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01/31/2005

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

IN RE:	§	
	§	
VIRGINIA ANN FINGLEMAN	§	Case No. 03-10984
	§	
	§	
Debtor	§	Chapter 7

MEMORANDUM OF DECISION

This matter came before the Court for hearing on the Objection to Debtor's Claim of Exemptions filed by William Gilbreath in the above-referenced case. Virginia Ann Fingleman (the "Debtor") received a discharge and the case was closed in October, 2003, but Gilbreath requested that the Court reopen the case for the limited purpose of administering assets. The Court subsequently reopened the case for that limited purpose. Having reopened the case, the Court heard the Objection to Debtor's Claim of Exemptions on December 14, 2004. Upon conclusion of the hearing, the Court took the matter under advisement. This memorandum of decision disposes of all issues pending before the Court.[1]

Background

Gilbreath and the Debtor were married for approximately 14 years from 1980 to

[1] This Court has jurisdiction to consider the Motion pursuant to 28 U.S.C. §1334 and 28 U.S.C. §157(a). The Court has authority to enter a final order in this contested matter since it constitutes a core proceeding as contemplated by 28 U.S.C. §157(b)(2)(A), (B), and (O).

1994.[2] Prior to that time the Debtor was a single adult who lived at 13 Whitewing, Dayton, Texas (the "Whitewing property") and she claimed that property as her homestead. Upon marrying Gilbreath, the Debtor moved onto Gilbreath's homestead property in Huffman, Texas (the "Huffman property"), where the couple lived for the duration of the marriage. The Huffman property was the family's homestead. The family never occupied the Whitewing property during the course of the marriage and it was rented during that time period.

The parties separated in 1992, and the divorce decree issued in 1994 recognized the Whitewing property as the Debtor's separate property. However, after the separation, and even after the divorce was finalized two years later, the Debtor did not move back onto the Whitewing property. Instead, at all times since the divorce in 1994, the Debtor has rented that property and she has never reestablished the Whitewing property as her residence. Nevertheless, the Whitewing property remains the only parcel of real property owned by the Debtor.

During the course of the divorce proceedings in 1994, the state court found that the Debtor had engaged in fraudulent conduct in failing to give proper notice to Gilbreath of a hearing relating to the issuance of temporary orders sought by the Debtor.[3] As a result,

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[2] Gilbreath testified that the parties were married for 12 years, apparently excluding the time the parties were separated before the divorce became final in 1994.

[3] Plaintiff's Exhibit 1, page 9.

a portion of the final divorce decree awarded to Gilbreath a judgment against the Debtor in the amount of $41,000.[4]

In 1995, Gilbreath filed an abstract of that judgment in Liberty County, Texas, the location of the Whitewing property.[5] The Abstract of Judgment contained the following notation:

> Issued at the request of
> STAVIS GILBREATH
> 5219 FULTON STREET
> HOUSTON TX 77022,

but it also identified the address of Gilbreath, as the judgment creditor, as follows:

> c/o Stavis Gilbreath
> 6219 Fulton
> Houston, Texas 77022.[6]

Upon filing for bankruptcy relief under Chapter 7 of the Bankruptcy Code on July 3, 2003, the Debtor filed the necessary schedules, claiming the Whitewing property as her homestead.[7] The Debtor sent notice to her creditors, including Gilbreath. She used one of the addresses from the 1995 Abstract of Judgment as Gilbreath's address on the

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[4] Id.

[5] Defendant's Exhibit D.

[6] The parties have all acknowledged that Stavis Gilbreath, a licensed attorney, is the son of the objecting party, William Gilbreath.

[7] While there is some discrepancy as to the accuracy with which the Debtor described the property in her schedules, the parties stipulated that the discrepancy regarding the property description was not the product of any fraudulent intent on the Debtor's behalf and should not control the Court's resolution of this dispute.

creditor matrix, and the notices sent to that address were not returned. The §341 creditors' meeting was conducted and concluded on August 15, 2003, which Gilbreath did not attend, and no party filed any objection to the Debtor's homestead claim within the requisite 30 days following the conclusion of the creditors' meeting. Neither did any party file a dischargeability action against the Debtor within the 60-day time limit imposed by FED. R. BANKR. P. 4007(c). Accordingly, the Debtor received her discharge on October 15, 2003.

Gilbreath now alleges that he knew nothing about the Debtor's bankruptcy filing until sometime after March 24, 2004, when he filed a new writ of execution upon his prior abstract of judgment.[8] On July 14, 2004, Gilbreath petitioned to reopen this bankruptcy case for the purpose of administering assets[9] and he later filed his objection to the Debtor's claim of exemption as to the Whitewing property.[10] The Debtor claims that the notice of the bankruptcy filing issued to Gilbreath at the commencement of the case was sufficient under the circumstances and that his objection to her homestead exemption claim is therefore time-barred.

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[8] Defendant's Exhibit B.

[9] *See* Motion to Reopen Case to Administer Assets (Docket # 9).

[10] *See* Objection to Debtor's Claim of Exemptions (Docket # 22), filed on October 18, 2004.

Discussion

Sufficiency of Notice

It is elementary bankruptcy law that the commencement of a case creates an estate encompassing all legal and equitable interests in property of the debtor as of the petition date, including any property that might potentially be exempt. 11 U.S.C. §541(a). The debtor may then exempt certain property from the bankruptcy estate by claiming either the federal exemptions provided by §522(d), or any other exemptions provided by applicable federal, state, or local law. 11 U.S.C. §522(b). FED. R. BANKR. P. 4003 requires the debtor in a bankruptcy case to list in her schedules the property she claims is exempt under 11 U.S.C. §522. All affected parties then have thirty days from the conclusion of the 341 creditors' meeting to object to such an exemption claim, and if they fail to object or request an extension within that time period, they lose the opportunity to object. FED. R. BANKR. P. 4003(b); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 112 S.Ct. 1644, 118 L.Ed.2d 280 (1992).

It is undisputed that Gilbreath did not act within the 30-day period following the conclusion of the creditors' meeting in this case. The Debtor argues that Gilbreath's objection is therefore barred by FED. R. BANKR. P. 4003(b) as interpreted by *Taylor*. However, the validation of exemption claims championed by *Taylor* is inherently premised upon proper notice of the proceedings. The trustee in *Taylor* had actual notice of the debtor's exemption claim and was thereafter barred from pursuing an objection to

that exemption claim because, *despite* such notice, he failed to object to the claim within the 30-day period prescribed by Rule 4003(b). The emphasis on finality expressed in *Taylor* is based upon a knowledge (express or implied) of pending deadlines. Absent sufficient notice of the pendency of the case, no knowledge of the pending deadlines can or should be properly inferred to the detriment of an omitted creditor.[11] *In re Lang*, 276 B.R. 716, 721-22 (Bankr. S.D. Fla. 2002) [noting that "[d]eadlines produce finality . . ." but finality is not to be prized above due process."]. As the Eighth Circuit has generally noted,

> Both statutory and constitutional implications arise when a creditor fails to receive adequate notice of the bankruptcy proceedings. 11 U.S.C. § 342(a) provides that "[t]here shall be given such notice as is appropriate ... of an order for relief in a case under this title." The burden of establishing that a creditor has received appropriate notice rests with the debtor. *See, e.g., In re Savage Indus.,* 43 F.3d 714, 721 (1st Cir. 1994); *In re Horton,* 149 B.R. 49, 57 (Bankr. S.D.N.Y. 1992). . . . The constitutional component of notice is based upon a recognition that creditors have a right to adequate notice and the opportunity to participate in a meaningful way in the course of bankruptcy proceedings. *See City of New York v. New York, New Haven & Hartford R.R. Co.,* 344 U.S. 293, 297, 73 S.Ct. 299, 301, 97 L.Ed. 333 (1953) ["The statutory command for notice embodies a basic principle of

[11] While it may be argued that the interests of an omitted creditor is sufficiently protected by the nondischargeability provisions of 11 U.S.C. §523(a)(3), to deny an omitted creditor an opportunity to bring an exemption objection despite a lack of proper notice, particularly when his informed participation in the bankruptcy case would have brought additional information to light regarding the true status of Debtor's assets, would reward the wrongful conduct of the debtor to the detriment of the estate and the unsecured creditors for which it was created.

> justice--that a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights."]; *Reliable Elec. Co. v. Olson Constr. Co.,* 726 F.2d 620, 623 (10th Cir. 1984) ["the discharge of a claim without reasonable notice ... is violative of the fifth amendment"]; *In re Avery,* 134 B.R. 447, 448 (Bankr. N.D. Ga. 1991) ["fundamental due process mandates that a creditor be given notice and opportunity to participate"].

In re Hairopoulos, 118 F.3d 1240, 1244-45 (8th Cir. 1997); *see also In re Martinez,* 51 B.R. 944, 947 (Bankr. D. Colo. 1985) ["Inasmuch as ... Chapter 13 proceedings are subject to the Due Process Clause ... creditors must be notified of all vital steps ... in order to afford them an opportunity to protect their interests."].

Determining whether a creditor received adequate notice depends on the facts and circumstances of each case. *In re Eagle Bus Mfg., Inc.*, 62 F.3d 730, 735 (5th Cir. 1995). It has long been recognized that due process requires "notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). Of course, notice reasonably calculated to inform a party in one circumstance may be insufficient in another circumstance. *Faden v. Ins. Co. of N. Am. (In re Faden)*, 96 F.3d 792, 796 (5th Cir. 1996) ["While reliance on a telephone directory may be reasonable in some circumstances, it did not suffice here because Appellants could have easily referenced their own files to find the requisite information."].

The Court finds that the address utilized by the Debtor to notify Gilbreath of the bankruptcy filing was insufficient under the circumstances of this case. As a prelude, it is interesting to note that the very judgment debt which the Debtor owed to Gilbreath arose as a result of insufficient notice in a prior proceeding. Accordingly, the Debtor should have possessed a heightened awareness of the importance of giving adequate notice to opposing parties in legal proceedings. In spite of that background, the Debtor elected to utilize an attorney's address appropriated from an eight year-old abstract of judgment in lieu of sending notice directly to Gilbreath, despite the fact that she was fully aware of Gilbreath's residential address, having shared it with him for more than ten years of marriage. The evidence conclusively demonstrates that Gilbreath's residential address had been stable for more than two decades and that the Debtor had no reason to believe that it had changed. The Debtor further admitted that she had successfully contacted Gilbreath in the past when she needed to do so after their divorce. Notwithstanding her explanation that she thought Gilbreath's residential address in Huffman was inadequate for mailing purposes because it was rural, the Debtor clearly knew of the existence of that address but chose to ignore it. Though it should have, at the very least, been the starting point for an inquiry to determine the best address for Gilbreath, there is no evidence that she made any attempt to determine the validity of that last-known, actual address. Even if some degree of uncertainty existed as to the utility of the Huffman address, the Debtor could have simply asked the parties' son for his father's current mailing address or made

a direct inquiry by telephone. Any such action would have shown the *bona fides* of the Debtor's expressed desire to give adequate notice.

Yet she made no effort at all and instead elected to utilize one of the addresses provided in an eight year-old abstract of judgment.[12] No reasonable rationale (consistent with an intent to provide proper notice) has been proffered by the Debtor for utilizing an old attorney address in lieu of ex-husband's known address. Such an approach is clearly inconsistent with the general requirements of notice provided in a bankruptcy case. As one court recognized, "the initial scheduling which occurs before a creditor or its attorney has made an appearance in the case should be the creditor's own address if he has one." *Carpet Serv., Inc. v. Hutchison (In re Hutchison)*, 187 B.R. 533, 535 (Bankr. S.D. Tex. 1995) [holding that service to a creditor's attorney in a state court suit pending between the debtor and creditor was insufficient even when there was no dispute as to the accuracy of the attorney's address].[13] Without making any reasonable attempt to ascertain the best service address, there is serious doubt that the Debtor actually intended to give proper notice to Gilbreath. In any event, regardless of her subjective intent, she failed to do so.

The Court therefore finds that the means by which the Debtor elected to give notice of her bankruptcy case to Gilbreath was not "reasonably calculated, under all of the

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[12] No explanation has been given as to why or how the one address was selected from the two provided in the abstract.

[13] The court continued, "[P]roper scheduling of a creditor requires listing the creditor at its own address or at least that of an agent designated for service of process." *Hutchison*, 187 B.R. at 535.

circumstances, to apprise [him] of the pendency of the action and afford [him] an opportunity to present [his] objections." *Mullane*, 339 U.S. at 314. As such, it did not meet the requirements of due process, and Gilbreath's objection to exemption is not barred by FED. R. BANKR. P. 4003.[14] Thus, the Court now turns to the merits of the Gilbreath objection.

Debtor's Homestead Claim

The Debtor elected to claim exemptions under Texas law, as authorized by 11 U.S.C. §522(b). The court therefore looks to Texas law in assessing the Debtor's claimed exemptions. *Bradley v. Pac. Southwest Bank (In re Bradley)*, 121 B.R. 306, 312 (Bankr. N.D. Tex. 1990), *rev'd on other grounds*, *In re Bradley*, 960 F.2d 502 (5th Cir. 1992); *see also In re Moody,* 77 B.R. 580, 590 (S.D. Tex. 1987) ["Bankruptcy courts must resort to

[14] Though never raised by the Debtor, the Court has considered whether Gilbreath waived his right to object to the Debtor's claimed exemptions by failing to formally object within 30 days of the time he received actual notice of the bankruptcy case and the claimed exemptions, and concludes that he did not. *See* FED. R. BANKR. P. 4003(b); *Perkins Coie v. Sadkin (In re Sadkin)*, 36 F.3d 473, 475 (5th Cir. 1994); and *In re Cooke*, 84 B.R. 67 (Bankr. N.D. Tex. 1988). In addition to the Debtor's failure to demonstrate any degree of prejudice created by such delay (part of which can be legitimately explained by the necessity of responding to the Debtor's immediate appeal of the order reopening this case), the record establishes only that Gilbreath had actual knowledge of the claimed exemptions upon filing his Motion to Reopen Case to Administer Assets on July 14, 2004. While Gilbreath did not formally object to the Debtor's claimed exemptions until over 90 days after the filing of the motion to reopen, the contents of the motion to reopen clearly gave the Debtor actual notice that he intended to seek an invalidation of the Debtor's homestead exemption claim. To hold that actual notice to Gilbreath could be sufficient to trigger the 30-day period for the filing of a formal objection, but that the existence of actual notice to the Debtor regarding the intended exemption challenge (which the Debtor likely anticipated in any event) was not sufficient to satisfy that filing requirement, would be a most quixotic result. *See generally In re Starns*, 52 B.R. 405 (S.D. Tex. 1985) (holding that actual notice to debtor of creditor's objection to claim of exemptions was sufficient although formal objection was not timely filed); *but see In re Boyd*, 243 B.R. 756 (N.D. Cal. 2000) (expressly rejecting the sufficiency of actual notice).

state law for an interpretation of state exemption rights in homesteads."], *aff'd by In re Moody*, 862 F.2d 1194 (5th Cir. 1989). The Texas Constitution, both now and on the petition date, states that:

> The homestead, not in a town or city, shall consist of not more than two hundred acres of land, which may be in one or more parcels, with the improvements thereon; the homestead in a city, town or village, shall consist of lot or contiguous lots amounting to not more than 10 acres of land, together with any improvements on the land; provided, that the homestead in a city, town or village shall be used for the purposes of a home, or as both an urban home and a place to exercise a calling or business, of the homestead claimant, whether a single adult person, or the head of a family; provided also, that any temporary renting of the homestead shall not change the character of the same, when no other homestead has been acquired; provided further that a release or refinance of an existing lien against a homestead as to a part of the homestead does not create an additional burden on the part of the homestead property that is unreleased or subject to the refinance, and a new lien is not invalid only for that reason.[15]

Similarly, the Texas Property Code states as follows:

> (a) If used for the purposes of an urban home or as both an urban home and a place to exercise a calling or business, the homestead of a family or a single, adult person, not otherwise entitled to a homestead, shall consist of not more than 10 acres of land which may be in one or more contiguous

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[15] *See* TEX. CONST. art. XVI, §51 (amended 1999); *see also England v. FDIC*, 975 F.2d 1168, 1172 (5th Cir. 1992) ["From the beginning of Texas' statehood in 1845, its constitutions have provided homestead protection to its residents. . . ."].

lots, together with any improvements thereon.

(b) If used for the purposes of a rural home, the homestead shall consist of:

(1) for a family, not more than 200 acres, which may be in one or more parcels, with the improvements thereon; or

(2) for a single, adult person, not otherwise entitled to a homestead, not more than 100 acres, which may be in one or more parcels, with the improvements thereon.[16]

This exemption protects a debtor's homestead from seizure for the claims of creditors, except for encumbrances which are "properly fixed" on the homestead property.[17]

The homestead exemption under Texas law has a long and distinguished history. Maintaining the unity of the family, providing a home and a means of support for a debtor and his family, and establishing an individual's sense of freedom and independence are some of the rationales upon which the necessity of the Texas homestead exemption has been based. *See 1018-3rd St. v. State,* 331 S.W.2d 450, 453 (Tex. Civ. App. — Amarillo 1959, no writ); *see also England v. FDIC (In re England)*, 975 F.2d 1168, 1174 (5th Cir. 1992) ["Texas cases have consistently held that the fundamental purpose of the Texas homestead laws is to secure a place of residence against financial disaster."] (*citing Cocke v. Conquest*, 120 Tex. 43, 35 S.W.2d 673, 678 (1931)). In order to advance these purposes, Texas courts have always liberally construed any claimed homestead

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[16] TEX. PROP. CODE ANN. §41.002(a), (b) (Vernon 2000).

[17] TEX. PROP. CODE ANN. §41.001(a) states that "[a] homestead . . . [is] exempt from seizure for the claims of creditors except for encumbrances properly fixed on homestead property."

exemption. *Woods v. Alvarado State Bank*, 19 S.W.2d 35 (Tex. 1929) ["The rule that homestead laws are to be liberally construed to effectuate their beneficent purpose is one of general acceptation."] (*citing Trawick v. Harris*, 8 Tex. 312 (Tex. 1852)); *In re Mitchell*, 132 B.R. 553, 557 (Bankr. W.D. Tex. 1991).

Although the party objecting to the homestead exemption has the ultimate burden of persuasion (or the risk of non-persuasion) pursuant to FED. R. BANKR. P. 4003(c), a debtor-claimant must sustain an initial burden of production or going forward with the evidence to establish that the referenced property qualifies for the claimed exemption before the objecting party is obligated to go forward with his proof. This is consistent with Texas law in this area which requires any homestead claimant to prove that the property claimed as homestead actually qualifies for the homestead exemption. *See, e.g., Perry v. Dearing (In re Perry),* 345 F.3d 303, 311 (5th Cir. 2003) ["The claimant has the initial burden of establishing homestead status."] (*citing Burk Royalty Co. v. Riley,* 475 S.W.2d 566, 568 (Tex. 1972)); *Bradley v. Pac. Southwest Bank (In re Bradley),* 960 F.2d 502, 507 (5th Cir. 1992) ["It is well settled in Texas that an individual who seeks homestead protection has the initial burden to establish the homestead character of her property."] (*citing Lifemark Corp. v. Merritt,* 655 S.W.2d 310, 314 (Tex. App. — Houston [14th Dist.] 1983, writ ref'd n.r.e.)); *Vaughn v. Vaughn*, 279 S.W.2d 427, 436 (Tex. Civ. App. — Texarkana 1955, writ ref'd n.r.e.) and cases cited therein.

In the present case, the uncontroverted evidence establishes that, from their

marriage in 1980 until their divorce in 1994, the marital homestead of the Debtor and Gilbreath was the Huffman property. It is axiomatic that the Debtor could not have simultaneously claimed another homestead under Texas law. *Hillock Homes v. Claflin (In re Claflin)*, 761 F.2d 1088, 1090 (5th Cir. 1985); *Burk Royalty Co. v. Riley*, 475 S.W.2d 566, 567 (Tex. 1972) ["[A]fter the new family was created by her remarriage, there was no homestead apart from that new family"]. Thus, if the Whitewing property currently constitutes the homestead of the Debtor, it must of necessity have been created *subsequent to* her divorce from Gilbreath in 1994. Thus, the Debtor must carry the burden to demonstrate the circumstances under which the homestead character of the Whitewing property was established.

Generally, in order to assert homestead rights in a particular property, a person must use the property as a home. TEX. CONST. art. XVI, §51 (amended 1999); TEX. PROP. CODE ANN. §41.002(a), (b) (Vernon 2000). *See also Claflin*, 761 F.2d at 1091 ["the purpose of the homestead exemption laws is to protect the possession and enjoyment of the individual in property which is *used* as his or her home" (*emphasis added)*]; *Yates v. Home Bldg. & Loan Co.*, 103 S.W.2d 1081, 1084-85 (Tex. Civ. App. — Beaumont 1937, no writ) ["Homestead rights in a house cannot be acquired by mere intention, but to effectuate the intent actual use of the property as a home must concur."]. Finding the actual use requirement too strict to allow for the liberal construction generally afforded homestead rights under Texas law, however, courts applied homestead rights to properties

where a stated intention to occupy a property as a homestead was accompanied by overt acts towards occupation. *See Huizar v. Bank of Robstown (In re Huizar)*, 71 B.R. 826, 829-30 (Bankr. W.D.Tex. 1987) (citing requirements of actual use under the Texas Constitution and Texas Property Code before citing court opinions allowing an intent to use coupled with overt acts); *Clark v. Salinas*, 626 S.W.2d 118 (Tex. Civ. App. — Corpus Christi 1981,writ ref'd n.r.e.), *Sims v. Beeson*, 545 S.W.2d 262, 263 (Tex. Civ. App. — Tyler 1976, writ ref'd n.r.e.). A long-standing opinion of the Texas Court of Civil Appeals explained the overt act requirement in the following manner:

> Where the homestead right is made to rest upon intention, as distinguished from actual use and occupancy, there is strong reason for requiring the accompaniment of some overt acts on the part of the claimant, evidencing a purpose or effort to carry his intentions into effect. Use and occupancy are open to observation, and consist of facts which are easily proved or combatted; but, where the homestead right is made to rest on mere intention, the situation is otherwise. No one would be willing to swear that another did not in fact have a certain intention regarding the occupancy of premises, and in the majority of instances the difficulty of disproving intention by circumstances is so great as to render the undertaking practically fruitless. Hence, unless some rule should be adopted by the courts requiring a secret intention to be accompanied by some physical conduct open to observation, the liberality of the construction placed by them upon this section of the Constitution would furnish a cloak easily available for concealing fraudulent transactions.

Parker v. Cook, 122 S.W. 419, 423 (Tex. Civ. App. 1909, writ denied). Thus, where

there is no actual use of the property as a homestead, a showing of intent by the property owner to occupy certain premises as a homestead, accompanied by overt acts which evidence an effort to carry that intention into effect, is sufficient under Texas law to establish the homestead character of the property.

In the present case, the Debtor admits she has not occupied the Whitewing property since her marriage to Gilbreath in 1980. Therefore, any homestead claim which the Debtor might assert as to the Whitewing property at a time subsequent to her divorce from Gilbreath must be based upon her stated intent to occupy that property as a homestead, buttressed by some overt acts which evidence that intent. The Debtor, as one would expect, testified as to her intent to treat the Whitewing property as her homestead. However, other evidence belies that bald assertion of intent. When asked why she had not resumed occupancy of the property since divorcing Gilbreath in 1994, the Debtor stated that, among other reasons, she desired the rental income from the property. A sustained election to receive an income stream generated by a piece of non-exempt property does not substantiate an asserted intent to utilize that same property as one's home. The Debtor stated that, during all the years of her marriage to Gilbreath and at all times subsequent thereto, she kept the property because of "the *possibility* that I may need to go there." However, even a liberal construction of the homestead exemption offered by Texas law does not contemplate a spouse maintaining a parcel of separate property as a "contingent homestead" which would arise only in the event that her marriage fails and

the existing marital homestead is dissolved.[18]

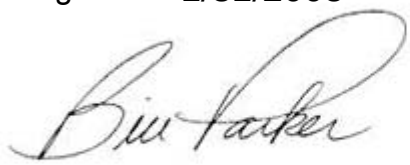
Even assuming that the Debtor possessed a subjective intention to claim the Whitewing property as her homestead despite her extended absence from it, no Texas homestead claim in that property would arise as a result of that intent without a demonstration of overt acts "evidencing a purpose or effort to carry [her] intentions into effect." *Parker*, 122 S.W. at 423. However, storing a folding table in the garage and some dishes in the attic of the Whitewing property, which are the only acts proffered by the Debtor in support of her stated intent, are far from sufficient to evidence an actual intent to occupy the premises as a homestead. The Debtor admitted that, since 1994, she has either lived as a single woman with her mother at a separate location or as a married woman with a subsequent husband at other locales, and that she has never taken any affirmative steps to occupy the Whitewing property as a home, even though she has had more than an adequate opportunity to do so. She elected instead to utilize the Whitewing property as a stable source of income. In order for overt acts to evidence an intent to occupy a premises as a homestead, they must be more substantial than the Debtor's actions in this case in order to endow a non-occupied property with those attributes for which the homestead exemption was created. *See, e.g., Huizar,* 71 B.R. at 830 [spending

[18] If that were so, any time a person owned a single parcel of real estate, that property would qualify as a homestead as a matter of law, regardless of use. Such is not the law in Texas. *In re Mitchell*, 80 B.R. 372, 384 (Bankr. W.D. Tex. 1987)["it is entirely possible for someone to own only one piece of real property, yet not have a homestead."]. However, it is on this faulty premise that the Debtor actually based her argument.

substantial sums on repairs in preparation for occupancy]; *and Vaughn v. Sterling Nat'l Bank & Trust Co.*, 124 S.W.2d 440 (Tex. Civ. App.— El Paso 1938, writ denied) [moving furniture and a piano into the home in anticipation of occupancy]. While it would certainly be convenient for the Debtor to continue to retain the Whitewing property as a haven against all of the various vicissitudes of life, notwithstanding her current marital status or other life choices which have sustained her absence from the Whitewing property for almost a quarter-century, Texas law does not provide a homestead protection for such a purpose. Accordingly, the Court finds that the Debtor has failed to meet her initial burden to demonstrate that the Whitewing property qualifies for a homestead exemption under Texas law and concludes that Gilbreath's exemption objection must therefore be sustained.

This memorandum of decision constitutes the Court's findings of fact and conclusions of law[19] pursuant to FED. R. CIV. P. 52, as incorporated into contested matters in bankruptcy cases by FED. R. BANKR. P. 7052 and 9014. A separate order regarding the objection shall be entered consistent with this opinion.

Signed on 1/31/2005



THE HONORABLE BILL PARKER
CHIEF UNITED STATES BANKRUPTCY JUDGE

[19] To the extent that any finding of fact is construed to be a conclusion of law, it is hereby adopted as such. To the extent any conclusion of law is construed to be a finding of fact, it is hereby adopted as such. The Court reserves the right to make additional findings and conclusions as necessary or as may be requested by any party.