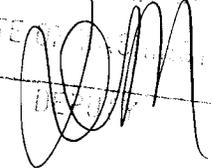


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STATE OF WASHINGTON
BY 

No. 41392-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DENISE H. ROBERTS, aka DENISE WILSON and
JOHN MILLER WILSON,

Appellants

v.

JAMES C. CASTERLINE,
In his capacity as Guardian/Conservator of
THERESA A. ROBERTS

Appellee

APPELLANTS BRIEF

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2. **THE UNIFORM FRAUDULENT TRANSFER ACT (UFTA) DOES NOT APPLY TO HOMESTEAD PROPERTY.**

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ASSIGNMENTS OF ERROR

1. The trial court erred in determining that an equitable lien should be ordered.
2. The trial court erred in determining that the deed from Denise Roberts to John Wilson was a fraudulent conveyance.
3. The trial court erred in determining that the homestead exemption did not apply to the appellants' property.

B. ISSUES PRESENTED

1. Is an equitable lien an appropriate remedy where a trust gives a trustee the discretion to utilize trust assets for the care, support and maintenance of the trustor and the trustee uses trust assets to improve real property to provide housing for the benefit of the trustor?
2. Does the homestead exemption apply to a principle residence where an equitable lien is judicially created after the homestead exemption has attached to the subject property?
3. Is a deed from wife to husband fraudulent under the Uniform Fraudulent Transfer Act (UFTA) where the subject real property is generally exempt under non-bankruptcy law and therefore not considered an asset under the UFTA?

C. STATEMENT OF THE CASE

Appellants purchased property located at 137 Argus Lane in Kelso, Washington for the purpose of building their primary residence. Appellant, Denise Roberts, has resided at the Argus Lane property since April of 2006. Therefore, the subject property is homestead property under Washington law. VRP, Vol. 2: 44.

Denise Roberts was named as the successor trustee under her mother's trust. Trial Exhibits 3 and 4. Due to her mother becoming incapacitated, Denise Roberts became the acting trustee. Dr. Alan Steinberg declared in writing in January 2006 that Theresa Roberts was incapacitated. VRP, Vol. 1: 158-159. She had full authority directly from her mother, and under the trust, to utilize trust assets to provide maintenance, care and support for her mother. Trial Exhibits 3 and 4. Denise Roberts used trust assets to build into her home accommodations for her mother's care. VRP, Vol 2: 32-36; Trial Exhibit 5. A handicapped ready apartment was constructed in the appellants' home. VRP, Vol 1:136. The apartment was constructed as part of a plan to care for Theresa Roberts in Appellant's home in Washington. VRP, Vol 1: 110-111; VRP, Vol. 2: 27-28; VRP, Vol 2: 58-60; VRP, Vol. 2: 81-88; VRP, Vol 1: 116. The cost of the accommodations was considerably less expensive than the institution that Theresa Roberts is confined to under the Oregon conservatorship. VRP, Vol. 2: 55-60; VRP, Vol 1: 116-117.

Theresa Roberts expressed that she did not want to live in a nursing home. VRP, Vol. 1: 110-111; VRP, Vol. 2: 56; VRP, Vol. 2: 82-83.

Theresa Roberts historically helped her children with financing their homes. Theresa made large distributions to her son, John, and her daughter, Marta. VRP, Vol. 1: 32, 68, 102-107.

In August 2006, Denise Roberts deeded her interest in the Argus Lane property to her husband, appellant John Wilson. The deed was done because Denise Roberts had credit issues. The deed was necessary to qualify for a loan. VRP, Vol. 1: 162-165.

Prior to moving Denise Robert's mother, Teresa Roberts, to the apartment constructed as part of the appellants' residence, a conservatorship was started in Oregon at the direction of Denise Roberts' siblings. VRP, Vol. 1: 69-70. The conservator would not allow Teresa Roberts to go to appellants' home in Kelso, Washington to reside. VRP, Vol. 1: 61, 70-71.

The trial court granted the Appellee an equitable lien against the Appellants' property. Further, the trial court granted judgment against the Appellants in the amount of \$153,000 plus costs and statutory attorney fees.

D. ARGUMENT

- 1. DENISE ROBERTS HAD THE DISCRETION TO USE TRUST FUNDS FROM THE TRUST FOR THE CARE, MAINTENANCE AND SUPPORT OF THE TRUSTOR. DENISE ROBERT'S UTILIZATION OF TRUST MONIES WAS REASONABLE UNDER THE CIRCUMSTANCES. THEREFORE, AN EQUITABLE LIEN SHOULD NOT HAVE BEEN IMPOSED BY THE TRIAL COURT.**

On January 9, 2004, Appellant Denise Roberts was named as the Successor Trustee of the Theresa A. Roberts Trust.

Theresa Roberts was declared incapacitated by a letter from a

physician in January 2006. Article II, Section C of the Amended and Restated Revocable Living Trust states as follows:

Distribution of Principal for Support. In addition, if at any time in the discretion of the Trustee the Trustor should be in need of funds for her proper care, dental care, maintenance and support, the Trustee may, in the Trustee's discretion, pay to the Trustor, or apply for her benefit, such sums from the principal of the Trust Estate as the Trustee deems necessary or advisable for such purposes. In making any payments of principal to or for the benefit of the Trustor under this paragraph, the Trustee shall take into consideration, to the extent the Trustee deems advisable, any other resources of the Trustor, outside the Trust Estate, known to the Trustee.

The term "maintenance" is defined in the Fifth Edition of Black's Law Dictionary as follows:

Act of maintaining, keeping up, supporting; livelihood; means of sustenance. *Federal Land Bank of St. Louis v. Miller*, 184 Ark. 415, 42 S.W. 2d 564, 566. The upkeep, or preserving the condition of property to be operated.

Sustenance; support; assistance; aid. The furnishing by one person to another, for his support, of the means of living, or food, clothing, shelter, etc., particularly where the legal relation of the parties is such that one is bound to support the other, as between father and child, or husband and wife. *State ex rel. Blume v. State Board of Education of Montana*, 97 Mont. 371, 34 P.2d 515, 519. The supplying of the necessaries of life. *Federal Land Bank of St. Louis v. Miller*, 184 Ark. 415, 42 S.W. 2d 564, 566. Term "maintenance" means primarily food, clothing and shelter, but it does include such items as reasonable and necessary transportation or automobile expenses, medical and drug expenses, utilities and household expenses. *Hughes v. Hughes*, La.App., 303 So.2d 766, 769. [emphasis added]

We ascertain a settlor's intent and purpose from the four corners of the trust instrument, construing all of its provisions together. *Templeton v. Peoples Nat'l Bank*, 106 Wash.2d 304, 309 (1986).

It becomes a slippery slope when the court dictates the discretionary use of trust assets for the benefit of a trustor. The main reason that many people create trusts is to avoid the courts and probates.

The evidence remains unchallenged that the Appellant, Denise Roberts, acting as successor trustee, utilized trust assets to provide care, support and maintenance for her mother by expending funds to create a handicapped ready apartment in the Appellants' basement. The apartment was completed and was intended to be used for the care and support of the Trustor. As successor trustee, Denise Roberts had the unfettered discretion to use trust funds for the benefit of the Trustor. However, due to the conservator in Oregon, the Trustor was not allowed to reside at the Appellant's residence in Washington.

The trial court made the following findings:

C. Subsequent in time to this agreement, the plans for the home changed requiring the addition of a third level to the home. It was intended that THERESA A. ROBERTS

reside in the lower level of the home as redesigned. This requirement of a third level added to the cost of the home, with Defendants paying \$450,203.55 for the home.

H. Defendant DENISE H. ROBERTS was without legal authority to use the funds for her own benefit or that of her husband. Although the \$153,000 may have been expended with the intention to benefit THERESA A. ROBERTS, such funds did not, in fact, benefit THERESA A. ROBERTS. The home should have been titled with THERESA A. ROBERTS as an owner or some other security should have been given to ensure that THERESA A. ROBERTS' interests were protected. This did not happen. Consequently, DENISE H. ROBERTS breached her fiduciary obligations to her mother.

The trial court erred in finding that the Appellant, Denise Roberts, breached her fiduciary duty in utilizing trust funds for the construction of the handicapped basement apartment for the Trustor. It remains unchallenged that utilization of the basement apartment would have been much less costly than the care facility in Oregon. The care facility in Oregon charged \$6,200.00 per month for the Trustor's residence there. At the time of trial, the total amount far exceeded the trust funds used for the basement apartment in the amount of \$153,000. Utilization of the trust funds was allowed under the Trust for the maintenance of the Trustor. Shelter is within the common definition of maintenance. Therefore, there was no breach of any fiduciary duty. Utilization of the money for the basement apartment was reasonable, both

economically and from the position that the Trustor would be residing with her daughter, a family member. Living in the basement apartment in Washington was consistent with the wishes of Theresa Roberts. She expressed those wishes to the tax preparer, Mr. Johnston, as well as the Appellants in this case. The basement apartment was not used only because the Oregon conservator would not allow the Trustor to use it.

Under the circumstances, the trial court erred in imposing an equitable lien and rendering judgment against the Appellants.

2. THE UNIFORM FRAUDULENT TRANSFER ACT (UFTA) DOES NOT APPLY TO HOMESTEAD PROPERTY.

The Appellee has the burden to show that the property at issue is “an asset” under the Uniform Fraudulent Transfer Act.

Pursuant to RCW 19.40.011, an asset is defined

as follows:

(2) “Asset” means property of a debtor, but the term does not include:

(i) Property to the extent it is encumbered by a valid lien; or

(ii) Property to the extent it is generally exempt under

nonbankruptcy law.

The homestead exemption in the State of Washington is automatic. RCW 6.13.040 . Several courts have addressed the issue of whether homestead property is an asset under the UFTA. The Montana Supreme Court recently stated in part as follows:

The UFTA excludes from its definition of “asset” property that is “generally exempt under nonbankruptcy law.” The term “generally” means “as a rule” or “in disregard of specific instances with regard to an overall picture.” Merriam-Webster Online Dictionary, retrieved July 21, 2009, from <http://www.merriam-webster.com/dictionary>. The majority of states plus the District of Columbia have homestead exemption laws. See e.g. Ala. Code § 6-10-2, Cal. Code Civ. Proc. § 704.720, Iowa Code § 561.16. The existence of homestead exemption provisions in over 45 states quite simply means that homesteads are “generally exempt” from execution or forced sales.

...
Therefore, under the statute as written, we conclude that because Gribble’s homestead would be “generally exempt under nonbankruptcy law”, it is not an “asset” for purposes of the UFTA. [emphasis added]

The foregoing interpretation is consistent with Montana’s tradition of liberally construing exemptions in favor of debtors.

McCone County Federal Credit Union v. Gribble, 216 P.3d 206 (2009).

In *In re Roca* 404 BR 531 (2009) the bankruptcy court held that the Arizona UFTA could not be utilized to avoid a transfer of homestead property because homestead property is not an asset under the UFTA.

In *Fidelity National Title Insurance Co. v. Schroeder*, 101

Ca.Rptr.3d 854, 179 Cal.App.4th 834 (2009), the California Court of

Appeals stated in part as follows:

In order for a fraudulent transfer to occur, among other things, there must be a transfer of an asset as defined in the UFTA. (Civ. Code, § 3439.04; see, e.g., *In re Valente* (1st Cir. 2004) 360 F.3d 256, 260, 264 (Valente) [no transfer of asset for purposes of the UFTA if encumbrances exceed value of property at time of transfer].) In the definitional section of the UFTA, a “transfer” is defined as “every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset.” (Civ. Code, § 3439.01, subd. (i).) “Asset” means “property of a debtor, but the term does not include, the following: (1) Property to the extent it is encumbered by a valid lien. (2) Property to the extent it is generally exempt under non-bankruptcy law.” (Civ. Code, § 3439.01, subd. (a)(1) & (2).)

...
Second, the injury requirement is built into the express terms of the UFTA, which not only require that we exclude prior encumbrances from the definition of “asset” (for the purpose of determining if a fraudulent transfer of an asset occurred), but also property “to the extent it is generally exempt under non-bankruptcy law.” (Civ. Code, § 3439.01, subd. (a)(1) & (2).) We believe the automatic homestead protection exemption and the declared homestead exemption are contained in the chapter of the enforcement of judgment law that specifically addresses exemptions. (See tit. 9, div. 2, ch. 4 of Code Civ. Proc., including §§ 703.010-704.995.) Section 703.10, subdivision (a), states the rule that unless otherwise provided by statute, “[t]he exemptions provided by this chapter or by any other statute apply to all procedures for enforcement of a money judgment.” In section 704.720, pertaining to homestead exemptions (including the automatic homestead exemption), it clearly states that “[a] homestead

is exempt from sale under this division [the enforcement of judgment law] to the extent provided in section 704.800.” (§ 704.720, subd. (a). Thus, the Legislature has plainly categorized the automatic homestead protection as an exemption. We conclude that in the UFTA definition of what constitutes an “asset,” the exclusion therein of “exempt” property was intended to include the exemption applicable to a dwelling under the automatic homestead exemption. Accordingly, the trial court correctly applied the law when it considered the automatic homestead exemption in evaluating Fidelity’s claim under the UFTA. [emphasis added]

In *Duran v. Henderson*, 71 S.W.3d 833 (2002) the Texas

Court of Appeals stated in part as follows:

We need not decide whether the conveyance to the family trust effectively waived Charles Duran’s homestead claim to the property. This is because, even assuming for the purposes of argument that the conveyance was a complete alienation that resulted in Charles Duran losing his homestead claim to the property, the conveyance would still not result in the property being subject to the claims of Charles Duran’s creditors. TUFTA applies to the transfer of “assets,” the definition of which explicitly excludes property that is exempt under non-bankruptcy law. See Tax. Bus. & Com. Code Ann. §§ 24.002(2); 24.002(12); 24.005. Furthermore, it is well settled that a conveyance of exempt property may not be attacked on the ground that it was made in fraud of creditors. *Chandler v. Welborn*, 156 Tex. 312, 294 S.W.2d 801 (1956); *Crow v. First Nat’l Bank of Whitney*, 64 S.W.2d 377, 379 (Tex. Civ. App.-Waco 1933, writ ref’d); *Dulaney v. Lawler*, 282, S.W. 321, 322 (Tex. Civ. App.-Texarkana 1926, no writ). The rationale for this rule is that because the law already has removed the homestead property from the reach of creditors, the conveyance of the property, whether fraudulent or not, does not deprive the creditors of any right they had against the property. *Wood v. Chambers*,

20 Tex. 247, 254 (1857); Radney v. Clear Lake Forest Cmty. Ass'n. Inc., 681 S.W.2d 191, 197 (Tex.App.-Houston [14thDist.] 1984, writ ref'd n.r.e.); Matador Land & Cattle Co. v. Cooper, 87 S.W. 235, 236 (Tex. Civ. App. 1905, no writ). It follows that a debtor may sell exempt property or give it away and pass title as against his creditors, See, e.g., Wills v. Mike, 76 Tex. 82 13 S.W. 58 (1890); Johnson v. Echols, 21 S.W.2d 382, 384 (Tex. Civ. App.-Eastland 1929, writ ref'd); Russell v. Adams, 293 S.W. 264, 270 (Tex. Civ. App.-Dallas 1927), aff'd, 299 S.W. 889 (Tex. Comm'n App. 1927, holding approved). Charles Duran had the power and the right to convey title to his homestead property to the Duran Family Trust free of any claim of his creditors.

...

The constitutional protections afforded homestead rights as well as the explicit provisions of TUFTA make it clear that the conveyance of a homestead may not be set aside as in fraud of creditors. The trial court erred in finding that Charles Duran waived his homestead claim in the 165 acres by conveying the land to the Family Trust. Thus, it was error to set the conveyance aside and subject it to the Hendersons' claim. The trial court also set aside Charles Duran's conveyance of the home and surrounding one acre. The court did so despite the fact that it concluded that Charles Duran had effectively reserved this property as his homestead. This was also error. Consequently, we reverse that portion of the judgment that ordered the two conveyances set aside and the 165 acres sold to satisfy the Hendersons' claim, and we render judgment that the Hendersons take nothing on those claims. As Duran does not challenge the seizure of the monies, that portion of the judgment is affirmed. [emphasis added]

The Washington UFTA is written exactly as it is in the other jurisdictions that have adopted the law. Excluded from the

definition of an asset is property that is generally exempt under non-bankruptcy law. Washington, like most other states, has a homestead exemption under state law. In Washington State, the homestead exemption is automatic. Therefore, the quit claim deed from Denise Roberts to her husband, John Wilson, conveyed an asset protected by the Washington State automatic homestead exemption, currently in the amount of \$125,000. Therefore, under the UFTA the transfer is specifically excluded as an asset from the UFTA.

3. THE APPELLANTS ARE ENTITLED TO THE AUTOMATIC HOMESTEAD EXEMPTION UNDER WASHINGTON LAW.

RCW 6.13.010(a) states as follows:

(1) The homestead consists of real or personal property that the owner uses as a residence. In the case of a dwelling house or mobile home, 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, or improved or unimproved land owned with the intention of placing a house or mobile home thereon and residing thereon. A mobile home may be exempted under this chapter whether or not it is permanently affixed to the underlying land and whether or not the mobile home is placed upon a lot owned by the mobile home owner. Property included in the homestead must be actually intended or used as the principal home for the owner.

RCW 6.13.020 states in relevant part as follows:

If the owner is married or in a state registered domestic partnership, the homestead may consist of the community or jointly owned property of the spouses or the domestic partners or the separate property of either spouse of either domestic partner.

Property occupied as a principal residence by the owner is entitled to an automatic homestead exemption. RCW 6.13.040.

Pursuant to RCW 6.13.080, the homestead exemption is available except for limited exceptions defined by the statute.

RCW 6.13.080 states as follows:

The homestead exemption is not available against an execution or forced sale in satisfaction of judgments obtained:

- (1) On debts secured by mechanic's, laborer's, construction, maritime, automobile repair, materialmen's or vendor's liens arising out of and against the particular property claimed as a homestead;
- (2) On debts secured (a) by security agreements describing as collateral the property that is claimed as a homestead or (b) by mortgages or deeds of trust on the premises that have been executed and acknowledged by both spouses or both domestic partners or by any claimant not married or in a state registered domestic partnership;
- (3) On one spouse's or one domestic partner's or the community debts existing at the time of that spouse's or that domestic partner's bankruptcy filing where (a) bankruptcy is filed by both spouses or both domestic partners within a six-month period, other than in a

joint case or a case in which their assets are jointly administered and (b) the other spouse or other domestic partner exempts property from property of the estate under the bankruptcy exemption provisions of 11 U.S.C. Sec. 522(d);

(4) On debts arising from a lawful court order or decree or administrative order establishing a child support obligation or obligation to pay maintenance;

(5) On debts owing to the state of Washington for recovery of medical assistance correctly paid on behalf of an individual consistent with 42 U.S.C. Sec. 1396p;

(6) On debts secured by a condominium's or homeowner association's lien. In order for an association to be exempt under this provision, the association must have provided a homeowner with notice that non-payment of the association's assessment may result in foreclosure of the association lien and that the homestead protection under this chapter shall not apply. An association has complied with this notice requirement by mailing the notice, by first-class mail, to the address of the owner's lot or unit. The notice required in this subsection shall be given within thirty days from the date the association learns of a new owner, but in all cases the notice must be given prior to the initiation of a foreclosure. The phrase "learns of a new owner" in this subsection means actual knowledge of the identity of a homeowner acquiring title after June 8, 1988, and does not require that an association affirmatively ascertain the identity of a homeowner. Failure to give the notice specified in this subsection affects an association's lien only for debts accrued up to the time an association complies with the notice provision under this subsection; or

(7) On debts owned for taxes collected under chapters 82.08, 82.12, and 82.14 RCW but not remitted to the department of revenue.

The Appellee cited an old Washington case, *Webster v. Rodrick*, 64 Wash.2d 814 (1964) as authority that the homestead exemption is not applicable regarding property to which an equitable lien has been imposed. There are several fatal problems with the Appellee's position. First, the Webster case is limited to cases of fraud or wrongdoing. There are no such findings in this case. Appellant, Denise Roberts, acted in what she believed was in her mother's best interest and consistent with her mother's wishes.

Next, *Webster v. Rodrick* was decided in 1964 prior to the adoption by Washington State of the UFTA and prior to the re-codification and amendments to the homestead exemption statutes. At the time that *Rodrick* was decided, the homestead exemption was codified under RCW 6.12 et seq. The homestead exemption was significantly amended and re-codified under RCW 6.13 et seq. in 1987. The UFTA was also adopted in 1987. When the legislature adopted the UFTA and re-codified and amended the homestead exemption provisions in 1987 the legislature could have included a specific exclusion of the homestead exemption for an

equitable lien. However, the legislature declined to do so. The only exclusions to the homestead exemption are set forth in RCW 6.13.080. There is no exclusion for an equitable lien. By not addressing an equitable lien after re-codification and amendment, the legislature has implicitly overruled any legal effect that *Webster v. Rodrick* may have had.

Finally, the definition of an asset under the UFTA supports the broad application of the homestead exemption under Washington law. Homestead and exemption laws are favored in law and are to be liberally construed. *Sweet v. O'Leary*, 88 Wash.App. 199 (1997). An asset that is "generally" exempt under non-bankruptcy law is excluded from the definition of an asset under the UFTA. Under Washington law, primary residences are "generally exempt under non-bankruptcy law", pursuant to the automatic homestead provisions. Therefore, the legislature intended homestead property to be excluded from the UFTA.

E. CONCLUSION

The trial court erred in imposing an equitable lien and judgment against the Appellants. Further, the trial court erred in finding a fraudulent conveyance. Finally, the trial court erred in

finding that the Homestead Exemption is inapplicable in this case.

Therefore, the trial court's determinations should be reversed.

Dated: May 13, 2011

Respectfully Submitted,

A handwritten signature in black ink, consisting of a large, stylized initial 'D' followed by several loops and a long horizontal stroke extending to the right.

Darrel S. Ammons
WSBA #18223
Attorney for Appellants

CLERK OF COURT
DIVISION II

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STATE OF WASHINGTON
BY [Signature]
CLERK

NO. 41392-2-II

**COURT OF APPEALS, DIVISION II
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DENISE H. ROBERTS, aka
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MILLER WILSON,

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v.

JAMES C. CASTERLINE, in his
capacity as Guardian
/Conservator of THERESA A.
ROBERTS,

Appellee.

DECLARATION OF SERVICE

I, Pamela L. Pierce, declare as follows:

On May 13, 2011, I sent by United States mail, first class
postage prepaid a true and correct copy of the Appellant's Brief, to
the address listed below:

Michael Claxton
Walstead Mertsching
P.O. Box 1549
1700 Hudson St., 3rd Floor
Longview, WA 98632

I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

DATED 5-13-11, at Longview, Washington.

[Signature]
Pamela L. Pierce