SUPERIOR COURT OF WASHINGTON FOR ISLAND COUNTY

In the Estate of: ) NO.

)

XXXXXX ) MEMORANDUM OF LAW IN

) SUPPORT OF MOTION FOR

) ORDER DECLARING

Deceased. ) GIFT DEED INVALID,

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_) NULL, AND VOID

RCW 26.16.030(2) and (3)

COMES NOW, the Personal Representative, XXX, by and through his attorney, PAUL A. NEUMILLER, and respectfully submits the following legal argument and authorities in support of his motion to declare the Gift Deed executed by the Decedent on February 17, 2001, and recorded with the Island County Auditor on XXXX, under Auditor’s File No. XXXXX (the “Gift Deed”), invalid, null and void.

# I. ISSUE

Whether the Gift Deed executed by the Decedent is a proper and valid gift of community real property without the signature or express or implied consent of her husband.

# II. RULE

To be a proper and valid gift of community property, a spouse must have the express or implied consent of the other spouse. To be a proper and valid conveyance of community real property, both spouses must join in the execution of the deed.

Section 26.16.030 of the Revised Code of Washington, in part, states:

26.16.030. Community Property Defined – Management and Control. Property not acquired or owned, as prescribed in RCW 26.16.010 [Separate Property of Husband] and 26.16.020 [Separate Property of Wife], acquired after marriage by either husband or wife or both , is community property. Either spouse, acting alone, may manage and control community property, with a like power of disposition as the acting spouse has over his or her separate property, except:…

(2) Neither spouse shall give community property without the express or implied consent of the other.

(3) Neither spouse shall sell, convey, or encumber the community real property without the other spouse joining in the execution of the deed or other instrument by which the real estate is sold, conveyed, or encumbered, and such deed or other instrument must be acknowledged by both spouses.….

In Nichols Hill Bank v. McCool, Jr., 104 Wn.2d 78, 701 P.2d 1114 (1985) (a copy of which is attached as Attachment “A”), the Washington Supreme Court interpreted RCW 26.16.030(2) where a husband guarantied a loan to a son without his wife’s consent. The loan was discharged in bankruptcy for the son and the bank sought judgment against the husband’s separate property and the husband’s one-half interest in the community property. The trial court dismissed the claim against the husband’s community property. The Supreme Court held that:

RCW 26.16.030(2) specifically requires the consent of both spouses before a gift of community property can be effectuated. If we found that a creditor could reach the donor spouse’s one-half interest in community property, the total amount of that property would be diminished. We would, in effect, be defying the statutory mandate by allowing the community estate to be gratuitously reduced without the consent of both spouses.

*Id.* at 88. The Supreme Court affirmed the trial court judgment dismissing the claim against the husband’s community property solely because the wife had not given consent.

A second case is factually similar to this matter. In Bosone v Bosone, 53 Wn. App. 614, 768 P.2d 1022 (1989) (a copy of which is attached as Attachment “B”), a husband and wife entered into a community property agreement that converted all of their separate assets into community property. Unbeknownst to the wife, the husband deeded their residence to his children from a former marriage. After the husband’s death, his children from the former marriage listed the residence for sale and the surviving spouse brought a quiet title action. The Washington Court of Appeals affirmed the trial court’s *grant of summary judgment* to the wife and declared the deed void and invalid under both RCW 26.16.030(2) (requiring consent of both spouses for gift of community property) and RCW 26.16.030(3) (requiring both spouses to join in and acknowledge a conveyance of community real property.)

# III. APPLICATION

In the present matter, the Decedent and Mr. XXXX took title to their residence as “husband and wife” (see Exhibit “A” of Mr. XXXX’s Declaration) (the “Residence”). On January 22, 1975, the Decedent and Mr. XXXX entered into a “three-prong” community property agreement entitled “Agreement as to Status of Community Property “(see Exhibit “B” of Mr. XXXX’s Declaration) stating, in part, that “all property of whatsoever nature or description whether real, personal or mixed and wherever situated now owned or hereafter acquired by them or either of them shall be considered and is hereby declared to be community property.” The Agreement then states that “upon the death of either of the aforementioned parties title to all community property herein defined shall immediately vest in fee simple in the survivor of them.” There is no question that the Residence was the community property of the Decedent and Mr. XXXX.

Shortly before her death, the Decedent signed and recorded the Gift Deed giving all of her community property interest in the Residence to her son from a previous marriage and to her sister, without Mr. XXXX’s signature, express or implied consent, or knowledge (see Exhibit “C” of Mr. XXXX’s Declaration.)

# IV. CONCLUSION

Mr. XXXX respectfully submits that, as a matter of law, the Gift Deed is invalid and should be declared invalid, null, and void because it is an invalid gift of community real property without his signature or express or implied consent in violation of RCW 26.16.030(2) and RCW 26.16.030(3) and Washington cases construing these RCW sections.

Respectfully submitted this \_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_, 20.

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PAUL A. NEUMILLER, WSBA #28124

Attorney for Personal Representative