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COURT OF APPEALS NO. 71007-9-I

KING COUNTY SUPERIOR COURT NOS. 09-3-07405-8 SEA
13-2-03411-5 SEA

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

AHMAD ABDEL-WAHED,

Appellant,

and

NANCY A. GASS,

Respondent.

OPENING BRIEF OF RESPONDENT

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STATE OF WASHINGTON
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TABLE OF CONTENTS

Table of Authorities.....	1
Introduction.....	4
Counter Statement of Case.....	5
Argument.....	10
1. The Lower Court Did Not Lack Jurisdiction to Impose a Constructive Trust.....	10
2. The Existence of a “Lien” is not a Predicate To Imposing a Constructive Trust.....	12
3. The Lower Court Correctly Refused to Apply The Homestead Exemption Given the Connection Between the Wrongfully Obtained Funds and Property Claimed as Exempt.....	15
4. Appellant Misstates the Law Regarding Execution Against a Husband’s Homestead.....	17
5. The Respondent is Entitled to Attorney’s Fees On Appeal.....	18
Conclusion.....	19
Certificate of Service.....	20

TABLE OF AUTHORITIES

Cases

State Cases

<i>Baker v. Baker</i> , 149 Wash. App. 208.....	17
<i>Beatty v. Guggenheim Exploration Co.</i> ,	

122 N.E. 378, 381 (N.Y. 1919)	12
<i>Christensen v. Christgard, Inc.</i> , 35 Wash. App. 626, 629... (1983).....	17, 18
<i>Consulting Overseas Management, Ltd. V. Shtikel</i> , 105 Wn. App. 80, 86 (2001), review denied 145 Wn. 2d 1003 (2001).....	13
<i>Hough v. Stockbridge</i> , 150 Wn. 2d 234, 236 (2003)	12
<i>In re The Catholic Bishop of Spokane</i> , 329, B.R. 304, 328 (E.D. Wash. 2005).....	13
<i>Marriage of Lanaham</i> , 153 Wn. 2d 553, 560 (2005)	12
<i>Meinhard v. Salmon</i> , 164 N.E. 545, 548 (N.Y. 1928)	13
<i>Scymanski v. Default</i> , 80 Wn. 2d 77, 89 (1971).....	13
<i>Webster v. Rodrick</i> , 64 Wn. 2 nd 814 (1964).....	13, 14, 16

Statutes

RCW 6.13.....	11
RCW 7.24.010.....	11
RCW 7.24.120.....	11
RCW 26.09.140.....	18

Court Rules

CR8(a)	10, 11
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INTRODUCTION

This case is an appeal by defendant, Mr. Abdel-Wahed, of the trial court's decision on Cross-Motions for Summary Judgment in a Declaratory Judgment action. The declaratory action 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 were protected by the homestead exemption.

Thereafter, Ms. Gass filed this declaratory action to determine the scope of the homestead exemptions in this case. 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 appeals that decision.

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

The matrix set forth on page 1 of the Opening Brief of Appellant is the initial arbitrator's matrix dated 4/24/10 which was subsequently modified on 5/30/10 and is show above. On page 3, footnote 1 of the Opening Brief, Appellant also misstates the Decree of Dissolution by claiming "each party was awarded \$107,787 from that [Fidelity] account." This clearly misstates the Decree which awarded the entire account to Ms. Gass.

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. Soon after entry of the Decree of dissolution, Mr. Abdel-Wahed began making large withdrawals from the Fidelity account awarded to Ms. Gass. 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. The 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 was 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 September 2011, Ms. Gass garnished the Fidelity account at which time the balance had been reduced by Mr. Abdel-Wahed to \$40,199. *CP*, 64-65.
6. In June 2011, Ms. Gass obtained a Qualified Domestic Relations Order by default to obtain the 401(K) fund awarded to her. *CP*, 67-71.
7. 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.*

8. 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.*
9. 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.*

10. 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.
11. 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 7 above. *CP, 412.*
12. 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 refuses 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.

ARGUMENT

1. The Lower Court Did Not Lack Jurisdiction to Impose a Constructive Trust. Mr. Abdel-Wahed argues that Ms. Gass' Complaint did not allege "unjust enrichment" and therefore the Court lacked jurisdiction to grant such relief.
Washington is a "notice pleading" state and as such a complaint is sufficient if it contains "(1) a short and plain

statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled.” *CR 8(a)*.

The complaint in the present case briefly related the facts of the case as stated above and that “controversies exist between the parties over the interpretation and application of case law under the homestead statutes. RCW 6.13 et. seq. *CP, 1-3*. The Complaint 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*.

Under the Declaratory Judgment statute, the Court has “the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.” RCW 7.24.010 (Emphasis added). Furthermore, the Declaratory Judgment statute “is to be liberally construed and administered.” RCW 7.24.120. Thus, even if a pleading is technically defective under applicable court rules, by having sought declaratory relief the statute empowers the court to grant litigants whatever relief it deems appropriate “whether or not” the relief granted was or could have been claimed.

Finally, 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 invoked...whatever relief the facts warrant will be granted.” Marriage of Lanaham, 153 Wn. 2d 553, 560 (2005).

The Complaint in the recent case prayed for whatever relief “the Court finds just and equitable.” CP, 3. The Court had full power as articulated by the Supreme Court to impose a constructive trust to prevent unjust enrichment in this case.

2. The Existence of a “Lien” is not a Predicate to Imposing a Constructive Trust. The applicability of the equitable remedy of constructive trust is not dependent on the existence of a lien.

Beginning with first, Principals, as articulated by Justice Cardozo, a “constructive trust is the formula through which the conscience of equity finds expression.” Beatty v. Guggenheim Exploration Co., 122 NE. 378, 381 (N.Y. 1919). In a later case he defined a constructive trust as

“the remedial device through which preference of self is made subordinate to loyalty to others.” Meinhard v. Salmon, 164 N.E. 545, 548 (N.Y. 1928). These first principles have been incorporated into Washington law and are summarized as follows:

“A constructive trust is an equitable remedy that compels restoration, where one through actual fraud, abuse of confidence reposed and accepted or through other questionable means gains something for himself which, in equity and good conscience, he should not be permitted to hold.” Consulting Overseas Management, Ltd. v. Shtikel, 105 Wn. App. 80, 86 (2001), review denied 145 Wn. 2d 1003 (2001). “[T]he primary purpose of a constructive trust is to prevent unjust enrichment.” *Id.* at 87; Scymanski v. Default, 80 Wn. 2d 77, 89 (1971); In re The Catholic Bishop of Spokane, 329 B.R. 304, 328 (E.D. Wash. 2005).

The remedy of constructive trust has been applied to deny the protection of the homestead exemption to a homeowner liable for embezzlement. Webster v. Rodrick, 64 Wn. 2d 814 (1964). The Webster court stated:

“The homestead exemption must be used as a shield to protect the homesteader and his dependents in the enjoyment of a domicile. We find no decision in this jurisdiction where the Court permitted a judgment debtor to use the statutes as a sword to protect a theft.” Id at 816.

“It is well settled that one who has purchased real property with funds of another, under circumstances which ordinarily would entitle such other person to enforce a constructive trust in, or an equitable lien against the property, cannot defeat the right to enforce such trust or lien on the grounds that it is a homestead property and exempt from the claims of creditors.”

“The homestead exemption statute cannot be used as an instrument of fraud and imposition.” Id at 818 (emphasis added).

Mr. Abdel-Wahed’s argument in his Opening Brief that “No Judgment Lien Ever Attached to the Appellant’s Homestead Property” is puzzling since the trial court’s decision on summary judgment was based on unjust enrichment and not on any theory of implied, equitable, constructive or express liens.

3. The Lower Court Correctly Refused to Apply the Homestead Exemption Given the Connection Between the Wrongfully Obtained Funds and the Property Claimed as Exempt. Mr. Abdel-Wahed argues in his Opening Brief that the funds he wrongfully obtained were not used to purchase the homestead property and that as a result the lower court had no authority to disregard his homestead exemption. Appellants Opening Brief at 12-13. Mr. Abdel-Wahed is mistaken. There is a clear connection between the investment accounts he looted and the property he claims as a homestead.

The parties' Decree of Dissolution imposed an equal exchange of property between the parties. As a result of the Decree, Mr. Abdel-Wahed acquired Ms. Gass' one-half community interest in the parties' homestead and as compensation she was awarded Mr. Abdel-Wahed's one-half community interest in the parties' investment accounts. But Mr. Abdel-Wahed frustrated this fair and equitable exchange by looting the investment accounts. He now claims the benefit of the Decree as the sole owner of the homestead but ignores the blatant fact that by having looted

the investment accounts, the consideration he was ordered to give for his sole ownership was never paid in full. The nexus between his wrongful conduct and his acquisition of sole ownership of the homestead cannot be any more clear and direct.

We also find a nexus between the property claimed as an exempt homestead and the wrongfully obtained funds in Mr. Abdel-Wahed's admission that he used those looted funds to pay the mortgage on the homestead. Appellants Opening Brief at 2-3. Mr. Abdel-Wahed states he was ill and unable to work and could not "meet his living expenses" and was thus "compelled" to loot the investment funds awarded to Ms. Gass. *Id.* At 2-3. This is precisely the type of nexus between embezzled funds and homestead property that the Court in *Webster v. Roderick*, *supra*, found sufficient to deny application of the homestead exemption.

The lower Court's decision to impose a constructive trust to prevent Mr. Abdel-Wahed from being unjustly enriched by his wrongful conduct was fully warranted by the facts of this case and the law of this state and is in keeping with Justice Cardozo's admonition that a constructive trust is "the

formula through which the conscience of equality finds expression.” Supra.

4. Appellant Misstates the Law Regarding Execution Against a Husband’s Homestead. In his Opening Brief, appellant argues that:

“Generally, a judgment in favor of the wife obtained in a dissolution proceeding cannot be executed against the husband’s homestead, Baker v. Baker, 149 Wash. App. 208...even if the husband’s conduct may be described as ‘wrongful’. Christensen v. Christgard, Inc. 35 Wash. App. 626, 629...(1983).”

In Baker, the Court made clear that “the sole issue on appeal is whether “two contiguous parcels of land can be a single homestead under the statute. Id at 210. Nothing in the Court’s opinion can fairly be construed as disfavoring execution of judgments on a former husband’s homestead.

Equally without merit, is Mr. Abdel-Wahed’s offering of Christensen v. Christgard, Inc. as authority for the assertion that a former husband’s homestead is exempt from a former wife’s execution of judgment even if the husband’s conduct

is wrongful. The parties in Christensen were never married to one another. Furthermore, the Court of Appeals affirmed the trial court's decision denying the protection of the Homestead exemption because the judgment was based on conduct that "was unlawful and amounts to fraud." *Id* at 627. Christensen clearly stands as authority for the rule that theft, fraud, embezzlement, and other serious misconduct prevents the wrongdoer from claiming the protection of the Homestead exemption. Mr. Abdel-Wahed's wrongful conduct, whether characterized as fraud, theft, embezzlement or looting, is precisely the type of conduct which the Christensen court choose not to protect. This court should do likewise because to do so is consistent with this court's prior decisions and is necessary to safeguard the public policy of effectuating a fair and equitable division of property in a dissolution of marriage proceeding.

5. The Respondent Is Entitled to Attorney's Fees On Appeal.

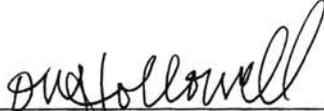
This appeal is the mere continuation of a long, complex, and difficult series of proceedings to enforce, effectuate, and defend the Decree of Dissolution entered between the

parties. Awarding attorney's fees in family law proceedings is authorized under RCW 26.09.140 and should be awarded to Respondent in this case.

CONCLUSION

For each of the reasons set forth above, the ruling of the lower court should be affirmed and the Respondent should be awarded her attorney's fees on appeal.

Respectfully submitted this 20th day of Feb, 2014.



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CERTIFICATION OF SERVICE

I certify that on the 20th day of Feb, 2014, I mailed a copy of the foregoing Opening Brief of Respondent to the attorney for the Appellant, by first class mail, postage prepaid to the following address:

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