



1 determined that the Debtors' Oklahoma property (the "Oklahoma Dwelling") might qualify  
2 as a residence under the statute. In so determining, the Court followed the majority of the  
3 Courts and found that the Oklahoma Dwelling qualifies for the exemption only if it is the  
4 Debtors' homestead. *In re Stoner*, 487 B.R. 410, 416-21 (Bankr. D. N. J. 2013).<sup>4</sup> The  
5 Court also determined that it looked to Oklahoma law in making this determination. *Id.* at  
6 416. The Court, finally, decided that unresolved questions of fact existed and set this matter  
7 for trial.

### 8 **Legal Standard**

9 No one disputes that the Oklahoma Dwelling was Debtors' homestead (and principal  
10 residence) prior to their relocation to California. Under Oklahoma law, "[o]nce homestead  
11 character attaches to the property, it continues to be the homestead until the owner  
12 voluntarily changes its character either by disposing of the property, abandoning it or  
13 performing some other act which relinquishes his right to the exemption." *Jones, Givens,*  
14 *Gotcher & Bogan, P.C. v. Berger*, 46 P.3d 698, 701 (2002). Abandonment occurs when the  
15 owner vacates the property and forms the intent never to return. *Id.* at 702. A party  
16 challenging an assertion of homestead bears the burden of establishing abandonment by  
17 clear and convincing evidence. *Id.* Thus, the Trustee was required to prove by clear and  
18 convincing evidence that Debtors had moved from the Oklahoma Dwelling and had formed  
19 the intent never to return.

### 20 **Undisputed Facts**

21 The following facts are undisputed.

- 22 • Debtors lived in the Oklahoma Dwelling prior to the petition date.

23  
24 left them with the federal exemption option.

25 <sup>4</sup> The minority approach discussed and rejected by the bankruptcy court in *Stoner*, allows the  
26 exemption as to any property in which the debtor actually lives. *Id.* at 415-16. This approach is  
27 actually more generous in the typical case as it allows an exemption as to a vacation home, for  
28 example, notwithstanding that it is not the debtor's homestead under applicable law. The Trustee  
argued for this application of the law and then urged that there was no residence involved. Given  
the Court's ultimate conclusion, the Trustee has no complaint. But, given the facts as determined by  
the Court, it makes no difference. There was no evidence that the Debtors were actually living in  
the Oklahoma Dwelling on even a part time basis as of the petition date.

- 1 • Prior to the petition date, Debtors left Oklahoma; they currently live in a rented  
2 dwelling in San Diego County as a result of a change in debtor-husband's  
3 employment.
- 4 • Debtor-husband is the chief financial officer of an Indian casino.
- 5 • The Oklahoma Dwelling has never been insured and remained uninsured on a post-  
6 petition basis.
- 7 • Debtors listed the Oklahoma Dwelling on their schedules. After taking into  
8 consideration an estimated value, estimated costs of sale, estimated trustee's  
9 commission, and the maximum exemption arguably possible, there was equity in the  
10 Oklahoma Dwelling available for estate creditors. Debtors disclosed estimated  
11 available equity in their schedules; they even showed their math:

12 ○ Costs of Sale Analysis:

- 13 ▪ \$ 62,212.00: FMV<sup>5</sup>
- 14 ▪ \$ 3,110.60: Trustee's Commission<sup>6</sup>
- 15 ▪ \$ 3,732.72: 6% Fees
- 16 ▪ \$ 55,368.68: Net Equity

- 17
- 18 • Debtor's claimed exemptions in the Oklahoma Dwelling totaled \$45,950.00, leaving  
19 equity for the bankruptcy estate of \$9,418.68<sup>7</sup> based on the Debtor's own Costs of  
20

21

22 <sup>5</sup> The Court acknowledges an inconsistency in the schedules. While the analysis uses "\$62,212" as  
23 the value, the schedules use "\$60,212" as the value in other places. This discrepancy does not alter  
the analysis, as equity in a material amount was available to creditors using either number.

24 <sup>6</sup> The Court is unclear as to how Debtors calculated this amount. Section 326(a) applies to the  
25 commission calculation and requires a computation based on amounts paid to parties-in-interest  
26 other than the Debtors. Thus, the calculation should be based at its start on asset value (\$62,212)  
27 less exempt proceeds allegedly payable to the Debtors (\$45,950). Thus, under Debtors' best case  
scenario, the commission would be based on no more than \$16,262. The § 326(a) formula then  
should be calculated as \$1,250 (25% of the first \$5,000) plus \$1,126.20 (10% of the remaining  
amount as it is less than \$45,000) or \$2,376.

28 <sup>7</sup> Again, this number might be \$735 higher if the commission calculation is off.

1 Sale Analysis or approximately \$8,473<sup>8</sup> if the Court used a slighter lower value for  
2 the Oklahoma Dwelling from other portions of the schedules.

- 3 • The Debtors continue to store personal property at the Oklahoma Dwelling.
- 4 • The Oklahoma Dwelling is boarded up and an elderly relative occasionally checks in  
5 on it.
- 6 • The Debtors visited the Oklahoma Dwelling once since the petition was filed. This  
7 visit was in November, and Debtors did not sleep in the Oklahoma Dwelling; they  
8 camped in the yard.
- 9 • On a post-petition basis, the Trustee sought approval to sell the Oklahoma Dwelling  
10 as a result of its uninsured status and obtained an order allowing the sale. Debtors  
11 did not oppose this motion. The Court is unaware of the status of the sale at this  
12 time.
- 13 • The Debtors will return to Oklahoma for a visit in a few months and, presumably if it  
14 has not sold, they may inhabit the Oklahoma Dwelling when they attend ceremonies  
15 related to the death of debtor-wife's sister.
- 16 • The Oklahoma Dwelling has long been in debtor-wife's family and is located close to  
17 relatives and debtor-wife's tribal land.
- 18 • At the § 341(a) Meeting of Creditors the Trustee asked Ms. West whether she  
19 intended to return to Oklahoma. She replied "Well, I'm not for sure." Reporter's  
20 Transcript of 341(a) meeting of July 23, 2015 at 8:8-10. The Debtors were given an  
21 opportunity at the evidentiary hearing to explain this statement, but failed to do so.  
22 Instead, Debtor-wife indicated that they might "have to" return to the Oklahoma  
23 Dwelling if her husband lost his job.

24  
25  
26 <sup>8</sup> \$60,212: FMV  
less 3,613: 6% COS  
27 2,176: Trustee's Commission  
45,950: Maximum Exemption  
28 \$8,473

1 **Analysis**

2 As discussed above, once established, a homestead may be claimed until abandoned.  
3 Abandonment requires a physical move from the property and an intention never to return.  
4 The party challenging the claim of exemption bears the burden of establishing both factors  
5 by clear and convincing evidence.

6 **Trustee's Evidence at Trial**

7 First, the Trustee put into evidence § 341(a) testimony wherein debtor-wife stated  
8 that she did not know if they would return to the property.

9 Trustee: Okay. And do you intend to go back there. Ms. West: Well, I'm not for  
10 sure.

11 Reporter's Transcript of 341(a) meeting of July 23, 2015 at 8:8-10. The Debtors were given  
12 an opportunity at the evidentiary hearing to explain this statement but failed to do so.  
13 Debtor-wife merely indicated that they might "have to" return to the property if her husband  
14 lost his job.

15 Trustee also provided the schedules as evidence. As noted above, the Debtors' own  
16 schedules evidence their acknowledgment that there was equity in the Oklahoma Dwelling  
17 above their claimed exemptions and, thus, realizable by the Trustee. And the amount of  
18 equity available, on a worst case basis for creditors, was no less than \$9,418 to \$8,473 after  
19 costs of sale and trustee distributions ; this amount was not *de minimus*. Indeed, it would  
20 allow a more than 20% recovery on scheduled unsecured claims.<sup>9</sup>

21 Both of Debtors signed the schedules. And Debtor-husband is the chief financial  
22 officer of an Indian casino. As a result, the Court reasonably assumes that he is not  
23 unsophisticated in financial matters. Further, the Court reasonably assumes, in the absence  
24 of evidence to the contrary, that the Debtors understood that asset value net of exemptions  
25 was available to their creditors and that a liquidation of the Oklahoma Dwelling to recover  
26 this value for their creditors was a natural consequence of its value and their bankruptcy.

27  
28 <sup>9</sup> And, it would allow a more than 100% recovery on timely filed claims.

1 The Court did not allow expert testimony on this point,<sup>10</sup> but the implication raised by the  
2 schedules was clear. This evidence strongly suggested abandonment; if Debtors wanted a  
3 bankruptcy discharge they needed to make this equity available to their creditors and, in the  
4 usual case, this requires a sale. Put another way, the schedules evidence that when Debtors  
5 filed bankruptcy they elected to allow sale of the Oklahoma Dwelling; and an election to  
6 allow sale equates to an intent not to return to the Oklahoma Dwelling.

7 While the assumptions flowing from the schedules clearly lead to a loss of the right  
8 to claim a homestead, the Debtors were given an opportunity dispel the obvious  
9 implications. The Court, indeed, pointed out that the implication was not necessarily  
10 dispositive and that the Debtors, for example, might testify that they intended to purchase  
11 the equity shown in their schedules in order to avoid loss of the Oklahoma Dwelling. The  
12 Debtors, however, provided no testimony or other evidence on this point.

13 The uninsured status of the Oklahoma Dwelling and its boarded up status are factors  
14 slightly supportive of the Trustee's position. The fact that Debtors have returned only once  
15 and then camped in the yard, again, is another factor slightly in Trustee's favor.

16 After considering all evidence, the Court finds that the Trustee met his burden of  
17 establishing by clear and convincing evidence that Debtors left the Oklahoma Dwelling and  
18 formed the intent never to return. The Oklahoma Dwelling was boarded up. It was not  
19 insured. While Debtors did return once, they did not stay inside the Oklahoma Dwelling.  
20 Further, Ms. West testified that she was not sure they would ever return, and at trial stated  
21 only that they might have to if Mr. West lost his job. Most importantly, Debtors knew that  
22 there was equity in the Oklahoma Dwelling, and, by filing for chapter 7, they made the  
23 Oklahoma Dwelling available for sale to pay creditors.

24 The Court acknowledges that the Debtors provided declaratory evidence stating an  
25 intention to retain the Oklahoma Dwelling and that they adopted and, to a limited extent,  
26 supplemented this testimony at trial. But their broad assertions are more than overcome by  
27

28 <sup>10</sup> The intention of a trustee – or even his general practice or that of trustees generally – is not the  
issue here. Rather, the issue is the Debtors' intent.

1 the Trustee's evidence. The Court has no doubt that Debtors, like any debtor, would love to  
2 keep all their assets while also obtaining a bankruptcy discharge. But by electing  
3 bankruptcy while owning an easily liquidated asset with significant equity, this desire  
4 becomes nothing but a wish – instead, the evidence establishes that they elected and agreed  
5 to asset sale.

6 As a result, the Court concludes that an exemption under § 522(d)(1) is not available.  
7 The evidence before the Court, notwithstanding that the Trustee has the burden of proof,  
8 establishes that as of the petition date, the Debtors were not living in the Oklahoma  
9 Dwelling and had no expectation or intention of returning to live in the Oklahoma Dwelling.  
10 Debtors' self-serving statements in the declarations do not overcome the Trustee's evidence,  
11 including, the §341(a) admission, the equivocal testimony at trial, and the fact that a sale by  
12 the chapter 7 trustee had to be anticipated as Debtors pointed out in their schedules that  
13 there was equity available in the Oklahoma Dwelling even if the claimed exemption was  
14 appropriate.

15 The Court finally notes that the Debtors' intentions must be measured as of the  
16 petition date, so the failure to oppose sale of the Oklahoma Dwelling is not dispositive.  
17 Indeed, it is not even particularly relevant; but it certainly does not suggest a different result.

18  
19 DATED: March 29, 2016

  
LAURA S. TAYLOR, Chief Judge  
United States Bankruptcy Court

In re William Erwin West and Lydia Kay West, Bk. No. 15-04173-LT7

**CERTIFICATE OF MAILING**

The undersigned, a regularly appointed and qualified employee in the office of the United States Bankruptcy Court for the Southern District of California, at San Diego, hereby certifies that a true copy of the attached document, to wit:

**MEMORANDUM DECISION FOLLOWING TRIAL**

**[RE: OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS FILED BY RONALD E. STADTMUELLER, CHAPTER 7 TRUSTEE]**

was enclosed in a sealed envelope bearing the lawful frank of the bankruptcy judges and mailed via first class mail to the party at their respective address listed below:

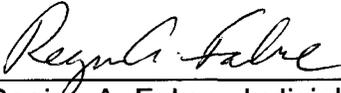
William Erwin West  
Lydia Kay West  
PO Box 1465  
Alpine, CA 91903

Mark Miller, Esq.  
Larissa L. Lazarus, Esq.  
Law Offices of Mark L. Miller  
2341 Jefferson Street, Suite 100  
San Diego, CA 92110

Davis & Stadtmueller, LLP  
Ronald E. Stadtmueller  
Kathryn M. Otto  
10755 Scripps Poway Pkwy., #370  
San Diego, CA 92131

Office of the U.S. Trustee  
402 West Broadway, Suite 600  
San Diego, CA 92101-8511

Said envelope(s) containing such document was deposited by me in the City of San Diego, in said District on March 29, 2016.

  
\_\_\_\_\_  
Regina A. Fabre, Judicial Assistant

## Notice Recipients

District/Off: 0974-3  
Case: 15-04173-LT7

User: Admin.  
Form ID: pdfO1

Date Created: 3/29/2016  
Total: 6

### Recipients of Notice of Electronic Filing:

tr	Ronald E. Stadtmueller	ecfstadt@aol.com
aty	Larissa L. Lazarus	Larissa@millerlegalcenter.com
aty	Ronald E. Stadtmueller	ecfstadt@aol.com
aty	Ronald E. Stadtmueller	ronstadtmueller@aol.com

TOTAL: 4

### Recipients submitted to the BNC (Bankruptcy Noticing Center):

db	William Erwin West	PO Box 1465	Alpine, CA 91903
jdb	Lydia Kay West	PO Box 1465	Alpine, CA 91903

TOTAL: 2