

E FILED
OCT 03 2016
WASHINGTON STATE
SUPREME COURT

No. 93665.0

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 72758-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

E

FILED
September 12, 2016
Court of Appeals
Division I
State of Washington

In re the Estate of:
RANDAL J. LANGELAND,
Deceased,
JANELL BOONE,
Petitioner,
v.
SHARON DROWN,
Respondent.

CONDITIONAL REQUEST FOR REVIEW

SMITH GOODFRIEND, P.S.

By: Catherine W. Smith, WSBA No. 9542
Howard M. Goodfriend, WSBA No. 14355

1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974

Attorneys for Helsell Fetterman, LLP

TABLE OF CONTENTS

A.	Identity of Aggrieved Party.....	1
B.	Court of Appeals Decision.	1
C.	Facts relevant to the Helsell firm's conditional request for review.	1
D.	Argument in support of conditional request for review. (RAP 13.4(b)(4)).....	6
E.	Conclusion.	9

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>In re Estate of Langeland</i> , 177 Wn. App. 315, 312 P.3d 657 (2013), <i>rev.</i> <i>denied</i> , 180 Wn.2d 1009 (2014)	2, 5
Statutes	
RCW Title 11.....	8
RCW 11.28.120	2
Rules and Regulations	
RAP 7.2.....	7
RAP 8.1.....	7
RAP 12.8.....	6
RAP 13.4.....	6, 9

A. Identity of Aggrieved Party.

The law firm of Helsell Fetterman, LLP (“the Helsell firm”), asks this Court to authorize the firm to participate in this case as a party in the event the Court grants petitioner Janell Boone’s petition for review. The Helsell firm was not a party in the trial court or on appeal, but is aggrieved by the Court of Appeals’ published decision, which adversely and directly affects the firm’s professional reputation and standing and required restitution of funds the Helsell firm had withdrawn from the superior court registry in reliance on trial court orders that were not superseded on appeal.

B. Court of Appeals Decision.

The Helsell firm timely sought reconsideration of the Court of Appeals’ July 18, 2016 published decision, which is attached as Appendix A and cited by paragraph number in this pleading. The Court of Appeals denied the Helsell firm’s motion for reconsideration on August 12, 2016. (Appendix B)

C. Facts relevant to the Helsell firm’s conditional request for review.

This was a dispute between petitioner Janell Boone, the adult daughter and sole intestate heir of the decedent Randal Langeland, and respondent Sharon Drown, who was determined to have an interest in assets held in Langeland’s estate by virtue of their

committed intimate relationship in the first appeal in this matter. *In re Estate of Langeland*, 177 Wn. App. 315, 329, ¶ 27, 312 P.3d 657 (2013), *rev. denied*, 180 Wn.2d 1009 (2014) (*Langeland I*). The Helsell firm represented Boone, who had been appointed personal representative of her father's estate pursuant to RCW 11.28.120(2) in 2009.

The trial court after a trial in 2011 initially rejected most of Drown's claims against Langeland's estate, holding that the estate's assets would ultimately go to Boone as the intestate decedent's sole heir. (CP 1312-17) The trial court reinstated Boone as personal representative in August 2011 and directed the clerk to distribute estate assets being held in court registry towards Boone's substantial fees. (CP 1540-47)

In her 2011 motion for attorney fees, Boone had sought to shift to Drown \$104,710.80 of her total fees and costs of \$113,083.05. (CP 1340, 1482) Boone also asked that she "be permitted to pay her reasonable attorney's fees and costs out of the Court Registry pending later payment of said fees and costs by Sharon Drown." (CP 1336, 1340) The trial court granted both Boone's requests for relief on August 12, 2011. The trial court awarded fees against Drown, but limited her liability for fees to \$70,000, entering "Judgment in the

amount of \$70,000 . . . against Sharon Drown in favor of the Estate,” and directed the clerk to pay to the Helsell firm “from the court registry \$98,035.80 or as much as is contained therein.” (CP 1544)

The trial court’s August 2011 order authorized the Helsell firm to withdraw “as much as is contained” in the court registry because all of the funds contained in the registry were, under the trial court’s analysis, Langeland estate funds. On August 24, 2011, the Helsell firm withdrew \$101,498.82, all that was then contained in the court registry. When the Helsell firm withdrew funds from the court registry under the trial court’s August 12, 2011 order, Drown had no established equitable interest in those funds, which the trial court had held to be property of an estate in which Boone was the sole beneficiary, and which Boone had successfully defended against Drown’s claims. The Helsell firm’s actions were in full compliance with the terms of the trial court’s August 12, 2011 order as those terms were understood by the parties and the trial court at that time.

The Court of Appeals’ decision that petitioner Boone asks this Court to review takes the Helsell firm to task for failing to acknowledge that the August 12, 2011 order contained a “scrivener’s error” by withdrawing \$101,498.82 from the court registry (App. A ¶31), characterizing that amount as “excess funds” that included

\$2,732 of Drown's supersedeas payments (¶32), and for failing to file a satisfaction of judgment. (¶31 n.28) In criticizing the Helsell firm's actions in its published opinion, Division One overlooked or misapprehended the record, in which the trial court clearly expressed its intent to authorize the Helsell firm to withdraw from the court registry estate funds sufficient to pay its fees. (CP 1544-45, 1858, 2057-58)

Further, no portion of the funds withdrawn by the Helsell firm were Drown's supersedeas funds when the withdrawal was authorized, and the court registry contained no "supersedeas funds" when the Helsell firm withdrew estate funds on August 24, 2011. The supersedeas order entered on October 25, 2011 stayed only enforcement of the portion of the judgment requiring Drown to vacate house, "on the condition that Sharon Drown pay a monthly sum of \$683 into the Registry of this Court pending appeal." (CP 1608) The trial court's supersedeas order specifically did "not stay enforcement" of the \$70,000 fee judgment entered against Drown on August 26, 2011 in accord with the trial court's August 12 order. (CP 1608)

Division One's 2013 decision in the first appeal held that "the contested probate assets" in the Langeland estate were "jointly

owned” by Drown and Langeland. *Langeland I*, 177 Wn. App. at 329, ¶ 27. Drown never argued in the first appeal that the Helsell firm’s removal of funds from the court registry pursuant to the August 2011 trial court orders was improper. In *Langeland I*, Division One simply remanded to the trial court to “reconsider the proper distribution of the jointly acquired assets and the issue of attorney fees.” 177 Wn. App. at 331, ¶ 34.

On remand, the trial court in October 2014 confirmed that the Helsell firm had been entitled to “withdraw estate assets being held in the court registry and apply those assets” to fees and costs incurred. (CP 2070) The trial court declined to order restitution of the funds withdrawn by the Helsell firm from the court registry pursuant to the August 2011 orders on the grounds that “Sharon Drown paid no portion of the August 26, 2011 Judgment entered against her in the amount of \$70,000.” (CP 2070) Thereafter, the trial court entered amended findings of fact and conclusions of law, awarded half of “joint property assets” to Drown (App. A. ¶ 11), and vacated its award of attorney fees against Drown. (¶ 13)

In a second appeal by both Boone and Drown, Division One held that the trial court had erred in denying Drown restitution for the amounts the Helsell firm had withdrawn from the court registry,

and remanded for entry of judgment in favor of Drown. (App. A ¶45)
On August 5, 2016, the Helsell firm deposited \$101,498.82 with the
Whatcom County Superior Court registry pursuant to the Court of
Appeals' decision ordering restitution.

D. Argument in support of conditional request for review. (RAP 13.4(b)(4))

If this Court accepts review, it should pursuant to RAP 13.4(b)(4) consider the propriety of the Helsell firm's reliance on the trial court's orders, which expressly approved its fees for services that benefitted the estate and authorized it to be paid from estate funds that were being held by the superior court clerk. The Helsell firm was entitled to rely on the trial court's orders, including its order that Drown had not satisfied the judgment and was "not entitled to restitution under RAP 12.8" (CP 2070), until those orders were reversed by the decision from which Boone seeks review. The implication in Division One's published decision that the Helsell firm engaged in "sharp practice" or took advantage of a clerical error by removing more than the amount of the fee judgment against Drown from the court registry, or by failing to file a satisfaction of judgment, is unwarranted and should be corrected in any decision by this Court.

The Helsell firm's actions were in full compliance with the terms of the trial court's August 12, 2011 order as those terms were

understood by the parties and the trial court at that time. The order was entered after a contested hearing where counsel for Drown appeared, argued, and then signed the order. (CP 1547) Drown did not supersede the trial court's August 12, 2011 order authorizing payment of the funds in the court registry to the Helsell firm pending appeal. (CP 1608)

Under RAP 8.1(b), "[a] trial court decision may be enforced pending appeal or review unless stayed pursuant to the provisions of this rule." RAP 7.2(c) provides that "[a]ny person may take action on the validity of a trial court judgment or decision until enforcement of the judgment or decision is stayed . . .". Therefore, the Helsell firm was entitled to rely on the trial court's August 12 order that directed the superior court clerk "to distribute from the court registry \$98,035.80, or as much as is contained therein . . . to Helsell Fetterman, LLP in payment of outstanding fees and costs herein" (CP 1544) when it removed funds from the court registry on August 24, 2011.

Until Division One's 2013 decision, Drown's interest in assets titled in Langeland had not been established. The trial court held following trial in 2011 that they were assets of the Langeland estate. (CP 1291: ordering Drown's counsel to "pay all estate funds under his

control” into the court registry) Moreover, the trial court confirmed on remand in October 2014 that the Helsell firm was entitled to “withdraw estate assets being held in the court registry and apply those assets to the fees and costs incurred,” and that “Sharon Drown paid no portion of the August 26, 2011 Judgment entered against her in the amount of \$70,000,” rejecting as not supported by the record “Drown’s allegations that Helsell Fetterman, LLP withdrew estate assets from the court registry without authority or notice to the parties or this court.” (CP 2070)

The Helsell firm has complied with the Court of Appeals’ decision ordering restitution on the grounds it would be inequitable to deprive Drown of funds in which Drown had an undivided interest arising from her committed intimate relationship with the decedent. (App. A ¶44) But any inequity justifying restitution was a function of the interplay between RCW Title 11, which governs the rights of spouses and other statutory beneficiaries in a decedent’s property, and the common law property rights of parties in committed intimate relationships, which are not self-executing but necessarily become vested only upon a court order or decree. Any inequity was not the consequence of misconduct by the Helsell firm in acting in reliance on trial court orders.

E. Conclusion.

Any inequity justifying the lower court's restitution decision does not arise from any overreaching by the Helsell firm, and any decision of this Court should correct the implications of Division One's published opinion to the contrary. If it accepts review on Boone's petition, pursuant to RAP 13.4(b)(4) this Court should also address the enforceability of un-superseded orders pending appeal and hold that the Helsell firm properly acted pursuant to valid and enforceable court orders in withdrawing and retaining estate assets.

DATED this 12th day of September, 2016.

SMITH GOODFRIEND, P.S.

By: 

Howard M. Goodfriend
WSBA No. 14355
Catherine W. Smith
WSBA No. 9542

1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974

Attorneys for Helsell Fetterman, LLP

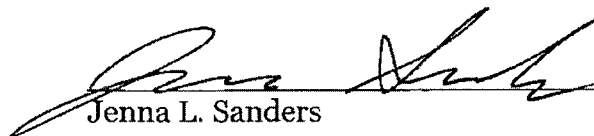
DECLARATION OF SERVICE

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

That on September 12, 2016, I arranged for service of the foregoing Conditional Request for Review, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-File
Douglas R. Shepherd Shepherd and Allen 2011 Young Street, Suite 202 Bellingham, WA 98225 dougshepherd@saalawoffice.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Michael B. King Gregory M. Miller Carney Badley Spellman PS 701 5th Ave Ste 3600 Seattle WA 98104-7010 king@carneylaw.com miller@carneylaw.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Michael L. Olver Helsell Fetterman LLP 1001 4th Avenue, Suite 4200 Seattle, WA 98154 molver@helsell.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

DATED at Seattle, Washington this 12th day of September, 2016.


Jenna L. Sanders

KeyCite Yellow Flag - Negative Treatment
Distinguished by Metropolitan Life Insurance Company v. Sumner,
W.D.Wash., August 5, 2016

2016 WL 3919687

Only the Westlaw citation is currently available.
Court of Appeals of Washington,
Division 1.

In the Matter of the Estate of Randall J. Langeland,
Janell Boone, Appellant/Cross-Respondent,
v.
Sharon Drown, Respondent/Cross Appellant.

No. 72758-3-I

|
(Consolidated with No. 72759-1-I)

|
FILED: July 18, 2016

Appeal from Whatcom County Superior Court, Docket
No: 09-4-00039-9, Honorable Ira J. Uhrig.

Attorneys and Law Firms

Michael L. Oliver, Kameron Lee Kirkevold, Helsell
Fetterman LLP, 1001 4th Avenue, Suite 4200, Seattle,
WA, 98154-1154, Douglas Ross Shepherd, Bethany C.
Allen, Kyle Scott Mitchell, Shepherd and Allen, 2011
Young Street, Suite 202, Bellingham, WA, 98225-4052,
Counsel for Appellants.

Douglas Ross Shepherd, Bethany C. Allen, Shepherd and
Allen, 2011 Young St. Suite 202, Bellingham, WA, 98225-
4052, Kameron Lee Kirkevold, Michael L. Oliver, Helsell
Fetterman LLP, 1001 4th Avenue Suite 4200, Seattle, WA,
98154-1154, Counsel for Respondent.

Opinion

Leach, J.

*1 ¶ 1 In this second appeal, Janell Boone and Sharon Drown seek review of different decisions made by the trial court after remand from the first appeal. Boone contends that the trial court should have found that her father and Drown had a separate property contract. Alternatively, Boone claims that the trial court mischaracterized property, exceeded its authority when dividing property, and erred in awarding Drown attorney

fees. Drown contends that the trial court should have required Boone's counsel to repay funds delivered to it from the court registry by the court clerk.

¶ 2 Because this court already decided as a matter of law that the property acquired during the Langeland/Drown relationship was joint property subject to equitable division, we reject Boone's arguments about any separate property agreement under the law of this case. The trial court awarded Drown only joint property. Thus, it did not erroneously award her Langeland's separate property. Because Boone did not ask the trial court to include property that Drown acquired or held during the relationship until her motion to reconsider the trial court's order on remand, we decline to consider that challenge now. The trial court reasonably concluded that Boone's motion to reconsider lacked a foundation in fact or law. Thus, it did not abuse its discretion in awarding Drown attorney fees for defending that motion. But the trial court denied Drown restitution for attorney fees that Boone's counsel withdrew from the court registry based on untenable grounds. We reverse the trial court's restitution decision and remand for the trial court to enter judgment for Drown. Finally, we award Drown attorney fees for this appeal, as permitted by RCW 11.96A.150.

FACTS

¶ 3 Sharon Drown and Randall Langeland shared a committed intimate relationship (CIR) from 1991 until Langeland's death in January 2009. The two lived together and shared household duties and expenses. They maintained separate bank accounts. They tracked their monthly expenses, from groceries to health insurance, and paid one another the difference at the end of each month.

¶ 4 Drown and Langeland bought a house in Bellingham in 1999. Langeland paid \$148,500 of the \$158,500 initial purchase price, and Drown paid the other \$10,000. Drown signed a promissory note for \$40,000 with seven percent interest in favor of Langeland. She also signed a deed of trust securing the note. The note required monthly payments, which Drown paid until 2008. Drown and Langeland paid equally the house expenses, including property taxes, improvements, and house maintenance. Due to Langeland's declining health, Drown had primary responsibility for upkeep and maintenance.

¶ 5 Langeland formed a software business, J. Randall & Associates, in 1994. Drown performed office work for the company from then until Langeland's death.

¶ 6 Drown and Langeland bought a sailboat together in 1998. To pay it off, in 2002 they took out a \$65,000 equity loan secured by the house.¹

*2 ¶ 7 Langeland became ill in 1998. From 2003 until his death, he required daily medication and care as his medical condition became more complicated. Drown cared for him. She also maintained the home and sailboat, while continuing to work full time.

¶ 8 Langeland died intestate in January 2009, survived by Drown and his daughter, Janell Boone. Each asserted claims against Langeland's estate. After a bench trial in May 2011, the trial court concluded that Drown owned half of the personal property listed as jointly owned in the estate inventory and was entitled to 24.7 percent of the house's sale proceeds. The court awarded Boone attorney fees from the estate.

¶ 9 Drown appealed. In October 2013, this court reversed in part and remanded. We held that the presumption that property a couple acquires during a CIR is jointly owned prevails over any presumption about the correctness of the estate inventory.² We further held that Boone failed, as a matter of law, to rebut the joint property presumption as to three contested assets, the house, sailboat, and proceeds from the software company.³ We remanded for the trial court to reconsider the proper distribution of joint assets and the issue of attorney fees.⁴

¶ 10 On remand, the trial court entered amended findings of fact and conclusions of law (FFCL). The trial court found, consistent with this court's decision, that the assets Drown and Langeland acquired during the CIR were joint property. It further concluded that the contract regarding the house "was not executed by Drown or made freely, voluntarily and upon independent advice with full knowledge of her rights"; that Drown signed it without "full candor and sincerity" beforehand; and that Drown and Langeland did not follow the contract's terms.

¶ 11 The trial court awarded Drown half of the joint property assets. It also found that equity required it to distribute most of the estate's half of the joint property

assets to Drown. This included the other half interest in the house, the company bank account, the estate bank account, a 2007 Toyota, and household personal property. The trial court awarded Boone the estate's half of the proceeds from sale of the sailboat and a 2002 Honda.

¶ 12 Boone challenges the amended FFCL. She asks this court to enforce the alleged agreement between Drown and Langeland to keep their property separate and their agreement about the house. She also asks this court to reverse the trial court's award of \$9,187 to Drown for having to defend against Boone's motion to reconsider the amended FFCL.

¶ 13 Although the trial court awarded most of the estate assets to Drown on remand and vacated its \$70,000 attorney fee award against her, it declined to order that Boone's counsel, Helsell Fetterman LLP, repay the funds it withdrew from the court registry to pay this award. Drown cross appeals, asking this court to remand for the trial court to enter judgment against Boone and her counsel, Helsell Fetterman.⁵

STANDARD OF REVIEW

*3 ¶ 14 We review the trial court's characterization of property a couple acquired during a CIR de novo.⁶ We review the trial court's fact findings for substantial evidence, without weighing the evidence or making our own factual findings.⁷

¶ 15 We review the legal basis for awarding attorney fees de novo.⁸ We then review the trial court's discretionary decision to award attorney fees and the reasonableness of the amount for abuse of discretion.⁹

ANALYSIS

Law of the Case

¶ 16 As a preliminary matter, Drown contends that the law of the case doctrine bars Boone's challenges to the trial court's characterization of the contested assets as joint property. We agree. This court generally applies the law of the case doctrine to preclude successive reviews of issues

that a party raised, or could have raised, in an earlier appeal in the same case.¹⁰

¶ 17 Boone contends that we did not consider, in the first appeal, the issues she raises here. She argues that this court decided only the correct presumption to apply and that Boone did not rebut that presumption by tracing the funds used to purchase the contested assets to Langeland's separate property. She contends that neither the separate property agreement nor the house agreement was at issue at trial or on appeal, so she should be allowed to assert them now.¹¹

¶ 18 We disagree. The law of the case precludes her arguments about the separate property agreement and house agreement. We previously held that “[a]s a matter of law, Boone failed to overcome the joint property presumption with respect to all three contested probate assets”—the business, house, and sailboat.¹² In doing so, we necessarily rejected the arguments Boone advances now, that the separate property agreement prevented Drown and Langeland from accumulating any joint property and that the alleged house agreement gave them separate interests in the house. Thus, we “actually decided”¹³ the issues Boone now raises again.

¶ 19 Boone not only raises issues this court already decided, but she also reasserts the same arguments that she asserted in the prior appeal. Drown had challenged the trial court's finding that she and Langeland had a separate property agreement. In response, Boone argued, as she does now, that Drown and Langeland “manifested an intent to maintain the separate character of their property,” and that “throughout their relationship, [they] split every expense equally between the two of them.” Boone also argued, as she does now, that Drown and Langeland had a contract that established the house as separate property.

*4 ¶ 20 The law of the case doctrine is discretionary, and Boone suggests it would be a “manifest injustice” not to enforce the purported agreements here.¹⁴ But declining to enforce the asserted agreements does not “result in manifest injustice” because the equities heavily favor Drown. Also, Boone's arguments lack merit. First, if we were to reach the merits of Boone's separate property agreement claim, we would find that the record contains insufficient evidence to prove this agreement

existed. An agreement to manage property separately is not the same as an agreement to convert property that is presumptively joint into separate property.¹⁵ The evidence Boone identifies as proof of the alleged agreement proves, at most, an agreement to manage property separately. The record contains no evidence that Drown or Langeland intended or attempted to change the ownership of the property they acquired together.¹⁶ Second, the record belies Boone's assertion that Langeland “carefully negotiated” the purported house agreement. Drown's testimony showed that she did not understand the terms or the purpose of the agreement Boone now asserts. Thus, substantial evidence supports the trial court's findings that that agreement was not executed freely and voluntarily or with full candor and sincerity toward Drown. Additionally, the record contains no evidence that Drown and Langeland intended to convert their jointly owned earnings into separate interests in the house. No injustice results from our refusal to reconsider the alleged agreements here.

Langeland's “Separate Property”

¶ 21 Boone next contends that the trial court erred in concluding that it had “‘the power to award Langeland's separate property to Drown’ ” and then awarding that “‘separate property in its entirety to Drown.’ ”

¶ 22 Washington law “require[s] equitable distribution of property that would have been community property had the partners been married.”¹⁷ All the partners' joint property is subject to equitable division, regardless of which partner acquired it or holds title to it.¹⁸ But Washington courts also recognize that because “equity is limited,” the trial court may not distribute a partner's separate property.¹⁹ This includes property the partner acquired before the relationship and property acquired “by gift, bequest, devise, or descent” during the relationship.²⁰

¶ 23 The trial court thus could not award Langeland's separate property to Drown. The trial court's statement that it had the power to award Langeland's separate property in equity is wrong. Boone contends that upon Langeland's death, his interest in joint property became his separate property and was no longer subject to equitable distribution by the court. Our Supreme Court has rejected the argument that the death of one

partner extinguishes the other partner's right to equitable distribution of that joint property.²¹ The trial court awarded Drown only part of her and Langeland's joint property. It had the power to award that property to Drown in equity, and it did not abuse its discretion in doing so.²²

Joint Property Held by Drown

¶ 24 Next, Boone asserts that the trial court erred in ordering distribution of estate assets without considering property that Drown acquired during the CIR.

¶ 25 We agree that all of Drown and Langeland's jointly acquired assets were subject to equitable distribution, including those that Drown acquired or held title to.²³ However, Boone prepared the inventory of Langeland's assets. This included his interest in joint property. As Boone acknowledges, the estate inventory here did not include Drown's assets. Boone did not challenge the inventory through trial, an appeal, and remand.²⁴ "Matters not urged at the trial level may not be urged on appeal."²⁵ We therefore decline to consider Boone's argument made for the first time in this second appeal.

Attorney Fees for Opposing Boone's Motion To Reconsider

*5 ¶ 26 After denying Boone's motion to reconsider its amended FFCL, the trial court ordered Boone to pay Drown \$9,187 for attorney fees under RCW 11.96A.150. Boone contends the trial court abused its discretion in doing so.

¶ 27 RCW 11.96A.150(1) gives the trial court discretion to award costs it "determines to be equitable," including attorney fees to any party from another party or the estate.

¶ 28 The trial court explained that Boone's motion asked it "to ignore the binding Court of Appeals decisions in this case." It further explained that Boone's motion contended that the court should not have issued its amended FFCL without an evidentiary hearing, even though she had asked the court to enter her own proposed FFCL without a hearing.

¶ 29 This court's opinion bound the trial court on remand. It followed that opinion with its amended FFCL. Boone's motion for reconsideration merely repeated arguments

that were unsuccessful before. The trial court did not abuse its broad discretion in awarding Drown attorney fees under RCW 11.96A.150.

Restitution for Drown

¶ 30 Drown cross appeals. She claims that the trial court erred in denying restitution of the estate funds withdrawn from the court registry and paid to Helsell Fetterman for the now-vacated attorney fee award.

¶ 31 In June 2011, after Drown lost at trial, her counsel paid into the court registry all the estate funds under his control.²⁶ In August 2011, the trial court heard Boone's motion for \$98,035.80 for fees and costs. It awarded \$70,000.00, but through a mistake failed to correct the amount in parts of Boone's proposed order that it signed. As a result, the court directed its clerk to pay to Helsell Fetterman \$98,035.80 in attorney fees and costs from the court registry, "or as much as is contained therein."²⁷ Helsell Fetterman, nonetheless, withdrew \$101,498.82 from the registry on August 24, 2011.²⁸ The record provides no explanation why Helsell Fetterman did not return the excess funds to the clerk.

¶ 32 The trial court also ordered Drown to continue paying \$683 per month into the court registry to supersede the judgment that the house belonged to the estate.²⁹ When this court remanded the case in October 2013, Drown had paid \$28,003 into the registry as supersedeas. Because of Helsell Fetterman's withdrawal, however, the registry contained only \$25,271. In her cross appeal, Drown asks for the \$2,732 difference and an amount equal to the estate funds ultimately awarded to her by the trial court.

*6 ¶ 33 In the first appeal, we vacated the \$70,000 fee award against Drown. Accordingly, Drown asked on remand that the trial court order restitution for the amount Helsell Fetterman withdrew.³⁰ The trial court denied Drown's request. It decided that she was not entitled to restitution under RAP 12.8 because she had not paid any of the \$70,000. The trial court further found that the record did not show that Helsell Fetterman lacked authority to withdraw estate assets from the court registry. It explained that Helsell Fetterman was acting pursuant to court order.³¹ It further explained, in denying Drown's motion to reconsider, that the fees it authorized the clerk

to pay Helsell Fetterman from the estate were to defend the estate against Drown's claims.

¶ 34 In addition to the missing supersedeas funds, Drown contends that Helsell Fetterman owes her \$61,085.50, the portion of the withdrawn funds she says this court determined belonged to her. In the first appeal, we awarded Drown \$3,896.83 for costs under RAP 14.4. Drown contends that the trial court thus erred in denying her a judgment of \$67,714.33 plus 12 percent interest.³²

¶ 35 This court reviews a trial court's decision about restitution under RAP 12.8 for abuse of discretion.³³ The rules of appellate procedure “ ‘will be liberally interpreted to promote justice.’ ”³⁴ Restitution is an equitable remedy, and the trial court should award it “in appropriate circumstances” when a party “partially or wholly satisfied a trial court decision” that this court then modified or reversed.³⁵ To identify “appropriate circumstances,” Washington courts look to the common law of restitution as the Restatement of Restitution § 74 (Am. Law. Inst. 1937) describes it:³⁶ “ ‘A person who has conferred a benefit upon another in compliance with a judgment ... is entitled to restitution if the judgment is reversed or set aside, unless restitution would be inequitable or the parties contract that payment is to be final.’ ”³⁷ This rule is subject to an exception where restitution “would not serve the purpose of remedying unjust enrichment.”³⁸

¶ 36 In In re Marriage of Mason,³⁹ this court held that an ex-husband was entitled to restitution from his ex-wife's trial attorney after the attorney's fee award was reversed on appeal. The trial court originally ordered the ex-husband to pay the attorney directly, under RCW 26.09.140, and named the attorney as a judgment creditor.⁴⁰ Noting that the attorney was a “judgment creditor in his own right” under that judgment, this court held that restitution under RAP 12.8 was appropriate.⁴¹

*7 ¶ 37 The Supreme Court clarified the scope of Mason in Ehsani v. McCullough Family Partnership,⁴² where it held that an attorney was not liable in restitution for fees he had received as proceeds of a judgment that was later reversed. The trial court initially awarded the defendants judgment against the plaintiff, who paid the

amount of the judgment into the client trust account of the defendants' attorney. Then, at the defendants' direction, that attorney distributed those funds to the defendants' creditors, including himself. The plaintiff successfully appealed the judgment. On remand, the plaintiff asked the trial court to order the attorney to return the fees as restitution.⁴³ The Supreme Court held that, unlike in Mason, these were not “appropriate circumstances” for restitution under RAP 12.8.⁴⁴

¶ 38 The Supreme Court acknowledged the general rule that a person who has paid a judgment to another “is entitled to restitution if the judgment is reversed.” But the court identified an exception to this rule that applies when restitution “would not serve the purpose of remedying unjust enrichment.”⁴⁵ The court held this to be the case where a judgment creditor's attorney receives judgment proceeds from his client and retains them as payment for legal services. In this case, the court explained, that attorney “ ‘received the money as a bona fide purchaser’ ... under the terms of a valid, preexisting agreement with the judgment creditor.”⁴⁶ Thus, the clients (judgment creditors), but not the attorney, were liable in restitution under RAP 12.8.⁴⁷ The court explained, “Mason actually stands for the more limited proposition that an attorney paid pursuant to a statutory scheme making him a real party in interest may be liable in restitution for the amount of his fees when the trial court's favorable judgment is subsequently reversed.”⁴⁸

¶ 39 This court distinguished Ehsani when it affirmed a restitution award in Arzola v. Name Intelligence, Inc.⁴⁹ The trial court had decided that the amounts an employer owed its employees were wages and awarded the employees attorney fees under wage-claim statutes.⁵⁰ This court reversed that decision. On remand, the trial court awarded the employer restitution for the attorney fees. This court affirmed that restitution decision. We reasoned that the judgment was not paid directly to the attorney's client trust account, as in Ehsani, but instead “itself awarded attorney fees to the lawyers as part of a statutory scheme.”⁵¹ We noted that the trial court erred by awarding fees under the statute. We reasoned that it would be inequitable to make the employer bear the cost of the employees' attorney fees.⁵²

¶ 40 Here, the trial court abused its discretion in refusing to order restitution for the vacated attorney fee award. First, Boone and the trial court are incorrect that Drown did not pay any of the \$70,000 judgment against her. Whether the funds Helsell Fetterman withdrew came from the court registry or Drown's bank account, the record shows that Boone, Drown, and the trial court all understood the attorney fee award to be a transfer from Drown to Boone.⁵³ Because the trial court finally determined on remand that Drown owned the majority of the estate assets, most of the money Helsell Fetterman withdrew from the court registry in August 2011 belonged to Drown.

*8 ¶ 41 Second, Boone and the trial court are also incorrect that the registry's payment to Helsell Fetterman was an administrative expense of the estate. Helsell Fetterman did not represent the estate at any time when the firm was accruing the awarded fees and costs. The court revoked Boone's letters of administration in February 2009. It appointed Carol Lenington personal representative. She hired separate counsel, Brian Hansen. Boone asserts that a brief exchange of letters with Hansen gave Helsell Fetterman authority to defend the estate. But those letters cannot reasonably be construed to state this: Hansen did not approve of Boone defending against any or all claims against the estate. He said only that the estate did "not object" to Boone's seeking recoupment of an IRA (individual retirement account).⁵⁴ Moreover, Hansen demanded that Boone hold the estate harmless for her attorney fees. Both Hansen and Lenington later attested that they did not request, approve, or receive notice that Helsell Fetterman would defend against Drown's claims or otherwise represent the estate. They added that they would not have approved this action had they known about it. Instead, Lenington noted, the only nonadministrator to work for the estate's benefit was Drown.

¶ 41 Thus, the record shows that Boone and Helsell Fetterman did not represent the estate between February 2009 and June 2011. The statutes the trial court cited to support its attorney fee award apply only to expenses for "a personal representative" and its attorney or to "costs of administration." Therefore, the trial court erred in awarding the fees to Helsell Fetterman under RCW 11.48 and 11.76.⁵⁵

¶ 42 Boone nonetheless contends that Ehsani precludes restitution here. She contends Mason does not apply because Helsell Fetterman did not receive payment directly from Drown under a statutory scheme making the firm a real party in interest.

¶ 43 Again, we disagree. Helsell Fetterman, like the attorney in Mason, received attorney fees through a court order directing that the fees be paid to it under statutes providing for attorney fees to be paid directly to the attorney.⁵⁶ This made the firm a "real party in interest" in the Ehsani court's words. The trial court directed the clerk to pay the fees directly to Helsell Fetterman, not to a client trust account as in Ehsani. As in Arzola, the trial court's statutory basis for the fees was wrong.⁵⁷

¶ 44 Finally, it would be inequitable to allow Helsell Fetterman to keep Drown's supersedeas funds or the assets the trial court determined belong to Drown.⁵⁸ The trial court allowed Helsell Fetterman to withdraw \$31,498.82 based on a clerical error, then declined to remedy that error. Helsell Fetterman offers no reasonable justification for keeping these funds. This court vacated the \$70,000.00 fee award, which, in any case, the trial court had based on the false premise that Boone and Helsell Fetterman represented the estate. Allowing Helsell Fetterman to keep those funds would deny Drown the practical benefit of her successful appeal and cause her to pay her unsuccessful opposing party's legal expenses. Drown, who shared her life with Langeland and cared for him during nearly a decade of illness, would receive nothing from the estate except Langeland's half of the house. Restitution is meant to remedy just this type of unfairness.⁵⁹

CONCLUSION

¶ 45 The law of this case precludes Boone's two main arguments, as this court previously held that she failed to overcome the joint property presumption with respect to the contested assets. Boone's remaining arguments lack merit. We reverse the trial court's denial of Drown's restitution request because the trial court based its conclusion that Drown is not entitled to restitution on untenable grounds. We therefore remand for the trial court to enter judgment for Drown with an interest rate in accord with RCW 4.56.110(4).⁶⁰ And considering

the same equities that compel restitution for Drown, we award Drown attorney fees for this appeal.⁶¹

Dwyer, J.

Appelwick, J.

All Citations

*9 WE CONCUR:

--- P.3d ----, 2016 WL 3919687

Footnotes

- 1 Along with the house (valued at \$235,000.00), sailboat (sold for a net \$75,250.00), and business (with \$19,257.47 in assets), Drown and Langeland acquired the following during their CIR:
 - An estate account containing \$6,453.03
 - A 2007 Toyota valued at \$8,000.00
 - 2002 Honda valued at \$4,500.00
 - Household personal property valued at \$1,078.00
- 2 In re Estate of Langeland, 177 Wash.App. 315, 324, 312 P.3d 657 (2013), review denied, 180 Wash.2d 1009, 325 P.3d 914 (2014). Joint property is in most respects treated as analogous to community property for married couples. Connell v. Francisco, 127 Wash.2d 339, 351, 898 P.2d 831 (1995).
- 3 Langeland, 177 Wash.App. at 327, 312 P.3d 657.
- 4 Langeland, 177 Wash.App. at 331, 312 P.3d 657.
- 5 Excepting the house, deducting the estate's share of the Honda (which Drown apparently kept), and adding the supersedeas funds withdrawn by Helsell Fetterman and costs included in this court's mandate, the property the trial court awarded Drown totaled \$67,714.33. Drown asks for this amount in her reply brief.
- 6 See In re Marriage of Skarbek, 100 Wash.App. 444, 447, 997 P.2d 447 (2000).
- 7 Prostov v. Dep't of Licensing, 186 Wash.App. 795, 819–20, 349 P.3d 874 (2015).
- 8 Hall v. Feigenbaum, 178 Wash.App. 811, 827, 319 P.3d 61, review denied, 180 Wash.2d 1018, 327 P.3d 54 (2014).
- 9 Hall, 178 Wash.App. at 827, 319 P.3d 61.
- 10 State v. Worl, 129 Wash.2d 416, 424–25, 918 P.2d 905 (1996).
- 11 Arguing against Drown's motion for entry of judgment, Boone's counsel acknowledged that Boone had the motive and opportunity to present the contract issue on the first appeal, "I don't think that the Court of Appeals recognized [the separate property agreement] as an issue. It wasn't really addressed, and, frankly, that's on us." Counsel was incorrect that the issue was not addressed, but his concession is well taken: the contract argument was available to Boone on the first appeal.
- 12 Langeland, 177 Wash.App. at 327, 312 P.3d 657.
- 13 Fluke Capital & Mgmt. Servs. Co. v. Richmond, 106 Wash.2d 614, 620, 724 P.2d 356 (1986).
- 14 See Roberson v. Perez, 156 Wash.2d 33, 41–42, 123 P.3d 844 (2005).
- 15 In re Marriage of Mueller, 140 Wash.App. 498, 506–09, 167 P.3d 568 (2007) (holding that oral agreement "to divide the remainder of [ex-husband's] income after the payment of joint expenses" did not overcome presumption that assets were community property (emphasis omitted)).
- 16 See Mueller, 140 Wash.App. at 507–08, 167 P.3d 568.
- 17 Oliver v. Fowler, 161 Wash.2d 655, 668–69, 168 P.3d 348 (2007); see Connell, 127 Wash.2d at 350, 898 P.2d 831.
- 18 Connell, 127 Wash.2d at 351, 898 P.2d 831.
- 19 Oliver, 161 Wash.2d at 668–69, 168 P.3d 348.
- 20 Connell, 127 Wash.2d at 351, 898 P.2d 831.
- 21 Oliver, 161 Wash.2d at 670–71, 168 P.3d 348.
- 22 See Connell, 127 Wash.2d at 351, 898 P.2d 831.
- 23 See Connell, 127 Wash.2d at 351, 898 P.2d 831.
- 24 Boone claims that on remand she asked the trial court to consider Drown's jointly held assets before making a distribution. But she did so only in her motion to reconsider after the trial court entered its amended FFCL.
- 25 Lewis v. City of Mercer Island, 63 Wash.App. 29, 31, 817 P.2d 408 (1991).

- 26 These included \$75,240.97 from Drown's client trust account. With an added \$23,525.85 from the estate checking account and J. Randall & Associates business account, the court registry contained \$98,766.82 of estate funds as of June 9, 2011.
- 27 The trial court judge crossed out Helsell Fetterman's proposed amount of attorney fees, \$98,035.80, in some places but not in others. Boone's attorney acknowledged in the hearing that the amounts should be changed to \$70,000.00. That is the amount the court stated at the hearing that it would award and the amount it found to be reasonable. Moreover, despite the literal meaning of the phrase "or as much as is contained therein," Boone offers no explanation why Helsell Fetterman would be entitled to the entire contents of the court registry regardless how large that amount was. Drown's reading of the order is more reasonable: had the registry contained less than Helsell Fetterman was awarded, the order would have entitled Helsell Fetterman to the entire amount therein.
- 28 Helsell Fetterman did not notify Drown or her counsel before withdrawing the funds or file a satisfaction of judgment afterward.
- 29 The trial court did not order supersedeas for the attorney fees.
- 30 In particular, Drown asked the trial court to award her \$64,982.33 from Helsell Fetterman and Boone, consistent with this court's mandate and the trial court's FFCL on remand. She asked also that the trial court order Helsell Fetterman and Boone to return \$2,732.00 of Drown's supersedeas funds, for a total of \$67,714.33. She asked, alternatively, for a \$67,714.33 judgment against Boone coupled with an order that Helsell Fetterman return the \$101,498.82 to the court registry.
- 31 That order "direct[ed] the attorney for the Personal Representative to withdraw the estate assets being held in the court registry and apply those assets to the fees and costs incurred by Helsell Fetterman, LLP, in defense of estate assets."
- 32 This amount is the sum of \$61,085.50, \$3,896.83, and \$2,732.00.
- 33 Ehsani v. McCullough Family P'ship, 160 Wash.2d 586, 589, 159 P.3d 407 (2007).
- 34 Sloan v. Horizon Credit Union, 167 Wash.App. 514, 520, 274 P.3d 386 (2012) (quoting RAP 1.2(a)).
- 35 RAP 12.8; Ehsani, 160 Wash.2d at 589, 159 P.3d 407.
- 36 Ehsani, 160 Wash.2d at 590–91, 159 P.3d 407; State v. A.N.W. Seed Corp., 116 Wash.2d 39, 45–46, 802 P.2d 1353 (1991). In the current version of the Restatement, the relevant section is Restatement (Third) of Restitution and Unjust Enrichment § 18 (Am. Law. Inst. 2011).
- 37 Ehsani, 160 Wash.2d at 592, 159 P.3d 407 (quoting Restatement of Restitution § 74).
- 38 Ehsani, 160 Wash.2d at 592, 159 P.3d 407.
- 39 48 Wash.App. 688, 692–93, 740 P.2d 356 (1987).
- 40 Mason, 48 Wash.App. at 691, 740 P.2d 356. The dissolution statutes provide, "The court may order that the attorneys' fees be paid directly to the attorney who may enforce the order in his or her name." RCW 26.09.140.
- 41 Mason, 48 Wash.App. at 692–93, 740 P.2d 356.
- 42 160 Wash.2d 586, 588, 159 P.3d 407 (2007).
- 43 Ehsani, 160 Wash.2d at 589, 159 P.3d 407.
- 44 Ehsani, 160 Wash.2d at 593–94, 159 P.3d 407.
- 45 Ehsani, 160 Wash.2d at 591–92, 159 P.3d 407.
- 46 Ehsani, 160 Wash.2d at 593, 159 P.3d 407 (quoting RESTATEMENT OF RESTITUTION, § 74, cmt. h), 595.
- 47 Ehsani, 160 Wash.2d at 595, 159 P.3d 407.
- 48 Ehsani, 160 Wash.2d at 596, 159 P.3d 407.
- 49 188 Wash.App. 588, 594, 355 P.3d 286 (2015).
- 50 Arzola, 188 Wash.App. at 591, 355 P.3d 286; RCW 49.52.
- 51 Arzola, 188 Wash.App. at 594, 355 P.3d 286.
- 52 Arzola, 188 Wash.App. at 594, 355 P.3d 286.
- 53 For instance, in moving for the fees, Boone claimed she "should be allowed to pay her attorneys the incurred fees and costs out of the Court Registry now, pending deposit of said fees and costs by Sharon Drown into the registry."
- 54 Boone ultimately failed to recoup the IRA benefits from Drown, and the trial court excluded the fees she incurred in that effort from its award.
- 55 RCW 11.48.050 provides that an estate's personal representative "shall be allowed all necessary expenses in the care, management, and settlement of the estate." RCW 11.48.210 allows "just and reasonable" compensation for a personal representative and its attorney. RCW 11.76.110 provides for "payment of costs of administration" before payment of any other debts of an estate.
- 56 See RCW 11.48.050, 210; RCW 11.76.110.

- 57 See Arzola, 188 Wash.App. at 594, 355 P.3d 286.
- 58 See Arzola, 188 Wash.App. at 593-94, 355 P.3d 286.
- 59 See Young v. Young, 164 Wash.2d 477, 484, 191 P.3d 1258 (2008) (notions of fairness and justice require recovery when a party would be unjustly enriched).
- 60 See Arzola, 188 Wash.App. at 595, 355 P.3d 286 ("An award of prejudgment interest is appropriate where a party retains funds rightly belonging to another party and thereby denies the party the use value of the money."). Although the trial court has discretion to reduce the maximum interest rate, it would abuse that discretion to do so without setting forth adequate reasons. See In re Marriage of Harrington, 85 Wash.App. 613, 631, 935 P.2d 1357 (1997).
- 61 See RCW 11.96A.150.

2016 AUG 12 AM 11:13

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

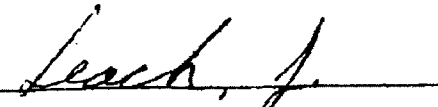
In the Matter of the Estate of)	No. 72758-3-1
)	
RANDALL J. LANGELAND.)	(Consolidated with
)	No. 72759-1-1)
JANELL BOONE,)	
)	ORDER DENYING HELSELL
Appellant/Cross-Respondent,)	FETTERMAN LLP'S MOTION
)	FOR RECONSIDERATION
v.)	
)	
SHARON DROWN,)	
)	
Respondent/Cross Appellant.)	
_____)	

Helsell Fetterman LLP, an interested non-party, having filed a motion for reconsideration herein, and the hearing panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 12th day of August, 2016.

FOR THE COURT:



Judge