

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

In re Anderson,
Supreme Court No. 20180424

Michael Lee Anderson
Petitioner and Appellant
Bankr. D.N.D. File No. 18-30365

vs.

Kip M. Kaler, Bankruptcy Trustee,

Appellee

APPELLEE'S BRIEF

CERTIFIED QUESTION FROM THE UNITED STATES BANKRUPTCY
COURT, DISTRICT OF NORTH DAKOTA, FILE NO. 18-30365

BY THE HONORABLE SHON HASTINGS,
JUDGE OF THE BANKRUPTCY COURT

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STATEMENT OF THE CASE AND ISSUES

¶1 This matter comes before the Court pursuant to Rule 47 of the North Dakota Supreme Court Rules and an Order from the United States Bankruptcy Court, District of North Dakota (hereinafter Bankruptcy Court) Certifying the following question to the North Dakota Supreme Court;

To determine what part of a North Dakota debtor's jointly owned homestead is exempt, does the correct application of sections 28-22-02(7), 47-18-01 and 28-22-02(10) of the North Dakota Century Code permit the debtor to divide the equity in the homestead (full value less secured liens) equally with his non-debtor spouse and then apply the entire \$100,000 homestead exemption to the debtor's one-half equity interest (as opposed to subtracting the entire \$100,000 exemption from the equity in the property and then dividing the remaining equity between debtor and his or her non-debtor spouse)? (Bankr. D. N.D. File 18-30365 docket #19, App. At 14)

¶2 The debtor seeks to apply the exemption so as to minimize his and his non-filing spouse's separate creditors' access to their property to satisfy their debts. The debtor's homestead property, after subtracting liens, has \$163,200 of equity. The debtor asks the Court to divide the equity between the debtor and his non-filing spouse leaving each with equity valued at \$81,600. This would then allow the debtor to use the entire homestead exemption to exempt all of his interest so his creditors get nothing. Alternatively, it is the trustee's position that the homestead, as a benefit to the whole "family," is deducted from the homestead's equity and creditors are to have access to the balance to satisfy their respective creditor claims.

¶3 The following issues must be considered in order to come to a decision on the certified question. What is the correct definition and application of the homestead exemption under North Dakota Law, who is entitled to take the exemption, and what portion of the equity remaining in the homestead are creditors able to reach? The appellee contends that upon review of the issues raised in this matter, the answer to the certified question above is "No."

ARGUMENT

A. The Homestead Exemption in North Dakota Law.

[¶4] Under North Dakota Law, the homestead exemption is defined as:

“The homestead of any individual, whether married or unmarried, residing in this state consists of the land upon which claimant resides, and the dwelling house on that land in which the homestead claimant resides, with all its appurtenances, and all other improvements on the land, the total not to exceed \$100,000 in value, over and above liens or encumbrances or both. The homestead shall be exempt from judgment lien and from execution or forced sale, except as otherwise provided in this Chapter. The homestead may not embrace different lots or tracks of land unless the lots or tracks of land are continuous, for purposes of this Section, “continuous” means two or more tracks of real property which share a common point or which would share a common point but for an intervening road or right of way.” N.D.C.C. § 47-18-01.

[¶5] When construing a statute, the “Court’s primary objective is to ascertain the legislature’s intent.” Midthun v. North Dakota Work Force Safety Ins., 2009 N.D. 22, ¶ 10, 761 N.W.2d 572, 576. “A statute is ambiguous if it is susceptible to meanings that are different, but rational.” Id. at ¶ 13, citing Public Service Comm’n v. Wimbledon Grain Co., 2003 N.D. 104, ¶ 20, 663 N.W.2d 186. “Only if the statute is ambiguous does the Court delve further for legislative intent or policy.” Warner and Co. v. Solberg, 2001 N.D. 156, ¶ 19, 634 N.W.2d 65, 71. “It is black letter law in North Dakota that in construing and applying the statute, the Court looks first to the language of the statute.” Id. “In determining legislative intent, we may consider the object sought to be obtained, the statute’s connection to other related statutes and the consequences of a particular construction.” Holtz v. North Dakota Workers Compensation Bureau, 479 N.W.2d 469, 470 (N.D. 1992). Additionally, in determining the intention of the legislation for ambiguous statutes, the Court may also consider the common law or former statutory provisions, including laws upon the same or similar subjects as well as the consequences of a particular construction. N.D.C.C. §1-02-39 (4) and (5).

[¶6] “Statutes are construed as a whole and harmonized to give meaning to related provisions.” Vail v. S/L Services, Inc., 2017 N.D. 202, ¶ 12, 900 N.W.2d 271, 275 citing N.D.C.C. §1-02-07. “Statutes are construed to give effect to all their provisions so no part of a statute is rendered inoperative or superfluous.” Id. citing N.D.C.C. §1-02-38(2) and (4). “However, statutes that are clear and unambiguous when read separately may contain a latent ambiguity when read together and applied to a particular set of facts.” Kroh v. American Family Ins., 487 N.W.2d 306, 308 (N.D. 1992) citing State ex. rel. Moug v. N.D. Auto. Assigned Claims Plan, 322 N.W.2d 245 (N.D. 1982).

[¶7] While the appellants argue that the homestead exemption statute is unambiguous, on closer examination of the practical application of the homestead exemption, numerous ambiguities emerge. For example, the dispute between the parties in this matter as to the correct application of the homestead exemption in a bankruptcy case indicates that there are at least two conceivable ways to interpret homestead exemption statutes. Further, the remainder of N.D.C.C. Ch. 47-18 contains a number of sections that indicate that the homestead exemption is not a strictly individual exemption. For example, N.D.C.C. § 47-18-03 states that “if a homestead claimant is married, the homestead may be selected from the separate property of either spouse with the consent of the other spouse.” This indicates that the homestead exemption is intended to only allow one exemption per family. Further, while the appellant argues that only the debtor’s interest in the property is part of the bankruptcy estate, N.D.C.C. § 47-18-12 states that when:

[R]eal property claimed as a homestead can be divided without material injury, the court, by an order, shall direct the appraisers to set off to the claimant so much of the real property, including the residence, as will amount in value to the homestead exemption. The execution may be enforced against the remainder of the real property.

N.D.C.C. § 47-18-12. Reading this statute, it appears that once the homestead exemption is claimed, it is limited to the exemption amount of N.D.C.C. § 47-18-01, and the remainder of the value of the property is available for execution by creditors. N.D.C.C. § 47-18-12 does not contain any carve-outs for spousal interest in the property. As such, it appears that a reasonable interpretation of that statute would allow a spouse’s interest to be executed upon as well. Finally, N.D.C.C. § 47-18-14, regarding the disposition of proceeds upon the sale of the homestead, states that “when the execution is against a married claimant whose spouse is living, the Court may direct that the \$100,000 be deposited in Court to be paid out only on the joint receipt of the husband and wife[.]” This section indicates that even when only one spouse claims a homestead exemption, both spouses are entitled to the value of that exemption.

[¶8] As such, due to the numerous ambiguities contained within N.D.C.C. Ch. 47-18 relating to the homestead exemption, the Court is obligated to take a closer look at the actual definition and application of the homestead exemption.

B. Homestead Exemption within the Larger North Dakota Exemption Framework.

[¶9] Under North Dakota Law, “the homestead as created, defined, and limited by law [.]” is absolutely exempt from all process, levy, or sale. N.D.C.C. § 28-22-02(7). Property claimed as exempt under N.D.C.C. Ch. 28-22 must be claimed by the head of a family. N.D.C.C. § 28-22-01. The head of the family is defined as “the husband **or** wife when the claimant is a married person.” N.D.C.C. § 28-22-01.1(1) (emphasis added). “The word ‘or’ is disjunctive in nature and ordinarily indicates an alternative between different things or actions.” State ex rel. Stenehjem v. FreeEats.com, Inc., 2006 N.D. 84, ¶14, 712 N.W.2d 828. While the homestead exemption statute does contain the definition “individual, whether married or unmarried” (N.D.C.C. § 47-18-01), the application of N.D.C.C. Ch. 28-22 means that only a head of the

family is allowed to claim exemptions for the homestead, and therefore only one exemption may be claimed.

[¶10] Further examination of N.D.C.C. Ch. 28-22 shows the intent of the legislature in defining the availability of exemptions is to be determined based on the person's family status. N.D.C.C. § 28-22-01 states that "the property mentioned in this Chapter is exempt to the head of a family[.]" N.D.C.C. § 28-22-03 provides for additional exemptions for the head of a family, which in addition to the absolute exemptions contained in N.D.C.C. § 28-22-02 also allow for a "wild card" exemption in the sum of \$7,500. The legislature also created additional exemptions for all North Dakota residents that are available to be claimed by any individual residents of North Dakota, independent of any family status. N.D.C.C. § 28-22-03.1. Next, the legislature created an exemption for unmarried persons without dependents under N.D.C.C. § 28-22-05. This Section allows for unmarried persons without dependents to claim the absolute exemptions in N.D.C.C. § 28-22-02 and a separate "wild card" exemption in the amount of \$3,750 (one-half of the head of family wild-card exemption). N.D.C.C. § 28-22-05. The legislature in drafting these sections intended to separate individuals and the exemptions that they are able to claim into classes based on their family status. Their rights and exemptions are altered based on the class they belong to. The family is allowed one set of exemptions, unmarried persons without dependents are allowed one set of exemptions, and all North Dakota residents are allowed a final set of exemptions independent of family status. The legislature appears to have weighed and balanced the competing rights and exemptions available to each class of persons who could claim exemptions under the North Dakota statutes. This emphasis in the exemption statutes on the existence of a familial relationship reinforces the holding that the homestead exemption is a family right that is part of the benefits and burdens that are inherent to being part of a family.

The mere fact that the homestead exemption is available to unmarried persons without dependents does not negate the fact that the treatment of exemptions under North Dakota Law varies based on the person's family status. The debtor and his non-filing spouse are therefore governed by the exemption regime for families.

[¶11] The fact that the household exemption is a family right and not an individual right is supported by a substantial amount of North Dakota case law. “Historically, North Dakota’s Homestead Laws were founded upon sound public policy, their purpose being ‘to protect the family to the end that it may not be without a home or opportunity for self-support.’” Mattern v. Frank J. Mattern Estate ex rel. Erickson, 2015 N.D. 155, ¶ 14, 864 N.W.2d 458, 461. In North Dakota, the concept of a homestead exemption originates with Article XI, Section 22 of the North Dakota Constitution which “mandates that a debtor’s right to enjoy the comforts and the necessities of life should be recognized by laws exempting a homestead from forced sale.” In Re Fandrich, 63 B.R. 250, 252 (Bankr. D.N.D. 1986) citing N.D.Const. Art. XI § 22. “The whole impetus for the existence of homestead is to preserve a home for a family. The North Dakota constitution and statutes are replete with references to family and the implicit necessity of providing for dependent children and relatives.” Id. at 253. See also Rosholt v. Mehus, 3 N.D. 513, 57 N.W. 783 (1894), Bremseth v. Olson, 16 N.D. 242, 112 N.W. 1056, 1057 (1907) (the purpose of the homestead exemption “was to protect and preserve the home, not for the benefit of the head of the family, but for the benefit of the family as a whole.”), First International Bank v. Lee, 25 N.D. 197, 141 N.W. 716, 719 (1913) (“The law does not look upon the right to exemptions as a personal right of the husband, or even as being given to the husband at all. It is a family right rather than a personal right.”), and Albrecht v. Albrecht, 99 N.W.2d 229 (N.D. 1959). “While recognizing that the purpose of the exemption is to guarantee the family a place

to live, it has also been stated that the right to claim the homestead exemption is not without limits.” Farstveet v. Rudolph ex. rel. Eileen Rudolph Estate, 2000 N.D. 189, ¶ 11, 630 N.W.2d 24.

[¶12] It is worth noting, as the appellants do, that N.D.C.C. § 47-18-01 was amended to remove the language “every head of the family” in 1979. 1979 N.D. Sess. Laws ch. 488, § 1. However, a review of the caselaw cited in the paragraph above shows that North Dakota Courts continue to interpret the homestead exemption as a family right well after the amendment.

[¶13] A number of states have analyzed a similar issue to the one facing this Court and have determined that the trustee’s application of the homestead exemption is the proper way to apply a homestead exemption in circumstances involving a debtor and non-debtor spouse who hold the homestead as joint tenants. In Vermont, a married couple filed bankruptcy and both spouses attempted to claim the homestead exemption to exempt the entirety of the equity in their home. D’Avignon v. Palmisano 34 B.R. 796 (D. Vt. 1982). The definition of a homestead in Vermont at the time was “the homestead of a natural person consisting of a dwelling house, outbuildings and the land used in connection therewith, not exceeding \$30,000 in value, and owned and used or kept by such person as a homestead together with the rents, issues, profits, and production thereof, shall be exempt from attachment and execution except as herein provided.” VT. Stat. Ann. tit. 27-§101. This definition is similar to North Dakota’s in defining an individual or a natural person as the person available to claim the homestead exemption. The Court in the D’Avignon case determined that, like in North Dakota, the homestead exemption in Vermont is a family right and that there is only one homestead exemption available per family. The Court further ruled that the words “natural person” in the exemption statute are intended as

words of classification to distinguish corporations and other legal persons from individuals who are able to claim the exemption. Id.

[¶14] Numerous states have prohibited debtors from doubling their homestead exemptions both by statute and case law. In Re Pace, 521 B.R. 124 (Bankr. N.D. Miss. (2014), citing Alaska Stat. § 09.38-010; Ariz. Rev. Stat. Ann. § 33-1101(B); Cal. Civ. Proc. Code § 703.110(a); Haw. Rev. Stat. § 651-92(a)(2); Ky. Rev. Stat. Ann. § 132.810(2)(e); Mass. Gen. Laws ch. 188, § 1; Minn. Stat. Ann. § 510.02; Mo. Ann. Stat. § 513.475(1); Mont. Code Ann. §§ 70-32-103, 70-32-104; R.I. Gen. Laws Ann. § 9-26-4.1(b); In re Lindstrom, 331 B.R. 267, 271 (Bankr. E.D. Mich. 2005) (applying Michigan law); In re Foulk, 134 B.R. 929, 930-31, (Bankr. D. Neb. 1986) (applying Nebraska law); In re Lenox, 58 B.R. 104, 106 (Bankr. D. Nev. 1986) (applying Nevada law). North Dakota bankruptcy courts have specifically ruled that joint debtors may not “stack” exemptions but rather only qualify to claim the homestead exemption once in a bankruptcy case. In Re Reisnour, 56 B.R. 225 (D. N.D. 1985) and In re Reisnour, 49 B.R. 406 (D. N.D. 1985).

In other states, however, joint debtors using state exemptions are permitted to double the monetary amount of their exemptions. *See, e.g., John T. Mather Mem'l Hospital of Port Jefferson, Inc. v. Pearl*, 723 F.2d 193 (2d Cir.1983) (applying New York law); *In re Alvarez*, 14 B.R. 940 (Bankr.D.Co.1981) (Colorado law). In most cases, these states' exemption statutes make it clear that doubling is allowed. *See, e.g., IND.CODE ANN. § 34-55-10-2(c)(1)* (\$15,000 exemption “individually available to joint debtors concerning property held by them as tenants by the entireties.”).

In re Pace, 521 B.R. at 128.

C. Practical Application of Either Construction of the Homestead Exemption.

[¶15] The practical application of the debtor/appellant’s construction of the homestead exemption is contrary to North Dakota statutes, in that it allows the debtor and his non-filing spouse to double their homestead exemption. In this case, the debtor would be able to utilize the

entire \$100,000 homestead exemption allowable under North Dakota law in his bankruptcy. Later, should a creditor of the non-filing spouse attempt to execute on the homestead or should the non-filing spouse file bankruptcy at some point in the future, she would then have the right to claim a homestead exemption for an entire amount of \$100,000 for her half interest in the home, thereby doubling the homestead exemption.

[¶16] Even in a more limited set of circumstances, where the debtor/appellant would concede that only one homestead exemption exists, the practical application of such a regime would be problematic. The determination and enforcement of ensuring that debtors only claim one homestead exemption would require a full review of all potential bankruptcy and foreclosure actions regarding the debtors in order to determine if the homestead exemption has been claimed in the past by either party. It raises a myriad of issues, including determining how long the homestead exemption remains in effect before it can be claimed again, how the proceeds are protected, whether it attaches just to one property in perpetuity or expires at some point, how to apply the homestead exemption if the debtors move, and on and on. The multitude of problems inherent in the appellant's approach indicate it was not the legislative intent of the statute.

[¶17] The trustee/appellee's construction of the application of the homestead exemption is both simpler and harmonizes N.D.C.C. Ch. 47-18 and N.D.C.C. Ch. 28-22. Under such an application, spouses owning a homestead and claiming a homestead exemption can exempt \$100,000 from the entire equity in the property, leaving the remainder of the non-exempt equity to be shared in equal parts between the non-liaible spouse and the liable debtor. This gives full force to N.D.C.C. §47-18-01 (allowing a full \$100,000 homestead exemption), gives full force to N.D.C.C. § 47-18-12 (allowing for the execution to be enforced against the remainder of the non-exempt real property), gives full force to N.D.C.C. §47-18-14 (the exempted amount of

\$100,000 to be deposited in court to be paid out on the joint receipt of the husband and wife, upon execution on the homestead of a married claimant), and gives full force and effect to N.D.C.C. §28-21-01 (allowing only the head of the family as defined by N.D.C.C. §28-22-01.1, to claim the homestead exemption). The debtor/appellant's construction makes all these statutory provisions superfluous aside from N.D.C.C. § 47-18-01 which only provides a definition of the value and extent of the property protected by the homestead exemption.

CONCLUSION

[¶18] The entire history of the North Dakota homestead exemption from its inception, both before and after the amendment in 1979, demonstrates it is a family right and not an individual right. As a family right, each family is only entitled to one homestead exemption under the laws of the State of North Dakota. Further, the trustee/appellee's construction and application of homestead exemption is far simpler and gives force to the numerous statutes at issue instead of prioritizing one and making numerous others superfluous.

THEREFORE, based on the above arguments, the trustee/appellee respectfully requests that this Court answer the certified question presented by the Bankruptcy Court with "No."

Dated this 14th day of March, 2019.

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CERTIFICATE OF SERVICE VIA EMAIL

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I, Paralegal, Connie Economos, hereby Certify that on March 14, 2019, I served the following document:

APPELLEE'S BRIEF

upon Attorney Sara E. Diaz at Sara@Bulielaw.com and upon Attorney Alan Sorensen at Alan@Bulielaw.com

Dated: March 14, 2019

/s/Connie Economos

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