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Homestead Exemptions for Military Members on Assignment

Life in the military comes with inherent risks. Outside of combat, service members face challenging legal issues. New assignments in new states mean new laws. In Nevada, with five military bases, military families have faced obstacles in voting¹ and obtaining school vouchers.²

Bankruptcy presents its own wrinkles. A recent appellate decision addressed whether military members on assignment can claim homestead exemptions and, if so, under what law.³ The answer is not as clear as it seems, however. Debtors, property and the court might be in different states, and the question of residence and domicile involves a mix of fact and law. Finally, a court must apply both federal and state law. There is a complex body of law for claims of cross-border, extraterritorial exemptions.⁴

The U.S. Bankruptcy Appellate Panel (BAP) for the Ninth Circuit provided guidance with *Burke v. Larsen (In re Larsen)*. Neither the debtor nor the trustee provided the bankruptcy court with the correct law, resulting in an incorrect decision below. The BAP highlighted the controlling federal statute: Section 522(b) of the Bankruptcy Code states that the applicable exemption law is determined by the debtors' domicile.⁵ Despite the bright line, lawyers and courts have overlooked it. Case law is not always correct when addressing a military member's homestead exemption. This oversight can result in tactical and financial errors in evaluating a potential bankruptcy. In a bankruptcy, the mistake can result in a windfall for one side. *Larsen* is a reminder that without applying the correct federal law at the start, the remaining evaluation might lead to an outcome subject to reversal on appeal.

Statutory Framework

Larsen invoked questions on the federal bankruptcy venue, the federal allowance of exemptions and the federal interpretation of state law of allowable exemptions. Debtors may file for bankruptcy in any federal judicial district where they had their "domicile, residence, principal place of business ...

or principal assets" in the 180 days before bankruptcy (or the longer portion of that period).⁶ While a residence usually encompasses the same district for all purposes, some debtors might be able to file in multiple districts.

Military families may have a different *domicile* and *residence*, giving them two venues for filing. The terms are similar but distinct. A residence is where one lives in real time.⁷ A domicile is a permanent home — where one resides with the intention to remain or to which one intends to return following a temporary departure.⁸ A person residing in a state is not necessarily domiciled there.⁹ When domicile is disputed, "courts try to determine the subjective intent of [the] debtors" from subjective statements and objective facts.¹⁰

The second relevant statute allows debtors to exempt assets from collection and liquidation in bankruptcy.¹¹ Individuals may select exemptions authorized by federal bankruptcy law or the state law of their domicile.¹² While the venue statute may allow a debtor to file in multiple jurisdictions, the exemption statute depends solely on the debtor's domicile.¹³

The applicable exemptions also may depend on finer points. The first arises if the debtor was domiciled in two or more states in the 730 days prior to filing for bankruptcy. The court applies the law of the state where the debtor had the longest domicile for the 180 days before those 730 days.¹⁴ The second arises in determining the applicable exemptions. Some states permit debtors to select state or federal exemptions,¹⁵ but other states opt out of the federal exemptions, thus requiring debtors to apply the state exemptions.¹⁶ Finally, some states bar their exemptions from applying to property outside the state. Rather than denying the debtor an exemption, the debtor still can apply the federal exemption.¹⁷



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6 28 U.S.C. § 1408(1).

7 *Carl v. United States (In re Carl)*, 142 B.R. 257, 259 (Bankr. N.D. Ill. 1992); William Houston Brown, et al., *Bankruptcy Exemption Manual* § 4:6 (2020).

8 *Lew v. Moss*, 797 F.2d 747, 749 (9th Cir. 1986).

9 *Weible v. United States*, 244 F.2d 158, 163 (9th Cir. 1957).

10 *Bankruptcy Exemption Manual* § 4:6 (citing *In re Felix*, 562 B.R. 700, 705 (Bankr. S.D. Ohio 2017)).

11 11 U.S.C. § 522(b)(1).

12 11 U.S.C. § 522(b)(1)-(3), (d).

13 11 U.S.C. § 522(b); *In re Stockburger*, 192 B.R. 908, 910 (E.D. Tenn. 1996), *aff'd*, 106 F.3d 402, No. 96-5409, 1997 WL 41202 (6th Cir. Jan. 31, 1997) (table).

14 11 U.S.C. § 522(b)(3)(A); *Mancuso v. Yarnall (In re Mancuso)*, No. NV 16-1387-BHTA, 2018 WL 1354337, *2 (B.A.P. 9th Cir. March 12, 2018).

15 For example, courts recognize that Washington law does not require debtors domiciled there to select its state law exemptions. *Klein v. Anderson (In re Anderson)*, 988 F.3d 1210 (9th Cir. 2021).

16 *See, e.g., Nev. Rev. Stat.* 21.090(3).

17 11 U.S.C. § 522(b)(3) (hanging paragraph), (d); *In re Rody*, 478 B.R. 384 (Bankr. D. Ariz. 2012).

1 Amy Rose, "We're Serving Our Country. Now Trump Says Votes Like Ours Don't Count," *Washington Post* (Nov. 11, 2020). 50 U.S.C. § 4025 (military member does not lose voting right in home state).

2 Sandra Chereb, "Policy Allows Military Exemption on Nevada's School Choice Accounts," *Las Vegas Review-Journal* (Nov. 11, 2015).

3 *Burke v. Larsen (In re Larsen)*, No. NV-20-1133-FBG, 2020 WL 6440884 (B.A.P. 9th Cir. Nov. 3, 2020) (mem. *per curiam*).

4 *See, e.g., Fernandez v. Miller (In re Fernandez)*, No. EP-11-CV-1123-KC, 2011 WL 3423373 (W.D. Tex. Aug. 5, 2011), *rev'g*, 445 B.R. 790 (Bankr. W.D. Tex. 2011).

5 11 U.S.C. § 522(b)(1).

Background of *Larsen*

Larsen presented a mixed set of facts when debtors filed a joint chapter 7 petition in January 2020 in Nevada.¹⁸ They were from Washington, and Cami Larsen owned a home there, which they lived in until Jason Larsen was assigned to Guam in 2014. They moved to Nevada in 2017 when he was assigned to Naval Air Station Fallon.¹⁹ From 2014–20, the Larsens rented the Washington house at times, and a relative lived there on the petition date. Debtors scheduled the Washington home as exempt under Nevada law. They believed that because they lived in Nevada, they were required to file for bankruptcy in Nevada and use its exemption law.

The Issue and the BAP's Ruling

The trustee objected to the exemption and argued that the Washington house could not be their homestead because they did not reside there. He also argued that Nevada's homestead exemption does not apply to property outside the state.²⁰

The Larsens responded that they considered the Washington home their permanent home. Their driver's licenses were from Washington, the debtor husband's earnings statement listed Washington as his legal state of residence, and they paid Washington property taxes under the state's homestead law. The family member at the debtor's home was only housesitting, and they intended to return to the home once Mr. Larsen retired in June 2020.²¹

The debtors argued that they lived in Nevada under the Navy's orders, and that Washington remained their residence for voting purposes while on active duty under federal law. The Larsens also claimed that they were obligated to file for bankruptcy in Nevada under the venue statute. Finally, the Larsens argued that the Ninth Circuit allowed state law exemptions to apply to properties in other states.²² Hon. **Bruce T. Beesley** overruled the trustee's objection, allowing the exemption because Mr. Larsen was in the military at the time.

The BAP subsequently held that the bankruptcy court correctly determined that the debtors were entitled to an exemption. The panel also held that the trustee correctly argued that the debtors could not exempt their Washington home under Nevada law, but the reasoning behind both points was flawed because it overlooked the federal law on exemptions in bankruptcy.

The BAP pointed to § 522(b), which states that exemptions are determined by the debtor's "domicile."²³ After considering the law on the residence and domicile, the BAP noted that debtors can file bankruptcy cases in states where they cannot claim the exemptions due to a different domicile. Effectively, its legal conclusion did not depend on many issues raised at the bankruptcy court, including on the Larsens' residence in Nevada, the amount of time they spent in Nevada and the amount of time they spent away from Washington. The BAP held that the uncontradicted evidence in the record established that the Larsens were domiciled in Washington.²⁴

Although the decision reversed the original order sustaining their exemption, the BAP noted that the debtors were not left unprotected. Debtors may amend their exemptions as a matter of course at any time before the case is closed, subject to limited exceptions.²⁵ The debtors subsequently amended their schedules to claim exemptions under Washington law.

Other Rulings in Military Contexts

There are scant decisions about a military member's exemptions. The case of first impression is *In re Wellberg*, with a debtor from Minnesota on active duty in Virginia who filed for bankruptcy in Virginia.²⁶ The court debated the application of Virginia and Minnesota homestead law. The court held that the debtor remained domiciled in Minnesota when on call and, applying § 522(b), allowed the homestead exemption under Minnesota law.²⁷ Some subsequent decisions have correctly applied § 522(b).²⁸

Other courts have reached contrary conclusions. In *In re Anderson*, a debtor filed for bankruptcy in Texas while on assignment there and claimed a federal homestead exemption in property in South Carolina.²⁹ The trustee objected that she did not live in South Carolina. The court considered the facts about the property and state law decisions about absences due to military service, then allowed the exemption under federal bankruptcy law.

Anderson is similar to *Larsen* in that both courts felt compelled to provide a homestead exemption — but both decisions failed to address § 522(b). If the court had analyzed the statute, it could not have allowed an exemption under federal bankruptcy law. The court clearly found that the debtor remained domiciled in South Carolina, so the debtor should have applied South Carolina exemption law under § 522(b). South Carolina has opted out of the federal exemptions, and as a result, the debtor could not take the federal exemptions under South Carolina exemption law.

Yet the bankruptcy court still allowed the debtor to claim federal exemptions. Those were only available if the court held that the debtor was domiciled in Texas, which had not opted out of the federal exemptions.³⁰ The court had to ignore the issue of domicile and missed the requirements of § 522(b) to allow federal exemptions under Texas law. The outcome is even more surprising because the court cited *Wellberg*. Had the court followed that case, it would have held that the debtor was domiciled in South Carolina and limited to an exemption under South Carolina law.

In another case, the court factually rejected the debtors' claim of domicile in the state where they had a home, apart from their state of residence during the military assignment.³¹ The debtors lived in Utah while the debtor husband worked there with the Air Force. The debtors had bought land in Idaho 16 years before filing for bankruptcy, built a cabin

25 *Id.* at *5 (citing Fed. R. Bankr. P. 1009, and *Lua v. Miller (In re Lua)*, 692 F. App'x 851 (9th Cir. 2017)).

26 12 B.R. 48 (Bankr. E.D. Va. 1981).

27 The decision did not consider whether the debtor's raw land and an intent to build a home qualified as an exempt homestead that the debtor "uses as a residence." 11 U.S.C. § 522(d).

28 *In re Ober*, 613 B.R. 631, 636 & n.5 (Bankr. E.D. Pa. 2020) (uncontested application of Arizona exemption while military member was in Pennsylvania); *In re Porvaznik*, 456 B.R. 738 (Bankr. M.D. Pa. 2011) (overruling trustee objection based on debtor's absence from state during husband's assignment in Louisiana).

29 240 B.R. 254 (Bankr. W.D. Tex. 1999).

30 S.C. Code § 15.41-30(A)(1).

31 *In re Kline*, 350 B.R. 497 (Bankr. D. Idaho 2005).

18 2020 WL 6440884 at *1.

19 Fallon is home to the Navy's "Top Gun" program; in the 1986 movie, the program was based in San Diego.

20 2020 WL 6440884 at *1-2.

21 *Id.* at *2.

22 *Id.* (citing *Arrol v. Broach (In re Arrol)*, 170 F.3d 934 (9th Cir. 1999)).

23 *Id.* at *4 (citing *In re Stanton*, 457 B.R. 80, 85 (Bankr. D. Nev. 2011)).

24 *Id.*

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and spent summers there. They stated that their intent was to retire to Idaho, remaining in Utah after his retirement until she retired. The debtor wife retired shortly before the bankruptcy, but the debtors were unable to move until after the filing due to the seasonal weather. Under those facts, the court held that they were domiciled in Utah and ineligible for Idaho exemptions. In *dicta*, Hon. **Jim D. Pappas** suggested that the debtors could not claim any exemption since Utah opted out and only exempted property in the state.³² The decision did not discuss the savings clause that preserves a federal exemption if none is available under state law.

There is an economic impact on applying one state's exemptions rather than another, whether rightly or wrongly. In *Larsen*, the Nevada homestead exemption protects up to \$605,000 in equity,³³ but Washington's exemption is capped at \$125,000.³⁴ In an appellate brief, the parties disputed whether the debtors had \$107,000 in equity or \$202,000.

Under the original ruling with Nevada law, the equity would be exempt in either scenario. However, when the domicile is determined and Washington law is applied, there is excess equity for the bankruptcy estate if the trustee's valuation is correct. The decision to file for bankruptcy seemed to make sense if Nevada law applied and exempted all their home equity. In retrospect, the decision to file for bankruptcy makes less sense because the trustee can recover the excess home equity under Washington's less generous law.

Bankruptcy courts have complex questions of state and federal law when presented with issues of residence, domicile, homesteads and military duty. Differing decisions are common in cases involving multiple questions of fact and law. However, *Larsen* provides a baseline of the legal questions and analysis to resolve future cases. **abi**

Editor's Note: *ABI's Veterans and Servicemembers Affairs Task Force was created to to educate, remediate and prevent adverse debt concerns and impacts on veterans and service members. For more information, visit veterans.abi.org.*

³² *Id.* at 502, n.6.

³³ Nev. Rev. Stat. 21.090(1)(f), 115.050.

³⁴ Wash. Rev. Code § 6.13.030.

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