THE STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NUMBER 2023-023

KATHERINE R. BRADY
Appellant
V.
LAWRENCE P. SUMSKI
Appellee

CERTIFIED QUESTIONS OF LAW FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

AMICUS BRIEF OF MICHAEL ASKENAIZER, TRUSTEE FOR THE BANKRUPTCY ESTATES OF WILLIAM LINANE AND DEBORA LINANE

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STATEMENT OF THE FACTS AND CASE

Amicus agrees with the statements of the undisputed facts and case submitted by the parties.

SUMMARY OF ARGUMENT

The Federal District Court presents to the New Supreme Court the following questions:

> 1. Does the ownership requirement described in the second sentence of N.H. Rev. Stat. Ann. 480:1 apply to all real property occupied as a homestead, or does it apply only to manufactured housing occupied as a homestead?
>
> That is to say, assuming the homestead is real property other than manufactured housing, does the non-owning occupying spouse of one who holds a homestead right pursuant to RSA 480:1 also have a present, vested, non-contingent homestead right of his or her own, which is currently valued at $120,000? and
>
> 2. Does a non-owning spouse who occupies a manufactured housing unit with an owning spouse have a present (i.e., non-contingent) and enforceable homestead right with respect to that home, which is currently valued at $120,000?

This Court should answer:

> 1. As to all real property only an owner has a homestead exemption. A non-owning spouse's right, once it arises, is to occupy the homestead of the owner during the life of the owner and then for the remainder of the non-owning spouse's life. Before the homestead is set off the non-owner's right is "only an inchoate right, personal to the parties in whom it exists." Tidd v. Quinn, 52 N.H. 341, 343 (1872). Before the homestead is set off the non-owner's rights are not vested. Perley v. Woodbury, 76 N.H. 23, 26, 78 A. 1073, 1075 (1911).

> 2. A non-owning spouse who occupies a manufactured housing unit with an owning spouse has the same rights as the non-owning spouse of an owner who owns any other homestead property. The second sentence of NH R.S.A. 480:1 use of the words "own and occupy" merely restates the law of homestead as understood by the legislature and as stated by this Court in, among other cases, Beland v. Goss, 68 N.H. 257, 258, 44 A. 387, 387 (1894).

ARGUMENT

I. THE FIRST SENTENCE OF N.H. R.S.A. 480:1 CREATES A HOMESTEAD RIGHT OF EXEMPTION FROM LEVY ONLY TO PERSONS WHO HAVE REAL PROPERTY OTHERWISE SUBJECT TO LEVY – OWNERS.

The exemption from attachment and levy created by N.H. R.S.A. Chapter 480 begins with N.H. R.S.A. 480:1. N.H. R.S.A. 480:1 consists of two sentences. The first of the two has its genesis in the homestead laws enacted in 1851 and 1867. Over one hundred years later, in 1981, a second sentence was added dealing with manufactured housing. Today it reads in full:

> **Every person is entitled to $120,000 worth of his or her homestead, or of his or her interest therein, as a homestead**. The homestead right created by this chapter shall exist in manufactured housing, as defined by RSA 674:31, which is owned and occupied as a dwelling by the same person but shall not exist in the land upon which the manufactured housing is situated if that land is not also owned by the owner of the manufactured housing.

N.H. Rev. Stat. Ann. § 480:1 (LexisNexis) (emphasis added). The important sentence to understand is the first. The first has existed in substance (subject to dollar amount modifications) since 1851.

The first sentence uses the word "homestead" twice. The statute is not a tautology. Instead, the statute uses the word "homestead" in the first instance as a descriptor of a class of real property: "'Homestead' means home place, or place of the home…" Austin v. Stanley, 46 N.H. 51, 52 (1865).

The second use of the word "homestead" cannot again be referring to the place of the home, but instead is referring to the right created by the statute. The right created by the statute is the exemption now contained in N.H. R.S.A. 480:4:

> The homestead right is exempt from attachment during its continuance from levy or sale on execution, and from liability to be encumbered or taken for the payment of debts, except in the following cases:
>
> …

N.H. Rev. Stat. Ann. § 480:4 (LexisNexis). The statute, as it has for over a hundred years, grants owners, or their family, a right of occupancy, exempt from attachment, levy, or sale on execution, of "his or her" home place.

A. The Possessive Words Used Require Ownership.

The words "his or her," or similar over the years, require that the home place belong to him or her. The words require that he or she have an "interest therein." The interest can be the equity of redemption of mortgaged property. Sav. Bank v. French, 105 N.H. 407, 200 A.2d 858 (1964) (Husband's homestead interest junior to mortgage but senior to

attaching creditor). The interest can be rights under a purchase and sale agreement or bond for deed. Libbey v. Davis, 68 N.H. 355, 356, 34 A. 744, 745 (1895) ("A right to receive a conveyance by virtue of a contract is an interest in land upon which creditors may levy, and which may be subject to a homestead right."). The interest cannot be that of a tenant in a "hired" home. Rogers v. Ashland Sav. Bank, 63 N.H. 428 (1885) (Homestead found in garden owned and used by debtor, but no homestead in the leased house).

The statute uses the possessive and tells readers that the exemption from attachment is granted to a person holding a homestead. The statute grants the exemption to owners.

B. The Statutory Scheme Requires an Attachable Interest: the Legislature Has No Reason to Protect Non-Owners from Attachment.

N.H. R.S.A. 480:1 does not grant property to any person. Instead, it grants an exemption from attachment. Only persons holding property attachable by their creditors could benefit from the exemption. The exemption was written to assure an impecunious landowner a parcel of land for the support of "him" and "his" family. The exemption is "a personal privilege which the law gives to **the owner**, in order that he or his family may occupy it…" Currier v. Sutherland, 54 N.H. 475, 486 (1874) (emphasis added).

C. The Homestead Property, Once Set Off, is Subject to Two Life Estates, Similar to Life Tenancies by the Entireties: Two Spouses Each with Rights in One Parcel.

At the time that the homestead law was first written, the usual procedure to execute on a judgment was to set-off a certain portion of the defendant's land. It was not until 1899 that creditors generally could sell unencumbered property. See N.H. Rev. Stat. Ann. § 529:27 (LexisNexis) (permitting sale on execution of property that was not mortgaged and noting in the history that it was first enacted in Laws 1899, 73:1). Before 1899, real estate in general was to be "taken on execution … and set off to the creditor at its just value in satisfaction of the execution" except where the land was mortgaged. N.H. Rev. Stat. Ann. § 529:1 (LexisNexis) (noting in the history, RS 195:1).

The process of taking on execution required the debtor to assert their homestead[1] which was then to be, itself, set off or assigned from that which the creditor took on execution. Currier v. Sutherland, 54 N.H. 475, 484

[1] If the property could not be "conveniently divided without injury and inconvenience," then during the period from 1851 through 1942, the statutes had various special schemes for the sale on execution of homestead property. Those schemes were triggered by a determination by the appraisers that the Property "cannot be divided without injury and inconvenience." Chapter 1089, Laws of 1851, §4. Those schemes were variations on the following: Upon the making of that determination, the Debtor was given the option to satisfy the execution by tendering the surplus value of the property over the homestead, and if the debtor did not, then a sale was to be held, if the sale yielded more than $500, then the $500 was paid to the debtor and spouse jointly, otherwise, no sale was had. Id. This Brief will deal with those schemes at Section I F below.

(1874) ("Although Mrs. Smith may have been entitled to have the whole premises set off to her as her homestead, she could not assign this right to the plaintiff. A right to a homestead is not assignable. .... The right of homestead, before the same has been set out and assigned, is only an inchoate right, personal to the parties in whom it exists."). When the homestead was assigned, the debtor, and family, had an entitlement to occupy the homestead so assigned for the remainder of the owner's life, their spouse's life (and before 1961, their children's minority). N.H. Rev. Stat. Ann. § 480:3-a (LexisNexis).

Set off or assignment of the homestead was the process that converted the homestead right from one which was "inchoate," free floating, undefined, to one which was an interest in real estate, itself capable of being conveyed or otherwise treated like any other life estate. "[T]he homestead right is inchoate and conditional until set out…" Perley v. Woodbury, 76 N.H. 23, 26, 78 A. 1073, 1076 (1911). The homestead, before "having been set out," was not assignable. Bennett v. Cutler, 44 N.H. 69, 71 (1862) (citing Gunnison v. Twitchel, 38 N.H. 62 (1859)). The right of homestead changes from an inchoate right to a conditional estate for life when it is set out:

> In Norris v. Moulton, 34 N.H. 392, it is held that the right of homestead, like that of dower before it is assigned and set off in severalty, is inchoate, and while it thus remains unassigned, no estate can be said technically to vest in the wife, but, as in the case of dower, she has an inchoate homestead in the whole estate to the extent of such proportion as $500 bears to the value of the whole; that when it is assigned and set off to her, that vests in her a conditional estate for life;

Tidd v. Quinn, 52 N.H. 341, 343 (1872); Lake v. Page, 63 N.H. 318, 319, 1 A. 113 (1885) ("The homestead right is merely an inchoate right, which is not assignable until the homestead is set out and assigned in specific property. It then becomes a vested estate."). "[H]omestead rights… do not vest until set out and assigned in specific property." Fletcher v. Cotton, 81 N.H. 243, 245, 123 A. 889, 890 (1924); Munroe v. Wilson, 68 N.H. 580, 581, 41 A. 240, 241 (1896) ("Before an actual set-off, she was not seized of any estate in the premises and was not entitled to possession as against the heirs."); Perley v. Woodbury, 76 N.H. 23, 26, 78 A. 1073, 1076 (1911) ("…the homestead right is inchoate and conditional until set out…"); Judge of Prob. v. Simonds, 46 N.H. 363, 368 (1866) ("But her interest was a mere personal right to occupy during her life. It was no estate that she could transfer to another;"). The homestead right, without having been set off, could not form the basis for a claim in trespass. Babb v. Babb, 61 N.H. 142, 143 (1881) ("The plaintiff cannot recover in this action on any claim of a homestead right in the land, the homestead not having been assigned."); Fogg v. Fogg, 40 N.H. 282, 286 (1860) ("…the sheriff having the writ of execution, shall, on application of the debtor or his wife, cause a homestead, such as the debtor may select, to be set off to him.."). A homestead right begins as an inchoate personal privilege and is not converted into a vested interest in land until it is set out.

The statutory scheme, where one person owned the land, provides and provided no room for two set offs of two homesteads. Instead, the statute permits the creditor to set off the owner's land in satisfaction of the owner's debt "except the homestead right." N.H. Rev. Stat. Ann. § 529:1 (LexisNexis). The noun phrase "homestead right" is singular. It is not

"except homestead right**s.**" The homestead may be assigned to the owner and when it is assigned in specific property "[i]t then becomes a vested estate." Lake v. Page, 63 N.H. 318, 319, 1 A. 113 (1885).

The rights in that specific property assigned to the owner are rights belonging both to the owner and the owner's spouse.[2] Each spouse's rights in the homestead so set off amount to a conditional life estate. N.H. Rev. Stat. Ann. § 480:3-a (LexisNexis); Lake v. Page, 63 N.H. 318, 319, 1 A. 113 (1885) ("…when a homestead is set off and assigned to the widow, her inchoate and imperfect right becomes a vested estate for life in the premises set off…"); Cross v. Weare, 62 N.H. 125, 126 (1882) ("The homestead right thus exempted is not the entire estate in the homestead, but a life estate merely."). The statute has, and has always had, a scheme which exempted one parcel of land and created two life estates: a life estate to the owner and a separate life estate to the owner's spouse.[3]

The purpose of the life estate to the owner's spouse was to protect that spouse much as dower protected the wife. Lake v. Page, 63 N.H. 318, 319, 1 A. 113 (1885) ("The interest of the widow in the homestead premises bears some analogy to her right of dower."); Lemay v. Lemay, 84 N.H. 299, 300, 149 A. 864, 864 (1930) ("The homestead right is classified and treated in the same way as dower.").

Since neither spouse can convey or waive the homestead alone, the rights of occupancy are similar to a life tenancies by the entireties. N.H. Rev. Stat. Ann. § 480:5-a (LexisNexis). Tenancy by the entireties was

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[2] Before 1961, those rights belonged to the owner, spouse, and minor children.

[3] And before 1961, an estate for the minority of any children's lives.

abolished in New Hampshire at about the same time as the homestead statutes were first enacted: 1860. Boissonnault v. Savage, 137 N.H. 229, 231, 625 A.2d 454, 455 (1993) ("This special form of ownership was abolished in New Hampshire in 1860. *See* Laws 1860, ch. 2342."). The nature of a tenancy by the entireties is described thus:

> This estate, created by conveyance to husband and wife, is a peculiar one. The interest of the grantees is not joint, nor in common. The parties do not hold moieties, but take as one person, taking as a corporation would take; they have but one title; each is seized of the whole and each owns the whole.

Coop. Fire Ins. Ass'n v. Domina, 137 Vt. 3, 5, 399 A.2d 502, 503 (1979) (quoting Town of Corinth v. Emery, 63 Vt. 505, 506-507, 22 A. 618 (1891)). The Legislature abolished tenancies by the entireties and replaced that spousal protection against creditors with the homestead scheme. Like entireties tenancies, two spouses each have protected rights in one owner's parcel of land.

D. The Court's Uncertainty Around the Spouse's Co-Ownership of Homestead Property Confirms that the Homestead Parcel is Just One Parcel with Multiple Life Estates.

The 19th Century male legal mind did not adapt easily to separate ownership by a wife of land and the reconciliation of that mindset with the arrival of something like modernity makes clear that the homestead rights granted to husband and wife are two rights in one parcel owned by one owner. The homestead laws were first written in an era not far removed from the common law doctrines of marriage:

> By marriage, husband and wife become one person in law,--that is, the very being or legal existence of the wife is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection, and cover she performs everything." …. Such being the common law status of the wife, her domicile necessarily followed her husband's and the maxim applied without limitation or qualification.

Shute v. Sargent, 67 N.H. 305, 305, 36 A. 282, 282 (1892); Cf., Hall v. Young, 37 N.H. 134, 144-45 (1858) (Husband has "marital right" to "personal chattels in possession, which belonged to the wife at the time of the marriage, or which fell to her afterward, became instantly the absolute property of the husband…").

The 19th Century male legal mind had to adapt to the possibility that a wife might own a separate parcel of land. When it attempted to do so, the lower courts often concluded that the wife could not have a homestead in both her parcel and a separate parcel owned by the husband, each of which were used together as a home place. The thought was that the homestead protected the family, and one family can only have one homestead no matter if the property was owned by one spouse or both. A correction did not come from the Supreme Court that there could be two homesteads for one family in jointly held property until the middle of the twentieth century, and then in *dicta*.

The earliest example is Nichols v. Nichols, 62 N.H. 621 (1883). The husband owned a farm and the wife an adjoining parcel. They moved into the wife's parcel and continued to occupy and use the husband's farm. Husband died. The probate court disallowed a homestead to the wife in the

husband's property because she had her own property in which she could claim a homestead. The Supreme Court reversed noting, however, that "[w]hether the act of 1878 gives the widow a homestead, as an unmarried person, when she owns one in her own right, we need not decide." The Court could not quite commit itself to two homesteads where property is jointly owned by husband and wife.[4]

Nichols involved adjoining parcels. Twenty-seven years later, and fifty years after the homestead regime began, the Court expanded its reasoning to a tenancy in common, but could still not commit itself to two complete homesteads in McLaughlin v. Collins, 75 N.H. 557, 78 A. 623 (1910). In McLaughlin, the husband and wife owned as tenants in common. A lender sued the wife. The wife asserted a homestead in her interest in the property. The Court sustained the claim of homestead over the objection that she cannot have a homestead in both her interest and her husband's interest. The Court responded:

> Whether the defendant might under some circumstances enjoy two homestead rights, one in her own estate and one in her husband's estate, is not the question presented by the case.

McLaughlin v. Collins, 75 N.H. at 558, 78 A. at 624.

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[4] The reticence of the Court to declare outright that a husband and wife, as co-owners, might have two homestead rights may be reflected in the brevity of a subsequent opinion on the matter: Chase v. Barnard, 64 N.H. 615, 17 A. 410 (1886) ("The wife is entitled to a homestead. The legal question in the case was decided in *Nichols* v. *Nichols*, 62 N.H. 621 which is affirmed.").

The proposition that both husband and wife could assert a homestead was addressed in the lifetime of some of counsel in Sav. Bank v. French, 105 N.H. 407, 200 A.2d 858 (1964) and even then, the outcome did not depend on the existence of two homesteads. The husband and wife held the mortgaged property as joint tenants. The husband's interest was attached by Bemis. The bank foreclosed and there was a surplus which was less than the combined homesteads. No one sued the wife and "She is therefore, as joint owner, entitled to one half this surplus." Sav. Bank v. French, 105 N.H. at 409, 200 A.2d at 860. They had occupied the property beyond the foreclosure and therefore the husband's homestead interest in the surplus was not attached and his assignee obtained the other half of the proceeds as his homestead.

Even though the facts did not require this statement, and that the only thing the Court had to decide is whether the husband had a homestead, the Court said:

> Since they occupied the premises until after the foreclosure sale, they each retained a homestead right in the surplus, amounting to $1,500 in value (RSA 480:1; *McLaughlin* v. *Collins*, 75 N.H. 557, 78 A. 623), which is exempt from attachment.

Sav. Bank v. French, 105 N.H. 407, 409, 200 A.2d 858, 860 (1964). French in 1964 is the first time, after over a hundred years of homestead law, that the Supreme Court asserted that there are two separate homesteads in jointly held property and that assertion was *dicta*.

This Court has never explicitly ruled, except in *dicta,* that married joint owners are entitled to two homesteads. Rather, this Court has consistently only held that **an** owner is entitled to **a** homestead and the

nature of that homestead right is an entireties-like life estate: both husband and wife are entitled to occupy the single homestead parcel (worth $120,000 today) free of creditor claims as protection for the family unit.

E. Ms. Brady's Proposition that She and Her Husband are Each Entitled to a Separate $120,000 Homestead Parcel (for a total of $240,000) Proves too Much: It Requires Recognition of Life Estates in $480,000 of Homestead Property in Jointly Held Property.

Appellant's claim is that in a single parcel of land owned by one spouse both spouses are entitled to a $120,000.00 exemption before creditors of the owning spouse receive anything. In a world where land would be set off to a creditor in satisfaction of its judgment, e.g., N.H. Rev. Stat. Ann. § 480:7 (LexisNexis), Appellant asks that two tracts of land, each worth $120,000.00, be set off before creditor claims: one for her homestead life estate, and a different tract for her husband's homestead life estate.[5]

The history of homestead cases suggests that we consider the factual pattern of Nichols v. Nichols, supra: suppose Appellant owned a farm and her husband owned the adjoining house. Both being occupied and used conveniently as a homestead, she claims her homestead in the farm (owned by her) asserting both her claim and that of her husband. Examining her holdings, and accepting her legal theory, she would be entitled to protect two tracts of land in her farm from creditors: $240,000.00.

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[5] Appellant leaves one to guess whether Appellant proposes to claim a life estate in the tract thus set over to her husband, or, whether her husband would be entitled to a life estate in the tract thus set over to her.

Of course, her husband (as in Nichols) would make the same claims as to his separate parcel: two tracts from that parcel, each worth $120,000, must be set aside, away from creditors - $240,000.00.

The result of her theory is that if she and her husband owned adjoining parcels each used as part of the homestead, together they would be entitled to $480,000.00 in exemption.

If you change the fact pattern to a tenancy in common, as in McLaughlin v. Collins, the same result occurs: each spouse's separate estate is protected, under the Appellant's theory, in the amount of $240,000.00 and the combination of the two estates is, again, $480,000.00.

If you modify the fact pattern yet a third time to a joint tenancy, as in Sav. Bank v. French, the same result arises: on Appellant's theory each separate estate is protected in the amount of $240,000 and the husband and wife thus share a combined protection of $480,000.00.

In the 19th Century and early part of the 20th Century the Court was sufficiently troubled by the prospect that joint ownership doubles the homestead amount beyond that allocated by the legislature to avoid the question. Quadrupling the homestead amount, as Appellant's theory would, is an outcome not ever reached by this Court.

The homestead parcel is a parcel, or an interest in a parcel, used as the home place with a value of not more than $120,000.00. The homestead rights consist of two life estates, like an entireties interest, in that parcel. The parcel exempted is worth $120,000.00, the two life estate rights to occupy that parcel belong to the two spouses.

F. Whenever it Addressed the Issue, the Legislature has Treated the Homestead Exemption of a Married Couple with a Single Owner as Two Life Estates in Common in a Single Parcel Valued at the Homestead Amount.

The statutory language, when it addressed distribution on sheriff's sale of a married person's property, valued the homestead parcel at the applicable dollar amount (initially $500.00) and distributed that sum to the spouses jointly.

1. The 1851 Act Treated the Homestead as One Exemption of $500.00 Subject to Rights Belonging to Both Spouses.

The 1851 Act protected only heads of household: "The family homestead of the head of each family shall be exempt from attachment and levy or sale on any execution on any judgment …" Chapter 1089, Laws of 1851; Chapter 196, Consolidated Statutes 1853 §1. That Act provided for sale if "in the opinion of the appraisers cannot be divided without injury and inconvenience." Id. § 4. In the event of such a sale, only one sum of $500.00 was to be paid to the husband and wife jointly:

> it shall be lawful for the officer to advertise and sell the same at auction; …out of the proceeds of such sale to pay the said execution debtor, with the written consent of his wife, the sum of five hundred dollars; *provided however*, if the wife of such debtor shall not consent to such payment, the sheriff or officer having such proceeds shall deposit said sum of five hundred dollars in some savings institution in this State, to the credit of said debtor and wife ; and the same may be withdrawn therefrom only by the joint order of the husband and wife, or by the survivor in case one should decease…

Id., § 4. In the 1851 Act, the Legislature allotted one parcel worth $500.00 as the subject of the two life estates and if the parcel was to be sold, there would be but one payment of $500.00 to the spouses jointly.

2. The 1867 Laws Treated the Homestead as One Exemption of $500.00 Subject to Rights Belonging to Both Spouses.

The 1867 Statutes addressed the sale of the homestead parcel in the same manner as the 1851 Act: if the property "cannot be divided without injury" the officer is authorized (after a process) to sell it. General Statutes, Chapter 124, §§ 10-15. Upon sale, if creditor tendered the $500.00 or if more than $500.00 was bid,

> Sec. 16. The said sum of five hundred dollars, whether paid by the creditor or derived from the sale, shall be paid by the officer as the debtor and his wife, if living, or the guardian of the children may agree.
>
> Sec. 17. If they do not so agree, the officer may deposit the same in some savings institution, to the credit of the husband and wife or children, and it shall not be withdrawn but upon the joint order of the husband and wife, if living or guardian of the children, or the survivor…

General Statutes, Chapter 124, §§ 16, 17. In the 1867 Laws, the Legislature allotted one parcel worth $500.00 as the subject of the two life estates and if the parcel was to be sold, there would be but one payment of $500.00 to the spouses jointly.

3. The 1878 Laws Treated the Homestead as One Exemption of $500.00 Subject to Rights Belonging to Both Spouses.

The 1878 Laws faced the same problem of sale as the 1867 Laws and resolved it with the same language:

> Sec. 18. The said sum of five hundred dollars, whether paid by the creditor or derived from the sale, shall be paid by the officer as the debtor and his wife, if living, or the guardian of the children may agree.
>
> Sec. 19. If they do not so agree, the officer may deposit the same in some savings institution, to the credit of the husband and wife or children, and it shall not be withdrawn but upon the joint order of the husband and wife, if living or guardian of the children, or the survivor…

General Laws Chapter 138, §§ 18, 19. In the 1878 Laws, the Legislature allotted one parcel worth $500.00 as the subject of the two life estates and if the parcel was to be sold, there would be but one payment of $500.00 to the spouses jointly.

4. The 1891 Laws Treated the Homestead as One Exemption of $500.00 Subject to Rights Belonging to Both Spouses.

The 1891 Laws adopted essentially today's language creating the homestead right with the exception that the 1891 Laws avoided the possible tautology by referring to the homestead when referring to the parcel of land and creating the "homestead right." Section 1 of Chapter 138 of the 1891 Laws read:

> Every person is entitled to five hundred dollars worth of his homestead, or his interest therein, as a homestead right.

Public Statutes Chapter 138, § 1. If set off of the homestead parcel was "impracticable" or "cannot be made without injury" then the officer was authorized, after a process, to sell the homestead. Id., § 8.

Upon such a sale, despite the "interest therein" language, the 1891 laws treated the proceeds as they had been treated in earlier statutes – as a single exempt sum of $500.00 payable to the husband and wife jointly:

> The officer shall pay the five hundred dollars received by him of the creditor, or derived from the sale, as the debtor and wife or husband, if any, or if there be none, as the debtor and the guardian of the minor children of the debtor, may agree in writing; if they do not agree, he shall deposit the money with the clerk of the supreme court …

Public Statutes, Chapter 138 §11. In the 1891 Laws, the Legislature allotted one parcel worth $500.00 as the subject of the two life estates and if the parcel was to be sold, there would be but one payment of $500.00 to the spouses jointly.

5. The 1901 Laws Treated the Homestead as One Exemption of $500.00 Subject to Rights Belonging to Both Spouses.

In 1901, the Section 1 language was unchanged from the 1891 version. Similarly, the language in Section 11 was unchanged. In 1901, the legislature continued to allot one parcel worth $500.00 as the subject of two life estates and if the parcel was sold, there would be but one payment of $500.00 to the spouses jointly. Public Statutes Chapter 138, §§ 1, 11 (1901).

6. *The 1925 Laws Treated the Homestead as One Exemption of $500.00 Subject to Rights Belonging to Both Spouses*

In 1925 the Section 1 language was unchanged from the 1891 version:

> Every person is entitled to five hundred dollars worth of his homestead, or his interest therein, as a homestead right.

Public Laws Chapter 215, § 1 (1925). In 1925 the language in Section 11 was also unchanged except that the $500 was to be paid in to the superior court, not the supreme court:

> The officer shall pay the five hundred dollars received by him of the creditor, or derived from the sale, as the debtor and wife or husband, if any, or if there be none, as the debtor and the guardian of the minor children of the debtor, may agree in writing; if they do not agree, he shall deposit the money with the clerk of the superior court …

Public Laws Chapter 215, §11 (1925). In 1901, the legislature continued to allot one parcel worth $500.00 as the subject of two life estates and if the parcel was sold, there would be but one payment of $500.00 to the spouses jointly.

7. In 1942, the language in Section 1 Remained Unchanged and the Language Relating to Post Sheriff's Sale Protections the Distribution of the Exempt Proceeds Was Deleted.

In 1942 the legislature retained the core homestead language that we have today: "Every person is entitled to five hundred dollars worth of his homestead, or his interest therein, as a homestead right." The changes in 1942 eliminated the post-sheriff's sale protections previously afforded debtors' spouses and families.

The history of the post-sheriff's sales protections confirm that the grant of homestead rights is the grant of a set of two life estates in one parcel which parcel is to be worth the exemption amount.

G. This Supreme Court has Confirmed that a Pre-condition to a Homestead is Ownership of the Parcel.

1. This Supreme Court's Cases before the 1982 Amendment have Recognized that Ownership is Required for Creation of a Homestead.

The question certified to this Court focuses on the words "manufactured housing… which is owned and occupied as a dwelling…" in the second sentence of N.H. Rev. Stat. Ann. § 480:1 (LexisNexis). The suggestion made is that those words may have modified the elements of the first sentence: "Every person is entitled to $120,000 worth of his or her homestead, or of his or her interest therein, as a homestead." Id.

The words "owned and occupied" in the second sentence do not change the requirements for a homestead, but merely restate the requirements as this Court has. Before 1982, this Court had observed that the requirements for a homestead included ownership and occupancy.

Interpreting the 1891 statute, the language of which is substantially identical to today's, this Court stated the elements succinctly: "**Ownership** and **occupancy** being essential for the assertion of the right, it was lost upon the sale and removal." Beland v. Goss, 68 N.H. 257, 258, 44 A. 387, 387 (1894) (emphasis supplied); Cf., Gerrish v. Hill, 66 N.H. 171, 171, 19 A. 1001, 1002 (1889) ("As they had neither title nor possession when the demand was made, their application for a homestead was properly denied.").

Ownership and occupancy were elements required to create a homestead in the first sentence of RSA 480:1 before the 1982 amendment. The use of those words in the second sentence did not modify the first but

merely confirmed that the homestead granted in manufactured housing was the same as that which existed in all other housing.

2. *Sabato v. Fed. Nat'l Mortg. Ass'n, 172 N.H. 128, 210 A.3d 205 (2019) is Consistent with the Understanding that the Homestead is Two Joint Life Estates in one Home Place.*

Sabato is about N.H. Rev. Stat. Ann. § 480:5-a (LexisNexis) and the effect of a failure of a mortgage to properly waive the homestead right. RSA 480:5-a says:

> No deed shall convey or encumber the homestead right, except a mortgage made at the time of purchase to secure payment of the purchase money, unless it is executed by the owner and wife or husband, if any, with the formalities required for the conveyance of land.

N.H. Rev. Stat. Ann. § 480:5-a (LexisNexis). In Sabato, the wife granted a first mortgage in her homestead without her husband's signature. They then both executed a second mortgage (thereby effectively encumbering the homestead). The second mortgagee foreclosed. The second mortgage bid its debt ($65,000.00) and then conveyed to the first mortgagee. This Court held that the first mortgagee (FNMA) held subject to the husband's life estate in property of a value of the difference between the bid ($65,000.00) and the exemption amount ($120,000.00).

Sabato does not hold or even suggest that there are two homestead parcels each worth $120,000.00. Instead, Sabato deals with the consequences of a failure to waive the homestead right. The waiver in Sabato was ineffective. It was not effective as to the wife and ineffective as to the husband, but the statute simply made it ineffective. Because the

waiver was ineffective, both the husband and wife retained their joint estate. The identity of the plaintiff (husband or wife) made no difference to the outcome.

This Court has consistently held that ownership and occupancy are the required elements to create a homestead right. Once created, the right is a joint life estate held by the spouses in property worth $120,000.00.

H. N.H. Rev. Stat. Ann. § 529:20-a Does Not Grant Additional Homestead Rights but Merely Provides Notice Reasonably Calculated to Encourage Investigation and Action by Debtors.

N.H. Rev. Stat. Ann. § 529:20-a does not define the homestead right but merely requires the creditor to give a notice to the residents of the property about to be sold at a sheriff's sale. The notice requirement was added to the statute in 1994. The notice is conditional – it notifies the occupant that they may have a right to a homestead. The conditional language is:

> YOU AND/OR YOUR SPOUSE **MAY** BE ENTITLED TO A HOMESTEAD EXEMPTION PURSUANT TO RSA 480:1. THIS EXEMPTS $ 120,000 FOR A SINGLE PERSON AND $ 240,000 FOR A MARRIED COUPLE.

N.H. Rev. Stat. Ann. § 529:20-a (LexisNexis) (emphasis added).

NH RSA 529:20 does not amend the homestead statute when it notifies a debtor that "This exempts $120,000 for a single person and $240,000 for a married couple." It merely reflects the fact that most married couples own their home jointly.

The levy statute does not define the homestead nor its amount. That definition remains in N.H. Rev. Stat. Ann. § 480:1. That definition was unchanged in 1994 when the RSA 529:20-a was added. Where the homestead before 1994 permitted one homestead parcel per owner, the addition of the Levy Notice in 1994 did not change that requirement: the creation of a homestead still required ownership and occupancy and when the homestead was occupied by a married couple and owned by one of them, each spouse holds a life estate once the homestead parcel is set out.

I. N.H. Rev. Stat. Ann. § 480:3-a Does Not Create an Ownership Interest Upon Which N.H. Rev. Stat. Ann. §480:1 impresses a second $120,000.00 Homestead.

The Appellant's argument, and that made by the State, is that the non-owing spouse's life estate interest created by RSA 480:3-a is "an interest therein" which RSA 480:1 protects as homestead (the "Section 3-a Interest Theory"). RSA 480:1 does not support the Section 3-a Interest Theory.

1. The Section 3-a Interest Theory is Unsupported by the Long History of Practice.

It does not, first, because long history of practice fails to support that theory. The "interest" language has been a part of the homestead statute since 1851 yet never has either the legislature or the Court found a homestead based on the spouse's interest arising under the homestead statute to create twice as much protection.

Each iteration of the statute has a reference to an "interest therein" in some form. The "interest" language was in the Statute of 1851:

> Sec. 2. Such exemption shall extend **to any interest** which the debtor may own in such homestead, **and to any interest** in any building occupied by him as a homestead standing on land not owned by him, to an amount not exceeding five hundred dollars.

Chapter 1089, Laws of 1851; Chapter 196, Consolidated Statutes 1853 § 2. (emphasis added). The 1867 Statute granted the homestead to "[t]he wife, widow and children of any debtor who is the owner of any homestead, **or of any interest therein**…". General Statutes, Chapter 124, § 1 (emphasis added). The 1878 Statute granted the homestead for an "owner of a homestead, **or of any interest therein**, occupied by himself or herself and his or her family…" General Laws Chapter 138, §1 (emphasis added). The statutes from 1891 forward all use the locution of today's statute: "Every person is entitled to five hundred dollars worth of his homestead, **or interest therein**…" Public Statutes, Chapter 138 §1 (emphasis added).

Despite over one hundred seventy (170) years of practice, before this proceeding, no suggestion is made in the reported cases that married debtors, where the homestead is owned by one spouse, are entitled to twice the homestead exemption amount. Instead, for ninety years or more, from 1851 through 1942, the legislature treated the homestead as merely a single amount expressly shared between husband and wife. See Statutes in Section I F above. After 1942, the legislature removed the protections it afforded to the spouse, but it did not otherwise change the homestead awarded.

During those one hundred and seventy (170) years of practice, the Supreme Court slowly reached the conclusion, in *dicta,* that if two spouses each had an ownership of the homestead parcel, then the household would

benefit from twice the exemption amount. See Section 1 D above. No case or litigant before this Court has ever suggested that a married person's homestead interest without joint ownership would be protected in an amount equal to twice the stated exemption amount.

2. The Section 3-a "Interest" is not an interest in property within the meaning of Section 1 of the statute, but an inchoate, conditional, unvested privilege.

The Section 3-a Interest Theory fails because this Court has described the homestead interest of the non-owner spouse as inchoate, conditional, and not vested, or fixed, until set off from a creditor's levy. See Section I. C. above. It is a mere personal privilege and not an interest in real estate. Currier v. Sutherland, 54 N.H. 475, 486 (1874) ("The exemption of a homestead from attachment or levy is a personal privilege which the law gives to the owner…"); Meader v. Place, 43 N.H. 307, 308 (1861) (Husband slept with wife's sister. Wife left the homestead. Court ruled: "[i]t may be considered as settled in this State, that the voluntary separation of husband and wife, for the cause assigned in this case, does not debar the wife of the privileges conferred by the homestead exemption statute.").

The Section 3-a Interest Theory fails the test of historical practice, it fails the test of the logic of the cases, it fails the test of the language used to describe that homestead interest, and it results in an exemption for jointly owned property in an amount equal to quadruple the stated exemption amount. See Section 1 E above. The statute and cases establish that only an owner may claim a homestead and that homestead claimed includes joint life estates for the owner and spouse.

The statute protects a parcel of land owned by a married individual worth $120,000.00 as homestead. That means that each spouse has a right to occupy that parcel for their life, free from attachment or sale by creditors.[6] It does not mean that each spouse has a separate entitlement to $120,000.00. It does not mean that two tracts, each worth $120,000.00 would be set off to the Debtor and spouse. It means that together the two spouses have an undivided life estate interest in one parcel or one amount of $120,000.00.

II. THE SECOND SENTENCE OF N.H. R.S.A. 480:1 CREATES THE SAME HOMESTEAD RIGHT OF EXEMPTION IN MANUFACTURED HOUSING AS EXISTS IN ANY OTHER REAL ESTATE OCCUPIED AS A HOME.

Amicus believes that the second sentence of RSA 480:1 only restates the law of homestead and applies it to manufactured housing. It does not change the law of homestead with respect to either manufactured housing or other real estate. The second sentence is relevant to this proceeding only because it evidences the legislature's understanding of the law of homestead in 1982 which it was extending to manufactured housing.

CONCLUSION

For one hundred and seventy years in New Hampshire a homestead exemption has protected the well-being of the family from creditors. It does that by protecting the family's ability to occupy $120,000.00 of the home place for the life of both husband and wife. If, during creditor

[6] Creditors may levy on the reversion after the life estates. Cross v. Weare, 62 N.H. 125 (1882).

recovery, the property is sold, the value of the property in which those life estates would have been granted is paid to the debtor. The statute creates two life estates in only one homestead premises.

To the first question the Court should answer: yes, the first sentence contains an ownership requirement which has always been part of the homestead.

To the restatement of the first question, the Court should answer: the non-owner spouse has a non-vested, contingent, personal privilege to occupy the homestead parcel for life which becomes a vested life estate when the homestead is set off.

To the second question, the Court should answer: the non-owning spouse of a manufactured home appropriately occupied has the same rights as a non-owning spouse of any homestead real property.

STATEMENT REGARDING ORAL ARGUMENT

The undersigned respectfully requests oral argument in this matter. The oral argument will be presented by Edmond J. Ford, Esquire.

Respectfully Submitted,

Michael Askenaizer, Trustee of the Bankruptcy Estate of William and Debora Linane, Bk. No. 22-10612
By his Attorneys

Ford, McDonald & Borden, P. A.

Date:

By: /s/ *Ryan M. Borden*

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CERTIFICATE OF COMPLIANCE

I, Ryan M. Borden, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 7740 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

Date: April 17, 2023 /s/ *Ryan M. Borden*
Ryan M. Borden

CERTIFICATION OF SERVICE

I, Ryan M. Borden, hereby certify that a copy of this Brief and its Appendix shall be served on Lawrence Sumski, counsel for the Chapter 13 Trustee, Leonard Deming, counsel for Katherine Brady, and Anthony Galdiere, Zachary Towle, and Mary Stewart, attorneys for the State of New Hampshire, through the New Hampshire Supreme Court's electronic filing system.

Date: April 17, 2023 /s/ *Ryan M. Borden*
Ryan M. Borden