

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
JEFFREY J. DUBSKY,) CASE NO. BK02-41592
)
Debtor(s).) CH. 7

MEMORANDUM

Hearing was held in Lincoln, Nebraska, on September 4, 2002, on the Chapter 7 Trustee's Objection to Debtor's Claim of Exemptions (Fil. #5), and Objection by the debtor (Fil. #8). James Birkel appeared for the debtor, and Joseph Badami appeared as the Chapter 7 Trustee. 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 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 had no dependents living with him on the petition date.

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 and been supported by him while he has owned the residence. Neb. Rev. Stat. § 40-115. In particular, his unmarried, unemployed adult brother resided with him for approximately two months in 1999. The debtor's former spouse and her minor daughter resided with him for three months in 2000 while the former spouse was unemployed. There is no evidence, however, that the parties lived in the residence during their marriage.

The debtor also suggests that his parents should be considered when making the homestead determination because he lives next door to them and cares for them on a daily basis. In order to claim a homestead interest in property, the debtor must have an interest in the real estate. He has no legal or equitable interest in his parents' home, and they do not reside on his property with him, so while he provides care and support for them, the living arrangements would not qualify debtor as

head of a household under § 40-115.

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), cited by the debtor for the proposition that once a property becomes a homestead, it retains that characterization until the property is sold or abandoned, 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), ___ F.3d ___, 2002 U.S. App. Lexis 17926 at *3 (8th Cir. Aug. 30, 2002) ("A debtor may exempt from his bankruptcy estate property that is exempt under state law on the date the petition is filed.")

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 an adult sibling or other 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.

Separate order will be entered.

DATED: September 23, 2002

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

Notice given by the Court to:

*Joseph Badami
James Birkel
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 September 4, 2002, on the Chapter 7 Trustee's Objection to Debtor's Claim of Exemptions (Fil. #5), and Objection by the debtor (Fil. #8). James Birkel appeared for the debtor, and Joseph Badami appeared as the Chapter 7 Trustee.

IT IS ORDERED: 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 Chapter 7 Trustee's Objection to Debtor's Claim of Exemptions (Fil. #5) is sustained. See Memorandum filed this date.

DATED: September 23, 2002

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

Notice given by the Court to:

*Joseph Badami
James Birkel
United States Trustee

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