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No. 840440

BY RONALD R. CARPENTER SUPREME COURT  
OF THE STATE OF WASHINGTON

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BANK OF AMERICA, N.A., a national association,

Petitioner,

v.

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

Respondent,

J'AMY LYN OWENS, an unmarried person, SHULKIN, HUTTON,  
INC., P.S. a Washington professional service corporation; and  
EDMUND JOHN WOOD,

Defendants.

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SUPPLEMENTAL BRIEF OF  
RESPONDENT KENNETH TREIGER

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& GOODFRIEND, P.S.

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## I. ISSUES ON REVIEW

1. Whether a dissolution decree containing the real property judgment summary required by RCW 4.64.030(2)(b) that orders the sale of real property and awards half the "net proceeds" to one spouse creates a lien on the property under RCW 4.56.190?

2. Whether the lien created by the dissolution decree has priority over a prejudgment writ of attachment against solely the other spouse's interest in real property that was issued more than seven months after the dissolution decree was entered and after the creditor that obtained the writ had actual notice of the decree?

3. Whether orders requiring one spouse to pay the other spouse sums certain have priority over a prejudgment writ of attachment against solely the property of the debtor spouse that was issued after the orders were both filed in court and recorded in the real property records, giving the unsecured creditor that obtained the writ actual and constructive notice of the orders before the writ was issued?

The answer to each of these questions is "yes." The real property judgment summary in the respondent's dissolution decree gave him a lien as a matter of law against the real property that was entitled to priority over petitioner Bank's later issued prejudgment

writ of attachment. Further, the orders awarding the respondent a percentage interest in proceeds from the court-ordered sale of real property, and awarding him sums certain from his former spouse, had priority over the Bank's prejudgment writ of attachment, obtained after the Bank had both actual and constructive knowledge of respondent's claims in the property.

## **II. STATEMENT OF THE CASE**

The principles of priority of lien that the Court will address in this case may arise in many dissolutions where one but not both spouses have separately incurred unsecured debts to third parties. This Court considers these issues in this case, however, under a unique set of facts:

During their marriage, respondent Kenneth Treiger's wife, J'Amy Lyn Owens (but not Treiger), had executed a Promissory Note and Borrowing Agreement in favor of petitioner Bank of America. (CP 148) When Treiger and Owens' marriage was dissolved on June 19, 2002, the dissolution court expressly reserved property and debt issues until Treiger's pending bankruptcy proceedings were concluded. (CP 84) The Bank filed proofs of claim for Owens' debt in Treiger's bankruptcy action as a "community obligation," but never asserted that Treiger was

separately liable for Owens' debt. (CP 137) Treiger's bankruptcy estate paid over \$95,000 to the Bank towards the \$455,308.78 debt alleged owed by Owens. (CP 137, 200) The community debt and any separate debts of Treiger, including any obligation to the Bank, were discharged when the Treiger bankruptcy was closed on July 24, 2002. (CP 137, 142, 173-74, 200)

After the bankruptcy proceedings concluded, Treiger and Owens returned to King County Superior Court to resolve their marital property issues. (See CP 84) A supplemental dissolution decree dividing the marital estate was entered on May 9, 2006. (CP 15-23) The dissolution court ordered certain real property (the "Maplewood property") sold, and awarded Treiger one-half of the net proceeds from the sale. (CP 16, 19, 20-22, 88-89) The decree expressly defined "net proceeds" as the proceeds from sale less the costs of sale and the outstanding mortgage. (CP 21) The decree also provided that any "lawsuits against the wife [Owens] or liens or encumbrances against the property for wife's debts" would be paid from Owens' share of the proceeds "after the payment to [Treiger] of the amounts due to him." (CP 22) The first page of the supplemental decree described the Maplewood property under the "Real Property Judgment Summary." (CP 15) The supplemental

decree's "Money Judgment Summary" also included a \$27,501.42 judgment against Owens for back child support, an IRS refund, and attorney fees and costs. (CP 15-16)

On July 18, 2006, the Bank commenced a collection action against Owens for the remaining unsecured debt she owed after the payment out of Treiger's bankruptcy estate. (CP 138) On October 27, 2006, Treiger recorded in the real property records several orders entered in the dissolution action awarding him certain sums from Owens, including the supplemental dissolution decree awarding him one-half of the net proceeds from the sale of the Maplewood property. (CP 5-45) On December 15, 2006, the court in the collection action granted the Bank's request for a \$351,413.55 prejudgment writ of attachment against "the defendant J'Amy Owens' interest (including any and all rights to proceeds) in" the Maplewood property. (CP 63-70) This writ for the first time gave the Bank a lien on any of Owens' property for the unsecured loan the Bank had made to Owens years earlier. The court considered but declined the Bank's request to attach Treiger's interest in the Maplewood property and its proceeds as well. (See CP 63-64)

After being on the market for almost a year, the Maplewood property was sold in May 2007. (CP 20, 135) Sale proceeds of

\$1,114,054.83 were wired to a trustee pursuant to the parties' agreement that the remaining proceeds after closing costs and the mortgage were paid would be held pending a determination how the proceeds were to be distributed. (CP 51, 147) On December 14, 2007, the court in the collection action entered a \$593,519.24 judgment in favor of the Bank against Owens (CP 58-61), and Treiger and the Bank both filed motions asking the trial court to determine the priority of their respective liens. (CP 135, 144)

The trial court ordered the following disbursement of the Maplewood proceeds: 1) unpaid fees and costs to the trustee; 2) \$40,000 homestead exemption to Owens; 3) \$72,288.57 to Treiger for four of seven money judgments Treiger recorded before the Bank perfected its prejudgment writ of attachment.<sup>1</sup> 4) \$590,670.77 to the Bank for its judgment against Owens; 5) \$64,639.25 to Treiger for four judgments recorded after the Bank perfected its prejudgment writ of attachment; and 6) thereafter, any "remaining sums . . . to Kenneth Treiger as partial payment to him of his one-half share of the 'net proceeds.'" (CP 301-02)

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<sup>1</sup> The trial court declined to give priority to the three other recorded money judgments, totaling \$102,962, because "[n]one of [those] documents . . . contained a judgment summary or in any way purported to be a judgment." (FF 16, CP 292-93)

As a result of this order of payment, Treiger received far less than one-half of the "net proceeds" as ordered by the dissolution court. Treiger appealed the trial court's order giving the Bank's prejudgment writ of attachment priority over his award of one-half the net proceeds in the Maplewood property and the three money judgments against Owens that he had filed and recorded before the Bank's prejudgment writ of attachment. (CP 283, 297)

Division One reversed in part and affirmed in part, *Bank of America, N.A. v. Owens*, 153 Wn. App. 115, 221 P.3d 917 (2009), holding 1) that the supplemental decree of dissolution was a judgment and created a lien "as a matter of law on one-half of the proceeds of the sale of the Maplewood property," 153 Wn. App. at 125, ¶ 20; 2) that the trial court erred "by failing to grant Treiger's lien priority" over the Bank's prejudgment writ of attachment recorded after the supplemental decree was filed and recorded, 153 Wn. App. at 125, ¶ 20; and 3) that a post-decree order that awarded Treiger \$99,012 also should have been granted priority because it was a "final order" filed and recorded prior to the prejudgment writ of attachment and there was "no question of constructive notice to the Bank." 153 Wn. App. at 127, 128, ¶¶ 25, 27. However, Division One affirmed the trial court's grant of priority

to the Bank's prejudgment writ of attachment over two other orders filed and recorded by Treiger before the writ, holding that they were not "final orders." 153 Wn. App. at 126, ¶ 23.

This Court granted review of both Division One's decision granting priority to the supplemental dissolution decree and the order awarding Treiger \$99,012 (on the Bank's petition) and of Division One's refusal to grant priority to the two money awards that Treiger recorded before the Bank's prejudgment writ of attachment (on Treiger's cross-petition).

### III. SUPPLEMENTAL ARGUMENT

#### **A. A Decree Of Dissolution Awarding A Spouse Proceeds From The Court-Ordered Sale Of Real Property Has Priority Over A Later Prejudgment Writ Of Attachment On The Other Spouse's Interest In The Real Property.**

##### **1. A Real Property Judgment Summary On The Face Of A Decree Of Dissolution Creates A Lien Against The Property Under RCW 4.56.190.**

The supplemental decree of dissolution was a judgment, became a lien against real property upon entry, and had priority over all other later filed judgments or attachments, including petitioner Bank's. RCW 4.56.190 (the real estate of any judgment debtor shall be held and bound to satisfy any judgment of the superior court); RCW 4.56.200 (a judgment filed in the county where the real property is located takes effect from the time of the

entry or filing thereof); RCW 6.01.020 (a judgment is entered when it is delivered to the clerk's office for filing); RCW 6.13.090 ("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"); RCW 61.24.080(3) ("interests in, or liens or claims of liens against the property eliminated by sale under this section shall attach to such surplus in the order of priority that it had attached to the property"); See also Civil Rule 58(a), (b) (judgments are "entered immediately after they are signed by the judge" and "shall be deemed entered for all procedural purposes from the time of deliver to the clerk for filing").

The supplemental dissolution decree contained a real property judgment summary as required by RCW 4.64.030(2)(b), setting forth the tax parcel number to the Maplewood property and Treiger's interest in the property: "the husband is awarded as his separate property the following 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 16) Under these statutes, nothing more was required to perfect Treiger's lien against the Maplewood property, because the supplemental decree contained a real property judgment summary and specifically outlined his interest in the property. See *Hartley v. Liberty Park Associates*, 54 Wn. App. 434, 437, 774 P.2d 40, rev. denied, 113 Wn.2d 1013 (1989) ("decree of dissolution is a judgment and lien that attached to the real property on the date the decree was filed"). Division One correctly held that "the supplemental decree gave Treiger a judgment lien as a matter of law on one-half of the proceeds of the sale of the Maplewood property, after payment of the costs of sale and the outstanding mortgage, as outlined in that decree. Because Treiger's judgment lien was prior in time to the Bank's prejudgment writ of attachment, Treiger's lien was entitled to priority over the Bank's interest." 153 Wn. App. at 125, ¶ 20.

**2. It Would Be Contrary To Public Policy To Deprive A Creditor Spouse Of His Percentage Interest In The Proceeds From The Court-Ordered Sale Of Real Property Simply Because At The Time A Dissolution Decree Was Entered No Specific Dollar Amount Could Be Awarded.**

Despite the clear language of the statutes governing the priority of judgment liens, petitioner Bank argues that the only way the supplemental dissolution decree could have priority over its

later prejudgment writ of attachment was if the decree awarded Treiger a money judgment for a sum certain. (See *Pétition* 10-13) But a dissolution decree awarding a percentage equity interest in real property is a "monetary award," enforceable as a judgment. ***Stokes v. Polley***, 145 Wn.2d 341, 350-51, 37 P.3d 1211 (2001). Further, as a matter of public policy a spouse who is awarded a specific percentage from the proceeds of the sale of real property should be treated no differently, and no less well, than a spouse who is awarded a sum certain from the sale of real property.

At the conclusion of many marriages, real property must be sold and the proceeds divided between the spouses in order to effect an equitable division of the marital estate. This is quite common because, as here, the real property may be the most significant asset of the marital estate and there is no other property available to offset an award of the property to one spouse. In these circumstances, a sum certain often cannot be awarded at the time the decree is entered because the exact amount of the award cannot be determined until the real property is actually sold and the amount of "net proceeds" is established, sometimes years later.

Under the Bank's reasoning, whenever one spouse is awarded the parties' residence in the decree, that spouse's

subsequent separate obligations, even if incurred years after the decree, would have priority over the other spouse's interest in the proceeds of sale. The creditor spouse would in effect be liable for the post-dissolution debts of his former spouse.

Here, a proper real property judgment summary provided notice to all creditors, including petitioner Bank, that Treiger owned one-half of the "net proceeds" from the court-ordered sale of the Maplewood property, defined as the sale proceeds less "costs of sale (real estate commission, excise tax, etc.) [and] mortgage owing to Select Portfolio Servicing (approximately \$469,982)." (CP 21) No public policy supports the Bank's argument that its unsecured loan to Owens, which Treiger had already partially satisfied in the bankruptcy proceedings that discharged his obligation, and that of the community, was entitled to priority simply because the "net proceeds" due to Treiger could not be established with mathematical precision until the Maplewood property was actually sold.

**3. A Creditor That Has Both Actual And Constructive Notice That A Decree Of Dissolution Awards A Spouse An Interest In The "Net Proceeds" Of The Court-Ordered Sale Of Real Property Takes Subject To The Spouse's Interest.**

Even if the supplemental dissolution decree did not create a lien in favor of Treiger as a matter of law, it did create a lien as a

matter of fact here, as there is no dispute that the Bank had actual and constructive knowledge of Treiger's interest in the Maplewood real property when it obtained its prejudgment writ of attachment. The Bank seeks a rule that as a matter of law an award of proceeds from the sale of real property in a dissolution decree can never be a lien against real property, and is merely an "award of future personal property" that can only be perfected at the time of sale. (Petition 8-10) The Bank relies on a Division One case decided over twenty years before this Court held in **Stokes v. Polly**, 145 Wn.2d at 350-51, that an award of a percentage equity interest in real property is a money judgment, to argue that the award of "net proceeds" to Treiger could not be a judgment, **Kshensky v. Pioneer National Title Insurance Co.**, 22 Wn. App. 817, 592 P.2d 667, *rev. denied*, 92 Wn.2d 1025 (1979). This Court should disavow the holding of **Kshensky** to the extent it supports such a proposition.

In **Kshensky**, a dissolution decree awarded the family residence to the wife. The decree provided that the husband would be entitled to a lien on the proceeds of sale in a sum equal to one-half of the total sales price in excess of \$14,250, but did not require the wife to sell the residence. **Kshensky**, 22 Wn. App. at 818.

Twelve years after the divorce, the wife sold the home for \$61,000 cash and left the country. Because the wife could not be located, the husband sued the purchaser, who had no actual knowledge of the lien because the decree had never been recorded. ***Kshensky***, 22 Wn. App. at 818-19.

The Court of Appeals affirmed the trial court's dismissal of the husband's action against the purchaser, holding that the decree "unambiguously" awarded the wife the residence and that the language in the decree did not create a lien on the property. ***Kshensky***, 22 Wn. App. at 820. The court held that the lien was "by its terms limited to the proceeds," that the "proceeds of sale in this context means moneys actually received by the seller," and that "a lien is binding on all persons who acquire property with notice of the lien or who have constructive notice of the lien by reason of its recordation but unless otherwise provided by statute, it is not binding on bona fide purchasers for value and without notice." ***Kshensky***, 22 Wn. App. at 820-21.

Contrary to the Bank's argument, ***Kshensky*** does not stand for the proposition that an award of a percentage of proceeds from the sale of real property can never act as a lien against the real property. But if it did, this Court must disavow its holding in this

case because the Bank had both actual and constructive notice of the lien. Here, unlike in *Kshensky*, 1) the decree had been recorded in the real property records and contained a real property judgment summary as required under RCW 4.64.030(2)(b), alerting the Bank to Treiger's interest in the real property; 2) the proceeds "by its terms" were defined as the proceeds less "costs of sale (real estate commission, excise tax, etc.) [and] mortgage owing to Select Portfolio Servicing (approximately \$469,982)" (CP 21); and 3) the decree specifically provided that any "lawsuits against the wife or liens or encumbrances against the property for wife's debts," including that of the Bank (which had already been paid over a quarter of the loan balance in Treiger's bankruptcy, discharging him and the community from the debt), would be paid from Owens' share of the proceeds. (CP 22)

The Bank in this case had both actual and constructive knowledge of Treiger's interest in the Maplewood property before it obtained its prejudgment writ of attachment against the same property. No statute, no case law, and no public policy supports the Bank's attempt to transform its unsecured loan to Treiger's ex-wife into a lien on real property that had priority over the interests of Treiger, who had been discharged from any further obligation to the

Bank. Treiger's interest in the real property as defined by the supplemental dissolution decree had priority over the Bank's later writ of attachment.

**B. A Creditor That Has Actual And Constructive Knowledge Of Orders Awarding A Spouse Sums Certain In A Dissolution Action Takes Subject To The Recorded Interests.**

The Bank also claims that its prejudgment writ of attachment took priority over orders entered in the dissolution action and recorded in the real property records, of which the Bank indisputably had notice when it obtained its writ, because these orders did not contain formal judgment summaries under RCW 4.64.030(2)(a). The dissolution court's orders requiring Owens to pay sums certain to Treiger were both filed with the clerk and recorded with the auditor in the real property records months in advance of the Bank's prejudgment writ of attachment. This gave these orders priority over the Bank's later prejudgment writ of attachment regardless of their lack of judgment summaries because orders awarding sums certain to a spouse act as judgments with priority over subsequently perfected liens so long as they substantially comply with the notice requirements of RCW 4.64.030.

Citing RCW 4.64.030(3), the Bank claims the recorded orders were not "judgments" entitled to priority because "the clerk

may not enter a judgment, and a judgment does not take effect, until the judgment has a summary in compliance with this section.” But these orders contained all of the pertinent information required in a summary within the body of the orders, which were between two to four pages in length. (See CP 7-8, 38-39, 42-45) The orders identified the amount owed, the name of the person who owed the money, and to whom the money was owed. See RCW 4.64.030(2)(a).

The intent of the statute is to give notice to any persons subsequently acquiring a lien on real property of prior encumbrances. See RCW 4.64.030(1); ***Hartley v. Liberty Park Associates***, 54 Wn. App. at 438 (“filing of the decree provided constructive notice to any subsequent purchaser or mortgagee that the [ ] property was encumbered”); 1 *Washington Practice: Methods of Practice* § 12.5 (4<sup>th</sup> ed. 1997) (“Entry of a judgment imparts constructive notice to a purchaser even if it is not recorded in real property records”). Here, all the orders at issue complied with the substantive purpose of RCW 4.64.030 because they provided the necessary information that is required in a summary and they were recorded in the real property records, providing notice to the Bank of the existence of Treiger’s interests.

"Strict compliance with legislatively mandated procedures [of RCW 4.64.030] is not always required. Washington courts have long upheld actions taken in substantial compliance with statutory requirements, albeit with procedural imperfections." *Kim v. Lee*, 102 Wn. App. 586, 591, 9 P.3d 245 (2000), *reversed on other grounds*, 145 Wn.2d 79, 31 P.3d 665, 43 P.3d 1222 (2001). In *Kim*, the judgment at issue did not contain a summary as described in RCW 4.64.030(2) because the required information was on the second page of the judgment. A lender seeking priority for its lien asserted that the judgment was not effective due to this procedural imperfection. Division One held that the judgment was effective as a lien because it "was in actual compliance with the substantive purpose of RCW 4.64.030 despite the minor procedural imperfection." *Kim*, 102 Wn. App. at 592.

This Court should adopt the *Kim* holding that so long as a judgment substantially complies with the substantive purpose of RCW 4.64.030 to give constructive notice to creditors, it should be effective regardless of any "procedural imperfection." See *also* RCW 65.08.030 (irregular recorded instrument "shall impart the same notice to third persons, from the date of recording, as if the instrument had been executed, acknowledged, and recorded in

accordance with the laws”). Here, the orders that were filed and recorded were valid judgments as they “actually complied with the substantive purpose” of RCW 4.64.030 by giving the Bank notice of the existence of the orders against Owen awarding Treiger money.

Division One correctly held that one order had priority over the Bank’s subsequent prejudgment writ of attachment because it met the intent of the statute as “there is no question of constructive notice to the Bank,” and that because the order was “entered and [ ] recorded, it was effective against the Bank’s subsequent writ.” 153 Wn. App. at 128, 131, ¶¶ 27, 30. However, Division One erred in holding that two other orders, of which the Bank also indisputably had notice and that were also “entered and recorded,” could not act as liens against the real property because they were not “final.” 153 Wn. App. at 126, ¶¶ 22-23. This Court must reject any rule that would prevent a spouse from enforcing an order awarding sums certain as a judgment simply because the order was issued while a dissolution action was still pending.

Under RCW 26.09.060 and RCW 26.09.140, the superior courts in dissolution actions may make temporary orders, including orders for maintenance, support, and attorney fees, that are immediately enforceable. See *Furgason v. Furgason*, 1 Wn. App.

859, 860-61, 465 P.2d 187 (1970) (“an order for temporary support is a final judgment within the meaning of the law, a final judgment is not necessarily the last one in an action”) (*citations omitted*); see also ***Lindsey v. Lindsey***, 54 Wn. App. 834, 776 P.2d 172 (1989). To prevent a spouse who has received a monetary award from enforcing that order as a judgment because the order was entered while the action was still pending would defeat the clear policy behind this statute, potentially leaving innocent spouses unprotected and unable to collect while the other spouse would be free to sell or leverage the real property that may be the only asset against which such awards may be enforced.

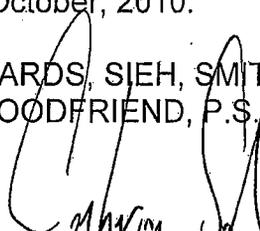
In this case, the orders at issue awarded Treiger sums certain from Owens. Those orders were immediately enforceable against Owens, and because they were recorded their payment should have had priority over a subsequent writ of attachment obtained by another creditor. Recording these orders in the real property records complied with the purpose of the RCW 4.64.030 by giving notice to the Bank of the sums awarded to Treiger, and this Court should hold that the Bank took subject to all the dissolution orders recorded before it obtained its prejudgment writ of attachment.

#### IV. CONCLUSION

This Court should hold that a real property judgment summary in a decree of dissolution that gives a spouse with a percentage interest in the proceeds from the sale of real property creates a lien that was perfected upon its entry and that had priority over any subsequent writ of attachment. This Court should hold that orders awarding sums certain recorded in the real property records where the judgment debtor owns real property create liens against the real property that have priority over any subsequent writ of attachment. This Court should remand for entry of a judgment against the Bank consistent with this priority of liens.

Dated this 1st day of October, 2010.

EDWARDS, SIEH, SMITH  
& GOODFRIEND, P.S.

By:  \_\_\_\_\_

Catherine W. Smith, WSBA No. 9542  
Valerie A. Villacin, WSBA No. 34515

Attorneys for Respondent Kenneth Treiger

**DECLARATION OF SERVICE**

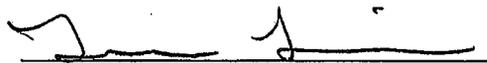
The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on October 1, 2010, I arranged for service of the foregoing Supplemental Brief of Respondent Kenneth Treiger, to the court and the parties to this action as follows:

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**DATED** at Seattle, Washington this 1st day of October, 2010.

  
 Tara D. Friesen

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