FILED
June 11, 2015
Court of Appeals
Division I
State of Washington

72758-3

NO. 72758-3-I

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

JANELL BOONE as Personal Representative of THE ESTATE OF RANDAL J. LANGELAND,

Appellant,

vs.

SHARON DROWN,

Respondent/Cross Appellant.

OPENING BRIEF OF APPELLANT

Michael L. Olver, WSBA #7031
Kameron L. Kirkevold, WSBA #40829
Attorneys for Appellant/Cross Respondent
Helsell Fetterman LLP
1001 4th Avenue, Suite 4200
Seattle, WA 98154
(206) 292-1144

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY OF ARGUMENT.....1

II. APPELLANT'S ERRORS ON APPEAL.....3

III. ISSUES ON APPEAL.....8

IV. STATEMENT OF THE CASE.....10

A. **Statement of Facts**.....10

1. During their 18-year committed intimate relationship, Langeland and Drown contracted to maintain the separate character of their income and assets.....10

2. In 1999, Langeland purchased a home in Bellingham as his separate property and he and Drown entered into a contract to allow Drown to obtain a 31.7 percent interest in the property over time 13

B. **Procedural History**.....15

V. STANDARD OF REVIEW.....20

VI. AUTHORITY AND ARGUMENT.....20

A. **Drown and Langeland Made Objective Manifestations of their Intent to Maintain Separate Property, thus Establishing a Separate Property Contract that Rebuts the Presumption of Jointly Owned Income and Assets**.....20

1. Substantial evidence presented at trial proves that Drown and Langeland had a separate property contract to maintain the separate character of their income and assets.....22

a. *Drown and Langeland had the necessary intent to form an implied contract to maintain the separate character of their assets and property*.....22

b. *Drown and Langeland continually reaffirmed the terms of their separate property agreement through their words and actions*.....27

(i) Drown and Langeland never comingled assets.....27

(ii) Drown kept painstaking and meticulous account of, and shared equally in, all expenses.....28

(iii) Over their 18 year CIR, Drown and Langeland continually affirmed the terms of their separate property agreement.....29

(iv) When Drown and Langeland wanted an asset to be jointly held, they made clear manifestations of that intent.....29

(v) Drown explicitly acknowledged the existence of the separate property agreement which she described as the "Monthly Agreement."....30

B. **Drown and Langeland Entered into an Express Written Contract Regarding their Ownership of the Bellingham Property**.....31

1. The deed is a clear manifestation of Drown and Langeland's intent to define their respective joint ownership interests in the Bellingham home. 32

2. Substantial evidence shows that Drown entered into this contract freely and voluntarily.....34

3. Drown only acquired a 24.7 percent interest in the property under the terms of the contract that she executed and, therefore, it would be inequitable to award her anything more.....35

4. The Real Property Contract is not a marital agreement because Drown and Langeland were not spouses and were not creating separate property.....36

C. The Trial Court Erred in Awarding Langeland's Separate Property to Drown.....38

1. Upon Langeland's death, his interest in the community-like property became his separate property and, therefore, was not before the court to distribute.....40

2. Awarding Drown the Estate's interest in the contested probate assets would be giving her the equivalent of an intestate share, which is contrary to established law and the law of this case.....42

D. Even if the Couple had Joint Assets, the Trial Court Erred When it Failed to Include Drown's Assets When Making an Equitable Division of the Couple's Assets.....44

E. This Contract Argument Does Not Implicate Judicial Estoppel.....46

F. The Trial Court Erred in Awarding Drown Attorney's Fees, and Boone Should be Awarded her Fees from the Estate, and Drown Required to Reimburse the Estate.....48

VII. CONCLUSION.....49

TABLE OF AUTHORITIES

Case Law

Affiliated FM Ins. Co, v. LTK Consulting Servs., Inc., 170 Wn.2d 442, 243 P.3d 521 (2010).....32

Connell v. Francisco, 127 Wn.2d 339, 898 P.2d 831 (1995).....20, 21,38,39,42,44,45

deNoskoff v. Scott, 36 Wn. App. 424, 674 P.2d 687 (1984).....40,41,42

Dewberry v. George, 115 Wn. App. 351, 62 P.3d 525 (2003).....23,25,26,27,28

Eaton v. Engelcke Mfg., Inc., 37 Wn. App. 677, 681 P.2d 1312 (1984).....22,23

Edmonds v. Ashe, 13 Wn. App. 690, 537 P.2d 812 (1975).....41

Estate of Langeland, 177 Wn. App. 315, 312 P.3d 657 (2013).....35,43,44,46,47

Fluke Capital & Management Services Co. v. Richmond, 106 Wn.2d 614, 724 P.3d 356 (1986).....46

Folsom v. County of Spokane, 111 Wn.2d 256, 759 P.2d 1196 (1988).....46

Granville Condo. Homeowners Ass'n v. Kuehner, 177 Wn. App. 543, 312 P.3d 702, (2013).....23

Greene v. Rothschild, 68 Wn.2d 1, 402 P.2d 356, 414 P.2d 1013 (1965).....46

In re Estate of Mell, 105 Wn.2d 518, 716 P.2d 836 (1986).....39,40

In re G.W.-F., 170 Wn. App. 631, 285 P.3d 208 (2012).....20, 21,24,27

In re Marriage of Lindsey, 101 Wn.2d 299, 678 P.2d 328 (1984).....20,35

In re Marriage of Mueller, 140 Wn. App. 498, 167 P.3d 568, 571-72 (2007).....21

Johnson v. Nasi, 50 Wn.2d 87, 309 P.2d 380 (1957).....23

Johnson v. Whitman, 1 Wn. App. 540, 463 P.2d 207, 211 (1969).....23

Kellar v. Estate of Kellar, 172 Wn. App. 562, 291 P.3d 906 (2012).....36,37

MacDonald v. Hayner, 43 Wn. App. 81, 715 P.2d 519 (1986).....23

Matter of Ford's Estate, 31 Wn. App. 136, 639 P.2d 848 (1982)...31

Newport Yacht Basin Ass'n of Condo Owners v. Supreme Northwest, Inc., 168 Wn. App. 56, 277 P.3d 18 (2012).....32

Olver v. Fowler, 131 Wn. App. 135, 126 P.3d 69 (2006); aff'd, 161 Wn.2d 243, 778 P.32d 1022 (2007).....38,39,40,42

Peffley-Warner v. Bowen, 113 Wn.2d 243, 778 P.2d 1022 (1989).....43,44

P.E. Systems, LLC v. CPI Corp., 176 Wn.2d 198, 207, 289 P.3d 638 (2012).....34

Sunnyside Valley Irr. Dist. V. Dickie, 149 Wn.2d 873, 73 P.3d 120 (2003).....20

Washington Greensview Apartment Associates v. Travelers Property Cas. Co., of America, 173 Wn. App. 663, 295 P.3d 284 (2013).....34

Statutes

RCW 26.16.120.....31

RCW 64.08.050 32

RCW 11.96A.150 48

RAP 18.1 4

I. INTRODUCTION AND SUMMARY OF ARGUMENT

In 1991, Randall J. Langeland (Langeland) and Sharon Drown (Drown) began a committed intimate relationship (CIR). From 1991 until Langeland's death in 2009, Drown and Langeland shared almost all aspects of their lives: they moved from California to Washington together, they ended up owning a home together, and, sadly, together they shared in the debilitating health struggles that Langeland faced for many years preceding his death. Importantly, they even shared in the conscious and intentional decision not to get married; to maintain separate property; to never comingle or combine assets; and to contract for different interests in the home.

After years of litigation and volumes of evidence, the totality of the evidence establishes but one very simple, very logical conclusion: during Drown and Langeland's 18-year CIR, they had, in Drown's own words, a "Monthly Agreement" to maintain the separate character of property acquired, and they adhered to this contract and continually reaffirmed it by their words and conduct throughout the entirety of their CIR. Despite the evidence, the trial court awarded Drown nearly all of Langeland's separate interest in property acquired in his name

only during the couple's CIR, most significantly his interest in the Bellingham Property. Consequently, the trial court committed clear error.

Boone respectfully requests that the trial court's rulings be reversed and that this Court (1) find that Drown and Langeland had a valid, enforceable agreement to maintain the separate character of their property during their CIR and continually reaffirmed the terms of the agreement through their words and conduct; (2) find that Drown executed a valid and enforceable Real Property Contract to obtain a 31.7 percent ownership interest in the Bellingham home and only obtained 24.7 percent interest under the terms of the contract; (3) find that the award to Langeland's separate property to Drown was contrary to law; (4) find that the Estate Inventory (CP 527-34) is accurate because the couple acquired no jointly owned assets except for those intentionally made joint assets as listed in the inventory; (5) in the alternative, assuming that all assets acquired during the CIR between Drown and Langeland were jointly owned, find that the trial court did not make a fair and equitable distribution because it failed to include all assets acquired by Drown during the CIR; and (6) award Boone all of her fees and costs associated with this

matter.

II. APPELLANT'S ERRORS ON APPEAL

Appellant, Janell Boone, as Personal Representative of the Estate of Randall J. Langeland, assigns error to the following decisions entered by the trial court:

1. The trial court's decision not to enter Boone's Proposed Amended Findings of Facts and Conclusions of Law. CP 1668-1675.

2. The trial court's entry of Amended Finding of Fact No. 5: Drown and Langeland pooled resources and services. CP 1697.

3. The trial court's entry of Amended Finding of Fact No. 20: during Drown and Langeland's committed intimate relationship, they pooled resources and services for the benefit of both and acquired and managed assets for the benefit of both. CP 1699.

4. The trial court's entry of Amended Finding of Fact No. 24: all income from J. Randall & Associates was the joint property of Langeland and Drown. CP 1699.

5. The trial court's entry of Amended Finding of Fact No. 25: J. Randal and Associates was the joint property of Drown

and Langeland. CP 1700.

6. The trial court's entry of Amended Finding of Fact No. 29: At the time of Langeland's death, the 36 foot Catalina sailboat was the joint property of Drown and Langeland. CP 1700.

7. The trial court's entry of Amended Finding of Fact No. 33: The property located at 3926 Lakemont Street, Bellingham, WA, at the time of Langeland's death was the joint property of Drown and Langeland. CP 1700

8. The trial court's entry of Amended Finding of Fact No. 35: The source of payments for the home equity loan was presumed to be from joint funds. CP 1701

9. The trial court's entry of Amended Finding of Fact No. 42: Drown paid for the costs of Langeland's funeral care. (Drown sought reimbursement from the Estate for the funeral costs). CP 1702

10. The trial court's entry of Amended Finding of Fact No. 44: The court has to resolve ownership and to determine who should be awarded the Estate's interest in certain assets. CP 1702.

11. The trial court's entry of Amended Finding of Fact No. 48: The listed accounts contained "joint" funds. CP 1703.

12. The trial court's entry of Amended Finding of Fact

No. 49: One half of the funds listed in FF No. 48 belonged to Drown. CP 1703.

13. The trial court's entry of Amended Finding of Fact No. 50: "The SEP IRA number 2AT-20273, was created from joint (community) funds earned by Langeland and Drown after 1991." CP 1704

14. The trial court's entry of Amended Finding of Fact No. 51: One half of the funds listed in FF No. 50 were owned by Drown. CP 1704.

15. The trial court's entry of Amended Finding of Fact No. 53: Drown and Langeland jointly owned all assets acquired during their committed intimate relationship. CP 1704.

16. The trial court's entry of Amended Finding of Fact No. 54: Drown should be awarded a 50 percent share in the listed assets acquired during her and Langeland's committed intimate relationship. CP 1704.

17. The trial court's entry of Amended Finding of Fact No. 55: the court, in equity, must determine how to distribute the Estate's remaining 50 percent interest in the contested assets. CP 1705.

18. The trial court's entry of Amended Finding of Fact No. 56: Drown's "unpaid" efforts in caring for Langeland and the property. CP 1705.

19. The trial court's entry of Amended Findings of Fact No. 57 A, B, C, E, and G: an additional award from the Estate of Langeland should be awarded to Drown. CP 1706.

20. The trial court's entry of Amended Finding of Fact No. 58: the property agreement signed by Drown was not executed freely and voluntarily. CP 1706.

21. The trial court's entry of Amended Finding of Fact No. 59: before Drown signed the property agreement, there was not full candor and sincerity in all matters bearing up on the agreement. CP 1707.

22. The trial court's entry of Amended Finding of Fact No. 60: the terms of the property agreement were not followed by either Langeland or Drown after the agreement was prepared and signed. CP 1707.

23. The trial court's entry of Amended Finding of Fact No. 61: Drown, under TEDRA, is entitled to her attorney's fees. CP 1707.

24. The trial court's entry of Conclusion of Law No. 4: Boone did not provide any evidence of tracing of funds used to acquire the following Estate assets. (Boone provided evidence of a contract which rebutted the presumption of jointly held assets). CP 1707

25. The trial court's entry of Amended Conclusion of Law No. 8: the Court of Appeals determined as a matter of law that certain assets were joint property at the time of death. CP 1708.

26. The trial court's entry of Amended Conclusion of Law No. 9: each party shall bear their own attorney's fees and costs. CP 1708.

27. The trial court's entry of Amended Conclusion of Law No. 10: the court had the power to award Langeland's separate property to Drown. CP 1708.

28. The trial court's entry of Amended Conclusion of Law No. 11: nearly the entire joint property be awarded to Drown. CP 1708.

29. The trial court's entry of Conclusion of Law No. 12: "A judgment should be entered dividing and awarding the property as outlined hereinabove in the findings of fact." CP

1709.

30. The trial court's finding that Boone's CR 59(a)(7) Motion to Reconsider Entry of Amended Findings of Fact and Conclusions of Law was not well grounded in fact or law. CP 1861.

31. The trial court's finding that Boone's CR 59(a)(7) Motion to Reconsider Entry of Amended Findings of Fact and Conclusions of Law was interposed for improper purposes. CP 1861.

32. The trial court's finding that Boone's CR 59(a)(7) Motion to Reconsider Entry of Amended Findings of Fact and Conclusions of Law was contrary to, and not warranted by, the existing law of the case. CP 1861.

33. The trial court's denial of Boone's CR 59(a)(7) Motion to Reconsider Entry of Amended Findings of Fact and Conclusions of Law. CP 1862.

34. The trial court's entry of Judgment on Attorney Fees Awarded Drown. CP 2097-2098.

III. ISSUES ON APPEAL

1. Did the trial court err when it concluded that no facts or law supported the existence of a separate property

agreement between Drown and Langeland when the clear weight of the evidence at trial demonstrated 1) their meticulous and painstaking effort to maintain the separate character of their income and assets; 2) their successful attempt to avoid the unintentional comingling of any income or assets; and 3) their clear intent, evidenced by a validly executed written property agreement, to contractually define their ownership interests in the Bellingham home?

2. Did the trial court err when it concluded that Drown did not freely and voluntarily sign a contract for a 31.7 percent ownership interest in a Bellingham home when uncontroverted evidence demonstrates that Drown acknowledged receiving the contract, reviewing the terms of the contract, signing the contract, and abiding by the terms of the contract?

3. Whether the trial court erred when it awarded Drown, the surviving partner in a committed intimate relationship, her deceased partner's separate property?

4. Whether the trial court erred when it failed to consider all property acquired during a committed intimate relationship, including income and property acquired by Drown during the CIR, before making a just and equitable distribution?

5. Whether the trial court erred when it awarded Drown fees on Boone's Motion to Reconsider

6. Whether Boone should receive an award of fees and costs associated with this matter from the Estate, including fees and costs at the trial court and on the second appeal?

IV. STATEMENT OF THE CASE

A. Statement of Facts

1. During their 18-year committed intimate relationship, Langeland and Drown contracted to maintain the separate character of their income and assets.

In 1983 Ms. Drown and Mr. Langeland met in Chico, California, and began dating. CP 1651; RP 68-69. For the first eight years of their relationship, both Drown and Langeland resided in separate homes. CP 1651. In 1991, Drown moved into Langeland's Chico residence, and the two began living together in a committed intimate relationship (CIR). CP 1651; RP 52. The relationship lasted until Langeland passed away on January 9, 2009. CP 461, 963.

There is no dispute that throughout the 18 years that Drown and Langeland lived together, they were a loving, caring couple who shared nearly all aspects of their lives, the good and

the bad. CP 926, 1651. Their love and commitment to each other was clear, and just as clear was their mutual intent to maintain the separate character of their income and assets. RP 216-220; Ex. 23.

Beginning in 1991, and until Langeland's death in 2009, Langeland and Drown were meticulous in maintaining separate property. RP 216-220; Ex. 23. The couple never maintained a joint bank account, and were never given access to one another's accounts. CP 921, 1008, 1013. Daily expenses, such as groceries, utilities, and meals, were split fifty-fifty, with Drown and Langeland each paying his or her share from their separate bank accounts. CP 921-927; RP 216-220; Ex. 23. Each month, Drown executed and recorded the split with precision, making a list of all monthly expenses, determining which party had paid what expenses, and then calculating whether she or Langeland had paid more than fifty percent so that the difference could be equaled out. CP 987-995; RP 216-220, Ex. 23. If Drown had not paid a 50 percent share of the monthly expenses, she would write a check to Langeland, reimbursing him for the difference. CP 987-988; RP 216-220, Ex. 23. The process was followed for the purchase of the most ordinary items such as a pillow case cover

($9.74), a magnifying glass ($10.83), and kids Easter candy ($10.00) (RP 216-220; Ex 23), to more substantive expenses such as health care coverage that Drown obtained for Langeland through Drown's employer. CP 960-963.

According to Drown, Langeland began receiving health insurance through her employer, but as the money was deducted from her pay check each month, Langeland wanted to reimburse Drown for those amounts. CP 962, lines 13-15. In Drown's own words, reimbursement of these amounts were "**included in our monthly agreement.**" CP 962[1], Lines 16-20. (Emphasis Added). When asked to what Drown was referring when she said "monthly agreement," Drown testified, that is was **"[m]oneys that I -- I paid him and that was, you know, perhaps deducted from just between the two of us."** CP 962, lines 20-24. (Emphasis added).

They followed the "monthly agreement" each and every month during their entire CIR. RP 216-220; Ex. 23. This separateness even extended to the Bellingham home Langeland purchased, which Drown then contracted to purchase a

[1] Whiles these statements were made under oath at Drown's deposition, they were made without objection and Ms. Drown's deposition was later published at trial without objection. RP 210.

percentage share by written agreement. CP 932-935; RP 248-250, Ex. 30.

2. In 1999, Langeland purchased a home in Bellingham as his separate property and he and Drown entered into a contract to allow Drown to obtain a 31.7 percent interest in the property over time.

In 1999, eight years after Drown and Langeland first began living together, the couple moved from California to Washington. CP 921. Upon moving to Washington, Langeland purchased a home located at 3946 Lakemont Street in Bellingham, Washington. CP 921, 1651; RP 248-250, Ex. 30. Langeland contributed $148,500 of his separate property assets to the initial purchase price of $158,500. RP 248-250, Ex. 30. But Langeland and Drown determined that Drown should have an ownership interest in the residence, and agreed upon a process by which Drown could acquire up to a 31.7 percent interest in the property. CP 932-936. According to Drown, the documents were prepared because Langeland "wanted me to be a co-owner on - - with our home[]", and "I just know that [Langeland] wanted me to be a co-owner . . . ." CP 934-935. To accomplish this, Drown made an initial payment of $10,000 from her separate bank account and then executed a promissory note in favor of Langeland in the

amount of $40,000. CP 946-947; RP 177-179; Ex. 30. In return, the parties executed a deed of trust in which Drown obtained a 31.7 percent interest in the Bellingham home. CP 934-936; RP 248-250; Ex. 30.

In addition to the deed of trust, several other documents memorialized the terms of the agreement including the promissory note with interest at 7% whereby Drown would make monthly payments on the note to be credited as a payment towards her home ownership. CP 946-947; RP 177-179; Ex. 30. In addition to the deed and the note, other documents memorialized the parties' understanding: a memo from Langeland to the title company, requesting Drown be added as an owner to the property pursuant to the terms of the promissory note; an addendum/amendment to the purchase and sale agreement for the property; and an amendment to the home insurance policy. RP 177-179; Ex. 30. At trial, these five documents comprised Exhibit 30, or the "Real Property Contract." RP 177-179; Ex. 30. At her deposition, and uncontroverted at trial, Drown testified that she had received, reviewed, and then signed the Real Property Contract. CP 932-936. At no time did she testify that any confusion or coercion existed at the time she signed each of the

documents. At no time did she even suggest that she wanted an attorney to represent her with regard to this very straight forward agreement.

Drown made payments to Langeland consistent with the terms of the promissory note until 2008. CP 178, 945; RP 75, 325-325. CP 945. In November 2008, Drown stopped making payments on the loan. RP 316, Ex. 33; RP 325-326. When asked at trial by her attorney why she quit making payments after Langeland had passed, Drown responded: "Because our home was paid for and I just quit making arrangements, I just quit taking notes on everything." RP 342. When Drown's payments ceased, she had acquired a 24.7 percent interest in the home pursuant to the terms of the Real Property Contract as testified to by an expert certified public accountant at trial which was unrebutted. RP 316, Ex. 33.

B. Procedural History

In 2009, Langeland died, intestate, leaving his daughter, Janell Boone, as his only heir. CP 1613-1614. At the time of Langeland's death, he had been in a CIR with Sharon Drown. CP1613. Both Drown and Boone asserted claims over the disposition of Langeland's estate. CP 1611.

In May 2011, a three-day bench trial was heard before the Honorable Ira J. Uhrig, Whatcom County Superior Court Judge. RP 1-458. Judge Uhrig entered Findings of Fact and Conclusions of Law. CP 1287-1292. These findings included all of the following important determinations:

- No. 6: "Decedent and Sharon Drown shared equally in all household expenses." CP 1288.
- No. 7: "Decedent and Sharon Drown maintained separate bank accounts at all times." CP 1288.
- No. 8: "Decedent and Sharon Drown did not comingle assets, except for 3 checks totaling $6,650 described in Exhibit 29 which Sharon Drown deposited in decedent's account by accident." CP 1288.
- No. 9: "Decedent and Sharon Drown maintained the separate character of all property except property which was intentionally purchased jointly as described in the Estate Inventory and Appraisement." CP 1288.
- No. 12: "Decedent purchased real property located at 3946 Lakemont Street, Bellingham, WA, using his own separate assets." CP 1289
- No. 13: "Decedent and Sharon Drown entered into a contract in which Ms. Drown was to acquire an interest in the Bellingham property by making payments in accordance with Exhibit 30 admitted herein." CP 1289.
- No. 14: "Ms. Drown made payments, including a $10,000 down payment, totaling $17,565.29 in cumulative interest, and $29,144.71 in principal, which equates to a $24.7% ownership interest in the home at the time of Decedent's death." CP 1289.

- No. 18: "The parties received their earnings in their own name; they scrupulously deposited their own earnings into their own accounts titled in their own names; they carefully did not jointly acquire any assets of significance; they meticulously divided, to the penny, all expenses equally; and decedent did not add Sharon Drown to any of his bank accounts; and only allowed her to acquire an interest in the residence by making payments with interest as provided in Exhibit 30. Decedent did not marry Sharon Drown nor did he execute a will in her favor." CP 1290.

On October 28, 2013, this Court, in relevant parts, affirmed the trial's finding that Drown was not entitled to an intestate share of Langeland's estate, and concluded that the presumption of property acquired during a CIR prevails over a presumption of correctness for an estate inventory. In re Estate of Langeland, 177 Wn. App. 315, 324, 312 P.3d 657 (2013). This Court reversed the trial court's division of probate assets, holding that Boone had failed to overcome the joint property presumption through tracing on a 36-foot sailboat, proceeds from a software company, and the Bellingham home, and remanded to the trial court to reconsider the proper distribution of the contested assets. See Id. Although Drown sought to have the Court award her an intestate share of the Estate's assets and invalidate the Real Property Contract, this Court refused to do so and otherwise affirmed the trial court's

initial determinations. Id at 329.

On remand, without presentation of new or additional evidence, both Drown and Boone submitted proposed sets of Amended Findings of Fact and Conclusions of Law. CP 1668-1676, CP 1677-1690, respectively. The findings submitted by Boone asked the trial court to hold, based on its prior factual findings regarding the meticulous separation of assets and income, that Drown and Langeland had a valid and enforceable separate property agreement in the form of the "Monthly Agreement" which maintained the separate character of all of the couple's income and assets. CP 1668-1676. Boone filed a motion, objecting to Drown's proposed amended findings of fact and conclusions of law, specifically those findings which addressed the Real Property Contract. CP 1691-1695. Ultimately, the trial court entered Drown's proposed Amended Findings of Fact and Conclusions of Law. CP 1697-1709. The trial court ignored evidence of all contracts both written (Bellingham House) and implied in fact ("the monthly agreement") entered into between Drown and Langeland. CP 1697-1709. Additionally, the trial court failed to include in the division of assets, any of Drown's income and property acquired during the couple's CIR. CP 1697-

1709, RR 212-214; Ex. 27.

On September 29, 2014, Boone filed a Motion to Reconsider Entry of the Amended Findings of Fact and Conclusions of Law or, alternatively, for Clarification of the Court's Ruling. CP 1710-1725. Specifically, Boone asked the court to address the separate property agreement, the validity of the Real Property Contract, the court's decision to give away Langeland's separate property, and the court's failure to include Drown's property in the overall division of assets.[2] CP 1710-1725. The trial court denied Boone's motion and awarded Drown attorney's fees. CP 1860-1863. Boone now appeals the trial court's Amended Findings of Fact and Conclusions of Law and the trial court's denial of her motion to reconsider the same, and asks that this Court enforce the "Monthly Agreement" and the Real Property Contract.

[2] Assets acquired by Drown during the CIR but not addressed by the trial court for distribution include all of the following: (1) Peoples Bank checking Acct. 4734; (2) Peoples Bank Savings Acct. 5576; (3) Certificate of Deposit No. 6828; (4) Certificate of Deposit No. 0184; (5) AIG/Valic Retirement Account 401A; (6) Fidelity Retirement Account 6467; (7) Fidelity IRA 0650; (8) Great American Life, No. 8998; (9) N.T. Enloe Hospital Pension Plan, rolled over into Fidelity IRA; (10) 1992 Toyota Camry; (11) Antique China Hutch; (12) Dishwasher; and (13) Loveseat K&D. CP 1061, 1065, 1721, RP 212-214, Ex. 27.

V. STANDARD OF REVIEW

A trial court's findings of fact are reviewed for substantial evidence. In re G.W.-F., 170 Wn. App. 631, 637, 285 P.3d 208 (2012) (citing Sunnyside Valley Irr. Dist. V. Dickie, 149 Wn.2d 873, 879, 73 P.3d 120 (2003)). Substantial evidence is that which is sufficient to persuade a fair-minded, rational person of the findings' truths. In re G.W.-F., 170 Wn. App. at 637. An appellate court reviews a trial court's conclusions of law *de novo* to determine if they are supported by the findings of fact. Id.

VI. AUTHORITY AND ARGUMENT

A. Drown and Langeland Made Objective Manifestations of their Intent to Maintain Separate Property, thus Establishing a Separate Property Contract that Rebuts the Presumption of Jointly Owned Income and Assets.

A committed intimate relationship (CIR) is a "stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist." Connell v. Francisco, 127 Wn.2d 339, 346, 898 P.2d 831 (1995); In re Marriage of Lindsey, 101 Wn.2d 299, 304, 678 P.2d 328 (1984). Because the parties in a CIR have chosen not to get married, laws involving the distribution of marital property do not directly apply; however, courts may look to those laws for guidance and,

when appropriate, apply them by analogy. Connell, 127 Wn.2d at 349.

By analogy, Washington courts hold that income and property acquired during a CIR is presumed to be owned by both parties. Id. at 351. Like spouses, partners in a CIR may change the status of their community-like property to separate property by entering into mutual agreements. In re G.W.-F., 170 Wn. App. 631, 638, 285 P.3d 208 (2012).

Courts interpret agreements between spouses like they do other types of contracts. In re Marriage of Mueller, 140 Wn. App. 498, 505, 167 P.3d 568, 571-72 (2007). In construing contracts, a court's objective is to determine the parties' mutual intent. Id. "Extrinsic evidence may be consulted to elucidate the meaning of the contract's terms, but not to contradict the parties' objective manifestations of intent." Id.

The party seeking to enforce an agreement that converts community property to separate property must establish with clear and convincing evidence both (1) the existence of the agreement and (2) that the parties mutually observed the terms of the agreement throughout the relationship. In re G.W.-F., 170 Wn. App. at 638.

In the present case, Boone does not dispute that assets acquired during Drown and Langeland's CIR were subject to the joint property presumption nor that the presumption was not rebutted through evidence of tracing. Rather, Boone argues that the evidence establishes but one logical conclusion: Drown and Langeland had a valid and enforceable agreement that prevented the accumulation of joint property and that they mutually observed and reaffirmed the terms of the agreement every day of every month of every year throughout their relationship. Ex. 23.

1. Substantial evidence presented at trial proves that Drown and Langeland had a separate property contract to maintain the separate character of their income and assets.

   a. *Drown and Langeland had the necessary intent to form an implied contract to maintain the separate character of their assets and property.*

An express contract is one where the intentions of the parties and the terms of the agreement are expressed by the parties in writing or orally at the time it is entered into. Eaton v. Engelcke Mfg., Inc., 37 Wn. App. 677, 680, 681 P.2d 1312 (1984). By contrast, an implied contract is "an agreement depending for its existence on some act or conduct of the party sought to be charged and arising by implication from circumstances which . . .

show a mutual intention on the part of the parties to contract with each other." Granville Condo. Homeowners Ass'n v. Kuehner, 177 Wn. App. 543, 555, 312 P.3d 702, (2013) (quoting Johnson v. Nasi, 50 Wn.2d 87, 91, 309 P.2d 380 (1957)). The legal relationship between parties to an implied contract is no different than in an express contract -- only the method of proof is different. Johnson v. Whitman, 1 Wn. App. 540, 545, 463 P.2d 207, 211 (1969).

Like an express contract, an implied contract requires a meeting of the minds. MacDonald v. Hayner, 43 Wn. App. 81, 85, 715 P.2d 519 (1986). Acts and conduct, as well as words, may show an offer and an acceptance. Johnson v. Whitman, 1 Wn. App. at 545. Here, substantial evidence presented at trial demonstrated that Drown and Langeland had such a contract.

In the spousal context and, by analogy, in a CIR, evidence of an oral agreement to maintain separate property and an implied in fact contract can be demonstrated by the parties' acts and conduct. Compare Dewberry v. George, 115 Wn. App. 351, 62 P.3d 525 (2003) (finding that the parties had an oral agreement to maintain separate income and property **as evidenced by the continual affirmation of their agreement through words and actions)** (emphasis added); with Eaton, 37 Wn. App. at 680

(finding that, although payment was never discussed, the parties had an enforceable implied in fact contract because (1) the employee's services were rendered at the employer's request; (2) the employer expected, or should have expected, to pay for the services; and (3) **the parties continually affirmed this agreement through their conduct**) (emphasis added)).

The Division I case of In re G.W.-F., which upheld the right of parties in a committed intimate relationship to enter into an oral contract to maintain separate property during the relationship, is analogous to our present case. The parties, Dr. Melissa Finch and Dr. Gary Wieder, lived in a committed intimate relationship and had two children together. In re G.W. –F., 170 Wn. App at 635-36. Evidence demonstrated that during their CIR, the parties had an oral agreement to maintain separate assets and "structured their lives to create an egalitarian relationship. All life tasks were to be shared equally." Id. at 635.

Generally, the parties in In re G.W.-F. maintained separate accounts, separate investments, and separate health insurance; however they did hold one joint account, as well as a joint credit card, for certain expenses which they agreed to pay together. Id. But they did not always contribute equally to the account, with

Dr. Wider typically contributing 60 percent and Dr. Finch 40 percent. Id. When the parties separated, Dr. Finch commenced a parentage action, seeking equitable division of all assets acquired by either party during their CIR. Id. at 636.

At trial, the court found that the parties lived in a CIR and that they had an enforceable oral agreement with respect to the maintenance of separate and community-like property. Id. The court found that the parties agreed to contribute equally to the payment of their joint expenses and childcare expenses but that "[a]ll other income and property would remain each partner's separate property, invested and used as each wished." Id. at 635. Additionally, the court found that **"over the course of . . . 25 years, the parties avoided co-mingling their individual and joint assets"** and **"did not pool their income other than the portion they devoted to the shared household expenses."** Id. at 342. (Emphasis added).

On appeal, Dr. Finch argued that the parties did not perform their oral agreement and that Dr. Finch had breached the agreement as evidenced by her failure to contribute her full share to the joint account. Id. at 334. In affirming the trial court's findings, this Court looked to the case of Dewberry, 115 Wn. App.

at 62, which explicitly addressed the validity of an oral agreement in the analogous context of marriage. Id. at 342.

In Dewberry, during marriage dissolution proceedings, the parties disputed the existence of an oral separate property agreement entered into prior to marriage. Dewberry, 115 Wn. App. at 357. The trial court found, and this Court agreed, that prior to marriage, the parties made an oral agreement to, inter alia, treat each party's income and property as separate. Id. at 362. Evidence demonstrated that during the marriage, the parties deposited their incomes into separate accounts which they used for their personal expenses and investment and that both **"continually affirmed their agreement through words and actions"** including records reflecting **"painstaking and meticulous effort to maintain separate finances and property."** Id. at 356. (Emphasis added).

In finding that **"[t]he husband and wife relationship cannot account for such painstaking efforts to establish and maintain separate property,"** the Court concluded that the trial court's determination of an oral agreement to maintain separate property was supported by substantial evidence. Id. at 362. (Emphasis added). Additionally, because there was substantial

evidence of the agreement and of the parties' performance of that agreement, the statute of frauds was satisfied and the agreement was, therefore, legally enforceable. Id. Like the parties in Dewberry and In re G.W.-F., Drown and Langeland took painstaking efforts to establish and maintain the separate character of their property. See May 26, 2011, Findings of Fact and Conclusions of Law, Finding No. 18, CP 1290. These efforts are substantial evidence of a separate property agreement which prevented the accumulation of jointly owned income and assets.

b. Drown and Langeland continually reaffirmed the terms of their separate property agreement through their words and actions.

In the present case, substantial evidence presented at trial demonstrates that over the course of their relationship, Drown and Langeland had an agreement to maintain all acquired property, including income, as separate, except where they made express contracts to the contrary.

(i) Drown and Langeland never comingled assets.

Just like in the case of In re G.W.-F and Dewberry, Drown and Langeland were very careful to prevent the comingling or pooling of assets. During their 18-year CIR, Drown and Langeland

each maintained separate bank accounts and never added one another as signatory on any of these accounts. Each made independent decisions on how to spend the funds in their respective accounts and never gave each other access to their accounts. CP 921, 1008, 1013. The couple's careful attempts to prevent the comingling or pooling of assets is, in and of itself, substantial evidence of their contract to prevent such comingling or pooling of assets.

(ii) Drown kept painstaking and meticulous account of, and shared equally in, all expenses.

As in the case of Dewberry, Drown painstakingly undertook a monthly recording of the couple's expenditures and payments on behalf of the community. When one had paid more of their expenses from his or her separate bank account, he or she would receive a credit or reimburse the other for amounts due. CP 987-988; RP 216-220, Ex. 23. As stated in Dewberry, this is not just something a couple does because they are a couple. As in Dewberry, this was substantial evidence of the separate property agreement between Drown and Langeland.

(iii) Over their 18 year CIR, Drown and Langeland continually affirmed the terms of their separate property agreement.

Each and every month, year after year, Drown tracked each dollar spent on behalf of the community and then she or Langeland would reimburse the other person. Even when Langeland began receiving his medical insurance through Drown's employer, Langeland paid Drown back because, in Drown's own words, it was included in their "monthly agreement." CP 962, lines 16-20. This continued reaffirmation is substantial evidence of the couple's intent that the separate property agreement remain valid and enforceable.

(iv) When Drown and Langeland wanted an asset to be jointly held, they made clear manifestations of that intent.

Although Drown and Langeland had an agreement to maintain separate assets, when they wanted to acquire an asset jointly, they made a clear manifestation in writing of their intent. This is evidenced in the Real Property Contract that the two entered into in 1999 where Drown contracted with Langeland to acquire a 31.7 percent interest in the Bellingham home by making payments over a 15 year period, a home purchased by Langeland

as his separate property. CP 934-935; RP 248-250. See Ex. 30 (promissory note, escrow instrument and amendment to purchase and sale agreement all signed and initialed by Drown). The decision of Drown and Langeland to execute an express written contract when they intended to accumulate a joint interest in property, is substantial evidence of their separate property agreement which otherwise prevented the accumulation of jointly owned income or assets.

(v) Drown explicitly acknowledged the existence of the separate property agreement which she described as the "Monthly Agreement."

Drown testified to the terms and existence of the separate property agreement. She described it as the "Monthly Agreement," and there was no evidence presented which would contradict her explicit acknowledgment. Her explicit acknowledgment is substantial evidence of the agreement's existence.

Overall, the couple's intent was clear: their property was to remain separate except where they made a clear expression of a contrary intent with regard to a specific assets. Consequently, it was error for the court to ignore their intent.

B. Drown and Langeland Entered into an Express Written Contract Regarding their Ownership of the Bellingham Property.

Generally, spouses are free to enter into any type of agreement with one another about any subject they wish, including the status or disposition of property. RCW 26.16.120. Spouses may agree to modify the ownership characterization of real property by contract, such as by execution of a deed. See Matter of Ford's Estate, 31 Wn. App. 136, 639 P.2d 848 (1982) (Husband waived any interest in parcels of real property he may have held under community property agreement with wife when he later executed a quitclaim deed to property to wife and wife accepted deed and retained it in her safety-deposit box, thereby manifesting her intent to modify community property agreement).

Here, Drown and Langeland had a separate property agreement, and due to the existence of that agreement, when they wished to acquire jointly owned assets, such as the Bellingham home, they were careful to make a clear written expression of this intent.

1. The deed is a clear manifestation of Drown and Langeland's intent to define their respective joint ownership interests in the Bellingham home.

Deeds are construed to give effect to the intentions of the parties, with particular attention given to the intent of the grantor when discerning the meaning of the entire document. Newport Yacht Basin Ass'n of Condo Owners v. Supreme Northwest, Inc., 168 Wn. App. 56, 64, 277 P.3d 18 (2012). Interpretation of a deed is a mixed question of fact and law; what the parties intended is a question of fact and the legal consequences of that intent is a question of law. Id. (citing Affiliated FM Ins. Co, v. LTK Consulting Servs., Inc., 170 Wn.2d 442, 459 n. 7, 243 P.3d 521 (2010)). Courts determine the intent of the parties by looking to the language of the deed: "[i]t has long been the rule of our state that, where the plain language of a deed is unambiguous, extrinsic evidence will not be considered." Newport Yacht Basin, 168 Wn. App. at 64. The "language of a written instrument is the best evidence of the intent of the original parties to a deed." Id. Additionally, a certification of acknowledgement, such as a notarization, "is prima facie evidence of the facts therein recited." RCW 64.08.050.

Here, the terms of the Real Property Contract are

unambiguous. Drown herself stated that she and Langeland entered into the written contract because Langeland wanted her to have an ownership interest in the Bellingham property.[3] CP 934-935. Further, Drown acknowledged that she saw the contract, knew the contents of the contract, and then executed the contract. CP 932-936. Finally, the deed was notarized. RP 177-179; Ex. 30. Consequently, the deed is valid and describes Drown's maximum interest in the property at 31.7%.

What the trial court ignored, but is demonstrated by substantial evidence, is that Drown and Langeland entered into a written contract for Drown to obtain an ownership interest in the Bellingham Property. Exhibit 30 consists of three signed and initialed documents evidencing a clear manifestation of the terms of their agreement. The clear intent of the parties in executing the Real Property Contract was to confirm that when Langeland first purchased the home, it was his separate property, and by entering into the contract Drown was to obtain a clearly defined interest in said property. Drown herself acknowledged that she was put on the deed because Langeland wanted her to be a co-owner. CP

[3] Testimony from the published Deposition of Drown.

934-935. If the property had been jointly held when Langeland purchased it, there would have been no need for Drown and Langeland to execute the Real Property Contract.

2. Substantial evidence shows that Drown entered into this contract freely and voluntarily.

To be a valid contract, there must be a meeting of the minds, demonstrated through an "objective manifestation of mutual assent of both parties." P.E. Systems, LLC v. CPI Corp., 176 Wn.2d 198, 207, 289 P.3d 638 (2012). Objective manifestation means that the unexpressed subjective intent is irrelevant; rather, courts look to the outward manifestations. Washington Greensview Apartment Associates v. Travelers Property Cas. Co., of America, 173 Wn. App. 663, 679, 295 P.3d 284 (2013). Additionally, the terms to which the parties assent must be sufficiently definite. P.E. Systems, 176 Wn.2d at 207. Drown and Langeland had a valid Real Property Contract.

Here, substantial evidence, including the written contract (CP 177-79; Ex. 30) and Drown's own testimony (CP 934-35), demonstrate the existence of the express Real Property Contract. On remand, no new or additional evidence was presented to the trial court which could be interpreted to contradict the evidence

previously admitted at trial. Drown acknowledged that she knew the contents of the Real Property Contract and that she signed the documents. CP 932-936. Additionally, Drown abided by the terms of the Real Property Contract, specifically the promissory note for the full 10 years, faithfully making her monthly payments in full and on time. There is no evidence to support the trial court's finding that Drown did not freely and voluntarily enter into the contract and outwardly manifest her intent each month of the CIR to be bound by its terms. See Estate of Langeland, 177 Wn. App. 315, 331, 312 P.3d 657 (2013).

3. Drown only acquired a 24.7 percent interest in the property under the terms of the contract that she executed and, therefore, it would be inequitable to award her anything more.

Under In re Marriage of Lindsey, a court must determine what interest each party has in the subject property before making a just and equitable distribution. In re Marriage of Lindsey, 101 Wn.2d at 304.

Uncontroverted evidence established that Drown contracted for a 31.7 percent interest but only obtained a 24.7 percent interest under the terms of the Real Property Contract. RP 316, Ex. 33. Awarding Drown the entire home is unjust and

inequitable since it violates the express terms of the Real Property Contract between Drown and Langeland. Under the trial court's ruling, not only did Langeland pay the equivalent of 75.3 percent of the purchase price, but he is denied both his initial contribution and the benefit of any equity that may be in the home. Basic contract principles require that the court find Drown's interest in the property to be 24.7 percent and award her this amount.

4. The Real Property Contract is not a marital agreement because Drown and Langeland were not spouses and were not creating separate property.

Generally, marital agreements are contracts subject to contract law but also subject to special rules and statutes formulated by the legislature and courts. See Kellar v. Estate of Kellar, 172 Wn. App. 562, 854, 291 P.3d 906 (2012). The parties to a marital or spousal agreement are unique, because "they do not deal with each other at arm's length." Id. "Their relationship is one of mutual confident and trust which calls for the exercise of good faith, candor and sincerity in all matters bearing upon the proposed agreement." Id. In the prenuptial agreement context, the agreement must be procedurally and substantively fair. Id. at 585. A court evaluates fairness based on "(1) whether there was

full disclosure by the parties of the amount, character, and value of the property; and (2) whether the agreement was entered into freely and voluntarily, upon independent advice, and with full knowledge by both spouses of their rights." Id. However, these principals do not apply to the Real Property Contract between Drown and Langeland because they were not married, and the courts have not extended this requirement to unmarried individuals.

Even if, however, the above described principals did apply to Drown and Langeland, substantial evidence demonstrates that the property agreement is substantially and procedurally fair. By entering into the Real Property Contract for the Bellingham home, Drown was obtaining an interest in property that she did not already possess. This was substantively and procedurally fair to Drown. Drown contracted to attain a 31.7 percent interest, based on the purchase price paid by Langeland, in a piece of real estate that she did not own. She acknowledged her share of the purchase price for the home, the character of the home, and its value. Additionally, as evidenced by her signature and testimony, Drown freely and voluntarily entered into the contract.

Advice of counsel, although not obtained, would have been

superfluous. Drown was not giving up a right or ownership in an asset that she possessed; rather, because of her and Langeland's "Monthly Agreement," Drown was obtaining an interest in property she did not already own. Arguing that Drown should have had counsel is analogous to arguing that any couple that purchases a home, car, or any piece of real or personal property, must first get the advice of counsel before making a joint purchase. Such a requirement would frustrate general contract principles and establish entirely new precedent for CIRs and spousal agreements.

C. The Trial Court Erred in Awarding Langeland's Separate Property to Drown.

A trial court, even in equity, may not award a surviving partner to a CIR a deceased partner's **separate property**. See, e.g., Connell v. Francisco, 127 Wn.2d 339, 350, 898 P.2d 831 (1995); Olver v. Fowler, 131 Wn. App. 135, 144, 126 P.3d 69 (2006); aff'd, 161 Wn.2d 243, 252, 778 P.32d 1022 (2007). In Amended Conclusion of Law 10, the Trial Court awarded all of Langeland's separate property to Drown in contradiction of long standing legal authority:

> 10. The Court in equity, has the power to award Langeland's separate property to Drown and in

> equity awards Langeland's separate property in its entirety to Drown. CP 1708.

In Washington, the term "separate property" means both "property obtained before or during marriage which is owned by only one spouse, and property which remains or becomes owned by only one spouse after dissolution of the marriage or death of one of the marriage partners." In re Estate of Mell, 105 Wn.2d 518, 523, 716 P.2d 836 (1986). Following the dissolution of a CIR, a court limits the distribution of property to property that would have been characterized as community had the parties been married. Connell, 127 Wn.2d at 350. Unlike in a marriage, where a spouse's community and separate property is subject to equitable division, the separate property of a partner in a CIR is not before the court for distribution. Olver, 131 Wn. App. at 144. As this Court unambiguously and succinctly stated in Olver:

> Each spouse in a marriage has a present, vested, undivided, one-half interest in the community property. The death of one spouse does not generate a new right or interest in the surviving spouse; rather, the survivor already owns half the property, and that interest is neither created nor extinguished by the other spouse's death. **At the moment of death, the community ends and the property becomes the separate property of each.** Thus, when a married person dies, the surviving spouse immediately owns half the community property as his or her separate property. This is true

whether or not the decedent dies intestate.

> Applying community property principles by analogy, each partner in a [CIR] . . . owns an undivided interest in the joint property. **After a partner dies, that partner's share is the estate upon which inheritance rules will operate.**

Id. at 145. (emphasis added)

Assuming arguendo, that this Court finds the parties did not have a separate property agreement and that the Real Property Contract evidenced by the deed and promissory note is invalid, then the trial court erred when it awarded Drown the Estate's 50 percent interest in the assets.

1. Upon Langeland's death, his interest in the community-like property became his separate property and, therefore, was not before the court to distribute.

Washington courts hold that "when a marital community dissolves, one-half share of community property of a former spouse becomes that spouse's 'separate property.'" In re Estate of Mell, 105 Wn.2d at 523. Similarly, upon the death of one spouse, "community property becomes the separate property of the decedent's estate and of the surviving spouse." Id.; deNoskoff v. Scott, 36 Wn. App. 424, 246-27, 674 P.2d 687 (1984). No new title vests in the survivor at the moment of death. Id. at 427.

In deNoskoff, although decedents Sergey and Vera Politoff married in 1949, between 1975 and 1979, Sergey opened two savings accounts in his name only. Id. at 425. After Sergey opened the second account, Vera died, testate, leaving her estate to her son and her daughter. Id. Before Vera's estate had been distributed, Sergey hired a housekeeper, Beverly Scott, and changed the status of the two accounts to joint accounts with right of survivorship, naming Scott on the accounts. Id. A few months later, Sergey died and Scott withdraw all the funds from one of the accounts. Id. at 426. Vera's daughter, as personal representative for each estate, brought an action seeking judgment declaring the funds in the two accounts to be the property of each estate and to recover the amounts withdrawn by Scott. Id. The trial court concluded, inter alia, and this Court agreed, that Vera's estate was entitled to one-half of the funds in each account at the moment of her death because **"[a]t death, the community is dissolved and the former community property becomes separate property of the decedent's estate and of the surviving spouse."** Id. (Emphasis added) (citing Edmonds v. Ashe, 13 Wn. App. 690, 537 P.2d 812 (1975)). By analogy, deNoskoff is applicable to the present case.

If, for argument sake, the contested probate assets, specifically the Bellingham home, were community-like property, then both Langeland and Drown each had a 50 percent interest in the property. As articulated in deNoskoff and Olver, upon Langeland's death, the community dissolved and any interest that Drown and Langeland had in joint property became their separate property. Consistent with Connell and Olver, once the trial court determined that the Estate had a 50 percent interest in the assets, that interest was separate property and could not be awarded to Drown. Such an award would be in direct opposition to black letter law.

Because a court may not award the surviving partner in a CIR the deceased partner's separate property, the trial court erred in awarding Drown the Estate's interest in the assets acquired during the couple's CIR. Additionally, to the extent that Drown was awarded any Estate assets, such an award goes against rules for intestate succession.

2. Awarding Drown the Estate's interest in the contested probate assets would be giving her the equivalent of an intestate share, which is contrary to established law and the law of this case.

Although Washington courts look to marital property laws

and apply by analogy to CIRs, such laws do not extend to testamentary disposition. Estate of Langeland, 177 Wn. App. at 329-30 (citing Peffley-Warner v. Bowen, 113 Wn.2d 243, 253, 778 P.2d 1022 (1989)).

In Peffley-Warner, appellant Marilyn Peffley-Warner ("Peffley-Warner") lived in a committed intimate relationship with Sylvan Warner for 22 years before Mr. Warner's death. Peffley-Warner, 113 Wn.2d 243, 244-45, 778 P.2d 1022 (1989). After Mr. Warner's death, Peffley-Warner applied for but was denied widow benefits by the United States Social Security Administration. Id. at 244. On appeal, the Ninth Circuit certified the following question to the Washington State Supreme Court: "would Washington law afford a person in [Peffley-Warner's] situation the same status as that of a wife with respect to the intestate devolution of [Mr. Warner's] personal property?" Id. at 245.

The Supreme Court determined that the sole issue was whether the surviving partner in a committed intimate relationship had the same status as a spouse under the laws of intestate succession. Id. The Court stated that because by common definition a spouse is "a marriage partner or a wife or a husband[]", the two were not spouses; consequently, Peffley-

Warner could not receive a share of Mr. Warner's estate under intestate succession laws. Id. at 252-53. The same is true in the present case.

In Langeland I, this Court expressly rejected Drown's argument that she be awarded, in equity, the Estate's interest in various assets. Langeland, 177 Wn. App. at 329-30. On remand, the trial court gave Drown exactly what this Court said it could not – the Estate's separate property interest in the assets. Amended Conclusion of Law 17 at CP 1708. Even if the Court were to ignore the Real Property Contract and find that the house was jointly owned, Drown would only be entitled to a 50 percent share of the house. Awarding her the house is, in essence, giving her the Estate's separate property – which is contrary to established Washington law and the holding in Langeland I.

D. Even if the Couple had Joint Assets, the Trial Court Erred When it Failed to Include Drown's Assets When Making an Equitable Division of the Couple's Assets.

Once a trial court determines the existence of a CIR, to distribute property upon dissolution or termination of the CIR the court must (1) evaluate the interest of each party in the property acquired during the relationship, and then (2) make a just and equitable distribution of the property. Connell v. Francisco, 127

Wn.2d at 349. Property acquired during the relationship is presumed to be owned by both parties, and all "property considered to be owned **by both parties** is before the court and is subject to a just and equitable distribution." Id. at 351. (Emphasis added)

The separate property agreement notwithstanding, the trial court erred when it failed to consider all the property acquired by both Langeland and Drown during the CIR before making its division. Instead, the trial court only inventoried the Estate's interest in property titled in Langeland's name and then awarded it all to Drown. Drown and Langeland were equal partners in a CIR, yet, for all of Langeland's efforts, his Estate received nothing. If Langeland were alive today and the couple had chosen to end their CIR, it is unlikely that a court, sitting in equity, would have awarded Drown from Langeland what it awarded her from his Estate: Everything. However, in death, despite the couple's 50/50 split on each and every grocery, utility, car, and home maintenance expense, including Drown's insistence that she and Langeland just wanted things to be equal, Langeland's Estate, the Estate he spent his life building, received nothing. It was error for the trial court to disregard the assets acquired by Drown during

the CIR when making a division.

If this Court fails to rule in Appellants favor with regard to the contract issues, then it should remand the case to the trial court for an equitable division of assets that includes all of the assets acquired by Drown during the CIR as well as those acquired by Langeland.

E. This Contract Argument Does Not Implicate Judicial Estoppel.

"Where there has been a determination of the applicable law in a prior appeal, the law of the case doctrine ordinarily precludes re-deciding the same legal issues in a subsequent appeal." Folsom v. County of Spokane, 111 Wn.2d 256, 263, 759 P.2d 1196 (1988). The doctrine applies only to issues actually decided. Fluke Capital & Management Services Co. v. Richmond, 106 Wn.2d 614, 620, 724 P.3d 356 (1986). Additionally, application of the doctrine is discretionary, not mandatory. Folsom, 111 Wn.2d at 264 (citing Greene v. Rothschild, 68 Wn.2d 1, 7, 402 P.2d 356, 414 P.2d 1013 (1965). The doctrine does not apply in the present case.

In Langeland I, this Court concluded that "the trial court failed to apply the correct presumption to property acquired

during the Langeland/Drown committed intimate relationship," and reversed and remanded for the trail court to reconsider the property distribution of jointly acquired assets. In re Estate of Langeland, 177 Wn. App. at 331. Otherwise, the Court affirmed the trial court's initial determination. Id. In the initial Findings of Fact and Conclusions of Law, the trial court found the Real Property Contract between the parties to be valid, and awarded Drown a 24.7 percent interest in the home. CP 1289-1290. The trial court's finding or conclusion were not overturned by the Court. As a result, this Court never made a ruling with regard to the contract theory, instead ruling only with regard to competing presumptions and tracing.

The Court's ruling with regard to presumptions was that the assets were presumed jointly held. This Court did not determine nor conclude that the presumption could not be rebutted or, in the alternative, that assets should be split evenly. To the contrary, this court expressly rejected Drown's assumption that the assets be equally divided. Langeland, 177 Wn. App. at 329.

Because the issues on appeal result from the trial court's errors on remand and are consistent with the law of the case,

Boone's argument with regard to the "Monthly Agreement" and the Real Property Contract are properly before this Court.

F. The Trial Court Erred in Awarding Drown Attorney's Fees, and Boone Should be Awarded her Fees from the Estate, and Drown Required to Reimburse the Estate.

Under RCW 11.96A.150(1), a trial court, in its discretion, may award reasonable attorneys' fees to any party from either (1) any other party; (2) from asserts of the estate involved in the proceeding; or (3) from any nonprobate asset that is the subject of the proceeding. Under RCW 11.96A.150(1), "the superior court or any court on appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be award to any party . . . ." Under RAP 18.1(a), if a law or statute permits for the recovery of fees or expenses before the Court of Appeals or Supreme Court, a party seeking the recovery of fees must affirmatively request an award of fees or expenses.

Pursuant to RCW 11.96.150 and RAP 18.1, Boone requests an award of costs and reasonable attorneys' fees on appeal, and for reinstatement of those fees incurred in the trial court and this appeal. This matter should never have come to litigation, and now the estate has been exhausted by attorney's fees and costs. From the beginning of this action Ms. Drown has been attempting

to argue for new law in the form of a spousal right to probate assets through the intestacy statute. Furthermore, she has forced ongoing litigation regarding the division of assets when she knows, despite the fact that she acknowledges the existence of the separate property agreement. She knows that the agreement was to keep assets separate, but now that Langeland is dead, she has made a grab for all of his assets. Ms. Boone should be awarded her fees from the estate, and Ms. Drown should be ordered to reimburse the Estate in an equivalent amount.

VII. CONCLUSION

Drown and Langeland shared in a loving, long-term, committed intimate relationship. They chose to live this life together, just as they chose to keep their finances and property separate; however, the trial court's rulings go directly against Drown and Langeland's objective intent and continual affirmation of that intent. As established by uncontroverted evidence, Drown and Langeland had a valid and enforceable separate property agreement in the form of the "Monthly Agreement" established by their 18 years of meticulous and painstaking efforts to never comingle assets and track each and every expense to be shared equally. Additionally, as established by the execution of a Real

Property Contract, the couple clearly knew and understood how to create a joint asset when they wished to do so. As substantial evidence proved the existence and terms of both the separate property agreement and Real Property Contract, it is inequitable to ignore these contracts and award Langeland's entire estate to Drown.

Respectfully, Boone requests that this Court reverse the trial court's decisions and award the Estate the property that Drown and Langeland agreed each would be entitled to: Langeland's rightful and bargained for separate property, in its entirety.

HELSELL FETTERMAN LLP

By:

Michael L. Olver, WSBA No. 7031
Kameron L. Kirkevold, WSBA No. 40829

DECLARATION OF SERVICE

I, Kacie Coselman, hereby declare and state as follows:

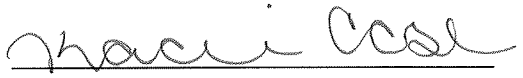
1. I am over the age of majority, competent to testify and make the following statements based upon my own personal knowledge and belief.

2. I am now and at all times herein mentioned employed by the offices of Helsell Fetterman LLP, 1001 4th Avenue, Suite 4200, Seattle, WA 98154.

3. I did on the date written below (1) cause to be filed with this Court the Opening Brief of Appellant; (2) cause the Opening Brief of Appellant to be delivered via Legal Messenger, to the following recipients: Mr. Douglas R. Shepherd, Shepherd and Abbott, 2011 Young St, Ste 202, Bellingham, WA 98225-4052.

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: June 11, 2015, at Seattle, Washington.



Kacie Coselman