

FILED

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CLERK OF THE APPELLATE
COURT, 4TH DISTRICT

NO. 4-09-0376

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: the Estate of LEROY M. FANCHER,)	Appeal from
Deceased,)	Circuit Court of
GLADYS FANCHER,)	Champaign County
Petitioner Appellant,)	No. 07P272
v.)	
DEBRA A. HORNSBY,)	Honorable
Respondent-Appellee.)	Holly F. Clemons,
)	Judge Presiding.

ORDER

In this interlocutory appeal, petitioner, Gladys Fancher, appeals the trial court's April 2009 ruling in which the court denied her motion for modification of the court's February 2009 order. In February 2009, the court had allowed respondent Debra A. Hornsby's motion to disallow homestead award in part and denied it in part. The court allowed the motion in part after finding Mrs. Fancher could not assert a homestead exemption in her own right pursuant to section 12-901 of the Code of Civil Procedure (Code) (735 ILCS 5/12-901 (West 2006)). The court denied the motion in part but found Mrs. Fancher was entitled to a homestead exemption under section 12-902. We reverse.

I. BACKGROUND

On February 16, 2005, Mrs. Fancher and decedent, Leroy M. Fancher married, decedent died on September 6, 2007. On September 11, 2007, Ms. Hornsby, decedent's daughter, filed a petition for probate of will and letters testamentary.

On September 18, 2007, decedent's will, dated September 27, 1999, was admitted to probate and letters testamentary were issued to Ms. Hornsby appointing her as independent executrix. Article III of decedent's will directs "that any real estate that I own at the time of my death be sold by my executor and that the net proceeds of such sale, and all of my residuary estate, be divided equally among my [c]hildren." Decedent's primary asset at his death was a residence at 602 West Columbia Avenue in Champaign, Illinois (residence). The last recorded deed, dated June 27, 1980, shows the residence was titled in joint tenancy to decedent and his predeceased first wife, Emma Fancher.

On October 5, 2007, Mrs. Fancher filed a renunciation of will.

On August 14, 2008, the trial court entered an order in which it granted possession of the residence to the executrix free and clear from Mrs. Fancher's claims related to the homestead rights pursuant to section 12-901 of the Code, and free and clear of the claim stated in a notice of lis pendens on January 23, 2008. The court's order also provided that the executrix shall use all reasonable means necessary to sell the residence. Finally, the court ordered that a determination of a homestead amount, if any, due to Mrs. Fancher pursuant to her homestead rights under section 12-901 of Code shall be reserved for determination at a later date pursuant to section 20-6(d) of the Probate Act of 1975 (Probate Act) (755 ILCS 5/20-6(d) (West 2006)).

On August 27, 2008, the executrix sold the residence for \$60,000. After the mortgage and costs associated with the sale were paid, the estate received \$31,025.92.

On November 21, 2008, the executrix filed a motion to disallow homestead award. The motion alleged Mrs. Fancher (1) was not entitled to a homestead exemption under section 12-901 of the Code because at no time had she "owned or rightly possessed by lease or otherwise" the residence, (2) was not entitled to a homestead exemption under section 12-902 of the Code because she could not assert that right against the legatees under the will because she became a cotenant with them by virtue of her renunciation of the decedent's will, and (3) abandoned her homestead since she had ceased to occupy the residence prior to August 5, 2008, when the trial court granted the executrix possession of the residence.

Also on November 21, 2008, the executrix filed a motion to offset spousal award. The motion asked that the estate be granted a total offset against any claims Mrs. Fancher had in relation to a spousal award pursuant to section 15-1 of the Probate Act (755 ILCS 5/15-1 (West 2006)) because of (1) lost rental income, (2) goods and chattels Mrs. Fancher removed from the residence, (3) damage to the home caused by Mrs. Fancher's failure to take proper care of the residence, and (4) Mrs. Fancher's malfeasance that resulted in the estate incurring additional legal fees. In a motion for reimbursement for dissipation or conversion of estate assets filed that same day, the

executrix claimed Mrs. Fancher's acts, alleged in the motion to offset spousal award, caused the estate to be damaged in excess of \$100,000. The motion asked the court to order the estate be reimbursed for costs and lost asset value due to Mrs. Fancher's malfeasance.

On November 26, 2008; December 22, 2008; and January 21, 2009, evidence was presented at a trial. Mrs. Fancher testified she continued to live in the residence after decedent's death until August 5, 2008, when the executrix evicted her. However, between January 2008 and April 2008, Mrs. Fancher had moved in with her sister because the power at the residence had been shut off. When asked if decedent ever executed a deed that gave her ownership of the residence, Mrs. Fancher stated, "I have no idea." Mrs. Fancher acknowledged she never entered into a lease for the residence with the executrix or the estate.

Ms. Hornsby testified she did not foresee any money being left to make any payment to the beneficiaries of the estate after paying decedent's creditors.

A docket entry dated February 25, 2009, indicates the trial court allowed the motion to disallow homestead award in part and denied it in part. The court allowed the motion insofar as it found Mrs. Fancher was not entitled to an exemption in her own right pursuant to section 12-901. The court denied the motion in part, finding Mrs. Fancher could claim decedent's exemption pursuant to section 12-902. The docket entry reflects that the court found "no just reason to delay enforcement or

appeal." See 210 Ill. 2d R. 304(a).

On March 26, 2009, Mrs. Fancher filed a (1) complaint against the executrix for mismanagement; (2) motion for finding; (3) motion to strike the motion for reimbursement; (4) motion to strike the motion to offset spousal award; and (5) a motion for modification of the trial court's February 25, 2009, ruling.

The motion for finding stated the following:

"As directed by the [trial] court, the widow, Gladys Fancher, moves the court for a finding that the homestead exemption she is claiming pursuant to [s]ection 12-902 of the Code of Civil Procedure is not being asserted 'between joint tenants or tenants in common'. The testimony of the [executrix] at the beginning of the trial on November 26, 2008, when she was called as an adverse witness, establishes that the homestead exemptions in this case are being claimed only against creditors. Indeed, after reviewing the assets and liabilities of the estate at that time, the [executrix] admitted that creditors were the only people affected by the allowance or disallowance of the homestead exemptions. This is because, no matter whether the homestead exemptions are allowed or disallowed, the cotenants will not get anything

because, in either case, the estate liabilities far exceed the estate assets. In other words, the question is whether the creditors get it all, and the widow gets nothing, or whether the widow gets the homestead exemption, and the creditors get the rest. Accordingly, it was conceded that no homestead exemptions in this case were being claimed against a co-tenant."

In her motion for modification of judgment, Mrs. Fancher argued that as a result of her renouncing the will "she had title to an undivided 1/3 interest in the premises." Therefore, she was entitled to a homestead exemption in her own right pursuant to section 12-901 of the Code. Moreover, Mrs. Fancher contended the homestead exemption was not being applied against a cotenant. Finally, Mrs. Fancher argued cotenancy was not an issue with respect to decedent's homestead exemption to which Mrs. Fancher was entitled pursuant to section 12-902 because decedent was the sole owner of the property when he died.

In an April 30, 2009, docket entry, the trial court denied Mrs. Fancher's motion for modification of judgment. The court entered a Rule 304(a) finding, stating that it found "that there is no just reason for delaying either enforcement or appeal of its rulings on [Mrs. Fancher's] claims to homestead exemptions under [s]ections 12-901 and 12-902 of the [Code]." The court also (1) reserved ruling on the motion for finding, (2) granted

the motion to strike the motion to offset spousal award, (3) denied the motion to strike the motion for reimbursement, and (4) heard evidence with respect to the motion for reimbursement. The matter was continued until June 5, 2009.

On May 7, 2009, Ms. Hornsby filed another motion to set and offset spousal award. On May 18, 2009, Mrs. Fancher responded.

Also on May 18, 2009, Mrs. Fancher filed her notice of appeal. The notice of appeal states that Mrs. Fancher was appealing from the trial court's February 25, 2009, ruling "to the extent that it failed to award her the homestead exemptions she requested in her residence, and an appeal is also taken from the April 30, 2009[,] denial of the [m]otion for [m]odification of that [j]udgment." Mrs. Fancher requested this court to grant her requests for a \$15,000 homestead exemption in her own right pursuant to section 12-901 of the Code and a \$15,000 homestead exemption as decedent's widow pursuant to section 12-902 of the Code.

A June 5, 2009, docket entry indicates the "[c]ause [was] called for continued [b]ench [t]rial." The trial court heard arguments and continued the hearing for ruling at a later date.

II. ANALYSIS

On appeal, Mrs. Fancher claims that "courts are unanimous in holding that, in the present situation, a widow can claim homestead exemption under [s]ection 12-901 of the [Code], in

addition to the survivorship homestead exemption under [s]ection 12-902." Because the resolution of this issue requires this court to interpret sections 12-901 and 12-902 of the Code and is a question of law, our review is de novo. Knolls Condominium Ass'n v. Harms, 202 Ill. 2d 450, 454, 781 N.E.2d 261, 264 (2002).

Initially, of note, Mrs. Fancher has included in the appendix to her brief part of a transcript of the trial court's February 25, 2009, oral ruling on Ms. Hornsby's motion to disallow homestead exemptions. Similarly, Ms. Hornsby has included in the appendix to her brief a transcript of the trial court's July 21, 2009, ruling on Ms. Hornsby's motion for reimbursement. Neither transcript is included in the record and neither party has moved to supplement the record with the transcripts contained in the appendices. Since these are transcripts of hearings before the trial court, we will treat these transcripts in the appendices as motions to supplement the record. We grant the motion with respect to Mrs. Fancher. However, the transcript Ms. Hornsby included in the appendix to her brief is from a hearing that took place after the notice of appeal was filed so we will not consider it.

"The purpose of the homestead exemption is to provide the debtor with the necessary shelter or the means to acquire shelter required for his welfare during difficult economic circumstances ***." Bank of Illmo v. Simmons, 142 Ill. App. 3d 741, 745, 492 N.E.2d 207, 211 (1986). Previously, Illinois's homestead statute provided a single homestead exemption to

"[e]very householder having a family." Ill. Rev. Stat. 1981, ch. 52, par. 1. A 1982 amendment replaced the term "householder" with "individual," and currently states the following:

"Every individual is entitled to an estate of homestead to the extent in value of \$15,000 of his or her interest in a farm or lot of land and buildings thereon, a condominium, or personal property, owned or rightly possessed by lease or otherwise and occupied by him or her as a residence or in a cooperative that owns property that the individual uses as a residence. That homestead and all right in and title to that homestead is exempt from attachment, judgment, levy, or judgment sale for the payment of his or her debts or other purposes and from the laws of conveyance, descent, and legacy, except as provided in this Code or in [s]ection 20-6 of the [Probate Act]. This [s]ection is not applicable between joint tenants or tenants in common but it is applicable as to any creditors of those persons." (Emphases added.) 735 ILCS 5/12-901 (West 2006).

Section 12-902 provides the "exemption shall continue after the death of such individual, for the benefit of the spouse surviving, so long as he or she continues to occupy such home-

stead." 735 ILCS 5/12-902 (West 2006). The trial court ruled Mrs. Fancher was entitled to only her husband's homestead exemption under section 12-902. However, Mrs. Fancher was entitled to her own as well.

There is no dispute that joint tenants can each claim a homestead exemption in their own right pursuant to section 12-901. See First National Bank of Moline v. Mohr, 162 Ill. App. 3d 584, 515 N.E.2d 1356 (1987) (where the appellate court allowed both husband and wife, who owned their home in joint tenancy, to claim a homestead exemption of \$7,500 each for a combined total of \$15,000). Here, the issue is whether Mrs. Fancher can claim her own exemption even though her name is not on the title.

The Seventh Circuit recognizes that Mrs. Fancher would be entitled to the two exemptions. In In re Belcher, 551 F.3d 688 (2008), the Seventh Circuit Court of Appeals recognizes two situations which create an interest in property sufficient to be recognized by homestead: (1) divorce and (2) spouse's death by intestacy or renunciation of the will.

Neither interest was at issue or existed at the time of the bankruptcy in Belcher.

"Under Illinois' divorce laws, a nontitled spouse has a potential equitable interest in the marital home upon divorce despite not being listed on the title. See 750 [ILCS] 5/503(b)(1) [(West Supp. 2005)]; In re Marriage of Marriott, 264 Ill. App. 3d 23, [31-

32,] 636 N.E.2d 1141, 1147 (1994) (finding that title is one of several factors to be considered in determining a nontitled spouse's ownership interest in family home during divorce proceedings). The Illinois Probate Code also allows a surviving spouse to claim an equitable interest in the family home when the titled spouse dies regardless of whether the property was ever titled in the surviving spouse's name. See 755 [ILCS] 5/2-1 [(West Supp. 2005)] (intestate share of surviving spouse); [755 ILCS] 5/2-8 [(West Supp. 2005)] (statutory share of surviving spouse if will renounced); [In re] Estate of Webster, 214 Ill. App. 3d 1014, [1020-21,] 574 N.E.2d 245, 251 (1991). Because Keith and Katherine Belcher were still married and alive at the time they filed the petition for bankruptcy, neither of the situations required to trigger Keith's equitable interest under these statutes was present." Belcher, 551 F.3d at 691.

The case sub judice differs from Belcher in that one of the situations required to trigger Mrs. Fancher's equitable interest is present here. Even though Mrs. Fancher's name was not on the title, she rightly possessed the home and had other

evidence of title: her marital interest and the renunciation and her one third interest.

Moreover, in In re Rhoades, 176 B.R. 167, 167-68 (Bankr. C.D. Ill. 1994), the widow claimed a homestead exemption in her own right pursuant to section 12-901. Rhoades, 176 B.R. at 167-68. Additionally, the widow claimed her husband's exemption under section 12-902. Rhoades, 176 B.R. at 167-68. The trustee objected to the widow claiming what was, in effect, a double exemption, on the grounds that only one homestead exemption was available to any person. Rhoades, 176 B.R. at 168. In addition to her exemption under section 12-901, the court allowed the widow to claim her deceased husband's homestead exemption pursuant to section 12-902. Rhoades, 176 B.R. at 169.

While Rhoades did not discuss title directly, it did say the widow paid \$5,500 for the property and had lived at her "personal residence" for 35 years. Rhoades, 176 B.R. at 167. Thus, her ownership in the property and her right to an exemption under section 12-901 were apparently never in question. This may differentiate Rhoades from the case sub judice. However, section 12-901 grants a homestead not only to a person who owns the property, but also to one who "rightly possesses by lease or otherwise." 735 ILCS 5/12-901 (West 2006). As stated, Mrs. Fancher rightly possessed by lease or otherwise.

Finally, the court in In re Collins stated the following, indicating that one person may claim two exemptions:

"There is nothing in the statutory scheme as

it is presently constituted to indicate that the survivor's interest under [s]ection 12-902 is intended to terminate if the survivor subsequently qualifies for an exemption under [s]ection 12-901. The sections appear as independent, stand-alone provisions and must be applied as such." In re Collins, No. 05-83021, slip op. at ___, 2005 WL 3506356 (Bankr. C.D. Ill. 2005).

Because section 12-901 grants a homestead exemption to a person who owns or rightly possesses by lease or otherwise (see 735 ILCS 5/12-901 (West 2006)), Mrs. Fancher was therefore entitled to her own homestead exemption under section 12-901 in addition to her spouse's under section 12-902.

III. CONCLUSION

For the reasons stated, we reverse the trial court's judgment.

Reversed.

MYERSCOUGH, P.J., with TURNER, J., concurring.

MCCULLOUGH, J., dissenting.

JUSTICE McCULLOUGH, dissenting:

I respectfully dissent.

Sections 12-901 and 12-902 of the Code do not provide for granting more than one homestead exemption. Specifically, section 12-901 says nothing about the granting of more than one exemption and, likewise, section 12-902 says nothing about more than one homestead exemption.

As stated by the majority, section 12-902 simply provides "[the] exemption shall continue after the death of such individual for the benefit of the spouse surviving, so long as he or she continues to occupy such homestead." 735 ILCS 5/12-902 (West 2006).

The majority cites Rhoades and Collins, cases decided by the Federal District Court in Illinois. I submit that these bankruptcy cases are not authority, or precedent, as to the Illinois law on homestead exemptions.

Likewise, Belcher, a federal case, says nothing to support two homestead exemptions.

The trial court's order should be affirmed.