



1 On July 16, 2009, the trustee timely filed his objection to  
2 the claim of exemption, together with a supporting declaration  
3 and exhibits. On July 27, 2009, the trustee submitted as an  
4 additional exhibit the transcript of the meeting of creditors in  
5 this case. On August 26, 2009, the debtors timely filed  
6 opposition to the objection, supported by declarations of each of  
7 them. On September 2, 2009, the trustee filed a reply to the  
8 debtors' opposition, and on September 9, 2009, the court heard  
9 oral argument on the matter.

## 10 II. ANALYSIS

11 This court has jurisdiction over the objection pursuant to  
12 28 U.S.C. §§ 1334 and 157(b)(1). The objection is a core  
13 proceeding under 28 U.S.C. § 157(b)(2)(B).

14 The objecting party, in this case the trustee, bears the  
15 burden of proving that a claimed exemption is improper. Fed. R.  
16 Bankr. P. 4003(c). Because a claimed exemption is presumptively  
17 valid, the objecting party must produce evidence to rebut the  
18 presumptively valid exemption, whereupon the burden of production  
19 shifts to the debtor to demonstrate that the exemption is proper.  
20 The burden of persuasion remains with the objecting party. In re  
21 Carter, 182 F.3d. 1027, 1029-30 n.3 (9th Cir. 1999). Exemptions  
22 are to be liberally construed in favor of debtors. In re Lucas,  
23 77 B.R. 242, 245 (9th Cir. BAP 1987).

24 The debtors do not dispute the facts underlying the  
25 objection. First, on their petition, the debtors listed their  
26 street address as 1687 Brier Road, Turlock, California (the  
27 "Turlock property"). In their Statement of Financial Affairs, in  
28 answer to the question calling for other premises occupied in the

1 prior three years, they listed no other addresses. At the  
2 meeting of creditors, the debtors testified that they purchased  
3 the Tracy property in 1999, that at the time the petition was  
4 filed, they did not reside in the Tracy property, but instead had  
5 been using it as a rental, that they currently had a tenant in  
6 the Tracy property and were collecting \$650 per month in rent,  
7 and that they lived in the Turlock property at the time the  
8 petition was filed.<sup>2</sup>

9 In response to the objection, the debtors contend they had  
10 lived in the Tracy property until 2007 and, as of the petition  
11 date, they intended to move back to the Tracy property after  
12 their tenant moved out. The debtors testified in their  
13 declarations that prior to filing the petition, they consulted  
14 with their attorney to determine their options for saving the  
15 Turlock property from foreclosure, that it became apparent to  
16 them they would not be able to do so, that they decided their  
17 only option was to return to the Tracy property, and that they  
18 therefore contacted their tenant and informed him he would need  
19 to vacate the premises within 60 days.

20 On April 20, 2009, Mrs. Fisher gave birth to a child, an  
21 event the debtors contend slowed the timing of their move back  
22 into the Tracy property. They finally moved into the Tracy  
23 property on or about August 4, 2009, approximately three months  
24 after they filed their petition.

25 The issue is whether the debtors' intent to move back into  
26 the Tracy property is sufficient to make that property their

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28 2. Declaration of Michael D. McGranahan, filed July 16,  
2009, submitted without objection from the debtors.

1 "homestead," as the term is used in CCP § 704.710(c). "The  
2 essential factors in determining residency for homestead purposes  
3 are physical occupancy of the property and the intent to live  
4 there." In re Dodge, 138 B.R. 602, 607 (Bankr. E.D. Cal. 1992),  
5 citing Ellsworth v. Marshall, 196 Cal. App. 2d 471, 474 (1961).

6 The debtors are correct that a temporary absence from a  
7 residence is not necessarily a bar to a homestead exemption.  
8 Dodge at 607. As the debtors point out, the applicable code  
9 section, CCP § 704.710, subd. (c), was amended in 1983 to delete  
10 the word "actually" from before the word "reside." The purpose  
11 was to "to avoid a possible construction that a person  
12 temporarily absent (such as a person on vacation or in the  
13 hospital) could not claim a dwelling exemption for his or her  
14 principal dwelling, . . . , merely because the person is  
15 temporarily absent, even though the dwelling is the person's  
16 principal dwelling and residence." Cal. Law Revision Com. com.,  
17 17 West's Ann. Code Civ. Proc. (2009 ed.) foll. § 704.710,  
18 p. 131.

19 The debtors' circumstances are substantially different from  
20 the situation of a person absent from his or her home because he  
21 or she is on vacation or in the hospital. The debtors here had  
22 purchased the Turlock property and moved from Tracy between one  
23 and two years before they filed their petition, and had rented  
24 out the Tracy property. The respective values of the two  
25 properties, as listed in the debtors' A-schedule, suggest that  
26 the debtors viewed the Turlock property as a "move-up" home.  
27 There is no indication that at the time they moved, they did not  
28 intend the Turlock property to be their principal residence.

1       The debtors' position overlooks the requirement of  
2 § 704.710, subd. (c) that the debtor's or the debtor's spouse's  
3 residence in the particular dwelling must have been continuous up  
4 to the date a court determines that the dwelling is a homestead.  
5 In this case, there was more than a temporary absence from a  
6 principal dwelling -- there was the substitution of one principal  
7 dwelling for another; that is, the one in Turlock for the one in  
8 Tracy. There is every reason to believe that had property values  
9 increased, such that the debtors built up equity in the Turlock  
10 residence, they would have claimed that residence as their  
11 homestead, rather than the Tracy property.

12       The debtors' situation is similar to that in In re Anderson,  
13 824 F.2d 754 (9th Cir. 1987). In that case, prior to filing  
14 their bankruptcy petition, the debtors had purchased a home in  
15 Sonoma and moved there, leasing their Mendocino home to tenants,  
16 but claimed the Mendocino home as exempt in their bankruptcy  
17 schedules. The purpose of the debtors' move to Sonoma was for  
18 one of them to be closer to the college he was attending. The  
19 court found that "the absence from Mendocino could not be  
20 construed as a temporary absence like a vacation or hospital stay  
21 which the homestead statutes are designed to excuse" (Anderson at  
22 756), and thus, that the debtors were not entitled to the  
23 homestead exemption. Ibid. at 757.<sup>3</sup>

24       The fact that the debtors had equity in the Mendocino home  
25 but little or none in the Sonoma home was not relevant.

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27       3. The primary focus of the Anderson decision was on the  
28 declared homestead provisions found in CCP §§ 704.910-704.995.  
The debtors in this case do not contend they have rights under a  
declared homestead.

1 While it is true that the Andersons have little or no  
2 equity in the Sonoma home to protect, they could have  
3 transferred their equity in the Mendocino house to the  
4 Sonoma home: one may voluntarily sell a declared  
5 homestead, invest the proceeds in a new homestead  
6 within six months, and declare an exemption in the new  
property that relates back to the time of the original  
homestead. See Cal. Civ. Proc. Code §§ 704.720(b),  
704.960. . . . They had an opportunity to protect their  
equity by transferring it to the Sonoma home, but  
failed to take the appropriate action.

7 Anderson at 760.

8 Similarly, the fact that the debtors have equity in the  
9 Tracy property, but none in the Turlock property, is not relevant  
10 to this decision. Nor is the unfortunate fact that property  
11 values have decreased.

12 In short, the court finds the facts of this case to be  
13 materially closer to those in Anderson than to those in cases in  
14 which the homestead was allowed. For example, in In re Bruton,  
15 167 B.R. 923 (Bankr. S.D. Cal. 1994), cited by the debtors, the  
16 court allowed the debtor's exemption of his interest in a condo  
17 in San Diego, although he had been working in Concord for four  
18 months by the time of his bankruptcy filing. He never moved his  
19 furniture from the San Diego condo, did not rent an apartment in  
20 Concord, did not change his driver's license address, but did  
21 return to San Diego for long weekends.<sup>4</sup>

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22  
23 4. See also In re Pham, 177 B.R. 914 (Bankr. C.D. Cal.  
24 1994), in which the debtors claimed a homestead exemption in  
25 their property in Bakersfield, but had jobs in Los Angeles. They  
26 initially commuted daily to Los Angeles, but later rented an  
27 apartment there. The debtors' eldest daughter continued to  
reside in the Bakersfield property, paying no rent, and the  
debtors left the majority of their furniture and possessions  
there, returning on weekends and holidays. And in In re Dodge,  
138 B.R. 602 (Bankr. E.D. Cal. 1992), the debtors claimed an  
exemption in their house in Sacramento, although the wife was

(continued...)

1 In In re Yau, 115 B.R. 245 (Bankr. C.D. Cal. 1990), prior to  
2 their bankruptcy filing, the debtors moved from their Glendale  
3 home to the home of one of their parents in Monterey Park because  
4 they could no longer afford the mortgage payments on the Glendale  
5 house. They leased the Glendale property to a tenant, but in  
6 support of their claim of a homestead exemption, contended they  
7 hoped to return to the Glendale property at some time in the  
8 future.

9 Holding that the debtors were not temporarily absent from  
10 the Glendale property, the court observed that the debtors  
11 provided no evidence of how much time might lapse before they  
12 might return or whether they would ever return. Yau at 249. The  
13 debtors in the present case have in fact returned to the Tracy  
14 property, three months after filing their petition.<sup>5</sup>

15 The difference, however, is that in the interim, they  
16 purchased and moved into a different home, thus establishing a  
17 new homestead and breaking the chain of continuous residency in  
18 the Tracy property. To allow the Tracy homestead exemption in  
19 these circumstances would defeat the purpose of § 704.710(c),  
20 which is "to preclude a judgment debtor from moving into a  
21 \_\_\_\_\_

22 4.(...continued)  
23 working in Salinas and renting a one-bedroom apartment there,  
24 returning to the Sacramento house on the weekends, while the  
husband usually stayed at the Sacramento house but made  
occasional trips to Salinas.

25 5. On September 15, 2009, after the record on this matter  
26 had closed, the debtors filed a change of address, listing as  
27 their new address an address on Kasson Road in Tracy; that is, at  
28 a property other than either of the two that are at issue here.  
The court mentions this change of address only for the purpose of  
advising the parties that this change of address has no bearing  
on the present decision.

1 dwelling after creation of a judgment lien or after levy in order  
2 to create an exemption.'" Hastings v. Holmes (In re Hastings),  
3 185 B.R. 811, 814 (9th Cir. BAP 1995), quoting the legislative  
4 committee comment to CCP § 704.710(c).

5 **III. Conclusion**

6 For the reasons set forth above, the objection will be  
7 sustained. The court will issue an appropriate order.

8 Dated: September 22, 2009

9 \_\_\_\_\_/s/  
10 ROBERT S. BARDWIL  
11 United States Bankruptcy Judge  
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