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Washington State Supreme Court

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SUPREME COURT NO. 91195-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

AHMAD ABDEL-WAHED,

Appellant,

and

NANCY A. GASS,

Respondent.

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

This is a consolidated case involving post decree relief in an action for Dissolution of Marriage and related post Decree Declaratory Judgment Action. The case arises out of the parties' 2010 action dissolving their marriage to one another, wherein the Decree of Dissolution awarded the marital home to Mr. Abdel-Wahed and awarded an offsetting equal amount of the parties'

financial accounts to Ms. Gass. Thereafter, Mr. Abdel-Wahed failed to transfer the financial accounts to his former wife and instead made substantial withdrawals from those accounts. Ms. Gass obtained contempt judgments against Mr. Abdel-Wahed together with orders on contempt forcing Mr. Abdel-Wahed to vacate the home awarded to him in the Decree of Dissolution and allowing Ms. Gass to sell the property. Mr. Abdel-Wahed then filed a Declaration of Homestead and after the sale claimed the proceeds of sale were protected by the homestead exemption.

Thereafter, Ms. Gass filed a declaratory action to determine the scope of the homestead exemptions in this case. She also filed a motion to modify the Decree to award her the real property and award Mr. Abdel-Wahed the investment accounts he had already looted. The trial court concluded that the homestead exemption could not be used to facilitate unjust enrichment or fraud and imposed a constructive trust on a portion of the proceeds of sale in favor of Ms. Gass. Mr. Abdel-Wahed appealed that decision and the Court of Appeals affirmed.

COUNTER STATEMENT OF CASE

The material facts supporting this motion are as follows:

1. The parties to this action were formerly married to one another. Their marriage was dissolved and a Decree of Dissolution of Marriage was entered on August 24, 2010. *CP, 306-311.*
2. The Decree of Dissolution incorporated by reference the handwritten decision of Arbitrator Harry Slusher, dated May 30, 2010, which divided the parties' property according to a matrix reproduced verbatim below. *CP, 402.*

		Husband	Wife
IRA (W)	16,849		16,849
'06 Chrysler	7,860		7,860
'07 Toyota	18,285	18,285	
Smith Barney	7,641		7,641
Fidelity	107,787		107,787
Home	270,000	270,000	
401(K)	223,200	47,992	175,208
Pre-distribution	2,000		2,000
Pre-distribution	18,932		18,932
TOTALS	\$672,554	\$336,277	\$336,277

3. The Decree also awarded the Ms. Gass spousal maintenance. *CP*, 309.
4. The Mr. Abdel-Wahed failed and refused to transfer the various accounts to Ms. Gass, withdrew funds from the Fidelity and Smith Barney accounts and failed to pay the spousal maintenance ordered in the Decree. Even before entry of the Decree of dissolution, Mr. Abdel-Wahed began making large withdrawals from the Fidelity account in violation of the Court's Temporary Restraining Order entered on March 5, 2010. *CP*, 268. The Arbitrator's Decision was handed down on April 24, 2010 and revised on May 30, 2010. The Decree incorporating the Arbitrator's Decision was entered on August 24, 2010. Mr. Abdel-Wahed withdrew \$31,603.55 from the Fidelity account in April 2010, another \$26,910.53 in June 2010, and a final withdrawal of \$109,099.46 in November 2010. *CP*, 370-372.

By the time Ms. Gass garnished the Fidelity account, the balance was only \$40,199 instead of \$107,787 set forth in the Decree. *CP*, 64-65. These withdrawals from the

Fidelity account are on top of Mr. Abdel-Wahed's regular Microsoft salary of \$118,275.17 in 2009 and \$111,699.73 in 2010. *CP, 102-109*. Mr. Abdel-Wahed's health did not impact his earnings until 2011 during which he still managed to earn almost \$50,000. *CP, 106*.

Mr. Abdel-Wahed's apparent suggestion that his looting of the Fidelity account in early 2010 was necessitated by his failing health is ridiculous. The looting started as soon as the Arbitrator rendered a decision Mr. Abdel-Wahed didn't like so he took matters into his own hands and simply ignored the Court. At the time Mr. Abdel-Wahed began looting the Fidelity account there was in place a Temporary Order entered March 5, 2010 restraining the parties "from transferring, removing, encumbering, concealing or in any way disposing of the property." *CP, 111-116*.

5. In addition, Ms. Gass tried to enforce the Decree through a series of contempt motions, arrest warrants, garnishments, and other court proceedings. The details of the ensuing prolonged and expensive game of hide and seek are not all

relevant to this proceeding and will not be related in detail.

What is relevant is that the Superior Court issued an Order and Judgment of Contempt against Mr. Abdel-Wahed on August 8, 2012, in the amount of \$190,318.25. *CP*, 352.

This amount included \$50,400 in unpaid spousal maintenance, \$96,760.35 in un-transferred accounts, \$27,966.97 in interest through June 1, 2012, \$14,526.00 in attorney's fees, and \$665.03 in costs. *CP*, 352. The Order and Judgment also ordered that the home awarded to Mr. Abdel-Wahed be sold and authorized Ms. Gass to do so under the supervision of the Court. *CP*, 356.

6. On September 14, 2012, Mr. Abdel-Wahed was arrested by the police on a bench warrant for contempt. To effectuate the arrest, the police had to smash through the rear sliding glass door of the subject home after Mr. Abdel-Wahed refused to open the door to police. Though Mr. Abdel-Wahed was released from jail on the same day as he was arrested, it is believed he never reoccupied the premises. Shortly after his release from jail, he cut off the utilities to the premises, stopped mailing mortgage payments, failed to replace the destroyed sliding glass door, and began

removing his personal property from the premises. Ms. Gass took possession of the premises, repaired the door, cleaned the premises, and retained a realtor to market the property. *CP, 120-121.*

7. Two weeks after his arrest and after vacating the premises, Mr. Abdel-Wahed recorded a Declaration of Homestead on September 28, 2012. *CP, 118-119.*
8. On November 28, 2012 the home was sold to a third party resulting in net proceeds in the amount of \$175,074.08. *CP, 93.*
9. On December 18, 2012, pursuant to agreement of counsel, \$50,400 of the sales proceeds were paid to Ms. Gass as payment of the principal sum due for past spousal maintenance under the judgment described in Paragraph 5 above. *CP, 412.*
10. The remainder of the sale proceeds total \$124,510.08. The remainder of the Ms. Gass' unsatisfied contempt judgment is \$139,318.35.

Mr. Abdel-Wahed refused to pay any of the remaining proceeds of the sale to Ms. Gass claiming the unsatisfied remainder of her judgment is protected by the Homestead Act.

This consolidated action was commenced with the result that the trial court imposed a constructive trust on the proceeds of sale and awarded Ms. Gass a judgment for a substantial portion of the proceeds of sale. Mr. Abdel-Wahed appealed and the Court of Appeals affirmed. Mr. Abdel-Wahed now petitions the Supreme Court for review.

ARGUMENT

1. The Court of Appeals Did Not Create a New Non-statutory Exception to the Protections of the Homestead Act. The Court of Appeals did not create a new non-statutory exception to the protection of the Homestead Act, but merely applied the non-statutory exception created by this Court in Webster v. Rodrick fifty years ago. Webster v. Rodrick, 64 Wn. 2d 814 (1964). In that decision, this Court held that under circumstances which would ordinarily entitle a person to claim a “constructive trust in, or an equitable lien against” homestead property, the protections of the Homestead Act “cannot defeat the right to enforce the trust or lien on the ground that it is homestead property and exempt from the claims of creditors.” *Supra at 818.*

The trial court found that “the defendant Mr. Abdel-Wahed intentionally and in bad faith “looted” the investment accounts which were supposed to be transferred to plaintiff Ms. Gass as part of the Decree, and was unjustly enriched by doing so. Mr. Abdel-Wahed has never challenged that finding. The trial court, expressly relying on Webster v. Rodrick, imposed a constructive trust. *CP 201*.

The Court of Appeals characterized the Petitioners failure to transfer the investment accounts as “intentionally culpable conduct.” Court of Appeals Decision at A-9. The Court of Appeals held that “the trial court appropriately relied on Webster as authority to impose the constructive trust.” *Id at A-9*.

As the trial court and the Court of appeals both concluded, Mr. Abdel-Wahed's argument is without merit for two reasons.

First, Mr. Abdel-Wahed was ordered to pay the parties' mortgage on the residence. *CP, 271*. He did make the mortgage payments until shortly after his arrest on the contempt warrant in September, 2012. *CP, 120-121*. He further admits that he took money from the investment

accounts “in order to meet my living expenses.” *CP*, 374. In November, 2012 when the residence was sold to a third party, neither the Closing Statement (*CP*, 364-365) nor the title insurance report (*CP*, 364-365) show any indication that the mortgage was delinquent. Nor has Mr. Abdel-Wahed ever denied he paid the mortgage. He merely argues that there is no evidence that he did so.

In Webster, this Court expressly cited the use of embezzled funds to make mortgage payments as a basis for denying the protections of the Homestead Act. Webster at 819.

Secondly, the parties Decree of Dissolution equally divided the community property. Respondent’s interest in the marital home was awarded to the Mr. Abdel-Wahed and his interest in the parties’ investment accounts was awarded to the Ms. Gass. Mr. Abdel-Wahed “looted” the investment accounts and thus, in effect, attempted “to use the homestead exemption to avoid paying for the home.” Court of Appeals Decision at A-9. The “looted” funds are directly tied to the homestead property.

Mr. Abdel-Wahed also argues that the lower courts' decision in this case creates a "direct conflict with the holding of Division III in Baker v. Baker, 149 Wn. App. 208 (2009). Mr. Abdel-Wahed is wrong for the following reasons:

First, Baker did not involve "looted" or otherwise wrongfully obtained funds belonging to the other spouse. The Baker Court was not asked to consider any claim involving Webster. Baker merely involved a wife seeking to enforce a monetary judgment against her former husband by executing on one of five contiguous parcels of land owned by the former husband.

Second, the only issue before the Court in Baker was whether the one of five contiguous parcels upon which the ex-wife sought to execute was part of the homestead and thus exempt under the Homestead Act because the ex-husband lived in a house located on one of the parcels. Baker at 210. The Court held that "because the use and enjoyment of a residence includes the surrounding

property” all five lots were included within the homestead and thus exempt for execution.

The Baker case is not remotely relevant to the present case. There is no conflict between Baker and the Court of Appeals decision in this case.

The Court of Appeals decision in this case was based on a clear and proper application of this Court's decision in Webster and not on the creation of any newly created exception to the protections of the Homestead Act.

2. The Lower Court Properly Imposed a Constructive Trust.

Mr. Abdel-Wahed contends that the authority granted by the declaratory judgment statute does not include the authority to fashion equitable relief such as a constructive trust. Mr. Abdel-Wahed did not make this argument to the trial court in response to Ms. Gass' motion for summary judgment and he did not identify any rationale which allows him to claim it for the first time on appeal. Court of Appeals Decision at A-4.

The Complaint in the Declaratory Judgment portion of this case asked the Court to award Ms. Gass the proceeds from the sale of the parties' former home and to grant "such

other and further relief as the Court finds just and equitable.” *CP*, 1-3. The Court was asked to exercise its equitable powers and without objection at the time did so. A Court sitting in equity “may fashion broad remedies to do substantial justice” whether or not the remedy ordered was specifically sought. Hough v. Stockbridge, 150 Wn. 2d 234, 236 (2003). Indeed, “when the equitable jurisdiction of the court is involved...whatever relief the facts warrant will be granted.” Marriage of Lanaham, 153 Wn. 2d 553, 560 (2005).

Furthermore, the declaratory judgment sought in this case was a continuation of a divorce action over which the trial court exercised original and continuing equitable jurisdiction. An order was entered in the trial court consolidating the Declaratory Judgment action (King County Case No. 13-2-03411-5 SEA) and the Dissolution of Marriage action (King County Case No. 09-3-07405-8 SEA), in which was then pending Ms. Gass’ motion to modify the Decree of Dissolution asking that the property division be modified to award her the home and award Mr. Abdel-Wahed the investment accounts he had already looted.

CP, 150. When the trial court entered its Order on Cross Motions for Summary Judgment, it entered orders in both the declaratory case and the Dissolution Case. *CP, 199.* Whatever limitations on jurisdiction may exist in a strictly limited declaratory action involving, for example, the interpretation of a contract, those limitations do not apply in this consolidated case involving continuing jurisdiction of an equitable dissolution proceeding and a related declaratory action specifically seeking equitable relief which arises out of the dissolution action.

In Marriage of Langham, 153 Wn. 2d 553 (2005) the court dealt with a post decree claim that the former husband violated the property division in the decree by converting certain stock options. The husband argued that a claim of conversion was a separate tort action at law that could not be decided in a motion made in the dissolution case. In ruling in favor of the wife, the court reasoned as follows:

Having before it at the outset a cause cognizable in equity, the court retains jurisdiction over the subject matter and the parties to be affected by its decree for all

purposes—to administer equity among the parties according to law or equity. [Citation omitted]

The superior court unquestionably has authority to enforce property settlements. RCW 26.12.010. It further has the authority to use “any suitable process or mode of proceeding” to settle disputes over which it has jurisdiction... Indeed, “when the equitable jurisdiction of the court is invoked... whatever relief the facts warrant will be granted.” [Citation omitted] Marriage of Langham, *supra* at 560.

In the present consolidated case, the trial court had the authority to invoke a constructive trust as a necessary measure of settling the dispute over the funds “looted” by Mr. Abdel-Wahed in a blatant disregard of the court’s decree of dissolution. The court further correctly relied on Webster in applying the equitable protections of the constructive trust to the proceeds from the sale of the parties’ former marital home.

3. The Petition for Review Fails to Meet the Criteria for Review Under RAP 13.4(b).

Under RAP 13.4(b), the Supreme Court will accept review only if at least one of four listed criteria are met. None of the four criteria for review have been met in this case.

The decision of the Court of appeals is not in conflict with the Supreme Court's decision in Webster but merely applies it to the facts of this case.

The decision of the Court of Appeals in this case is not in conflict with Division III's decision in Baker as that case did not consider Webster or any exemptions to the Homestead Act.

The present case raises no significant questions of law under either the State or Federal Constitutions.

The petition does not involve any issue of substantial public interest. Indeed, the Court of Appeals Decision is unpublished. Mr. Abdel-Wahed did not timely file a motion requesting publication of the Court of Appeals Decision under RAP 12.3(e). Furthermore, without publication, the

Court of Appeals' unpublished opinion in this case cannot be cited as authority in further cases. GR 14.1(a). Under these circumstances, there can be no "substantial public interest" in this case.

4. The question of attorney's fees awarded by the court of appeals will not be addressed as that Issue should be/or has been directed to that Court.
5. Ms. Gass does request attorney's fees incurred in replying to the Petition for Review under RCW 26.09.140 as this case is a continuation of the original dissolution action.

Seals v. Seals, 22 Wn. App. 652, 657 (1979)

CONCLUSION

The courts below did not create a new non-statutory exemption to the homestead but merely applied such an exemption first articulated by this Court in Webster 50 years ago.

The courts below had the authority and jurisdiction in this consolidated case to impose a constructive trust as an appropriate remedy to settle the dispute between the parties arising from Mr. Abdel-Wahed's looting of the investment accounts awarded to Ms. Gass.

Mr. Abdel-Wahed's Petition for Review fails to meet any of the four criteria for discretionary review set forth under RAP 13.4(b) and should thus be denied.

Ms. Gass should be awarded her costs, including reasonable attorney's fees, incurred in answering this Petition for Review.

Respectfully submitted this 23rd day of June, 2015.



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Attorney for Respondent

CERTIFICATION OF SERVICE

I certify that on the 23rd day of Jan, 2015, I mailed a copy of the foregoing Answer to Petition for Review to the attorney for the Appellant, by first class mail, postage prepaid to the following address:

C. Nelson Berry III
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Dear Clerk:

Please find attached an Answer to petition for Review along with the attached Certification of Service to filing in case number 91195-9.

Case Name: Ahmad Abdel-Wahed, Appellant and Nancy A. Gass, Respondent
Case No: 91195-9
Respondent's Attorney: O.W. Hollowell
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If I can provide further information, please do not hesitate to contact me.

Thank you for your kind assistance,
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