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NO. 42078-3-II

COURT OF APPEALS,  
DIVISION II  
OF THE STATE OF WASHINGTON

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In the Matter of the Estate of

LARRY CLINTON CAPPS,

Deceased,

KIMBERLY A. SCALERA,

Petitioner,

vs.

LINDA CAPPS,

Respondent

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RESPONDENT LARRY A. CAPPS BRIEF

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### COUNTER STATEMENT OF THE CASE

Larry Capps and Linda Capps married On February 26, 1977 (RP 54). At the time of marriage Mr. Capps owned a home at 4903 North Huson which he had purchased on July 2, 1975 by means of a real estate contract. (CP 66, Exhibit 1). Mr. Capps owed \$15,000 on his separate property home at the time of marriage. (Exhibit 4). At the time of marriage he also had more than \$80,000 in bank accounts and a loan receivable from a third-party. (Exhibit 4).

On April 21, 1977 Larry Capps received a statutory warranty deed in fulfillment of the obligation that he owed on his house at marriage. (Exhibit 5). The evidence at trial does not disclose what funds were used to pay off the obligation on Mr. Capps separate property home.

On May 6, 1977 Linda Capps executed a Quit Claim Deed to her husband for the separate property home that he owned. The Deed quit claimed her interest in Mr. Capps' home to him "as his sole and separate property". In addition, the Deed contains the following language:

This Deed is to confirm that said property is and will remain the separate property of the Grantee. (CP 85).

On May 13, 1977 Larry Capps borrowed \$42,500 using his separate property home as security for the loan (RP 118). The proceeds of the loan went into the community account as were used for community

purposes (RP 118). The loan was paid back during marriage by the marital community who had used the funds. Ms. Capps admitted at trial that since it was the marital community that received the funds, it was the marital community that should pay them back. (RP 119).

In 1979 Larry Capps made a Will. The Will left his community property to his wife and his separate property to his children. (CP 10-12).

After Mr. Capps died in January, 2007 personal representative Gregory Pratt wrote a letter to the two Capps children stating that all of the assets, including the house, were community property because they had been "co-mingled". (CP 370). The personal representative's letter stating that the home was community property caused the Capps children to commence a Petition under RCW 11.96A. to confirm that the home was Mr. Capps separate property and that his will bequeathed it to his children. (CP 4-16).

In July 2009 one of Mr. Capps' children, Larry A Capps filed a motion for summary judgment requesting the court to determine that the house was his father's separate property and was distributed to Mr. Capps' two children pursuant to his will. (CP 56). The primary basis upon which it was asserted that the house was Mr. Capps separate property was the fact that he purchased it before marriage. (CP 57-61). Ms. Capps had already testified in her deposition that nothing had been done before Mr.

Capps died to change the property from separate property to community property. (Declaration of Bart Adams dated January 6, 2009 excerpting deposition testimony of Linda Capps CP pending.) In her deposition Ms. Capps said:

Q. You are not claiming that before he passed away, your husband took any legal action to change title to you; is that true?

A. That's true.

Q. And you didn't sign like a community property Agreement that made it community property?

A. No.

Q. You didn't sign any other agreements that made it community property?

A. No.

Ms. Capps did not respond to the motion for summary judgment except to rely on a declaration and memorandum she had filed in connection with a motion regarding her being required to pay rent for the premises after death. (CP 30-40, 49-51). Ms. Capps did not present any anti-nuptial agreement or argue that any anti-nuptial agreement was relevant to the motion for summary judgment.

After the court granted summary judgment in favor of the Capps children determining that the house was separate property and that it was

bequeathed by the Will to the Capps children, Ms. Capps filed a Motion for Reconsideration. (CP 127-128). For the first time she presented the court with a premarital agreement, the existence of which she had denied in her deposition. (CP 184-204). She argued that under the premarital agreement increases of value of the separate property home of Mr. Capps due to community labor expended on refurbishing the home were community property. (CP 131). She also argued that the parties “treated” the house as community property. The court denied the motion for reconsideration. It, however, allowed her to file a creditor’s claim to establish a right to reimbursement secured by an equitable lien upon the separate property home of Mr. Capps. (CP 400-403). Ultimately, before trial, Ms. Capps abandoned any action on her creditor’s claim, undoubtedly because the action was untimely, and entered an agreed order determining that her action was not an action on a creditor’s claim but was a direct action not brought to collect upon a creditor’s claim. (CP 524).

Ms. Capps filed a second amended complaint on March 22, 2010. (CP of September 7<sup>th</sup> 255-265). That second amended complaint said in paragraph 14 of that complaint:

Linda Capps contends that all post-marriage increases in value of the house (“all rents, issues, profits, income or proceeds of property”) are community property pursuant to the parties’ anti-nuptial agreement and under Larry’s Will belong to her. But in the event the probate court’s summary

judgment ruling that house is Larry's separate property is not modified by the trial court or reversed on appeal, then Linda Capps is entitled to a right of reimbursement of all separate and community contributions made to the house during her and Larry's marriage, which right is secured by a equitable lien on the house. (CP of September 7<sup>th</sup> 258-259).

Ms. Capps did not ask the court to change its summary judgment decision determining the house was Mr. Capps separate property until she filed a motion for leave to try separate property issue at trial. (CP 414-435). That motion was heard on March 11, 2011, two business days before trial. The court denied the motion. (CP 525-526).

The case went to trial on March 15, 2011. At trial, Ms. Capps' counsel argued she was entitled to reimbursement of payments made by the marital community on the mortgage against Mr. Capps' separate property home related to the loan used by the marital community. He made that argument even though the funds from the loan went into the community account and were used for community purposes. (RP 118). Ms. Capps agreed at trial that since the marital community got the money from the loan it was fair that the marital community should pay it back. (RP 119). The court found no basis for a right to reimbursement to arise from repayment of that loan because the marital community used those funds for community purposes. (Conclusion of Law III)

Ms. Capps' second claim at trial was a claim for reimbursement secured by an equitable lien was for monies paid for real property taxes on Mr. Capps' separate home during marriage. Ms. Capps provided no evidence at trial as to the character of the money used to pay the taxes. Since Mr. Capps had more than \$80,000 I bank accounts and loans receivable at marriage (Exhibit 4) there were sufficient funds to pay most of the taxes with separate property. None of that \$80,000 remained in separate bank accounts of Mr. Capps at death. The court did not grant a right to reimbursement because of the lack of proof of the character of funds used to pay the taxes and because even if they were paid with community funds the taxes which totaled about \$100,000.00 were far less than reasonable rent for the separate home of Mr. Capps which the court found to be \$286,500.00. ( Finding of Fact V, Conclusion of Law III).

At trial Ms. Capps argued that the increases in value of Mr. Capps separate property home should be awarded to her. She argued that the home had increased to \$755,000. She makes that same argument on appeal. There was no testimony regarding the value of the house at trial. That issue is not before the court because the character of the home was determined on summary judgment. Neither the premarital agreement nor the appraisal relied on by Ms. Capps was admitted as evidence at trial. No testimony regarding the value of the home was admitted at trial. Instead,

In her argument or appeal, Ms. Capps relies upon an appraisal that was put in to evidence as part of a motion during the pendency of this action. Because no evidence was admitted on the issue the court did not address increases in value as part of its decision.

One expert testified at trial, Tim Richmond. He testified without objection that the reasonable rental value of the separate property home of Mr. Capps where the marital community resided during the period from marriage to January 2009 was \$322,000.00. (RP 64). The trial court found that the portion accrued prior to death was \$286,560. (Finding of Fact V)

The trial court denied any relief to Ms. Capps on alternate grounds. First, it decided that Ms. Capps' claim is a claim for amounts owed by the decedent at death and ruled that the provisions of RCW 11.40.010 and 11.40.051 required Ms. Capps to timely file a creditor's claim before bringing the action. Since the action pursued was not on a creditor's claim and since no creditor's claim was timely filed the action was dismissed.

The court also ruled that value of the free use of the separate property home of Mr. Capps during marriage exceeded the amount paid for by the community for the home during marriage. On that basis it ruled that Ms. Capps claim for a right of reimbursement of community funds spent on Mr. Capps separate property home failed.

CLAIMS OF LINDA CAPPS ARE PRECLUDED BY RCW 11.40

The claims brought by Linda Capps are barred by both RCW 11.40.010 and 11.40.051 because she is suing to collect for obligations she claims the decedent owed to her that were incurred before his death for which no creditor's claim has been filed. RCW 11.40.010 prohibits commencement of an action to collect amounts owed by a decedent unless a claim for the debt alleged to be owed is first presented to the Personal Representative. The trial court correctly determined that the claims made by Ms. Capps were for debts of the decedent for which no claim has been presented to the Personal Representative and properly dismissed the case. (Conclusion of Law II).

Linda Capps argues that she was not required to file a creditor's claim in this cause because the debts she is pursuing were incurred after death. She does not describe any event that made the debts become due after death or explain when the debts became due. The debts which she is attempting to recover are of three types, (1) mortgage payments repaying money borrowed after marriage for community purposes using Mr. Capps separate property home as security; (2) property taxes paid on Mr. Capps' separate property home during marriage; and (3) an increase in value due to inflation of Mr. Capps' separate property home after marriage. It is not disputed that the last mortgage payment for she is asking to recover a

judgment secured by an equitable lien was paid in approximately 1991. The property taxes for which she makes a claim were paid between marriage and the end of 2006. Her claim for increases in value of the separate property house of Mr. Capps was not heard at the trial court because the court determined that the home was Mr. Capps separate property in a summary judgment motion before trial. The increases she claims occurred between the 1977 marriage and Mr. Capps 2007 death. Since all of the claims made by Ms. Capps are for debts of the decedent, her claims were properly dismissed for failing to comply with RCW 11.40.010.

Ms. Capps cites In re Marriage of Johnson, 28 Wn. App. 574, 265 P2d 720, (1981) for the proposition that the right to reimbursement secured by an equitable lien is an inchoate right that does not arise until resolved by the court. From that she argues that the right to sue upon the lien accrued after death. Johnson, supra, did not involve a probate and it did not address when a cause of action to collect a debt secured by an equitable lien arises or becomes due. The language in Johnson relied upon by Ms. Capps discusses the character of equitable liens as “inchoate” to describe the nature of equitable liens as being not attached to property or creating an interest in property until they are found to exist by a court. Equitable liens are a remedy for collection of a debt. Monegan v. Pacific

National Bank, 16 Wn.App. 280, 556 P.2d 226 (1976). If there is a debt owed to Ms. Capps it is not created by the lien. If a court finds that a debt exists, it may grant a judgment and upon entry of that judgment secure the debt by an equitable lien that is similar to a judgment lien created by RCW 4.56.190. Just like a judgment lien, an equitable lien becomes effective upon entry of the judgment that creates it. No authority supports Ms. Capps' argument that because an equitable lien is established at the time of judgment in an action to collect a debt owed that the obligation secured by the lien arose after death. Ms. Capps was not relieved of filing a creditor's claim because she her complaint asks that any money judgment entered be secured by an equitable lien. If the debt sued upon here is owed, it was owed by the decedent at death based on events that happened before his death. Neither the Personal Representative who is a defendant in the suit nor the Capps children who are also defendants did anything after death to create a basis for liability. RCW 11.40.010 prohibits this action being brought without first presenting a creditors claim to the Personal Representative.

Although her argument is unclear, apparently Ms. Capps asserts that only Mr. Capps' death could trigger the right to commence an action for reimbursement of community funds spent on Mr. Capps separate property home. That argument flies in the face of Marriage of Johnson,

supra, that determined that equitable liens can be awarded during the life of the parties in a marriage dissolution action. It also ignores that Ms. Capps could have brought a declaratory judgment action during life to determine her right to receive a payment secured by an equitable lien based upon community property spent on the separate asset of her husband.

The position taken by the Capps children follows the procedure described as mandated by the Washington State Bar Association Washington Community Property Deskbook, 3<sup>rd</sup> Edition, § 3.4(2)(a) where the author states:

- (2) The equitable lien
  - (a) Nature of the lien

Because the courts have rarely seen fit to distinguish between the right of reimbursement and the equitable lien by which the right is enforced, they have done little to delineate the precise dimensions of the equitable lien. A lien seems to arise by operation of law to secure reimbursement from the specific property improved. Enforcement of the right of reimbursement may extend beyond the property to which the lien attaches against the separate estate of a spouse who diverts community funds, labor, or property, or the separate funds or property of the other spouse. The lien is equitable in nature and is usually, but not necessarily, claimed within the framework of settling a decedent's estate or in a dissolution proceedings. When asserted in the context of estate administration, the right of reimbursement must be submitted as a claim. As a claim it is subject to the rules of the nonclaim statute. In re Estate of Bellingham, 85 Wn.App. 450, 933 P.2d 425 (1997) (affirming without comment trial court's denial of

right of reimbursement because time-barred per the nonclaim statute).

The position taken by the Washington State Bar Association Washington Community Property Deskbook has been available to practitioners since the 3<sup>rd</sup> edition was published in 2005. It is widely followed.

Linda Capps admits that this action is not an action on a creditor's claim and signed a stipulated order to that effect before trial. (CP 524). Her claim is barred by 11.40.010 because she did not first present it to the personal representative before bringing this claim.

Ms. Capps argues that Foley v Smith, 14 Wn.App. 285, 539 P.2d 874 (1975) and Estate of Wilson v. Livingston, 8 Wn.App. 519, 507 P.2d. 902 (1973) hold that claims arising after the decedent's death need not have creditor's claims filed. The distinction between the facts of this case and Foley, supra, and Wilson, supra, are obvious. Estate of Wilson, supra, involves funeral expenses that were contracted for post death by persons other than the decedent and did not accrue prior to death. Foley v. Smith, supra, involved a cause of action for breach of a purchase and sale agreement to sell a parcel of property to the Plaintiff. The Plaintiff in the action against the estate was the second of two purchasers to execute a purchase and sale agreement for the same property from the same husband and wife sellers. The first purchaser brought a specific performance action

and joined both the sellers and the second purchasers in an action to determine which of the two purchasers had the right to the property. After the action was filed, but before judgment, the husband of the marital community that was selling the property died. When the first purchaser prevailed in the specific performance action, the second purchaser sued the deceased seller's estate for damages. The reasoning behind the court's decision that the second purchaser's claim was not barred by the creditor's claim statute was that since the second purchaser had closed his purchase with the seller and was in title and possession he could not have sued the seller until the specific performance action was completed and the first purchaser was awarded the property. At the time of the decedent's death no claim could have arisen because at that point in time there had been no breach of the purchase and sale agreement between the deceased and the second purchaser.

Unlike, Estate of Wilson, supra, and Foley, supra, in the instant case all of the facts that needed to occur for Ms. Capps cause of action to arise had occurred prior to the decedent's death. Her claim was a claim against the decedent for which a creditor's claim is required. Her argument that Estate of Wilson, supra, and Foley, supra, remove her from the requirement of filing a creditor's claim and presenting to to the Personal Representative is misplaced.

Ms. Capps also argues that she was not required to file a creditor's claim in this cause because she is claiming an interest in the real property. That argument fails to recognize the nature of an equitable lien. Equitable liens do not grant a party an interest in the real property which they may sue on independently of a debt. Monegan v. Pacific National Bank, supra. Monegan makes it clear that equitable liens have no interest in the property of the things to which they attach. Instead, they are a remedy for a debt. Monegan, supra. The debt can be satisfied by either the sale of the property or other property owned by the debtor. Washington State Bar Association Washington Community Property Deskbook 3<sup>rd</sup> Edition § 3.4(2)(a). An equitable lien does not change title to the property from separate property to community property. Strand v. Pekola, 18 Wn.2d 164, 138 P.2d 204 (1943), Enrich v. Barton, 2 Wash. App. 954, 959-60, 471 P.2d 700 (1970). Cummings v. Anderson 94 Wn. 2d 135, 614 P.2d 1283 (1980). That position is also clearly enunciated by Harry M. Cross, the Community Property Law of Washington, Washington Law Review Vol. 61 (1986). There the author states:

The community or separate property character of an asset becomes fixed at the time of acquisition, but subsequent to acquisition, assets or labor of a different character may be used to make payments in connection with the transaction or to contribute to the quality or enhance the value of the asset. Such contributions may give right to an equitable lien in favor of the contributing fund or estate and thereby

provide a protection to the contributor without ordinarily creating in the contributor a share or fraction of the ownership of the asset. ... Although the right is commonly referred to as an “equitable lien,” the author believes that the better analysis postulates that the contributor has a right to reimbursement protected by an equitable lien.

The clear authority in Washington is that a claim of a right to an equitable lien by Linda Capps did not create an interest in property.

Since she has no interest in the real property Smith v. McLaren, 58 Wn.2d 907, 365 P.2d 331 (1961), Olson v. Roberts, 42 Wn. 2d. 862, 259 P.2d 418 (1953), and Gottwig v. Blaine, 59 Wn.App. 99, 795 P.2d 1196 (1990) are not applicable to this case. In each of those cases, the claim of the Plaintiff was not subject to creditor’s claim because in each of those cases, the Plaintiff actually owned a ½ interest in the property at issue. Neither Ms. Capps nor Mr. Capps took any action to convert the separate property home of Mr. Capps into community property after marriage. The claim that residence is property in which she holds an interest as opposed to a right of reimbursement secured by an equitable lien is not sustainable.

In a footnote Ms. Capps cites Morton v. Le Blank 125 Wash 191, 215 P. 528 (1923) for the proposition that an equitable lien creates a property interest. Her reliance on that case as authority for that position is misplaced. In that case in a land sale the buyer agreed to pay \$2,000.00 of the seller’s obligation on a mortgage that encumbered both the property

sold by the seller to the buyer and another property owned by the seller. The sale agreement stated that if the seller paid off the mortgage, that the buyer would execute a \$2,000.00 mortgage in favor of the seller against the property. The seller then paid off the mortgage and demanded that the buyer execute the \$2,000.00 mortgage as required by the agreement. When the buyer refused the seller sued to require the mortgage to be issued or in the alternative for a judgment and a right to a sheriff's sale foreclosing the judgment as a mortgage. The only reference to an "equitable lien" in the case was in the complaint filed by the plaintiff that referred to his right to have the mortgage granted as an "equitable lien" on the property. The court did not grant or adjudicate an equitable lien in the case and the term equitable lien did not refer to the type of lien sought here by Ms. Capps. The nature of the equitable lien sought here has been clearly defined by Washington appellate courts to not include an interest in real property. Ms. Capps may not avoid the necessity of filing a creditor's claim by claiming that her request for an equitable lien to secure payment of a money judgment she alleged is owed to her created an interest in the subject property. The court properly determined that her claim could not be brought without first presenting it to the Personal Representative and dismissed her complaint.

Even if Ms. Capps had proceeded with an action on the rejected creditor's claim that she filed the claim would be barred by RCW 11.40.051. That statute requires claims against a decedent to be brought, at the latest, within two years after death. It is not disputed that the decedent died on January 15, 2007 and that the creditor's claim filed by Ms. Capps that was abandoned before trial was not filed until October 2009, well after the two year statute of limitations had expired.

It is a longstanding rule that RCW 11.40.051 is to be more strictly enforced than general statutes of limitation. Judson v. Associated Meat & Seafoods, 32 Wn. App. 794, 798, 651 P.2d 222 (1982). The statute is mandatory; it is not subject to enlargement by interpretation and it cannot be waived. Judson, supra. Neither fraud nor equity provide grounds for an exception to the statute. See In re Guardianship of Mayou 6 Wn. App. 345, 348-349, 492 P.2d 1047 (1972); Trierweiler Estate 5 Wn.App. 117, 486 P.2d 314 (1971). The claim of Linda Capps for a money judgment secured by an equitable lien cannot be construed to anything other than an obligation owed by the decedent that time of his death. It is subject to the claims statute.

The reason that it is critical that the action be timely presented as a creditor's claim to avoid being dismissed by RCW 11.40.010 and 11.40.051 is that the debt, if any, that is owed to Linda

Capps needs to be paid by the estate so that the burden of the debt is spread among the beneficiaries by paying it pro-rata from the estate assets. Ms. Capps inherited all of the community property she and her husband accumulated. The Capps children inherited all of Mr. Capps' separate property. The decedent also owned \$900,000.00 available for creditors immediately before his death. The community assets that were to go to Ms. Capps under the will should have been used to satisfy her claim for money owed pro-rata with the separate assets bequeathed to Mr. Capps' children. In Re Armstrong Estate 33 Wn. 2d 118, 264 P 2d 500 (1949). The non-probate assets that were owned by Mr. Capps and available to satisfy his debts immediately before his death are also be subject to payment of a pro-rata share of any judgment awarded in favor of Ms. Capps in this action. RCW 11.18.200. What Ms. Capps is trying to do is have all of her claim paid by the Capps children so that she does not share in the payment of the claim from the assets she received on Mr. Capps' death. RCW 11.40.010 precludes her from placing the obligation to pay all of any judgment she might receive in this action from the Capps children by requiring that all claims against the decedent be directed to the personal representative so they may be properly apportioned between the estate assets and beneficiaries.

SUMMARY JUDGMENT DETERMINING HOUSE TO BE  
SEPARATE PROPERTY WAS PROPER

In the first argument contained in her brief Ms. Capps asserts that the in granting summary judgment trial judge relied solely on a 1977 quit claim deed to rule that Mr. Capps home was his separate property. Based on that assertion she claims that the court erred in failing to find disputed facts regarding the parties' intent related to that quit claim deed that precluded summary judgment. That argument is without merit for three reasons.

First, the Judge found the home to be separate property of Mr. Capps based upon the fact that he had purchased it before marriage. The primary argument supporting the Motion for Summary Judgment brought by the Capps children, contained at CP 57 – 61, was that the character of property as community or separate is determined at the time of acquisition. Strand v. Pekola, supra, Enrich v. Barton, supra. The quit claim deed discussed in the motion for summary judgment was not necessary to the court's ruling as it was undisputed that no action was ever taken during the marriage to change the character of the home to community property. In excerpted portions of her deposition in the record for the summary judgment Ms. Capps admitted that no action was taken by Mr. Capps or

Ms. Capps to change title of the separate property home of Mr. Capps to community property during marriage (CP pending):

Q. You are not claiming that before he passed away, your husband took any legal action to change title to you; is that true?

A. That's true.

Q. And you didn't sign like a community property Agreement that made it community property?

A. No.

Q. You didn't sign any other agreements that made it community property?

A. No.

The undisputed testimony of Ms. Capps contained in the record for the motion for summary judgment was that neither party signed any documents or took steps to change the character of the home from separate property to community property. As a matter of law it remained Mr. Capps separate property. In the court's oral ruling, the first ground upon which the Judge found the home to be separate property was that it has been separate property at the time of acquisition stating:

But, I agree that law is clear, in my mind, that at the time of the acquisition is separate property... (RP 9/4/2009 pg. 23)

The court found the home to be separate property primarily because it was owned by Mr. Capps at marriage and because Ms. Capps admitted that the

parties had done nothing to convert the property into community property. Without some affirmative action taken by the parties to change the character of the separate property home to community property, which did not occur, it remained Mr. Capps separate property and the court properly granted summary judgment.

The second reason Ms. Capps argument that the court erred in finding the house to be separate property fails is that the argument she makes now claiming that the court should have considered evidence of intent at the time the quit claim deed was executed was not made in the trial court. Ms. Capps admits in her opening brief that her current theory, that Ms. Capps intent in executing the Quit Claim Deed was an issue of fact for the court, was not argued or brought to the attention of the court in either the Summary Judgment Motion or in the Motion For Reconsideration. (See Appellant's Brief page 27-28). She also admits that she did not argue in her motion for reconsideration that the prenuptial agreement converted increases in the North Huson Street house into community property. (Appellant's Brief page 28). The suggestion that she may now raise them for the first time on appeal is meritless. RAP 2.5.

In response to the summary judgment motion, Ms. Capps presented no evidence to support an argument that the quit claim deed was done in connection with a loan against the property. She did not file any

Promissory Note or Deed of Trust that her counsel now argues demonstrate the reason for the loan. She did not present testimony that the deed was for some purpose other than what it stated which was too make it certain of record that the house was and was to remain separate property of Mr. Capps. Equally important, Ms. Capps had testified under oath that nothing had ever been done to change the character of the property from separate to community property as is outlined in the excerpted testimony above. Based upon the evidence presented and the arguments made, there was no doubt that the home of Mr. Capps was his separate property because it had been his separate property before marriage and remained that way throughout marriage. It was not error to grant a summary judgment determining that the property was separate property.

Finally, the court did not err in granting the summary judgment because the only argument made by Ms. Capps to claim that the property was community property was that the property had become community property by commingling due to improvements done to the property during marriage. Ms. Capps presented as authority for that proposition Marriage of Elam 97 Wn. 2d 811, 650 P 2d, 213 (1982). That case does not support the argument that making improvements to real property during marriage changes the character of property. Instead it holds that increases in the value of separate property are presumed to be separate

property. That presumption may be rebutted by direct and positive evidence that the increases attributable to community funds of labors. The owner spouse of a separate property parcel is entitled to increase in value of all separate property except to the extent by which the other spouse can show that the increase was attributable to community contributions or inflation in proportion to the value of the community contributions. Ms. Capps did not raise the argument that she is making now, that the court should have considered the intent of the parties regarding the quit claim deed in response to the motion for summary judgment. The argument may not be raised for the first time on appeal. RAP 2.5.

TRIAL COURT DID NOT ERR IN DENYING MOTION FOR  
RECONSIDERATION

Ms. Capps argues to this court that the language of the prenuptial agreement that she presented to the court for the first time in connection with the Motion for Reconsideration converted increases in the value of the separate property home owned by Mr. Capps at marriage into community property. In making that argument she ignores the language of the prenuptial agreement which mandate that the home be found to Mr. Capps' separate property. Paragraph 4 of the prenuptial agreement states, in the relevant portion (CP 200):

Provisions of this agreement shall not prevent either party from making gifts of property to the other spouse, and such gifts shall become separate property of the donee, together with the rents, issues, profits, income and proceeds of said property.

Within a short time after that prenuptial agreement was executed Linda Capps signed a Quit Claim Deed to her husband for the residence at issue in this case. That Deed states (CP 83):

Linda S. Capps for and in consideration of love and affection convey and quit claim to her husband, Larry C. Capps, as his sole and separate property, the following real estate, situated in the County of Pierce, State of Washington . . .

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

The effect of the Quit Claim Deed and premarital agreement together is clear. The home is to remain the separate property of Mr. Capps.

In her brief to this court, Ms. Capps now argues that the trial court should have granted reconsideration due to the premarital agreement because the intent in executing a Quit Claim deed is an issue of fact because the deed was signed as a requirement of a loan to Mr. Capps. Ms. Capps presented no evidence in connection with the motion that the quit claim deed was signed as an accommodation to a lender for a loan. Ms. Capps presented no evidence in connection with the motion that the quit claim

deed was required by the bank. Even if she had, it would not have been admissible. The deed itself expressly states that it is being executed so that the house is and will remain the separate property of Larry Capps. That additional language added to a standard quit claim deed was not necessary to satisfy a bank requirement to establish that the house was Mr. Capps separate property for loan purposes. Even if Ms. Capps had attempted to testify that the reason for the quit claim deed was to satisfy the bank and that it was not intended to determine that the property was to remain separate property that evidence would not have been admissible. Hearst Communications Inc. v Seattle Times Company, 154 Wn. 2d. 493, 115 P3d 262 (2005). Under that case, what the intention of Ms. Capps was at the time she executed that quit claim deed must be determined from the words written in the quit claim deed using the words ordinary and usual meaning. It is not possible to read the language of the quit claim deed to express any intent other than to keep the entirety of Mr. Capps' residence as his separate property and evidence of an intent contrary to the language of the deed is not admissible. Ms. Capps' attempt at this point to argue that the Deed of Trust and Promissory Note, which were not presented in the evidence at the time of the Motion for Reconsideration, show an intent different than the language of the quit claim deed should be rejected because the matter was not raised below RAP 2.5. Ms. Capps

admission in her opening brief at pages 27 and 28 that she did not argue neither in the summary judgment motion or the motion for reconsideration that the court should have considered her intent in executing a quit claim deed or that the prenuptial agreement converted increases in the North Huson Street house into community property precludes the court from reversing the trial court's denial of the motion for reconsideration on appeal. RAP 2.5. The suggestion that she may now raise them for the first time on appeal is meritless.

LINDA CAPPS MOTION FOR LEAVE TO TRY SEPARATE  
PROPERTY ISSUE WAS NOT TIMELY FILED

Linda Capps argues that the court erred in failing to grant her motion to amend her pleading to allow her to litigate a claim that, pursuant to a prenuptial agreement, the increases in value of the home after marriage were community property. In her second amended complaint filed with the court, Linda Capps said in paragraph 14 that she would ask the trial court to reconsider its ruling that the home was separate property but if the court did not do so, then her claim was only for an equitable lien. (CP September 7<sup>th</sup> 258-259). Although she named it a motion for leave to try separate property issue at trial, her motion was actually a motion to amend the pleadings and add a claim stating that the premarital agreement signed between the parties made increases in the separate property home

of Mr. Capps community property. That motion was held on Friday, March 11<sup>th</sup>, two business days before the March 15, 2011 trial date. The delay in bringing a motion to amend is grounds for denial if the delay results in prejudice to the non-moving party. Herron v. Tribune Publishing Company, 108 Wn. 2d 162, 726 P 2d. 249 (1987). Ms. Capps intentionally delayed bringing her motion until just before the trial even though her second amended complaint filed in March 2010, one year earlier, states that she intended to have the summary judgment entered by the trial court corrected by a motion before trial. The court properly denied the motion to amend.

Ms. Capps claims that the Plaintiff's were not prejudiced by the late filing of the motion to amend because, she argues, summary judgment was granted in favor of the Capps' children four days prior to the original trial date and therefore the Capp's children should have been prepared to try that issue. That argument fails because Linda Capps had not yet made any claim under the pre-nuptial agreement as of the time of the hearing of the summary judgment. She had denied its existence until just prior to the summary judgment motion being heard and she did not raise the agreement as a basis to establish any portion of the home as community property as of the September 4, 2009 summary judgment. Ms. Capps' argument that the issue was before the court and the Capps children should

have been prepared to address the issue at trial is factually erroneous and unsupportable based on the record.

It was also not error for the trial court to reject the last minute amendment attempted by Ms. Capps because the premarital agreement expressly precludes the claim that Ms. Capps is making that the increases in value of the separate property are community property. Paragraph 4 of the anti-nuptial agreement cited above in its entirety expressly says that gifts made by one spouse to the other and the rents, issues and profits of those gifts remain separate property. Ms. Capps executed a deed to the separate property of her home to confirm that the property is and would remain after the prenuptial agreement was executed. The deed together with the language of the prenuptial agreement made it clear that it gifted any interest to Mr. Capps that Ms. Capps could have received otherwise under any theory so that it would remain separate property. By the express terms of the agreement, the home and the rents, issues and profits of the home were agreed to remain Mr. Capps separate property.

Ms. Capps argument that the trial court erred in denying her motion for leave to try the separate property issue at trial was also meritless because Ms. Capps argument that the quit claim deed was solely for the purpose of allowing a loan on the premises was not supported by evidence in the record for the motion. The loan from the bank could have

been accomplished without a quitclaim deed by having the deed of trust executed by Ms. Capps to encumber any potential community interest of Ms. Capps. Instead of doing that the parties chose to execute a deed that expresses a clear intent that the property would remain Mr. Capps' separate property. No other reason for the deed was or could have been testified to by Ms. Capps because it would have been contrary to the clear language of the quit claim deed and barred by the Parole Evidence Rule. Hearst Communications Inc. v. Seattle Times, supra.

CAPPS MARITAL COMMUNITY IS NOT ENTITLED TO AN  
EQUITABLE LIEN

In her argument Ms. Capps claims that the Capps marital community is entitled to an equitable lien and a right to reimbursement for mortgage payments made and interest on each mortgage payment made by the marital community at 12 % since each payment was made. That argument is utterly meritless because although the \$42,500.00 borrowed in 1977 used Mr. Capps separate property as security, all of the funds borrowed were used by the marital community for community purposes with the expectation that the marital community would make the payments on the bank loans because they received the use of the borrowed funds. (Finding of Fact III). A lien arises whenever property of one of the three characters, separate property of husband, separate property of wife or

community property is used to benefit property of a different character. In re: Estate of Trierweiler 5 Wn.App. 17, 486 P 2d. 314 (1971). In the instant case, Linda Capps asks for a right to reimbursement of payments made by the marital community on a loan where all of the loan proceeds were used by the marital community. A lien does not arise in those circumstances because the marital community both got use of the loan proceeds and made the payments. The claim for a lien and interest on those payments is utterly without merit.

Ms. Capps claims that the \$42,500.00 of borrowed funds used by the marital community from the 1977 loan paid off a \$15,000.00 debt secured by a mortgage against Mr. Capps separate property home that was owed at marriage. There is no evidence in the record to show that the \$42,500.00 loan repaid the debt owed by Mr. Capps at marriage. In fact the fulfillment deed was signed in favor of Mr. Capps several days before the \$42,500.00 loan was taken out. (Ex 5). Mr. Capps had \$80,000.00 of funds at marriage that could have been used to pay off the debt. Since Mr. Capps had substantial assets at marriage including bank deposits and an account receivable for a loan which exceeded \$80,000, it is presumed that the separate funds were used to pay the loan. Jones v. Davis, 15 Wn 2d. 567, 131 P 2d. 433 (1942). Pollock v. Pollock, 7 Wn.App. 394, 499 P 2d

231 (1972). It was Ms. Capps burden to show that the debt was paid with community funds. She did not meet the burden.

Ms. Capps claims a right to an equitable lien for property taxes paid on Mr. Capps separate property home. There is no evidence in the records as to whether those taxes were paid with community property or Mr. Capps separate property. Since Mr. Capps had substantial assets at marriage including bank deposits and an account receivable for a loan which exceeded \$80,000 it was Ms. Capps burden to show that the taxes were paid with community property at least up to the point that the separate funds were exhausted. Jones v. Davis, supra, Pollock v. Pollock, supra, she did not present evidence of the source of payment of those taxes and the court specifically found that she failed to prove that those were paid with community property (Finding of Fact IX). Ms. Capps claim for a lien for taxes fails because she failed to provide the necessary proof.

In an argument that is not supported by any evidence in the trial record Ms. Capps argues that she's entitled to a lien for inflation increases in the North Huson Street house from \$50,000 at marriage to \$755,000 in 2008. As support for increase in value of the premises to \$755,000 Ms. Capps refers to an appraisal filed with a Declaration of Jay Latteri connection with a Motion for Reconsideration that was neither offered nor admitted at trial. There is therefore no evidence in the record to support

the argument. Exhibits 37-39 referred to in Ms. Capps appellate brief at pg. 40 also were neither offered or admitted at trial. Increases in value of separate property due to market conditions are separate property. In re Marriage of Johnson, 28 Wn.App. 574, 625 P 2d. 720 (1981). The increase in market value does not support a lien.

It appears that Ms. Capps is arguing in her brief that increases in value to Mr. Capps separate property were converted into community property by the prenuptial agreement that was not admitted at trial. Ms. Capps assigned error to the trial court's decision refusing to admit the prenuptial agreement. (Assignment of Error N, exhibit 3). Nowhere in her brief does she explain why it was error to refuse to admit the agreement at trial. At page 47 of her brief, Ms. Capps argues that the prenuptial agreement "expressed a wish that his wife was an owner of the house". No argument is presented as to what language in the prenuptial agreement is relied on for that statement. Assignments of Error that are not supported by argument or authority are deemed abandoned. Spino v. Dept. of Labor and Industries, 1 Wn.App. 730, 463 P 2d. 256 (1969). The prenuptial agreement was not relevant to this case because the character of the home and the disposition of the home under the decedent's will was determined on summary judgment. Ms. Capps elected not to place the premarital agreement in the record in response to the summary judgment or to argue

any effect that she claimed the premarital agreement would have. It was not error for the court to refuse to admit the premarital agreement.

As part of her argument regarding the premarital agreement Ms. Capps asked this court to determine that all increases in the value of the house up to \$750,000 are community property and belong to Ms. Capps. In effect, Ms. Capps asks that the court not only reverse the summary judgment but that this court grant her summary judgment regarding the interpretation of the premarital agreement even though no such summary judgment was ever filed or heard by the court. This court should deny any relief based upon the language of the premarital agreement and the lack of evidence of the value Ms. Capps asserts the home had at the time of the decedent's death.

Ms. Capps argues that she is entitled to interest on the amounts of community funds advanced for taxes and mortgage payments. Even if Ms. Capps had proof of amounts of community funds advanced to pay a separate obligation of Mr. Capps, interest is typically not award in connection with equitable liens. Fritch v. Fritch, 53 Wn. 2d. 496, 335 P 2d. 43 (1959). Merkel v. Merkel, 39 Wn. 2d. 102, 234 P 2d. 857 (1951).

Ms. Capps claims that the court erred in failing to credit her with payments of what she claims is \$32,164.96 on the \$42,500 mortgage from her separate property. Ms. Capps did testify at trial that she received

funds from an automobile accident that were solely for pain and suffering. That testimony was contrary to her deposition testimony where she stated there was no segregation as to what part of the \$75,000 which were lost wages and what part of it was for other damages. RP 129-132. It is also undisputed that that money was comingled with community money in a community checking account. RP 132. Ms. Capps provided no evidence to trace the payment of any funds on the loan to the accident proceeds. The trial court did not believe Ms. Capps claim that the personal injury settlement was separate property because her trial testimony was different than her deposition testimony. The court made an express finding that it did not believe her (Finding of Fact III). In fact the trial court had specific concerns about the truthfulness of Ms. Capps' testimony. RP 297-298. Ms. Capps simply wasn't credible and her testimony wasn't believed. She also failed to provide proof of the tracing of the accident funds to pay off the mortgage.

The primary reason that the Capps marital community would not have been entitled to any lien against the separate property home of Mr. Capps even if she had properly and timely presented her claim to the Personal Representative is that the marital community lived in the home without paying rent for 30 years. The rental value of the premises during that 30 years was \$286,560. That amount significantly exceeded the

property taxes paid on the premises. Where a benefit received by the marital community from free rent more than offsets the amounts a marital community paid for the house no lien arises. In re Marriage of Miracle, 101 Wn. 2d 137, 139675 P.2d 1229 (1984). Ms. Capps was entitled to no lien because the trial court found that it would not be equitable for the lien to arise when the marital community's benefit from free rent exceeded all of the contributions to the home even if they had been proven to be paid from community property.

LINDA CAPPS DID NOT OBJECT TO THE EXPERT TESTIMONY  
OF RENTAL VALUE

Linda Capps argues that the trial court erred in admitting the evidence of the rental value of Larry Capps' separate property home and in finding that the reasonable rental value of the home from February 1, 1977 through January 31, 2007 was \$286,560.00. Ms. Capps admits that the expert testified to that reasonable rental value but argues that it was error to admit the testimony.

Ms. Capps' argument fails because her counsel did not object to the admission of the testimony at trial. Evidence Rule 103 precludes the court from finding that a trial court erred in admitting evidence unless a substantial right of the party objecting to the evidence at trial is affected unless an objection to admission of the evidence is timely made or a

Motion to Strike is made, stating the specific ground for the objection. Failure to raise an evidentiary objection at the trial court precludes a party from raising it on appeal. Symes v. Teagle, 67 Wn.2d. 867, 873, 410 P2d. 594 (1966), DeHaven v. Gant, 42 Wn. App. 666, 713 P 2d. 149 (1986). Ms. Capps counsel did not make a single objection to the admissibility of the testimony of Tim Richmond. She may not raise the issue the issue for the first time on appeal. RAP 2.5.

TIM RICHMOND'S QUALIFICATIONS ALLOW EXPERT  
TESTIMONY

Even if Ms. Capps had objected to the evidence of Tim Richmond at trial, his testimony as an expert witness was admissible. Mr. Richmond testified at trial about reasonable rents for the separate property home of decedent, Larry Capps during the period from 1977 through 2007. Mr. Richmond has experience as a real estate appraiser for thirty-four years at the time of trial. (RP 58) He has managed his own rental properties since 1976. (RP 58) He has managed his father's rental properties and appraised rental properties for thirty years from which he has a good understanding of rents in the industry. (RP 58/59) Based on his analysis and understanding of the market and review of rental properties in 2006 and 2008 for which known rentals were available, and based on his experience as an appraiser and as a rental manager for residential properties and as an

owner of his own residential rental properties, Mr. Richmond opined that the rental value of the house ranged between \$185.00 per month in 1977 and \$1,500.00 in 2007. He found the average rent to be about \$840.00. As an expert he was entitled to express an opinion as to the rental value ER 702. Even if Ms. Capps had objected, it would not have been error to admit the evidence.

DOMESTIC SERVICES PROVIDED BY SPOUSE DURING  
MARRIAGE DO NOT AFFECT LIEN OFFSET UNDER MIRACLE

Ms. Capps argues that the trial court erred in failing to allow Ms. Capps to testify about services she provided to the marital community during marriage as an offset against the lien. The court sustained objection to questions of Ms. Capps about her work for Mr. Capps construction company (RP 48-50) and about her domestic chores done around the Capps' home. (RP 93 line 3).

The court correctly sustained an objection to those questions as being irrelevant. Ms. Capps argues that Marriage of Miracle, supra, allows an offset against reasonable rent for services provided to the marital community. The services being referred to in Miracle, supra, were services in improving separate property in a way that increases its value. The suggestion that the court can offset against reasonable rent for services unrelated to improvements of the separate property home is not

supportable by any authority. Who did the housekeeping, cooking and errands for the marital community and worked in a business to earn money has nothing to do with the offset for reasonable rent where a marital community lives in a separate property of one spouse. The court properly sustained to the two question asked by Ms. Capps counsel about services provided to the community.

Ms. Capps argues that the trial court placed great emphasis on the fact that Mr. Capps had \$80,000 in assets at the time of marriage. There is no basis for any objection to the court considering that because it was contained in Exhibit 4 which was offered by Ms. Capps at trial. (RP 52).

Ms. Capps also argues that the court considered irrelevant factors when it considered the amount of pay on death assets and community property assets received by Ms. Capps upon her husband's death. The trial judge made no findings of fact or conclusions of law related to assets received by Linda Capps either from the probate or from non-probate assets. Ms. Capps counsel opened the door to discussing what assets Ms. Capps got by attempting to admit Exhibit 14, which purported to be a letter from Mr. Capps to his wife. Counsel argued that the letter was relevant to show that, contrary to his Will, Mr. Capps wanted his wife to receive the house upon his death. (RP 97 lines 15 to 23). The objection to

the letter was properly sustained on a relevance ground as the letter did not comply with requirements of a valid will. RCW 11.12.020.

Ms. Capps claims that the court improperly considered the amount of non-probate assets she received on the death of her husband. Ms. Capps counsel initially asked Ms. Capps what other assets she had. (RP 98 line 11). That drew an objection and Ms. Capps counsel went on to tell the court that she had received \$950,000 of non-probate assets. (RP 99 line 4.)

How much Mr. Capps had in non-probate assets and in community assets is highly relevant to the case because it points out the reason that it is improper for Ms. Capps to have brought this action without filing a creditor's claim so that the debt, if any, established in this action could be apportioned properly among the estate assets non-probate assets. Who got the other assets was not relevant at trial and counsel for the Respondent's child, Larry Capps initially inquired only about the amount of non-probate assets and not who received them. (RP 126 and 128-129.)

On redirect Ms. Capps counsel asked her why she had removed items from the house that were part of the real property and belonged to the Capps children when the house was awarded to them. She explained that she had sold items out of the home because she "needed money" (RP 192). By presenting testimony that she sold items from the home that

should have gone to the children because she “needed money” Ms. Capps opened up the door to her financial circumstances. Although counsel for the Capps children did not immediately address the issue the court did. (RP 193). Ms. Capps cannot open the door to the issue of whether or not Ms. Capps was justified in taking items that were attached to the house like light fixtures because she needed the money without opening up the issue of how much she received. The court followed up on that issue when Ms. Capps opened the door to it. Ultimately, the issue was not considered by the court in its decision as the court correctly ruled that Ms. Capps’ claims were barred because she had not followed RCW 11.40 and because the reasonable rental value of the home exceeded the only evidence upon which a lien could have been created, the payment of real estate taxes. The evidence of Ms. Capps net worth was irrelevant to the court’s final ruling.

#### TRIAL JUDGE WAS NOT BIASED

Ms. Capps asks the court to order a change of judges if the case is remanded to the trial court. As evidence of the alleged bias Ms. Capps argues that the judge focused on the amount that Ms. Capps received in non-probate assets. That subject was introduced by Ms. Capps. She may not complain that the judge considered it.

As the next ground Ms. Capps says that the judge grilled her about removing plants from the yard when she moved out. Ms. Capps was not credible when she made that claim because she attempted to excuse her conduct due to her need for money when she had received \$950,000.00 in non-probate assets as well as substantial probate assets. He asked the questions described in Ms. Capps brief because her comments showed her lack of credibility. The comment of the Judge that Ms. Capps was angry also was proper as he found her not credible based on her anger which was supported by the testimony of her lifelong friend who testified at trial that Ms. Capps was angry toward the Capps children. (RP 234)

The remainder of the complaints of Ms. Capps regarding the alleged bias relate to evidentiary rulings of the court. Not one of those evidentiary rulings was error and in most cases the questions he now argues that opposing counsel asked that he now says were objectionable were not objected to at trial.

The trial judge did not make a single legal error in his rulings. Ms. Capps does not effectively argue that any of the findings of fact are not supported by the evidence. Ms. Capps cannot establish bias when she cannot show the bias had any effect on the rulings of the judge.

ATTORNEY'S FEE AWARD WAS PROPER

The trial court awarded attorney's fees to the defendants in this cause under RCW 11.96A.150. This action was commenced by the two Capps children under 11.96A. to determine the separate or community property character of Mr. Capps' home at the time of death. 11.96A.150 states, in the relevant portion:

Either the Superior Court or any court on appeal may, in its discretion, award costs, including reasonable attorney's fees to be awarded to any party: (a) from any party to the proceedings . . . the court may order costs, including reasonable attorney's fees to be paid in such amount and in such manner as the court determines to be equitable. In exercising discretion under this section the court may consider any and all factors it deems relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

RCW 11.96A.150 gives the court broad discretion to award fees in any manner and to any party. In re Estate of Black, 116 Wn.App. 476, 66 P3d 670 (2003). In the instant case, the trial court awarded attorney's fees because Ms. Capps caused the Capps children to incur enormous attorney's fees to establish that the home owned by Mr. Capps prior to marriage was his separate property and Ms. Capps also forced the claims to trial even though no creditor's claim was filed and the lien claim was meritless. The court did not abuse its discretion in granting fees.

### ATTORNEY'S FEES ON APPEAL

Larry Capps further asks this court for an award of attorney's fees against Linda Capps on this appeal. The basis for such an award is RCW 11.96A.150. Throughout this appeal Ms. Capps attempts to argue issues that were not properly presented at the trial court. She attempts to argue this appeal based upon evidence that was not neither offered nor admitted at trial. All of that is because Ms. Capps attempted to change her theory of the case after summary judgment determining the separate property character of the Capps home was granted. This court should award attorney's fees to Larry Capps for the necessity for responding to this appeal and an amount determined by the commissioner following the appellate court's ruling.

### CONCLUSION

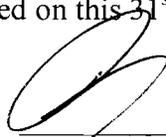
This court should affirm the trial court's decision dismissing Ms. Capps' claim on the ground that she failed to first present her claim to the personal representative of the Capps Estate. It should also dismiss the claim because it is too late for her to now present such a claim to the personal representative.

Even if Ms. Capps claim was timely filed, the court decided on an alternate ground that she was not entitled to a lien from monies spent on the separate property home of Larry Capps. The only evidence that was

admitted at trial that could support a lien was payment of the real estate taxes which, over 30 years totaled approximately \$100,000. It was undisputed that during the marriage the marital community benefited by receiving free rent with a value of \$286,500 which more than offset the property tax payments made by Mr. and Mrs. Capps. There was no basis presented at trial for a claim of Mrs. Capps secured by an equitable lien. The claim should be dismissed.

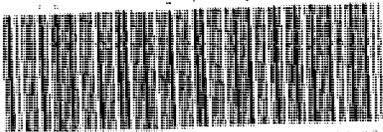
Mr. Capps' son, Larry A. Capps should be awarded his attorney fees in responding to this appeal pursuant to RWC 11.96A.150. The amount of such fees should be determined by further order of the court commissioner after the filing of affidavits.

Respectfully submitted on this 31<sup>st</sup> day of October, 2011.



Bart L. Adams, WSBA 11297

## APPENDIX



07-4-00351-0 36126717 FNCL 03-29-11

THE HONORABLE FREDERICK W. FLEMING  
IN OPEN COURT

FILED  
MAR 28 2011  
Pierce County Clerk  
By *[Signature]*  
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

In the Matter of the Estate of:

LARRY CLINTON CAPPS,

Deceased.

No. 07-4-00351-0

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

LINDA S. CAPPS,

Plaintiff,

vs.

CONSOLIDATED INTO CAUSE NUMBER  
ABOVE

GREGORY H. PRATT, Personal  
Representative for the Estate of Larry C.  
Capps; LARRY A. CAPPS and ANGIE  
CAPPS, husband and wife; and KIMBERLY  
A. SCALERA and GUY SCALERA, wife and  
husband,

Defendants.

This matter came on regularly for trial before the above-entitled court on March 15, 2011; and Linda Capps appearing by and through her attorney, Carl Carlson; and Larry A. Capps appearing by and through his attorney, Bart L. Adams; and Kim Scalera appearing by and through her attorney, Tom Krilich; and the court having proceeding to a trial, having taken testimony of the witnesses, makes the following

FINDINGS OF FACT

ORIGINAL

## I.

1  
2 Larry C. Capps and Linda Capps were married on February 26, 1977. At the time of  
3 marriage, Larry C. Capps owned a residence at 4903 North Huson Street, Tacoma,  
4 Washington. The court has previously ruled that the home is his separate property. In addition  
5 to that home, at the time of marriage Mr. Capps had substantial bank deposits and an account  
6 receivable for a loan, the total of which exceeded \$80,000.00. None of those funds remained  
7 in separate accounts at his death. They were either used to pay off the \$15,000.00 in separate  
8 debt that he had at the time of marriage or to benefit the marital community. At the time of  
9 marriage, Mr. Capps also had several vehicles, furniture and antiques worth \$10,000.00, and  
10 an operating construction company.

## II.

11  
12 Linda Capps owned no real property at the time of marriage. She sold her home in  
13 December, 1976. Her testimony that she received \$22,750.00 from that sale and that those  
14 funds were brought into the marriage is not credible and the court finds that she failed to trace  
15 any of the funds from the sale of her home or prove that any funds from that house were used  
16 for community purposes.

## III.

17  
18 Larry C. Capps borrowed \$42,500.00 from State Mutual Savings Bank in May of 1977.  
19 The loan encumbered only his separate estate and he used his separate property home as  
20 security for the loan. The funds borrowed were used by the marital community of Larry C.  
21 Capps and Linda Capps with the expectation that the marital community would make the  
22 payments on the loan to the bank because they received the use of the borrowed funds. Larry  
23 C. Capps' separate estate got none of the net proceeds of the loan and did not receive any fee  
24 for pledging his separate property for money that was used by the community. The interest  
25 rate and other terms of the loan are not known. The loan was paid back during marriage. Ms.  
Capps has failed to prove the source of the funds used to repay the loan. The court

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

## IV.

5 At marriage, Mr. Capps owed \$15,000.00 on his home at 4903 North Huson Street,  
 6 Tacoma, Washington. That debt was paid off in May of 1977. The source of the funds for  
 7 payment has not been proven. Mr. Capps had \$80,000.00 of separate funds at marriage on  
 8 February 26, 1977, that could have been used for that purpose. If his separate funds at  
 9 marriage were not used for the purpose of paying off the debt, they benefited the marital  
 10 community as they were not used for any separate purpose of Mr. Capps.

## V.

12 Larry C. Capps and Linda Capps lived in the separate property home of Larry C. Capps  
 13 throughout their marriage until his death in January, 2007. The community did not pay rent to  
 14 Larry C. Capps' separate estate during the marriage. During the period from February 1, 1977,  
 15 through January 31, 2007, the reasonable rental value of the premises was \$286,560.00. The  
 16 reasonable rental value of the premises from the time of Larry C. Capps' death through  
 17 September, 2009, was \$1,500.00 per month. Linda Capps lived in the residence from the time  
 18 of the decedent's death through September, 2009, without paying rent. Linda Capps alleged  
 19 that the home and all of the assets of Larry C. Capps were community property and were  
 20 Willed to her, giving her the right to the home. She would be unjustly enriched if she does not  
 21 pay reasonable rent for the premises during that time.

## VI.

22 \* AND INSURANCE ON THE  
 23 \* HOUSE IN THE AMOUNT OF 2502.00  
 24 Between February 1, 2007, and September 31, 2009, Linda Capps paid property tax  
 25 payments on the residence of 4903 North Huson Street of \$13,795.41. \* She also paid an  
 installation of windows in the premises for the sum of \$6,618.78. Those amounts would have  
 been paid by a landlord had she rented the property from a landlord and they should be

1 credited toward payment of reasonable rent in the premises from February, 2007, through  
2 September, 2009.

3 VII.

4 Linda Capps had a deck built on the premises after the decedent's death. She failed to  
5 get a permit for the deck and the deck was not built to code. The deck has failed. It adds no  
6 value to the home.

7 VIII.

8 Linda Capps paid other miscellaneous expenses toward the home after the death of Mr.  
9 Capps. Those expenses would have been incurred by a tenant and should not be set off  
10 against reasonable rent.

11 IX.

12 Real property taxes became due and owing on Larry C. Capps' North Huson Street  
13 home during marriage. There is no evidence of when or how they were paid or from what  
14 source the taxes were paid. Linda Capps has failed to prove by a preponderance of the  
15 evidence that they were paid with either community property or her separate property.

16  
17 That from the foregoing Findings of Fact, the court makes the following

18 CONCLUSIONS OF LAW

19 I.

20 That the court has jurisdiction of the parties in the subject matter of this suit.

21 II.

22 That Linda Capps made a claim for a right to reimbursement procured by an equitable  
23 lien or constructive trust against the residence at 4903 North Huson Street, Tacoma,  
24 Washington, in both Pierce County Superior Court cause number 07-4-00351-0 and Pierce  
25 County Superior Court cause number 09-2-15731-1. That her claim under cause number 07-4-  
00351-0 was brought as a suit on a rejected creditor's claim that had been filed on October 13,

1 2009. The cause of action of Linda Capps under cause number 09-2-15731-1 was amended  
2 by the Second Amended Complaint to be a cause of action directly against the Personal  
3 Representative, Larry A. Capps and Kim Scalera, and their respective spouses, and not an  
4 action brought on a creditor's claim. Linda Capps' counsel signed an order dated March 11,  
5 2011, with agreed language stating that the claim she was pursuing for trial was brought under  
6 her Second Amended Complaint under cause number 09-2-15731-1 and was not based on a  
7 creditor's claim. The claims made by Linda Capps for reimbursement of funds spent on the  
8 separate property home of Larry C. Capps is a claim against the decedent for a debt owed by  
9 the decedent at death. Washington law does not recognize a direct action against the  
10 Personal Representative or against Larry A. Capps and his wife or Kim Scalera and her  
11 husband on such a claim without the filing and rejection of a creditor's claim.

12 III.

13 Even if Linda Capps had not abandoned her action on a creditor's claim filed in cause  
14 number 07-4-00351-0 prior to trial and had proceeded on that claim, the evidence presented at  
15 trial would not sustain a right to reimbursement secured by an equitable lien or constructive  
16 trust in her favor. Linda Capps presented claims for an equitable lien for repayment of a  
17 \$42,500.00 loan taken against Mr. Capps' separate property. Even if that loan was repaid with  
18 community funds, the community had the use of the borrowed funds which were placed in the  
19 community account and used for community purposes and no right to reimbursement secured  
20 by an equitable lien or constructive trust would arise. Further, it would be inequitable to grant a  
21 right of reimbursement for payment of those funds because Mr. Capps brought more than  
22 \$80,000.00 in cash assets into the marriage that were used by the marital community for  
23 community purposes which more than compensated the marital community for any payments  
24 made on the loan. Further, the marital community received a benefit of free rent with a value of  
25 \$286,560.00 during the period of the marriage which considerably exceeds the value of any

1 community contributions to the separate property home of the decedent, making it inequitable  
2 to grant a right of reimbursement secured by an equitable lien.

4 IV.

5 Even if Linda Capps had proved that community funds were used to pay off the  
6 \$15,000.00 debt owed by Larry C. Capps from the purchase of the residence at 4903 North  
7 Huson Street prior to marriage, no right to reimbursement of those funds would arise because  
8 Mr. Capps brought more than \$80,000.00 of cash into the marriage and because even when  
9 added to the other requests of Linda Capps for reimbursement secured by an equitable lien,  
10 the amounts requested are far less than the benefit received by the community from not being  
11 required to pay rent on the separate property premises of Larry C. Capps during marriage.

12 V.

13 That real property taxes were incurred on the residence during the marriage. Even if  
14 Linda Capps had proven that those taxes were paid with community funds, which she did not,  
15 no right for reimbursement secured by an equitable lien would arise because the reasonable  
16 rental value received by the marital community for the use of Mr. Capps' home far exceeded  
17 the amount of property taxes paid.

18 VI.

19 That a judgment should be entered in favor of Larry A. Capps and Kim Scalera, and  
20 their respective spouses, in their separate estates against Linda Capps for the reasonable  
21 rental value of the premises at 4903 North Huson Street, from February 1, 2007 through  
22 September 30, 2009, subject to an offset for property taxes of \$13,795.41 and costs of  
23 windows paid by Linda Capps for the residence of \$6,618.78, leaving a net judgment of

24 ~~\$27,586.00~~ 25,084.00

*Handwritten initials: CAX, KAK, etc.*

25 VII.

*Handwritten signature/initials.*

*Handwritten notes: AOK, INSURANCE OF \$2502,00, BNA, etc.*

1 That the claims by Linda Capps for reimbursement of funds spent on the separate  
2 property home of Larry C. Capps during marriage should be dismissed with prejudice.

3 VIII.

4 That Larry A. Capps and Kim Scalera should be awarded attorneys fees against Linda  
5 Capps under RCW 11.96.A150 on several grounds. First, the action under cause number 09-  
6 2-15731-1 is not authorized because it was admitted by Ms. Capps not to be an action on the  
7 creditor's claim. Second, the claim was not properly brought against Larry A. Capps and Kim  
8 Scalera. Third, Linda Capps pursued a claim on legal theories regarding the right to an  
9 equitable lien that do not have merit such as a request for an equitable lien for repayment of  
10 funds borrowed by Larry C. Capps that were used by the marital community. Finally, Linda

11 Capps' claim was based on her testimony which the court found to be not credible. REASONABLE

12 FEES FOR LARRY A. CAPPS ARE 40,072.20 AND FOR KIM SCALERA

13 DATED this 28th day of March, 2011. THEY ARE 20,632.50 PLUS

14 ADDITIONAL EXPENSES OF 688.40  
15 \* 650 OF WHICH IS AN EXPERT WITNESS  
16 EXPENSE.

DEPT  
IN OPEN COURT  
MAR 28 2011  
Pierce County Clerk  
By DR  
DEPUTY

Frederick W. Fleming  
FREDERICK W. FLEMING, JUDGE

MARK  
B 18  
CFC  
BT

17 Presented by:

Approved as to Form;  
Notice of Presentation Waived:

18 [Signature]  
19 Bart L. Adams, WSBA# 11297  
20 Attorney for Larry A. Capps

Carl J. Carlson  
Carl J. Carlson, WSBA# 7157  
Attorney for Linda Capps

Thomas Krilich  
Thomas Krilich, WSBA# 2973  
Attorney for Kim Scalera

NO. 42078-3-II

COURT OF APPEALS,  
DIVISION II  
OF THE STATE OF WASHINGTON

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In the Matter of the Estate of

LARRY CLINTON CAPPS,

Deceased,

KIMBERLY A. SCALERA,

Petitioner,

vs.

LINDA CAPPS,

Respondent

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**AFFIDAVIT OF MAILING**

---

BART L. ADAMS, WSBA #11297  
ADAMS & ADAMS LAW, P.S.  
2626 North Pearl Street  
Tacoma, Washington 98407  
(253) 761-0141  
Attorney for Larry Capps

STATE OF WASHINGTON )  
 ) ss.  
County of Pierce )

The undersigned, being first duly sworn on oath, deposes and states:

That I am a citizen of the United States; over legal age; not a party to this proceeding; competent to be a witness herein; that on the 3<sup>rd</sup> day of November, 2011, I mailed a true and correct copy of Respondent Larry A. Capps Brief which is identical to the originals thereof, which are on file with the Clerk of this Court addressed to:

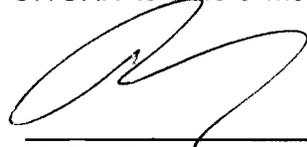
Carl J. Carlson  
Carlson & Dennett, PS  
1601 Fifth Avenue #2150  
Seattle, WA. 98101-1686

Thomas G. Krilich  
Krilich, LaPorte, et al  
524 Tacoma Avenue S  
Tacoma, WA. 98402

That the same was deposited into the United States mail in a sealed envelope, with correct postage affixed, by first class mail.

  
\_\_\_\_\_  
Theresa Zalewski

SUBSCRIBED AND SWORN to before me this 3<sup>rd</sup> day of November, 2011.

  
\_\_\_\_\_  
NOTARY PUBLIC in and for the  
State of Washington,  
Residing at Fox Island, WA.  
My Commission Expires: 11/15/12