

**FEB 27 2006**

**NOT FOR PUBLICATION**

**HAROLD S. MARENUS, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT**

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

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

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

Filed - February 27, 2006

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

1 This is an appeal from a bankruptcy court order sustaining  
2 the trustee's objection to the debtor's claimed homestead  
3 exemption in a residence that the debtor no longer owned and from  
4 which he had been removed by a prebankruptcy state-court order.  
5 We AFFIRM.

6  
7 FACTS

8 The facts are not in dispute. The debtor and appellant,  
9 Ronald L. Wilson, and his spouse, Mary Wilson, owned real property  
10 commonly known as 4516 Pender Drive, Ferndale, Washington  
11 ("residence"). Ronald and Mary separated in 2001 and divorced in  
12 2003. Ronald occupied the residence by himself from February 2001  
13 until June 2004, when he was required by court order to vacate.

14 A decree of dissolution entered on May 21, 2003, and not  
15 appealed, dissolved the marriage, awarded the residence to Mary  
16 Wilson, provided that Ronald was "divested of his interest in  
17 property," and provided that Mary should take physical possession  
18 of the residence on or before May 15, 2004, and proceed to sell  
19 it. Even though the order divested Ronald of his interest in the  
20 residence, it provided that he would receive one half of the  
21 proceeds from the sale of the residence, less two debts totaling  
22 \$4,200.

23 Ronald ceased to occupy the property in June 2004, after  
24 which the property was marketed in accordance with the state-court  
25 order.

26 On October 2, 2004, Ronald executed a homestead declaration,  
27 wherein he stated that he was residing or, intended to reside, on  
28 the premises. The homestead declaration was recorded on October

1 4, 2004.

2 On October 21, 2004, Ronald (hereinafter "debtor") filed a  
3 voluntary petition under chapter 7, listing an address in  
4 Bellingham, Washington as his residence. In Schedule A, even  
5 though he had been divested of ownership in a final order that had  
6 not been appealed, the debtor listed a half interest in the  
7 previous Ferndale residence. He claimed the residence as exempt  
8 in the amount of \$40,000 in Schedule C pursuant to Revised Code of  
9 Washington ("RCW") 6.13.010, 6.13.020, and 6.12.030.

10 When the debtor learned that the Ferndale residence had been  
11 sold on October 12, 2004, and that the proceeds from the sale,  
12 approximately \$84,000, were in a blocked escrow account pursuant  
13 to an order entered by the Whatcom County Superior Court, the  
14 debtor notified the trustee.

15 On December 16, 2004, the trustee filed an objection to the  
16 debtor's claim of exemption. The trustee, appellee Peter Arkison,  
17 objected on the following grounds: (1) the debtor did not present  
18 evidence that he resided on the property at the time the petition  
19 was filed in order to claim the automatic homestead exemption  
20 under RCW 6.13.030 and 6.13.040; (2) the debtor did not show that  
21 he filed a Declaration of Homestead required by 6.13.040 if he was  
22 not living on the property at the time the petition was filed; and  
23 (3) the debtor did not show that he filed a declaration that he  
24 had not abandoned his interest in the property as required by RCW  
25 6.13.050.

26 On the same day, the trustee also filed a motion for an order  
27 sustaining his objection to the debtor's claim of exemption and  
28 for turnover of funds.

1           On December 21, 2004, the debtor's former spouse filed a  
2 response to the trustee's objection entitled "Declaration of Mary  
3 Wilson in Support of Response to Motion on Homestead and  
4 Turnover." The debtor's former wife objected to the homestead  
5 claim "to the extent that it does not pay off the debts that were  
6 according to court order to be paid from the house sale proceeds,  
7 to the extent that it does not reflect the property adjustments in  
8 the divorce decree, to the extent that it does not reimburse her  
9 for her expenses in preventing the house from being foreclosed and  
10 to maintain it for sale, and for back and current unpaid child  
11 support."

12           On January 5, 2005, the debtor filed a three-page "opposition  
13 to trustee's motion to turnover funds and objection to exemptions"  
14 and a declaration in support thereof. The debtor framed his first  
15 argument as whether he was entitled to prepare and record a  
16 declaration of homestead on his residence after he had been  
17 excluded from the residence by court order. He contended that he  
18 followed all of the rules by filing a homestead declaration and  
19 thereafter putting the trustee on notice that he claimed the  
20 property as exempt. The debtor explained that he could not  
21 control the actions of the Whatcom County Superior Court or of his  
22 former spouse.

23           Additionally, the debtor's opposition addressed the trustee's  
24 contention that he had not filed a declaration that he had not  
25 abandoned his interest in the property as required by RCW  
26 6.13.050. Although one may lose his homestead if he abandons his  
27 property for more than six months and fails to record a  
28 declaration of non-abandonment, the debtor argued he did not

1 voluntarily abandon his property, but was forced off the property  
2 by a court order. Moreover, when he filed bankruptcy, he had not  
3 yet been excluded from the property for more than six months.

4 The debtor did not, however, address the implications of the  
5 divestiture of his interest that had occurred by virtue of the  
6 final and unappealable divorce decree.

7 On January 12, 2005, the court held a hearing on the  
8 trustee's objection to the debtor's homestead exemption, wherein  
9 the court ultimately sustained the trustee's objection. No  
10 evidence was taken. Nobody objected to the procedure employed.

11 The court emphasized that the debtor faced the problem that  
12 he either had to reside on the property or have an intent to  
13 reside on the property in order to qualify for the homestead  
14 exemption. The debtor did not reside on the property.

15 As to the intent inquiry in connection with filing a  
16 declaration of homestead, the court questioned how the debtor  
17 could file a homestead declaration and state that he intended to  
18 live at the residence, when the previously entered divorce decree  
19 ordered that he could not live at the residence and awarded  
20 possession and title to the debtor's former spouse. The court  
21 stated that the debtor's intent to reside on property was "not a  
22 reality because he's been thrown out."

23 The debtor's counsel explained that the debtor had done  
24 everything he could "to let the world know that he want[ed] his  
25 portion of proceeds from the sale of his homestead." Thereafter,  
26 the court questioned counsel whether the debtor or the debtor's  
27 former spouse received the homestead or if there were two  
28 homesteads. Counsel for the debtor's former wife explained that

1 his client had not lived there for several years, while the  
2 debtor's counsel explained that the divorce decree and Whatcom  
3 County Superior Court order did not address who received the  
4 homestead or whether or not they were giving up a homestead.  
5 Ultimately, the court explained that probably no one received the  
6 homestead exemption because she had not lived there for years.  
7 The debtor responded that the difficulty with such a solution was  
8 that then the community lost the exemption.

9       Near the end of the hearing, the court explained that if one  
10 presumed that a person preserved a homestead right in proceeds,  
11 which the statute allowed, and a year passed without spending the  
12 proceeds, one could not claim the proceeds as exempt because the  
13 character of the proceeds had changed. The debtor's counsel  
14 responded that under that analogy the character of the proceeds  
15 had not changed because the proceeds were from a transaction that  
16 occurred the previous month.

17       Ultimately, after noting that the issue "might be worth an  
18 appeal ... it's a new question," the court reiterated that the  
19 debtor was not residing on the property and could not have an  
20 intent to reside on the property as to qualify for the homestead  
21 exemption. The debtor's counsel responded that the debtor had  
22 made a motion to set aside the divorce decree. There is no  
23 evidence in the record regarding this purported motion.

24       At the end of the hearing, the court explained that it would  
25 only rule on the homestead issue and not on the motion for  
26 turnover because debtor's former wife needed to commence an  
27  
28

1 adversary proceeding for turnover.<sup>1</sup> The court did not make  
2 findings of fact and conclusions of law.

3 This timely appeal ensued.  
4

5 JURISDICTION

6 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334.  
7 We have jurisdiction under 28 U.S.C. § 158(a)(1).  
8

9 ISSUE

10 Whether the debtor had a good faith intent to reside in  
11 property when he recorded a Washington declaration of homestead in  
12 property in which he no longer owned any legal or equitable  
13 interest, that was in the process of sale by court, and from which  
14 he had been removed pursuant to court order.  
15

16 STANDARD OF REVIEW

17 The scope of a state law exemption involves construction of  
18 state law that we review de novo. Casserino v. Casserino (In re  
19 Casserino), 290 B.R. 735, 737 (9th Cir. BAP 2003). Since the  
20 court did not make findings of fact and conclusions of law, we  
21 review the entered order de novo as if it had been a motion for  
22 summary judgment. Dias v. Elique, \_\_ F.3d \_\_, 2006 WL 267154 (9th  
23 Cir. 2006).  
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25 <sup>1</sup>The debtor's former spouse commenced an adversary proceeding  
26 against the debtor and the trustee on February 10, 2005. On April  
27 29, 2005, the bankruptcy court entered an Order for Turnover of  
28 Funds that ordered Whatcom Land Title to turn over half of the  
approximately \$84,000 presently in its possession to the debtor's  
former spouse and that Whatcom Land Title pay the second half of  
the funds then in its possession to the trustee.

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DISCUSSION

The debtor's inescapable dilemma is one of timing. We are persuaded that the prebankruptcy declaration of homestead was ineffective and that at the time the debtor filed his voluntary petition, he was not entitled to claim a homestead exemption in the subject property under Washington law.

I

When a debtor elects to claim an exemption under state law pursuant to 11 U.S.C. § 522, a debtor must comply with the state law in effect at the time of the filing of his bankruptcy petition. England v. Golden (In re Golden), 789 F.2d 698, 700 (9th Cir. 1986). Accordingly, we apply Washington law in determining whether the debtor may claim a homestead exemption.

Under Washington law, the homestead consists of real or personal property that the owner uses as a residence. RCW § 6.13.010(1).<sup>2</sup> Property included in the homestead must be

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<sup>2</sup>RCW 6.13.010(1) provides in pertinent part:

(1) The homestead consists of real or personal property that the owner uses as a residence. In the case of a dwelling house or mobile home, the homestead consists of the dwelling house or the mobile home in which the owner resides or intends to reside, with appurtenant buildings, and the land on which the same are situated 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.

(continued...)



1 actually intended or used as the principal home for the owner.

2 Id.

3

A

4 Although Washington does not require that the "owner" of a  
5 homestead have a legal interest in the property and regards  
6 possession by way of occupancy and use as the key to the right to  
7 homestead, where there is not such occupancy one must have at  
8 least an equitable interest in the property in order to have a  
9 homestead. Felton v. Citizens Fed. Sav. & Loan Ass'n, 679 P.2d  
10 928, 930 (Wash. 1989).

11 Washington has two methods for claiming a homestead. Arkison  
12 v. Gitts (In re Gitts), 116 B.R. 174, 178 (9th Cir. BAP 1990),  
13 aff'd and adopted, 929 F.2d 1109 (9th Cir. 1991). First, under  
14 RCW 6.13.040(1),<sup>3</sup> an automatic homestead exemption is created for

15

16 <sup>2</sup>(...continued)  
17 Wash. Rev. Code § 6.13.010(1) (1999).

18

<sup>3</sup>RCW 6.13.040 provides, in pertinent part:

19

20 (1) Property described in RCW 6.13.010 constitutes a  
21 homestead and is automatically protected by the  
22 exemption described in RCW 6.13.070 from and after the  
23 time the real or personal property is occupied as a  
24 principal residence by the owner or, if the homestead is  
25 unimproved or improved land that is not yet occupied as  
26 a homestead, from and after the declaration or  
27 declarations required by the following subsections are  
28 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).

29

30 (2) An owner who selects a homestead from unimproved or  
31 improved land that is not yet occupied as a homestead must  
32 execute a declaration of homestead and file the same for

33

(continued...)

1 "[p]roperty described in RCW 6.13.010 [which] constitutes a  
2 homestead and is automatically protected by the exemption  
3 described in RCW 6.13.070<sup>4</sup> from and after the time the property is  
4 occupied as a principal residence by the owner." Id.

5 The second method for claiming a homestead is for a landowner  
6 to 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 or declarations  
9 are filed for the record. Id., citing RCW 6.13.040(1).  
10 Accordingly, in order to "establish a valid declared homestead  
11

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12 <sup>3</sup>(...continued)  
13 record in the office of the recording officer in the county  
14 in which the land is located. However, if the owner also owns  
15 another parcel of property on which the owner presently  
16 resides or in which the owner claims a homestead, the owner  
17 must also execute a declaration of abandonment of homestead  
18 on that other property and file the same for record with the  
19 recording officer in the county in which the land is located.

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

24 Wash. Rev. Code § 6.13.040 (1993).

25 <sup>4</sup>RCW 6.13.070 provides in pertinent part:

26 (1) Except as provided in RCW 6.13.080, the homestead is  
27 exempt from attachment and from execution or forced sale  
28 for the debts of the owner up to the amount specified in  
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 (1987).

1 exemption, an owner must intend to reside on the property, record  
2 a declaration of homestead, and record a declaration of  
3 abandonment of any automatic homestead or any existing declared  
4 homestead." Id.

5 In this instance, at the time the debtor filed bankruptcy, we  
6 are persuaded that he could not use either method for claiming a  
7 homestead exemption under Washington law. Cisneros v. Kim (In re  
8 Kim), 257 B.R. 680, 684 (9th Cir. BAP 2000) (a debtor's exemptions  
9 rights are determined as of the petition date); Wolf v. Salven (In  
10 re Wolf), 248 B.R. 367-68 (9th Cir. BAP 2000); Magallanes v.  
11 Williams (In re Magallanes), 96 B.R. 253, 255 (9th Cir. BAP 1988).

12  
13 B

14 Under RCW 6.13.040(1), homestead protection is "automatic" if  
15 the occupancy requirement is met. RCW 6.13.040; Gitts, 116 B.R.  
16 at 178; Sweet v. O'Leary (In re Sweet), 944 P.2d 414, 415 (Wash.  
17 Ct. App. 1997). Here, at the time the debtor filed his petition,  
18 he did not occupy the residence. Pursuant to the decree of  
19 dissolution, he could no longer occupy the residence and had been  
20 "removed" from the residence four months before he filed his  
21 petition. Consequently, the debtor did not occupy the property  
22 and, thus, was not entitled to an automatic homestead exemption.

23  
24 C

25 The only other way the debtor could have exempted the  
26 property was by executing a declaration establishing that he  
27 intended to reside on the property. RCW 6.13.010(1); RCW  
28 6.13.040(3). Accordingly, as the debtor contends, the pivotal

1 issue at the bankruptcy court was whether the debtor satisfied the  
2 intent requirement.

3 Ordinarily, intent is an inherently subjective matter that is  
4 poorly suited to summary disposition. In this instance, however,  
5 the crucial fact was beyond dispute: the bankruptcy court  
6 questioned how the debtor could possibly have intended to reside  
7 in a residence from which he had been excluded by court order.

8 The debtor contends that although there are no cases that  
9 squarely address the intent issue, there are cases that address  
10 the requirement that a homestead declaration be filed in "good  
11 faith," which has been construed to mean that the statement of  
12 intent must be accurate. Heck v. Kaiser Gypsum Co., 351 P.2d  
13 1035, 1036 (Wash. 1960); Clark v. Davis, 226 P.2d 904, 908 (Wash.  
14 1951).

15 In Clark, the Washington Supreme Court had to decide "how  
16 [Clark] could, in good faith, have intended to reside on the  
17 premises when, at the time she filed her [homestead] declaration,  
18 the property had been ordered sold in the partition suit which  
19 she, as plaintiff, had instituted." Clark, 226 P.2d at 908.  
20 Ultimately, the supreme court determined that at the time Clark  
21 "filed her declaration of homestead, she, in good faith, actually  
22 intended to occupy the premises with her family as a home." Id.  
23 The supreme court came to this conclusion because Clark attended  
24 the partition sale and made several bids. Id. "She had with her  
25 a cashier's check for \$500 to make the earnest money payment as  
26 required by the notice of sale. It was testified without  
27 objection that she had also contacted a bank concerning a loan in  
28 the event she was the successful bidder, and the bank agreed to

1 loan her the money." Id.

2 Although the debtor contends that he should prevail under the  
3 rule in Clark because he executed his declaration of intent to  
4 occupy in good faith, Clark is of no help to the debtor. The  
5 problem with the "good faith" inquiry in this instance is that the  
6 record is devoid of any evidence of good faith. As noted, the  
7 bankruptcy court did not, and was not asked to, take any testimony  
8 regarding the issue pursuant to Federal Rule of Bankruptcy  
9 Procedure 9014(d).

10 On the record before us, there is only the debtor's homestead  
11 declaration on a standard fill-in-the-blanks form, the dissolution  
12 order terminating his ownership interest and excluding him from  
13 the property, and the debtor's declaration asserting that he had  
14 no intention of abandoning his interest in the property when he  
15 was forced to find other living arrangements and that in order to  
16 protect his homestead interest he filed a declaration. His  
17 declaration does not speak either to his good faith or to his  
18 intention to return to the property. Moreover, as the trustee  
19 points out, the record does not contain evidence that the debtor  
20 took any affirmative steps to return to the property or to either  
21 establish or retain an ownership interest in the property.

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

28 Factually, the truth in this appeal is that at the time the

1 debtor executed and recorded the declaration, he did not reside on  
2 the premises nor, as a matter of law, could he reside there in the  
3 future because the divorce decree divested any interest in the  
4 property that he had and further required that he be physically  
5 excluded from the property. To the extent that the debtor could  
6 form an intent to return to the property when he was aware that he  
7 could not return to it pursuant to a court order, it is not  
8 consistent with the circumstances at hand.

9 It is suggested that Gitts is the definitive case on the  
10 issue presented by this appeal. The decision in Gitts is  
11 inapposite. In that situation, the debtors were, as a matter of  
12 law and fact, entitled to a Washington homestead and entitled to  
13 switch their homestead to another property. Gitts, 116 B.R. at  
14 180. This is not the situation in this appeal.

15 As the Washington Supreme Court has held, it is "well  
16 settled" under Washington law that "a declaration of homestead is  
17 a right or privilege given a property owner by statute, so that  
18 its validity depends upon compliance with the statutory  
19 requirements and only by such compliance does the homestead come  
20 into existence." Cook, 517 P.2d at 636.

21 In this instance, the debtor was not in compliance with the  
22 statutory requirement that he actually "intend" to occupy the  
23 residence. Hence, his prebankruptcy declaration was not effective  
24 and the facts do not warrant entitlement to a homestead as of the  
25 date of filing of the bankruptcy.

26 CONCLUSION

27 For the foregoing reasons, we AFFIRM.

28