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COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

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BANK OF AMERICA, N.A., a National Association,
Respondent,

v.

KENNETH TREIGER, a married person as to his separate estate,
Appellant,

v.

J'AMY LYN OWENS, an unmarried person;
Appellant,

SHULKIN, HUTTON, INC., P.S., a Washington professional service
corporation; and EDMUND JOHN WOOD,
Defendants.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE GREG CANOVA

BRIEF OF RESPONDENT BANK OF AMERICA, N.A.

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INTRODUCTION

This appeal arises from a dispute as to the priority of claims attaching to a parcel of real property described herein as the Maplewood Property. The fundamental flaw in Appellant's argument is his mischaracterization of the Maplewood Property as community property.

Appellant would have this Court ignore the Second Purchase of the Maplewood Property by J' Amy Lyn Owens after she was divorced. The trial court's decision should be affirmed.

I. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENT OF ERROR

Whether the trial court properly granted the motion for summary judgment of respondent Bank of America N.A., ("Bank of America") finding and concluding that:

- (a) This action is controlled by the terms of the Trust Agreement executed by the parties prior to the filing of this declaratory action;
- (b) At the time of her purchase of the Maplewood Property J' Amy Lyn Owens ("Owens") was single and that under the terms of the Trust Agreement, the parties agreed that the Maplewood Property was her separate estate;
- (c) Appellant Kenneth Treiger ("Treiger") was not awarded a lien on the Maplewood Property in the Supplemental Decree entered in the Marital Dissolution Proceeding but a disbursement of one half the proceeds from the sale of the Maplewood Property, after payment of all encumbrances which had attached to it prior to its sale; and

- (d) Only the judgments entered in favor of Treiger on the Execution Docket in the Marital Dissolution Proceeding attached as liens to the Maplewood Property under RCW 6.13.090 prior to Bank of America's attachment of the Maplewood Property.

II. STATEMENT OF THE CASE

A. Declaratory Judgment Action

This is a declaratory judgment action filed pursuant to an agreement of the parties to this action to determine the amount and priority of claims by the parties in certain funds held in trust from the sale of real property located at 10263 Maplewood Place Southwest, Seattle, WA 98146 (the "Maplewood Property"). Clerk's Papers (CP) 285-86.

Due to competing claims of liens against the Maplewood Property and to the rights and priority to the disbursement of the funds after its sale, the parties to this action executed an Agreement Regarding Closing of Sale and Holding of Net Proceeds in Trust (the "Trust Agreement").¹ CP 50-56.

Under the terms of the Trust Agreement, the parties agreed to allow the sale of the Maplewood Property to close and to release any and all claim they may have to the title or to a lien on the title to the Maplewood Property in consideration of the following:

¹ Two of the named defendants in this declaratory action Shulkin Hutton, Inc., P.S., ("Shulkin") and trustee Edmund Wood ("Wood") are not parties to this appeal.

In consideration for the releases requested by Chicago Title, the interests asserted by Owens, Treiger, Shulkin and Bank of America against the Property shall attach to the Net Sale Proceeds (held by the Trustee, in trust) as though the Net Proceeds were the Property in the same manner, date and priority as they attached to the Property at the time of the closing of the Pending Sale.

CP 51 (emphasis added).

The Trust Agreement recited that:

Owens, as her separate estate, is the owner of the Property.

CP 50 (emphasis added).

The Trust Agreement further provided the closing agent Chicago Title Insurance Company (“Chicago Title”) was authorized, at closing, to pay: (1) all the closing and related costs of the sale, including the real estate commission related specifically thereto; (2) all prorated unpaid real estate taxes assessed against the Maplewood Property; and (3) the amounts necessary to obtain the full reconveyance of the deed of trust against the Maplewood Property recorded under King County Auditor’s File Number 2000062600103. CP 51. After payment of the above, under the terms of the Trust Agreement all of the remaining funds from the sale (hereinafter referred to as the “Net Sale Proceeds”) were required to be disbursed by Chicago Title to the Trustee to be held in trust for the benefit of Owens, Treiger, Shulkin and Bank of America in a separate interest bearing trust account pending further determination by a court. CP 51. Treiger,

Owens, and a representative of Bank of America all executed the Trust Agreement. CP 52-54.

On or about May 20, 2007, the Net Sale Proceeds, in the amount of One Million One Hundred Fourteen Thousand Fifty-four Dollars and 83/100 (\$1,114,054.83), were wired by Chicago Title to the trust account of the Trustee per the terms of the Trust Agreement. CP 288. The Net Sale Proceeds were held by the Trustee under the terms of the Trust Agreement in a separate interest bearing trust account pending the determination by the trial court regarding the priority and extent of the claims asserted by Owens, Treiger, Shulkin, and Bank of America in the Net Sale Proceeds. CP 288.

This declaratory judgment action was filed subsequent to the Net Sale Proceeds being placed in such trust, seeking a declaration regarding the priority and extent of the claims asserted by the parties to the Trust Agreement in the Maplewood Property. CP 285-86. The asserted claims of interests relevant to this appeal are described in detail below.

B. The Marital Dissolution and Bankruptcy Proceedings of Owens and Treiger

Owens and Treiger were married on July 4, 1997. CP 84. Almost three years later, on June 1, 2000, the parties began living separate and apart, but did not enter into a separation agreement. CP 179. On February

22, 2001, Owens and Treiger filed for dissolution in King County Superior Court under cause number 01-3-02067-0 SEA (herein after referred to as the "Marital Dissolution Proceeding"). CP 84. On or about June 26, 2000, shortly after separation but before filing for dissolution, Treiger and Owens acquired title to the Maplewood Property, as husband and wife (hereinafter referred to as the "First Purchase"). CP 179. During this period, Owens and Treiger also acquired title to another parcel of real property in Seattle located on First Avenue North (hereinafter referred to as "Queen Anne Property"). CP 269.

On January 30, 2002, during the pendency of the Marital Dissolution Proceeding but prior to entry of a decree of dissolution, Treiger a filed Chapter 13 bankruptcy petition in the United States Bankruptcy Court for the Western District of Washington in Seattle under Case Number 02-11124. CP 178-79. Shortly after, on February 19, 2002, Owens filed a separate Chapter 11 bankruptcy petition in the same bankruptcy court under Case Number 02-12018. CP 179. Because Treiger was the first of the two to file a bankruptcy petition, all the property of the marital community of Treiger and Owens (including the Maplewood Property and Queen Anne Property) became part of Treiger's bankruptcy estate. 11 U.S.C. § 541(a)(2); CP 180. Treiger claimed a homestead exemption in the Queen Anne Property which he occupied, not

the Maplewood Property which was occupied by Owens. CP 188, 269. Treiger's bankruptcy was converted to a Chapter 7 on April 3, 2002. CP 179. James Rigby was appointed the Chapter 7 Trustee to administer Treiger's bankruptcy estate. ("Treiger's Bankruptcy Trustee") *Id.*

Owens and Treiger received relief from stay in their respective bankruptcy proceedings in order to finalize their dissolution. CP 269. On or about June 19, 2002, a Decree of Dissolution was entered in the Marital Dissolution Proceeding. CP 84. On this date, Owens and Treiger's marriage was dissolved and Owens became a single woman. CP 84. The dissolution court specifically reserved the issues surrounding Owens and Treiger's property and debts until the conclusion of each of their bankruptcy proceedings. CP 84.

In the context of their bankruptcy proceedings, Owens and Treiger's Bankruptcy Trustee engaged in protracted litigation to determine whether the Maplewood Property was characterized as community property or the separate property of Owens. CP 183. Ultimately, Treiger's Bankruptcy Trustee filed an adversary proceeding against Owens to determine whether the Maplewood Property was part of Treiger's bankruptcy estate. CP 270. On or about May 30, 2003, based on findings that Owens and Treiger purchased the Maplewood Property, as husband and wife, the bankruptcy court determined that:

Under Washington law, property acquired by a married couple during the course of the marriage is presumed to be community property, and that presumption applies to the Maplewood Place property, which was acquired by Mr. Treiger and Ms. Owen during the course of their marriage as husband and wife.

CP 180.

After the Decree of Dissolution was entered in the Marital Dissolution Proceeding, Owens engaged in negotiations with Treiger's Bankruptcy Trustee to purchase the Maplewood Property from the bankruptcy estate. CP 186. On or about April 7, 2004, Treiger's Bankruptcy Trustee filed a report in Treiger's bankruptcy proceeding regarding a settlement reached with Owens. CP 183-84. Pursuant to the Settlement Agreement attached to the report to the bankruptcy court, in exchange for \$215,000.00 Treiger's Bankruptcy Trustee "agree[d] to convey his entire interest in the Maplewood Place property to Ms. Owens, subject to all liens of record against that property . . ." CP 187 (emphasis added). In addition, Owens agreed to release any claim to the homestead exemption claimed by Treiger in the Queen Anne Property and consented to the disbursement by Treiger's Bankruptcy Trustee of \$40,000 in homestead funds to Treiger as part of the of the agreement reached with Treiger's Bankruptcy Trustee. CP 188. The bankruptcy court approved

the Settlement Agreement between Treiger's Bankruptcy Trustee and Owens . CP 270.

Thereafter, on or about April 29, 2004, Treiger's Bankruptcy Trustee executed a Trustee's Quitclaim Deed, which conveyed all of Treiger's interest in the Maplewood Property to: "J'Amy Lyn Owens, a single individual" (hereinafter sometimes referred to as the "Second Purchase"). CP 192-93 (emphasis added).

Treiger's Bankruptcy Trustee administered the claims against the former marital community and distributed the community assets liquidated by the estate pro-rata amongst the allowed community creditors, including Bank of America. CP 200.

C. Bank of America's Attachment of Maplewood Property

While married to Treiger, Owens executed certain commercial guaranties to induce Bank of America's predecessor Bank of America NT & SA, dba Seafirst Bank, to lend money and extend credit to The Retail Group, Inc., a business in which Owens was part owner. Bank of America commenced a collection action under the guaranties in King County Superior Court Cause Number 06-2-23098-1 SEA (the "Collection Action"). CP 58-65. The named defendants in the Collection Action were J'Amy Lyn Owens and In Rem Against Any and All Separate Property of J'Amy Lyn Owens Awarded to Kenneth Treiger. CP 58-65.

On December 19, 2006, Bank of America obtained a prejudgment Writ of Attachment on Real Property Against Interest in Property Held by J' Amy Lyn Owens Only ("Order on Prejudgment Writ of Attachment"). CP 63-65. A writ of attachment was subsequently issued by the Clerk of the King County Superior Court and delivered to the King County Sheriff. CP 66-73. On December 20, 2006, these documents were recorded with the King County Auditor under number 2006122000610 against the Maplewood Property. CP 66.

On December 14, 2007, a final judgment was entered in the Collection Action against Owens in favor of Bank of America in the amount of \$593,519.24. (the "Bank of America Judgment") CP 58-62. After entry of the Bank of America Judgment, the Collection Action was ordered consolidated with this declaratory action. CP 61.

D. Marital Dissolution Court's Property Distribution

On or about May 9, 2006, a Supplemental Decree of Dissolution ("Supplemental Decree") dividing the parties' assets and liabilities was entered in the Marital Dissolution Proceeding along with the court's Findings of Fact and Conclusions of Law. CP 74-91.

In the Supplemental Decree, a money judgment was awarded to Treiger in the total amount of \$27,501.42, with interest accruing thereon at a rate of 12% per annum. CP 74-75. This judgment was comprised of

amounts awarded to Treiger in the Supplemental Decree for: (1) past amounts due pursuant to the Order of Child Support; (2) Treiger's portion of an IRS refund; and (3) amounts awarded to Treiger at other times in the Marital Dissolution Proceeding. CP 75. Additionally, the court ordered that the Maplewood Property be sold. CP 78.

In making a just and equitable distribution of the Owens and Treiger's property, the Supplemental Decree provided that Treiger be awarded:

One half proceeds of the sale of the real property located at 10263 Maplewood Place Southwest, Seattle, Washington, which has a gross value of at least \$1,116,000 and one encumbrance with an approximate balance of \$469,982.

CP 75 (emphasis added). This is an award of personal property. Owens was awarded the balance of the proceeds from the sale of the Maplewood Property after Treiger was paid. CP 76. Attached to the Supplemental Decree was an addendum entitled "Treiger/Owens Sale of Home Provisions." CP 79-81. The Supplemental Decree was recorded in the King County Auditor's Office on October 27, 2006. CP 98. At no point in the Supplemental Decree or the addendum attached thereto did the court in the Marital Dissolution Proceeding expressly award Treiger an ownership interest in or a lien on the Maplewood Property itself. CP 74-81.

On October 27, 2006, Treiger recorded four judgments entered in the Marital Dissolution Proceeding. A summary of the judgments entered on the Execution Docket in King County Superior Court follows. CP 93, 99, 109, 113. First, a judgment in the amount of \$1,429.00, accruing interest at the rate of 12% per annum, was entered on the Court's Execution Docket on March 29, 2006, under judgment number 06-9-11201-1. This judgment was recorded under King County Auditor's Number 20061027001371. CP 93-97. Second, a judgment in the amount of \$27,501.42, accruing interest at the rate of 12% per annum, was entered on the Court's Execution Docket on May 9, 2006, under judgment number 06-9-15270-6. This money judgment was contained in the Supplemental Decree and recorded under King County Auditor's Number 20061027001372. CP 99-108. Third, a judgment in the amount of \$16,081.00 accruing interest at the rate of 12% per annum was entered on the Court's Execution Docket on June 9, 2006. This judgment was recorded under King County Auditor's Number 20061027001373. CP 109-112. The fourth judgment in the amount of \$8,278.00, accruing interest at the rate of 12% per annum, was entered on the Court's Execution Docket on June 9, 2006. This judgment was recorded under King County Auditor's Number 20061027001374. CP 113-120.

In addition to the four judgments listed on the Clerk's Execution Docket, on October 27, 2006, Treiger also recorded various other "orders" entered in the Marital Dissolution Proceeding, which are included in the record on appeal at CP 113-34. None of these orders contained a judgment summary or were entered on the Execution Docket in the Marital Dissolution Proceeding. *Id.*; CP 92.

E. Declaratory Judgment Action Decision on Appeal

Pursuant to terms of the Trust Agreement, Bank of America filed this declaratory judgment action in King County Superior Court for determination of the priority and extent of the claims of the parties to the Maplewood Property. CP 285-86.

After briefing and argument on three cross motions for summary judgment brought by Bank of America, Treiger and Owens, the trial court entered an Order Granting Bank of America's Motion for Summary Judgment finding and concluding:

- (a) that this action is controlled by the terms of the Trust Agreement executed by the parties prior to the filing of this declaratory action;
- (b) that at the time of her purchase of the Maplewood Property J' Amy Lyn Owens ("Owens") was single and that under the terms of the Trust Agreement, the parties agreed that the Maplewood Property was her separate estate;
- (c) that appellant Kenneth Treiger ("Treiger") was not awarded a lien on the Maplewood Property in the

Supplemental Decree entered in the Marital Dissolution Proceeding but a disbursement of one-half the proceeds from the sale of the Maplewood Property, after payment of all encumbrances which had attached to it prior to its sale; and

- (d) that only the judgments entered in favor of Treiger on the Execution Docket in the Marital Dissolution Proceeding attached as liens to the Maplewood Property under RCW 6.13.090 prior to Bank of America's attachment of the Maplewood Property.

CP 284-296.

The trial court ordered payment of the proceeds from the sale of the Maplewood Property in the following priority:

- (1) payment to Owens of her \$40,000 homestead exemption;
- (2) payment to Treiger of the four judgment liens recorded prior to December 20, 2006;
- (3) payment to Bank of America on its judgment lien which attached to the Maplewood Property through a prejudgment writ of attachment on December 20, 2006;
- (4) payment to Treiger on his remaining four judgments recorded after December 20, 2006; and
- (5) payment to Treiger and Owens, respectively, in accordance with the terms of the Supplemental Decree entered in the Marital Dissolution Proceeding.

CP 284-96. Subsequently, the trial court entered an Order Disbursing Funds and Resolving all Remaining Issues. CP 300-03.

Disagreeing with the trial court's decision below as to the priority of claims attached to the Maplewood Property, Treiger has filed this appeal.

III. ARGUMENT

A. Standard of Review

This Court should affirm the trial court's decision below. A trial court's findings of fact will not be disturbed on appeal if they are supported by substantial evidence. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959). "Substantial evidence exists if the record contains evidence of a sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *In re Marriage of Griswold*, 112 Wn. App. 333, 339, 48 P.3d 1018 (2002). This Court then reviews de novo whether the trial court's conclusions of law flow from the findings. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). Unchallenged findings of fact are verities on appeal. *Davis v. Dep't of Labor & Indus.*, 94 Wn.2d 119, 123, 615 P.2d 1279 (1980).

Treiger assigns errors to certain of the trial court's findings and conclusions. As discussed below, the trial court's challenged findings are supported by substantial evidence and the trial court's conclusions of law are properly supported by those findings.

B. The Maplewood Property was the Separate Estate of Owens.

This Court should affirm the ruling of the trial court that, at the time of her purchase of the Maplewood Property, J'Amy Lyn Owens ("Owens") was single and that, under the terms of the Trust Agreement, the parties agreed that the Maplewood Property was her separate estate. The trial court's ruling is supported by both substantial evidence and Washington law.

1. Owens' purchase of the Maplewood Property from Treiger's bankruptcy estate, as a single individual, made it her separate estate.

The trial court below correctly held that the Maplewood Property was the separate estate of Owens. Simply stated, when Owens, as a single individual, purchased the Maplewood Property from Treiger's Bankruptcy Trustee on April 29, 2004, said property became her separate estate. Second, the Maplewood Property was divested of any community interest of Treiger when it was quit claimed to Owens by Treiger's Bankruptcy Trustee.

The character of property as separate or community is determined as of the date of acquisition. *In re Marriage of Shannon*, 55 Wn. App. 137, 140, 777 P.2d 8 (Div. I 1989). Property acquired outside of a marriage is separate property. *See* RCW 26.16.010-020. Owens acquired the Maplewood Property in April of 2004, outside of her marriage to

Treiger, **after entry** of the decree of dissolution in the Marital Dissolution Proceeding. CP 192.

Moreover, pursuant to the terms of the Settlement Agreement between Owens and Treiger's Bankruptcy Trustee, Owens acquired all of Treiger's community interest in the Maplewood Property, as Treiger's Bankruptcy Trustee agreed to "convey his entire interest in the Maplewood Property" via the Trustee's Quitclaim Deed. CP 187.

Since Treiger claimed no exemptions in the Maplewood Property, Treiger's Bankruptcy Trustee owned Treiger's *entire interest*. 11 U.S.C. § 541(a)(2)(A) provides in pertinent part that:

(a) The commencement of a case under section 301, 302, or 303, of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—

(A) under the sole, equal, or joint management and control of the debtor; . . .

(emphasis added).

Additionally, even if Owens and Treiger had not yet been divorced at the time, the Maplewood Property's community character at the time of separation would have been transformed to Owens' separate estate through execution and delivery of the Trustee's Quitclaim Deed of the Maplewood Property to Owens. "A spouse or domestic partner may give,

grant, sell or convey directly to the other spouse or other domestic partner his or her community right, title, interest or estate in all or any portion of their community real property . . .” RCW 26.16.050. It has long been the law of Washington that such a conveyance of community property by husband to wife has effect of changing its community character to that of separate property of the wife. *Sponogle v. Sponogle*, 86 Wash. 649, 151 P. 43 (1915); *Klosterman v. Harrington*, 11 Wash. 138, 39 P. 376 (1895). A quit claim deed from one spouse to the other divests the real estate “from any claim or demand as community property and shall vest the same in the grantee as separate property.” RCW 26.16.050.

In short, the act of Treiger’s Bankruptcy Trustee quit claiming his entire interest (which was Treiger’s entire interest) in the Maplewood Property to Owens divested the Maplewood Property from any claim of Treiger or the former marital community, and it vested the Maplewood Property as Owens’ separate estate.

To support his argument that title does not control the character of property, Treiger cites *Hamlin v. Merlino*, 44 Wash. 851, 862, 272 P.2d 125 (1954), and *In re Marriage of Skarbek*, 100 Wn. App. 444, 448-49, 997 P.2d 447 (2000). Both cases are inapposite. In *Skarbek*, the court found that \$46,000 of separate funds of the husband traceable in a joint checking account remained separate property. The court pointed out that

“[t]he name under which property is held does not constitute direct and positive evidence determinative of whether the property is separate or community”; rather, property is characterized at acquisition as separate or community. *Skarbek*, 100 Wn. App. at 446-47. Because the husband acquired the property outside the marriage, the court found it to be separate property. *Id.* at 449. In *Hamlin*, the court finds that real and personal property held in the name of the husband but acquired during marriage is presumptively community property. 44 Wn.2d at 862.

Each of these cases underscores the bright line rule in Washington that property is characterized as community or separate at acquisition, but they do nothing to further Treiger’s argument. As discussed above, Owens acquired Maplewood Property from the Treiger bankruptcy estate as “a single individual.” CP 190. Next, Treiger’s Bankruptcy Trustee, standing in the shoes of Treiger, quit claimed his entire interest in the Maplewood Property to Owens. Therefore, under the rules articulated in *Skarbek* and *Hamlin* and under RCW 26.16.050, the Maplewood Property became the separate estate of Owens from the date of the delivery of the Trustee’s Quitclaim Deed.

In short, the Maplewood Property could simply not be anything other than Owens’ separate estate. Owens was not married when she acquired it from Treiger’s Bankruptcy Trustee, and community property

cannot be created in the absence of a marriage. *See* RCW 26.16.030 (“Property . . . acquired after marriage by either husband or wife, or both, is community property.”) (emphasis added); *compare* RCW 26.16.140 (“When a husband and wife are living separate and apart, their respective earnings and accumulations shall be the separate property of each.”).

Washington’s community property laws are triggered on the existence of a viable marital community. RCW 26.16.030. When a marital community ceases to exist through an entry of a Decree of Dissolution, creation of community property becomes an impossibility because there is no longer a community enterprise to which the spouses are contributing. Again, Owens and Treiger were divorced on June 19, 2002. At the time of Owens’ Second Purchase of the Maple Property from Treiger’s bankruptcy estate on or about April 29, 2004, the marital community of Owens and Treiger simply did not exist. Thus, it is impossible to classify the Maplewood Property as anything other than Owens’ separate estate because there was no community enterprise to which Owens could contribute when she acquired it.

2. **The trial court correctly concluded that this matter is controlled by the terms of the Trust Agreement which is a binding agreement and accurately reflects the understanding of the parties.**

The parties to this appeal executed the Trust Agreement in good faith with the purpose of reserving claims to the Maplewood Property in order to allow the sale of the Maplewood Property to proceed. The trial court's conclusion that this matter is controlled by the terms of the Trust Agreement and that the parties agreed that the Maplewood Property was the separate estate of Owens is supported by substantial evidence in the record.

Relying on *Black v. Evergreen Land Developers, Inc.*, 75 Wn.2d 241, 450 P.2d 470 (1969), Treiger attempts to eschew the agreement he signed as a false characterization of the Maplewood Property as "separate property." See Brief of Appellant at 19-21. This conclusion is not supported by the record or case law.

In *Black*, the court found that a party was not bound by a boilerplate provision included in an earnest money agreement, denying the existence of any other agreements. 75 Wn.2d at 250-51. Noting that courts tend to discredit fine print clauses, there was overwhelming evidence it was the manifest understanding of the parties that an oral covenant between the parties was not merged into the agreement. *Id.*

No such overwhelming evidence exists in this case. The Trust Agreement executed by the parties is a four-page document containing no boilerplate provisions. Treiger states that the Trust Agreement's characterization of the Maplewood Property as Owens' separate estate is contrary to both the bankruptcy court and the dissolution court's determination in earlier proceeding, citing CP 180 and CP 84. This is simply incorrect. At the time of the execution of the Trust Agreement in May 2007 after the Second Purchase, as noted above, the Maplewood Property was the separate estate of Owens.

The bankruptcy court decision relied upon by Treiger is the determination of May 2003 that Owens and Treiger purchased the Maplewood Property during the course of their marriage, concluding that the property was community property. CP 179. Similarly in the Supplemental Decree, the dissolution court stated that the "Maplewood Property was community property *at separation*, although the wife now holds Maplewood in her name by virtue of the quitclaim deed." CP 84 (emphasis added).

Bank of America does not dispute that the Maplewood Property was community property at the time of the First Purchase by Owens and Treiger via a warranty deed on or about June 26, 2000, or that the property was community property at the time Owens and Treiger separated.

However, as discussed above, the Maplewood Property: (1) was divested of any right, title or interest held by Treiger and the former marital community; and (2) became the separate estate of Owens when the Maplewood Property was conveyed to Owens by Treiger's Bankruptcy Trustee at the time of the Second Purchase via a quit claim deed on or about April 29, 2004. CP 192.

Characterizations of the Maplewood Property as community property prior to Owens' Second Purchase of it from Treiger's bankruptcy estate is hardly the type of "overwhelming evidence" needed to contradict the express terms of the parties' Trust Agreement executed in good faith.

Moreover, neither the trial court nor Bank of America are bound by any potential contrary or conflicting characterizations regarding the Maplewood Property made in the Marital Dissolution Proceeding. The Washington State Supreme Court has long held that the only proper parties in a dissolution proceeding are the spouses themselves stating in pertinent part:

The spouses are made parties to a divorce action by due process and the state is made one by statute. The children are not parties, but, as a subject of the action, they have been made the chief concern of both the legislature and the courts. Other persons can not be made parties to the action by any statutory form of notice, nor can they intervene therein. It would appear elementary then, that there is no due process of law in a divorce action as to the rights of creditors of the spouses. The judgment can neither

conclusively determine their rights, nor be made available on their behalf as a basis for any of the provisional remedies.

Arneson v. Arneson, 38 Wn.2d 99, 101, 227 P.2d 1016 (1951) (emphasis added).

The trial court correctly concluded, based on substantial evidence, that under the terms of the Trust Agreement, the parties to this declaratory action agreed that Owens, as her separate estate, was the owner of the Maplewood Property. CP 287. It is the duty of the court to "declare the meaning of what is written." *Max L. Wells Trust by Horning v. Grand Cent. Sauna and Hot Tub Co. of Seattle*, 62 Wn. App. 593, 602, 815 P.2d 284 (Div. I 1991). As this Court stated in *Max L. Wells Trust*:

Washington follows the objective theory of contracts, focusing on the objective manifestations of the agreement rather than the less precise subjective intent of the parties not otherwise manifested. Absent fraud, deceit or coercion, a voluntary signatory is bound to a signed contract even if ignorant of its terms. *Sherman v. Lunsford*, 44 Wash.App. 858, 861, 723 P.2d 1176 (1986). See *Lyall v. DeYoung*, 42 Wash.App. 252, 256-57, 711 P.2d 356 (1985), review denied, 105 Wash.2d 1009 (1986), and cases cited therein.

62 Wn. App. at 602 (emphasis added). In this case the terms are clear.

There is no ambiguity or other uncertainty in the plain language of the Trust Agreement that:

Owens, as her separate estate, is the owner of the Property.

CP 50. (emphasis added).

3. **Since Treiger's interest in the Maplewood Property was conveyed by Treiger's Bankruptcy Trustee, Treiger cannot assert an interest in the Maplewood Property as a tenant in common under the Supplemental Decree.**

Relying on the false premise that the Maplewood Property was not the separate estate of Owens after she, as a single individual, acquired all interests in it from Treiger's Bankruptcy Trustee, Treiger then makes the false argument that the parties were left as tenants in common of the Maplewood Property after entry of the Supplemental Decree until it was sold. This is simply incorrect. The Maplewood Property was the separate estate of Owens at the time the Supplemental Decree was entered in the Marital Dissolution Proceeding. The cases cited by Treiger are inapposite as they involve community property (not separate property) to which a divorce decree is silent. *See Yeats v. Yeats' Estate*, 90 Wn.2d 201, 206, 580 P.2d 617 (1978) ("documents must put the parties and the court upon notice that the assets exist"). Further, the Supplemental Decree is not silent regarding the Maplewood Property and Treiger, as noted in further detail below, is not awarded an interest in it.

4. **The trial court's order of disbursement of the funds from the sale of the Maplewood Property did not violate Treiger's discharge in his bankruptcy.**

Again, relying on the false premise that the Maplewood Property was not the separate estate of Owens after she, as a single individual, acquired all interests in it from Treiger's Bankruptcy Trustee. Treiger also

makes the false argument that the trial court's decision "circumvented the bankruptcy court's discharge." However, nothing in Treiger's bankruptcy proceeding can have any impact upon Owens' separate liability to Bank of America. Owens never obtained a bankruptcy discharge and remained separately liable for the judgment that Bank of America obtained against her. This judgment was secured by the prejudgment writ of attachment against her separate Maplewood Property. *See BNC Mortgage, Inc., v. Tax Pros, Inc.*, 111 Wn.App 238, 247 46 P.3d 812 (Div. II 2002). In short, this case involves the collection by Bank of America of Owens' separate debt against her separate property, specifically the Maplewood Property.

C. The Trial Court Correctly Concluded that the Supplemental Decree did not Award Treiger a Lien or Other Interest in the Maplewood Property.

The court in the Marital Dissolution Proceeding had all the parties' property before it when making its property distribution, including the parties' separate property. In its determination of the lien priorities on the Maplewood Property, the trial court correctly concluded that the Supplemental Decree did not award Treiger a lien or other interest in the Maplewood Property but only a one-half interest in the proceeds after its sale, which were the amounts received after payment of encumbrances on the property. CP 293

1. **The Supplemental Decree provided Treiger with only an interest in the “proceeds” from the sale of the Maplewood Property.**

The Supplemental Decree provides only that Treiger be awarded the following with respect to the Maplewood Property:

One half proceeds of the sale of the real property located at 10263 Maplewood Place Southwest, Seattle Washington, which has a gross value of at least \$1,116,000 and one encumbrance with an approximate balance of \$469,982.

CP 75 (emphasis added). This is an award of personal property. No language in the Supplemental Decree purported to give Treiger an express lien against the Maplewood Property, which was titled in Owens name as a single individual and characterized as her separate property under the dissolution court’s findings. “The apparent transformation of the Maplewood home from community property to separate property of the wife as a result of the Trustee’s quitclaim deed to her is irrelevant to the task before this court.” CP 89 (Findings at 2.21 ¶3). “The wife’s separate property is available for distribution, and is properly before this court.” CP 89 (Findings at 2.21 ¶5). Thus, all the parties’ property, including Owens’ separate property, was before the court in the Marital Dissolution Proceeding and considered in the court’s determination of the property distribution.

Treiger argues that he was awarded a lien on the Maplewood Property because the Supplemental Decree included the tax parcel number in the real property judgment summary. However, a judgment summary in and of itself cannot award an express interest in real property. Such an interest must be granted expressly within the actual body of the judgment by the court. The actual body of the Supplemental Decree awards no right, title or interest in the Maplewood Property to Treiger. Rather, the dissolution court orders the Maplewood Property to be sold and that Treiger receive one-half of the proceeds.

2. **Under this Court's decision in *Kshensky*, "proceeds" in this context are amounts received from the sale of the Maplewood Property, after encumbrances are paid.**

Treiger's award of "proceeds" under the Supplemental Decree is an award of personal property in an undetermined amount at a future date, not an interest or title in real property which attached to the Maplewood Property prior to its sale. This Court's decision in *Kshensky v. Pioneer National Title Insurance Co.* controls here. 22 Wn. App. 817, 592 P.2d 667 (Div. I 1979). In that case, a dissolution decree awarded the parties' residence to the wife and granted the husband "a lien on the proceeds of such sale in the sum equal to one-half of the total sales price in excess of \$14,250.00." *Id.* at 818. The wife sold the house 12 years after the divorce and failed to pay the husband that which was ordered under the

parties' decree. In his suit against the wife, the purchaser, lender and title insurer money, the husband argued that he was owed over \$23,000 dollars. In affirming the trial court's decision to dismiss the purchaser and title insurance company, the court held that "[t]he lien language in the decree did not purport to be a lien on the property and cannot be construed as such." *Id.* at 820 (emphasis added) (internal citation omitted). This Court further stated in *Kshensky* that:

The husband's lien was by its terms limited to the Proceeds of any such sale, if the home was ever sold. 'Proceeds of sale' in this context mean moneys actually received by the seller. *Long-Bell Lumber Co. v. National Bank of Commerce*, 35 Wn.2d 522, 536, 214 P.2d 183 (1950). See *Black's Law Dictionary* 1369 (4th Ed. 1968).

Id. at 820 (emphasis added).

This Court's conclusion in *Kshensky* comports with the rule in Washington which requires that liens imposed by dissolution courts are imposed by "express order and not otherwise." *Seattle Brewing & Malting Co. v. Talley*, 59 Wash. 168, 170, 109 P. 600 (1910). See also *Northern Commercial Company v. E.J. Hermann Co., Inc.*, 22 Wn. App. 963, 593 P.2d 1332 (Div. II 1979) (dissolution decrees awarded an express and specific lien on community property to secure the payment of a property settlement in the sum of \$49,292.86); *In re Marriage of Wintermute*, 70 Wn. App. 741, 855 P.2d 1186 (Div. II 1993) (dissolution

decree awarded an express and specific lien in favor of the husband in the amount of \$12,000 on the family home awarded to wife).

Treiger attempts to distinguish *Kshensky* on the basis that the wife in that case retained the subject property and that Bank of America in this case had notice of the parties' Supplemental Decree. These are distinctions without a difference. Neither distinction raised by Treiger remedies the fact that the court in the Marital Dissolution Proceeding did not award Treiger an express and specific lien on the Maplewood Property in the Supplemental Decree. As stated in *Seattle Brewing, supra*, liens are imposed "by *express* order and not otherwise." *Id* at 170 (emphasis added). The Supplemental Decree awarded Treiger a money judgment in the amount of \$27,501.42, which attached to the Maplewood Property when the decree was recorded on October 27, 2006. Apart from that money judgment, the dissolution court only ordered that Treiger receive half of the proceeds from the sale of the Maplewood Property. Under *Kshensky*, this award of proceeds was money actually received by Owens, not an interest in the Maplewood Property, itself.

3. **Bank of America was not a party to the Owens and Treiger's Dissolution and is not bound by the Dissolution Court's distribution of property.**

The ordered distribution of the proceeds from the sale of the Maplewood Property in Marital Dissolution Proceeding cannot circumvent

the rights of a perfected lien creditor in the Maplewood Property prior to its sale. As previously noted above, the Washington State Supreme Court has long held that the only proper parties in a dissolution proceeding are the spouses themselves. *Arneson v. Arneson*, 38 Wn.2d 99, 101, 227 P.2d 1016 (1951).

Treiger and Bank of America are holders of recorded judgment liens which attached the Maplewood Property prior to its sale on May 20, 2007. Under Washington case law, the ordered distribution of the proceeds from the sale of the Maplewood Property to Treiger and Owens as parties to the Martial Dissolution Proceeding cannot effect the perfected rights of Bank of America in the Maplewood Property (who obviously is not a party in the dissolution proceeding). Beyond the distribution of property as between Treiger and Owens themselves, the dissolution court had no power to determine the rights of third party creditors which attached to the Maplewood Property after the Second Purchase in April 2004 and prior to its ultimate sale in May 2007. *In re Marriage of Soriano*, 44 Wn. App. 420, 722 P.2d 132 (Div. I 1986). As this Court stated in *Soriano*:

We find nothing in chapter 26.09 RCW, no matter how broadly construed, which gives a trial court the power to determine the rights of the Bank who is here asserting the position of a third party creditor.

44 Wn. App. at 134.

D. The trial court correctly concluded that Treiger's Recorded Orders are Not Judgments and Did Not Attach to the Marplewood Property under RCW 6.13.090.

The trial court correctly determined that the documents recorded by Treiger, but not included on the Execution Docket of the Marital Dissolution Proceeding, were not judgments and did not attach to the Marplewood Property under RCW 6.13.090.

1. A judgment is a final determination of the rights of a party and is statutorily required to contain a judgment summary prior to its taking effect for purposes of imposing a lien.

The trial court rejected Treiger's contention that all the documents he recorded in the King County Auditor's Office were "judgments," finding that these documents failed to comply with Civil Rule (CR) 54(a)(1) and RCW 4.64.030. A "judgment" is defined as "the final determination of the rights of the parties in the action and includes any decree and order from which an appeal lies." CR 54(a)(1). All judgments must have judgments summaries in compliance with RCW 4.64.030 before the judgment takes effect and is entered by the clerk of the court. RCW 4.64.030. An "order" is defined as "[e]very direction of a court or judge, made or entered in writing, not included in a judgment, . . ." CR 54(a)(2). In sum, under Washington law an "order" is not synonymous with a "judgment." It is obvious that Treiger understood this distinction as

he recorded four judgments with proper summaries prior to Bank of America's attachment of the property.

RCW 4.64.030 provides the procedure by which a judgment is entered and also dictates the format necessary for a judgment to be effective. This statute provides in pertinent part that:

The clerk shall enter all judgments in the execution docket, subject to the direction of the court and shall specify clearly the amount to be recovered, the relief granted, or other determination of the action.

RCW 4.64.030(1).

However, "[t]he clerk may not enter a judgment, and a judgment does not take effect, until the judgment has a summary in compliance with this section." RCW 4.64.030(3) (emphasis added). A judgment summary must be on the first page of each judgment providing for the payment of money and include the judgment creditor and the name of his or her attorney, the judgment debtor, the amount of the judgment, the interest owed to the date of the judgment, and the total of the taxable costs and attorney's fees. RCW 4.64.030(2)(a).

In this case, all of the documents recorded by Treiger without judgment summaries, were simply court orders under CR 54(a)(2) for attorney's fees and or sanctions. The imposition of costs, attorney's fees, contempt sanctions, and Rule 11 sanctions are not judgments. *Cooter &*

Gell v. Harmarz Corp., 496 U.S. 384, 396, 110 S.Ct. 2447 (1990). These “orders” simply are not enforceable judgments which attached as liens to Owens’ homestead property upon recording under RCW 6.13.090).

This conclusion comports with a review of the Execution Docket of the King County Superior Court relating to the Marital Dissolution Proceeding. CP 92. As discussed in the Statement of Facts above, the Execution Docket lists all of the judgments in favor of Treiger which were entered in the Marital Dissolution Proceeding, only four of which were recorded prior to Bank of America’s prejudgment writ of attachment on the Maplewood Property. The trial court’s ruling to this effect was correct.

2. **Only “judgments” against the owner of a homestead shall become a lien on the value of the homestead in excess of the homestead exemption from the time the judgment is recorded.**

RCW 6.13.090 provides in pertinent part as follows:

A judgment against the owner of a homestead shall become a lien on the value of the homestead property in excess of the homestead exemption from the time the judgment creditor records the judgment with the recording officer of the county where the property is located

(emphasis added).

Treiger cites *In re Deal*, 85 Wn. App. 580, 933 P.2d 108 (Div. I 1997) in support of his argument that the recording of the court orders complies with RCW 6.13.090. *Deal* is inapposite. In *Deal*, it was

undisputed that an actual certified copy of an actual judgment was recorded in the county in which the homestead property was located. There was no dispute in *Deal* over whether the document recorded was an effective judgment in accordance with RCW 4.64.030.

Treiger's reliance on *Kim v. Lee*, 102 Wn. App. 586, 591, 9 P.3d 245 (Div. I 2000), *overruled on other grounds* by 145 Wn.2d 79, 31 P.3d 665 (2001), in support of an argument of substantial compliance with RCW 4.64.030 is equally misplaced. *Kim* involved the issue of whether under RCW 4.64.030, the judgment summary could commence on the first page of the judgment and carry over onto the second. *Kim* does not address the situation of an order containing no judgment summary at all.

Further Treiger did not substantially comply with RCW 4.64.030 as he contends. Substantial compliance requires "actual compliance in respect to the substance essential to every reasonable objective of [the] statute." *Kim v. Lee*, 102 Wn. App. at 591. Treiger's recorded orders contain no judgment summaries at all. Clearly this cannot constitute actual compliance in respect to the substance essential to the objective of RCW 4.64.030.

3. There is no conflict between Civil Rule 58 and RCW 4.64.030.

Finally, there is no conflict between CR 58 and RCW 4.64.030 as Treiger argues. CR 58(b) merely explains the time at which a judgment is

deemed entered for “procedural purposes.” As the Washington State Supreme Court has expressly stated:

While the comment to CR 58 indicates that this rule supersedes RCW 4.64.010 [Time of entering judgment—Motions—Filing—Recording, now repealed], it leaves in operation RCW 4.64.030 which requires the clerk to enter the judgment in the journal.

Malott v. Randall, 83 Wn.2d 259, 262 n.1, 517 P.2d 605 (1974) (emphasis added).

Moreover, the issues presented here regard substantive rights not procedural ones. For example, CR 58 has absolutely no bearing on the substantive right relating to when a judgment attaches as a lien to a homestead. This substantive right is expressly granted by the Legislature in RCW 6.13.090 and requires the recording of a “judgment”, which the legislature has expressly declared does not take “effect” until it has a summary in compliance with RCW 4.64.030. The same is true for all of the other substantive rights provided by the legislature which accrue with respect to judgments, including, but not limited to, the lien of said judgments on real property provided by RCW 4.56.190 and the enforcement and execution of said judgments provided under the various chapters found in Title 6 RCW. To assert the legislature does not have the power to define when a judgment becomes “effective” for purposes of

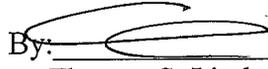
enforcement of the substantive rights the legislature has accorded to said judgments simply defies logic. Treiger's argument fails.²

IV. CONCLUSION

The trial court's findings are supported by substantial evidence and the trial court's conclusions of law are proper. The decision of the trial court in this case should be affirmed.

DATED this 19th day of November, 2008.

SCHWEET RIEKE & LINDE, PLLC
Attorneys for Respondent
Bank of America, N.A.

By: 
Thomas S. Linde
WSBA 14426
Katie A. Axtell
WSBA 35545

² In addition, to the extent Treiger may be arguing that RCW 4.64.030 is somehow unconstitutional, RCW 7.24.110 requires service upon the attorney general and an opportunity to be heard. Since this did not occur below, there is no jurisdiction to address the issue in this appeal. *Camp Finance, LLC v. Brazington*, 133 Wn. App. 156, 162, 135 P.3d 946 (Div. III 2006).

DECLARATION OF SERVICE

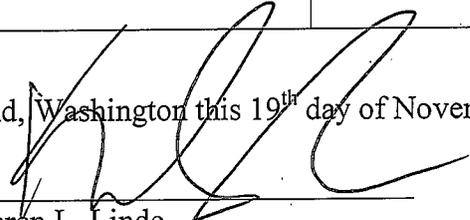
The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following true and correct:

That on November 19, 2008, I arranged for service of the Brief of Respondent Bank of America, N.A., to the court and counsel for the parties to this action as follows:

| | |
|---|---|
| Office of the Clerk Court of Appeals, Division 1 One Union Square 600 University Street Seattle, WA 98101 | <input checked="" type="checkbox"/> Hand Delivered <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail |
| Jerome Shulkin Shulkin Hutton, Inc., P.S. 7525 SE 24 th Street, Suite 330 Mercer Island, WA 98024 | <input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail |
| Jerry R. Kimball Attorney At Law Law Office of Jerry R. Kimball 1200 Fifth Avenue, Suite 2020 Seattle, WA 98101 | <input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail |
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| Cynthia B. Whitaker Attorney at Law 1200 Fifth Avenue, Suite 2020 Seattle, WA 98101-3100 | <input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail |

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DATED AT Mercer Island, Washington this 19th day of November, 2008.



Karen L. Linde