

MAY 15 2006

NOT FOR PUBLICATION

**HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

6	In re:)	BAP No.	NC-05-1298-RyBK
7	JAMES PAULETT CHARLTON,)	Bk. No.	04-32400
8	Debtor.)		
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10	CONSUELO CHARLTON,)		
11	Appellant,)		
12	v.)	MEMORANDUM¹	
13	E. LYNN SCHOENMANN, Chapter)		
14	11 Trustee; JAMES PAULETT)		
15	CHARLTON,)		
	Appellees.)		

Argued and Submitted on March 24, 2006
at San Francisco, California

Filed - May 15, 2006

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

Honorable Thomas E. Carlson, Bankruptcy Judge, Presiding

Before: RYAN,² BRANDT AND KLEIN, Bankruptcy Judges

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

² Honorable John E. Ryan, Bankruptcy Judge for the Central District of California, sitting by designation.

1 **I. INTRODUCTION**

2 James Paulett Charlton ("Debtor") requested authority to
3 sell the Marc Chagall painting *Le Peintre et L'Horloge* or the
4 *Painter and the Clock* (the "Chagall"). Consuelo Charlton
5 ("Consuelo"), Debtor's ex-wife, objected to the extent Debtor
6 sought to use the proceeds from the sale, arguing that she had an
7 interest in the Chagall. Nevertheless, the parties stipulated to
8 the sale of the Chagall, and the court entered an order that the
9 proceeds would be held in escrow until the ownership issue was
10 resolved.

11 Later, Debtor filed a motion to authorize the release of the
12 sale proceeds to pay certain estate administrative expenses (the
13 "Motion"). Debtor argued that Consuelo's interest in the Chagall
14 proceeds was inchoate and unvested. Consuelo again objected,
15 arguing that she had a vested interest in all of the "marital
16 property," including the Chagall proceeds, based on the filing of
17 a divorce complaint. After a hearing, the court granted the
18 Motion, holding that Consuelo did not have a vested interest in
19 the Chagall and that her unvested, inchoate property interest was
20 subject to §§ 544(a)(1) and (3) of the Bankruptcy Code.³
21 Consuelo timely appealed.

22 We VACATE and REMAND.

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24 ³ Unless otherwise indicated, all chapter, section, and rule
25 references are to the Bankruptcy Code (the "Code"), 11 U.S.C.
26 §§ 101-1330, prior to its amendment by the Bankruptcy Abuse
27 Prevention and Consumer Protection Act of 2005 (the "Act"), Pub.
28 L. 109-8, 119 Stat. 23, as the case from which this appeal arose
was filed before the Act's effective date (October 17, 2005), and
to the Federal Rules of Bankruptcy Procedure (the "Rules"), Rules
1001-9036.

1 **II. STATEMENT OF FACTS**

2 On May 29, 1993, Consuelo and Debtor married. During the
3 marriage, the Chagall was acquired. The parties do not dispute
4 that the Chagall was Debtor's separate property. Debtor and
5 Consuelo separated during February 1999. In May 2003, Consuelo
6 filed for divorce in Utah. On December 18, 2003, the Utah court
7 granted a bifurcated decree of divorce leaving for further
8 determination the equitable distribution of the marital property.

9 On August 24, 2004, Debtor filed a voluntary chapter 11
10 petition. The Chagall was listed on Debtor's Schedule B. On
11 October 25, 2004, Debtor filed a motion to sell the Chagall and
12 another painting outside the ordinary course of business (the
13 "Sale Motion"). Debtor argued that the sale of the paintings was
14 necessary to pay for the costs of administering the estate.
15 Consuelo opposed the sale to the extent Debtor sought to use the
16 proceeds, arguing that she had an interest in the Chagall because
17 under Utah law she would likely receive at least one-half of the
18 marital estate. In addition, Consuelo argued that the proposed
19 purchase price was not representative of the Chagall's actual
20 value.

21 At the hearing on the Sale Motion, Consuelo withdrew her
22 objection, provided that her interest attached to the sale
23 proceeds. By order signed November 19, 2004, the bankruptcy
24 court authorized the sale of the Chagall free and clear of
25 Consuelo's alleged interest with the proceeds to be held in
26 escrow until the ownership issues were resolved.

27 The Chagall was sold for \$200,000. On January 18, 2005,
28 Debtor filed the Motion, arguing that Consuelo's interest in the

1 Chagall proceeds was inchoate and unvested, thereby leaving her
2 with an unsecured claim upon the bankruptcy filing. Consuelo
3 responded that she had a vested interest in the Chagall proceeds
4 because of the divorce decree and her interest was not estate
5 property. Therefore, she contended that her interest in the
6 proceeds could not be used to pay administrative expenses.

7 After a hearing, the court concluded that, as of the
8 petition date, Consuelo had an unvested, inchoate interest in the
9 Chagall subject to the trustee's avoiding powers under
10 §§ 544(a)(1) and (3). Accordingly, the court granted the Motion,
11 and Debtor was authorized to use the Chagall proceeds to pay
12 certain administrative expenses totaling \$46,250 and any other
13 administrative expenses that may be necessary to preserve the
14 estate or upon further court order. Consuelo timely appealed.

15 On April 1, 2005, the court ordered the appointment of E.
16 Lynn Schoenmann as chapter 11 trustee ("Trustee").

17 Two weeks earlier, on March 14, 2005, the bankruptcy court
18 approved a stipulation granting relief from stay for the divorce
19 court to equitably distribute the property. On March 7, 2006,
20 Consuelo filed with the panel a copy of the Utah state court
21 findings of fact and conclusions of law issued on February 27,
22 2006, fixing the parties' interests in the marital property (the
23 "Decision"). On March 24, 2006, the parties again brought the
24 Decision to our attention during oral argument.

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III. Issues

27 1. Whether the bankruptcy court erred in its determination
28 that, as of the petition date, Consuelo's marital property

1 interest in the Chagall had not vested under Utah law.

2 2. Whether Consuelo's interest in the Chagall was cut off by
3 the Trustee's avoiding powers under §§ 544(a)(1) and (3).

4 5 **IV. Jurisdiction**

6 The bankruptcy court had jurisdiction under 28 U.S.C.
7 § 1334 and 28 U.S.C. §§ 157(a) and (b). We have jurisdiction
8 under 28 U.S.C. §§ 158(c) and (d).

9 10 **V. Standard of Review**

11 The facts are undisputed. The extent and nature of property
12 of the estate is a question of law. We review the bankruptcy
13 court's conclusions of law and interpretation of the Code de
14 novo. Bunyan v. United States (In re Bunyan), 354 F.3d 1149,
15 1150 (9th Cir. 2004); Tanzi v. Comerica Bank - California (In re
16 Tanzi), 297 B.R. 607, 610 (9th Cir. BAP 2003).

17 18 **VI. DISCUSSION**

19 Generally, "an appellate court should base its decision on
20 the facts as they existed at the time the trial court made its
21 decision." Frankfurth v. Cummins (In re Cummins), 20 B.R. 652,
22 653 (9th Cir. BAP 1982). However, an appellate court may, in
23 extraordinary circumstances, take judicial notice of developments
24 in a case that occur while the appeal is pending. Id.; see also
25 Bryant v. Carleson, 444 F.2d 353, 357 (9th Cir. 1971) (taking
26 judicial notice of post-appeal developments affecting the issues
27 presented on appeal); and Alexander v. Jensen-Carter (In re
28 Alexander), 239 B.R. 911, 913 (8th Cir. BAP 1999).

1 In the Decision, the Utah court, acting under the color of
2 relief from stay by the bankruptcy court, determined the property
3 rights of the parties as of December 18, 2003, the date of the
4 bifurcated divorce decree.⁴ The state court ordered that certain
5 property, including any art titled in Debtor's name, was in
6 constructive trust for Consuelo's benefit.⁵

7 Therefore, the state court awarded the Chagall to Consuelo
8 *nunc pro tunc* effective December 18, 2003.⁶ Because this
9 potentially affected the analysis of the parties' ownership
10 interests in the Chagall as of the petition date, we take
11 judicial notice of the Findings.

12 Where "circumstances have changed between the ruling below
13 and the decision on appeal, the preferred procedure is to remand
14 to give the [trial] court an opportunity to pass on the changed
15 circumstances." Korn v. Franchard Corp., 456 F.2d 1206, 1208 (2d
16 Cir. 1972); see also Warm Springs Dam Task Force v. Gribble, 621
17 F.2d 1017, 1026 (9th Cir. 1980); and Hadley v. Victory Constr.
18 Co., Inc. (In Re Victory Constr.), 37 B.R. 222, 227 (9th Cir. BAP

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20 ⁴ The court reasoned that this was the latest date
21 available that would allow it to establish Debtor's legal or
22 equitable interests as of the petition date. While the court
23 recognized that, in the end, only the bankruptcy court could
determine what property still existed, the court distributed the
property as if it existed as of December 18, 2003.

24 ⁵ The court stated that Consuelo requested the declaration
25 of a constructive trust because she believed that a constructive
26 trust would defeat the trustee's strong-arm powers under
§§ 544(a)(1) & (3).

27 ⁶ The parties do not dispute that the Chagall was Debtor's
28 separate property. Therefore, the Chagall is presumably "art
titled in [Debtor's] name" that Debtor is to hold in constructive
trust for Consuelo's benefit.

1 1984). We will follow this practice here.

2 The nature of Consuelo's interest in the Chagall as of the
3 petition date based on the commencement of divorce proceedings
4 under Utah law was critical to the bankruptcy court's
5 determination that the proceeds from the Chagall could be used to
6 pay estate administrative expenses. The Decision appears to have
7 changed the basis for evaluating Consuelo's interest. The Utah
8 court made a distinction between those assets that Consuelo
9 received via equitable division and those subject to a
10 constructive trust, indicating that the latter may defeat the
11 trustee's strong-arm powers. That premise may be mistaken. See
12 Chbat v. Tleel (In re Tleel), 876 F.2d. 769, 772 (9th Cir. 1989);
13 see also In re Roman Catholic Archbishop of Portland in Oregon,
14 335 B.R. 868, 878 (Bankr. D. Or. 2005). However, because the
15 Decision was issued after the briefing of this appeal neither the
16 bankruptcy court nor we have the benefit of fully developed
17 arguments on this issue.

18 Under the circumstances, the Decision is important in fixing
19 Consuelo's pre-petition interest in the Chagall. Therefore,
20 justice is better served by remanding the case for the bankruptcy
21 court to consider the effect of the Decision and the resulting
22 supplemental divorce decree, if any,⁷ on Consuelo's interest in
23 the proceeds from the sale of the Chagall and the use of those
24 proceeds to pay administrative claims of the bankruptcy estate.

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26 ⁷ The Utah court ordered that counsel for Consuelo prepare
27 a supplemental divorce decree consistent with the Findings.
28 Nothing in the bankruptcy court's docket, nor anything filed in
supplementation of the record on appeal, indicates whether a
supplemental decree has been entered.

1 **VII. Conclusion**

2 In sum, while this appeal was pending, the Decision issued
3 addressing Consuelo's ownership interest in the Chagall as of
4 December 18, 2003. The Decision opens questions (about which we
5 intimate no views) regarding its effect on the bankruptcy case
6 that deserve more careful consideration than we can afford within
7 the confines of the appellate record. Therefore, justice is
8 better served by remanding this matter to provide the bankruptcy
9 court an opportunity to determine the effect of the Decision on
10 Consuelo's interest in the Chagall proceeds and any use of those
11 proceeds to pay administrative claims.

12 We VACATE and REMAND.
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