United States Bankruptcy Court
Middle District of Florida
Tampa Division

In re:

Alfred Thomas Rasmussen, Case No. **8:05-bk-20277-MGW**

Debtor. Chapter 7

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AMICUS BRIEF IN OPPOSITION TO OBJECTION TO EXEMPTIONS

A review of the Bankruptcy Abuse Prevention and Consumer Protection Act (hereinafter BAPCPA) fails to give any support either the Trustee's theory that the allowed exemption provided in §522(p)(1) does not stack in a joint case; nor that appreciation in the homestead property occurring after purchase counts towards limiting such exemption.

I. Stacking of §522(p)(1) exemptions

A. Theory of Joint Case

Joint administration of a bankruptcy case is a procedural tool permitting use of a single docket for administrative matters, including the listing of filed claims, the combining of notices to creditors of the different estates, and the joint handling of other ministerial matters that may aid in expediting the cases. Advisory Notes, Bankruptcy Rule 1015. In re Reider, 31 F.3d 1102, 1109 (11th Cir. 1994). Used as a matter of convenience and as a cost saving device, it does not create substantive rights. Unsecured Creditors Committee v. Leavitt Structural Tubing Co., 55 B.R. 710, 712 (N.D.Ill., 1985), Cited Reider 31 F.3d at 1109.

In not changing substantive rights, the joint administration of a bankruptcy case with a husband and wife cannot reduce the exemptions to which they would otherwise be entitled. This

is further supported by §522(m) providing that exemptions shall apply separately with respect to each debtor in a joint case. While this section was amended in 1984 to prevent one joint debtor from choosing federal exemptions while the other chose state exemptions; both debtors are still permitted to assert an exemption against the same item of property, effectively doubling the exemptable amount in that item. 2 William L. Norton, Jr., Norton Bankruptcy Law and Practice 2nd §46:4 (2005) citing John T. Mather Memorial Hosp. of Port Jefferson, Inc. v. Pearl, 723 F.2d 193 (2nd Cir. 1983); Augustine v. U.S., 675 F.2d 582 (3rd Cir. 1982).

If the Debtors had filed separate individual cases, each would be entitled to exempt their ½ interest in up to $250,000 total value in a homestead. This would also be true if the property was owned by non-married individuals who all were entitled to claim the property as homestead. There is no basis to penalize the Debtors for filing a joint case, or even less to discourage marriage by disallowing homestead exemptions for married couples when an unmarried couple in similar circumstances would be entitled to the exemption.

II. Appreciation in value not subject to §522(p) limitations

The facts in this case show a rollover of $35,331.75 equity in a prior Florida homestead toward the $37,125.70 down payment on the current homestead. Only $1,793.95 in new money was put into the homestead purchased June 7, 2002. All of the remaining equity in the property came from appreciation of the property itself, except for minimal equity from the regular mortgage payments.

§522(p) provides that a debtor 'may not exempt any amount of *interest* that was *acquired* by the debtor during the 1215-day period preceding the date of the filing of the petition that

exceeds in the aggregate $125,000 in value' in the homestead (emphasis added). The Oxford English Dictionary defines interest as '[t]he fact or relation of being legally concerned; legal concern *in* a thing; esp. right or title to property, or to some of the uses or benefits pertaining to property (emphasis supplied). 7 J.A. Simpson and E.S.C. Weiner, Oxford English Dictionary 1099 (2nd Ed.) reprinted in The Compact Oxford English Dictionary 864 (1992). Blacks Law Dictionary defines interest as '[t]he most general term that can be employed to denote a right, claim, or title, or legal share in something. Both definitions look to the rights of ownership rather than the monetary value of such rights. Appreciation in value does not constitute an interest acquired within the meaning of §522(p).

In enacting the limitations on homestead, Congress was concerned with Debtors moving to a state with a large exemption in order to obtain exemptions that they were not entitled to in the prior state. As quoted in In re Kaplan, 331 B.R. 483, 488 (Bankr. S.D. Fla. 2005), the intent of the statute was to close the " 'millionaire's mansion' loophole in the current bankruptcy code that permits corporate criminals to shield their multi-million dollar homesteads"); *id.* at S2415-02 (statement of Sen. Carper that "under current law, a wealthy individual in a State such as Florida ... can go out ... and invest that money in ... a huge house file for bankruptcy, and basically protect all of their assets.... With the legislation we have before us, someone has to figure out that 2 1/2 years ahead of time people are going to want to file for bankruptcy and be smart enough to put the money into a home ...."). Appreciation in a homestead was not the target of the legislation, rather transferring nonexempt property to exempt property was the focus of the statute.

Further support is found in In re Wayrynen, 332 B.R. 479 (Bankr. S.D. Fla. 2005).

The gravamen of § 522(p)(1) is to limit the ability of individuals desiring to take advantage of the lenient exemption provisions of "debtor-friendly" states by relocating to such states. h.r.

rep. no. 190-31, pt. 1, at 102 (2005). To the contrary, the "safe harbor" language of § 522(p)(2)(B) would appear to have been intended to afford protection to individuals like the Debtor who, rather than seeking to take advantage of Florida's exemption provisions to shelter illicitly- or improperly-obtained funds, simply have benefitted (sic) as a result of their ownership of Florida real property and the general appreciation of property values attributable to previous intra-state transactions.

Id. at 486.

The only case directly on this point rejects the Trustee's argument that appreciation is subject to §522(p) limitations. In In re Blair, 334 B.R. 374 (Bankr. N.D. Tex. 2005) Judge Hale ruled that any appreciation caused by mortgage payments or appreciation in property was not an interest in property acquired within 1215 days for purposes of §522(p). The court noted that one does not 'acquire' equity in a home, rather one acquires title to a home. Id. at 376. This is the position taken by commentators on the new act, and is consistent with the other provisions of the act. Id. at 377.

CONCLUSION

The Trustees argument is contrary both to the legislative history and with the weight of case law decisions to date. There is no policy argument to jeopardize homesteads of individuals who have lived in the state for years and who, through no fault of their own, are subject to appreciating real estate values. Further, there is no basis to penalize joint debtors when if they had filed individual cases, each would be able to exempt their ½ interest in $250,000 equity in a homestead. In the absence of a cognizable legal or policy argument, the trustee's objection must fail.

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