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NO. 68928-2

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

(Skagit County Cause No. 10-4-00138-7)

**IN RE THE ESTATE OF LYDE L. HERRLE,
CONNIE MARICH and THOMAS MARICH,
Appellants,**

vs.

**JOHN LEE, personal Representative to the Estate and
Trustee of the Lyde L. Herrle Trust,
Respondent.**

APPELLANTS MARICHS' APPEAL BRIEF

Douglas R. Shepherd, WSBA #9514
Bethany C. Allen, WSBA #41180
SHEPHERD and ABBOTT
2011 Young Street, Suite 202
Bellingham, WA 98225
(360) 733-3773 or 647-4567

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COURT OF APPEALS
DIVISION ONE

September 21, 2012

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I – INTRODUCTION

This is a quiet title action brought by the Estate of Lyde L. Herrle (Estate) against Connie and Thomas Marich (Marich), joined with the probate matter pursuant to the trial court's Order dated February 29, 2012. CP 202. The Personal Representative of the Estate, acting with non intervention powers, issued two checks to Connie Marich in April of 2010 for \$140,000. On June 10, 2010, Marich purchased a home for \$351,100, using the money Connie Marich received from the Estate as a down payment. CP 3, ¶ 13. A year later, the Estate wrote a letter to Marich claiming an interest in their home. This litigation was commenced in 2012.

II – ASSIGNMENTS OF ERROR

Appellants Marich assign error to the following decisions of the trial court:

No. 1. The trial court erred when it entered an Order on May 17, 2012, granting summary judgment in favor of the Personal Representative to the Estate of Lyde L. Herrle and Trustee of the Lyde L. Herrle Trust as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Summary judgment is granted to and the Court quiets title in favor of Petitioner John Lee, Personal Representative to the Estate of Lyde L. Herrle and Trustee of the Lyde L. Herrle Trust, against Connie Marich and Thomas Marich, and the marital community composed thereof.

Fee simple title in and to lands and premises in Skagit County, Washington, located at 1483 Barrell Springs Road, Bellingham, Washington 98229, Parcel Number P122569, described as Lot 2 of Skagit County Short Plat PL-04-0465 AF #200503180147, being a portion of the SW 1/4 of the NE 1/4, be and the same is hereby quieted, established, and confirmed in the Lyde L. Herrle Trust in a proportionate interest of 42.7% and in Connie and Thomas Marich, husband and wife, in a proportionate interest of 57.3%.

CP 519.

No. 2. The trial court erred when it entered an Order on May 17, 2012, denying Marich's Motion for Summary Judgment as follows: "Respondent Mariches' [sic] Motion for Summary Judgment is Denied." CP 519.

III - ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the Estate establish, at summary judgment, that it was undisputed by material facts that it had an ownership interest in the Marich home?

2. Did Marich establish, at summary judgment, that it was undisputed by material facts that Connie Marich had received the \$150,000 from the Personal Representative of the Estate in full settlement of all claims she may have had against the estate?

IV – STATEMENT OF THE CASE

Connie Marich is the niece of Lyde Herrle (Herrle). CP 542. In 2008, Herrle was old, lonely and lived alone. Id. He did not want to leave his farm, but he was unable to take care of himself or his farm. CP 543. In early 2008, Connie Marich and her husband, Thomas Marich, moved in with Herrle, at Herrle's request, to provide needed support for Herrle. CP 542. After Marich moved in with Herrle, Herrle, a single man, developed a dependency on Marich. Marich intended to spend a short time with Herrle and return to Florida for the winter. In the summer of 2008, they informed Herrle that they intended to spend the winter of 2008 in Florida as they had done for a number of years. Id. Herrle asked them not to go to Florida and to remain on the farm taking care of him and the farm. Id. They agreed and remained taking care of Herrle.

In 2008, Marich were given a copy of a document which demonstrated that they were to be given the 26 acre farm, worth more than \$350,000, if they remained for the winter taking care of Herrle and if they paid \$100,000. CP 542. The document shown Marich can be found at CP 294, offered at summary judgment by the Estate, and the understanding is documented at CP 310. In 2008, Marich gave Herrle \$10,000, which Marich believed and understood was a down payment on the \$100,000 purchase price for the farm. CP 542-43; CP 570.

Shortly before Herrle's death, Marich became aware that someone was preparing documents for Herrle to sign and that Marie Kunferman (Kunferman), or others, were intending to sell the Herrle farm. CP 543. Marich believed that Herrle was not competent to understand or sign documents or authorize the sale of his property. CP 7; CP 543; CP 604. Marich discussed their concerns with Kunferman, before Herrle's death. CP 543, ¶ 11.

Herrle died on February 23, 2010, at the age of 96. CP 7; 73-74. He was married briefly once, about 50 years ago, which marriage lasted less than five (5) years. He had no children. CP

542, ¶ 2. Kunferman was appointed as the Personal Representative of the Estate on April 2, 2010. CP 6; 80-88. Kunferman was authorized to act and administer the Estate “without Court intervention and interference . . .” CP 87. As of April 2, 2010, Kunferman had the “power to transfer any and all of the real and personal property of the above named decedent without further order of this Court.” Id. Kunferman hired attorney Rosemary Kamb (Kamb) to help her administer the probate. CP 8. Kamb represented the Estate in April of 2010, including negotiating the sale of the 26 acre farm to a Mr. Jungquist, on April 20, 2010, for \$350,000 and the settlement with Connie Marich. CP 8.

After Herrle’s death, and before the sale of the farm to Jungquist, Marich informed Kunferman and Kamb that they had claims against the Estate and they intended to try to enforce the agreement to purchase the 26 acre farm consistent with the 2008 document they had seen, which document and understanding had caused them to pay Herrle \$10,000 and continue to take care of him and his farm. CP 543. In April of 2010, Marich understood and believed, correctly, that Kunferman was the Personal

Representative of the Estate. CP 604, ¶ 3.

Marich met with Kamb at least three times. CP 543, ¶ 13. Marich met with Kamb because based upon conversations with Kunferman, they understood and believed that Kunferman had given Kamb authority to negotiate a settlement of their claims against the Estate. CP 604. At one or more of those meetings, Kamb, who Marich understood to be acting on behalf of the Estate of Herrle, asked Marich how much money it would take for them to give up any creditor or other claim they may have against the Estate. CP 543. Connie Marich told her that they believed they were entitled to the full value of the farm, \$342,000. Id. Kamb offered Connie Marich \$150,000 in full settlement of all her claims against the Estate. CP 543, ¶ 14. Connie Marich accepted that offer. Id. From conversations with Kunferman, Thomas Marich understood and believed that Kunferman knew of the settlement and approved the settlement reached. CP 604.

Kamb prepared a "Full and Final Distribution and Receipt of Heir" for Connie Marich's signature and gave her \$150,000. CP 543, ¶ 15; CP 572. In April of 2010, Connie Marich signed the "Full

and Final Distribution and Receipt of Heir" believing and understanding that the \$150,000 belonged to her and that she no longer had any claim against the Estate. CP 543-44, ¶ 15; CP 572. In April of 2010, two Cashier's Checks, check #496769 in the sum of \$40,000 dated 04/27/10 and check #496068 in the sum of \$100,000 dated 04/14/10, remitted by the Estate totaling \$140,000 payable to Connie Marich, and signed by Kunferman, as personal representative of the Estate, were delivered to and cashed by Connie Marich. CP 222, ¶ 3; CP 224-25. Earlier, a cashier's check payable to Connie Marich, check #5479501002 dated 03/29/10 in the sum of \$10,000, also signed by Kunferman, was delivered to and cashed by Connie Marich. CP 222, ¶ 4; CP 227.

Herrle also owed Thomas Marich for funds provided directly to Herrle or for improvements to the property. CP 538, ¶ 3. Kamb, on behalf of the Herrle estate, offered Thomas Marich \$20,000 to give up his creditor claims against the Estate. Kamb prepared a "Receipt to Heir" for Thomas Marich's signature. *Id.*; CP 540. He was not an heir. Thomas Marich accepted that offer and signed the Receipt to Heir believing and understanding that the \$20,000

belonged to him and that he no longer had any claim against the Estate. CP 538; CP 540. These negotiations and this settlement have not been contested by the Estate.

On February 10, 2012, the Estate filed the Petition at issue in this appeal. CP 1. It was the fifth attempt by the Estate to file and serve the pleading, the first having been filed on July 1, 2011. CP 527.

V – LEGAL ARGUMENT

A. Summary Judgment

On appeal, a trial court's summary judgment is reviewed de novo. *Coppernoll v. Reed*, 155 Wn.2d 290, 296, 119 P.3d 318 (2005). Where the moving parties have failed to meet their burden of showing the absence of disputed material facts, summary judgment must be denied. *Safeco Ins. Co. v. Butler*, 118 Wn.2d 383, 823 P.2d 499 (1992). "A court must consider all facts and any reasonable inferences in the light most favorable to the nonmoving party." *Hubbard v. Spokane County*, 146 Wn.2d 699, 707, 50 P.3d 602 (2002).

This court conducts de novo review to determine if the record before the superior court, with all facts and inferences considered in the light most favorable to ... the non-moving party, demonstrates that there is no genuine issue of material fact, and that ... [the moving party] is entitled to judgment as a matter of law. The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion.

Cochran Elec. Co. v. Mahoney, 129 Wn.App. 687, 692, 121 P.3d 747 (2005).

A court will grant summary judgment only when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Wilson v. Steinbach*, 98 Wash.2d 434, 437, 656 P.2d 1030 (1982). The court must consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party. *Wilson*, at 437. The motion will be granted only if reasonable persons could reach only one conclusion from all of the evidence. *Wilson*, at 437.

Hansen v. Friend, 118 Wn.2d 476, 485, 824 P.2d 483 (1992).

B. The Court Appointed PR Acted With

Nonintervention Powers.

The Personal Representative (PR), Kunferman, acting with nonintervention powers, had the authority and obligation to settle all claims against the Estate without intervention of the court.

(1) Any personal representative acting under nonintervention powers may borrow money on the general credit of the estate and may mortgage, encumber, lease, sell, exchange, **convey**, and otherwise have the same powers, and be subject to the same limitations of liability, that a trustee has under chapters 11.98, 11.100, and 11.102 RCW **with regard to the assets of the estate, both real and personal, all without an order of court and without notice, approval, or confirmation, and in all other respects administer and settle the estate of the decedent without intervention of court.** Except as otherwise specifically provided in this title or by order of court, a personal representative acting under nonintervention powers may exercise the powers granted to a personal representative under chapter 11.76 RCW but is not obligated to comply with the duties imposed on personal representatives by that chapter. **A party to such a transaction and the party's successors in interest are entitled to have it conclusively presumed that the transaction is necessary for the administration of the decedent's estate.**

RCW 11.68.090. (Emphasis added).

A party to a transaction with a nonintervention PR is “entitled to have it conclusively presumed that the transaction is necessary for the administration of the decedent’s estate.” *Estate*

of Freitag v. Frontier Bank, 118 Wn.App. 222, 232, 75 P.3d 596 (2003).

[A] conclusive presumption 'is more accurately described as a rule of substantive law rather than of evidence. [Citations.]' 'Conclusive presumptions are not evidentiary rules so much as they are rules of substantive law' As a rule of substantive law, the (rule) . . . represents a policy choice that courts may not second-guess on nonconstitutional grounds. 'The Legislature declares state public policy, not the courts.' (Citations omitted.)

We may not rewrite the law, nor pretend to write on a blank slate and reach different policy conclusions than the Legislature, nor decline to give effect to the Legislature's policy choices.

Strong v. Superior Court, 198 Cal.App.4th 1076, 1986-87, 132 Cal.Rptr.3d 18 (2011).

An 'irrebuttable presumption,' also known as a 'conclusive presumption,' is a presumption that cannot be overcome by any additional evidence or argument. It is not a presumption at all, but rather, a substantive rule of law directing that proof of certain basic facts conclusively proves an additional fact which cannot be rebutted. Such presumptions rest upon grounds of expediency or public policy so compelling in character as to override the requirement of proof.

Am.Jur. Evidence § 201, 29 Am.Jur.2d Evidence (2012); see also, In Re Green's Estate, 46 Wn.2d 637, 642, 283 P.2d 989 (1955).

C. Authority of Kamb.

Even if Kunferman did not have nonintervention powers and had not signed the checks, the Estate is bound by the conduct of Kunferman and Kamb. The Estate had Kunferman appointed as PR. Kunferman hired Kamb to assist in administering the Estate. The authority of Kunferman was actual.

The authority of Kamb was both actual and implied. Kamb has not filed a single document which denied her authority to act on behalf of the Estate. Kunferman has declared that she gave Kamb authority. "Ms. Kamb continued to represent Mr. Herrle or his Estate in the sale of his house and farm after Mr. Herrle died and after March 9, 2010." CP 281, ¶ 10. "With actual authority, the principal's objective manifestations are made to the agent; with apparent authority, they are made to a third person." *King v. Riveland*, 125 Wn.2d 500, 507, 886 P.2d 160 (1994). Kamb had apparent authority and therefore bound the Estate. Kunferman told Marich that Kamb had authority, acted as though Kamb had authority and signed the checks after Kamb negotiated the settlement. Kunferman's words and conduct caused Marich to

reasonably believe that Kamb and Kunferman had authority, and Marich reasonably believed in the authority of both. Therefore, authority is established. *Mohr v. Grantham*, 172 Wn.2d 844, 860, 262 P.3d 490 (2011).

Kunferman told Connie Marich to discuss her concerns and claims with Kamb. CP 543, ¶ 11. Because of this conversation, Connie Marich believed Kamb was acting on behalf of Estate and had authority to negotiate a settlement of her claims against the Estate. *Id.*, ¶ 13.

The conversations with Ms. Kamb occurred as a result of my understanding from conversations with Marie Kunferman that I should discuss my wife and mine concerns, claims, and settlement with the estate or trust with Ms. Kamb. From my conversations with Ms. Kunferman, I understood and believed that she knew of and approved the settlement documents prepared by Ms. Kamb. The checks we received, pursuant to the settlement, were signed by Ms. Kunferman.

CP 604, ¶ 2, Dec. of Thomas Marich.

D. Promissory Estoppel

Marich, in return for \$150,000 gave up any claims against the estate under the various documents filed in the probate and this action. Marich believed that the will provisions being probated

were executed at a time when Herrle lacked capacity. CP 543, ¶ 10. Marich, in April of 2010, gave up her right to contest any document allegedly signed by Herrle after 2008. There was good and valuable consideration given for the agreement with the Estate. "Consideration is any act, forbearance, creation, modification or destruction of a legal relationship, or return promise given in exchange." *King v. Riveland*, 125 Wn.2d at 505.

Even assuming there was no consideration, the Estate is estopped by its conduct and delay. The Estate's claim against Marich was delayed for more than a year, at a time when it was likely that it was too late for Marich to file any claim or contest the post 2008 will changes. "Promissory estoppel renders a promise made without consideration enforceable." *Id.* at 506. Liability attaches, even without consideration, when five prerequisites exist. They are: "(1) A promise which (2) the promisor should reasonably expect to cause the promisee to change his position and (3) which does cause the promisee to change his position (4) justifiably relying upon the promise, in such a manner that (5) injustice can be avoided only by enforcement of the promise." *Central Heat*,

Inc. v. Daily Olympian, 74 Wn.2d 126, 132, 443 P.2d 544 (1968).

All five prerequisites exist in this matter.

E. Joint Ownership.

The trial court created a partnership or some other form of joint ownership, summarily, between the a Church and Marich, holding as a matter of undisputed fact and law, that the Estate owned 42.7% and Marich owned 57.3% of a home purchased by and titled in Marich. CP 519. This was done without any accounting and without any evidence of how much money had been paid, by Marich, as a down payment or as monthly payments on the house located at 1483 Barrell Springs Road. The trial court has erroneously made a contract for Marich, which contract did not previously exist. In Washington, "courts cannot and ought not make contracts for the parties and, assuredly, cannot make a contract for them which they did not make for themselves." *Grant Const'rs v. E.V. Lane Corp.*, 77 Wn.2d 110, 121, 459 P.2d 947 (1969).

A joint tenancy can only be created by written instrument which expressly declares the interest created to be a joint tenancy.

In re Estate of Fox, 51 Wn.App. 498, 504, 754 P.2d 690 (1988); RCW 64.28.010. There is no such written instrument creating a joint tenancy between Connie Marich and the Church. "We have consistently held that we cannot upon general considerations of abstract justice make a contract for the parties that they did not make for themselves." *Jackson v. Domschot*, 40 Wn.2d 30, 34, 239 P.2d 1058 (1952).

VI – CONCLUSION

Accordingly, the Court should grant the Marichs' motion for summary judgment, and enter judgment in favor of the Marichs denying the Estate's motion for summary judgment and dismissing the Estate's multiple petitions to quiet title with prejudice.

If not, the Court should deny the Estate's motion for summary judgment and remand the matter for trial.

Respectfully submitted this 21st day of September, 2012.

SHEPHERD AND ABBOTT

By 
Douglas R. Shepherd, WSBA # 9514
Bethany C. Allen, WSBA # 41180
Of Attorneys for Appellant Marich