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NO. 67255-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

(Whatcom County Cause No. 09-4-00039-9)

IN RE THE ESTATE OF LANGELAND:

SHARON DROWN, an individual,

Appellant/Cross-Respondent,

vs.

JANELL BOONE, an individual,

Respondent/Cross-Appellant.

APPELLANT DROWN'S REPLY BRIEF

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I – INTRODUCTION

In 1991, Sharon Drown (Drown) moved in with Randall Langeland (Langeland) and began a loving intimate committed relationship. RP 52; RP 69. Drown's commitment to Langeland continued until his death on January 9, 2009. CP 275; RP 52.

Janell Boone (Boone), in this appeal, asks this Court to rely upon the inventory filed by Ms. Lenington the court appointed personal representative. That argument and any reliance is misplaced. At trial, Lenington testified as follows:

> Q. Now, let's continue on with Exhibit No. 5, page seven, down at the bottom, line number five. We have annuities IRS's totaling $233,477.39, correct?
> A. Yes.
> Q. The first one was a paid on death beneficiary to Sharon Drown for $56,982.60, correct?
> A. Yes.
> Q. You have no idea where the source of those funds were, correct?
> A. I do not.
> Q. Or when it was opened?
> A. I do not.

RP 32-33.

> Q. So by filing this inventory, you are not trying to say that the gifts that we see, starting under item number five to everyone, didn't belong half to Ms. Drown or not half to Ms. Drown, are you?

A. I have no knowledge.
Q. And you are not trying to represent to the court whether they are or not joint property and/or are or are not similar to community property?
A. No, I am not.

RP 33-4.

Boone incorrectly argues that Drown's issues on appeal were whether Drown is entitled to an interest in any of Langeland's separate property and whether there was any community property to divide equitably. Drown admits she has no interest, equitable or otherwise, in Langeland's separate property and community property is created only in a legal marriage. However, Drown does argue that the trial court incorrectly concluded that the business, a 36 foot sailboat, and Drown's home was Langeland's separate property. Further, Drown argues that all three properties were joint property at the time of death and therefore one half (1/2) of those three assets belonged to her and not the estate and the other half, in equity, should be awarded to her by applying community property law by analogy to reach a just result. At page 34 of her opening brief, Boone admits that Washington law

requires equity to address the distribution of "jointly owned" property. Drown Opening Brief, p. 34

II – SUMMARY OF ARGUMENT

A. IRA

The trial court, which had the benefit of hearing Boone's handwriting expert, David Sterling's (Sterling) testimony firsthand, including his inconsistencies, properly made its determination regarding the credibility of the expert testimony and gave it no weight. The weight and credibility of expert testimony regarding handwriting is reserved for the trier of fact. *In re Zimmerli's Estate*, 162 Wash. 243, 248, 298 P. 326 (1931).

B. Joint Property

Boone, daughter of Langeland, admitted that Drown entered into a loving, committed, intimate relationship with Langeland, starting in 1991. RP 52. The business known as J. Randall and Associates was started in 1994, three years after Drown's commitment to Langeland. RP 114. The sailboat was purchased in 1998, seven years after Drown entered into a committed intimate relationship with Langeland. Ex. 6. The home was

purchased in 1999, eight years after Drown committed her life to Langeland. RP 25.

"[I]ncome and property acquired during a meretricious relationship should be characterized in a similar manner as income and property acquired during marriage. Therefore, all property acquired during a meretricious relationship is presumed to be owned by both parties. *Connell v. Francisco*, 127 Wn.2d 339, 351, 898 P.2d 831, 836 (1995). "[T]he presumption can be overcome only by clear and convincing proof" that the transaction falls within the scope of a separate property section." *Yesler v. Hochstettler*, 4 Wash. 349, 354, 30 P. 398 (1892).

"[W]e adopt the rule that courts must 'examine the [meretricious] relationship and the property accumulations and make a just and equitable disposition of the property.'" *In re Marriage of Lindsey*, 101 Wn.2d 299, 304, 678 P.2d 328 (1984), *citing Latham v. Hennessey*, 87 Wn.2d 550, 554, 554 P.2d 1057 (1967). When an intimate committed relationship existed, the trial court should "**apply community property law by analogy;** (and) property acquired jointly during the relationship could be

equitably divided between the partners, even if only one partner held title." (Emphasis added.) *Olver v. Fowler*, 161 Wn.2d 655, 666; 168 P.3d 348 (2007).

Legal determinations of the trial court are reviewed de novo. *State v. Osman*, 168 Wn.2d 632, 639, 229 P.3d 729 (2010). "A trial court's characterization of property as community or separate is reviewed de novo." *Marriage of Chumbley*, 150 Wn.2d 1, 5, 74 P.3d 129 (2003).

C. Attorney's Fees

The trial court erroneously awarded fees under RCW 11. 96A.150. Courts have consistently refused to award attorney's fees as part of the cost of litigation in the absence of a contract, statute, or recognized ground of equity. *Haner v. Quincy Farm Chemicals, Inc.*, 97 Wn.2d 753, 757, 649 P.2d 828 (1982). Boone received attorney fees, under RCW 11.96A.150, arguing that Drown advanced novel, incorrect and/or difficult issues. Under RCW 11.96A.150, it is an abuse of discretion and unwarranted, to award fees when there are novel, original or difficult issues. *In Re Estate of D'Agosto*, 134 Wn.App 390, 402, 139 P.3d 1125 (Div. I, 2006),

review denied, 160 Wn.2d 1016 (2007). In her brief, Boone raised no specific equitable facts supporting an award of attorney fees.

III - ARUGMENT

A. The Trial Court Correctly Determined the IRA belonged to Drown.

On May 26, 2011, the trial court correctly found that "[t]he signatures on Exhibit 31 are deemed to be those of Mr. Langeland." CP 50. On that same date, the trial court also made conclusion of law No. 5, as follows, "Ms. Drown is entitled to the funds in the Fidelity IRA." CP 51. Boone argues that the trial court erred in entering the foregoing finding of fact and conclusion of law. Boone further argues that Langeland's signatures were forgeries, rendering the award of the IRA to Drown error.

Boone presented the testimony of handwriting expert, David Sterling (Sterling), to testify that Langeland did not sign the beneficiary change documents. Ex. 31. Sterling's testimony at trial was confusing at best. He initially testified that he was retained by Boone, to review Langeland's signature on Exhibit 31. RP 379-80. He then testified as to his review of Exhibit 30, the Chicago Title

documents, as compared to the six exemplar documents used in his review. RP 380-82; 384-85. Sterling ultimately testified, after the trial court sought clarification, that his testimony pertained to Exhibit 31. RP 385-86. Sterling often testified using the plural pronoun "we," which he was assumedly using to refer to his laboratory staff.

"[E]xpert and opinion testimony as to the genuineness of handwriting is competent, and the credence and weight to be given to such evidence is for the triers of the facts." *In re Zimmerli's Estate*, 162 Wash. at 243, 248, 298 P. 326, 328 (1931); *see also In re O'Connor's Estate*, 105 Neb. 88, 179 N.W. 401 (1920). "The trial judge had the advantage of seeing and hearing the witnesses and of marking their demeanor on the witness stand." *In re Zimmerli's Estate*, 162 Wash. at 249; *see also In re Connolly's Estate*, 89 Wash. 168, 154 P. 155, (1916). The trial court, which had the benefit of hearing Sterling's testimony firsthand, including his inconsistencies, properly made its determination regarding the credibility of the testimony and gave it the appropriate corresponding weight.

Drown did not sign Exhibit 31. RP 415. Drown, in an offer of proof, testified Langleland signed Exhibit 31. RP 415-16. A reasonable fact finder could conclude that Langeland signed the document. There were other admitted signatures. Ex. 8, Ex. 10, and Exhibit 12 were admitted to contain his signature. RP 93; RP 96; RP 107. When there are other admitted signatures the fact finder is allowed to compare the questions signature with the admitted signatures to determine if it is a genuine signature. *Stokes v. U.S.*, 157 U.S. 187, 194, 15 S.Ct. 617 (1895).

Drown and Langeland's relationship was not a "confidential relationship", as defined in *Estates of Palmer*, 145 Wn.App. 249, 187 P.3d 758 (2010). In *Palmer*, the confidential relationship was created by a durable power of attorney (agency-like) relationship. *Id.* at 261. Boone has not provided any authority characterizing a committed intimate relationship as a confidential relationship, as in *Palmer*. *Id.* As Drown and Langeland's relationship was not a confidential relationship, the corresponding burden of proving no undue influence is simply inapplicable to these facts. Even assuming it was Drown's burden to establish no undue influence,

the trial testimony of Langeland's doctor and best friend, Dr. Lombard and Jerry Ringel, clearly demonstrate there was no undue influence. RP 363-365; 316-324.

B. Joint Property.

1. Business.

At the time of death, the business bank account balance was $32,413.74. Ex. 1. At the time of trial, the business bank account balance was $19,257.47. Ex. 3. Lenington, the court appointed personal representative, made no attempt to trace the source of the business funds or the funds in any other bank account. RP 26; RP 27-31.

Drown, from the beginning of J. Randall and Associates, worked in the business without compensation. She did the bookkeeping, accounting, and contacted clients. RP 114-15. After Langeland became ill, Drown was required to work more and more in the business, again without compensation. After 1994, Langeland's entire income was from the business. Lenington asked Drown for and needed assistance to manage the business. Drown

was at all times cooperative. Regarding the business, Drown was the person relied upon by Lenington. RP 25.

2. Sailboat.

Lenington, the court appointed personal representative, at the time of trial had no knowledge of where the funds came from to buy the 36 foot sailboat. RP 29. The source of the down payment was never identified by Lenington or Boone. Boone argues that Drown's testimony is controlling on the issue of whether or not the sailboat was separate property. The specific question asked of Ms. Drown was whether Boone's counsel's restatement of her alleged earlier testimony was a correct restatement.

> Q. I believe you testified that Mr. Langeland purchased the Catalina 36 sailboat with his own funds, correct?
> A. Correct.

RP 245.

Boone's reliance on an answer to a poorly worded question to rebut the presumption of joint property is misplaced. Down's answer could mean that Drown agreed that it was counsel's belief that she had previously so testified, or

that Drown believed that she had previously so testified, or that Drown accepted counsel's representation that she had previously so testified. It might be argued that the answer is an admission that he used a check from his checking account or cash to make the down payment. However, it cannot be concluded that she intended to say that wherever the funds came from, they were Langeland's separate property.

A review of the entire transcript demonstrates that the question was a clear misstatement of Drown's prior testimony. Nowhere in the transcript, before or after Boone's counsel's question, did Drown testify that the sailboat was purchased with Langeland's "own funds". A review of other questions and answers at page 245 of the transcript demonstrate the lack of clarity which existed in the line of questioning.

> Q: During the last six months of Randall Langeland's life, was he able to lay out his own prescription pills?
> A. Was he able to what?
> Q. Lay out his own prescription pills for the day?
> A. I helped him with his medications.
> Q. That's not my question.
> A. Oh.

RP 245.

Drown's testimony as to the source of the funds for the down payment of the sailboat was that it came from savings accumulated by Langeland during their committed intimate relationship.

> Q. Do you know where the funds came to purchase this boat, came from?
> A. Um he saved all of his money for this boat.
> Q. And was that savings that occurred during the time that you were in a committed intimate relationship starting in 1991?
> A. Yes.

Other than one response to a poorly worded question, Boone provides no argument or authority for the trial court to: give no weight to the presumption of joint property; give no weight to the fact that funds acquired by Langeland, after 1991, were not his separate funds; disregard Drown's testimony that the money came from funds acquired during the relationship; and, to give no weight to the fact that in 2002 Drown and Langeland borrowed $65,000 to pay off the sailboat. Ex. 9. The expenses for the sailboat were shared equally, including moorage costs. Drown maintained the sailboat for almost 10 years with no assistance from Langeland.

These facts demonstrated an intent to have joint ownership. RP 18, l. 17; RP 80, l. 7.

3. Residence.

Prior to 1999, Drown paid more than $10,000 to Langeland in California. In 1999, Drown gave Langeland an additional $10,000. The Bellingham home was placed in both their names. Lenington made no attempt to determine where the funds came from to purchase the home or to trace any funds used to pay for the home. RP 26.

Boone argues that escrow instructions to Chicago Title & Escrow, which instructions were followed by the title company in part and not followed by Drown and Langeland thereafter, is an enforceable contract, providing uncontroverted evidence of the intent of Langeland and Drown. Ex. 30. Langeland could not testify as to his intent. But we have circumstantial evidence of his intent. Drown paid 50% of the annual property taxes and 50% of the costs of repairs on the home. RP 82; RP 84; RP 105. After the purchase of the home, Langeland received more $40,000 in payments from Drown, with no accounting for those payments.

The payments made and received were not consistent with the alleged agreement. Clearly, the alleged agreement was not performed. The payments were not reported by Langeland, in the taxes he filed, as interest or income. Ex. 21. The amortization (interest) calculations were on a document prepared for trial. Ex. 33; RP 311.

There is no evidence that Langeland signed any document in Exhibit 30. The only testimony regarding Langeland's signatures on Exhibit 30, was by Boone's expert, Sterling, who testified that the signatures on Exhibit 30 were "not Langeland's handwriting pattern." RP 382.

> Q. And what were you findings as you examined that two groups of signatures, Exhibit 30 with the six other documents you described?
> A. It was my professional opinion that the questioned document exemplars submitted for comparison to the exemplars of what ws purported to be authentic signatures of Mr. Langland, that we determined that it was probably that they were not Mr. Langland's handwriting pattern - -

Id.

> Q. And your, did you, as a result of your investigation and findings, form an opinion as to whether or not the

> signatures on Exhibit 30 were the signatures of Randall Langeland?
> A. Yes. In my professional opinion, we determined that the signatures were not the signatures of Randall Langeland. . .

RP 384-85.

Except for this testimony of alleged forgery, Boone's only offered testimony on Exhibit 30, was as follows:

> Q. (By Mr. Olver) On the first page of Exhibit 30 which I have marked as page A, I have marked the pages A, B, C, D, and E for ease of reference on the record. And page A, would you tell me – well, let me strike that. I actually have no questions with regard to Exhibit 30.

RP 250.

After learning that her counsel was examining Sterling with the wrong exhibit, Boone asked no questions as regards Exhibit 30 and did not attempt to prove Langeland's signature on Exhibit 30. Boone made this choice because Boone did not want to waive any objection it intended to make as regards the Dead Man's Statute. Boone cannot now argue Boone established that Exhibit 30 was a binding contract. Drown was not examined on Exhibit 30. Boone's argument that any part of Exhibit 30 is a binding contract is advanced without any legal authority. A writing does not make a

contract even if it bears signatures. *Evans v. Yakima Valley Grape Growers Ass'n*, 52 Wn.2d 634, 676, 328 P.2d 671 (1958).

Assuming an agreement, undisputed testimony established that the intention of Langeland was consistent with the intention of Drown. Boone was told of the parties' intent. Before his death, Langeland told Boone that Drown was to get the house, to which Boone responded to her father: "Sharon can have the house." RP 208, l. 6. Boone did not deny this conveyed intent.

Even assuming an intent by Langeland to obtain a separate property agreement from Drown, community property law should be applied by analogy. Such an attempt to create a separate property agreement on the home should fail. "Spouses may change the status of the community property to separate property by entering into mutual agreements . . . . A spouse seeking to enforce an agreement, whether oral or written, that purports to convert community property into separate property must establish with clear and convincing evidence both (1) the existence of the agreement and (2) that the parties mutually observed the terms of the agreement throughout their marriage." *Marriage of Mueller*,

140 Wn.App. 498, 504-505, 167 P.3d 568 (Div. 1, 2007), *review denied* 163 Wn.2d 1043 (2007). In addition to the elements of an ordinary contract, in the case of a separate property agreement, the spouse "must sign the agreement freely and voluntarily on independent advice with full knowledge of her rights." *Friedlander v. Friedlander*, 80 Wn.2d 293, 303, 494 P.2d 208 (1972).

C. Trial Court's Award of Attorney's Fees

It is not disputed that the trial court's rulings related to the allowance of attorney's fees are reviewed for an abuse of discretion. *Laue v. Estate of Elder*, 106 Wn.App. 699, 712, 25 P.3d 1032 (Div. I, 2001). A trial court abuses its discretion if it relies on unsupported facts, applies a wrong legal standard, or takes a position no reasonable person would take. *Mayer v. Sto Indus., Inc.,* 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

The trial court made and entered no findings of fact or conclusions of law based upon equitable principles as to why Drown should pay the Estate for attorney's fees incurred by Boone, when she was not the personal representative of the Estate. Furthermore, Boone has not advanced any equitable principles in

her Brief as to what equitable principles the trial court's award of attorney's fees were based on.

IV – CONCLUSION

This Court should affirm the trial court's findings of fact and conclusions of law regarding the Fidelity IRA, to which Drown was named the beneficiary.

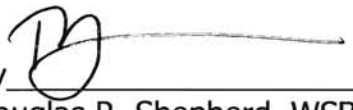
The trial court incorrectly categorized the property acquired during Drown and Langeland's committed intimate relationship as Langeland's separate property, improperly placing the burden on Drown to establish the joint nature of the property. Drown respectfully asks this Court to reverse the errors of the trial court and return this matter, after appropriately classifying the home, business, and sailboat as joint property owned equally at the time of death, to be equitably distributed using the intestate statutes by analogy.

Further, the court improperly awarded Boone $70,000 in attorney's fees pursuant to RCW 11.96A.150 without making any findings of fact regarding any equitable facts supporting an award of attorney's fees. Drown respectfully requests that this Court to

reverse of the trial court's erroneous award of attorney's fees to Boone.

Respectfully submitted this 26th day of September 2012.

SHEPHERD AND ABBOTT



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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In Re the Estate of: RANDALL J. LANGELAND, Deceased. SHARON DROWN, Appellant/Cross-Respondent, vs. JANELL BOONE, Respondent/Cross-Appellant.	**Consolidated Appeal** **Case No. 67255-0-I** **Whatcom County Superior Court** **Case No. 09-4-00039-9** **DECLARATION OF SERVICE**

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I, Heather Shepherd, declare that on September 26th, 2012, I caused to be served a copy of the following document: **Appellant Drown's Reply Brief;** and a copy of this **Declaration of Service**, in the above matter, on the following persons, at the following addresses, in the manner described:

Michael L. Olver, Esq. Helsell Fetterman, LLP 1001 4th Avenue, Suite 4200 Seattle, WA 98154 nfallis@helsell.com mwimmer@helsell.com molver@helsell.com	(X) U.S. Mail ( ) Express Mail ( ) Fax ( ) E-Mail ( ) Messenger Service ( ) Hand Delivery
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 26th day of September 2012, at Bellingham, Washington.

Heather Shepherd

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