

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION**

IN RE:)	Case No.: 00-51222 C 7
SUSAN RENAE STONE)	
)	
)	

ORDER DISALLOWING DEBTOR'S CLAIM FOR EXEMPTIONS

This matter came on for hearing before the undersigned Bankruptcy Judge on February 7, 2001, in Winston-Salem, North Carolina, after due and proper notice, upon the Objection by Trustee to Debtor's Claim for Property Exemptions and the Objection by Roy D. Casstevens and Jason Lee Casstevens to Debtor's Claim for Property Exemptions. Appearing before the court were Robert Lefkowitz, on behalf of Roy D. Casstevens and Jason Lee Casstevens (the "Creditor"), Bruce Magers, on behalf of the Chapter 7 Trustee, and A. Carl Penney, on behalf of the Debtor.

This court has jurisdiction over the subject matter of this proceeding pursuant to 28 U.S.C. §§ 1334 and 157(a) and the General Order of Reference entered by the United States District Court for the Middle District of North Carolina on August 15, 1984. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A),(B),(K) and (O) which this court may hear and determine.

After reviewing the file and considering the arguments of counsel and the testimony presented at the hearing, this court makes the following:

FINDINGS OF FACT

1. On or about June 23, 2000, the Debtor filed a voluntary petition under Chapter 7

of the United States Bankruptcy Code. Bruce Magers was subsequently appointed as the Chapter 7 Trustee.

2. On July 5, 2000, the Debtor filed the Debtor's Claim for Property Exemptions. The Debtor claimed an exemption of \$10,000.00 in real property described as 1045 Cades Cove Drive, Yadkinville, NC 27055, with a market value of \$151,000.00, a mortgage of \$114,000.00 and a net value of \$37,000.00. The Debtor indicated that she owned the property jointly with her ex-husband and proposed that the property be sold by the Trustee.

3. On August 4, 2000, the Debtor filed an Amended Claim for Property Exemptions. Again, the Debtor claimed an exemption of \$10,000.00 in real property described as 1045 Cades Cove Drive, Yadkinville, NC 27055, with a market value of \$151,000.00, a mortgage of \$114,000.00 and a net value of \$37,000.00. The note included in the first claim for exemptions, indicating that the property was owned jointly and proposing that the property be sold, was deleted in the amendment.

4. On August 18, 2000, the Creditor filed an Objection to Claim of Exemption pursuant to Bankruptcy Rule 4003. An Amended Objection to Claim of Exemptions was filed by the Creditor on September 5, 2000. The Objections were based on the Creditor's contention that the Debtor had not used 1045 Cades Cove Drive, Yadkinville, North Carolina as a residence for more than ten months prior to the filing of the case and that the Debtor did not have the intent to have the property serve as a residence in that the Debtor had resided with her parents at another address for ten months prior to the filing.¹

¹The Creditor also objected to the Debtor's listed exemptions in a vehicle, a 401k plan, and "clothing, household goods and jewelry." These issues have been resolved either by agreement of the parties or by separate orders of this court and will not be further addressed in this Order.

5. On August 21, 2000, the Trustee filed a Motion to Extend Time to Object to Exemptions. An Order was entered on October 11, 2000 allowing the Trustee through and including October 19, 2000 in which to object to the Debtor's exemptions.

6. On October 19, 2000, the Trustee filed an Objection to Debtor's Claim for Property Exemptions. The Trustee objected to the Debtor's claimed exemption in realty located at 1045 Cades Cove Drive, Yadkinville, North Carolina on the basis that the Debtor does not reside at that location.²

7. The Debtor and Jason Lee Casstevens separated in February of 1999. The Debtor voluntarily left the marital home located at 1045 Cades Cove Drive, Yadkinville, North Carolina, and moved into the home of her parents, located at 1044 Cades Cove Drive, Yadkinville, North Carolina.

8. Jason Lee Casstevens continued residing at 1045 Cades Cove Drive after the separation and has resided at that location since that time.

9. With the consent of Jason Lee Casstevens, the Debtor entered the marital home on one occasion in February 1999, after the parties separated, to collect some of her personal belongings. The Debtor attempted to enter the marital home on a second occasion in February or March of 1999 to collect additional personal belongings but was unable to do so because the locks had been changed.

10. The Debtor contacted an attorney regarding her domestic case in March of 1999. She did not seek to obtain possession of the marital home.

²The Trustee also objected to the Debtor's claimed exemptions in a 1995 Chevrolet Blazer and certain household goods. These issues have been resolved either by agreement of the parties or by separate orders of this court.

11. The Debtor and Jason Lee Casstevens filed a joint tax return for 1999 and listed their address as 1045 Cades Cove Drive. The Debtor has not changed her driver's license to reflect a change of address from 1045 Cades Cove Drive. However, when she moved in with her parents, she advised the taxing authorities of her new address.

12. The Debtor was granted an absolute divorce based on a separation for at least one year next preceding the commencement of the action. The Judgment was entered on June 12, 2000. Issues of Equitable Distribution in that action are pending.

13. The Debtor has no dependents living in the marital home.

DISCUSSION

The issue before the court is whether the Debtor is entitled to an exemption in the amount of \$10,000.00 in the real estate located at 1045 Cades Cove Drive, Yadkinville, North Carolina (the "marital home") pursuant to North Carolina Gen. Stat. § 1-C 1601 (a) (1) or if she is only entitled to a wild card exemption of \$3,500.00. It is the position of the Creditor and the Trustee that the Debtor is not entitled to the exemption because the marital home is not being used as a "residence" as required by the North Carolina statute. They contend that the Debtor voluntarily left the marital home in February of 1999 and moved into her parents' home, where she continued to reside when the petition was filed. The Creditor claims that the verified Complaint filed by the Debtor in March 2000, seeking a divorce, supports its position in that it includes an allegation that the Debtor and Jason Lee Casstevens have lived continuously separate and apart since February 19, 1999. The Debtor contends that while she did leave the marital home when she separated from her husband, this was the only property she ever owned and she considers it her residence.

Property which may be claimed as exempt by a debtor in bankruptcy is generally

governed by Section 522 of the Bankruptcy Code. 11 U.S.C. § 522. Pursuant to Section 522

(b)(1), North Carolina has “opted out” of the federal exemptions specified in Section 522 (d) and has instead created its own exemptions. N.C.G.S. § 1-C 1601 (f); see, In re McQueen, 196 B.R. 31 (E.D.N.C. 1995). With respect to residential property, North Carolina Gen. Stat. § 1-C 1601 provides in part as follows:

(a) Exempt property. - Each individual, resident of this State, who is a debtor is entitled to retain free of the enforcement of the claims of creditors:

(1) The debtor’s aggregate interest, not to exceed ten thousand dollars (\$10,000) in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor.

North Carolina’s exemption laws are to be liberally construed in favor of the exemption. In re Laues, 90 B.R. 158 (Bankr. E.D.N.C. 1988). It is also the rule in North Carolina that “provisions which restrict a debtor’s access to exemptions should be construed narrowly’ and debtors should be allowed a great deal of flexibility in claiming and maintaining their exemptions.” In re Cain, 235 B.R. 812, 816 (Bankr. M.D.N.C. 1998) (citing Household Finance Corp. v. Ellis, 107 N.C. App. 262, 266, 419 S.E.2d 592 (1992); Commissioner of Banks v. Yelverton, 204 N.C. 441, 168 S.E. 505 (1933)). However, the statute expressly requires that the real property in which the debtor seeks an exemption must be used as a residence by the debtor or a dependent of the debtor. In re Cain, 235 B.R. at 817.

Residence is not a defined term in the North Carolina statute. There are, however, several North Carolina cases that have addressed the issue of residence in insurance coverage cases, and the definition used for residence must comport with the purpose of the statute. As stated in Barker v. Iowa Mut. Ins. Co., 241 N.C. 397, 399, 85 S.E.2d 305, 306-307 (1955),

Residence has been variously defined by this Court. The definitions vary according to the purposes of the several statutes referring to residence and the objects to be accomplished by them. Definitions include "a place of abode for more than a temporary period of time;" in other cases the word residence is construed to mean "domicile," signifying a permanent and established home.

In Sheffield v. Walker, 231 N.C. 556, 559, 58 S.E.2d 356, 359 (1950), the court held that "the word 'residence' . . . has many shades of meaning ranging all the way from mere temporary presence to the most permanent abode."

The court finds that the best definition of residence for the purpose of the North Carolina Gen. Stat. § 1C-1601 (a)(1) is a person's actual place of abode, whether permanent or temporary. Jamestown Mut. Ins. Company v. Nationwide Mut. Ins. Co., 266 N.C. 430, 146 S.E.2d 410 (1966). In North Carolina, the residential exemption is conditioned upon the use of the property as a residence when the bankruptcy case is filed and the continued use and ownership of the property as a residence. In re Love, 54 B.R. 947, 948 (E.D.N.C. 1985).

The Debtor did not use this property as her residence at the time of the filing and had not used the property as her residence for a period of fifteen months prior to the filing. Therefore, the Debtor is not entitled to a \$10,000.00 residency exemption but is limited to a wild card exemption of \$3,500.00.

Therefore, it is ORDERED, ADJUDGED AND DECREED that the Objections by the Trustee and by Roy D. Casstevens and Jason Lee Casstevens to the Debtor's residency exemption are hereby sustained.

This the 21 day of February, 2001.

CATHARINE R. CARRUTHERS

Catharine R. Carruthers
United States Bankruptcy Judge