UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. MW 06-035

Bankruptcy Case No. 05-50837-HJB

EDWARD R. SZWYD
Debtor

JACK E. HOUGHTON, JR, Chapter 7 Trustee,
Appellant,

v.

EDWARD R. SZWYD
Appellee

APPELLEE'S BRIEF

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TABLE OF CONTENTS

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BRIEF FOR THE APPELLEE

APPELLATE JURISDICTION AND REVIEW

While the Appellee does not agree in whole with the Appellant's statement of basis for jurisdiction and his applicable standard for Appellate review, it is conceded that the Bankruptcy Appellate Panel does have jurisdiction, and that there was a "final judgement" by the Bankruptcy Court. Further, there are no facts in question as is stated by the Appellant and the only matters at issue are those of law, and as such are subject to De Novo review.

STATEMENT OF THE CASE:

The Appellee takes no issue with the Appellant's statement of the case save for an assertion

on page 6 that the debtor signed the recited mortgage as "Trustee of the Myszka Nominee Realty Trust", that matter is dealt with in the body of the argument and need not be taken up here.

ARGUMENT:

Synopsis:

Appellee Debtor has claimed by Declaration, properly recorded, an Estate of Homestead under *Massachusetts General Laws (MGL) Chapter 188 Section 1.* The portion of the Section creating the controversy is the first sentence that states "An estate of homestead to the extent of $500,000.00 in the land and buildings maybe acquired pursuant to this Chapter by an owner or owners of a home or one or all who rightfully possess the premises by lease or otherwise and who occupy or intend to occupy said home as a principal residence."

The questions which must be answered involve Massachusetts Law as it defines "owner"for purposes of including the effect of the doctrine of Stare Decisis and its effect on a federal court, and under the rules of construction how the phrase "one or all who rightfully possess the premises by lease or otherwise", is to be interpreted.

It is the Appellee's position that "owner" includes a trust beneficiary who is both the sole beneficiary and the sole trustee, and that the question as it involves a trust is moot because of merger of title and the subsequent nullification/dissolution of any purported trust. The Appellee further argues that the statute should be construed liberally in favor of the debtor, in such a manner that a holder of equitable title who is in possession, using the subject property as his or her residence is entitled an Estate of Homestead. Additionally, Appellee urges this Panel to adopt the view that such a trust beneficiary is "one who rightfully possess the premise by lease or otherwise"

STARE DECISIS - Whether the Federal Court is Bound by Past Massachusetts Case Law

The precise question raised by the Appellant is "Whether or not a Bankruptcy Court, ruling on an issue of state law, is compelled under the doctrine of Stare Decisis to rule in conformity with the existing state law of the Commonwealth of Massachusetts" (Appellant Brief page 3) This has application to Appellee's argument as stated above.

The Appellant has raised the issue and precept of Stare Decisis. Its simplest translated definition is "To abide by, or adhere to, decided cases" *Blacks Law Dictionary, Revised Fourth Edition, p 1577 (1964)* . *Blacks* goes on, in defining it as "Policy of Courts to stand by precedent and not disturb settled point" from *Neff v. George #364 ILL 306, 4NED 338,390,391,* to a "Doctrine that, when court has once laid down a principle of law as applicable to a certain set of facts, it will adhere to that principle and apply it to all future cases where facts are substantially" from *Moore v City of Albany, 98 N.Y. 396, 410,* to "... while it should ordinarily be strictly adhered to, there are occasions when departure is rendered necessary to vindicate plain, obvious principles of law and remedy continued injustice" from *McGregor V. Provident Trust Co. of Philadelphia, 119 Fla. 718, 162 So. 223.*

The short and simple answer to the Appellant's question, therefore, is yes. The better answer is extremely complex. The complexity however, arises not from the superficial question (Federal bound by State when interpreting State) but in how the state itself views the concept of Stare Decisis: What does Stare Decisis mean in the Commonwealth of Massachusetts, and specifically what meaning of the doctrine is applicable to the case at hand.

Starting with the case of *Marsh v. Putnam 3 Gray 551, 69 Mass. 551 (1855)*, the Supreme

Judicial Court ("SJC") in 1854 stated quoting *Ogden v. Saunders* "It is a general rule expressly recognized by the court in *Sturges v. Crowninshield* that the positive authority of decision is coextensive only with the facts on which it is made." *(From Chief Justice Marshall) at 12 Wheat. 333.* This was a Bankruptcy case involving states' rights, yet the Court was careful not to take precedent as immutable law and to limit the application to an identity of facts..

The Appellant argues that "In the instant case, the Massachusetts Court has addressed the issue of a Declaration of Homestead by a Trustee of a Nominee Trust", (Appellant Brief p 11). He would have us believe that Stare Decisis binds the Massachusetts Court and therefore the Federal Court to the decision in the case of *Asst Recorder of the North Registry District of Bristol County v. Spinelli, 38 Mass. App. Ct. 655 (1995)* which he states is"... instructive on the issue.". Appellee argues that it does not so bind. Reference is made to the *Marsh* decision (supra).

Moving forward, in the case *The George T. Kemp 2 Low. 477, 10F. Cas. 227, NO. 5341 (D. Ct .D. Mass. 1876*), a federal bankruptcy case from the District of Massachusetts, the Court stated "... and so an adherence to the mere result of those cases is not defensible on the ground of Stare Decisis, because it is standing by the letter at the expense of principle". The issue at hand was a specific point of a Stevedore's lien but the gauntlet is thrown: Principle over precedent.

The Supreme Judicial Court (SJC) in *Mabardy v McHugh 202 Mass. 148, 88N.E. 894 (1909)* states "While perhaps it is more important as to far reaching juridical principles that the court should be right... it is never the less vital that there be stability in the courts adhering to decisions deliberately made after ample consideration." The Court is struggling, appropriately, with the issue of overruling prior decisions. The result is to confine the doctrine to narrow limits. "The conclusion is that we do not overrule the decisions who soundness has been debated at the bar, although we do not extend their scope, but confine them strictly to their precise point...".

In a case involving deceit, and misrepresentation in a commercial "landlord v tenant" case, the SJC stated, "Stare Decisis is a salutary principle, because in most matters a settled rule on which reliance can be placed is of more importance then the precise form of the rule. But if Stare Decisis must always be paramount the law would be deprived of its capacity for growth and adaptation...". *Kabatchnick v. Hanover-Elm Bldg. Corp. 328 Mass. 341, 346-347,103 N.E.2d 692 (1952).*

In a case involving the interpretation of a will's provision for disposition of estate assets the SJC cautioned, "Obviously, in interpreting Booth's will, undue weight cannot be given to cases involving other wills different in content.". *Old Colony Trust Company v. Tufts 341 Mass. 280,168 N.E. 2d 86, 88, (1960).* This has specific significance to the case at bar, because of the important difference in the fact pattern between the Appellant's *Spinelli* case and the facts of this case.

The Massachusetts Courts have also been aware of interpretation of statutes which may be at odds with other states' interpretation of similar statutes. In the case at bar, in issues such as the ability to homestead possessory right, this is well established and have been used as authority in key decisions *(See e.g. Burrows v Burrows 886 P.2d 984 (1994).* In 1967, the SJC articulated this view in a case involving tort claim for an unborn fetus. Dealing with the then Massachusetts law the court stated "The decision, which presented the issue for the first time in this Country, was based principally on the lack of supporting precedent at the time. A similar result based on Stare Decisis was reached in *Bliss v. Passanesi 326 Mass. 461* ...". It expressed its moderation of that earlier opinion in the next paragraph stating, "We expressed the view that 'the law of this Commonwealth, should be in general in harmony with that of the large and growing proportion of other states (allowing a right of action)'". The analogy is to those other states' homestead laws and the foreign courts' interpretation of their state's statutes.

Turning to the very specific issue of the Appellant's argument that *Spinelli* should rule, the Appellee offers the following: "While the rule of Stare Decisis does not prevent the overruling of those cases they should not be disturbed unless they now appear to be so clearly wrong as to have no sound support", quoting *Marbardy v. McHugh,*. It must appear that the law was 'misunderstood or misapplied' 1 Kent's Com. 475" The key is that in *Spinelli* the Court relied on *Thurston v Maddocks 6 Allen 427, 88 Mass. 427 (1863)*, and incorrectly, it is argued, assumed Thurston interpreted the referred to "rightful possess" clause of the then current statute correctly. While the *Thurston* decision was in 1863, the Court was applying an 1857 version of the statute, which differed significantly from the 1860 version. Therefore, *Spinelli's* basic application of the law was flawed and *Thurston* was "misunderstood or misapplied". Consequently, Stare Decisis is not to govern.

The Appellant is relying on a tax case. Stare Decisis is of significantly greater importance in tax cases as the Massachusetts cases state. Tax statutes and especially exemptions must be construed strictly as they affect the public good. In *Welch v. City of Boston* the Court said "...stability of interpretation is signally [sic] desirable in matters relating to taxation. A shifting policy in this regard would be fraught with unusual misfortune, the reasons in favor of the doctrine of Stare Decisis are especially forceful in a case like this." *Welch v City of Boston 211 Mass 178, 97 N.E. 893 (1912).*

In 1915 however, in *Berkshire County v Cande 222 Mass. 87,109 N.E. 838, 839*, the Court stated " It is a rule that a statute which would be unconstitutional as applied to a certain class of cases and is constitutional as applied to another class, maybe held to have been intended to apply only to the latter class ....". It is but a short step to analogize this to the case at bar. Appellant argues *Spinelli*. Appellee argues *Dwyer v Cempellin, 424 Mass. 26(1996)*. Strict construction/interpretation

versus liberal construction/interpretation. Strict is appropriate for one class of cases, namely tax; liberal is applicable to a different class - homestead.

If we are to follow Stare Decisis as applied in the Commonwealth, *Erikson v Ames 264 Mass. 436, 163 N.E. 70*, is instructive. "Expressions in some of the earlier cases, which bear a contrary aspect, are to be taken as not essential to the point decided and hence not binding upon the court or falling within the protection of the Doctrine of Stare Decisis". The comment in *Spinelli* regarding *Thurston* was in many ways of a contrary aspect; it dealt with a side issue in the case after the Appellate Court had already ruled that the beneficiary could not utilize the tax exemption on the house owned by two (2) trusts and a beneficiary. Additionally, the Court referenced the case apparently without reading it carefully and checking the statute upon which the *Thurston* decision was based.

Turning back to tax cases, in 1998 the SJC decided that "Construing the definition of a tax-payer narrowly in a context of a tax exemption is consistent with legal precedent and sound public policy ...", interestingly quoting *Dwyer v Cempellin* (supra). In 2002 the SJC interpreted a tax statute so as not to be able to tax "We adhere to the familiar principle that tax statutes are to be strictly construed; we will not read into a statute an authority to tax that it does not plainly confer", again a strict construction interpretation. *Commissioner of Revenue v. Oliver 436, Mass. 467, 765 N.E. 2d 742, 746 (2002).*

In what might at first blush seem like a support of "the Appellant's position", the Appellee cites *Nichols v Bacon v Same 217 Mass. 548, 105 N.E. 376 (1914)*, which states that when statutes are construed by courts and re-enacted by a legislature without change it is presumed to have adopted the judicial construction. The Appellant would lead us back to *Spinelli* and then *Thurston* and argue

that Stare Decisis, with legislative approval, rules. That result is in opposite to reality. The statute that was first construed was the 1857 version. In 1995, *Spinelli* did not construe the statute correctly based on the *Thurston* decision as, apparently, it did not comprehend the basis for that decision. The legislature did make a significant change in 1860, as stated earlier. *Spinelli* argues that a nominee trust beneficiary is not an owner. That equitable and legal title cannot be separated for tax exemption purposes. Appellee argues only that the result should be different for homestead exemption statutes.

As has been shown by the cases cited, Stare Decisis is conclusive, only, when it does not take form over substance, when the Court is construing a statute for the same purpose (here tax exemption and homestead exemption), and that there has been no gross "misunderstood or misapplied". *Mabardy v McHugh, (supra).*

Stare Decisis in the Commonwealth does not require rigid adherence to a decision from a lower court that deals with a very narrow band of cases, that flies against national trends; and that can be seen to have "misunderstood or misapplied".

THE HOMESTEAD STATUTE'S EVOLUTION - Has a Direct Effect on this Case

The Homestead statute was adopted originally in 1851, "Estate of homestead is a creation of the law and is not a carry over from English Cannon Law", *Kerley v. Kerley, 13 Allen 286, 95 Mass. 286 (1866).*

As the concept has no pedigree we are forced to rely on the language of the statute itself throughout its evolution. The statute has been amended twenty two (22) times, but only less than one-half of those amendments dealing with the first paragraph.

There are significant changes in the Statutes of 1860, 1882, 1939, 1977, 1983, and 1989. The most important change as it affects the case at bar was in 1860. The pertinent part of the statute

as it read in 1851, 1855 and 1857 stated "... there shall be exempted the lot and buildings thereon, occupied as a residence and owned by the Debtor, or any such buildings owned by the Debtor on land not his own, but of which he shall be in rightful possession, by lease or otherwise, he being a householder ...". St. 1851 Chap. 340, St. 1855 Chap. 238, and St. 1857 Chap. 298. In 1860 the language at issue in this case was changed to "Every householder having a family shall be entitled to an Estate of Homestead, ... in the farm or lot of land and buildings thereon owned, or rightfully possessed by lease or otherwise, and occupied by him as a residence..." St. 1860 Chap. 104

The rules of statutory construction state, "When a new provision conflicts with a prior statute, the new provision, as the last expression of the legislature, controls." *Doe v. Attorney Gen, 680 N. E. 2d, 92.* "..... the statutory language must be given its plain and ordinary meaning", *15-17 University, LLC v. Lucas, 2006 Mass App. Div 50.* "Legislative language will be interpreted on the assumption that the legislature was aware of existing statutes" *(Sutherland Statutory Construction citing Johnson's Case 318 Mass. 741, Condon v Haitsma 325 Mass. 371)*, and further that "if a change occurs in legislative language a change was intended in legislative result".

Clearly there was a significant change. The legislature intentionally moved away from the language in the St. 1857. The rules of construction require that we give meaning to the change.

"Reason and common sense are not to be abandoned by the court in interpreting a statute, since it is to be supposed that the legislature intended to act in accordance with them". *Van Dresser v Firlings 24 N.E. 2d 969 (1940).* Stressing this point "When a new provision conflicts with a prior statute, the new provision, as the last expression of the legislature, controls." *Doe v. Attorney Gen. (supra).*

A straight reading of the statute of 1860, without any emphasis, except as punctuated by the

legislature, reads: Every householder ... with a family, is entitled to an Estate of Homestead (1) in the farm or lot of land and buildings thereon owned, or rightly possessed by lease or otherwise. There is no longer any mention of "... buildings owned by the debtor, and so occupied, on land not his own, but of which he shall be in rightful possession by lease or otherwise, ..." St. 1857 (supra).

Statutory construction requires that we give a plain reading to the new language with the belief that the legislature intended a change. The change permitted life tenants, tenants by curtesy, tenants for a term of years, and others in rightful possession, to protect their interests in the family home.

The Court in the case of *Thurston v Maddocks*, is misunderstood also in a fundamental sense: A new estate in land was created changing the homestead from an exemption to "Estate of Homestead". This major change will be addressed in detail later.

In *Thurston v Maddocks* (supra), the purchasers, one of which was Maddocks, obtained a bond to purchase certain property. Maddocks argued that the property was exempt from levy under the provisions of Homestead. The Court stated, "It is said that the language of the statute, giving the homestead right to householders in property 'owned or rightly possessed by lease or otherwise, is broad enough to include such equitable title ... The object of this clause in St. 1855 Chap. 238, ***obviously*** (emphasis added) is to create a Homestead right in a house owed by the occupant but standing on leased land". The Court goes on to refer to the St. 1857 giving no regard to the St. 1860, as it was enacted after the subject transaction took place.

The Court in *Thurston* may have properly assessed the law as it pertained to Maddocks' claim citing St. 1855 or even St. 1857. Although the decision was rendered in 1863, the application of the earlier law was appropriate due to the date of the argued acquisition of equitable title. The

then language of homestead, defined the phrase at issue, arguably to preclude a general use of the terms to permit a non-owner of the land, or of the buildings to acquire a right to homestead. *Spinelli's* use of the case misses the point. Although *Thurston* was decided in 1863, it did not involve the St. 1860 wherein the language changed.

The revised statutory language eliminated the limitation to "...one whose buildings are on the land of another and who has rightful possession by lease or otherwise..." and substituted for it "... in the farm or lot of land and buildings thereon owned, or rightfully possessed by lease or otherwise, ...". Grammatically, the change in language and the change in punctuation set up two (2) classes who could obtain homestead protection: 1) Those who owned "the farm or lot of land and buildings thereon", and 2) those who "rightfully possessed by lease or otherwise".

Most importantly, by the time the Spinelli case was decided, the legislature amended the statute nineteen (19) times, and removed all punctuation in the clause in question. Again, relying on normal rules of grammar, without punctuation, each phrase is to be given equal weight. Therefore, where the statute as stated on Page 2 above has no punctuation in the first sentence, we have the estate being available 1) owners of a home; and 2) one or all who rightfully possess the premise by lease of otherwise. A look to 1983 gives us this same construction, and 1977 the same punctuation and words as used in 1860.

In conclusion on this point, the *Spinelli* court cited the *Thurston* case in passing, and in error, as it did not stand for the assertion that the law did not permit a rightful possessor to claim an Estate of Homestead.

In fact, with the statute permitting an Estate of Homestead to be declared/claimed by "one who rightfully possesses by lease or otherwise" the sole beneficiary of a nominee trust (if there is, in law, a valid trust) which has as its sole asset the residence of the beneficiary, the conclusion must

be that said sole beneficiary is in rightful possession (Myszka Nominee Trust R86/Declaration of Homestead and Statement of Beneficial Interest R94), and therefore entitled to the Estate of Homestead and its protection.

STATUTORY CONSTRUCTION of M.G.L 188 Section 1

Appellant correctly recites the flavor of the Bankruptcy Court's obligations regarding matters of state law. In the case of *In re Miller 113 B.R. 98 (Bankr D. Mass 1990)* the Court stated "Like a federal court sitting in diversity, a bankruptcy court ruling on an issue of state law must rule as it believes the highest court of this state. When the highest court has not addressed the issue, the bankruptcy court should not regard the lower court rulings on the issue as dispositive. Rather, it should attempt to predict what the highest court would do and to that end should accord proper regard to decisions of other courts of the state". The Appellant was incorrect in stating that the Bankruptcy Court should have looked to lower court rulings for direction on the matter. See also *In re Bellirano 233 B.R.11, 14 (Bankr D Mass 1999).*

Bellirano goes on, discussing that the SJC determined that the homestead statute should be construed liberally in favor of the debtors citing *Shamban v Masidlover 429 Mass. 50, 53, 705 N.E. 2d 1136, 1138 (1999).*

Revisiting the aspect of the Appellants brief as to *Spinelli* having a strict rather then liberal interpretation of the statute in favor of the Debtors, as the Dwyer case pointed out it should, Spinelli was a tax case and that the tax exemption statutes serve a different purpose as has been explained earlier in this brief.

Where the Appellant references *Shamban v Masidlover* (supra) he uses it for the proposition that the SJC "didn't buy" a liberal construction. To the contrary in *Shamban* there was, in the statute

an affirmative obligation to do a certain task in order to obtain an estate under MGL 188 sec 1A. Without that prerequisite being fulfilled, the Court, is obligated to read the words of the statute, had to deny the Debtors request. The Court did however, find, of its own accord that the Debtor was entitled under Section 1 of the statute.

In *Dwyer* there was no act of any kind which was left undone by the Debtors. There the Court interpreted the statute as it existed at the time of the Bankruptcy filing and found that its ambiguity had to be resolved favorably for the Debtors. *Shamban* had no ambiguity: *Dwyer* had a question involving doing more then the statute required, which the Court resolved for the Debtors without subverting the legislatures intent. As the Court stated in *Dwyer*, "The homestead statute does not state that the second signature on the declaration renders the homestead claim invalid". *Dwyer* supra at 31.

The Bankruptcy Court in our case stated that Spinelli took the wrong approach to statutory interpretation. Stated again, *Spinelli,* a tax statute case, stands for strict interpretation. The Bankruptcy Court judge stated that *Dwyer* distinguished *Spinelli* from all homestead cases.

Even if this Panel wishes to retain *Spinelli's* strict interpretation, the case is distinguishable from the case at bar. The fact pattern creates a major distinction. In *Spinelli*, the Debtor Lydia Spinelli established the Lydia Spinelli Investment Trust (a nominee trust). Its beneficiary was the Lydia Spinelli Living Trust. Debtor was Trustee of the Investment (nominee) Trust but the principal beneficiary of the Living Trust. Not only is the interest once removed but the Debtor was not even the sole beneficiary of the Living Trust. In our case there is but one trust; the sole trustee and sole beneficiary are the same.

Spinelli	Szwyd
Inv Tr (Debtor - Trustee)	Realty Trust (Debtor-Trustee)
Living Trust (Beneficiary)	Beneficiary (Debtor)
Debtor et al (Beneficiaries)	

Spinelli should be disregarded as distinguishable on the facts alone, without regard to the legal issues presented.

Lastly, the Appellant argues that because the legislature has not added protection for nominee trust beneficiaries, and as *Spinelli* spoke to the issue eleven (11) years ago, the Federal Court is confined to the *Spinelli* interpretation. Again, *Spinelli* is distinguishable on its facts from the present case. Additionally, the Court Federal and State are not obligated to follow *Spinelli* under Stare Decisis except perhaps for exactly what it is: A tax exemption request by the resident of a home which is owned by a trust, once removed from the resident. It would put precedent over principle

SEPARATION OF EQUITABLE AND LEGAL TITLE

Part of the debate, about the issue at hand, deals with the separation of legal and equitable title disqualifying a debtor from claiming an Estate of Homestead, from *Thurston* to *Kirby Kirby v. Board of Assessors of Medford, 350 Mass. 386, 215 N.E.2d 99 (1966)*, to *Spinelli*,(supra)

As discussed earlier, the legislature, in 1860, intentionally changed the homestead "Exemption" to an "Estate of Homestead". Cases, in dealing with the issues of a declaration of homestead, being claimed by a debtor, where there is a trust somewhere, as debtor beneficiary, as debtor trustee, or just a trust itself, ultimately deal with the rights of legal and equitable titles.

The argument is that an Estate of Homestead can only be claimed where both legal and equitable title rest in the same, otherwise qualified person, or, as discussed later in this brief, where

there is a merger of title.

It is Appellee's position that the laws of the Commonwealth say otherwise; that there are specific provisions in *MGL 188* for a divergence of legal and equitable ownership.

MGL 188 Section 2 deals with the acquisition of an Estate of Homestead in real property. As stated in the statute, it can be acquired "... in the deed of conveyance by which the property is acquired; or, after the title has been acquired, such designation may be declared by a writing ..." and recorded in the appropriate Registry of Deeds.

By statute, we have the Estate of Homestead separated from legal title until there is a recording. In fact, the Estate of Homestead does not come into existence until the recording.

MGL 188 Section 7 deals with the termination of an Estate of Homestead. The statue states that an Estate of Homestead can be terminated "... a deed conveying the property in which a state of homestead exists, signed by the owner and the owner's spouse, if any, which does not specifically reserve said Estate of Homestead". Further, it goes on "A deed reserving said Estate of Homestead shall convey, according to its terms, any title or interest in the property beyond the Estate of Homestead ."

The Appellee's position is that legal title, by way of deed, can be separated from the Estate of Homestead. The equitable rights, the rights of possession, occupancy, and enjoyment exist as an Estate, separate from the residual or remainder ownership, and they exist in the form of an Estate of Homestead. That is the only conclusion that can be drawn from the clear and plain language of *Section 7 of Chapter 188.*

The statute allows a reservation of the Estate of Homestead independent of legal title. One who owns real property is his/her name solely, provided there is a dwelling which is that owner's

principal residence, can declare an Estate of Homestead. That owner could then convey title to the realty to a Nominee Trust, retaining for him/herself the Estate of Homestead. Therefore, at least for this discussion of the separation of legal and equitable title, and the ability of one without legal title to have an Estate of Homestead, the statute is clear.

While the facts in the instant case differ, in that title went directly to the trust (which ceased to exist due to a merger of title), the point here is that the argument over not being able to use the exemption allowed for declared homesteads, if the debtor does not have merged title is inaccurate.

The confusion may well have developed when the statutory language of *St. 1857* changed with *St. 1860* from a homestead exemption to an Estate of Homestead. This was intentional and change has been resisted. A proposed bill, in 1980 that would have moved in a direction many other jurisdictions have gone, by using a statutory homestead exemption, was rejected. *65 MBA Law Review 175 by Jordan Cherrick.*

The legislature dealt with the issue. It decided to keep the "Estate of Homestead". While property declared and qualified as an Estate of Homestead is exempt from attachment by creditors, there is no "Homestead Exemption" per se.

Therefore, it is the Appellee's position that a separation of legal and equitable title, as may take place in a nominee trust or other situations, should not be a bar to claim of an Estate of Homestead.

MERGER OF TITLE

The Bankruptcy Court based its decision not on the Massachusetts Homestead Statute *MGL 188 sec 1.* Rather it determined that the issues presented by the Appellant at hearing and in his brief to the Court need not be reached.

The Bankruptcy Judge relied on Massachusetts real estate law therefore avoiding slipping into state statutory construction matters. The Bankruptcy Judge stated "It is axiomatic that a purported trust in which the sole trustee is also the sole beneficiary is a nullity".

In addition to the cases cited by the Bankruptcy Court we have Scotts on Trustsstating "the creation of a trust involves a separation of the legal and equitable interests in property. Where a single individual has the whole legal interest and the whole beneficial interest there is not trust. Where the sole trustee has also the whole beneficial interest he simply holds the property free of trust." Citing Parker v. Converse, 5 Gray 336 (Mass. 1855); *Langley v Conlan 212 Mass. 135.* Scotts cites regarding the concept of merger *Vittands v. Sudduth 730 N.E. 2d 325 (Mass. App. 2000)*, as does the Bankruptcy Judge.

The subject trust is referred to as a Nominee Trust, yet it fails that categorization on one critical fact. The Trustee here had full, not ministerial or titular authority (See R68-71 Powers of Trustee). It matters not whether the Trust was a so called Nominee Trust or a traditional Inter - Vivos Trust. (*Vittands at 409 quoting Drucker*) One individual cannot solely hold legal and equitable title and still have a trust, excepting for rare situations where a trust is established by one now deceased, and there is a reason the grantor/settlor wanted the trust to exist.

In addition to the cases presented by the Bankruptcy Court in this case, there is the SJC case *Langley v. Conlan 212 Mass. 135, 98 N.E. 1064 (1912).* Langley makes the point that where the total benefit and the total control is vested in one person, equity will dissolve the trust.

Clearly in the case at bar there is no dispute that after the first few months of the trust's existence, in 1992, the Debtor was the sole Trustee, and it is undisputed that he was always the sole beneficiary. He dealt with the property without regards to the trust.

In the most recent refinance, the Appellee/Debtor, contrary to the claims of the Appellant, obtained the new mortgage in his own name. The Appellee signed as Edward R. Szwyd without specifying any capacity. The language, "Trustee Myska (sic) Nominee Realty Trust" was added without Appellee's knowledge about not in his hand. Tthe mortgage riders and other documents are all signed by the Appellee in his individual capacity.

Significantly, it does not matter. The Appellee treated the property as his own, to the exclusion of others, used it, financed it, and dealt with it as if there was not trust. The law of the Commonwealth tells us the Appellee was correct as the trust ceased to exist when the Appellee became Trustee in 1992.

Generally in Massachusetts which is a so called title state verses a lien state for mortgage purposes there is a split of equitable and legal title when a mortgage is given. Once the mortgage conditions are met the mortgage deed is discharged and the title is merged in the mortgagor who had been, arguably the equitable owner. The court in *Maglione v. Bank Boston Mortgage Corporation, Mass. App. Ct. 88, 557 N.E. 2d 756 (1990)* stated "Literally, in Massachusetts, the granting of a mortgage vests title in the mortgagee to the land placed as security for the under lying debt. The mortgage splits the title in two part; the legal title, which becomes the mortgagees, in the equitable title, which the mortgagor retains... So it is that the mortgagor retains an equity of redemption."

As for the Appellant's argument that because the Appellee signed the Declaration of Homestead as "beneficiary" of a trust that was a nullity, he is not entitled to the Estate, the Appellee refutes the assertion.

In the same way that the merger of title vested the Appellee with the "whole title" in the

subject property, the nullification merely eliminates the Appellee/Debtor's appellation as beneficiary. He had stated his intention to Declare an Estate of Homestead in the proper form, recorded with the proper Registry of Deeds, and identifying the subject property. If there was no trust he was not a beneficiary but he was still the owner, now of both titles rather then just equitable title.

CONCLUSION

Appellee maintains the following:

1. There was a merger of title vesting legal and equitable title in the Appellee.
2. The Declaration of Homestead (R94) fulfills all legal requirements and survives the dissolution of the Trust.
3. Failing 1 and 2 above, the doctrine of Stare Decisis must be followed to arrive at a determination of what the SJC would decide.
4. Stare Decisis determines that cases should be construed only for the precise facts and points of law for which they stand; As such Mass case law supports the Appellee's contention that the Homestead statute should be construed liberally in favor of the Appellee.
5. Spinelli is not controlling. It ruled on a tax not homestead exemption. Tax statutes not all statutes should be construed strictly. Further, it rests on a faulty interpretation of Thurston.
6. Case law permits "one in rightful possession" to declare successfully an Estate of Homestead.
7. There is no prohibition if the Estate of Homestead is severed from legal title to the subject real property, therefore permitting an Estate of Homestead to be held by the Trust beneficiary.

For all of the reasons summarized above and detailed in the body of the brief Appellee prays

this Panel to uphold the Bankruptcy Court's decision overruling the Trustee's Objection To Homestead.

REQUEST FOR ORAL ARGUMENT

Due to the diverse issues presented in this case, and the matter of State Statutory Construction in a case that would have significant effects, The Appellee believes that it would be in the best interests of the parties if the Panel members would be able to ask, and have answered questions by the litigants.

By: _____

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TABLE OF AUTHORITIES

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STATUTES

MISCELLANEOUS