

APR 21 2010

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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NOT FOR PUBLICATION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

6	In re:)	BAP No. WW-09-1313-HMoMk
7	BONNIE G. SNAVELY)	
8	Debtor.)	Bk. No. 07-11283-SJS
9	_____)	
10	BONNIE G. SNAVELY)	
11	Appellant,)	
12	v.)	M E M O R A N D U M¹
13	NANCY L. ISSERLIS,)	
14	Appellee.)	
	_____)	

Argued and Submitted on February 19, 2010
at Seattle, Washington

Filed - April 21, 2010

Appeal from the United States Bankruptcy Court
for the Western District of Washington

Honorable Samuel J. Steiner, Bankruptcy Judge, Presiding.

Before: HOLLOWELL, MONTALI and MARKELL, Bankruptcy Judges.

The debtor in this case recorded a declaration of homestead stating she resided on property located in Flathead County, Montana and amended her bankruptcy schedules to take an exemption

¹ 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.

1 in that property. However, the bankruptcy trustee contended that
2 the debtor did not reside on the property and filed a motion to
3 void the homestead declaration. The bankruptcy court found the
4 debtor's assertion of residence on the property was not credible
5 and entered an order voiding the declaration of homestead. We
6 AFFIRM.

7 **I. FACTS**

8 Bonnie Snavelly (Snavelly) filed an individual chapter 11²
9 bankruptcy petition on March 25, 2007. Snavelly listed her
10 address and residence in King County, Washington, in the city of
11 Black Diamond. She checked a box stating she had been domiciled
12 in Western Washington and had a residence or principal place of
13 business in Western Washington for at least 180 days prior to
14 filing bankruptcy or for the longer part of the 180 days prior to
15 filing bankruptcy than in any other district.

16 Snavelly's bankruptcy schedules indicated she did not pay
17 rent.³ Her monthly expenses included \$100 for home maintenance
18 and \$3,100 for real property taxes. Snavelly's interest in real
19 property (Schedule A) included: (1) commercial property in
20 Montana; (2) cabins at Lake McDonald in Montana, subject to a
21 partition claim ("Lake McDonald"); (3) Kona Ranch on Amigo Road
22 in Missoula, Montana ("Kona Ranch"); and (4) mineral rights on
23

24 ² Unless specified otherwise, all Code, chapter, and section
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

26 ³ We have taken judicial notice of the bankruptcy case
27 docket and underlying bankruptcy records. See O'Rourke v.
28 Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957-58
(9th Cir. 1989) (court may take judicial notice of underlying
bankruptcy records with respect to an appeal).

1 real property in Montana. Snavely did not claim a homestead
2 exemption. Pursuant to § 522(b)(1) and (2), she claimed federal
3 exemptions under § 522(d)⁴ for: real property mineral rights,
4 cash on hand, household goods⁵, jewelry and furs, office
5 equipment, and an automobile. The trustee did not object to any
6 of the exemptions claimed by Snavely within 30 days after the
7 § 341 meeting of creditors. See Rule 4003(b).

8 On her schedules, Snavely listed her business as a real
9 estate developer and her business address, since 1989, as the
10 Black Diamond address. She included Kona Ranch as a business
11 address since 1999. In October 2008, Snavely recorded a
12 declaration of homestead in Missoula, Montana, stating that Kona
13 Ranch was her residence and homestead.⁶ Kona Ranch was
14 foreclosed in November 2008.

15 On May 22, 2009, the trustee sought permission to sell Lake
16 McDonald for the benefit of the estate. The trustee proposed to
17 sell Lake McDonald for \$103,500 to in-laws of Snavely's
18 ex-husband because the property would otherwise be difficult to
19 sell as it was subject to a partition action and the septic

21 ⁴ Washington has not "opted out" of the federal exemption
22 scheme. A debtor domiciled in Washington may select either the
23 exemptions afforded by Washington law, or the federal exemption
24 scheme. 11 U.S.C. § 522(b); 4 Collier on Bankruptcy ¶ 522.02
(Henry Somers & Alan Resnick, eds., 15th ed. rev. 2009).

25 ⁵ Various household furnishings and goods to which Snavely
26 claimed an exemption were listed as being located in Black
27 Diamond, Washington, in Kalispell, Montana, at Kona Ranch and at
28 Lake McDonald.

⁶ At the time Snavely recorded the declaration of homestead,
Kona Ranch had been the subject of motions for relief from stay
filed by its secured creditor to conduct a foreclosure sale.

1 system was in disrepair. Snavelly filed an opposition on
2 June 12, 2009. Snavelly argued that the trustee was not
3 adequately marketing Lake McDonald or realizing its full value.
4 On June 19, 2009, the trustee filed a motion for approval of sale
5 of Lake McDonald by auction. Again Snavelly objected to the
6 proposal, asserting the property would not realize its full
7 market value if sold at auction. After a hearing on the matter,
8 the bankruptcy court entered an order on June 29, 2009, approving
9 the sale of Lake McDonald by auction. On July 8, 2009, the
10 trustee filed a notice that the auction was scheduled for
11 August 10, 2009. At the auction, Lake McDonald sold for
12 \$301,000; the bankruptcy court confirmed the sale by an order
13 entered on August 14, 2009.

14 On July 21, 2009, after the trustee was granted the
15 authority to sell Lake McDonald, but before the auction took
16 place, Snavelly recorded a declaration of homestead in Flathead
17 County, Montana stating that Lake McDonald was her residence and
18 homestead.

19 On September 11, 2009, the trustee filed a motion requesting
20 that the bankruptcy court declare Snavelly's homestead declaration
21 for Lake McDonald void. The trustee argued that Snavelly did not
22 reside at Lake McDonald but at Kona Ranch. To support that
23 contention, the trustee submitted Snavelly's declaration of
24 homestead for Kona Ranch along with a declaration from Mr. Samuel
25 (who acquired Kona Ranch at the foreclosure sale), which stated
26 that Snavelly resided at Kona Ranch and a lease for an extension
27 of the arrangement was being negotiated. Furthermore, the
28 trustee contended that the declaration of homestead encumbered

1 the trustee's ability to sell Lake McDonald and that the filing
2 of the declaration violated the automatic stay.

3 In a filed opposition, Snavely asserted there was no
4 evidence suggesting she did not reside at Lake McDonald. Snavely
5 submitted her own declared testimony stating that the Lake
6 McDonald property was purchased in 1973, with the intention of it
7 being a retirement home, and that improvements on the property
8 were made in anticipation of her retirement in the home. Snavely
9 stated she stayed at Kona Ranch when in Missoula on business, but
10 that she otherwise resided at Lake McDonald.

11 A hearing on the trustee's motion to void Snavely's
12 recording of the homestead on Lake McDonald was set for
13 September 25, 2009. Approximately one hour prior to the hearing,
14 Snavely amended her bankruptcy schedules to claim Montana state
15 exemptions, including a homestead exemption for Lake McDonald
16 under MCA § 70-32-104.⁷ The bankruptcy court granted the
17 trustee's motion, finding that "under all the circumstances, I
18 don't think this homestead declaration is in good faith. I don't
19 believe the debtor." The bankruptcy court entered an order on
20 September 25, 2009, voiding Snavely's recorded declaration of
21 homestead on Lake McDonald. Snavely timely appealed.

22 _____
23 ⁷ At the hearing, the trustee notified the bankruptcy court
24 that Snavely had amended her schedules to switch from federal to
25 state exemptions but did not specify that the state exemptions
claimed were under Montana law.

26 The trustee subsequently filed an objection to Snavely's
27 claimed Montana state exemptions on October 5, 2009. See e.g.,
28 Seror v. Kahan (In re Kahan), 28 F.3d 79, 82 (9th Cir. 1994)
(trustee timely objected to exemption claim by filing objection
within 30 days of amendment, which was not a mere clarification
of initial exemption claim).

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V. DISCUSSION

The briefing in this appeal conflates whether Snavely had a valid declaration of homestead with whether she had a valid homestead exemption claim. However, Snavely had not amended her bankruptcy schedules to claim a homestead exemption until immediately prior to the hearing on the trustee's motion to void the homestead declaration. Nevertheless, at oral argument on appeal, the parties agreed that the issue here is ultimately whether Snavely's claim of a Montana state homestead exemption itself is allowable⁸ and valid.⁹

Under many state exemption statutes, the declaration of homestead must comply with specific requirements, which are necessary to establish and obtain a homestead exemption. For example, in order to claim a homestead exemption under Montana law, as Snavely did here, there must be a declaration of

⁸ Snavely asserts that the bankruptcy court refused to allow her to amend her bankruptcy schedules to claim state exemptions. That issue was not addressed by the bankruptcy court. Although exemption rights are determined by the facts as they exist on the petition date, a debtor may create a valid exemption postpetition if his or her declaration of homestead is recorded and the bankruptcy schedules are amended to claim the exemption. See Cisneros v. Kim (In re Kim), 257 B.R. 680, 684 (9th Cir. BAP 2000); Arkison v. Gitts (In re Gitts), 116 B.R. 174, 178-79 (9th Cir. BAP 1990) aff'd, and adopted by Arkison v. Gitts (In re Gitts), 927 F.2d 1109 (9th Cir. 1991); Martison v. Michael (In re Michael), 163 F.3d 526, 529 (9th Cir. 1998).

⁹ The trustee contends that the bankruptcy court treated the hearing on the motion to void the homestead declaration as a hearing on an objection to the claim of homestead exemption. Appellee's Opening Brief at 3. However, neither the transcript of the hearing nor the subsequent order that was entered by the bankruptcy court support the trustee's contention.

1 homestead recorded in the real property records where the
2 property is located. MCA § 70-32-105. Thus, because the
3 declaration of homestead is entwined with the homestead exemption
4 itself, we address both issues.

5 **A. Declaration of Homestead**

6 The validity of a declaration of homestead depends upon its
7 compliance with statutory requirements. United States Fid. &
8 Guar. Co. v. Alloway, 173 Wn. 404, 406 (1933); Wilson v. Arkison
9 (In re Wilson), 341 B.R. 21, 27 (9th Cir. BAP 2006). Snavely's
10 declaration of homestead was executed and properly recorded in
11 Flathead County.¹⁰ The declaration stated that Snavely "resides
12 in Lake McDonald as a homestead."

13 On appeal, Snavely contends she "satisfied the requirements
14 for a declaration of homestead under Montana law."¹¹ Opening
15 Brief at 8. Additionally, in a footnote in her opening brief,
16 Snavely asserts that because "Washington law arguably applies to
17 determine the validity of her homestead declaration,"¹² the

18
19 ¹⁰ Although the copy of the declaration of homestead
20 included in the record on appeal does not contain the "attached
21 Exhibit A" that describes the real property claimed as a
22 homestead, we assume for purposes of this appeal that it properly
23 references Lake McDonald.

24 ¹¹ It is unclear what law the bankruptcy court applied in
25 making its determination that Snavely did not reside at Lake
26 McDonald. Snavely referred to both Montana and Washington law in
27 her briefing before the bankruptcy court. The actual exemption
28 statute under which Snavely claimed her homestead exemption was
not referenced in Snavely's pleadings before the bankruptcy
court.

¹² Snavely is entitled to claim Washington state exemptions
or the federal exemptions of § 522(d). 11 U.S.C. § 522(b)(1).

(continued...)

1 declaration of homestead was also valid under Washington law.
2 After reviewing the statutory requirements for a declaration of
3 homestead under both Montana and Washington law, we conclude that
4 under either state's law, the bankruptcy court correctly
5 identified Snavely's residency at Lake McDonald as necessary to a
6 valid homestead declaration and a claim of homestead exemption.

7 1. Montana Law

8 Montana law defines a homestead as the dwelling house in
9 which the person resides and the land on which it is situated.
10 MCA § 70-32-101. A valid recorded declaration of homestead is
11 required to establish a homestead exemption. MCA § 70-32-105.
12 The declaration of homestead must be executed and acknowledged in
13 the same manner as a grant of real property. Id. It must
14 contain a statement that the person making it is residing on the
15 premises (description provided) and claims them as a homestead.
16 MCA § 70-32-106. Then, the declaration must be recorded in the
17 office of the county clerk of the county in which the land is
18 situated. MCA § 70-32-107.

19 2. Washington Law

20 Similarly, in Washington, a "homestead consists of real or
21 personal property that the owner uses as a residence" or "the
22 dwelling house or a mobile home in which the owner resides or
23 intends to reside. . . . Property included in the homestead must
24 be actually intended or used as the principal home for the
25

26 ¹²(...continued)

27 Section 522(b)(3)(A) provides that the exemptions are those
28 available under applicable state law, which is defined as where
the petition is filed. See Arrol v. Broach (In re Arrol),
170 F.3d 934, 935 (9th Cir. 1999).

1 owner." RCW 6.13.010(1). For improved or unimproved land not
2 yet occupied, a recorded homestead declaration is necessary to
3 establish the homestead. A declaration of homestead must contain
4 a statement that the person making it is residing on the premises
5 or intends to reside on the premises. RCW 6.13.040(3)(a). The
6 declaration must provide a legal description of the premises, an
7 estimate of the actual cash value of the premises, and must be
8 recorded in the recording office for the county where the land is
9 located. RCW 6.13.040(2) and (3); In re Wilson, 341 B.R. at 26.

10 3. Declarant Must Reside On The Property

11 Snavelly argued she was entitled to a homestead at Lake
12 McDonald because she resided there.¹³ Montana has statutory
13 guidelines for determining residency. Umland v. Nat'l Cas. Co.,
14 2003 MT 356, ¶ 20, 319 Mont. 16, 81 P.3d 500. A residence is
15 considered to be "the place where a person remains when not
16 called elsewhere for labor or other special or temporary purpose
17 and to which the person returns in seasons of repose."
18 MCA § 1-1-215. Washington has no general statutory definition of
19 a residence.

20
21 _____
22 ¹³ Snavelly stated in her September 22, 2009, declaration
23 that since the time she and her former spouse bought Lake
24 McDonald, she intended to use it as a retirement home. However,
25 the intention to reside on a declared homestead, under Washington
26 law, is measured at the time the declaration is filed. See
27 In re Wilson, 341 B.R. at 26. The bankruptcy court found that
28 Snavelly could not have reasonably intended to reside at Lake
McDonald at the time she filed the declaration of homestead:
"She's filed a declaration of homestead - on a piece of property
which she can never live on." H'rg. Tr. at 7:15-19. Indeed, at
the time Snavelly filed the declaration of homestead, the order
granting the trustee authority to sell Lake McDonald had already
been entered and an auction was pending.

1 The evidence that Snavelly resided at Lake McDonald consisted
2 of her declaration, dated September 22, 2009, attached to her
3 opposition to the trustee's motion to void the homestead
4 declaration. In it she stated that: (1) she and her husband
5 purchased Lake McDonald in 1973, with the intention of making it
6 their retirement home; (2) improvements were made in anticipation
7 of retiring in the home; (3) she stays at Kona Ranch when in
8 Missoula and "when [she] is not in Missoula [she] reside[s] at
9 the Lake McDonald cabin"; and finally, (4) she is essentially
10 destitute and Lake McDonald is the only place she has to go.

11 For her part, the trustee contended Snavelly did not actually
12 reside at Lake McDonald based upon Snavelly's prior recorded
13 homestead declaration for Kona Ranch and a declaration from
14 Mr. Samuel, who acquired Kona Ranch in foreclosure. Mr. Samuel's
15 declaration stated that Snavelly continued to reside on Kona Ranch
16 after the foreclosure and that he and Snavelly were in
17 negotiations for her to continue to live there in the future.

18 A homestead declaration must be filed in good faith, which
19 is construed as meaning that "'it must speak the truth' in order
20 to be valid." In re Wilson, 341 B.R. at 27 (citation omitted);
21 see also, Blagg v. Bass, 261 F.2d 631, 635 (9th Cir. 1958). At
22 the close of hearing, the bankruptcy court found that Snavelly's
23 declaration of homestead was not truthful:

24 All the while the trustee is selling this property,
25 going through all kinds of contortions, finally sells
26 it, then all of a sudden, boom, I have a
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28

1 homestead. . . . [U]nder all the circumstances,¹⁴ I don't
2 think this homestead declaration is in good faith. I
3 don't believe the debtor.

4 Hr'g. Tr. at 9:7-10; 10:2-5.

5 The briefing and evidence submitted to the bankruptcy court
6 were sparse. As a result, the bankruptcy court's findings were
7 few. The bankruptcy court found that the declaration of
8 homestead was not filed in good faith because: (1) Snavelly did
9 not raise the issue of a homestead on Lake McDonald during the
10 sale motions and objections; (2) she filed the bankruptcy
11 petition stating she resided in Washington, and (3) she could
12 have no intention to reside on Lake McDonald in the future
13 because it was set for sale at auction. Additionally, the
14 bankruptcy court found Mr. Samuel's declaration that Snavelly
15 resided at Kona Ranch was more credible than Snavelly's
16 declaration that she resided at Lake McDonald.

17 We must defer to the bankruptcy court's findings of fact
18 based on credibility. We do not find the bankruptcy court's
19 conclusion that Snavelly did not actually reside at Lake McDonald

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¹⁴ The bankruptcy court presided over Snavelly's previously
22 filed chapter 11 bankruptcy case in 2002. During the course of
23 that bankruptcy, Snavelly opposed a change of venue to Montana on
24 the basis that she resided in Washington and intended to always
reside in Washington. The bankruptcy court alluded to this
during the September 25, 2009, hearing, stating:

25 Sometimes I have a pretty good memory. . . she took the
26 position [then] that she was a resident of Black Diamond.
27 She had always been a resident of Black Diamond. She would
28 always be a resident of Black Diamond. And when this case
was filed, she - the petition showed she was a resident of
Black Diamond. Now, how does all of a sudden she have a
homestead over in Lake McDonald?

Hr'g Tr. at 3:14-4:1.

1 clearly erroneous. "Where there are two permissible views of the
2 evidence, the fact finder's choice between them cannot be clearly
3 erroneous." Anderson v. City of Bessemer, 470 U.S. at 574.

4 The only evidence of Snavely's residency at Lake McDonald
5 was her own assertion that she splits her time between Kona Ranch
6 and Lake McDonald. There is no other evidence in the record to
7 support that contention. For example, Snavely's bankruptcy
8 schedules do not indicate that she resided in Montana at the time
9 the petition was filed. During the course of the bankruptcy
10 case, Snavely asserted she resided at Kona Ranch (a place where a
11 portion of her business was located). Snavely's recorded
12 homestead for Kona Ranch was not abandoned (although the property
13 was foreclosed).¹⁵ Snavely did not file any amendment or
14 document in the bankruptcy case changing her address or residence
15 to Lake McDonald until September 25, 2009, when she amended her
16 schedules to claim an exemption for Lake McDonald as a homestead.
17 Moreover, Snavely did not assert, in her objections to the sale
18 of Lake McDonald, that she resided or spent any time on the
19 property, or that she claimed a homestead exemption in the
20 property. Since Montana and Washington law both provide for a
21 homestead exemption in excess of \$125,000, knowing that Snavely
22 intended to assert a homestead would have had a bearing on the
23 trustee's decision to sell Lake McDonald.

24
25 ¹⁵ If the property owner resides or claims a homestead on
26 another parcel of property, he or she must also execute and
27 record a declaration of abandonment of homestead (in the same
28 manner as a declaration of homestead is recorded) on that
property. See RCW 6.13.040(2) and (4); MCA § 70-32-302. A
homestead may also be abandoned by a grant of the homestead
property. Id.

1 Accordingly, the bankruptcy court's findings of fact were
2 supported by the evidence and declaration testimony. The
3 bankruptcy court applied the correct rule of law (the
4 determination of residency on the property) to the facts and it
5 did not err in the conclusion it reached. Therefore, we agree
6 with the bankruptcy court that Snavely's homestead declaration is
7 void.

8 **B. Homestead Exemption**

9 Snavely filed her bankruptcy petition and declared she was
10 domiciled in Washington. Therefore, Snavely is only entitled to
11 claim Washington state exemptions or the federal exemptions of
12 § 522(d). 11 U.S.C. § 522(b)(1). Section 522(b)(3)(A) provides
13 that the exemptions are those available under applicable state
14 law, which is defined as where the petition is filed. See
15 In re Arrol, 170 F.3d at 935. Accordingly, Snavely is not
16 entitled to claim a Montana state homestead exemption. Even if
17 she were so entitled, the lack of a valid homestead declaration
18 precludes her from doing so. MCA § 70-32-105.

19 Snavely is also not entitled to claim a homestead exemption
20 in Lake McDonald under Washington law. In Washington, there are
21 two methods of creating a homestead exemption. "An automatic
22 homestead exemption is created under RCW 6.13.040(1) for
23 '[p]roperty described in RCW 6.13.010 [which] constitutes a
24 homestead and is automatically protected by the exemption
25 described in RCW 6.13.070 from and after the time the property is
26 occupied as a principal residence by the owner.'" In re Gitts,
27 116 B.R. at 178. Alternatively, a property owner may establish a
28 homestead for exemption purposes by declaration. In re Wilson,

1 341 B.R. at 26. To declare a homestead in property "that is not
2 yet occupied as a homestead," the property owner must execute and
3 record a declaration establishing his or her intent to reside on
4 the property in the future. Id.; RCW 6.13.010(1), 6.13.040(2)
5 and (3).

6 A debtor's entitlement to an exemption is determined based
7 upon facts as they existed at the time of the bankruptcy filing,
8 and subsequent changes to those facts typically are irrelevant
9 for exemption determination purposes. See Hopkins v. Cerchione
10 (In re Cerchione), 414 B.R. 540, 548 (9th Cir. BAP 2009);
11 In re Kim), 257 B.R. at 684. At the time Snavely filed her
12 bankruptcy petition, she did not occupy the residence at Lake
13 McDonald. Therefore, she was not eligible to qualify for the
14 "automatic" homestead exemption afforded under RCW 6.13.040(1);
15 In re Wilson, 341 B.R. at 26.

16 The bankruptcy court did not err in finding that Snavely did
17 not reside or intend to reside at Lake McDonald. "[U]nder
18 Washington law . . . a 'declaration of homestead is a right or
19 privilege given a property owner by statute, so that its validity
20 depends upon compliance with the statutory requirements and only
21 by such compliance does the homestead come into existence.'" In re Wilson
22 341 B.R. at 27 (quoting Bank of Anacortes v. Cook,
23 10 Wn.App. 391, 395, 517 P.2d 633, 636 (1974)). Here, Snavely
24 did not comply with the statutory requirement that she actually
25 reside or intend to reside at Lake McDonald. Therefore, she is
26 not entitled to claim a homestead exemption for Lake McDonald
27 under Washington law. See In re Wilson, 341 B.R. at 27.

VI. CONCLUSION

For the foregoing reasons, we AFFIRM the bankruptcy court's order voiding Snavely's declaration of homestead for Lake McDonald, which precludes Snavely from claiming a homestead exemption for Lake McDonald.