Rel: October 28, 2022

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2022-2023

1210396

Jenny D. Matherly

v.

The Citizens Bank

SC-2022-0443

The Citizens Bank

v.

Jenny D. Matherly

SC-2022-0520

Penn Waters, LLC

v.

The Citizens Bank

Appeals from Coffee Circuit Court
(CV-18-900132)

MENDHEIM, Justice.

These consolidated appeals stem from an action commenced by The Citizens Bank ("Citizens Bank") in the Coffee Circuit Court against Steve P. Matherly ("Steve"); Sue E. Matherly a/k/a Sue Ellen Stratten, Steve's former spouse ("Sue"); and Penn Waters, LLC ("Penn Waters"). The initial complaint sought: (1) to quiet title to certain real property in Steve; (2) an accounting from Penn Waters as to the balance allegedly owed on a mortgage securing a home-equity line of credit on the same real property; (3) damages from Steve for breach of contract and fraud based on his failure to pay on his personal guaranty of a corporate debt; and (4) a judicial foreclosure of the mortgage securing the indebtedness

owed Citizens Bank by Steve. In the course of the proceedings, Steve's current spouse, Jenny D. Matherly ("Jenny"), intervened as a defendant, claiming a homestead interest in the real property at issue. Eventually, the circuit court entered two orders granting a summary judgment in favor of Citizens Bank. The first order awarded the real property in question to Citizens Bank and granted it immediate possession thereof, requiring Steve and Jenny to vacate the property, awarded Jenny $5,000 based on a homestead claim, and required Steve to pay the deficiency balance owed by him to Citizens Bank following foreclosure on the subject real property. The second order concluded that the mortgage held by Penn Waters was void because it had been previously satisfied. Both Jenny and Penn Waters appeal from the circuit court's judgments, and Citizens Bank cross-appeals the circuit court's judgment awarding $5,000 to Jenny. Steve has not appealed the judgment against him, and Sue is not a party to the appeals. We affirm the judgments of the circuit court.

I. Facts

On October 16, 2006, Steve and Sue executed and delivered to Community Bank & Trust of Southeast Alabama ("Community Bank") a

"Home Equity Line of Credit Agreement" ("the HELOC agreement"), which was secured by a mortgage on real property at which the Matherlys resided ("the HELOC mortgage"), which was evidenced by a separate agreement ("the HELOC mortgage agreement"). The real property consisted of 9.682 acres located on County Road 537 in Enterprise, Coffee County, and it is undisputed that it was worth well in excess of $5,000 ("the Matherly property"). The HELOC mortgage agreement permitted the Matherlys to borrow from a revolving line of credit, not to exceed $100,000 at any given time, over a five-year period. The HELOC mortgage secured only advances pursuant to the terms and conditions of the HELOC mortgage agreement, and the maximum principal indebtedness secured by the mortgage could never exceed $100,000. The HELOC mortgage was paid off on April 7, 2008. Additionally, the HELOC agreement matured and expired on October 20, 2011, without any outstanding debt owed to Community Bank under the terms of the HELOC agreement or the HELOC mortgage agreement.

On October 30, 2008, Community Bank also extended to Steve a $100,000 revolving commercial line of credit ("the commercial loan"), which was secured by a mortgage from Warehouse Properties, LLC

("Warehouse"), an entity owned by Steve ("the first Warehouse mortgage"). The first Warehouse mortgage to Community Bank encumbered two parcels of real property owned by Warehouse ("the Warehouse parcels"). On November 20, 2008, Community Bank renewed and increased the commercial loan to the sum of $249,500. As additional collateral for the renewed commercial loan, Warehouse granted Community Bank a second mortgage on the Warehouse parcels ("the second Warehouse mortgage"), and Steve also purported to pledge the HELOC mortgage as secondary collateral for the renewed commercial loan. The commercial loan was renewed several times, and each subsequent renewal of the commercial loan listed the first Warehouse mortgage, the second Warehouse mortgage, and the HELOC mortgage as collateral.

On March 12, 2012, Steve and Sue were divorced by judgment; the Matherly property was awarded to Steve. On October 5, 2012, Steve and Jenny were married. It is undisputed that, upon their marriage, Steve and Jenny began occupying the Matherly property as their marital residence.

On November 20, 2012, US Aero Services, Inc. ("US Aero"), an entity owned in part by Steve, executed and delivered to Citizens Bank a promissory note in the amount of $500,000 ("the US Aero note"). In doing so, Steve assigned Citizens Bank a security interest in certain invoices that US Aero had submitted to the United States Department of Defense as well as payments associated with a contract between US Aero and the United States Department of State related to the overhaul of "Huey" style helicopters. The US Aero note was personally guaranteed by Steve.

On August 23, 2013, to further secure the US Aero Note and any other existing or future obligations due from US Aero or Steve to Citizens Bank, Steve executed and delivered to Citizens Bank an agreement pledging a mortgage on the Matherly property ("the Citizens Bank mortgage") and his personal guaranty ("the Citizens Bank mortgage agreement"). The Citizens Bank mortgage agreement expressly identified Steve as "an unmarried male" and stated that he had "full power, right, and authority to enter into the Mortgage and to hypothecate the Property."

From March 28, 2014, to December 29, 2015, Citizens Bank and US Aero entered into various change-in-terms agreements extending the

maturity date of the US Aero note. In the final change-in-terms agreement between Citizens Bank and US Aero dated December 29, 2015, Steve acknowledged that the outstanding unpaid principal balance of the US Aero note as of that date was $382,676.46, and the maturity date of the US Aero note was extended to October 20, 2016.

On July 9, 2015, Penn Waters purchased without recourse the commercial loan from Community Bank. As part of that transaction, Community Bank assigned to Penn Waters the first Warehouse mortgage, the second Warehouse mortgage, and, purportedly, the HELOC mortgage, although the assignment does not expressly reference the HELOC mortgage. The principal sum due and owing under the commercial loan on July 9, 2015, was $179,384.47.

US Aero and Steve failed to pay the indebtedness due on the US Aero note by October 20, 2016, and thus defaulted. Under the terms of the US Aero note, the interest rate on the outstanding debt then increased to 18% per annum. As a result of the default, Citizens Bank commenced foreclosure proceedings on the Matherly property. At the foreclosure sale on November 1, 2019, the Matherly property was sold to Citizens Bank for $275,000.

The outstanding indebtedness owed to Citizens Bank by US Aero and Steve under the US Aero note and his personal guaranty on the date of the foreclosure sale was $528,697.92. As provided under the terms of the Citizens Bank mortgage agreement, the credit bid from the foreclosure sale was applied first to the foreclosure expenses, second to unpaid property taxes, third to pay off a superior IRS tax lien, fourth to accrued interest, and fifth to the unpaid principal balance of the US Aero note. After applying the applicable portion of the credit bid to the US Aero note, there remained a deficiency balance of $277,934.50, upon which interest continued to accrue since November 1, 2019.

On July 23, 2018, Citizens Bank commenced this action in the Coffee Circuit Court against Steve, Sue, and Penn Waters. As we noted earlier, Citizens Bank sought to quiet title to the Matherly property in Steve, an accounting from Penn Waters as to the balance allegedly owed on the mortgage evidenced by the HELOC mortgage, damages from Steve for breach of contract and fraud based on his failure to pay on his personal guaranty, and a judicial foreclosure of the Citizens Bank mortgage. On October 2, 2019, Citizens Bank dismissed Sue from the action without prejudice and filed its first amended complaint against Steve and Penn

Waters. In that complaint, Citizens Bank sought a judgment declaring the extent and validity of the lien on the Matherly property claimed by Penn Waters under the HELOC mortgage and a judgment against Steve for the indebtedness owed to Citizens Bank under the US Aero note.

Jenny first learned of Citizen Bank's foreclosure on the Matherly property on November 8, 2019, when a letter was received at Steve and Jenny's home demanding that Steve vacate the home within 10 days. On December 10, 2019, Jenny petitioned to intervene in the action as a party claiming a homestead interest in the Matherly property.

On January 29, 2020, Citizens Bank filed a second amended complaint in which it added Jenny as a defendant. In that complaint, Citizens Bank sought a judgment declaring the extent, validity, and priority of the HELOC mortgage assigned to Penn Waters, a judgment declaring that the Matherly property was not the homestead of Jenny when Steve executed the Citizens Bank mortgage agreement, a judgment declaring the extent, validity, and priority of the Citizens Bank mortgage, which it had already foreclosed, and a judgment against Steve for the remaining indebtedness owed to Citizens Bank under the US Aero note.

On April 7, 2020, Jenny filed an answer and a counterclaim to the second amended complaint in which she asserted that the Citizens Bank mortgage and Citizens Bank's foreclosure deed to the Matherly property were void pursuant to the "homestead" provisions in Article X, § 205, Ala. Const. 1901, and § 6-10-3, Ala. Code 1975.[1]

On November 23, 2020, Jenny filed a summary-judgment motion on her counterclaim. On February 25, 2021, Citizens Bank filed a summary-judgment motion against all parties and as to all claims. On June 23, 2021, Citizens Bank filed its opposition to Jenny's summary-judgment motion. Also on June 23, 2021, Penn Waters and Steve filed their opposition to Citizens Bank's summary-judgment motion. On June 24, 2021, Jenny filed her opposition to Citizens Bank's summary-judgment motion. A hearing on all motions and oppositions thereto was held on June 28, 2021.

On November 19, 2021, the circuit court entered two orders that granted summary judgments in favor of Citizens Bank. In the first order, the circuit court concluded that the Citizens Bank mortgage and Citizens

[1]The text of Article X, § 205, Ala. Const. 1901, and the text of § 6-10-3, Ala. Code 1975, are quoted in Part III.B. of this opinion.

Bank's foreclosure deed to the Matherly property were valid and enforceable; that Citizens Bank was the owner of the Matherly property by virtue of its foreclosure deed and was entitled to immediate possession of the property; and that Steve and Jenny had to immediately vacate the Matherly property but that, after Steve and Jenny vacated the Matherly property, Jenny was entitled to receive $5,000 as compensation for her homestead interest in the Matherly property because Steve had mortgaged the Matherly property without her assent or signature. In that same order, the circuit court also entered a judgment against Steve for the deficiency balance owed by him to Citizens Bank as guarantor of the US Aero note in the amount of $322,251.88. In the second order, the circuit court entered a summary judgment in favor of Citizens Bank and against Penn Waters, concluding that "the HELOC Mortgage was void and satisfied at the time of the assignment" to Penn Waters and, thus, had no effect on Citizens Bank's claim to the Matherly property.

Steve, Jenny, and Penn Waters all filed postjudgment motions on December 15, 2021. On January 31, 2022, the circuit court denied in separate orders the postjudgment motions filed by Steve and Jenny. On February 16, 2022, the circuit court held a hearing on Penn Waters's

postjudgment motion. That postjudgment motion was denied by operation of law pursuant to Rule 59.1, Ala. R. Civ. P., on March 15, 2022.

On March 11, 2022, Jenny filed a notice of appeal. On March 28, 2022, Citizens Bank filed a notice of appeal, commencing its cross-appeal concerning the circuit court's award of $5,000 to Jenny for her homestead interest in the Matherly property. On April 7, 2022, Penn Waters filed a notice of appeal.

II. Standard of Review

> "'This Court's review of a summary judgment is de novo. Williams v. State Farm Mut. Auto. Ins. Co., 886 So. 2d 72, 74 (Ala. 2003). We apply the same standard of review as the trial court applied. Specifically, we must determine whether the movant has made a prima facie showing that no genuine issue of material fact exists and that the movant is entitled to a judgment as a matter of law. Rule 56(c), Ala. R. Civ. P.; Blue Cross & Blue Shield of Alabama v. Hodurski, 899 So. 2d 949, 952-53 (Ala. 2004). In making such a determination, we must review the evidence in the light most favorable to the nonmovant. Wilson v. Brown, 496 So. 2d 756, 758 (Ala. 1986). Once the movant makes a prima facie showing that there is no genuine issue of material fact, the burden then shifts to the nonmovant to produce "substantial evidence" as to the existence of a genuine issue of material fact. Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794, 797-98 (Ala. 1989); Ala. Code 1975, § 12-21-12.'"

Aliant Bank, a Div. of USAmeribank v. Four Star Invs., Inc., 244 So. 3d 896, 907 (Ala. 2017) (quoting Dow v. Alabama Democratic Party, 897 So. 2d 1035, 1038-39 (Ala. 2004)).

III. Analysis

A. Preliminary Matters

Before we address the primary issue presented in these appeals, which concerns what effect, if any, Jenny's assertion of the Matherly property as her homestead had upon the validity of the Citizens Bank mortgage and Citizens Bank's foreclosure deed, we briefly cover two preliminary matters.

First, Jenny filed a motion to dismiss Citizens Bank's cross-appeal, arguing that the cross-appeal was untimely under Rule 4(a)(2), Ala. R. App. P. Rule 4(a)(2) requires that a notice of appeal commencing a cross-appeal be filed "within 14 days (2 weeks) of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires." Jenny's notice of appeal was filed on March 11, 2022; Citizens Bank's notice of appeal was not filed until March 28, 2022, more than 14 days after the filing of the original notice

of appeal. Therefore, Jenny argues, Citizens Bank's cross-appeal is untimely.

Citizens Bank argues in its response that its notice of appeal was timely because it was filed 13 days after Penn Waters's postjudgment motion was denied by operation of law. In other words, Citizens Bank contends that the deadline for commencing its cross-appeal was tolled by the pendency of Penn Waters's postjudgment motion.

We agree with Citizens Bank. In Wellcraft Marine, a Div. of Genmar Indus., Inc. v. Zarzour, 577 So. 2d 414, 417 (Ala. 1990), this Court observed:

> "[I]t is well established that the filing of a post-judgment motion made pursuant to Rule 59, A[la.] R. Civ. P., tolls the time for taking an appeal from the case. Rule 4(a)(3), A[la.] R. App. P. The running of the time for taking an appeal is tolled as to all parties, not just the one who filed the post-judgment motion."

Therefore, because the time for taking an appeal was tolled until a ruling on Penn Waters's postjudgment motion became final, Citizens Bank's cross-appeal was timely.

Second, we note that, although Penn Waters has appealed the circuit court's judgment against it, its only argument on appeal mirrors the one presented by Jenny, which is that the Citizens Bank mortgage is

void pursuant to Article X, § 205, Ala. Const. 1901, and § 6-10-3, Ala. Code 1975, because of Jenny's homestead interest in the Matherly property. However, in its second order entered on November 19, 2021, the circuit court concluded that the HELOC mortgage was void because

> "the HELOC Agreement was paid in full and Community Bank had no obligation to extend any further credit to Steve under the HELOC Agreement. … Thus, the purported assignment of the HELOC Mortgage by Community Bank to Penn Waters assigned no rights to the [Matherly] Property to Penn Waters, as the HELOC Mortgage was void and satisfied at the time of the assignment."

In other words, the circuit court concluded that the purported assignment of the HELOC mortgage had no bearing on the validity of the Citizens Bank mortgage because the HELOC mortgage had been previously satisfied and, thus, was void at the time that that mortgage was assigned to Penn Waters. Penn Waters does not dispute that conclusion in its appeal, even though it is clearly an independent reason for the circuit court's ruling against Penn Waters, regardless of what effect, if any, Jenny's homestead claim may have on the validity of the Citizens Bank mortgage and Citizen Bank's foreclosure deed. "[A] challenge to the judgment is waived where … the trial court actually states two grounds for its judgment, both grounds are championed by the appellee, and the

appellant simply declines to mention one of the two grounds." Soutullo v. Mobile Cnty., 58 So. 3d 733, 739 (Ala. 2010). Consequently, we affirm the circuit court's summary judgment against Penn Waters in appeal no. SC-2022-0520.

B. Relevant Homestead-Law Provisions

The remaining arguments in Jenny's appeal and Citizens Bank's cross-appeal revolve around provisions of Alabama law concerning homestead exemptions. As this Court explained in Miller v. Marx, 55 Ala. 322, 330 (1876), the idea of providing an exemption for property began with a statute that "was enacted on the 12th January, 1833," but "[i]t was confined to a few chattels, of agricultural and family necessity." The first statute to exempt real property was enacted in 1843. See id. The homestead exemption "was made a part of the permanent, organic law of the land, by the constitution of 1868 …." Id. See Art. XIV, § 2, Ala. Const. 1868. By the time Miller was decided, the Court could say that, "in this State, the principle of exemption of part of the property of the citizen from levy and sale has ripened into a permanent policy; and these statutes have always received a liberal construction at the hands of the courts." Id. The provision for a homestead exemption in the Alabama Constitution

of 1901, which is identical in wording to the provisions in the Constitutions of 1868 and 1875, states:

> "Every homestead not exceeding eighty acres, and the dwelling and appurtenances thereon, to be selected by the owner thereof, and not in any city, town, or village, or in lieu thereof, at the option of the owner, any lot in a city, town, or village, with the dwelling and appurtenances thereon owned and occupied by any resident of this state, and not exceeding the value of two thousand dollars, shall be exempt from sale on execution or any other process from a court; for any debt contracted since the thirteenth day of July, eighteen hundred and sixty-eight, or after the ratification of this Constitution. Such exemption, however, shall not extend to any mortgage lawfully obtained, but such mortgage or other alienation of said homestead by the owner thereof, if a married man, shall not be valid without the voluntary signature and assent of the wife to the same."

Article X, § 205, Ala. Const. 1901 (Off. Recomp.) (emphasis added).

In Miller, the Court explained the reason for requiring the assent and signature of the spouse to an alienation of the homestead:

> "Exemption is not intended merely as a boon to the head of a family. It has a broader purpose. It proposes to secure to the resident and his family a home and a shelter, of which they cannot be deprived by the visitations of adversity, or by the demands of creditors. It provides alike for the family, while the head of it is living, and for the widow and children, composing the family after his death. So clearly is this manifested, that the homestead cannot be alienated by mortgage or otherwise, 'by the owner thereof, if a married man, without the voluntary signature and assent of the wife.'

> Speaking of the purpose of such legislation, the Supreme Court of Iowa, in Parsons v. Livingston[& Kinkead], 11 Iowa [104], 106 [(1860)], said, it was 'based upon the idea, that it is a matter of public policy, for the promotion of the prosperity of the State, and the general good of the people, that such citizen should be independent and above want -- that he should have a home, a place where he and his family may live in society, beyond the reach of financial misfortune, and the demands of creditors.'"

55 Ala. at 330. The Miller Court ultimately explained the basic meaning of the homestead provision in the Alabama Constitution:

> "We hold, then, that the constitution, by its unaided force, and without legislation, exempts every homestead absolutely and entirely, with the two limitations; first, that if it be in the country, it shall not exceed eighty acres in quantity, no matter what its value may be, unless it exceed two thousand dollars; second, that whether in the country, or in a city, town or village, it shall not exceed two thousand dollars in value. This right to the homestead, within the limits named, is secured absolutely to the owner by the constitution itself; and cannot be reduced or impaired by the legislature. The clause under discussion imposes no restraint on the legislative power to increase the exemption."

55 Ala. at 334-35 (emphasis added).

As the Miller Court noted, the Alabama Constitution provided the minimum confines of the homestead exemption, but the legislature could increase that exemption. Subsequent statutes have done just that. Section 6-10-2, Ala. Code 1975, sets the parameters of the homestead

exemption. At the time Steve executed the Citizens Bank mortgage agreement on August 23, 2013, § 6-10-2 provided:

> "The homestead of every resident of this state, with the improvements and appurtenances, not exceeding in value $5,000[2] and in area 160 acres, shall be, to the extent of any interest he or she may have therein, whether a fee or less estate or whether held in common or in severalty, exempt from levy and sale under execution or other process for the collection of debts during his or her life and occupancy and, if he or she leaves surviving him or her a spouse and a minor child, or children, or either, during the life of the surviving spouse and minority of the child, or children, but the area of the homestead shall not be enlarged by reason of any encumbrance thereon or of the character of the estate or interest owned therein by him or her. When a husband and wife jointly own a homestead each is entitled to claim separately the exemption provided herein, to the same extent and value as an unmarried individual. For purposes of this section and Sections 6-10-38 and 6-10-40, [Ala. Code 1975,] a mobile home or similar dwelling if the principal place of residence of the individual claiming the exemption shall be deemed to be a homestead."

Section 6-10-3, Ala. Code 1975, expounds upon the limitation on alienation of the homestead of a married couple:

> "No mortgage, deed or other conveyance of the homestead by a married person shall be valid without the voluntary signature and assent of the husband or wife, which must be shown by his or her examination before an officer

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[2]Act No. 2015-484, § 1, Ala. Acts 2015, changed the amount of the homestead exemption from $5,000 to $15,000, but it did not alter § 6-10-2 in any other respect.

> authorized by law to take acknowledgments of deeds, and the certificate of such officer upon, or attached to, such mortgage, deed, or other conveyance, which certificate must be substantially in the form of acknowledgment for individuals prescribed by Section 35-4-29[, Ala. Code 1975]."

This Court has explained that

> "Ala. Code 1975, § 6-10-2 (Supp. 1988) and § 6-10-3, are essentially a codification of Article X, § 205, of the Alabama Constitution. However, there are some material differences, such as increases in both the acreage and value of land that can be exempt, and the inclusion of mobile homes as homesteads. It is clear from the language of these statutes that they, like § 205, were intended to protect the homes of debtors and their families …."

Gowens v. Goss, 561 So. 2d 519, 522 (Ala. 1990). What are now § 6-10-2 and § 6-10-3 were first enacted in 1873. See Act No. 28, §§ 3-4, Ala. Acts 1872-73.

However, one other statutory provision is relevant to Jenny's homestead claim and the circuit court's disposition of this case. Section 6-10-40, Ala. Code 1975, provides:

> "When the homestead, after being reduced to the lowest practicable area, exceeds $5,000 in value and the husband or wife has aliened the same by deed, mortgage, or other conveyance without the voluntary signature and assent of the spouse, shown and acknowledged as required by law, the alienor or, if he or she fails to act, the spouse or, if there is no spouse or if he or she fails to act, their minor child or children

> may, by filing a complaint, have the land sold and the homestead interest separated from that of the alienee."

The purpose behind § 6-10-40, the first version of which was enacted in 1877[3] and which plays a pivotal role in the disposition of this case, will be discussed in Part III.D. But having detailed the relevant provisions of law at issue, we will now proceed to discuss the arguments presented by Jenny and Citizens Bank in their appeals.

C. Appeal No. SC-2022-0443: Citizens Bank's Cross-Appeal

Citizens Bank contends that the circuit court erred in awarding Jenny a $5,000 homestead interest pursuant to § 6-10-40 because, it says, the Matherly property was not Jenny's homestead when Steve executed the Citizens Bank mortgage agreement on August 23, 2013. In support of this argument, Citizens Bank notes that on August 8, 2005, Jenny filed a homestead declaration with the Revenue Commissioner of Coffee County claiming a different property, located on County Road 533 in New Brocton ("the New Brocton property"), as her homestead under Alabama law pursuant to Ala. Code 1975, §§ 40-9-19(a) and § 40-9-21.1.[4] Citizens

[3]See § 2832, Ala. Code 1876 (published in 1877 and incorporating Ala. Acts 1876-77); Act No. 7, § 15, Ala. Acts 1876-77.

[4]In 2005, § 40-9-19(a), Ala. Code 1975, provided, in pertinent part:

Bank further observes that Jenny continued to claim a homestead exemption on the New Brocton property from August 8, 2005, until she sold the property in 2018 and that she did not claim a homestead exemption on any other real property during that period. Finally, Citizens Bank notes that this Court has held that "[i]t is legally impossible to have two homesteads at the same time." Woodstock Iron Co. v. Richardson, 94 Ala. 629, 631, 10 So. 144, 145 (1891). See also

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> "Homesteads, as defined by the Constitution and laws of Alabama, are hereby exempted from all state ad valorem taxes. In no case shall the exemption herein made apply to more than one person, head of the family, nor shall the said exemption exceed $4,000 in assessed value, nor 160 acres in area for any resident of this state who is not over 65 years of age."

Section 40-9-19 has been amended several times since 2005. The pertinent provision, with several minor wording changes, now appears in § 40-9-19(a)(1), but the substance of the provision remains the same.

In 2005, § 40-9-21.1, Ala. Code 1975, provided, in pertinent part: "Any person … who qualifies for the homestead exemption[] in Section[] 40-9-19 … shall not be required to annually claim such exemption[] after the initial qualification, but may verify such condition each year thereafter by mail on a form affidavit to be provided by the tax assessor." Section 40-9-21.1(a) currently provides: "Any person who qualifies for the homestead exemption in Section 40-9-19 … shall initially claim the exemption in person or by mail on a form affidavit provided by the tax assessing official."

MacPherson v. Tillman, 414 So. 2d 943, 945 (Ala. 1982) ("There is but one homestead. … A wife may not claim one homestead, and the husband another."). Therefore, Citizens Bank argues, Jenny "waived any homestead exemption for the Matherly [p]roperty because she claimed another property [the New Brocton property] as her homestead at the time of the Citizens Bank Mortgage and for several years thereafter." Citizens Bank's brief, p. 36.[5]

Jenny concedes that she claimed a homestead exemption pursuant to what is now § 40-9-19(a)(1) (see note 4, supra) on the New Brocton property in August 2005 because, at that time, she was "a divorced mother and head of household" living on the New Brocton property. Jenny's reply brief, p. 2. However, Jenny contends that she abandoned "the claim of homestead for the New Brocton home, in fact and intention," when she married Steve on October 5, 2012, and began occupying the Matherly property. Id., p. 4. Jenny notes that one of the requisites for a property to qualify as a homestead "is that the property must be the

[5]We note that the circuit court did not discuss this argument in its order that awarded Jenny a $5,000 homestead interest.

actual place of residence." Gowens, 561 So. 2d at 521. As the Gowens Court further explained:

> "Actual occupancy of the property is a threshold requirement of § 6-10-2, as it is of § 205. In re Quinlan, 12 B.R. 824 (Bankr. M.D. Ala. 1981); In re Brasington, 10 B.R. 76 (Bankr. M.D. Ala. 1981). The nature of the required occupancy has been described as 'occupancy in fact and a clearly defined intention of present residence and occupancy.' In re Brasington, supra, at 78 (citing Blum v. Carter, 63 Ala. 235 (1879))."

Id. at 522. Because it is undisputed that Steve and Jenny occupied the Matherly property at the time Steve executed the Citizens Bank mortgage agreement, Jenny argues that the Matherly property was her actual homestead at that time.

We agree with Jenny. "The homestead right must exist at the time it is claimed," and "[a]ctual occupation as a dwelling place, as a home, is the characteristic which distinguishes [a homestead] from other real estate." Boyle v. Shulman, 59 Ala. 566, 570, 569 (1877). Because Jenny occupied the Matherly property with the intention of remaining there at the time Steve executed the Citizens Bank mortgage agreement, the New Brocton property was not her homestead at that time. It also must be remembered that there is a distinction between the right to claim the homestead exemption codified in § 6-10-2 and the right to prevent

alienation of the homestead codified in § 6-10-3. It is clear that Jenny could not have claimed a homestead exemption on the Matherly property pursuant to § 6-10-2 because only Steve held an ownership interest in that property. See, e.g., Central Bank of Alabama, N.A. v. Gillespie, 404 So. 2d 35, 38 (Ala. 1981) (" 'It is manifest that ownership, entire or partial, in fee or for a term, is one of the essentials of rightful claim of homestead exemption. If there is no ownership, there is ... no occasion or field of operation for the claim of exemption.' " (quoting Beard v. Johnson, 87 Ala. 729, 731, 6 So. 383, 383-84 (1889))); Winston v. Hodges, 102 Ala. 304, 311, 15 So. 528, 530 (1894) ("We have found no case, however, which has gone to the extent of holding that a homestead right, even inchoately, could attach to premises in which the occupant neither owned nor claimed to own any right or interest."). But any right Jenny may have had to invoke the antialienation principle in § 6-10-3 was not dependent upon her having an ownership interest in the Matherly property. See, e.g., Yeager v. Lucy, 998 So. 2d 460, 464 (Ala. 2008) ("The house [that a married couple occupied as their homestead] was their family residence in 1990, even though the house was the sole property of Edna before the marriage. Accordingly, § 6-10-3 applies to the 1990 deed, making Larry's signature

necessary."); People's Bank of Red Level v. Barrow, 208 Ala. 433, 435, 94 So. 600, 602 (1922) ("Mrs. Sowell owned no title or interest in the homestead during the life of the husband that she could sell; but he could not alienate it without her consent, expressed as the statute requires. Section 4161, Code [now § 6-10-3]."). Therefore, Jenny did not "waive" any right she may have possessed to void alienation of her homestead under § 6-10-3 or to claim a homestead interest pursuant to § 6-10-40 by claiming a homestead exemption under § 40-9-19(a)(1) for the New Brocton property.[6]

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[6]Citizens Bank also argues that Jenny's failure to revoke her homestead declaration on the New Brocton property after she began living with Steve at the Matherly property "constitutes a fraud." Citizens Bank's brief, p. 39. For support, Citizens Bank cites § 40-9-21.2, Ala. Code 1975, which became effective on May 22, 2013, and provides, in part:

> "(a) Any person who knowingly and willfully gives false information for the purpose of claiming a homestead exemption … shall be ordered to pay twice the amount of any ad valorem tax which would have been due retroactive for a period of up to 10 years plus interest at a rate of 15 percent per annum from the date the tax would have been due."

But whether Jenny is subject to a tax penalty under § 40-9-21.2 is a separate issue from whether she is entitled to assert her right to a homestead interest under § 6-10-40, and Citizens Bank cites no authority stating otherwise. We also note that Jenny's deposition testimony appears to indicate that she did not intentionally continue to claim a

D. Appeal No. 1210396: Jenny's Appeal

Jenny contends that Article X, § 205, Ala. Const. 1901, and § 6-10-3, Ala. Code 1975, required the circuit court to find that the Citizens Bank mortgage agreement was void because it was executed without her signature or assent. In support of this argument, Jenny asserts that in Lazenby v. Lazenby, 229 Ala. 426, 427, 157 So. 670 (1934), this Court cited numerous cases acknowledging "that since the initial adoption of [what is now Article X, § 205,] in 1868, the Alabama courts have 'uniformly held that a mortgage, or other conveyance of the homestead, without the voluntary signature and assent of the wife, is absolutely void, and inoperative for any purpose." Jenny's brief, pp. 18-19 (quoting Lazenby, 229 Ala. at 427, 157 So. at 671). In short, Jenny contends that because she challenged the Citizens Bank mortgage under Article X, § 205, and § 6-10-3, the circuit court erred in holding that the mortgage was valid and enforceable.

The problem with Jenny's argument is that it fails to account for § 6-10-40's role with respect to the issue of the alienation of a homestead.

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homestead exemption on the New Brocton property after her marriage to Steve.

As we noted in Part III.B., § 6-10-40 provides that, in the event a homestead that exceeds $5,000 in value is alienated without one spouse's signature and assent, the nonassenting spouse is entitled to a $5,000 homestead interest if the nonassenting spouse objects to the alienation. From the time of the original enactment of what is now § 6-10-40, this Court has maintained a consistent interpretation of its purpose in light of Article X, § 205, and §§ 6-10-2 and 6-10-3, a purpose that Jenny's argument does not acknowledge. This Court summarized the history behind, and the purpose of, what is now § 6-10-40 in Drake v. Drake, 262 Ala. 609, 614, 80 So. 2d 268, 272-73 (1955):

> "It is evident that the homestead referred to in § 205 of the Constitution of 1901 and in Code of 1940, Title 7, §§ 625 and 626 [now §§ 6-10-2 and 6-10-3], as amended, means that a homestead which cannot be alienated without the wife's consent is one that does not exceed in value $2,000 and in area 160 acres.
>
> "At one time a home owned and occupied by a married man greater in value and area than the limits noted above did not have the characteristics of a homestead and did not come within the provisions of the constitution prohibiting its alienation without the consent of the wife. Miller v. Marx, [55 Ala. 322 (1876)]. This holding in 1876 demonstrated the defect in the older statutes and in 1877 the legislature enacted a law which is now § 656, Title 7, Code of 1940 [now § 6-10-40]. A history of this section appears in Estes v. Metropolitan Life Ins. Co., 232 Ala. 656, 169 So. 316, 317 [(1936)], as follows:

"'Section 7913 (Tit. 7, § 656) of the Code [now § 6-10-40], the provisions of which the appellant invokes in this case, has its genesis in the Act of the Legislature of February 9, 1877 (Gen. Acts 1876-77, p. 32). Prior to the passage of that act this court had held that exemption did not extend to and embrace a homestead, which, after being reduced to the lowest practical area, still exceeded $2,000 in value. And that the law had provided no method for carving a homestead, or its equivalent, out of the property thus circumstanced. We held, however, under the then existing law that, if by a division a homestead, either in a city, town, or county, could be so separated from the residue of the land as to reduce its value to a sum not exceeding $2,000, then and in that event such separated portion would be exempt.

"'We further held that, when the homestead, after being reduced to the lowest practical area, exceeded $2,000 in value, a valid conveyance of the whole land could be made by the owner, without the voluntary signature and assent of the wife. Farley v. Whitehead, 63 Ala. 295 [(1879)]; Moses v. McClain, 82 Ala. 370, 2 So. 741 [(1887)].

"'To secure to the owner and family the benefit of homestead exemption, when the homestead, after being reduced to the lowest practical area, still exceeded $2,000, the Legislature of Alabama passed an act, which was approved on February 9, 1877, and which by successive codifications is now embodied in said section 7913 (Tit. 7, § 656), and which reads: "When the homestead, after being reduced to the

> lowest practicable area, exceeds two thousand dollars in value, and the husband has aliened the same by deed, mortgage, or other conveyance, without the voluntary signature and assent of the wife, shown and acknowledged as required by law, the husband, or if he fails to act, the wife, or if there is no wife, or if she fails to act, his minor child, or children may, by bill in equity, have the land sold, and the homestead interest separated from that of the alienee."'"

(Emphasis added.) See also Thompson v. Sheppard, 85 Ala. 611, 617, 5 So. 334, 337 (1889) ("Prior to the act of February 9, 1877, the statutes provided no method for carving a homestead or its equivalent out of property which, when reduced to its lowest practicable area, still exceeded two thousand dollars in value; a homestead thus circumstanced was without the constitutional protection, and a valid conveyance of the whole land could be made by the owner, being a married man, without the voluntary signature and assent of the wife. … This defect was remedied by the act of February 9, 1877, which provides a mode for separating the homestead interest."); Moses v. McClain, 82 Ala. 370, 373, 2 So. 741, 742 (1887) (same).

In other words, although the term "homestead" is not defined in § 6-10-3, the Court has defined a "homestead" protected by the

antialienation principle stated in § 6-10-3 to be limited to the parameters of a "homestead" provided in § 6-10-2. Thus, "a homestead which exceeds two thousand dollars in value, is not an exempt homestead …." Jackson v. Rowell, 87 Ala. 685, 689, 6 So. 95, 96 (1889). In Miller, a case decided in December 1876 -- before the enactment of the first iteration of § 6-10-40 -- the Court concluded that because the real property at issue was "not susceptible of division so as to reduce it, in value, to a sum 'not exceeding two thousand dollars,' [the nonassenting spouse] has no valid right of homestead." 55 Ala. at 344. Because of the Miller decision, the legislature enacted the first iteration of § 6-10-40 (§ 2832, Ala. Code 1876), which allowed a nonassenting spouse to receive a homestead interest of $2,000 even when the alienation of the real property at issue exceeded the definition of an exempt homestead found in § 2820, Ala. Code 1876 (now § 6-10-2).[7]

[7]At the time the first iteration § 6-10-40 (§ 2832, Ala. Code 1876) was enacted, the homestead interest provided therein was $2,000, which was identical to the homestead exemption provided in the then existing version of § 6-10-2 (§ 2820, Ala. Code 1876). Both the homestead exemption provided in § 6-10-2 and the homestead interest provided in § 6-10-40 were increased to $5,000 in 1980. See Ala. Acts 1980, Act No. 80-569, § 2 and § 6. As we have previously noted, in 2015, the legislature increased the homestead exemption provided in § 6-10-2 to $15,000 (see

Drake was not espousing a new interpretation of the homestead provisions at issue. In Farley, Spear & Co. v. Whitehead, 63 Ala. 295, 303 (1879), the Court concluded:

> "If, after being reduced to the lowest practicable area, the homestead still exceeds two thousand dollars in value, it is entirely without the operation of the constitutional protection; and the conveyance of it by the owner, being a married man, without the voluntary signature and assent of his wife, is not made void by that instrument. If, when the mortgage was made, the homestead exceeded two thousand dollars in value, Sutherlin had no valid claim to have it declared exempt from the grants and covenants contained in his mortgage to Taylor."

63 Ala. at 303 (emphasis added). In De Graffenried v. Clark, 75 Ala. 425 (1883), the Court explained:

> "At that time, February, 1873, the area of such homestead exemptions was that fixed by the Constitution of 1868, which did not exceed eighty acres of land, of a value not exceeding two thousand dollars. -- Hardy v. Sulzbacher, 62 Ala. 44 [(1878)]; Nelson v. McCrary, [60 Ala. 301 (1877)]; Const. 1868, Art. XIV, § 2.
>
> "It is insisted that the mortgage, under which plaintiff claims title, is void because it is an attempted alienation of a homestead in the actual occupancy of the owner, and is signed by the husband alone without the signature of the wife, and for this reason it conveyed no estate or interest to the

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note 2, supra), but the homestead interest provided in § 6-10-40 was not updated, and thus it remains $5,000.

> mortgagee. Such is undoubtedly the law where the occupant is entitled to a homestead of a certain area, and attempts to alienate it without the voluntary signature and assent of the wife. -- Halso v. Seawright, 65 Ala. 431 [(1880)]; Miller v. Marx, 55 Ala. 322 [(1876)].
>
> "But this principle does not hold where the area of the homestead, or its value, exceeds the constitutional or statutory limitation. In such case, the mortgage or conveyance is good for the excess over and above the quantity to which the occupant is entitled by way of exemption. Our decisions are uniform as to this proposition. -- McGuire v. Van Pelt, 55 Ala. 344 [(1876)]; Garner v. Bond, 61 Ala. 84 [(1878)]; Snedecor v. Freeman, 71 Ala. 140 [(1881)]."

75 Ala. at 426 (emphasis added). Similarly, in Rhodes v. Schofield, 263 Ala. 256, 82 So. 2d 236 (1955), the Court stated:

> "The burden is on one seeking to set aside a mortgage of the homestead because it was not executed as required by section 626, Title 7, Code [now § 6-10-3], to show that the homestead was such as described in section 625, Title 7 [now § 6-10-2]. Metropolitan Life Ins. Co. v. Estes, 228 Ala. 582, 155 So. 79 [(1934)]. It is only a homestead within the limits there fixed which is controlled by section 626 [now § 6-10-3]. Drake v. Drake, [262] Ala. [609], 80 So. 2d 268[] [(1955)]. …
>
> "The rule is well established that if a homestead not exceeding $2,000 in value and not exceeding 160 acres in area, can be practicably carved out of a home place which exceeds either of such limits, that portion only is exempt and subject to the requirements of section 626 [now § 6-10-3]. Where the conveyance is of a larger tract, including the homestead, which has not been selected or set apart, the conveyance is valid as to the excess over and above the quantity to which the owner is entitled by way of exemption. 'In such case (it is said), the legal title to the whole passes to the grantee, with

> the reserved power in the grantor to withdraw the exempted portion from the operation of the conveyance, by some proper act of selection, by which it is separated from the other.' De Graffenried v. Clark, 75 Ala. 425 [(1883)]; McGuire v. Van Pelt, 55 Ala. 344 [(1876)]. See Estes v. Metropolitan Life Ins. Co., 232 Ala. 656, 169 So. 316 [(1936)]; Moses v. McClain, 82 Ala. 370, 2 So. 741 [(1887)]; Farley v. Whitehead, 63 Ala. 295 [(1879)]."

263 Ala. at 263-64, 82 So. 2d at 242-43 (emphasis added). In Allagood v. DuBose, 286 Ala. 559, 243 So. 2d 668 (1971), the Court reiterated:

> "First, the 180 acre tract was in excess of the area allowed for a homestead. A homestead which could not be alienated at that time without the wife's consent was one that did not exceed in value $2,000.00 and in area 160 acres. Tit. 7, §§ 625 and 626, Code 1940 [now §§ 6-10-2 and 6-10-3], and section 205 of the Constitution of 1901; Drake v. Drake, 262 Ala. 609, 80 So. 2d 268 [(1955)]."

286 Ala. at 561, 243 So. 2d at 669. See also Carpenter v. First Nat'l Bank of Birmingham, 236 Ala. 213, 215-16, 181 So. 239, 240 (1938) ("A mortgage upon a house and lot owned by the husband and occupied as a homestead, not validated by the proper signature and separate acknowledgment of the wife, is void as to the homestead. But if it exceeds in value the homestead right of $2,000, such mortgage passes the equity in the excess value as security for the mortgage debt."); Maroney v. Whitaker, 265 Ala. 409, 411, 91 So. 2d 668, 669-70 (1956) (quoting from De Graffenried and concluding that "it appears that the conveyance was

not wholly void as appellant contends but was valid as to that portion of the property in excess of the homestead").

It is undisputed that the value of the Matherly property exceeds the value of a "homestead" provided in § 6-10-2 as well as the homestead-interest amount provided in § 6-10-40. Therefore, under the foregoing authorities, most of which the circuit court cited, Steve's execution of the Citizens Bank mortgage agreement without Jenny's assent and signature did not void the mortgage under § 6-10-3 because that right to prevent homestead alienation does not apply to a mortgage or conveyance in excess of the homestead value provided in § 6-10-2 as long as the nonassenting spouse is allotted the homestead interest provided in § 6-10-40. In other words, the only right available to Jenny, pursuant to § 6-10-40, is to receive the homestead-interest amount of $5,000, which is what the circuit court awarded to Jenny.

Jenny offers three responses to the overwhelming authority provided by the circuit court for its decision. First, Jenny argues that the remedy provided in § 6-10-40 would come into play only if Jenny had opted to exercise it rather than seeking to void the Citizens Bank mortgage under § 6-10-3. This is, frankly, not a tenable interpretation of

the interplay between §§ 6-10-3 and 6-10-40. It lacks textual support in the statutes, and Jenny offers no supporting authority that discusses the two provisions as providing "optional" remedies to a nonassenting spouse. It is true that a spouse is not required to take advantage of the homestead interest available under § 6-10-40. Section 6-10-40 states, in part, that "the spouse … may, by filing a complaint, have the land sold and the homestead interest separated from that of the alienee." (Emphasis added.) But that language does not imply that, when the subject real property exceeds the value of the homestead exemption in § 6-10-2, a spouse who did not assent to the alienation of the property may elect either to void the alienation under § 6-10-3 or allow the alienation and accept the homestead interest provided under § 6-10-40. In fact, § 6-10-3 unequivocally states that "[n]o mortgage, deed or other conveyance of the homestead by a married person shall be valid without the voluntary signature and assent of the husband or wife …." No option is offered to a spouse in the language of § 6-10-3. Certainly, § 6-10-3 ordinarily has been enforced through suits filed by spouses invoking it. But its language is clear that a mortgage or conveyance of "the homestead" by one spouse without the assent of the other is void. Obviously, if a mortgage or

conveyance is void, § 6-10-40 has no operative effect. Indeed, the implication of Jenny's overall argument is that the value of a "homestead" is irrelevant to the applicability of § 6-10-3, i.e., that the Citizens Bank mortgage is void even though the Matherly property indisputably exceeds the value of a homestead provided in § 6-10-2. But that interpretation renders § 6-10-40 inert, and we strive to avoid such interpretations. See, e.g., Willis v. Kincaid, 983 So. 2d 1100, 1103 (Ala. 2007) ("'[S]tatutes must be construed in pari materia in light of their application to the same general subject matter. ... Our obligation is to construe [the] provisions "in favor of each other to form one harmonious plan," if it is possible to do so.'" (quoting Opinion of the Justices No. 334, 599 So. 2d 1166, 1168 (Ala. 1992), quoting in turn Ex parte Coffee Cnty. Comm'n, 583 So. 2d 985, 988 (Ala. 1991))).

Moreover, as the circuit court noted, Jenny's argument is also inconsistent with the history of the purpose behind § 6-10-40 explicated in such cases as Moses, Thompson, De Graffenried, Drake, and Estes v. Metropolitan Life Insurance Co., 232 Ala. 656, 169 So. 316 (1936). As we explained above in quoting from those cases, absent the legislature's enactment of what is now § 6-10-40, a nonassenting spouse would have

no legal remedy when the other spouse has alienated homestead property that exceeds the homestead value provided in § 6-10-2 because such property falls outside the protection afforded by the Alabama Constitution and by § 6-10-3. Jenny offers no rejoinder to that history of § 6-10-40's purpose.

Second, Jenny relies heavily upon Worthington v. Palughi, 575 So. 2d 1092 (Ala. 1991), and Sims v. Cox, 611 So. 2d 339 (Ala. 1992). The Worthington Court summarized the undisputed facts in that case as follows:

> "Esther Stroke Fields and Gregory O. Fields, Sr., were wife and husband. Each had been previously married and each owned residential property in fee. After the Fieldses were married, they decided it was in their best financial interest to sell Gregory's residence and reside together in Esther's residence. On May 17, 1974, Esther and Gregory executed and properly recorded a deed conveying Esther's residence at 5109 Maudelayne Drive South, Mobile, Alabama, to themselves jointly with the right of survivorship.
>
> "On January 25, 1988, unknown to Gregory, Esther executed and recorded a warranty deed conveying 'all her rights, title and interest' in the Maudelayne Drive residence to her daughter, Shirley T. Worthington. The deed contained only Esther's signature.
>
> "On May 10, 1988, Esther died. On June 1, 1988, Gregory filed an affidavit of survivorship in the Mobile County Probate Court, claiming ownership of the Maudelayne Drive residence in fee simple, based on the survivorship

> clause in the May 17, 1974, deed. Gregory continued to occupy the residence until his death on January 25, 1989.
>
> "After Gregory's death, the defendant, John Anthony Palughi, was appointed administrator of Gregory's estate. On December 11, 1989, Worthington filed a complaint to quiet title to the Maudelayne Drive property, and she filed a notice of lis pendens. …
>
> "After a hearing on the matter, the trial court entered a summary judgment in favor of Palughi as to count one of Worthington's complaint; the trial court's ruling was based on Ala. Code 1975, § 6-10-3."

575 So. 2d at 1093. The Worthington Court framed the issue in the case as:

> "[W]hether one spouse can convey to a third party an interest in the homeplace held jointly by both spouses. Palughi argues that § 6-10-3 specifically prohibits one spouse from conveying 'homestead property' to a third party unless the conveying spouse obtains the assent of the other spouse. Worthington contends that § 6-10-3 does not apply to the conveyance in this case, because, she says, the residential property in question did not constitute 'homestead property.'"

Id. The Worthington Court affirmed the trial court's summary judgment, concluding that Esther Fields's purported conveyance of the subject property to her daughter was void by reasoning:

> "It is clear that the requirement of a spouse's signature on a conveyance is intended to protect that spouse from a conveyance of the homeplace without his or her assent. Gowens v. Goss, 561 So. 2d 519 (Ala. 1990), and Leonard v. Whitman, 249 Ala. 205, 30 So. 2d 241 (1947). For this

> requirement to be applicable, it is necessary that the property in question be the actual place of residence, Wildman v. Means, 208 Ala. 487, 94 So. 823 (1922); it is undisputed that the property involved in the present case was the actual place of residence.
>
> "The undisputed facts in this case are that Esther attempted a conveyance of a one-half interest in the homeplace to a third party and that her spouse had not assented to the conveyance; such a conveyance without that assent is strictly prohibited by § 6-10-3."

575 So. 2d at 1094.

The facts in Sims were very similar to those in Worthington.

> "Catherine Golden Rector acquired title in her own name to certain residential real estate in Shelby County, Alabama, on January 31, 1958. In 1982, she conveyed title to herself and her husband, Bruce A. Rector, as joint tenants with right of survivorship. On March 21, 1985, Bruce Rector attempted to convey his undivided interest in that real estate to his daughter, Gracie Joan Cox, and his son-in-law, Farris Lee Cox. Mrs. Rector did not sign the deed. When that deed was delivered, Mr. and Mrs. Rector were married and were living on the real estate as their homestead. The real estate was worth approximately $47,000.
>
> "Bruce Rector died in 1985. Mrs. Rector died intestate in 1987, leaving two children, Spencer Sims and Gracie Joan Cox. No further conveyances of the property had been made.
>
> "Spencer Sims filed a petition to sell this real estate for division of the proceeds, naming as defendants Gracie Joan Cox and Farris Lee Cox (hereinafter the two shall be called 'Cox'). He filed the petition on January 31, 1990. At trial, on September 16, 1991, Sims amended his petition to specifically claim that he owned an undivided one-half interest in the real

> estate. Following a nonjury trial, the judge entered a judgment on April 1, 1992, holding, among other things, that the deed from Bruce Rector to Cox was invalid to the extent of the homestead value of $5,000, but was valid to convey his interest above that amount. Thus, the trial court held that Sims owned a one-fourth interest in the real estate plus one-half of the $5,000 homestead value. Sims appeals."

Sims, 611 So. 2d at 339-40. After citing Worthington and summarizing its facts, the Sims Court concluded:

> "Applying the rule in Worthington, we must conclude that the deed from Bruce Rector to Cox is void. The property interest Bruce Rector attempted to convey was clearly an interest in the homeplace owned by him and his wife. Both statutory and case law clearly support the proposition that the signature and assent of the wife are necessary to effectuate the husband's conveyance of homestead property. Because this attempted conveyance of homestead property lacked the signature and assent of Catherine Golden Rector, Sims is entitled to an undivided one-half interest in the land in question by virtue of intestate succession from his mother."

611 So. 2d at 341 (emphasis added).

Jenny contends that the facts in the present case coincide with those in Worthington and Sims and, thus, that the circuit court should have concluded that the Citizens Bank mortgage on the Matherly property was void pursuant to § 6-10-3. However, there was no citation to, or any express discussion of the relevance of, § 6-10-40 in Worthington. Furthermore, there was no discussion in Worthington of

authorities such as Moses, Thompson, Estes, Whitehead, De Graffenried, Jackson, Barrow, Drake, Rhodes, and Maroney. The absence of any mention of § 6-10-40 or of those authorities strongly suggests that § 6-10-40 and its potential impact was not raised or argued by the parties in Worthington. In fact, the Worthington Court never mentioned the value of the subject property. In Worthington, the issue whether the subject property would qualify as a homestead seemed to center on whether Gregory and Esther Fields actually resided on the subject property, not on whether the value of the subject property exceeded the value of a "homestead" as defined in § 6-10-2 -- the relevant issue for the application of § 6-10-40.

Admittedly, the decision in Sims is more curious. In Sims, as in Worthington, there was no mention of § 6-10-40. However, the Sims Court expressly noted that "[t]he real estate was worth approximately $47,000." 611 So. 2d at 340. Moreover, at the outset of its opinion, the Sims Court stated:

> "The issue raised in this appeal is whether a husband, who held a joint interest with his wife in homestead property with right of survivorship, could make a conveyance of his interest during the lifetime of his wife without the wife's signature and assent. We hold that the law of Alabama, under the facts of this case, declares such a conveyance void in its

> entirety, even as to any excess in the value of the property over the homestead exemption value."

Id. at 339 (emphasis added).

Even assuming that the Sims Court had § 6-10-40 in mind when it made the foregoing statement, it appears from the Sims Court's distinguishing of two cases that plainly did apply § 6-10-40 -- Inman v. Goodson, 394 So. 2d 915 (Ala. 1981), and Cole v. Racetrac Petroleum, Inc., 466 So. 2d 93 (Ala. 1985) -- that the Sims Court misunderstood the interplay between § 6-10-3 and § 6-10-40. The Sims Court explained that

> "Cox argues that the cases of Inman v. Goodson, 394 So. 2d 915 (Ala.1981), and Cole v. Racetrac Petroleum, Inc., 466 So. 2d 93 (Ala. 1985), are dispositive of this issue and require a different result. We disagree. Those cases are clearly distinguishable from this case and are not controlling on the facts presented here."

Id. at 341. The Sims Court summarized Inman as follows:

> "In Inman, the holder of an option contract appealed from a judgment declaring that the option to sell property that the grantor and his wife contended was their homestead was void because the option was not signed by the wife. This Court, in reversing, held that 'a spouse does not have to sign a conveyance of property by the other spouse which is in excess of and which reserves unto them an amount of property with a value equal to or greater than that required to constitute [a] homestead.' 394 So. 2d at 916. Because the option contract did not affect the 16 acres on which the husband and wife actually resided, the Court held that the option contract, transferring an interest in 40 acres which,

> though contiguous, was separated from the 16-acre homestead by a highway, was valid even though the wife had not signed it."

611 So. 2d at 341. The Sims Court summarized Cole this way:

> "In Cole, Clyde and Louise Lacy, husband and wife, purchased 1.46 acres of land in 1971. Shortly thereafter, Clyde Lacy erected a house on the land, which he and his wife used as their dwelling. In late 1972, Clyde Lacy leased a .32-acre portion of the 1.46 acres, along with a gasoline station he had built on the property, to Racetrac Petroleum, Inc., for 10 years with an option at the end of that period to extend the lease for 10 more years. The wife did not sign the lease.
>
> "In January 1973, the Lacys sold the 1.46 acres, including the .32 acres, to Wayne and Betty Cole. The deed of conveyance to the Coles stated that the land was subject to Racetrac's lease. For nine years, the Coles received monthly rental payments from Racetrac. When Racetrac notified the Coles that it wished to renew the lease pursuant to the 1972 agreement, the Coles requested that Racetrac vacate the premises until a new lease was executed.
>
> "On appeal, the Coles argued that the homestead laws of Alabama were not complied with. The Coles maintained that 'since the 1.46 acres of land that was purchased from Clyde and Louise Lacy was their homestead, any lease concerning the property must have been signed by both spouses or it was void, or at least voidable, at the time of its execution.' 466 So. 2d at 95. The Court, citing Inman as authority, held that after Clyde Lacy leased the .32-acre portion of the 1.46 acres, the home and land remaining easily exceeded the statutory homestead limit. 'Therefore, the lease agreement signed only by Clyde Lacy and not Louise did not violate the homestead requirements.' Id."

611 So. 2d at 341-42. The Sims Court then identified what it believed distinguished the situation presented in Sims from those presented in Inman and Cole:

> "What makes Inman and Cole distinguishable from this case is that those two cases dealt with property that was clearly severable from what Alabama has traditionally defined as 'homestead' property. The property in this case was a 5.13-acre residential tract upon which the Rectors' family residence was located. Bruce Rector attempted to convey his joint interest in property on which the family residence was located.
>
> "We conclude, based on the facts in this record, that the conveyance here is of the homestead. To the contrary, Inman and Cole involved conveyances of property that the law did not classify as homestead property subject to the restrictions of § 6-10-3 relating to conveyances of the homestead without the assent of the other spouse. We hold that Bruce Rector's attempted conveyance of a one-half interest in the Rector residence to Cox without the assent of Catherine Golden Rector is 'strictly prohibited by § 6-10-3.' Worthington, 575 So. 2d at 1094."

611 So. 2d at 342.

In short, the Sims Court focused on the fact that Bruce Rector had "attempted to convey his joint interest in property on which the family residence was located," unlike in Inman and Cole, where the conveyances had not affected the residences of the married couples in those cases. Id. at 342. Thus, the Sims Court apparently believed that for a property

alienation made by one spouse without the assent of the other spouse to be valid, the property must exceed the value of a "homestead" defined in § 6-10-2 and the terms of sale (or in the case of Cole, a lease) must expressly not alienate the residential portion of the property.

However, there are two problems with the Sims Court's understanding. First, it misunderstood the holdings in Inman and Cole. In Inman, the Court summarized its holding as follows:

> "It is clear that a spouse does not have to sign a conveyance of property by the other spouse which is in excess of and which reserves unto them an amount of property with a value equal to or greater than that required to constitute homestead. In the present case, the option contract did not affect the sixteen acres on which the Goodsons resided. This property appears to have a value in excess of that required for homestead, but if it does not, the grantor could withdraw the exemption portion from the operation of the option contract under procedures as stated in Allagood[v. DuBose, 286 Ala. 559, 243 So. 2d 668 (1971)]; thus, the trial court erred in holding, as a matter of law, that the option was invalid because Mrs. Goodson did not sign it."

394 So. 2d at 918 (emphasis added). Thus, citing Allagood, the Inman Court observed that, because the property at issue exceeded the value of a "homestead," the conveyance of the property did not require the assent of the other spouse and that, even if the property exceeded the value of a "homestead" only with the residence included, the homestead interest

could be exempted and the conveyance would still be valid. Likewise, the Cole Court, after quoting the above portion of Inman, concluded: "After Clyde Lacy leased the .32-acre portion of the 1.46 acres, the home and land remaining easily exceeded the $2,000 statutory limit. Therefore, the lease agreement signed only by Clyde Lacy and not Louise did not violate the homestead requirements." 466 So. 2d at 95. Thus, in concluding that the lease at issue did not violate § 6-10-3, the Cole Court emphasized the fact that the entire property at issue, including the Coles' residence, exceeded the value of a "homestead" defined in § 6-10-2, not the fact that the lease itself did not include the Coles' residence. [8]

The second problem with the Sims Court's understanding is that it did not reflect the interpretation of § 6-10-40 that consistently had been given in other cases -- cases that Sims did not cite or, apparently, consider. As our quotations from cases such as Thompson, Carpenter, De Graffenried, Drake, and Rhodes demonstrate, if the alienated property exceeds the value of a "homestead" defined in § 6-10-2, then the antialienation principle in Article X, § 205, and § 6-10-3 does not apply,

[8]The lease at issue in Cole occurred before the legislature increased to $5,000 the homestead exemption in § 6-10-2 and the homestead interest in § 6-10-40.

and, therefore, the mortgage or conveyance is valid, but the nonassenting spouse is entitled to a homestead interest of $5,000 pursuant to § 6-10-40. In other words, a carveout of the residential property does not have to be expressly provided in the mortgage or conveyance instrument in order for the conveyance or mortgage to be valid; a payment of the homestead interest may be provided after the fact by the purchaser.[9]

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[9]We also note one potential distinction that the Sims Court did not discuss in its opinion. The facts in Sims strongly suggest that the children of Bruce and Catherine Rector, Spencer Sims and Gracie Jo Cox -- the parties in Sims who were fighting over the subject property -- were not minor children when Catherine died. Whether the children were minors when their mother died is relevant because, as this Court observed in Walker v. Hayes, 248 Ala. 492, 495, 28 So. 2d 413, 415 (1946),

> "the homestead protection is for the decedent's widow and minor children and not for classes that are deemed capable of protecting themselves.
>
> "… 'The possessory homestead right in the widow and minors is enjoyed concurrently and successively during the life of the widow or minority of the children, or of any one of them, whichever may last terminate.'"

(Quoting Buchannon v. Buchannon, 220 Ala. 72, 75, 124 So. 113, 115 (1929)). That understanding dovetails with the language of § 6-10-40, which states that the homestead interest is available to "the alienor or, if he or she fails to act, the spouse or, if there is no spouse or if he or she fails to act, their minor child or children …." (Emphasis added.) If Spencer Sims and Gracie Jo Cox were not minors when their mother died, they had no homestead interest in the subject property at that time or later when Spencer Sims commenced his action to quiet title. Thus, it is

Consequently, even if Sims implicitly did consider § 6-10-40, its application of that statute contradicted the overwhelming understanding of § 6-10-40 from its original enactment in 1877.[10]

Finally, Jenny argues that

> "Citizens Bank, as the mortgagee/alienee under the faulty mortgage, is not a party identified in the statutory language of § 6-10-40, Ala. Code, and as such is not authorized to seek the assistance of the trial court to force the separation of the homestead from the remainder of the property mortgaged."

Jenny's brief, p. 23. Jenny notes that the language in § 6-10-40 provides that

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likely that the homestead interest had already been extinguished when Spencer Sims commenced his action, and, thus, neither Spencer Sims nor Gracie Jo Cox could properly invoke the relief available in § 6-10-40.

[10]The circuit court distinguished Worthington and Sims on the basis that the subject properties in those cases were jointly owned by the spouses while it is undisputed that Steve was the sole owner of the Matherly property. However, Jenny correctly observes (as we noted in Part III.C., with our citations to Yeager and Barrow) that joint ownership of the subject property is irrelevant with respect to the applicability of § 6-10-3 because that statute does not state that a nonassenting spouse must have an ownership interest in the homestead property in order to prevent its alienation. The circuit court was correct, however, in observing that "the limited holdings" in Sims and Worthington "are of little value to the Court" in the face of so many cases in which the value of the homestead exceeded the homestead exemption and this Court permitted alienation of property that lacked assent from one spouse.

> "the alienor or, if he or she fails to act, the spouse or, if there is no spouse or if he or she fails to act, their minor child or children may, by filing a complaint, have the land sold and the homestead interest separated from that of the alienee."

Because § 6-10-40 does not state that a mortgagee or alienee may file a complaint to have a homestead interest awarded to a nonassenting spouse "[w]hen the homestead, after being reduced to the lowest practicable area, exceeds $5,000 in value," Jenny insists that Citizens Bank cannot invoke § 6-10-40.

Citizens Bank concedes that it "cannot exercise the reservation provided to [Jenny] under Alabama Code § 6-10-40 on her behalf," but it argues that "the trial court may clearly use its equitable powers to do so." Citizens Bank's brief, p. 32. Equity is in issue here because Citizens Bank has already foreclosed the mortgage; it simply asked the circuit court to make a determination with respect to the validity of the mortgage and the foreclosure deed. Indeed, Jenny does not correctly describe the procedural posture of Citizens Bank's invocation of § 6-10-40. As we noted in the rendition of facts, Citizens Bank sought a judgment declaring the extent, validity, and priority of the Citizens Bank mortgage and the subsequent foreclosure proceedings. Jenny then intervened in the action because, unbeknownst to Citizens Bank, she was married to Steve at the

time he executed the Citizens Bank mortgage agreement. Jenny contended that the Citizens Bank mortgage was void pursuant to § 6-10-3. It was in response to that argument that Citizens Bank noted the law provided in § 6-10-40. In short, Citizens Bank did not file a complaint seeking the reservation of a homestead interest for Jenny; it simply used § 6-10-40 in defense of Jenny's invocation of § 6-10-3. Thus, § 6-10-40's text is not directly at issue.

Furthermore, Citizens Bank correctly observes that this Court previously has used its equitable powers to invoke § 6-10-40. In De Graffenried v. Clark, the mortgagee initiated an action "in ejectment to recover a tract of land consisting of one hundred and sixty acres." 75 Ala. at 425. The mortgagor contended that the mortgage was void because it was signed by the husband without the assent or signature of the wife. The Court concluded that, because the subject property exceeded the acreage of a homestead, "[t]he legal title to the whole … passed to the grantee, with the reserved power in the grantor to withdraw the exempted portion from the operation of the conveyance by some proper act of selection, by which it is separated from the title of the

mortgagee." 75 Ala. at 427. The mortgagor was awarded 80 acres by the jury.

> "Conceding the right of the [mortgagor] to make his selection by special plea, he had no right to select more than eighty acres, and this he refused to do. He cannot complain that he has been deprived of this privilege, because he has been allowed by the verdict of the jury precisely the quantity to which he was entitled, including the dwelling house and appurtenances, in the actual occupancy of which he claims to have continued up to the time of commencing this suit. The question was fairly submitted to the jury to determine what particular tract of eighty acres was occupied by him as a homestead, including the dwelling and appurtenances, and this they have determined. The only land recovered by the [mortgagee] was the eighty acres situated in section seventeen, which must be presumed to be the quantity conveyed by the mortgage in excess of the exemption to which the [mortgagor] was entitled. If there be any error in the rulings of the court, it is error without injury to the [mortgagor], under the peculiar circumstances of the case."

75 Ala. at 427-28 (emphasis added). Thus, the Court approved the homestead carveout even though the mortgagee had initiated the action.

Likewise, in Rhodes v. Schofield, the plaintiff mortgagor tried to have the mortgage vacated based on § 6-10-3, but the defendant mortgagee responded that the mortgage was valid but that the homestead interest of $2,000 should be provided to the mortgagor.

> "While the bill seeks a cancellation of the mortgage in its entirety because it is upon the homestead, [the mortgagor] is relieved of complying with such condition by virtue of the

> cross bill which seeks to have the court set apart to [the mortgagor] out of that tract of 105 acres a homestead of the value of $2,000, free from the mortgage held by [the mortgagee], and to foreclose that mortgage in respect to the balance of the tract not set apart as a homestead. That procedure proposed by the cross bill and pursued by the court is not prejudicial to [the mortgagor], but beneficial in that it relieves him of the duty to restore the $5,000 to [the mortgagee] as a condition which he would otherwise be bound to perform to obtain such a favorable decree as sought by the cross bill.
>
> "….
>
> "It is apparent that the court by virtue of the cross bill was trying to do for [the mortgagor] what he was entitled to have done, although [the mortgagor] had the burden in that respect and had not sought that relief. [The mortgagor] has no cause to complain of that proceeding by the court. The court was of the opinion that to the extent that the tract of 105 acres exceeded in value $2,000, the mortgage was nevertheless not valid to pass the title, not having been witnessed nor acknowledged, but operated as an agreement to mortgage and thereby created an equitable lien."

Rhodes, 263 Ala. at 263-64, 82 So. 2d at 242-43 (emphasis added). Thus, the Rhodes Court affirmed the trial court's conclusion that, even though the mortgage ordinarily would not be valid because it lacked the other spouse's signature, the subject property exceeded the homestead exemption and, therefore, the mortgagor received what he was entitled to despite not asking for it: the homestead-interest amount.

Finally, in Thompson v. Sheppard, a complaint was filed by a husband to enforce a vendor's lien on the sale of property that included a homestead, and the purchaser of the property filed a cross-claim seeking to void the sale, arguing that he lacked title to the homestead property because, he said, the bill of sale was signed by the husband but not the wife. See Thompson, 85 Ala. at 616, 5 So. at 336-37. Thus, the husband sought payment for all the property sold, and the purchaser sought to void the sale pursuant to the version of § 6-10-3 then in force (§ 2508, Ala. Code 1886). Neither party invoked the version of § 6-10-40 then in force, § 2538, Ala. Code 1886, but the Court explained that in equity it could apply that law anyway.

> "The deed made by [the husband] to [the purchaser] is valid as to all of the land in excess of the homestead interest. When, in such case, the vendor files a bill to enforce his lien on the whole land, the court rightfully acquires jurisdiction of the subject-matter, and, having rightful jurisdiction of the subject-matter and the parties, will not undertake to do justice by piece-meal. It has authority to require the complainant to do equity as a condition to the grant of relief, and will exert its powers to do justice between the parties; and to this end, will mould its decrees to meet the exigencies of the case, and adapt them to the mutual and adverse claims and controlling equities, having regard to the substance more than to the mere form of proceeding. -- Reese v. Kirk, 29 Ala. 406 [(1856)]. In order to quiet litigation, and to prevent a multiplicity of suits, the court may, on a bill filed by the

> husband as vendor to enforce his lien, decree a sale of the land, and award and allot to the husband two thousand dollars of the proceeds of sale as his homestead interest. It would be a vain and useless proceeding, injurious to the rights of the parties, and would render uncertain and insecure the title acquired from a judicial sale, if the court were, in such case, to abate the purchase-money by the value of the homestead interest, decree a sale of the land in excess thereof for the payment of the balance, and turn the parties round to the expense and inconvenience of another bill, to have the land re-sold, and to separate the homestead interest, when all can be accomplished in one suit. When land sold by the husband is so situated that the lowest practicable area to which it is reducible exceeds two thousand dollars in value, and the husband files a bill in equity to enforce a vendor's lien, a decree of sale of the whole land, separating from the proceeds of the sale the value of the homestead interest, is a separation of such interest from that of the alienee in substantial conformity with the statute, and protects the real and substantial rights of the parties."

Thompson, 85 Ala. at 618, 5 So. at 337-38 (emphasis added).

The foregoing authorities illustrate that the circuit court appropriately examined the entirety of homestead law presented in this case and, in equity, awarded a homestead interest to Jenny, even though she did not invoke the remedy in § 6-10-40, because otherwise she would not receive any compensation because Steve's execution of the Citizens Bank mortgage agreement was not entitled to protection under Article X,

§ 205, Ala. Const. 1901, and § 6-10-3, Ala. Code 1975. Therefore, we affirm the circuit court's judgment in appeal no. 1210396.

IV. Conclusion

On appeal, Penn Waters does not dispute that the HELOC mortgage was satisfied and void at the time that mortgage was assigned to Penn Waters and that, therefore, the HELOC mortgage had no bearing on the validity of the Citizens Bank mortgage. The Citizens Bank mortgage and Citizens Bank's foreclosure deed were valid and enforceable against Steve and Jenny because the Matherly property exceeded the value of a "homestead" provided in § 6-10-2, and the Matherly property therefore fell outside the protections against alienation provided in Article X, § 205, Ala. Const. 1901, and § 6-10-3. However, because Jenny was married to Steve and lived with him on the Matherly property at the time Steve executed the Citizens Bank mortgage agreement, Jenny is entitled to a $5,000 homestead interest pursuant to § 6-10-40 once she vacates the premises. Therefore, we affirm the judgments of the circuit court challenged by the parties in these appeals.

1210396 -- AFFIRMED.

SC-2022-0443 -- AFFIRMED.

SC-2022-0520 -- AFFIRMED.

Parker, C.J., and Bolin, Shaw, Wise, Bryan, Sellers, Stewart, and Mitchell, JJ., concur.