

FEB 14 2005

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

U.S. BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

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

In re:) Chapter 7
JUSTIN WEISS,) No. 4:04-bk-01295-JMM
)
) **MEMORANDUM DECISION RE:**
) **DEBTOR'S CLAIM OF EXEMPTION**
)

Debtor.)

On January 25, 2005, this court held a hearing on Chapter 7 Trustee's Objection to Debtor's Claim of Exemption to Monies Transferred to Wife from Sale of House. After reviewing the pleadings, the arguments and the entire file, this court now rules.

FACTS

Justin Weiss ("Debtor") and Margarita Weiss ("Meg") were married in 1976. In October 1982, Debtor and Meg purchased a single family residence (the "Residence") in Tucson, Arizona. Title to the Residence was taken, not as community property, but as joint tenants with the right of survivorship.

On March 20, 2003, Meg filed a petition for the dissolution of her marriage to Debtor in Pima County Superior Court and the parties decided to sell their Residence in the process. The sale of the Residence closed on September 23, 2003. The sales price paid was \$1,345,000.00. After paying off several liens, Debtor received \$25,000 and Meg received a total of \$538,401.87. Thereafter, Meg used these monies to purchase another home, in her name only. Debtor does not live in the home that Meg purchased.

Debtor filed his chapter 13 bankruptcy petition on March 19, 2004. Debtor voluntarily elected to have his chapter 13 case converted to a chapter 7 liquidation proceeding on August 5, 2004. On November 29, 2004, a Decree of Dissolution was entered in Debtor and Meg's divorce proceeding.

1 Debtor and Meg signed a Property Settlement Agreement, whereby Debtor agreed Meg could retain the
2 \$538,401.87.

3 In his bankruptcy schedules, Debtor claimed an exemption, in Schedule C, for the monies
4 received upon the sale of the home. Debtor's Schedule C lists "monies transferred to wife from sale of
5 house" as exempt in the amount of \$100,000.

6 On December 21, 2004, Gayle Eskay Mills ("Trustee") filed Chapter 7 Trustee's Objection to
7 Debtor's claim of Exemption to Monies Transferred to Wife from Sale of House.

8 9 ISSUES

- 10
- 11 1. Whether the Trustee objected to Debtor's claim of exemption within the prescribed time?
 - 12 2. Whether Debtor has a right to claim a homestead exemption in the money that he
13 transferred to his wife in connection with their marital settlement agreement?
- 14

15 DISCUSSION

16 17 **1. Procedural Issues**

18
19 Debtor claims that Trustee's objection to his claimed exemption is untimely because the time to
20 object to the exemption is 30 days after the Section 341 Meeting of Creditors original date or continued
21 date. Debtor alleges that the original date of the § 341 Meeting was May 5, 2004 but it was continued
22 several times with the final continued date of September 15, 2004. Therefore, Debtor contends, Trustee
23 had only 30 days from September 15, 2004 to object to any exemption. Trustee filed her objection on
24 December 21, 2004, which is clearly 30 days beyond September 15, 2005.

25 Trustee claims that her objection is timely. Trustee argues that Bankruptcy Rule 4003(b)
26 provides that the time allowed for objection to a claim of exempt property is within thirty days after the

1 § 341 Meeting is concluded. Since the § 341 Meeting was never concluded in Debtor's chapter 13, the
2 applicable time period was thereby tolled. In addition, the serving Chapter 13 Trustee did file an
3 objection to Debtor's claim of exemption within thirty days of the date when the 341 Meeting was
4 initially noticed. (See, Dkt. 15). The Trustee maintains that this objection thus preserved the estate's
5 rights. Debtor did not oppose that objection. Finally, Trustee alleges the subject objection was filed on
6 December 21, 2004, which is within 30 days of the Debtor's first appearing for a § 341 Meeting, which
7 in this case was on November 30, 2004. However, the § 341 Meeting was not concluded on November
8 30, 2004, but was continued to January 11, 2005. Therefore, Trustee contends her objection is timely.

9 Bankruptcy Rule 4003(b) states:

10 A party in interest may file an objection to the list of property claimed as exempt within
11 30 days after the meeting of creditors held under § 341 is concluded or within 30 days
after any amendment to the list or supplemental schedules is filed, whichever is later.

12 Bankruptcy Rule 4003(b) clearly states an objection can be filed within 30 days after the 341 Meeting
13 is *concluded*. The Editors' Comment to this rule states:

14 [t]his meeting of creditors may be adjourned to additional times depending upon the
15 complexity of the case and the nature of the information sought by the creditors. Thus,
16 all of the obtainable facts as to the debtor's financial condition will not be known, if at all,
until the conclusion of the creditors' meeting. Consequently the trustee or any other
17 creditor may not be in a position to file an objection to the debtor's claimed exemptions
until the meeting of the creditors has concluded.

18 The original date of Debtor's § 341 Meeting was May 5, 2004. Debtor did not appear at the §
19 341 Meeting and it was continued several times. On August 5, 2004, Debtor voluntarily converted his
20 chapter 13 to chapter 7. While it is true that a conversion of the case does not give rise to a new 30-day
21 period for filing objections to Debtor's claimed exemptions, *In re Smith*, 235 F.3d 472 (9th Cir. 2000),
22 the Chapter 13 Trustee filed an objection to Debtor's exemption on April 15, 2004, which was before
23 Debtor's original § 341 Meeting was scheduled to be held. After the conversion, a § 341 Meeting was
24 held on November 30, 2004 and was continued to January 11, 2005, at which point it was concluded.
25 Since Debtor's 341 Meeting was not concluded until January 11, 2005, the Trustee's objection to
26 Debtor's claim of exemption, which was filed at the latest on December 21, 2004, was timely.

1 **2. Whether Debtor is Entitled to Claim a Homestead Exemption in Monies Transferred**

2
3 The Trustee claims that Debtor's pre-petition transfer of his interest in the sales proceeds from
4 the Residence caused a waiver of the homestead exemption. The Trustee cites several cases for the
5 proposition that, in the State of Arizona, property that is exempt can lose its exempt character if the
6 property is transferred. The Trustee also contends that Debtor's lack of intent to use the proceeds from
7 the sale of the Residence to acquire another homestead results in a loss of the right to claim an
8 exemption. Finally, the Trustee maintains that the Debtor is precluded from claiming a homestead
9 exemption in the monies by operation of 11 U.S.C. § 522(g).

10 Debtor's only claim is that since the Trustee's objection to the exemption was untimely, under
11 *Taylor v. Freeland & Kronz*, 503 U.S. 638, 112 S.Ct. 1644 (1992), his exemption is valid. While this
12 is a correct statement of the law, the Trustee's objection was timely and therefore *Taylor* does not apply.

13
14 **a. Whether Debtor's Pre-Petition Transfer Caused a Waiver of the Exemption**

15 The Trustee claims that Debtor waived his right to claim an exemption because of his voluntary
16 pre-petition act of transferring his separate property interest to his wife, Meg, who has not filed for
17 bankruptcy. The Trustee cites to *In re Noblit*, 72 F.3d 757, 758 (9th Cir. 1995), for the proposition that
18 "[i]f the exempt property is transferred, the debtor has in essence waived the exemption. . . ."

19 The Ninth Circuit has held that when exempt property is transferred, the debtor waives the
20 exemption. Therefore, Debtor cannot claim an exemption in the proceeds from the sale of his
21 homestead because those proceeds were voluntarily transferred to Meg. Debtor has thus waived his
22 homestead exemption by transferring the proceeds to his ex-wife.
23
24
25
26

1 **b. Whether Debtor's Lack of Intent to Use Proceeds to Acquire Another**
2 **Homestead Results in a Loss of the Right to Claim an Exemption**

3
4 The Trustee claims Debtor is not entitled to claim an exemption because he did not intend to
5 use the proceeds from the sale of the Residence to acquire another homestead. The Trustee cites to an
6 Illinois bankruptcy case, which held that where there does not exist a good faith intent to
7 reinvest the proceeds received from the sale of a residence in another homestead, the statutory
8 exemption is not applicable. *In re Ziegler*, 239 B.R. 375, 378-79 (Bankr. C.D.Ill. 1999). The Trustee
9 alleges that while the Illinois homestead exemption statute, like Arizona's homestead exemption statute,
10 does not specifically require a debtor intend to use the proceeds received from a sale to acquire another
11 homestead, such a requirement is implicit because the purpose of the statute is to aid a homeowner in
12 maintaining their status as a homeowner.

13 A.R.S. § 33-1101 (as it read at the time of debtor's filing) provides as follows:

14 C. The homestead exemption, not exceeding the value provided for in subsection A of
15 this section, automatically attaches to the person's interest in identifiable cash proceeds
16 from the voluntary or involuntary sale of the property. The homestead exemption in
17 identifiable cash proceeds continues for eighteen months after the date of the sale of the
18 property or until the person establishes a new home with the proceeds, whichever period
19 is shorter.

20 However, *In re Glaze* states "[t]he purpose behind the homestead exemption under Arizona law is to
21 exempt the amount of money necessary to make sure there is a shelter for the family. Thus, it appears
22 that the exemption is designed to protect the family and/or guarantee the family some place to live."
23 169 B.R. 956, 969 (Bankr.D.Ariz. 1994) (citations omitted). *See also In re Allman*, 286 B.R. 402
24 (Bankr.D.Ariz. 2002) (Arizona courts have held that homestead laws should be interpreted liberally to
25 advance their objectives, the fundamental purpose of which is to protect the family against forced sale
26 of the home property.)

 It is clear that the purpose behind Arizona's homestead exemption is to provide another
homestead for the Debtor to reside in. To that effect, the Arizona homestead statute allows the debtor
eighteen months to reinvest the *identifiable* cash proceeds from the sale of the debtor's homestead

1 before the exemption expires. In Debtor's case, he has neither reinvested the proceeds from the sale
2 of the Residence into a new homestead for himself, nor has he kept the proceeds identifiable. Debtor
3 and Meg sold the Residence on September 23, 2004. The homestead exemption continues for eighteen
4 months after the sale of the homestead. Therefore, Debtor technically has until March 23, 2005 to
5 reinvest the proceeds into a new homestead. However, the Arizona homestead statute also provides that
6 the exemption can only be in identifiable cash proceeds. Debtor received only \$25,000 from the sale
7 of the Residence and Meg received \$538,401.87, which she has reinvested in the purchase of real
8 property. Debtor has not retained the \$25,000 in a separate account and therefore that money cannot
9 be considered identifiable. In addition, the \$538,401.87 transferred to Meg in accordance with the
10 Property Settlement Agreement can hardly be considered Debtor's identifiable cash proceeds because
11 he no longer controls the money and whatever interest he might have claimed was voluntarily
12 transferred by him, to his ex-wife almost a year and a half ago. Therefore, because Debtor failed to
13 reinvest identifiable cash proceeds into a new homestead he has thus lost the right to claim a homestead
14 exemption in either the \$25,000 or in any portion of the \$538,401.87 given to Meg.

15
16 c. **Whether Debtor is Precluded from Claiming the Exemption by Operation**
17 **of § 522(g)**

18 The Trustee claims that if a recovery is made of the transferred money by the Trustee, Debtor
19 cannot claim an exemption in the recovered money under § 522(g). The Trustee asserts that she intends
20 to file an adversary complaint against Meg to recover the interest of the Bankruptcy Estate in the
21 proceeds generated from the sale of the family residence if a voluntary relinquishment, settlement,
22 and/or compromise is not reached.

23 Section 522(g) provides:

24 Notwithstanding sections 550 and 551 of this title, the debtor may exempt under
25 subsection (b) of this section property that the trustee recovers under section 510(c)(2),
26 542, 543, 550, 551, or 553 of this title, to the extent that the debtor could have exempted
such property under subsection (b) of this section if such property had not been
transferred, if -

1 (1)(A) such transfer was not a voluntary transfer of such property; and

2 (B) the debtor did not conceal such property; or

3 (2) the debtor could have avoided such transfer under subsection (f)(2) of this
4 section.

5 This court will deal with § 522(g) if and when the Trustee recovers the proceeds transferred to
6 Meg. To decide this issue now would be to provide an advisory opinion, which is prohibited under
7 Article III of the United States Constitution. *Muskrat v. U.S.*, 219 U.S. 346, 31 S.Ct. 250 (1911).

8
9 **CONCLUSION**

10
11 The Trustee's Objection to Debtor's Claim of Exemption to Monies Transferred to Wife from
12 Sale of House was timely because it was filed within 30 days of the conclusion of Debtor's § 341
13 Meeting. In addition, Debtor is not entitled to claim, as exempt, those monies transferred to his wife
14 because the Ninth Circuit has held that when exempt property is transferred, the debtor has waived the
15 exemption. In addition, Debtor is not entitled to claim the sales proceeds from the sale of the Residence
16 as exempt because he has failed to comply with Arizona's homestead exemption statute by not keeping
17 the proceeds identifiable. Finally, this court refrains from deciding whether debtor can exempt the
18 proceeds under § 522(g) because the Trustee has yet to recover the proceeds transferred to Meg.

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

20
21 DATED: February 14, 2005.

22 
23 _____
24 JAMES M. MARLAR
25 UNITED STATES BANKRUPTCY JUDGE
26

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

COPIES served as indicated below this 14
day of February, 2005, upon:

Cheryl K. Copperstone
252 W. Ina Road, Suite 203
Tucson, AZ 85704
Email copperstonebankruptcy@earthlink.net
Attorneys for Debtor

Michael M. Neal
110 S. Church Ave., #4298
Tucson, AZ 85701
Email: mmnealpc@qwest.net
Attorney for Chapter 7 Trustee

Gayle Eskay Mills
P.O. Box 36317
Tucson, AZ 85740
Chapter 7 Trustee / U.S. Mail

Steven M. Cox
Waterfall Economidis Caldwell Hanshaw & Villamana, P.C.
5210 E. Williams Cir., #800
Tucson, AZ 85711
Email scox@wechv.com

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

By *MB Thompson*
Judicial Assistant