

FILED
August 25, 2016
Court of Appeals
Division I
State of Washington

No. 73742-2-I
(Appeal of King County No. 14-2-15399-6)

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

IN THE GENERAL RECEIVERSHIP OF
JACOB G. BUTTNICK

**REPLY BRIEF OF APPELLANT
JACOB G. BUTTNICK**

Marc S. Stern
Law Office of Marc S. Stern
1825 NW 65th St.
Seattle, WA 98117
(206) 448-7996
office@hutzbah.com
Attorney for Jacob Buttnick, Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... **ii**

 CASES..... **ii**

 STATUTES..... **ii**

ARGUMENT..... **1**

 The test to determine whether a debtor is entitled to claim a
 homestead is either the intent to reside or actual residence
 **1**

 There is no basis to deny Buttnick a homestead on the basis of
 estoppel. **3**

CONCLUSION. **4**

DECLARATION OF SERVICE. **5**

TABLE OF AUTHORITIES

CASES

Arrison v. Gilts (In re Gilts), 116 B.R. 174 (B.A.P. 9th Cir.1990), aff'd and adopted, 927 F.2d 1109 (9th Cir.1991)..... **1**

Baldwin v. Silver, 147 Wn. App. 531, 196 P.3d 170 (2008)..... **3**

Cunningham v. Reliable Concrete Pumping, Incorporated., 126 Wash.App. 222, 108 P.3d 147 (2005). **2**

HJS Development, Incorporated v. Pierce Cty. ex rel. Department of Planning and Land Servs., 148 Wn.2d 451, 61 P.3d 1141 (2003). **1**

In re McKee, 2016 WL 3648549 *2 (Bankr. E.D. Wash. June 30, 2016). **2**

State v. Tiffany, 44 Wash. 602, 87 P. 932 (1906)..... **1**

Wilson v. Arrison (In re Wilson), 341 B.R. 21 (B.A.P. 9th Cir.2006). ... **2**

STATUTES

RCW 6.13.010. **2**

RCW 6.13.010(1). **1**

RCW 6.13.040(1). **2**

RCW 6.13.070. **2**

ARGUMENT

The test to determine whether a debtor is entitled to claim a homestead is either the intent to reside or actual residence.

RCW 6.13.010(1) is the statute in question. The language of the statute is clear. It provides in part:

Property included in the homestead must be actually **intended or used** as the principal home for the owner.

[Emphasis added.]

“Or” is usually used in the disjunctive. Miriam Webster defines “or” as “—used as a function word to indicate an alternative, i.e., ‘coffee or tea’; ‘sink or swim.’” Or has a specific meaning in statutory construction:

Ordinarily, the word “or” does not mean “and” unless there is clear legislative intent to the contrary. See *State v. Tiffany*, **44 Wash. 602, 87 P. 932 (1906)**. Statutory phrases separated by the word “and” generally should be construed in the conjunctive. See 1A Norman J. Singer, *Statutes and Statutory Construction* § 21:14, at 179–81 (6th ed.2002).

HJS Development, Incorporated v. Pierce Cty. ex rel. Department of Planning and Land Servs., 148 Wn.2d 451, 61 P.3d 1141, 1152 (2003) (FN 94).

When the change to the statute was made, the legislature was reacting to cases where property occupied by judgment debtors was being sold because they had not filed a Declaration of Homestead. The change was designed to make the property exempt as long as the debtor was residing in it. The amendment changed established law and it was no longer necessary to show an intent to reside if the debtor was actually residing in the property.

Washington has two methods for establishing a homestead. *Arkison v. Gilts (In re Gilts)*, 116 B.R. 174, 178 (B.A.P. 9th Cir.1990), *aff'd & adopted*, 927 F.2d 1109 (9th Cir.1991); *Wilson v. Arkison (In re Wilson)*, 341 B.R. 21, 25 (B.A.P. 9th Cir.2006). The first is occupancy. For property described in **RCW 6.13.010**, an automatic homestead exemption is created under **RCW 6.13.040(1)** and automatically protected by the exemption described in **RCW 6.13.070**, from and after the time the property is *occupied as a principal residence by the owner*.

In re McKee, 2016 WL 3648549, at *2 (Bankr. E.D. Wash. June 30, 2016).

Here, Appellant Jacob Buttnick (“Buttnick”) had no other residence. He lived in a building that, as miserable and decrepit as it was, was his principal residence. The trial court made many Findings of Fact

concerning Buttnick's indifference to cleanliness. However, the court did not find that he had another principal residence. At the time, his only alternative residence was a cardboard box or dumpster on the street.

The trial court found that he resided in the property even though he intended to move at sometime in the future. In doing so, the court imposed an additional test. It changed the meaning of "or" to "and." This is reversible error. The test posited by the statute is that "either he resided in the property **or** he intended to." The test does not require both and the court below erred when it imposed the additional requirement.

There is no basis to deny Buttnick a homestead on the basis of estoppel.

Respondents Miyatovich and Jolan argue that Buttnick lost his right to a homestead because he is judicially estopped from claiming it.

Judicial estoppel is an equitable remedy calculated to prevent "a party from gaining an advantage by asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wash.App. 222, 224–25, 108 P.3d 147 (2005).

Baldwin v. Silver, 147 Wn. App. 531, 196 P.3d 170, 172 (2008). In this case the appellees can show no instance where a court accepted Buttnick's

claim that he was not residing in the property. There is no evidence that Buttnick's residence, or lack thereof, in the J&M Building had any relevance to anything in the case except his right to a claim a homestead exemption. Because there was no judicial acceptance of any claim that he did not reside in the property, the elements of judicial estoppel are not shown. There is no basis to invoke the principals of judicial estoppel to deprive Jacob Buttnick of his homestead exemption.

CONCLUSION

The trial court found that Buttnick resided in the property. It then erred by requiring a second condition, i.e., that he intended to make it his residence. Actual residence was sufficient, and the imposition of a second step to the test was error.

This court should reverse the trial court and direct that Buttnick be allowed his homestead exemption.

Respectfully submitted this August 25, 2016.

/s/ Marc S. Stern
Marc S. Stern, WSBA #8194
Attorney for Jacob Buttnick

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury of the laws of the State of Washington that on August 25, 2016, I served a copy of the foregoing document on all counsel of record by email per agreement as follows:

Dillon E. Jackson
Foster Pepper PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101-3299
jackd@foster.com

Thomas Linde
Schweet Linde & Coulson, PLLC
575 S Michigan St
Seattle, WA 98108
tomlinde@schweetlaw.com

Jason P. Amala
Pfau Cochran Vertetis Amala PLLC
403 Columbia St., Suite 500
Seattle, WA 98104
jason@pcvalaw.com

Skylee J. Sahlstrom
Pfau Cochran Vertetis Amala PLLC
403 Columbia St., Suite 500
Seattle, WA 98104
ssahlstrom@pcvalaw.com

Vincent T. Nappo
Pfau Cochran Vertetis Amala PLLC
403 Columbia St., Suite 500
Seattle, WA 98104
vnappo@pcvalaw.com

Merrilee MacLean
Hanson Baker Ludlow Drumheller P.S.
2229-112th Avenue N.E. Suite 200
Bellevue, WA 98004
mmaclean@hansonbaker.com

John Rizzardi
Cairncross & Hemplemann, P.S.
524 2nd Ave. Ste. 500
Seattle, WA 98104
jrizzardi@cairncross.com

Jennifer Kent Faubio
Cairncross & Hemplemann, P.S.
524 2nd Ave. Ste. 500
Seattle, WA 98104
jfaubion@cairncross.com

Dated at Seattle, Washington this 25th day of August, 2016.

/s/ Tanya Bainter
Tanya Bainter, Legal Assistant
Law Office of Marc S. Stern