

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
FORT MYERS DIVISION  
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In re: Case No. 9:20-bk-03978-FMD  
Chapter 7

Christine Marie Cosgrove,

Debtor.

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**OPINION SUPPLEMENTING ORDER  
SUSTAINING TRUSTEE'S OBJECTION TO  
DEBTOR'S CLAIM OF EXEMPTION**

This opinion supplements the Court's *Order Sustaining Trustee's Objection to Debtor's Claim of Exemptions* entered on December 1, 2020 (the "Order"),<sup>1</sup> after the Court announced its ruling at a hearing conducted on November 19, 2020.<sup>2</sup>

The case came before the Court for hearing to consider the *Trustee's Objection to Debtor's Claim of Exemption* (the "Objection"),<sup>3</sup> Debtor's response,<sup>4</sup> and the Trustee's supplemental memorandum in support of the Objection.<sup>5</sup> In this case, Debtor moved to Florida from Colorado within 730 days of filing her bankruptcy petition, and under 11 U.S.C. § 522(b)(3)<sup>6</sup> was not eligible to claim property as exempt under Florida law. The question before the Court is whether § 522(b)(3) requires Debtor to utilize the Colorado exemption statutes, or whether, as Debtor asserts, she may utilize the federal exemptions provided for in § 522(b)(3) and § 522(d) because she did not reside in Colorado on the petition date. For the reasons that follow, the Court has sustained the Trustee's Objection.

**A. Background**

The facts are not in dispute. Debtor resided in Colorado from April 2017 until September 2019. In September 2019, Debtor moved from Colorado to Fort Myers, Florida.<sup>7</sup>

On May 22, 2020, Debtor filed a Chapter 7 bankruptcy petition in the Middle District of Florida. On her *Schedule C: The Property You Claim as Exempt*, Debtor listed her personal property—including a vehicle, six financial accounts, and an interest in a life insurance policy—as exempt under §§ 522(d)(2), (3), (5), (7), and (8).<sup>8</sup> Debtor does not own any real property, and did not claim any interest in real property as exempt.

The Trustee objects to Debtor's claimed personal property exemptions on the grounds that Colorado has opted out of the federal exemptions; that the relevant statute is Colorado's personal property exemption statute; that the applicable statute is not restricted to Colorado residents; and that Debtor therefore must claim the exemptions provided by Colorado law. In response, Debtor contends that Colorado's personal property exemption statute enables non-residents, such as Debtor, to choose either the federal exemptions or Colorado's state exemptions.<sup>9</sup>

**B. Discussion**

Under § 522(b)(1), an individual debtor may exempt from property of the estate the property listed in § 522(b)(2) or § 522(b)(3). Under § 522(b)(2), debtors are permitted to claim the property listed in § 522(d) as exempt unless "the State law that is applicable to the debtor under paragraph (3)(A) specifically does not so authorize." Both Florida and Colorado are "opt-out" states, meaning that their residents may not elect the exemptions provided for in § 522(d).<sup>10</sup>

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<sup>1</sup> Doc. No. 24

<sup>2</sup> Doc. No. 23.

<sup>3</sup> Doc. No. 7.

<sup>4</sup> Doc. No. 10.

<sup>5</sup> Doc. No. 22.

<sup>6</sup> Unless otherwise stated, all references are to the United States Bankruptcy Code, 11 U.S.C. § 101, *et. seq.*

<sup>7</sup> Doc. No. 1, Statement of Financial Affairs, p. 32.

<sup>8</sup> Doc. No. 1, pp. 16-17.

<sup>9</sup> Doc. No. 10, para. 2.

<sup>10</sup> Fla. Stat. § 222.20; Colo. Rev. Stat. § 13-54-107.

Under § 522(b)(3)(A), if a debtor's domicile has not been located in a single state for the 730-day period preceding the bankruptcy petition date, the applicable exemption law is the state law of the state where the debtor lived for the 180 days immediately preceding the 730 days. The hanging paragraph of § 522(b)(3) explains that if the effect of the domiciliary requirement of § 522(b)(3)(A) renders the debtor ineligible for any exemption, the debtor may elect to exempt the property that is specified under § 522(d), i.e., the federal slate of exemptions.

Here, it is undisputed that Debtor did not live in either Florida or Colorado for 730 days before the petition date; that she lived in Colorado for the 180 days preceding the 730 days; and that Colorado law applies to determine Debtor's exemptions. Debtor claimed her personal property as exempt under § 522(d) on the theory that because she was not a resident of Colorado on the petition date, the Colorado exemptions are not available to her and therefore, under § 522(b)(3), she may elect the federal exemptions.

In considering this issue the Court is guided by the bankruptcy court's factually similar decision in *In re Kelsey*.<sup>11</sup> In *Kelsey*, the debtors had moved from Colorado to Florida within the 730-day period prior to filing their bankruptcy petition. The debtors claimed exemptions for their real and personal property under Colorado state law, and the Chapter 7 trustee objected on the ground that Colorado's exemption laws are not extraterritorial, i.e., that only Colorado residents could claim Colorado exemptions. The *Kelsey* court held that the debtors were not entitled to claim their real property as exempt under Colorado law because Colorado's homestead exemption is not extraterritorial and only applies to Colorado residents. But the court also held that Colorado's personal property exemptions are extraterritorial and could therefore be claimed by the debtors.<sup>12</sup>

In reaching its decision, the *Kelsey* court found that a state's opt-out statute is not the relevant statute for determining a debtor's substantive exemption; the court stated that the purpose of an opt-out statute "is simply to render the federal exemptions unavailable; it has nothing to do with the state's own exemption statutes."<sup>13</sup> On this point, the court in *Kelsey* expressly disagreed with another Florida bankruptcy court's ruling in *In re Underwood*,<sup>14</sup> which may have relied in part on Colorado's opt-out statute to hold that Colorado's exemptions were not extraterritorial.<sup>15</sup> Instead, the court in *Kelsey* evaluated the issue under the multi-step analysis set out in *In re Jevne*.<sup>16</sup> Using this analysis, courts look to the state's specific exemption statutes to determine how they apply to non-resident debtors.<sup>17</sup>

Under this procedure, courts will first analyze the express language of the relevant state's exemption statute to determine whether the statute itself restricts its application to property located within the state. If so, then the statute cannot be given extraterritorial effect. (Citation omitted). However, if the statute is silent as to its extraterritorial effect, then courts will review the relevant state's case law to determine whether the exemption can be applied extraterritorially.<sup>18</sup>

With respect to Colorado's homestead and personal property exemption statutes, the *Kelsey* court made the following findings:

1. Under Colorado's homestead statute, "every homestead *in the state of Colorado* shall be exempt," meaning that the statute clearly limits its application to homestead real property within the state of Colorado.<sup>19</sup>

2. Under Colorado's personal property exemption statute, the categories of personal property identified therein are "exempt from levy and sale under writ of attachment or writ of

<sup>11</sup> 477 B.R. 870 (Bankr. M.D. Fla. 2012).

<sup>12</sup> *In re Kelsey*, 477 B.R. at 871-72.

<sup>13</sup> *Id.* at 877.

<sup>14</sup> 342 B.R. 358 (Bankr. N.D. Fla. 2006).

<sup>15</sup> *In re Kelsey*, 477 B.R. at 877.

<sup>16</sup> 387 B.R. 301 (Bankr. S.D. Fla. 2008).

<sup>17</sup> *In re Kelsey*, 477 B.R. at 877.

<sup>18</sup> *Id.* at 874(citing *In re Jevne*, 387 B.R. at 304).

<sup>19</sup> *In re Kelsey*, 477 B.R. at 874(quoting Colo. Rev. Stat. § 38-41-201)(emphasis added by the court in *Kelsey*).

execution,” but neither the exemption statute nor the state’s definition of “debtor” expressly restricts the availability of the exemptions only to Colorado residents.<sup>20</sup>

3. In the absence of an express restriction, Colorado’s personal property exemption statute is silent as to its extraterritorial effect, and Colorado’s case law must be reviewed to determine whether the state’s personal property exemption is limited to Colorado residents.<sup>21</sup>

4. In a 1910 case, *Sandberg v. Borstadt*,<sup>22</sup> the Colorado Supreme Court appeared to hold that a sewing machine owned by a Colorado citizen was exempt and that Colorado’s exemption laws were primarily for the benefit of its residents. The *Underwood* court construed the *Sandberg* ruling to mean that Colorado’s personal property exemption is limited to Colorado residents.<sup>23</sup> But as discussed by the court in *Kelsey*, the statute at issue in *Sandberg* was a narrow statute that related only to sewing machines in Colorado; Colorado’s current personal property exemption statute does not include any residency requirement; and *Sandberg* should not be interpreted as holding that the current statutes are limited to Colorado residents or Colorado property.<sup>24</sup>

The *Kelsey* court concluded that “absent any contrary Colorado statute or decisional law on this issue, the Court will, in reliance on the *Jevne* procedure and rationale, interpret Colorado’s personal property exemption statute as having extraterritorial application.”<sup>25</sup> The bankruptcy court in *In re Wilson* later followed *Kelsey*’s analysis and conclusion, holding that debtors who had moved from Colorado to Idaho were required to use Colorado’s state exemptions instead of the federal exemptions that they had claimed.<sup>26</sup>

This Court concurs with the analysis of *Jevne*, *Kelsey*, and *Wilson* and concludes that (1) Debtor’s domicile for purposes of 11 U.S.C. § 522(b)(3)(A) is Colorado such that Debtor is limited to the

exemptions allowed under Colorado law; (2) because Colorado is an opt-out state, Debtor may not claim the exemptions provided for under § 522(d); (3) Colorado’s personal property exemption law is not limited to Colorado residents or Colorado property; and (4) Debtor is required to claim her personal property exemptions under Colorado law.

Accordingly, as set forth in the Order, the Trustee’s Objection to Debtor’s Claim of Exemption is **SUSTAINED**.

**DATED: December 18, 2020.**

/s/ Caryl E. Delano

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Caryl E. Delano  
Chief United States Bankruptcy Judge

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<sup>20</sup> *Id.* at 874-75 (quoting Colo. Rev. Stat. §§ 13-54-102 and 13-54-101(1)).

<sup>21</sup> *Id.* at 875.

<sup>22</sup> 48 Colo. 96, 109 P. 419 (1910).

<sup>23</sup> *In re Underwood*, 342 B.R. at 361.

<sup>24</sup> *In re Kelsey*, 477 B.R. at 875-77.

<sup>25</sup> *Id.* at 877.

<sup>26</sup> *In re Wilson*, 2015 WL 1850919, at \*4-5 (Bankr. D. Idaho Jan. 13, 2015).