

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 05-12681-JMD
Chapter 7

Jeremiah Evarts and
Joanne C. Evarts,
Debtors

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MEMORANDUM OPINION

I. INTRODUCTION

River Valley Country Day School (the “School”) objected to the Debtors’ claim of a homestead exemption in property located in Cornish, New Hampshire. The Court held an evidentiary hearing on the objection on May 22, 2006, and took the matter under advisement. This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the “Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire,” dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. FACTS

The Debtors own a 35.9 acre parcel of real estate in Cornish, New Hampshire (the “Property”) in which they claimed a homestead exemption pursuant to state statute. The Property consists of a main house, a detached garage, a separate cottage building with an attached barn, and 30.76 acres of undeveloped land. The Debtors and their teenage daughter, when she is home from school, reside in the main house. The Debtors use the detached garage for their vehicles and storage.

The original cottage building was built in 1790 and has been enlarged over the years. At the time the Debtors purchased the Property in 1986 the cottage building was uninhabitable. The Debtors undertook a renovation of the building so that they would have space in the future for their blended family to stay. Some of the renovation costs exceeded the Debtors’ expectations, however, and, as a way of generating money to pay for these costs, the Debtors began renting the cottage space on an ad hoc basis. Despite the rental of space in the cottage, the cottage remains in poor condition with mold in the basement, low clearance on the first floor, steep eaves, rotting sills, and uneven heating.

On the petition date the cottage contained three separate housing units. One unit was occupied by the Debtors’ adult son. A second unit was occupied by an unrelated woman and her infant child. A third unit was not occupied but had been used for storage by yet another unrelated individual both prepetition and postpetition.

The Debtors’ son pays no rent for occupying his unit but does pay the expenses associated with the unit. His unit contains a small stove and a small refrigerator. The Debtors’ son has lived in the cottage building for at least four years.

The woman occupying the second unit pays the expenses associated with the unit and some monthly rent. Her unit also has toilet facilities and some means of cooking. The woman has occupied the unit since February 2005. At the time she began staying in the unit she was pregnant and needed a place to live. She gave birth to her child in April 2005, and intended to move out of the cottage by July 2005. When the woman's marriage plans fell through, she asked the Debtors if she could stay longer in the cottage and the Debtors agreed. Prior to the woman occupying the unit, another unrelated individual lived there.

The third unit was not being used on the petition date. However, it has been used by a friend of the Debtors' son for storage of his personal items both prepetition and postpetition. The third unit contains a small gas stove. The parties do have some arrangement regarding rent for that unit.

Postpetition the Debtors were informed that the units in the cottage building cannot be lawfully rented because doing so violates the Town's zoning ordinance and building and fire safety codes. As a result, the Debtors have indicated that the second unit will be vacated by early summer. The Debtors do not intend to rent the cottage house units in the future.

Adjoining the cottage building is a barn that has been used for theater productions. Most of the productions were put on by the School's students during a period when the Debtors were employed by the School as headmistress and teacher. The Debtors did not charge the School rent for holding productions in the barn but the School did pay the expense of heating the barn. The Debtors have also used the barn to host other theater productions including a Shakespeare play postpetition, last summer for which they charged \$50.00.

The Property also consists of 30.76 acres of undeveloped land. For several years the Debtors have allowed a farmer to use the land to grow corn for the farmer's own agricultural purposes. The Debtors do not receive any payment for this use. The Debtors allow the farmer to use their land because it was getting overgrown. In addition, this undeveloped land is subject to a conservation easement that prohibits the Debtors from further developing or subdividing the Property.

III. DISCUSSION

As the party objecting to the Debtors' claim of homestead exemption, the School bears the burden of proving that the homestead exemption was not properly claimed. Fed. R. Bankr. P. 4003(c). The School does not contest that the main house and the garage are homestead property. Rather, the School argues that neither the cottage building nor the undeveloped land qualify as homestead property and therefore cannot be claimed as exempt.

The legal right to a homestead exemption is to be determined by NH RSA 480:1¹ and such right is to be construed liberally. In re Mirulla, 163 B.R. 910, 911 (Bankr. D.N.H. 1994) (citing Currier v. Woodward, 62 N.H. 63, 66 (1882)). Entitlement to the homestead exemption is determined as of the date of the bankruptcy petition. Mirulla, 163 B.R. at 911 (citing In re Eckols, 63 B.R. 523, 526 (Bankr. D.N.H. 1986)). "Although 'homestead' is not defined by the statute, the term is commonly understood to refer to a dwelling and the real property on which it is located." Bower v. Deickler (In re Deickler), 1999 BNH 026, at 9 (citing In re Kiedaisch, Bk. No. 95-11726-MWV (Bankr. D.N.H. Apr. 22, 1996)). A homestead right is established by

¹ RSA 480:1 provides in relevant part: "Every person is entitled to \$100,000 worth of his or her homestead, or of his or her interest therein, as a homestead."

actual physical possession of a property with an intent to occupy it as a home. Currier, 62 N.H. at 64.

In general, the homestead right does not apply to investment property, property occupied by tenants, or other property where the owner, or his family, does not dwell. Id. (cited in In re Chase, 2003 BNH 032, at 2-3). “The New Hampshire homestead statute was ‘intended to secure to debtors and their families, the shelter of the homestead roof; not to exempt mere investments in real estate, or the rents and profits derived therefrom.’” In re Myers, 323 B.R. 11, 13 (Bankr. D.N.H. 2005) (quoting Austin v. Stanley, 46 N.H. 51, 52 (1865)). Under New Hampshire law, it is sufficient if a property is “actually and conveniently used by the [Debtors] in connection with the house where they lived, and was necessary to the convenient enjoyment of the house by them as a home.” Libby v. Davis, 68 N.H. 355, 356 (1895) (quoted in Myers, 323 B.R. at 13).

The policies underlying the New Hampshire homestead exemption have been applied to exclude from the exemption that portion of a building or parcel not actually utilized by a debtor or his family as a residence, Cole v. Laconia Savings Bank, 59 N.H. 53, 54 (1879), and those portions which are utilized to generate rental income from third parties, Kilburn v. Filby (In re Filby), 225 B.R. 532, 536 (Bankr. D.N.H. 1998); In re Tsoupas, 250 B.R. 466, 468 (Bankr. D.N.H. 2000); Mirulla, 163 B.R. at 912. The cases excluding portions of a building or a parcel not occupied by a debtor and his family have been determined upon the actual use of the building or parcel by the debtor, not the nature of the building or parcel.

Myers, 323 B.R. at 13.

On the petition date, the cottage building was used by the Debtors’ adult son and by an unrelated woman and her infant child. While the Debtors have received some rental income related to such use, in the Court’s view such rental income does not transform the cottage into an investment property that would deprive the Debtors of their claim of homestead. The cottage building is not located on a separate lot of record but rather is part of the Property. It cannot be

legally rented and cannot be subdivided and sold to a buyer. Unlike the cases cited by the School, the Debtors' rental of the cottage to their son and third parties has not been part of a deliberate, long-term business plan by the Debtors to lease this portion of the Property. See Kilburn v. Filby (In re Filby), 225 BR. 532, 536 (Bankr. D.N.H. 1998) (holding debtor was entitled to a homestead exemption only in that portion of a duplex in which he resided and was not entitled to a homestead exemption in that portion which he rented to a third party and did not occupy himself); Mirulla, 163 B.R. at 912 (holding the debtor was entitled to a homestead exemption only in the five rooms of the hotel in which he actually resided and not the portions used in the debtor's business of running a hotel and a separate motel). The fact that an immediate family member (i.e., a child) living in a debtor's home contributes to the expenses of maintaining the home does not result in the loss of a debtor's homestead exemption in any portion of the property. The Court agrees with the Debtors that use of a portion of the Property to generate de minimis income for the purpose of maintaining the Property should not affect the Debtors' right to a homestead in that portion of the Property, especially where the right to claim a homestead exemption is to be construed liberally in a favor of a debtor. See Granite Bank v. Cohen (In re Cohen), 267 B.R. 39, 44-45 (Bankr. D.N.H. 2001).

The School also objects to the Debtors' claim of homestead with regard to the 30.76 acres of undeveloped land. Such land is not a separate lot of record but rather is part of the Property. It cannot be subdivided and sold to a buyer as the entire parcel is subject to a conservation easement. While the Debtors have permitted a farmer to use the land for his own purposes, such use helps the Debtors prevent overgrowth of the Property. Even if the Debtors were to obtain de minimis income or benefit from the farmer's use of the open land, so long as

the primary purpose of the use is to maintain the Property, the Debtors will suffer no loss of their homestead exemption in the Property. Id. In the Court's view the undeveloped land is actually and conveniently used by the Debtors in connection with their enjoyment of the main house as their home. Accordingly, it constitutes part of the Debtors' homestead and therefore can be claimed as exempt by the Debtors in accordance with New Hampshire law.

IV. CONCLUSION

Because the Court concludes that the Debtors have properly claimed a homestead exemption in the Property, the School's objection to their claim of homestead exemption is overruled. This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate order consistent with this opinion.

ENTERED§ at Manchester, New Hampshire.

Date: June 30, 2006

/s/ J. Michael Deasy
J. Michael Deasy
Bankruptcy Judge