

UNITED STATES BANKRUPTCY COURT

DISTRICT OF SOUTH DAKOTA

ROOM 211

FEDERAL BUILDING AND U.S. POST OFFICE

225 SOUTH PIERRE STREET

PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

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December 13, 1988

Timothy Engel, Esq.
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Pierre, South Dakota 57501

Thomas Lloyd, Esq.
326 U.S. Courthouse & Post Office
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Re: Wesley and Imogene High Elk
88-30012

Dear counsel:

I have considered the record, briefs and transcript in this matter and render the following decision.

On December 16, 1983 attorney David Bergren signed a complaint (ex. H) on behalf of the Debtors versus Cheyenne River Sioux Tribal Police Department. Suit was brought in South Dakota Circuit Court. The complaint alleged the Police Department caused the wrongful death of the Debtors' daughter.

The Debtors signed four \$16,250.00 notes (exs. A,B, C,D), dated February 28, 1985, to Lemmon Federal Credit Union, secured in part by "Check Assignment from Attorney." The record contains two assignments (eMs. E & F) signed by the Debtors and dated March 4, 1985 and October 31, 1986. The earlier assignment provides that attorney Bergren will withhold up to \$20,000.00 from any proceeds of the wrongful death lawsuit for the benefit of the Credit Union to reduce the High Elk's debt. The latter assignment provides that attorney Bergren will withhold up to \$40,000.00, reduced by "costs of suit," from any wrongful death proceeds for the benefit of the Credit Union. By a settlement (cx. C) dated April 10, 1987 the High Elks were to receive \$35,000.00 for their wrongful death claim.

On February 24, 1988, the Debtors filed a Chapter 12 petition, which was voluntarily converted to Chapter 7 by an order entered June 14, 1988. Attorney Engel filed a stipulation between the Debtors and the Credit Union August 3, 1988. The stipulation provides that the Credit Union's security interest includes "proceeds" of the April 10, 1987 settlement, and that the net proceeds of the settlement would be paid to the Credit Union to

satisfy its claims in the bankruptcy. The net amount of the proceeds is stated to be \$17,447.31. Attorney Lloyd of the United States Attorneys office objected to the requested court approval on behalf of the Farmers Home Administration and set the matter for hearing in Pierre, South Dakota September 8, 1988. The Court heard argument at this hearing and received exhibits A through I as an evidentiary record.

FmHA resists payment of the net lawsuit proceeds to the Credit Union because, under its reasoning. The assignment of the wrongful death proceeds was invalid, and the Credit Union holds no security interest in the proceeds. The FmHA theorizes the proceeds therefore are unencumbered and should be available for distribution on unsecured claims generally. The FmHA objection claims the Debtors owe the agency \$278,179.80 "not secured by any real estate or chattels in the debtors' possession." The agency obviously anticipates sharing in the proceeds as an unsecured creditor.

The agency's position that the assignment is unenforceable is supported by three premises. All three premises must be true to support the argument. The premises are: first, that under South Dakota law, a cause of action may not be assigned unless it is of a type that survives the death of the claim holder; second, under South Dakota law a wrongful death claim does not survive the death of the, claim holder; third, that the assignment of the proceeds of a cause of action is ineffective if the cause of action itself could not have been assigned.¹

Even if the agency's first and third arguments were accepted, its argument that the assignment was unenforceable fails because its second premise is untrue. This premise is based upon Simons v. Kidd, 41 N.W.2d 840, a 1950 South Dakota Supreme Court decision. In Simons the South Dakota Supreme Court held that a wrongful death cause of action did not survive the death of the claim holder. Simons overruled Sherman v. Harris, 153 H.W. 925 (1915). The court construed what is now S.D.C.L. 43-42-2 and 21-5-5. The survival statute, S.D.C.L. 43-42-2 provides "A thing in action arising out of the violation of a right of property or out of an obligation may be transferred by the owner. Upon the death of the owner it passes to his personal representatives except where in the cases provided by law it passes to his devisees or successor in office." The court held that a wrongful death cause of action does not arise from a violation of a property right or "out of an obligation."

The year after Simons was handed down, the South Dakota Legislature enacted S-D.C.L. 15-4-1, which provides: "All causes of action shall survive and be brought, notwithstanding the death of the person entitled or liable to the same. Any such action may be brought by or against the executor or administrator or successors in interest of the deceased." The statute plainly provides that all

¹ The Credit Union in its brief concedes the Uniform commercial Code does not apply to the transaction in question. See S.D.C.L. 57A-9-104(11). The court therefore concentrates on non U.C.C. state law.

causes of action survive the death of the holder. See City of Sturgis v. Walker, 116 N.W.2d 803 (S.D. 1962); Steckman v. Silver Moon Tours, 90 N.W.2d 170 (S.D. 1958). It is apparent that the South Dakota Legislature was dissatisfied with the Simon rule, and statutorily overruled it. See, Note, Wrongful Death, Survival, and Loss of Consortium, 5 S.D.L. Rev. 125, 129 (1960).

Under S.D.C.L. 15-4-1 a cause of action for wrongful death survives the holder of the claim. A premise required to support the FmHA's position is missing. Accordingly, the FmHA's objections to court approval of the Debtors/Lemmon Federal Credit Union stipulation is overruled.

The Court holds only as to the validity of the FmHA's objection. The Court has not decided whether the assignments in question awarded Lemmon Federal Credit Union a security interest in the wrongful death proceeds, or whether such a security interest was perfected so as to be unavoidable in bankruptcy.

This matter constitutes a core proceeding under 28 U.S.C. Section 157(b)(2). This letter decision shall constitute the Court's findings of fact and conclusions of law. The Court shall enter an order approving the Debtors/Lemmon Federal Credit Union stipulation and overruling the FmHA's objections.

Very truly yours,

Chief Bankruptcy Judge

INH/sh

CC: Bankruptcy Clerk