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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NOT FOR PUBLICATION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 No.	CC-08-1091-HMoD
7	DENNIS J. COOK,)	Bk. No.	SA-06-10725-ES
8	Debtor.)	Adv. No.	SA-07-01143-ES
9	_____)		
10	WENETA M.A. KOSMALA, Chapter 7)		
11	Trustee,)		
12	Appellant,)		
13	v.)	MEMORANDUM ¹	
14	DENNIS J. COOK; DONALD DEAN)		
15	COOK, JR.,)		
16	Appellees.)		
17	_____)		

Argued and Submitted on October 16, 2008
at Pasadena, California

Filed - November 3, 2008

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

Honorable Erithe A. Smith, Bankruptcy Judge, Presiding

Before: HOLLOWELL, MONTALI and DUNN, 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.

1 The Chapter 7 bankruptcy Trustee, Weneta M.A. Kosmala
2 ("Trustee"), asserts that Dennis J. Cook ("Debtor") acquired an
3 interest in trust property as a bequest, devise or inheritance
4 because the bulk of the trust assets were transferred into the
5 trust by the Debtor's mother's will. Appellees disagree, arguing
6 the Debtor's interest in trust property merely vested at the time
7 of the Debtor's mother's death and is excluded from property of
8 the estate. The bankruptcy court found for the Appellees. We
9 AFFIRM.

11 I. FACTS

12 The Debtor's parents established the Donald D. Cook and
13 Nancy A. Cook Revocable Trust Dated October 23, 1997 (the
14 "Trust"), deeded four parcels of real property (the "Properties")
15 to the Trust, and executed their wills the same day in October,
16 1997. Each parent's will is identical in terms; all property and
17 assets of their estate were given to the Trust (the "Will").² No
18 other real property was ever transferred to the Trust. At some
19 point, the Properties were taken from the Trust for refinancing
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21
22 ² The Will states, in part: "I give all my property to the
23 trustee of the Donald D. Cook and Nancy A. Cook Revocable Trust,
24 created under the declaration of trust executed on the same date
25 as, but immediately before, the execution of this will"
26 The Will further states, "If the Donald D. Cook and Nancy A. Cook
27 Revocable Trust has been revoked, terminated, or declared invalid
28 for any reason, I give the residue of my estate to the executor
of this will, as trustee, who shall hold, administer, and
distribute the property under a testamentary trust, the terms of
which shall be identical to the terms of the Donald D. Cook and
Nancy A. Cook Revocable Trust that are in effect on the date of
execution of this will." See Section 2.1 and 3.1.

1 purposes and the Debtor's parents did not re-deed the Properties
2 to the Trust.

3 The Debtor's parents were the settlors, co-trustees and
4 beneficiaries of the Trust. The Debtor and his three siblings
5 are beneficiaries of the Trust, in equal shares, upon the death
6 of the parents.

7 The Debtor's father died on May 7, 2006, leaving Debtor's
8 mother as the surviving beneficiary of the Trust. The Debtor's
9 brother, Donald D. Cook, Jr. (the "Successor Trustee"), succeeded
10 as the trustee due to incapacity of the mother. The Debtor filed
11 for Chapter 7 bankruptcy relief on May 18, 2006.³ The Debtor's
12 mother died October 10, 2006, within 180 days of the filing.

13 The Trust contained three checking accounts (with over
14 \$110,000 in funds) at the time the Debtor filed for bankruptcy.
15 At the time of the death of Debtor's mother, the Properties were
16 still not in the Trust.⁴

17 The Debtor did not list his interest in the Trust on his
18 schedules. The bankruptcy case was closed as a no-asset case on
19 January 31, 2007. Subsequently, the Trustee became aware of the

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21 ³ Unless otherwise indicated, all "Code," chapter and
22 section references are to the Bankruptcy Code, 11 U.S.C. §§ 101
23 - 1532, and to the Federal Rules of Bankruptcy Procedure, Rules
24 1001-9037.

25 ⁴ The Trustee, in her brief and her summary judgment
26 motion, asserts both that "no real property assets were held in
27 the name of the Trust" and, that "no assets were held in the name
28 of the Trust" at the time of the death of Debtor's parents. This
latter assertion is contradicted by Appellee's declaration that
three checking accounts were held in the Trust as of the date of
the Debtor's bankruptcy filing. It is unclear what assets other
than the Properties were conveyed to the Trust by the pour over
provision of the Debtor's mother's Will.

1 Trust and sought an order to re-open the bankruptcy case. The
2 Debtor's bankruptcy case was re-opened on May 21, 2007. After
3 the case was re-opened, the Debtor amended his schedules to list
4 his interest in the Trust as a contingent remainder interest
5 which he asserted was not property of the estate because of the
6 spendthrift provisions of the Trust.

7 Because the Properties were not in the Trust at the time of
8 the Debtor's mother's death and were conveyed to the Trust only
9 by the terms of the Will, the Successor Trustee sought an order
10 from the Superior Court of California affirming that the
11 Properties were an asset of the Trust. The order was granted on
12 February 1, 2007.

13 On May 30, 2007, the Trustee filed a five count complaint
14 ("Complaint") for (1) a determination that the Properties in the
15 Trust were property of the estate, (2) turnover of the Properties
16 in the Trust pursuant to 11 U.S.C. § 542, (3) the avoidance and
17 recovery of the Properties pursuant to 11 U.S.C. § 544, (4) the
18 recovery of 25% of the Debtor's beneficial interest in the Trust
19 and (5) attorneys' fees. In counts one, two, and three, the
20 Trustee was seeking recovery of the Properties in the trust.
21 Only in the fourth count of the Complaint was the Trustee seeking
22 recovery of any part of the Debtor's interest in the Trust.

23 The Successor Trustee and the Debtor filed motions to
24 dismiss and/or for summary judgment. The Trustee also filed a
25 motion for summary judgment. In her motion, the Trustee altered
26 her argument from seeking the Properties to seeking recovery of
27 the Debtor's interest in the Trust (what she refers to as the
28 "Testamentary Interest").

1 The matter was heard by the bankruptcy court which entered
2 an order granting summary judgment to the Successor Trustee and
3 the Debtor on counts one, two, and three regarding the Debtor's
4 interest in the Properties in the Trust. The bankruptcy court
5 also granted summary judgment against the Trustee on count five
6 which was her request for attorneys' fees. The Trustee filed a
7 timely notice of appeal. The Trustee does not appeal the
8 bankruptcy court's dismissal without prejudice of the fourth
9 count relating to the Debtor's interest in the Trust.

11 II. ISSUE

12 Is the Debtor's interest in the Trust property of the
13 bankruptcy estate?

15 III. JURISDICTION

16 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
17 § 157(b)(2)(B). We have jurisdiction to hear appeals from final
18 judgments, orders, and decrees under 28 U.S.C. § 158. This is a
19 final judgment because it "ends the litigation on the merits."
20 Slimick v. Silva (In re Slimick), 928 F.2d 304, 307 (9th Cir.
21 1990).

23 IV. STANDARDS OF REVIEW

24 We review conclusions of law and issues of statutory
25 interpretation de novo. Irwin Mortgage Co. v. Tippett (In re
26 Tippett), 338 B.R. 82, 85 (9th Cir. BAP 2006).

1 **V. DISCUSSION**

2 The primary issue in this case is whether the Debtor
3 acquired his interest in the Trust through bequest, devise, or
4 inheritance within 180 days of filing for bankruptcy. The
5 Trustee puts great weight on the fact that the Trust held no real
6 property until the Properties were transferred into the Trust by
7 the Debtor's mother's Will.⁵ Because the Trust received the
8 Properties through the pour over provisions of the Will, and
9 because the Trust's provisions require a distribution of Trust
10 assets upon the death of the last settlor, the Trustee argues the
11 Trust is merely a conduit for the devise of the Properties and
12 that the Debtor's interest in the Properties is property of the
13 bankruptcy estate under the plain language of § 541(a)(5).

14 The filing of a bankruptcy petition creates a bankruptcy
15 estate comprised of "all legal or equitable interests of the
16 debtor in property as of the commencement of the case." § 541
17 (a)(1). Property of the bankruptcy estate is further defined in
18 Section 541(a)(5) to include "any interest in property that would
19 have been property of the estate if such interest had been an
20 interest of the debtor on the date of the filing of the petition,
21 and that the debtor acquires or becomes entitled to acquire
22 within 180 days after such date-- by bequest, devise, or
23 inheritance." § 541(a)(5)(A) (emphasis added).

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27 ⁵ Our analysis is not affected by whether or not title to
28 the Properties was in the Trust or remained with the Debtor's
mother on the date the Debtor filed for bankruptcy.

1 A. State law defines the Debtor's interest in the Trust.

2 Section 541(a) (1) defines what interests of a debtor are
3 included in the estate; however, the existence and scope of a
4 debtor's property interest is determined by state law. State v.
5 Farmers Mkts., Inc. (In re Farmers Mkts, Inc.), 792 F.2d 1400,
6 1402 (9th Cir. 1986); Butner v. United States, 440 U.S. 48, 54-
7 55, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979).

8 The Trustee argues that Lyeth v. Hoey, 305 U.S. 188, 59
9 S.Ct. 155, 83 L.Ed. 119 (1938), and the U.S. Constitution's
10 uniformity requirement of the Bankruptcy Code mandate a
11 definition of bequest, devise or inheritance to include all
12 property transfers upon death by will, trust, or otherwise in
13 order to bring nationwide uniformity to § 541(a) (5) (A).

14 The Lyeth case addresses the definition of income for tax
15 purposes when a person receives more from a will contest
16 settlement agreement than by the terms of the will itself. The
17 only issue was whether an "inheritance" should be expanded to
18 include settlement proceeds derived from challenging the
19 inheritance. Lyeth is not factually similar to this case and its
20 holding interpreting provisions of the tax code does not provide
21 persuasive authority to adopt, in this case, an expansive federal
22 definition of inheritance to include, as the Trustee argues, all
23 transfers of property upon the death of another.

24 Butner addresses the argument for a uniform federal approach
25 in situations involving property rights in bankruptcy and
26 resolves the issue by holding that "unless some federal interest
27 requires a different result, there is no reason why [property
28 interests] should be analyzed differently [than under state law]

1 simply because an interested party is involved in a bankruptcy
2 proceeding." 440 U.S. at 55. We find no such federal interest
3 here. See id. at 54 ("Congress has generally left the
4 determination of property rights in the assets of a bankrupt's
5 estate to state law."); Magill v. Newman (Matter of Newman), 903
6 F.2d 1150, 1153 (7th Cir. 1990) ("The federal courts must use
7 state law to determine what constitutes a bequest, devise, or
8 inheritance under [§ 541(a)(5)(A)].").

9 Although using state law determinations might lead to
10 different results in different states, this does not affect the
11 constitutionality of the Bankruptcy Code. Stellwagen v. Clum,
12 245 U.S. 605, 613, 38 S. Ct. 215, 62 L.Ed. 507 (1918); Drummond
13 v. Urban (In re Urban), 375 B.R. 882, 891-92 (9th Cir. BAP 2007).
14 Therefore, consistent with California state law, we define a
15 bequest as a gift (transfer) by will of personal property; a
16 devise as a testamentary disposition of land or realty or a gift
17 of real property by the last will and testament of the donor;
18 and, inheritance as property which descends to an heir on the
19 intestate death of another. Birdsell v. Coumbe (In re Coumbe),
20 304 B.R. 378, 383-84 (9th Cir. BAP 2003) (citing BLACK'S LAW
21 DICTIONARY 160, 452, and 782 (6th ed. 1990)); Estate of Cochran,
22 30 Cal. App. 3d 892, 898 n.2 (1973); CAL. PROB. CODE § 32.

23 B. Under California law, the Trust is an inter vivos
24 trust, not a testamentary trust.

25 Whether post-petition trust distributions to a debtor-
26 beneficiary qualify for inclusion in the bankruptcy estate
27 depends on the nature of the trust at issue. In re Schauer, 246
28 B.R. 384 (Bankr. D. N.D. 2000); Matter of Newman, 903 F.2d at

1 1152; Heidkamp v. Galliher (In re Hunger), 272 B.R. 792, 795
2 (Bankr. M.D. Fla. 2002). Trusts may be created by will or "inter
3 vivos" (between living persons). RESTATEMENT (THIRD) OF TRUSTS
4 § 10 (2003);⁶ 60 CAL. JUR.3D TRUSTS § 2 (2008). The Trust in
5 this case was created and initially funded by Debtor's parents
6 during their lifetimes. The Will did not create the Trust, it
7 merely served to transfer the Properties to the existing Trust
8 through a "pour over" disposition. Therefore, the Trust itself is
9 an inter vivos trust.

10 Inter vivos trusts are considered to be non-testamentary
11 even though the terms of the trust may provide for the transfer
12 of the trust's assets to its beneficiaries upon the last
13 settlor's death. RESTATEMENT (SECOND) OF TRUSTS § 57 (1959).
14 "Where an interest in the trust property is created in a
15 beneficiary other than the settlor, the disposition is not
16 testamentary" merely because the interest of the beneficiary does
17 not take effect before the death of the settlor or because the
18 settlor reserves the power to revoke or modify the trust. Id.;
19 Spencer v. Zimmermann (In re Spencer), 306 B.R. 328, 334 (Bankr.
20 C.D. Cal. 2004). There is no requirement that an inter vivos
21 trust, as the Trustee asserts (without the support of authority),
22 provide the beneficiary monthly income payments or be outside the
23 control of the settlor.

25 ⁶ It reads: § 10. Methods of Creating a Trust. "Except as
26 prevented by the doctrine of merger, a trust may be created by:
27 (a) a transfer by the will of a property owner to another person
28 as trustee for one or more persons; or (b) a transfer inter vivos
by a property owner to another person as trustee for one or more
persons"

1 In contrast, if the trust is created after the death of the
2 settlor by the terms of a will, then the disposition of the trust
3 assets is considered to be testamentary. See RESTATEMENT
4 (SECOND) OF TRUSTS § 56 cmt. a (1959); York v. Kragness (In re
5 Kragness), 58 B.R. 939 (Bankr. D. Or. 1986). Distributions from
6 testamentary trusts received by a debtor-beneficiary within 180
7 days of filing the bankruptcy petition are property of the
8 estate. See In re Hunger, 272 B.R. at 795; In re Kragness, 58
9 B.R. at 944.

10 The Trustee argues that the distinction between inter vivos
11 and testamentary trusts is artificial and lumps all trusts which
12 involve a distribution of property on the death of the settlors
13 into a category of "estate planning trusts," which provide
14 debtors with "testamentary interests" that become property of the
15 estate if received within 180 days of filing a bankruptcy
16 petition.⁷

17 California courts, however, recognize the distinction
18 between inter vivos and testamentary trusts; under California law
19 distributions from an inter vivos trust do not constitute
20 testamentary dispositions. Bucholtz v. Belshe, 114 F.3d 923,
21 925-926 (9th Cir. 1997); In re Spencer, 306 B.R. at 334-336;
22 Neuton v. Danning (In re Neuton), 922 F.2d 1379, 1384 fn.6 (9th
23 Cir. 1990).

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26 ⁷ The cases cited to by the Trustee to support her argument
27 that Trust assets belong in estate property involve testamentary
28 trusts-trusts created by wills-and are distinguishable from the
facts of this case.

1 C. The devise of the Properties to the Trust does not make
2 the Trust testamentary.

3 The Trustee asserts the Trust is testamentary because the
4 Properties came into the Trust by devise from the Will and then
5 were "immediately" distributable to the beneficiaries.⁸ However,
6 the character of the Trust is not altered merely because the
7 Properties were transferred by the Will to the Trust. Even
8 though revocable inter vivos trusts may have the practical effect
9 similar to or identical to a will, "it is universally held that
10 such a transaction is not rendered testamentary." George Gleason
11 Bogert et. al., Bogert's The Law of Trusts and Trustees § 104
12 (2008); In re Crandall, 173 B.R. 836, 838 (Bankr. D. Conn.
13 1994).

14 A pour over devise is "a provision in a will that (i) adds
15 property to an inter vivos trust . . . or (ii) funds a trust that
16 was not funded during the testator's lifetime but whose terms are
17 in a trust instrument that was executed during the testator's
18 lifetime." RESTATEMENT (THIRD) OF PROPERTY § 3.8 (1999). The
19 validity of this type of testamentary addition to a trust is
20 determinable by state law. CAL. PROB. CODE § 6300.

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23 ⁸ The Trustee uses the phrase "immediate distribution" in
24 her argument; however, there is no immediate time frame for the
25 distribution to be made under the Trust agreement. The document
26 states that "The Survivor's Share shall be held, administered,
27 and distributed by the Trustee . . ." and allows the trustee the
28 power to defer division or distribution for a period of six
months after the last settlor's death. See Section 5.3 of the
Trust. The Trust document also directs the trustee to pay death
taxes, debts, and burial expenses prior to allocating the
beneficiaries' shares. See Section 5.1 of the Trust.

1 The California Probate Code provides that a devise may be
2 made by will to the trustee of an established trust and that
3 "unless the testator's will provides otherwise, the property so
4 devised (1) is not deemed to be held under a testamentary trust
5 of the testator but becomes part of the trust to which it is
6 given and (2) shall be administered and disposed of [according to
7 the terms of the trust]." Id.

8 Therefore, the Properties were devised through a pour over
9 provision to the Trust, not to the Debtor. The Debtor was a
10 contingent beneficiary of the Trust at the date of his bankruptcy
11 filing and had no direct interest in the Properties. The
12 Debtor's interest and right to the Properties became a vested
13 interest under the terms of the Trust when his mother died. It
14 was not acquired through bequest, devise or inheritance. Schmitt
15 v. Burton (In re Schmitt), 215 B.R. 417, 422 (9th Cir. BAP 1997)
16 (a debtor's interest in a revocable inter vivos trust is not a
17 property right); In re Spencer, 306 B.R. 328, 336 (Bankr. C.D.
18 Cal. 2004).

19 The Trustee tries to maneuver around this outcome by arguing
20 for the adoption of a federal law definition of bequest, devise,
21 or inheritance so that an inheritance includes all property
22 transfers upon death. However, as we noted above, there is no
23 bankruptcy case which supports the Trustee's argument. We
24 conclude that no compelling rationale has been provided in this
25 case to depart from the general Butner principle that the
26 interest of a bankruptcy estate with respect to particular
27 property is determined under applicable state law. Butner v.
28 United States, 440 U.S. at 54. There is no basis to apply

1 anything other than the general state law definitions of bequest,
2 devise or inheritance in interpreting § 541(a)(5). In re
3 Crandall, 173 B.R. at 839 ("The court is constrained to give a
4 narrow construction to the words 'bequest, devise, and
5 inheritance' and to conclude such words in their plain meaning do
6 not encompass revocable inter vivos trusts."). We find no
7 authority to support the Trustee's assertion that the Debtor's
8 interest in the Trust assets is property of the estate.

9
10 **VI. CONCLUSION**

11 The Debtor's interest in the Trust, at the time of his
12 bankruptcy filing, was a contingent beneficial interest in a
13 revocable inter vivos trust and was not property of the
14 bankruptcy estate. After Debtor's mother died, the Debtor had a
15 right to a share of the distribution of the Trust property, or
16 its value, consisting of all assets of the Trust including the
17 Properties. This right was acquired through vesting of his
18 interest in the Trust, not through bequest, devise, or
19 inheritance, and is, therefore, not included in the estate.
20 Because the inter vivos trust is not property of the estate, we
21 need not reach the issue of whether the Debtor's interest is
22 protected by a valid spendthrift provision. For these reasons,
23 the bankruptcy court's order is AFFIRMED.