

**JAN 20 2006**

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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT**

**ORDERED PUBLISHED**

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT**

6	In re:	)	BAP No.	CC-05-1168-BKPa
		)		
7	OAKMORE RANCH MANAGEMENT,	)	Bk. No.	LA 94-16755-ER
		)		
8	Debtor.	)	Adv. No.	LA 96-01580-ER
		)		
9	_____	)		
		)		
10	MICHAEL J. WELTHER, III,	)		
		)		
11	Appellant,	)		
		)		
12	v.	)	<b>O P I N I O N</b>	
		)		
13	JAMES H. DONELL; DAVID SEROR,	)		
	Chapter 7 Trustee,	)		
14	Appellees.	)		
		)		
15	_____	)		

Argued and Submitted on November 17, 2005  
at Los Angeles, California

Filed - January 20, 2006

Appeal from the United States Bankruptcy Court  
for the Central District of California

Honorable Ernest M. Robles, Bankruptcy Judge, Presiding

Before: BRANDT, KLEIN and PAPPAS, Bankruptcy Judges.

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1 BRANDT, Bankruptcy Judge:

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3 After David Seror, the trustee in the chapter 7<sup>1</sup> bankruptcy of  
4 Oakmore Ranch Management, obtained a judgment against appellant Michael  
5 J. Welther, III, on behalf of the bankruptcy estate, he executed on  
6 funds owed to appellant by a third party. Because the promissory note  
7 evidencing the obligation was in his children's names, appellant  
8 contended he had no interest in the note, and thus it could not be  
9 levied upon; the bankruptcy court apparently found otherwise, and  
10 ordered the funds released to the trustee. This appeal ensued.

11 Appellant expressly waived any procedural error in the bankruptcy  
12 court, and did not provide an adequate record on appeal. But we AFFIRM  
13 because appellant has not shown that the bankruptcy court clearly erred  
14 in making the crucial factual finding which we discern in the incomplete  
15 record we do have.

16 We publish to highlight again - see In re Gertsch, 237 B.R. 160,  
17 169 (9th Cir. BAP 1999) - the difficulties created when necessary  
18 findings are contained in tentative rulings which are neither designated  
19 for the record on appeal nor included in the excerpts. The problem is  
20 here exacerbated by the fact that the tentative ruling is neither

21 \_\_\_\_\_  
22 <sup>1</sup> Absent contrary indication, all "Code," chapter and section  
23 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 prior to  
24 its amendment by the Bankruptcy Abuse Prevention and Consumer  
25 Protection Act of 2005, Pub. L. 119-8, 119 Stat. 23, as the case from  
26 which the adversary proceeding and these appeals arise was filed  
27 before its effective date (generally 17 October 2005).

28 All "Rule" references are to the Federal Rules of Bankruptcy  
Procedure, and all "FRCP" references are to the Federal Rules of Civil  
Procedure.

All "CCP" references are to the California Code of Civil  
Procedure.

1 docketed nor oral and thus available via transcript. But for the unique  
2 simplicity of this appeal, we (and any appellate court) would have no  
3 choice but to remand for findings or affirm because error cannot be  
4 shown from the record. The former would inflict considerable costs on  
5 all concerned, and the latter would be of no benefit to appellant.

6  
7 **I. FACTS**

8 The trustee obtained a \$2.1 million judgment on behalf of the  
9 Oakmore Ranch Management bankruptcy estate against Welther on 31 March  
10 1997. In 2004, while attempting to execute on the judgment, the trustee  
11 discovered Lillian Russell owed a debt to Welther. The debt was  
12 evidenced by a promissory note naming Welther's three minor children as  
13 payees, signed by Ms. Russell on 14 May 1999 for \$111,000. Exhibit A to  
14 Opposition to Release Funds . . . ("Note").

15 The trustee served a writ of execution on Ms. Russell in June 2004,  
16 providing a copy to Welther's counsel. Thereafter Ms. Russell and the  
17 trustee reached an agreement whereby Ms. Russell would make payments on  
18 the \$87,650 balance of the Note directly to the trustee. Previously she  
19 had paid by offset against condominium rent owed to her by Welther. Ms.  
20 Russell's attorney sent a letter outlining this agreement to Welther's  
21 counsel on 27 August 2004.

22 Ms. Russell made payments under the agreement until December 2004,  
23 when she informed the trustee that Welther was asserting that the funds  
24 were owed to his children. She paid the remaining balance of \$47,650 to  
25 the trustee in trust, pending a court order authorizing disposition of  
26 the funds.

27 On 11 February 2005 the trustee wrote Welther's counsel requesting  
28 that Welther stipulate to release of the funds; neither Welther nor his

1 counsel responded. Shortly thereafter, the trustee moved for release of  
2 the funds. His motion erroneously alleged that the debt was evidenced  
3 by a promissory note dated 10 July 1991 for \$110,000 in favor of  
4 Welther. Welther's response pointed out the error, which the trustee  
5 later conceded, and Welther, as proposed guardian ad litem for his  
6 children, opposed the motion, asserting that he had no interest in the  
7 Note. Welther asserted that the loan that gave rise to the note was  
8 funded with money from his children's trust fund, which was why the  
9 children were the payees. In reply, the trustee argued that,  
10 notwithstanding that the children were the named payees, the funds  
11 actually came from Welther and the beneficial interest in the Note was  
12 his.

13 The bankruptcy court promulgated a tentative ruling, apparently  
14 agreeing with the trustee's position, and entered an order authorizing  
15 release of the funds to the trustee. Welther timely appealed.  
16

## 17 **II. JURISDICTION**

18 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334 and  
19 § 157(b)(1) and (B)(2)(A) and (O), and we do under 28 U.S.C. § 158(c).  
20

## 21 **III. ISSUES<sup>2</sup>**

22 A. Whether we should dismiss or affirm for Welther's failure to  
23 provide an adequate record; and

24 B. Whether the bankruptcy court clearly erred in concluding that  
25 Welther owned the beneficial interest in the Note.  
26

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27  
28 <sup>2</sup> The order also granted Welther's request to be appointed as  
guardian ad litem; that aspect of the order was not appealed.

1 **IV. STANDARDS OF REVIEW**

2 We review the bankruptcy court's findings of fact for clear error.  
3 Rule 8013. A factual finding is clearly erroneous if the appellate  
4 court, after reviewing the record, has a firm and definite conviction  
5 that a mistake has been committed. Anderson v. Bessemer City, 470 U.S.  
6 564, 573 (1985). If two views of the evidence are possible, the trial  
7 judge's choice between them cannot be clearly erroneous. Id. at 574.  
8

9 **V. DISCUSSION**

10 **A. Record on Appeal**

11 Rule 8009(b) (5) requires that an appellant designate and provide a  
12 record that includes "the opinion, findings of fact, and conclusions of  
13 law filed or delivered orally . . . ." See also Rule 8006. Welther  
14 included a copy of the hearing transcript in the excerpts of record;  
15 that transcript suggests the court's findings were in its tentative  
16 ruling and counsel so indicated at argument. Welther did not provide  
17 that ruling in his excerpts. He bears the burden of presenting a  
18 complete record, In re Kritt, 190 B.R. 382, 387 (9th Cir. BAP 1995), and  
19 we need not look beyond the excerpts provided. In re Kyle, 317 B.R.  
20 390, 394 (9th Cir. BAP 2004).

21 If a tentative decision is necessary to understanding the court's  
22 ruling, it must be included in the designation and the excerpts of the  
23 record. Gertsch, 237 B.R. at 169. Moreover, this appeal arises from a  
24 contested matter, and: "the court shall find the facts specially and  
25 state separately its conclusions of law thereon . . . ." FRCP 52(a),  
26 applicable via Rules 7052 and 9014.

27 We may remand when the absence of findings of fact and conclusions  
28 of law hinder our review. In re Pham, 250 B.R. 93, 99 (9th Cir. BAP

1 2000) (citing In re Hotel Hollywood, 95 B.R. 130, 133-34 (9th Cir. BAP  
2 1988)). Or we could take judicial notice of the tentative ruling, which  
3 presumably explicates the court's findings, if it were in the docket, In  
4 re E.R. Fegert, Inc., 887 F.2d 955, 957-58 (9th Cir. 1989), but it is  
5 not.

6 Further, as we said in Kyle, 317 B.R. at 393:

7 The settled rule on appellate records in general is that  
8 failure to provide a sufficient record to support informed  
9 review of trial-court determinations may, but need not, lead  
either to dismissal of the appeal or to affirmance for  
inability to demonstrate error.

10 . . . .

11 Moreover, the Ninth Circuit applies an abuse of  
12 discretion standard of review to bankruptcy appellate panel  
13 and district court decisions to affirm bankruptcy court orders  
14 summarily for noncompliance with nonjurisdictional procedural  
15 requirements. It views such summary dispositions as tantamount  
to sanctions. This implies not only that we have discretion,  
but also that we should first consider whether informed review  
is possible in light of what record has been provided.

16 (citations omitted).

17 Where the tentative ruling contains findings on which the court's  
18 decision depends, and the court has neither made that ruling in written  
19 and docketed form nor orally on the record, prudent counsel will request  
20 that the court do one of those things, and then include the document or  
21 transcript in the record on appeal. This is not of concern solely to  
22 the disappointed party who may wish to appeal - if remand is necessary,  
23 the attendant costs and delay will be visited on all, and judicial  
24 economy will suffer.

25 In this instance, we can glean from the record sufficient  
26 indication of the crucial finding to permit review:

27 [Welther's counsel]: And I understand the basis of granting  
28 the motion is because there's no competent evidence showing  
there was an interest in the - or that the children had an

1 interest in the trust or anything like that -

2 The Court: Right.

3 Counsel: - or the source of the funds in such a trust.

4 The Court: Yes.

5 Transcript, 5 April 2005, at 1-2. We construe this passage to indicate  
6 that the bankruptcy court found that the children had no interest in the  
7 note and, as the only alternative prospect was Welther, that the  
8 beneficial interest was his.

9  
10 **B. Merits**

11 Welther contends that the children hold legal title to the Note as  
12 it is in their names, and that the trustee did not meet his burden of  
13 coming forward with clear and convincing evidence that they do not also  
14 hold beneficial title. He cites to Cal. Evid. Code § 662, which  
15 provides: "The owner of the legal title to property is presumed to be  
16 the owner of the full beneficial title. This presumption may be  
17 rebutted only by clear and convincing proof." Welther further argues,  
18 without citation, that the source of the funds for the loan underlying  
19 the note is irrelevant.

20 The trustee points out that the clear and convincing standard  
21 applies only where there is no challenge to legal title, citing Murray  
22 v. Murray, 26 Cal. App. 4th 1062, 1068, 31 Cal. Rptr. 2d 855, 858 (1994)  
23 (clear and convincing standard "applies when valid legal title is  
24 undisputed and the controversy involves only beneficial title").

25 We begin with the presumption that the payee and holder of a note  
26 is its owner. Dysert v. Weaver, 46 Cal. App. 576, 577-78, 189 P. 492  
27 (1920); Cal. Evid. Code § 637. The trustee argues that he has  
28 challenged legal title throughout, and nothing in the record indicates

1 who holds the note. Alternatively, the trustee argues that he met his  
2 burden even under the clear and convincing standard.

3 The trustee never explicitly challenged legal title in the  
4 bankruptcy court, but he did submit evidence to rebut the presumption  
5 that the beneficial interest in the Note belongs to the children. He  
6 asserted in the bankruptcy court that Welther's denial of an interest in  
7 the note was not credible because Welther knew Ms. Russell had been  
8 making payments to the trustee for nearly six months before he objected,  
9 the children could not have funded the loan to Ms. Russell in 1999, and  
10 Welther had established a pattern of fraudulently hiding assets.

11 In support, the trustee provided the Declaration of Henley L.  
12 Saltzburg, attaching:

13 1. State court complaint in which Welther alleges that funds for  
14 the loan represented by the Note were procured "primarily from his  
15 Retirement Account and his children's Social Security monies" (emphasis  
16 in original);

17 2. Interpleader complaint arising out of a "scam" whereby Welther  
18 allegedly loaned funds to Ms. Russell's sister but made Welther's sister  
19 Barbara payee on the note. Barbara interpleaded the funds received as  
20 payment on that note, requesting a determination of the ownership and  
21 application of the funds. Judgment was entered against Welther in that  
22 proceeding; and

23 3. Excerpts from Welther's 13 July 2004 deposition wherein he  
24 states that his children each receive Social Security of \$800-\$900 per  
25 month. The trustee argues that, as the children were aged two and five  
26 at the time of the 1999 loan, they could not have amassed enough funds  
27 to have funded the loan, in addition to another investment of \$140,000  
28 about which Welther testified in his deposition.

1 Salzburg's declaration also indicates that he asked Welther for  
2 documents to substantiate the loan, but no records were ever produced.

3 Welther filed a declaration stating that in 1999 Ms. Russell  
4 borrowed \$110,000 from his children, and that the monies came from the  
5 "minor children's account." In support, he attached excerpts from Ms.  
6 Russell's deposition testimony in the state court interpleader action,  
7 in which she testified that the funds came from Welther's "kids trust,"  
8 and that she agreed to pay back the funds to "the kids." Welther  
9 Declaration, Exhibit B, pages 34-35.

10 The bankruptcy court concluded that there was insufficient evidence  
11 that the children had an interest in the Note, and correctly gave little  
12 weight to Ms. Russell's deposition testimony, because there is no  
13 indication in her statements regarding the basis of her knowledge about  
14 the source of funds for the loan.

15 Under California law, virtually any admissible evidence that the  
16 holder of the note is not the owner is sufficient to rebut the  
17 presumption. See Rancho Santa Fe Pharmacy, Inc. v. Seyfert, 219 Cal.  
18 App. 3d 875, 882, 268 Cal. Rptr. 505, 508-09 (1990) ("[W]hen the party  
19 against whom . . . a presumption [affecting the burden of production]  
20 operates produces some quantum of evidence casting doubt on the truth of  
21 the presumed fact, the other party is no longer aided by the  
22 presumption."). With respect to the presumption that the holder of  
23 legal title is also the beneficial owner (a presumption affecting the  
24 burden of proof), the quantum of proof is higher. Id. The trustee  
25 prevails under either standard.

26 Because of the trustee's initial error in identifying the correct  
27 promissory note, arguably Welther had no chance to rebut the allegation  
28 that he held the beneficial interest - the trustee's arguments appeared

1 for the first time in his reply brief. At the bankruptcy court hearing,  
2 counsel asked for additional time to produce more documentation, which  
3 the bankruptcy court refused. But Welther never requested an  
4 evidentiary hearing and, at oral argument on appeal his counsel, in  
5 response to our query, expressly waived any procedural defects which may  
6 have occurred in the bankruptcy court. In view of this waiver, we need  
7 not and do not address possible procedural issues such as the necessity  
8 for an evidentiary hearing, Rule 9014(d), or an adversary proceeding,  
9 Rule 7001, or whether the procedural requirements of California law were  
10 satisfied.

11 As there was evidence to support the finding that Welther held the  
12 beneficial interest in the note, it was not clearly erroneous, and we  
13 will affirm.

14  
15 **VI. CONCLUSION**

16 Welther's escape from remand for findings or affirmance for failing  
17 to provide an adequate record on appeal is to no avail: he has not  
18 shown clear error in the bankruptcy court's finding that he, rather than  
19 his children, held the beneficial interest in the Note. Accordingly, we  
20 AFFIRM.