NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP Nos. NV-08-1049-JuKuK
	NV-08-1052-JuKuK
ROBERT K. SHAWHAN,	(related appeals)
Debtor.	Bk. No. 04-10196
ROBERT K. SHAWHAN,	
Appellant,	
v.	**M E M O R A N D U M**[1]
DONNA KNOLL SHAWHAN; RICK A. YARNALL, Chapter 13 Trustee; DAVID L. TANNER; WASHINGTON MUTUAL HOME LOAN; WASHINGTON MUTUAL BANK; BARBARA LAUREEN TAVES,	
Appellees.	

Argued and Submitted on June 18, 2008
at Seattle, Washington

Filed - July 7, 2008

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

Honorable Mike K. Nakagawa, Bankruptcy Judge, Presiding

Before: JURY, KURTZ,[2] and KLEIN, Bankruptcy Judges.

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[1] 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 8013-1.

[2] Frank L. Kurtz, Chief Bankruptcy Judge for the Eastern District of Washington, sitting by designation.

In these related appeals, appellant-debtor Robert K. Shawhan appeals pro se[3] the bankruptcy court's orders (1) granting appellee Linda Knoll Shawhan ("Knoll"), debtor's former wife, relief from the automatic stay provisions of § 362(a) and (2) denying debtor's Motion to Avoid Lien and Fraudulent Transfer to Inside Creditor (the "Avoidance Motion").[4]

Both orders relate to the marital residence which was awarded to Knoll as her sole and separate property pursuant to a stipulated property settlement agreement between Knoll and debtor during their divorce proceeding. In return, Knoll gave debtor a lifetime leasehold interest in the residence as long as he paid the mortgages on the property and met other conditions. The property settlement agreement was incorporated into a divorce decree that became final prior to debtor's bankruptcy filing.

Debtor defaulted on payments concerning the property prior to, and after, filing his chapter 13 petition. Knoll thus sought relief from stay to enforce the terms of the divorce decree and evict debtor from the property. Debtor opposed Knoll's motion on the grounds that he made all payments

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[3] Because of debtor's pro se status, we liberally construe his pleadings. Kashani v. Fulton (In re Kashani), 190 B.R. 875, 883 (9th Cir. BAP 1995).

[4] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated prior to the effective date of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23, because the case from which this appeal arises was filed before its effective date (generally October 17, 2005).

concerning the property and that the divorce decree was void for various reasons and should be set aside. Thereafter, the bankruptcy court approved the parties' stipulated conditional relief from stay order so that the family court could resolve issues relating to the validity of the divorce decree, title to and ownership of the residence and Knoll's request to evict debtor from the property.

Finding debtor in default of the property settlement agreement, the family court entered a judgment and order that required debtor to vacate the residence. In a separate order, the family court denied debtor's motion to set aside the divorce decree as void. With the family court's judgments in hand, Knoll renewed her request in the bankruptcy court for relief from stay to proceed with debtor's eviction, which the bankruptcy court granted.

After losing in the family court, debtor filed his Avoidance Motion seeking, among other relief, to avoid the transfer of his interest in the marital residence to Knoll in the divorce proceeding under various Code sections. The bankruptcy court denied his motion.

Based upon our review of the record, and construing debtor's pro se briefs liberally, we conclude the bankruptcy court did not abuse its discretion in granting Knoll's relief from stay motion nor did it err in denying debtor's Avoidance Motion.

Accordingly, we AFFIRM.

I. FACTS

Debtor and Knoll ended their marriage by divorce by 2003.

The divorce proceeding took place in the District Court[5] for Douglas County, Nevada, Case No. 02-DI-0118.

Prior to trial, the couple entered into a stipulated property settlement agreement which addressed the division of community assets. They agreed that the marital residence located at 2900 Justice Lane, Las Vegas, Nevada, would be awarded to Knoll as her sole and separate property, in partial satisfaction of a note debtor had executed in her favor in the amount of $105,000. In turn, Knoll gave debtor a lifetime leasehold in the residence, conditioned upon his payment of the mortgage, lines of credit, real property taxes, homeowners' association ("HOA") fees, and maintenance expenses in a timely manner. The parties further agreed that the lease would terminate if debtor did not personally occupy the residence for thirty days or defaulted on payments, or caused a lien against the property and did not cure within a fifteen-day period.

At the hearing, the family court asked debtor whether he had heard and understood the terms of the agreement, whether he believed it was a fair and equitable resolution of all issues, and whether he agreed to be bound. Debtor answered "yes" to all three questions.

The family court entered its Findings of Fact, Conclusions of Law and Decree of Divorce, which incorporated the property settlement agreement, on June 10, 2003.

Thereafter, despite Knoll's demands, debtor refused to convey the residence to her in compliance with the divorce decree.

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[5] Hereinafter the District Court for Douglas County, Nevada is referred to as the family court.

A. Debtor's Defaults Under the Divorce Decree and Subsequent Bankruptcy Filing

Debtor continued to reside in the residence after Knoll and the couple's minor son left in 1999.

Debtor failed to pay the HOA fees and became involved in litigation with the HOA as a result. Eventually, the HOA filed a Notice of Default and Election to Sell and gave notice for the sale of the property to occur on January 12, 2004.[6] When Knoll learned of the default, she commenced litigation against the HOA to enjoin the foreclosure and reduce the amount it claimed due. She cured debtor's default on January 9, 2004.

On January 8, 2004, four days before the scheduled foreclosure sale of the property, debtor filed his voluntary chapter 13 petition. Debtor listed the residence as his property, claiming a homestead exemption in it in Schedule C. Debtor did not provide notice of his filing to Knoll or her divorce attorney, nor did debtor list Knoll in his schedules. Accordingly, Knoll did not have notice of the § 341(a) meeting of creditors.

On January 28, 2004, debtor filed an amendment to his petition, the balance of his bankruptcy documents, and a proposed plan. Debtor's certificate of mailing lists a "Donna Shawhan, Esq.", but no mailing address for her was included. Knoll thus did not receive a copy of debtor's proposed plan. The bankruptcy court confirmed debtor's initial plan on October

[6] Debtor evidently did not disclose the litigation or his obligation to the HOA during the divorce proceedings.

20, 2004.[7]

Without notice of debtor's bankruptcy filing, Knoll filed a motion in the family court on February 13, 2004 seeking to hold debtor in contempt and have the family court execute a deed conveying debtor's interest in the property to her.[8] Although debtor received notice of Knoll's motion, he did not respond. Accordingly, the family court filed an Order to Execute Documents on April 2, 2004. Pursuant to this order, the Clerk of the family court executed a Clerk's Deed conveying the residence to Knoll on April 1, 2004.[9]

On July 17, 2006, Washington Mutual Bank ("WaMu"), the holder of the first trust deed on the property, filed a motion

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[7] Debtor filed a modified plan on September 7, 2006 which the bankruptcy court approved by order entered on March 9, 2007.

[8] Knoll maintains that it was not until debtor amended his schedules and mailing matrix to add Knoll as a creditor in January 18, 2007 that she learned about his bankruptcy. Debtor amended his schedules to add the $105,000 debt he owed to Knoll by virtue of the note he had executed in her favor. This was the same note involved in the divorce proceedings when debtor agreed with Knoll that she receive his one-half interest in the residence in partial satisfaction of the note.

[9] We observe, as did the bankruptcy court, that at the time the Order to Execute Documents was entered and the Clerk's Deed was recorded, the automatic stay was in effect. Thus, both the Order to Execute Documents and the Clerk's Deed are void in the absence of an order annulling the stay. Schwartz v. United States (In re Schwartz), 954 F.2d 569, 572-73 (9th Cir. 1992). The bankruptcy court is authorized to annul the stay in an manner that would retroactively validate the Clerk's Deed. See 11 U.S.C. § 362(d); Schwartz, 954 F.2d at 573. The record does not reflect that Knoll has ever requested retroactive relief from stay. Nor does the docket in Bankruptcy Case No. 04-10196, of which we take judicial notice. Atwood v. Chase Manhattan Mortgage Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

for relief from stay which resulted in an adequate protection order entered on September 12, 2006. Debtor failed to comply with the adequate protection order. The bankruptcy court entered an ex parte order terminating the stay in favor of WaMu on November 9, 2006. As a result, Knoll paid the outstanding balance to WaMu on February 21, 2007 to avoid losing the property.

In January 2007, debtor made a tenant complaint to the Southern Nevada Health District, stating that Knoll as owner of the residence was not providing him, as the tenant, with a habitable dwelling unit. An agent of the Health District completed a Report and Notice of Inspection on January 26, 2007, and sent a letter to Knoll informing her of the essential services a landlord must provide a tenant and outlining her duties to comply with Nevada law.

On February 6, 2007, the second trust deed holder on the residence, Bank of America, filed a Notice of Default and Election to Sell Under Deed of Trust for failure to pay monthly installments that became due on September 26, 2006.[10]

B. Knoll's Motion for Relief From Stay

On March 15, 2007, Knoll filed her stay relief motion in the bankruptcy court to commence eviction proceedings against debtor. She contended that debtor breached the lease provisions set forth in the divorce decree and maintained that the residence was not an asset of debtor's estate.

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[10] The docket does not show that Bank of America filed a motion for relief from stay in debtor's case. In that event, Bank of America's filing of the Notice of Default and Election to Sell Under Deed of Trust is an apparent violation of the automatic stay.

Debtor opposed Knoll's motion on the grounds that he had made all mortgage payments since February 2004 and that the divorce decree should be set aside. In his set aside motion directed to the family court, debtor contended that the divorce decree was void for multiple reasons, including, but not limited to, Knoll's fraud regarding her wealth, that the residence was debtor's sole and separate property and the division of property was inequitable.[11]

1. The Conditional Relief From Stay Order

Pursuant to the parties' stipulation, the bankruptcy court conditionally granted Knoll's request for relief from stay by order entered on April 25, 2007.[12] The stay was lifted to allow the divorce proceedings to go forward in the family court on all matters related to Case No. 02-DI-0118, including, but not limited to, Knoll's Motion for an Order to Vacate the Residence and Debtor's Motion to Set Aside the Divorce Decree. The bankruptcy court continued Knoll's stay relief motion for a final hearing.

Knoll filed a renewed Motion for an Order to Vacate the Residence in the family court. On May 21, 2007, the family court signed a Judgment and Order to Vacate Residence, finding debtor had violated the provisions of the divorce decree by failing to pay the HOA fees, the first trust deed payments to

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[11] Debtor's motion to set aside the divorce decree also sought alimony, title to a vehicle, child custody and child support.

[12] Debtor filed an objection to the order pro se, claiming the order was not what he had approved. The bankruptcy court noted, however, that debtor's counsel, who approved the order, remained counsel of record in the case.

WaMu and the second trust deed payments to Bank of America. The order gave debtor fifteen days to vacate the residence and pay Knoll $26,074.17, which represented $8,348.99 for Knoll's cure of the January 2004 HOA foreclosure and $17,725.18 for her cure of the WaMu foreclosure and May and April, 2007 monthly payments.

The family court denied debtor's Motion to Set Aside Divorce Decree by order entered on May 21, 2007, reaffirming that the residence was Knoll's sole and separate property. The family court further found that Knoll had committed no plan or scheme designed to improperly influence the court in its entry of the divorce decree and that there was no evidentiary support for debtor's motion.

On May 29, 2007, the family court entered an Amended Judgment and Order to Vacate Residence, which resolved debtor's Counterclaim for Set Off and Motion to Set Aside Portions of the Divorce Decree Entered Due to Fraud upon the Court by an Attorney filed in response to Knoll's renewed Motion for an Order to Vacate Residence. (Hereinafter, the family court's orders collectively are referred to as the "May Orders").

Debtor did not appeal any of the May Orders.

2. The Final Hearing

Knoll filed supplemental points and authorities in support of her stay relief motion on June 4, 2007. She renewed her request to the bankruptcy court for an order acknowledging that the residence was not an asset of debtor's estate and granting relief from stay so that she could move ahead with debtor's eviction from the residence in accordance with the

family court's orders.

The final hearing on Knoll's motion for relief from stay occurred on July 9, 2007. The court took the matter under submission.

On January 31, 2008, the court filed its Memorandum Decision granting Knoll's motion for relief from stay under §§ 362(d)(1) and (2) and permitting Knoll to proceed in family court to enforce the divorce decree and the May Orders. The order granting Knoll's motion was entered on the same date.

Debtor moved for a stay of the order pending appeal. The bankruptcy court denied debtor's request by order entered on March 14, 2008. Subsequently, this Panel denied debtor's request for a stay pending appeal on April 14, 2008.

C. Debtor's Avoidance Motion

Having lost in the family court, two days after Knoll filed her supplemental points and authorities in connection with the final hearing on her stay relief request, debtor filed his Avoidance Motion on June 6, 2007.

Debtor sought to avoid the transfer of the residence in the divorce decree under various Code sections including §§ 522, 542, 547(b)(4)(B) and Rule 4003(d). He also alleged that Knoll had not disclosed assets in the divorce proceedings and maintained that he never had his "day in court" regarding his claim to the home.

The court heard debtor's Avoidance Motion on July 9, 2007, the same day it conducted the final hearing on Knoll's motion for relief from stay. The court took the matter under submission.

The court filed its Memorandum Decision on January 31, 2008, denying debtor's Avoidance Motion and entered the related order on the same date.

Debtor timely appealed the bankruptcy court's order granting Knoll relief from stay and its order denying his Avoidance Motion.

II. JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 1334 over this core proceeding under § 157(b)(2)(A), (F), (G) and (H). We have jurisdiction under 28 U.S.C. § 158.

III. ISSUES

A. Whether the bankruptcy court abused its discretion in applying the doctrine of issue preclusion to bar debtor from litigating whether the divorce decree was void in the bankruptcy court when that issue was previously litigated and resolved in the family court.

B. Whether the bankruptcy court abused its discretion in granting Knoll relief from the automatic stay.

C. Whether the bankruptcy court erred in its finding that debtor's avoidance actions were barred by the statute of limitations in § 546(a).

IV. STANDARDS OF REVIEW

The availability of issue preclusion is reviewed de novo. Jung Sup Lee v. Tcast Commc'ns (In re Lee), 335 B.R. 130, 135 (9th Cir. BAP 2005). If issue preclusion is available, the decision to apply it is reviewed for abuse of discretion. Lopez v. Emergency Serv. Restoration, Inc. (In re Lopez), 367 B.R. 99, 103 (9th Cir. BAP 2007).

The bankruptcy court's decision to grant or deny relief from the automatic stay is reviewed for an abuse of discretion. Benedor Corp. v. Conejo Enters., Inc. (In re Conejo Enters., Inc.), 96 F.3d 346, 351 (1996); First Fed. Bank of Cal. v. Robbins (In re Robbins), 310 B.R. 626, 629 (9th Cir. BAP 2004).

The bankruptcy court's conclusions of law are reviewed de novo, and its findings of fact are reviewed for clear error. Price v. U.S. Tr. (In re Price), 353 F.3d 1135, 1138 (9th Cir. 2004).

The bankruptcy court's interpretation of a divorce decree is a question of law we review de novo. Lowenschuss v. Selnick (In re Lowenschuss), 170 F.3d 923, 929 (9th Cir. 1999).

V. DISCUSSION

At the heart of these appeals is debtor's attempt to litigate issues pertaining to the marital residence that were already litigated in the family court. After stipulating to conditional relief from stay, which the bankruptcy court approved, debtor unsuccessfully defended Knoll's Motion for an Order to Vacate the Residence and unsuccessfully presented his Motion to Set Aside the Divorce Decree in the family court. Having lost in family court, debtor filed his Avoidance Motion in the bankruptcy court, which essentially sought to restore ownership of the marital residence to himself, and not for the benefit of his estate or his creditors.

Debtor's arguments here and in the trial court below all equate to variations of his main theme that the divorce decree was void ab initio and his theory that the decree remains null from the beginning into infinity even though debtor never

appealed any of the family court's rulings. It appears that debtor is asking this Panel to find that the bankruptcy court abused its discretion in applying the doctrine of issue preclusion to bar debtor from litigating in the bankruptcy court whether the divorce decree was void.

A. Issue Preclusion

The preclusive effect, if any, of the family court's rulings derives from principles of res judicata, which generally apply in bankruptcy proceedings. Katchen v. Landy, 382 U.S. 323, 334 (1966). The generic term of res judicata encompasses two doctrines: claim preclusion and issue preclusion. Paine v. Griffin (In re Paine), 283 B.R. 33, 38-39 (9th Cir. BAP 2002). Issue preclusion has more applicability here because debtor raised in the bankruptcy court common issues of fact and law regarding the validity of the divorce decree and the division of community property that were already litigated and resolved in the family court.

When determining the preclusive effect of a state court judgment, we must apply as a matter of full faith and credit the state's law of issue preclusion. Lee, 335 B.R. at 136; See also 28 U.S.C. § 1738.[13] Under Nevada law, "[t]he general rule of issue preclusion is that if an issue of fact or law was actually litigated and determined by a valid and final judgment, the determination is conclusive in a subsequent action between the

[13] The Full Faith and Credit Act provides that state court decisions "shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." 28 U.S.C. § 1738.

parties." Executive Mgt., Ltd. v. Ticor Title Ins. Co., 114 Nev. 823, 835, 963 P.2d 465, 473-74 (1998). Application of the issue preclusion doctrine is appropriate when the following elements are met: (1) the issue decided in the prior litigation is identical to the issues presented in the current action; (2) the initial ruling was on the merits and became final; and (3) the parties against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation. LaForge v. State, Univ. and Comty. College Sys. of Nev., 116 Nev. 415, 419, 997 P.2d 130, 133 (2000). Issue preclusion may apply even though the causes of action are substantially different, if the same fact issue is presented. Id.

A review of the record shows that the issue raised in the bankruptcy court — whether the divorce decree was void[14] — was identical to the issue raised in the family court. Specifically, debtor argued in opposition to Knoll's stay relief motion that the divorce decree was void for various reasons. He also argued in his Avoidance Motion that the divorce decree was

[14] Subsumed within this issue is whether the residence was debtor's sole and separate property, whether the division of the marital property was unequal, and whether Knoll committed fraud in the divorce proceeding by failing to disclose all her assets. At oral argument, debtor's counsel emphasized that the inequality of the division of marital property made the divorce decree void ab initio. This argument was based upon NEV. REV. STAT. § 125.155 which provides that the [family] court "[s]hall, to the extent practical, make an equal disposition of the community property of the parties . . . ." Neither debtor's briefs nor his counsel at oral argument provided case law which supported their broad assertion that a divorce decree is rendered void an initio because the property was divided unequally, nor could we find any. Besides the lack of case law, that debtor stipulated to the allegedly unequal property division further weakens his argument.

void. After the bankruptcy court granted the parties conditional relief from stay, debtor argued that the divorce decree was void in the family court. Debtor used the same facts and essentially the same arguments to support his defenses and motions in both the family court and the bankruptcy court. We thus conclude the first element for issue preclusion is met.

Next, the family court decided the issue on the merits when it denied debtor's Motion to Set Aside Divorce Decree for lack of "evidentiary support" and granted Knoll's Motion for an Order to Vacate the Residence. The family court's May Orders are final and debtor did not appeal. Accordingly, the second element for issue preclusion is met.

The third element is met because the matters involve the same parties.

Even though the elements for issue preclusion are met, a court has discretion whether to apply the doctrine. Lopez, 367 B.R. at 107. Equitable circumstances may justify not applying the doctrine. Such circumstances may occur when there is a change in applicable legal context, to avoid the inequitable administration of laws,[15] when there are differences in the

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[15] The Restatement (Second) Judgments § 28 (1982) explains:

> [I]n determining whether the applicable legal context has changed, or that applying preclusion would result in inequitable administration of the law it is important to recognize that two concepts of equality are in competition with each other. One is the concept that the outcomes of similar legal disputes between the same parties at different points in time should not be disparate. The other is that the outcomes of similar legal disputes being contemporaneously determined between different parties should be resolved according

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quality or extensiveness of procedures, or when there is an inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action. Id. Federal courts espouse a preference to not preclude the use of offensive collateral estoppel, but grant the trial courts broad discretion in determining when it should be applied. Id. Therefore, we review the bankruptcy court's application of issue preclusion for abuse of direction.

Debtor contends that he never had his day in court to litigate the issues regarding the division of the marital property. He further maintains that even though he did not appeal the divorce decree or the family court's May Orders, the division of the marital property is still illegal and unfair.

Our review of the record, however, shows that debtor had the full opportunity to litigate whether the divorce decree was void when the parties returned to the family court to present their respective motions after the bankruptcy court conditionally lifted the stay. Moreover, while debtor may now perceive the division of the martial property as unequal and unfair, he initially acknowledged in the family court that he heard and understood the terms of the agreement, he believed it was a fair and equitable resolution of all issues and he agreed to be bound. He also was represented by counsel, though debtor now complains it was Knoll's mother who paid for his attorney.

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[15](...continued)
to the same legal standards. Applying issue preclusion invokes the first of these concepts, treating temporally separated controversies the same way at the expense of applying different legal standards to persons similarly situated at the time of the second litigation.

Nonetheless, under these circumstances, debtor's perception of injustice simply does not rise to the level of an exception to the issue preclusion doctrine.

Lastly, to the extent debtor contends the family court's decision to deny his Motion to Set Aside Divorce Decree as void was erroneous, debtor could have attempted to have the errors corrected on appeal. This he did not do. His failure to appeal does not affect the bankruptcy court's obligation to give full faith and credit to the family court's ruling.

In sum, because the issue of whether the divorce decree was void was litigated and determined by valid and final orders, the family court's determinations on that and related issues were conclusive in debtor's bankruptcy proceeding. Debtor already had his day in the family court and could not begin anew with these issues in the bankruptcy court. We thus conclude the bankruptcy court properly applied the doctrine of issue preclusion in both matters which debtor now appeals.

B. Motion for Relief from Stay

Debtor's brief and reply brief largely fail to present and meet the real issues involved in his appeal of the bankruptcy court's order granting Knoll relief from stay. His focus instead is on the same arguments[16] he made in the family court.

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[16] Specifically debtor argues that under Nevada law, it is Knoll's duty to maintain the dwelling in a habitable condition, not his, because the divorce decree is "void and illegal." Thus, he concludes that he has an absolute right not to pay rent until Knoll makes the necessary repairs to make the home habitable. Next, debtor maintains that the divorce decree is void ab initio, that he has never had his day in court to litigate the division of property and asserts that even though "the divorce decree was not [appealed, it] does not make this division of community

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Because issue preclusion prohibits debtor from relitigating most of the issues he raises, we turn to the sole issue: whether the bankruptcy court abused its discretion in granting Knoll relief from stay to proceed with debtor's eviction.

Section 362(a) provides that the filing of a bankruptcy petition automatically operates as a stay against the commencement of an action or proceeding against the debtor and acts to obtain possession of property of the estate. See § 362(a)(1), (3). Congress, however, has granted broad discretion to bankruptcy courts to lift the automatic stay if cause exists or if the debtor does not have equity in the property and the property is not needed for reorganization. See § 362(d)(1) and (2). A proper showing under either § 362(d)(1) or (2) is sufficient to afford relief from the automatic stay.

1. Section 362(d)(1): Cause Existed to Lift the Stay

Section 362(d)(1) provides that the court "shall" grant relief from the automatic stay "for cause, including the lack of adequate protection of an interest in property of such party in interest." See § 362(d)(1). Because the Code provides no definition of what constitutes cause, the courts must determine when discretionary relief is appropriate on a case-by-case basis. Conejo Enters., Inc., 96 F.3d at 352 (9th Cir. 1996).

Applying § 362(d)(1), the bankruptcy court found the requisite cause existed. First, pursuant to the divorce decree

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[16](...continued)
property legal, fair or equal." Lastly, debtor contends it is the duty of the bankruptcy court to litigate bankruptcy fraud, not the divorce court. Debtor's last contention we address in the context of the Avoidance Motion.

and May Orders, all of which were final, debtor's interest in the property was conclusively established as one for a leasehold only. Next, the court found debtor defaulted on the mortgages and other payments related to the property. Debtor's arguments to the contrary were unsupported and contradicted by the record. For example, debtor entered into an adequate protection order with WaMu, with which he did not comply. The record shows that Knoll then paid the arrearages to WaMu so the property would not be lost. Further, the family court found debtor in default of the terms of the divorce decree because he did not make the payments concerning the property as required under the decree.

Upon weighing these factors, we are not left with a definite and firm conviction that the trial court committed a clear error in judgment in finding that cause existed to grant relief from stay under § 362(d)(1). We thus conclude the court did not abuse its discretion.

2. Section 362(d)(2): The Debtor Did Not Have Equity in the Property Nor Was the Property Necessary for Debtor's Reorganization

Section 362(d)(2) provides that the court shall grant relief from the stay "with respect to a stay of an act against property . . . if — (A) the debtor does not have an equity in such property; and (B) such property is not necessary to an effective reorganization." This section relates to acts against property of the estate and both elements must be satisfied.

At the time debtor filed his petition he had an equitable interest in the residence by virtue of his lease which had not yet terminated. After the family court granted Knoll's Motion for an Order to Vacate the Residence when the stay was lifted,

debtor's leasehold interest was effectively terminated because the family court found him in breach of the lease terms, a breach which has never been cured. Debtor thus did not have equity in the property for purposes of § 362(d)(2)(A). Pistole v. Mellor (In re Mellor), 734 F.2d 1396, 1400 n. 2 (9th Cir. 1984)(equity refers to the difference between the value of the property and all encumbrances on it).[17]

Moreover, our review of the record shows that debtor's continued occupancy of the property could not have been a goal of his confirmed chapter 13 plan when he defaulted on the terms of the lease set forth in the divorce decree. Instead, he sought to use his bankruptcy as an opportunity to renege on his former agreement that the property was Knoll's and that he had a leasehold interest only so long as he made the payments. Even so, as the bankruptcy court noted, whether as a lessee or an owner, debtor was required to meet his financial responsibilities and he did not. Accordingly, we agree that debtor failed to demonstrate he needed the property for an effective reorganization.

In sum, we hold that the banrkuptcy court did not abuse its discretion in granting Knoll relief from the automatic stay provision of § 362(a) to proceed with debtor's eviction.

C. The Avoidance Motion

Debtor raises several grounds for reversal. Debtor contends the court erred in its ruling that he was time barred from pursuing his actions against Knoll under §§ 522 and 542.

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[17] It is highly questionable that a party could ever have "equity" in a residential leasehold interest.

He also argues that whenever there is an unequal division of community property in a divorce, there is a fraudulent transfer of the bankruptcy estate's property if the debtor receives the smaller share. Debtor thus concludes the court erred because the issue of fairness of the division of property in light of creditors and debtor has yet to be litigated. We discuss each of debtor's contentions below.

1. Section 522: Debtor Failed to Meet the Requirements Under § 522(h)

The bankruptcy court found that debtor could not avoid the transfer of the residence to Knoll under the divorce decree because his avoidance actions were untimely. Specifically, under § 546(a)(1),[18] the applicable provision for calculating the time period in which debtor was required to file avoidance actions under §§ 544, 547, and 548, was two years after the entry of the order for relief. Since debtor filed his case on January 8, 2004, debtor had to commence his actions by January 8, 2006.[19] He did not do so. Debtor's effort was thus untimely

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[18] This section provides: an action or proceeding may not be "commenced after the earlier of — (1) the later of — (A) 2 years after the entry of the order for relief; or (B) 1 year after the appointment or election of the first trustee under section . . . 1302 of this title, if such appointment or such election occurs before the expiration of the period specified in subparagraph (A)."

[19] The bankruptcy court recognized that a chapter 13 debtor has standing, concurrently with the chapter 13 trustee, to exercise the avoiding powers under the Code. Getsey v. Eiler (In re Cohen), 305 B.R. 886, 899 (9th Cir. BAP 2004). We believe this concept should not be extended to our facts. The Cohen court addressed the concern that a debtor could use the trustee's avoiding powers and pocket the proceeds without any benefit to

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as found by the bankruptcy court.

Debtor does not claim that the court erred in its ruling that debtor was time barred from proceeding with his avoidance actions under §§ 544, 547, and 548. Rather, he contends that the statute of limitations set forth in § 546(a) is inapplicable to § 522(h). Debtor reasons that § 522 is not listed in § 546(a) and, therefore, there is no time bar to his avoidance under § 522(h). Debtor also argues that Rule 4003(d)[20] has no time limitation within which he had to bring a motion to avoid a transfer of exempt property.

Section 522 authorizes a debtor to exempt certain property from the bankruptcy estate so that it may not be reached by the trustee or creditors in bankruptcy. See § 522(b). Section

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[19](...continued)
the estate and creditors by noting that any recovery becomes property of the estate which the debtor could use only after notice and a hearing. This safeguard, however, is illusory here because debtor is clearly seeking to avoid the transfer of the marital residence so that he can continue to live in it, whether exempt or not, and preferably without making the payments required under the divorce decree since he claims that he can withhold rent under Nevada law. Debtor's motive especially becomes apparent because the trustee has filed his Final Account and Report and debtor's discharge was due to occur on April 23, 2008. We take judicial notice of trustee's Final Account and Report at Dkt. No. 210 in Bankruptcy Case No. 04-10196. Atwood, 293 B.R. at 233 n.9. When there is no benefit to the estate or the creditors, it is unlikely that debtor could be viewed to have concurrent standing with the trustee to exercise avoiding powers under the standards espoused in Cohen.

[20] Rule 4003(d) provides: "a proceeding by the debtor to avoid a lien or other transfer of property exempt under § 522(f) shall be made by motion in accordance with Rule 9014." While the Rule does not set forth a time limit, a Bankruptcy Rule may not create an exception to the Bankruptcy Code. Beaty v. Selinger (In re Beaty), 306 F.3d 914 (9th Cir. 2002). Here, the statute of limitations in § 546 is applicable to § 522(h).

522(h) allows debtor to use the trustee's avoiding powers in aid of his exemption rights if he meets five conditions: "(1) the transfer cannot have been a voluntary transfer of property by the debtor; (2) the debtor cannot have concealed the property; (3) the trustee cannot have attempted to avoid the transfer; (4) the debtor must exercise an avoidance power usually used by the trustee that is listed within § 522(h); and (5) the transferred property must be of a kind that the debtor would have been able to exempt from the estate if the trustee (as opposed to the debtor) had avoided the transfer pursuant to one of the statutory provisions in § 522(g)." DeMarah v. United States (In re DeMarah), 62 F.3d 1248, 1251 (9th Cir. 1995); See §§ 522(g) and (h).[21] Several elements are not met here.

We first address debtor's contention that he is not bound by the limitations period in § 546(a)(1) for purposes of bringing avoidance actions pursuant to § 522(h). Under § 522(h)(1), the plain language of the statute provides that a debtor may avoid a transfer via §§ 544, 547 and 548 if "such transfer is avoidable by the trustee . . . ." Thus, if the chapter 13 trustee in debtor's case identified some incentive to pursue avoidance actions under §§ 544, 547, and 548 against

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[21] Section 522(h) provides that "the debtor may avoid a transfer of property . . . to the extent that the debtor could have exempted such property under subsection (g)(1) of this section if the trustee had avoided such transfer, if (1) such transfer is avoidable by the trustee under section 544, 545, 547, 548, 549, ... ; and (2) the trustee does not attempt to avoid such transfer." Section 522(g)(1) provides that the "debtor may exempt property that the trustee recovers . . . to the extent debtor could have exempted such property . . . if — (A) such transfer was not a voluntary transfer of such property by the debtor; and (B) the debtor did not conceal such property . . . ."

Knoll, the trustee could not have done so when debtor filed his Avoidance Motion on June 6, 2007 because the limitations period for bringing such actions expired on January 8, 2006. If the trustee would be barred by the passage of the § 546(a)(1) limitations period, debtor is too as debtor does not get greater rights that those of the trustee. See Verner v. Verner (In re Verner), 318 B.R. 778, 792 (Bankr. W.D. Pa. 2005); In re Steck, 298 B.R. 244, 248 (Bankr. D.N.J. 2003); Schroeder v. First Union Nat'l Bank (In re Schroeder), 173 B.R. 93, 94 (Bankr. D. Md. 1994), rev'd on other grounds, 183 B.R. 723 (D. Md. 1995).

Even assuming that the limitations period in § 546(a)(1) was inapplicable to debtor, debtor still would be unable to meet the other necessary elements for utilizing § 522(h). We discuss these additional elements for the sake of completeness and because we can affirm the bankruptcy court on any ground supported by the record. Leavitt v. Soto (In re Leavitt), 171 F.3d. 1219, 1223 (9th Cir. 1999).

The first element under DeMarah, 62 F.3d at 1251, requires that the transfer cannot have been a voluntary transfer of property by the debtor. Voluntary transfers are excepted from a debtor's avoidance rights so that a debtor does not receive a windfall and benefit from his own voluntary act. Rodriguez v. Dorine's Bail Bonds, Inc. (In re Rodriguez), 361 B.R. 887, 892-93 (Bankr. D. Ariz. 2007).

What is a voluntary transfer for purposes of a transfer under § 522(g) is not defined in the Code. Id. at 893. Guidance is provided, however, by case law which largely supports the notion that "an involuntary transfer of property

may occur under circumstances that, although not beyond the debtor's control, involve fraud, material misrepresentation or coercion." Id. In contrast, "voluntary transfers occur when a debtor has knowledge of all essential facts and is free from the persuasive influence of another and chooses of his own free will to transfer property to the creditor." Ross v. Phila. Hous. Auth. (In re Ross), 1997 WL 331830 at *3 (Bankr. E.D. Pa. 1997).

Here, debtor sets forth a litany of reasons as to why the stipulated property settlement was "involuntary" (although he does not use that precise term). He contends he had no choice but to transfer his interest in the residence to Knoll because it was the only way he would be able to see his son. He further complains that his counsel in the divorce proceeding was paid for by Knoll's mother. Last, he maintains Knoll committed fraud on the family court by failing to disclose all her assets in the divorce proceeding. By implication, debtor's transfer of his interest in the martial residence to Knoll under the stipulated property settlement was not of his own free will.

The doctrine of issue preclusion, however, bars debtor from relitigating this issue. The family court found that there was no evidentiary support for debtor's motion to set aside the divorce decree as void. It further found that Knoll had committed no plan or scheme designed to improperly influence the court. Debtor's transfer of the residence was therefore voluntary and the first element under DeMarah is not met.

Furthermore, to utilize § 522(h), debtor must prove that he could have exempted the property transferred under § 522(b). See § 522(g). The only property that can be exempted is

property of debtor's bankruptcy estate. Owen v. Owen, 500 U.S. 305, 308 (1991); See § 522(b).

Debtor's exemption rights in the marital residence were addressed by the court below. The bankruptcy court found that the residence was not property that debtor could exempt because it was awarded to Knoll by the divorce decree prior to the commencement of his case and debtor received only a leasehold interest.[22] The divorce decree, which incorporated the parties' stipulated property settlement agreement, unambiguously states that the property was Knoll's sole and separate property. See Renshaw v. Renshaw, 96 Nev. 541, 542, 611 P.2d 1070, 1071 (1980)(when a document is clear and unambiguous on its face, the court must construe it from the language therein). The property was thus not part of debtor's estate. The court further found that under Nevada law, a debtor with a mere right to exclusive possession of property does not have a cognizable "value" or "equity" to claim it as exempt. See Savage v. Pearson, 157 P.3d 697, 701 (2007)(the homestead exemption statute protects only the amount of equity debtor has in the property).

Nonetheless, debtor contends that he is entitled to an exemption in the property because Knoll did not timely object. See Rule 4003(b); Taylor v. Freeland & Kronz, 503 U.S. 638 (1992). We have previously rejected debtor's "exemption by default" argument in the context of § 522(h). Heintz v. Carey

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[22] Further, the transfer of debtor's one-half interest in the martial residence to Knoll was an outright transfer and did not create a lien subject to avoidance under § 522(f). Cf. Farry v. Sanderfoot, 500 U.S. 291, 293 (1991). Accordingly, debtor could not use § 522(f) to "avoid" Knoll's lien because the divorce decree did not create a lien.

(In re Heintz), 198 B.R. 581, 586-87 (9th Cir. BAP 1996). In Heintz, we noted that creditors who have not timely objected to the claimed exemptions are nevertheless able to challenge the validity of the debtor's exemption when defending an avoidance action under § 522(h). We thus agree with the bankruptcy court that the property is not the kind the debtor would have been able to exempt under the circumstances here.

In sum, the bankruptcy court's determination that debtor was time barred from bringing avoidance actions under §§ 544, 547, and 548 was not erroneous.[23] Similarly, the bankruptcy court's conclusion that debtor was not entitled to exempt his interest in the property was not erroneous. For the reasons stated by the bankruptcy court and those discussed above, debtor was unable to utilize § 522(h).

2. Section 542 Is Inapplicable

Debtor also argues that no time limitation bars his action under § 542(a). Debtor contends that Knoll has an ongoing duty until the bankruptcy case is closed to turn over to the trustee an accounting of her investments, bank accounts, income, businesses, and all tax returns while she was married to debtor. Debtor concludes that Knoll's duty to turn over property pursuant to § 542 is "absolute."

Section 542, entitled "Turnover of property of the estate" states in relevant part that ". . . an entity, . . . in

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[23] We likewise affirm the court's ruling that debtor was time barred from using the trustee's avoiding power under § 549. Nonetheless, as previously noted, the Clerk's Deed transferring title to the property to Knoll postpetition was void as it was in violation of the automatic stay and Knoll has yet to seek retroactive relief to validate that deed.

possession, custody or control, during the case, of property that the trustee may use, sell or lease under section 363 . . . or that the debtor may exempt under section 522 . . ., shall deliver to the trustee, and account for, such property or value of such property . . . ." The bankruptcy court found § 542 inapplicable for two reasons. First, the residence was awarded to Knoll by the divorce decree prior to debtor's filing and therefore it was not property of the estate that a trustee may use, sell or lease under § 363. Next, the residence was not property debtor could exempt because he received only a leasehold interest. Savage, 157 P.3d at 701. To the extent debtor seeks the turnover of the marital residence, we agree with the court's ruling that § 542 is inapplicable.

Moreover, if debtor is attempting to obtain records from Knoll regarding her wealth, there is no suggestion that these documents are property of his estate. Rather, this is simply another one of debtor's attempts to relitigate whether the property division in his divorce proceeding was equal.

3. The Unequal Division of Community Property and Fraudulent Transfer: Reasonably Equivalent Value Was Established As A Matter of Law

Debtor contends that the bankruptcy court refused to acknowledge or review the bankruptcy fraud issue of the unequal division of community property. Specifically, debtor argues that whenever there is an unequal division of community property in a divorce, there is a fraudulent transfer of estate property if the debtor receives the smaller share. Debtor contends that Knoll received a greater share of the marital estate than he did. Debtor thus asserts that the bankruptcy court erred by not

deciding whether he received reasonably equivalent value for Knoll's greater share.

We disagree. Although debtor is time barred from proceeding under §§ 544 and 548,[24] again for the sake of completeness and because we can affirm on any ground supported by the record, see Leavitt, 171 F.3d at 1223, we hold that under the circumstances here, debtor received reasonably equivalent value under the divorce decree as a matter of law.[25]

Our holding is based upon the reasoning of the Fifth Circuit in Ingalls v. Erlewine (In re Erlewine), 349 F.3d 205 (5th Cir. 2003) and the bankruptcy court in Batlan v. Bledsoe (In re Bledsoe), 350 B.R. 513 (Bankr. D. Or. 2006). Both cases involved the trustees' attempt to set aside the unequal transfer of marital assets to nondebtor spouses. The courts denied the

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[24] Section 548(a)(1) provides in relevant part: "[T]he trustee may avoid any transfer of an interest in the debtor in property . . . if the debtor voluntarily or involuntarily — . . . (B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligations; and (ii)(I) was insolvent on the date that such transfer was made . . . ."

[25] Debtor cites Roosevelt v. Ray (In re Roosevelt), 176 B.R. 200 (9th Cir. BAP 1994); Britt v. Damson, 334 F.2d 896 (9th Cir. 1964) cert. denied 379 U.S. 966 (1965), and Maddox v. Robertson (In re Prejean), 994 F.2d 706 (9th Cir. 1993) in support. Collectively these cases stand for the proposition that a trustee may set aside certain transfers pursuant to state fraudulent transfer law or § 548. These cases, however, are unpersuasive under the circumstances here. In none of those cases did the debtor seek to stand in the shoes of the trustee to avoid the transfer of an unequal division of marital assets for his own benefit. Further, while Nevada has adopted the Uniform Fraudulent Transfer Act ("UFTA"), see NEV. REV. STAT. §§ 112.180, 112.190, we found no Nevada decision in which it was held that creditors of a marital community which has been terminated by divorce may set aside a property award on the basis that it was a fraudulent transfer. See Britt, 334 F.2d at 901.

trustees' request to set aside the transfer of debtors' interest finding that debtors' received reasonably equivalent value as a matter of law.

The Erlewine court held that when a divorce was "fully litigated, without any suggestion of collusion, sandbagging, or indeed any irregularity", the decree should not be unwound by a federal court merely because of its unequal division of marital property. 349 F.3d at 213. Likewise, the Bledsoe court noted that "[i]f a decree of dissolution is subject to collateral attack in federal court because the distribution of assets is financially or mathematically unequal, then virtually every decree would be subject to endless litigation and an 'intolerable uncertainty regarding the finality of any' judgment." 350 B.R. at 519. The court concluded that "[b]ecause there [were] no allegations of collusion, actual intent to defraud, or that the dissolution judgment was not obtained pursuant to a regularly conducted proceeding under state law, the transfers made pursuant to the dissolution judgment conclusively establish reasonably equivalent value for purposes of § 548(a)(1)(B)." Id.

Both courts relied upon the rationale espoused by the Supreme Court in BFP v. Resolution Trust Corp., 511 U.S. 531 (1994). In BFP, the Supreme Court affirmed the Ninth Circuit's holding that the price received at a mortgage foreclosure sale conclusively satisfies the reasonable equivalence test as long as the sale was noncollusive and conducted in conformity with state law. In interpreting § 548 and the phrase "reasonably equivalent value", the Supreme Court was mindful that fraudulent

transfer law and foreclosure law had enjoyed over 400 years of peaceful coexistence. Id. at 542. The court observed that without clearer textual guidance other than the phrase "reasonably equivalent value", it could not interpret the phrase to require a foreclosure sale to yield a certain price beyond what state foreclosure law already required. Id. at 543. The court thus took into account the state's interest in the security of titles to real property, an interest that would be threatened if every foreclosure could be undone in the federal bankruptcy court.

The Ninth Circuit's opinion, BFP v. Imperial Sav. & Loan Assoc. (In re BFP), 974 F.2d 1144 (9th Cir. 1992) should not be overlooked. The Ninth Circuit noted that "[t]he Supreme Court has recently reminded us that our interpretation of federal statutes should be tempered with due regard for traditional state areas of regulations." Id. at 1149.

While the Supreme Court in BFP took care to limit its holding to mortgage foreclosure sales, 511 U.S. at 537 n. 3, the "same concerns [as those in BFP] are present in this case, and they suggest that we should hesitate before we impute to Congress an intent to upset the finality of judgments in an area as central to state law as divorce decrees." Erlewine, 349 F.3d at 212.

Just as creditors are protected from collusive foreclosure sales, they are protected from collusive transfers in dissolution proceedings. This case does not, however, present a collusive transfer situation nor was there any irregularity as the parties' divorce was pursuant to a regularly conducted

proceeding under Nevada law.

During the regularly conducted proceeding, debtor was represented by an attorney. Moreover, he agreed that the terms of the property settlement agreement were fair and equitable and he agreed to be bound.

Thereafter, the validity of the divorce decree was fully litigated when the parties returned to the family court after the bankruptcy court conditionally granted relief from stay. Debtor urged the family court to find the divorce decree void based upon his argument, among others, that the assets were unequally divided — partially due to Knoll's failure to disclose assets and partially due to Knoll's undue influence over him. The family court rejected debtor's arguments and denied his motion to set aside the decree. It was only after he lost in family court and his eviction on the horizon, that debtor sought to utilize the trustee's avoidance powers. This occurred years after he filed for relief and not at the time he was proposing a plan, but at a time when his plan was nearly completed.

Moreover, with respect to the martial residence, debtor's transfer of his interest in the residence to Knoll was in partial satisfaction of a $105,000 note he had executed in Knoll's favor. It was not until three years after his filing that debtor amended his schedules to include Knoll as a creditor and list the $105,000 debt he owed to her. Debtor's amendment took place shortly before Knoll filed her motion for relief from stay.

Finally, it is debtor who seeks to step into the trustee's shoes to use the trustee's avoiding powers under §§ 544 and 548,

and not the trustee in his own right. As previously noted, debtor's attempt to set aside the transfer is for his own benefit and not to provide funding for his plan which has been completed. Thus, even if debtor could stand in the shoes of the trustee under the circumstances here, there is no benefit for his estate or creditors.

Simply put, to adopt debtor's argument that he did not receive reasonably equivalent value for Knoll's allegedly greater share of the marital property would, under these circumstances, result in "endless litigation" and an "intolerable uncertainty regarding the finality" of the family court's rulings.

In sum, we hold that debtor received reasonably equivalent value under the divorce decree as a matter of law. Debtor's grounds for reversal are thus without merit and we affirm the bankruptcy court's decision to deny debtor's Avoidance Motion in all respects.

4. Requirement of an Adversary Proceeding

Lastly, we affirm the bankruptcy court's ruling that an adversary proceeding is necessary to recover money or property from a nondebtor party. See Rule 7001(9). Debtor complains that his motion is adequate because Knoll did not oppose him proceeding by motion. A review of the docket in his case, however, shows that debtor has commenced an adversary proceeding against Knoll.[26]

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[26] We take judicial notice of the docket in Shawhan v. Knoll. Adversary Case No. 08-01049 (filed February 19, 2008). Atwood, 293 B.R. at 233 n.9.

VI. CONCLUSION

For the reasons set forth above, we AFFIRM.