App. 1

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-10044
Non-Argument Calendar

D.C. Docket Nos.
6:19-cv-00699-PGB; 6:15-bk-06458-CCJ

WILLIAM W. COLE, JR.,

Plaintiff-Appellant,

versus

PRN REAL ESTATE & INVESTMENTS, LTD.,
NANCY ROSSMAN,
LORI PATTON, Trustee,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(September 29, 2020)

Before MARTIN, LAGOA, and ANDERSON, Circuit Judges.

PER CURIAM:

William Cole, Jr., appeals the district court's order affirming the bankruptcy court's resolution of his Chapter 7 bankruptcy petition. He argues that the bankruptcy court incorrectly apportioned the proceeds from the sale of his lakefront homestead property. Cole moves to certify the question of apportionment to the Florida Supreme Court. Cole also says that the State of Florida has title to the portion of his property beneath the lake's surface, and that he did not mislead the bankruptcy court by gerrymandering his homestead parcel to exclude this underwater portion. After careful consideration, we deny Cole's motion to certify and affirm the judgment of the bankruptcy court.

I.

In 2001, Cole purchased 2.95 acres of property on Lake Minnehaha in the city of Maitland, Florida. The property included approximately .765 acres of dry land and 2.185 acres of land beneath the surface of the lake. Cole built a 10,000 square foot home on the property and lived there with his family Cole held title to the property, as a single parcel of land, through a self-settled revocable trust (the "Trust").

In 2015, however, Cole began preparing to file for bankruptcy after stalled negotiations with his creditor, PRN Real Estate & Investments, Ltd. ("PRN"). In January 2015, Cole asked a surveyor to divide his lake property into two parcels. The first parcel encompassed the dry land containing Cole's home, dock,

and boathouse, and the second parcel encompassed the land at the lake bottom. In June 2015, Cole executed a special warranty deed conveying the lake bottom land from the Trust back to the Trust.

In July 2015, Cole filed his Chapter 7 bankruptcy petition. His sworn schedules listed his lake property as two separate parcels of land: the dry property (with an estimated value of $2.5 million) and the lake bottom property (with a value of $1,000). Cole designated the dry property as his homestead. Under the Florida Constitution, a debtor's homestead is exempted from forced sale following bankruptcy. See Fla. Const. art. X, § 4. But if a debtor's homestead is located within a municipality, as is Cole's, only one-half acre of contiguous land is protected by the homestead exemption. Id. By claiming the homestead exemption, Cole sought to shelter the dry property—the smaller of the two newly created parcels—from forced sale.

Both PRN and Cole's bankruptcy trustee, Lori Patten, objected to Cole's designation of the dry property as his homestead. PRN asked the bankruptcy court to deny Cole a homestead exemption in light of Cole's attempt to split his lake property and thereby fraudulently gerrymander his homestead. Both PRN and the trustee argued that the bankruptcy court should consider Cole's dry and submerged property as one parcel when evaluating Cole's homestead exemption claim.

Cole responded that he was entitled to a homestead exemption regardless of his pre-bankruptcy conduct. He also raised a new argument that the land at

the bottom of the lake belonged to the State of Florida, so the bankruptcy court could not consider it part of his homestead.

The bankruptcy court held a two-day trial on the issue of Cole's homestead property. After trial, the court found that Cole had been "misleading" in claiming his lake property as two separate parcels in the bankruptcy petition, and that his explanations for the split were "not credible." Nevertheless, it held Cole was still entitled to a homestead exemption under Florida law. The court then addressed which portions of the lake property were relevant to Cole's homestead exemption claim. Because all agreed that the lake bottom property had "little value and utility," the court treated Cole's lake property "as indivisible" and directed the sale of the property with apportionment of the proceeds to Cole and his creditors.

The bankruptcy court declined to consider the question of the lake bottom property's ownership, because to do so would give credence to Cole's "blatant and inequitable" attempt to gerrymander his property before filing for bankruptcy. The court also found that the issue of whether title to the lake bottom land belonged to Cole or the State of Florida was not a proper question for the court to decide, especially since Florida had not asserted claim to title in almost 150 years of record title history. Instead, the court considered the State's interest in the lake bottom land "as a potential cloud on title" and assumed "that Debtor owns all of the Property as a single indivisible parcel."

Finally, the bankruptcy court allowed Cole to claim a homestead exemption despite his misleading pre-bankruptcy conduct. Because Cole's homestead property was more than one-half acre and indivisible, the court decided that Cole could benefit from the homestead exemption by receiving a portion of the proceeds from the sale of his property. The court held that Cole would receive proceeds in the amount of a simple percentage of the exempt acreage, here .5 acres, divided by the total acreage of his property, here 2.95 acres. From this calculation, Cole would receive 16.95% of the proceeds from the sale of his property.

Cole appealed this ruling to the district court for the Middle District of Florida. The district court affirmed the bankruptcy court's decision in full. Cole appealed, raising several claims of error in the bankruptcy court's decision. Cole also moves this Court to certify a question of law to the Florida Supreme Court.

II.

"In a bankruptcy case, this Court sits as a second court of review." In re Brown, 742 F.3d 1309, 1315 (11th Cir. 2014) (quotation marks omitted). "[W]hen a district court affirms a bankruptcy court's order . . . this Court reviews the bankruptcy court's decision." Id. "We review the bankruptcy court's factual findings for clear error and its legal conclusions de novo." Id. (quotation marks omitted). We may affirm on any ground that is supported by the record. Big Top Koolers, Inc. v. Circus-Man Snacks, Inc., 528 F.3d 839, 844 (11th Cir. 2008).

III.

A.

Cole first argues that the bankruptcy court erred by allocating the proceeds of the homestead sale by "a simple percentage of the exempt acreage to the total acreage of the property." He says that the bankruptcy court contradicted "binding Eleventh Circuit precedent" because our Court had established a different standard for allocating these proceeds. Specifically, he says our Court has endorsed a method of calculation that the Eighth Circuit set forth in O'Brien v. Heggen, 705 F.2d 1001 (8th Cir. 1983).

We begin with the text of the Florida constitutional homestead exemption. In relevant part, Article 10, § 4, of the Florida Constitution provides:

> There shall be exempt from forced sale under process of any court . . . the following property owned by a natural person: a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon . . . ; or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or the owner's family

Fla. Const. art. X, § 4(a) (emphasis added).

The bankruptcy court held that Cole was entitled to the benefit of the homestead exemption here. Cole's property, however, exceeded the one-half acre of property allowed for a municipal homestead. Ordinarily, if

a Florida homeowner's property "exceeds the one-half acre allowed for [a] municipal homestead," then "he cannot declare as exempt his entire parcel, but may select his homestead in any continuous shape from his qualifying lands." In re Kellogg, 197 F.3d 1116, 1120 (11th Cir. 1999) (quotation marks omitted). However, the bankruptcy court determined that, under Kellogg, Cole could not carve out a half-acre homestead from his property. The court reasoned that Cole's land was indivisible, since the lake bottom property was worthless if separated from the dry property. If a homestead parcel is indivisible, "sale [of the parcel] and apportionment of the proceeds is an equitable solution [and] allows for an appropriate recognition of the debtors' homestead exemption." In re Englander, 95 F.3d 1028, 1032 (11th Cir. 1996). The bankruptcy court thus ordered the parcel sold and decided that Cole would receive proceeds in the amount of "a simple percentage of the exempt acreage [.5 acres] to the total acreage of the property."

On appeal, Cole does not challenge the bankruptcy court's finding of indivisibility.[1] Neither does Cole dispute that the proper way to apply the homestead exemption to indivisible land is to sell the property and apportion the proceeds. Instead, Cole takes issue with the bankruptcy court's method of apportioning the

[1] Cole does argue that the bankruptcy court should have found that the submerged land never belonged to him, but to the State of Florida. However, Cole makes no argument that, if he owns the entire parcel, the submerged portion was divisible from the dry portion.

proceeds from the sale of his land. Cole argues that the bankruptcy court erred by not following the Eighth Circuit's decision in O'Brien.

O'Brien considered the application of Minnesota's homestead exemption statute to a parcel of land exceeding the protected homestead area. 705 F.2d at 1003. The O'Brien debtor acknowledged that his outsized parcel should be sold. Id. But he argued that the non-exempt portion of his land was "virtually worthless, thus entitling him to keep the [entire] proceeds of the sale, less a nominal amount of $1,000 attributable to the non-exempt portion." Id. The Eighth Circuit rejected this argument. It held that the bankruptcy court had fairly apportioned the proceeds from the sale by assessing the value per square foot of the unimproved land, then multiplying this value "to the total number of square feet in excess of the [homestead] acre limitation." Id. at 1004 & n.4. This calculation "determined the non-exempt portion of the proceeds." Id. at 1004. The rest of the proceeds went to the debtor in recognition of his homestead exemption. See id. This method, the Eighth Circuit held, was not "clearly erroneous." Id.

Cole argues that, under O'Brien, the bankruptcy court should have apportioned the parcel sale proceeds by considering only the value of the unimproved land. If the bankruptcy court were to determine the non-exempt portion of the proceeds using the value of the land in its unimproved state, Cole would retain the full value of his home and other improvements through the homestead exemption. Cole argues that this outcome is consistent with the typical application of the Florida

homestead exemption, where debtors are permitted to keep the full value of their half-acre homestead, including the value of any improvements to this parcel.

O'Brien interpreted another state's homestead exemption and the surrounding case law. See 705 F.2d at 1003-04 (applying Minnesota law). And contrary to Cole's assertion, our Court has not endorsed O'Brien's method of apportioning homestead sale proceeds. Cole points to this Court's decisions in Kellogg and Englander. But in Englander, our Court merely noted that the Eighth Circuit had approved "the sale of a property and apportionment of the proceeds in a situation where the property exceeded the state homestead limitation on area." 95 F.3d at 1032. Kellogg's reference to O'Brien stood for the same proposition: "that partition was equitable and proper when the debtor's homestead exceeded the amount allowed in the [homestead exemption] and was indivisible." 197 F.3d at 1121. Neither Kellogg nor Englander discussed O'Brien's method for apportioning sale proceeds. The bankruptcy court thus did not contradict "binding Eleventh Circuit precedent" by declining to apply O'Brien when apportioning the proceeds in Cole's case.

Beyond this, the only court in this circuit to address apportionment has recognized that, under Florida law, it is permissible to apportion the proceeds of a homestead parcel sale, including the value of any improvements, by a pure percentage of protected acreage to overall acreage. In In re Quraeshi, 289 B.R. 240 (S.D. Fla. 2002), the bankruptcy court applied the Florida

homestead exemption to order a sale of the debtor's indivisible, oversized property and apportionment of the proceeds. See id. at 241. The bankruptcy court determined "that one-half acre constituted 19 percent of the total [parcel] acreage . . . [so] the Debtor was entitled to 19 percent of the [sale] proceeds." Id. In this way, the bankruptcy court apportioned the total proceeds by the percentage of homestead-protected acreage to overall acreage. See id.

The bankruptcy court in Cole's case followed the process used by the bankruptcy court in Quraeshi by apportioning the sale proceeds to Cole based on a percentage of homestead-protected acreage to overall acreage. Cole argues that he should be able to carve out the full value of one-half of an acre of his land, including the value of his home and other improvements. However, the Quraeshi court held that "permitting a debtor to 'carve out' a one-half acre of land[] refers only to cases where it is possible, and legal and practical, for the debtor's real property to be physically partitioned into a homestead-exempt one-half acre . . . and a remaining non-exempt portion." Id. at 244. And although Cole relies on O'Brien, Quraeshi observed that it was not bound by O'Brien's interpretation of an entirely different statute and accompanying case law. Id. at 245 n.1.

Cole points out that, on appeal to the district court, the Quraeshi debtor raised a different issue and "d[id] not challenge the bankruptcy court's ruling . . . that the Debtor is entitled to 19 percent of the claimed homestead." Id. at 242. Nevertheless, the bankruptcy

court's apportionment in Quraeshi still supports that apportioning proceeds by percentage of homestead acreage to overall acreage is a valid interpretation of the Florida homestead exemption.

In sum, it was not legal error for the bankruptcy court to follow Quraeshi's interpretation of the Florida homestead exemption instead of O'Brien's interpretation of Minnesota law. Cole asks to certify the question of whether apportionment under Florida homestead exemption follows the rule in O'Brien or the rule in Quraeshi. This Court may certify a question to the Florida Supreme Court if "we maintain more than 'substantial doubt' as to how the issue before us would be resolved under Florida law." Toomey v. Wachovia Ins. Servs., Inc., 450 F.3d 1225, 1231 (11th Cir. 2006). In light of the precedent supporting the bankruptcy court's apportionment of the proceeds, however, we do not have substantial doubt as to the correctness of the bankruptcy court's decision. See id.

B.

Next, Cole argues that the bankruptcy court should have decided whether he or the State of Florida has ownership of the lake bottom land. Cole says that the bankruptcy court should have determined that the State of Florida owns the submerged land in his parcel. PRN responds that Cole is estopped from challenging his ownership of the lake bottom land, because he claimed ownership of this land in the sworn schedules of his bankruptcy filings. We agree with PRN.

Generally, "a party is bound by the admissions in his pleadings." Best Canvas Prods. & Supplies, Inc. v. Ploof Truck Lines, Inc., 713 F.2d 618, 621 (11th Cir. 1983). For this reason, "[n]umerous courts have held that statements in bankruptcy schedules that are executed under penalty of perjury are eligible for treatment as judicial admissions." Ussery v. Allstate Fire & Cas. Ins. Co., 150 F. Supp. 3d 1329, 1344 & n.10 (M.D. Ga. 2015) (quotation marks omitted and alterations adopted) (collecting cases); see, e.g., In re Kane, 470 B.R. 902, 925 (Bankr. S.D. Fla. 2012) (noting that bankruptcy schedules "are signed under oath and constitute admissions with regard to the information contained therein"); Matter of Musgrove, 187 B.R. 808, 812 (Bankr. N.D. Ga. 1995) (finding that an entry in the debtor's schedule "constitutes a judicial admission"). A fact judicially admitted is a fact "established not only beyond the need of evidence to prove [it], but beyond the power of evidence to controvert [it]." Cooper v. Meridian Yachts, Ltd., 575 F.3d 1151, 1178 (11th Cir. 2009).

In his bankruptcy schedules, Cole swore under penalty of perjury that he owned the submerged land by revocable trust. Cole stated that he was the "Owner" of the lake bottom parcel and the "Deed/Legal Title is held by: William W. Cole, Jr. Family Trust." Cole never amended his sworn schedules. Even so, at the trial held in the bankruptcy court, Cole argued for the first time that the State of Florida owned the submerged land.

Cole is bound by his sworn admission in the bankruptcy schedules. He cannot later contradict this admission with evidence that the State of Florida owned

the lake bottom land. See Cooper, 575 F.3d at 1178. Thus, the bankruptcy court did not err in declining to decide ownership of the parcel, because Cole had admitted his ownership. We affirm the bankruptcy court's decision on this ground.

C.

Finally, Cole argues that the bankruptcy court clearly erred in finding that he misleadingly gerrymandered his homestead parcel. We hold that, in light of the factual record, this finding was not clear error.

The bankruptcy court held that Cole's attempts to split his land into dry and submerged parcels were misleading and even "a species of fraud." The bankruptcy court considered the fact that Cole, as a real estate investor and developer of over 20 years, had "admitted expertise in matters of real estate." The court noted that, two days after negotiations between Cole and his creditor PRN went south, Cole asked a surveyor to split his lake property into dry and wet land. Further, Cole did not use the "ordinary high water mark" to divide his parcel, but requested a boundary line that included his boathouse in the dry parcel he claimed as his homestead. Cole then executed a warranty deed to convey the lake bottom parcel from the Trust back to the Trust. However, Cole denied that he split his property solely for fraudulent "pre-bankruptcy planning" reasons. Yet Cole did not seek approval from the city of Maitland before executing this deed, even though he had experience obtaining a

zoning variance when splitting similar parcels. And of course, Cole represented in his bankruptcy schedules that the dry parcel was his homestead and that the wet parcel was an unrelated property.

On these facts, the bankruptcy court permissibly found that Cole misleadingly manipulated his homestead exemption by attempting to split his parcel. And even if this finding was clear error, Cole suffered no harm from this determination, because the bankruptcy court held he was "nevertheless entitled to his constitutional homestead exemption."

IV.

The bankruptcy court did not apply an incorrect legal standard to apportion the sale proceeds of Cole's homestead property. Neither did the bankruptcy court wrongly decline to hold that Cole's submerged property was owned by the State of Florida. Finally, the bankruptcy court's factual findings do not amount to clear error. The judgment of the bankruptcy court is **AFFIRMED**, and Cole's motion to certify a question to the Florida Supreme Court is **DENIED**.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

In Re: William W. Cole, Jr.

WILLIAM W. COLE, JR.,

Appellant,

v.

LORI PATTON, PRN REAL ESTATE AND INVESTMENTS, LTD. and NANCY ROSSMAN,

Appellees. /

Case No: 6:19-cv-699-Orl-40

ORDER

(Filed Dec. 20, 2019)

This cause comes before the Court without oral argument on the following:

1. Initial Brief of Appellant William W. Cole, Jr. (Doc. 19), filed July 8, 2019;
2. Brief of Appellees PRN Real Estate & Investments, Ltd., and Nancy Rossman (Doc. 29), filed August 19, 2019;
3. Reply Brief of Appellant William W. Cole, Jr. (Doc. 34), filed September 3, 2019.

Appellant appeals the final order of the Bankruptcy Court rejecting his attempts to circumvent the one-half acre constitutional limit on his homestead

exemption and holding that his homestead property consisted of an indivisible 2.95-acre site. (Doc. 11-2). After reviewing the entirety of the record, including the briefs filed by all parties, this Court affirms the final order of the Bankruptcy Court for the reasons set forth below.

I. BACKGROUND

In 2001, Appellant purchased 2.95 acres of property at 608 Bentley Lane, Maitland, Florida (the "**Property**"). (Doc. 11-2, pp. 2-3). The Property abutted Lake Minnehaha and consisted of both dry land and lake bottom. (*Id.*). Soon after purchasing the Property, Appellant constructed a 10,000 square foot home. (*Id.* at pp. 3-4). At all relevant times, either Appellant or his family resided on the Property. (*Id.* at p. 4).

The Florida Constitution exempts a debtor's homestead from forced sale following bankruptcy. FLA. CONST. art. X, § 4. If a homestead is located within a municipality, the constitutional homestead limit is one-half acre of contiguous land. *Id.* Appellant's Property is located within the City of Maitland, a municipality. Knowing this, Appellant engaged in "blatant and inequitable" attempts to redraw the boundaries of his lot "on the eve of his bankruptcy filing." (Doc. 11-2, p. 19).

Until 2015, Appellant held title to the Property—as a single intact parcel—under a self-settled revocable

trust (the "Trust"). (*Id.* at p. 4).[1] On January 26, 2015, Appellant and Appellee PRN attempted to resolve Appellant's underlying debt obligation, but the mediation resulted in an impasse. (*Id.* at p. 7). Two days later, Appellant began preparations for bankruptcy. (*Id.*). Specifically, he asked a surveyor to "have [the Property] broken out into two surveys." (*Id.*). The new surveys purported to divide the Property into one lot encompassing Appellant's home, dock, and boathouse (the "Improved Land") and another containing the residual submerged land (the "Unimproved Land"). (*Id.* at p. 4).[2] The Unimproved Land does not front a road and is accessible only by water. (*Id.*).

In June 2015, Appellant executed a special warranty deed conveying the Unimproved Land from the Trust back to itself. (*Id.*). Shortly thereafter, Appellant filed a Chapter 7 bankruptcy petition. (*Id.* at p. 5). His sworn schedules list the Property as two separate parcels: the Improved Land with an estimated value of $2.5 million and the Unimproved Land with a value of $1,000. (*Id.*). The schedules do not make any reference

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[1] Pursuant to Fla. Stat. § 736.0505(1), property owned by a revocable trust is subject to the settlor's creditors during the settlor's lifetime. Thus, because Appellant's trust is revocable, the Property is part of his bankruptcy estate and subject to the claims of his creditors except to the extent exempted by the homestead exemption.

[2] The Bankruptcy Court referred to the Improved Land as "Upland Property" and the Unimproved Land as "Submerged Land." However, because the so-called Upland Property actually includes some submerged land, this Court feels that Improved and Unimproved are more apt descriptions.

to the size of the parcels or indicate that the parcels are contiguous. (*Id.*). Appellant claimed the Improved Land as his homestead, but not the Unimproved Land. (*Id.*).

At trial, Appellant "discounted the suggestion that his request to divide the survey was made solely for purposes of 'pre-bankruptcy planning.' But he did acknowledge that bankruptcy might have been *one* of the reasons." (*Id.* at p. 7). He also admitted that he directed the surveyor to use a boundary line other than the ordinary high-water mark line because he wanted to ensure that his boathouse was protected against creditors. (*Id.*). He characterized his execution of the special warranty deed as a "bifurcation of a deed," and claimed that he did not intend to create a second lot. (*Id.*). He admitted that he did not obtain any type of approval or seek a zoning variance in order to split the Property, and that the Unimproved Land was unmarketable in isolation. (*Id.*).

It now appears undisputed that Appellant's execution of the special warranty deed "did not change anything." (Doc. 19, p. 29).[3] Apparently recognizing that the so-called deed bifurcation would be unsuccessful in reducing the size of his homestead, Appellant advanced a new legal theory. Nearly one year after his

[3] Appellant argues without elaboration that the Bankruptcy Court's finding that the so-called deed bifurcation was "impermissible" was clearly erroneous. (Doc. 19, p. 5). However, the Bankruptcy Court received extensive evidence to support its conclusion that the special warranty deed constituted a "lot split" in violation of Maitland zoning regulations. (Doc. 11-2, pp. 8-9).

initial Chapter 7 petition, Appellant first claimed that the land beneath Lake Minnehaha is owned by the state of Florida and not the Trust.[4] Accordingly, Appellant contends that the Unimproved Land could not be included in his homestead property because it was never his in the first place.

At trial, the Bankruptcy Court weighed "reasoned arguments" and "compelling and credible" expert testimony provided by both parties. (Doc. 11-2, p. 17). After detailed consideration of the evidence and law, the Bankruptcy Court concluded:

> In sum, the court views the matter of the state's interest, if any, in the [Unimproved Land] as a potential cloud on title. This may impact the value the Trustee ultimately obtains for the Property upon sale or may impact some future owner if and when the state elects to lay claim to the [Unimproved Land] or Lake Minnehaha more generally. But for purposes of this case and in determining [Appellant's] homestead exemption, the Court concludes that it must assume that [Appellant] owns all of the Property as a single individual parcel.

(*Id.* at pp. 20-21).

Finally, the parties agreed with the general proposition that when a debtor's homestead property exceeds the constitutional acreage limitation and is

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[4] Appellant argues that he did not raise the issue of the Unimproved Land's ownership until July 2016 because Appellees "never asked." (Doc. 19, p. 29).

indivisible, the appropriate means by which to honor the claimed homestead while also providing value to creditors is to direct a sale of the property and allocate the net proceeds between the debtor and the bankruptcy estate. However, they disagreed as to how that allocation is to be made. The Bankruptcy Court ultimately determined that proper apportionment was a simple percentage of the exempt acreage to the total acreage of the subject property. (*Id.* at p 22).

This appeal followed.

II. STANDARD OF REVIEW

The Court has jurisdiction over this appeal from the final order of the Bankruptcy Court pursuant to 28 U.S.C. § 158. In bankruptcy appeals, the district court reviews the bankruptcy court's factual findings for clear error and its resolution of legal questions *de novo*. *In re Coady*, 588 F.3d 1312, 1315 (11th Cir. 2009) (per curiam).

III. ISSUES ON APPEAL

1. Whether the Bankruptcy Court clearly erred in finding that Appellant's actions and Bankruptcy Schedules were misleading or a species of fraud.

2. Whether the Bankruptcy Court applied the correct legal standard to determine that Appellant "gerrymandered" his homestead.

3. Whether the Bankruptcy Court erred by admitting the Appellees' expert witness.

4. Whether the Bankruptcy Court applied the correct legal standard in attributing the Unimproved Land to Appellant without conclusively determining ownership.

5. Whether the Bankruptcy Court applied the correct legal standard to allocate the homestead sale proceeds.

IV. ANALYSIS

Appellant raises a series of objections to the Bankruptcy Court's order. The Bankruptcy Court properly rejected each of these arguments, and this Court now affirms.

A. Whether the Bankruptcy Court clearly erred in finding that Appellant's actions and Bankruptcy Schedules were misleading or a species of fraud

Appellant's first argument seemingly takes issue with the language used by the Bankruptcy Court to describe his conduct before and during these proceedings. Specifically, he asserts that labeling his Bankruptcy Schedules and corresponding actions as "misleading" and a "species of fraud" was clearly erroneous. (Doc. 19).

"He who seeks to have a judgment set aside because of an erroneous ruling carries the burden of

showing that prejudice resulted." *Palmer v. Hoffman*, 318 U.S. 109, 116 (1943); *see also* Fed. R. Bankr. P. 9005 (adopting Fed. R. Civ. P. 61's harmless error rule). Even assuming the Bankruptcy Court was incorrect in its characterizations, Appellant fails to articulate how the error resulted in any meaningful prejudice. After all, in the portion of the Bankruptcy Court's order that Appellant now seeks to reverse, *he* was the prevailing party. The court concluded, "[Appellant's] sworn schedules in this case are misleading. His explanations for the lot spit are not credible. But under Florida law, he is nevertheless entitled to his constitutional homestead exemption." (Doc. 11-2, p. 16).[5] In the absence of prejudice, this Court has no grounds to modify the Bankruptcy Court's judgment. *See Flores v. Cabot Corp.*, 604 F.2d 385, 386 (5th Cir. 1979) (per curiam).[6]

Regardless, the Bankruptcy Court's findings were not clearly erroneous, but rather substantiated by extensive evidence in the record. The Bankruptcy Court supported its conclusions by enumerating Appellant's

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[5] In this portion of its order, the Bankruptcy Court rejected Appellees' argument that Appellant's actions warranted denial of his entire homestead exemption. The Bankruptcy Court held that "Florida law does not permit the outright denial of a debtor's homestead exemption based upon allegations of fraud, no matter how egregious, unless funds obtained through such fraud were then used 'to invest in, purchase, or improve the homestead." (Doc. 11-2, p. 16) (quoting *Havoco of Am., Ltd. v. Hill*, 790 So. 2d 1018, 1028 (Fla. 2001)).

[6] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981.

questionable actions—specifically, Appellant's "failure to expressly note the acreage limitation on his Schedule C, his impermissible splitting of the Property on the eve of his bankruptcy filing, his illogical explanations for the illegal lot split, and his eleventh-hour change in position regarding ownership of the [Unimproved Land]." (Doc. 11-2, p. 14).

Appellant contends, "There is no dispute that both the Homestead property and the [Unimproved Land] were accurately disclosed in [Appellant's] Bankruptcy Schedules; [Appellees] just don't like how they were disclosed." (Doc. 19, p. 26).[7] However, this argument fails to recognize that a disclosure can be technically true and also misleading. The Bankruptcy Court's lengthy discussion of Appellant's suspect behavior supports the logical inference that his ultimate goal was to "minimize value due [to] the estate and 'cheat' creditors." (Doc. 11-2, p. 16). This finding was not clearly erroneous.

Appellant continuously bemoans the above facts as "red herrings" that undermined his credibility and—by implication—befuddled the Bankruptcy Court. (Doc. 19, pp. 27, 28, 31). However, the argument that Appellant's bankruptcy schedules were not misleading is itself a distraction. The Bankruptcy Court's discussion of Appellant's behavior had no bearing on its actual holding: Appellant is entitled to his homestead

[7] Likewise, Appellant appears to make the argument that his disclosures cannot be characterized as misleading because no one was actually misled. (Doc. 26, p. 27). Appellant cites no case law to support this proposition.

exemption as it relates to the entirety of his Property. At best, the court's characterization of his conduct as "misleading" and a "species of fraud" was dicta.

Accordingly, Appellant's hurt feelings are not an appealable issue.

B. Whether the Bankruptcy Court applied the correct legal standard to determine that Appellant "gerrymandered" his homestead[8]

Appellant next argues that the Bankruptcy Court did not articulate what legal standard it applied to determine that he gerrymandered—that is, impermissibly redrew—his homestead. (Doc. 19, pp. 33-35). Curiously, Appellant does not direct the Court to what he believes is the correct standard or any case law in support thereof. Instead, he attempts to distinguish away the cases discussed by the Bankruptcy Court: *Englander v. Mills (In re Englander)*, 156 B.R. 862 (Bankr. M.D. Fla. 1992), *aff'd*, 95 F.3d 1028 (11th Cir. 1996); and *Kellogg v. Schreiber (In re Kellogg)*, 197 F.3d 1116 (11th Cir. 1999).

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[8] Gerrymandering is more frequently used in the political arena in which the term originated. The term is used to describe the manipulation of the geographic boundaries defining an electoral district in order to favor one political party. In the homestead context, it is used to describe a debtor's designation of his exempt homestead within a parcel of real property that exceeds the allowed acreage limitation, with the purpose of either concentrating value within the portion claimed as exempt or rendering valueless that portion not claimed as exempt. (Doc. 11-2, p. 2 n.1).

In both *Englander* and *Kellogg*, the Eleventh Circuit rejected debtors' attempts to select half-acre portions of their properties as exempt homestead when such divisions would violate local zoning laws. "If [a debtor] could not lawfully divide his land into two parcels before declaring bankruptcy, he should not be allowed to use his homestead exemption to circumvent zoning regulations." *Kellog*, 197 F.3d at 1120.[9] When a debtor's property is not divisible, the bankruptcy trustee must sell the property and the court must apportion the proceeds. *Id.* at 1121 (quoting *Englander*, 95 F.3d at 1032). Furthermore, "The status of [a debtor's] property is determined as of the date he filed his [bankruptcy] petition." *Id.* (citing *In re Crump*, 2 B.R. 222, 223 (Bankr. S.D. Fla. 1980)).

Appellant argues that *Englander* and *Kellogg* are distinguishable because those cases involved disclaimed property that was "rendered worthless because the designation of the homestead did not comply with local zoning restrictions," whereas here the "nonexempt property has no value because it is under a lake." (Doc. 19, p. 35). While Appellant is correct that this case is unique in that it involves submerged property, this detail is a paradigmatic distinction without a difference. A careful reading of the opinions cited by the Bankruptcy Court does not suggest that the intrinsic value of the jettisoned property holds any significance. The Eleventh Circuit emphasized the broad

[9] "When a landowner acquires the land with knowledge of the zoning restrictions, he cannot cry 'hardship.' " *Id.* at 1121 n.4 (quoting *Josephson v. Autrey*, 96 So.2d 784, 789 (Fla. 1957)).

scope of the *Englander* rule by rejecting the argument that its application was limited to cases involving "chicanery' where "the debtor artfully crafts his homestead to defraud his creditors by leaving a useless parcel." *Kellogg*, 197 F.3d at 1121. The relevant inquiry is straightforward. If a debtor's property "could not be conveyed into smaller parcels lawfully," then the entire property must be considered indivisible. Additional facts—like the debtor's intent or the character of the property—are immaterial.

Here, Appellant does not appear to argue that the Property could be lawfully divided.[10] Lot splits require approval by the City of Maitland. (Doc. 11-2, p. 9). It is uncontested that Appellant did not seek such approval. (*Id.*). Furthermore, Appellant's partitioning of the Property violated Maitland's zoning code because the Unimproved Land did not conform to lot-width requirements and lacked street frontage. (*Id.*). It is uncontested that Appellant did not seek a variance from these restrictions. (*Id.*). As was the case in *Kellogg*, Appellant had not obtained a variance before filing his petition, so the Property must be considered

[10] At times, Appellant disputes the contention that he sought to divide the Property at all. He argues that he "never intended to do a 'lot-split' under the City Code. . . . The deed bifurcation was not intended to be a designation of his 0.5-acre exempt homestead, as the Bankruptcy Court erroneously assumed." (Doc. 19, p. 28). However, the Bankruptcy Court heard and accepted testimony that the City of Maitland does not consider the intent of a property owner when determining whether a particular act constitutes a lot split. (Doc. 11-2, p. 9). "Whatever [Appellant's] intentions may have been, 'the creation of a separate parcel did partition the site, creating a new lot." (*Id.*).

indivisible. Therefore, the Bankruptcy Court applied the correct legal standard and properly determined that Appellant impermissibly gerrymandered his homestead.

C. Whether the Bankruptcy Court erred by admitting the Appellees' expert witness

Appellant also makes a conclusory argument that the Bankruptcy Court "clearly erred" by admitting the expert testimony of James R. Dyer ("**Dyer**"), a former Vice President of First American Title Insurance Company ("**First American**"). (Doc. 19, p. 32).[11] Although framed as an attack on Dyer's qualifications as an expert, Appellant's brief makes no argument or cites any authority to support this bare assertion. Instead, Appellant seemingly takes issue with the credence given to Dyer's testimony.

The Bankruptcy Court properly accepted Dyer as an expert on title. A witness who is qualified by knowledge, skill, experience, training, or education may testify as an expert if: (1) his specialized knowledge will help the factfinder determine a fact in issue; (2) the testimony is based on sufficient facts or data; (3) the testimony is the product of reliable principles

[11] Appellant's brief refers to an incorrect standard of review. When considering a lower court's decision to admit or exclude expert testimony, courts apply an abuse-of-discretion standard. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999). Regardless, the Bankruptcy Court's admission of Dyer's expert testimony was proper.

and methods; and (4) the expert has reliably applied the principles and methods to the facts of the case. Fed. R. Evid. 702. At the time of trial, Dyer had approximately thirty-two years of experience as an underwriter and title examiner. (Doc. 11-2, p. 10). He was regularly called upon to make determinations as to the ownership of a specified parcel of real estate, including whether submerged land in Florida is subject to private ownership. (*Id.*). Dyer testified that he located an 1875 land patent conveying the Property from the United States to a private individual within Appellant's chain of title. (Doc. 11166, 253:1-256:17). This testimony was based upon a routine title search whose methodology was not meaningfully challenged by Appellant's brief.[12] Accordingly, the Bankruptcy Court did not abuse its discretion by admitting Dyer as an expert witness based on his experience.

Furthermore, the Bankruptcy Court found that Dyer's testimony and opinions were credible, despite minor discrepancies in the chain of title occurring prior to the 1875 land patent. This finding was sufficiently articulated and therefore was not clearly erroneous.

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[12] At trial, Appellant suggested that Dyer should have examined the original patent allegedly in the files of the Bureau of Land Management, rather than the transcript on file in Orange County, Florida. (Doc. 11-166, 297:16-24). Similarly, Appellant suggested that Dyer should have examined the "State Tract books," rather than First American's own set of "tract books." (*Id.* at 299:21-300:7). However, Appellant never produced any evidence to indicate a discrepancy between the corresponding documents.

D. Whether the Bankruptcy Court applied the correct legal standard in attributing the Unimproved Land to Appellant without conclusively determining ownership

Nearly a year after initiating this bankruptcy case, Appellant advanced the argument that the Unimproved Land cannot be included in his homestead because it is owned by the state of Florida. "It is settled law in this country that lands underlying navigable waters within a state belong to the state in its sovereign capacity. . . ." *United States v. Holt State Bank*, 270 U.S. 49, 54 (1926). Indeed, it is an "uncontroverted legal proposition that the State of Florida received title to all lands beneath navigable waters . . . as an incident of sovereignty, when it became a state in 1845." *Denson v. Stack*, 997 F.2d 1356, 1360 (11th Cir. 1993) (quoting *Coastal Petroleum Co. v. Am. Cyanamid* Co., 492 So.2d 339, 342 (Fla. 1986)) (internal quotations omitted). However, Appellant failed to produce evidence of Lake Minnehaha's navigability. Accordingly, the Bankruptcy Court declined to ignore the Unimproved Land's 150-year-long chain of title and Appellant's past and present conduct with respect to his Property.

1. Navigability of the Lake Minnehaha

As a threshold matter, Appellant failed to establish that Lake Minnehaha was a "navigable" body of water when Florida became a state in 1845. In Florida, a water body is navigable if it is "used, or susceptible

of being used, in its natural and ordinary condition as a highway for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *Baker v. State*, 87 So.2d 497, 498 (Fla. 1956). Absent evidence of navigability, a water body should be regarded as non-navigable. *Odom v. Deltona Corp.*, 341 So.2d 977, 988-89 (Fla. 1976) (citing *Feig v. Graves*, 100 So.2d 192, 194 (Fla. 2d DCA 1958)).

The Florida Supreme Court has held that "meandering"[13] creates a rebuttable presumption of navigability. *Odom*, 341 So.2d at 988-89. "The logical converse of this proposition . . . is that non-meandered lakes and ponds are rebuttably presumed non-navigable." *Id.* at 989. Appellant's expert, Dr. Joe Knetsch,[14] testified that Lake Minnehaha was never meandered. (Doc. 11-116, 396:14-16). Accordingly, Appellant had the burden to rebut the presumption that Lake Minnehaha was not navigable in 1845.

Appellant relied solely on the testimony of Dr. Knetsch to establish navigability. However, Dr. Knetsch

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[13] A meander survey is a series of line segments drawn to depict the sinuosities (*i.e.*, curves) of the shorelines of navigable water bodies. Such surveys approximate the water body's contours, thereby permitting estimation of its acreage. C. White, *A History of the Rectangular Survey System* (1983); David Guest, *The Ordinary High Water Boundary on Freshwater Lakes and Streams: Origin, Theory, and Constitutional Restrictions*, 6 Fla. St. U. J. LAND USE & ENVTL. L. 205, 222 (1991).

[14] Dr. Knetsch is a historian. He admitted that he is not qualified to render an opinion as to the title of privately owned land. (Doc. 11-116, 393:14-394:20). He did not review the chain of title in this case, nor did he provide an opinion on title. (*Id.*).

could not offer any direct evidence of such. In fact, Dr. Knetsch could not conclusively state that Lake Minnehaha even existed in 1845. (Doc. 11-166, 389:18-400:3). The earliest documentation of the lake was an 1879 map and an 1885 photograph. (*Id.* at 389:18-390:3). The lake was absent from earlier, more contemporaneous maps and photographs from the 1840s, 1850s, and 1860s. (*Id.* at 394:11-19).[15] Ultimately, Dr. Knetsch opined that Lake Minnehaha was "likely" a navigable body of water in 1845, but this fact could not be known for certain. (*Id.* at 383:11-384:7, 389:18-390:3).

In sum, testimony from Appellant's own expert showed that Lake Minnehaha was never meandered. This created a rebuttable presumption that the lake was non-navigable, and therefore would not be sovereign land owned by the state of Florida. Appellant could not produce any direct evidence—and produced only minimal indirect evidence—to support navigability. Thus, the presumption of non-navigability and its corollary of private ownership remain unrebutted.[16]

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[15] Dr. Knetsch noted that most maps from this period do not detail the southern parts of the state. (*Id.*).

[16] Appellees further argue that Fla. Stat. § 253.141 proves that the land beneath Lake Minnehaha is privately owned because the statute expressly provides that lakes included in grants by the United States prior to 1953 are not "navigable waters." Appellees presented compelling evidence that Lake Minnehaha fits squarely within the plain text of § 253.141(2). However, this Court—like the Bankruptcy Court—finds that delving into the applicability of § 253.141 and conclusively determining the

2. Chain of Title to the Unimproved Land

In declining to indulge Appellant's attempt to toss aside the Unimproved Land, the Bankruptcy Court emphasized that doing so would simultaneously toss aside "almost 150 years of record title history." (Doc. 11-2, p. 20). Appellee's expert identified an 1875 land patent that conveyed a tract of land containing Lake Minnehaha from the United States to a private individual within Appellant's chain of title. (Doc. 11-166, 253:1-256:17).[17] The land patent contained no reservation of public rights. (*Id.* at 255:3-5). Since 1875, title to the Property remained undisputed. Indeed, no one questioned the lake bottom's private ownership until it became clear that doing so would be in Appellant's—and only Appellant's—immediate financial interest.

To date, the state of Florida has never asserted any interest or claim to the land beneath Lake Minnehaha. The Bankruptcy Court correctly noted that there is no "authority that would allow it to place record title in the [Unimproved Land] into the state against its wishes, much less without its participation." (Doc. 11-2, p. 20). Appellant's response to this conclusion is to cast the state of Florida as an indispensable party and argue that the Bankruptcy Court's

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Unimproved Land's ownership is unnecessary to resolve the present dispute.

[17] "A patent is the highest evidence of title, and is conclusive as against the Government, and all claiming under junior patents or titles, until it is set aside or annulled by some judicial tribunal." *United States v. Stone*, 69 U.S. 525, 535 (1864).

failure to join the state to his bankruptcy case requires remand. (Doc. 19, pp. 24-25).

At the outset, Appellant's contention that the Bankruptcy Court erred by not joining the state of Florida proves too much. In declining to make a conclusive determination of title to the Unimproved Land, the Bankruptcy Court noted that it:

> cannot ignore the effect such a ruling might have on the interests of third parties who had no part—or even *notice*—of this proceeding. Other private owners of property on Lake Minnehaha, the City of Maitland and its residents, and the likely cadre of mortgage creditors, all could be adversely impacted. The only winner, it seems, would be [Appellant].

(Doc. 11-2, p. 20). If, as Appellant argues, this bankruptcy dispute required joinder of the state, then it required joinder of all of these other parties as well.

More importantly, Appellant's argument misstates the nature of the case and the Bankruptcy Court's holding. This proceeding was not and is not a quiet title action. The Bankruptcy Court did not "believe that it is the proper court to determine the issue of title to the [Unimproved Land] as between [Appellant] and the State of Florida." (Doc. 11-2, p. 20). Accordingly, the Bankruptcy Court reached a conclusion that adjudicated the narrow homestead issue without affecting the rights of any other party. *See* Fed. R. Civ. P. 19(a)(1). The Bankruptcy Court's decision to view the state's alleged interest in the land as a potential cloud on title

neither impairs the state's ability to assert a future sovereign ownership claim nor exposes Appellant to multiple or inconsistent liabilities. *Id.*

Appellant has always conceded that he had at least *some* interest in the Unimproved Land. (Doc. 19, pp. 11, 14, 36).[18] Likewise, Appellant argues that he never intended to divide the Property. (*Id.* at pp. 15, 35, 36). Therefore, the Bankruptcy Court held that, "for the purposes of this case and in determining [Appellant's] homestead exemption, the Court concludes that it must assume that [Appellant] owned all of the Property as a single indivisible parcel." (Doc. 11-2, pp. 20-21). The Bankruptcy Court further reasoned that the state's interest—if any—in the Unimproved Land was merely "a potential cloud on title." (*Id.* at p. 20). This Court agrees with the Bankruptcy Court's analysis and its ultimate conclusions.

3. Appellant's Treatment of the Unimproved Land

Appellant's own actions with respect to the Unimproved Land belie his protestations that he does not own it. From 2001 until 2015, Appellant held title to the Property as an undivided, 2.95-acre parcel. On the eve of his bankruptcy filing, Appellant attempted to perform an illegal lot split. The Bankruptcy Court found that Appellant's initial explanations for doing so were incredible, and further noted that the state's

[18] Appellant does not explain how exactly he could have an interest in land which is wholly owned by the state.

alleged ownership of the Unimproved Land was not one of them. Indeed, Appellant continued to claim ownership over the entire property—albeit as two parcels—even after the lot split. As late as his Rule 2004 examination on November 14, 2015, Appellant continued to maintain that he held title to the land beneath Lake Minnehaha. (Doc. 29-18, p. 4). Appellant did not raise a sovereign ownership argument until July 5, 2016—nearly seven months later.

The Bankruptcy Court found that Appellant's representations throughout these proceedings undermine his argument that he does not own any of the lakebed. The most notable contradiction is Appellant's claimed homestead exemption itself. His alleged homestead consists of all upland property *and* a small portion of beachfront and an area surrounding the dock and boathouse—that is, submerged land. (Doc. 11-2, p. 6 n.30). The Bankruptcy Court emphasized, "[Appellant's] partition of the Property did not use the ordinary high-water mark as the boundary line in the legal descriptions in the Warranty Deeds, rather he reserved to the [homestead] (and therefore to himself) that small portion of the Submerged Land that he considered particularly valuable." (*Id.*).[19] The Bankruptcy Court

[19] Appellant concedes that he "also included a small portion of the submerged land" in his homestead property. (Doc. 19, p. 14 n.3). He dismisses his claimed ownership of submerged land as a means to "protect it from Creditors attempting to interfere with his riparian rights." (*Id.*). However, elsewhere in his brief, Appellant displays an awareness that "[I]akefront property that stops at the high water mark has the same riparian rights . . . as lots

interpreted this inconsistency as evidence that Appellant did not truly believe that the submerged land belonged to the state of Florida. (*Id.* at p. 20).

Furthermore, the Bankruptcy Court noted that Appellant's sworn Bankruptcy Schedules list both the Improved Land and Unimproved Land as owned by his revocable trust. Even after adopting the novel theory that the state owned the lakebed, Appellant never amended his schedules to disclaim ownership. (*Id*.). He explains the failure to amend as follows:

> Nowhere in the Bankruptcy Schedules did [Appellant] claim to have full, fee-simple rights to the Submerged Land. Rather, the Bankruptcy Schedule A form requires the debtor to 'list all real property in which the debtor has <u>any legal, equitable, or future interest</u>. . . .' That is what [Appellant] did. He listed the real property described in the deeds that had been conveyed to him or his trust, and those deeds were made 'subject to' all restrictions and matters of record, or other similar language.

(Doc. 34, p. 7) (internal citations omitted). This admission is entirely consistent with the Bankruptcy Court's decision to attribute the entire Property to Appellant while regarding the alleged sovereign ownership as a "potential cloud on title." (Doc. 11-2, p. 20).

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that extend into the middle of the lake." (*Id.* at p. 16). Accordingly, the Court finds Appellant's stated explanation implausible.

In addition to his representations in the instant litigation, Appellant purported to own the Unimproved Land in his dealings with third parties.[20] First, when Appellant obtained a home-equity line of credit, he represented that the property securing the loan was the entire 2.95-acre parcel. (Doc. 11-166, 110:16-23; 111:3-6). Second, Appellant paid taxes on the Property as a single parcel. (*Id.* at 87:4-88:4; 108:21-109:18).[21] Even after the lot split, both parcels received tax assessments for which Appellant was responsible. (Doc. 34, pp. 9-10).[22] Third, following the Bankruptcy Court's decision, Appellant sold the *entire* Property. (Doc. 37). This Court has already taken judicial notice of the Trustee's Deed specifically conveying *both* the

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[20] Appellant disputes this finding. He testified that he told "several people" that he "[doesn't] really have any ownership below the normal high watermark." (Doc. 11-166, 111:9-112:10). When pressed, however, he could not identify any such individuals. (*Id*.). Moreover, this statement directly contradicts other testimony by Appellant. First, as discussed, he explicitly claimed ownership of land below the high watermark. (Doc. 19, p. 14 n.3). Second, he testified, "if somebody asked me, how big your lot is, I'll tell them it's three acres." (Doc. 11-166, 109:22-23).

[21] Appellant claimed that he believed that the taxes were assessed only as to the Improved Land. The Bankruptcy Court found this incredible, noting that Appellant's "admitted expertise in matters of real estate belies his assertions of ignorance." (Doc. 11-2, p 19).

[22] Appellant points out that the Orange County Property Appraiser valued the Unimproved Land at $100.00 and imposed a property tax of $0.00. This actually weakens Appellant's sovereign ownership argument. The Unimproved Land's negligible tax burden only underscores the fact that Appellant was *theoretically* liable for any and all property taxes. Presumably, the state would not appraise and assess taxes on its own property.

Improved Land ("Parcel 1") *and* the Unimproved Land ("Parcel 2"). (Doc. 32, pp. 5-7).[23]

Overall, Appellant disclaimed ownership of the Unimproved Land only after his earlier attempt to gerrymander his Property failed—and even then, only when it suited his interests. The Bankruptcy Court was unpersuaded by Appellant's efforts to explain away his shifting positions and transparent gamesmanship. This Court agrees with the Bankruptcy Court's refusal to "give support to [Appellant's] blatant and inequitable actions." (Doc. 11-2, p. 19).[24]

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[23] The deed includes language that the transfer was made "SUBJECT to covenants, restrictions, easements of record and taxes for the current year." (Doc. 32, pp. 5-7). Appellant claims this language is broad enough to include sovereign rights and therefore indicates that the buyers were not actually taking title to the parcel specifically identified in the instrument. If this is true, the Court ponders why Appellant would purport to sell the Unimproved Land at all.

[24] Appellant characterizes the Bankruptcy Court's holding as a punishment for perceived misconduct. (Doc. 34, p. 20). The Court recognizes that such a practice is impermissible, *see Law v. Siegel*, 571 U.S. 415 (2014), but is unpersuaded that it occurred in this case. Regardless, assuming *arguendo* that the Bankruptcy Court violated *Law v. Siegel* by declining to determine ownership of the submerged land "as a matter of equity," that was one of several well-reasoned and legally independent justifications for the court's holding.

E. Whether the Bankruptcy Court applied the correct legal standard to allocate the homestead sale proceeds

Appellant's final argument is that the Bankruptcy Court applied an incorrect standard to allocate the homestead sale proceeds. When a debtor claims as his homestead a residence that sits on land exceeding the one-half acre allowance for a municipal homestead, the entire parcel is not exempt. *See Kellogg*, 197 F.3d at 1121. However, a debtor is entitled to claim any one-half acre portion of the parcel as exempt, as long as the remaining portion has legal and practical use. *See Englander*, 95 F.3d 1032. In contrast, when a parcel exceeds the acreage limitation and is indivisible—as is the case here—the appropriate means by which to honor the claimed homestead, while also providing value to creditors, is to direct a sale and allocate the net proceeds as between the debtor and the estate. *See id.; Kellogg*, 197 F.3d at 1122. However, no Eleventh Circuit case explains *how* such an allocation is to be made.[25]

Appellees argued, and the Bankruptcy Court agreed, that Florida law requires an allocation of the net sale proceeds as a percentage of the allowed exempt acreage to the total acreage sold. Applying this formula, Appellant is entitled to 16.9% of the net proceeds from the sale of the Property. In contrast,

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[25] Appellant's contention that the Bankruptcy Court's allocation was "contrary to binding Eleventh Circuit precedent" is incorrect. For the reasons stated below, Appellant mischaracterizes the holdings of *Kellogg* and *Englander*.

Appellant's proposed methodology for determining the Trustee's share would require a determination of the value per square foot of the subject real property in its unimproved state—thereby allowing Appellant to retain the full value of his residence—and then multiply that value by the number of square feet by which the Property exceeds the allowed acreage exemption.

The parties identify a single case interpreting the Florida homestead exemption in these circumstances: *Quraeshi v. Dzikowski (In re Quareshi)*, 289 B.R. 240 (S.D. Fla. 2002). The *Quareshi* court first noted that,

> There is apparently no controlling Eleventh Circuit case law or Florida case law dealing with explicitly whether, after sale of a debtor's property in which only a portion can be claimed as homestead, the debtor's homestead-exempt funds should be calculated as a portion of the net proceeds of the sale (after certain other liens have been paid) or based upon the gross sale price of the entire property.

Id. at 244. The court then reasoned that the constitutional homestead exemption specifically excludes a small number of debts that are connected to homestead property—for example, mortgages, real property taxes, and repairs to improve the land. *Id.* Because the homestead exemption does not shield debtors from those particular obligations, proceeds from the sale of an oversized and indivisible homestead should be allocated to the debtor only *after* such obligations have been satisfied. Indeed, "only the proceeds remaining

after those specific debts are paid qualify as homestead." *Id.* The *Quraeshi* court concluded that, "[A] debtor's homestead exemption [extends] to a *pro rata* portion of the net proceeds of a sale of debtor's property, *based on his acreage share of the property sold*, rather than a *pro rata* portion of the gross sales price." *Id.* (emphasis added).

The Bankruptcy Court noted that, "[T]he *Quraeshi* court was not faced with the precise question here, rather the court addressed the related inquiry of whether the apportionment was to be based upon the net proceeds of the sale or the gross sale price." (Doc. 11-2, p. 22). However, the Bankruptcy Court nonetheless concluded that *Quraeshi* supports the proposition that "the proper method of allocating the net proceeds in these circumstances should be a simple percentage of the exempt acreage to the total acreage of the subject property." (*Id.*). This Court agrees.

Appellant makes the borderline misleading claim that Eleventh Circuit precedent required the Bankruptcy Court to apply his preferred apportionment method—namely, the one accepted by the Eighth Circuit in *O'Brien v. Heggen*, 705 F.2d 1001 (8th Cir. 1983).[26] He is incorrect. The Eleventh Circuit has never cited *O'Brien* as authority relating to the allocation of sale proceeds. Indeed, the *Kellogg* court specified that

[26] The Court notes that Appellant softened his characterization of *Kellogg* and *Englander* between his Initial Brief and his Reply Brief. *Compare* (Doc. 19, pp. 54, 59) ("binding Eleventh Circuit precedent") *with* (Doc. 34, p. 26) ("[T]he Eleventh Circuit has indicated its approval of the allocation method in *O'Brien.*").

its earlier *Englander* opinion relied on *O'Brien* for the proposition that "partition was equitable and proper when the debtor's homestead exceeded the amount allowed in the Florida constitution and was indivisible." 197 F.3d at 1121. The Eleventh Circuit has never discussed, let alone adopted, the "unimproved land" valuation method utilized in *O'Brien. See Englander*, 95. F.3d at 1032.[27] Furthermore, not even the *O'Brien* opinion required the Bankruptcy Court to apply Appellant's preferred method—the Eighth Circuit simply held that the lower court's apportionment was not clearly erroneous. 705 F.2d at 1003-04.

According to Appellant, "*O'Brien* better approximates the result that would occur in the ordinary case (where the nonexempt property can be sold separately)[28] and is more consistent with the public policy behind the homestead exemption." (Doc. 19, p. 59). However, this argument misunderstands the fundamental rationale behind the homestead exemption. The constitutional provision reflects a reasoned policy judgment that strikes a balance between the rights of

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[27] In *Quraeshi*, the district court affirmatively declined to apply *O'Brien*, noting that, "As an initial matter, this court, in interpreting the Florida homestead provision, is hardly bound by a case from another federal circuit interpreting the Minnesota homestead provision and Minnesota case law from almost twenty years ago." 289 B.R. at 245 n.1. Among the differences between the Florida and Minnesota homestead provisions, the current Minnesota statute imposes a $420,000 exemption limit. Minn. Stat. § 510.02(2).

[28] Appellant produces no evidence to support his assumption that most properties can be legally subdivided and that his case is a rare exception.

creditors and preservation of the family *home*. "The exemption is intended to protect the family *home* and not to unjustly impose upon the rights of creditors." *In re Wierschem*, 152 B.R. 345, 349 (M.D. Fla. 1993) (emphasis added) (citing *Hillsborough Inv. Co. v. Wilcox*, 13 So.2d 448, 451 (Fla. 1943)). Where preservation of the family home is impossible—that is, where the property exceeds the constitutional acreage limitation and is indivisible—the homestead exemption does not thereby become a tool for concentrating the family home's value.

The Bankruptcy Court correctly observed that Appellant's proposed method of apportionment would "necessarily affect a windfall to a debtor while unjustly prejudicing the rights of creditors." (Doc. 11-2, p. 23). Conversely, Appellant responds that the Bankruptcy Court's holding instead produced a windfall for his creditors. (Doc. 34, p. 29). Notwithstanding the fact that repayment of legitimate debts hardly constitutes a windfall, the homestead exemption is not intended to protect a debtor's standard of living. (Doc. 11-2, p. 23) (citing *Smith v. Guckenheimer*, 27 So. 900, 911 (Fla. 1900)). "The purpose of Florida's homestead provision is to protect families from destitution and want by preserving their homes." *Kellogg*, 197 F.3d at 1120. Under the Bankruptcy Court's allocation method, Appellant will retain approximately $289,000 as exempt homestead funds. (Doc. 29, p. 54 n.46). The Court believes that this outcome will leave Appellant sufficiently protected from destitution and want.

V. Conclusion

For the foregoing reasons, this Court holds that:

1. The Bankruptcy Court did not clearly err in finding that Appellant's actions and Bankruptcy Schedules were misleading and a species of fraud.

2. The Bankruptcy Court applied the correct legal standard to determine that Appellant "gerrymandered" his homestead.

3. The Bankruptcy Court did not err by admitting the Appellees' expert witness.

4. The Bankruptcy Court applied the correct legal standard in attributing the Unimproved Land to Appellant without conclusively determining ownership.

5. The Bankruptcy Court applied the correct legal standard to allocate the homestead sale proceeds.

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. The final order (Doc. 11-2) of the Bankruptcy Court is **AFFIRMED**.

2. The appeal is **DISMISSED**.

3. The Clerk of Court is **DIRECTED** to close the file.

DONE AND ORDERED in Orlando, Florida, on December 20, 2019.

/s/ Paul G. Byron
PAUL G. BYRON
UNITED STATES
DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Parties

ORDERED.

Dated: April 03, 2019 [SEAL]

/s/ Cynthia C. Jackson
Cynthia C. Jackson
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
www.flmb.uscourts.gov

In re:

WILLIAM W. COLE, JR.,
Debtor. /

Case No.
6:15-bk-06458-CCJ

MEMORANDUM DECISION SUSTAINING, IN PART, OBJECTIONS TO DEBTOR'S CLAIM OF EXEMPTION
(Homestead Exemption)

This case came before the Court for a two-day trial on Creditors PRN Real Estate & Investments, Ltd. and Nancy A. Rossman's (collectively "PRN") Objection to Debtor's Claimed Homestead Exemption (Doc. No. 104) ("PRN's Objection") and Chapter 7 Trustee Lori Patton's (the "Trustee") Objection to Debtor's Claim of Homestead Exemption (Doc. No. 116) ("Trustee's Objection") (together, the "Objections"). After considering the evidence admitted at trial and the governing case law, the Court concludes that the Objections should be sustained in part. Debtor William W. Cole, Jr. ("Debtor" or "Mr. Cole") will not be denied his homestead

exemption outright. But Mr. Cole's exemption must be limited to a half of an acre out of a total of 2.95 acres.

Jurisdiction

This Court has jurisdiction over this proceeding under 28 U.S.C. §§ 157 and 1334(b). This is a core proceeding under 28 U.S.C. § 157(b)(2)(B).

The Real Property

The real property at issue in this matter is located at 608 Bentley Lane, Maitland, Florida, 32751 (the "Property"). The Debtor owns the Property under a revocable self-settled trust. Joint Pretrial Statement (hereafter "Jnt. Stip.") ¶¶ 2–8. (Doc. No. 373). The Property is located within the City of Maitland, Florida and consists of approximately 2.95 acres, which sits upon and extends into Lake Minnehaha. Jnt. Stip. ¶¶ 9, 16. The Court will refer to the approximate .765 acres of the parcel that is above the ordinary high water mark and upon which Debtor's 10,000 square foot home is located as the "Upland Property." The Court will refer to the remaining 2.185 acres of the parcel that is below the ordinary high water mark and which extends into Lake Minnehaha as the "Submerged Land." *See* Jnt. Stip. ¶ 9.

Issues for Decision

1. Whether the Debtor's homestead exemption should be denied outright because of the Debtor's prepetition efforts to "gerrymander" the exemption.[1]

2. If the Debtor is entitled to claim a homestead exemption at all, (a) whether the Submerged Land should be considered in determining the total acreage of the Debtor's homestead and (b) the proper method of allocating value to the homestead exemption.[2]

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[1] Gerrymandering is more frequently used in the political arena in which the term originated. The term is used to describe the manipulation of the geographic boundaries defining an electoral district in order to favor one political party. In the homestead context, it is used to describe a debtor's designation of his exempt homestead within a parcel of real property that exceeds the allowed acreage limitation, with the purpose of either concentrating value within the portion claimed as exempt or rendering valueless that portion not claimed as exempt.

[2] Since trial, the Court entered an order upon joint motion of the Trustee and the Debtor authorizing the sale of the Property subject to specified terms and conditions. (Doc. No. 632). Accordingly, the Court need not address the issue of whether the Court may order a sale of the Property. Debtor acknowledges that the law in this circuit allows the sale by a bankruptcy trustee of partially-exempt property that is indivisible for purposes of liquidating the estate's interest in the property. However, he suggests that the Supreme Court's holding in *Law v. Siegel*, 571 U.S. 415 (2014), might alter the law in this circuit as to the forced sale of a homestead. The Court respectfully disagrees as *Siegel* is distinguishable. First, a sale in this case would not be directed as a sanction for alleged misconduct. Second, and more importantly, the Court would not need to invoke § 105(a) of the Bankruptcy Code or its inherent power to order the sale as Florida law, which governs the claim of exemption, permits a forced sale in these

Governing Standards

The procedures for claiming any property as exempt and for the resolution of any objection to the exemption are governed by Rule 4003 of the Federal Rules of Bankruptcy Procedure ("Rule(s)"). Because a debtor's claim of exemption is presumptively valid under 11 U.S.C. § 522(1),[3] the party objecting to a claimed exemption bears the burden to show that the exemption is not properly claimed. Rule 4003(c); *see*, *e.g.*, *Silliman v. Cassell (In re Cassell)*, 688 F.3d 1291, 1294 (11th Cir. 2012); *In re Gentry*, 459 B.R. 861, 863 (Bankr. M.D. Fla. 2011).

At issue here is the Debtor's claim of exemption in his homestead, asserted under Article X § 4 of the Florida Constitution, which provides in part:

> (a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for the house, field or other labor performed on the realty, the following property owned by a natural person:
>
> (1) a homestead . . . if located within a municipality, to the extent of one-half acre of

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circumstances. *See Kellogg v. Schreiber (In re Kellogg)*, 197 F.3d 1116 (11th Cir. 1999).

[3] References are to 11 U.S.C. §§ 101–1532 ("Code" or "Bankruptcy Code"), unless indicated otherwise.

> contiguous land, upon which the exemption shall be limited to the residence of the owner or his family.

This exemption from forced sale is "designed to protect and preserve the family home."[4] It is often said that, "[a]s a matter of public policy, the Florida homestead exemption should be liberally construed in favor of the party seeking the exemption."[5] At the same time, a court should not construe the exemption "so liberally that they become 'instruments of fraud, an imposition on creditors, or a means to escape honest debts.' "[6]

The relevant date for determining whether a debtor is entitled to a claim of exemption is the petition date.[7]

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[4] *In re Ballato*, 318 B.R. 205, 209 (Bankr. M.D. Fla. 2004); *See also Englander v. Mills (In re Englander)*, 95 F.3d 1028, 1031 (11th Cir. 1996) ("Florida case law dictates that the homestead exemption laws be liberally applied to the end that the family shall have shelter and shall not be reduced to absolute destitution.").

[5] *In re Aloisi*, 261 B.R. 504, 511 (Bankr. M.D. Fla. 2001).

[6] *Kellogg v. Schreiber (In re Kellogg)*, 197 F.3d 1116, 1120 (11th Cir. 1999) (quoting *Frase v. Branch*, 362 So. 2d 317, 318 (Fla. Dist. Ct. App. 1978)).

[7] *See In re Williams*, 427 B.R. 541, 547 (Bankr. M.D. Fla. 2010); *In re Vick*, No. 07-10844-BKC-AJC, 2008 WL 2444526, at *2 (Bankr. S.D. Fla. June 16, 2008) (listing cases).

FINDINGS OF FACT[8]

A. *Debtor's Prepetition Acts and Statements as to the Property*

Mr. Cole acquired the Property in 2001.[9] He and his wife Terre Cole moved onto the Property in 2002 or 2003, after construction of the residence.[10] Except for a period between May 2009 and November 2014, Mr. Cole has lived on the Property since he acquired it. At all relevant times, either Mr. Cole or his family have resided on the Property.[11]

Mr. Cole holds title to the Property under a self-settled revocable trust, which held title to the Property—as a single intact parcel—in a series of deeds until approximately three months prior to the petition date.[12] In May 2015, Mr. and Mrs. Cole, as co-trustees, executed and recorded a special warranty deed conveying—from the trust to the trust—the Property less the Upland Property and a small portion of the Submerged Land containing, primarily, a dock and boathouse.[13] In June 2015, Mr. and Mrs. Cole executed and recorded a second special warranty deed to correct an error in the

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[8] PRN's Exhibits (Doc. Nos. 367, 382, and 397) shall be noted as "Cr. Ex." or "Cr. Am. Ex." Debtor's Exhibits (Doc. No. 369) shall be noted at "D. Ex." References to the trial transcript shall be noted as "Tr." (Doc. No. 416).

[9] Tr. 73:5–7, 131:1–3; Jnt. Stip. ¶ 7.

[10] Jnt. Stip. ¶ 15.

[11] Jnt. Stip. ¶¶ 3, 17, 18.

[12] Jnt. Stip. ¶ 7; Tr. 72:10–17; Cr. Exs. 4Z–4CC; Cr. Am. Ex. 10.

[13] Cr. Exs. 4DD and 15; Tr. 93:5–20.

May deed. The June deed conveyed the Submerged Land less the same small portion of the beachfront and the area surrounding the dock and boathouse, again from the trust to the trust.[14] The Submerged Land does not front a road and is accessible only by water.[15]

Mr. Cole designated the boundary line used to split the Property. In late January 2015, Mr. Cole emailed Kevin Cavone, a surveyor, a copy of an old survey of the Property and asked that Mr. Cavone "have [it] broken out into two surveys."[16] Mr. Cavone's surveys were used to prepare the legal descriptions in the May and June 2015 special warranty deeds.[17]

At various times, Mr. and Mrs. Cole have listed the Property for sale.[18] When listed, the Multiple Listing Service listing described the property for sale as 2.95 acres.[19]

In May 2009, Mr. and Mrs. Cole executed an "Affidavit of Trustee" in conjunction with a request for Fidelity National Title Insurance Company to issue a title insurance policy on the Property. The affidavit provides a legal description consisting of the entire Property and states the Property is the "homestead property" of the trust's settlor (Mr. Cole) or his family.

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[14] Cr. Exs. 4EE; Tr. 96:3–13.

[15] Jnt. Stip. ¶ 20.

[16] Cr. Am. Ex. 10; Jnt. Stip. ¶ 19.

[17] Tr. 95:23–96:2.

[18] Jnt. Stip. ¶ 21; Tr. 78:11–81:25.

[19] Tr. 81:16–84:11; Cr. Ex. 9.

No reference is made to a potential interest held by the State of Florida to the Submerged Land.[20]

Mr. Cole has paid the real property taxes assessed against the Property since acquiring it through the petition date. The Property is taxed as a single parcel.[21] In a November 2013 email to Mr. Cole, Mrs. Cole questioned whether they were paying inflated real estate taxes based upon the tax rolls listing the Property at 2.9 acres. Mr. Cole responded: "We are not overpaying. It shows it is on the water."[22]

B. *Debtor's Schedules*

Mr. Cole filed this chapter 7 case on July 27, 2015.[23] His sworn schedules were timely filed on August 10, 2015.[24] To date, Mr. Cole has never amended his schedules.

Schedule A lists two parcels of real property. First, "608 Bentley Lane, Maitland, Florida 32751", in which Mr. Cole claimed ownership via the trust and homestead status. Mr. Cole estimates the value of this parcel at $2.5 million. Second, a parcel in Orange County described in an attached exhibit, "A-1", in which Mr. Cole again claimed ownership under the trust but no homestead status. Mr. Cole estimates the value of this parcel

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[20] Cr. Ex. 13 and Ex. 13 ¶¶ 3–5; Tr. 76:8–78:8.

[21] Tr. 85:4–86:4; Cr. Ex. 8.

[22] Cr. Ex. 11; Tr. 86:18–87:7.

[23] D. Ex. 1; Jnt. Stip. ¶ 1.

[24] D. Ex. 2; Jnt. Stip. ¶ 4.

at $1,000. Exhibit A-1 contains a legal description which is identical to the legal description contained in the June 2015 special warranty deed.[25]

Schedule C claims the "608 Bentley Lane, Maitland, Florida 32751" parcel as exempt pursuant to Article X § 4(a)(1) of the Florida Constitution. Mr. Cole claims the "Full Value" as exempt, which, consistent with his Schedule A, is estimated at $2.5 million.[26]

Neither Schedule A, including Exhibit A-1, nor Schedule C make any reference to the size of the parcels.[27] Nor do they indicate that the parcels are contiguous.

C. *Debtor's Rule 2004 Examination Testimony Regarding the Splitting of the Property*

Asked to explain the reason for executing the May and June 2015 special warranty deeds (together, the "Warranty Deeds"), Mr. Cole testified in his 2004 exam that it was "just to call out what was useable land and what was unusable land."[28] He added that there was also some concern about potential liability given that a water ski course laid within the waters over the Submerged Land. This threat of liability notwithstanding,

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[25] D. Ex. 2; Cr. Ex. 4EE; Tr. 96:9–13.

[26] D. Ex. 2.

[27] Notwithstanding the lack of specificity in his Schedule C, Mr. Cole acknowledges that his claim of exemption is limited to one-half acre. Jnt. Stip. ¶ 14.

[28] Cr. Am. Ex. 12, Transcript of Mr. Cole's 2004 Exam ("2004 Exam") 20:9–12.

Mr. Cole acknowledged that the Warranty Deeds did not change the ownership of the Property.[29]

As to the lake parcel identified in Exhibit A-1 of his Schedule A,[30] Mr. Cole admitted that the parcel was not accessible by land and did not front a road.[31] He evaded labeling the Submerged Land as unmarketable yet acknowledged it "[w]ouldn't have any value to me."[32] Asked, hypothetically, if he would ever sell the Submerged Land apart from the Upland Property, Mr. Cole testified: "Not without some compelling reason."[33]

Mr. Cole first stated that he believed that the City of Maitland would not care if he tried to sell the Submerged Land separately from the Upland Property. But he quickly qualified this statement, noting that the City had cared (and disallowed it) when he had shortly before requested to split a lot on the opposite side of Lake Minnehaha. Mr. Cole further claimed that

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[29] Cr. Am. Ex. 12, 2004 Exam 20:15–24.

[30] As noted above, the lake parcel created by the June 2015 special warranty deed and described in Exhibit A-1 to Schedule A consists of the submerged land below the ordinary high water mark less a small portion of beachfront and an area surrounding the dock and boathouse. The Court nevertheless, for ease of analysis, refers to this parcel as the Submerged Land. The Court adds this note to make clear that Debtor's partition of the Property did not use the ordinary high water mark as the boundary line in the legal descriptions in the Warranty Deeds, rather he reserved to the Upland Property (and therefore to himself) that small portion of the Submerged Land that he considered particularly valuable.

[31] Cr. Am. Ex. 12, 2004 Exam 117:1–6.

[32] Cr. Am. Ex. 12, 2004 Exam 117:7–10.

[33] Cr. Am. Ex. 12, 2004 Exam 117:16–18.

at one point, the City had suggested he deed the submerged lands to the State of Florida. He could provide no details of this claim, other than to say that the matter "came up" at a zoning hearing.[34]

D. *Testimony Adduced at Trial*

1. Debtor William W. Cole, Jr.

Debtor, who holds a bachelor's in accounting from the University of Florida, has been a real estate investor and developer for more than twenty years. Mr. Cole has experience reviewing real estate documents such as surveys, tax maps, title commitments, and title insurance policies.[35]

Mr. Cole identified several errors in his bankruptcy schedules and initial disclosures. But he indicated no errors on his Schedule A or C.[36] Mr. Cole acknowledged that by recording the Warranty Deeds, he warranted "to the world" that the trust owned the Property and more specifically, the Submerged Land. The Warranty Deeds contain no indication that the trust lacked any interest or right in the Property or that the Property was held in any lessor capacity other than as full title owner.[37]

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[34] Cr. Am. Ex. 12, 2004 Exam 117:19–118:25.

[35] Tr. 66:14–67:15.

[36] Tr. 70:3–71:12; *see* Tr. 127:6–12 (stating there were no inaccuracies on Schedule A except for "possibly overstating the values").

[37] Tr. 72:18–73:4.

As to real estate taxes, Mr. Cole claimed that he believed that the taxes were assessed only as to the Upland Property. But he acknowledged that the Property was taxed as a single parcel.[38]

Mr. Cole attended a mediation of his dispute with PRN on January 26, 2015. The mediation resulted in an impasse. Two days later, Mr. Cole sent the email to Mr. Cavone requesting the old survey of the Property be divided in two.[39] At trial, Mr. Cole explained his email and the "unusual request" it contained as follows:

> Because I was trying to identify since the mediation didn't go well, I wasn't quite sure what was going to happen, I still hoped we were going to settle, but began a process of identifying what I considered to be my homestead parcel.[40]

Mr. Cole admitted that he directed Mr. Cavone to use a boundary line other than ordinary high water mark because he wanted to ensure his boathouse was protected.[41] Mr. Cole discounted the suggestion that his request to divide the survey was made solely for purposes of "pre-bankruptcy planning." But he did acknowledge that bankruptcy might have been *one* of the reasons.[42]

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[38] Tr. 85:25–86:4, 105:21–106:18.

[39] Tr. 88:22–89:5, 90:3–7.

[40] Tr. 91:11–18.

[41] Tr. 93:5–20.

[42] Tr. 93:21–94:3; *see also* Tr. 115:14–22.

Regarding the splitting of the Property, Mr. Cole claimed he did not intend to create a second lot and denied that he did so pursuant to the City's code.[43] He admitted that he did not obtain any type of approval from the City before executing the Warranty Deeds.[44] And in contrast to his Rule 2004 testimony, Mr. Cole admitted that the Submerged Land, by itself, was not marketable.[45] Mr. Cole characterized his execution of the Warranty Deeds as a "bifurcation of a deed."[46] Despite his experience obtaining a variance in order to split similar parcels, he did not seek a variance in regard to the Property because "[he] didn't think it was necessary."[47]

Mr. Cole acknowledged that he made no claim that the State of Florida owned the Submerged Land at his Rule 2004 examination.[48] He also acknowledged that in executing the Warranty Deeds, he deeded the land, effectively, back to himself rather than to the State of Florida.[49] These acknowledgments notwithstanding, Mr. Cole stated that his claim that the state owned the Submerged Land was not newly invented, but rather he had shared his belief with "several people." The only

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[43] Tr. 92:22–93:4, 97:14–17.

[44] Tr. 96:19–22.

[45] Tr. 97:2–4.

[46] Tr. 97:23–98:15.

[47] Tr. 99:16–100:1

[48] Tr. 103:15–104:7.

[49] Tr. 106:24–107:4.

individual he could specifically identify, however, was counsel.[50]

Mr. Cole pointed to the sovereignty exception in his title insurance policy for the Property as the basis of his belief that the state owned the Submerged Land.[51] Though he acknowledged he could have asked to have the exception removed, he did not do so because, in his experience as a developer, title insurance companies would not remove such an exception.[52] Mr. Cole could not say if in those prior cases where an insurer denied his request to remove a sovereignty exception, there was, as here, a patent out of the United States without a reservation of rights involved.[53]

2. Sara Blanchard, Chief Planner, City of Maitland

Ms. Blanchard, who holds a master's degree in Urban and Regional Studies, has been employed by the City of Maitland for thirty-two years. Ms. Blanchard is currently the City's Chief Planner and has served also as a planner, zoning administrator, and senior planner. In her current position, Ms. Blanchard oversees land development and growth management issues for the City, including reviewing proposed construction projects. She drafts ordinances related to these issues and

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[50] Tr. 109:9–110:23.

[51] Tr. 133:5–135:2, 148:6–14; *see* D. Ex. 3.

[52] Tr. 107:10–108:2.

[53] Tr. 156:18–157:8.

is the representative to the City's planning and zoning commission.[54]

Ms. Blanchard testified that where a property owner attempts to divide a single parcel of real estate into two, the City refers to this partitioning as a "lot split." The City's code requires that a lot split be approved by the City, except where the lot split involves a transfer of small portions of land between adjoining property owners.[55] There is a varying degree of process involved in obtaining the City's approval. Once approved, the property may be split and recorded in the public records.[56]

As part of her regular duties, Ms. Blanchard is involved in the review of proposed lot splits. In this regard, Ms. Blanchard is responsible for ensuring that a proposed lot split is consistent with the requirements of the City's code and determining whether a variance is needed.[57] She is also responsible for preparing "zoning confirmation letters," which are letters that put forth the City's position on questions posed in matters effecting the zoning of real property within the City.[58] Two zoning confirmation letters authored by Ms. Blanchard, one dated May 5, 2016, and addressed to PRN's counsel and a second dated August 12, 2016,

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[54] Tr. 169:4–171:15.

[55] Tr. 171:20–172:17.

[56] Tr. 172:18–173:5.

[57] Tr. 173:6–17.

[58] Tr. 175:6–176:16.

and addressed to Debtor's counsel, were admitted at trial.[59]

Consistent with her May 5 letter, Ms. Blanchard testified that Debtor's splitting of the Property would have required City approval.[60] Debtor did not seek the City's approval before executing and recording the Warranty Deeds, nor had the City taken any step in any process that might lead to granting its approval.[61] Ms. Blanchard testified that Debtor's partitioning of the Property did not conform with the City code's lot width requirements and, therefore, a variance would be needed.[62] It is undisputed that Debtor did not apply for a variance.[63] At a minimum, Debtor's splitting of the Property violated Section 21-6 of the City's zoning code because of the failure to adhere to lot width requirements.[64] The Submerged Land specifically failed to comply with applicable lot width requirements because it lacked any street frontage.[65]

Ms. Blanchard testified that the intent of a property owner is not considered in determining whether a particular act constitutes a lot split.[66] Whatever Mr.

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[59] Cr. Ex. 24 (May 5, 2016 letter to Mr. Elkins) and Cr. Ex. 39 (Aug. 12, 2016 letter to Mr. Herron).

[60] Tr. 177:23–25.

[61] Tr. 178:4–18.

[62] Tr. 178:19–24.

[63] Tr. 179:24–180:3.

[64] Tr. 179:2–20; *see* Cr. Ex. 24 (suggesting Debtor's actions also violated Section 7.5–90 and Section 16–44).

[65] Tr. 193:4–16; *see also* Tr. 179:2–8, 185:8–11.

[66] Tr. 180:9–12.

Cole's intentions may have been, "the creation of a separate parcel did partition the site, creating a new lot."[67]

3. James R. Dyer, Vice President, First American Title

Mr. Dyer, a Vice President with First American Title, has been employed as an underwriter and title examiner for about 32 years. He is certified as a land searcher by the Florida Land Title Association and is licensed to sign title policies and commitments.[68] Mr. Dyer is regularly called upon to make determinations as to the ownership of a specified parcel of real estate, primarily for the purpose of risk assessment. His experience includes determinations of whether submerged land in Florida is subject to private ownership. Mr. Dyer has never had one of his title determinations rejected by a court of law.[69] The court accepts Mr. Dyer as an expert on title.

As to the Submerged Land, Mr. Dyer opined that the parcel was owned by Mr. and Mrs. Cole as co-trustees of the trust and not by the State of Florida.[70] His opinion is based upon a chain of title going back to an indenture dated June 4, 1873, between Robert C. Parton, as grantor, and Richard H. Marks, as grantee.[71]

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[67] Cr. Ex. 39.

[68] Tr. 207:6–210:17.

[69] Tr. 210:20–25, 213:8–214:1, 214:21–24.

[70] Tr. 237:11–238:22, 267:3–14.

[71] Tr. 238:23–239:19, 240:11–242:9, 256:12–14; *see* Cr. Exs. 4A–4EE (less Ex. 4Y).

The gap period between 1845, when Florida became a state, and 1873 was not a concern for Mr. Dyer because, within the chain of title, he located a patent from the United States to Mr. Parton, which did not contain a reservation of rights.[72] And under Section 253.141(2), Florida Statutes, because there was a patent from the United States to a private individual, the Submerged Land would not be sovereign land owned by the State of Florida.

Mr. Dyer explained that a sovereignty exception, like the one in Mr. Cole's title policy, is standard practice when a parcel includes lands submerged beneath a water body. As true with any title exception, however, a sovereignty exception may be removed from a policy (although it is rare) if removal is requested and supported by the research into the chain of title.[73] When asked to remove a sovereignty exception, Mr. Dyer searches the land records for a deed out of either the United States or the State of Florida.[74] Mr. Dyer opined that based upon his review of the chain of title for the Property, had he been writing Mr. Cole's title policy and been asked to remove the sovereignty exception, he would have done so.[75]

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[72] Tr. 242:10–25, 245:1–20, 254:3–5, 256:19–23, 257:10–259:18; *see* Cr. Ex. 4D.

[73] Tr. 229:24–231:9.

[74] Tr. 235:22–236:3.

[75] Tr. 269:10–270:4, 270:14–21.

4. Joe Knetsch, Ph.D.

Now retired, Dr. Knetsch served for 28 years as a historian for Florida's Division of State Lands. His primary task was researching whether water bodies in the state were navigable at the time Florida became a state for purposes of determining whether the land underneath was owned by the State of Florida.[76] Dr. Knetsch has authored several books and numerous articles on topics in Florida history, including the history of surveying in Florida, the history of the public trust doctrine, and the Seminole wars.[77] The court accepts Dr. Knetsch as an expert in Florida history.

In researching whether Lake Minnehaha, and other water bodies more generally, was navigable in 1845, Dr. Knetsch stated there was not a wealth of witness accounts to rely on because Florida was not well developed at the time it became a state. He therefore examined other matters such as map history, surveys, and surveyor field notes. He also looked at military records, basically "whatever might apply to showing the existence or nonexistence of a water body."[78] And from there, he examined whether the water body was used "in the customary use of the day." Customary use might include activities ranging from recreation to commerce.[79]

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[76] Tr. 337:11–24, 339:17–22.

[77] Tr. 338:6–15, 340:7–343:7; *see* D. Ex. 5.

[78] Tr. 352:20–353:19.

[79] Tr. 380:17–381:10.

The earliest evidence of navigability of Lake Minnehaha that Dr. Knetsch located was a 1879 map of Orange County, issued by surveyor E.R. Trafford.[80] Later maps also reflect the existence of the lake.[81] Dr. Knetsch discovered no historical evidence that Lake Minnehaha, nor any of the lakes in the same chain, ever disappeared and later reappeared as has occurred with several other lakes in different parts of the state.[82]

Most maps of the period between 1840 to 1860 do not detail the southern part of the state. Dr. Knetsch owns copies of several.[83] Of the well-known maps of the period, none show Lake Minnehaha.[84] But Dr. Knetsch cautioned, "they don't show a lot of others."[85]

Other evidence of Lake Minnehaha's navigability included photographs obtained from the state archives taken around 1885 depicting a boat on Lake Minnehaha,[86] the Chronological History of Winter Park, Florida published in 1950, which describes boats traveling the various canals and lakes in the area,[87] a book published in 1972 about historic homes in Maitland describing a "majestic boathouse" at one home on the east side of Lake Minnehaha which was described as a social scene

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[80] Tr. 356:3–7, 358:1–9, 381:18–21; *see* D. Ex. 7.

[81] Tr. 359:17–360:18, 363:6–21, 364:18–24; *see* D. Exs. 8 and 9.

[82] Tr. 364:25–369:11.

[83] Tr. 392:11–22.

[84] Tr. 412:10–413:1; *see also* Tr. 392:11–22.

[85] Tr. 412:25–413:1.

[86] Tr. 369:14–371:11; *see* D Ex. 10.

[87] Tr. 371:23–373:15; *see* D Ex. 11.

in the early 1900s,[88] and a 2011 book discussing canal tourism in the area in 1937.[89] Dr. Knetsch acknowledged, however, that the canals connecting the lakes in Lake Minnehaha's chain did not exist in 1845 and were constructed in the 1890s to facilitate the logging industry.[90]

Dr. Knetsch also examined the field notes of surveyors of the time. He noted that in 1845, the majority of Florida had not been surveyed.[91] Dr. Knetsch examined one particular survey performed by Henry Washington in 1843. The survey does not mention Lake Minnehaha, however, this was not unexpected as the lake did not cross the lines Washington was directed to survey. But Washington's field notes reflect a marsh extending in the lake's direction. Dr. Knetsch conceded that Lake Minnehaha was never meandered.[92] And as he further acknowledged, it is the law in the State of Florida, that a non-meandered lake is presumably non-navigable and therefore would not be sovereign land owned by the State of Florida.

To his knowledge, the State of Florida has not asserted an ownership claim to the lake.[93]

Based upon the sum of his research and experience, Dr. Knetsch opined that Lake Minnehaha was likely a navigable water way in 1845 when Florida

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[88] Tr. 373:17–374:12; *see* D Ex. 13.

[89] Tr. 374:19–375:7; *see* D Ex. 12.

[90] Tr. 383:16–384:2.

[91] Tr. 376:2–5, 376:25–377:1.

[92] Tr. 393:4–394:16, 397:8–398:19, 406:2–8, 418:14–419:21.

[93] Tr. 394:24–395:1, 398:23–399:5.

became a state.[94] Accordingly, he offered that any submerged land below the ordinary high water mark would be sovereign land owned by the state.[95] He acknowledged, however, that based on the available historical record, it cannot be known for certain whether Lake Minnehaha either existed or was navigable in 1845.[96]

CONCLUSIONS OF LAW

I. Debtor's Entitlement to a Homestead Exemption[97]

(a) Arguments of the Parties

PRN (but not the Trustee) asks the Court to deny Mr. Cole his homestead exemption in its entirety based

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[94] Tr. 381:11–382:7.

[95] Tr. 376:16–20, 377:16–378:3, 380:8–16.

[96] Tr. 387:18–388:3.

[97] PRN also has argued that the Court should impose an equitable lien in its favor against Debtor's homestead. But PRN has not provided any binding (or persuasive) authority for that proposition on these facts. True, a court is not wholly without authority to impose an equitable lien against a homestead based on a theory of unjust enrichment. *E.g. Palm Beach Sav. & Loan Ass'n v. Fishbein*, 619 So. 2d. 267 (Fla. 1993). However, that particular remedy is available only in the rarest of circumstances, circumstances that do not exist here because there is no evidence that PRN provided value that Debtor used to benefit his homestead. *Havoco of Am., Ltd. v. Hill*, 790 So. 2d 1018 (Fla. 2001). Here, it is clear that PRN is a creditor, if at all, based upon PRN's breach of contract and fraud claims, which are unrelated to Debtor's homestead. *Cf. Flinn v. Doty*, 214 So. 3d 683 (Fla. Dist. Ct. App. 2017) (upholding equitable lien where appellant used alleged ill-gotten funds to pay off a mortgage on her homestead and rejecting imposition of a second equitable lien where alleged ill-gotten funds were not used to satisfy any pre-existing obligation on the home).

upon his prepetition split of the Property into the Upland Property and the Submerged Land. PRN asserts that this was an impermissible (and fraudulent) attempt to gerrymander his homestead exemption at the expense of his creditors. In support of its argument, PRN relies on *In re Englander*, 156 B.R. 862 (Bankr. M.D. Fla. 1992), *aff'd*, 95 F.3d 1028 (11th Cir. 1996).[98]

Debtor responds that an outright denial of his homestead exemption based upon his prepetition conduct is not only contrary to the policies underlying the exemption but also unsupported by law. Debtor argues that based upon *Law v. Siegel*, 571 U.S. 415 (2014), and *Havoco of Am., Ltd. v. Hill*, 790 So. 2d 1018 (Fla. 2001),[99] neither gerrymandering nor any other type of "pre-bankruptcy planning" provides a basis for a

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[98] PRN also cites *Isaacson v. Isaacson*, 504 So. 2d. 1309 (Fla. Dist. Ct. App. 1987). However, *Isaacson* does not stand for the proposition that a homestead exemption may be denied in its entirety as a result of "reprehensible conduct" of the debtor. Rather, the court stated that an equitable lien may be imposed against homestead property under certain circumstances and then, notably, reversed the imposition of an equitable lien in favor of a child support creditor. *Isaacson* was decided before *Havoco*, 790 So. 2d 1018. And in *Havoco*, the Florida Supreme Court rejected the contention that in addition to the three express exceptions provided in the Florida Constitution, the court had created an unexpressed fourth homestead exception based upon fraud through its equitable lien jurisprudence.

[99] *Havoco*, 790 So. 2d 1018 (Fla. 2001), arose on certified question from the Eleventh Circuit. *See Havoco of Am., Ltd. v. Hill*, 255 F.3d 1321 (11th Cir. 2001) (opinion after certified question answered).

bankruptcy court to deny an otherwise properly claimed homestead exemption.

(b) Analysis

Under the Florida Constitution, the Debtor's homestead exemption is limited to one-half acre because the Property lies within the City of Maitland. Debtor timely claimed the exemption on his Schedule C, albeit limited to the Upland Property. Accordingly, Debtor's homestead claim is presumptively valid. 11 U.S.C. § 522(1).

PRN argues that the Court should reject the claim of exemption outright due, essentially, to fraud. In support of its argument, PRN cites to the Debtor's failure to expressly note the acreage limitation on his Schedule C, his impermissible splitting of the Property on the eve of the bankruptcy filing, his illogical explanations for the illegal lot split, and his eleventh-hour change in position regarding the ownership of the Submerged Land. PRN analogizes Mr. Cole's conduct to the debtors' conduct in *In re Englander*. And PRN notes that the bankruptcy court in that case stated that debtors might have suffered a "total denial" of their homestead exemption had the issue not been one of first impression.[100]

The facts in *In re Englander* are similar to the facts at issue here. In that case, the debtors lived on just over an acre of lakefront property in the City of

[100] *In re Englander*, 156 B.R. at 871.

Winter Park, Florida, a neighbor of Maitland. The Englanders attempted to gerrymander their exemption by designating as exempt a one-half acre plot containing the residence, which encircled the rest of the parcel. The property the debtors designated as non-homestead was useless, with no access to roads, utilities, or lakefront.[101] After concluding that the property at issue could not be so divided, the Court ordered a sale of the property and the apportionment of the proceeds as between debtors and the bankruptcy estate, noting:

> The misleading and fraudulent actions [of the debtors in gerrymandering the property] could have resulted in a total denial of the debtors right to claim a homestead exemption in his residence. However since the issues in this case had not been directly addressed by a Court construing Florida law before today . . . , this Court believes that total elimination of his homestead is too severe a punishment and holds that these debtors should be allowed to claim a fair share of the proceeds from the sale of their residence.[102]

The bankruptcy court's suggestion that a homestead exemption might be denied in its entirety was *dicta* and was not adopted by the Eleventh Circuit on appeal. Rather, the Eleventh Circuit focused on and ultimately endorsed the bankruptcy court's "equitable solution" to the problem of how to honor a debtor's

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[101] *Id.* at 863–64.

[102] *Id.* at 871.

homestead exemption when the property claimed as exempt exceeds the acreage limitation in the Florida Constitution and is indivisible.[103] The Eleventh Circuit did not mention the bankruptcy court's finding that the Englanders had claimed their homestead exemption in bad faith, nor did it discuss exceptions to the homestead exemption more generally.[104]

PRN has not identified any post-*Englander* case where a debtor was denied the homestead exemption outright because the court found the debtor had gerrymandered the exemption. And importantly, since the *Englander* decision, the Eleventh Circuit has issued its decision in *Havoco*, which forecloses PRN's argument.

Havoco began in the U.S. Bankruptcy Court for the Northern District of Florida. There, creditor Havoco of America, Ltd. objected to the chapter 7 debtor's homestead exemption on the basis that the debtor converted non-exempt assets into exempt ones, including the homestead, "with the intent to hinder, delay, or defraud his creditors."[105] The bankruptcy overruled the creditor's objection, concluding that Florida law did not prohibit the conversion of non-exempt assets into an exempt homestead even when the debtor does so with the specific intent to place assets beyond the reach of

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[103] *Englander*, 95 F.3d at 1030–32.

[104] Rather, the Eleventh Circuit noted that "[b]ecause the only exceptions to homestead exemption are those specifically enumerated in the Florida Constitution, courts have refused to create new ones." *Id.* at 1031.

[105] *Havoco of Am., Ltd. v. Hill*, 197 F.3d 1135, 1136 (11th Cir. 1999).

his creditors. The district court affirmed.[106] On appeal, the Eleventh Circuit certified the following question to the Florida Supreme Court:

> Does Article X, Section 4 of the Florida Constitution exempt a Florida homestead, where the debtor acquired the homestead using nonexempt funds with the specific intent of hindering, delaying, or defrauding creditors in violation of Fla. Stat. § 726.105 or Fla. Stat. §§ 222.29 and 222.30?[107]

The Florida Supreme Court answered the certified question in the affirmative. After a detailed review of its homestead related jurisprudence, including its cases involving equitable liens, the Florida Supreme Court concluded:

> The transfer of nonexempt assets into an exempt homestead with the intent to hinder, delay, or defraud creditors is not one of the three exceptions to the homestead exemption provided in article X, section 4. Nor can we reasonably extend our equitable lien jurisprudence to except such conduct from the exemption's protection. We have invoked equitable principles to reach beyond the literal language of the exceptions only where funds obtained through fraud or egregious conduct were used to invest in, purchase, or improve the homestead.[108]

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[106] *Id.* at 1136–37.

[107] *Id.* at 1144.

[108] *Havoco*, 790 So. 2d at 1028.

In reaching its holding, the court observed that "in harmony" with the liberal construction of the homestead exemption is the "strict construction as applied to the exceptions."[109] Though the court acknowledged that it had "strayed from the literal language of the exemption where the equities have demanded it" (*i.e.* the equitable lien cases), the court added that it had done so only in the rarest of circumstances and then only with "due regard" to the provision's three exceptions.[110]

With the certified question answered, the Eleventh Circuit affirmed.[111]

It is clear therefore that Florida law does not permit the outright denial of a debtor's homestead exemption based upon allegations of fraud, no matter how egregious, unless funds obtained through such fraud were then used "to invest in, purchase, or improve the homestead."[112] And gerrymandering a homestead exemption, the very purpose of which can only serve to minimize value due the estate and "cheat" creditors, is simply a species of fraud.

The Court does not condone Mr. Cole's conduct in this case. His sworn schedules in this case are misleading. His explanations for the lot split are not credible. But under Florida law, he is nevertheless entitled

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[109] *Id.* at 1021.

[110] *Id.* at 1023–24.

[111] *Havoco*, 255 F.3d. 1321.

[112] *Havoco*, 790 So. 2d at 1028.

to his constitutional homestead exemption.[113] Accordingly, to the extent PRN's Objection seeks to deny Mr. Cole's homestead exemption outright, it is overruled.

II. The Submerged Land as Part and Parcel of the Homestead

(a) Arguments of the Parties

Both PRN and the Trustee argue that the Court should find that the Submerged Land belongs to the Debtor and must be included along with the Upland Property in evaluating Mr. Cole's homestead exemption claim.

Debtor, on the other hand, argues that the Submerged Land belongs to the State of Florida and may not be considered by the Court in apportioning the value due to his homestead claim.

(b) Analysis

Without doubt, the issues surrounding the ownership of the Submerged Land are both fascinating and complex. Both PRN and Debtor have presented reasoned arguments. And both PRN's and Debtor's experts provided compelling and credible testimony. But in the end, the Court finds that it need not decide the issue given the Eleventh Circuit's decision in *In re Kellogg*.[114]

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[113] *See Havoco*, 790 So. 2d 1018.

[114] *Kellogg*, 197 F.3d 1116.

In *Kellogg*, a chapter 7 debtor claimed the homestead exemption on his Palm Beach oceanfront property, which was located within the city and was approximately 1.3 acres in size. The debtor claimed the entire parcel, which he noted was "indivisible," and valued his exemption based on the tax assessor's value for the entire parcel. The chapter 7 trustee objected to the debtor's claimed exemption. At trial, the court heard testimony from the Palm Beach zoning administrator. The administrator testified that under applicable zoning laws, the debtor could not legally subdivide his property.[115] Based upon this testimony, the bankruptcy court ordered that the property be sold and the proceeds apportioned.[116]

On appeal, the Eleventh Circuit examined whether the debtor should be allowed to carve out a half-acre portion of his property to keep as his homestead.[117] Citing *Englander*, the court concluded that the bankruptcy court correctly directed a sale of the property and the apportionment of the proceeds.[118]

In its analysis, the Eleventh Circuit held that where property claimed as homestead is located within a city and exceeds the one-half acre limitation, a debtor may reasonably designate a portion that is exempt "so long as the remaining portion has legal and practical

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[115] *Id.* at 1118.

[116] *Id.* at 1118–19.

[117] *Id.* at 1120.

[118] *Kellogg*, 197 F.3d at 1121.

use."[119] In Mr. Kellogg's case, the court noted that any non-exempt portion would have no such use to the chapter 7 trustee because to convey that portion would violate local zoning laws. The court therefore rejected Mr. Kellogg's attempt to designate an exempt half-acre to retain as his homestead. In doing so, the court noted that if the debtor "could not lawfully divide his land into two parcels before declaring bankruptcy, he should not be allowed to use his homestead exemption to circumvent zoning regulations after filing his petition."[120] Because he had failed to obtain a variance before the filing, the court determined that it must consider the property indivisible. The circuit rejected, on procedural grounds, the debtor's argument that he could obtain the necessary zoning variance, if allowed to pursue the matter.[121]

Unwilling to concede defeat, the debtor argued that the constitutional homestead exemption cannot yield to local zoning ordinances. Dismissing the argument, the court noted that after the sale, the debtor could use his share of the proceeds to purchase a new homestead.

> The Florida constitution grants Kellogg the right to exempt up to one-half acre of municipal property; it does not grant him the

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[119] *Id.* at 1120; *see Quraeshi v. Dzikowski (In re Quraeshi)*, 289 B.R. 240, 243 (S.D. Fla. 2002); *see also Siewak v. AmSouth Bank*, No. 8:06-CV-927-T-24EAJ, 2007 WL 141186, at *3 (M.D. Fla. Jan. 16, 2007).

[120] *Kellogg*, 197 F.3d at 1120.

[121] *Id.* at 1119–21.

> inalienable right to homestead in his particular part of Palm Beach, where he chose to live knowing his property could not be subdivided into an exempt one-half-acre parcel.[122]

Here, as in *Kellogg*, Mr. Cole seeks to circumnavigate local zoning regulations and protect his homestead claim by asking the Court to overlook the fact that his splitting of the Property was not allowed under local zoning laws. There is no dispute that Mr. Cole never sought a variance, even after the fact, to bless his partition of the Property. And it is undisputed that as of the petition date, Debtor had record title to both the Upland Property and the Submerged Land. Granted, Mr. Cole's partitioning of the Property was accomplished prepetition, but it is without dispute that the partition, without a variance, would not be legally permissible under the City of Maitland's zoning code. Further, Mr. Cole admits that the Submerged Land by itself is of little value and utility. Thus, by his own admission, the designated non-exempt portion of the Property would have no practical use to the Trustee.[123] Accordingly, under the rubric of *Kellogg*, the Court

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[122] *Id.* at 1121–22.

[123] Ironically, Mr. Cole acknowledged at trial that the value of the Upland Property is increased because of its proximity to the Submerged Land yet accords none of that added value to the Submerged Land. As discussed, *infra*, it would be inequitable to permit Debtor to ignore that which gives his claimed homestead significant value.

must treat the Property as indivisible[124] and directs the sale of the Property and allocation of the proceeds.

The Court also declines to decide the issue of the ownership of the Submerged Land as a matter of equity. If the Court were to decide the issue, it would give support to Mr. Cole's blatant and inequitable actions in partitioning the Property on the eve of his bankruptcy filing. At trial, Mr. Cole attempted to explain away the Warranty Deeds, characterizing his actions as a mere "bifurcation of Deed," by saying he did not intend to create another lot and did not do so pursuant to the City's code.[125] His testimony, however, is contradicted by Ms. Blanchard, who testified that whenever a property owner divides a single parcel of real estate into two the City considers it a lot split and that a property owner's intentions have no bearing on the matter. Mr. Cole also testified that he believed he was taxed only on the Upland Property and that he believed a variance would not be required. But Mr. Cole's admitted expertise in matters of real estate belies his assertions of ignorance. Further, as PRN notes, Mr. Cole did not

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[124] *See also In re Baxt*, 188 B.R. 322, 323–24 (Bankr. S.D. Fla. 1995).

[125] Notably, Art. X § 4 of the Florida Constitution speaks only of "contiguous land." It is not required that the land be a single lot or that the claimant hold title by a single deed. *See*, *e.g.*, *In re Mohammed*, 376 B.R. 38 (Bankr. S.D. Fla. 2007) (permitting chapter 7 debtors to claim the homestead exemption in each of two contiguous lots, of which one was vacant and one contained their residence, even though the lots were acquired in separate transactions and assessed separately for tax purposes, where the combined acreage of the lots did not exceed the acreage limitation).

offer any of this testimony at his Rule 2004 examination.

In the end, Mr. Cole attempts to explain his splitting of the Property as simply trying to identify his homestead parcel. The Court does not find Mr. Cole's testimony on the issue to be credible. For that matter, Mr. Cole ignores the fact that the Upland Property in which he claims his homestead exemption by itself exceeds one-half acre, a fact he does not clearly identify in his bankruptcy schedules. Further, on the ownership issue, the Court cannot overlook the fact that he did not use the ordinary high water mark as the dividing line between the two parcels, as would be the case if Mr. Cole truly believed at that time that the Submerged Land belonged to the State of Florida. And despite ample opportunity to do so, Debtor has never amended his schedules to disclaim ownership of the Submerged Land, nor did he include, at trial, this among the inaccuracies he testified to in his schedules.

And last, as suggested by the Trustee, the Court does not believe that it is the proper court to determine the issue of title to the Submerged Land as between the Debtor and the State of Florida. If almost 150 years of record title history are to be tossed aside, particularly in the absence of a contrary claim to title, it is for a state court of competent jurisdiction to do so.

The State of Florida may well have a claim to the Submerged Land and to all of Lake Minnehaha for that matter. But according to Dr. Knetsch, it has yet to assert any such claim. The court is unaware of any

authority that would allow it to place record title in the Submerged Land into the state against its wishes, much less without its participation.[126] And the court cannot ignore the effect such a ruling might have on the interests of third parties who had no part—or even *notice*—of this proceeding. Other private owners of property on Lake Minnehaha, the City of Maitland and its residents, and the likely cadre of secured mortgage creditors, all could be adversely impacted. The only winner, it seems, would be the Debtor.

In sum, the court views the matter of the state's interest, if any, in the Submerged Land as a potential cloud on title. This may impact the value the Trustee ultimately obtains for the Property upon sale or may impact some future owner if and when the state elects to lay claim to the Submerged Land or Lake Minnehaha more generally. But for purposes of this case and in determining Debtor's homestead exemption, the Court concludes that it must assume that Debtor owns all of the Property as a single indivisible parcel.

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[126] On this point, this case is distinguishable from the cases relied upon by the Debtor. In each of those cases, the State of Florida was a participant in the proceedings. For that matter, in each of those cases, a private landowner was attempting to vindicate his ownership of a water body. *See*, *e.g.*, *Adams v. Crews*, 105 So. 2d 584 (Fla. Dist. Ct. App. 1958). Here, Mr. Cole is attempting the reverse.

III. Allocating Sale Proceeds to Value Debtor's Homestead Claim

The Parties agreed not to include valuation issues as part of the trial on the homestead exemption claim. Accordingly, the Court decides only the method by which the Court will allocate the net proceeds of the sale once the Property's value is ascertained.

(a) Arguments of the Parties

Both PRN and the Trustee contend that Florida law requires the Court to allocate the net sale proceeds on a percentage basis calculated by comparing the allowed exempt acreage to the total acreage of the Property. In support, they rely on *Quraeshi v. Dzikowski (In re Quraeshi)*, 289 B.R. 240 (S.D. Fla. 2002). Applying the formula as argued by PRN and the Trustee, Debtor would be entitled to 16.9% of the net proceeds.

Debtor asks the Court to apply the methodology used by the Eighth Circuit in *O'Brien v. Heggen*, 705 F.2d 1001 (8th Cir. 1983), a case upon which the Eleventh Circuit relied for another reason in *Englander*. Debtor's proposed methodology for determining the Trustee's share would require a court to determine the value per square foot of the subject real property in its *unimproved* state—therefore allowing the Debtor to retain the full value of his residence—and then multiply that value by the number of square feet the property exceeds the allowed acreage exemption. Debtor acknowledges, but attempts to distinguish, *In re Quraeshi*.

(b) Analysis

Several cases, including *Englander* and *Kellogg*, hold that where a homestead property exceeds the acreage limitation and is indivisible, the appropriate means by which to honor the claimed homestead, while also providing value to creditors, is to direct a sale and allocate the net proceeds as between the debtor and the estate. But none of these cases goes further to discuss how that allocation is to be made.[127] The parties have identified what appears to be the sole case interpreting the Florida homestead exemption in these circumstances—*In re Quraeshi.*

The *Quraeshi* court, citing the homestead provision's plain language, including its express exceptions, stated that "it would seem that a debtor's homestead exemption would extend to a *pro rata* portion of the net proceeds of a sale of debtor's property, based on his acreage share of the property sold, rather than a *pro rata* portion of the gross sales price."[128] Thus, the court proposed that the sale proceeds should be allocated based upon a simple percentage of the exempt acreage to the total acreage of the property. But as Debtor correctly points out, the *Quraeshi* court was not faced with the precise question here, rather the court addressed the related inquiry of whether the

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[127] *See Kellogg*, 197 F.3d at 1121; *Englander*, 95 F.3d. at 1032; *In re Baxt*, 188 B.R. at 324–25.

[128] *In re Quraeshi*, 289 B.R. at 244.

apportionment was to be based upon the net proceeds of the sale or the gross sale price.[129]

Notwithstanding the differing inquiry, this Court agrees with the *Quraeshi* court that the proper method of allocating the net proceeds in these circumstances should be a simple percentage of the exempt acreage to the total acreage of the subject property.

First, this method best aligns with the language of the Florida Constitution. "While the Florida Constitution does not define the term 'homestead,' it does provide various limitations and requirements. Among these are an acreage limitation, an ownership requirement, and a residency limitation."[130] Noticeably absent is any value limitation.[131] The Court therefore agrees with the Trustee that were it to accept Debtor's proposed value-based allocation method, it would introduce into Florida homestead law an element not supported by the language of the constitution.

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[129] *Id.*

[130] *In re Wierschem*, 152 B.R. 345, 347 (Bankr. M.D. Fla. 1993); *see Englander*, 95 F.3d at 1031.

[131] *Cf.* Ala. Code § 6-10-2 (limiting homestead exemption to $15,000 in value); Cal. Civ. Proc. § 704.730 (limiting homestead exemption to $75,000–$175,000 in value depending on status of residents); Mo. Rev. Stat. § 513.475 (limiting homestead exemption to $15,000 in value); N.Y. C.P.L.R. 5206 (limiting homestead exemption to $75,000–$150,000 in value depending on county of residence); Ohio Rev. Code § 2329.66(a)(1)(b) (limiting homestead exemption to $125,000 in value); S.D. Codified Laws § 43-45-3 (limiting homestead exemption to $60,000 in value if property is sold either voluntarily or involuntarily); Vt. Stat. tit. 27 § 101 (limiting homestead exemption to $125,000 in value).

Second, this method is consistent with the approach used by courts when evaluating the residency limitation contained in the homestead exemption when the property is used for additional purposes other than the debtor's residence. For example, in *In re Wierschem*,[132] debtors lived in one of three units in one of two dwellings on their beach front property. Debtors rented out the remaining five units.[133] The court directed that upon sale of the property, the trustee would allocate the proceeds based upon the square footage of debtors' unit as a percentage of the total square footage attributable to the dwelling units.[134]

Third, this method is consistent with the public policies underlying the homestead exemption.[135] "The [homestead] exemption is intended to protect the family home and not to unjustly impose upon the rights of creditors."[136] Concentrating the value of a parcel of real property into that portion of the property occupied by the residence, as advocated by the Debtor, may serve

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[132] 152 B.R. 345; *see also In re Radtke*, 344 B.R. 690 (Bankr. S.D. Fla. 2006) (concluding that apportionment of the sale proceeds must account for mixed residential and commercial use of the property); *In re Pietrunti*, 207 B.R. 18 (Bankr. M.D. Fla. 1997) (concluding that debtors were entitled to claim as homestead 1.25 acres of a total 5 acres where debtors resided only in 1 of 4 residences located on the parcel).

[133] *In re Wierschem*, 152 B.R. at 346.

[134] *Id.* at 349 ("[T]he debtors shall be entitled to the portion of the net proceeds that the square footage of the debtors' residential unit bears to the total square footage of the two structures.").

[135] *See Kellogg*, 197 F.3d at 1120.

[136] *In re Wierschem*, 152 B.R. at 349 (citing *Hillsborough Inv. Co. v. Wilcox*, 152 Fla. 889, 891 (1943)).

the former aim but not the latter. In fact, where realty is not severable, it would necessarily affect a windfall to a debtor while unjustly prejudicing the rights of creditors. The homestead exemption aims "to promote the stability and welfare of the state by securing to the householder a home, so that the homeowner and his or her heirs may live beyond the reach of financial misfortune and the demands of creditors."[137] The exemption is not intended to protect a debtor's standard of living, particularly where that standard might be found to be luxurious or excessive.[138]

Fourth, this method provides a simple formula of easy application. It avoids expensive and protracted litigation over valuation issues, which likely would require the use of expert testimony. The method the Court adopts today conserves costs to the parties as well as judicial resources. It also avoids potential gamesmanship by debtors seeking in bad faith to increase their exemption at the expense of the bankruptcy estate and the trustee, who must defend such tactics. And because of the ease of application, the method also serves the Bankruptcy Code's goal of efficient administration of the estate.

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[137] *Williams*, 427 B.R. at 544 (quoting *Snyder v. Davis*, 699 So. 2d 999, 1002 (Fla. 1997))

[138] *See generally Smith v. Guckenheimer*, 42 Fla. 1, 36–42 and 38 (1900) ("The creditor has a legal right to sell any property of his debtor not exempt from execution. The constitution declares that the exemption shall not apply to excessive improvements. This is a constitutional command, as forceful and mandatory as the other command to exempt the homestead.").

Debtor's attempt to distinguish *Quraeshi* is not persuasive. And his reliance on *O'Brien* is misplaced. Although the Eleventh Circuit relied on *O'Brien* in *Englander*, it did not do so for the principals relating to the allocation of the sale proceeds.[139] Moreover, the Eighth Circuit in *O'Brien* did not conclude that the valuation methodology employed by the bankruptcy court was "the" proper methodology to be used. Rather, it found that the bankruptcy court's factual finding as to the apportionment of value to the non-exempt portion of the property was supported by the evidence and not clearly erroneous.[140]

For these reasons, the court concludes that the proper method of allocating the net proceeds in this case should be a simple percentage of the exempt acreage to the total acreage of the property.

CONCLUSION

Despite Mr. Cole's inequitable and incredulous attempt to gerrymander his homestead exemption, Florida law commands that he cannot be denied his constitutional homestead exemption on that basis. But the Court will disregard his illegal partitioning of the Property, treat the entire parcel as indivisible, and direct its sale and the allocation of the proceeds. The Court concludes that the net proceeds should be allocated as between the Debtor and the Trustee based on

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[139] *Englander*, 95 F.3d at 1032.

[140] *O'Brien*, 705 F.2d at 1003–04.

a simple percentage of the allowed exempt acreage to the total acreage of the Property.

The Court will enter a separate Order consistent with this Memorandum Decision.

Service of this Memorandum Decision, other than by CM/ECF, is not required as the interested parties are registered CM/ECF users. Local Rule 9013-1(b).

ORDERED.

Dated: April 04, 2019 [SEAL]

/s/ Cynthia C. Jackson
Cynthia C. Jackson
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
www.flmb.uscourts.gov

In re:

WILLIAM W. COLE, JR.,

Debtor. /

Case No.
6:15-bk-06458-CCJ
Chapter 7

ORDER SUSTAINING, IN PART, OBJECTIONS TO DEBTOR'S CLAIM OF EXEMPTION
(Homestead Exemption)

THIS CASE is considered following trial on Creditors PRN Real Estate & Investments, Ltd. and Nancy A. Rossman's Objection to Debtor's Claimed Homestead Exemption (Doc. No. 104) and Chapter 7 Trustee Lori Patton's Objection to Debtor's Claim of Homestead Exemption (Doc. No. 116) (together, the "Objections"). After considering the evidence and the governing case law, and for the reasons stated in the Court's Memorandum Decision entered concurrently with this Order

(Doc. No. 788), the Court sustains the Objections, in part.[1]

It is therefore **ORDERED:**

1. The Objections (Doc. Nos. 104 and 116) are sustained, in part.

2. Debtor is entitled to claim a homestead exemption, which is limited to one-half acre. *See* Fla. Const. Art. X § 4.

3. For purposes of this chapter 7 case, the illegal lot split shall be ignored. Further, the Submerged Land is deemed to belong to the Debtor and shall be considered in the determination of the claim of exemption.

4. Upon sale of the Property, Debtor shall be entitled to retain 16.9% (.5 acres / 2.95 acres) of the net sale proceeds. This allocation is without prejudice to a refinement of the stipulated acreage for the Property.

Service of this Order, other than by CM/ECF, is not required as the interested parties are registered CM/ECF users. Local Rule 9013-1(b).

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[1] Capitalized terms shall have the meaning attributed to them in the Court's Memorandum Decision (Doc. No. 788).