

UNITED STATES BANKRUPTCY COURT

DISTRICT OF SOUTH DAKOTA

ROOM 211

FEDERAL BUILDING AND U.S. POST OFFICE

225 SOUTH PIERRE STREET

PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

TELEPHONE (605) 224-0560

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December 23, 1998

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

Rick A. Ribstein, Esq.,
Counsel for Debtor
Post Office Box 78
Brookings, South Dakota 57006

Subject: *In re John W. Kitterman,*
Chapter 7; Bankr. No. 98-40600

Dear Trustee and Counsel:

The matter before the Court is Trustee Lovald's objection to Debtor's claimed exemption in certain property. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and subsequent order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that the Trustee's objection must be sustained as to the trailer home.

SUMMARY OF STIPULATED FACTS. John W. Kitterman (Debtor) filed a Chapter 7 petition on July 27, 1998. Among the assets he claimed exempt were a lot and trailer that sit on a lake front near Volga. The trailer is not attached to the land and can be moved. The lot and trailer together were valued at \$9,500.00 in 1997. Assessments of the property in 1998 yielded a total value of \$11,606.00. Debtor has elected that the trailer and lot be taxed separately. On the petition date, about \$12,500.00 was still owed for the lot and trailer under a contract for deed. The property generates about \$195.00 net per month in rental income. Debtor declared his homestead exemption on separate realty. Debtor declared the lot and trailer exempt under S.D.C.L. § 43-45-4.

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Trustee Lovald objected to the exemption claim on the lot and trailer. Debtor responded with value information and an affidavit regarding the contract for deed.

A hearing was held October 8, 1998. The Trustee reiterated his position as stated in his objection. Debtor's counsel explained how the contract for deed and rental income were set forth in Debtor's schedules. The Court directed the parties to file a stipulation on whether Debtor has elected to have the property taxed as one unit of realty or separately as realty and a trailer.

By letter dated October 23, 1998, Trustee Lovald advised the Court that he and Debtor's counsel agreed that the trailer and realty are taxed separately. They also forwarded a copy of the installment contract for the trailer and lot and an amortization schedule.

APPLICABLE LAW. In addition to certain personal property and a homestead that are absolutely exempt under state law, a debtor in South Dakota who is not the head of a household may declare exempt another \$4,000.00 in personal property under § 43-45-4. By the specific language of the statute, only personal property may be exempted under § 43-45-4, not real property.

If an objection to claimed exempt property is timely filed, the objector bears the burden of proving that an exemption has not been properly claimed. Bankr. R. 4003(c). The standard of proof is clear and convincing evidence. *In re Fabian*, 122 B.R. 678, 682 (Bankr. W.D. Pa. 1990).

DISCUSSION. It is clear from the facts provided by the parties that the trailer is separate property from the river-front lot. Therefore, it remains personal property that Debtor may declare exempt under § 43-45-4. However, the lot itself, as realty, does not qualify under § 43-45-4. The Trustee's objection will be sustained as to the lot.

The Court does not have sufficient evidence to accurately value the trailer and lot separately to see whether Debtor's claim of an exemption in the trailer will cause Debtor to exceed his limit under § 43-45-4. The Court will leave that issue to the parties to determine (they will also need to allocate the post-petition rental payments between the estate's interest in the lot and Debtor's interest in the trailer). If the value issue cannot

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be timely resolved, the parties may request a continued hearing. Otherwise, Trustee Lovald shall submit a proposed order sustaining his objection to an exemption in the river-front lot.

Sincerely,



Irvin N. Hoyt
Chief Bankruptcy Judge

INH:sh

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

I hereby certify that a copy of this document
was mailed, hand delivered, or faxed this date
to the parties on the attached service list.

DEC 28 1998

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

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

DEC 28 1998

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

Case: 98-40600 Form id: 122 Ntc Date: 12/28/1998 Off: 4 Page : 1
Total notices mailed: 5

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