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STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Debra Heitkamp, as Personal Representative for the Estate of Nick Lyons, Appellant, vs. Kevin Kabella, Appellee.	Richland Co. No.: 39-2017-CV-00100 Supreme Court No.: 20180288

APPELLANT'S BRIEF
APPEAL FROM DISTRICT COURT'S ORDER ENTERED MAY 24, 2018 HOLDING THAT THE LAND RENT CONTRACT TERMINATED AS OF MARCH 29, 2017

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STATEMENT OF THE ISSUES

Whether the district court erred in holding that the Agreement between the parties is limited by § 47-16-02 of the North Dakota Century Code to a period of ten years.

STATEMENT OF THE CASE

This is an appeal from the order of the Richland County District Court holding that a Land Rent Contract (hereinafter the "Agreement") between Nick Lyons (hereinafter "Lyons") and Kevin Kabella (hereinafter "Kabella") expired on March 29, 2017.

This Agreement was previously before this Court in Anderson v. Lyons, 2014 ND 61, 845 N.W.2d 1. This Court held at that time, due to contingencies contained in the Agreement which may cause the Agreement to terminate according to its own terms, the Agreement was valid under § 47-16-02 of the North Dakota Century Code for a period of at least ten years after its execution. The Court declined to determine whether the Agreement would continue to be valid beyond ten years.

Plaintiff and Appellant Debra Heitkamp (hereinafter "Heitkamp"), as personal representative of the estate of Nick Lyons, brought this present action seeking a declaratory judgment that the Agreement is and will continue to be valid until such time as defendant and Appellee Kabella offers to sell the Property to Lyons or his successors, heirs, and assigns at the agreed upon price.

¶ 1 STATEMENT OF FACTS

¶ 2 Kabella and Lyons entered into the Agreement on March 29, 2007. Under the terms of the Agreement, Lyons was to pay Kabella "the **total sum of $20,670.00**" (Land Rent Contract, App. p. 5) (emphasis in original). Payment of the contract price was to be made according to the following terms: "$8,268 to be paid at signing of this contract and the remainder to be paid to [Kabella] by [Lyons] as follows: $4,134 to be paid on or before June 1, 2009; $4,134 to be paid on or before June 1, 2010; $4,134 to be paid on or before June 1, 2011 this is agreed by [Kabella] and with [Lyons] to be the full and undisputed final payment on this lease." Id. The Agreement required no other payments or services from Lyons.

¶ 3 In exchange for the payment of $20,670, Kabella agreed to give Lyons possession and use of the Property "in perpetuity." Id. In addition to receiving the Property "in perpetuity", the Agreement contemplated that Kabella would eventually sell the Property to Lyons for "three and one half times the total sum stated above (or $72,345)." (Land Rent Contract, App. p. 6).

¶ 4 Prior to the 2012 farming season, Kabella, in contravention of the Agreement, attempted to lease the Property to Kermit Anderson Jr. (hereinafter "Anderson"). Lyons responded by asserting his rights under the Agreement and refused to vacate the Property. Anderson brought an eviction action against Lyons. Kabella was included as a defendant in the action, presumably with the intention of determining Kabella's rights under the Agreement. In the 2012 action, the Richland County District Court entered judgment in favor of Lyons finding that the Agreement was valid until at least 2017. The

decision was appealed to this Court which affirmed the district court's decision. Anderson v. Lyons, 2014 ND 61, 845 N.W.2d 1.

¶ 5 Lyons passed away on May 10, 2013. Heitkamp was appointed personal representative of the Nick Lyons estate. The estate has utilized the Property since this time.

¶ 6 On or about March 4, 2017, Debra Heitkamp (hereinafter "Heitkamp"), as the personal representatives of the estate of Nick Lyons, brought the present action seeking a declaratory judgment that the Agreement is valid into perpetuity. The district court held that the Agreement was a lease under § 47-16-02 and that due to the non-occurrence of any of the contingencies contained in the Agreement, it expired on its tenth anniversary, March 29, 2017. The district court further held that Kabella was entitled to a money judgment against the estate in the amount of $12,589.48 representing the lease value of the Property for 2017 plus pre-judgment interest and costs and disbursements.

¶ 7 ARGUMENT

¶ 8 This Court has previously had the opportunity to review the Agreement in Anderson v. Lyons, 2014 ND 61, 845 N.W.2d 1. The Court held that certain contingencies within the Agreement left it uncertain as to whether it would terminate according to its own terms within ten years. Id. at ¶ 17, 845 N.W.2d 1. As such, the Court held that the Agreement was valid for at least ten years but left for another time the question of whether the Agreement would be valid beyond ten years. Id. With the Agreement having passed its tenth year, the issue before the Court is now ripe.

¶ 9 For the reasons below, the Agreement is not restricted or limited by § 47-16-02 of the North Dakota Century Code. As such, the Agreement is valid and will continue to be

valid into perpetuity or until Kabella or his successors, heirs, and assigns offers to sell the Property to Lyons or his successors, heirs, and assigns at the agreed upon price.

¶ 10 **A. Perpetual Leases are Not Prohibited**

¶ 11 The majority of jurisdictions have held that while perpetual leases are not favored, they are not per se prohibited. "The weight of authority elsewhere holds that, absent a statutory prohibition, a perpetual lease or a right to a perpetual renewal of a lease does not violate the rule or create a restraint on alienation." Camerlo v. Howard Johnson Co., 710 F.2d 987, 991 (3rd Cir. 1983) (citing Lonergan v. Connecticut Food Store, Inc., 168 Conn. 122, 357 A.2d 910, 913 (1975); St. Regis Paper Co. v. Brown, 247 Ga. 361, 276 S.E.2d 24, 26 (1981); Keogh v. Peck, 316 III. 318, 147 N.E. 266, 271 (1925); 5 R. Powell, Powell on Real Property § 771[2] at 71-72 (1981); Abbot, "Leases and the Rule Against Perpetuities," 27 Yale L.J. 878 (1918). Restatement (Second) of Property, Landlord and Tenant § 1.4, Reporter's Note to Section 1.4 (1977)).

¶ 12 "[I]t is well settled in most other jurisdictions that, absent statutory provision to the contrary, the right to perpetual renewal of a lease is not forbidden by the law, either upon the ground that it creates a perpetuity or a restraint on alienation or upon any other ground, and such provisions, when properly entered into, will be enforced." Lonergan v. Connecticut Food Store, Inc., 357 A.2d 910, 913 (CT 1975) (citing Nakdimen v. Atkinson Improvement Co., 149 Ark. 448, 456, 233 S.W. 694; Williams v. J. M. High Co., 200 Ga. 230, 236, 36 S.E.2d 667; Ehrhart v. Spencer, 175 Kan. 227, 232, 263 P.2d 246; In re State Highway Commissioner, 372 Mich. 104, 108-9, 125 N.W.2d 482; Lloyd's Estate v. Mullen Tractor & Equipment Co., 192 Miss. 62, 75-76, 4 So.2d 282; Blackmore v. Boardman, 28 Mo. 420, 426; Burns v. City of New York, 213

N.Y. 516, 520, 108 N.W. 77; 61 Am.Jur.2d, Perpetuities and Restraints on Alienation, s 41; 70 C.J.S. Perpetuities s 11; annot., 31 A.L.R.2d 607, 622-23). The Lonergan court went on to "acknowledge the clear weight of authority as stating the correct view of the law on this issue [i.e., that perpetual leases are not forbidden]." Id.

¶ 13 Due to the fact that perpetual leases are disfavored, "there must be some peculiar and plain language before it will be assumed that the parties intended to create it." Id. (quoting Winslow v. Baltimore & O.R. Co., 188 U.S. 646, 655, 23 S.Ct. 443, 446, 47 L.Ed. 635). Courts commonly require words or phrases such as "'forever', 'for all time', or 'in perpetuity.'" Id. at 914. Another example is: "as long as the grass grows or water runs." Rutland Amusement Co. v. Seward, 248 A.2d 731, 734 (Vt. 1968). Such "plain language" is present in the Agreement. Kabella agreed to grant Lyons and his successors, heirs, and assigns use and possession of the property "in perpetuity".

¶ 14 Although this issue has not previously come before this Court, this Court should "acknowledge the clear weight of authority" (Lonergan, 357 A.2d at 913) and hold that in the absence of a statutory prohibition, that parties may enter into perpetual leases.

¶ 15 **B. The Agreement is neither Prohibited nor Limited by North Dakota Law**

¶ 16 1. Interpretation of Statutory Language.

¶ 17 The rules for interpreting a statute are clear and have been cited by this Court many times. Specifically, this Court has held that "[i]n the interpretation of a statute, courts are to look first to the plain language and give each word its ordinary meaning." Environmental Driven Solutions, LLC v. Dunn County, 2017 ND 45, ¶ 12, 890 N.W.2d 841. "Courts are not to construe a statute to create an ambiguity or exception when none exists in the statute's plain language." Id. The North Dakota Century Code also

directs that "[w]hen the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." N.D.C.C. § 1-02-05. See also, Leet v. City of Minot, 2006 ND 191, ¶ 13, 721 N.W.2d 398 ("Where a statute's plain language is clear and unambiguous, the letter of the statute cannot be disregarded under the pretext of pursuing its spirit because legislative intent is presumed clear from the face of the statute").

¶ 18 2. Section 47-16-02 of the North Dakota Century Code does not limit or restrict this Agreement.

¶ 19 The district court held that the Agreement terminated upon its tenth anniversary due to the limitations of § 47-16-02. This Court also applied § 47-16-02 to the Agreement in Anderson v. Lyons, 2014 ND 61, 845 N.W.2d 1. Section 47-16-02 of the North Dakota Century Code reads:

> "No lease or grant of agricultural land **reserving any rent or service of any kind for a longer period than ten years** shall be valid. No lease or grant of any city lot reserving any rent or service of any kind for a longer period than ninety-nine years shall be valid."

N.D.C.C. § 47-16-02 (emphasis added).

¶ 20 However, a careful reading of this language demonstrates that the Agreement does not fall within the prohibitions of this statute because (1) the Agreement does not "reserv[e] any rent or service;" and (2) because all payments under the Agreement are due within the first five years (no future payments or services are required). Therefore, the Agreement does not reserve any rent or services "for a longer period than ten years."

¶ 21 *a. The Agreement Does Not Reserve Any Rent or Services.*

¶ 22 Perhaps the most notable aspect of the Agreement, aside from its length, is the way the payments are structured. Instead of making annual rent payments, Lyons was

obligated to pay "**the total sum of $20,670.00**." (Land Rent Contract, App. p. 5) (emphasis in original). This amount was split up over four payments with a large upfront payment and the "remainder" to be made over a five year period. Upon the fourth and final payment, due on or before June 1, 2011, Lyons had no further responsibilities to Kabella. These payments are never referred to as "rent" nor is the word "rent" used in the Agreement outside of its title. Nor do these payments constitute rent as defined by ¶47-16-02.

¶ 23 While neither § 47-16-02 nor its predecessor statute define the words "rent" or "service[s]", this Court was called upon to interpret what constitutes "rent" in Wegner v. Lubenow, 95 N.W. 442 (N.D. 1903). Wegner involved an agreement in which the "lessor" conveyed an interest in agricultural land to the "lessee." Id. at 443. The interest was for the life of the lessee or his spouse. Id. at 445. In exchange, the lessee paid the lessor $200 payable up front and as a single payment. Id. The lessor later deeded the property to a third party who attempted to terminate the agreement under the then existing statute which read: "No lease or grant of agricultural land for a period longer than ten years, in which shall be reserved any rent or service of any kind, shall be valid." Id.

¶ 24 The Wegner Court looked to other jurisdictions for guidance in interpreting the statute and determined that it was derived from New York's Constitution. Id. With this knowledge, the Wegner Court proceeded to review several cases interpreting the language of New York's Constitution and favorably cited Stephens v. Reynolds, 6 N.Y. 454 (1852), which, itself, was decided shortly after New York adopted the relevant constitutional amendment. Id. at 444. The Stephens court found that: "The leases or

grants of land prohibited by the Constitution were such as were held by the tenants upon a reservation of an annual or periodical rent or service, to be paid as a compensation for the use of the lands, in contradistinction from a consideration paid for the estate granted." Id. (citing Stephens v. Reynolds, 6 N.Y. 454 (1852)).

¶ 25 The Stephens Court went on to strongly distinguish payments made for an estate in the land as opposed to payments made for use of the lands:

> This consideration may be payable all at once, **or by installments**, or in services, so that it be not by way of rent. By the Constitution, there must be a reservation of rent or service. **A reservation** is defined to be a keeping aside or providing, as **where a man lets or parts with his land, but reserves or provides himself a rent out of it for his own livelihood**. And a **rent is said to be a sum of money or other consideration, issuing yearly out of lands or tenements**. Blackstone defines rent or reditus as a compensation or return, it being the nature of an acknowledgement given for the possession of some corporeal inheritance. And it is defined to be **a yearly profit issuing out of lands**. . . . This profit must be certain, or capable of being reduced to a certainty. **It must also issue yearly**.

Id. at 444-45 (citing Stephens v. Reynolds, 6 N.Y. 454 (1852)) (internal citations omitted) (emphasis added).

¶ 26 The Wegner Court then applied the statutory language as it existed at that time and found that the "[Wegner] lease reserved no rent or service, and therefore is not effected by the provisions" of the predecessor to § 47-16-02. Id. at 445-46. The $200 paid by Wegner was not rent in that it "was not profit issuing out of the land." Id. at 445.

¶ 27 Much like the lease in Wegner, this Agreement reserves neither rent nor services. The Agreement makes it explicitly clear that Lyons did not pay rent for the use of the Property but instead paid Kabella a set dollar amount, "the **total sum of $20,670.00**". (Land Rent Contract, App. p. 5) (emphasis in original). That this dollar amount was split over four payments does not convert these payments into rental payments. See Wegner v. Lubenow, 95 N.W. at 444-45 ("This consideration may be

payable all at once, or by installments, or in services, so that it be not by way of rent.") (quoting Stephens v. Reynolds, 6 N.Y. 454 (1852)). Following the fourth payment, Lyons' obligations under the Agreement were completed. As they are not issuing yearly, they cannot be "rent."

¶ 28 Also relevant is the fact that the parties do not describe their payments as "rent" and, in fact, the only time the Agreement uses the word "rent" is in the title of the document. A simple review of the Agreement shows that the document's title is incorrect. The payments are not described by the Agreement as being "rent" payments because they were not intended by the parties to be rent payments.

¶ 29 To properly consider the parties' intentions as to whether the payments by Lyons were considered rent payments, the Court should consider the following hypothetical: Based upon the language of the Agreement, would Lyons be responsible for making all of the agreed upon payments if Kabella offered to sell, and Lyons agreed to purchase, the Property within the first year? The language of the Agreement implies that Lyons would, in fact, be required to do so. Under the Agreement, Kabella agreed to give Lyons possession and use of the property "**for the total sum of $20,670.00**." (Land Rent Contract, App. p. 5) (emphasis in original). The Agreement describes the payment schedule as "$8,268.00 to be paid at signing of this contract and **the remainder to be paid** to [Kabella] **as follows**: $4,134.00 to be paid on or before June 1st 2009; $4,134.00 to be paid on or before June 1st 2010; $4,134.00 to be paid on or before June 1st 2011 this is agreed to by parties of the first part and with parties of the second part to be the full and undisputed final payment on this lease." (Land Rent Contract, App. p. 5) (emphasis added).

¶ 30 The Agreement's use of words like "the total sum" and "remainder" is indicative of the parties' intent that Kabella be paid the entire amount of $20,670 and that Lyons' obligations to pay this would continue even if the parties exercised their rights under the fixed-price right of first refusal.

¶ 31 In addition to reserving no rent, the Agreement also reserves no services. There is no requirement that Lyons plow or disc the land between crop seasons. Lyons is not required to plant cover crops or fertilize the Property. Lyons is not obligated to use any sort of best practices in farming or otherwise using the land. Lyons is not obligated under the Agreement to mow or otherwise manage any ditches or drains on the property. Lyons is not even required to farm the Property.

¶ 32 *b. Payments are Not Reserved for a Period in Excess of Ten Years.*

¶ 33 Even if the payments under the Agreement could be construed as "rent" under the Wegner analysis, the Agreement is not invalid in that the rent payments are not reserved for a period of longer than ten years. That is, no payments, whether rent or otherwise, are due from Lyons

¶ 34 Due to the structure of the payments, the issues raised by this Agreement appear to be a matter of first impression. In previous cases heard by the North Dakota Supreme Court, the leases or grants at issue reserve rent or services over the entire life of the lease. Indeed, Wegner, with its single upfront payment, appears to be the sole outlier.

¶ 35 In deciding Anderson v. Blixt, this Court arrived at a four-part test for analyzing long-term agricultural leases under § 47-16-02.

> In the jurisdictions where the law restricts the duration of a lease of agricultural land, before a court is justified in declaring it invalid, it must find that [1] the lease is of agricultural land; [2] that the use of the land for

> agricultural purposes is not excluded; [3] that rent or service is reserved; [4] and that the term is within the restriction.

Anderson v. Blixt, 72 N.W.2d 799, 803 (N.D. 1955). Relevant to this discussion is the fact that the Blixt lease required the tenant to provide annual rent (one-half of the crops). Id. at 803. It also required annual services (summer fallowing). Id. 803. The test adopted in Blixt continues to be used and, in fact, was applied by the Court the first time this Agreement was reviewed. Anderson v. Lyons, 2014 ND 61, 845 N.W.2d. 1.

¶ 36 However, in looking to other jurisdictions, the Blixt Court failed to properly examine the statutory language of § 47-16-02 and how that language differs from the statutory language of other jurisdictions.

¶ 37 In adopting this test, the Blixt Court cited the following jurisdictions:

¶ 38 **Alabama**: The language of Alabama's statute was not cited by the Blixt Court, so the language of Alabama's statute cannot at this time be properly compared to North Dakota's statute. Regardless, the Blixt Court noted that under Alabama law, a prohibition holding that "no leasehold estate in land can be created for a longer term than twenty years, applies only to tenancies for terms of years, and is not appropriate to or a restriction on tenancies for the life of the tenant or another." Blixt, 72 N.W.2d at 806 (citing Interurban Land Co. v. Crawford, C.C., 183 F.630 (N.D. Ala. 1910)).

¶ 39 **Nevada**: The relevant statute in Nevada read:

> No lands, town or city lots, or other real property, within this state, shall hereafter be conveyed by lease or otherwise, except in fee and perpetual succession, for a longer period than twenty years. All leases hereafter made contrary to the provisions of this act shall be void. St.1923 Nev. c. 175.

Id. at 806 (citing Aikins v. Nevada Placer, 13 P.2d 1103, 1105 (Nev. 1932)

¶ 40 **Michigan**: Although the Blixt Court did not specifically cite the relevant Michigan statute, the Michigan case which the Blixt Court relied upon did cite it in full:

> "No lease or grant hereafter of agricultural land for a longer period than twelve years, reserving any rent or service of any kind, shall be valid." Article 18, § 12

Waldo v. Jacobs, 116 N.W. 371, 372 (Mich. 1908).

¶ 41 In addition to the above-cited cases, research into this issue turned up a number of other jurisdictions which either have, or previously had, similar statutes. The following represent how these statutes appeared at, or before, the time the Blixt Court was conducting its analysis.

¶ 42 **South Dakota:** South Dakota's statute previously read:

> "No lease or grant of agricultural land for a longer period than ten years, in which shall be reserved any rent or service of any kind, shall be valid." S.D.C. 38.0403.

Ryan v. Sioux Gun Club, 2 N.W.2d 681 (S.D. 1942) (quoting S.D.C. § 38.0403).

¶ 43 **California:** When California enacted its statutory limitation on leases in 1872, it read:

> "No lease or grant of agricultural land for a longer period than ten years, in which shall be reserved any rent or service of any kind, shall be valid."

Cal. Civ. Code § 717, Historical and Statutory Notes. By 1909, the statute had been amended twice to clarify that it applied to grants "of land for agricultural or horticultural purposes" instead of grants of agricultural land. Id.

¶ 44 **New York**: As noted above, New York's Constitutional Amendment appears to be the genesis of those statutes that limit leases. When enacted, it read:

> "No lease or grant of agricultural land for a longer period than twelve years, hereafter made, in which shall be reserved any rent or service of any kind, shall be valid."

Wegner v. Lubenow, 95 N.W. 442, 443 (N.D. 1903) (quoting Article 1, Section 14, New York Constitution of 1846).

¶ 45 **Montana:**

> "No lease or grant of agricultural land for a longer period than ten years, in which shall be reserved any rent or service of any kind, shall be valid."

Lerch v. Missoula Brick & Tile Co., 123 P.25, 26 (Mont. 1912). (quoting Section 4465, Revised Codes).

¶ 46 With the exception of Alabama's statute, whose language was not cited by the Blixt Court or the cases the Blixt Court referenced and Nevada's statute, it is striking, though not surprising, how similar these statutes are. They all prohibit a lease or grant (1) of agricultural land; (2) for a specified period of time; and (3) which reserve rent or service of any kind.

¶ 47 North Dakota's original statute was nearly identical: "No lease or grant of agricultural land for a period longer than ten years, in which shall be reserved any rent or service of any kind, shall be valid." Wegner v. Lubenow, 95 N.W. 442 (N.D. 1903). It followed the same format in that it also prohibited a lease (1) of agricultural land; (2) for a specified period of time; and (3) which reserved rent or services. Also notable is how closely the earlier statutory language follows the four part test identified in Blixt.

¶ 48 However, in 1943, several years before Blixt was decided, the legislature rewrote the statute to read, in relevant part: "No lease or grant of agricultural land reserving any rent or service of any kind for a longer period than ten years shall be valid." In doing so, it changed the necessary elements. In rewriting the statute, the legislature effectively shifted what, exactly, the ten year limitation measures and prohibits. Whereas the statute originally limited any leases beyond ten years (if they reserved rents or services), it now specifically limits only those leases that reserve rent or services for more than ten years.

¶ 49 Further, by rewriting the statute, the legislature severed the statute's uniformity with those jurisdictions that followed New York's example. This intentional divergence

by the legislature limits the extent to which those jurisdictions are relevant in interpreting North Dakota's current statute. As such, the four-part test adopted by the Blixt Court, while useful in many circumstances, is inaccurate and should not apply to the Court's interpretation of this Agreement.

¶ 50 3. Public Policy Does Not Encourage the Limitation of this Agreement.

¶ 51 When this Court was first called upon to review the Agreement it looked to New York's reasons for adopting constitutional limits on leases.

> A large part of the manorial lands in this state were originally settled under leases in fee, leases for lives, or a long term of years. In other words the proprietors, instead of selling their lands out and out to purchasers, demised them to tenants for long periods of time, reserving an annual rent, in money, produce or services. Experience proved that this mode of settling the country was prejudicial to the prosperity and interests of the state, as a question of political economy. The proprietors owning the lands, and the tenants having only the usufructuary interests, subject to be lost by forfeiture, by a non-performance of any of the conditions of the lease, the latter felt none of the pride of independent ownership, and no desire to improve, by the best mode of cultivation, an inheritance which was liable to pass from them or their descendants without a compensation.

Anderson v. Lyons, 2014 ND 61, ¶ 11, 845 N.W.2d 1 (quoting Stephens v. Reynolds, 6 N.Y. 454, 456-57 (1852).

¶ 52 The public policies espoused by the Stephens Court are not implicated here. Under the Agreement, Kabella did not reserve any rent or services, so this is not a situation where Kabella can sit idly by collecting rent nor is there concern that Lyons, or his heirs and successors, will be lacking the pride in or the motivation to improve the Property. While Kabella does, in fact, own title to the Property, it is all but inevitable that Lyons, or his heirs and successors, will someday own it or at least be given the chance to purchase it for the agreed-upon price. This Agreement can only end in one of four ways: (1) Kabella can sell the Property to Lyons' heirs and successors for $72,345; (2)

Lyons' heirs and successors can terminate the Agreement; (3) Kabella can continue to sit on the land indefinitely while not receiving any compensation, whether in the form of rent or services; or (4) Kabella stops paying taxes and allows the Property to be sold at a tax foreclosure sale where Lyons' heirs and successors will have the opportunity to purchase it.

¶ 53 Where this case differs from others is that Lyons' heirs and successors have no reason to terminate the Agreement. They can farm the Property, lease it out, or let it sit fallow as they see fit, just as true owners could. Lyons and his heirs and successors are not harmed by continuing under the current circumstances nor is society harmed by this arrangement as there is an advantage to Lyons' heirs and successors in maintaining and improving the Property. Lyons' heirs and successors will either own the Property or they will continue to farm or otherwise occupy it in perpetuity. Improvements to the Property will benefit them and them alone. Finally, there is a significant disincentive to stop Kabella from allowing the Property to be sold at a tax sale; specifically, the loss of $72,345 that he could receive by selling the Property to Lyons' heirs and successors as contemplated under the Agreement.

¶ 54 Further, the legislature's loosening of restrictions is consistent with the changing attitudes of other jurisdictions. Alabama, which previously limited the length of leases to 20 years, has extended the maximum length of leases to 99 years. Ala. Code § 35-4-6. It has retained a vestige of its 20 year limitation in that leases beyond 20 years must be acknowledged and recorded within one year after its execution. Id. Nevada, whose statutory limitations differed significantly from the statutes used in the other states, has extended its limitation from 20 years to 25 years for agricultural land and extended its

leases from 20 years to 99 years for all others. Nev. Rev.d Stat. § 111.200. South Dakota's statute was increased from ten years to twenty. S.D. Codified Laws § 43-32-2. California first limited leases over ten years but has since extended them to the current maximum of 51 years. Cal. Civ. Code § 717. Michigan, Montana and New York all appear to have repealed their statutory or constitutional limitations on leases.

¶ 55 In fact, if the district court is correct in holding that the current language of § 47-16-02 limits all agricultural leases to ten years, then North Dakota would appear to be one of the only states that has not expanded the terms of its statutory limitation.

¶ 56 4. Section 47-16-02 Does Not Apply to All Agreements, Leases or Grants.

¶ 57 Section 47-16-02, by its very language, is limited to leases of agricultural lands and to city lots. This Court has previously held that this statute only applies to agricultural lands that are being leased for agricultural purposes. Berry-Iverson Co. of North Dakota, Inc. v. Johnson, 242 N.W.2d 126 (N.D. 1976). Under this interpretation, there are a number of properties or land uses that would take a lease outside of either of these definitions.

¶ 58 This Court has found the following types of leases to be outside of the restrictions of § 47-16-02: Grain bins and agricultural equipment storage sites (Zundel v. Zundel, 2017 ND 217, 901 N.W.2d 731); a "Sand, Gravel and Rock Lease" (Trauger v. Helm Bros., Inc., 279 N.W.2d 406 (N.D. 1979); and a radio transmitter tower site (Berry-Iverson Co. of North Dakota, Inc. v. Johnson, 242 NW.2d 126. The South Dakota Supreme Court has found that a parcel of land leased to the Sioux Gun Club was not within the restrictions of South Dakota's statute, which at that time was nearly identical to North Dakota's, on the grounds that the land was used for "Club purpose,

recreational and social purposes, and not as and for agricultural purposes." Ryan v. Sioux Gun Club, 2 N.W.2d 681, 682 (S.D. 1942).

¶ 59 The above-cited cases clearly demonstrate that § 47-16-02 is not a strict prohibition effective as against all leases or agreements that fall outside of its time restrictions. If a lease does not meet the statutory requirements, it is neither limited to ten years nor is it void. As already noted, where a lease is not limited by statute, the parties are free to agree to a perpetual lease. See Camerlo v. Howard Johnson Co., 710 F.2d 987, 991 (GA. 1983).

¶ 60 5. The Agreement does not offend the Rule Against Perpetuities.

¶ 61 The United States Court of Appeals for the Third Circuit had the opportunity to apply Pennsylvania's statutory rule against perpetuities to a perpetual lease and found that the rule did not apply. Camerlo v. Howard-Johnson Co., 710 F.2d 987 (3rd Cir. 1983). The Camerlo Court noted:

> A lessee's option to purchase the leasehold was once thought by some to be subject to the rule against perpetuities. See J. Gray, The Rule Against Perpetuities § 230.3 (4th ed. 1942). Other authorities, however, recognize that an option to purchase granted to a lessee has the same substantial social value as an option to renew a lease. In both situations, "[a] lessee in possession of lands ... needs to be able so to plan for the future as to get the benefits of the full utilization of the land during his lease-term. This makes it important for such a lessee and for society in general, that extensions or renewals of the term and purchase of the lessor's ownership be facilitated rather than prohibited." Restatement of Property § 395, Comment a (1944) quoted in 5 R. Powell, Powell on Real Property ¶ 771[2] at n. 17 (1981). See also Abbot, "Leases and the Rule Against Perpetuities," 27 Yale L.J. 878, 885–889 (1918); Note, "Options to Purchase and the Rule Against Perpetuities," 17 Va.L.Rev. 461 (1931).
>
> The scope of the Barton decision has been limited by later decisions of the Pennsylvania Supreme Court. In Poland Coal Co. v. Hillman Coal & Coke, 357 Pa. 535, 55 A.2d 414 (1947), cert. denied 333 U.S. 862, 68 S.Ct. 742, 92 L.Ed. 1141 (1948), the court found the earlier case inapplicable "because in [Barton] there was no leasehold." The court quoted section 395 of the

> Restatement of Property, which provides that "[w]hen a lease limits in favor of the lessee an option [to purchase the leased premises] exercisable at a time not more remote than the end of the lessee's term ... then such option is effective ... even when it may continue for longer than [the period of the rule against perpetuities]." 357 Pa. at 540, 55 A.2d at 416. See also Abbot, "Leases and the Rule Against Perpetuities," 27 Yale L.J. 878, 884–889 (1918); Note, "Options to Purchase and the Rule Against Perpetuities," 17 Va.L.Rev. 461 (1931) (both articles cited with approval in Poland Coal.)

Id.

¶ 62 CONCLUSION

¶ 63 Debra Heitkamp, as personal representative of the Nick Lyons estate, requests that the Court reverse the district court's finding that the Agreement terminated on March 29, 2017; reverses the district court's money judgment in favor of Kabella and against the estate in the amount of $12,589.48; and find that the estate has possession of the Property until such time as Kabella offers to sell the Property to the estate for the agreed upon sum of $72,345.

Dated: October 24, 2018

/s/ Asa K. Burck

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IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Debra Heitkamp, as Personal Representative for the Estate of Nick Lyons, Appellant, vs. Kevin Kabella, Appellee.	Richland Co. No.: 39-2017-CV-00100 Supreme Court No.: 20180288

AFFIDAVIT OF ELECTRONIC SERVICE

I, Charity Grueneich, being first duly sworn and under oath, depose and say: I am of legal age, a citizen of the United States and not a party to the action herein; that on the 24th day of October, 2018, I served the following documents:

APPELLANT'S BRIEF and

APPENDIX TO APPELLANT'S BRIEF

on the persons listed below by sending via email to the following addresses:

Mark Meyers markameyer@702com.net

Charity Grueneich

Charity Grueneich

Subscribed and sworn to before me this 24th day of October, 2018.

SHERRY MICHELSON
Notary Public
State of North Dakota
My Commission Expires Aug. 25, 2023

Notary Public
Cass County, ND