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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1147**

Leslie J. Overman, et al.,
Appellants,

vs.

Minnwest Bank South,
Respondent.

**Filed July 1, 2008
Reversed
Wright, Judge**

Murray County District Court
File No. 51-CV-06-223

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Considered and decided by Klaphake, Presiding Judge; Stoneburner, Judge; and
Wright, Judge.

UNPUBLISHED OPINION

WRIGHT, Judge

Appellants challenge the district court's refusal to enter a declaratory judgment releasing them from a mortgage held by respondent. We reverse.

FACTS

Appellants Leslie and Rose Overman (collectively the Overmans) operate a family farm. Starting in 1997, Leslie Overman took occasional short-term loans from respondent Minnwest Bank (the bank) to cover the farm's operating expenses, executing promissory notes in connection with these loans. By the first half of 2001, his past-due notes totaled approximately \$185,000. Rose Overman, however, was not a signatory party to any of these notes.

On June 4, 2001, Leslie Overman executed a new promissory note consolidating his outstanding debt. As security for the new note, the bank's loan officer sought a mortgage on the Overmans' land. The mortgage, which both Overmans signed, states that it secures "all present and future indebtedness," specifically including a \$185,000 note maturing March 30, 2020. The promissory note, signed only by Leslie Overman, states that it matures January 5, 2002, more than 18 years earlier. Believing that the loan officer had deceived them, the Overmans sought a declaratory judgment negating the mortgage. Following a bench trial, the district court concluded that the mortgage was valid. This appeal followed.

DECISION

The Overmans challenge the legal validity of the mortgage based on the 18-year discrepancy in the due date stated in the mortgage instrument and the due date of the promissory note. They argue that the mortgage fails for lack of consideration because Rose Overman signed a mortgage instrument securing a promissory note that becomes

due in 2020—a note that does not exist. Accordingly, the Overmans maintain that Rose Overman has no obligations with respect to the actual note that becomes due in 2002.

Consideration is necessary to support a mortgage, but only indirectly. *Baker v. Citizens State Bank*, 349 N.W.2d 552, 557 (Minn. 1984). A mortgage is a species of deed, which is simply a vehicle for conveying an interest in land. *Id.*; *Black's Law Dictionary* 423 (7th ed. 1999) (defining “deed”); *see also* Minn. Stat. § 507.01 (2006) (including mortgage in definition of “conveyance”). This “conveyance,” however, is conditional; nothing is actually conveyed unless the mortgage is foreclosed on. *Romanchuk v. Plotkin*, 215 Minn. 156, 161, 9 N.W.2d 421, 424-25 (1943). Rather, the deed is security for the performance of an underlying contractual obligation. *Baker*, 349 N.W.2d at 557. And because the underlying contract must be supported by consideration, a mortgage conditioned on it is functionally dependent on consideration as well. *Id.*

In framing their argument in terms of consideration, however, the Overmans do not recognize the difference between consideration for the underlying contract and that contract as a condition for the mortgage to convey an interest in property. A mortgage is valid as a conveyance regardless of consideration, but that conveyance occurs only when triggered by nonperformance of the underlying contract. *See generally Restatement (Third) of Prop.: Mortgages* § 1.2 cmt. a (1997) (discussing relationship between mortgage and underlying obligation); *accord Baker*, 349 N.W.2d at 557.

There is no dispute that Leslie Overman was contractually obligated to repay his overdue debt to the bank. Nor is it disputed that the bank agreed to forego temporarily its

legal right to collect that debt by executing the new promissory note refinancing the debt. Leslie Overman's obligation to repay the note, therefore, is supported by consideration. The existence of consideration supporting an obligation between Rose Overman and the bank is consequently immaterial if she granted the mortgage to secure an obligation between her husband and the bank. *See Restatement (Third) of Prop.: Mortgages* § 1.3 ("An obligation whose performance is secured by a mortgage may be that of the mortgagor or of some other person.").

The Overmans' overriding concern appears to be that, although the note executed by Leslie Overman is due in 2002, Rose Overman was not a party to that note, and the only instrument that she signed was the mortgage, which specifically describes a note due in 2020. In substance, the Overmans argue that the 18-year discrepancy between the two documents' terms is, on its face, sufficiently material that Rose Overman's signature cannot reasonably be construed as granting a mortgage to secure the actual note. We agree.

Subject to exceptions not relevant here, no mortgage of a homestead is valid unless it is signed by both spouses. Minn. Stat. §§ 507.01-.02 (2006). A "signature," however, is more than a set of written characters that have been physically inscribed on paper; it is a symbol that objectively represents the spouse's willingness to grant the mortgage. *See Wells Fargo Home Mortgage, Inc. v. Newton*, 646 N.W.2d 888, 895 (Minn. App. 2002) (stating that basic policy objective of section 507.02 is to protect families against alienating their homestead without willing signatures of both spouses); *cf. Restatement (Second) of Contracts* § 134 (1981) (defining signature satisfying statute-

of-frauds' authentication requirement as "any symbol made or adopted with an intention, actual or apparent, to authenticate the writing as that of the signer"). And to the extent that a spouse's signature cannot be construed to represent an objective willingness to convey the homestead on the occurrence of a particular condition—namely, the nonperformance of the underlying obligation—that signature is ineffective. *Cf. Graham v. Nat'l Sur. Co.*, 244 F. 914, 919-20 (8th Cir. 1917) (holding that wife's signature on conveyance was ineffective to secure husband's past indebtedness, which she had orally refused to do, and signed only to secure his future indebtedness). Had Rose Overman also signed the note, we could not excuse her lack of knowledge of the date it states that repayment is due. *See Huseman v. Life Ins. Co. of N. Am.*, 402 N.W.2d 618, 620 (Minn. App. 1987) ("Absent fraud, mistake or unconscionable terms, a party to a document cannot avoid the requirements of the document by showing he did not know its contents."). And under certain circumstances, we might be persuaded to disregard the transposed digits as "a mere clerical mistake of the scrivener" of which Rose Overman should have been aware. *Cf. Fowler v. Woodward*, 26 Minn. 347, 348, 4 N.W. 231, 232 (1880) (concluding that mortgage's reference to "quarterly" interest payments was accidentally used in place of "annually" when only interest payments mortgagors owed were annual interest payments on a particular note); *Resolution Trust Corp. v. Indep. Mortgage Servs., Inc.*, 519 N.W.2d 478, 481 (Minn. App. 1994) (permitting note and mortgage to be treated as single instrument or transaction when simultaneous execution demonstrates parties' intent to treat them as such), *review denied* (Minn. Sept. 28, 1994). But we are unwilling to place the burden of a typographical error of this magnitude on

Rose Overman when she was not even a party to the note. Based on the circumstances present here, Rose Overman's signature cannot be fairly construed to represent her willingness to grant a mortgage conveying her homestead on the occurrence of a condition nearly two decades sooner than stated in the only document she signed. As such, the mortgage lacks the effective signatures of both the Overmans and, consequently, is void. *Dvorak v. Maring*, 285 N.W.2d 675, 677 (Minn. 1979) (stating that if either spouse's signature is omitted, mortgage is void, and mortgagee acquires no rights whatsoever in homestead). Although we recognize the harshness of this result to the bank, "the home should be a citadel of security against the misfortunes and uncertainties of life," and the legislature has carefully designed section 507.02 "to preserve the homestead to the family even at the sacrifice of just demands." *Newton*, 646 N.W.2d at 895 (quotation omitted).

Reversed.