

MAR 12 2018

NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

5	In re:	)	BAP No.	NV-16-1387-BHTa
6	LEONARD A. MANCUSO, II,	)	Bk. No.	2:16-bk-10769-BTB
7	Debtor.	)		
8	_____	)		
9	LEONARD A. MANCUSO,	)		
10	Appellant,	)		
11	v.	)	<b>MEMORANDUM*</b>	
12	RICK A. YARNALL, Chapter 13	)		
13	Trustee; VICTORIA L. NELSON,	)		
14	Chapter 7 Trustee,	)		
	Appellee.	)		
	_____	)		

Argued and Submitted on December 1, 2017  
at Las Vegas, Nevada

Filed - March 12, 2018

Appeal from the United States Bankruptcy Court  
for the District of Nevada

Honorable Bruce T. Beesley, Chief Bankruptcy Judge, Presiding

Appearances: Thomas Edmund Crowe argued for appellant Leonard  
A. Mancuso, II; Daniel Riggs argued for appellee  
Rick A. Yarnall, Chapter 13 Trustee.

Before: HOULE,\*\* TAYLOR, and BRAND, Bankruptcy Judges.

\* This disposition is not appropriate for publication.  
Although it may be cited for whatever persuasive value it may  
have (see Fed. R. App. P. 32.1), it has no precedential value.  
See 9th Cir. BAP Rule 8024-1(c)(2).

\*\* The Hon. Mark D. Houle, United States Bankruptcy Judge  
for the Central District of California, sitting by designation.

1 Less than 730 days before filing bankruptcy, Leonard  
2 Mancuso ("Debtor") moved from Florida to Nevada. After filing  
3 bankruptcy in Nevada, Debtor selected Nevada state exemptions in  
4 his bankruptcy schedules. The Chapter 7<sup>1</sup> Trustee filed a motion  
5 seeking an order: (1) disallowing Debtor's claim of Nevada  
6 exemptions; and (2) holding that Debtor was only eligible to use  
7 the § 522(d) federal exemptions. Debtor responded by arguing  
8 that, if Debtor was ineligible to use Nevada state exemptions,  
9 Debtor should be permitted to use Florida state exemptions  
10 (although Debtor had not yet amended his schedules to seek  
11 Florida exemptions). The bankruptcy court granted the motion of  
12 the Chapter 7 Trustee, and Debtor appealed. Within an hour of  
13 the entry of the bankruptcy court's order, Debtor's case was re-  
14 converted to Chapter 13, and, as a result, the Chapter 13  
15 Trustee is the Appellee in this appeal. For the reasons outlined  
16 below, we AFFIRM.

17 **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

18 In July 2014, Debtor relocated from Florida to Nevada, and,  
19 on May 7, 2015, purchased real property located in Las Vegas,  
20 Nevada. On February 22, 2016, Debtor filed a Chapter 13  
21 voluntary petition. Debtor later converted his case to  
22 Chapter 7.

23 The Chapter 7 Trustee filed an objection to Debtor's  
24 claimed Nevada exemptions on the basis that Debtor had not

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25  
26 <sup>1</sup> Unless otherwise indicated, all chapter and section  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.  
28 All "Rule" references are to the Federal Rules of Bankruptcy  
Procedure. All "Civil Rule" references are to the Federal Rules  
of Civil Procedure.

1 resided in Nevada for the entirety of the previous 730 days.  
2 Debtor responded by arguing that, if he were ineligible to  
3 select Nevada exemptions, he should be allowed to claim Florida  
4 exemptions - the state where he resided prior to moving to  
5 Nevada - including Florida's homestead exemption, even though  
6 at the time of the bankruptcy filing Debtor's homestead was  
7 located in Nevada.

8 The bankruptcy court ultimately sustained Trustee's  
9 objection, holding that Debtor was only entitled to claim the  
10 § 522(d) exemptions. The bankruptcy court's oral conclusions of  
11 law at the hearing on September 28, 2016, indicate that the  
12 bankruptcy court implicitly found that Florida exemptions were  
13 limited to Florida residents. Because the bankruptcy court  
14 concluded that the Code prohibited Debtor from using Nevada  
15 exemptions and that Florida law precluded Debtor from using  
16 Florida exemptions, the bankruptcy court concluded that Debtor  
17 was only entitled to use § 522(d) exemptions. On the day of this  
18 ruling, Debtor re-converted his case to Chapter 13, and, two  
19 weeks later, appealed the bankruptcy court's order sustaining  
20 the Trustee's objection.

## 21 **II. JURISDICTION**

22 Subject to the discussion below, the bankruptcy court had  
23 jurisdiction under 28 U.S.C. §§ 1334 and 157(b) (2) (B). We have  
24 jurisdiction under 28 U.S.C. § 158.

## 25 **III. ISSUES**

26 1. Is this appeal moot due to Debtor's failure to claim  
27 Florida exemptions prior to entry of the applicable order?

28 2. Is Debtor eligible to select Florida exemptions despite

1 not being a resident of the state of Florida as of the petition  
2 date?

3 3. If Debtor can select the Florida homestead exemption,  
4 can Debtor utilize such exemption to exempt a homestead located  
5 outside the state of Florida?

#### 6 IV. STANDARDS OF REVIEW

7 We review the bankruptcy court's legal conclusions de novo.  
8 See, e.g., Graves v. Myrvang (In re Myrvang), 232 F.3d 1116,  
9 1120 (9th Cir. 2000). "We review . . . mootness de novo." United  
10 States v. Montes-Ruiz, 745 F.3d 1286, 1289 (9th Cir. 2014). The  
11 disallowance of an exemption is subject to de novo review. See,  
12 e.g., Lieberman v. Hawkins (In re Lieberman), 245 F.3d 1090,  
13 1091 (9th Cir. 2001).

#### 14 V. DISCUSSION

##### 15 A. The appeal is not moot or premature.

16 In Trustee's Appellee's brief, Trustee suggests that  
17 because "[t]he crux of this appeal revolves around whether  
18 Debtor can apply Florida's homestead exemption to his Nevada  
19 property," the appeal may be moot, since, at the time of the  
20 appeal, Debtor had only requested, but not yet formally claimed,  
21 Florida exemptions. An appeal is moot if, due to events that  
22 occurred after the filing of the appeal, the reviewing court is  
23 unable to offer effectual relief. See, e.g., Church of  
24 Scientology of Cal. v. United States, 506 U.S. 9, 13 (1992).  
25 Here, the appeal is clearly not moot because an order finding  
26 Debtor is entitled to claim Florida exemptions would allow  
27 Debtor to claim Florida exemptions in his pending bankruptcy  
28 case.

1 To the extent that Trustee's argument could be  
2 characterized as an argument that the appeal is premature, we  
3 reject the contention. The bankruptcy court issued an order  
4 prohibiting Debtor from selecting any exemptions other than  
5 federal exemptions and, therefore, Debtor's request to be  
6 allowed to select Florida exemptions is ripe.

7 **B. Legal Background**

8 11 U.S.C. § 522(b)(1)-(3)(A) (2016) states, in part:

9 (b)(1) Notwithstanding section 541 of this title, an  
10 individual debtor may exempt from property of the  
11 estate the property listed in either paragraph (2) or,  
in the alternative, paragraph (3) of this section.

11 . . .

12 (2) Property listed in this paragraph is property that  
13 is specified under subsection (d), unless the State  
14 law that is applicable to the debtor under paragraph  
(3)(A) specifically does not so authorize.

15 (3) Property listed in this paragraph is -  
16 (A) subject to subsections (o) and (p), any  
17 property that is exempt under Federal law, other  
18 than subsection (d) of this section, or State or  
19 local law that is applicable on the date of the  
20 filing of the petition to the place in which the  
debtor's domicile has been located for the 730  
21 days immediately preceding the date of the filing  
of the petition or if the debtor's domicile has  
22 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[.] . . .

23 Debtor and Trustee agree that Debtor's domicile was not  
24 located in a single state for the 730-day period prior to the  
25 petition date, and also agree that Debtor's domicile was located  
26 in Florida for the 180 days immediately preceding the 730 days  
27 prior to the petition date.

1           **C.    The bankruptcy court was correct in concluding that**  
2           **Debtor could not use Florida exemptions to exempt his**  
3           **residence located in Nevada.**

4           Trustee next argues that Debtor is not permitted to claim a  
5 Florida homestead exemption in a homestead located outside the  
6 state of Florida. As is noted by Trustee, this proposition has  
7 been repeatedly accepted by the courts. As one bankruptcy court  
8 stated:

9           Florida courts have construed the Florida Constitution  
10          to require that a homestead be located within the  
11          State of Florida for the Florida homestead exemption  
12          to be applicable. In doing so, Florida adopts the  
13          majority view that in order to utilize a state's  
14          homestead exemption, the property claimed must be  
15          located within that state. Holding that the Florida  
16          homestead exemption has no extraterritorial effect  
17          discourages debtors from forum shopping to take  
18          advantage of Florida's generous homestead exemption.  
19          This position also recognizes that state exemption  
20          laws are drafted to protect the homes of families  
21          located within the state and should not be applied  
22          with extraterritorial force.

23          In re Schlakman, No.05-36921-BKC-PGH, 2007 WL 1482011 at \*3  
24          (Bankr. S.D. Fla. Jan. 16, 2007) (citations and footnotes  
25          omitted) (collecting cases); see also In re Sanders, 72 B.R.  
26          124, 125 (Bankr. M.D. Fla. 1987) ("Article 10, § 4(a)(1) of the  
27          Florida Constitution as amended in 1972 governs homestead  
28          exemptions. Implicit within that section is the requirement that  
29          the property being claimed as exempt homestead be located in the  
30          State of Florida.").

31          Debtor has not provided a case in which a court concluded  
32          that Florida did not require the homestead to be located within  
33          the state of Florida. Instead, Debtor has advanced two arguments  
34          in support of his request that the Panel deviate from the

1 traditional interpretation of the Florida homestead exemption,  
2 which can be characterized as follows: (1) an implicit  
3 requirement regarding the location of the homestead is  
4 incompatible with the policy of liberally construing exemptions;  
5 and (2) continuing to impose a residency requirement would  
6 impose unintended consequences after the BAPCPA<sup>2</sup> amendments to  
7 § 522(b).

8       Regarding the first argument, Debtor cites Drenttel v.  
9 Jensen-Carter (In re Drenttel), 403 F.3d 611 (8th Cir. 2005) and  
10 Arrol v. Broach (In re Arrol), 170 F.3d 934 (9th Cir. 1999), in  
11 which the courts allowed homestead exemptions in out-of-state  
12 property under Minnesota and California law, respectively. These  
13 cases, however, are distinguishable from the present  
14 circumstance because the Eighth and Ninth Circuits relied on  
15 Minnesota and California law and found that those states have  
16 consistently espoused a liberal, broad construction of the  
17 applicable homestead exemption, supporting an extension of the  
18 exemption to a homestead located out of state. One bankruptcy  
19 court recently explained its process of determining whether  
20 exemption laws apply extraterritorially:

21       Accordingly, if the language of a state's homestead  
22 statute restricts its application to property located  
23 within the state, the statute cannot be given  
24 extraterritorial effect by this Court. If the plain  
25 language of a state's homestead statute is silent as  
26 to its extraterritorial effect, the Court will look to  
27 that state's case law precedent to determine if the  
28 state's homestead statute can be applied to property  
outside of the state. If the state's homestead statute  
is silent as to its extraterritorial effect, and there

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27       <sup>2</sup> Bankruptcy Abuse Prevention and Consumer Protection Act  
28 of 2005, Pub. L. 109-8, 119 Stat. 23 (2005) ("BAPCPA").

1 is no case law precedent determining the property of  
2 its extraterritorial application, the Court believes  
3 it is appropriate to interpret the state's homestead  
4 law to apply extraterritorially based upon the strong  
policy of liberally construing exemptions in favor of  
the debtor as espoused by the Eighth and Ninth Circuit  
Courts of Appeal.

5 In re Jevne, 387 B.R. 301, 304-05 (Bankr. S.D. Fla. 2008). In  
6 contrast to Drenttel and Arrol, in which the respective courts  
7 found applicable case law did not directly address the issue,  
8 and therefore continued to consider policy concerns, here, as  
9 discussed in the beginning of this section, a review of case  
10 law<sup>3</sup> interpreting Florida law reveals a clear restriction of the  
11 Florida homestead exemption to property located within the state  
12 of Florida. Therefore, the Panel declines to adopt Debtor's  
13 position that the legislative silence regarding the  
14 extraterritorial application of Florida homestead law should be  
15 deemed to permit such application.

16 Debtor's second argument is that a prohibition on  
17 extraterritorial application of Florida's homestead exemption  
18 would be inconsistent with the Code. 11 U.S.C. § 522(b)(3)(A)  
19 operates, in the default situation, to require the application  
20 of the law of a debtor's domicile as of the petition date, to  
21 the factual situation of a debtor as of the petition date. If a  
22 debtor has not been domiciled in a single state for the previous  
23 730 days, then the provision contains an exception, reaching  
24 back to apply the law of the state where debtor was domiciled

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25  
26 <sup>3</sup> There do not appear to be Florida state court decisions  
27 directly on point. Bankruptcy courts analyzing Florida law,  
28 however, have uniformly found that the Florida homestead  
exemption only applies to property located within the state of  
Florida.

1 for the majority of the 180 days prior to the 730 day period  
2 preceding the petition date. But while the BAPCPA amendment  
3 temporally changes the applicable law, it does not contain any  
4 language that would produce the same effect on a debtor's  
5 factual situation (i.e. the language of the statute does not  
6 change the state of a debtor's domicile). If Congress, however,  
7 had desired that the residency determination, or the  
8 determination of any other factual issue, also be determined by  
9 looking to the facts as existed 730 days prior to the petition  
10 date, it could easily have drafted the appropriate instructions.

11 While the Panel cannot conclude that the clear purpose of  
12 § 522(b)(3)(A) is to treat a debtor not residing in his current  
13 jurisdiction for more than 730 days as if he were a resident of  
14 the state he resided in for the 180 days prior to that period,  
15 there may exist equitable and policy grounds that may support  
16 Debtor's argument. Specifically, given that the alternative  
17 federal exemptions contain only a relatively insignificant  
18 homestead exemption, a debtor who has significant equity in a  
19 home and has moved to a different state in the previous two  
20 years may be, from a practical perspective, significantly  
21 prejudiced in filing a Chapter 7 petition, depending on the  
22 exemptions allowed in the state the debtor previously resided  
23 in. As noted earlier, however, the Panel concludes that any such  
24 equitable concerns must defer to the relevant state's (here  
25 Florida) interpretation of their own exemption laws. And, as  
26 more fully discussed below, the Panel concludes that such  
27 equitable concerns cannot save Debtor's preemption argument.

28 The court in In re Fernandez, No. EP-11-CV-123-KL, 2011 WL

1 3423373 (W.D. Tex. Aug. 5, 2011) identified, and extensively  
2 discussed, the two<sup>4</sup> approaches to the extraterritorial  
3 application of state exemption laws post BAPCPA: (1) "the state-  
4 specific interpretation"; and (2) "the preemption view." Id. at  
5 6; see Extraterritorial Application of State's Homestead  
6 Exemption Pursuant to Bankruptcy Code § 522, 47 A.L.R. FED. 2d  
7 335 (2010) for a summary of different approaches. The former  
8 approach mirrors the approach taken in Jevne and requires the  
9 court to look to state law to determine whether extraterritorial  
10 application is warranted. The Fernandez court cites In re  
11 Garrett, 435 B.R. 434 (Bankr. S.D. Tex. 2010) as an example of  
12 the latter approach, an approach that Debtor appears to request  
13 that the Panel adopt here.

14 Although not cited by either party, the court in In re  
15 Camp, 396 B.R. 194 (Bankr. W.D. Tex. 2008) adopted the approach  
16 advocated by Debtor, holding that residency restrictions in  
17 Florida law relating to exemptions (in Camp, Florida's opt-out  
18 provision) were preempted by § 522(b). The Camp court, in  
19 explaining its holding, stated the following:

20 But the general rule has limited application, where  
21 (as here) § 522(b)(3)(A) requires the application of  
22 the exemption laws of a state other than the state of  
23 the debtor's residence. For example, if thirty days  
24 before filing bankruptcy a debtor moved from Texas to  
25 Louisiana and purchased a home, § 522(b)(3)(A)  
requires the bankruptcy court to "disregard the  
element of reality" of the actual state of the  
debtor's residence (Louisiana), and instead engage in  
the fiction of considering the state of his or her

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26 <sup>4</sup> The court in Fernandez actually noted three approaches.  
27 The third approach, adopted in the bankruptcy court decision  
28 under review in Fernandez, was rejected on appeal and does not  
appear to have been adopted in any other decision.

1 former residence (Texas) to be the state where he or  
2 she currently resides. If the debtor chooses state  
3 exemptions, Texas exemption laws would apply to the  
4 debtor's home and other property located within the  
5 state - in this case, within "Louisiana qua Texas."  
6 This is not, however, the extraterritorial application  
7 of Texas's exemption laws. It is not under the  
8 authority of the State of Texas that its exemption  
9 laws are being applied to property outside Texas.  
10 Rather, it is a federal choice of law statute -  
11 § 522(b) (3) (A) - that has expressly provided that the  
12 exemption laws of a particular state - Texas - are  
13 applicable to a debtor who, by definition, is no  
14 longer a domiciliary of that state and so whose  
15 property is almost certainly no longer located within  
16 that state.

17 Id. at 201-02; see also id. at 200 ("In this case,  
18 § 522(b) (3) (A) evidences a strong policy in favor of treating a  
19 recently departed debtor as if he had not moved for purposes of  
20 determining what property he may claim as exempt."). The  
21 approach in Camp directly contradicts the approach to Florida  
22 homestead exemptions adopted by the court in In re Adams,  
23 375 B.R. 532 (Bankr. W.D. Mo. 2007).

24 The Panel cannot embrace the gymnastics engaged in by the  
25 Camp decision, which represents the minority approach to the  
26 issue. See In re Fernandez, 2011 WL 3423373 (W.D. Tex. 2011)  
27 (discussing "state-specific interpretation" and the "preemption  
28 view"). Specifically, the reasoning in the Camp excerpt above  
appears incomplete. The Camp court reasons that because  
§ 522(b) (3) (A), in some situations, requires debtors to use the  
exemptions of a state where they do not reside, that provision  
preempts residency requirements. There is a fundamental problems  
with this conclusion, however, because if a state does not have  
residency restrictions, then the hanging paragraph of § 522(b)  
explicitly provides a solution by guaranteeing the debtor

1 federal exemptions. Section 522 does not appear to conflict with  
2 state exemption laws at all, but, rather, it harmonizes with  
3 those laws.

4 The second step taken by Camp, implicitly extending  
5 preemption from residency restrictions to restrictions on the  
6 location of the property, implicates additional issues. That  
7 reasoning, applied to the situation here, would have the Panel  
8 look to two years before the petition date to find the proper  
9 exemption laws and the residency status of Debtor, essentially  
10 requiring the Panel to treat "the recently departed debtor as if  
11 he had not moved for purposes of determining what property he  
12 may claim as exempt." In re Camp 396 B.R. at 200. But,  
13 simultaneously, the Panel is required to treat the Debtor as if  
14 he had moved for purposes of determining what property he may  
15 claim as exempt, for, if Debtor had not moved, there would be no  
16 Nevada property to exempt, and it certainly would not be  
17 Debtor's homestead. The preemption view essentially mandates  
18 this logically inconsistent approach be adopted because by  
19 classifying Debtor as a resident of Florida, it would preclude a  
20 debtor from selecting federal exemptions, constraining the  
21 debtor to a state's exemption scheme that would be partially  
22 inapplicable.

23 Instead, the Panel concludes that the majority approach,  
24 the state-specific approach, is the more logically coherent  
25 analysis. As is evidenced by Drenttel and Arrol, this approach  
26 may lead a court to permit the extraterritorial application of  
27 state homestead exemption laws. When interpreting Florida  
28 homestead laws, however, such extraterritorial application is

1 not permitted. While Drenttel and Arrol concluded that under the  
2 state laws of Minnesota and California, respectively, homestead  
3 exemptions were to be liberally applied, such an application is  
4 not adopted by Florida courts. Courts have repeatedly deferred  
5 to the individual states' preferences for their exemption  
6 schemes, even when such schemes result in a lack of uniformity.  
7 See, e.g., Storer v. French (In re Storer), 58 F.3d 1125 (6th  
8 Cir. 1995); see also Owen v. Owen, 500 U.S. 305, 308 (1991)  
9 ("Nothing in subsection (b) (or elsewhere in the Code) limits a  
10 state's power to restrict the scope of its exemptions; indeed,  
11 it could theoretically accord no exemptions at all."). Debtor's  
12 request, that this Panel adopt a more liberal interpretation of  
13 the Florida homestead exemption than the interpretation adopted  
14 by Florida courts, is in contravention of the above-mentioned  
15 principle.<sup>5</sup>

16 **D. We decline to determine whether Debtor is eligible to**  
17 **select Florida personal property exemptions.**

18 The bankruptcy court order states that: "The Debtor shall  
19 only be entitled to claim the exemptions set forth under Section  
20 522(d)," which implicitly prevents Debtor from selecting any  
21 Florida exemptions, real property or personal property. A review  
22 of the record, however, establishes that the parties essentially  
23 limited their briefing to the issue of the extraterritorial  
24 application of Florida homestead's exemption; Debtor's

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25  
26 <sup>5</sup> Furthermore, the Court does not agree with Debtor's  
27 contention that the BAPCPA amendments evince Congressional  
28 desire for courts to adopt more generous interpretations of  
state homestead exemption laws; BAPCPA amendments were for the  
explicit purpose of preventing abuse of the bankruptcy system.

1 eligibility to select Florida personal property exemptions was  
2 not directly briefed or argued before the Panel. On the record  
3 before us, the Panel declines to determine whether Debtor is  
4 entitled to select Florida personal property exemptions.

5 **E. We do not reach Debtor's new argument first raised on**  
6 **appeal.**

7 Debtor also asserted a new theory at oral argument relating  
8 to Debtor's ability to exempt the proceeds of the sale of his  
9 Florida real property in whatever form those proceeds currently  
10 exist. "[I]n general, 'a federal appellate court does not  
11 consider an issue not passed upon below.'" Mano-Y&M, Ltd. v.  
12 Field (In re Mortg. Store, Inc.), 773 F.3d 990, 998 (9th Cir.  
13 2014) (quoting Singleton v. Wulff, 428 U.S. 106, 120 (1976)).  
14 And a "litigant may waive an issue by failing to raise it in a  
15 bankruptcy court." Id. That said, we "have discretion to  
16 consider arguments raised for the first time on appeal, but do  
17 so only if there are 'exceptional circumstances.'" Id. (quoting  
18 El Paso City of Tex. v. Am. W. Airlines, Inc. (In re Am. W.  
19 Airlines), 217 F.3d 1161, 1165 (9th Cir. 2000)). Here, Debtor  
20 did not even raise the issue in his opening brief, but, instead,  
21 waited until oral argument. We decline to exercise discretion to  
22 consider this new theory first raised on appeal at oral  
23 argument.

24 **VI. CONCLUSION**

25 In accordance with the foregoing, the Panel finds that the  
26 Florida homestead exemption cannot be applied to a homestead  
27 located outside the state of Florida. Therefore, the bankruptcy  
28 court order is AFFIRMED.