

In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

EDWARD STEVEN WRIEDT and
TRACY LYNN WRIEDT

Bankruptcy No. 97-02624S

Debtor(s).

Chapter 7

ORDER RE: OBJECTION TO HOMESTEAD EXEMPTION

The matter before the court is the Trustee's objection to the Debtors' claim of exemption in their homestead under South Dakota law. Hearing on the matter was held in Sioux City on December 9, 1997. Wil Forker, Trustee, appeared for himself. Craig Lane appeared for the Debtors. This is a core proceeding under 28 U.S.C. § 157(b)(2)(B).

The Debtors filed a Chapter 7 petition on August 27, 1997. They scheduled an interest in real property and claimed their equity in the property exempt under South Dakota law as their homestead. The Trustee objected on the ground that the amount claimed, \$42,000, exceeds the \$30,000 limit allowed by the South Dakota homestead statute. Debtors argue that because a homestead in South Dakota is "absolutely exempt," their exemption extends to the full amount of their equity, and that the \$30,000 limit applies only in the case of an actual sale of the home.

From a review of the statutory and case law, it appears that the Trustee is correct. The homestead exemption of a debtor residing in South Dakota is limited to equity up to \$30,000.

Discussion

South Dakota is an "opt-out" state. 11 U.S.C. § 522(b)(1); South Dakota Codified Laws § 43-31-30; S.D.C.L. § 43-45-13. A debtor in bankruptcy may claim an exempt homestead only as allowed under South Dakota law. The homestead exemption is provided in S.D.C.L. § 43-31-1, which states:

The homestead of every family, resident in this state, as hereinafter defined, so long as it continues to possess the character of a homestead is exempt from judicial sale, from judgment lien, and from all mesne or final process from any court, to the extent and as provided in this code

The homestead is limited to the house used as a home by the owner and appurtenant buildings. S.D.C.L. § 43-31-2. The homestead is limited in area to one acre within a town and 160 acres in the country. S.D.C.L. § 43-31-4.

Chapter 43-45 of the South Dakota code is titled "Personal Property Exempt from Process." Section 43-45-1 provides:

Except as hereinafter provided, the property mentioned in this chapter is exempt from attachment or mesne process, and from levy and sale on execution, and from any other final process issued from any court.

Section 43-45-3, cited by the Debtors in support of their homestead exemption claim, provides:

A homestead:

1. As defined and limited in chapter 43-31, is absolutely exempt; or
2. In the event such homestead is sold under the provisions of chapter 21-19, or is sold by the owner voluntarily, the proceeds of such sale, not exceeding the sum of thirty thousand dollars, is absolutely exempt for a period of one year after the receipt of such proceeds by the owner. Such exemption shall not be limited to thirty thousand dollars for a homestead of a person seventy years of age or older or the unmarried surviving spouse of such person so long as it continues to possess the character of a homestead.

The South Dakota code does not say directly what it means that the homestead is "absolutely exempt." [\(U\)](#) The only definition is provided in Chapter 21-19, titled "Claim of Homestead and Personal Property Exemptions." Section 21-19-1 provides:

As used in this chapter unless the context otherwise plainly requires:

1. "Absolute exemptions" means property which, under chapters 43-31 and 43-45, is absolutely exempt from levy.

Other provisions of the code show that property classified as "absolutely" exempt is property in a preferred category. It is not, however, unconditionally exempt from levy and execution sale. Absolute exemptions include, in addition to the homestead, books and pictures, wearing apparel and the other items of personal property listed in S.D.C.L. § 43-45-2. Absolute exemptions are distinguished from "additional exemptions." The head of a family may select additional property which is also exempt, not to exceed in the aggregate \$4,000 in value; a single person may select \$2,000 in additional exemptions. S.D.C.L.

§ 43-45-4. As against certain claims, a debtor may choose only absolute exemptions. See, e.g., S.D.C.L. § 10-22-11 (delinquent property taxes), § 40-28-26 (damage caused by animals), § 43-45-9 (property obtained under false pretenses). Unlike absolute exemptions, additional exemptions may be waived if they are not timely claimed. Compare S.D.C.L. §§ 21-19-3 and 21-19-12 with § 21-19-15.

The South Dakota homestead exemption limitation is not based on the fair market value of the home. Peck v. Peck, 212 N.W. 872, 875 (S.D. 1927); Hansen v. Hansen, 166 N.W. 427, 428 (S.D. 1918). The dollar amount in S.D.C.L. § 43-45-3 limits a debtor's exemption to \$30,000 in equity. Hoffman Farms v. Pokela (In re Hoffman Farms), 195 B.R. 80, 87 (D. S.D. 1996) (finding no equity in which debtor could claim exemption); First National Bank of Beresford, South Dakota v. Anderson, 332 N.W.2d 723, 725-26 (S.D. 1983) ("homestead is exempt against the claim of creditors to the extent of the statutory amount of the exemption, over and above encumbrances," affirming order setting aside \$30,000 for benefit of debtors); see also Peck v. Peck, 212 N.W. at 875 (same; statutory limit at the time was \$5,000); Hansen v. Hansen, 166 N.W. at 430.

The procedure for satisfaction of claims of execution creditors makes the \$30,000 limitation relevant prior to actual sale of the homestead property. In order to levy on the homestead, a creditor must first determine that the debtor's equity in the home exceeds the \$30,000 exempt amount and make an affidavit to that effect. S.D.C.L. § 21-19-2. The levying officer's notice of levy constitutes a levy on the excess amount. Id.; see also Keim v. Rand, 158 N.W. 904, 905 (S.D. 1916) (docketing judgment against owner creates lien on the land to the extent of value in excess of statutory limitation). Although the failure to claim the homestead exemption does not constitute a waiver of the exemption, S.D.C.L. § 21-19-15, the homestead, as an absolute exemption, should be included in a claim of exemptions. S.D.C.L. § 21-19-10. The parties may dispute the value of the property and amount of the debtor's equity. S.D.C.L. §§ 21-19-19 to 21-19-24 (appraisal procedures). An execution creditor may obtain sale of the homestead to collect its debt against the excess equity. S.D.C.L. §§ 21-19-28, 21-19-29. The debtor receives the exempt amount from the proceeds. S.D.C.L. § 21-19-29; see also Keim v. Rand, 158 N.W. at 905 (creditor is entitled to equity over and above homestead exemption and prior mortgage).

Because the Chapter 7 Trustee has the power to sell property of the estate and has the powers of an execution creditor, 11 U.S.C. §§ 363(b), 544(a)(2), it is not necessary that there be an actual sale of the homestead property for the Trustee to successfully challenge a claim of homestead exemption over the statutory limit. See also, In re Johnson, 61 B.R. 858, 866 (Bankr. D. S.D. 1986) (creditor objected to debtor's claim of homestead exemption; court noted that amount of claim was "well within the \$30,000 limitation"); Citibank (New York State), N.A. v. Doyon (In re Doyon), 54 B.R. 810, 812 (Bankr. D. S.D. 1985) (in motion to avoid judgment lien, court found "debtors' value in real property ... claimed as homestead and exempt under S.D.C.L. § 43-45-3 is less than \$30,000, Citibank's South Dakota judicial lien impairs this exemption").

IT IS ORDERED that the Trustee's objection to Debtors' claim of exemption in their homestead is sustained.

SO ORDERED THIS 19th DAY OF DECEMBER 1997.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on I mailed a copy of this order by U.S. mail to Craig Lane, Wil Forker and U.S. Trustee.

1. In Hansen v. Hansen, 166 N.W. 427 (S.D. 1918), the issue was whether a surviving widow, as against heirs, was entitled to the use and occupancy of her entire 160 acres without limit. The heirs argued she was limited to use of property to the extent of \$5,000 in value, the dollar limitation in the homestead statute at that time. The homestead was also "absolutely exempt." Id. at 428 (quoting from section 323). The court's decision does not indicate that the term "absolutely" was relevant to the matter. The court, quoting the statute providing for execution sale of the homestead, held that the dollar limitation was for the benefit of execution creditors, not the defendant heirs.