

No. 42169-1 II

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

JANE VAN ALLEN,

Respondent

v.

VERNON WEBER

Appellant

APPEAL FROM THE SUPERIOR COURT FOR PIERCE COUNTY
STATE OF WASHINGTON
THE HONORABLE RONALD E. CULPEPPER

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR 1

II. ISSUES PRESENTED 1

A. Was evidence present at trial to support donative intent?. 1

B. Did the trial court abuse its discretion by not applying judicial estoppel to Ms. Van Allen’s bankruptcy filings as they relate to this case?..... 1

C. Did the trial court abuse its discretion by not allowing new evidence after trial of differing real property values? 1

III. STATEMENT OF THE CASE..... 1

A. ERRORS IN APPELLANT’S STATEMENTS OF FACT..... 1

B. RESPONDENT’S COUNTERSTATEMENT OF THE CASE 2

1. Judicial Estoppel..... 2

2. Donative Intent 3

3. Reconsideration Based upon the Next Tax Year’s Assessed Value 3

IV. ARGUMENT 3

A. DONATIVE INTENT WAS PRESENT, AND THE COURT HAD SUFFICIENT EVIDENCE TO SUPPORT ITS DECISION..... 3

B. JUDICIAL ESTOPPEL DOES NOT APPLY IN THIS CASE 11

1. Bankruptcy debts paid by Dr. Weber’s line of credit were for Dr. Weber’s household and business expenses..... 15

2. No injury to the bankruptcy court due to Ms. Van Allen’s mistake. 16

3.	No Unfair Detriment on the Opposing Party	17
4.	Interest payments	19
5.	No judicial estoppel	19
C.	THE TRIAL COURT HAD NO REASON TO VACATE OR RECONSIDER ITS OPINION RELATED TO THE VALUES OF THE PROPERTIES	20
1.	CR 60(b)(1) does not afford a basis to reconsider	22
2.	CR 60(b)(3) does not afford a basis to reconsider	22
3.	CR 60(b)(11) does not afford a basis to reconsider	23
D.	ATTORNEY FEES FOR FRIVOLOUS APPEAL	25
V.	CONCLUSION	25

TABLE OF AUTHORITIES

Cases

<i>Arkison v. Ethan Allen</i> , 160 Wn.2d 535, 160 P.3d 13 (2007).....	12
<i>CHD, Inc. v. Taggart</i> , 153 Wn. App. 94, 220 P.3d 229 (2009).....	15
<i>Cunningham v. Reliable Concrete Pumping, Inc.</i> , 126 Wn. App. 222, 108 P.3d 147 (2005).....	14
<i>Dines v. Hyland</i> , 180 Wn. 455, 40 P.2d 140 (1935).....	9, 10
<i>In re Cunningham's Estate</i> , 19 Wn.2d 589, 143 P.2d 852 (1943).....	9, 10
<i>In re Riley's Estate</i> , 78 Wn.2d 623, 479 P.2d 1 (1970).....	9
<i>Johnson v. Si-Cor Inc.</i> , 107 Wn.App. 902, 28 P.3d 832 (2001).....	13
<i>Konstantinidis v. Chen</i> , 626 F.2d 933, 938 (D.C.Cir.1980).....	15
<i>Miller v. Campbell</i> , 164 Wn.2d 259, 192 P.3d 352 (2008).....	14, 15
<i>Mitchell v. Washington State Institute of Public Policy</i> , 153 Wn. App. 803, 225 P.3d 280 (2009).....	21
<i>Russell v. Rolfs</i> , 893 F.2d 1033, 1037 (9th Cir.1990)	15
<i>Scott v. Currie</i> , 7 Wn.2d 301, 109 P.2d 526 (1941).....	10
<i>Shoemaker v. Shaug</i> , 5 Wn.App. 700, 704, 490 P.2d 439 (1971).....	15

<i>Skinner v. Holgate</i> , 141 Wn. App. 840, 173 P.3d 1103 (2006).....	19
--	----

Statutes

RCW 11.04.015	9
---------------------	---

Rules

CR 60	25
CR 60(b).....	20
CR 60(b)(1).....	22
CR 60(b)(11).....	23
CR 60(b)(3).....	22
RAP 18.9.....	25

I. ASSIGNMENTS OF ERROR

Ms. Van Allen does not appeal the trial court's decision, and therefore assigns no error.

II. ISSUES PRESENTED

- A. Was evidence present at trial to support donative intent? Yes.
- B. Did the trial court abuse its discretion by not applying judicial estoppel to Ms. Van Allen's bankruptcy filings as they relate to this case?
No.
- C. Did the trial court abuse its discretion by not allowing new evidence after trial of differing real property values? No.

III. STATEMENT OF THE CASE

A. ERRORS IN APPELLANT'S STATEMENTS OF FACT

Generally, Dr. Weber's Statement of the Case is accurate. However, the Appellant is incorrect in the following factual assertions:

- 1. Appellant states that Dr. Weber's monthly income during the course of his relationship with Ms. Van Allen was approximately \$1,000. App. Br. 5. Dr. Weber actually testified that was what he made at the end of the relationship. 3 VRP 322.¹

¹ The first two volumes of Transcripts of Proceedings, submitted by Appellant, are cited herein as 1 VRP and 2 VRP, respectively. The third transcript, although submitted in three volumes, comprises the entirety of trial testimony and is sequentially numbered as if comprising a single volume. They are cited herein collectively as 3 VRP.

2. The real property located at 14907 113th Street, Spanaway, Washington (the “14907 Property”) was not gifted to the “couple.” App. Br. 8. It was partially sold and partially gifted.

3. No evidence at trial proved that somehow Ms. Van Allen ran up credit card debt before she filed for bankruptcy protection. App. Br. 9. In fact, Appellant cites to counsels’ argument and the court’s general questions, not to evidence or testimony. Also, the items purchased with the credit cards include a \$10,000 television, which is in Dr. Weber’s possession. 3 VRP 115.

4. Dr. Weber has no evidence that “his home” was to be seized by the trustee of Ms. Van Allen’s bankruptcy estate. App. Br. 10.

B. RESPONDENT’S COUNTERSTATEMENT OF THE CASE

1. *Judicial Estoppel*

The trial court heard uncontroverted evidence that the parties shared all expenses, both business and household. 3 VRP 33, 48. The court heard evidence that Ms. Van Allen used her credit card to pay for Dr. Weber’s business and personal expenses, and that personal property items purchased with Ms. Van Allen’s credit card are still in the possession of Dr. Weber. 3 VRP 145-48.

Such actions were part of the parties' "scam" and the court rightly ruled that Ms. Van Allen's failure to properly list assets on her bankruptcy schedule does not judicially estop her in this instance.

2. *Donative Intent*

The evidence clearly showed Ms. Van Allen's brother deeded the 14907 Property based upon a gifting donation, and the court awarded Ms. Van Allen that gifted share. Dr. Weber did, however, obtain a half-interest in the portion of the real property he paid for. CP 193-94.

3. *Reconsideration Based upon the Next Tax Year's Assessed Value*

The parties agreed that the value of the real properties in this case would be their assessed value for 2011. CP 203. After trial, Dr. Weber received a Notice of Change of Value, as all property owners do, and sought to have the trial court reconsider its calculation of the property value. The court refused "because he could should have known of a potential re-valuation based on his twenty year ownership of the property." CP 268.

IV. ARGUMENT

A. **DONATIVE INTENT WAS PRESENT, AND THE COURT HAD SUFFICIENT EVIDENCE TO SUPPORT ITS DECISION.**

The trial court did not err when it granted Ms. Van Allen a partial separate property interest in real property located at 14907 113th Street,

Spanaway, Washington (the “14907 Property”). Dr. Weber cites to portions of the court record, essentially arguing that the court’s reasoning was unsupported by evidence. Dr. Weber, however, fails to cite to several important sections of the court’s decision and the trial record.

During the trial Ms. Van Allen testified under direct examination about the 14907 Property and why she received it for less than market value:

Q Why did your brother sell it to you for less than the market value?

A He knew I wanted to have a house close to where Dr. Weber and I lived because I was planning on having a home for a safe house, like for girls that needed help.

3 VRP 101. Further Ms. Van Allen testified as to the title of the 14907 Property:

A The grantor is Harry Phipps Jr. conveying it to Earth Home Ministries, the property at 14907 13th Avenue, and it was dated July 2004.

Q Who is Mr. Phipps?

A He is my brother.

Q And what is Earth Home Ministries again?

A It’s a ministry that owns the home.

Q Who is connected with this ministry?

A I am the successor.

Q Is there any other member of this ministry?

A Members, No.

Q Are there any other bishops or anybody else connected to this ministry besides yourself?

A No.

3 VRP 129. Therefore, evidence in the trial supports the trial court’s

understanding, as articulated in Findings of Fact Nos. 29-32, that the property effectively belonged to Ms. Van Allen as a result of her brother's quit claim deed. CP 174.

The trial court addressed that very issue when it asked the following series of questions of Ms. Van Allen related to the quit claim deed used by Mr. Phipps to convey the property to the ministry.

THE COURT: So just so I understand it, the quit claim deed says zero dollars, and Mr. Phipps actually received \$61,000. Is that my understanding?

THE WITNESS: Prior to this.

THE COURT: So he says he's giving it to a ministry for nothing.

THE WITNESS: He gifted it.

3 VRP 130-31. Dr. Weber himself indicates the reason the 14907 Property was placed in the name of Earth Home Ministries was so that Ms. Van Allen had "something."

Q. And why was the house hypothecated in Earth Home Ministries?

A. That was one of [Ms. Van Allen]'s ideas that I didn't understand from the very start, but she wanted to put it in her name so she had something of hers.

3 VRP 253. In fact, Dr. Weber testified that he thought Ms. Van Allen was paying for the remaining amount (beyond the \$61,000) which would have otherwise been paid for the 14907 Property had it been purchased for market value.

Q. And what was your understanding of what monies were to go to Mr. Phipps for Earth Home Ministries?

A. Apparently I knew very little until yesterday about it, but she had made a lot of money prior to that so I figured she was paying part of the money and she ran out of money and didn't have enough to pay for it. That's why I had to take out the line of credit. But after yesterday I found out she gave him absolutely nothing, and I don't know where all the money went that she had before that, but I had to go to my line of credit. So apparently I'm the only one that has any financial interest in that property up there because she states that she has none and he had none. It was zero that was exchanged.

3 VRP 281. (emphasis added). Dr. Weber further testified that he had no involvement with Earth Home Ministries' formal paperwork. 3 VRP 299.

Most importantly, on cross examination, Dr. Weber testified that he had no evidence that Ms. Van Allen's brother, Mr. Phipps, wanted Dr. Weber to have an interest in the residual equity in the 14907 Property which was conveyed to Earth Home Ministries.

Q. Did you understand that Ms. Van Allen's brother was, in a sense, gifting the property to Ms. Van Allen?

A. That's what he said in the quit claim deed, yes.

Q. Well, then I guess the question I would have is, do you think that her brother intended for you to have a partial ownership interest of that gift?

A. I think he did.

Q. Anything in writing expressing that?

A. Well, no.

Q. Just a general understanding?

A. Yes.

When addressing the issue of who owned the 14907 Property, the court states:

Again, the title documents show this Earth Home Ministries. The parties are asserting I should disregard that, and I think I should, and the transaction from the brother to Van Allen and Weber is more a sale, so I'm going to treat it as kind of a sale.

Now, the sale price apparently was \$61,000. That's the amount of the line of credit that Weber took out to help pay for it. It appears that the property had a value of quite a bit more than that at the time of the sale. I don't know exactly what it was, but the assessed value was quite a bit higher than that, so I suppose it was some kind of donative element, and it would make some sense that this would be more for Ms. Van Allen and her daughter's benefit than Mr. Weber since it was her brother.

1 VRP 80 (emphasis added). Therefore, the trial court expressly concluded that Ms. Van Allen benefitted from the donative intent of the conveyance by her brother to her solely-controlled ministry, Earth Home Ministries. Ex 50. The trial court also made its calculation based upon the amount that was paid to Ms. Van Allen's brother, Mr. Phipps, by Ms. Van Allen and Dr. Weber. The trial court examined what it considered to be the donative intent by Ms. Van Allen's brother in conveying the property to Ms. Van Allen's ministry at far less than market value, and concluded that there was "a large donative element here from Ms. Van Allen." 1 VRP 81. Finally, the trial court found that Ms. Van Allen "made some of

the payments, and I think she has an equitable interest in this asset of about 75 percent of the value, which my arthritc [sic] is \$164,550.” *Id.*

As a result, Ms. Van Allen did not succeed in obtaining a solely separate interest in the 14907 Property. Her interest was measured against the variety of facts and circumstances to which the parties testified over the days of trial in the case.

Contrary to Dr. Weber’s argument that the grantor of the 14907 Property had an intent to grant the property to Dr. Weber, the record shows that the grantor, Mr. Phipps, conveyed the property to a ministry that his sister, Ms. Van Allen, owned and operated solely (even if only) on paper. There is no evidence that Dr. Weber received the property himself, or that he held it as some sort of vicarious owner or trustee for Earth Home Ministries.

When addressing the 14907 Property, the court specifically took into account the \$61,000 payment made via Dr. Weber’s line of credit by awarding Dr. Weber credit for the payment. 1 VRP 83. This specifically gave Dr. Weber an interest in the 14907 property representing the contribution he personally made. The trial court also obligated Ms. Van Allen to pay \$30,500 (one half of the \$61,000 payment made by Dr. Weber) as part of the allocation of debts between the parties. *Id.*

Dr. Weber’s argument comes down to this: that his estranged

girlfriend's brother intended that his gift of a substantial piece of real property at below market value to his sister's ministry was actually a gift to Dr. Weber of a half interest in the real property, despite Dr. Weber maintaining affairs with other women at the time of the conveyance. 3 VRP 396. Of course, there is no evidence to support such a preposterous position. Dr. Weber merely argues now that he should enjoy a half interest in the portion of the 14907 Property which was not fully paid for, but, in fact, given to Ms. Van Allen's ministry.

Putting aside the fact that the evidence at trial supports the court's finding of donative intent, case law provides that "[w]here the property is deeded to one, the natural object of the donor's bounty,² a gift rather than a trust is presumed." *In re Cunningham's Estate*, 19 Wn.2d 589, 143 P.2d 852 (1943), citing *Dines v. Hyland*, 180 Wn. 455, 40 P.2d 140 (1935). The alternative is a resulting trust. However, a resulting trust must be proven only by evidence "which is clear, cogent and convincing." *In re Cunningham's Estate*, 19 Wn.2d 589, 143 P.2d 852 (1943); *Dines v. Hyland*, 180 Wn. 455, 40 P.2d 140 (1935); *Scott v. Currie*, 7 Wn.2d 301, 109 P.2d 526 (1941). The evidence in this case does not support such

² Natural object of testator's bounty, are those persons who would take in the absence of a will. Such persons are those whom intestacy statutes have so designated to take and, under most, if not all, modern intestacy statutes recognize the status of near relationship. *In re Riley's Estate*, 78 Wn.2d 623, 479 P.2d 1 (1970). See also RCW 11.04.015, which provides that a sibling can take by intestate succession.

reasoning and does not provide relief for Dr. Weber.

Finally, the appellant has taken snippets of counsel's closing argument to mean that Ms. Van Allen's position is that the 14907 Property was donated to both parties. That is simply not what was said.

The transcript reflects that the trial court interrupted after counsel said that the conveyance of the 14907 Property was to the couple, and stated that it "thought it was given to Earth Home Ministries". 1 VRP 25

It is important for this court to take into account that the calculation of the trial court as to equitable value reflects an understanding of all the properties in this case, along with offsets and calculations on all of those properties to create an equitable distribution of the assets. The parties in this action lived together for 20 years, maintained records that were difficult to follow, and put together a system of encumbrances on all real property that they owned in a way to avoid creditors from taking any of their assets. The court's decision reflects the best understanding of the parties' relationship and their relationship to the assets acquired during their non-marital cohabitation following days of testimony. During that testimony, the trial court had the ability to judge the credibility of the witnesses and the logic of the positions each was asserting. The court's finding regarding the 14907 Property should not be disturbed.

B. JUDICIAL ESTOPPEL DOES NOT APPLY IN THIS CASE

Dr. Weber is far too selective in his recitation of the facts as they relate to judicial estoppel in this case. He has failed to point out that the bankruptcy filing from 2005 and the resulting payoff of creditors were for the benefit of what would be characterized as community debts. In fact, the court found that such debts were quasi-community, and therefore allocated half of the outstanding balance on Dr. Weber's line of credit to Ms. Van Allen. 1 VRP 83. More importantly, the trial court found that Dr. Weber was not injured in any way, and instead heard evidence that he actually received a benefit from the bankruptcy court filing. 1 VRP 69, 83-84.

In filing her bankruptcy without the assistance of an attorney, Ms. Van Allen listed an interest in the real properties in Spanaway, Washington, but did not list an interest in the remaining assets. She believed that she was truthful when she made those disclosures. Ms. Van Allen relied on the quitclaim deed to Earth Home Ministries and her understanding that she did not "own" Earth Home Ministries, but held it in her fiduciary capacity. She considered her interest in the other properties as subject to corporate or trust-based interests. As became clear at trial, the parties to this action simply did not have a clear understanding of their

legal rights and responsibilities, and did not know what they owned and in what capacity they owned it.

No bankruptcy court actually accepted Ms. Van Allen's opinion and discharged her debts based upon her filings alone. In fact, Ms. Van Allen fully paid all the creditors in her bankruptcy estate, and was still granted a discharge. Such a fact does not now preclude her from asserting an interest in real property in which she did not understand that she fully had an interest. Ms. Van Allen also tried to fix her mistaken filing. 3 VRP 108. Importantly, the doctrine of judicial estoppel does not apply when it is based upon a mistake. *Arkison v. Ethan Allen*, 160 Wn.2d 535, 160 P.3d 13 (2007). In this matter, Ms. Van Allen did not understand what assets she had, and she was mistaken as to those assets. 3 VRP 15. However, nothing that occurred as a result of the bankruptcy filing damaged Dr. Weber. Instead, he received a benefit from the filing.

That Ms. Van Allen did not understand what she was doing when she filed her bankruptcy petition was proven, in part, by the fact that she listed \$85,000 as the value of her real property when she thought she was listing \$85,000 as the amount she owed associated with the real property. 3 VRP 110. Further, Ms. Van Allen clearly did not understand the interest she had in the subject real properties in this action, and, in fact, did not know at the time she filed bankruptcy that the line of credit, which

eventually paid off the bankruptcy debt, was not secured by any interest in the underlying real properties. 3 VRP 110. When Ms. Van Allen realized that she had made a mistake in her pro se bankruptcy petition, she hired counsel to help her fix the problem. Trial testimony is clear on this point. 3 VRP 113. Ultimately, Ms. Van Allen was unable to correct her mistakes through an amended schedule, and she ended up paying all of the listed creditors, with Dr. Weber's assistance, all the money that was owed. Ex. 201, Final Report of Trustee.

Judicial estoppel only applies when the litigant's prior inconsistent statement benefits the litigant or was accepted by the court. *Johnson v. Si-Cor Inc.*, 107 Wn.App. 902, 28 P.3d 832 (2001). Here, Ms. Van Allen did not benefit by making mistakes in her bankruptcy petition. In fact, the opposite occurred. She paid all claims in full, and the trial court allocated responsibility to her to pay the associated debt used to pay those claims (one half of Dr. Weber's line of credit). Ex. 201, Final Report of Trustee. Ms. Van Allen also apparently incurred thousands of dollars in associated fees. *Id.* Further, and most importantly, Dr. Weber benefitted from Ms. Van Allen's representations in her filing.

The appellate court reviews the trial court's application of the doctrine of judicial estoppel to the facts of the case for an abuse of discretion. *Cunningham v. Reliable Concrete Pumping, Inc.* 126 Wn. App.

222, 108 P.3d 147 (2005). Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *Miller v. Campbell* 164 Wn.2d 529, 192 P.3d 352 (2008). ('Because the rule is intended to prevent 'improper use of judicial machinery,' ... judicial estoppel 'is an equitable doctrine invoked by a court at its discretion') (quoting *Konstantinidis v. Chen*, 626 F.2d 933, 938 (D.C.Cir.1980), *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir.1990)). Equity's goal is always to do substantial justice to both parties when a forfeiture is sought. *Shoemaker v. Shaug*, 5 Wn.App. 700, 704, 490 P.2d 439 (1971).

A trial court's application of judicial estoppel is discretionary. *CHD, Inc. v. Taggart*, 153 Wn. App. 94, 220 P.3d 229 (2009). The doctrine of judicial estoppel protects the integrity of the judicial process, not the interest of a defendant attempting to avoid liability. *Miller v. Campbell*, 164 Wn.2d 259, 192 P.3d 352 (2008).

Ms. Van Allen could not be expected to know that as a party to a committed intimate relationship she would have property rights in assets held by her partner in 2005, four years before their relationship ended and she sought the advice of counsel.

1. *Bankruptcy debts paid by Dr. Weber's line of credit were for Dr. Weber's household and business expenses.*

Ms. Van Allen used the credit cards paid off in her bankruptcy to purchase personal property items which remain in Dr. Weber's possession. 3 VRP 115. Ms. Van Allen's tax liability (paid off in the bankruptcy) also arose because of her earnings during the committed intimate relationship. Ultimately, Dr. Weber paid all the debt from Ms. Van Allen's bankruptcy as evidenced by an \$89,556.08 check sent to Brian Budsberg, the trustee of the bankruptcy estate. 3 VRP 144. The trial court found that half of those debts were Ms. Van Allen's responsibility, and allocated debt distribution based upon this finding. 1 VRP 83-84. Further, the credit cards which were paid off through the bankruptcy proceeding were also used for the benefit of Dr. Weber's chiropractic business and household expenses. 3 VRP 118.

Ms. Van Allen believed that on her bankruptcy petition she should segregate what portion of the debts on the then-outstanding line of credit were her responsibility. 3 VRP 165. She therefore indicated that she owed \$38,224.71 associated with creditors holding secured debts. Her belief, as evidenced in her testimony, was that her share of the outstanding line of credit was secured by interest in real property, when, in fact, she

had no liability for that debt, nor was it secured. Clearly, she completed the bankruptcy schedule incorrectly. 3 VRP 165.

The court should take notice of the fact that all of the cases cited by Dr. Weber dealing with judicial estoppel in a debtor's bankruptcy pleadings have to do with situations where the debtor's creditors would have otherwise had a right to pursue an interest in the claim. That is not what is at stake in this matter. In fact, it should be pointed out, and the distinguishing factor here is that Ms. Van Allen's creditors were fully paid. Further, those creditors were arguably Dr. Weber's creditors for debts incurred which would otherwise be called community debts. In fact, even at the time of their breakup, Dr. Weber still had the \$10,000 television bought with Ms. Van Allen's credit cards, which had been paid off in the bankruptcy. 3 VRP 161. Finally, Dr. Weber received the excess funds returned by the trustee through the bankruptcy in the amount of \$9,596.57. 3 VRP 172. See also Ex. 201, Final Report of Trustee.

2. *No injury to the bankruptcy court due to Ms. Van Allen's mistake.*

The integrity of the bankruptcy court was not harmed by the filing made by Ms. Van Allen. In fact, Ms. Van Allen paid all creditor claims and hired counsel to fix her mistake. 3 VRP 172. See also Ex. 201, Final Report of Trustee. The proper procedure by which the bankruptcy court

would have addressed this matter would have been to re-open the bankruptcy proceeding if a creditor had a valid claim, and to address those assets at that time.

Dr. Weber makes much of the point in the proceedings wherein the trial court found that Dr. Weber was not injured by statements in the bankruptcy, arguing that because he was not injured, the court used the wrong basis to apply judicial estoppel. However, Dr. Weber does not go on to cite the rest of the court's oral decision on that point, which reads:

And Dr. Weber could be seen also to have been involved to some extent in these shams or scams, whatever you want to call them, these phony – the only word I can think of – trust and corporations that were set up to try to hide assets. They both, during the relationship, owed the IRS a good deal of money and were trying to avoid paying it.

1 VRP 69. The court specifically found that Dr. Weber was a participant in the “scams” of Ms. Van Allen, which included her bankruptcy filing. As such, he cannot benefit from any sort of oversight or mistake Ms. Van Allen may have committed. Since all creditors were paid in full and Dr. Weber received relief from debt as well, the principles of judicial estoppel do not apply.

3. *No Unfair Detriment on the Opposing Party*

The third factor in a judicial estoppel claim –that a party derive an unfair advantage or impose an unfair detriment on the opposing party – is

not present since Ms. Van Allen actually paid off all of her creditors, and no creditor was harmed in any way, unlike in *Skinner v. Holgate*, 141 Wn. App. 840, 173 P.3d 1103 (2006), or any of the other cases cited by Dr. Weber.

Dr. Weber also cites unsubstantiated facts in his motion, in particular, at page 39, where he argues that “[b]efore leaving Dr. Weber, Ms. Van Allen pursued a disingenuous plan to discharge debts she had recently run up on her credit cards through a bankruptcy proceeding where she failed to disclose jointly held assets.” App. Br., at 39. This statement is absolutely false. Ms. Van Allen filed her bankruptcy in October of 2005. She separated from Dr. Weber in March of 2009, almost three and a half years after she filed her bankruptcy petition. CP 18, 28. There is absolutely no evidence that Ms. Van Allen “pursued a disingenuous plan to discharge debts she had recently run up on her credit cards through a bankruptcy proceeding” or that somehow she unfairly caused Dr. Weber to be responsible for those debts. In fact, during the course of the trial, the court heard evidence and found that all those debts incurred by Ms. Van Allen were incurred for the benefit of what would be considered the community in the form of paying for business expenses, household goods, household maintenance, food, clothing, furniture, and the things of life

that a couple requires for their lives over the period of a 20-year relationship. 3 VRP 145-48.

4. *Interest payments*

On appeal, Dr. Weber complains of the fact that he is forced to pay interest payments on the line of credit. However, the court allocated the responsibilities for the debts of the parties pursuant to its order, and took great pains addressing the debts to be paid, the responsible party or parties, and the rationale for each of its allocations. There is no appeal of the trial court's decision on debt distribution and no evidentiary facts to support such an appeal.

5. *No judicial estoppel*

In sum, judicial estoppel is inapplicable to this case because any misrepresentations were mistakes, did not benefit Ms. Van Allen, and actually benefitted Dr. Weber and his personal assets.

As the trial court stated, the parties' system of corporations and trusts were a sham and scam and had no legal effect, even if the parties mistakenly thought they did. To hold Ms. Van Allen responsible for a clear mistake in her bankruptcy schedules, which benefited the party who now asserts judicial estoppel is a misapplication of the doctrine.

C. THE TRIAL COURT HAD NO REASON TO VACATE OR RECONSIDER ITS OPINION RELATED TO THE VALUES OF THE PROPERTIES

The Court of Appeals reviews a trial court's decision on motions to vacate for "abuse of discretion," which is present only if there is a clear showing that the exercise of discretion was manifestly unreasonable, based on untenable grounds, or based on untenable reasons. *Mitchell v. Washington State Institute of Public Policy*, 153 Wn. App. 803, 225 P.3d 280 (2009), citing CR 60(b). Here, no evidence supports the argument that "untenable reasoning" was applied.

Following trial, Dr. Weber filed a motion seeking to have the trial court change its valuation of one piece of real property which had changed in assessed value since the trial date. The trial court rightly denied that motion. Part of the reasoning for the court's denial was that at any time prior to trial the parties had the right to obtain appraised values or to contest the values asserted by the other party. CP 267-68. Instead, the values set forth in the pleadings and jointly submitted to the court by counsel for both parties were the county's tax assessed values. The reliance on county assessments was accepted by all parties and the court. CP 294. If Dr. Weber had an issue with the value of his property at any time leading up to trial, he could have submitted contrary evidence as to the value, in which case Ms. Van Allen would have had an opportunity to

present her own evidence as to the value. However, both parties relied on the then-current tax assessed values. Dr. Weber now asks this court to repudiate the very position he advanced at trial, which would result in a substantial injustice to Ms. Van Allen, who has no opportunity to respond to this post-trial change of position.

There was no error or “erroneous” decision made by the court. At the time of the trial, the value of the property was accurate. Weber asserts that the valuation by the Pierce County Assessor-Treasurer used for tax purposes for tax year 2012 should be substituted post-trial as the value for one of the properties. Dr. Weber ignores that he and his counsel submitted the values and adopted them at trial with full knowledge that each year the assessed value of real property may change. The fact that the assessed value of one property declined after the trial is no more relevant than if the building suffered a devastating loss post-trial. Post-trial occurrences do not change the value presented to the trial court by stipulation of the parties before and during trial.

Dr. Weber seems to confuse the annual notice of valuation, which is what he received in this case, with some fundamental flaw in the assessment. If, for instance, the county had issued a notice stating that they made a mistake on the \$182,000 appraisal and that the assessed value was wrong for 2011 when made, then the facts relied upon at trial would

have been mistaken and might be subject to an alteration. However, the Assessor-Treasurer did not make a mistake or “change” its assessment as of the date it was made; it simply updated the information to reflect a different valuation for the next tax year.

1. CR 60(b)(1) does not afford a basis to reconsider.

CR 60(b)(1) does not afford a basis for the trial court to reconsider its findings, since no “mistake” was made. The value at the time of trial was accurate. The Assessor-Treasurer did not correct a mistaken valuation, but instead updated the valuation for the next tax year. Simply put, no mistake of fact occurred.

2. CR 60(b)(3) does not afford a basis to reconsider.

CR 60(b)(3) does not afford a basis to reconsider the trial court’s findings, since there was no “newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial.” At any time, Weber could have chosen to present evidence as to an alternative value of the South Tacoma Way Property. He could have had an appraisal done by a professional of his choosing. He elected not to do so, and cannot now claim that he had no opportunity to do so before trial.

The fact that the Assessor-Treasurer changes the taxable value of properties on an annual basis is not surprising; it is simply the function of that office. The parties elected to rely upon the tax assessed values, which

were current at the time. Either party could have used any evidence they felt was compelling to convince the court of a higher or lower property value. Weber chose not to do so, and now, without authority, claims that he is entitled to present new evidence of value.

3. *CR 60(b)(11) does not afford a basis to reconsider.*

CR 60(b)(11) does not afford a basis to reconsider the court's findings, since updating of taxable values for real property by county assessors is not an "extraordinary circumstance". Weber has functionally owned and operated his chiropractic business at the South Tacoma Way Property for twenty years. He has been taxed on the South Tacoma Way Property and others for just as many years. He receives, as do all property owners, notices of changes of valuation on an annual basis. In 2011, he received a notice that the property he owns had been assessed for tax purposes for 2012 at a value he now claims he did not anticipate. Such an event is not an "extraordinary circumstance" justifying reconsideration. Again, if Dr. Weber was not satisfied with the values determined for property tax purposes, he had ample opportunity to offer other opinions.

Dr. Weber's post-trial attempt to abandon his trial strategy is highly prejudicial to Ms. Van Allen, and the trial court rightly denied the motion to vacate. The court has achieved an equitable distribution of the parties' assets, and no changes should be made to the court's decision.

Further, if the court were inclined to allow this issue to be revisited, the equitable result would be to allow all of the values of the properties to be revisited, since the parties relied on assessed values which by their very nature change on an annual basis.

There is simply no newly discovered evidence that would provide a basis for the court to find that due diligence would have resulted in evidence of another value. In particular, Dr. Weber could have contacted the assessor and asked for a change in value before or during the trial; he could have presented his own testimony as to the estimated value of the real property; or, he could have retained an expert to testify as to the value of the real property. He chose to do none of those things, and instead presented the very evidence to the court that he now seeks to repudiate. The parties, through counsel, submitted to the trial court that the value of real properties would be based on the then-available assessed values. These values were presented to the court and adopted without objection by Dr. Weber. On March 31, 2011, Dr. Weber's counsel indicated that the value of the disputed property was \$182,000. 1 VRP 62.

Ultimately, there is no evidence that the county assessor made any mistake when valuing Dr. Weber's property originally. The assessor simply lowered the assessed value for the next tax year. All the properties in this case are subject to a change in tax assessed values between the time

of the trial and future publication of assessed values. To allow Dr. Weber the right to have this issue re-litigated would be a significant problem and a massive change from the underlying case law in this state. CR 60 is designed to protect litigants when something unexpected happens. This case, and Dr. Weber's argument related to the property value, is not an unexpected incident. There is no basis for litigants who have not prepared properly for trial or who want to change stipulations made in trial to do so. To have vacated the ruling would amount to abuse of discretion, and this court should affirm the trial court's refusal to do so.

D. ATTORNEY FEES FOR FRIVOLOUS APPEAL

Pursuant to RAP 18.9 this court should order that Dr. Weber pay Ms. Van Allen's attorney fees on appeal, given that Dr. Weber did not present the entire record on appeal which clearly shows evidence contrary to his description of the trial record, and that none of his cited points of error by the trial court demonstrate an abuse of discretion.

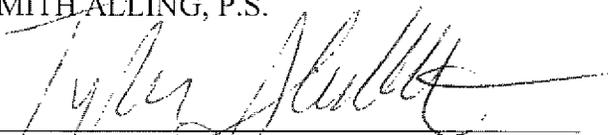
V. CONCLUSION

Based on the foregoing, Ms. Van Allen request that Dr. Weber's appeal be denied, that the court affirm the trial court's Findings of Fact and Conclusions of Law, its oral rulings, and its ruling on Dr. Weber's Motion to Vacate.

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RESPECTFULLY SUBMITTED this 1st day of March, 2012.

SMITH ALLING, P.S.

A handwritten signature in black ink, appearing to read "Tyler Shillito", written over a horizontal line.

BARBARA A. HENDERSON, WSBA #16175

C. TYLER SHILLITO, WSBA #36774

Attorneys for Respondent Van Allen

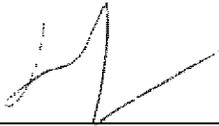
CERTIFICATION OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on this 1st day of March, 2012, I caused to be delivered a true and correct copy of the foregoing Brief of Respondent to the following via e-mail transmission pursuant to the parties' agreement:

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DATED this 1st day of March, 2012.



Joseph M. Salonga