



Entered on Docket
January 10, 2008

Hon. Mike K. Nakagawa
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re)

YUKIO NARITA and IRIS NARITA,)

Debtors.)

Case No. BK-05-22553-MKN

Chapter 7

Date: September 12, 2007
Time: 9:30 a.m.

MEMORANDUM DECISION ON TRUSTEE’S OBJECTION TO DEBTORS’ HOMESTEAD EXEMPTION IN EXCESS OF \$125,000¹

This matter was taken under submission after an evidentiary hearing was conducted. The appearances of counsel were noted on the record. Both written and oral arguments were presented.

BACKGROUND

Yukio Narita and Iris Narita (“Debtors”) filed a voluntary joint petition for Chapter 7 relief on October 11, 2005, along with their Schedules of Assets and Liabilities, and a Statement of Financial Affairs. (Dkt# 1) Their primary asset is a residence located at 7747 N. Torrey Pines

¹ In this Memorandum Decision, all references to “Rule” shall be to the Federal Rules of Bankruptcy Procedure unless otherwise indicated. Additionally, all references to “Section” shall be to the provisions of the Bankruptcy Code found in Title 11 of the United States Code, as amended by the applicable provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”), unless otherwise noted.

1 Drive, Las Vegas, Nevada (“the Residence”). The Residence was claimed as exempt in the
2 amount of \$121,000. Leonard E. Schwartz (“Trustee”) was assigned to administer the case.

3 On January 9, 2007, creditor Accredited Home Lenders, Inc. (through its nominee
4 Mortgage Electronic Registration Systems, Inc.) filed a motion for relief from stay (Dkt # 14)
5 alleging, inter alia, that the Residence was worth \$420,000 according to the Debtors’ schedules
6 and that only \$195,194.69 was owed, resulting in available equity in excess of \$191,205.31². On
7 January 18, 2007, the Trustee filed written opposition asserting that the lender’s interest was
8 adequately protected by a substantial equity cushion in the Residence. The Trustee wanted to
9 sell the Residence for an amount beyond the maximum exemption that could be claimed by the
10 Debtors. In view of the Trustee’s response, the lender withdrew its motion on February 2, 2007.
11 (Dkt# 26)

12 On January 30, 2007, the Trustee filed an objection to Debtors’ claim of exemption (Dkt#
13 24) to the extent it exceeds \$125,000 and then filed an amended objection shortly thereafter.
14 (Dkt# 29) No response to the amended objection was filed by Debtors’ bankruptcy counsel and
15 the objection was sustained without opposition. An order to that effect was entered on April 18,
16 2007. (Dkt# 33)

17 Debtors obtained new bankruptcy counsel who filed a “Motion to Set Aside Order
18 Regarding Trustee Objection to Exemption of Homestead in Excess of \$125,000” on June 29,
19 2007. (Dkt# 35) The Trustee filed a “Response to Motion to Set Aside Order Regarding Trustee
20 Objection to Exemption of Homestead in Excess of \$125,000”. (Dkt# 42) At the initial hearing,
21 counsel for the parties agreed to set aside the April 18, 2007 Order and to resolve the Trustee’s
22 objection on the merits. An evidentiary hearing was scheduled and deadlines were established
23 for counsel to file further briefs on the substantive issues. Those additional briefs consist of
24 “Debtors’ Opposition to Trustee’s Objection to Exemption of Homestead in Excess of \$125,000”
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26 ² The lender asserted that sales costs of \$33,600 would be incurred in liquidating the
27 Residence and that the Debtors were delinquent in their monthly payments.

1 (Dkt# 46) and the Trustee's "Reply Brief in Support of Trustee's Objection to Debtors'
2 Homestead Exemption in Excess of \$125,000". (Dkt# 47)

3 The evidentiary hearing was conducted on September 12, 2007. Debtor Iris Narita
4 ("Iris") testified and was subject to direct and cross examination. Debtor Yukio Narita
5 ("Yukio") did not appear and no other witnesses were called to testify. The parties stipulated to
6 the admission of seven exhibits offered by the Trustee. Closing arguments were presented and
7 the matter was taken under submission.

8 **APPLICABLE LEGAL STANDARDS**

9 Under Rule 4003(a), a debtor is required to list all property claimed to be exempt. If no
10 objection is made to a claimed exemption within 30 days after conclusion of the first meeting of
11 creditors, the exemption is allowed even if the exemption lacks a valid legal basis. See
12 Fed.R.Bankr.P. 4003(b)(1); Taylor v. Freeland & Kronz, 503 U.S. 638, 112 S.Ct. 1644, 118
13 L.Ed.2d 280 (1992). Thus, a scheduled claim of exemption is presumed to be valid. See A.
14 Resnick and H. Sommer, 9 Collier on Bankruptcy, ¶ 4003.04 (15th Edition Revised 2007).

15 Under Bankruptcy Rule 4003(c), it is the objecting party's burden to prove that an
16 exemption is not properly claimed. The objecting party must produce evidence to rebut the
17 presumption that the exemption is valid. See In re Carter, 182 F.3d 1027, 1029-30 n.3 (9th Cir.
18 1999). Once such evidence is produced, the burden shifts to the debtor to provide evidence
19 demonstrating that the exemption is proper. See Fed.R.Evid. 301.

20 **SUMMARY OF THE TESTIMONY OF IRIS NARITA**
21 **AND OF THE EXHIBITS ADMITTED**

22 Iris testified that she was last employed in approximately 1996. She left employment due
23 to injuries sustained in a car accident. She still takes various medications as a result. Iris and her
24 husband, Yukio, have been married for 17 years. They have two children, ages 15 and 16 years.
25 She testified that they all were living in the Residence when the bankruptcy case was
26 commenced on October 11, 2005.

27 Iris also testified that the Residence was purchased in 1996 and title was taken in both of
28

1 the Debtors' names. The Residence was built in 1990, but no one had actually lived in it prior to
2 its purchase by the Debtors in 1996. Since that time, no one other than the Debtors and their
3 children have lived in the Residence. Various improvements and repairs to the Residence have
4 been made over the years, such as to a bathroom, the roof, the garage, and the insulation, as well
5 as the addition of a porch enclosure, shelving, and a tool shed.

6 The Debtors' marriage was in difficulty in 2001. Because of those difficulties, the
7 Residence was transferred in August 2001 to just Iris's name. Trustee's Exhibit "5" is a copy of
8 a Quitclaim Deed dated August 20, 2001, whereby Yukio transferred all right, title and interest
9 in the Residence to Iris. Iris testified that she and her husband had decided that Iris should get
10 the Residence since she would be taking care of the children. Yukio was contemplating a return
11 to Japan for a different job and wanted Iris to have the house. Iris testified that Yukio is from a
12 small village in Japan where he would be difficult to reach. She explained that it would take a
13 long time to get Yukio's signature on any paperwork necessary to transfer the Residence and that
14 facsimile machines would not be readily available.

15 Although the transfer of the Residence solely to Iris's name took place in August 2001,
16 the couple did not get divorced and have remained married.

17 Iris further testified that in February 2005, it was necessary to refinance the Residence in
18 order to pay a \$60,000 judgment that had been obtained on a claim for breach of contract.
19 Apparently, Iris had entered into a contract to sell the Residence, backed out of the deal, and was
20 sued by the disappointed purchasers. A refinance of the Residence was the only way to satisfy
21 the judgment. Because Iris was not employed, however, the lender required Yukio to be on title
22 to the Residence before making the loan. Iris therefore transferred title to the Residence to
23 Yukio in February 2005. Trustee's Exhibit "6" is a copy of a Quitclaim Deed dated January 26,
24 2005, and recorded on February 1, 2005, whereby Iris remises, releases and forever quitclaims
25 the Residence to Yukio as his sole and separate property. The refinance loan closed and the
26 judgment was paid off.

1 Iris also testified that in July 2005, Yukio transferred the Residence back to her since he
2 was thinking about accepting a job offer in Japan. Trustee's Exhibit "7" is a copy of a Quitclaim
3 Deed dated July 13, 2005, and recorded on July 14, 2005, whereby Yukio quitclaimed to Iris his
4 right, title and interest in the Residence. She testified that they were not contemplating a divorce
5 at that time, but that it remained a possibility. If the Residence was sold after Yukio moved, it
6 would still be difficult completing any paperwork even if they remained married. Iris stated that
7 the transfer of the Residence was a gesture of trust showing that Yukio was providing for his
8 children. Just as in 2001, however, Yukio did not move to Japan after all.

9 Iris also testified that she has two years of college education and film school. Trustee's
10 Exhibit "1" is a copy of the real property Schedule "A" filed in the Debtors' case. Iris testified
11 that it looks like one of the pages she signed, but that it was prepared by her initial bankruptcy
12 lawyer.³ Iris stated that she was told to hurry up and sign her bankruptcy schedules and to read
13 through them. She acknowledged that Schedule "A" shows that the Residence is subject to a
14 secured claim in the amount of \$299,000, and that about \$200,000 is currently owed. Trustee's
15 Exhibit "4" is a copy of the motion for relief from stay filed by the lender. Included as an exhibit
16 to the motion is a copy of a promissory note in the original principal amount of \$199,000. Iris
17 testified that she saw the paperwork for the refinance on the Residence and believes that the
18 promissory note included in Exhibit "4" is an accurate copy of the loan document. She believes
19 that \$299,000 was listed as the amount of the secured claim in Schedule "A" as a result of a
20 mistake.

21 Trustee's Exhibit "3" is a copy of the Debtors' secured claims Schedule "D" which also
22 indicates that \$299,000 is owed against the Residence. Iris acknowledged that it was part of the
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25 ³ As previously noted, Debtors' initial bankruptcy counsel never filed opposition to the
26 Trustee's original objection to the homestead exemption. On or about June 4, 2007, Debtors
27 engaged the services of other counsel to represent them with respect to the objection. See
28 Affidavit of Christopher P. Burke in Support of Motion for Order Shortening Time, filed June
29, 2007, at ¶ 2. (Dkt # 38)

1 bankruptcy documents that she and her husband signed. She testified that she is not sure of the
2 amount owed at the time but that the \$299,000 figure seems like an error. She was not aware of
3 any place where the quitclaim deed in 2005 would have been disclosed and that the Debtors'
4 initial bankruptcy attorney hardly talked to them. Iris acknowledged that she never disclosed
5 quitclaim deeds to the bankruptcy trustee since she never thought they did anything wrong. No
6 one asked them about it.

7 Trustee's Exhibit "2" is a copy of the Debtors' exemption Schedule "C" which states
8 that the value of claimed homestead exemption is \$121,000. Iris testified that she does not know
9 the current equity in the Residence and the exact amount of the debt now. She testified that all
10 mortgage payments have been made since the bankruptcy case was filed. Moreover, Iris testified
11 that if the lender asserted that it was owed no more than \$195,000 as of January 9, 2007, she
12 would agree with that figure.

13 The Court finds the testimony of Iris to be credible.

14 **SUMMARY OF THE ARGUMENTS PRESENTED BY THE PARTIES**

15 Section 522(p), effective April 20, 2005, generally limits a debtor's homestead
16 exemption to \$125,000 for a residence acquired within 1215 days prior to commencement of the
17 bankruptcy case. Debtors' bankruptcy case was filed on October 11, 2005. The Trustee argues
18 that Iris acquired her interest in the Residence on July 14, 2005, i.e., within the 1215-day period,
19 and therefore can exempt no more than \$125,000 of the available equity. As to Yukio, the
20 Trustee argues that Yukio has no interest in the Residence at all that can be exempted because
21 his transfer to Iris was an interspousal gift, making the Residence her separate property.
22 Moreover, even if Yukio acquired an interest in the Residence on February 1, 2005, it still would
23 have been within the 1215-day period prior to the bankruptcy and would be subject to the
24 \$125,000 cap. The Trustee acknowledges that Yukio might have some community property
25 interest in the residence after July 14, 2005, to the extent he may have made mortgage payments
26 using community property income.

1 Debtors argue that one or both of them have owned and occupied the Residence
2 continuously since 1996, well outside of the 1215-day period. With respect to Iris, she was out
3 of title to the Residence for only the five month period between February 2005 and July 2005,
4 when it was refinanced for the purpose of paying a judgment creditor rather than to shield assets
5 from other creditors. As to Yukio and the children, Debtors argue that the Nevada homestead
6 protection extends to them as well as to Iris. Based on the decision in In re Perez, 302 B.R. 661
7 (Bkrcty.D. Ariz. 2003), Debtors argue that Iris can claim the homestead interest on behalf of
8 Yukio and the children. They also argue that the Residence remains community property since it
9 was acquired with community property income after marriage. Debtors contend that the
10 homestead exemption should be applied liberally and that the Residence is excepted from the
11 \$125,000 homestead cap under the terms of Section 522(p)(2)(B).⁴

12 DISCUSSION

13 Nevada is an “opt out” state that requires its residents in bankruptcy to claim the
14 exemptions available under Nevada law and other non-bankruptcy law. See In re Thompson,
15 336 B.R. 800, 801 n.8 (Bkrcty.D.Nev. 2005). See, e.g., In re Virissimo, 332 B.R. 201
16 (Bkrcty.D.Nev. 2005)(concluding that Section 522(p) applies in all cases regardless of whether a
17 state has opted out of federal bankruptcy exemptions). As of July 1, 2005, a Nevada resident
18 could assert a homestead exemption in his or her residence of up to \$350,000 under Sections
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22 ⁴ At oral argument, Debtors’ counsel also mentioned but did not advance the argument
23 that the Trustee’s objection may be barred by Rule 4003(b)(1). That rule requires objections to
24 be brought within 30 days after completion of the first meeting of creditors. The meeting was
25 concluded in this case on November 30, 2005, and the Trustee’s initial objection was not filed
26 until January 30, 2007. The Trustee’s delay in filing the objection, however, apparently was due
27 to his reliance on the Debtors’ schedules showing \$299,000 rather than \$195,194.69 of secured
28 debt against the Residence. It was only after the lender filed its motion for relief from stay that
the accurate amount of the secured debt was known, which reflected possible equity beyond the
\$125,000 homestead cap amount. Under these circumstances, the Court likely would have
granted the Trustee equitable relief to allow him to file the objection.

1 115.010.2 and 21.090.1(l) of the Nevada Revised Statutes.⁵ In In re Greene, 346 B.R. 835, 838
2 (Bkrcty.D.Nev. 2006), the court observed that “The purpose of the homestead exemption is to
3 preserve the family home and to strengthen family security and stability for the benefit of the
4 family.” For that very reason, it is well-established in the State of Nevada that “the homestead
5 exemption must be construed liberally in favor of the persons for whose benefit it was enacted.”
6 Id. at 839, citing Jackman v. Nance, 109 Nev. 716, 857 P.2d 7, 8 (1993).

7 Section 522(p) was enacted to prevent wealthy individuals from shielding non-exempt
8 assets by relocating to states that have more generous homestead statutes. Prior to its adoption,
9 individuals could move to states having no dollar limitation on their homestead protections, such
10 as Florida and Texas, thereby placing their otherwise non-exempt assets beyond the reach of
11 their creditors. The legislative intention to eliminate this “mansion loophole” through enactment
12 of Section 522(p) is described in a more scholarly fashion by Judge Markell in the Kane
13 decision, 336 B.R. at 481-485, and does not need to be repeated here. See also Margaret
14 Howard, “Exemptions Under the 2005 Bankruptcy Amendments: A Tale of Opportunity Lost”,
15 79 Am. Bkrcty.L.J. 397, 402-04 (2005)⁶.

16 The language of Section 522(p) manifests this intention. Section 522(p)(1)(D) provides
17 in relevant part as follows:

18 “Except as provided in paragraph (2) of this subsection...., a debtor
19 may not exempt any amount of interest that was acquired by the

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21 ⁵ In recent years, the Nevada homestead exemption has been increased from \$200,000 to
22 \$350,000, See In re Kane, 336 B.R. 477, 479 n.1 (Bkrcty.D.Nev. 2006), and now to \$550,000
effective as of July 1, 2007. See 2007 Nev. Stat. Ch.512 (A.B.483), §§ 2 and 6.

23 ⁶ “The legislative history makes this purpose plain: ‘The bill also restricts the so-called
24 ‘mansion loophole.’ Under current bankruptcy law, debtors living in certain states can shield
25 from their creditors virtually all of the equity in their homes. In light of this, some debtors
26 actually relocate to these states just to take advantage of their ‘mansion loophole’ laws. S. 256
27 [BAPCPA] closes this loophole for abuse by requiring a debtor to be a domiciliary in the state
for at least two years before he or she can claim that state’s homestead exemption; the current
requirement can be as little as 91 days.” Margaret Howard, supra, 79 Am. Bkrcty.L.J. at 403 n.
27 27, quoting H.R. Rep.No. 109-31, pt. 1, at ____, 2005 WL 832198, *15 (2005).

1 debtor during the 1215-day period preceding the date of filing the
2 petition that exceeds in the aggregate \$125,000 in value in....(D)
3 real or personal property that the debtor or dependent of the debtor
4 claims as a homestead.”

5 11 U.S.C. § 522(p)(1)(Emphasis added.). Capping the homestead exemption at \$125,000 for
6 residences acquired within 1215 days, i.e., approximately 40 months, prior to commencement of
7 the bankruptcy case, is intended to deter a wealthy individual from fleeing to a state having a
8 more generous homestead law on the eve of bankruptcy. The intention to address this concern is
9 further manifested in the exception found in subparagraph (2).

10 Section 522(p)(2)(B) provides that “For purposes of paragraph (1), any amount of such
11 interest does not include any interest transferred from a debtor’s previous principal residence
12 (which was acquired prior to the beginning of such 1215-day period) into the debtor’s current
13 principal residence, if the debtor’s previous and current residences are located in the same
14 State.” 11 U.S.C. § 522(p)(2)(B)(Emphasis added.). This exception to the homestead cap was
15 intended to prevent an individual who has lived in a state for more than 1215 days from being
16 punished for acquiring a new principal residence in the same state within the 1215-day period.
17 See Margaret Howard, supra, 79 Am. Bkrtcy.L.J. at 404. The relevant inquiry under the
18 exception is whether the debtor’s homestead interest in the previous principal residence was
19 transferred to the debtor’s current principal residence.

20 In the instant case, the Residence was purchased by Iris and Yukio in 1996, prior to the
21 beginning of the 1215-day period. It was acquired and used continuously as the permanent
22 residence of the Debtors and their children. The import of Iris’s testimony was that she and her
23 husband always intended that the Residence would be the home for themselves and their
24 children. Debtors therefore acquired their homestead interest in the Residence outside of the
25 1215-day period. See In re Green, supra, 346 B.R. at 842-43 and n.2. Other than the period
26 between February 2005 and July 2005, Iris always has been on title to the Residence since its
27 purchase and could assert a homestead interest under Nevada law. When title was transferred
28 out of Iris’s name for that brief period, her intention to use the property as the primary residence

1 for herself and her children had never changed.

2 Yukio's quitclaim of title to Iris in August 2001 may have constituted a gift that
3 transmuted the Residence into Iris's separate property, and Iris's quitclaim of title to Yukio in
4 February 2005 also may have constituted a gift transmuting the Residence into Yukio's separate
5 property. Yukio's further quitclaim of title to Iris in July 2005 also may have constituted a gift
6 transmuting the Residence to Iris's separate property in spite of the Residence being identified as
7 community property on Debtors' Schedule "A". While these transmutations might prevent
8 Yukio from claiming that he has a community property interest in the Residence under Nevada
9 law, they do not alter the result under the Section 522(p)(2)(B) exception: Iris's homestead
10 interest in the Residence acquired prior to the 1215-day period was transferred into her
11 homestead interest in the Residence as of the petition date.⁷

12 At the hearing, the Trustee argued that the exception under Section 522(p)(2)(B) does not
13 apply because no consideration was paid when Iris quitclaimed the Residence in February 2005
14 and Yukio quitclaimed the Residence in July 2005. The absence of consideration is indicated on
15 each of those quitclaim deeds. Because Section 522(p)(2)(B) refers to "any amount of such
16 interest", the Trustee asserted that the exception is limited to those situations where monetary
17 consideration is paid in connection with the transfer of interests between one principal residence
18 and another.

19 Nothing in Section 522(p)(2)(B) requires, however, that the homestead interest that is
20 transferred from one principal residence to another be accompanied by monetary consideration.
21 All that is required by Section 522(p)(2)(B), and all that the Nevada homestead exemption

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23 ⁷ At the hearing, Debtors' counsel argued that under In re Norris, 203 B.R. 463
24 (Bkrcty.D.Nev. 1996), Iris's equitable interest in the Residence could be "traced" since only
25 legal title may have changed for a brief, five month period, but nothing else. Unlike the situation
26 in Norris, however, there is no commingling of assets in the instant case that requires the use of
27 tracing concepts. Here, the Trustee does not assert that Iris's homestead interest in the current
28 principal residence has any source other than the principal residence that was acquired by the
Debtors prior to the 1215-day period. In this case, the "previous principal residence" and the
"debtor's current principal residence" are one and the same.

1 requires, is that the claimed residence be the debtor's primary dwelling.⁸ Cf., In re Green, supra,
2 346 B.R. at 842 ("The property becomes a homestead only when the purchaser starts to reside on
3 the property with the full intention of using that property as his primary residence.") The
4 Trustee's position merely begs the question: who would be the relevant recipient of the
5 consideration when a debtor transfers her homestead interest from one principal residence to
6 another?

7 If the transfer involves a single debtor, an exchange of consideration simply does not
8 exist. If the transfer is between joint debtor spouses, no purpose would be served by recognition
9 of a consideration requirement since homestead interests under state law may or may not be
10 divisible. Compare In re Rowe, 236 B.R. 11, 13-14 (9th Cir.B.A.P. 1999)(homestead exemption
11 under Nevada law cannot be asserted separately by spouses) with John R. Mather Memorial
12 Hospital, Inc. v. Pearl, 723 F.2d 193, 194-95 (2nd Cir. 1983)(homestead exemption under New
13 York law may be held individually and separately by each spouse). If the transfer involves the
14 acquisition of the current residence from a third party, the consideration paid effects the equity in
15 the property and therefore the value of the exemption that may be claimed rather than the
16 validity of the exemption itself. There is no reason to imply a requirement of monetary
17 consideration especially where none is set forth in the statute. More important, regardless of any
18 consideration that accompanies the transfer of the debtor's homestead interest from one property
19 to another, the evils of the "mansion loophole" simply do not exist when a long-term resident of
20 a state reacquires the same residence.

21 Because the exception under Section 522(p)(2)(B) applies to Iris's claim of a homestead
22 exemption in the Residence, the Trustee's objection will be overruled. Debtors' separate
23 contentions regarding Iris's assertion of homestead rights on behalf of Yukio and the children, or

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25 ⁸ Debtors are claiming the homestead exemption under Sections 115.010 and
26 21.090(1)(l) of the Nevada Revised Statutes, not the separate "dwelling" exemption under
27 Section 21.090(1)(m) of the Nevada Revised Statutes. See Savage v. Pierson, ___ Nev. ___, 157
28 P.3d 697 (Nev. 2007). A Nevada homestead is defined, however, to include "a quantity of land,
together with the dwelling house thereon and appurtenances...." Nev.Rev.Stat. § 115.005(2).

1 of any continuing community property interest of Yukio, therefore need not be addressed.

2 **CONCLUSION**

3 The Trustee's Objection to Exemption of Homestead will be overruled. Iris may amend
4 Schedule "C" to claim an exemption in the Residence not to exceed the \$350,000 limit set forth
5 under Sections 115.010 and 21.090.1(l) of the Nevada Revised Statutes. A separate order has
6 been entered concurrently herewith.

7
8 Copies noticed through ECF to:

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