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No. 97463-2

SUPREME COURT  
OF THE STATE OF WASHINGTON

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GLORIA PETELLE,

*Respondent,*

v.

MICHELLE ERSFELD-PETELLE,

*Petitioner.*

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**RESPONDENT GLORIA PETELLE'S ANSWER TO  
MEMORANDUM OF AMICUS CURIAE, PROFESSOR KAREN E.  
BOXX, IN SUPPORT OF REVIEW**

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## I. INTRODUCTION

Professor Karen E. Boxx, as amicus curiae, raises new issues and makes new arguments never seen before in this case. She argues that this Court should accept review to make new law and hold that the party seeking to enforce a separation agreement must affirmatively prove that the agreement was made knowingly and voluntarily. That is not the law in Washington, nor should it be. The authorities Professor Boxx cites do not support her position, and actually support the Court of Appeals' decision instead. The Court of Appeals' decision enforcing unambiguous contract language is consistent with Washington precedent on contract interpretation and promotes certainty for contracting parties. Review is not warranted.

## II. ANSWERING ARGUMENT

**A. Review is not warranted to address a new and unsupported argument that the party seeking to enforce a separation agreement should have the affirmative burden to prove that the agreement was made knowingly, voluntarily, and after independent legal advice.**

The Court of Appeals correctly determined that the phrase “all...marital and property rights” in the separation agreement in this case includes the marital right of intestate succession. Contrary to Professor Boxx's assertion, the Court of Appeals did not apply a “conclusive presumption of waiver”; rather, it interpreted and enforced the agreement's unambiguous terms. *Amicus Memo.* at 5. In criticizing the Court of Appeals for “look[ing] no further than the language of the agreement” in reaching its decision, Professor Boxx derides the Court of Appeals for following

Washington law, which the Court of Appeals correctly stated and applied. *Amicus Memo.* at 2.

Washington follows the objective manifestation theory of contract interpretation. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). Under this approach, the court will “attempt to determine the parties’ intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties.” *Id.* The parties’ subjective intent “is generally irrelevant if the intent can be determined from the actual words used.” *Id.* at 503-04. This Court stated in *Hearst*, “We do not interpret what was *intended* to be written but what *was* written.” *Id.* at 504 (emphasis added).

Washington also follows the context rule, which recognizes that contracting parties’ intent “cannot be interpreted without examining the context surrounding an instrument’s execution.” *Hearst*, 154 Wn.2d at 502 (citing *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990)). This means that extrinsic evidence is admissible to aid in understanding the parties’ mutual intent. *Id.* Nevertheless, the context rule is limited: extrinsic evidence is admissible only to determine the meaning of the specific words and terms used in the written contract, not to show an intention independent of the writing or to vary, contradict, or modify the written word. *Id.* at 503. Evidence of a party’s unilateral, subjective intention is irrelevant. *Id.* at 503-04.

The Court of Appeals correctly concluded that ordinary contract-interpretation principles apply when interpreting a separation agreement.

*See Slip Op.* ¶ 10 (citing *Boisen v. Burgess*, 87 Wn. App. 912, 920, 943 P.2d 682 (1997)). Moreover, the Court of Appeals properly applied those principles to interpret the separation agreement’s unambiguous language and hold that the extrinsic evidence offered was not helpful in determining the meaning of the specific words and terms used in the separation agreement.

Professor Boxx advocates for a new requirement that the party seeking to enforce a separation agreement prove that the agreement was knowingly and voluntarily made. *See Amicus Memo.* at 2-5. This is a new argument not previously advanced by Respondent Michelle Ersfeld-Petelle, and this Court should not consider arguments raised only by amici curiae. *State v. Gonzalez*, 110 Wn.2d 738, 752 n.2, 757 P.2d 925 (1988). Regardless, the authorities Professor Boxx cites do not support her position.

Professor Boxx’s argument focuses largely on the Uniform Probate Code (UPC), a model act that less than half the states have enacted. Washington has not enacted the UPC.<sup>1</sup> Even if it had, applying the UPC would not change the result in this case. Indeed, section 2-213(h) of the UPC, quoted by Professor Boxx, supports the result here. It provides that a waiver of “all rights” in a separation agreement renounces intestate-succession rights (and even supersedes a prior will):

Unless an agreement under subsection (b) provides to the contrary, ***a waiver of “all rights” or equivalent language, in the property or estate of a present or prospective spouse or a complete property***

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<sup>1</sup> <https://www.uniformlaws.org/committees/community-home?CommunityKey=a539920d-c477-44b8-84fe-b0d7b1a4cca8> (last visited 10/2/2019).

***settlement entered into after or in anticipation of separation or divorce is*** a waiver of all rights of elective share, homestead allowance, exempt property, and family allowance by the spouse in the property of the other spouse and ***a renunciation of all benefits that would otherwise pass to the renouncing spouse by intestate succession*** or by virtue of any will executed before the waiver or property settlement.

UNIF. PROBATE CODE § 2-213(h) (emphasis added).

Furthermore, contrary to Professor Boxx's argument, the UPC does not require the party seeking to enforce a separation agreement to prove that it was made knowingly and voluntarily and with access to independent legal advice. Instead, the surviving spouse must establish unenforceability based on such factors. *See* UNIF. PROBATE CODE § 2-213(c). In any event, Michelle Ersfeld-Petelle never claimed her execution of the separation agreement was not knowing or voluntary, that Michael Petelle's property was not fully disclosed, or that she lacked access to independent legal representation. Thus, this is not an appropriate case in which to address such issues.

As for Professor Boxx's surmise that the UPC provision's very existence "implies that a statute may be necessary or preferable to give notice that contractual language will be interpreted to waive the statutory intestacy scheme," she cites no precedent suggesting that a contract should not be enforced as written, absent fraud or undue influence. *Amicus Memo.* at 4. In any event, if a statute is indeed "necessary or preferable," then the matter is one for the Legislature, not this Court.

Neither of the two cases Professor Boxx cites supports her position. In one of the cases, the South Dakota Supreme Court applied UPC section

2-213, as adopted by South Dakota. *Amicus Memo.* at 3 (citing *In re Estate of Smid*, 756 N.W.2d 1 (S.D. 2008)). Professor Boxx asserts that the court held that a separation agreement “was not enforceable since [the surviving spouse] had no legal advice and was not informed of her statutory rights as a surviving spouse.” *Amicus Memo.* at 3. In fact, however, the court held the exact opposite, affirming the trial court’s rejection of the surviving spouse’s claims that her waiver was involuntary or made without full knowledge or an opportunity to obtain independent legal advice. *Estate of Smid*, 756 N.W.2d at 6-14. Only a single dissenting justice disagreed, advocating for a multi-factor test to determine enforceability and concluding that the proposed factors weighed against enforcing the agreement. *Id.* at 14-19.

The second case Professor Boxx cites is readily distinguishable. *See Amicus Memo.* at 2-3 (citing *Hempe v. Hempe*, 54 Or. App. 490, 635 P.2d 403 (1981)). In *Hempe*, the asserted written separation agreement had been lost. The sole evidence of its contents was the surviving spouse’s testimony that her petition for dissolution contained the agreed-upon division of assets. Because the surviving spouse had received her share of assets under the asserted agreement, the trial court determined she was estopped claim inheritance from her husband. *Hempe*, 635 P.2d at 404. Although the appellate court recognized that spouses may waive inheritance rights in a property-settlement agreement, the court nevertheless reversed because there was no evidence that the agreement contained any provision regarding the effect on the parties’ rights if one of them died before their marriage was

dissolved. *Id.* at 404-05. Absent such a provision, the most reasonable inference was that a dissolution decree was a condition precedent to the agreement's taking effect. *Id.* at 404-05.

Here, unlike in *Hempe*, the trial court had the actual, written separation agreement, and that agreement expressly provided that the agreed property division would remain valid and enforceable if either party died before entry of a dissolution decree. *Slip Op.* ¶ 17; CP 48. The Court of Appeals properly enforced the agreement per its terms.

**B. The Court of Appeals' decision enforcing unambiguous contract language will not cause "confusion and litigation" but rather promotes certainty.**

Professor Boxx is correct that a contractual waiver of "all...marital and property rights" may well apply to a variety of property rights that spouses may have. *Amicus Memo.* at 6. She does not explain why that might cause "confusion and litigation." *Id.* Although such a waiver is undeniably broad, Michael and Michelle chose to include that language in their separation agreement, and "all...marital and property rights" plainly includes the marital right to intestate succession. Rather than causing confusion or litigation, the Court of Appeals' decision promotes certainty by confirming that separation agreements will be enforced as written. Review is not warranted.

### **III. CONCLUSION**

This Court should deny review.

Respectfully submitted this 14th day of October, 2019.

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**CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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DATED this 14<sup>th</sup> day of October, 2019.

  
\_\_\_\_\_  
Patti Saiden, Legal Assistant

**CARNEY BADLEY SPELLMAN**

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