

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Howard Malloy and Great Plains Potato
Production, LLP,

Plaintiffs and Appellees,

vs.

James Behrens,

Defendant and Appellant.

Supreme Court No. 20210155

District Court No. 30-09-C-00869

**APPEAL FROM THE MORTON COUNTY DISTRICT COURT'S
ORDER GRANTING PETITION FOR APPRAISAL OF
HOMESTEAD, ORDER GRANTING PETITION FOR SALE OF
HOMESTEAD, AND ORDER CONFIRMING SALE, JUDGE DAVID
E. REICH PRESIDING**

ORAL ARGUMENT REQUESTED

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[¶ 3] STATEMENT OF THE ISSUES

[¶ 4] 1. Whether the District Court Erred when it Granted the Plaintiffs' Petition for Appraisal of Homestead.

[¶ 5] 2. Whether the District Court Erred when it Granted Plaintiffs' Motion for Order Directing Sale of Homestead.

[¶ 6] 3. Whether the District Court Erred when it Concluded the Minimum Bid Price would not Include the Balance of Plaintiffs' Judgment

[¶ 7] 4. Whether the District Court Erred when it Confirmed the Sale of the Property.

[¶ 8] STATEMENT OF THE CASE

[¶ 9] This appeal is brought following an order of the district court granting Plaintiff-Appellee Howard Malloy's ("Malloy") Petition for Appraisal of Homestead, Motion for Order Directing Sale of Homestead, and an Order Confirming Sale of Homestead.

[¶ 10] On November 3, 2009, Malloy commenced this lawsuit against Defendant-Appellant James Behrens' ("Behrens" or "Jim"). (App. 11-15). On March 25, 2010, Malloy obtained a judgment against Behrens "in the sum of \$341,765.26 ..." (App. 16).

[¶ 11] Beginning in the summer of 2020, in accordance with N.D.C.C. Ch. 47-18, Malloy undertook an effort to conduct a forced execution sale of Behrens' homestead. (See, e.g., Doc. Id. ##134-136). Those efforts were ultimately

successful. (App. 28-29). Behrens' homestead was sold at a sheriff's execution sale on June 1, 2021. (Doc. Id. #208). This appeal followed. (App. 26-27 and 30).

[¶ 12] STATEMENT OF FACTS

[¶ 13] Jim is an individual who resides in Morton County, North Dakota. Jim is married to his wife, Julie Behrens ("Julie"). In 2006 the Behrens purchased their current home located at 3252 22nd Ave, Mandan ND 58554 (the "Homestead"). (Behrens' Answers to Interrog., Doc. Id. #141). The Behrens purchased the Homestead with the assistance of a note and mortgage from Dakota Community Bank, N.A., which had an original balance of \$306,420.75 (the "Mortgage"). (Doc. Id. ##174 and 175). The Homestead has been the Behrens' home and residence since 2006. (Behrens' Answers to Interrog., Doc. Id. #141). James Behrens is the only spouse on the title of the Homestead.

[¶ 14] Prior to November 2009, Malloy and Behrens were business partners and co-owners of Plaintiff-Appellee Great Plains Potato Production, LLP. On November 3, 2009, Malloy commenced this lawsuit against Behrens. Malloy's Complaint alleged Behrens possessed Partnership property and he was using the property for his own personal gain. The Complaint also alleged Behrens had defaulted on a loan to Malloy. (App. 11-15).

[¶ 15] On March 2, 2010, Malloy moved for default judgment because Behrens did not answer or respond to the Complaint. On March 23, 2010, the district court granted Malloy's motion for default judgment and ordered that judgment be

entered against Behrens “in the sum of \$341,765.26 ...” Judgment was entered on March 25, 2010. (App. 16-17).

[¶ 16] On February 24, 2020, the Morton County District Court Clerk of Courts issues a general execution to Malloy (the “General Execution”). (Doc. Id. #125). On March 31, 2020, the Morton County Sheriff’s Office served the General Execution on Behrens via substitute service on Julie. (Doc. Id. #132). On April 2, 2020, the Sheriff recorded a levy with the Morton County Recorder’s Office. (Doc. Id. #144). Among other things, the levy listed the Behrens’ home as property upon which Malloy was levying. (Doc. Id. #144).

[¶ 17] On April 10, 2020, Behrens served an “Objection to Execution and Declaration of Exemptions” on Malloy and the Sheriff. (Doc. Id. #194). In the declaration, Behrens claimed “[his] homestead located at: 3252 22nd Ave, Mandan, ND 58554” as being exempt from “all execution, levy or other legal process ...” (Doc. Id. #194 ¶ 6). Behrens further asserted his “homestead cannot be ‘conveyed or encumbered’ without the signature of [his] wife. See N.D.C.C. § 47-18-05.” (Doc. Id. #194 ¶ 9). And further demanded the “release of the Levy and Execution against [his] homestead.” (Doc. Id. #194 ¶ 9).

[¶ 18] On April 20, 2020, the Sheriff returned the Execution as partially satisfied. (Doc. Id. #131). On May 7, 2020, the Sheriff recorded a release of the Levy. According to the release of levy, the Sheriff “RELEASE[D] AND DISCHARGE[D] EACH AND EVERY PART OF SAID PROPERTY HEREIN DESCRIBED FROM THE SAID LEVY, AND FROM THE NOTICE AND

EFFECT OF SAID LEVY, AND I HEREBY ABANDON, WAIVE, DISCHARGE & CANCEL THE SAID LEVY.” (emphasis in original). (Doc. Id. #145).

[¶ 19] On June 30, 2020, Malloy filed and served a Petition for Appraisal of Homestead. (Doc. Id. #134). The petition claimed Behrens’ homestead had a sheriff’s levy “recorded against the Property in the office of the Morton County Recorder ...” and the “value of the Property exceeds the balance owing on the mortgaged lien and the amount of the homestead exemption as defined by N.D.C.C. § 47-18-01” and requested that “the court ... appoint appraisers to appraise the Property, and enter an order directing the sale of the Property, all pursuant to N.D.C.C. Chapter 47-18.” (Doc. Id. #134 ¶¶ 5, 7, and 8).

[¶ 20] On July 28, 2020, Behrens filed and served an Objection to the Petition for Appraisal. Specifically, Behrens objected on the basis that under N.D.C.C. § 47-18-06, there was no “levy upon” Behrens’ homestead because the Levy had been released. (Doc. Id. #143).

[¶ 21] On August 12, 2020, Malloy’s Petition for Appraisal came before the district court for hearing. The district court took testimony from three appraisers - Wade Bachmeier, Daryl Kerzman, and Steve Tomac. (Tr. Oral Argument 5:3 - 21:23, Aug. 12, 2020). The district court also heard argument from the Parties. (Tr. Oral Argument 21:24 - 26:17, Aug. 12, 2020).

[¶ 22] On September 4, 2020, the district court granted Malloy’s Petition for Appraisal. (App. 18-20). Among other things, the district court concluded “N.D.C.C. § 47-18-06 requires only that the homestead be levied upon. The statute

does not require that the levy not be released. Behrens’ argument that there is no ‘levy upon’ Behrens’ homestead because it has been released is without merit.” (App. 19 ¶ 6). The district court further ordered that the appraisers “view the [homestead] and appraise the value thereof, and if the appraised value exceed the homestead exemption, determine whether the real property claimed can be divided without material injury” and the “appraisers shall present to the court a report in writing which must show the appraised valued of the homestead ...” (App. 20 ¶¶ 9(b) and 9(d)).

[¶ 23] On September 18, 2020, Malloy filed and served the appraisals. All three appraisers concluded the fair market value of the Property was \$600,000. (See Joint Appraisal of Wade Bachmeier and Steve Tomac at Doc. Id. #168 and Appraisal of Daryl Kerzman at Doc. Id. #169).

[¶ 24] On October 2, 2020, Malloy filed and served a proposed “Order Directing Sale of Homestead.” (Doc. Id. #176). On October 6, 2020, the district court signed the Order Directing Sale of Homestead. (Doc. Id. #179). But after Behrens raised concerns about the lack of motion and notice of motion regarding the Order Direction Sale of Homestead, and after Behrens scheduled a status conference, Malloy made a “Motion for Order Directing Sale of Homestead.” (See Doc. Id. ##180, 181, and 185).

[¶ 25] On November 2, 2020, Behrens filed and served a Brief Opposing Motion for Order Directing Sale of Homestead. Behrens argued “i) Malloy has not received the consent of Jim’s wife, Julie Behrens, to the sale of the Behrens’

homestead and any such sale would be void under N.D.C.C. § 47-18-05; ii) Malloy has not followed the proper statutory procedure to force a sale of the Behrens' homestead; and iii) Malloy has not properly accounted for all of the liens and encumbrances against the Behrens' homestead. Finally, even if the [district court] orders a sale of the Behrens' homestead, it must set the correct minimum bid.” (Doc. Id. #192 ¶ 1).

[¶ 26] On November 3, 2020, Malloy's Motion for Order Directing Sale of Homestead came before the district court. At the outset of the hearing, a discussion was held regarding the October 6, 2020 Order Directing Sale of Homestead:

Teigland: ... I would like to hear from the Court, though, what the Court believes is -- the Court signed an order for sale of homestead ... I am curious what the Court thinks of the status of that order. That was -- that's a contested issue, and I don't know if the Court made -- misunderstood or mad some mistake about whether -- whether that was contested or not, but the defendant wasn't given any opportunity to respond to that. It was filed on a Friday afternoon and by Monday night the Court signed it ... [A]s long as the -- the defendant is able to have his arguments heard, his -- on the merits, that's all -- that's all the defendants is requesting.

Malloy: ... I don't have any objection at all to Mr. Behrens being heard on this issue.

The Court: I guess when I signed the previous order, I thought these matters had been addressed from the previous petition, and the arguments, that were made at the earlier hearing, but perhaps I misunderstood where we were at on that. But -- so you are prepared to address the motion -- pending motion today, is that what I am hearing?

[¶ 27] See Oral Argument Tr. 4:1 - 5:25, Nov. 3, 2020. Thereafter, the Parties were able to present their arguments on Malloy’s Motion for Order Directing Sale of Homestead. (Oral Argument Tr. 7:6 - 20:6, Nov. 3, 2020).

[¶ 28] On March 29, 2021, the district court granted Malloy’s Motion for Order Directing Sale of Homestead. (App. 21-25). While the district court had previously signed a similar order, the Court and Parties have always treated the March 29, 2021 Order Directing Sale of Homestead as the operative order. (See, e.g., App. 28 ¶ 1 (citing the March 29, 2021 order in its Order Confirming Sale - not the October 6, 2020 order)).

[¶ 29] In the order, the district court concluded Behrens argument regarding the lack of consent of Julie Behrens was “without merit” because “such an interpretation would frustrate the purpose of N.D.C.C. Chapter 47-18, and specifically the provisions of N.D.C.C. § 47-18-04(4).” (App. 24 ¶ 7). The district court also concluded the balance of the Judgment at the time of the order was about \$550,000 and the balance of the mortgage was about \$220,000 and “[a]ccording to N.D.C.C. § 28-20-13, the Plaintiff’s Judgment in this action is not a lien or encumbrance on the homestead. The only liens or encumbrances of which the court has been made aware is [the Mortgage].” (App. 24 ¶ 6).

[¶ 30] The district court also ordered “the minimum bid received must exceed the balance of the mortgage on the property plus one hundred thousand dollars and the Plaintiff’s recovery to satisfy his judgment is limited to any proceeds over and above and above these amounts.” (App. 24 ¶ 8). In other words, the district

court ordered the first \$320,000 (approximately) of the sale should be paid to Jim and the balance to Malloy “to satisfy his judgment.”

[¶ 31] On April 29, 2021, the Morton County Clerk of Courts issued a Special Execution directing the Morton County Sheriff “to advertise and sell [the Homestead.]” (Doc. Id. #199).

[¶ 32] On May 27, 2021, Behrens filed a notice of appeal appealing the district court’s order granting petition for appraisal of homestead and the order directing sale of homestead. (App. 26-27).

[¶ 33] On June 1, 2021, the Morton County Sheriff sold the Property at a public auction to Malloy for \$579,894.82. (Doc. Id. #208). From the purchase price, the Sheriff retained \$135 for its fees and expenses to conduct the sale. Instead of limiting the Malloy’s recovery to amounts paid over the “balance of the mortgage on the property plus one hundred thousand dollars” as ordered by the district court, the remainder of the bid was paid to Malloy. (Compare App. 24 ¶ 8 (“the Plaintiff’s recovery to satisfy his judgment is limited to any proceeds over and above and above [the homestead exemption]”) with Doc. Id. #208 ¶ 4(g)(2) (“I have paid to Howard Malloy, the plaintiff, the amount of the bid price, less my fees and expenses of \$135.00 for making the sale ...”)).

[¶ 34] On June 3, 2021, Malloy filed and served a Sheriff’s Report of Sale, a Sheriff’s Certificate, and a proposed Order Confirming Sale of the property. (Doc. Id. ##208-211). That same day, after Malloy’s aforementioned filings, Behrens filed an “Objection to Proposed Order.” (Doc. Id. #212). Under the objection, Behrens

argued “a request for a court order must be made by motion” and that Behrens must “be give his due process rights and [be] allowed to present” arguments regarding why the “sheriff’s sale was fatally flawed” to the district court. (Doc. Id. #212).

[¶ 35] On June 7, 2021, the district court confirmed the sale. (App. 28-29). There is nothing in the record from the district court regarding why it concluded or believed a motion was not necessary from Malloy. On August 3, 2021, Behrens filed a second notice of appeal appealing the district court’s order confirming sale of homestead. (App. 30).

[¶ 36] **ARGUMENT**

I. THE DISTRICT COURT ERRED WHEN IT GRANTED MALLOY’S PETITION FOR APPRAISAL OF HOMESTEAD BECAUSE THERE WAS NO EXECUTION OR LEVY PENDING WHEN MALLOY FILED HIS PETITION FOR APPRAISAL.

A. Standard of Review.

[¶ 37] The facts regarding the sale of the Homestead are not in dispute and therefore this appeal presents pure questions of law. Most of Behrens’ arguments involve questions involving interpretation of statutes that are reviewed de novo. See Grinnell Mut. Reinsurance Co. v. Thompson, 2010 ND 22, ¶ 9, 778 N.W.2d 526 (“Interpretation of a statute is a question of law”). Behrens’ arguments also include questions involving his due process rights and public policy that are also reviewed de novo. See Hagen v. Horst, 2019 ND 37, ¶ 2, 923 N.W.2d 106 (“This court reviews a claimed violation of a constitutional right de novo.”) and Meyer v.

Hawkinson, 2001 ND 78, ¶ 20, 626 N.W.2d 262 (“Public policy is a principle of law”).

B. Judgment creditor’s remedies and the homestead exemption.

[¶ 38] A judgment creditor has a variety of opportunities and remedies to satisfy a judgment. One of those remedies is by sheriff’s execution against real and/or personal property of the judgment debtor under N.D.C.C. Ch. 28-21. But a judgment creditor’s ability to reach the real and/or personal property of the judgment debtor is not absolute. North Dakota Century Code chapter 28-22 contains property that is “exempt ... from attachment, prejudgment, or other mesne process and from levy and sale upon execution ...” N.D.C.C. § 28-22-01.

[¶ 39] Relevant here is the homestead exemption, which is located in N.D.C.C. §28-22-02 (7) (“The property mention in this section is absolution exempt rom all process, levy, or sale: ... The homestead as created, defined, and limited by law.”). The right to a homestead exemption is also included in North Dakota’s Constitution. See N.D. Const. Art. XI § 22 (“The right of the debtor to enjoy the comforts and necessaries of life shall be recognized by wholesome laws, exempting from forced sale to all heads of families a homestead ...”). The homestead is defined as:

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.

N.D.C.C. § 47-18-01.

[¶ 40] North Dakota’s homestead provision places designated homestead property out of the reach of creditors while it is occupied as a home, or as otherwise stated, to secure a debtor’s essential shelter from creditors. In re Anderson, 2019 ND 217, ¶ 7, 932 N.W.2d 506. The North Dakota Supreme Court liberally construes the homestead statutes. See Id. However, the homestead right is not unlimited. See N.D.C.C. § 47-18-01 (the total of the homestead exemption is “not to exceed one hundred thousand dollars in value, over and above liens or encumbrances or both.”).

C. The right to execute upon the homestead of a judgment debtor.

[¶ 41] The procedure by which a judgment creditor can force sale of a homestead requires an analysis of century code sections located in Chapters 28-21, 28-23, 28-24, and 47-18 of the Century Code. A creditor’s right to execute on a homestead is a statutory remedy. Therefore, strict compliance with the statutory procedure is required. See Red River State Bank v. Reieron, 533 NW 2d 683, 688 (ND 1995) (holding strict compliance was required for waiver of homestead exemption under N.D.C.C. § 47-18-05.1(1)); see also Poppe v. Stockert, 2015 ND 252, ¶ 9, 870 N.W.2d 187 (“A person claiming the benefits of a statutory lien must demonstrate strict compliance with the statute.”) (citation omitted). Understanding the actual, legal, statutory procedure is essential for understanding why the district court erred in this case.

[¶ 42] First, to levy an execution on real property (including a homestead), the judgment creditor must request an execution be delivered to “the sheriff of any county where the judgment is docketed.” N.D.C.C. § 28-21-05. The execution must contain, among other things, the seal of the court, the clerk of court’s signature, the name of the parties, and the amount of money due to the judgment creditor, etc. See N.D.C.C. § 28-21-06.

[¶ 43] Second, the execution must be delivered to the sheriff and “[u]pon receipt of the execution, the sheriff shall: ... [s]atisfy the judgment ... out of the personal property of the judgment debtor, and if sufficient personal property cannot be found, out of the real property belonging to the debtor on the date when the judgment was docketed in the county or at any time after that date.” N.D.C.C. § 28-21-06(1).

[¶ 44] Third, the sheriff must levy upon the real property by filing “a notice of levy with the recorder of the county in which the property is located.” N.D.C.C. § 28-21-08(1)(a).

[¶ 45] Fourth, while the notice of levy is still pending, to determine whether a judgment debtor’s equity exceeds the homestead exemption, and therefore “subject to execution or forced sale,” a judgment creditor must apply to the district court for an appraisal of the homestead. See N.D.C.C. § 47-18-04(4). Under N.D.C.C. § 47-18-06 “[w]hen an execution for the enforcement of a judgment obtained in a case ... is levied upon the homestead, the judgment creditor may apply

to the district court in the county in which such homestead is situated for the appointment of persons to appraise the value thereof.”

[¶ 46] Fifth, if appraisers are appointed, within fifteen days of their appointment, “the appraisers must present to the judge a report in writing which must show the appraised value of the homestead and their determination upon the matter of a division of the real property claimed.” N.D.C.C. § 47-18-11.

[¶ 47] Sixth, if, after reviewing the appraiser’s reports, the district court concludes “the real property claimed as a homestead exceeds in value the amount of the homestead exemption and that it cannot be divided without material injury, the court must make an order directing its sale under the execution.” N.D.C.C. § 47-18-13.

[¶ 48] Seventh, the sheriff must “give public notice of the time and place of the sale by advertisement in the county’s official newspaper once a week for three successive weeks, the last publication to be at least ten days before the making of the sale.” N.D.C.C. § 28-23-04

[¶ 49] Eighth, the sheriff must hold a “public auction” at which the homestead is sold “to the highest bidder.” N.D.C.C. § 28-23-07. The auction must occur between the hours of nine a.m. and four p.m. Id.

[¶ 50] Ninth, the sheriff must give to the purchaser (i.e. the highest bidder) a certificate of sale. N.D.C.C. § 28-23-11(1). The certificate must include a description of the property sold, a statement of the whole price paid, and the

redemption period (if any), among other things. Id. The certificate must also be recorded in the office of the recorder. N.D.C.C. § 28-23-12.

[¶ 51] Tenth, if a sale of a homestead occurs, the sheriff must pay to the debtor/homestead claimant “the amount of the homestead exemption ... and the residue applied to the satisfaction of the execution.” N.D.C.C. § 47-18-14.

[¶ 52] Eleventh, if the sheriff causes a levy and sale to be made on any of the debtor’s property, the sheriff must return the execution to the clerk of courts “within a reasonable time following the completion of the sale of the property or ninety days after receipt by the officer.” N.D.C.C. § 28-21-07.

[¶ 53] Twelfth, the district court, upon the return of the execution, must “carefully examine[] the proceedings of the officer” and if the district court is “satisfied that the sale has been made in all respects in conformity to the provisions of [Ch. 28-23], the court shall make an order confirming the sale and directing ... [the sheriff] make to the purchaser a deed of the real property ... at the expiration of the redemption period ...” N.D.C.C. § 28-23-13.

[¶ 54] Finally, upon expiration of the redemption period, if there has been no redemption, “the sheriff shall execute and deliver a sheriff’s deed for the property immediately after the time for redemption has expired.” N.D.C.C. § 28-24-13. A sheriff’s deed “is sufficient evidence of the legality of the sale and proceedings contained in the certificate ... and vests in the grantee title to the premises as vested in the debtor at or after the time when the real property became liable to the satisfaction of the judgment.” N.D.C.C. § 28-24-14.

[¶ 55] North Dakota law provides an approximately thirteen step procedure by which a creditor can force the sale of a debtor’s homestead. In this case, the most relevant steps are steps one (i.e. obtaining an execution), three (i.e. the sheriff recording a levy with the county recorder’s office), and ten (i.e. after a sale of homestead, the sheriff must pay the homestead exemption amount to the debtor).

D. The district court erred when it granted the Plaintiffs’ petition for appraisal of homestead because there was no execution or levy pending at the time of the petition.

[¶ 56] On June 30, 2020, Malloy filed and served a Petition to Appoint Appraiser. (Doc. Id. #134). According to the Petition, “[t]he [Homestead] was levied on behalf of Malloy by the Morton County Sheriff ...” (Doc. Id. #134 ¶ 5). Behrens objected to the petition because, prior to the petition being filed, the sheriff released the levy and under N.D.C.C. § 47-18-06, a district court can only grant a petition to appoint appraiser “[w]hen an execution for the enforcement of judgment ... is levied upon [a] homestead ...” (Doc. Id. #143 ¶¶ 5 and 6).

[¶ 57] On September 4, 2020, the district court granted the petition and concluded N.D.C.C. § 47-18-06 “requires only that the homestead be levied upon. The statute does not require that the levy not be released.” (App. 19 ¶ 6). Accordingly, the position of the district court and the Malloy is, apparently, as long as there was *a* levy recorded against a homestead *sometime* in the past, that is all that is required. They are wrong.

[¶ 58] A creditor must follow the statutory procedure, as described in N.D.C.C. Ch. 28-21, 28-23, 28-24, and 47-18, to force a valid sale of a debtor’s

homestead. See Red River State Bank, 533 NW 2d at 688 (holding strict compliance was required for waiver of homestead exemption under N.D.C.C. § 47-18-05.1(1)).

[¶ 59] First, under N.D.C.C. § 47-18-06, “[w]hen an execution for the enforcement of a judgment obtained in a case ... **is levied** upon the homestead, the judgment creditor may apply to the district court ... for the appointment of persons to appraise the value [of the homestead].” Section 47-18-06 uses the term “is,” which obviously indicates a present condition of the homestead. The section similarly assumes “an execution” is outstanding and in the hands of the sheriff.

[¶ 60] Second, Behrens’ interpretation of N.D.C.C. § 47-18-06 is further supported by a number of sections in N.D.C.C. Ch. 47-18, including Sections 47-18-12, -13, and -14. All three sections, like Section 47-18-06, *assume* an execution has been issued and is pending, which is only consistent with Behrens’ interpretation of N.D.C.C. § 47-18-06.

[¶ 61] Under N.D.C.C. § 47-18-13, if after reviewing the petition, the district court concludes “the real property claimed as a homestead exceeds in value the amount of the homestead exemption and that it cannot be divided without material injury, the court must make an order directing its sale under **the** execution.” (emphasis added). Section 47-18-13 does not state the “the court must make an order directing its sale under a future execution.” It says **the** execution. Accordingly, N.D.C.C. § 47-18-13 *assumes* an execution has been issued and is pending, which is only consistent with Behrens’ interpretation of N.D.C.C. § 47-18-06.

[¶ 62] N.D.C.C. § 47-18-12 similarly *assumes* an execution is pending at the time an application for appraisal is made. See N.D.C.C. § 47-18-12 (when a homestead can be divided without material injury, the “**execution** may be enforced against the remainder of the real property.”) (emphasis added).

[¶ 63] Finally, under N.D.C.C. § 47-18-14, during an execution sale of a homestead, “the amount of the homestead exemption must be paid to the claimant and the residue apply to the satisfaction of the execution” and “[w]hen the execution is against a married claimant whose spouse is living ...” Accordingly, Section 47-18-14 also *assumes* an execution is pending at the time an application for appraisal is made.

[¶ 64] Had the proper statutory procedure been followed, Behrens would have been granted an opportunity to “satisfy the judgment ... out of the personal property of the judgment debtor[.]” N.D.C.C. § 28-21-06(1). Only then would Malloy have been permitted to attempt to satisfy the judgment out of Jim’s real property. Id. While there are no North Dakota cases describing in detail the process by which a creditor can seek an execution on the excess value over the homestead exemption, California had similar homestead statutes and California courts have addressed similar questions, which also support Behrens’ interpretation. California and North Dakota both adopted portions of Field’s Code. Therefore, “California court decisions construing Field Code sections, while not binding, are entitled to respectful consideration, and may be ‘persuasive and should not be ignored.’” McLean v. Kirby Co., 490 N.W.2d 229, n.1 (N.D. 1992). Specifically, in California,

under what was then Section 1245 of the Civil Code, “[w]hen an execution for the enforcement of a judgment ... is levied upon the homestead, the judgment creditor may ... apply to the superior court of the county in which the homestead is situated for the appointment of persons to appraise the value thereof ...” Swearingen v. Byrne, 67 Cal. App. 3d 580, n.3 (1977). In Swearingen, the court of appeals held a creditor was not entitled to have execution levied against the excess value over the homestead exemption because the creditor “did not obtain a writ of execution or comply with section 1245 of the Civil Code which ... is the only procedure where a lien may attach to the excess value of the property” and “until the levy of an execution on homestead property a judgment is not secured by any kind of lien ...” Id. at 587.

[¶ 65] Here, despite the requirement of a pending levy under N.D.C.C. § 47-18-06 and an outstanding execution under N.D.C.C. § 47-18-13, Malloy filed his petition for appraisal nearly two months after the levy was released and after the execution was return by the sheriff. Therefore, Malloy failed to follow the statutory procedure to force a sale of the Behrens’ homestead and the district court erred, as a matter of law, when it appointed appraisers. This Court must REVERSE the district court’s Order Granting Petition for Appraisal of Homestead, Order Granting Petition for Sale of Homestead, and Order Confirming Sale of Homestead.

II. THE DISTRICT COURT ERRED WHEN IT GRANTED MALLOY’S MOTION FOR ORDER DIRECTING SALE OF HOMESTEAD BECAUSE MALLOY FAILED TO FOLLOW THE STATUTORY PROCEDURE FOR A SALE OF HOMESTEAD UNDER EXECUTION, MALLOY HAS NOT RECEIVED JULIE BEHRENS’ CONSENT TO THE SALE, AND THE APPRAISED VALUE OF THE HOMESTEAD DID NOT EXCEED THE HOMESTEAD EXEMPTION AMOUNT.

[¶ 66] On October 9, 2020, Malloy filed and served a Motion for Order Directing Sale of Homestead. (Doc. Id. ##184-187). Malloy argued in the motion the appraised value of the Homestead exceeded the value of the homestead exemption and the appraisers determined that the Homestead “cannot be divided without material injury” and requested an order “Directing Sale of Homestead.” (Doc. Id. #186 ¶¶ 4 and 8).

[¶ 67] Behrens opposed the motion because Malloy had not followed the proper statutory procedure to force a sale of the Behrens’ homestead, Malloy had not received Julie’s consent of to the sale of the Behrens’ homestead and any such sale would be void under N.D.C.C. § 47-18-05, and Malloy had not properly accounted for all of the liens and encumbrances against the Behrens’ homestead. (Doc. Id. #192 ¶ 1).

A. Malloy failed to follow the statutory procedure for an execution sale of a homestead.

[¶ 68] The district court granted Malloy’s Motion for Order Directing Sale of Homestead and concluded Behrens’ argument regarding Malloy not following the statutory procedure was “without merit.” (App. 24 ¶ 7).

[¶ 69] Under N.D.C.C. § 47-18-06, “[w]hen an execution for the enforcement of a judgment ... **is levied upon [a] homestead**, the judgment creditor may apply to the district court in the county in which such homestead is situated for the appointment of persons to appraise the value thereof.” (emphasis added). The arguments made supra at ¶¶ 56 - 65 are incorporated herein by reference.

[¶ 70] Here, despite the requirement of a pending levy under N.D.C.C. § 47-18-06 and an outstanding execution under N.D.C.C. § 47-18-13, Malloy filed his motion for sale of homestead months after the levy was released and after the execution was return by the sheriff. Therefore, Malloy failed to follow the statutory procedure to force a sale of Behrens’ homestead and the district court erred, as a matter of law, when it ordered the sale of homestead. This Court must REVERSE the district court’s Order Granting Petition for Appraisal of Homestead, Order Granting Petition for Sale of Homestead, and Order Approving Sale of Homestead.

B. Malloy has not received the consent of Julie Behrens, to the sale. Therefore, any such sale is void.

[¶ 71] The district court granted Malloy’s Motion for Order Directing Sale of Homestead and concluded Jim’s argument regarding Malloy requiring Julie’s consent to the sheriff’s sale was “without merit” because “such an interpretation would frustrate the purpose of N.D.C.C. Chapter 47-18, and specifically the provisions of N.D.C.C. § 47-18-04(4).” (App. 24 ¶ 7).

[¶ 72] Under N.D.C.C. § 47-18-05, “[t]he homestead of a married person ... cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife.”

[¶ 73] The buyer of a sale under execution receives a sheriff’s certificate and if the debtor fails to redeem a sheriff’s deed. See N.D.C.C. §§ 28-23-11 and 28-24-13. Accordingly, a sheriff’s certificate and deed is a “instrument of conveyance” and, under the plain language of Section 47-18-05, will be void unless signed by Julie Behrens. See Matter of Estate of Hall, 2019 ND 196, ¶ 19, 931 N.W.2d 482 (“The conveyance of a homestead or any portion thereof must be executed and acknowledged by both husband and wife, or it is void and ineffective.”).

[¶ 74] In Kipp v. Sweno, 683 N.W.2d 259 (Minn. 2004), the Minnesota Supreme Court addressed a similar issue as the one presented here. The defendant-appellant was a married judgment debtor. Id. at 261. The defendant’s spouse was not a debtor. Id. The defendant owned his home with his wife as joint tenants. Id. The plaintiff-appellee served defendant with a writ and notice of a sheriff’s execution sale of personal and real property and thereafter sought a forced sale of defendant’s “undivided one-half interest” in the homestead-property. Id.

[¶ 75] The defendant argued, among other things, that the property could not be sold via a sheriff’s execution sale because under Minn. Stat. § 507.02 (2004), if an owner of a homestead is married, “no conveyance of the homestead ... shall be valid without the signatures of both spouses.” See Kipp at 262 and 263.

[¶ 76] The Minnesota Supreme Court agreed with the defendant and held a judgment creditor “cannot acquire more property rights in a property than those already held by the [judgment debtor]” and “a judgment debtor also may not increase the reach of the judgment lien beyond the property owned by the judgment debtor.” Id. at 266.

[¶ 77] Here, while it is true Jim is the only spouse on title and in Kipp both spouses were on title, N.D.C.C. § 47-18-05 is unambiguous. Any conveyance of the property requires the express written consent of Julie Behrens. Concluding otherwise would increase Jim’s property rights in the homestead and permit a judgment creditor to do something that Jim himself is unable to do.

[¶ 78] The district court concluded the Behrens’ interpretation of N.D.C.C. § 47-18-05 would “frustrate the purpose of ... N.D.C.C. § 47-18-04(4).” (App. 24). But what the district court failed to recognize about North Dakota law is that the entire purpose of the homestead exemption, and N.D.C.C. Ch. 47-18, is to shield the homestead from creditor’s claims (i.e., to frustrate them). See In re Anderson, 2019 ND 217, ¶ 7, 932 N.W.2d 506 (holding the purpose of North Dakota’s homestead provision is “to secure a debtor’s essential shelter from creditors.”).

[¶ 79] North Dakota liberally construes its homestead statutes. In re Anderson, 2019 ND 217, ¶ 7, 932 N.W.2d 506. Here, the district court ignored the plain language and intent of N.D.C.C. § 47-18-05 and it misconstrued and misapplied the law. Any sale of the Homestead is void without Julie’s express written consent, which Malloy has not obtained. Therefore, the district court erred

as a matter of law and this Court must REVERSE the district court’s Order Granting Petition for Appraisal of Homestead, Order Granting Petition for Sale of Homestead, and Order Approving Sale of Homestead.

C. The district court miscalculated Behrens’ homestead exemption by not including the balance of the Judgment.

[¶ 80] The district court granted Malloy’s Motion for Order Directing Sale of Homestead and rejected Jim’s argument regarding how to calculate the Homestead exemption because “[a]ccording to N.D.C.C. § 28-20-13, the [Judgment] is not a lien or encumbrance on the homestead. The only liens or encumbrances of which the court has been made aware is the Mortgage...” (App. 24 ¶ 6).

[¶ 81] Under N.D.C.C. § 47-18-01, the homestead exemption shall not “exceed one hundred thousand dollars in value, over and above liens or encumbrances or both.” While it is true Malloy’s judgment may not *attach* as a lien due to N.D.C.C. § 28-20-13 prior to execution and levy, for purposes of N.D.C.C. Ch. 47-18, the Judgment is to be deemed a lien.

[¶ 82] For example, N.D.C.C. § 47-18-16 says “[i]f a homesteads is ... sold for the satisfaction of any **lien** mentioned in section 47-18-04, the price thereof or the proceeds of the sale beyond the amount necessary to satisfy such **lien** ... is entitled ... to the same protection against legal process as the law gives to the homestead.” (emphasis added). In the context of this case, what “lien” is Section 47-18-16 referring to if not Malloy’s Judgment?

[¶ 83] Had Malloy followed the correct statutory procedure (see supra at ¶¶ 56-65), it would be even more clear that the Judgment is to be deemed a lien or encumbrance for purposes of N.D.C.C. Ch. 47-18. Specifically, as has been previously argued, a levy should be pending against a homestead while the creditor is seeking the forced sale of the homestead. To levy means “[t]o take or seize property in execution of a judgment.” Black’s Law Dictionary 1047 (Deluxe 10th ed. 2014); see also In re Peterson, 80 B.R. 167, 169 (Bankr. N.D. 1987) (“The object of a levy is to bring property within the custody of the law.”). Therefore, when a levy is pending against a property, the sheriff is in possession of the legal title to the property. Finally, Behrens’ interpretation is, once again, supported by California case law interpreting similar statutory provisions. In Swearingen v. Byrne, 67 Cal. App. 3d 580 (1977), the court of appeals held “the judgment creditor’s right to subject such excess to the satisfaction of his judgment is initiated by and finds its sole basis in the levy of execution provided for by section 1245 of the Civil Code ... [and] **that such levy establishes the lien for the purpose of such proceedings.**” Id. at 585 (emphasis added).

[¶ 84] North Dakota liberally construes statutes regarding homesteads. In re Anderson, 2019 ND 217, ¶ 7, 932 N.W.2d 506. Here, Malloy was claiming his lien under N.D.C.C. § 47-18-04(4). Reading N.D.C.C. Ch. 47-18 as a whole, Malloy’s judgment a “lien or encumbrance” under N.D.C.C. § 47-18-01 and must be included in the Court’s homestead calculation. The district court concluded the balance of the Judgment was about \$550,000, the balance of the Mortgage was about \$220,000,

and Behrens was entitled to a \$100,000 statutory credit. Had the district court correctly calculated Behrens' Homestead exemption, it would have arrived to the amount of \$870,000, which exceeds the appraised value of the Homestead (i.e. \$600,000). Therefore, the district court misapplied and misconstrued the law, erred as a matter of law, and this Court must REVERSE the district court's Order Granting Petition for Appraisal of Homestead, Order Granting Petition for Sale of Homestead, and Order Approving Sale of Homestead.

III. THE DISTRICT COURT ERRED WHEN IT CONCLUDED THE MINIMUM BID PRICE FOR THE PROPERTY SHOULD NOT INCLUDE THE BALANCE OF THE JUDGMENT.

[¶ 85] On October 9, 2020, Malloy filed and served a Motion for Order Directing Sale of Homestead. (Doc. Id. #184-187). Malloy argued in the motion "there are no other liens or encumbrances on the Homestead [other than the Mortgage]" and the value of Jim's homestead exemption should be no "greater than the \$220,000 mortgage plus \$100,000 ..." (Doc. Id. #186 ¶ 7).

[¶ 86] Under an execution sale of a homestead "no bid must be received unless it exceeds the amount of the homestead exemption." N.D.C.C. § 47-18-13. The amount of the homestead exemption is "one hundred thousand dollars in value, over and above liens or encumbrances or both." N.D.C.C. § 47-18-01.

[¶ 87] Behrens argued, even if the district court were to conclude the property must be sold, "the minimum bid at a sheriff's sale would be \$100,000 plus the balance of the Malloy judgment plus the balance of the Behrens' mortgage." (Doc. Id. #192 ¶ 25). The district court concluded "Plaintiff's Judgment in this

action is not a lien or encumbrance on the homestead. The only liens or encumbrances of which the court has been made aware is the Mortgage ...” (App. 24 ¶ 6).

[¶ 88] Behrens’ arguments regarding calculating the homestead exemption, located supra at ¶¶ 80-84, are incorporated herein by reference. The district court misconstrued and misapplied the law regarding calculating the homestead exemption and the minimum bid amount. Therefore, even if this Court concludes the district court did not err when it appointed appraisers or ordered the sale of the Homestead, it still must REVERSE the district court’s Order for Sale of Homestead and REMAND with instructions that a new sale occur with the minimum bid beginning at \$870,000.

IV. THE DISTRICT COURT ERRED WHEN IT CONFIRMED THE SALE OF THE PROPERTY BECAUSE THE ORDER WAS SIGNED AFTER BEHRENS FILED HIS NOTICE OF APPEAL AND THE ORDER WAS SIGNED WITHOUT NOTICE OR MOTION.

[¶ 89] On May 27, 2021, Behrens filed a notice of appeal appealing the district court’s order granting petition for appraisal and the order directing sale of homestead. (App. 26-27). Generally, a district court loses jurisdiction when a notice of appeal is filed. CHS, Inc. v. Riemers, 2018 ND 101, ¶ 16, 910 N.W.2d 189. The jurisdiction of the Supreme Court attaches upon the filing of the appeal, and generally the trial court has no further jurisdiction in the matter. Id. Further, an order or judgment entered by the trial court after an appeal has been filed is ordinarily void for lack of jurisdiction. Id.

[¶ 90] Here, the district court lost jurisdiction when Behrens filed his notice of appeal on May 27, 2021. Nevertheless, on June 3, 2021, Malloy filed and served a Sheriff’s Report of Sale, a Sheriff’s Certificate, and a proposed Order Confirming Sale of the property. (Doc. Id. ##208-211). On June 7, 2021, the district court signed the Order Confirming Sale. (App. 28 - 29). In the order, the district court concluded “the sale has been made in all respects in conformity to the provisions of N.D.C.C. Chapters 28-23 and 47-18.” (App. 28 ¶ 2). However, the sheriff failed to pay to Behrens the amount of the homestead exemption as required by N.D.C.C. § 47-18-14 and has been previously ordered by the district court in its Order Granting Petition for Sale of Homestead. (App. 24-25 ¶ 8). (“Plaintiff’s recovery to satisfy his judgment is limited to any proceeds over and above [the Homestead exemption].”). This Court must order that the Order Confirming Sale must be REVERSED.

[¶ 91] In addition, the Order Confirming Sale was signed without a motion or notice of motion. Under N.D.R.Civ.P. 7(b)(1) “[a] request for a court order must be made by motion.” The requirement that written motions be filed and served with notice and opportunity to respond is not a mere formality but instead a “fundamental principal of justice and due process.” See McWethy v. McWethy, 366 N.W.2d 796, 798 (N.D. 1985). See also Merneigh v. Lane, 409 N.E.2d 319 (Ill. App. 1980) (“basic due process require that [litigants] be given ... a meaningful opportunity to respond to [a] motion ... by submitting a written memorandum in opposition thereto ...”).

[¶ 92] In First W. Bank v. Wickman, 464 N.W.2d 195 (N.D. 1990), the plaintiff-bank commenced a foreclosure action. Id. at 195. The defendant-debtor served an answer denying they had defaulted. Id. The bank served a motion for summary judgment along with a brief. Id. No notice of motion was provided with the motion. Id. The court granted the motion. Id. The defendant then retained counsel who moved to vacate the order and judgment because the bank “did not serve them with a notice of its summary-judgment motion.” Id. at 196. The district court denied the motion to vacate and the defendant appealed. Id.

[¶ 93] On appeal, the debtor argued “that the order granting summary judgment should be reversed because [Plaintiff] failed to properly notify the [Defendants] that the summary judgment was pending” Id. at 196. This Court agreed and reversed the district court and held “some notice should accompany a ... motion” and “Rule 3.2 authorizes the hearing of routine motions on brief without formal oral arguments but does not dispense with the requirement that **a motion must be noticed.**” Id. at 196 (emphasis added, citation omitted). This Court further concluded the defendants “were not notified of the particular procedure [plaintiff] intended the trial court to employ” and reversed because “there was no notice” served with the motion and the defendants “were denied [an] opportunity” to respond. Id. at 197.

[¶ 94] Here, Behrens was provided even less notice than the defendants in Wickman. On June 3, 2021, Malloy filed a Sheriff’s Report of Sale, a Sheriff’s Certificate, and a proposed Order Confirming Sale of the property. (Doc. Id. ##208-

211). No notice was provided to Behrens. No explanation was provided “regarding of the particular procedure [plaintiff] intended the trial court to employ.” Behrens informed the district court of his desire “to present his arguments to the Court.” (Doc. Id. #212). Despite Behrens’ due process rights, the district court signed the Order Confirming Sale just four days after a proposed order was filed. (App. 28-29).

[¶ 95] The district court lacked jurisdiction when it signed the Order Confirming Sale and the order was signed without providing Behrens any notice or opportunity to respond. Therefore, the order must be VACATED and the Order Confirming Sale REVERSED.

V. THE COURT SHOULD PERMIT ORAL ARGUMENTS.

[¶ 96] Pursuant to Rule 28(h) of the North Dakota Rules of Appellate Procedure, the Appellant requests that this Court schedule oral argument. Oral arguments will be helpful to the Court because this case presents a number of novel issues and oral argument will be of assistance to the Court.

[¶ 97] CONCLUSION

[¶ 98] This Court must reverse the district court because a creditor must obtain an execution and levy upon a homestead before an execution sale of the property, any conveyance of a homestead is void without the express written consent of Julie Behrens, the balance of Malloy’s judgment must be included in the calculation of the Behrens’ homestead exemption, and the order confirming sale of

homestead was signed when the district court lacked jurisdiction and was signed without due process of the law.

Dated: August 29, 2021.

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[¶ 99] CERTIFICATE OF COMPLIANCE

[¶ 100] The undersigned hereby certifies that said brief complies with N.D.R.App.P. 32 in that the brief does not exceed 38 pages. Specifically, the total number of pages for this brief is 36.

[¶ 101] Dated: August 29, 2021.

/s/ James Teigland
James A. Teigland (ND # 07895)

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

<p>Howard Malloy and Great Plains Potato Production, LLP,</p> <p style="text-align: center;">Plaintiffs and Appellees,</p> <p>vs.</p> <p>James Behrens,</p> <p style="text-align: center;">Defendant and Appellant.</p>	<p>Supreme Court No. 20210155</p> <p>District Court No: 30-09-C-00869</p> <p style="text-align: center;">CERTIFICATE OF SERVICE</p>
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¶1 I, James A. Teigland, an attorney licensed to practice law in this state, hereby certifies that on the date below, the following documents were served on all individual Parties:

- Appellant’s Brief
- Appellant’s Appendix

¶2 Service was completed by sending true and correct copies to the following address(es):

Tim Lervick
tlervick@crowleyfleck.com

Dated: August 29, 2021.

/s/ James A. Teigland
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