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Home, Sweet Home

An Overview of the South Carolina Homestead Exemption

By John B Butler III

Why should I care about the homestead exemption? Do you meet with people who are planning for their future and own a home? Do you represent creditors or debtors in bankruptcy or in state court? Do you counsel people after a spouse dies? If you answered yes to any of these questions, the homestead exemption in South Carolina may be quite pertinent to your practice.

The South Carolina Homestead Exemption Statute[1] exempts "from attachment, levy, and sale . . . final process issued by a court or bankruptcy proceeding . . .. The debtor's aggregate interest, not to exceed sixty-seven thousand one hundred dollars [$67,100.00] [joint owners $134,175.00] in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor . . ." [As adjusted periodically].[2]

Most litigation on the homestead exemption occurs in bankruptcy court, not only in the context of the exemption itself, but also in the context of a motion peculiar to bankruptcy, a motion, pursuant to 11 U.S.C. §522(f)(1)(A), to avoid a judicial lien. A judicial lien may be avoided to the extent the lien impairs the debtor's homestead exemption after deducting non-avoidable liens like mortgages from the value of the debtor's interest in the property.[3] The use of state exemptions in bankruptcy court provides an abundance of authority interpreting the South Carolina exemptions in general, and the homestead exemption in particular, this authority is also useful in state court, judicial sales, and general

collection practice

Since South Carolina opted out of the federal bankruptcy exemptions, only the South Carolina homestead exemption is available to bankruptcy debtors who are **domiciled** in South Carolina.[4]

The term "domicile,"[5] as defined in 11 U.S.C. §522(b)(3)(A), can be quite confusing, especially in today's mobile society. The general rule is a debtor in bankruptcy is entitled to claim the exemptions permitted by the state in which the debtor resided for the 730-days prior to the petition. If a debtor has not resided in any one state for the 730-days prior to the petition, the debtor's domicile for purpose of determining exemptions is the state in which the debtor resided during the 180-day period preceding the 730-days prior to the petition. If a debtor has not resided in any one state for the 730-days prior to the petition, nor has the debtor lived in a single state in the 180-day period preceding the 730-days prior to the petition, then the debtor's domicile for purpose of determining exemptions is the state in which the debtor resided during the greater part of the 180-day period preceding the 730-days prior to the petition. If a debtor does not satisfy any of the other domiciliary requirements of §522(b)(3)(A), then the debtor is entitled to claim the federal exemptions of §522(d).[6] While the amounts and nature of exemptions may vary from state to state, the domicile requirement for debtors in bankruptcy remains the same.

The homestead exemption, whether in bankruptcy court or state court, must be in property in which the debtor holds a title interest or sufficient equitable interest, a possessory interest or trust interest will not suffice. For example, in the *Scotti* case,[7] the debtors filed a motion to avoid a judicial lien on real estate she owned but was resided in by both debtors. No party objected, but the court *sua sponte* scheduled a hearing to decide whether Mr. Scotti could claim a homestead exemption in real estate where he lived but which was not titled in his name. The court held "a debtor must have an ownership interest in the property he seeks to exempt; a mere possessory or potential equitable distribution interest is not sufficient." *In re Franklin,*[8] the court sustained the trustee's objection to the debtor's claim of homestead exemption in real estate he resided in but to which he had transferred title to a revocable trust in which he was trustor, his non-filing wife the trustee, and their three children as beneficiaries, holding: "Franklin owns only rights and interests in the Trust, not an interest in the real property itself as the plain language of the [exemption] statute requires. Although that statute does not require fee simple title to real property, it requires something more than a possessory, future or potential ownership interest." On the other hand, *In re Wicker,*[9] dealt with a trustee's objection to a homestead exemption claimed by the wife, as a joint debtor, in real estate inherited by her husband. The court held the wife's "equitable interest" in the residence, under a constructive trust, entitled her to claim a homestead exemption.[10]

The homestead exemption may be claimed if the **debtor or a dependent of the debtor** uses the property as a residence. Another issue in the *Scotti* case[11] discussed above was the importance of the term "dependent" in the statute. The court held the purpose of the inclusion of the word "dependent" is to "exempt the property interest of a debtor if the debtor or a dependent of the debtor uses the property as a residence. The debtor need not reside on the property if a dependent does. Another case which focused on the term "dependent" was *In re Versace.*[12] In *Versace,* the debtor and her son lived in an apartment in a nearby city. The court overruled a creditor's objection and permitted a homestead exemption in real estate the debtor purchased with her father and in which he, the debtor's 20-year-old daughter, and a granddaughter lived.

While the homestead exemption is most often used to exempt the traditional home and land used as a residence, the exemption may be used for any of the three items listed: residence, cooperative used as a residence, or a burial plot. In the case of *In re Lucas,*[13] the court overruled the trustee's objection to the debtors' homestead exemptions in their residence and a burial plot holding the words "or" and "aggregate" expressed the legislature's intent to permit debtors to "claim up to the aggregate the amount of the homestead exemption in any one or more of the properties listed in Section 15-41-30(A)(1)(a)." Furthermore, the homestead may be used for "personal property" which serves as the debtor's residence. In bankruptcy court, debtors routinely use the homestead exemption to protect the equity in mobile homes in which they reside.

While it may seem counterintuitive, the homestead exemption may be used for more than one tract of land. Depending on the specific circumstances, the bankruptcy court has consistently allowed debtors to exempt multiple pieces of real estate as part of an integrated homestead. [14]

The homestead exemption is not limited to the property itself; the exemption may be claimed in the proceeds of the sale of the exempt property. In the *France* case,[15] the court rejected the trustee's argument that on the sale of the real estate, the proceeds were no longer exempt in the amount of the homestead exemption but were converted to non-exempt cash stating: "Were this the case, judicial sales would always extinguish the exemption in a residence. This is not the practice concerning or effect of a judicial sale or bankruptcy sale. The proceeds of sale equal to the exemption are delivered to the debtor." Another consideration raised by the *France* case is that just because a homestead exemption may not be available, a debtor (judgment or bankruptcy) may claim a liquid assets exemption in cash and other liquid assets to the extent of a value not exceeding $6,700.00 (adjusted periodically). The liquid assets exemption is only

available if the individual did not claim a homestead exemption. "The term 'liquid assets' includes deposits, securities, notes, drafts, unpaid earnings not otherwise exempt, accrued vacation pay, refunds, prepayments, and other receivables."[16]

Most issues about the homestead exemption involve whether the property is the debtor's homestead. The debtor must show the property is a "place of habitation," or a place the debtor "intended to make his permanent home."[17] The bankruptcy court examines many specific facts to determine the debtor's intent and actual habitation of the property in question. The factual analysis may involve whether the property is habitable, whether the property meets the needs of the debtor and the debtor's dependents, perhaps even where the debtor is registered to vote, or the address on a driver's license, or where the debtor picks up mail. Such analysis would be pertinent in state court proceedings where the actual use of the property as a residence is disputed.

Even though, the homestead exemption statute engenders a large percentage of exemption litigation, the exemption is to be construed "liberally in favor of both the debtor and the exemption."[18]

In bankruptcy court, the party (trustee or creditor) objecting to the exemption has the burden of proof.[19] In light of the cases setting forth the principle of the presumption in favor of exemptions, a good argument can be made for the same burden of proof in state court.[20]

It is important to note, the homestead exemption is not a panacea; it only protects the exempt amount from execution under a judgment,[21] the exemption does not affect a valid tax debt or mortgage.[22]

Under certain specific conditions, 11 U.S.C. §522(o), (p) and (q) may limit the extent of a debtor's otherwise valid homestead exemption in a bankruptcy case. Section 522(o) reduces the amount of the debtor's homestead exemption by the amount the value of the exemption is attributable to property disposed of by the debtor within the 10 years preceding the filing of the petition with intent to hinder, delay or defraud a creditor to the extent the property disposed of was not exempt at the time.[23] Section 522(p) requires a debtor claiming a state homestead exemption in excess of $170,359.00 (as adjusted periodically) to have lived in that state for 1,215-days prior to the filing of the bankruptcy petition. Exceptions exist if it is the principal residence of a family farmer as defined in 11 U.S.C. § 101(18), or if an amount is rolled over from the sale of a residence prior to 1,215-days before the filing of the bankruptcy petition, so long as both the prior residence and the current residence are in the same state. Section 522(q) limits a debtor claiming a state homestead exemption to $170,350.00 (as adjusted periodically) if the debtor committed certain crimes or tortious acts or incurred certain penalties. An exception exists to the extent the homestead exemption is reasonably necessary for the support of the debtor and a dependent of the debtor.

Those seeking to maximize a client's homestead exemption should review S.C. Code Ann. §15-41-30(A)(1)(b). This 2017 statute creates a homestead exemption for a "surviving spouse" as defined in the second sentence of the subsection. The term "surviving spouse" is defined in S.C. Code Ann. 12-37-50(D) as a person (seemingly of any age) who is married to a decedent who is entitled to a homestead **tax** exemption under S.C. Code Ann. 12-37-50(A)[24] at the time of death; who acquires complete fee simple title or a life estate within nine months after the death of their spouse; who has not remarried; who permanently resides in the property or cooperative and claims it as a residence as defined in S.C. Code Ann. §12-37-250(A)(5). A person who qualifies as a "surviving spouse" may not only claim their own homestead exemption but may also claim the $50,000.00 homestead exemption to which their deceased spouse would have

been entitled.[25]

The homestead exemption is one of the most important of all exemptions and is perhaps the one with the most emotional investment involved, as such attorneys should periodically review the statute and the cases interpreting it. Hopefully, this primer will serve that purpose, at least for now.

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Endnotes

[1] S.C. Code Ann. 15-41-30(A)(1)(a).

[2] The periodic adjustments to the exemption statute may be found at the Bankruptcy Property Exemption - Inflation Component published by the South Carolina Revenue and Fiscal Affairs Office. rfa.sc.gov .

[3] *In re Autry*, 14-00716-DD n. 2, 2014 WL 1347228 (Bankr. D.S.C. Apr. 4, 2014) (Since debtor was entitled to claim homestead exemption in property he owned with his wife, and the equity in his one-half interest after deducting the mortgage was less than the amount of his homestead exemption, the entire judgment lien was avoided.). Compare, *In re Scotti,* 456 B.R. 760 (Bankr. D.S.C. 2011) (Debtors filed Motion to Avoid Judicial Lien on real estate she owned but resided in by both debtors. Mr. Scotti was not entitled to claim a homestead exemption or avoid the judicial lien. Mrs. Scotti was entitled to claim a homestead exemption, and the judicial lien impaired that exemption in part and was avoidable, but only in part.); *In re Ivins,* No. C/A 98-05808-W, 1998 WL 2016848 (Bankr. D.S.C. Oct. 28, 1998) (Court denied debtor's motion to avoid judicial liens stating: "[T]he Court has several concerns as the liens that the Debtor seeks to avoid do not appear to be perfected judicial liens. Additionally, the Debtor lists no real property to which these alleged liens could have attached.").

[4] *In re Lafferty,* 469 B.R. 235, 244 (Bankr. D.S.C. 2012) ("The property exemptions available to Debtors arise under state law. South Carolina has opted out of the federal exemptions, and the South Carolina Code of Laws provides that the federal exemptions are not available to a debtor in a bankruptcy proceeding."); *In re Brown,* 551 B.R. 780, 783 (Bankr. D.S.C. 2016) ("South Carolina has opted out of the federal exemptions, so the exemptions available to a bankruptcy debtor arise under state law."); *In re Riley,* 486 B.R. 711, 715 (Bankr. D.S.C. 2013) ("Section 522(b)(1) of the Code offers the debtor a choice between exempting either the property specified in § 522(d) or the property protected by federal nonbankruptcy law or state law, 'unless the State law that is applicable to the debtor ... specifically does not so authorize ....' South Carolina has opted out of the federal exemptions and has set forth its own system of exemptions."); *In re Wilde,* No. CA 11-07777-HB, 2012 WL 2086996, at *1 (Bankr. D.S.C. June 8, 2012) ("The Bankruptcy Code permits a debtor to exempt from the estate certain property for which an exemption is available under state or federal law .... In South Carolina, state exemptions are appropriate.").

[5] The definition of "domicile" is only applicable to bankruptcy debtors whose exemptions are determined by federal law and not state court parties.

[6] *See Sheehan v. Ash,* 889 F.3d 171, 174 n.5 (4th Cir. 2018) ("Because the Ashes had not lived in West Virginia for the 730 days immediately preceding their bankruptcy filing, they were required, pursuant to 11 U.S.C. § 522(b)(3)(A), to designate Louisiana as their domicile for exemption purposes. The Ashes thus looked to the state where they had lived for the '180 days immediately preceding the 730–day period,' i.e., Louisiana."); *In re Bauer,* No. CV 13-01562-HB, 2013 WL 2661835 (Bankr. D.S.C. June 12, 2013) (Since the debtor recently moved to South Carolina from Indiana, he was not entitled to claim the South Carolina exemptions under §522(b)(3)(A) or the Indiana state exemptions; he was entitled to claim the federal exemptions.); *In re Garrett,* 435 B.R. 434, 438 (Bankr. S.D.Tex. 2010) ("The parties agree that the Debtors were domiciled in North Carolina and Texas during the 730 days immediately preceding the Debtors' bankruptcy petition [and] the Debtors lived in North Carolina throughout the entire 180-day look-back period. Thus, the Debtors choice of North Carolina exemptions fits squarely within § 522(b)(3)(A)'s requirements.").

[7] *See* footnote 2, *supra.*

[8] *In re Franklin,* No.12-03834-HB (Bankr. D.S.C. Dec. 21, 2012).

[9] *In re Wicker,*No. 13-07546-JW (Bankr. D.S.C. Apr. 11, 2014).

[10] See also, *Gibbs v. Hunter,* 99 S.C. 410, 83 S.E. 606 (1914) (Son's vested remainder interest in real estate was sufficient to allow him to claim homestead exemption.).

[11] *See* footnote 2, *supra.*

[12] *In re Versace,* No. 16-05593-HB, 2017 WL 1501386 (Bankr. D.S.C. Apr. 26, 2017).

[13] *In re Lucas,* No. 21-00741-DD, 2021 WL 3195816 (Bankr. D.S.C. July 29, 2021).

[14] *In re Bycura,* 540 B.R. 211 (Bankr. D.S.C. 2015) (Court overruled objections holding 13-acre tract on which residence was located and adjacent 1 acre tract where vacant house and well for the 13 acre were located, both served the purpose "consistent with the meaning of a 'residence...'"); *In re Weldon,* No. C/A 11-05407-JW (Bankr. D.S.C. Dec. 7, 2011) (Exemption applied to 2 tracts, one where the house was, and the other where the driveway and part of the pool were located.).

[15] *In re France,* No. 20-03044-DD, 2021 WL 5496563 (Bankr. D.S.C. Nov. 23, 2021).

[16] S.C. Code Ann. 15-41-30(A)(5).

[17] *In re Vance,* No. CV 15-04743-HB, 2015 WL 9261399 (Bankr. D.S.C. Dec. 17, 2015) (Court found debtor was only sleeping at property "for the temporary purpose of attempting to stake a claim for a homestead exemption ...." Factors considered by the court: no electricity, water, or furniture at the property; debtor testified he did not intend to live at the property long-term; the property was too small and did not meet his family's needs; his family lived elsewhere; debtor lived at property for a short time and returned to another house daily.). Compare, *In re Autry, supra* note 3 (Debtor was entitled to claim homestead exemption in property he owned with his wife for many years, even though in 2010 he considered the property a mail drop and one of the places he occasionally stayed, because he considered it his permanent address and stayed there several nights a month.); *In re Jones,* 397 B.R. 765, 770, (Bankr. D.S.C. 2008) ("In South Carolina, a homestead exemption is properly taken in real property that the debtor uses as a residence."); *Holden v. Cribb,* 349 S.C. 132, 561 S.E.2d 634, (Ct. App. 2002) (Inmate did not intend to abandon his "domicile" and was entitled to the homestead exemption. "The act and intent as to domicile, and not the duration of residence, are the determining

factors .... Clearly, Singleton had no intent to transfer his residence to the detention center and, in fact, was being involuntarily detained.").

[18] *In re Nguyen,* 211 F.3d 105, 110 (4th Cir. 2000) ("Generally, statutes creating debtors' exemptions must be construed liberally in favor of the debtor and the exemption."); *In re Lucas, supra* note 13; *In re Versace, supra* note 12; *In re Vance, supra* note 17; *In re Bycura, supra* note 14; *In re Wicker, supra* note 9.

[19] *In re Vance, supra* note 17; *In re Lucas, supra* note 13; *In re Versace, supra* note 12; *In re Bycura, supra* note 14; Fed. R. Bankr. P. 4003(c) ("In any hearing under this rule, the objecting party has the burden of proving that the exemptions are not properly claimed ....").

[20] *First Citizens Bank & Tr. Co., Inc. v. Blue Ox, LLC,* 422 S.C. 461, 468–69, 812 S.E.2d 418, 422 (Ct. App. 2018) (With respect to Bank's objection to officer's retirement contributions, court stated: "Because the exemptions in the Homestead Act are to be construed in favor of the debtor, we conclude the Bank must demonstrate an actual intent to defraud by Lindgren in order to remove the disputed contributions from the protection afforded by subsection (13).").

[21] *Holden v. Cribb, supra* note 17 ("Under the homestead exemption, certain real and personal property of the debtor is statutorily exempt from sale to enforce a judgment."); *Nance v. Hill,* 26 S.C. 227, 1 S.E. 897, 899 (1887) ("The [homestead] act ... expressly declares that the homestead shall be exempt from levy as well as sale under execution; and, as section 310 of the Code of Procedure expressly exempts such property from the lien of a judgment, and as there could be no levy unless there was a lien, it follows that a levy is not a condition precedent to an application for a homestead.").

[22] *Bobo v. Vanderbilt Mortgage and Finance, Inc.* (*In re Bobo*), 07-01120-HB, Adversary No. 07-80057-HB, slip op. at 8 (Bankr. D.S.C. 2008) ("To the extent that Plaintiff's interest in the real property exceeds the amount owed to Vanderbilt, the Court assumes that by operation of Rule 71 of the South Carolina Rules of Civil Procedure which governs foreclosure, that Plaintiff will receive any surplus claimed, subject to any other superior valid claims (such as tax claims) .... Plaintiff is entitled to his homestead exemption, but only after the mortgage and other valid liens are satisfied."); *People's Bank of Campobello v. O'Shields,* 167 S.C. 296, 166 S.E. 351, 353 (1932) ("If one mortgage his land, he may not claim homestead in it, as against the mortgage.").

[23] *See, In re Lafferty, supra* note 4 (In finding unclean hands and §522(o) prevented debtors from claiming homestead exemption, the court stated: "Debtors disposed of nonexempt property within the ten year period prior to their bankruptcy filings, yet maintained control of the property. When the property was transferred back to them, they received back the entire value of the property, which would be exempt but for Debtors' actions, discussed in detail above."). Compare, *In re Jones,* 397 B.R. 765, 769, 770 (Bankr. D.S.C. 2008) ("[M]oving out of a house and surrendering it to foreclosure hardly seems the type of disposition of nonexempt property that § 522(o) was designed to address .... Further, § 522(o) requires disposing of property, 'with the intent to hinder, delay, or defraud a creditor....' There is no direct evidence of fraudulent intent here.").

[24] S.C. Code Ann. 12-37-250(A) is a **tax** exemption (not an exemption from attachment, levy, or sale) and exempts $50,000.00 of value of a homestead from real property taxes and other taxes.

[25] As discussed in footnote 2, *supra,* all sections of S.C. Code Ann. §15-41-30(A) have been amended to increase each of the dollar amounts in §15-41-30(A) including the increase of §15-41-30(A)(1)(a) to $67,100.00 and presumably (b) to the same amount. S.C. Code Ann. 12-37-250(A), however has not been increased above $50,000.00 (2019-2020 Bills S0910 and H3332 to increase the $50,000.00 amount; the bills were never enacted), therefore the homestead **tax** exemption in §12-27-250(A) is limited to $50,000.00. Presumably the "surviving spouse" is limited to the $50,000.00 despite the higher homestead **exemption** amount in §15-41-30(A)(1)(b).