

**FILED**

SEP 16 2005

**IN THE UNITED STATES BANKRUPTCY COURT** U.S. BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA  
**FOR THE DISTRICT OF ARIZONA**

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4 In re: ) Chapter 7  
5 ) No. 0:05-bk-00254-JMM  
6 **DARRELL KENNETH BENNETT,** ) **MEMORANDUM DECISION RE:**  
7 ) **HOMESTEAD EXEMPTION**  
8 ) (Opinion to be Posted)  
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This matter comes before the court on Debtor's Objection to Aurora Bennett's Motion for Order Disallowing Homestead Exemption. This court held a hearing on the matter on August 15, 2005. After reviewing the arguments, the pleadings, and the entire file, this court now rules.

**JURISDICTION**

This court has jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b). Venue is proper in this Court pursuant to 28 U.S.C. § 1409.

**FACTS**

Darrell Bennett ("Debtor") filed a voluntary Chapter 7 bankruptcy petition on March 8, 2005. Debtor's estranged wife, Aurora Bennett ("Ms. Bennett"), previously initiated a domestic relations action in Yuma County Superior Court, in which she sought dissolution of her marriage to Debtor, custody of their minor child, determination of visitation, award of child support and spousal support, and division of property.

1 Debtor's Schedule C lists two residences as exempt under Debtor's homestead exemption: 910  
2 Harvard Street and 912 Harvard Street. Both properties are located in Yuma, Arizona. Debtor has listed  
3 the exemption value of each residence at \$75,000.00.

4 On April 29, 2005, Ms. Bennett filed a Motion to Approve Order Disallowing Debtor's  
5 Homestead Exemption. Ms. Bennett's Motion argues that since only one homestead is allowed under  
6 the Bankruptcy Code, Ms. Bennett should be allowed to claim her residence as exempt<sup>1</sup> because she has  
7 custody of the parties' minor child. Ms. Bennett's Motion also argues that Debtor claimed a homestead  
8 in two separate residences but that he only resides in one. Debtor's Response to Ms. Bennett's Motion  
9 contends that (1) 910 Harvard Street is a contiguous parcel with 912 Harvard Street; (2) Debtor and Ms.  
10 Bennett have joint legal and physical custody of their minor child; and (3) the right to claim exemptions  
11 rests solely in the spouse filing bankruptcy.

12 The court heard arguments on August 15, 2005 and took the matter under advisement.

13  
14 **ISSUES**

- 15  
16 1. Whether a married debtor, separated from his spouse, can claim a homestead in the  
17 property he resides in? In other words, does any party besides the debtor have a right  
18 to choose which property to claim as exempt?  
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20 2. If Debtor is allowed to claim a homestead in his residence, are 910 Harvard Street and  
21 912 Harvard Street one residence for purposes of the homestead exemption?  
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<sup>1</sup> Her residence is neither of the properties claimed by Debtor.

1 **DISCUSSION**

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3 **1. Capacity of Debtor Spouse to Exempt Residence**

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5 Pursuant to 11 U.S.C. §522(b)(2)(A), Arizona law controls the Debtor's claimed homestead  
6 exemption.<sup>2</sup> A.R.S. § 33-1101(A) provides, in relevant part:

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

- 9 (1) The person's interest in real property in one compact body upon which  
10 exists a dwelling house in which the person resides.  
11 ...  
12 (3) A mobile home in which the person resides.  
13 (4) A mobile home in which the person resides plus the land upon which  
that mobile home is located.

14 Debtor claimed a homestead exemption in 910 Harvard Street and 912 Harvard Street. Ms.  
15 Bennett argues that she should be allowed to claim her residence as exempt because she has custody  
16 of the parties' minor child. However, "[t]he filing by a spouse of an individual bankruptcy petition  
17 creates an estate which encompasses *community property* that is under the spouse's joint management  
18 and control as of the date of the petition." *In re Homan*, 112 B.R. 356, 359 (9th Cir. BAP 1989),  
19 citing 11 U.S.C. § 541(a)(2)(A); *In re Fietz*, 852 F.2d 455, 458 (9th Cir. 1988); *In re Willard*, 15 B.R.  
20 898, 900 (9th Cir. BAP 1981). In addition, "[t]he right to claim exemptions in this property vests  
21 *solely* in that spouse." *Homan*, 112 B.R. at 359, citing 11 U.S.C. § 522(b).

22 When Debtor filed his bankruptcy petition, all community property of Debtor and Ms. Bennett  
23 became a part of Debtor's bankruptcy estate. At the time of filing his petition, Debtor and Ms.  
24 Bennett's community property included the Harvard Properties. The entry of the Harvard Properties  
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<sup>2</sup> Arizona has opted out of the federal exemption scheme. A.R.S. §33-1133(B).

1 into Debtor's bankruptcy estate gave Debtor the exclusive right to claim the homestead exemption.  
2 Debtor chose that property. That Ms. Bennett has primary physical custody of the parties' minor  
3 child is immaterial. Therefore, Debtor has the sole right to claim which property will be his  
4 homestead.

## 6 2. The Harvard Properties

8 Arizona courts have held that homestead exemptions should be interpreted liberally to  
9 advance their objectives. "[T]he fundamental purpose of the homestead law is to protect the family  
10 against the forced sale of home property from certain creditors, and, to further this purpose, the  
11 homestead laws should be interpreted liberally to advance the objectives of the statutes." *Matcha v.*  
12 *Winn*, 131 Ariz. 115, 117, 638 P.2d 1361, 1363 (App.Div.1 1981).

13 Debtor has claimed a homestead exemption in 910 Harvard Street and 912 Harvard Street,  
14 claiming that the Harvard Properties are a contiguous parcel, connected to the same septic tank and  
15 water meter. Debtor has a manufactured home on 910 Harvard Street, in which he resides, and claims  
16 to use the other lot to park cars and for storage. A.R.S. § 33-1101(A) allows a homestead exemption  
17 in "the land upon which that mobile home is located."

18 A.R.S. § 33-1101(A)(4) "does not, by its terms, limit the real property to a single subdivision  
19 lot, but rather permits the claim to extend to 'the land upon which that mobile home is located.' This  
20 imposes no acreage or any other kind of size limitation; the only requirement is that the land be land  
21 on which the mobile home is located." *In re Allman*, 286 B.R. 402, 404 (Bankr.D.Ariz. 2002). The  
22 bankruptcy court in *Allman* held that "the language 'plus the land upon which that mobile home is  
23 located' . . . include[s] the entire contiguous parcel of land on which the mobile home sits, regardless  
24 of whether it consists of one or more lots as determined by the subdivision plat or assessor's parcel  
25 numbers . . . ." *Id.* at 407.

26 Even though Debtor claimed two lots as his homestead, this exemption potentially could be

1 allowed because 910 Harvard Street and 912 Harvard Street constitute a contiguous parcel of land  
2 upon which Debtor's manufactured home sits. In addition, Debtor's Schedule C lists the value of  
3 each lot at \$75,000.00. Since the two lots combined total \$150,000.00, Debtor's exemption has not  
4 exceeded the statutory homestead exemption amount of \$150,000.00.

5 However, Debtor cannot claim two contiguous lots as his homestead if "there is evidence that  
6 a subdivided portion of the entire parcel is not being used for residential purposes." *Id.* At the  
7 hearing, Debtor claimed that he used the property at 912 Harvard Street to park cars and for storage.  
8 Ms. Bennett claimed that 912 Harvard Street was a rental lot but that the Debtor was not currently  
9 renting it. Ms. Bennett has the burden of proving that Debtor uses 912 Harvard Street for other than  
10 residential purposes, but was unable to provide any evidence prior to or at the time of the hearing that  
11 Debtor indeed rented 912 Harvard Street.

12 Subsequent to the hearing, Ms. Bennett submitted a Supplemental Memorandum Regarding  
13 Motion for Disallowance of Homestead Exemption, which provided evidence that Debtor receives  
14 rental payments on 912 Harvard Street. However, this court has listened to the transcript of the  
15 August 15, 2005 hearing, and at no time did Ms. Bennett make a request to submit additional  
16 information relating to the issue nor did this court grant leave for her to do so. The matter was fully  
17 submitted on August 15, 2005. Therefore, filing her Supplemental Memorandum subsequent to the  
18 hearing provided no opportunity for Debtor to review or rebut the new evidence presented. If this  
19 court were to now take this evidence into consideration, it would be denying Debtor his due process  
20 rights. Therefore, this court will not consider Ms. Bennett's Supplemental Memorandum.

21 Accordingly, since Ms. Bennett stated at the hearing that Debtor was not currently renting 912  
22 Harvard Street, there is no evidence contrary to Debtor's position that the lots were being used for  
23 something other than Debtor's residential purposes. Therefore, 910 Harvard Street and 912 Harvard  
24 Street are "one compact body" for purposes of the homestead exemption.

1 CONCLUSION

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3 Under the law of the Ninth Circuit, a debtor has the sole right to claim which property will be

4 his homestead. Ms. Bennett's Motion seeking to disallow Debtor's homestead exemption on the

5 grounds that he should be required to instead claim a homestead on *her* residence, simply because the

6 parties' minor child resides with her, is denied. In addition, Ms. Bennett's Motion seeking to

7 disallow Debtor's homestead exemption will also be denied because Arizona law provides that a

8 homestead can be taken in "one compact body."

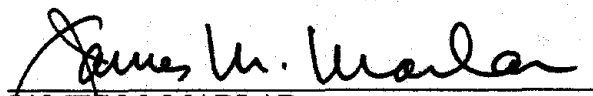
9 A separate order will be entered concurrently with this Memorandum Decision.

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12 DATED: September 16, 2005

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16 JAMES M. MARLAR  
17 UNITED STATES BANKRUPTCY JUDGE

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1 COPIES served as indicated below this 16  
day of Sept, 2005, upon:

2 John Weil  
3 Weil & Weil, PLLC  
4 1600 South Fourth Avenue, Suite C  
5 Yuma, AZ 85364  
6 Attorneys for Debtor  
7 U.S. Mail

8 Lawrence C. Kentworthy  
9 Hunt, Kentworthy & Hossler  
10 330 West 24th Street  
11 Yuma, AZ 85364  
12 Attorneys for Aurora Bennett  
13 U.S. Mail

14 Jim D. Smith  
15 221 South Second Avenue  
16 Yuma, AZ 85364  
17 Chapter 7 Trustee  
18 U.S. Mail

19 Office of the United States Trustee  
20 230 North First Avenue, Suite 204  
21 Phoenix, AZ 85003-1706  
22 U.S. Mail

23  
24  
25  
26  
By MB Thompson  
Judicial Assistant