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SUSAN M. SPRAUL, CLERK
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NOT FOR PUBLICATION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. AZ-17-1110-FSKu
)
 ABIGAIL J. DUNCAN,) Bk. No. 2:15-bk-14927-PS
)
 Debtor.)
)
 _____)
)
 ABIGAIL J. DUNCAN,)
)
 Appellant,)
)
 v.) **MEMORANDUM***
)
 DALE D. ULRICH,)
)
 Appellee.)
 _____)

Argued and Submitted on October 26, 2017
at Phoenix, Arizona

Filed - November 7, 2017

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

Honorable Paul Sala, Bankruptcy Judge, Presiding

Appearances: David L. Brown of Brown and Associates, PLLC
 argued on behalf of appellant Abigail J. Duncan;
 Terry A. Dake argued on behalf of appellee Dale D.
 Ulrich.

Before: FARIS, SPRAKER, 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 8024-1.

1 **INTRODUCTION**

2 Chapter 7¹ debtor Abigail J. Duncan appeals from the
3 bankruptcy court's order sustaining chapter 7 trustee Dale D.
4 Ulrich's ("Trustee") objection to her homestead exemption. The
5 bankruptcy court found that, on the date of her bankruptcy
6 petition, Ms. Duncan intended to abandon the property as her
7 homestead. The issue of Ms. Duncan's intent is a question of
8 fact. We discern no clear error and AFFIRM.

9 **FACTUAL BACKGROUND**

10 **A. Prepetition events**

11 Ms. Duncan and her then-husband resided in their home
12 located on Kingbird Drive in Gilbert, Arizona (the "Kingbird
13 Drive Property") since 2006. In 2010, Ms. Duncan divorced her
14 husband and acquired his interest in the Kingbird Drive Property.
15 Faced with the daunting prospect of making monthly mortgage
16 payments on her own, she obtained a modification of the existing
17 loan on the Kingbird Drive Property, which reduced the interest
18 rate on the loan to two percent per annum, with annual increases
19 to 5.25 percent in 2018.

20 At the end of 2013, realizing that she could no longer
21 afford to stay in the Kingbird Drive Property, Ms. Duncan decided
22 to move into a rental apartment on Market Street in Gilbert,
23 Arizona (the "Market Street Rental"). She continuously resided
24 at the Market Street Rental from January 10, 2014.²

25
26 ¹ Unless specified otherwise, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

28 ² As of the evidentiary hearing, Ms. Duncan's lease for the
(continued...)

1 Ms. Duncan initially leased the Kingbird Drive Property to
2 Jan Krajniak and his wife from January 2014 through January 2015.
3 Ms. Duncan thereafter orally agreed to allow the Krajniaks to
4 stay in the property until November 2017.

5 **B. Bankruptcy filing and meeting of creditors**

6 On November 23, 2015, Ms. Duncan filed her chapter 7
7 bankruptcy petition. On that date, she had been residing at the
8 Market Street Rental for nearly one year and eleven months. She
9 claimed a \$150,000 exemption on the Kingbird Drive Property under
10 Arizona Revised Statutes section 33-1101(A).

11 Ms. Duncan attended a § 341(a) meeting of creditors on
12 December 29, 2015. When the Trustee asked her about her claimed
13 homestead exemption and her intentions regarding the Kingbird
14 Drive Property, she testified that she could not afford to keep
15 the property and intended to sell it:

16 HEARING OFFICER: Okay. And what is the status of
17 [the Kingbird Drive Property]?

18 THE WITNESS: **It's currently rental. I have tried**
19 **to - I'm going to sell it. I have renters in there**
20 **right now. So, I want to get rid of it, because I'm**
21 **not going to be able to afford it for myself and two**
22 **kids. My salary's not going to cut it.**

23 . . .

24 HEARING OFFICER: Are you intending to make any
25 more mortgage payments or are you going to let it get -

26 THE WITNESS: Yeah. Yeah, because **I want to just**
27 **get this done.**

28 . . .

29 ²(...continued)

30 Market Street Rental continued through January 9, 2017. The
31 bankruptcy court found that she intended to extend her current
32 lease when it expired.

1 HEARING OFFICER: You have it listed at all to try
2 and sell it?

3 MR. BROWN: **We were waiting until you decided if**
4 **you were going to abandon it or not.**

5 (Emphases added.)

6 **C. The Trustee's objection to homestead exemption**

7 On January 27, 2016, the Trustee filed a Motion to Extend
8 Exemption Deadline. He represented that he was attempting to
9 reach a settlement with Ms. Duncan regarding her claimed
10 homestead exemption and requested an extension of the objection
11 deadline to March 15.

12 On February 5 - over a month after the meeting of creditors
13 and before the bankruptcy court ruled on the motion - the Trustee
14 filed an objection to the claimed homestead exemption
15 ("Objection"). The bankruptcy court subsequently granted the
16 motion to extend the deadline.

17 In his Objection, the Trustee argued that the Arizona
18 homestead exemption is only applicable to property "in which the
19 person resides." Ms. Duncan had not resided at the Kingbird
20 Drive Property since late 2013 or early 2014, and she leased the
21 property to another person in January 2014. He also stated that
22 "the debtor testified that she has no intention of returning to
23 the property. Rather, she plans to sell the property or, as she
24 puts it, 'I want to get rid of it.' She further admitted she
25 cannot afford to keep the property."

26 In response, Ms. Duncan contended that she had a valid
27 homestead exemption at the time she filed her bankruptcy petition
28 because she had resided at the Kingbird Drive Property from 2006
through January 2014. She argued that, although she was not then

1 residing at the Kingbird Drive Property, she did not abandon the
2 homestead and did not intend to sell the property. She pointed
3 to her driver's license and voter registration, which listed the
4 Kingbird Drive Property as her address, as well as the fact that
5 she had obtained an order in May 2015 preventing her ex-husband
6 from claiming any interest in the Kingbird Drive Property.

7 In March 2016, prior to the hearing on the Trustee's
8 Objection, Ms. Duncan obtained a new modification of the mortgage
9 loan. The modification fixed the interest rate at four percent,
10 extended the amortization period to 2056, and set the monthly
11 payments at \$2,016.44.

12 After an initial hearing, the court set an evidentiary
13 hearing and ordered the parties to file a joint pretrial
14 statement. The parties stipulated to certain facts, including
15 that "[t]he trustee filed a timely objection to the exemption
16 claimed by the Debtor in the Kingbird property"

17 At the evidentiary hearing, Ms. Duncan testified that she
18 had been residing continuously at the Market Street Rental since
19 January 10, 2014 and intended to renew the lease for another year
20 beginning January 2017. She also testified that Mr. Krajniak had
21 been living continuously at the Kingbird Drive Property since
22 January 2014. She admitted that she listed her home address on
23 her 2014 and 2015 tax returns as the Market Street Rental and
24 reported the Kingbird Drive Property as a rental property.

25 The Trustee then asked Ms. Duncan about her statements
26 concerning the Kingbird Drive Property at the meeting of
27 creditors:

28 Q. So you said you want to get rid of [the Kingbird

1 Drive Property]?

2 A. Yes.

3 Q. And that was what you were planning to do at the
4 time?

5 A. Yes.

6 Q. And that's what you were planning to do when you
7 filed the bankruptcy case, was get rid of the house?

8 A. And if you see the last line, it said my salary's
9 not going to cut it.

10 Q. So you needed to get rid of the house?

11 A. Things have changed since then.

12 Q. Okay. But I'm talking about when the bankruptcy was
13 filed and what you told the Trustee at the creditors'
14 meeting?

15 A. At that point in time, yes.

16 Ms. Duncan also agreed with the Trustee that, "[o]nce the trustee
17 decided not to abandon the property, then the Debtor changed her
18 mind about getting rid of it."

19 The bankruptcy court took the matter under advisement and
20 entered a detailed ruling sustaining the Trustee's Objection. It
21 first held that Ms. Duncan established her homestead at the
22 Kingbird Drive Property by residing there from 2006 through
23 January 2014.

24 The critical question was whether Ms. Duncan had abandoned
25 her homestead interest. The court held that the mere fact that
26 Ms. Duncan moved from the Kingbird Drive Property and rented it
27 to Mr. Krajniak did not establish that she had permanently
28 removed from the property. Nevertheless, the court found that
the Trustee had established that Ms. Duncan had a clear intent to
permanently remove from the Kingbird Drive Property: Ms. Duncan

1 bankruptcy court's interpretation of state exemption laws. Diaz
2 v. Kosmala (In re Diaz), 547 B.R. 329, 333 (9th Cir. BAP 2016).
3 De novo review requires that we consider a matter anew, as if no
4 decision had been rendered previously. United States v.
5 Silverman, 861 F.2d 571, 576 (9th Cir. 1988).

6 With regard to claimed exemptions, "the issue of a debtor's
7 intent is a question of fact to be reviewed under the clearly
8 erroneous standard." Kelley v. Locke (In re Kelley), 300 B.R.
9 11, 16 (9th Cir. BAP 2003) (citing Coughlin v. Cataldo
10 (In re Cataldo), 224 B.R. 426, 428-29 (9th Cir. BAP 1998)). "To
11 be clearly erroneous, a decision must strike us as more than just
12 maybe or probably wrong; it must . . . strike us as wrong with
13 the force of a five-week-old, unrefrigerated dead fish." Papio
14 Keno Club, Inc. v. City of Papillion (In re Papio Keno Club,
15 Inc.), 262 F.3d 725, 729 (8th Cir. 2001) (quoting Parts & Elec.
16 Motors, Inc. v. Sterling Elec., Inc., 866 F.2d 228, 233 (7th Cir.
17 1988)); see Anderson v. City of Bessemer City, 470 U.S. 564, 573
18 (1985) (A factual finding is clearly erroneous if, after
19 examining the evidence, the reviewing court "is left with the
20 definite and firm conviction that a mistake has been
21 committed."). The bankruptcy court's choice among multiple
22 plausible views of the evidence cannot be clear error. United
23 States v. Elliott, 322 F.3d 710, 714 (9th Cir. 2003).

24 DISCUSSION

25 **A. The bankruptcy court did not clearly err in determining that**
26 **Ms. Duncan intended to remove permanently from the Kingbird**
Drive Property.

27 Ms. Duncan argues that the Trustee failed to establish that
28 she had a clear intent to abandon her homestead at the time she

1 filed her bankruptcy petition. We disagree. The bankruptcy
2 court's factual determination of Ms. Duncan's intention on the
3 date of her bankruptcy filing was not clearly erroneous.

4 **1. Abandonment of homestead in Arizona requires a clear**
5 **intent of a permanent removal.**

6 Our inquiry begins with the relevant statutes. Arizona has
7 opted out of the federal bankruptcy exemption scheme, so we must
8 examine and apply Arizona law. Ford v. Konnoff (In re Konnoff),
9 356 B.R. 201, 204 (9th Cir. BAP 2006).

10 Section 33-1101 of the Arizona Revised Statutes provides a
11 homestead exemption. It states, in relevant part:

12 A. Any person the age of eighteen or over, married or
13 single, who resides within the state may hold as a
14 homestead exempt from attachment, execution and forced
15 sale, not exceeding one hundred fifty thousand dollars
16 in value, any one of the following:

17 1. The person's interest in real property in one
18 compact body upon which exists a dwelling house in
19 which the person resides.

20 . . .

21 C. The homestead exemption, not exceeding the value
22 provided for in subsection A, automatically attaches to
23 the person's interest in identifiable cash proceeds
24 from the voluntary or involuntary sale of the property.
25 The homestead exemption in identifiable cash proceeds
26 continues for eighteen months after the date of the
27 sale of the property or until the person establishes a
28 new homestead with the proceeds, whichever period is
shorter. Only one homestead exemption at a time may be
held by a person under this section.

Ariz. Rev. Stat. § 33-1101.

The exemption statute is liberally construed and does not
necessarily require physical presence on a day-to-day basis.
Garcia v. Garcia (In re Garcia), 168 B.R. 403, 408 (D. Ariz.
1994). A "temporary absence" will not defeat a homestead claim,

1 but the debtor must intend that the home be her residence. Id.

2 Once a homestead has been established, section 33-1104
3 provides for abandonment under certain circumstances:

4 A. A homestead may be abandoned by any of the
5 following:

6 1. A declaration of abandonment or waiver.

7 2. A transfer of the homestead property by deed of
8 conveyance or contract for conveyance.

9 3. A permanent removal of the claimant from the
10 residence or the state. A claimant may remove
11 from the homestead for up to two years without an
12 abandonment or a waiver of the exemption.

13 Ariz. Rev. Stat. § 33-1104.

14 We discussed the application of these two statutes in
15 Calderon v. Lang (In re Calderon), 507 B.R. 724 (9th Cir. BAP
16 2014), which presented a similar factual situation. In that
17 case, the debtor filed for chapter 7 bankruptcy and claimed his
18 former residence as exempt. At the time the debtor filed for
19 bankruptcy, he had lived away from the property for a little more
20 than a year and had rented the property to third-party tenants
21 who had exercised their option to extend the lease through a
22 second year. Id. at 726.

23 The trustee objected to the homestead exemption, arguing
24 that the debtor had abandoned the property. However, the debtor
25 claimed that he had moved out only temporarily to reduce his
26 housing expenses and intended to return to the residence. Id. at
27 727.

28 The court held an evidentiary hearing and sustained the
trustee's objection. The trustee's evidence tended to show that
the debtor owned the residence but was not living there and had

1 rented out the residence. The trustee conceded that the debtor
2 had expressed a generalized intent "to move back into [the
3 residence] at some point." Id. at 728. The court held that the
4 totality of the evidence demonstrated that the debtor was not
5 living at the residence "for the better part of the last two
6 years" and, after moving out, he had been using the residence as
7 an income-producing property. Id. The court stated that the
8 debtor's "vague" intent to return to the residence was not
9 sufficient to sustain the homestead exemption under
10 section 33-1101(A). Id.

11 On appeal, we remanded to the bankruptcy court on the issue
12 of the debtor's intent. We stated that the appeal hinged on
13 section 33-1104(A) (3) and the debtor's intent to "permanently"
14 remove from the property:

15 So stated, the usual meaning of the word
16 "permanent" introduces an element of intent into the
17 statutory inquiry. This focus on intent for purposes
18 of determining whether debtors have permanently
19 abandoned their homestead is consistent with the
20 consideration of intent for purposes of determining
21 debtors' "residence" under Arizona's homestead
22 exemption laws.

23 Id. at 731 (citations omitted).

24 Construing the two sentences of section 33-1104(A) (3), we
25 summarized the meaning of that section:

26 On the petition date, if the debtor has been living
27 elsewhere for less than two years, **only evidence of a
28 clear intent of permanent removal will suffice to
permit the bankruptcy court to find that the debtor has
abandoned his homestead exemption under Arizona law.**
On the other hand, on the petition date, if the debtor
has been living elsewhere for two years or more, then
the debtor is presumed to intend for the removal to be
permanent, and only evidence of a clear intent for the
removal to be temporary will overcome that presumption.

1 Id. at 732 (emphasis added). We held that the bankruptcy court
2 had misapplied the law by requiring the debtor, who had been
3 removed for less than two years, to prove that he had more than a
4 "vague intent" to return to the residence. Id. at 733. Because
5 the record as to the debtor's intent was poorly developed, we
6 remanded for the bankruptcy court to determine whether to reopen
7 the evidence or to apply the correct law to the established
8 facts.

9 **2. The bankruptcy court properly evaluated the evidence to**
10 **discern Ms. Duncan's intent at the time she filed the**
11 **bankruptcy petition.**

12 In the present case, the bankruptcy court followed the
13 correct legal standard that we outlined in Calderon. There is no
14 dispute, and the court found, that Ms. Duncan had established her
15 homestead in the Kingbird Drive Property by virtue of having
16 resided there from 2006 through January 2014. The question
17 becomes whether she intended to permanently remove from the
18 property and therefore abandoned her homestead interest.

19 As we stated in Calderon, "[o]n the petition date, if the
20 debtor has been living elsewhere for less than two years, only
21 **evidence of a clear intent of permanent removal** will suffice to
22 permit the bankruptcy court to find that the debtor has abandoned
23 his homestead exemption under Arizona law." Id. at 732 (emphases
24 added).³ There is no dispute that Ms. Duncan had removed from

25 ³ Ms. Duncan argued to the bankruptcy court that Calderon is
26 on all fours with her case. While Calderon is instructive for
27 laying out the statutory framework of a debtor's abandonment of a
28 homestead and its underlying facts are strikingly similar, its
procedural posture is distinguishable from the present case. In
(continued...)

1 the Kingbird Drive Property in January 2014 and filed her
2 petition on November 23, 2015 - less than two years after she
3 moved out of the property. Therefore, the Trustee had the burden
4 of proving that Ms. Duncan clearly intended on the petition date
5 to abandon the homestead permanently.

6 The bankruptcy court received testimony from Ms. Duncan
7 regarding her intent as to the disposition of the Kingbird Drive
8 Property. It found that, as of the petition date, Ms. Duncan had
9 a clear intent of permanent removal from the property because she
10 could not afford to keep the property and intended to "get rid of
11 it." She only changed her intention to sell the property when
12 she was able to modify her mortgage loan in March 2016. We must
13 defer to the bankruptcy court's findings as to a debtor's intent
14 unless we are left with a firm conviction that the bankruptcy
15 court committed a mistake. All of these findings are supported
16 by the record, and the bankruptcy court did not clearly err.

17 Ms. Duncan argues that the bankruptcy court erred in relying
18 on her testimony at the meeting of creditors to determine her
19 intent a month earlier, when she filed her bankruptcy petition.
20 She is correct that exemptions are determined as of the petition
21 date. See Wolfe v. Jacobson (In re Jacobson), 676 F.3d 1193,
22

23 ³(...continued)

24 that case, the bankruptcy court received only the slightest
25 evidence regarding the debtor's intent: the trustee's hearsay
26 testimony. Thus, we remanded for the court to decide whether to
27 take further evidence. Conversely, in the present case, the
28 evidentiary hearing focused almost exclusively on Ms. Duncan's
intent to remove from the Kingbird Drive Property, and Ms. Duncan
herself testified. The bankruptcy court had ample evidence with
which to make a finding of Ms. Duncan's intent.

1 1199 (9th Cir. 2012) (“Under the so-called ‘snapshot’ rule,
2 bankruptcy exemptions are fixed at the time of the bankruptcy
3 petition.”). But the bankruptcy court properly concluded that
4 Ms. Duncan’s testimony at the meeting of creditors was the best
5 evidence of her intention at the time she filed the petition a
6 month earlier.⁴ Ms. Duncan does not offer any authority on
7 appeal that the bankruptcy court could not rely on her testimony
8 at the meeting of creditors. Rather, she asks us to look at
9 favorable facts in the years leading up to the petition and
10 following the March 2016 loan modification and to ignore all
11 evidence to the contrary. We decline to take such a selective
12 view of the evidence.

13 Ms. Duncan further contends that the bankruptcy court erred
14 in relying on her treatment of the Kingbird Drive Property as a
15 rental property as evidence of her intent. But the court did not
16 consider this factor in isolation, nor did it conclude that a
17 rental property always loses the homestead exemption; the court
18 merely found that she treated the Kingbird Drive Property as a
19 rental property and the Market Street Rental as her primary
20 residence.

21 Ms. Duncan argues that the bankruptcy court misunderstood
22 the effect of the March 2016 loan modification, which allegedly
23 “resolved the issue of the intended sale raised at the 341
24 meeting.” But the bankruptcy court found that the March 2016

25
26 ⁴ Ms. Duncan does not dispute her testimony at the meeting
27 of creditors, but implies that she would have testified that her
28 intent a month earlier was different. But the Trustee allowed
her to clarify her intent, and she did not offer a different
answer or explanation at the evidentiary hearing.

1 loan modification only kept her monthly payments at their current
2 amount (rather than increasing with the variable interest rate),
3 even though she had testified that she could still not afford the
4 payments at the time. The court also found that she admitted
5 that she changed her mind about selling the Kingbird Drive
6 Property only after the March 2016 loan modification, indicating
7 that she had previously (including on the petition date) intended
8 to abandon the property. Although it may have become financially
9 possible for Ms. Duncan to retain the Kingbird Drive Property in
10 March 2016, the bankruptcy court was correct to focus on her
11 intent on the petition date.

12 She also argues that the bankruptcy court erred by not
13 addressing her homestead exemption in the proceeds from the sale
14 of the Kingbird Drive Property under section 33-1101(C). But the
15 only relevant question is whether Ms. Duncan intended to return
16 to her property and keep it as a homestead. The bankruptcy court
17 found that, as of the petition date, she did not have such
18 intent, so she had abandoned the homestead exemption and she
19 would not be able to thereafter claim the exemption on the sale
20 proceeds in any event.

21 She contends that the court did not consider all of the
22 evidence of her intent to keep the Kingbird Drive Property. But
23 the bankruptcy court was not required to explicitly address the
24 significance of every single piece of evidence.⁵

25
26 ⁵ For example, Ms. Duncan argues that her intent to return
27 to the Kingbird Drive Property is evidenced by her efforts to
28 refinance the property; by her defense of her interest in the
property against her ex-husband; and by her desire to keep her
(continued...)

1 **B. The Trustee's Objection was timely.**

2 Ms. Duncan asserts that the Trustee's Objection was both
3 tardy and premature. She argues that the Trustee did not file
4 his Objection within thirty days of the December 29 meeting of
5 creditors or obtain an extension of time before filing; in this
6 respect, his February 5 Objection was untimely. The court ruled
7 on the motion to extend time on February 25, but the Trustee had
8 already filed his Objection; in this respect, she argues that his
9 Objection was premature.

10 This contention is frivolous. Ms. Duncan stipulated before
11 the bankruptcy court that the "[t]he trustee filed a timely
12 objection to the exemption claimed by the Debtor in the Kingbird
13 property" She cannot now argue on appeal that the
14 Objection was untimely.

15 Ms. Duncan admits that she did not raise this argument
16 below. The court so noted the lack of an objection when ruling
17 on the request for an extension. Nor did Ms. Duncan take issue
18 with the Trustee's timeliness in her response to the Objection.
19 We will not consider issues raised for the first time on appeal.
20 See Yamada v. Nobel Biocare Holding AG, 825 F.3d 536, 543 (9th
21 Cir. 2016). Even if she had not stipulated, she has waived the
22 timeliness argument.

23 Even if we were to consider this issue, it is meritless.
24 The bankruptcy court extended the deadline to file an objection
25

26 ⁵(...continued)
27 children in the same school district. The bankruptcy court's
28 weighing of this evidence along with all of the other evidence
was not clearly erroneous.

1 to the homestead exemption to March 15, 2016. The Trustee had
2 filed the Objection on February 5, which was well before the
3 court's deadline. She provides no authority or analysis to
4 support her contention that the court needed to specify that its
5 order retroactively covered the Objection. It was thus timely.

6 Further, she argues that the court's order "did not provide
7 for an approval . . . for cause." But the Trustee explained that
8 an extension was necessary because he was working toward reaching
9 a settlement with Ms. Duncan, and the court specifically found
10 "[g]ood cause appearing."

11 Accordingly, the Trustee's Objection was neither tardy nor
12 premature, and Ms. Duncan's argument to the contrary is
13 frivolous.

14 **CONCLUSION**

15 The bankruptcy court did not err in sustaining the Trustee's
16 Objection to Ms. Duncan's homestead exemption. Accordingly, we
17 AFFIRM.