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TIMOTHY R. WALBRIDGE, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE: **GRANT, BRUCE, and** **EASTER-GRANT, EMILY,** **Debtors.**	**Case No. 97-04863-M** **Chapter 7**

MEMORANDUM OPINION

THIS MATTER comes before the Court pursuant to the Trustee's Objection to Exemption (the "Objection") filed by Gerald R. Miller ("Trustee" or "Miller"). The Court held an evidentiary hearing on the Objection on October 4, 2000. Debtors appeared personally and through their attorney, Scott Kirtley ("Kirtley"). The Trustee appeared *pro se*. At the conclusion of the hearing, the matter was taken under advisement. The following findings of fact and conclusions of law are made pursuant to Bankruptcy Rule 7052 and Federal Rule of Civil Procedure 52.

Jurisdiction

The Court has jurisdiction over this matter pursuant to 28 U.S.C.A. § 1334(b),[1] and venue is proper pursuant to 28 U.S.C.A. § 1409. Reference to the Court of this matter is proper pursuant to 28 U.S.C.A. § 157(a). This is a core proceeding as contemplated by 28 U.S.C.A. § 157(b)(2)(B).

Findings of Fact

This matter centers around the ability of the Debtors to amend their claim of exemptions in order to claim certain real property located in Wagoner County, Oklahoma (the "Wagoner Property")

[1] Unless otherwise noted, all statutory references are to sections of the United States Bankruptcy Code, 11 U.S.C.A. § 101 *et. seq.* (West 2000).

32

as an exempt homestead under Oklahoma law.[2] Debtors acquired the Wagoner Property in 1993 for a purchase price of $20,000.00. At the time, the Wagoner Property consisted of a single family residence located upon a small acreage. The residence was in a state of serious disrepair. Debtors spent approximately two or three months repairing the residence, and then moved to the Wagoner Property.

Debtors continued to live on the Wagoner Property until sometime in 1995. During that year, Debtors moved to Tulsa, Oklahoma in order to care for the father of Ms. Easter-Grant, who suffers from multiple sclerosis. Upon moving to Tulsa, Debtors took up residence in a rental dwelling adjacent to the home of Ms. Easter-Grant's father (the "Rental"). Debtors have resided in the Rental continuously since 1995.

Debtors filed a petition for relief under Chapter 7 of the Bankruptcy Code on October 17, 1997.[3] Debtors listed one parcel of real property on Schedule A of their bankruptcy schedules. That property was a townhouse located in Tulsa (the "Townhouse"). Debtors claimed the Townhouse as

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[2] The legal description of the Wagoner Property is

> The East Half of the East Half (E/2 E/2) of the South 18.56 acres of Lot Six (6), in the Northwest Quarter of the Southwest Quarter (NW1/4 SW1/4), and the East Half of the East Half (E/2 E/2) of Lot Seven (7) in the Southwest Quarter of the Southwest Quarter (SW1/4 SW1/4), all in Section Thirty (30), Township Sixteen (16) North, Range Nineteen (19) East of the IBM, Wagoner County, Oklahoma.

[3] At the time of filing, Mr. Grant was receiving monthly disability payments from the Social Security Administration. Ms. Easter-Grant was employed in the manufacturing sector. Ms. Easter-Grant's employer, SAMCO, had previously purchased the assets of American Beauty Products, Inc., ("ABP") a Tulsa company that had employed Ms. Easter-Grant. ABP filed bankruptcy under Chapter 11 in 1995 while Ms. Easter-Grant was serving as the company's president. Kirtley represented ABP in its bankruptcy case. Ms. Easter-Grant is currently the president of SAMCO.

their exempt homestead.[4] There were no objections to the Debtors' claims of exemption, and the same were allowed as a matter of law. Debtors received a discharge on January 27, 1998. The Court entered its final decree closing the case on February 12, 1998.

Debtors did not list the Wagoner Property on their schedules. In response to direct questioning by Miller at the first meeting of creditors, Debtors stated under oath that their schedules contained a complete listing of all of their assets and liabilities. Ms. Easter-Grant testified that although they were aware of the requirement to disclose all their assets upon filing bankruptcy, the Debtors deliberately omitted the Wagoner Property from their schedules. Ms. Easter-Grant said this was done because Debtors considered the Wagoner Property to be their homestead and believed they were not required to list exempt property on the schedules. Debtors informed Kirtley of the existence of the Wagoner Property sometime in 2000, only after they unsuccessfully attempted to pledge the Wagoner Property as collateral for a loan.

Debtors currently visit the Wagoner Property approximately twice a month for maintenance purposes. In addition, they occasionally host family gatherings there. Ms. Easter-Grant testified that the Debtors intend to return to the Wagoner Property and reestablish permanent residence there, although when this will happen is dependent upon her father's health. According to Ms. Easter-Grant, the Debtors consider the property in Wagoner County to be their home notwithstanding the fact that they have resided at the Rental since 1995.

Debtors moved to reopen their case on June 1, 2000. An order reopening the case was

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[4] The record indicates that Debtors did not occupy the Townhouse when this case was filed. They eventually defaulted on the note and mortgage secured by the Townhouse and the lender subsequently foreclosed on the property.

entered on June 8, 2000. At the time they filed their motion to reopen, Debtors filed an amendment to their Schedule A, claiming fee simple ownership of the Wagoner Property. In addition, Debtors amended their Schedule C to claim the Wagoner Property as their homestead. It is this claim of exemption which has drawn the objection of the Trustee.

To the extent the "Conclusions of Law" contain any items which should more appropriately be considered "Findings of Fact," they are incorporated herein by reference.

Burden of Proof

The burden of proof is upon the objecting party, the Trustee, to show by a preponderance of the evidence that an exemption is not properly claimed. *See* Fed. R. Bankr. P. 4003(c) (West 2000); *see also In re Simpson*, 206 B.R. 230, 232 (Bankr. E.D. Okla. 1997). The homestead exemption statute should be liberally construed in favor of debtors to allow for the protection of the family and their home. *See In re Martin,* 875 P.2d 417, 422 (Okla. 1974). The existence and extent of a homestead are questions for the trier of fact. *In re Kretzinger,* 103 F.3d 943, 946 (10th Cir. 1996). Under Oklahoma law, the abandonment of a homestead must be proven by clear and convincing evidence. *State ex rel. Means v. Ten (10) Acres of Land,* 877 P.2d 597, 601 (Okla. 1994).

Conclusions of Law

Pursuant to § 522 of the Bankruptcy Code, a Chapter 7 debtor may exempt certain property from the bankruptcy estate and place it beyond the reach of creditors, while non-exempt property becomes part of the bankruptcy estate. In a Chapter 7 bankruptcy case, all exemption entitlements (including that of homestead) are determined as of the date the case is filed. *See Mansell v. Carroll*, 379 F.2d 682, 684 (10th Cir. 1967); *see also In re Klaus,* 228 B.R. 475, 478 (Bankr. N. D. Okla.1999). Oklahoma has chosen to opt out of the federal exemption scheme, limiting the

exemptions available in bankruptcy cases to those allowed under state law. *See* § 522(b)(1); *see also* Okla. Stat. Ann. tit. 31, § 1 *et. seq.* (West 1991 & Supp. 2000). Oklahoma law provides for the following homestead exemption:

> A. Except as otherwise provided in this title and notwithstanding subsection B of this section, the following property shall be reserved to every person residing in the state, exempt from attachment or execution and every other species of forced sale for the payment of debts, except as herein provided:
>
> 1. The home of such person, provided that such home is the principal residence of such person;

Okla. Stat. Ann. tit. 31, § 1(A)(1) (West 1991 & Supp. 2000). Debtors are entitled to exempt one homestead per family. *See Glaze v. Drawver*, 117 P.2d 544, 546 (Okla. 1941).

In order to qualify as a homestead for exemption purposes, two requirements must be met: (1) there must be a clear intent to make certain property a homestead as expressed by "overt acts of preparation in the erection of improvements and in preparation of the land for the home," and (2) the property must be occupied without undue postponement after the overt acts of preparation or a good faith attempt at occupancy must be made. *See In re Jones*, 107 B.R. 350, 351-352 (Bankr. E.D. Okla. 1989). In order to change from one homestead to another there must be a clear intent to repudiate and abandon the old homestead. *See In re Simpson*, 206 B.R. at 232 (E.D. Okla. 1997). Each of these matters are questions of fact to be decided by the trier of fact. *See In the Matter of Neis*, 723 F.2d 584, 589 (7th Cir. 1983); *see also In re Bradshaw*, 125 B.R. 782, 784-785 (Bankr. E.D. Wis. 1991).

When Debtors filed their Chapter 7 case, they had a full opportunity to claim the Wagoner County property as their homestead. Instead, they claimed the Townhouse as exempt, and deliberately failed to disclose their ownership interest in the Wagoner Property. The Court finds that

the claim of the Townhouse as exempt establishes Debtors' intention to repudiate and abandon any claim of the Wagoner Property as their homestead. In order to eliminate any issue as to whether the Court has applied the proper standard of proof, the Court explicitly finds that Debtors' abandonment of any homestead claim in the Wagoner Property has been proven by clear and convincing evidence.

The Trustee also argues that Debtors are acting in bad faith in seeking to amend their exemption claim, pointing to the fact that Debtors purposely failed to disclose any interest in the Wagoner Property prior to the reopening of their case. Every debtor has a duty to cooperate with the trustee and to surrender to the trustee all property of the estate. *See* § 521(3) and (4); *see also Davis v. Davenport (In re Davenport),* 147 B.R. 172, 181 (Bankr. E.D. Mo. 1992) (debtor has duty to answer all of trustee's questions concerning financial affairs in accurate, candid and truthful manner); *Holder v. Bennett (In re Bennett),* 126 B.R. 869, 875 (Bankr. N.D. Tex. 1991) ("[c]andor, accuracy and integrity are required of a debtor in bankruptcy"). In this case, Debtors breached this duty. They did not disclose their interest in the Wagoner Property until it was necessary in order to further their own interests; i.e., in order for them to borrow against the Wagoner Property.

Debtors maintain that they failed to disclose their interest in the Wagoner Property because of a good faith belief that such disclosure was not required. The Court finds this explanation untenable for two reasons. First, the Debtors were represented by Kirtley, an experienced bankruptcy attorney and a member of the Chapter 7 trustees' panel in this district. The Court does not believe that Kirtley failed to make clear to Debtors the necessity of disclosing, at the time of filing, *all* of their assets, *including those they wished to claim as exempt*. In addition, if Debtors did not disclose their interest in the Wagoner Property due to a good faith belief that disclosure of an exempt homestead was not required, one is left to ponder why they scheduled their interest in the

Townhouse, and claimed that interest as exempt.

The only witness which the Court heard regarding the intent and belief of the Debtors with respect to their claim of homestead and their reasons for not disclosing any interest in the Wagoner Property was Ms. Easter-Grant.[5] Having heard her testimony and observed her demeanor on the witness stand, the Court does not believe that Ms. Easter-Grant failed to appreciate the importance of answering the Trustee's questions truthfully and fully. She is not an unsophisticated person. In 1995, during her tenure as president of ABP, the company reorganized under Chapter 11. Since that time, Ms. Easter-Grant has advanced to the position of president of SAMCO, the company that purchased ABP's assets. She has substantial experience in the business world and familiarity with bankruptcy procedure. Her alleged naiveté with respect to the duty of full disclosure is not credible.

A court may, based upon the facts of a particular case, refuse to allow a debtor to amend its claimed exemptions "if there is bad faith by the debtor or prejudice to creditors." *In re Calder*, 973 F.2d 862, 867 (10th Cir. 1992) (citations omitted). On the facts before it, the Court concludes that the attempt by Debtors to amend their exemptions to claim the Wagoner Property as their homestead was not made in good faith. To rule otherwise would render the duty of every debtor to fully and completely list all of their assets and all of their liabilities a nullity. It would also reward these Debtors for misleading the Trustee and the Court.

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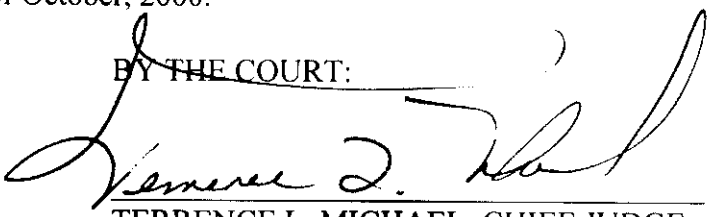
[5] Mr. Grant testified briefly for the purpose of reaffirming the testimony of Ms. Easter-Grant.

Conclusion

The Trustee's Objection to Exemption filed by Gerald R. Miller is sustained. A separate judgment in accordance with this Memorandum Opinion is entered concurrently herewith.

Dated this 17th day of October, 2000.

BY THE COURT:



TERRENCE L. MICHAEL, CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT

cc: Scott Kirtley
Gerald R. Miller

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