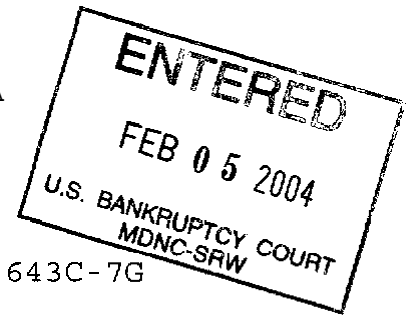


UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF NORTH CAROLINA  
GREENSBORO DIVISION



IN RE: )

Kathy Gail McClamrock, )

Debtor. )

) Case No. 03-13643C-7G  
)  
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ORDER

This case came before the court on January 13, 2004, for hearing upon the Trustee's objection to Debtor's claim for property exemptions. Thomas L. Nesbitt appeared on behalf of the Debtor and Charles M. Ivey, III, appeared on behalf of the Trustee.

When this case was filed, the Debtor owned as a tenant in common a one-half undivided interest in a house and lot located at 817 Old Charlotte Road, Concord, North Carolina ("the Property"). According to Debtor's schedules, the Property had a value of \$42,000.00 and was subject to a deed of trust securing an obligation of some \$20,500.00. In her claim for property exemptions, the Debtor claimed an exemption of \$10,000.00 with respect to the Property pursuant to N.C.G.S. § 1C-1601(a)(1) which provides that a debtor may claim as exempt property "[t]he 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. ." <sup>1</sup> (Emphasis supplied). In his

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<sup>1</sup>Pursuant to N.C.G.S. § 1C-1601(f), North Carolina has opted out of the exemptions provided for in § 522(d) of the Bankruptcy Code and adopted the exemptions provided in N.C.G.S. § 1C-1601.

objection, the Trustee asserts that the Debtor may not claim an exemption in the Property pursuant to N.C.G.S. § 1C-1601(a) (1) because the Property was not the residence of the Debtor or a dependent of the Debtor when this case was filed. The issue thus presented is whether the Property qualifies as a residence of the Debtor for purposes of N.C.G.S. § 1C-1601(a) (1). In resolving this issue, the court is required to follow the maxim that the exemption laws should be liberally construed in favor of the exemption. See Elmwood v. Elmwood, 295 N.C. 168, 185, 244 S.Ed.2d 668, 678 (1978).

The term residence is not defined in N.C.G.S. § 1C-1601 or elsewhere in the exemption statutes. Although the North Carolina Courts have not defined residence in the context of N.C.G.S. § 1C-1601(a)(1), they have defined the meaning of residence in other contexts. The word has been given different shades of meaning, depending upon the nature and purpose of the statute in which residence is used, and there is no single, fixed meaning of residence that is applicable in all cases. See Jamestown Mutual Ins. Co. v. Nationwide Mut. Ins. Co., 266 N.C. 430, 435-39, 146 S.E.2d 410, 414-17 (1966) (discussing various cases which have defined residence). However, a common thread running through the North Carolina cases is that, at a minimum, in order for a place to be a person's residence, it must be occupied by the person as his or her principal place of dwelling on more than a transient basis. See In re Stone, 2001 WL 1699678 (Bankr. M.D.N.C.).

In the present case, although the Debtor occupied the Property as her principal dwelling at one time, the evidence established that she no longer did so when this case was filed. As a result, the Property does not qualify as the Debtor's residence and therefore may not be exempted pursuant to N.C.G.S. § 1C-1601(a) (1).

More than five years before this case was filed the Debtor moved from the Property. According to the Debtor, she did so as a result of domestic violence on the part of her former husband. At that time the Debtor took her clothes and personal effects from the Property and began living at another location. The Debtor has never resumed living on the Property and was not living there when this case was filed.

The fact that the Debtor did not have a physical presence at the Property when this case was filed does not, standing alone, preclude the Property from qualifying as her residence. Absence from the home that is involuntary and temporary does not constitute relinquishment or abandonment of the homestead. See In re Buick, 237 B.R. 607, 610 (Bankr. W.D. Pa. 1999). A debtor who is driven from her residence by domestic violence and who is prevented from returning by the continuing presence of her abusive spouse may still claim an exemption in the residence. See In re Thomas, 27 B.R. 367, 370-71 (Bankr. S.D.N.Y. 1983). However, this is not a case in which the Debtor has been barred from her home involuntarily. Debtor's former husband no longer lives on the property and has been gone for

several years. There was no showing of continuing domestic violence or any other reason why the Debtor could not have resumed living on the Property if she wished to do so. When this case was filed, the Debtor listed her street address as being in Thomasville, North Carolina. The address listed in her petition is an apartment in Thomasville which she occupies with a companion with whom she has lived for several years. The Debtor keeps her clothes and personal belongings at the apartment in Thomasville, spends most nights there, takes most meals there, receives her mail there and lists the apartment as her home address on her driver's license.

It thus appears that by her own choice the Debtor has occupied the apartment in Thomasville as her principal home for a significant period of time and was doing so when this case was filed. Consequently, the Property was no longer her residence when this case was filed. Debtor's self-serving testimony that she intends to return to the Property at some point in the future was insufficient to establish constructive occupancy of the property. See In re Lusiak, 247 B.R. 699, 703 (Bankr. N.D. Ohio 2000) ("for a debtor to establish the requisite intent to return to his property, the debtor's own testimony must be coupled with external circumstances which would demonstrate that it would be realistic to expect that the debtor will actually return to the property"). See also 5 COLLIER ON BANKRUPTCY ¶ 522.09[1] (15th ed. rev. 2003) ("there must be some positive indication of an intent to occupy the premises; an

undefined floating intention is inadequate").

Since the Property does not qualify as a residence of the Debtor for purposes of N.C.G.S. § 1C-1601(a) (1), the Trustee's objection will be sustained and the Debtor will not be permitted to claim a \$10,000.00 exemption with respect to the Property. Instead, the Debtor will be limited to a \$3,500.00 wildcard exemption with respect to the Property pursuant to N.C.G.S. § 1C-1601(a) (2).

IT IS SO ORDERED.

This 4th day of February, 2004.

  
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WILLIAM L. STOCKS  
United States Bankruptcy Judge