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

In re the Estate of:		
	)	No. 29827-2-III
	)	
EARLE T. KAZMARK,	)	
	)	
	)	
Deceased.	)	UNPUBLISHED OPINION
	)	

Siddoway, A.C.J. — In the weeks before his death in 2009, Earle Kazmark revoked a reciprocal will that mirrored the terms of his late wife Barbara's will; the wills had been executed simultaneously by the two in 2005. Under the 2005 will he, like his wife, had provided for three of their children from prior marriages. The new will executed by Earle shortly before his death substantially favored his son, Earle Jr.

Following a bench trial, the superior court found that the wills executed by Earle and Barbara Kazmark in 2005 were made to effectuate an agreement to make mutual wills—reciprocal wills made pursuant to an agreement between two individuals as to how their property will be distributed after both die—for which there was consideration and which was fully performed by Barbara Kazmark. Based on its finding of a binding agreement, the court substituted Earle's 2005 will for probate. Earle Jr. and the personal

representatives under the 2009 will appeal. We affirm.

FACTS AND PROCEDURAL BACKGROUND

Earle Kazmark and Barbara Kazmark married in 1985. Both had children from prior marriages and they had no children together. Earle[1] had five children; by the time of the wills at issue, he was estranged from all but his sons Earle Jr. and Jason Kazmark. Barbara had three sons, one of whom died before she met Earle; she was estranged from another. She was close to her third son, Clinton Shane Krag (Shane), and his wife and daughter.

Earle and Barbara were married for 20 years before they consulted an attorney about preparing wills. They had over $2,000,000 in assets by that time, most of which were Barbara's. She had come into the marriage with significant assets, while Earle brought comparatively little separate property to the marriage. The separate character of Barbara's assets had largely been preserved. According to close friends who testified in the trial below, by the time they prepared wills, Earle and Barbara had agreed on a disposition that both were comfortable with: each would leave his or her assets to the other, and on the death of the second to die, approximately half would pass to Shane or his wife or children (Shane would receive the home in which his mother and stepfather

[1] Given the common surnames of the parties and testators, first names are used throughout for the purpose of clarity. No disrespect is intended.

were allowing him to live and 50 percent of the residual estate) and the other half would be shared by Earle's sons, Earle Jr. and Jason (Earle Jr. would receive the home in which his father and stepmother were allowing him to live, and Earle Jr. and Jason would each receive 25 percent of the residual estate). Although some of Barbara's friends commented that she was being very generous to Earle's children, she responded, "'Well, we've talked about it and we think this is fair.'" Report of Proceedings (RP) (Feb. 15, 2010) at 280.

Earle and Barbara contacted attorney John Montgomery about preparing the wills in October 2005, shortly before leaving for Arizona for the winter. They were in a hurry to leave and originally asked if they could not just give Mr. Montgomery the information for their wills over the phone, but he insisted that they come into his office. Upon meeting with them, however, he largely deferred to their instructions, which were based on decisions they had already made.

Although the wills provided for the same ultimate distribution of the couples' assets following the death of the second to die, the Kazmarks never used the term "mutual wills" in explaining their wishes to Mr. Montgomery and he never asked if they intended their identical disposition of assets on the second death to be binding. He never explained to them what mutual wills were, or how they differed from wills that were merely reciprocal.

In counseling the Kazmarks, Mr. Montgomery brought up the option of a community property agreement (CPA), which was his standard practice when there is "a marriage that's of long duration." RP (Feb. 14, 2010) at 168. The Kazmarks liked the idea that a CPA would eliminate the need for a probate of the estate of the first to die, and the resulting privacy.

Mr. Montgomery drafted the wills and a CPA, which the Kazmarks signed in late October 2005. The wills provided that upon the death of either spouse, the surviving spouse would take the entire estate provided he or she survived the other by 30 days. Otherwise, Earle's will contained the following specific and residual bequests at its sections IV and V, which were mirrored in Barbara's will:

> IV.
> Specific Bequest of Personal Property
>
> In the event that my wife, BARBARA L. KAZMARK, does not survive me by thirty (30) days, I give, devise and bequeath all interest that I may have in certain real property, subject to any obligation owed thereon or against, as follows:
>
> A. Unto my son, EARLE V. KAZMARK, prov[id]ed that he survives me, all interest in real property located at 5114 East Handy Road, Colbert, Washington.
>
> B. Unto my wife's son, CLINTON SHANE KRAG, or his wife, MARY C. KRAG, provided he does not survive me, all interest in real property and manufactured home located thereon, on Sherman Road, near Deer Park, Washington.
>
> V.
> Residual Bequest
>
> In the event that my wife, BARBARA L. KAZMARK, does not survive me by thirty (30) days, I give, devise and bequeath all the rest, residue and remainder of my estate of every kind, character and description,

and wheresoever situate or found as follows:

. . . .

(1) One-half (½) of my remaining estate equally unto my sons, EARLE V. KAZMARK and JASON S. KAZMARK, or to the survivor thereof.

(2) One-half (½) of my remaining estate unto my wife's son, CLINTON SHANE KRAG, or to his issue per stirpes.

Clerk's Papers (CP) at 244. Earle specifically disinherited his three other children in his will, while Barbara specifically disinherited her estranged son in hers.

The CPA executed by the Kazmarks converted all of their current and subsequently-acquired property to community property. It also provided, as did their wills, that "upon the death of either of the parties hereto, title to all community property . . . shall vest in fee simple in the survivor of them," provided he or she survives for 30 days. CP at 234.

Barbara died in February 2009. Earle did not commence probate proceedings, relying on the CPA to pass title to her property. Then, in mid-July 2009, Earle engaged Mr. Montgomery to draft a new will for him. This 2009 will contained the same bequests to Shane and Earle Jr. of the homes in which they were living as had been included in Earle's and Barbara's 2005 wills, but it left the entire remainder of his estate to Earle Jr. alone. Earle died on July 23, 2009, nine days after executing the new will.

Mr. Montgomery commenced a probate of Earle's 2009 will on behalf of its

personal representatives. Shortly thereafter Shane and Jason filed a petition contesting the will's validity. They initially alleged that Earle had lacked testamentary capacity and that the will was the result of undue influence. Ultimately, however, they challenged the distribution under the 2009 will solely on the basis that Earle and Barbara agreed to make mutual wills in 2005, that they executed their 2005 wills to effectuate their agreement, and that sections IV and V of Earle's 2005 will—reflecting the agreement they had reached as to the ultimate distribution of their combined estates—were therefore binding.

Following a bench trial, the trial court ruled that the evidence clearly established an oral agreement to execute mutual wills, that Earle's 2005 will should be admitted to probate, and that his 2009 will should be vacated.[2] The court's written findings later characterized the evidence supporting the agreement to make mutual wills as not merely clear and convincing, but "overwhelming." CP at 264. The court concluded that the Kazmarks' agreement to make mutual wills was supported by consideration not only

[2] In probating the earlier will, the trial court followed a course of action favored by a minority of courts. A majority of jurisdictions would admit Earle's 2009 will to probate and allow the beneficiaries of the oral contract to bring a claim against the estate for breach of contract, rather than invalidating the will executed in violation of the terms of the contract. This is because wills are always revocable, while a contract to make wills may not be. *See* 1 Page on the Law of Wills § 11.1, at 608, § 11.9, at 632 (rev. 2003); *cf. In re Estate of Krause*, 173 Wash. 1, 8-9, 21 P.2d 268 (1933) ("an action to enforce specific performance of an oral agreement to make a will is in the nature of recovery of property impressed with a trust"). This aspect of the procedure followed by the court leads to the same disposition of Earle's estate and is not challenged on appeal.

through their execution of the wills but also by Barbara's contemporaneous execution of the CPA, whereby Earle immediately acquired a community property interest in her extensive separate property. The court concluded that although the agreement was subject to the statute of frauds in light of the real property covered by the agreement, the part performance exception applied where Barbara not only executed the CPA but also died without having revoked her will.

Earle Jr. and the personal representatives under the 2009 will (hereafter collectively referred to as "Earle Jr.") timely appealed.

ANALYSIS

The Law of Will Contracts, Including Mutual Wills

Reciprocal wills are wills having provisions that mirror each other, but whose parallelism has no legal significance. A testator may change a will that is merely reciprocal at any time. Mutual wills, on the other hand, not only contain mirror provisions but their identical dispositions on the second death reflect an agreement by the testators as to how their estates are to be distributed after both have died, and are executed in order to put that agreement into effect. *See Newell v. Ayers*, 23 Wn. App. 767, 769-70, 598 P.2d 3 (1979); *see also In re Estate of Richardson*, 11 Wn. App. 758, 760, 525 P.2d 816 (1974) (mutual wills exist "[w]hen two parties make an agreement as to the manner of the disposition of their property after both are deceased . . . and

thereafter make such wills" (footnote omitted)). Stated differently, mutual wills are reciprocal wills executed pursuant to a contract. Mark Reutlinger & William C. Oltman, Washington Law of Wills and Intestate Succession § C.1, at 305 (1985).[3] Distinguishing between mutual and reciprocal wills may be difficult, because "even where a contract exists it rarely is incorporated into (or even mentioned in) the wills, so that reciprocal and mutual wills usually are identical in appearance." *Id*. § C.1, at 290.

Like any contract to make a will, a contract to make mutual wills requires mutual assent and consideration to be valid. *Richardson*, 11 Wn. App. at 760. The consideration requirement may be satisfied by the testators' mutual promises to execute wills effectuating the agreed disposition. *Raab v. Wallerich*, 46 Wn.2d 375, 382, 282 P.2d 271 (1955). The contract to make mutual wills may be orally made before executing wills or written into the reciprocal wills themselves. *See, e.g.*, *Auger v. Shideler*, 23 Wn.2d 505, 511, 161 P.2d 200 (1945) (agreement previously made and conveyed to will drafter); *Newell*, 23 Wn. App. at 769 (will providing "'by agreement with my wife . . . who is making a like will, mutually agreed to, in the event my wife predeceases me, I give,

[3] The treatise observes that the Washington courts' use of the term "mutual wills" to mean wills subject to a contract is "by no means a universal usage," noting that the Uniform Probate Code, for example, states that "the execution of 'mutual wills' does *not* create a presumption of a contract not to revoke the wills; that is, 'mutual' means merely 'reciprocal.'" Reutlinger & Oltman, *supra*, § C.1, at 305 n.117 (citing Uniform Probate Code § 2-701).

devise and bequeath'").

If no present consideration has passed between the parties other than their mutual promises or execution of the agreed wills, a will made pursuant to an agreement is unilaterally revocable during the lifetime of the parties, but only after adequate notice to the other party in sufficient time for the latter to make a new will if desired. *Allen v. Dillard*, 15 Wn.2d 35, 51, 129 P.2d 813 (1942); Reutlinger & Oltman, *supra*, § C.3, at 307. If a valid agreement is proven, a party or a beneficiary to the agreement may maintain a suit for specific performance or other appropriate relief. *Allen*, 15 Wn.2d at 45.

Whether a contract to make mutual wills was made is ordinarily a question for the trier of fact. *Newell*, 23 Wn. App. at 769; *see also Saluteen-Maschersky v. Countrywide Funding Corp.*, 105 Wn. App. 846, 851-52, 22 P.3d 804 (2001) (noting that the existence of an oral contract is a factual determination unless the evidence is undisputed); *In re Estate of Wade*, 202 Kan. 380, 387, 449 P.2d 488 (1969) ("it has become firmly established that whether a will was the product of an agreement is a question of fact"). Whether adequate consideration exists is also a factual determination. *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 524, 826 P.2d 664 (1992).

In challenging the court's findings and conclusion that Earle was bound by his agreement with Barbara as to how their estates would be distributed on the death of the

second to die, Earle Jr. assigns error to (1) the trial court's asserted failure to recognize the independent legal validity and enforceability of Earle's and Barbara's CPA; (2) four of the trial court's findings of fact, which he contends are not supported by substantial evidence; and (3) an erroneous conclusion that Earle's and Barbara's oral agreement was not barred by the statute of frauds. We address his assignments of error in turn.

I

Most of Earle Jr.'s legal argument is devoted to his contention that Earle's and Barbara's CPA superseded any oral contract to make mutual wills, a result he claims was ignored by the trial court. Generally, contracts are in conflict if the legal effect of a subsequent contract rescinds an earlier contract and becomes its substitute, making the subsequent contract the only agreement between the parties covering the same subject matter. *Stranberg v. Lasz*, 115 Wn. App. 396, 402-04, 63 P.3d 809 (2003) (recognizing that a CPA was not inconsistent with the wills at issue because they all could be read together); *see also In re Estate of Bachmeier*, 147 Wn.2d 60, 66, 52 P.3d 22 (2002) (reaffirming that a CPA could be rescinded by mutual intent clearly demonstrated through the preparation of mutual wills).

We do not see the conflict between the agreement to make mutual wills and the CPA that Earle Jr. repeatedly claims exists but never identifies. The CPA (unlike the agreement) converted Barbara's separate property to community property. It thereby

affected *which* assets would pass from one spouse to the other on the death of the first to die, but its conversion of assets did not change the fact that the survivor would ultimately own all of the couple's assets by virtue of the combined operation of the CPA and the wills and could therefore make a promise how to distribute them at death. The agreement to make wills, as effectuated by the 2005 wills, went beyond the CPA and addressed the agreed disposition of assets upon the death of the survivor, but it was identical to the CPA as far as the CPA went: it provided that the first to die would leave his or her entire estate to the survivor.

When questioned about the precise conflict at oral argument, counsel for Earle Jr. asserted that the CPA does not provide for contingent beneficiaries and that RCW 26.16.120 requires any modification of the CPA to be in the mode and manner of a deed. But the CPA did not require modification; it covered that part of the parties' agreement that would ordinarily be contained in a CPA. It was not required to cover the parties' entire agreement. And while we see no inconsistency or ambiguity, the trial court nonetheless properly concluded that the CPA should be construed together with the contemporaneous wills, executed to effectuate the parties' agreed disposition of their estates. CP at 267 (Conclusion of Law 3); *see In re Estates of Wahl*, 31 Wn. App. 815, 818, 644 P.2d 1215 (1982) (provisions of a CPA must be construed together with a simultaneous codicil, earlier wills, and the surrounding circumstances to determine the

contractual intent of the parties to the agreement), *aff'd*, 99 Wn.2d 828, 664 P.2d 1250 (1983).

Earle Jr. complains that the trial court failed to consider the independently-operating CPA, but it is Earle Jr. who fails to consider his father's independent agreement with his wife as to the ultimate disposition of their estates as effectuated by his father's independently-operating 2005 will. In light of Earle's and Barbara's agreement to execute mutual wills found by the trial court—an agreement supported by consideration—sections IV and V of Earle's 2005 will, which reflect the agreed disposition on the second death, are specifically enforceable by Shane and Jason. It does not matter that the CPA does not address that part of Earle's and Barbara's agreement. There is no conflict.

II

Earle Jr. next assigns error to four of the trial court's factual findings that he contends are not supported by substantial evidence arguing, first, that the court erred in admitting extrinsic evidence to arrive at any of its findings; second, that three of the challenged findings (findings of fact 12, 17, and 18) are not supported by substantial evidence; and third, that finding of fact 27, construing the residuary clause of the wills, is in error as a matter of law. We address these separate challenges separately.

Admission of extrinsic evidence. Earle Jr. argues that the trial court erred by

admitting extrinsic evidence. We review the trial court's admission of evidence for an abuse of discretion. *Hoskins v. Reich*, 142 Wn. App. 557, 566, 174 P.3d 1250 (2008).

Earle Jr. relies for his argument on cases holding that in interpreting the meaning of a will, the court should not rely on extrinsic evidence unless the testator's intent is ambiguous. *See, e.g.*, *In re Estate of Sherry*, 158 Wn. App. 69, 76, 240 P.3d 1182 (2010) ("If possible, the court must determine the testator's intent from the language of the will as a whole" (citing *In re Estate of Bergau*, 103 Wn.2d 431, 435-36, 693 P.2d 703 (1985))); *In re Estate of Price*, 73 Wn. App. 745, 754, 871 P.2d 1079 (1994) (the testator's intent "should, if possible, be garnered from the language of the will itself" (citing *Bergau*, 103 Wn.2d at 435)). Here, however, the court did not admit and consider extrinsic evidence in order to interpret the terms of the wills. It considered the evidence in order to determine whether the Kazmarks entered into an oral contract to make wills.[4] Indeed, apart from Earle Jr.'s argument that the 2005 wills made no provision for distribution of the estate of a testator who survived his or her spouse by more than 30

[4] Before trial, the court entered an evidentiary ruling that "[t]he parol evidence rule does not preclude Petitioners from offering evidence extrinsic to the October 28, 2005 wills, for the purpose of proving the testators' intent when they executed those wills." CP at 260-61. While this ruling is not clear about the particular "intent" for which the court would consider the evidence, its ultimate findings and conclusions make clear that the evidence was considered for the purpose of determining whether Earle and Barbara had made an agreement to make mutual wills, not to interpret the meaning of Earle's 2005 will.

days (discussed below) there is nothing in sections IV and V of the wills that anyone has suggested is ambiguous.

Admitting evidence as to the existence of an agreement to make mutual wills is clearly permitted, as recognized by cases elsewhere cited by Earle Jr. *See*, *e.g.*, *Arnold v. Beckman*, 74 Wn.2d 836, 841, 447 P.2d 184 (1968) (considering witness testimony when assessing whether testators had orally agreed to make mutual wills); *Auger*, 23 Wn.2d at 511 (recognizing that witness testimony "shows clearly that the minds of the parties had met as to the disposition of their property, and there is no room for doubt that the wills were made pursuant to their agreement"). *See generally Spradlin Rock Products, Inc. v. Pub. Util. Dist. No. 1 of Grays Harbor County*, 164 Wn. App. 641, 655, 266 P.3d 229 (2011) ("the existence of an oral contract and its terms usually depends on the credibility of witnesses testifying to specific fact-based dealings").[5]

Sufficiency of evidence to support findings 12, 17, 18, and 27. We next consider Earle Jr.'s contention that the evidence was insufficient to support findings 12, 17, 18, and 27. The portion of his brief devoted to the sufficiency challenge addresses

[5] Other authority is in accord. 79 Am. Jur. 2d *Wills* §§ 706 (recognizing that "[e]xtrinsic evidence is admissible to show that wills . . . were executed in pursuance of an agreement" and that "[t]he rule that parol evidence is not admissible to change or vary the terms of an unambiguous will does not render inadmissible extrinsic evidence that a will was executed pursuant to a compact"), 715 (stating that mutual wills "may be established by extrinsic evidence such as the testimony of witnesses who know the facts" (footnote omitted)) (2002).

shortcomings in evidentiary support only for finding 12, that

> [t]he evidence at trial was not just clear, cogent and convincing, but was overwhelming, that prior to meeting with Mr. Montgomery about their wills, Barbara and Earle Kazmark had reached an agreement as to how they would bequeath their estate after both were deceased, and had agreed to make wills to put their agreed-upon dispositions into effect.

CP at 264. The Estate of Earle T. Kazmark (Estate) argues that Earle Jr. has presented insufficient argument for us to consider a sufficiency challenge to the remaining factual findings challenged in his assignments of error. Failure to support an assignment of error with appropriate argument and citations to the record waives the assignment. RAP 10.3(a)(5)-(6); *Milligan v. Thompson*, 110 Wn. App. 628, 635, 42 P.3d 418 (2002).

Earle Jr.'s position appears to be that if the evidence is insufficient to support the existence of the critical agreement, then the other findings are of no consequence—with one exception: as to finding 27, he challenges the court's construction of the residuary clause of the wills not as a matter of fact, but as a matter of law. We discuss his legal challenge hereafter. We otherwise agree that he has effectively challenged only finding 12, and it is only the evidence supporting that finding that we need consider.[6]

Ordinarily we review challenged findings of fact for substantial evidence, defined

[6] We therefore do not address his challenge to the court's finding that Barbara's execution of the CPA was consideration for Earle's execution of his will (finding 17) and that in executing their 2005 wills, it was Earle's and Barbara's intent to put into effect their agreement as to the distribution of their individual and combined estates (finding 18).

as the quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). We view the evidence and all reasonable inferences in the light most favorable to the prevailing party. *Korst v. McMahon*, 136 Wn. App. 202, 206, 148 P.3d 1081 (2006). When a trial court bases its findings of fact on conflicting evidence and there is substantial evidence to support the findings entered, we do not reweigh the evidence and substitute our judgment even though we might have resolved the factual dispute differently. *Brown v. Superior Underwriters*, 30 Wn. App. 303, 305-06, 632 P.2d 887 (1980).

When, as here, a challenged factual finding was required to be proved by clear, cogent, and convincing evidence, we apply a heightened substantial evidence review. A party claiming the existence of an oral contract to make mutual wills must prove the existence of that contract to be highly probable. *Cook v. Cook*, 80 Wn.2d 642, 644, 497 P.2d 584 (1972) (reexamining the standard and burden of proof applied by prior cases and settling on the "highly probable" standard currently applied). Washington courts equate the "highly probable" standard of proof to the "clear, cogent, and convincing" standard. *E.g.*, *In re Welfare of Sego*, 82 Wn.2d 736, 739, 513 P.2d 831 (1973). When findings subjected to this burden of proof are appealed, "the question to be resolved is not merely whether there is 'substantial evidence' to support the trial court's ultimate

determination of the factual issue but whether there is 'substantial evidence' to support such findings in light of the 'highly probable' test." *Id*.

Earle Jr. argues that in testing the sufficiency of the evidence, nothing in the record other than Mr. Montgomery's testimony and the documents executed by the Kazmarks in 2005 should be considered. He claims that the only relevant intent is Earle's and Barbara's intent "at the time of execution," and that only Mr. Montgomery's perceptions are sufficiently simultaneous, the testimony of the Kazmarks' close friends and employees as to statements made by the Kazmarks before and after execution being too "diffuse" to illuminate their intent on the date of execution. Br. of Appellant at 29. He cites *Auger*, 23 Wn.2d 505, *Arnold*, 74 Wn.2d 836, and *In re Estate of Campbell*, 87 Wn. App. 506, 510, 942 P.2d 1008 (1997) in support.

The cases cited by Earle Jr. do not support his position that only statements of intent made at the time of executing the wills are relevant. The court in *Auger*, for instance, was concerned about whether the evidence supported a finding that the testators "*prior to the time of making their wills*, had an agreement as to the disposition of their property and to make wills carrying their agreement into effect." 23 Wn.2d at 512-13 (emphasis added). Likewise, nothing in *Arnold* or the handful of other Washington cases discussing mutual wills requires that an agreement to make such wills be reached at the same time the wills are executed and Earle Jr. offers no reason why the agreement could

not precede a request for preparation of the wills. Moreover, Mr. Montgomery's testimony takes on diminished importance in light of his frank acknowledgement that he never discussed with Earle and Barbara whether their common scheme of distribution was an agreed distribution; he simply assumed that they did not want mutual wills because they did not bring it up. Yet the Kazmarks would have no reason to know the term "mutual will." *See Auger*, 23 Wn.2d at 511 (married couple "would have no knowledge of the distinction between a mutual will and just merely a reciprocal will"). Earle Jr.'s argument on this point appears tied to a mistaken belief that the fact of agreement must be written into the wills themselves and yet appears nowhere in the 2005 wills drafted by Mr. Montgomery. But the agreement need not appear in the wills, as already discussed.

Having rejected Earle Jr.'s contention that we must disregard most of the evidence, his position is reduced to an argument that we weigh the evidence differently than did the trial court. The testimony of the Kazmarks' friends, particularly that of Ronald McGuire, Elaine Forster, and Leroy Warner, was evidence from which the trial court could find that an agreement to execute mutual wills was highly probable. Several testified that the Kazmarks represented that their wills would be executed pursuant to agreement and were not to be changed after one of them died. The provisions of the 2005 wills are consistent with an agreement to execute mutual wills, especially given that both parties made

residual bequests to their spouse's children from previous marriages. Finally, the trial court was entitled to consider as some evidence of agreement the natural character of Barbara's estate plan being urged by the Estate, in contrast to Earle Jr.'s suggestion of an unnatural plan: that Barbara conveyed, bequeathed, and devised all of her substantial assets to Earle without any agreement or other provision for Shane and her daughter-in-law and granddaughter, to whom she was close. The trial court's finding is supported by the necessary quantum of evidence.

Finding 27: interpreting sections IV and V of the wills. The trial court's finding 27 states:

> Upon the death of the second to die, Barbara and Earle's October 2005 wills contained substantially identical provisions: other than $1 bequests to certain disinherited children, Barbara and Earle both bequeathed a parcel of real property (valued in the Estate's preliminary inventory at $169,000) to Barbara's son, Shane Krag, and a parcel of real property (valued in the Estate's preliminary inventory at $185,000) to Earle's son, Earle V. Kazmark, leaving the rest, residue and remainder of their estate 50% to Shane Krag, and 50% to be divided equally between Earle's two sons, Jason Kazmark and Earle V. Kazmark.

CP at 266. Although this finding did not directly address whether the Kazmarks agreed to execute mutual wills, it interpreted the 2005 wills to create a virtually identical disposition of the estates on the second death—some evidence of an intent to create mutual wills, although clearly insufficient standing alone. While the trial court labeled this a finding of fact, the interpretation of a will is generally a question of law that we

review de novo. *Woodard v. Gramlow*, 123 Wn. App. 522, 526, 95 P.3d 1244 (2004). A conclusion of law that is erroneously denominated a finding of fact is reviewed as a conclusion of law. *State v. Gaines*, 122 Wn.2d 502, 508, 859 P.2d 36 (1993).

Earle Jr. disputes the trial court's interpretation of sections IV and V of Earle and Barbara's 2005 wills. According to him,

> In the event **neither** spouse survived the other by thirty days, the entire estate of both Earle and Barbara passed to contingent beneficiaries Clinton Shane Krag (50%) and Earle, Jr. and Jason Kazmark (50%). . . . Nothing in either Barbara's or Earle's will provided any bequest to another individual if the surviving spouse survived the decedent by thirty days.

Br. of Appellant at 8. Mr. Montgomery's testimony at trial appears to reflect the same understanding. *See*, *e.g.*, RP (Feb. 15, 2010) at 233. In other words, both Earle Jr. and Mr. Montgomery appear to contend that Earle's will, for example, (1) devised and bequeathed his estate to Barbara if he died first and she survived him for 30 days; (2) devised and bequeathed his estate to Shane, Earle Jr., and Jason as provided by its sections IV and V if he died first and Barbara did not survive him by 30 days; but (3) if Barbara did not survive Earle by 30 days because she died first, would cease to be of any import or effect whatsoever.

Sections III of the couple's 2005 wills set forth their primary bequests to each other. Sections IV and V set forth the alternate bequests to Shane, Earle Jr., and Jason, both specific and residual, "[i]n the event that my [spouse] does not survive me by thirty

(30) days." CP at 238, 244. The plain language of the will does not allow for the meaning urged by Earle Jr. It cannot be read to provide that the alternate disposition provided by sections IV and V was to come into effect in Earle's estate only if he died first or died within 30 days of Barbara's death and was otherwise ineffectual. Rather, the provisions of Earle's will reflect two general schemes of distribution and a third, narrow exception. They reflect his general intent to leave everything to Barbara if he died first. They reflect his general intent that if Barbara died first, his estate be distributed in the manner provided by sections IV and V. They reflect a third, narrow exception, sometimes called a "common accident" exception, that if he died first but she died immediately thereafter (within 30 days), then rather than have everything pour into Barbara's estate for distribution under her will, his estate should pass according to the provisions of sections IV and V. Such a disposition makes sense.

What does not make sense is Earle Jr.'s interpretation, under which he argues that sections IV and V of his father's will do not address what happens to his father's estate if Barbara predeceases him by more than 30 days—an entirely foreseeable scenario, and the one that came to pass. He has not favored us with his view of what would have happened under the 2005 will had the 2009 will never been executed. He argues only that because sections IV and V of the 2005 will would never have controlled the distribution of his father's estate if Barbara predeceased Earle by more than 30 days, then they are no

evidence of Earle's and Barbara's mutual agreement.

We reject Earle Jr.'s challenge to finding 27. It correctly interpreted sections IV and V of the Kazmarks' 2005 wills to provide for the distribution of their estates if (in addition to the common accident scenario) they died more than 30 days after their spouse.

III

Earle Jr. last argues that the Kazmarks' oral agreement to make mutual wills is barred by the statute of frauds and that the part performance exception to the statute cannot save it. "[A]n agreement to make mutual wills is within the statute of frauds, if real property is involved." *Allen*, 15 Wn.2d at 50. The Estate agrees that the Kazmarks' agreement was subject to the statute of frauds in light of their real property holdings, so the dispute presented on appeal is over whether the trial court's findings support its conclusion of law 4, that "[t]here was sufficient part performance" of the parties' agreement to "satisfy the Statute of Frauds." CP at 267. We decide de novo whether a court's findings support the trial court's conclusions of law. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), *overruled on other grounds by Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007).

The equitable doctrine of part performance "prevents a party from asserting the invalidity of a contract where the other party has acted in conformity with the contract and thus placed himself in a position where it would be intolerable in equity to deny its

enforcement." *Stevenson v. Parker*, 25 Wn. App. 639, 643-44, 608 P.2d 1263 (1980). The mere execution of reciprocal wills alone is not sufficient part performance to remove an agreement to make mutual wills from the statute of frauds. *Cummings v. Sherman*, 16 Wn.2d 88, 102-03, 132 P.2d 998 (1943). Instead, the party asserting the exception must demonstrate "sufficient part performance or full performance of the contract." *In re Estate of Fischer*, 196 Wash. 41, 48, 81 P.2d 836 (1938).

Earle Jr. has either not challenged, or not successfully challenged, the several findings of the court that underlie the trial court's conclusion 4. We have rejected his challenges to findings 12 and 17. He has not challenged finding 20, that the CPA immediately converted Barbara's separate property to community property, or its finding 28, that following Barbara's death, Earle became the owner in fee simple of 100 percent of Barbara's estate. We treat unchallenged findings as verities. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

We need not consider whether Barbara's execution of the CPA, thereby converting her separate property to community property, was sufficient part performance, because Washington cases recognize that a spouse who dies first, without having revoked an agreement to make mutual wills, has fully performed. In *Fischer*, a case bearing a striking resemblance to this one, a married couple converted their separate property to community property and, pursuant to an oral agreement, executed mutual wills leaving all

of the property to the surviving spouse and thereafter to agreed-upon beneficiaries. 196 Wash. at 49. After the husband died, the wife executed a new will, naming different beneficiaries. *Id*. at 44-45. Our Supreme Court rejected the notion that the statute of frauds precluded enforcement of the oral agreement, recognizing that the husband had fully performed under the terms of the agreement by having died without altering his promised will. *Id*. at 51-52.

Other cases from this and other jurisdictions are in accord. *Cummings*, 16 Wn.2d at 102-03 (finding sufficient performance to avoid the statute of frauds where spouses made mutual wills pursuant to an oral agreement and the surviving spouse took the other's estate); *Luthy v. Seaburn*, 242 Iowa 184, 190, 46 N.W.2d 44 (1951) (recognizing that where husband and wife made mutual wills pursuant to oral agreement and neither will was revoked during the wife's lifetime, the wife's portion of the contract was fully performed upon her death and thereafter the agreement was not within the statute of frauds); *Brown v. Webster*, 90 Neb. 591, 134 N.W. 185, 189 (1912) (same proposition).

When Barbara died and Earle took possession of her entire estate, her performance of the agreement was completed. The trial court properly concluded that there was sufficient part performance of the parties' agreement to satisfy the statute of frauds.

IV

Both sides request an award of attorney fees from the estate under RCW

11.96A.150 and RAP 18.1. The controlling statute, RCW 11.96A.150, leaves the award of attorney fees to the discretion of the court both at trial and on appeal. *In re Estate of Black*, 116 Wn. App. 476, 488-89, 66 P.3d 670 (2003), *aff'd*, 153 Wn.2d 152, 102 P.3d 796 (2004). We may award attorney fees to either or both parties, and may make the award from a party or the estate. RCW 11.96A.150(1). In making our decision, we may consider any factors we deem relevant. *Id*. An award of attorney fees from the estate may be appropriate where all beneficiaries are involved in the litigation and the action is of benefit to the estate by establishing a definitive determination of their respective rights. *Black*, 153 Wn.2d at 174; *In re Estate of Watlack*, 88 Wn. App. 603, 612-13, 945 P.2d 1154 (1997).

While we agree with the Estate that this case presents no novel issues or close factual disputes, the fact remains that the mutuality of the wills was by an oral agreement, subject to a demanding burden of proof, and in which the appellants' position was supported by the will's drafter. This case is like *Black* and *Watlack* in that the rights of all beneficiaries were at issue. We exercise our discretion to allow both sides to recover, from the estate, for costs and reasonable attorney fees necessarily incurred in this appeal.

Affirmed.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW

2.06.040.

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Siddoway, A.C.J.

WE CONCUR:

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Sweeney, J.

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Brown, J.