

DEC 2 2013

NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No.	ID-13-1218-JuKiKu
)		
6	STEPHANIE LYNN,)	Bk. No.	ID-12-02896-TLM
)		
7	Debtor.)		
)		
8	<hr/> STEPHANIE LYNN,)		
)		
9	Appellant,)		
)		
10	v.)	M E M O R A N D U M *	
)		
11	JEREMY J. GUGINO, Chapter 7)		
	Trustee;)		
12)		
	Appellee.)		
13	<hr/>)		

Argued and Submitted on November 22, 2013
at Pasadena, California

Filed - December 2, 2013

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

Honorable Terry L. Myers, Chief Bankruptcy Judge, Presiding

Appearances: Brian John Coffey, Esq. argued for appellant
Stephanie Lynn; Matthew Todd Christensen, Esq.,
of Angstman, Johnson & Associates, PLLC argued
for appellee Jeremy J. Gugino.

Before: JURY, KIRSCHER, and KURTZ, Bankruptcy Judges.

* 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 Debtor Stephanie Lynn appeals from the bankruptcy court's
2 order sustaining the objection of appellee-chapter 7¹ trustee,
3 Jeremy J. Gugino, to debtor's homestead exemption of unimproved
4 real property. At issue is whether debtor "actually intended"
5 to make unimproved real property her homestead within the
6 meaning of Idaho Code § 55-1001(2). For the reasons explained
7 below, we AFFIRM.

8 I. FACTS

9 A. Prepetition Events

10 Debtor and her ex-husband, David Arthaud (Arthaud),
11 purchased unimproved property located on Placer Creek Road
12 (Place Creek property) near Boise, Idaho. In 2006, debtor
13 initiated divorce proceedings and the parties subsequently
14 entered into a Stipulated Judgment and Decree of Divorce filed
15 July 31, 2007. Attached to the divorce decree is a Marital
16 Property Settlement Agreement (MPSA) that deals with, among
17 other things, the Placer Creek property. The terms of MPSA
18 require that the parties sell the property, deposit the proceeds
19 in debtor's attorney's trust account, and then distribute the
20 proceeds according to a distribution scheme. Under the MPSA,
21 debtor and Arthaud have equal access to the property until it is
22 sold.

23 On August 24, 2012, debtor executed a declaration of
24 abandonment of her residence located on Elk Creek Road in Idaho
25

26 ¹ Unless otherwise indicated, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
28 "Rule" references are to the Federal Rules of Bankruptcy
Procedure.

1 City (Elk Creed Road property) and a declaration of homestead on
2 the Placer Creek property. She recorded both documents on
3 August 27, 2012, in Boise County, Idaho.

4 **B. Bankruptcy Events**

5 Not long after, on December 11, 2012, debtor filed her
6 chapter 7 petition. Gugino was appointed trustee.

7 The Placer Creek property had not been sold by the petition
8 date. In Schedule A, debtor listed the Placer Creek property
9 with a value of \$32,872 and listed her ownership interest as fee
10 simple. In Schedule C, debtor claimed the Placer Creek property
11 exempt for its full value under Idaho Code §§ 55-1001, 55-1002,
12 and 55-1003.

13 Trustee timely objected to debtor's homestead exemption in
14 the Placer Creek property, asserting that: (1) the property was
15 unimproved bare ground; (2) debtor was not living on or
16 otherwise occupying the property on the petition date; (3) the
17 property had been listed for sale almost continuously for
18 several years prior to the petition date; and (4) the MPSA
19 required debtor and her husband to sell the property and
20 distribute the proceeds according to a distribution scheme.
21 Based on these facts, trustee argued that the property did not
22 qualify as a homestead under Idaho law because debtor could not
23 have "actually intended" to use the property as her principal
24 home within the meaning of Idaho Code § 55-1001(2).

25 In response to the objection, debtor requested an
26 evidentiary hearing to determine her subjective intent to reside
27 on the property. Debtor further asserted that to the extent
28 trustee was arguing that she could not have had the requisite

1 intent due to the language in the MPSA, that argument should
2 fail as a matter of law.

3 In his memorandum, trustee maintained that the facts were
4 not substantially in controversy and that the adjudication of
5 the matter would turn largely on the language in the MPSA which
6 required the parties to sell the Placer Creek property.

7 According to trustee, because debtor was under a court order to
8 sell the property, her sale power rights were transferred to
9 trustee on the date of debtor's filing. As a result, trustee
10 asserted that debtor's requisite intent to make the property her
11 homestead "went away" as soon as her sale power rights were
12 transferred.

13 In her responsive memorandum, debtor contended that
14 although the divorce decree required the parties to sell the
15 Placer Creek property, there was no timeframe or deadline for
16 doing so. Debtor further argued that the decree and MPSA made
17 clear that she and her ex-husband had equal access to the
18 property until it was sold.

19 On April 22, 2013, the bankruptcy court held an evidentiary
20 hearing. The evidence consisted of the divorce decree, debtor's
21 declarations of homestead and abandonment, debtor's schedules
22 and statement of financial affairs, and debtor's testimony.

23 After taking the matter under advisement, the bankruptcy
24 court orally entered its decision on the record, sustaining
25 trustee's objection and disallowing debtor's homestead
26 exemption. The bankruptcy court found that: (1) debtor
27 testified that the Placer Creek property had been listed for
28 sale for much of the time from and after 2007, although

1 occasionally it was taken off the market for strategic reasons
2 during the winter season and again briefly when a real estate
3 agent handling the property passed away; (2) debtor had occupied
4 the Elk Creek Road property from December 2007 through October
5 2011 and ceased occupancy some 14 months prior to her
6 surrendering that property through her statement of intention;
7 (3) debtor's schedules showed the Elk Creek Road property was
8 significantly underwater and that a mortgage was owed to Bank of
9 America well exceeding the value of the property; (4) on
10 August 24, 2012, debtor executed the abandonment of the Elk
11 Creek Road property as her homestead and a declaration asserting
12 a homestead on the Placer Creek property; (5) the only occupancy
13 of the Placer Creek property was a few summer months prior to
14 debtor's divorce in 2006; (6) debtor's testimony did not
15 describe any steps that she had taken at any time, up to or
16 after the filing of the petition, to make the Placer Creek
17 property her primary residence; and (7) on the date of her
18 filing, debtor lived in rental property and worked in Meridian,
19 Idaho, which was some distance from the Placer Creek property.

20 Based on these facts, the bankruptcy court concluded that
21 the weight of the objective evidence, and the direct and
22 circumstantial evidence provided by trustee, successfully
23 impeached debtor's testimony of her actual intent to reside on
24 the Placer Creek property. In the end, the court concluded that
25 debtor did not have the actual intent required by the Idaho Code
26 in order to substantiate the homestead exemption.

27 On April 30, 2013, the bankruptcy court entered the order
28 sustaining trustee's objection to debtor's claim of exemption.

1 Debtor timely appealed.

2 **II. JURISDICTION**

3 The bankruptcy court had jurisdiction over this proceeding
4 under 28 U.S.C. §§ 1334 and 157(b)(2)(B). We have jurisdiction
5 under 28 U.S.C. § 158.

6 **III. ISSUE**

7 Whether the bankruptcy court erred in sustaining trustee's
8 objection to debtor's homestead exemption in the unimproved
9 Placer Creek property.

10 **IV. STANDARDS OF REVIEW**

11 We review questions of fact, such as the bankruptcy court's
12 ultimate decision regarding debtor's actual intent to make the
13 Placer Creek property her homestead, under the clearly erroneous
14 standard. Kelley v. Locke (In re Kelley), 300 B.R. 11, 16 (9th
15 Cir. BAP 2003). We affirm the bankruptcy court's factual
16 findings unless its interpretation of the facts was "illogical,
17 implausible, or without support in inferences that may be drawn
18 from the facts in the record." United States v. Hinkson,
19 585 F.3d 1247, 1261-62 & n.21 (9th Cir. 2009) (en banc).

20 We review a bankruptcy court's conclusions of law,
21 including its interpretation of state law, de novo. Hopkins v.
22 Cerchione (In re Cerchione), 414 B.R. 540, 545 (9th Cir. BAP
23 2009).

24 **V. DISCUSSION**

25 When debtor filed her chapter 7 petition, all her assets
26 became "property of [her] bankruptcy estate, see 11 U.S.C.
27 § 541, subject to [her] right to reclaim certain property as
28 'exempt.'" Schwab v. Reilly, 560 U.S. 770, 130 S.Ct. 2652, 2657

1 (2010). "Property a debtor claims as exempt will be excluded
2 from the bankruptcy estate '[u]nless a party in interest'
3 objects." Id. (citing § 522(1)). Whether property qualifies as
4 exempt is to be determined as of the date of the filing of
5 debtors' chapter 7 petition. White v. Stump, 266 U.S. 310, 313
6 (1924); In re Cerchione, 414 B.R. at 548.

7 Section 522(b) allows debtors to choose the exemptions
8 afforded by state law or the federal exemptions listed under
9 § 522(d). Idaho has elected to "opt out" of the federal
10 exemptions. Idaho Code § 11-609. Therefore, debtor was limited
11 to the exemption allowed under Idaho state law.

12 In re Steinmetz, 261 B.R. 32, 33 (Bankr. D. Idaho 2001). Idaho
13 exemption statutes are to be liberally construed in favor of the
14 debtor. Id.

15 Trustee, as the party objecting to debtor's homestead
16 exemption, had the burden of production and persuasion, and
17 therefore must produce evidence to rebut the presumptively valid
18 exemption. In re Kelly, 300 B.R. at 17. "While the burden of
19 persuasion always remains with the objecting party, if the
20 objecting party can produce evidence to rebut the presumption,
21 then the burden of production shifts to the debtor to come
22 forward with unequivocal evidence to demonstrate that the
23 exemption is proper." Id. To have his objection sustained,
24 trustee must prove by a preponderance of the evidence that
25 debtor lacked the intent required under the Idaho Code. Id.

26 In Idaho, the homestead can be established automatically by
27 occupying a home as one's principal residence or by recording a
28 proper declaration of homestead. Idaho Code § 55-1004. To

1 claim a homestead exemption in bare land or improved property
2 which he or she does not yet occupy, the debtor must record a
3 proper declaration. Idaho Code § 55-1004(2). In the case of a
4 debtor who owns more than one parcel of property and who desires
5 to claim a homestead exemption in a parcel he or she does not
6 yet occupy, the debtor must execute and record two different
7 declarations: a declaration of homestead as to the unoccupied
8 property, and a declaration of abandonment as to the occupied
9 property.

10 Trustee does not dispute that debtor recorded the requisite
11 declarations or that the declarations were in the proper form.
12 Rather, the trustee asserts that to prove debtor "actually
13 intended" to make the Placer Creek property her homestead within
14 the meaning of Idaho Code § 55-1001(2), debtor needs more than a
15 mere declaration of homestead. We agree.

16 Idaho Code § 55-1001(2) states:

17 'Homestead' means and consists of the dwelling house
18 or the mobile home in which the owner resides or
19 intends to reside, with appurtenant buildings, and the
20 land on which the same are situated and by which the
21 same are surrounded, or improved; or unimproved land
22 owned with the intention of placing a house or mobile
23 home thereon and residing thereon Property
24 included in the homestead must be actually intended or
25 used as a principal home for the owner.

26 The plain language of the statute states that property
27 included in the homestead must be "actually intended" as a
28 principal home for the owner. Black's Law Dictionary defines
"actual" as "existing in fact; real." Thus, the phrase
"actually intended" involves an examination of external
verifiable facts as opposed to examining only an individual's
subjective intention. As a result, determining a debtor's

1 "actual" intent to establish a homestead on property is a
2 factually intensive endeavor. In re Kelley, 300 B.R. at 16;
3 In re Moore, 269 B.R. 864, 868 (Bankr. D. Idaho 2001). However,
4 in analyzing the debtor's actual intent to occupy the property,
5 the exemption does not require proof of an ability to actually
6 occupy. See In re Ramsey, 2013 WL 3205415, at *4 (9th Cir. BAP
7 2012) citing In re Conley, 1999 WL 33490228, at *12 (Bankr. D.
8 Idaho 2001) (finding that the debtor's decade long litigation
9 concerning the unimproved property was indicative of his
10 subjective intent to make the property his homestead).

11 As the trier of fact, the bankruptcy court had to determine
12 whether debtor's testimony was credible, which of the
13 permissible competing inferences it would draw from the evidence
14 presented, and ultimately whether the party with the burden of
15 persuasion – here the trustee – had persuaded it that the
16 requisite facts showing intent or lack thereof were proven. The
17 record shows that the bankruptcy court performed this function
18 properly.

19 The bankruptcy court summarized the evidence in support of
20 the trustee's position and debtor's countervailing evidence that
21 it considered. The court did not find debtor's testimony
22 persuasive regarding her actual intent to occupy the Placer
23 Creek property in light of other evidence in the record that
24 suggested the contrary. The bankruptcy court noted that other
25 than debtor's declarations regarding the abandonment and
26 declaration of her homestead, debtor did not testify that she
27 had taken any steps to occupy the property. Moreover, debtor
28 did not refute the terms of the divorce decree or that she had

1 been continually marketing the Placer Creek property prior to
2 filing her bankruptcy petition. Instead, debtor hung her hat on
3 the fact that the divorce decree did not specify a time when the
4 property was to be sold. However, contrary to debtor's
5 suggestion, the bankruptcy court did not solely rely on the
6 divorce decree to either establish or refute debtor's intent
7 because it was silent as to the occupancy of the property, not
8 even addressing it.

9 In sum, the bankruptcy court did not clearly err in finding
10 that debtor did not have the actual intent to make the Placer
11 Creek property her homestead. The record as a whole supports
12 the bankruptcy court's inferences and findings. "Where there
13 are two permissible views of the evidence, the factfinder's
14 choice between them cannot be clearly erroneous." Anderson v.
15 City of Bessemer City, N.C., 470 U.S. 564, 574-75 (1985).

16 VI. CONCLUSION

17 For these reasons, we AFFIRM.
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