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signed 2-5-01

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

In re:

**DONALD R. LAMPE,
SHELIA L. LAMPE,**

DEBTORS.

**CASE NO. 00-41306-7
CHAPTER 7**

ORDER ON OBJECTIONS TO EXEMPTIONS AND LIEN AVOIDANCE

This matter came before the Court on objections to the debtors' claims for a tools of trade exemption for each of them, and their attempts to avoid a creditor's liens on the tools claimed to be exempt. The objections were filed by the chapter 7 trustee, Darcy W. Williamson, and creditor Iola State Bank ("the Bank"). The debtors appeared by counsel William J. Metcalf. The trustee appeared pro se. The Bank appeared by counsel Amy J. Ginsberg. The debtors appeared personally as well. A vice president of the Bank, Thomas Strickler, also appeared. The Court has heard the evidence and the arguments of counsel, has reviewed the relevant pleadings, and is now ready to rule.

The parties' dispute involves two issues: (1) Was farming the primary occupation of each of the debtors when they filed their chapter 7 bankruptcy petition? and (2) Does each debtor have an ownership interest in the farm tools he or she has claimed as exempt?

FACTS

Before 1999, both debtors were unquestionably farmers. Mr. Lampe began farming in 1971 while he was in high school. The Lampes got married in 1980, and both of them farmed from that time

until at least 2000. Mr. Lampe performed all the activities required in the farming operation, and Mrs. Lampe performed all the activities except running the planter and the combine. During 1997, 1998, and 1999, Mrs. Lampe also worked at least part time as a secretary. The debtors used to carry on a cattle operation as well as a grain farming operation, but have not had any cattle since before 1999.

The debtors had financing for the farming operation from both the Farm Services Agency (“FSA”) and the Bank. In 1999, they realized that they would be unable to make the payment on their FSA loan and disclosed this to the Bank. They were then unable to reach an agreement with the Bank for a renewal of their operating loan. Consequently, the debtors realized that the farming operation was in jeopardy.

The debtors then increased their non-farm employment. In February 2000, Mr. Lampe got a job at the local John Deere implement dealer. He currently works 40 hours per week there, making \$9.00 per hour. Mrs. Lampe began providing daycare services, but later began working about six hours a day as a para-educator for a cooperative, netting about \$520 per month. They still work on the farm at times when they are not required to be at their other jobs.

Although they did not have an operating loan in 1999, the debtors were able to obtain credit from the local farm cooperative that covered the cost of the fuel, fertilizer, seed, and other items they needed to plant and care for crops that year. They planted a spring crop that they harvested in the fall, and planted a wheat crop in the fall. After they filed for bankruptcy in June 2000, with the chapter 7 trustee’s approval, Mr. Lampe and another person harvested the wheat crop. They also qualified for some government farm payments in 1999 and 2000. The trustee, the farm cooperative, and the Bank are apparently now litigating their respective rights to the crop proceeds and government payments.

The 1999 crop proceeds are about \$57,000, and the 2000 ones are about \$15,000. The 1999 and 2000 government payments currently due or already paid and held in escrow total about \$24,000. The proof of loss forms submitted to obtain federal crop insurance benefits for 1999 listed Mr. Lampe as the only producer of the damaged crops.

Early in 2000, the Bank commenced an action seeking, among other things, to foreclose its mortgage on the farmland the debtors own. Since they filed for bankruptcy, it has obtained stay relief to continue to foreclose. The debtors will apparently have no land of their own once the foreclosure is completed.

The Lampes' tax returns for 1997 through 1999, all joint returns, show that their primary and virtually only occupations were farming (although Mrs. Lampe's occupation was reported to be "secretary"). The schedules and forms generally concern both the debtors, except Schedule F, on which profit or loss from farming is reported, and Schedule SE, on which self-employment tax is reported. On Schedule F, only Mr. Lampe is listed as a proprietor of the farm, and on Schedule SE, only Mr. Lampe is listed as having self-employment income. Mrs. Lampe was not paid wages for the work she did for the farm during any of those years, and no employee withholding taxes were paid on her account. The debtors' 2000 return had not been filed when this matter was tried.

The debtors testified that they intend to continue farming in the future. Mr. Lampe's mother apparently owns some land, part of which is presently leased to a third party. The debtors intend to lease some pastureland from her, and to lease her available tillable land on either a cash-rent or crop-share basis. In the past, the debtors have leased and crop-shared land for cattle and grain farming operations. Mr. Lampe also intends to custom harvest and to make arrangements with unnamed third

parties to raise feeder cattle. The debtors currently have no money on hand to finance such endeavors; however, their bankruptcy estate owes Mr. Lampe an undetermined sum for harvesting the 2000 crop, and they have received credit for input costs in the past even when they were in poor financial condition. Undoubtedly, if they enter into any farming enterprise at present, it will be on a small scale and will likely not produce gross income which exceeds their non-farm income. Their ability to generate any future farming income will depend on the success of their early ventures, if any.

The debtors claimed \$15,000 worth of farm equipment as exempt tools of the trade, relying on the \$7,500 per person exemption provided by K.S.A. 60-2304(e). Most of the equipment was acquired with money from the debtors' joint bank account. Mr. Lampe alone contracted to buy a tractor, subject to a security interest, that they included in the claimed tools of trade. Mr. Lampe testified that he thinks he got three of the pieces of equipment from his father; no one asked whether this was by purchase, gift, or inheritance.

The debtors claim they do not have a farming partnership, and their co-ownership claims to the allegedly exempt property arise from the fact that they are married. They deposit all income from the farming operation and other jobs into a joint bank account, and then use that account for all business and personal expenses. They presented no evidence that Mrs. Lampe had significant non-farm income in the past that was deposited into the joint account and could have contributed materially to the acquisition of any of the property claimed to be her tools of trade. In addition, there is no evidence that Mrs. Lampe received any of the property by gift, inheritance, or any other method that would have made it her sole and separate property under Kansas law. As mentioned, on their tax returns, the debtors listed Mr. Lampe as the sole proprietor of the farming operation and as the only one subject to

self-employment tax. They calculated depreciation deductions on Form 4562 for each return and used the deductions in calculating on Schedule F Mr. Lampe's profit or loss from farming.

DISCUSSION AND CONCLUSIONS

Under K.S.A. 60-2304(e), every person residing in Kansas is allowed an exemption for: "The books, documents, furniture, instruments, tools, implements and equipment, the breeding stock, seed grain or growing plants stock, or the other tangible means of production regularly and reasonably necessary in carrying on the person's profession, trade, business or occupation in an aggregate value not to exceed \$7,500." Only items used in the person's primary trade or occupation qualify for this exemption. *Seel v. Wittman*, 173 B.R. 734, 736 (D.Kan. 1994); *In re Oetinger*, 49 B.R. 41, 42 (Bankr.D.Kan. 1985). Under Federal Rule of Bankruptcy Procedure 4003(c), the party objecting to a debtor's exemptions has the burden of proving that the exemptions are not properly claimed. Here, the debtors claim farm equipment with a total value of \$15,000 as exempt under K.S.A. 60-2304(e). The trustee and the Bank have the burden of proving that the debtors are not entitled to exempt any of the equipment or only some portion of it.

The trustee and the Bank first contend that farming is not the primary occupation of either of the debtors. Exemptions are determined as of the date the bankruptcy is filed. *In re Peterson*, 897 F.2d 935, 937-38 (8th Cir. 1990); *First National Bank v. Norris*, 701 F.2d 902, 905 (11th Cir. 1983); *In re Currie*, 34 B.R. 745, 748 (D.Kan. 1983); *see also Mansell v. Carroll*, 379 F.2d 682, 684 (10th Cir. 1967) (same rule under 1898 Bankruptcy Act); *In re Beshirs*, 236 B.R. 42, 44-47

(Bankr.D.Kan. 1999) (even after conversion from chapter 13 to chapter 7, date bankruptcy was filed controls right to exemptions). Before February 2000, both debtors derived all or nearly all of their income from farming and devoted most or all of their time to the farming operation. Since then, although the debtors have continued to farm, both of them have also been employed more extensively off the farm.

Nevertheless, and despite the Bank's foreclosure action, the debtors planted and harvested crops during 2000, and the proceeds of those crops (including government payments that are attributed to some of them) were equal to or greater than the off-farm income the debtors earned, although the crop proceeds are property of their bankruptcy estate. Thus, while the debtors now (or soon will) no longer own any farmland, they continued to conduct farming operations during 2000, and even did so after they filed for bankruptcy. Nothing in the Kansas exemption scheme limits the tool of trade exemption for farmers to those who own the land on which they carry out farming activities. *In re Massoni*, 67 B.R. 195, 197 (Bankr.D.Kan. 1986).

Both debtors testified that they intend to continue to do farm work when they are not required to be at their non-farm jobs. The Court is well aware that much farm work can be and is done outside of normal business hours in the early morning, late afternoon, and evening, and on weekends. For example, while working at his forty-hour per week job, Mr. Lampe harvested crops for his bankruptcy estate. The debtors' long history of farming, their farming activities up to the time they filed for bankruptcy and thereafter, and their stated desire to continue farming all support the conclusion that as of the date they filed for bankruptcy, farming was both debtors' primary occupation. Even though they both obtained off-farm jobs when it became clear their farming operations would be curtailed due to

their financial problems, neither of them had given up farming and it had not ceased being their primary occupations. See *In re Oetinger*, 49 B.R. 41, 42-43 (Bankr.D.Kan. 1985) (despite off-farm job, farming was primary occupation); *In re Massoni*, 67 B.R. 195, 196-97 (Bankr.D.Kan. 1986) (same); see also *In re Kobs*, 163 B.R. 368, 373 (Bankr.D.Kan. 1994) (Flannagan, J.) (same, but questioning whether exemption is limited to tools of primary occupation). Consequently, both debtors are entitled to an exemption for tools of their farming trade that they may own.

This leaves the question whether each of the debtors owns one-half of the tools they have claimed as exempt. Various aspects of Kansas law have an impact on this question. In Kansas, a married person may own property separate from his or her spouse. K.S.A. 1999 Supp. 23-201(a). Furthermore, a married person may carry on a trade or business on his or her separate account, and earnings from the trade or business are his or her sole and separate property. K.S.A. 23-204. Farming is a business. Because Kansas is not a community property jurisdiction, the business owner's spouse does not automatically acquire an ownership interest in the business's earnings or property purchased with the earnings simply based on the marital relationship. Instead, to own any interest in the tools used to carry on the business, the non-business-owning spouse must acquire them by gift or inheritance, by purchase with his or her sole and separate property, or by some agreement involving a partnership, joint venture, association, corporation, or other business entity legally recognized by Kansas law. See *In re Goebel*, 75 B.R. 385, 386-87 (Bankr.D.Kan. 1987).

However, a person holding an ownership interest in a partnership or other business entity cannot claim a tool of trade exemption in the entity's property. The Kansas Supreme Court long ago held that partnership property cannot be exempted as tools of a trade under the state's exemption

statutes. *Guptil & Hinton v. McFee*, 9 Kan. 30, 34-37 (1872). Statutes concerning partnerships indicate this is still the law in Kansas.¹ The Kansas Supreme Court more recently relied on *Guptil & Hinton* in declaring that the statutory exemptions are available only to natural persons, not to an artificial entity such as a corporation. *Southwest State Bank v. Quinn*, 198 Kan. 359, 363-64 (1967). The Bankruptcy Code also allows only individuals to claim exemptions. *See* 11 U.S.C.A. §522(b).

The debtors' tax returns indicate that Mr. Lampe is the sole proprietor of the farming business and that he alone pays employment taxes on income from the farming operation. He did not pay Mrs. Lampe any wages or pay any withholding taxes on her behalf. Mrs. Lampe did not report having any farm income separate from Mr. Lampe, and she did not pay any self-employment tax. The evidence indicated that the farm equipment the debtors have has all been purchased with income produced by the farming operation over the years, or obtained in some unspecified manner from Mr. Lampe's father. This evidence indicated that Mr. Lampe owns the farming business and the equipment used in it.

No evidence was presented to show that Mrs. Lampe obtained any of the farm's equipment with her separate property, or by a gift or inheritance. The debtors testified that they have not formed a farm partnership, and their tax returns support that claim. Instead, they suggest the farming operation

¹Until 1998, K.S.A. 56-325(b)(3) (Furse 1994), part of the Kansas version of the Uniform Partnership Act, provided that none of the partners could claim any exemptions when partnership property was attached for a partnership debt. *Repealed* 1998 Kan. Sess. Laws, ch. 93, §76 (eff. July 1, 1999). The Revised Uniform Partnership Act of 1997 ("R.U.P.A.") omitted this provision, but the Official Comment to §203 of the R.U.P.A. indicates the provision was unnecessary because exemption rights apply only to individual partners' property, not to partnership property. Uniform Partnership Act (1997), §203, Comment ¶3, Westlaw U.L.A. Partnership 1997 (2000 Electronic Supp.). Kansas has adopted §203 of the R.U.P.A. *See* K.S.A. 56a-203.

constitutes some kind of marital enterprise that gives Mrs. Lampe an ownership interest in the business even though it does not amount to a partnership, corporation, or other artificial entity recognized under Kansas law as one through which two or more people co-own property that they use to carry on a business for profit. The Court does not believe that Kansas law allows a spouse to obtain an ownership interest in this manner.

Instead, because Mr. Lampe clearly has an ownership interest in the farm and its equipment, if the Court were convinced that Mrs. Lampe also had such an ownership interest, it would also be forced to conclude that the debtors in fact operate their farm as a partnership. K.S.A. 1999 Supp. 56a-202, part of the Kansas version of the Revised Uniform Partnership Act of 1997 (“R.U.P.A.”), provides in pertinent part:

(a) [T]he association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership.

. . . .

(c) In determining whether a partnership is formed, the following rules apply:

(1) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not by itself establish a partnership, even if the co-owners share profits made by the use of the property.

(2) The sharing of gross returns does not by itself establish a partnership, even if the persons sharing them have a joint or common right or interest in property from which the returns are derived.

(3) A person who receives a share of the profits of a business is presumed to be a partner in the business, unless the profits were received in payment:

[of or for any of six items, none of which have anything to do with being a spouse of the other co-owner.]

The Official Comments to the R.U.P.A. explain further:

Section 202 combines UPA Sections 6 and 7. The traditional UPA Section 6(1) “definition” of a partnership is recast as an operative rule of law. No substantive change in the law is intended. The UPA “definition” has always been understood as an operative rule, as well as a definition. The addition of the phrase, “whether or not the persons intend to form a

partnership,” merely codifies the universal judicial construction of UPA Section 6(1) that a partnership is created by the association of persons whose intent is to carry on as co-owners a business for profit, regardless of their subjective intention to be “partners.” Indeed, they may inadvertently create a partnership despite their expressed subjective intention not to do so. The new language alerts readers to this possibility.

As under the UPA, the attribute of co-ownership distinguishes a partnership from a mere agency relationship. A business is a series of acts directed toward an end. Ownership involves the power of ultimate control. To state that partners are co-owners of a business is to state that they each have the power of ultimate control. [Citation omitted.] On the other hand, as subsection (c)(1) makes clear, passive co-ownership of property by itself, as distinguished from the carrying on of a business, does not establish a partnership.

Uniform Partnership Act (1997), §202, Official Comment 1, Westlaw U.L.A. Partnership 1997 §202 (2000 Electronic Supp.).² The debtors clearly share the profits from the farm, and so could have formed a partnership even though they did not intend to do so. Furthermore, while sharing profits from passively co-owned property does not create a partnership, actively participating in and sharing profits from a co-owned business does create one.

The intersection of the Kansas tool of trade exemption law and these facets of the R.U.P.A. explain why Mrs. Lampe is not entitled to exempt any of the equipment the debtors use on the farm. To qualify for the tool of trade exemption under K.S.A. 60-2304(e), Mrs. Lampe could not passively co-own the farm equipment but had to participate personally in the farming operation to be able to claim farming as her primary occupation. Under the R.U.P.A., though, if she co-owned the farm equipment purchased with the proceeds from the farm, her personal participation in the operation, combined with sharing the profits with her husband, would have made their farming relationship into a

²Kansas had adopted §§6 and 7 of the U.P.A. in 1972, and repealed them in 1998 when it adopted the R.U.P.A. *See* 1972 Kan. Sess. Laws, ch. 210, §§6 & 7, *codified at* K.S.A. 56-306 & 56-307 (Furse 1994) (repealed 1998 Kan. Sess. Laws, ch. 93, §76 (eff. July 1, 1999)).

partnership. To be able to participate personally in the operation, co-own the equipment, share in the profits, and qualify for the Kansas tool of trade exemption, she would have had to obtain her co-ownership interest in the equipment from her sole and separate property, not from the business itself.

In Kansas, a married person does have certain potential rights in his or her spouse's separate property. Under K.S.A. 1999 Supp. 23-201(b), when a divorce petition is filed, all the couple's property, both joint and separate, becomes marital property subject to equitable division by the divorce court. When his or her spouse dies, a married person has various rights in the spouse's property unless he or she has properly waived them. *See, e.g.*, K.S.A. 59-401 to -404 (homestead and family allowance); K.S.A. 1999 Supp. 59-505 (right to one-half of spouse's real estate under certain circumstances); K.S.A. 1999 Supp. 59-6a201 to K.S.A. 59-6a217 (spousal elective share). Kansas also recognizes the common law doctrine of necessities, under which those who provide food, shelter, or medical services to a married person who is unable to pay for them may be able to recover from the person's spouse. *See St. Frances Regional Medical Center v. Bowles*, 251 Kan. 334, 335-41 (1992). Otherwise under Kansas law, in an intact marriage, so far as the Court is aware, one spouse has no automatic, legally-recognized interest in the separate property of the other. The Court is convinced the limited potential rights in Mr. Lampe's property that the Lampes' marriage does confer on Mrs. Lampe do not amount to the ownership interest required to permit Mrs. Lampe to claim the tool of trade exemption she seeks.

The pertinent facts in this case are virtually identical to those involved in this Court's decision in *In re Goebel*, 75 B.R. 385 (1987), except there it was conceded that the husband was a farmer and entitled to the tool of trade exemption, and here, the tax returns introduced into evidence establish that

Mr. Lampe is the sole proprietor of the farming business and that he alone pays employment taxes on the farm income. In *Goebel*, the Court ruled against the assertions that Mrs. Lampe is making here. The Court remains convinced that its decision in that case was correct, and believes that the decision is applicable here.

For these reasons, the Court concludes that the debtors were farmers at the time this case was filed, that farming was their primary occupation, and that they did not operate the farm as a partnership. The Court further concludes that Mr. Lampe owns the equipment claimed to be exempt, but that Mrs. Lampe does not. Consequently, Mr. Lampe is entitled exempt \$7,500 worth of the equipment as tools of his trade, and to avoid the Bank's liens on those exempt tools. However, Mrs. Lampe may not exempt any of the equipment and may not avoid the Bank's liens on any of it.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this ____ day of February, 2001.

JAMES A. PUSATERI
CHIEF BANKRUPTCY JUDGE