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Court of Appeals No. 46778-0-II

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SUPREME COURT OF THE STATE OF WASHINGTON

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THE ESTATE OF DANA BRUCE MOWER,

Deceased.

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REPLY TO ANSWER TO PETITION FOR REVIEW

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LEDGER SQUARE LAW, P.S.

By: Stuart C. Morgan, WSBA #26368  
Chrystina R. Solum, WSBA #41108  
Attorneys for Appellant

**LEDGER SQUARE LAW, P.S.**

710 Market Street  
Tacoma, Washington 98402  
Telephone: (253) 327-1900



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## I. ARGUMENT

### A. **It is an issue of substantial public interest whether a decedent's dissolution from his spouse operates to revoke any bequest to his ex-spouse and his ex-spouse's family.**

The Court of Appeals held that a bequest to a former spouse's relatives could be "in favor of" a former spouse and thus subject to RCW 11.12.051 depending on the facts of the specific case. This issue was central to the Court's decision to affirm, and not dicta. In imposing a factual analysis to RCW 11.12.051, the decision encourages costly litigation contrary to the mandate of the Trust and Estate Dispute Resolution Act, Ch. 11.96A RCW ("TEDRA"). Additionally, the Court improperly weighed facts on review of a summary judgment order, contrary to prior authority by this Court. The Estate asks that this Court accept review.

In response to the Estate's argument that RCW 11.12.051 operates to automatically disinherit a former spouse's relatives, the Court of Appeals examined the specific language of the statute. The Court noted that the statute's specific language revoked bequests "in favor of or granting any interest or power to" a former spouse. The Court reasoned that "in favor of" must have a separate meaning than "granting any interest or power to" a former spouse. "Because the legislature chose to include the language, it must refer to some benefit other than a direct grant of power or property."<sup>1</sup> The Court went on to hold that "in some cases, gifts to former spouse's family members may confer some benefit on the former spouse. Whether a

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<sup>1</sup> *Estate of Mower*, 193 Wn. App. 706, 720, 374 P.3d 180 (2016).

particular will provision benefits the testator's former spouse would be a factual question for the trial court to resolve."<sup>2</sup>

The Court properly determined that "in favor of" could include an indirect benefit to a former spouse. However, the Court erred in determining that this was a factual question to be decided on a case-by-case basis. This analysis encourages costly litigation despite TEDRA's encouragement of a swift and cost-effective dispute resolution process. Issues of fact cannot be resolved short of trial, meaning that families will have to undertake expensive discovery, motions practice, and trial with former in-laws as they grieve the loss of their relatives.

Consistent with TEDRA's encouragement of a swift resolution of estate matters, the Court should have held that "in favor of" included indirect bequests to a former spouse, including bequests to the former spouse's relatives. The Schulers have yet to offer any admissible evidence that Dana's bequest to them was based on any status besides their own relationship to Christine, Dana's wife. The only admissible evidence below showed that Dana despised his in-laws and only included them in his Will as part of a reciprocal estate planning decision made shortly before major heart surgery. It is a matter of public interest whether estates will be forced to undertake significant litigation to resolve these situations.

The Schulers argue that this portion of the Court of Appeals' decision regarding RCW 11.12.051 is nothing more than dicta.<sup>3</sup> However,

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<sup>2</sup> *Id.*

<sup>3</sup> *Answer* at 10 – 11.

the crux of the Estate's appeal has been that the statute disinherits the Schulers because the bequest was given for Christine's benefit. That is the issue addressed in the supposed "dicta."

Dicta, as the Supreme Court has previously explained, is defined as follows:

The word is generally used as an abbreviated form of *obiter dictum*, 'a remark by the way;' that is, an observation or remark made by a judge in pronouncing an opinion upon a cause, concerning some rule, principle, or application of law, or the solution of a question suggested by the case at bar, but not necessarily involved in the case or essential to its determination; any statement of the law enunciated by the court merely by way of illustration, argument, analogy, or suggestion.<sup>4</sup>

In *Lemon*, the Court was faced with a similar challenge that a portion of an earlier opinion was dicta. The challenged issue in the prior case

was whether a taxpayer could maintain an action against state officials involving a matter of public concern without having a direct pecuniary interest in the actions of the officials which were challenged by the suit. To decide that question it was necessary for the court first to determine *whether any taxpayer, under any circumstances, could maintain such a suit*. If that question had been answered in the negative, it would have disposed of the action completely.<sup>5</sup>

After that preliminary conclusion, the Court could then determine whether the individual taxpayer in its case could personally maintain the suit. The Court concluded it was necessary to determine whether the taxpayer was

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<sup>4</sup> *State ex rel. Lemon v. Langlie*, 45 Wn.2d 82, 89, 273 P.2d 464 (1954).

<sup>5</sup> *Lemon*, 45 Wn.2d at 89.

entitled to bring a lawsuit because “[i]f that question had been answered in the negative, it would have disposed of the action completely.”<sup>6</sup>

Similarly, it was necessary for the Court of Appeals to determine whether RCW 11.12.051 applies to direct or indirect bequests to a former spouse and whether that determination was an issue of fact that could be decided on summary judgment. This case was decided on summary judgment early in the litigation with minimal discovery conducted. The Estate argued on appeal that RCW 11.12.051 operated to disinherit the relatives of former spouses. While the Estate raised multiple arguments on appeal, the Court was required to address all of the arguments in order to affirm the trial court’s grant of summary judgment. In its holding, the Court of Appeals acknowledged that a bequest can benefit a former spouse, recognizing that “in favor of” included “all will provisions that benefit a former spouse without directly conveying any power or property interest, as long as those provisions would be effectively revoked by treating the former spouse as predeceasing the testator.”<sup>7</sup> This language was not dicta.

If any part of the *Mower* decision is dicta, it is the Court’s analysis of hypothetical facts not before it:

In contrast, a will provision conferring some personal benefit on the former spouse—for example, a provision setting up a trust to care for the former spouse’s pet as long as the former spouse lived—would not survive if that former spouse were considered deceased.<sup>8</sup>

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<sup>6</sup> *Lemon*, 45 Wn.2d at 89 – 90.

<sup>7</sup> *Estate of Mower*, 193 Wn. App. at 716.

<sup>8</sup> *Mower*, 193 Wn. App. at 721.

There was nothing before the Court regarding a trust to care for a pet. These hypothetical facts are not properly part of a decision, nor properly weighed on summary judgment.

**B. The Court of Appeals' opinion weighs factual issues contrary to prior case law.**

In the alternative, if the Court of Appeals properly identified a factual question, it erred by weighing factual determinations while reviewing a summary judgment order, contrary to this Court's prior authority.

As noted above, the Court of Appeals' own language recognizes that whether a bequest is "in favor of" a former spouse is a factual determination. Yet, the Court then concluded that the bequest in this instance to the Schulers was not "in favor of" Christine. Because this matter is before the Court on summary judgment, such factual determinations cannot be resolved at this time. There was evidence offered below that Dana only included the Schulers in his Will as a favor to Christine, who executed a similar Will. These facts should be examined by a trier of fact on full presentation of evidence, not on summary judgment.

The Schulers focus their argument on what Dana intended would happen if Christine predeceased him.<sup>9</sup> However, this approach ignores the relevant intent – what Dana intended when he included the Schulers in his Will in 2005.

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<sup>9</sup> *Answer* at 8 -- 9.

Dana made his Will while married to Christine and just before major heart surgery. Christine executed a reciprocal Will in which they both left their assets to their siblings. Dana made no bequest for non-relatives, and specifically excluded his “brother in law,” Peter Schuler. Dana passed away over the Thanksgiving holiday just two weeks after finding out that his dissolution with Christine had been finalized. Dana has a well-documented history expressing his dislike and distrust of his in-laws. After his dissolution, Dana did not maintain a relationship with the Schulers. In fact, Dana’s close friend and employee, David Allan, expressly recalls Dana making statements expressing animosity and dislike towards the Schulers.<sup>10</sup> Christine called David Allan shortly after Dana’s death and stated that Dana did not want the Schulers to inherit anything under his Will.<sup>11</sup>

There is evidence that the Will was created as a favor to Christine and in exchange for her reciprocal Will to leave her assets to the couple’s siblings. The Estate asks that this Court remand to the trial court for further discovery and fact-finding.

**C. The Estate requests its attorney fees and costs on appeal.**

Attorney’s fees and expenses incurred on appeal can be awarded if applicable law, a contract, or equity permits an award of such fees and expenses.<sup>12</sup> The Court may award a party costs, including reasonable attorney fees, pursuant to applicable Washington law in RCW 11.96A.150(1). This action benefits Dana’s Estate in correctly

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<sup>10</sup> CP at 111.

<sup>11</sup> CP at 111 – 12.

<sup>12</sup> RAP 18.1(a).

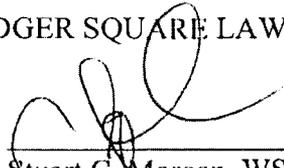
identifying his heirs and giving effect to his true intent. The Estate requests attorney fees and costs against the Schulers related to this action.

## II. CONCLUSION

Law and equity mandate that a decedent's dissolution from his ex-spouse operates to revoke any bequest in favor of the spouse, which includes a bequest to the ex-spouse's family. Here, Dana's bequest to the Schulers as alternate beneficiaries was based solely on their relationship to him through Christine. Dana had no contact with the Schulers following his dissolution and never reaffirmed his bequest to the Schulers after his dissolution. Accordingly, this Court should reverse the trial court's orders on summary judgment and award the Estate's attorney fees and costs associated with this matter.

RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of October, 2016.

LEDGER SQUARE LAW, P.S.

By: 

Stuart C. Morgan, WSBA #26368  
Chrystina R. Solum, WSBA #41108  
Attorneys for Linda Turner, Personal  
Representative of the Estate of Dana  
Bruce Mower

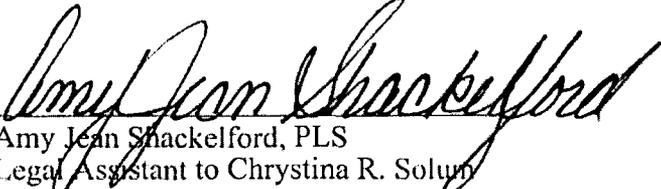
**CERTIFICATE OF SERVICE**

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below:

C. Tyler Shillito Smith Alling, PS 1515 Dock St., Suite 3 Tacoma, WA 98402 <a href="mailto:tyler@smithalling.com">tyler@smithalling.com</a>	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Overnight Courier <input checked="" type="checkbox"/> Electronically via email <input type="checkbox"/> Facsimile
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DATED this 11<sup>th</sup> day of October 2016, at Tacoma, Washington.

  
Amy Jean Shackelford, PLS  
Legal Assistant to Chrystina R. Solun