

3. On his Schedule B-4, Debtor claimed as exempt this one-half interest in the homestead, located at 847 24th Street, West Des Moines, Iowa.

4. The real property in question was owned by Debtor and his former wife, Mary C. Pearson, as tenants in common. Prior to the entry of the dissolution decree on December 10, 1987, the property was held by the parties as joint tenants. The dissolution decree provided as follows regarding the property in question:

H. That the real property owned by the parties, locally known as 847 24th Street, West Des Moines, Iowa, and legally described as:

Lot 8, and the North three feet of Lot 9, Fairmeadows, Plat 27, an Official Plat, now included in and forming a part of the City of West Des Moines

shall be awarded to the parties, as tenants in common, with the Petitioner, Mary C. Pearson, having the right to occupy the real property locally known as 847 24th Street, West Des Moines, Iowa, as her sole and exclusive residence, along with the minor children of the parties, until the occurrence of one of the following events:

1. The youngest child of the parties, Sara M. Pearson, graduates from high school or turns eighteen (18) years of age, whichever occurs last;
2. The Petitioner, Mary C. Pearson, remarries.
3. The Petitioner, Mary C. Pearson, voluntarily abandons the residence or elects to sell same.

Upon the occurrence of one of the events set forth above, the home shall be sold and from the gross sale price shall be deducted the usual and customary costs of sale, the existing mortgage indebtedness at that

time, and the amount of the reduction of the existing mortgage indebtedness since the date of the entry of this Decree, and the remaining proceeds shall be divided equally between the Petitioner and the Respondent; the Petitioner shall receive the amount by which the mortgage indebtedness was reduced from the date of Decree to the date of sale, and the Respondent shall receive no interest upon any amounts due him at the time of the sale of the residence. [emphasis added]

I. That the Petitioner, Mary C. Pearson, shall be solely and exclusively responsible for all mortgage payments, real estate taxes, home insurance, and any and all other necessary and incidental expenses incurred in occupying the residence at 847 24th Street, West Des Moines, Iowa, and shall hold the respondent, Robert C. Pearson, harmless from all such costs and expenses; in the event that the Petitioner shall be more than ninety (90) days delinquent in the payment of any mortgage installment, real estate tax or insurance premium, the Respondent may, at his sole option, make such payments and subsequently recoup them from the Petitioner upon the event of sale of the residence, or, in the alternative, require the property to be sold pursuant to the division of proceeds set forth hereinbefore.

5. On May 13, 1988, at the first meeting of creditors, Debtor testified that he was not residing at the address listed for the claimed-as-exempt homestead.

6. On May 27, 1988, Trustee filed an objection to Debtor's claim of exempt property regarding the homestead. Trustee listed three grounds for objecting: 1) Debtor was not occupying said property as a homestead on the date of filing; 2) the exemption claim in said property is not authorized by law; and 3) Debtor's interest in said property is a saleable interest.

DISCUSSION

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. 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); Givans v. Dewey, 47

Iowa 414, ____ (1877); Charles v. Lamberson, 1 Iowa 435, ____ (1855). 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); White v. Danforth, 122 Iowa 403, ____, 98 N.W. 136, 137 (1904); see Maquire v. Hanson, 105 Iowa 215, 74 N.W. 776 (1898). 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); see also In re McClain's Estate, 220 Iowa 638, ____, 262 N.W. 666, 669-70 (1935) (intention to occupy in the future, while insufficient to establish a homestead originally, is sufficient to continue a homestead previously established).

Once property has acquired a homestead character, it is presumed to continue until its use as such is terminated. McClain's Estate, 220 Iowa at ____, 262 N.W. at 670; Maquire, 105 Iowa at ____, 74 N.W. at 777. The homestead character is terminated only by waiver or abandonment by the owner. McClain's Estate, 220 Iowa at ____, 262 N.W. at 670. The burden of showing such termination is upon the party who assails it. Maquire, 105 Iowa at ____, 74 N.W. at 777.

In order to be abandoned, there must be actual removal from a homestead with no intention to return to it. Id.; Cotton

v. Hamil, 58 Iowa 594, ____, 12 N.W. 607, 609 (1882). The removal must be voluntary and not under any kind of compulsion. Schaffer, 198 Iowa at ____, 199 N.W. at 338; Novotny v. Harecka, 200 Iowa 1217, ____, 206 N.W. 110, 112 (1925). No abandonment occurs after a temporary absence if the owner has a good-faith intention of returning. Maquire, 105 Iowa at ____, 74 N.W. at 777; see Schaffer, 198 Iowa at ____, 199 N.W. at 338. Thus, abandonment is largely a matter of intent, to be determined on a case-by-case basis. Schaffer, 198 Iowa at ____, 199 N.W. at 338; Cotton, 58 Iowa at ____, 12 N.W. at 609.

In the case at bar, Debtor does not meet the minimum Iowa standards to establish a homestead exemption because at the time he filed his bankruptcy petition, he was not occupying the claimed-as-exempt homestead. Following the entry of the dissolution decree, Debtor's only interest in the property was an expectancy in one-half of the proceeds following the eventual sale of the home. Even assuming arguendo that Debtor's claimed-as-exempt home does have a homestead character, the fact remains that Debtor has been absent since the dissolution decree was entered in 1987, and there is no evidence evincing an intention on his part to return. Therefore, the Court concludes Debtor is not entitled to claim a homestead exemption on the property in West Des Moines.

The Court wishes to make clear that this ruling does not give Trustee the right to sell the entire residence and

displace Debtor's children and former wife, who currently occupy and have a valid homestead exemption in the property. Rather, as Trustee readily admits, the ruling only allows him to liquidate Debtor's expectancy in proceeds from the eventual sale of the property.

CONCLUSION AND ORDER

WHEREFORE, based on the foregoing analysis, the Court concludes Debtor is not entitled to claim the homestead exemption in the West Des Moines property because he does not occupy such.

IT IS ACCORDINGLY ORDERED that Trustee's objection to Debtor's claim of exempt property is sustained.

Dated this _____ day of December, 1988.

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE