

HOME SWEET HOME? LITIGATION ASPECTS TO MINNESOTA'S DESCENT OF HOMESTEAD STATUTE

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I. INTRODUCTION

Imagine a spouse, shortly after his wife's death, learning from the trustee of his wife's revocable trust that the home in which she lived for twenty years, and in which the couple lived for fifteen years after their marriage, was not considered by the trustee to be the deceased wife's homestead and that he needs to move out. Although the husband is speechless, the trustee calmly explains that, prior to marriage, the wife transferred her house into a revocable trust, which leaves the home to her children from a previous marriage. The trustee continues that, because the trustee owned the house at the wife's death, the home is not considered the wife's homestead under the descent statute. Further, the trustee says the fact that the wife was a resident of a nursing home for the last year of her life means that she also did not occupy the home, another necessary requirement for defining a homestead. The outraged husband seeks out an attorney to litigate the issue of whether he is entitled to remain in the home that he and his wife shared during their marriage.

Imagine next a younger couple who marry after living in and owning their own homes. The couple resides in the wife's house while they completely remodel the husband's home. The husband dies unexpectedly in a car accident, but the couple had not yet taken up residence in the husband's home, and the husband had not changed his will that left everything to his parents and siblings, the husband had not transferred his home into joint tenancy with his wife. The personal representative of the husband's estate informs the wife that she is not entitled to the home she and her late husband had spent countless hours remodeling, and where they intended to live, because the house was uninhabitable and therefore not capable of being occupied by the husband as his homestead. In any event, the personal representative says, the husband could only have one homestead so it must be the wife's house where he was living at death.

Most married couples acquire and own their homes in the traditional manner. They buy it together during the marriage and own it in joint tenancy. However, with the increasing frequency of second marriages, marriages that occur later in life and after significant wealth accumulation, the possibility of these hypothetical scenarios actually coming into the legal practitioner's door is not as remote as it may seem. Further, these cases present practitioners with a more complicated issue than it may seem at

first blush because of the lack of a clear and specific definition of the term “homestead,” as it is used in the descent of homestead statute. The difficulty is not in defining the term homestead, as it is well settled that it is a dwelling owned and occupied by the decedent at his or her death.¹ Rather, the difficulty is in ascertaining, with a sufficient degree of certainty to avoid protracted and expensive litigation, what it means to “own or occupy” a dwelling for purposes of creating a homestead. Prior to analyzing the issues that may arise in the litigation of ownership and occupation, it is necessary to examine what existing law holds with respect to the descent of the homestead.

II. THE DESCENT OF THE HOMESTEAD

A. *Minn. Stat. § 524.2-402*

In Minnesota, the homestead descends to the surviving spouse, regardless of any testamentary or other disposition, if there are no surviving descendants of the decedent.² If there are surviving descendants of the decedent, then the homestead descends to the surviving spouse for life and the remainder in equal shares to the decedent’s descendants by representation.³ Specifically, the relevant portions of the descent of homestead statute provide as follows:

- (a) If there is a surviving spouse, the homestead, including a manufactured home which is the family residence, descends free from any

1. *See infra* notes 20-47 and accompanying text.

2. *See* MINN. STAT. § 524.2-402 (2000). A comment should be made about when a person is a decedent’s surviving spouse. Minnesota Statutes section 524.2-802 provides that when a marriage to a decedent has been dissolved or annulled then the person is not a surviving spouse. However, this same statute provides that “[a] decree of separation which does not terminate the status of husband and wife is not a dissolution of marriage for purposes of this section.” Based upon this provision, the Minnesota Court of Appeals held that a decedent’s estranged wife was his “surviving spouse” and, therefore, was entitled to her elective share even though (1) the estranged wife and decedent were separated, (2) the decedent had led the wife to believe that they were divorced when, in fact, they had not been divorced, and (3) the wife had remarried even though she had not been divorced. *See In re Estate of Kueber*, 390 N.W.2d 22, 23-24 (Minn. Ct. App. 1986). The court further denied the personal representative’s argument that equitable principles should preclude decedent’s estranged wife from taking her elective share. *Id.* at 24.

3. MINN. STAT. § 524.2-402(a)(2).

testamentary or other disposition of it to which the spouse has not consented in writing or as provided by law, as follows:

- 1) if there is no surviving descendant of decedent, to the spouse; or
 - 2) if there are surviving descendants of decedent, then to the spouse for the term of the spouse's natural life and the remainder in equal shares to the decedent's descendants by representation.
- (b) If there is no surviving spouse and the homestead has not been disposed of by will it descends as other real estate. . . .⁴

Minnesota's descent of homestead statute does not provide a definition of the word "homestead;" however the following discussion will address what courts have interpreted to be the meaning of homestead under the homestead descent statute.⁵

B. Dower and Homestead Rights Historically

Legal protection for the rights of a surviving spouse and children arise out of a surviving spouse's right to a dower or curtesy interest in the deceased spouse's lands, to which homestead rights closely resemble.⁶ Dower and curtesy rights in Minnesota vested in fee, to the surviving spouse, a one-third interest in all real property owned by the deceased spouse at his death, with the residue being vested in equal shares to the decedent's children.⁷ These rights were in addition to the right of a surviving spouse to the homestead or to a life estate in the homestead.⁸ Dower and curtesy rights have been abolished in Minnesota,⁹ but the right to an interest in homestead continues. This right was first statutorily created in 1876.¹⁰ In 1878, the statute was amended to read:

The surviving spouse or husband shall also be entitled to hold for the term of his or her natural life, free from all claims on account of the debts of the deceased, the

4. *Id.*

5. *Id.*

6. *See In re Wightman*, 31 Minn. 168, 169, 17 N.W. 280, 280 (1883).

7. *Snortum v. Snortum*, 155 Minn. 230, 233, 193 N.W. 304, 306 (1923).

8. *Id.*

9. 1925 Minn. Laws 174 § 2.

10. 1876 Minn. Laws 37 § 1.

homestead of such deceased, as such homestead may be defined in the statutes relating to homestead exemptions.¹¹

The statute, as newly amended in 1878, specifically referenced the exemption statute for a definition of what constituted a homestead under the descent statute and courts were directed to look to the exemption statute for guidance.¹² Courts at that time found that a homestead was a dwelling that was owned and occupied by the person claiming the homestead.¹³ The current version of the descent of homestead statute does not refer to the exemption statute for the definition of what constitutes a homestead, and therefore, homestead under the descent statute is not defined.¹⁴

By 1894, the homestead statute had been amended again and provided, in substance, for the same rights that a surviving spouse with children has under the current statute.¹⁵ In particular, the law in 1894 provided that the homestead descended free from any testamentary devise or other disposition to which the spouse had not consented in writing and was free from all debt.¹⁶ Further, the homestead descended to the surviving spouse for the term of his or her natural life, and the remainder to the decedent's children or grandchildren by right of representation.¹⁷ As the Minnesota Supreme Court noted, these early descent of homestead statutes were a departure from previous legislative policy and designed to provide for the surviving spouse and to preserve the homestead for the children, notwithstanding the will of the decedent.¹⁸ Therefore, the rights of a surviving spouse and surviving children to an interest in the homestead has a long-standing history in Minnesota. Despite this history, there are surprisingly few cases discussing what constitutes a decedent's homestead or what it means to own and occupy a dwelling for homestead purposes. Examination of the potentially litigious issues involving the descent

11. MINN. GEN. ST. c. 46, § 2 (1878). *In re Baillif's Estate*, 40 Minn. 172, 173, 41 N.W. 1059, 1059 (1889) (discussing whether the house and lot qualified as a homestead "within the meaning of section 2, c. 46, Gen. St. 1878").

12. *In re Baillif's Estate*, 40 Minn. at 173, 41 N.W. at 1059.

13. *Id.* at 173, 41 N.W. at 1059. *See also* MINN. GEN. ST. c. 68 § 1 (1878).

14. *See supra* notes 3-5 and accompanying text.

15. *See* MINN. GEN. ST. § 4470 (1894). *See also* *Schacht v. Schacht*, 86 Minn. 91, 92, 90 N.W. 127, 128 (1902). *Cf.* MINN. STAT. § 524.2-402.

16. MINN. GEN. ST. § 4470 (1894).

17. *Id.*

18. *Schacht*, 86 Minn. at 94, 90 N.W. at 129.

of a homestead requires an understanding of existing case law and attempts by Minnesota courts to define the meaning of homestead in a variety of contexts.

C. Homestead Defined: "Owned and Occupied"

There is no explicit definition of the word homestead contained within the descent of homestead statute.¹⁹ However, the homestead statute does indicate that a homestead includes a "manufactured home which is the family residence."²⁰ However, the Minnesota Court of Appeals has made it very clear that the phrase "family residence" contained in the statute is of no import to non-mobile dwellings, and that this phrase is simply a recognition by the legislature that manufactured homes may be homesteads.²¹ Further, the court of appeals has held that a property's status as a family residence is irrelevant under the descent of homestead statute.²²

The court of appeals in *Cleys v. Cleys*, one of the few cases to address the definition of a homestead for purposes of the descent statute, looked to Minnesota's homestead exemption statute which protects a debtor's homestead from attachment and seizure.²³ Therefore, the court in *Cleys v. Cleys* adopted the homestead exemption definition that a house owned and occupied by a debtor as the debtor's dwelling place shall constitute the homestead of the debtor and the debtor's family.²⁴ However, simply stating that a homestead is one that is owned and occupied as a dwelling place does not end the inquiry. The court of appeals later held that "the test to determine if a house is 'owned and occupied' . . . is whether the ownership and occupancy affords "a 'significant "community connection" . . . ' [that allows] the debtor and his or her family . . . to be self-sustaining."²⁵

The facts in *Cleys v. Cleys* involved a decedent who resided in a resort during the tourist season, stayed at another property he

19. See MINN. STAT. § 524.2-402 (2000).

20. *Id.*

21. See *Cleys v. Cleys*, 363 N.W.2d 65, 70 (Minn. Ct. App. 1985).

22. *Id.* (citing *St. Denis v. Mullen*, 157 Minn. 266, 196 N.W. 258 (1923); *Rux v. Adam*, 143 Minn. 35, 172 N.W. 912 (1919); *Murphy v. Renner*, 99 Minn. 348, 109 N.W. 593 (1906)).

23. See *Cleys*, 363 N.W.2d at 70 (citing MINN. STAT. § 510.01 (1982)).

24. See *id.*

25. *Id.* (citing *Denzer v. Prendergast*, 267 Minn. 212, 218, 126 N.W.2d. 440, 444 (1964)).

owned for a couple of weeks in the fall and spring, and lived the rest of the year in his mother's home in Illinois.²⁶ The court upheld the decision that the resort property was the decedent's homestead by examining specific facts of the case: the decedent had occupied the main resort house for a substantial part of the year; maintained his personal effects there throughout the year; was living in the resort house when he entered the hospital before his death; maintained a Minnesota driver's license; filed Minnesota income taxes; and had made declarations that he believed the resort property to be his homestead.²⁷ In doing so, the court noted that the statute does not require uninterrupted physical presence at a dwelling in order to make it one's homestead.²⁸

The court in *Cleys v. Cleys* also notes that another statute protects spousal interests in the homestead, specifically with reference to filing and recording conveyances made by one spouse without the consent of the other during the marriage.²⁹ This conveyance statute provides that one spouse may not convey the homestead during the marriage unless the other spouse consents in writing.³⁰ A spouse may, however, convey property other than the homestead that is owned by that spouse without the consent of the other.³¹ A deed of conveyance of the homestead by one spouse during the marriage without the other spouse's written consent is a nullity and is void.³² Since this conveyance statute only protects a spouse from inter vivos conveyances of the homestead that occur during the marriage, and is not relevant to conveyances made prior to the marriage or by a testamentary disposition after death, it is of little assistance in resolving disputes that may result after death as to the descent of the homestead.³³ However, the fact that this separate conveyance statute protects a spouse from unwanted transfers of the homestead during marriage underlies the principle noted by the Minnesota Supreme Court that these statutes are

26. *Id.* at 68.

27. *Id.*

28. *Id.* at 70.

29. *See Cleys*, 363 N.W.2d at 69-70. *See also* MINN. STAT. § 507.02 (2000) (stating the conveyance of homestead is "subject to the rights of the other spouse therein").

30. MINN. STAT. § 507.02.

31. *Id.*

32. *See Rux v. Adam*, 143 Minn. 35, 38, 172 N.W. 912, 914 (1919).

33. *See* MINN. STAT. § 507.02. An examination of restrictions on inter-vivos conveyances of the homestead during the marriage is beyond the scope of this article.

designed “to preserve the homestead for the family even at the sacrifice of just demands.”³⁴

Although the court in *Cleys v. Cleys* held that the property’s status as a family residence is irrelevant under the descent statute, clearly some significant physical presence by the decedent is necessary in order to qualify the dwelling as a homestead under the descent statute.³⁵ As the Minnesota Supreme Court noted in a 1898 decision, “[a]ctual occupancy, as distinguished from mere possession (which may be constructive), is the prominent idea associated with the word ‘homestead.’”³⁶ However, the term “actual occupancy” must be reasonably construed and does not require constant physical presence at the dwelling.³⁷ In fact, a person’s absence from a dwelling as a result of some casualty, for business or for pleasure has long been recognized not to constitute a removal, abandonment or a ceasing of occupancy of a dwelling for homestead purposes.³⁸ It has also been held that a parcel of property cannot be claimed as a homestead where a person never occupies the property as his residence, but rather occupied a rented dwelling as his regular place of abode.³⁹ Although the appellate courts of this state have never specifically stated that the intention of a decedent or owner to make a dwelling his or her homestead is a significant consideration, the implication is apparent in the courts’ review of the facts of each case.⁴⁰ For example, in *Clark v. Dewey*, the supreme court found it significant that the record amply reflected an intent by the owner to leave the premises and to never occupy it again as his home or place of abode.⁴¹ It should also be noted that if the decedent leaves significant property, for example a farm, that the homestead rights

34. See *Holden v. Farwell, Ozmun, Kirk & Co.*, 223 Minn. 550, 559, 27 N.W.2d 641, 646 (1947).

35. See *supra* notes 26-28 and accompanying text.

36. *Clark v. Dewey*, 71 Minn. 108, 110, 73 N.W. 639, 639-40 (1898).

37. *Id.* at 110, 73 N.W.2d at 640.

38. *Id.*

39. See *In re Flanagan’s Estate*, 196 Minn. 140, 142, 264 N.W. 433, 434 (1936).

40. See *id.* See also *Clark v. Dewey*, 71 Minn. at 110-11, 73 N.W. at 640 and *Cleys v. Cleys*, 363 N.W.2d 65, 71 (Minn. Ct. App. 1985).

41. See *Clark*, 71 Minn. at 110-11, 73 N.W. at 640. It must be noted that this case did not involve the descent of homestead statute; but rather a forced sale to satisfy a judgment against the owner. *Id.* at 110, 73 N.W. at 639. There are very few cases in Minnesota that deal specifically with the concept of homestead under the descent statute, which is likely why the court in *Cleys v. Cleys* looked to the homestead exemption statute and associated case law in its analysis of the descent statute. See *supra* notes 19-31 and accompanying text.

of the surviving spouse are limited to the land which the decedent actually devoted to homestead purposes and that was actually occupied as the homestead at the time of death.⁴²

Since the court of appeals, in its most recent and most relevant case, used the homestead debtor exemption statute in its analysis of what constitutes a homestead for purposes of the descent statute, a closer look at the exemption statute may provide guidance for how the courts may look at unresolved descent of homestead issues in the future. The homestead exemption statute specifically provides that if a debtor is married, the title to the homestead may be vested in either spouse and that “[a]ny interest in the land, whether legal or equitable, shall constitute ownership, within the meaning of this chapter.”⁴³ Under this statute, the Minnesota Supreme Court has construed homestead interests liberally.⁴⁴ For example, in *Cargill*, a 160-acre farm, title to which was held by a family farm corporation (Hedge Farm, Inc.), the couple who farmed and had a house on the property was entitled to claim a homestead exemption in eighty acres of the farm upon which the party resided.⁴⁵ This liberal construction of homestead has long been recognized in the State of Minnesota. In another case, the supreme court held that property held in trust by J for the benefit of his brother M, which was occupied by M as his residence, constituted M’s homestead and he was deemed the actual owner of the property even though legal title was held by his brother J.⁴⁶

Although a dispute may arise as to whether a dwelling and parcel of property are in fact a decedent’s homestead, if homestead status is conferred, the interests in the homestead vest in the surviving spouse and surviving children immediately and absolutely upon the decedent’s death and without any act on the survivors’ part or the part of the probate court.⁴⁷

42. See *King v. McCarthy*, 54 Minn. 190, 195, 55 N.W. 960, 961 (1893).

43. MINN. STAT. § 510.04 (2000).

44. See *Cargill, Inc. v. Hedge*, 358 N.W.2d 490, 492 (Minn. Ct. App. 1984), *aff’d*, 375 N.W.2d 477 (Minn. 1985).

45. *Id.* at 493.

46. See *Jelinek v. Stepan*, 41 Minn. 412, 43 N.W. 90 (1889).

47. See *In re Lee*, 171 Minn. 182, 185-86, 213 N.W. 736, 737 (1927); *In re Walberg’s Estate*, 130 Minn. 462, 466, 153 N.W. 876, 878 (1915). Although these cases remain good law, under the present descent statute a surviving spouse must file a petition for her homestead rights or she will be deemed to consent to a contrary disposition of the homestead. See MINN. STAT. § 524.2-402.

D. The Homestead Allowance Under the Uniform Probate Code

Although not necessarily probative to litigation issues arising in the context of the descent of the homestead, it is advisable to examine how the Uniform Probate Code, which has been largely adopted in Minnesota, addresses the descent of the homestead. The Uniform Probate Code, while allowing for some interest by the surviving spouse with respect to the homestead, does not give the surviving spouse any substantial interest of the homestead in fee, or if there are children of the decedent, a life estate.⁴⁸ Rather, the Uniform Probate Code provides a decedent's surviving spouse a homestead allowance in the amount of \$15,000.⁴⁹ If there is no surviving spouse, each minor child and dependent of the decedent is entitled to the \$15,000 homestead allowance divided equally among them.⁵⁰ Like Minnesota, the Uniform Probate Code homestead allowance is exempt from all claims against the estate and is added to any share passing by will, intestate succession, or elective share.⁵¹ There is an optional provision in the Uniform Probate Code for states that have constitutional provisions for either fee title to, or a life estate in, the homestead, which provides that the value of the constitutional homestead shall be charged against the homestead allowance.⁵² Clearly Minnesota's descent of homestead statute provides greater security for the surviving spouse and may provide the surviving spouse with a greater financial benefit as well depending upon whether he or she receives the homestead in fee and depending upon the value of the life interest.⁵³

E. Treatment of the Homestead in Other States

Other states take a myriad of different approaches with respect to a surviving spouse's interest in the homestead, as well as give a variety of different definitions to the term homestead.⁵⁴ An

48. UNIF. PROBATE CODE § 2-402 (1993). *But see* MINN. STAT. § 524.2-402 (2000).

49. UNIF. PROBATE CODE § 2-402.

50. *Id.*

51. MINN. STAT. § 524.2-402; UNIF. PROBATE CODE § 2-402.

52. UNIF. PROBATE CODE § 2-402A.

53. *See supra* note 4 and accompanying text.

54. An examination of the homestead-related statutes and homestead provisions in various state constitutions of all fifty states is well outside the scope of this article. The state statutes discussed in this section are by way of example and

examination of some of these differing approaches emphasizes the importance of Minnesota's approach descending the homestead to the surviving spouse.

1. Varying Approaches to the Homestead Allowance

The approaches taken by states providing some interest in the decedent's homestead to the surviving spouse can be sorted into four categories: a) Uniform Probate Code states; b) constitutional or statutory descent homestead states; c) residency during probate proceedings or at the discretion of the court; and d) other miscellaneous approaches.⁵⁵

a. Uniform Probate Code States

Numerous states have adopted the homestead allowance approach recommended by the Uniform Probate Code.⁵⁶ The amount of the homestead allowance varies from state to state, but ranges from \$7,500 to \$27,000.⁵⁷ Some states employ a homestead allowance in connection with other homestead provisions for the surviving spouse that impact the right to the homestead and the amount of the allowance.⁵⁸

b. Constitutional or Statutory Homesteads

This category of states provides either a life estate or fee simple rights to the surviving spouse and children. Minnesota is an example of a state providing a statutory right to homestead.⁵⁹ Minnesota is fairly unique in that it grants the surviving spouse fee

are not all inclusive of the nuances that exist among the descent of homestead statutes in the various states. For a brief summary of the history and development of homestead rights and allowances in the United States see the statutory note following RESTATEMENT (SECOND) PROPERTY: DONATIVE TRANSFERS § 1.1 (1992).

55. Examples of each will be discussed in turn.

56. See *supra* notes 48-53 and accompanying text.

57. Examples of states having homestead allowances and their respective amounts include the following: \$27,000—ALASKA STAT. § 13.12.402 (Michie 2001); \$20,000—MONT. CODE ANN. § 72-2-412 (2001); \$18,000—ARIZ. REV. STAT. § 14-2402A (West 2001); \$15,000—HAW. REV. STAT. § 560:2-402 (2001); MICH. COMP. LAWS § 700.2402 (2002); MO. REV. STAT. § 474.290 (2001); \$10,000—ME. REV. STAT. ANN. tit. 18-A § 2-401 (2001); \$7,500—NEB. REV. STAT. § 30-2322 (2001).

58. See WYO. STAT. ANN. §§ 2-5-103 and 2-7-501 to 2-7-509 (2002) (\$30,000); ALA. CODE § 43-8-110 (2002) (\$6,000). See *infra* notes 77-80 and accompanying text (discussing these two statutes).

59. See *supra* notes 2-5 and accompanying text.

title to the homestead if there are no children.⁶⁰ Vermont's homestead statute provides that the decedent's homestead, not exceeding \$75,000 in value, shall pass and vest in the surviving spouse and be set out to the surviving spouse by the probate court.⁶¹ These statutes, however, make no provision for the surviving children.⁶² The Vermont Supreme Court has noted that the homestead right of a surviving spouse is of paramount importance.⁶³ Further, homestead rights take precedence over the fundamental right to make a testamentary disposition, and any effort to will away the homestead right must fail.⁶⁴

Other states provide only a life estate to the surviving spouse. Rhode Island, for example, provides only a life estate to the surviving spouse and subjects the spouse to any encumbrances on the property existing at death.⁶⁵ Case law in Rhode Island invalidates transfers of property into revocable trusts for purposes of defeating a surviving spouse's homestead right on the ground that such a transfer is "illusory."⁶⁶ New Hampshire also provides a life estate in the surviving spouse, and has a statutory provision specifying that a conveyance of real property by deed to trustees of a revocable trust shall not result in the loss of homestead rights by the person executing the deed, unless the deed contains an express release of homestead rights.⁶⁷ Several states, however, provide simply a right of occupancy, rather than the vesting of a life estate, and when the surviving spouse ceases to occupy the homestead, whether before or upon death, his or her rights terminate.⁶⁸ Therefore, under these provisions, once a spouse ceases to occupy the homestead it descends according to the other laws of descent.⁶⁹ Florida is an example of a constitutional homestead state, which provides that the homestead shall not be "subject to devise if the

60. *Id.*

61. *See* VT. STAT. ANN. tit. 27, §§ 101, 105 (2001).

62. *Id.*

63. *See* *Budde v. Pierce*, 375 A.2d 984, 986 (Vt. 1977).

64. *Id.*

65. *See* R.I. GEN. LAWS § 33-25-2(a) (2001). *See also* ARK. CODE ANN. § 28-39-201 (Michie 2001); TENN. CODE ANN. § 31-1-104 (2001).

66. *See* *Pezza v. Pezza*, 690 A.2d 345, 348-50 (R.I. 1997). Although the result is the same, this is a different approach taken by the tentative draft of the RESTATEMENT (THIRD) TRUSTS § 25. *See infra* notes 114-122 and accompanying text.

67. N.H. REV. STAT. ANN. §§ 480:3-a (1992) and 480:9 (Supp. 2001).

68. *See, e.g.*, KY. REV. STAT. ANN. § 427.070 (Michie 2001).

69. *See id.*

owner is survived by a spouse or minor child.”⁷⁰

c. Residency During Probate Proceedings

Numerous states have separate provisions allowing a surviving spouse to possess and occupy the homestead during the pendency of the probate proceedings or for an indefinite period of time at the discretion of the court. For example, Connecticut allows the family of the decedent to remain in the dwelling house occupied by the decedent at the time of his or her death, and allows them to occupy all land and buildings connecting with the dwelling house for as long as the court deems necessary for the family's convenience and comfort until the property is sold, distributed or otherwise disposed of.⁷¹ South Dakota allows a surviving spouse to continue to possess and occupy the whole homestead until it is otherwise disposed of by law.⁷² Further, upon the death of both spouses “the children may continue to possess and occupy the whole homestead until the youngest child becomes of age.”⁷³ Iowa allows a surviving spouse to occupy the homestead until it is otherwise disposed of according to law.⁷⁴ However, a surviving spouse in Iowa is also able to elect to retain the homestead for life in lieu of a dower interest in the real estate of decedent.⁷⁵ The purpose of the occupancy statute in Iowa is merely a protection for the surviving spouse to remain in possession of the homestead prior to her taking her distributive share of the decedent's estate or electing a life interest in the homestead.⁷⁶

d. Other Miscellaneous Approaches

A number of states use a combination of approaches to the homestead allowance and a surviving spouse's interest in the homestead. For example, Wyoming provides a homestead allowance equal to the amount of the homestead exemption of \$30,000.⁷⁷ If the appraisal of the property determines the value to be less than \$30,000, the court shall order the homestead set off to

70. See FLA. STAT. ch. 732.4015 (2001). See also FLA. CONST. art. X, § 4(a).

71. CONN. GEN. ST. § 45a-321 (2001).

72. See S.D. CODIFIED LAWS § 43-31-13 (Michie 2001).

73. *Id.*

74. See IOWA CODE § 561.11 (2001).

75. See *id.* at § 561.12.

76. See *Wadle v. Boston Market Co.*, 191 N.W. 528, 529 (1923).

77. See WYO. STAT. ANN. §§ 2-5-103, 2-7-504, and 2-7-508 (Michie 2001).

the persons entitled to it.⁷⁸ However, if the appraisal determines the value to be greater than \$30,000, the property will be divided if possible, and if not possible, the property will be sold and the proceeds divided to the persons having an interest in the homestead.⁷⁹ Alabama is an example of a state that provides a homestead allowance, but also provides a constitutional right to the homestead in the family home.⁸⁰

2. *How Several States Define Homestead*

Among the states that provide some occupancy, life estate, or fee interest in the homestead to the surviving spouse or children, several of the states have undertaken to define homestead within the statute or within the state's homestead exemption statute. New Hampshire, for example, defines the homestead exemption in the same manner as Minnesota in that a homestead is defined as property owned and occupied as a dwelling.⁸¹ A bankruptcy case citing this statute held that for the creation of the homestead right, the occupancy must be actual and physical in nature, but that temporary absence with no intent to abandon the property may still be sufficient.⁸² Similarly, the Vermont homestead exemption statute defines the homestead as the dwelling house, outbuildings and land used as such.⁸³ Again, ownership and occupancy have been held to be the key inquiries,⁸⁴ but a significant absence will not destroy the homestead character of the property if there is shown an intent to return to the homestead.⁸⁵

Iowa's homestead exemption statute provides that "the homestead must embrace the house used as a home by the owner," and if the owner has two or more houses used as such the owner may select which one will retain the homestead status.⁸⁶ Again, occupancy of the dwelling house, except when the owner is temporarily absent with the intent to return, is essential to claim

78. *Id.* at § 2-7-506.

79. *Id.* at § 2-7-507.

80. *See* ALA. CODE § 43-8-110 (2001). *See also* ALA. CONST. of 1901, art. X, § 208.

81. *See* N.H. REV. STAT. ANN. § 480:1 (2001). *Cf.* MINN. STAT. § 510.01 (2000).

82. *See In re Eckols*, 63 B.R. 523, 524-25 (Bankr. D.N.H. 1986).

83. *See* VT. STAT. ANN. tit. 27, § 101 (2001).

84. *In re Brent*, 68 B.R. 893, 894-96 (Bankr. D.Vt. 1987).

85. *See In re Avery*, 41 B.R. 224 (Bankr. D.Vt. 1984).

86. *See* IOWA CODE § 561.1 (2001).

the homestead right.⁸⁷ However, once a homestead is established in Iowa an intent to occupy that would be insufficient to create a homestead right in the first instance is nonetheless sufficient to continue the homestead status.⁸⁸ The court in *McClain's Estate* stated that once a homestead is established, it is presumed to continue.⁸⁹ A Mississippi statute attempts to narrow the definition of home and homestead by defining these terms as the dwelling actually occupied as the primary home of a family group that is owned by the head of the family.⁹⁰ Florida's statutes do not define the term homestead, but do define the term owner to include the grantor of a revocable trust and in the same manner as if the interest held in the revocable trust was owned by the grantor.⁹¹ Idaho more specifically defines the term homestead as consisting of the dwelling house, and the land upon which it sits, in which the owner resides or intends to reside.⁹² This statute further expands on the definition of homestead by including unimproved land owned with the intention of placing a house on it and residing therein.⁹³ Clearly Idaho places great importance on the intent of the property owner claiming homestead status.

Although the definitions utilized by other states with similar homestead rights to the surviving spouse do not resolve all ambiguity as to the meaning of the term, they are illustrative of the argument that the homestead not only encompasses actual physical presence in the dwelling, but also an intent to make the dwelling one's home even if absent from it for significant periods of time. Further, at least two states acknowledge that the element of ownership is satisfied even if the homestead is held by the deceased grantor's revocable trust.⁹⁴

87. See *Berner v. Dellinger*, 222 N.W. 370, 371 (Iowa 1928).

88. See *In re McClain's Estate*, 262 N.W. 666, 668 (Iowa 1935). This approach is very similar, if not identical, to the presumption given in domicile cases. See *infra* notes 198-205 and accompanying text.

89. *Id.*

90. See MISS. CODE ANN. § 27-33-19 (2001).

91. See FLA. STAT. ch. 732.4015(2) (a) (2001).

92. See IDAHO CODE § 55-1001 (Michie 2001).

93. *Id.*

94. See *supra* notes 67, 91 and accompanying text.

III. LITIGATING THE ISSUE OF WHAT CONSTITUTES THE HOMESTEAD

A. *Generally*

As discussed in the hypotheticals in the introduction of this article, several litigation scenarios can arise with respect to the homestead descent statute.⁹⁵ This section will address three potentially litigious areas involving the homestead.⁹⁶ The first area of potential litigation involves the case where the spouses are living separately at the time of death of one of them and whether an argument may be raised that the surviving spouse should not be entitled to the dwelling in which the deceased spouse occupied at the time of his or her death. The second area of potential litigation involves the revocable trust hypothetical and whether a dwelling transferred into a revocable trust prior to marriage is nevertheless owned by the decedent for purposes of claiming right of descent to the homestead. This area will be examined by looking at the evolution of the law of trusts as applied to spousal rights as reflected in various uniform statements of the law. The third area of potential litigation involves aspects of the trust and remodeling hypotheticals and arguments involving the failure to occupy the dwelling at the time of death.

B. *To Whose Homestead Does the Statute Refer: Spouses Living Separately*

When spouses reside separately at the time of death of one, there is a natural temptation on the part of many personal representatives of the deceased spouse, and their attorney for that matter, to argue that the surviving spouse should not receive fee title, or if there are children, a life estate, in the deceased spouse's homestead. This is particularly true if the reason for living apart involves a breakdown of the marital relationship that has yet to culminate in a divorce decree. Litigation may result based upon an argument that the surviving spouse has his or her own homestead and would therefore be inequitably benefited by receiving a

95. *See supra* Part I.

96. These three areas are not necessarily inclusive of all potential litigation involving the descent of homestead statute. The author has selected these three areas because of their similarity to actual cases he has litigated. The facts of the hypotheticals have been changed to protect client confidentiality.

homestead that he or she does not need. Further, the legislative purpose of protecting the spouse from losing the roof over his or her head does not apply to a surviving spouse who owns his or her separate homestead. Although the lack of the surviving spouse's need of the decedent's homestead as compared to the purpose of the descent statute would seem to favor not granting homestead rights, the clear implication under Minnesota law is that the surviving spouse would nonetheless receive the decedent's homestead.⁹⁷

In a 1923 decision by the Minnesota Supreme Court, the homestead of a decedent who was not living with his spouse but who was living with another woman who he unlawfully attempted to marry, descended to his lawful wife for life and the remainder to their children.⁹⁸ The court was not swayed by the fact that the decedent and his unlawful wife lived together in the homestead for twenty-four years.⁹⁹ In an earlier case, the same result was reached when the court held that a life estate to decedent's homestead descended to his lawful wife with whom he was not living, with the remainder to her children, despite the fact that the decedent lived with another woman who was not his wife, but with whom he had six children.¹⁰⁰ The appellate courts of this state have not recently ruled on a case with similar facts as *St. Denis* and *Rux*. One can only speculate as to whether the courts would be constrained by the language of the descent of homestead statute to rule in favor of the lawful surviving spouse, or whether the courts would carve an exception based upon a definition of the term homestead for purposes of rectifying a potentially inequitable result.

Further support for the argument that a spouse living separately still has an interest in the homestead may be found in the residential property tax statutes. A residential homestead for property tax purposes is defined as residential real estate that is occupied and used for the purposes of a homestead by its owner.¹⁰¹ This property tax statute provides some persuasive support to the theory that a dwelling does not lose its homestead quality merely because the husband and wife are not living together.¹⁰²

97. See *supra* notes 95-96, *infra* notes 98-106 and accompanying text.

98. See *St. Denis v. Mullen*, 157 Minn. 266, 268, 196 N.W. 258, 259 (1923).

99. *Id.* at 269, 196 N.W. at 259.

100. See *Rux v. Adam*, 143 Minn. 35, 38, 172 N.W. 912, 913-914 (1919).

101. See MINN. STAT. § 273.124, subd. 1(a) (Supp. 2002).

102. *Id.* at subd. 1(e).

Specifically, when a parcel of property is owned by a person who is married, "the assessor must not deny homestead treatment in whole or in part if only one of the spouses occupies the property and the other spouse is absent due to: (1) marriage dissolution proceedings, (2) legal separation, . . . or (4) other personal circumstances causing the spouses to live separately. . . ." ¹⁰³

While there may be room in the future for an equitable argument for a change in the law with respect to whether a surviving spouse who lives separately from the deceased spouse should receive the deceased's homestead, the issue of financial need has been more recently addressed by the Minnesota Court of Appeals. In a 1990 decision, the court held that the guardian of an incapacitated surviving spouse, who had sufficient assets to support her round-the-clock nursing care needs for the remainder of her life expectancy, could nevertheless exercise the surviving spouse's right to the homestead. ¹⁰⁴ The court's decision was not impacted by the fact that by the time the matter reached the appellate court the surviving spouse has died. ¹⁰⁵ Clearly, financial need of a surviving spouse is not a consideration in determining whether he or she takes an interest in the homestead, ¹⁰⁶ and it appears that if a dwelling is determined to be the decedent's homestead, a surviving spouse's right to take an interest in it under the descent statute is absolute. ¹⁰⁷

C. *The Meaning of "Ownership"*

In the hypothetical described in the introduction to this article an issue is raised as to whether title to a dwelling that is transferred inter-vivos into a revocable trust before marriage is considered owned by the grantor of the trust for purposes of the surviving spouse's claim to a homestead interest in the property. ¹⁰⁸ Since there is no Minnesota case law on this issue, the question is best examined by a discussion of how various *Restatements of the Law* and

103. *Id.*

104. *See In re Estate of Wentworth*, 452 N.W.2d 714, 716-18 (Minn. Ct. App. 1990).

105. *Id.* at 719.

106. *Id.*

107. *Id.*

108. *See supra* Part I. Note that the transfer would have to be made before the marriage since the homestead conveyance statute would nullify any transfer of the homestead into the trust during the marriage if the surviving spouse did not consent to the transfer in writing. *See supra* note 23 and accompanying text.

the *Uniform Trust Code* resolve this issue. As the following discussion will indicate, there has been a fundamental shift with respect to whether transfers by one spouse into a revocable trust defeat the spousal rights of the other spouse. Examination will also be made into arguments that the failure to occupy the dwelling at the time of death may result in litigation under the homestead descent statute as well.

1. *Revocable Inter Vivos Trusts*

The increased frequency of use of revocable inter vivos trusts as an estate planning tool is obvious to all practitioners and generally to the public as a whole. Property transferred into a revocable trust is, of course, no longer titled or retained in the name of the individual grantor of the trust, but rather is titled in the name of the trustee of the revocable trust.¹⁰⁹ Further, title to property held by a trustee vests with a successor trustee upon qualification of the successor, if the trust so provides, or upon the appointment of a successor trustee by the district court.¹¹⁰ A grantor will commonly transfer title to his or her residence to the trustees of the revocable trust at the time the trust is created and funded and during the lifetime of the grantor. This transfer of title from the grantor to the trustee of a trust, and potentially to any number of successor trustees, raises an argument that the decedent, at his or her death, did not own the real estate in which a surviving spouse claims a homestead interest because that real estate was not titled in the decedent's name. In other words, the personal representative of a decedent's estate may argue that the decedent did not own the real estate held by the trustee of the revocable trust, and consequently there is no homestead for the surviving spouse to receive.¹¹¹ Various uniform codes, restatements, and statutes from other states have changed positions over time as to whether a surviving spouse's rights to a portion of a deceased spouse's estate can be defeated by the transfer of property into an inter vivos revocable trust.¹¹² Although a spouse's right to an elective share or other statutory allowance is typically the subject of

109. See generally Minnesota Trustees' Powers Act, MINN. STAT. § 501B.81 (detailing the enumerated powers of a trustee).

110. See MINN. STAT. § 501B.08 (2000).

111. This issue of ownership with respect to the descent of a homestead has not been the subject of any appellate court decisions in the State of Minnesota.

112. See discussion *infra* Parts III.C-III.D.

litigation involving the inter vivos transfer of assets into a revocable trust, the analysis can be applied equally to the surviving spouse's rights to a homestead under Minnesota Statutes section 524.2-402.¹¹³

a. The Restatement of Trusts Approach

The law of trusts has undergone substantial development and change since the use of revocable inter vivos trusts have become commonplace in estate planning and, in fact, routinely serve as will substitutes. Legal developments with respect to revocable trusts, and the use of trust assets to satisfy statutory allowances, are highlighted by the change of position between the Restatement (Second) of Trusts and the tentative draft to Restatement (Third) of Trusts.¹¹⁴ Specifically, the tentative draft to Restatement (Third) of Trusts provides that "a revocable inter-vivos trust is ordinarily subject to substantive restrictions on testation and to rules of construction and other rules applicable to testamentary dispositions, and in other respects the property of such a trust is ordinarily treated as if it owned by the settlor."¹¹⁵ The Reporter's Notes to this provision state that:

The position stated in these Comments and in Subsection (2) differ fundamentally from the positions taken in prior Restatements of Trusts.

Thus, Restatement, Second, Trusts § 57, Comment *d* stated: "The rule stated in this section [that revocable trusts are nontestamentary and valid] is applicable although the trust is one which could not be created by will [¶] Thus, if it is provided by statute that the wife of a testator shall be entitled to a certain portion of his

113. The issue of ownership of revocable trust assets for purposes of defeating a surviving spouse's elective share rights does not arise in Minnesota given the adoption of the concept of an augmented estate against which a surviving spouse may make an election. See MINN. STAT. §§ 524.2-201 to -203. See also UNIF. PROBATE CODE §§ 2-201 to -203. (11th ed. 1993). Specifically, transfers made by the decedent to a revocable trust during the decedent's lifetime would be included in the augmented estate as a nonprobate transfer to others. See MINN. STAT. § 524.2-205. As the descent of the homestead is separately addressed by Minnesota Statutes section 524.2-402, it is excluded from computation of the value of the augmented estate. See MINN. STAT. §§ 524.2-204 to -207.

114. See RESTATEMENT (SECOND) OF TRUSTS § 57 (1959) and RESTATEMENT (THIRD) OF TRUSTS § 25 (Tentative Draft No. 1, 1996).

115. RESTATEMENT (THIRD) OF TRUSTS: VALIDITY AND EFFECT OF REVOCABLE INTER VIVOS TRUST § 25 (2) (Tentative Draft No. 1, 1996).

estate of which she cannot be deprived by his will, a married man can nevertheless transfer his property inter vivos in trust and his widow will not be entitled on his death to a share of the property so transferred, even though he reserves a life estate and power to revoke or modify the trust.”¹¹⁶

The preceding quotation illustrates the position taken by the Restatement (Second) of Trusts that a deceased spouse could deprive his surviving spouse of her statutory rights by transferring his property into a revocable inter vivos trust.¹¹⁷ However, comments d and e of the Restatement (Third) of Trusts further provide that “since the prior restatement [Restatement (Second) of Trusts] there has been significant change in case law and especially in legislative policy with respect to . . . matters of spousal protection and the rights of creditors.”¹¹⁸

Accordingly, the Restatement (Third) of Trusts has reversed its position on the ability of a surviving spouse to satisfy her statutory allowances with revocable trust assets by stating:

[I]ncreasingly, statutes and case law in the various states are coming to recognize, as this Restatement provides, that the rights of the spouses and creditors of testators and settlors of revocable trusts are fundamentally alike, because both the testator and the settlor have retained their complete control over the property that is subject to the will or trust instrument. Similarly, whatever the technicalities of concept and terminology, the interests the revocable trust beneficiaries will receive on the death of the settlor should receive the same treatment and, generally at least, should be subject to the same rules of construction as the “expectancies” of devisees and legatees.

Thus, this Restatement recognizes and gives effect to a property owner’s right to chose among different forms and procedures for disposition of property. Yet it seeks to treat functional equivalents similarly, and not to allow choice of a form either to provide an escape from serious, substantive policies or to cause the loss of properly relevant aids in essentially constructional matters. Such a

116. *Id.* at Reporter’s Notes d and e (brackets and symbols in original). Note that Comment d referred to in this quotation, should in fact refer to Comment c. *See* RESTATEMENT (SECOND) OF TRUSTS, § 57 n. 112 at cmt. c (1959).

117. *Id.*

118. *Id.*

policy of treating testamentary trusts and their settlors and beneficiaries in like manner to the treatment accorded testators and will beneficiaries, both during life and after death of the settlor or testator, has long been explicit in the federal income and transfer tax systems. Early, traditional, and still developing doctrine in trust and probate law has been neither so clear nor so consistent.

In brief, the fundamental and pervasive policy underlying this section and related to the rules of this Restatement is that diverse forms of revocable trusts (i) are valid without compliance with Wills Act formalities but (ii) absent persuasive reason for departure, are subject to the same restrictions (such as spousal rights) and other rules and constructional aids that are applicable to wills.¹¹⁹

Although the change of position represents a fundamental shift from the common law and second Restatement, these comments to Restatement (Third) of Trusts, section 25, reveal that this change is simply an acknowledgment that the very nature and use of revocable trusts have changed, and therefore, common sense dictates that the law with respect to claims against trust assets must also change.¹²⁰ In fact, the comments point out that other areas of law recognized the development of the inter vivos revocable trust as a common estate planning tool and allow creditors to attach trust assets to enforce debts of the individual, and permit the IRS to enforce tax obligations owed by an individual on that person's revocable trust assets.¹²¹ The reasoning behind the rule allowing a surviving spouse to attach assets of a decedent's revocable trust is really one of basic common sense and is best described by the above-quoted phrase, "treat functional equivalents similarly."¹²²

b. The Restatement of Property (Donative Transfers) Approach

Further support for this shift is found in the Restatement

119. See RESTATEMENT (THIRD) OF TRUSTS, § 25, cmt. a (Tentative Draft No. 1, 1996) (citing I.R.C. §§ 671-677 (income tax), §§ 2036 and 3038 (estate tax), § 2511 with Treasury Regulation, § 25.2511-2(c) (gift tax) (internal citation omitted), and § 2652(a) (generation-skipping transfer tax) (parenthetical information in original)).

120. *Id.*

121. *Id.*

122. *Id.*

(Second) of Property: Donative Transfers.¹²³ The Restatement provides that:

An inter vivos donative transfer to others than the donor's spouse that is a substitute for a will, or that is revocable by the donor at the time of the donor's death, is subject to spousal rights of the donor's spouse in the transferred property that would accrue to the donor's spouse on the donor's death if the transfer had been made by the donor's will.¹²⁴

Therefore, this Restatement also recognizes that a revocable trust should not deprive a surviving spouse of her statutory spousal rights.¹²⁵ Although this Restatement is primarily concerned with a surviving spouse's right to elective share, reference is also made in the Comments to a statutory right to the homestead.¹²⁶ This section of the Restatement on the law of donative transfers is also referenced in the tentative draft to the Restatement (Third) of Trusts.¹²⁷

c. The Uniform Trust Code Approach

Although the fundamental shift in position of the Restatement on the law of trusts is in a tentative draft format, further and compelling evidence that the law of trusts has developed to subject assets of a decedent's revocable trust to statutory allowances is provided in the recently approved Uniform Trust Code (drafted by the National Conference of Commissioners on Uniform State Laws).¹²⁸ Specifically, the Uniform Trust Code provides that:

After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that was revocable at the settlor's death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and [statutory allowances] to a surviving spouse and children

123. See RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS, § 34.1(3) (1992).

124. *Id.*

125. *Id.*

126. *Id.* at cmt. (k) on § 3.

127. RESTATEMENT (THIRD) OF TRUSTS: VALIDITY AND EFFECT OF REVOCABLE INTER VIVOS TRUST § 25(2) at Reporter's Notes d and e (Tentative Draft No. 1, 1996) (approved and recommended for enactment in all states).

128. UNIF. TRUST CODE: CREDITOR'S CLAIMS AGAINST SETTLOR, § 505 (2000).

to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and [allowances].¹²⁹

The comments to the final draft of Section 505 discuss the rationale behind the provision subjecting trust assets to claims for statutory allowances by a surviving spouse:

Subsection (a) (3) recognizes that a revocable trust is usually employed as a will substitute. As such, the trust assets, following the death of the settlor, should be subject to the settlor's debts and other charges. However, in accordance with traditional doctrine, the assets of the settlor's probate estate must normally be first exhausted before the assets of the revocable trust can be reached. This section does not attempt to address the procedural issues raised by the need to first exhaust the decedent's probate estate to reach the assets of the revocable trust. Nor does this section address the priority of the creditor claims or the possible liability of the decedent's other nonprobate assets for the decedent's debts and other charges . . . as long as the rights of the creditor or family member claiming a statutory allowance are not impaired, the settlor is free to shift liability from the probate estate to the revocable trust.¹³⁰

The Uniform Trust Code, including section 505 with the statutory allowance language, was introduced in both the Minnesota Senate and Minnesota House of Representatives during the 2001-2002 legislative session.¹³¹ As of the date of publication of this article, the Senate bill has been referred to the Senate Judiciary Committee and the House bill has been referred to the House Civil Law Committee.¹³²

D. The Meaning of "Occupied"

As noted in the introductory hypotheticals, disputes may also arise as to whether a deceased spouse occupied a dwelling at the time of his or her death sufficient to make that dwelling a

129. *Id.* at § 505(3) (brackets in original).

130. UNIF. TRUST CODE: CREDITOR'S CLAIMS AGAINST SETTLOR, Comment to § 505 (2000).

131. See S.F. 2384, 82nd Leg. Sess. (Minn. 2001-2002); H.F. 2540, 82nd Leg. Sess. (Minn. 2001-2002).

132. S. Journal, 55th Day, 82nd Leg. Sess. 3642 (Minn. 2001-2002); and H. Journal, 56th Day, 82nd Leg. Sess. 5033 (Minn. 2001-2002).

homestead.¹³³ These issues, as well as potential arguments for expanding the concept of occupancy for purposes of the homestead descent statute, are more fully addressed in other sections of this article.¹³⁴ The cases that have addressed the occupancy requirement of homestead reveal that physical presence at the dwelling is a necessity, but that a temporary absence, if coupled with an intent to return, will not defeat occupancy.¹³⁵ Litigation arises when there is an absence from the dwelling and a dispute exists as to whether the absence is temporary or permanent and whether the absent spouse intends to return to the dwelling.

In the hypothetical where the deceased spouse is absent from the homestead due to remodeling of the home, it may be argued that the absence is temporary and for a definitive period of time. That is, the spouse is only absent from the homestead for the specific period of time that the work on the home is being completed and, arguably, the intent to return when the work is complete seems fairly clear. However, questions may arise whether an elderly spouse who has been a resident of a nursing home for the past year is only temporarily absent from the homestead. Is a spouse with advancing Alzheimer's ever going to return from the nursing home to her homestead? If the spouse in the nursing home was asked where her home was, would she identify her homestead, and is this relevant to showing intent to return? How should the court approach the issue of a terminally ill spouse who is admitted to a hospital or hospice facility with no hope or expectation of ever returning to the homestead? Certainly the law does not require a person to die in their home to retain a homestead classification, but the question of to what extent the circumstances of a person's life, and often death, may impact a determination of their homestead may be difficult to answer. These are some of the myriad of issues that may give rise to litigation under the homestead descent statute, and unless the understanding of occupancy is expanded or the presumption that homestead status continues once established is adopted, these issues will continue to arise and outcomes will vary according to the specific facts of each case.¹³⁶

133. *See supra* Part I.

134. *See infra* notes 198-205 and accompanying text.

135. *Id.* *See also infra* notes 36-42 and accompanying text.

136. *See infra* notes 198-205 and accompanying text.

IV. AVOIDING LITIGATION OVER THE HOMESTEAD

There are three statutory mechanisms a practitioner can utilize to assist a client in preventing litigation over the homestead when the client does not want the homestead to descend to the client's surviving spouse or surviving children.

A. *Antenuptial and Postnuptial Contracts: Minn. Stat. § 519.11*

Prior to the solemnization of a marriage, a couple may enter into an antenuptial contract that determines what rights each party has in nonmarital property upon dissolution, legal separation, or the termination of the contract upon the death of one spouse.¹³⁷ Further, the antenuptial contract may bar the surviving spouse from claiming rights that he or she would otherwise have against the decedent's estate, even though the estate is not a party to the agreement.¹³⁸ Prior to entering an antenuptial contract, certain requirements must be met.¹³⁹ First, there must be a full and fair disclosure of the earnings and property of each party.¹⁴⁰ Second, both parties must have had an opportunity to consult with legal counsel of their choosing.¹⁴¹ There are also requirements to ensure the proper execution of an antenuptial contract.¹⁴² The agreement must be in writing, executed in the presence of two witnesses, acknowledged by the parties, executed before a notary public, and signed before the day of the wedding.¹⁴³ A power of attorney may not be used to execute an antenuptial agreement.¹⁴⁴ An amendment to an antenuptial agreement may only be made through a validly executed postnuptial agreement.¹⁴⁵

The requirements for a valid postnuptial agreement were

137. See MINN. STAT. § 519.11, subd. 1 (2000).

138. *Id.*

139. *Id.*

140. *Id.* See also *infra* notes 166-86 and accompanying text for an examination of what constitutes full and fair disclosure.

141. *Id.* As a practical note, if one spouse refuses to retain counsel, the attorney for the other should amply document their file with correspondence to the unrepresented spouse of his or her right to counsel and a notification that the attorney is not providing legal advice to the unrepresented spouse. Further, the agreement should acknowledge that the unrepresented spouse is waiving his or her right to counsel.

142. See MINN. STAT. § 519.11, subd. 2 (2000).

143. *Id.*

144. *Id.*

145. See MINN. STAT. § 519.11, subd. 2a.

recently amended during the 2001-2002 Minnesota legislative session.¹⁴⁶ Several requirements for postnuptial contracts were unchanged by the recent amendments. For example, a postnuptial contract must comply with all of the requirements for a valid antenuptial contract, must be procedurally and substantively fair and equitable at the time of execution and enforcement, must be executed in the same manner as antenuptial contracts, and must not determine child support or child custody.¹⁴⁷ Further, both spouses must be represented by separate legal counsel, as opposed to the antenuptial requirement that both parties must merely be allowed the opportunity to consult with counsel of their choosing.¹⁴⁸ The recent amendment to the postnuptial contract statute is nevertheless a significant change that may make its use more widespread. Prior to the amendment, in order for a postnuptial contract to be valid, each of the spouses had to have marital property, nonmarital property, or a combination of both with a net value exceeding \$1,200,000.¹⁴⁹ Obviously, this lessened the usefulness and frequency of use of the postnuptial statute. Also, the previous statute provided that if either party commences an action for dissolution or legal separation within two years of the date of execution of the postnuptial contract the agreement is not valid or enforceable.¹⁵⁰ The recent amendment eliminated the monetary requirement.¹⁵¹ This change may have the effect of increasing the frequency of postnuptial contracts given that couples with fewer assets now have this option. The amendment also modified the provision that voided the agreement if either spouse commenced a dissolution or legal separation within two years.¹⁵² The statute now states that if either party commences a dissolution proceeding or proceeding for legal separation the agreement is presumed to be unenforceable.¹⁵³ This presumption is rebuttable, however, if the spouse seeking to enforce the postnuptial contract can establish that the contract is fair and

146. See 2002 Minn. Sess. Law Serv. ch. 338 (West); see also MINN. STAT. § 519.11, subd. 1a.

147. MINN. STAT. § 519.11, subd. 1a(2)(b).

148. *Id.* at subd. 1a(2)(c).

149. See *id.* at subd. 1a(2)(d).

150. *Id.* at subd. 1a(2)(e).

151. See 2002 Minn. Sess. Law Serv. ch. 338, sec. 1 (West).

152. *Id.*

153. *Id.*

equitable.¹⁵⁴ The availability of antenuptial and postnuptial agreements as a means of avoiding litigation after death may be extremely important for practitioners in advising their clients on wealth transfer and estate planning.

B. Waiver of Right to Elect and of Other Rights: Minn. Stat. § 524.2-213

Minnesota's probate code provides another mechanism by which a spouse can avoid litigation over the descent of the homestead by having his or her spouse execute a waiver of the right to election and of other rights.¹⁵⁵ Minnesota's waiver of spousal rights statute provides:

The right of election of a surviving spouse and the rights of the surviving spouse to the homestead, exempt property, and family allowance, or any of them, may be waived, wholly or partially, after marriage, by a written contract, agreement, or waiver signed by the party waiving after fair disclosure. Unless it provides to the contrary, a waiver of "all rights," or equivalent language, in the property or estate of a spouse is a waiver only of the right to the elective share. Any waiver prior to marriage must be made pursuant to § 519.11.¹⁵⁶

The significant issue for the practitioner with respect to the homestead is that if the homestead right is being waived, it must include specific language to that effect.¹⁵⁷ Also of note is the requirement that only the spouse waiving rights needs to execute the document.¹⁵⁸ Unlike antenuptial or postnuptial contracts, the waiver provision does not have witnessing or attestation requirements.¹⁵⁹ However, the practitioner should recommend that any waiver be witnessed and notarized to avoid any argument that the signature is not that of the waiving spouse and to assist in the defense of a lack of capacity or undue influence claim that may be made after the death of the waiving party. Finally, it should be noted that the waiver statute requires only "fair disclosure" of assets, whereas the antenuptial and postnuptial statute requires full

154. *Id.*

155. *See* MINN. STAT. § 524.2-213 (2000).

156. *Id.*

157. *Id.*

158. *Id.*

159. UNIF. TRUST CODE: CREDITOR'S CLAIMS AGAINST SETTLOR, § 505 (2000). *Cf.* MINN. STAT. § 519.11 (2000).

and fair disclosure.¹⁶⁰

While no appellate court in Minnesota has yet drawn a distinction between the differing terms used in these two statutes, an argument may be made that the waiver statute requires a disclosure that is less detailed than does the antenuptial statute.¹⁶¹ A justification for a lesser standard of disclosure may be that a spouse who executes a waiver of spousal rights is in a better position to have information as to what assets the non-waiving spouse owns. Whereas, in the antenuptial setting a prospective spouse may not have the type of access or information prior to the marriage as to the other prospective spouse's assets. Another justification for a lesser standard may be that the danger of coercion by one spouse against another, by for example threatening to call off the wedding, is diminished when the waiver is executed during the marriage. The waiver of spousal rights is a very effective way to minimize the chance of expensive and protracted litigation, and may be easier to procure if a spouse is reluctant to execute an antenuptial contract because he or she desires to protect their interests in the event of a divorce.

C. Miscellaneous Considerations for the Practitioner

1. Adequate Inquiry Into Your Client's Wishes

Invariably, if litigation erupts over the surviving spouse's rights upon the death of a client, to the homestead or otherwise, there will be no end to the individuals willing to testify as to what were the decedent's wishes. The surviving spouse will be prepared to testify that the decedent told her on one or more occasions that the house will be hers upon his death. Whereas, the personal representative or trustee, who also happens to be an heir, will be ready to testify that the decedent did not want his wife to have anything from his estate. It is therefore incumbent upon the practitioner to thoroughly ascertain the estate planning client's wishes, particularly with respect to the homestead, which in many cases may be the most significant asset in the estate. By understanding the client's wishes with respect to what the surviving spouse will claim upon the client's death, the practitioner is better

160. Compare MINN. STAT. § 524.2-213, and MINN. STAT. § 519.11. See also discussion *infra* at notes 166-86 and accompanying text.

161. See discussion *infra* notes 166-86 and accompanying text.

able to offer alternatives such as a waiver or postnuptial contract. Also, by confirming the client's wishes apart from a testamentary instrument, through correspondence or a videotaped meeting, the practitioner may also prevent a decedent's heirs from attempting to obstruct a surviving spouse's claims for spousal rights when the intent and expectation of the decedent was that his surviving spouse would receive the full benefit of her statutory entitlements.

2. *Filing Petition Asserting Homestead Rights*

Although Minnesota case law indicates that a surviving spouse's life estate or fee interest in the homestead, as the case may be, vests upon the decedent's death, the surviving spouse must still take an action to assert and preserve this right under the descent of homestead statute.¹⁶² The descent statute provides that a surviving spouse is deemed to consent to any testamentary or other disposition of the homestead to which the spouse has not previously consented to in writing unless a petition is filed asserting the homestead rights in the same manner as a petition for an elective share.¹⁶³ The time limit for filing a petition for elective share is nine months from the date of death, or six months after admission of the will to probate, whichever is later to occur.¹⁶⁴ An extension may be sought from the court to extend the time for making an election.¹⁶⁵

3. *Fair Disclosure in Executing a Waiver*

As previously discussed, the disclosure requirement of a waiver of spousal rights, including the right to the homestead, may be waived only "after fair disclosure," whereas the antenuptial and postnuptial contract statute requires full and fair disclosure.¹⁶⁶ Since there are no cases discussing what fair disclosure means under the waiver statute it is unclear whether the same standard for disclosure applies to waivers of spousal rights and antenuptial contracts. Arguments may be made that the waiver statute requires a lesser amount of disclosure than does an antenuptial or

162. See *supra* note 47 and accompanying text. See also MINN. STAT. § 524.2-402(d) (2000).

163. MINN. STAT. § 524.2-402(d).

164. See MINN. STAT. § 524.2-211.

165. *Id.*

166. See *supra* notes 140, 161 and accompanying text.

postnuptial contract.¹⁶⁷ However, for the practitioner intent on avoiding litigation for his or her client on the issue of whether a waiver is void for lack of fair disclosure, the best approach is to read the two statutes as requiring the same level of disclosure. Therefore, an examination as to what constitutes full and fair disclosure is warranted.

The Minnesota Supreme Court has said that the preferred method of fully and fairly disclosing earnings and property under the antenuptial statute is to attach complete and detailed financial statements.¹⁶⁸ However, the court did not make this a requirement.¹⁶⁹ The court in *McKee-Johnson* found that the antenuptial agreement met the requirements for procedural fairness in that the wife was advised of, and waived, her right to consult with independent counsel and that the agreement was signed upon full and fair disclosure.¹⁷⁰ With regard to full and fair disclosure, attached to the antenuptial agreement were detailed and complete financial statements in which both parties disclosed assets, liabilities, net worth, and earnings.¹⁷¹ The court said that they had previously suggested these types of statements and other jurisdictions also looked favorably on such statements as satisfying the full and fair disclosure requirement.¹⁷² The court held that “to so attach those statements, it appears to be an appropriate and practical way in which to comply with the disclosure requirement.”¹⁷³

There is case law in Minnesota that holds that full and fair disclosure under the antenuptial statute was made without the rendering of complete and detailed financial statements.¹⁷⁴ In one such case, the Minnesota Supreme Court found that since the plaintiff and defendant had been acquainted with each other for twenty years prior to their marriage, had visited one another’s homes, and Plaintiff had visited Defendant’s farms the court held that “Plaintiff was familiar with and had full knowledge of the extent and nature of Defendant’s property when the antenuptial

167. *Id.*

168. *See* *McKee-Johnson v. Johnson*, 444 N.W.2d 259, 266 (Minn. 1989).

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *See infra* notes 175-76 and accompanying text.

agreement was made.”¹⁷⁵ Further, in a 1984 Minnesota Court of Appeals case, the court found sufficient disclosure when the party requesting the antenuptial agreement stated to his future wife that he was worth approximately \$300,000 to \$400,000, when in fact he was worth \$750,000.¹⁷⁶ The court commented that “[t]his understatement gave the wife a grossly deflated view of her husband’s estate. However, the record as a whole does support that the trial court’s finding that the discrepancy was a good faith error resulting from explosive growth in the real estate market.”¹⁷⁷

In an early case, the court found that a confidential relationship voided the antenuptial contract because the defendant never allowed his future spouse to become acquainted with the full value of his property and that “[i]t was his duty to inform her, as well as to advise her of the nature and extent of the interest in his estate that she was giving up.”¹⁷⁸ This case involved the marriage of an older man of substantial means to a significantly younger fiancée who was pregnant with their child, and to whom he provided no information as to his assets, nor informed her regarding her entitlements under the law upon his death.¹⁷⁹ A similar result occurred in a case involving a sixty-six year old retired farmer who married a fifty-eight year old German immigrant with marginal skills in the English language.¹⁸⁰ The court found that because Plaintiff was without business experience and no match for her husband with regard to negotiating the terms of antenuptial agreements, and since there did not appear to be any particular disclosure made as to the husband’s property and assets, the antenuptial agreement was invalid and unenforceable.¹⁸¹

Another case illustrates how courts have treated situations where one future spouse springs an antenuptial agreement upon the other.¹⁸² In this case, the wife was told five days prior to the wedding that if she did not sign the antenuptial agreement there would be no marriage.¹⁸³ She therefore signed.¹⁸⁴ The court

175. See *Gertner v. Gertner*, 246 Minn. 319, 325, 74 N.W.2d 809, 814 (1956).

176. See *Hill v. Hill*, 356 N.W.2d 49, 53 (Minn. Ct. App. 1984).

177. *Id.*

178. See *Slingerland v. Slingerland*, 115 Minn. 270, 275, 132 N.W. 326, 328 (1911).

179. *Id.* at 272, 132 N.W. at 327.

180. See *Stanger v. Stanger*, 152 Minn. 489, 490-91, 189 N.W. 402, 403 (1922).

181. *Id.* at 491, 189 N.W. at 403.

182. See *Rudbeck v. Rudbeck*, 365 N.W.2d 330 (Minn. Ct. App. 1985).

183. *Id.* at 332.

184. *Id.*

invalidated the antenuptial agreement because the wife had no meaningful opportunity to consult with an attorney and because the husband failed to make full disclosure.¹⁸⁵ The husband's argument that he did make full disclosure is that his wife "had the opportunity to determine the extent of his assets because of all the 'stuff laying all over [his] desk.'"¹⁸⁶

4. *Discovery Practice in Homestead Litigation*

For the practitioners who do find themselves representing a client in homestead or other spousal rights litigation, the aggressive use of written and deposition discovery may be helpful in obtaining a speedy resolution to the case, either through summary judgment or settlement. Interrogatories requesting information about the nature, location, amount of the decedent's assets, dates of transfers made by the decedent, and information regarding the expected testimony of witnesses are just some of the areas where relevant information may arise.¹⁸⁷ Also, requests for production of documents seeking tax returns, property tax classifications, mortgage documents, deeds, lines of credit, or invoices for utility services or renovations may assist in establishing incidents of ownership in the event that ownership of the dwelling is challenged.¹⁸⁸ Finally, with respect to written discovery, detailed requests for admissions may assist in narrowing the issues for trial or for a summary judgment motion.¹⁸⁹ Selected depositions of the decedent's personal representatives, trustees, children, other estate beneficiaries, or even close friends early in the litigation may help facilitate resolution and will help to root out all of the statements allegedly made by the decedent to these individuals.¹⁹⁰

5. *Use of Summary Judgment Motions to Expedite Resolution*

Minnesota summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either

185. *Id.*

186. *Id.* at 333.

187. *See* MINN. R. CIV. P. 33.

188. *See* MINN. R. CIV. P. 34.

189. *See* MINN. R. CIV. P. 36.

190. *See* MINN. R. CIV. P. 30.

party is entitled to a judgment as a matter of law.”¹⁹¹ The summary judgment standard is a familiar one and is looked upon favorably as a means to dispose of litigation where it is clear that no material fact issues exist and a party is entitled to judgment as a matter of law.¹⁹² A material fact, for the purposes of summary judgment, is a fact which will affect the outcome of the case.¹⁹³

The United States Supreme Court has stated that the plain language of Rule 56 of the Federal Rules of Civil Procedure, which sets the same standard as Rule 56 of the Minnesota Rules of Civil Procedure, mandates the entry of summary judgment in the following instance:

[A]fter adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be “no genuine issue as to any material fact,” since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.¹⁹⁴

A motion for summary judgment may be appropriate in homestead litigation since, other than the case in which conflicting statements from the decedent are argued, the facts surrounding the issue of whether a dwelling was owned or occupied might not be in dispute. For example, in the two hypotheticals discussed in the introduction of this article there will likely be no dispute that the wife transferred her house into a revocable trust prior to the marriage or that she resided in a nursing home for the last year of her life.¹⁹⁵ Likewise, there will likely not be a dispute as to whether the husband who died in the car accident while his home was being remodeled intended to move into the home with his wife once the renovations were complete, or that he and his wife were living in her home at the time of his death.¹⁹⁶ Summary judgment motions in both of these hypotheticals may be an appropriate and

191. MINN. R. CIV. P. 56.03; *see also* MINN. GEN. R. PRAC. DIST. CT. 115 (describing the procedure for bringing a motion for summary judgment).

192. *See Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. Ct. App. 1989).

193. *Zappa v. Fahey*, 310 Minn. 555, 556, 245 N.W.2d 258, 259-60 (1976).

194. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

195. *See supra* Part I.

196. *Id.*

expedient way to resolve contested issues of what constitutes the decedent's homestead, or at a minimum move the case toward settlement.¹⁹⁷

V. A PROPOSAL FOR AN EXPANDED DEFINITION OF HOMESTEAD IN THE PROBATE CODE

A. *Generally*

Given the potential for litigation in determining what constitutes a decedent's homestead and whether it is owned and occupied by the decedent at the time of death, this author suggests that a homestead should be determined in much the same way that a person's domicile is determined. What follows is a discussion on how domicile is determined and how this analysis may be used to resolve the ambiguity that exists with respect to the descent of homestead statute.

B. *An Analogy to Domicile*

Domicile requires a person's physical presence at a location coupled with an intention to make that location one's home.¹⁹⁸ To acquire a new domicile there must be a union of residence with an intent to make the place one's home.¹⁹⁹ As the Minnesota Supreme Court has stated, "residence without intention, or intention without residence, is of no avail."²⁰⁰ Once domicile is established it is presumed to continue until the contrary is shown.²⁰¹ The court in *Smith* found that a change in domicile was justified because the decedent had taken the following actions: opened a bank account in a particular county; changed his address with the post office; told acquaintances of his intent to remain in the county; and identified himself in court documents as being a resident of that county.²⁰² Clearly a person's intention to make a particular location his or her

197. The author has noted that in these cases the basic facts are not generally disputed, but rather the application of these facts to the definition of homestead is what is in dispute, which can be resolved by summary judgment.

198. See *Manthey v. Comm'r of Revenue*, 468 N.W.2d 548, 549 (Minn. 1991). See *Smith v. Smith*, 242 Minn. 85, 89, 64 N.W.2d 129, 131 (1954).

199. *Manthey*, 468 N.W.2d at 549; *Smith*, 242 Minn. at 89, 64 N.W.2d at 131.

200. *Davidner v. Davidner*, 304 Minn. 491, 493, 232 N.W.2d 5, 7 (1975).

201. See *Manthey*, 468 N.W.2d at 550.

202. *Smith*, 242 Minn. at 89-90, 64 N.W.2d at 132.

domicile is of paramount importance.

In terms of an absence from a person's established domicile and the effect of an absence, Minnesota courts have held that a mere change of residence, although continued for a long time, does not change a person's domicile.²⁰³ The court in *Davidner v. Davidner* found that a physician with an established domicile in Minnesota did not change his domicile although he moved to Utah for a significant period of time to complete his medical residency.²⁰⁴ This holding comports with the general rule that while a person can have only one domicile, he or she may have more than one residence.²⁰⁵

Notions of domicile and homestead naturally have some commonalities, including a physical presence at a location and varying degrees of intent to make the location one's domicile or homestead. Further, temporary absence from the domicile or homestead for varying lengths of time does not defeat a claim of domicile or homestead. This article proposes that these common elements should be even more closely aligned with each other. That is, an intention of a decedent to make a dwelling his or her homestead should be given greater consideration and weight, as it is in determining domicile. Further, once a physical presence has been established at a dwelling, combined with an intent to make the dwelling one's homestead, a presumption should attach that this dwelling is the person's homestead until a contrary intention is shown. Finally, this author suggests that prolonged physical absences from a homestead should not give rise to arguments that the dwelling is no longer the person's homestead. To expand the concept of homestead and its definition of a dwelling owned and occupied for purposes of the descent statute to the same standards on which a person's domicile is determined will greatly clarify the ambiguity that exists and likely eliminate many of the litigious issues that arise. Further, this expanded concept of a homestead under the descent statute is appropriate given Minnesota's long-standing protection of the surviving spouse and children with respect to homestead rights.

203. See *Davidner*, 304 Minn. at 493-94, 232 N.W.2d at 7; *Berc v. Berc*, 407 N.W.2d 131, 135 (Minn. Ct. App. 1987).

204. *Davidner*, 304 Minn. at 493-494, 232 N.W.2d at 7.

205. *Mut. Serv. Cas. Ins. Co. v. Olson*, 402 N.W.2d 621, 624 (Minn. Ct. App. 1987).

VI. CONCLUSION

Minnesota has long provided a surviving spouse and children with life estate and fee rights in the decedent's homestead. With the increased frequency of second marriages or marriages occurring later in life the potential for litigation over what constitutes a decedent's homestead has also increased, often at the cost of significant estate assets in attorneys' fees and expenses. A greater awareness on the part of the estate planning practitioner of mechanisms, such as the waiver of homestead rights, will help to minimize the incidents of contested proceedings involving the homestead and ensure that a decedent's wishes are fulfilled. Expanded concepts of ownership, which would include homesteads held in revocable trusts, and occupancy, which should hinge on the decedent's intent to return to the homestead even during significant absences, will further clarify the issue and protect the rights of the surviving spouse and children in the homestead.