

**MAR 07 2006**

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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**NOT FOR PUBLICATION**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**

In re:	)	BAP No.	EC-05-1307-NMaPa
	)		
ANTHONY JOHN BOVA,	)	BK. No.	04-31759
	)		
Debtor.	)		
_____	)		
LAWRENCE G. GRAY, Trustee,	)		
	)		
Appellant,	)		
	)		
v.	)	<b>MEMORANDUM<sup>1</sup></b>	
	)		
ANTHONY JOHN BOVA,	)		
	)		
Appellee.	)		
_____	)		

Argued and Submitted on  
January 19, 2006 at Sacramento, California

Filed - March 7, 2006

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

Honorable Thomas C. Holman, Bankruptcy Judge, Presiding

\_\_\_\_\_  
Before: NAUGLE,<sup>2</sup> MARLAR and PAPPAS, Bankruptcy Judges.

<sup>1</sup> This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

<sup>2</sup> Hon. David N. Naugle, Bankruptcy Judge for the Central District of California, sitting by designation.

1 The Chapter 7 Trustee, Lawrence G. Gray ("Gray" or  
2 "Trustee"), appeals an order of the bankruptcy court overruling  
3 his objection under § 522(g)<sup>3</sup> to Anthony John Bova's ("Bova")  
4 claim of homestead exemption.

5 Because there was no transfer of Bova's equitable interest  
6 in the Subject Property, and therefore no recovery of property by  
7 the Trustee, § 522(g) does not preclude Bova's claimed homestead  
8 exemption. We AFFIRM.

9 **Facts**

10 On May 13, 2004, Bova filed a voluntary chapter 7  
11 bankruptcy. Bova listed, on his Schedule A, a "1/6 interest in  
12 1404 Picardy Dr., Stockton" ("Subject Property"). Gray was  
13 appointed as the chapter 7 trustee.

14 The Subject Property was initially transferred to Bova and  
15 two of his five other siblings, Marie Ann Andrews ("Andrews") and  
16 Darlene L. Schenone ("Schenone"), in 1968 via grant deed. Bova's  
17 parents, Anthony and Angelina Bova, were the transferors. Bova,  
18 Andrews and Schenone were the transferees. They understood that  
19 they held title on behalf of all six Bova children, each sibling  
20 having an equal 1/6 undivided interest in the Subject Property.

21 It is undisputed that on May 16, 1991, Bova transferred  
22 legal title in the Subject Property to Andrews and Schenone via  
23 grant deed in order to facilitate refinancing of the mortgage on  
24

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25 <sup>3</sup> Unless otherwise indicated, all chapter, section, and  
26 rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-  
27 1330 and to the Federal Rules of Bankruptcy Procedure, Rules  
28 1001-9036, prior to the effective date of the Bankruptcy Abuse  
Prevention and Consumer Protection Act of 2005 ("BAPCA"), Pub.  
L. 109-8, 119 Stat. 23 (Apr. 20, 2005).

1 the Subject Property. It is also undisputed that the parties to  
2 the transfer did not intend that Bova be divested of his interest  
3 in the Subject Property by that transfer. Bova, Andrews and  
4 Schenone understood and do not dispute that Bova retained his 1/6  
5 interest in the Subject Property despite the transfer. Bova  
6 could not remain on title and refinance because his bank advised  
7 him that he could not borrow any more money at the time. Bova  
8 currently lives and has lived on the Subject Property since  
9 approximately 2003, and periodically pays rent to Andrews and  
10 Schenone.

11 On December 14, 2004, Gray filed an adversary proceeding  
12 against Andrews and Schenone. Gray sought to sell both the  
13 interest of Andrews and Schenone, as well as the estate's  
14 interest, in the Subject Property pursuant to § 363(h). Andrews  
15 and Schenone objected to the sale, claiming Bova was entitled to  
16 a homestead exemption as to his interest in the Subject Property.

17 On March 16, 2005, Bova amended his Schedule C to claim a  
18 homestead exemption in his 1/6 interest in the Subject Property  
19 in the amount of \$150,000, pursuant to California Code of Civil  
20 Procedure ("C.C.P.") § 704.730(a)(3).

21 On March 21, 2005, Gray amended his Complaint in the  
22 adversary proceeding to seek turnover of estate property pursuant  
23 to § 542(a). Then, on April 14, 2005, Gray filed an objection to  
24 Bova's claimed exemption in the bankruptcy case, asserting that  
25 it should be disallowed under § 522(g).

26 The hearing on Gray's objection to Bova's exemption took  
27 place on May 24, 2005. Earlier the same day, the bankruptcy  
28 court had issued a tentative decision overruling Gray's objection

1 to the homestead exemption on the grounds that § 522(g) requires  
2 the trustee to prove that the property was concealed. Because  
3 Bova had disclosed his interest in the Subject Property on his  
4 bankruptcy schedules, the bankruptcy court tentatively concluded  
5 that Gray could not show that Bova had concealed the Subject  
6 Property.

7 At the May 24, 2005 hearing, Gray sought a continuance to  
8 permit further briefing of the issue as to who carried the burden  
9 of proving under § 522(g) that Bova did not voluntarily transfer  
10 and conceal the Subject Property. The bankruptcy court continued  
11 the hearing to June 28, 2005.

12 Gray argued, in his supplemental brief to the bankruptcy  
13 court, that the tentative ruling erroneously inverted the  
14 language of § 522(g) by placing the burden on the trustee to show  
15 that debtor both voluntarily transferred and concealed the  
16 Subject Property. Gray further argued that a proper  
17 interpretation of § 522(g) requires that he need only show that  
18 Bova voluntarily transferred or concealed the Subject Property.

19 At the June 28, 2005 hearing, Gray's counsel represented to  
20 the bankruptcy court that there was no tentative ruling.  
21 Transcript (June 28, 2005), page 3. The bankruptcy court then  
22 asked Gray's counsel: (1) whether Gray contested the fact that  
23 Bova has had an equitable interest in the Subject Property at all  
24 relevant times; and (2) whether Gray contested that the only  
25 thing that happened was that Bova transferred only his legal  
26 interest to his sisters, who now held the property for the  
27 benefit of the six siblings. Gray's counsel responded "No" to  
28 both inquiries. Transcript (June 28, 2005), page 5.

1 The bankruptcy court then determined that Bova held an  
2 equitable interest in the Subject Property. Relying upon In re  
3 Moffat, 107 B.R. 255 (Bankr. C.D. Cal. 1989), the court allowed  
4 Bova's homestead exemption. The bankruptcy court also decided  
5 that, under these facts, nothing was recoverable by the Trustee,  
6 because all that had occurred was a transfer of Bova's "legal  
7 interest to the other two co-owners who now hold the property for  
8 the six siblings." Transcript, page 4, ll. 23-25; page 5, l. 1.  
9 Because all Gray sought to do in his adversary proceeding was to  
10 sell the interests of Bova and the co-owners, the bankruptcy  
11 court did not address Gray's argument that the Trustee need only  
12 show that Bova had voluntarily transferred the Subject Property  
13 in order to defeat the exemption under § 522(g).

14 On July 8, 2005, the bankruptcy court entered the order  
15 overruling the objection to Bova's homestead exemption without  
16 prejudice to Gray's initiating a proceeding to seek damages  
17 against Bova, if the delayed claim of exemption had prejudiced  
18 creditors.

19 Gray timely appealed.

#### 20 Jurisdiction

21 The bankruptcy court had jurisdiction under 28 U.S.C. § 1334  
22 and § 157(b)(1) and (b)(2). This Panel has jurisdiction under 28  
23 U.S.C. § 158(b)(1).

#### 24 Issues Presented

25 (1) Whether Bova's transfer of legal title constituted a  
26 transfer of property under § 522(g).

27 (2) Whether a trustee "recovers" property, as required under  
28 § 522(g), under circumstances where Bova still owns and discloses

1 an equitable interest in property held in a resulting trust.

2 **Standard of Review**

3 We review the legal issues, including a debtor's right to  
4 claim exemptions, de novo, and review factual findings for clear  
5 error. Federal Rule of Bankruptcy Procedure 8013; In re Blumer,  
6 95 B.R. 143, 145 (9th Cir. 1988); In re Kelley, 300 B.R. 11, 16  
7 (9th Cir. BAP 2003) citing Village Nurseries v. Gould, (In re  
8 Baldwin Builders), 232 B.R. 406, 409-10 (9th Cir. BAP 1999);  
9 Coughlin v. Cataldo, (In re Cataldo), 224 B.R. 426, 428-29 (9th  
10 Cir. BAP 1998).

11 **Discussion**

12 **1. Was There A Transfer of Property Under § 522?**

13 § 541(a) provides:

14 The commencement of a case under section 301, 302 or  
15 303 of this title creates an estate. Such estate is  
16 comprised of all the following property, wherever  
located and by whomever held:

17 (1) Except as provided in subsections (b)  
18 and (c) (2) of this section, all legal or  
equitable interests of the debtor in  
property as of the commencement of the case.

19 11 U.S.C § 541(a) (2005).

20 In this case, the parties do not dispute that Bova retained  
21 an equitable interest in the Subject Property after executing the  
22 grant deed to his sisters in 1991. Thus, pursuant to § 541(a)(1),  
23 Bova's equitable interest in the Subject Property became property  
24 of the estate when he filed his Chapter 7 case. Under § 522(b)  
25 and the case law interpreting the California homestead statutes,  
26 like Moffat, Bova could exempt his equitable interest in the  
27 Subject Property as a homestead.

28 Section 522(b)(1) allows states to opt out of the federal

1 list of exemptions established in § 522(d), and California has  
2 done so. See C.C.P. § 703.130; *In re Reaves*, 285 F.3d 1152, 1155  
3 (9th Cir. 2002). Therefore, Bova's right to the exemption is  
4 determined under California law. See *In re Carter*, 182 F.3d  
5 1027, 1029 (9th Cir. 1999); *In re McKown*, 203 F.3d 1188, 1189  
6 (9th Cir. 1999).

7 Rule 4003(c) provides that the objecting party has the  
8 burden of proving that exemptions are not properly claimed.

9 The objecting party must produce evidence to rebut the  
10 presumptively valid exemption. *Carter*, 182 F.3d at 1029.

11 The Bankruptcy Rules set forth the procedural framework for  
12 filing both a list of property claimed as exempt and objections  
13 to claimed exemptions. *Moffat*, 107 B.R. at 258. Therefore, under  
14 Rule 4003(c), Gray, as objecting party, has the burden to prove  
15 that the exemption is not properly claimed.

16 Bova claimed a homestead exemption in his 1/6 interest  
17 in the Subject Property pursuant to C.C.P. § 704.730(a)(3)  
18 in the amount of \$150,000 with a current market value of  
19 \$20,000. Whether Bova may claim a \$150,000 homestead exemption  
20 under C.C.P. § 704.730 for his claimed interest in the Subject  
21 Property, which he valued at \$20,000, is a question not presently  
22 before this Panel. Instead, Gray contends that, under § 522(g),  
23 Bova's conveyance of legal title, 13 years before, constituted a  
24 transfer as defined by § 101(54), which thereby precludes Bova's  
25 claim of a homestead exemption because he voluntarily transferred  
26 the Subject Property, regardless of whether he retained an  
27 equitable interest therein.

28

1 § 522(g) (1) provides:

2 Notwithstanding sections 550 and 551 of this  
3 title, the debtor may exempt under subsection (b) of  
4 this section property that the trustee recovers under  
5 section 510(c) (2), 542, 543, 550, 551, or 553 of this  
6 title, to the extent that the debtor could have  
7 exempted such property under subsection (b) of this  
8 section if such property had not been transferred, if

9 (1) (A) such transfer was not a voluntary transfer of  
10 such property by the debtor; and

11 (B) the debtor did not conceal such property.

12 11 U.S.C. § 522(g) (1) (2005) .

13 Gray argues that the bankruptcy court improperly applied  
14 § 522(g) by requiring him to prove that Bova transferred and  
15 concealed the Subject Property. However, the tentative ruling  
16 included in the record on appeal reflects that the bankruptcy  
17 court properly interpreted the conjunctive requirement of  
18 § 522(g) (1) (A) (B) .

19 At the June 28 continued hearing, Gray's counsel maintained  
20 that there had been no tentative ruling. The bankruptcy court did  
21 not reference § 522 on the record of the hearing. Nonetheless,  
22 given the questions posed by the bankruptcy court to counsel,  
23 regarding Bova's voluntary transfer of his legal interest and  
24 retention of an equitable interest, the Panel is satisfied that  
25 the bankruptcy court determined that no transfer of Bova's  
26 equitable interest occurred; and thus, there was no property for  
27 the trustee to recover for purposes of § 522(g). The bankruptcy  
28 court did not need to determine whether Gray had the burden of  
proof to show that Bova transferred and concealed the Subject  
Property once Gray's counsel admitted that Bova transferred only  
his legal interest and retained an equitable interest.



1 Gray relies upon Glass v. Hitt (In re Glass), 60 F.3d 565,  
2 569 (9th Cir. 1995) (citing In re Glass, 164 B.R. 759, 764 (9th  
3 Cir. BAP 1994)), to support his argument that he need only  
4 establish that Bova either voluntarily transferred or concealed  
5 the Subject Property under § 522 (g) (1) (A) (B).

6 Glass presents an interesting twist in the quotation of  
7 §522(g) (1) (A) (B) that may differ from the statute as enacted.  
8 However, the "and" versus "or" controversy is not determinative  
9 in this case. Gray's counsel conceded at oral argument that not  
10 every transfer of an interest in property by a debtor (e.g., from  
11 husband and wife, as joint tenants, to themselves as tenants in  
12 common), would forever defeat the rights of that debtor to claim  
13 an exemption.

14 Whether a transfer has occurred is controlled by federal  
15 law. Barnhill v. Johnson, 503 U.S. 393, 397-98 (1992) citing  
16 McKenzie v. Irving Trust Co., 323 U.S. 365, 369-370 (1945).

17 Section 101(54) of the Bankruptcy Code defines "transfer" as:

18 [E]very mode, direct or indirect, absolute or  
19 conditional, voluntary or involuntary, of disposing of  
20 or parting with property or with an interest in  
21 property, including retention of title as a security  
22 interest and foreclosure of the debtor's equity of  
23 redemption.

24 11 U.S.C. § 101(54) (2005).

25 As held in In re Wallaert, 149 B.R. 665 (Bankr. W.D. Wash.  
26 1992), "[t]he all-encompassing language unambiguously comprehends  
27 any disposition of any interest in property." Id. at 668  
28 (internal citations omitted).

29 However, the definition of transfer "in turn includes  
30 references to parting with 'property' and an 'interest in

1 property.' In the absence of any controlling federal law,  
2 'property' and 'interests in property' are creatures of state  
3 law." Barnhill, 503 U.S. at 398 citing McKenzie at 370.  
4 See also, Butner v. United States, 440 U.S. 48, 54 (1979).

5 **a. "Interest of Property"**

6 In addition, for § 522(g) to operate, there must be a  
7 transfer of an "interest in property." In deciding whether Bova  
8 transferred an interest in property, the analysis in Wallaert,  
9 149 B.R. 665 (Bankr. W.D. Wash. 1992), is instructive as, under  
10 both Washington and California law, legal title empowers the  
11 holder of title to lawfully convey the property. See Stevens  
12 Group Fund IV v. Sobrato Dev. Co., 1 Cal.App.4th 886, 894-95  
13 (Cal. Ct. App. 1991). In Wallaert, the court held that one  
14 holding legal title to property also holds the legal power to  
15 convey or encumber that property. This power "must be fairly  
16 characterized an interest in property, when the lack of it is,  
17 under state law, a defect entitling the purchaser to rescind a  
18 contract to purchase real property." Wallaert, 149 B.R. at 668-  
19 69. Therefore, the court held that a transfer of a debtor's  
20 legal title to property constitutes a transfer of an interest in  
21 that property pursuant to § 101(54) of the Bankruptcy Code,  
22 despite the debtors' retention of an equitable interest. See id.

23 Here, Bova originally held a 1/3 interest in the legal title  
24 of the Subject Property along with Andrews and Schenone. Bova  
25 then transferred that legal interest to Andrews and Schenone in  
26 the 1991 grant deed and relinquished his role as trustee for his  
27 siblings as to that legal interest. Bova's conveyance of his 1/3  
28 legal interest to Andrews and Schenone constituted a transfer of

1 a property interest pursuant to § 101(54). But as explained  
2 below, while Bova transferred his legal interest in the Subject  
3 Property in 1991, that would not constitute a recoverable  
4 transfer by the Trustee under § 522 because Bova never  
5 relinquished his only true interest—an equitable 1/6 interest in  
6 the Subject Property.

7  
8 **b. The Nature of Bova's Remaining "Interest in Property"**  
9 **Express or Resulting Trust?**

10 In California, the law of trusts is established by statute.  
11 See McCurdy v. Otto, 140 Cal. 48, 53 (1903). An express trust  
12 with respect to real property is required to be in writing. Viau  
13 v. Viau, 57 Cal.App. 66, 73 (Cal. Ct. App. 1922). Therefore,  
14 Bova's transfer of his legal title in the Subject Property to his  
15 sisters did not give rise to an express trust.

16 However, a resulting trust arises when the circumstances  
17 show the parties did not intend that a transferee receive the  
18 transferor's entire beneficial interest in property. See  
19 American Motorists Ins. Co. v. Cowan, 127 Cal.App.3d 875, 884  
20 (Cal. Ct. App. 1982); Restatement 3d Trusts § 7 (2003), Comment  
21 a. A resulting trust carries out the inferred intent of the  
22 parties. Id. at 885. The beneficial interest that is held in  
23 the resulting trust is "simply an equitable reversionary interest  
24 implied by law with the 'resulting trust' terminology being  
25 applied if and when the reversionary interest materializes as a  
26 present interest." Restatement 3d of Trusts § 7 (2003), Comment  
27 a.

28 Here, the record shows that Bova transferred legal title to  
Andrews and Schenone in 1991. However, it is undisputed that the

1 parties did not intend that Andrews and Schenone also take Bova's  
2 beneficial interest in the Subject Property pursuant to the  
3 transfer. Bova maintains he has always retained a 1/6 interest  
4 in the Subject Property and so listed it on his Schedule A.  
5 Andrews and Schenone and Bova's other siblings agree and  
6 acknowledge his interest. Therefore, Bova's interest in the  
7 Subject Property can be classified as a beneficial interest under  
8 a resulting trust, which is an equitable reversionary interest  
9 implied by law.

10 In sum, Bova transferred his legal interest to Andrews and  
11 Schenone but always retained an equitable reversionary interest  
12 implied by law. That interest remained his property.

13 **2. Gray "Recovered" Nothing As Is Required By § 522(g)**

14 **a. Bova Owns a 1/6 Equitable Interest Which Gray May**  
15 **sell Pursuant to § 363(h)**

16 Section 522(g) precludes a debtor from exempting property  
17 that the debtor voluntarily transferred "that the trustee  
18 recovers under section . . . 542 . . . ." 11 U.S.C.  
19 § 522(g) (2005).

20 We agree with the bankruptcy court that, under these facts,  
21 there was nothing for Gray to recover. Although Bova transferred  
22 his legal title in the Subject Property, he retained his  
23 equitable interest. It was disclosed in the Schedules and not  
24 disputed by any co-owner. Because Bova retained the only true  
25 property interest he ever had, Gray could sell the Subject  
26 Property in its entirety under § 363(h), as Bova's equitable  
27 interest transferred to the estate upon the filing of the  
28 bankruptcy. Or, Gray could sell the 1/6 interest standing alone.

1           **b. Gray Could Merely Step Into Bova's Shoes and Have the**  
2           **1/6 Legal Title Held in Resulting Trust Transferred to**  
3           **the Estate**

4           A resulting trustee ordinarily has no duty other than to  
5           transfer the property to the person entitled thereto.  
6           Restatement 3d Trusts § 7 (2003), Comment e ("Thus, if . . . a  
7           transfer of property is made to one person and the purchase price  
8           is paid by another, it is the duty of the transferee to convey  
9           the property upon demand to the payor or the payor's successors  
10          in interest, in the absence of other direction by the payor or  
11          successor."); 13 Witkin, Summary of California Law, Trusts § 311  
12          (2005).

13          Indeed, the "trustee has no duties to perform, no trust to  
14          administer, and no purpose to carry out except the single one of  
15          holding or conveying [title to property] according to the  
16          beneficiary's demand." Richman v. Green, 143 Cal.App.2d 470, 473  
17          (Cal. Ct. App. 1956) citing Bainbridge v. Stoner, 16 Cal.2d 423,  
18          428 (1940). As the bankruptcy court held, Moffat is instructive  
19          in this case even though here we are dealing with a resulting  
20          trust and Moffat dealt with a revocable trust. In Moffat, the  
21          court held:

22                 Pursuant to debtor's interest as trustor in the 'revocable'  
23                 living trust, the bankruptcy estate holds a 'contingent  
24                 reversionary interest' in the subject dwelling The  
25                 bankruptcy trustee - standing in debtor's place as trustor  
26                 of the Living Trust - can, in his discretion, revoke the  
27                 trust in whole or in part, reverting title in the residence  
28                 back to the bankruptcy estate.

29          Moffat, 107 B.R. at 260.

30          In this case, Gray need merely stand in Bova's place as a  
31          beneficiary of the resulting trust and ask for his portion of  
32          legal title from Andrews and Schenone. Section 522(g)

1 contemplates "exemptions on behalf of debtors who have  
2 voluntarily transferred their property rights so as to give rise  
3 to the trustee's *avoidance* powers." Glass, 60 F.3d at 569  
4 (internal citations omitted) (emphasis added). Here, the transfer  
5 of legal title did not give rise to Gray's avoidance powers under  
6 § 542(a) and it appears that Gray merely amended his initial  
7 § 363(h) complaint to include § 542(a) in order to deny Bova his  
8 homestead exemption.

9 Nor are the purpose and policies behind § 522(g) frustrated in  
10 this case, as Bova did not conceal his interest in the Subject  
11 Property after he had transferred his legal interest  
12 approximately thirteen years prior to filing bankruptcy. It is  
13 well recognized under California state law that "[a] homestead  
14 statute, being of a remedial and humane character, should be  
15 given a liberal construction in favor of the exemptions created."  
16 Thorsby v. Babcock, 36 Cal.2d 202, 204 (1950).

### 17 Conclusion

18 The transfer of Bova's legal interest constitutes a transfer  
19 under § 101(54), but it did not constitute a transfer recoverable  
20 by the trustee under § 522(g) because it was undisputed that Bova  
21 always held, disclosed and retained a 1/6 beneficial interest.  
22 The bankruptcy court correctly held that since there was no  
23 recovery as required by § 522(g), and by analogizing to Moffat,  
24 that Bova held an equitable interest in the Subject Property.  
25 Because there was no transfer of an equitable interest in  
26 property and no recovery as required by § 522(g), Bova was not  
27 precluded from claiming the Subject Property exempt as his  
28 homestead. **AFFIRMED.**