

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NOT FOR PUBLICATION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.)	MEMORANDUM¹	
)		
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,² MARLAR and PAPPAS, Bankruptcy Judges.

¹ 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.

² 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)³ 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

25 ³ 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 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"**
Express or Resulting Trust?

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

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

27 Here, the record shows that Bova transferred legal title to
28 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.**