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I. ASSIGNMENTS OF ERROR

The trial court erred in:

A. Entering that Order dated September 4, 2007 (CP 118-120), ruling on partial summary judgment that the house at 4903 North Huson St., Tacoma, Washington, was decedent Larry Capps' separate property.

B. Entering that Order dated October 2, 2009 (CP 384-387) denying Appellant Linda Capps's "Motion for Reconsideration [of Summary Judgment] and Relief from Judgment" (CP 127-128).

C. Entering that Order dated October 2, 2009 (CP 384-387) denying Linda Capps's September 14, 2009 "Motion to Stay Delivery and/or Recordation of Deed" (CP 121).

D. Concluding as a matter of law that a surviving spouse must file a Creditor's Claim under RCW 11.40 as a prerequisite to bringing a claim for contributions to the deceased spouse's separate real property. CP 583-589, Conclusion of Law ("CL") II.

E. Concluding as a matter of law that rent should be imputed to a surviving spouse who lived with her husband in the family home for 30 years up until his death, entirely offsetting her and the marital community's contributions to that property. CP 583-589, CL III, IV, V.

F. Failing to apply the law that payments made during a marriage are presumed to be made by the marital community, and that income received during a marriage is presumed to be community property.

G. Excluding evidence relevant to a determination of whether equitable contribution should be awarded and if so, the amount thereof.

H. Admitting expert testimony on rental value of a residence over the course of 30 years from an unqualified expert.

I. Admitting irrelevant and prejudicial testimony of events surrounding Appellant's move from the subject property long after the events relevant to her claim for equitable contribution had passed.

J. Deeming Appellant's testimony not credible based on untenable grounds. CP 583-589, Findings of Fact II, III.

K. Entering Findings of Fact 1, 2, 3, 4, 5 and 9, and Conclusions of Law 2, 3, 4, 65, 6, 7 and 8.

L. Awarding Respondents their attorney's fees.

M. Denying Appellant's "Motion for Leave to Try Separate Property Issue at Trial." CP 525-526.

N. Admitting exhibits 44, 45, 46 and 47, and excluding exhibits 3, 6, 7 and 14.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Did the court err by granting summary judgment determining a quitclaim deed's legal effect despite factual disputes and when different inferences could be drawn from the facts?

B. Did the court abuse its discretion by refusing to consider, and denying, Linda Capps' motion for leave to raise at trial the issue of the parties' intent in signing a quitclaim deed, when that issue had not been addressed in entering a partial summary judgment construing the deed?

C. Must a surviving spouse file a creditor's claim under RCW Ch. 11.40 when claiming reimbursement for community and separate contributions made to a deceased spouse's separate property?

D. Did the court err in failing to consider the proper factors when determining Linda Capps' claim to equitable reimbursement for contributions made to her husband's separate property?

E. Did the court abuse its discretion by imputing to Linda Capps the rental value of living with her husband in his separate property as an offset of her claim for equitable reimbursement?

F. Did the court err in admitting Respondents' expert's testimony on the rental value of a house going back 30 years?

G. Is it equitable to deny a surviving wife any reimbursement for contributions that paid off most of a mortgage, and 30 years of real property taxes, on a home which was her husband's separate property at time of marriage, on the ground that the benefit the marital community received by living there offset all such contributions?

H. Did the court abuse its discretion in deeming specific testimony by Linda Capps to be not credible?

I. Did the court abuse its discretion in awarding attorneys' fees and costs against Linda Capps?

III. STATEMENT OF THE CASE

A. Introduction and Summary.

This case involves claims by Linda Capps to an interest in a house located at 4903 North Huson St. in Tacoma ("the North Huson St. house") that her husband, Larry Capps, bought shortly before they married in 1977, and in which they lived together for the 30 year duration of their marriage up to his death in 2007.

Judge Frederick Fleming ruled on partial summary judgment that the North Huson St. house was Larry's separate property based on a quitclaim deed Mrs. Capps signed when the property was refinanced in 1977, and as such, under the terms of a 1979 will, went to his children by a prior marriage. Mrs. Capps then pursued a claim at trial for equitable

reimbursement of contributions made to the property during her and Larry's 30 year marriage. Following inflammatory testimony by Respondents that Mrs. Capps had, upon moving out of the house, damaged it, and left a defaced family photograph on the kitchen counter for them to see, Judge Fleming at the conclusion of trial angrily berated her, denied her any reimbursements for anything, ordered her to pay Respondents \$25,000 rent for the time she lived in the house after Larry died and before it was ruled to be his separate property, *and* ordered her to pay more than \$60,000 for Respondents' attorneys' fees and costs.

Judge Fleming failed to consider the correct controlling legal issue and key evidence in ruling on summary judgment that the North Huson St. house was entirely Larry's separate property. At trial he made repeated errors in admitting and excluding evidence, failed to consider the proper factors in determining the extent to which a surviving spouse is entitled to equitable reimbursement for contributions to a deceased spouse's separate property, made fundamental legal errors, and demonstrated bias and prejudice toward Mrs. Capps. This Court can and should not only reverse Judge Fleming's rulings below, but also enter decision as a matter of law that all increases in the North Huson St. house over the \$35,000 net value it had when Linda and Larry married are community property, and under Larry's will belong to his wife, Appellant Linda Capps.

B. Facts and Procedural History.

Larry Capps and his first wife bought the North Huson St. house in 1975 for \$24,100 on a real estate contract (Exh. 1; CP 66-90). They divorced shortly after that and Larry got the house. Linda Capps began living with Larry in August 1976. CP 184-204, ¶ 1; RP I, 44/8-21. In December 1976 she sold her house for \$22,750 (RP I, 44/16-45/22; Exh. 2) and commingled the proceeds with Larry's money. RP I, 44/5-47/2; 124/12-24; Exh. 2; CP 30-40, at 31 lines 17-18. Larry had relatively little invested in the North Huson St. house when he and Linda began living together. They married months later, in February 1977, and remained married for 30 years (CP 205-206) until his death in January 2007.

On February 22, 1977, just before their marriage, Mr. and Mrs. Capps executed a prenuptial agreement (CP 184-204, at 199-204; Exh. 3, admission refused). It provided that the separate property listed on an attachment, in the values stated, would remain separate, but *all future increases* in their separate property were converted to community property. *Ibid.* The attachment showed the North Huson Street house as Larry's separate property, with a value of \$50,000, subject to a \$15,000 mortgage. Exh. 4.

Two months after the marriage Larry refinanced the house. He borrowed \$42,500 to pay off the \$15,000 due on the real estate contract

(Exh. 7, 8; RP I, 82/12-83/24; 112/25-113/25). The North Huson St. house remained in Larry's name alone, and the new loan was in Larry's name alone, secured by a Deed of Trust on the house. Exhs. 8, 9. When the bank issued that loan, it had Mrs. Capps sign a quitclaim deed quitclaiming any interest she had in the house to Larry. (Exh. 5, 6, 8; CP 252-259, at 256).

Larry executed a will in 1979, left unchanged until he died, providing that his separate property went to his children and his community property went to Mrs. Capps. (CP 66-90, Exh. E thereto). According to their 1977 prenuptial agreement, it appears Larry's intent was to leave his \$35,000 separate property interest in the North Huson St. house to his children, and all increases in the house to his wife

Mr. and Mrs. Capps paid \$350 on that 1977 mortgage every month for the next 14 years (CP 184-204; RP I, 86/22-87/10, 89/6-90/8). Then around 1990 Mrs. Capps received \$75,000 in settlement of a personal injury claim (*Ibid.* CP 30-40; RP I, 89/18/22; 90/9-91/14), which were all for pain and suffering and legally her separate property *Ibid.* Mr. and Mrs. Capps did not treat anything they earned or received during their marriage as separate (RP I, 44/19-47/2; 112/25-115/11; 131/4-132/14; 144/24-145/6), and in 1991 they paid off the balance on the mortgage loan from those settlement funds. RP I, 90/9-91/4; CP 184-204, ¶ 2. On November

11, 1991 the bank recorded a Deed of Full Reconveyance, returning Larry's Deed of Trust to him (Exh. 13), but it did nothing about the quitclaim deed that had also been recorded. And there it sat.

Mr. and Mrs. Capps also paid the property taxes on the North Huson St. house every year with community funds (RP I, 101/12-14; Exh. 15). According to the tax assessor's records those payments totaled over \$101,000 during their marriage (1977-2006) (Exh. 15¹).

By the time Larry died, the value of the house had soared to about \$750,000. (CP 139-183). Mrs. Capps was 59 years old at the time (CP 205-206), hadn't worked outside the home for many years and had few employable skills (CP 205-205; *see* RP I, 41/4-44/4). Besides the house they had together accumulated over \$900,000 in community assets, in the form of non-probate assets.² RP I, 136/3-13.³ Mrs. Capps and everyone else assumed that, given the duration of their marriage, the North Huson St. house was community property and under his will went to her. *See* CP 26-28, CP 30-40, at 34; CP 354-361; CP 105-109. Indeed, Larry seemed

¹ The Clerk's Exhibit Record does not show Exhibit 15 as having been admitted at trial. Counsel originally neglected to offer it for admission, but that was corrected and the court did admit it. RP II, 293/10 – 295/17.

² Other than miscellaneous personalty, the Estate had no significant assets besides the North Huson St. house. (CP 310-353, at pp. 329-330).

³ The Report of Proceedings will be cited by Volume, then page number followed by a slash and the lines on those pages that are being cited.

to think the same thing. In 2005, apparently concerned about some potential criminal liability (which never materialized), he wrote Mrs. Capps a letter urging her to sell the North Huson St. house if anything happened to him, and use the funds for her retirement. CP 30-40, and unnumbered exhibit thereto; proposed Exh. 14.

Dispute over house begins. Larry's children discovered the 1977 quitclaim deed, and in February 2008 petitioned for a declaratory judgment that the house was Larry's separate property. CP 4-16; see CP 30-40, at 34-35. Mrs. Capps's original counsel, Marc Christianson, responded to the Petition by asserting that the North Huson St. house had through commingling become community property (CP 17-19).

July - October 2009: Motion for Summary Judgment. In July 2009 Respondent Larry Capps, Jr. moved for summary judgment on the issue of the property's status as separate or community (CP 56), based solely on the quitclaim deed. CP 57-61; CP 62-64. Respondent Scalera's counsel filed a Declaration adding to the record the 1977 Fulfillment Deed conveying the property to Larry Capps (Exh. 5), Larry's will and, again, the quitclaim deed. CP 66-90. Mrs. Capps's counsel relied for her response on Declarations and briefing that had been submitted in

December, 2008 on a different issue (CP 232-233; CP 118-120), which did not mention the prenuptial agreement.⁴

In argument at the September 4, 2009 summary judgment hearing, Respondents asserted (although it was not before the court) that Mrs. Capps had to file a creditor's claim before she could claim reimbursement for contributions to the Larry's separate property. CP 207-215, at 208. Based on the quitclaim deed,⁵ Judge Fleming ruled that the North Huson St. house was Larry Capps' separate property (CP 118-120), and ordered that a deed be issued to Respondents. *Ibid.* But the court orally noted that Mrs. Capps could still pursue a claim for equitable reimbursement:

MR. CHRISTIANSON: What do we do about the money, the investment—

THE COURT: You have your own claim. I'm not telling you what to do, but I think there is a claim, you know, an equitable lien claim. . . . (CP 252-259, at 256).

Motion for Reconsideration and Prenuptial Agreement. Mrs. Capps simultaneously moved for reconsideration (CP 127-128), and in response to

⁴ Mrs. Capps had forgotten about that document and it was discovered only shortly before the summary judgment motion. CP 239-251; RP 1, 50/6-13. She had no recollection of any such agreement in her December 2008 deposition.

⁵ THE COURT: "Mr. Christianson, I'm not addressing what may be or may not be any equitable lien issue. But . . . the time of the acquisition is separate property . . . — and they may very well have wanted to—the bank probably required, for loans, this Quitclaim Deed. And the wife, you know, all these years [sic], I understand, executed a Quitclaim Deed, confirming that it is his separate property. And I think that's the law. . . I have to follow what I believe the law is."

the Court’s invitation to file a claim for an equitable lien (CP 123-126, 123/17-19), filed a “Motion to Determine Community Property Interest and Terms of Payment” (CP 122).

In support of reconsideration Mrs. Capps filed a Declaration attaching the 1977 prenuptial agreement for the first time. CP 184-204, at 198. It completely changed the analysis—or, at least it should have. Her counsel argued that the prenuptial agreement, “if given effect”, changed all increases in the house into community property (CP 129-135, at 131), but failed to explain how that, in turn, impacted the quitclaim deed.⁶ He didn’t point out that the court’s primary objective in interpreting a quitclaim deed is to discern the parties’ intent⁷ (discussed further below), and since the prenuptial agreement made increases in the North Huson St. house community property as of May 6, 1977, the burden was on Respondents to prove by clear and convincing evidence that Mr. and Mrs. Capps intended the quitclaim deed to convert that community property into separate property⁸ (discussed further below). Under the circumstances, there was an obvious question of fact—the parties’ intent in executing the quitclaim deed.

⁶ See CP 129-135; CP 123-129; CP 239-251; CP 379-383.

⁷ *Niemann v. Vaughn Cmty. Church*, 154 Wn.2d 365, 374-375 (2005).

⁸ 19 Kenneth Weber, *Washington Practice, Family and Community Property Law* §§ 10.6, 11.34 (1997).

In opposing reconsideration Respondents continued to rely on the quitclaim deed (CP 216-231; CP 207-215), arguing that even if there had been a prenuptial agreement, the quitclaim deed superseded it.⁹

In response to Mrs. Capps’s Motion to Determine Community Property Interest, Respondents argued that she hadn’t yet *pleaded* a claim for equitable reimbursement, and couldn’t do so without first filing a creditor’s claim (CP 207-215; 216-231)—for which the 2-year statute of limitations (RCW 11.40.051) had expired. *Ibid.*

October 2, 2009 Order on Reconsideration; filing of equitable lien claim Judge Fleming on October 2, 2009 simply “confirmed that the 4903 N. Huson St. property is the separate property of the decedent and per the will it is the property of the Petitioners.” CP 384-387, at 387. But he also held that Mrs. Capps could still plead a claim for equitable reimbursement:

The Court heard argument about time and manner of filing claim and the Court ordered that Linda Capps is not time barred or precluded and shall file a claim for her lien in the N. Huson St. property. . . . The court rules that she may file such a claim . . . CP 384-387.

This ruling necessarily meant that a Creditor’s Claim was not required in order to pursue an action for equitable reimbursement—because otherwise

⁹ Ms. Scalera: “[E]xecution of the later quit claim deed . . . invalidate[d] . . . that alleged ante-nuptial agreement” (CP 207-215). Larry Jr.: “The effect of that Quit Claim Deed, together with the premarital agreement is absolutely clear. The home is and will remain the property of the Decedent and all rents, issues, [etc.] of the property also remain . . . separate property.” CP 216-231, at 230.

that claim *would* have been time barred. Respondent Scalera understood this implication and moved for Discretionary Review of this part of Judge Fleming's order, identifying the issue as:

whether or not the Court can permit a surviving spouse to claim an equitable lien for alleged separate or community contributions made to decedent's property when a timely claim therefore has not been filed.

Court of Appeals Cause No. 39907-II¹⁰. By "timely claim" Ms. Scalera meant a Creditor's Claim, arguing,

[W]here . . . there is a claim that a marital community or the separate estate of the other spouse has made an investment for the improvement of the separate asset, that is a claim that can only be initiated . . . , it is done in the context of a probate proceeding, by the filing of a creditor's claim.

The meaning of this part of Judge Fleming's October 2, 2009 Order is significant because at the conclusion of trial he dismissed Mrs. Capps's claim on the ground that Washington law does not permit a party to bring a claim for equitable reimbursement "without filing the filing and rejection of a creditor's claim." Conclusion of Law I (CP 583-589).

October 2009. Separate civil action filed to enforce creditor's claim. Pursuant to Judge Fleming's Order, Mr. Christianson filed both an equitable lien claim ("Petition for Judicial Determination of Rights", CP 391-393) *and* a creditor's claim (CP 388-390). When the PR rejected the

creditor's claim (CP 404-405), Mr. Christianson filed a new civil action to enforce the rejected claim as required by *Schluneger v. Seattle-First Nat'l Bank*, 48 Wn.2d 188 (1956), Pierce County Superior Court Cause No. 09-2-15731-1. CP __¹¹. Mrs. Capps's new counsel later amended that Complaint to replace the suit on a rejected Creditor's Claim with a claim for equitable reimbursement. CP __, "Second Amended Complaint", filed 3/22/11. The two cases, now both asserting the same claim, were consolidated and proceeded to trial as a single action. At the start of trial the parties stipulated that only Mrs. Capps' equitable lien claim, not any Creditor's Claim, was at issue. ("Order Defining Issues", CP 524).

February 2011: Motion for Leave to try separate property issue at trial. As trial approached, Mrs. Capps moved for leave to try the issue of the character of the North Huson St. house, notwithstanding the earlier

¹⁰ The Commissioner granted review, which this Court reversed on Mrs. Capps's Motion to Modify.

¹¹ Pleadings from 09-2-15731-1 will be provided to the Court in supplementation of the Clerk's Papers.

Although its relevance is unclear to Appellant, the court erred finding in CL II (as a fact) that Mrs. Capps' "claim under cause number 07-4 00351-0 was brought as a suit on a rejected creditor's claim that had been filed on October 13, 2009." While Mrs. Capps had filed a creditor's claim in the probate proceeding (as is required), when it was rejected she filed suit on that claim the 09-2-15731-1 civil case (again, as required). The court also erred in CL II, finding that "Mrs. Capps' Counsel signed an order dated March 11, 2011 with agreed language stating that the claim she was pursuing for trial was brought under her Second Amended Complaint under cause number 09-2-15731-1." The March 11, 2011 Order (CP 524) says nothing remotely to this effect. The agreed Order simply said that at trial Mrs. Capps was pursuing only a claim for equitable reimbursement. But that claim had been brought in *both* the 07 matter and the 09 matter.

summary judgment order. CP 414-435. The court can revisit and revise a partial summary judgment ruling at any time prior to final judgment in the case. CR 54. Judge Fleming summarily denied that motion.

March 2011 trial. The personal representative took no position on who was entitled to the house (CP 354-364; CP 310-353) and at trial Respondents, rather than the Estate, opposed Mrs. Capps's claim for reimbursement of contributions to the North Huson St. house. Respondents at trial emphasized

- that Larry Capps in 1977 had brought more assets into the marriage than Mrs. Capps (RP I, 24/10-14);
- Larry's separate funds could have been used to pay off the mortgage on the house (RP I, 121/6-124/11); and especially,
- Mrs. Capps had received \$900,000 in assets upon her husband's death. RP I, 126/7-20; 128/1-20; 136/3-13; RP II, 208/16-209/15.

As argued below, while perhaps relevant in a divorce proceeding, where a court has all of the parties' assets before it and the duty to divide them equitably, these points are irrelevant when distributing assets under a *will*.

"Trashing" the house and defaced photograph. Both Respondents testified at trial, but not about contributions to the North Huson St. house nor

anything else that occurred before Larry's death.¹² Instead they were called to accuse Mrs. Capps of intentionally damaging and making a mess of the North Huson St. house when she moved out in late 2009,¹³ and testify about a family picture left on the kitchen counter which had been cut in half, leaving only Respondents in the picture, with small Christmas lights poked through their eyes and the words "Satan's spawn" written on it. While they may seem immaterial to the issues in the case, these accusations turned out to be critical because they inflamed Judge Fleming and had an obvious effect on his treatment of Mrs. Capps.

Respondents testified "There was boxes of stuff thrown all over the place" (RP II, 168/13), the basement floor was "flooded", the utility room floor was damaged because water was left running when the washing machine was removed, some light fixtures had been replaced with others of lesser quality (and one wasn't replaced at all), the range, refrigerator, washer and dryer had been removed, and sold some plantings and step stones from the yard had been removed (RP II, 156/6-159/17, 166/12-168/5).

When Larry Capps Jr. began to testify about the defaced picture, and Mrs. Capps objected "this has nothing to do with value" (RP II, 172/1-7),

¹² But Respondent Larry Capps Jr. testified that a deck Mrs. Capps had added to the house after Larry died was shoddily done and falling apart.

Judge Fleming responded “Overrule your objection. *I'm getting the picture about what went on here.*” RP II, 172/1-11. Without having heard any of Mrs. Capps’s side of the story, Judge Fleming appeared to have decided who the bad guy was in the case. He himself examined Larry Capps Jr. further about things that had been removed from the yard. RP II, 173/5-174/5. Respondent Scalera’s entire testimony consisted of describing what she says was the poor condition of the house and the defaced picture. RP II, 174/14-181/25. When Mrs. Capps testified in rebuttal, Judge Fleming grilled her at length about just one thing—the defaced picture (RP II, 215/23-217/25).

Mrs. Capps called Judith Lauderdale at the last minute (RP II, 221/18-23) to rebut Respondents’ unexpected testimony about the condition of the house. Ms. Lauderdale with others had helped Mrs. Capps clean and move out of the house, and credibly contradicted Respondents’ testimony about there being “trash” everywhere and the extent of water leakage. RP II, 221/18-228/16. But the only testimony that Judge Fleming showed any interest in was the picture left on the kitchen counter, questioning *her* at length about it (RP II, 232/19-234/24), including:

Q: Do you know who -- whose writing that is and who did that to the eyes?

A: I do not.

Q: Did you have any discussions with Ms. Capps about it?

¹³ Respondents had made a videotape of the house, but instead of offering it into evidence they presented three snapshots from the video. RP II, 175/31-178/13.

A: I did not.

Q: Where did you see that? [Indicating the defaced picture.]

A: I believe it was in the kitchen.

Q: Also in the kitchen.

A: Yes.

Q: Didn't you think anything about it? Didn't it impact you at all so that you—did you just look at it and not say a word?

A: I thought she was angry.

Q: Who was angry?

A: I thought Linda was angry about what was happening.

Ms. Lauderdale was the final witness. She could have had no idea how her comment about Mrs. Capps being angry that day would affect the case.

Court's oral ruling. Testimony ended before noon that day. Judge Fleming announced that court would reconvene at 1:30, he was leaving for the day at 3:30, and intended to rule following closing arguments. RP II, 236/25 – 238/4. The moment Mrs. Capps's counsel concluded his closing, Judge Fleming declared:

All right. I'm going to tell you this. There is no statutory basis for a claim, and I'm going to dismiss it. RP II, 297/21-23.

That was the totality of the court's analysis. CL II, however, elaborates "The claims made by Mrs. Capps for reimbursement . . . is a claim against the decedent for a debt owed by the decedent at death. Washington law does not recognize a direct action . . . on such a claim without the filing and rejection of a Creditor's Claim." This directly contradicted Judge Fleming's October 2009 order that Mrs. Capps's equitable lien claim was not time barred.

The only evidence Judge Fleming discussed in his oral ruling was the 2 photographs of the condition of the house offered by Respondents, and the defaced picture, launching into a heated diatribe attacking Mrs. Capps:

And let me tell you something else: having heard the testimony of Ms. Linda Capps, I'm very concerned about credibility *and anger and how that impacted her testimony*. Her own friend since the 4th grade [Ms. Lauderdale] said in her testimony, she was called at the last minute, *and I wrote it down: She was mad*. And if you look at Exhibits 45, 46 and 47 [photographs], I believe they were, pictures say a lot, impacting credibility and who knows what else. (Emphases added.) RP II, 2978/2-298/7.

He later repeated, “The trashing I think showed her mental attitude. I think that she wasn't credible”. RP II, 299/14-16.

Prompted by Respondents' counsel, Judge Fleming agreed to a second ground for denying Mrs. Capps's claim to reimbursement: the rental value to the community of living in the house exceeded the value of all contributions she and the community had made. Judge Fleming ordered Mrs. Capps to pay Respondents' attorneys' fees, and to pay them \$25,000 rent for the time she remained in the house after her husband died—nearly 3 years. RP II, 297/8-299/2; CL V, VI; CP 590-592. When Mrs. Capps's counsel protested that awarding rent was unfair because she would not have stayed there had she been on notice that rent could be due, Judge Fleming responded with a non sequitur reflecting what *he* was focused on:

And she wouldn't have dug up plants and taken things that were attached to the landscape, either, I suppose. She was mad. RP II, 299/19-24.

IV. ARGUMENT

A. **The court erred in ruling on summary judgment that the North Huson St. house was Larry Capps' separate property.**

Judge Fleming relied solely on the face of the 1977 quitclaim deed to rule that the property was entirely Larry's separate property. (Verbatim Report of Proceedings, 9/4/2009.) But it is black letter law that "The primary objective of deed interpretation is to discern the parties' intent." *Niemann v. Vaughn Cmty. Church*, 154 Wn.2d 365, 374-375 (2005); *Harris v. Ski Park Farms, Inc.*, 120 Wn.2d 727 (1993). The intent of parties in executing a deed is a question of fact. *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, 170 Wn.2d 442, 459 (2010).

In determining the parties' intent in signing a deed, courts are to look beyond the terms of the deed "and ascertain, if possible, the true intent and purpose of the parties." *Estate of Borghi*, 167 Wn.2d 480, 487 (2009). This is just an application of the general "context rule" that controls when courts must ascertain the intention of parties to a contract: courts are to consider the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of

respective interpretations advocated by the parties. *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 254 (1973). Further, when several documents are executed at or near the same time or in connection with the same matter, the courts are to construe them together. *Platts v. Arney*, 46 Wn.2d 122, 127 (1955); *Lynch v. Higley*, 8 Wn. App. 903 (1973).

Courts frequently recognize that deeds, absolute on their face, may be intended for purposes besides conveying title. *Pearson v. Gray*, 90 Wn. App. 911, 915 (1998) (“While the quitclaim deed is absolute in form, the contract . . . evinces a loan of money in exchange for the deed, i.e., the granting of equitable title”); *Cook v. Cook*, 80 Wn.2d 642, 647 (1972) (“A title company official testified that the deed by the daughter was given to clear title for an oil company which sought title insurance to cover its lease on the lands in issue”); *Estate of Borghi, supra* (discussing *Estate of Deschamps*, 77 Wash. 514 (1914), acknowledging that a quitclaim deed is sometimes executed “to accommodate the requirements of a mortgagee”).

The evidence at summary judgment, even before the prenuptial agreement was brought to the court’s attention, created at a minimum a material disputed issue of fact as to the parties’ intent. Indeed, reasonable persons could have drawn only one reasonable inference from those facts—the opposite of Judge Fleming’s conclusion—that Mrs. Capps had signed

the quitclaim deed just to accommodate the mortgagee,¹⁴ not to actually convey outright to her husband all of her future interest in their home:

1. The quitclaim deed, promissory note, and Deed of Trust creating a security interest to the property in favor of the bank were all signed on May 6, 1977. Exhs. 6, 8, 9.

2. The relevant documents were then recorded all on the same day, 10 days later, in a sequence that evidences an intent to protect the lender's security interest:¹⁵ first the real estate vendor's Warranty Deed conveying title to Mr. Capps (Exh. 5), which although signed earlier (4/27/1977) had not yet been recorded; then the quitclaim deed (Exh. 6); and, finally, the Deed of Trust.

3. The original quitclaim deed recited that after recording it was to be mailed to the lender, State Mutual Savings Bank, 7412 27th Street West, Tacoma, not to the nominal grantee, Mr. Capps.

4. After the deed was signed, Mrs. Capps contributed her separate personal injury proceeds, and the community devoted community funds to paying for the house and all costs of ownership, tying up a large percentage of the total assets available for them to live on in their retirement.

¹⁴ Judge Fleming himself drew this inference, commenting in his oral ruling "the bank probably required, for loans, this Quitclaim Deed". But he failed to understand the law and realize that this actually was important.

5. In 2005 Larry expressed his intent in writing that if “something should happen to him” Mrs. Capps should sell the house and take all the proceeds in order to provide for her retirement (CP 30-40, at 32, and unnumbered exhibit thereto), evidencing that he intended and understood she was entitled to the value of their house.

Especially when granting all reasonable inferences in favor of the nonmoving party, there was a profound factual dispute about the parties’ intent in executing the quitclaim deed, which precluded summary judgment.

B. The court erred in denying Mrs. Capps’s Motion for Reconsideration.

On reconsideration, the parties’ prenuptial agreement was added to the evidence before the court. This created both new legal issues, and compelling new evidence on the parties’ intent with the quitclaim deed.

Increases in separate property are presumed to be separate property. Once the character of property as separate or community is established, it is presumed that it maintains that character until some clear and convincing evidence to the contrary is made to appear. *Estate of Borghi, supra* at 484, fn. 4; *Guye v. Guye*, 63 Wash. 340, 350 (1911); 19 *Washington Practice* §§ 11.34, 15.6.

¹⁵ The recording numbers show the order in which the documents were recorded.

Mr. and Mrs. Capps's prenuptial agreement, signed just days before they married, was clear and convincing evidence that they intended to convert future increases in the North Huson St. house over and above Mr. Capps's existing \$35,000 net equity into community property. The language was unequivocal and the agreement was signed in writing and acknowledged, as required for agreements that convert the character of real property.¹⁶ So as of May 6, 1997, all future increases in the North Huson St. house were community property.

Washington law is strongly in favor of community property, and all doubts about whether an asset is community or separate are resolved in favor of the community estate. 19 Kenneth Weber, *Washington Practice: Family and Community Property Law* ("19 *Washington Practice*"), § 10.5 (1997). Reflecting this strong policy the courts have created a set of presumptions in favor of community property that are a form of *evidence*. These are "not the type of presumption that disappears once controverting evidence is introduced," *Ibid.* § 10.3, but "are true presumptions and in the absence of evidence sufficient to rebut an applicable presumption, the court must determine the character of property according to the weight of the presumption." *Estate of Borghi*, 167 Wn.2d 480, 483-484 (2009).

¹⁶ See Cross, Harry M., "Community Property Law in Washington", 61 Wash. L. Rev. 13, 102-103 (1986).

The proponent of a change of community property into separate property has the burden of proof by “clear and convincing evidence” *Ibid.*; *Marriage of Janovich*, 30 Wn. App. 169, 171 (1981). So on Mrs. Capps’s motion for reconsideration, it was Respondents’ burden of proving by clear and convincing evidence that the parties intended the May 6, 1977 quitclaim deed to change community property into Larry’s separate property.¹⁷

In light of the prenuptial agreement, along with the evidence of the surrounding circumstances already before the court on the summary judgment motion, there were only two possible inferences to draw from of the facts. Either (1) the quitclaim deed was signed as an accommodation for the bank who loaned money to Larry that day, or (2) Mr. and Mrs. Capps coincidentally happened to decide precisely on May 6, 1977 to change a fundamental agreement they had made less than 3 months earlier about their

¹⁷ Courts in some cases have said when a spouse deeds their interest to the other spouse, full title passes to the grantee “unless the testimony is very clear and convincing that such was not the intention.” *Carmack's Estate*, 133 Wash. 374, 380 (1925); *accord*, *Estate of Monighan*, 198 Wash. 253, 255 (1939); *Estate of Ford*, 31 Wn. App. 136, 139 (1982). This is contrary to the general rule when it is claimed that community property has been converted into separate property. It puts a greater burden on spouses trying to protect their community interest in real property than applies to other parties trying to protect their interests in real property: when the deed doesn’t purport to convert community property, the court’s duty is to determine the parties’ intent by a preponderance of the evidence; requiring a spouse to prove intent by a higher burden when a deed deals with community property is inconsistent with Washington’s fundamental policy in *favor* of community property.

economic future together, and divest Mrs. Capps of any interest in their home for the duration of their marriage.

Judge Fleming in denying Mrs. Capps's motion for reconsideration failed to determine the intent of the parties when she signed the quitclaim deed. He failed to apply the community law's presumption that once property is characterized as community it retains that character until the proponent of a change proves by clear and convincing evidence that the parties intended to change it. He failed to put the burden of proof on Respondents, and failed to grant the nonmoving party all reasonable inferences in her favor. He erred in granting summary judgment when there was evidence creating a genuine issue of material fact.

C. The court abused its discretion in denying Appellant's motion for leave to raise separate property issue at trial.

1. A partial summary judgment is subject to review and revision any time before a final judgment. The trial court's Order deeming the North Huson St. house to be entirely Larry's separate property was a partial summary judgment order, the purpose of which is simply to narrow the issues at trial. *Grill v. Meydenbauer Bay Yacht Club*, 57 Wn.2d 800 (1961). CR 54(b) provides that unless the court certifies that there is no just reason for delay in treating a partial summary judgment as a final order, the order "is subject to revision at any time

before the entry of judgment adjudicating all the claims.” See *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 299-301 (1992); *Bratton v. Calkins*, 73 Wn. App. 492 (1994). Accord, 10B *Wright, Miller & Kane*, 3rd Ed., § 2787; *Alberty-Velez v. Corporacion de P.R. Para la Diffusion Publica*, 242 F.3d 418, 419 (1st Cir. 2001).

Before entry of a final judgment there is no deadline for asking the court to revisit or reverse a partial summary judgment order. A party need not seek to vacate the order under CR 56, nor seek other form of relief from judgment under CR 60. See *Washburn v. Beatt Equipment Co.*, *supra*; *Bratton v. Calkins*, *supra*. It is not error for a trial court to allow a party to present evidence at trial on, and reargue, an issue that had previously been decided in a partial summary judgment order. *Ibid*.

2. The reasons for trying the issue of the character of increases in the North Huson St. house were compelling. Mrs. Capps on February 9, 2011, a month before trial, filed a motion for leave to try the issue of the character of the North Huson St. house at trial, notwithstanding that the court had entered a partial summary judgment ruling on that issue. CP 414-435, and CP 507-517.

Her motion explained that the parties at summary judgment had failed to advise the court of the controlling law—that the parties’ intent in executing a deed is determinative (*supra*, at 11-12). So the prior order had

been entered without the court being able to consider the correct law or the determinative issue of intent. She also explained that prior counsel, after bringing the prenuptial agreement to the court's attention on reconsideration, failed to explain or argue that (1) it actually converted increases in the North Huson St. house into community property as of May 6, 1977, (2) Respondents had to prove by "clear and convincing evidence" that the parties intended the quitclaim deed to change that community property into Mr. Capps's separate property, and (3) the evidence was overwhelming that the deed was simply intended to accommodate a mortgagee. *Ibid*, at 8-9, 14-15, 19. Mrs. Capps argued that hearing the issue at trial was necessary in order to reach the correct decision and to promote judicial economy, while there was little if any prejudice to Respondents because the September 4, 2009 summary judgment ruling came only 4 days before trial was set to commence, and the parties had already prepared fully to try that issue. *Ibid*, at 22.

3. Trial court's denial of motion on untenable grounds.

Judge Fleming denied Mrs. Capps's motion. Whether to grant such a motion is discretionary. A trial court abuses its discretion if it exercises its discretion on untenable grounds or for untenable reasons, or if the act is manifestly unreasonable. *In re Estates of Palmer*, 145 Wn. App. 249 (2008). At the hearing on the motion, Judge Fleming clearly had not read

Mrs. Capps's materials, and didn't appear to know the nature of the motion. Mrs. Capps's memorandum opened by bluntly saying she sought to reopen an issue the court had already ruled on:

On September 4, 2009 this court entered an order on summary judgment holding that the residence located at 4903 North Huson Street, Tacoma was the decedent Larry Capps' separate property

Linda Capps now moves this court for leave to litigate at trial the issue of whether the North Huson St. house is separate or community property, notwithstanding the prior summary judgment order.

Yet Judge Fleming's first words after Mrs. Capps's counsel introduced himself at the hearing indicated he thought the hearing was about a different case (3/11/11 hearing RP, 2/14-17):

THE COURT: And the issue involves *the trust*?

The case did not involve any trust. The word "trust" did not appear in Mrs. Capps's (CP 414-435) or Respondent Scalera's (CP 477-482) materials, and only once in quoting another document in Larry Capps Jr.'s memorandum. Mrs. Capps's counsel replied,

Actually, Your Honor, the issue involves the house, the house in which the parties lived during the marriage.

Judge Fleming insisted, "But also *a trust* is involved". 3/11/2011 RP, 2/18-21. Respondents' counsel suggested an explanation for the Court's confusion, "He's asking for a constructive trust. I think that's what you're speaking of." But neither had any constructive trust been mentioned in any

of the materials. When Mrs. Capps's counsel started to explain (the following colloquy is located at 3/11/2011 RP, 2/24-3/19),

The issue is over the character of the house as separate versus community property and also whether—if it's separate property and – Judge Fleming interrupted, turning to opposing counsel and asking. “What did I do with this case some time ago when you were here?” The opening words of Mrs. Capps's motion had explained “what the court did before”. That was the whole point of the motion.

Mr. Adams replied, “You ruled it was separate property entirely, causing Judge Fleming to ask, “So why are we back?” When Mrs. Capps's counsel said, “That's explained in our motion,” Judge Fleming snapped, “Well, I'm not doing it over again.” Mrs. Capps's counsel tried to explain,

Your Honor, what was done before was a partial Summary Judgment and nobody argued to the Court about the Quit Claim Deed or the fact that the intent—a Quit Claim Deed—the reason the Court ruled— Judge Fleming again interrupted, “I read all the stuff you had,” then, as it apparently began to dawn on him what the case involved, continued,

You're going to have to get an appellate court to tell me what the law is when you've signed a Quit Claim Deed because, you know, *I thought I remembered this thing* and it is what it is.

And moments later, “I remember what I did before and you're asking for reconsideration is what it amounts to. I ruled on this one time.” *Id.*, 4/9-14. That was the extent of Judge Fleming's consideration of the motion.

Denying a motion without reading the movant's materials or considering the issue is an abuse of discretion. Judge Fleming's reason for denying the motion—because he had “ruled on it one time,” and it amounted to “asking for reconsideration”—was an untenable reason, because the very basis for the motion was that the court *had* entered a ruling on partial summary judgment, and the issue the motion raised was whether, in light of the facts and circumstances surrounding the entry of that prior order, justice and judicial economy nevertheless justified hearing the issue at trial. Judge Fleming never considered the circumstances surrounding entry of the prior summary judgment order, the reasons Mrs. Capps presented for hearing the issue at trial, nor the effect of not considering the issue at trial—precisely what the parties are now faced with: potentially two appeals. If the summary judgment order is reversed and the case remanded, there would then have to be a second trial, and potentially an appeal from the result of that second trial, when everything could have been addressed in one trial.

4. Judge Fleming's double standard, favoring Respondents.

Yet at trial Judge Fleming revisited his October 2, 2009 Order about whether the Creditor's Claim statute applied to a claim for equitable reimbursement, and at the conclusion of trial dismissed Mrs. Capps's claims on the ground that she had to first file a Creditor's Claim as a prerequisite to seeking such reimbursement. CP 583-589, CL II. Mrs. Capps had thought that issue was

resolved and did not even address it in her trial brief (CP 543-552), and seeing that Respondents argued it in their briefs (CP 529-542, CP 553-565), she filed a Supplemental Trial brief on the final day of trial (CP 570-575).

D. The trial court erred in ruling that filing a creditor's claim is required when a spouse seeks equitable reimbursement.

If it is concluded that because of the parties' prenuptial agreement, increases in the North Huson St. house are community property, that resolves Mrs. Capps's claims. But if not, then under long-established community property law she is entitled to reimbursement for contributions made during marriage to her spouse's separate property.

The trial court erred in ruling that Washington law does not "recognize a direct action" on a spouse's claim for reimbursement of contributions made to a spouse's separate property without first filing Creditor's Claim. CL II. No reported Washington case has so held. Treating a spouse's claim for equitable reimbursement from a deceased spouse's separate property mistakes the nature of a "debt" to which Washington's Creditor's Claim statute, RCW Ch. 11.40, applies.

1. The Creditor's Claim statute applies only to debts due at the time of the decedent's death. It is undisputed the creditor's claim statutes applies only to an obligation for a debt incurred by the decedent during his lifetime. *Olsen v. Roberts*, 42 Wn.2d 862 (1953), quoting 3

Bancroft's Probate Practice (2d ed.) §§ 772, 778. A claim that accrues as the result of the death of the decedent, or which is only against the decedent's estate instead of the decedent himself, is not a "debt" and does not require filing a Creditor's Claim. *Foley v. Smith*, 14 Wn. App. 285, 293-295 (1975); *Estate of Wilson v. Livingston*, 8 Wn. App. 519, 526 (1973).

The trial erred in ruling (CL II) that Mrs. Capps's claim for equitable reimbursement "is a claim against the decedent for a debt owed by the decedent at death." This is incorrect. A spouse's claim to reimbursement of contributions to a spouse's separate property is inchoate at the time of her husband's death. It is not debt owed at the time of death.

In re Marriage of Johnson, 28 Wn. App. 574, 579 (1981):

Whether an equitable lien to secure a right of reimbursement will be recognized ultimately depends upon the equities of the case. In reality, the right does not arise or is merely inchoate unless and until the court determines whether and to what extent the right will be recognized.

2. Claims arising upon/after decedent's death are not owed by the decedent but by the estate and are not covered by RCW Ch. 11.40.

Notwithstanding that conduct underlying a claim occurred during a decedent's lifetime, the Creditor's Claim statute does not apply unless the conduct has actually resulted in a debt owed by the decedent at the time of death. *Foley v. Smith, supra*; *Estate of Wilson v. Livingston, supra*.

In *Foley v. Smith*, Foley contracted to sell a property to A, but then sold it to B, giving a statutory warranty deed. “A” sued for specific performance while Foley was alive, but he died while the action was pending. His spouse individually and as personal representative proceeded as the parties in the case. The trial court ordered specific performance in favor of A, against Mrs. Foley and her husband’s estate.

B sued Mrs. Foley and the estate for breach of the warranties in the statutory warranty deed, and won. Mrs. Foley argued on appeal that B’s claim was barred because he failed to file a creditor’s claim. The Court of Appeals held it was the decree of specific performance *after* Mr. Foley died that breached the warranties, so the debt was not owed when he died:

[T]he breaches of the covenants of warranty and quiet enjoyment did not take place until the specific performance decree became final. That decree . . . *being against the estate rather than against the deceased, no claim was required to be filed.* It is unnecessary to present a claim that does not arise until after the death of the testator or intestate. [Citations]. (Emphasis added.)

Accord, Wilson v. Livingston (“A debt which accrues as a result of the death of the decedent, i.e., funeral and burial expenses, . . . is not against ‘the deceased’, and a claim need not be filed in order for the executor to be authorized to pay a claim of this character”).

Respondents argued in closing that Mrs. Capps’s claim was against the *estate* (“THE COURT: You agree that if there was any lien, it's against

the estate and not against the property. MR. KRILICH: Right. It's a claim against the estate"; RP I, 287/12-16), and Judge Fleming orally ruled,

And if it was a claim [i.e., if the law permitted the action], I think that it's accurate that it's not against the house, the separate property; it would be against the estate. RP II, 298/18-22.

3. A claim to an interest in a specific asset claimed by an estate is not a statutory creditor's claim. An action to establish an interest in specific property claimed by a decedent's estate is not a claim for a debt subject to the Creditor's Claim statute. *Smith v. McLaren*, 58 Wn.2d 907 (1961); *Olsen v. Roberts*, 42 Wn.2d 862 (1953); *Gottwig v. Blaine*, 59 Wn. App. 99 (1990).

In *Smith v. McLaren*, *supra*, Bess married Marvin and they bought a home together. They divorced, signing a stipulation that the home was community property but Marvin could live there until it sold, with the sale proceeds to be split between them. Marvin died and his son moved into the house. Then the son also died and his estate sold the house. Bess brought an action against the son's estate "to have her interest in the property [cash from the sale] adjudicated." *Smith v. McLaren*, *supra*, at 910. The trial court awarded Bess one-half of the sale proceeds. The Estate appealed, arguing that Bess's claim should have been dismissed because she had failed to file a Creditor's Claim. The Supreme Court

squarely rejected that argument, holding “This is not an action by a creditor of the estate”, explaining (58 Wn.2d, at 909):

The respondent does not claim that the estate is indebted to her, but rather seeks to establish her interest in specific property. . . . *[T]he filing of a creditor's claim is not a condition precedent to an action by a former spouse to recover his or her share of community property accumulated during the marriage. . . .*

In *Olsen v. Roberts*, Margaret and Frederick divorced, with Frederick apparently concealing property. When he died, Margaret filed “a petition to be awarded her share of the marital community property”, and to “remove from said estate . . . a fair and equitable share thereof” and distribute it to her. *Olson, supra*, 42 Wn.2d, at 863. The trial court dismissed Margaret’s claim, and she appealed. Frederick’s estate argued that her claim was barred because she failed to file a Creditor’s Claim. The Supreme Court reversed, holding that a party’s claim to an interest in specific property in a probate proceeding is not a Creditor’s Claim:

To constitute a claim against the estate of a deceased person, an obligation must consist of a debt incurred by or for the decedent during his lifetime.

Where, on the other hand, the recovery of specific property is sought on the ground that such property is impressed with a trust, . . . the matter is not one of claimed indebtedness but of an assertion that the particular property is no part of the general assets of the estate.

Olson, supra, at 865-866, quoting 3 *Bancroft's Probate Practice* (2d ed.) 512, 526, §§ 772, 778. *Accord, McCullough v. McCullough*, 153 Wash.

625, 626 (1929) (action for specific performance of an oral contract to make a will made during decedent's life, claiming a house plus \$50,000 from decedent's estate, "is plainly not within the statute requiring a claim to be filed against the decedent's estate within six months")

In *Gottwig v. Blaine*, 59 Wn. App. 99 (1990), a party claimed ownership as joint tenant of decedent's ½ share of a property, which had been deeded to another. The trial court awarded the property to the claimant. The estate appealed, arguing the claim was barred because no Creditor's Claim had been filed. This Court rejected that argument, holding that a claimant alleging ownership of an interest in a property is not a creditor. While Mrs. Capps does not assert *sole* ownership of the North Huson St. house, she asserts ownership of a property interest in it.¹⁸

E. The court erred in ruling that the value of living in the North Huson St. house offset all contributions made to it over 30 years.

When one spouse contributes to the value of the other spouse's separate property, upon divorce or the other spouse's death he or she is generally entitled to be reimbursed for the value of their investment, referred to as a right to contribution supported by an equitable lien on the separate property involved. While no clear line has been drawn, or

theoretical basis developed, to determine exactly what sorts of contributions it is equitable to reimburse (*Ibid.*, at §§ 11.29 -.11.33), it is well established that a right to contribution exists for:

- Mortgage principal;¹⁹
- Mortgage interest;²⁰
- Property taxes;²¹ and
- Share of increase due to inflation/market factors.²²

Mortgage payments. Mr. and Mrs. Capps's marital community made monthly payments of \$350 on the May 1977 \$42,500 mortgage on the house (RP I, 86/22-89/11, 89/18-90/8), until November 1991 when Mrs. Capps paid off the balance early with proceeds from her personal injury settlement (RP I, 89/18-90/14; Exh. 13; RP I, 91/5-17). Those monthly payments (June 1977-November 1991) totaled approximately \$60,000 (350 x 172 months = \$60,200; Mrs. Capps provided a more

¹⁸ An equitable lien on real property constitute a "property interest." *Restatement of Property*, § 6; *Morton v. LeBlank*, 125 Wn.191 (1923) (*lis pendens* giving notice of action seeking equitable lien on real property is proper, as equitable lien affects title).

¹⁹ *Washington Community Property Deskbook*, §3.4(1)(a); *Marriage of Harshman*, 18 Wn. App. 116 (1977); *Fritch v. Fritch*, 53 Wn.2d 496 (1959); *Merkel v. Merkel*, 39 Wn.2d 102 (1951).

²⁰ *Merkel v. Merkel*, 39 Wn.2d 102, 115 (1951).

²¹ 19 *Washington Practice*, § 11.35.1; *Fritch v. Fritch*, *supra*, 53 Wn.2d at 506-507; *Estate of Trierweiler*, 5 Wn. App. 17, 22-23 (1971).

²² *Marriage of Elam*, 97 Wn.2d 811, 816-817 (1982); *Marriage of Pearson-Maines*, 70 Wn. App. 860, 869 (1993).

refined calculation of \$59,850.50 in Exh. 37²³). The principal balance due in November 1991 was about \$32,164. Exh. 39

Mrs. Capps relied on proposed Exhibit 7, a copy of the promissory note from Mr. Capps' May 1977 refinance, for the rate of interest used in these calculations. The court erred in entering that part of part of FF III, providing, "The interest rate and other terms of the loan are not known." The interest rate and other terms are known. They were in Exhibit 7, a carbon copy of the May 6, 1977 promissory note, which the trial court erroneously refused to admit (RP I, 83/20-86/20) on the grounds that it was not properly authenticated, and "had no legal efficacy" since it wasn't signed. RP I, 86/19-20. Exhibit 7 is an aged-looking carbon copy of an unsigned promissory note dated May 6, 1977 bearing the same terms as are in an identical-appearing, aged carbon copy of a *signed* deed of trust (see Exhs. 8, 9). Mrs. Capps' testimony that Exhibit 7 was located in her and her husband's papers (RP I, 83/20-23) was sufficient to authenticate it. ER 901(1). It was also authenticated both by comparing it with Exhibits 8 and 9 (ER 901(4)), and as an ancient document (ER 901(8)).

Property taxes. Tax assessor records (Exh. 15) showed that real property taxes had been paid on the North Huson St. house annually

²³ The schedules and calculations identified as Exhibits 37-42 were summaries provided by Appellant's counsel for use in closing argument.

between 1977-2006. Mrs. Capps testified that she and her husband paid those taxes (RP I, 101/12-14) which totaled \$101,434.

Interest on contributions. Prejudgment interest is ordinarily calculated at the rate of 12% except in cases of tort, or where a contract provides otherwise. *Stevens v. Brink's Home Sec., Inc.*, 162 Wn.2d 42 (2007); *Mahler v. Szucs*, 135 Wn.2d 398 (1998). Interest at 12% per annum on Mrs. Capps's and the marital community's contributions as of the time of trial (March 2011) amounts to:

Marital community's monthly payments = 190,454.64 (Exh. 41);
 Mrs. Capps's 1991 separate payment = 74,609.84 (*Ibid.*)
 Marital community's property tax payments = 87,325.00 (Exh. 42)

Inflation/Market factors. The parties agreed the North Huson St. house was worth \$50,000 when they married (Exh. 4), against which Larry borrowed \$42,500. The marital community and Linda paid the entire \$42,500, leaving \$7,500 paid for by Larry's separate funds. So the parties' proportionate contributions to the property were (Exhs. 37, 38, 39):

	<u>Larry</u>	<u>Linda</u>	<u>Community</u>
Initial equity	7,500.00	0	0
Principal—monthly payments (\$10,313.38 + 22.16) ÷ 2 =	0	0	10,335.54
Payoff, November 15, 1991 =	0	32,164.96	0
Property taxes =	0	0	101,434.72
Totals:	7,500.00	32,164.96	111,770.26
Proportionate contributions	5%	21%	74%

The useful life of improvements to the house since the parties' marriage had expired (RP I, 18/4-14, 24/5-11), so the property's \$705,000 increase in value from \$50,000 in 1977 to \$755,000 in 2008 (CP 139-183) was from inflation and market factors. Mrs. Capps is entitled to 21% (\$148,050) and the marital community 74% (\$521,700), of the increase.

Summary: Mrs. Capps and the marital community's contributions to the property, plus share of the inflation in its value, total:

<u>Marital community</u>	
Monthly mortgage payments	= 60,000.00
Interest on monthly mortgage payments	= 190,454.00
Property tax payments	= 101,434.00
Interest on property tax payments	= 87,325.00
74% of inflation	= <u>521,700.00</u>
	960,913.00
<u>Appellant's separate:</u>	
1991 separate property payment	= 32,164.96
Interest on 1991 separate property payment	= 74,609.84
21% of inflation	= <u>148,050.00</u>
	254,824.80

1. Courts must take all the circumstances into account in order to determine what is equitable. There is an obvious problem in the above numbers. Rotely applying rules that work in other equitable reimbursement cases could result in the contributors being entitled to aggregate reimbursements greater than the value of the separate property itself. Even if the marital community's \$960,913 contribution is split

50/50 (\$480,456 each), Mrs. Capps would be due $\$480,456 + \$254,824 = 735,280$, and the property's "owner" would get nothing.

This outcome can be tweaked to achieve a more equitable result by, for example, changing the interest rate used; or deducting the contributions from the total inflation figure before apportioning the inflation among the parties. This illustrates the rule that courts must take all of the circumstances into account in determining what is equitable. Cross, Harry M., "Community Property Law in Washington", 61 Wash. L. Rev. 13, 68 (1986); *Miracle v. Miracle*, 101 Wn.2d 137, 139 (1984) ("The trial court must take into account *all the circumstances* in deciding whether a right to reimbursement has arisen"; emphasis added.). Washington cases have addressed the issue of equitable reimbursement since territorial days, and they have offered many, sometimes conflicting, formulations, which ultimately depend heavily on the specific facts in each case. So as 19 *Washington Practice, supra*, § 11.26 summarizes,

The rules concerning reimbursement and equitable liens are confused and the theoretical basis of reimbursement is often not clearly understood, which has lead to inconsistent and contradictory results.

2. The trial court failed to properly credit Appellant and the marital community with contributions made.

Mortgage principal and interest. The court did not credit Mrs. Capps or the marital community for any of the payments identified above in satisfaction of the \$42,500 mortgage loan secured by the North Huson St. house, on the ground that the proceeds from the loan went to the community, so (Judge Fleming concluded, CL II) the community was just giving back what it – not Larry’s separate property—benefitted from. In support of this conclusion the court erroneously found, as part of Finding of Fact III,

The [\$42,500 mortgage] funds borrowed were used by the marital community of Larry C. Capps and Mrs. Capps with the expectation that the marital community would make the payments on the loan to the bank because they received the use of the borrowed funds.

This finding, and the court’s conclusion that all of loan proceeds went to the community, are wrong because:

- \$15,000 of the loan went immediately to satisfy Larry’s separate debt on the real estate contract under which he was buying the property, benefitting him alone.
- Mrs. Capps separately, not the community, paid back \$32,164.96 of those funds;
- The 1977 \$42,500 loan encumbered Larry’s separate property. His separate estate benefitted when that encumbrance was paid.

Property taxes. The court failed to credit the marital community with any of the property taxes it had undisputedly made, by erroneously accepting Respondents' proposed finding that there was no evidence of property tax payments, (CL V) when Exhibit 15 provided that evidence.

Interest and inflation. By failing to credit Mrs. Capps and the community with mortgage and property tax payments, the trial court deprived them of the very large amount of interest that accrued over the 30 year term of the parties' marriage, and their percentage of the value added to the property by inflation.

3. Trial court erred in considering irrelevant factors.

The trial court placed great emphasis on the fact that when the parties married in 1977 Mr. Capps had about \$80,000 in separate property²⁴. And both Respondents and the court kept returning to, and dwelling on, the fact that Mrs. Capps got \$900,000 of community assets when her husband died.²⁵ These may be factors to consider in divorce situations, where both spouses will continue to live after the divorce, and

²⁴ **CL III:** "[I]t would be inequitable to grant a right of reimbursement for payment of those funds because Mr. Capps brought more than \$80,000.00 in cash assets into the marriage . . ."; **CL IV:** "Even if Mrs. Capps had proved that community funds were used to pay off the \$15,000 debt owed by Larry C. Capps. . . prior to marriage, no right to reimbursement of those funds would arise because Mr. Capps brought more than \$80,000.00 of cash into the marriage. . ."

²⁵ Respondents: CP529-542, at 550; RP I, 126/10-24; 128/1-129/3; RP II, 208/16-209/15 (BMW, other vehicles); 136/3-12. The court: RP II, 192/10-193/13; 194/2-195/17.

the court's goal is to fairly divide their total assets—both community and separate. But they are not relevant when the issue is the amount of contributions invested in a specific piece of a spouse's separate property.

Yet Judge Fleming focused constantly on the \$900,000 Mrs. Capps had received. During Respondents' opening, he interrupted to confirm,

She inherited everything, you're going to prove, except the house; that you're alleging was clearly the separate property that went to his kids,

to which Mr. Adams' replied, "Right". RP I, 24/6-9. When, in moving to admit a 2005 letter from Larry urging Mrs. Capps to sell the house and use the proceeds for her retirement if anything happened to him (proposed Ex. 14; RP I, 94/5-97/23), counsel argued the letter evidenced Larry's wish that she "get her fair share of it", Judge Fleming interrupted,

THE COURT: Get her fair share.

MR. CARLSON: Pardon?

THE COURT: Get her fair share.

MR. CARLSON: Correct.

THE COURT: For example, now, with reference to this, who got the biggest share of Larry's estate?²⁶

RP I, 97/24-98/4. But when counsel immediately followed up by trying to give Mrs. Capps a chance to explain her financial concerns, the court sustained an objection on grounds of relevance (RP I, 98/9-99/13).

²⁶ Actually, the \$900,000 was community property, of which Larry's interest was only \$450,000. So assuming the house was worth about \$750,000, his children were receiving by far "the biggest share of Larry's estate".

When Mrs. Capps testified that she removed and sold appliances and plantings before moving out of the house because “the only thing that was on my mind is that I needed to have some money, some ready cash money”,²⁷ Judge Fleming again interrupted counsel’s questioning,

THE COURT: You know, I have to ask. I should wait, but didn't you get 8 or \$900,000?

MS. CAPPS: Yes, I did.

THE COURT: And when did you get that with reference to October 31st, 2009?

MS. CAPPS: When did I get it?

THE COURT: Yeah.

MS. CAPPS: I got it, as soon as Larry had passed [January 2007] I got the cash.

THE COURT: So you got the cash, and you're telling this Court that you needed to sell plants?

MS. CAPPS: Yes. May I explain?

THE COURT (to Counsel): Ask another question.

(RP II, 192/16-193/3) When Mrs. Capps’s counsel then ask her to explain *why* she felt stressed about money at the time, Judge Fleming overruled Respondents’ objection, caustically commenting,

Wait. I opened it up. I wanted to know about 8, \$900,000, and she's saying that plants that are attached to this property she had to sell because she needed money, and she had to sell washers and dryers for \$25 a piece because she needed money.²⁸ RP II, 193/9-13.

²⁷ Mrs. Capps moved out on very short notice when Judge Fleming ruled in October 2009 that she had to pay \$1,250 rent in order to remain. (CP 384-387) The funds she had in January 2007 were by then been reduced by losses in the 2008 stock market crash, and by buying a condominium. RP II, 193/4-23.

²⁸ Judge Fleming’s criticism was due in part to his own misunderstanding of the law. Appliances like ranges, refrigerators and dryers are not fixtures; they belonged to her. *Emerald City Electric v. Jensen Electric*, 68 Wn. App. 734 (1993).

And later (RP II, 194/9-13),

I'm going to allow her to tell—she's testified that she needed to sell washers and dryers for \$25 a piece, take plants that were buried in the ground on the property and sell them because she needed money. And I'm going to let counsel explore that.

When Mrs. Capps explained she had lost part of those assets in the 2008 market crash (RP II, 10-20), Judge Fleming again interrupted,

THE COURT: Lost it, lost some of it?

MS. CAPPS: No. Some of it.

THE COURT: How much is "some of it"?

MS. CAPPS: Oh, about 250.

THE COURT: So 650 [after paying \$250K for a condominium], and lose 200; that leaves you, what, 450, almost a half a million dollars. And you're selling a washer and dryer for \$25 a piece.

MS. CAPPS: Yes. (RP II, 10-193/13; 194/2-195/17)

4. The trial court erred in excluding relevant evidence.

Judge Fleming erred in refusing to allow Mrs. Capps to introduce evidence relevant to the equities, including:

- The parties' prenuptial agreement (rejected Exh. 3), which plainly expressed Larry's wish and expectation that his wife was also an owner of the house, and should ultimately benefit from it.

Objection on relevance grounds sustained without comment or explanation (RP I, 50/6-51/7).

- The letter Larry wrote in 2005 saying that if anything happened to him, he wanted Mrs. Capps to sell the house and use all the proceeds for her retirement (rejected Exh. 14; RP I, 96/5-98/8); and
- Testimony that Mrs. Capps had provided services maintaining the property and household. RP I, 47/3-50/1; 93/3-96/4.

5. The trial court’s findings of fact on which its conclusion that the property’s rental value offset all contributions to the property were not based on substantial evidence, and were in error. The trial court erred in entering Conclusions of Law III²⁹, IV³⁰ and V³¹, ruling that the benefit the marital community received from living rent-free in Larry’s separate property outweighed all contributions the community and Mrs. Capps separately had made to the house. These conclusions of law are not supported by the findings of fact. In the first place, as demonstrated above, the trial court failed to credit Mrs. Capps and the marital community with all of their contributions.

²⁹ “. . . the marital community received a benefit of free rent with a value of \$266,560.00 . . . which considerably exceeds the value of any community contributions to the separate property home of the decedent.”

³⁰ “. . . the amounts requested are far less than the benefit received by the community from not being required to pay rent on the separate property premises of Larry C. Capps during marriage.”

³¹ “. . . no right for reimbursement . . . would arise because the reasonable rental value received by the marital community for the use of Mr. Capps’ home far exceeded the amount of property taxes paid.”

Second, key findings on which these conclusions were based were not based on substantial evidence. The trial court erred in entering findings of fact denying that proceeds from the May 6, 1977 mortgage loan (paid for by the marital community and Mrs. Capps) benefitted Mr. Capps's separate estate by paying off the \$15,000 owed on the North Huson St. house, and speculating that Mr. Capps's separate funds might instead have paid off that \$15,000 instead. FF I³², FF III³³, FF IV³⁴.

There was simply no evidence whatsoever about what happened to the separate funds Mr. Capps had when he married Mrs. Capps. The fact that as of May 6, 1977 he had chosen *not* to use his available funds to pay off the \$15,000 creates the inference that, while he perhaps could have done so, he did not want to. There is no substantial evidence supporting the Court's speculations that Larry Capps's separate funds "might" have been used to pay the \$15,000 due on his real estate contract.

³² "Mr. Capps had substantial bank deposits and an account receivable for a loan, the total of which exceeded \$80,000.00. None of those funds remained in separate accounts at his death. They were either used to payoff the \$15,000.00 in separate debt that he had at the time of marriage or to benefit the marital community."

³³ "Larry C. Capps' separate estate got none of the net proceeds of the loan."

³⁴ "Mr. Capps owed \$15,000.00 on his home at 4903 North Huson Street. . . . That debt was paid off in May of 1977. The source of funds for payment has not been proven. Mr. Capps had \$80,000.00 of separate funds. . . . If his separate funds at marriage were not used for the purpose of paying off the debt, they benefitted the marital community as they were not used for any separate purpose of Mr. Capps."

And the evidence showed that the \$15,000 was paid off, and the seller's deed conveying title to Larry was recorded simultaneously with the documents for the \$42,500 mortgage loan. (Exhs. 1, 5, 8). Besides the coincidental timing of the payoff, the Court can take judicial notice that lenders universally require existing encumbrances to be satisfied before distributing loan proceeds to a borrower.

Finally the law presumes that purchases made during a marriage are made with community funds. This is a "true presumption", and in the absence of evidence sufficient to rebut it the court must determine the character of property according to the weight of the presumption. *Estate of Borghi*, 167 Wn.2d 480, 483-484 (2009). The trial court failed to apply this presumption to the payoff of the real estate contract. There was no evidence to the contrary. The trial court failed to apply this presumption and erred in entering the identified portions of FF I, III and IV.

Payments on mortgage loan. The trial court erred in finding that "Mrs. Capps has failed to prove the source of the funds used to repay the [\$42,500 mortgage] loan." FF III. The same presumption discussed above applies. The trial court failed to apply this presumption to the payments made on the mortgage between 1977-1991, during which time

Mr. and Mrs. Capps were married.³⁵ There was no evidence to the contrary and it was binding on the trial court. In addition, Mrs. Capps's testimony that the marital community had made every \$350 monthly mortgage payment from the date of the loan until it was paid off in 1991 was uncontradicted.

Lump sum payoff of mortgage balance. The trial court erred entering that part of FF III in which it

specifically finds it does not believe Ms. Capps' testimony that she received \$75,000.00 from a personal injury settlement that was solely for pain and suffering and was her separate property and used that to repay the loan.

While credibility determinations are within a judge's discretion, and generally entitled to considerable deference, this finding was an abuse of discretion. It was made for no tenable reason, and on untenable grounds.

Mrs. Capps's testimony about the personal injury settlement and payoff of the mortgage was uncontroverted and consistent with all of the surrounding facts. Documentary evidence proved that the mortgage was, in fact, paid in full and the Deed of Trust reconveyed on November 13, 1991. Exh. 13. Mrs. Capps testified that once she and Larry begin living together they commingled everything and treated everything like

³⁵ The Court likewise erred in failing to apply the community property law presumption in FF II: ". . . she failed to trace any of the funds from the sale of her home or prove that any funds from that house were used for community purposes."

community property. RP I, 44/19-47/2; 112/25-115/11; 131/4-132/14; 144/24-145/6. This is consistent with how spouses in a long-term marriage typically behave, and there is no reason to doubt the testimony. Mrs. Capps's testimony about her employment history was consistent with having no wage loss claim. RP I, 41/10-43/18. Larry Capps was also injured in the same accident (RP I, 90/9-91/1), and Respondents—his children—presumably would have been aware of it. They made no effort to contradict Mrs. Capps's testimony. There was no evidence supporting the court's finding that it *specifically* disbelieved this particular testimony.

Untenable reason. The sole occasion on which Judge Fleming commented on Mrs. Capps's credibility was his outburst over her supposed damage the house and the defaced photograph when she moved out. He declared (twice) that she wasn't credible because "she was angry" (*supra*, at 19). But her testimony about the personal injury settlement was identical in 2008 (CP 30-40; CP 184-204), long before she had to move out of her house in October 2009 which caused the "anger", and there is no logical connection between Mrs. Capps's testimony about the proceeds from her personal injury settlement and anger she may have felt when she

was forced to move from her house. Judge Fleming's sole reason for finding Mrs. Capps's testimony not credible was untenable.³⁶

The trial court erred in finding as facts that "there is no evidence of when or how" property taxes for the North Huson St. house were paid" (FF IX), and that Mrs. Capps had failed to prove that they were paid with community funds (CL V; "Even if Mrs. Capps had proven that those taxes were paid from community funds, which she did not. . ."). This is incorrect. Exhibit 15 conclusively proved the amount of property taxes due each year and the fact that they were paid every year between 1977-2006. Judge Fleming's finding is contrary to the controlling presumption that payments made during a marriage are presumed to be with community funds absent clear and convincing evidence to the contrary.

6. The trial court erred in concluding that it was equitable to offset imputed rent at all, after 30 years of living in the home.

³⁶ Judge Fleming adopted another of Respondents' proposed findings that uncontroverted, reasonable testimony by Mrs. Capps was not credible (FF II: while Mrs. Capps had sold her home in December 1977 "Her testimony that she received \$22,750.00 from that sale and that those funds were brought into the marriage is not credible"). But that testimony was consistent over time (*see* CP 30-40), was supported by surrounding circumstances (Exh. 2 showed 1% real estate excise tax was \$227.50, confirming the sale price to be \$22,750; Mr. and Mrs. Capps were living together at the time (RP I, 44/8-21) and stayed together for the rest of his life, and Mrs. Capps testified that once they began living together they commingled everything. RP I, 44/19-47/2; 112/25-115/11; 131/4-132/14; 144/24-145/6. There was no evidence from which an inference contrary to this testimony could be drawn. Judge Fleming's only reason for finding any of Mrs. Capps's testimony not credible was because she was angry when she moved from her home.

In some circumstances courts have imputed to the marital community the value of rent for living in one spouse's separate property as an offset against the contributions the community made. *Miracle v. Miracle*, 101 Wn.2d 137 (1984); *Fritch v. Fritch*, 53 Wn.2d 496, 506-507 (1959); *Estate of Hickman*, 41 Wn.2d 519, 526 (1952); *Merkel v. Merkel*, 39 Wn.2d 102, 115 (1951). But none of these cases discuss a rationale or analysis for when rent should be offset, and none of them involve offsetting the value of the *community* of living in the house against the non-owner spouse's *separate* contributions.

In *Miracle*, a divorce case involving a 7-year marriage, the court considered the issue of whether "In a dissolution proceeding, may the trial court offset the community's beneficial use of one spouse's separate asset against the amount of community funds expended toward that property?" 39 Wn.2d at 137-138. The court concluded yes, it may. Not that is *must*, but may. Mrs. Miracle owned a house when the parties married, in which they lived and on which the marital community made the mortgage payments. Mr. Miracle sought reimbursement for his share of those payments. The Court noted that "Mr. Miracle had provided no personal services, nor were any improvements made to the home," *Miracle, supra*, at 137, in holding that it was not error to offset the rental value of the house against his claim for reimbursement. The *Miracle* Court clearly

considered a spouse's services (or lack thereof) to be a factor in evaluating whether it was equitable to charge them with rent. Here, Judge Fleming refused to admit any testimony about Mrs. Capps's services to support the house and marital community (RP I, 93/3-96/1), while arguing with Mrs. Capps's counsel in support of Respondents' theory. RP I, 93/23-95/10.

In *Fritch v. Fritch*, another divorce case, the parties bought property while married but separated soon after. The husband then lived on the property for 10 years, improving it. His former wife was later awarded a community interest in the property but was ordered to reimburse him for ½ his contributions. The court also held, "On the other hand, [Mrs. Fritch] has, by her testimony, waived any claim for rent during the time that respondent has maintained his home on the property," eliminating any offset for rent. *Fritch* makes clear that the owner's intent or expectation may be a factor in deciding whether to impute an obligation on the contributing party to pay rent.

In *Hickman*, a probate case, a husband and wife lived in the wife's separate property before she died. The husband continued living there after she died, making contributions to the property for which he later claimed reimbursement for his post-death contributions. The court held he was entitled to reimbursement, but as a matter of equity charged him with the rental value of the property *since the date his wife's will was admitted*

to probate. *Hickman, supra*, at 526-527. So although the contributing spouse had lived in the house with his wife while she was alive, the court did not find it equitable to charge him with rent for that time.

In *Merkle*, another divorce case, the husband continued to live on the community's property for about 5 years after he and his wife separated. The court awarded the wife equitable reimbursement for ½ the mortgage payments, but nothing for the interest, tax and upkeep payments on the ground that *those* amounts had been offset by rental value. *Merkle* is an example of how courts must delve into the details of the facts and equities in order to allocate interests.

7. No findings of fact support the conclusion of law that it was equitable to impute rent to a surviving spouse. The trial court's legal conclusion that it was equitable to charge Mrs. Capps 30 years' rent for the North Huson St. house is not supported by findings of fact.³⁷ This case involves an extreme set of facts—a 30-year marriage that ended only when the husband died, in which the wife paid as much, if not more, for a

³⁷ The trial court did recite in FF IV that Mrs. Capps “would be unjustly enriched if she does not pay reasonable rent for the premises during that time” (a conclusion of law), but this is not supported by findings of fact for which there is substantial evidence. As noted above, the court did not credit Mrs. Capps or the community with substantial contributions, interest on those contributions, nor any share of the appreciation in the value of the house; it entered no findings related to “justness” other than financial factors—nothing about the relationship between Mr. and Mrs. Capps; the Decedent's expectations or intent; nor what is “just” about Respondents, who contributed nothing, benefitting from the rental value of the home instead of Mrs. Capps.

house that is deemed the husband's separate property. It is not remotely similar to any of the reported cases in which a court has offset rent against a spouse's claim for reimbursement of contributions to the other spouse's separate property. If on these facts a surviving wife is entitled to no reimbursement whatsoever for a lifetime of payments toward the family home, which was expected to be a major source of funds to live on in retirement, it is hard to imagine any circumstances in which reimbursement to a spouse would be due.

It cannot be the rule that the rental value of living in a house legally characterized as the other spouse's separate property must always be offset against contributions made to that property, regardless of the facts. Property is characterized as separate or community based solely on the time of acquisition, but the time of acquisition may not be a significant factor in the equities of a situation. Consider two scenarios:

Situation 1: Man owns house outright. He marries. Wife moves in. Most household work done by staff. Community pays property taxes for 3 years, at which point couple divorces. Wife seeks reimbursement for ½ property taxes during the 3 years of marriage.

Situation 2: Man pays \$10,000 down on \$100,000 house and marries 2 months later. Wife promptly pays off remaining \$90,000 with separate funds. Couple lives in the house for 30 years. Wife doesn't work outside the home. Husband dies. House now worth \$1,000,000, and couple has few other assets. Husband's will gives separate property to kids by prior marriage. Wife seeks reimbursement for her \$90,000 contribution 30 years' earlier.

These examples illustrate some factors that equity seemingly requires be considered in concluding whether to impute rent to the survivor when one spouse dies, and the survivor seeks contributions they have made to property characterized as the Larry's separate property:

- The time value of the spouses' contributions to the property.
- Length of the marriage;
- Proportion of the community's total assets tied up in the separate property;
- The husband and wife's own expectations and wishes;
- Whether party can earn rent by providing household or other non-paid services (community property concept seems to require this, for protection of non-wage earning partners).

Judge Fleming refused to consider any of these factors, or to allow Mrs. Capps to even introduce compelling evidence of Larry's own wishes for his wife's entitlement to value for the house. This court should reverse the trial court, and remand to a different judge with instructions about factors to consider in determining whether it is equitable to charge Mrs. Capps rent for living in the North Huson St. house during her marriage.

8. The trial court erred in admitting Respondents' expert testimony on the rental value of the North Huson St. house. The trial court erred in entering that part of FF IV providing "During the period

from February 1, 1977, through January 31, 2007, the reasonable rental value of the premises was \$286,560.00". It is supported by no admissible evidence. While it was testified to by Respondents' expert (RP I, pp. 57-81), it was error to admit that testimony.

To testify as an expert witness, one must be "qualified as an expert by knowledge, skill, experience, training, or education". ER 702. Mr. Richmond was not so qualified. Mr. Richmond graduated from high school in 1972, worked in construction for about 5 years, "enrolled in a technical arts real estate program" at TCC, and became licensed to sell real estate in 1976. He sold real estate in 1976-77, became an appraiser trainee in 1977-78, and had been an appraiser ever since. RP I, 57/1-9. He bought his first rental property in 1976, managed his "own rental properties," and helped his father maintain and manage some rental properties. RP I, 58/12-23.

Mr. Richmond devised his own methodology to determine the fair market rents of houses going back more than 30 years. He did not research any actual rents in earlier years. RP I, 62/18-22. Instead, he determined the actual rent charged in 2006 and 2008 for 2 houses he deemed comparable to the North Huson St. house, and calculated the ratio between the rents and the real property taxes paid for them in those two years. RP I, 71/14-72/25. He then assumed that the same ratio between

rents and taxes (22%) prevailed from 1977-2009, and multiplied the property tax paid in each prior year by 22% to reach his opinion of market rent for the North Huson St. house over the decades. E.g., 1977 property taxes were \$833.81 (Exh. 15), so he concluded that monthly rent that year was \$185; RP I, 69/21-25 (22% X 833.81 = 183.43). Based on that math he expressed the opinion that the average market rent for the North Huson St. house between 1977-2009 was \$840/month. RP I, 70/1-71/10.

Mr. Richmond did not cross check his results with any actual rents in earlier years (RP I, 77/21-24). RP I, 72/23-73/7. But he considered it validation for his analytical method that the amount Mr. Capps was paying on his real estate contract in 1977 (\$185/month) was the same amount his formula predicted for reasonable rent that year, because “when you look at what people pay for properties, when they rent a property they like to look at rents are covering the majority of their expenses. I thought that was interesting. I felt it was a validation.” RP I, 73/20-74/6. However, a few months later (after the May 1977 refinance) the Capps’ monthly mortgage payment was \$350 (RP I, 86/22-89/11, 89/18-90/8), and after 1991 it was \$0. Mr. Richmond’s lack of sophistication is demonstrated by his finding meaningless relationships based on anecdotal information.

Mr. Richmond offered no evidence that the ratio between property taxes and monthly rents for single family houses in 2006 and 2008 were

typical and no basis for his assumption that that ratio 2006 and 2008 was likely to be the same in 1977, 1987 or 1997. His data sample is too small to be reliable. His methodology was not tested for accuracy. RP I, 74/14-75/5. His opinion was unreliable, and it was error to admit that testimony.

F. The trial court abused its discretion in awarding attorneys' fees against Appellant.

While awards of attorney's fees are generally within a trial court's discretion, awarding fees on untenable grounds or for untenable reasons is an abuse of discretion. *In re Estates of Palmer*, 145 Wn. App. 249 (2008).

The court erred in concluding (CL VIII) that attorneys' fees should be awarded against Mrs. Capps on the grounds that (1) her action was not authorized "because it is not an action on a creditor's claim;" (2) her claim was "not properly brought against Larry A. Capps and Kim Scalera;" (3) she "pursued a claim on legal theories regarding the right to an equitable lien that do not have merit" because she made a claim for repayment of funds that were used by the marital community; and (4) the court found her testimony to not be credible. None of these is a tenable ground for awarding attorney's fees against Mrs. Capps.

In the absence of a statute, contract or certain common bases, under the American Rule each party is liable for its own attorneys' fees. The conclusion that Mrs. Capps's claim was not "authorized" is simply a

legal conclusion that her allegations failed to state a cause of action on which relief may be granted. No statute, contract or common law rule authorizes an award of attorneys' fees whenever a claim fails to state a cause of action. Further, as already discussed, the legal conclusion that a party cannot bring a claim for equitable reimbursement against the estate of a deceased spouse without filing a Creditor's Claim is incorrect.

The finding that Mrs. Capps's claim was "not properly brought against Larry A. Capps and Kim Scalera" is error. The estate's PR deeded the North Huson St. house to Respondents as directed by Judge Fleming on summary judgment. In order for Mrs. Capps to assert her claim of lien on a parcel of real property, the owners of the property are necessary parties. *Curtis Lumber Co. v. Sortor*, 83 Wn.2d 764, 770-771 (1974) (owner of property subject to mechanic's lien). The claim was "properly" brought against Respondents as owners of the North Huson St. house.

Finding that Mrs. Capps pursued a claim on legal theories that did not have merit because she sought reimbursement of "funds that were used by the marital community" is also error. As discussed above, the \$42,500 loan funds did benefit Mr. Capps's separate estate; and Mrs. Capps separately, not the community, paid off much of that loan. But even if the finding were supported by the evidence, the fact that a court reaches a

legal conclusion contrary to a party's position – i.e., that party loses—is not a ground for awarding attorney's fees despite the American Rule.

Finally, as noted above, Court's reasons for awarding fees against Mrs. Capps were not legally valid, and so were untenable.

V. REQUEST FOR ASSIGNMENT TO DIFFERENT JUDGE ON REMAND

Appellant respectfully requests, if this court remands the case back to the trial court level, that it be assigned to a different judge because Judge Fleming's impartiality may reasonably be questioned. The test for determining if a judge's impartiality might reasonably be questioned is an objective one that assumes the reasonable person knows and understands all the relevant facts. *West v. Wash. Ass'n of County Officials*, 162 Wn. App. 120 (2011). This Court has found it necessary to assign cases tried before Judge Fleming to different judges on remand in at least in two recent cases. *Edwards v. Le Duc*, 157 Wn. App. 455 (2010); *State v. Ra*, 144 Wn. App. 688 (2008). In *Edwards v. Le Duc* the court concluded that Judge Fleming "appeared to overstep the bounds of impartiality repeatedly during the trial." In *State v. Ra*, the court concluded that Judge Fleming's comments, including a scolding of a witness, did not show judicial restraint and should not have been made, and his involvement with counsel's presentation amounted to "entering into the fray" of the case.

The Court appears to have found Judge Fleming's "evident and potentially undue concern for the victim's war record" sufficiently indicative of potential partiality to warrant assigning the case to a different judge.

Here, the extremely one-sided nature of Judge Fleming's rulings alone might reasonably lead one to question his impartiality. But events throughout the trial suggested that the court sided with Respondents and was hostile to Mrs. Capps. Judge Fleming:

1. Focused unduly on the money Mrs. Capps received upon her husband's death and seemed to think that she had already gotten enough ("For example, now. . . who got the biggest share", *supra* at 45).
2. Showed hostility in grilling Mrs. Capps when she said she removed and sold appliances upon moving from the house because she was concerned about her finances (*supra*, 46-47).
3. Repeatedly excluded evidence Mrs. Capps offered despite the fact that this was a bench trial.
4. Attacked her personally at the conclusion of trial ("And let me tell you something else. . . .", *supra*, at 19), which was entirely unnecessary treatment of a civil litigant whose fate lay in the hands of the judicial system, and who had already just lost everything.
5. Repeatedly interrupted Mrs. Capps's counsel's examination of witness to comment on counsel's question, or tell him what to ask or

how to ask it. See RP II, 183/11-25; 189/8-190/9; 224/9-11; 225/10-22; 227/7-12; 228./17-229/15; 235/10-22; 226/22-227/6

6. Interrupted to *sua sponte* object on his own to Mrs. Capps' counsel's questions as leading, although opposing counsel didn't object (RP II, 187/22-188/70; RP I, 140/1-14), even lecturing counsel,

if you come in here and you're not following the rules, you're going to hear from me, whether they're saying anything or not (Ibid) . . . I want a fair trial here, and I don't want you testifying is what it amounts to (RP II, 188/18-19).

Once when Respondents objected (probably not inappropriately) to a question from Mrs. Capps' counsel as leading, Judge Fleming commiserated with opposing counsel, "I know he is," continuing, "I've admonished counsel, but he continues. I don't know where he thinks he's getting with it, but he's continued" RP II, 196/7-11. Yet an examination of the record will show that Mrs. Capps' counsel didn't ask leading questions any more—and probably less—than Respondents' counsel, and Judge Fleming never once objected to leading their questions. RP I, 58/24-59/6 (*permitting* a leading question over Mrs. Capps' objection); RP I, 64/2-17; 65/2-7; RP II, 155/13-14; 156/9-25; 157/17-19; 159/6-8; 159/13-15; 171/24-172/4; 178;14-16; 180/25-181/2; 181/19-21). Judge Fleming himself, from the bench, directed egregiously leading questions to witnesses. In one case, Respondents' counsel was trying to get Mrs.

Capps to agree that the marital community wasn't entitled to reimbursement for paying the \$42,500 mortgage, because it had received the proceeds of the loan:

Q. (By Mr. Adams) And since—since you and your husband together as a marital community got the use of that money, basically, you were the ones—the marital community also should pay back the loan because you got the money; isn't that right?

MR. CARLSON: Objection, calls for a legal conclusion.

THE COURT: No, it doesn't. You may answer.

A. Yes. . . .

Q. You would agree that whoever ended up with the borrowed money from the bank should pay it back, whichever entity got it should pay it back, and that it was the marital community that got it. Isn't all that true?

A. Yes.

THE COURT: That's two questions. Do you understand it? *The marital community got the money.* [Leading.]

MS. CAPPS: Yes.

THE COURT: *Correct?* [Leading]

MS. CAPPS: Yes, correct.

THE COURT: So then the marital community, *it's fair that the marital community pay it back to whoever they got it from.*

[Leading]

MS. CAPPS: Yes, yes.

MR. ADAMS: Okay.

RP I, 118/20-119/24. *See also* RP I, 173/5-10, 173/22-174/2; RP II, 228/17- 229/15, 233/6-20; 215/23-217/25; RP II, 236/22-227.

7. Sided with Respondents on every disagreement over the language to be included in the Findings and Conclusions (and there were many, CP 321-334). One clear example of the court's partiality was including Respondents' proposed language in CL II that "Mrs. Capps'

Counsel signed an order dated March 11, 2011. . . *stating that the claim she was pursuing for trial was brought under her Second Amended Complaint under cause number 09-2-15731-1.*” In fact, that March 11 Order (CP 566) said nothing about which cause number her claim for equitable relief had been brought under; it had been alleged in both cases, which were consolidated for trial of the single issue of her equitable reimbursement claim. Mrs. Capps pointed this out at presentation of the findings and conclusions and proposed instead to just quote the language of the Order in the finding. RP III 321/13-13-16.³⁸ Given counsels’ vigorous argument (RP III 321/13-328/17) Judge Fleming might have looked at the 1-page March 11 Order to see if Respondents’ proposed language was there or not. But he didn’t, instead finally just saying “I’m going to leave it the way it is”. RP III 328/17.

The record in this case would cause a reasonable person to question Judge Fleming’s objectivity. If remanded, the case should be assigned to a different judge.

VI. CONCLUSION

Appellant requests that this court:

³⁸ The transcript indicates counsel are discussing “number 5”—this was the number used in Mrs. Capps’ proposed revisions to the findings and conclusions, which the parties were looking at the time. CP ____ (record will be supplemented to provide).

1. Reverse the trial court's summary judgment order finding the North Huson St. house to be entirely Larry's separate property, and on the basis of the parties prenuptial agreement and the other undisputed facts, rule that all increases in the North Huson St. house over and above the value of \$35,000 are community property and as such belong to Appellant under the terms of Larry's last will.

2. In the alternative, reverse the trial court's orders granting Respondents summary judgment, and the judgment dismissing Appellant's claim for reimbursement of contributions to the North Huson St. house, and remand all issues to the trial court for further proceedings, assigned to be heard by a different judge.

3. Order that Respondents reconvey title to the North Huson St. house back to the personal representative of decedent's estate, and reimburse the estate for the value of Respondents' use of the property.

4. Order Respondents, jointly and severally, to return to Appellant all funds paid on the judgment below with interest on those funds at the rate of 12% per annum.

Dated: September 8, 2011

Carlson & Dennett, P.S.

By: Carl J. Carlson
Carl J. Carlson, WSBA# 7157
Attorneys for Appellant

42078-3-II

11 SEP -9 11:06
STATE OF WASHINGTON
DEPUTY

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

In the Matter of the Estate of
LARRY CLINTON CAPPS,

Deceased

LINDA CAPPS,

Appellant,

v.

LARRY CAPPS and KIMBERLY SCALERA

Respondent.

DECLARATION OF SERVICE

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CARL J. CARLSON
Attorneys for Linda Capps

ORIGINAL

The undersigned makes the following declaration:

1. I am now, and at all times herein mentioned was a resident of the State of Washington, over the age of eighteen years and not a party to this action, and I am competent to be a witness herein.

That on September 8, 2011, I caused copies of the following:

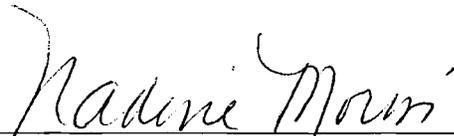
- a. Amended Brief of Appellant;
- b. Appellant Linda Capps' Motion for Leave to File Over-Length Brief; and
- c. Declaration of Service

to be served on the following in the manner noted below:

Thomas G. Krilich Krilich, La Porte, West & Lockner, P.S. 524 Tacoma Avenue South Tacoma, WA 98402	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile: <input type="checkbox"/> Email:
Barton L. Adams Adams & Adams Law PS 2626 N. Pearl Street Tacoma, WA 98407-2499	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile: <input type="checkbox"/> Email:

2. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct

Date: September 8, 2011

By: 
Nadine Morin