

No. 75010-1-I

COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION ONE

ANDREW CLAYTON,

Respondent,

v.

MARY KAY WILSON,

Appellant

ON APPEAL FROM
KING COUNTY SUPERIOR COURT
No. 04-2-14443-4 SEA

APPELLANT'S REPLY BRIEF

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I. Standard of Review.

The parties agree the homestead issue in this case is a matter of statutory review and review is *de novo*. See Respondent's Brief at 10-11; *Baker v. Baker*, 149 Wn. App. 208, 210-211, 202 P.3d 983 (2009).

II. Property Surrounding a Person's Residence is Homestead.

In cases such as this case, where a dwelling place is at issue, RCW 6.13.010 clearly and unambiguously states "the homestead consists of the dwelling house or the mobile home in which the owner resides or intends to reside, with appurtenant buildings, *and* the land on which the same are situated *and by which the same are surrounded.*" (emphasis added). It is clear the Legislature used the conjunction "and," which means each phrase that follows the word "and" is protected as homestead. *HJS Dev., Inc. v. Pierce Cty. ex rel. Dep't of Planning & Land Servs.*, 148 Wn.2d 451, 474, n.94, 61 P.3d 1141, 1152 (2003). This means that property that surrounds a person's dwelling is homestead.

III. Tracts That are Contiguous to a Dwelling Surround the Dwelling and are Protected Homestead.

The issue in this case is whether the contiguous tracts to Mary Kay Wilson's dwelling are protected homestead. RCW 6.13.010 has been so construed. *Baker*, 149 Wn. App. at 211-212.

Respondent tries to discount *Baker*, but it is on point and controlling. Respondent incorrectly argues that *Baker* "is not the sweeping mandate that Mrs. Wilson would like it to be." But, it really is. *Baker* defined the "true issue" as "whether contiguous parcels would be characterized as 'land ... by which the same are surrounded.'" *Baker*, 149 Wn. App. at 211. Then the *Baker* court ruled that the contiguous parcels were land that surrounded the dwelling and was protected homestead. *Baker*, 149 Wn. App. at 212 ("the parcels that surround Mr. Baker's residence are exempt under Washington's homestead act.")

The other cases cited by Respondent are equally flawed. First, Respondent cites *Burch v. Monroe*, 67 Wn. App. 61, 64, 834 P.2d 33, 34 (1992), but does so in an incomplete and misleading manner. The principle Respondent cites is that the "purpose of homestead statutes is to ensure 'shelter for families' and protect property in the 'interest of humanity.'" Respondent then ends the

phrase with a period. But, that is not the end of the quote from the case. The entire quote reads:

In general, homestead statutes are enacted as a matter of public policy “in the interest of humanity *and thus are favored in the law and are accorded a liberal construction.*” (Internal Citations Omitted). Their intent is to ensure shelter for families, *not to protect the rights of creditors.* (Citation Omitted).

Burch v. Monroe, 67 Wn. App. 61, 64, 834 P.2d 33, 34 (1992) (emphasis added)

The takeaway that Respondent tried to conceal was that the homestead statutes are liberally construed in favor of the debtor and not to protect creditors. “In fact, they are in derogation of [creditor’s] rights.” *First Nat. Bank of Everett v. Tiffany*, 40 Wn.2d 193, 202, 242 P.2d 169, 173–74 (1952).

Second, Respondent cites *Morse v. Morris*, 57 Wash. 43, 106 P. 468 (1910) that discussed “appurtenant buildings.” The homestead statute has changed since 1910. In 1910, the homestead statutes protected “the dwelling house, in which the claimant resides, and the land on which the same is situated,” Pierce’s Code, § 5456 (Ballinger’s Ann. Codes & St. § 5214). It further required the entire homestead “must be actually intended and used for a home for the claimants, and shall not be devoted exclusively to any other purposes.” Pierce’s Code, § 5479

(Ballinger's Ann. Codes & St. § 5237). See *Morse v. Morris*, 57 Wash. at 44. There was no language that protected property that “surrounded” the dwelling and the legislature has since eliminated the requirement that the entire premises be exclusively used as a home.

Finally, Respondent cites *In re Murphy's Estate*, 46 Wash. 574, 90 P. 916 (1907) for the proposition that the property in that case was a single tract purchased for a home. But that is not entirely correct. One of the buildings on the multiple tracts involved in *Murphy* was rented to another, and that building was separated from the *Murphy* dwelling by a partition fence. *In re Murphy's Estate*, 46 Wash. at 577. That is similar to this case. Here, there are four tracts that were acquired prior to any tort occurring or any judgment being entered. One tract is Mary Kay Wilson's dwelling. A second contiguous tract is vacant land. A third contiguous tract has a vacant house on it that provided shelter for Mary Kay Wilson's mother (a family purpose). The fourth contiguous tract has another vacant building on it that was once rented by the Wilsons. There is nothing in these facts to remove these four tracts from the homestead definition.

IV. Respondent Still has a Remedy.

Respondent is not without a remedy. First, “our legislature set a \$125,000 limit to avoid abuse of the homestead exemption.” *Baker*, 149 Wash. App. at 212. “Value of homestead property in excess of the \$125,000 exemption may be reached by a special execution procedure...” 28 Wash. Prac., Creditors' Remedies - Debtors' Relief § 7.21. (emphasis added.) The special execution procedure is found in Ch. 6.13 RCW, but this must be used when the property is homestead property.

Once a creditor invokes the special execution procedure, then a court, but not the creditor, can segregate a homestead parcel after an appraisal is performed by a qualified appraiser.

RCW 6.13.150 provides:

If, *from the report*, it appears to the court that the value of the homestead, less liens and encumbrances senior to the judgment being executed upon and not including the judgment being executed upon, exceeds the homestead exemption and the property can be divided *without material injury* and without violation of any governmental restriction, *the court may*, by an order, direct the appraiser to set off to the owner so much of the land, including the residence, as will amount in net value to the homestead exemption, and the execution may be enforced against the remainder of the land. (emphasis added)

This statutory right to segregate a homestead parcel from multiple parcels is reserved for courts, not creditors. It also

requires an appraiser's report as a prerequisite to segregation. Here, the creditor is trying to usurp the courts' exclusive function and segregate a tract without getting the required qualified appraiser's report. There was no evidence or findings as to the value of each tract or the amount of senior debt encumbering each tract. There is no evidence that Mary Kay Wilson is getting the \$125,000 exemption she is entitled to.

It is important to decide this issue before any sale because the judgment creditor and the judgment debtor should know what is going to happen when bids are solicited. The judgment creditor, who may bid in his judgment, would need to know whether he needs to cash out Mary Kay Wilson's \$125,000 homestead before bidding in the judgment. If he thought he could come up with no money and just bid in his judgment, then he would be mistaken. This could result in a void sale. It is equally important for Mary Kay Wilson to know whether she will receive \$125,000 in cash if the property is sold.

V. The Issuance of the Initial Writ of Execution and the Required Affidavit of Due Diligence are Subject to Review.

The December 2015 Writ of Execution and the required Affidavit of Due Diligence are subject to review. Constitutional due process

does not require creditors to give debtors notice of the affidavit of due diligence and the application for or issuance of a writ of execution. The reason is because creditors can challenge the writ of execution's issuance and the due diligence affidavit after the creditor levies on the debtor's property. *Casa del Rey v. Hart*, 31 Wn. App. 532, 537, 643 P.2d 900, 904 (1982).

Moreover, RAP 2.4 allows review of the December 2015 Writ of Execution and the required Affidavit of Due Diligence. "The appellate court will review a trial court order or ruling not designated in the notice, including an appealable order, if (1) the order or ruling prejudicially affects the decision designated in the notice..." RAP 2.4. Appellate courts liberally construe this rule to allow argument on the merits. *Behavioral Scis. Inst. v. Great-W. Life*, 84 Wn. App. 863, 869–70, 930 P.2d 933, 937 (1997). Here, the judge's direction to the clerk to issue the writ of execution based on a faulty and incomplete due diligence affidavit prejudicially affects the subsequent order that allowed a levy and execution sale on Mary Kay Wilson's homestead.

VI. There is Ample Authority for a Court to Impose an Equitable Lien on the Surrounding Property.

An equitable lien is a remedy intended to protect one party's right to reimbursement. *Miracle v. Miracle*, 101 Wn.2d 137, 139, 675 P.2d 1229, 1230 (1984). A right of reimbursement is a right to restitution.

A person confers a benefit upon another if he gives to the other possession of or some other interest in money, land, chattels, or choses in action, performs services beneficial to or at the request of the other, satisfies a debt or a duty of the other, or in any way adds to the other's security or advantage. He confers a benefit not only where he adds to the property of another, but also where he saves the other from expense or loss. The word "benefit," therefore, denotes any form of advantage.

Restatement (First) of Restitution § 1 (1937)

Courts may impose an equitable lien to enforce a right of restitution or reimbursement.

This means the court will provide a remedy that will have the effect of restoring to the plaintiff the benefit conferred. Restitution 'is not aimed at compensating the plaintiff, but at forcing the defendant to disgorge benefits that it would be unjust to let him keep

Jeffrey Davis, Equitable Liens and Constructive Trusts in Bankruptcy: Judicial Values and the Limits of Bankruptcy Distribution Policy, 41 Fla. L. Rev. 1, 3 (1989)

Here, creditors waited for over 10 years to enforce its judgment against Mary Kay Wilson's homestead. In the meantime, she has preserved the property and its value for creditor's benefit. Had she

not paid the taxes, mortgage payments, etc., then the property would not be available for the judgment creditor. These expenses should be restored to Mary Kay Wilson from the sales proceeds.

Respondent did not address Washington's law that limits a community creditor's recovery to the equity in community property that existed when the community dissolved or when the judgment was entered.

VII. An Equitable Lien is not a Legal Encumbrance Prohibited by the Judgment.

An equitable lien is neither a debt nor a right of property, but a *remedy* for a debt. *Ellenburg v. Larson Fruit Co.*, 66 Wn. App. 246, 252, 835 P.2d 225, 229 (1992). Being a remedy, and not an interest in property, it is not the type of encumbrance that the trial court prohibited when it said that Mary Kay Wilson should not encumber the property available for execution. Mary Kay Wilson's right to be reimbursed for making 10 years of real estate tax and mortgage payments necessary to preserve the property for the creditor's execution was not affected by the trial court's Judgment.

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DATED this 6th day of September 2016.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the below written date, I caused delivery of a true copy of this Reply Brief of Appellant to the following:

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Signed this 6th day of Sept., 2016 at Edmonds, Washington.

/s/ Robert J. Cadranell

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