

MAR 15 2016

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	WW-14-1424-KiFJu
)		
JEFFREY LLOYD WICKLUND,)	Bk. No.	14-11419-KAO
)		
Debtor.)		
_____)		
JEFFREY LLOYD WICKLUND,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM¹	
)		
ROBERT D. JOHNSON TRUST,)		
)		
Appellee.)		
_____)		

Argued and Submitted on September 25, 2015,
at Seattle, Washington

Filed - March 15, 2016

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

Honorable Karen A. Overstreet, Bankruptcy Judge, Presiding

Appearances: _____
 Steven D. Hathaway submitted on brief for appellant
 Jeffrey Lloyd Wicklund; Bryan L. Page of Zender
 Thurston, P.S. argued for appellee Robert D.
 Johnson Trust.

Before: KIRSCHER, FARIS and JURY, Bankruptcy Judges.

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 8024-1.

1 Debtor Jeffrey Lloyd Wicklund ("Jeffrey")² appeals orders of
2 the bankruptcy court denying the homestead exemption he claimed
3 under Washington homestead exemption statutes and denying
4 Jeffrey's motion to alter or amend the order denying Jeffrey's
5 homestead exemption. We AFFIRM.

6 **I. FACTUAL BACKGROUND**

7 Jeffrey owns a wine shop in Bellingham, Washington. His
8 spouse, Edalyn Wicklund ("Edalyn") is employed as an office
9 manager at a dentist's office. Jeffrey and Edalyn moved to
10 Bellingham in 2005 to start a wine shop, Purple Smile Wines.
11 Their mailing address is a rental house in Bellingham.

12 In November 2010, Edalyn and her sister, after their mother
13 died, inherited the home in which they grew up in Everett,
14 Washington. Jeffrey and Edalyn bought out Edalyn's sister's
15 interest in the Everett home in November 2011 for approximately
16 \$175,000. For a short period of time, ending in July 2013,
17 Jeffrey and Edalyn lived at the Everett home.

18 In 2008, Jeffrey and Bob Johnson ("Johnson") entered into an
19 agreement wherein Johnson loaned Jeffrey money to expand his wine
20 shop business. Johnson died in May 2013, after which Johnson's
21 claim passed to the "Bob Johnson Trust" ("Johnson Trust"). The
22 executors of his estate pressured Jeffrey to pay the outstanding
23 debt, until Jeffrey felt compelled to file a chapter 13³

24
25 ² In identifying Mr. and Mrs. Wicklund, we have used their
26 first names in this memorandum. No disrespect is intended.

27 ³ Unless specified otherwise, all chapter, code and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. All
(continued...)

1 bankruptcy petition.

2 Jeffrey filed his chapter 13 bankruptcy petition on
3 February 28, 2014. On Schedule A, Jeffrey listed the Everett home
4 as real property owned in fee simple,⁴ with a value of \$318,000
5 and encumbered by a secured claim in the amount of \$168,337.31.
6 Schedule D identifies the holder of the secured claim on the
7 Everett home as Banner Bank, which also has liens on Jeffrey's
8 inventory, fixtures, and equipment located at Purple Smile Wines.
9 Schedule B lists personal property assets with a value of
10 \$61,008.35, including \$12,705.81 in a Roth IRA account, \$0.00
11 worth of shares in PS Fairhaven, Inc., which is the owner of
12 Purple Smile Wines and \$27,842.77 worth of inventory, fixtures,
13 and equipment located at Purple Smile Wines.

14 On Schedule C, Jeffrey claimed a homestead exemption in the
15 Everett home in the amount of \$125,000, specifying that he claimed
16 the exemption under Wash. Rev. Code ("RCW") §§ 6.13.010, 6.13.020
17 and 6.13.030. Schedule F lists two unsecured, nonpriority claims
18 held by the Johnson Trust in the amounts of \$180,726.67 and
19 \$45,181.67.

20 The chapter 13 trustee conducted the § 341(a) meeting of
21 creditors on April 9, 2014. Jeffrey testified at that meeting
22 that he received rent from a tenant at the Everett home in August
23 2013, and then not again until March 2014 when a tenant signed a
24 one year lease at \$1,900 per month.

25 _____
26 ³(...continued)
27 "Civil Rule" references are to Federal Rules of Civil Procedure.

28 ⁴ Jeffrey left the column on Schedule A indicating "Husband,
Wife, Joint, or Community" blank.

1 At the § 341(a) meeting, Jeffrey answered the following
2 questions about the Everett home:

3 Q. Okay. Have you ever lived there?

4 A. Yes.

5 Q. When was the last time you lived there?

6 A. Well, it was kind of part-time.

7 Q. Okay.

8 A. Before we rented it the first time, so probably
9 July.

10 Q. Of?

11 A. '13.

12 Q. July of '13 was the last time you lived there?

13 A. Yeah.

14 Q. Okay. What's your intention with the property? Is
15 it to maintain as a rental? I mean -

16 A. Probably eventually live there.

17 Q. Okay. When would that be?

18 A. Hard to say.

19 Q. Try.

20 A. A couple years, maybe. Depends on how things go up
21 north.

22 Q. Okay. So what's keeping you up north? It's your
23 business, right?

24 A. Yes.

25 Q. And your wife's job is up there as well?

26 A. Yes.

27 Q. You are - I guess I just want to - so you would
28 imagine moving to this property at some point in the

1 near future?

2 A. Potentially, yeah. It's an inheritance. My wife
3 grew up in the house.

4 * * * *

5 Q. Do you have any firm plans right now to move into
6 the [Everett] house?

7 A. No.

8 Q. Do you intend to keep it or sell it?

9 A. Intention is to keep it.

10 Mr. Hathaway [debtor's counsel]: I think you
11 testified an intent to move back into it.

12 Mr. Wicklund: Yeah, at some point down the road,
13 but for right now -

14 Mr. Hathaway: You're not going to sell it?

15 Mr. Wicklund: No.

16 The Johnson Trust filed objections to confirmation, a motion
17 to convert and an objection to Jeffrey's claim of homestead
18 exemption in the Everett home. The Johnson Trust argued in its
19 objection to exemption that Jeffrey could not claim Washington's
20 automatic homestead exemption because he did not currently live at
21 the Everett home and he could not otherwise claim a homestead
22 exemption because, at the time of the objection, he had not
23 recorded a homestead declaration for the Everett home, a
24 declaration which he could not make in good faith.

25 Jeffrey filed a response to the Johnson Trust's objection on
26 June 4, 2014. Attached to Jeffrey's response was an email from
27
28

1 Tammy Heaton,⁵ the tenant at the Everett home, dated May 24, 2014,
2 which read:

3 This letter to to (sic) clarify the future use of the
4 property located [in Everett]. We have signed a 2 year
5 lease beginning on March 1, 2014. The intent if [sic]
6 the landlords is to move back into the property once the
7 lease term is up. They've left the majority of the
household items in the garage and had let us know they
wanted a renter who would take good care of their home
they planned on moving back into.

8 Following a hearing held June 11, 2014, the bankruptcy court
9 entered an order on June 13, 2014, sustaining the Johnson Trust's
10 objection and denying Jeffrey's claimed homestead exemption. On
11 June 27, 2014, Jeffrey filed a "Motion to Alter or Amend Order
12 under [Civil Rule] 59(e) and [Rule] 9023," raising several issues
13 and grounds for reconsideration of the bankruptcy court's denial
14 of his homestead exemption, including that he filed a declaration
15 of homestead on June 20, 2014, after the court's denial of his
16 homestead exemption. Jeffrey also raised several other grounds
17 related to his non-debtor spouse's interest in the Everett home,
18 her separately-filed declaration of homestead on the Everett home,
19 and its status as community property and a community business.⁶
20 Jeffrey argued that: (1) it was manifest error of law for the
21 court to preclude him from claiming a homestead exemption when he
22 had the right to file a homestead declaration after he filed his

23

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25 ⁵ The record does not show whether Heaton's email was
admitted into evidence.

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27 ⁶ According to the bankruptcy court's order denying Jeffrey's
28 motion to alter or amend, the newly recorded homestead
declarations were attached to Jeffrey's motion as exhibits.
However, the homestead declarations are not part of Jeffrey's
excerpts of record.

1 bankruptcy petition; (2) his and Edalyn's subsequent filing of
2 their homestead declarations constituted newly discovered evidence
3 entitling him to reconsideration; and (3) it was a manifest
4 injustice to deny Jeffrey a homestead exemption in this inherited
5 family home since he and Edalyn had displayed a clear intent to
6 live there when they retired.

7 The chapter 13 trustee and the Johnson Trust opposed
8 Jeffrey's motion to alter or amend order. The trustee contended
9 that the court should not consider the homestead declarations,
10 which were filed after the June 11, 2014 hearing and the
11 bankruptcy court's decision, because Jeffrey could have filed the
12 homestead declarations prior to the hearing. The trustee also
13 argued that Jeffrey's post-hearing homestead declarations, taken
14 in context, did not show a good faith intent to use the Everett
15 home as Jeffrey's homestead.

16 The Johnson Trust, like the trustee, argued that Jeffrey
17 should not be allowed under Civil Rule 59 to file newly "created"
18 homestead declarations under the guise of newly "discovered"
19 evidence, because Jeffrey could have recorded his declaration
20 before the hearing but did not. In addition, the Johnson Trust
21 argued that the homestead declarations were defective and did not
22 contain the statements required under RCW § 6.13.040(3)(a) that
23 the person is residing or intends to reside on the premises and
24 claims them as a homestead. The Johnson Trust argued that Jeffrey
25 had failed to show an intent to reside at the Everett home in the
26 near future, which was evidenced by the fact that Jeffrey and
27 Edalyn were leasing the property to a third party.

28 On August 18, 2014, the bankruptcy court entered its order

1 denying Jeffrey's motion to alter or amend order. The court
2 addressed only whether it should alter or amend its order denying
3 Jeffrey's exemption and declined to address any issues relating to
4 Edalyn's rights in the Everett home, stating Edalyn's issues
5 "[were] not properly before the Court on a Motion to Alter or
6 Amend."

7 With respect to Jeffrey's claim of exemption, the court found
8 that no errors of law or fact occurred in its original order and
9 that the court properly disallowed Jeffrey's claim of homestead
10 exemption under RCW § 6.13.040(2) based on the facts that existed
11 at the time of the hearing, i.e., that Jeffrey did not reside at
12 the property and he had not filed a declaration of homestead prior
13 to the date the court ruled on the objection. The court wrote
14 that Jeffrey's filing of a declaration of homestead after entry of
15 the order denying his homestead exemption did not serve as a basis
16 for granting a motion to alter or amend under Rule 59(e). Citing
17 Contempo Metal Furniture Co. of California v. East Texas Motor
18 Freight Line, Inc., 661 F.2d 761, 766 (9th Cir. 1981), and 11 Fed.
19 Prac. & Proc. Civ. § 2808 (C. Wright & A. Miller, eds., 3d ed.),
20 the bankruptcy court held that a movant seeking to alter or amend
21 on the grounds of newly discovered evidence "must show that the
22 fact was in existence at the time the order was entered." Order,
23 Docket No. 72 (Aug. 18, 2014) 9:1.

24 The bankruptcy court went on to hold that even if Jeffrey's
25 declaration of homestead did constitute newly discovered evidence,
26 the court would nevertheless disallow Jeffrey's claimed homestead
27 exemption because Jeffrey had failed to show an intent to reside
28 at the Everett home:

1 As noted by the Bankruptcy Appellate Panel in Gitts,
2 Errez and Wilson, filing a declaration of homestead
3 alone is insufficient to establish intent to reside on
4 the property. Traverso v. Cerini, 146 Wash. 273, 276
5 (1928); Wolph v. Kennedy, 96 Wash. App. 1026 (1999).
6 The court must also find facts that support an intent to
7 reside on the property. Id. The only evidence in
8 support of the claimed homestead in this case is the
9 Debtor's self-serving declaration testimony, combined
10 with a declaration from his tenant that it was her
11 understanding that the Debtor intended to live there at
12 some point in the future. At the 341 meeting, however,
13 the Debtor admitted that he had no firm plans to move to
14 the Colby Avenue Property. Page Decl., Dkt. 24 Ex. 1,
15 p. 18, lines 20-22. The Debtor is 53 years old and in a
16 Chapter 13 bankruptcy. There is no evidence that he is
17 near retirement or has any specific plans to occupy the
18 property. When considered in conjunction with the
19 Debtor's failure to file the homestead declaration prior
20 to the hearing on the Objection, the Court finds the
21 factual record insufficient to establish an intent to
22 reside on the property. Therefore, the Court will not
23 alter or amend the Order Denying Exemption.

24 Id. at 9:15-10:2.

25 Jeffrey filed a timely notice of appeal on August 27, 2014,
26 after the bankruptcy court issued its order denying his motion to
27 alter or amend order on August 18, 2014.⁷

28 ⁷ Jeffrey timely filed his notice of appeal after the
bankruptcy court issued its order denying his motion to alter or
amend order on August 18, 2014, and the notice includes the order
denying claim of homestead exemption and order denying the motion
to alter or amend. Rule 8001(a) in effect when this appeal was
taken did not require the appellant to designate the order
appealed from, even though 9th Cir. BAP Rule 8001-1(a)-1 required
attachment of the order if it was available. Rule 8003(a)(3)(B),
effective December 1, 2014, requires attachment of the appealed
order. The notice of appeal directly designates the homestead
order and indirectly references the reconsideration order. We
conclude that Dudley v. Anderson (In re Dudley), 249 F.3d 1170,
1173-74 (9th Cir. 2001) (Rule 8001(a) does not require the notice
of appeal to designate the order appealed from), citing United
States v. Arkison (In re Cascade Roads, Inc.), 34 F.3d 756, 761
(9th Cir. 1994), applies; we have jurisdiction to consider all
issues raised in both orders. "A mistake in designating the order
being appealed is not fatal 'as long as the intent to appeal a
specific judgment can be fairly inferred and the appellee is not
prejudiced or misled by the mistake.'" McCarthy v. Mayo, 827 F.2d

(continued...)

1 standard. In re Kelley, 300 B.R. at 16. A factual finding is
2 clearly erroneous, even when there is evidence to support it, only
3 if we have a definite and firm conviction that a mistake has been
4 committed. Banks v. Gill Distrib. Ctrs., Inc. (In re Banks),
5 263 F.3d 862, 869 (9th Cir. 2001) (quoting Anderson v. City of
6 Bessemer City, N.C., 470 U.S. 564, 573 (1985)). Alternately
7 stated, we must affirm the bankruptcy court's findings of fact
8 unless those findings are "illogical, implausible, or without
9 support in inferences that may be drawn from the facts in the
10 record." United States v. Hinkson, 585 F.3d 1247, 1262-63 (9th
11 Cir. 2009) (en banc).

12 A bankruptcy court's denial of a motion for reconsideration
13 is reviewed for an abuse of discretion. Arrow Elec., Inc. v.
14 Justus (In re Kaypro), 218 F.3d 1070, 1073 (9th Cir. 2000); Sewell
15 v. MGF Funding, Inc. (In re Sewell), 345 B.R. 174, 178 (9th Cir.
16 BAP 2006). To determine whether the bankruptcy court abused its
17 discretion, we conduct a two-step inquiry: (1) we review de novo
18 whether the bankruptcy court "identified the correct legal rule to
19 apply to the relief requested" and (2) if it did, we consider
20 whether the bankruptcy court's application of the legal standard
21 was illogical, implausible or "without support in inferences that
22 may be drawn from the facts in the record." Hinkson, 585 F.3d at
23 1261-62. If two views of the evidence are possible, the trial
24 judge's choice between them cannot be clearly erroneous.
25 Anderson, 470 U.S. at 574; Ng v. Farmer (In re Ng), 477 B.R. 118,
26 132 (9th Cir. BAP 2012).

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V. DISCUSSION

A. Denial of Homestead Exemption

Washington has not “opted out” of the federal exemption scheme. Thus, a debtor domiciled in Washington may select either the exemptions afforded by Washington law or the federal exemption scheme. § 522(b); 4 COLLIER ON BANKRUPTCY ¶ 522.02[1] (Alan N. Resnick & Henry J. Sommer, eds., 16th ed.). Jeffrey claimed a Washington state homestead exemption on Schedule C.

Homestead and exemption statutes in Washington are favored and should be liberally construed. Jefferies v. Carlson (In re Jefferies), 468 B.R. 373, 380 (9th Cir. BAP 2012); Pinebrook Homeowners Ass'n v. Owen, 48 Wash. App. 424, 427, 739 P.2d 110 (1987). “In Washington, a ‘homestead consists of real or personal property that the owner uses as a residence’ or ‘the dwelling house or the mobile home in which the owner resides or intends to reside Property included in the homestead must be actually intended or used as the principal home for the owner.” In re Jefferies, 468 B.R. at 380 (citing RCW § 6.13.010(1)). Washington has two methods for establishing a homestead. Arkison v. Gitts (In re Gitts), 116 B.R. 174, 178 (9th Cir. BAP 1990), aff’d & adopted, 927 F.2d 1109 (9th Cir. 1991); Wilson v. Arkison (In re Wilson), 341 B.R. 21, 25 (9th Cir. BAP 2006).

First, property occupied as a principal residence is automatically protected by the exemption. RCW § 6.13.040; In re Gitts, 116 B.R. at 178; In re Wilson, 341 B.R. at 25-26. The evidence in this case shows that the Everett home was occupied by a tenant on Jeffrey’s petition date. The first method for establishing a Washington homestead does not apply because Jeffrey

1 did not occupy the Everett home as his principal residence.

2 Second, if an owner cannot show occupancy and use, the owner
3 may nevertheless claim a homestead for exemption purposes by
4 declaration. In re Gitts, 116 B.R. at 178; In re Wilson, 341 B.R.
5 at 26. In order to establish a valid declared homestead
6 exemption, an owner must intend to reside on the property, record
7 a declaration of homestead and record a declaration of abandonment
8 of any automatic homestead or any existing declared homestead.
9 In re Gitts, 116 B.R. at 178; In re Wilson, 341 B.R. at 25-26. A
10 debtor's entitlement to a claimed exemption is determined as of
11 the date the bankruptcy petition is filed. Hopkins v. Cerchione
12 (In re Cerchione), 414 B.R. 540, 548 (9th Cir. BAP 2009); Culver,
13 LLC v. Chiu (In re Chiu), 266 B.R. 743, 751 (9th Cir. BAP 2001).
14 The validity of a declared Washington homestead exemption requires
15 focus on the time the declaration is recorded. In re Wilson,
16 341 B.R. at 26 (citing cases). If a judgment debtor files a
17 homestead declaration at any time subsequent to entry of a
18 judgment but before execution, the allowed homestead is exempt
19 from execution or forced sale. In re Gitts, 116 B.R. at 178.
20 These cases reflect the difference between entitlement as of the
21 bankruptcy petition date and validity as of the recordation date.
22 In re Wilson, 341 B.R. at 26. Intent to reside at a location
23 becomes the pivotal issue. Id.

24 The Johnson Trust argues that the bankruptcy court correctly
25 denied Jeffrey's homestead exemption because Jeffrey did not
26 reside at the Everett home on the date he filed his bankruptcy
27 petition and he did not record a declaration of homestead prior to
28 the denial of his exemption. Jeffrey counters that Gitts entitles

1 him to file a declaration of homestead after the petition date.

2 While Jeffrey's contention may be true in certain
3 circumstances, he misconstrues the holding in Gitts. In Gitts,
4 the debtors filed a declaration of homestead on the day after they
5 filed their bankruptcy petition.⁸ In re Gitts, 116 B.R. at 175.
6 The debtors' declaration of homestead related to property in which
7 the debtors did not reside but in which they indicated an
8 intention to reside as of the date of filing the bankruptcy
9 petition. Id. After the trustee filed an objection to the
10 debtors' claimed homestead exemption, the debtors filed a
11 declaration of abandonment of a different property and moved into
12 the new homestead property more than two months before the
13 bankruptcy court entered an order allowing the debtors' homestead
14 exemption and denying the trustee's objection. Id. at 175-76.

15 In the instant case, Jeffrey did not file his declaration of
16 homestead on the Everett home until after the bankruptcy court had
17 entered its order denying his homestead exemption. Jeffrey had
18 notice of the Johnson Trust's objection to his homestead exemption
19 and had notice of the hearing held on June 11, 2014. In fact, at
20 the § 341(a) meeting held on April 9, 2014, the trustee informed
21 Jeffrey that he might need a homestead declaration for the Everett
22 home. For reasons unknown, Jeffrey waited to record a homestead
23 declaration until after the bankruptcy court entered its order
24 denying his homestead exemption.

25 Under the particular facts of this case, the bankruptcy court

27 ⁸ The court noted that "but for the delay of a messenger
28 service [they] would have filed their declaration of homestead on
the same date." In re Gitts, 116 B.R. at 180.

1 did not err in denying Jeffrey's homestead exemption in the
2 Everett home because Jeffrey did not reside there and, more
3 importantly, did not intend to reside there as of the bankruptcy
4 petition filing date; he also had not filed a declaration of
5 homestead prior to the time the bankruptcy court entered its order
6 denying the exemption. The evidence supports the bankruptcy
7 court's conclusion that Jeffrey did not satisfy either method for
8 claiming a homestead under Washington law.

9 Jeffrey also contends that Edalyn's rights, intent and
10 interest in the Everett home, as her own separate property and as
11 community property, should have been considered and determined by
12 the bankruptcy court prior to deciding Jeffrey's homestead
13 exemption. The bankruptcy court declined to rule on Edalyn's
14 interest in the Everett home, either as separate or community
15 property, because those issues were not raised in the Johnson
16 Trust's objection and were not properly before the court. "[A]n
17 appellate court will not consider issues not properly raised
18 before the [bankruptcy] court." Price v. Lehtinen
19 (In re Lehtinen), 332 B.R. 404, 410 (9th Cir. BAP 2005), aff'd,
20 564 F.3d 1052 (9th Cir. 2009) (quoting Smith v. Marsh, 194 F.3d
21 1045, 1052 (9th Cir. 1999)).

22 **B. Motion to Reconsider; Civil Rule 59(e)**

23 Jeffrey also complains that the bankruptcy court abused its
24 discretion when it denied his motion to alter or amend the order
25 denying Jeffrey's homestead exemption based upon Civil Rule 59(e),
26 which applies in cases under the Code under Rule 9023. The Ninth
27 Circuit has written:

28 "[A] motion for reconsideration should not be granted,

1 absent highly unusual circumstances, unless the [] court
2 is presented with newly discovered evidence, committed
3 clear error, or if there is an intervening change in the
4 controlling law.” 389 Orange St. Partners v. Arnold,
5 179 F.3d 656, 665 (9th Cir. 1999). A motion for
6 reconsideration “may **not** be used to raise arguments or
7 present evidence for the first time when they could
8 reasonably have been raised earlier in the litigation.”
9 Kona Enters., Inc. v. Estate of Bishop, 229 F.3d 877,
10 890 (9th Cir. 2000).

11
12 Marlyn Nutraceuticals, Inc. v. Mucos Parma GmbH & Co., 571 F.3d
13 873, 880 (9th Cir. 2009) (emphasis in original); Zimmerman v. City
14 of Oakland, 255 F.3d 734, 740 (9th Cir. 2001) (amendment under
15 Civil Rule 59(e)); Hagerman v. Yukon Energy Corp., 839 F.2d 407
16 (8th Cir. 1988).

17 The Ninth Circuit affirmed a district court’s denial of
18 reconsideration of three new pieces of evidence in Marlyn
19 Nutraceuticals, writing: “Each of these pieces of evidence could
20 have been introduced earlier in the litigation.” 571 F.3d at 880.
21 This language applies in the instant case, because Jeffrey was
22 told at the § 341(a) meeting on April 9, 2014, that a homestead
23 declaration might be needed for the Everett home, but he failed to
24 file a declaration of homestead until after the bankruptcy court
25 entered its order denying his homestead exemption on June 13,
26 2014.

27 “A party does not properly preserve an issue for appeal by
28 raising it for the first time in a motion for reconsideration.”
29 Hendricks & Lewis PLLC v. Clinton, 766 F.3d 991, 998 (9th Cir.
30 2014) (quoting Self-Realization Fellowship Church v. Ananda Church
31 of Self-Realization, 59 F.3d 902, 912 (9th Cir. 1995)). Jeffrey
32 asserted his filed homestead declaration for the first time in his
33 motion to alter or amend order, after the bankruptcy court denied

1 his claimed homestead exemption. The bankruptcy court denied his
2 homestead exemption prior to the date Jeffrey filed his homestead
3 declaration. As noted above, the debtors in Gitts not only
4 recorded their homestead declaration before the bankruptcy court
5 decided the trustee's objection to exemption, they also moved in
6 two months before the court issued its decision and established
7 their intent to reside at their property as of the petition date.
8 In re Gitts, 116 B.R. at 175-76.

9 The Johnson Trust contends that newly discovered evidence
10 justifying relief under Civil Rule 59(e) must be of facts existing
11 at the time of trial or allowance of exemptions would always be in
12 play and never finally decided. The Johnson Trust also contends
13 that our decision in Errez v. James (In re Errez), 2010 WL 6452901
14 (9th Cir. BAP Mar. 24, 2010), controls. Conversely, Jeffrey
15 argues that the homestead declaration does not have to be recorded
16 "prior to the adjudication of bankruptcy in order for it to be
17 effective."

18 Errez is an unpublished decision and was decided based upon
19 Gitts and Wilson. 2010 WL 6452901, at *4-*5. The Panel
20 distinguished Gitts on the same facts discussed above, namely that
21 first, the debtors in Gitts recorded their homestead declaration
22 before the bankruptcy court ruled on their exemption; and second,
23 the evidence in Gitts was sufficient to establish the requisite
24 intent to make their declared homestead their future residence as
25 of the petition date, while in contrast, the evidence in Errez
26 showed that the debtor had no intention of occupying his homestead
27 because he had listed it for sale. Id. at *4.

28 Jeffrey contends that his § 341(a) testimony, Rule 2004

1 examination testimony and declarations filed with the bankruptcy
2 court show a good faith intent to occupy the Everett home. The
3 Johnson Trust argues that the bankruptcy court's finding that
4 Jeffrey lacked the necessary intent to reside at the Everett home
5 was not clearly erroneous and, thus, should be affirmed because
6 Jeffrey did not demonstrate an actual, present intent to occupy
7 and use the Everett home in the near or foreseeable future,
8 because both Jeffrey and Edalyn lived and worked in Bellingham and
9 showed no time line or ability to retire and reside at the Everett
10 home. When two views of the evidence are possible, the bankruptcy
11 court's choice between them cannot be clearly erroneous.
12 Anderson, 470 U.S. at 574.

13 A Washington homestead declaration must "speak the truth" in
14 order to be valid. In re Wilson, 341 B.R. at 27 (citation
15 omitted). The homestead declaration in Wilson was found not to
16 speak the truth because the debtor did not reside on the premises,
17 nor could he reside there in the future because his divorce decree
18 had divested him of his property interest and required that he be
19 physically removed from the property. Id. at 26, 27. Thus,
20 Wilson did not comply with the Washington requirement that he
21 actually intended to occupy the residence; his declaration was not
22 effective. Id. at 21.

23 In the instant appeal, Jeffrey did not reside at the Everett
24 home on the date he filed his bankruptcy petition. He resided at
25 a rental in Bellingham; the Everett home was leased to a tenant
26 for a period of either 1 or 2 years, from which he received rent.
27 The only evidence in the record that Jeffrey might intend to
28 reside at the Everett home, as recognized by the bankruptcy court

1 in its order entered August 18, 2014, was Jeffrey's "self-serving
2 declaration testimony" and "a declaration from his tenant." In
3 contrast, Jeffrey's § 341(a) testimony demonstrates at best a
4 potential that he will "[p]robably eventually live there." But
5 when asked: "Do you have any firm plans right now to move into the
6 [Everett home]," Jeffrey answered "No." Based upon the record,
7 the bankruptcy court concluded there was "no evidence that
8 [Jeffrey] is near retirement or has any specific plans to occupy
9 the property."

10 The bankruptcy court denied Jeffrey's motion to alter or
11 amend order, finding that no errors of law or fact occurred in its
12 original order and that the court properly disallowed Jeffrey's
13 claim of homestead based on the facts that existed at the time of
14 the hearing. The bankruptcy court concluded that Debtor did not
15 have a present intent to reside at the Everett home at the time he
16 filed his bankruptcy petition, which is supported by the facts and
17 is not clearly erroneous.

18 Based upon the evidence, we do not have a definite and firm
19 conviction that a mistake has been committed by the bankruptcy
20 court in its finding that Jeffrey failed to show a good faith
21 intention to reside at the Everett home as of the petition date.
22 See, e.g., In re Wilson, 341 B.R. at 26, 27. Furthermore, the
23 bankruptcy court was not required to consider Jeffrey's
24 declaration of homestead which was filed after the bankruptcy
25 court's decision, even though the court considered it in arriving
26 at its decision denying his motion to alter or amend order.
27 Finally, under the facts presented, the bankruptcy court did not
28 abuse its discretion in denying Jeffrey's motion for

1 reconsideration.

2 **VI. CONCLUSION**

3 For the reasons stated, we AFFIRM the bankruptcy court's
4 orders denying Jeffrey's claim of homestead exemption and denying
5 Jeffrey's motion to alter or amend the order denying Jeffrey's
6 homestead exemption.

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