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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	CC-06-1079-KMoSn
)		
KRISTINA KARR,)	Bk. No.	ND 05-12307-RR
)		
Debtor.)		
_____)		
)		
SANDRA MCBETH, Chapter 7)		
Trustee,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM*	
)		
KRISTINA KARR,)		
)		
Appellee.)		
_____)		

Argued and Submitted on September 22, 2006
at Pasadena, California

Filed - October 2, 2006

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Robin L. Riblet, Bankruptcy Judge, Presiding

Before: KLEIN, MONTALI, and SNYDER,** Bankruptcy Judges.

*This disposition is not appropriate for publication and may not be cited except when pertinent under the doctrine of law of the case or the rules of res judicata, including issue and claim preclusion. See 9th Cir. BAP Rule 8013-1.

**Hon. Paul B. Snyder, United States Bankruptcy Judge for the Western District of Washington, sitting by designation.

1 On Schedule A, she included her joint-tenancy interest in
2 the Santa Cruz property, with the explanation:

3 Debtor is on title as Joint tenant on the property but
4 not on mortgage which is currently owed \$703,863.
5 Debtor is over 55 years of age and has earned less than
6 \$15,000 in the last 12 months. Debtor has owned the
7 property since April, 2001.

8 Debtor's residence is in Santa Cruz but she has lived
9 for the last several months in Moorpark, California
10 since she has been visiting there with relatives since
11 February, 2005.

12 The same statement appears on Schedule C, where she claimed
13 a \$150,000 homestead exemption in the Santa Cruz property in
14 accordance with California Code of Civil Procedure §§ 704.710 -
15 704.850.

16 Appellant chapter 7 trustee timely objected to the homestead
17 exemption in the Santa Cruz property, relying principally on the
18 debtor's statement in the venue portion of the petition and the
19 address provided on the petition. The trustee contended that
20 because the debtor did not reside in the Santa Cruz property,
21 either when she filed her bankruptcy case or for the preceding
22 six months, it could not be claimed as an exempt homestead.

23 The debtor responded that the Santa Cruz property remained
24 her permanent residence throughout her visit with family and that
25 she had resided continuously in the property since 2001.

26 In support of her position that her presence in Moorpark was
27 merely a family visit for mental health reasons, the debtor
28 presented evidence that substantially all of her personal
29 belongings remained in the Santa Cruz residence, that her
30 driver's license and voter registration continued to be based on
31 that residence, and that her dog remained in Santa Cruz under the

1 care of her partner pending her return.

2 Following a hearing on February 7, 2006, at which evidence
3 was taken by declaration without objection and without live
4 testimony, the court ruled that the debtor continuously resided
5 at the Santa Cruz property and that she always "intended that
6 Santa Cruz was her home." The court also found that the debtor's
7 extended visit with family, including her niece in Moorpark, was
8 "to get out of town for a little while" and seek treatment for
9 her mental health issues. Hence, the court overruled the
10 trustee's objection to the claimed homestead exemption.

11 This timely appeal ensued.

13 JURISDICTION

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

17 ISSUE

18 Whether the debtor's sojourn disqualified her for the
19 California "automatic" homestead exemption.

21 STANDARD OF REVIEW

22 Whether the debtor resided at the Santa Cruz property, for
23 purposes of California homestead law, on the date she filed her
24 bankruptcy petition is a fact-intensive question regarding intent
25 that we review for clear error. Neben & Starrett, Inc. v.
26 Chartwell Fin. Corp. (In re Park-Helena Corp.), 63 F.3d 877, 880
27 (9th Cir. 1995). A finding of fact is not clearly erroneous if a
28 permissible view of the evidence of record supports the finding.

1 SEC v. Rubera, 350 F.3d 1084, 1094 (9th Cir. 2003). Clear error
2 exists when, after examining the evidence, the reviewing court is
3 left with a definite and firm conviction that a mistake has been
4 committed. Granite State Ins. Co. v. Smart Modular Tech., Inc.,
5 76 F.3d 1023, 1028 (9th Cir. 1996).

7 DISCUSSION

8 We review the court's assessment of the evidence probative
9 of the debtor's intent regarding her residence during her sojourn
10 with family for psychological reasons before turning to the
11 application of the law to the facts.

13 I

14 The trustee assigns error to the court's factual finding
15 (which was based on state of mind and on other objective
16 evidence), that the Santa Cruz property was her real residence
17 and to its resulting conclusion that the debtor met the residence
18 requirement of California Code of Civil Procedure § 704.710(c)
19 for claiming an automatic homestead exemption.¹

20 Although the statute requires continuous residence, a debtor
21 does not lose the homestead exemption due to a temporary absence

23 ¹The general requirement is:

24 (c) "Homestead" means the principal dwelling (1) in
25 which the judgment debtor or the judgment debtor's spouse
26 resided on the date the judgment creditor's lien attached to
27 the dwelling, and (2) in which the judgment debtor or
28 judgment debtor's spouse resided continuously thereafter
until the date of the court determination that the dwelling
is a homestead. ...

CAL. CODE CIV. PROC. § 704.710(c).

1 from the property, such as for a vacation or hospital stay.
2 Legislative Committee Comment to Amended Cal. Civ. Proc. Code
3 § 704.710; Redwood Empire Prod. Credit Ass'n v. Anderson (In re
4 Anderson), 824 F.2d 754, 756 (9th Cir. 1987). In other words,
5 the California statute embodies a temporary absence doctrine.

6 The trustee's evidence in opposition to the homestead
7 exemption was essentially based on two statements appearing on
8 the face of the debtor's petition: identifying her niece's
9 Moorpark address and checking the box in the venue statement that
10 indicated that she had been domiciled, or had a residence, or a
11 principal place of business, or principal assets in the Central
12 District for at least 180 days immediately preceding the date of
13 the petition.

14 Although the trustee emphasizes the putative admissions made
15 on the face of the petition, the totality of the filed petition
16 and schedules is more equivocal. Schedules A and C, which were
17 filed with the petition, contained statements in which the
18 debtor's residential situation was accurately described. Thus,
19 under a fair reading of the petition and schedules, the factual
20 basis for the debtor's assertion of a homestead exemption in the
21 Santa Cruz property was set forth.

22 The debtor's evidence, in addition to the statements on
23 Schedules A and C, included the debtor's declaration testimony
24 that she merely intended to visit relatives for a period
25 sufficient to address her psychological issues and then return
26 home to Santa Cruz.

27 It was also undisputed that the debtor maintained her voter
28 registration and driver license addresses at the Santa Cruz

1 dwelling and that substantially all her personal belongings
2 remained in the Santa Cruz home, as did her dog.

3 The court believed the debtor's assertions regarding her
4 intent to remain away from her home only temporarily. This
5 determination was consistent with undisputed objective evidence
6 regarding the debtor's official address for purposes of voter
7 registration and the California Department of Motor Vehicles and
8 the location of her personal possessions and her pet. It was
9 also consistent with her statements on Schedules A and C.

10 We reject the appellant's contention made at oral argument
11 that the lack of oral testimony at the hearing means that we
12 should not apply clearly erroneous review and should not defer to
13 the opportunity of the court to judge the credibility of
14 witnesses. Such review and deference is mandated by Federal Rule
15 of Civil Procedure 52(a), which rule applies to this contested
16 matter, and is reiterated in the bankruptcy appellate rules.
17 FED. R. CIV. P. 52(a), incorporated by FED. R. BANKR. P. 7052 &
18 9014; FED. R. BANKR. P. 8013. The deferential standard applies
19 even where the trial court relies solely on a written record.
20 Amanda J. ex rel. Annette J. v. Clark County Sch. Dist., 267 F.3d
21 877, 887 (9th Cir. 2001).

22 Moreover, the trustee waived the issue by not invoking
23 Federal Rule of Bankruptcy Procedure 9014(d) to insist upon
24 testimony in open court. Although Rule 9014(d) requires that
25 testimony of witnesses with respect to disputed material factual
26 issues in contested matters be taken in the same manner as
27 testimony in an adversary proceeding, the trustee's tactical
28 decision not to insist on testimony in open court reflects a

1 knowing litigation choice by a party who cannot thereafter
2 complain about the consequences of that choice. FED. R. BANKR. P.
3 9014(d).

4 The bankruptcy court believed the debtor and found that the
5 facts supported the conclusion that the Santa Cruz property
6 remained her residence throughout her sojourn and thus met the
7 residency requirements of California Code of Civil Procedure
8 § 704.710(c).

9 So long as there is evidence in the record that supports the
10 court's factual findings, there is no clear error in those
11 findings. That is the situation in this instance. As noted, not
12 only was the court entitled to believe the debtor, there was
13 objective evidence of the continuous presence of her personal
14 possessions, including her dog, in the subject residence and of
15 her continued use of that residence for voting and her driver
16 license. In light of this accumulation of evidence, we cannot
17 say that the trial court clearly erred.

18 Moreover, we would reach the same conclusion even if we were
19 applying a more stringent standard of review. As noted, the
20 petition and schedules are not as damaging to the debtor's
21 position as the appellant asserts. Against the assertions on the
22 first page of the petition regarding address and venue, there are
23 the statements made on Schedules A and C that more accurately
24 describe the situation. A fair reading of the schedules supports
25 the debtor's position regarding her homestead residence.

26 If there is an issue created by the petition and the
27 schedules, it relates to venue. The record suggests that venue
28 under 28 U.S.C. § 1408 may not have been correctly sited in the

1 Central District of California. Incorrect venue, however, does
2 not deprive a court of jurisdiction over a bankruptcy case.

3 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE,
4 § 1063 (3d ed. 2002). The trustee did not make a motion to
5 transfer the case to the Northern District of California. In any
6 event, nothing in the Bankruptcy Code or in California law links
7 bankruptcy venue to entitlement to a homestead exemption.

8
9 II

10 California's homestead exemption laws subdivide into two
11 groups: (1) the "automatic" homestead exemption laws set forth in
12 California Code of Civil Procedure §§ 704.710 - 704.850; and (2)
13 the declared homestead exemption laws set forth in California
14 Code of Civil Procedure §§ 704.910 - 704.995.¹ Because the
15 debtor claimed her exemption under Cal. Code Civ. Pro. §§ 704.710
16 - 704.850, and because she did not record the homestead
17 declaration that is essential for a "declared" homestead, the
18 "automatic" homestead exemption governs this case.

19 The "automatic" homestead exemption applies to a debtor's
20 principal dwelling in which the debtor resided at the time a
21 creditor's lien attached, and in which the debtor resided
22 continuously until the court determines that the dwelling is a
23 homestead. CAL. CIV. PROC. CODE § 704.710(c); Kelley v. Locke (In
24 re Kelley), 300 B.R. 11, 17 (9th Cir. BAP 2003).

25 The exemption is determined as of the date of the bankruptcy
26 petition. Nadel v. Mayer (In re Mayer), 167 B.R. 186, 189 (9th

27
28

¹A declared homestead exemption requires the party residing
in the dwelling to record a homestead declaration in the county
recorder's office. CAL. CIV. PROC. CODE § 704.920.

1 Cir. BAP 1994). In making that determination, courts consider
2 two factors: (1) the debtor's physical occupancy of the property
3 on the petition date; and (2) the debtor's intention to live
4 there. Kelley, 300 B.R. at 21, citing Ellsworth v. Marshall, 196
5 Cal. App. 2d 471, 474 (1961).

6 The fact that the debtor did not actually physically occupy
7 the Santa Cruz property on the date of her petition does not
8 automatically prevent her from claiming a homestead exemption.
9 In re Pham, 177 B.R. 914, 918 (Bankr. C.D. Cal. 1994). In 1983,
10 the California statute was amended to delete the word "actually"
11 from the phrase "actually resides" so as to permit a temporary
12 absence doctrine designed to accommodate such situations as a
13 vacation or hospital stay. CAL. CIV. PROC. CODE § 704.710;²
14 Anderson, 824 F.2d at 756.

15 In In re Bruton, 167 B.R. 923, 926 (Bankr. S.D. Cal. 1994),
16 the court articulated a useful analysis for resolving temporary
17 absence issues that focuses on "whether the debtors demonstrated,
18 rather than merely claimed, their intent to return to their home
19 after the absence." Id.

20
21 ²The California legislature amended the statute in 1983 to
22 clarify this point:

23 Sections 704.710 and 704.930 are amended to delete
24 "actually" which appears before "resides" or "resided" in
25 various provisions of the sections. The word "actually" is
26 deleted to avoid a possible construction that a person
27 temporarily absent (such as a person on vacation or in the
28 hospital) could not claim a dwelling exemption for his or
her principal dwelling, or file a homestead declaration on
his or her principal dwelling, merely because the person is
temporarily absent, even though the dwelling is the person's
principal dwelling and residence.

17 Cal. L. Revision Comm'n Reports 854 (1983).

1 In this case, the court utilized the Bruton analysis when it
2 reasoned that the evidence demonstrated the debtor's intent was
3 to return to her home in Santa Cruz and merely to visit her niece
4 in Moorpark, rather than to establish another residence. In
5 other words, the debtor's assertions were more than mere claims;
6 rather, they were claims that were consistent with objective
7 evidence and that persuaded the trier of fact that the temporary
8 absence standard was satisfied.

9 In attempting to distinguish Bruton, the trustee argues from
10 the incorrect premise that the facts in this case demonstrate
11 that the debtor established a new residence in Moorpark. To the
12 contrary, not only are the facts at least ambiguous on the point,
13 the weight of the objective evidence supports the debtor's
14 continued residence in Santa Cruz.

15 The trustee contends that the "intent" requirement is not
16 "intent to return," but rather intent that the occupancy at the
17 purported residence be permanent. This is a distinction without
18 a meaningful difference. If the debtor is temporarily absent
19 from the permanent residence when the petition is filed, then
20 intent to return to the residence that the debtor considers
21 permanent is logically relevant in the sense that it is probative
22 of the degree of "temporariness" and of the proposition that one
23 has not ceased residing in the dwelling.

24 As noted, whether the debtor is entitled to an exemption is
25 determined as of the date of the bankruptcy petition. Mayer, 167
26 B.R. at 188. Both Kelley and Ellsworth focus on the debtor's
27 physical occupation of the property and the debtor's intention to
28 live at the property. Kelley, 300 B.R. at 211; Ellsworth, 196

1 Cal. App. 2d at 474. Thus, the debtor's intent is measured as of
2 the petition date.

3 As of the petition date, the debtor was not physically
4 present at the Santa Cruz property, but she had left all her
5 personal belongings there, she left her dog there, and she
6 maintained her Santa Cruz address with the Department of Motor
7 Vehicles and the Santa Cruz County Elections Department. She
8 expressly stated on her bankruptcy petition that her residence is
9 in Santa Cruz, and she had been visiting relatives in Moorpark.
10 There is no substantial evidence to the contrary. Those facts,
11 which are supported by the evidence, support the bankruptcy
12 court's conclusion that the debtor continuously resided at the
13 Santa Cruz property on the petition date.

14 The debtor was in Moorpark temporarily visiting her niece in
15 an attempt to overcome severe emotional problems. The fact that
16 the visit lasted more than six months does not make the
17 bankruptcy court's findings of fact clearly erroneous. When
18 there are two permissible views of the evidence, the trial
19 court's choice between them is not clearly erroneous. Village
20 Nurseries v. Gould (In re Baldwin Builders), 232 B.R. 406, 409-10
21 (9th Cir. BAP 1999).³

22
23 ³We need not consider who had the burden of proof because,
24 even if the debtor had the burden, we agree that she demonstrated
25 by a preponderance of evidence the residency required to have a
California "automatic" homestead in the Santa Cruz dwelling. We
note, however, that the burden of proof is uncertain.

26 Although Federal Rule of Bankruptcy Procedure 4003(c)
27 purports to allocate the burden of proof to the objecting party,
doubt about the validity of that rule arises in light the Supreme
28 Court's decision in Raleigh v. Ill. Dep't of Revenue, 530 U.S.
15, 20-21 (2000), holding that the burden of proof in bankruptcy
matters is substantive, not procedural, and is governed by

(continued...)

1 CONCLUSION

2 The bankruptcy court applied the correct law and made
3 findings supported by the evidence. We are not left with a
4 definite and firm conviction that a mistake was made when the
5 court concluded that, for homestead purposes, the debtor resided
6 in the Santa Cruz property on the date she filed her bankruptcy
7 case and is able to claim the Santa Cruz property as exempt as
8 her homestead. There being no error, the order is AFFIRMED.

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15 ³(...continued)
16 applicable nonbankruptcy law. Gonzalez v. Davis (In re Davis),
17 323 B.R. 732, 740-45 (9th Cir. BAP 2005) (Klein, J., concurring).
California law allocates the burden of proof on a homestead
based on the records of the county tax assessor:

18 If the records of the county tax assessor indicate that
19 there is a current homeowner's exemption or disabled
20 veteran's exemption for the dwelling claimed by the judgment
21 debtor or the judgment debtor's spouse, the judgment
22 creditor has the burden of proof that the dwelling is not a
23 homestead. If the records of the country tax assessor
24 indicate that there is not a current homeowners's exemption
or disabled veteran's exemption for the dwelling claimed by
the judgment debtor or the judgment debtor's spouse, the
burden of proof that the dwelling is a homestead is on the
person who claims that the dwelling is a homestead.

25 CAL. CIV. PROC. CODE § 704.780(a)(1). As confirmed at oral
26 argument, the record does not indicate whether the relevant
27 exemptions appear on the records of the county tax assessor for
Santa Cruz County.

28 Nevertheless, the evidence is such that, if the debtor
(instead of the trustee) had the burden of proof, she succeeded
in carrying it.