

In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

NEAL THERRIEN
Debtor(s).

Bankruptcy No. 95-50092XS
Chapter 7

ORDER RE: TRUSTEE'S OBJECTION TO CLAIM OF EXEMPTIONS

The matter before the court is the Trustee's objection to the debtor's claim of exemptions. Hearing was held July 5, 1995 in Sioux City, Iowa. The following constitutes the court's findings of fact and conclusions of law as required by Fed.R.Bankr.P. 7052. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B).

Neal Therrien filed his Chapter 7 bankruptcy petition in the Northern District of Iowa on January 23, 1995. He listed his address as Whiteman Air Force Base, Missouri. Although Therrien's schedule of exemptions identified the exemption law only by statute number, the parties agree that he claimed exemptions under Missouri law. The Trustee objected to Therrien's claim of exemptions on the ground that Therrien's testimony at his meeting of creditors indicated he was a resident of Arizona. Therrien argues that he resides in Missouri.

Therrien elected to claim exemptions available under 11 U.S.C. § 522(b)(2) which authorizes a debtor to exempt:

any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place.

11 U.S.C. § 522(b)(2)(A) (emphasis added). The terms "residence" and "domicile" under bankruptcy law are not synonymous. In re Pettit, ___ B.R. ___, 1995 WL 363337 at *2 (Bankr. D. Mass. 1995); 3 Collier on Bankruptcy ¶ 522.06 at 522-30 (15th ed. 1995). The statute governing venue of bankruptcy cases uses both terms. 28 U.S.C. § 1408. Therrien's place of residence would be relevant in determining where he was eligible to file a bankruptcy petition. However, the issue regarding his choice of exemption law is whether Therrien is domiciled in Missouri.

Establishment of a domicile "requires the physical presence of a person at the place of the domicile claimed, coupled with the intention of making it his present home." Ellis v. Southeast Construction Co., Inc., 260 F.2d 280, 281 (8th Cir. 1958). "A person can have only one domicile at a time, and a domicile once obtained persists until a new one is acquired." Id. A change in residence alone does not indicate a change in domicile. Smith v. Wellberg (In re Wellberg), 12 B.R. 48, 49-51 (Bankr. E.D. Va. 1981). A person in the armed forces retains the domicile he had upon entering the service, unless

he indicates an intent to abandon it. Ellis, 260 F.2d at 281-82; Wellberg, 12 B.R. at 51. He does not involuntarily acquire a new domicile each time the government stations him in a new place. Until a member of the military services shows an intention to establish a new domicile, he is presumed to keep the domicile he had before he entered the service. Ellis, 260 F.2d at 281-82; 13B Wright, Miller & Cooper, Federal Practice & Procedure: Jurisdiction 2d § 3617 (1984).

Therrien was a resident of Arizona at the time he entered the Air Force nine years ago. Since then he has lived in Arizona, Korea and Missouri. He last resided in Arizona four years ago. He has resided in Missouri since September, 1993. He and his wife live in Air Force base housing. Therrien has registered a motor vehicle in Iowa, but his driver's license was issued in Arizona. He is not registered to vote. He filed his 1994 tax return as an Arizona resident. Exhibit 2. The Air Force withholds Arizona income tax from his paycheck. Exhibits 3 and 4. Therrien conceded that he could change his payroll deductions by requesting the Air Force to withhold Missouri tax. Therrien testified that where he lives in the future depends on his career, but that he has no intention of staying in Missouri.

The standard of proof for military personnel to show a change from pre-entry domicile is apparently higher than the preponderance of the evidence. Pettit, 1995 WL 363337 at *1 (applying "clear and convincing" standard); Wright, Miller & Cooper § 3617 at 567 ("clear and unequivocal" evidence required, citing cases). However, even under a preponderance of the evidence standard, the court concludes that Therrien has not established a domicile in Missouri. The evidence shows further that Therrien was domiciled in Arizona before he entered the Air Force and has not abandoned his Arizona domicile. Therefore, Therrien is not entitled to claim exemptions under Missouri law. The Trustee's objection should be sustained.

ORDER

IT IS ORDERED that the Trustee's objection to Neal Therrien's claim of exemptions is sustained. Debtor's claims of exemption under Missouri law are disallowed. Judgment shall enter accordingly.

SO ORDERED THIS 10th DAY OF JULY 1995.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on I mailed a copy of this order and a judgment by U.S. mail to: U. S. Trustee, Kay Dull and Wil Forker.