

SO ORDERED.

SIGNED this 12th day of April, 2013.



Catharine R. Aron

UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

IN RE:)
Carol Lynn McTearnen) Case No.: 12-81754
)
)
_____)

ORDER OVERRULLING
TRUSTEE'S OBJECTION TO DEBTOR'S CLAIM FOR PROPERTY
EXEMPTIONS AND TRUSTEE'S OBJECTION TO PLAN CONFIRMATION

THIS MATTER came on for hearing before the Court on March 21, 2013, in Durham, North Carolina, after due and proper notice, upon the Trustee's Objection to Debtor's Claim for Property Exemptions and the Trustee's Objection to Plan Confirmation. Edward Boltz and Koury Hicks appeared on behalf of the Debtor and Benjamin E. Lovell appeared on behalf of the Chapter 13 Trustee (the "Trustee"). After considering the objections, arguments of counsel, testimony of Debtor, and evidence on record, the Court makes the following findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure:

JURISDICTION

This Court has jurisdiction over the subject matter of this proceeding pursuant to 28 U.S.C. §§151, 157 and 1334, and Local Rule 83.11 entered by the United States District Court for the Middle District of North Carolina and this is a core proceeding within 28 U.S.C. §157(b) which this Court may hear and determine.

PROCEDURAL HISTORY AND FINDINGS OF FACT

Carol Lynn McTearnen (the “Debtor”) lived in Colorado with her husband and children for over 30 years. The husband was the primary wage earner, but the Debtor worked as a licensed real estate broker and, in recent years, her income varied from \$5,000 to \$15,000.

In December 2011, her husband was diagnosed with brain cancer. In an effort to obtain better medical care, the family moved to Durham, North Carolina in April 2012. The Debtor’s husband was unable to work due to his illness, and the Debtor was unable to seek employment as she was the primary caregiver for her husband. The family depleted funds from his 401(k) retirement to pay for medical and living expenses.

The Debtor’s husband passed away on October 11, 2012. At his death, the Debtor was the beneficiary of a \$100,000 life insurance policy that her husband had obtained through his employer. Due in large part to the medical bills the family incurred, the Debtor filed a Chapter 13 petition on November 21, 2012.

The Trustee filed an Objection to the Debtor’s Claim for Property Exemptions. The issue before the Court is whether the Debtor may exempt these life insurance proceeds and if so, how much of the proceeds should be exempt. The answer to this question will also resolve the Trustee’s Objection to Plan Confirmation. The Trustee is

requesting that all non-exempt insurance proceeds be turned over to the Trustee for distribution to unsecured creditors.

DISCUSSION

The vast majority of individuals that file for bankruptcy in North Carolina take the exemptions provided in the North Carolina Statutes. The exemptions provided in 11 U.S.C. § 522(d), the federal bankruptcy exemptions, are *not* applicable to North Carolina residents.

In this instance, however, the Debtor is ineligible to claim the North Carolina exemptions because she does not meet the 730-day domiciliary requirement of § 522(b)(3) of the Bankruptcy Code to claim North Carolina exemptions. Colorado law is the state law that is applicable to the Debtor under § 522(b)(3)(A). Colorado Revised Statute § 13-54-107 (the “Colorado Opt-Out Provision”) states that Colorado residents are not entitled to the exemptions set out in 11 U.S.C. § 522(d). The Colorado Opt-Out Provision does *not* apply to non-residents, therefore the Debtor is eligible to use the federal bankruptcy exemptions. *See In re Camp*, 631 F.3d 757, 760 (5th Cir. 2011) (finding that the opt-out provision of Florida law was not applicable to debtor who was a former resident of Florida; thus, the debtor was able to claim federal exemptions under § 522(b)(2)). The Debtor used the proper 91C non-North Carolina exemption form when she filed her claim for exemptions.

The Debtor has asked to retain \$100,000 of the life insurance proceeds as exempt under 11 U.S.C. § 522(d)(11)(C), the provision that allows for the exemption of life insurance payments needed for support. The Trustee takes the position that all of the funds are not reasonably necessary for the Debtor’s support and that any excess monies

should be directed to increased payments under her Chapter 13 plan for distribution to unsecured creditors.

Courts have varied on the exemption amount properly claimed pursuant to the standard of “reasonably necessary.” *Compare In re Woodford*, 73 B.R. 675 (Bankr. N.D.N.Y. 1987) (finding under the applicable New York exemption statute that only 30% of the \$116,000 in a retirement plan was necessary for the support of a 58-year-old Debtor who was still practicing law and had equity in his home), *with In re Gallo*, 49 B.R. 28 Bank. N.D. Tex. 1985) (finding under § 522(d)(11)(C) of the Bankruptcy Code, \$275,000 of life insurance proceeds was reasonably necessary for the support of a debtor who had a degenerative disease, two young dependants, and no occupation). The Bankruptcy Code does not specify a dollar ceiling on the exemption. The Court looks to see if the funds are reasonably necessary for the debtor’s subsistence rather than seeking to maintain the quality of the debtor’s pre-petition lifestyle. *See In re Walck*, 459 B.R. 208, 213 (Bankr. M.D. Pa. 2011); *In re Collins*, 281 B.R. 580, 582 (Bankr. M.D. Pa. 2002). The following factors are considered when assessing whether insurance proceeds are reasonably necessary for the support of the debtor: (1) The debtor’s present and anticipated living expenses; (2) debtor’s present and anticipated income from all sources; (3) the age of the debtor and his or her dependants; (4) the health of the debtor and his or her dependants; (5) debtor’s ability to earn a living; (6) debtor’s job skills, education, and training; (7) the debtor’s other assets, including exempt assets; (8) the liquidity of these other assets; (9) debtors ability to save for retirement; (10) the special needs of the debtor and his or her dependants; and (11) debtor’s continuing financial obligations, like

alimony or support payments. *See Walck*, 459 B.R. at 213-14 (explaining that the factors are adopted from the Uniform Exemptions Act).

The Court applies the *Walck* factors to find as follows: The Debtor currently has no income other than the money from the life insurance policy. The Debtor proposes to amortize the monies over the life of the Chapter 13 plan to show income of \$1,666.00 per month. Her Chapter 13 plan proposes a payment of \$184.00 per month for 60 months. The Debtor's expenses exceed her income. Her budget is minimal (for example, she only allocates \$100.00 per month for food and \$20 per month for clothing). At the present time, the Debtor's daughter is contributing money to the household. It is unknown if this stream of income will continue.

The Debtor is fifty-four years old and is without a college education. North Carolina does not give reciprocity to Colorado realtor licenses, so she would have to start anew to become a realtor in North Carolina. She has been actively seeking employment. The Debtor has no special needs, no dependants, nor does she have continuing financial obligations like alimony or support payments, so she has no other assets to pay debts. The Debtor has no money for retirement.

CONCLUSION

Based on the foregoing, the Court concludes that the Trustee has not met his burden to show that the \$100,000.00 of life insurance proceeds is not reasonably necessary for the Debtor's support.

It is therefore ORDERED that the Trustee's Objection to Debtor's Claim for Property Exemptions and Objection to Confirmation of Plan are **OVERRULED**.

END OF DOCUMENT

SERVICE LIST

Carol Lynn McTearnen
Debtor

Edward Boltz
Koury Hicks
Attorneys for Debtor

Richard M. Hutson, II
Trustee