

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
LINDA DIANE NIELSON) CASE NO. BK01-82305
) CH. 7
DEBTOR) Filing No.3,7

MEMORANDUM

Hearing was held on January 2, 2002, on Objection to Claim of Exemptions by Debtor filed by Richard D. Myers, Trustee. Appearances: Oliver Pollak for the debtor and Richard Myers for the trustee. This memorandum contains findings of fact and conclusions of law required by Fed. R. Bankr. P. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(B).

Introduction

This matter is before the court on the debtor's claim of homestead exemption and the trustee's resistance thereto. The debtor has claimed as exempt an interest in real property formerly owned by her deceased mother. The trustee argues that because the debtor has no present right to possession due to her status as a remainder-person, she is not entitled to a homestead exemption. In opposition, the debtor argues that upon death of her mother she became a de facto tenant in common with the other heirs of the intestate estate and thereby has the required right to immediate possession. The trustee's resistance to the claim of homestead exemption is denied.

Facts

The debtor has lived in the home since 1984 and, while her mother was living, paid rent and utilities. She resided in the home with her mother and her minor son until 1998 when her sister moved in to assist in caring for their ailing mother. The debtor's mother died intestate in December of 1999. The mother's estate is currently in probate. The debtor is one of three intestate heirs to her mother's estate. The trustee has claimed whatever interest the debtor has in

her mother's estate and has abandoned the remainder of the bankruptcy estate.

The debtor filed for bankruptcy on July 30, 2001. On her Schedule A and Schedule C, she claims a 1/3 interest of the homestead valued at a total of \$40,000.00 less repair costs due and owing. The net value of her claimed homestead exemption is \$10,000.00.

Issue

Does a debtor have a legal right to present occupancy and, therefore, a right to a homestead exemption to real property that has passed to her by intestate succession?

Decision

A debtor has the legal right to present occupancy because, according to Nebraska law, upon death of an ancestor, intestate, such ancestor's lands descend directly to heirs. With such descent flows the right to possession.

Analysis

The trustee objects to the debtor's claim of homestead exemption arguing that the debtor does not own the claimed real property. The trustee claims that the property is owned by the estate of the debtor's deceased mother. The estate is to be shared equally between the three heirs who include the debtor, her sister and her brother. The trustee has abandoned the remainder of the estate.

The trustee correctly argues that, according to Nebraska law, a person must have a present right to occupancy or possession, followed by exclusive occupancy in order to claim the right to a homestead exemption. Blankeneau v. Landess, 261 Neb. 906, 626 N.W.2d 588 (2001); Mainelli v. Neuhaus, 157 Neb. 392, 59 N.W.2d 607 (1953). J.H. Melville Lumber Co v. Maroney, 145 Neb. 374, 379, 16 N.W.2d 557, 529 (1944). Citing Giles v. Miller, 36 Neb. 346, 54 N.W. 551(1893) (The Court stated "an undivided interest in real estate accompanied by the exclusive occupancy of the premises by the owner of such interest and his family in a home sufficient to support a homestead exemption.") See also Conner v. McDonald, 120 Neb.

503, 233 N.W. 894 (1931). Fee simple ownership is not necessary. Blankeneau, 261 Neb. at 913, 626 N.W.2d at 595.

In J.H. Melville Lumber Co v. Maroney, the Nebraska Supreme Court held that when an ancestor dies intestate his lands descend directly to his heirs. J.H. Melville Lumber Co., 145 Neb. at 379, 16 N.W.2d at 529. It does not require settlement of the estate or a probate order declaring heirship to vest title. See Johnston v. Colby, 52 Neb. 327, 72 N.W. 313 (1897). Later, in the case of Evans v. Evans, as the Nebraska Supreme Court reasoned that if title passes to and vests in the heirs, then the present possessory right goes with it. Evans v. Evans, 199 Neb. 480, 260 N.W.2d 188 (1977). Although the administrator of the estate has an optional legal right to possession, until the administrator chooses to invoke the right, the heir's right to possession remains. J.H. Melville Lumber Co., 145 Neb at 381, 16 N.W.2d at 530. As stated in J.H. Melville Lumber Co., "The fact that the title may be afterwards divested, by proceedings subjecting and selling the land for payment of the ancestor's debts, does not prevent title from passing, and renders the estate none the less one of freehold." Id. Citing Shellenberger v. Ransom, 41 Neb. 631, 59 N.W. 935 (1894).

Applying the law to the facts in the present case, upon the death of her mother in 1999, the real property formerly belonging to her passed directly to her three children who are the sole heirs to her estate. Title vested in her heirs at the time of her death regardless of whether the estate has been probated. No evidence has been presented regarding the administration of the estate. When the title vested, the debtor obtained the right to present possession.

Although the debtor is a co-tenant, according to Nebraska law, any undivided interest in real estate is sufficient to satisfy the requirements of the homestead exemption as long as the other prerequisites are satisfied. Edgerton v. Hamilton County, 150 Neb. 821, 36 N.W.2d 258 (Neb. 1949); J.H. Melville Lumber Co., 145 Neb at 374, 16 N.W.2d at 527; First Nat'l Bank of Tekamah v. McLanahan, 83 Neb. 706, 120 N.W.185 (Neb. 1909).

At the time the bankruptcy was filed, the debtor was living in the real property that formerly belonged to her mother. She had resided on the premises for 17 years with her dependent son. Upon the death of her mother, because she is

one of three heirs, title to the property vested immediately in her and she was therefore, entitled to immediate possession and occupancy.

Although the trustee correctly states that, in Fisher v. Kellogg, 128 Neb. 248, 258 N.W. 404 (1935), the Nebraska Supreme Court held that a remainder estate whether vested or contingent will not support a claim of homestead, the reasoning is inapposite in the present case. In Fisher, the court reasoned that land held in remainder dependent upon another's life estate is not susceptible to immediate occupancy. Fisher, 258 N.W. at 406.(emphasis added) In the present case, the debtor does not hold her interest subject to someone else's life estate. Rather, upon her mother's death, the real property descended directly to her and her siblings and she is thus entitled to immediate possession and occupancy.

Conclusion

For the foregoing reasons, the trustee's objection to homestead exemption is overruled.

Separate Order to be entered.

DATED: February 21, 2002

BY THE COURT:

s/Timothy J. Mahoney

Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

09 MYERS, RICHARD
69 POLLAK, OLIVER

Copies mailed by the Court to:

Movant (*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

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| IN THE MATTER OF |) | |
| |) | |
| LINDA DIANE NIELSON, |) | CASE NO. BK01-82305 |
| |) | A |
| <u>DEBTOR(S)</u> |) | |
| |) | CH. 7 |
| |) | Filing No. 3, 7 |
| Plaintiff(s) |) | |
| vs. |) | <u>ORDER</u> |
| |) | |
| |) | |
| |) | DATE: February 21, 2002 |
| <u>Defendant(s)</u> |) | HEARING DATE: January |
| |) | 2, 2002 |

Before a United States Bankruptcy Judge for the District of Nebraska regarding Trustee's objection to Debtor's Claim of Homestead Exemption and the Debtor's Resistance thereto.

APPEARANCES

Oliver Pollak, Attorney for the debtor
Richard Myers, Trustee
(X) Copy to Law Clerk

The trustee's objection to homestead exemption is overruled. See Memorandum entered this date.

BY THE COURT:

s/Timothy J. Mahoney

Timothy J. Mahoney
Chief Judge

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