

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE

In re:

No. 92-13809
Chapter 7

HERBERT DAVID MARTIN

Debtor

MEMORANDUM

Appearances: Charles O. Ragan, Jr., Chattanooga, Tennessee, Attorney for
Debtor

Douglas R. Johnson, Johnson & Gilbert, Chattanooga, Tennessee,
Attorneys for Trustee

R. THOMAS STINNETT, UNITED STATES BANKRUPTCY JUDGE

When Herbert Martin filed his Chapter 13 bankruptcy case, he was living in an apartment and did not claim a homestead exemption in the townhouse that he owned. Mr. Martin moved into the townhouse during the Chapter 13 case. Later, when he converted the Chapter 13 case to a Chapter 7 case, Mr. Martin claimed a homestead exemption in the townhouse. The bankruptcy trustee objects to the exemption. The trustee contends:

- (1) Mr. Martin's exemption rights must be determined according to the facts at the moment he filed his Chapter 13 case;
- (2) Tennessee law allows a homestead exemption only in the debtor's residence;
- (3) Mr. Martin cannot claim the homestead exemption because the townhouse was not his residence when he filed the Chapter 13 case.

For the reasons stated below, the court denies the trustee's objection and allows the exemption. The parties have stipulated certain facts and the court has taken judicial notice of other facts from the record of the case. FED. R. EVID. 201.

This case was originally filed on August 25, 1992, as a Chapter 13 wherein Mr. Martin listed his residence as 409 Cameron Circle, Apartment 2303, Chattanooga, Tennessee 37402. Mr. Martin also listed ownership of a two story frame townhouse located at 3616 Oakland Terrace, Chattanooga, Tennessee 37415. He claimed no homestead exemption in the Oakland Terrace property. The Oakland Terrace property was then leased to another individual or individuals as indicated in the statement of affairs at question number 2.

The court confirmed Mr. Martin's Chapter 13 plan on September 30, 1992. The order confirming the Chapter 13 plan provided that property of the bankruptcy estate did not revert in Mr. Martin on confirmation of the plan.

In the late spring or early summer of 1994, Mr. Martin moved into the house on Oakland Terrace and established that property as his residence.

On September 1, 1994, before completing the Chapter 13 plan, Mr. Martin filed a notice of conversion of his Chapter 13 case to a Chapter 7 case. Simultaneously, he amended the schedules in his bankruptcy case to include a homestead exemption in the house on Oakland Terrace.

DISCUSSION

A debtor begins a voluntary bankruptcy case by filing a petition under a particular chapter of the Bankruptcy Code. This is the commencement of the bankruptcy case and the date of filing of the petition. 11 U.S.C. §§ 301 & 302. The bankruptcy case may be converted from one chapter of the Bankruptcy Code to another, but conversion does not change the date of filing of the petition or the date of commencement of the case. 11 U.S.C. § 348(a), (b), (c).

Mr. Martin commenced his bankruptcy case by filing a Chapter 13 petition on August 25, 1992. That day may be referred to as the petition date, the date of filing, or the commencement of the case.

The filing of the petition also brings into existence the bankruptcy estate. The bankruptcy estate generally includes all the debtor's property interests at the moment he filed the bankruptcy petition. 11 U.S.C. § 541(a).

Section 522 of the Bankruptcy Code allows a debtor to exempt property of the bankruptcy estate. 11 U.S.C. § 522(b). Mr. Martin's interest in the townhouse became

property of the bankruptcy estate when he filed his Chapter 13 petition. The order confirming Mr. Martin's Chapter 13 plan provided that the property of the bankruptcy estate would not revert in him until completion of the Chapter 13 plan. As a result, Mr. Martin's interest in the townhouse remained property of the bankruptcy estate after confirmation of his Chapter 13 plan. Mr. Martin converted the case to Chapter 7 before completing the plan. His interest in the townhouse never left the bankruptcy estate before conversion of the case to Chapter 7, and it became property of the bankruptcy estate in the Chapter 7 case.¹ *Cf. In re Bartlett*, 149 B.R. 446, 447 (Bankr. W. D. Tex. 1992).

Tennessee law allows a homestead exemption only in real property used as a principal place of residence. See TENN. CODE ANN. 26-2-301. The issue is whether Mr. Martin's right to a homestead exemption is limited by the facts when he filed the Chapter 13 petition—when the townhouse was not his residence.

¹New § 348(f) does not apply to cases, such as this one, that were filed before October 22, 1994. 11 U.S.C. § 348(f); 2 LAWRENCE P. KING, COLLIER ON BANKRUPTCY ¶ 348.06A, note 1 (15th ed. 1995).

Section 522 of the Bankruptcy Code provides that a debtor's exemptions must be determined under the exemption *law* in effect on the petition date. 11 U.S.C. § 522(b)(2)(A). Section 522 does not provide, however, that the debtor's exemptions are controlled by *the facts* on the petition date. Thus, § 522 does not require the court to determine Mr. Martin's exemptions according to the facts when he filed his Chapter 13 petition. See *In re Butcher*, 75 B.R. 441, 443 (E. D. Tenn. 1987) *aff'd Butcher v. McLemore (In re Butcher)*, 848 F.2d 189 (6th Cir. 1988) (table); *Wilson v. Davis (In re Wilson)*, 62 B.R. 43, 45 (E. D. Tenn. 1985).

Furthermore, the Bankruptcy Rules allow the debtor to amend his schedules, including his schedule of exempt property, as a matter of course at any time before the case is closed. FED. R. BANK. P. 1009(a). *Lucious v. McLemore*, 741 F.2d 125 (6th Cir. 1984). To deny Mr. Martin his homestead exemption in this case would deny him the fresh start contemplated by the Bankruptcy Code. See *Armstrong v. Lindberg (In re Lindberg)*, 735 F.2d 1087 (8th Cir. 1984) *cert. den.* 469 U.S. 1073, 105 S.Ct. 566, 83 L.Ed.2d 509 (1984); *Winchester v. Watson (In re Winchester)*, 46 B.R. 492 (Bankr. 9th Cir. 1984); *In re Dyess*, 65 B.R. 143 (Bankr. W. D. La. 1986).²

Mr. Martin's interest in the townhouse did not revert in him when the plan was confirmed. 11 U.S.C. § 1327(b). This distinction may seem at odds with the reasoning in cases such as *Winchester v. Watson (In re Winchester)*, 46 B.R. 492 (Bankr. 9th Cir. 1984):

Once the property is reverted in the debtor after confirmation, he can do anything with it so long as

²These cases dealt with property that came into the bankruptcy estate on the petition date, not property acquired by the debtor after the petition date and before the conversion to Chapter 7. See also *In re Magness*, 160 B.R. 294 (Bankr. N. D. Tex. 1993) (involving § 541(a)(5)).

it is not subject to a lien provided for in the plan or order of confirmation. 11 U.S.C. §§ 1327(b) and (c). Thus, during the course of a plan, which can last as long as five years, a debtor may sell, abandon, consume, or trade-in most of his assets. Combining this with the possibility of after-acquired property means that by the time of conversion the estate may have been changed completely in character and amount.

46 B.R. at 495. See also *In re Mutchler*, 95 B.R. 748 (Bankr. D. Mont. 1989) (Chapter 12).

However, the provision of the confirmation order that prevents revesting in the debtor does not prevent the debtor from dealing with the property during the Chapter 13 case. It merely imposes the requirement of notice and a hearing for transactions outside the ordinary course of the debtor's financial affairs. 11 U.S.C. §§ 1303 & 363(b); 2 KEITH M. LUNDIN, CHAPTER 13 BANKRUPTCY § 6.16 (2nd ed. 1994). The debtor's actions and events after confirmation can still cause a substantial change in the bankruptcy estate between confirmation of the Chapter 13 plan and conversion to Chapter 7.

Allowing the exemption based on the facts at the time of conversion may seem at odds with the Supreme Court's 1924 decision in *White v. Stump*, 266 U.S. 310, 45 S.Ct. 103, 69 L.Ed. 301 (1924). That case, however, was decided under the earlier statutes known as the Bankruptcy Act. 1A JAMES W. MOORE, ET AL., COLLIER ON BANKRUPTCY ¶ 6.07 (14th ed. 1978). Its reasoning does not necessarily carry over to cases under the Bankruptcy Code. *In re Patterson*, 825 F.2d 1140, 1143 (7th Cir. 1987).

Judge Cook's decision in *In re Payne* is not determinative. It involved a car that one of the debtors, Mrs. Payne, bought after the petition date. Unlike Mr. Martin's

townhouse, Mrs. Payne's car did not become property of the bankruptcy estate on the petition date. *Weems v. Winston (In re Payne)*, 88 B.R. 818 (Bankr. E. D. Tenn. 1988).

Finally, the debtor in a Chapter 13 case generally has an absolute right to dismiss the Chapter 13 case. 11 U.S.C. § 1307(b). The debtor can dismiss the Chapter 13 case and file a new Chapter 7 case. This will leave no doubt that the debtor's exemptions are determined by the facts at the time of filing the Chapter 7 case. The good faith requirement may prevent this procedure in some unusual circumstances but probably not in the ordinary case. See *Society National Bank v. Barrett (In re Barrett)*, 964 F.2d 588 (6th Cir. 1992); *Industrial Insurance Services, Inc. v. Zick (In re Zick)*, 931 F.2d 1124 (6th Cir. 1991); *In re Washtenaw/Huron Investment Corp.*, 160 B.R. 74 (E. D. Mich. 1993). The trustee has made no suggestion that Mr. Martin has acted other than in good faith. Accordingly, the court concludes the trustee's objection should be denied. An appropriate order shall be entered.

This Memorandum constitutes findings of fact and conclusions of law as required by Fed. R. Bankr. P. 7052.

BY THE COURT

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE

In re:

No. 92-13809
Chapter 7

HERBERT DAVID MARTIN

Debtor

ORDER

In accordance with the Memorandum entered this date,

It is ORDERED that the objection by the bankruptcy trustee to the debtor's claim of homestead exemption in the property located at 3616 Oakland Terrace, Chattanooga, Tennessee, is denied.

ENTER:

BY THE COURT

R. THOMAS STINNETT
U.S. BANKRUPTCY JUDGE

[entered August 3, 1995]