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Deeds - Nature and Creation of Reservations - Reservation of a Property Interest in a Deed in Favor of the Grantor's Spouse Is Effective When That Is the Grantor's Intent

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DEEDS — NATURE AND CREATION OF RESERVATIONS — RESERVATION OF A PROPERTY INTEREST IN A DEED IN FAVOR OF THE GRANTOR'S SPOUSE IS EFFECTIVE WHEN THAT IS THE GRANTOR'S INTENT

Clyde Boettcher owned real estate as his separate property.[1] His wife, Dorothy, joined him in executing a deed conveying the property interest to their daughter, Loretta Malloy.[2] The deed contained a clause in which the husband and wife reserved a life estate in the property.[3] In an action by the grantee, Loretta, to quiet title after the death of Clyde, the district court found that Dorothy did not receive a life estate in the property based on the common law rule that one cannot reserve an interest in property to a third person who is a stranger to the title.[4] The North Dakota Supreme Court reversed and *held* that Dorothy possessed a life estate in the property since the common law prohibition against a reservation in favor of a stranger to the title should not be allowed to defeat Clyde's manifest intent to reserve a life estate interest for his wife in the deed to their daughter.[5] *Malloy v. Boettcher*, 334 N.W.2d 8 (N.D. 1983).

The common law rule that a reservation or exception[6] in a deed of conveyance cannot operate as a conveyance to a third party

1. Malloy v. Boettcher, 334 N.W.2d 8 (N.D. 1983). Clyde Boettcher owned an undivided one-third interest in a quarter section of land. Clyde was the sole owner of this one-third interest; his wife had no interest in the land. *Id.*

2. *Id.* Clyde and Dorothy executed a deed on May 22, 1978. Clyde died intestate on September 8, 1978. *Id.*

3. *Id.* The reservation clause in *Malloy* contained the following language: "RESERVING HOWEVER, to parties of the first part a life estate in the one-third (⅓) interest hereby conveyed." *Id.*

4. *Id.*

5. *Id.* at 9.

6. *See* Christman v. Emineth, 212 N.W.2d 543, 552 (N.D. 1973). In considering whether there was a material difference between the words "reservation" and "exception," the North Dakota Supreme Court in *Christman* stated that "[w]hile a reservation is, in effect, a regrant of the thing reserved, an exception operates to take something out of the thing granted which would otherwise pass." *Id.*

who is a stranger to the title or deed[7] is of feudal origins.[8] Most jurisdictions follow the rule.[9] This rule was devised in part to promote uniformity in the methods of conveyance by deed, which had replaced transfers by manual livery of seisin.[10] Under the rule

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7. *See* Stetson v. Nelson, 118 N.W.2d 685 (N.D. 1962). In *Stetson* the Nortn Dakota Supreme Court stated the common law rule as follows: "A reservation and exception purporting to be in favor of a stranger cannot operate as a conveyance to him of the excepted interests in the land. . . ." *Id.* at 688.

The common law rule prohibiting a reservation or exception in favor of a stranger is often phrased in terms of a stranger to the *deed. See generally* Annot., 52 A.L.R.3d 753 (1973). But what is logically meant is a stranger to the *title. See* Lemon v. Lemon, 273 Mo. 484, 496, 201 S.W. 103, 106 (1918). Questions regarding who is a stranger within the meaning of the common law rule have been answered as follows: Those who are not parties to a deed are strangers to the deed (*see* Stetson v. Nelson, 118 N.W.2d 685, 688 (N.D. 1962)); heirs of the grantor are not strangers to the deed (*see* Engel v. Guaranty Trust Co. of New York, 280 N.Y. 43, ____, 19 N.E.2d 673, 675 (1939)); public bodies or governmental agencies are not strangers to the deed (*see* Dade County v. Little, 115 So. 2d 19, 21 (Fla. Dist. Ct. App. 1959)); a spouse is not a stranger to the deed because of a spouse's ownership of inchoate rights created by statutes (*see* Saunders v. Saunders, 373 Ill. 302, ____, 26 N.E.2d 126, 129 (1940)).

8. *See* Harris, *Reservations in Favor of Strangers to the Title,* 6 OKLA. L. REV. 127, 131 (1953). The commentator notes that the common law rule prohibiting reservations in favor of strangers was originally a rule of property law dealing with the form and method employed to accomplish a transfer of property. *Id.* at 132. For example, at common law *A* could convey a life estate to *B* with the remainder in *C,* but *A* could not effect the same result by a conveyance to *B* with a reservation of a life estate to *C.* The grantor could accomplish the transfer, but he had to do it in the formal manner established in existing rules of property. *Id.*

9. *See generally* Annot., 88 A.L.R.2d 1199 (1963). The following states observe the general rule that in an instrument of conveyance a reservation in favor of a stranger is ineffective to create in him a right or interest in the property: Alabama (*see* Jackson v. Snodgrass, 140 Ala. 365, 37 So. 246 (1904)); Arkansas (*see* Guaranty Loan & Trust Co. v. Helena Improvement Dist. No. 1, 148 Ark. 56, 228 S.W. 1045 (1921)); Connecticut (*see* School Dist. v. Lynch, 33 Conn. 330 (1866)); Florida (*see* Dade County v. Little, 115 So. 2d 19 (Fla. Dist. Ct. App. 1959)); Idaho (*see* Davis v. Gowen, 83 Idaho 204, 360 P.2d 403 (1961)); Illinois (*see* Saunders v. Saunders, 373 Ill. 302, 26 N.E.2d 126 (1940)); Indiana (*see* Olge v. Barker, 224 Ind. 489, 68 N.E.2d 550 (1946)); Iowa (*see* Stone v. Stone, 141 Iowa 438, 119 N.W. 712 (1909)); Maine (*see* Hill v. Lord, 48 Me. 83 (1861)); Maryland (*see* Dawson v. Western Maryland R.R., 107 Md. 70, 68 A. 301 (1907)); Massachusetts (*see* Hodgkins v. Bianchini, 323 Mass. 169, 80 N.E.2d 464 (1948)); Michigan (*see* Choals v. Plummer, 353 Mich. 6, 90 N.W.2d 851 (1958)); Mississippi (*see* Cook v. Farley, 195 Miss. 638, 15 So. 2d 352 (1943)); Missouri (*see* Schmidt v. City of Tipton, 89 S.W.2d 569 (Mo. Ct. App. 1936)); Nebraska (*see* Bauer v. Bauer, 180 Neb. 177, 141 N.W.2d 837 (1966)); New York (*see* Lanzillotta v. Verity, 16 Misc. 2d 462, 181 N.Y.S.2d 558 (Sup. Ct. 1958)); North Carolina (*see In re* Dixon, 156 N.C. 22, 72 S.E. 71 (1911)); Oklahoma (*see* Leidig v. Hoopes, 288 P.2d 402 (Okla. 1955)); Rhode Island (*see* Fusaro v. Varrecchione, 51 R.I. 35, 150 A. 462 (1930)); South Carolina (*see* Glasgow v. Glasgow, 221 S.C. 322, 70 S.E.2d 432 (1952)); South Dakota (*see* Brace v. Van Eps, 21 S.D. 65, 109 N.W. 147 (1906)); Texas (*see* Large v. T. Mayfield, Inc., 646 S.W.2d 292 (Tex. Ct. App. 1983)); Vermont (*see* First Nat'l Bank v. Laperle, 117 Vt. 144, 86 A.2d 635 (1952)); Washington (*see* Pitman v. Sweeney, 34 Wash. App. 321, 661 P.2d 153 (Wash. Ct. App. 1983)); West Virginia (*see* Erwin v. Bethlehem Steel Corp., 134 W. Va. 900, 62 S.E.2d 337 (1950)); Wisconsin (*see* Strasson v. Montgomery, 32 Wis. 52 (1873)).

The following states observe the general rule that an exception in favor of a stranger in an instrument of conveyance is ineffective to vest any title or interest in him: Arkansas (*see* Rye v. Baumann, 231 Ark. 278, 329 S.W.2d 161 (1959)); Maine (*see* Foxcroft v. Mallett, 45 U.S. (4 How.) 353 (1846)); Massachusetts (*see* Hodgkins v. Bianchini, 323 Mass. 169, 80 N.E.2d 464 (1948));Mississippi (*see* Wilson v. Gerard, 213 Miss. 177, 56 So. 2d 471 (1952)); Nebraska (*see* Bauer v. Bauer, 180 Neb. 177, 141 N.W.2d 837 (1966)); New York (*see* Lanzillotta v. Verity, 16 Misc. 2d 462, 181 N.Y.S.2d 558 (Sup. Ct. 1958)); North Carolina (*see* Redding v. Vogt, 140 N.C. 562, 53 S.E: 337 (1906)); Oklahoma (*see* Independent School Dist. No. 8 v. Hunter, 414 P.2d 231 (Okla. 1966)); Pennsylvania (*see* Ozehoski v. Scranton Spring Brook Water Serv. Co., 157 Pa. Super. 437, 43 A.2d 601 (1945)); South Carolina (*see* Glasgow v. Glasgow,221 S.C. 322, 70 S.E.2d 432 (1952)); Texas (*see* Large v. T. Mayfield, Inc., 646 S.W.2d 292 (Tex. 1983)); Vermont (*see* Tallarico v. Brett, 137 Vt. 52, 400 A.2d 959 (1979)); West Virginia (*see* Erwin v. Bethlehem Steel Corp., 134 W. Va. 900, 62 S.E.2d 337 (1950)).

10. Harris, *supra* note 8, at 132-33. The commentator suggests that the terms "reserve" and "except" are not words of grant because they are inadequate by themselves to prove the requisite intention to transfer title. *Id.*

the individual grantor's intent is secondary to uniformity.[11]

The North Dakota Supreme Court upheld this common law rule in a case involving a reservation of a mineral interest to a stranger to the deed in *Stetson v. Nelson.*[12] Although the court in *Stetson* honored the rule, it recognized the importance of the grantor's intent. The court found that the grantors intended to make a reservation to the third person.[13] Because the grantors did not intend to pass the reserved interests to the grantees, the court held that the interest remained with the grantor.[14] Prior to *Malloy*, *Stetson* was the only case in North Dakota that addressed the validity of an attempted reservation of a property interest in favor of a stranger.

The modern view concerning the construction of deeds is that the intention of the parties, as ascertained from the four corners of the instrument, should be given effect.[15] Since the common law rule conflicts with the modern view, courts have circumvented the rule using a number of methods and implements.[16] When a grantor attempts to reserve a property interest in favor of a stranger to the title, there are three possible outcomes: the interest remains with the grantor; the entire interest vests in the grantee; or the interest passes to the stranger in equity.[17] California court decisions exemplify one jurisdiction's use of various legal maneuverings to avoid the harsh results of the common law rule and to give effect to the grantor's intent.[18] Because the California courts have frequently litigated the issue of an attempted reservation in favor of a stranger, the results of the California cases will be discussed in this Comment.

In 1860 the California Supreme Court followed the common

11. Harris, *supra* note 8, at 133.

12. 118 N.W.2d 685 (N.D. 1962). In *Stetson* the grantor attempted to reserve a mineral interest in favor of a person who was a stranger to the title of the property and to the deed. Stetson v. Nelson, 118 N.W.2d 685, 686 (N.D. 1962). He was identified in the reservation clause as "one of the parties of the first part." *Id.* However, he was not a party to the instrument. *Id.* at 687.

13. *Id.* at 688.

14. *Id.*

15. *See, e.g.,* Malloy v. Boettcher, 334 N.W.2d 8, 9 (N.D. 1983). ("the primary purpose in construing a deed is to ascertain and effectuate the intent of the grantor"); McDonald v. Antelope Land & Cattle Co., 294 N.W.2d 391, 393 (N.D. 1980) (in order to accurately determine the meaning of reservation language, reference must be made to contract interpretations).

16. *See* Harris, *supra* note 8, at 133-34. Harris divides the cases upholding a reservation in favor of a stranger into four categories. The first category treats the attempted reservation as an exception, thus withholding the interest from the grantee. *Id.* at 134. Under the second category, title is passed to the grantee but he is estopped from challenging the validity of the reservation — an equitable charge is created against his interest. *Id.* The third method treats the reservation as an exception and gives effect to the grantor's intent by treating the language as creating a trust. *Id.* at 135. The fourth method permits a reservation to a spouse by subordinating the common law rule to the grantor's intent or by creating an exception for a spouse. *Id.*

17. *See* Harris, *supra* note 8, at 134-35.

18. *See, e.g.,* Willard v. First Church of Christ, Scientist, Pacifica, 7 Cal. 3d 473, 477, 498 P.2d 987, 990, 102 Cal. Rptr. 739, 742 (1972) (abandons the common law rule of reservations in favor of third parties).

law rule to avoid the interest asserted by a stranger to the deed in *Eldridge v. See Yup Co.*[19] Twelve years after *Eldridge*, however, the California Legislature enacted a statute which mandated that principles of contract law were to apply to land transfers.[20] It was not until 1972, however, in *Willard v. First Church of Christ, Scientist, Pacifica*,[21] that the California Supreme Court expressly favored contract interpretation principles over technical rules of construction and completely discarded the common law rule.[22]

Between *Eldridge* and *Willard*, however, courts effectuated the grantor's intent without abandoning the common law rule.[23] In *Butler v. Gosling*[24] the California Supreme Court treated an attempted reservation as an exception, which prevented the grantee from obtaining title to the property.[25] In *Butler* the court noted that a reservation or exception will not vest title to any interest in a stranger but may, under certain circumstances, operate as an admission in favor of the stranger or as an estoppel against the grantor.[26]

In *Sutter Butte Canal Co. v. Richvale Land Co.*[27] a California appellate court extended the principle established in *Butler* and ruled that a reservation or exception may operate as an estoppel against the grantee.[28] A few years later the California Supreme Court in *Boyer v. Murphy*[29] again recognized the common law rule but held that it was inapplicable in a situation involving a

19. 17 Cal. 44 (1860). In *Eldridge* the California Supreme Court refused to give effect to a clause in the deed directing the grantee to use the land for a church. Eldridge v. See Yup Co., 17 Cal. 44, 53 (1860). The actual basis of the decision was that any restriction on the use of land by the grantee was void. *Id.* at 51.

20. *See* CAL. CIV. CODE § 1066 (West 1982) (enacted 1872). Section 1066 states, "Grants are to be interpreted in like manner with contracts in general, except so far as is otherwise provided in this article." *Id.*

21. 7 Cal. 3d 473, 498 P.2d 987, 102 Cal. Rptr. 739 (1972). In *Willard* a lot was sold subject to an easement for automobile parking during church services. Willard v. First Church of Christ, Scientist, Pacifica, 7 Cal. 3d 473, 475, 498 P.2d 987, 988, 102 Cal. Rptr. 739, 740 (1972).

22. *Id.* at 478, 498 P.2d at 991, 102 Cal. Rptr. at 743. In its decision to abandon the common law rule, the California Supreme Court said "[t]he rule may frustrate the grantor's intent even though it is riddled with exceptions." *Id.*

23. *Id.* at 477, 498 P.2d at 990, 102 Cal. Rptr. at 742.

24. 130 Cal. 422, 62 P. 596 (1900).

25. Butler v. Gosling, 130 Cal. 422, 425, 62 P. 596, 597 (1900). In *Butler* two wives owned a ranch as their separate property. *Id.* at 424, 62 P. at 596. Their husbands joined them in conveying the ranch to third persons, reserving a certain number of square miles of the ranch land for themselves. *Id.* at 424, 62 P. at 596. The California Supreme Court ruled that even though the word "reserving" was used, the clause was an "exception." *Id.* at 425, 62 P. at 597. The effect of the ruling was to leave the title to the excepted portion precisely as it was before the instrument was executed. *Id.* at 425, 62 P. at 597.

26. *Id.* at 426, 62 P. at 597.

27. 40 Cal. App. 451, 181 P. 98 (1919).

28. Sutter Butte Canal Co. v. Richvale Land Co., 40 Cal. App. 451, 457, 181 P. 98, 100 (1919). In *Sutter Butte Canal* the grantees claimed that a reservation of easements was void. *Id.* at 455, 181 P. at 99. The court ruled that the grantees were estopped to object to the easement because they had consented to the reservation. *Id.* at 457, 181 P. at 100.

29. 202 Cal. 23, 259 P. 38 (1927).

reservation in favor of a grantor's spouse.[30] By construing the language of the reservation as an exception, the court ruled that the statutory provision applying contract interpretations to grants mandated that the grantor's intent be given effect.[31]

Nineteen years later a California appellate court affirmed the common law rule because the rule's application did not conflict with the intentions of the parties.[32] In *Mott v. Nardo*[33] the court found that the property owner did not intend to vest title in a stranger; accordingly, the court needed no device to mitigate the harshness of the rule.[34]

Almost twenty years after *Mott* a California appellate court upheld the reservation of a right in a stranger to the title when the grantor reserved a right to use and occupy the land for life for herself and her sister.[35] In *Dandini v. Johnson*[36] the court found that the parties intended to reserve a nonexclusive right in the grantor and her sister for the use of the property.[37] A year later, in *Smith v. Kraintz,*[38] the court of appeals held that a reservation in a stranger of a nonexclusive easement for road purposes and public utilities was ineffective as a reservation but was evidence of an intent to dedicate the interest to the public.[39] Thus, the court enforced the grantor's intent even though the reservation was invalid.[40]

Finally, in 1972 the California Supreme Court in *Willard v. First Church of Christ, Scientist, Pacifica*[41] laid to rest the common law

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30. Boyer v. Murphy, 202 Cal. 23, 32-33, 259 P. 38, 41 (1927). The facts in *Boyer* were similar to those in *Malloy*. In *Boyer* the wife was the sole owner of certain real estate. *Id.* at 25, 259 P. at 39. Her husband joined with her in executing a deed conveying the fee to third persons. *Id.* The deed contained a clause concluding as follows: "reserving to the parties of the first part [the wife and her husband] the ownership and possession thereof during the lifetime of the parties of the first part and the survivors of them." *Id.* The California court held that the husband possessed a life estate in the property. *Id.* at 36, 259 P. at 42.

31. *Id.* at 29-33, 259 P. at 40-41. See *supra* note 20 for the statutory provision applying contract principles to grants in California.

32. *See* Mott v. Nardo, 73 Cal. App. 2d 159, ____, 166 P.2d 37, 39-40 (1946).

33. 73 Cal. App. 2d 159, 166 P.2d 37 (1946).

34. Mott v. Nardo, 73 Cal. App. 2d 159, ____, 166 P.2d 37, 40 (1946). In *Mott* a bank and a trustee jointly conveyed property to a third party. *Id.* at ____, 166 P.2d at 39. The grantor reserved a right of way over the land for water conduits. *Id.* Subsequently, the trustee conveyed the rights reserved by him in the deed to a third party. Years later the bank conveyed the same reserved rights to another party. *Id.* The court held that since the trustee was a stranger to the title, the reservation to him was a nullity. *Id.* at ____, 166 P.2d at 40.

35. Dandini v. Johnson, 193 Cal. App. 2d 815, 14 Cal. Rptr. 534 (1961). Dandini conveyed her undivided one-half interest in certain property to her husband, reserving to herself and her sister the right to use and occupy the land during the terms of their respective lives. *Id.* at ____, 14 Cal. Rptr. at 535.

36. 193 Cal. App. 2d 815, 14 Cal. Rptr. 534 (1961).

37. Dandini v. Johnson, 193 Cal. App. 2d 815, ____, 14 Cal. Rptr. 534, 537 (1961). In upholding the reservation to the grantor and her sister, the court in *Dandini* based its decision on the intent of the parties. *Id.* at ____, 14 Cal. Rptr. at 536-37.

38. 201 Cal. App. 2d 696, 20 Cal. Rptr. 471 (1962).

39. Smith v. Kraintz, 201 Cal. App. 2d 696, ____, 20 Cal. Rptr. 471, 473-74 (1962).

40. *Id.* at ____, 20 Cal. Rptr. at 474.

41. 7 Cal. 3d 473, 498 P.2d 987, 102 Cal. Rptr. 739 (1972).

rule and followed the lead of Oregon and Kentucky.[42] In holding that section 1066 of the California Code[43] prevailed over the common law rule, the California court eliminated the need to circumvent the common law rule with various legal procedures.[44] The court further found that application of the common law rule could potentially conflict with another California statute that allowed a valid grant in any natural person.[45]

In *Malloy* the North Dakota Supreme Court relied heavily on *Willard.* North Dakota has a statutory provision concerning who can receive a present interest in property.[46] This statute contains language identical to the California statute noted in *Willard.*[47] The North Dakota court agreed with the California Supreme Court's interpretation that the common law rule conflicted with the statutory provision.[48] The court in *Malloy* interpreted section 47-09-17 of the North Dakota Century Code to allow a property interest to vest in a person, that the person need not be a party under a grant, and words of conveyance are not necessary.[49]

Another motivating factor behind the *Malloy* decision was the

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42. Willard v. First Church of Christ, Scientist, Pacifica, 7 Cal. 3d 473, 478, 498 P.2d 987, 991, 102 Cal. Rptr. 739, 743 (1972). The reservation in *Willard* was an easement allowing a parking lot for a church. *Id.* at 473, 498 P.2d at 988, 102 Cal. Rptr. at 740. The California Supreme Court ruled that the common law rule would not be permitted to defeat the grantor's intent. *Id.* at 479, 498 P.2d at 991, 102 Cal. Rptr. at 743.

Oregon abandoned the common law rule in *Garza v. Grayson. See* Garza v. Grayson, 255 Or. 413, ____, 467 P.2d 960, 961-62 (1970). In *Garza* the reservation was an easement over land for public utility purposes benefiting a third party. *Id.* at ____, 467 P.2d at 961. The Oregon Supreme Court in *Garza* ruled that the common law prohibition against reservations in favor of strangers should not be allowed to defeat the grantor's expressed intention. *Id.*

Kentucky abandoned the common law rule in *Townsend v. Cable. See* Townsend v. Cable, 378 S.W.2d 806, 808 (Ky. 1964). The court abandoned the common law rule because it was not compatible with the rule followed in the construction of deeds — to determine the intention of the parties as gathered from the four corners of the instrument. *Id.* at 808. The Kentucky Court of Appeals in *Townsend* treated the reservation as a conveyance, vesting title in the stranger. *Id.* The reservation was for a one-half interest in all oil and gas from a tract of land for the use and benefit of a stranger to the deed. *Id.* at 806-07.

43. CAL. CIV. CODE § 1066 (West 1982). See *supra* note 20 for the text of § 1066.

44. *See Willard,* 7 Cal. 3d at 476-78, 498 P.2d at 989-91, 102 Cal. Rptr. at 741-43. The California Supreme Court in *Willard* stated that grants are to be interpreted in the same way as other contracts and not according to rigid feudal standards. *Id.* at 476, 498 P.2d at 989, 102 Cal. Rptr. at 741.

45. *Id.* at 477, 498 P.2d at 990, 102 Cal. Rptr. at 742. Section 1085 of the California Civil Code provides, "A present interest, and the benefit of a condition or covenant respecting property, may be taken by any natural person under a grant, although not named a party thereto." CAL. CIV. CODE § 1085 (West 1982) (enacted 1872). The court in *Willard* noted that the provision had never been used in any California case and would not apply in *Willard* because the church was a corporation and not a natural person. *Willard,* 7 Cal. 3d at 477, n.3, 498 P.2d at 990, n.3, 102 Cal. Rptr. at 742, n.3.

46. *See* N.D. CENT. CODE § 47-09-17 (1978). Section 47-09-17 states, "A present interest and the benefit of a condition or covenant respecting property may be taken by any natural person under a grant although not named a party thereto." *Id.*

47. Malloy v. Boettcher, 334 N.W.2d at 10. For the text of § 1085 of the California Civil Code, see *supra* note 45. The punctuation in § 47-09-17 is not the same as California's § 1085; California's provision contains commas while North Dakota's provision has no punctuation.

48. 334 N.W.2d at 10.

49. *Id.* The court stated that § 47-09-17 permits "a natural person to receive a present interest in property even though that person is not named through words of conveyance as a party under the grant." *Id.*

court's willingness to effectuate the grantor's intent.[50] The *Stetson* case, which followed the common law rule, was overruled to the extent it was contrary to *Malloy*.[51] The *Malloy* court said that language in the reservation clause that identified the husband and wife as "parties of the first part" receiving a life estate expressed the husband's intention that his wife would possess a life estate in the property after his death.[52]

Since the reservation clause in *Malloy* involved a husband and wife, a reservation in favor of a spouse in North Dakota will operate as a conveyance of a property interest to the spouse when that is the grantor's intent.[53] Whether the same result would occur if a true stranger to the title were involved, however, is unclear.

Three of the justices filed special concurrences because they felt that a wife is not a stranger to the title.[54] Justice VandeWalle felt that *Stetson* should not be overruled until a case involving a true stranger to the title is before the court.[55] Justice Pederson concluded that the court might want to apply the common law rule upheld in *Stetson* when a case involves a real stranger.[56] Justice Sand reasoned that *Stetson* does not apply to the *Malloy* case because *Stetson* involved a stranger to the deed whereas *Malloy* involved a spouse who had joined in the deed and was, therefore, not a stranger to the deed.[57]

A reservation in a deed to the grantor's spouse will be a valid method of property conveyance in North Dakota when courts

50. *See id.* at 9-10. The court in *Malloy* did not rule that § 47-09-11 of the North Dakota Century Code was controlling as California had ruled regarding § 1066 in *Willard*. *See supra* note 20. Section 47-09-11 of the North Dakota Century Code states in part, "Grants shall be interpreted in like manner with contracts in general except so far as otherwise provided by this chapter. . . ." N.D. CENT. CODE § 47-09-11 (1978).

51. *Malloy*, 334 N.W.2d at 10. The *Stetson* case was not completely overruled by *Malloy*. *Id.* If a reservation is ineffective to convey a property interest to a third person who is a stranger to the deed or title, the reserved or excepted interest remains in the grantor and does not pass to the grantee. *See* Stetson v. Nelson, 118 N.W.2d 685, 688 (N.D. 1962).

Justice Pederson, concurring specially in *Malloy*, felt that *Stetson* should be overruled to the extent that it operates to defeat attempted reservations to a husband and wife in a deed signed by both parties. 334 N.W.2d at 11 (Pederson, J., concurring). Justice Pederson stated that a wife is a necessary party to a property transaction because of her legal interests in her husband's property and is, therefore, not a stranger within the meaning of the common law rule. *Id.*

52. *Malloy*, 334 N.W.2d at 10.

53. *Id.*

54. *See id.* at 10-12.

55. *Id.* at 11 (VandeWalle, J., concurring). Justice VandeWalle viewed the issue in *Malloy* as merely whether a wife is a stranger. *Id.* He said the larger issue involving a true stranger was neither raised nor briefed. *Id.*

56. *Id.* (Pederson, J., concurring).

57. *Id.* (Sand, J., concurring). Justice Sand stated that the common law rule upheld in *Stetson* was abandoned in North Dakota when the legislature enacted § 47-09-17 of the North Dakota Century Code. Justice Sand reasoned that § 1-01-06 accomplished that result. *Id.* at 11-12. See *supra* note 46 for the text of § 47-09-17. Section 1-01-06 of the North Dakota Century Code provides, "In this state there is no common law in any cases where the law is declared by the code." N.D. CENT. CODE § 1-01-06 (1975).

determine that this is the grantor's intent. Consequently, questions will arise concerning the sufficiency of the language necessary to establish this intent.[58] A consequence of the *Malloy* decision is that in North Dakota, the words "parties of the first part" in a deed may be considered a sufficient manifestation of the intention necessary to vest title in the spouse.[59]

Another consequence of the *Malloy* decision is that courts may uphold exceptions as well as reservations in favor of a spouse.[60] Finally, North Dakota may apply this holding to uphold a reservation of other property rights and interests such as easements and mineral rights to a spouse.[61] If a case involving a true stranger is presented to the North Dakota Supreme Court and the court holds that the *Malloy* decision extends to those who are not spouses, the same questions and consequences will apply to the stranger.

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58. *See Malloy,* 334 N.W.2d at 10. The language used to reserve or except an interest must clearly show an intention to reserve or except from the *grant* and not from some other provision in the deed such as the warranty clause. *See* Mueller v. Stangeland, 340 N.W.2d 450 (N.D. 1983) (language used to reserve or except a mineral interest to the vendor was located *within* the warranty clause, indicating an intention to except the interest from the warranty rather than an intention to except the interest from the grant so that the deed did not except or reserve to the heirs of the vendor any minerals or mineral rights).

59. *See* Malloy, 334 N.W.2d at 10. The opinion is not clear whether the words "parties of the first part" were sufficient in *Malloy* because the parties were husband and wife or if the words would be a sufficient manifestation of intent no matter what the relationship would be between those named as parties to the grant.

60. *Id.* at 9. In *Malloy* the common law rule was replaced with the rule that "a reservation *or exception* can be effective to convey a property interest to a third party who is a stranger to the deed or title of the property where that is determined to have been the grantor's intent." *Id.* (emphasis added).

61. *Id.* at 10. The court stated that it was following the lead of California, Oregon, and Kentucky. *Id.* The California case involved an easement. *See Willard,* 7 Cal. 3d at 475, 498 P.2d at 988, 102 Cal. Rptr. at 740. The Oregon case also involved an easement. *See* Garza v. Grayson, 255 Or. at ____, 467 P.2d at 961. The Kentucky case involved mineral rights. *See* Townsend v. Cable, 378 S.W.2d at 807.