UNITED STATES BANKRUPTCY COURT

DISTRICT OF IDAHO

IN RE	)	
	)	**Case No. 14-20557-TLM**
STEVEN EUGENE WILSON and	)	
MICHELLE MARIE WILSON,	)	**Chapter 7**
	)	
Debtor.	)	
	)	

MEMORANDUM OF DECISION

This matter comes before the Court on the Objection to Claim of Exemptions, Doc. No. 29 ("Objection"), filed on September 26, 2014, by the chapter 7 trustee, David P. Gardner ("Trustee").[1] The Objection was heard on December 15, 2014, and taken under advisement. The Court concludes the Objection will be sustained. This Decision constitutes the Court's findings and conclusions pursuant to Rules 7052 and 9014.

FACTS

The parties presented no evidence at the time of hearing. Ordinarily, this would be problematic. However, they agree on the fundamental underlying facts, which are in large part taken from the schedules and the statement of financial

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[1] Unless otherwise indicated, all chapter, section and other statutory references are to the Bankruptcy Code, Title 11, U.S.C. §§ 101–1532 (the "Code"), and all rule references are to the Federal Rules of Bankruptcy Procedure 1001–9037. The Court has jurisdiction, and the matter presented is a core proceeding. *See* 28 U.S.C. §§ 1334(a), (b); 28 U.S.C. §§ 157(a), (b)(1), (b)(2)(B).

affairs ("SOFA") filed by joint debtors Steven and Michelle Wilson ("Debtors").[2]

Debtors are married and entitled to file a joint petition under § 302. They did so on June 27, 2014. Doc. No. 1. The petition indicates that Steven's address is 3321 S. Lands End Road in Coeur d'Alene, Idaho, and Michelle's is 5245 E. Weaver Avenue in Centennial, Colorado.[3] Both show yet another Coeur d'Alene address (2900 N. Government Way #322) as a common mailing address. *Id.* at 1.[4]

Debtors' Schedule A discloses a "primary residence" at 3321 S. Lands End Road in Coeur d'Alene, asserts that it is "jointly" owned, and shows that Debtors' interest is in "fee simple." *Id.* at 9. This residence is allegedly worth $453,000 and Debtors disclose $743,441 in liens against it. *Id.* at 9, 19.

Debtors claimed exemptions under § 522(d). This included a "homestead exemption" in the "primary residence" under § 522(d)(1), and a number of personal property exemptions under other subsections of § 522(d). *Id.* at 16–18.

Material to the issue presented, Debtors' SOFA disclosed several prior

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[2] As the Court advised the parties at the time of hearing, it takes judicial notice of the files and records in this matter. Fed. R. Evid. 201. Additionally, Debtors' assertions in their sworn schedules and statements may be treated as evidentiary admissions under Fed. R. Evid. 801(d)(2). *See, e.g., Jordan v. Kroneberger (In re Jordan)*, 392 B.R. 428, 444 n.32 (Bankr. D. Idaho 2008); *Murietta v. Fehrs (In re Fehrs)*, 391 B.R. 53, 62 n.16 (Bankr. D. Idaho 2008). The Court accepts the oral representations of counsel at hearing that "clarify" the record, where there were no objections from the other party.

[3] Debtor's first names are used in this Decision solely for clarity.

[4] Debtors assert that venue is proper for both of them under this joint petition because Steven's domicile is in Idaho, and the location of Michelle's "principal assets" (*i.e.*, the Coeur d'Alene house) are in Idaho even though her domicile is in Colorado. *See* Doc. 38 at 2–3 (brief). Trustee has not challenged the venue or the use of a joint petition.

addresses. *Id.* at 47. From that disclosure and the balance of the schedules, and the uncontested representations at hearing, the Court can summarize the situation as follows.

Debtors lived together in Greenwood Village, Colorado, from June 1999 through September 2012. That property was foreclosed upon, and Debtors soon thereafter located to two different places.[5] From October 2012 to the petition's filing date, Steven lived at the Lands End Road address in Coeur d'Alene, Idaho. Michelle lived at the Weaver Avenue address in Centennial, Colorado, from roughly October 2012 through February 2013.[6]

DISCUSSION AND DISPOSITION

A bankruptcy estate is created when the petition is filed. Under § 541(a)(1), the property of the estate consists of all legal and equitable interests in property held by the debtor at that time. *Rousey v. Jacoway*, 544 U.S. 320, 325 (2005). The Bankruptcy Code allows a debtor to exempt property of the estate under § 522. Absent timely objection, exemptions claimed become final and unassailable, even

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[5] The SOFA indicates a residence in an apartment in Denver from "3/[20]13 to present." At hearing, Debtors' counsel conceded this was an error, and the Denver apartment was actually used between the foreclosure of the Greenwood, Colorado property in 2012 and Michelle's occupancy of rental property on Weaver Avenue in Centennial, Colorado, later in 2012.

[6] Schedules A and D reflect ownership of the Idaho property subject to a mortgage, and Steven's Schedule J shows a $5,423.00 mortgage expense. *Id.* at 32. Debtors' Schedule G does not show any leases. *Id.* at 28. However, Michelle's Schedule J shows a $2,195.00 mortgage/rent expense. *Id.* at 35. Debtors represented at hearing that this Weaver Avenue property had initially been on a one-year lease that converted to a month-to-month lease, and confirmed the $2,195.00 amount.

if they lack a good faith basis. *Taylor v. Freeland & Kronz,* 503 U.S. 638, 644 (1992).

Trustee here timely objected. *See* Rule 4003(b)(1). As the objecting party, Trustee bears the burden of proving the claim of exemption is not proper. Rule 4003(c); *Carter v. Anderson (In re Carter)*, 182 F.3d 1027, 1029 n.3 (9th Cir. 1999). The validity of the exemption is determined as of the petition date. § 522(b)(3)(A); *Culver, LLC v. Chiu (In re Chiu)*, 266 B.R. 743, 751 (9th Cir. BAP 2001). As explained in *Carter*, once the objecting party presents sufficient evidence to rebut the presumptive validity of the exemption, "the burden of production then shifts to the debtor to come forward with unequivocal evidence to demonstrate that the exemption is proper. . . . The burden of persuasion, however, always remains with the objecting party." 182 F.3d at 1029 n.3 (internal citations omitted).

Under § 522(b)(1), an individual debtor may exempt property under either § 522(b)(2) or, alternatively, (b)(3). Section 522(b)(2) allow debtors to assert federal exemptions under § 522(d) "unless the State law that is applicable to the debtor under paragraph (3)(A) specifically does not so authorize." Both Idaho and Colorado have exercised this "opt-out" provision. *See* Idaho Code § 11-609, Colo. Rev. Stat. § 13-54-107.

Determining the applicable state law is not always easy. Section 522(b)(2), added by the 2005 BAPCPA amendments, created a choice of law provision that is

premised on debtor's domicile.[7] As this Court previously explained:

> In a fairly complicated choice of law provision, Congress has dictated that it is where Debtors were domiciled at different times in relation to their bankruptcy filing that is critical to determining which exemption law Debtors may invoke. Under § 522(b),
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> > (3) Property listed in this paragraph [i.e., the property Debtors may exempt] is
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> > (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.

In re Katseanes, 2007 WL 2962637, at *2 (Bankr. D. Idaho Oct. 9, 2007) (quoting and analzying § 522(b)(3)(A)).

In *Katseanes*, the debtors filed their petition on March 19, 2007. In looking at their domicile during the required 730-day period from March 19, 2005 to the petition date, the Court found debtors were located in two different states (Utah and Idaho) during that period. The Court then determined that the facts showed those debtors' were domiciled in Utah for the greater part of the 180-day period immediately preceding the 730-day period and, "[t]hus, Utah law will control

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[7] "Domicile" is not the same thing as "residence" but is, instead, an actual residence coupled with the present intention to remain there. *Lowenschuss v. Selnick (In re Lowenschuss)*, 171 F.3d 673, 684 (9th Cir. 1999), *cert. denied*, 528 U.S. 877 (1999).

Debtors' exemption rights." *Id.*

Here, Debtors' counsel conceded during argument that, given the June 27, 2014 filing date and the commencement of the 730-day period on June 27, 2012, both Debtors had Colorado domiciles for purposes of § 522(b)(3)(A). Michelle was domiciled in Colorado throughout that entire period without interruption. Steven moved to Idaho in October 2012, which was within the 730-day period. This, then, requires an evaluation of his domicile for the 180-day period immediately preceding June 27, 2012. His domicile for that 180-day period, and afterward up to his October 2012 move to Idaho, was also in Colorado.

Thus, consistent with § 522(b)(3)(A), Colorado law will control Debtors' exemption rights. Debtors, however, used and claimed federal exemptions under § 522(d), relying on the language in the "hanging paragraph" immediately following the other provisions of § 522(b)(3). That paragraph provides: "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)."

Here, both Debtors were limited to exemptions under Colorado law. The question is thus whether application of Colorado law "render[s] the debtor[s] ineligible for *any* exemption[.]" *Id.* (emphasis added). This requires an evaluation of Colorado statutes and any controlling Colorado state decisional law construing

and applying those statutes.[8]

As noted, Colorado is an "opt-out" state, *see* Colo. Rev. Stat. § 13-54-107, and exemptions are limited to those provided by Colorado law. Colorado statutes limit the ability of debtors to claim a homestead exemption, allowing such an exemption only on property located within that state. *See* Colo. Rev. Stat. § 38-41-201 ("Every homestead *in the state of Colorado* shall be exempt . . . .") (emphasis added). *See also In re Kelsey*, 477 B.R. 870, 874 (Bankr. M.D. Fla. 2012); *In re Jevne*, 387 B.R. 301, 303–04 (Bankr. S.D. Fla. 2008). Colorado statutes are silent on the extraterritorial effect of personal property exemptions. *See* Colo. Rev. Stat. § 13-54-102; *see also Kelsey*, 477 B.R. at 874–76.

Debtors rely on a century-old Colorado case, *Sandberg v. Borstadt*, 109 P. 419 (Colo. 1910), in which the court commented that "[p]rimarily, the exemption laws of the state [of Colorado] are for the benefit of residents[.]" 109 P. at 419. Debtors emphasize the word "residents." However, *Sandberg* involved a Colorado statute that limited a personal property exemption of "a sewing machine, *when owned by any citizen of the state of Colorado*[.]" *Id.* (emphasis added). Colorado's current personal property exemption statute does not contain a similar residency restriction.

Sandberg has led some bankruptcy courts, including *In re Underwood*, 342

[8] The parties have identified little state law to assist the Court. They do note several bankruptcy court decisions that evaluate Colorado law. Those are not controlling, but the Court below identifies several, including those that are the most helpful.

B.R. 358 (Bankr. N.D. Fla. 2006) and *In re Jewell*, 347 B.R. 120 (Bankr. W.D.N.Y. 2006),[9] to conclude that Colorado's personal property exemption statutes lack extraterritorial effect. However, this Court finds *Kelsey*, which critiqued and did not follow *Underwood* and *Jewell*, to be the more thorough, complete and persuasive analysis. *See* 477 B.R. at 874–78. *Kelsey* found no such restriction in the Colorado law.[10]

Katseanes noted that the key to the hanging paragraph is concluding that debtor are "ineligible for *any* exemptions" due to the domiciliary requirements of § 522(b)(3)(A). *See also In re Capps*, 438 B.R. 668, 673–74 (Bankr. D. Idaho 2010). In looking to Utah law, the Court found that the exemption statutes applied to debtors even if they did not benefit from *all* the various exemptions available under Utah law. So long as debtors can receive some exemptions under the applicable state law, there is no reason for recourse to § 522(d) federal exemptions as a fallback under § 522(b)(3)'s hanging paragraph. *In re Katseanes*, 2007 WL 2962637, at *3.

The burden shifted to Debtors to establish that they could not claim any Colorado exemptions, and they therefore had to claim federal exemptions under

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[9] *Jewell* stated that Colorado exemption law was limited to those who "actually reside within the State [of Colorado] at the time of filing. . . ." *See* 347 B.R. at 122.

[10] The Court acknowledges that *Katseanes* discussed briefly *Underwood* and *Jewell*. *See* 2007 WL 2962637 at *3, n.3. But Colorado law was not at issue in *Katseanes*, and the Court did not have the 2012 analysis of *Kelsey* to assist it. Under the circumstances, this Court does not today feel bound to a *Katseanes* construction of the Colorado statutes, and focuses instead on the balance of *Katseanes* applicable to the construction of § 522(b)(3)(A).

the savings provision of the paragraph following § 522(b)(3)(A). They did not meet that burden. Indeed, Trustee indicated he will have no objection, generally speaking, to the use of Colorado law as he believes it is such law that should be utilized.[11]

CONCLUSION

Trustee met his burden of showing that Debtors' assertion of federal exemptions was improper under § 522(b)(3)(A). Debtors are required to utilize Colorado law in connection with their exemptions, and Debtors have not established that the "hanging paragraph" is applicable. Trustee's Objection will therefore be sustained, and the exemptions currently claimed will be disallowed. A separate order will be entered.

DATED: January 13, 2015

TERRY L. MYERS
CHIEF U. S. BANKRUPTCY JUDGE

[11] It remains to be seen, though, just what specific exemptions Debtors claim and whether the Colorado statutory bases of those exemptions, or case law, authorize the same. The Court will not try to predict what exemptions are claimed, or what objections might be raised. Not only are advisory opinions generally improper, here they would be on a speculative and unresolved procedural platform.