

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF: )  
 )  
DONALD D. WIEZOREK, ) CASE NO. BK03-42714  
 )  
Debtor(s). ) CH. 7

MEMORANDUM

Hearing was held in Lincoln, Nebraska, on December 3, 2003, on the Chapter 7 Trustee's Objection to Debtor's Claim of Homestead Exemption (Fil. #4), and Resistance by the debtor (Fil. #8). Kenneth Fritzler appeared for the debtor, and John Wolf appeared as the Chapter 7 Trustee. This memorandum contains findings of fact and conclusions of law required by Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(B).

The trustee's objection is sustained.

The Chapter 7 trustee objects to the debtor's claimed homestead exemption under Neb. Rev. Stat. § 40-101 because the debtor is single and has no dependents, and was not married at the time he purchased the residence nor at the time he filed bankruptcy.<sup>1</sup>

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<sup>1</sup>The relevant statutory sections are as follows:

**§ 40-101. Homestead, defined; exempted.**

A homestead not exceeding twelve thousand five hundred dollars in value shall consist of the dwelling house in which the claimant resides, its appurtenances, and the land on which the same is situated, not exceeding one hundred and sixty acres of land, to be selected by the owner, and not in any incorporated city or village, or, at the option of the claimant, a quantity of contiguous land not exceeding two lots within any incorporated city or village, and shall be exempt from judgment liens and from execution or forced sale, except as provided in sections 40-101 to 40-116.

(continued...)

The debtor asserts that he should be considered the head of a household and therefore entitled to the homestead exemption because various relatives or former relatives have temporarily lived with him while he has owned the residence. Neb. Rev. Stat. § 40-115. In particular, his three stepchildren reside with him from time to time, and a nephew recently lived with him for 30 consecutive days. In response, the trustee suggested at the hearing that running a bed and breakfast for family members does not qualify a debtor for a homestead exemption.

The court addressed this issue under similar factual circumstances in the case of Jeffrey Dubsky, Neb. Bkr. 02-216, Case No. BK02-41592 (Bankr. D. Neb. Sept. 23, 2002). The

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<sup>1</sup>(...continued)

**§ 40-102. Homestead; selection, property available for.**

If the claimant be married, the homestead may be selected from the separate property of the husband, or with the consent of the wife from her separate property. When the claimant is not married, but is the head of a family within the meaning of section 40-115, the homestead may be selected from any of his or her property.

**§ 40-115. Head of family, defined.**

The phrase head of a family, as used in sections 40-101 to 40-116, includes within its meanings every person who has residing on the premises with him or her and under his or her care and maintenance:

(1) His or her minor child or the minor child of his or her deceased wife or husband;

(2) A minor brother or sister or the minor child of a deceased brother or sister;

(3) A father, mother, grandfather, or grandmother;

(4) The father, mother, grandfather, or grandmother of a deceased husband or wife;

(5) An unmarried sister, brother, or any other of the relatives mentioned in this section who have attained the age of majority and are unable to take care of or support themselves; or

(6) A surviving spouse who resides in property which would have qualified for a homestead exemption if the deceased spouse were still alive and married to the surviving spouse.

conclusions of law reached in that case are equally applicable here, and are reiterated in the context of this case.

The Nebraska Supreme Court has made clear that the purpose of the homestead exemption is "the preservation of the family." Landon v. Pettijohn, 231 Neb. 837, 843, 438 N.W.2d 757, 761 (1989) (citing Bowker v. Collins, 4 Neb. 494 (1876)). Accordingly, "the homestead law should be liberally construed in favor of those for whose benefit it was enacted." Landon, 231 Neb. at 843 (quoting Horn v. Gates, 155 Neb. 667, 671, 53 N.W.2d 84, 86 (1952)).

Most, if not all, of the reported cases regarding the scope of the Nebraska homestead exemption when a debtor is not currently married and lives alone deal with debtors who are divorced or widowed but had lived in the residence at one time with their spouses and/or children. The case law is clear that in those situations, the existence of the homestead continues.

The case of Palmer v. Sawyer, 74 Neb. 108, 103 N.W. 1088 (1905), held that a widower retained homestead rights in the property even though his children had grown up and moved away at the time of the execution sale of the property to satisfy a judgment. The Palmer court observed:

In Galligher [sic] v. Smiley, 28 Neb. 189, Reese, C. J., in rendering the opinion, said:

"In its inception a homestead is a parcel of land on which the family resides, and which is to them a home. It is constituted by the two acts of selection and residence, in compliance with the terms of the law conferring it. When these things exist *bona fide*, the essential elements of the homestead right exist, of which the persons entitled to it cannot be divested by acts or influences beyond their volition."

74 Neb. 108 at 113. Accord U.S. Nat'l Bank v. Simonds, 133 Neb. 42, 44, 274 N.W. 187, 188 (1937) (The rule in Nebraska cases is that when a husband and wife reside on a homestead selected from the husband's separate property, and the wife dies while the husband continues to reside there, the homestead character of the land continues in the husband, although he may have no children or other dependents residing with him.)

The Palmer court also noted that the Nebraska statutes "reserve the homestead right to every person who is the head of

a family as defined in [the statute], whether married or unmarried at the time of acquisition." 74 Neb. at 111. See also Brusha v. Phipps, 86 Neb. 822, 126 N.W. 856, 857 (1910) (widow with no minor children was not entitled to homestead exemption in property purchased after husband's death because she had no one dependent on her and no one ever lived there with her as a member of her family, so she did not qualify as head of household).

In the bankruptcy context, the focus is on the debtor's status as of the petition date. See 11 U.S.C. § 522(b)(2)(A) (a debtor may exempt "any property that is exempt under . . . State or local law that is applicable on the date of the filing of the petition . . . ."); Peoples' State Bank v. Stenzel (In re Stenzel), 301 F.3d 945, 947 (8th Cir. 2002) ("A debtor may exempt from his bankruptcy estate property that is exempt under state law on the date the petition is filed."); In re Murphy, 292 B.R. 403, 408-09 (Bankr. D.N.D. 2003) ("A debtor's exemptions are determined as of the time of the bankruptcy petition filing. . . . Accordingly, courts focus only on the law and facts as they exist on the date of filing the petition.").

Linking a debtor's right to claim a homestead exemption to his or her head-of-household status on the petition date is necessary to give the law substance. If a single debtor with no dependents were able to claim a homestead exemption based on a temporary living arrangement that occurred a number of years prior to filing bankruptcy, the trustee and the creditors would be unable to determine valid claimants without performing discovery. In formulating this statutory scheme to protect and preserve the family, the State of Nebraska focused on marriage as the event triggering the exemption, while acknowledging that the end of the marriage does not result in the loss of the exemption. Marriage is an event of public record, and a debtor's marital or parental status is readily ascertainable. By contrast, the right to a homestead exemption for an unmarried debtor who takes in a relative on a short-term basis well prior to filing bankruptcy is nebulous and difficult to verify.

Therefore, without further guidance from the Nebraska legislature or the Nebraska Supreme Court, I am not inclined to extend the scope of the statute to provide homestead exemptions for non-marital head-of-household situations that were not in existence on the petition date.

The trustee's objection will be sustained by separate order.

DATED: December 4, 2003

BY THE COURT:

/s/ Timothy J. Mahoney  
Chief Judge

Notice given by the Court to:

\*John Wolf  
Kenneth Fritzler  
United States Trustee

Movant (\*) is responsible for giving notice of this order to all other parties not listed above if required by rule or statute.

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ORDER

Hearing was held in Lincoln, Nebraska, on December 3, 2003, on the Chapter 7 Trustee's Objection to Debtor's Claim of Homestead Exemption (Fil. #4), and Resistance by the debtor (Fil. #8). Kenneth Fritzler appeared for the debtor, and John Wolf appeared as the Chapter 7 Trustee.

IT IS ORDERED: For the reasons stated in the Memorandum filed contemporaneously herewith, the Chapter 7 Trustee's Objection to Debtor's Claim of Homestead Exemption (Fil. #4) is sustained.

DATED: December 4, 2003

BY THE COURT:

/s/ Timothy J. Mahoney  
Chief Judge

Notice given by the Court to:

\*John Wolf  
Kenneth Fritzler  
United States Trustee

Movant (\*) is responsible for giving notice of this order to all other parties not listed above if required by rule or statute.