

SIGNED.



Dated: April 07, 2005

Randolph J. Haines

RANDOLPH J. HAINES
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re)	Chapter 11
)	
FRED TRYSON HENDRIX and)	CASE NO. 2-04-16924-RJH
MARILYN DOROTHY HENDRIX,)	
)	MEMORANDUM DECISION
Debtors.)	DENYING HOMESTEAD EXEMPTION

The issue to be determined is the validity of Debtors' claimed homestead exemption pursuant to Arizona Revised Statutes (hereinafter "A.R.S.") § 33-1101 and § 33-1104. This Court finds Debtors fail to satisfy the definition of "resides" in § 33-1101 and that Debtors abandoned the homestead pursuant to § 33-1104. Based on these two findings, the Court concludes Debtors' claimed homestead exemption to be invalid.

Factual Background

In June, 1999, Debtors Fred and Marilyn Hendrix ("Hendrix") purchased an RV park, the "Oxbow Estates," in Payson, Arizona. Although they owned and lived in a home in Phoenix up until that time, they then moved their motor home to the RV park and began living there. The Hendrixes remained at the park until the inception of their bankruptcy case, only returning to the Phoenix residence occasionally to do maintenance.

While living at the RV park, the Hendrixes had mail from the Phoenix home forwarded to them. They rented out their Phoenix residence beginning in late 1999, soon after moving to the Oxbow Estates, sometimes pursuant to one-year leases. Tax returns confirm the Hendrixes received rental income from the Phoenix property in the years 1999-2002.

The Hendrixes eventually sold the Phoenix residence in October, 2003. The

1 Hendrixes and Oxbow filed for Chapter 11 in September, 2004, and listed as exempt the equity
2 in the Phoenix residence. Ernest and Betty Anderson, the sellers of the RV park and creditors in
3 this case, objected to the claimed homestead exemption.

4 **Analysis of Homestead Requirements**

5 Arizona permits a party to claim a homestead exemption for a “house in which
6 the person resides,” A.R.S. 33-1101(A)(1). The term “resides” in § 33-1101(A)(1) has been
7 interpreted to require physical presence at the time the homestead exemption is claimed.
8 *Morrissey v. Ferguson*, 156 Ariz. 536, 753 P.2d 1192 (Ariz. App. 1988) (Debtor held not to
9 reside in mobile home while in jail). Although that case may have been decided essentially on
10 the insufficiency of the declaration of homestead, it clearly implies that there is some physical
11 element to the meaning of residency: “It is undisputed that Ferguson has been in custody since
12 April 1984 and that he did not reside on the property at the time the declaration was recorded in
13 November 1986.” *Id.* at 537, 753 P.2d at 1193.

14 For purposes other than homestead, Arizona law defines residency as “primarily
15 a state of mind combined with actual physical presence.” *St. Joseph’s Hosp. and Med. Ctr. v.*
16 *Maricopa County*, 142 Ariz. 94, 99, 688 P.2d 986, 991 (1984)(quoting *Ariz. Bd. of Regents v.*
17 *Harper*, 108 Ariz. at 228, 495 P.2d at 458). That case also noted that although the terms
18 “residence” and “domicile” carry the same connotations, they “are not synonymous terms at
19 common law.” *Id.*, citing *Martinez v. Bynum*, 461 U.S. 321, 330-31 (1983). *Martinez*, in turn,
20 held that “residence” “generally requires both physical presence and an intention to remain.”
21 *Martinez*, 461 U.S. at 330. It also generally defined domicile of an individual to be “his true,
22 fixed and permanent home and place of habitation. It is the place to which, whenever he is
23 absent, he has the intention of returning.” *Id.* at 331, quoting *Vlandis v. Kline*, 412 U.S. 441,
24 454 (1973). This demonstrates one of the principal differences between domicile and residence
25 – a person can have only one domicile, but may have multiple residences. Indeed, A.R.S. § 33-
26 1102 contemplates the possibility of multiple residences, because it requires the debtor to
27 choose among them when claiming a homestead.

28 *St. Joseph’s* therefore requires proof of two elements to establish residency –

1 physical presence and intent. No case law suggests that the intention to remain or return can
2 overcome a complete lack of physical presence. Indeed, that was essentially the debtor's
3 argument in *Morrissey*, because he contended that he had not abandoned his homestead because
4 his absence from the property was involuntary. The court rejected that argument because,
5 among other reasons, he did not establish the residency element given his complete absence
6 from the property for two and one-half years.

7 Bankruptcy court decisions upholding the homestead exemption notwithstanding
8 temporary absence from the home all found some degree of physical presence. In *Garcia v.*
9 *Garcia (In re Garcia)*, 168 B.R. 403 (D. Ariz. 1994), the evidence showed that the debtor
10 "checked on the home at least three or four times a week, and she eventually moved back in on a
11 permanent basis." *Id.* at 408. In *In re Elia*, 198 B.R. 588 (Bank. D. Ariz. 1996), the debtor was
12 found to have resided in the property for a prolonged period of time, the debtor's furniture and
13 belongings were present there until the day before the recording of the declaration of homestead,
14 and even after the belongings were removed the debtor continued to be physically present at the
15 property after the homestead declaration was recorded. *Id.* at 598.

16 This Court must conclude that while temporary absence is not sufficient to defeat
17 the residence element, a complete absence from the property for a period as long as two or four
18 years fails to satisfy the residency element, notwithstanding some intent ultimately to return.
19 This is especially true where, by granting one year leases, the Debtors made it impossible for
20 them to reside there even for short periods of time.

21 Moreover, even if the Debtors had established a valid homestead, the Court also
22 must conclude that it had been abandoned. A.R.S. § 33-1104(A)(3) provides that a homestead
23 may be abandoned by a "permanent removal of the claimant from the residence." The next
24 sentence of the statute essentially says that a removal for as long as two years may not be
25 regarded as permanent: "A claimant may remove from the homestead for up to two years
26 without an abandonment or a waiver of the exemption." The clear negative implication of that
27 sentence, however, is that any removal in excess of two years should be regarded as a permanent
28 removal and therefore an abandonment. Debtors have not suggested any more plausible

1 interpretation of the plain meaning of that statute.

2 For these reasons, the Debtors' claim of homestead must be denied.

3 DATED AND SIGNED ABOVE

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5 Copy of the foregoing mailed
6 this 8th day of April, 2005, to:

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