



# Use It or Lose It: A Nebraska Exemption Primer

by James C. Bocott

I will not soon forget the jaws dropping to the table and the eyes as wide as saucers as the trustee informed the debtor he or she was going to lose his or her: tax refund, car, home, motorcycle, or whatever other asset the person owned, because it was not exempt under the Nebraska exemption statutes. It was good to experience this vicariously, and I learned that if one wanted to build and retain a good reputation in the bankruptcy area, one had better plan exemptions well. No surprise at a 341 meeting is a good surprise. The following article is an attempt to summarize and briefly comment on various exemption statutes and their application, with the exception of wages, which will be addressed in a subsequent article. The author is hopeful this will provide a convenient reference to those with exemption questions.

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## 1. Real Estate and Improvements - The Homestead Exemption

A homestead is defined in Nebraska as "a dwelling house in which the claimant resides, its appurtenances, and the land on which the same is situated, not exceeding 160 acres of land." *Neb. Rev. Stat. § 40-101*. The term **dwelling house** does not contemplate any particular kind of house, and the requirement is satisfied if the claimant and his/her family reside in the habitation, whatever be its character. *In re Foley*, 97 F.Supp 843 (1951). This even includes mobile homes, tents and any other habitation which one can argue are permanently affixed/annexed to the land. In making this determination, the Courts liberally construe the statute to effectuate the purpose intended by the legislature, which is to protect the family claiming the homestead exemption.

In order to claim the homestead exemption, one must: 1) be the head of family; 2) be the "owner" of real estate concerning the exemption; and, 3) occupy the same as a family residence.

**Head of Family** is defined by *Neb. Rev. Stat. § 40-115*, and includes those who have a spouse, minor child(ren), or other relative who is dependent upon debtor's care - living in the home. And once the home acquires exempt status, it can never lose the status as to the person claiming the exemption. *In re Bartlett*, 153 BR 881 (1993). For instance, if single parent purchases a home and has a 17 year old child who only lives in the home for one year, the exemption still applies 35 years later even though the owner of the home has not been "head of family" since the 17 year old child reached the age of majority, 34 years prior.

An "**owner**" of real estate is also interpreted quite loosely. One need not own property in fee simple. Having a leasehold or a legal or equitable right to possess the real property is suffi-



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cient. *In re Buzzell* 110 BR 40 (1990). A head of family who owns a tent attached to the ground on a leased plot of land, is an "owner of real estate" for purposes of the homestead exemption statutes.

Lastly, one must occupy the habitation as a family residence. One cannot claim the homestead exemption in a rental property unless one moves the family into the rental property with the intent to make it his/her permanent residence. And again, once homestead exemption status is achieved, it does not change so long as claimant lives in the home.

In 2007, the Nebraska Legislature increased the amount of the homestead exemption from \$12,500.00, to **\$60,000.00**. And while not equal to the Texas or Florida unlimited homestead exemption, this is a giant step forward in protecting family homes from execution.

## 2. Personal Property - Autos, Boats, Harleys, Cash, Furniture, Keepsakes, etc.

Several statutes allow for the exemption of tangible personal property. *Neb Rev. Stat.* § 25-1556 allows for the exemption of: 1) Unlimited immediate personal possessions; 2) unlimited necessary wearing apparel; 3) \$1,500.00 per debtor in household furnishings, household goods, household computers, household appliances, books, or musical instruments which are used primarily for personal, family or household use; 4) \$2,400.00 per debtor in a vehicle used to get to and from work, or for debtor's interest in tools, implements, professional books, or supplies, used in connection with his or her principal trade or business; and, 5) the debtors interest in professionally prescribed health aids.

### Immediate personal possession, clothing and health aids

So what are "immediate personal possessions"? Case law has determined it means something more intimate than a vehicle, but may include those items which are traditionally sentimental and symbolic of the family, i.e. photo albums, family bible, wedding rings and other jewelry with great symbolic significance. *In re Karaus*, 276 BR 227 (2002). Ultimately, the statutes will be interpreted liberally so there is an incentive to proffer a well reasoned argument that a questionable item may be an "immediate personal possession."

As for necessary wearing apparel, I have not heard yet of anyone having their clothing taken away as unnecessary. I suspect it would take the likes of the late Princess Diana or the late Michael Jackson to pique the interest of a Chapter 7 Trustee with regard to non-necessary clothing. The same is true with professionally prescribed health aids. As with any claim, reasonableness is the key. The walker will always be exempt, the hot tub may be exempt, but the custom made golf clubs will likely not make the cut, or should I say "slice."

## Household Goods and Furnishings and Tools of the Trade

One oft cited definition of "household goods and furnishings" for exemption purposes is the *McGreevy* definition which includes "those items of personal property that are typically found in or around the home and used by the debtor or his dependents to support and facilitate day-to-day living within the home, including maintenance and upkeep of the home itself." *In re Karaus*, 276 BR 227 (2002). Liberally construed, this includes a great deal of property. For instance, firearms used to protect ones' home, i.e., a shotgun and .45 caliber handgun have been deemed to be household goods and furnishings.

"Tools of the trade," while generally self explanatory, is subject to liberal interpretation as well. One must actually be employed or operate a business to claim one's vehicle as a tool of the trade. The amount of income one must derive from a particular trade, or the amount of time devoted to the particular trade, in order to claim the tool of the trade exemption for other property is unclear. Experience reveals that the debtor should be actively engaged in the particular trade at the time the exemption is claimed. A seasonal employee, for instance, may still be actively engaged in a trade even though they are unable to work at the time of filing as a result of the season. Yet a blacksmith who has not practiced his trade for two years, but anticipates becoming active in the next several months after filing, may not be able to claim the exemption.

There needs to be a logical and reasonable connection between the nature of the asset claimed to the furtherance of the trade activity. For instance, can a Corvette qualify as a "tool of the trade" for a farmer? What if the farmer uses the Corvette to drive to leased land, pick up seed, and obtain parts? Does it matter whether the farmer has other vehicles with which he can perform these tasks? The bankruptcy court in *In re Heimboach*, 246 BR 895 (2000) reasoned that the Corvette was not a tool of the trade. First, it was not purchased for the purpose of farming, but rather for personal use. Second, the debtor owned other vehicles with which he could inspect leased land, pick up seed and obtain parts. Finally, the court held the Corvette simply was not "held for use," or otherwise owned for the purpose of carrying on the farming operation.

Note in *Neb. Rev. Stat.* § 25-1556 that only the "debtor's interest" in property identified in subsections 3 through 5 is protected by the claim of exemption. This may have adverse consequences when the non-filing spouse or other joint property owner is unable to claim an exemption.

### The Wildcard

A favorite exemption of clients is the so called wildcard exemption, found at *Neb Rev Stat.* § 25-1552. The value limit on the exemption is \$2,500.00, but each debtor can use the exemp-

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tion for any personal property he or she chooses, aside from wages which are covered by separate statute. Hence the name *wildcard*. For a married couple, the debtors may combine their exemption to claim up to \$5,000.00 in jointly owned property.

### Stacking

While the author of this article was unable to find any Nebraska or Eighth Circuit authority for stacking exemptions, it appears to be a common practice and other jurisdictions have approved of exemption stacking in certain circumstances. For instance, if a debtor has a motor vehicle with \$5,000 in equity, but the vehicle exemption is capped at \$2,500, the debtor may use the personal property "wildcard" exemption for the remaining equity, as the automobile is classified as personal property. The personal nature of the exemptions, however, should not be ignored. One jurisdiction has held that when claiming a tax refund as exempt, only the debtor earning the wages, and hence creating the refund, is allowed to claim the exemption. *In re Carlson*, 394 BR 491 (2008). In that jurisdiction, the non-wage-earning spouse is not able to stack his or her exemption with the wage earning spouse to increase the value of the cap.

### 3. Personal Property - Retirement Accounts, Benefits, Life Insurance, Tax Refunds, and Injury Compensation

Workers Compensation Benefits are not subject to attachment or assignment except for attorney fees or child support. *Neb Rev Stat.* § 48-149

Sums paid for personal injuries or death are also exempt, with the exception of child support enforcement. Unlike workers compensation benefits, one may assign personal injury proceeds. *Neb Rev Stat.* § 25-1563.02

Individual Retirement Accounts, 401(k)s, 403(b)s and other qualified retirement plans are exempt to the extent necessary for the debtor's, and debtor's dependents', support. *Neb Rev Stat.* § 25-1563.01 An exception is when the accounts are funded in abnormally high amounts within the two years prior to filing bankruptcy or entry of judgment. See, *In re Bashara* 293 BR 216 (2003) and *In re Rosen*, 318 BR 166 (2004). This appears to be a method of avoiding creditors rather than a regular and consistent attempt to fund a retirement plan. As with all exemption planning, pigs get fat, hogs get slaughtered. There is at least one Nebraska decision which held that a young man's IRA was not exempt for the reasons that he was able-bodied, would not likely retire for many years, and could rebuild his retirement.

Social Security Benefits are not only exempt from garnishment or attachment, but any accounts/proceeds traceable to the social security proceeds are also exempt. *Havelock Bank of Lincoln v. Hog Confinement Systems, Inc.*, 214 Neb. 783, 335

N.W.2d 765, 2 Soc.Sec.Rep. Serv. 1428 (1983)

**NOTE** - Once the nature of the asset changes, i.e. from an account clearly traceable to, and funded by, personal injury proceeds - to a boat or house or other asset, the asset is no longer exempt! Use caution when advising clients how to protect their assets upon receiving a personal injury settlement or lump sum workers compensation benefits so the clients understand the consequences of changing the status of the asset in the event they are the target of creditors.

Income tax refunds are only exempt to the extent they constitute earned income tax credits (EIC). *Neb. Rev. Stat.* § 25-1553. Otherwise, the wildcard statute must be used to exempt income tax refunds. It is common for debtors to stack these exemptions to protect tax refunds. Child tax credits (CTC) may also be exempt. *In re Schwarz*, 314 BR 433 (2004). When it comes to EICs, CTCs, and tax refunds, timing may be important. For instance, when a bankruptcy is filed, the only portion of a tax refund or credit which becomes part of the estate, is that which is already earned on the date of filing. This is why Chapter 7 trustees generally do not begin asking debtors about tax refunds at 341 meetings until September. In some cases, it may pay to delay or hasten a bankruptcy filing depending on the circumstances.

Life insurance proceeds, cash values and annuity contracts (up to \$10,000), and benefits, are exempt from garnishment, attachment, or other process, unless the proceeds were obtained pursuant to some criminal activity. Life insurance benefits are assignable. *Neb. Rev. Stat.* § 44-1089 and 44-371

### 4. Other Exemption Statutes

The following statutes also provide exemptions:

*Neb. Rev. Stat.* § 12-506 and 511 - Burial Plots

*Neb. Rev. Stat.* § 23-2322 - County Employee Retirement

*Neb. Rev. Stat.* § 24-710.02 - Judge Retirement

*Neb. Rev. Stat.* § 25-1558 - Wages

*Neb. Rev. Stat.* § 25-1559 - Pension of Disabled Soldiers and Sailors, AND traceable property

*Neb. Rev. Stat.* § 48-647 - Unemployment Benefits

*Neb. Rev. Stat.* § 60-550 - Cash deposits with State Treasurer

*Neb. Rev. Stat.* § 67-325(2)(c) - Certain interests in Partnerships

*Neb. Rev. Stat.* § 68-1013 - Public assistance to the aged, blind or disabled

*Neb. Rev. Stat.* § 81-2032 - Nebraska State Patrol Retirement 