

JUL 07 2008

HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6	In re:)	BAP Nos.	NV-08-1049-JuKuK
)		NV-08-1052-JuKuK
7	ROBERT K. SHAWHAN,)		(related appeals)
)		
8	Debtor.)	Bk. No.	04-10196
)		
9	_____)		
)		
10	ROBERT K. SHAWHAN,)		
)		
11	Appellant,)		
)		
12	v.)	MEMORANDUM¹	
)		
13	DONNA KNOLL SHAWHAN; RICK A.)		
	YARNALL, Chapter 13 Trustee;)		
14	DAVID L. TANNER; WASHINGTON)		
	MUTUAL HOME LOAN; WASHINGTON)		
15	MUTUAL BANK; BARBARA LAUREEN)		
	TAVES,)		
)		
16	Appellees.)		
)		
17	_____)		

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.

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.

1 In these related appeals, appellant-debtor Robert K.
2 Shawhan appeals pro se³ the bankruptcy court's orders (1)
3 granting appellee Linda Knoll Shawhan ("Knoll"), debtor's former
4 wife, relief from the automatic stay provisions of § 362(a) and
5 (2) denying debtor's Motion to Avoid Lien and Fraudulent
6 Transfer to Inside Creditor (the "Avoidance Motion").⁴

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

16 Debtor defaulted on payments concerning the property prior
17 to, and after, filing his chapter 13 petition. Knoll thus
18 sought relief from stay to enforce the terms of the divorce
19 decree and evict debtor from the property. Debtor opposed
20 Knoll's motion on the grounds that he made all payments
21

22 ³ Because of debtor's pro se status, we liberally construe
23 his pleadings. Kashani v. Fulton (In re Kashani), 190 B.R. 875,
24 883 (9th Cir. BAP 1995).

25 ⁴ Unless otherwise indicated, all chapter, section and rule
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
27 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as
28 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).

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

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

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

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

26 Accordingly, we AFFIRM.

27 **I. FACTS**

28 Debtor and Knoll ended their marriage by divorce by 2003.

1 The divorce proceeding took place in the District Court⁵ for
2 Douglas County, Nevada, Case No. 02-DI-0118.

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

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

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

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

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

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

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

5 Debtor failed to pay the HOA fees and became involved in
6 litigation with the HOA as a result. Eventually, the HOA filed
7 a Notice of Default and Election to Sell and gave notice for the
8 sale of the property to occur on January 12, 2004.⁶ When Knoll
9 learned of the default, she commenced litigation against the HOA
10 to enjoin the foreclosure and reduce the amount it claimed due.
11 She cured debtor's default on January 9, 2004.

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

20 On January 28, 2004, debtor filed an amendment to his
21 petition, the balance of his bankruptcy documents, and a
22 proposed plan. Debtor's certificate of mailing lists a "Donna
23 Shawhan, Esq.", but no mailing address for her was included.
24 Knoll thus did not receive a copy of debtor's proposed plan.
25 The bankruptcy court confirmed debtor's initial plan on October
26
27
28

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

1 20, 2004.⁷

2 Without notice of debtor's bankruptcy filing, Knoll filed a
3 motion in the family court on February 13, 2004 seeking to hold
4 debtor in contempt and have the family court execute a deed
5 conveying debtor's interest in the property to her.⁸ Although
6 debtor received notice of Knoll's motion, he did not respond.
7 Accordingly, the family court filed an Order to Execute
8 Documents on April 2, 2004. Pursuant to this order, the Clerk
9 of the family court executed a Clerk's Deed conveying the
10 residence to Knoll on April 1, 2004.⁹

11 On July 17, 2006, Washington Mutual Bank ("WaMu"), the
12 holder of the first trust deed on the property, filed a motion
13

14
15 ⁷ Debtor filed a modified plan on September 7, 2006 which
the bankruptcy court approved by order entered on March 9, 2007.

16 ⁸ Knoll maintains that it was not until debtor amended his
17 schedules and mailing matrix to add Knoll as a creditor in
January 18, 2007 that she learned about his bankruptcy. Debtor
18 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
19 same note involved in the divorce proceedings when debtor agreed
20 with Knoll that she receive his one-half interest in the
residence in partial satisfaction of the note.

21 ⁹ We observe, as did the bankruptcy court, that at the time
22 the Order to Execute Documents was entered and the Clerk's Deed
was recorded, the automatic stay was in effect. Thus, both the
23 Order to Execute Documents and the Clerk's Deed are void in the
24 absence of an order annulling the stay. Schwartz v. United
States (In re Schwartz), 954 F.2d 569, 572-73 (9th Cir. 1992).
25 The bankruptcy court is authorized to annul the stay in an manner
that would retroactively validate the Clerk's Deed. See
26 11 U.S.C. § 362(d); Schwartz, 954 F.2d at 573. The record does
27 not reflect that Knoll has ever requested retroactive relief from
stay. Nor does the docket in Bankruptcy Case No. 04-10196, of
28 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).

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

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

16 On February 6, 2007, the second trust deed holder on the
17 residence, Bank of America, filed a Notice of Default and
18 Election to Sell Under Deed of Trust for failure to pay monthly
19 installments that became due on September 26, 2006.¹⁰

20 **B. Knoll's Motion for Relief From Stay**

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

26
27 ¹⁰ The docket does not show that Bank of America filed a
28 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.

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

9 **1. The Conditional Relief From Stay Order**

10 Pursuant to the parties' stipulation, the bankruptcy
11 court conditionally granted Knoll's request for relief from stay
12 by order entered on April 25, 2007.¹² The stay was lifted to
13 allow the divorce proceedings to go forward in the family court
14 on all matters related to Case No. 02-DI-0118, including, but
15 not limited to, Knoll's Motion for an Order to Vacate the
16 Residence and Debtor's Motion to Set Aside the Divorce Decree.
17 The bankruptcy court continued Knoll's stay relief motion for a
18 final hearing.

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

24
25 ¹¹ Debtor's motion to set aside the divorce decree also
26 sought alimony, title to a vehicle, child custody and child
support.

27 ¹² Debtor filed an objection to the order pro se, claiming
28 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.

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

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

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

21 Debtor did not appeal any of the May Orders.

22 **2. The Final Hearing**

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

1 family court's orders.

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

5 On January 31, 2008, the court filed its Memorandum
6 Decision granting Knoll's motion for relief from stay under
7 §§ 362(d)(1) and (2) and permitting Knoll to proceed in family
8 court to enforce the divorce decree and the May Orders. The
9 order granting Knoll's motion was entered on the same date.

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

14 **C. Debtor's Avoidance Motion**

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

19 Debtor sought to avoid the transfer of the residence in the
20 divorce decree under various Code sections including §§ 522,
21 542, 547(b)(4)(B) and Rule 4003(d). He also alleged that Knoll
22 had not disclosed assets in the divorce proceedings and
23 maintained that he never had his "day in court" regarding his
24 claim to the home.

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

1 The court filed its Memorandum Decision on January 31,
2 2008, denying debtor's Avoidance Motion and entered the related
3 order on the same date.

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

7 **II. JURISDICTION**

8 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
9 §§ 1334 over this core proceeding under § 157(b)(2)(A), (F), (G)
10 and (H). We have jurisdiction under 28 U.S.C. § 158.

11 **III. ISSUES**

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

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

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

22 **IV. STANDARDS OF REVIEW**

23 The availability of issue preclusion is reviewed de novo.
24 Jung Sup Lee v. Tcast Commc'ns (In re Lee), 335 B.R. 130, 135
25 (9th Cir. BAP 2005). If issue preclusion is available, the
26 decision to apply it is reviewed for abuse of discretion. Lopez
27 v. Emergency Serv. Restoration, Inc. (In re Lopez), 367 B.R. 99,
28 103 (9th Cir. BAP 2007).

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

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

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

13 **V. DISCUSSION**

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

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

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

6 **A. Issue Preclusion**

7 The preclusive effect, if any, of the family court's
8 rulings derives from principles of res judicata, which generally
9 apply in bankruptcy proceedings. Katchen v. Landy, 382 U.S.
10 323, 334 (1966). The generic term of res judicata encompasses
11 two doctrines: claim preclusion and issue preclusion. Paine v.
12 Griffin (In re Paine), 283 B.R. 33, 38-39 (9th Cir. BAP 2002).
13 Issue preclusion has more applicability here because debtor
14 raised in the bankruptcy court common issues of fact and law
15 regarding the validity of the divorce decree and the division of
16 community property that were already litigated and resolved in
17 the family court.

18 When determining the preclusive effect of a state court
19 judgment, we must apply as a matter of full faith and credit the
20 state's law of issue preclusion. Lee, 335 B.R. at 136; See also
21 28 U.S.C. § 1738.¹³ Under Nevada law, "[t]he general rule of
22 issue preclusion is that if an issue of fact or law was actually
23 litigated and determined by a valid and final judgment, the
24 determination is conclusive in a subsequent action between the

26 ¹³ The Full Faith and Credit Act provides that state court
27 decisions "shall have the same full faith and credit in every
28 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.

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

13 A review of the record shows that the issue raised in the
14 bankruptcy court – whether the divorce decree was void¹⁴ – was
15 identical to the issue raised in the family court.
16 Specifically, debtor argued in opposition to Knoll's stay relief
17 motion that the divorce decree was void for various reasons. He
18 also argued in his Avoidance Motion that the divorce decree was
19

20
21 ¹⁴ Subsumed within this issue is whether the residence was
22 debtor's sole and separate property, whether the division of the
23 marital property was unequal, and whether Knoll committed fraud
24 in the divorce proceeding by failing to disclose all her assets.
25 At oral argument, debtor's counsel emphasized that the inequality
26 of the division of marital property made the divorce decree void
27 ab initio. This argument was based upon NEV. REV. STAT. § 125.155
28 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.

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

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

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

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

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

23 [I]n determining whether the applicable legal context
24 has changed, or that applying preclusion would result
25 in inequitable administration of the law it is
26 important to recognize that two concepts of equality
27 are in competition with each other. One is the concept
28 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

(continued...)

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

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

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

25
26 ¹⁵(...continued)

27 to the same legal standards. Applying issue preclusion
28 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.

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

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

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

18 **B. Motion for Relief from Stay**

19 Debtor's brief and reply brief largely fail to present and
20 meet the real issues involved in his appeal of the bankruptcy
21 court's order granting Knoll relief from stay. His focus
22 instead is on the same arguments¹⁶ he made in the family court.

23
24 ¹⁶ Specifically debtor argues that under Nevada law, it is
25 Knoll's duty to maintain the dwelling in a habitable condition,
26 not his, because the divorce decree is "void and illegal." Thus,
27 he concludes that he has an absolute right not to pay rent until
28 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

(continued...)

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

5 Section 362(a) provides that the filing of a bankruptcy
6 petition automatically operates as a stay against the
7 commencement of an action or proceeding against the debtor and
8 acts to obtain possession of property of the estate. See
9 § 362(a)(1), (3). Congress, however, has granted broad
10 discretion to bankruptcy courts to lift the automatic stay if
11 cause exists or if the debtor does not have equity in the
12 property and the property is not needed for reorganization. See
13 § 362(d)(1) and (2). A proper showing under either § 362(d)(1)
14 or (2) is sufficient to afford relief from the automatic stay.

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

16 Section 362(d)(1) provides that the court "shall"
17 grant relief from the automatic stay "for cause, including the
18 lack of adequate protection of an interest in property of such
19 party in interest." See § 362(d)(1). Because the Code provides
20 no definition of what constitutes cause, the courts must
21 determine when discretionary relief is appropriate on a case-by-
22 case basis. Conejo Enters., Inc., 96 F.3d at 352 (9th Cir.
23 1996).

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

27 ¹⁶(...continued)
28 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.

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

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

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

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

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

1 debtor's leasehold interest was effectively terminated because
2 the family court found him in breach of the lease terms, a
3 breach which has never been cured. Debtor thus did not have
4 equity in the property for purposes of § 362(d)(2)(A). Pistole
5 v. Mellor (In re Mellor), 734 F.2d 1396, 1400 n. 2 (9th Cir.
6 1984) (equity refers to the difference between the value of the
7 property and all encumbrances on it).¹⁷

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

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

23 **C. The Avoidance Motion**

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

27
28 ¹⁷ It is highly questionable that a party could ever have
"equity" in a residential leasehold interest.

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

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

10 The bankruptcy court found that debtor could not avoid
11 the transfer of the residence to Knoll under the divorce decree
12 because his avoidance actions were untimely. Specifically,
13 under § 546(a)(1),¹⁸ the applicable provision for calculating the
14 time period in which debtor was required to file avoidance
15 actions under §§ 544, 547, and 548, was two years after the
16 entry of the order for relief. Since debtor filed his case on
17 January 8, 2004, debtor had to commence his actions by January
18 8, 2006.¹⁹ He did not do so. Debtor's effort was thus untimely
19

20 ¹⁸ This section provides: an action or proceeding may not be
21 "commenced after the earlier of - (1) the later of - (A) 2 years
22 after the entry of the order for relief; or (B) 1 year after the
23 appointment or election of the first trustee under section . . .
24 1302 of this title, if such appointment or such election occurs
before the expiration of the period specified in subparagraph
(A)."

25 ¹⁹ The bankruptcy court recognized that a chapter 13 debtor
26 has standing, concurrently with the chapter 13 trustee, to
27 exercise the avoiding powers under the Code. Getsey v. Eiler (In
28 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

(continued...)

1 as found by the bankruptcy court.

2 Debtor does not claim that the court erred in its ruling
3 that debtor was time barred from proceeding with his avoidance
4 actions under §§ 544, 547, and 548. Rather, he contends that
5 the statute of limitations set forth in § 546(a) is inapplicable
6 to § 522(h). Debtor reasons that § 522 is not listed in
7 § 546(a) and, therefore, there is no time bar to his avoidance
8 under § 522(h). Debtor also argues that Rule 4003(d)²⁰ has no
9 time limitation within which he had to bring a motion to avoid a
10 transfer of exempt property.

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

14

15

¹⁹(...continued)

16 the estate and creditors by noting that any recovery becomes
17 property of the estate which the debtor could use only after
18 notice and a hearing. This safeguard, however, is illusory here
19 because debtor is clearly seeking to avoid the transfer of the
20 marital residence so that he can continue to live in it, whether
21 exempt or not, and preferably without making the payments
22 required under the divorce decree since he claims that he can
23 withhold rent under Nevada law. Debtor's motive especially
24 becomes apparent because the trustee has filed his Final Account
25 and Report and debtor's discharge was due to occur on April 23,
2008. We take judicial notice of trustee's Final Account and
26 Report at Dkt. No. 210 in Bankruptcy Case No. 04-10196. Atwood,
27 293 B.R. at 233 n.9. When there is no benefit to the estate or
28 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.

26 ²⁰Rule 4003(d) provides: "a proceeding by the debtor to
27 avoid a lien or other transfer of property exempt under § 522(f)
28 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).

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

14 We first address debtor's contention that he is not bound
15 by the limitations period in § 546(a)(1) for purposes of
16 bringing avoidance actions pursuant to § 522(h). Under
17 § 522(h)(1), the plain language of the statute provides that a
18 debtor may avoid a transfer via §§ 544, 547 and 548 if "such
19 transfer is avoidable by the trustee" Thus, if the
20 chapter 13 trustee in debtor's case identified some incentive to
21 pursue avoidance actions under §§ 544, 547, and 548 against

22
23 ²¹ Section 522(h) provides that "the debtor may avoid a
24 transfer of property . . . to the extent that the debtor could
25 have exempted such property under subsection (g)(1) of this
26 section if the trustee had avoided such transfer, if (1) such
27 transfer is avoidable by the trustee under section 544, 545, 547,
28 548, 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"

1 Knoll, the trustee could not have done so when debtor filed his
2 Avoidance Motion on June 6, 2007 because the limitations period
3 for bringing such actions expired on January 8, 2006. If the
4 trustee would be barred by the passage of the § 546(a)(1)
5 limitations period, debtor is too as debtor does not get greater
6 rights than those of the trustee. See Verner v. Verner (In re
7 Verner), 318 B.R. 778, 792 (Bankr. W.D. Pa. 2005); In re Steck,
8 298 B.R. 244, 248 (Bankr. D.N.J. 2003); Schroeder v. First Union
9 Nat'l Bank (In re Schroeder), 173 B.R. 93, 94 (Bankr. D. Md.
10 1994), rev'd on other grounds, 183 B.R. 723 (D. Md. 1995).

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

18 The first element under DeMarah, 62 F.3d at 1251, requires
19 that the transfer cannot have been a voluntary transfer of
20 property by the debtor. Voluntary transfers are excepted from a
21 debtor's avoidance rights so that a debtor does not receive a
22 windfall and benefit from his own voluntary act. Rodriguez v.
23 Dorine's Bail Bonds, Inc. (In re Rodriguez), 361 B.R. 887, 892-
24 93 (Bankr. D. Ariz. 2007).

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

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

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

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

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

1 property of debtor's bankruptcy estate. Owen v. Owen, 500 U.S.
2 305, 308 (1991); See § 522(b).

3 Debtor's exemption rights in the marital residence were
4 addressed by the court below. The bankruptcy court found that
5 the residence was not property that debtor could exempt because
6 it was awarded to Knoll by the divorce decree prior to the
7 commencement of his case and debtor received only a leasehold
8 interest.²² The divorce decree, which incorporated the parties'
9 stipulated property settlement agreement, unambiguously states
10 that the property was Knoll's sole and separate property. See
11 Renshaw v. Renshaw, 96 Nev. 541, 542, 611 P.2d 1070, 1071
12 (1980) (when a document is clear and unambiguous on its face, the
13 court must construe it from the language therein). The property
14 was thus not part of debtor's estate. The court further found
15 that under Nevada law, a debtor with a mere right to exclusive
16 possession of property does not have a cognizable "value" or
17 "equity" to claim it as exempt. See Savage v. Pearson, 157 P.3d
18 697, 701 (2007) (the homestead exemption statute protects only
19 the amount of equity debtor has in the property).

20 Nonetheless, debtor contends that he is entitled to an
21 exemption in the property because Knoll did not timely object.
22 See Rule 4003(b); Taylor v. Freeland & Kronz, 503 U.S. 638
23 (1992). We have previously rejected debtor's "exemption by
24 default" argument in the context of § 522(h). Heintz v. Carey

25 _____
26 ²² Further, the transfer of debtor's one-half interest in
27 the marital residence to Knoll was an outright transfer and did
28 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.

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

8 In sum, the bankruptcy court's determination that debtor
9 was time barred from bringing avoidance actions under §§ 544,
10 547, and 548 was not erroneous.²³ Similarly, the bankruptcy
11 court's conclusion that debtor was not entitled to exempt his
12 interest in the property was not erroneous. For the reasons
13 stated by the bankruptcy court and those discussed above, debtor
14 was unable to utilize § 522(h).

15 **2. Section 542 Is Inapplicable**

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

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

25
26 ²³ We likewise affirm the court's ruling that debtor was time
27 barred from using the trustee's avoiding power under § 549.
28 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.

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

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

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

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

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

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

9 Our holding is based upon the reasoning of the Fifth
10 Circuit in Ingalls v. Erlewine (In re Erlewine), 349 F.3d 205
11 (5th Cir. 2003) and the bankruptcy court in Batlan v. Bledsoe
12 (In re Bledsoe), 350 B.R. 513 (Bankr. D. Or. 2006). Both cases
13 involved the trustees' attempt to set aside the unequal transfer
14 of marital assets to nondebtor spouses. The courts denied the
15

16 ²⁴ Section 548(a)(1) provides in relevant part: "[T]he
17 trustee may avoid any transfer of an interest in the debtor in
18 property . . . if the debtor voluntarily or involuntarily - . . .
19 (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"

20 ²⁵ Debtor cites Roosevelt v. Ray (In re Roosevelt), 176 B.R.
21 200 (9th Cir. BAP 1994); Britt v. Damson, 334 F.2d 896 (9th Cir.
22 1964) cert. denied 379 U.S. 966 (1965), and Maddox v. Robertson
23 (In re Prejean), 994 F.2d 706 (9th Cir. 1993) in support.
24 Collectively these cases stand for the proposition that a trustee
25 may set aside certain transfers pursuant to state fraudulent
26 transfer law or § 548. These cases, however, are unpersuasive
27 under the circumstances here. In none of those cases did the
28 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.

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

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

21 Both courts relied upon the rationale espoused by the
22 Supreme Court in BFP v. Resolution Trust Corp., 511 U.S. 531
23 (1994). In BFP, the Supreme Court affirmed the Ninth Circuit's
24 holding that the price received at a mortgage foreclosure sale
25 conclusively satisfies the reasonable equivalence test as long
26 as the sale was noncollusive and conducted in conformity with
27 state law. In interpreting § 548 and the phrase "reasonably
28 equivalent value", the Supreme Court was mindful that fraudulent

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

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

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

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

1 proceeding under Nevada law.

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

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

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

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

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

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

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

18 **4. Requirement of an Adversary Proceeding**

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

26
27
28 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.

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