

IN THE COURT OF APPEALS OF IOWA

No. 9-926 / 09-0397
Filed July 14, 2010

FREEDOM FINANCIAL BANK,
Plaintiff-Appellee,

vs.

ESTATE OF EDWARD J. BOESEN,
Defendant-Appellant/Cross-Appellee,

and

MAUREEN A. BOESEN,
Defendant-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Polk County, Douglas F. Staskal,
Judge.

Administrator of estate and decedent's widow appeal the district court's
grant of summary judgment ordering foreclosure of a mortgage signed by the
decedent. **AFFIRMED IN PART AND REVERSED IN PART.**

James R. Monroe, Des Moines, for appellant Estate of Edward J. Boesen.

Adam C. Van Dike of Connolly, O'Malley, Lillis, Hansen, Olson, L.L.P.,
Des Moines, and Jerrold Wanek of Garten & Wanek, Des Moines, for appellee
Maureen Boesen.

Louis R. Hockenbergh and Benjamin M. Clark of Sullivan & Ward, P.C.,
West Des Moines, for appellee Freedom Financial Bank.

Heard by Sackett, C.J., and Doyle and Danilson, JJ.

SACKETT, C.J.

The district court granted summary judgment, ordering foreclosure of a mortgage given to Freedom Financial Bank (Freedom) by one Edward Boesen, now deceased. Edward's widow, Maureen Boesen, and the administrator of Edward's estate (Estate) appeal from the order of foreclosure, each contending their rights to the property are superior to Freedom's and superior to each other's.¹ We affirm in part and reverse in part.

I. SCOPE OF REVIEW. A mortgage foreclosure is an equitable proceeding. Iowa Code § 654.1 (2007). Generally cases in equity are reviewed by this court de novo. Iowa R. App. P. 6.907 (2009). However where, as here, the appeal of an equitable proceeding addresses only the issue of the grant of a summary judgment, we review for correction of errors at law. See *Moser v. Thorp Sales Corp.*, 312 N.W.2d 881, 886 (Iowa 1981).

II. UNDISPUTED FACTS. Edward Boesen sought to purchase property legally described as "Lot 2 in John Deere Place Plat No. 4, An Official Plat," and arranged for Freedom to provide financing for the purchase. On May 25, 2007, he delivered a promissory note to Freedom for \$232,000. The note bore interest of 7.25 percent and indicated its purpose was to purchase investment property. At the same time Edward delivered to Freedom an "Open-End Real Estate Mortgage" with a future advance clause that indicated it secured credit in the amount of \$290,000 together with interest and was senior to indebtedness to other creditors holding subsequently recorded or filed mortgages or liens. The

¹ The real estate secured was not a homestead.

mortgage further showed it was a purchase money mortgage. The mortgage was signed by Edward and allegedly signed by Maureen, as his wife, and bore the required acknowledgment and seal of a notary indicating both parties were known to and had appeared before the notary and signed it voluntarily.

At 03:00:29 p.m. on February 25, 2007, a warranty deed signed by the seller on the same date conveying the property in question to Edward alone was recorded with the Polk County Recorder. At 03:01:11 p.m. on the same day the real estate mortgage given to Freedom was recorded. Edward died intestate on July 15, 2008. He was survived by his wife, Maureen, and children who are all also Maureen's children.

III. PROCEEDINGS. An estate was opened for Edward. The note securing Freedom's mortgage was in default, and on August 8, 2008, Freedom sued Edward's estate and Maureen to foreclose the mortgage, electing foreclosure without redemption and seeking judgment in rem against the real estate and judgment in personam. Maureen and the Estate answered contending, among other things, that Maureen did not sign the mortgage.

All parties filed motions for summary judgment and resistances to same. Freedom contended there were not disputed facts and the mortgage should be foreclosed. Maureen contended she never signed the mortgage, title passed to her under Iowa Code section 633.211, and the mortgage was void. The Estate contended that the mortgage was not valid as to Maureen because her signature was forged; however, the property was subject to the debts and charges of the estate. Freedom's motions contending that Maureen's interest was subject to its

mortgage stated it proceeded under the assumption that Maureen's signature on the mortgage was forged.

The district court entered a ruling on the motions on January 26, 2009, and found the undisputed facts to be as set forth above. It further found that Maureen did not sign the mortgage nor did she authorize anyone to sign it for her. The court then addressed the legal issues.

The court determined the mortgage to be a purchase money mortgage under Iowa Code section 654.12B and determined that Maureen's interest was "any other right, title, [or] interest . . . arising . . . through, or under" Edward. The court rejected Maureen's argument that she took the property free of Freedom's lien under Iowa Code section 633.211.² It concluded that there is no conflict between sections 633.211(1) and 654.12B, that prior case law has recognized there is common law priority of purchase money mortgages that operates against statutes similar to section 633.211, and that section 654.12B codified existing common law principles.

On February 25, 2009, the district court entered its decree foreclosing the mortgage and entering judgment in favor of Freedom and against the Estate in the amount of \$228,056.42 plus 7.25 percent interest from August 5, 2008, plus court costs, insurance costs, attorney fees of \$10,500, and other advances made

² Iowa Code section 633.211 provides in relevant part:

If the decedent dies intestate leaving a surviving spouse and leaving no issue or leaving issue all of whom are the issue of the surviving spouse, the surviving spouse shall receive the following share:

1. All the value of all the legal or equitable estates in real property possessed by the decedent at any time during the marriage, which have not been sold on execution or by other judicial sale, and to which the surviving spouse has made no relinquishment of right.

by Freedom including real estate taxes. The court further ordered that any surplus remaining after the sheriff's sale shall be paid to the Estate. In a supplemental order also dated February 25, 2009, the district court addressed the question of whether Freedom should have judgment for funds advanced to Edward that were not part of the original purchase money funds. The court rejected Freedom's position that the mortgage secured priority for indebtedness beyond the original purchase money. On March 16, 2009, the district court entered a ruling in response to a request by Freedom for a clarification of the court's order on how surplus of sale proceeds over amounts loaned for purchase of the property should be distributed. The district court said:

[T]he court affirms its prior order that any surplus funds after sale of the property will be paid into the estate for administration. Any such funds will: (1) retain the same priority vis a vis other creditors (except Mrs. Boesen under 633.211) as the real estate had under the plaintiff's mortgage; and (2) be regarded as real estate owned by Edward Boesen at the time of his death for the purposes of applying 633.211.

On March 9, 2009, Edward's estate appealed from the order on summary judgment entered on January 26, 2009, and the order and supplemental order entered on February 25, 2009. On March 25, 2009, Maureen entered what she termed a "cross appeal" appealing from all rulings adverse to her in the orders of January 26, 2009, the supplemental order of February 25, 2009, and a second supplemental order of March 16, 2009.

IV. IS THE MORTGAGE A PURCHASE MONEY MORTGAGE, MAKING IT SUPERIOR TO MAUREEN'S RIGHTS UNDER § 633.211 AND ANY RIGHTS OF THE ESTATE? Maureen and the Estate contend it is not for two reasons. First, they argue Maureen's rights did not arise "either directly or indirectly by,

through, or under the purchaser” pursuant to Iowa Code section 654.12B. Secondly, they contend that the conflict between her statutory rights and the purchase money mortgage should be resolved in favor of her statutory rights.

The mortgage provided that it was a purchase money mortgage. The note it secured provided it was for purchase money. The initial funds advanced by Freedom were used to purchase the real estate. There is little argument but that the mortgage Edward gave had many of the trappings of a purchase money mortgage as defined in section 654.12B.

Maureen and the Estate rely on *Lucas v. White*, 120 Iowa 735, 741, 95 N.W. 209, 211 (1903),³ to support their position that Maureen’s interest does not arise directly or indirectly by, through, or under the purchaser (here Edward). In *Lucas*, the court said:

[T]he widow’s right of dower is not like that of an heir derived by descent from the husband, nor does it date from his death. The right becomes complete in her the instant there is a concurrence of seisin^[4] in the husband and marriage relation between the parties. *It is not called into existence by the grant or grace or favor of the husband*, and the wife holds it wholly independent of him . . . *a right attaching by implication of law . . . yet from the moment the fact of marriage and of seisin have concurred it is so fixed upon the land as to become a title paramount to that of any person claiming under the husband by any subsequent act. After this right has once*

³ In *Lucas*, a husband had transferred real estate without his wife’s signature. After his death the widow sued for her dower interest in the land. The question was whether the statute of limitations ran from the time the land was transferred without the widow’s signature or if it ran from the time of the husband’s death. The court found the statute commenced running at the time of his death and opined that “while her right becomes effective only upon the husband’s death in her lifetime, her dower attached to the land not from the date of his decease, but from the date when her inchoate right had its origin.” 120 Iowa at 741, 95 N.W. at 211.

⁴ Defined as “possession of a freehold estate in land; ownership.” Black’s Law Dictionary 1389 (8th ed. 2004). (Hereinafter “Black’s”).

attached it is held by the wife entirely independent of her husband, and cannot be affected by any act or omission on his part.

Lucas, 120 Iowa at 741, 95 N.W. at 211 (emphasis added).

Freedom disagrees that *Lucas* is controlling because section 654.12B,⁵ which does not specifically provide that a purchase money mortgage has priority over any dower rights of a mortgagor's surviving spouse, and Iowa common law, support its position that its interest is superior to any rights of Maureen and/or the Estate. Even if *Lucas* supports the argument that Maureen's right does not arise by, through, or under Edward's, our inquiry as to the applicability of section 654.12B does not end there. This is because section 654.12B(2) provides in part, "[t]he rights of this section are in addition to, and the obligations are not in derogation of, all rights provided by common law." We therefore look to the common law.

Prior to *Lucas*, in *Thomas v. Hanson*, 44 Iowa 651, 651 (1876), the court addressed the question of whether a widow's dower or share in property was subject to the lien of a purchase money mortgage or superior to it. The court decided that the widow's share was subject to a mortgage where her husband

⁵ Iowa Code section 654.12B provides in relevant part:

The lien created by a recorded purchase money mortgage shall have priority over and is senior to preexisting judgments against the purchaser *and any other right, title, interest, or lien arising either directly or indirectly by, through, or under the purchaser.* A mortgage is a purchase money mortgage to the extent it is either:

2. Taken by a lender who, by making an advance or incurring an obligation, provides funds to enable the purchaser to acquire rights in the real estate, including all costs in connection with the purchase, if the funds are in fact so used. . . .

. . . *The rights in this section are in addition to, and the obligations are not in derogation of, all rights provided by common law.*

(Emphasis added.)

had taken a deed to the property from his father and at the same time executed a mortgage to his father. *Thomas*, 44 Iowa at 651-52. The court found the husband was “seized but for an instant taking an absolute estate in fee, and instantly rendered back a conditional estate in fee.” *Id.* at 652. The court then held the two instruments “must be considered as parts of one and the same contract between the parties.” *Id.* at 653. It stated, “as no time, in contemplation of law, intervened between the execution of the deed . . . and the mortgage . . . [the widow’s] inchoate right of dower attached subject to the mortgage.” *Id.* at 653.⁶ The time between the recording of the deed to Edward and the recording of the mortgage to Freedom was less than a minute, which *Thomas* would seem to indicate is “no time” in the contemplation of the law. *See id.*

In cases after *Thomas* the Iowa courts, in holding or discussing that the dower interest in real estate attaches subject to a purchase money mortgage, have followed the *Thomas* holding. In *Noyes v. Kramer*, 54 Iowa 22, 24-25, 6 N.W. 123, 124-25 (1880), the court addressed whether a widow’s interest in land was subject to a vendor’s lien and said,

Whatever estate she holds in the land is acquired by operation of law and in this respect is not different from the estate of an heir. The estate of neither . . . is released from the operation of a vendor’s lien against the husband

⁶ The court also made the following observation:

Courts, indeed, have gone so far as to hold that where a purchaser takes a deed of land and at the same time executes a mortgage to a third person, to secure money used in payment for the land, the mortgage and deed may be regarded as constituting one transaction, and the mortgage will be paramount to the dower right of the wife of the purchaser, although she does not sign the mortgage.

Thomas, 44 Iowa at 653 (citations omitted).

The same year, in *Kemerer v. Bournes*, 53 Iowa 172, 174-75, 4 N.W. 921, 923-24 (1880), the court held that the widow of one who purchases real estate and assumes the payment of a mortgage on the property as a part of the purchase price is not entitled to her dower rights as against the mortgagee.

In *Haynes v. Rolstin*, 164 Iowa 180, 182, 145 N.W. 336, 336 (1914), the court discussed the fact many of its decisions had held the dower interest in real estate attaches subject to the superior rights of a purchase money mortgage, and that the widow is not entitled to assert it as against the prior claim based on a purchase-money lien.⁷ In *Snyder v. Richey*, 150 Iowa 737, 743-44, 130 N.W. 922, 923-24 (1911), the court, citing *Thomas*, 44 Iowa at 651, discussed prior cases holding the widow's inchoate dower right attached only to the land subject to a purchase-money mortgage that she did not join, that was given during the marriage.⁸

Maureen and the Estate contend that if the early common law was correct, it was changed in *Westergard v. Klepper*, 229 N.W.2d 236, 238-39 (Iowa 1975). In *Westergard*, the deceased husband had, during his marriage, entered into

⁷ In *Haynes*, there was a purchase money mortgage on eight acres of land, forty of which were decedent's homestead. The widow sought to sell the land and have one-third of the land including the homestead set aside for her. The court held:

[U]pon the death of the husband the homestead rights held by him would by operation of law, pass to his widow, and, subject only to its secondary liability for purchase-money lien, would, in the admeasurements of her dower right so as to include the homestead, pass to her free from the claim of the indebtedness.

Haynes, 164 Iowa at 184, 145 N.W. at 337.

⁸ Here the issue was whether a surviving widower took land subject to mortgages the deceased spouse alone gave *prior* to their marriage. The court reasoned, "Surely if the survivor's interest is subject to purchase-money mortgages, it should be for a similar reason subject to mortgages existing on the land at the inception of coverture." *Snyder*, 150 Iowa at 744, 130 N.W. at 924.

long term real estate leases without his wife's signature. 229 N.W.2d at 237. The court held the widow's interest in that real estate was not subject to the leases and stated that "a deed or a lease by the husband during coverture without the wife's concurrence is a nullity as to her." *Id.* at 238. The court went on to say:

The dower right, given by statute, to a wife in the property of her husband, though inchoate pending the life of the husband, is in the nature of a property right, and she cannot be divested of it by any act of her husband, whether done in good faith, or in *fraud*. It may be generally stated that her dower cannot be defeated or impaired by any act of her husband or by any title emanating^[9] from him The wife's right not only prevails over any conveyance^[10] made by the husband in the execution of which she does not share, but also remains unaffected by *any lien*^[11] or other claim based on a contract made by him.

Id. at 239 (internal citations omitted) (emphasis added). The issue in *Westergard* concerned a lease, not a purchase money mortgage, and it did not specifically overrule any of the prior cases giving a purchase money mortgage priority over earlier statutes addressing a spouse's rights to property titled in the other spouse's name when the spouse had not joined in a conveyance. See *id.* at 240-41.

The district court recognized that the language in *Westergard* broadly held that a surviving spouse's dower right remains unaffected by any lien or other claim based on a contract made by the deceased spouse. The district court rejected applying *Westergard* here, reasoning it did not believe *Westergard* was

⁹ "Emanation" is defined as: "1. The act of coming or flowing forth from something. 2. That which flows or comes forth from something; an effluence." Black's at 567.

¹⁰ "The voluntary transfer of a right or of property." Black's at 357.

¹¹ "A legal right or interest that a creditor has in another's property lasting usually until a debt or duty that secures it is satisfied." Black's at 941.

intended to establish a different rule regarding the priority of purchase money mortgages.

We are in equity. While dower is favored by the courts, it is not to be allowed at the expense of clearly inequitable results unless the statute clearly requires it. *Snyder*, 150 Iowa at 743, 130 N.W. at 924; *Sullivan v. Sullivan*, 139 Iowa 679, 687, 117 N.W. 1086, 1089 (1908). Yet, the holding in *Westergard* showed little sympathy for the lessee's rights saying: "He cannot found rights on failure or neglect to obtain joint consent, and if he cannot assure himself, he must take the business hazard, or seek a lease elsewhere." 229 N.W.2d at 239.

Freedom asked for Maureen's signature. It apparently believed it needed it and had obtained it.¹² However, apparently it was unable to show it was Maureen's signature, and it appears to have been a fraudulent transaction.¹³ Should Freedom be allowed to found its right on failure or neglect? *Westergard* would suggest it should not.¹⁴

Yet Edward's ability to purchase the property appears to have been contingent on the execution of the purchase money mortgage. It is difficult to say it is equitable for Maureen to take the property free of the purchase money mortgage or to reject the clear language of *Westergard*. The purchase money mortgage meets the definition of a lien based on a contract made by Edward. We believe that Freedom should prevail because the mortgage and deed were in

¹² This record does not really reveal how Maureen's forged signature was notarized.

¹³ The district court found it was not her signature and that is not challenged here.

¹⁴ In argument an attorney for either Maureen or the Estate suggested it is a good banking practice to require all parties to a mortgage to sign in a bank employee's presence. Freedom responded it should be entitled to rely on the notary.

essence a single transaction. See *Thomas*, 44 Iowa at 651-52 (holding that taking a fee and instantly rendering back a conditional estate are considered the same transaction). The purchase money mortgage was recorded a little less than a minute after the deed conveying the property to Edward. Both documents were executed on the same date. Edward was never seized with an unencumbered fee, but took title to the property subject to the mortgage lien. We affirm on this issue.

V. IS THE PROPERTY MAUREEN TAKES SUBJECT TO THE DEBTS AND CHARGES OF THE ESTATE? The Estate contends the property is responsible for debts and charges. Maureen contends it is not and it passes to her free and clear from the debts of her dead husband.

Maureen contends Iowa Code section 633.211(1) establishes that she is entitled to all legal or equitable estates in real property owned by her husband, and it does not provide the real property is subject to her dead husband's debts and charges. The Estate contends that under section 633.350 it takes the property and it is chargeable with the payment of debts and charges against the estate.¹⁵

¹⁵ Iowa Code section 633.350 provides in relevant part:

Except as otherwise provided in this probate code, when a person dies, the title to the person's property, real and personal, passes . . . to the persons who succeed to the estate as provided in this probate code, but all of the property shall be subject to the possession of the personal representative as provided in section 633.351 . . . and such property, except homestead and other exempt property, shall be chargeable with the payment of debts and charges against the estate. There shall be no priority as between real and personal property, except as provided in this probate code

Maureen cites *Mock v. Watson*, 41 Iowa 241 (1875) to support her position. *Mock* addressed a statute referred to as section 2440,¹⁶ and the court said,

The interest of the wife is not, as that of the heirs under section 2453^[17] made subject to the rights of others and to charges against the estate. It is secured by absolute words and no conditions or limitations are affixed to it. These cannot be engrafted on the statute upon presumption of legislative intent.^[18]

41 Iowa at 246.

Maureen contends *Mock*, in addressing a statute very similar to 633.211(1), holds that the interest of a widow in the lands of her deceased husband is not subject to debts and charges against his estate. She argues that the statute here, as was the statute at the time that *Mock* was decided, is not conditioned on the payment of debts and charges. She further cites *In Re Estate of Frinch*, 239 Iowa 1069, 1091, 32 N.W.2d 819, 829-30 (1948), and *Thomas v. Thomas*, 73 Iowa 657, 659, 35 N.W. 693, 694 (1932) to support her position.

The Estate argues that the decedent's property passes to the decedent's devisees or intestate heirs, unless provided otherwise in the probate code, but in

¹⁶ Section 2440 provided:

One-third in value of all the legal or equitable estates in real property, possessed by the husband at any time during the marriage, which have not been sold on execution, or any other judicial sale, and to which the wife has made no relinquishment of her right, shall be set apart as her property in fee simple, if she survive[s] him.

Mock, 41 Iowa at 244.

¹⁷ Section 2453 provided that "[s]ubject to the rights and . . . charges herein before contemplated, the remaining estate . . . in the absence of other arrangements by will, descend in equal shares to his children." *Mock*, 41 Iowa at 244.

¹⁸ The statute in question had been recently adopted and the court found the statute expressly abolished the common law estate of dower and created another estate to take its place, to which the legislature had given no name. *Mock*, 41 Iowa at 243. It stated, "[t]hough no name be given this estate, the profession, finding it inconvenient to speak or write about a thing without a name, will discover a fit term by which to designate it." *Id.*

all cases the decedent's property is subject to the personal representative's possession, to the control of the court for administration purposes, and to the debts of the decedent's estate pursuant to Iowa Code section 633.350. The Estate also argues that while section 633.211(1) does not discuss creditor's claims and is silent with respect to the decedent's debts as they apply to the decedent's estate, it should not be read to indicate that the real estate passes free and clear of creditor claims. The Estate additionally argues that section 633.211 should be read only as giving priority to the payment of debts out of non-exempt personal property rather than a complete exclusion of real estate from the decedent's debts. It urges this interpretation is supported by section 633.436.

The Estate contends that Maureen's reliance on *Mock* is unfounded.¹⁹ The Estate argues that Iowa Code section 633.350 was adopted in 1966, it supersedes the common law, and it specifically states the only assets that pass free of decedent's debts are the homestead and exempt property as defined in sections 561.1 and 627.6. It cites *Noel v. Uthe*, 184 N.W.2d 686, 688 (Iowa 1971), for the proposition that the codification of the probate code in 1963 apparently changed some common law rules regarding intestacy.

The Estate argues that the purpose of Iowa Code section 633.350 is to set forth the rule that title to a deceased person's property passes immediately to the devisee in a will, or pursuant to the law of intestate distribution. It argues that the

¹⁹ The Estate also argues *Mock* should not be followed because it has not been cited since 1948.

“[e]xcept as otherwise provided” language at the beginning of the statute does not apply to the balance of the statute. See, e.g., Iowa Code § 633.351.

Section 633.211(1) standing alone gives Maureen,

All the value of all the legal or equitable estates in real property possessed by decedent [Edward] at any time during the marriage, which have not been sold on execution or by other judicial sale, and to which the surviving spouse [Maureen] has made no relinquishment of right.

The question is whether section 633.211(1) is modified by other provisions of section 633.350.

The Estate agrees that although section 633.211(1) gives the real estate to Maureen, section 633.350 allows them to take control of the property. Section 633.350 provides that on death, title to decedent’s property passes to the person it was devised to under a will or to the person who succeeds to it as provided by the probate code, in this case Maureen. The statute then refers to property that succeeds to a person under probate that

all of the property shall be subject to the possession of the personal representative as provided in section 633.351 . . . and such property, except homestead and other exempt property, shall be chargeable with the payment of debts and charges against the estate.

Iowa Code § 633.350. Contrary to the Estate’s arguments, we believe that to interpret section 633.350, we need to look to section 633.351.

Section 633.351 is not all inclusive of all property, but provides that

[i]f there is no distributee of the real estate present and competent to take possession, or if there is a lease of such real estate outstanding, or if the distributees present and competent consent thereto, the personal representative shall take possession of such real estate, except

There is no evidence here that any of the three circumstances set forth in the statute exists. Therefore we do not believe under the record made here, that this section authorizes the Estate to take the property for payment of debts.

The Estate also argues that section 633.218 allows estate debt to be taken from the property. Section 633.211 provides that debt can be paid from non-exempt personal property, but makes no such provision for real property or exempt personal property. Section 633.211 appears to follow *Mock* in that the dower share is not subject to the debts of the estate, and section 633.218 subjects only non-exempt personal property to debts and charges.

Both parties point to section 633.436(5), which provides that property devised to a surviving spouse who takes under the decedent's will must be used for payment of debts of the estate, to support their position. Maureen claims if intestate property was subject to the statute, it would have so provided, and the Estate argues it is not realistic to assume the legislature would have intended to give an intestate spouse property not subject to claims when a testate spouse's property would be subject to debt.²⁰

The Estate also argues that Maureen's construction of section 633.211 as providing a blanket exception from Edward's debts for real estate passing to her through intestate distribution is absurd. It explains that where the estate is insolvent, section 633.436(5) states that property devised to a surviving spouse

²⁰ Iowa Code section 633.211 was amended in 1985 to increase the share of the surviving spouse from "one third" to "all the value of." There was no amendment made to section 633.218, which allows the surviving spouse to select property "equal in value to the amount to which the spouse is entitled under section 633.211" *after* payments of the debts.

taking under a spouse's will can be used for payment of debts of the estate, and that construing section 633.211(1) as Maureen argues, would give an intestate spouse real estate not subject to creditor claims, while a testate spouse's real estate could abate to pay creditors.

Both Maureen's and the Estate's arguments have merit. The legislature's failure to make changes to section 633.218 when the spouse's share under section 633.211 was increased results in inconsistencies between these two sections. However, if these sections are to be changed, the change should be made by the legislature, not the courts. We reverse the district court's determination that the excess from the sale, if any, be paid to the estate.

VI. FREEDOM FINANCIAL'S MORTGAGE COULD NOT BE RECORDED. The Estate's initial brief raises the issue that Freedom's mortgage could not be recorded because it was improperly notarized. While raising the issue, the Estate fails to state how the issue was preserved for appellate review. Maureen in her reply brief joins in this argument. Maureen contends she raised the issue in the district court in a reply memorandum to Freedom's resistance to her cross-motion for summary judgment. The district court did not rule on the issue and no Iowa Rule of Civil Procedure 1.904(2) motion was filed. Issues must be presented to and passed upon by the trial court before they can be raised and decided on appeal. *Metz v. Amoco Oil Co.*, 581 N.W.2d 597, 600 (Iowa 1998); *Conner v. State*, 362 N.W.2d 449, 457 (Iowa 1985). The rule of error preservation is based upon considerations of fairness. *Sorci v. Iowa Dist. Ct.*, 671 N.W.2d 482, 489 (Iowa 2003). It is fundamentally unfair to fault the

district court for failing to rule correctly on an issue it was never given the opportunity to consider. *Otterberg v. Farm Bureau Mut. Ins. Co.*, 696 N.W.2d 24, 28 (Iowa 2005). We do not address this claim.

We affirm the priority of the purchase money mortgage. We reverse the determination that the excess from the sale, if any, be paid to the estate.

AFFIRMED IN PART AND REVERSED IN PART.