NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. CC-08-1218-MkPaD
MICHAEL J. WAHL,	Bk. No. SV 04-10644-GM
Debtor.	Adv. No. SV 04-01465-GM
MICHAEL J. WAHL; CANDACE CRAIG WAHL,	
Appellants,	
v.	**MEMORANDUM**[*]
DAVID K. GOTTLIEB, Chapter 7 Trustee,	
Appellee.	

Argued and Submitted on May 14, 2009
at Pasadena, California

Filed - June 22, 2009

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

Honorable Geraldine Mund, Bankruptcy Judge, Presiding

Before: MARKELL, PAPPAS and DUNN, Bankruptcy Judges.

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[*]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.

The debtor, Michael J. Wahl, appeals the denial of his chapter 7 bankruptcy discharge,[1] and he and his wife, Candace Craig Wahl, appeal the bankruptcy court's determination that certain property was community property, and hence part of Mr. Wahl's bankruptcy estate. We AFFIRM.

FACTS

Michael and Candace Wahl were residents of California who married in Florida in 1981. They assert that before the marriage, they had conversations in which they agreed that their income from "creative endeavors" would remain separate property.[2] The term was never specifically defined. They testified that consistent with their agreement, throughout their marriage, they have maintained separate bank accounts in which they kept their "creative" income separate and subject to their individual control. Mr. Wahl used his money to buy a stereo, which he put in the living room of their home, and Ms. Wahl used some of her money for grooming expenses for her modeling work. Under the

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[1]Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, as enacted and promulgated prior to the effective date (October 17, 2005) of the relevant provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, April 20, 2005, 119 Stat. 23, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

[2]In his testimony at the trial of the adversary proceeding, Mr. Wahl said that in the days before their marriage, he had told his wife-to-be, "[G]oing forward, anything you do individually and that I do individually from our creative endeavors is going to be owned separately." Memorandum of Opinion After Trial, at 4, *ll*. 22.5-23.5. This statement by Mr. Wahl is the essence of their purported prenuptial agreement.

agreement, the joint household expenses were to be paid through Mr. Wahl's and Ms. Wahl's income from other work, which was deposited in a joint checking account.[3] Though no evidence of three separate checking accounts was submitted to the bankruptcy court, the court "[n]onetheless [found] that three accounts existed." Memorandum of Opinion After Trial, at 5.

During the marriage, Mr. Wahl worked as an executive in the motion picture industry, and Ms. Wahl worked as a substitute teacher. In addition, Mr. Wahl created a product called "Chrismoose," which he registered with funds from his separate bank account for copyright and trademark in his own name. Besides her income from teaching, Ms. Wahl had income from modeling, which she put into her separate account.

In 1993, Ms. Wahl created "Flutter Faeries," and she entered into an agreement with Gunther-Wahl Productions, Inc. ("Gunther-Wahl"), which was 50% owned by her husband, to develop and sell an animated television series based on Flutter Faeries and to develop and sell characters and toys based on the Flutter Faeries concept. Gunther-Wahl made presentations about Flutter Faeries to a number of toy companies, including Mattel, Inc. ("Mattel").

In 1998, Ms. Wahl and Gunther-Wahl sued Mattel in the Los Angeles Superior Court for breach of contract. They claimed that Mattel was using the Flutter Faeries concept and characters after having told Gunther-Wahl that it was not interested in the idea.

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[3]In the sentence after the "creative endeavors" sentence quoted in note 2, Mr. Wahl testified, he told his wife-to-be, "We are going to have a household income from my legal activities." Id. lines 24-24.5. At the time of their marriage, Mr. Wahl was working as a lawyer.

Mattel responded with a suit in federal District Court claiming copyright infringement.

The state court case was tried, with a jury verdict for Mattel; the federal case was settled and dismissed. Ms. Wahl and Gunther-Wahl appealed the state court verdict, and the California Court of Appeal reversed the state court jury verdict and remanded the case for retrial, which remains pending.

On January 28, 2004, Mr. Wahl filed for bankruptcy under chapter 7. In his schedule of assets, he made no mention of his wife's assets from her "creative endeavors," including Flutter Faeries and the pending litigation against Mattel. Despite Gunther-Wahl's lawsuit against Mattel, Mr. Wahl listed the value of Gunther-Wahl, of which he was a 50% owner, at $0. At the first meeting of creditors, Mr. Wahl testified under oath that Gunther-Wahl had been inactive since the late 1990s. The trustee asked him whether the company had any assets. "None," Mr. Wahl said.

At the trial and in his court papers, Mr. Wahl stated that in his bankruptcy filing he was assisted and advised by a lawyer, Keith Rouse, who, he said, was fully aware of the Mattel litigation. Mr. Wahl asserts that he acted in good faith on Mr. Rouse's advice and that he did not commit fraud. Mr. Rouse was not called as a witness to testify about what advice he gave Mr. Wahl about his bankruptcy schedules and Gunther-Wahl's value.[4]

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[4]At oral argument of this appeal, Mr. Wahl explained that he had not called Mr. Rouse to testify at the trial because of the possibility that waiving his attorney-client privilege could have resulted in disclosing information relative to the Mattel litigation that would lessen its value.

The bankruptcy trustee, Mr. Gottlieb, says that he was unaware of the pending Mattel litigation involving Gunther-Wahl until, on the deadline date for objecting to Mr. Wahl's discharge, he received a letter from Mattel's lawyer regarding mediation of the dispute.

Ms. Wahl filed an adversary proceeding against the trustee seeking declaratory relief that Flutter Faeries and the Mattel lawsuit were her separate property. The trustee counterclaimed against Mr. Wahl to revoke his discharge under § 727(d)(1).

On August 30 and 31, 2007, and June 26 and 27, 2008, the bankruptcy court conducted four days of trial on the adversary proceeding between Ms. Wahl and the trustee regarding the purported prenuptial agreement and on the trustee's complaint to revoke Mr. Wahl's discharge. The court ruled on August 13, 2008, that no legally cognizable prenuptial agreement existed between Mr. and Ms. Wahl; that all of Ms. Wahl's income and assets acquired during the marriage, including her interest in the Mattel litigation, were community property; and that Mr. Wahl's actions – including his failure to list these assets on his bankruptcy schedules and to disclose them at the § 341(a) meeting of creditors – constituted fraud. As a result of the fraud, the court revoked his discharge.

The Wahls timely appealed on August 22, 2008, challenging (1) the refusal of the bankruptcy court to recognize the purported prenuptial agreement, which would have shielded Ms. Wahl's separate assets from Mr. Wahl's bankruptcy estate and (2) the finding that Mr. Wahl had committed fraud and the consequent

revocation of his discharge.[5]

JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and 157. We have jurisdiction under § 158.

STANDARDS OF REVIEW

We review a bankruptcy court's legal conclusions, including its interpretation of the Bankruptcy Code and state law, de novo. Roberts v. Erhard (In re Roberts), 331 B.R. 876, 880 (9th Cir. BAP 2005), aff'd 241 Fed. Appx. 420 (9th Cir. 2007).

"Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous . . . ." Rule 8013. Moreover, in order to reverse a bankruptcy court's findings of fact, we must have a definite and firm conviction that the court committed a clear error of judgment in the conclusion it reached. SEC v. Coldicutt, 258 F.3d 939, 941 (9th Cir. 2001); Hansen v. Moore (In re Hansen), 368 B.R. 868, 874-75 (9th Cir. BAP 2007).

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[5]Appellants did not provide a complete transcript of the trial for this panel to review. Without a full transcript, we cannot fully consider the arguments that they claim they made to the trial court, and we cannot realistically evaluate the court's findings of fact to determine if they are clearly erroneous. It is the appellants' burden to provide a transcript. See Rule 8006. As this panel has previously stated, "The burden is on [an appellant] to demonstrate that the findings of fact [made by the trial court] were clearly erroneous. We are entitled to presume that [an appellant who does not provide a transcript] does not think the trial transcript helpful in that regard." Gionis v. Wayne (In re Gionis), 170 B.R. 675, 680-81 (9th Cir. BAP 1994).

DISCUSSION

All parties acknowledge that California is a community property state and that, in the absence of a supervening agreement between the spouses, each spouse owns an undivided one-half interest in all property acquired during the marriage.[6]

Prenuptial agreements are covered by the statute of frauds, which means that they must be in writing.[7] It is not impossible for an oral prenuptial agreement to be deemed valid and binding, but it is extremely difficult, and the standard for recognizing a prenuptial agreement in the absence of a writing is very high. The bankruptcy court found that "the Wahls had some sort of premarital understanding," but whatever that understanding was, it did not meet the high burden that the law requires for enforceability against third parties.

In their briefs and in their arguments, the Wahls fundamentally misunderstand and misconstrue prenuptial agreements, the statute of frauds, and the reasons for the requirement that such agreements must be in writing. They

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[6]The Wahls were married in 1981. At that time, premarital agreements were covered in §§ 5133-37 of the California Civil Code. Effective January 1, 1986, California adopted the Uniform Premarital Agreement Act which provided that premarital agreements made before the Act's effective date were to be governed by the law in existence at the time such agreements were made. Cal. Fam. Code § 1503.

[7]Former § 5134 of the California Civil Code provided that the statute of frauds applied to premarital agreements. "[A]ll contracts for marriage settlements must be in writing, and executed or acknowledged or proved in like manner as a grant of land is required to be executed and acknowledged or proved." Current § 1611 of the Cal. Fam. Code is similar: "A premarital agreement shall be in writing and signed by both parties. It is enforceable without consideration."

contend that the issue of oral prenuptial agreements usually arises in divorce cases, where the divorcing spouses typically disagree with each other about whether they had a premarital agreement and what it provided. The Wahls note that the current case is not a divorce proceeding, and, in fact, they say, the spouses agree that there was a prenuptial agreement and what its terms were. In their view, the fact that they agree should end the inquiry, and no one, including the chapter 7 trustee, has standing to challenge what the spouses say they verbally agreed to before the marriage.[8]

Their argument is just plain wrong. While it may be true that the issue of an oral prenuptial agreement usually arises in the context of a divorce, that is not the only context in which it may arise or in which it matters. In a bankruptcy proceeding, under § 541(a)(2), the debtor's estate includes all of the debtor's and the nonfiling spouse's interests in community property. Given this interest, creditors are entitled to a full accounting of a debtor's assets, which may very well be affected by the presence or absence of a valid prenuptial agreement that

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[8]In their opening brief, the Wahls say they have:

> repeatedly acknowledged the existence of their premarital agreement. They do not dispute it and both have acted in conformity therewith. In this present situation, as the only parties to the agreement, they are the only ones with standing to dispute the existence of the agreement. If they both agree that the premarital agreement exists and their commitment to it, the Trustee cannot use the statute of frauds in an attempt to frustrate that agreement.

Appellants' opening brief at 13.

purports to determine whether property is community or separate property. A valid prenuptial agreement overriding a state's community property law would prevent creditors from gaining access to half of the assets of the nondebtor spouse. But if there is no such agreement, all such property would be community property, and it would become part of the debtor spouse's bankruptcy estate under § 541(a)(2).

That is exactly the case here, and that is why the trustee, who stands in the place of the creditors, may challenge the purported prenuptial agreement. If a debtor has assets that are estate assets available to the creditors, the trustee is obligated to find them and administer them for the creditors' benefit. Failing to do so would be an abdication of the trustee's responsibility to the creditors. See § 704(a)(1).

Moreover, far from dispensing with the need for a written prenuptial agreement, this case highlights the need for one or for unassailable evidence to support a purported oral agreement.

The Wahls have a common interest in arguing that they had a prenuptial agreement that overrode California's community property law. They are trying to prevent Ms. Wahl's community property interest in the Mattel litigation and the property to which it relates from being turned over to Mr. Wahl's creditors. There is incentive for collusion, which is exactly why the statute of frauds applies. The Wahls must either produce a writing showing exactly what they agreed to before the wedding, or, in the absence of a writing, they must meet the very high standard of proof to establish that they had an oral agreement and that they adhered to it throughout their marriage.

In the absence of such a showing, Ms. Wahl's assets acquired during the marriage are community property under California law and thus property of the estate.

Do the Wahls Have a Valid Prenuptial Agreement?

California courts, as well as the courts of other states, have upheld oral prenuptial agreements when there is indisputable evidence of full or partial performance with the terms of the agreement and that performance was to the detriment of the performing party. Further, the acts of performance must be "unequivocally referable to the contract" and must be acts not reasonably expected in a marriage. See, e.g., Hall v. Hall, 222 Cal. App.3d 578, 271 Cal. Rptr. 773 (1990), in which the California Court of Appeal enforced an oral premarital agreement on the basis of the wife's partial performance: she gave her husband $10,000, quit her job, and applied for early Social Security. Id. at 586, 271 Cal. Rptr. at 778.

As explained by Witkin's Summary of California Law, for a purported oral agreement to avoid the statute of frauds there must be "substantial change of position in reliance on [the] oral agreement." 1 Bernard E. Witkin, Summary of California Law, Contracts, § 325, at 305-06 (9th ed. 1987). In the current case, the Wahls have shown no unambiguous change of position as a result of whatever understanding they may have had, and certainly no substantial change of position.

The bankruptcy court also considered DewBerry v. George, 115 Wash. App. 351, 62 P.3d 525 (2003), a case from Washington, another community property state, in which the court upheld an oral premarital agreement not unlike the one the Wahls claim to

have made. The court found that the parties in that case had agreed to treat their incomes as separate property and, in accordance with that agreement, made a "painstaking and meticulous effort to maintain separate finances and property." Id. at 356, 62 P.3d at 526. For example, they maintained separate bank accounts, purchased property separately, did not establish a joint account until four years into the marriage, after their first child was born, and reimbursed their separate accounts from the joint account if they used their separate funds for household purchases. The court found that these "painstaking efforts to establish and maintain separate property," Id. at 362, 62 P.3d at 530, were not usually followed in a husband-and-wife relationship and were convincing proof of performance of an oral premarital agreement.

By contrast, the bankruptcy court here found that neither of the Wahls presented sufficient evidence of part performance to overcome the statute of frauds. Unlike the wife in Hall, neither of the Wahls was disadvantaged by "trivial and insufficient" evidence they presented of having used their separate checking accounts for separate purposes. Memorandum of Opinion After Trial, at 14. Unlike the parties in DewBerry, the Wahls did not show "painstaking efforts" to maintain separate property, and what they did show was not "unequivocally referable" to their purported prenuptial agreement. Id.

Furthermore, the bankruptcy court found that the term "creative endeavors" was "too uncertain to satisfy the requirements of the statute of frauds." Id. at 16. "The term 'creative endeavor' remains virtually meaningless," the court

found. Id.[9] See In re Marriage of Shaban, 105 Cal. Rptr. 2d 863, 869, 88 Cal. App. 4th 398, 409 (Cal. Ct. App. 2001) (stating a "need for reasonable certainty of terms and conditions" in premarital agreements in order to give them effect).

As a result of all of these defects, the bankruptcy court found that whatever "understanding" the Wahls may have had before their marriage, in the absence of a writing, it was not enforceable against third parties. The court was correct. The Wahls may have had some sort of agreement, but they did not do what was necessary under California law to make it enforceable against third parties. As a result, California community property law applies without exception. This means that the relevant pool of community assets, swept into the estate by § 541(a)(2), included all income and assets received during the

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[9]In its discussion of the uncertainty of the term "creative endeavors," the bankruptcy court correctly identified another fatal defect that prevents the purported premarital agreement from being enforceable:

> At the time of their understanding, Michael was a practicing lawyer and expected to pursue a career outside the home with a regular source of income. But what if he had made a lot of money on Chrismoose and quit his law job to work at home creating more animated characters? Would everything he made be his separate property to spend as he wished or would his prior "hobby" then morph into a regular source of income to be used to support the family?
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> Similarly, what if Candace had moved from periodic fit modeling to steady work in that field or even become a celebrity model? Would this replace her community property income as a substitute teacher or would she retain everything as separate property?

Id. at 16-17.

Wahls' marriage and in existence when Mr. Wahl filed his bankruptcy petition. It also means that Mr. Wahl and Ms. Wahl each has a one-half interest in all property acquired by either during marriage, including Ms. Wahl's interest in the Flutter Faeries project and the Mattel litigation. Under § 541(a)(2), these community property interests are property of Mr. Wahl's bankruptcy estate.

Were Michael Wahl's Actions Fraudulent and Should His Discharge Be Revoked?

In response to Ms. Wahl's lawsuit seeking to quiet title in the Flutter Faeries project and the Mattel litigation, the trustee counterclaimed, seeking to revoke Mr. Wahl's discharge. Although there was some procedural confusion as to the status of the discharge – it should have been issued as a matter of course at the time of the counterclaim, but wasn't – the trustee established that Mr. Wahl should not retain his discharge under the standard for denial of a discharge.[10]

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[10]Mr. Wahl contended at the trial that the trustee's counterclaim seeking revocation of the discharge was improper because the court had never entered the discharge. But Ninth Circuit law on this point is clear. In Dietz v. Mitchell (In re Dietz), 914 F.2d 161 (9th Cir. 1990), the court found that "the [bankruptcy] court acted consistently with the spirit of the bankruptcy rules, which contemplate that discharge is effective immediately upon expiration of the 60-day period following the creditors' meeting, so long as no objections are filed." Id. at 164.

In the current case, since the 60-day period had passed, the trustee was entitled to believe that the discharge was effective. He could thus counterclaim to have it revoked. The fact that the court had not formally entered the discharge did not bar the trustee's counterclaim.

Under § 727(d)(1), "[o]n request of the trustee, . . . and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if — [¶](1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge . . . ." As stated in Collier on Bankruptcy, "[t]his language requires, at a minimum, that the discharge would not have been granted but for the fraud alleged. The fraud required to be shown is fraud in fact, such as the intentional omission of assets from the debtor's schedules." 6 Collier on Bankruptcy ¶ 727.15[2] (Alan N. Resnick & Henry J. Sommer eds., 15th rev. ed. 2009). See, e.g., White v. Nielsen (In re Nielsen), 383 F.3d 922, 925 (9th Cir. 2004); Bowman v. Belt Valley Bank (In re Bowman), 173 B.R. 922, 925 (9th Cir. BAP 1994).

The bankruptcy court found that failure to list the Flutter Faeries property and the Mattel litigation was fraudulent concealment. It also found that Mr. Wahl's valuation of his interest in Gunther-Wahl at zero was part of this fraudulent concealment.[11]

Mr. Wahl contends that the highly factual finding of an intent to defraud was improper because he testified that his

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[11]The trustee testified at the trial that he did not know of the Mattel litigation until Mattel's counsel contacted him on May 3, 2004, which was the last day to file objections to discharge. The bankruptcy court credited that testimony and concluded that the trustee did not know of Mr. Wahl's fraud before that date, thus satisfying § 727(d)(1)'s requirement that "the requesting party did not know of such fraud until after the granting of such discharge."

failure to list the property was entirely due to his faithful following advice of counsel. In many cases, reliance on the advice of counsel in completing bankruptcy schedules may constitute good faith and thus negate the necessary deceptive intent required for a finding of fraud. "Generally, a debtor who acts in reliance on the advice of his attorney lacks the intent required to deny him a discharge of his debts." First Beverly Bank v. Adeeb (In re Adeeb), 787 F.2d 1339, 1343 (9th Cir. 1986) (citing Hultman v. Tevis, 82 F.2d 940, 941 (9th Cir. 1936) and In re Nerone, 1 B.R. 658, 660 (Bankr. S.D.N.Y. 1979)).

But Mr. Wahl attempted to prove his good faith by his testimony alone. The bankruptcy court heard that evidence and did not believe it or credit it as strongly as Mr. Wahl desires. Without corroboration by his lawyer or by some other evidence, we cannot say that the bankruptcy court's factual findings with respect to good faith were clearly erroneous.

Review under the clearly erroneous standard is significantly deferential, requiring a "definite and firm conviction that a mistake has been committed." See Easley v. Cromartie, 532 U.S. 234, 242 (2001); Lentini v. California Center for the Arts, Escondido, 370 F.3d 837, 843 (9th Cir. 2004); USAA Fed. Sav. Bank v. Thacker (In re Taylor), 390 B.R. 654, 660 (9th Cir. BAP 2008). Under this standard, if the bankruptcy court's account of the evidence is plausible in light of the entire record, we may not reverse, even if we would have weighed the evidence differently. See Husain v. Olympic Airways, 316 F.3d 829, 835 (9th Cir. 2002), aff'd, 540 U.S. 644 (2004). "Where there are two permissible views of the evidence, the factfinder's choice between them

cannot be clearly erroneous." United States v. Elliott, 322 F.3d 710, 714 (9th Cir. 2003); see also Hayes v. Woodford, 301 F.3d 1054, 1067 n.8 (9th Cir. 2002) (internal quotation omitted) ("To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week-old unrefrigerated dead fish.").

The record as provided by Mr. Wahl does not give us any plausible basis to reverse under these standards. Moreover, Mr. Wahl's other testimony on this point was also not helpful. Mr. Wahl testified at trial that because Mattel had won in Gunther-Wahl's state court action for breach of contract, he believed the litigation was worthless, and thus his interest in Gunther-Wahl was legitimately zero. But the facts as found by the bankruptcy court belie that statement. The bankruptcy court, which heard Mr. Wahl's testimony, found it "unbelievable," Memorandum of Opinion After Trial, at 22, and special deference is paid to credibility findings. See Anderson v. City of Bessemer, 470 U.S. 564, 573 (1985); McClure v. Thompson, 323 F.3d 1233, 1241 (9th Cir. 2003). The bankruptcy court supported this finding by noting that Mr. Wahl knew that his wife and Gunther-Wahl (of which he was an officer) had retained counsel to appeal the state court litigation, which meant that at least they thought the claim had value.

Based upon this and other testimony, the bankruptcy court found that Mr. Wahl "acted with the requisite fraudulent intent when he continually concealed the Flutter Faeries litigation from the Trustee." Memorandum of Opinion After Trial, at 22. The bankruptcy court found a pattern of conduct demonstrating that

"the debtor acted with fraudulent intent in concealing property of the estate." Id. at 21-22.

Given Mr. Wahl's election not to call his lawyer to corroborate his testimony regarding good faith, and his failure to provide relevant transcripts, we cannot say on this record that any of the factual predicates supporting the bankruptcy court's fraud determination were erroneous, let alone clearly erroneous. The bankruptcy court thus committed no error.

CONCLUSION

We AFFIRM the bankruptcy court's conclusion that there was no enforceable prenuptial agreement, that California's community property law applies, and that one-half of Ms. Wahl's interest in Flutter Faeries and the Flutter Faeries litigation belong to Mr. Wahl and are part of his bankruptcy estate.

We further AFFIRM the bankruptcy court's judgment that Mr. Wahl's failure to disclose assets was knowing and fraudulent and warranted revocation of his discharge.