



1996

Comfortable Beds, a Church Pew, a Cemetery Lot, One Hog, One Pig, Six Sheep, One Cow, a Yolk of Oxen or a Horse, and Your Notary Seal: Some Thoughts about Exemptions

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Recommended Citation

Bottrell, Lowell P. (1996) "Comfortable Beds, a Church Pew, a Cemetery Lot, One Hog, One Pig, Six Sheep, One Cow, a Yolk of Oxen or a Horse, and Your Notary Seal: Some Thoughts about Exemptions," *North Dakota Law Review*: Vol. 72 : No. 1 , Article 4.

Available at: <https://commons.und.edu/ndlr/vol72/iss1/4>

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COMFORTABLE BEDS, A CHURCH PEW,
A CEMETERY LOT, ONE HOG,
ONE PIG, SIX SHEEP, ONE COW,
A YOLK OF OXEN OR A HORSE, AND YOUR
NOTARY SEAL: SOME THOUGHTS ABOUT EXEMPTIONS

LOWELL P. BOTTRELL*

I. INTRODUCTION

Prior to filing bankruptcy and meeting with counsel, most debtors probably wonder if they will be able to keep any property after they file. After meeting with counsel, debtors are reassured that they can keep certain property such as their house and other property, but that they cannot keep property like cash. This may perplex the average individual because it seems strange that the debtor may keep a home worth several thousand dollars yet they cannot keep the \$200 or \$300 cash they have in their checking accounts. This situation raises concerns of whether the exemptions that are allowed to debtors are based on common sense or on something entirely different.

The sole purpose of this article is to initiate debate about restructuring the exemption scheme in North Dakota, Minnesota, and elsewhere. The purpose of this article is not to discuss all of the unusual exemptions that exist today, nor is the purpose to discuss all of the assets that a debtor may claim as exempt in some hypothetical or theoretical bankruptcy. This article does not attempt to analyze every intricacy involved in the development of the patchwork of exemptions that exists in many states today. What this article does do is stand for the proposition that state exemption schemes should be modernized to be more user-friendly. This author is certain that both creditors and debtors will criticize this article. Debtors will contend that restructuring the exemption scheme will deprive them of exemptions, and creditors will contend that the exemptions are, at present, already too liberal. The debate must begin somewhere—let it begin here.

The problems with the exemptions as they are structured today are numerous. For example, the existing exemption scheme fosters improper pre-bankruptcy planning in that it encourages debtors to convert non-exempt assets into exempt form on the eve of bankruptcy. It fosters uncertainty because neither the debtor nor the creditors are certain whether the assets will be considered exempt in the future or whether the debtor will lose his or her discharge as a result of any improper

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pre-bankruptcy planning. It fosters inflexibility because the debtor is not certain if he or she wants to continue in his or her current occupation, but is being advised that he or she can obtain a greater lien avoidance and more exemptions because of that lien avoidance if he or she continues the same occupation. Finally, exemption schemes lack practical application because cash is not exempt in some states, yet if the debtor uses cash as a downpayment on a home, it is exempt. All of the above problems increase litigation and consequently, the cost to the litigants.

This article will first discuss the policy reasons courts have espoused as the foundation for exemptions. Next, the article will provide the constitutional footing for exemptions in North Dakota and Minnesota.¹ The discussion will then turn to the types of exemptions that are available to debtors, the case law developed from the various state exemptions, and the litigation in the courts today concerning pre-bankruptcy planning. Finally, the author will suggest a starting point for discussion which is not meant to be a solution, but rather—a starting point. This starting point suggests that the pigeon hole exemptions in North Dakota and Minnesota be abolished and that both state legislatures provide a flat “wild card” exemption to debtors for a certain dollar amount, which the debtor may use to exempt whatever assets the debtor chooses. The rationale behind this suggestion is that debtors would then not have to play games with their exemptions for pre-bankruptcy planning purposes and creditors would know that the debtor, in any circumstance, would be entitled to a certain flat dollar amount of exemptions. Creditors and debtors would know, upon entering into financial transactions with one another, what amount the debtor could claim as exempt, and would not have to consider whether the property is homestead property,² cash value life insurance, or a musical instrument.

1. This article primarily addresses the statutory exemption schemes in Minnesota and North Dakota, where this author practices. By this article, the author does not suggest that there be any uniform federal exemptions. However, the wild card exemption, this author suggests, could be applied to the federal exemptions under 11 U.S.C. § 522(d) (1988), instead of the patchwork of exemptions that are provided by Congress.

2. If the homestead exemption is not properly waived in a North Dakota mortgage, then the mortgage may not be enforceable against the property. N.D. CENT. CODE § 47-18-05.1 (Supp. 1995); *Red River State Bank v. Reiersen*, 533 N.W.2d 683, 686-87 (N.D. 1995).

II. THE POLICY OF EXEMPTIONS

The court-enunciated policy³ for providing exemptions is that exemptions are necessary to fulfill certain societal purposes.⁴ The Eighth Circuit Court of Appeals has stated that the policy reason for the homestead exemption, and for allowing the debtor to pay down on the homestead mortgage, prior to the filing of bankruptcy, is to “[p]rotect[] the family unit from impoverishment, relieve[] society [of] the burden of supplying subsidized housing, and provide[] the debtors with a means to survive during the period following the bankruptcy filing when [the debtor] may have little or no income.”⁵

The exemption scheme may also serve one of the following social policies:

- (1) To provide the debtor with property necessary for his or her physical survival;
- (2) To protect the dignity and the culture and religious identity of the debtor;
- (3) To enable the debtor to rehabilitate himself or herself financially and earn income in the future;
- (4) To protect the debtor's family from adverse consequences of impoverishment; and
- (5) To shift the burden of providing the debtor and his or her family with minimal financial support from society to the debtor's creditors.⁶

3. *Bertozzi v. Swisher*, 81 P.2d 1016, 1017 (Cal. Ct. App. 1938).

[T]he fundamental reason for the enactment of exemption laws is to protect a person, whatever his occupation might be, from being reduced by financial misfortune to abject poverty; therefore, to accomplish that end and to encourage industry and thrift, laws of that type have been framed which place beyond the reach of creditors not only the debtor's home but also various kinds of personal property reasonably necessary for him to have in order to earn a living for himself and his family; and from the beginning, among the exemptions thus granted are to be found certain domestic animals, including a limited number of horses. However, as pointed by those earlier cases, horses so exempt are intended in good faith to be used as instruments of husbandry or labor; in other words, they must be work horses.

Id. (citations omitted).

4. *Seablom v. Seablom*, 348 N.W.2d 920, 925 (N.D. 1984). The court stated:

Exemptions statutes are remedial and are to be liberally construed to effectuate their purpose of their enactment. Exemption statutes have two major objectives: To provide a fresh start to the debtor who is being sued and to aid society by reducing the number of debtors who would need public assistance.

Id. at 925 (citations omitted); *see also* *In re Wallerstedt*, 930 F.2d 630, 631 (8th Cir. 1991) (favoring liberal construction of exemption statutes to benefit the debtor).

5. *Norwest Bank Nebraska v. Tveten*, 848 F.2d 871, 876 (8th Cir. 1988).

6. *In re Ellingson*, 63 B.R. 271, 277-78 (Bankr. N.D. Iowa 1986); *Tveten*, 848 F.2d at 876.

The policy consideration which purports to shift the loss from the taxpayer and society to the creditor is cursory and therefore does not support the existence of the exemption scheme because, in actuality, society still bears the loss through increased prices of the creditor's goods and services.⁷ However, the policy provision which supports debtor rehabilitation and provides the debtor's dependents with necessities during rehabilitation, does support the purpose behind the exemption scheme. Commenting on the necessity of the exemption scheme, the Minnesota Supreme Court in *Ferguson v. Kumler*,⁸ suggested that this:

wise and humane policy [is] in the [best] interest of the state, whose welfare and prosperity so largely depend[s] on the growth and cultivation among its citizens[,] of feelings of personal independence, together with love of country and kindred—sentiments that find their deepest root and best nourishment where the home life is spent and enjoyed.⁹

However, whether one accepts the policy reasons behind allowing exemptions is irrelevant because exemptions, in whatever shape or form, are a common thread of our society and will presumably always be available to debtors. Even though some of the policy reasons behind exemptions are important, this author does not agree with the various types and amounts of exemptions that different states offer debtors.

Over the years, legislatures have altered their exemption schemes to conform to changes and variances of society.¹⁰ Therefore, re-examining exemptions in light of societal changes, as this author suggests, is not a new concept.

7. This policy argument may even be flawed by the fact that the debtor may not be on welfare directly, but the debtor is being supported by the taxpayers, the taxpayers being the creditors that the debtor owes. Because creditors obviously pass their losses on to their consumers through increased prices of their product or services, other members of society pick up the loss of the particular debtor. Therefore, indirectly, society bears the burden of these exemptions and to argue that shifting the burden of the debtor and the debtor's family to the creditors and not to society, is no argument at all. Society pays for the exemption either directly or indirectly.

8. 6 N.W. 618 (Minn. 1880).

9. *Ferguson v. Kumler*, 6 N.W. 618, 619 (Minn. 1880). In *In re Johnson*, 880 F.2d 78, 83 (8th Cir. 1989), the court recognized that the debtor's home is a "sanctuary" and reaffirmed the *Denzer* position that stated "[w]e have recognized that no exemption is more central to the legitimate aims of state lawmakers than a homestead exemption." *Johnson*, 880 F.2d at 83 (citing *Denzer v. Prendergast*, 126 N.W.2d 440, 443 (Minn. 1964)).

10. See *Poznanovic v. Maki*, 296 N.W. 415, 417 (Minn. 1941) (determining that the specific term "wagon" could not be interpreted to mean vehicle based on the legislative history); see also the recent changes to N.D. CENT. CODE § 28-22-03.1 (Supp. 1995) (providing additional exemptions such as pensions, annuities, and benefits due); MINN. STAT. ANN. §§ 510.01-.02 (West Supp. 1996) (redefining the homestead exemption).

III. CONSTITUTIONAL FOOTING

In many states, a debtor's right to exemptions does not come from a statutory grant, but rather, is rooted in the state constitution. In North Dakota, the constitution provides in pertinent part:

The right of the debtor to enjoy the comforts and necessities of life shall be recognized by wholesome laws, exempting from forced sale to all heads of families a homestead, the value of which shall be limited and defined by law; and a reasonable amount of personal property; the kind and value shall be fixed by law. This section shall not be construed to prevent liens against the homestead for labor done and materials furnished in the improvement thereof, in such manner as may be prescribed by law.¹¹

Moreover, the Minnesota constitution provides:

No person shall be imprisoned for debt in this state, but this shall not prevent the legislature from providing for imprisonment, or holding to bail, persons charged with fraud in contracting said debt. A reasonable amount of property shall be exempt from seizure or sale for the payment of any debt or liability. The amount of such exemption shall be determined by law. Provided, however, that all property so exempt shall be liable to seizure and sale for any debts incurred to any person for work done or materials furnished in the construction, repair or improvement of the same, and provided further, that such liability to seizure and sale shall also extend to all real property for any debt to any laborer, or service performed.¹²

Both constitutional provisions entitle the debtor to a reasonable amount of property. Legislatures determine what constitutes a reasonable amount of property. Although it appears that state constitutions may provide for a homestead exemption, separate from personal property, it does not limit the legislature's right to define the homestead.¹³ The North Dakota legislature established its definition of the homestead in

11. N.D. CONST. art. XI, § 22.

12. MINN. CONST. art. I, § 12.

13. The legislature could allow a \$25,000 homestead and \$25,000 in personal property or \$50,000 in any form the individual chooses. *See, e.g.*, 11 U.S.C. § 522(d)(1), (5) (1988) (listing dollar amounts for exempt property); N.D. CENT. CODE § 28-22-03.1(1) (Supp. 1995) (codifying the lien against the homestead exemption).

section 47-18-01 of the North Dakota Century Code,¹⁴ which places a dollar limitation on the exemption of contiguous property. Theoretically, in North Dakota, a debtor may claim as exempt, pursuant to section 47-18-01 of the North Dakota Century Code, property which encompasses several sections of land so long as the equity in the property does not exceed \$80,000 and the property consists of contiguous tracks.¹⁵

The Minnesota legislature set forth its definition of the homestead exemption in section 510.01 of Minnesota Statutes Annotated,¹⁶ and limited its definition in section 510.02.¹⁷ The federal bankruptcy court for the District of Minnesota discussed the force of the homestead statute in *In re Joy*¹⁸ when it stated that the homestead exemption in Minnesota is not simply a privilege but is a constitutionally guaranteed right,¹⁹ even though the Minnesota Constitution²⁰ itself does not specifically mention

14. N.D. CENT. CODE § 47-18-01 (Supp. 1995). This section provides as follows:

The homestead of any person, whether married or unmarried, residing in this state shall consist of the land upon which the claimant resides, and the dwelling house on that land in which the homestead claimant resides, with all its appurtenances, and all other improvements on the land, the total not to exceed eighty thousand dollars in value, over and above liens or encumbrances or both. The homestead shall be exempt from judgment lien and from execution or forced sale, except as otherwise provided in this chapter. In no case shall the homestead embrace different lots or tracts of land unless they are contiguous.

Id.

15. See *In re Patten*, 71 B.R. 574, 575-76 (Bankr. D.N.D. 1987) (determining that the homestead exemption could include a building consisting of apartments wherein debtors resided and rented out the remaining apartments, as long as the equity did not exceed \$80,000).

16. MINN. STAT. ANN. § 510.01 (West Supp. 1996). This section provides as follows:

The house owned and occupied by a debtor as the debtor's dwelling place, together with the land upon which it is situated to the amount of area and value hereinafter limited and defined, shall constitute the homestead of such debtor and the debtor's family, and be exempt from seizure or sale under legal process on account of any debt not lawfully charged thereon in writing, except such as are incurred for work or materials furnished in the construction, repair, or improvement of such homestead, or for services performed by laborers or servants and is as provided in section 550.175.

Id.

17. *Id.* § 510.02. This section provides as follows:

The homestead may include any quantity of land not exceeding 160 acres, and not included in the laid out or platted portion of any city. If the homestead is within the laid out or platted portion of a city, its area must not exceed one-half of an acre. The value of the homestead exemption, whether the exemption is claimed jointly or individually, may not exceed \$200,000 or, if the homestead is used primarily for agricultural purposes, \$500,000, exclusive of the limitations set forth in section 510.05.

Id.

18. 5 B.R. 681 (Bankr. D. Minn. 1980).

19. *Joy v. Leonard (In re Joy)*, 5 B.R. 681, 683 (Bankr. D. Minn. 1980). Recently, in a case involving a debtor who abandoned his homestead, the Minnesota Bankruptcy Court re-affirmed its former position that "the homestead exemption is a guaranteed right." *In re Kasden*, 181 B.R. 390, 393 (Bankr. D. Minn. 1995), *rev'd on other grounds sub nom Steiner & Saffer v. Kasden*, 186 B.R. 667 (Bankr. D. Minn. 1995).

20. See MINN. CONST. art. I, § 12; *supra* note 12 and accompanying text (quoting the relevant portion of the Minnesota Constitution allowing for the creation of the exemption).

the right to a homestead as does the North Dakota Constitution.²¹ The Eighth Circuit Court of Appeals has also recognized that the Minnesota Constitution provides a fundamental right to a homestead exemption.²² In Minnesota, the homestead exemption limits the debtor to 160 acres of contiguous land if the property is not a platted portion of a city.²³ If the homestead exists within a platted portion of a city, then the exempt property cannot exceed one-half of an acre.²⁴ The value in either case cannot exceed \$200,000 for non-agricultural property, and \$500,000 for property primarily used for agricultural purposes.²⁵

Both legislatures adopted the above exemptions, along with various other exemptions, pursuant to each state's constitutional provisions. There are occasions, however, where the legislatures in Minnesota and North Dakota created exemptions which the courts later found unconstitutional.²⁶

21. See N.D. CONST. art. XI, § 22; *supra* note 11 and accompanying text (quoting the North Dakota Constitution which provides the homestead exemption).

22. *Panuska v. Johnson*, 880 F.2d 78, 82 (8th Cir. 1989).

23. MINN. STAT. ANN. § 510.02 (West Supp. 1996).

24. *Id.*

25. *Id.* This section has been amended twice in the last ten years. In 1986, the area for non laid out or platted property outside the city went from 80 acres to 160 acres. MINN. STAT. ANN. § 510.02 (West 1990). Then in 1993, the legislature limited the value to \$200,000 or \$500,000 if the debtor used the homestead primarily for agricultural purposes. MINN. STAT. ANN. § 510.02 (West Supp. 1996).

26. In *re Bailey*, 84 B.R. 608 (Bankr. D. Minn. 1988) (holding the portion of MINN. STAT. ANN. § 550.37(22) that allowed an unlimited exemption for special damages in a personal injury action unconstitutional); In *re Hilary*, 76 B.R. 683, 686 (Bankr. D. Minn. 1987) (holding the musical instruments exemption under MINN. STAT. ANN. § 550.37(2) unconstitutional); *Estate of Jones v. Kvamme*, 529 N.W.2d 335, 338 (Minn. 1995) (holding unconstitutional MINN. STAT. ANN. § 550.37(24)(1), which exempted certain retirement accounts because the value was not limited); In *re Tveten*, 402 N.W.2d 551, 560 (Minn. 1987) (holding unconstitutional MINN. STAT. ANN. § 550.37(11), which allowed unlimited fraternal benefits). *But see* In *re Cook*, 138 B.R. 943, 944-45 (Bankr. D. Minn. 1992) (holding an exemption for a right of action for personal injuries unconstitutional for special damages, but constitutional for general damages); In *re McKeag*, 111 B.R. 815, 817 (Bankr. D. Minn. 1990), (citing In *re Lockhart*, Bky. No. 3-87-1727 (Bankr. D. Minn. 1988), *aff'd sub nom* *Iannacone v. Lockhart*, 112 B.R. 962 (Bankr. D. Minn. 1988)) (holding that the public employees retirement exemption was constitutional since other integrated statutory provisions provide a reasonable limitation on the amount of the exemption). If the musical instrument statute is unconstitutional because it does not limit the value of the instrument, is the family bible exemption statute also unconstitutional because it lacks any limitation? See MINN. STAT. ANN. § 550.37(2) (West 1988) (providing for no value limitation on the family bible). Is there a constitutional argument concerning the separation of church and state? See *Christians v. Crystal Evangelical Free Church* (In *re Young*), 148 B.R. 886, 896 (Bankr. D. Minn. 1992), *aff'd*, 152 B.R. 939 (Bankr. D. Minn. 1993) (determining that contributions to a church were avoidable as fraudulent transfers). It is interesting to note that the District Court for the District of North Dakota allowed a debtor to claim all of the proceeds from a life insurance policy pursuant to N.D. CENT. CODE § 26-10-17 (1988). See In *re Hexom*, 50 B.R. 324, 326 (D.N.D. 1984). Section 26-10-17 allowed all surrender value to be claimed absolutely exempt from the claims of creditors of the insured. *Id.* at 325. Section 26-10-17 was repealed in 1985, however, the language § 26-10-17 was very similar to the current language of § 28-22-03.1(3), which limits the amount of exempt insurance policy proceeds to what is reasonably necessary for support. N.D. CENT. CODE § 28-22-03.1(3) (Supp. 1995). Presumably, the parties did not assert the constitutional limitation of a *reasonable* amount of personal property, the value and kind to be *fixed* by law. See *Hexom*, 50 B.R. at 326.

Pursuant to the social policies underlying exemption schemes, a reasonable amount of property consists of the comforts and necessities of life. This enables the debtor to continue working and to be a productive member of society by providing for the debtor and the debtor's family and protecting the family from destitution.

IV. TYPES OF EXEMPTIONS

Most states provide a hodge podge of different exemptions which the debtor may claim.²⁷ For example, many states provide exemptions for particular religious items, such as family bibles, places of worship, and a burial right.²⁸ Other states have exemptions that are presumably based on the average lifestyle of that state's citizens.²⁹ For example, the legislatures in Minnesota and North Dakota provide agricultural exemptions and allow exemptions for farm machinery.³⁰

Other states allow various types of exemptions of which a debtor may wish to take advantage. As previously noted, New Hampshire provides exemptions for one hog and one pig, six sheep and the fleeces of the same, a cow, a yoke of oxen, a horse, and domestic fowls.³¹ Oklahoma provides exemptions for five milk cows and their calves under

27. See, e.g., N.H. REV. STAT. ANN. § 511:2 (1983 & Supp. 1995). New Hampshire allows, in part, one hog and one pig and the pork of the same unslaughtered; six sheep and the fleeces of the same; one cow and a yoke of oxen or a horse, when required for farming or teaming purposes or other actual use; the bibles and school books and library of a debtor; a comfortable bed and bedsteads and bedding for the debtor, his wife and children; the debtor's interest in a pew in a meeting house in which he or she usually worships; and the debtor's right to a lot or a right of burial in any cemetery. *Id.*

28. See ALA. CODE § 6-10-5 (1993) (providing exemptions for a pew in the place of worship and any interest in a burial lot); CONN. GEN. STAT. § 52-352b(c) (Supp. 1995); (providing an exemption for a burial plot of the debtor and family); DEL. CODE ANN. tit. 10, § 4902(a) (1994) (providing exemptions for the family bible, seat or pew at place of worship, and interest in burial plot); IOWA CODE ANN. § 627.6(3)-(4) (West Supp. 1995) (providing exemptions for the family bible and any interest in a public or private burial ground); KAN. STAT. ANN. § 60-2304(d) (1994) (providing an exemption for a burial plot); MINN. STAT. ANN. § 550.37(2), (3) (West 1988) (providing exemptions for the family bible, a pew, and burial lot); NEB. REV. STAT. § 12-605 (1991) (providing an exemption for a cemetery lot); N.H. REV. STAT. ANN. § 511:2(VIII), (XIV), (XV) (1983) (providing exemptions for the family bible, the pew at the family place of worship, and a right of burial); N.D. CENT. CODE § 28-22-02(2)-(4) (1991) (providing exemptions for a pew, a burial lot and the family bible); OKLA. STAT. ANN. tit. 31, § 1(4) (West 1991) (providing an exemption for a lot in the cemetery); TENN. CODE ANN. 26-2-103(3) (1980) (providing an exemption for the family bible).

29. See, e.g., *Poznanovic v. Maki*, 296 N.W. 415, 417 (Minn. 1941) (recognizing that the legislature provided exemptions to its citizens based upon "their individual circumstances and necessities, when the hour of misfortune overtakes them" (quoting *Grimes v. Byrne*, 2 Minn. 89, 2 Gil. 72, 86 (1858))).

30. MINN. STAT. ANN. § 550.37(5) (Supp. 1996) (providing that an individual engaged in farming may claim \$13,000 in farm machinery and equipment). However, an individual not engaged in agriculture is only entitled to tools, implements, and machinery not exceeding \$8,000. *Id.* § 550.37(6). See also N.D. CENT. CODE § 28-22-04(3) (1991) (providing exemption for livestock and farm implements in the amount of \$4,500).

31. N.H. REV. STAT. ANN. § 511.2(X)-(XIII) (1983 & Supp. 1995).

six months old, 100 chickens, two horses, two bridles and two saddles, one gun, ten hogs, and 20 head of sheep.³² The Kansas exemptions of food, fuel, and clothing for the debtor, are consistent with the policy of providing for the basic needs and necessities of the debtor and the debtor's family.³³ New Hampshire also provides a fuel and food exemption.³⁴ Idaho has a unique exemption which allows the debtor to claim as exempt, not only wearing apparel, but also household pets.³⁵ Idaho recognizes water rights which are unique to that state.³⁶

The Connecticut exemption scheme considers the debtor's health and well being and provides exemptions for health aids necessary to the debtor.³⁷ Connecticut also exempts wedding and engagement rings.³⁸ Delaware allows sewing machines.³⁹ Texas allows exemptions of two horses, a mule or donkeys, 12 head of cattle and 60 other types of livestock, and 120 fowl along with the debtor's household pets.⁴⁰ California is a more contemporary state and provides exemptions for jewelry, heirlooms, works of art, and health aids.⁴¹ Finally, there is a group of states which recognizes a citizen's right to bear arms and therefore each state provides a firearms exemption.⁴²

The above laundry list of exemptions provided to debtors in many states reveals that the majority of states have a hodge podge exemption scheme. This author does not attempt to address every exemption in each and every state since there are a multitude of exemptions in North Dakota and Minnesota alone. In North Dakota, the debtor may claim as exempt cash value life insurance, annuities, or retirement plans up to the value of \$200,000.⁴³ Moreover, North Dakota allows exemptions for a homestead or, if the debtor does not have a homestead, the "in lieu of

32. OKLA. STAT. ANN. tit. 31, § 1(10), (12), (14), (15), (16) (West 1991).

33. KAN. STAT. ANN. § 60-2304(a) (1994).

34. N.H. REV. STAT. § 511:2 (VI) (1983). North Dakota has a similar statute which allows exemptions for the debtor's food and fuel for a year. N.D. CENT. CODE § 28-22-02(6) (1991).

35. IDAHO CODE § 11-605(b) (1990).

36. *Id.* § 11-605(6).

37. CONN. GEN. STAT. ANN. § 52-352b(k) (West 1991).

38. *Id.* § 52-352b(f).

39. DEL. CODE ANN. tit. 10, § 4902(c) (1975).

40. TEX. PROP. CODE ANN. § 42.002(a)(10)-(11) (West 1984 & Supp. 1995).

41. CAL. CIV. PROC. CODE ANN. §§ 704.040, 704.050 (West 1987).

42. CONN. GEN. STAT. ANN. § 52.352b(i) (exempting arms and military equipment, uniforms owned by a member of the militia or armed forces); IDAHO CODE § 11-605(1)(a) (exempting a fire arm); OKLA. STAT. ANN. tit. 31, § 1(A)(14) (allowing exemption of a gun); TEX. PROP. CODE ANN. § 42.002(a)(7) (allowing exemption of two firearms).

43. N.D. CENT. CODE § 28-22-03.1(3) (1991). These would not include the plans which are controlled by Employee Retirement Income Security Act of 1974 (ERISA) as ERISA plans cannot be attached or levied upon except as provided by federal law. *Patterson v. Shumate*, 112 S. Ct. 2242, 2250 (1992). Therefore, the state exemption laws are pre-empted by federal law and a state statute cannot prescribe the amounts exempt. *Id.* at 2245 (stating that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated"). Thus, ERISA qualified plans are simply a "freebie."

homestead exemption" which the debtor may apply to any type of property.⁴⁴ Further, North Dakota has a motor vehicle exemption statute⁴⁵ and has several other specific statutes which may relate to a debtor's specific circumstances, such as benefits from Operation Shield and Desert Storm,⁴⁶ unemployment benefits,⁴⁷ worker's compensation benefits,⁴⁸ and crime victim reparations.⁴⁹

Minnesota provides a homestead exemption,⁵⁰ exemptions for wearing apparel and household goods,⁵¹ employee benefits and retirement plans,⁵² and public assistance or relief received from a county or state.⁵³ Minnesota is also not without unique exemptions and provides exemptions for the notary seal and official notary register.⁵⁴ A Vietnam bonus,⁵⁵ and bail money in criminal proceedings, except for the fine or criminal restitution that the criminal must pay, may also be claimed as exempt.⁵⁶ Like many other states, the North Dakota and Minnesota exemption statutes reflect a patchwork of societal changes, and even though many of the exemptions fulfilled a concrete purpose in the past, these exemptions today are antiquated and useless. Furthermore, these exemptions encourage improper pre-bankruptcy planning; a reshuffling of assets to fit some statutory scheme which does not advance the policy reasons for exemptions.⁵⁷

V. THE PIGEON HOLED EXEMPTIONS

A panoply of litigation has sprung out of the pigeon holed exemptions that many states provide. The most litigated area is pre-bankruptcy planning, where the debtor has property that is not pigeon holed into what the exemption allows and, therefore, the debtor must somehow convert the non-exempt asset into an exempt asset to save it from the hands of the creditors on the eve of the bankruptcy, or on the eve of attachment by the creditor.⁵⁸ The unavailability of a specifically

44. N.D. CENT. CODE § 28-22-03.1(1) (1991).

45. *Id.* § 28-22-03.1(2) (exempting a motor vehicle worth \$1,200).

46. *Id.* § 37-26-06 (Supp. 1995).

47. *Id.* § 52-06-30 (1989).

48. *Id.* § 65-05-29 (1995).

49. N.D. CENT. CODE § 28-22-19(2) (1991).

50. MINN. STAT. ANN. §§ 510.01-510.09 (West 1990).

51. *Id.* § 550.37(4).

52. *Id.* § 550.37(24).

53. *Id.* § 550.37(14).

54. *Id.* § 359.03 (1991).

55. MINN. STAT. ANN. § 197.985 (1992).

56. *Id.* § 629.53 (1983).

57. See notes 3-10 *supra* and accompanying text (discussing policy reasons behind exemptions).

58. See *Panuska v. Johnson* (In re *Johnson*), 880 F.2d 78, 79 (8th Cir. 1989) (determining a debtor may take advantage of an unlimited value homestead exemption by paying off a substantial amount of the mortgage).

tailored exemption forces the debtor to play games with his or her assets on the eve of bankruptcy to ward off creditors.⁵⁹

Through pre-bankruptcy planning, debtors are in a situation where they may take advantage of all statutory exemptions, whether in the form of musical instruments, annuities or homesteads. The debtor's pre conversion assets would not be exempt, however, except that other pigeon holes or exemptions, which a debtor may take advantage of, are available.

For example, a debtor in Minnesota claiming the Minnesota exemptions is not entitled to claim cash or firearms as exempt. A debtor may however, take cash on the eve of bankruptcy and purchase a homestead and claim the homestead as exempt. Furthermore, a debtor could sell a firearm, use the cash from the sale to purchase a car, and claim the car exempt. When a debtor files for bankruptcy, the only concern is whether the debtor has hindered, delayed, or defrauded his or her creditors, in which case there would be no discharge.⁶⁰

In the past, debtors have taken spare cash and on the morning of filing bankruptcy, purchased a home, moved into the home at noon and filed the petition in bankruptcy in the afternoon.⁶¹ Most courts, consistent with the liberal language of the homestead exemption and exemptions in general, have allowed these actions because there is no proof that the debtor made the purchase to hinder, delay, or defraud creditors.⁶²

The current exemption schemes in North Dakota and Minnesota create uncertainty. The debtor cannot know what the bankruptcy will bring—whether the court will allow a debtor to claim a particular

59. See also *Norwest Bank Nebraska v. Tveten*, 848 F.2d 871, 872-73 (8th Cir. 1988) (denying a bankruptcy discharge to a debtor who transferred most of his net worth to exempt property, including large annuities, on the eve of bankruptcy); *Hanson v. First Nat'l Bank in Brookings*, 848 F.2d 866, 867 (8th Cir. 1988) (using cash from sales of their assets, debtors purchased exempt life insurance policies and paid down their mortgage); *Matter of Armstrong*, 931 F.2d 1233, 1236 (8th Cir. 1991) (allowing a farm couple to convert non-exempt property to exempt property on the eve of bankruptcy because there was no "extrinsic evidence of fraud"); *Smith v. St. Luke's Hosp. of Fargo (In re Smith)*, 119 B.R. 714, 721 (Bankr. D.N.D. 1990) (using insurance proceeds to purchase an annuity policy on the eve of bankruptcy); *In re Pulos*, 168 B.R. 682, 691 (Bankr. D. Minn. 1994) (determining that debtors' failure to document the sale of \$750,000 in real estate on the eve of bankruptcy denied them discharge in bankruptcy).

60. See *Tveten*, 848 F.2d at 874 (noting that the debtor must intend to defraud creditors when transferring property on the eve of bankruptcy to disallow the discharge); *Johnson*, 880 F.2d at 83 (noting that absent extrinsic evidence of fraud, there is nothing illegal about taking advantage of exemptions).

61. *Farrell v. Ernie Johnson*, Civ. No. 6-88-594 (Bankr. D. Minn. July 21, 1989) (unpublished opinion).

62. See, e.g., *Hanson*, 848 F.2d at 868 (stating that the court must find an intent to defraud creditors to disallow transfer of property to exempt status).

exemption⁶³ or whether the court will even grant a discharge.⁶⁴ Uncertainty also exists for creditors because they assume that the debtor cannot exempt certain property but are then later surprised to find out after the debtor completed pre-bankruptcy planning, most of the cash assets the debtor previously held are no longer available to creditors for collection and distribution. The parties are left with a substantial amount of litigation to determine their rights in the property and determine whether the debtor eluded creditors by hindering, delaying, or defrauding them.

The pigeon holing of exemptions does nothing more than invite litigation and necessitate sharp practice by attorneys to maneuver around the practice of pigeon holing.⁶⁵ The resulting amount of litigation simply makes no sense. Why should it matter that the debtor has \$50,000 worth of assets and those assets are held either in a homestead, household goods, six sheep, one hog, one pig, or the pork of the same? If the social policy behind the exemption scheme is to provide basic necessities to the debtor and to keep the debtor and the debtor's family from destitution, it should not matter at what time, or for what reason, the debtor purchased the property. If the legislature entitled the debtor to a certain dollar amount of exemptions, it would not matter what the debtor claimed as exempt or when or where the debtor purchased the exempt property. Uncertainty would disappear if the legislature simply provided a specific dollar amount that a debtor could claim as exempt—and nothing more.⁶⁶

VI. ONE "WILD CARD" EXEMPTION

Is it necessary to have well-defined and fact specific exemptions? Is it necessary to provide exemptions for comfortable beds, family bibles,

63. See *In re Tveten*, 402 N.W.2d 551, 560 (Minn. 1987) (determining exemption for annuity contracts and unmatured life insurance unconstitutional because of their unlimited value); *In re Gagne*, 166 B.R. 362, 364 (D. Minn. 1993) *rev'd in part*, 179 B.R. 884 (Bankr. D. Minn. 1994) (determining debtor not entitled to exemption because annuity was not purchased "on account of" illness, age, or disability); *In re Raymond*, 71 B.R. 628, 630 (Bankr. D. Minn. 1987) (stating that an annuity contract must be related to income to be exempt under MINN. STAT. ANN. § 550.37(24)); *In re Johnson*, 108 B.R. 240, 244 (Bankr. D. Minn. 1989) (determining that the debtors were not allowed an exemption as a structured tort settlement, but entitled to the exemption as actual personal bodily injury).

64. The court may deny the discharge because the pre-bankruptcy planning amounted to hindering, delaying, or defrauding creditors.

65. *In re Johnson*, 880 F.2d 78, 82 (8th Cir. 1989) (stating extent of pre-bankruptcy planning); *Tveten*, 848 F.2d at 875 (stating that the debtor consulted with attorneys to engage in pre-bankruptcy planning); *Hanson*, 848 F.2d at 867 (noting that debtors sold assets and purchased others as part of pre-bankruptcy planning).

66. See, e.g., FLA. STAT. ANN. § 222 (West 1989) (providing that any purchase of an asset one year before the debtor claims his or her exemptions is not allowed).

annuities,⁶⁷ cash value life insurance, or the notary seal, or will a single blanket exemption suffice? If the underlying social policy for exemptions is to provide the debtor and the debtor's family with basic necessities to enable the debtor to make a living and continue to provide for the family, it does not make sense that the debtor should exempt tools of his or her "trade" where the debtor may not be able to afford, after bankruptcy, to work in that trade.⁶⁸ For example, if a debtor loses substantial monies as a farmer, quite possibly that debtor may not want to engage in the business of farming any longer. Why then, would the debtor exempt \$13,000 of farm machinery when the debtor has no real intention of returning to farming, and where the debtor's only intent in claiming the equipment is to convince the court that the \$13,000 is a necessary exemption?⁶⁹ Most likely, the debtor does not return to farming, but takes advantage of a different profession where the debtor believes he or she can make a better living.

The farmer is not the only example. The same is true of a seamstress, a plumber, a pipefitter, or any other profession. There should be no pigeon holing of these types of exemptions. If a debtor wishes to take up a new profession, the debtor should not be penalized by that wish. If a debtor wishes to exempt \$13,000 in plumbing equipment so that the debtor may remain a plumber, then the court should acknowledge that wish and fulfill the purpose of the exemption, if the underlying social policies of exemptions really mean anything.

On the other hand, why should one even engage in the discussion of whether the debtor should be allowed \$13,000 or \$5,000 of tools of the trade, whether the debtor should be allowed so many dollars for a sewing machine, whether the debtor should be allowed six horses or ten horses, or whether the family pet should be allowed as an exemption? The legislature should not get involved in the debate of whether two firearms are a necessity or whether twelve or fifteen head of cattle would be more

67. It is hard to imagine how \$200,000 in annuities forwards the "policy" of maintaining the debtor's necessities. The debtor is entitled to a fresh start but not a head start. *Norwest Bank Nebraska v. Tveten*, 848 F.2d 871, 876 (8th Cir. 1988) (quoting *In re Zouhar*, 10 B.R. 154, 156 (Bankr. D.N.M. 1981); James Alan Lodoen, *Pit Falls of Pre-Bankruptcy Planning, Preserving Assets and the Discharge*, 69 N.D. L. REV. 93, 111 (1993).

68. See *In re Zimmer*, 185 B.R. 786, 789 (Bankr. D. Minn. 1995) (challenging debtors' exemption for farm machinery where husband earned no income and wife was employed as a bookkeeper at a grain elevator).

69. MINN. STAT. ANN. § 550.37(5) (West 1996); See *In re LaFond*, 791 F.2d 623, 625-26 (8th Cir. 1986) (determining that debtor was a farmer and thus, his equipment could be exempted); *In re Schuette*, 58 B.R. 417, 420 (Bankr. D. Minn. 1986) (determining that a farmer may claim a farm equipment exemption while not intending to immediately resume farming); *In re Peters*, 60 B.R. 711, 715 (Bankr. D. Minn. 1986) (stating that a farmer may claim a MINN. STAT. ANN. § 550.37(5) farm equipment exemption though not intending to immediately resume farming); *In re Fossem*, 59 B.R. 820, 823 (Bankr. D. Minn. 1986) (holding that a debtor could not increase the amount of his tools of the trade exemption when subsequently revised by statute).

beneficial to the debtor. Courts, on the other hand, should not be forced to decide whether the purchase of the twelve head of cattle on the eve of bankruptcy with cash that was not exempt, constitutes improper pre-bankruptcy planning and therefore disallows the exemption or even disallows the debtor's discharge. These are not useful discussions in which either the legislature or the court should engage. Furthermore, resorting to litigation on these issues does nothing to improve our system or to benefit debtors or creditors.

The more logical approach to exemptions is to provide a single exemption with a specific dollar limitation which the debtor can use in any way he or she chooses. A close substitute to this statute is the "in lieu of" homestead exemption in North Dakota, which allows the debtor, if the debtor is not claiming the homestead exemption, to claim as exempt, any property up to \$7,500 in value.⁷⁰ The same is true of section 28-22-03 of the North Dakota Century Code, which allows the debtor to claim \$5,000 of any type of property without pigeon holing the property into a particular exemption.⁷¹ Delaware also provides the head of family exemption and allows the debtor to claim as exempt personal property valued at \$500 in "articles to be selected by the debtor."⁷²

A court's involvement should not extend to the tedious task of determining whether a Rolex watch or a wedding ring constitute wearing apparel. Legislatures should enact statutes that simply entitle the debtor to \$50,000 equity in any property which the debtor owns. The necessity for pre-bankruptcy planning would not exist because the debtor would not have to consider whether cash or a firearm would be exempt, the debtor would not have to worry about eight horses or 28 horses or whether the debtor used those horses for recreational purposes or income-producing purposes. The debtor could exempt any assets and there would be no discussion about whether the assets claimed exempt fit within the correct pigeon holed exemption. There would be no discussion about whether the debtor properly claimed the annuity as exempt⁷³ and the debtor would know where he or she stood on all other exemptions.

Although it is arguable that this proposal increases costs to litigants by creating fact-based issues and valuation issues, such arguments are

70. N.D. CENT. CODE § 28-22-03.1(1) (1995).

71. *Id.* § 28-22-03.

72. DEL. CODE ANN. § tit. 10, § 4903 (Supp. 1994).

73. See *In re Johnson*, 108 B.R. 240, 244 (Bankr. D.N.D. 1989) (determining annuity not properly claimed exempt); *In re Gagne*, 163 B.R. 819, 824 (D. Minn. 1993), *rev'd on other grounds*, 172 B.R. 50 (Bankr. D. Minn. 1994) (determining worker's compensation benefits exempt prior to bankruptcy, but not exempt afterwards).

not unique. The system today fosters the same problems of making fact-based determinations and valuation considerations to fit property within the current exemption scheme. For example, in North Dakota, if a debtor claimed the in lieu of homestead exemption, the debtor must determine whether the assets exceed the \$7,500 limit.⁷⁴ Moreover, if the debtor claims the homestead exemption in North Dakota, a determination of whether the valuation of the property exceeds \$80,000 must be made.⁷⁵ In Minnesota, a debtor may have to determine the valuation of the property so that it does not exceed the statutory limits and if the property has an unlimited value, the statutory scheme may even be unconstitutional.⁷⁶ There would be no issue concerning pre-bankruptcy planning nor any litigation to decide whether the debtor improperly converted certain property on the eve of bankruptcy. All parties involved would know that the statute automatically entitled the debtor to a certain dollar amount of exemption in whatever property the debtor chooses.

VII. CONCLUSION

The societal purpose of exemptions is to provide necessary property for the physical survival of the debtor; to protect the dignity, culture, and religious identity of the debtor; to enable the debtor to rehabilitate financially and to provide for the debtor's family; and to protect the debtor and the debtor's family from impoverishment. Each of these policies can be fulfilled by providing a single wild card exemption where the debtor would determine what property the debtor wishes to keep to fit the debtor's needs. It is not necessary for the legislature to dictate what the debtor should and should not be allowed to claim as exempt. By allowing a single wild card exemption to the debtor, the issue of pre-bankruptcy planning disappears and it is not necessary to consider whether the debtor, by his or her actions, hindered, delayed, or defrauded creditors. A single wild card exemption scheme would be more efficient and less litigious. Hopefully the legislature and the courts will consider the single wild card exemption as a functional alternative to the current exemption scheme.

74. N.D. CENT. CODE. § 28-22-03.1(1) (1991).

75. N.D. CENT. CODE § 47-18-01 (1995).

76. *In re Hilary*, 76 B.R. 683, 686 (Bankr. D. Minn. 1987) (determining MINN. STAT. ANN. § 550.37(2), exempting musical instruments, unconstitutional because the statute did not limit the value).

