

Dated: June 13, 2019



*Daniel P. Collins*

Daniel P. Collins, Bankruptcy Judge

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF ARIZONA**

<b>In re:</b>	)	<b>Chapter 13 Proceedings</b>
	)	
<b>ARTHUR BENSON MOORE,</b>	)	<b>Case No.: 3:18-bk-13222-DPC</b>
	)	
<b>Debtor.</b>	)	<b>UNDER ADVISEMENT RULING ON</b>
	)	<b>TRUSTEE’S OBJECTION TO</b>
	)	<b>CLAIMED HOMESTEAD</b>
	)	<b>EXEMPTION</b>
	)	
	)	<b>[NOT FOR PUBLICATION]</b>

Before this Court is Trustee, Edward J. Maney’s, (“Trustee”) Objection to Claim of Property as Exempt<sup>1</sup> (“Trustee’s Objection”) and Arthur Benson Moore’s (“Debtor”) Response to Trustee’s Objection to Claim of Property as Exempt<sup>2</sup> (“Debtor’s Response”). In addition to the initial Trustee’s Objection, the Court considered the Debtor’s Supplemental Brief in Response to Trustee’s Objection to Claim of Property as Exempt<sup>3</sup> (“Supplemental Brief”) and the Trustee’s Response to Debtor’s Supplemental Brief in Response to Trustee’s Objection to Claim of Property as Exempt<sup>4</sup> (“Response to Supplemental Brief”). After reviewing the parties’ briefs and considering the attached exhibits, the Court grants the Trustee’s Objection and denies the Debtor’s claimed homestead exemption.

**I. BACKGROUND**

On October 29, 2018, Debtor filed the instant Chapter 13 bankruptcy.<sup>5</sup> On Debtor’s Schedule C, Debtor claimed an exemption in his one-third interest in equity in the real property

---

<sup>1</sup> DE 13. “DE” references a docket entry in this administrative bankruptcy case 3:18-bk-13222-DPC.  
<sup>2</sup> DE 15.  
<sup>3</sup> DE 22.  
<sup>4</sup> DE 23.  
<sup>5</sup> DE 1.

1 located at 3700 N. Sharon, Prescott Valley, AZ 86314 (“Property”).<sup>6</sup> On December 3, 2018, the  
2 11 U.S.C. § 341<sup>7</sup> Meeting of Creditors was held. On December 6, 2018, Trustee filed Trustee’s  
3 Objection.<sup>8</sup> On January 9, 2019, Debtor filed Debtor’s Response.<sup>9</sup> On April 19, 2019, this Court  
4 heard oral arguments on Trustee’s Objection and Debtor’s Response.<sup>10</sup> The Court and parties  
5 agreed that some additional briefing was necessary. On May 3, 2019, Debtor filed his  
6 Supplemental Brief. On May 9, 2019, Trustee filed his Response to Supplemental Brief and this  
7 Court took the matter under advisement.

8 Debtor attached four documents to his Supplemental Brief: (1) Debtor’s declaration; (2)  
9 a warranty deed for the Property; (3) a June 17, 2009 Yavapai County Superior Court Decree of  
10 Dissolution of Marriage (“Divorce Decree”) between Debtor and his ex-spouse Kymothy Kaye  
11 Moore (“Ex-Wife”); and (4) a letter from Debtor’s Ex-Wife.

12 • Debtor’s declaration provides 11 statements based on Debtor’s personal  
13 knowledge. Specifically, Debtor states, “9. If I were permitted to do so, I would return and live  
14 on the Property...”<sup>11</sup>

15 • The warranty deed conveyed the Property to Debtor and Ex-Wife on April 20,  
16 2000, “as community property with right of survivorship.”<sup>12</sup>

17 • The Divorce Decree reads, in relevant part:

18 7. That [Ex-Wife] is awarded the following separate and community property, to  
19 wit: ...

20 e. Exclusive use and occupancy of the residence and real property located  
21 at 3700 N. Sharon Dr., Prescott Valley, Arizona...Upon the sale of the  
22 residence [Ex-Wife] shall receive two-thirds of the net proceeds and  
23 [Debtor] shall receive one-third of the net proceeds...<sup>13</sup>

---

24 <sup>6</sup> *Id.* at page 17 of 51; Debtor listed the value of his exemption at approximately \$45,000 based on a \$200,000  
25 valuation of the Property.

26 <sup>7</sup> Unless indicated otherwise, statutory citations refer to the U.S. Bankruptcy Code (“Code”), 11 U.S.C. §§ 101-  
1532 and to the Federal Rules of Bankruptcy Procedure (“FRBP”), Rules 1001-9037.

27 <sup>8</sup> DE 13.

<sup>9</sup> DE 15.

<sup>10</sup> DE 21.

<sup>11</sup> DE 22, Ex. 1.

<sup>12</sup> DE 22, Ex. A.

<sup>13</sup> *Id.* at Ex. B.

1           •       The letter from Ex-Wife states that the Debtor is still listed as an owner of the  
2 Property and that Ex-Wife has been living at the Property and is responsible for the mortgage  
3 payments since the parties' divorce in 2009.<sup>14</sup> The letter further states that Ex-Wife is unable to  
4 refinance the mortgage on the Property because it would result in higher mortgage payments that  
5 she cannot afford.<sup>15</sup>

6           Trustee attached two documents to his Response to Supplemental Brief: (1) a Zillow  
7 summary including home value, price and tax history, and neighborhood analysis; and (2) U.S.  
8 Bank, National Association's proof of claim for its secured claim against the Property.<sup>16</sup>

9  
10       **II.    JURISDICTION**

11           Pursuant to 28 U.S.C. § 157(b)(2)(B), this Court has jurisdiction over the allowance or  
12 disallowance of claimed exemptions on property of the estate.

13  
14       **III.   ISSUE**

15           Whether Debtor's claimed homestead exemption is allowed in Property in which his ex-  
16 wife was awarded "[e]xclusive use and occupancy" in a Divorce Decree entered ten years before  
17 Debtor's Chapter 13 petition.

18  
19       **IV.    ANALYSIS**

20           A.   The Law.

21           The filing of a bankruptcy petition begins a bankruptcy case that in turn creates a  
22 bankruptcy estate consisting of all the debtor's property. *See* § 541; *Wolfe v. Jacobson (In re*  
23 *Jacobson)*, 676 F.3d 1193, 1198 (9th Cir. 2012). The debtor is entitled to certain exemptions  
24 available under applicable law. *See* § 522(b); *In re Jacobson*, 676 F.3d at 1198. Arizona has opted  
25 out of the federal bankruptcy exemption scheme and therefore Arizona residents are limited to  
26 exemptions available under Arizona law. *See In re Smith*, 342 B.R. 801, 805 (9th Cir. B.A.P.

27           

---

<sup>14</sup> *Id.* at Ex. 2.

28           <sup>15</sup> *Id.*

<sup>16</sup> DE 23, Ex. A and B. Ex-Wife suggests she cannot afford to both pay the mortgage and the health insurance. This is puzzling because, under the Divorce Decree, Debtor (not Ex-Wife) is to pay the health insurance

1 2006) (citing A.R.S. § 33-1133). In determining whether an applicable exemption is allowed,  
2 courts must interpret and apply Arizona law. *See id.*; *see also Renner v. Ariz. Dept. of Econ. Sec.*  
3 (*In re Renner*), 822 F.2d 878, 879 n.1 (9th Cir. 1987).

4 The Arizona Supreme Court has stated that Arizona law requires that the homestead  
5 exemption be liberally construed to further its fundamental purpose of protecting the family from  
6 “the forced sale of home property.” *Matcha v. Winn*, 131 Ariz. 115, 117 (Ct.App. 1981); *see also*  
7 *First National bank v. Reeves*, 27 Ariz. 508 (1925). The trustee bears the burden of proof to  
8 establish that the debtor is not entitled to the claimed exemption. *See Fed. R. Bank. P. 4003(c)*;  
9 *see also In re Calderon*, 507 B.R. 724, 729 (9th Cir. B.A.P. 2014) (citing Fed. R. Bank. P. 4003(c)  
10 and *In re Cerchione*, 414 B.R. 540, 548-49 (9th Cir. B.A.P. 2009)).

11 Under A.R.S. § 33-1101, Arizona residents are entitled to a homestead exemption not  
12 exceeding one hundred fifty thousand dollars in value. The statute provides:

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

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

18 Ariz. Rev. Stat. Ann. § 33-1101(A)(1). Courts have held that “temporary absence” from a home  
19 does not defeat a homestead and that A.R.S. § 33-1101(A)(1) does not require physical presence  
20 for the homestead to be claimed. *See In re Garcia*, 168 B.R. 403 (D. Ariz. 1994) (“temporary  
21 absence from a home will not defeat a homestead claim if a party intends that home to be his  
22 residence.”); *see also In re Calderon*, 507 B.R. at 731 (rejecting trustee’s argument that A.R.S. §  
23 33-1101(A)(1) did not apply once debtor moved out of the residence).

24 A.R.S. § 33-1104 governs abandonment of homesteads and provides in relevant part:

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

- 26 1. A declaration of abandonment or waiver;  
27 2. A transfer of the homestead property by deed of conveyance or  
28 contract for conveyance.

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

3 Ariz. Rev. Stat. Ann. § 33-1104(A)(1)-(3). The controlling question when determining whether  
4 an individual abandoned their homestead is whether the individual intended to abandon their  
5 homestead. *In re Calderon*, 507 B.R. at 732 (interpreting A.R.S. § 33-1104(A)(3)). If, on the  
6 petition date, the debtor has been living elsewhere for two years or more, then the debtor is  
7 presumed to intend for the removal from the homestead to be permanent, and only evidence of a  
8 clear intent for the removal to be temporary will defeat that presumption. *Id.* If the debtor is  
9 prohibited by a divorce decree from occupying the property, the debtor's mere assertion of an  
10 intent to return is insufficient to support a finding of a valid homestead declaration. *In re Wilson*,  
11 341 B.R. 21, 25 (B.A.P. 9th Cir. 2006).

12  
13 B. Application of the Law to the Facts of this Case.

14 The Trustee urges the Court to find that the Debtor abandoned his homestead exemption  
15 in the Property because he has not lived there for more than a decade and is barred from living  
16 there pursuant to the Divorce Decree. The Debtor argues that the Divorce Decree expressly states  
17 that Debtor retains an interest in the Property and that it is not impossible that Debtor could return  
18 and reside in the Property some point in the future. Debtor's declaration expressly states that he  
19 would return and live on the Property but for being prohibited from doing so by the Divorce  
20 Decree.

21 First, the Court agrees with Debtor's claim that he has maintained an interest in the  
22 Property by virtue of the Divorce Decree. The Divorce Decree expressly grants Debtor an interest  
23 in one-third of the net proceeds should the Property be sold. The Divorce Decree does not contain  
24 any language divesting Debtor of his interest in the Property titled to him and the Ex-Wife as  
25 "community property with right of survivorship." The question for this Court to determine is  
26 whether Debtor presented sufficient evidence to overcome the presumption that his absence from  
27 the Property for more than two years constitutes abandonment for the purposes of A.R.S. § 33-  
28 1104.

1           Although the Debtor presented evidence in the form of a declaration stating that he would  
2 return to the Property but for the Divorce Decree prohibiting him from doing so and a letter from  
3 his Ex-Wife expressly stating that the Property "...is currently under the documented ownership  
4 of [Debtor] and [Ex-Wife]..." this Court disagrees that Debtor has presented evidence that  
5 overcomes the presumption that his absence from the Property since 2009 constitutes  
6 abandonment. This Court agrees with the B.A.P. in *In re Wilson* that a debtor cannot possess the  
7 requisite intent to claim a homestead when a divorce decree bars the debtor from using or  
8 occupying a residence.

9           The Divorce Decree explicitly grants "exclusive use and occupancy" of the Property to  
10 Ex-Wife. While the Debtor claims an intent to return to the Property, "...the probability of return  
11 in such circumstances is too remote to be material." *In re Wilson*, 321 B.R. at 25. The Debtor may  
12 similarly possess the subjective intent to someday occupy the Trustee's residence. As with the  
13 Property, Debtor's intent or desire to occupy a residence must be paired with a right to do so. This  
14 Court finds that the Debtor has not and could not possess the necessary intent together with the  
15 legal right required to overcome the presumption that his absence from the Property since 2009  
16 constitutes abandonment of his homestead claim to the Property. No evidentiary hearing is  
17 needed to confirm this finding. Debtor's desire to live in the Property, genuine or not, cannot  
18 support his claimed homestead exemption because he is legally barred from occupying the  
19 Property.<sup>17</sup> This Court finds the Trustee has satisfied his burden in objecting to the Debtor's  
20 claimed homestead exemption. The Trustee's Objection is sustained.

21           The Court agrees with the Trustee where he notes that there is no scenario in this  
22 bankruptcy case where a sale of the Property can be compelled by the Trustee. Neither the Debtor  
23 nor the Trustee could force a sale because the Divorce Decree grants "exclusive use and  
24 occupancy" to Ex-Wife. A sale of property cannot be compelled by the Debtor. The Trustee and  
25 this estate hold no greater rights to the Property than the Debtor himself has. Only in the event  
26 of a sale does the Debtor retain an interest in one-third of the sale proceeds. The Divorce Decree

---

27  
28 <sup>17</sup> Unless, of course, Debtor someday purchases the Ex-Wife's interest in the Property. This, however, could not support his currently claimed homestead because that exemption claim is viewed as of the date of his bankruptcy petition.

1 does not require a sale to take place. Under the Divorce Decree, a sale appears to be a decision  
2 which remains alone with the Ex-Wife or the state divorce court.

3  
4 **CONCLUSION**

5 The Court sustains the Trustee's Objection and denies the Debtor's homestead exemption  
6 in the Property.

7 **IT IS ORDERED** sustaining Trustee's Objection to Claim of Property as Exempt.

8 **DATED AND SIGNED ABOVE.**

9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19 Notice to be sent to the following:

20 Ross M. Mumme, Esq. #029956  
21 Staff Attorney to Chapter 13 Trustee  
22 101 North First Ave., Suite 1775  
Phoenix, Arizona 85003

23 Michael J. Gordon, Esq.  
24 850 Cove Parkway, Suite A  
Cottonwood, AZ 86326

25 Arthur Benson Moore  
26 6810 E. Spouse, Apt 116  
27 Prescott Valley, AZ 86314  
28