

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

APPELLANT'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 nondebtor 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 nondebtor spouse)?
(Bankr. D.N.D. File 18-30365 docket # 19, App. at 14)

¶2 To answer the question posed above, there are multiple considerations; for instance: 1) what is the North Dakota Homestead Exemption? 2) Who is entitled to take the exemption? 3) Is the non-debtor joint-tenant's share of the jointly held property part of the Debtor's Bankruptcy Estate? 4) How should the exemption, once taken, be applied against the Debtor's interest in the jointly owned homestead? The Appellant contends that the correct answer to the question above is "Yes".

STATEMENT OF FACTS

¶3 The Trustee and the Debtor stipulated to the following factual summary as set forth by the Bankruptcy Court:

Debtor Michael Lee Anderson petitioned for bankruptcy relief on June 19, 2018. On the same day, he filed a schedule of exempt assets, claiming an \$81,600 exemption in the following described real property under sections 28-22-02(7), 47-18-01 and 28-22-02(10) of the North Dakota Century Code:

Lot 10, Block 2 of Meidinger Second Addition to the City of Jamestown, County of Stutsman, State of North Dakota. The street address of this property is 1626 16th Street Southwest, Jamestown, North Dakota.

Debtor and his nondebtor spouse reside at the real property described above and claim it as their homestead. They own the property as joint tenants. On September 13, 2018, the Bankruptcy Trustee filed an objection to the homestead exemption Debtor claimed. He asserts that Debtor improperly deducted the \$100,000 homestead exemption from Debtor's one-half interest in the property.

He argues that Debtor must deduct the \$100,000 homestead exemption from the full value of the property less secured liens, resulting in \$63,200 in equity. The Trustee claims: "Half that amount, or \$31,600, would remain as property of the debtor's wife and the balance would be nonexempt property of the bankruptcy estate." Debtor filed a response arguing that his \$81,600 homestead exemption claim is proper. The Bankruptcy Trustee and Debtor agree that the value of the real property is \$167,200. The parties also agree that the real property is subject to USDA Rural Development's secured claim totaling \$4,000. (Bankr. D.N.D. File 18-30365 docket # 19, App. at 14)

STANDARD OF REVIEW

[¶4] Under N.D.R.App.P. 47, the United States Bankruptcy Court, District of North Dakota certified a question of law to this Court. This Court may answer questions of law certified to it by a United States district court when: "(1) questions of law of this state are involved in any proceeding before the certifying court which may be determinative of the proceeding; (2) it appears to the certifying court there is no controlling precedent in the decisions of the supreme court of this state." N.D.R.App.P. 47(a).

ARGUMENT

[¶5] Any individual is entitled to claim a homestead in North Dakota not exceeding \$ 100,000 in value.

The homestead exemption is currently defined as follows:

The homestead of any individual, whether married or unmarried, residing in this state consists of the land upon which the 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 one hundred thousand dollars in value, over and above liens or encumbrances or both. N.D.C.C. § 47-18-01. (emphasis added).

The statute as written is unambiguous: any individual residing in the State of North Dakota is entitled to exempt as his or her homestead a residence in which he or she has \$ 100,000 in equity. Any person residing in North Dakota may declare as his or her homestead the premises on which he or she resides. N.D.C.C. § 47-18-17, N.D.C.C. § 47-1-19(1).

[¶6] The non-debtors share of the joint tenancy homestead is not part of the bankruptcy estate.

A joint interest is one owned by several persons in equal shares by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants. N.D.C.C. § 47-02-06 (emphasis added).

[¶7] "Most courts find that the debtor's interest in property jointly held by one debtor becomes property of the estate upon the filing of the bankruptcy petition, but that the nondebtor's interest is not property of the estate." Abernathy v. LaBarge (In re Abernathy), 259 B.R. 330, 332 (B.A.P. 8th Cir. 2001); *See also* Hanf v. Summers (In re Summers), 278 B.R. 808, 809 (B.A.P. 9th Cir. 2002): "[the] bankruptcy court concluded that debtor and husband hold the property as joint tenants, and therefore husband's interest is not property of debtor's bankruptcy estate"; and Cohen v. Chernushin (In re Chernushin), No. 18-1068, 2018 U.S. App. LEXIS 36212 at *5 (10th Cir. Dec. 21, 2018): Congress intended the trustee to stand in the shoes of the debtor and "take no greater

rights than the debtor himself had [] as of the [date of the] bankruptcy filing" (Internal citations omitted).

[¶8] The debtor may apply the full amount of the exemption to which he is entitled to his one-half interest in his homestead.

[¶9] Abernathy refers back to the Missouri homestead statute, which states as follows:

1. The homestead of every person, consisting of a dwelling house and appurtenances, and the land used in connection therewith, not exceeding the value of fifteen thousand dollars, which is or shall be used by such person as a homestead, shall, together with the rents, issues and products thereof, be exempt from attachment and execution. The exemption allowed under this section shall not be allowed for more than one owner of any homestead if one owner claims the entire amount allowed under this subsection; but, if more than one owner of any homestead claims an exemption under this section, the exemption allowed to each of such owners shall not exceed, in the aggregate, the total exemption allowed under this subsection as to any one homestead.

M.S.A § 513.475(1), Abernathy, 259 B.R. 330 at 333.

[¶10] In Abernathy, the issue was, as it is in the present case, to what extent may the Debtor claim an exemption in their interest in a jointly-held homestead. Id. at 333. In Abernathy, the debtor claimed the full amount of the Missouri homestead exemption allowed at that time, \$ 8,000.00. Id. Since no other joint tenant had claimed an exemption in the property, the plain meaning of the Missouri statute entitled Abernathy to claim the full amount of the allowed homestead exemption. Id. (emphasis added). *See Also In re Riebow*, 114 B.R. 656, 657 (Bankr. E.D. Mo. 1990). The Abernathy court pointed out an exception to this approach, wherein a married debtor filing individually was entitled only to one-half of the statutorily allowed homestead exemption. Abernathy, 259 B.R. 330 at 335, citing Van Der Heide v. LaBarge (In re Van Der Heide), 164 F.3d 1183 (8th Cir. 1999). The holding in Van Der Heide, however, was limited to the

situation where a debtor, with a one-half interest in entireties property, was trying to protect his spouse's interest in the homestead from a creditor holding jointly incurred debt of the debtor and his non-filing spouse. Van Der Hyde, 164 F3d. 1183 at 1186.

[¶11] Courts in other states, as well, have held that a debtor holding a joint tenancy in a homestead with a non-debtor are entitled to the full benefit of the state's homestead exemption: "In Montana, **homestead laws are to be liberally construed in favor of the claimant**. We therefore find that appellant is entitled to the full \$ 40,000 homestead exemption on her undivided one-half interest in the homestead property." Neel v. First Fed. Sav. & Loan Ass'n, 675 P.2d 96, 106 (Mont. 1984) (Internal citations omitted) (emphasis added).

[¶12] The Missouri statute is not terribly dissimilar from the North Dakota Statute below, which the Trustee cites in his objection:

The homestead of any individual, whether married or unmarried, residing in this state consists of the land upon which the 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 one hundred thousand dollars 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 tracts of land unless the lots or tracts of land are contiguous. For purposes of this section, "contiguous" means two or more tracts 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.

[¶13] The major difference is that, while the North Dakota statute does not specifically address the possibility that one joint owner may wish to use the maximum allowed exemption amount for his or her portion of the property, neither does the North Dakota statute prohibit that. What is clear from the North Dakota statute which the trustee has

cited is that it is available to either single or married persons, and that the maximum amount in either case is \$ 100,000.00.

[¶14] In the present case, Debtor Anderson has a joint interest in his homestead along with his non-debtor wife, whose joint interest in the same property is not part of the bankruptcy estate. Anderson may appropriately apply up to the full amount of the \$ 100,000 North Dakota homestead exemption to his one-half interest in the property. Mrs. Anderson did not file bankruptcy. The debt in this bankruptcy is not joint debt; it is solely Mr. Anderson's. The Andersons, in all respects other than joint ownership of the homestead, have entirely separate finances. They should not be penalized by the bankruptcy court because of Mr. Anderson's individual Chapter 7 filing. If Debtor Anderson were so limited, as a single debtor would not be, the result is effectively that there is a "marriage penalty" in North Dakota bankruptcy filings, which would certainly be against public policy. California courts have recognized, and dealt with such a scenario:

It is clear, therefore, that if the husband in this case had owned the property with a person other than his wife, he would be entitled to the full exemption in an execution sale. The wife's interest in joint tenancy property is no more subject to execution for the husband's debt than would be the interest of any other person; **no basis exists for affording the creditor a stronger hand as against property held in cotenancy with the claimant's spouse than as against property in which the cotenant is not married to the claimant.** Schoenfeld v. Norberg, 90 Cal. Rptr. 47, 52 (Ct. App. 1970) (Internal citation omitted) (emphasis added).

[¶15] The trustee's proposed application of the debtor's exemption is mistaken.

[¶16] The Trustee, in his objection to the Debtor's exemption of his homestead, would have us believe that the exemption was "improperly applied". (Bankr. D.N.D. File No.

18-30365 docket # 12, App. at 1). Further, citing two North Dakota cases, the Trustee states that the homestead exemption is a family right, not a personal right. Id., App. at 2

[¶17] The Trustee seemingly bases this argument upon an older, out-of-favor, concept in North Dakota law, that of the Homestead as a “family” right. Indeed, at one time, the right of homestead was not even accorded to a single person who had never been married. Fisher v. Fisher, 53 N.D. 631,634, 204 N.W. 434 (N.D. 1926) citing McCanna v. Anderson, 6 N.D. 482, 486, 71 N.W. 769 (N.D. 1897). The Trustee cites as his support for this “family” concept the 1959 case of Albrecht v. Albrecht, 99 N.W.2d 229 (N.D. 1959), “The law does not look upon the right to exemptions as a personal right of the husband, or even being given to the husband at all. It is a family right rather than a personal right”. In re Fandrich, 63 B.R. 250, 253 (Bankr. D.N.D. 1986) citing Albrecht v. Albrecht, 99 N.W.2d 229 (N.D. 1959), citing First Int’l Bank v. Lee, 25 N.D. 197, 141 N.W. 716 (1913).

[¶18] The Trustee reaches all the way back to 1913 (and beyond) in his quest to deny Debtor Anderson the exemption to which he is entitled; however, in 1979, N.D.C.C. 47-18-01 was amended, to specifically remove the phrase “every head of the family” and add the phrase “any person, whether married or unmarried” as qualifying descriptions of the individuals qualified to possess a “homestead”. N.D.C.C. § 47-18-02, “Head of family Defined,” was also repealed in 1979.

(House Bill 1582, Approved March 15, 1979, App. at 9-11).

[¶19] The Trustee would also have us believe that allowing Debtor Anderson the full \$ 100,000 exemption is somehow unfair. (Bankr. D.N.D. File No. 18-30365 docket # 12, App. at 3,4). The California court in Schoenfeld addresses this issue:

Thus, while a husband and wife cannot declare two homesteads, either on the same property or on different property, the statutes contemplate that where members of different families hold property in joint tenancy or tenancy in common, there might be more than one homestead exemption claimed on the same property.
Schoenfeld, 90 Cal. Rptr. 47 at 52.

N.D.C.C. § 47-18-01 is clearly stated; any individual is entitled to claim a homestead exemption of \$ 100,000. Under the Trustee's proposed application of the Debtor's homestead exemption, married debtors, as opposed to the single individual debtor, would suffer a disadvantage.

[¶20] The Trustee is also concerned that if Debtor Anderson is allowed to claim the full \$ 100,000 exemption that the statute allows, that his spouse may at some future date claim the same exemption to which she would not be entitled, in his opinion. (Bankr. D.N.D. File No. 18-30365 docket # 12, App. at 3). The Missouri court in Abernathy, has foreseen this possibility:

We also reject the Trustee's assertion that [the debtor] should only be entitled to claim one-third of the homestead exemption because of the possibility that one of the other joint tenants might later claim a homestead exemption in the same property . . . If, at a later date, the application of the unambiguous language of the statute results in an unintended consequence, that will be for the Missouri legislature to correct. The fact that this situation arises in bankruptcy does not change this result.
Abernathy, 259 B.R. 330 at 338.

The McCanna case was decided over one hundred years ago; Albrecht was decided 40 years ago. The current statute reflects a new social milieu quite unlike that of 100 or even 40 years ago. Appellant's counsel agrees that at times statutes concerning any topic may appear to be inexpertly drafted, or that every possibility in every situation has not been foreseen; however, '[p]olicy considerations and equitable concerns [] are impermissible bases for statutory interpretation when, as here, the language of the statute

is clear and unambiguous.” Hartford Underwriters Ins. Co. v. Magna Bank, N.A. (In re Hen House Interstate, Inc.), 177 F.3d 719, 723 (8th Cir. 1999).

CONCLUSION

[¶21] Any person, regardless of gender, may claim a homestead exemption pursuant to N.D.C.C. 47-18-01. “When a statute is unambiguous, the letter of it is not disregarded in pursuit of its spirit.” City of Fargo v. Ness, 551 N.W.2d 790, 794 (N.D. 1996), Citing Section 1-02-05, N.D.C.C. The statute is clearly stated; the Debtor is entitled to apply an exemption of up to \$ 100,000 to his interest in his homestead property, and he may apply that exemption to his half-interest in the jointly held homestead.

[¶22] WHEREFORE, based upon the above and foregoing, Appellant’s counsel respectfully requests that this Court answer the Certified Question presented by the Bankruptcy Court with “Yes”.

Respectfully submitted this 14th day of February, 2019

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