

JUL 09 2007

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NOT FOR PUBLICATION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 No.	CC-06-1399-PaAK
		)		
7	ORLANDO HIDALGO,	)	Bk. No.	LA 06-10288 VK
		)		
8	Debtor.	)		
		)		
9	_____	)		
		)		
10	HOWARD EHRENBERG, Chapter 7	)		
	Trustee,	)		
		)		
11	Appellant,	)		
		)		
12	v.	)		
		)		
13	ORLANDO HIDALGO	)		
		)		
14	Appellee.	)		
		)		

MEMORANDUM<sup>1</sup>

Argued and Submitted on June 21, 2007  
at Pasadena, California

Filed - July 9, 2007

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

Honorable Victoria Kaufman, Bankruptcy Judge, Presiding.

Before: PAPPAS, ALLEY<sup>2</sup> and KLEIN, Bankruptcy Judges.

<sup>1</sup> 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.

<sup>2</sup> The Honorable Frank R. Alley, Bankruptcy Judge for the District of Oregon, sitting by designation.

1 Howard Ehrenberg, the chapter 7<sup>3</sup> trustee ("Trustee"),  
2 appeals the order of the bankruptcy court overruling his  
3 objection to Debtor Orlando Hidalgo's claim of a homestead  
4 exemption. We AFFIRM.

5  
6 **FACTS**

7 In September 1999, Debtor, his sister Maria Hidalgo, and his  
8 niece Idalia Diaz, purchased a home in Los Angeles (the  
9 "Property") as joint tenants for \$176,500. Debtor, along with  
10 his wife and children, sister, niece and nephew, all have lived  
11 at the Property since its purchase.

12 In March 2003, Debtor and Idalia Diaz executed a deed  
13 transferring title of the Property solely to Maria Hidalgo.  
14 Allegedly, Debtor received no consideration for the transfer.  
15 Debtor, in his declaration in support of his claim of exemption,  
16 indicated that he transferred the Property to facilitate  
17 refinancing of the mortgage on the Property because his sister  
18 had a better credit rating. After the transfer, Debtor continued  
19 to make the same monthly payment he had prior to transferring  
20 title to his sister.

21 Debtor filed a chapter 7 petition on January 31, 2006. He  
22 did not list any interest in the Property in his Schedule A.  
23 However, the tax returns he turned over to Trustee reflected that  
24 Debtor deducted the interest paid on the mortgage on the Property  
25 for 2003 and 2004. When Trustee questioned Debtor as to how, if

26 \_\_\_\_\_  
27 <sup>3</sup> Unless otherwise indicated, all chapter, section and rule  
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

1 he owned no real property, he could claim a tax deduction for  
2 mortgage interest, Debtor explained that the 2004 tax deduction  
3 was a wedding gift from his sister.

4 Trustee concluded that Debtor was attempting to hide an  
5 ownership interest in the Property. Trustee communicated further  
6 with Debtor's attorney, but was unsatisfied with the responses to  
7 his inquires about the Property. He commenced an adversary  
8 proceeding against Maria Hidalgo on June 12, 2006, to avoid the  
9 transfer of the Property to her as a fraudulent conveyance, and  
10 to recover the Property for the benefit of the bankruptcy estate.

11 On July 14, 2006, Debtor filed amended Schedules A and C,  
12 now asserting that he held an equitable one-third interest in the  
13 Property, and claiming a \$75,000 homestead exemption as to his  
14 interest pursuant to Cal. Code Civ. Proc. § 704.730. Trustee  
15 objected to Debtor's exemption claim, contending that it would be  
16 improper to allow Debtor to exempt property that had been  
17 concealed from Trustee and creditors. Debtor responded, arguing  
18 he was entitled to claim the exemption.

19 The bankruptcy court conducted a hearing concerning the  
20 exemption issue on October 11, 2006. The court informed the  
21 parties at the beginning of the hearing that, had Debtor claimed  
22 an exemption in his equitable interest in the Property from the  
23 outset, it would have been proper under state law. As a result,  
24 according to the court, the focus of the hearing was whether  
25 Trustee and the bankruptcy estate would be prejudiced by allowing  
26 Debtor to amend his exemption schedules, and whether Debtor had  
27 engaged in a bad faith attempt to conceal his interest in the  
28 Property.

1           The bankruptcy court heard testimony from Debtor, Trustee,  
2 and Jennifer Aragon ("Aragon"), the attorney who represented  
3 Debtor until she referred him to a bankruptcy specialist to deal  
4 with Trustee's challenges to his exemption. After considering  
5 the testimony and evidence, the bankruptcy court announced that  
6 it had concluded that Debtor was entitled to claim the exemption.  
7 The bankruptcy court determined that Trustee had not satisfied  
8 his burden to show that Debtor engaged in bad faith by failing to  
9 initially disclose the equitable interest in the Property.  
10 Instead, the bankruptcy court determined that Aragon failed to  
11 investigate and disclose the facts adequately, and that Debtor  
12 did not understand the distinction between legal title and an  
13 equitable interest. Moreover, by providing the tax returns  
14 showing the mortgage interest deduction, the bankruptcy court  
15 concluded that Debtor did disclose his interest in the Property,  
16 at least to some extent.

17           The bankruptcy court and parties next turned their attention  
18 to whether Trustee and the bankruptcy estate should be  
19 compensated for any prejudice suffered because of the late  
20 amendment to Debtor's schedules to claim the homestead exemption.  
21 After argument, the bankruptcy court recessed to determine what  
22 amount of attorney's fees would be required to compensate the  
23 bankruptcy estate. However, during the recess, the parties  
24 stipulated that Debtor should pay Trustee \$7,500 for any fees and  
25 costs incurred by the bankruptcy estate.<sup>4</sup>

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27           <sup>4</sup> Interestingly, the bankruptcy judge later disclosed that  
28 she had determined to award fees in the amount of \$6,650, had the  
parties not reached an agreement.

1 Consistent with its ruling at the hearing, the bankruptcy  
2 court entered an order overruling Trustee's objection to Debtor's  
3 amended claim of exemption on October 30, 2006. The order  
4 provides:

5 Debtor shall have an allowed claim of exemption in his  
6 equitable interest in the property . . . in the amount  
7 of \$75,000 conditioned upon payment of the Trustee's  
8 administrative costs and fees in the amount of \$7500 if  
9 the property is sold by the Trustee.

10 In the event the property is not sold but the estate  
11 recovers other assets, the Debtor shall pay the sum of  
12 \$7500 to the Trustee in satisfaction of administrative  
13 costs incurred by the Trustee in connection with the  
14 objection to the homestead exemption.

15 Trustee filed a timely appeal from that order.

#### 16 **JURISDICTION**

17 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
18 §§ 1334(a) and 157(b) (2) (B). We have jurisdiction under 28  
19 U.S.C. § 158.

#### 20 **ISSUES**

21 Whether the bankruptcy court abused its discretion in  
22 concluding that Debtor did not attempt to amend his schedules in  
23 bad faith.

24 Whether § 522(g) precludes Debtor from claiming the  
25 exemption allowed under state law.

#### 26 **STANDARDS OF REVIEW**

27 "The bankruptcy court has no discretion to disallow amended  
28 exemptions, unless the amendment has been made in bad faith or

1 prejudices third parties." Arnold v. Gill (In re Arnold), 252  
2 B.R. 778, 784 (9th Cir. BAP 2000) (citing Martinson v. Michael  
3 (In re Michael), 163 F.3d 526, 529 (9th Cir. 1998); Doan v.  
4 Hudgins (In re Doan), 672 F.2d 831, 833 (11th Cir. 1982);  
5 Magallanes v. Williams (In re Magallanes), 96 B.R. 253, 256 (9th  
6 Cir. BAP 1988)). Whether the debtor has the right to claim an  
7 exemption is a question of law reviewed de novo, "whereas the  
8 issue of a debtor's intent is a question of fact reviewed under  
9 the clearly erroneous standard." Id. (citing Coughlin v. Cataldo  
10 (In re Cataldo), 224 B.R. 426, 428-29 (9th Cir. BAP 1998);  
11 Szymanski v. Herzog (In re Szymanski), 189 B.R. 5, 6-7 (N.D. Ill.  
12 1995)). "Any findings by the bankruptcy court on bad faith or  
13 prejudice are reviewed for clear error." In re Arnold, 252 B.R.  
14 at 784. "A factual finding is clearly erroneous if the appellate  
15 court, after reviewing the record, has a definite conviction that  
16 a mistake has been made." Beauchamp v. Hoose (In re Beauchamp),  
17 236 B.R. 727, 729 (9th Cir. BAP 1999)

## 18

### 19 DISCUSSION

#### 20 I.

21 The bankruptcy court's finding that Debtor did not  
22 engage in bad faith in amending his real property and  
exemption schedules was not clearly erroneous.

23 The bankruptcy court allowed Debtor's claim of a homestead  
24 exemption after concluding that the previous omissions in his  
25 schedules concerning his interest in the Property were not in bad  
26 faith.

27 Trustee disagrees. He argues that Debtor's failure to list  
28 his interest in the Property in his original schedules, taking

1 the mortgage interest deductions on his tax returns and asserting  
2 to Trustee that this was a wedding gift from his sister, and then  
3 only later amending his schedules to claim a homestead exemption  
4 after Trustee expressed concern, all evidence Debtor's bad faith.  
5 Trustee points out that Debtor had multiple opportunities to  
6 correct the record to reflect accurately his interest in the  
7 Property, and to claim an exemption, yet failed to do so until  
8 Trustee commenced an adversary proceeding to avoid a fraudulent  
9 transfer. Therefore, Trustee maintains that Debtor should be  
10 denied the exemption.

11 Debtor denies he acted in bad faith, alleges his failure to  
12 initially claim the exemption and other actions can be  
13 satisfactorily explained, and contends that the bankruptcy court  
14 correctly concluded that Debtor should be entitled to the  
15 exemption.

16 Rule 1009(a) provides that a schedule "may be amended by the  
17 debtor as a matter of course at any time before the case is  
18 closed." Such amendments "are and should be liberally allowed at  
19 any time absent a showing of bad faith or prejudice to third  
20 parties."<sup>5</sup> Arnold, 252 B.R. at 784 (citing Nelson v. White (In  
21 re White), 61 B.R. 388, 394 (Bankr. W.D. Wash. 1986); Andemahr v.  
22 Barrus (In re Andermahr), 30 B.R. 532, 533 (9th Cir. BAP 1983)).  
23 "The usual ground for a finding of 'bad faith' is the debtor's  
24 attempt to hide assets. Arnold, 252 B.R. at 785. The party

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25  
26 <sup>5</sup> The bankruptcy court concluded that Trustee was prejudiced  
27 by Debtor's late amendments to his schedules; however, the  
28 parties stipulated that payment to Trustee in the amount of  
\$7,500 would cure that prejudice. Tr. Hr'g. 95:15. The parties  
do not question this conclusion on appeal.

1 alleging the bad faith bears the burden of proof. See  
2 Magallanes, 96 B.R. at 256.<sup>6</sup>

3 To evaluate whether a debtor has engaged in bad faith by  
4 attempting to hide assets, a bankruptcy court must consider the  
5 entirety of the evidence. Arnold, 252 B.R. at 785. The mere  
6 fact that a debtor omitted an asset from the schedules, standing  
7 alone, is insufficient to prove bad faith. Magallanes, 96 B.R.  
8 at 256. In addition, "[b]y itself, claiming an exemption late is  
9 simply not bad faith." Arnold, 252 B.R. at 786.

10 Trustee argues that Debtor exhibited bad faith in repeatedly  
11 lying to him. As Trustee explained to the bankruptcy court:

12 The denial of the exemption is not just because the  
13 property was fraudulently conveyed. It's because of  
14 the Debtor's action from the first time I met him until  
15 I filed my lawsuit, and I don't think that his - - that  
16 he was given so many opportunities in very plain  
17 language to explain what he understood to be the facts,  
18 and I was not only not told what he believed, but I was  
19 told lies, and that's the reason why I think he should  
20 be denied the exemption is because of the multiple  
21 commissions of perjury[.]

22 Tr. Hr'g. 82:25-83:9 (Oct. 11, 2006). The bankruptcy court,  
23 however, did not view the evidence in the same manner as Trustee.  
24 The Court asked Trustee: "[I]s it perjury [to indicate in his  
25 schedules], 'I didn't own it,' when he's transferred title to his  
26 sister? I mean, he's transferred title to his sister. He

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27 <sup>6</sup> The law is unsettled whether, under these circumstances,  
28 bad faith must be proven by a preponderance, or by the heightened  
standard of clear and convincing evidence. See Arnold, 252 B.R.  
at 784 n.10 (discussing the split of authority, and questioning  
whether the Supreme Court's subsequent holding in Grogan v.  
Garner, 498 U.S. 279 (1991), would impact the earlier case law).  
Because the bankruptcy court, after acknowledging the split of  
authority, concluded Trustee had not shown bad faith under the  
less stringent preponderance of the evidence standard, the Panel  
need not address the issue here.



1 doesn't own it." Tr. Hr'g. 83:12-15. The bankruptcy court later  
2 stated:

3 I think here the preponderance of the evidence is when  
4 he said "I don't own the property. I don't own" - -  
5 that was a - - legally imprecise but semi-accurate  
because he wasn't on title, and I don't think he knows  
how to be legally precise.

6 Tr. Hr'g. 85:14-19.

7 The bankruptcy court also was not persuaded by Trustee's  
8 argument that Debtor exhibited bad faith by explaining that the  
9 mortgage tax deduction was a wedding present from his sister.  
10 After a discussion with Debtor's counsel and Trustee, the  
11 bankruptcy court concluded that Debtor was entitled to the tax  
12 deduction in 2003 because he owned an interest in the property,  
13 and it was plausible in 2004 that Debtor considered the tax  
14 deduction was a gift from his sister because Debtor was still  
15 paying his share of the house payments. Tr. Hr'g. 85:19-88:6.

16 Specifically addressing the issue of bad faith, the  
17 bankruptcy court stated, "I'm just saying is he entitled to amend  
18 his claim of exemptions . . . and he is as long as there - - I  
19 don't think there's sufficient evidence here of bad faith[.]"

20 Tr. Hr'g. 80:3-6. The court went on:

21 Like when he said "I don't own the property," he didn't  
22 own the property because he had transferred title to  
23 his sister, but he didn't know that he could claim an  
equitable interest . . . there wasn't a scheme to not  
claim an equitable interest until there was a  
fraudulent transfer complaint.

24

25 Tr. Hr'g. 80:8-14.

26 Debtor's initial bankruptcy counsel, Aragon, testified that  
27 she decided what information should be included in the bankruptcy  
28 schedules based upon her interview of Debtor, and that Debtor had

1 told her about the arrangement made with his sister to convey  
2 title to her to facilitate obtaining a refinance loan on the  
3 Property. Tr. Hr'g. 25:25-26:19. Based upon Debtor's statements  
4 to her, it was Aragon, not Debtor, who decided he did not own an  
5 interest in the Property, but rather "he just lived there as a  
6 tenant." Tr. Hr'g. 26:20. When an issue about Debtor's interest  
7 was later raised by Trustee, her response to Trustee was based  
8 solely on the state of the record title; she made no judgments  
9 whether Debtor owned an equitable interest in the Property. Tr.  
10 Hr'g. 28:16-17; 19-20. She conceded that she did not examine  
11 Debtor's tax returns closely enough to notice that he had claimed  
12 a deduction for mortgage interest. As a result, she did not  
13 inquire of Debtor about the source of the deduction. Tr. Hr'g.  
14 29:7-30:1. After she had received several communications from  
15 Trustee about the Property, Aragon referred Debtor to his present  
16 counsel because she believed the case was beyond her range of  
17 expertise. Tr. Hr'g. 30:5-10.

18 In addition to the attorney's omission to schedule Debtor's  
19 equitable interest in the Property, evidence was adduced to show  
20 that Debtor was not legally sophisticated, likely did not  
21 appreciate the distinctions between legal and equitable title,  
22 and did not comprehend the significance of omitting the Property  
23 from his original schedules. Trustee's counsel questioned Debtor  
24 extensively regarding his beliefs as to his ownership interest in  
25 the property.

26 MS. FRAZER [counsel to Trustee]: But you said you gave  
27 the property to your sister?

28 DEBTOR: It's the only way to fix the house, ma'am.

1 MS. FRAZER: And that after you gave the property to  
2 your sister, you didn't believe you owned it anymore?

3 DEBTOR: Well, I do because I'm living there. That's  
4 the only place that I - - we have, and my sister, we  
5 all do live there, I mean, all the way.

6 MS. FRAZER: But it was only after you met with Mr.  
7 Calsada [Debtor's present counsel] that you decided  
8 that you still had some sort of an ownership interest,  
9 isn't that correct?

10 DEBTOR: No.

11 MS. FRAZER: Well, your testimony earlier said you told  
12 Ms. Aragon that you didn't own any property.

13 DEBTOR: Well, on paper, no, but on my heart, yes.

14 Tr. Hr'g. 44:22-45:10.

15 Admittedly, there is likely sufficient evidence in the  
16 record from which to conclude that Debtor attempted to hide his  
17 interest in the Property, and claimed the homestead exemption  
18 only after Trustee discovered the true state of affairs.  
19 However, the bankruptcy court found that Debtor did not attempt  
20 to hide the Property from Trustee, but instead simply did not  
21 know how to describe the nature of his interest in the Property  
22 in a legally precise manner. Thus, the bankruptcy court  
23 concluded that Trustee had not proven that Debtor engaged in bad  
24 faith.

25 While the evidence is equivocal, the bankruptcy court did  
26 not commit clear error when it determined Debtor did not engage  
27 in bad faith. Beauchamp, 236 B.R. at 729-30 ("If two views of  
28 the evidence are possible, the trial judge's choice between them  
cannot be clearly erroneous."). The bankruptcy court heard the  
testimony and considered the evidence adduced by the parties at  
the hearing on October 11, 2006. Even if we disagree with the

1 bankruptcy court's conclusion, we are required to give special  
2 deference to credibility findings of a trial court. Anderson v.  
3 City of Bessemer, 470 U.S. 564, 573 (1985). There was evidence  
4 submitted to the bankruptcy court that Debtor misunderstood the  
5 nature of his interest in the Property. When Debtor retained a  
6 new attorney, and his interest was more closely examined by  
7 counsel, Debtor's bankruptcy schedules were promptly amended.<sup>7</sup>

8 The bankruptcy court did not clearly err in finding that  
9 Debtor had not attempted to hide his interest in the Property  
10 from Trustee. Thus, the bankruptcy court did not err when it  
11 determined that Debtor did not engage in bad faith in amending  
12 his real property and exemption schedules .

13  
14 II.

15 Debtor was not precluded from claiming  
16 a homestead exemption by § 522(g).

17 Trustee contends that although California law provides  
18 a broad homestead exemption,<sup>8</sup> under § 522(g)<sup>9</sup> of the Bankruptcy  
19

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20 <sup>7</sup> Assuming Debtor was attempting to hide his interest in  
21 the Property, it is difficult for the Panel to understand why he  
22 would turn over his tax returns to Trustee showing the mortgage  
23 interest deductions. At oral argument, in response to a question  
24 about this point, Trustee's counsel argued that there was nothing  
25 "voluntary" about Hidalgo's submission of his tax returns to  
26 Trustee because, under BAPCPA, a debtor is required to supply  
27 returns for the most recent tax year to the trustee.  
28 § 521(e)(2)(A)(i). Even so, Trustee had testified that Debtor  
also voluntarily provided a tax return for the year prior to the  
one required. Tr. Hr'g 64:11-13 ("She [Aragon] confirmed the  
story that the deduction was a gift, and she provided me with the  
prior year's tax return that showed the same deduction.").

<sup>8</sup> The parties do not dispute that, as the bankruptcy court  
concluded, California law would permit Debtor to claim a

(continued...)

1 Code, the bankruptcy court erred by declining to hold that Debtor  
2 was precluded from claiming such an exemption because he  
3 voluntarily transferred the Property to his sister, and then  
4 concealed the transfer and his remaining interest in the  
5 Property, from Trustee. Although § 522(g) was raised in the  
6 written briefs the parties submitted prior to the evidentiary  
7 hearing in the bankruptcy court, Trustee did not address the  
8 § 522(g) argument during the hearing. Instead, the bankruptcy  
9 court summarily concluded at the beginning of the hearing that  
10 had Debtor claimed the exemption from the commencement of his  
11 case, he would have been entitled to the exemption pursuant to  
12 state law. Tr. Hr'g. 5:9-23. The bankruptcy judge explained  
13 that she read all the cases the parties had cited in their  
14 briefing of the issue, and determined that the exemption was  
15 appropriate, leaving the only issue to address during the hearing

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17  
18 <sup>8</sup>(...continued)  
19 homestead exemption in an equitable interest in the Property.  
20 See Putnam Sand & Gravel Co., Inc. v. Albers, 92 Cal. Rptr. 636,  
21 639 (Cal. Ct. App. 1971) (“[N]otwithstanding the fraudulent  
conveyance, the defendants retained an equitable interest in the  
property which would enable them to file a valid claim of  
homestead before judgment.”).

22 <sup>9</sup> Section 522(g) provides in relevant part:

23 Notwithstanding sections 550 and 551 of this title, the  
24 debtor may exempt under subsection (b) of this section  
25 property that the trustee recovers under section  
26 510(c)(2), 543, 550, 551 or 553 of this title, to the  
27 extent that the debtor could have exempted such  
28 property under subsection (b) of this section if such  
property had not been transferred if -  
(1) (A) such transfer was not a voluntary transfer of  
such property by the debtor; and  
(B) the debtor did not conceal such property[.]

1 to be whether Debtor should be allowed to amend his schedules to  
2 claim it. Tr. Hr'g. 6:3-13.

3 "We may, in the absence of detailed findings, review a trial  
4 court's order if a complete understanding of the issues may be  
5 obtained from the record as a whole[.]" Harris v. United States  
6 Trustee (In re Harris), 279 B.R. 254, 261 (9th Cir. BAP 2002)  
7 (citations omitted). "In so doing, we may search the record for  
8 evidence supporting the order because we may affirm for any  
9 reason supported by the record." Id. (citing Dittman v.  
10 California, 191 F.3d 1020, 1027 n.3 (9th Cir. 1999); Polo Bldg.  
11 Group, Inc. v. Rakita (In re Shubov), 253 B.R. 540, 547 (9th Cir.  
12 BAP 2000)).

13 In a California bankruptcy case, a debtor may claim property  
14 exempt based upon state law. § 522(b)(1)-(3). "Section 522(g),  
15 however, limits the ability of a debtor to claim an exemption  
16 where the trustee has recovered property for the benefit of the  
17 estate." Hitt v. Glass (In re Glass), 164 B.R. 759, 761 (9th  
18 Cir. BAP 1994). "The purpose of § 522(g) is to prevent a debtor  
19 from claiming an exemption in recovered property which was  
20 transferred in a manner giving rise to the trustee's avoiding  
21 powers, where the transfer was voluntary or where the transfer or  
22 property interest was concealed." Id. at 764. However, in order  
23 to invoke § 522(g), the property at issue must have been  
24 recovered for the benefit of the bankruptcy estate. Id. at 764-  
25 65. Although the trustee need not have recovered the property by  
26 any formal means, § 522(g)(1) requires that the property at issue  
27 in fact be returned to the bankruptcy estate. Id.

28 In this case, at the time the bankruptcy court ruled on

1 Trustee's objection to Debtor's exemption claim, Trustee had  
2 commenced an adversary proceeding against Debtor's sister,  
3 asserting that the transfer of Debtor's legal interest in the  
4 Property to her constituted a fraudulent conveyance, and was  
5 therefore subject to avoidance. § 548(a)(1). But that action  
6 had not been concluded, Debtor's transfer had not been adjudged  
7 to have been fraudulent, nor had Debtor's legal interest in the  
8 Property been returned to the estate at the time of the hearing  
9 regarding Debtor's homestead exemption claim. It would therefore  
10 appear that Trustee's attempt to invoke § 522(g) under these  
11 facts was premature. Even so, Trustee relies upon several cases  
12 to support his contention that § 522(g) operates to deny Debtor a  
13 homestead exemption. We disagree with the argument that the case  
14 law compels such a result.

15 The first case cited for support by Trustee is Trujillo v.  
16 Grimmett (In re Trujillo), 215 B.R. 200 (9th Cir. BAP 1997),  
17 aff'd, 166 F.3d 1218 (9th Cir. 1999), a decision involving  
18 similar facts. There, the debtors deeded their home, without  
19 consideration, to their daughter to obtain a loan because the  
20 debtors' credit rating prevented them from obtaining the loan  
21 themselves. The debtors, however, "retained both possession and  
22 control of the house." Id. at 202. The Panel's decision makes  
23 clear that the issue to be decided was not whether debtors'  
24 exemption claim should be denied, but rather the propriety of  
25 "the [bankruptcy court's] amended judgment which found that the  
26 property had been fraudulently conveyed." Id. at 205. In other  
27 words, while the underlying facts are similar, because Trujillo  
28 addressed only issues arising from a transfer avoidance action,

1 it does not, as Trustee argues, support denying Debtor an  
2 exemption prior to a determination whether his transfer of the  
3 Property to his sister was in fact fraudulent.

4 In another case relied upon by Trustee, the debtor  
5 "quitclaimed a fee interest in his residence to his son . . . for  
6 'love and affection.'" Glass, 164 B.R. at 760. When he later  
7 filed for bankruptcy relief, the debtor did not include the  
8 residence in his schedules, disclose the transfer on his  
9 statement of financial affairs, or claim an exemption. Id.  
10 After the trustee became aware of the property and the debtor  
11 amended his schedules to claim an exemption, the trustee objected  
12 to the exemption claim pursuant to § 522(g), and gave notice of  
13 his intent to seek avoidance of the transfer to the debtor's son.  
14 Id. at 761. The son promptly reconveyed the property to the  
15 debtor. Id. The issue before the Panel was, under those facts,  
16 whether § 522(g) precluded the debtor's exemption claim, since  
17 the property was recovered without the necessity of prosecution  
18 of an adversary proceeding by the trustee. The Panel held that,  
19 for § 522(g) to apply, the recovery of the property by the estate  
20 need not result from a formal adversary proceeding, or via a  
21 bankruptcy court judgment or order. Id. at 764-65. The Panel  
22 explained that:

23 [a] trustee, however, must present sufficient facts  
24 upon which a bankruptcy court could reasonably conclude  
25 that a debtor transferred property in such a manner as  
26 to invoke the trustee's avoidance powers . . . , the  
27 transfer was voluntary or the debtor knowingly  
28 concealed the transfer or an interest in the property,  
and the property was returned to the estate as the  
result of the trustee's efforts, not limited to actions  
directed toward the transferee.

Id. at 765 (emphasis added).



1        Glass does not support Trustee's argument. Section 522(g)  
2 does not prevent Debtor from claiming the homestead exemption  
3 here because Debtor's interest in the Property has not at this  
4 time, by any means, been "returned to the estate as the result of  
5 trustee's efforts . . . ." See id.

6        Finally, Trustee cites Fox v. Smoker (In re Noblit), 72 F.3d  
7 757, 758 (9th Cir. 1995), for the proposition that "if exempt  
8 property is transferred, the debtor has, in essence, waived the  
9 exemption." Appellant Trustee's Opening Brief at 6. However,  
10 Noblit addressed whether a transferee had standing to assert the  
11 debtor-transferor's exemption as a defense to a trustee's action  
12 to avoid the transfer. The Ninth Circuit concluded that there  
13 was no standing. Noblit, 72 F.3d at 759. The case focused on  
14 the personal nature of the exemption to the debtor, but does not  
15 address the implications of § 522(g).

16        Instead, the case law appears clear that § 522(g) operates  
17 to prevent a debtor, who has voluntarily transferred property,  
18 from later claiming an exemption in that property after it has  
19 been recovered by the trustee. While Debtor's legal title to the  
20 Property was voluntarily conveyed to his sister, that interest  
21 has not yet been returned to the estate, nor has the bankruptcy  
22 court deemed the transfer an avoidable one. Under these facts,  
23 § 522(g) does not prevent Debtor from claiming the homestead  
24 exemption allowed under state law. Indeed, Trustee sought  
25 application of § 522(g) prematurely, and the bankruptcy court did  
26 not err in refusing to disallow Debtor's exemption.<sup>10</sup>

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27  
28        <sup>10</sup> There is an additional concern with the application of  
§ 522(g) to these facts, although one not raised by the parties  
(continued...)

1 **CONCLUSION**

2 The bankruptcy court's finding that Debtor did not engage in  
3 bad faith in amending his schedules to list the Property and  
4 claiming it exempt as a homestead was not clearly erroneous. Nor  
5 did the bankruptcy court err in declining to apply § 522(g) to  
6 prevent Debtor from claiming the exemption, prior to Trustee's  
7 recovery of the Property.

8 The bankruptcy court's order overruling Trustee's objection  
9 to Debtor's homestead exemption is **AFFIRMED**.

10  
11  
12 KLEIN, Bankruptcy Judge, concurring:

13  
14 I join the majority decision solely because the decision to  
15 permit the exemption was within the zone of permissible outcomes  
16 to which an appellate court owes deference to the trial court  
17 under the clear error standard. While I question whether I would  
18 have made the same ruling and regard the "wedding gift" story as  
19 so preposterous as to be probative of a deceptive state of mind,  
20 I cannot say that I have a definite and firm conviction that an  
21 error was made with respect to the determination that the debtor  
22 was not animated by bad faith in claiming the exemption.

23  
24 \_\_\_\_\_  
25 <sup>10</sup> (...continued)  
26 in their briefs. Debtor claimed the homestead exemption only in  
27 his remaining equitable interest in the Property, something  
28 allowed under California law. Debtor acknowledges that he never  
transferred his equitable interest to his sister, only record  
title to the Property. Because he is exempting an interest that  
has not been transferred, it would seem the provisions of  
§ 522(g) are not triggered and do not prohibit the exemption.

1 I write separately to be definite and firm that the decision  
2 to permit the exemption does not deleteriously affect the  
3 trustee's ability to avoid any transfer regarding the property or  
4 to object to the debtor's discharge. Cf., Hughes v. Lawson (In  
5 re Lawson), 122 F.3d 1237, 1241 (9th Cir. 1997) ("continuing  
6 concealment" doctrine permits § 727(a)(2) action to be timely  
7 despite long-term concealment of interest in residence).

8 It is worth noting that an advice of counsel defense is not  
9 availing where the debtor either does not rely in good faith or  
10 is trying to keep an asset out of view. First Beverly Bank v.  
11 Adeeb (In re Adeeb), 787 F.2d 1339, 1343 (9th Cir. 1987);  
12 Creative Recreational Sys., Inc. v. Rice (In re Rice), 109 B.R.  
13 405, 408-09 (Bankr. E.D. Cal. 1989), aff'd mem., 126 B.R. 822  
14 (9th Cir. BAP 1991). Moreover, the settled rule is that clients  
15 are held accountable for the acts and omissions of their  
16 attorneys. Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd.  
17 P'ship, 507 U.S. 380, 396-97 (1993); Link v. Wabash R. Co., 370  
18 U.S. 626, 633-34 (1962).

19 It is alarming that attorney Jennifer Aragon, a member of  
20 the California state bar who has represented more than 6,000  
21 bankruptcy debtors, would not understand the distinction between  
22 legal title and equitable interests, would not either bother or  
23 know how to read a tax return, and would not competently  
24 investigate and adequately disclose the facts:

25 Q. Is a significant portion of your practice  
26 represent[ing] debtors in bankruptcy proceedings?

27 A. That's true.

28 Q. And approximately how many debtors do you believe  
you've represented over the course of your career?

1           A. Slightly over 6,000.

2 Hrg. Tr. 10/11/06 25:12-17 (Testimony of Jennifer Aragon).

3           The very integrity of the bankruptcy system depends upon  
4 full, candid, and complete disclosure of assets and financial  
5 affairs. Searles v. Riley (In re Riley), 317 B.R. 368, 378 (9th  
6 Cir. BAP 2004), aff'd mem., 212 F. App'x 589 (9th Cir. 2006)  
7 (§ 727 denial of discharge).

8           It is of even greater concern that she would presume to  
9 advise her client, after being told what her client told her, to  
10 omit from the schedules the equitable interest in the residence.  
11 A 6000-case bankruptcy attorney who renders such advice and  
12 prepares such plainly defective schedules is playing with fire  
13 and inviting scrutiny. See 18 U.S.C. §§ 151-57.