UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Southern Division

In re:	Bankr. No. 00-40484
EVERT L. FREDRICKS Soc. Sec. No. [redacted]-9482	Chapter 7
and	
RHODA A. FREDRICKS Soc. Sec. No. [redacted]-0287	DECISION RE: OBJECTION TO CLAIMED HOMESTEAD EXEMPTION
Debtors.	

The matter before the Court is the objection to Debtors' claimed homestead exemption filed by Trustee John S. Lovald. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Decision and accompanying Order shall constitute the Court's findings and conclusions under Fed.R.Bankr.P. 7052. As set forth below, the Court concludes that the Trustee's objection must be overruled.

I.

Evert L. and Rhonda A. Fredricks ("Debtors") filed a Chapter 7 petition. On their schedule of real property, they included a house in Sioux Falls and valued it at $45,000. They claimed the house exempt as their homestead. They valued the exemption at $20,937.34. On their schedule of secured creditors, Debtors included Norwest Bank, who held a mortgage for $24,062.66 on the house. On their statement of intention, Debtors indicated they would reaffirm the mortgage.

In their statement of financial affairs, Debtors disclosed that in 1999 they had transferred a family home in Viborg, previously owned by Debtor Rhonda Fredricks' parents, to Debtor Rhonda Fredricks' daughter. They further stated that the transfers

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of the Viborg house to them and then from them to their daughter were without consideration.

Trustee John S. Lovald filed an objection to Debtors' claimed homestead exemption in the Sioux Falls house. He argued that the Debtors have not lived there since 1980 and that the last time the property was occupied was as a rental unit. He also argued that Debtors' equity in the property may exceed the allowed $30,000. Creditor Avera McKennan Hospital joined in the Trustee's objection.

Debtors timely responded to the Trustee's objection. They said the Sioux Falls house is not presently habitable and that the needed repairs diminish the value. They said they intend to make the necessary repairs and live there but that their financial circumstances have not yet permitted them to do so.

An evidentiary hearing was held September 5, 2000. Debtor Rhonda Fredricks testified that she and her husband presently live in Viborg. Debtor Evert Fredricks has had severe health problems in the past few years and is unable to work. Debtor Rhonda Fredricks works in Viborg where she is a salaried employee of the local funeral home. As part of her compensation, Debtors are provided a residence at the funeral home. She says they will continue to live in Viborg until she retires in several years. When she retires, they intend to move into the Sioux Falls house.

Debtor Rhonda Fredricks said she bought the Sioux Falls house in 1972 or 1973 and lived there a time before she married Evert. She last lived there in the 1980s. Debtor Evert Fredricks has never lived there. The house was used as a rental for 10-12 years.

It has been empty about five years because it needs repair.

The house is an older two-story unit. Its assessed value is $61,000. Debtor Rhonda Fredricks said she and her husband valued it lower in the bankruptcy because of the repairs that are needed. The repairs she identified included installing a new furnace, having asbestos removed, having the roof re-shingled, updating and repairing electrical work, and replacing the street-to-house sewer pipe. She estimated the new furnace and asbestos removal alone would cost $7,200 to $9,200.

Debtor Rhonda Fredricks estimated that the debt remaining on the house is about $24,000. She has only a year-to-year note and mortgage on it at 11.25% interest. She was unable to estimate when the debt would be repaid. The house costs the couple about $360 per month to cover the payments to Norwest and taxes.

The matter was taken under advisement.

II.

A bankruptcy debtor's entitlement to an exemption is determined on the day he files his petition. 11 U.S.C. § 522(b)(2)(A); *Mueller v. Buckley (In re Mueller)*, 215 B.R. 1018, 1022 (B.A.P.8th Cir. 1998)(cites therein); *Harris v. Herman (In re Herman)*, 120 B.R. 127, 130 (B.A.P. 9th Cir. 1990). Exemptions are construed liberally in favor of the debtor. *Wallerstedt v. Sosne (In re Wallerstedt)*, 930 F.2d 630, 631 (8th Cir. 1991). Homestead laws, in particular, are construed "for the creation and protection of the family home." *In re Corbly*, 61 B.R. 843, 850 (Bankr. D.S.D.

1986)(citing *Ramsey v. Lake County*, 14 N.W.2d 125, 126 (S.D. 1944)). "The underlying purpose is to 'provide the security of a home to a family against the claims of creditors.'" *Corbly*, 61 B.R. at 850 (quoting *Speck v. Anderson*, 318 N.W.2d 339, 343 (S.D. 1982)).

Under South Dakota law, an exempt homestead must embrace a house used as a home by the owner. S.D.C.L. § 43-31-2; *United States v. Nelson*, 969 F.2d 626, 631 (8th Cir. 1992)(homestead must be owned to be declared exempt). In determining whether a homestead character has attached to a house, the most important factor to consider is the debtor's intent. *Corbly*, 61 B.R. at 850 (cites therein).

The South Dakota Supreme Court has recognized circumstances which may necessitate a debtor's absence from a homestead but which do not cause the debtor's house to lose its homestead characteristic. These circumstances include when the absence is due to work elsewhere, health problems, or remarriage without the establishment of a new homestead, *Yellowhair v. Pratt*, 182 N.W. 702 (S.D. 1921), and *Hewitt v. Carlson*, 244 N.W. 108, 109 (S.D. 1932), when the debtor has claimed no other property as a homestead, *Warner v. Hopkins*, 176 N.W. 746, 748 (S.D. 1920), or when a debtor lives elsewhere because of financial difficulties. *Id.*, *In re Hansen*, 17 B.R. 239, 241-42 (Bankr. D.S.D. 1982). Even renting out the property for a time or offering it for sale, without more, does not constitute an abandonment of a homestead, *Yellowhair*, 182 N.W. at 704-05; *Hansen*, 17 B.R. at 241-42.

> While a party leaving a homestead must, in good faith, intend to return to it at some future date, such date need not be "fixed or definite" as to time; neither need such intent be an intent to return regardless of all possible contingencies; but if there is an honest believe that at some time in the future the party will reoccupy the property as a home, and such party does no act inconsistent with such relief and intent, the homestead right is not forfeited.

Yellowhair, 182 N.W. at 704.

Once the homestead characteristic of a house has been established, the next consideration is value. *In re Hughes*, 244 B.R. 805, 810-13 (Bankr. D.S.D. 1999). Under S.D.C.L. § 43-45-3(2) and related provisions, the homestead is exempt from the claims of creditors to the extent of $30,000 in equity over any encumbrances of record. *Hughes*, 244 B.R. at 810-13.[1]

III.

When the applicable statutes are construed liberally in Debtors' favor and when the relevant case law is applied, it is clear that Debtors may claim the Sioux Falls house as their homestead. There was no evidence that Debtor Rhonda Fredricks intended to abandon her homestead when she moved out of the house in the 1980s. *Yellowhair*, 182 N.W. at 703-04. Work in a near-by town and financial problems now both contribute to Debtors' absence

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[1] A special homestead exemption provision in S.D.C.L. § 43-45-3(2) applies in cases where the debtor is age 70 or over. It does not apply in this case.

from the house. On the petition date, Debtors had a present intent to live there upon Debtor Rhonda Fredricks' retirement. Their actions have not manifested a contrary intent. They have not claimed another property as a homestead. In sum, there is no evidence that Debtors' Sioux Falls property ever lost its character as a homestead since Debtor Rhonda Fredricks moved from it.

> The debtor in the absence of any expression of a contrary intention should be presumed to intend no further peril to his [or her] homestead right than the necessity demands.

Aisenbrey v. Hensely, 17 N.W.2d 267, 269 (S.D. 1945)(cited in *Keleher v. Technicolor Government Services, Inc.*, 829 F.2d 691, 693 (8th Cir. 1987)).

The Court is also unable to conclude that Debtors' equity in the home exceeds the allowed $30,000. The only value evidence offered was Debtor Rhonda Fredricks' opinion that it is presently worth $45,000. There is nothing on the record to dispute that.

An order overruling the Trustee's objection shall be entered.

So ordered this 26 day of September, 2000.

BY THE COURT:

Irvin N. Hoyt
Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: ______
Deputy Clerk

(SEAL)

UNITED STATES BANKRUPTCY COURT

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered

SEP 27 2000

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota