NO. 46778-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

THE ESTATE OF DANA BRUCE MOWER,

Deceased.

APPELLANT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

I. STATEMENT OF THE CASE

This case provides this Court with the opportunity to decide for the first time whether, as a matter of law and equity, a bequest in favor of an ex-spouse's family is also in favor of the ex-spouse, and thus revoked after the testator's dissolution. Here, Dana Bruce Mower died from a sudden and tragic heart attack just days after his dissolution from his ex-wife finalized. Due to his sudden passing, Dana[1] was unable to amend his Will to reflect the changed circumstances of his divorce. His ex-wife's siblings have demanded the inheritance of 50 percent of Dana's assets despite clear evidence that Dana had strong animosity for his in-laws and had only provided any bequest to his in-laws because of their relationship to Dana's wife at the time he signed his will. Dana had no intent to provide for his in-laws following his dissolution from his ex-wife. To hold otherwise is to permit Dana's ex-wife and her siblings to take 75 percent of his Estate. Such a holding is contrary to law, equity, and Dana's intent.

Additionally, a condition precedent to his in-laws inheritance required that Dana's "spouse" fail to survive him by at least 30 days. At the time of Dana's death, he had no "spouse," and thus the condition precedent to the alternate bequest failed. Dana's Estate must pass by intestate succession.

Appellant Linda Turner, Dana's sister and Personal Representative of the Estate of Dana Bruce Mower (the "Estate"), asks that this Court use

[1] For clarity's sake, this Appellant's Brief refers to the Mowers by their first names and intends no disrespect.

the broad equitable powers afforded under the Trust and Estate Dispute Resolution Act (TEDRA) to reform Dana's Last Will and Testament and find that the bequest to the Schulers was revoked by his dissolution.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in granting summary judgment in favor of Dana's in-laws because under law and equity, Dana's bequest to his former in-laws is a bequest in favor of his ex-wife and his dissolution operates to revoke any bequest to his ex-spouse and her relatives.

2. The trial court erred in denying Ms. Turner's cross-motion for summary judgment because Dana's continued marriage to his ex-wife was a condition precedent to his alternate bequest of his residuary, and thus Dana's Estate must pass by intestate succession.

3. The trial court abused its discretion in granting attorney fees to Dana's ex-in-laws when each side prevailed on a major issue.

III. ISSUE STATEMENTS

1. A bequest to an ex-spouse's family members is a bequest in favor of the ex-spouse and revoked along with a bequest to the ex-spouse upon dissolution unless there is independent evidence that the testator intended to provide for the ex-spouses relatives in the event of dissolution. Should this Court find that Dana's bequest to his former brother-in-law and sister-in-law is revoked and that he did not intend to provide for the Schulers in the event of his dissolution from Christine when (1) there is no evidence Dana intended to provide for the Schulers in the event of his dissolution from Christine, (2) Dana's bequest to the Schulers is based entirely on his

marriage to Christine, (3) the Schulers stand to inherit only because of their status as Christine's siblings, and (4) Dana had no relationship with the Schulers after his dissolution? (Assignment of Error No. 1) **Yes.**

2. When a spouse's death is a condition precedent to an alternative bequest, the disinheritance of a spouse by operation of law does not satisfy this precondition and the decedent's estate passes through the laws of intestate succession. Should this Court find that the condition precedent for the Schulers and Dana's siblings was not met where Christine survived Dana by more than 30 days? (Assignment of Error No. 2) **Yes.**

3. Under the intestacy statute, a decedent's estate passes to his parents if he is survived by a parent but not by a spouse or child. Should this Court find that Dana's mother, Lois, inherits his Estate when Dana is not survived by a spouse or any children? (Assignment of Error No. 2) **Yes**.

4. Attorney fees are not appropriate under TEDRA when each side prevails on a major issue and the Estate presented good faith, reasonable arguments. Did the trial court abuse its discretion in awarding attorney fees to Dana's former in-laws when they were not the substantially prevailing party? (Assignment of Error No. 3) **Yes**.

5. Should this Court award Ms. Turner and the Estate their attorney fees under RAP 18.1 and RCW 11.96A. 150(1)? **Yes**.

IV. FACTS

Dana Mower was one of six siblings. *See* Clerk's Papers ("CP") at 4. Dana's siblings included four brothers, Larry Mower, Steve Mower, Greg Mower, and Scott Mower, and one sister, Linda Turner. CP at 4.

During his life, Dana married Christine Schuler. Christine had two brothers, Peter Schuler and Eric Schuler, and a sister-in-law, Theresa Schuler, Eric's wife. CP at 43.

In 2005, shortly before Dana underwent serious heart surgery, Dana and Christine executed reciprocal wills leaving their estates to each other, or jointly to their siblings if their spouse did not survive them. CP at 43. In Article 1 of Dana's Last Will and Testament ("Will"), titled "IDENTIFICATION OF FAMILY," he identified his "immediate family" as his then-wife Christine Leiren Mower. CP at 2. Dana went on to explain that "[e]xcept as provided below, I make no provision in this Will for any of my family, whether named herein or not, nor for the descendants of any family member who does not survive me; and specifically, *I make no provision in this Will for my brother-in-law Peter Schuler.*" CP at 2 (emphasis added).[2] Notably, this section does not include any non-family heirs and Dana made no provision for any non-family member.[3] In Article 4, Dana bequeathed his personal property to his then surviving siblings. CP at 4–5. In Section 5, Dana bequeathed the residue of his Estate to Christine. CP at 5–8. As an alternate disposition of his residue, Dana stated:

> In the event my spouse fails to survive me by a period of thirty (30) days, I hereby give, devise, and bequeath the residue of my estate to the following individuals in the following percentages:

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[2] Christine's will included a similar exclusion for Peter Schuler.
[3] The section is not titled, for instance, "Identification of Beneficiaries."

a. Fifty percent (50%) of the residue of my estate to my then-surviving siblings equally (currently consisting of Larry Mower, Steve Mower, Greg Mower, Linda Turner, and Scott Mower); provided, however, in the event that all of my siblings predecease me, said residuary bequest shall be to my then-surviving nieces and nephews equally; and

b. Fifty percent (50%) of the residue of my estate to Theresa Schuler and Eric Schuler; provided, however, in the event either predecease me, the survivor of the two shall receive this entire residuary bequest. In the event both Theresa and Eric predecease me, I hereby give, devise, and bequeath fifty percent (50%) of the residue of my estate equally to their then-surviving children.

CP at 8. Dana made no provision for anyone outside of his family. CP 1-28. Additionally, Dana never named the Schulers as pay-on-death beneficiary designees for any of Dana's non-probate assets or as secondary beneficiaries to Christine. CP at 363.

In 2012, Christine petitioned for dissolution and a Stipulated Decree of Dissolution was entered on November 13, 2012. CP at 72. Tragically, Dana passed away just two days after learning that his dissolution was filed, on November 28, 2012, from a heart attack. CP at 72.

Dana's alternative bequest to the Schulers was based solely on his marriage to Christine, and not a personal relationship. In reality, Dana could not stand his in-laws. David Allan was a close friend and confidant of Dana's. CP at 110. Mr. Allan worked with Dana since 2004 and served as the chief operating officer of Dana's company, DBM Investments, LLC, since 2007. CP at 110–11. Mr. Allan is not a beneficiary named in Dana's

Will and has no inheritance rights under the Will. CP at 111. As Mr. Allan testified, "[d]uring [his] interactions with Dana during his life, [Mr. Allan] believed and understood that Dana did not have a good relationship with Eric Schuler. [Mr. Allan] repeatedly sensed that Dana was frustrated with the negative effect Eric's behavior would have towards himself, Christine, and the Schuler family. [Mr. Allan] remember[s] many instances and conversations [he] had with Dana where Dana would express his animosity and dislike towards Eric." CP at 111. Moreover, "Dana had no contact whatsoever with Eric Schuler or Theresa Schuler from November 13, 2012, the date Dana's divorce was finalized with Christine, to November 28, 2012, the date of Dana's death." CP at 111.

In fact, one of the sources of Dana's intense dislike of Eric Schuler stemmed from his financial exploitation of Eric and Christine's mother. In 2008, Eric Schuler was responsible for managing his mother, Dorin's, estate. Dorin suffered from Alzheimer's and Eric was trying to decide whether or not to buy Dorin a $1,000,000 house. CP at 258. Eric and Theresa had lived with Dorin rent free for many years and he was angling to keep living in a house at his mother's expense, even though Dorin suffered from Alzheimer's and had no need for a house of that cost. CP at 258. In 2008, Dana wrote to Charles E. Hallett, CPA, discussing his dislike of Eric and Theresa Schuler based on their greed:

> This is really a sad situation for Christine and Dorin. You can see what Chris[tine] is up against. Her brother is constantly verbally abusive to her, he is an idiot when it comes to financial matters of any kind. . . . Never mind that

> they have lived entirely rent and cost free in the most expensive and exclusive zip code in the U.S. for the past 30 years. That is entirely irrelevant to them. There is no question in my mind that whatever part of the estate Eric ends up with he will spend in short order because he has no money management skills.

CP at 258. Eric's abusive treatment of his own sister disgusted Dana.

> Terry and Eric's strategy to get control of the estate is to keep Christine away from Dorin[,] which they are through shear intimidation and screaming at Christine. That appears to be the only thing Eric is good at. Screaming at his sister. I have seen her become physically ill after many of Eric's screaming sessions.

CP at 258. Dana also expressed frustration at Eric and Theresa Schuler's inability to put aside their own personal interests and do what was best for their mother:

> They could care less about what is good for Dorin or Christine. It just doesn't make sense for an 85 year old woman who is 75% gone to Alzheimer's to buy a house in any price range. The only reason [Eric called Mr. Hallett] is because they are doing their best to keep living rent and cost free off Dorin's and Christine's estate. . . . The bottom line is that what Eric is suggesting is categorically not in Dorin's best interest but only theirs.

CP at 258.

Given Dana's well known feelings for the Schulers after execution of the Will and his subsequent dissolution with Christine, it is clear that Dana had no actual intent or desire that the Schulers inherit from his Estate. In fact, shortly after Dana's death, Christine called Mr. Allan and "expressed her discontent that Eric Schuler and Theresa would inherit

anything under Dana's will because she believed such a result was directly opposite to Dana's wishes." CP at 111–12.

Following Dana's passing, the Pierce County Superior Court admitted his Will to probate and appointed his sister, Linda Turner, as Personal Representative of his Estate, without bond and with powers of non-intervention. CP at 24–38.

On February 27, 2013, Ms. Turner filed a Petition for Declaratory Judgment to Adjudicate Beneficiaries under Will, in which she argued that under RCW 11.12.051, RCW 11.07.010, Restatement (Third) of Property, and cases from jurisdictions with similar statutory law, the dissolution of Dana's marriage to Christine also operated to revoke the bequests to her relatives as well as to Christine. CP at 42–51. The Schulers appeared and opposed any such finding, claiming that they were listed in Dana's Will because they had a personal friendship with Dana. CP at 176–184. The parties brought cross-motions for summary judgment, and the trial court granted summary judgment to the Schulers and denied Ms. Turner's cross-motion for summary judgment. CP at 329–33. Additionally, the trial court awarded the Schulers attorney fees and costs as the prevailing party. CP at 416–18.

Ms. Turner timely appealed. CP at 447–57.

V. ANALYSIS

A. Standard of review on appeal.

This Court reviews a grant of summary judgment de novo. *Verdon v. AIG Life Ins. Co.*, 118 Wn. App. 449, 452, 76 P.3d 283 (2003). In doing

so, this Court views the facts and all inferences therefrom in the light most favorable to the nonmoving party. *Verdon*, 118 Wn. App. at 542.

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *E.g.*, *Doe v. Dep't of Transp.*, 85 Wn. App. 143, 147, 931 P.2d 196, *rev. denied*, 132 Wn.2d 1012 (1997). A material fact is one upon which the outcome of the case depends. *Tran v. State Farm Fire & Cas. Co.*, 136 Wn.2d 214, 223, 961 P.2d 358 (1998). When a motion for summary judgment is before the court, it may decide questions of fact as a matter of law when reasonable minds could reach but one conclusion. *Ruff v. Cnty. of King*, 125 Wn.2d 697, 703-704, 887 P.2d 886 (1995).

B. The trial court erred in granting summary judgment in favor of the Schulers because law and equity mandates that a decedent's dissolution from his spouse operates to revoke any bequest to his ex-spouse and his ex-spouse's family.

The trial court erred in granting summary judgment to the Schulers. By law and equity, RCW 11.12.051 operates to disinherit the relatives of a former spouse following dissolution absent an express intent otherwise. In this instance, Dana's bequest to the Schulers was based solely on their status at the time he made his Will as his in-laws through his marriage to Christine. Dana had no independent relationship with the Schulers, whom he actively disliked, and did not reaffirm his bequest to them after his dissolution. Moreover, if the Schulers are allowed to inherit, Christine's family will have taken 75 percent of Dana's assets and Christine stands to benefit by later

inheritance through her siblings.[4] The trial court erred by failing to hold that Dana's dissolution operated to revoke any bequests to Christine and her family.

Washington courts have authority to determine the construction and interpretation of wills. RCW 11.96A.020; RCW 11.96A.030; RCW 11.12.230. Courts "shall have full and ample power and authority under this title to administer and settle . . . [a]ll matters concerning the estates and assets of incapacitated, missing, and deceased persons, including matters involving nonprobate assets and powers of attorney . . . ." RCW 11.96A.020; *see also* RCW 11.12.230 ("All courts and others concerned in the execution of last wills shall have due regard to the direction of the will, and the true intent and meaning of the testator, in all matters brought before them"). "[M]atter" is defined as "(a) The determination of any class of creditors, devisees, legatees, heirs, next of kin, or other persons interested in an estate, trust, nonprobate asset, or with respect to any other asset or property interest passing at death;" or "(b) The direction of a personal representative or trustee to do or refrain from doing any act in a fiduciary capacity . . . ." RCW 11.96A.030(2)(a)–(b). Ms. Turner asks this Court to make a determination regarding whether Washington's revocation by dissolution statute revokes all provisions in the decedent's will in favor of the testator's former spouse and the former spouse's relatives.

[4] As part of the dissolution, Christine received 50 percent of Dana's assets, and if the Schulers are allowed to inherit, they will receive 50 percent of what remains.

Under RCW 11.12.051, the dissolution, invalidation, or termination of a marriage revokes all provisions in a testator's will in favor of the former spouse. Specifically, RCW 11.12.050 states that

> If, after making a will, the testator's marriage or domestic partnership is dissolved, invalidated, or terminated, all provisions in the will in favor of or granting any interest or power to the testator's former spouse or former domestic partner are revoked, unless the will expressly provides otherwise. Provisions affected by this section must be interpreted, and property affected passes, as if the former spouse or former domestic partner failed to survive the testator, having died at the time of entry of the decree of dissolution or declaration of invalidity. Provisions revoked by this section are revived by the testator's remarriage to the former spouse or reregistration of the domestic partnership with the former domestic partner. Revocation of certain nonprobate transfers is provided under RCW 11.07.010.

RCW 11.12.051. Similarly, an ex-spouse is treated as having predeceased the decedent as to any nonprobate assets:

> If a marriage or state registered domestic partnership is dissolved or invalidated, or a state registered domestic partnership terminated, a provision made prior to that event that relates to the payment or transfer at death of the decedent's interest in a nonprobate asset in favor of or granting an interest or power to the decedent's former spouse or state registered domestic partner, is revoked. A provision affected by this section must be interpreted, and the nonprobate asset affected passes, as if the former spouse or former state registered domestic partner, failed to survive the decedent, having died at the time of entry of the decree of dissolution or declaration of invalidity or termination of state registered domestic partnership.

RCW 11.07.010.

No Washington appellate decision has yet decided whether a bequest to an ex-spouse's family is a bequest in favor of an ex-spouse. However, the purpose of the revocation by dissolution statute, precedent from other states that have decided this issue based on similar statutory language, and Dana's intent demonstrate that any bequests in favor of Christine's family were bequests in Christine's favor and revoked upon Dana's dissolution from Christine. There is no evidence in his Will that Dana intended to provide for the Schulers in the event of dissolution with Christine. The Schulers had no independent relationship with Dana that would justify his bequest surviving his dissolution. Allowing the Schulers to inherit frustrates the purpose of RCW 11.12.051 by putting an ex-spouse's assets in the possession and control of his former in-laws, potentially allowing Christine to inherit the assets anyway.

1. The purpose of the revocation by dissolution statutes is to reflect the change in circumstances between the parties after dissolution of a marriage and adhere to the testator's true intent.

RCW 11.12.051 is a "revocation by dissolution" statute modeled after the first Uniform Probate Code ("UPC") § 2-508 (1990). The purpose of these types of statutes is to revoke all provisions in the divorced individual's will which in any way can be construed to be "in favor of . . . the testator's former spouse or former domestic partner." RCW 11.12.051. The nature of such revocation is intended to lend finality and certainty to the dissolution decree and distribution of property agreement resulting

therefrom and prevent the unintended distribution of assets to a former spouse. RCW 11.12.051(2).

The effect of revocation is that the provisions in the will are given effect as if the decedent's former spouse disclaimed all provisions revoked by the statute. Furthermore, the Restatement provides that

> Even if the controlling revocation statute provides only that the devise to the former spouse is revoked, the court should feel free to effectuate the purpose of the statute by extending its terms to revoke the devise to the former spouse's children. The rationale for extending the statute is that the deceased spouse, the testator, would not want his or her estate to be divided between the testator's children and the former spouse's children.[5]

Restatement (Third) of Property (Wills & Don. Trans.) § 4.1, cmt. o (1999). Furthermore, the language revoking all provisions "in favor of . . . the testator's former spouse" includes provisions made in favor of the former spouse's relatives. To hold otherwise would permit ex-spouses to accumulate more of their former spouse's property after dissolution by inheriting through their relatives.

The same extension of the statute applies in this case with regards to the residuary provision to Dana's former in-laws. The intent of the statute is to prevent the unintended consequences of bequeathing a divorced individual's estate to his former spouse's family. This is logical because during the "divorce process or in the aftermath of the divorce, the former spouse's relatives are likely to side with the former spouse, breaking down

[5] Dana and Christine had no children and instead named their siblings and siblings-in-law.

or weakening any former ties that may previously have developed between the transferor and the former spouse's relatives, seldom would the transferor have favored such a result." UPC § 2-804, cmt. (2011).

As a result, many jurisdictions apply their respective revocation by dissolution statutes to bequests to former relatives absent a showing to the contrary. The application operates as a burden-shifting law, requiring those persons affected by the revocation to demonstrate some evidence that would militate against it, such as a continued relationship with the former spouse's relatives after dissolution or a will executed after dissolution. *See Friedman v. Hannan*, 412 Md. 328, 345, 987 A.2d 60 (2010).

There is no evidence that Dana continued a relationship with the Schulers after his dissolution and he did not execute a new Will after his dissolution. Dana passed away only two short weeks after his acrimonious divorce from Christine finalized. Dana did not have any relationship with the Schulers after his dissolution finalized. In fact, Dana's close friend and employee, David Allan, expressly recalls Dana making statements expressing animosity and dislike towards the Schulers. CP at 111. Christine called David Allan shortly after Dana's death and stated that Dana did not want the Schulers to inherit anything under his Will. CP at 111–12.

The simple fact is that Dana simply did not have the opportunity to change his Will in light of the circumstances of his final two days: the divorce decree had just been entered, he was still dealing with the fallout of his relationship with his former spouse, the Thanksgiving holiday took place in between, and his death was sudden and unexpected.

Furthermore, if the revocation did not apply to the testator's former relatives, it would create an absurd result in this case whereby Dana's ex-wife and her family would receive 75 percent of Dana's assets, leaving Dana's family with only 25 percent. That surely could not have been Dana's intent. Equity supports revoking the provisions in favor of the relatives of Dana's former spouse.

2. Other jurisdictions, especially other community property states, have resolved the issue in favor of revocation of the bequests to relatives of the former spouse.

Other states with similar statutory language have also determined that a dissolution's revocation of bequests relating to or in favor of an ex-spouse includes bequests to the ex-spouse's family. When a statute revokes a bequest to a spouse after a dissolution,[6] it also revokes bequests to the ex-spouse's family. *Friedman*, 412 Md. At 338–39 ("whether a particular bequest is one 'relating to the spouse,' is not limited to bequests to or for the benefit of the spouse"). Statutory revocation of a bequest to a former spouse may include bequests to a former spouse's family members. *Friedman*, 412 Md. at 339. Generally, when a testator provides for his spouse's family, he normally intends to exclude the ex-spouse's family after dissolution, unless a contrary intention is indicated elsewhere in his will. *In re Estate of Hermon*, 39 Cal. App. 4th 1525, 1531 (1995); *In re Estate of Jones*, 122 Cal. App. 4th 326, 331 (2004). The basis for this reasoning is

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[6] Maryland's statute states that, "By an absolute divorce of a testator and his spouse or the annulment of the marriage, either of which occurs subsequent to the execution of the testator's will; and all provisions in the will relating to the spouse, and only those provisions, shall be revoked unless provided in the will or decree." ET § 4-105(4).

that "during the dissolution process or in the aftermath of the dissolution, the former spouse's relatives are likely to side with the former spouse, breaking down or weakening any former ties that may previously have developed between the transferor and the former spouse's relatives." *Hermon*, 39 Cal. App. 4th at 1532.

In *Jones*, the testator's will included a residuary clause in favor of "my stepdaughter . . . Kathy Hardie" in the event his wife "does not survive me." 122 Cal. App. 4th at 332. California's statutory scheme mirrors Washington's and revokes bequests to a spouse upon dissolution and prevents property "from passing to a former spouse . . . as if the former spouse failed to survive the testator." *Jones*, 122 Cal. App. 4th at 332. The Court noted that the statute does not address the effect of divorce on bequests to a former spouse's child. *Jones*, 122 Cal. App. 4th at 332.

The *Jones* court rejected the ex-stepdaughter's argument that the use of her name, rather than just her class (stepdaughter) in the will displayed an intent to provide for her after divorce. *Jones*, 122 Cal. App. 4th at 334. "It seems more likely the testator was not contemplating divorce when he prepared his last will and testament six years before the divorce." *Jones*, 122 Cal. App. 4th at 335. The Court rejected her argument that she was not claiming any rights as her mother's heir, but on her own right as a named beneficiary. The Court held that "she was named in the will in the first place only because her mother was married to the testator. She would take only in the event of her mother's death." *Jones*, 122 Cal. App. 4th at 336.

Similarly, this Court should find that a bequest to an ex-spouse's family is "in favor" of the ex-spouse and thus revoked upon dissolution. There is no evidence that Dana intended to provide for the Schulers in the event that he divorced Christine. Dana and Christine executed reciprocal wills in which they agreed to provide for each other or, if they did not survive the other, each other's siblings. Dana provided a potential bequest for the Schulers only because of his marriage to Christine and they stood to inherit only in the event of their sister's death. *See also Friedman*, 412 Md. 328 (bequests by decedent to former spouse's family members related to the spouse, and thus bequests were revoked pursuant to statute); *Estate of Marchwick*, 356 Mont. 385, 387 (2010) (bequest in pour-over will to children of divorced individual's former spouse revoked by statute); *Hermon*, 39 Cal.App.4th at 1531.

Moreover, although Dana did not refer to the Schulers by their class (siblings-in-law), it is clear from his designation that their inclusion is based on their status as his then-in-laws. *See Cryder v. Garrison*, 387 Pa. 571, 576 (1957) ("The proposition that a gift to several individuals described by their respective names, may be construed as a gift to a class, if it is apparent from the will that the testator so intended"). Dana provided half of his Estate to his siblings, and half to the Schulers, two of Christine's siblings. To argue that the equal provision for his and Christine's siblings was not a class gift simply because Dana did not use the term "in-laws" in Section 5 ignores the plain language of Dana's Will and trumpets form over substance. In the section entitled "Identification of Family," Dana

specifically excluded from his identification of "family," family members that do not survive him and "my brother-in-law Peter Schuler." Dana had no obligation to address Peter's exclusion but for his intention to honor his wife's wishes and leave his assets to a class of persons – his in-laws minus Peter. Due to a family dispute, Christine also excluded Peter form her will. Thus, Dana's intent was to honor his wife's identification of her family and provide for the remaining Schulers in the context of their familial relation to him through Christine.

Additionally, because Peter Schuler is another of Christine's brothers, Dana's specific exclusion shows that he was including the Schulers solely because of their familial relationship through Christine. If Dana did not consider Peter Schuler, and thus all the Schulers, as his family, he would have no reason to specifically disinherit Peter Schuler. Dana had no obligation under the law to provide for Peter Schuler and there was no instance in which Peter Schuler would inherit through intestate succession. Rather, Dana set a class of individuals for which he was providing – his "family" – which included some family members through Christine. Dana included his brother-in-law and sister-in-law only as a result of his marriage to Christine. He excluded Peter because of Peter's dispute with Christine.

Dana's separate treatment of the Schulers based on their status as his in-laws is evidenced in other sections of his Will. Dana designated his sister, Ms. Turner, as an alternate personal representative in the event Christine was unable to fulfill that role. Dana did not include either of the Schulers as a possible personal representative. Additionally, in the event

that Christine did not inherit under the Will, Dana left his personal property to his siblings alone. There is no provision for the Schulers to receive any of Dana's personal property. Had Dana viewed the Schulers as his family or friends, rather than his in-laws, Dana would arguably have provided the Schulers with some personal bequest. Additionally, if Dana had viewed the Schulers as equal members of his family, he would arguably have bequeathed his Estate to his siblings and the Schulers to "share and share alike." Dana made no such provision for the Schulers. The structure of Dana's Will and the bequests therein demonstrate that Dana provided for the Schulers only to the extent they were his in-laws through Christine.

Moreover, Dana's lack of relationship with the Schulers independent of his marriage to Christine supports a conclusion that he did not intend to provide for the Schulers after his dissolution. Dana did not have any contact with the Schulers after his dissolution from Christine. Dana had a strained relationship with the Schulers because of their greed, mistreatment of Christine, and financial exploitation of their mother. Any bequest for the benefit of Christine's siblings had to be rooted in Dana's respect for his then-wife.

The Schulers are no longer Dana's family. Upon Dana's dissolution from Christine, his familial relationship with the Schuler family ended. Dana's provision for the Schulers depended entirely on this familial relationship and the gift is properly classified as a gift to a class – his wife's siblings minus the specifically excluded Peter Schuler.

3. *The plain language of Dana's Will conditions the alternate residuary bequest on the fact that Dana was married to his then-spouse Christine Mower.*

Dana's Will is predicated entirely on the fact that he was married to Christine at its execution. Dana identifies Christine as "my spouse." CP at 2. In his identification of "Family," Dana identified Christine's brother as his "brother-in-law Peter Schuler." CP at 2. Importantly, Dana's alternative disposition of the residuary conditions the bequest "[i]n the event my spouse fails to survive me by a period of thirty (30) days . . . ." CP at 8 (emphasis added). The triggering language of the alternate disposition requires Dana to have been married to Christine at the time of his death and that she failed to survive him by 30 days. Therefore, the triggering event became an impossibility upon the dissolution of their marriage.

This Court should hold that a bequest to the Schulers was a bequest in Christine's favor, that Dana did not intend to leave his assets to the Schulers but for his marriage to Christine, and that no independent relationship existed between Dana and the Schulers that would have explained the bequest. Ms. Turner requests that this Court revoke the bequest to Christine's brother and sister-in-law.

C. The trial court erred in denying Ms. Turner's motion for summary judgment because the alternate disposition of Dana's residuary failed because a condition precedent was not satisfied.

Dana set as a condition precedent to the Schulers and his siblings inheriting under his Will that Christine fail to survive him by 30 days. Washington's courts interpret such provisions as requiring that a spouse actually fail to survive and apply intestate succession rules when the

condition precedent is not met. Here, Christine survived Dana by more than 30 days. As such, the condition precedent for the Schulers and Dana's siblings was never met and intestate rules of succession must be applied.

At issue in this case is what happens when a testator dies days after obtaining a dissolution from his spouse and his will makes alternate bequeaths on the condition that the ex-spouse fails to survive him.

"Gifts are said to be substitutional when a provision is made for someone to take a gift in the event of the death of the original beneficiary before the period of distribution." 96 Corpus Juris Secondum § 1215. When the condition of a substitutional gift fails, the testator's estate passes through intestacy. *Ray v. Tate*, 272 S.C. 472, 473, 476 (1979). When a substitutional gift is conditioned on the first legatee failing to survive the testator, the disinheritance of the first legatee by law does not satisfy the condition. *Ray*, 272 S.C. at 476.

When an ex-spouse is disinherited by operation of law following a dissolution, a will sets as a condition precedent for an alternative bequest that the spouse fails to survive the decedent, and the disinherited ex-spouse in fact survives the decedent, the condition precedent to the alternative bequest is not met and intestate rules of succession are applied. *In re the Estate of Harrison*, 21 Wn. App. 382, 384, 585 P.2d 187 (1978); *In re McLaughlin's Estate*, 11 Wn. App. 320, 321, 523 P.2d 437, *rev. denied* 84 Wn.2d (1974). In *McLaughlin*, the decedent had executed a will that bequeathed his estate to his wife and provided an alternative bequest to his wife's son if she predeceased the decedent. 11 Wn. App. at 320–21. The

decedent and his wife subsequently obtained a dissolution and the decedent passed away before changing his will. *McLaughlin*, 11 Wn. App. at 321. The decedent was survived by his ex-wife, his stepson, and his brother, sister, and niece. The issue on appeal was that in light of the dissolution, whether the stepson rightfully inherited under the decedent's will. *McLaughlin*, 11 Wn. App. at 321.

On appeal, Division II of the Court of Appeals held that the trial court erred in awarding any inheritance to the stepson because the decedent's ex-wife did not predecease him and thus the precondition to the stepson's inheritance never occurred. *McLaughlin*, 11 Wn. App. at 321. The Court held that the ex-wife did not inherit because former RCW 11.12.050 revoked bequeaths as to divorced spouses. *McLaughlin*, 11 Wn. App. at 321. The Court went on to explain that:

> [o]ur holding that [the stepson] is entitled to nothing under the will is based on the fact that the alternative bequest to him in the will was conditional, i.e., by the terms of the will he takes only if the ex-wife predeceases the decedent. *Since the ex-wife survived the defendant, the bequest fails, leaving the decedent's estate to pass via the laws of intestate succession.*

McLaughlin, 11 Wn. App. at 321 (emphasis added).

In *Harrison*, the decedent's will provided for unequal alternative bequeaths to his natural children "in the case of [his wife's] Death before distribution to her." 21 Wn. App. at 383. The decedent and his wife obtained a dissolution prior to his death, resulting in the revocation of any bequeath to the ex-wife. In holding that the condition that the decedent's

ex-wife die before the alternative bequeaths would be triggered, the Court held that "[i]t would be easy and possibly simplistic to hold that the will gave the property [according to the alternative bequests] if [the ex-wife] died. She didn't; therefore, that paragraph is inoperative and intestacy results." *Harrison*, 21 Wn. App. at 384.

Similarly to the testators in *McLaughlin* and *Harrison*, Dana set as a condition precedent to inheritance by his siblings and the Schulers that Christine fail to survive him by at least 30 days. Although RCW 11.12.051 and RCW 11.07.010 treat Christine as having predeceased Dana, this is insufficient to satisfy the condition precedent in Dana's Will. Dana's choice of wording is crucial here as he did not state that the alternative bequest was conditioned upon Christine "predeceasing" him, but rather she had to actually fail to "survive" him. As *McLaughlin* and *Harrison* demonstrate, the actual death of a spouse is required, rather than a disinheritance due to the operation of law. Christine survived Dana by more than 30 days. The condition precedent for the alternative bequest was not met. Accordingly, Dana's Estate must pass by intestate succession.

RCW 11.12.051 and RCW 11.07.010 do not change the outcome of this matter. As the Schulers admit in their Motion for Summary Judgment, RCW 11.12.051 and RCW 11.07.010 are silent as to the effect of a dissolution on alternative bequeaths. *McLaughlin* and *Harrison*, requiring the actual death of a spouse to satisfy the condition precedent for alternative bequeaths, were decided long before the legislature adopted RCW 11.12.051 and RCW 11.07.010 in 1994.

"The legislature is presumed to be aware of the existing state of the case law in the areas in which it is legislating." *Price v. Kitsap Transit*, 125 Wn.2d 456, 463, 886 P.2d 556 (1994). "Absent an indication that the Legislature intended to overrule the common law, **new legislation will be presumed to be consistent with prior judicial decisions**." *Marriage of Williams*, 115 Wn.2d 202, 208, 796 P.2d 421(1990) (emphasis added).

Here, it is undisputed that Washington courts have required that in order for an alternative bequest to a spouse to pass to the next beneficiary, the spouse's *actual death* is required. *Harrison*, 21 Wn. App. at 384; *McLaughlin*, 11 Wn. App. at 321. Case law is clear that disinheritance by operation of law is insufficient to satisfy the condition precedent of a spouse's death. The Legislature made no mention of these cases and did not indicate that it intended to overrule them. If the Legislature intended a result different from that outlined in *McLaughlin* and *Harrison*, it could have made that change at the time it adopted RCW 11.12.051 and RCW 11.07.010 in 1994, or amended the statute in 2008. LAWS OF 1994, ch. 221, § 11; LAWS OF 2008, ch. 6, § 910. However, the Legislature made no such changes and the legislative history surrounding the adoption of RCW 11.12.051 and RCW 11.07.010 gives no indication that the Legislature was acting in response to the decisions of *Harrison* or *McLaughlin*, or any case at all. *See* SUBSTITUTE SENATE BILL REPORT, S.H.B. 2270 (Feb. 24, 1994); FINAL BILL REPORT, S.H.B. 2270.

RCW 11.15.051 and RCW 11.07.010 do not address the effect of a dissolution on alternative bequests, yet *Harrison* and *McLaughlin* do. *Harrison* and *McLaughlin* control.

D. Under the laws of intestate succession, the Schulers are not entitled to any inheritance from Dana's Estate.

As the siblings of Dana's ex-wife Christine, the Schulers have no right to inherit under intestacy succession.

Intestacy succession provides for distribution of a decedent's estate to his or her surviving spouse, children, parents, siblings, grandparents, or cousins, depending on which class of persons survive the decedent. RCW 11.04.015. If a decedent is not survived by his or her spouse or children, his or her estate passes through intestacy succession to his or her parents. RCW 11.04.015(2)(b). There is no provision in RCW 11.04.015 for non-relatives or former in-laws.

Here, Dana is survived by his mother, Lois, but not by a spouse or any children. The Schulers have no right to inherit from Dana's Estate either under his Will or through intestate laws. Accordingly, Dana's Estate must pass to his mother, Lois. However, to the extent that any non-probate assets designate beneficiaries other than Christine, such assets must still pass according to those alternate beneficiary designations.

E. The trial court abused its discretion granting attorney fees and costs to the Schulers.

The superior court has considerable discretion in ruling on a request for attorney fees under RCW 11.96A.150. *In re Estate of Black*, 116 Wn.

App. 476, 489, 66 P.3d 670 (2003), *aff'd on other grounds*, 153 Wn.2d 152, 102 P.3d 796 (2004). The court's decision to award or deny fees is based on equitable considerations and in "exercising its discretion under this section, the court may consider any and all factors that it deems relevant and appropriate . . . ." RCW 11.96A.150(1).

The Schulers are not the substantially prevailing party because they prevailed on only one issue, the probate assets, while the Estate prevailed on the second issue, the non-probate assets. The Schulers also failed on their motion to remove Ms. Turner as the Personal Representative.

Washington State follows the American Rule for attorney fees in which each party generally bears the cost of their attorney fees unless an exception applies. Attorney fees are not awarded unless expressly authorized by contract, statute, or recognized equitable exception. *Pierce Cnty. v. State*, 159 Wn.2d 16, 50, 148 P.3d 1002 (2006). The general rule in determining who is the "prevailing party" for the purpose of awarding attorney fees is the "substantially prevailing" or "net affirmative judgment" rule, meaning that the prevailing party is the one who receives an affirmative judgment in his favor. *Riss v. Angel,* 131 Wn.2d 612, 633, 934 P.2d 669 (1997). If neither party wholly prevails, then the party who *substantially* prevails is the prevailing party. *JDFJ Corp. v. Int'l Raceway, Inc.,* 97 Wn. App. 1, 8, 970 P.2d 343 (1999). "[I]f both parties prevail on major issues, both parties bear their own costs and fees." *Phillips Bldg. Co., Inc. v. An.*, 81 Wn. App. 696, 702, 915 P.2d 1146 (1996).

Here, the Schulers have failed on multiple claims. They have failed to establish any right to non-probate assets, despite their earlier request that this Court rule in their favor in regard to non-probate assets. In addition, they failed in their attempt to remove Ms. Turner as the Personal Representative of the Estate. Although TEDRA does not limit attorney fees to just the prevailing party, under RCW 11.96A.150, this Court can consider all relevant factors in determining an attorney fee award. That the Schulers did not substantially prevail is a relevant factor.

F. The Estate requests its attorney fees and costs on appeal.

Attorney's fees and expenses incurred on appeal can be awarded if applicable law, a contract, or equity permits an award of such fees and expenses. RAP 18.1(a). The party requesting an award of fees and expenses must devote a section of its opening brief to the request for the fees or expenses. RAP 18.1(b).

The Court may award a party costs, including reasonable attorney fees, pursuant to applicable Washington law in RCW 11.96A.150(1). In exercising its discretion, the Court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved. RCW 11.96A.150(1).

This action benefits Dana's Estate in correctly identifying his heirs and giving effect to his true intent. Ms. Turner requests attorney fees and costs against the Schulers related to this action.

VI. CONCLUSION

Law and equity mandate that a decedent's dissolution from his ex-spouse operates to revoke any bequest in favor of the spouse, which includes a bequest to the ex-spouse's family. Here, Dana's bequest to the Schulers as alternate beneficiaries was based solely on their relationship to him through Christine. Dana had no contact with the Schulers following his dissolution and never reaffirmed his bequest to the Schulers after his dissolution. Allowing the Schulers to inherit frustrates the intent of RCW 11.12.051 by making it possible that an ex-spouse could one day inherit her former spouse's assets. As such, the trial court erred in not revoking the bequest to the Schulers. Additionally, because the condition precedent for Dana's alternative bequest, that Christine fail to survive him by at least 30 days, did not occur, his Estate must pass through intestacy succession. As the siblings of Dana's ex-wife, the Schulers have no inheritance rights under the laws of intestacy succession. Accordingly, this Court should reverse the trial court's orders on summary judgment and award Ms. Turner the Estate's attorney fees and costs associated with this matter.

RESPECTFULLY SUBMITTED this 26th day of March, 2015.

LEDGER SQUARE LAW, P.S.

By: _____

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Attorneys for Appellant Linda Turner,
Personal Representative of the Estate of
Dana Bruce Mower

CERTIFICATE OF SERVICE

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

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

C. Tyler Shillito Smith Alling, PS 1515 Dock St., Suite 3 Tacoma, WA 98402 tyler@smithalling.com	☐ U.S. First Class Mail, postage prepaid ☐ Via Legal Messenger ☐ Overnight Courier ☑ Electronically via email ☐ Facsimile

DATED this 26th day of March 2015, at Tacoma, Washington.

Amy Jean Shackelford

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

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