

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION**

IN RE: Travis F. and Danielle Marie Wood, Debtors

**No. 5:07-bk-70696
Ch. 7**

ORDER

Travis and Danielle Wood [the debtors] filed a voluntary chapter 7 bankruptcy petition on March 9, 2007, and claimed an entitlement to exemptions under 11 U.S.C. § 522(b)(2), sometimes referred to as the federal exemptions. On April 17, 2007, the chapter 7 trustee filed his Objection to Debtors Claim of Exemptions. The debtors responded on April 20, 2007, with their Debtors' Response to Trustee's Objection to Exemptions. The Court heard the objection and response on June 12, 2007, and, at the conclusion of the hearing, took the matter under advisement. For the reasons stated below, the Court overrules the trustee's objection to the debtors' claim of exemptions.

Jurisdiction

This Court has jurisdiction over this matter under 28 U.S.C. § 1334 and 28 U.S.C. § 157, and it is a core proceeding under 28 U.S.C. § 157(b)(2)(B). The following opinion constitutes findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052, made applicable to this proceeding under Federal Rule of Bankruptcy Procedure 9014.

Issue Presented

The sole issue before the Court is whether the debtors, who presently live in Arkansas, are eligible to exempt from property of their bankruptcy estate the property listed under § 522(d), commonly referred to as the federal exemptions. Because the debtors have not lived in Arkansas for the requisite 730 day time period under § 522(b)(3)(A), the trustee believes that only the Arizona exemptions should apply because Arizona has "opted-out"

of the federal exemption scheme under § 522(b).¹

At the hearing, Danielle Wood testified that she and her husband moved to Arkansas from Arizona on or about June 15, 2006, have lived in Arkansas since that time, and have no intention of returning to Arizona. She also testified that they lived in Arizona since at least September 4, 2004. Therefore, the debtors lived in Arizona for the 180 day period immediately preceding the 730 day period prior to the filing of their bankruptcy petition.

Findings of Fact and Conclusions of Law

The exemption issue raised by the parties is based on § 522(b) of the code, which states, in relevant part:

(b)(1) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (2) or, in the alternative, paragraph (3) of this subsection. . . .

(2) Property listed in this paragraph is property that is specified under subsection (d), unless the State law that is applicable to the debtor under

¹ The trustee also contended that because the debtors had not been “removed” from Arizona for two years, that under Arizona law the debtors had not abandoned or waived a claim of exemption that may have been available to them:

A claim of exemption under this article may be abandoned by a declaration or grant of abandonment or waiver or by permanent removal of the claimant from this state. *A claimant may remove from this state for up to two years without an abandonment or waiver of the exemption.*

Ariz. Rev. Stat. Ann. § 33-1153.A. (West 1994) (emphasis added).

It appears that the purpose of the trustee’s argument was to show that the debtors were not ineligible for an Arizona exemption and, therefore, the hanging paragraph at the end of § 522(b) would not be applicable. The trustee’s argument fails in two ways. First, the conclusion reached by the Court in this opinion obviates the use of the hanging paragraph because the Arizona opt-out statute does not preclude a non-resident from choosing the federal exemptions. Second, the statute cited by the trustee appears in Article 3 of the Arizona exemption statutes, and Article 3 deals specifically with exemptions from the execution of foreign judgments. The specific statute cited by the trustee begins: “A claim of exemption *under this article* may be abandoned . . .” If Arizona law were applicable in this case, the exemptions for which the debtors would be eligible would be personal property exemptions, not an exemption from the execution of a foreign judgment.

paragraph (3)(A) specifically does not so authorize.

(3) Property listed in this paragraph is

(A) subject to subsections (o) and (p), any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 730 days immediately preceding the date of the filing of the petition or if the debtor's domicile has not been located at a single State for such 730-day period, the place in which the debtor's domicile was located for 180 days immediately preceding the 730-day period or for a longer portion of such 180-day period than in any other place;

...

If the effect of the domiciliary requirement under subparagraph (A) is to render the debtor ineligible for any exemption, the debtor may elect to exempt property that is specified under subsection (d).

11 U.S.C. § 522(b).

The debtors proceeded under § 522(b)(2), which is the subsection that allows a debtor to choose the federal exemptions listed in subsection (d), if the state law referenced under paragraph (3) allows the debtor to take federal exemptions (in other words, as long as the state has not “opted-out” of the federal exemptions). Under pre-BAPCPA law, the reference to the state law was straight forward. Because the domiciliary requirement of 180 days mirrored the venue requirements for filing a petition, *see* 28 U.S.C. § 1408,² the

² 28 U.S.C. § 1408 states, in relevant part:

[A] case under title 11 may be commenced in the district court for the district--

(1) in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case have been located for the one hundred and eighty days immediately preceding such commencement, or for a longer portion of such one-hundred-and-eighty-day period than the domicile, residence, principal place of business, in the United States, or principal assets in the United States, of such person were located in any other district; . . .

debtor typically did not have to be concerned with which state law would apply in determining his exemption choice. It would be the law of the state in which venue was also proper.

Under BAPCPA, a debtor is still allowed to choose the federal exemptions listed in subsection (d), again with the condition that the state law referenced under paragraph (3) allows the debtor to take federal exemptions. However, now the domiciliary requirement no longer mirrors the venue requirements; now, the debtor must have been domiciled in the debtor's filing state for 730 days, not 180 days, in order to take that state's exemptions. In this case, the debtors meet the venue requirement under 28 U.S.C. § 1408 because they have lived in Arkansas for the longer portion of the requisite 180 days, but they do not meet the domiciliary requirement of 730 days relating to their choice of exemptions. Instead, they must look to "the place in which the debtor's domicile was located for 180 days immediately preceding the 730-day period;" in this case, Arizona.

A debtor is permitted to take the federal exemptions if the state law referenced under § 522(b)(3) will allow the debtor to do so. According to Arizona law, residents of Arizona are not entitled to use the federal exemptions provided in § 522(d); instead, they must use the exemptions enumerated in the Arizona statutes. Ariz. Rev. Stat. Ann. § 33-1133.B. (West 1980).³ However, the debtors in this case are no longer residents of Arizona. Although Arizona is typically considered an opt-out state, the statute clearly states that *residents* are not entitled to federal exemptions, but has no reference to non-

³ Ariz. Rev. Stat. Ann. § 33-1133 states:

A. Nothing in this article shall be construed to displace other provisions of law which afford additional or greater protection to a debtor's property.

B. Notwithstanding subsection A, in accordance with 11 U.S.C. 522(b), residents of this state are not entitled to the federal exemptions provided in 11 U.S.C. 522(d). Nothing in this section affects the exemptions provided to residents of this state by the constitution or statutes of this state.

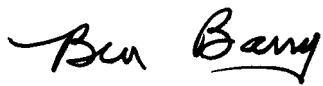
residents (which includes those who are now required to apply Arizona’s exemption law under BAPCPA). Section 522(b)(2) allows a debtor to choose federal exemptions “unless the State law that is applicable to the debtor under paragraph (3)(A) *specifically* does not so authorize.” In this case, because Arizona law does not preclude non-residents from choosing federal exemptions, the Court finds that the debtors are eligible to exempt from property of the estate the property listed under § 522(d), in accordance with § 522(b)(2).

The Court’s conclusion is bolstered by the subsection that precedes the Arizona opt-out statute. It states that “[n]othing in this article shall be construed to displace other provisions of law which afford additional or greater protection to a debtor’s property.” Ariz. Rev. Stat. Ann. § 33-1133.A. (West 1980). Because the debtors are no longer residents of Arizona, but are still required by federal bankruptcy law to apply the Arizona exemption statutes, the greater protection referenced in section 33-1133.A. is afforded by allowing non-resident debtors to apply federal exemptions if they so choose. This liberal allowance in the construction of the exemption statute, and the specific reference to “residents of this state” in the Arizona opt-out provision, supports this Court’s finding that the debtors are eligible to exempt from property of the estate the property listed under § 522(d). Accordingly, the trustee’s objection to the debtor’s claim of exemptions is overruled.

IT IS SO ORDERED.

June 28, 2007

DATE



BEN T. BARRY
UNITED STATES BANKRUPTCY JUDGE

cc: William M. Clark Jr., chapter 7 trustee
Donna Phillips, attorney for the debtors
U.S. Trustee