

NO. A10-2239

State of Minnesota
In Court of Appeals

Jody Lynn Nelson,

Appellant,

vs.

Douglas Jon Nelson,

Respondent.

RESPONDENT DOUGLAS JON NELSON'S BRIEF

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ARGUMENT

Not unlike countless divorce decrees entered for decade's prior, Appellant was awarded the homestead in the division of marital property, and Respondent was awarded a lien on the parties homestead for his portion of the marital property division.

Contrary to Appellant's assertion in her brief, Respondent's marital lien was not simply for "his share of the equity in the property" or "equal to Respondent's share of equity in the homestead at the time of marriage dissolution." Respondent's lien represented the overall division of marital property, which also included the division of other assets, tax debts, etc. Appellant's efforts to portray the marital lien issue as tied directly to the homestead is an attempt to divert the Court from the core issue at hand by making assertions and conclusions about the nature of the marital property division without supporting evidence from the record.

Appellant's strategy also attempts to turn long standing legal principles upside-down by presenting out of context arguments that twist, turn and confuse the reader, and then Appellant reaches for conclusions that appear to be the opposite of what application of the legal principle would provide – all efforts by Appellant to reach an absurd conclusion that Appellant owes nothing to Respondent. Appellant attempts to argue that:

- 1) a security interest can exist without an underlying debt or obligation to

pay; 2) that the trial court's upholding a 10-year old divorce decree is a modification of the division of property; and 3) that Respondent's sole remedy is pursuant to the mortgage foreclosure statute.

Appellant's obligation to pay her marital property division settlement pursuant to the Dissolution Decree is separate and distinct from Respondent's marital lien, which represented a security interest for the marital property settlement. The trial court did not err in converting Respondent's marital lien on homestead property to a money judgment.

The trial court did not abuse its discretion, misapply controlling law, or improperly modify the decree. Respondent respectfully requests that this Court affirm the trial court's judgment.

I. STANDARD OF REVIEW – ABUSE OF DISCRETION.

Although the trial court is accorded discretion in implementing a dissolution decree, if there is a clearly erroneous conclusion that is against logic and the facts on the record, the court of appeals will find that the trial court abused its discretion. Stromberg v. Stromberg, 397 N.W. 2nd 396, 400 (Minn.Ct. App. 1986).

In this case, the trial court did not make a clearly erroneous conclusion that was against logic and the facts on the record, and therefore the trial court did not abuse its discretion and should be affirmed.

II. THE TRIAL COURT DID NOT ERR IN CONVERTING THE MARITAL LIEN INTO A MONEY JUDGMENT.

The main issue presented is whether a property division contained in a dissolution judgment and decree creates an obligation to pay separate from the security interest that is created when a lien is granted.

The trial court concluded in its order that “the Judgment and Decree in the case at bar does not state that the sole source of repayment of the \$67,725 (plus interest) is the homestead” (Appellant’s Add. at 3). The trial court further concluded, “Thus [Respondent’s] marital lien on the real estate is separate and distinct from [Appellant’s] obligation to pay [Respondent] the amount of debt owed pursuant to the Judgment and Decree” (Appellant’s Add. at 3). The court then ordered, “The marital lien created by the Judgment and Decree...is hereby converted to a money judgment against Appellant... (Appellant’s Add. at 3).

Appellant has failed to show that by enforcing the judgment and decree by converting the marital property division into a money judgment, that the trial court made a clearly erroneous conclusion that is against logic and the facts on the record thereby abusing the trial court’s discretion.

A. By Its Very Nature, The Judgment and Decree Create A Debt Obligation Separate and Distinct From The Marital Lien That Acts As The Security Interest.

The trial court did not abuse its discretion when it awarded Respondent a personal judgment against Appellant for Appellant's failure to pay under the terms of a stipulated dissolution decree. The Dissolution Decree does create a debt obligation separate and distinct from the marital lien. The trial court in the case at bar reasoned as follows:

Minnesota law is clear: a lien is a charge upon land for the payment of a debt or duty.... A lien is in no sense an estate or interest in the land. Application of Gau, 230 Minn. 235, 240, 41 N.W.2d 444, 448 (1950). In State Bank of Pennock v. Schwenk, 395 N.W.2d 371 (Minn. App. 1986), the facts parallel the case at bar. The wife in that case had retained no ownership interest in real property after entry of the parties' dissolution decree. In its place she was awarded \$100,000 secured by a lien on her ex-husband's property. The Court of Appeals found that the lien was not a property interest, but was simply **collateral for a debt** (emphasis added).

(Appellant's Add. at 2-3).

Appellant argues that the Dissolution Decree only provides Respondent with a security interest or lien in the parties' marital homestead – and that it does not create a personal debt obligation by Appellant to Respondent. (Appellant's Brief at 6). Appellant fails to describe how any person or entity can have a security interest if there is nothing to be secured.

The Merriam-Webster dictionary has the following definitions for

“security interest” and “lien:”

Security Interest - the rights that a creditor has in the personal property of a debtor that **secures an obligation**. "security interest." *Merriam-Webster.com*. 2011. <http://www.merriam-webster.com> (5 July 2011)(emphasis added).

Lien - a charge upon real or personal property for the satisfaction of **some debt or duty** ordinarily arising by operation of law. "lien." *Merriam-Webster.com*. 2011. <http://www.merriam-webster.com> (5 July 2011)(emphasis added).

By their own definitions, a security interest must have an underlying obligation and a lien must have some underlying debt or duty. Appellant cites the Bakken and Driscoll cases in support of her position that the dissolution decree only provides Respondent with a security interest and that it does not create a personal debt obligation by Appellant to Respondent (Appellant’s Brief at 8).

According to the language in Bakken, “Marital liens...are not judgment liens; they are a method of distributing property in a dissolution proceeding.” Bakken v. Helgeson, 785 N.W.2d 791, 794 (Minn. Ct. App. 2010). The Bakken case supports Respondent’s position, stating: “A lien is an encumbrance on property **as security for the payment of debt.**” *Id* at 795. This is precisely the point – a marital lien is not a judgment lien, it is security for the payment of a debt – therefore Respondent simply followed procedures described in the Minnesota Practice Series on Family

Law and converted Appellant's underlying obligation into a money judgment to collect on the marital property division.

According to the Minnesota Practice Series on Family Law, when addressing the enforcement of property awards in a dissolution, "[O]ne can proceed with a motion in contempt for non-compliance with the terms of the judgment and decree or order; one can proceed with a motion to specifically enforce the terms of the judgment and decree and ask for appropriate sanctions; or one can ask for judgment against the other party. 14 Minn. Prac., Family Law § 9:44 (3d ed.).

Appellant relies heavily on the Bakken case to support her position that the security interest does not create a debt obligation. However, the Bakken case is highly distinguishable from the holding that Appellant seeks to gain from that case. In Bakken, a June 15, 1983 judgment dissolved the marriage. It provided in relevant part that appellant would "relinquish her interest in" the property and "have no right, title, interest or equity" in it but gave her "a lien against [the property] in the amount of Five thousand and 00/100 (\$5,000.00) payable when the premises are sold." Id at 793. Various portions of the property at issue in Bakken were conveyed numerous times, and in 2008, appellant commenced an action seeking to foreclose her lien. Id at 793-794.

The Respondents in Bakken moved for summary judgment, arguing that appellant's claim was barred by the 10-year statute of limitations for enforcing a judgment or judgment lien. The district court granted summary judgment on this basis and dismissed appellant's claim. The district court concluded that because appellant's lien is a judgment lien, she was required to foreclose or otherwise collect on the lien within ten years of entry of the dissolution judgment, i.e., by June 16, 1993. Id.

The main issue addressed by the Court of Appeals in Bakken was whether appellant's claim was barred by the 10-year statute of limitations for enforcing a judgment or judgment lien or the 15-year statute of limitations for a mortgage foreclosure action. The Court of Appeals disagreed with the trial court's use of the 10-year state of limitations for a judgment lien by stating that: "But marital liens, such as appellant's, are not judgment liens; they are a method of distributing property in a dissolution proceeding. A lien on a homestead is a division of property." Id at 794.

Respondent does not disagree with the Bakken court. Respondent in the case at bar did not try enforce or foreclose on the actual marital lien – Respondent requested relief from the trial court to convert the marital lien into a judgment lien, so that Respondent could choose his method of enforcing the property award – to "foreclose or otherwise collect," as stated by the Bakken court.

In fact, the Bakken case supports Respondent's position that the marital lien is separate and distinct from the debt obligation, stating: A lien is "an encumbrance on property **as security for the payment of debt.**" Id at 795.

As is the case with any other lender, a lien which secures the obligation to pay may be lost – but losing a lien right does not terminate an obligor's obligation to pay. Many major financial institutions are falling victim to losing their junior lien rights, but that does not mean that the junior lien holder cannot pursue the borrower on the underlying obligation to pay – such is the case when a junior lien holder sues a borrower to obtain a money judgment.

Appellant also cites the Driscoll case for her proposition that the Court has previously recognized the distinction between an award of a marital lien and the award of a separate underlying debt. However, the Driscoll case involved the issue of calculation of child support prior to or after subtracting the maintenance award. The language that Appellant cites from the Driscoll case is dicta taken out of context when the Driscoll court addressed the parties homestead (the main holding from Driscoll related to the calculation of child support and maintenance).

The key component that Appellant conveniently leaves out of her Driscoll analysis is that the amount of the husband's marital lien was "equal

to the outstanding balances on the mortgage and two home improvement loans.” Driscoll v. Driscoll, 414 N.W.2d 441, 443 (Minn. Ct. App. 1987).

The reason the marital lien had no value is because it was equal to the amount of debt that was owed against the homestead (the first mortgage and two home improvement loans), and not the amount of equity in the marital asset, so that if the house were ever sold, it protected respondent’s interest “since he was legally obligated on all three loans.” Id. This is the reason the Driscoll court stated that the marital lien “was not an asset.”

The Driscoll court stated:

Finally, appellant argues that the trial court erred by granting respondent a lien against the homestead for the amount of the unpaid mortgages. We find the lien was a proper exercise of trial court discretion. As a no value asset, the court-ordered lien simply protects respondent in the event appellant defaults on any of the loans or sells the homestead as, until all three loans are paid off, **respondent remains a legal obligor on the loans** (emphasis added).

Id at 447.

In the case at bar, Respondent was not awarded a lien based on loans in which he remained a legal obligor, as was the case in Driscoll. Again, Appellant’s questionable use of the Driscoll case by taking court dicta out of context is an example of the strategy being employed by Appellant to divert this court from the true nature of the law in the case at bar. Driscoll’s main holding that reversed and remanded the trial court was

based on the calculation of child support and maintenance, and by no means held that a marital lien in general is not an asset, and it certainly did not implicate the trial court's decision currently before the court as an abuse of discretion for making a conclusion that is clearly erroneous, against logic and the facts on the record.

Finally, based on the legal house of cards that Appellant built using out of context holdings and dicta from Bakken and Driscoll, Appellant asserts that the Decree does not provide an independent personal obligation of Appellant to Respondent because the parties could have agreed to include language in the Decree awarding Respondent a "marital" award separate from the "lien" award. Therefore, based on Appellant's conclusion that there is no separate obligation to pay, the trial court's granting a judgment to Respondent for Appellant's failure to pay her property division settlement "constitutes an improper modification of the original Decree" (Appellant's Brief at 8).

The trial court addressed Appellant's argument about the Decree being silent with respect to how Respondent's lien could be enforced, stating: "[T]he Judgment and Decree in the case at bar does not state that the sole source of repayment of the \$67,725 (plus interest) is the homestead. It could have. It did not." (Appellant's Add. at 3).

Because Appellant's obligation to pay her marital property settlement pursuant to the Dissolution Decree is separate and distinct from Respondent's marital lien, which represented a security interest for the marital property settlement, the trial court did not improperly modify the original Decree. In fact, Respondent would argue that exactly the opposite would be true in the case at bar – allowing Appellant to pay nothing to Respondent because Appellant lost all of the equity in the property would be an improper modification of the original Decree.

Based on the above, the trial court did not err or abuse its discretion in converting Respondent's marital lien on homestead property to a money judgment.

B. Respondent's Marital Lien Should Not Be Treated Solely As A Mortgage.

Appellant argues that the relief sought by Respondent was not contemplated by the parties Dissolution Decree. Appellant argues that because the Decree did not provide an independent debt obligation from Appellant to Respondent, and because the Decree was silent with respect to how Respondent's marital lien could be enforced, the lien must be treated as a mortgage entitling Respondent to the remedy of foreclosure on the homestead.

Again, Appellant relies heavily on the Bakken case to support her position. The language in the Bakken case related to the foreclosure remedy is permissive, not restrictive, and reads as follows: "A marital lien may be foreclosed as a mortgage under [Minnesota foreclosure statutes] when the original judgment does not expressly provide a different means for enforcement. Id (citing Erickson v. Erickson, 452 N.W.2d 253, 256 (Minn.App.1990)). The Bakken court reasoned that the statute of limitations for mortgage foreclosure is 15 years from the maturity of the whole of the debt secured by the mortgage, and in that case, the judgment did not expressly provide a means for enforcement. Therefore, appellant's lien may be foreclosed as a mortgage, for which the statute of limitations is 15 years (emphasis added). As a result, because the debt secured by appellant's marital lien was \$5,000.00 "payable when the premises are sold," appellant's foreclosure action is not time-barred until 15 years from the date the property was sold. Id.

In the end, the Bakken court reversed and remanded the trial court on the basis of the 15-year mortgage foreclosure statute of limitations vs. 10-year judgment enforcement statute of limitations. The Bakken court did not hold that foreclosure was the only method of enforcing a marital lien when the judgment did not expressly provide a means for enforcement; it stated that a marital lien may be foreclosed as a mortgage.

The Court in Erickson also held that a party **may** enforce their lien through a foreclosure action. Erickson v. Erickson, 452 N.W.2d 253, 254 (Minn.App.1990). However, unlike Erickson, in the case at bar Respondent was not awarded a percentage of the net proceeds upon the sale of the property. In the end, the Court in Erickson reasoned “because we find no authority exempting spousal liens from foreclosure, the trial court acted within its discretion by concluding respondent **may** foreclose on her lien.” Id at 256. Appellant cannot rely on the Erickson decision to support her position that the trial court abused its discretion because “the trial court should have characterized the lien as a mortgage” (Appellant’s Brief at 10).

Further, the Erickson Court’s analysis and discussion of the Hanson v. Hanson case further supports Respondent:

In Hanson, the parties could not agree on the division of their personal property, although the dissolution decree granted one-half of the property to each party. To solve the problem and enforce the decree, the trial court awarded the wife title to the property and ordered her to pay one-half of the property’s value to the husband. This court **affirmed** the trial court reasoning enforcement of the decree in this way **only changed the form of the husband’s interest in property from goods to cash**. Further, the trial court’s decision did not affect the parties’ substantive rights, that is, **neither party received more or less than under the original decree**.

Erickson at 255-256 (citing Hanson v. Hanson, 379 N.W.2d 230, 233 (Minn. Ct. App.1985)).

In the case at bar, the trial court converted Respondent's marital lien into a money judgment. Like Hanson, the trial court should be affirmed because the enforcement of the decree only changed the form of the Respondent's marital lien to a judgment, and neither Appellant nor Respondent is receiving more or less than under the original decree.

In further support that the trial court in the case at bar did not abuse its discretion, the Hanson case provides as follows:

[A] court of equity normally possesses inherent authority to enforce its own directives. This necessarily includes the exercise of some discretion in interpreting them; and where enforcement of a property settlement provision is sought in situations where the court in the original decree has directed that one of the parties perform specific acts, it is felt that the court necessarily reserves some latitude to construe the basic intent and purpose of the decreed directive, and may enter an appropriate supplemental order accordingly, despite the fact that the precise language of the original decree may not have spelled out exactly what was later found necessary to be done to achieve those broad purpose.

The trial court has broad discretion in dissolution property divisions, and will not be overturned absent a clear abuse of that discretion.

Hanson v. Hanson, 379 N.W.2d 230, 233 (Minn.Ct.App.1985).

Appellant's questionable use of the Bakken and Erickson cases by taking the court's holdings out of context is an example of the strategy being employed by Appellant to divert this court from the true nature of the law in the case at bar. The Bakken holding that reversed and remanded the trial court was based on the use of the appropriate statute of

limitations, and by no means limited the methods that may be employed to enforce a marital lien. Certainly neither the Bakken nor Erickson cases implicate the trial court's decision currently before the court as an abuse of discretion for making a conclusion that is clearly erroneous, against logic and the facts on the record, and the Hanson case strongly supports the trial court's decision.

From a policy perspective, Respondent does not disagree with the policy reasoning cited by Appellant for the use of marital liens in dissolution decrees. "The postponing of the judgment language for payment of a homestead lien accommodates occupancy of the home by minor children." Saabye v. Saabye, 373 N.W.2d 386,387 (Minn. Ct. App. 1985). Further, it provides "a method of dividing the homestead is chosen which will have the least impact on its occupancy by the children." Kerr v. Kerr, 243 N.W.2d 313, 315 (Minn. 1976).

Somehow, Appellant interprets the Saabye and Kerr cases to hold that "unless otherwise specifically provided in a dissolution decree, a marital lien does not create a separate personal debt obligation from the possessing-spouse to the lien holder" (Appellant's Brief at 6).

If Appellant's reasoning and conclusion about these cases were true, the policy considerations of accommodating occupancy by minor children and having the least impact on the children would be obliterated. In lieu of

an immediate sale of the homestead to get their client's assets out, no practicing divorce attorney would ever counsel their client to accept a marital lien, because that lien, under Appellant's theory, may only be enforced as a mortgage, has no underlying obligation to pay, and may become worthless based on market conditions or the conduct of the other party.

Under Appellant's reasoning, Respondent will be deemed to have lost his entire marital property division settlement amount because the Appellant lost her equity in the homestead. Respondent had no right to sell, maintain, or control the real estate. Respondent had no potential to gain anything more than his property division and lien amount, even with any increase in the equity in the real estate. Under this scenario, Appellant has all of the upside – no need to pay the marital property division upon divorce, no need to ever pay more than was awarded to Respondent in the divorce decree, with full incidents of ownership to do with the property as Appellant wished. Yet Appellant would like to walk away without paying Respondent anything, because there was no equity left in the property at the end of the day. Would the result be the same if Appellant committed waste on the property and diminished its value to the point of having no equity? Would the result be the same if Appellant failed to pay property insurance and the house was lost to a fire? Would the result be the same

if Appellant refinanced and/or placed second and third mortgages on the property to take all of the cash equity out? Again, Respondent had no control over these property issues or Appellant's decisions about when to sell or dealing with the equity, yet Appellant wishes to place the burden of the loss of equity on Respondent.

The fact that Appellant may not have understood or contemplated in 2001 that the money she agreed to pay Respondent in the marital property division would be due and payable to Respondent at some point, whether there is equity in the property or not, cannot be put to blame on Respondent or the trial court as an abuse of discretion. Appellant's divorce attorney should have explained the consequences of a marital property division and marital lien. Unfortunately, those getting divorced prior to the real estate bust who agreed to a property division that included a marital lien instead of a full liquidation of assets may not have considered that they might actually lose (or have cashed out) equity in their property. However, that was not, and is not, the Respondent's risk. At the time of the divorce, Appellant agreed and chose to defer her marital property division payment obligation, and Respondent agreed to defer taking such payment for the betterment of the family and children. In exchange, Appellant agreed through a marital termination agreement and under the judgment and

decree that Respondent would be paid at a future time, and that his right to be paid would be secured by a lien on the property.

CONCLUSION

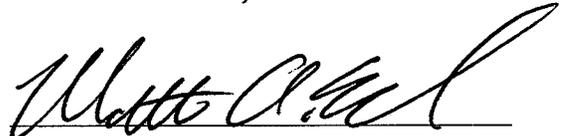
Because Appellant's obligation to pay the marital property division pursuant to the Dissolution Decree is separate and distinct from Respondent's marital lien, the trial court did not err in converting Respondent's marital lien on homestead property to a money judgment.

The trial court did not make a clearly erroneous conclusion that was against logic and the facts on the record, and therefore the trial court did not abuse its discretion and should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Attorney for Respondent hereby certify that this brief complies with the word and line count limitation contained in Minn. R. Civ. App. P. 132.01, subd. 3(a), as follows:

The word processing software used to prepare this brief was Microsoft Word for Mac 2011. There are 4,074 words and 393 lines in this brief, not including the Table of Contents and Table of Authorities.

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