No. 97463-2

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 77556-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

GLORIA PETELLE,

Respondent,

v.

MICHELLE ERSFELD-PETELLE,

Petitioner.

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

STATE CASES

STATUTES

RULES AND REGULATIONS

A. Identity of Petitioner.

The petitioner is Michelle Ersfeld-Petelle, respondent in the Court of Appeals.

B. Court of Appeals Decision.

Petitioner seeks review of the Court of Appeals' published decision reversing the trial court and remanding with directions to terminate petitioner's statutory right under RCW 11.04.015 to inherit as the "surviving spouse" of respondent's son, who died intestate while the parties were still married but after they had entered into a separation contract converting their marital estate to separate property. Division One's May 6, 2019 opinion deciding as a matter of first impression that the parties' separation contract disinherited petitioner as a matter of law is published at *Estate of Petelle*, ___ Wn. App.2d ___, 440 P.3d 1026 (2019). Citations in this petition are to the paragraph numbers in the opinion as attached in Appendix A. The Court of Appeals denied petitioner's timely motion for reconsideration in a June 24, 2019 order, attached as Appendix B.

C. Issue Presented for Review.

Whether a separation contract that converted the marital estate to separate property and was a "final settlement of all their marital and property rights and obligations" but was neither a

contract to legally separate or dissolve the marriage nor purported to expressly disclaim the statutory right to inherit if the other spouse died intestate nevertheless "impliedly waived" the parties' statutory right to intestate succession as a surviving spouse?

D. Statement of the Case.

Petitioner Michelle Ersfeld-Petelle and decedent Michael Petelle married on May 20, 2011 and separated on January 27, 2017, when Michael filed a petition for dissolution in King County Superior Court. (Opinion ¶ 2) On February 14, 2017, Michelle and Michael entered into a "Separation Contract and CR 2A Agreement." (Opinion ¶ 1) The separation contract expressly provided that the "parties are not contracting to legally separate or dissolve their marriage, but agree if a decree of legal separation or decree of dissolution is obtained, this contract shall be incorporated in said decree and given full force and effect thereby." (CP 43)

The separation contract terminated the community estate as of January 27, 2017 and divided the spouses' assets and liabilities. (CP 44) Both spouses released claims against "[a]ll disclosed property not otherwise awarded or assigned in this agreement" and agreed that "[a]ll property which shall hereafter come to either party shall be his or her separate property and neither party shall hereafter

have any claim thereto." (CP 46) Although the separation contract was a "final settlement of all their marital and property rights and obligations" (CP 46), the parties did not contract to terminate their marriage, and the separation contract did not terminate the marriage or purport to waive any statutory rights either party might have as a surviving spouse. The separation contract became "final and binding upon the execution of both parties, whether or not a legal separation or decree of dissolution is obtained" (CP 43-44); its property distribution and obligations were to "remain valid and enforceable against the estate of either party" upon death. (CP 48)

Despite the fact that the separation contract required Michael's attorney to draft and furnish to Michelle's counsel by April 15, 2017 orders incorporating the terms of the separation contract, Michael's counsel never did so after Michael sent an email to his attorney on April 2 asking her to "postpone the closing date" of the dissolution "an additional six months" while he and Michelle decided whether or not to reconcile. After executing the separation contract, neither spouse executed wills that could have prevented the property awarded to them from passing to the other upon death. Nor was the contract recorded. (CP 14, 17; *see also* CP 1-2, 4-8)

Michael died, with "no will and no issue," on May 1, 2017. At the time of his death, the parties were still married; no decree of dissolution had been entered. (Opinion ¶ 2) Because Michael died intestate with no children, RCW 11.04.015 governs distribution of his estate. That statute provides that his "surviving spouse" was entitled to receive three-quarters of his net separate property estate. His mother, respondent Gloria Petelle, was entitled to the remainder of his estate.

Respondent filed a TEDRA petition, RCW ch. 11.96A, to terminate petitioner's statutory right to take by intestate succession, arguing she had "waived all her statutory and common law rights as a surviving spouse . . . when she executed the Separation and CR2A Agreement." (CP 18-27) The trial court denied respondent's petition, finding that petitioner did not waive her statutory right to intestate inheritance under the plain language of the separation contract. (RP 17-19; CP 111-12) The Court of Appeals reversed in a published opinion. Division One rejected respondent's argument that petitioner was not entitled to inherit as a "surviving spouse" because her marriage to decedent was "terminated" under RCW 11.02.005(17). (Opinion ¶¶ 5-8) But as a matter of first impression, the Court of Appeals held as a matter of law that the separation

contract "impliedly waived" petitioner's statutory rights to inherit as a "surviving spouse" under RCW 11.04.015(1) because the separation contract recited that it was a "complete and final settlement of all . . . marital and property rights." (Opinion ¶¶ 13-14)

E. Why This Court Should Grant Review.

For purposes of review, petitioner concedes that the separation contract converted property that would otherwise have been community property into the separate property of the spouse to whom it was awarded in the separation contract. The issue presented for review by this Court is whether by executing the separation contract, the parties as a matter of law "impliedly waived" their statutory rights to intestate succession if the other spouse died prior to dissolution of the parties' marriage.

1. The Court of Appeals' published opinion conflicts with this Court's decisions that a decree of dissolution cannot be entered after a spouse's death and that intestate interests are created only upon the death of the intestate, thus raising issues of substantial public importance. (RAP 13.4(b)(1), (4))

"Waiver is the intentional relinquishment of a known right." *Wagner v. Wagner*, 95 Wn.2d 94, 102, 621 P.2d 1279 (1980). "It is necessary that the person against whom waiver is claimed have intended to relinquish the right, advantage, or benefit and his action

must be inconsistent with any other intent than to waive it." *Wagner*, 95 Wn.2d at 102. "[T]o constitute a waiver, other than by express agreement, there must be unequivocal acts or conduct evincing an intent to waive." *Wagner*, 95 Wn.2d at 102. "Intent cannot be inferred from doubtful or ambiguous factors." *Wagner*, 95 Wn.2d at 102; *Vehicle/Vessel, L.L.C. v. Whitman County*, 122 Wn. App. 770, 778, 95 P.3d 394 (2004) ("Implied waiver will not be inferred; the party claiming waiver must present unequivocal acts or conduct that show an intent to waive."). The Court of Appeals' holding, as a matter of first impression and as a matter of law, that petitioner "impliedly waived" her statutory intestate rights as surviving spouse under RCW 11.04.015 is not only inconsistent with its holding that she *was* a "surviving spouse" under RCW 11.02.005(17), but conflicts with this Court's decisions that a dissolution action normally abates upon the death of one of the spouses, and that intestate interests are created only upon the death of the intestate.

In *Pratt v. Pratt*, 99 Wn.2d 905, 665 P.2d 400 (1983), this Court vacated a dissolution decree entered nunc pro tunc after the husband's death, the effect of which "was to cut off [the wife's] inheritance rights," holding that "the trial court had improperly

attempted to make the record reflect what *might* have happened had Mr. Pratt lived." 99 Wn.2d at 911 (emphasis in original). In reversing Division Two, this Court noted that dissolution actions normally abate upon a spouse's death because until entry of final decree, "anyone can change his mind," "[t]he parties can reconcile, the terms of the property distribution can be altered or the trial court can decide not to grant the decree." *Pratt,* 99 Wn.2d at 910.

In *Estate of Baird,* 131 Wn.2d 514, 933 P.2d 1031 (1997), this Court held that a disclaimer of the right to inherit intestate made before the decedent's death was invalid, because "[a]n intestate interest is created only upon the death of the creator of the interest, i.e., the death of the intestate." 131 Wn.2d at 520. Because the purported disclaimer by the decedent's child at issue there had been executed before she died, "he did not yet have an 'interest' in his mother's estate to disclaim." *Baird,* 131 Wn.2d at 520.

The Court of Appeals' published opinion here conflicts with both *Pratt* and *Baird.* In reaching its decision, the Court of Appeals misplaced its relied on *Brown's Estate,* 28 Wn.2d 436, 183 P.2d 768 (1947) and *Estate of Lindsay,* 91 Wn. App. 944, 957 P.2d 818 (1998), *rev. denied* 137 Wn.2d 1004 (1999), in concluding that petitioner could and did as a matter of law "impliedly waive" her statutory right

to intestate succession by entering into the separation contract. Neither *Brown* nor *Lindsay,* which both addressed a wife's right to a homestead allowance from the husband's estate when the husband had executed a will excluding the wife as a beneficiary, support an implied waiver of the statutory right to intestate succession.

In *Brown*, the spouses entered into a property settlement intended to "be final and conclusive between the parties hereto, regardless of whether or not either party hereto may die before the Interlocutory Decree of Divorce shall become final." 28 Wn.2d at 437-38. The husband died less than six months later, after the trial court had entered an interlocutory decree of divorce but before a final decree was entered, and after executing a will that excluded the wife as a beneficiary. *Brown*, 28 Wn.2d at 438-39.

This Court held in *Brown* that the wife waived her right to a homestead allowance from the husband's estate by entering into the settlement agreement, focusing on two primary considerations. First, the parties expressly and clearly "had in contemplation the possibility of death and obviously that they meant to waive any rights which might accrue upon death, one of which rights would be the homestead right." *Brown*, 28 Wn.2d at 440. Second, "the actions of the parties immediately after the agreement was executed" gave

"additional force" to their intent. *Brown*, 28 Wn.2d at 440. "Both parties sold their separate interest in the real estate to a third party" after signing the settlement agreement, and "executed and delivered real estate contract and deed, which were placed of record." *Brown*, 28 Wn.2d at 440-41. The "language of the agreement *and* the actions of the parties to that agreement reflect[ed] the intent of the parties to waive each and every right . . . one could exercise as to the property of the other if the division of the property was to be affected by the death of either party before the interlocutory decree of divorce became final." *Brown*, 28 Wn.2d at 441 (emphasis added).

Similarly, in *Lindsay*, the parties "signed a separation agreement dividing their real and personal property" and "relinquished any claim to the other's property acquired after" the date of execution. 91 Wn. App. at 947. Both parties then revoked prior reciprocal wills and executed new wills excluding the other as a beneficiary. *Lindsay*, 91 Wn. App. at 947. When the husband died four years later, the wife applied for an award in lieu of homestead. The trial court denied the discretionary homestead allowance, finding "that the parties had renounced their marriage and thereby effectively waived any right to a surviving spouse's award in lieu of homestead." *Lindsay*, 91 Wn. App. at 947-48.

In affirming the trial court, Division Three recognized that the "agreement clearly reflect[ed] an intent to give up those rights which would normally follow legal spouses" based on "all of the circumstances surrounding the transaction, including the subject matter *together with the subsequent acts of the parties* to the instrument." *Lindsay*, 91 Wn. App. at 951 (emphasis added) (quoted source omitted). The parties "never rescinded, revoked, or altered" the separation agreement. *Lindsay*, 91 Wn. App. at 952. Nor did they live together in the four years between when they entered into the agreement and when the husband died. *Lindsay*, 91 Wn. App. at 952. Crucially, during that time, both parties also rescinded their reciprocal wills and "executed wills leaving nothing to the other." *Lindsay*, 91 Wn. App. at 952.

In finding that the surviving spouses had waived their right to a homestead allowance, both *Brown* and *Lindsay* relied not only on the language in the parties' separation contracts, but their subsequent conduct demonstrating their intent to waive that statutory right. Here, in contrast, neither the "language of the agreement" nor "the actions of the parties" reflect any similar intent to waive any and all "rights which might accrue upon death." *Brown*, 28 Wn.2d at 440-41. *See also Estate of Lundy v. Lundy*, 187 Wn.

App. 948, 959-60, 352 P.3d 209 (dissolution decree awarding an ERISA retirement account to former husband as his separate property was not a waiver by former wife to her rights to that account as the designated beneficiary: "Disclaiming an ownership interest is not the same as disclaiming future rights as a beneficiary."), *rev. denied*, 184 Wn.2d 1022 (2015).

The Court of Appeals reasoned that *Brown* and *Lindsey* supported its decision and that petitioner had impliedly waived her statutory right to intestate succession because she had settled her "marital rights." (Opinion ¶¶ 13-14) But intestate succession under RCW 11.04.015 is not the sort of "marital right" addressed in *Brown* and *Lindsey*. Intestate succession is not a "marital right" at all, but is instead merely a statutory interest, arising at death, intended by the Legislature to serve as an estate distribution plan where a decedent fails to devise his or her estate by will. While a "surviving spouse" is an enumerated class of beneficiary, defined by RCW 11.02.005(17), the surviving spouse's statutory interest is not a marital right because it can be unilaterally destroyed by the simple act of execution of a will by the other spouse.

Petitioner's statutory right to inherit in this case arose by virtue of the decedent's failure to assert his own right to make a will

directing the distribution of his estate, and because (as the Court of Appeals correctly held: Opinion ¶ 18), petitioner was a "surviving spouse" as defined in RCW 11.02.005 at the time of his death. Petitioner's statutory right to inherit intestate could not have accrued by virtue of her marriage because it could have been unilaterally revoked by the decedent by making a will. *See Pond v. Faust*, 90 Wash. 117, 119-20, 155 P. 776 (1916) ("Until a man dies he has no heirs. It can never be known before then, even if he die intestate, who will succeed him and be legally found to be his heirs"); *Estate of Wright,* 147 Wn. App. 674, 680, ¶ 21, 196 P.3d 1075 (2008) ("the laws of intestacy are by definition inapplicable when the decedent leaves a will"), *rev. denied,* 166 Wn.2d 1005 (2009).

The separation contract here did not waive the parties' statutory rights to inherit intestate. The Court of Appeals' published decision concluding that petitioner "impliedly waived" the statutory rights of a surviving spouse also raises an issue of substantial public importance, because it is inconsistent with public policy encouraging marriage and discouraging dissolution, and will call into doubt the consequence of many standard separation contracts. This Court should accept review.

2. The Court of Appeals' published decision conflicts with decisions limited the consequence of contractual integration clauses. (RAP 13.4(b)(2))

Contrary to the Court of Appeals' conclusion that "there was no reliance on extrinsic evidence" in this case (Opinion ¶ 10), petitioner relied upon the facts that not only did the separation contract itself not expressly waive intestate succession rights, but that neither spouse's conduct demonstrated any intent to disinherit the other or to waive either spouse's statutory right to inherit separate property under RCW 11.04.015. The spouses were separated for less than four months when the husband died, and there was evidence that they were seeking to reconcile. (CP 1-2, 4-8, 14, 17) Neither spouse executed a will intentionally excluding the other from inheriting, or otherwise took any affirmative action to expressly ensure that the survivor would not receive any property upon the death of the other.

As argued in the previous section, the Court of Appeals' conclusion that petitioner nevertheless impliedly waived her statutory right to intestate succession as a matter of law goes well beyond the holdings and facts of both *Brown* and *Lindsay;* the Court of Appeals impermissibly inferred intent "from doubtful or ambiguous factors." *Wagner*, 95 Wn.2d at 102; *see also Lundy,* 187

Wn. App. at 960, ¶ 26 (in the absence of express agreement in dissolution decree, "there was no such clear conduct demonstrating Kelly's intent to waive her rights as beneficiary of Craig's retirement account. The only evidence the Estate cites regarding intent is Kelly and Craig's lack of closeness after their divorce. But, we cannot infer intent from 'doubtful or ambiguous factors.'").

In concluding that the separation contract nevertheless waived respondent's statutory intestate succession rights, the Court of Appeals in its published opinion relies on the language in the separation contract stating that its terms could only be modified in writing. (Opinion ¶ 24) Its opinion therefore also conflicts with decisions that "a contract clause prohibiting oral modifications is essentially unenforceable because the clause itself is subject to oral modification." *Pacific Northwest Group A v. Pizza Blends, Inc.*, 90 Wn. App. 273, 277-78, 951 P.2d 826 (1998); *see also* RCW 26.09.070(8) ("If at any time the parties to the separation contract by mutual agreement elect to terminate the separation contract they may do so without formality unless the contract was recorded").

Leaving aside that nothing in the language of the separation contract itself waived either spouse's statutory right to intestate succession if the parties remained married when one spouse died, the

Court of Appeals' reliance on this "integration" clause was not a basis for ruling as a matter of law that the separation contract disinherited respondent. This Court should also accept review to hold that at a minimum, remand to the trial court was required to determine whether the spouses in fact intended the separation contract to be a waiver of statutory intestate succession rights.

F. Conclusion.

This Court should accept review, reverse the Court of Appeals, and reinstate the trial court's decision.

Dated this 19th day of July, 2019.

SMITH GOODFRIEND, P.S.

By: _____

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on July 19, 2019, I arranged for service of the foregoing Petition for Review, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 19th day of July, 2019

Sarah N. Eaton

440 P.3d 1026
Court of Appeals of Washington, Division 1.

In the MATTER OF the ESTATE
OF: Michael A. PETELLE, Deceased.
Gloria Petelle, Appellant,
v.
Michelle Ersfeld Petelle, Respondent.

No. 77556-1-I
|
FILED: May 6, 2019

Synopsis

Background: After husband died intestate during pendency of divorce action, wife filed petition for letters of administration. The Superior Court, King County, No. 17-4-05917-7, Kenneth L. Schubert, J., denied husband's mother's petition for order terminating wife's right to intestate succession. Mother appealed.

The Court of Appeals, Smith, J., held that wife waived right to inherit husband's property as surviving spouse.

Reversed and remanded with instructions.

***1027** Appeal from King County Superior Court, 17-4-05917-7, Honorable Kenneth L. Schubert, J.

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PUBLISHED OPINION

Smith, J.

¶1 After a six-year marriage, Michael Petelle filed a petition to dissolve his marriage to Michelle Ersfeld Petelle.[1] The parties executed a Separation Contract and CR2A Agreement (Separation Contract) that divided their assets into separate property and was a "final settlement of all their marital and property rights and obligations." Michael died intestate with no children before a dissolution decree was entered. Gloria Petelle, Michael's mother and heir, appeals the trial court's denial of her motion to terminate Michelle's right to intestate succession. We hold that the right to intestate succession is a marital right that, although derived from statute, arises because of a person's marital status. By agreeing to a final settlement of all marital rights, Michelle waived that right by signing the Separation Contract. Therefore, we reverse and remand with instructions for the trial court to grant Gloria's motion to terminate Michelle's right to intestate succession. We also deny Michelle's request for attorney fees on appeal and at the trial court.

1 Because all the parties have the same last name, we refer to each person by his or her first name.

FACTS

¶2 Michael and Michelle married on May 20, 2011. On January 27, 2017, Michael filed a petition for dissolution of their marriage. On February 14, 2017, Michael and Michelle executed the Separation Contract that divided ***1028** their property and debts. Michael died on May 1, 2017, before a final decree of dissolution was entered. He did not have a will, and he had no children.

¶3 Michelle submitted a petition for letters of administration, appointment of an administrator, an order of solvency, and nonintervention powers on May 10, 2017. Her petition did not disclose the existence of the dissolution action or the Separation Contract. Furthermore, she did not give notice to any of Michael's heirs of her intent to petition for nonintervention powers, as required by RCW 11.68.041. Gloria contested Michelle's nonintervention powers. The trial court revoked Michelle's nonintervention powers and required her to post a $ 100,000 bond but allowed Michelle to continue as Michael's personal representative. It also awarded attorney fees to Gloria.

¶4 Gloria then petitioned the court on September 27, 2017, for an order terminating Michelle's right to intestate succession.

App. A

The trial court denied Gloria's motion but reserved ruling on Michelle's motion for attorney fees. Gloria appeals.

RIGHT TO INHERIT AS A "SURVIVING SPOUSE"

¶5 Gloria argues that Michelle and Michael's marriage was defunct and, therefore, Michelle is not entitled to inherit as a "surviving spouse" because her marriage to Michael was "terminated" under RCW 11.02.005(17). We disagree.

¶6 The meaning of a statute is a question of law that we review de novo. Durant v. State Farm Mut. Auto. Ins. Co., 191 Wash.2d 1, 8, 419 P.3d 400 (2018). Our fundamental objective in determining what a statute means is to ascertain and carry out the legislature's intent. Durant, 191 Wash.2d at 8, 419 P.3d 400. "If the statute's meaning is plain on its face, then courts must give effect to its plain meaning as an expression of what the legislature intended." Durant, 191 Wash.2d at 8, 419 P.3d 400. The court may use a dictionary to discern the plain meaning of an undefined statutory term. Nissen v. Pierce County, 183 Wash.2d 863, 881, 357 P.3d 45 (2015). If, after consulting a dictionary, the statute is susceptible to more than one reasonable meaning, the statute is ambiguous and it is appropriate to use other statutory construction aids and examine the legislative history. Wrigley v. State, 5 Wash. App. 2d 909, 924-25, 428 P.3d 1279 (2018). "The court has frequently looked to final bill reports as part of an inquiry into legislative history." State v. Bash, 130 Wash.2d 594, 601, 925 P.2d 978 (1996).

¶7 RCW 11.04.015(1)(c) states that a "surviving spouse" shall receive "[t]here-quarters of the net separate estate if there is no surviving issue, but the intestate is survived by one or more of his or her parents." RCW 11.02.005(17) describes when an individual does *not* qualify as a "surviving spouse":

> "Surviving spouse" or "surviving domestic partner" does not include an individual whose marriage to or state registered domestic partnership with the decedent has been *terminated, dissolved, or invalidated....* A decree of separation that does not terminate the status of spouses or domestic partners is not a dissolution or invalidation for purposes of this subsection.

(Emphasis added.) "Terminated" is not defined in the statute, but the dictionary defines "terminate" as "to bring to an ending or cessation in time, sequence, or continuity : CLOSE ... to form the ending or conclusion of ... to end formally and definitely (as a pact, agreement, contract)." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2359 (2002). Using this definition of "terminated," the term is susceptible to two or more meanings because it is not clear what action is required to "terminate" a marriage or domestic partnership. Therefore, it is necessary to consult the legislative history of the statute to ascertain the legislature's intent.

¶8 RCW 11.02.005(17) was revised in 2008 as part of a broader bill expanding domestic rights and responsibilities of all couples recognized as domestic partners under Washington's State Registered Domestic Partnerships Act, chapter 26.60 RCW. H.B. 3104, 60th Leg., Reg. Sess. (Wash. 2008). The statute's references to domestic partners and domestic partnerships and the word "terminated" were added as part of this revision. Based on the final bill report, "terminated" ***1029** refers to a process for ending a domestic partnership with the Secretary of State. See FINAL B. REP. ON SECOND SUBSTITUTE H.B. 3104, 60th Leg., Reg. Sess. (Wash. 2008). Contrary to Gloria's contention, the legislature did not add "terminated" to describe a marriage that is defunct. Because Michelle was not in a domestic partnership with Michael that was terminated by the Secretary of State, she is a surviving spouse under the statute and is entitled to inherit 75 percent of his separate property, absent a waiver of that right.

WAIVER OF MARITAL RIGHT TO INTESTATE SUCCESSION

¶9 Gloria next argues that Michelle waived her right to inherit Michael's property as a "surviving spouse" by entering into the Separation Contract. We agree.

¶10 "When the parties to a separation agreement dispute its meaning, the court must ascertain and effectuate their intent at the time they formed the agreement." Boisen v. Burgess, 87 Wash. App. 912, 920, 943 P.2d 682 (1997). "The intent of the parties is determined by examining their objective

manifestations, including both the written agreement and the context within which it was executed." Boisen, 87 Wash. App. at 920, 943 P.2d 682. "If the agreement has only one reasonable meaning when viewed in context, that meaning necessarily reflects the parties' intent." Boisen, 87 Wash. App. at 920, 943 P.2d 682. If the agreement has more than one reasonable meaning, a question of fact is presented and this court reviews the trial court's determination for substantial evidence. Boisen, 87 Wash. App. at 920-21, 943 P.2d 682. But where there is no reliance on extrinsic evidence, interpretation of a contract is a question of law we review de novo. State v. R.J. Reynolds Tobacco Co., 151 Wash. App. 775, 783, 211 P.3d 448 (2009). "[W]e attempt to determine the parties' intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties." Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wash.2d 493, 503, 115 P.3d 262 (2005).

¶11 " '[W]aiver is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right.' " In re Estate of Lindsay, 91 Wash. App. 944, 950, 957 P.2d 818 (1998) (alteration in original) (quoting Peste v. Peste, 1 Wash. App. 19, 24, 459 P.2d 70 (1969)). It can be an express agreement or be inferred from the circumstances. Lindsay, 91 Wash. App. at 950-51, 957 P.2d 818. Waiver is " 'a voluntary act which implies a choice, by the party, to dispense with something of value or to forego [sic] some advantage.' " Lindsay, 91 Wash. App. at 951, 957 P.2d 818 (quoting Peste, 1 Wash. App. at 24, 459 P.2d 70).

¶12 Under Washington law, a surviving spouse has a right to inherit from his or her deceased spouse's estate. RCW 11.04.015(1). This statutory right to intestate succession turns on a person's marital status and is therefore a marital right. See 19 SCOTT J. HORENSTEIN, WASHINGTON PRACTICE: FAMILY & COMMUNITY PROPERTY LAW § 5:3, at 125 (2d ed. 2015) ("Marital rights ... include ... inheritance rights.").

¶13 Here, the Separation Contract states that "the parties hereby stipulate and agree to make a complete and final settlement of *all their marital and property rights* and obligations on the following terms and conditions." (Emphasis added.) This language is, arguably, sufficient to constitute waiver of all marital and property rights flowing from the marital relationship, including the right to intestate succession.

¶14 While Michelle concedes that a party can waive his or her right to intestate succession, she argues that such a waiver did not occur here. She contends that in order to constitute a waiver of her right to intestate succession, the Separation Contract must clearly state that she waived that specific right and that a general waiver of all marital rights is insufficient. Even assuming her argument has merit, we hold that additional language in the Separation Contract supports a holding that Michelle impliedly waived her right to intestate succession.

¶15 Washington courts have determined that a spouse's right to a homestead, another ***1030** marital inheritance right, can be impliedly waived in a settlement agreement of marital and property rights in two previous cases: In re Estate of Brown, 28 Wash.2d 436, 439, 183 P.2d 768 (1947), and Lindsay. Following the analysis in both of these cases, Michelle impliedly waived her right to intestate succession by entering into the Separation Contract.

¶16 In Brown, the Supreme Court considered whether Florence Turner was entitled to an award of property in lieu of homestead from Louis Brown's estate. At the time of Brown's death, the parties were separated, their divorce was pending, and Brown had executed a new will that omitted Turner. Brown, 28 Wash.2d at 437, 439, 183 P.2d 768. The parties also entered into a settlement agreement that stated:

> "(4). In the event of the granting of a divorce in the above entitled action, this property settlement shall be a *full and complete settlement of all of the property rights of the parties hereto,* and the property received by the first party hereunder shall thereupon become and/or remain in his separate property, free and clear of all claims whatsoever on the part of the second party, and the property received by the party of the second part shall thereupon become her separate property, free and clear of any claims whatsoever on the part of the first party. It is hereby agreed by the parties hereto that this property settlement shall be final and conclusive between the parties hereto, *regardless of whether or not either party hereto may die before the Interlocutory Decree of Divorce shall become final.* ...
>
> "....

> "This agreement shall be binding on each of the parties hereto, their heirs and assigns forever."

Brown, 28 Wash.2d at 438, 183 P.2d 768 (emphasis added). The Supreme Court held that Turner waived all rights to a homestead by signing the agreement. Brown, 28 Wash.2d at 440, 183 P.2d 768. It determined that if the parties intended the settlement agreement to be effective even if one of them died, "then the property secured by each became and remained separate property, free and clear of *all* claims —including right of homestead—on the part of the other party." Brown, 28 Wash.2d at 440, 183 P.2d 768 (emphasis added). Considering the language of the agreement and the circumstances surrounding its execution, the court held that it was "clear" that Turner and Brown contemplated the possibility of death and "meant to waive *any* rights which might accrue upon death, one of which rights would be the homestead right." Brown, 28 Wash.2d at 440, 183 P.2d 768 (emphasis added). This was clear because the language of the agreement indicates that "the property settlement shall be final and conclusive between the parties, regardless of whether either party died prior to the time the interlocutory decree of divorce became final." Brown, 28 Wash.2d at 440, 183 P.2d 768. That, combined with the release of claims on the other's separate property, and the recitation that the agreement was binding on the parties, heirs, and assigns, clearly evidenced "that the division of the property should stand and that each should dispose of that separate property as if either were unmarried." Brown, 28 Wash.2d at 440, 183 P.2d 768.

¶17 Here, similar to the agreement in Brown, the Separation Contract also states that it is "a complete and final settlement of all [of Michelle and Michael's] marital and property rights and obligations." Furthermore, it is effective even upon the death of either party. Therefore, as in Brown, the Separation Contract evidences Michael and Michelle's intent that "the property secured by each became and remained separate property, free and clear of *all* claims ... on the part of the other party," including any right to intestate succession. Brown, 28 Wash.2d at 440, 183 P.2d 768 (emphasis added).

¶18 More recently, in Lindsay, Division III of this court also concluded that a separation agreement constituted an implied waiver of a spouse's right to a homestead. In that case, Murray and Cathy Lindsay signed a separation agreement dividing their real and personal property on October 1, 1991, after an almost eight-year marriage. Lindsay, 91 Wash. App. at 947, 957 P.2d 818. Murray then executed a new will leaving nothing to Cathy. ***1031** Lindsay, 91 Wash. App. at 947, 957 P.2d 818. He died unexpectedly three years later, and Cathy petitioned the court for an award in lieu of homestead. Lindsay, 91 Wash. App. at 947, 957 P.2d 818.

¶19 The Court of Appeals held that the intent of the separation agreement was undisputed. Lindsay, 91 Wash. App. at 951, 957 P.2d 818. The agreement stated that " 'neither has a claim or interest in anything acquired after the date of October 1, 1991 or anytime in the future,' " and it required that if the parties later reconciled, any changes to the agreement had to be in a writing and signed by both parties. Lindsay, 91 Wash. App. at 951, 957 P.2d 818. The court held that as of October 1, 1991, Cathy and Murray were legally separated and their property divided, effective immediately. Lindsay, 91 Wash. App. at 951, 957 P.2d 818. It explained that "[t]he agreement clearly reflects an intent to give up those rights which would normally follow legal spouses" and "showed an intent to prevent, waive, and abandon what a surviving spouse could normally take." Lindsay, 91 Wash. App. at 951-52, 957 P.2d 818. Under the agreement, Cathy "effectively renounced the marriage and waived the statutory homestead allowance." Lindsay, 91 Wash. App. at 952, 957 P.2d 818.

¶20 The court rejected Cathy's argument that because the separation agreement did not specifically mention the homestead right, she was entitled to a homestead allowance. Lindsay, 91 Wash. App. at 951, 957 P.2d 818. It held that the homestead right could be waived by implication and the real question was whether the parties' actions evidenced a decision to renounce the community with no intention of resuming the marital relationship. Lindsay, 91 Wash. App. at 951, 957 P.2d 818. Because the separation agreement divided all property and waived all claims to the others' property and was never rescinded, revoked, or altered, that test was met. Lindsay, 91 Wash. App. at 952, 957 P.2d 818.

¶21 The same analysis applies in this case. Michael and Michelle's Separation Contract states that "[a]ll property which shall hereafter come to either party shall be his or her separate property and neither party shall hereafter have any claim thereto." This is similar to the separation agreement in Lindsay, which the court held "showed an intent to prevent, waive, and abandon what a surviving spouse could normally take." Lindsay, 91 Wash. App. at 952, 957 P.2d 818. As such,

Michelle waived her marital right to intestate succession by entering into the Separation Contract.

¶22 Michelle argues that Brown and Lindsay are distinguishable because those cases dealt with the homestead right applicable to disinherited spouses, not the right to intestate succession. Although it is true that Brown and Lindsay do not address the rights of a surviving spouse to intestate succession, the analysis is still instructive. Both cases analyzed whether a separation contract that is a final settlement of a married couple's property and rights, effective even upon death, evidences an intent to waive the statutory marital rights of a surviving spouse. Michelle's right to intestate succession, like the homestead right, is a statutory marital right due to a surviving spouse. For that reason, Brown and Lindsay are persuasive.

¶23 Michelle also argues that the parties' subsequent actions in Brown and Lindsay were vital to the courts' conclusions that the disinherited spouse intended to waive the homestead right. Specifically, she highlights the fact that the spouses in those cases revoked their previous wills that named one another as beneficiaries and executed new wills that did not provide for any inheritance. By contrast, Michelle argues that after she and Michael signed the Separation Contract, they did not take any actions, such as executing a new will, that showed an intent to waive the right to intestate succession. But, the courts in Brown and Lindsay did not rely on the parties' subsequent actions. In each of those cases, the court reached its conclusion based on that the language of the separation agreements alone. Brown, 28 Wash.2d at 440, 183 P.2d 768 ("This conclusion [that the parties intended to waive the homestead right] is inescapable under the language that the agreement was to be binding on each of the parties, their heirs and assigns forever."); Lindsay, 91 Wash. App. at 951, 957 P.2d 818 ("The *agreement* clearly reflects an intent to give up those rights which would normally follow legal spouses.") (emphasis added). The ***1032** parties' subsequent actions, while further supporting their intent to waive their homestead rights, were not relied on to find waiver. Furthermore, in both Brown and Lindsay, a new will was necessary because the settlement agreement did not automatically disinherit the estranged spouses from one another's existing wills and the parties had to update their wills to reflect that intent. Here, Michael did not have a will and there is no evidence in the record that Michelle had one either, so there was nothing that needed modification. For these reasons, Michelle's attempt to distinguish Brown and Lindsay is not persuasive.

¶24 Finally, Michelle argues that even if she waived her right to intestate succession, remand is necessary to determine whether or not she and Michael intended to reconcile. She cites evidence in the record that Michael contacted his attorney on April 2, 2017, to ask that the dissolution be delayed, a no-contact order be removed, and a house in Leavenworth no longer be included in the Separation Contract. But even if this were evidence that Michael and Michelle intended to reconcile, it does not change the result. The Separation Contract states that it may be "terminated and modified *only* by a written document so reflecting, signed by both parties." (Emphasis added.) Michael's email to his attorney was not a modification or termination that was signed by both parties. Furthermore, any extrinsic evidence of Michael's intent to reconcile with Michelle after the execution of the Separation Contract is not needed where the intent of the parties at the time of execution is clear, as is the case here. Berg v. Hudesman, 115 Wash.2d 657, 667, 801 P.2d 222 (1990) ("[E]xtrinsic evidence is admissible as to the entire circumstances under which the contract was made, as an aid in ascertaining the parties' intent."). For these reasons, we decline Michelle's request to remand for further fact-finding.

ATTORNEY FEES

¶25 Michelle asks this court to award her attorney fees and costs on appeal and for the proceedings at the trial court under RCW 11.96A.150(1) and RAP 18.1(a). We deny her request.

¶26 Attorney fees may be awarded only when authorized by a contract, a statute, or a recognized ground of equity. Labriola v. Pollard Grp., Inc., 152 Wash.2d 828, 839, 100 P.3d 791 (2004). RCW 11.96A.150(1) allows a court to award costs and reasonable attorney fees to any party in trust and estate disputes. It states, "[i]n exercising its discretion under this section, 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).

¶27 Here, Michelle requested attorney fees in the trial court, but the trial court reserved its decision on fees. Because Michelle is not the prevailing party on the issue of waiver and her litigation of that issue does not benefit the estate, we decline to award her fees at trial or on appeal.

¶28 We reverse and remand to the trial court to grant Gloria's motion terminating Michelle's marital right to intestate succession.

Leach, J.

Schindler, J.

All Citations

WE CONCUR:

440 P.3d 1026

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FILED
6/24/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In the Matter of the Estate of:	)	
	)	
MICHAEL A. PETELLE,	)	No. 77556-1-I
	)	
Deceased.	)	ORDER DENYING MOTION
	)	FOR RECONSIDERATION
GLORIA PETELLE,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	
MICHELLE ERSFELD PETELLE,	)	
	)	
Respondent.	)	
	)	

Respondent, Michelle Petelle, has filed a motion for reconsideration of the opinion filed on May 6, 2019. Appellant, Gloria Petelle, has filed an answer to respondent's motion. The court has determined that respondent's motion for reconsideration should be denied. Now, therefore, it is hereby

ORDERED that respondent's motion for reconsideration is denied.

FOR THE COURT:

Smith, J.
Judge

SMITH GOODFRIEND, PS

July 19, 2019 - 11:45 AM

Transmittal Information

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Appellate Court Case Title:	Estate of Michael Petelle. Gloria Petelle, Appellant v. Michelle Ersfeld Petelle, Respondent

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