

NO. 42078-3-II

Pierce County Superior Court No. 07-4-00351-0

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,

Respondents.

BRIEF OF RESPONDENT KIMBERLY A. SCALERA

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I. COUNTER-STATEMENT OF THE CASE

Decedent Larry C. Capps and Linda Capps were married on February 26, 1977. RP 54:3-5. The parties resided in a house at 4903 North Huson Street in Tacoma, which had been acquired by decedent prior to his marriage to Linda Capps.

On May 6, 1977, Linda Capps executed and recorded a Quit Claim Deed to decedent as grantee to the Huson Street house which stated:

“This deed is to confirm that said property is and will remain the separate property of the grantee.” CP 85.

Decedent executed his Last Will on February 26, 1979. CP 324-327. In Article II, he left all of his separate property to Larry A. Capps and Kimberly Capps (now Kimberly Scalera), his children by a former marriage. CP 324. The remainder of his estate, which was his community property, was left to his spouse, Linda Capps. CP 325. She also received some \$800,000 or \$900,000 in joint bank accounts and certificates of deposit. RP 136:3-13.

Larry C. Capps died on January 15, 2007. CP 2. His Last Will was admitted to probate on March 1, 2007. CP 1-3. Subsequent to his death, the personal representative of his estate informed Larry A. Capps and Kimberly Scalera that the house on North Huson Street had, through commingling with community funds, become community property, and

that there was no separate property in decedent's estate which would pass to them pursuant to the will. CP 370.

On February 25, 2008, Larry A. Capps and Kimberly Scalera filed a "Petition for Judicial Proceedings to Confirm Certain Real Property as Separate Property of the Decedent and to Direct Distribution Thereof to Petitioners Pursuant to Will." CP 4. Said petition prayed for an adjudication that the subject real property on North Huson Street be confirmed as the separate property of the decedent and distributed to the petitioners, Larry A. Capps and Kimberly Scalera, pursuant to Article II of the will, and for reasonable attorney's fees and costs. CP 7.

The surviving spouse, appellant Linda Capps, filed a response to the petition on May 7, 2008 (CP 17), which denied that the property was the separate property of the decedent because "the parties have utilized community property, community funds and community labor to substantially and significantly improve" the subject house. CP 17. Her response prayed that the petition be dismissed with prejudice, and that the court "determine that the title to the subject real property be placed in the name of Linda S. Capps as the sole surviving spouse of the decedent, Larry C. Capps." CP 18.

Larry A. Capps filed a motion for an order of summary judgment determining that the subject real property was the separate property of the

decedent, that was bequeathed to his two children. CP 56. On September 4, 2009, the trial court entered an "Order on Motion for Summary Judgment" which adjudged the house at 4903 North Huson Street in Tacoma to be the separate property of the decedent, and ordered that it be distributed to respondents Larry A. Capps and Kimberly A. Scalera pursuant to the will. CP 118-120.

On September 11, 2009, Linda Capps filed a "Motion to Stay Delivery and/or Recordation of Deed" (CP 121), as well as a "Motion to Determine Community Property Interest and Terms of Payment" (CP 122), and a "Motion for Reconsideration and Relief from Judgment" regarding the order granting summary judgment. CP 127-128. Those motions were denied on October 2, 2009. CP 384-387.

Linda Capps then filed a creditors claim in the probate proceeding on October 12, 2009, more than two years after the death, asking for "\$755,000 or the current fair market value of 4903 N. Huson, Tacoma, Washington, if greater plus interest and appreciation." CP 388-389. At the same time, she also filed a "Petition for Judicial Determination of Rights" alleging that community contributions to the home had created an interest therein in her favor, and asking for her interest in the Huson house to be determined. CP 391-393.

The personal representative promptly rejected said claim on

October 30, 2009 (CP 404-405), and on November 23, 2009, Linda Capps filed suit upon that rejected claim in a separate civil action under Pierce County cause number 09-2-15731-1 (CP from case No. 09-2-15731-1, page 242), which complaint was later amended on March 23, 2010. CP from case no. 09-2-15731-1, page 255. Both complaints named the spouses of Larry Capps and Kimberly Scalera as defendants.

On July 23, 2010, that civil action was consolidated into the original probate proceeding, Pierce County number 07-4-00351-0. CP 413.

On March 11, 2011, the court entered an order again denying Linda Capps' motion to re-litigate the separate property issue at trial (CP 527-528), and defining the sole claim of Linda Capps to be whether she is entitled to reimbursement for any community and/or her separate contributions to the house at 4903 North Huson. That order, approved by all counsel, stated that "The remaining action is not based on the creditor's claim but is a direct action." CP 524.

The case came on for trial on March 15, 2011, and the court entered its findings of fact, conclusions of law and judgment on March 28, 2011. CP 584-592.

II. ARGUMENT

A. ARGUMENT IN SUPPORT OF JUDGMENT

1. The position of the personal representative and the surviving spouse that the decedent's separate real property had been converted to community property through later improvement or investment made by the marital community or the surviving spouse's separate estate was not legally supportable.

The character of property is determined at the time of acquisition. *Strand v. Pekola*, 18 Wn.2d 164, 138 P.2d 204 (1943). *Strand, supra*, is exactly on point. In that case, a husband purchased property prior to marriage, paying for it in cash. The property was unimproved. Three years after the purchase, the property owner got married and after marriage, the parties used funds which his wife had prior to marriage to build a house on the property. Thereafter, although they did not deed the property from the husband to the wife, the parties borrowed funds using the property as security, with both parties signing the mortgage, and built a house, a barn, a chicken house, a garage, a tool house, a root house, a shed, feed house, pump house, two wells and they fenced the property. At issue was whether the expenditure of separate property of the wife and community funds changed the character of the property so that a separate property of the wife and community funds changed the character of the property so that a separate creditor of the husband could not execute on

the real property. In holding that despite all of the community improvements to the home, the property remained the husband's separate property, the court in *Strand* said, at page 165:

“We recognize the rule adopted in the case of *In Re Bing's Estate*, 5 Wn.2d 446, 105 P.2d 689, that the status of property whether real or personal becomes fixed as of the date of its purchase or acquisition and retains its character until changed by agreement of the parties or operation of law...”

The court went on to hold that the property remained the separate property of the husband, despite the community improvements to it and denied a request that it be exempt from the separate property creditor of the husband.

That the status of property becomes fixed at the time of acquisition and does not change has been repeated by numerous Washington cases. In *Enrich v. Barton*, 2 Wn. App. 954, 471 P.2d 700 (1970), the court repeated the same rule. There, the court said, at pages 959 and 960:

“Clearly, the property in question was property acquired by the husband after marriage, by gift. It was, therefore, the separate property of Chris F. Enrich.

“Its status as separate property was established as of the date of acquisition. And the presumption is that its status as such remained unchanged.””

(citations omitted)

That position was repeated by the Washington Supreme Court in *Cummins v. Anderson*, 94 Wn.2d 135, 614 P.2d 1283 (1980). At the time

the spouses in the case at bar got married, the property at issue was the separate property of decedent Larry Capps. As a matter of law, it remained separate property because nothing was done to change the status of it.

2. Increase in the value of separate property is presumed to be separate property.

While a surviving spouse or marital community may have a claim for reimbursement for money expended for the improvement of decedent's separate property, it does not follow that such expenditure automatically entitles the surviving spouse to an interest in any increase of value of the separate property. In *Marriage of Elam*, 97 Wn.2d 811, 650 P.2d 213 (1982), the court said, after reviewing and distinguishing some earlier cases:

Accordingly, we hold that any increase in the value of separate property is presumed to be separate property. This presumption may be rebutted by direct and positive evidence that the increase is attributable to community funds or labors.

Marriage of Elam at 816.

The *Elam* case makes it clear that Linda Capps had the burden of proving:

- a) That community funds or her separate funds had been expended for the improvement of decedent's separate house; and
- b) That such improvements were directly related to an

increase in value. This later element had to be proven by “direct and positive evidence that the increase is attributable to community funds or labors.” *Marriage of Elam, supra*.

It is respectfully submitted that Linda Capps did not prove to the satisfaction of the trial court that community funds, or her separate funds, had been expended for the improvement of decedent’s separate house. Even if the court would have accepted all of her claimed expenditures as having been made by the marital community or from her separate properties, those particular expenditures which were primarily paying off a mortgage, or paying real estate taxes, were not really “improvements” to the separate house, and certainly cannot be directly and positively related to any increases in value that occurred through normal appreciation in the real estate market. Furthermore, most of the proceeds of the loan secured by the house during marriage went to the benefit of the community.

RP 113:11-25, 114:1-15.

3. A spouse claiming an interest in decedent’s separate real property for contributions by herself or the marital community is a creditor who must file a timely creditor’s claim.

The only possible claim that the surviving spouse could have with regard to this clearly separate real property would be a claim for reimbursement for community funds, or her separate funds, expended for

improvement to the separate property.

In a situation where you have a parcel of separate real property, and there is then 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 either in a proceeding for dissolution of marriage, or, if it is done in the context of a probate proceeding, by the filing of a creditor's claim. As stated in the Washington Community Property Deskbook, 3d. Ed., at page 3-149:

“The lien is equitable in nature and is usually, but not necessarily, claimed within the framework of settling a decedent's estate or in dissolution proceedings. When asserted in the context of estate administration, the right of reimbursement must be submitted as a claim.”

The above statement in the Community Property Deskbook is founded upon, and supported by the case of *Estate of Bellingham*, 85 Wn. App. 450, 933 P.2d 425 (1997). In the *Bellingham* case, there were various claims, one of which involved a claim for reimbursement from the estate for improvements and maintenance to a separate asset from 1985 to the date of death. The trial court found that those claims were “barred as untimely under RCW 11.40.014 and 11.40.010, provisions governing claims against the decedent.” *Estate of Bellingham*, 85 Wn. App. 450, at 453 (1997). That decision by the trial court on that issue was affirmed by the Court of Appeals.

At no time did Linda Capps ever file a timely creditor's claim in this estate. RCW 11.40.010, which is entitled "Claims-presentation-other notice not affected," states:

A person having a claim against the decedent may not maintain an action on the claim unless a personal representative has been appointed and the claimant has presented the claim as set forth in this chapter."

RCW 11.40.051(1), which is entitled "Claims against decedent-time limits," states:

(1) Whether or not notice is provided under RCW 11.40.020, a person having a claim against the decedent is forever barred from making a claim or commencing an action against the decedent, if the claim or action is not already barred by an otherwise applicable statute of limitations, unless the creditor presents the claim in the manner provided in RCW 11.40.070 within the following time limitations:

(a) If the personal representative provided notice under RCW 11.40.020 and the creditor was given actual notice as provided in RCW 11.40.020(1)(c), the creditor must present the claim within the later of: (i) Thirty days after the personal representative's service or mailing of notice to the creditor; and (ii) four months after the date of first publication of the notice;

(b) If the personal representative provided notice under RCW 11.40.020 and the creditor was not given actual notice as provided in RCW 11.40.020(1)(c):

(i) If the creditor was not reasonably ascertainable, as defined in RCW 11.40.040, the creditor must present the claim within four months after the date of first publication of notice;

(ii) If the creditor was reasonably ascertainable, as defined in RCW 11.40.040, the creditor must present the claim within twenty-four months after the decedent's date of death;

In this case, notice to creditors was filed on March 5, 2007, and first published on March 5, 2007.

Notice of Pendency of Probate was given to Linda Capps on March 24, 2007, by the personal representative by mailing. Even though there is no proof that she was given a copy of the Notice to Creditors, she clearly had notice of the probate proceeding. If she wasn't bound by the 4-month filing requirement of RCW 11.40.051(1)(b)(i), she was certainly bound by the 24-month filing requirement of RCW 11.40.051(1)(b)(ii).

Linda Capps did file a creditor's claim on October 12, 2009 (CP 383-389), well more than two years after decedent's death on January 15, 2007. CP 2.

B. ARGUMENT IN OPPOSITION TO APPELLANT

1. The 1977 quit claim deed from Linda Capps to decedent is clear and unambiguous.

The quit claim deed in question was not just a deed from one spouse to another spouse as his separate property, but it went on to contain the following type-written additional language not usually found in such deeds: "This deed is to confirm that said property is and will remain the separate property of the grantee." CP 85.

Linda Capps now asks the court to allow her to testify that she and the decedent had something else in mind when they used that language.

There are two problems with Linda Capps's position:

1) The language of the deed is clear and unambiguous. As stated in *Hoglund v. Omakwood Prods.*, 81 Wn. App. 501, at 504, 914 P.2d 1197 (1996):

When determining the intent of the parties to a deed, we read the deed as a whole, and give the words of conveyance their ordinary meaning. *McKillip*, 46 Wn. App. at 873. If a statement is capable of two or more meanings, it is ambiguous.”

There is nothing ambiguous about the words “Larry C. Capps, as his sole and separate property,” or “This deed is to confirm that said property is and will remain the separate property of the grantee.” If there is no ambiguity, there is nothing for the court to construe.

2) It flies in the face of the Deadman's Statute, RCW 5.60.030, which states:

No person offered as a witness shall be excluded from giving evidence by reason of his or her interest in the event of the action, as a party thereto or otherwise, but such interest may be shown to affect his or her credibility: PROVIDED, HOWEVER, That in an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative of any deceased person, or as deriving right or title by, through or from any deceased person, or as the guardian or limited guardian of the estate or person of any incompetent or disabled person, or of any minor under the age of fourteen years, then a party in interest or to the record, shall not be admitted to testify in his or her own behalf as to any

transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased, incompetent or disabled person, or by any such minor under the age of fourteen years: PROVIDED FURTHER, That this exclusion shall not apply to parties of record who sue or defend in a representative or fiduciary capacity, and have no other or further interest in the action.

In the case at bar, the adverse parties, Larry Capps and Kimberly Scalera, derive their right and title from the decedent, and Linda Capps cannot therefore testify as to alleged transactions she had with the decedent which purport to invalidate the clear and unambiguous language of the recorded deed signed by her. The summary judgment that the house was separate property of decedent was correct.

2. The trial court did not err in denying Linda Capps's motion for reconsideration.

The alleged antenuptial agreement (CP 198-204) Linda Capps sought to use against the motion for summary judgment was questionable for many reasons, but most notably that it referred to attached, specifically dated financial statements (CP 198-199) that weren't attached, and were never produced, and was, most importantly, irrelevant because it predated the later quit claim deed, which confirmed the separate status of the house. CP 85.

Linda Capps' contention that the decedent's interest in his separate house should be limited to the value of his equity at the time of marriage is

inconsistent with the language of the quit claim deed she later executed stating that “This deed is to confirm that said property is and will remain the separate property of grantee.” CP 85. Her asking the trial court to construe that deed to exclude appreciation in the value of the house would be a most tortured interpretation of the deed.

Her argument that the decedent’s separate interest in the house is based solely on the handwritten list attached to the purported antenuptial agreement. The agreement made reference to financial statements for the prospective husband and wife “as of February 22, 1977” (CP 199), whereas the documents attached were dated February 18, 1977. CP 203-204.

Linda Capps attempted to make an offer of proof of the purported antenuptial agreement at trial. RP 50:6-25, 51:1-18. The court properly sustained an objection to it. Besides the serious questions as to its incomplete nature, it was also clearly irrelevant in view of the “Order Defining Trial Issues.” CP 524.

Linda Capps then introduced the two handwritten lists dated February 18, 1977 (RP 51:19-25, 20:1-17) but then acknowledged that the two pages she had wanted to pass off as the financial statements referred to in the antenuptial agreement were not a list of her assets or a financial statement. RP 52:25, 53:1-22.

3. The court did not abuse its discretion in denying Linda Capps' motion for leave to raise the separate property issue at trial.

The trial court had previously ruled, by summary judgment, that the subject house on North Huson Street was the separate property of the decedent, and was to be distributed to his children of a former marriage pursuant to the Last Will and Testament which had been admitted to probate. CP 118-120. The whole purpose behind CR 56 is to allow the court to make a summary legal decision on a case, or on an issue within the case, when there is no genuine question of material fact regarding that case or issue. Once the court makes a summary judgment on an issue, that becomes the law of the case, unless the court reconsiders.

Linda Capps had made a motion for reconsideration of the summary judgment that the house was decedent's separate property (CP 123), and that motion had been denied. CP 384. There was no abuse in the trial court's refusal to allow Linda Capps to re-litigate that issue which had already been decided summarily, and the requested reconsideration of which had previously been denied. Linda Capps was not entitled to a "third bite of the apple."

4. The creditor's claim statute applies to all debts owed by decedent as of the time of death.

Linda Capps admits in her brief that the creditors claim statute

applies to all debts owed by the decedent at time of death, but tries unsuccessfully to distinguish her claim for an equitable lien. In reality, if the marital community, or she personally from her separate estate, had advanced funds for the improvement of decedent's separate house, then that clearly would be a debt owed by the decedent as of the time of his death.

Linda Capps cites *In re Marriage of Johnson*, 28 Wn. App. 574, 579, 625 P.2d 720 (1981) for the proposition that her claim for an equitable lien was "inchoate" and did not arise prior to death, but only arose when and if the court ruled in her favor. Her claim would have necessarily been an issue in a dissolution of marriage proceeding, so it clearly arose before her husband's death. It is sophistry to suggest that she doesn't have a claim until a judge agrees with her. There is an obvious difference between having a claim, and successfully recovering on that claim.

If anything, *In re Marriage of Johnson*, 28 Wn. App. 574, holds that increased value of separate property due to inflation is not to be included in any claim for an equitable lien. *Ibid.*, at page 575. It also, at page 579, holds that there is no merit in any claim that "her performance of the usual homemakers chores helped produce the increase in value and justifies the granting of the lien."

Marriage of Elam, 97 Wn.2d 811, 650 P.2d 213 (1982), discussed earlier in this brief, was decided one year after *Marriage of Johnson*, 28 Wn. App. 574, and made it absolutely clear that increases in value of separate property were presumed to be separate property in the absence of direct and positive evidence that the increase is attributable to community funds and labor. *Elam*, 97 Wn.2d at 816.

5. Linda Capps' claim was not a claim of ownership of an interest in specific property.

Linda Capps cites three cases to support her argument that she was not required to file a creditors claim because she was claiming an interest in a specific asset. Those three cases are all clearly distinguishable because they involved claims of actual ownership, whereas she is claiming an equitable lien based upon funds allegedly advanced to the decedent for the benefit of his separate property.

In *Smith v. McLaren*, 58 Wn.2d 907, 365 P.2d 331 (1961), the subject property was community property. At time of dissolution, the parties stipulated that it would remain community property, but that the husband could live in it until it was sold, when the sale proceeds would be divided between the former spouses. The husband died without selling the house. His son who was residing with him then died, and an effort was made to include the entirety of the house in the son's estate. The former

wife brought action to confirm and recover her ownership interest in the sale proceeds. This is clearly distinguishable from the case at bar, where Linda Capps had no community or separate ownership, or title interest, in the husband's separate property at the time of his death.

In *Olson v. Roberts*, 42 Wn.2d 862, 259 P.2d 418 (1953), the husband had concealed property at the time of the divorce, which property, by law, remained community property of the parties. After the husband died, his estate claimed ownership of the concealed property, and the former wife filed suit to recover her ownership interest in the same. Once again, the case at bar is distinguishable because Linda Capps held no ownership interest, either community or separate, in her husband's separate property at the time of his death. Her claim was to recover for funds allegedly advanced from the community, or from her separate estate, to the husband.

In *Gottwig v. Blaine*, 59 Wn. App. 99, 795 P.2d 1196 (1990), the plaintiff's claim was for complete ownership of a piece of property after the death of a joint tenant. Once again this was an action to confirm ownership of specific property, which claim had arisen before death, and was not merely a claim to have some equitable relief based upon alleged funds advanced.

Interestingly enough Linda Capps argues: "while Mrs. Capps does

not assert sole ownership of the N. Huson St. house, she asserts ownership of a property interest in it." It is interesting to note that her untimely creditors claim was in the amount of "\$755,000 or the current fair market value of the Huson Street house, if greater." CP 388-389. She was clearly making a claim for the entire house.

Linda Capps' claim of an "equitable lien" is not a claim of ownership in an asset. As was stated in *Marriage of Miracle*, 101 Wn.2d 137, 675 P.2d 1229 (1984), at page 139:

An equitable lien is a remedy intended to protect one party's right to reimbursement. *In re marriage of Harshman*, 18 Wn. App. 116, 567 P.2d 667 (1977); Cross, The Community Property Law In Washington, 49 Wash. L. Rev. 729, 776 (1974).

It must be noted once again that Linda Capps' claim is for reimbursement for money expended during the lifetime of the decedent. An equitable lien would be merely a device to secure her claim if the court found that her claim was valid. The remedy of a "equitable lien" doesn't arise until the claim is accepted by the court. Therefore, the claim of the right to an "equitable lien" does not constitute a claim of ownership interest in an asset unless the court finds that there is a right to reimbursement and creates an equitable lien to secure that interest.

6. The court did not err in ruling that the value of living in the house offset all contributions made to it over 30 years.

In re Marriage of Johnson, 28 Wn. App. 574, (1981), cited by Linda Capps and earlier discussed in this brief, makes it clear that the marital community's use and enjoyment of the family home would be available as an offset to claims of improvement in value by community contributions. *Ibid.*, at 579, and also citing earlier cases such as *Merkel v. Merkel*, 39 Wn.2d 102, 116, 234 P.2d 857 (1951).

In *Marriage of Miracle*, 101 Wn.2d 137, 675 P.2d 1229 (1984), the court stated at page 139:

[1] We believe that the trial court properly refused to impose an equitable lien in favor of the community in view of the finding that the community had been adequately compensated for its expenditures by its beneficial use of the premises. An equitable lien is a remedy intended to protect one party's right to reimbursement. *In re marriage of Harshman*, 18 Wn. App. 116, 567 P.2d 667 (1977); Cross, The Community Property Law In Washington, 49 Wash. L. Rev. 729, 776 (1974). A right to reimbursement may not arise if the contributing spouse received a reciprocal benefit flowing from the use of the property. *Merkel v. Merkel*, 39 Wn.2d 102, 234 P.2d 857 (1951); *In Re Estate of Woodburn*, 190 Wash. 141, 66 P.2d 1138 (1937); *In Re Marriage of Johnson*, 28 Wn. App. 574, 625 P.2d 720 (1981); *In Re Marriage of Harshman*, *supra*. In that case, equity will find that the contributing spouse has already been reimbursed. Cross, 49 Wash. L. Rev. at 777 n.220, 779.

The un rebutted evidence in the case at bar, from the testimony of Tim Richmond, an expert real estate appraiser, which testimony was

offered without objection, was that the marital community had received the benefit of use of the decedent's house, the reasonable rental value of which was \$840 per month for the period of the long marriage, which amount totaled some \$322,000. RP 64:10-20. Obviously, the use of the property by the marital community as a residence was a benefit which would more than offset any of the claims by Linda Capps. Admittedly, *In Re Marriage of Miracle, supra*, involved a dissolution, but the same principle should still apply where a spouse has died, especially when you factor in the purpose behind the dead man's statute.

7. The court did not fail to properly credit Linda Capps and the marital community with contributions made.

Linda Capps offered, and attempted to offer, considerable testimony of her own with regard to alleged contributions made by the marital community and herself personally to the improvement of the subject house. The problem was that the trial court specifically found that she was not credible in much of her testimony (RP 297:21-25, 298:1-7), and that any claim she had was more than offset by the rental value the marital community had received. RP 298:11-22. The court's specific Finding of Fact IX was that while real estate taxes on the house had been paid during the marriage, there was a failure of proof that the payment had

been from the community or her separate funds. Finding of Fact IX, CP 586.

The trial court's determination that Linda Capps was not credible cannot be challenged on appeal. "Credibility determinations are for the trier of fact and are not subject to review." *State v. Mines*, 163 Wn.2d 387, 391, 179 P.3d 835 (2008).

8. The amount of the decedent's original separate property was not irrelevant.

The evidence showed that when decedent and Linda Capps were married, in addition to the subject house which he held his separate estate, he also had some \$81,900 of separate cash accounts. RP 121:6-25, 122:1-21. All of decedent's cash accounts, either separate or community, went to Linda Capps at his death because they were apparently set up as joint accounts with her. RP 124:1-2. The relevance of the amount of decedent's original separate cash was to show that the decedent had more than sufficient separate cash to pay off the mortgage on his separate property (RP 124:7-11), make tax payments, and improvements on his separate house, which, coupled with Linda Capps' lack of credibility, and failure to prove that payments were made from community funds or her separate funds during marriage, were enough to defeat her claims regarding contributions allegedly made by the community or herself.

9. Linda Capps is not entitled to a new judge upon remand.

There is no basis for requiring a change of judge upon remand absent a finding that the trial judge is prejudiced against a party or party's attorney.

CR 40(f) reiterates RCW 4.12.040 which allows for removal of a judge after it is established that the judge is prejudiced against a party or party's attorney. RCW 4.12.050 as well as CR 40(f) provide for the filing of an affidavit of prejudice prior to the time that the court makes a discretionary ruling in a case.

Linda Capps asks the appellate court to find that the trial court was prejudiced against her. The actions by the trial court which she claims evidence prejudice are really nothing more than unhappiness with the fact that she lost her case. The mere fact that the court found in favor of one party to litigation and against the other, does not, by itself, evidence prejudice against the losing party. It is somewhat disingenuous for counsel to suggest that the judge was "prejudiced" and that is the only reason why his client lost her case. The court's remarks regarding the credibility of Linda Capps and the court's comments on some of her actions may have evidenced the fact that the court was somewhat offended by her actions and her claims, which included trying to claim all of

decedent's separate estate, defacing family photos (RP 178:10-19), apparent destruction (RP 175:19-25, 176:1-4), digging up plants (RP 159:9-15), but that reaction was a natural reaction to the evidence, and cannot be said to be based on prejudice.

In fact, one of counsel's statements in Linda Capps' brief, at page 64 of that brief in item #4, shows evidence of counsel's skewed view of the nature of the case. In that item #4 it is alleged that the court "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 lost everything." Admittedly, she had lost her husband four years prior, but she had certainly not "just lost everything." In fact, the unrebutted evidence in the case is that she had received some \$800,000 or \$900,000 in cash accounts as a result of her husband's death (RP 136:8-12), and had received personal property including contents of the house. The only thing that she had "lost" was her claim that in addition to all of what she did receive, she lost her claim that the entire house should belong to her as well, totally ignoring the fact that she had agreed, by deed, that the house was to remain the separate property of the decedent (CP 85), and that decedent's will had left that separate property to his children of a former marriage. CP 324.

It is somewhat ludicrous to suggest that his client had “just lost everything” when in fact, she had received nearly a million dollars, and the only thing she had “lost” was her attempt to deprive her husband’s children of a former marriage of the specific, separate property that he had bequeathed to them.

10. The trial court had discretion to award reasonable attorney’s fees and costs.

This case arose out of the estate of Larry A. Capps, deceased, and is therefore subject to the provisions of RCW 11.96A (TEDRA). RCW 11.96A.150 specifically provides:

(1) Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys’ fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys’ fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

(2) This section applies to all proceedings governed by this title, including but not limited to proceedings involving trusts, decedent’s estates and properties, and guardianship matters. This section shall not be construed as being limited by any other specific statutory provision providing for the payment of costs, including RCW 11.68.070 and 11.24.050, unless such statute specifically provides otherwise. This section shall apply to matters involving guardians and

guardians ad litem and shall not be limited or controlled by the provisions of RCW 11.88.090(10).

The court had the discretion to award reasonable attorney's fees under RCW 11.96A.150, and no abuse of discretion has been shown.

The court also had discretion to award reasonable attorney's fees under CR 11, which the court specifically mentioned. RP 298:8-10. CR 11(a) provides that where a signed pleading is submitted is supposed to certify that to the:

best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in facts; (2) it is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose such as to harass or cause unnecessary delay or needless increase in the cost of litigation.

It is clearly the case that the original pleading which brought this issue to the court was the response filed by Linda Capps to the original petition filed by Larry Capps and Kimberly Scalera. CP 17-19. That pleading, signed by both Linda Capps and her attorney, claiming that the separate house had become community property through "comingling," was not warranted by any existing law or good faith argument for the extension, modification or reversal of existing law or the establishment of new law.

After the trial court entered the summary judgment confirming the house as decedent's separate property and directing its distribution to his children per the will (CP 118-120), Linda Capps then filed a creditor's claim (CP from case number 09-2-15731-1, page 263) claiming the whole house, followed by the filing of a whole new separate legal action in Pierce County case number 09-2-15731-1. The complaint in that action (CP from case number 09-2-15731-1, page 242), signed by both Linda Capps and her attorney and the second amended complaint she filed (CP from case number 09-2-15731-1, page 255) both named the spouses of decedent's children as parties defendant, even though those spouses were not heirs of the decedent and had no community interest in the house that had been bequeathed to their spouses.

Although the court did not specify further, it is clear that, in view of the quit claim deed she had executed, there was no justification in law or in fact for claiming that the house was all community property. It is also clear that Guy Scalera, the husband of Kimberly Scalera, along with the wife of Larry Capps, had no interest in the estate or the house and should never have been made parties to the suit filed in regard to the rejected creditor's claim. It might also be argued that Linda Capps' filing of a Lis Pendens (CP 408) when she filed her action on the rejected creditor's claim in civil case No. 09-2-15731-1, which came after the court

had ruled, by summary judgment in the probate that the house was separate property and should be distributed to decedent's children by a former marriage (CP 118-120), was clearly unjustified and was intended to do nothing more than prevent those children from being able to do anything with the house while the Lis Pendens was in place.

11. Attorney's fees on appeal.

Respondent Kimberly Scalera should be awarded her reasonable attorney's fees and costs on appeal pursuant to RCW 11.96A.150, against Linda Capps personally.

III. CONCLUSION

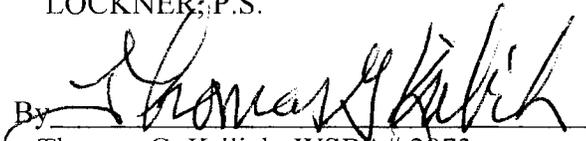
Where the surviving spouse has a claim against the decedent's estate for alleged contribution by the community or her own separate estate for improvement of or investment in the separate asset of decedent, there has to be a timely creditor's claim filed in the estate by the spouse. No such creditor's claim was ever filed within the statutory time period, and therefore, any such claim is barred by RCW 11.40.051.

Even if the surviving spouse is not bound by the time limits of the creditor's claim statute, the benefits realized by the marital community and the surviving spouse, in this case the un rebutted fair market rental value of the use of the separate house, was more than sufficient to offset

all the claims made for reimbursement, which claims were not proven.

RESPECTFULLY SUBMITTED this 28th day of October, 2011.

KRILICH, LA PORTE, WEST &
LOCKNER, P.S.

By 
Thomas G. Krilich, WSBA# 2973
Attorney for Respondent Kimberly Scalera

CERTIFICATE OF SERVICE

I, Sally J. Favors, hereby certify under penalty of perjury under the laws of the state of Washington, that the following is true and correct:

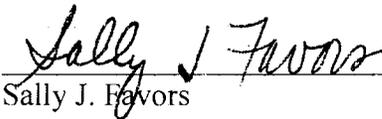
On October 28, 2011, I delivered a true and accurate copy of the foregoing Brief of Respondent Kimberly Scalera, via first class mail, to:

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DATED: October 28, 2011, at Tacoma, Washington.



Sally J. Favors

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