"Please, Sir, I Want Some More"—Loopholes, Austerity, and the Cost of Living—Nebraska Exemption Policy Revisited

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The authors express their appreciation to Professor Michaela White, Creighton University School of Law, for her assistance.

*** The quote is from CHARLES DICKENS, OLIVER TWIST, Chap. 2 (1838).
I. INTRODUCTION

Fifteen years have elapsed since Congress passed the Bankruptcy Reform Act in 1978, and a dozen years have passed since Professor Richard F. Duncan published "Through the Trap Door Darkly: Nebraska Exemption Policy and the Bankruptcy Reform Act of 1978." That article constitutes the acknowledged treatise on Nebraska exemptions. Due to the timing of its publication and the relative newness of the law, Duncan cited only one Nebraska bankruptcy case decided under the Bankruptcy Code. In the interim, the Nebraska Bankruptcy Court has rendered nearly a thousand reported decisions.

Since that time significant bankruptcy-related activity has transpired. The Nebraska state exemptions have been repeatedly amended: in 1980, 1981, 1986, 1987, and twice in 1993. Nebraska has grudgingly increased its homestead exemption, reduced the annuity exemption, created new exemptions for pensions and lump-sum and structured settlements, and almost lost all of the exemptions for debtors filing bankruptcy.

The federal Bankruptcy Code has been in continual flux as a result of direct legislative amendment and the volume of emerging case law. Under the Code, the national and Nebraska bankruptcy court caseload grew substantially, especially in the area of consumer

9. For a discussion of the changes in Nebraska's annuity exemption laws, see infra notes 116-143 and accompanying text.
10. See infra notes 169-174 and accompanying text.
cases.11 The introduction of Chapter 12 for the family farmer also increased Nebraska’s caseload due to the significant amount of agricultural activity within the state.12 In September 1987, the court expanded from one judge in Omaha to include a second judge sitting in Lincoln.13 The bankruptcy court, district court, Eighth Circuit Court of Appeals and U.S. Supreme Court have rendered several decisions that further explicate the interaction between the Bankruptcy Code and state exemptions.

11. Filings by year and chapter:

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<th>Lincoln</th>
<th>Nebraska</th>
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<td>22</td>
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</table>

*(first 6 months of 1994)*


13. Two opinions exist regarding the prejudecntial authority of unpublished decisions. Judge Mahoney, relying on In re Anderson, 50 B.R. 728, 732 (D. Neb. 1985), believes that unpublished decisions may be cited. Judge Minahan, on the other hand, follows In re Leimer, 724 F.2d 744, 745 (8th Cir. 1984), which states “unpublished opinions of this Court are not intended to create binding precedent,” and Eighth Circuit Rules of Appellate Procedure, Rule 28A(k), which states in part that “[n]o party may cite a federal or state court opinion not intended for publication.” It appears that Judge Minahan deems decisions appearing solely in the Legal Information Service publication, Nebraska Bankruptcy Opinions, [hereinafter Neb. Bkr. yr:pagel, as unpublished opinions, while Judge Mahoney treats them as published decisions. Conversation between the Judges, Bankruptcy Section of the Nebraska State Bar Association, Annual Convention, Omaha, October 13, 1993. See also In re Shubert, 147 B.R. 618, 619 (Bankr. N.D. Ga. 1992)(citing Fox v. Acadia State Bank, 937 F.2d 1566, 1570 (11th Cir. 1991)).
This Article not only supplements and updates Duncan’s analysis in light of the subsequent amendments and case law but also advocates an exemption agenda for future consideration. This Article concludes that the solution lies in legislative amendment and recommends that the state adopt a system of debtor-creditor relations that meets requirements of justice and compassion.

Historically, Nebraska and other state legislatures periodically review exemptions and amend them to conform with contemporary use and practice. The Bankruptcy Reform Act permits states either to use the federal exemptions pursuant to 11 U.S.C. § 522(d) or opt out and substitute state exemptions. Nebraska opted out with the Act of April 16, 1980, and enacted Legislative Bill 940. Although this legislation prohibited Nebraska citizens from using the congressional scheme of exemptions, it raised Nebraska's homestead exemption from $4,000 to $6,500 and increased the "in lieu of homestead" exemption from $1,500 to $2,500. Nonetheless, with minor exceptions, "Nebraska’s exemptions are dramatically less generous than the exemptions afforded debtors under the Federal Bankruptcy Code.”


In 1969, Neb. Rev. Stat. § 25-1556 (Reissue 1969) was modernized to its current form. The updated section shed the traditional, rural and archaic specific exemptions, such as the Family Bible; family pictures; school books; seat or pew in any house or place of public worship; all beds, bedsteads and bedding necessary for family use; all stoves and appendages, not to exceed $100; one cow, three hogs, and all pigs under 6 months, if the debtor was in the agricultural business; one yoke of oxen or a pair of horses in lieu thereof; 10 sheep and their wool; one wagon, cart or dray; 2 plows and one drag, which had been allowed as exemptions. The $500 exemption was raised to $1,000 in 1969 and to $1,500 in 1973. Section 25-1556 has not been amended since 1973. Section 25-1552 was raised from $500 to $1,500 in 1973 and to $2,500 in 1991. Neb. Rev. Stat. § 25-1552 (Cum. Supp. 1993).


The federal exemptions provided in 11 U.S.C. Section 522, subsection (d), are hereby rejected by the State of Nebraska. The State of Nebraska elects to retain the personal exemptions provided under Nebraska statutes and the Nebraska Constitution and to have such exemptions apply to any bankruptcy petition filed in Nebraska after April 17, 1980.

Thirty-four other jurisdictions also opted to maintain or amend their state exemptions, or permit their citizens to elect state or federal exemptions, rather than allow them to use solely the federal exemptions.


19. Paul Festerson, Nebraska Exemptions, The Annuity Brouhaha and LB 335, 2 (Neb. Continuing Legal Education 1987). Duncan approved the choice of state over federal exemptions: "The disparity between federal and Nebraska’s exemptions gives rise to one positive effect of Nebraska’s opting out of the federal
A comparative review of the parallels, harmony, and dissonance between federal and state exemptions is instructive. The passage of the Bankruptcy Reform Act of 1994 doubled the federal exemptions established in 1978, which, with few exceptions, were already more generous than Nebraska. Moreover, the Reform Act provides triennial review of exemption levels based on the Consumer Price Index for All Urban Consumers published by the Department of Labor. Some of Nebraska's exemptions have been expanded, such as the section 40-101 homestead and structured settlements, while other areas, such as section 44-371, have been narrowed. The expansions result both from altered federal exemptions and a recognition that the exemptions are not keeping pace with inflation. The narrowing is in reaction to perceived abuses of exemptions. Furthermore, the Unicameral has reacted to a changing economic, political, and social climate. In this new environment, pension plans are becoming a predominant form of long term investment, and structured settlements in personal injury cases

scheme—the elimination of an incentive for debtors to rush into bankruptcy in order to take advantage of the more generous federal exemptions." Duncan, supra note 2, at 234 n.65. Nebraska "has always been a creditor driven and a creditor oriented state" and "reject[ed] all the federal exemptions. We are going to reject exemptions because they are far more liberal than this state could ever tolerate and allow." See FLOOR DEBATE ON L.B. 335, 90th LEG., 1ST SESS. 3658 (1987) (remarks of Sen. V. Johnson). Committee hearings and Unicameral debates are replete with attorney and debtor bashing.

20. The federal exemption structure is as follows:

   (1) Homestead exemption - $15,000 per debtor and for joint debtors, $30,000;
   (2) Motor vehicle - $2,400;
   (3) Personal property $400 per item, aggregate $8,000;
   (4) Jewelry - $1,000;
   (5) any property - $800 plus up to $7,500 of any unused amount from (1);
   (6) tools of trade - $1,500;
   (7) any unmatured life insurance contract;
   (8) life insurance - $8,000;
   (9) health aids;
(10) (A) social security, unemployment compensation;
    (B) veterans' benefits;
    (C) disability, illness or unemployment;
    (D) alimony, support or separate maintenance;
    (E) stock bonus, pension, profitsharing, annuity, or similar plan or contract
        on account of illness, disability, death, age or length of service, to the
        extent reasonably necessary for the support of debtor and any
        dependent;
(11) (A) award under a crime victim's reparation law;
    (B) wrongful death award;
    (C) life insurance;
    (D) $15,000 personal injury award;
    (E) future lost income award;
have become a mutually agreeable economic resolution, sometimes preferable to lump sum payment.

The disparity between the federal and state exemptions results in unequal treatment of Nebraska citizens in comparison to citizens of states that apply the federal exemptions or have more generous opt out provisions.\(^{21}\) For example, under the federal exemptions, a married couple with a homestead and other tangible personal property\(^ {22} \) could claim exempt property totaling $56,600 while a similarly situated Nebraska couple applying Nebraska exemptions could only claim $18,500. Absent the homestead, the federal exemptions provide $43,200 in exempt property; Nebraska only exempts $11,000. For a single person, the federal exemptions, including a homestead, provide $14,350 of exemption. Under Nebraska exemptions, a single person who is neither married nor head of family at the time the home was acquired, and did not subsequently marry or become head of household, cannot claim a homestead exemption and is limited to $5,500 in exempt property. If Nebraska permitted a person living alone to claim a homestead, the exemption would be $13,000, still far less than the federal exemption.\(^ {23}\)

Since several Nebraska exemptions overlap and interact, they cannot be discussed in isolation, particularly in a joint bankruptcy.\(^ {24}\) For example, In re Dahlberg\(^ {25} \) established that a debtor (husband) and joint debtor (wife) could both claim exemptions under the general personal property provision,\(^ {26} \) and under the in-lieu-of-homestead provision,\(^ {27} \) which totals $8,000. The in-lieu-of-homestead provision, also commonly called the wildcard\(^ {28} \) exemption, interacts directly with the homestead exemption\(^ {29} \) and personal property provision.\(^ {30} \) Where the husband claimed the homestead under section 40-101, the wife could

\(^{21}\) See infra Parts III, IV, X, XI.

\(^{22}\) This does not include pensions or any items in (7) through (11)).

\(^{23}\) The 1978 federal exemptions represent a compromise between the Senate and House versions. The House Bill exemptions were substantially higher. For instance, the House homestead exemption was $10,000, the vehicle exemption was $1,500, the jewelry exemption was $750, and tools exemption was $1,000, per debtor. See Report of the Committee on the Judiciary, House of Representatives, H.R. Rep. No. 595, 95th Cong., 1st Sess. 361 (1977); 140 Cong. Rec. H10,765 (daily ed. Oct. 4, 1994) (Rep. Brooks inserting section-by-section description of Bankruptcy Reform Act of 1994).

\(^{24}\) A husband and wife may file a joint bankruptcy with the husband being the debtor and the wife the joint debtor.

\(^{25}\) Neb. Bkr. 78:75, 75-76.


\(^{27}\) Id. § 25-1552 (Reissue 1989).

\(^{28}\) In re Welborne, 63 B.R. 23, 26 (Bankr. D. Neb. 1986). See also Duncan, supra note 2, at 266.


\(^{30}\) Id. § 25-1556 (Reissue 1989).
claim the in-lieu-of-homestead under section 25-1552. The character of the property exempted under section 25-1552 and the general personal property provision may be identical, with section 25-1552 being applied for the values that exceed the section 25-1556 general personal property limitations. Additionally, in Patterson v. Shumate, the United States Supreme Court may have simplified or compounded the interplay between the pension exemption and the annuity exemption.

II. INTERACTION BETWEEN STATE EXEMPTIONS AND FEDERAL DISCHARGE

While the scope of the exemption is fixed by state law, the debtor's right to discharge is determined by federal law. Filing for bankruptcy includes the obligation of listing all the debtor's property and claiming appropriate exemptions. As simple as it sounds, this process is subject to an increasing number of pitfalls and a lack of predictability.

A. Pre-bankruptcy Planning

Determining when the conversion of nonexempt assets to exempt assets enters the zone of danger on the eve of bankruptcy is problematic and potentially unpredictable. Debtor's counsel should thoughtfully engage in pre-bankruptcy planning and zealously claim exemptions. The tension between preserving assets and giving the creditors their due, the tension between providing a fresh start or head start, and counsel's ethical duty to prepare the client for bankruptcy has received a considerable amount of attention.

Eve of bankruptcy conversions are not fraudulent per se. However, 11 U.S.C. § 727(a) provides "the court shall grant the debtor a discharge, unless (2) the debtor, with intent to hinder, delay, or defraud a creditor . . . has transferred, removed . . . or concealed (A) property of the debtor, within one year before the date of the filing of the petition." And while 11 U.S.C. § 548 provides a one year moratorium on fraudulent conveyances, at least one jurisdiction has held that 11 U.S.C. § 522 may permit inquiry and invalidation of exemptions in the face of fraud for periods extending longer than one year prior to filing.

34. Id. § 44-371 (Reissue 1993).
An early commentator has written that “[b]ankruptcy legislation and state exemption laws were not designed to protect the debtor who acts in bad faith to deprive his creditors of assets.”\(^{37}\) The Eighth Circuit addressed how much is too much and under what circumstances acquisition is tainted in three cases. In *Norwest Bank of Nebraska v. Tveten*,\(^{38}\) a fifty-nine-year-old Minnesota physician with $19,000,000 in obligations liquidated non-exempt assets and converted $700,000 into life insurance or annuity contracts. He even liquidated his exempt home for $50,000. The court found extrinsic evidence of intent to defraud and denied discharge. However, Tveten was “entitled to retain, free from creditors’ claims, property rightfully exempt under relevant state law.”\(^{39}\) Judge Arnold dissented on the basis that the court had entered the realm of the legislative branch by interposing its judicial interpretation of state law which had created an unlimited exemption.\(^{40}\)

In *Hanson v. First National Bank in Brookings*,\(^{41}\) a South Dakota farmer purchased life insurance with a cash surrender value of $19,955. South Dakota law provided a maximum exemption of $20,000 in life insurance policies.\(^{42}\) Hanson was a farmer, not a physician. His debts and the scope of his pre-bankruptcy planning were on a far smaller scale than Tveten’s. The conversion was permitted and discharge granted.\(^{43}\) Judge Arnold wrote a separate concurring opinion.\(^{44}\)

In *re Johnson*\(^{45}\) is the last of the trilogy. Johnson was a forty-three-year-old Minnesota physician who had invested along with Tveten. In *Johnson*, the bankruptcy court and district court held that a Minnesota physician, who “made a conscious, if selfish, effort to fully avail himself of the full range of debtor protections afforded by the Minnesota state legislature . . . [in a] wholly self-serving” manner,

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38. 848 F.2d 871 (8th Cir. 1988).
39. *Id.* at 876.
40. *Id.* at 878-79.
41. 848 F.2d 866 (8th Cir. 1988). Judge Arnold, who dissented in *Norwest Bank of Nebraska v. Tveten*, wrote a separate concurring opinion in *Hanson*. He opposed the court’s interposing its subjective opinion in the face of clear statute, and asserted it was the state legislature’s role to impose limits on nonexempt property transfer. See *Norwest Bank of Nebraska v. Tveten*, 848 F.2d 871, 877 (8th Cir. 1988) (Arnold, J., dissenting); Hanson v. First Nat’l Bank in Brookings, 848 F.2d 866, 870 (8th Cir. 1988) (Arnold, J., concurring).
44. *Id.* at 870-71.
45. 880 F.2d 78 (8th Cir. 1989).
with which the court had “gut-level difficulty,” did nothing to merit denial of discharge.46 The bankruptcy court decided Johnson before Tveten and Hanson, but the Eighth Circuit decided it after Tveten and Hanson. The Eighth Circuit remanded Johnson to the bankruptcy court. On remand, the bankruptcy court merged Tveten and Hanson into a seven-pronged test for fraud, which compared the reasons that the debtor claimed the exemption against the legislative purpose for establishing the exemption.47 The court found intrinsic fraud based on the claimed exemption of a life insurance policy which was acquired shortly before filing bankruptcy and cashed in shortly thereafter. The debtor also claimed an exemption for a grand piano and harpsichord valued at $8,000 when he was not even able to play the instruments. The court denied discharge.48

The adage that pigs get fed while hogs get slaughtered appropriately summarizes the growing literature and case law.49 Professor Resnick suggests that “[s]o long as his purpose is to obtain a reasonable amount of property to fulfill his genuine needs, such acquisitions can be considered as part of the debtor’s prudent planning.”50

Professor Resnick has articulated five often cited policy premises for exemptions:

(1) To provide the debtor with property necessary for his physical survival;
(2) To protect the dignity and the cultural and religious identity of the debtor;
(3) To enable the debtor to rehabilitate himself financially and earn income in the future;
(4) To protect the debtor’s family from the adverse consequences of impoverishment;
(5) To shift the burden of providing the debtor and his family with minimal support from society to the debtor’s creditors.51

Professor Duncan suggests that “the starting point for the debtor’s counsel is clear—the specific exemptions are to be liberally construed

48. Id. at 297.
50. Resnick, supra note 37, at 643.
51. Resnick, supra note 37, at 621. See Norwest Bank of Neb. v. Tveten, 848 F.2d 871, 876 (8th Cir. 1988).
in favor of the person claiming the exemption."\(^{52}\) However, in *In re Loftis*,\(^ {53}\) the court sounded a cautionary note. In that case, the debtors were not completely honest in their dealings with the creditor. The court ruled that "honesty in fact and full disclosure are the very heart and soul of good faith."\(^ {54}\)

Correctly applying the appropriate exemptions cannot be overemphasized.\(^ {55}\) While *Tveten, Hanson,* and *Johnson* provide some guidance on pre-bankruptcy conversion, they may exaggerate the risk of pre-bankruptcy planning in Nebraska where the exemptions are already so lean. However, a debtor fleeing Nebraska to a jurisdiction with luxuriant exemptions might run into a "Coplan analysis." In *In re Coplan*,\(^ {56}\) although the debtor relied on advice of counsel and the plain reading of the statutes, the creditors persuaded the court that Wisconsin's exemptions were nonetheless applicable rather than those of the new host state. The court found a "systematic conversion of assets had occurred . . . for the specific purpose of placing the asset out of reach of creditors."\(^ {57}\) Judge Arnold, dissenting in *Tveten*, disagreed with such an approach, and observed that a state legislative enactment relied on by a debtor in another jurisdiction should not be overruled by a court.\(^ {58}\)

### B. Concealment of Assets

The penalty for failing to list all of the debtor's property may be severe. One adage indicates that the difference between tax avoidance and tax evasion is between five to ten years.\(^ {59}\) The court has a low tolerance level for debtors seeking a safe harbor in bankruptcy who do not completely and adequately describe what it is they hold. In *In re Hohnholt*,\(^ {60}\) a debtor was denied discharge after having failed to disclose his insurance renewal income.\(^ {61}\) Under 11 U.S.C. § 727(a), a debtor is entitled to a discharge unless the debtor knowingly and

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54. *Id.* at 61.
57. *Id.* at 90.
59. More precisely, the penalty for fraudulently concealing assets is $5,000 and/or five years imprisonment. 18 U.S.C. § 152 (1988).
61. *Id.* at 363. *See also* *In re Mertz*, 955 F.2d 596 (8th Cir. 1992)(holding failure to disclose estate tax refund was material misrepresentation warranting denial of
fraudulently made a false oath or statement in connection with the case. In *In re Lundy*, the "drastic remedy" of denying a discharge resulted when the debtors' testimony regarding their sources of cash lacked credibility and was "nonsense." The debtors had several opportunities to set the record straight but failed to do so. The trustee's objection to the exempt homestead was denied. Although the unlisted property may be of inconsequential value or even exempt, failure to list it could result in denial of discharge. Failure to list contingent claims such as personal injury, malpractice, consumer fraud, unfair debt collection, or an uncollected personal debt could also result in the loss of the claim on the theory that the discharged debtor/plaintiff did not have clean hands to pursue the claim since it was not listed as an asset in the bankruptcy. Furthermore, reopening the case pursuant to 11 U.S.C. § 350 to correct the omission is not an automatic right.

Bankruptcy fraud and crimes have received increased scrutiny from the U.S. Trustee. The court, the trustee, and the U.S. Trustee may refer questionable practices to the U.S. Attorney for investigation and possible grand jury indictment and prosecution. These sanctions clearly go beyond the denial of exemptions or discharge. For example, in a recent case, an attorney who advised a debtor to hide assets had his sentence enhanced under the Sentencing Guidelines because the lawyer had "special skills."

C. Valuation

Establishing the value of property is an art. The vast majority of debtors cannot afford a professional appraiser. The value of exempt and non-exempt property focuses on the legal standard to be applied and the purpose of the valuation. The issue is important because in the current scheme all exemptions contain limits on the value of designated property the debtor may claim.

Determining the value of potentially exempt property is governed by section 522(a)(2) which provides that "value" means "fair market value." Standards for arriving at fair market value may include replacement value, insurance value, retail price, wholesale price, auc-

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63. *Id.* at 503-09.
64. See *Use of Bankruptcy Knowledge Lands Lawyer in Prison*, 3 CONSUMER BANKR. NEWS 1, 8 (January 10, 1994).
tion or distress sale value, pawnshop price, or garage sale price.\textsuperscript{67} In \textit{In re Sato},\textsuperscript{68} the court distinguished between fair market value and liquidation value. The court recognized "the forced sale nature of a trustee sale" could result in a "decline in the sale price" but without further evidence was unwilling to accept that the decline would be twenty to forty percent.\textsuperscript{69} Value, for the purposes of Chapter 13 liquidation analysis, is that amount which the trustee in Chapter 7 would have available to disburse to creditors following liquidation and its inherent costs.\textsuperscript{70}

When secured property is retained or subject to cramdown, section 506(a) of the Code dealing with secured claims provides that "value shall be determined in light of the purpose of the valuation and of the proposed disposition of use of such property."\textsuperscript{71} The legislative history indicates "that the concept of value is flexible and grants discretion to the courts to determine value on a case-by-case basis."\textsuperscript{72} Competing perspectives are represented by the wholesale price and commercially reasonable sale price. The central issue is what amount the creditor would realize if the property were disposed of in a bid market.\textsuperscript{73}

The circuits are split on which standard to apply when valuing assets. The Ninth Circuit, in \textit{General Motors Acceptance Corp. v. Mitchell},\textsuperscript{74} placed value at the property's wholesale price. Judge Noonan dissented, recognizing that valuation is neither simple nor unambiguous and the statutory language should be controlling. He would have established value at the retail price of replacement.\textsuperscript{75} On the other hand, the Fourth Circuit relies on the debtor's intended use of the

\begin{itemize}
\item \textsuperscript{67} The Nebraska Legislature has recognized the difficulty of valuation. "[T]he value of a piece of property can vary considerably to different individuals under different considerations and under different marketing conditions." See FLOOR DEBATE ON L.B. 335, 90th LEG., 1st Sess. 2573 (1987)(remarks of Sen. Schmit).
\item \textsuperscript{68} Neb. Bkr. 88:655.
\item \textsuperscript{69} Id. at 656.
\item \textsuperscript{71} 11 U.S.C. § 506(a)(1988).
\item \textsuperscript{74} 954 F.2d 557 (9th Cir.) cert. denied, 113 S. Ct. 303 (1992).
\item \textsuperscript{75} Id. at 561 (Noonan, J., dissenting).\end{itemize}
property. The Supreme Court has thus far denied certiorari to resolve the split. Perhaps Supreme Court review has been denied because the legislative history anticipated a case-by-case analysis.

Recently, In re Stauffer has further muddied the water by combining the approaches. In Stauffer, the court concluded that "the most equitable approach [in valuing property]... would seem to... average the two figures," the NADA wholesale and retail values, to fix the value of a motor vehicle in a Chapter 13.

Flagrantly violating good sense in the valuation process could result in sanctions under Federal Rule of Bankruptcy Procedure 9011. In In re Ridner, the debtor and counsel grossly undervalued jewelry at $200 when a pawnshop estimated a minimum value of $1,800 and a retail replacement cost of $4,650. The attorney was sanctioned $800 as a result of the undervaluation. Rule 9011 provides in part that an attorney's signature on a document represents that the attorney has read the document and the claim "is well grounded in fact and is warranted by existing law or a good faith argument." Violation of the rule may result in "an appropriate sanction."

D. Amending Exemptions

In In re Welborne, debtors were permitted to amend their exemptions after they had received a discharge. The court found that the rule did not establish a clear deadline for amending the list of property claimed as exempt and overruled the creditors' reliance on the doctrine of laches.

E. Case Conversion and Onset of Exemption

When debtors convert from Chapter 11 or 13 to 7, a question frequently arises as to from what date the exemptions derive. Generally, exemptions taken in the initial case prevail. For instance, if the case was filed when the homestead exemption was $6,500, but upon conversion to Chapter 7 the exemption was $10,000, the debtor's exemption is limited to $6,500. However, if the property was sold while the initial case was pending and no longer in the debtor's possession and a...
substitute homestead was not acquired, then the debtors would be entitled to a section 40-101 exemption for the replacement homestead or entitled to a section 25-1552 in-lieu-of-homestead exemption.85

F. Objecting to Exemptions

In a case where a trustee’s objection to an exemption was imperfectly served, both parties appealed to the district court, where Judge Cambridge’s decision86 anticipated the Supreme Court ruling in Taylor v. Freeland & Kronz.87 The court reversed on the basis that “Bankruptcy Rule 4003 provides that objections to exemptions must be filed within 30 days of the first meeting of the creditors unless within that 30 days, the court grants an extension of time to object.”88 The court found that the bankruptcy court had “erroneously relied upon the ‘relation back’ theory.”89 Thus, “the debtor’s claim of exemption should be affirmed for the reason that the objection was not timely filed in accordance with Bankruptcy Rule 4003.”90

G. The IRS and Nebraska Exemptions

Nebraska exemptions do not apply when the United States is a creditor. The IRS has established its own set standards for property exempt from levy. These exemptions include wearing apparel, school books, fuel, provisions, furniture and personal effects up to $1,650, books and tools of the trade that do not exceed $1,100 in value, and other streams of income.91 “Exemptions under state law are not valid against a tax lien except to the extent provided by 26 U.S.C. § 6334(a).”92 If the IRS has a secured claim, the most the debtor can do is reduce the secured portion to the value of the secured property with the balance becoming unsecured or priority. It is important to note that lien avoidance under section 522(f)(1) is directed toward ju-

85. See e.g., In re Lindberg, 735 F.2d 1087 (8th Cir. 1984); In re Beethé, Neb. Bkr. 87:259.
89. Id. at 256.
90. Id. See also Klein, supra note 55; Arend R. Baack, Exemptions, Neb. Continuing Legal Education, Fundamentals of Bankruptcy (December 10, 1993).
91. I.R.C. § 6334(a)-(d) (1988 & Supp. V 1993). The exempt amount is periodically increased. For example, section 6334(a)(2), fuel, provisions, furniture, and personal effects exemption, which is only available if the taxpayer is the head of a family, has risen from $1,500 to $1,650 from 1986 to 1990. Section 6334(a)(3), books and tools of the trade exemption, rose from $1,000 to $1,150 over the same period.
dicial liens, not statutory claims. Similarly, if the United States forecloses a mortgage in federal district court, the defendant does not have recourse to section 25-1506 homestead stays, which would delay the sale three months to nine months under Nebraska law, depending on the vintage of the mortgage.

III. SPECIFIC EXEMPTIONS: SECTION 25-1556

Section 25-1556 of the Nebraska Revised Statutes provides in part that:

[§]o property hereinafter mentioned shall be liable to attachment, execution or sale on any final process issued from any court in this state, against any person being a resident of this state: (1) The immediate personal possessions of the debtor and his family; and (2) all necessary wearing apparel of the debtor and his family; all kitchen utensils and household furniture, to be selected by the debtor, not exceeding in value fifteen hundred dollars; all equipment or tools used by the debtor or his family for their own support not exceeding fifteen hundred dollars in value; the provisions for the debtor and his family necessary for six months' support, either provided or growing, or both; and fuel necessary for six months.93

In 1981, Duncan noted that section 25-1556, passed in 1969, was "less than fifteen years old, and a substantial body of case law interpreting its provisions has not yet developed."94 Since then a considerable body of case law has been decided.

A. Personal Possessions, Motor Vehicles and Tools of the Trade

Generally speaking, a debtor's most valuable possession, other than the homestead, is an automobile. Federal exemption 522(d)(2) provides each debtor with a $2,400 exemption for a motor vehicle. Some states provide a specific exemption for motor vehicles. Other states, like Iowa, provide shelter in a general category that specifically includes an automobile.95 Nebraska statutes do not provide a specific motor vehicle exemption. Nebraskans either must fit the automobile in as a $1,500 exemption under section 25-1556 as tool of the trade, which is very difficult to accomplish, or under section 25-1552, the $2,500 wild card exemption.

In *In re Dahlberg*,96 the court established that an automobile would not pass under the classification "immediate personal possessions of the debtor and family" under section 25-1556, reasoning that the statutory language appeared to refer "to something more intimate than a vehicle."97 However, a vehicle may be exempt as a "tool of the

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95. IOWA CODE § 627.6.9 (1988).
97. Id. at 76.
trade" when the vehicle's use is "related to the occupation of the
debtor."98 For instance, an insurance salesman who put 81,000 miles
on an automobile while servicing farmers living in out-state Nebraska
was allowed to avoid a non-possessory, non-purchase money security
interest on the vehicle under section 522(d)(6).99 In In re Keller,100
the court found that even though the debtor's wife did not actively use
her husband's tools, the court allowed both spouses to claim a "tool of
the trade" $1,500 exemption, totaling $3,000. The court interpreted
the language so that the exemption facilitated the family's support.101

Section 522(d)(1) of the Bankruptcy Code refers to "personal prop-
erty." Sections 522(d)(3) and 522(f)(2)(A) refer to "household furnish-
ings" and "household goods." The Nebraska exemptions use different
language. Section 25-1556 includes "immediate personal possessions"
and "household furniture." Section 25-1552 applies to "personal prop-
erty." To date, the diversity in language has not caused insuperable
confusion, but Congress is struggling to define "household goods."102

B. Provisions for Debtors

Farmers have attempted to stretch section 25-1556(2)'s "provisions
for debtors and their family necessary for six months' support" to in-
clude growing and harvested grain. In one case, the bankruptcy court
exempted $4,200 worth of a farmer's 1987 crop under the six months'
provisions allowance. The district court, however, reversed, stating
that this provision did not apply to growing crops which were not yet
provisions or food supplies and noting that the Legislature did not ex-
empt the proceeds of the harvested crop.103 Likewise, in another case,
where the assertion was made for approximately 2,400 bushels of corn
and 520 bushels of wheat, the lien avoidance was denied.104

IV. THE WILDCARD EXEMPTION: SECTION 25-1552

Nebraska Revised Statute section 25-1552 as amended in 1993
provides that:

100. 50 B.R. 23 (Bankr. D. Neb. 1985). See also In re Nachtigal, 82 B.R. 533 (Bankr.
102. The section 522(d) definition of "household goods" includes clothing, furniture,
appliances, linens, china, crockery, and kitchenware and personal effects of the
debtor and debtor's dependents. Household goods do not include works of art,
electronic entertainment equipment except for one television and one radio, anti-
ques over 100 years old when the debtor acquired them, and jewelry other than
[a]ll debtors who do not have lands, town lots, or houses subject to exemptions as a homestead under sections 40-101 to 40-116 shall have exempt from forced sale on execution the sum of twenty-five hundred dollars in personal property, except wages. The provisions of this section shall not, in any manner, apply to the exemption of wages, that subject being fully provided for by section 25-1558. In proceedings involving a writ of execution, the exemption from execution under this section shall be claimed in the manner provided by section 25-1516. The debtor desiring to claim an exemption from execution under this section shall, at the time the request for hearing is filed, file a list of the whole of the property owned by the debtor and an indication of the items of property which he or she claims to be exempt from execution, along with a value for each item listed. The debtor or his or her authorized agent may select from the list an amount of property not exceeding the value exempt from execution under this section according to the debtor's valuation or the court's valuation if the debtor's valuation is challenged by a creditor.

Little litigation has taken place under the wildcard exemption. The nature of the wildcard suggests that anything may fit in, so long as it does not exceed the $2,500 limitation. There is no distinction as to necessities, luxury items, household goods, art, antiques, or the like. In In re Welborne, the debtors sought to exempt a twenty-four inch color television as “necessary” furniture under section 25-1556. The creditor, ITT, argued that the stereo system and color television were luxury items. The court’s discussion regarding the “necessities of life” was inconclusive, but the property was found to be exempt under the wildcard provision. In another case, the debtors exempted a cash appearance bond under this section. However, the court found that the garnishment lien was voidable as a judgment lien pursuant to section 522(f)(1). Section 25-1552 is the main haven for motor vehicles in Nebraska. For a married couple without a homestead, the exemption is doubled to $5,000.

V. DUE PROCESS AND GARNISHMENT PROCEDURE

In the face of a constitutional challenge, the Legislature amended Nebraska’s garnishment procedure in 1988 to provide the judgment debtor notice, due process, and a right to hearing. Later in 1993, the Legislature responded to another constitutional challenge to Nebraska’s post-judgment execution process with Legislative Bill 463. In Schafer v. Long, Western Nebraska Legal Services brought a


107. Id. at 25.

108. Id. at 26.


class action suit to challenge Nebraska procedure based on the Ohio case, *Hutchison v. Cox.* The representative plaintiffs complained that lack of notice and due process deprived them of their rights under the Fourteenth Amendment of the Constitution and other federal statutes. Legislative Bill 463, as originally introduced, would have radically curtailed the entire Nebraska exemption scheme. Only “judgment debtors” would have been eligible to apply for the exemption. A debtor without judgment would have had no right to exemption. However, both the bill’s sponsor and the committee disclaimed this intention, and the final version of this bill was merged into Legislative Bill 458 with refined language. Thus, while section 25-1552 has additional language, the Legislature did not intend to change any substantive exemption. Judgment debtors are now given notice of execution and have the burden of responding.

VI. ANNUITY CONTRACT, INSURANCE PROCEEDS, AND BENEFITS: SECTION 44-371

Section 44-371 dates from the depression. Judging from the legislative history, section 44-371 operated in the absence of pension plans and estate planning as a means by which farmers provided for their retirement. In 1978, section 44-371 provided that:

> [All] money, avails, cash values, and all and every benefit accruing under any annuity contract or under any policy or certificate of life insurance payable to a beneficiary other than the estate of the insured, and under any accident or health insurance policy, heretofore or hereafter issued, shall be exempt from attachment, garnishment, or other legal or equitable process, and from all claims or creditors of the insured, and of the beneficiary if related to the insured by blood or marriage, in the absence of a written agreement or assignment to the contrary.

The annuity exemption, section 44-371, has been hotly contested in the bankruptcy courts, district courts, and circuit court of appeals. When Nebraska opted out of the federal exemptions, section 44-371

113. 784 F. Supp. 1339 (S.D. Ohio 1992); See also *Acean v. San Juan County Sheriff’s Dep’t*, 944 F.2d 691 (10th Cir. 1991)(holding New Mexico post-judgment execution statute unconstitutional).

114. *See L.B. 634, 93d Leg., 1st Sess. (1993).* The limitation of the exemption to “judgment debtor” pervaded the entire exemption scheme, including homestead. *In re Plasden*, 154 B.R. 305 (N.D. Cal. 1993), held that the California homestead exemption could only be invoked by a debtor whose home was subject to forced sale by a judgment creditor. The California Legislature quickly amended the homestead provision.


116. At this date, the interaction between an execution to which the judgment debtor does not respond, the debtor filing bankruptcy, the section 362 automatic stay, and the claim of exemption under state law inside bankruptcy is unknown.

was amended in 1980\textsuperscript{118} and again in 1981\textsuperscript{119} so that the exemption would "not apply to any loan value in the excess of five thousand dollars of an unmatured life insurance contract."\textsuperscript{120}

At that time, no amendments had modified the status of the word "all." Thus, in In re Lowe,\textsuperscript{121} following a personal injury, the Union Pacific Railroad agreed to pay the debtor $90,000 followed with monthly payments of $500 for a period of twenty-five years with any remainder upon the debtor's death to go to his estate under a release and settlement agreement. The court found that a trust had not been created and the payments were property of the estate.\textsuperscript{122} The trustee argued that "the underlying agreement itself really constitutes a structured settlement of a lawsuit."\textsuperscript{123} While not finding a valid spendthrift trust, the court held that the character of the payment met the dictionary definition of an "annuity" and therefore was exempt.\textsuperscript{124} The Legislature was put on notice of the ambiguity of the "structured settlement."

Later, the debtor Lowe argued that his assignment of the exempt Union Pacific monthly payment to Alliance National Bank and Trust Company was invalid because of the exemption. The court found that the assignment was a statutorily valid transfer which removed the asset from its exempt status.\textsuperscript{125} The debtor's motion to avoid the lien pursuant to section 522(h) was subsequently denied.\textsuperscript{126}

In In re Block,\textsuperscript{127} debtors converted the $15,000 proceeds from a teacher's annuity contract into savings certificates for the benefit of the debtors' children and claimed that they were exempt. The bankruptcy court overruled the trustee's objection to the exemption and the trustee appealed to the district court to determine whether the savings certificates were part of the debtors' estate once they were found to be exempt, or whether certificate of ownership had passed to the debtors' children.\textsuperscript{128} The district court affirmed the bankruptcy court holding that under section 44-371 "annuities and proceeds therefrom are exempt from property of the estate."\textsuperscript{129} The court affirmed the bankruptcy court's finding "that the savings certificates are traceable to the annuity contracts. As such they are a form of cash proceeds

\textsuperscript{118} L.B. 940, 86th Leg., 2d Sess. (1980).
\textsuperscript{119} L.B. 327, 87th Leg., 1st Sess. (1981).
\textsuperscript{120} NEB. REV. STAT. § 44-371 (Reissue 1984).
\textsuperscript{121} Neb. Bkr. 86:207.
\textsuperscript{122} Id. at 212.
\textsuperscript{123} Id. at 211.
\textsuperscript{124} Id. at 213.
\textsuperscript{125} In re Lowe, Neb. Bkr. 87:99, 105.
\textsuperscript{126} Id. at 261.
\textsuperscript{127} Neb. Bkr. 86:258.
\textsuperscript{128} Id. at 259.
\textsuperscript{129} Id. at 261.
exempt under the statute." Block may mean that property is exempt when acquired with proceeds derived from exempt property, a reversal of the contentious problem of transforming non-exempt property into exempt property.

The section 44-371 annuity exemption provisions were dramatically amended due to protracted litigation in In re Armstrong. Armstrong filed Chapter 11 on December 31, 1986 and voluntarily converted to Chapter 7 on May 1, 1987. Beginning in 1985 and through the fall of 1986, the debtors sold non-exempt assets and transferred the $303,000 proceeds from the sales into annuities claimed to be exempt under section 44-371. The Chapter 7 trustee and the Bank of Hemingford, which was owed in excess of $800,000, objected to the exemption. Relying on Eighth Circuit precedent, the court stated:

It is well established that under the Code, a debtor's conversion of non-exempt property to exempt property on the eve of bankruptcy for the express purpose of placing that property beyond the reach of creditors, without more, will not deprive the debtor of the exemption to which he otherwise would be entitled.

Since the court found no "extrinsic evidence of fraud," the exemption was allowed.

The creditor pursued a second line of attack and began an adversary proceeding to deny discharge based on 11 U.S.C. § 727(a)(2). That section states the court will grant a discharge unless "the debtor, with intent to hinder, delay, or defraud a creditor . . . has transferred (A) property of the debtor within one year before the date of the filing of the petition." The court found "sufficient extrinsic evidence of intent to hinder, delay, or defraud a creditor" and denied the discharge. Thus, the bankruptcy court found the annuities exempt but denied a discharge. The district court and the court of appeals affirmed both decisions. Judge Crawford anticipated the seemingly anomalous result when he observed:

[It] appears to be that even though the debtor is denied a discharge because he committed a serious breach of duty prior to bankruptcy such as a fraudulent conveyance with intent or the concealing of property, the exempt property

130. Id. at 262.
132. Id. at 203.
134. Id. at 569.
which is granted to him by Section 522 will never be liable for his pre-petition debts.  

The Armstrong decision noted that the Nebraska Legislature was facing debtor abuse of section 44-371. In 1981, the Legislature through its Banking, Commerce and Insurance Committee not only amended the annuity provision, but also provided a comprehensive treatment of pension plans and structured settlements. Legislative Bill 327 was meant "to control the very large and sophisticated and well-to-do person who goes through bankruptcy who can utilize the loophole that we have had in Nebraska up until this time."  

While the text of section 44-371 was left intact, subparagraph (2) was added to severely limit the use of annuities in bankruptcy and against judgment debtors in civil court.

(2) This section shall not apply to an individual's aggregate interests greater than ten thousand dollars on all loan values or cash values or all matured life insurance contracts or to all proceeds, cash values, or benefits accruing under all annuity contracts owned by such individual. Notwithstanding anything in this subsection to the contrary, the aggregate exemptions any person may claim under this subsection and subsection (3) of section 44-1089 shall not exceed ten thousand dollars.

The most strategic pre-bankruptcy planning loophole had been closed. Additionally, subparagraph (3) was added to protect insurance companies.

In the debate, Senator Landis was the main proponent of the bill, while Senator Schmit represented farmer's interests in preserving section 44-371 as a retirement vehicle for farmers as originally conceived in the 1930s. Senator Johnson advocated moderating the attack on exemptions and modeling the amendment after the federal exemption. Recognizing the futility of his position, Schmit stated: "It's a tribute to the rural people they have survived as long as they have." Senator Johnson, also frustrated, stated:

The reason that I am fighting this so hard, and will continue to fight this all the way through passage, in that event that it is going to pass, is because eight years ago this legislature nailed the debtors' skins to the doors when it


simply washed out all the federal bankruptcy exemptions and passed the Nebraska narrow exemptions.\(^{144}\)

The amendment to section 44-371 passed without the emergency provisions that its proponents desired, becoming effective on August 30, 1987. No perceptible rush of filings occurred to take advantage of the annuity loophole in the last six months of the unlimited annuity exemption's existence. The amendment placed a cap of $10,000 on the aggregate cash values of debtor owned annuity contracts and life insurance policy for exemption purposes. The amendment also contained important provisions on pensions and structured settlements.

VII. FRATERNAL BENEFITS: SECTION 44-1089

The fraternal benefits exemption, like the annuity exemption discussed in the previous section, dates from the 1930s. The original exemption in section 44-1029\(^{145}\) exempted all proceeds derived from an organization defined as any “corporation, society, order or voluntary association, without capital stock.”\(^{146}\) These provisions exempted groups that operated on a lodge system with rituals and representative government, commonly called fraternal societies.\(^{147}\) In 1985, Legislative Bill 508 repealed sections 44-1001 to 44-1071, covering fraternal insurance, and relocated coverage of fraternal insurance in sections 44-1072 to 44-10,109.\(^{148}\) As passed in 1985, the exemption limited the loan or cash value of unmatured life insurance to $5,000.\(^{149}\) In 1987, Legislative Bill 335 raised the exempt loan or cash value to $10,000.\(^{150}\)

In closing, it should be noted that sections 44-371 and 44-1089 provide a total aggregate exemption of $10,000 per debtor, which is somewhat more generous than the analogous exemption provided by the federal exemption in 11 U.S.C. § 522(d)(8), which has an $8,000 limitation per debtor. Thus, sections 44-371 and 44-1089 could be used as a means for sheltering assets where the equity in a home exceeded $10,000. A married couple could mortgage their property to the extent of $20,000, thus shielding $30,000 in equity. Whether this would pass the good faith test and other barriers described above is problematic. It does use the statutes as they are written, it does not cross state lines, and its goal is to provide a modicum of future security for the

\(^{144}\) See Floor Debate on L.B. 335, 90th Leg., 1st Sess. 3687 (1987)(remarks of Sen. V. Johnson).
\(^{146}\) Id. § 40-1001 (Reissue 1984).
\(^{147}\) Id. §§ 44-1001, 44-1002 (Reissue 1984).
debtors, all of which suggest survival of the exemption in the face of a challenge by a creditor or trustee.

VIII. STOCK, PENSIONS, AND SIMILAR PLANS:
SECTION 25-1563.01

Until 1987, Nebraska was one of the few states to offer only minimal protection for retirement benefits.151 The passage of section 25-1563.01, which tracks 11 U.S.C. § 522(d)(10)(E), cured this omission.

In bankruptcy and in the collection of a money judgment, the following benefits shall be exempt from attachment, garnishment, or other legal or equitable process and from all claims of creditors: To the extent reasonably necessary for the support of the debtor and any dependent of the debtor, an interest held under a stock bonus, pension, profit-sharing, or similar plan or contract payable on account of illness, disability, death, age, or length of services unless:

1. Within two years prior to bankruptcy or to entry against the individual of a money judgment which thereafter becomes final, such plan or contract was established or was amended to increase contributions by or under the auspices of the individual or of an insider that employed the individual at the time the individual’s rights under such plan or contract arose; or
2. Such plan or contract does not qualify under section 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code of 1986 or the successors of such sections.152

The expression “to the extent reasonably necessary for the support of the debtor and any dependent of the debtor” is identical to that found in 11 U.S.C. § 522(d)(10)(E). This language raises two questions: How much is “reasonably necessary,” and does the exemption apply to future and current income? Both questions are resolved on a case by case analysis.

In *In re Weaver*,153 an ex-wife, who was a judgment creditor, challenged the exemption her healthy twenty-eight-year-old former husband (who was earning $13.64 per hour) claimed in a retirement plan containing $26,365. The court recognized “the objective of the legislature was to limit the previously existing unlimited exemption for annuities and unmatured life insurance.”154 Acknowledging “the general purpose of placing a limitation upon the exemption for annuities and unmatured life insurance,”155 the court reviewed prior case law and ultimately applied the eleven part test elucidated in *In re McCabe*156 to determine reasonable necessity. The court concluded that the entire retirement plan was exempt.

151. Certain city, county, and state employees had specific exemptions. The income sources cited in section 522(d)(10)(A), (B), and (C) were exempt.
154. Id. at 498.
155. Id. at 499.
156. Id. at 500 (citing *In re McCabe*, 74 B.R. 119, 122 (Bankr. N.D. Iowa 1986)). The eleven factors are (1) debtor’s present and anticipated living expenses; (2) debtor’s present and anticipated income from all sources; (3) age of the debtor and
In re Nuttleman\textsuperscript{157} presented the court with two issues. The debtor claimed his approximately $50,000 pension was exempt under sections 25-1563.01 and 44-371 and also argued that the objecting Chapter 7 trustee had not given notice of his objection within the required thirty days. The court found that the pension was property of the estate and therefore, exempt pursuant to section 25-1563.01 and its language "reasonably necessary for the support of the debtor."\textsuperscript{158} The court also ruled that the pension was exempt under section 44-371 and concluded that "[s]ince the Bankruptcy Code specifically allows states to create exemptions, and since ERISA does not prohibit or even speak of such exemptions, the only way to harmonize the two federal statutes is to allow the exemption."\textsuperscript{159}

Both parties appealed to the district court, where Judge Cambridge's decision\textsuperscript{160} procedurally anticipated the Supreme Court ruling in Taylor v. Freeland & Kronz.\textsuperscript{161} Judge Cambridge found that, pursuant to Code section 522(1) and Bankruptcy Procedure Rule 4003, the trustee has thirty days to object to debtor claimed exemptions. On the substantive issue, the district court found that the "ultimate decision of the bankruptcy court to overrule the trustee's objection to the debtors' claim of exemption should be affirmed."\textsuperscript{162} The Weaver and Nuttleman holdings do not provide much guidance in determining whether benefits are "reasonably necessary for the support of the debtor." They do, however, suggest that the court will grant substantial latitude to the debtor and that a creditor or trustee has a difficult burden to achieve a distribution from the pension plan.\textsuperscript{163}

While section 25-1563.01 comports somewhat with the federal exemption in 11 U.S.C. § 522(d)(10)(E), Nebraska added a waiting, or look back period which has no federal counterpart.\textsuperscript{164} The Legislature debated whether to omit the waiting period or include a waiting period of up to three years. In the end, the Legislature succeeded in closing a loophole. While the Bankruptcy Code provides a one year look back

\begin{itemize}
  \item dependents;
  \item (4) health of the debtor and dependents;
  \item (5) debtor's ability to work and earn a living;
  \item (6) debtor's job skills, training, and education;
  \item (7) debtor's other assets, including exempt assets;
  \item (8) liquidity of other assets;
  \item (9) debtor's ability to save for retirement;
  \item (10) special needs of the debtor and dependents;
  \item (11) debtor's financial obligations, e.g. alimony or support payments.
\end{itemize}

\textsuperscript{157} Id. 117 B.R. 975 (Bankr. D. Neb. 1990).
\textsuperscript{158} NEB. REV. STAT. § 25-1563.01 (Reissue 1989).
\textsuperscript{161} 112 S. Ct. 1644 (1992).
\textsuperscript{163} But see In re Clark, 711 F.2d 21 (3rd Cir. 1983); In re Miller, 33 B.R. 549 (Bankr. D. Minn. 1983); In re Clark, 18 B.R. 824 (Bankr. E.D. Tenn. 1982); In re Kochell, 26 B.R. 86 (Bankr. W.D. Wisc. 1982); In re Taff, 10 B.R. 101 (Bankr. D. Conn. 1981).
\textsuperscript{164} NEB. REV. STAT. § 25-1563.01(1) (Reissue 1989).
period for fraudulent conveyances in 11 U.S.C. § 548, Nebraska extends the period of scrutiny for identifying "loading up" or statutorily suspect pre-bankruptcy conversion of assets.

In _Patterson v. Shumate_, the Supreme Court may have simplified the status of pensions, estate property, ERISA qualified plans, and spendthrift provisions. In that case, Shumate was the president of a furniture company that filed a Chapter 11 case which was later converted into a Chapter 7 filing. Shumate himself filed a Chapter 11 case which was converted to Chapter 7. The decision involved the status of Shumate's pension plan, valued at $250,000. Justice Blackmun found that an ERISA qualified pension plan was not property of the estate. Under section 541(c)(2), the court construed the plain meaning of "applicable nonbankruptcy law" to include federal as well as state law. ERISA benefits, therefore, fell within the meaning of the exemption.

While pensions meeting the _Shumate_ specifications are not deemed property of the estate, Nebraska presents peculiar permutations of the federal-state intersection. The _Shumate_ decision does not create an absolute safe harbor. A debtor filing bankruptcy could conceivably exclude the pension from property of the estate, but if the debtor engaged in "loading up" or inside transactions during the previous two years, that portion of the retirement plan would not be exempt. In bankruptcy, unlike _Tveten_ or _Johnson_, the discharge would be granted but the exemption disallowed. If the debtor is in Chapter 13, the court may disallow a budget that continues voluntary debtor contribution to a pension or 401 K profit sharing plan at the expense of disposable income and, thus, at the expense of a larger distribution to unsecured creditors.

Individual Retirement Accounts (IRAs) are a product of federal, social, and economic planning. IRAs provide savings for security in retirement, minimize income taxes for the year the money is earned and saved, and defer the tax until retirement. Nebraska has no specific exemption niche similar to 11 U.S.C. § 522(d)(1)(E), and, thus, for a long time, hard-earned IRA savings destined for long term goals had to be spent down or sheltered in exempt property lest the trustee

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claim it upon filing bankruptcy. By liquidating the IRA in anticipation of bankruptcy, the debtor incurred tax liability. When the debtor claimed his IRA as exempt, the trustee argued that a debtor's IRA did "not fall within the parameters of a 'similar plan or contract payable on account of illness, disability, death, age or length of service.'"169 In a case of first impression, the bankruptcy court found that the "unique wording" of section 25-1563.01 and "[t]he language used by the legislature in the statute strongly indicates an intent by the Legislature to generally include plans or contracts such as IRA's within the statutory exemption."170

IX. LUMP-SUM AND STRUCTURED SETTLEMENTS: SECTION 25-1563.02

Section 44-371 previously provided shelter for structured annuity-like settlements in which debtors could receive a stream of income in compensation for loss of earning capacity.171 When the Unicameral pared down section 44-371 for annuities, a specific exemption was also needed for structured settlements.

However, in 1987, the Legislature passed section 25-1563.02 which made structured settlements exempt.172 In In re Hitch,173 a debtor had received a $465,000 personal injury settlement. The trustee claimed the entire amount and assignee bank claimed $22,549.56. The debtor argued that the bulk of the award arose post-petition, that the settlement was not property of the estate, and that the settlement was exempt under the provisions of section 48-149. The court found that the entire settlement amount was property of the estate exempted pursuant to section 25-1563.02 and, therefore, subject to assignment to the bank. The court noted that the structured settlement exemption anticipated assignment and provided funds that were exempt "unless a written assignment to the contrary had been obtained."174 Additionally, a settlement that provided for an initial payment of $18,000 and then $2,300.81 per month for the following twelve months was completely exempt.175 As in Weaver and Nuttleman, the court liberally construed the statute.

Section 25-1563.02 was liberally amended in 1993 by Legislative Bill 118, which provides that "[a]ll proceeds and benefits, including

174. Id. at 459.
interest earned thereon, which are paid in either a lump sum or are accruing under any structured settlement . . . shall be exempt."176

X. NEBRASKA'S HOMESTEAD EXEMPTION: SECTION 40-101

Nebraska's homestead statute dates back to territorial days. According to Professor Henry H. Foster, the primary purpose was to benefit the state by preservation of the family, as the exemption is provided to rich and poor alike.177 However, a monetary limit was imposed on the exemption to prevent the rich from using it to avoid paying debts which they could well afford to pay without hardship on their families.178 Professor Duncan's analysis brought the statute and case law into the early 1980s.179

Homestead exemptions vary from state to state. The federal exemption of $7,500 per debtor established in 1978 was revised to $15,000 in 1994.180 The most generous states are Florida, Iowa, Kansas, Minnesota, Texas, and Washington. All allow a 100% exemption. However, Iowa law provides that homestead equity is not exempt against claims for indebtedness which pre-date the homestead acquisition if a deficiency remains on the prior debts after exhausting other property.181 Fifteen states permit homestead exemptions between $16,000 and $100,000. Seven states provide exemptions between $7,600 and $15,000, including Nebraska, which exempts homesteads at $10,000. Seventeen states have homestead exemptions of $7,500 or less, but in some instances both parties in a marriage may claim separate exemptions, thus doubling the exemption's value.

While homestead protection endures as one of the most fundamental and motivating concerns of debtor homeowners, Nebraska's homestead exemption policy stubbornly resists all but grudging and incremental changes. The homestead exemption remains woefully inadequate. The story of Nebraska's homestead exemption in the last dozen years is mostly one of what did not happen.182 It is a story of the struggle not to lose liberal interpretations of the past183 and a

177. The Nebraska Homestead, 3 NEB. L. BULL. No. 2, 112 (1924).
178. Id. at 357.
179. See Duncan, supra note 2.
182. Nebraska Legislative Bill 999 attempted to provide a significant increase, but failed, when radical compromise became necessary to save the bill. The bill as passed did provide some relief to farmers by altering the foreclosure process. L.B. 999, 88th Leg., 2d Sess. (1988).
183. See infra note 218 discussing an unpublished bankruptcy decision denying the homestead exemption to a widow.
story of lost opportunities to make significant progress. Homestead exemption issues in this state continue to be crucial for debtors, creditors, and practicing attorneys.

A. Case Law Developments

Nebraska's homestead exemption laws are codified in sections 40-101 through 40-118. This Article's analysis of Nebraska's homestead exemption policy, execution, forced sale, and bankruptcy, treats the sections in pari materia. Section 40-101 defines the exemption as "[a] homestead not exceeding ten thousand dollars in value shall consist of the dwelling house in which the claimant resides, its appurtenances and the land on which the same is situated. . . ." The section limits the exemption to 160 acres of land to be selected by an owner who resides outside the limits of an incorporated city or village and to "a quantity of contiguous land not exceeding two lots" if the homestead is within any incorporated city or village.

The current version of section 40-102 reads as follows:

If the claimant be married, the homestead may be selected from the separate property of the husband, or with the consent of the wife from her separate property. When the claimant is not married, but is the head of a family within the meaning of section 40-115, the homestead may be selected from any of his or her property.

Section 40-102's awkwardness apparently results from the Unicameral's erratic efforts to eliminate sexist or gender-biased language from its statutes. This language appears to say that a married couple qualifies for the homestead exemption, but that only one of the

184. Nebraska Legislative Bill 999 (1986) and Nebraska Legislative Bill 463 (1993) were opportunities to scrutinize and liberalize the homestead exemption laws. The final versions of those bills fell short of true reform. See L.B. 999, 89th Leg., 2d Sess. (1986); L.B. 463, 93d Leg., 1st Sess. (1993).


186. Id. This difference between rural and urban homesteads is quite customary, occurring in most jurisdictions that have opted out of the federal exemption scheme. The federal exemptions did not provide this distinction.

187. Neb. Rev. Stat. § 40-102 (Reissue 1993). This language also raises, but fails to answer, the question as to why a wife can apparently claim a homestead exemption in the separate property of her husband without his consent, and yet a husband cannot make such a claim from his wife's separate property in the absence of her statutorily mandated consent. Additionally, the husband cannot file an individual bankruptcy to claim the section 25-1552 exemption and also claim the homestead exemption, in his bankruptcy, attributing it to the non-filing wife's separate property, unless the homestead truly is the wife's separate property. See In re Callahan, Neb. Bkr. 94:49.

188. For a more detailed explanation of the impact on the section of the Legislature's intent and efforts to remove "sexist language" from the Nebraska statutes, see Duncan, supra note 2, at 237, n.85.
two spouses can claim it; and a non-married person can qualify for the homestead exemption if, but only if, the individual is head of family, as defined in section 40-115.

Section 40-103 states:

The homestead is subject to execution or forced sale in satisfaction of judgments obtained (1) on debts secured by mechanics', laborers', or vendors' liens upon the premises; and (2) on debts secured by mortgages upon the premises executed and acknowledged by both husband and wife, or an unmarried claimant.

This section provides certain instances when the homestead exemption is inoperative. Essentially, consensual liens, held by certain enumerated lienholders, that follow the proper formalities of execution and acknowledgement procedures, are removed from the prohibitions of the exemption. Thus, creditors secured by mortgages and mechanics liens are generally entitled, upon default by the debtors, to execution and forced sale unhampered by the homestead exemption.

In *Federal Land Bank of Omaha v. Blankemeyer*, the debtors asserted that a foreclosure decree created a judicial lien avoidable pursuant to 11 U.S.C. § 522(f)(1). Referring to section 40-103, the Nebraska Supreme Court held that a judicial foreclosure decree does not convert a section 40-103 consensual lien into a 11 U.S.C. § 522(f)(1) avoidable judicial lien. Therefore, the mortgagee, Federal Land Bank of Omaha, held an unavoidable lien, upon which it was free to foreclose, since the homestead exemption was inoperative.

This case also upheld the constitutionality of section 40-103. Among other theories, the debtors alleged that section 40-103 gives consensual lienholders a special privilege or immunity which violated the Nebraska Constitution. The debtors also argued that section 40-103 rendered these specially classified lienholders immune from the operation of homestead exemption law. The court determined that section 40-103 does not immunize the lienholder from 11 U.S.C. § 522; rather, the federal law just does not apply. Section 40-104 protects competent but ignorant or unwitting spouses by describing the formalities that creditors must follow in order for their section 40-103 consensual mortgage liens to take priority over the homestead exemption.

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190. NEB. REV. STAT. § 40-103 (Reissue 1993).

191. 228 Neb. 249, 422 N.W.2d 81 (1988).

192. Id. at 251, 422 N.W.2d at 83.

193. NEB. CONST. art. III, § 18. In relevant part, this section provides: "The Legislature shall not pass local or special laws... Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever..." Id.
These formalities must be complied with whenever spouses jointly own the subject homestead.

In *Landon v. Pettijohn*, a prospective purchaser sued reneging sellers of real estate for specific performance. The sellers were a husband and wife who qualified for homestead exemption status under section 40-102. The sellers had failed to comply with the section 40-104 acknowledgement formalities imposed on married homeowners. The sellers argued that since their signatures were not notarized on the purchase agreement, that agreement was invalid. The court agreed, ruling that the sellers did not have to sell their land. The plaintiff argued that section 40-103 violated the Equal Protection Clause of the United States Constitution because the statute classified married and non-married property owners differently and required only married property owners to notarize documents transferring real estate. The court upheld section 40-103, concluding that the classification was reasonably related to the legislative policy of preserving the family.

Section 40-105 provides that the "head of family" must apply for or assert the homestead exemption when faced with forced sale or execution by a creditor outside of those consensual lienholders set forth in section 40-103. This provision gives rise to the obvious dilemma of accurately identifying the "head of family."

In *In re Hartman*, husband and wife debtors brought an adversary proceeding seeking a determination that each spouse was entitled to claim a homestead exemption. The debtors argued that 11 U.S.C. § 522(m) mandated that each debtor be allowed to separately claim his or her exemptions in a joint case. They contended that Nebraska could not opt-out of section 522(m), but could only opt-out of the section 522(d) exemption scheme. The bankruptcy court ruled that Nebraska's opting-out rendered different sub-sections of 522 applicable to debtors' options and that as a result, state law provided the

196. See infra notes 210-211 and accompanying text for further discussion of section 40-115.
197. NEB. REV. STAT. § 40-115 (Reissue 1993)(defining "head of family").
198. See infra notes 210-211 and accompanying text for further discussion of section 40-115.
200. Id. at 845. See also Cheeseman v. Nachman, 656 F.2d 60 (4th Cir. 1981)(interpreting 11 U.S.C. § 522(m) to allow each debtor in a joint case to claim exemptions). See generally 3 COLLIER ON BANKR. § 522.05(5), at 522-27 (Lawrence P. King, et. al., eds., 15th ed. 1994)(discussing application of § 501 to joint cases).
only exemptions available to debtors. Accordingly, only one homestead exemption was permitted.

Sections 40-106, 40-107 and 40-108 provide the procedures for claiming the homestead exemption. The “head of family” has the burden of compliance. The court ultimately determines whether or not compliance occurred. The court determines whether or not the claimant is entitled to the exemption and determines the value and extent of the homestead. The “head of family” can assert his or her exemption until an already completed sale has been confirmed.

Section 40-108(2) raises one troubling aspect of this procedure:

In the event the land which is determined by the court to be subject to the homestead exemption has already been sold on execution by the sheriff, the sale shall be set aside and the judgment creditor shall be assessed the costs of the sale and of the hearing, unless such land was sold for more than the homestead exemption.

Another “trap door” is created by this provision. The floor of safety allegedly provided to married or qualifying head of family homeowners making timely claims for the homestead exemption, prior to confirmation of sale, is precisely that homesteads will not be forcibly sold upon execution by creditors. The debtor may fall through the trap door since the homestead can in fact be sold and confirmed, despite the proper and timely assertion of a homestead exemption, if the property was sold for a sufficient price in the court’s opinion. Granted, this occurrence would not place the former homeowner in further debt, but the house will have been lost.

Cash is not a satisfying substitute

202. Id. However, the debtor spouse prohibited from taking advantage of a second homestead exemption was permitted to take an in-lieu-of-homestead exemption as provided by Neb. Rev. Stat. § 25-1552 (Reissue 1989), in addition to the homestead exemption that was allowed to her spouse. For a discussion in the text pertaining to one spouse exerting the homestead exemption and the other spouse claiming the in-lieu-of-homestead exemption, see supra note 31 and accompanying text.
205. The phrase “trap door” alludes to the metaphor in Professor Duncan’s article. See Duncan, supra note 2.
206. Imagine the following hypothetical scenario: The hometown billionaire is in Europe on an extended business trip/vacation. Her homestead is paid for, free and clear of liens and encumbrances, and is valued at one million dollars. She is a head of family. Meanwhile, the local crank sues Ms. Billionaire for $1,000 over some injury, real or imagined, and gets service upon the person of a household staff member, who either forgets, declines, or cannot get in touch with his boss. A crotchety county judge enters a default judgment for $1,000, and the crafty crank registers the judgment in the district court. Time passes, and the crafty, cranky, creditor obtains execution upon the homestead and it is sold for $701,000. Prior to confirmation of the sale, the billionaire returns to town and is horrified to learn of developments. Her lawyers rush down and properly and timely assert a homestead exemption. The court determines that the sale will not be set aside because
for one's home.\textsuperscript{207} Real estate is unique, leading Nebraska law to recognize specific performance awards to frustrated plaintiff purchasers. Cash may not be much comfort to a displaced homeowner.

Sections 40-110 through 40-113 set forth procedures for dividing lands, separating homesteads from larger parcels of land, completing bids and sales, and distributing the proceeds of sales.\textsuperscript{208} These provisions would primarily apply to rural homesteads in excess of 160 acres. Owners of these homesteads who need to claim the exemption because they are facing foreclosure, forced sale, or the filing of a bankruptcy, should review the procedures contained in these sections carefully. Passage of Legislative Bill 999 in 1986 made changes allowing for the marshaling of assets to preserve the homestead.\textsuperscript{209}

Section 40-115 is the statutory litany of co-resident relatives that render a homeowner “head of family,” thus qualifying for the homestead exemption. Unchanged since the 1979 revision, this mysterious “head of family” definition reads:

The phrase head of a family, as used in sections 40-101 to 40-116, includes within its meanings every person who has residing on the premises with him or her, and under his or her care or maintenance: (1) His or her minor child, or the minor child of his or her deceased wife or husband, (2) a minor brother or sister, or the minor child of a deceased brother or sister, (3) a father, mother, grandfather or grandmother, (4) the father or mother, grandfather or grandmother of a deceased husband or wife, or (5) an unmarried sister, brother or any other of the relatives mentioned in this section who have attained the age of majority and are unable to take care of themselves.\textsuperscript{210}

This language is somewhat strange and confusing, especially in light of case law which indicates that once a homestead, always a homestead, unless and until it has been voluntarily terminated.\textsuperscript{211} Nebraska homestead exemption law clearly allows any owner\textsuperscript{212} actually

\textsuperscript{the sale price was sufficient. The creditor received satisfaction of his $1,000 judgment, the property sold for 70\% of its value, and accordingly, $700,000 was paid over to the former homeowner. This would appear to be lawful under Nebraska homestead exemption laws. \textit{See also} BFP v. Resolution Trust Corp., 114 S. Ct. 1757 (1994)(interpreting “reasonably equivalent value” under 11 U.S.C. § 548(a)(2) as the price in fact received at a foreclosure sale).\textsuperscript{207}\textsuperscript{ See e.g., Nuttelman v. Julch, 228 Neb. 750, 424 N.W.2d. 333 (1988).\textsuperscript{208}\textsuperscript{ Sections 40-109 and 40-114 have been repealed.\textsuperscript{209}\textsuperscript{ See infra\textsuperscript{ notes 250-257 and accompanying text; Floor Debate on L.B. 999, 89th Leg., 2d Sess. 10158-60 (1986)(remarks of Sen. R. Johnson).\textsuperscript{210}\textsuperscript{ NEB. REV. STAT. § 40-115 (Reissue 1993).\textsuperscript{211}\textsuperscript{ See e.g., In re Bartlett, Neb. Bkr 93:1. See McIntosh v. Borchers, 196 Neb. 109, 241 N.W.2d. 534 (1976); Struempler v. Peterson, 190 Neb. 133, 206 N.W.2d. 629 (1973); Federal Credit Co. v. Reynolds, 132 Neb. 495, 272 N.W. 397 (1937); Dougherty v. White, 112 Neb. 675, 200 N.W. 884 (1924); Palmer v. Sawyer, 74 Neb. 108, 103 N.W. 1088 (1905); Dorrington v. Meyers, 11 Neb. 388, 9 N.W. 555 (1881).\textsuperscript{212}\textsuperscript{ One exception to the ownership requirement is set forth in NEB. REV. STAT. § 40-102 (Reissue 1993). Pursuant to this section, one possible scenario exists.
occupying the land\textsuperscript{213} who is either married or an unmarried head of family to assert a homestead exemption. A plain language reading demonstrates that a never-married, single person living alone would not be entitled to claim a homestead exemption under any conceivable scenario.\textsuperscript{214} At first blush, it would seem that a person who was once married or was once the head of a family before some change of circumstances such as divorce or death would, in many instances, lose his or her basis for claiming a homestead exemption.

Nebraska cases have ameliorated that harsh result.\textsuperscript{215} In 1905, the Nebraska Supreme Court held that a widower who no longer qualified as the head of family should not be involuntarily divested of his homestead exemption.\textsuperscript{216} This policy was recently reiterated and cogently articulated in \textit{In re Bartlett}.\textsuperscript{217} The court reviewed and discussed Nebraska case law pertaining to the homestead exemption issue and concluded that "once acquired, a homestead interest continues until voluntarily sold or abandoned."\textsuperscript{218} Accordingly, any person

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  \item whereby a married person could claim the homestead from the separate property of a consenting spouse.
  \item The occupancy requirement was reiterated and clarified in \textit{Travelers Indemnity Co. v. Heim}, 218 Neb. 326, 352 N.W.2d 921 (Neb. 1984). Heim's house was located on mortgaged premises and faced foreclosure, but Heim's family occupied a trailer in Colorado and had removed windows and doors on the premises, leaving a shell of a house with a telephone and mailbox. \textit{See also} United States v. Thomassen, 610 F. Supp. 386, 400 & n.6 (D. Neb. 1985) (holding that 1,120 acres of irrigated pasture and timberland was subject to an actual "undivided ownership interest in the property," but was not a homestead under Nebraska law because no one was living on the land at the time).
  \item It is not unusual for an elderly single person, or widow or divorcee, swamped by medical creditors, occupying a house acquired after being widowed, with a value of $10,000, free and clear, to be forced into a Chapter 13 because the debtor is not entitled to a homestead. The Chapter 7 trustees, while loathe to take away homes from senior citizens, are also constrained by the language "head of the household."
  \item Galligher v. Smiley, 28 Neb. 189, 44 N.W. 184 (1889). In Galligher, a debtor owned a parcel of land that had been annexed into the city limits. The homestead exemption available in the city was smaller in size than homesteads outside of the city. The size of the debtor's homestead was within the permissible exemption size outside of town, but larger than the permissible exemption inside town. Upon annexation, a creditor attempted to execute on her judgment and force a sale. The court protected the homestead, believing that once homestead rights attached, those same rights remained intact until voluntarily sold or abandoned. The intervening annexation was not a voluntary act by the debtor.
  \item Palmer v. Sawyer, 74 Neb. 108, 103 N.W. 1088 (1905).
  \item Galligher v. Smiley, 28 Neb. 189, 44 N.W. 184 (1889). In Galligher, a debtor owned a parcel of land that had been annexed into the city limits. The homestead exemption available in the city was smaller in size than homesteads outside of the city. The size of the debtor's homestead was within the permissible exemption size outside of town, but larger than the permissible exemption inside town. Upon annexation, a creditor attempted to execute on her judgment and force a sale. The court protected the homestead, believing that once homestead rights attached, those same rights remained intact until voluntarily sold or abandoned. The intervening annexation was not a voluntary act by the debtor.
  \item Id. at 3. This reversed an unpublished decision of a few months earlier. In \textit{In re Henry}, No. 91-41972 (Bankr. D. Neb. Jan. 15, 1992), the court granted the Chapter 13 trustee's objection, and determined that a widow who was no longer the head of a family at the time of applying for the exemption was not entitled to claim it under the terms of Nebraska law, due in part apparently to the 1974 legislative repeal of \textit{Neb. Rev. Stat.} § 40-117 (Reissue 1971). The Chapter 13 trustee's major argument in brief was that the 1905 \textit{Palmer v. Sawyer} decision,
entitled to a homestead exemption by virtue of being either married or
the head of family would retain his or her homestead rights even if
that person subsequently is no longer married or the head of the
family.

That being the case, the clause in section 40-115(5) that provides
"... or any other of the relatives in this section who have attained the
age of majority and are unable to take care of themselves" allows a
narrow list of certain, specified, less-than-fully-competent relatives,
whether or not they have resided with the claimant in the past (ren-
dering to the claimant head of family status as long as the claimant
continued to occupy the premises), to move in with the claimant for
the purpose of creating the exemption that may save the homestead
from execution and forced sale by creditors. The statute on its face
permits this tactic, so long as there is an actual and necessary depen-
dency by reason of the dependent's inability to support himself or
herself.\textsuperscript{219}

"Home ownership has long been regarded as a mark of social, eco-
nomic, and political stability."\textsuperscript{220} It "continues to be a telling indicator
of status and responsibility."\textsuperscript{221} "In much of America, becoming a
homeowner takes on a social significance that is second only to taking
a job."\textsuperscript{222} Approximately fifty-two percent of bankruptcy petitioners
are homeowners.\textsuperscript{223}

Since home ownership is vital to American culture, in an era of
increased bankruptcy filings, many consumer bankruptcies are filed
primarily to save or protect the debtors' homes.

The picture of homeowners in bankruptcy is one of people struggling to keep
their homes. Whether fighting their mortgage lenders or concealing the fact
of their bankruptcy while they scramble to meet their mortgage payments, the
debtors in bankruptcy have not given up. The data reinforce the notion that
debtors do whatever they can to save their homes.\textsuperscript{224}

A motivated homeowner in Nebraska who would not otherwise qualify
for a homestead exemption, who had significant home equity but who
needed to file a bankruptcy, would have several pre-bankruptcy op-
tions\textsuperscript{225} available to qualify for the exemption in order to protect the

\begin{footnotes}
\item 220. SULLIVAN, supra note 14, at 128.
\item 221. Id.
\item 222. Id. at 129.
\item 223. Id.
\item 224. Id. at 143.
\item 225. See supra notes 49-50 and accompanying text regarding the issues and risks in-
herent in converting non-exempt property into exempt property prior to filing a
bankruptcy.
\end{footnotes}
homestead. For example, it is possible that a claimant could marry to qualify under section 40-102. Like deportable immigrants who marry for the protective status of derivative citizenship, foreclosable homeowners can marry for the protection of the homestead exemption.226

Traditionally, the homestead meant the nuclear family, husband and wife. Changing mores, equal rights, and gender neutral legislation constitute a trend toward legally recognizing that one person, regardless of gender, can constitute a household, and therefore, a single person can claim the homestead exemption. Nebraska has not recognized these developments. Without detailing the forty-nine other states, Resnick stated in 1978 that “[m]any exemptions apply only when the debtor is the head of a household.”227 His examples were Colorado, Mississippi, and Washington.228 By 1993, however, Colorado no longer referred to a “head of household”229 and provided a $30,000 homestead exemption to property “occupied as a home by the owner thereof or his family. . . .”230 Mississippi had provided that “[e]very citizen of this state, male or female, being a householder shall be entitled” to a $75,000 homestead exemption.231 Single households were eligible for the homestead exemption.232 Washington continues to maintain a homestead exemption tied to being the head of family. Finally, although not cited by Resnick, Nebraska’s sister state, Iowa, provides a total homestead exemption to the home owner.233

Under Nebraska’s section 40-103, the prospective claimant can acquire a larger or additional mortgage or mechanic lien indebtedness increasing the indebtedness against the homestead, lowering the equity below the threshold amount.234 Similarly, under section 40-115, the debtor could locate a qualifying relative and move them into the homestead. Pursuant to that section, a debtor could forego marriage, acquire a minor child, and then assert a valid claim for the exemption.

226. It always seems to cheapen justice to resort to creative stratagems to achieve equity and compassion within the confines of vague, stingy, and archaic statutes—born of desperation on the part of debtors whom these statutes were designed to protect, and intellectual discomfort by those charged with the obligation of achieving justice.

227. Resnick, supra note 37 at 625, n.64.

228. Id.


230. Id. § 38-54-102.


232. Id. § 85-3-21; Pickle v. Pickle, 476 So. 2d 32 (Miss. 1985).


234. If the additional indebtedness is in the nature of a mortgage, the proceeds must be made exempt, such as by placing them in an exempt annuity pursuant to Neb. Rev. Stat. § 44-371 (Reissue 1993).
Does a fetus give rise to a valid claim for homestead exemption?\textsuperscript{235} Because it is a matter of policy and tradition in bankruptcy that exemptions are to be liberally construed in favor of debtors, both nationally\textsuperscript{236} and in Nebraska,\textsuperscript{237} and, further, because the Nebraska Legislature decided to replace the federal bankruptcy exemption schedule with a less generous state exemption scheme,\textsuperscript{238} this sort of desperate posturing by debtors is not only necessary, but encouraged. More generous exemptions would obviate the need for such desperate tactics.

\textit{In re Wagner}\textsuperscript{239} provides an instructive illustration. The debtors filed their joint bankruptcy petition subsequent to the congressional enactment of the 1978 Bankruptcy Code but prior to Nebraska’s 1980 opting out of the federal exemptions. The debtors were jointly able to claim a $15,000 aggregate homestead exemption, which enabled them to save their house. If Nebraska’s exemption laws had been in effect, the debtors would have been able to exempt only $4,000.

When Nebraska opted out\textsuperscript{240} of the more generous federal exemption scheme while simultaneously increasing the homestead exemption from $4,000 to $6,500\textsuperscript{241} and the in-lieu-of-homestead exemption from $1,500 to $2,500,\textsuperscript{242} Professor Duncan called the compromise “a

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\item \textsuperscript{235} Instead of getting married, perhaps all a single female homeowner would have to do is to become pregnant. If so, and she were then unable to stave off creditors for nine months, what would be her homestead status on the date of filing? By the time the issue came before a court, the birth would in all likelihood have occurred. It is conceivable that a court would deny the exemption and cause the forced sale of the mother’s and infant’s homestead.
\item \textsuperscript{236} \textit{In re Ageton}, 14 B.R. 833, 836 (Bankr. 9th Cir. 1981).
\item \textsuperscript{238} Duncan, \textit{supra} note 2, at 234.
\item \textsuperscript{239} Duncan, \textit{supra} note 2, at 234.
\item \textsuperscript{239} Duncan, \textit{supra} note 2, at 234.
\item \textsuperscript{240} Opt-out states have generally followed one of three models. Nebraska’s approach is consistent with the majority of the opt-out jurisdictions. State law declares that the exemptions of the Bankruptcy Code are not authorized and impose state requirements and amounts with which the debtors must comply. Other approaches include opting out of the federal bankruptcy exemption schedules and then establishing a state scheme that is applicable only in bankruptcy situations, different from non-bankruptcy context state exemptions. The third approach arises from the community property approach and is exemplified in California, where debtors can elect between federal and state exemptions, but joint debtors must agree. See Lee Robert Bogdanoff, \textit{Exemptions Under the Bankruptcy Code: Using California’s New Homestead Law as a Medium for Analysis}, 72 CALIF. L. REV. 922, 926 (1984). See generally Joseph Lamport, \textit{The Preemption of Bankruptcy-Only Exemptions}, 6 CARDozo L. REV. 583 (1985).
\item \textsuperscript{241} L.B. 940, 86th Leg., 2d Sess. (1980)(codified at NEB. REV. STAT. § 40-101 (Reissue 1993)).
\item \textsuperscript{242} L.B. 940, 86th Leg., 2d Sess. (1980)(codified at NEB. REV. STAT. § 25-1552 (Reissue 1989)).
\end{itemize}
reasonable balance between debtor and creditor interests." Since then, Nebraska has increased the exemption to $10,000 while the federal exemption has increased to $30,000. Assuming for the sake of argument that $6,500 was a reasonable balance in 1980, a quick comparison of not only the federal exemptions, but also various area states, demonstrates that $10,000 is austere and oppressive in 1994. In light of current housing valuations, this amount should be increased, at least prospectively. There might be both federal and state constitutional difficulties in attempting to apply increases retroactively.

243. Duncan, supra note 2, at 234.
244. FLOOR DEBATE ON L.B. 999, 89th Leg., 2d Sess. 10160 (1986)(Sen. Hoagland describing compromise amendments). This bill, as originally introduced by Sen. Rod Johnson, proposed increasing the homestead exemption to $40,000. This amount was lowered during amendments by the Judiciary Committee to $20,000. Further compromise watered down the final version to $10,000. See JUDICIARY COMM. HEARING ON L.B. 999, 89th Leg., 2nd Sess. 2 (1986)(remarks of Chairperson).
246. Federal exemptions provide for $15,000 per debtor ($30,000 for joint filing by husband and wife), with some opportunity to apply residual exemptions to other assets if the homestead if not otherwise exhausted. Id. Iowa allows for unlimited homestead exemption when applied to post homestead purchase indebtedness. IOWA CODE §§ 561.16, 561.21 (1993). North Dakota provides for a homestead exemption of $80,000. N.D. CONST. art. XI, § 22; N.D. CENT. CODE § 47-18-01 (Supp. 1989). Colorado's homestead exemption is $30,000. COLO. REV. STAT. § 38-41-201 (1993 Cum. Supp.). Texas, the first American state to provide a homestead exemption, allows an unlimited homestead exemption as to dollar amount (but with a restriction on size). TEX. CONST. art. 16, § 50; TEX. STAT. ANN. § 41.000 (1985). Kansas provides for an unlimited homestead exemption in terms of dollar amounts, limiting the size only to 160 acres of farm land and one acre in town. KANS. STAT. ANN. § 60.2301 (1983). South Dakota likewise provides for an unlimited dollar amount, restricting size to one acre in town and 160 acres when not in town. S.D. CODIFIED LAWS ANN. § 43-31-4 (1983). Wyoming joins Nebraska with a $10,000 exemption, but each spouse may claim $10,000. WYO. STAT. ANN. §§ 1-20-101, 1-20-102(b) (1977). Only Missouri, at $8,000, has a smaller exemption than Nebraska. MO. ANN. STAT. § 513-475 (Vernon Supp. 1993). With the exception of Missouri, Nebraska is surrounded by layers of concentric circles of states with more liberal or generous homestead exemptions.
248. NEB. CONST., art. I, § 16.
249. See FLOOR DEBATE ON L.B. 999, 99th Leg., 2d Sess. 11790-91, 11822 (1986)(remarks of Sen. Hoagland and Sen. V. Johnson) concerning possible interpretations of L.B. 999, which ultimately passed the Legislature without a conclusion concerning the constitutional questions being reached. See also Edwards v. Kearzey, 96 U.S. 595 (1877)(refusing to retroactively apply North Carolina's homestead exemption to allow recovery of property sold at judicial sale).
B. Legislative Developments

The major legislative initiative since 1981 pertaining to Nebraska's homestead exemption was Legislative Bill 999.\textsuperscript{250} Legislative Bill 999 was designed to prospectively help farmers who were experiencing severe debt load and cash flow crises. Legislative Bill 999 was drafted and introduced to minimize the negative impact of debt and foreclosure upon Nebraska's debtor farmers.\textsuperscript{251} It was enacted into law in 1986, amending portions of sections 40-101 and 40-110 of Nebraska's homestead exemption laws and other statutory provisions not within the scope of this Article.

While federal law introduced Chapter 12, Adjustment of Debts of a Family Farmer with Regular Annual Income,\textsuperscript{252} the State Legislature addressed debt and foreclosure in three ways. First, Legislative Bill 999 extended the "cure" time wherein debtor farmers could "deaccelerate" the indebtedness on their mortgage notes and cure default, thereby preventing foreclosure.\textsuperscript{253} Second, the bill provided a "partial redemption" whereby the debtor farmers could separate out up to 160 acres as a homestead from the balance of the land area which would be subject to forced sale. If the selected parcel qualified for homestead and the debtor could pay its fair market value, the debtor could retain the selected homestead.\textsuperscript{254} Third, it increased the value of the homestead exemption\textsuperscript{255} and revised time lines and procedures for execution and foreclosure proceedings.\textsuperscript{256} The increase of the homestead exemption was almost a side issue throughout the proceedings. Originally proposed as $40,000, amendments in committee reduced it to $20,000, and ultimately political compromises further reduced the exemption to the current $10,000, as set forth in version of section 40-101.\textsuperscript{257}

\textsuperscript{250} Nebraska Legislative Bill 463 (1993) would have dramatically altered section 40-101, but it was quickly amended. L.B. 463, 93d Leg., 1st Sess. (1993).

\textsuperscript{251} See generally J. B. Johnson, The Nebraska Legislative System: Legislative Roles in a Nonpartisan Setting (1972)(unpublished Ph.D. dissertation University of Nebraska)(analyzing the rural-urban split in Nebraska legislative proceedings).


\textsuperscript{254} Id.

\textsuperscript{255} Item 2 of the explanation of amendments adopted by the committee indicated that the Committee version of the bill to be sent to the body as a whole proposed "the homestead exemption... is increased... to... $20,000.00 to take account of inflation." Committee Statement of the Judiciary Committee, L.B. 999, 89th Leg., 2d Sess. (1986).

\textsuperscript{256} See supra text accompanying note 253.

\textsuperscript{257} See supra note 244 and accompanying text.
Debtors residing in a homestead, even when there is no equity or when they intend to abandon the property, are forced into claiming the homestead exemption even if it is valueless. The debtor cannot elect to take advantage of the section 25-1552 in-lieu-of-homestead exemption instead, so long as he continues to occupy the property.258

XI. PUBLIC POLICY AND EXEMPTIONS

A. Balancing Test and the Moving Target

English law provided for debtors prison. Some American states continued imprisonment for debt well into the nineteenth century.259 Article 8 of the United States Constitution provides Congress the authority "[t]o establish . . . uniform laws on the subject of Bankruptcies throughout the United States."260 At the time the Constitution was drafted, this provision was decidedly pro creditor. It lent federal power to the apprehension of a debtor "and will prevent so many frauds where the parties or their property may lie or be removed into different States."261 While the Constitution uses the term "uniform laws," the exemptions have descended "into utter incoherence."262

The industrial revolution and expansion of America placed a premium on the skills of the risk-taking entrepreneur. Business people, the hapless victims of volatile capitalism, uninsured patients victim to runaway medical expenses,263 the divorced, the chemically dependent, the unemployed, and yes, the occasional improvident and abuser of credit, all find shelter in the Bankruptcy Code. Bankruptcy provides an orderly transition for struggling and failing businesses and families.

Bankruptcy is designed to give discharged debtors a fresh start not a head start. But because of geographic diversity, exemption levels vary according to state, and range from lean and austere to comfortable. Pre-bankruptcy exemption planning may include moving from a low exemption jurisdiction to a high exemption jurisdiction. Apocryphal stories of forum shopping for more generous exemptions abound. The generosity of Texas exemptions is legendary. In recent years,


261. The Federalist No. 42 (James Madison).


263. "The truth of the matter is the leading cause of bankruptcy is medical expenses . . . we don't have national health insurance." See Floor Debate on L.B. 940, 86th Leg., 2d Sess. 9393 (1980)(remarks of Sen. V. Johnson).
Florida has been the forum of choice for personalities in financial trouble, like Bowie K. Kuhn, Harvey Myerson, Marvin Warner, and Martin A. Segal.264

_In re Coplan_265 provides an illustration of a Florida court's reaction to forum shopping. In that case, the debtors left Wisconsin in the wake of approximately $1,000,000 in debts, sold their Wisconsin home, moved to Florida, and paid $228,000 in cash for their home. One year and five days after moving to Florida they declared bankruptcy. The court concluded that the move was made to take advantage of the more generous Florida homestead exemption and that it comprised fraudulent pre-bankruptcy planning and impermissible manipulation. Although the debtors were acknowledged to be bona fide Florida residents, the court denied the 100% homestead exemption and limited the debtors to the $40,000 Wisconsin homestead exemption.

Attitudes regarding austerity or stinginess of exemptions are admittedly subjective perceptions of relative deprivation. When Colorado recently passed an exemption for pensions, complaints were still heard from Colorado commentators that Colorado, with a homestead exemption of $30,000, still had limited and "meager exemptions."266

Bankruptcy operates within at least three sets of countervailing and overlapping pressures. First, the ever present tension between state and federal authority exists, in which states jealously tend to preserve their autonomy in the face of federal encroachment. Second, tension between creditor and debtor exists. Third, there is the compassion of society or the social policy, to rehabilitate victims of economic or personal imprudence. _Solon_267 and _Deuteronomy_268 recognized the necessity of debt cutting to preserve the body politic and human dignity.

While attorney and debtor bashing is rife, aside from anecdotal evidence of abuse (frequently highlighting educated professionals), little evidence exists that debtors flock to take advantage of liberalized exemptions or rush to file cases before a narrowed exemption is implemented. A major study of bankruptcy, funded in part by the National Science Foundation and the National Institute of Child Health and Human Development, found that "the correlation is too weak to have any substantive impact."269

266. Hyman, _supra_ note 49, at 1, 3.
269. SULLIVAN, _supra_ note 14, at ix, x, 233, 237. The authors criticize the grandiose untested attempts at devising economic incentives through exemptions, an exam-
B. Homestead

Professor Duncan observed in 1981 that time and inflation frittered away the value of the homestead exemption. According to Duncan, the "homestead exemption is increasingly ineffective as a means of protecting the family home from forced sale." 270 Senator Ashford has indicated that "reasonable" homestead exemptions would be "about $35,000," 271 or $25,000. 272

The homestead exemption provisions are vague, antiquated, and in need of revision. Case law has left the basic homestead rights intact, but has either rejected or ignored both straightforward and creative arguments to augment those rights. Perhaps the courts believed that augmentation was appropriately the province of the legislature. In any event, the solution clearly lies with the legislature.

The Unicameral should either adopt the federal homestead exemption provisions or amend the state exemption. Adopting the federal exemption would solve a variety of problems and would create some balance for creditors. The federal exemption scheme permits both spouses in joint bankruptcies to claim $15,000 thereby enabling married persons to have an increased exemption, up to $30,000 from Nebraska's current $10,000. 273 This result favors married homeowners, and Nebraska has already found the policy of family preservation to be constitutionally permissible. 274

Adopting the federal exemptions would end the messy determination of which spouse is head of the household. Such arguments discourage family preservation and tend to be sexist. As a matter of policy, Nebraska has been trying to rid its statutes of sexism. 275 Adopting the federal exemptions would give homestead exemptions to singles, without distinguishing widows and other categories of people. The advantage to be gained is consistency. As creditors become national in scope, it is advantageous for them to have states that comply with a national standard.

270. Duncan, supra note 2, at 256 n.188.
273. Arguably, 11 U.S.C. § 522(d)(5) as amended in 1984 would enable each debtor to claim an additional $800 toward homestead. If so, the maximum possible homestead exemption would be $31,600.
275. See Duncan, supra note 2, at 237, n.85, 239 n.89.
Another option would be for Nebraska to retain its own exemption scheme but make equitable amendments. Amendments should apply to all homeowners and increase the exemption to an amount of $30,000, uniformly available to all Nebraska homeowners. This amendment would bring Nebraska more in line with its neighboring states and reflect an appropriateness as assessed and pronounced by Senator Ashford during legislative discussion.276

Either of these proposed alternatives would be an improvement on the existing homestead exemption laws in Nebraska. It is time for Nebraska to join its neighbors and protect its land and its backbone, the citizen homeowners.

C. Motor Vehicles

An automobile is an acknowledged necessity of life. Sixteen states and jurisdictions have adopted the federal exemptions and have a specific motor vehicle exemption of $2,400 per debtor, or higher state exemptions.277 Twenty-seven states that have opted out of the federal exemptions maintain state exemptions specifically applying to motor vehicles. The balance of the states, including Nebraska, subsume the automobile within a personal property exemption.

There is extraordinary wide diversity in the characterization and the dollar amount of the vehicle exemption. At the parsimonious end, the individual debtor in Massachusetts may take the state exemption of $700 or if in bankruptcy, the federal exemption of $2,400.278 Missouri raised its exemption in 1992 from $500 to $1,000.279 At the more generous end of the spectrum, Alaska provides one motor vehicle not exceeding $3,000 in value if the full value of the vehicle does not exceed $20,000.280 Mississippi has a tangible personal property exemption of $10,000.281 Kansas exempts a vehicle up to a value of $20,000282 and Texas permits a $30,000 exemption in personal property.283

In Nebraska, if the vehicle is not a tool of the trade under section 25-1556, only section 25-1552 would exempt the family automobile. Nebraska needs a separate exemption for a motor vehicle to bring the exemption structure and dollar amount in line with economic and so-

277. Minnesota and Washington allow $2,000 and $2,500 respectively.
283. TEx. PROP. CODE ANN. §§ 42.001, 42.002 (West Supp. 1994). Texas raised the individual personal property exemption from $15,000 to $30,000 in 1991.
cial reality, and it can be accomplished without interfering with section 25-1552.

D. Cost of Living and Exemption Levels

The homestead exemption, section 40-101, has risen from $2,000 in 1879, to $4,000 in 1973, to $6,500 in 1980, and to its current $10,000 level in 1986. The in-lieu-of-homestead exemption, section 25-1552, was increased from $1,500 to $2,500 in 1980. The specific property exemption, section 25-1556, has not changed the dollar amount of exemption since 1973. For sections 40-101 and 25-1552, the legislative history reveals a relationship between a rising cost of living, inflation, real dollar values, and the level of the exemption. No similar application exists for section 25-1556. Fiscal updating is periodically necessary and should be extended to section 25-1556.

A failure to apply fiscal updating is unfair to hard pressed, honest debtors facing the specter of bankruptcy without the wider federal exemptions. Rather, the continually eroding Nebraska exemptions inhibit the “fresh start” goal of bankruptcy. The bogey man of people rushing to take advantage of exemptions about to be eliminated or new lush and liberal exemptions is a fabrication and a red herring. The dollar value of Nebraska’s exemptions is about one-fourth that of the federal exemptions.

The average cost of an automobile rose dramatically from 1980 to 1994. Factoring in the presence of the secured lien and depreciation, an automobile which would clearly fit into exempt status through the mid-1980s has non-exempt status in the 1990s, because the exemption allowed under section 25-1552 has not kept pace with the economy.

If COLA is an accepted national standard, and if IRS exemptions from levy, Social Security and Supplemental Security Income benefits, and other pensions are tied to inflation as well as to the cost of living, and in light of federal exemptions adopting triennial review based on the Department of Labor’s Consumer Price Index for All Urban Consumers, then cost of living provisions could be applied to sections 25-1552, 25-1556, and 40-101.

286. Public Hearing on L.B. 901 Before the Banking Commerce and Insurance Committee of the Nebraska Unicameral, 86th Leg., 2d Sess. 39 (1980)(remarks of Sen. Landis). See FLOOR DEBATE ON L.B. 940, 86TH LEG., 2D SESS. 9380, 9389 (1980)(remarks of Sen. Landis). “Neither the federal government nor most states have taken action to raise exemption limits since the Bankruptcy Code was enacted in 1978. And due to inflation, exemptions reflect the value of property less and less—especially real estate.” Klein, supra note 55 at 906.
287. See supra note 21 and accompanying text.
XII. CONCLUSION

Oliver Twist’s plaintive request, “Please, sir, I want some more,” was not base nor driven by greed.\textsuperscript{288} It was a cry for equity. Homestead acts foster the policy of home conservation. Personal property exemptions are more than “in the nature of charity.”\textsuperscript{289} This Article advocates a limited enhancement of Nebraska’s exemptions to continue the rehabilitative goal of the fresh start, without being handicapped by a false start, or unjustly enriched by a head start. Nebraska’s exemptions are widely acknowledged to be far more stingy than thoughtfully considered exemptions under the federal Bankruptcy Code. Professor Duncan saw austerity as economically beneficial.\textsuperscript{290} Senator Vard Johnson favored retaining the federal exemptions in 1980 and has repeatedly contrasted the gap between federal and state exemptions in committee and on the Unicameral floor.\textsuperscript{291} Other senators have called for expanding the exemptions.\textsuperscript{292}

The exemption level of section 25-1556 was last addressed in 1973, section 25-1552 in 1980, and section 40-101 in 1986. In response to the cry of Oliver Twist, if not now, when?

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\item \textsuperscript{288} Charles Dickens, Oliver Twist, Chap. 2 (1838).
\item \textsuperscript{289} Foster, supra note 37, at 143.
\item \textsuperscript{290} Duncan, supra note 2, at p. 234 n.65.
\item \textsuperscript{291} See supra notes 142-144, 264 and accompanying text; Floor Debate on L.B. 940, 86th Leg., 2d Sess. 9401 (1980).
\item \textsuperscript{292} “In my estimation, the Nebraska exemptions are too low. And the way to solve that is for the Banking Committee to take a look this summer at an interim study and use some comparative data and come up with a better range of exemption limitations than what are there now.” Floor Debate on L.B. 335, 90th Leg., 1st Sess. 4520, 4594 (1987)(remarks of Sen. Landis). See also Floor Debate on L.B. 335, 90th Leg., 1st Sess. 4529-30 (1987)(remarks of Sen. Schmit).
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