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signed 5-19-99

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF KANSAS**

**In re:**

**BRIAN MALLORY BAUER,**

**DEBTOR.**

**CASE NO. 96-41743-7  
CHAPTER 7**

**ORDER SUSTAINING OBJECTIONS TO HOMESTEAD EXEMPTION**

This matter is before the Court on objections to the debtor's claimed homestead exemption. Trustee Darcy D. Williamson and creditor Union State Bank filed the objections. The debtor appears by counsel Robert L. Baer. Ms. Williamson appears as counsel for the trustee. Union State Bank appears by counsel Leon B. Graves. The Court has reviewed the relevant pleadings and is now ready to rule.

**FACTS**

In July 1995, a divorce decree was entered that ended the debtor's marriage to Judith A. Bauer. The decree incorporated a separation and property settlement agreement between the couple. Mrs. Bauer was awarded the couple's house in or near Clay Center, Kansas, which was also designated as the primary residence for their four minor children. If she decided to sell the house at any time before May 2015, the debtor was entitled to receive a share of the proceeds pursuant to a formula set out in the agreement, but otherwise, he would get nothing from the house. Mrs. Bauer was given essentially unfettered discretion to decide whether to sell the house, and the debtor was given no power

to force her to sell it or to pay him except from sale proceeds. She and the children continued to live in the house after the divorce while the debtor rented various dwellings.

On July 30, 1996, the debtor filed a chapter 7 bankruptcy petition. At that time, he thought that Mrs. Bauer intended to keep the house and not sell it. The debtor claims he told Stephen Freed, the attorney who filed the bankruptcy case for him, about his interest in the house, but the interest was not listed in the bankruptcy schedules. Mr. Freed could not remember whether they had discussed the interest, but thought he would have included it in the schedules if they had. On the other hand, he conceded that he knew of the divorce. The mortgage debt on the house was listed as an unsecured claim in the debtor's schedules with a notation that it was a "[m]ortgage on home awarded to ex-wife." There is no doubt that the debtor had given Mr. Freed a copy of the divorce decree and settlement agreement by September 1996, since Mr. Freed mailed a copy to the trustee at that time.

The debtor also claims that he disclosed his interest in the house to the trustee at the meeting of creditors held in September 1996 pursuant to 11 U.S.C.A. §341(a). Ruth Graham, an attorney who attended the meeting with the debtor for Mr. Freed, sent Mr. Freed a letter after the meeting indicating that the schedules would need to be amended to list the interest "even though it may have a zero value."

By November 1996, the trustee had learned that Mrs. Bauer had sold the house, and the trustee contacted professionals involved in the sale to assert the bankruptcy estate's interest in the proceeds. Around February 1997, the trustee received \$15,379.81 from the sale of the house.

In May 1998, the trustee filed her final account, and early in June, gave notice of her intent to distribute the assets of the estate. On behalf of the debtor, Mr. Freed filed an objection to the intended

distribution, claiming the debtor was entitled to receive some or all of the funds in the estate. About a month later, the debtor's present attorney, Mr. Baer, amended the objection to the intended distribution, and filed a motion to amend the debtor's schedules to list the interest in the house and claim it as exempt. The trustee and Union State Bank objected to the debtor's motion on the ground it had been made too late. At the evidentiary hearing held on the motion and objections, the Court raised the question of the substantive basis for the debtor's exemption claim. Although he testified at that hearing, the debtor contends he must be afforded the opportunity to present more evidence to support the claim before the Court can deny it on a substantive ground.

#### DISCUSSION AND CONCLUSIONS

Although Fed. R. Bankr. P. 1009(a) provides that the debtor may amend his schedules as a matter of course any time before the case is closed, the trustee and Union State Bank contend the debtor's amendment should not be allowed because they have been prejudiced by the debtor's delay in amending his schedules and asserting the claim that his share of the house sale proceeds are exempt. The Tenth Circuit has held that an amendment making new exemption claims can be disallowed because of the debtor's bad faith or prejudice to the creditors. *Calder v. Job (In re Calder)*, 973 F.2d 862, 867-68 (10th Cir. 1992). There, the debtor sought to exempt property after the trustee had relied in litigation on the debtor's position that the property was not property of the bankruptcy estate. *Id.* In the case before this Court, the trustee contacted parties handling Mrs. Bauer's sale of the house on more than one occasion, but no litigation was involved. The Court is inclined to doubt whether the debtor's delay should defeat his exemption claim. Rather than resolving the question whether the

amendment should be denied on the ground of bad faith or prejudice to creditors, the Court will turn to the substance of the debtor's exemption claim. The Court believes the facts established by the divorce decree and settlement agreement, and the debtor's testimony concerning his intent at the time he filed for bankruptcy make the presentation of any further evidence unnecessary.

The Kansas homestead exemption is available for property "occupied as a residence by the owner or by the family of the owner, or by both the owner and family thereof." K.S.A. 60-2301. "Residence" under this provision means "the place which is adopted by a person as the person's place of habitation and to which, whenever the person is absent, the person has the intention of returning." K.S.A. 77-201, Twenty-third; *Beard v. Montgomery Ward & Co.*, 215 Kan. 343, syl. ¶3 (1974). The proceeds of a voluntary sale of a homestead are also exempt so long as the owner had the intent by the time of the sale to use the proceeds to procure another homestead. *Smith v. Gore*, 23 Kan. 488, 490 (1880). The owner may have a reasonable time to act on this intent to reinvest the proceeds. *First Nat'l Bank v. Dempsey*, 135 Kan. 608, 609-10 (1932). Nothing in Kansas homestead law protects money generated from the sale of property that is not already the recipient's homestead. Considering the debtor alone, it is clear the house awarded to his ex-wife could not have been his homestead after the divorce because he could not have had the necessary intent to return there. While it is conceivable the debtor might have hoped that he and his wife would reconcile and he would return to the house, the debtor has not alleged this to be the case and the Court does not believe such a hope can be equated with an intent to return. Returning to the residence must be an event the person claiming the homestead right can control. Perhaps recognizing this problem, the debtor does not rely on

his own residence but on his family's residence in the house to establish it as having been his homestead when he filed for bankruptcy.

The debtor's argument overlooks an inconsistency in his exemption claim. He suggests the house was his homestead because his children lived there, but that he should be able to exempt his share of the proceeds because he intends to use it to buy a homestead for himself, not for his children. In fact, his interest in the house is actually adverse to his children's homestead, reducing the proceeds available to buy a replacement homestead for them. The Court does not believe Kansas state courts would permit a divorced parent, simply because his children were living there, to retain an interest with homestead protection for up to twenty years in a house he could not personally occupy.

Furthermore, Kansas courts have generally held that no homestead rights can exist without an ownership interest. *Johnston v. Gibson*, 184 Kan. 109, 112-13 (1959); *Hartman v. Armstrong*, 59 Kan. 696, 698-99 (1898); *see also Clark v. Axley*, 162 Kan. 339, 343 (1947) (no homestead rights exist until ownership interest acquired); Theis & Swartz, "Kansas Homestead Law," 65 J. Kan. Bar. Ass'n 20, 27-28 (1996) (discussing general rule and its exceptions, none of which apply here). Interests held to be sufficient have included a co-tenancy title, an equitable title, an executory contract to purchase, a leasehold estate, and an estate for life. *Cole v. Coons*, 162 Kan. 624, 633 (1947). This Court has previously ruled that a lien on a house was insufficient to support a homestead claim to the house, *In re Freed*, Case No. 84-40963-7, Memorandum of Decision (Bankr.D.Kan. July 17, 1986), and the debtor's interest here was even somewhat less than an ordinary lien since he could not foreclose on it and his ex-wife could defeat it simply by retaining the house. The debtor's interest must also be distinguished from a lien granted in a divorce decree that gave the lienholder the right to

foreclose if the ex-spouse did not pay the lien off by a specified date about five months after the divorce. *Green v. Daniels (In re Daniels)*, 65 B.R. 703, 704 (Bankr.D.Kan. 1986).

The debtor suggests that the phrasing of the divorce decree and settlement agreement indicate that his interest was an ownership interest rather than a mere lien because the word “lien” was not used and certain provisions would be unnecessary if he had only a lien. The Court cannot agree. Read together, the relevant provisions clearly describe the debtor’s interest in terms that make it at most a lien. The fact the limiting contours of the interest were described more extensively than by using the word “lien” does not mean the interest was necessarily greater than a lien. Indeed, the Court would be more inclined to conclude the interest was not even a lien on the house itself but only a lien on potential proceeds from its sale than to conclude the interest amounted to partial ownership of the house. The divorce decree gave Mrs. Bauer full ownership of the house and it was her and the children’s homestead, not the debtor’s.

Although the literal language of the statute and constitution would not extend to the proceeds of a voluntary or involuntary transfer of a homestead, Kansas courts have, as indicated above, afforded homestead protection to such proceeds so long as the debtor intended to use them to obtain a new homestead, either immediately or within a reasonable time. *Mitchell v. Milhoan*, 11 Kan 617, 627-29 (1880); *Smith v. Gore*, 23 Kan. at 489-91; *First Nat’l Bank v. Dempsey*, 135 Kan. at 609-10. Even if the house would have qualified as the debtor’s homestead on the day he filed for bankruptcy, he has conceded he did not at that time have the necessary present intent to use his share of the proceeds from a sale of the house to buy a new homestead. Instead, he testified, he thought then that his ex-wife was going to stay in the house. Since the decision to sell or not was completely in her control and he

did not think she was going to sell, the debtor's intent could have been nothing more definite than to use his share of the proceeds to buy a homestead if she ever did decide to sell before 2015. He simply did not have a reasonable expectation to receive and use the proceeds within a reasonable time, or ever.

Under the circumstances that exist here, and that further evidence could not change, the Court concludes that the debtor is not entitled to exempt as his homestead his interest in the proceeds from the sale of the house. The objections to his exemption claim are therefore sustained.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this \_\_\_\_\_ day of May, 1999.

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JAMES A. PUSATERI  
CHIEF BANKRUPTCY JUDGE