

AUG 22 2005

**HAROLD S. MARENUS, CLERK
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NOT FOR PUBLICATION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.	EC-04-1516-SBMa
)		
WILLIAM F. HARRINGTON)	Bk. No.	01-25387
and PATRICIA HARRINGTON,)		
)		
Debtors.)		
_____)		
PATRICIA HARRINGTON,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM¹	
)		
GERALD AINSWORTH, Trustee,)		
)		
Appellee.)		
_____)		

Argued and Submitted on
June 24, 2005 at Sacramento, California

Filed - August 22, 2005

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

Honorable Christopher M. Klein, Bankruptcy Judge, Presiding

Before: SMITH, BRANDT AND MARLAR, Bankruptcy Judges

¹This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

1 Surviving Debtor Patricia Harrington ("Debtor")² appeals an
2 order sustaining the trustee's objection to her claim of
3 exemption. The order was entered October 6, 2004 and Debtor
4 filed a timely notice of appeal on October 14, 2004. We AFFIRM.

5 FACTS

6 There are no factual disputes in this case. Patricia and
7 William Harrington (d/b/a JKS, Industries, Inc. and Lon's Mobile
8 Home Service) (collectively, "Debtors") filed this voluntary
9 chapter 7³ petition on May 3, 2001. Debtors' Schedule A listed
10 residential property, commonly known as 5640 Oak Knoll Lane,
11 Auburn, California, with a market value of \$480,000 and secured
12 obligations against the property totaling \$399,000. Debtors'
13 Schedule C, also filed on May 3, claimed an \$81,000 homestead
14 exemption under Cal. Civ. Pro. Code ("CCP") § 704.020. The
15 trustee did not object to the exemption.⁴ On the petition date,
16 Debtors were both under the age of 65 and gainfully employed.

17 Three years later, in May 2004, Debtors had separated and
18 William was attempting to sell the Oak Knoll property when he
19 died suddenly of congestive heart failure at the age of 62. On
20 May 25, the court approved the trustee's employment of Coldwell
21 Banker to market and sell the Oak Knoll property. The trustee
22 moved for approval of sale of the property on July 28. Debtor

23 _____
24 ²William Harrington died on May 17, 2004.

25 ³Unless otherwise indicated, all chapter, section and rule
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

27 ⁴The trustee confirmed at oral argument that he does not
28 object to the claimed exemption amount of \$81,000, which exceeds
the statutorily allowed \$75,000, and that issue is not on appeal.

1 objected to the sale on the ground that the sale price was too
2 low. At the same time, she amended her Schedule C, claiming that
3 the value of the Oak Knoll property had increased to \$850,000 and
4 that her exemption had increased to \$150,000, pursuant to
5 § 522(b)(2) and a recent revision to CCP § 704.730(a)(3)(B)-(C).

6 Debtor believed she was entitled to the increased exemption
7 because her circumstances had changed: she was now over the age
8 of 55, was medically unable to work, had annual income of less
9 than \$15,000, and was awaiting approval of social security
10 disability benefits. By the amendment, Debtor sought to take
11 advantage of a January 1, 2004, amendment to CCP § 740.730 that
12 increased the amount of a claimed exemption from \$125,000 to
13 \$150,000 for (1) persons 65 years or older, (2) persons unable to
14 work due to physical or mental disabilities, or (3) persons 55
15 years or older with a gross annual income of less than \$15,000,
16 or if married, less than \$20,000. CCP § 704.730(a)(3)(A)-(C).

17 The trustee objected to Debtor's increased exemption,
18 arguing that she was entitled only to the value of her exemption
19 on the date she filed, regardless of how the facts or law may
20 change thereafter. The trustee also argued that the sale should
21 go forward and submitted supporting declarations of the real
22 estate brokers responsible for marketing the property. On August
23 30, the court authorized the sale of the property for \$698,000.
24 The order permitted the Trustee to pay certain allowed claims
25 from the proceeds of the sale, but did not resolve the issue of
26 the amount of Debtor's exemption. The order provided that
27 Debtor's disputed homestead exemption claim would attach to the
28 remaining proceeds "to the same extent and validity as they

1 existed as of the commencement of the debtors' case pending a
2 resolution thereof."

3 After the issue of the value of Debtor's exemption was fully
4 briefed and argued, the court sustained the trustee's objection
5 and held that Debtor was only entitled to the \$81,000 exemption.
6 Debtor appeals.

7 JURISDICTION

8 The bankruptcy court had jurisdiction under 28 U.S.C. § 1334
9 and § 157(b)(1) and (b)(2)(I). This Panel has jurisdiction under
10 28 U.S.C. § 158(c).

11 ISSUE

12 Whether the court erred in holding that date for measuring
13 entitlement to and value of a homestead exemption in California
14 is the date the petition was filed.

15 STANDARD OF REVIEW

16 "Questions regarding the right of a debtor to claim
17 exemptions are questions of law subject to de novo review[.]" In
18 re Arnold, 252 B.R. 778, 784 (9th Cir. BAP 2000); see also, Nadel
19 v. Mayer (In re Mayer), 167 B.R. 186, 188 (9th Cir. BAP
20 1994) ("The determination of a homestead exemption based on
21 undisputed facts is a legal conclusion interpreting statutory
22 construction which is reviewed de novo.").

23 DISCUSSION

24 Debtor maintains that the court erred in not allowing her to
25 recalculate the value of her homestead exemption because her
26 circumstances changed between the petition date and the time of
27 the sale. We disagree.

1 A. Debtor's exemption was fixed on the petition date.

2 The bankruptcy estate includes all of a debtor's interests
3 in property at the commencement of the case, except property that
4 the debtor elects to exempt based on applicable federal or state
5 law. See §§ 541(a), 522(b)(2); Seror v. Kahan (In re Kahan), 28
6 F.3d 79, 81 (9th Cir. 1994); Kendall v. Pladson (In re Pladson),
7 35 F.3d 462, 464 (9th Cir. 1994) ("Exemptions prevent certain
8 property from becoming part of the bankruptcy estate, and thus
9 place the exempted property beyond the reach of the bankruptcy
10 trustee.").

11 Section 522 is the principal Code section governing
12 exemptions. Subsection (d) lists the exemptions that a debtor
13 can claim, but § 522(b) allows states to opt out of § 522(d)'s
14 provisions and instead permits debtors to claim exemptions on
15 property available under state law. In re Yau, 115 B.R. 245, 248
16 (C.D. Cal. 1990). Like most states, California has opted out of
17 the federal exemption scheme. 35 F.3d at 464. California has
18 established its own exemption system, which is codified at CCP §§
19 704, et seq.⁵ In re Rostler, 169 B.R. 408, 411 (Bankr. C.D. Cal.

20 ⁵Under CCP § 704.720(b), "the proceeds of sale [of a
21 homestead] . . . are exempt in the amount of the homestead
22 exemption provided in Section 704.730." Section 704.730 in
effect at the time Debtors filed their petition provides, in
relevant part:

23 Amount of homestead exemption

24 (a) The amount of the homestead exemption is one of the
following:

25 (2) . . . \$ 75,000 if the judgment debtor or spouse of
26 the judgment debtor who resides in the homestead
is at the time of the attempted sale of the
27 homestead a member of a family unit, and there is
at least one member of the family unit who owns no
28 interest in the homestead or whose only interest

(continued...)

1 1994). We look to state law when interpreting California's
2 exemption statutes. In re Morgan, 157 B.R. 467, 470 (Bankr. C.D.
3 Cal. 1993) (holding that when there is an objection to a homestead
4 exemption, the court must apply California law to determine the
5 validity, extent and amount of the exemption).

6 There is no dispute that Debtor is entitled to a homestead
7 exemption. The only dispute is the amount. Under § 704.730(a),
8 a debtor may claim either \$ 50,000, \$ 75,000, or \$ 125,000,
9 depending on factors such as age, income, and family status. In
10 re Pladson, 35 F.3d at 464; In re Morgan, 157 B.R. at 470. Cases

11 ⁵(...continued)

12 in the homestead is a community property interest
with the judgment debtor.

13 (3) . . . \$ 125,000 if the judgment debtor or spouse
14 of the judgment debtor who resides in the
homestead is at the time of the attempted sale of
15 the homestead any one of the following:

16 (A) A person 65 years of age or older.

17 (B) A person physically or mentally disabled and
18 as a result of that disability is unable to
engage in substantial gainful employment.
19 There is a rebuttable presumption affecting
the burden of proof that a person receiving
20 disability insurance benefit payments under
Title II or supplemental security income
21 payments under Title XVI of the federal
Social Security Act satisfies the
22 requirements of this paragraph as to his or
her inability to engage in substantial
23 gainful employment.

24 (C) A person 55 years of age or older with a
25 gross annual income of not more than . . . \$
15,000 or, if the judgment debtor is married,
26 a gross annual income, including the gross
annual income of the judgment debtor's
spouse, of not more than . . . \$ 20,000 and
the sale is an involuntary sale.

27 Section 704.730(a)(3) was amended, effective January 1,
28 2004, to increase the amount available from \$125,000 to \$150,000.
See Amendments to § 704.730.

1 interpreting the statute are clear: the homestead exemptions set
2 forth in CCP § 704.730(a) are dependent upon whether "the debtor
3 is eligible for an exemption as of the date of the petition." In
4 re Rostler, 169 B.R. at 411 (emphasis added), citing In re Dore,
5 124 B.R. 94, 98 (Bankr. S.D. Cal. 1991) (holding that exemption
6 rights are fixed as of the petition date); see also, In re
7 Herman, 120 Bankr. 127, 130 (9th Cir. BAP 1990) ("Exemptions are
8 determined as of the date the bankruptcy petition was filed.");
9 In re Whitman, 106 B.R. 654 (Bankr. S.D. Cal. 1989); In re
10 Seyfert, 97 B.R. 590, 592 (Bankr. S.D. Cal. 1989) ("By
11 establishing the debtor's exemption rights as of the petition
12 date, uniformity and certainty is promoted in the area of
13 exemptions.").

14 As the Herman court commented,

15 Absent conversion from one chapter to another, the
16 nature and extent of a debtor's exemption rights are
17 determined as of the date of the petition. The
18 petition date is appropriate because the existence of
19 exemptions presupposes a hypothetical attempt by the
20 trustee to levy upon and sell all of the debtor's
21 property upon the filing of the petition.

22 120 B.R. at 130 (citations omitted).

23 The court here held that the critical date for determining
24 Debtors' exemption rights is the petition date and that there was
25 no evidence that Debtors qualified for an exemption of \$125,000
26 at that time. Therefore, the court held that, as a matter of
27 law, Debtors were entitled to an exemption of \$75,000.

28 In their petition, Debtors claimed a homestead exemption of
\$81,000, stating that CCP § 704.720 was the basis for the
exemption. It appears that this figure was based on the
difference between the value Debtors assigned to their residence,

1 \$480,000, and the amount of the secured obligation thereon,
2 \$399,000, as listed in their schedules. Regardless of the
3 figure's origin, since there was no objection to the exemption,
4 the court held, under Taylor v. Freeland & Kronz, 503 U.S. 638
5 (1992), that Debtors were entitled to an exemption of \$81,000.
6 As previously noted, the trustee does not dispute this figure.

7 On appeal, Debtor maintains that the court should have
8 allowed her exemption to be increased because her changed
9 circumstances qualified her for a higher exemption under CCP §§
10 704.730(a)(3)(B)-(C), which was increased to \$150,000 by an
11 amendment effective January 1, 2004. Debtor is wrong for two
12 reasons.

13 First, although the amendment to CCP § 704.730(a)(3)
14 increased the homestead exemption to \$150,000, even if Debtor
15 qualified for this exemption, she would only be entitled to the
16 amount allowed by the statute at the time she filed her petition,
17 which was \$125,000. Hyman v. Plotkin (In re Hyman), 967 F.2d
18 1316, 1319 (9th Cir. 1992). The Hyman court specifically
19 addressed this issue and held that "[a]lthough Cal. Civ. Proc.
20 Code § 704.730(a)(2) was amended to increase the homestead
21 exemption [from \$45,000] to \$75,000, the Hymans are only entitled
22 to a \$45,000 homestead exemption because an exemption amount is
23 determined on the date the petition is filed." Id., citing In re
24 Herman, 120 B.R. 127, 130 (9th Cir. BAP 1990).

25 Next, Debtor did not qualify for a homestead exemption under
26 CCP §§ 704.730(a)(3)(B)-(C) when her petition was filed because
27 there is no evidence that she was physically or mentally disabled
28 on that date. Further, she was gainfully employed as a nurse

1 earning \$3,000 a month and her husband had monthly earnings of
2 \$3,600.

3 The case of In re Rostler, 169 B.R. 408, 411 (Bankr. C.D.
4 Cal. 1994), is instructive. There, the debtor was diagnosed with
5 a condition, post-petition, that her doctor determined had
6 symptoms, pre-petition. She amended her schedules to claim the
7 increased exemption under CCP § 704.730(a)(3)(B) and the trustee
8 objected on the ground that, as of the petition date, the debtor
9 was not suffering from a physical or mental disability. Id. The
10 trustee further asserted that even if the debtor had a physical
11 or mental disability at the petition date, she had not shown that
12 the disability rendered her unable to engage in substantial
13 gainful employment as required by § 704.730(a)(3)(B). Id. The
14 court held that the plain language of CCP § 704.730(a)(3)(B) has
15 two requirements: the debtor has a mental or physical disability;
16 and, as a result of the disability, the debtor is unable to
17 engage in substantial gainful employment. Id. "When asserting
18 the exemption in bankruptcy, these conditions must exist as of
19 the date of the petition." Id., citing, Dore, 124 Bankr. at 98.

20 At oral argument, Debtor attempted to support her position
21 by analogy, arguing that Sylvester v. Hafif (In re Sylvester),
22 220 B.R. 89 (9th. Cir. BAP 1998) stands for the proposition that,
23 under CCP § 704.140, a debtor's personal injury exemption
24 "ripens" post-petition. The debtor in Sylvester settled a law
25 suit involving multiple claims, including a personal injury claim
26 for "emotional distress" in June 1994, and filed a chapter 7
27 petition in October 1996. The debtor claimed that all of the
28 settlement proceeds were exempt under the personal injury

1 exemption. On appeal, we were unable to determine what portion,
2 if any, of the settlement proceeds was for the emotional distress
3 claim, and what portion was for other claims. We, therefore,
4 remanded the case back to the bankruptcy court to determine the
5 portion of the settlement proceeds representing payment for the
6 emotional distress claim. We did not hold that the exemption
7 "ripened" post-petition. Rather, we instructed the bankruptcy
8 court to determine the amount which the debtor could claim as an
9 exemption as of the date of the petition.

10 The bankruptcy court correctly found that Debtor did not
11 qualify for an exemption under CCP §§ 704.730(a)(3)(B)-(C) as of
12 the petition date and, therefore, was not entitled to claim the
13 exemption at a later date.

14 B. The Hyman case does not suggest that debtors can
15 revisit claimed exemptions at sale time.

16 Debtor argues that in cases such as this one, where a
17 trustee takes no action for several years and then decides to
18 sell the property, the exemption should be revisited because the
19 estate has benefitted by the continued maintenance of the
20 property, at substantial expense to the debtor. According to
21 Debtor, the case of In re Hyman supports her position because
22 that case suggests that declared homestead exemptions on real
23 property should be calculated both at the petition date, and at
24 the time of the trustee's sale, since that is when the exemption
25 "comes into play". 967 F.2d 1316. We believe this is a
26 misreading of the Ninth Circuit's ruling.

27 The Hymans were California debtors whose residence was
28 valued at \$415,000 on their petition date. 967 F.2d at 1321.

1 With \$348,000 in liens encumbering the property, the Hymans' net
2 equity in the residence was approximately \$ 67,000. The Hymans
3 claimed a \$45,000 homestead exemption. The bankruptcy court
4 approved the trustee's motion to sell the residence. The Hymans
5 sought declaratory relief claiming that they were entitled to all
6 post-bankruptcy-petition appreciation in their residence. Id.

7 The Ninth Circuit held

8
9 The Hymans' claim for appreciation is without merit.
10 The California statute gives the Hymans a \$45,000
11 exemption as of the time of sale, not a \$45,000 equity
12 in the property. . . . Only in the bankruptcy context,
13 where an appreciable period of time usually passes
14 between filing of the petition and sale of the
15 property, can the property rise or fall in value. . . .
16 The debtor's right to use the exemption comes into play
17 not upon the filing of the petition, but only if and
18 when the trustee attempts to sell the property.

19 In re Hyman, 967 F.2d at 1321 (emphasis added).

20 The court did not hold that a debtor's exemption is
21 *determined or valued* at the time the property is sold, only that
22 the *right to use* the exemption is triggered. Unless there is a
23 sale of the property, there are no funds to be exempted.

24 Additionally, with respect to Debtor's argument that she was
25 prejudiced by the Trustee's delay in selling her residence, the

26 Hyman court commented

27 To the extent the trustee delays selling the home to
28 wait for it to appreciate, the debtor gets to live in
it for free. If the debtor believes he is being
prejudiced by the trustee's delay, he can move for
abandonment.

Id. at fn.11.

29 In Alsberg v. Robertson (In re Alsberg), 68 F.3d 312, 315
30 (9th Cir. 1995), the Ninth Circuit explained Hyman. In that
31 case, the debtor failed to claim an exemption prior to the sale

1 of his residence. Id. at 313. Following the sale, he filed an
2 Amended B-4 schedule, for the first time, claiming a homestead
3 exemption of \$ 45,000. Id. Later, the debtor moved to compel
4 the trustee to abandon the proceeds of the sale, arguing that the
5 estate was not entitled to any of the proceeds of the sale
6 because the sum of the amount owed on the mortgage plus the
7 homestead exemption exceeded the value of the residence at the
8 time of filing. Citing Hyman, the court explained

9 When the original bankruptcy petition was filed,
10 Alsberg's interest in the residence passed to the
11 bankruptcy estate. Alsberg's California homestead
12 exemption can be realized only from the net proceeds of
13 sale received by the estate. The estate held an
14 interest in the residence at all times after the
15 petition was filed. Therefore, when the residence was
16 sold, the proceeds of the sale vested in the estate.
17 When Alsberg subsequently filed a claim for a \$45,000
18 homestead exemption after the sale of the property, he
19 became entitled to \$45,000 of the proceeds, and no more.

20 Id. at 315.

21 And, more recently, this panel explained Hyman in Morgan-
22 Busby v. Gladstone (In re Morgan-Busby), 272 B.R. 257 (9th Cir.
23 BAP 2002). There, we explained that Hyman makes it clear that
24 the trustee has the right to sell property that a debtor claims
25 as exempt, and that California's exemption laws do not provide a
26 debtor with an unassailable ownership or equity interest in
27 exempt property, but rather restrict a debtor's exemption to the
28 proceeds from a sale up to the statutory maximum. 272 B.R. at
29 265, citing Hyman at 1321.

30 As these cases illustrate, and as the court correctly held,
31 the Hyman case does not stand for the proposition that one
32 determines the amount of exemption that is available as a matter
33 of law on the date of the sale. It is well established that the

1 amount of the available exemption is determined, as a matter of
2 law, by the filing date of the petition. See e.g., White v.
3 Stump, 266 U.S. 310 (1924); In re Herman, 120 B.R. 127; In re
4 Dore, 124 B.R. 94; In re Seyfert, 97 B.R. 590; In re Whitman,
5 106 B.R. 654.

6 CONCLUSION

7 Based on the foregoing, we AFFIRM.
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