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COURT OF APPEALS
STATE OF WASHINGTON
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**NO. 68724-7
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

Estate of Carole S. Christian,)	
)	
Lowell Christian, Appellant,)	King County Cause 10-4-04506-3 KNT
)	
Charles Esposito, Respondent.)	
_____)	

AMENDED AND CORRECTED BRIEF OF APPELLANT

PETER KRAM, WSBA 7436
Kram & Wooster
Attorneys for Appellant
1901 South I Street
Tacoma, WA 98405
(253) 272-7929
facsimile (253) 572-4167

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I. INTRODUCTION

This case is about a marriage, the acquisition of property, the preparation of a fraudulent Will and a death. Lowell Christian, the surviving spouse of decedent Carole S. Christian, appealed a decision of the King County Superior Court, The Hon. Monica Benton, Judge, finding he was entitled to neither the remaining community property nor any share of separate property acquired while the parties were married but separated. The 1992 Will fraudulently and intentionally claimed that Lowell Christian was dead. The unrebutted trial testimony at trial proved that Carole Christian knew that Lowell Christian remained alive and residing in Milton, Washington. The unrebutted trial testimony demonstrated that the parties acquired community property during their marriage which the Court erroneously awarded to Charles Esposito. The Court erroneously found that Mr. Christian's petitions and requests were frivolous and erred when it awarded the estate substantial attorney's fees while denying Mr. Christian any portion of either the community or separate property. The trial Court's findings and conclusions were not supported by the evidence, did not meet the clear, cogent and convincing standard, and were abuses of discretion. All references to Clerk's Papers (CP) refer to the King County Superior Court's Index to Clerk's Papers dated August 13, 2012, and received by Appellant's counsel 15 August 2012. The papers are referred

to by the Clerk's Sub No. and page numbers for example 30:43-45
(Declaration of Charles Esposito).

II. ASSIGNMENTS OF ERROR

A. The Trial Court denied the Appellant due process when it initially orally excluded certain items of evidence in the presence of counsel and later considered those excluded items of evidence without affording Appellant notice or opportunity to be heard on the matter. CP 49:142-145; 56 B: 197-199; 61: 201-203; 62: 204-207; 64: 210-219; 66: 220-250; 67: 251, 68: 252-256; 69: 257-258.

B. The Trial Court erred in finding a defunct marriage when that issue was not before the court and had neither relevance nor materiality to the nature and extent of community and separate property. CP 61: 201-203; 62: 204-207; 64: 210-219; 66: 220-250; 67: 251; 69: 257-258.

C. The Trial Court erred when it failed to determine that the estate was intestate as to the surviving spouse. CP 61, 62, 64, 66, 67, 69.

D. The Trial Court erred when it failed to award community and separate property to the surviving spouse when the undisputed evidence demonstrated that the decedent knew the parties were married at the time

she created her Will and fraudulently claimed the Appellant was deceased. CP 1: 1-3; 7: 8-13; 16: 20-25; 24: 34-35; 27: 41-42; 61: 201-203; 62: 204-207; 66: 220-250; 67: 251; 69: 257-258..

E. The Trial Court erred when it awarded all community and all separate property to Charles Esposito when the Appellant was the surviving spouse at the time of decedent's death and undisputed evidence demonstrated that the decedent knew Lowell Christian survived her. CP 1: 1-3; 7: 8-13; 16: 20-25; 24: 34-35; 27: 41-42; 61: 201-203; 62: 204-207; 66: 220-250; 67: 251.

F. The Trial Court erred when it denied the Appellant's request for family allowance and distribution of community and separate proceeds assets to him when the estate was intestate as to him. The un rebutted evidence and testimony contradicted the court's findings, conclusions and judgment. CP 1: 1-3; 7: 8-13; 16: 20-25; 24: 34-35; 27: 41-42; 61: 201-203; 62: 204-207; 66: 220-250; 67: 251; 69: 257-258.

G. The Trial Court erred when it found the Petition of Lowell Christian was frivolous and without merit and awarded over \$40,000 in fees to the estate from Lowell Christian. CP 61: 201-203; 62: 204-207; 67: 251; 68: 252-256; 69: 257-258.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR:

No. 1. Did the Trial Court deny Appellant due process when at trial with counsel present it excluded items of evidence and later included the evidence in its Findings of Fact and Conclusions of Law without affording the Appellant notice or opportunity to be heard on the issue?

No. 2. Did the Trial Court err in finding a defunct marriage when no petition was filed to declare the marriage defunct, no divorce or petition for legal separation had been filed and the decedent could not testify as to the marriage?

No. 3. Did the Trial Court err when it failed to determine that the estate was intestate as to the surviving spouse?

No. 4. Did the Trial Court tolerate and approve a fraud on the court by failing to award community property to the surviving spouse when the Will unequivocally was fraudulent on its face, the decedent knew that her spouse was alive and no dissolution of marriage or legal separation had been initiated during decedent's life?

No. 5. Did the Trial Court tolerate and approve a fraud on the court by failing to award one-half of the separate property to Lowell Christian when the estate was intestate as to him?

No. 6. Did the Trial Court err in finding the petition of Lowell Christian frivolous and without merit and awarding the estate over \$40,000 in fees and

costs when the undisputed evidence demonstrated that he was a surviving spouse and the parties had community property?

III. STATEMENT OF THE CASE

Carole and Lowell Christian married in approximately 1968. RP 38: 2-25; CP 56B: 197-199, , Exhibit 1. They married in Washoe County, Nevada, and the marriage has never been dissolved nor was there ever a legal separation. RP 42: 1-4, 64: 18-25, 65: 1-11, CP 56B: 197-199, Exhibits 1, 2. No children were born of this marriage and the decedent's parents did not survive her. CP 7:8-13. The parties physically separated in the early 1970's but continued to periodically see one another. RP 39:15-25, 40:1-22. Neither Lowell nor Carole Christian ever filed a Petition for Dissolution nor for Legal Separation. RP 42: 1-4; 64: 18-25; 65: 1-11. The parties owned a home in the Des Moines, Washington, area during their marriage. RP 50: 19-25. Ms. Christian sold the home without Mr. Christian's knowledge or consent some time in the 1970's. Mr. Christian received none of the proceeds. RP 51: 1-11; 55: 8-25.

Both Carole and Lowell Christian later purchased residence properties in their own names holding themselves out as single persons. RP 55: 8-25; 61: 4-23, 63: 3-25; 64: 1; CP 56B: 197-199, Exhibits 6, 14, 15, 16.

Interestingly Mr. Christian's attorney, Mr. Codd, was the father of the estate's first attorney, Julie Codd. RP 43: 1-25; 44: 1-5. In 1992 Carole Christian prepared and executed a Will in which she stated she was widowed and her husband predeceased her. The Will was prepared by another attorney. CP 7: 8-13. To paraphrase Mark Twain, the reports of Mr. Christian's death were greatly exaggerated. Mr. Christian is very much alive as he demonstrated to Ms. Codd when he came to her office and when he testified at trial. RP 43: 1-25; 44: 1-5.

Carole Christian died in 2010. She owned a duplex residence in the city of Seatac, Washington, along with other assets and property. CP 3: 4-6; 31: 46-48. The Will was tendered for probate and Mr. Esposito was appointed the personal representative to serve without bond and with nonintervention powers. CP 1: 1-3; 3: 4-6; 7: 8-13. His daughter was appointed co-personal representative so the estate would have a Washington resident agent. CP 9: 14-16..

In 2011 Mr. Christian received a call from Richard Duicus concerning his wife. RP 27: 18-25; 28: 1-11. When he attempted to call Carole Christian he discovered the phone was disconnected so he went to her residence. Finding the house empty he contacted a neighbor who advised him that his wife had died about a year before. RP 42: 5-25. Mr. Christian then searched and found that this probate had been opened in

King County, Washington. He contacted Ms. Codd and presented his driver's license, passport, marriage certificate and birth certificate. RP 43: 1-25; 44: 1-5. Mr. Christian is a surviving spouse and if Ms. Christian died intestate, he would be entitled to one-half of any separate property and all community property. RCW 11.04.015; CP 16: 20-25; 41: 79-84; 47: 106-137; 48: 138-141, RP 94: 1-3. Because the Will erroneously identifies him as deceased he is an omitted heir and thus his claims should have been treated as though no Will was in existence and the estate was intestate as to him. Not surprisingly the estate does not nor could it contest the proposition that a surviving spouse is entitled to all community and one-half the separate property of an intestate decedent spouse. This is precisely the solution Mr. Christian sought at trial.

The issues before this court and the trial court concern the nature and distribution of property by a Will which contains a patent falsehood and which patent falsehood formed part of the bases for the trial court's erroneous decisions. When the trial commenced on December 13, 2012, Lowell Christian renewed Motions In Limine regarding certain exhibits. RP 4: 4-5. The court reserved ruling on the admissibility of the estate's proffered exhibits: Exhibit 9 at RP 4: 7-16; Exhibit 11 at RP 9: 2-25, Exhibit 12 at RP 11: 1-8; Exhibit 17 at RP 12: 1-6 and Exhibit 18, at RP 13: 1-19. At the close of the evidence the court excluded these

declarations and exhibits, RP 108: 25, 109: 1-5. At no time did any party in this matter ever file a Trust and Estate Dispute Resolution Act Summons and Petition. RCW 11.96A.100. In fact the matter was set down for trial. CP 35: 75-76. Exhibits admitted at trial included exhibits 1 through 6, 8, 13 through 16 and 19. RP 15: 3-14, CP 56 B: 197-199.

Testimony in this matter was adduced from several witnesses. Richard Duicus testified concerning his continued friendship with both parties RP 28: 1-11. He also testified as to how he learned of the death of Carole Christian. 27: 18-25. Mr. Duicus testified concerning his contact with Carole Christian and Lowell Christian at a truck stop in California in approximately 1979. RP 22: 15-21, 23: 24-27. This testimony was not rebutted by any witness offered by the estate.

Roland Schloer testified concerning his knowledge and acquaintance with both parties. He testified to the social interaction of the parties. RP 32 and 33. He also testified that he had a conversation with Carole concerning the marital status of Lowell Christian and Carole Christian and that she knew Lowell Christian was alive approximately three years before her death. RP 33: 20-25, 34: 1-25, 35: 1-7. That testimony was not rebutted. Mr. Schloer does not stand to benefit from the Will or a determination of intestacy.

Lowell Christian testified concerning his marriage to Carole Christian, RP 38: 2-25, his operation of trucks with Carole Christian and confirmed the encounter with Richard Duicus in California. RP 39: 4-25, 40: 1-18. Mr. Christian testified to the acquisition of stock shares by the parties during their marriage. RP 41: 1-25. Mr. Christian testified that there was never a divorce nor was there any legal separation filed. RP 42: 1-4. He described how he learned of the death of Carole Christian through Mr. Schloer. RP 42: 5-25. Thereafter he presented various items of identification together with his marriage license to Julie Codd, the attorney who initiated the probate. RP 43: 1-25, 44: 1-5, CP 56B: 197-199. This testimony was un-rebutted. No evidence was ever produced demonstrating that either party filed a petition for legal separation or Decree of Dissolution. Thus, the parties were married at the time the Will was created, CP 1: 1-3; 7: 8-13, and they were married at the death of Carole Christian. No amount of magic or slight of hand can change that fact.

Mr. Christian described the receipt of a check for one half the value of the stock shares from the State of Washington. RP 45: 18-25, 46: 1-25 and 47: 1-6. He described the parties' acquisition of property including a community property home and a home owned by Carole. RP 47: 7-24, pages 48 and 49. RP 57: 7-25- and 58: 1-18. Mr. Christian also

described his own home purchase. RP 55: 8-25. Mr. Christian described a house that was jointly owned by the parties which had been sold without his knowledge. He never received any funds from this joint asset. RP 50: 19-25, 51: 1-11.

Mr. Christian described his efforts to discuss this matter with Mr. Esposito, the beneficiary and personal representative of the estate, and Esposito's terse and stonewalled response. RP 44: 25, 45: 1-12. Mr. Esposito provided the same description. RP 70: 14-17 and 71: 1-13 and 19-25, 72: 1-25 and 73: 1-18. Angela Esposito described the bases of her knowledge of the Christian marriage and property as being gathered from other parties is contained at RP 67: 21-25, 68: 1-2 and 8-25, 69: 1-17. She testified she did not know Lowell Christian was alive. RP 81: 24-15 and 82: 1. At the close of the evidence Mr. Christian renewed the motion to exclude exhibits. Exhibits 9, 11 and 12 were excluded. RP 85: 22-25, 87: 1-9, 89: 17-20.

Despite the objections of Mr. Christian and despite the lack of foundation the court later included declarations of Robert Stevenson, Julie Codd, Richard Dahlke, Angela Esposito and Charles Esposito in the evidence it considered. CP 62: 204-207, Findings of Fact, Paragraph 2. These declarations were not even identified in the estate's exhibit list, CP 56B: 197-199.

At no time were the exhibits ever authenticated by any maker as to date, time or other indicia of reliability. There was simply no basis for their admission or acceptance by the court. It is particularly distressing that the court has excluded exhibits and later reversed itself with no opportunity to discuss this matter and the court's rulings had no evidentiary basis. Mr. Christian was denied due process in this matter.

IV. ARGUMENT

1. The Trial Court erred and denied Appellant Due Process when it based its decision on declarations and items of evidence with no proper foundation, not formally admitted and later included in its Findings of Fact and Conclusions of Law without affording the Appellant notice or opportunity to be heard on the issue.

In its written findings, conclusions and judgment, CP 62: 204-207; 69: 257-258, the Trial Court included Exhibits and declarations not properly introduced at trial. RP 108: 25; 109: 1-5. There was no competent evidence to support the late admission of these documents as counsel for the estate admitted. RP 15: 22-25, 26: 1-2; RP 6: 8-25; 7: 1-12. Only relevant and material evidence may be admitted. ER 402. Mr. Christian filed a Motion in Limine to exclude these unauthenticated documents. CP 43: 100-103; 47: 106-137; 48: 138-141; RP 4: 4-5 through 7:1-6. Mr. Christian's substantial right to a fair trial was destroyed by this ruling without notice, an opportunity to be heard or a

proper foundation. ER 103(a), CR 1, 43(a)(1), 43(d); Washington Const. Art. 1, §3; Sherman v. State, 128 Wn. 2d 164, 905 P.2d 355 (1995); Yantsin v. City of Aberdeen, 54 Wn. 2d 787, 345 P.2d 178 (1959); Sheldon v. Sheldon, 47 Wn. 2d 699, 702, 289 P.2d 355 (1955). The Trial Court erred when it later relied in part on these documents in its decision CP 62: 204-207; 69: 257-258. This court should reverse the lower court's decision. No foundation for these documents was ever laid, CP 61: 201-203.

Early on Mr. Christian requested special notice of proceedings in this matter, CP 15: 18-19. The court will recall this matter was set down for trial following a commissioner's hearing. CP 35: 75-76. The estate never commenced a TEDRA action under RCW 11.96A.100. The estate's claim that this was somehow connected to a TEDRA action is disingenuous. RP 109.

Moreover, inclusion of the estate's proffered documents from non-testifying witnesses was improper. The court excluded these documents, RP 83, 84, CP 62: 204-27. The Court had admitted the will at the outset of the proceedings. The will was clear enough that it needed no bolstering, duplicative testimony and so the admission of these declarations was unnecessary and contrary to case law. The problem with

this matter is the demonstrably false predicate of Mr. Christian's death contained in the will and on which the court appears to have relied.

The court sought to determine the intent of the testatrix in Re: Estate of Wright, 147 Wn. App. 674, 196 P. 3d 1075, review denied 166 Wn. 1005, 208 P. 3d 1124 (2008). The court had resorted to external documents that were unnecessary to determine the testatrix's intent. The court held, 147 Wn. App. at 681:

“We determine the testatrix's intent based on the provisions of the Will itself. We consider the entire Will and give effect to every part. We may consider extrinsic evidence to explain the language of the Will only if the terms of the Will manifesting the testatrix's intent are ambiguous.” citations omitted.

Here there is no ambiguity in her intent so all of the external material admitted was an abuse of discretion and contrary to law.

2. The Trial Court erred when it determined that the marriage was defunct when no petition was filed to declare the marriage defunct, no divorce, or Petition for Legal Separation had been filed and the decedent could not testify as to the marriage.
3. The Trial Court erred when it failed to determine that the estate was intestate as to the surviving spouse.

At her death Carole Christian possessed certain real and personal property. CP 31: 46-48. All of the property was acquired during marriage. Much of the property was acquired after the parties physically separated. RP 47: 7-25; 48: 1-21. Carole Christian died intestate as to

Lowell Christian because of the false statement contained in the Will. CP

7: 8-13. Because she died intestate Mr. Christian's share of the estate must be analyzed under intestacy statutes. RCW 11.02.070 provides:

"Except as provided in RCW 41.04.273 and 11.84.025, upon the death of a decedent, a one-half share of the community property shall be confirmed to the surviving spouse, and the other one-half share shall be subject to testamentary disposition by the decedent, or shall descend as provided in Chapter 11.04 RCW. The whole of the community property shall be subject to probate administration for all purposes of this title including the payment of obligations and debts of the community, the award in lieu of homestead, the allowance for family support, and any other matter for which the community property would be responsible or liable if decedent were living."

RCW 11.04.015 provides:

The net estate of a person dying intestate, or that portion thereof with respect to which the person shall have died intestate, shall descend subject to the provisions RCW 11.04.250 and 11.02.070, and shall be distributed as follows:

- (1) share of surviving spouse. Surviving spouse shall receive the following share:
 - (a) all of the decedent's share of the net community estate; and...
 - (c) three quarters of the net separate estate if there is no surviving issue, but the intestate is survived by one or more of his parents, or by one or more of the issue of one or more of his parents; or
 - (d) all of the net separate estate, if there is no surviving issue nor parent nor issue of parent."

It is undisputed that the parties had no children and that the parties never divorced. RP 33: 1-12, 20-25; 34: 1-25; 35: 1-7, 38: 2-25, 42: 1-4.

Property is characterized at the time of acquisition. Community property is that acquired during marriage. RCW 26.16.010. The stock

certificates and resulting cash were acquired during marriage. RP 41: 1-25; 42: 1-4.

As early as 1912 the Washington State Supreme Court held that where there were no children a surviving spouse was the sole heir of a decedent's estate In Re: Siebs' Estate, 70 Wash. 374, 380, 126 P. 912 (1912). The court later held that the surviving spouse had an absolute right to an award from an estate. In Re: Jones' Estate, 11 Wn. 2d 254, 260, 118 P.2d 951 (1941). The Jones court authorized an award from separate property. For spouses who arrive after a creation of a Will RCW 11.12.051(1) specifically requires the presence of a Decree of Dissolution or Legal Separation for the parties in order to terminate a domestic partnership or a marriage. There was no pre- or postnuptial agreement between these parties which would change the status. The testatrix in this case had a full opportunity to pursue a Decree of Dissolution and the only testimony we have before the court and in the record is that she declined to do so for 19 years. She even failed to do so after a discussion with Roland Schloer within three years of her date of death. RP 33: 20-25; 34: 1-25, 35: 1-7. For this reason, this court cannot determine the status of the marriage because one of the parties is not present and even though the parties did not live together the issue of a defunct marriage simply is inapplicable as to the status of the property. Thus the trial court

erroneously decided this case on evidence which did not exist at all and ignored the only evidence that did exist concerning Carole Christian's decision to leave the marriage intact.

4. The Trial Court tolerated and approved a fraud on the court by failing to award community property to the surviving spouse when the Will unequivocally was fraudulent on its face, the decedent knew that her spouse was alive and no dissolution of marriage or legal separation had been initiated during decedent's life.
5. The Trial Court tolerated and approved a fraud on the court by failing to award all of the community and one-half of the separate property to Lowell Christian when the estate as intestate as to him.

The parents of Carole Christian are deceased and there are no other surviving siblings of decedent. Lowell Christian is the sole surviving heir with respect to this property even though he is fraudulently identified as deceased. Thus, no provision was made for him in the Will admitted to probate. This court cannot allow a factually untrue statement to be the basis of distribution in this matter. The leading Washington treatise states, M. Reutlinger, Washington Law of Wills and Intestate Succession, at 1, 81 (Washington State Bar Association Bar Assoc. 2nd ed., 2006):

“Any person who dies without a valid will in existence is said to have died intestate. A person who dies without a valid Will that distributes only a portion of his estate has died intestate as to the remainder of the estate. To the extent that a person has died intestate, his property is distributed pursuant to RCW 11.04.015.” (Page 1)

“Fraud in the execution refers to an intentional misrepresentation as to the nature or contents of the document being executed by the testator.” (Page 81)

Professor Reutlinger went on to say that the result is a conclusion that the document signed by the testator is “not his will.” (Page 82) Black’s Law Dictionary (5th Edition) defines Intestate Succession thusly:

“A succession is called “intestate” when the deceased has left no will, or when his will has been revoked or annulled as irregular.”

Regardless of whether the personal representatives argue the defunct marriage issue, The Washington Supreme Court has held that inheritance rights depend upon the existence of the legal status of marriage rather upon the quality of the marriage relationship. Togliatti v. Robertson, 29 Wn. 2d 844, 846-47, 190 P.2d 575 (1948). Whether a marriage is defunct or not does not destroy the right of the surviving spouse to intestate succession, community property or receiving the statutory one-half of the community property irrespective of the provisions of the Will. K. Weber, 19 Washington Practice: Family and Community Property Law, Section 6.16.2, at 114 (West Publishing, St. Paul, MN 1997). As the author commented, a spouse is a spouse irrespective of

whether he or she is a happy spouse. K. Weber, ibid, Section 6.16.2, at 114, Fn. 9.

In the Togliatti case the court held that had the surviving spouse brought the matter before the court it would have been determined the sole heir of the estate and the father of the decedent was not, in fact, the sole heir. This was so regardless the duration of the marriage or other factors present in decedent's estate. The statute does nothing to change that ruling. The same result was reached In Re: Arland's Estate, 131 Wash. 297, 300, 230 P. 157 (1924). Arland involved a dispute between a second wife and the children of the decedent's first wife. In a Will contest that occurred after a dissolution trial but before entry of the final pleadings, the court held that, while a trial court could enter a dissolution decree nunc pro tunc, it could do so "only where it is necessary to effectuate an important public policy" (i.e., avoidance of bigamy or bastardry) or were necessary to correct a clerical or ministerial error. In Re: Marriage of Pratt, 99 Wn. 2d 905, 909, 665 P.2d 400 (1983). No such public policy exists here. Carole Christian was free to seek a divorce or legal separation for 19 years before her death. She did not do so and the marriage remained valid.

Mr. Christian earlier sought a family allowance, CP 16: 20-25; 20: 28-32; 23; 33; 24: 34-35; 25: 36-40. Analysis of the family allowance statute supports the Appellant's position on all these issues.

The purpose of the family allowance is to insure that the surviving spouse or children of the decedent receive assets from the estate despite other provisions made by the decedent and subject to pending creditors' claims. C. and F. Mitchell, 26 Washington Practice: Probate Law and Practice Sec. 4.41, at 311 (Thomson-West, Eagan MN 2006). The family award claim is a priority under the statute, RCW 11.54.060; 26B Washington Practice Sec. 4.43, at 318. A family allowance is to be distinguished from the award in lieu of homestead. It is simply an effort to keep the surviving spouse cared for during the pendency of the probate. The family allowance award is supported by public policy. K. Weber, 19 Washington Practice: Family and Community Property Law Sec. 13.8.2, at 248 (West Publishing Company, St. Paul MN 1997):

“The award is based on a strong public policy in favor of supporting the family and accordingly, the family allowance statute is given liberal construction.”

See Estate of Wind, 32 Wn. 2d 64, 200 P.2d 748 (1948); In Re Estate of Dillon, 12 Wn. App. 804, 532 P.2d 1189 (1975).

While the court can deny the award if there is no showing of need the court is also confronted with the public policy issue of supporting the

family. Lowell Christian is a surviving spouse and he should be entitled to receive this award.

Lowell Christian is also an omitted spouse within the meaning of RCW 11.12.095. The Will states that Mr. Christian predeceased the decedent. Inasmuch as he is still alive and is not otherwise named in the Will he is, by definition, an omitted spouse. This statute awards all of the community and separate property to Mr. Christian in the absence of any children or surviving parents. Carole Christian's parents predeceased her. Her own Will says she had no children. Therefore, pursuant to RCW 11.12.095(1)(a) and (d) Mr. Christian would be entitled to receive all of the community property and all of the net separate property. The statute is very clear on this. Mr. Christian requested an award of all community property and one-half of the separate property. This request harmonizes the statute and Carole Christian's Will. He renews that request.

Mr. Christian requested special notice of proceedings soon after he learned of Carole's death, filed June 1, 2011. CP 15: 18-19. He requested a family allowance and determination of his heirship status. CP 20: 28-32; 23: 33; 24: 34-35; 25: 36-40. The commissioner declined to grant the request without prejudice and set the matter for trial. CP 35: 75-76.

RCW 11.54.010 grants the court authority to make an award to a surviving spouse from the property of the decedent. The award can come

from either separate or community property, RCW 11.54.010(2). An award can also come from non-probate assets. The court can award a homestead allowance from lands of the decedent, RCW 11.54.020. The court has the ability to award a monthly stipend to the surviving spouse if it is demonstrated by clear, cogent and convincing evidence that present and reasonably anticipated future needs during the pendency of the probate with respect to basic maintenance and support will not otherwise be provided and that the award is not inconsistent with the decedent's intentions. RCW 11.54.040(1). The court can consider all of the resources of the decedent. The expenses of last illnesses and funeral expenses need to be paid. The court considers, without limitation, certain factors under RCW 11.54.040(3). The factors include provisions made for a claimant by the decedent under the decedent's Will or otherwise, provisions for third parties or other entities that will be affected and if the claimant is a surviving spouse, the duration and status of the marriage, the effect of any award on the availability of other resources or benefits to the claimant and the size and nature of decedent's estate and oral or written statements. Whether these factors apply to an omitted spouse remains an issue for either this court or, on remand, the trial court.

Mr. Christian's request is consistent with case law in this matter.

In Re: Estate of Moi, 136 Wn. App. 823, 151 P. 2d 3d 995, review denied,

162 Wn. 2d 1003 (2006), held that the spouse must be both named and provided for in order to avoid the effect of RCW 11.12.095. See 136 Wn. App. at 829. The Moi court stated, 136 Wn. App. at 828:

“The new statute.... establishes a presumption that the omitted spouse will receive the same amount as if the decedent died intestate.”

The case of Bay v. Estate of Bay, 125 Wn. App. 468, 105 P.3d 434 (2005), construed the predecessor which was very similar in language and effect. The Bay court stated that the standard was clear, cogent and convincing evidence and created presumptions in favor of the omitted spouse. The Bay court involved a prenuptial Will rather than a post-marriage Will. Similarly Estate of Miller, 134 Wn. App. 885, 143 P. 3d 315, review denied 161 Wn. 2d 1003 (2006), reached the same conclusion with respect to omitted heirs.

6. The Trial Court Erred in finding the petition of Lowell Christian frivolous and without merit when the undisputed evidence that he was a surviving spouse and the parties had community property and then awarding over \$40,000 in fees and costs to the estate.

The trial court erred in awarding attorney’s fees in finding Lowell Christian’s claims frivolous. CP 62: 204-207; 69: 257-258. Washington courts regularly hold that actions are not frivolous when there is a legal basis for the action. Estate of Wegner v. Tesche, 157 Wn. App 554, 237 P. 3d 387 (2010). In Wegner v. Tesche the court was construing statutory

issues and thus reviewed the trial court's decisions de novo. This court will be construing the statutory issues before the court. It staggers the imagination to declare that Mr. Christian is dead when he walked in the courtroom and testified that he was very much alive. No more clear, cogent and convincing evidence could be produced that Mr. Christian's un rebutted, live testimony. Denying this testimony and these facts cannot be the basis for a trial court decision. Not only is it an abuse of discretion but it is so far beyond the boundaries of the evidence presented as to be unsustainable on appeal under any review standard.

CONCLUSIONS

The net effect of Washington statute and case law is to provide certain benefits to a surviving spouse. As the appellate court said when reversing the trial court, the trial court improperly attempted to make the record reflect what might have happened, Marriage of Pratt, 99 Wn. 2d at 911. The Court awarded the community property to the surviving spouse where the decedent was intestate. The Christians never filed a divorce or legal separation petition let alone obtained a decree. See In Re: Jones' Estate, 11 Wn. 2d 254, 188 P.2d 951 (1941). The Jones court held that the award was in the sound discretion of the trial court, 11 Wn. 2d at 261. The court awarded all of the community property to the surviving spouse.

Lowell Christian asks this court to apply the law as written to both separate and community property. Because the Trial Court erred in this matter, the only remedy is to reverse the Trial Court and remand to the court with instructions. The Trial Court should be instructed to enter an order with the following provisions:

1. That Lowell Christian take all of the community property, namely the stock share proceeds of approximately \$29,000.

2. That Lowell Christian take one-half of the remaining separate property.

3. That the Court reverse and vacate the Trial Court's award of costs and attorney's fees against Lowell Christian.

4. That Lowell Christian be awarded his attorney's fees for having to litigate an issue of settled law with property of undisputed origin and characterization.

If the court does not specify the relief ordered and instead orders a new trial, Lowell Christian respectfully requests that this case be remanded to a different trial judge for hearing on the merits and excluding improper evidence. The errors in this case mandate a return to the Trial Court with proper instructions. The evidence is sufficient to have this court render those instructions in order to avoid any misunderstanding and further litigation.

RESPECTFULLY SUBMITTED this 12th day of September

2012.



Peter Kram, WSBA #7436
Attorney for Appellant