

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
ROBERT LEE CALLAHAN,	)	CASE NO. BK93-80970
	)	
DEBTOR	)	CH. 13
	)	Filings No. 19 & 29

MEMORANDUM

Hearing was held on November 29, 1993, on the Amended Chapter 13 Plan filed by the Debtor. Appearing on behalf of Debtor was Howard Duncan of Omaha, Nebraska. Kathleen Laughlin appeared as Chapter 13 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)(L).

Background

The Chapter 13 Trustee objected to the confirmation of the Debtor's plan. The plan proposed a zero dollar repayment to unsecured creditors which the Trustee alleges fails the best interests test of 11 U.S.C. § 1325(a)(4). The best interests test would require that unsecured creditors receive no less in a Chapter 13 plan than they would receive in a Chapter 7 liquidation.

The Trustee argues that the Debtor is not entitled to all of the exemptions he has claimed. The Trustee alleges that the Debtor, claiming the homestead exemption (Nebraska Revised Statute 40-101), would not be allowed to claim the "in lieu of" homestead exemption (Nebraska Revised Statute 25-1552). Thus, if the Debtor is not allowed to claim the "in lieu of" exemption, \$8,404.38 would be available for the unsecured creditors. In the alternative, if the Debtor is allowed to claim both exemptions, only \$5,979.37 would be available to the unsecured creditors. In either case, the proposed plan is non-confirmable.

Discussion

Robert Callahan filed a voluntary Chapter 13 petition on June 10, 1993. The Debtor's wife, Caroline Callahan, has not filed bankruptcy.

Under Nebraska law, it is clear that if the Callahans had filed a joint bankruptcy, both the homestead exemption (\$10,000.00), as well as the "in lieu of" homestead exemption (\$2,500.00 in personal property) could have been claimed, for a total exemption of \$12,500.00. In re Coonrod, 135 B.R. 375 (Bankr. D. Neb. 1991). However, the Callahans did not file a joint bankruptcy.

Furthermore, the wording of Nebraska Revised Statute 25-1552 indicates that the "in lieu of" exemption is unavailable to an individual who filed bankruptcy if that individual possesses a homestead.

The Debtor contends that under Section 40-102, when the homestead is selected from property of the wife with her consent, the Debtor may then claim the personal property exemption. However, Debtor's reliance on that section is misplaced. Debtor overlooks the wording of Nebraska Revised Statute 40-102 which states: "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." In this case, the homestead does not appear to be the sole and separate property of the wife as Robert Callahan, the Debtor, is listed as the owner of the residence in Schedule A-Real Property. Thus, the homestead cannot be selected from the separate property of the wife.

In Nebraska, the spouse qualifying as the head of the household/family is entitled to the homestead exemption. The spouse who is not the head of the household/family may claim the "in lieu of" or personal property exemption. In re Nachtigal, 82 B.R. 533, 535 (Bankr. D. Neb. 1988) quoting In re Hartmann, 19 B.R. 844 (Bkrtcy. Neb. 1982).

In Hartmann, the court held that only "heads of families" are entitled to a Nebraska real estate homestead exemption. The Trustee argues that the Debtor is the head of the family because his earnings support him and his wife. The Debtor's statement of financial affairs supports the Trustee's contention, as those documents indicate, that the Debtor's wife has earned no income for the past three years. Thus, the debtor-husband, but not the debtor-wife, was entitled to the real estate homestead exemption. Id. at 845.

#### Conclusion

The homestead exemption must be claimed by the debtor-husband. Since the homestead exemption and personal property

exemptions are mutually exclusive when only one party files in bankruptcy, the debtor-husband cannot claim the "in lieu of" exemption. The Trustee's objection is, therefore, justified and the plan should not be confirmed as proposed.

Separate journal entry to be entered.

DATED: February 9, 1994

BY THE COURT:

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

CC: Movant, Debtor(s) Atty. and all parties appearing at hearing  
[ ] Chapter 13 Trustee [ ] Chapter 12 Trustee [ ] U.S.Trustee

Movant is responsible for giving notice of this journal entry to any parties in interest not listed above.

