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68036-6

No. 68036-6-I

King County Superior Court Cause No. 06-4-02161-1 SEA

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**COURT OF APPEALS  
DIVISION ONE  
OF THE STATE OF WASHINGTON**

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In the Matter of the Estate of  
SHIRLEY A. HARTY,

J. PATRICK HARTY, BENJAMIN HARTY, AND JASON HARTY,

Appellants,

v.

GREG HARTY,

Respondent.

2012 FEB 24 AM 10:56  
 COURT OF APPEALS DIV 1  
 STATE OF WASHINGTON

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**REPLY OF APPELLANTS J. PATRICK AND CHRISTINE HARTY  
AND JASON AND BEN HARTY**

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**ORIGINAL**

## ISSUE

This appeal presents a very straightforward issue. In 30 pages of briefing, respondent Greg Harty fogs the issue with verbiage, without ever directly attacking the position of appellants that the plain language of RAP 12.8 and the case law under it requires the Superior Court to enter an order restoring the marital community of J. Patrick Harty and Christine Harty all of the funds which have been garnished from community earnings and community savings accounts by Greg Harty during the previous appeal.

The previous appeal resulted in a reversal of the trial court judgment upon which the garnishments of community wages and bank accounts were based. RAP 12.8 is mandatory (in the third line it reads “a trial court shall enter orders . . . ,” equity is only involved if the intervening rights of third parties bring into play restitutionary principles.<sup>1</sup>

By denying the marital community of J. Patrick and Christine Harty their rights under RAP 12.8, the Superior Court has ignored its

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<sup>1</sup> In the decision in this matter filed on February 7, 2011 (CP 13-14) the court reversed judgment against Christine and the marital community:

Patrick’s challenge to the award of attorneys’ fees does have merit insofar as the judgment was entered against Patrick’s wife Christine and the marital community comprised of Patrick and Christine. The statute authorizes fees only against estate or trust assets, non-probate assets that are the subject of the proceedings, or parties to the action. RCW 11.96A.150(1). Christine was a witness. But Christine and the marital community were not parties. . . . We therefore reverse the portion of the judgment awarding fees against Christine and the marital community.”

responsibilities under the rule and the earlier Court of Appeals decision. By requiring Pat and Chris Harty to “seek contribution” from their children to be made whole from wrongful garnishments has no support in the case law, the prior decision, or the Rule itself.

### **REPLY**

Greg Harty argues that the marital community of Pat and Chris Harty “have no separate assets.” That may be true but nowhere in RAP 12.8 or the case law under it is the collectability of a judgment made a factor in its application. Collectability of judgments is always an issue and certainly no more or less so in the case of an award of attorneys’ fees following conclusion of a trial in a probate proceeding. Greg Harty cites no cases making collectability an issue under RAP 12.8, which is not surprising because the rule itself does not contemplate such an issue.

Greg Harty then argues that tort cases should apply in regard to the collectability of the separate judgment against Pat Harty for attorneys’ fees. Reliance on *deElche v. Jacobsen*, 95 Wn.2d 237, 622 P.2d 835 (1980) and *Keene v. Edie*, 131 Wn.2d 822, 935 P.2d 588 (1997) is misplaced as both are acknowledged by Greg Harty to be tort decisions. Both decisions limit the applicability of the exception to community liability to separate debt of a member of the community in tort situations. This is not a tort situation. Given the recent decisional law on the matter

by the Supreme Court, the Court of Appeals has no authority to overrule or modify existing interpretation of community property laws of the Supreme Court. *1,000 Virginia Limited Partnership v. Vertecs*, 158 Wn.2d 566, 578-9, 146 P.3d 423 (2006). The Court of Appeals must follow existing decisional and statutory law and limit the community property invasion rights of a judgment creditor only to tort creditors.

The present case involves a judgment in favor of Greg Harty under the probate code, plainly not a tort action. RCW 11.96A.150. The cited statute limits the authority of the court to award fees only to a “party” to the proceeding. In its earlier decision in this case, the Court of Appeals concluded that the marital community of Pat and Chris Harty and Chris Harty individually were not “parties.” The previous decision limited the judgment entitlement of Greg Harty to Pat Harty individually as to his separate property. The convoluted and misplaced arguments of Greg Harty in an effort to avoid the plain language of RAP 12.8 must be unsuccessful.

Greg Harty spends volumes in his argument on the “entity” status of a marital community. The argument by Greg Harty ignores the decision of the Court of Appeals in this case limiting his entitlement to judgment against Pat Harty only and only against the separate property of Pat Harty. Greg Harty is attempting to urge reconsideration by this court

of its earlier decision in a manner inconsistent with the rules. Greg Harty cites *Household Financial Corp. v. Smith*, 70 Wn.2d 401, 423 P.2d 621 (1967) in support of his “entity” argument. However, the case dealt with a foreign judgment creditor seeking to collect on a foreign transaction against judgment debtors who had subsequently moved to the State of Washington and established a marital community in this state. Both the husband and wife had signed the obligation making it a joint and several obligation in South Dakota where the transaction was entered into. The transaction in South Dakota would have “encompass[ed] their separate property or any property in which they had an interest in South Dakota or elsewhere.” (At p. 405.) The court concluded by saying that this separate liability and joint and several liability should extend to “. . . their interest in community property in Washington.” The court held that the community property statutes are not:

A device to defraud out-of-state creditors in cases where both husband and wife have signed a promissory note and created thereby a joint and several obligation outside the State of Washington, which would be enforceable against community property had it been executed in this state.” (At p. 404.)

The facts in *Household Finance* give no support to the Greg Harty arguments against the enforcement of RAP 12.8 and the enforcement of the prior decision in this case.

Finally, Greg Harty relies on a mis-reading of RAP 12.8 to claim that the Superior Court has equitable authority to ignore the plain mandate of the rule in cases where no third-party equities are involved. Greg Harty argues that the court should ignore the phrase “. . . shall enter orders. . .” in RAP 12.8 in favor of an overall generalized equitable discretion in the trial court as to whether or not to do so in cases where no third-party equities are involved. Greg relies on *Ehsani v. McCullough Family Partnership*, 160 Wn.2d 586, 159 P.3d 407 (2007) as support for his contention.

*Ehsani* does not support Greg’s contention. *Ehsani* involved an effort to collect an unsatisfied judgment against an attorney who had received funds into his client trust account and disbursed those funds as the client directed. The court held that the attorney was not liable “in restitution” when the judgment was reversed on appeal. The court made no similar ruling as to the client who received the funds pursuant to a later-reversed judgment.

RAP 12.8 provides for restitution “in appropriate circumstances” but that language is preceded by the word “or.” “Or” means that the restitution is an alternative in cases where the mandate of RAP 12.8 does not apply because of intervening equitable interests in the property against

which RAP 12.8 is sought to be applied.<sup>2</sup> In the present case, there are no intervening equitable interests, Greg Harty received the garnished community salary, and garnished community bank account funds personally and makes no claim in his argument that intervening equitable principles should apply so as to avoid the plain mandate of RAP 12.8. None of the facts in *Ehsani* support the claim of Greg Harty to avoid the mandate of RAP 12.8 here.

There is nothing “unjust” about the preservation of marital community assets from a separate judgment of a member of the marital community. The judgment was reversed as to the marital community, hardly giving ground for the argument that insulation of the marital community is “unjust” in this situation. The Court of Appeals has already determined the non-liability of the marital community and/or Chris Harty individually. The court should require the Superior Court to enforce RAP 12.8 as written and enter a judgment in favor of the marital community against Greg Harty for all community monies garnished pursuant to the judgment entered by the Superior Court against the community later reversed on appeal by this court.

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<sup>2</sup> “Or” is defined as a disjunctive word “. . . used to express an alternative or to give a choice of one or more things.” *Black’s Law Dictionary* (4<sup>th</sup> Ed.). See, *Mount Spokane Skiing v. Spokane*, 86 Wn. App. 165, 173, 936 P.2d 1148 (1997) where the court described “or” to be disjunctive and substituted its meaning in a statute which erroneously used “and” in a listing of choices.

## CONCLUSION/RELIEF SOUGHT

At page 21 of his brief, Greg Harty concedes that:

The Court of Appeals has only ruled that the obligation is Pat Harty's separate obligation, and not the joint obligation of Pat and Christine Harty.

There is nothing "unjust" or violative of the mandate of RAP 12.8 in requiring the restoration of monies of the community previously garnished by Greg Harty where the Court of Appeals has determined that the community should have had no liability in the first place. In 30 pages of appellate briefing, Greg Harty is arguing legal and factual grounds for avoidance of the mandate of RAP 12.8 that have no support in the present case. Nothing about enforcement of the mandate of RAP 12.8 will result in an "unjust" outcome. The marital community was not a party to the proceeding giving rise to the judgment in favor of Greg Harty for attorneys' fees, the Court of Appeals has confirmed that the judgment against the marital community is invalid. The marital community assets should be restored. Collectability of a judgment against the separate estate of Pat Harty is simply not an issue to be determined by the Court of Appeals in an RAP 12.8 proceeding.

The Court of Appeals is asked to direct the Superior Court to enter judgment restoring to the marital community all funds garnished including prejudgment interest, and to include in that judgment confirmation of the

decision of the Court of Appeals that neither the marital community of Pat and Chris Harty or Jason or Ben Harty is liable for the judgment entered in favor of Greg Harty pursuant to RCW 4.96A.150.

RESPECTFULLY submitted this 23 day of February, 2012.

OSERAN HAHN SPRING STRAIGHT & WATTS, PS

By: 

CHARLES E. WATTS, WSBA #02331  
Attorney for Appellants

**CERTIFICATE OF MAILING/SERVICE**

The undersigned, Joy Griffin, certifies that on the 23<sup>rd</sup> day of February, 2012, she caused to be served via U.S. Mail, postage prepaid, a copy of the foregoing REPLY OF APPELLANTS J. PATRICK AND CHRISTINE HARTY AND JASON AND BEN HARTY to the Court of Appeals/Division I, Cause No. 68036-6-I and to the following:

**VIA US MAIL**

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I certify under penalty of perjury under the laws of the State of Washington the foregoing is true and correct.

Dated this 23<sup>rd</sup> day of February, 2012.

  
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JOY GRIFFIN  
Legal Assistant to Charles E. Watts