

NO. 49389-6-II

COURT OF APPEALS STATE OF WASHINGTON  
DIVISION II

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IN RE MARRIAGE OF:

CHRISTINE AMBURGEY,

Respondent,

v.

CHRISTOPHER VOLK,

Petitioner.

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PETITIONER VOLK'S OPENING BRIEF

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## **A. ASSIGNMENTS OF ERROR**

### **1. Assignments of error.**

Appellant Desiree Peacock assigns error to the following findings of fact & conclusions of law from the trial court's August 18, 2016 "Final Order and Findings on Petition to Change a Parenting Plan, Residential Schedule or Custody Order":

- finding of fact no. 4;
- conclusions of law no. 11;

Appellant Desiree Peacock also assigns error to the following findings of fact & conclusions of law from the trial court's August 18, 2016 "Findings of Fact and Conclusions of Law Re: Relocation and Modifications to Parenting Plan":

- findings of fact no. 7, 8, 9, 10, 11, 19, 20, 23;
- conclusions of law (as to relocation) no. 1, 2;
- conclusions of law (as to modification) no. 1, 3, 9.

### **2. Issues pertaining to assignments of error.**

Whether the trial court erred in finding detriment to the children and reversing custody where, after trial, the court initially offered the mother (who had moved to Centralia under a

commissioner's order granting temporary relocation) to continue as primary custodian if she moved back to Yelm

## **B. STATEMENT OF THE CASE**

### **1. Background**

Christopher Volk and Christine Amburgery lived together from approximately 1994 to January 2014, when Ms. Amburgery moved out of Mr. Volk's home. Clerk's Papers (hereinafter "CP") at 13. The parties maintained separate finances throughout the time period they lived together. Id.

On November 19, 2013, Ms. Amburgery filed a Chapter 7 bankruptcy Petition in the Western District of Washington. CP 13, and CP 16-54 (bankruptcy petition). Ms. Amburgery filed the Petition as an "individual" Debtor and did not list any joint debtor. CP 16. She asserted she had no interest in any real property, nor in any community or joint property. See CP 21, 23. She asserted she had an interest in her business as a sole proprietorship, and she listed her interest was "100%", without mentioning Mr. Volk. CP 25. As for other property she set forth in the schedules, see, e.g., CP 27 (Schedule C), none of it was Mr. Volk's property. Nor did she disclose any claims, potential claims, or interests

in Mr. Volk's property anywhere on any of the schedules. See CP 25-34. Indeed, she marked "None" for the question asking her to list "Other contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims" in Schedule B. See id., p. 10.

On February 26, 2014, Ms. Amburgery's debts were discharged, CP 56-57, and her bankruptcy was closed with no assets distributed to creditors on March 3, 2014. CP 59.

Counsel for Mr. Volk advised counsel for Ms. Amburgery that Mr. Volk would seek fees and sanctions if she chose to continue to pursue her CIR complaint, see CP 61-64, against Mr. Volk despite her contradictory representations to the U.S. Bankruptcy Court. Ms. Amburgery did not withdraw her complaint.

## **2. Motion for Summary Judgment**

On July 8, 2016 Mr. Volk moved for summary judgment. Specifically, he sought an order estopping Ms. Amburgery from (1) claiming she and Mr. Volk were in a committed intimate relationship (CIR) prior to November 19, 2013, when Ms. Amburgery filed her Chapter 7 Voluntary Petition for Bankruptcy in the United States

Bankruptcy Court of the Western District of Washington, Cause Number 13-47159-PBS, given Ms. Amburgery did not schedule this CIR claim in her bankruptcy action; (2) claiming any interest in property acquired prior to Ms. Amburgery filing for bankruptcy on November 19, 2013, given Ms. Amburgery did not disclose any such interests in her bankruptcy filings; and (3) dismissing Ms. Amburgery's claimed interests in property Mr. Volk acquired prior to Ms. Amburgery filing for bankruptcy on November 19, 2013, because Ms. Amburgery lacked standing to bring such claims. CP 1-12 (Summary Judgment Motion).

On August 5, 2016, the trial court declined to apply judicial estoppel and denied the Motion for Summary Judgment, see CP 82-84, specifically finding that “unless a committed intimate relationship had been found by [the] court and property interests allocated, [Ms. Amburgery] was not under any obligation to disclose her potential interests in Mr. Volk's property to the Bankruptcy Court[.]” CP 84.

Mr. Volk moved for Discretionary Review of this ruling, and the Commissioner granted review in a ruling dated January 17, 2017.

## C. ARGUMENT

### 1. Standard of Review.

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The appellate court reviews summary judgment de novo, considering the facts in the light most favorable to the nonmoving party. Keck v. Collins, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). For the reasons set forth below, the Court should conclude the trial court erred, reverse the trial court's denial of summary judgment, and remand for dismissal.

### 2. **The trial court erred because judicial estoppel applies to preclude litigants seeking bankruptcy from taking one position in their bankruptcy action, and then later taking an inconsistent position.**

“Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.” Arkinson v. Ethan Allen, Inc., 160 Wn.2d 535, 538, 160 P.3d 13 (2007) (quoting Bartley-Williams v. Kendall, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006)). Although it is an equitable doctrine, judicial estoppel applies in the context of motions for summary judgment of

dismissal. See Cunningham v. Reliable Concrete Pumping, Inc., 126 Wn. App. 222, 225, 108 P.3d 147 (2005) (affirming trial court's grant of summary judgment based on judicial estoppel). Judicial estoppel is applicable where the two actions involve different parties. Johnson v. Si-Cor, Inc., 107 Wn. App. 902, 908, 28 P.3d 832 (2001).

When applying the doctrine of judicial estoppel, a trial court considers the following:

(1) Whether a party's later position is clearly inconsistent with its earlier position; (2) whether judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Arkinson, 160 Wn.2d at 538-39 (quoting New Hampshire v. Maine, 532 U.S. 742, 750-51, 121 S.Ct. 1808 (2001)).

The classic example of application of judicial estoppel is in the context of proceedings following bankruptcies. Indeed, courts consistently apply judicial estoppel in situations where a debtor fails to list a property interest or a potential claim as an asset during bankruptcy and then pursues the interest or claim after discharge. See Arkinson v. Ethan Allen, Inc., 160 Wn.2d 535, 539, 160 P.3d 13

(2007) (“Courts may generally apply judicial estoppel to debtors who fail to list a potential legal claim among their assets during bankruptcy proceedings and then later ‘pursue the claims after the bankruptcy discharge’”). Courts use judicial estoppel to prevent a debtor who failed to disclose a claim in a prior bankruptcy proceeding from later asserting it for his or her benefit because the nondisclosure of assets during bankruptcy impairs the interests of creditors and the bankruptcy court. Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 785 (9th Cir. 2001).

This is the exact situation here. Ms. Amburgery filed a Petition for bankruptcy as an individual, she failed to list any of Mr. Volk’s property as property in which she had an interest, and she told the bankruptcy court she had no other claims at all. All estoppel factors are present here, and the trial court should have applied the doctrine to bar her CIR claims as inconsistent with her bankruptcy filing.

**a. Ms. Amburgery’s claims under this action are inconsistent with the representations she made to the bankruptcy court in her bankruptcy proceeding.**

A bankruptcy debtor has an affirmative duty to disclose all

assets, including contingent and unliquidated claims and potential causes of action, as part of the debtor's bankruptcy proceeding. Cunningham, 126 Wn. App. at 229-30. The debtor should list possible causes of action even if the likelihood of success is unknown. Id.

Ms. Amburgery filed her bankruptcy petition on November 19, 2013. In her Petition, she now claims she and Mr. Volk began a CIR as early as 1994, but in Schedule A, which requires a debtor to list any interest in real property, Ms. Amburgery listed none. CP 23. Likewise, in Schedule B, which requires the debtor to list all personal property of the debtor of whatever kind, Ms. Amburgery made limited disclosures. See CP 21. Ms. Amburgery claimed to have personal property with a value of only \$23,054.11, all of which she claimed as exempt from collection, at the time she filed her voluntary petition. CP 26-27. She claimed only her bank accounts in her name; limited household furnishings and entertainment; limited books, art, and collections; limited clothes and jewelry; a 2009 Lincoln MZK, Tent Trailer and a 2003 Ford Ranger; and limited office supplies. Id. She marked "none" in the section asking whether she had any interests in retirement accounts, and she indicated she had a "100%" interest" in

her own sole proprietorship. CP 25.

Ms. Amburgery did not schedule any property in Mr. Volk's name, nor did she identify her relationship or any allegedly joint property with Mr. Volk. Ms. Amburgery's representation to the bankruptcy court that her estate was extremely limited is entirely inconsistent with her current claims that she was in a CIR with Mr. Volk from 1994, continuously to January 2014. See CP 61-62 (Petition for Dissolution of CIR). In direct contradiction to her bankruptcy petition, Ms. Amburgery now claims an interest in Mr. Volk's property beginning as early as 1994. Her position is clearly inconsistent with the position she took before the bankruptcy court, and the trial court should have rejected it.

**b. The trial court's acceptance of Ms. Amburgery's inconsistent positions indicates either the Bankruptcy Court or the trial court was misled.**

“[J]udicial estoppel means only that the first court has adopted the position urged by the party, either as a preliminary matter or as part of a final disposition.” In re Coastal Plains, Inc., 179 F.3d 197, 206 (5th Cir. 1999) (citing Reynolds v. Commissioner of Internal Revenue, 861 F.2d 469, 473 (6th Cir. 1988)). A specific inconsistent

court order is not required, Johnson v. Si-Cor Inc., 107 Wn. App. 902, 909, 28 P.3d 832 (2001), and the party need not have prevailed on the merits. Reynolds, 861 F.2d at 473. A bankruptcy court may accept a debtor's position by discharging her debts. Hamilton, 270 F.3d at 784; see also, Johnson v. Si-Cor Inc., 107 Wn. App. 902, 909, 28 P.3d 832 (2001) ("By closing the case as a 'no asset' case, the court implicitly accepts the debtor's position, as stated in the debtor's bankruptcy schedules. . . .").

When Ms. Amburgery declared to the bankruptcy court that her assets were limited to \$23,054.11 of exempt personal property and failed to disclose any claimed interest in Mr. Volk's property or her relationship with Mr. Volk, the trustee processed Ms. Amburgery's bankruptcy as a no asset case with no distribution to the creditors and the court closed the case as a no asset case. See CP 56-57, 59. The bankruptcy court accepted Ms. Amburgery's assertions of her limited estate and of no interest in Mr. Volk's assets when it closed her case without further investigation. Ms. Amburgery has either perjured herself to the bankruptcy court when she claimed no interest in Mr. Volk's property and failed to disclose any relationship with Mr. Volk,

or she has done so now in claiming a CIR with Mr. Volk and an interest in Mr. Volk's property.

Given Ms. Amburgery's claim that she was in a CIR with Mr. Volk beginning in 1994, and given the bankruptcy court has not had the opportunity to consider any of the property she now claims an interest in, it means either the bankruptcy court or the trial court WAS misled by Ms. Amburgery. This is exactly the type of inconsistent position judicial estoppel is meant to prevent, and the trial court erred in declining to grant summary judgment.

**c. Ms. Amburgery will derive an unfair advantage from her assertion of inconsistent positions.**

By failing to disclose any potential interest in any property owned by Mr. Volk, Ms. Amburgery ensured that her bankruptcy case would be dismissed as a no asset case with no payment to her creditors, and she would go forward completely discharged from her obligations to her creditors. If the court was to accept Ms. Amburgery's current claims that she was in a CIR with Mr. Volk, and find that she has an interest in Mr. Volk's property, Ms. Amburgery will have an unfair advantage. Ms. Amburgery will have been able to

discharge all of her debts without payment to creditors while benefiting completely from property she now claims an interest in which may have been used to pay her creditors.

Whether Ms. Amburgery's prior position or her present position is taken as true, judicial estoppel is necessary to prevent Ms. Amburgery from deriving an unfair advantage by "playing 'fast and loose with the courts' and asserting inconsistent positions." Rockwell Int'l Corp. v. Hanford Atomic Metal Trades Council, 851 F.2d 1208, 1210 (9th Cir. 1988). The trial court erred.

**d. It is fair to apply judicial estoppel to Ms. Amburgery's claims.**

Ms. Amburgery's failure to disclose her relationship with Mr. Volk or her claimed interest in Mr. Volk's property was not based on inadvertence or mistake. Inadvertence only exists when a party lacks knowledge or has no motive to conceal a potential claim. Skinner v. Holgate, 141 Wn. App. 840, 853-54, 173 P.3d 300 (2007). A party has knowledge when she is aware of the facts giving rise to a claim. See Jethroe v. Omnova Solutions, Inc., 412 F.3d 598, 601 (5th Cir. 2005) ("to claim that her failure to disclose was inadvertent [the party] must show not that she was unaware that she had a duty to disclose her

claims but that, at the time she filed her bankruptcy petition, she was unaware of the facts giving rise to them”). Furthermore, good faith reliance on legal advice does not constitute inadvertence or mistake. Cannon-Stokes v. Potter, 453 F.3d 446, 449 (7th Cir. 2006).

Ms. Amburgery told the trial court she was in a CIR with Mr. Volk from 1994 to January 2014, see CP 61-62. She cannot dispute she had knowledge of the facts giving rise to her alleged community-like interest in Mr. Volk’s assets by November 2013, when she filed for bankruptcy. Relevant factors establishing a CIR include, but are not limited to, continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties. Connell v. Francisco, 127 Wn.2d 339, 346, 898 P.2d 831 (1995). Ms. Amburgery alleges she and Mr. Volk had been living together for years and had children together when Ms. Amburgery completed her bankruptcy petition. It is beyond dispute that Ms. Amburgery was aware of the alleged facts giving rise to her claim of CIR with Mr. Volk at the time she filed her bankruptcy petition. Ms. Amburgery also had a clear motive to conceal her alleged interest in Mr. Volk’s property. By not disclosing the interest

during her bankruptcy, she secured the discharge of her debts without having to subject her now claimed interests in Mr. Volk's property to the claims of her creditors.

**e. Bankruptcy courts routinely address property interests derived from Committed Intimate Relationship cases.**

In response to discretionary review, Ms. Amburgery argued judicial estoppel cannot apply because the Defense Against Marriage Act had not yet been repealed. But this argument about marriage is irrelevant because bankruptcy courts are empowered to address property interests derived from committed intimate relationships under Washington law. See, e.g., In re Zimmer, No. C07- 1591 RSL, 2008 WL 2180084, at \* 3 (W.D. Wash. May 22, 2008) (remanding matter to bankruptcy court to assess debtor's interest in a building in light of "Washington law governing the distribution of property following the termination of a committed intimate relationship"); In re Andrus, Bankr. No. 09- 13123, No. ADV 09- 01264, 2010 WL 4809114, at \*4 (Bankr. W.D. Wash. Aug. 13, 2010) (analyzing whether the debtor "intended to convert her separate Property into the equivalent of community property in a marriage" and analyzing

whether a CIR existed).<sup>1</sup>

In short, it was error that the trial court failed to apply judicial estoppel and grant Mr. Volk's Motion for Summary Judgment.

**3. The trial court erred because Ms. Amburgery lacked standing to assert interests in Mr. Volk's property that accrued prior to her bankruptcy petition on November 19, 2013.**

The trial court also erred by failing to grant summary judgment because Ms. Amburgery lacks standing to assert interests in Mr. Volk's property that accrued prior to Ms. Amburgery's bankruptcy petition on November 19, 2013. The rules of civil procedure require that an action be pursued by the real party in interest. CR 17(a). This rule requires that the "plaintiff must have a personal stake in the outcome of the case in order to bring suit." Gustafson v. Gustafson, 47 Wn. App. 272, 276, 734 P.2d 949 (1987).

When Ms. Amburgery filed for bankruptcy any claim she had in Mr. Volk's property became a claim of the bankruptcy trustee. When a debtor files for bankruptcy, an estate is created. 11 U.S.C. § 541; In re Becker, 136 B.R. 113, 115 (Bankr. D. N.J. 1992). The estate

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<sup>1</sup> See generally Fed. R. App. P. 32.1 (permitting citation to unpublished federal decisions issued on or after January 1, 2007); GR 14.1(b) allowing citation to unpublished opinions from other jurisdictions if permitted under the law of that jurisdiction).

is comprised of all legal or equitable interests the debtor held in property as of the commencement of the case. Becker, 136 B.R. at 115. The debtor's interest in property that is jointly owned with a nondebtor spouse is included as property of the estate. Id. Similarly, community property is an asset of the bankruptcy estate. 11 U.S.C. § 541(a)(2). Income and property acquired during a CIR are "characterized in a similar manner as income and property acquired during marriage" and, therefore, is are "presumed to be owned by both parties"; community property rules are applied by analogy. Connell, 127 Wn.2d at 351. Accordingly, if a debtor acquires a community-like interest or other legal or equitable interest in property prior to filing for bankruptcy, that interest becomes part of the bankruptcy estate when the debtor files.

Ms. Amburgery claims that she and Mr. Volk were a CIR as early as 1994. Therefore, any alleged community-like interest Ms. Amburgery claims would have accrued prior to her filing for bankruptcy on November 19, 2013, and would be a part of the bankruptcy estate pursuant to 11 U.S.C. § 541.

A bankruptcy estate is represented by the bankruptcy trustee

who has the exclusive capacity to sue and be sued on behalf of the estate. Estate of Spiritos v. One San Bernardino Cnty. Superior Court Case Numbered SPR 02211, 443 F.3d 1172, 1174 (9th Cir. 2006). The right to pursue causes of action formerly belonging to the debtor vests in the trustee for the benefit of the estate, and the debtor has no standing to pursue such causes of action. Bauer v. Commerce Union Bank, Clarksville, Tennessee, 859 F.2d 438, 441 (6th Cir. 1988). Accordingly, Ms. Amburgery has no standing to pursue any alleged interests in Mr. Volk's property acquired before Ms. Amburgery filed for bankruptcy. As such, it was also error for the trial court to deny summary judgment on this ground.

#### **4. Fees and Sanctions.**

In the pleadings below, Mr. Volk has pled counterclaims seeking relief under CR 11 and RCW 4.84.185. The trial court should have granted summary judgment, and should also have awarded Mr. Volk his fees, costs, and sanctions under RCW 4.84.185, which provides that the "determination shall be made upon motion by the prevailing party after a[n] . . . order on summary judgment . . . ." Counsel for Mr. Volk sent counsel for Ms. Amburgery a letter

explaining in detail why Ms. Amburgery's claims were not well-grounded in law and advising she would be judicially estopped from asserting those claims with the filing of this motion. The letter specified if the claims against Mr. Volk were not promptly dismissed, and he was forced to spend additional attorney fees and costs defending the case, he would seek recovery of these fees and costs from Ms. Amburgery. If this Court reverses the trial court, Mr. Volk should be entitled to his fees and costs both below and on appeal.

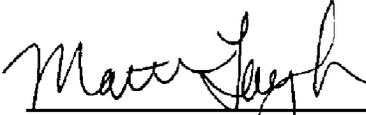
#### **D. CONCLUSION**

Ms. Amburgery failed to schedule any of her now claimed interest in Mr. Volk's property when she filed her bankruptcy petition on November 19, 2013, and she was subsequently discharged from her obligation to repay her debts with no assets transferred to her creditors as a result of her failure to disclose. The bankruptcy court accepted Ms. Amburgery's position by accepting her petition and discharging her from her obligation to repay her debts. Judicial estoppel should apply to bar her inconsistent claims, and the trial court erred by failing to grant summary judgment.

In addition, Ms. Amburgery lacks standing to assert any claims or interest in any property acquired before the filing of her bankruptcy petition. Any such claims became the property of the bankruptcy estate at the time she filed her petition, and the bankruptcy trustee is the only party with standing to bring those claims. The trial court also erred by failing to grant summary judgment on this ground. Mr. Volk respectfully requests that this Court reverse the trial court.

RESPECTFULLY SUBMITTED this 26th day of May, 2017.

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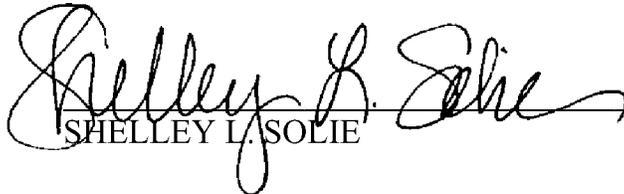
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CERTIFICATE OF SERVICE

I certify that on May 26, 2017, I caused to be served a true and correct copy of the foregoing Opening Brief to Division II of the Court of Appeals on the following parties via electronic mail, and also via hand-delivery:

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**Comments:**

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