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COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON

Gloria Petelle,
Appellant

v.

Michelle Ersfeld Petelle,
Respondent

On Appeal from King County Superior Court
Cause No. 17-4-05917-7 SEA
Hon. Kenneth Schubert

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Does a written Separation Contract waive the right to intestate succession when the Separation Contract is a “complete and final settlement of all ... marital and property rights,” declares the marriage defunct, equitably divides all community property and debts, releases claims to property allocated to the other party, states that it is effectively immediately and after death whether or not a divorce decree is entered, and stipulates that the Separation Contract shall be drafted into a final court decree of dissolution? The answer in Washington is yes, and the trial court’s holding to the contrary should be reversed in a published opinion.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in denying the petition for an order terminating statutory marital rights of Michelle Ersfeld-Petelle (CP 111).
2. The trial court erred in calling the legal conclusions set forth on page 2 “findings of fact.” (CP 112).
3. The trial court erred in finding as a matter of fact that the full satisfaction of all claims set forth on page four of the Separation Contract related only to property disclosed but not otherwise awarded or assigned (CP 112).
4. The trial court erred when it found that “The contract shall be read as of the time of death” (CP 112).

5. The trial court erred when it found that the CR2A did not waive Michelle’s right to inherit under RCW 11.04.015 (CP 112).

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is a trial court’s erroneous labeling of a finding law as a finding of fact dispositive? (Assignment of Error 2).
2. Whether a party to a Separation Contract who declares the marriage is “defunct”—a synonym for terminated—can assert rights as a “surviving spouse?” (Assignments of Error 1, 3, and 5).
3. Whether a party to a Separation Contract that completely and finally settles all marital rights, terminates all claims in the property of the other spouse, and is effective post-death without a divorce decree has waived the right to intestate succession? (Assignments of Error 1, 3, and 5).
4. Whether the second sentence in the full satisfaction of all Claims section of the Separation Contract relates only to property not otherwise awarded by the agreement? (Assignment of Error 3).
5. Whether a contract should be read at the time of execution or at the time of the death of a party to the contract? (Assignment of Error 4).

IV. STATEMENT OF THE CASE

4.1 Facts.

On February 14, 2017, Michael Petelle and Michelle Ersfeld-Petelle signed a “Separation Contract and CR2A Agreement” (the “Separation Contract”). In the Separation Contract, Michael and Michelle divided all their property and debts, CP 44, released claims

to property allocated to the other, CP 51, stated the Separation Contract will remain effective after death, CP 48, and stipulated at least three times that the Separation Contract or its terms shall be drafted into a final court decree of dissolution. CP 43, 48, 49. They agreed the Separation Contract could only be modified by a written document signed by both parties. CP 47. The Separation Contract declared the marriage to be both irretrievably broken and “defunct,” with the community presumption terminated “on or about January 27, 2017.” CP 44, 49.

The Separation Contract stated twice that it was a complete and final settlement of all of their marital rights (CP 43, 49), with one recitation as follows:

In consideration of the mutual promises and agreements and other good and valuable consideration herein expressed, the parties *hereby stipulate and agree to make a complete and final settlement of all their marital and property rights* and obligations on the following terms and conditions.

CP 43 (emphasis added).

The Separation Contract declared four times that it was effective immediately, CP 43-44, 47, 48, 49, and enforceable after death. CP 48.

Michael died on May 1, 2017, after the parties executed the Separation Contract, but before entry of a final decree of dissolution. CP 31.

4.2 Procedural History.

On May 10, 2017, Michelle petitioned the King County Superior Court for Letters Testamentary. She and her attorneys did not disclose the Separation Contract or Michael's separate property even though Michelle's attorney knew there was separate property. Order Denying Motion for Reconsideration, CP 69. The trial court eventually stripped Michelle's non-intervention powers and admonished Michelle's counsel for their lack of candor to the tribunal under RPC 3.3. CP 63 at FN 1.

Gloria Petelle filed a TEDRA in King County Superior Court seeking an order terminating Michelle's right to intestate succession based on the "complete and final settlement of all [her] marital and property rights..." in the Separation Contract. CP 18, CP 43. The trial court denied the TEDRA and made the following "findings of fact:"

1. The full satisfaction of all claims paragraph set forth on P.4 of the CR2A Agreement only releases any claim to disclosed property not otherwise awarded or assigned in this agreement and that property is free and clear of any claim on the part of the other.
2. The contract shall be read as of the time of death.

3. The “hereafter” language on Line 8 of Page 4 of the CR2A is sufficient to waive any claim to an award of homestead or family support.
4. The CR2A did not waive Michelle Ersfeld-Petelle’s right to take under RCW 11.04.015, the Intestate Succession Statute.

CP 111–12.

Gloria Petelle appeals.

V. ARGUMENT

This case poses a technically novel issue of law requiring a minor, obvious and predictable extension of longstanding case law to a squarely analogous situation: Whether spouses can waive their right to intestate succession in a Separation Contract, either by completely and finally settling all marital rights effective immediately and after death, or by declaring their marriage “defunct” and thus terminating their status as a “surviving spouse” under RCW 11.02.005(17). Well-established and squarely analogous case law says that spouses can waive the statutory right to a homestead by implication. The trial court recognized it was bound by that controlling case law and “found” that Michelle waived her statutory marital right to claim a homestead. However, the trial court erred in failing to apply the same controlling case law by analogy to the statutory marital right of intestate succession.

5.1 Labeling of Findings and Standard of Review

The label given to determinations made by the trial court does not control the standard of review, and the appellate court will determine whether a “finding” made by a trial court is really determination of law rather than of fact. *State Ex Rel. Evergreen Freedom Found. v. Wash. Educ. Ass’n*, 111 Wn.App. 586, 596–97, 49 P.3d 894 (2002). A finding of fact is a determination from the evidence of the case propounded by one party and denied by another. *Para-Medical Leasing v. Hangen*, 48 Wn. App. 389, 397, 739 P.2d 717 (1987). If a term carries legal implications, then a court’s determination about the term will be reviewed as a conclusion of law. *Id.* Contract interpretation is considered a matter of law, and statutory construction is a question of law. *Noble v. Ogborn*, 42 Wn. App. 387, 390, 717 P.2d 285 (1986); *State v. Evans*, 177 Wn.2d 186, 191, 298 P.3d 724 (2013).

The trial court labeled the challenged determinations about the Separation Contract “findings of fact,” but each “finding” actually makes a legal determination. The court’s first “finding” interprets the CRA agreement, which is an issue of contract interpretation. The court’s second “finding” states the date upon which the contract will be read – time of death – which is again a

matter of contract interpretation. The third “finding” determines the import of “hereafter” language in the CR2A agreement, which is a matter of contract interpretation. Finally, the court’s fourth “finding” determined that the CR2A did not waive a right to take under a statute, which is an issue of both contract interpretation and statutory construction. None of these findings makes a determination of fact based on the evidence offered in the case, and instead each makes a legal determination about the interpretation of a contract and/or statutory rights. The court’s “findings” are therefore legal conclusions that are properly reviewed de novo.

5.2 The Separation Contract Terminated Michelle’s Right to Intestate Succession

Washington courts have long held that spouses can waive statutory rights attendant to marriage, including rights that arise only upon the death of another. *See In re Estate of Brown*, 28 Wn.2d 436, 438, 183 P.2d 768 (1947) (holding that a separation contract can waive homestead rights). Surviving spouses are excluded from wrongful death settlements, for example, when before the death they separated with “no intention of ever resuming the marital relationship.” *Parrish v. Jones*, 44 Wn. App. 449, 456–57, 722 P.2d 878 (1986) And for homestead rights, which are statutory marital

rights that arise upon death, an agreement that is “final and conclusive between the parties, regardless of whether either died” before a divorce will waive them even when the rights are not explicitly mentioned in the contract. *Brown*, 28 Wn.2d at 438, 183 P.2d 768; *See also In re Estate of Lindsay*, 91 Wn. App. 944, 949–52, 957 P.2d 818 (1998) (holding that a separation contract can waive homestead rights).

The statutory right to intestate succession is squarely analogous to the statutory right to claim a homestead; both rights are asserted only upon the death of a spouse, both rights terminate automatically upon divorce, and both rights are purely statutory.

The *Brown* case is particularly instructive; the Court treated the potential waiver of statutory marital homestead rights as so obvious as to not warrant discussion or analysis. *See Brown*, 28 Wn.2d 439 (stating “[t]hat the right of homestead may be waived or relinquished, needs no citation of sustaining authority.”). The *Brown* case involved a widow who applied for and was awarded property in lieu of a homestead, over the objection of the decedent’s heir. Months prior to his death, the deceased spouse and the survivor widow had separated, retained counsel and entered into a written agreement that stated it was a full and complete settlement of all

their property rights, divided and allocated property between themselves and waived claims thereto, and said the agreement would be effective whether or not a final divorce decree was entered before one of the parties died. Mr. Brown died before the interlocutory divorce decree became final.

The only question the *Brown* Court considered worth examining was

[whether] it was their intention to make a settlement which would be effective regardless of whether either party to the agreement died before the entry of a final decree of divorce. [If it was], then the property secured by each became and remained separate property, free and clear of all claims-including right of homestead-on the part of the other party.

Brown, 28 Wn.2d 440.

The *Brown* Court had no difficulty discerning the parties' intent that their property settlement agreement include within its scope all rights that might accrue upon death, including homestead rights. Even though the property settlement agreement never addressed homestead rights, it explicitly recited it would "be final and conclusive between the parties, regardless of whether either party died prior to the time the ... divorce became final." *Brown*, 28 Wn.2d at 438.

In the light of that recitation, in conjunction with the agreement of the parties that the property divided and made separate property by the instrument shall be free and clear of all claims whatsoever on the part of the other party, and that 'this agreement shall be binding on each of the parties hereto, his heirs and assigns forever,' it is clear the parties meant to make sure that the division of the property should stand and that each should dispose of that separate property as if either were unmarried.

Brown, 28 Wn.2d at 440.

The Court found it "obvious" that marital rights could be waived: "Applying the well-established rule, it is clear from the facts recited above that the parties to the property agreement had in contemplation the possibility of death and *obviously they meant to waive any rights which might accrue upon death....*" *Brown*, 28 Wn.2d at 440 (italics added).

Similarly, Cathy Lindsay made a claim for homestead allowance against the estate of Murray Lindsay, after Cathy and Murray agreed in writing to separate, agreed on the division of their real and personal property, relinquished any claim to the other's property after the date of separation, and agreed that any reconciliation or changes to the agreement had to be in writing. *Lindsay*, 91 Wn.App. at 947. Like the *Brown* Court, the *Lindsay*

court wasted no time in getting to the point of the separation contract:

The agreement clearly reflects an intent to give up those rights which would normally follow legal spouses. [I]mplied waiver is enough. 'The test is whether the parties through their actions have exhibited a decision to renounce the community 'with no intention of ever resuming the marital relationship.' Their actions showed an intent to prevent, waive, and abandon what a surviving spouse could normally take.

Lindsay, 91 Wn.App. at 951.

Like the *Brown* agreement, the *Lindsay* separation contract never mentioned homestead rights, but it was effective immediately, not contingent on a divorce decree, divided all their property and relinquished all claims thereto. In both *Brown* and *Lindsay*, the courts found the surviving spouse impliedly waived all their marital rights, including (not just) their homestead rights.

Here, like the separation contracts in *Brown* and *Lindsay*, the Separation Contract between Michael and Michelle declared it was a complete and final settlement of all their marital and property rights, CP 43, 49, it identified and divided all of the parties' real and personal property into separate property, CP 44, CP 51, it was effective and binding upon execution, not entry of a final decree of dissolution, CP

43-44, 47, 48, 49, it explicitly contemplated enforcement of the agreement after death of a party, CP 48, and it resolved and waived all claims in the property of the other, CP 51, 46, first as to specific items and assets (CP 51) and then as to all other interests (CP 46).

The language of the contract and intent to settle is clear:

In consideration of the mutual promises and agreements and other good and valuable consideration herein expressed, the parties *hereby stipulate and agree to make a complete and final settlement of all their marital and property rights* and obligations on the following terms and conditions.

CP 43 (italics added).

The Separation Contract specifically states that it is a complete and final settlement of *all* marital rights; it does not hold back some of them. The right to intestate succession of a spouse's separate property is a marital right and the Separation Contract completely and finally settled all their marital rights.

5.2.1 Parties to a Separation Contract Who Declare their Marriage Defunct Have Declared They Are Not Spouses for Purposes of Intestate Succession.

A finding that a marriage is defunct is a “termination of the marriage....” *Peters v. Skalman*, 27 Wn. App. 247, 252, 617 P.2d 448 (1980) (holding that “termination [of the marriage] can result from legal action—divorce or dissolution—or when it can be

determined that the marriage is defunct.”). Black’s Law Dictionary defines *defunct* as “dead, extinct” and a *defunct marriage* as “[a] marriage in which both parties, by their conduct, indicate their intent to *no longer be married*.” BLACK’S LAW DICTIONARY 993 (8th Edition 2004) (italics added). In Washington, “[a] defunct marriage exists where it can be determined that the spouses, by their conduct, indicate that they no longer have a will to union.” *Skalman*, 27 Wn. App. at 252.

The *Skalman* court addressed a claim that a deceased husband had adversely possessed his wife’s community interest in a parcel of land. The parties had separated for 29 years, had no contact with each, and the husband held himself out as a single man. *Skalman*, 27 Wn.App. 248. Deeply held and well-established principles of Washington’s community property system are offended by the idea that one spouse can divest another of a community interest by adverse possession. *Skalman*, 27 Wn.App. 251-52. Nonetheless, the *Skalman* court found the marriage was defunct. The *Skalman* court said that “so long as the actions of the parties evidence an intent to renounce the marriage [] no interlocutory divorce decree or entry of a written separation agreement [was]...necessary” to declare the marriage defunct and

therefore terminated. *Skalman*, 27 Wn.App. 253. In a defunct marriage, neither party had a duty to the other to deal with the property of the community “for the common good.” *Skalman*, 27 Wn.App 253. A husband adversely possessed his wife’s community property interest in land even without a separation contract, because a defunct marriage is a terminated marriage.

Washington law provides for the intestate succession of a “surviving spouse.” RCW 11.04.015(1). A “surviving spouse” is defined in RCW 11.02.005(17) which states that a surviving spouse “does not include an individual whose marriage . . . has been terminated, dissolved, *or* invalidated” RCW 11.02.005(17) (*italics added*). A decree of dissolution is not the only way to terminate one’s status as a “surviving spouse.” As *Skalman* states, a marriage is terminated if it is found to be defunct. *Skalman*, 27 Wn. App. at 252. Thus, when parties to a separation contract declare their marriage defunct, divide their property, and state that the contract is intended to be effective even without a decree and after death like Michael and Michelle did, they have declared their marriage to be terminated and under RCW 11.02.005(17) they should no longer be treated as “surviving spouses.”

The purpose of intestacy laws is to effectuate the presumed intent of the decedent. *See* Megan Moser, *Intestacy Concerns for Same-Sex Couples: How Variations in State Law and Policy Affect Testamentary Wishes*, 38 SEATTLE U. L. REV. 1523, 1535 (2015) (“the purpose of intestacy statutes is to reflect the intent of the testator”); John E. Wallace, *The Afterlife of the Meretricious Relationship Doctrine: Applying the Doctrine Post Mortem*, 29 SEATTLE U. L. REV. 243, 256 (2005) (“The primary purpose of creating intestacy laws is to distribute the decedent’s estate according to his or her probable donative intent.”); Cristy G. Lomenzo, *A Goal-Based Approach to Drafting Intestacy Provisions for Heirs Other than Surviving Spouses*, 46 HASTINGS L.J. 941, 946 (1995) (“[A]n intestacy statute should provide an inheritance pattern that the average decedent probably would have wanted if an intention had been expressed by will.” (Internal quotations omitted)).

The holding sought herein would effectuate what common sense says most Separation Contract parties intend, since the primary reason couples execute a Separation Contract is to resolve and terminate marital rights. A couple who has made a complete and final settlement of all their marital and property rights, declared their

marriage defunct, divided all their community property into separate, waived all claims thereto, and agreed the contract would be effective post-death even without a divorce decree presumably do not intend for their soon-to-be ex-spouse to inherit 3/4ths of the property they just divided in anticipation of a final divorce. There is no reason to agree to enforcement after death even without a divorce decree if the parties did not intend to waive marital claims that arise at death.

Michael and Michelle declared their marriage “defunct” and terminated as of January 27, 2017. They executed a Separation Contract that “settled all marital and property rights” and was to be “effective after death.” CP 44. Thus, Michelle is not a “surviving spouse” as defined in RCW 11.02.005(17) because she and Michael “exhibited a decision to renounce the community ‘with no intention of ever resuming the marital relationship.’” *Skalman*, 27 Wn.App. 253 (quoting *Oil Heat Co. of Port Angeles, Inc. v. Sweeney*, 26 Wn.App. 351m 354, 613 P.2d 169 (1980)). Michelle is not entitled to inherit Michael’s intestate estate as a “surviving spouse.”

5.2.2 Implied Waiver by a Separation Contract is Supported by Statute and Case Law.

The Washington Legislature has decided that a “surviving spouse” is entitled to inherit receive a share of the separate property of a deceased spouse. RCW 11.04.015(1). A person is not a “surviving spouse” if the marriage has been “terminated, dissolved or invalidated.” RCW 11.02.005(17). The legislature used the word “or” to join the list of ways a person is not a surviving spouse, which means the statute is disjunctive—a person is not a surviving spouse if any one of the three disqualifying conditions exists. *Cf. Bullseye Distrib. v. Gambling Comm'n.*, 127 Wn.App 231, 239, 110 P.3d 1162 (2005).

In 2007, the legislature defined “surviving spouse” for Title 11 RCW and said that a person is not a “surviving spouse” if his or her marriage has been “dissolved or invalidated....” *See* HB 2236 60TH LEG. 2007 REGULAR SESSION at 4; *See also* RCW 11.02.005(18) (2007 version) (“‘Surviving spouse’ does not include an individual whose marriage to the decedent has been dissolved or invalidated....”).

Only a year later, the legislature amended the statute to specifically add the word “terminated,” to the descriptors of a

marriage that does not have a surviving spouse. *See* SECOND SUB. HB 3104 60TH LEG. 2008 REGULAR SESSION at 113-114; *See* RCW 11.02.005(18) (2008 version through current) (“‘Surviving spouse’ does not include an individual whose marriage to the decedent has been terminated, dissolved or invalidated....”).

Skalman was decided in 1980. Washington courts presume the legislature is aware of judicial interpretations, and the legislature’s explicit amendment of the definition of surviving spouse to bring it within the ruling of *Skalman* is clear and compelling evidence the legislature intended to affirm and codify the reasoning of *Skalman*. *Cf. Federal Way v. Koenig*, 167 Wn.2d 341, 348, 217 P.3d 1172 (2009) (Noting rule that failure to amend statute after judicial construction indicates legislative acquiescence). “[W]here, as here, a statute is plain and unambiguous, it must be construed in conformity to its obvious meaning...” *Koenig*, 167 Wn.2d 341 (Stephens, J. concurring)

5.3 The Full Satisfaction of All Claims Sentence Is Independent from the Prior Sentence.

The trial court “found” that the second sentence in the section of the Separation Contract titled “Full Satisfaction of all Claims” only applied to the property described in the preceding

sentence. CP 112. The “Full Satisfaction of All Claims” section is quoted in its entirety below:

1. All disclosed property not otherwise awarded or assigned in this agreement, whether acquired before the relationship, during the relationship or during any period of separation, shall be, and remain, the sole property of the party in whose possession or control it presently is, free and clear of any claim on the part of the other.

2. All property which shall hereafter come to either party shall be his or her separate property and neither party shall hereafter have any claim thereto.

3. Except as defined in this agreement, each party is hereby released from any and all claims by the other party for injuries or losses, known or unknown, foreseen and unforeseen, which have accrued through the date of execution of this agreement, arising out of the marriage or any other relationship between the parties.

CP 43 (formatted, numbered and italicized for ease of reference).

The trial court’s interpretation does not follow from the language of the contract. The first sentence converts property that was disclosed but not discussed in the agreement into the separate property of the person in possession. It also terminates all claims of the other party in said property. The second sentence, operates on “*all property which shall hereafter come to either party . . .*”; by its terms, the second sentence operates on *all property*, not just disclosed but

unawarded property as the trial court found. CP 43 (emphasis added). Furthermore, since the first sentence already states that the first category of property (disclosed but unallocated) is awarded free of claims, CP 43, the trial court’s “finding” that the second sentence applies only to the first sentence renders the second sentence redundant. A court cannot adopt a contract interpretation that renders a term absurd or meaningless. *See Kelly v. Tonda*, 198 Wn.App. 303, 317-18, 393 P.3d 824 (2017) (citing *Spectrum Glass v. Public Utility District of Snohomish*, 129 Wn. App. 303, 312, 119 P.3d 854, (2005)).

The use of the word “hereafter” also demonstrates the intent of this sentence to apply to property awarded under the Separation Contract, not just property received thereafter. Hereafter means “from *now* on.” BLACK’S LAW DICTIONARY 743 (8th Edition 2004) (emphasis added). The choice to use the word hereafter—meaning now and in the future received—clearly demonstrates the parties’ intent to terminate all claims in the property assigned under the Separation Contract. This makes sense: it would be absurd to terminate claims in undisclosed or future acquired property but allow for claims against property that was just rendered separate under a Separation Contract that was intended to “make a complete and final

settlement of all ... marital and property rights and obligations....”

CP 43. What would be the point? Why would anyone pay lawyers to create such an inane, conflict-generating Separation Contract as that?

The three sentences in the “Full Satisfaction of All Claims” section of the Separation Contract work together to terminate all marital rights and ensure the agreement is a “full satisfaction of all claims.” CP 46. Each sentence involves a particular type of marital right and together they terminate all marital rights. The first sentence establishes which spouse would own disclosed property not otherwise awarded in the agreement and terminates claims therein. CP 46. The second sentence terminates all claims in all property of either party from the moment of execution of the Separation Contract (“here”) thereby preventing the parties from making claims in the any property of the other party following the agreement (“after”). CP 46. And the third sentence terminates any and all claims arising out of the marriage that occurred prior to the execution of the agreement. CP 46. Read together, these three sentences terminate past claims, current claims and future claims. In other words, a “Full Satisfaction of All Claims,” exactly like the Separation Contract says.

5.4 The Contract Should be Read as of The Time of Execution.

The Trial Court, in Findings of Fact number 2 stated that “the contract shall be read as of the time of death.” CP 112. The legal significance of this statement is unclear and it is a mystery why the trial court included this finding, which appears to have been foisted upon it by counsel. RP 22:24-24:15. It was not in the court’s initial oral ruling, though the court appeared to adopt it without fully articulating what it means. RP 23:4-24:6. Regardless of the trial court’s intent, the law on this issue is clear: a court should “ascertain the parties’ intent at the time they executed the contract.” *Int’l Marine Underwriters v. ABCD Marine, LLC*, 179 Wn.2d 274, 282, 313 P.3d 395 (2013). The trial court’s “finding” that the contract shall be interpreted as of the time of death is clearly erroneous under the unambiguous and universal contractual interpretation standards of Washington.

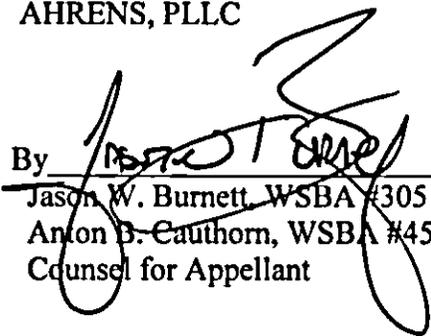
VI. CONCLUSION

The Trial Court erred when it denied Gloria Petelle’s petition to terminate Michelle’s inheritance rights based on the Separation Contract. The purpose of intestacy laws is to effectuate the intent of the decedent, and the trial court went well out of its way to frustrate

the expressed intent of the decedent that the Separation Contract be enforced even without a decree and after death. Gloria Petelle respectfully requests the Court of Appeals reverse the trial court in a published opinion stating that as a matter of law Michelle Ersfeld-Petelle waived her right to intestate succession by executing a separation contract that was a complete and final settlement of all her marital and property rights that was enforceable after death and without a divorce decree, that divided all the parties' community property into separate and waived all claims thereto, and stated the Separation Contract could only be modified in a writing signed by both parties.

DATED this 1 day of March 2018.

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Michelle Ersfeld Petelle,

Respondent.

CERTIFICATE OF SERVICE

I declare under penalty of perjury, under the laws of the State of Washington, that on March 2, 2018, I caused true and correct copies of the APPELLANT'S OPENING BRIEF, and this Certificate of Service, to be served to the parties and counsel of record as follows:

Addressee

Ann T. Wilson
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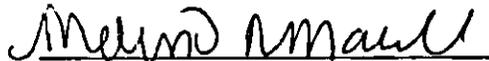
Via

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DATED this 2nd day of March, 2018.



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