UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of	:	
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LOUIS J. RIZZUTI and	:	**Case No. 97-05572-CH**
JACKIE A. RIZZUTI,	:	**Chapter 7**
	:	
MICHELLE L. FALLER and	:	**Case No. 97-05573-CH**
TIM C. FALLER,	:	**Chapter 7**
	:	
RICHARD A. MUELLER,	:	**Case No. 98-00396-CH**
	:	**Chapter 7**
	:	
Debtors.	:	
	:	

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ORDER – OBJECTIONS TO CLAIMS OF EXEMPTION AND MOTIONS IN LIMINE

This matter involves three separate but related cases. On December 12, 1997, Debtors, Louis J. and Jackie A. Rizzuti and Michelle L. and Tim C. Faller, filed Voluntary Petitions for Chapter 7 relief under the U.S. Bankruptcy Code. On February 4, 1998, Richard A. Mueller filed a Voluntary Petition for Chapter 7 relief . On August 31, 1998, evidentiary hearing was held on the Trustee's Objections to Claims of Exemption and Objections thereto and the Debtors' Motions in Limine and Objections thereto. Debtors were represented by attorney Jeffrey W. Courter; Trustee, Anita Shodeen, was represented by attorney Jerrold Wanek. At the conclusion of the hearing, the Court took the matter under advisement upon a briefing schedule. Post-trial briefs have been filed and the Court now considers the matter fully submitted.

The Court has jurisdiction of this matter pursuant to 28 U.S.C. § 157(b)(1) and § 1334. This is a core proceeding. 28 U.S.C. § 157(b)(2)(B). The Court, upon review of the briefs,

pleadings, evidence, and arguments of counsel, now enters its findings and conclusions pursuant to Fed. R. Bankr. P. 7052.

FINDINGS OF FACT

1. The individual bankruptcy filings of the Rizzutis, the Fallers, and Mueller were all precipitated by their involvement in SparQuest, Inc. ("SparQuest"), an Iowa limited liability corporation that has had a chapter 11 proceeding pending with this Court since June, 1997 and docketed as case number 97-5362-CH.

2. SparQuest was a corporation which was primarily engaged in the business of operating several restaurants. The corporation continues to operate three restaurants under the franchise known as "Subway" restaurants. The corporation started at least one franchise known as "The Garden Café" in Ames, Iowa. This endeavor apparently led to the demise of the corporation. In the spring of 1997, The Garden Café was forced to close and that business was evicted from its premises in Ames, Iowa. An individual lawsuit was filed by the landlord, Main Street Station, against each defendant individually in the summer of 1997. The debtors contacted and were represented by attorney Jeffrey Courter with respect to the lawsuit involving The Garden Café. The representation appears to have commenced in approximately July, 1997.

Rizzutis

3. On December 12, 1997, Louis J. Rizzuti and Jackie A. Rizzuti (the "Rizzutis") filed a voluntary joint chapter 7 bankruptcy petition. On their Schedule A, "Real Property," the Rizzutis listed their homestead at 3825 S.E. 25th Street in Des Moines, Iowa, with a value of

$145,000 and no claims against it. On their Schedule C, the Rizzutis claimed the entire value of the Homestead as exempt pursuant to Iowa Code § 561.16.

4. The Rizzutis scheduled a one-third minority interest in Artistic Ornamental Iron Works, L.C. (Artistic) on their Schedule B. Artistic is a closely-held family company in which Louis Rizzuti owns a 1/3 interest with his two brothers. This 1/3 interest has existed for several years.

5. The Rizzutis' Schedule B assigned a value of $130,000 to this 1/3 interest which was shown to be subject to a $54,000 lien in favor of West Bank and a Purchase and Sale Agreement dated January 2, 1997.

6. The Rizzutis disclosed in their Statement of Fiancial Affairs that they cashed out Debtor Louis Rizzuti's non-exempt SEP in July 1997 for $75,000, and then applied the proceeds to retire the mortgage on their homestead.

7. On July 31, 1997, about four months prior to the bankruptcy filing, the Rizzutis paid off their mortgage by making a $93,107.37 payment to First Federal, the first mortgage holder on the Rizzuti home. The funds for the mortgage pay-off came from the liquidation of Debtor Louis Rizzuti's non-exempt SEP and loan proceeds from West Bank in the amount of $55,000, which were secured by Louis Rizzuti's one-third minority interest in Artistic.

Fallers

7. On December 12, 1997, Michele L. Faller and Tim C. Faller ("the Fallers") filed a joint chapter 7 bankruptcy petition. On their Schedule A, the Fallers scheduled their homestead at 9604 Iltis Drive, Urbandale, Iowa ("Iltis Homestead") with a market value of $255,000, and a

secured claim against it in the amount of $160,000. They claimed their $95,000 of equity as exempt on the Schedule C, pursuant to Iowa Code § 561.16.

8. In the spring of 1997, prior to purchasing their Iltis Homestead, the Fallers sold their homestead at 4705 Oakwood in Pleasant Hill, Iowa (Oakwood Homestead) and closed the sale on July 15, 1997 for $105,000.

9. On January 30, 1998, the Fallers filed an Amendment to their Statement of Financial Affairs and disclosed that on or about July 10, 1997, they sold a piece of real estate located in Van Meter, Iowa (the lot) to Mr. Faller's brother, Joel Faller, for $60,000. The Fallers later returned $8,127 to Joel Faller, resulting in a net purchase price of $51,873. The Fallers had purchased the lot in 1988 for approximately $43,000. There was no agreement that Joel Faller would resell the lot to the Fallers. Joel Faller sold the lot nearly a year later to a third party for $55,000.

10. On or about October 23, 1996, over 13 months before filing their bankruptcy petition, the Fallers made a lump sum payment on their first mortgage on the Oakwood Homestead in the amount of $28,453.90.

Mueller

11. On February 4, 1998, Richard A. Mueller (Mueller) filed an individual voluntary chapter 7 bankruptcy petition. On his Schedule A, Mueller listed his homestead as 4815 64th Street, Urbandale, Iowa (Urbandale Homestead) with a value of $227,300 and a secured claim against it in the amount of $142,300. On Schedule B, Mueller listed various items of personal property, most of which he claimed as exempt on Schedule C.

12. On or about August 17, 1998, Mueller filed an Amendment to Schedules and Statement of Financial Affairs in which he amended the information on his Homestead to show it had a value of $192,000 and that he owned an undivided one-half interest in it along with Sara E. McMillan ("McMillan"), a single person. Mueller's 50% share of the $49,700 of equity in his Homestead is $24,850. Mueller also itemized various personal property under Schedule B which he had previously listed as "miscellaneous" on his original Schedule B and clarified his claimed exemptions on Schedule C for those specific types of personal property.

13. Mueller also indicated in that Amendment that on February 3, 1997, over one year pre-petition, he transferred by quit claim deed to McMillan his interest in real property locally known as 2401 Pleasant Street in West Des Moines, Iowa ("West Des Moines Homestead"). Mueller and McMillan had lived together at the West Des Moines Homestead, for which each had paid half of the purchase price, with both names originally on the deed. Mueller transferred his interest in the property to McMillan for the purpose of refinancing the home in McMillan's name only, which allowed for more favorable terms.

14. The West Des Moines Homestead was the subject of a standing offer to sell to the Iowa Department of Transportation ("D.O.T."), executed on January 2, 1997, for the purchase price of $97,000. The sale to the D.O.T. did take place and was closed on December 29, 1997. McMillan additionally received a relocation payment of $42,900 in October of 1997, which went towards the down payment on the couple's Urbandale Homestead.

15. On or about August 28, 1998, Mueller filed a Second Amendment to Schedules and Statement of Financial Affairs in which he: 1) itemized his household goods and furnishings under Schedule B(4); 2) clarified his exemptions for those specific pieces of property under Schedule C; and 3) indicated on his Statement of Financial Affairs his belief that there were three

or four financial statements issued during the two years immediately preceding the commencement of his chapter 7 case.

DISCUSSION

Motion in Limine

The Court first considers the Motion in Limine. The Debtors seek to preclude the Court's consideration of certain evidence presented at trial on irrelevance grounds. At trial, the Court reserved ruling on the Motion in Limine, and allowed the evidence objected to as an offer of proof.

Bankruptcy Rule 9017 provides that the Federal Rules of Evidence apply to bankruptcy cases. Although the Federal Rules of Evidence do not explicitly authorize in limine rulings, the practice has developed pursuant to the district court's inherent authority to manage the course of trials. Luce v. United States, 469 U.S. 38, 41 n. 4 (1984) (citing Fed. Rule Evid. 103(c); Fed. Rule Crim. Proc. 12(e)). A motion in limine, however, "is a procedural tool used to ensure that potentially prejudicial evidentiary matters are not discussed in the presence of the jury. It can serve no useful purpose in a nonjury case." Shark v. Thompson, 373 N.W.2d 859, 864 (N.D. 1985). See also Capitol Neon Signs, Inc. v. Indiana Nat. Bank, 501 N.E.2d 1082, 1083 n.1 (Ind. App. 1986); Lewis v. Buena Vista Mutual Ins. Ass'n, 183 N.W.2d 198, 201 (Iowa 1971) ("[T]he motion in limine . . . is usually used to prohibit mention of some specific matter, such as an inflammatory piece of evidence, until the admissibility of that matter has been shown out of the hearing of the jury".).

Whether a motion in limine was appropriate or not, this Court will not elevate form over substance. See Pepper v. Marks, 168 Ill. App. 3d 253, 256, 522 N.E. 2d 688, 690, 119 Ill. Dec.

26, 28 (1988) ("whether the Court considers the admissibility of the evidence on a pretrial motion in limine or after an objection at trial, the result is the same"). Counsel for the Debtors has, in essence, objected to Trustee's Exhibits G and Q-X on the grounds that they are irrelevant to the questions surrounding the Debtors' homestead exemptions. The exhibits in question consist of several checks for cash written from the Rizzuti's checking account, and numerous checks written from the Fallers' checking account for cash and a variety of other payments.

On March 23, 1998, a Consent Order was entered which granted the Trustee an extension of time in which to file objections to exemptions in each of the three cases. The Order specified that the Trustee would "be given an additional 60 days . . . in which to complete her investigation of the Debtors' homestead exemption[s] and then make a determination whether she will be filing [objections] thereto." The extension was to be limited to an investigation into the Debtors' homestead exemptions only.

The grounds upon which the Trustee objected to each of the Debtors' homestead exemptions consisted of allegations of fraud. As will be further discussed in the next section, proving fraud invariably requires establishing circumstantial evidence which supports an *inference* of fraud, since direct evidence of fraud is rare. Textron Financial Corp. v. Kruger, 545 N.W.2d 880, 883 (Iowa Ct. App. 1996). The Court must consider the totality of the circumstances surrounding the Debtors' homestead exemptions, and will thus consider all of the evidence presented at trial in making its determination. The Motion in Limine is denied.

Homestead Exemptions

The Trustee objects to the homestead exemptions claimed by the Debtors. Section 522(b) of the Bankruptcy Code permits a debtor to choose between the federal exemptions provided in

§ 522(d) and the exemptions provided under state law, unless a state "opts out" of the federal exemptions. Huebner v. Farmers State Bank, Grafton, Iowa, 986 F.2d 1222, 1224 (8th Cir. 1993); Hanson v. First National Bank in Brookings, 848 F.2d 866, 868 (8th Cir. 1988). The state of Iowa has opted out of the federal exemptions. See Iowa Code § 627.6(8)(e). Consequently, Iowa law will govern the scope of the exemptions in this case.

In Iowa, a debtor's homestead is exempt from bankruptcy pursuant to Iowa Code § 561.16, with certain exceptions enumerated at Iowa Code § 561.21,[1] which are not relevant here. The objecting party has the burden of proving an objection to a claim of exemption. Fed. R. Bankr. P. 4003(c). The standard of proof for the dishcargeability exceptions under § 523(a) is the preponderance of the evidence standard. Grogan v. Garner, 498 U.S. 279, 291 (1991).

Iowa's exemption statutes are construed liberally in favor of debtors in light of the purposes of the exemption. See In re Wallerstedt, 930 F.2d 630, 631 (8th Cir. 1991); Allison-Bristow Comm. School Dist. v. Iowa Civil Rights Comm'n, 461 N.W. 2d 456, 458 (Iowa 1990); In re Eby, 76 B.R. 140, 141 (Bankr. S.D. Iowa 1987). In Matter of Hahn, 5 B.R. 242, 244 (Bankr. S.D. Iowa 1980), this Court enumerated five purposes for exemption laws:

1. To provide a debtor enough money to survive.
2. To protect his dignity and his cultural and religious identity.
3. To afford a means of financial rehabilitation.
4. To protect the family unit from impoverishment.

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[1] The homestead may be sold to satisfy debts of each of the following classes:

1. Those contracted prior to its acquisition, but then only to satisfy a deficiency remaining after exhausting the other property of the debtor, liable to execution.
2. Those created by written contract by persons having the power to convey, expressly stipulating that it shall be liable, but then only for a deficiency remaining after exhausting all other property pledged by the same contract for the payment of the debt.
3. Those incurred for work done or material furnished exclusively for the improvement of the homestead.
4. If there is no survivor or issue, for the payment of any debts to which it might at that time be subjected if it had never been held as a homestead.

Iowa Code § 561.21 Note: A new homestead, to the extent in value of the old, is exempt from execution in all cases where the old or former one would have been. Iowa Code § 561.20.

5. To spread the burden of the debtor's support from society to his creditors.

All of the Debtors in this case converted non-exempt assets into exempt assets prior to filing bankruptcy. They each accomplished this at least in part by paying off or down their homestead mortgages.

The Fraud Exception to Iowa's Homestead Exemption

In addition to the statutorily enumerated exceptions to the Iowa homestead exemption found at I.C.A. § 561.21, the Iowa Supreme Court has enunciated a fraud exception based on the doctrine of fraudulent conveyance. "When a debtor disposes of [or converts] property with the intent to delay or defraud creditors, we deem the disposition inequitable and will set it aside." Benson v. Richardson, 537 N.W.2d 748, 756 (Iowa 1995). The reason is that the debtor's property is thought of as constituting a fund from which the debtor's obligations should be paid. Id. Property purchased with wrongfully obtained funds does not belong to the purchasers in the first place. Cox v. Waudby, 433 N.W.2d 716, 719 (Iowa 1988). To the extent of the illegal funds used, such purchasers never acquire a homestead interest. Id. Fraudulently acquired funds simply may not be shielded by the homestead in Iowa. See also In re Munsells' Guradianship, 239 Iowa 307, 321, 31 N.W.2d 360, 367 (1948); McGaffee v. McGaffee, 244 Iowa 879, 893, 58 N.W.2d 357, 360-61 (1953). If the Debtors in this case converted their nonexempt property to their exempt homesteads with the intent to delay or defraud their creditors, their creditors could have avoided such transfers under Iowa law, and Debtors will not be allowed to claim homestead exemptions in their bankruptcy cases to the extent of such transfers. [2]

[2] Some Eighth Circuit cases hold that an exemption may be denied where there exists an intent to conceal, hinder, delay or defraud creditors, without citing to any state law. See, e.g., Federal Sav. and Loan Ins. Corp. v. Holt (In re Holt), 894 F.2d 1005, 1008 (8th Cir. 1990); Hanson, 848 F.2d at 868. The fact that Iowa has opted out of the

Under Iowa law, "[a]s a general rule, a fraudulent conveyance occurs when the owner of real or personal property seeks to place land or goods beyond the reach of creditors, or when a transaction operates to prejudice the legal or equitable rights of the creditors. Benson, 537 N.W.2d at 756; Kruger, 545 N.W.2d at 883. This language is not entirely applicable in a bankruptcy context, because federal case law and legislative history have established that placing property beyond the reach of creditors is a legitimate aim of bankruptcy planning. Hanson v. First National Bank in Brookings, 848 F.2d 866, 868 (8th Cir. 1988) (the mere act of converting nonexempt property into exempt property on the eve of bankruptcy with the express purpose of shielding assets from creditors, even while a debtor is insolvent, will not deprive a debtor of exemptions to which they are otherwise entitled); Norwest Bank Nebraska, N.A. v. Tveten, 848 F.2d 871, 873-74 (8th Cir. 1988) (same); Forsberg v. Security State Bank, 15 F.2d 499 (8th Cir. 1926) (same). See also the House and Senate reports to 11 U.S.C. § 522(b):

> As under current law, the debtor will be permitted to convert nonexempt property into exempt property before filing a bankruptcy petition. The practice is not fraudulent as to creditors, and permits the debtor to make full use of the exemptions to which he is entitled under the law.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 361 (1977), reprinted in 1978 U.S. Code Cong. & Ad. News 5963, 6317; S. Rep. No. 989, 95th Cong., 2nd Sess. 76, reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 5862. Even an early Iowa Supreme Court case recognized the "general rule that the conversion of nonexempt property into exempt property does not of itself invest the creditor with any right to follow the exempt property." American Sav. Bank of Marengo v. Willenbrook, 228 N.W. 295, 299-300 (Iowa 1929).

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federal exemptions, see Iowa Code § 627.6(8)(e), leads this court to look to Iowa law to determine the scope of the exemptions in this case.

Based on the foregoing, the mere fact that the Debtors in this action sought to place property beyond the reach of their creditors is insufficient grounds upon which to sustain Trustee's objection to the Debtors' homestead exemptions. Something more must be shown, namely, an intent to delay or defraud creditors, before the Court will deny the exemptions. Benson, 537 N.W.2d at 756.

Because proof of actual intent to delay or defraud creditors may rarely be established by direct evidence, courts infer fraudulent intent from the circumstances surrounding the transfer, or from what has been referred to as "extrinsic evidence of fraud." Textron Financial Corp. v. Kruger, 545 N.W.2d 880, 883 (Iowa Ct. App. 1996); Brown v. Third National Bank (In re Sherman), 67 F.3d 1348, 1353 (8th Cir. 1995); Hanson, 848 F.2d at 868; In re Krantz, 97 B.R. 514, 522 (Bankr. N.D. Iowa 1989). When determining whether a transaction constitutes a fraudulent conveyance, Iowa courts look for a number of badges or indicia of fraud. Benson, 537 N.W.2d at 756; Hartford-Carlisle Sav. Bank v. Shivers, 552 N.W. 2d 909, 911 (Iowa Ct. App. 1996); Kruger, 545 N.W.2d at 883. These indicia of fraud include:

1) inadequacy of consideration;
2) insolvency of the transferor;
3) pendency or threat of third-party creditor litigation;
4) secrecy or concealment;
5) departure from the usual method of business;
6) any reservation of benefit to the transferor; and
7) retention by the debtor of possession of the property.

All the circumstances are ordinarily considered together. Kruger, 545 N.W.2d at 883. The convergence of several badges or indices may support an inference of fraud, which grows in strength as the badges increase in number. Id.

Rizzutis

The Rizzutis paid off their homestead mortgage, which had a balance of $93,107.37, a little more than 4 months before they filed their bankruptcy petition. As previously stated, the funds for this payoff were derived from the conversion of Lou Rizzuti's non-exempt SEP and proceeds from a loan from West Bank, secured by Mr. Rizzuti's non-exempt interest in Artistic. The Trustee argues that the payoff was fraudulent and requests that the homestead exemption be denied to the extent of $93,107.

In this case, the Trustee has not proven any of the indices by a preponderance of the evidence in order to support a finding of fraud. The one exception might be insolvency. Since the transfers in issue occurred four months prior to the Rizzutis' filing bankruptcy, it is likely safe to assume that they were insolvent or approaching insolvency. However, as already stated, insolvency alone will not deprive a debtor of exemptions to which they are otherwise entitled. Hanson, 848 F.2d at 868; Tveten, 848 F.2d at 873-74; Forsberg v. Security State Bank, 15 F.2d 499 (8th Cir. 1926).

The Court distinguishes this case from those in which debtors borrow funds on an unsecured basis to purchase exempt assets just before filing bankruptcy. It is generally recognized that such practice is an indication of fraud. See, e.g., Hanson, 848 F.2d at 868; First Texas Savings Assoc., Inc. v. Reed, 700 F.2d 986, 991 (5th Cir. 1983); 6 L. King, Collier on Bankruptcy ¶ 727.02[3][g], p. 727-22 (15th ed. rev. 1998). In this case, however, the funds borrowed from West Bank which were placed into the Rizzuti's Homestead were more than adequately secured by Mr. Rizzuti's nonexempt interest in a closely-held business which had long been in his family. Mr. Rizzuti has held his 1/3 interest in Artistic for several years, and the

conversion of part of this interest into his exempt Homestead lacks any indication of fraudulent purpose.

The conversion of the non-exempt SEP and the proceeds from a loan secured by Mr. Rizzuti's non-exempt interest in Artistic were legitimate bankruptcy planning transactions. As such, the Trustee's Objection to the Rizzuti's homestead exemption will be overruled.

Fallers

The Fallers made a large payment on the first mortgage on their prior homestead in October of 1996, more than 13 months prior to filing their chapter 7 bankruptcy petition. In July of 1997, the Fallers sold a separate, non-exempt piece of property to Mr. Faller's brother to pay off the second mortgage on their prior homestead, sold that homestead, and then purchased the homestead which they now claim is exempt. These are the transactions which the Trustee claims were tainted with fraud.

There is nothing fraudulent in the mere paying down of a homestead mortgage, as the Trustee appears to be alleging. Additionally, the purchase of a new homestead with the proceeds of the old does nothing to limit one's homestead rights. "Where . . . a new homestead has been acquired with the proceeds of the old, the new homestead, to the extent in value of the old, is exempt from execution in all cases where the old or former one would have been." Iowa Code § 561.20.

As for the sale of the non-exempt lot, a sale to family members, standing on its own, does not establish extrinsic evidence of fraud. Benson, 537 N.W.2d at 756. Such transfers will be closely scrutinized, however. Id. The Fallers paid approximately $43,000 in 1988 for the lot, which they sold to Mr. Faller's brother, Joel Faller, in July of 1997. Joel Faller paid $60,000 for

the lot, and later received $8,127 back from the Fallers, resulting in a net purchase price of $51,873. This is 86.46% of the Fallers' $60,000 asking price for the lot. The lot was not a gift, and there was no agreement that Joel Faller would sell the property back to the Fallers. The Fallers did not retain possession or any beneficial interest in the lot. Joel Faller sold the lot to a third party on July 20, 1998, nearly one year after he bought it, for $55,000. Based on these facts, the Court finds no evidence sufficient to support an inference of fraud as to the lot transaction. Looking at the aforementioned indicia of fraud used by Iowa courts, none have been convincingly shown. The consideration paid by Joel Faller was not "inadequate" given that it constituted more than 85% of the asking price of $60,000. Additionally, the lot had been on the market at that price for several years with no takers. The Court finds that the Trustee has not carried her burden of establishing fraud by a preponderance of the evidence, and the Objection to the Fallers' homestead exemption will be overruled.

Mueller

Mr. Mueller and Sara McMillan, presumably domestic partners, have lived together for the last 7 or 8 years and continue to do so. Together they own the Urbandale Homestead, which they bought in October of 1997 with the proceeds of the sale of the West Des Moines Homestead. The West Des Moines Homestead was purchased jointly in 1993, with both Mueller's and McMillan's name on the original deed. Prior to that, Mueller had owned a homestead in Des Moines, which he acquired in 1990 and sold in 1993, using the proceeds in purchasing the West Des Moines Homestead.

Mueller transferred his interest in the West Des Moines Homestead to McMillan by quitclaim deed on February 3, 1997. Mueller testified that the reason for this was that a mortgage

representative required it in order to clear up title so that McMillan could be approved for the financing of the Urbandale Homestead. The West Des Moines Homestead became subject to a standing offer to sell to the Iowa D.O.T. on January 2, 1997, one month before the quitclaim deed was executed. In October of 1997, McMillan received a relocation payment from the D.O.T. in the amount of $42,900, which went toward the down payment on the Urbandale Homestead. In December of 1997, the sale to the D.O.T. was closed.

Trustee objects to Mueller's homestead exemption. On the one hand, she claims that Mueller's obligations predate his acquisition of his homestead. The Trustee asserts that Mueller did not acquire his homestead until October of 1997, when the Urbandale Homestead was acquired, because his homestead rights in the West Des Moines Homestead were lost when he quitclaim deeded his interest to McMillan in February of 1997. On the other hand, Trustee claims that the non-exempt $42,900 relocation payment, which had been made out to McMillan, was "sheltered" into the Urbandale Homestead property. However, as has already been pointed out, the pre-petition conversion of non-exempt assets to exempt assets is allowed in the absence of fraud. Trustee has not shown that the conversion of this payment to the homestead was tainted with any of the indicia of fraud as outlined by the Iowa Supreme Court.

The continuity of Mueller's homestead rights, however, is a somewhat more difficult matter. A debtor's homestead in Iowa is exempt from bankruptcy pursuant to Iowa Code § 561.16, with certain exceptions. One of the exceptions permits a homestead to be sold to satisfy debts "contracted prior to its acquisition, but then only to satisfy a deficiency remaining after exhausting the other property of the debtor, liable to execution." I.C.A. § 561.21(1).

A homestead is "acquired" when the homestead right attaches by actual use and occupation of the property as a homestead, not when a person acquires title to the property. In re

Streeper, 158 B.R. 783, 788 (Bankr. N.D. Iowa 1993) (citing Hale v. Heaslip, 16 Iowa 451 (1864) (holding homestead rights had not attached after property was purchased and before possession); Elston & Green v. Robinson, 23 Iowa 208 (1867) (same)). See also Harris v. Carlson, 205 N.W. 202, 201 Iowa 169 (1925) ("Actual occupation of premises as home, except in cases of temporary absence, is required to support claim of "homestead," and mere use or cultivation is insufficient . . . ."). Iowa case law thus emphasizes the primary importance of occupation and use of property as a homestead, as opposed to ownership.

Homestead rights also require *some* type of ownership, as evidenced by Iowa Code section 561.1, stating that "[t]he homestead must embrace the house used as a home by the *owner* . . . ." (emphasis added). The Supreme Court of Iowa, however, has held that something less than full ownership is sufficient to claim property as a homestead. Perhaps the earliest and most frequently cited Iowa Supreme Court case is Pelan v. De Bevard, 13 Iowa 53, 55-56 (1862), which held that a homestead right does not necessarily depend upon a title in fee simple, but may attach to a leasehold interest. See also, In re Guynn, No. L-91-1545C, slip op. at 2 (Bankr. N.D. Iowa Aug. 17, 1993).

The U.S. Bankruptcy Court for the Northern District of Iowa has interpreted the ownership requirement of I.C.A. § 561.1 as mandating that a debtor hold a *possessory* interest in the property claimed as a homestead. In re Guynn, No. L-91-1545C, slip op. at 2 (Bankr. N.D. Iowa Aug. 17, 1993) (citing In re Nielsen, No. 84-00352, slip op. at 3 (Bankr. N.D. Iowa Jan. 14, 1986)). This interpretation is supported by early Iowa cases, which hold that homestead rights can arise from "title sufficient to justify . . . occupancy", such as a life estate, a leasehold estate, or an equitable estate. Lennert v. Cross, County Sheriff, 241 N.W. 787, 788 (Iowa 1932); Rutledge v. Wright, 171 N.W. 28, 30 (Iowa 1919); Livasy v. State Bank of Redfield, 170 N.W. 756 (Iowa

1919); Green v. Root, 62 F. 191, 195-96 (S.D. Iowa 1893). See also Bauldry v. Hall, 174 F.2d 379, 381 (8th Cir. 1949). "The homestead right is that of possession and enjoyment, use and occupancy." Id.; Livasy, 170 N.W. at 756.

The Iowa Supreme Court case, Kleinsorge v. Clark, 4 N.W.2d 433 (Iowa 1942), stands for the proposition that, "[o]rdinarily, one who parts with ownership of his homestead loses his homestead rights even though he later reacquires the property." Id. at 434. While Kleinsorge does so hold, it also makes a distinction between legal and equitable ownership. The case involved a debtor whose homestead mortgage was foreclosed upon, and a sheriff's deed was issued to the receiver of the bank which held the mortgage. The debtor remained in possession of the property. The court held that the debtor retained an equitable ownership interest in the property sufficient to maintain his right of homestead. Id. at 435.

In Mueller's case, his purpose in transferring his interest in the West Des Moines Homestead to McMillan was to facilitate their purchase of another homestead. Mueller never intended to give up his homestead rights, and he continued to occupy the premises as his homestead. The Court finds that Mueller retained an equitable interest in the West Des Moines property sufficient to maintain his right of homestead. Since the proceeds of the sale of the West Des Moines Homestead were used to purchase the Urbandale Homestead, Mueller is permitted to exempt one-half the value of the sale price of the West Des Moines Homestead, or, $48,500. "Where . . . a new homestead has been acquired with the proceeds of the old, the new homestead, to the extent in value of the old, is exempt from execution in all cases where the old or former one would have been." Iowa Code § 561.20.

The Trustee has failed to prove fraudulent intent by Mueller in the circumstances surrounding his homestead exemption. Neither has she shown that Mueller's obligations arose

prior to the acquisition of his homestead. Therefore, the Trustee's Objection to Mueller's homestead exemption will be overruled.

The Amount of the Conversions is Irrelevant

As a final note, the Trustee argues that the size of the conversions in each of these cases merits a denial of exemption based on Norwest Bank Nebraska, N.A. v. Tveten, 848 F.2d 871 (8th Cir. 1988). Tveten found extrinsic evidence of fraud in the mere size of the conversion of non-exempt to exempt assets. However, Panuska v. Johnson (In re Johnson), 880 F.2d 78 (8th Cir. 1989), attempting to clarify Tveten, stated: "Tveten establishes that where an exemption, *other than a homestead exemption*, is not limited in amount, the amount of property converted into exempt forms and the form taken may be considered in determining whether fraudulent intent exists." In re Johnson, 880 F.2d at 82 (emphasis added). Thus, the total amount of property converted into the homestead is irrelevant in all three cases here in issue, as they all concern homestead exemptions.

ORDER

IT IS THEREFORE ORDERED that the Rizuttis' and Fallers' Motions in Limine are DENIED.

IT IS FURTHER ORDERED that Trustee's Objections to the Rizzuti's, the Faller's and Mueller's Claims of Exemption are each OVERRULED.

Dated this _____ day of May, 1999.

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RUSSELL J. HILL, CHIEF JUDGE
U.S. BANKRUPTCY COURT