

News From OBA Sections:

## One Step Beyond: Judicial Creation Of A "Judgment Lien" In Divorce Decrees

By Kraettli Q. Epperson

(Editor's Note: OBA Sections have been invited to submit short notes of Section information for publication in the Bar Journal.)

### Statutory Judicial Lien

A consensual lien, such as a mortgage or security agreement, attaches when delivered and is perfected upon filing. However, an *in personam* money judgment becomes both "attached" and "perfected" as a lien upon a judgment debtor's real property only when a certified copy of the money judgment is filed of record in the local county clerk's land records (attached to an affidavit, as of June 1, 1991). 12 O.S. §706; *Long Bell Lumber Co. v. Etter*, 123 Okla. 54, 251 P.2d 997 (1926); Oklahoma Title Examination Standards 12.1. and 12.2. See also: Kraettli Q. Epperson, "Judgment Lien Creation Now Requires A Judgment Affidavit," 59 OBJ 3643 (1988).

However, the question arises: Can you ignore a divorce decree which has not been filed in the local county clerk's land records, but which contains language expressly granting a lien on specifically described real property?

#### One Step Beyond: Lien by Judicial Decree

According to the Oklahoma Supreme Court, and due to recent changes to 43 O.S. §134.C., it is clear that a judge has the authority to create a lien on a specified tract of real property to secure a money judgment given to a spouse in a divorce action. Consequently, a third party with notice of such a judicially created, but unrecorded, lien (*i.e.*, attached, but unperfected) would take their interest subject to this lien.

In *United Oklahoma Bank v. Moss*, 793 P.2d 1359 (Okla. 1990), a husband and wife who jointly owned

some non-homestead real property were granted a divorce (the form of ownership is not clear from the record on appeal). The decree awarded the entire interest in the property to the ex-husband with the express condition that the property was "subject to mortgages and encumbrances of record and further subject to a lien in favor of Peggy L. Moss [the ex-wife]...." *Id.* at 1361. On appeal the Court held:

[B]ecause her decree-conferred lien stands as but a transformation of her prior one-half possessory interest in the entire tract, her decree-conferred lien is *pro tanto* (to the extent of that one-half interest) the functional equivalent of a purchase money mortgage. The lien of a purchase money mortgage 'has priority over all other liens created against the purchaser.'

*Id.* at 1363.

To the extent of her previously owned one-half interest (*i.e.*, pre-divorce), her lien was held senior to a mortgage granted by the husband (prior to the divorce) without her consent which mortgage purported to cover the entire interest.

A recent federal case, *Watkins v. Watkins*, 922 F.2d 1513 (10th Cir. 1991), applied Oklahoma law, and dealt with a divorce decree where each of the spouses had owned a one-half interest in the land before the divorce. The court awarded one spouse title to the entire tract and granted the other spouse a lien on the entire parcel. The divorce decree was not filed of record by the judgment creditor spouse in the local land records before the judgment debtor spouse filed for bankruptcy. The Court overruled the bankruptcy trustee's efforts to avoid the judgment lien. The trustee claimed he took title to the land as a bona fide purchaser without any constructive notice (*i.e.*, record notice) of the unrecorded divorce decree lien. The Court held:

Under Oklahoma law, a purchaser of land takes the property with constructive notice of whatever appears in the conveyances constituting his chain of title....

The trustee in bankruptcy had constructive notice of the wife's security interest, even though she did not perfect her interest by recording it in the county clerk's office. The divorce judgment—a judicial decree—vested undivided title to the entire property in the husband. Before the divorce, the husband owned only a one-half interest. Therefore, ...

a bona fide purchaser at the time of the bankruptcy filing was on constructive notice of any defects in the ex-husband's title that were contained in the divorce decree, including the ex-wife's lien on the property.

*Id.* at 1514-15.

The *Moss* and *Watkins* cases are limited to situations involving two conditions: (1) the decree expressly granted a lien on specifically described property, and (2) the judgment debtor spouse acquired part of the record title to the real property through the divorce decree.

12 O.S. §2004.2 requires that notice of any pending suit affecting real property be recorded in the local land records, and 12 O.S. §181 also requires that judgments affecting real property be recorded in the local land records, before such notice or judgment will constitute constructive notice. However, the *Moss* and *Watkins* cases qualify such recording requirements by holding that a third party has a duty to inquire if the recorded chain of title discloses that a spouse gained their interest in the tract through an unrecorded decree.

It should also be noted that under the new version of 43 O.S. §134.C. (effective September 1, 1991), the court is specifically empowered to grant a lien in a divorce decree to secure a judgment for either support or a division of property.

#### Conclusion

As noted above, it is clear that in a divorce context the court can expressly create an equitable lien on specific real property. It also appears that such a lien, even if unrecorded, will have a priority ahead of other liens attaching subsequently in favor of persons either (1) having actual notice of the existence of the decree and its terms, or (2) having constructive notice from the record that a spouse acquired an interest through an unrecorded instrument. Reasonable inquiry about the unrecorded instrument would then disclose the creation of a lien within the same decree that granted the interest itself.

However, several unanswered corollaries arise:

(1) If one spouse gives the other a deed, usually a quit claim deed, vesting the other spouse with the entire interest, is there still an

obligation to locate and review the decree?

(2) Under the new statute, 43 O.S. §134.C., does a divorce decree create a lien when filed pursuant to 12 O.S. §706, if the decree provides for a payment of money pertaining to a division of property, but fails to specifically provide for a lien?

(3) Under the new statute, 43 O.S. §134.C., how can a court specifically provide in a divorce decree that there is a lien on a spouse's property for an amount of money designated as support where the amount is by its nature indefinite? Is it not a clog on the equity of redemption?



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Consideration of immediate amendment of the Oklahoma Title Standards 12.1 "Judgment Liens" and 12.2 "Lien of Alimony or Support Judgment," to reflect the law of the *Moss* and *Watkins* cases and the revised statute is currently underway by the author of this article. Any suggestions on how to reflect these changes are hereby vigorously solicited.