In the

United States Court of Appeals

For the

Ninth Circuit

In Re: STEVEN JAY CHAPPELL and JULIE LYNN CHAPPELL,

Debtors,

STEVEN JAY CHAPPELL and JULIE LYNN CHAPPELL,

Appellants,

v.

MICHAEL P. KLEIN, Chapter 7 Trustee,

Appellee.

Appeal from a decision of the United States Bankruptcy Appellate Panel
No. WW-06-01435-RKMo · Hon. Robin Riblet, Christopher M. Klein, Dennis Montali, Bankruptcy Judges

BRIEF OF APPELLANTS

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STATEMENT OF THE BASIS OF APPELLATE JURISDICTION.

Stephen and Julie Chappell, the appellants, are appealing the final order of the United States Bankruptcy Appellate Panel for the 9th Circuit reversing the United States Bankruptcy Court for the Western District of Washington. The Court of Appeals for the Ninth Circuit has jurisdiction over this appeal pursuant to 28 USC § 158 (a) and (b).

The Order was entered on July 30, 2007 and the Notice of Appeal was filed on August 10, 2007

ASSIGNMENTS OF ERROR

The Bankruptcy Appellate Panel erred when it reversed the trial court and determined that the debtors' residence had not been withdrawn from the estate after the trustee failed to timely object to the claim of exemption set forth on Schedule C. ER 44.[1]

The Bankruptcy Appellate Court erred when it found that the federal exemptions are a claim of exemption in value. It is property, not value that is claimed exempt.

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[1] The Excerpts of record are referred to as ER. The Bankruptcy Court's Findings of FF

ISSUES RELATED TO ASSIGNMENT OF ERROR

1. Does a property interest properly claimed exempt by a Chapter 7 Debtor under 11 U.S.C. § 522(d)(1) pass out of the estate at the expiration of the objection period established in 11 U.S.C. § 522(l) and Fed. Rule Bankr. Pro. 4003(b)?

2. When the debtors specifically identify property and make a good faith effort to value it, and claim it exempt, is there any ambiguity in the claim of exemption?

STANDARD OF REVIEW

The parties have stipulated to the basic facts regarding this appeal that are set forth in ER 26-28. This issue presented is a legal issue. The Court reviews legal issues *de novo*. *In re New England Fish Co.* 749 F 2nd 1277 (9th Cir. 1984).

STATEMENT OF CASE.

Nature of the Case and Statement of Facts.

On June 30, 2004, the Debtors filed a Chapter 7 Bankruptcy.[2] ER 37. In their schedules, the Debtors valued their residence at $350,000 ER 40 with total underlying debts in the amount of $328,488.75. This left equity over and above encumbrances in the sum of $21,511.25. ER 44, FF3. Using federal exemption

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[2]This case was filed prior to October 15, 2005 therefore the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 do not apply.

set forth in 11 USC § 522(d)(1) the Debtors claimed as exempt "98 S. Glacier Peak Drive, Camino Island, WA, 98282 - residence" as the description of property claimed exempt in the first column of Official Form Schedule C, and valued the exemption at $21,511.25 in the column headed "Value of the Claimed Exemption. They thus claimed the entire aggregate value the property exempt. ER 44, FF5. The Trustee has acknowledged that he understood the exemption claim to have been made pursuant to the language of 11 U.S.C. 522 (d)(1) ER 26, FF2 and did not object to the exemption. The parties have stipulated that at filing, the actual value of the property did not exceed $362,000, and that the value of property reduced by encumbrances did not exceed the statutory maximum value of exemption allowed to them under § 522(d)(1). ER 26-28, FF3.

On July 7, 2006, two years later, the holder of the First Deed of Trust filed a Motion for relief from Stay. ER 26, FF7. In response to that motion, some 21 months after the deadline for objection to the Debtors' claim of exemption, the trustee for the first time announced an intention to sell the property. ER 26-27, FF7. The Debtors objectied to the Trustees' proposal to sell the property ER 31. The Bankruptcy Court in its order of November 20, 2006, ruled that because the equity in the residence was totally exempt as of the date the case was filed, the property was withdrawn from further administration by the Trustee. ER 24.

SUMMARY OF ARGUMENT

Exemptions are claimed in "the property", not the "value of the property." If the net value of an exempted is less than the allowed maximum on the date of filing the petition and there is no objection to exemptions filed pursuant to BR 4003, the entire property is exempt and passes out of the estate and the control of the trustee. It becomes the exclusive property of the debtor and is no longer available to pay pre-petition debts. Thereafter, the trustee has no basis to bring the property back into the estate to take advantage of any post filing appreciation..

ARGUMENT.

The property claimed exempt by the Debtors passed out of the estate upon the expiration of the time to object to claims. *Taylor v. Freeland & Kronz, et. al.*, 503 U.S. 638, 112 S.Ct. 1644 (1992) and 11 U.S.C. 522(d)(1) and 522(l).

This case involves the exemption of a residential real property by a debtor in Chapter 7 bankruptcy proceedings. The effect of exempting property from the estate is to withdraw that property from the estate and administration by the bankruptcy trustee. "An exemption is an interest withdrawn from the estate (and hence from the creditors) for the benefit of the debtor." *Owen v. Owen*, 500 U.S. 305, 308 (1991).

As with any case involving application of a statute, the place to begin is the language of the statute. Section 522(l) provides that the exemption becomes efective if no party in interest timely objects as follows:

> "The debtor shall file a list of property that the debtor claims is exempt under sub section b of this section... unless a party in interest objects, the property claimed as exempt on such list is exempt."

Bankruptcy Rule 4003(b) requires that the objection be made within 30 days after conclusion of the § 341 hearing.

Shortly after deciding *Owen*, *supra,* the Court had an opportunity to consider application of 522(l) in *Taylor v. Freeland & Kronz, et. al.,* 503 U.S. 638, 112 S.Ct. 1644 (1992). In *Taylor,* the debtor listed a discrimination lawsuit as exempt for an unknown value in the Schedule C she filed pursuant to §522(l). The trustee did not timely object to the exemption, but later sought to administer the proceeds of the suit when it was determined that the lawsuit had a much greater value than he originally anticipated. The Court ruled that because the trustee did not timely object, the property was exempt, or in the language of *Owen,* it was withdrawn from the estate pursuant to § 522(l), despite the change in the realizable value of the asset.

This court reached the same conclusion in *In re Smith* 235 F.3d 472 (9th Cir. 2000), wherein it held:

> It is widely accepted that property deemed exempt from a debtor's bankruptcy estate revests in the debtor. *See* 11 U.S.C. § 522(*l*); *see also In re Brown*, 178 B.R. 722, 726-27 (Bankr.E.D.Tenn.1995) (citing cases to that effect), *Owen v. Owen*, 500 U.S. 305, 308, 111 S.Ct. 1833, 114 L.Ed.2d 350 (1991) (when property becomes exempt, it: is "withdrawn from the estate (and hence from the creditors) for the benefit of the debtor").

The court cited with approval *In re Bell* 225 F.3d 203.(2nd Cir 2000) wherein the court held at 215 – 216 that property of the debtor acquired by the debtor post petition is not property of the debtor but remains property of the estate.

> Such after-acquired property includes property that exits the estate and revests in the debtor through the exemption process. As already noted, the Code provides that "[u]nless a party in interest objects [to the debtor's claim], the property claimed as exempt ...*is exempt.*" 11 U.S.C. § 522(*l*) (emphasis added). It is well-settled law that the effect of this self-executing exemption is to remove property from the estate and to vest it in the debtor. *See Owen v. Owen*, 500 U.S. 305, 308, 111 S.Ct. 1833, 114 L.Ed.2d 350 (1991) (when property becomes exempt, it is "withdrawn from the estate (and hence from the creditors) for the benefit of the debtor"); *Redfield v. Peat, Marwick, Mitchell & Co. (In re Robertson)*, 105 B.R. 440, 446 (Bankr.N.D.Ill.1989) ("The effect of the automatic allowance of a claim of exemption due to expiration of the 30-day period is, under well-settled case law, to revest the property in the Debtor and end its status as property of the estate") (internal quotation

> marks and citation omitted); *accord* In re Halbert, 146 B.R. at 188-89 (collecting cases); *In re Brown*, 178 B.R. at 726-27 (collecting cases); *see also Turner v. Ermiger (In re Turner)*, 724 F.2d 338, 341 (2d Cir.1983) (Friendly, *J.*) (where a debtor has already "reclaimed" exempted property from the estate, a dispute over such property is not sufficiently "related to" the bankruptcy case to sustain federal jurisdiction under the identical predecessor to 28 U.S.C. § 1334(b)). *Cf.* 11 U.S.C. § 1123(c) (in Chapter 11, if the debtor does not propose a reorganization plan and the court approves a plan proposed by a creditor, such plan may not provide for the "use, sale, or lease" of exempted property unless the debtor consents). Quite simply, property that has been exempted belongs to the debtor.

The Eleventh Circuit reached a similar result in *Allen v. Green (In re Green)* 31 Fed. 3d. 1098 (11th Cir 1994). In that case, the Debtor listed an auto accident lawsuit which she valued at $1.00 as exempt for $1.00. The Trustee did not object to the valuation or to the exemption. The Court followed *Taylor* in ruling that because the debtor had claimed the asset exempt for its full value as reported in the schedules, the Trustee's untimely objection to the exemption could not be sustained. The 8th Circuit also concluded that property claimed exempt passes out of the estate if a party in interest fails to timely object. *Abramowitz v. Palmer*, 999 F. 2d 1274, 1276, (8th Cir. 1993).

This is also the holding of the 6th Cir. BAP in *In Re Anderson* 377 B.R. 865 (6th Cir BAP 2007). *Anderson* dealt property claimed under the federal exemptions.

> Failure to timely object will leave the trustee without recourse if the court later determines that the debtor intended to exempt the property in full, even if such a ruling results in an exemption greater that the statutory limits." *Mullis v. AgGeorgia Farm Credit, ACA (In re Jones),* 357 B.R. 888, 897 (Bankr. M.D. Ga. 2005)

Because *Taylor* affirmed a Third Circuit case, the Second, Third, Eighth, Eleventh, and the Supreme Court have all ruled that under the Bankruptcy Code, property is withdrawn from administration by the Trustee upon the expiration of the time to object to exemptions. This Circuit agreed when applying the federal statutes although it has found differently when applying the California homestead exemption. The decision below is clearly contrary to this Circuit's ruling in *Smith, supra*. and to the weight of the authority across the country.

The case at bar is essentially the same as *Taylor, Smith, Bell,* and *Green* and identical to *Anderson.* It differs from *Green and Taylor* only in that the Debtors were more accurate in valuing the property that they claimed as exempt. The Debtors listed their residence '9850 Glacier Peak Drive, Camino Island, WA – residence' as exempt to the aggregate amount of their beneficial interest therein at the time of filing under federal exemption statute 11 U.S.C. 522(d)(1). Unlike the

debtor in *Green,* they were extremely accurate in valuing their property, the value of the interest claimed exempt and the amount of prior encumbrances. The trustee did not object to the exemption within 30 days after the first meeting of creditors as required by BR 4003(b). The property thus passed out of the estate under 522(l) in the same manner that the assets passed out of the estates in *Bell, Smith, Anderson, Taylor* and *Green.* It is no longer available for the Trustee to administer regardless of the fact that it may now have a value greater than at the time the case was filed.

The key to these decisions, as evidenced by the holding in *Owen, supra* is that the exemption is claimed in the debtors' aggregate in property, not value of property. *Taylor* does not discuss the exemption of a value, but only of property having a value. This approach is consistent with the language of the statute and Official Bankruptcy Form Schedule C. Section 522(l) provides for the exemption of property as follows:

> (d) The following **property** may be exempted under subsection (b)(1) of this section:
>
> (1) The debtor's aggregate interest, not to exceed $ $18,450 in value, in real property...[emphasis supplied]

The property that the debtor may exempt under (d) is the value of "aggregate interest" specified in § 522(d)(1) on the date of the filing of the original petition. Black's Law Dictionary, 8th Ed. defines "aggregate" as the "Entire number, sum. mass or quantity of something.... a combined whole."

In *In re Maddox* 713 F.2d 1526 (11th Cir. 1983) the court held:

> 11 U.S.C. § 541(a)(1) specifically refers to "all legal or equitable interests of the debtor in property as of the commencement of the case." This court must reject the appellant's narrow interpretation of the phrase "debtor's interest." The word "interest" is a broad term encompassing many rights of a party, tangible, intangible, legal and equitable, and the court will not redefine the term to reach the result sought by the appellant.

The Debtor's aggregate interest thus includes the combined whole of the interests vested in the debtor including right to possession, equity of redemption, the legal right to make mortgage payments to make future equity in the property. *In re Ricks,* 40 B.R. 507, at 508 (Bankr. D. Col. 1984).

Because the term "property" used in section 522(d) must have the same meaning as the same term is later used in section 522(l), it is the debtors aggregate or entire interest that is withdrawn (to use the term from *Owen, supra*) from bankruptcy administration at the time that the objection deadline passes. The accurate valuation of that interest at filing at less than the maximum allowance is

not questioned in this case. Because the aggregate interest which existed and was properly claimed was less than the allowed maximum, the entirety of the Debtors' interest passed out of the estate and there is nothing left for the Trustee to administer at a later date. The Bankruptcy Court thus ruled correctly on this issue and should have been sustained under *Taylor, Smith,* and the language of the statute.

The code makes it clear that, for exemption purposes, the property is valued on the date of the filing of the petition. Section 522(a) provides:

> (2) "value" means fair market value as of the date of the filing of the petition or, with respect to property that becomes property of the estate after such date, as of the date such property becomes property of the estate.

The court below correctly ruled

> The critical date for determining exemption rights is the petition date." *Goswami v. MTC Dist. (In re Goswami)*, 304 B.R.386, 391-92 (9th Cir. BAP 2003), citing *White v. Stump*, 266 U.S.310, 313 (1924) and *Harris v. Herman (In re Herman)*. 120 B.R.610 127, 130 (9th Cir. BAP 1990). [E]xemptions . . . are determinedon the date of bankruptcy and without reference to subsequent changes in the character or value of the exempt property[.]" *Culver, LLC v. Chiu (In re Chiu)*, 266 B.R. 743, 751 (9th Cir. BAP2001), aff'd, 304 F.3d 905 (9th Cir. 2002), citing *Herman*, 120B.R. at 130.

After a good start, the court did exactly the opposite of what it held was not appropriate. It decided that the value of the debtor's residence, that was properly claimed exempt, would be determined on the date that the trustee sought authority to sell it, not the date of filing the petition.

The Court below, contrary to its decision, and contrary to the law that the aggregate value is limited to the amount provided in 522(d)(1) on the petition date determined that it would be valued when the trustee sought authority to sell it. This approach does not give effect to how the statute and Schedule C work together.

Beginning with the first column of Schedule C, the debtor identifies the property. In the third column, headed "Specify Law Providing each exemption" the debtor specifies 522(d)(1) which provides for exemption of an aggregate interest up to a statutory limit; the selection of the statute imposes the limitation of the exemption taken.[3] The next step is to determine what happens to the interest claimed exempt, a function served by section 522(l). That section takes the entire

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[3]It is worth contemplating how the schedule looks when the value of the debtor's equity exceeds the allowed exemption. In such a case, the penultimate column will contain the maximum allowable amount for the exemption which defines the value of the interest that passes out of the estate under 522(l). The excess does not pass out of the estate unless the debtor can show that there was somewhere evidenced a clear claim to exempt the excess amount.

aggregate interest claimed exempt out of the estate on the day after objections are due unless an objection is timely filed. If the value of that aggregate interest is less than the maximum amount allowable in 522(d)(1), the entire interest passes out of the estate and there is nothing left to administer. If the value of the aggregate interest is more than the allowable maximum, then only the allowable maximum passes out of the estate, and the balance remains in the estate (including appreciation) for the trustee to administer.

For example, if the property was worth $1 million, underlying encumbrances were $100,000 and the homestead $100,000, there would be $800,000 of equity above the homestead. The $800,000 would not pass out of the estate.

This analysis works for schedules properly completed in the normal fashion such as in this case. In the case at bar, because the entire interest had a value of less than the allowed maximum at filing, the entire property passes out of the estate leaving the Trustee with nothing.

Taylor and *Green* represent a special case where the asset is only valued nominally or is valued as unknown and the Court is compelled to determine whether the debtor reasonably evidenced an intent to exempt the entire balance. The instant case is much less severe than *Taylor* in an important respect. In this

case, at the time of filing, the asset was worth less than the maximum allowable exemption and the entire interest passed out of the estate because there was no value in excess of the maximum. The appreciated value only appeared some two years later. In *Taylor*, the debtor acknowledged a value of the property in excess of the allowed exemption at the first meeting, before the objection period passed. Thus at the time of filing value of the asset was acknowledged to be greater than the allowed exemption. The exemption was allowed because of a determination that the entire value had been claimed exempt because of the congruence of the value of the exemption and the announced value of the property.

As demonstrated by the next section, it is clear that the debtors in this case clearly claimed their entire interest in the property exempt and they are, therefore, entitled to retain the entire property.

The Debtors unambiguously claimed the entirety of the property exempt causing it to be withdrawn from the estate even under *Reed* and *Hyman*.

The Court below assumes without explanation that the claim of exemption in this case was ambiguous. This was not a finding by the trial court; it is a construction by the BAP. Review of the exemption, as claimed, the Findings of Fact, ER 26 and the other facts of the case does not support this conclusion.

The best place to begin this analysis of the exemption claim is with Schedule C upon which the property is claimed exempt. ER 44. The first column in Schedule C is labeled "Description of Property". In that column the Debtors listed a specific property address. There can thus be no doubt that the Debtors were claiming the real property at that address exempt. There is nothing in the column entry from which one can infer that they were claiming any less than the entire property exempt. Further the stipulated facts of the case ER 26-28, FF5, provide that the trustee understood that the claim was made according to the terms of the statute which can only mean the aggregate interest provided in 522(d)(1) of the statute. If a claim of exemption identifying a specific property by address is ambiguous, then all future debtors will have to anticipate a trustee's make weight ambiguities and address them by claiming more than is required by the form.

This is a much different case than *Reed, infra* and *Hyman, infra* in which the Ninth Circuit found an ambiguous claim of exemption. In those cases the debtors did not identify a specific property, but entered the word "homestead" in the column headed "Description of Property". The Court found that such language could be read to claim the California homestead allowance amount as exempt, rather than the homestead property itself, and applied the statute as if the claim had been so made. That is not the case here. Here, the Debtors clearly identified

the property claimed as exempt by address in the proper place, and there is no ambiguity as to the identity of that property.

Second, the valuation ascribed to the property claimed as exempt absorbed the entire reported value of the property. Use of such a valuation indicates an intention to exempt the "full amount" whatever it turns out to be. *In re Green,* 31 Fed. 3d. at 1100 "Thus an unstated premise of the Court's holding [in *Taylor*] was that a debtor who exempts the entire reported value of an asset is claiming the "full amount" whatever that turns out to be." Similarly, in *Anderson, supra* the Court said:

> Moreover, we are persuaded generally that a debtor's listing of an exemption in an amount sufficient to exempt all of the available (i.e., unencumbered) value in the property indicates his or her intent to exempt the property in full. "[A]n unstated premise of the Court's holding [in *Taylor*] was that a debtor who exempts the entire reported value of an asset is claiming the 'full amount' whatever it turns out to be." *Allen v. Green (In re Green),* 31 F.3d 1098, 1100 (11th Cir.1994). A contrary ruling would reverse the burden of proof placed on an objecting party to challenge the propriety of an exemption in Rule 4003(c) and render the 30-day objection period meaningless. *In re Harrington,* 306 B.R. 172, 181-183 (Bankr. E.D. Tex.2003). As explained by the Supreme Court in *Taylor*, if a trustee is uncertain about an exemption claimed by a debtor, the trustee may seek a hearing on the issue or request an extension of time to object. *Taylor,* 503 U.S. at 644, 112 S.Ct. 1644.

Anderson at 876.

Finally, the debtors in *Reed* and *Hyman* apparently used a form that only claimed a value as exempt, *see* e.g. *In re Hyman,* 967 Fed. 2d 1313 at footnote 1, leading the Court in each case to conclude that they had exempted only a value. In the case at bar, the debtors did not claim a value as exempt, but reported the **"value of the claimed exemption"** (ER 44). The debtors valued the property and then accurately calculated their equity to claim the exemption as is proper. They then valued the claim of exemption at the amount of their equity, over and above encumbrances. This is an important distinction; in the former case and the California Statute (as read by the Court) it is the value itself that is claimed exempt; in this case the "aggregate interest in property" that is claimed exempt and then valued as required by the form, but the valuation column does not claim the exemption, it only informs parties in interest of the net value of the claimed exemption at the time to the case is filed

The cout below apparently reads the column headed "value of claimed exemption" as creating an ambiguity. The perceived ambiguity only arises upon misreading the valuation column heading of the official form as stating an amount of the claimed exemption or limiting the value that Debtors can recover from

property claimed exempt, rather than simply valuing the aggregate interest claimed exempt.[4]

These significant distinguishing facts make it clear that these debtors claimed the aggregate interest property itself as exempt and not merely the value thereof. The Trustee did not timely object to the debtors' exemption of the property. Consequently, under 11 U.S.C. 522(l) as interpreted in *Taylor* and *Owen*, the property has been withdrawn from the estate and is not subject to administration by the Trustee.

The cases relied upon by the BAP and by the trustee rely on California State Law that is not consistent with other 9th Cir case law or the language § 522

The BAP cites with approval 5 cases none of which were decided under the federal exemption statutes set forth in 11 U.S.C. 522(d), as support for the blanket proposition exempt property does not pass out of the estate and is still available for administration inspite of a failure to timely object. These cases were decided prior to this court's decision in *In Re Smith, supra.* The holding in Smith overrules them and this court should acknowledge their demise.

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[4] It is worth noting, that if the Debtors follow the form accurately, they could not appropriately even enter the full allowance of the statute because to do so would actually overvalue the exemption.

These cases were decided under California exemption statutes which differ from the federal bankruptcy exemption statutes in at least two important respects. First, the federal statute allows the exemption of aggregate interests in property whereas the California statutes in question apparently focus upon the exemption of value. Secondly, the federal statute provides for a date certain at which the interests leaves the estate and vests in the debtor whereas the state exemption rights were determined to arise only upon eventual sale of the property. In this case there is also an important factual difference. The value of the property on the date of filing was well below the amount claimed exempt. There was no equity in the estate belonging to the trustee.

The earliest case cited by the appellant, and of which all the others are progeny, *Schwaber v. Reed (In re Reed) 940 F.2d 1317 (9th Cir. 1991),* characterized the California homestead exemption used by the debtors as follows:

> California does not permit a debtor to exempt his entire interest in a homestead, but specifically limits the dollar amount up to which a homestead exemption can be claimed. Cal.Civ.Proc. Code 704.730(a). The language of the relevant statutes makes it clear that the "homestead exemption" in California is merely a debtor's right to retain a certain sum of money when a court orders sale of a homestead in order to enforce a money judgment; it is not an absolute right to retain the homestead itself.

Id at 1321. The subsequent cases cited by the appellee below, *Hyman v. Plotkin (In re Hyman)*, 967 F. 2d 1316 (9th Cir. 1992), *In Re Alsberg* 68 F. 3d. 312 (9th Cir 1995), *cert. den.* 517 U.S. 1168, 116 S.Ct. 1568 (1996); *In Re Viet Vu* 25 BR 644 (9th Cir. BAP (Cal) 1991): and *In re Farthing* 340 BR 376 (Bankr. Ct. D. Az. 2006) all depend upon this characterization of the relevant state exemption statute. The latest of these cases characterizes the state homestead right as "the Debtor's inchoate interest in a portion of its possible proceeds." *In re Farthing* 340 BR at 380.

The case at bar differs from *Reed* and its progeny in that it does not involve a state exemption of value realizable only upon judicial sale, but the federal exemption of an "aggregate interest" in property on the date of filing the petition. The Court in *Reed* specifically recognized that such a distinction would alter the outcome of its decision stating: "No doubt Debtor's argument would have merit if his entire interest in the residence had been set aside or abandoned to him" 940 F.2d at 1323 Fn. 3. According to *Taylor, Owen,* and *Smith* however, section 522(l) of the federal statute does exactly that; it withdraws or sets aside the Debtor's "aggregate interest" from administration at the expiration of the time to object to claims. Because the interest is withdrawn from the estate under *Taylor* and *Owen*, *Reed* and its progeny have no application to the case at bar.

Put somewhat differently, the appreciation cannot inure to the estate because the exempt property is no longer subject to administration by the trustee after the deadline for objection to exemptions passes without objection and the property becomes the exclusive property of the debtor.

Federal Supremacy requires that exemption statutes be construed in bankruptcy proceedings in conformity with federal, not state law.

The Bankruptcy Appellate Panel concludes that § 522 should be construed in conformity with the California State statutes to provide consistency in state and federal exemption law. This argument is flawed for several reasons. First it assumes that the states laws are consistent. That is not so. For example, Washington is different. In Washington "[t]he homestead is neither a lien nor an encumbrance, but a species of land tenure exempt from execution and forced sale in all but the enumerated circumstances." *City of Algona v. Sharp*, 30 Wash.App. 837, 843, 638 P.2d 627 (1982). This is an extremely important distinction. In all of the cases cited by the Trustee and the BAP, the law of the state involved apparently, at least as characterized by the courts, defined the property in terms of value at sale.[5] In Washington, as in § 522, the drafters had a different

[5]Since this property is located in Washington, if the court decides it is property to graft state law onto the bankruptcy code, should not the law of Washington and not California be used?

methodology. Further, in Washington, a debtor claiming homestead is allowed a year to live in the property after the execution sale. Can a Washington Homestead Claimant thus live in his residence for a year after a sale by the trustee? Defining the Federal Law according to the laws of different states is bound to create more confusion than it solves.

More importantly, the approach stands the Supremacy Clause on its head. There is an inherent contextual difference between state homestead laws and federal exemptions. The state laws must be drafted to allow for an execution sale at any time over a 10 or 20 year period. Because of the shifting value of properties there must be a time certain for making the valuation. In the context of the execution sale, the only reasonable date to use as the benchmark is the sale date. Bankruptcy takes place in a different context under which the referent date for determining the amount of the exemption has been universally held as the date of the filing of the petition. *Owen, supra* at 310, *White, supra*.

Even though the court below paid lip service to this proposition, its holding is clearly contrary. The effect of the decision is to allow trustees the option to value property when they want to sell it, not the petition date as required by statute and case law.

In *Hyman v. Plotkin (In re Hyman)*, 967 F. 2d 1316 (9th Cir. 1992) and its relatives, the Ninth Circuit applied the California timing structure to the Bankruptcy context. Now the argument is made in the name of uniformity of application to carry the state timing structure into the Federal Bankruptcy Code, in derogation of the rather clear language of that statute. That seems much like the tail waging the dog: the Federal law should be given supremacy. If anything, the reversal of *Reed* and its relatives should be acknowledged to make the California law conform to the federal mandate. Or, perhaps better, to the extent there is an inconsistency in the statutes, it should be resolved by the Congress/Legislatures and not by judicial grafting of the California law onto the United States Bankruptcy Code.

Allowing the trustee to play real estate speculator with the debtor's property is bad public policy.

Courts should not give incentives to Trustees to keep cases open.

Section 704(1) requires the trustee to close the estate as expeditiously as possible. The Handbook for Chapter 7 Trustees promulgated by the Department of Justice[6] provides

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[6]Available at http://www.usdoj.gov/ust/eo/private_trustee/library/chapter07/docs/forms/blank1.pdf

> Section 704(1) provides that a trustee shall close an estate as expeditiously as is compatible with the best interests of the estate. Delays in case closure diminish the return to creditors, undermine the creditors' and public's confidence in the bankruptcy system, increase the trustee's exposure to liability, raise the costs of administration, and, in cases involving non-dischargeable pre-petition tax liabilities, expose the debtor to increased penalties and interest. Delays also give rise to public criticism of the bankruptcy process.

When the rules were promulgated, the drafters opted for a short time period for objection. Clearly it is the intent of the code and the rules that the issue of exemptions be resolved early on in a case. As the Department of Justice said, delays are bad for the system. Delays while the debtor does not know what is happening to their house present additional problems that are discussed *infra*.

In this case the case was open for 2 years while the trustee dealt with other litigation before the trustee even thought about administering the debtor's residence. During this time, had the debtor known of the trustee's intent, the debtor could have moved for abandonment, not expended post petition assets to maintain the property and pay the mortgage, or simply saved the money.

Allowing the trustee to reap the benefits of his own failure to act is contrary to the mandate of the statute, the handbook, and good policy.

The abandonment option is inconsistent with good case administration.

If, as the BAP suggests, the problem could have been solved had the debtor moved for an Order of Abandonment, what would stop the trustee from responding that he is waiting for the property to appreciate so that there will be something for creditors. Not only is such an expectation an unreasonable burden on a cash strapped debtor who would have to pay a filing fee, pay for an appraisal, and pay for the debtor's attorney to prepare the pleadings and go to the hearing, it also violates the self-executing structure of the exemption provisions (*Smith, supra, Bell, supra*)contained in § 522(l) that are designed to curtail costs and provide prompt certainty to the status of assets. Further, a rule allowing Trustees unfettered access to appreciation opens up the argument that the property should not be abandoned because there is value to the estate in the as yet unrealized appreciation, and argument that brings even more uncertainty to asset administration. Further, debtors would be forced to flood the bankruptcy courts with abandonment motions.

If there is no certainty as to whether the asset will pass out of the estate, Debtors will be advised to stop secured loan payments until the issue is resolved. Why would any debtor continue to make the payments and keep the property out of foreclosure if it would all be for the benefit of the estate. Occupancy is not a

reason. The debtor clearly has the right to occupy the property. *See, In re Szekely* 936 F.2d 897 (7th Cir. 1991), *In re Rolfes,*307 B.R. 59 (E.D. Tenn. 2004). Under the BAP ruling, they would be wasting their exempt assets and post petition earnings to preserve the estate without hope of recompense. If this decision is allowed to stand, no debtor who is competently represented will ever make payments until the trustee commits to abandon the property. What additional stress will this place on the mortgage market as tens of thousands of debtors withhold payments pending a determination of whether the trustee will try to sell their residences?

CONCLUSION.

The aggregate interest in the Debtors' residence passed out of the estate when the Trustee or other party in interest failed to timely object to the Debtors' claim of exemption under 11 U.S.C. 522(l) as interpreted in *Taylor v. Freeland & Kronz, et. al., 503 U.S. 638, 112 S.Ct. 1644 (1992)* and *Owen v. Owen, 500 U.S. 305(1991).* The cases cited by Appellant for the proposition that the property remained in the estate depend upon specific provisions of state exemption law which are inapposite to the federal exemptions claimed by the Debtors in this case. Ruling of he Bankruptcy Court should be affirmed and the BAP reversed.

Respectfully submitted this March 3, 2008

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font, and contains 6,195 words.

STATEMENT OF RELATED CASES

There are no related cases pending in this Court.

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I, Maurice L. Harrington , declare that I am not a party to the action, am over 18 years of age and my business address is: 354 South Spring St., Suite 610, Los Angeles, California 90013.

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