

UNITED STATES COURT OF APPEALS  
For the Fifth Circuit

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No. 94-40145

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IN THE MATTER OF: WILLIE KATHERINE McCAIN,

Debtor.

WILLIE KATHERINE McCAIN,

Appellant,

versus

FIRST NATIONAL BANK -  
LINDEN, TEXAS,

Appellee.

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Appeal from the United States District Court  
For the Eastern District of Texas

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(2:93 CV 160)

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(January 13, 1995)

Before JONES and DeMOSS, Circuit Judges, and SHAW\*, District  
Judge.

PER CURIAM:\*\*

This is an appeal from a contested core proceeding in the

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\*District Judge of the Western District of Louisiana, sitting  
by designation.

\*\*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should not be published.

Chapter 7 bankruptcy of debtor-appellant Willie Katherine McCain ("McCain"). McCain claimed a rural homestead interest as to three tracts of land in Cass County, Texas. Creditor-appellee First National Bank of Linden ("the bank") held a \$138,000 pre-petition judgment against McCain on a business debt, and it claimed a judgment lien. The bank objected to McCain's homestead claim, and the case was tried on October 20, 1992 in the United States Bankruptcy Court for the Eastern District of Texas. In an order entered on July 28, 1993, the bankruptcy court ruled that McCain had demonstrated an intent to claim for homestead use only a small portion of the homestead claim, the 5.056-acre tract where she and her non-filing spouse had built their home.

McCain appealed to the district court for the Eastern District of Texas. On January 5, 1994, the district court entered an order affirming the decision of the bankruptcy court that McCain may claim as her homestead only the 5.056-acre tract and not the remainder of the land she had originally attempted to claim as homestead. McCain brought this appeal.

#### DISCUSSION

McCain and her husband, Milton McCain, own 100 percent of the 5.056-acre tract where the family home is located. The other land claimed by McCain as homestead -- consisting of 76.68 acres in the "Briarwood Acres" tract and 23.32 acres in the "Phase II" tract -- is owned in cotenancy, two-thirds by appellant McCain as separate property and one-third by James Stewart, McCain's uncle.

Originally, the land at issue totalled 150 acres and was owned

by Stewart and John Thompson, III, McCain's brother. In the early 1970s, approximately 120 acres of the land were platted, subdivided and provided with road access. Stewart and Thompson named the 120-acre tract "Briarwood Acres" and began to sell residential lots from it. The remaining 28.38-acre tract was left undisturbed and is referenced on the plat as "Briarwood Acres - Phase II." In 1977, McCain purchased her uncle's two-thirds interest in the land. In 1984, McCain and her uncle executed cross-deeds to each other so that each would acquire outright ownership of approximately 5 acres for the purpose of building homes for their families. McCain as a result became the outright owner of the 5.056-acre tract, and on the same day she conveyed a half interest in that tract to her husband. Later in 1984 the McCains completed their house and moved in with their family. From 1980 to 1987, 14 lots were sold from Briarwood Acres. The deeds conveying these lots contained residential deed restrictions and were conveyed by McCain (but not her husband), Stewart, and Stewart's wife. In 1987, the McCains executed a document designating only the 5.056-acre tract as their homestead. In April 1992, appellee First National Bank of Linden obtained a judgment against McCain for \$138,400.13, and abstracted the judgment in the Cass County records in May 1992. On June 15, 1992, McCain, without her husband's joinder, filed for relief under Chapter 7 of the Bankruptcy Code. McCain claimed a rural homestead exemption in 71 acres of property that she did not describe in any way on the exemption schedule she filed. The claim of 71 acres seems to take into account that McCain owns (1) two-thirds of the

unsold lots in Briarwood Acres (totaling approximately 76.68 acres), (2) two-thirds of the remainder of the "Phase II" tract from which her 5.056-acre tract was taken (totaling approximately 23.32 acres); and 100 percent of the 5.056-acre tract.

It is clear under Texas law that a debtor may claim a homestead in property in which she owns an undivided interest. Moore v. Bank of Commerce, 93 B.R. 480, 482 (N.D. Tex. 1988)(citing Cheswick v. Freeman, 282 S.W.2d 315, 316 (Tex. Civ. App.--Waco 1955), rev'd on other grounds, 287 S.W.2d 171)) (Tex. 1956)). However, the status of ownership in which McCain held the separate tracts is an element to be considered in the factual question of her future intent with regard to the different tracts, and in showing a lack of overt acts to change the character of that property from its original identity as a commercial development.

An individual who claims protection under the rural homestead exemption<sup>1</sup> has the initial burden to establish the character of the property as a homestead by showing a combination of both overt acts of homestead usage and the intention on the part of the owner to claim the property as a homestead. Matter of Bradley, 960 F.2d 502, 507 (5th Cir. 1992). After hearing conflicting testimony and arguments on the McCain family's use of the different tracts and the claimed intentions behind the various conveyances and states of ownership, the bankruptcy court found that McCain failed to meet the initial burden of proof on any of the land except the 5.056-

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<sup>1</sup>See TEX. CONST. art. XVI, § 51; TEX. PROP. CODE § 41.002(b); 11 U.S.C. § 522.

acre tract:

"This Court finds that she clearly demonstrated a lack of an intent to convert the remainder of the property to a homestead interest by simply continuing the ownership of the property as she had held it from inception and by making no change in the use of the property other than the fact that she moved in closer proximity upon the completion of her home. These actions convince this Court that there was no intent to claim that property as a rural homestead until such a claim became a useful device to escape the judgment abstracted against her by the Bank."

We must affirm the factual findings of the bankruptcy court unless they are clearly erroneous. In re Niland, 825 F.2d 801, 806 (5th Cir. 1987). According to this deferential standard, we should overturn the bankruptcy court's findings only when, after review of all the evidence, we are left with a firm and definite conviction that the bankruptcy court committed a mistake. Matter of Bradley, 960 F.2d 502, 507 (5th Cir. 1992)(citing United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)). The test for both the district court and the Fifth Circuit "is not whether a different conclusion from the evidence would be appropriate, but whether there is sufficient evidence in the record to prevent clear error in the trial judge's findings." In re Bardwell, 610 F.2d 228, 230 (5th Cir. 1980). In addition, due regard must be given to the bankruptcy court's opportunity to judge the credibility of witnesses. FED. R. BANKR. P. 8013; In re Texas Research, Inc., 862 F.2d 1161, 1163 (5th Cir. 1989). Conclusions of law by the bankruptcy and district courts are reviewed using a de novo standard. In re Killebrew, 888 F.2d 1516, 1519 (5th Cir. 1989).

Whether a debtor has evidenced an intent to establish a

homestead is a question of fact. The bankruptcy court expressly found that the Briarwood Acres land and the Phase II land were not put to homestead use. The bankruptcy court was in the best position to weigh the evidence and testimony and make determinations of credibility. Although McCain did introduce testimony that her family used the land for cutting firewood, hunting, riding horses and other uses, she has not produced evidence leading us to the definite and firm conviction that the bankruptcy court committed a mistake in its findings of fact.

Therefore, for the reasons stated in this opinion, and the reasons stated by the bankruptcy court in its "Opinion" of July 28, 1993, and by the district court in its "Opinion and Order" of January 5, 1994, we are satisfied that the bankruptcy court's findings of fact, as adopted by the district court, are not clearly erroneous, and that the district court's application of the law to these findings was correct. We therefore affirm the district court's decision that McCain may claim as her homestead only the 5.056-acre tract and not the remainder of the land she had originally attempted to claim as homestead.

AFFIRMED.