IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

SANDRA HENDRICKS, Appellant, v. DANIEL DISON, as Personal Representative of, and Notice agent for, THE ESTATE OF JOSEPH G. DISON, deceased, and DOES A to Z. Respondent.	No. 37026-3-II No. 37126-0-II (consolidated) UNPUBLISHED OPINION

Houghton, P.J. — Sandra Hendricks appeals the trial court's directed verdict in favor of the Estate of Joseph Dison (Estate), on claims against her late husband. She argues that the trial court made evidentiary errors and abused its discretion. We affirm.

FACTS

Hendricks and Dison married on December 16, 2003. Three days before the marriage, they signed a purchase and sale agreement for a condominium located in Clark County. On December 29,[1] Dison alone signed the final sale agreement, listing himself as "a single person." Clerk's Papers (CP) at 92. He filed a petition for dissolution of the marriage on January 9, 2004.

[1] Dison averred in his dissolution petition that the couple separated on December 24, 2003. Hendricks disputed this and argued that they separated on January 8, 2004, and that they had reconciled on February 27.

On April 2, he died of lung cancer, with Hepatitis C listed as a contributing factor on his death certificate. No court entered a dissolution decree before his death.

Dison signed a will on May 30, 2002, in which he bequeathed property in Brush Prairie to his daughters, Lea Robinson and Jonni Allen, and two tracts of property in Amboy to his son, Daniel Dison.[2] Dison also named Daniel the personal representative for his Estate. On January 16, 2004, Dison signed a codicil to his May 2002 will in which he stated that he married Hendricks but the two "are now separated." Ex. 2. He further provided that

> [m]y Wife and I are estranged, and it is my specific desire, instruction and direction that my Wife receive none of my estate and property upon my death, that she not be considered one of my heirs, and I specifically devise and bequeath her nothing.
>
> I further request and instruct my personal representative to take all steps necessary to prevent my estranged Wife from receiving a spousal award pursuant to RCW 11.54 et. seq., to the degree permitted by law.

Ex. 2, at 1. Dison did not specifically devise the condominium in either document.

Hendricks filed a wife's creditor's claim in the superior court on August 25, 2004. She claimed that Daniel, as personal representative for the Estate, was holding pieces of her personal property. She also asserted a 100 percent interest in the Vancouver condominium, stating that the condominium was "community property purchased after the date of marriage . . . with the intention that both parties would own and reside on the property." CP at 67. She also claimed $50,000 for medical treatment for Hepatitis C, which she said she contracted from Dison. Hendricks attached as, exhibits a list of her personal property, a letter from the previous owner of the condominium and a handwritten letter she claimed was written by Dison, dated February 27,

[2] We refer to Daniel by his first name for clarity and intend no disrespect.

2004.

On October 1, 2004, Hendricks filed a lawsuit against Daniel, as the Estate's personal representative. She alleged personal injury based on exposure to Hepatitis C and brought conversion claims for Daniel's failure to return her separate property and grant her possession of or proceeds from the condominium.

On July 6, 2006, Hendricks dismissed her personal injury claim for exposure to Hepatitis C. She moved to consolidate her remaining claims for conversion with the "currently pending probate action." CP at 19. The trial court granted Hendricks's motion to consolidate.

At a bench trial held on the matter, Hendricks attempted to enter the declaration of her daughter, Shonda Kelley, into evidence. The trial court declined to admit the declaration for lack of supporting testimony. Hendricks then called her sister, Brenda Alosa, to testify. Counsel for the Estate objected, arguing that Alosa did not appear on any witness list Hendricks submitted. The trial court allowed Hendricks to question Alosa as an offer of proof to allow Hendricks time to produce the witness lists, but the trial court noted that if grounds for the objection were later established, it would disregard the testimony.

During Alosa's testimony, Hendricks asked her what she knew of "Joe's intentions of that condo," and counsel for the Estate objected based on the deadman's statute, RCW 5.60.030. Report of Proceedings (RP) at 15. The trial court sustained the objection.

Hendricks testified that on December 23, 2003, she went to Dison's Amboy home after work and found Daniel, his sister, and his girl friend loading Hendricks's personal property into a U-Haul truck. Daniel and his sister placed some of Hendricks's belongings in a storage container

behind the Amboy home and put the remainder in a storage facility. Hendricks also testified that she and Dison purchased the condominium to "get away from [Dison's] kids and have some peace." Report of Proceedings (RP) at 30.

Hendricks further testified that she and Dison reconciled and that she stayed in the Amboy home until January 8, 2004. On January 8, she left the residence. She went to the storage facility on January 9 and again on February 11. Also on February 11, she went to the storage container on the Amboy property and discovered that it was mostly empty.

Hendricks claimed that she and Dison reconciled on February 27. She attempted to enter into evidence a handwritten letter dated February 27, which she claimed he wrote. Hendricks explained that she attached the letter to her wife's creditor's claim and asked the trial court to admit that claim and its attachments. Counsel for the Estate objected, based on lack of foundation and hearsay. The trial court admitted the creditor's claim but not the letter.

On cross-examination, Hendricks admitted that Dison filed a dissolution of marriage petition. Counsel for the Estate presented Hendricks with a copy of her response to the petition for dissolution. Hendricks objected, but the trial court denied the objection because the inquiry merely related to the documents presented at that point.

Counsel for the Estate then drew attention to Hendricks's response in which she admitted that the marriage was irretrievably broken. The trial court suggested offering the documents as evidence rather than questioning Hendricks on this point and when counsel for the Estate did so, the trial court admitted them.

Hendricks further admitted that her name did not appear on the promissory note or the

mortgage for the condominium. She also admitted that she and Dison had separate checking accounts and held no joint checking account. She then rested her case.

Counsel for the Estate submitted copies of the Estate's first interrogatories and requests for production, and Hendricks's responses. Counsel for the Estate noted that Hendricks had not listed Alosa's name as a potential witness. The trial court then excluded Alosa's testimony.

The Estate moved for a directed verdict on the conversion claims. The trial court denied the motion as to Hendricks's conversion claims on her personal property but granted the motion as to the condominium. The trial court found that Hendricks had stated an insufficient claim to the condominium or any proceeds thereof due to her admission in response to Dison's petition for dissolution that the condominium was Dison's separate property.

The Estate then proceeded on its defense to the personal property portion of the case. Counsel for the Estate presented testimony from Daniel and from Dison's daughter, Allen, that Hendricks removed her personal property and that the Estate did not possess it. At the conclusion of the trial, the trial court found in favor of the Estate on the personal property conversion claim. Hendricks does not assign error to the trial court's finding regarding her personal property claim, and we consider it a verity on appeal. *Moreman v. Butcher*, 126 Wn.2d 36, 39, 891 P.2d 725 (1995).

The trial court entered written findings of fact and conclusions of law in favor of the Estate and ordered Hendricks to pay the Estate $5,000 in attorney fees and costs. She appeals.

ANALYSIS

Evidentiary Rulings

Hendricks contends that the trial court abused its discretion by admitting evidence from the dissolution action and excluding other documentary evidence. She first asserts that the trial court should not have been admitted documents from the court dissolution file.

We review a trial court's evidentiary rulings for an abuse of discretion. *City of Kennewick v. Day*, 142 Wn.2d 1, 5, 11 P.3d 304 (2000). A trial court abuses its discretion if it bases its ruling on untenable grounds or reasons. *Day*, 142 Wn.2d at 5.

ER 801(d)(1) provides that a witness's prior statements are not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition." Here, Hendricks alleged in her complaint and asserted in her testimony that the condominium was community property. On cross-examination, counsel for the Estate presented her response to the petition for dissolution in which she admitted that the couple owned no community property. Therefore, her prior statement is not hearsay and the trial court properly admitted it under the evidence rules.

Hendricks also argues that the trial court abused its discretion in prohibiting her from admitting a handwritten letter from Dison into evidence. Although written statements by the deceased are admissible under the deadman's statute, *Thor v. McDearmid*, 63 Wn. App. 193, 202, 817 P.2d 1380 (1991), Dison's name appeared nowhere on the letter and Hendricks

presented no evidence to authenticate the letter. There was no foundation for admitting the letter; therefore, the trial court did not abuse its discretion in refusing to admit it.

Hendricks next argues the trial court abused its discretion when it barred Alosa's testimony under the deadman's statute. Although the trial court initially limited Alosa's testimony to an offer of proof, the trial court ultimately struck her testimony based on Hendricks's failure to list Alosa as a potential witness in pretrial information. The trial court did not abuse its discretion in doing so.

Hendricks further argues that the trial court abused its discretion in preventing her from admitting Kelley's affidavit and the letter from the previous owner of the condominium into evidence.

Neither Kelley nor the previous owner testified at trial. Therefore, any statements contained within the affidavit or letter constitute out-of-court statements. ER 801(c). Further, Hendricks did not provide any reason for submitting the affidavit or letter other than to prove the truth of the statements contained within it. The affidavit and letter were therefore hearsay, and the trial court did not abuse its discretion in refusing to admit them into evidence.

Directed Verdict: Condominium

Hendricks also contends that the trial court incorrectly directed a verdict on her claim on the condominium. She asserts that she was Dison's legal wife at the time of his death and had a rightful claim.

Under CR 41(b)(3), a trial court in a bench trial may grant a motion to dismiss at the end of the plaintiff's case. *Commonwealth Real Estate Servs. v. Padilla*, 149 Wn. App. 757, 762, 205

P.3d 937 (2009). In doing so, the trial court may either make a factual determination based on the evidence or it may rule as a matter of law by viewing the evidence in the light most favorable to the plaintiff. *In the Matter of the Dependency of Schermer*, 161 Wn.2d 927, 939, 169 P.3d 452 (2007). In either case, if the plaintiff has failed to establish a prima facie case, the trial court may grant the directed verdict against the plaintiff. *Schermer*, 161 Wn.2d at 939. In determining the standard of review,

> [i]f the trial court dismisses the case as a matter of law, review is de novo and the question on appeal is whether the plaintiff presented a prima facie case, viewing the evidence in the light most favorable to the plaintiff. But if the trial court acts as a fact-finder, appellate review is limited to whether substantial evidence supports the trial court's findings and whether the findings support its conclusions of law.

Schermer, 161 Wn.2d at 939-40.

A trial court's characterization of property as community or separate is a question of law that we review de novo. *In the Matter of the Marriage of Skarbek*, 100 Wn. App. 444, 447, 997 P.2d 447 (2000). But the decision to grant or deny a homestead award is within the discretion of the trial court. *See In the Matter of Martin's Estate*, 33 Wn. App. 551, 551, 655 P.2d 1211 (1983).

In her complaint, Hendricks alleged that the Estate converted her property. She alleged that she and Dison signed the purchase agreement for the condominium three days before their marriage and that the property transaction closed after the parties married, with the deed issued in Dison's name. She claimed that despite her demand, the Estate did not relinquish to her either possession of the condominium or proceeds from its sale.

In Washington, the elements of a conversion claim are:

1. The defendant willfully interfered with a chattel.
2. The defendant acted without lawful justification.
3. The plaintiff was entitled to possession of the chattel.
4. The plaintiff was deprived of such possession.

29 David K. DeWolf, Washington Practice: Elements of an Action § 7:1, at 201-02 (2008). Therefore, to carry her burden at trial, Hendricks was required to show that she had a property interest in the condominium and that the Estate "willfully interfered" without legal justification to deprive her of the condominium. Hendricks argues that she has a property interest in the condominium because it is either community property or subject to a homestead award under chapter 11.54 RCW.

Washington law presumes that all property acquired during marriage is community property. *In the Matter of the Marriage of White*, 105 Wn. App. 545, 550, 20 P.3d 481 (2001). We resolve all doubts as to the property's character in favor of the community estate. *In the Matter of the Marriage of Chumbley*, 150 Wn.2d 1, 5, 74 P.3d 129 (2003). A party may overcome the strong presumption of community property with clear and convincing evidence of the property's separate character. *Chumbley*, 150 Wn.2d at 5. Evidence sufficient to overcome this presumption may include a showing that the property was acquired using separate funds, or received by one spouse as a gift or inheritance. *Chumbley*, 150 Wn.2d at 5.

The Estate bore the burden to prove by clear and convincing evidence that Dison purchased the condominium using separate funds because the condominium sale closed after the couple married; further, and there is no evidence in the record that he acquired the condominium as a gift or inheritance. To meet its burden, the Estate relied largely on Hendricks's response to Dison's petition for dissolution in which she admitted that the couple did not have any community

property, as well as Hendricks's testimony that she and Dison did not have a joint checking account.[3]

To overcome the presumption of community interest, an admission by a spouse may be sufficient as long as there is additional evidence that separate funds were actually used to make the purchase. 19 Kenneth W. Weber, Washington Practice: Family and Community Property Law § 10.5, at 138 (1997). Hendricks's admissions that "[t]he parties own no community property" and "[a]ll of the property should be characterized as separate property," Exs. 31, at 2 and 32, are sufficient to prove with some degree of certainty that Dison used separate funds to purchase the condominium. *Berol v. Berol*, 37 Wn.2d 380, 382, 223 P.2d 1055 (1950). These admissions are particularly revealing because Hendricks and Dison did not share a joint bank account.

Based on Hendricks's admissions, the trial court properly found clear and convincing evidence to show that the condominium was separate property. Therefore, Hendricks's argument that the condominium was community property fails.

In the alternative, Hendricks argues that she is entitled to the condominium as a homestead award under chapter 11.54 RCW. But she did not raise the issue of a homestead award at trial; we, therefore, do not consider it. RAP 2.5(a); *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988).

Hendricks further argues that the Estate willfully deprived her of the condominium. Because she has failed to prove that she has a property interest in the condominium, we need not

[3] The Estate also presented evidence that Hendricks's name did not appear on the promissory note or the mortgage for the condominium. But we do not consider this evidence in our determination because the long-standing rule in Washington is that the name on a deed is not generally controlling. *Merritt v. Newkirk*, 155 Wash. 517, 520-21, 285 P. 442 (1930).

consider this argument. Her claims to the condominium all fail.

ATTORNEY FEES

Hendricks finally contends that the trial court erred in awarding $5,000 in fees against her. Both she and the Estate seek attorney fees on appeal.

RCW 11.96A.150 applies to "proceedings involving trusts, decedent's estates and properties, and guardianship[s]." RCW 11.96A.150(2). It states that "the superior court or the court on appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party." Former RCW 11.96A.150(1) (1999). The trial court properly awarded the Estate attorney fees under RCW 11.96A.150 as the prevailing party. As we affirm the trial court's decision, we award the Estate attorney fees on appeal under RAP 18.1.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

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Houghton, P.J.

We concur:

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Bridgewater, J.

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Hunt, J.