



**SO ORDERED.**

**SIGNED this 21 day of June, 2006.**

*Dale L. Somers*

Dale L. Somers  
UNITED STATES BANKRUPTCY JUDGE

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

**In re:**

**CHERYL RUTH YAPP,**

**DEBTOR.**

**CASE NO. 04-40891  
CHAPTER 7**

**MEMORANDUM AND ORDER  
SUSTAINING TRUSTEE'S OBJECTION TO EXEMPTION OF VEHICLE**

On April 27, 2006, trial was held on the Chapter 7 Trustee's objection to Debtor's exemptions, including a 2002 Chrysler PT Cruiser Automobile, VIN#3C8FY68B12T239315.<sup>1</sup> The Trustee, Darcy

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<sup>1</sup> This Court has jurisdiction pursuant to 28 U.S.C. § 157(a) and §§ 1334(a) and (b) and the Standing Order of the United States District Court for the District of Kansas that exercised authority conferred by § 157(a) to refer to the District's Bankruptcy judges all matters under the Bankruptcy Code and all proceedings arising under the Code or arising in or related to a case under the Code, effective July 10, 1984. Allowance or disallowance of exemptions is a core proceeding as provided in 28 U.S.C. § 157(b)(2)(B). There is no objection to venue or jurisdiction over the parties.

D. Williamson, appeared by Darcy D. Williamson. The Debtor, Cheryl Ruth Yapp, appeared by Mark W. Neis, Neis & Michaux. There were no other appearances. The parties were given 30 days to file additional memoranda. The Court is now ready to rule.

**I. FINDINGS OF FACT.**

Debtor filed this case pro se on April 13, 2004. Her Schedule B listed one vehicle, a 2001 Chevrolet Tahoe, subject to a credit union's security interest. There was no claim of exemption of any vehicle on her Schedule C. Schedule F listed unsecured debt of \$154,339.20, but included no debts owed to individuals. Debtor's Statement of Financial Affairs, question three, did not list any transfers to insiders within one year. Neither the schedules nor statement of affairs disclosed ownership or transfer of a PT Cruiser.

Darcy D. Williamson was appointed Trustee. A 341 meeting was held on May 11, 2004. Debtor testified that she intended to keep the Chevy Tahoe, even though the credit union holding a perfected security interest in the vehicle had filed a motion for relief from stay.<sup>2</sup> Debtor disclosed payments made to family members within one year of her filing for bankruptcy. The meeting was continued. In response to the Trustee's request for additional information made at the May 11, 2004 meeting, Debtor provided the Trustee with a list of payments to family members. It included a \$12,000 payment to James Bath on February 16, 2004.

On June 1, 2004, Trustee issued a preference demand letter to James Bath. He responded by letter date June 9, 2004, and in that letter stated he had not been paid in cash but had been given a PT

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<sup>2</sup> Doc. 7. That motion was unopposed and was granted on June 4, 2004. Doc. 10. Debtor surrendered possession shortly thereafter.

Cruiser by the Debtor to sell. Mr. Bath also indicated that he had returned the vehicle to the Debtor after receipt of the Trustee's letter.

The 341 meeting was continued to June 29, 2004. On that date, counsel entered an appearance on behalf of Debtor, and Debtor filed amended schedules and statement of affairs. Amended Schedule B disclosed ownership of the PT Cruiser, and Amended Schedule C claimed exemption of the Cruiser, stating a value of \$13,750. The Amended Statement of Financial Affairs, in response to question six, stated that James Bath, Debtor's former spouse, had possession of the PT Crusier valued at approximately \$10,000 given to him on or about February 26, 2004, and that the amount still owing to him was \$12,000. This information was supplemented by the following note:

Debtor attempted, but creditor refused or declined payment on cash loan of \$12,000 made by creditor to debtor on 7/31/2003. Debtor intended to pay by transfer of a vehicle shown and described below. Creditor never completed *any* transfer documents, never offered vehicle for sale, never insured in his name, and never took any other action inconsistent with debtor's full right, title, and ownership of vehicle. Creditor's explanation of payment by transfer of title was not communicated to debtor until after chapter 7 petition was filed by debtor, on April 13, 2004. Creditor returned possession of vehicle to debtor voluntarily upon her request to retake possession of vehicle as custodian of bankruptcy estate property. Creditor has made declaration of debt cancellation. Vehicle with which debtor attempted to repay creditor is a 2002 Chrysler PT Cruiser Automobile, VIN#3C8FY68B12T239315. Amended Schedule B and Amended Schedule C filed on 06/29/2004. Testimony at initial "341" hearing to the contrary. Testimony was unintentionally erroneous.

The Trustee objected to the exemption of the 2002 PT Cruiser on July 22, 2004.<sup>3</sup>

Trial testimony established the following facts concerning the Cruiser and the debt to Mr. Bath.<sup>4</sup> Debtor purchased the PT Cruiser new in May 2002. At that time she lived with her husband, Ernest Pugh, on a farm near Wamego, Kansas, and worked in a family communication business located on the property. When she purchased the Cruiser, she also owned the Chevy Tahoe, which she used to pull her boat, for short trips, and when she was transporting her grandchildren. Because the PT Cruiser got better mileage, she used it for transportation of one person and for longer distances.

In 2002, after approximately 32 years of marriage, Debtor petitioned for divorce from Ernest Pugh. On September 9, 2003, the court entered an order granting a divorce and restoring the Debtor's former name. Debtor moved from the Wamego farm to outside of Manhattan, Kansas, and obtained employment in Manhattan. She used the PT Cruiser for commuting to work and the Tahoe for pleasure trips on weekends. Debtor continued to use the Cruiser to commute approximately 20 miles each way to work after she moved to Alma, Kansas, in January, 2004. On March 29, 2004, Debtor transferred possession of the PT Cruiser to James Bath, as more fully explained below.

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<sup>3</sup> Doc. 31. In addition to the PT Cruiser, the Trustee also objected to the exemption of children's books, coins, and porcelain dolls. These additional items of personal property were not addressed in the pretrial order (Doc. 109) and were not the subject of testimony at the evidentiary hearing. The Court denies these additional objections because they were abandoned.

<sup>4</sup> Debtor's statements in her schedules and at the 341 meeting concerning the PT Cruiser and the debt to James Bath varied from the Court's Findings of Fact. However, at trial the testimony of Debtor and James Bath was credible and generally consistent, even though James Bath was excluded from the courtroom during Debtor's testimony.

Before her marriage to Ernest Pugh, Debtor had been married to James Bath from 1964 until their divorce in 1969. Two children were born of that marriage, and contact between Debtor and James Bath during the 1970's, 1980's and 1990's was limited to issues related to their children. In 2003, James Bath learned through his children that Debtor was obtaining a divorce and contacted her to see how she was getting along. Debtor was uncharacteristically friendly. Thereafter, in the summer of 2003, Debtor contacted James Bath and requested a loan. Debtor recalls stating she needed funds to keep her credit card balances current. James Bath testified Debtor stated she needed funds for down payment on a home. In any event, James Bath loaned Debtor \$12,000, which he in turn had borrowed from his brother. There was no express understanding as to payment terms, but James Bath believed that Debtor would be getting substantial funds from the divorce settlement and would repay the loan at that time. Debtor intended to repay the loan.

By Memorandum of Decision entered on November 14, 2003, the divorce court divided property and allocated debt. Debtor was awarded the 2001 Tahoe, the 2002 PT Cruiser, and substantial assets. Because of gambling losses and other expenditures, Debtor did not pay James Bath. In March 2004, Debtor offered the PT Cruiser in payment. James Bath declined, and the parties agreed that James Bath would attempt to sell the PT Cruiser and apply the proceeds to the satisfaction of the debt, with any excess going to Debtor. On March 29, 2004, Debtor and James Bath traveled to Topeka and obtained a replacement title for the PT Cruiser from the Department of Motor Vehicles. Debtor endorsed the title and gave possession of the title, the vehicle, and the keys to the PT Cruiser to James Bath. After making inquiries concerning value and determining that he could not sell the car for

the \$12,000 needed to cover the debt, he made little or no effort to sell the vehicle. When he received the preference demand letter from the Trustee, he responded by letter dated June 9, 2004, stating:

Cheryl Yapp has not paid me anything. She gave me a car to sell for her, however the car has not been sold.

I returned the car to her today and it is now in her possession.

The PT Cruiser was returned to Debtor on the same weekend the Tahoe was repossessed by the credit union. Debtor bought new tires for the Cruiser and commenced using it as her means of transportation.

Debtor testified concerning the omissions from her initial schedules and her incomplete disclosures at her initial 341 meeting. As to her initial schedules, Debtor prepared them herself. Although she was employed in a law office as a secretary, she had no familiarity with bankruptcy pleadings and received no assistance from an attorney or others. She did not understand the meaning of “insider.” She omitted the vehicle from her schedules and did not disclose it at the initial 341 meeting because she thought her debt to James Bath had been taken care of by the transfer of the vehicle, which he probably had sold. In her mind, the debt to James Bath had been paid in cash, because giving him the car to sell was equivalent to cash. She did not disclose the PT Cruiser because she thought she no longer owned it, not because she decided to hide it from the Trustee.

## **II. ANALYSIS.**

### **A. DEBTOR’S AMENDED SCHEDULE C IS ALLOWED.**

The Trustee’s first argument is that the Court should disallow Debtor’s amended Schedule C, in which she claims the PT Cruiser exempt, because she acted in bad faith and the estate has been prejudiced. She cites *In re Calder*, which holds that “[a]n amendment may be denied . . . if there is bad

faith by the debtor or prejudice to creditors.”<sup>5</sup> For the following reasons, the Court denies this contention and allows the amendment.

Bankruptcy Rule 1009(a) allows schedules to be “amended by the debtor as a matter of course at any time before the case is closed.”<sup>6</sup> “The permissive approach to amendments has been construed to give courts no discretion to reject amendments unless the debtor has acted in bad faith or concealed property, or the amendment would prejudice creditors.”<sup>7</sup> The 10th Circuit has adopted this construction.<sup>8</sup> “The usual ground for a finding of ‘bad faith’ is the debtor’s attempt to hide assets.”<sup>9</sup> “However, the failure to disclose an asset may be considered an inadvertent mistake when the debtor either lacks knowledge of the undisclosed asset or has no motive for its concealment.”<sup>10</sup> When determining whether bad faith exists, the courts look to the totality of the circumstances and refuse

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<sup>5</sup> *Calder v. Job (In re Calder)*, 973 F.2d 862, 867 (10th Cir. 1992).

<sup>6</sup> Fed. Rule Bankr. P. 1009(a). This case was filed before October 17, 2005, when most provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 become effective. All statutory references to the Bankruptcy Code are to 11 U.S.C. §§ 101-1330 (2004), unless otherwise specified. All references to the Federal Rules of Bankruptcy Procedure are to Fed. R. Bankr. P. (2004), unless otherwise specified.

<sup>7</sup> 9 *Collier on Bankruptcy* ¶ 1009.02 (Alan N. Resnick & Henry J. Sommer, eds-in-chief, 15<sup>th</sup> ed. rev. 2005). Future citations shall be to volume and paragraph number only.

<sup>8</sup> *In re Calder*, 973 F.2d at 867.

<sup>9</sup> *Arnold v. Gill (In re Arnold)*, 252 B.R. 778, 785 (9th Cir. BAP 2000); see *In re Grogan*, 300 B.R. 804, 808-09 (Bankr. D. Utah 2003).

<sup>10</sup> *Ford v. Gillman (In re Ford)*, 336 B.R. 813, 817 (10th Cir. BAP 2006), citing *In re Grogan*, 300 B.R. at 809.

amendment only upon a showing of clear and convincing evidence of bad faith.<sup>11</sup> For example, in *In Ford*, the bankruptcy appellate panel reversed a bankruptcy court's denial of amendment to claim as exempt a personal injury cause of action not listed on the original schedules where the debtor was not a person whom one would have expected to have legal knowledge that a personal injury lawsuit was property of the estate and the trustee had not articulated any motive attributable to the debtor for the concealment.<sup>12</sup>

In this case, there is not clear and convincing evidence, nor even substantial evidence, that the Debtor acted in bad faith by intentionally concealing the PT Cruiser. Debtor, who had no legal training and no experience completing bankruptcy pleadings, prepared the schedules without assistance. The failure to disclose the transaction with James Bath in the Statement of Financial Affairs was adequately explained by Debtor's testimony, including the fact that she did not know the meaning of the term "insider." A person in Debtor's position cannot be expected to have such knowledge. The Court finds credible Debtor's testimony about the initial 341 meeting that she believed she did not own the PT Cruiser because it had been sold or was owned by James Bath. In addition, the Trustee has shown no motive for Debtor's failure to initially disclose the PT Cruiser.

It is true that the Trustee was given several inconsistent versions of the facts and was required to make numerous inquiries before it became apparent that Debtor is the owner of the PT Cruiser. But this does was not the result of intentional concealment. Trustee's efforts were not obstructed by Debtor,

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<sup>11</sup> 9 *Collier on Bankruptcy* ¶ 1009.02; see *In re Grogan*, 300 B.R. at 808; and *In re Ford*, 336 B.R. at 816.

<sup>12</sup> *In re Ford*, 336 B.R. at 817.



who in good-faith responded to all of the Trustee's inquiries. Debtor promptly amended her schedules and statement of affairs upon retaining counsel. The fact that those amended documents did not fully comport with the testimony at trial or James Bath's understanding of details concerning the informal transaction between Debtor and James Bath, not bad faith concealment.

Likewise, the Trustee has shown no prejudice to creditors.<sup>13</sup> "In determining whether the amendment would prejudice creditors, the appropriate inquiry is not whether a creditor will recover less or be adversely affected by the amendment."<sup>14</sup> More is required. For example, prejudice to creditors has been found where a trustee was required to expend resources of the estate not only to ferret out the omitted asset but also to obtain and prosecute an order to show cause to compel the debtors to turnover over the asset.<sup>15</sup> Another example of prejudice is creditors' detrimental reliance upon the debtor's initial position.<sup>16</sup> The prejudice to the creditor must outweigh the prejudice to the debtor caused by the denial of the opportunity to amend.<sup>17</sup> In this case, the Trustee shows no detriment to creditors, other than the exclusion of the PT Cruiser from property of the estate available to creditors if the exemption were allowed. This is not the nature of the prejudice which is sufficient to deny an amendment.

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<sup>13</sup> The Court notes that no creditor is objecting to Debtor's amendment. Debtor has not contended that the Trustee lacks standing to assert prejudice to creditors. The Court, by discussing the lack of evidence provided by the Trustee on this issue, expresses no opinion on the question of standing.

<sup>14</sup> 9 *Collier on Bankruptcy* ¶ 1009.02.

<sup>15</sup> *In re Grogan*, 300 B.R. at 810.

<sup>16</sup> *Osborn v. Durant Bank & Trust Co. (In re Osborn)*, 24 F.3d 1199, 1206 (10th Cir. 1994).

<sup>17</sup> *Id.*

For the foregoing reasons, the Court denies the Trustee's objection to Debtor's amended Schedule C claiming the PT Cruiser exempt.

**B. THE PT CRUISER IS NOT EXEMPT UNDER K.S.A. 60-2304(c).**

The Trustee's second argument is that the PT Cruiser does not qualify for exemption. The Court agrees. As more fully explained below, the Debtor was not regularly using the vehicle for transportation on the date of filing, as required by the Code and K.S.A. 60-2304(c), the applicable exemption statute.

Section 522 of the Code governs exemptions.<sup>18</sup> Subsection (b) allows the states to prohibit their citizens from choosing the federal exemptions set forth in subsection (d) and to require the use of state exemptions. Kansas has opted out of the federal plan and enacted its own exemptions.<sup>19</sup> The applicable exemption for Debtor's PT Cruiser is K.S.A. 60-2304(c), which provides:

Every person residing in this state shall have exempt from seizure and sale upon any attachment, execution or other process issued from any court in this state, the following articles of personal property:

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(c) Such person's interest, not to exceed \$20,000 in value, in one means of conveyance regularly used for the transportation of the person or for transportation to and from the person's regular place of work, . . . .

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<sup>18</sup> 11 U.S.C. § 522.

<sup>19</sup> K.S.A. 60-2312.

The Code and case law make it clear that a debtor’s exemption rights are determined as of the date of filing of the petition.<sup>20</sup> Once the debtor claims an exemption, the objecting party bears the burden of proof.<sup>21</sup>

When determining the validity of the exemption claimed under state law, the bankruptcy courts look to state law.<sup>22</sup> Under Kansas law, exemptions are to be liberally construed in favor of the claimant.<sup>23</sup> The parties have not cited, and the Court has been unable to locate a reported decision of the Kansas appellate courts or the bankruptcy courts that interprets the term “regularly used for transportation” for purposes of the vehicle exemption. The Court therefore considers the similar tools of the trade exemption for “tangible means of production regularly and reasonably necessary in carrying on the person’s profession, trade, business or occupation . . . .”<sup>24</sup> This exemption has been construed by the bankruptcy courts in accord with the general rule that to claim the exemption the debtor must be engaged in the trade on the date of the petition.<sup>25</sup> However, this rule is subject to the refinement that

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<sup>20</sup> 11 U.S.C. § 522(b); *Mansell v. Carroll (In re Mansell)*, 379 F. 2d 682, 684 (10th Cir. 1967) (holding “[i]n a bankruptcy proceeding the determination of what property is exempt is made as of the date of filing . . . .”); *Lampe v. Iola Bank & Trust (In re Lampe)*, 278 B.R. 205, 210 (10th Cir. BAP 2002) aff’d 331 F.3d 750 (10th Cir. 2003) (holding that debtor’s right to exemption is determined as of date petition is filed); *In re Johnson*, 19 B.R. 371, 374 (Bankr. D. Kan. 1982) (holding that “[e]xemption rights in bankruptcy are determined as of the date the petition is filed”).

<sup>21</sup> *Lampe v. Williamson (In re Lampe)*, 331 F.3d 750, 754 (10th Cir. 2003).

<sup>22</sup> *In re Lampe*, 331 F.3d at 754.

<sup>23</sup> *Id.*, quoting *In re Gunther*, 282 B.R.16, 19 (Bankr. D. Kan. 2002).

<sup>24</sup> K.S.A. 60-2304(e).

<sup>25</sup> *In re Johnson*, 19 B.R. at 374.

when “the debtor had only temporarily ceased the vocation at the time the petition, the tools of the trade may still be exemptable.”<sup>26</sup> To retain the exemption, the termination of the trade must be temporary, and the debtor must be sincere “in his or her intent to shortly resume that vocation.”<sup>27</sup> The Court predicts that the Kansas courts, if presented with the issue, would construe the “regularly used for transportation” requirement of the vehicle exemption statute in the same manner as the bankruptcy courts have construed the “regularly and reasonably necessary in carrying out the person’s trade” element of the tools of the trade exemption, to allow, without loss of the exemption, the temporary ceasing of regular use of the vehicle for transportation, if there is intent to resume such use.<sup>28</sup>

The issue in this case is whether Debtor “regularly used” the PT Cruiser for transportation on the date of filing her bankruptcy petition within the meaning of vehicle exemption. The Court concludes she did not. The evidence in this case establishes that the Debtor used the PT Cruiser regularly for transportation before she gave the vehicle, the endorsed title, the keys, and possession of the vehicle to James Bath on March 29, 2004. When she filed for bankruptcy relief on April 13, 2004, she was not regularly using the vehicle. In addition, she is not entitled to the exemption because of intention to resume regular use in the near future. On April 13, 2004, Debtor had no intention of again regularly

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<sup>26</sup> *Id.*; see *In re Lampe*, 278 B.R. at 211 (holding that debtors’ temporary abatement of work in a trade is not fatal to the tools of the trade exemption if the debtors have intent to continue that trade).

<sup>27</sup> *In re Henke*, 294 B.R. 105, 109 (Bankr. D N.D. 2003) (construing qualification for § 522(f)(2)(B) lien avoidance).

<sup>28</sup> This construction is also similar to the homestead exemption where in order for the interest to be destroyed or abandoned, there must be a removal from the premises and an intent not to return. *In the Matter of the Estate of Fink*, 4 Kan App.2d 523, 527-28, 609 P.2d 211, 216 (1980) rev. denied June 20, 1980.

using the PT Cruiser, and believed she was no longer the owner. She had given it to James Bath to sell for the purpose of raising cash to pay her debt to him. At the 341 meeting, Debtor testified that she intended to retain the Tahoe as her means of transportation. The fact that Debtor regained possession of and began regularly using the PT Cruiser in early June 2004, shortly after the repossession of the Tahoe, was a fortuitous event which is insufficient to evidence regular use on the date of filing. The PT Cruiser is not exempt under Kansas law.

### **III. CONCLUSION.**

For the foregoing reasons, the Court denies the Trustee's objection to Debtor's Amended Schedule C and holds that it was filed in good faith and without prejudice to creditors. The Court grants the Trustee's objection to Debtor's claim of exemption of the PT Cruiser because Debtor was not regularly using the vehicle for transportation on the date of filing and had no intent to resume regular use of that vehicle. The Court denies Trustee's objection to Debtor's exemption of children's books, coins, and porcelain dolls as having been abandoned because not preserved in the pretrial order or at trial.

The foregoing constitute Findings of Fact and Conclusions of Law under Rule 7052 of the Federal Rules of Bankruptcy Procedure and Rule 52(a) of the Federal Rules of Civil Procedure. Judgment based upon this ruling will be entered on a separate document as required by Federal Rule of Bankruptcy Procedure 9021 and Federal Rule of Civil Procedure 58.

**IT IS SO ORDERED.**

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