

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of

EUGENE PAUL MORRISON, . Case No. 88-608-C H
Debtor. . Chapter 7

ORDER--OBJECTION TO EXEMPTION

On September 19, 1988, a hearing was held on creditor's objection to Debtor's exemption. Gregory A. Skinner appeared on behalf of Debtor and C. J. May, III, appeared on behalf of creditor Thomas J. Reilly Law Firm, P.C. (hereinafter "Creditor") . At the conclusion of said hearing, the Court took the matter under advisement.

This is a core proceeding pursuant to 28 U.S.C. §157(b) (2). The Court, upon review of the pleadings, arguments of counsel, evidence admitted, and briefs, now enters its findings and conclusions pursuant to Fed.R. Bankr.P 7052.

FINDINGS OF FACT

1. On March 21, 1988, Debtor filed a Chapter 7 petition.
2. On July 10, 1987, Debtor filed a petition for dissolution of marriage in the Iowa District Court for Jasper County.
3. On August 4, 1987, Debtor moved out of the parties' Colfax, Iowa, home with no intention of returning. Throughout the pendency of the dissolution matter, Debtor requested and desired that the residence be sold.

4. On December 22, 1987, the Iowa District Court for Jasper County entered a dissolution decree which provided in relevant part:

[T]he parties' Colfax home, located in R. R. 1, Colfax, Iowa, shall be placed on the market and sold. The proceeds from said sale shall first pay the Deere Community Credit Union Loan No. 4222-096 and other associated costs, and thereafter, all proceeds shall be divided equally between the parties.

Loan No. 422-096 is a mortgage loan on the parties' Colfax home and has an outstanding balance due of \$52,575.96.

5. On January 5, 1988, the Iowa District Court for Jasper County enlarged its previous ruling and found Debtor:

is entitled to physically remain in the premises at Colfax during the time it is for sale and that if [Debtor] physically lives in the premises he alone shall be responsible for payment of all of the monthly mortgage payments and all of the utilities associated with the property including taxes and insurance. If [Debtor] does not occupy the premises during its offering for sale, then [Debtor] and [former wife] shall each be responsible for one-half of the monthly mortgage payments including taxes and insurance.

6. On January 11, 1988, Debtor's former wife removed herself from the Colfax home.

7. On January 20, 1988, Debtor and his former wife signed a listing agreement for the Colfax home with Iowa Realty.

8. The parties' Colfax home sat empty until Debtor

moved back into the home March 29, 1988, eight days after he filed his chapter 7 petition.

9. On his bankruptcy statement of financial affairs, filed March 21, 1988, Debtor listed his residence as 2101 W. First Street, Apartment 1, Ankeny, Iowa. In addition, Debtor listed Box 267, Colfax, Iowa, as one of the places he had resided during the six years immediately preceding the filing of his petition.

10. On his schedule B-4, Debtor claimed as exempt a homestead valued at \$20,000.00. Said homestead consisted of Debtor's former residence in Colfax which, as previously noted, was ordered to be sold by the Iowa District Court for Jasper County, pursuant to the terms of the December 22, 1987, dissolution decree.

11. On his schedule A-3, Debtor listed Creditor as having an unsecured claim of \$7,200.00 for attorney fees.

12. On May 24, 1988, Creditor filed an objection to Debtor's claimed exemption in the Colfax home. Creditor objected to the claimed exemption on two grounds: 1) prior to the filing of Debtor's petition, the home was ordered to be sold by the Iowa District Court for Jasper County, pursuant to the terms of a dissolution decree; and 2) Debtor was not occupying the property as a homestead at the time he filed his petition.

13. Debtor's claimed-as-exempt homestead in Colfax has not yet been sold.

DISCUSSION

The issue in this case is whether Debtor is entitled to claim a homestead exemption in property which previously was ordered sold pursuant to the terms of a state court dissolution decree.

Iowa Code section 561.1 defines a homestead and states:

The homestead must embrace the house used as a home by the owner, and, if the owner has two or more houses thus used, the owner may select which the owner will retain. It may contain one or more contiguous lots or tracts of land, with the building and other appurtenances thereon, habitually and in good faith used as part of the same homestead.

Iowa Code §561.1 (1987) (emphasis added). The exemption for a homestead is found at Iowa Code §561.16 which provides:

The homestead of every person is exempt from judicial sale where there is no special declaration of statute to the contrary. Persons who reside together as a single household unit are entitled in the aggregate only one homestead to be exempt from judicial sale. A single person may claim only one homestead to be exempt from judicial sale. For purposes of this section, "household unit" means all persons of whatever ages, whether or not related, who habitually reside together in the same household as a group.

Iowa Code §561.16 (emphasis added). In order to determine whether Debtor is entitled to claim a homestead exemption, the Court must first decide whether the property in question is Debtor's homestead.

The Iowa Supreme Court has held that the homestead character does not attach to property until the owner actually occupies it. Dolan v. Newberry, 200 Iowa 511,

____ 202 N.W. 545, 547 (1925); First Nat'l Bank of Stuart V. Hollinsworth, 78 Iowa 575, ____, 43 N.W. 536, 537 (1889). A mere intent to occupy the premises as a home at some time in the future does not impress the property with a homestead character. Schaffer v. Campbell, 198 Iowa 43, ____, 199 N.W. 334, 338 (1924). However, once the homestead character is established, an owner's temporary absence does not cause the home to lose its homestead character provided the owner has an intention to return. Berner V. Dellinger, 206 Iowa 1382, ____, 222 N.W. 370, 371 (1928).

Applying the facts in the case at bar to the above case law, the Court concludes the Colfax home is not Debtor's homestead for a number of reasons. First, while Debtor may still technically own a one-half interest in the home, the dissolution decree included the state court's order that it be sold. As a result, the Court concludes that for purposes of determining the validity of an exemption, Debtor does not own the home. Second, even if Debtor still does technically own the home, he was not occupying it as his homestead at the time he filed his petition. Finally, even if the homestead character was established, Debtor voluntarily left the home over seven months before he filed his petition, and when he left he had no intention of returning.

Assuming arguendo that Debtor's claimed-as-exempt homestead is actually his homestead, Debtor is still not entitled to claim the exemption due to the operation of Iowa

Code §598.21. Said section is part of the Iowa marriage dissolution statute and *states* in relevant part:

Upon every judgment of annulment, dissolution or separate maintenance the court shall divide the property of the parties and transfer the title of the property accordingly.

Iowa Code §598.21(1). The Iowa Supreme Court has construed §598.21 as a "special declaration of statute to the contrary" of the homestead exemption granted by Iowa law. In re Marriage of Tierney, 263 N.W.2d 533 534-35 (Iowa 1978); Kobringer V. Winter, 263 N.W.2d 892, 893-94 (Iowa 1978). As a result, the dissolution decree-ordered judicial sale of Debtor's Colfax home operates to make the homestead laws ineffective to bar judicial sale of the homestead, thus precluding Debtor from exempting the homestead.

CONCLUSION AND ORDER

WHEREFORE, based on the foregoing analysis, the Court concludes Debtor is not entitled to exempt his claimed-as-exempt homestead because: 1) the Colfax home is not Debtor's homestead, and 2) the dissolution decree-ordered judicial sale precludes such exemption.

IT IS ACCORDINGLY ORDERED that Creditor's objection to exemption is sustained.

Dated this 9th day of January, 1989.

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE