

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
KENNETH & ANN DASHER,) CASE NO. BK01-41109
) Ch. 7
DEBTOR(S).)

MEMORANDUM

Hearing was held on August 20, 2001, on Trustee's Objection to Debtor's Claim of Exemption (Fil. #7) and Resistance by the Debtor (Fil. #10). Joseph Badami appeared for the Chapter 7 Trustee, and Allan Eurek appeared for the Debtors. This memorandum contains findings of fact and conclusions of law required by Fed. R. Bankr. P. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(B).

The Chapter 7 Trustee objects to the debtors' claimed exemption in a 2001 Ford pickup-truck purchased pre-petition and entirely with proceeds of Mr. Dasher's Nebraska school employees' pension fund. The debtors listed the cash distribution from the pension fund on their bankruptcy schedules. They subsequently (*i.e.* after the schedules were prepared but before they were filed, and without consulting their attorney) used those funds to purchase the pickup. The debtors amended their schedules and now claim the pickup as exempt property because it was purchased with money from an otherwise exempt retirement fund.

The Trustee objects to the claimed exemption because the Nebraska statute exempting pension, profit-sharing, and similar plans "payable on account of illness, disability, death, age or length of service" applies only to interests held in such plans or contracts, and does not contemplate protecting personal property purchased with proceeds of such accounts. Neb. Rev. Stat. § 25-1563.01.

The first issue to be addressed is whether the retirement fund proceeds were property of the bankruptcy estate. The Bankruptcy Code excludes a debtor's interest in a pension plan from property of the estate if it meets the requirements of 11 U.S.C. § 541(c)(2). Section 541(c)(2) provides "[a] restriction on the transfer of a beneficial interest of the debtor in a

trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title." The United States Supreme Court has said that a debtor's interest in an ERISA-qualified plan may be excluded from property of the estate under § 541(c)(2). Patterson v. Shumate, 504 U.S. 753 (1992).

There is no evidence before the court as to the terms of the pension plan in which Debtor participated. Because it was a state-sponsored plan for public school employees, it is presumed to meet the requirements of § 541(c)(2). As a result, for purposes of this case, the debtor's interest in the plan and its proceeds would not have been property of the debtor's bankruptcy estate.

Prior to filing the bankruptcy petition, Debtor converted those proceeds into personal property which is property of the estate regardless of the status of the funds with which the property was purchased. The issue to be decided is whether the personal property, here a pickup truck, purchased with otherwise exempt proceeds, retains the exempt status of the proceeds.

Previous decisions by the Bankruptcy Court in Nebraska make clear that a debtor's interest in a pension plan is exempt "to the extent reasonably necessary for the support of the debtor and any dependent of the debtor." Neb. Rev. Stat. § 25-1563.01; In re Reuland, Neb. Bkr. 94:693; In re Brehm, Neb. Bkr. 93:454.

In determining whether such property is reasonably necessary for the support of a debtor and his or her dependents, the court considers:

1. the debtor's present and anticipated living expenses;
2. the debtor present and anticipated income from all sources;
3. the age of the debtor and any dependents;
4. the health of the debtor and any dependents;
5. the debtor's ability to work and earn a living;
6. the debtor's job skills, training, and education;
7. the debtor's other assets, including exempt assets;
8. the liquidity of such other assets;
9. the debtor's ability to save for retirement;
10. special needs of the debtor and any dependents; and
11. the debtor's financial obligations, such as alimony or support payments.

In re Brehm, Neb. Bkr. 93-454 at 457 (citing Matter of Weaver,

98 B.R. 497, 500 (Bankr. D. Neb. 1988)).

Such an analysis is useful and necessary when the property at issue is either the debtor's interest in the fund itself or the cash proceeds of the fund. "It is not difficult for courts to conclude that as long as the funds are held in cash or cash equivalents, the proceeds retain their exempt status." In re Burchard, 214 B.R. 494, 496 (Bankr. D. Neb. 1997) (dealing with proceeds from a personal injury lawsuit).

However, the debtors here have taken the next step of converting the exempt cash proceeds into personal property. They assert that the exemption follows the funds, especially when the money is easily traceable to its exempt source, as here. While no Nebraska court has decided the question under § 25-1563.01, the issue has been discussed in the context of § 25-1563.02, which exempts all proceeds of personal injury or death claims. See In re Burchard, supra.

In Burchard, the debtor used the proceeds of his personal injury claim to purchase a motorcycle and a pickup. The court found that the funds lost their exempt status when they were converted into tangible personal property. This decision was based on four reasons.

First, the statute is silent as to whether the exemption extends to property purchased with exempt proceeds. "The natural inference from silence is that the exemption expires when the exempt funds are used to purchase non-exempt assets." Burchard, 214 B.R. at 496.

Second, the legislature knows how to extend an exemption if it wants to. It did so when it exempted homestead proceeds for six months. See Neb. Rev. Stat. § 40-116. This leads to the conclusion that the lack of such protection in other exemption statutes is purposeful. Burchard, 214 B.R. at 496.

The third and fourth reasons concern the legislature's long-standing and well-known reluctance to expand the statutory exemption scheme. Id.

The rationale of Burchard is applicable to the factual situation in this case. There is no statutory or case support for extending an exemption into not-otherwise-exempt personal property purchased with exempt funds, particularly when the personal property is not reasonably necessary for the support of

the debtor or his dependents. While a reliable vehicle may well be a necessity for the debtors, a brand-new pickup truck is not.

Therefore, under the circumstances presented in this case, the pickup truck purchased pre-petition entirely with proceeds from the debtor's pension plan is not an exempt asset. The Trustee's Objection to Claim of Exemptions (Fil. #7) is sustained.

Separate order to be filed.

DATED: October 16, 2001.

BY THE COURT:

/s/Timothy J. Mahoney

Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

*Joseph Badami, Ch. 7 Trustee
Allan J. Eurek, Atty. for Debtors, 402/477-7525

Copies mailed by the Court to:

United States Trustee

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

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
KENNETH & ANN DASHER,) CASE NO. BK01-41109
) Ch. 7
DEBTOR(S).)

ORDER

IT IS ORDERED the Trustee's Objection to Claim of Exemptions (Fil. #7) is sustained. See Memorandum filed this date.

DATED: October 16, 2001.

BY THE COURT:

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

Copies faxed by the Court to:

*Joseph Badami, Ch. 7 Trustee
Allan J. Eurek, Atty. for Debtors, 402/477-7525

Copies mailed by the Court to:

United States Trustee

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