

**NOT FOR PUBLICATION**

**UNITED STATES BANKRUPTCY APPELLATE  
PANEL FOR THE FIRST CIRCUIT**

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**BAP NO. RI 06-032**

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**Bankruptcy Case No. 05-12490-ANV**

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**THEODORE M. SACHARKO and JULIE SACHARKO,  
Debtors.**

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**THEODORE M. SACHARKO  
and JULIE SACHARKO,  
Appellants,**

**v.**

**LISA A. GEREMIA, Chapter 7 Trustee,  
Appellee.**

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**Appeal from the United States Bankruptcy Court  
for the District of Rhode Island  
(Hon. Arthur N. Votolato, U.S. Bankruptcy Judge)**

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**Before  
Lamoutte, Haines and Carlo,  
United States Bankruptcy Appellate Panel Judges.**

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**Alfred R. Rego, Jr., Esq., on brief for Appellant.**

**Steven J. Boyajian, Esq., on brief for Appellee.**

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**January 17, 2007**

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**Per Curiam.**

The issue before the panel is whether, under Rhode Island law, the debtor/appellant is entitled to a homestead exemption in property in which he does not reside nor intend to reside because his child lives there with his ex-wife. We conclude he is not and, therefore, AFFIRM the bankruptcy court's decision denying him the exemption.

**BACKGROUND**

Theodore and his current wife Julie Sacharko filed a petition under chapter 7 of the Bankruptcy Code on July 6, 2005. They claimed the Rhode Island homestead exemption with regard to real estate located at 34 Edgewater Road, Narragansett, Rhode Island. Theodore Sacharko ("Sacharko") owns a 40% interest in the property, but does not live there and has no intention of doing so. His ex-wife, who resides at the property with their daughter, owns a 60% interest in the property. Sacharko's 40% interest in the property is estimated to be worth \$84,000. According to their divorce decree, entered on April 15, 2004, Sacharko's interest in the property vests when his child is eighteen or upon her graduation from high school, whichever occurs later, but in no event later than the her 19<sup>th</sup> birthday. Sacharko's daughter will turn 19 on June 8, 2007.

The trustee objected to Sacharko's claim of exemption in the real estate, arguing that he does not qualify for the Rhode Island homestead exemption because he neither occupies the property nor intends to do so. The bankruptcy court agreed, issuing an order denying the claimed homestead exemption on July 10, 2006. This appeal ensued.

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## **JURISDICTION**

The Bankruptcy Appellate Panel may hear appeals from a final order of a bankruptcy judge, by virtue of 28 U.S.C. § 158(a)(1) and (c)(1). An order granting or denying a debtor's claimed exemptions is a final order. See Fiffy v. Nickless (In re Fiffy), 293 B.R. 550, 553 (B.A.P. 1st Cir. 2003); Howe v. Richardson (In re Howe), 232 B.R. 534, 535 (B.A.P. 1st Cir. 1999) (“Although other issues may remain for resolution in a case after the determination of the Debtor's claimed exemptions, orders granting or denying exemptions are appealable as final orders.”), aff'd, 193 F.3d 60 (1st Cir. 1999).

## **STANDARD OF REVIEW**

Appellate courts generally apply the “clearly erroneous” standard to findings of fact and *de novo* review to conclusions of law. See T I Fed. Credit Union v. DelBonis, 72 F.3d 921, 928 (1st Cir.1995); Western Auto Supply Co. v. Savage Arms, Inc. (In re Savage Indus., Inc.), 43 F.3d 714, 719-20 n. 8 (1st Cir.1994). A debtor's entitlement to a bankruptcy exemption most often involves a legal question and is reviewed *de novo*, except where facts are in dispute. See In re Howe, 232 B.R. at 535 (*de novo* review of bankruptcy court's order sustaining objections to debtor's exemptions where no factual issues were disputed on appeal).

The facts of this case are not in dispute. We will review the bankruptcy court's conclusions of law *de novo*. In re Morad, 323 B.R. 818, 822 (B.A.P. 1st Cir. 2005).

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## **DISCUSSION**

The Rhode Island Homestead Act provides that:

- (a) In addition to the property exempt from attachment as set forth in § 9-26-4, an estate of homestead...in the land and buildings may be acquired pursuant to this section by an owner or owners of a home or one or all who

rightfully possess the premise by lease or otherwise, and who occupy or intend to occupy the home as a principal residence...

(b) For the purposes of this section, “owner of a home” includes a sole owner, joint tenant, tenant by the entirety or tenant in common; provided, that only one owner may acquire an estate of homestead in the home for the benefit of his or her family; and provided further, that an estate of homestead may be acquired on only one principal residence for the benefit of a family. For the purposes of this section, “family” includes either a parent and child or children, a husband and wife and their children, if any, or a sole owner....

R.I. Gen. Laws § 9–26-4.1 (a) 2005.

Sacharko argues that the homestead exemption is intended to protect the debtor’s family and home from creditors, and that the “intent to occupy” element of the statute is fulfilled by his family’s (i.e., his daughter’s) use of the homestead at the time of his bankruptcy filing. He asserts that the court should apply the exemption in accordance with the legislative intent to benefit the family, and that the homestead exemption should be construed liberally in his favor. The trustee counters that the essential prerequisites to a homestead exemption in Rhode Island are ownership and occupancy, or, alternatively, ownership and an intent to occupy. According to the trustee, the occupancy of the property by Sacharko’s ex-wife and daughter does not satisfy the occupancy requirement of the homestead exemption unless it is accompanied by Sacharko’s own occupancy or intent to occupy; the inclusion of the “family” language in the second paragraph of the statute is to avoid any attempt to double the exemption, not to provide an independent basis for claiming the exemption.

The Rhode Island homestead statute was interpreted in In re Franklino, 329 B.R. 363 (Bankr. D.R.I. 2005), where the bankruptcy court concluded that the debtor’s assertion that he intended to move into the real estate at issue was not sufficient to meet the statutory “intent to

occupy”. Sacharko argues that the instant case is distinguishable because his daughter continues to reside at the property for which the exemption is sought. However, he also notes the Rhode Island bankruptcy court’s acknowledgment that it does not know of any case construing the issue of statutory “intent to occupy” in Rhode Island.

In support of his position, then, Sacharko looks to Massachusetts law and what he considers to be a similar homestead exemption provision. He cites In re Webber, 278 B.R. 294 (Bankr. D. Mass. 2002), where the court held that the occupancy requirement was satisfied by the occupancy of the premises by the debtor’s estranged wife and minor children, since the debtor had been ordered by the divorce court to abandon the property. Webber also held, though, that the requirement of occupancy or intent to occupy is only a limitation on the acquisition of an estate of homestead; once acquired, a Massachusetts homestead does not terminate when the owner ceases to satisfy the occupancy requirement. 278 B.R. at 298. Webber also stated that if the holder of a homestead estate is married, he cannot terminate the estate unilaterally; therefore, the requirement of continuing occupancy should be deemed satisfied as long as either the holder or the spouse continue to occupy the property, or intends to do so. Id. at 299. Finally, the Webber court held that, where the spouse of the owner of an estate in homestead is living apart from the owner for justifiable cause, or custody of the children is granted to a person other than the owner, the court may grant the spouse or children the right to use, occupy and enjoy the homestead; such order does not create or preserve an estate of homestead but specifies which persons shall enjoy the estate after divorce. Id. The court noted that “[t]his provision would make no sense unless the homestead estate continued in effect after the owner were indefinitely or permanently prohibited from reoccupying the premises as his or her principal residence.”

The Rhode Island bankruptcy court rejected Sacharko's reliance on Webber, noting that: "the two statutes (Rhode Island and Massachusetts) bear no similarity as to how homestead estates are created, how they are terminated, or as to occupancy requirements.<sup>1</sup> In addition, *Webber* is factually dissimilar from the instant case. To use *Webber* as precedent here would be more than a stretch - it would be a clear abuse of discretion." See "Order Denying Debtor's Homestead Exemption Claim", exhibit 3 to appellant's brief. Webber is legally distinguishable from the case before us.

We agree that Webber is also factually distinguishable from the case before us. In Webber, on the date of bankruptcy, the divorce decree was not final and had yet to be appealed. Moreover, the debtor intended to obtain custody of his children and return to the marital home. Much of the court's rationale is based upon the fact that debtor was still legally married at the time of the filing of the bankruptcy petition. In the case at bar, Sacharko was divorced from his first wife at the time the petition was filed, and does not intend to return to and reside at the property in which he claims a homestead exemption.

### **CONCLUSION**

Sacharko does not satisfy the occupancy requirement of the Rhode Island homestead exemption statute. Accordingly, the decision of the bankruptcy court, denying Sacharko his claimed homestead exemption, is AFFIRMED.

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<sup>1</sup> As the bankruptcy court noted, a homestead exemption is created in Massachusetts "only by a writing that must be recorded in the registry of deeds in the county or district where the property is located." M.G.L c. 188 § 2. A Massachusetts homestead may be terminated in any of three ways, all of which include a writing. By contrast, Rhode Island's homestead statute is self-executing: no writing or recording is required to create or terminate an exemption, which endures so long as all the necessary elements are present.