

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
EARL & DORIS ATTEBERRY,)	CASE NO. BK95-80840
)	A
<u>DEBTOR(S)</u>)	
)	CH. 13
)	Filing No. 13, 18
Plaintiff(s))	
vs.)	
)	
)	
<u>Defendant(s)</u>)	

MEMORANDUM

Hearing was held on Objection by Variety Distributors, Inc., to Claim of Exemptions on September 29, 1995. Appearances: Bert Blackwell, Attorney for debtors, Ron Sanchez, Attorney for Variety Distributors, Inc., and Marilyn Abbott, Attorney for trustee. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b) (2) (B).

I. BACKGROUND

Debtors, husband and wife, filed a joint Chapter 13 petition. The debtors claimed exemptions in accordance with the Nebraska exemption laws. Earl Atteberry, husband, used the Homestead exemption afforded to him by Section 40-101 of Nebraska Revised Statutes. NEB. REV. STAT. § 40-101 (Reissue 1993). Doris Atteberry, the wife, was entitled to an exemption of \$2,500 under Section 25-1552 of the Nebraska Statutes. NEB. REV. STAT. § 25-1552 (Reissue 1989). She attempted to apply the total \$2,500 exemption to property that was jointly owned by wife and husband. The property was valued at approximately \$2,700. One of the creditors, Variety Distributors, Inc., has objected to the amount that Ms. Atteberry claimed as exempt.

The creditor claims that because the property is owned in joint tenancy, each debtor owns a one-half interest in the property. Consequently, Ms. Atteberry's interest in the property would only be \$1,350, and the other half would be the husband's. Because he used the Homestead exemption, his interest cannot be exempted and becomes property of the estate, the value of which must be distributed under a Chapter 13 plan.

The debtors, on the other hand, argue that Ms. Atteberry has an undivided interest in the entire property. Therefore, she is entitled to apply the entire \$2,500 exemption that is provided to her under Section 25-1552.

II. DISCUSSION

In Hartmann v. Wolf (In re Hartmann), 19 B.R. 844 (Bankr. D. Neb. 1982), the court addressed the issue of whether a wife in a joint bankruptcy case with her husband could claim the in-lieu-of homestead exemption under 25-1552. Judge Crawford held that a wife was entitled to the in-lieu-of homestead exemption of 25-1552 even though her husband has a real estate homestead consisting of property in which both husband and wife live. Id. at 846.

Here, Ms. Atteberry's husband used the homestead exemption and so, according to Hartmann, Ms. Atteberry was entitled to apply the in-lieu-of exemption of 25-1552.

The issue, therefore, becomes how much of the jointly owned property Ms. Atteberry is allowed to claim as exempt under 25-1552?

The creditor has argued that the case of In re Nachtigal, 82 B.R. 533 (Bankr. D. Neb. 1988) supports its position that Ms. Atteberry's interest in the property is only half of the value of the property. In that case, the court echoed the decision in Hartmann and held that Section 25-1552 may be claimed by whichever spouse is not the "head-of household". Id. at 535. In addition, the court went on to hold that property may be claimed as exempt under this provision only to the extent of \$2,500, and only if the property *is owned by the spouse entitled to the in-lieu-of homestead exemption.* Id. (Emphasis added).

The creditor argues that this language precludes the wife from claiming the entire exemption value of \$2,500. In particular, the creditor argues that as joint tenants, each only owns half of the property. Thus, according to Nachtigal, Ms. Atteberry would only be entitled to claim \$1,350 as exempt because that represents the portion of her property that she owns.

The creditor has also offered a Journal Entry from In re Broberg, Journal Entry, Case No. BK91-41193. (Bankr. D. Neb., November 27, 1991), to support its position. In Broberg, a husband and wife filed a joint chapter 7 bankruptcy. The husband used the head of household exemption under 40-101. The wife

asserted the in-lieu-of exemption under 25-1552. The wife claimed exemptions totalling \$1,885. The trustee objected to these exemptions on the ground that the property claimed as exempt was properly owned by the husband and not available to the wife for exemption purposes.

In particular, the trustee argued that the amount claimed as exempt represented the husband's interest in the vehicle, cash and deposits, and office equipment, and because the husband has already claimed the homestead exemption, the value of his other property interests must be used to determine the amount to be paid unsecured creditors under the plan.

Judge Minahan, relying on the holding in Nachtigal, agreed. Mrs. Broberg was only allowed to exempt her property under the in-lieu-of homestead exemption.

Neither Nachtigal nor Broberg concerned property owned in joint tenancy.

State and not Federal law will determine the nature and extent of the debtor's interest in the property in a proceeding under the Bankruptcy Code. Hackett v. Commercial Banking Corp. (In re Hackett), 23 B.R. 710 (Bankr. E.D. Penn. 1982) (citing Butner v. U.S., 440 U.S. 48, 99 S. Ct. 914, 59 L. Ed. 2d 136 (1979)). The reason for this rule is that property interests are created by and defined by state law.

Consequently, Nebraska law on joint tenancy and property rights will govern the outcome of this case. In the case of Hein v. The W.T. Rawleigh Co., the court addressed the property rights of joint tenants. 167 Neb. 176, 92 N.W.2d 185 (1958). The court, quoting *Corpus Juris Secundum* on joint tenancy, stated:

Each joint tenant is seized of the whole estate; he has an undivided share of the whole estate rather than the whole of an undivided share. Each tenant is said to hold per my et per tout, by the half and by the whole.

Hein, 167 Neb. at 179 (citing 48 C.J.S. *Joint Tenancy* § 6).

III. CONCLUSION

Under Nebraska law, a joint tenant is the owner of an undivided interest in the whole of the property. Neither filing bankruptcy nor claiming an exemption terminates the joint tenancy interest. Therefore, Ms. Atteberry has the right to claim the full in-lieu-of homestead exemption in the amount of \$2,500 in

property in which she has an interest. There is no dispute concerning the fact that she has a joint tenancy interest in all of the property claimed as exempt. Therefore, the objection to the exemption claimed by Ms. Atteberry in the total amount of \$2,500 is denied.

Since the debtors claimed specific assets worth over \$4,000 on their original claim of exemptions, they must amend the claim of exemptions to specifically itemize those pieces of property which Ms. Atteberry now claims as exempt under Section 25-1552. NEB. REV. STAT. § 25-1552 (Reissue 1989). The balance of the property claimed exempt with a value in excess of \$2,500 is deemed to be not exempt and is property of the estate which must be considered in the confirmation process.

Separate journal to be entered.

DATED: November 2, 1995.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies mailed by the Court to:

Bert Blackwell, P.O. Box 426, McCook, Ne 69001
Ron Sanchez, 1120 William Ave., North Platte, NE 69101
Kathleen Laughlin, Trustee
United States Trustee

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

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Plaintiff(s))	
vs.)	<u>JOURNAL ENTRY</u>
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)	
)	DATE: November 2, 1995
<u>Defendant(s)</u>)	HEARING DATE: September
)	29, 1995

Before a United States Bankruptcy Judge for the District of Nebraska regarding Objection by Variety Distributors, Inc., to Claim of Exemptions.

APPEARANCES

Ron Sanchez, Attorney for Variety Distributors, Inc.
Marilyn Abbott, Attorney for trustee

IT IS ORDERED:

Objection to exemptions claimed by Ms. Atteberry is denied.
See memorandum entered this date.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

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