NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. MW 15-035

Bankruptcy Case No. 14-40719-HJB

CHRISTIAN NEALON,
Debtor.

CHRISTIAN NEALON,
Appellant,

v.

THERESA MATTHEWS,
Appellee.

Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Hon. Henry J. Boroff, U.S. Bankruptcy Judge)

Before
Deasy, Harwood, and Cary,
United States Bankruptcy Appellate Panel Judges.

Richard N. Gottlieb, Esq., on brief for Appellant.

Jason A. Webber, Esq., on brief for Appellee.

January 20, 2016

Harwood, U.S. Bankruptcy Appellate Panel Judge.

Christian Nealon appeals from the bankruptcy court's May 21, 2015 order sustaining the objection of creditor Theresa Matthews to his claimed homestead exemption and determining that the exemption extended only to the parcel upon which his residence was situated, and not to three adjacent parcels. On appeal, Mr. Nealon argues that the bankruptcy court applied the wrong standard and erroneously focused on his original intent to subdivide the property rather than his family's actual use of the property at the time of the declaration of homestead. For the reasons set forth below, we **REVERSE**.

BACKGROUND

A. Pre-Bankruptcy Events

On January 31, 2005, Christian and Lynette Nealon acquired by quitclaim deed from Vera Geissinger certain real estate located at 30 North Mill Street, Hopkinton, Massachusetts, designated as Lot 2 (the "Property" or "Lot 2"). The Property consisted of approximately 13 acres of land and a 240-year old house, and included both wooded areas and wetlands. To finance the purchase of the Property, the Nealons obtained a loan from Milford Federal Savings & Loan secured by a mortgage on the Property.

Over the next several years, Mr. Nealon met with a land surveying and engineering firm and other consultants to begin the process of subdividing the Property. On March 17, 2009, Mr. Nealon filed an application with the Planning Board of the Town of Hopkinton (the "Planning Board") for the approval of a definitive subdivision plan for the Property entitled "30 North Mill Street Subdivision" (the "Subdivision Plan"). The proposed Subdivision Plan, which was revised several times, included two buildable lots—Lot 2A with 168,686 square feet upon which

Mr. Nealon intended to build a new house for his family, and Lot 2B with 62,976 square feet upon which the Nealons' existing house was situated. The Subdivision Plan also showed Lots 2C and 2D, which were not buildable lots. The Subdivision Plan called for the construction of a new private right-of-way (Hickory Way) for access to the new Lot 2A.

After several hearings, on September 30, 2009, the Planning Board issued a Certificate of Planning Board Action (the "CPBA") regarding Mr. Nealon's application. In the CPBA, the Planning Board identified the proposed Subdivision Plan as follows:

> The 13.44 acre site is located within the Agricultural zoning district. The Subdivision Plan creates two house lots, one with the existing house. Additionally, the Applicant will donate a conservation restriction on 7.55 acres of the site, and may donate the 7.55 acres in fee to a conservation organization. A portion of the land is in use as a single family home, and the remainder of the site is wooded with wetland resource areas, including a potential vernal pool. A new dead end street would serve one new lot (lot 2A) and the second lot (2B) would contain the existing house at 30 North Mill St. and be accessed from North Mill St.

The CPBA indicated that the Planning Board voted to approve the Subdivision Plan, subject to certain additional conditions, including the following:

> The Applicant has generously offered to donate a Conservation Restriction on 7.5 acres, shown as parcels 2C and 2D, within the subdivision. The land subject to the Conservation Restriction will continue to be owned by the Applicant or may be donated to a conservation organization. The Applicant shall select the recipient of the Conservation Restriction, which shall be subject to the approval of the Planning Board, prior to endorsement of the Subdivision Plan.

The CPBA also provided that no building permits would be issued and no construction in the subdivision would be allowed until approval for such work was obtained from the Conservation Commission regarding wetland areas. In addition, the CPBA directed that "[i]nfrastructure construction within the new [right-of-way] shown on the Subdivision Plan shall be completed within two (2) years from the start of construction or this approval shall be

automatically rescinded unless such time is extended by the Board. If such construction has not commenced within five (5) years from the date of this approval, such approval shall be automatically rescinded."

On July 12, 2010, Mr. Nealon executed, and the Planning Board approved, a Conditional Approval Agreement as required by the CPBA, in which he acknowledged the Planning Board's approval of the subdivision plan was subject to certain conditions, including the condition relating to the Conservation Restriction.

Thereafter, Mr. Nealon filed the appropriate applications with the Executive Office of Energy and Environmental Affairs, Division of Conservation Services, seeking approval of the Conservation Restriction. On August 27, 2010, the Division of Conservation Services sent Mr. Nealon a checklist identifying certain items that needed to be completed before it would approve the Conservation Restriction. Among the required items was for the mortgagee on the Property to partially release its mortgage as to Lots 2C and 2D.[1]

On January 10, 2011, the Conditional Approval Agreement was recorded at the Middlesex Country Registry of Deeds. The Subdivision Plan was also recorded the same day.

In March 2011, the Nealons contacted Milford Federal Savings & Loan requesting a partial release of its mortgage with respect to the proposed Conservation Restriction on Lots 2C and 2D as required by the Executive Office of Energy and Environmental Affairs. The bank notified them, however, that it would not partially release its mortgage unless the Nealons paid

[1] Although the checklist referred to a "subordination" of the mortgage, it is evident that the Executive Office of Energy and Environmental Affairs wanted the bank to partially release its mortgage on the lots that would be subject to the Conservation Restriction.

down the mortgage by approximately $70,000.00. The Nealons never paid the $70,000.00 and the Executive Office of Energy and Environmental Affairs never approved the Conservation Restriction. According to Mr. Nealon, once the bank declined to partially release its mortgage, he and his wife decided to discontinue efforts on the Subdivision Plan.

On November 22, 2011, the Nealons executed and recorded a Declaration of Restrictive Covenant, which imposed covenants restricting the area of wetlands alterations which could take place on the Property.[2]

More than two years later, on December 20, 2013, the Nealons executed a Declaration of Homestead with respect to "the premises located at 30 North Mill Street, Hopkinton, Middlesex County, Massachusetts," which they indicated they owned "by virtue of the deed dated January 31, 2005 from Vera Geissinger . . . ."

B. The Bankruptcy Proceedings

Mr. Nealon filed a chapter 7 petition on April 9, 2014.[3] On his Schedule A, Mr. Nealon listed the Property with a current value of $420,000.00 secured by a mortgage in the amount of $307,192.00. On his Schedule C, he claimed an exemption in the Property pursuant to Mass. Gen. Laws ch. 188, § 1. On his Schedule F, Mr. Nealon listed Ms. Matthews as a general

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[2] In order to be "exempt from having to obtain individual water quality certification permits for the lots comprising the Property," Mr. Nealon was required to impose "a restrictive covenant limiting to 5,000 square feet the amount of wetlands" which could be "removed, filled, dredged or altered." This was a condition of the CPBA, but an entirely different requirement from the Conservation Restriction.

[3] Unless expressly stated otherwise, all references to "Bankruptcy Code" or to specific statutory sections shall be to the Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. §§ 101, et seq. All references to "Bankruptcy Rule" shall be to the Federal Rules of Bankruptcy Procedure.

unsecured creditor with a nonpriority claim in the amount of $281,265.91 based on an arbitration award.[4]

On July 16, 2014, Ms. Matthews filed an objection to Mr. Nealon's claimed homestead exemption ("Objection to Homestead Exemption"), asserting that the Property had been subdivided into four parcels of land, Mr. Nealon's house was only located on Lot 2B, and the claimed homestead exemption should be limited to that parcel and disallowed as to the vacant Lots 2A, 2C and 2D.

On September 26, 2014, Mr. Nealon filed a response to the Objection to Homestead Exemption, in which he asserted that the entire Property was entitled to protection under the Massachusetts homestead statute because: (1) the proposed subdivision of the Property into distinct parcels of land was a "legal nullity" because certain conditions contained in the CPBA did not occur within the appropriate timeframe; and (2) he and his family have consistently used the land surrounding his house before and after filing the Declaration of Homestead. Mr. Nealon's response was accompanied by numerous exhibits, including photographs depicting his family's alleged use of the Property, and affidavits of both Mr. and Mrs. Nealon.

The bankruptcy court held an evidentiary hearing on April 9, 2015. Mr. Nealon, Mrs. Nealon, and J. Timothy Nealon (Mr. Nealon's father and real estate attorney) testified, and the bankruptcy court admitted over thirty stipulated exhibits into evidence.

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[4] Ms. Matthews filed a proof of claim in the amount of $285,752.86 based on the arbitration award, and asserted that $101,020.00 was entitled to priority under § 507(a)(7). The chapter 7 trustee objected, arguing that § 507(a)(7) capped the priority amount at $2,775.00 and, therefore, Ms. Matthew's claim should be allowed as a priority claim in the amount of $2,775.00 only, with the balance allowed as a general unsecured claim. The bankruptcy court sustained the trustee's objection.

During the course of the hearing, Mr. Nealon testified that, at the time he purchased the Property and submitted the Subdivision Plan for approval, he intended to build a new house for his family on Lot 2A, possibly sell the old house on Lot 2B, and donate Lots 2C and 2D. He testified about his numerous meetings with a land surveying and engineering firm and other consultants to perform work in furtherance of the proposed subdivision. He stated that between 2009 and 2011, he spent over $55,000.00 on the subdivision process, but ultimately he stopped all such efforts in 2011 after the bank refused to partially release its mortgage. According to Mr. Nealon, they stopped pursuing the project due to changing priorities (their children were getting older, and they "had college in the[ir] sights") and because the subdivision process was "arduous" and no longer "financially feasible" as they would have to incur another $100,000.00 just to complete the subdivision ($30,000.00 to complete the infrastructure and $70,000.00 to the bank for the partial release of its mortgage). Mr. Nealon testified that the last work performed on the infrastructure occurred in late 2011—they were working on stone walls, but never completed them. He conceded he did not take any steps to formally rescind the Subdivision Plan, stating he thought doing so would cost more money because he would have to hire an engineer to prepare a new plot plan.

Mr. Nealon also testified about his family's use of the vacant lots surrounding his house both before and after the filing of the Declaration of Homestead. He stated that they used the vacant lots for various activities such as sledding, snowshoeing, cross country skiing, hiking, snowboarding, riding off-road vehicles, storing boats during the winter, and gathering lumber, firewood, and holiday greens. He also introduced photographs depicting his family's use of the vacant lots for such activities.

At the conclusion of Mr. Nealon's testimony, his counsel moved for a judgment on partial findings pursuant to Fed. R. Civ. P. 52(c) and Fed. R. Bankr. P. 7052, which the bankruptcy court denied. Mr. Nealon's counsel then called Mrs. Nealon to testify. Mrs. Nealon corroborated Mr. Nealon's testimony as to the family's use of the Property and the timing of the photographs. She also testified that they decided in "late fall 2011" to discontinue the subdivision process. She stated that at the time they filed their Declaration of Homestead, they no longer had any desire to pursue the subdivision and build a new house as they were "comfortable" in their existing house, they were using the land the way they wanted to use it, and they had "no energy to pursue all the steps that it w[ould] take to finish [the subdivision] and build a house . . . ."

Attorney Nealon testified that he assisted the Nealons with the preparation of documents relating to the proposed Subdivision Plan, including a Declaration of Restrictive Covenant regarding wetlands on the Property in November 2011. He said he knew from conversations "over the dinner table" in late summer 2011 that the Nealons were "changing their mind[s]" and "having second thoughts" about completing the subdivision and building a new home, but that he completed preparation and recording of the Declaration of Restrictive Covenant because he had been working on the matter for some time, and he "didn't know what was going to happen down the road" and "didn't want to leave it hanging" after the time they had spent on it.

At the conclusion of the hearing, the bankruptcy court ruled from the bench as follows:

> The following constitute my findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure as made applicable to this contested matter under Rule 9014 of the Federal Rules of Bankruptcy Procedure. The debtor has claimed an exemption under Section 522(b) in the property which has been denominated as lot 2 and better described during the testimony and then in various exhibits.

Ms. Matthews, Theresa Matthews, has objected to that exemption. The burden of proof is on the objecting party, that is the burden of persuasion. And that burden is to prove her case by a preponderance of the evidence.

11 U.S.C. [§] 522(b) permits a debtor in Massachusetts to elect either of the exemptions that are available under Section 522(d) of the Bankruptcy Code or those exemptions available under state and nonbankruptcy federal law. Here, Mr. Nealon, the debtor, has elected the state exemptions, and as to the subject property has based his claimed exemption on lot 2 based on the provisions of Mass[.] General Laws Chapter 188 Section . . . 3 or 4, I don't recall which. Both of those provisions permit an exemption in property that is the debtor's principal residence.

And accordingly, the question is do lots A, C, and D include portions of the property that are the debtor's principal residence? I've had the opportunity to examine the various exhibits that have been provided, ruled on those that were admissible, excluded others. I've listened to Christian Nealon, the debtor, Ms. Nealon, and attorney Nealon. And my decision is, at least in part, based on their credibility and in part on the exhibits that have been presented.

I find that on and after 2004, Mr. Nealon intended to subdivide lot 2 to retain lot 2B in order to build a new home, which he may or may not have abandoned in terms of his intention at a later time, but that he also, at all relevant times, intended to sell lot 2A and to donate lots 2C and 2D to the town of Hopkinton.[5] In pursuit of that plan, the debtor expended substantial sums of money to hire consultants, engineers, and others, and ultimately achieved agreement from the . . . town of Hopkinton to permit him to subdivide the property subject to certain conditions. And Mr. Nealon took that approval, either personally or through agents, and had it recorded in the applicable registry of deeds.

The town of Hopkinton's approval was subject to an order of conditions which included a requirement . . . that the mortgage on lot 2, as an entirety, would be partially released in order to effect the agreement with the town of Hopkinton and

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[5] Although no parties raise the issue, this constitutes an erroneous finding of fact by the bankruptcy court. The bankruptcy court mistakenly found that Mr. Nealon intended to *sell Lot 2A* and *retain Lot 2B* to build a new home. It is clear from the record, however, that the Nealons intended to retain Lot 2A to build a new house, and to possibly sell the old house which was on Lot 2B. The new house was never built, however, and the Nealons' residence has always been on Lot 2B. Thus, the erroneous finding is harmless as the bankruptcy court properly considered whether Lots 2A, 2C and 2D were part of the Nealons' principal residence for purposes of the Massachusetts homestead statute.

its environmental department in order to subordinate the bank's lien on the wetlands, which were lots 2C and D of the property.

Mr. Nealon would have completed that endeavor to subdivide the property, sell lot A and donate lots 2[D] and C, but for his inability to secure from Milford Savings Bank, the holder of the first mortgage on lot 2, a partial release of the mortgage. Milford Savings Bank conditioned that partial release on the payment of $70,000, an amount that Mr. Nealon was either unwilling or unable to pay.

I simply do not believe that the debtor ever rescinded his intention to subdivide the property, sell lot 2A, and donate lots C and D. He had already significantly invested in the subdivision of the property. He had been delayed by the refusal of the bank to provide the partial release and for no other reason, and has now offered reasons other than that payment requirement by Milford Savings Bank, none of which I find particularly credible, particularly the suggestion that because the size of the family living at the [residence] was expected to be reduced in the following decade or so, and according to Mr. and Ms. Nealon, they were comfortable in the house . . . they were in, that for that reason they were no longer interested in getting rid of lots 2A, 2C, and 2D. I find that counterintuitive.

I've reviewed the various pictures showing children at play, stacking wood, watching wildlife, testimony about driving an AT[V], storing a sailboat, snowshoeing on lots 2A, 2C, and 2D, but there is no reason why those activities should not have happened regardless of what the party's intention was ultimately with respect to the property. The property had not yet been sold and these various activities are neither consistent nor inconsistent with any intention to retain the property. The issue is whether this property was part of the Nealon's principal residence, not whether – notwithstanding a subdivision of the property they took the opportunity to play on the property so long as it was in their possession.

The question is whether, as of the date of the declaration of homestead, the date that the parties say is the relevant date, Mr. and Ms. Nealon considered lots 2A, 2C, and 2D part of their principal residence. I find they did not. The property was simply extraneous property with respect to which they had encountered an obstacle to its sale.

Accordingly, I find and I rule that lots 2A, 2C, and 2D were not, and frankly are not, part of the debtor's principal residence. Accordingly, the objection to the exemption will be sustained to the extent that the homestead ex[emption] under Mass[.] General Laws Chapter 188 will extend only to lot 2B and will not extend to the property that has been denominated as lots A, C, and D.

Thereafter, on May 21, 2015, the bankruptcy court entered an order stating, in its entirety, as follows:

> Hearing held April 9, 2015. For the reasons set forth in open court on April 9, 2015, the objection of Theresa Matthews to the Debtor's claims of homestead exemption is sustained to the extent that the homestead exemption claimed under Mass. General Laws ch. 188 extends only to the property denominated as Lot 2B and does not extend to the property denominated as Lots 2A, 2C, and 2D.

This appeal followed.

JURISDICTION

The Panel has jurisdiction to hear appeals from final judgments of the bankruptcy court. 28 U.S.C. § 158(a)(1). A bankruptcy court's order sustaining an objection to a debtor's claimed homestead exemption is a final, appealable order. See Massey v. Pappalardo (In re Massey), 465 B.R. 720, 723 (B.A.P. 1st Cir. 2012); Newman v. White (In re Newman), 428 B.R. 257 (B.A.P. 1st Cir. 2010); Hildebrandt v. Collins (In re Hildebrandt), 320 B.R. 40, 42 (B.A.P. 1st Cir. 2005) (citations omitted). Accordingly, the Panel has jurisdiction to hear this appeal.

STANDARD OF REVIEW

The Panel reviews a bankruptcy court's findings of fact for clear error and its conclusions of law de novo. See Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 592 F.3d 267, 269 (1st Cir. 2010) (citation omitted). Generally, a debtor's entitlement to a bankruptcy exemption involves a legal question and is reviewed de novo. See In re Hildebrandt, 320 B.R. at 43 (citations omitted). To the extent that a determination of a claimed homestead exemption revolves around a factual issue, however, the Panel must consider whether the bankruptcy court's factual findings were clearly erroneous. See Fiffy v. Nickless (In re Fiffy), 293 B.R. 550, 554 (B.A.P. 1st Cir. 2003). "'A factual finding is clearly erroneous when although there is

evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" Ross v. Garcia (In re Garcia), 532 B.R. 173, 181 (B.A.P. 1st Cir. 2015) (quoting Goat Island S. Condo. Ass'n v. IDC Clambakes, Inc. (In re IDC Clambakes, Inc.), 727 F.3d 58, 63-64 (1st Cir. 2013)).

DISCUSSION

I. Applicable Law

A. Exemptions in bankruptcy

Section 522 of the Bankruptcy Code allows a debtor to exempt certain property from the bankruptcy estate that would otherwise be available for distribution to creditors, and § 522(b) allows debtors to choose between the federal bankruptcy exemptions listed in § 522(d), and the exemptions provided by their state of residence together with those provided by federal, nonbankruptcy law. See 11 U.S.C. § 522. Under § 522(l), a debtor's claimed exemptions are presumed valid in the absence of a timely objection. See 11 U.S.C. § 522(l). Bankruptcy Rule 4003(c) places the burden of proving that an exemption is not properly claimed on the party objecting to the claimed exemption. Fed. R. Bankr. P. 4003(c). If, however, the objecting party can produce evidence to rebut the exemption, the burden of production then shifts to the debtor to come forward with unequivocal evidence to demonstrate that the exemption is proper. In re Marrama, 307 B.R. 332, 336 (Bankr. D. Mass. 2004) (citation omitted).

B. The Massachusetts homestead exemption

In this case, Mr. Nealon claimed an exemption in the Property under the Massachusetts homestead statute. The Supreme Judicial Court has described the policy underlying the homestead exemption as follows:

> Homestead laws are based on a public policy which recognizes the value of securing to householders a home for the family regardless of the householder's financial condition. "The preservation of the home is of paramount importance because there the family may be sheltered and preserved."

Dwyer v. Cempellin, 673 N.E.2d 863, 866 (Mass. 1996) (citation omitted). The Massachusetts homestead exemption is to be liberally construed in favor of the declarant. Id. (citations omitted). However, liberal construction does not mean that courts can extend the protection of the homestead exemption when doing so would contradict the "plain and unambiguous" language of the statute. In re Gray, 378 B.R. 728, 731 (Bankr. D. Mass. 2007) (citations omitted) (internal quotations omitted).

The Massachusetts homestead statute provides, in relevant part, as follows:[6]

> An estate of homestead to the extent of the declared homestead exemption in a home may be acquired by 1 or more owners *who occupy or intend to occupy the home as a principal residence*. The estate of homestead shall be created by a written declaration executed and recorded in accordance with section 5.

Mass. Gen. Laws ch. 188, § 3(a) (emphasis added). Therefore, the statute contains the explicit requirement that in order to claim a homestead estate, the declarant must either: (1) actually occupy the property as his principal residence; *or* (2) intend to occupy the property as his principal residence. Id. The statute defines a "principal residence" as "the home where an owner . . . resides or intends to reside as the primary dwelling; provided, however, that no person

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[6] In 2010, the Massachusetts legislature enacted a comprehensive revision to the Massachusetts homestead statute. These revisions, which took effect on March 16, 2011, now recognize two exemptions—a "declared homestead exemption" and an "automatic homestead exemption"—offering varying degrees of protection depending on whether the owner validly recorded a declaration of homestead. See In re Palladino, No. 14-11482-WCH, 2015 Bankr. LEXIS 448 (Bankr. D. Mass. Feb. 12, 2015). Under the revised statute, a "declared homestead exemption" is an exemption in the amount of $500,000.00 created by a properly executed and recorded written declaration with respect to the declarant's "home." Mass. Gen. Laws ch. 188, §§ 1, 5.

shall hold concurrent rights in more than 1 principal residence." Mass. Gen. Laws ch. 188, § 1. A "home," in turn, includes "a single-family dwelling, including accessory structures appurtenant thereto and the land on which it is located . . . ." Id.

Although a debtor's entitlement to an exemption in a bankruptcy case is determined when the petition is filed, see Pasquina v. Cunningham (In re Cunningham), 513 F.3d 318, 324 (1st Cir. 2008) (citations omitted), the operative date for determining the validity and geographical extent of the homestead estate is the date the declaration was recorded. See In re Genzler, 426 B.R. 407, 417 (Bankr. D. Mass. 2010) (citations omitted); In re Marrama, 307 B.R. at 337 (citation omitted); see also In re Andris, 471 B.R. 761, 765 (Bankr. D. Mass. 2012) ("[T]he statutory requirement is that the declarant, at the time the declaration is recorded, 'occupy or intend to occupy' the principal residence.") (citations omitted); In re Roberts, 280 B.R. 540, 547 (Bankr. D. Mass. 2001) ("[U]nder Massachusetts law, the Debtor has failed to demonstrate that he was entitled to an estate of homestead because he neither occupied nor intended to occupy the Premises at the time he filed the declaration."); but see In re Edwards, 281 B.R. 439, 450 (Bankr. D. Mass. 2002) (indicating petition date is determinative date for determining whether debtor used and occupied an adjacent parcel as his principal residence). Therefore, the validity and extent of Mr. Nealon's homestead depends on whether, at the time of the declaration, he occupied or intended to occupy the Property as his principal residence. See In re Fiffy, 293 B.R. at 555.

There is no dispute that at the time he recorded his homestead declaration, Mr. Nealon occupied his house, and the portion of the Property designated as Lot 2B on the Subdivision Plan, as his principal residence. Thus, the question before us is not whether Mr. Nealon's

homestead declaration was valid, but the geographical extent of the homestead estate. This question turns on whether Mr. Nealon actually occupied the vacant land surrounding his house (designated as Lots 2A, 2C and 2D on the Subdivision Plan) together with Lot 2B as his principal residence for purposes of the Massachusetts homestead statute.

Mr. Nealon contends that the subdivision was never completed and the bankruptcy court should have viewed the entire Lot 2 as one parcel, namely a residence with surrounding land used in connection with the residence. Ms. Matthews argues, however, that the Property should be viewed as four distinct parcels, and, because Mr. Nealon intended to donate or sell three of those parcels, they should not be included in his homestead estate.[7]

In this case, however, we do not need to decide whether the Property constitutes a single parcel or four separate parcels. If, as Mr. Nealon suggests, the Property was never formally subdivided, the outcome of this appeal would be simple—the entire parcel would fall within the statute's definition of "home" as it would consist of "a single-family dwelling . . . and the land on which it is located." See Mass. Gen. Laws ch. 188, § 1. Even if the Property consists of four separate parcels, however, applicable case law (as discussed below) establishes that the proper focus is on Mr. Nealon's actual use of the parcels in connection with his primary residence, rather than the configuration of the Property.[8]

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[7] In her brief, Ms. Matthews spends a considerable amount of time arguing that the Property consisted of four subdivided lots as Mr. Nealon neither officially rescinded his recorded Subdivision Plan, nor was it rescinded by the terms of the CPBA, which provided for automatic rescission if infrastructure construction was not completed within two years from the start of construction, or if such construction had not commenced within five years.

[8] In any event, despite his initial contention that the Property is one, undivided parcel, Mr. Nealon repeatedly refers to the Property by its distinct lot designations (i.e., Lots 2A, 2B, 2C and 2D), and the focus of his argument is that the bankruptcy court's determination was "inherently flawed" as it ignored

Prior to the 2010 enactment of the current law, the Massachusetts homestead statute did not contain a definition of "home." In interpreting the statute, however, courts recognized that homes come in many forms and are used in many different ways. See In re Carey, 282 B.R. 118, 119 (Bankr. D. Mass. 2002). As the Carey court stated:

> [T]he homestead statute extends the estate of homestead to the whole of the lands and buildings that constitute the owner's "home," limited only by the dollar value of the exemption. The statute sets forth no other express limitation, and does not define "home." Homes come in many forms and are put to many uses. They variously include rental units, home offices from which the owners conduct business and earn their livings, professional and for-profit workshops and studios, land used for farming or storage of vehicles, and land and rooms that (though within the house) the owners never actually occupy or use in any meaningful sense.

Id. Thus, courts adopted a broad interpretation of the term "home," holding that a Massachusetts homestead estate is not limited to the particular area of the residence actually occupied by the family. See id.; see also In re Edwards, 281 B.R. at 446; In re Brizida, 276 B.R. 316, 320-22 (Bankr. D. Mass. 2002); but see In re Kelly, 334 B.R. 772, 775 (Bankr. D. Mass. 2005) ("The use of the word 'home' appears in reference to the type of claimant [who could acquire a homestead estate] and does not refer to the object of the homestead.").

Courts also recognized that the homestead estate is not automatically limited to the single parcel upon which the principal residence is located. See In re Edwards, 281 B.R. at 449; see also In re Fiffy, 293 B.R. at 555. The Edwards court wrote that "[a]lthough an owner of

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his family's "actual use of the *adjacent lots 2A, 2C and 2D* for family, household and recreational purposes." (emphasis added). Inherent in this argument is that the Property constituted four distinct parcels, all of which were used in connection with his primary residence. Therefore, without deciding the issue, we will treat it as such for purposes of our analysis.

property may claim an estate of homestead in only one principal residence, the statute does not directly provide, or indirectly imply, that a principal residence is limited to one parcel." In re Edwards, 281 B.R. at 449. Thereafter, the Panel held that "Massachusetts law does not proscribe a homestead exemption simply because the property consists of separately-deeded parcels, nor does it require partition of property included in the homestead simply because a part of the claimed homestead is vacant land." In re Fiffy, 293 B.R. at 555 (citing In re Edwards, 281 B.R. at 449). Rather, it explained, Massachusetts law requires that the debtor actually use and occupy the additional parcels as part of, or in connection with, the principal residence. Id.; see also In re Edwards, 281 B.R. at 449. In determining whether a debtor used and occupied property for purposes of Massachusetts homestead law, courts looked at the facts and circumstances of each case. In re Fiffy, 293 B.R. at 555 (citation omitted).

For example, in Edwards, the debtor claimed a homestead exemption in a parcel of real estate upon which his residence was located together with a contiguous, vacant parcel of land which he acquired at a later date. 281 B.R. at 442. The creditors objected, arguing that the adjacent parcel should be viewed as a separate piece of land because the debtor made only occasional use of the adjacent property and did not occupy it in any meaningful way. Id. at 444. At trial, the debtor asserted that the adjacent parcel was properly included in his homestead estate because his daughter played there, and he had landscaped a portion of the land, built a shed and a dog run, and constructed a wildflower garden. Id. at 442. The creditors countered that the debtor clearly did not intend to occupy the adjacent parcel as part of his principal residence as he purchased it as an investment, explored obtaining a building permit, and indicated he might build a house for his daughter on the property in the future. Id. at 444.

The bankruptcy court ultimately determined that the debtor had a valid homestead exemption on both parcels because the debtor and his family *actually used and occupied* the adjacent parcel as an integral part of their residence. Id. at 450. The bankruptcy court also determined that the debtor's intentions at the time he purchased the adjacent parcel were irrelevant. Id. The bankruptcy court stated as follows:

> To satisfy sections 1 and 2 of the homestead statute the Debtor must (1) occupy the property in question as his principal residence *or* intend to occupy it as such; *and* (2) declare his desire to so occupy the premises in the deed of conveyance or in a separate declaration of homestead. The Debtor recorded a declaration of homestead with respect to both the residential parcel and the adjacent parcel on May 18, 2001. . . . The issue in the instant case, then, is whether the Debtor actually occupied or intended to occupy the adjacent parcel together with the residential parcel as his principal residence at the commencement of the Chapter 7 bankruptcy case. . . .
>
> In the present case, the Debtor introduced, and the Creditors failed to rebut, convincing evidence that the Debtor actually used and occupied the adjoining parcel as part of and in connection with his principal residence as of the date of the filing of his bankruptcy petition. The Debtor proved that he and his family utilized the adjacent parcel as an extension of the residential parcel to a reasonable extent given that the adjacent parcel is 55% wetland. The Debtor landscaped a portion of the adjacent parcel and built a garden shed on the parcel as well as a dog run. The Debtor's children used the adjacent parcel as a play area. The Debtor testified that he purchased the adjacent parcel for the benefit of the family to protect their privacy and to guard against any future development. He and his wife repeatedly rejected offers to sell the adjacent parcel or to grant an easement on it. The Debtor and his family treated the adjoining parcel as an integral part of their homestead, even though the Debtor holds two titles for the parcels.

Id. at 449-50.

With respect to the debtor's prior intention of developing the adjacent parcel and his speculative future intentions, the bankruptcy court stated:

> The Debtor's prior intention of developing the adjacent parcel is not material to the validity of his homestead under the circumstances of this case. First, the Debtor's development plans were preliminary in nature and preceded the filing of

> the May 18, 2001 declaration of homestead by seven years. Moreover, the Debtor's development plans did not come to fruition at least in part because the adjacent parcel is predominantly wetland . . . . Whatever the Debtor's intentions were in 1992, as of the petition date, which is the determinative date, the Debtor used and occupied both parcels as his principal residence.
>
> Similarly, the Debtor's future intent to someday give the adjoining parcel to his grown daughter so that she might build a home on the parcel does not defeat the validity of the homestead at the time of the commencement of the Chapter 7 case. The Debtor's future intent is speculative and uncertain . . . . In any event, the Debtor's future intent is irrelevant because the Massachusetts homestead statute is phrased in the alternative, creating a valid estate of homestead where the Debtor occupies or intends to occupy the property as his principal residence. Here, the Debtor proved that on the petition date his family occupied both parcels as their residence.

Id. at 450. Thus, the court determined that the creditors had not sustained their burden of proving that, at the time of the declaration of homestead, the adjacent parcel was not used as part of the debtor's principal residence. Id.

Massachusetts bankruptcy courts considering the issue after the 2010 revisions to the state's homestead statute continue to apply the approach set forth in Edwards, focusing on the debtor's actual use and occupancy of the property when determining the extent of the homestead estate. See, e.g., In re Kology, 499 B.R. 20, 36 n.108 (Bankr. D. Mass. 2013) (noting that, despite the 2010 revisions to the Massachusetts homestead statute, earlier cases are still relevant because the current law "preserves most of the same core concepts"); see also In re Catton, No. 14-41468-MSH, 2015 Bankr. LEXIS 688, *6 (Bankr. D. Mass. Mar. 5, 2015) ("While no legislative history of the current homestead statute exists, it would not be unreasonable to surmise that the statute's definition of 'home' in section 1 was the legislature's attempt to codify the rulings in cases like Edwards and Carey."), aff'd, 2015 U.S. Dist. LEXIS 155255 (D. Mass. Nov. 17, 2015). "By focusing on actual use and occupancy, courts ensure that exemptions will

be construed in a manner consistent with the purpose and policy of the Massachusetts Homestead Statute." In re Kology, 499 B.R. at 36 (citation omitted).

The bankruptcy court's analysis in Kology is helpful here. In Kology, the debtors purchased land in Harwich, Massachusetts in 1969 via two separate deeds. In 1990, they subdivided the land into three lots, selling two of the lots and retaining the lot upon which their house stood. In 1992, the debtors prepared another subdivision plan, proposing to further subdivide the remaining lot with a new access road. The Harwich Planning Board approved the 1992 subdivision plan, and the debtors cleared trees for the new right-of-way, graded the cul-de-sac and added utility service. However, the subdivided lots were never sold. In 2003, the debtors prepared yet another plan to subdivide the property, creating four additional lots. However, title litigation ensued and again, the lots were never sold.

In the meantime, in 1992, the debtors purchased a recreational vehicle and traveled extensively until 2010, when it was repossessed. In July 2011, the debtors filed a declaration of homestead. The declaration identified their property both by its street address and by reference to the deeds by which the debtors originally acquired title to the property prior to the various subdivisions having occurred. In 2012, the debtors filed a chapter 13 petition and claimed the Massachusetts homestead exemption. The creditors objected to the claimed homestead exemption, arguing that the lot upon which the debtors' house stood had been rendered separate and distinct from the rest of the property by the subdivisions. The debtors countered that the court should focus on their actual use of the contiguous parcels of land in connection with their home, rather than the configuration of the subdivided lots.

The court acknowledged that the question was whether the debtors actually used and occupied the entire property as part of their principal residence, and that cases such as Fiffy and Edwards suggest that the requisite "use" for vacant land to fall within the homestead is a fairly low threshold and includes: storage, landscaping, gardening, sheltering of animals and livestock, cultivation, recreation, maintaining privacy, or guarding against future development. The bankruptcy court found that between 1969 and 1990, the debtors engaged in the types of sufficient uses identified in Fiffy and Edwards on their various lots. The court noted, however, that in 1992 and 2003, the debtors sought and obtained approval of plans subdividing the property into additional lots, and their intention was to sell the subdivided lots. The court pointed out that the debtors took substantial steps to realize their subdivision plans but ultimately, title litigation hindered their plans. The bankruptcy court determined that the debtors' actions with respect to the subdivisions were substantial evidence that they intended to alienate the property beyond their principal residence rather than occupy it in connection with their principal residence.

The court noted, however, that, notwithstanding the above facts, the appropriate consideration was whether the debtors occupied the property at the time of the declaration. Noting that the debtors did not offer any direct evidence (through testimony or documentation) regarding their use of the surrounding lots at the time of the declaration, the bankruptcy found as follows:

> The evidence clearly establishes that the Debtors occupy their house, which is located on Lot 4, as a principal residence. Unfortunately, the only evidence of their use or intent with respect to [the other lots] after 2003 is that Mr. Kology once, approximately one year before the trial, scavenged the lots for broken branches to fuel his woodstove. The recurring theme of his testimony was that all "extensive" and regular use of the Property beyond Lot 4 ceased long ago.

> Particularly where the Debtors' intervening conduct manifested a clear intent which was at odds with an intent to occupy [the other lots] in connection with the principal residence, they are not entitled to rely on their pre-subdivision use and conduct to establish the requisite intent at the time of the Homestead Declaration.

499 B.R. at 38. Thus, the court determined that the creditors had introduced irrefutable evidence that, prior to the homestead declaration, the debtors intended to alienate the Property, shifting the burden to the debtors to produce unequivocal evidence that, at the time of the homestead declaration, they occupied the property in its entirety as a principal residence. The debtors having failed to produce any evidence that they used the surrounding lots, the bankruptcy court limited their homestead exemption to the lot upon which their house was located.

It is apparent from cases such as Edwards, Fiffy, and Kology that, in determining whether parcels adjacent to the property on which a debtor's home is located are part of the debtor's principal residence for purposes of the Massachusetts homestead statute, Massachusetts bankruptcy courts primarily examine the debtor's actual use (if any) of the adjacent parcels, rather than the configuration of the land or the debtor's subjective intent with respect to the adjacent parcels. Neither the Supreme Judicial Court nor the First Circuit has addressed the issue.

II. Analysis

In the present case, the bankruptcy court concluded that Mr. Nealon's homestead exemption extended only to the lot upon which his residence was situated, and not to the three adjacent parcels. In making its determination, the bankruptcy court focused upon Mr. Nealon's intent to subdivide the Property, as evidenced by the recording of the Subdivision Plan, and found that, at the time he filed his homestead declaration, he had not rescinded his intent to subdivide the Property and, therefore, he did not consider the adjacent parcels to be a part of his

principal residence. Mr. Nealon argues that the bankruptcy court applied the wrong standard and erroneously focused on his original intent to subdivide the Property rather than his family's actual use of the Property at the time of the declaration.

As noted above, Bankruptcy Rule 4003(c) places the burden of proving that an exemption is not properly claimed on the party objecting to the claimed exemption. Fed. R. Bankr. P. 4003(c). If the objecting party can produce evidence to rebut the exemption, the burden of production then shifts to the debtor to come forward with unequivocal evidence to demonstrate that the exemption is proper. In re Marrama, 307 B.R. at 336. Thus, in order to meet her burden, Ms. Matthews needed to produce sufficient evidence that, at the time of the homestead declaration, Mr. Nealon did not occupy the vacant lots as his part of his principal residence.

Ms. Matthews argues that she satisfied her burden of proof by introducing evidence of Mr. Nealon's active efforts to subdivide the Property which showed he did not intend to use the adjacent parcels as part of his principal residence. At trial, Ms. Matthews presented evidence that between 2005 and 2011, Mr. Nealon attempted to subdivide the Property into four separate lots, he prepared a Subdivision Plan, received conditional approval from the Planning Board, and recorded the proposed Subdivision Plan, and he expended considerable resources trying to comply with the Planning Board's conditions and effectuate that plan. It is clear from the testimony that Mr. Nealon reached an obstacle to his Subdivision Plan in 2011, when the mortgagee refused to partially release its mortgage unless he paid $70,000.00. Both Mr. Nealon and Mrs. Nealon offered alternative reasons for abandoning the project in 2011, but the bankruptcy court found that those reasons were not credible, and that Mr. Nealon never rescinded his intention to subdivide the Property. Giving due deference to the bankruptcy

court's unique opportunity to assess the credibility and demeanor of the witnesses, see Robin Singh Educ. Servs., Inc. v. McCarthy (In re McCarthy), 488 B.R. 814, 825 (B.A.P. 1st Cir. 2013), we can conclude that the bankruptcy court's findings regarding Mr. Nealon's intent in 2011 were supported by the record and, therefore, were not clearly erroneous.

The bankruptcy court's focus, however, should not have been on Mr. Nealon's intent to subdivide the Property between 2004 and 2011, but on his family's actual use of the Property at the time of the declaration in 2013. When a debtor actually occupies property and uses the surrounding land in connection with his principal residence, his past or future intention regarding the property is not controlling. See Edwards, 281 B.R. at 450-51.

Thus, even if Ms. Matthews adequately rebutted the presumption in favor of Mr. Nealon's homestead exemption, and the burden shifted to Mr. Nealon to produce unequivocal evidence to demonstrate that the exemption was proper, Mr. Nealon satisfied that burden. Mr. Nealon introduced, and Ms. Matthews failed to rebut, convincing evidence that Mr. Nealon and his family actually used and occupied the vacant lots as part of and in connection with his principal residence at the time of the declaration in 2013.

The Nealons testified about the various uses that the family made of the vacant lots surrounding their home both before and after the filing of the Declaration of Homestead, including sledding, snowshoeing, cross country skiing, hiking, snowboarding, riding off-road vehicles, storing boats during the winter, and gathering lumber, firewood, and holiday greens. He also introduced photographs depicting his family's use of the vacant lots for such activities. Ms. Matthews did not produce any evidence to counter the Nealons' testimony and documentary evidence regarding their use of the vacant lots and, therefore, it is unrefuted. The bankruptcy

court acknowledged the Nealons' various activities, but found that "there is no reason why those activities should not have happened regardless of what the party's intention was ultimately with respect to the property. The property had not yet been sold and these various activities are neither consistent nor inconsistent with any intention to retain the property." Based on cases such as Edwards, Fiffy, and Kology, however, these are precisely the kinds of activities that establish a debtor's use and occupancy of surrounding land in connection with a principal residence for purposes of the Massachusetts homestead statute. Whatever his intentions were through late 2011, Mr. Nealon produced evidence that, as of the date of the declaration in December 2013, he used and occupied the entire Property in connection with his principal residence. As such, the bankruptcy court erred in disregarding evidence of the Nealons' use of the Property, and in determining that Mr. Nealon's homestead exemption did not include Lots 2A, 2C and 2D.

CONCLUSION

For the reasons set forth above, we **REVERSE** the bankruptcy court's order sustaining the objection of Ms. Matthews to Mr. Nealon's claimed homestead exemption, and **REMAND** for entry of an order consistent with this opinion.