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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

Filed November 29, 1982

2-241
2-67667 50

IN THE MATTER OF THE ESTATE OF ESTELLA GREENWOOD, Deceased,

WILLIAM NORKAITIS and **JOSEPHINE NORKAITIS**,

Appellants.

Appeal from Polk District Court, A. M. Critelli, Judge.

The judgment creditors of the decedent's heir appeal from adverse judgment ordering the administrator to deliver a deed to the purchasers of certain real estate upon receipt of the purchase price. The creditors claim that the trial court erred in holding that a residence was a homestead at the time of decedent's death, and that the securing of a mortgage on the property did not constitute a waiver of the homestead exemption under Iowa Code § 633.11 (1981). The estate claims that the appeal should be dismissed since the judgment creditors were not interested parties in the sale and since they have not objected to the trial court's ruling that all interested parties were given notice of the proposed sale and waived any objection to the sale. AFFIRMED.

Richard L. Rick of Richard L. Rick, P.C., Des Moines, for appellants.

Doyle D. Sanders of Peddicord, Simpson & Sutphin, P.C., Des Moines, for appellee estate.

Considered en banc.

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Until June, 1970, the decedent, Estella, occupied a residence as homestead property. After June, 1970, an involuntary conservatorship was established for Estella, who resided in a nursing home until the date of her death, March 16, 1976. For at least one year Ronald Greenwood, Estella's conservator and son, rented the premises to several tenants and subsequently occupied the premises with his wife, Donna Greenwood, as their residence. There is no evidence that Ronald and Donna paid rent during their occupation of the premises.

Ronald Greenwood was named administrator of Estella's estate. On November 30, 1976, Ronald, as administrator, filed an application to mortgage the property to pay estate claims, and as sole heir consented to the mortgage. The trial court entered an order that the property be mortgaged.

On November 28, 1978, William and Josephine Norkaitis, as creditors under a 1975 judgment against Ronald and Donna, caused an execution to be levied on the property.

On February 7, 1979, Ronald died testate leaving all of his property to Donna. Ronna Greenwood, daughter of Ronald and Donna, was appointed administrator of Estella's estate. On June 11, 1980, Ronna, as the successor administrator for Estella's estate, filed a petition to sell the real estate. The potential buyers were Gerald and Sharon Kinton, son-in-law and daughter, respectively, of Ronald and Donna. The Kintons offered to buy the real property by assuming the existing mortgage, paying the estate administration fees, and a claim against the estate. The effective value of the offer was $28,000, which was under the market value of the property. Donna filed a written consent to the sale.

On July 9, 1980, the court entered an order granting authority to sell the property to the Kintons with the Kintons required to pay all expenses of the sale. The judgment creditors of Ronald were subsequently given notice of the fact that the estate was selling the property so that the creditors could assert any interest they had in the property. On December 12, 1980, a report of the sale was filed, and on the same day a hearing before the probate referee was held.

On January 8, 1981, the referee in probate filed her findings of fact and conclusions. The referee determined that the property was not the homestead of Estella at the time of her death since she had left the premises and they were used as rental property for a period prior to her death. The referee based this conclusion, in part, on Iowa Code Section 425.11(1)(a), which permits a property tax homestead exemption for persons confined to a nursing home where the property is not leased. The referee also determined that even if the property was Estella's homestead at the time of her death, Ronald was no longer entitled to a homestead exemption under § 633.100, because of the mortgage placed on the property during the administration of the estate. The referee also found that the judgment creditors were not interested parties entitled to notice under section 633.389, but that the estate of Ronald Greenwood was entitled to such notice. The referee concluded that since such notice was not given, the order allowing the sale should be set aside and the report of sale should be disapproved.

The administrator of Estella's estate filed objections to the referee's ruling, but the judgment creditors did not.

On September 1, 1981, the trial court entered a ruling rejecting some of the conclusions reached by the referee. The court concluded that Estella did not abandon the homestead by moving out or renting the property and that the homestead definition for the homestead tax credit under § 425.11 was inapplicable in this situation. The court also determined that the homestead character of the property was not waived by the execution of a mortgage, since the "waiver" under section 633.100 was limited to protection of the interests of the recipient of the mortage and not judgment creditors. The trial court also ruled "that all truly 'interested persons' entitled to notification of the proposed sale of real estate have been served with such notice and have effectively either waived same or concurred and agreed in said sale and that it is not necessary that the Estate of Ronald Greenwood be administered, a personal representative named, and said personal representative served with a copy of the proposed sale." The court concluded that the report of sale should be approved. On September 24, 1981, the trial court entered an order adopting these conclusions.

I. Scope of Review

This case arose in proceedings in probate. The issues are therefore considered as tried in an equity proceeding, and our review is de novo. Iowa Code § 633.33 (1981), Iowa R. App. P. Rule 4; Matter of Allen's Estate, 239 N.W.2d 163 (Iowa 1976). We give deference to but are not bound by the trial court's findings.

II. The Standing of the Appellants

William and Josephine Norkaitis are judgment creditors of an heir of the estate. Their only interest arose when they attempted to levy on the house owned by the estate but lived in by Donna Greenwood, the beneficiary of the now-deceased heir of the estate. Iowa Code section 633.350 (1981) provides that all property except homestead and other exempt property passes, on the death of its owner, to the person to whom it is devised or to his successors, subject to payment of debts and charges against the estate. Under the assumption that the property in question here was Estella's homestead, the administrator of her estate has argued that it could not be sold to pay a claim by Mabel Lin Manor Nursing Home against Estella's estate. The administrator concedes, however, that if the property were not Estella's homestead at the time of her death, it was subject to being sold by the court for payment of that claim. The administrator of the estate has also contended that William and Josephine, the appellants herein, had no interest in this property because they were judgment creditors of the heir of the estate, but had no claim on the estate property as such. "Interested parties" are defined in Iowa Code section 633.389 (1981) as including "only distributees in the estate and persons who have requested notice as provided by this code." William and Josephine had not requested notice as provided by Iowa Code section 633.42 (1981), and are not distributees. In light of these facts, the probate referee sustained the objection by the attorney for the estate to participation by William and Josephine in the case.

Under Iowa Rule of Civil Procedure 214, "any party may file written objections to" the referee's report. William and Josephine did not file an objection to the referee's ruling that they had no right to participate in this case because they were not interested parties. The trial court arrived at the same conclusion, that they were not interested parties in these proceedings.

"Failure in the brief to state, to argue or to cite authority in support of an issue may be deemed waiver of that issue." Iowa R. App. P. 14(a)(3). Inasmuch as William and Josephine have failed to state, argue, or cite authority in support of a claim that they are interested parties in this estate, they may be deemed to have waived the issue and any entitlement to further participation in the case.

III. Interested Parties in the Estate of Ronald L. Greenwood

The probate referee concluded that the estate of Ronald L. Greenwood is an interested party in the sale of this property, that such interested person would have to be given notice, and that in order for that to take place, the estate of Ronald L. Greenwood would have to be administered for the sole purpose for receiving notice of the sale.

Estella's estate objected to that conclusion on the ground that the only interested party was Donna Greenwood, the sole beneficiary of the estate of Ronald L. Greenwood. She had received notice of the hearing, was present, and did consent to the sale. The trial court ruled that such administration of Ronald's estate was "an unnecessary step and procedure" and that all of the real interested persons had been given notice of the proposed sale and had effectively waived any objection to it.

William and Josephine have not appealed this ruling, and have therefore waived that issue under Iowa Rule of Appellate Procedure 14(a)(3). This waiver at the trial court level and failure to appeal requires us to affirm, since all interested parties have waived objection to the sale and may thus be presumed to have agreed to it.

IV. The Homestead Issue

Even if we did not affirm on this basis, appellants could not prevail on the merits. The property was rented for some time at different intervals after Estella had moved out of her home into the nursing home where she spent her last years. For most of that time, her children, Ronald and Donna Greenwood, lived in that house. Since Ronald's death, Donna has continued to live there. While Estella was in the nursing home, she and her children hoped that she would ultimately be able to return home. William and Josephine argue that rental of the property negated any subsequent claim that the property was Estella's homestead, that it therefore ceased to be exempt from any levy upon it by creditors, and that they ought therefore to be able to levy against it in order to collect their claim against Ronald.

William and Josephine argue that section 425.11 and section 561.1 are in pari materia, and that this entails that rental of Estella's home nullified any homestead exemption that the estate might otherwise have enjoyed. We disagree.

Section 425.11 of the Code has to do with the homestead tax credit, and provides that a person who leases his property for the purpose of gaining an income from it may not at the same time claim that property as qualifying for the homestead exemption from property taxes. Chapter 561, however, is devoted to general problems having to do with the homestead, and the definition of "homestead" in section 561.1 is to be construed as applying to the sections immediately following for the purposes of that chapter. Section 425.11 provides that the provisions of Chapter 561 shall control "where not in conflict with the terms of the definitions above set out." William and Josephine argue that this provision puts section 425.11 and chapter 561 in pari materia. The thrust of their argument seems to be that the restrictions found in section 425 ought to be carried over to chapter 561. The plain meaning of the statute, however, is precisely the opposite: that the broad definition of chapter 561 shall control, except where such definition is inconsistent with the provisions of chapter 425. We must therefore seek other authority for the proposition urged by William and Josephine that rental of Estella's home nullified any claim her estate might have had to its being considered a homestead.

A temporary removal from the homestead while renting it to third parties is not considered to be an abandonment of the homestead if the party having the homestead right intends to return to the premises and resume the occupancy. In re Sueppel's Estate, 255 Iowa 974, 124 N.W. 2d 154 (1963). This is an old rule which is eminently sensible. A person who is traveling overseas, for example, and rents his home during his absence, while intending to return, should not be denied the benefits of the homestead exemption from a possible levy in the event of his death, although it also makes perfectly good sense not to permit him to claim the homestead exemption from property taxes while he is using the property to produce income. We see no reason to change this long-standing rule.

We therefore find that the principal issue in this case, whether Estella's home was her homestead at the time of her death, is answered in the affirmative. Since that is the case, the property passed with the homestead exemption to Estella's sole heir, Ronald Greenwood, and to his sole beneficiary, Donna Greenwood.

For all of these reasons, then, we conclude that the arguments presented by the appellants are without merit, and we affirm the ruling of the district court.

AFFIRMED.