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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

In re:) BAP No. WW-05-1054-KSD
RONALD LEE WILSON,) Bk. No. 04-23672
Debtor.)
_____)
RONALD LEE WILSON,)
Appellant,)
v.) **OPINION**
PETER H. ARKISON, Chapter 7)
Trustee; MARY WILSON,)
Appellees.)
_____)

Argued and Submitted on January 19, 2006
at Seattle, Washington

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Appeal from the United States Bankruptcy Court
for the Western District of Washington

Honorable Thomas T. Glover, Bankruptcy Judge, Presiding.

Before: KLEIN, SMITH and DUNN,¹ Bankruptcy Judges.

¹ Hon. Randall L. Dunn, United States Bankruptcy Judge for
the District of Oregon, sitting by designation.

1 KLEIN, Bankruptcy Judge:

2
3 The bankruptcy court sustained the trustee's objection under
4 Washington law to the debtor's claim of an exempt homestead in a
5 residence that the debtor no longer owned and from which he had
6 been removed by a prebankruptcy state-court order. We AFFIRM.

7 FACTS

8 Ronald Wilson, the debtor and appellant herein, commenced a
9 chapter 7 bankruptcy case on October 21, 2004, listing an address
10 in Bellingham, Washington, as his residence.

11 Seventeen days earlier, on October 4, 2004, the debtor
12 recorded a homestead declaration in which he averred that he was
13 residing, or intended to reside, at real property in Ferndale,
14 Washington. However, he had been judicially "divested" of that
15 property and had vacated under compulsion of a state-court order.

16 A divorce decree entered by the Whatcom County (Washington)
17 Superior Court on May 21, 2004, (and not appealed) awarded the
18 Ferndale residence (where the debtor had lived alone since 2001)
19 to his former spouse, declared that the debtor was "divested of
20 his interest in [the] property," and directed that his former
21 spouse take prompt physical possession of the residence and sell
22 it. The decree also provided that, although "divested" of his
23 interest in the property, the debtor would receive one-half of the
24 sale proceeds, less two debts totaling \$4,200.

25 In his bankruptcy case, the debtor scheduled a one-half
26 interest in the Ferndale residence notwithstanding that he had
27 been "divested" of his ownership interest and had not occupied the
28 property since June 2004. He also claimed the residence as exempt

1 in the amount of \$40,000 in Schedule C pursuant to Revised Code of
2 Washington ("RCW") 6.13.010, 6.13.020, and 6.12.030.²

3 The debtor did not learn until after filing bankruptcy that
4 the Ferndale residence was sold on October 12, 2004, with proceeds
5 of about \$84,000 held in a blocked account per state-court order.

6 Upon learning of the sale, the debtor notified the trustee,
7 appellee Peter Arkison, who demanded turnover of the proceeds and
8 timely objected to the claim of exemption.³

9 Specifically, the trustee objected that the debtor did not
10 show: (1) that he resided on the property when the petition was
11 filed so as to qualify for the automatic homestead exemption under
12 RCW 6.13.030 and 6.13.040; (2) that he had filed the Declaration
13 of Homestead required by RCW 6.13.040 if he was not living on the
14 property when the petition was filed; or (3) that he had filed a
15 declaration that he had not abandoned his interest in the
16 property, as required by RCW 6.13.050.

17 The debtor responded that, by recording a homestead
18 declaration, he had complied with Washington law and that, having
19 done all he could do under the circumstances, he should not be
20 disadvantaged by the fact of having been compelled to vacate the
21 premises by a state-court order. In addition, he contended it was
22 still timely to file a declaration of non-abandonment of homestead
23 because he was excluded from the Ferndale residence less than six
24 months before he filed his bankruptcy case. He did not, however,

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26 ² In text, we use the form "RCW xxx" used in Washington
27 practice instead of the "Bluebook" form "Wash. Rev. Code § xxx"
that we use in formal citation.

28 ³ The debtor's former spouse commenced an adversary
proceeding regarding the sale proceeds. The bankruptcy court
ordered one-half of the funds turned over to the former spouse and
remainder to the trustee. That order is not implicated in this
appeal.

1 address the implications of the divestiture of his property
2 interest that had occurred by virtue of the final and unappealed
3 divorce decree or the implications of the intervening sale.

4 At the hearing, the parties treated the facts as not in
5 controversy and did not proffer evidence. No findings were made.

6 The court noted that Washington law created a dilemma for the
7 debtor by requiring him either to reside on the property or to
8 have an intent to reside there. Not only had he vacated the
9 premises, the state-court's exclusion order made it impossible for
10 him to "intend" to reside there.

11 The court concluded that the debtor could not in good faith
12 aver in a homestead declaration that he intended to live at the
13 residence in the face of a final divorce decree that "divested"
14 him of ownership and ordered him to vacate. His intent, it noted,
15 was "not a reality because he's been thrown out." Nor did the
16 expression of a wish to request that the divorce decree be set
17 aside suffice to supply the requisite intent.

18 Thus, conceding that the situation paradoxically led to loss
19 of a homestead exemption that would otherwise have been available,
20 the court sustained the objection. This timely appeal ensued.

21 JURISDICTION

22 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334.
23 We have jurisdiction under 28 U.S.C. § 158(a)(1).

24 ISSUE

25 Whether the debtor had a good faith intent to reside at
26 property in which, when he recorded a Washington declaration of
27 homestead, he no longer owned a legal or equitable interest, that
28 was in the process of court-ordered sale, and from which he had

1 been removed pursuant to court order.

2 STANDARD OF REVIEW

3 We review de novo a decision construing a state's statutory
4 exemption and predict how the state's supreme court would rule on
5 the question. Kearns v. Transam. Home Loan (In re Kearns), 314
6 B.R. 819, 822 (9th Cir. BAP 2004). Since the bankruptcy court
7 neither took evidence and nor made findings of fact and
8 conclusions of law, the procedure followed most closely resembles
9 that of summary judgment, which we review de novo. Id.

10 DISCUSSION

11 The debtor's inescapable dilemma is one of timing. Applying
12 Washington law by virtue of 11 U.S.C. § 522(b), the prebankruptcy
13 declaration of homestead was ineffective, and, when the bankruptcy
14 commenced, the debtor was not otherwise entitled to a homestead.

15 A Washington homestead consists of real or personal property
16 that must be actually intended or used as the principal home of
17 the owner. Wash. Rev. Code § 6.13.010(1) (2004).⁴

21 ⁴ That section of RCW provides in pertinent part:

22 (1) The homestead consists of real or personal property
23 that the owner uses as a residence. In the case of a
24 dwelling house or mobile home, the homestead consists of
25 the dwelling house or the mobile home in which the owner
26 resides or intends to reside, with appurtenant
27 buildings, and the land on which the same are situated
28 and by which the same are surrounded, or improved or
unimproved land owned with the intention of placing a
house or mobile home thereon and residing thereon. A
mobile home may be exempted under this chapter whether
or not it is permanently affixed to the underlying land
and whether or not the mobile home is placed upon a lot
owned by the mobile home owner. Property included in the
homestead must be actually intended or used as the
principal home for the owner.

Wash. Rev. Code § 6.13.010(1) (2004).

Although Washington does not require that the homestead "owner" have a legal interest in the property and deems occupancy and use as the key to the right to homestead, one must, when there is not occupancy and use, have at least an equitable interest in the property in order to have a homestead. Felton v. Citizens Fed. Sav. & Loan Ass'n of Seattle, 679 P.2d 928, 930 (Wash. 1989). Here, the debtor had neither legal nor equitable interest in light of the terms of the state-court order.

Washington has two basic methods for establishing a homestead. Arkison v. Gitts (In re Gitts), 116 B.R. 174, 178 (9th Cir. BAP 1990), aff'd & adopted, 929 F.2d 1109 (9th Cir. 1991). First, under RCW 6.13.040(1),⁵ an automatic homestead exemption is

⁵ That section of RCW provides, in pertinent part:

(1) Property described in RCW 6.13.010 constitutes a homestead and is automatically protected by the exemption described in RCW 6.13.070 from and after the time the real or personal property is occupied as a principal residence by the owner or, if the homestead is unimproved or improved land that is not yet occupied as a homestead, from and after the declaration or declarations required by the following subsections are filed for record or, if the homestead is a mobile home not yet occupied as a homestead and located on land not owned by the owner of the mobile home, from and after delivery of a declaration as prescribed in RCW 6.15.060(3)(c) or, if the homestead is any other personal property, from and after the delivery of a declaration as prescribed in RCW 6.15.060(3)(d).

(2) An owner who selects a homestead from unimproved or improved land that is not yet occupied as a homestead must execute a declaration of homestead and file the same for record in the office of the recording officer in the county in which the land is located. However, if the owner also owns another parcel of property on which the owner presently resides or in which the owner claims a homestead, the owner must also execute a declaration of abandonment of homestead on that other property and file the same for record with the recording officer in the county in which the land is located.

(continued...)

1 created for "[p]roperty described in RCW 6.13.010 [which]
2 constitutes a homestead and is automatically protected by the
3 exemption described in RCW 6.13.070⁶ from and after the time the
4 property is occupied as a principal residence by the owner." Id.

5 The second way to establish a homestead is for an owner to
6 declare a homestead. Gitts, 116 B.R. at 178. "[I]mproved land
7 that is not yet occupied as a homestead" is protected by the
8 exemption from and after the time the declaration is filed for the
9 record. Id.; Wash. Rev. Code § 6.13.040(1) (2004). In order to
10 "establish a valid declared homestead exemption, an owner must
11 intend to reside on the property, record a declaration of
12 homestead, and record a declaration of abandonment of any
13 automatic homestead or any existing declared homestead." Gitts,
14 116 B.R. at 178.

15 While exemptions are determined as of the date of bankruptcy,
16 the validity of a declared Washington homestead requires focus on

18 ⁵(...continued)

19 (3) The declaration of homestead must contain: (a) A
20 statement that the person making it is residing on the
21 premises or intends to reside thereon and claims them as a
22 homestead

23 Wash. Rev. Code § 6.13.040 (2004).

24 ⁶ That section of RCW provides in pertinent part:

25 (1) Except as provided in RCW 6.13.080, the homestead is
26 exempt from attachment and from execution or forced sale
27 for the debts of the owner up to the amount specified in
28 RCW 6.13.030. The proceeds of the voluntary sale of the
homestead in good faith for the purpose of acquiring a
new homestead, and proceeds from insurance covering
destruction of homestead property held for use in
restoring or replacing the homestead property, up to the
amount specified in RCW 6.13.030, shall likewise be
exempt for one year from receipt, and also such new
homestead acquired with such proceeds.

Wash. Rev. Code § 6.13.070 (2004).

1 the time the declaration is recorded. Cisneros v. Kim (In re
2 Kim), 257 B.R. 680, 684 (9th Cir. BAP 2000), aff'd, 35 F. App'x
3 592 (9th Cir. 2002); Wolf v. Salven (In re Wolf), 248 B.R. 365,
4 367-68 (9th Cir. BAP 2000).

5 II

6 Under RCW 6.13.040(1), homestead protection is "automatic" if
7 the occupancy requirement is met. Wash. Rev. Code § 6.13.040
8 (2004); Gitts, 116 B.R. at 178; Sweet v. O'Leary (In re Sweet),
9 944 P.2d 414, 415 (Wash. Ct. App. 1997).

10 Here, at the time the debtor filed his petition, he did not
11 occupy the residence. Pursuant to the decree of dissolution, he
12 could no longer occupy the residence and had been "removed" from
13 the residence four months before he filed his petition.
14 Consequently, the debtor did not occupy the property and, thus,
15 was not entitled to Washington's automatic homestead exemption.

16 III

17 The remaining method for the debtor to exempt the property
18 was to record a declaration establishing his intent to reside
19 there. Wash. Rev. Code. §§ 6.13.010(1) & 6.13.040(3) (2004).
20 Hence, the pivotal issue at the bankruptcy court was whether the
21 debtor satisfied the intent requirement of a declared homestead.

22 Ordinarily, intent is an inherently subjective matter that is
23 poorly suited to summary disposition. In this instance, however,
24 the crucial fact was beyond dispute: any "intent" to reside on
25 the property in the future was impossible in light of the order
26 excluding the debtor, divesting his ownership, and requiring sale.

27 The debtor contends that although no cases squarely address
28 the intent issue, there are cases that address the requirement

1 that a homestead declaration be filed in "good faith," which has
2 been construed to mean that the statement of intent must be
3 accurate. Heck v. Kaiser Gypsum Co., 351 P.2d 1035, 1036 (Wash.
4 1960); Clark v. Davis, 226 P.2d 904, 908 (Wash. 1951).

5 In Clark, the Washington Supreme Court had to decide "how
6 [Clark] could, in good faith, have intended to reside on the
7 premises when, at the time she filed her [homestead] declaration,
8 the property had been ordered sold in the partition suit which
9 she, as plaintiff, had instituted." Clark, 226 P.2d at 908.

10 Ultimately, it ruled that at the time Clark "filed her declaration
11 of homestead, she, in good faith, actually intended to occupy the
12 premises with her family as a home," which conclusion followed
13 from a record showing that Clark attended the partition sale and
14 made bids: "She had with her a cashier's check for \$500 to make
15 the earnest money payment as required by the notice of sale. It
16 was testified without objection that she had also contacted a bank
17 concerning a loan in the event she was the successful bidder, and
18 the bank agreed to loan her the money." Id.

19 Although the debtor contends that he should prevail under the
20 rule in Clark because he executed his declaration of intent to
21 occupy in good faith, Clark does not help him. The problem is
22 that the record is devoid of summary judgment evidence that would
23 corroborate the existence of an actual good faith intent or, as in
24 Clark, establish that he took actions preparatory to purchasing
25 the property for his own account.

26 On the record before us, there is only the debtor's homestead
27 declaration on a standard pre-printed legal form, the dissolution
28 order terminating his ownership interest and excluding him from

1 the property, and the debtor's declaration asserting that he had
2 no intention of abandoning his interest in the property when he
3 was forced to find other living arrangements and that in order to
4 protect his homestead interest he filed a declaration. His
5 declaration does not speak either to his good faith or to his
6 intention to return to the property. Nor, as noted, does the
7 record contain summary judgment evidence suggesting that the
8 debtor took affirmative steps to return to the property or either
9 to establish or to retain an ownership interest in the property.

10 The bottom line is that a Washington homestead declaration
11 "must speak the truth" in order to be valid. Bank of Anacortes v.
12 Cook, 517 P.2d 633, 637 (Wash. Ct. App. 1974) ("Cook"). In other
13 words, it must accurately reflect the declarant's true intent.
14 Heck, 351 P.2d at 1036 (factual indicia contradicted intent);
15 Clark, 226 P.2d at 908 (factual indicia supported intent).

16 Factually, it is beyond cavil that, when the debtor executed
17 and recorded his declaration, he neither resided on the premises
18 nor, as a matter of law, could reside there in the future because
19 the divorce decree "divested" him of his property interest and
20 required that he be physically excluded from the property. To the
21 extent that the debtor nevertheless "intended" to return to the
22 property, the probability of a return in such circumstances was
23 too remote to be material. Hence, his homestead declaration did
24 not "speak the truth."

25 We reject the suggestion that Gitts controls this appeal.
26 Gitts is inapposite as the debtors in that case were, as a matter
27 of law and fact, entitled to a Washington homestead and entitled
28 to switch their homestead to another property. Gitts, 116 B.R. at

1 180. That is not the situation in this appeal.

2 Although the analysis is technical, the state supreme court
3 has held it to be "well settled" under Washington law that "a
4 declaration of homestead is a right or privilege given a property
5 owner by statute, so that its validity depends upon compliance
6 with the statutory requirements and only by such compliance does
7 the homestead come into existence." Cook, 517 P.2d at 636.

8 In this instance, the debtor did not comply with the
9 statutory requirement that he actually "intend" to occupy the
10 residence. Hence, his prebankruptcy declaration was not
11 effective. The facts do not warrant entitlement to a homestead as
12 of the date of filing of the bankruptcy.

13 CONCLUSION

14 For the foregoing reasons, we AFFIRM.

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