No. 2023-0023

State Of New Hampshire
Supreme Court

KATHERINE R. BRADY,
Plaintiff – Appellant
v.
LAWRENCE P. SUMSKI,
Defendant – Appellee

On Certification from the U.S. District Court,
District of New Hampshire
Case No. 22-cv-272-SM

REPLY BRIEF OF APPELLANT, KATHERINE R. BRADY, TO BRIEF OF APPELLEE LAWRENCE P. SUMSKI

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SUMMARY OF THE ARGUMENT

The Appellee/Trustee relies on a novel restructuring of the statutes and case law relative to this case. He does so as a fiduciary obligated to protect the position of the creditor, not the debtor who is clothed with protection of the homestead right, and therefore seeks a strained construction of the law as currently construed and applied.

ARGUMENT

Waiving no arguments previously made, this Reply Brief for the Appellant tracks the argument structure of the Appellee's Brief for the convenience of all involved in this matter.

I. THE APPELLEE/TRUSTEE MISCONSTRUES THE HOMESTEAD "RIGHT" BY ASSERTING IT AS STATUS-DEPENDENT MULTI-FEATURED AS SOMEHOW DEPRIVING A NON-OWNING SPOUSE OF A SEPARATE EXEMPTION UNDER N.H.R.S.A. 480:1 ET SEQ

The Appellee adopts the bankruptcy court's flawed analysis on page 6 of its opinion, Appendix at p. 10, and thus posits the existence of two separate statuses for the owning and non-spouse calling them "monetary" rights and non-monetary, ancillary" rights respectively. Appellee Brief, pp. 11-12, 16-17.

The Appellee attempts to distinguish the "interest" set forth in the first sentence of N.H.R.S.A. 480:1 from the "ownership" requirement found in the second sentence as being something different. But prior to 1983 with the amendment adding the "ownership" requirement as to manufactured housing in the second sentence, all this section ever stated was "interest" and did not make a distinction as to who owned the property and who did not. In other words, the "interest" for all purposes was identical. The addition of the "ownership" language in 1983 did not change that. If there were an intent to change it, the General Court could have, and presumably would have, done so. Instead, the legislative history as referenced in the Appellant's opening brief makes the assertion, as it has generally been understood by courts and practitioners alike that, repeated here for the convenience of the Court:

> In the event such homestead rights are not waived, a secured party foreclosing upon a security interest created under this paragraph shall first pay to the debtor an amount equal to that which a person is entitled to under RSA 480:1, *and the same amount to his or her spouse*, if any, out of the proceeds of the sale of the manufactured housing, which payment shall extinguish all homestead rights therein.

Copy of Senate Journal, 24 May 1983, pp. 974-975. App at 23-24, highlighted at 24. Emphasis added.

This has been the understanding for decades in New Hampshire, as referred to previously by the Appellant in her opening brief with the examples of *Sabato v. FNMA,* 172 N.H. 128 (2019), and *Robitaille v. Roy and Dahar*, Rockingham County Superior, Court, Docket No. 218-2014-CV-00406, and relied on by bankruptcy practitioners and others alike, and never really challenged until now.

The General Court never stated nor intended that the "interest" set forth in the statute was to be deemed some "bifurcated" interest and not the same, basic, identical interest.

II. THE APPELLEE/TRUSTEE MISCONSTRUES THE "STATUTORY CONSTRUCTION" IN HIS ANALYSIS

The Appellee contends, in his "statutory construction" analysis, that "the second sentence [of N.H.R.S.A. 480:1] clarifies the extent and meaning of the protection" of the Homestead exemption while acknowledging that the "legislative intent was to extend to owners and occupiers of manufactured homes the exact same rights and protections possessed by owners of traditional stick-built homes cited in the first sentence.…" Appellee Brief at 22. The Appellee also expresses the tardy desire that "it would have been much preferable for the Legislature to have repealed this section, and changed it into two sections" to reflect what he urges upon this Court. Appellee Brief at 21. But, as aforesaid, the Legislature did not make the distinction

the Appellee presses here and it is asserted that such a distinction therefore was not intended and cannot be grafted upon the statute. And, contrary to the Appellee's assertion, the parties do not agree that there are two distinct parts to the homestead exemption in the nature of the fiction pressed upon this Court. Appellee Brief at 20.

The Appellant and the State aver that the ownership requirement set forth in the second sentence of NHRSA 480:1 only applies to the land upon which the manufactured housing sits, and that this ambiguity is resolved by resort to the legislative history as previously stated.

The portion of the Appellee's "statutory analysis" relative to unequal treatment of owners of "stick" homes on one hand, and "manufactured" homes as "second class housing" on the other, Appellee brief at 25, is thus a *non sequitur* and it would be illogical if that were the intent of the legislature. But it was not and Appellant, contrary to Appellee's assertions, has never suggested that it was. The Appellant has consistently averred that manufactured homeowner and their spouses enjoy the same protection as owners and spouses of stick built homeowners and their spouses. The ownership language of the second sentence of N.H.R.S.A. 480:1 was to clarify the scope of the exemption as it applies to land and building which, unlike most stick built homes, could be owned by separate persons.

Finally, the Appellee's adoption of the bankruptcy court's suggestion that all occupiers might be afforded a homestead interest in an overbroad reading of the statute is unavailing. It is clear that the General Court limited the exemption to the spouse in NHRSA 480:3-a when it amended NHRSA 480:3 to remove minor children from its coverage.

III. THERE ARE CASES DIRECTLY ON POINT SHOWING THE CLEAR DIRECTION OF THIS HONORABLE COURT AND STATE COURTS FOLLOWING THIS COURT IN CONSTRUING THE HOMESTEAD RIGHT LIBERALLY AND IN FAVOR OF NON-OWNING SPOUSES

Appellant will spend little time or space replying to this portion of the Appellee's brief. Case law has already been addressed in the Appellant's opening brief and there is no need to restate all of that here *in toto*.

Certainly there are "no authoritative cases directly on point," Appellee Brief at p. 32, that the Appellee may rely upon. Rather, the Appellant cites cases that are inapposite to the strict issue before this Court and can be distinguished.

The case of *Beland v. Goss*, 68 N.H. 257 (1895) involved a previous homestead that was conveyed away and the parties pressing for homestead treatment no longer owned it. It is interesting, however, that the *Beland* court suggested in its final sentence that both the

debtor and the non-owning spouse had a homestead exemption before the property was conveyed.

Similarly, the case of *Gerrish v. Hill*, 66 N.H. 171 (1890) set forth a situation where the petitioners had sold the subject real estate and moved, and had a homestead at another location making the Appellant's reliance on ownership and occupancy moot.

Three other cases submitted by the Appellant fail to find traction. These include *Stewart v. Bader*, 154 N.H. 75 (2006), *In re St. Laurent*, 2022 BNH 002, Appellee's Appendix at p. 63, *In re Weiner*, 2015 BNH 012, Appellant's Appendix at p. 52. All of these cases found a lack of necessary occupancy of the homestead premises, a factor not relevant in the case at bar since the Appellant and her spouse and two children occupied the premises at all relevant times.

Since the matter at bar originated from the U.S. Bankruptcy Court for the District of New Hampshire, cases from that court get mentioned in the mix. However, those cases have no precedential value for this Court and are only referred to as perhaps having persuasive value. And, for reasons already mentioned, there is little persuasive value to be had. As noted, the *St. Laurent* and *Weiner* cases involved occupancy issues not before this Court.

The bankruptcy case of *In re Visconti*, 426 B.R. 422 (Bankr. D.N.H. 2001) is a good example. As aforesaid, the holding in *Visconti*

was mere *dicta* and given the fact circumstances in that case, the bankruptcy court's pronouncements were unnecessary. Judge Deasy in that case stated that the debtor was not married to someone who had an ownership interest in the property, which were the facts in that case. *Visconti*, 426 B.R. at 426. It was unnecessary to go further and draw conclusions which were not before that court. It needs not be referred to here where the debtor is married to the non-owning spouse.

Finally, the reference to *In re Hopkins*, 2021 BNH 004, Appellee's Appendix at p. 56, is a reach having nothing to do with the case before this Court. The petitioner in *Hopkins* was trying to double up the homestead exemption based upon the language of N.H.R.S.A. 480:3-a to be granted a second homestead exemption for his non-owning deceased wife, clearly an unviable argument which was rejected. In this case, the non-owning spouse is very much alive.

Rather, the case law of this Court and other courts in New Hampshire that have found that the exemption should be construed liberally and that the interest of the non-owning spouse has value. *Sabato v. FNMA,* supra, and *Robitaille v. Roy and Dahar*, supra, *Maroun v. Deutsche Bank Nat'l Tr. Co.*, 167 N.H. 220 (2014)

Appellee's reference to NHRSA 529 seeks adoption of a construction which results in that statute having no meaning. For exactly why does it exist at all if the non-owning spouse has no cognizable interest that has any value? Appellee Brief at p. 37. The

Appellant makes this assertion virtually in the same breath as he bemoans the decision of the Superior Court in the *Robitaille* case which he acknowledges lands on "all fours" with the Appellant's position here. Appellee Brief at pp. 37-38.

IV. WHILE CREDITORS ARE GRANTED LEGAL PROTECTION, THE HOMESTEAD RIGHT IS INTENDED TO PROTECT THE FAMILY HOME OF THE DEBTOR

In this section, the Appellee notes that he is really just making a policy argument and no citations are required. Appellee Brief at p. 39, footnote 14. The Appellee is a Chapter 13 trustee and has a fiduciary duty to creditors to represent their interests. But the bankruptcy code exists to enable debtors to get a "fresh start" or reorganize so they can get on with their lives free of disabling debt. While creditors' right certainly should be protected, the bankruptcy code sets forth the manner in which people can get on with their lives and part and parcel of that is affording debtors exemptions so that they do not have to walk out of court in a barrel.

Exemptions by their very nature are unfair to creditors. If a debtor does not pay a debt, the creditor has the right to sue, get a judgment and lien and execute that lien. BUT, we, as a society, have decided that regardless of their debt situation, people should be able to retain certain property. The question before the Court is not whether an exemption is fair to the creditor.

New Hampshire permits debtors to utilize the state exemptions, and the question before this Court is whether, bankruptcy or no bankruptcy, the "interest" of the non-owning spouse as set forth in NHRSA 480:1 has value, and what that value is.

The Appellant asserts that, as this Court has previously suggested and state courts have observed, citations *infra*, that interest" has value and that value currently is up to $120,000.

Much of the remainder of this section addresses a creditor's sensible duty of diligence in making loans. That duty is present now and, regardless of this Court's ultimate decision, creditors will have that same duty going forward. A purchase money mortgage does not require the release of the homestead *ab initio*, N.H.R.S.A. 480:5-a, but encumbrances thereafter, with certain exceptions, are subject to the non-owning spouse's interest, which requires the non-owning spouse to release that interest in most circumstances. This means that subsequent lenders have to find out if there is now a spouse. And every mortgage specifically states whether the mortgagor is single or married. There is no big change to adapt to as the Appellee would suggest since mortgage practice and, Appellant urges, the law, already assumes such an interest which must be released.

V. DESPITE THE APPELLEE'S ASSERTION, THE APPELLANT'S "PROBLEM" IS NOT HAVING THE BENEFIT OF THE HOMESTEAD RIGHT AS ENVISIONED TO PROTECT THE FAMILY HOME.

The Appellee describes the Appellant's "predicament a solution in search of a problem." Of course, this couldn't be further from the truth. The Appellant very much has a problem, as do all homeowners in the same situation. Instead, the Appellee, it is suggested, is proposing a problem that does not exist.

As to the former, the Appellant filed for bankruptcy protection with the expectation, based upon previous bankruptcy practice specifically and treatment of the issue outside of bankruptcy generally, that she and her husband were entitled to exemptions which would protect their home. For many families, the family home is the major if not the sole asset of any consequence, and rely on that for survival going forward. It is very much a problem for the Appellant if she and her husband are denied this.

However, the trustee suggests a nefarious motive in a married couple choosing to have their home titled in only one spouse's name. This apparently is to confound creditors of the non-owning spouse such that they have no recourse to recover what they are entitled to. But there could be other reasons, such as the non-owning spouse not having a satisfactory credit record which would make a creditor comfortable with making a loan to that individual. Or perhaps the

non-owning spouse could not be present at the closing. But the Appellee's ill-considered logic ignores the simple fact that if the non-owning spouse were to actually be an owner as he believes is required, then the exemption would prevent the creditor from getting to the asset anyway.

The Appellee finally suggests that the simple expedient of a quitclaim deed, executed after the home was purchased, would have somehow generously given the spouse an exemption worth $120,000. But the Appellant asserts that such an action was unnecessary because, due to the way in which the exemption has previously been treated, he already had the exemption and so the formalistic rite of spending fifty dollars, give or take, should not be necessary for the spouse's "interest" to be recognized.

CONCLUSION

The questions certified to this Court by the U.S. District Court should be answered such that the ownership requirement described in the second sentence of N.H. Rev. Stat. Ann. 480:1 does not apply to all real property occupied as a homestead since the "interest" language of the statute was not revised, nor does the ownership requirement apply to non-owners of manufactured housing inasmuch as the ownership language is only intended to refer to the land upon which the manufactured housing sits. Therefore, this Court should find and hold that the cohabiting, non-owner spouse has a separate, present,

non-contingent homestead exemption valued at $120,000, whether the home is stick-built, or is manufactured housing.

Dated: May 1, 2023

Respectfully Submitted,
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By Deming Law Office
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CERTIFICATE OF COMPLIANCE

COMES NOW Attorney Leonard G. Deming, II, Counsel for the Appellant, Katherine R. Brady, and hereby certifies that this Brief was produced using standard sized typewriter characters or size 14 font, and that excluding the Cover Page, Table of Contents, Table of Authorities, the Certificate of Compliance, Certificate of Service, and Signature Block, this brief contains 2,462 words.

Dated: May 1, 2023

/s/ Leonard G. Deming II
Leonard G. Deming, II, Esq.

CERTIFICATE OF SERVICE

COMES NOW Attorney Leonard G. Deming, II, Counsel for the Appellant, Katherine R. Brady, and hereby certifies that I have caused a copy of the Brief to be served upon Counsel for the Appellee and intervening parties using this Court's electronic filing system.

Dated: May 1, 2023

/s/ Leonard G. Deming II

Leonard G. Deming, II, Esq.