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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NOT FOR PUBLICATION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. MT-09-1359-HJRu
	)	
DONALD WILLIAM PARR and	)	Bk. No. 09-60408-RBK
KIMBERLI RAE PARR,	)	
	)	
Debtors.	)	
	)	
_____	)	
	)	
KIMBERLI RAE PARR,	)	
	)	
Appellant,	)	
	)	
v.	)	<b>M E M O R A N D U M<sup>1</sup></b>
	)	
JOSEPH V. WOMACK, Chapter 7	)	
Trustee,	)	
	)	
Appellee.	)	
_____	)	

Argued and Submitted on May 21, 2010  
at Pasadena, California

Filed - July 19, 2010

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

Honorable Ralph B. Kirscher, Chief Bankruptcy Judge, Presiding

\_\_\_\_\_  
Before: HOLLOWELL, JURY and RUSSELL<sup>2</sup>, 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 Donald and Kimberli Parr (the Debtors) claimed a homestead  
2 exemption for their home. The bankruptcy trustee objected. The  
3 bankruptcy court sustained the trustee's objection, finding that  
4 Donald did not reside at the home when the homestead declaration  
5 was filed and that Donald was therefore not entitled to a  
6 homestead exemption. Additionally, the bankruptcy court  
7 determined that Kimberli was entitled to exempt only the value of  
8 her one-half joint interest in the home. We **AFFIRM**.

9 **I. FACTS**

10 In 2005, the Debtors purchased property on Butterfly Lake  
11 Lane (Butterfly Lake) in Billings, Montana. In 2008, the  
12 Debtors' marriage began to fail. They separated and Donald moved  
13 out in February 2008. Kimberli remained at Butterfly Lake with  
14 their children and obtained a restraining order against Donald  
15 forbidding him access to Butterfly Lake. She filed a petition  
16 for dissolution of marriage in late March or early April 2008.  
17 Donald lived for a short while at his office before briefly  
18 moving to Missoula, then lived with his mother upon his return to  
19 Billings, and after November 2008, at a duplex on Westchester  
20 Square in Billings (Westchester Square).

21 On January 13, 2009, as the Debtors were dissolving their  
22 marriage and preparing to file bankruptcy, they executed and  
23 filed a declaration of homestead. The declaration states:  
24 "[t]hat at the time of making this declaration, they actually  
25 reside on [Butterfly Lake]." On March 23, 2009, the Debtors  
26 filed a joint chapter 7<sup>3</sup> bankruptcy case. The Debtors'

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27  
28 <sup>3</sup> Unless otherwise indicated, all chapter, section, and rule  
references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 bankruptcy petition lists Donald's address at Westchester Square  
2 and Kimberli's at Butterfly Lake. Butterfly Lake is included on  
3 Schedule A as their jointly-owned residence, valued at \$199,000  
4 with a secured claim against it in the amount of \$154,229.52.  
5 The Debtors claimed a homestead exemption under MCA § 70-32-104  
6 in the amount of \$44,770.48.<sup>4</sup>

7 Within 30 days after the § 341 meeting of creditors was  
8 held, the bankruptcy trustee (the Trustee) objected to Donald's  
9 homestead exemption (the Objection). The Trustee contended that  
10 Donald was not entitled to claim a homestead exemption for  
11 Butterfly Lake because Donald did not reside there on the  
12 petition date.

13 Kimberli filed an opposition on May 22, 2009. She argued  
14 that even though Donald was not occupying Butterfly Lake, it was  
15 still his place of residence unless and until the divorce action  
16 was resolved and the community property was allocated. In the  
17 alternative, Kimberli argued that she would be allocated full  
18 ownership of Butterfly Lake through the divorce property  
19 settlement, and therefore, was entitled to the full exemption  
20 claim.

21 On June 23, 2009, the bankruptcy court held a hearing on the  
22 Objection. The bankruptcy court determined that it would not  
23 decide the matter until the divorce court allocated the community  
24 property.<sup>5</sup> On August 18, 2009, the state court entered a  
25

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26 <sup>4</sup> Montana allows an exemption value of up to \$250,000 for a  
27 homestead. MCA § 70-32-104.

28 <sup>5</sup> The order entered by the bankruptcy court gave the Debtors  
10 days to request relief from the stay in order to proceed with  
the dissolution.

1 Settlement Agreement, Waiver of Hearing and Consent to Entry of  
2 Decree, which was approved by a Final Decree of Dissolution of  
3 Marriage entered on August 28, 2009 (the Divorce Decree).<sup>6</sup>

4 On September 22, 2009, the bankruptcy court held a second  
5 hearing on the Objection. The Debtors provided testimony and  
6 various documents were entered into evidence. On October 26,  
7 2009, the bankruptcy court issued a Memorandum Decision,  
8 concluding that because Donald did not reside at Butterfly Lake  
9 on the petition date, he was not entitled to claim it as a  
10 homestead; and that Kimberli was only entitled to claim a  
11 homestead value proportionate to her one-half interest in  
12 Butterfly Lake as of the petition date. In re Parr, 2009 WL  
13 3517602 (Bankr. D. Mont. 2009). An order sustaining the  
14 Objection was entered the same day. Kimberli timely appealed.<sup>7</sup>

## 15 II. JURISDICTION

16 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
17 § 157(b)(2)(B). We have jurisdiction under 28 U.S.C. § 158.

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20  
21 <sup>6</sup> The Divorce Decree states, in part:  
22 The parties own [Butterfly Lake]. Although Donald  
23 has lived in temporary quarters since the parties  
24 separated, [Butterfly Lake] has remained his legal  
25 residence during the pendency of this matter.  
Based upon the equities of this case, . . . an  
equitable distribution of the parties' assets  
requires that Kimberli receive [Butterfly Lake].

26 <sup>7</sup> Although only Kimberli filed the appeal, her Opening Brief  
27 refers, for the most part, to her arguments and position as  
28 belonging to the Debtors. In our discussion, we likewise  
attribute the position of Kimberli with respect to the joint  
claim of homestead exemption as belonging equally to the Debtors.



1 In Montana, a homestead "consists of the dwelling house or  
2 mobile home, and all appurtenances, in which the claimant resides  
3 . . . ." MCA § 70-32-101. There is no "automatic" homestead  
4 exemption based upon possession alone. Martinson v. Michael  
5 (In re Michael), 183 B.R. 230, 233 (Bankr. D. Mont. 1995). In  
6 order to be entitled to a Montana state homestead exemption, a  
7 debtor must execute and record, in the same manner as a grant of  
8 real property, a declaration of homestead. Id.; MCA §§ 70-32-  
9 105, -106, -107. The declaration of homestead must contain a  
10 description of the premises and a statement that the person  
11 resides there and claims it as a homestead. MCA § 70-32-106.

12 Montana state exemption statutes are liberally construed in  
13 favor of debtors. In re Snyder, 2006 MT 308 ¶ 13, 335 Mont. 11,  
14 14, 149 P.3d 26, 28 (citing Mont. Const. art. XIII, § 5); Glass  
15 v. Hitt (In re Glass), 60 F.3d 565, 570 (9th Cir. 1995).

16 Nevertheless, if there is not compliance with the statute there  
17 is no valid homestead exemption. In re Michael, 183 at 233.  
18 Moreover, the essential element of claiming a homestead exemption  
19 is residence on the property. In re Luthje, 107 B.R. 292, 296  
20 (Bankr. D. Mont. 1989) ("[A] homestead cannot be claimed unless  
21 the [d]ebtor resides on the property."); In re Vaughn, 16 Mont.  
22 B.R. 182, 183 (Bankr. D. Mont. 1997) (The "general rule is that  
23 an individual asserting a homestead exemption must reside on  
24 the premises.").

25 A debtor's entitlement to an exemption is determined based  
26 upon facts as they existed at the time of the bankruptcy filing.  
27 See In re Cerchione, 414 B.R. at 548; Cisneros v. Kim  
28 (In re Kim), 257 B.R. 680, 685 (9th Cir. BAP 2000). It is

1 undisputed that at the time Donald filed his bankruptcy petition,  
2 he had not physically occupied Butterfly Lake for over a year.

3 Donald testified that when he moved from Butterfly Lake in  
4 February 2008, he took most of his personal property with him and  
5 never returned. Donald testified that even though he had never  
6 intended to return to Butterfly Lake to live with Kimberli, he  
7 considered Butterfly Lake his home and felt that he was entitled  
8 to part of the house. Donald testified he considered Westchester  
9 Square his residence as of November 2008. This is confirmed by  
10 Donald listing Westchester Square as his residence on the  
11 couple's January 2009 parenting plan, Donald opening a bank  
12 account with the Westchester Square address in January 2009,  
13 filing his bankruptcy petition listing Westchester Square as his  
14 address in March 2009, and submitting his 2008 tax returns  
15 indicating his residence at Westchester Square.

16 Nevertheless, the Debtors assert that:

17 All of the testimony at the hearing on this matter made  
18 it clear that [Butterfly Lake] was the residence of  
19 both Donald and Kimberli as of February 2008 when  
20 Donald moved out because of marital differences. At no  
21 time thereafter did he make any overt act that showed  
22 his intention to establish a new residence from  
23 [Butterfly Lake] prior to filing the homestead  
24 declaration.

25 Appellant's Opening Brief at 10.

26 Essentially, the Debtors argue that Donald "established his  
27 residence" at Butterfly Lake and did not abandon or terminate it  
28 when the couple separated. They rely on MCA § 1-1-215, which  
provides guidelines for determining a person's residence:

(1) [A person's place of residence] is the place  
where a person remains when not called elsewhere for

1 labor or other special or temporary purpose and to  
2 which he returns in seasons of repose.

3 (2) There may be only one residence. If a person  
4 claims a residence within Montana for any purpose, then  
5 that location is the person's residence for all purpose  
6 unless there is a specific statutory exception.

7 (3) A residence cannot be lost until another is  
8 gained.

9 . . .  
10 (6) The residence can be changed only by the union  
11 of act and intent.

12 MCA § 1-1-215. "Each case regarding a person's place of  
13 residence 'must stand on its own facts.'" Umland v. Nat'l Cas.  
14 Co., 319 Mont. 16 ¶ 20, 81 P.3d 500, 503 (Mont. 2003) (internal  
15 citation omitted).

16 In support of their argument, the Debtors cite to several  
17 Montana cases where the court, for various reasons, allowed a  
18 party to claim a residence as a homestead even if the party did  
19 not physically occupy the residence. These cases are  
20 distinguishable.

21 The courts in In re Vaughn, 16 Mont. B.R. 182 (Bankr. D.  
22 Mont. 1997) and In re Loeb, 1993 WL 837912 (Bankr. D. Mont. 1993)  
23 were concerned with whether a homestead had been abandoned,  
24 either through marital separation or under the requirements for  
25 abandonment under MCA § 70-32-302. In In re Snyder, 2006 MT 308  
26 ¶ 13, 335 Mont. 11, 14, 149 P.3d 26, 28 (Mont. 2006), the court  
27 concluded that even though a person no longer resided on  
28 property, he or she could still be able to claim a homestead  
under MCA § 70-32-216, which provides that if sold property could  
have been claimed an exempt homestead, the proceeds that are  
traceable to it may be exempted. Finally, in McCone County Fed.  
Credit Union v. Gribble, 2009 MT 290, 352 Mont. 254, 216 P.3d 206

1 (Mont. 2009), the court analyzed whether the defendant resided on  
2 a homestead in order to evaluate whether the property was an  
3 asset for purposes of MCA § 31-2-328, the Montana Uniform  
4 Fraudulent Transfer Act, which does not require a declaration of  
5 homestead to be filed in order to claim an asset exempt.

6 By contrast, the court in In re Schuster, 2006 WL 2711800  
7 (D. Mont. 2006), found that because the debtor did not reside on  
8 the property when he filed his homestead declaration, his  
9 homestead claim was invalid. The debtor in In re Luthje, 107  
10 B.R. 292 (Bankr. D. Mont. 1989) was denied a discharge under  
11 § 727 because he fraudulently attempted to establish a homestead  
12 exemption on property on which he did not reside (even though he  
13 had a mobile home on the property, he did not spend time at the  
14 property, the property did not have utility service, and the  
15 majority of the debtor's personal property was elsewhere).

16 The Debtors' assumption that they established their  
17 residence at Butterfly Lake for homestead exemption purposes  
18 prior to recording the homestead declaration is simply incorrect.  
19 They essentially construe the guidelines for residency contained  
20 in MCA § 1-1-215 as an automatic homestead statute. However,  
21 there is no automatic homestead exemption in Montana. It is the  
22 execution and recording of a declaration of homestead that  
23 establishes a homestead as exempt.<sup>8</sup> MCA § 70-32-105. Therefore,  
24 the issue is not whether Donald abandoned his homestead at  
25 Butterfly Lake by his absence during the separation, but whether

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26  
27 <sup>8</sup> The statement that Butterfly Lake remained Donald's legal  
28 residence in the Divorce Decree does not change the analysis  
because the Divorce Decree could not establish Donald's residency  
for the purpose of claiming a homestead exemption.

1 he resided at Butterfly Lake when the homestead declaration was  
2 filed in order for the homestead declaration to be valid.

3 Donald was statutorily required to reside at Butterfly Lake  
4 when he filed his declaration of homestead in order to claim it  
5 as his homestead. In re Michael, 183 B.R. at 233; Wilson v.  
6 Arkison (In re Wilson), 341 B.R. 21, 27 (9th Cir. BAP 2006).  
7 After reviewing the documents and testimony submitted by the  
8 parties, the bankruptcy court found that Donald did not reside at  
9 Butterfly Lake at the time the declaration of homestead was  
10 filed. Given that Donald filed documents and gave testimony  
11 stating that he lived at Westchester Square since November 2008,  
12 we find no clear error in the bankruptcy court's findings.  
13 Therefore, Donald was not entitled to a homestead exemption for  
14 Butterfly Lake.

15 B. Kimberli Is Not Entitled To A Full Claim Of Exemption For  
16 Butterfly Lake

17 As noted above, a debtor's entitlement to an exemption is  
18 determined based upon facts as they existed at the time of the  
19 bankruptcy filing. See In re Cerchione, 414 B.R. at 548;  
20 In re Kim, 257 at 685. Although the Divorce Decree allocated  
21 Butterfly Lake to Kimberli postpetition, at the time the Debtors  
22 filed their bankruptcy petition, they owned Butterfly Lake  
23 jointly.

24 Under Montana law, a joint tenant owns an undivided equal  
25 share of the joint tenancy estate. MCA § 70-1-307 ("A joint  
26 interest is one owned by several persons in equal shares. . . .");  
27 In re Zimmerman, 2002 MT 90 ¶ 16, 309 Mont. 337, 341, 46 P.3d  
28 599, 601 (Mont. 2002). Furthermore, MCA § 70-32-104(2) provides

1 that "[i]f a claimant who is an owner of an undivided interest in  
2 real property claims a homestead exemption, the claimant is  
3 limited to an exemption amount proportional to the claimant's  
4 undivided interest." Accordingly, the value of Kimberli's  
5 homestead claim is limited to the proportional share of her  
6 interest, which is one-half because she was a joint tenant at the  
7 time the petition was filed.

8 **VI. CONCLUSION**

9 For the foregoing reasons, we AFFIRM the bankruptcy court's  
10 order sustaining the Trustee's objection to the Debtors' claim of  
11 homestead exemption for Butterfly Lake.