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### **Court: Mortgage valid despite wife's failure to sign**

by [Michelle Lore](#) Staff Writer

A mortgage was valid and enforceable against a wife who actively participated in a mortgage transaction with her husband even though she didn't sign the loan documents as a co-borrower, the Minnesota Court of Appeals has ruled.

The wife stopped making mortgage payments on her home after her husband died, and the bank foreclosed.

An Anoka County District Court judge had determined that the mortgage was void because the wife did not sign the mortgage as required by Minnesota law.

But the Court of Appeals reversed, citing the woman's knowing participation in the transaction and the fact that she had signed a waiver of her homestead rights.

"[T]he purpose of Minn. Stat. sec. 507.02, which seeks to protect the non-signing spouse's interest in the homestead from wrongful conveyance, was satisfied by [the spouse's] waiver of homestead rights," wrote Judge Roger Klaphake.

The decision is *National City Bank v. Engler*.

Edina attorney Thomas Olson, who represents the bank, said the Court of Appeals rejected the wife's attempt to be "hyper technical" and instead looked at and enforced the parties' intention.

"There is no harm to [the wife] as a result of getting what she expected," he said. "The sense of the transaction is enforced. Form is not exalted over substance."

The wife's attorney, Steven Lodge, of Andover, said the Court of Appeals' decision sends the message that a mortgage lender can dictate the terms of a deal and then not worry about the ramifications if it's done wrong.

"The intent of the statute is to protect against the rough handling of the mortgagor in these situations," Lodge said. "[Now] even though the statute says the spouse must join in the mortgage you can do an end run around that by getting the client to sign a homestead waiver."

#### Signature squabble

The respondent, Judith Engler, and her late husband, Harold, owned a homestead in joint tenancy subject to a mortgage. In 2004, they refinanced their home with a mortgage from First Franklin Financial Corporation, which assigned the loan to appellant National City Bank in 2006.

During the mortgage application process, Judith signed preliminary documents as a potential borrower. But at the closing, First Franklin asked that only Harold sign the promissory note and the mortgage. In the mortgage, both Harold and Judith are identified as "borrowers" in the definition section, but on the signature page Harold signed as borrower and Judith signed as non-borrower. Judith's signature was further modified with language appearing below the signature line that stated, "Signing solely for the purpose of waiving any and all Homestead Rights."

Harold died in February 2006 and Judith ceased making mortgage payments in April 2006. After a court trial on the bank's foreclosure proceedings, the trial court judge concluded that the mortgage was void as a matter of law. The bank appealed.

The Court of Appeals explained that under Minn. Stat. sec. 507.02, if an owner is married, a homestead conveyance — including a mortgage — is void without the signatures of both spouses.

The parties dispute whether Judith's signature immediately followed by "non-borrower" constitutes a signature for purposes of the statute. They also dispute the effect of her post-signature language restriction of "Signing solely for the purpose of waiving any and all Homestead Rights."

The Court of Appeals disagreed with the trial judge's dismissal of the phrase as meaningless, instead determining that it clearly indicates that Judith was waiving her homestead rights. The court refused to ignore the signature-modifying language and concluded that all provisions of the contract can be harmonized — the husband signed the promissory note and mortgage conveying the homestead, and the wife acquiesced in this conveyance by waiving her homestead rights.

"Although a mortgage conveyance of a homestead is generally void under Minn. Stat. sec. 507.02 if both spouses do not sign the conveyance, when the non-signing spouse actively and knowingly participates in the transaction and waive his or her homestead rights, the purpose of the statute is fulfilled and the mortgage may be enforced," Klaphake wrote.

Real estate lawyers say the decision makes sense, particularly because it appears the wife knew what she was doing and benefited from the deal.

Bloomington attorney Brad Boyd said that common sense prevailed over creative reconstruction.

"It appears all parties knew precisely why [the wife] was signing the mortgage. Her signature, and the language accompanying her signature, was given the meaning that was clearly intended," he said.

Minneapolis attorney Shaun McElhatton agreed.

"It seems clear to me the wife intended to waive her homestead rights," he said. "The statute is intended to make sure that one spouse doesn't bargain away the homestead of the other. Here, the wife was involved in the process and signed off on it."

McElhatton noted that the decision is one of several that have been issued by the Court of Appeals in the last year that refuse to allow a party to point to a "technicality" to invalidate an otherwise valid real estate document.

Minneapolis attorney L.B. Guthrie said the decision is consistent with existing real estate practices, adding that the spouse did in fact sign the documents, but as a "non-borrower."

"It is quite common for only one spouse to sign a note and be solely responsible for the debt, but because of [sec.] 507.02, the lender needs to have both spouses sign the mortgage," he said. "National City would have had a big impact if it had upheld the District Court and invalidated this mortgage."

While Lodge disagrees with the decision, he acknowledged that it underscores the fact that people entering into these types of transactions need to understand them.

"I think there's an obligation on the part of the lender, the title agents and the mortgage brokers to make sure that they do," he said.