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NO. 66828-5-I

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COURT OF APPEALS, DIVISION 1  
OF THE STATE OF WASHINGTON

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DONNA M. KELLAR,

Appellant,

vs.

THE ESTATE OF KENNETH L. KELLAR,

Respondent.

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REPLY/RESPONSE BRIEF OF APPELLANT

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## I. CLARIFICATION OF THE FACTS

### A. The Prenuptial Agreement

The Estate makes many assertions of “fact” which inaccurately describe the circumstances surrounding the creation of the Kellar Prenuptial Agreement. Although Ken Kellar (“Mr. Kellar”) initially asked Donna Kellar (“Mrs. Kellar”) to marry him approximately three months prior to the wedding, Mrs. Kellar did not consider the “proposal” to be sincere. The couple had been fighting and Mrs. Kellar had asked for a break from the relationship. CP 238-239. In a desperate effort to win Mrs. Kellar back, Mr. Kellar made an impromptu “proposal” of marriage without presenting an engagement ring. *Id.* There was no engagement and Mrs. Kellar never considered the proposal to have been real. CP 239. The actual marriage proposal did not occur until September 2, 2001, only 17 days prior to the date of marriage scheduled by Mr. Kellar. CP 390; CP 240. By the time Mrs. Kellar knew they were going to get married, Mr. Kellar and his attorney’s had been working on a prenuptial agreement for over three months. CP 317.

There is a substantial dispute over the value of Mr. Kellar’s assets at the time of the marriage. The Estate contends that Mr. Kellar was worth approximately \$15 million in 2001. Respondent’s Brief at 11. In 2005,

when Mr. Kellar first provided Mrs. Kellar with a breakdown of the assets he possessed in 2001, she received a document labeled “Kenneth L. Kellar Balance Sheet, December 31, 2001” that listed assets of approximately \$93 million at the time of their marriage. CP 449-453. There is a difference of approximately \$78 million between the figures alleged by the Estate and those alleged by Mrs. Kellar. The Estate also disputes the value of Mrs. Kellar’s assets at the time of the marriage. See *infra* § B. The court has made no factual determinations regarding the value of either of the party’s assets at the time of marriage.

Mr. Kellar had a significant advantage during the “negotiations” of the prenuptial agreement. Mr. Kellar first began to discuss and review drafts of the prenuptial agreement and develop a negotiation strategy with his attorney in June 2001, at least three months prior to the “mediation” and signing of the agreement. CP 317. Conversely, Mrs. Kellar did not have the opportunity to meet with her own attorney until sometime between September 6, 2001, and September 11, 2001, after “mediation” was completed and the “negotiations” had already taken place. CP 626; CP 391; CP 317. This was only 8-12 days prior to the wedding date. *Id.*

The “mediation” with Ron Morgan was not really a mediation, and it is a stretch to say that the prenuptial agreement was “negotiated” during the “mediation.” CP463-465; CP 201. Mr. Kellar’s attorney was not

present, Mrs. Kellar had not yet retained counsel, the parties met face to face rather than in private rooms, and they did not send the mediator, nor each other any letters of position; nor was there any disclosure of assets. CP 433; 463. Mr. Morgan admitted that the mediation was “certainly” not a “negotiation.” CP 201; CP 463. It would be more appropriately characterized as a “hot box” where two salesmen sell a lemon of a car to a customer. The “mediation” was Mr. Kellar’s opportunity to present the terms that he and his attorney had prepared, and have the assistance of a “neutral” third party who could help in “getting Donna comfortable” with the terms of the agreement. CP 463. In addition, Mr. Morgan testified that there was no discussion of assets at the mediation. CP 465. This was simply a “fast shuffle” of an attractive young waitress who was 39 years old, by a 73 year old multimillionaire business mogul skilled in negotiation and backed up by an army of professional advisors.

Mrs. Kellar’s attorney, Mathew Peach, did not do any negotiating on her behalf, and was not involved with the process until the document was a fait accompli. CP 305; CP 426. Mr. Kellar’s attorney presented the agreement to Mr. Peach on September 11, 2001, after the “mediation.” CP 463. Mr. Kellar even attempted to present the agreement without the minor changes he and Mrs. Kellar had discussed. CP 305. Mr. Peach did not review any evidence of Mr. Kellar’s assets with Mrs. Kellar prior to

her signing the prenuptial agreement. CP 427. The agreement was signed on September 14, only five days before the wedding and three to seven days after Mrs. Kellar first had an opportunity to see the document. CP 477; CP 455; CP 640.

**B. South Dakota Gaming License**

The factual assertions in the Response regarding the South Dakota Gaming Commission need to be “clarified.” The matter of the South Dakota Gaming License was not for the benefit of Mrs. Kellar, but was pursued by Mr. Kellar for his own benefit. CP 43-47. Mr. Kellar had a long history of using family and friends as proxy’s for holding gaming licenses that were intended to benefit him. CP 44. Richard Pluimer was Mr. Kellar’s long time personal friend and South Dakota attorney. CP 44; CP 1498. After summary judgment had been granted by the trial court based on the Estate’s allegation that the Gaming Commission hearing had been for Mrs. Kellar’s benefit, the Estate submitted Mr. Pluimer’s affidavit in support of its motion for attorney’s fees. Mr. Pluimer submitted an affidavit describing in detail how the entire matter regarding the South Dakota Gaming Licenses was coordinated by Mr. Kellar for his own benefit. CP 44-45. Because only a limited number of gaming licenses could be issued to one person, the commission initially denied Mrs. Kellar’s application because she was married to Mr. Kellar. CP 44.

Not happy with this result, Mr. Kellar had Mr. Pluimer pursue a review of the decision under Mrs. Kellar's name and flew his young wife in to star in the dog and pony show they had scripted. CP 44-45. Mrs. Kellar simply showed up at the hearing and testified as she had been instructed by Mr. Pluimer. *Id.* The end result was that Mr. Kellar received the benefit of additional gaming licenses in Mrs. Kellar's name. CP 46.

## II. REPLY ARGUMENT

### A. The Standard Of Review For Evidentiary Decisions Made On Summary Judgment Is De Novo.

Contrary to the Estate's assertions, this court has consistently held that all evidentiary rulings made on summary judgment are reviewed de novo. *Enzley v. Mollmann*, 155 Wn. App. 744, 752, 230 P.3d 599 (Div. I, 2010) (portions of a non-expert witness declaration struck on summary judgment motion, appellate court reviewed evidentiary decisions of the trial court de novo); *Lane v. Harborview Medical Center*, 154 Wn. App. 279, 286, 227 P.3d 297 (Div. I, 2010) (portions of plaintiff's declaration struck by trial court on summary judgment, evidentiary question reviewed de novo); *Momah v. Bharti*, 144 Wn. App. 731, 749, 182 P.3d 455 (Div. I, 2008) (appellate court applied de novo review to trial court's decision to exclude several exhibits submitted on motion for summary judgment); *Diaz v. State, University of Washington*, 161 Wn. App. 500, 508, 251 P.3d

249 (Div. I, 2011) (trial court decision on summary judgment to admit portions of a settlement agreement reviewed de novo).

The Estate mistakenly relies on the case of *Int. Utilities, Inc. v. St. Paul*, 122 Wn. App. 736, 87 P.3d 774 (2004) in support of its argument that evidentiary decisions made on summary judgment should be reviewed for an abuse of discretion. However, the Estate's reliance on *Int. Utilities, Inc.*, is flawed. The abuse of discretion standard is applied to evidentiary decisions after a full trial, but the standard of review on a summary judgment order is de novo. See *State v. Bourgeois*, 133 Wn.2d 389, 399, 945 P.2d 1120 (1997); compare to *Lane*, 154 Wn. App. at 286; *Momah*, 144 Wn. App. at 749; *Diaz*, 161 Wn. App. at 508; *Enzley*, 155 Wn. App. at 752. The court in *Int. Utilities, Inc.*, cited to *State v. Bourgeois*, for the evidentiary standard of abuse of discretion. However, *State v. Bourgeois* was a criminal matter that went through full trial prior to appeal. The court in *State v. Bourgeois* properly applied the abuse of discretion standard of review to evidentiary decisions in that matter because it had gone through a full trial prior to appeal. See *Bourgeois*, 133 Wn.2d at 393. The application of the abuse of discretion standard to evidentiary rulings made on summary judgment in *Int. Utilities, Inc.*, was an anomaly and this court has consistently applied the de novo standard of review in more recent cases. See *Lane*, 154 Wn. App. 279; *Momah*, 144 Wn. App. 731;

*Diaz*, 161 Wn. App. 500; *Enzley*, 155 Wn. App. 744. Apart from the unique holding of *Bourgeois*, which is clearly distinguished, the settled law is that a de novo standard of review is applied to all evidentiary rulings of the trial court made on motions for summary judgment.

**B. The Facts Presented By Mrs. Kellar Are Supported By The Record.**

The Estate complains of “inaccurate, incomplete, and misleading” factual statements presented by Mrs. Kellar, but specifies only a few examples in a footnote. Respondent’s Brief at 24. To a large extent, the real issue behind these complaints is that there has not been a trial, and there are many questions of fact left to be resolved. When facts differ in summary judgment affidavits each party tends to complain that their “facts” are correct, and the other’s are false. In law, however, that is why summary judgment was inappropriate. CR 56. In order to resolve these questions, this matter must be remanded for trial.

The Estate contends that there is no support for the contention that Mrs. Kellar had little income, and a net worth of under \$100,000. Respondent’s Brief at 24. However, the 2001 tax return shows that Mrs. Kellar had very little income from employment and investments in 2001. CP 1792-1798. Mrs. Kellar’s Adjusted Gross Income for 2001 was \$20,440. CP 1792. Although the return shows that Mrs. Kellar owned

and rented out three single family residential properties, after crediting \$8,400 in total rental income she had a net loss of \$4,368 on those properties in 2001. CP 1795. Whether Mr. Kellar had \$15 million or \$93 million in assets, the substantial difference in assets is clear and it is incredible that the estate would argue the couple's relative wealth at all.

The Estate contends that the assessment of Mr. Kellar's assets at approximately \$93 million is unsupported. Brief of Respondent at 24. However, the figure is based on the document which Mrs. Kellar received from Mr. Kellar in 2005 for the matter involving the South Dakota Gaming Commission. CP 1327. Mrs. Kellar has no contemporaneous record of Mr. Kellar's financial worth in 2001 because Mr. Kellar's financial assets were not disclosed with the prenuptial agreement, and the Estate cannot produce any evidence to refute this. CP 405-411. To the extent that the Estate disputes the accuracy of the financial disclosure made in 2005 as a basis to argue against the fairness of the prenuptial agreement, that is a question of fact that has yet to be determined by the trial court.

**C. Presentation Of Extrinsic Evidence Regarding The Circumstances Surrounding The Formation Of The Kellar Prenuptial Agreement Is Required to Determine the Validity Of the Agreement.**

The one paragraph statement of disclosure contained in the Kellar Prenuptial Agreement is insufficient to establish the substantive and procedural requirement of full disclosure of assets on its own, without the admission of extrinsic evidence.<sup>1</sup> The statement of disclosure states:

Each of the parties individually own certain property, the full nature and extent of which has been disclosed by each to the other, and the parties by affixing their initials to this paragraph represent and warrant that they have satisfied themselves as to the fullness and accuracy of the disclosure of said assets each to the other and the respective values thereof. CP 405.

The Estate seeks an expansion of the current law by arguing that a single statement of disclosure is sufficient to meet all the requirements of establishing both substantive and procedural fairness in a prenuptial agreement, without the need for the court to even consider evidence regarding the relative size of the parties estates, the fairness of the contract, and the procedural protections established under Washington law. This would be a substantial deviation from current law and public policy, and would eliminate the current protections that have been established since *Friedlander v. Friedlander*, 80 Wn.2d 293, 494 P.2d 208

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<sup>1</sup> For a prenuptial agreement to be valid, it must be both substantively and procedurally fair. *Marriage of Matson*, 107 Wn.2d 479, 483, 730 P.2d 668 (1986).

(1972) to prevent mistake, negligence, fraud, or undue influence in the execution and procurement of prenuptial agreements.

Absent the Estate's move to expand current law, extrinsic evidence is required to determine whether the Kellar prenuptial agreement was both substantively, and procedurally fair, and whether there was in fact a full disclosure of assets. The parol evidence rule is not a blanket prohibition against admission of extrinsic evidence in a contractual dispute, and a party may offer extrinsic evidence to aid the finder of fact in interpreting a contract term and determining the contracting parties' intent regardless of whether the contract's terms are ambiguous. *Brogan & Anensen LLC v. Lamphiear*, 165 Wn.2d 773, 775, 202 P.3d 960 (2009). The trial court may properly consider evidence of negotiations and circumstances surrounding the formation of the contract to determine if the agreement has been fully integrated. *M.A. Mortenson Co. v. Timberline Software Corp.*, 93 Wn. App 819, 827, 970 P.2d 803 (1999). Parol evidence may also be admitted to determine the issue of the validity of a contract or to impeach its creation. *Matter of Prior Bros., Inc.*, 29 Wn. App. 905, 632 P.2d 522 (1981).

Lacking the customary schedule of assets and liabilities as recommended by Mr. Kellar's own attorney (CP 317), the Kellar prenuptial agreement cannot be said to be a fully integrated contract, and

therefore extrinsic evidence is required to determine the circumstances surrounding its creation and the validity of the agreement. It is undisputed that the Kellar Prenuptial Agreement excludes any disclosure of the assets of either Mr. or Mrs. Kellar. Because there is no written disclosure of assets in the agreement, any disclosure that the Estate alleges to have been made would, by necessity, have been made orally or through extrinsic documentation. As such, any testimony regarding the existence or non-existence of such disclosure, and the amount and character of the assets alleged to have been disclosed, is admissible under the parol evidence rule. *See Brogan & Anensen LLC*, 165 Wn.2d at 775; *M.A. Mortenson Co.*, 93 Wn. App at 827; *Matter of Prior Bros., Inc.*, 29 Wn. App. at 632.

**D. The Estate Has Waived Evidentiary Objections By Presenting The Deposition Testimony Of Mrs. Kellar And Other Individuals.**

The Estate presented extensive deposition testimony of Mrs. Kellar in support of its own Motion for Summary Judgment, and yet successfully moved to exclude the same testimony presented by Mrs. Kellar in support of her own Motion for Summary Judgment. RCW 5.60.030 (Dead Man's Statute) is waived by an adverse party when such party presents deposition testimony of the party in interest or presents any other testimony favorable to the estate about transactions or communications with the decedent. *See Wildman v. Taylor*, 46 Wn. App 546, 556, 731 P.2d 541 (1987) (although

court found that deposition testimony had not actually been introduced, the court ruled that had such deposition testimony been introduced by the Estate, it would have constituted waiver of the Dead Man's Statute); *Estate of Lennon v. Lennon*, 108 Wn. App. 167, 175, 29 P.3d 1258 (2001); *see also Botka v. Estate of Hoerr*, 105 Wn. App. 974, 980, 21 P.3d 723 (2001). "Where the incompetency imposed upon a witness by the [Dead Man's Statute] is waived at all, it is waived as to all facts pertinent to the matters developed from the witness by the party for whose benefit the statute was enacted. *Johnson v. Peterson*, 43 Wn.2d 816, 819, 264 P.2d 237 (1953) (emphasis added). The Estate has waived all objections based on the Dead Man's Statute in this matter by presenting the following testimony of Donna Kellar, and other individuals, regarding discussions and interactions between Mrs. Kellar and Mr. Kellar that took place throughout their relationship:

1. South Dakota Gaming Commission hearing.

The Estate has waived the Dead Man's Statute by filing Mrs. Kellar's testimony provided to the South Dakota Gaming Commission as Exhibit B to Declaration of Joseph Straus In Support of Estate's Motion for Summary Judgment Regarding Estoppel and Ratification, CP 486-546, in which she testifies to discussions and interactions between herself and

Mr. Kellar, thus waiving objection as to all facts pertinent to the matters developed on the following subjects:

- Discussions and interactions between Mr. and Mrs. Kellar regarding their engagement. CP 492.
  - Discussions and interactions between Mr. and Mrs. Kellar regarding the Kellar prenuptial agreement. CP 492.
  - Discussions and interactions between Mr. and Mrs. Kellar regarding their finances and characterization of their property. CP 493-494.
  - Discussions and interactions between Mr. and Mrs. Kellar regarding business relations between Mrs. Kellar and Mr. Kellar. CP 498.
2. Excerpts from the Deposition of Donna M. Kellar Volume I, December 20, 2010.

The Estate has filed with the trial court excerpts from the Deposition of Donna M. Kellar Volume I taken December 20, 2010, and in so doing, has waived objections based on the Dead Man's Statute as to all the facts pertinent to the following subjects:

- The Estate filed with the trial court Mrs. Kellar's testimony regarding discussions and interactions between Mr. Kellar and Mrs. Kellar regarding Mr. Kellar's proposal on September 2, 2001. CP 574.
- The Estate filed with the trial court Mrs. Kellar's testimony regarding discussions and interactions between Mr. Kellar and Mrs. Kellar as to Mr. Kellar's attorney, Mark Packer, being the individual to suggest Ron Morgan as the mediator. CP 574-578.
- The Estate filed with the trial court Mrs. Kellar's testimony regarding discussions and interactions between Mr. Kellar

and Mrs. Kellar regarding Mr. Kellar's failure to provide financial disclosure of his assets in conjunction with the prenuptial agreement. For example:

- The Estate filed with the trial court Mrs. Kellar's testimony in answer to the question of whether she thought Mr. Kellar was required to provide disclosure of his assets, she stated "I would think he was supposed to, but it didn't happen." CP 580.
- The Estate asked Mrs. Kellar, "Did Ken lie to you at the time you entered into the prenuptial agreement?" and Mrs. Kellar replied, "I don't feel like he was completely honest with me." The Estate asked, "What was he not honest with you about?" and Mrs. Kellar stated, "All of the assets of his and liabilities." CP 1467.
- The Estate asked the following question, "So, is it your testimony today that Mr. Kellar did not disclose to you what he owned and the values of that property?" to which Mrs. Kellar answered, "Correct." CP 1894.
- The Estate filed with the trial court Mrs. Kellar's testimony regarding discussions and interactions between Mr. Kellar and Mrs. Kellar occurring in 2005 regarding Mr. Kellar's finances in 2001. CP 582.
- The Estate filed with the trial court Mrs. Kellar's testimony regarding discussions and interactions between Mrs. Kellar and Mr. Kellar regarding the terms of the prenuptial agreement. CP 1459.
- The Estate filed with the trial court Mrs. Kellar's testimony regarding discussions and interactions between Mrs. Kellar and Mr. Kellar while negotiating the prenuptial agreement. CP 1467; CP 1877.
- The Estate filed with the trial court Mrs. Kellar's testimony regarding discussions and interactions between Mr. Kellar and Mrs. Kellar regarding his marriage proposals, planning

of the wedding, and other matters related to the process of getting married and the pressures put on Mrs. Kellar to sign the prenuptial agreement prior to the wedding. CP 1875-1894.

- The Estate filed with the trial court Mrs. Kellar's testimony regarding discussions between Mr. Kellar and Mrs. Kellar regarding how they decided to characterize property during their marriage. CP 1892.

3. Excerpts from the Deposition of Donna M. Kellar Volume II, December 22, 2010.

The Estate has filed with the trial court excerpts from the Deposition of Donna M. Kellar Volume II taken December 21, 2010, and in so doing, has waived objection based on the Dead Man's Statute as to all facts pertinent to the matters developed on the following subjects:

- The Estate filed with the trial court Mrs. Kellar's testimony regarding discussions and interactions between Mr. Kellar and Mrs. Kellar regarding the disclosure of assets prior to signing the prenuptial agreement. CP 1923; CP 586. For example:
  - In response to the Estate's question "Had you ever seen any of Ken's financial statements before November 2005?" Mrs. Kellar responded "No." And to the follow up question "You'd never seen a single one before that point in time?" Mrs. Kellar responded "Never." CP 1923; CP 586.
- The Estate filed with the trial court Mrs. Kellar's testimony regarding discussions and interactions between Mr. Kellar and Mrs. Kellar in 2005 regarding Mrs. Kellar's acquisition of Mr. Kellar's 2001 financial statement showing that he possessed approximately \$93,000,000 at the time the couple was married in 2001. CP 586; CP 590.

- The Estate filed with the trial court Mrs. Kellar's testimony regarding discussions and interactions between Mrs. Kellar and Mr. Kellar regarding Mr. Kellar's estate plan and the no contest clause in his wills. CP 1323.
- The Estate filed with the trial court Mrs. Kellar's testimony regarding discussions and interactions between Mrs. Kellar and Mr. Kellar regarding when, how, and where the couple would get married. CP 1670; CP 1922.
- The Estate filed with the trial court Mrs. Kellar's testimony regarding discussions and interactions between Mrs. Kellar and Mr. Kellar that may have caused Mrs. Kellar to feel pressure to get married. CP 1670.
- The Estate filed with the trial court Mrs. Kellar's testimony regarding discussions and interactions between Mr. Kellar and Mrs. Kellar during their marriage regarding the characterization of newly acquired property and how it should be owned during their marriage. CP 1914-1915; CP 1930-1933.
- The Estate filed with the trial court Mrs. Kellar's testimony regarding discussions and interactions between Mr. Kellar and Mrs. Kellar regarding the application process and Gaming Commission Hearing to obtain the gaming license in South Dakota. CP 1916-1917; CP 1933.
- The Estate filed with the trial court Mrs. Kellar's testimony regarding her understanding of the prenuptial agreement at the time she signed it and the alleged waiver contained in paragraph 2 of the agreement. CP 1918-1921.
- The Estate filed with the trial court Mrs. Kellar's testimony regarding discussions and interactions between Mr. Kellar and Mrs. Kellar that provided Mrs. Kellar's knowledge of Mr. Kellar's assets throughout the relationship, what assets she was aware of and when she became aware of those assets. CP 1921.
- The Estate filed with the trial court Mrs. Kellar's testimony regarding discussions and interactions between Mr. Kellar

and Mrs. Kellar regarding business transactions, and how they worked as partners in business situations. CP 1927; CP 1929; CP 1930-1933.

4. Excerpts from the deposition of Ron Morgan on December 2, 2010.

The Estate has waived the protections of the Dead Man’s Statute by presenting excerpts from the December 2, 2010, Deposition of Ron Morgan, who was the “mediator” for Mr. Kellar and Mrs. Kellar prior to executing the prenuptial agreement. Mr. Morgan made statements regarding the discussions and negotiations between Mr. Kellar and Mrs. Kellar while they were discussing the prenuptial agreement. CP 1756-1766. The Estate’s presentation of such statements made by Mr. Morgan regarding discussions or interactions between Mr. Kellar and Mrs. Kellar represents a waiver of the Dead Man’s Statute because it opens the door for Mrs. Kellar’s rebuttal testimony. *Estate of Lennon* 108 Wn. App at 175; *Botka*, 105 Wn. App. at 980.

**E. Alternatively The Estate Has Failed To Prove That Portions Of Mrs. Kellar’s Declaration Violate The Dead Man’s Statute.**

This court applies de novo review of evidentiary decisions made by the trial court on summary judgment. *Lane*, 154 Wn. App. at 286; *Momah*, 144 Wn. App. at 749; *Diaz*, 161 Wn. App. at 508; *Enzley*, 155 Wn. App. at 752.

The purpose of RCW 5.60.030 (“The Dead Man’s Statute”) is to

prevent the interested party from testifying to matters that cannot be contradicted by the deceased party. *Thor v. McDearmid*, 63 Wn. App. 193, 199, 817 P.2d 1380 (1991) (citing *McFarland v. Department of Labor & Indus.*, 188 Wash. 357, 362-63, 62 P.2d 714 (1936)); see also, *Thompson v. Henderson*, 22 Wn. App 373, 591 P.2d 784 (1979).

However, The Dead Man's Statute does not bar three critical and substantial areas of evidence: (1) one's own observations and own acts; (2) one's feelings and impressions; and (3) documents. Such evidence is not within the ability of the decedent to contradict because it is either an act or feeling that is personal to the declarant, or is a document.

1. The Estate cannot prevent Mrs. Kellar from testifying about her own acts.

Mrs. Kellar may testify to her lack of receipt of financial information because, whether she received the information is entirely within her particular knowledge. In *Slavin v. Ackman*, 119 Wn. 48, 204 P. 816 (1922), the court admitted a letter reasoning that:

She testified that she had received the letter herein as set out. We have held that such testimony is not a testimony as to a transaction with a deceased person. (Cited cases omitted). "She also testified as to the acts which she did in conformity with the letter."

*Slavin*, 119 Wn. at 50-51 citing *An How v. Furth*, 13 Wash. 550, 43 P. 639 (1896). Although the witness in *Slavin* testified to receiving a document,

there should not be a distinction between testifying about receiving information as opposed to testifying about not receiving information. Mrs. Kellar is permitted to testify that she did not receive a written disclosure of Mr. Kellar's assets and liabilities, just as she would have been entitled to testify that she did receive the disclosure had disclosure occurred.

The Estate attempts to distinguish *Slavin* by suggesting that the act of receiving a letter in the mail is distinct from the act of receiving a document directly from the decedent. This argument is flawed in two respects. First, the act of receiving a document is personal to the individual who receives said document, regardless of who actually hands the document to the individual. Second, although Mrs. Kellar never received a document disclosing Mr. Kellar's assets, had she received such disclosure, it is likely that she would have received it from a third party such as Mr. Kellar's attorney. Interactions between Mrs. Kellar and Mr. Kellar's attorney are not barred by the Dead Man's Statute. RCW 5.60.030. And in this case, Mr. Kellar's attorney has testified that he never received nor produced financial disclosures from either of the parties and despite explaining the importance of such disclosure to Mr. Kellar, cannot state whether any disclosure in fact occurred. CP 133-134. This evidence should be admitted, and the court should be allowed to review the evidence and attach such weight as the court deems

appropriate.

2. The Estate cannot prevent Mrs. Kellar from testifying about her own feelings and impressions.

“[T]he deadman’s statute does not prevent an interested party from testifying regarding his or her own feelings or impressions.” *Lennon v. Estate of Lennon*, 108 Wn. App. 167, 175, 29 P.3d 1258 (2001). *Lennon* cited *Jacobs v. Brock*, 73 Wn.2d 234, 237-38, 437 P.2d 920 (1968), in which Mrs. Jacobs provided a very detailed level of care to Dr. Brock, including daily coffee enemas. *Jacobs*, 73 Wn.2d at 235. She testified that they “were to receive the Lake Crescent property for their services.” *Id.* at 236. Her husband was asked and answered famously:

“Why didn’t you submit a statement to Dr. Brock?”

Answer: “I was always given the impression that we were getting the lake property for looking after him.”

*Id.* at 237

The Court held that “Mr. Jacob’s statement did not reveal a statement made by the decedent nor did it relate to a transaction.” *Id.* at 237 (citing cases that a decedent must be able to contradict the statement). “Clearly, Mr. Jacob’s statement of his own feelings or impressions does not come within this definition.” *Id.* at 238; *see also Dwelly v. Chesterfield*, 88 Wn.2d 331, 334, 560 P.2d 353 (1997); and *Lappine v. Lueurell*, 13 Wn. App. 277, 534 P.2d 1038 (1975). Mrs. Kellar may

testify about her own feelings and impressions.

Mrs. Kellar may testify to the pressure she felt to sign the agreement and get married in such a short period of time. The Estate mistakenly contends that any pressure to sign could not be independent of interactions with Mr. Kellar, and is therefore barred by the Dead Man's Statute. Respondent's Brief at 30. However, the pressure that Mrs. Kellar felt to sign the agreement prior to getting married is precisely the type of "own impression" that does not violate the Dead Man's Statute. Although Mr. Kellar's actions may have contributed to Mrs. Kellar's own subjective feelings of pressure, Mrs. Kellar's actual feelings are her own, and Mr. Kellar could not rebut testimony regarding Mrs. Kellar's own feelings even if he were still living.

Mrs. Kellar's testimony regarding the pressure she felt to sign the paperwork is relevant to this matter and goes to the procedural fairness of the prenuptial agreement. Mrs. Kellar had 17 days to prepare for a secret wedding after Mr. Kellar asked her to marry him, creating a limited opportunity to negotiate and decide on the fairness of the prenuptial agreement. CP 390. His insistence that she not tell family or friends (CP 1924; CP 392) cast the entire burden of the wedding and the prenuptial agreement on her shoulders. She may testify to her feelings of pressure resulting from these circumstances. *See Jacobs*, 73 Wn.2d at 235

**F. This Matter Should Be Remanded For Trial So That The Court May Consider The Facts It Has Mistakenly Ruled Inadmissible.**

The trial court has excluded admissible evidence that would have affected its rulings. This matter should be remanded so that the trial court may consider the issues in light of the admissible evidence previously excluded.

**G. The Estate Has Failed To Meet Its Burden Of Proof To Show That The Agreement Was Substantively Fair.**

The Estate, as the party asserting the validity of the prenuptial agreement, has the burden of proving the agreement was substantively fair. RCW 26.16.210; *Friedlander v. Friedlander*, 80 Wn.2d 293, 300, 494 P.2d 208 (1972); *In re Marriage of Bernard*, 165 Wn.2d 895, 904, 204 P.3d 907 (2009); *Matter of Estate of Crawford*, 107 Wn.2d 493, 496, 730 P.2d 675 (1986). In order for the Kellar Prenuptial Agreement to be considered valid, the Estate must prove that it is both substantively and procedurally fair. *Id.*

The Kellar prenuptial agreement is invalid because the Estate has failed to prove that the agreement meets even the basic requirements for substantive fairness. First, the agreement allowed Mr. Kellar to unilaterally secure for his separate estate, property that would otherwise belong to the community as was prohibited in *Hamlin v. Merlino*, 44 Wn.2d 851, 862-863, 272 P.2d 125, (1954). Second, the agreement did

not provide for a significant distribution to Mrs. Kellar upon dissolution, as the provisions for her were disproportionate to the means of Mr. Kellar as was found repugnant in *In re Marriage of Bernard*, 165 Wn.2d 895, 905, 204 P.3d 907 (2009).

Even if the court were to apply the rules as alleged by the Estate in its responsive brief, the Estate fails to even meet its burden of proving substantive fairness. The Estate argues that agreements that are not substantively fair, share the following hallmarks:

- 1) The spouses have vastly disparate assets (not just different, but vastly different), with one spouse typically entering the marriage with nothing or close to nothing (a few thousand dollars); and
- 2) One or both of the following:
  - a) The prenuptial agreement is one-sided: it prevents the accretion of community property; allows only one spouse to benefit from community property; or allows only the spouse with substantial premarital assets (typically the husband) to grow their assets, while preventing the other spouse from doing so;
  - b) The prenuptial agreement makes no provision whatsoever for the less-advantaged spouse upon the spouses' divorce or upon the death of the other spouse.

Respondent's Brief at 35-36.

The Estate has failed to meet its burden of proving that the couple did not have vastly disparate assets. The Estate goes beyond the current law in arguing that a one sentence disclosure in a prenuptial agreement is

in and of itself sufficient to establish the value of the parties estates and meet the burden of proving substantive fairness. The presence or absence of asset disclosure goes directly to the heart of substantive fairness, as without knowing the parties relative assets, it is impossible to determine if the agreement was substantively fair. If a one sentence statement of disclosure is sufficient to avoid disclosure, the requirement of substantive fairness would be effectively eliminated because such a statement would be the equivalent of the parties' acknowledgment and warranty that the agreement is substantively fair. Without the admission of extrinsic evidence to show the actual amount of assets, there would be no way to prove that the agreement was not substantively fair as a matter of law.

Without going beyond the law as it currently stands, the Estate has been unable to demonstrate that the agreement was substantively fair. Although the Estate disputes the precise amount of assets and income possessed by Mr. Kellar, the Estate admits that Mr. Kellar had assets of at least \$15 million at the time of marriage. Respondent/Cross Appellant's Brief at 11. He had income of almost one million dollars per year in 2001 according to his financial statements. CP 451. And although the Estate also disputes Mrs. Kellar's precise assets and income, there is little dispute that she had less than \$100,000 in net assets and as a waitress earned an income of less than \$25,000 per year. CP 1792-1298. Using these

numbers, Mr. Kellar possessed assets in excess of at least 150 times, and income of at least 40 times, the amount that Mrs. Kellar possessed, which must be considered “vastly disparate.”

The Estate has also failed to meet its burden of proving that the prenuptial agreement is not one-sided in favor of Mr. Kellar. The terms of the agreement entirely eliminated the community property rights of Mrs. Kellar by granting Mr. Kellar a veto power over the creation of any future community property. Under the prenuptial agreement, community property could only be formed by the affirmative agreement of both spouses. CP 408, ¶ 6. The Estate contends that this otherwise draconian agreement was actually fair because Mrs. Kellar had a “substantial estate” entering marriage, and the provisions were applied to the benefit of Mrs. Kellar. Respondent’s Brief at 37. However, Mrs. Kellar’s “substantial estate” of \$100,000 paled in comparison to Mr. Kellar’s truly substantial estate of \$15-\$93 million, to such an extent that limitations on the accumulation of community property could only benefit Mr. Kellar.

The Estate also fails to meet its burden of proving that the agreement treated Mrs. Kellar fairly at the end of the marriage. The agreement called for Mrs. Kellar to receive \$25,000 a year for each year of marriage plus an additional \$500,000 if the couple was married for over four years. However, per the terms of the agreement, this was to be paid

in twenty annual installments.<sup>2</sup> Due to the time value of money, this payment strategy overwhelmingly favored Mr. Kellar to the detriment of Mrs. Kellar.

Under the terms of the agreement, Mr. Kellar is entitled to hold the principal balance of the assets and earn income on that principal throughout the time that he is paying Mrs. Kellar her 20 annual installments. Applying a modest interest rate of only 5%, Mr. Kellar would never have to invade the principal on the \$700,000 in order to meet the terms of the agreement. From another perspective, the disparity is even greater. Had Mrs. Kellar been entitled to receive the \$700,000 upfront, and invested it at the modest rate of 5% compounded over 20 years, that \$700,000 would be worth \$1,857,308.39 after 20 years. Thus, because the terms of the agreement require Mrs. Kellar's provision to be paid out through 20 annual payments, Mrs. Kellar is giving up approximately \$1,157,308.39 while Mr. Kellar is giving up nothing. If the interest rate is increased above the rather conservative 5% used to calculate the above numbers, Mr. Kellar actually makes money while Mrs. Kellar's opportunity loss increases and the disparity grows significantly. Under any fair analysis, the provisions under the prenuptial agreement

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<sup>2</sup> The couple was married for eight years resulting in a total of \$700,000 owed to Mrs. Kellar. Divided into twenty annual installments, this resulted in annual payments of \$35,000 per year, which was slightly more than her salary as a waitress.

were disproportionately in favor of Mr. Kellar.

**H. The Estate Has Failed To Meet Its Burden Of Proof To Show That There Was Procedural Fairness In The Execution Of The Prenuptial Agreement.**

The Estate acknowledges that it has the burden of proving that the execution of the prenuptial agreement was procedurally fair.

Respondent/Cross Appellant's Brief at pg. 22 note 52. However, the Estate fails to prove that the prenuptial agreement meets the requirements of procedural fairness. To be procedurally fair, a prenuptial agreement must meet three criteria, which the Estate fails to do. *Marriage of Matson*, 107 Wn.2d 479, 483, 730 P.2d 668 (1986).

1. The Estate has failed to meet its burden of proving that Mrs. Kellar had full knowledge of the value of Mr. Kellar's assets.

The Estate has the burden to prove that Mr. Kellar made full disclosure of the amount, character, and value of his property. *Marriage of Matson*, 107 Wn. 2d at 483. All evidence points to an intentional lack of disclosure of assets by Mr. Kellar in the prenuptial agreement. (See attorney letter to Mr. Kellar stating that the agreement would be unenforceable without the disclosure of assets. CP 317.) The Estate's reliance on the one sentence statement of full disclosure contained in the prenuptial agreement goes beyond the current law and attempts to eliminate the protections of Washington State law as it currently stands.

- a. *The Estate can provide no documents or testimony to contradict Mrs. Kellar's admissible statements that there was no financial disclosure.*

Neither the Kellar prenuptial agreement itself, nor any of the file material from the attorneys involved, contains a list of assets evidencing a disclosure by Mr. Kellar. Nearly three months prior to execution of the agreement, Mr. Kellar's attorney, Mr. Packer, informed Mr. Kellar that he would need to disclose his assets, and even provided Mr. Kellar with a draft prenuptial agreement containing a section where a list of assets was to be attached as "Exhibit A."<sup>3</sup> CP 412; CP 419-420. Despite Mr. Packer's advice, Mr. Kellar never provided any of his financial information to Mrs. Kellar, and under *Friedlander*, a presumption arises that the contract was obtained through "deliberate concealment" of Mr. Kellar's assets. *Friedlander*, 80 Wn.2d at 300. Which is what actually occurred.

The material contained in the record demonstrates a complete lack of disclosure through any extraneous documents. As part of the discovery process, the parties reviewed the files of Mr. Kellar's attorney Mark Packer, Mrs. Kellar's attorney Matt Peach, and the mediator Ron Morgan. In all of these files there is not one letter, document, or attorney's note that suggests there was ever a disclosure of the couple's assets. If there was, the Estate would have certainly presented it, but it did not. The admissible

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<sup>3</sup> Although the draft document contained a section for a disclosure of assets, neither the draft, nor the final agreement, contained any actual list of assets.

testimony of Mrs. Kellar confirms the lack of full disclosure of assets by Mr. Kellar during the process of creating the agreement. *See supra.* § D. As the Estate has no documentation or testimony to evidence a full and complete disclosure of assets, the Estate has failed to meet its burden of proof. RCW 26.16.210; *Friedlander*, 80 Wn.2d at 300; *see also In re Marriage of Bernard*, 165 Wn.2d at 204; *Matter of Estate of Crawford*, 107 Wn.2d at 730. The law as it currently stands demands the admission of extrinsic evidence to determine if there was a full disclosure of assets to ensure that the agreement was not the result of mistake, negligence, fraud, or undue influence.

- b. *The amount of assets alleged by the Estate to have been disclosed to Mrs. Kellar is significantly less than Mr. Kellar's actual net worth at the time the agreement was signed.*

Mr. Kellar's failure to make a "full, frank disclosure" of his property to Mrs. Kellar prior to signing the agreement is fatal to the validity of the agreement. *Friedlander*, 80 Wn.2d at 301-302 (emphasis added) (the parties to a prenuptial agreement have a confidential relationship and do not deal with each other at arms length, "which calls for the exercise of good faith, candor and sincerity in all matters bearing upon the proposed agreement"). Without citation to any testimony or to any document, the Estate's attorneys allege that Mr. Kellar somehow

disclosed only \$15 million in assets at the time of marriage.

Respondent/Cross Appellant's Brief at 11. The information received by Mrs. Kellar in 2005 showed that Mr. Kellar possessed over \$93 million at the time of marriage. CP 449. Even if the Estate's allegation that Mr. Kellar disclosed approximately \$15 million in assets is accurate, his failure to disclose \$77 million (or about 83.9%) of the value of his estate, renders the prenuptial agreement invalid. *Friedlander*, 80 Wn.2d at 302.

2. The Estate fails to meet its burden of proof to show that Mrs. Kellar entered into the prenuptial agreement fully and voluntarily on her own accord.

The estate has the burden to prove that Mrs. Kellar entered into the prenuptial agreement fully and voluntarily. *Marriage of Matson*, 107 Wn. 2d at 483. The evidence before this court reveals that Mrs. Kellar did not enter the agreement fully and voluntarily on her own accord. A timeline of events evidences the disparate bargaining power, the pressure that Mrs. Kellar felt, and the uneven way Mr. and Mrs. Kellar entered into the prenuptial agreement:

- Approximately three months prior to the engagement, Mr. Kellar and Mrs. Kellar nearly separated. CP 1879-1880. In an attempt to try and avoid the breakup, Mr. Kellar proposed to Ms. Kellar, but she declined and the couple did not become engaged at that time. *Id.*
- Unbeknownst to Mrs. Kellar, it was about that time, three months prior to getting engaged, that Mr. Kellar began to discuss the prenuptial agreement with his attorney Mark

Packer and develop a negotiation strategy to get Mrs. Kellar to sign the agreement. CP 317.

- Mr. Kellar and Mrs. Kellar were engaged on September 2, 2011, only 17 days prior to the wedding. CP 574.
- After the engagement, Mr. Kellar told Mrs. Kellar that his attorney, Mark Packer, told him that they had to go meet with Ron Morgan for mediation. CP 575.
- At mediation on September 6, four days after the engagement, Ron Morgan and Mr. Kellar worked together, without Mrs. Kellar's attorney present, on "getting Donna comfortable" with the terms that had been developed by Mr. Kellar and his attorney Mark Packer. CP 200-201. Ron Morgan stated that that it "certainly" was not a "negotiation" (CP 201), there was no disclosure of assets at the "mediation" (CP 465), Mr. Kellar controlled the mediation (CP 466), and that he "certainly [didn't] remember [Mrs. Kellar] being of the caliber of Ken Kellar." (CP 467)
- After "mediation," just 8 to 12 days prior to the wedding, Mrs. Kellar met with her attorney, Mathew Peach, for the first time. It was then that she first saw a draft of the prenuptial document. CP 305; CP 391. Mr. Peach's involvement was limited to a letter dated September 13, 2001, clarifying what Mrs. Kellar had understood to be the terms of the agreement as dictated to her at "mediation." CP 305.
- The next day, with the couple's departure for the wedding imminent and pressure to sign the document mounting, on September 14, 2011, the couple signed the document. CP 405. The date the document was signed was only 12 days after getting engaged, just a few days after Mrs. Kellar first saw the prenuptial agreement, and just 5 days before the wedding. CP 574; CP 391.

From the 12 day rush to get the agreement signed, to the full court press put on by Mr. Morgan and Mr. Kellar to get Mrs. Kellar

“comfortable” with the agreement during “mediation,” the undisputed facts show that the transaction was not procedurally fair. The Estate’s characterization of the agreement as “an arms-length, fairly negotiated, bargained-for agreement, and a mutual meeting of informed minds advised by counsel” is disingenuous, and demonstrates the Estate’s complete lack of respect for the public policy concerns established by our courts when determining whether to uphold a premarital agreement. Estate’s Response Brief at 43; *Friedlander*, 80 Wn.2d 301 (“Parties to a pre-nuptial agreement do not deal with each other at arm’s length.”) (emphasis added). It is axiomatic that one cannot sign a prenuptial agreement fully and voluntarily where material information (extent of assets) has been purposefully and methodically hidden. *Friedlander*, 80 Wn.2d at 302. The Estate’s reliance on the one sentence statement of disclosure goes beyond the law, and the Estate has failed to meet its burden of proving that Mrs. Kellar signed the agreement fully and voluntarily upon her own accord.

3. The Estate has failed to meet its burden of proving Mrs. Kellar had effective assistance of counsel.

The Estate has the burden of proving that Mrs. Kellar received effective independent assistance of counsel and that she entered into the agreement with full knowledge of her rights. *Marriage of Matson*, 107

Wn. 2d at 483. Mrs. Kellar's lack of opportunity to be represented by counsel during the negotiations of the prenuptial agreement is fatal to the validity of the Kellar prenuptial agreement. *Matter of Marriage of Foran*, 67 Wn. App. 242, 254, 834 P.2d 1081 (1992); *Bernard*, 137 Wn. App at 835; *Friedlander*, 80 Wn.2d at 303.

The closest Mr. and Mrs. Kellar were to having a "negotiation" over the prenuptial agreement, was the "mediation" where Mr. Kellar and Ron Morgan worked together to get Mrs. Kellar "comfortable" with the agreement as presented by Mr. Kellar. CP 201. Whereas, Mrs. Kellar was unrepresented at that mediation, Mr. Kellar had been working with his attorney for three months prior to the "mediation" so that he would understand his legal position and have every advantage to negotiate a favorable outcome. CP 317. Mr. Kellar was a very good business man who was accustomed to hard nosed negotiations, Mrs. Kellar was a simple waitress who did not have the benefit of legal representation during the critical period. CP 201-202. Only after the terms of the agreement had been finalized, did Mrs. Kellar have an attorney review a draft of the document prepared by Mr. Kellar's attorney three months earlier. CP 317; CP 305. The extent of Mrs. Kellar's attorney's involvement in the "negotiations" was to confirm a term that had been presented to Mrs. Kellar at the mediation, and nothing more. CP 305.

The Estate argues that whether Mrs. Kellar received effective assistance of independent counsel is unimportant; just so long as she had counsel. Brief of Respondent at 44. However, it is only unimportant if the black letter law, as determined by the Washington State Supreme Court, is ignored. The Estate specifically misconstrues the case of *In re Marriage of Bernard*, 137 Wn. App. 827, 155 P.3d 171 (2007), by suggesting that the *Bernard* court did not make any ruling on the issue of effective representation by independent counsel. However, the *Bernard* court specifically addressed and ruled on these issues. First, in the portion of the decision titled “*Independent Counsel*” the court cited the rule from *Matter of Marriage of Foran*, 67 Wn. App. 242, 254, 834 P.2d 1081 (1992) that the primary duty of independent counsel is, “assisting the subservient party to negotiate an economically fair contract.” *Bernard*, 137 Wn. App at 835. An attorney, no matter how skilled, cannot render effective assistance when critical information (extent of assets and liabilities) are intentionally withheld and when he is given little or no time to work on the issues. *Matson*, 107 Wn.2d 486-487. Additionally, counsel must inform the party what rights they are giving away. *Id.* at 487. Because the Estate has been unable to prove that Mrs. Kellar had independent counsel assist her with negotiating an economically fair contract, the prenuptial agreement is void *ab initio*.

4. Contrary to the Estate's assertion, the timing of the prenuptial agreement is highly relevant.

Mr. Kellar's insistence on a quick marriage and secrecy from friends and family gave Mrs. Kellar insufficient time to acquire independent advice and negotiate an equitable agreement. While not one of the three express criteria, courts have considered the importance of the timing of the prenuptial agreement as a means to ensure that there is adequate time for the subservient spouse to obtain independent advice and come to a negotiated agreement. *Foran*, 67 Wn. App 252. Because parties are reluctant to postpone or cancel their wedding, sufficient time is required to not only seek counsel, but also "to negotiate an economically fair contract." *Id.* The short time of only 17 days from proposal and only 5 days after signing the document, combined with the secrecy of the engagement, meant that Mrs. Kellar did not have an opportunity to negotiate and consider a fair agreement. Not only was Mrs. Kellar under pressure to sign the agreement within a few days of first reviewing the document, she was not permitted by Mr. Kellar to discuss the matter with any other individuals. CP 392.

While not controlling in Washington, national standards are highly instructive and dictate that the presentation of a proposed agreement less

than 30 days before the marriage creates a presumption of invalidity. *See* American Law Institute, Principles of the Law of Family Dissolution (2010): Analysis and Recommendations § 7.04(3)(a). CP 477. Although no bright line rule has been adopted, Washington State case law also strongly disfavors a time period between presentation of the agreement and marriage that is less than 30 days. *See, e.g. In re Marriage of Bernard*, 165 Wn.2d at 906-07 (agreement received “only a few days before the wedding” and spouse had seen a draft version of the agreement 18 days before the wedding); *In re Estate of Crawford*, 107 Wn.2d at 497-98 (agreement signed “only 3 days before the wedding”); *Matter of Marriage of Matson*, 107 Wn.2d at 486-87 (presentation of agreement 4 days before the wedding and signing of the final agreement the night before the wedding characterized as an “extremely short” time period); *Friedlander*, 80 Wn.2d at 295-96 (agreement was signed two days before the marriage); *Matter of Marriage of Foran*, 67 Wn. App. At 248 (spouse knew that an agreement was being prepared more than two weeks before the marriage and signed the agreement on day before leaving on the wedding trip that would culminate in marriage 7 days later).

Mrs. Kellar was allowed only about 8 to 12 days from the time she first saw the written agreement to the date of the wedding, and during that time Mr. Kellar did not allow her to discuss the matter with any family or

friends. CP 243. The limited time and secrecy imposed by Mr. Kellar resulted in an agreement that was poorly negotiated and was substantially unbalanced in favor of Mr. Kellar.

**I. The Estate’s Position Regarding Judicial Estoppel Is Unsupported.**

1. The Estate misinterprets the principal of judicial estoppel as it relates to issues of law and issues of fact.

When it uses the testimony before the gaming commission as a means to estop Mrs. Kellar’s lawsuit, the Estate ignores a significant and fatal flaw in its judicial estoppel argument, to wit; the heart of the doctrine is the prevention of inconsistent positions as to facts, and it does not require consistency on points of law. *King v. Clodfelter*, 10 Wn. App. 514, 521, 518 P.2d 206 (1974). The doctrine of judicial estoppel “concerns itself with inconsistent assertions of fact, not with inconsistent positions taken on points of law.” *CHD, Inc. v Taggart*, 153 Wn. App. 94, 102, 220 P.3d 229 (2009) (party not prohibited from changing its legal position); citing *Ashmore v. Estate of Duff*, 165 Wn.2d 948, 951-52, 205 P.3d 111 (2009); *King v. Clodfelter*, 10 Wn. App. at 521 (where the Estate first attempted to bar evidence prohibited by the Dead Man’s Statute, it was not prohibited from changing its position and later waiving the statute); *Anfinson v. FedEx Ground Package System, Inc.*, 159 Wn. App. 35, 244 P.3d 32 (2010) (position on appeal, though representing a different

legal argument than one presented in a prior proceeding, was not estopped).

The Estate has presented no legal authority to support its argument that Mrs. Kellar is judicially estopped from asserting the legal position that the prenuptial agreement is invalid. The question of the validity of the prenuptial agreement is a question of law, and Mrs. Kellar cannot be judicially estopped from asserting a position of law contrary to a previously asserted position of law. *King*, 10 Wn. App. at 521; *see also* Mrs. Kellar's Opening Brief at § C (1).

2. Mrs. Kellar has not contradicted testimony presented to the South Dakota Gaming Commission.

Mrs. Kellar testified only to the existence and terms of the prenuptial agreement, and cannot now be judicially estopped from taking the legal position that the agreement is void *ab initio*. “Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.” *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007), quoting *Bartley-Williams v. Kendall*, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006). When deciding whether to apply judicial estoppel, Washington courts look to three factors:

- (1) Whether a party's later position is clearly inconsistent with its earlier position;
- (2) whether

judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

*Arkinson*, 160 Wn.2d at 538-39.

These factors are not an exhaustive formula and additional considerations may guide a court's decision. *Arkinson*, 160 Wn.2d at 539. The Supreme Court of Washington State explicitly pointed to six factors that may be relevant considerations:

(1) The inconsistent position first asserted must have been successfully maintained; (2) a judgment must have been rendered; (3) the positions must be clearly inconsistent; (4) the parties and questions must be the same; (5) the party claiming estoppel must have been misled and have changed his position; (6) it must appear unjust to one party to permit the other to change.

*Markley v. Markley*, 31 Wn.2d 605, 615, 198 P.2d 486 (1948), quoting 19 Am. Jur. 709, Estoppel, § 73; *see also Arkinson*, 160 Wn.2d 539.

Mrs. Kellar did not testify to any of the *Friedlander* factors (*supra*) to determine the validity of a prenuptial agreement in front of the South Dakota Gaming Commission, and cannot now be estopped from presenting testimony regarding said factors in this case. *Friedlander*, 80 Wn.2d 293; CP 488-546. Although the Estate admits at pg. 51, fn. 65 of its Response/Cross Appeal Brief that Mrs. Kellar never testified to the

validity of the agreement, the Estate attempts to contort Mrs. Kellar's Gaming Commission testimony to equate testimony regarding the existence of a prenuptial agreement with the agreement's alleged validity. One is a question of fact, and the other is a conclusion of law. The existence of a document and the validity of a document are distinct issues, and the issue of the validity of the Kellar prenuptial agreement was never before the South Dakota Gaming Commission. Because Mrs. Kellar never testified that the agreement was valid, instead testifying only that the document existed and to its terms, Mrs. Kellar cannot be judicially estopped from presenting the legal argument that the document is invalid.

3. Neither the South Dakota Gaming Commission, nor the Washington State Court has been misled.

Mrs. Kellar is incapable of misleading the court as to the legal determination regarding the prenuptial agreement's validity. The doctrine of judicial estoppel "concerns itself with inconsistent assertions of fact, not with inconsistent positions taken on points of law." *Ashmore*, 165 Wn.2d at 951-52; *see King*, 10 Wn. App. at 521. This position is consistent with one of the purposes of judicial estoppel, which is to preserve respect for judicial proceedings without the necessity of resort to the perjury statutes. *Johnson v. Si-Cor Inc.*, 107 Wn. App. 902, 28 P.3d 832 (2001). It is not possible for a party to perjure themselves by making

a mistake, or changing a position as to an issue of law; therefore, parties are not judicially estopped from doing so. *Ashmore*, 165 Wn.2d at 951-52; *see King*, 10 Wn. App. at 521.

It is pure hubris to suggest that Mrs. Kellar could be capable of misleading either the South Dakota Gaming Commission, or the Washington State court on the pure question of law regarding the validity of the prenuptial agreement. Mrs. Kellar did not present testimony to the South Dakota Gaming Commission regarding the *Friedlander* factors, and she may not be barred from testifying to those factors in the present action. It is the role of the judicial body to make determinations on questions of law such as the validity of the Kellar prenuptial agreement, and contrary to the Estate's arguments, it is therefore impossible for Mrs. Kellar to mislead the court as to the validity of the agreement. *Ashmore*, 165 Wn.2d at 951-52; *see King*, 10 Wn. App. at 521.

4. Mrs. Kellar cannot derive an unfair advantage vis-à-vis the Estate with regard to the South Dakota Gaming Commission.

Mrs. Kellar's testimony regarding the existence of the prenuptial agreement has not given her an unfair advantage nor imposed an unfair detriment upon the Estate. The Estate argues that Mrs. Kellar would gain an unfair advantage if permitted to "repudiate her position" and obtain income from "perjured or disavowed testimony." Respondents Brief at

54. As discussed *supra*, Mrs. Kellar has neither perjured nor disavowed testimony regarding factual issues presented to the Gaming Commission or this court. *See supra*. § F (1) & (2). Therefore, it cannot be said that she gained an advantage by perjured or disavowed testimony.

The Gaming Commission did not make a determination on the validity of the prenuptial agreement that gave Mrs. Kellar an unfair advantage over the Estate in this action. A determination on the legal validity of the prenuptial agreement was not an issue before the Gaming Commission, nor was it in the authority of the Gaming Commission to make such a determination. However, had the Gaming Commission affirmatively ruled that the prenuptial agreement was valid, that would have been a mistake of law, and the Estate should not now be permitted to benefit to the detriment of Mrs. Kellar from such a mistake of law.

Even if Mrs. Kellar had gained an advantage, any such advantage would be in relation only to the State of South Dakota Gaming Commission because the Estate was not a party to that action and is in no way affected by the outcome. To the extent that the Estate could be said to have been affected by the determination of the Gaming Commission, it can only be said to have benefited. As the affidavit of Richard A. Pluimer reveals, Mr. Kellar was the driving force behind, and the primary beneficiary of, the gaming licenses. CP 43-47. If this court were to apply

judicial estoppel to prevent Mrs. Kellar from asserting the legal position that the prenuptial agreement is invalid, the Estate would be the only party gaining an unfair advantage.

5. This issue should be remanded to the trial court because there are questions of fact regarding the issue of judicial estoppel.

The Estate has acknowledged that Mrs. Kellar never admitted that the prenuptial agreement was valid in front of the Gaming Commission. There have been no findings of fact as to what specific testimony she presented to the Gaming Commission, if any, that has been contradicted by testimony she has provided in this matter. In order for judicial estoppel to apply, the Estate must first prove what specific testimony has been contradicted in the two alleged judicial proceedings. This important initial question of fact should be remanded to trial to determine what, if any, contradictory testimony was presented by Mrs. Kellar.

**J. The Estate Has Waived The Issue Of Ratification.**

The Estate has offered no argument or authority on the issue of ratification of the prenuptial agreement and has therefore waived the argument. *Cowiche Canyon Conservancy v. Bosely*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (appellate court will not consider arguments not supported by authority or citations to the record); *State v. Elliott*, 114 Wn.2d 6, 15, 785 P.2d 440 (1990) (appellate court need not consider

claims that are insufficiently argued). The trial court relied on its own hybrid theory of ratification and estoppel when it improperly granted summary judgment dismissing Mrs. Kellar's case. February 9, 2011, Report of Proceedings 6:3-8:3. The trial court held that Mrs. Kellar was judicially estopped from contesting the prenuptial agreement because she ratified the agreement five years after it was signed when she discovered the true nature of Mr. Kellar's assets in 2005, yet continued to press forward with her request for the gaming licenses. *Id.* Under the court's ruling, without her ratification of the agreement, she could not have taken inconsistent positions in front of the Gaming Commission and the trial court leading to judicial estoppel. In short, without ratification, there was no estoppel. *See Id.*; See Order Granting Estate's Motion for Partial Summary Judgment Regarding Estoppel and Ratification CP 71. The Estate's waiver of the ratification argument negates the trial court's ruling on estoppel, and this matter must be remanded for a trial on the issue of validity.

Additionally, as discussed in Mrs. Kellar's Opening Brief § D, contractual principals of ratification cannot be applied to prenuptial agreements because the validity of a prenuptial agreement cannot be analyzed under general contract law principals. *See In re Estate of Crawford*, 107 Wn.2d 493, 497, 730 P.2d 675 (1986). "Parties to [a

marital] agreement do not deal at arm's length with each other. Their relationship is one of mutual trust and confidence. They must exercise the highest degree of good faith, candor and sincerity in all matters bearing on the proposed agreement." *Hamlin*, 44 Wn.2d at 864. The Kellar prenuptial agreement is not the equivalent of an arms length business contract, and is not subject to the same rules of ratification.

The prenuptial agreement was void *ab initio*, and could not be revived through later actions. "The validity of prenuptial agreements in this state is based on the circumstances surrounding the execution of the agreement." *In re Marriage of Bernard*, 165 Wn.2d at 904. Therefore, actions and circumstances occurring after the execution of a prenuptial agreement have no bearing on the validity of the agreement. *See South Tacoma Way, LLC v. State*, 169 Wn.2d 118, 233 P.3d 871 (2010) quoting *Louisville, N.A. & C. Ry. Co. v. Louisville Trust Co.*, 174 U.S. 552, 567, 19 S.Ct. 817, 43 L.Ed. 1081 (1899).

Even if the failure to provide financial information prior to the execution of the prenuptial agreement was a condition that can be corrected and then later ratified, the failure to provide financial statements goes only to one aspect of substantive and procedural fairness. The provisions in the prenuptial agreement which set forth Mrs. Kellar's marital rights are so draconian that the prenuptial agreement still fails the

test of substantive fairness. *Bernard*, 165 Wn.2d at 904. To the extent that ratification must be knowing, Mrs. Kellar's later awareness of Mr. Kellar's financial assets and liabilities does not remedy her lack of the full knowledge of his and her respective property rights. *Matson*, 107 Wn.2d at 483.

**K. The Newly Discovered Evidence Is Significant Because It Shows That Mr. Kellar Was The Driving Force Behind The Gaming Commission Appeal And He Received The Primary Benefit Therefrom.**

The affidavit of Mr. Kellar's attorney, Richard A. Pluimer, presented by the Estate in support of a fee award, reveals a more accurate account of events surrounding the South Dakota Gaming Commission hearings than the account presented by the Estate to the trial court on Summary Judgment. CP 43-47. Specifically, the affidavit acknowledges that Mrs. Kellar had little to no role in the application or appeal aside from providing the testimony that Mr. Kellar's attorney Mr. Pluimer instructed her to provide. *Id.* Nearly all of the communications and directions regarding the matter came directly from Mr. Kellar, and Mr. Pluimer did not even talk to Mrs. Kellar until just before she was scheduled to testify. *Id.* Obtaining gaming licenses through his friends and family was a standard business practice for Mr. Kellar, and the Estate's depiction of the matter as some sort of significant action orchestrated by Mrs. Kellar from

which she obtained a grand benefit is a mischaracterization of events that is substantially dispelled by Mr. Pluimer's affidavit. *Id.*

**L. The Estate Has Failed To Establish That Fulfilling Mr. Kellar's Testamentary Intent Was A Sound Basis For Awarding The Estate's Attorneys Fees.**

Fulfilling Mr. Kellar's testamentary intent with regard to the inapplicable *in terrorem* clause is not a legally sound basis for attorney's fees and costs, and the Estate has provided no legal authority to the contrary. A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. *Emmerson v. Weilep*, 126 Wn. App. 930, 940, 110 P.3d 214 (2005). Although the trial court found the *in terrorem* clause to be inapplicable to Mrs. Kellar's legal action, it based its decision to award fees on the untenable grounds that an award of fees would carry out Mr. Kellar's testamentary intent with regard to the *in terrorem* clause. February 25, 2011, Report of Proceedings 34:9-11 and 36:6-14 respectively. Either the *in terrorem* clause in Mr. Kellar's will applies to Mrs. Kellar's contestation of the prenuptial agreement, or it does not. It is wholly inappropriate for the court to rule that it cannot legally disinherit Mrs. Kellar through the *in terrorem* clause, only to achieve a partial disinheritance through imposition of inflated attorney's fees and costs. *See also* Mrs. Kellar's Opening Brief § G.

### **III. RESPONSE ARGUMENT**

#### **A. The Trial Court Correctly Denied the Estate's Motion for Partial Summary Judgment Regarding The Validity Of The Prenuptial Agreement Because The Estate Had Not Met Its Burden Of Proving Substantive Or Procedural Fairness.**

This issue has been addressed in Mrs. Kellar's Opening Brief § B and in Reply Argument § E & F supra. Those sections are hereby incorporated by this reference so as not to give the inadvertent appearance of waiver of this issue.

#### **B. Facts Related To Response Argument**

Before signing the prenuptial agreement with Mr. Kellar, Mrs. Kellar received advice from Attorney Matt Peach that the prenuptial agreement appeared valid. CP 1590-1591 ¶ 7. But after Mr. Kellar's death, Mrs. Kellar fully disclosed to several attorneys all of the material facts regarding the prenuptial agreement, and it was the considered opinion of those attorneys that Mrs. Kellar could bring a challenge to the prenuptial agreement. First, Mrs. Kellar spoke to Attorney Katti Esp about the prenuptial agreement and Ms. Esp told her that the prenuptial agreement might not be valid. CP 1590 ¶ 5. Although Ms. Esp could not represent Mrs. Kellar, Ms. Esp referred Mrs. Kellar to Attorney Tory Johnson. CP 1590-1591 ¶¶ 6-7. Mrs. Kellar showed Mr. Johnson her

prenuptial agreement and told him about her salary before marriage, the circumstances surrounding the signing of the prenuptial agreement, Mr. Kellar's failure to fully disclose his assets, and that she was not fully informed of her rights. CP 1590-1591 ¶ 7. Mr. Johnson advised Mrs. Kellar that she had a valid basis to challenge the prenuptial agreement. CP 1591 ¶ 8.

Later, Mrs. Kellar met with Attorney James C. Haigh, telling Mr. Haigh everything that she had told Mr. Johnson. CP 1591-1592 ¶¶ 9-10; CP 1575-1576 ¶ 3. She also told Mr. Haigh about an application she had made to the South Dakota Commission on Gaming for gaming licenses; that she testified about the prenuptial agreement at a hearing before the Gaming Commission; and that she testified that she and her husband tried to keep their assets segregated. CP 1592-1593 ¶ 11. It was Mr. Haigh's opinion that she had a valid claim, and he filed the petition to invalidate the prenuptial agreement. *Id.* Mrs. Kellar also consulted Attorney Paula McCandlis, a family law litigator, and disclosed the same information that she shared with Mr. Johnson. CP 1593 ¶ 12; CP 1587 ¶ 3. Ms. McCandlis inquired into the prenuptial agreement and its formation and told Mrs. Kellar that she had a good challenge to the agreement. CP 1594 ¶ 14; CP 1588 ¶¶ 4, 6. Based upon her disclosure of this information and

the resulting advice from multiple attorneys, Mrs. Kellar challenged the validity of the prenuptial agreement.

**C. The Trial Court Properly Granted Mrs. Kellar's Motion For Summary Judgment On The No Contest Clause Because Mrs. Kellar Did Not Contest The Will And Any Contest Was Done After Full Disclosure To Her Attorneys And Their Advice To Proceed.**

Summary judgment is appropriate when the pleadings, depositions, and other records on file, together with any affidavits submitted with the motion, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c); *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

Summary judgment should be used to “avoid a useless trial when there is no genuine issue of any material fact.” *Olympic Fish Prods., Inc. v. Lloyd*, 93 Wn.2d 596, 602, 611 P.2d 737 (1980).

1. Challenging the prenuptial agreement was not a will contest.

No Washington court has held that an *in terrorem* or “no contest” clause encompasses anything other than the contest of a will. *See In re Kubicks' Estate*, 9 Wn. App. 413, 419, 513 P.2d 76 (1973).

Under Article 5, entitled “No Contest,” in Kenneth Kellar’s Will:

If any person brings any action, lawsuit, or claim against my estate, my Personal Representative, or any other beneficiary under my Will, which requests a resolution that would, if successful, increase

the share of the claimant of my estate, then I direct that the claimant shall forfeit all interest in my estate, and the share that such person would have received under my Will shall be distributed as if he or she had died before me, leaving no descendants.

CP 1505 (emphasis added).

Well established Washington case law has held that a dispute over the character of property is not a will contest. *See In re Martin's Estate*, 127 Wash. 44, 47-49, 219 P. 838 (1923); *Drasdo v. Jobst*, 39 Wash. 425, 427, 430, 81 P. 857 (1905). It is axiomatic that “one spouse cannot devise the property of another by will.” *Prince v. Prince*, 64 Wash. 552, 556, 117 P. 255 (1911). A testator’s power is specifically limited by Washington’s community property law, which states: “Neither person shall devise or bequeath by will more than one-half of the community property.” RCW 26.16.030(1); *see In re Wegley's Estate*, 65 Wn.2d 689, 692-93, 399 P.2d 326 (1965); *see also* RCW 11.02.070. Mr. Kellar could not devise all of the community’s property by will, so a challenge as to the character of property is not a challenge to the will, and is protected by Washington law and public policy.

Mrs. Kellar’s challenge to the prenuptial agreement sought to determine the nature of Mr. Kellar’s estate, not to get more from it. The no-contest provision states that it is comes into affect when, “any person

brings any action, lawsuit, or claim against my estate, . . . which requests a resolution that would, if successful, increase the share of the claimant of my estate.” (Emphasis added.) Mrs. Kellar’s challenge to the prenuptial agreement argued that Mr. Kellar’s estate was smaller than the co-Personal Representatives had inventoried because the inventory incorrectly included property that should be community property due to the invalidity of Mr. and Mrs. Kellar’s prenuptial agreement. Mrs. Kellar was not seeking to increase her distribution under Mr. Kellar’s will.

Historically there is a parallel in a widow’s suit for dower—by invalidating the prenuptial agreement she would not have broken the will. *See Herrick v. Miller*, 69 Wash. 456, 463, 125 P. 974 (1912). It is well settled that where she is not “put to her election,” a “wife may claim and take both what the law gives her in the community property, and also what is given her by the will of her husband in that portion thereof subject to his testamentary disposition.” *Herrick*, 69 Wash. at 466.

As noted by the above commentator, in Washington one who challenges the ownership status of property to which she claims an interest separate from a will does not implicate a will and its “no contest” clause. *See White v. Chellew*, 108 Wash. 628, 632, 185 P. 621 (1919). As Mrs. Kellar’s challenge to the prenuptial does not go to her share of Mr. Kellar’s estate, and goes instead to what property the estate is composed

of, the “no contest” clause does not apply to her challenge to the prenuptial agreement. It is in the nature of a challenge to the inventory. RCW 11.44.035; *see Olver v. Fowler*, 161 Wn.2d 655, 660, 168 P.3d 348 (2007)

For instance, in *Boettcher v. Busse*, a nephew of the testator brought a creditors claim to collect on an oral promise of the decedent and the other nephew cross-complained that a “no contest” clause in the will precluded recovery for the complaining nephew. *Boettcher v. Busse*, 45 Wn.2d 579, 584-85, 277 P.2d 368 (1954). The Washington Supreme Court affirmed the trial court’s dismissal of the creditor claim and affirmed the trial court’s dismissal of the cross-complaint on the “no contest” clause. *Boettcher*, 45 Wn.2d at 585-86. The Court stated that “the instant case is not a will contest. It is an action to enforce the terms of an alleged oral contract to devise property.” *Boettcher*, 45 Wn.2d at 585. It then explained that although success on the creditor claim would “change the amount received by the residuary legatees, it would not ‘break the terms and conditions of this will,’ nor would it establish appellant as a residuary legatee.” *Boettcher*, 45 Wn.2d at 585. Thus the court held that “filing or enforcement of a creditor’s claim, by a legatee or devisee, does not invoke the provision of a will forfeiting the share of a contesting beneficiary.” *Boettcher*, 45 Wn.2d at 585.

*Boettcher* merely fleshed out *In re Chappell's Estate II*, 127 Wash. 638, 221 P. 336 (1923), and drew from a Washington commentator that supported the Court's view. See *Boettcher v. Busse*, 45 Wn.2d at 585.

That Washington commentator noted:

Courts which have previously committed themselves by favoring the clause and permitting forfeiture, escape their position in certain cases by holding that no contest, within the meaning of the testator, has taken place. The word "contest" is given legal significance.

... In Washington it has been held that one holding property by deed does not forfeit that same property by contesting a will simply because it is also devised to him in a will made after the deed. A claim against the estate is not a contest. A widow's unsuccessful suit for dower is not a breach of the forfeiture clause because had she recovered, the will would not have been broken.

Frank Parks Weaver, Comment, *Provisions In a Will Forfeiting the Share of a Contesting Beneficiary*, 3 WASH. L. REV. 45, 51-52 (1928) (footnotes omitted), CP 1655-1663.

Mrs. Kellar's challenge to the prenuptial agreement in no way challenges:

1. The Will's attestation;
2. Decedent's capacity; or
3. Any persons' undue influence.

Nowhere did she ask the trial court to invalidate the will in any shape, matter or form. Her challenge of the prenuptial agreement was not a challenge of Mr. Kellar's will, and thus the no-contest clause is not invoked by Mrs. Kellar's challenge of the prenuptial agreement.

2. Mrs. Kellar brought a good faith challenge to the prenuptial agreement.

- a. *It is not necessary to be successful for a challenge to be in good faith.*

It is not necessary to bring a successful challenge for a challenge to be brought in good faith. *In re Kubicks Estate*, 9 Wn. App 413, 420, 513 P.2d 76. In *Chappell's Estate I*, the son brought a challenge based on an erroneous interpretation of the law. *In re Chappell's Estate I*, 124 Wash. 128, 134, 213 P. 684 (1923). The son was not punished in *Chappell's Estate II*, where it was found that he had acted under a good faith belief, based on his misunderstanding of the law, that the will was invalid. *In re Chappell's Estate II*, 127 Wash. 638, 221 P. 336 (1923).

- b. *Mrs. Kellar made a good faith challenge to the prenuptial agreement based on the advice of fully informed counsel.*

A no-contest clause "does not operate where the contest is brought in good faith and with probable cause." *In re Estate of Mumby*, 97 Wn. App. 385, 393, 982 P.2d 1219 (1999). "If a contestant initiates an action on the advice of counsel, after fully and fairly disclosing all material facts,

she will be deemed to have acted in good faith and for probable cause as a matter of law.” *Id.* at 393. The contestant is shielded so long as she “laid the facts fully and fairly before her attorney and acted on his advice in bringing the action” and a suit “brought on advice of counsel is persuasive of the bona fides of the suit.” *In re Kubicks’ Estate*, 9 Wn. App. at 420.

For almost a century, Washington’s Supreme Court has held that a good faith challenge to a will or its provisions does not trigger a “no contest” clause if the contestant had probable cause for the contest. *In re Chappell’s Estate II*, 127 Wash. at 646. In *Chappell’s Estate*, the testator’s son petitioned for a court to set aside the will and invalidate a trust based on California law because the father was domiciled in and resident of California while the personal property was merely located in Washington. *In re Chappell’s Estate I*, 124 Wash. 128, 129, 213 P. 684 (1923). The Washington Supreme Court held Washington law governed the will and did not forbid the trust. *In re Chappell’s Estate I*, 124 Wash. at 134.

After a remand for dismissal of the petition, the executors filed a final report where they determined that the son had forfeited his bequest under a “no contest” clause in the Will. *In re Chappell’s Estate II*, 127 Wash. at 640. The son challenged the executors’ determination and the trial court held that he had forfeited his \$2,000 legacy. *In re Chappell’s*

*Estate II*, 127 Wash. at 640. The Washington Supreme Court reversed the trial court and held that the petitioner did not “forfeit his legacy” when he erred concerning his interpretation and understanding of the law because he contested the will in good faith and, given his understanding of the law, had probable cause to bring the will contest. *In re Chappell’s Estate*, 127 Wash. at 646

It is only when the petitioner does not “disclose all material facts to counsel” that she is “not entitled to a presumption of good faith.” *In re Estate of Mumby*, 97 Wn. App. at 394. In *Mumby*, the daughter of the testator petitioned to invalidate a living trust and the executor counterclaimed that the “no contest” clause barred the daughter from taking as a beneficiary. *Id.* at 387. The trial court “held that the trust was properly executed and enforced the no contest provision.” *Id.* Division Two of the Court of Appeals affirmed the trial court’s enforcement of the “no contest” clause. *Id.* at 395.

Here, Mrs. Kellar sought the counsel of four different attorneys about the prenuptial agreement after the death of her husband, after fully informing each of all the material facts she received opinions from each that she had a valid challenge to the prenuptial agreement. Mrs. Kellar proceeded in good faith on her challenge to the prenuptial agreement.

- c. *Mrs. Kellar was not required to waive her attorney client privilege prior to determination of the merits of her claim.*

Case law does not support the Estate’s position that Ms. Kellar was required to prove good faith by waiving the attorney-client privilege afforded by RCW 5.60.060(2)(a) before the substantive conclusion of the proceedings. The Estate attempts to put the cart before the horse when it claims Mrs. Kellar had a duty to inform the Estate of everything before the court issued its decision on her challenge. The question of probable cause “is a mixed question of law and fact,” and “[t]he question only arises after an unsuccessful contest.” *Weaver, supra* at 50; *see, e.g., In re Kubicks’ Estate*, 9 Wn. App. at 420 (remanding for an evidentiary hearing on the basis of a challenge because “[s]uch a determination must await presentation of the guardian’s evidence on this issue”). If a challenger succeeds, then the testator and estate cannot be offended at something they could not prevent. *See Boettcher v. Busse*, 45 Wn.2d 579, 585, 277 P.2d 368 (1954).

- d. *There is no public policy requirement for a good faith exception to a no contest clause.*

Taking a small portion of dicta from *Chappell’s Estate II*, the Estate argues that no-contest clauses are only voidable under limited exceptions that require the challenger to bring a contest over a provision in

a will that would be void under the law or contrary to public policy.

Respondent's Brief at 62. With this novel argument, the Estate attempts to have this court establish new standards for good faith exceptions contrary to the clear language of Washington case law directly on point.

If the Estate requires some form of public policy basis for a good faith exception, then such basis exists—Mrs. Kellar's challenge sought to invalidate a void prenuptial agreement and prevent the disposition of her community property interest. The Estate's argument to broadly deny legal challenges to determine the character of property would violate the public policy in support of a fair division of community assets during probate as required by RCW 11.02.070; or prohibit a contradiction of inventory under RCW 11.44.035; or as a clause prohibiting a challenge to an executor might violate RCW 11.28.020. *In re Kubicks' Estate*, 9 Wn. App. at 419.

- e. *There is no bad faith exception to the good faith exception.*

The Estate then attempts to create a novel bad faith exception, wherein, if the contestant acted in bad faith anytime during the litigation, as measured by the opposing party, that such contestant cannot make use of the good faith exception to a no-contest clause. Respondent's Brief at 65. The Estate makes this argument again without citation to any

authority to support their proposition and against the weight of existing authority.

The real good faith exception requires only that the contestant make full disclosure to the attorney and then proceed with the contest upon the advice of counsel. *In re Estate of Mumby*, 97 Wn. App. at 393; *In re Kubicks' Estate*, 9 Wn. App. at 420. The Estate attempts to impose on the contestant a separate requirement to be herself informed of the law and to make a legal determination that the law supports her claim. The good faith exception only requires the contestant to make full disclosure to her counsel. To follow the Estate's position would punish contestants for legal errors that counsel made. The Estate would have this Court again create new law redefining the concept of "good faith."

Mrs. Kellar had every right and her counsel had every duty to contest evidentiary issues such as attorney client privilege, and to do so does not imply bad faith or a "sinister" motive. The Washington Supreme Court has aptly noted that "it is both the right and duty of a lawyer to protest vigorously rulings on evidence or procedure or statements in the judge's charge which he deems erroneous" and then, "for the time being, accept it and invoke his remedy by appeal to the higher court." *Dike v. Dike*, 75 Wn.2d 1, 7, 448 P.2d 490 (1968) (quoting HENRY S. DRINKER, LEGAL ETHICS 69 (1953)). Where an attorney believes that a privilege

protects evidence and protection is in his client's interest, it is the attorney's duty to invoke that protection. *See Dike*, 75 Wn.2d at 9-10, 15-16.

- f. *If testator's intent controls then the no contest clause was not intended to cover a challenge to the prenuptial agreement.*

The Estate argues without citation in the record to any testimony that Mr. Kellar's intent is important for determining whether the no contest provision applies. There is no evidence to indicate that it was Ken Kellar's intent to have the no-contest provision cover challenges to the prenuptial agreement.

Mr. Kellar's will was executed eight years after the prenuptial agreement. Mark Packer, Mr. Kellar's long time attorney, stated Mr. Kellar's intent in having a no-contest clause as follows: "To the maximum extent allowable by existing law, Mr. Kellar wants a \$1.00 no contest clause to terrorize the children and anyone else, such as hangers-on, from attempting to challenge the estate plan." CP 1499. Mrs. Kellar is no hanger-on, having been married to Ken Kellar for eight years at that time, and she is not challenging Mr. Kellar's estate plan, just the extent of property that the co-personal representatives have identified as Mr. Kellar's estate.

Despite the awareness of the prenuptial agreement, the no-contest provision did not include any language that would cause a challenge to the prenuptial agreement to be governed by the no-contest clause. Rather than specifically add “prenuptial agreement” to the no challenge provision, J. Bruce Smith, the attorney who drafted the operative will, changed a no-contest clause that specifically identified “challenges” to the “provisions of the will” to challenges that if successful would increase the share of the claimant of Mr. Kellar’s estate. CP 1505. Again, Mrs. Kellar’s challenge to the prenuptial agreement sought to determine the nature of Mr. Kellar’s estate if the prenuptial agreement was invalid. If Mr. Kellar intended to prevent challenges to the prenuptial agreement, he could have done it much more clearly.

The Estate’s assertions in all other respects, regarding what Mr. Kellar intended, are without any support.

#### **IV. CONCLUSION**

For the reasons set forth above, Mrs. Kellar respectfully requests that the Court of Appeals reverse the trial court’s grant of the Estate’s motion for summary judgment on ratification and estoppel; grant Mrs. Kellar’s motion for summary judgment on the invalidity of the prenuptial agreement; uphold the trial court’s summary judgment holding regarding the no-contest clause; reverse the trial court’s award of attorneys’ fees and

costs to the Estate; vacate the judgment of the trial court; award her reasonable fees on appeal; and remand the matter to the trial court for further proceedings consistent with the ruling by this Court.

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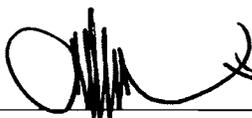
**CERTIFICATE OF SERVICE**

I, CRAIG H. NIM, hereby declare and state as follows:

1. I am over the age of majority, competent to testify and make the following statements based upon my own personal knowledge and belief.
2. I am now and at all times herein mentioned employed by the offices of Helsell Fetterman LLP, 1001 4<sup>th</sup> Avenue, Suite 4200, Seattle, WA 98154.
3. In the appellate matter of Donna Kellar v. the Estate of Kenneth L. Kellar, I did on September 27, 2011 (1) cause to be filed with this Court the Appellant's Brief; (2) cause Appellant's Brief to be delivered via messenger, to the following recipients: J. Bruce Smith, Barron, Smith, Daugert, PLLC, 300 North Commercial, P.O. Box 5008, Bellingham, WA 98227-5008, who are counsel of record of Respondent and Cross-Appellant; and to Joseph J. Straus, Schwabe, Williamson & Wyatt, 1420 5<sup>th</sup>, Ave Ste 3400, Seattle, WA 98101-2339, who are counsel of record for Respondent and Cross-Appellant and to James C. Haigh via email.

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

DATED: February 17<sup>th</sup>, 2012

  
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CRAIG H. NIM