

JUL 31 2012

SUSAN M SPRAUL, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

5	In re:	)	BAP No. ID-11-1495-HJuMk
6	RANDAL SCOTT BANKS and	)	Bk. No. 11-20008
7	DEBRA LOUISE BANKS,	)	
8	Debtors.	)	
9	RANDAL SCOTT BANKS;	)	
10	DEBRA LOUISE BANKS,	)	
11	Appellants,	)	
12	v.	)	<b>M E M O R A N D U M<sup>1</sup></b>
13	WASHINGTON TRUST BANK;	)	
14	C. BARRY ZIMMERMAN,	)	
15	Chapter 13Trustee,	)	
	Appellees.	)	

Argued and Submitted on June 14, 2012  
at Boise, Idaho

Filed - July 31, 2012

Appeal from the United States Bankruptcy Court  
for the District of Idaho

Honorable Terry L. Myers, Chief Bankruptcy Judge, Presiding

Appearances: Cameron Lee Phillips, Esq. argued for the Appellants; Bruce A. Anderson, Esq. of Elsaesser Jarzabek Anderson Elliott & Macdonald, CHTD, argued for Appellee C. Barry Zimmerman, Chapter 13 Trustee; Michael A. Roozekrans, Esq. argued for Appellee Washington Trust Bank.

Before: HOLLOWELL, JURY, and MARKELL, Bankruptcy Judges.

<sup>1</sup> This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.



1 for Pinehurst.

2 On January 19, 2011, the Debtors' filed their chapter 13  
3 plan. The chapter 13 plan proposed to pay Linzy Lane's first  
4 mortgage directly to Bank of America (on which they were current)  
5 and "strip-off" the second mortgage as wholly unsecured. They  
6 did not propose to surrender Linzy Lane. Indeed, the Debtors  
7 continue to reside there.

8 At the § 341 meeting of creditors held February 4, 2011, the  
9 Debtors testified that they did not, at the time, intend to move  
10 to Pinehurst. They stated that if they lost the rental income  
11 and were unable to re-lease the space, they would have to  
12 consider leaving Linzy Lane for Pinehurst. Thus, they stated  
13 that, "If we can't maintain our house, we might have to [move to  
14 Pinehurst]." Based in part on this testimony, the Trustee filed  
15 an objection to the Debtors' homestead exemption for Pinehurst.  
16 Washington Trust Bank (Washington Bank) joined in the objection.

17 An evidentiary hearing was held on July 6, 2011. At the  
18 hearing, Mr. Banks testified that the Debtors intended to reside  
19 at Pinehurst if the rental income was lost. Mr. Banks  
20 acknowledged that Pinehurst was not zoned for residential living  
21 and was not available for occupancy until at least June 2012. He  
22 testified that the Debtors had not taken steps to re-zone  
23 Pinehurst in order to reside there. However, the Debtors  
24 provided photographs of Pinehurst and asserted that Pinehurst was  
25 ready for residential habitation given that the Church had  
26 facilities for restrooms, an industrial kitchen, and various  
27 rooms that could be used as bedrooms.

28 Additionally, the evidence revealed that the Debtors

1 obtained the benefit of a homeowners exemption for Linzy Lane for  
2 tax purposes; however, the Debtors did not request a similar tax  
3 exemption for Pinehurst.

4 On July 28, 2011, the bankruptcy court issued its ruling on  
5 the objection, finding that "several probative factors . . .  
6 impeached the legitimacy of the debtors' stated and declared  
7 subjective intent" to reside at Pinehurst and, therefore, they  
8 were not eligible to claim a homestead exemption for it. Hr'g  
9 Tr. (July 28, 2011) at 14-15. On August 8, 2011, the bankruptcy  
10 court entered its order sustaining the objection of the Trustee  
11 and Washington Bank and disallowing the exemption. The Debtors  
12 timely appealed.

## 13 II. JURISDICTION

14 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
15 § 157(b)(2)(B) and 28 U.S.C. § 1334. We have jurisdiction under  
16 28 U.S.C. § 158.

## 17 III. ISSUE

18 Did the bankruptcy court err in determining that the Debtors  
19 were not entitled to claim a homestead exemption for Pinehurst?

## 20 IV. STANDARDS OF REVIEW

21 We review a bankruptcy court's conclusions of law de novo  
22 and its factual findings for clear error. Hopkins v. Cerchione  
23 (In re Cerchione), 414 B.R. 540, 545 (9th Cir. BAP 2009); Kelley  
24 v. Locke (In re Kelley), 300 B.R. 11, 16 (9th Cir. BAP 2003).  
25 Questions of a debtor's right to claim an exemption are questions  
26 of law subject to de novo review. In re Kelley, 300 B.R. at 16.  
27 However, the issue of a debtor's intent to reside on the property  
28 claimed as exempt is a question of fact reviewed under the

1 clearly erroneous standard. Id.; In re Moore, 269 B.R. 864, 869  
2 (Bankr. D. Idaho 2001).

3 A finding is clearly erroneous if it is "illogical,  
4 implausible, or without support in the record." Retz v. Samson  
5 (In re Retz), 606 F.3d 1189, 1196 (9th Cir. 2010) (citing United  
6 States v. Hinkson, 585 F.3d 1247, 1261-62 & n.21 (9th Cir. 2009)  
7 (en banc)).

#### 8 V. DISCUSSION

9 Property that may be exempted from the bankruptcy estate is  
10 set forth in § 522(b)(1). Idaho has opted out of the federal  
11 exemption scheme and permits its debtors only the exemptions  
12 allowable under state law. 11 U.S.C. § 522(b)(2), (b)(3)(A);  
13 Idaho Code (I.C.) § 11-609 (debtor may exempt from property of  
14 the estate only such property as is specified under the laws of  
15 this state). Therefore, while "the federal courts decide the  
16 merits of state exemptions, . . . the validity of the claimed  
17 state exemption is controlled by the applicable state law."  
18 In re Kelley, 300 B.R. at 16; Thorp v. Gugino (In re Thorp),  
19 2009 WL 2567399, \*3 (D. Idaho, Aug. 12, 2009); I.C. § 11-609.

20 Idaho law allows debtors to claim a homestead exemption, not  
21 to exceed \$100,000 in equity, in real property under I.C. §§ 55-  
22 1001-1011. A homestead "consists of the dwelling house or the  
23 mobile home in which the owner resides or intends to reside."  
24 I.C. § 55-1001(2). There are two methods of creating a homestead  
25 exemption in Idaho. An automatic homestead exemption is created  
26 for property described as a homestead under I.C. § 55-1001 from  
27 and after the time the property is occupied as a principal  
28 residence by the owner. I.C. § 55-1004(1).

1           Alternatively, a property owner may establish a homestead  
2 for exemption purposes by declaration. Id.; I.C. § 1004(2). To  
3 declare a homestead in "unimproved or improved land that is not  
4 yet occupied as a homestead," the property owner must execute and  
5 record a declaration establishing his or her intent to reside on  
6 the property in the future. Id.; I.C. § 55-1004(3).

7 Additionally, if the owner also owns another property on which he  
8 resides, he must record a declaration of abandonment of homestead  
9 for the other property. I.C. § 55-1004(2).

10           The Debtors complied with these requirements. They properly  
11 abandoned their claim to an automatic homestead exemption for  
12 Linzy Lane and recorded the Declaration to establish Pinehurst as  
13 their future homestead. However, the Trustee and Washington Bank  
14 contend that, despite what they said in the Declaration, the  
15 Debtors do not intend to reside at Pinehurst. Thus, the Trustee  
16 and Washington Bank assert that the Debtors failed to meet the  
17 requirements for claiming a homestead exemption under I.C. § 55-  
18 1001(2) ("Property included in the homestead must be actually  
19 intended or used as a principal home for the owner.").

20           A debtor's entitlement to an exemption is determined based  
21 upon facts as they existed at the time the petition is filed.  
22 In re Cerchione, 414 B.R. at 548; Culver, LLC v. Chiu (In re  
23 Chiu), 266 B.R. 743, 751 (9th Cir. BAP 2001) (citing White v.  
24 Stump, 266 U.S. 310, 313 (1924)); Cisneros v. Kim (In re Kim),  
25 257 B.R. 680, 685 (9th Cir. BAP 2000); In re Thorp, 2009 WL  
26 2567399, at \*3. The issue in this case is whether the Debtors  
27 actually intended, at the time of filing, to use Pinehurst as  
28 their primary residence. Although the Debtors declared they

1 intended to reside at Pinehurst, the bankruptcy court found that  
2 there were "impeaching and contradictory facts" that demonstrated  
3 they had "no present intention to leave [Linzy Lane]." H'rg Tr.  
4 (July 28, 2011) at 12-13.

5 For example, the Debtors continued to reside at Linzy Lane  
6 postpetition and continued to pay the first mortgage without  
7 defaulting on any payments. Linzy Lane was central to their  
8 chapter 13 plan because they indicated they intended to strip-off  
9 the second mortgage. Additionally, Pinehurst was a commercial  
10 building, in which the Debtors had only a half-interest. Thus,  
11 the bankruptcy court noted that the Debtors had potential  
12 liabilities to their business partner for conversion of use or  
13 loss of rental income if the Debtors used Pinehurst as a  
14 residence. The bankruptcy court also noted that Pinehurst would  
15 require a zoning variance for residential use. Pinehurst was not  
16 even available until June 2012, at the earliest, if the Church  
17 decided not to renew its lease.

18 The Debtors argue that none of these facts or other evidence  
19 put forth by the Trustee or Washington Bank overcame the  
20 Declaration and the Debtors' testimony that they intended to  
21 reside at Pinehurst.<sup>2</sup> As the Debtors assert in their brief on  
22

---

23 <sup>2</sup> As the parties objecting to the Debtors' claimed homestead  
24 exemption, the Trustee and Washington Bank had the burden of  
25 proof to establish that the exemption claim was not proper.  
26 Rule 4003(c); In re Cerchione, 414 B.R. at 548. Once the Trustee  
27 and Washington Bank produced evidence to rebut the validity of  
28 the claimed exemption, the burden of proof shifted to the Debtors  
to produce evidence establishing that their claimed exemption was  
valid, even though the ultimate burden of persuasion remained  
with the Trustee and Washington Bank. Id. at 549.

1 appeal, "[t]he disagreement is as to what the evidence is capable  
2 of showing about subjective intent of the Banks" and "what  
3 inferences can be made from the circumstantial evidence  
4 presented."

5 In its ruling, the bankruptcy court made a factual finding  
6 that the Debtors, despite what they stated, did not actually  
7 intend to make Pinehurst their homestead or permanent residence.  
8 The bankruptcy court determined that there were other factors  
9 that made their statements regarding their intent not credible.  
10 A homestead declaration must be filed in good faith, which is  
11 construed as meaning that "'it must speak the truth.'" Wilson v.  
12 Arkison (In re Wilson), 341 B.R. 21, 27 (9th Cir. BAP 2006)  
13 (applying Washington law); see also, Blagg v. Bass, 261 F.2d 631,  
14 635 (9th Cir. 1958). There must be a "good faith intent to  
15 occupy the premises as a homestead and intent must be shown by  
16 something more than mere declarations." In re Harris, 2010 WL  
17 2595294, \*5 (Bankr. D. Idaho June 23, 2010) (internal citation  
18 omitted). After reviewing the record, we conclude that the  
19 bankruptcy court's finding that the Debtors did not intend to  
20 occupy Pinehurst as their homestead or residence was not  
21 illogical, implausible, or without support in inferences from the  
22 facts in the record.

23 As noted by the bankruptcy court, the Debtors failed to  
24 provide any evidence that corroborated their intent to move to  
25 Pinehurst. There was no evidence that they had researched  
26 whether a zoning variance could be obtained in order to reside at  
27 Pinehurst, which is located in a strip mall, or, that they had  
28 negotiated an arrangement with their business partner to reside



1 at Pinehurst. Mr. Banks testified that because there was no debt  
2 on the building, the Debtors would only be responsible for taxes  
3 and insurance and therefore, by moving to Pinehurst, they could  
4 cut their expenses considerably. But there was no mention of  
5 what rent or other payments would be required given the co-  
6 ownership of the property.

7 Furthermore, the Debtors testified that they intended to  
8 reside at Linzy Lane "unless something forces [them] out."  
9 Mr. Banks testified that if the Debtors no longer had the rental  
10 income from Pinehurst, then they would move into the building.  
11 In the event they moved to Pinehurst, they would either try to  
12 rent Linzy Lane or surrender it at that time. The Debtors  
13 acknowledged that they intended to move essentially if no better  
14 option came along that would allow them to remain. See In re  
15 Harris, 2010 WL 2595294, at \*5 ("The intent to reside is  
16 equivocal and insufficient to establish a homestead.").

17 Idaho's homestead exemption statutes are liberally construed  
18 in favor of debtors. In re Cerchione, 414 B.R. at 546; In re  
19 Kline, 350 B.R. 497, 502 (Bankr. D. Idaho 2005). Nevertheless,  
20 we must defer to the bankruptcy court's findings of fact based on  
21 credibility. Additionally, "[w]here there are two permissible  
22 views of the evidence, the fact finder's choice between them  
23 cannot be clearly erroneous." Anderson v. City of Bessemer City,  
24 N.C., 470 U.S. 564, 574 (1985). Accordingly, the bankruptcy  
25 court's finding that the Debtors did not actually intend to  
26 reside at Pinehurst is not clearly erroneous. The bankruptcy  
27 court, therefore, did not err in sustaining the Trustee's and  
28 Washington Bank's objection to the Debtors' claim of a homestead

1 exemption for Pinehurst.

2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**VI. CONCLUSION**

The Debtors failed to establish the intent to reside on Pinehurst, which was required to claim a homestead exemption. As a result, we AFFIRM the bankruptcy court's order disallowing the homestead exemption.