 P.3d 735 (2001) (each of these factors are intended “to reach all relevant evidence”)¹⁰.

Substantial pooling of resources is required as one of the elements because only in that circumstance is the underlying rationale for the CIR doctrine – to deter unjust enrichment – satisfied. The primary concern in any equitable division claim is to prevent unjust enrichment of one party to the detriment of the other when unmarried couples jointly acquire property during their relationship. *In re Pennington, supra* 142 Wn.2d at 602. The facts are insufficient to support the claim where “the parties maintained separate accounts, purchased no significant assets together, and did not significantly or substantially pool their time and effort”

¹⁰ Ms. Wolfgram incorrectly argues that *Vasquez* does not rule that the five factors are essential elements of the CIR theory. Brief of Appellant at 45. To the contrary, *Vasquez* states these factors are each necessary to reach all relevant evidence.

In re Pennington, supra 142 Wn.2d at 607 (the absence of these facts will not support any conclusion that the parties mutually intended a meretricious relationship).

In *Pennington*, the Supreme Court addressed two cases. The first case was an alleged relationship between Clark Pennington and Evelyn Van Pevenage. Evelyn presented evidence that the parties shared some living expenses and that she cooked meals, cleaned the house, and helped with interior decoration. But, she presented “no evidence to suggest she made constant or continuous payments [or] jointly or substantially invested her time and effort into any specific asset so as to create any inequities.” *In re Pennington, supra* 142 Wn.2d at 605. The Court determined that the pooling factor was not satisfied. There was insufficient evidence to support any equitable distribution of property. *Id.*

The second relationship was between James Nash and Diana Chesterfield. They had a joint bank account for living expenses and shared mortgage payments, but maintained separate bank accounts, contributed to separate retirement plans, and purchased no property jointly. *Id.* at 606-07. The Court held that the evidence did “not fully establish the parties jointly pooled their

time, effort, or financial resources enough to require an equitable distribution of property. . . .” *Id.* at 607.

Ms. Wolfgram argues that she meets the pooling of resources requirement by giving her “time and services to the care of Mr. Vaupel.” Brief of Appellant at 47. But, she makes no showing that her services were invested in a specific asset to justify its equitable division. The joint creation of assets through the pooling of resources is the very underpinning for the equitable claim. Under *Pennington*, the pooling factor is satisfied if the parties “jointly invested their time, effort, or financial resources in any specific asset to justify the equitable division of the parties’ property *acquired during the course of their relationship.*” *In re Pennington, supra* 142 Wn.2d. at 605 (emphasis added). Here, there is no evidence that Ms. Vaupel pooled her resources with Mr. Vaupel to jointly create or acquire any specific assets with Mr. Vaupel.

The Estate Administrator could not identify any facts to support Ms. Wolfgram’s claim. The real estate was purchased prior to this alleged relationship. (CP 557). The real property has decreased in value from 2009 through 2010 by about \$132,000.00. (CP 557). The bank and investment accounts were established

prior to the relationship. (CP 557). Ms. Wolfgram never contributed any of her monies to these accounts or to Mr. Vaupel's assets. (CP 557). Any fluctuation in value is the result of market forces. (CP 557). The Estate Administrator is not aware of assets jointly acquired during the period 1999 to 2010. (CP 557).

Ms. Wolfgram incorrectly claims that during the relationship assets grew by \$1,552,318.59. Brief of Appellant at 4 & 50. She cites to the Estate Tax Return (CP 285) prepared when Versie Vaupel, Mr. Vaupel's wife, died in 1996. Id. at 50. She claims that this return shows a total gross estate of \$1,056,878.25 and compares it to the \$2.6 million value of assets at Warren Vaupel's death in 2010 to reach the erroneous conclusion that assets grew in value by about \$1.5 million. Id.

The Estate Tax Return prepared in 1996 when Versie died shows **her** gross estate – i.e., the decedent's one-half share of the community property. The figures on the return are 50% of total value. In 1996, using the estate tax return, the jointly held community property had a value of approximately \$2.1 million compared to a value in 2010 of \$2.6 million or an increase of about \$500,000.00. Such appreciation is consistent with market fluctuations over 14 years and Mr. Vaupel's cash deposits since

Versie's death. (CP 556-557). Ms. Wolfgram cites no direct and positive evidence that she financially invested in or produced the increase in value. Conclusory arguments are insufficient to support this claim and defeat summary judgment.

Cohabitation, companionship, cleaning house and cooking meals are insufficient to establish an equitable right to someone else's property. *In re Pennington, supra*. If the doctrine applies here, then it could apply in almost any situation involving an affectionate live-in care provider. Companionship and the rendition of domestic services, without more, is insufficient as a matter of law to establish an equitable claim to Mr. Vaupel's property. *In re Pennington, supra* 142 Wn.2d at 604-07. Ms. Wolfgram is actually making an unsupported claim for compensation for services rendered without recognizing that the theoretical basis for such a claim is in contract or quasi-contract. The facts in this case simply do not fit into CIR doctrine.

C. There is No Jointly Acquired Property to be Equitably Divided Even Assuming a CIR Relationship.

For the purpose of dividing property at the end of a meretricious relationship, the definitions of 'separate' and 'community' property found in RCW 26.16.010-.030 apply by analogy. *Connell v. Francisco, supra* 127 Wn.2d at 351.

“Therefore, property owned by one of the parties prior to the meretricious relationship and property acquired during the meretricious relationship by gift, bequest, devise, or descent with rents, issues and profits thereof, is not before the court for division. All other property acquired during the relationship would be presumed to be owned by both of the parties.” *Id.* The court cannot “equitably distribute” any “separate” property. As the Supreme Court has explained:

Until the Legislature, as a matter of public policy, concludes meretricious relationships are the legal equivalent to marriages, we limit the distribution of property following a meretricious relationship to property that would have been characterized as community property had the parties been married. This will allow the trial court to justly divide property the couple has earned during the relationship through their efforts without creating a common-law marriage or making a decision for a couple which they have declined to make for themselves. Any other interpretation equates cohabitation with marriage; ignores the conscious decision by many couples not to marry; confers benefits when few, if any, economic risks or legal obligations are assumed; and disregards the explicit intent of the Legislature that RCW 26.09.080 apply to property distributions following a marriage.

Id. at 350. “If there is no community-like property, there is nothing for the court to justly and equitably distribute.” *Soltero v. Wimer*, 159 Wn.2d 428, 434, 150 P.3d 552 (2007). In making its just and

equitable distribution, the court cannot authorize a stream of payment in the nature of ‘alimony’ or ‘support,’ nor can the court treat ‘domestic services’ as ‘community-like property.’ *Id.* “Committed intimate relationship” law is thus limited to preventing economic unjust enrichment with respect to property *acquired during the relationship*; it does not extend to broader, general equities of the relationship or to pre-relationship separate property.

“The court may not dispose of the parties’ separate property” to satisfy an equitable division claim. *In re Long*, 158 Wn. App. 919, 929, 244 P.3d 26 (2010). Likewise, it is presumed that any increase in the value of separate property is likewise separate in nature. *Id.* The presumption may be rebutted only by “direct and positive evidence that the increase is attributable to [her] community . . . labors.” *Id.*

Here, there is no “community-like” property to divide even if the Court were to find a committed intimate relationship. (CP 556-557). There was no jointly acquired property during the relationship. There were no wages, and therefore no “community” income, given that Mr. Vaupel was retired and Ms. Wolfgram did not work.

Ms. Wolfgram acknowledges that any equitable distribution must be of jointly acquired property. Brief of Appellant at 48. Yet, she does not identify any such property. There simply is no “community” property in which Mary Wolfgram may claim any equitable entitlement.

The “community” may be entitled to reimbursement if “community” labor caused an increase in the value of “separate” property. *In re Long, supra* 158 Wn. App. at 929. Such a claim is limited to an asset’s appreciation directly attributable to uncompensated, individual efforts. *See, e.g., In re Marriage of Elam*, 97 Wn.2d 811, 816, 650 P.2d 213 (1982). There must be “direct and positive evidence” to overcome the presumption that any increase in the value of separate property is likewise separate in nature. *In re Long, supra* 158 Wn. App. at 929. “A court may offset the ‘community’s right of reimbursement against any reciprocal benefit received by the ‘community’ for its use and enjoyment of the individually owned property.” *Connell v. Francisco, supra* 127 Wn.2d at 351.

Here, the major asset in Mr. Vaupel’s estate is the investment and bank accounts. Any appreciation in value of those accounts during the relationship is purely a result of market forces.

(CP 556-57). During the relationship, Mr. Vaupel did some remodeling of the house at 1402 N. 2nd Street. Mr. Vaupel paid for these improvements to his property with his funds. (CP 556-557) Furthermore, there is no evidence of any appreciation in value of either parcel of real estate, let alone appreciation in amounts exceeding the cost of these improvements. Indeed, the real estate depreciated in value. (CP 557).

Ms. Wolfgram did not contribute any funds or any labor on the remodel project, although she claims to have planned the remodel and oversaw the labor of the contractors. Yet, there is no dispute that Mary Wolfgram did not contribute any “sweat equity” or significant labor to the project. Moreover, she was amply compensated by her use and enjoyment of Warren’s homes rent-free and, additionally, received substantial financial support for her living expenses.

Mary Wolfgram has failed to provide any “direct and positive evidence” that she committed “uncompensated community” labor substantially increasing the value of Mr. Vaupel’s individual property. In her verified inventory (CP 128-133), prepared in her guardian capacity, she did not even claim any interest in Mr. Vaupel’s assets. Her sworn account precludes her

present claim either by inconsistent position or judicial admission. See *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 230, 108 P.3d 147 (2005) (failure to disclose claim when under a duty to do so); *Seidler v. Hansen*, 14 Wn. App. 915, 920, 547 P.2d 917 (1976) (sworn pleadings are judicial admissions).

Her CIR theory does not have the facts to support it. It is not legally sufficient to allow this claim against the Estate to proceed based upon Ms. Wolgram's vague and generalized concept of equity. "Mere allegations, argumentative assertions, conclusory statements, and speculation do not raise issues of material fact that preclude a grant of summary judgment." *Greenhalgh v. Department of Corrections*, 160 Wn. App. 706, 248 P.3d 150 (2011). The lower court properly granted summary judgment.

E. The Writing, Alleged to Be a Codicil, is Plainly Not a Codicil Based on Express Contractual Language in the Document.

Ms. Wolfgram argues that the handwritten document (CP 341-343) is testamentary. Brief of Appellant at 17-22. The handwritten document is not a will or a will codicil and does not purport to be such. Rather, Ms. Wolfgram prepared a writing setting forth her version of an agreement with Mr. Vaupel and then

sought to have Mr. Vaupel confirm it. Her purpose apparently was to document a purported verbal agreement with her.

The document states it “is the last agreement between me, Warren, and Mary.” (CP 341). “I, Warren, sign the contract and agreement with full knowledge of its contents.” (CP 343). It is a two-party transaction. Ms. Wolfgram wrote it (CP 519) and signed it as one party to the alleged agreement (CP 343). She did not sign as a witness to a will; she signed as a party to the alleged promissory transaction. Mr. Vaupel purportedly signed as the other party. (CP 343). Amanda Wolfgram allegedly witnessed it. (CP 343).

Ms. Wolfgram never regarded it as a will, except as a litigation afterthought. She admitted, in a sworn statement, that the 1996 Will admitted to probate was Mr. Vaupel’s last will. (CP 195; 197). She has stated under penalty of perjury, in response to the petition for probate of the 1996 Will, that “[i]t appears that no new will was ever prepared.” (CP 197). This is a judicial admission on the subject. *Seidler v. Hansen*, 14 Wn. App. 915, 920, 547 P.2d 917 (1976) (sworn pleadings and affidavits filed in court are judicial admissions). She admits that, when she responded to the petition for probate of the 1996 Will, she was “fully aware of [the

handwritten document] since it was created in 2008.” (CP 519). Yet, she did not object to the probate of the 1996 Will on the basis that it was incomplete because a codicil leaving her \$830,000.00 was missing.

She regarded the handwritten document as a writing confirming a past or present agreement not a will codicil. Her Creditor’s Claim (CP 710-715) states: “[t]o the extent that the Codicil is rejected or successfully contested, the document is “an express contract . . . ; or alternatively . . . [confirmation of an implied contract] for services rendered, including but not limited to care, domestic services, and management of Mr. Vaupel’s finances during his lifetime”¹¹ Although the contract claim is without merit, this description of the document is at least consistent with its content and her understanding as evident from her response to the probate petition. The inapt characterization of the document as a codicil is not consistent with the words and content of the writing.

There is no language in the document of devise or bequest, or other words of testamentary nature; nor is it prepared or

¹¹ Whether there actually was such an agreement was not a claim present to the lower court and is not an issue on appeal.

executed with will formalities.¹² There is no attestation before two witnesses that it was signed by the testator as his free will and final testament while of sound mind. Rather, it is prepared to purportedly confirm a purported *inter vivos* promissory transaction.

Its character cannot be changed or contradicted by extrinsic evidence. Extrinsic evidence may not be used to “show an intention independent of the instrument or to vary, contradict or modify the written word.” *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695-96, 974 P.2d 836 (1999). See also *Hulbert v. Port of Everett*, 159 Wn. App. 389, 400, 245 P.3d 779 (2011). It does not make any difference if “twenty bishops” testified that something different was intended. *City of Everett v. Estate of Sumstad*, 95 Wn.2d 853, 855, 631 P.2d 366 (1981).

This rule of contract law renders all argument about the Deadman’s Statute academic. Even if competent to testify, which she is not, Ms. Wolfgram may not testify in a manner to contradict the plain language of the document. Her competency as a witness

¹² Because the document is not executed in legal form, Ms. Wolfgram is not entitled to any presumption of testamentary capacity on the part of Mr. Vaupel. *In re Riley’s Estate*, 78 Wn.2d 623, 646, 479 P.2d 1 (1970). And because Ms. Wolfgram, on whom Mr. Vaupel totally depended in this period, apparently never took him to see a doctor around this time, there are no medical records available to which one might refer in assessing his testamentary capacity in June 2008. Ms. Wolfgram is not a competent witness to his capacity. Thus, the document fails on this basis, as well.

is immaterial to the result because extrinsic evidence is inadmissible to alter or change the document.

Ms. Wolfgram relies on case law that is not helpful because the issue is case specific and controlled by the character of the document and the circumstances of the individual case. She relies heavily on *In re Chamber's Estate*, 187 Wn. 417, 60 P.2d 41 (1936). Brief of Appellant at 23, 26 – 29. In *Chamber's Estate*, the decedent executed a will, not a writing confirming an alleged agreement as here. The issue was whether the will was validly executed in accordance with statutory formalities. In the present case, the analysis does not get to the execution issue because Ms. Wolfgram cannot get past the threshold issue that the document is not a will.

Ms. Wolfgram also relies on *In re Murphy's Estate*, 193 Wn. 400, 75 P.2d 916 (1938). Brief of Appellant at 17 – 20. Again, the document in *Murphy's Estate* is too different from the document here to support use of that case as authority here. *Murphy's Estate* recognizes that a document that states or recognizes a present indebtedness or obligation payable on or after death of the maker (such as a promissory note) does not make the document testamentary in character. *In re Murphy's Estate, supra* 193 Wn. at

420. Other cases are to the same effect. See *In re Lewis Estate*, 2 Wn.2d 458, 98 P.2d 654 (1940) (performance of the promise at death does not make the document testamentary) and *In re Estate of Verbeek*, 2 Wn. App. 144, 467 P.2d 178 (1970) (present obligation wherein enjoyment is postponed until death does not make the instrument testamentary).

Ms. Wolfgram devotes extensive effort in her brief addressing her problem with the fact that this document is not executed with will formalities. See Brief of Appellant at 22 -39. Ms. Wolfgram argues that she is a competent witness and not disqualified by the Deadman's Statute. Id. at 22. She cites RCW 11.12.160 in support of her position that she is not disqualified. Id. at 23 – 26. She states that the only issue is whether she should be disqualified from receiving benefits because of the statutory presumption of undue influence. Id. at 26. She argues that an attestation clause is unnecessary and this testimony can be provided after death. Id. at 28. She invokes rules of statutory interpretation, legislative history and the law before statehood. Id. at 29-35. Apparently, unsatisfied with that analysis, she presents hypothetical situations to make her point. Id. at 35 -36. Not quite finished, she urges acceptance of her testimony under the

Deadman's Statute even if RCW 11.12.160 has no application here.
Id. at 36 -39.

A "codicil" is a kind of will, RCW 11.02.005(9), and must, therefore, be executed in the manner required for a will, as set forth at RCW 11.12.020. *E.g., Estate of Ricketts*, 54 Wn. App. 221, 773 P.2d 93 (1989). Washington law requires attestation by two (or more) competent witnesses to validate a will. RCW 11.12.020 (1). That requirement is not met here on the face of the document as explained above.

"Generally, a witness is competent to attest a will if he would be competent (that is, legally qualified) to testify in court to the same facts as those attested to in the will." *In re Mitchell's Estate*, 41 Wn.2d 326, 341, 249 P.2d 385 (1952). RCW 5.60.030 provides:

[I]n 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, . . . 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 . . . person

Id. "The purpose of the dead man's statute is to prevent interested parties from giving self-serving testimony about conversations or

transactions with the deceased.” *Estate of Miller*, 134 Wn. App. 885, 890, 143 P.3d 315 (2006). Ms. Wolfgram and her daughter are disqualified by this statute from testifying about the transaction in a manner to cure perceived deficiencies in the document or to change its content.

Ms. Wolfgram and Amanda’s February 2011 “attesting” affidavits (CP 344-347), prepared by counsel after Mr. Vaupel’s death for the purposes of this litigation, seek to present testimony on their own behalf as to the nature of the transaction with Mr. Vaupel and to give it testamentary effect. This attempt by post-death “attestation” is an attempt to change the document into something it is not – i.e., a codicil or will – rather than a “contract or agreement” as stated in the document. Even if any extrinsic evidence is admissible to contradict the document, such evidence may not come from Ms. Wolfgram or Amanda who are disqualified from testifying.

Both Ms. Wolfgram and Amanda are parties in interest. Ms. Wolfgram’s interest is obvious and undisputed -- \$830,000.00. Amanda’s interest is equally apparent. The transaction purports to

ratify questionable gifts in her favor.¹³ She stands to gain or profit from her testimony. “For purposes of the Deadman’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*, *supra* 134 Wn. App. at 893. Ms. Wolfgram’s citation to *Murante v. Rizzuto*, 46 Wn.2d 800, 804, 285 P.2d 560 (1955)¹⁴, to support Amanda’s testimony, does not meet this point. That case did not involve a circumstance involving a witness named in the transaction and for whose benefit, in part, the instrument was prepared.

Ms. Wolfgram argues at considerable length that the Deadman’s Statute is in conflict with RCW 11.12.160. Brief of Appellant at 22-36. She did not make this argument to the lower court. (CP 585-598). The appellate court need not consider arguments not raised below. RAP 2.5(a)(3).

Furthermore, the Deadman’s Statute presents no conflict with RCW 11.12.160. There is no authority for the proposition that RCW 11.12.160 permits interested parties from testifying about a transaction with the decedent, under the guise of attestation, in a manner seeking to change a document from an alleged contract into

¹³ These alleged gifts were made under circumstances suggesting financial exploitation of a vulnerable adult.

¹⁴ Brief of Appellant at 37.

a will. To the contrary, this argument is an attempt at circumvention of the law prohibiting such testimony. Conversations between Ms. Wolfgram and Amanda and Mr. Vaupel about the document is within the scope of the Deadman's Statute and barred. *Erickson v. Kerr*, 69 Wn. App. 891, 901, 851 P.2d 703 (1993), *aff'd in part, rev'd in part* 125 Wn.2d 183, 883 P.2d 313 (1994). RCW 11.12.160 does not apply because the document is not a will codicil.

Here, Ms. Wolfgram and Amanda are attempting to supply evidence after death of testamentary intent rather than contractual intent. This is testimony about a transaction with the decedent by interested parties. The Deadman's Statute clearly precludes their testimony about the document, its character or the decedent's intention. Ms. Wolfgram and Amanda are incompetent to testify about the transaction in any manner to shape it to their present interest. There is no need for a trial on whether the instrument is a codicil because it does not purport to be on its face, it was never prepared to be a will and not executed with will formalities.¹⁵ The lower court so ruled correctly.

¹⁵ Additionally, in drafting a document for Mr. Vaupel that she purports to be a codicil, Ms. Wolfgram was engaging in the unauthorized practice of law. *See In re Estate of Marks*, 91 Wn. App. 325, 335-36, 957 P.2d 235 (1998) (affirming trial court's finding

E. The Court Had Authority Under TEDRA to Rule Without Requiring Mediation.

Ms. Wolfgram argues that the lower court did not have authority under TEDRA to rule on the summary judgment motions without first requiring mediation. Brief of Appellant at 52-54. To the contrary, RCW 11.96A.020(2) gives the lower court “full power and authority to proceed with such administration and settlement [of all matters concerning estates] in any manner and way that to the court seems right and proper, all to the end that the matters be expeditiously administered and settled by the court.” Pursuant to RCW 11.96A.100(9) any “party may move for an order relating to a procedural matter, including discovery, and for summary judgment, in the original petition, answer, response, or reply, or in a separate motion, or at any other time” The lower court has authority under RCW 11.96A.300(3) to decide the matter at the initial hearing or direct other judicial proceedings notwithstanding a request for mediation.

On January 25, 2011, the Estate Administrator filed a petition for determination of rights. (CP 8-29). The hearing on the motion

that a friend’s assistance in the preparation of a will constitutes the unauthorized practice of law and voids the gift to the drafter).

was scheduled for March 8, 2011. (CP 185-86). On March 3, 2011, Ms. Wolfgram served a notice of mediation on the Administrator. (CP 495). On March 4, 2011, the Administrator filed an objection to mediation. (CP 529-530).

On March 22, 2011 the parties stipulated to the entry of a pretrial civil case schedule that required the parties to complete discovery by May 6, 2011, mediation by May 9, 2011, and any hearing on a dispositive motion by May 23, 2011. Order Setting Civil Case Schedule ¶¶ 2.3, 3.1, and 3.2. (CP 541-543). Nothing in the stipulated pretrial schedule required dispositive motions to be heard before mediation. The lower court had authority to decide the matter or direct other proceedings. The issues were appropriately decided in a manner that properly resolves the claims expeditiously in accordance with TEDRA.

V. CONCLUSION

There is no evidence that Ms. Wolfgram jointly acquired property with Mr. Vaupel or that she substantially invested in his assets in a manner that creates inequities if she is not given an interest in his property. The CIR doctrine has no application here. Likewise, the “codicil claim” has no basis in fact. The document is not a codicil. Ms. Wolfgram may not testify in any manner to

change its character. It is respectfully submitted that that the lower court's decisions granting summary judgment and dismissing Ms. Wolfgram's claims with prejudice should be affirmed.

Respectfully submitted this 14 day of November, 2011.

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CASE NO. 67212-6-I

COURT OF APPEALS
DIVISION I
FOR THE STATE OF WASHINGTON

IN RE THE ESTATE OF WARREN F. VAUPEL

MARY WOLFGRAM,
Appellant,

vs.

JOHN JARDINE
Respondent.

CERTIFICATE OF SERVICE

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COURT OF APPEALS
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STATE OF WASHINGTON
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