

Exemptions - Homestead

In re Mary K. Kresse

695-62127-fra7

10/4/95

FRA

Unpublished

At the time of the debtor's petition for relief, the debtor held a \$5,000 judgment against her former husband, awarded as part of the decree dissolving their marriage in lieu of equity in their marital residence. The debtor claimed the judgment as exempt on her schedules as the proceeds from the sale of her residence. The trustee objected to the exemption.

On November 4, 1994, a "Stipulated Judgment of Dissolution of Marriage" was filed, dissolving the debtor's marriage and distributing their property. As part of the stipulated judgment, the \$5,000 judgment was payable by the ex-husband on the first anniversary of the dissolution.

In order to be exempt as proceeds from the sale of a residence, the recipient must hold the proceeds with the intent to reinvest those proceeds in a new residence within one year. In Oregon, the courts liberally construe the statute creating the homestead exemption in favor of the claimant. Reading the statute liberally, the court determined that the \$5,000 judgment constituted proceeds from the sale of her residence. The court stated that the reinvestment period should arguably be tolled until the date that the judgment is payable. However, since the judgment was stipulated to by the debtor the impediment to the debtor's use of the proceeds could not be said to be beyond the debtor's control. Under those circumstances, the reinvestment period is not tolled; the debtor may claim the judgment as exempt, but must reinvest in a new residence within one year of the dissolution of her marriage or the exemption is lost.

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UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

IN RE )  
 )  
MARY K. KRESSE, ) Case No. 695-62127-fra7  
 )  
Debtor. ) MEMORANDUM OPINION

At the time her petition for relief was filed Debtor held a \$5,000 judgment against her former husband, awarded as a part of the decree dissolving their marriage. In her schedules she claimed that the judgment is exempt from execution under Oregon law, as proceeds from her residence. The trustee has objected to the claimed exemption.

I. FACTS

Debtor's Petition for Relief under Chapter 7 of the Bankruptcy Code was filed on June 6, 1995.

On November 4, 1994 a "Stipulated Judgment of Dissolution of Marriage" was filed in the Circuit Court for Marion county, Oregon. The Judgment dissolved the Debtor's marriage, and distributed their property. Provisions at issue here are:

8. **Real Property:** Respondent [husband] is awarded the real property located at [address deleted]<sup>1</sup> . . . free and clear of any claims by Petitioner [Debtor here], and he shall assume all encumbrances thereon, indemnifying and holding harmless the Petitioner therefrom.

9. **Equalizing Judgment:** As an equalization of Petitioner's interest in the marital residence, Respondent shall pay to petitioner, and Petitioner shall have judgment against Respondent in the amount of \$5,000.00, payable within one year from the date the judgment is entered herein, at [sic] interest of nine percent (9%) per annum.

Debtor's former husband was to pay the amount awarded no later than November 1, 1995. On May 26, 1995 he filed a Petition for Relief under Chapter 13, together with a plan calling for payments of \$125 a month for 40 months. The case was dismissed on August 11, 1995.<sup>2</sup>

## II. ISSUES

Debtors may exclude from their estates in bankruptcy property exempt from execution under state law. 11 U.S.C. § 522. Use of state law exemptions is mandatory in Oregon.

11 U.S.C. § 522(b)(1), O.R.S. 23.305.

Oregon law exempts from execution the value of an individual's homestead, or the proceeds thereof, up to \$25,000. O.R.S. 23.240(1). Proceeds "derived from [the] sale" of homestead property are also exempt, "if the proceeds are held for a period

<sup>1</sup> It is not disputed that the property was Debtor's homestead up to the time of the divorce.

2 I take judicial notice of the plan and confirmation order in the former husband's case, which was filed in this Court's Portland division. FRE 201.

1 not exceeding one year and held with the intention to procure  
2 another homestead therewith." O.R.S. 23.240(2).

3 The issues presented are:

4 1. Does the judgment constitute "proceeds derived from the  
5 sale" of Debtor's homestead?

6 2. If the judgment does amount to proceeds of a sale, is the  
7 one-year time limit tolled if the judgment is not enforceable by  
8 the Debtor?

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10 III. DISCUSSION

11 *1. The judgment as proceeds of the homestead*

12 Oregon law requires that the statutes creating the homestead  
13 exemption be liberally construed in favor of the claimant. See,  
14 Wilkinson v. Carpenter, 277 Or. 557, 560, 561 P.2d 607, 608 (1977).  
15 It follows that the term "sale" should be construed in a manner  
16 which allows for the exemption to apply to the proceeds of a  
17 disposition of the residence by other means.

18 The judgment in lieu of the equity in a home awarded to the  
19 other party is authorized by O.R.S. 107.105, and is a feature  
20 commonly found in Oregon divorce judgments. It would not be  
21 consistent with the statutory homestead scheme to render what is  
22 often a forced disposition to be subject to less protection than a  
23 purely voluntary sale. The judgment does, therefore, constitute  
24 proceeds of the homestead under O.R.S. 23.240.

25 This approach was presented by the debtor in In re White, 727  
26 F.2d 884, 887 (9th Cir. 1984). There the Court of Appeals referred

1 to language in O.R.S. 23.240, holding that to be exempt under that  
2 statute, proceeds of a sale of a homestead must be from either a  
3 sale or a removal from the property. In the court's view,  
4 the award to the non-debtor spouse by the divorce court was either  
5 a "sale" of or a "removal" from the property; accordingly, the  
6 judgment was the proceed of a "sale" for the purpose of the  
7 exemption statute.

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9 *2. Tolling the statutory time in which to reinvest*

10 O.R.S. 23.240(2) requires that the proceeds be held no more  
11 than one year, and with the intent that they be reinvested in  
12 another homestead.

13 California's homestead exemption statute is similar to  
14 Oregon's in relevant respects. In re White, 727 F.2d 884, 888 (9th  
15 Cir. 1984). In Thorsby v. Babcock, 222 P.2d 863, 36 Cal.2d 202  
16 (1950), the California Supreme Court held that, in light of the  
17 state's strong policy in favor of preserving homes, and against  
18 forfeiture, the reinvestment period should be tolled during such  
19 time as the debtor is prevented, through no fault of his own, from  
20 employing the proceeds.

21 In White the Court of Appeals held that the filing of the  
22 petition for relief tolled the reinvestment period because it  
23 placed the property under the control of the trustee, citing to In  
24 re Widdershoven, 452 F. Supp. 503 (N.D. Cal. 1978). However, a  
25 later case points out that Widdershoven was decided prior to  
26 enactment of the Bankruptcy Code in 1978. Under the Code, the

1 debtor makes her claim of exemption at or soon after the case is  
2 filed, and retains control over exempt property; as a result,  
3 simply filing a bankruptcy provides no basis for tolling the  
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5 reinvestment period. In re Golden, 789 F.2d 698, 700 (9th Cir.  
6 1986).

7       What does prevent Debtor from using the proceeds to reinvest  
8 is the fact that the judgment is not payable until its first  
9 anniversary. Until that time debtor may not force payment by  
10 execution. Arguably, the reinvestment period should not commence  
11 until the judgment is subject to execution. However, it appears  
12 from the facts of the divorce judgment that it was stipulated to by  
13 the parties. That being the case, the impediment to employment of  
14 the proceeds cannot be said to be beyond Debtor's control. Where  
15 the impediment is taken on voluntarily, it does not toll the  
16 reinvestment period. Were the rule otherwise, the exemption in  
17 proceeds could be continued indefinitely.<sup>3</sup>

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19 *3. Intent to reinvest*

20       The final element is that the proceeds be held with intent to  
21 reinvest in a home. The statute does not say when that intent has  
22 to be present, or whether, having lapsed, it can be revived. It  
23 is, of course, virtually impossible to prove lack of intent if none  
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26 <sup>3</sup> Debtor argues that her former husband's bankruptcy also  
tolls the reinvestment period. The affidavit submitted to the  
court overlooks the fact that the case has been dismissed. Given  
the disposition of the case, it is not necessary to decide the  
issue.

1 of the fund has been used for a contrary purpose, and the party  
2 objecting to the exemption has the burden of proof. BR 4003(c).  
3 Here, the trustee offers no such proof.

4 If, on the other hand, the reinvestment period runs its course  
5 without acquisition of a new home, the exemption is lost. At that  
6 point, the trustee is entitled to recover the proceeds. In re  
7 Golden, 789 F.2d 698, 701 (9th Cir. 1986).  
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#### 9 IV. CONCLUSION

10 The debtor's claim of exemption is sustained on the condition  
11 that the judgment, or cash received therefrom, be applied to the  
12 acquisition of a new homestead within one year of the judgment of  
13 dissolution of marriage, that is, until November 1, 1995.  
14 Thereafter the judgment, or any cash received by virtue of the  
15 judgment, shall become property of the estate.

16 The foregoing constitutes the Court's findings of fact and  
17 conclusions of law. They will not be separately stated. Counsel  
18 for debtor should tender to the Court a form of order consistent  
19 herewith.  
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22 FRANK R. ALLEY, III  
23 Bankruptcy Judge  
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