

In the United States Bankruptcy Court

for the Northern District of Iowa

HAROLD FREDERICK BURMESTER and
MARVEL GWENDOLYN BURMESTER
Debtors.

Bankruptcy No. 85-02282M

Chapter 7

MEMORANDUM OF DECISION AND ORDER RE: OBJECTION OF CLAIM OF EXEMPTION IN HOMESTEAD

The matters before the court are the objections to the debtors' claim of exemption in certain real property as their homestead. The objections were filed by the trustee Larry S. Eide (TRUSTEE) and by creditor Hampton State Bank (BANK).

Hearing was held on the objections on May 11, 1988 in Mason City, Iowa. The court, having heard the evidence, now issues the following memorandum of decision and ruling which includes findings of fact and conclusions of law pursuant to Bankr.R. 7052.

This is a core proceeding under 28 U.S.C. 157(b)(2)(A).

FINDINGS OF FACT

1. Harold F. Burmester and Marvel G. Burmester ("BURMESTERS" when referred to jointly), husband and wife, filed their joint voluntary petition under Chapter 7 of the Bankruptcy Code on November 1, 1985.

2. By an amendment to Schedule B-4, they claimed as exempt under Iowa Code Ch. 561 the following real estate:

Debtors' homestead described as:

A tract commencing at the Northwest corner of the Northeast Quarter (NE 1/4) of Section 14, Township 92 North, Range 21, West of the 5th P.M., Franklin County, Iowa; thence South 1056 feet; thence East 1676.4 feet; thence North 1056 feet; thence West 1676.4 feet to place of beginning, said tract containing approximately 40 acres, more or less.

3. Harold F. Burmester (Harold Burmester) initially inherited an undivided one-half interest in this property from his father, Fred H. Burmester, who died during the 1950s. The other undivided one-half interest was inherited by Harold F. Burmester from his mother, Alvina Burmester, under the provisions of a will executed by her on December 1, 1959 and which will became subject to probate proceedings in Franklin County, Iowa as Probate No. P1804-1083.

4. Alvina Burmester died on or before October 28, 1983.

5. The Last Will and Testament of Alvina Burmester is set out in full as follows:

LAST WILL AND TESTAMENT
of
ALVINA BURMESTER

I, Alvina Burmester, being of sound and disposing mind, do hereby make, publish and declare this to be my last Will and Testament, and I hereby revoke all other Wills heretofore made by me.

Item 1. It is my wish that all of my debts, funeral expense, expense of the administration of my estate, shall be paid by my Executor and Executrix.

Item 2. I will, devise and bequeath to my son Harold Burmester, a one-half undivided interest in the Northeast Quarter of Section 14, Township 92 North Range 21, West of the 5th P. M. Franklin County, Iowa, subject to his paying in cash to my daughter, Darlene Burmester Bohn, a one-third of the appraised value of said real estate. Said appraisement to be made by the regular Inheritance Tax Appraisers of Franklin County, Iowa.

Item 3. At the time that my husband, Fred H. Burmester, executed his Will on the 18th day of March 1952, his farm was free of any indebtedness. Subsequent to his death, we purchased a home and residence property in Hampton, Iowa, paying the sum of \$14,000.00 for it. In order to finance this purchase, we borrowed money from the Omaha Federal Land Bank, in the amount of \$17,000.00, giving a first mortgage against the Northeast Quarter of Section 14, Township 92 North, Range 21, West of the 5th P. M. Franklin County, Iowa. At the date of the death of my husband, Fred H. Burmester, we still owed \$16,000.00 on this indebtedness. In order to equalize and be fair to my children, I hereby direct that my residence property shall be sold after my death, and that my son shall be compensated with the sum of \$7,500.00, being the amount of the indebtedness at the end of the administration of my husband, Fred H. Burmester's estate. The balance of the price of said property shall be paid to my daughter, Darlene Burmester Bohn, in cash.

Item 4. I will, devise and bequeath to my daughter, Darlene Burmester Bohn, all of my household goods and appliances located in the residence property at Hampton, Iowa.

Item 5. I will, devise and bequeath to my grandchildren, all the residue of my property, share and share alike.

Item 6. I will and devise to the Trinity Lutheran Church at Hampton, Iowa, the sum of \$100.00, and in the event that I leave money or bonds in the aggregate amount of \$1000.00 or over, I direct that my Executor and Executrix shall give to my church above described one-tenth of the value of such money and bonds.

Item 7. I nominate and appoint my son, Harold Burmester, Executor and my daughter Darlene Burmester Bohn, Executrix of this, my last Will and Testament, and said Executor and Executrix shall serve without bond for the faithful performance of their duties.

/s/ Alvina Burmester

Witnesses

/s/ R. S. Stuart

/s/ Mona Wallace

On this 1st day of December, 1959, the foregoing instrument consisting of two sheets of paper was in our presence signed and executed by Alvina Burmester, and by her declared to be her last Will and Testament, and at her request, and in her presence, and in the presence of each other, we affixed our names as witnesses.

Witnesses Residence

/s/ R. S. Stuart Hampton, Iowa

/s/ Mona Wallace Hampton, Iowa

6. On December 31, 1982, Harold Burmester executed a promissory note to Hampton State Bank identified as note 8385 in the principal amount of \$202,712.71. The purpose of the loan was to rewrite several notes on which Harold Burmester was indebted to Bank. These included note no. 1959 in the amount of \$56,445.82, a "Refinance"; note no. 1956 in the amount of \$13,828.28, a "79 Carryover"; a rewrite of notes 6004 and 6239R in the amount of \$45,173.02, an "81 Carryover"; and a rewrite of "82 Carryover" in the amount of \$87,265.59. On March 23, 1984, Harold Burmester and Marvel G. Burmester signed a promissory note to Hampton State Bank identified as no. 011006 in the principal sum of \$231,000.00. This loan was a rewrite of note no. 8385, a note no. 9407 and for an additional advance in the amount of \$9,922.12.

7. On September 9, there was entered in the records of the Iowa District Court for Franklin County an "Order for Partial Summary Judgment" in Equity No. CL225-0585, in the case of Hampton State Bank v. Harold F. Burmester, et al. The order provided that judgment would be entered against Harold F. Burmester and Marvel G. Burmester in the sum of \$228,722.15 on the basis of the promissory note executed March 23, 1984.

8. Due to post-bankruptcy liquidation of collateral, at the time of the hearing on the objections to exemptions, there was due upon the judgment the sum of \$187,373.19.

DISCUSSION

Trustee and Hampton State Bank raise four issues in objecting to the claim of exemption in the homestead:

1. That debtors are not entitled to claim an undivided onehalf interest in the real estate as exempt because the debtors were not the "owners" of the property on the date of the filing of the bankruptcy case.
2. Even if debtors did acquire title to the real estate prior to the filing of the bankruptcy case, an undivided one-half interest was acquired subsequent to the incurrence of debt to Hampton State Bank and therefore the undivided one-half interest in the real estate is not exempt pursuant to the exception of Iowa Code 561.21(1).
3. Bank and trustee argue that to the extent the property is set aside as exempt, this court should impose an equitable lien to the extent of \$45,000.00 in the event the trustee must pay Harold

Burmester's sister to clear title to the non-exempt real estate which is contiguous to the property claimed as exempt.

4. Debtors have claimed an area of homestead in excess of the 40 acres permitted by Iowa Code 561.2.

I.

At first it must be said that trustee and Bank direct their objections to exemption only to the undivided one-half interest in the property which is covered by item 2 of the will of Alvina Burmester (WILL).

It is conceded that Harold Burmester obtained an undivided one-half interest from the estate of his father in the 1950s and that the acquisition of that interest by Burmester preceded any indebtedness to Bank.

There is further apparently no issue raised by Bank or trustee that as to the property in question, Burmesters were not occupying the real estate as a home prior to incurring the indebtedness to Bank.

It is instead, objectors' argument that the will contained a condition precedent to Harold Burmester's inheritance of the other undivided one-half interest which condition was unfulfilled at the time of the filing of the bankruptcy case. The condition precedent is contained in item 2 of the will. It requires Harold Burmester to compensate his sister to the extent of one-third of the appraised value of the undivided one-half interest described in item 2. According to various pieces of evidence, the compensation was to be \$45,000.00.

Objectors also speak in terms of the requirement to pay Darlene Burmester Bohn, Mr. Burmester's sister, as an unexercised option which would have passed to the trustee upon the filing of the case.

Because Harold Burmester failed to pay his sister prior to the filing of the Chapter 7 petition, objectors argue he did not obtain title to the property sufficient upon which to base a claim of homestead. Said in a different way, he was not an "owner" under the homestead statute. Iowa Code 561.1.

There is precious little evidence in this case as to whether Harold Burmester did satisfy the will's requirement that he pay his sister.

Bank President Ivan Davis testified he did not believe the money had been paid. The court notes that Darlene Burmester Bohn is listed as a creditor of the estate to the extent of \$45,000.00.

Based on the debtors' answers to interrogatory nos. 1 and 2 of Exhibit I, the court finds that at the time of the filing of the bankruptcy case, the payment required under item 2 of the will had not been made. The interrogatories and the answers thereto were admitted into evidence without objection. The court believes that they are admissions of the debtor Harold Burmester.

II.

Inasmuch as the payment has not been made, a question remains as to whether title to the undivided interest vested in Harold Burmester or whether the payment was a condition precedent or an option which being unsatisfied prevented title to the interest of Alvina Burmester from vesting in Harold Burmester as a result of the will and her death.

"A testator by his will determines the nature of a devise, and in reading a will the object is to ascertain the testator's intent." In re Estate of Hoagland, 203 N.W.2d 577, 580 (Iowa 1973).

"It is a principle long established that the law favors the vesting of estates when not in contravention to some established rule of law or public policy, and unless it clearly appears the devise was intended to be conditional it would tend to vest upon the death of the testator." Johnston v. Boothe, 234 Iowa 201, 12 N.W.2d 176, 178 (1943).

The court concludes from a reading of the will that the devise of real estate by Alvina Burmester to Harold Burmester under item 2 of the will was neither a condition precedent nor an option with regard to the required payments to Darlene Burmester Bohn. The required payment is in the nature of a legacy to a third person (Darlene Burmester Bohn) and is to be treated as a charge upon the land devised to Harold Burmester. Schrader v. Schrader, 158 Iowa 85, 139 N.W. 160, 163 (1912).

It is noteworthy that the will provisions of item 2 contain no alternative or substitutionary devise of the land in the event of the non-payment to Bohn. See Overturff v. Miller, 247 Iowa 284, 71 N.W.2d 913, 919 (1955) reh'g. denied (1955).

From an examination of the Burmester will, it appears that Alvina Burmester was attempting to equalize the devises to her children in order to be fair. (See item 3 of the Last Will and Testament of Alvina Burmester.)

The court believes the reasoning applied by the Iowa Supreme Court in Schrader v. Schrader is applicable in this instance. There it was said in discussing a testator's intent:

"There is no reason for thinking he intended to do anything more than to insure such equalization by making the payment of said sum a positive and unequivocal charge upon the land, and this is effectually accomplished by treating the provision as creating a lien or providing a condition subsequent as it would be by considering in a condition precedent."

Schrader v. Schrader, 139 N.W. at 162.

The court concludes that by the will of Alvina Burmester, and upon her death in 1983, Harold Burmester obtained a vested interest in her undivided one-half interest in the Northeast Quarter of Section 14, Township 92 North, Range 21, West of the P. M. Franklin County, Iowa subject to a lien for the payment required by item 2 of the will.

III.

It is true that prior to the death of Alvina Burmester and the vesting of the undivided one-half interest, Harold Burmester became indebted to Hampton State Bank. On December 31, 1982, he executed note no. 8385 which included the refinancing of prior indebtedness apparently dating back as early as 1979.

The incurring of debt by Harold Burmester to Hampton State Bank in 1979, however, does not render the debtors' claim of homestead subject to attack.

It is not essential that a claimant to a homestead have complete or fee title in the real estate in order to support a claim of homestead. "A tenant in common may enjoy the tenancy of

property and claim the same as a homestead." Livasy v. State Bank of Redfield, 185 Iowa 442, 170 N.W. 756 (1919).

The requirements for a homestead claim are set out in Iowa

Code 561.1 where the homestead is defined as follows:

"The homestead must embrace the house used as a home by the owner.

Iowa Code 561.1.

Debtors have claimed the property in question as homestead property. There has been no evidence presented that debtors did not occupy the property as a homestead under Harold Burmester is ownership rights as a joint tenant which he obtained through his father's will. The burden of proof to show otherwise was on the objectors. Bankr. R. 4003(c). This claim of homestead based on Harold Burmester's earlier ownership interest was sufficient to support a claim of homestead which predated the indebtedness to Bank.

It follows, therefore, that Harold Burmester's obtaining of more complete title after the incurrence of the debt can have no effect upon the date of acquisition of the homestead right.

Rutledge v. Wright, 186 Iowa 777, 171 N.W. 28, 31 (1919).

As stated in Rutledge v. Wright, "[T]o the extent of the area permitted by the statute a homesteader with an imperfect and incomplete title may yet acquire the homestead right within the statutory limit, and may thereafter perfect or complete his title to the homestead area. Likewise he may improve his homestead and add to its value. The date of the acquisition of the homestead is not thereby changed." 171 N.W. at 31.

This construction of the homestead statute is in conformance with the precept that homestead rights are to be jealously guarded by the law and liberally construed for those claiming their benefits. Merchants Mutual Bonding Co. v. Underberg, 291 N.W.2d 19, 21 (Iowa 1980); American Savings of Marengo v. Willenbrock, 209 Iowa 250, N.W. 295, 297 (1929).

The court, therefore, concludes that because Harold Burmester and Marvel Burmester established their homestead right to the real estate in question prior to the incurrence in 1979 of any indebtedness to Bank, the claim of exemption in the homestead is not subject to denial because of Iowa Code 561.21(1).

IV.

A question raised by Bank and trustee is whether, if the homestead claim is allowed, this court should impose an equitable lien upon the homestead equal to the costs incurred by the estate to enable the debtors to acquire the homestead portion of the property free of the sister's lien.

Even if the homestead exemption is allowed, the trustee has sold the remaining 120 acres owned by the debtors which are contiguous to the homestead parcel.

It is the position of the objectors that in order to provide clear title on the same, it might be necessary for the trustee to make the payment to Darlene Burmester Bohn.

Objectors argue that such a payment would then free the debtors' homestead from the potential lien. They argue it is

inequitable to have the unsecured creditors receive a smaller distribution from the proceeds of sale in order to pay off a lien on the debtors' exempt property.

This may be so, but the court concludes that this is an inappropriate proceeding in which to determine that issue.

The court believes that such an issue would be more appropriately resolved, if necessary, by a subsequent adversary proceeding in which the trustee might argue his theory that his payment to Mrs. Bohn should be equitably prorated over all 160 acres, or that he should be subrogated to any rights of Mrs. Bohn. In any event, the relief requested by Hampton State Bank in its brief is not appropriate to this proceeding and may be later raised by the trustee.

V.

One final issue remains and that is the claim by the trustee and Bank that the debtors seek to exempt more than the 40 acres to which they are limited by Iowa Code 561.2.

Debtors contend in their brief that there is no evidence upon which the court can find an excess claim. Alternatively, debtors argue that if the court does find an excess claim of exemption, that they be permitted to transfer to the trustee by quit claim deed the excess acres.

Whether the debtors claim an excess of 40 acres can be determined from the evidence before the court, all that is necessary is the amended B-4 schedule giving the legal description of

the property. From the legal description, it can be concluded that debtors are claiming as exempt 1,770,278.4 square feet of land. The court, pursuant to Fed. R. Evid. 201(c), now takes judicial notice that an acre contains 43,560 square feet.

From these two figures, it can be calculated that the debtors claim as exempt 40.64 acres which is in excess of the limitation under Iowa Code 561.2.

The court does not agree that the best methodology is a quit claim deed by debtors to the trustee for such excess.

Alternatively, the debtors will be able to amend their claim of exemption to reduce the claim of homestead to the maximum number of acres under Iowa law and any objections to such amended legal description may relate only to the extent of the area which may be claimed.

CONCLUSIONS OF LAW

1. The real estate claimed exempt by the debtors as their homestead is an exempt homestead under Iowa Code Ch. 561.
2. The Burmesters' acquisition of the homestead right under Iowa Code Ch. 561 antedated any indebtedness by Burmesters to Hampton State Bank.
3. Debtors have claimed an area of homestead in excess of that allowed by Iowa Code 561.2 by the amount of .64 acres.

ORDER

IT IS THEREFORE ORDERED that the objection to the claim of homestead is sustained to the extent that the debtors have claimed an excess area of homestead by .64 acres and is overruled in all other respects.

SO ORDERED ON THIS 29th DAY OF AUGUST, 1988.

William L. Edmonds
Bankruptcy Judge

Filed Stamped 8/30/88