

20140298

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

OCT 17 2014

Jeanette J. Mattern,	)	Supreme Court Case No.: 2014-0298
	)	
Plaintiff and Appellant,	)	Burleigh County No.: 2011-CV-02627
	)	
vs.	)	
	)	
Frank J. Mattern Estate, by and	)	
through Anne M. Erickson, personal	)	
representative,	)	
	)	
Defendant and Appellee.	)	

Appeal from the JUDGMENT dated August 20, 2014

Burleigh County, North Dakota  
South Central Judicial District  
Honorable Donald L. Jorgensen

---

**BRIEF OF APPELLANT**

---

Clark J. Bormann (ID # 04655)  
Sophie Y. Morgan (ID #06592)  
BORMANN, MYERCHIN,  
MONASKY & ESPESETH, LLP  
P.O. Box 995  
Bismarck, ND 58502-0995  
Telephone: (701) 250-8968  
Email: [cbormann@bmmelaw.com](mailto:cbormann@bmmelaw.com)  
Email: [smorgan@bmmelaw.com](mailto:smorgan@bmmelaw.com)

Attorneys for the Plaintiff-Appellant  
Jeanette J. Mattern

**TABLE OF CONTENTS**

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES..... iii

STATEMENT OF THE ISSUES ..... ¶ I

STATEMENT OF THE CASE..... [¶ 1]

STATEMENT OF THE FACTS ..... [¶ 4]

ARGUMENT ..... [¶ 13]

I. Abuse of Discretion Standard of Review..... [¶ 13]

II. The Trial Court Abused its Discretion in Dividing the Homestead When  
No Creditors Exist..... [¶ 14]

III. The Trial Court Abused its Discretion in Ordering Jeanette to Pay Rent to  
Live on the Homestead..... [¶ 18]

A. The Surviving Spouse Has The Statutory Right To Live On The  
Homestead Without Paying Rent To The Remainder Beneficiaries.  
..... [¶ 18]

B. The trial court erred in signing off on the *Order for Judgment*,  
which contradicted the earlier *Order*..... [¶ 23]

IV. The Trial Court Abused its Discretion by Failing to Award the Surviving  
Spouse the Rents from the Homestead..... [¶ 25]

CONCLUSION ..... [¶ 27]

CERTIFICATE OF SERVICE..... [¶ 28]

**TABLE OF AUTHORITIES**

**Cases**

Calmer v. Calmer,  
15 N.D. 120, 106 N.W.684 (1906).....[¶ 15], [¶ 20]

Cullen v. Sullivan,  
51 N.D. 384, 199 N.W. 760 (1924).....[¶ 20]

Estate of Cashmore,  
2010 ND 159, 787 N.W.2d 261 ..... [¶ 13]

Estate of Kimbrell,  
2005 ND 107, 697 N.W.2d 315 ..... [¶ 25]

Estate of Wicklund,  
2014 ND 64, 844 N.W.2d 565 ..... [¶ 13]

Farstveet v. Rudolph ex rel. Eileen Rudolph Estate,  
2000 ND 189, 630 N.W.2d 24.....[¶ 20]

**Statutes**

N.D.C.C. ch. 30-16 ..... [¶ 22]

N.D.C.C. § 30-16-01 ..... [¶ 20], [¶ 25]

N.D.C.C. § 30-16-02..... [¶ 18]

N.D.C.C. § 30-16-09..... [¶ 15]

N.D.C.C. § 30.1-18-06 ..... [¶ 23]

N.D.C.C. § 47-18-01 ..... [¶ 20]

## **STATEMENT OF THE ISSUES**

- I. Whether the trial court abused its discretion in dividing the homestead when no creditors of the Estate exist.
- II. Whether the trial court abused its discretion in ordering the surviving spouse to pay rent to live on the homestead.
- III. Whether the trial court abused its discretion by failing to award the surviving spouse the rents from the homestead.

## STATEMENT OF THE CASE

[ ¶ 1] This is an appeal against the Estate of Frank J. Mattern, deceased, by Jeanette J. Mattern, surviving spouse of the deceased. The trial court ordered that the homestead should be divided into three apartments, and, to the extent the value of Jeanette's apartment exceeded the \$100,000.00 homestead exemption amount based upon an appraisal of the building as of the date of decedent's death, Jeanette was ordered pay a proportionate amount of rent to the Estate/remainder beneficiaries. The trial court's *Order for Judgment* ordered Jeanette to pay rent of \$729.00, as determined by an appraisal dated June 17, 2014. Jeanette was also ordered to pay rent retroactive to the date of decedent's death.

[ ¶ 2] Jeanette appeals and asserts the trial court abused its discretion in dividing the homestead, ordering Jeanette to pay rent to live in the homestead, and erred as a matter of law in basing the value of the homestead on a June 17, 2014 appraisal, when the decedent died on July 18, 2011.

[ ¶ 3] The trial court's *Order* should be reversed and remanded, and Jeanette should be permitted to live in the homestead – rent free – during her lifetime or until she remarries, and she should be entitled to collect the rents from the adjoining apartments.

## STATEMENT OF THE FACTS

### **Background**

[ ¶ 4] Frank J. Mattern (“Frank”) and Jeanette J. Mattern (“Jeanette”) were married on January 6, 1995. [Trial Transcript 43:3-4, hereinafter “Trial T.”] This was the second marriage for each. Frank had three adult daughters from his prior marriage [Trial T. 5:25-6:6], and Jeanette has one adult son from her prior marriage. Frank died on July 18, 2011. Frank’s daughter, Anne Erickson (“Anne”), is the personal representative of Frank’s Estate. [Trial T. 5:19-24.]

[ ¶ 5] Jeanette has lived in the marital home since the date of marriage; about sixteen and one-half (16½) years as of the date of Frank’s death – almost 20 years to date. [Trial T. 43:1-2.] The marital home has three “units”; two on the main-level and one on the second-floor. [Trial T. 8:2-7.] The two main-level units are rented, and Jeanette occupies the second-floor unit. Jeanette continues to live in the marital home. [Trial T. 42:22-23.]

### **The Probate Case**

[ ¶ 6] Frank’s Will was admitted to informal probate in Burleigh County Case No.: 08-2011-PR-00171. In his Will, Frank only permitted Jeanette to live in the marital home for eighteen (18) months. Jeanette filed and served a timely *Petition by Claimant for Allowance of Claim* requesting: her right to reside on the homestead and collect the rents; exempt property; the family allowance; reimbursement for insurance premiums paid from Frank and Jeanette’s joint checking account, which were refunded to the Estate; and, to the extent that she was not entitled to the

rents, reimbursement for costs expended in maintaining the homestead since Frank's death. (APP 12-13.)

[ ¶ 7] On October 28, 2011, the Estate filed and served a *Notice of Disallowance of Claim*. (APP 15.) In its concurrently filed *Response to Petition by Claimant Jeanette J. Mattern*, the Estate claimed Jeanette verbally waived her rights to the homestead estate and to exempt property, was not entitled to the family allowance, and disputed Jeanette's claim to the insurance premium refunds. (APP 16-19.) The Estate also claimed insufficient probate assets to allow the exempt property and family allowance (APP 17), to which Jeanette responded with a request for information regarding P.O.D. and joint survivorship accounts (APP 20-21).

### **The Underlying Case**

[ ¶ 8] On December 1, 2011, Jeanette timely served Anne, as personal representative of the Estate, with a *Complaint* to enforce Jeanette's claims against the Estate. (APP 5-9.) Anne filed her *Answer*, which was in line with the Estate's *Response to Petition by Claimant Jeanette J. Mattern* filed in the probate case. (APP 22-25.)

[ ¶ 9] Trial was held on January 6, 2014. On April 14, 2014, the trial court issued an *Order* concluding Jeanette did not waive her homestead rights and also ordered:

the personal representative to obtain an individual appraisal of each of the three units in the structure in question as of the date of death of Frank J. Mattern, July 18, 2011. In addition thereto, said appraisal [sic] shall include the fair rental value of the unit occupied by Jeanette J. Mattern. Following this appraisal, Jeanette will be entitled to the value of the unit she currently resides in, proportionately to the value of the other units in the structure, up to \$100,000.

(APP 28 ¶¶ 6-7.)

[ ¶ 10] The parties were unclear regarding the effect of the *Order* on the homestead and the Estate requested a hearing to clarify. A status conference was held on May 29, 2014. On July 2, 2014, Anne filed a proposed *Order for Judgment* (docket No. 69) and an *Appraisal Report* dated June 17, 2014 (APP 37-61).

[ ¶ 11] On July 3, 2014, in response to Anne's proposed order, Jeanette filed an *Objection to Proposed Order for Judgment* because the appraisal was based upon the value of the homestead as of June 17, 2014, i.e., nearly three years after Frank's death, and she again objected to the requirement that she pay rent, both retroactive and in the future, for living in the marital home. (APP 64-66.) The trial court, regardless of the fact that it ordered an appraisal as of the date of Frank's death, signed the proposed *Order for Judgment* that same day. (APP 62-63.)

[ ¶ 12] The trial court issued a *Memorandum* on July 18, 2014, informing the parties that no action would be taken regarding the *Objection* and allowed the parties to move forward with an appeal. (APP 68 ¶ 5.) *Judgment* was entered on August 20, 2014. (APP 69.) Jeanette filed her *Notice of Appeal* on August 21, 2014. (APP 71.)



## ARGUMENT

### **I. Abuse of Discretion Standard of Review.**

[ ¶ 13] “A district court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, or when it misinterprets or misapplies the law.” Estate of Wicklund, 2014 ND 64, ¶ 16, 844 N.W.2d 565 (quoting Estate of Cashmore, 2010 ND 159, ¶ 21, 787 N.W.2d 261).

### **II. The Trial Court Abused its Discretion in Dividing the Homestead When No Creditors Exist.**

[ ¶ 14] The trial court, in ordering separate appraisals for each unit in the homestead, arbitrarily divided the homestead in contradiction to North Dakota law.

[ ¶ 15] The homestead cannot be divided unless: (1) division is necessary to satisfy a judgment on a debt; (2) division will not cause material injury; and (3) the value of the homestead at the time of the decedent's death exceeds the homestead exemption amount. N.D.C.C. § 30-16-09 (excess value of homestead available for debts). Furthermore, “If the homestead cannot be divided without material injury ***the family home must be preserved intact as against the heirs, whose right to inheritance is inferior in degree . . .*** even though the homestead exceeds [the exemption amount] in value.” Calmer v. Calmer, 15 N.D. 120, 106 N.W.684, 688 (1906) (emphasis added) (concluding the homestead estate included the second-floor living quarters *and* the ground floor shop.).

[ ¶ 16] In this case, no judgment or debt exists wherein the homestead would need to be set aside and the excess sold. See Burleigh County Case No. 08-2011-PR-00171. Frank's three daughters merely want to enjoy the benefits of the homestead before Jeannette dies or remarries, and their wishes do not constitute a debt or

judgment against the estate. Furthermore, the homestead is indivisible and cannot be divided without material injury. (APP 34.) The property is one structure, is taxed as one building, the sprinkler system for the entire property is connected to a single water meter, and selling the apartments piecemeal, or separating them for that matter, would not make sense. (APP 35.) The trial court abused its discretion in arbitrarily setting aside half of the building and allowing the decedent's heirs to prematurely claim the remaining half of the structure.

[ ¶ 17] Though the homestead may exceed the exemption amount by an amount yet to be determined by an appraisal of the property as of the date of the decedent's death, no grounds exist for setting aside and dividing the homestead. The heirs simply want the benefits of the real estate before they are entitled to it. The trial court abused its discretion in dividing the homestead.

### **III. The Trial Court Abused its Discretion in Ordering Jeanette to Pay Rent to Live on the Homestead.**

#### **A. The Surviving Spouse Has The Statutory Right To Live On The Homestead Without Paying Rent To The Remainder Beneficiaries.**

[ ¶ 18] The surviving spouse's statutory right to reside on the homestead is outlined in N.D.C.C. § 30-16-02(1):

Upon the death of a person in whom the title to real property constituting a homestead is vested, a homestead estate shall survive, and, until otherwise disposed of according to law, shall be set over to . . . the surviving spouse for life or until the surviving spouse again marries.

[ ¶ 19] The trial court agreed that Jeanette had the right to live in the homestead. (APP 62 ¶ 4.) However, the trial court's determination that Jeanette should pay

the Estate rent to the extent that the homestead exceeded the exemption amount was an abuse of discretion.

[ ¶ 20] “There is a clear distinction between the “homestead” and the “homestead estate.” Cullen v. Sullivan, 51 N.D. 384, 199 N.W. 760, 762 (1924). The homestead is the real estate, and the homestead estate is the surviving family members’ right to live on the homestead – free of creditors’ claims up to \$100,000.00. N.D.C.C. §§ 47-18-01, 30-16-01(1) & 30-16-01(2). The homestead estate is “separate and distinct from, and not affected by, the right to take the real property, subjected to such estate, either as an heir or under a will.” Cullen, 51 N.D. 384, 199 N.W. at 762 (quoting Calmer, 15 N.D. 120, 127, 106 N.W. 684). “[T]he precise intent of the homestead provisions is to place designated homestead property out of the reach of creditors while it is occupied as a home, or as otherwise stated, to secure a debtor and his family essential shelter from creditors.” Farstveet v. Rudolph ex rel. Eileen Rudolph Estate, 2000 ND 189, ¶ 11, 630 N.W.2d 24; *see also* N.D.C.C. § 47-18-01.

[ ¶ 21] In this case, the trial court determined:

“The homestead of any individual, . . . consists of the land upon which the claimant resides . . . and . . . the total [is] not to exceed one hundred thousand dollars in value.” . . . [I]n light of the statutorily imposed limit on the homestead exemption, this Court orders the personal representative to obtain an individual appraisal of each of the three units in the structure in question as of the date of death of Frank J. Mattern, July 18, 2011. In addition thereto, said appraisal [sic] shall include the fair rental value of the unit occupied by Jeanette J. Mattern. Following this appraisal, Jeanette will be entitled to the value of the unit she currently resides in, proportionately to the value of the other units in the structure, up to \$100,000.00.

(APP 28 ¶ 7.)

[ ¶ 22] N.D.C.C. ch. 30-16 discusses dividing the homestead and protecting a portion of it, not to exceed \$100,000.00 in value, for the surviving spouse, with the excess being available for creditors. This chapter only applies to divide a homestead if there are creditors. As discussed above, no creditors exist. The trial court therefore misinterpreted or misapplied the law by limiting Jeanette's homestead estate to \$100,000.00 and ordering her to pay rent for the remainder. The trial court's determination was unreasonable, unsupported by North Dakota law, and created an absurd result. The homestead statutes were designed to protect the decedent's family, which inevitably includes the surviving spouse. The trial court's orders and resulting *Judgment* must therefore be reversed.

**B. The trial court erred in signing off on the Order for Judgment, which contradicted the earlier Order.**

[ ¶ 23] The trial court's April 14, 2014 *Order* required the personal representative to obtain an appraisal "as of the date of death of Frank J. Mattern, July 18, 2011." (APP 28 ¶ 7.) Further, N.D.C.C. § 30.1-18-06(1) requires the personal representative to prepare an inventory listing the decedent's assets and their "fair market value as of the date of the decedent's death."

[ ¶ 24] Anne obtained an appraisal of the home, which she filed with a proposed *Order for Judgment*, but the appraisal determined the value(s) as of June 17, 2014, nearly three years after Frank's death. (APP 38 ("the subject property's respective values, as of June 17, 2014, are concluded at . . .").) The trial court signed off on Anne's proposed *Order for Judgment*, which relied upon the June 17, 2014 appraisal (APP 62-63), at the same time that Jeanette filed her *Objection to Proposed Order for Judgment* (APP 64-66). The trial court therefore erred by

accepting and relying upon the appraisal and by signing the *Order for Judgment*, which clearly contradicted its earlier *Order* and North Dakota law. The *Judgment* must therefore be reversed.

**IV. The Trial Court Abused its Discretion by Failing to Award the Surviving Spouse the Rents from the Homestead.**

[ ¶ 25] In addition to right to live on the homestead for life, a surviving spouse is also entitled to rents from the homestead. N.D.C.C. § 30-16-01(2) explicitly states that the homestead estate includes “the right to the possession, use, control, income, and *rents* of the real property held or occupied by the decedent as a homestead at his death.” N.D.C.C. § 30-16-01(2) (emphasis added); *see also Estate of Kimbrell*, 2005 ND 107, ¶ 3, 697 N.W.2d 315 (concluding the surviving spouse had a statutory right to a life estate in the property, which included the income and rents for life or until remarriage).

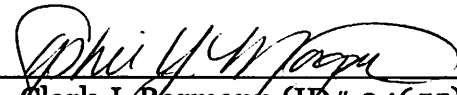
[ ¶ 26] In this case, the trial court did not make a determination as to the surviving spouse’s entitlement to rents, because it wrongly determined the surviving spouse had to pay rent to live on the homestead (*see* § III.A. above). (APP 28 ¶ 7; APP 62 ¶ 4.) As this case does not involve creditors of the Estate, nor is the homestead divisible without material injury, the entire building constitutes the homestead (*see* § II. above). Jeanette, as the surviving spouse, is entitled to the homestead estate which includes all the rents from the homestead. The trial court abused its discretion in failing to award Jeanette the rents from the adjoining apartments, and the *Judgment* must be reversed.

**CONCLUSION**

[ ¶ 27] No creditors of the Estate exist. The trial court therefore abused its discretion in dividing the building and ordering Jeanette, the surviving spouse, to pay rent in order to live on the homestead. The trial court further abused its discretion failing to award Jeanette the rents from the lower units. The *Judgment* dated August 20, 2014 (APP 69-70), which encompassed the *Order* dated April 14, 2014 (APP 26-30) and *Order for Judgment* dated July 3, 2014 (APP 62-63), must be REVERSED.

Respectfully submitted this 17<sup>th</sup> day of October, 2014.


**BORMANN, MYERCHIN,  
MONASKY & ESPESETH, LLP**  
Attorneys for the Plaintiff-Appellant,  
Jeanette J. Mattern  
418 E. Broadway Ave., Suite 240  
P.O. Box 995  
Bismarck, ND 58502-0995  
Phone: (701) 250-8968  
Email: [cbormann@bmmelaw.com](mailto:cbormann@bmmelaw.com)  
Email: [smorgan@bmmelaw.com](mailto:smorgan@bmmelaw.com)

By:   
Clark J. Bormann (ID# 04655)  
Sophie Y. Morgan (ID# 06592)

**CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing **BRIEF OF APPELLANT** was served on the following at their last known addresses on the 17th day of October, 2014, by depositing the same in the U.S. Mail with the First Class postage fully prepaid and firmly affixed:

Sheldon A. Smith  
SMITH BAKKE PORSBORG  
SCHWEIGERT & ARMSTRONG  
122 E. Broadway Ave.  
Bismarck, ND 58501

  
\_\_\_\_\_  
Clark J. Bormann (ID# 04655)  
Sophie Y. Morgan (ID# 06592)

**CERTIFICATE OF SERVICE**

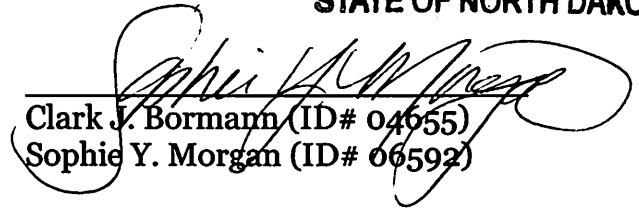
[ ¶ 28] The undersigned certifies that the **BRIEF OF APPELLANT** was served on the following at their last known addresses on the 17th day of October, 2014 and the revised Table of Contents and revised Table of Authorities were served on the 27th day of October, 2014, by depositing the same in the U.S. Mail with the First Class postage fully prepaid and firmly affixed:

Sheldon A. Smith  
SMITH BAKKE PORSBORG  
SCHWEIGERT & ARMSTRONG  
122 E. Broadway Ave.  
Bismarck, ND 58501

**FILED**  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

**OCT 27 2014**

**STATE OF NORTH DAKOTA**

  
Clark J. Bormann (ID# 04655)  
Sophie Y. Morgan (ID# 06592)