

JUN 14 2010

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U.S. BKCY. APP. PANEL

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

5	In re:	)	BAP No. ID-09-1338-HRuJu
		)	
6	S. WADE GARDNER, FKA Wade	)	
	Gardner Construction and	)	Bk. No. 08-40730-JDP
7	P. YVONNE GARDNER,	)	
		)	
8	Debtors.	)	
		)	
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	S. WADE GARDNER; P. YVONNE	)	
10	GARDNER,	)	
		)	<b>M E M O R A N D U M<sup>1</sup></b>
11	Appellants,	)	
		)	
12	v.	)	
		)	
13	DYKEMAN CONSTRUCTION; KENT	)	
	CAMPBELL; JUDY CAMPBELL	)	
14		)	
	Appellees.	)	
15		)	
		)	
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Submitted Without Argument on May 21, 2010  
at Pasadena, California

Filed - June 14, 2010

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

Honorable Jim D. Pappas, Bankruptcy Judge, Presiding

Before: HOLLOWELL, RUSSELL<sup>2</sup> and JURY, 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.

<sup>2</sup> Hon. David E. Russell, Bankruptcy Judge for the Eastern District of California, sitting by designation.

1 The debtors in this case sought to avoid two judicial liens  
2 to the extent the liens impaired their homestead exemption.  
3 However, the bankruptcy court determined that the Debtors did not  
4 satisfy the requirements for lien avoidance under § 522(f)<sup>3</sup>  
5 because they were not entitled to a homestead exemption under  
6 § 522(b). We **AFFIRM**.

7 **I. FACTS<sup>4</sup>**

8 Wade and Yvonne Gardner (the Debtors) filed a chapter 7  
9 bankruptcy petition on August 20, 2008. At that time, they lived  
10 at a home they owned on Van Elm in Blackfoot, Idaho (Van Elm).  
11 The Debtors also owned property at Rich Lane in Blackfoot, Idaho  
12 (Rich Lane). The Debtors parked a 5th-wheel trailer on Rich Lane  
13 in July 2008, and stayed there occasionally. They began  
14 construction of a residence on Rich Lane around the time they  
15 filed bankruptcy.

16 On August 20, 2008, the Debtors executed and recorded a  
17 declaration of homestead for Rich Lane. The Debtors did not,  
18 however, execute and record a notice of abandonment of homestead  
19 on Van Elm, which was being foreclosed on at the time. According  
20 to the Debtors, they were advised by the county clerk's office to  
21 file a declaration for Rich Lane in order to indicate their  
22 intention to claim an exemption in it. When they filed their  
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24 <sup>3</sup> Unless otherwise indicated, all chapter, section, and rule  
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
26 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

27 <sup>4</sup> The recitation of facts is taken from the parties'  
28 Stipulation of Facts Regarding 522 On 362 Motions, which was  
filed September 14, 2009 (docket #197).

1 bankruptcy petition later that same day, the Debtors listed their  
2 address as Rich Lane and claimed a \$100,000 homestead exemption  
3 for it under Idaho Code (I.C.) § 55-1003. Neither the bankruptcy  
4 trustee or any other party objected to the Debtors' claim to a  
5 homestead exemption for Rich Lane within the 30-day time limit of  
6 Rule 4003(b).

7 In June and July 2008, just prior to the time the Debtors  
8 filed for bankruptcy, two of their creditors obtained judgments  
9 and properly recorded them in the county clerk's office. Kent  
10 and Judy Campbell (the Campbells) obtained a judgment in the  
11 amount of \$28,130 and recorded it on June 11, 2008 (the Campbell  
12 Lien). Dykeman Construction, Inc. (Dykeman) obtained a judgment  
13 against the Debtors in the amount of \$82,342.03 and recorded it  
14 on July 7, 2008 (the Dykeman Lien).

15 On May 29, 2009, the Debtors filed motions to avoid the  
16 Campbell Lien and the Dykeman Lien. The Campbells objected on  
17 June 26, 2009, and filed a motion for relief from stay. Dykeman  
18 also objected on June 26, 2009. A hearing on the Debtors' motion  
19 to avoid the Campbell Lien was held on August 12, 2009.<sup>5</sup>  
20 However, Dykeman waived a hearing on the motion and agreed to  
21 submit the matter on the briefs. The bankruptcy court, in a  
22 Memorandum Decision entered October 5, 2009, determined that the  
23 Debtors were not entitled to a homestead exemption on Rich Lane,  
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26 <sup>5</sup> The hearing was combined with the Campbell's motion for  
27 relief from stay. The bankruptcy court addressed the merits of  
28 the motion in its Memorandum Decision and entered a separate  
order granting stay relief. That order is not part of this  
appeal.

1 and, therefore did not satisfy the requirements for lien  
2 avoidance under § 522(f). The same day, the bankruptcy court  
3 entered orders denying the Debtors' motions to avoid the Campbell  
4 Lien and the Dykeman Lien. The Debtors timely appealed.

5 **II. JURISDICTION**

6 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
7 § 157(b)(2)(K). We have jurisdiction under 28 U.S.C. § 158.<sup>6</sup>

8 **III. ISSUE**

9 Did the bankruptcy court err in determining that the Debtors  
10 were not entitled to a homestead exemption for Rich Lane under  
11 § 522(b)?<sup>7</sup>

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15 <sup>6</sup> The Debtors argue that the appeal "will become moot"  
16 because they intend to file a motion to avoid the Campbell Lien  
17 and the Dykeman Lien to the extent it impairs the Debtors' other  
18 exemptions. However, the issue of mootness is a threshold  
19 jurisdictional question. Giesbrecht v. Fitzgerald  
20 (In re Giesbrecht), - - B.R. - -, 2010 WL 1956618 (9th Cir. BAP  
21 2010). An appeal is moot only if the appellate court cannot  
22 grant effective relief to the appealing party even if it decides  
23 the merits in his or her favor. Pilate v. Burrell  
(In re Burrell), 415 F.3d 994, 998 (9th Cir. 2005). If we were  
24 to reverse the bankruptcy court, the Debtors would be provided  
25 relief because they would be able to avoid the Campbell Lien and  
26 the Dykeman Lien, therefore, the appeal is not moot. We decline  
27 to speculate on the Debtors' future § 522 arguments.

28 <sup>7</sup> The Debtors do not argue that the bankruptcy court erred  
in determining that the failure of a creditor to object to the  
homestead exemption claim does not bar it from contesting the  
lien avoidance action. In re Conley, 99.1 IBCR 7 (Bankr. D.  
Idaho 1999) ("The need to address the exemption's validity . . .  
arises at the time the assault under § 522(f) is launched.");  
Morgan v. Fed. Deposit Ins. Corp. (In re Morgan), 149 B.R. 147,  
152 (9th Cir. BAP 1993) (same).



1 their burden by establishing their entitlement to a claim of  
2 homestead under § 522(b).<sup>8</sup>

3 B. Homestead Exemptions Under § 522(b)

4 Property that may be exempted from the bankruptcy estate is  
5 set forth in § 522(b)(1). Idaho has opted out of the federal  
6 exemption scheme and permits its debtors only the exemptions  
7 allowable under state law. 11 U.S.C. § 522(b)(2), (b)(3)(A);  
8 I.C. § 11-609. Therefore, while "the federal courts decide the  
9 merits of state exemptions, . . . the validity of the claimed  
10 state exemption is controlled by the applicable state law."  
11 Kelley v. Locke (In re Kelley), 300 B.R. 11, 16 (9th Cir. BAP  
12 2003); Thorp v. Gugino (In re Thorp), 2009 WL 2567399 \*3  
13 (D. Idaho 2009).

14 Idaho law allows debtors to claim a homestead exemption, not  
15 to exceed \$100,000 in value, in real property under I.C. §§ 55-  
16 1001-1011. A homestead "consists of the dwelling house or the  
17 mobile home in which the owner resides or intends to reside,  
18 . . . and the land on which the same are situated . . .; or  
19 unimproved land owned with the intention of placing a house or  
20 mobile home" on the land for the purpose of residing there.  
21 I.C. § 55-1001(2).

22 There are two methods of creating a homestead exemption in  
23 Idaho. An automatic homestead exemption is created for property

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25 <sup>8</sup> The Campbell Lien and the Dykeman Lien were both judicial  
26 liens because they were obtained "by judgment." See 11 U.S.C.  
27 § 101(36). Thus, the Debtors satisfied the last three elements  
28 of the four-part test because the Rich Lane Property was listed  
as exempt on the Debtors' schedules and the liens impaired the  
exemption.

1 described as a homestead under I.C. § 55-1001 from and after the  
2 time the property is occupied as a principal residence by the  
3 owner. I.C. § 55-1004(1). Alternatively, a property owner may  
4 establish a homestead for exemption purposes by declaration.  
5 I.C. § 55-1004(1); 1004(2). To declare a homestead in  
6 "unimproved or improved land that is not yet occupied as a  
7 homestead," the property owner must execute and record a  
8 declaration establishing his or her intent to reside on the  
9 property in the future. Id.; I.C. § 55-1004(3).

10 However, if the owner also owns another parcel of  
11 property on which the owner presently resides or in  
12 which the owner claims a homestead, the owner must also  
13 execute a declaration of abandonment of homestead on  
14 that other property and file the same for record with  
15 the recorder of the county in which the land is  
16 located.

17 I.C. § 55-1004(2) (emphasis added).

18 A debtor's entitlement to an exemption is determined based  
19 upon facts as they existed at the time the petition is filed.  
20 In re Cerchione, 414 B.R. at 548; Cisneros v. Kim (In re Kim),  
21 257 B.R. 680, 685 (9th Cir. BAP 2000); White v. Stump, 266 U.S.  
22 310, 313 (1924); In re Thorp, 2009 WL 2567399 at \*3. The Debtors  
23 had an automatic homestead exemption for Von Elm because they  
24 lived there at the petition date. A valid homestead remains  
25 effective until it is abandoned. The statute requires that if a  
26 debtor records a homestead when he or she owns another parcel of  
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1 property on which he or she resides, the debtor must execute and  
2 record a declaration of abandonment.<sup>9</sup> I.C. § 1004(2).

3 Although Idaho's homestead exemption statutes are liberally  
4 construed in favor of debtors, In re Cerchione, 414 B.R. at 546  
5 (citations omitted), "[t]he liberal construction cannot . . . be  
6 used to interpret the homestead laws in a way that contradicts  
7 'the plain and unambiguous language of the statute.'"

8 In re Thorp, 2009 WL 2567399 at \*5 (citation omitted);

9 In re Cerchione, 414 B.R. at 546. The Debtors argue they filed  
10 the homestead declaration as instructed by the county clerk's  
11 office staff, however, such instruction is not legal advice that  
12 could be reasonably relied upon. See, e.g., In re Bach, 2007 WL  
13 405039 \*1 (Bankr. D. Ariz. 2007); Barr v. Barr (In re Barr),  
14 217 B.R. 626, 629 (Bankr. W.D. Wash. 1998). Given the plain  
15 language of I.C.

16 § 55-1004(2), filing the declaration of homestead could not  
17 constitute an election of the declared homestead over the  
18 automatic homestead. Therefore, because the Debtors did not  
19 abandon the automatic homestead created on Von Elm, they did not  
20 comply with the requirements for establishing a declared  
21 homestead exemption for Rich Lane. Accordingly, they have not  
22 demonstrated entitlement to a homestead exemption for Rich Lane  
23 sufficient to satisfy § 522(f)(1).

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26 <sup>9</sup> The only other method of abandoning a homestead under  
27 Idaho law is by non-residency for a continuous period of at least  
28 six months where no declaration of nonabandonment has been filed.  
I.C. § 55-1006.

1 **VI. CONCLUSION**

2 For the foregoing reasons, we AFFIRM the bankruptcy court's  
3 orders denying the Debtors' motions to avoid the Campbell Lien  
4 and the Dykeman Lien.

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