

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2482
Summary Calendar

IN THE MATTER OF: ALAN BURTON CALIVA, Debtor.

ALAN BURTON CALIVA,

Appellant,

versus

NATIONSBANK OF TEXAS, N.A.,
Administrator With Will Annexed
of the Estate of Vera B. Williams,
Deceased, Successor in Interest
to Ben B. Floyd, Trustee,

Appellee.

Appeal from the United States District Court
For the Southern District of Texas
(CA-H-91-640)

(April 22, 1993)

Before POLITZ, Chief Judge, HIGGINBOTHAM and WIENER, Circuit
Judges.

PER CURIAM:*

Alan Burton Caliva appeals the district court's order

*Local Rule 47.5 provides: "The publication of opinions that
have no precedential value and merely decide particular cases on
the basis of well-settled principles of law imposes needless
expense on the public and burdens on the legal profession."
Pursuant to that Rule, the Court has determined that this opinion
should not be published.

affirming the bankruptcy court's denial of his motion to amend his schedule of exempt property to add an interest in a 25-acre tract of land. Finding no error, we affirm.

Caliva filed a Chapter 11 bankruptcy petition on December 6, 1985. He did not include in his original schedule of exempt property the interest in a 25-acre tract bequeathed him by Frank and Vera Williams who had died pre-petition. The property was located near a growing commercial development and hence was potentially valuable. In his Disclosure Statement and Plan of Arrangement, filed in December 1986, Caliva indicated his intent to sell the property and to use the proceeds to pay his creditors. He repeated this representation at a hearing about his contested request for the use of certain cash collateral. On the basis of this representation, the bankruptcy court approved the request and entered an order approving the use of substantial funds.¹

On April 16, 1990, however, Caliva reversed his position. He moved to amend his schedule of exempt property to include his interest in the 25-acre tract, which, for the first time, he claimed as a business homestead. After a hearing, the bankruptcy court denied the motion. Caliva appealed to the district court. While his appeal was pending, Caliva reached an agreement with the bankruptcy trustee as to the sale of the property on the condition

¹ Caliva forged seven additional orders to withdraw another \$80,000 in cash collateral. He was convicted of fraudulently misusing the assets of the bankruptcy estate in violation of 18 U.S.C. § 152 and sentenced to five years imprisonment. He also was removed as debtor-in-possession and a trustee was appointed in his stead. Caliva was released on parole in 1990.

that his homestead interests, if any, would attach to the sale proceeds. The district court thereafter affirmed the bankruptcy court's decision and adopted its opinion. This appeal followed.

At the threshold, Caliva raises a jurisdictional challenge. He maintains that the bankruptcy court lacked jurisdiction over the 25-acre tract because probate of the Williams' wills was still proceeding in Texas state court. We are not persuaded. Caliva's interest in the 25-acre tract vested upon the death of the Williamses.² He thus held an interest in the tract at the time the bankruptcy petition was filed. The tract thereby became property of the bankruptcy estate under 11 U.S.C. § 541(a)(1)³ and was subject to the Bankruptcy Code, which preempts state law by operation of the Supremacy Clause.⁴ The bankruptcy court had jurisdiction.

We turn now to the substance of the appeal. Caliva claims error in the district court's affirmance of the bankruptcy court's refusal to allow him to amend his exemption schedule. His contention has no merit. A court may deny leave to amend if

² Tex. Prob. Code Ann. § 37; **Kelley v. Marlin**, 714 S.W.2d 303 (Tex. 1986).

³ 4 Collier on Bankruptcy ¶ 541.18 at 541-99 *et seq.* (15th ed. 1993); see In re Elliott, 81 B.R. 460 (Bankr. N.D.Ill. 1987).

⁴ **In re Goerg**, 844 F.2d 1562 (11th Cir. 1988), cert. denied, 488 U.S. 1034 (1989).

amendment would prejudice the creditors.⁵ This is exactly what would happen here. By representing that he intended to sell his interest in the 25 acres to pay his creditors, Caliva convinced the bankruptcy court to allow him to divert to his own use substantial cash collateral securing various debts. But for that representation, the creditors would have prevailed in their objections. Now Caliva seeks to strip the creditors of the proceeds of the asset on which the court relied in releasing the cash collateral. Denial of leave to amend decidedly was not an abuse of the bankruptcy court's discretion.⁶

Further, after review of the evidence we conclude that the bankruptcy court's finding that Caliva failed to establish the elements of a homestead claim was not clearly erroneous.⁷ We will not entertain Caliva's "questions" about the impartiality of the bankruptcy judge and district judge because they were not raised in a timely manner, although the purported grounds on which he claims bias were known to him since 1988.⁸

AFFIRMED.

⁵ **In re Williamson**, 804 F.2d 1355 (5th Cir. 1986).

⁶ Cf. **Williamson**.

⁷ **In re Hill**, 972 F.2d 116 (5th Cir. 1992) (bankruptcy court's factual findings are reviewed for clear error only).

⁸ **United States v. York**, 888 F.2d 1050 (5th Cir. 1989).