

UNITED STATES BANKRUPTCY COURT  
For the Southern District of Iowa

In the Matter of

FLORENCE F. ROGERS,  
Debtor.

Case No. 86-3350-C

ORDER ON TRUSTEE'S OBJECTION TO EXEMPTIONS

On March 25, 1987 the trustee's objection to exemptions filed on January 27, 1987 and the debtor's resistance thereto filed on February 6, 1987 came on for hearing in Des Moines, Iowa. R.L. Morgan appeared on behalf of the debtor. Anita L. Shodeen appeared on behalf of Robert D. Taha, the trustee. The case was submitted on the testimony of the debtor, documentary evidence presented at the hearing, and briefs filed by the parties.

The debtor filed her Chapter 7 petition on December 23, 1986. She claims a house located in Nevada, Iowa as a homestead exemption. The trustee maintains the debtor has not occupied the house for more than ten years and thus has failed to satisfy the occupancy requirement for establishing a homestead or has lost her homestead rights through abandonment.

FINDINGS OF FACT

On April 20, 1976, the debtor and William R. Rogers were divorced. The Iowa District Court for Polk County ordered

that the debtor have title to two parcels of real estate quieted in her name. The first parcel is known as 805 C Avenue, Nevada, Iowa (Nevada house). It is legally described as:

Lots 8 and 9, Block 4, HIGHLAND PARK ADDITION, now included in and forming a part of the City of Nevada, Story County, Iowa.

The second parcel is known as 2817 Rutland, Des Moines, Iowa (Des Moines house). Its legal description is:

The West 50 feet, East 250 feet, South 136 feet, Lot 101, KINGMAN PLACE, now included in and forming a part of the City of Des Moines, Polk County, Iowa.

The decree also provided that Mr. Rogers would be permitted to lease the Nevada house from the debtor for \$90.00 per month. Mr. Rogers has occupied and leased the premises since the divorce decree was entered.

The debtor has not resided at the Nevada house since 1975. Apparently at or before the time the decree was entered, the debtor moved into the Des Moines house. The debtor lists the Des Moines house as her residence. Schedule A-2 reveals that the Des Moines house is subject to a \$9,000.00 mortgage lien in favor of Fleet Mortgage Co. The debtor lists the value of the property as \$7,000.00. The

debtor has recently moved from the Des Moines house because the house has no water or heat.

The debtor testified at the hearing that she never intended to abandon the Nevada house as her homestead. She stated she is seeking to modify the decree and intends to evict her former husband and move back into the house. She also related that she still has personal property in the Nevada house including articles of clothing, some cooking utensils and two hospital beds. The debtor has opened a bank account in Nevada. She does not have keys to the Nevada house. Additionally, the debtor testified that she would move to Nevada immediately if she were able to secure employment there. The debtor stated she votes in Polk County.

The documentary evidence presented at the hearing reveals that the debtor has taken a homestead credit on the Des Moines house for the years 1982 through 1985; that the debtor has not taken a homestead credit on the Nevada house for the years 1982 through 1986; and that the debtor claimed the Nevada house as a rental property on her 1984 and 1985 income tax returns.

#### APPLICABLE LAW AND ANALYSIS

11 U.S.C. section 522(b)(1) permits states to "opt out" of the federal exemption scheme. Iowa law therefore must be applied in resolving the present controversy.

Pursuant to Bankruptcy Rule 4003, the objecting party, here the trustee, has the burden of proving that exemptions

are not properly claimed. For the reasons expressed below, the trustee has met this burden by showing that the debtor has waived any homestead rights she had through abandonment.

The Iowa Supreme Court has held that where the removal from the homestead is for a temporary purpose and there is a fixed, specific and abiding intention to return, there is no abandonment. Crail v. Jones ex ux., 221 N.W. 467, 469 (Iowa 1928). Whether a homestead has been abandoned is largely a matter of intent to be determined from the testimony of the parties in light of the surrounding circumstances. Fardal v. Satre, 206 N.W. 22, 24 (Iowa 1925); Wappello County v. Brady, 92 N.W. 717, 718 (Iowa 1902). The debtor's testimony that she never intended to abandon the Nevada house is not supported by the surrounding circumstances of the case.

The court first notes that the debtor has not occupied the Nevada house for eleven years. When she left she took most of her possessions. Since leaving Nevada, she has worked and voted in Des Moines. She has rented the Nevada house and no longer possesses keys to it. These facts evince an intent to abandon. In cases involving similar facts, the Iowa Supreme Court has found an intention to abandon. For example, in Cotton v. Hamil & Co., 12 N.W. 607 (Iowa 1882), the court was presented with a situation wherein a family had established a homestead in Adel. The family later moved to Des Moines and leased the homestead. Only a few articles of property of no particular value were left at the Adel premises. Over a five year period, the father of the family

worked in Des Moines or nearby towns. He voted in Des Moines and the family resided in Des Moines and then in Indianola. From these facts, the Iowa Supreme Court determined there was no definite purpose to return or to occupy the Adel property.

In Perry v. Dillrance, 53 N.W. 280 (Iowa 1892) a husband and wife established a homestead in Dubuque. The husband left Dubuque and moved to Omaha. There he established a domicile, became a citizen of Nebraska and voted in all elections. The wife remained in Dubuque and boarded with her daughter. During this time the former homestead was leased. The wife later joined her husband in Omaha leaving some articles of property at the Dubuque homestead. The daughter and her family lived in the homestead for a time but then moved to Omaha bringing most of the property the wife had previously left. The Dubuque property was offered for sale and occupied by tenants during-the seven year period the family resided in Omaha. The issue was whether the wife abandoned the Dubuque homestead. The Iowa Supreme Court ruled that there was nothing in the conduct of the wife to indicate that she ever expected to return to Dubuque to occupy the old homestead.

Cases wherein the Iowa Supreme Court found no intent to abandon a homestead stand in contrast to the instant case. In Repenn v. Davis, 34 N.W. 826 (Iowa 1887), a family established a homestead. The husband left in search of employment. The wife and daughter resided in the house for a few months then left. The house was rented but for one room

where the family's household goods were kept. After two years the wife returned but at some point thereafter moved again. She left some of her household goods in a room and reserved half of the lot. Only a part of the house and lot were rented. The husband eventually returned and the family asserted they did not intend to abandon the homestead.

Despite the passage of seven years during which the family did not live in the house, the court found that the family did not intend to abandon the homestead. The court based its decision on the fact the family retained possession of a part of the house wherein some of the household goods were stored.

In Painter v. Steffen, 54 N.W. 229 (Iowa 1893), the Iowa Supreme Court considered a case in which a family moved from their homestead for a period of eight years to pursue other employment. During this time period, the family did not rent the house and did not remove their furniture and other household goods. The wife would occasionally return to the house and for a one year period both the husband and wife returned and lived in the house before moving again. In finding no intent to abandon, the court put particular emphasis on the fact the family retained entire possession of the house and left their household goods there during their absence.

In the present case, the debtor has left but a few articles of little value at the Nevada house. She has not reserved part of the house nor part of the lot for storage.

In short, any indicia that might lead the court to conclude the debtor intended to return to the Nevada house is absent.

CONCLUSION AND ORDER

WHEREFORE, for the reasons set forth above, the court finds that it was the debtor's intention to abandon the Nevada house as a homestead.

THEREFORE the trustee's objection to exemptions is sustained.

Signed and filed this 29th day of September,  
1987.

LEE M. JACKWIG

U.S. BANKRUPTCY JUDGE