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Consumer Corner

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Section 522(b)(3): A Debtor with No Homestead Exemption

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Edward Everett Hale wrote about Philip Nolan in "The Man Without a Country," where a soldier was tried for treason and banished to live at sea without any news of America — a patriot's worst nightmare. Recently, a debtor named Steven Wallwork encountered a similar dismal fate when he was told he cannot have his Idaho homestead exemption, his prior Maryland residential homestead exemption or even the federal homestead exemption — making Wallwork[1] experience a debtor's worst nightmare by being "The Man Without a Homestead Exemption." This article establishes the idiosyncratic homestead-shifting statute of 11 U.S.C. § 522(b)(3) and an Idaho judge's review of the same, and how the court interpreted § 522(b)(3) with Maryland law to conclude that, in certain situations, a debtor might be deprived of a homestead exemption.

Basics of § 522(b)(3)

Section 522(b)(3)(A) applies to a debtor who has moved within two years of their bankruptcy petition. It states:

> (3) Property listed in this paragraph is —
> (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 to 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 in 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*.[2]

Essentially, this statute states that if a debtor lives two years prior to the bankruptcy filing in the state in which he/she is filing, then the resident state determines all exemption issues. But if a debtor resided in two or more states during the two years prior to a bankruptcy filing, then 11 U.S.C. § 522(b)(3) determines what state's exemptions apply. Section 522(b)(3) demands a "180-day test," which calculates where the debtor resided from 910 days prior to the filing for bankruptcy to 731 days prior to the bankruptcy filing. Exemptions, in such instances, are from the state where the majority of the debtor's residency was held during that time period.

Wallwork Facts

In *Wallwork*, the Idaho debtor's alternative exemption state was Maryland. The dates and number of days of residency are very important to determine this issue. In 2016, the debtor and nonfiling spouse found an Idaho Falls, Idaho, home in which to move. They purchased that property on Sept. 16, 2016, and moved some of their furniture there that same month. However, the sale fell through and they had to look for another Idaho home.

The second home required construction. The nonfiling spouse moved to Idaho in May or June 2017, and performed many of the associated change-of-residency concepts. Although the debtor's nonfiling wife had moved to Idaho, it was not until October 2017 that the debtor moved to Idaho. The debtor and nonfiling spouse did not move into

1 *In re Wallwork*, 616 B.R. 395 (Bankr. D. Idaho 2020).

2 11 U.S.C. § 522(b)(3)(A) (emphasis added).

their Idaho home until May 2018. The bankruptcy case was filed on Feb. 14, 2019, or about nine months after moving into the Idaho home or 16 months after the debtor left Maryland.

The initial issue is this: Did the debtor exclusively reside in Idaho during the two years prior to the filing — from Feb. 15, 2017, through Feb. 14, 2019? The question was answered in the negative by the debtor's schedules, in which he stated that he had only resided in Idaho from June 2017 to the present time (less than two years). That document, filed under penalty of perjury, further established that the only other home he had was in Maryland from 2012-17. The schedules' representation mandated implementation of 11 U.S.C. § 522(b)(3)'s 180-day test; the court concluded that Maryland was the exemption state, determined as the debtor resided every day of the 180-day test (731 days to 910 days prior to the filing) exclusively in Maryland.

The court then wrote a detailed opinion contrasting Idaho and Maryland law in regard to "domicile." The court found that "domicile" under Maryland law is defined as the following:

> [A] place with which an individual has a settled connection for legal purposes and the place where a person has his true, fixed, permanent home, habitation and principal establishment, without any present intention of removing therefrom, and to which place he has, whenever he is absent, the intention of returning. The controlling factor in determining a person's domicile is his intent.[3]

In Idaho, the court defined "domicile" as:

> A debtor's residence may be distinct from her domicile. *In re Halpin*, 94 I.B.C.R. 197, 197 (Bankr. D. Idaho 1994). "Domicile" requires an "intent to remain" at a location. *Id*. "Residence, by contrast, may refer to living in a particular locality without the intent to make it a fixed and permanent home." *Id*. (citing *Black's Law Dictionary* 1176 (6th ed. 1990)). Though a person may have only one domicile, she may have several residences. *Id*. (citing *Williamson v. Osenton*, 232 U.S. 619, 625, 34 S. Ct. 442, 58 L. Ed. 758 (1914)).[4]

The *Wallwork* court concluded that "domicile" is a "physical presence in a place in connection with a certain state of mind concerning one's intent to stay there."[5] The broken contract to buy, the construction delay and more led the court to conclude that the debtor's "Idaho domicile" never commenced until October 2017, when the debtor finally packed his Maryland belongings and moved to Idaho.

The second issue is this: What homestead exemption may the debtor use? An initial reaction is that § 522(b)(3)(A) gives the debtor Maryland exemptions, but the court concluded otherwise. First, although Idaho law may utilize another state's homestead exemption,[6] Maryland law prohibits extraterritorial homestead exemptions.[7] Because Maryland's homestead exemption law requires that the debtor be a domiciliary or resident of Maryland,[8] no Maryland homestead exemption could be applied to the Idaho property by the Idaho resident.

> **[T]he *Wallmark* decision contravenes the purpose of § 522(b)(3)(*).**

The next and final inquiry was federal homestead exemption. The allowance of federal exemptions described in § 522(d) may only be triggered under the "hanging paragraph" of § 522(b)(3), which will be referred to as 11 U.S.C. § 522(b)(3)(*) and reads, "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)."[9]

The problem with this clause is the phrase "ineligible for *any* exemption." Maryland *nonhomestead* exemptions can be extraterritorial; they do *not* require the debtor to be a Maryland resident.[10] The allowance of some personalty exemptions, as minuscule as they are, prohibits use of the federal exemptions.[11] The court concluded that the "ineligible for any exemption" clause of § 522(b)(3)(*) deprived the Idaho resident debtor to use federal exemptions because he could use the personal property exemptions provided under Md. Code Ann. § 11-504(b).

A Trifecta of Loss, then a Fourth Review

After being denied a homestead exemption under Idaho law, Maryland law and federal law, the court considered arguments in *dicta*. The additional analysis might provide insight as to why the "no homestead" decision was rendered. The trustee had argued, in the alternative, that he could trace transfers of nonexempt assets into the exempt homestead as permitted under § 522(o).

In this case, the debtor took cash advances exceeding $69,000 from his credit cards and delivered those cash advances into the Idaho home. These facts suggest bad-faith activity by the debtor; the trustee accordingly argued to reduce the homestead exemption under § 522(o) by the

3 *Wallmark* at 403 (citing *Oglesby v. Williams*, 372 Md. 360, 373, 812 A.2d 1061, 1068-69 (2002)) (quoting *Dorf v. Skolnik*, 280 Md. 101, 371 A.2d 1094, 1102-03 (Md. 1977)).

4 *Wallmark* at 402 (citing *In re Capps*, 438 B.R. 668, 674 (Bankr. D. Idaho 2010)).

5 *Wallmark* at 402 (citing *In re Andrews*, 225 B.R. 485, 487 (Bankr. D. Idaho 1998)). A paraphrasing of the U.S. Supreme Court's ruling, "For adults, domicile is established by physical presence in a place in connection with a certain state of mind concerning one's intent to remain there." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 47, 109 S. Ct. 1597, 104 L. Ed. 2d 29 (1989).

6 "Initially, the Court notes that even though [the] Debtor's homestead is located in Idaho, rather than Maryland, that fact does not bar the use of the Maryland homestead exemption. *See In re Grimes*, 18 B.R. 132, 133 (Bankr. D. Md 1982)." *Wallmark* at 404.

7 This is precisely what confounds the system. A simple move by a party seeking new residence for purposes of a job confronts a complicated issue about a state's law in a state located more than 1,000 miles from his new domicile. Finding an Idaho attorney versed in Maryland law, let alone exemption law, would be a challenging demand.

8 "[D]ebtors who are required to use the exemption laws of a state other than their current domicile under § 522(b)(3) are bound by provisions in the law restricting the use of the exemptions to residents or domiciliaries of the state." *Wallmark* at 404 (citing *Bierbach v. Brooks (In re Brooks)*, 393 B.R. 80, 8586 (Bankr. M.D. Pa. 2008)).

9 11 U.S.C. § 522(b)(3) (emphasis added).

10 "Maryland law provides for exemptions, without domiciliary restriction, in wearing apparel, books, tools, instruments, or appliances; money payable in the event of sickness, accident, injury, or death of any person, including compensation for loss of future earnings; professionally prescribed health aids for the debtor or any dependent of the debtor; household furnishings, household goods, wearing apparel, appliances, books, animals kept as pets, and other items that are held primarily for the personal, family, or household use of the debtor or any dependent of the debtor; certain cash or property; money payable or paid in accordance with an agreement or court order for child support or alimony; and certain trust property. Md. Code Ann. § 11-504(b)." *Wallmark*, n.14.

11 An interesting adage is in footnote 15 of the opinion. Arizona and Florida are "opt-out" states and limit their respective state exemptions to residents. Hence, for a Floridian or Arizonan who moves to another state within 730 days of their filing, any demand that the debtor use Florida or Arizona exemptions would fail, as they would not be residents. In turn, these circumstances allow federal exemptions, as the state exemptions are entirely not permitted. In this case, because some Maryland exemptions do not require residency, those exemptions are permitted to be used, and in turn, the federal exemptions are not permitted.

almost $70,000 of transfers. Although the trustee lost the argument, it was of no consequence because the court already had determined that the debtor was not entitled to any homestead exemption.

Safety Net Ripped Apart?

At first glance, § 522(b)(3)(*) appears to afford federal exemptions for any party who is deprived of his "new" state's exemptions and old state's exemptions. Some believe that the legislative intent was to make § 522(b)(3)(*) a safety net. Commentators have written that the purpose of § 522(b)(3)(*) was to discourage debtors from moving to states such as Florida where a mansion is exempt, but at the same time not to diminish the exemptions that would have been afforded to the same debtor had the debtor never moved.[12] The aforementioned commentators would likely opine that the *Wallmark* decision contravenes the purpose of § 522(b)(3)(*) and does not endorse using the floating paragraph to prohibit the use of *any* homestead exemption or to drastically reduce exemptions.

Conclusion

While it is always difficult to second-guess debtors' counsel, a better-timed bankruptcy filing might have avoided the bad outcome here. For example, the debtor could have dodged the issue by filing while residing in Maryland (*e.g.*, just before the October 2017 move to Maryland), or alternatively, the debtor could have waited the requisite time in Idaho so as to avoid the 730-day rule. The debtor should have also considered avoiding bankruptcy, which would, in turn, have avoided § 522(b)(3) or 522(o).

This ruling may have been influenced by the apparent bad faith by the debtor: creating equity in the house by cash advances of almost $70,000 from dischargeable credit card debt. The result is that this is a case where a debtor's apparent bad acts caused bad exemption law in Idaho. Even if "the debtor got what he deserved," Idaho now has a "tough on all § 522(b)(3) debtors" law — the denial of *any* homestead exemption — as a result of those bad facts. As they say, bad facts make bad law, and perhaps this decision will have limited reach beyond the unique set of facts presented herein. abi

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12 Prof. Laura B. Bartell, "The Peripatetic Debtor: Choice of Law and Choice of Exemptions," 22 *Emory Bankr. Dev. J.* 401, 419-20 (2006) ("Congress intended to put the debtor into the same position as the debtor would have been had the debtor not made the recent move. *Congress did not intend to punish the debtor for moving by providing the debtor less favorable exemptions than the debtor would have had by staying put*; it merely intended to discourage moves for the purpose of seeking more favorable exemptions prior to a bankruptcy filing.") (citing H.R. Rep. No. 109-31, pt. 1, at 166 (2005)); *see also Drummond v. Urban (In re Urban)*, 375 B.R. 882, 889 (B.A.P. 9th Cir. 2007) (stating that § 522(b)(3)(A) was designed "to curb the so-called mansion loophole") (emphasis added).