

**UNITED STATES BANKRUPTCY COURT  
For the Southern District of Iowa**

<b>In re:</b>	:	<b>Case No. 00-0255-DH</b>
<b>BONG NAM LAMBERT,</b>	:	
	:	
	:	<b>Chapter 7</b>
<b>Debtor.</b>	:	
	:	

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**ORDER— OBJECTION TO EXEMPTION AND RESISTANCE THERETO**

On May 16, 2000, hearing was held on Trustee’s Objection to Exemption and Debtor’s Resistance Thereto. Debtor was represented by attorney James Tappa. Trustee, A. Fred Berger was represented by J. H. Dane. Counsel for the parties appeared and presented a Stipulation of Facts and Exhibits. At the conclusion of the hearing, the court took the matter under advisement. The court considers the matter fully submitted.

The court has jurisdiction of these matters pursuant to 28 U.S. C. § 157(b)(1) and § 1334 and order of the United States District Court for the Southern District of Iowa pursuant to 28 U.S.C. § 157(a). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B). Upon review of the pleadings, stipulation of facts, evidence, and arguments of counsel, the court now enters its findings and conclusions pursuant to Fed. R. Bankr. P. 7052.

**FINDINGS OF FACT**

1. On January 31, 2000, Bong Nam Lambert (hereinafter Debtor) filed a petition for relief under Chapter 7 of Title 11, the Bankruptcy Code.

2. Debtor was divorced from her husband Dennis A. Lambert pursuant to a Judgment of Dissolution of Marriage filed in the Circuit Court for Rock Island County, Illinois on April 29, 1997, case number 97-333.

3. Debtor and Dennis A. Lambert entered into a written Marital Settlement Agreement that provided for settlement of property, maintenance and other claims that might arise out of the marital relationship. The Illinois Circuit Court considered the Marital Settlement Agreement and approved all of its terms. The agreement was incorporated into the Judgment of Dissolution of Marriage.

4. As part of the Judgment of Dissolution of Marriage, Debtor retained joint ownership with her ex-husband of the real estate located at 2444 18th Avenue, Rock Island, Illinois (hereinafter the Rock Island house).

5. The Judgment of Dissolution of Marriage provided that the Rock Island house was to be listed for sale, and the “net proceeds, after payment of the mortgage loan obligation, broker’s fees, closing costs and taxes and assessments upon said property,” was to be divided 50% - 50% between Debtor and her ex-husband.

6. The Rock Island house was listed for sale three years ago for approximately \$55,000, but did not sell.

7. The Rock Island house is not presently on the market despite the language of the Judgment of Dissolution of Marriage requiring that it be sold.

8. The Debtor’s ex-husband and their children continue to reside at the Rock Island house.

9. The Debtor resides at 2845 W. 63rd, Davenport, Iowa. She has not resided at the Rock Island house since 1997. Prior to that time, she resided there with Dennis Lambert and their children.

10. The Judgment of Dissolution of Marriage requires that the Debtor pay her ex-husband as and for the support of the minor children, \$500 per month, which shall be paid to Firststar Bank for the mortgage on the Rock Island house. The payments for each child are to continue until further order of the court or until the child becomes emancipated. The payments shall be made directly to Firststar Bank or its successor in interest. Should the Rock Island house be sold, the child support payments shall go directly to Debtor's ex-husband.

11. The mortgage debt on the Rock Island house has not been paid and is delinquent.

12. Debtor scheduled the value of the Rock Island house in Schedule A as \$55,000 and the indebtedness thereon as \$41,000. She scheduled the Rock Island house as jointly owned with her ex-husband, Dennis Lambert.

13. The Judgment of Dissolution of Marriage establishes that the father Dennis Lambert is the primary custodial parent.

14. Dennis Lambert has been in continuous possession of the subject Rock Island house since the entry of the Judgment of Dissolution of Marriage. Debtor has not resided at the Rock Island house since the entry of the judgment.

15. The Judgment of Dissolution of Marriage does not specify which party is entitled to possession of the Rock Island house prior to its sale.

## DISCUSSION

This matter comes before the court on Trustee's Objection to Exemption. Trustee asks the court to disallow Debtor's homestead exemption of the Rock Island house. Trustee argues that Debtor abandoned any homestead rights that she may have had in the Rock Island house when she moved out following her divorce. He contends that Debtor cannot claim a homestead exemption in the Rock Island house because she did not live there on the date that she filed the petition. Debtor argues that she retains a homestead interest in the Rock Island house because her ex-husband and their children reside there. She argues that her homestead interest cannot be severed from that of her ex-husband. For the following reasons, the court agrees with Trustee, and debtor's claim of exemption will be disallowed.

The Bankruptcy Code permits a debtor to exempt certain property from the bankruptcy estate. 11 U.S.C. § 522(b). A debtor may exempt any property that is exempt under federal law, or state law that is applicable on the date the petition is filed. 11 U.S.C. § 522(b)(2)(A). Further, "any interest in property in which the debtor had, immediately before the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law." 11 U.S.C. § 522(b)(2)(B). Section 522(b)(1) permits the states to "opt out" of the federal exemption scheme and require the debtor to use the exemptions provided by state law. Iowa has chosen to opt out of the federal exemptions. Iowa Code § 627.10.

On January 31, 2000, Debtor filed a petition for Chapter 7 relief with the United States Bankruptcy Court for the Southern District of Iowa. In that petition, she stated that her address was 2845 W. 63rd Davenport, Iowa. Debtor indicated that venue was proper by marking the box stating, “Debtor has been domiciled or has had a residence, principal place of business, or personal assets in this District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District.” Therefore, the claim of exemption for the homestead is made pursuant to Iowa law.

Iowa law provides an exemption for a person’s homestead. Iowa Code § 561.16 states:

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 to claim 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 the 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.

Once the homestead is acquired, it is presumed to continue until its use is terminated. In re McClain’s Estate, 262 N.W. 666, 669-70 (Iowa 1935). However, once actual occupancy ceases, a presumption arises that the homestead is abandoned. Crail v. Jones, 221 N.W. 467, 469 (Iowa 1928). In that instance, the burden shifts to the one claiming the exemption to show a fixed, specific, and abiding intent to return. Id.; Citizens’ Bank of Milo v. Frank, 235 N.W. 30, 32 (Iowa 1931). “Whether or not a homestead has been abandoned is largely a matter of intent to be determined on the particular facts in each case. The question is one of intention and that must usually be determined from the testimony of the parties in the light of the surrounding

circumstances.” Charter v. Thomas, 292 N.W. 842, 843 (Iowa 1940)(internal citations omitted).

In this matter, the stipulated facts do not state when the Rock Island house was acquired. However, it can be inferred that prior to the dissolution of marriage, Debtor resided there with her husband and two children. Debtor was a joint owner of the Rock Island house and retains ownership at the present time. The court concludes that Debtor acquired a homestead interest in the property.

Sometime in 1997, Debtor moved out of the Rock Island house. She has not lived there since. At the time she filed her petition for Chapter 7 relief, her address was 2845 W. 63rd, Davenport, Iowa. The court concludes that Trustee has presented prima facie evidence that Debtor has abandoned her homestead in the Rock Island house. Crail, 221 N.W. at 469; Des Moines Marble & Mantel Co. v. McConn, 227 N.W. 521, 522 (Iowa 1929). The burden accordingly shifts to Debtor to show a fixed, specific, and abiding intent to return to the homestead. Crail, 221 N.W. at 469; Bank of Milo, 235 N.W. at 32. The court finds that Debtor has not met her burden.

The record is devoid of evidence as to Debtor’s intention to return to the homestead. Debtor did not testify at the evidentiary hearing and afford the court the opportunity to weigh her testimony in the light of the surrounding circumstance. Debtor’s counsel offered the possibility of Debtor returning to the Rock Island house to care for her children. Without some credible evidence by the Debtor, the court finds this argument to be speculative at best.

Debtor correctly states that homestead rights cannot be severed. It is well settled that "[i]f only one spouse files a liquidation petition, the trustee's right to liquidate the debtor's interest is subject to the same limitations that state law places on the rights of judgment creditors when the state exempts the entire interest of the debtor." In re Tyree, 116 B.R. 682, 684 (Bankr. S.D. Iowa 1990). The debtor must assert his homestead rights and those available to his wife or the rights may be waived. Id. In Tyree, this court noted that "[h]omestead rights are indivisible, and a spouse's homestead rights are not severable from those of the other." Id., quoting Francksen v. Miller, 297 N.W.2d 375, 377 (Iowa 1980). "There can be no splitting of homestead rights. The very nature of the doctrine makes such a result intolerable. It is just as destructive of family security to lose half the homestead as all of it. Id. at 685, quoting Merchant's Mutual Bonding Co. v. Underberg, 291 N.W.2d 19, 21 (Iowa 1980).

Debtor argues that because her ex-spouse and children live at the Rock Island house and because spouses' homestead rights are not severable, she is entitled to shield her interest in the property even though she removed herself from the property. Debtor's argument overlooks the obvious. She and her ex-husband are no longer married; he is no longer her spouse. The homestead right that they held together was severed upon the dissolution of their marriage. See, In re the Marriage of Tierney, 263 N.W.2d 533, 534 (Iowa 1978) (deciding a case under a former version of § 561.16, the Iowa Supreme Court held that dissolution sunders the family that the homestead laws are designed to protect, and afterwards the homestead status depends on personal rather than family occupancy). Any homestead that Debtor maintains must be based on her own right.

As previously stated, Trustee has presented prima facie evidence that Debtor abandoned her homestead in the Rock Island house. The court finds that Debtor has offered no evidence of an intention to return to the Rock Island house and has not carried her burden to prove that she did not abandon the homestead. Therefore, Trustee's objection must be sustained.

The court expresses no opinion as to the value of the Rock Island house or the value of Debtor's interest. Likewise, the court expresses no opinion as whether the trustee can meet his burden under § 363(h) or as to what rights Dennis Lambert and the children might have in the Rock Island house.

**ORDER**

IT IS ACCORDINGLY ORDERED that Trustee's Objection to Exemption is  
SUSTAINED.

Dated this \_\_\_\_\_ day of December, 2000.

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