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NO. 45926-4-II

IN THE COURT OF APPEALS

STATE OF WASHINGTON

DIVISION II

STANGEL FAMILY TRUST by BEATRICE STANGEL, Trustee

Appellant,

v.

ELLEN MARIE STANGEL

Respondent.

APPELLANT'S OPENING BRIEF

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ORIGINAL

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 2. The trial court erred in entering the Findings of Fact, Conclusions of Law and Judgment of December 6, 2013, Finding of Fact 1.7, crediting the defendant two years of mortgage payments made by defendant (up to but not beyond November 1999) in the amount of \$21,245.28 against the payments owed and unpaid in the amount of \$31,867.92 during the three years preceding the filing of the lawsuit. 1

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A. ASSIGNMENTS OF ERROR.

Assignments of Error:

1. The trial court erred in entering the Findings of Fact, Conclusions of Law and Judgment of December 6, 2013, Finding of Fact 1.6, awarding the defendant the equity in the property.
2. The trial court erred in entering the Findings of Fact, Conclusions of Law and Judgment of December 6, 2013, Finding of Fact 1.7, crediting the defendant two years of mortgage payments made by defendant (up to but not beyond November 1999) in the amount of \$21,245.28 against the payments owed and unpaid in the amount of \$31,867.92 during the three years preceding the filing of the lawsuit.
3. The trial court erred in entering the Findings of Fact, Conclusions of Law and Judgment of December 6, 2013, Finding of Fact 1.9, ordering Plaintiff to list the property for sale and to the extent of awarding the defendant the equity in the property.
4. The trial court erred in entering the Findings of Fact, Conclusions of Law and Judgment of December 6, 2013, Conclusion of Law 2.6, and Judgment 3.6 (a) in not awarding the plaintiff judgment against the defendant for the entire three years of unpaid mortgage payments that were due preceding the filing of the lawsuit in the amount of \$31,867.92.
5. The trial court erred in entering the Findings of Fact, Conclusions of Law and Judgment of December 6, 2013, Judgment 3.8, distributing any portion of the proceeds of the sale to the defendant.
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7. The trial court erred in entering the Order on Reconsideration of January 24, 2014, ordering defendant's motion to obtain a conditional deed from the plaintiff granted in part.
8. The trial court erred in entering the Order on Reconsideration of January 24, 2014, granting the defendant the right to obtain a purchase

money mortgage or loan on the property and all collateral rights, orders, and/or procedures attached thereto as referenced in paragraphs 1 through 5.

9. The trial court erred in entering the Order on Reconsideration of January 24, 2014, in that it reversed the Findings of Fact, Conclusions of Law and Judgment ordering the Defendant evicted and restoring immediate possession of the property to the Plaintiff.

Issues Pertaining to Assignments of Error:

1. SHOULD THE PLAINTIFF/APPELLANT BE ENTITLED TO IMMEDIATE POSSESSION AND SHOULD THE DEFENDANT/RESPONDENT BE EVICTED FOR FAILURE TO COMPLY WITH THE TERMS OF THE TRUST? (Assignment of Error No. 6 and 9)

2. SHOULD THE DEFENDANT/RESPONDENT BE GIVEN CREDIT FOR PAYMENTS MADE BEFORE NOVEMBER 1999 WHEN PLAINTIFF/APPELLANT IS PREVENTED FROM COLLECTING FOR NON-PAYMENT FROM DECEMBER 1999 THROUGH MARCH 2010 BECAUSE OF THE STATUTE OF LIMITATIONS BARRING COLLECTION BEYOND THE THREE YEARS PRECEDING THE FILING OF THE LAWSUIT? (Assignment of Error No. 2 and 4)

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B. STATEMENT OF THE CASE.

1. **Stangel Family Trust and Family History.**

Defendant/Respondent Ellen M. Stangel is the daughter of William J. Stangel and step-daughter of Beatrice Stangel. (CP Exhibit #1) Beatrice Stangel is 87 years old. (VRP-1, p. 25, l. 8) In or about April 1994, William and Beatrice Stangel created the Stangel Family Trust with themselves or the survivor named as trustees. (CP 1 and CP Exhibit #1) In or about November 2003, William and Beatrice Stangel as trustees amended the trust by Second Amendment, which revoked in its entirety the First Amendment (CP Exhibit #2) and again amended it in or about August 2008 by Third Amendment (CP Exhibit #3). Defendant/Respondent Ellen M. Stangel is one of the residuary beneficiaries of the Stangel Family Trust. (CP Exhibits #1-3)

The pertinent portions of the Stangel Family Trust can be found in the Second Amendment, which states, in part:

“4.3 Specific Gifts. After the death of the surviving Settlor and after payment of expenses and taxes as provided hereinabove, the Trustee shall distribute the...following specific gifts: ... (c) If the residence in Tacoma, Washington, currently occupied by Husband’s daughter, ELLEN MARIE STANGEL, is part of the trust estate, then this asset shall be distributed to ELLEN MARIE STANGEL, subject to any outstanding liens and encumbrances at the date of distribution. However, if ELLEN MARIE STANGEL survives the surviving Settlor,

then any outstanding mortgage or deed of trust lien shall be discharged from ELLEN'S share of the residuary trust estate that she is entitled to receive pursuant to paragraph 4.4 below. In addition, in the event WILLIAM J. STANGEL is the first of the Settlers to die, ELLEN MARIE STANGEL shall have the right to remain in the Tacoma, Washington residence in the same manner and on the same terms that she currently occupies such residence, provided she signs an agreement with the Trustee acknowledging that following the death of the surviving Settlor, the balance outstanding of any mortgage or deed of trust lien on the residential property shall be paid from and charged against her share of the residuary trust estate pursuant to paragraph 4.4 below."

"If the residence in Tacoma, Washington, currently occupied by Husband's daughter, ELLEN MARIE STANGEL, is part of the trust estate and still occupied by ELLEN MARIE STANGEL, the Trustee shall have no power to sell, lease, encumber, or take any other action regarding this asset without the written consent of ELLEN MARIE STANGEL, who shall have the right to occupy this property as long as she pays all of the expenses related to the property, including, without limitation, all mortgage payments, taxes, insurance, maintenance, and repairs." (CP 1, CP 2-4, CP 197, CP Exhibit #2)

William Stangel died on November 27, 2012. (CP 100) The Stangels were married for 41 years. (VRP-2, p. 5, l. 21 – p. 6, l. 3) Plaintiff/Appellant testified that Defendant/Respondent would not receive the subject property until after Plaintiff/Appellant dies pursuant to the terms of the trust. (VRP-2, p. 63, ll. 19-25 to p. 64, l. 1)

2. Subject Property and Background Information.

Plaintiff/Appellant is the legal owner of the property located at 6105 E. North

Parkway, Tacoma, Washington 98407, legally described as:

Lots 21, 22, 23 and 24, Block 5, REPLAT OF POINT DEFIANCE PARK ADDITION TO TACOMA, WASHINGTON, according to Plat recorded in Book 10 of Plats at Page 78, in Pierce County, Washington.

EXCEPT that portion of said Lots 23 and 24, lying Southwesterly of a line described as follows:

Commencing at the most Northerly corner of said Lot 24; thence Southwesterly along the Northwesterly line of said Lot 24 a distance of 13.26 feet to the point of beginning for said line; thence Southeasterly on a line parallel with the boundary line between Lots 20 and 21, in said Block 5, a distance of 124.98 feet, more or less, to the Southeasterly line of said Lot 23 and the terminus of said line.

SUBJECT TO Easement including the terms, covenants and provisions thereof, for the purpose of to install an anchor and guy wires, and incidental purposes, in favor of City of Tacoma, recorded under Auditor's No. 2259303.

Assessor's Tax Parcel ID #: 693000-026-5. (CP 149)

The subject property was purchased by statutory warranty deed by William and Beatrice Stangel on June 30, 1997. (CP 149 and CP Exhibit #4) Defendant/Respondent Ellen M. Stangel moved into the subject property on July 14, 1997. (VRP-1, p. 77, l. 6) On August 26, 1999, William and Beatrice Stangel transferred the subject property to themselves as trustees of the Stangel Family Trust. (CP 1, CP 4-6, and CP Exhibit #5) Defendant/Respondent Ellen M. Stangel resided in the subject property with the permission of the trustees William and Beatrice Stangel. (CP 1) Defendant/Respondent Ellen M. Stangel was required to make all mortgage,

insurance, and tax payments on the property and did so up to but not beyond November 3, 2003. (CP 150) Since November 2003, Defendant/Respondent Ellen M. Stangel failed to make the payments as required by the Stangel Family Trust. (CP 2) In July 2003, William J. Stangel and Beatrice F. Stangel placed a loan against the subject property as trustees of the Stangel Family Trust. (CP Exhibit #6) In 2008 correspondence was sent from the trustees regarding the need for Defendant/Respondent Ellen M. Stangel to vacate the subject property, which would be sold. (CP Exhibits #10, #11, #12, and #14) Prior to the death of William J. Stangel, Plaintiff/Appellant and Mr. Stangel had conversations with Defendant/Respondent Ellen M. Stangel regarding her need to pay the mortgage, taxes, insurance, and maintenance of the property as required by the trust. (CP 100) Plaintiff/Appellant emphatically told Defendant/Respondent Ellen M. Stangel in person in or about September/October 2012 that she had to make the payments as required by the trust. (CP 100) After Mr. Stangel passed away, Robert J. Filippi (Plaintiff/Appellant's son-in-law) assisted Plaintiff/Appellant in requiring Defendant/Respondent Ellen M. Stangel to comply with the terms and conditions of the trust. (CP 93-98)

3. **Procedural History.** On March 20, 2013, the Defendant/Respondent was served a Notice to Quit Premises. (CP 2 and CP

8) Said notice was dated March 20, 2013, and required Defendant/Respondent Ellen M. Stangel to surrender the premises on or before April 30, 2013. (CP 2 and CP 8) Defendant/Respondent Ellen M. Stangel failed to vacate in violation of the notice and was in unlawful possession (CP 2, CP 119, and CP 150-152). This action was commenced based on the failure of Defendant/Respondent Ellen M. Stangel to make payments for the right to possession of property held in the name of the Plaintiff/Appellant. (CP 1-8) The Complaint filed on June 27, 2013, was for ejectment. (CP 1-8) The summons was a 20-day summons. (CP 9-10) Possession and past due payments were the only issues. (CP 1-8)

On September 5, 2013, a show cause hearing was held and the court commissioner ruled that Defendant/Respondent Ellen M. Stangel was required to comply with the terms of the trust, staying the resulting order granting a writ of restitution pending trial, conditioned upon her paying the mortgage amounts into the Registry of the Court. (CP 128 and CP 108) On October 4, 2013, the trial court denied Defendant/Respondent's motion to revise and granted Plaintiff/Appellant's motion to revise. (CP 121-122) The trial court upheld the commissioner's ruling and required that the issuance of the writ of restitution be stayed pending trial, conditioned upon respondent paying two months of mortgage payments into the Registry of the Court by

October 18, 2013. (CP 128 and CP 119-120). Defendant/Respondent paid the required amount into the Registry of the Court on October 15, 2013. (CP 128) The answer to the complaint was filed on October 22, 2013, and contained no counterclaims. (CP 123-126)

Trial was held on October 24, 2013, and November 4 and 7, 2013. (CP 148) Findings of Fact, Conclusions of Law, and Judgment were entered on December 6, 2013, evicting Defendant/Respondent Ellen M. Stangel and restoring possession of the subject property to Plaintiff/Appellant, and required that the issuance of the writ of restitution be stayed until February 5, 2014, conditioned upon Defendant/Respondent paying \$885.22 on December 5, 2013, and January 5, 2014. (CP 148-154) Judgment was awarded to Plaintiff/Appellant against Respondent/Defendant in the amount of \$15,048.74 and no attorney's fees were awarded. (CP 148) Paragraph 1.9 of the Findings of Fact, Conclusions of Law, and Judgment state, "Plaintiff shall list the property for sale and apply the proceeds from said sale as stated in paragraph 1.6..." (CP 151) Paragraph 1.6 states that Defendant/Respondent is entitled to the equity in the property. (CP 150)

On December 19, 2013, Defendant/Respondent filed a Motion to Allow Defendant's Assumption or Right of First Refusal. (CP 157-158) The Order on Reconsideration dated January 24, 2014, granted the

Defendant/Respondent the right to obtain a purchase money mortgage or loan on the property despite her failure to comply with the trust (CP 173-175). The trust contains no provision giving the right to assumption, a right of first refusal or the right to obtain a purchase money mortgage or loan on the property. (CP Exhibits #1-3)

On March 4, 2014, Defendant/Respondent filed Motions to Set Bond; Conclude Sale. (CP 176-177). The hearing was continued to March 28, 2014. (CP 186) On March 19, 2014, Plaintiff/Appellant filed a Lis Pendens. (CP 189-190) On March 20, 2014, Plaintiff/Appellant filed a Motion to Stay Enforcement and Determine Bond. (CP 195) By order dated March 28, 2014, the trial court denied Defendant/Respondent's Motion to Conclude the Sale and granted Plaintiff/Appellant's Motion to Stay Enforcement. (CP 247) The trial court also allowed Plaintiff/Appellant's judgment against Defendant/Respondent to serve as alternate security and no additional bond was required. (CP 248) Defendant/Respondent was allowed to retain possession of the subject property pending appeal and is required to pay the mortgage in the amount of \$885.22, taxes, insurance and all maintenance of the property. In addition, the trial court ordered Plaintiff/Appellant was not entitled to subtract the equity in the home from Defendant/Respondent's beneficial/residual interest in the trust if the home was purchased from the

trust.

C. ARGUMENT.

1. STANDARD OF REVIEW. An appellate court reviews a trial court's decision following a bench trial by asking whether substantial evidence supports the findings and whether the findings support the court's conclusions of law.¹ Substantial evidence is that quantity of evidence sufficient to persuade a rational fair-minded person that a finding is true.² An appellate court reviews questions of law de novo.³

2. THE PLAINTIFF/APPELLANT IS ENTITLED TO IMMEDIATE POSSESSION AND THE DEFENDANT/RESPONDENT SHOULD BE EVICTED FOR FAILURE TO COMPLY WITH THE TERMS OF THE TRUST.

The trust in the case at hand requires the Defendant/Respondent Ellen M. Stangel to pay the mortgage, taxes, insurance and maintain the property pursuant to the Second Amendment. Paragraph I of the Second Amendment adds Paragraph 6.2 to Article IV of the Stangel Family Trust at page 20. It states that if the subject property is part of the trust estate and still occupied by the Defendant/Respondent, she shall have the right to occupy the property so long as she pays all of the expenses related to the

1 *Casterline v. Roberts*, 168 Wash. App. 376, 381, 284 P.3d 743, 745-46 (2012) (citing *Standing Rock Homeowners Ass'n v. Misich*, 106 Wash.App. 231, 242-43, 23 P.3d 520 (2001)).

2 *Casterline v. Roberts*, supra (citing *Hegwine v. Longview Fibre Co., Inc.*, 132 Wash.App. 546, 555-56, 132 P.3d 789 (2006)).

property including, without limitation, all mortgage payments, taxes, insurance, maintenance, and repairs.

The evidence supports the following findings: 1) title to the subject property is in the name of the Stangel Family Trust; 2) Defendant/Respondent occupied the subject property; 3) Defendant/Respondent failed to pay pursuant to the terms of the trust; 4) a notice to quit the premises was given to Defendant/Respondent; and 5) Defendant/Respondent failed to pay and vacate.

RCW 7.28.250 states:

When in the case of a lease of real property and the failure of tenant to pay rent, the landlord has a subsisting right to reenter for such failure; he or she may bring an action to recover the possession of such property, and such action is equivalent to a demand of the rent and a reentry upon the property. But if at any time before the judgment in such action, the lessee ... pay to the plaintiff, or bring into court the amount of rent then in ... he or she shall be entitled to continue in the possession ...

“Both ejectment and unlawful detainer are recognized as legal methods of evicting tenants who do not pay their rent.”⁴ “In an action by a landlord to recover possession of the premises for the tenant's failure to pay rent,

3 *Casterline v. Roberts*, supra (*Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wash.2d 873, 880, 73 P.3d 369 (2003)).

4 *Honan v. Ristorante Italia, Inc.*, 66 Wash. App. 262, 269-70, 832 P.2d 89, 93 (1992) (citing Stoebuck, *The Law Between Landlord and Tenant in Washington: Part II*, 49 Wash.L.Rev. 1013, 1020 (1974); see *Grove v. Payne*, 47 Wash.2d 461, 288 P.2d 242 (1955); *Harris v. Morgensen*, 31 Wash.2d 228, 196 P.2d 317 (1948); *Petsch v. Willman*, 29 Wash.2d 136, 185 P.2d 992 (1947)).

RCW 7.28.250 allows the tenant to deposit with the court the rent due, plus interest and costs of the action and to perform all the necessary covenants under the lease. Once the tenant has taken these necessary actions, he may continue in possession under the terms of the lease.”⁵ Demand for payment was made, a notice to quit was given, and Defendant/Respondent has failed to comply. She is not entitled to possession of the subject property and the same should be restored to Plaintiff/Appellant.⁶ The order staying the issuance of the writ was not supported by the evidence. The findings of fact were supported by the evidence in that the Defendant/Respondent should be evicted due to non-payment and immediate possession of the subject property be restored to the Plaintiff/Appellant. The order on reconsideration reversing the conclusions of law that Defendant/Respondent should be evicted and ordering the issuance of a writ of restitution to restore possession to Plaintiff/Appellant is erroneous and is not supported by the evidence or law.

3. THE DEFENDANT/RESPONDENT SHOULD NOT BE GIVEN CREDIT FOR PAYMENTS MADE BEFORE NOVEMBER 1999 WHEN PLAINTIFF/APPELLANT IS PREVENTED FROM COLLECTING FOR NON-PAYMENT FROM DECEMBER 1999 THROUGH MARCH 2010 BECAUSE OF THE STATUTE OF

⁵ *Neiffer v. Flaming*, 17 Wash. App. 440, 442, 563 P.2d 1298, 1299 (1977).
⁶ RCW 7.28.250; and *Neiffer v. Flaming*, supra.

LIMITATIONS BARRING COLLECTION BEYOND
THE THREE YEARS PRECEDING THE FILING OF
THE LAWSUIT.

Paragraph 1.4 of the Findings of Fact, Conclusions of Law, and Judgment state that the terms of the second amendment of the trust required Defendant/Respondent to pay the mortgage, taxes, insurance, and all maintenance of the property; Defendant/Respondent was notified of the terms; demand was made for payment; and Defendant/Respondent made no payment since the second amendment dated November 2003. Giving Defendant/Respondent credit for payments she made during a time up to but not beyond November 1999 toward the three-year period in which Plaintiff/Appellant sought recovery of the unpaid mortgage, taxes, insurance and maintenance Defendant/Respondent was required to pay, but failed to pay during the entirety of those three years is not supported in law.

“The general rule is that unless the creditor has specific instructions from the debtor as to how payments are to be applied, the creditor may apply payments to any part of the debt, as he sees fit.”⁷ “If neither party appropriates the payments to any particular part of the debt,

⁷ *Oakes Logging, Inc. v. Green Crow, Inc.*, 66 Wash. App. 598, 601, 832 P.2d 894, 895 (1992) (citing *United States Fidelity & Guar. Co. v. E.I. DuPont de Nemours & Co.*, 197 Wash. 569, 579, 85 P.2d 1085 (1939); *Ellingsen v. Western Farmers Assn., Farm Financing Assn.*, 12 Wash.App. 423, 529 P.2d 1163 (1974)).

the court will apply them ‘according to its own notion of the intrinsic equity and justice of the case.’”⁸ “Absent appropriation by either party to any particular part of the debt, unless other equitable considerations override, the oldest accounts should be credited first.”⁹ Even the law in federal court uses this principal of appropriation as the state of Washington. “The law in the federal court for the Western District of Washington is that in the absence of any proof of contrary intention concerning how partial payments are to be apportioned, the payments will be applied as the court presumes the creditor would have preferred, i.e., in the manner providing the creditor the greatest security on the remaining account balance; thus, any unsecured debt would be credited before the secured debt.”¹⁰ “The goal of equity is to do substantial justice. Equity exists to protect the interests of deserving parties from the “harshness of strict legal rules.”¹¹ “Washington courts embrace a long and robust

8 *Oakes Logging, Inc. v. Green Crow, Inc.*, supra, (citing *The Post-Intelligencer Publ. Co. v. Harris*, 11 Wash. 500, 502, 39 P. 965 (1895)).

9 *Oakes Logging, Inc. v. Green Crow, Inc.*, supra, (citing *Yancovich v. Cavanaugh Lumber Co., Inc.*, 20 Wash.App. 347, 350, 581 P.2d 1057 (1978) (oldest debts credited first where debtor had several open accounts with creditor)).

10 *Oakes Logging, Inc. v. Green Crow, Inc.*, supra (citing *Whitney-Fidalgo Seafoods, Inc. v. Miss Tammy*, 542 F.Supp. 1302, 1304 (W.D.Wash.1982)).

11 *Columbia Cmty. Bank v. Newman Park, LLC*, 177 Wash. 2d 566, 569, 304 P.3d 472, 473 (2013) (citing *Rodriguez v. Dep't of Labor & Indus.*, 85 Wash.2d 949, 953, 540 P.2d 1359 (1975) (quoting *Ames v. Dep't of Labor & Indus.*, 176 Wash. 509, 513–14, 30 P.2d 239 (1934))).

tradition of applying the doctrine of equity.”¹² “From ancient times, “ ‘[t]he first maxim in equity’ has been that one ‘who seeks equity must do equity.’ ” *People's Sav. Bank v. Bufford*, 90 Wash. 204, 208, 155 P. 1068 (1916) (italics omitted). Of similarly ancient provenance is the requirement that those “ ‘who come[] into equity must come with clean hands.’ ” *Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc.*, 96 Wash.2d 939, 949, 640 P.2d 1051 (1982).”¹³ Any pre-November 1999 payments should not have been applied as credits to the years of 2010-2013 especially given the eleven-year gap in time between December 1999 and March 2010 where Defendant/Respondent failed to pay. This is contrary to the terms of the trust, is not consistent with the law regarding allocation of payments, and violates the laws of equity.¹⁴ Judgment for Plaintiff/Appellant should have been for the full three years in the amount of \$31,867.92 and not \$10,622.64.

4. THE DEFENDANT/RESPONDENT SHOULD NOT BE AWARDED EQUITY IN THE PROPERTY WHEN SHE FAILED TO COMPLY WITH THE TERMS OF THE TRUST AND THE SURVIVING SETTLOR IS NOT YET DECEASED NOR SHOULD THE EQUITY BE A

12 *Columbia Cmty. Bank v. Newman Park*, supra (citing *Hamm v. State Farm Mut. Auto. Ins. Co.*, 151 Wash.2d 303, 326, 88 P.3d 395 (2004) (Sweeney, J., dissenting)).

13 *Columbia Cmty. Bank v. Newman Park, LLC*, supra.

14 “As stated in *Portion Pack, Inc. v. Bond*, 44 Wash.2d 161, 170, 265 P.2d 1045, 1051 (1954): ‘Equity will not interfere on behalf of a party whose conduct in connection with the subject-matter or transaction in litigation has been unconscientious, unjust, or marked by the want of good faith, and will not afford him any remedy.’” *Port of Walla Walla v. Sun-Glo Producers, Inc.*, 8 Wash. App. 51, 56, 504 P.2d 324, 328 (1972).

CHARGE AGAINST ANY FUTURE INHERITANCE
SINCE SHE SHOULD NOT RECEIVE THE SAME IN
THIS LAWSUIT.

The trust retained ownership of the subject property giving Plaintiff/Appellant the benefit of the use of the equity in the property, but with conditions placed on the power to sell the property. The Trust also provided under certain terms and conditions that the Defendant/Respondent *after the surviving settlor dies* would receive the property *subject to any outstanding mortgage or deed of trust lien* and if William Stangel is the first to die Defendant/Respondent would receive the property *after the surviving settlor dies* and the *balance of any mortgage or deed of trust lien* would be *charged against her future inheritance* so long as she (1) remained in the property paying all expenses related to the property and (2) signed an agreement the balance of any mortgage or deed of trust lien would be charged against her future inheritance. In other words, the Defendant/Respondent would inherit the property (receiving the equity and subject to the mortgage) *when Plaintiff/Appellant dies*, but if William Stangel died first, the trust would pay the mortgage if the Defendant/Respondent agreed in writing it would be paid from her inheritance and she agreed to keep making the monthly payments. She did neither. The Trust also provided that if the Defendant/Respondent

occupied the property *and* paid certain expenses, the trustee would not have the power to sell, lease, encumber or take other action regarding the property without the consent of Defendant/ Respondent. Defendant/ Respondent failed to comply with the terms of the trust.

The final decision of the Court essentially forced an inter vivos gift when there lacked a present intent to make a gift (the equity) from Plaintiff/Appellant to Defendant/Respondent and it restricted Plaintiff/Appellant's right to sell the property despite the Defendant/Respondent's defaults under the terms of the trust. Additionally, the decision forgave charges against Defendant's future inheritance of the loan balance and past due monthly payments. This is contrary to the terms of the trust and also violates the laws of equity. "As stated in *Portion Pack, Inc. v. Bond*, 44 Wash.2d 161, 170, 265 P.2d 1045, 1051 (1954): 'Equity will not interfere on behalf of a party whose conduct in connection with the subject-matter or transaction in litigation has been unconscientious, unjust, or marked by the want of good faith, and will not afford him any remedy.'"¹⁵ The Defendant/Respondent apparently wants to preserve her future inheritance without complying with the terms of the trust and wants the equity now depriving the surviving settlor of it rather than when the surviving settlor

¹⁵ *Port of Walla Walla v. Sun-Glo Producers, Inc.*, 8 Wash. App. 51, 56, 504 P.2d 324, 328 (1972).

dies allowing her the use of it during her life.

The record lacks substantial evidence to support the trial court's finding that the equity should be awarded to Defendant/Respondent or that the balance of the equity (*rather than the balance of any mortgage or deed of trust lien*) is to be a charge against any future inheritance of Defendant/Respondent and deducted from her share of the residual estate of the Stangel Family Trust.

5. THE PLAINTIFF/APPELLANT SHOULD NOT BE REQUIRED TO SELL THE PROPERTY AND THE DEFENDANT/RESPONDENT SHOULD NOT BE AWARDED THE RIGHT TO OBTAIN A PURCHASE MONEY MORTGAGE WHEN DEFENDANT/RESPONDENT CAME INTO COURT WITH UNCLEAN HANDS.

The Order on Reconsideration granted the Defendant/Respondent the right to obtain a purchase money mortgage or loan on the property despite her failure to comply with the trust. Substantial evidence shows she failed to make payments as required and the record contains no evidence she signed an agreement with the Trustee acknowledging that following the death of the surviving Settlor, the balance outstanding of any mortgage or deed of trust lien on the residential property shall be paid from and charged against her share of the residuary trust estate. The trust makes no provision giving the Defendant/Respondent the right to obtain a

purchase money mortgage or loan on the property. Defendant/ Respondent's answer includes no counterclaims. Defendant/Respondent makes no cause of action to quiet title in fee simple or a claim for setoffs. Defendant/Respondent is precluded from having a right to purchase the property.¹⁶

Substantial evidence showed Plaintiff/Appellant is the fee simple title holder. "The superior title whether legal or equitable must prevail. *Rue v. Oregon & Washington R.R. Co.*, 109 Wash. 436, 186 P. 1074 (1920); RCW 7.28.120."¹⁷ "It has never been held that an equitable title, of which a purchaser had no notice, would be allowed to prevail over a valid legal title purchased by him.' *Sengfelder v. Hill*, 21 Wash. 371, 58 P. 250, 255."¹⁸ In this case, Defendant/ Respondent claimed some equitable title in the subject property as a defense to non-payment. She also claimed she purchased the property. Neither claim prevailed. Clearly, the trust is the fee simple owner. Clearly, non-payment is unconscientious, unjust, or marked by the want of good faith.¹⁹ "A court of equity acts only when and as conscience commands; and, if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever may be the rights he

16 *Sengfelder v. Hill*, 21 Wash. 371, 58 P. 250 (1899).

17 *Finch v. Matthews*, 74 Wash. 2d 161, 166, 443 P.2d 833, 837 (1968).

18 *Davies v. Metro. Life Ins. Co.*, 198 Wash. 482, 488, 88 P.2d 829, 832 (1939).

19 RCW 7.28.250.

possesses, and whatever use he may make of them in a court of law, he will be held remediless in a court of equity.”²⁰ Defendant/Respondent came to court with unclean hands by failing to pay the mortgage, taxes, insurance, and maintenance and she should not be granted any relief or remedy, including any right to purchase the property and any order requiring Plaintiff/Appellant to sell the subject property.

The record lacks substantial evidence to support the trial court's finding (or conclusion of law or order) in paragraph 1.9 that the Plaintiff/Appellant “shall” list the property for sale. The Plaintiff/Appellant should be authorized to sell the subject property as stated in paragraph 3.7 of the Findings of Fact, Conclusions and Law and Judgment dated December 6, 2013, but she should not be ordered to sell it as stated in paragraph 1.9 of the findings or to sell it to the Defendant/Respondent as stated in the Order on Reconsideration.

D. CONCLUSION. Plaintiff/Appellant asks this Court to reverse the trial court’s Order on Reconsideration in its entirety and hold the following: 1) Defendant/Respondent be evicted as Plaintiff/Appellant is entitled to immediate possession of the subject property; 2) The Clerk of

²⁰ *Deweese v. Reinhard*, 165 U.S. 386, 390, 17 S. Ct. 340, 341, 41 L. Ed. 757 (1897). See also *Walsh v. Wescoatt*, 131 Wash. 314, 319, 230 P. 160, 162 (1924); and *Income Investors v. Shelton*, 3 Wash. 2d 599, 602, 101 P.2d 973, 974 (1940).

Pierce County Superior Court shall issue a writ of restitution for the subject property ordering the Sheriff of Pierce County to restore the property to the Plaintiff/Appellant without bond; 3) Plaintiff/Appellant is entitled to judgment in the amount of \$31,867.92 and \$4,426.10 for a total of \$36,294.02; and 4) Plaintiff/Appellant is authorized to sell, lease, encumber, or take any other action regarding the subject property without restriction pursuant to the terms of the trust.

Respectfully submitted,

DATED: June 3, 2014 HOLUM & HANN, P.S.

By: 

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Attorney for Appellant
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(253) 471-2141

NO. 45926-4-II
DECLARATION OF SERVICE
Cn

NO. 45926-4-II

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

STANGEL FAMILY TRUST by
BEATRICE STANGEL, Trustee,

Appellant,

vs.

ELLEN MARIE STANGEL,

Respondent.

NO. 45926-4-II

DECLARATION OF
SERVICE

Kim A. Hann states:

I am the attorney for Appellant in the above-entitled cause of action,
over 18, competent to testify on the matters stated herein and do so based on
personal knowledge.

ORIGINAL

On June 3, 2014, I caused to be delivered an original and one true and correct copy of Appellant's Opening Brief and this declaration by placing said document(s) in a sealed envelope and hand delivering to *The Court of Appeals of the State of Washington, 950 Broadway, Suite 300, Tacoma, Washington 98402*. In addition, I caused to be delivered one true and correct copy of Appellant's Opening Brief and this declaration by placing said document(s) in a sealed envelope and hand delivering to *Peter Kram of Kram & Wooster, P.S., 1901 SI Street, Tacoma, Washington 98405-3810*. I hereby declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED at Tacoma, Washington, on June 3, 2014.



Kim A. Hann