

UNITED STATES BANKRUPTCY COURT

DISTRICT OF SOUTH DAKOTA

ROOM 211

FEDERAL BUILDING AND U.S. POST OFFICE

225 SOUTH PIERRE STREET

PIERRE, SOUTH DAKOTA 57501

IRVIN N HOYT  
CHIEF BANKRUPTCY JUDGE

TELEPHONE (605) 224-0560  
FAX (605) 224-9020

April 2, 1997

James E. Carlon, Esq.  
Counsel for Debtor  
Post Office Box 249  
Pierre, South Dakota 57501

Trustee John S. Lovald  
Chapter 7 Trustee  
Post Office Box 66  
Pierre, South Dakota 57501

Donald E. Covey, Esq.  
Counsel for Sentinel Federal Credit Union  
Post Office Box 1766  
Winner, South Dakota 57580

John M. Grossenburg, Esq.  
Counsel for Debra Dice  
501 South Main Street  
Winner, South Dakota 57580

Subject: ***In re Roger L. Dice,***  
Chapter 7; Bankr. No. 96-30095

Dear Counsel and Trustee:

The matters before the Court are the Trustee's Objection to Claimed Exemptions and the Trustee's Motion to Abandon Estate Interest in Chattels and Debtor's responses to each. These are core proceedings under 28 U.S.C. § 157(b)(2). This letter decision and accompanying Order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that Debtor may claim exemptions under S.D.C.L. § 43-45-4 as a head of household, that Debtor has no homestead interest to declare exempt under S.D.C.L. § 43-31-1, that Debtor may not declare real property exempt under S.D.C.L. § 43-45-4, and that the Trustee may abandon the cattle from the estate to Debtor despite the tax ramifications to Debtor.

**SUMMARY OF FACTS.** Roger L. Dice and Debra Dice were divorced in April 1996. No formal property settlement has been made except that household goods were divided. Debra Dice has custody of the couple's minor daughter. Roger Dice pays monthly child support

46'

Re: Roger L. Dice  
April 2, 1997  
Page 2

for his daughter. Roger Dice and Debra Dice's son, of majority age, resides on rural property owned by the couple.

Since August 1996, Roger Dice has been residing with his fiancée and her minor children in a rented home. Roger and his fiancée each pay a portion of the rent. Roger Dice has no legal obligation to support his fiancée or her children.

Roger Dice (Debtor) filed a Chapter 7 petition on December 10, 1996. Debtor scheduled 800 acres of real property, which included 160 acres denominated as a homestead. Debtor has only a one-fourth undivided interest in 400 of the 800 acres. Debtor scheduled miscellaneous personalty valued at \$44,863.00. The personalty included 80 head of cattle (cows and calves combined) and a line of farm machinery. Of the 80 head of cattle, Debtor stated he had a 60% interest in 40 head of the calves.

Debtor declared two parcels of real estate exempt: 160 acres valued at \$2,937.00 under S.D.C.L. § 43-45-4 and another 160 acres as his homestead under S.D.C.L. § 43-31-1. Debtor declared an additional \$1,063.00 in personalty exempt under S.D.C.L. § 43-45-4.

On December 27, 1996, Trustee Lovald filed a Notice of Proposed Abandonment of Property Under Local Rule 317. Therein, he stated he intended to abandon from the estate 24 cows and 44 calves because their current fair market value was less than the secured claim against them held by Sentinel Federal Credit Union and because a sale in the estate would create a tax liability for the bankruptcy estate. Debtor filed a response on January 7, 1997. He argued there may be equity in the cattle for the estate and that the tax consequences of the sale should not be shifted from the bankruptcy estate to him. A hearing was held January 16, 1997 on the proposed abandonment. All parties agreed that the cattle could be sold when the weather permitted and that the abandonment question would be resolved at the next term of court.

On January 24, 1997, Trustee Lovald objected to Debtor's claimed exemptions. The Trustee argued Debtor could only claim \$2,000.00 exempt under § 43-45-4 and that some of the claimed exempt property, including realty, was undervalued. The Trustee also asked the Court to "review and determine the specific amount of homestead equity which debtor will be entitled to claim." Debtor filed a response on February 19, 1997. He argued he is entitled, as a head of household, to \$4,000.00 in exemptions under § 43-45-4 because his household consists of himself and his fiancée and because he financially supports his minor daughter. Debtor claimed that the realty values were based on current county assessments. Debtor further stated that Debra Dice's interests in the bankruptcy estate property should be determined in an adversary

Re: Roger L. Dice  
April 2, 1997  
Page 3

proceeding to which she is a party. Finally, Debtor argued that he is entitled to a homestead equity claim of \$30,000.00.

A hearing on the Trustee's objections to exemptions and a continued hearing on the Trustee's proposed abandonment was held February 27, 1997. Appearances included Attorney Carlon for Debtor, Trustee Lovald, and Attorney Covey for the Credit Union. Debtor testified about his residence, marital status, and support obligations on the date of the petition. The objection to exemptions and the proposed abandonment were taken under advisement. In addition, Attorney Carlon indicated he would commence an adversary proceeding to address Debra Dice's interest in the estate property.

**DISCUSSION--Head of Household.** The Court deems Debtor to be a head of household based on his support obligations to his minor daughter. Trustee Lovald indicated that he consented to that position in application of S.D.C.L. § 43-45-4 and the Court will abide by that. The policy is sound under the statute and encourages non custodial parents to comply with support orders. However, since a determination of whether Debtor qualifies as a head of household because he lives with his fiancée and her children is not necessary, the Court declines to rule on that question.

**Exemption of Real Property under § 43-45-4.** Section 43-45-4 expressly limits the property claimed thereunder to personal property, not real property. Therefore, Debtor may not declare exempt 160 acres valued at \$2,937.00 under that statute. The Court has had this issue raised previously and has consistently and strictly abided by the language of § 43-45-4 in bench rulings.

**Homestead.** Debtor's testimony established that on the petition date Debtor did not maintain a residence on his rural real property but that he maintained a residence in a rental home in town. Further, Debtor testified that his son lived on the rural real property. Finally, there was no indication that Debtor's residence at the rental home was temporary, that he intended to return to the house on the rural real property, or that he personally resided at both places but chose the rural home as his homestead. See S.D.C.L. § 43-31-2 (definition of a homestead); *Eagle Feather v. McHenry*, 190 N.W. 328, 330 (S.D. 1922) (intention to occupy must be evidenced by unmistakable acts showing an intention followed by actual occupancy within a reasonable time). Further, there is no evidence that Debtor resided at the rental house due to financial difficulties or for work or health reasons. *In re Hansen*, 17 B.R. 239, 242 (Bankr. D.S.D. 1982). Consequently,

Re: Roger L. Dice  
April 2, 1997  
Page 4

since the rental home does not qualify as a homestead, Debtor had no homestead interest on the petition date that he could declare exempt.

**Abandonment of Cattle from the Bankruptcy Estate.** Section 554(a) of the Bankruptcy Code provides that the trustee may abandon from the bankruptcy estate property that is "burdensome to the estate or that is of inconsequential value and benefit to the estate." Accordingly, various courts have held that the standard to be applied looks toward what is best for the estate, not necessarily what is best for the debtor or creditors. *In re Popp*, 166 B.R. 697, 698 (Bankr. D. Neb. 1993); *In re Nevin*, 135 B.R. 652, 654 (Bankr. D. Ha. 1991); and *Samore v. Olson (In re Olson)*, 121 B.R. 346, 348 (Bankr. N.D. Ia. 1990), *aff'd*, 930 F.2d 6 (8th Cir. 1991). To support his decision to abandon the property, the trustee has the burden to establish the value of the property and the liens against it. *New Jersey Department of Environmental Protection v. National Smelting of New Jersey, Inc. (In re National Smelting of New Jersey, Inc.)*, 49 B.R. 1012, 1014 (Bankr. D. Co. 1985) (cites therein).

The Trustee has met his burden. The actual sale prices obtained at auction established the cattle's fair market value. The secured claim against the cattle exceed the prices received. Accordingly, the abandonment is appropriate.<sup>1</sup> The Code does not shelter the Debtor from these post-petition tax consequences. *Popp*, 166 at 698-99; *In re Burpo*, 148 B.R. 918, 919 (Bankr. W.D. Mo. 1993). Debtor's right to a fresh start relates only to pre-petition debts. *Popp*, 166 B.R. at 698-99; *Olson*, 121 B.R. at 348.

**Determining Former Wife's Interests in Estate Property.** At the conclusion of the February 27, 1997 hearings, Attorney Carlon indicated that Debtor would commence an adversary proceeding so that Debtor's former wife's interest in estate property could be sorted out. While that needs to be done and ideally should have been done before the bankruptcy was filed, upon further reflection, this Court concludes that the state divorce court is the appropriate place for those matters to be sorted out. This Court

---

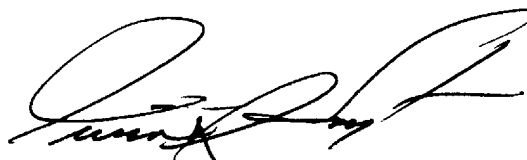
<sup>1</sup> Had the parties not consented to the sale of the cattle pending resolution of the abandonment issue and the Trustee had sold the cattle regardless, the bankruptcy estate would have had to bear the tax burden. See *Erickson v. United States (In re Bentley)*, 916 F.2d 431, 432-33 (8th Cir. 1990) (abandonment of post-petition sale proceeds is a taxable event to the estate).

Re: Roger L. Dice  
April 2, 1997  
Page 5

does not have jurisdiction over marital dissolution matters and can only affect title to property based on bankruptcy laws, not state divorce laws. Once those interests -- assets and liabilities -- are divided in state court, the Trustee can proceed to administer this case.

Appropriate orders will be entered.

Sincerely,



Irvin N. Hoyt  
Chief Bankruptcy Judge

INH:sh

CC: case file (docket original; copies to parties in interest)  
United States Trustee

**NOTICE OF ENTRY**  
Under F.R.Bankr.P. 9022(a)  
**Entered**

**APR 02 1997**

**Charles L. Nail, Jr., Clerk**  
**U.S. Bankruptcy Court**  
**District of South Dakota**

Case: 96-30095 Form id: 122 Ntc Date: 04/02/97 Off: 3 Page : 1  
Total notices mailed: 6

Debtor Dice, Roger L. Rt. 2-Box 76, Witten, SD 57584  
Aty Carlon, James E. PO Box 249, Pierre, SD 57501  
Trustee Lovald, John S. PO Box 66, Pierre, SD 57501  
Aty Covey, Donald E. PO Box 1766, Winner, SD 57580  
Aty Gering, Bruce J. Office of the U.S. Trustee, #502, 230 South Phillips Avenue, Sioux Falls, SD 57104-6321  
Aty Hill, David A. 505 East 4th, Dell Rapids, SD 57022  
Aty John M. Grossenburg, Counsel for Debra Dice, 501 S. Main St., Winner, SD 57580