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Court of Appeals  
Division I  
State of Washington

72758-3

NO. 72758-3-I

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

(Whatcom County Cause No. 09-4-00039-9)

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**IN RE THE ESTATE OF LANGELAND:**

**JANELL BOONE, an individual,  
Appellant/Cross-Respondent,**

vs.

**SHARON DROWN, an individual  
Respondent/Cross-Appellant.**

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**RESPONDENT / CROSS-APPELLANT DROWN'S BRIEF**

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## I - INTRODUCTION

In 2009, Randall Langeland (Langeland) died intestate leaving property in Whatcom County subject to probate. Langeland's daughter, Janell Boone (Boone), filed a probate action. CP 60, Amended Findings of Fact (AF/F) 7, 13-14. On February 19, 2009, Lenington was appointed replacement Administrator of the Estate of Langeland (Estate). CP 508; CP 59, AF/F 9. For 19 years, Sharon Drown (Drown) was Langeland's loving, supportive, committed and intimate partner. CP 59-61, AF/F 4-5, AF/F 19-20. In the probate action, Drown asserted equitable claims to Estate property.

On May 26, 2011, Judge Uhrig entered Findings of Fact, Conclusions of Law and Orders. CP 1287. Drown was ordered to pay Boone's reasonable attorney fees, incurred by Boone in responding to Drown's equitable claims. CP 1292. Drown appealed. CP 1298. On August 12, 2011, Judge Uhrig ordered Drown to pay Boone \$70,000 in reasonable attorney fees and entered a \$70,000 judgment in favor of Boone and against Drown. CP 1544; CP 1580. Drown appealed. See Appendix "A". On appeal, Drown prevailed. ***Estate of Langeland***, 177 Wn.App. 315, 312 P.3d 657 (Div. 1, 2013) *rev. denied* 180 Wn.2d 1009 (2013).

Drown successfully argued that the 2011 findings of fact and conclusions of law erroneously determined the ownership and fair and equitable division of jointly owned assets, and that Judge Uhrig should not have awarded attorney fees to Boone. *Id.* at 318. This Court held that the presumption that property acquired after 1991 was jointly owned prevailed; that the disputed assets were joint property; and, that equity governed the division of the jointly owned property. *Id.* at 319. This Court instructed Judge Uhrig, on remand, to reconsider the 2011 findings, conclusions and orders and make an equitable division of all joint property. *Id.* at 321-331. This Court also vacated the fees and costs awarded to Boone. *Id.* at 319.

On remand, Judge Uhrig entered Amended Findings of Fact and Conclusions of Law (AF/F, AC/L). CP 58. Judge Uhrig's AF/F and AC/L are well-supported and correct rulings. The errors alleged by Boone, in her second appeal, inappropriately raise issues and arguments Boone lost in the first appeal. This Court should affirm the amended findings and conclusions and instruct Judge Uhrig to enter a judgment, in the sum of \$63,817.50, with interest from August 24, 2011, in favor of Drown and against Boone and/or Helsell Fetterman, consistent with the amended findings and conclusions.

## **II – DROWN’S ASSIGNMENTS OF ERROR**

1. The trial court erred in entering its October 17, 2014 Order Denying Drown Motion for Entry of Judgment. CP 119; CP 220.

2. The trial court erred in entering its November 17, 2014 Order Denying Drown Motion for Reconsideration of Order Denying Entry of Judgment. CP 235; CP 416.

## **III – ISSUES**

### **A. DROWN’S ASSIGNMENTS OF ERROR**

1. Did the trial court err in denying Drown’s Motion for Judgment against Boone and/or Helsell Fetterman, in the sum of \$63,817.50, plus interest at 12% from August 24, 2011? [Yes.]

### **B. BOONE’S ASSIGNMENTS OF ERROR**

1. Did the trial court err when, consistent with this Court’s Opinion and instructions, it determined that there were no separate property agreements and, \$51,949.30, deposited into the registry of the court, in 2011, belonged to Drown and should be awarded to Drown?<sup>1</sup> [No.]

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<sup>1</sup> \$34,632.62, or one-half, of the proceeds of the sale of the sailboat; \$14,584.67, or one-half, of the cash in the business and checking account(s); and, \$2,732.00, which was four months of the \$683 supersedeas payments.

2. Did the trial court err when, consistent with this Court's Opinion and instructions, it determined that there were no separate property agreements, and an additional \$11,868.21 of Langeland's joint property, in equity, should be awarded to Drown?<sup>2</sup> [No.]

3. Should this Court award Drown her reasonable attorney fees and costs pursuant to RCW 11.96A.150 and/or CR 11? [Yes.]

#### **IV - RESTATEMENT OF THE CASE**

##### **A. The 2011 Orders and Judgments on attorney fees were incorrect and vacated.**

In 2011, Judge Uhrig incorrectly found that Drown advanced unsupported legal theories at trial requiring Boone to incur attorney fees and costs. CP 1289, F/F 17. In 2011, Judge Uhrig incorrectly concluded that it would be inequitable to require the Estate or Boone to pay Boone's costs and fees associated with Boone defending certain claims advanced by Drown. CP 1291, C/L 9. Boone's motion asked for attorney fees for Boone. CP 1332. Boone's counsel, declared the fees were incurred representing Boone. CP 1537.

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<sup>2</sup> The Estate's one-half of the business and personal checking accounts, less \$2250.00 credit for 50% of 2002 Honda.

Helsell Fetterman represented that time spent for Boone's duties as PR of the Estate were not being requested and were deducted from fees and costs requested.<sup>3</sup> CP 1347.

On August 12, 2011, Judge Uhrig, over Drown's objection, awarded Boone \$70,000.00 for attorney fees. CP 185. Drown advised Judge Uhrig that the trial court's August 12, 2011 Order granting Boone's motion for attorney fees and costs, did not properly reflect the decision(s) or argument(s) made. CP 269; CP 316.

On remand, the 2011 findings and conclusions related to Drown's alleged misconduct or obligation to pay any of Boone's fees or costs were vacated. CP 217. On remand, Judge Uhrig found that Drown was entitled to her reasonable attorney fees and costs. CP 69, AF/F 61.

**B. Judge Uhrig complied, in part, with the Court's instructions, by finding and concluding that all of Drown's joint property and a substantial portion of Langeland's joint property should be awarded to Drown.**

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<sup>3</sup> "In this matter, **Ms. Boone has incurred total fees and costs** in the amount of \$113,083.05. (\$23,547.97 to Betts, Patterson, & Mines, P.S.; \$84,360.13 to Helsell Fetterman LLP (including \$2,267.50 for fees and costs associated with this motion that are not reflected in the billing statements); and \$5,174.95 to Belcher Swanson Law Firm, P.L.L.C.) Thus, after excluding "IRA" fees and costs (\$5,028.00), "Mixed" fees and costs (\$7,230.65), and "Post Trial" fees and costs included in the statements but that do not involve this motion (\$2,788.60), **Ms. Boone is entitled to** a total of \$98,035.80 in reasonable attorney's fees and costs." Dec. of Olver, CP 1347. (Emphasis added.)

On September 18, 2014, Judge Uhrig made and entered his Amended Findings of Fact and Conclusions of Law. CP 58. Boone, in this second appeal, has not assigned error to the following amended findings of fact:

- Randall J. Langeland (Langeland), decedent, was a resident of Whatcom County, Washington, on January 9, 2009, leaving property in Whatcom County subject to probate.
- Decedent died intestate.
- Janell Boone (Boone) is the child of the decedent.
- **Sharon Drown (Drown) was involved in a committed intimate relationship with the decedent, which included continuous cohabitation for approximately 19 years of a more than 25 year relationship.**

CP 59, AF/F 1-4. (Emphasis added.)

- On January 23, 2009, Boone filed a Petition for Order 1) Appointing Administrator; 2) Issuing Letters of Administration; 3) Adjudicating [sic] Estate to be Solvent; and 4) Directing [sic] Administration Without Intervention [sic] and Without Bond, in Whatcom County Superior Court.
- On January 23, 2009, an Order 1) Appointing Administrator; 2) Issuing Letters of Administration; 3) Adjudicating Estate to be Solvent; and 4) Directing Administration Without Intervention and Without Bond was entered in Whatcom County Superior Court, naming Boone and Drown as decedent's surviving heirs, legatees, and devisees; and, confirming Boone as Administrator.
- On February 2, 2010, Drown filed a Motion for Order to Show Cause re Removal of Personal Representative, Accounting, and Appointment of Disinterested Third Party.

- On February 19, 2010, an Agreed Order 1) Revoking Letters of Administration; 2) Appointing Replacement Administrator, to Serve Without Bond and Without Court Intervention; and 3) Reissuing Letters of Administration Upon Oath, was entered appointing Carolyn Lenington as Administrator.

- **The Administrator (Lenington), Boone and Drown ask the Court to determine the ownership of the assets subject to probate and this Court has jurisdiction to grant the relief requested.**

- **By Order dated March 5, 2010, the trial proceeded in equity.**

- Randall Langeland (Langeland) was born April 5, 1950.

- Langeland died January 9, 2009.

- Langeland died intestate, with no will.

- Langeland, was not married, and was survived by his daughter, Janell Boone (Boone), his mother, Agnes Langeland, and Sharon Drown (Drown). His mother, Agnes Langeland has since died.

- Boone was born May 8, 1969.

- Drown was born December 3, 1962.

- Langeland and Drown, both single, began dating in 1983.

- **In 1991, in Chico, California, Langeland and Drown, began living together and entered into a loving, supportive, committed, intimate and nurturing relationship.**

CP 50-60, AF/F 5-19. (Emphasis added.)

- **In 1994, Langeland's employment ended with a hospital in Chico, California, and a business named J. Randall & Associates was formed.**

- **From its creation, until the date of Langeland's death, Drown worked with Langeland in J. Randall & Associates doing office work, including but not limited to invoicing, bookkeeping, talking to clients and tax preparation.**

CP 61, AF/F 22-23. (Emphasis added.)

- From 1991 through 1998, Drown, while they lived in California, made house payments, on a monthly basis, to Langeland.
- Drown's house payments to Langeland were \$165 per month, beginning in 1991, and changed to \$200 per month in approximately 1995.
- **In 1999, Langeland and Drown moved to Whatcom County, Washington.**

CP 62, AF/F 26-28. (Emphasis added.)

- **In 1999, during their committed intimate relationship, Langeland and Drown purchased a house in Whatcom County, Washington at 3946 Lakemont Street, Bellingham.**
- **From the date of purchase of the Bellingham house, until Langeland's death, Langeland and Drown shared equally in property taxes, costs of improvements, and costs of maintenance.**
- **From the date of purchase, because of health issues described below, Drown was the primary person responsible for all time spent on the upkeep and maintenance of the home.**

CP 62, AF/F 30-32. (Emphasis added.)

- In December 2002, during their committed intimate relationship, Langeland and Drown borrowed \$65,000, by a home equity loan, secured by the Bellingham home, to pay off any money still owed on the 36 foot sailboat.

CP 63, AF/F 34.

- Langeland became seriously ill in 1998.
- After Langeland became seriously ill, Drown did an amazing job of taking care of most all maintenance and other obligations around the home, the boat, home health care and

other matters they had previously shared, all while maintaining her full time employment.

- From 2003 until his death, Mr. Langeland was not well physically and required daily medication and care from Drown. From before 2005, Langeland's medical conditions were quite complex and very complicated.
- Healthcare providers in Whatcom County were not able to determine the exact nature or cause of what had become a very complicated and ultimately undiagnosed autoimmune disease in Langeland.

CP 63, AF/F 36-39.

Similar to the above uncontested amended findings of fact, Boone has not alleged error in any of the following amended conclusions of law:

- This Court has the power and authority to administer and settle all matters concerning the estate and assets of Randall Langeland. RCW 11.96A.020.
- This Court has jurisdiction over this matter and over Boone and Drown.
- Boone had the burden of proving which property was jointly owned and which property was separate.

CP 69, AC/L 1-3.

- Drown established that dates of acquisition for the following Estate assets were during Drown and Langeland's committed intimate relationship:
  - A. Home at 3946 Lakemont Street, with a fair value of \$235,000.00.
  - B. Cash in J. Randall Associates, Inc. bank account, of \$19,257.47.
  - C. Estate account of \$6,453.03.
  - D. Proceeds from sale of 36' Sailboat, \$75,250.00.

- E. 2007 Toyota, value \$8,000.00.
  - F. 2002 Honda, value of \$4,500.00. . . .
  - H. Household Personal Property, value of \$1,078.00.
- Property acquired during a committed, intimate relationship is presumed to be owned by both parties jointly.
  - Drown satisfied the burden of establishing the dates of acquisition of the following assets were all during Drown and Langeland's CIR:
    - A. Home at 3946 Lakemont Street, with a fair value of \$235,000.00.
    - B. Cash in J. Randall Associates, Inc. bank account, of \$19,257.47.
    - C. Estate account of \$6,453.03.
    - D. Proceeds from sale of 36' Sailboat, \$75,250.00.
    - E. 2007 Toyota, value \$8,000.00.
    - F. 2002 Honda, value of \$4,500.00.
    - . . . .
    - H. Household Personal Property, value of \$1,078.00.

CP 69-70, AC/L 5-7.

**C. On remand, Judge Uhrig correctly concluded that \$63,817.50 of funds, deposited in 2011 by Lenington and Shepherd, should be awarded to Drown.**

In June of 2011, pursuant to the erroneous Findings of Facts, Conclusions of Law and Order(s) entered by Judge Uhrig, funds from the business bank account, the Estate bank account, and the proceeds from the sale of the 36 foot sailboat were placed, by Lenington and Shepherd, into the registry of the Superior Court. CP 97; CP 101. Those funds were \$23,525.85 (from Lenington) and \$75,240.97 (from Shepherd). Between June 2011 and October

2011, Shepherd deposited another \$2,732.00 in supersedeas funds, belonging to Drown, into the registry of the Superior Court. CP 102-105.

On August 24, 2011, pursuant to the vacated Order Granting Motion for Attorney's Fees, \$101,498.82 was paid by the clerk of the Whatcom County Superior Court to Helsell Fetterman. CP 98; CP 106. Neither Helsell Fetterman nor Boone notified Drown of this withdrawal. Neither Helsell Fetterman nor Boone satisfied the \$70,000.00 judgment entered on attorney fees in this matter. CP 98-99. Subsequent hearings at the trial court and before this Court, during the first appeal, failed to disclose that all the proceeds from the sale of the joint property were in the possession of Helsell Fetterman.

On September 18, 2014, Judge Uhrig correctly found and concluded that \$63,817.50 of the above funds transferred to Helsell Fetterman, in equity, belonged to Drown. CP 58-71; CP 119; CP 123.

**D. After correctly finding and concluding that \$63,817.50 of the funds deposited with the trial court in June of 2011 belonged to Drown, Judge Uhrig failed to enter judgment(s) or other order(s) or process, pursuant to RAP 12.8, to restore to Drown the \$63,817.50, plus interest thereon.**

On October 2, 2014, Drown moved to set aside and vacate the 2011 Judgment of \$70,000 for attorney fees and costs. CP 112. On October 17, 2013, Judge Uhrig entered an Order setting aside and vacating its 2011 Judgment in favor of Boone and against Drown for attorney fees and costs. CP 217.

On October 2, 2014, Drown moved for entry of judgment in the sum of \$63,817.50. CP 119; CP 127. Drown asked for interest at 12%, from August 24, 2011, on that sum. Drown asked that the judgment be entered against Boone and Helsell Fetterman, LLP, jointly and severally, or Boone individually, and/or that the funds be deposited into the registry of the superior court. CP 132; CP 136; CP 139. On October 17, 2014, Judge Uhrig denied Drown's motion for entry of judgment against either Boone and/or Helsell Fetterman. CP 220.

**E. Helsell Fetterman was not a \$100,000 creditor of the Estate of Langeland on August 24, 2011.**

On remand, Boone argued that Helsell Fetterman got to keep the \$101,498.82 received from the court registry because Helsell Fetterman was paid "as a creditor of the Estate from Estate assets." CP 171; CP 175. This position was contrary to Boone's 2011 motion.

From 2009 through trial, Lenington was the court appointed Administrator of the Estate of Langeland. CP 508. Lenington, Estate Administrator, advised Judge Uhrig that: the Estate, through trial, had not requested Helsell Fetterman to defend the Estate, to represent the Estate; the Estate did not authorized Helsell Fetterman to do any legal work on behalf of the Estate; and, Helsell Fetterman filed no claim against the Estate related to legal fees incurred on behalf of the Estate. CP 364; CP 2004.

From appointment through trial, Hansen was Lenington's attorney, when she served as the Court Appointed Administrator. Hansen appeared as attorney for Lenington, as Administrator, on March 6, 2009. CP 376. Lenington and Hansen performed all Administration duties including managing, maintaining and selling the joint assets, and appearing at all court proceedings. CP 367.

Both Lenington and Hansen were compensated for their time incurred in administering the Estate. CP 367. Hansen never requested that Helsell Fetterman defend or represent the Estate; he never asked or directed Helsell Fetterman to perform any work on behalf of the Estate; he never authorized Helsell Fetterman to perform any work or tasks on behalf of the Estate; and, neither he

nor Lenington were served with any pleading or notice of any claim by Helsell Fetterman against the Estate for legal fees. CP 367-68. If Hansen had been made aware that Helsell Fetterman believed it was doing work on behalf of the Estate, Hansen would have advised Helsell Fetterman to stop that work. Other than Lenington and Hansen, Drown was the only person who Hansen was aware of doing anything of benefit to the Estate. CP 367-68; CP 2007.

#### **V – SUMMARY OF ARGUMENT**

Boone raises thirty-four (34) assignments of error which alleged errors inappropriately request this Court to reverse *Estate of Langeland*, 177 Wn.App. 315. Boone should not be allowed to re-litigate and re-appeal the same issues already decided by this Court.

Under Rap 12.8, Drown is entitled to a remedy, which remedy appropriately restores to Drown property belonging to Drown.

Under RCW 11.96A.150 and/or CR 11, Drown is entitled to her reasonable attorney fees on appeal. RAP 18.1, RAP 18.9.

## VI – ARGUMENT

### A. Standards of review.

“Challenged findings of fact are reviewed under a substantial evidence standard, which requires that there be sufficient evidence in the record to persuade a reasonable person that a finding of fact is true.” *Rec. Equip. Inc. v. World Wrapps*, 165 Wn.App. 553, 558, 266 P.3d 924 (Div. 1, 2011). Unchallenged findings of fact become verities on appeal. *In re Estate of Freeberg*, 130 Wn.App. 202, 205, 122 P.3d 741 (Div. 3, 2015). When both findings and conclusions are appealed, review is a two-step process. First, the findings must be “supported by substantial evidence in the record. If so, we must next decide whether those findings of fact support the . . . conclusions of law.” *Landmark Development, Inc. v. City of Roy*, 138 Wn.2d 561, 980 P.2d 1234 (1999).

The trial court’s rulings related to the allowance of attorney fees are reviewed for an abuse of discretion. *Laue v. Estate of Elder*, 106 Wn.App. 699, 712, 25 P.3d 1032 (Div. 1, 2001). A trial court abuses its discretion if it relies on unsupported facts, applies a wrong legal standard, or takes a position no reasonable person

would take. ***Mayer v. Sto Indus., Inc.***, 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

**B. Boone is not allowed to re-litigate issues resolved in the first appeal a second time.**

“[O]nce there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation.” ***Roberson v. Perez***, 156 Wn.2d 33, 41, 123 P.3d 844 (2005); *see also* ***Lutheran Day Care v. Snohomish County***, 119 Wn.2d 91, 113, 829 P.2d 746 (1992) (*citing* 15 Lewis H. Orland & Karl B. Tegland, *Washington Practice: Judgments* § 380, at 55–56 (4th ed.1986)). The doctrine promotes finality and efficiency in the judicial process. ***Id.***; *see also* 5 Am.Jur.2d *Appellate Review* § 605 (1995).

“[A]pplication of the doctrine may be avoided where the prior decision is clearly erroneous, and the erroneous decision would work a manifest injustice to one party.” ***Roberson v. Perez***, 156 Wn.2d at 42; *see, e.g.,* ***First Small Bus. Inv. Co. of Cal. v. Intercapital Corp. of Or.***, 108 Wn.2d 324, 333, 738 P.2d 263 (1987). “[A]pplication of the doctrine may also be avoided where there has been an intervening change in controlling precedent between trial

and appeal.” ***Roberson v. Perez***, 156 Wn.2d at 42. Neither exception exists nor have they been raised by Boone in this appeal.<sup>4</sup>

**1. There was no contract or agreement.**

In the first appeal, Boone unsuccessfully argued that Judge Uhrig correctly determined that Drown and Langeland had entered into a “contract” regarding the nature of their ownership of the Bellingham home and had “maintained the separate character” of the sailboat, business and home, relying in part, on the estate inventory. CP 1288-89, F/F 9 and 13. Boone again makes the same argument ignoring the following:

As a matter of law, Boone failed to overcome the joint property presumption with respect to all three contested probate assets (business, home, and 36-foot sailboat).

***Estate of Langeland***, 177 Wn.App. at 327.

Boone had the burden of proving that a separate property agreement was made, that it was presented by Langeland to Drown in good faith and with full disclosure, and that it was freely and intelligently entered into by Drown. ***Friedlander v. Friedlander***,

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<sup>4</sup> “The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court’s opinion of the law at the time of the later review.” RAP 2.5(c)(2).

80 Wn.2d 293, 301, 494 P.2d 208 (1972). The person seeking to enforce an agreement that purports to convert joint property into separate property "must establish with clear and convincing evidence both (1) the existence of the agreement and (2) that the parties mutually observed the terms of the agreement throughout their marriage." *Kolmorgan v. Schaller*, 51 Wn.2d 94, 98, 316 P.2d 111 (1957). Boone failed to establish any such agreement at trial, lost this issue during the first appeal, and provides no factual or legal basis for the relief requested in this second appeal.

Boone's present appeal, woven out of whole cloth, not only creates an imaginary need for a second appeal, it reiterates a mythology previously advanced by Boone before this Court and rejected. Boone, without factual or legal support, continues to argue that Langeland and Drown's relationship is governed by contract and not common law and equity.

[T]his Court (should) affirm the trial court's holding that unmarried individuals may enter into a valid contract to loan each other money, and that such a contract should not be considered a "marital contract" by simple virtue of the existence of a Committed Intimate Relationship (CIR) between the parties?

***Boone's Brief of Respondent/Cross Appellant, Court of Appeals***, 5-6, (Appeals 67255-0-I, 67659-8-I). First, after remand, there is no such "holding" by Judge Uhrig. Second, this Court, in the first appeal and Judge Uhrig, on remand, determined the assets, and therefore the cash from any sale of the assets, were joint property, owned upon Langeland's death one-half by Drown and one-half by the Estate.

On this second appeal, Boone argues:

[Monthly] payments were made by Ms. Drown out of her separate assets to repay her contractual loan obligation to Mr. Langeland, and did not result in any comingling of assets or acquisition of property rights over and above those specifically allowed by the loan contract.

***Id.*** at 11. Boone, in this appeal, repeatedly asks this Court to ignore its prior rulings, the clear law that applies to the remand and this second appeal, and determine that Langeland and Drown entered into a contractual and not equitable relationship. This argument has already been rejected. Again, this Court has already ruled that: "As a matter of law, Boone failed to overcome the joint property presumption with respect to all three contested probate assets." ***Estate of Langeland***, 177 Wn.App. at 327.

## **2. Boone is not entitled to any attorney fees.**

Appropriately, this Court vacated the trial court's award of attorney fees to Boone:

To provide the trial court with full discretion to make an equitable division, we also vacate its award of attorney fees to Boone.

***Estate of Langeland***, 177 Wn.App. at 329. Consistent with this Court's ruling, the trial Court vacated the award of attorney fees to Boone. Similar to her contract argument, Boone challenges the trial court's vacation of its 2011 rulings regarding attorney fees and asks this Court to rule contrary to its prior published Opinion. Boone's argument is advanced without factual or legal support.

**C. On remand, Judge Uhrig properly awarded all Drown's joint property to Drown and a fair and equitable portion of Langeland's jointly owned property to Drown.**

This Court's Published Opinion clearly gave Judge Uhrig authority to award Langeland's interest in the couple's jointly owned property to Drown,

Drown and Boone primarily contest ownership of three probate assets, the proceeds from a software company Langeland founded, a house that he purchased with Drown, and a 36-foot sailboat. All were acquired during the Langeland/Drown committed relationship and subject to the joint property presumption. The court

received no evidence tracing any of these three assets to funds owned by Langeland before his relationship with Drown began or acquired by Langeland by gift or inheritance afterward. As a matter of law, Boone failed to overcome the joint property presumption with respect to all three contested probate assets.

***In re Estate of Langeland***, 177 Wn.App. at 327.

Contrary to the assumption contained in Drown's briefing filed with this court, a determination that the contested probate assets were jointly owned does not require that the trial court divide them equally between Drown and Boone. The three-part analysis adopted in *Connell* requires that the trial court determine what property is subject to division and make a fair and equitable division based upon the factors identified in the court's opinion.

***In re Estate of Langeland***, 177 Wn.App. at 329. Judge Uhrig's Amended Findings of Fact and Conclusions of Law, as they relate to division of the property, were consistent with the ruling from this Court and consistent with the *Connell* factors.

**D. Boone cannot, in this second appeal allege error related to an issue which was not raised during trial or during the first appeal.**

Boone argues that Judge Uhrig erred because he did not consider all Drown's property in making his equitable decision. Boone does not list or describe any property that Judge Uhrig failed to consider. Boone, at trial and on remand, offered no evidence to Judge Uhrig regarding any other assets except those listed in the

original findings and amended findings. Boone advances this argument without any legal or factual support. "Matters not urged at the trial level may not be urged on appeal." ***Lewis v. Mercer Island***, 63 Wn.App. 29, 31, 817 P.2d 408 (Div. 1, 1991) *rev. denied* 117 Wn.2d 1024 (1991).

**E. Judge Uhrig's award of reasonable fees to Drown on Boone's Motion to Reconsider was proper.**

Drown requested an award of attorney fees, pursuant to CR 11 and/or RCW 11.96A.150, for responding, on remand, to Boone's continued arguments asking the trial court to ignore this Court's published Opinion. CP 155-70. Drown was awarded attorney fees in the amount of \$9,187.00, for responding to Boone's Motion to Reconsider. CP 1860-63. The award of attorney fees was made pursuant to RCW 11.96A.150. CP 2087.

The standard of review of an award of attorney fees is abuse of discretion. ***In re Recall of Pearsall–Stipek***, 136 Wn.2d 255, 265, 961 P.2d 343 (1998). There is a two-part standard of review to a superior court's award of attorney fees: "(1) we review de novo whether there is a legal basis for awarding attorney fees . . . and (2) we review a discretionary decision to award. . . attorney fees and

the reasonableness of any attorney fee award for an abuse of discretion.” ***Gander v. Yeager***, 167 Wn.App. 638, 647, 282 P.3d 1100 (Div. 2, 2012). The superior court has broad discretion when determining the reasonableness of an attorney fee award. ***Hall v. Feigenbaum***, 178 Wn.App. 811, 827, 319 P.3d 61 (Div. 1, 2014) *review denied*, 180 Wn.2d 1018 (2014). A superior court’s decision regarding attorney fees will only be overturned where it is manifestly unreasonable or based on untenable grounds. ***Hall***, 178 Wn.App. at 827.

An appellate court’s mandate is binding on the lower court and must be strictly followed. While a remand “for further proceedings” “signals this court’s expectation that the trial court will exercise its discretion to decide any issue necessary to resolve the case,” the trial court cannot ignore the appellate court’s specific holdings and directions on remand.

***Bank of Am., NA. v. Owens***, 177 Wn.App. 181, 189, 311 P.3d 594 (Div. 1, 2013) (citations omitted).

**F. Judge Uhrig erroneously failed to enter Judgment against Boone and Counsel for funds belonging to Drown.**

- 1. Helsell Fetterman should not be allowed to keep Drown’s supersedeas payments.**

In 2011, Drown appealed decisions of the trial court and moved to stay enforcement of all trial decisions pending appeal. CP 90. Drown was ordered to deposit the sum of \$683 per month into the Court Registry as supersedeas to stay enforcement of all decisions of this Court, except judgment for attorney fees of \$70,000. CP 1607-08. Drown's first payment was made on June 1, 2011. CP 102. Drown continued to pay \$683 per month into the Court Registry throughout the appeal process. CP 101-06. At the time of remand, in October 2014, Drown had made 41 payments, totaling \$28,003.00, into the Court Registry. CP 91.

On August 24, 2011, unbeknownst to Drown, Helsell Fetterman, LLP, (Helsell Fetterman) withdrew and received three checks from the Court Registry, totaling \$101,498.82. CP 106. Therefore, at the time of remand, the Court Registry had a balance of \$25,271.00. CP 99.

On October 2, 2014, Drown moved to set aside and vacate the award of attorney fees in the amount of \$70,000, awarded to Boone in trial, consistent with the Published Opinion and Mandate of this Court. CP 112-118. In its published Opinion, dated October 28, 2013, this Court's instructions of Judge Uhrig were clear.

Therefore, we reverse the trial court's division of probate assets and remand to the trial court for further proceedings consistent with this opinion. To allow the trial court full discretion to make an equitable award following a correct characterization, **we also vacate the fee award to Boone.**

*In re Estate of Langeland*, 177 Wn. App. at 329. (Emphasis added.)

On October 3, 2014, Drown moved the trial court to enter an Order releasing the remaining supersedeas security deposited with the Court Registry to Drown, consistent with the Published Opinion and Mandate of this Court. CP 89-111. In that same motion, Drown also requested that judgment be entered against Boone and Helsell Fetterman, jointly and severally, for the \$2,732.00 of supersedeas funds withdrawn by Boone from the Court Registry. CP 92. Following this Court's Opinion and Mandate, the Judge Uhrig entered amended findings and conclusions consistent with the appellate opinion. Property was awarded and there was no reason in fact or law for and portion of Drown's supersedeas security to remain in the court Registry or continue to be "owned" or held by Helsell Fetterman.

**2. Judgment should be entered in favor of Drown for the funds awarded her, presently held by Helsell Fetterman.**

Judge Uhrig erred in denying Drown a judgment against Boone and/or Helsell Fetterman for funds taken by them belonging to Drown. "Superior courts must strictly comply with the directive from an appellate court which leave no discretion to the lower court." ***State v. Schwab***, 134 Wn.App. 635, 645, 141 P.3d 658 (Div. 1, 2006). "[W]hen we remand 'for further proceeding,' or instruct a trial court to enter judgment 'in any lawful manner' consistent with our opinion, we expect the court to exercise its authority to decide any issue necessary to resolve the case on remand." ***Id.***

Generally, a court which has custody of funds has the authority and the duty to distribute the funds to the party or parties who show themselves entitled thereto. Such a court has the power and responsibility of protecting the fund and of disposing of it in accordance with the applicable principles of law and equity for the protection of the litigants and the public whose interests are affected by the final disposition thereof. The court is said to be free, in the discharge of that duty and responsibility, to use broad discretion in the exercise of its powers so as to avoid an unlawful or unjust result.

***Pacific Northwest Life Ins. Co. v. Turnbull***, 51 Wn.App. 692, 699, 754 P.2d 1262 (Div. 2, 1988). (Citations omitted.)

If a party has voluntarily or involuntarily partially or wholly satisfied a trial court decision which is modified by the appellate court, the trial court shall enter orders and authorize the issuance of process appropriate to restore to the party any property taken from that party, the value of the property, or in appropriate circumstances, provide restitution. An interest in property acquired by a purchaser in good faith, under a decision subsequently reversed or modified, shall not be affected by the reversal or modification of that decision.

RAP 12.8.

On August 24, 2011, Helsell Fetterman withdrew \$101,498.82 from the court Registry in this matter. The above \$2,732.00 and an additional \$61,085.50, of these funds were, on remand, determined to belong to Drown. Helsell Fetterman holds \$63,817.50, plus interest, of Drown's funds. Helsell Fetterman is not a good faith purchaser of Drown's funds. Those funds must be returned to Drown immediately or an appropriate judgment entered.

In an almost identical situation, except the attorney was not the attorney on appeal and he had a valid right to the funds at the time the attorney's judgment appealed was satisfied, this Court ordered the attorney to return the funds after the award and judgment were vacated on appeal. ***Marriage of Mason***, 48 Wn.App. 688, 740 P.2d 356 (Div. I, 1987) *review denied* 109 Wn.2d

1012 (1987). The *Mason* Court determined that the losing attorney's argument that he was a good faith purchaser, under RAP 12.8 was without merit. "One who has notice and is not a stranger to a transaction cannot be a purchaser in good faith." *Id.* at 692. "[R]estitution (or judgment) is proper under general equitable principles. . . . In summary, restitution of the attorney's fees ordered in this case is a matter of right under RAP 12.8. . . The trial court's order of restitution against Robert Schmitt [attorney] is affirmed." *Id.* at 693.

**G. Drown is entitled to her attorney fees incurred in this second appeal.**

Drown requests her reasonable fees and costs incurred in this appeal under RAP 18.1 and RAP 18.9. Boone attempts to re-litigate the issues previously decided by this Court. This attempt is without factual or legal support. Helsell Fetterman and Boone have lost. Yet, they stand before this Court arguing that Washington law allows Helsell Fetterman to keep all joint assets, belonging to the Estate and Drown.

- (1) Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate

or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

....

RCW 11.96A.150(1). RCW 11.96A.150(1) provides this Court with broad discretion to award attorney fees. ***In re Estate of Frank***, 146 Wn.App. 309, 327, 189 P.3d 834 (Div. 2, 2008). Drown respectfully requests that she be awarded her attorney fees on appeal as the prevailing party.

A request for appellate attorney fees requires a party to include a separate section in his or her brief devoted to the request. RAP 18.1(b). This requirement is mandatory. ***Phillips Bldg. Co. v. An***, 81 Wash.App. 696, 705, 915 P.2d 1146 (1996). This rule requires "more than a bald request for attorney fees on appeal." ***Thweatt v. Hommel***, 67 Wash.App. 135, 148, 834 P.2d 1058 (1992).

***In re Washington Builders Ben. Trust***, 173 Wn.App. 34, 86-7, 293 P.3d 1206 (Div. 2, 2013).

Boone's arguments on remand and in this second appeal are advanced in violation of CR 11. They are not well grounded in fact and are not warranted by existing law or a good faith argument for

an extension of the law. RAP 18.9(a). ***Carrillo v. City of Ocean Shores***, 122 Wn.App 592, 618 nn.17 & 18, 94 P.3d 961 (Div. 2, 2004). Drown requests reasonable attorney fees on appeal, pursuant to RAP 18.9. Boone, in her appeal, has failed to cite any fact or law which would allow any reasonable possibility of reversal or upon which reasonable minds could differ; therefore, fees under RAP 18.9 are appropriate. ***Johnson v. Jones***, 91 Wn.App. 127, 137-38, 955 P.2d 826 (Div. 1, 1998).

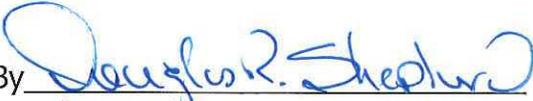
## **VII – CONCLUSION**

For the reasons stated above, the Court should affirm the amended findings and conclusions, and remand for entry of judgment, jointly and severally in the sum of \$63,714.33, plus interest at 12% from August 24, 2011, against Boone and Helsell Fetterman.

The Court should affirm the CR 11 award and judgment(s), entered against Boone, on remand, by the trial court. The Court should award Drown her reasonable attorney fees incurred in this appeal.

Respectfully submitted this 10th day of August 2015.

SHEPHERD AND ABBOTT

By 

Douglas R. Shepherd, WSBA #9514

Bethany C. Allen, WSBA #41180

Of Attorneys for Respondent/Cross

Appellant Drown

**DECLARATION OF SERVICE**

I, Jen Petersen, declare that on August 10, 2015, I caused to be served a copy of the foregoing **Respondent / Cross-Appellant Drown's Brief**, in the above matter, on the following person, at the following address, in the manner described:

Michael L. Olver, Esq.  
Kameron Kirkevold, Esq.  
Helsell Fetterman, LLP  
1001 4<sup>th</sup> Avenue, Suite 4200  
Seattle, WA 98154

- U.S. Mail
- FedEx Mail
- Fax
- Messenger Service
- Personal Service
- Email

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 10<sup>th</sup> day of August, at Bellingham, Washington.

  
\_\_\_\_\_  
Jen Petersen

# Appendix A

## **RCW 11.96A.150**

### Costs-Attorneys' fees.

(1) Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

(2) This section applies to all proceedings governed by this title, including but not limited to proceedings involving trusts, decedent's estates and properties, and guardianship matters. This section shall not be construed as being limited by any other specific statutory provision providing for the payment of costs, including RCW 11.68.070 and 11.24.050, unless such statute specifically provides otherwise. This section shall apply to matters involving guardians and guardians ad litem and shall not be limited or controlled by the provisions of RCW 11.88.090(10).

# **Appendix B**

## **RAP 12.1**

### **BASIS FOR DECISION**

(a) Generally. Except as provided in section (b), the appellate court will decide a case only on the basis of issues set forth by the parties in their briefs.

(b) Issues Raised by the Court. If the appellate court concludes that an issue which is not set forth in the briefs should be considered to properly decide a case, the court may notify the parties and give them an opportunity to present written argument on the issue raised by the court.

# Appendix C

## **RAP 18.1**

### **ATTORNEY FEES AND EXPENSES**

(a) Generally. If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.

(b) Argument in Brief. The party must devote a section of its opening brief to the request for the fees or expenses. Requests made at the Court of Appeals will be considered as continuing requests at the Supreme Court, except as stated in section (j). The request should not be made in the cost bill. In a motion on the merits pursuant to rule 18.14, the request and supporting argument must be included in the motion or response if the requesting party has not yet filed a brief.

(c) Affidavit of Financial Need. In any action where applicable law mandates consideration of the financial resources of one or more parties regarding an award of attorney fees and expenses, each party must serve upon the other and file a financial affidavit no later than 10 days prior to the date the case is set for oral argument or consideration on the merits; however, in a motion on the merits pursuant to rule 18.14, each party must serve and file a financial affidavit along with its motion or response. Any answer to an affidavit of financial need must be filed and served within 7 days after service of the affidavit.

(d) Affidavit of Fees and Expenses. Within 10 days after the filing of a decision awarding a party the right to reasonable attorney fees and expenses, the party must serve and file in the appellate court an affidavit detailing the expenses incurred and the services performed by counsel.

(e) Objection to Affidavit of Fees and Expenses; Reply. A party may object to a request for fees and expenses filed pursuant to section (d) by serving and filing an answer with appropriate

documentation containing specific objections to the requested fee. The answer must be served and filed within 10 days after service of the affidavit of fees and expenses upon the party. A party may reply to an answer by serving and filing the reply documents within 5 days after the service of the answer upon that party.

(f) Commissioner or Clerk Awards Fees and Expenses. A commissioner or clerk will determine the amount of the award, and will notify the parties. The determination will be made without a hearing, unless one is requested by the commissioner or clerk.

(g) Objection to Award. A party may object to the commissioner's or clerk's award only by motion to the appellate court in the same manner and within the same time as provided in rule 17.7 for objections to any other rulings of a commissioner or clerk.

(h) Transmitting Judgment on Award. The clerk will include the award of attorney fees and expenses in the mandate, or the certificate of finality, or in a supplemental judgment. The award of fees and expenses, including interest from the date of the award by the appellate court, may be enforced in the trial court.

(i) Fees and Expenses Determined After Remand. The appellate court may direct that the amount of fees and expenses be determined by the trial court after remand.

(j) Fees for Answering Petition for Review. If attorney fees and expenses are awarded to the party who prevailed in the Court of Appeals, and if a petition for review to the Supreme Court is subsequently denied, reasonable attorney fees and expenses may be awarded for the prevailing party's preparation and filing of the timely answer to the petition for review. A party seeking attorney fees and expenses should request them in the answer to the petition for review. The Supreme Court will decide whether fees are to be awarded at the time the Supreme Court denies the petition for review. If fees are awarded, the party to whom fees are awarded should submit an affidavit of fees and expenses within the time and in the manner provided in section (d). An answer to the request or

a reply to an answer may be filed within the time and in the manner provided in section (e). The commissioner or clerk of the Supreme Court will determine the amount of fees without oral argument, unless oral argument is requested by the commissioner or clerk. Section (g) applies to objections to the award of fees and expenses by the commissioner or clerk.

# Appendix D

## **RAP 18.9**

### **VIOLATION OF RULES**

(a) Sanctions. The appellate court on its own initiative or on motion of a party may order a party or counsel, or a court reporter or other authorized person preparing a verbatim report of proceedings, who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court. The appellate court may condition a party's right to participate further in the review on compliance with terms of an order or ruling including payment of an award which is ordered paid by the party. If an award is not paid within the time specified by the court, the appellate court will transmit the award to the superior court of the county where the case arose and direct the entry of a judgment in accordance with the award.

(b) Dismissal on Motion of Commissioner or Clerk. The commissioner or clerk, on 10 days' notice to the parties, may (1) dismiss a review proceeding as provided in section (a) and (2) except as provided in rule 18.8(b), will dismiss a review proceeding for failure to timely file a notice of appeal, a notice for discretionary review, a motion for discretionary review of a decision of the Court of Appeals, or a petition for review. A party may object to the ruling of the commissioner or clerk only as provided in rule 17.7.

(c) Dismissal on Motion of Party. The appellate court will, on motion of a party, dismiss review of a case (1) for want of prosecution if the party seeking review has abandoned the review, or (2) if the application for review is frivolous, moot, or solely for the purpose of delay, or (3) except as provided in rule 18.8(b), for failure to timely file a notice of appeal, a notice of discretionary review, a motion for discretionary review of a decision of the Court of Appeals, or a petition for review.

(d) Objection to Ruling. A counsel upon whom sanctions have been imposed or a party may object to the ruling of a commissioner or the clerk only as provided in rule 17.7.