

Original

NO. 36838-2-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

JIM J. SCHACHER, in his capacity as personal representative of the
Estate of **PATRICIA M. SCHACHER**,

Appellant,

vs.

MARILYN FEIK,

Respondent,

APPEAL FROM THE SUPERIOR COURT

HONORABLE ROGER A. BENNETT

BRIEF OF RESPONDENT

FILED APPELLANTS
COURT OF APPEALS II
DIVISION II
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STATE OF WASHINGTON
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RESPONSE TO ASSIGNMENT OF ERROR AND ISSUES

PRESENTED

The trial court correctly ruled that the garnished funds should be released.

1. Does Washington law govern the nature of assets that the Estate can collect?
2. Is the Estate's judgment a separate obligation?
3. Can community property be reached to satisfy a separate obligation?
4. Did the Estate recover a judgment for the tort of conversion?

STATEMENT OF THE CASE

I. General Facts.

Patricia Schacher married William Schacher on June 2, 1970. At that time, each had children from prior marriages. One of Patricia Schacher's children is Marilyn Feik. (CP 50)

John Feik and Marilyn Feik married on April 29, 1971. They are currently Washington residents and have been Washington residents since before February of 1992. (CP 50, 63)

William Schacher and Patricia Schacher entered into an Agreement to Execute Wills on November 14, 1998. Their estate plans provided that each would devise their entire estate to the surviving spouse. The survivor

would then devise one-third of the “probate estate” to Patricia Schacher’s children and two-thirds of the “probate estate” to William Schacher’s children. The same day, Mr. and Mrs. Schacher executed wills in accordance with their Agreement. (CP 50-1)

William Schacher died on February 4, 1992. Patricia Schacher passed away on July 3, 2003. (CP 51-2)

After William Schacher’s death, Patricia Schacher made certain gifts to Marilyn Feik as follows:

1. \$19,000.00 on July 6, 1997;
2. \$11,052.00 by naming Ms. Feik as a co-owner on bank account; and
3. \$30,338.00 by designating Ms. Feik as a beneficiary of an individual retirement account.

(CP 51)

II. Proceedings in Multnomah County, Oregon, Circuit Court.

Jim Schacher was appointed personal representative of Patricia Schacher’s Estate. In September of 2005, he commenced an action against Ms. Feik in the name of the Estate to recover the aforementioned monies that Patricia Schacher had given to her daughter.¹ At length, Mr. Schacher

¹ The case number of the action is “0509-09595.” The first two numerals in the case number stand for the year in which the action was filed. The second two numerals show the month that the case was filed. Therefore “0509” means that the action was filed in September of 2005.

filed a Second Amended Complaint. It alleged, among other things, that Patricia Schacher made the aforementioned gifts to Marilyn Feik. (CP 39-40) After making factual allegations, the complaint set out a “First Claim for Relief” referred to as “declaratory judgment.” It stated as follows:

14.

Defendant contends that distributions received from Patricia M. Schacher are her rightful property and not subject to the Agreement (to Execute Wills). A judiciable controversy exists.

15.

Plaintiff has no adequate remedy at law. Plaintiff contends that the court should (a) declare the Agreement (to Execute Wills) valid and enforceable; (b) declare all distributions and beneficiary distributions made by Patricia M. Schacher in favor of her children constitution a violation of the Agreement (to Execute Wills); (c) impose a constructive trust on those assets and direct a return of all such assets to the plaintiff, in his capacity as personal representative. To the extent those assets cannot be traced and return, the court should grant plaintiff a money judgment against defendant.

The Second Amended Complaint then listed an “Alternative Second Claim for Relief” entitled “unjust enrichment-money had and received” and an “Alternative Third Claim for Relief” styled as “conversion.” (CP 38-43)

The matter was tried to Hon. Frank Bearden in October of 2006. The parties presented a document they entitled Stipulated Facts. (CP 50-2) There is nothing in that document suggesting that Ms. Feik had any

knowledge of the Agreement to Execute Wills or the dispositive provisions of the wills of William Schacher and Patricia Schacher.

On October 5, 2006, Judge Bearden issued his Opinion and Order. It referred to and outlined the facts as contained in the parties' stipulation. He specifically noted that Patricia Schacher made "five gifts" to Ms. Feik between July of 1997 and September of 2003. (CP 54) Judge Bearden then turned to the primary issue presented to him — the proper construction of the Agreement to Execute Wills. He focused on what he perceived to be the primary point of contention between the parties — that the agreement's use of the term "probate estate" meant "that assets that do not go through probate are therefore not covered" by the agreement's terms. He stated that "a literal reading of the language of the contract incorporated by into the will" supported Ms. Feik's view that the agreement did not apply to the gifts she had received. (CP 56) Judge Bearden nonetheless rejected that interpretation. He focused on what he perceived to be Patricia Schacher's presumed understanding of the agreement—that anything not needed for her own support during her life should be devised in the required proportions. He also noted that Patricia Schacher would understand that she was favoring her children over Mr. Schacher's in violation of the agreement's terms. He recognized that Ms. Feik may not have known of the terms of the agreement. However, that

did not matter in the context of his construction of the agreement. (CP 57)

He concluded that the gifts violated the Agreement to Execute Wills.

Judge Bearden's Opinion and Order makes no mention of any claim that Ms. Feik was guilty of conversion.

On December 15, 2006, the Court entered a general judgment against Ms. Feik in the principle amount of \$60,390.00 with prejudgment interest of \$2,792.97. The judgment recites the following:

IT IS HEREBY ADJUDGED a judgment be entered in favor of plaintiff on all claims against defendant and against defendant on her counterclaim against plaintiff, declaring that the agreement declaring that the Agreement to Execute Wills signed by Patricia Schacher is valid and enforceable, that all distributions and beneficiary designations made by Patricia Schacher in favor of her children were violations of the agreement, and that a constructive trust shall be imposed on those assets received by defendant from Patricia Schacher, who shall return them to plaintiff.

The general judgment contains no reference to either the "Alternative Second Claim for Relief" of "unjust enrichment, money had and received" or the "Alternate Third Claim for Relief" styled as "conversion." (CP 60)

III. Clark County, Washington, Superior Court Proceedings.

The Oregon Circuit Court judgment was filed in Clark County Superior Court on February 14, 2007. This was followed by the filing of a Declaration Re: Foreign Judgment on February 22, 2007. (CP 1-5) On

June 19, 2007, plaintiff sought and obtained a writ of garnishment of the Feiks' bank accounts at Bank of America. On June 22, 2007, Bank of America submitted an answer to the writ of garnishment indicated it had had \$1,110.95 on account. (CP 12-15) These included funds for Mr. Feik's business established after the couple was married. (CP 62-64) Another Bank of America account contained monies Ms. Feik received from the Department of Social and Health Services to be a provider for her autistic son. (CP 69-70)

On June 27, 2007, plaintiff obtained a "Judgment on Answer and Order to Pay" notwithstanding the fact that the twenty days for controversion had not expired. (CP 28-9) Ms. Feik filed her controversion June 29, 2007. (CP 30-1) Mr. Schacher filed an objection to the controversion on July 10, 2007. (CP 34-5)

On July 31, 2007, Ms. Feik moved to release the funds from garnishment. (CP 65-68) Mr. Schacher responded by contending that the Oregon Circuit Court had entered a judgment for conversion. He attempted to submit portions of Ms. Feik's discovery deposition to support his argument. (CP 71-84) Ms. Feik objected to any discussion of material not contained in the factual stipulation. (RP 9-10)

On September 4, 2007, the Court issued its Ruling and Order Granting Motion for Release of Funds from Garnishment. It concluded

that there had been no conclusion by the Oregon Circuit Court that Ms. Feik was guilty of conversion. In the absence of such a conclusion, the Feiks community assets could not be reached to satisfy Mr. Schacher's judgment. (CP 85-6) Mr. Schacher then appealed. (CP 87)

ARGUMENT

I. Procedural Posture.

The procedure Ms. Feik utilized to bring this issue to the attention of the trial court is authorized by statute. Mr. Schacher does not contend to the contrary.

The writ of garnishment procedure requires the garnishee-defendant to file an answer. RCW 6.27.190. Either party may then controvert the answer within twenty days of its being filed. RCW 6.27.210. The answer of the Bank of America was filed on June 25, 2007. Ms. Feik filed a controversion on June 29, 2007. Her controversion was therefore timely.

Ms. Feik's resort to the controversion procedure to bring this issue before the trial court was perfectly proper. In *Spokane State Bank v. Tilton*, 132 Wash. 641, 233 P. 15 (1925), plaintiff obtained a judgment against defendant and sought to collect by garnishing community property. The defendant protested on the basis that plaintiff had sued on a separate

obligation. The trial court sided with the defendant and the Supreme Court affirmed.

After controversion, any party may note the matter for a hearing. The Court must determine whether an issue is presented that requires a trial. RCW 6.27.220. Ms. Feik noted the matter before the Court by filing a Motion to Release Funds from Garnishment. The Court heard the matter and determined that the evidence was sufficient to make a determination. It allowed a release of the funds.

II. Washington Law Governs What Property Is Available for Execution or Garnishment

At all material times, John and Marilyn Feik were Washington residents. For that reason, Washington has the most significant relationship with the issue presented in this case—what assets are available to satisfy Mr. Schacher’s judgment.

This was the holding of *Colorado National Bank of Denver v. Merlino*, 35 Wn.App. 610, 668 P.2d 1304 (1983). In that case, Mr. and Mrs. Merlino were Washington residents. Mr. Merlino agreed to purchase land without his wife’s consent and signed a promissory note for a portion of the purchase price. The note was assigned to Colorado National Bank. When Mr. Merlino defaulted on the note, the Bank sued and obtained a default judgment against him in Colorado. It sought to execute on the

judgment in Washington. The Court held that Washington law would govern which assets the bank could reach. It based its decision on the fact that the Merlino's were Washington residents at the time Mr. Merlino entered into the transaction and concluded that Washington had the most significant relationship to the issues presented. It noted that Mr. Merlino did not have the authority to contract for the purchase of community real property without his wife's joining in the transaction. RCW 26.16.030(4). On that basis, it ruled that the Merlino's marital community could not be held responsible for the obligation.

Our situation is conceptually identical to *Colorado National Bank of Denver v. Merlino, supra*. Mr. and Mrs. Feik have been Washington residents at all material times. Mr. Schacher's ability to collect this judgment must therefore be determined under Washington law. Once again, Mr. Schacher does not appear to disagree.

III. The Estate's Judgment Is for a Separate Obligation.

In the Oregon litigation, the parties stipulated that Patricia Schacher made certain gifts to Marilyn Feik between 1997 and 2003. The Oregon Circuit Court determined that Ms. Schacher was precluded from making those gifts by the Agreement to Execute Wills. The gifts to Ms. Schacher made to Ms. Feik were "property and pecuniary rights" that were

“acquired by gift.” Therefore, they were clearly and obviously Ms. Feik’s separate property. RCW 26.16.020. Mr. Schacher obtained a judgment against Ms. Feik for the value of those gifts with interest. Since the judgment affected Ms. Feik’s separate property, it must be considered a separate obligation.

Mr. Schacher contends that the gifts somehow became community property because the funds may have been used for community purposes. That is not correct. It is well settled that the character or property as community or separate is to be determined as of the date of its acquisition. If it is separate property at that time, it will remain separate property through all of its changes and transitions as long as it can be traced and identified. *Burch v. Rice*, 37 Wn.2d 185, 222 P.2d 847 (1950). For example, real estate acquired by one spouse before marriage and used for community purposes does not thereby become community property. *Baker v. Baker*, 80 Wn.2d 736, 498 P.2d 315 (1972); *In re Marriage of Pearson-Maines*, 70 Wn.App. 860, 855 P.2d 1210 (1993). Ms. Feik received gifts from her mother. At that moment, they were her separate property. The characterization of the property did not change.

It is true, as Mr. Schacher notes, that a marital community is liable for a tort committed in the management of community property. *deElche v. Jacobsen*, 95 Wn.2d 237, 622 P.2d 835 (1980). However, anything Ms.

Feik did or did not do with the money her mother gave her is an action she took as to a gift she received. And those gifts were undoubtedly her separate property.

It appears that Ms. Feik may have used a portion of the money to invest in stocks. Unfortunately, these lost their value. (CP 77) Mr. Schacher suggests that this occurrence somehow converts the obligation to one borne by the marital community because of alleged “comingling.” (Brief of Appellant, p. 6) That argument misses the mark. There is no showing of comingling here. In order for separate property to lose its character because of comingling there must be a substantial amount of separate property intermixed with a substantial amount of community property to the extent that it is no longer possible to identify whether the remainder is the separate property portion or the community property portion. *Estate of Witte*, 21 Wn.2d 112, 150 P.2d 595 (1944); *Estate of Allen*, 54 Wn.2d 616, 343 P.2d 867 (1959); *In re Marriage Pearson-Maines, supra*. If stock was purchased with the money Ms. Feik received, the stock would retain its character as separate property. If Ms. Feik still had the stock, it could be reached to satisfy this obligation. The fact that the money went for a stock purchase, however, does not make the judgment a community obligation.

Mr. Schacher further contends that use of the gifts for family purposes such as education of children somehow converts the gifts to community property. That could not possibly be correct. The expenses of the family and the education of the children are chargeable to both separate and community property. RCW 26.16.205; *Roller v. Blodgett*, 74 Wn.2d 878, 447 P.2d 601 (1969); *In re Trierweiler's Estate*, 5 Wn.App. 17, 486 P.2d 314 (1971). In other words, Ms. Feik could be required to use her separate property for family purposes.

In conclusion, the Oregon, judgment arose from property and pecuniary rights Ms. Feik had acquired by gift from her mother. It therefore amounted to a separate obligation as opposed to a community obligation.

IV. The Garnished Funds Cannot Be Reached.

Community property cannot be reached to satisfy a separate obligation. *Spokane State Bank v. Tilton, supra*; *First National Bank of Juneau v. Estus*, 185 Wash. 174, 52 P.2d 1243 (1936); *Achilles v. Hoopes*, 40 Wn.2d 664, 245 P.2d 1005 (1952); *Nichols Hills Bank v. McCool*, 104 Wn.2d 78, 701 P.2d 1114 (1985).

The garnished funds are clearly community property. That is defined as property acquired after marriage by either spouse not

amounting to separate property. RCW 26.16.030. John and Marilyn Feik were married in 1971. They have been Washington residents since, at the latest, the death of William Schacher in 1992. The assets garnished are bank accounts maintained by the Feiks. One relates to Mr. Feik's business. The other is an account Ms. Feik maintains for monies she receives from the State of Washington to care for her autistic son.

Since the garnished funds are community property, they are not subject to Ms. Feik's separate obligation.

V. Ms. Feik's Obligation Is Not in Tort.

a. Introduction

Relying on *deElche v. Jacobsen, supra*, and *Keene v. Edie*, 131 Wn.2d 822, 935 P.2d 588 (1997), Mr. Schacher argues that he recovered a judgment against Ms. Feik for conversion. On that basis, he claims the right to recover one-half of the community property. This contention must fail because he did not recover a tort judgment.

b. There Is No Clear Indication That the Court Concluded That Ms. Feik Was Guilty of Conversion.

Mr. Schacher claims that the Oregon Circuit Court found that Ms. Feik had committed the tort of conversion. That conclusion is not supported by the language of either Judge Bearden's Opinion and Order or

the General Judgment. Neither contains the word “conversion” — much less any conclusion that Ms. Feik was guilty of that tort.

In the absence of any explicit language indicating a conversion finding, we can only conclude, as did the trial court, that none was made. At best, the General Judgment is ambiguous. If it is, Oregon allows a review of the entire record for the purpose of interpreting the judgment and ascertaining its operation and effect. *Bennett v. Bennett*, 208 Or. 524, 302 P.2d 1019 (1956); *Schnitzer Investment Corp., v. Certain Underwriters at Lloyd's of London*, 341 Or. 128, 137 P.3d 1282 (2006). Such a review supports the conclusion that there was no conversion finding.

In his “First Claim for Relief,” Mr. Schacher sought “declaratory judgment” in the following terms:

Plaintiff has no adequate remedy at law. Plaintiff contends that the court should (a) declare the Agreement (to Execute Wills) valid and enforceable; (b) declare all distributions and beneficiary distributions made by Patricia M. Schacher in favor of her children constitution a violation of the Agreement (to Execute Wills); (c) impose a constructive trust on those assets and direct a return of all such assets to the plaintiff, in his capacity as personal representative. To the extent those assets cannot be traced and return, the court should grant plaintiff a money judgment against defendant.

(CP 32) The General Judgment Mr. Schacher prepared provided as follows:

IT IS HEREBY ADJUDGED a judgment be entered in favor of plaintiff on all claims against defendant and against defendant on her counterclaim against plaintiff, declaring that the Agreement to Execute Wills signed by Patricia Schacher is valid and enforceable, that all distributions and beneficiary designations made by Patricia Schacher in favor of her children were violations of the agreement, and that a constructive trust shall be imposed on those assets received by defendant from Patricia Schacher, who shall return them to plaintiff. . . .

(CP 45) In short, the Court declared the rights of the parties and imposed a constructive trust in virtually the exact terms as set out in Mr. Schacher's "First Claim for Relief" — nothing more and nothing less. He had alleged two other legal theories for recovery as "Alternate Claims for Relief." Since the Court had granted relief on the "First Claim for Relief," there was no need to move on to decide whether relief on the other two theories was warranted. By the same token, Mr. Schacher could certainly have included language in the General Judgment indicating that the Court found Ms. Feik guilty of conversion had he wanted to do so. In the Opinion and Order, Judge Bearden directed him to prepare a judgment. (CP 58)

Mr. Schacher has suggested that his pleading an "Alternate Third Claim for Relief" styled as "conversion" coupled with the language

in the General Judgment “that a judgment be entered in favor of plaintiff on all claims against defendant” means that the Circuit Court found that Ms. Feik was guilty of conversion. (CP 37) That argument, however, ignores Oregon procedural rules. In Oregon, a party’s allegations are referred to as “claims for relief.” In that regard, ORCP 18 provides as follows:

ORCP 18. Claims for relief

A pleading which asserts a claim for relief, whether an original claim, counterclaim, cross-claim, or third party claim, shall contain:

A A plain and concise statement of the ultimate facts constituting a claim for relief without unnecessary repetition.

B A demand of the relief which the party claims; if recovery of money or damages is demanded, the amount thereof shall be stated; relief in the alternative or of several different types may be demanded.

If the intent of the General Judgment was to indicate that relief was granted on the “Alternate Second Claim for Relief” and the “Alternate Third Claim for Relief,” it would have referred to judgment on all “claims for relief,” not “all claims.” The language concerning “all claims” can only refer to all the gifts Patricia Schacher made to Ms. Feik and nothing more.

Finally, the Estate's argument is at odds with the clear language of the Oregon procedural rule governing decisions on agreed facts, ORCP 66, that provides as follows:

ORCP 66. Submitted Controversy.

A Submission without action. Parties to a question in **controversy**, which might have been the subject of an action with such parties plaintiff and defendant, may submit the question to the determination of a court having subject matter jurisdiction. . . .

B Submission of pending case. An action may be submitted in a pending action at any time before trial, subject to the same requirements and attended by the same results as in a submission without action, and in addition:

B(1) Pleadings deemed abandoned. Submission shall be an abandonment by all parties of all prior pleadings, and the case shall stand on the agreed case alone. . . .

Therefore, by trying the matter on stipulated facts, the Estate abandoned the Second Amended Complaint.

c. Judge Bearden's Opinion and Order Shows He Did Not Conclude That Ms. Feik Was Guilty of Conversion.

The conclusion that Ms. Feik was guilty of conversion does not inhere in Judge Bearden's reasoning in the Opinion and Order he authored. This is demonstrated by a close of analysis of the Opinion and Order and Oregon law on conversion.

In Oregon, the tort of conversion is defined as the intentional exercise of the of the dominion or control over the chattel of another that so seriously interferes with the rights of the owner to control it that one who interferes may justly be required to pay the owner the full value of the chattel. Oregon has adopted the test set out in Restatement (Second) *Torts* §222A to determine the “seriousness” of the interference.

The test consists of the following questions or elements:

1. The extended duration of the actor’s exercise of dominion or control;
2. The actor’s intent to assert a right in fact inconsistent with the other’s right of control;
3. The actor’s good faith;
4. The extent and duration of the resulting interference with the other’s right of control;
5. The harm done to the chattel; and
6. The inconvenience and expense caused to the other.

Mustola v. Toddy, 253 Or. 658, 456 P.2d 1004 (1969); *Beall Transport Equipment Co. v. Southern Pacific Transportation*, 186 Or.App. 696, 64 P.3d 1193 (2003). As these cases note, while “good faith” is not an absolute defense to the tort of conversion, “good faith” is a factor for consideration. *Reynolds v. Schrock*, 197 Or.App. 564, 578 *fn.3*, 107 P.3d 52 (2005), reversed, 341 Or. 338, 142 P.3d 1062 (2006), does not stand for

a different proposition. The issue of “good faith” in this context is a substantial matter. The failure of the trial court to instruct on all the 222A factors — including good faith — caused the Court to remand the matter for a new trial in *Beall Transport Equipment Co. v. Southern Pacific Transportation, supra*.

Oregon has also recognized in at least one situation that the recipient of a gift did not convert the property she received. *Hocks v. Jeremiah*, 92 Or.App. 549, 759 P.2d 312 (1988).

The Opinion and Order, as indicated, does not contain the word “conversion.” It most certainly does not show an analysis of all of the factors set out in Restatement (Second) *Torts* §222A. In particular, it does not address how the issue of Ms. Feik’s good faith or absence of bad faith should factor into whether Mr. Schacher proved conversion. Obviously, good faith was an issue here. Ms. Feik had not stolen the money. She had received gifts from her mother. And, she had no knowledge of the Agreement to Execute Wills. These facts would have been germane to an analysis of Ms. Feik’s good faith. But Judge Bearden indicated that Ms. Feik’s knowledge of the agreement did not matter. Rather, the issue was Patricia Schacher’s knowledge of her contractual duties. Judge Bearden clearly saw Patricia Schacher as the malefactor, not Ms. Feik. (CP 57) Finally, there clearly was a good faith dispute over the legal effect of the

Agreement to Execute Wills. Ms. Feik was not the malefactor. As Judge

Bearden noted:

(Ms. Feik's) main point of contention as I understand it is that the contract refers to the "probate estate" thereby meaning that assets that do not go through probate are therefore not covered. A literal reading of the language of the contract incorporated by integration into the wills supports (Ms. Feik's) position. None of the husband's estate passed to wife through probate.

(CP 56)

Finally, Judge Bearden based his decision on three decisions from the Oregon Court of Appeals. These were *Musselman v. Mitchell*, 46 Or.App. 299, 611 P.2d 675 (1980); *Peterson v. Woods*, 48 Or.App. 675, 617 P.2d 915 (1980); and *Schaad v. Lorenz*, 69 Or.App. 16, 688 P.2d 1342 (1984). Each of these cases involved similar issues—violations of agreements to devise or otherwise dispose property on death. Each was decided on the basis of contractual obligations with the ultimate imposition of a constructive trust. In none were there findings that the recipient of the improper disposition was guilty of conversion.

This discussion shows ample doubt that Ms. Feik converted what her mother gave her. The larger point, however, is that Judge Bearden clearly did not determine that she did. This is apparent from the analysis

that he made. It is also apparent from the absence of the analysis he was required to make if he were to find Ms. Feik guilty of conversion.

d. Mr. Schacher Cannot Now Contend That Ms. Feik Committed a Tort.

Mr. Schacher appears to contend that Ms. Feik might have been guilty of conversion. That argument, however, is inconsistent with the doctrine of claim preclusion or *res judicata*. In that regard, the preclusive effect of the Oregon judgment is determined by reference to Oregon law. This is so because the judgment is entitled to full faith and credit pursuant to Article IV, §1 of the United States Constitution. This means that it must receive the same *res judicata* effect it would receive in Oregon. *Estate of Stein*, 78 Wn.App. 251, 896 P.2d 740 (1995); *Ram Technical Services, Inc., Koresko*, 215 Or.App 449, 171 P.3d 374 (2007).

In Oregon, claim preclusion forecloses a party that has litigated a claim against another from further litigation on that same claim on any ground or theory of relief that the party could have litigated in the first instance. *Dean v. Exotic Veneers, Inc.*, 271 Or. 188, 194, 531 P.2d 266 (1975); *Lincoln Loan Co. v. City of Portland*, 340 Or. 613, 617-18, 136 P.3d 1 (2006). In other words, Mr. Schacher cannot now claim Ms. Feik was guilty of conversion once he obtained a final judgment against her.

Mr. Schacher relies on *Ball v. Gladden*, 250 Or. 485, 443 P.2d 621 (1968) and *State v. Hannaford*, 178 Or.App. 451, 37 P.3d 200 (2001) to support his argument. Both cases arise in the criminal context. In *Ball v. Gladden, supra*, the issue presented was the voluntariness of the defendant's admission. In *State v. Hannaford, supra*, the question revolved around the propriety of a search and seizure. Both issues were, apparently, resolved by the Court prior to trial. In both cases, the Court stated the scope of its review of the trial court's factual findings. It noted that it was bound by findings if they were supported by the evidence. Further, if findings were not made on all factual issues, the Court would presume the facts to be consistent with the trial court's ultimate conclusion.

The rule of Oregon appellate procedure that Mr. Schacher brings forward has no applicability in our discussion. First of all, the question presented here is precisely what the Oregon Circuit Court ruled — not the scope of appellate review. Secondly, Judge Bearden found no facts. The matter was presented to him on the basis of agreed facts. Finally, the rule in *Ball v. Gladden, supra*, and *State v. Hannaford, supra*, is simply not applicable. We are not concerned here with how the Court should view factual matters for which there are no explicit findings. The issue presented here is what “ultimate conclusion” Judge Bearden made.

e. Conclusion

In conclusion, the Multnomah County Circuit Court did not conclude that Ms. Feik was guilty of the tort of conversion. The Estate is precluded in this action from arguing to the contrary. Therefore, Washington rules concerning collection of judgments involving separate torts are not applicable.

STATEMENT PURSUANT TO RAP 18.1

A party who prevails where the entry of a writ of garnishment is controverted is entitled to costs and reasonable attorney's fees both at trial and on appeal. RCW 6.27.230. An appellate court has inherent jurisdiction to fix attorney's fees for services on appeal and allowed by contract or statute. *Brandt v. Impero*, 1 Wn.App. 678, 463 P.2d 197 (1969); *Sarvis v. Land Resources, Inc.*, 62 Wn.App. 888, 815 P.2d 840 (1991). Ms. Feik seeks an award of attorney's fees and costs on appeal should she prevail.

CONCLUSION

The Multnomah County, Oregon, judgment is a separate obligation of Marilyn Feik because it extends from gifts she received from her mother. The Estate garnished community bank accounts. These could not

be reached to satisfy Ms. Feik's separate obligation. The trial court's ruling to that effect should be affirmed.

RESPECTFULLY SUBMITTED this 26 day of March, 2008.



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Of Attorneys for Marilyn Feik

NO. 36838-2-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

**JIM J. SCHACHER, in his capacity as personal representative of the
Estate of PATRICIA M. SCHACHER,**

Appellant,

vs.

MARILYN FEIK,

Respondent,

APPEAL FROM THE SUPERIOR COURT

HONORABLE ROGER A. BENNETT

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