

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Howard Malloy and Great Plains)	
Potato Production, LLP,)	
)	Supreme Court No. 20210155
Plaintiffs-Appellees,)	
v.)	Morton County District Court
)	Case No. 30-09-C-00869
James Behrens,)	
)	
Defendant-Appellant.)	
)	
)	
)	
)	

On Appeal from Morton County District Court’s Order Granting Petition for Appraisal of Homestead, Order Granting Petition for Sale of Homestead, and Order Confirming Sale, The Honorable David E. Reich Presiding, Morton County District Court, South Central Judicial District

BRIEF OF APPELLEES HOWARD MALLOY AND GREAT PLAINS POTATO PRODUCTION, LLP

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

[¶1] Whether the District Court erred in granting the plaintiff’s petition for appraisal of Homestead.

[¶2] Whether the District Court erred in entering the order directing sale of Homestead.

[¶3] Whether the District Court erred in concluding that plaintiffs’ judgment should not be included in the minimum bid price.

[¶4] Whether the District Court erred in confirming the sale of the Homestead.

ORAL ARGUMENT REQUESTED

[¶5] Malloy requests oral argument believing that the issues presented are nuanced and oral argument would give Malloy an opportunity to assist this Court in understanding the issues and law before the Court.

STATEMENT OF THE CASE

[¶6] This appeal follows a series of orders entered by the district court on behalf of Plaintiff-Appellee Howard Malloy (“Malloy”) who is seeking enforcement of a judgment obtained against Defendant-Appellant James Behrens (“Behrens”) on November 3, 2009 for the amount of \$341,890.26.

[¶7] In enforcing the judgment against the homestead of Behrens (“Homestead”), the district court entered orders granting the petition for appraisal of the Homestead (App. p. 18), granting the petition for sale of the Homestead (App. p. 21), and confirming the sale of the Homestead (App. p. 28).

[¶8] After not being paid for ten years on the Judgment, Malloy renewed the judgment on March 4, 2020 (Doc. Id. #128). In accordance with N.D.C.C. Ch. 47-18, Malloy asked the district court for a writ of execution on May 6, 2020 (Doc. Id. #131) and subsequently

moved through the statutory process of conducting a forced execution sale of Behrens' Homestead in satisfaction of the outstanding judgment.

[¶9] The Homestead was sold at a sheriff's execution sale on June 1, 2021. (Doc. Id. #208). This appeal follows.

STATEMENT OF THE FACTS

[¶10] On August 31, 2007, Behrens executed a Promissory Note to Malloy for the sum of \$412,089.30, with an interest rate of 7.5% per annum. This loan was secured with a Security Agreement dated August 31, 2007. The collateral on this Promissory Note was Behrens' 20% partnership interest in Great Plains Potato Production, LLP. (App. pp. 11-17).

[¶11] The relationship between the partners soured and lead to a lawsuit filed by Malloy against Behrens for dissolution of the partnership, Behrens impermissible use and personal gain from partnership property without compensation or approval from the partnership. Additionally, Behrens had since defaulted on the promissory note which, at the time, had an outstanding balance of \$334,724.27. (App. pp. 11-17).

[¶12] Malloy was "awarded a money Judgment in the amount of \$341,890.26" on March 25, 2010. (App. p. 16). The Judgment remains unpaid. The interest of Great Plains Potato Production, LLP in the Judgment was assigned to Malloy on February 26, 2020 (Doc. Id. #126).

[¶13] Malloy applied for a writ of execution with the Morton County District Court Clerk of Courts. This writ was granted on February 24, 2020, (Doc. Id. #125) and the Morton County Sheriff's Office served the notice of execution on Behrens on March 31, 2020. (Doc. Id. #132). The Sheriff then recorded the levy with the Morton County Recorder's

Office. (Doc. Id. #144).

[¶14] Within the ten days allowed under N.D.C.C. § 28-21-12, Behrens filed a timely objection to the execution and a declaration of exemptions asserting that the Homestead was exempt from “all execution, levy or other legal process.” The objection demanded the Sheriff release the levy and execution on the Homestead. (Doc. Id. #194, ¶9). Behrens also objected to the execution because the Homestead could not be conveyed or encumbered without his spouse’s signature. (Doc. Id. #194, ¶9). Following this, the Sheriff returned the execution as partially satisfied and released the levy on May 7, 2020. (Doc. Id. #145).

[¶15] Following the writ of execution and Sheriff’s notice of levy, Malloy filed a Petition for Appraisal of Homestead pursuant to N.D.C.C. § 47-18-09. (Doc. Id. #134). The district court held a hearing regarding this petition August 12, 2020. The court heard testimony from appraisers Wade Bachmeier, Daryl Kerzman, and Steve Tomac, as well as heard from the parties.

[¶16] On September 4, 2020, the district court granted the petition for appraisal concluding that Behrens’ arguments were without merit. (App. p.19, ¶ 6). Following N.D.C.C. § 47-18-10, the district court ordered the appraisers to appraise the value of the Homestead, and if the value exceeds the homestead exemption, to determine whether the Homestead can be divided without material injury.

[¶17] On September 11, 2020, Behrens filed the first notice of appeal of the district court’s Order Granting Petition for Appraisal of Homestead. (Doc. Id. #160). This appeal was dismissed as not appealable on September 30, 2020. (Doc. Id. #171).

[¶18] In compliance with N.D.C.C. § 47-18-11, the appraisers completed their reports within 15 days and Malloy filed and served the appraisals on September 18, 2020. (Doc. Id. ##168-69). The appraisers all agreed the Homestead had a fair market value of \$600,000.

[¶19] In anticipation of the mandatory order described in N.D.C.C. § 47-18-13, Malloy prepared and served a proposed Order Directing Sale of Homestead. (Doc. Id. #179). Behrens objected to entry of the Order, alleging that there was no motion requesting the Order, as required by N.D.R.Civ.P. (7)(b)(1). (Doc. Id. #180). Malloy argued that the petition requesting appointment of appraisers and order directing sale was such a motion, but out of abundance of caution, Malloy made a second motion for an order directing sale of Homestead. (Doc. Id. ##180, 181, and 185).

[¶20] On November 3, 2020, the district court held a hearing on the Motion for Order Directing Sale of Homestead and the motion was granted on March 29, 2021 after the court again found Behrens' arguments to be without merit.

[¶21] The district court explained that Behrens' interpretation of N.D.C.C. § 47-18-05, which requires conveyance of the homestead to be executed and acknowledged by both the husband and wife, would frustrate the purpose of N.D.C.C. Ch. 47-18. The district court also ordered that under N.D.C.C. § 47-18-01, the minimum bid price 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 those amounts." (App. p. 24, ¶ 8). The court calculated this amount to be approximately \$320,000 to Behrens to satisfy his mortgage plus the \$100,000 exemption, and the remainder of the purchase price to Malloy.

[¶22] Thereafter, the Morton County Clerk of Court issued a Special Execution directing the Morton County Sheriff “to advertise and sell [the Homestead]” as directed by N.D.C.C. § 28-23-04. (Doc. Id. #200).

[¶23] On May 27, 2021 Behrens file a second notice of appeal with this Court, which was unaccompanied by a request for stay under N.D.R.Civ.P. 62(h) or N.D.R.App.P. 8. (App. p. 26). Behrens appealed the court’s Order Granting Petition for Appraisal of Homestead and the Order Granting Petition for Sale of Homestead.

[¶24] On June 1, 2021 the Morton County Sheriff sold the Homestead at public auction to Malloy for \$579,894.82. (Doc. Id. #208).

[¶25] Malloy filed and served a Sheriff’s Report of Sale, a Sheriff’s Certificate, and a proposed Order Confirming Sale of the Homestead on June 3, 2021. (Doc. Id. ##208-211). Following this, Behrens filed an Objection to Proposed Order, stating that the Sheriff’s sale was fatally flawed for failure to provide proper notice to Behrens. (Doc. Id. #212).

[¶26] Without seeking a stay under N.D.R.Civ.P. 62(h) or N.D.R.App.P. 8, Behrens filed a third notice of appeal on August 3, 2021, (App. p. 30), after the district court confirmed the sale on June 7, 2021. (App. p. 28).

LAW AND ARGUMENT

I. THE DISTRICT COURT DID NOT ERR WHEN IT GRANTED MALLOY’S PETITION FOR APPRAISAL OF HOMESTEAD.

[¶27] Malloy filed a Petition for Appraisal of Homestead on June 30, 2020 after the sheriff’s levy was recorded against the Homestead. (Doc. Id. #134). The district court held a hearing on August 12, 2020 on Malloy’s petition and heard testimony from the

parties as well as the three court appointed appraisers: Wade Bachmeier, Daryl Kerzman, and Steve Tomac. (Tr. Oral Argument 5:3 – 21:23, Aug. 12, 2020).

[¶28] After the district court granted the Petition for Appraisal of Homestead, Behrens filed the first of the three appeals in this case. The first appeal was summarily dismissed as being not appealable. (Doc. Id. #171).

[¶29] Behrens argues the granting of the petition for appraisal was in error because the statutory procedure was not followed. (App. Br. ¶¶ 63-80). The district court held a hearing on Behrens’s concerns on November 3, 2020, and after considering these arguments concluded that there was no case law to support Behrens’s position and found them to be without merit. (App. p. 18).

[¶30] Behrens argued that the statutory process was not followed because N.D.C.C. § 47-18-06 states “when an execution for the enforcement of a judgment obtained in a case ... *is* levied on a homestead ...” means that the levy must be pending. Language requiring a pending levy is noticeably absent from § 47-18-06 and following statutes. While Behrens repeatedly points out that “North Dakota liberally construes its homestead statutes,” (App. Br. ¶ 79) (citing In re Anderson, 2019 ND 217, ¶7, 932 N.W.2d 506), this Court has never required judicial gymnastics in order to avoid clear legislative intent. In re C.J.A., 473 N.W.2d 439 (N.D. 1991) (“A cardinal rule of statutory construction is that we are to construe provisions in the North Dakota Century Code with a view to effecting their objectives.”).

[¶31] “Interpretation of a statute is a question of law fully reviewable on appeal.” In re M.W., 2009 ND 55, ¶ 6, 764 N.W.2d 185. This Court’s primary goal in statutory interpretation is to ascertain the intent of the legislature. Id. “Statutes relating to the

same subject matter shall be construed together and should be harmonized, if possible, to give meaningful effect to each, without rendering one or the other useless.” Public Serv. Comm’n v. Minnesota Grain, Inc., 2008 ND 184, ¶ 20, 756 N.W.2d 763. “[P]hrases must be construed according to the context and rules of grammar and the approved usage of the language.” N.D.C.C. § 1-02-03.

[¶32] The entirety of N.D.C.C. § 47-18-06 reads:

47-18-06. Homestead - When appraised.

When an execution for the enforcement of a judgment obtained in a case not within any of the classes specified under subsections 1, 2, or 3 of section 47-18-04 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.

The first phrase in this section is a condition precedent which must be met in order for the second phrase, the operative phrase, to activate. Read in this context, the first phrase requires that an execution be obtained and be levied on a homestead. The statute does not require that the levy be pending, only that the operative phrase cannot occur until the condition precedent occurs. Simply put, the conditional phrase does not contemplate *time* at all, only the *order* in which things must occur. Further, the statutory scheme does not consistently refer to a levy in the present tense. See, e.g., N.D.C.C. § 47-18-07(1). While this creates ambiguity under Behrens’ interpretation, a fair reading of the statute would simply reveal the statute is discussing the order in which things must be done.

[¶33] Here, the execution for the enforcement of judgment was levied on the Homestead on February 24, 2020. (Doc. Id. #124). At that moment, the condition in § 47-18-06

was satisfied and Malloy could move forward with requesting the appointment of persons to appraise the homestead as outlined in N.D.C.C. § 47-18-08.

[¶34] Behrens' extreme strict constructionist view is that the district court's interpretation of this statute will allow appraisers to be appointed on every homestead that has ever had a levy on it. Appoloni v. United States, 450 F.3d 185, 200 (6th Cir. 2006) ("A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means.") (quoting SCALIA, A MATTER OF INTERPRETATION, 23). Behrens' interpretation ignores the intent of the legislature, State v. Rambousek, 479 N.W.2d 832 (N.D. 1992), introduces inconsistency within the chapter, and creates friction requiring unexpressed assumptions to be forced into every subsequent statute in the chapter. (App. Br. ¶¶ 59-63). Not only does this interpretation frustrate the purpose of the statute, Leverson v. Olson, 25 N.D. 624, 142 N.W. 917 (N.D. 1913) (stating a statute should be given a liberal construction in order to effectuate and not frustrate legislative purpose), but "[t]hese statutes would be rendered meaningless," State v. Brown, 2009 ND 150, ¶ 14, 771 N.W.2d 267.

[¶35] Conversely, Malloy's interpretation allows for harmonious reading of the statutes. Mountrail County v. Hoffman, 2000 ND 49, ¶ 6, 607 N.W.2d 901. The plain meaning of the statute allows for a judgment creditor to request appointment of appraisers after a levy has been obtained. In this case, the levy was obtained prior to the appointment of the appraisers. This process is in line with the intent of the legislature. The district court did not err and we ask this Court to affirm.

II. THE DISTRICT COURT DID NOT ERR BY ORDERING THE SALE OF THE HOMESTEAD

[¶36] The district court made no error in ordering the sale of the Homestead. Upon receipt of the appraisers' report, "the court must make an order directing its sale" if the report shows "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." N.D.C.C. § 47-18-13. After a court appoints appraisers under N.D.C.C. § 47-18-09, the appraisers "must present to the judge a report in writing which must show the appraised value of the homestead[.]" N.D.C.C. § 47-18-09. Additionally, if the appraisers' report shows the real property claimed as a homestead 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 (emphasis added).

[¶37] Here, the appraiser's report was submitted on September 18, 2020, and included an opinion that the property could not be divided without material injury, (Doc. Id. #168, p. 2). On October 9, 2020, Malloy made a motion for an Order Directing Sale of the Homestead. (Doc. Id. ##184-87). The court ordered the Homestead sold, as required by law on October 6, 2020. (Doc. Id. #179). At this point, Behrens argued that due process would be violated if a motion was not made and a hearing not held. Out of an abundance of caution, Malloy requested a hearing and asked the court to reissue its mandatory order under N.D.C.C. § 47-18-13. The court held a hearing on November 3, 2020 and reissued the order granting petition for sale of homestead on March 29, 2021. (App. p. 21).

[¶38] Behrens argues that the first order was granted improperly because there was no motion or hearing as required by N.D.R.Civ.P. (7)(b)(1). (App. Br. ¶ 24). Malloy

maintains that the motion is not required by statute. Alternatively, even if a motion was required, Malloy’s petition for appraisal of homestead and his petition for sale of homestead were such motions.

[¶39] Behrens also argues the order granting petition for sale of homestead was in error because Julie Behrens, Jim Behrens’ spouse, did not consent to the sale. (App. Br. ¶¶ 72-79). See In re Estate of Hall, 2019 ND 196, ¶ 19, 931 N.W.2d 482 (citing Nichols v. Schutte, 75 N.D. 207, 26 N.W.2d 515, 521 (1947)). (When a conveyance of a homestead occurs, it must be “executed and acknowledged by both husband and wife[.]”). While N.D.C.C. § 47-18-05 does prevent a spouse from encumbering or conveying a homestead without both spouses’ signatures, this statute is inapplicable when the conveyance is by operation of law and does not come from either spouse.

[¶40] Here, neither Julie nor Jim Behrens are executing or consenting to the conveyance. Behrens’ argument is irrelevant because the conveyance did not come from either of them. The conveyance was made by operation of law. N.D.C.C. § 47-18-13.

[¶41] Behrens points to Kipp v. Sweno, 683 N.W.2d 259 (Minn. 2004) as persuasive authority. (App. Br. ¶ 74). In Kipp, the married judgment debtor owned his home with his wife as joint tenants. The court held that as a joint-tenant, the judgment debtor only had an undivided one-half interest and that was all that could be attached by a judgment. Similarly, in In re Anderson, 2019 ND 217, ¶ 9, 932 N.W.2d 506, the judgment debtor owned the homestead as joint tenants with his spouse and “the nondebtor spouse retained the remaining one-half interest in the property outside of the bankruptcy estate.” These cases are distinguishable from the case before this Court. The homestead was held in title exclusively by Jim Behrens and “the right to claim exemptions under

the homestead statute is not without limits.” In re Anderson, 2019 ND 217, ¶ 7, 932 N.W.2d 506.

[¶42] The order granting petition for appraisal of homestead was proper, and the district court followed the proper statutory procedures prior to the order for sale. The district court did not err by ordering the sale of the Homestead without Julie Behrens’ (or Jim Behrens’) consent because the sheriff’s certificate was issued by operation of law and neither of the Behrens’ signatures were required. We ask this Court to affirm the district court.

III. THE DISTRICT COURT DID NOT ERR IN EXCLUDING THE BALANCE OF MALLOY’S JUDGMENT FROM THE MINIMUM BID PRICE

[¶43] In order to force the sale of a homestead, the district court must ensure that the sale price exceeds \$100,000 in value over and above liens or encumbrances or both. N.D.C.C. § 47-18-01.

[¶44] Behrens argues that the Homestead is not subject to execution or forced sale under N.D.C.C. § 47-18-04(4) because the \$600,000 value of the Homestead is not more than \$100,000 over and above \$770,000 (consisting of the approximate \$220,000 mortgage *and* the approximate \$550,000 judgment in this action) in liens or encumbrances on the Homestead. This is an incorrect statement of law. As provided by N.D.C.C. § 28-20-13, Malloy’s judgment is not a lien or encumbrance on the Homestead.

[¶45] A judgment does not become a lien against real property occupied as a homestead at the time of judgment docketing. Falconer v. Farmers Union Co., 260 N.W.2d 1, 2 (N.D. 1977) (citing Small v. Cunningham, 120 N.W.2d 13 (N.D. 1963)).

[¶46] Here, the property was, and still is, being used as a homestead and therefore the judgment entered was not a “lien or encumbrance.” Therefore, the district court did not

err when it rightfully concluded that the only lien or encumbrance on the Homestead was the \$220,000 mortgage. We respectfully ask this Court to affirm the district court.

IV. THE DISTRICT COURT DID NOT ERR BY CONFIRMING THE SALE OF HOMESTEAD

A. This appeal should be dismissed as moot.

[¶47] This Court does not give advisory opinions, and “an appeal will be dismissed if the issues become moot or academic so no actual controversy is left to be determined.” Ashley Educ. Ass’n v. Ashley Pub. Sch. Dist., No. 9, 556 N.W.2d 666, 668 (N.D. 1996). This Court “has long recognized the failure to obtain a stay may moot issues raised on appeal.” In re Estate of Shubert, 2013 ND 215, ¶ 17, 839 N.W.2d 811 (citing State v. One Buick Automobile, 48 N.D. 348, 352, 185 N.W. 305, 307 (N.D. 1921) (execution sale of a vehicle had not been stayed and was performed rendering issues on appeal moot)). Stays are not automatic. “If the judgment directs the sale ... of real property, its execution is not stayed on appeal unless an undertaking is executed on behalf of the appellant by at least two sureties, for a sum as directed by the court.” N.D.R.Civ.P. 62(h).

[¶48] In Shubert, 2013 ND 215, ¶ 5, 839 N.W.2d 811, the district court issued an order approving a land sale. The order was appealed but the sale occurred prior to the appeal. This Court “held the appellants’ failure to obtain a stay rendered the issues involving the completed land sale moot, and ... dismissed the appeal from the order approving the land sale.” Nelson v. Nelson, 2020 ND 130, ¶ 10, 944 N.W.2d 335 (discussing Shubert, 2013 ND 215, 839 N.W.2d 811). Similarly, in Nelson, 2020 ND 130, ¶ 11, 944 N.W.2d 335, an order for sale was ordered and appealed. Again, this Court

dismissed appeal of the real property sale because appellant “did not seek a stay of the judgment before the condominium was sold.”

[¶49] The fact pattern here echoes this line of cases. Behrens did not seek or obtain a stay from the district court or this Court under either N.D.R.Civ.P. 62(h) or N.D.R.App.P. 8. Because Behrens failed to request a stay before the homestead was sold, this Court must dismiss this appeal as moot. N.D.R.App.P. 42(c)

B. The district court retained jurisdiction to sign the Order Confirming Sale because the issues raised in the May 27, 2021 notice of appeal were not appealable, and because the Order Confirming Sale was part of the execution process, which is not stayed on appeal.

[¶50] Behrens argues that the Order Confirming Sale was void for lack of the district court’s jurisdiction. Behrens makes the argument that when the second notice of appeal, dated May 27, 2021 (App. p. 26), was filed, the district court lost jurisdiction before the court entered the Order Confirming the Sale.

[¶51] Challenges to a district court’s subject matter jurisdiction are reviewed de novo. Schirado v. Foote, 2010 ND 136, ¶ 7, 785 N.W.2d 235. Once an appeal is filed, “a district court *generally* loses jurisdiction.” In re S.E., 2012 ND 168, ¶ 9, 820 N.W.2d 389 (emphasis added). The reason this is only generally true is because a notice of appeal must be of an appealable issue in order for the Supreme Court’s appellate jurisdiction to attach. This process allows for judicial efficiency and reinforces the Court’s longstanding policy against “piecemeal appeals.” Sime v. Tvenge Assoc. Architects & Planners, P.C., 488 N.W.2d 606 (N.D. 1992).

[¶52] While it may be argued that a notice of appeal attaches appellate jurisdiction until the Court decides there is no jurisdiction, In re S.E., 2012 ND 168, ¶ 9, 820 N.W.2d 389, a more holistic read of this Court’s precedence shows that this is not true.

LaRocque v. LaRocque, 1998 ND 143, ¶¶ 8-9, 582 N.W.2d 645 (“the notice of appeal was not timely and this Court is without jurisdiction.”).

[¶53] Behrens first appealed the district court’s Order Granting Petition for Appraisal of Homestead. (Doc. Id. #165). The first appeal was dismissed because the issues raised were not appealable. (Doc. Id. #171.) The question is whether Behrens’ second notice of appeal, (App. p. 26), presents an appealable issue.

[¶54] Behrens’ second notice of appeal asked this Court to exercise appellate jurisdiction on the following questions: 1) Malloy’s petition for appraisal of Homestead, 2) Malloy’s Petition for sale of Homestead, and 3) the district court’s decision that Malloy’s Judgment would not be included in the minimum bid price. Each of these orders are part of a process laid out in N.D.C.C. Ch. 47-18 for the execution sale of a homestead.

[¶55] Because these orders are part of a process, no individual order is a final order. Because the orders being appealed are not final orders, those orders are not appealable, and the second appeal should have been dismissed like the first appeal.

[¶56] Behrens’ third notice of appeal, (App. p. 30), requests appellate review of the district court’s Order Confirming Sale under N.D.C.C. § 28-23-13. This Court has appellate jurisdiction over this order under N.D.C.C. § 28-27-02(2). Farm Credit Bank of St. Paul v. Rub, 478 N.W.2d 279, 280 (N.D. 1991). In Rub, appellant filed an appeal from the notice of special execution sale and from the sheriff’s sale. Id. Rub’s appeal came before the district court’s final order; the Order Confirming the Sale. Id. This Court held: “A court order confirming an execution sale is an appealable order under Section 28-27-02(2). Rub did not appeal from a court order confirming the sale and his

attempted appeal is *not otherwise authorized* under Section 28-27-02.” Id. (internal citations omitted) (emphasis added). Because there were no appealable issues before the Court, this Court lacked jurisdiction over the case and remanded. Id.

[¶57] As an important side note, the reason for the remand was because after the appeal was filed “the district court thereafter refused to sign an order of confirmation because *[the district court] concluded* that it no longer had jurisdiction.” Rub, 478 N.W.2d at 280. The wording here is very specific. This Court intentionally did not say that the district court had in fact *lost* jurisdiction, only that the district court *said it had lost* jurisdiction.

[¶58] Similar to Rub, here Behrens has appealed non-appealable issues. “If there is no right to appeal, [this Court is] without jurisdiction to consider the merits and must dismiss the appeal.” Public Serv. Comm’n v. Minnesota Grain, Inc., 2008 ND 184, ¶ 20, 756 N.W.2d 763 (citing City of Grand Forks v. Lamb, 2005 ND 103, ¶ 5, 697 N.W.2d 362).

[¶59] The Order Confirming Sale directed the sale of the Homestead, and its execution was not stayed on appeal unless an undertaking was executed on behalf of Behrens, pursuant to N.D.R.Civ.P. 62(h). No undertaking was executed by Behrens, thus the execution was not stayed. The direction to the court in N.D.C.C. § 28-23-13 to make an order confirming sale is part of the execution process contained in N.D.C.C. Chapter 28-23, Sales Under Execution. If the execution is not stayed on appeal, it follows that entry of an order confirming sale is not stayed on appeal either, because it is part of the execution process. This is one of the exceptions to the general rule that a district court

loses jurisdiction when an appeal is filed. Therefore, Malloy respectfully requests this Court to hold that the district court had authority to enter the Order Confirming Sale.

C. Absent conformity with the provisions in N.D.C.C. Ch. 28-23, the entry of an order confirming the sale is mandatory on the district court and no notice or motion is required.

[¶60] Once real property has been sold under N.D.C.C. Ch. 28-23, “the court *shall make an order confirming the sale* and [direct] the clerk to make an entry on the journal that the court is satisfied of the legality of the sale” N.D.C.C. § 28-23-13 (emphasis added). As with the mandatory order in N.D.C.C. § 47-18-13 (“the court *must* make an order directing [the homestead’s] sale under the execution”), the district court here too had a statutorily mandated order to enter. Behrens is correct that N.D.R.Civ.P. 7(b)(1) requires a *request* for a court order to be made by motion. However, the Order Confirming Sale was not *requested* by Malloy, it was *required by statute*. N.D.C.C. § 28-23-13. Because a motion is necessary when requesting court action, See, e.g., N.D.R.Civ.P. 7(b)(1) (“A request for a court order must be made by motion.”), Malloy should not have to request an order when the court is already obligated to act.

[¶61] Behrens cites to First W. Bank v. Wickman, 464 N.W.2d 195 (N.D. 1990) to support his argument. (App. Br. ¶¶ 92-94). However, this case is very distinguishable from the facts at issue here. Primarily, Wickman was dealing with an order granting a summary judgment motion. Wickman, 464 N.W.2d at 196. The reason the Court gave for reversal was that there was no notice with the motion and “the defendants were not notified of the particular procedure plaintiff intended the trial court to employ.” App. Br. ¶ 93 (quoting Wickman, 464 N.W.2d at 196) (internal quotations and brackets omitted). Here, Malloy was not taking advantage of any “particular procedure.” Malloy

was simply watching the operation of law work. Additionally, Behrens was not kept in the dark on what might happen next. The Century Code is publicly available, and Behrens was on notice of a pending mandatory order. N.D.C.C. § 1-01-25.

[¶62] Behrens made a request to present arguments to the district court and did in fact file an “Objection to Proposed Order.” (Doc. Id. #212). After hearing Behrens’ arguments, the district court stated: “[a]fter having carefully examined the proceedings of the officer, the Court is satisfied that 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]. Accordingly, we ask this Court find in Malloy’s favor and hold that the district court did maintain jurisdiction and that a motion is not required in order for a district court to enter an order confirming the sale.

CONCLUSION

[¶63] For the reasons stated herein, it is respectfully requested that the district court’s Order Granting Petition for Appraisal of Homestead, Order Granting Petition for Sale of Homestead, and Order Confirming Sale, be in all things affirmed.

DATED this 28th day of September, 2021.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

[¶64] This Brief contains 23 pages, excluding the parts of the brief exempted by N.D.R.App.P. 32(a)(8)(A). I certify that this Brief complies with the typeface requirements of N.D.R.App.P. 32 and the type style requirements of that rule, because it has been prepared in a proportionally-spaced typeface using a Microsoft Word, Times New Roman, 12 point font.

By: /s/ Tim Lervick
Tim Lervick (#03495)

CERTIFICATE OF SERVICE

[¶65] I hereby certify that true and correct copies of the Brief of Appellees Howard Malloy and Great Plains Potato Production, LLP was on the 28th day of September, 2021, served electronically on the following:

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