

No. 41392-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DENISE H. ROBERTS, aka DENISE WILSON and
JOHN MILLER WILSON,

Appellants,

vs.

JAMES C. CASTERLINE,
In his capacity as Guardian/Conservator of
THERESA A. ROBERTS,

Respondent.

RESPONDENT'S BRIEF

By Michael A. Claxton
Attorney for Respondent

WSBA #25095
WALSTEAD MERTSCHING
Civic Center Building, Third Floor
1700 Hudson Street
Post Office Box 1549
Longview, WA 98632-7934
Telephone: (360) 423-5220
Fax: (360) 423-1478

TABLE OF CONTENTS

	<u>Page</u>
A. ISSUES PRESENTED	1
B. STATEMENT OF THE CASE	1
C. ARGUMENT	5
I. Standard of Review	5
II. Denise Roberts did not have the authority to use her mother’s funds to acquire real property in her individual name and then to transfer the interest in real property without consideration to a related party without protecting the interests of her mother.	6
III. The Uniform Fraudulent Transfers Act does	11
apply to property acquired as a result of fraud, and thus the Homestead Act offers no protection to the Defendants.	
D. CONCLUSION	17

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Barber v. Leonard</i> , 120 Wn.2d 538, 545, 843 P.2d 1050 (1993)	14
<i>Christensen v. Christgard, Inc.</i> , 35 Wn.App. 626, 629, 668 P.2d 1301 (1983)	13
<i>Commodity Futures Trading Commission v. Hudgins</i> , 620 F.Supp.2d 790, 793 (E.D. Tex. 2009)	15
<i>Coppler & Mannick, P.C. v. Wakeland</i> , 117 P.3d 914, 918 (N.M. 2005)	14
<i>Cox v. Waudby</i> , 433 N.W. 2d 716, 719 (Iowa 1988)	14
<i>Duran v. E.G. Henderson</i> , 71 S.W.3d 833 (Ct.App. Tex. 2002)	16
<i>Federal Intermediate Credit Bank of Spokane v. O/S Sablefish</i> , 111 Wn.2d 219, 229-230, 758 P.2d 494 (1988)	13
<i>Fidelity Nat. Title Ins. Co. v. Schroeder</i> , 179 Cal. App.4th 834 (2009)	16
<i>Hegwine v. Longview Fibre Co, Inc.</i> , 132 Wn. App. 546, 555-556, 132 P.3d 789 (2006)	6
<i>In re Estate of Bowers</i> , 132 Wn. App. 334, 342-343, 131 P.3d 916 (2006)	14
<i>In re Hecker</i> , 316 B.R. 375, 386 (S.D. Fla. 2004)	15
<i>In re Marriage of Petrie</i> , 105 Wn. App. 268, 276, 19 P.3d 443 (2001)	10
<i>In re Roca</i> , 404 B.R. 531 (Ariz. 2009)	16

TABLE OF AUTHORITIES (continued)

	<u>Page</u>
<i>Maki v. Chong</i> , 75 P.3d 376, 379 (Nev. 2003)	14
<i>McCone County Federal Credit Union v. Gribble</i> , 216 P.3d 206 (Mont. 2009)	15
<i>Palm Beach Sav. & Loan Ass'n, F.S.A. v. Fishbein</i> , 619 So. 2d 267, 270 (Fla. 1993)	15
<i>Sorenson v. Pyeatt</i> , 158 Wn.2d 523, 535, 146 P.3d 1172 (2006)	13
<i>Tucker v. Brown</i> , 20 Wn.2d 740, 150 P.2d 604 (1944)	8, 9, 10
<i>Webster v. Rodrick</i> , 64 Wn.2d 814, 394 P.2d 689 (1964) ..	11, 12, 13, 14
<i>Tabish v. Smith</i> , 572 P.2d 378, 380 (Utah 1977)	14
 <u>Statutes:</u>	
RCW 6.13 et. seq.	12
RCW 19.40 et. seq.	11

A. ISSUES PRESENTED

- I. Whether a trustee may use the beneficiary's funds to acquire property in the individual name of the trustee and then transfer that asset without consideration to the trustee's spouse without securing anything in return for the benefit of the beneficiary.
- II. Whether the homestead exemption applies to real property to the extent that the acquisition of the real property is directly traceable to fraudulently obtained funds.

B. STATEMENT OF THE CASE

Theresa A. Roberts (Theresa) is an 86-year-old woman currently residing in a long-term care facility in Oregon. James Casterline is her court-appointed Conservator and Guardian under Oregon Circuit Court for the County of Clatsop, case number P06-075. (Ex. 1, ER 904, p. 80; RP v.1, p. 14.)

Theresa has three children: Marta Ann Vignola, John Jesse Teaman, and Denise Roberts Wilson (Denise). (Ex. 1, ER 904, pp. 81, 94, 95.)

Back in 1995, Theresa executed the Theresa A. Roberts Trust, while a resident of California. (Ex 3.) Among her other assets was Theresa's

home. (RP v.1, p. 128.) As early as 1999, Theresa began exhibiting memory problems, with particularly noticeable problems around 2001 and 2002. (Ex. 1, ER 904 p. 92.)

In July 2003, Theresa executed an Amended and Restated Revocable Living Trust Agreement. (Ex. 3.) In January 2004, another amendment was executed designating Denise as the successor trustee. (Ex. 4.)

As is typical in most trusts, the trust allowed distributions “to the Trustor, or apply for her benefit” the income and principal for her support. (Ex. 3, Art. II.)

In May 2004, Denise acquired a condominium in Palms Springs, California. She was able to obtain two mortgages for the property. (RP v.1, pp. 88-93; Ex. 1, ER 904, pp. 1-46.)

In May 2005, Denise and her husband, John Wilson (John), contracted to buy a home to be constructed at 137 Argus Lane, Kelso, Washington. Title to the property was to be in both Denise and John’s names. (Ex. 1, ER 904, pp. 59-71; RP v.1, p. 173.) Due to building requirements, plans were changed from a two-story home to a three-level home. (RP v.1, pp. 176-177.) Theresa, who had dementia, was to live in a

///

unit on the lowest level. John's mother, who had Parkinson's disease, was to live in another area of the home. (Ex. 1, ER 904, p. 92; RP v.1, p. 131.)

In approximately April 2006, Theresa's home was sold. (RP v.1, p. 128.) However, instead of placing the funds into Theresa's trust account, Denise placed the funds in her own account at Edward Jones. (RP v.1, pp. 128, 129.)

In July 2006, Denise used \$153,000 in funds traceable to the funds owned by Theresa to pay Alkor Construction, the builder of the home, and Superior Stone Works for construction work on the property. (RP v.1, p. 129; Ex. 1, ER 904, pp. 98-100, 131.)

Sometime in early 2006, Denise moved her mother from California to an assisted living facility in Seaside, Oregon. (RP v.1, p. 137; Ex. 1, ER 904, p. 81.) Denise's brother and sister learned that their mother had sold her home and had disappeared. They had hired an investigator to locate her, which apparently Denise and John learned of at some point. (Ex. 1, ER 904, pp. 82-83; RP v.1, pp. 138-139, RP v.2, p. 6.) Denise sent an e-mail to her sister that provided a false address of where her mother could be found (it turned out to be the address of a friend of Denise). (RP v.2, pp. 20-21, 62-63; Ex. 1, ER 904, pp. 54-58.)

On August 1, 2006, a petition was filed for the appointment of a conservator and guardian for Theresa. (Ex. 1, ER 904, pp. 80-90.) On August 2, 2006, Denise wrote a check traceable from the sale of her mother's home to pay for an attorney to represent Denise in the Oregon matter. (Ex. 1, ER 904, p. 136; RP v.1, p. 145.) At approximately this same time, Denise had no job and no income. (RP v.1, pp. 86-88.) Her monthly child support ended near the time she and John moved into the house when her daughter turned 18. (RP v.2, pp. 44-45.) Denise had about \$4,300 in cash assets and her property in Palm Springs, California. (RP v.1, p. 144; Ex. 1, ER 904, p.3.)

On August 9, 2006, the court-appointed visitor in the Oregon guardianship/conservatorship proceeding interviewed Denise at the address of the friend (the same address as noted above). (Ex. 1, ER 904, pp. 91-97.)

On August 14, 2006, Denise executed a quit claim deed in favor of John's brother, Sterling Wilson, for no consideration for her Palm Springs property. (Ex. 1, ER 904, pp. 46-47; RP v.1, pp. 141-142.) On August 15, 2006, Denise executed a quit claim deed in favor of her husband on the 137 Argus Lane property, again for no consideration. (Ex. 1, ER 904, pp. 103-104; RP v.1, pp. 141-142.)

Although both Denise and John claimed that the transfer of the 137 Argus Lane property was the result of a request of the lender, it does not appear that Denise or John remember how this came about, even though both were present at the same time during testimony. Denise recalled that the conversation took place at a mortgage company on Commerce Avenue in Longview, Washington, while John said everything took place over the phone or over the Internet. (RP v.1, pp. 162-164, 182.)

Although there appeared to be some plan to move two elderly women into their home, evidence also established that the “plan” may not have been all that viable, nor all that realistic for Theresa. For one, Denise was twice jailed for driving under the influence while the matter was pending, and John was working nights. Denise reports taking several medications. This left caregiving duties for two elderly women with severe health problems in the hands of Denise’s 18-year-old daughter. (RP v.1, pp. 18-19, 52-53, 70-74, 135, 146-147, 151-153; RP v.2, pp. 43, 59, 71-73, 75-79, 85-86.)

C. ARGUMENT

I. Standard of Review.

When a trial court has weighed the evidence in a bench trial, appellate review is limited to determining whether

substantial evidence supports its findings of fact and, if so, whether the findings support the trial court's conclusions of law. . . . Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person that a finding is true.

Hegwine v. Longview Fibre Co, Inc., 132 Wn. App. 546, 555-556, 132 P.3d 789 (2006) (*citations omitted*).

An appeals court reviews “only those findings to which appellants assign error; unchallenged findings are verities on appeal.” Further, an appeals court views “the evidence in the light most favorable to the prevailing party and defer[s] to the trial court regarding witness credibility and conflicting testimony.” *Id.* at 556.

II. Denise Roberts did not have the authority to use her mother's funds to acquire real property in her individual name and then to transfer the interest in real property without consideration to a related party without protecting the interests of her mother.

Appellants contend that Denise had the authority to use her mother's funds to acquire the interest at 137 Argus Lane for her mother's benefit. Insofar as the argument goes, that much is true. However, that is not what actually happened.

///

Denise sold her mother's home and then placed the funds into her own account. (RP v.1, pp. 128, 129.) Only when the Oregon proceedings started did Denise properly place the remaining funds in a trust account for her mother's benefit. (RP v.1, p. 129.) Denise and her husband were to acquire the property at 137 Argus Lane in their joint names. (Ex. 1, ER 904, pp. 59-71; RP v.1, p. 173.) Of the funds used to acquire the 137 Argus Lane property, \$153,000 of this was directly traceable to Theresa's funds. (RP v.1, p. 137; Ex. 1, ER 904, pp. 98-100, 131.) Denise had no discernible income except for some child support payments that ended around the time she moved into the property. Denise had no financial assets to speak of. (RP v.1, pp. 86-87, 144; RP v.2, pp. 44-45; Ex. 1, ER 904, p. 3.) As soon as the Oregon guardianship and conservatorship proceedings were commenced, Denise conveyed her interest in the property to her husband without consideration. (Ex. 1, ER 904, pp. 103-104; RP v.1, pp. 141-142.) At the same time, she conveyed her interest in a California condominium to her husband's brother, also without consideration. (Ex. 1, ER 904, pp. 46-47; RP v.1, pp. 141-142.) Theresa received no discernible personal benefit from the real property, and Denise and her husband's actions had the effect of

///

ensuring that Theresa received no financial benefit from the transactions either.

While Denise and John state their “intent” to have Theresa reside there on a permanent basis, that did not happen, and serious questions arose as to whether that was a very well thought-out plan in any event. (RP v.1, pp. 18-19, 52-53, 70-74, 135, 146-147, 151-153; RP v.2, pp. 43, 59, 71-73, 75-79, 85-86.)

Appellants contend that the Court will enter some “slippery slope” if it does not condone their actions in this matter. However, given the facts, Appellants ask the Court to drive off a cliff by condoning just what they seek this Court to ratify. Not surprisingly, case law does not support such reckless behavior by a trustee. *Tucker v. Brown*, 20 Wn.2d 740, 150 P.2d 604 (1944), serves as a useful reminder of what a trustee may and may not do.

It is the duty of a trustee to administer the trust in the interest of the beneficiaries. The trustee must exclude from consideration not only his own advantage or profit, but also that of third parties in dealing with trust properties and in all other matters connected with the administration of the trust estate. No exception can be made to this rule. Courts have fixed a very high and exceptionally strict standard for trustees to follow in the conduct of their trust activities.

Id. at 768.

///

Further, “[u]ncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the “disintegrating erosion” of particular exceptions.” *Id.* at 768-769.

‘Wherever property, real or personal, which is already impressed with or subject to a trust of any kind, express or by operation of law, is conveyed or transferred by the trustee, not in the course of executing and carrying into effect the terms of the express trust, or devolves from a trustee to a third person, who is a mere volunteer . . . or who is a purchaser with actual or constructive notice of the trust . . . , then the rule is universal that such heir, devisee, successor, or other voluntary transferee, or such purchaser with notice, acquires and holds the property subject to the same trust which before existed, and becomes himself a trustee for the original beneficiary. Equity impresses the trust upon the property in the hands of the transferee or purchaser, compels him to perform the trust if it be active, and to hold the property subject to the trust, and renders him liable to all the remedies which may be proper for enforcing the rights of the beneficiary. It is not necessary that such transferee or purchaser should be guilty of positive fraud, or should actually intend a violation of the trust obligation; it is sufficient that he acquires property upon which a trust is in fact impressed, and that he is not a bona fide purchaser for a valuable consideration and without notice. This universal rule forms the protection and safeguard of the rights of beneficiaries in all kinds of trust; it enables them to follow trust property--lands, chattels, funds of securities, and even of money--as long as it can be identified, into the hands of all subsequent holders who are not in the position of bona fide purchasers for value and without notice; it furnishes all those distinctively equitable remedies which are so much more efficient in securing the beneficiary’s rights than the mere pecuniary recoveries of the law.’

Id. at 769-770, *quoting* 4 Pomeroy's Equity Jurisprudence, 5th Ed. 102, § 1048.

Purchases of assets that cannot be used by the beneficiary have been found to be a breach of fiduciary duty, particularly when the asset is placed in the individual name of the fiduciary and is the primary beneficiary of the use of that asset. Further, a "trustee who engages in self-dealing violates his duty of loyalty to the beneficiaries." *In re Marriage of Petrie*, 105 Wn. App. 268, 276, 19 P.3d 443 (2001).

It is one thing to say that a trustee may acquire an asset for the use and enjoyment of a beneficiary. It is quite another to say that a trustee may use the beneficiary's funds to acquire an asset in the trustee's individual name and may transfer that asset for no consideration and without regard to the beneficiary's interests. Substantial evidence exists in the record to show that the Trustee breached her fiduciary duties to the beneficiary and fraudulently transferred this asset to her husband while she was largely insolvent to avoid a potential legal claim against the Trustee. Accordingly, this trial court's findings in this regard should be affirmed.

///

///

III. The Uniform Fraudulent Transfers Act does apply to property acquired as a result of fraud, and thus the Homestead Act offers no protection to the Defendants.

It would appear from how the Appellants have framed the issues, they do not contest the trial court's finding that \$153,000 of the funds used to acquire the 137 Argus Lane property were traceable to Theresa's funds. Rather, they make the blanket argument that the Uniform Fraudulent Transfers Act (RCW 19.40 et. seq.) does not apply to property if it is subject to a nonbankruptcy law exemption because it is not an "asset." Contrary to what Appellants state, the trial court did find the use of the funds and the subsequent transfer of the asset acquired with these funds as fraudulent. (See CP, Findings of Fact and Conclusions of Law, pp. 10-23.)

Interestingly, Appellants cite no Washington cases that support their theory, merely cases in other jurisdictions where the alleged wrongs were not traceable to the homestead.

Webster v. Rodrick, 64 Wn.2d 814, 394 P.2d 689 (1964), is the leading case in Washington concerning use of fraudulent funds to purchase a homestead. In that case, the court found that "[i]t would be unrealistic to say that plaintiff's embezzled funds were not used to purchase and improve

the property in question. The funds have been traced with all the accuracy possible under the circumstances.” *Id.* at 819.

“[R]unning as a thread through our former decisions involving the homestead exemption is the requirement that it must be filed ‘in good faith.’ . . . We find no decision in this jurisdiction where the court has permitted the judgment debtor to use the statutes as a sword to protect a theft.”

Id. at 816 (*citation omitted*).

In that case, the Washington Supreme Court authorized the imposition of an equitable lien.

It is well settled that one who has purchased real property with funds of another, under circumstances which ordinarily would entitle such other person to enforce a constructive trust in, or an equitable lien against, the property, cannot defeat the

right to enforce such trust or lien on the ground that it is homestead property and exempt from the claims of creditors.

Id. at 817-818 (*citation omitted*).

Appellants seem to contend that the 1987 amendments to the Uniform Fraudulent Transfers Act somehow wiped out the concept that if real property is acquired by funds traceable to fraud, the property may be claimed as a homestead under RCW 6.13 et. seq. What Appellants fail to note is that Washington recognizes this property acquired by fraud not as a statutory

///

exemption to the homestead act, but rather as a common law exemption, and that *Webster* has been consistently cited with approval since 1964.

--“Washington also has a nonstatutory exemption to homestead protection for certain equitable liens. The nonstatutory exemption allows an equitable lien to be imposed against a homestead when the homestead claimant acquires the funds to purchase the homestead by fraud or theft.” *Federal Intermediate Credit Bank of Spokane v. O/S Sablefish*, 111 Wn.2d 219, 229-230, 758 P.2d 494 (1988).

--“Although the exact parameters of the exemption are not identified in *Webster v. Rodrick*, it is clear that an equitable lien may be imposed when the homestead claimant acquired the funds to purchase his homestead by fraud.” *Christensen v. Christgard, Inc.*, 35 Wn.App. 626, 629, 668 P.2d 1301 (1983).

--“Rather, we acknowledge that there are a number of circumstances where an equitable lien has been and may be an appropriate equitable remedy.” *Sorenson v. Pyeatt*, 158 Wn.2d 523, 535, 146 P.3d 1172 (2006).

Beyond which

The legislature is presumed to be familiar with the prevailing judicial interpretations of a statute when it amends the statute. . . . Legislative silence regarding the construed portion

of the statute in a subsequent amendment creates a presumption of acquiescence in that construction.

Barber v. Leonard, 120 Wn.2d 538, 545, 843 P.2d 1050 (1993); *see also, In re Estate of Bowers*, 132 Wn. App. 334, 342-343, 131 P.3d 916 (2006).

In fact, *Webster v. Rodrick* may be the country's leading case in support of the notion that one cannot hide behind the homestead if funds traceable to a person's fraud were used to acquire the homestead in question. For cases citing *Webster*, *see, e.g., Tabish v. Smith*, 572 P.2d 378, 380 (Utah 1977, "one may not use the statutes [homestead] as a shield for fraud or theft"); *Maki v. Chong*, 75 P.3d 376, 379 (Nev. 2003); and *Coppler & Mannick, P.C. v. Wakeland*, 117 P.3d 914, 918 (N.M. 2005).

Further, other states specifically recognize a common law exception to their homestead acts when the homestead is acquired with fraudulently obtained funds.

--"We conclude the legislature never contemplated or intended that a homestead interest could be created or maintained with wrongfully appropriated property. . . . Where wrongfully obtained funds are used to purchase property, the property does not belong to the purchasers, and therefore, to the extent of the illegal funds used, they never acquire a homestead interest." *Cox v. Waudby*, 433 N.W. 2d 716, 719 (Iowa 1988).

--“Courts have equitably allowed defrauded parties to stand in the shoes of mortgagors when fraudulently obtained funds were used to invest in or purchase a homestead.” *Commodity Futures Trading Commission v. Hudgins*, 620 F.Supp.2d 790, 793 (E.D. Tex. 2009).

--“[T]he Florida Supreme Court has repeatedly held that the homestead ‘cannot be employed as a shield and defense after fraudulently imposing on others.’ . . . As a result, under Florida law a homestead will not be exempt from the reach of creditors where fraudulently obtained funds are used to purchase, invest in or improve a homestead property.” *In re Hecker*, 316 B.R. 375, 386 (S.D. Fla. 2004) (*citations omitted*). *See also, Palm Beach Sav. & Loan Ass’n, F.S.A. v. Fishbein*, 619 So. 2d 267, 270 (Fla. 1993).

Cases cited by Appellants are inapposite.

In *McCone County Federal Credit Union v. Gribble*, 216 P.3d 206 (Mont. 2009), Gribble defaulted on loans owing to the credit union. There was no evidence that the loans were used to purchase Gribble’s home, but rather to purchase some tractors, a combine, a swather and a pickup truck. The loans were not secured by real property. Gribble transferred his home to a Wratishlaw by quit claim deed, which the credit union sought to set aside as a fraudulent transfer. *Id.* at 207.

In *Fidelity Nat. Title Ins. Co. v. Schroeder*, 179 Cal. App.4th 834 (2009), the title company failed to catch a judgment lien for court-ordered spousal support against Gordon Schroeder when he and his significant other refinanced their joint home. Gordon transferred his interest in the homestead to his significant other, and then the title company sought to set aside the transfer. *Id.* at 838. Again, there was absolutely no showing that the Gordon homestead was acquired with fraudulent funds.

In re Roca, 404 B.R. 531 (Ariz. 2009), the bankruptcy trustee sought to set aside a transfer from the debtor to her mother. However, there appears to be nothing in the case that suggests the debtor had acquired the home by use of fraudulently obtained funds.

In *Duran v. E.G. Henderson*, 71 S.W.3d 833 (Ct.App. Tex. 2002), Duran defaulted on a note, and Henderson sought to set aside a conveyance of property that apparently was not related to the notes. *Id.* at 836.

Consequently, although Appellants are correct that homesteads are generally exempt from creditors, this is an analysis that does not go far enough. Common law has created an exemption from the homestead act that prevents those who use fraudulently acquired funds to purchase real property and then claim the protection of the Homestead Act.

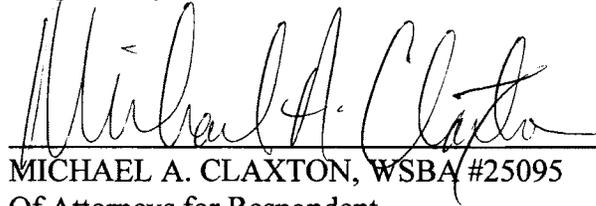
In these circumstances, courts allow the imposition of an equitable lien on the real property for funds “borrowed” or used to acquire the real property. Consequently, the trial court’s imposition of an equitable lien on the property located at 137 Argus Lane was a proper use of the court’s equitable powers.

D. CONCLUSION

For all the foregoing reasons, Respondent respectfully requests this Court to affirm the trial court’s Findings of Fact and Conclusions of Law and Judgment entered herein by the trial court.

DATED: June 9, 2011.

Respectfully submitted,



MICHAEL A. CLAXTON, WSBA #25095
Of Attorneys for Respondent

///

///

///

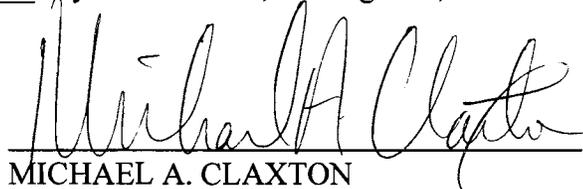
///

CERTIFICATE

I certify that on this day I caused a copy of the foregoing Respondent's Brief to be mailed, postage prepaid, to Appellants' attorney, addressed as follows:

Darrel S. Ammons
Attorney at Law, P.L.L.C.
1315 - 14th Avenue
Longview, WA 98632

DATED this 9th day of June 2011, at Longview,
Washington.


MICHAEL A. CLAXTON