

NOV 22 2005

NOT FOR PUBLICATION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**

5	In re:)	BAP No.	CC-05-1068-BMaMc
)		
6	OAKMORE RANCH MANAGEMENT,)	Bk. No.	LA 94-16755-ER
)		
7	Debtor.)	Adv. No.	LA 96-01580-ER
)		
8	_____)		
)		
9	MICHAEL J. WELTHER, III,)		
)		
10	Appellant,)		
)		
11	v.)	MEMORANDUM¹	
)		
12	JAMES H. DONELL; DAVID)		
	SEROR, Chapter 7 Trustee,)		
13	Appellees.)		
)		
14	_____)		

Argued and Submitted on September 28, 2005 at
Pasadena, California

Filed - November 22, 2005

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

Honorable Ernest M. Robles, Bankruptcy Judge, Presiding

Before: BRANDT, MARLAR and McMANUS,² 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 Hon. Michael S. McManus, Chief Bankruptcy Judge for the Eastern District of California, sitting by designation.

1 Appellee chapter 7³ trustee commenced an adversary proceeding
2 against debtor's general partner, appellant Michael J. Welther, III
3 ("Welther"), and obtained a \$2.1 million judgment, which was not
4 satisfied. Appellee, the receiver in aid of execution appointed by the
5 bankruptcy court under the state statutes, moved to determine the state
6 exemption rights Welther claimed in an independent retirement account.

7 The bankruptcy court denied Welther's exemption claim and ordered
8 turnover of the funds to the estate.

9 Welther argues that the bankruptcy court clearly erred in denying
10 his claimed exemption in the IRA by failing to properly apply the
11 evidence and to consider his and his dependents' future needs, and seeks
12 reversal and remand.

13 We AFFIRM.

14
15 **I. FACTS**

16 Oakmore Ranch Management ("debtor") filed chapter 11 bankruptcy in
17 1994. Appellee David Seror ("trustee") was appointed chapter 11
18 trustee, and upon conversion in June 1994, became chapter 7 trustee. In
19 1996, he commenced an adversary proceeding under § 547 et seq., and in
20 March 1997 the bankruptcy court entered a judgment against Welther for
21 \$2,154,477 plus interest. The judgment was entered jointly against
22 Welther and his partner, Harry Olivar. Although Welther made no payment
23 on the judgment, the trustee took no action to execute on the judgment
24 for several years.

25
26
27 ³ Absent contrary indication, all chapter and section
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330; all
"Rule" references are to the Federal Rules of Bankruptcy Procedure.
All "CCP" references are to the California Code of Civil Procedure.

1 In March 2004, the bankruptcy court appointed appellee James
2 Donell as receiver in the adversary proceeding under CCP §§ 564(b)(3)
3 and (b)(4), and 708.620. Donell filed a motion to determine, inter
4 alia, the extent of Welther's exemption in an IRA held at Morgan
5 Stanley, Account #244-017887 (the "IRA"). The IRA was originally
6 created in 2002, when Welther rolled over \$171,000 into it, from two
7 qualified pension plans which were created and maintained by two closely
8 held corporations of which Welther had been president and director,
9 though he had since retired. After the plans were terminated in 1990,
10 Welther elected to distribute the proceeds, totaling \$350,000, into an
11 IRA rollover account at Orange National Bank; he deposited \$171,000 of
12 these funds into the IRA. In December 2003 and August 2004, Welther
13 made withdrawals of \$6700 and \$2800, respectively, leaving a balance of
14 \$161,500. The current balance, with interest, is now approximately
15 \$164,000.

16 Welther argued that the IRA is entirely exempt as necessary for his
17 and his dependents' present and future needs. At the time of the
18 hearing, Welther was approximately 75 years old, retired, and had a
19 "heart condition requiring three medications." He provided no other
20 health-related testimony. He is unmarried but supports three minor
21 children, ages 8, 8 and 11, and their mother, age 49, none of whom live
22 with him. The children's mother, who is unemployed, receives social
23 security of \$800-900 monthly per child. There are no other facts or
24 documentation in the record about the dependents' living or financial
25 situation.

26 Welther claimed his debts total \$5,758,000 (mostly judgments and
27 legal fees), including the unsatisfied judgment. He owns two vehicles,
28 worth at most \$1500 each; business property in San Juan Capistrano,

1 California, which has no equity; and has a (disputed) claim for a life
2 estate interest in his condominium which, if recognized, is valued at
3 \$35,000. According to his declaration and supplemental declaration, his
4 only income is social security of \$1286 monthly and modest earnings from
5 a temporary job of \$600-800 per month. His monthly expenses total
6 \$8204, including combined rent of \$4062 (his own rent and the
7 dependents' rent, but there is no breakdown); children's school and
8 childcare, \$1020; food and supplies, \$1000; utilities and telephone,
9 \$350; insurance premiums, \$602; medical/dental, \$400; transportation,
10 \$320; and laundry, \$200. (There is no supporting documentation). Based
11 on these figures, Welther has a monthly shortfall of \$6918. He provided
12 no evidence as to how this differential is made up.

13 The bankruptcy court tentatively denied the exemption claim,
14 finding insufficient detail, but continued the hearing, ordering Welther
15 to "file and serve a balance sheet as described in the tentative ruling
16 and any further opposition to the Motion insofar as the Motion seeks a
17 ruling on the extent, if any, to which the Morgan Stanley account is
18 exempt." Welther filed a supplemental opposition and declaration but did
19 not request an evidentiary hearing under Rule 9014.

20 Assuming for purposes of analysis but without deciding that the
21 IRA qualified under state law as a "rollover individual retirement
22 account" under CCP § 704.115(a)(3), the court concluded:

23 3. Welther . . . failed to meet his burden of proof under
24 CCP § 703.580(b) of establishing the "necessary for support"
25 elements of CCP § 704.115(e). Based thereon, Welther's claim
of exemption with respect to the Morgan Stanley Account is
denied.

26 4. Since Welther does not have a sustainable claim of
27 exemption to the Morgan Stanley Account, the bankruptcy estate
28 is entitled to receive the funds in the Morgan Stanley Account
to apply to the judgment in favor of the Trustee and against
Welther.

1 Order Denying Claim of Exemption With Respect to Alleged IRA Rollover
2 Account and Ordering Funds to be turned over to the Estate for
3 Application of Judgment, 1 February 2005.

4 The bankruptcy court granted Welther's motion to stay the order
5 pending appeal. Welther sought leave to appeal, which we granted on 14
6 April 2005.

8 **II. ISSUE**

9 Whether the bankruptcy court clearly erred in denying Welther's
10 claim of exemption in the IRA under CCP § 704.115(e) as not necessary
11 for support.

13 **III. JURISDICTION**

14 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334 and
15 § 157(a), (b)(1), and (b)(2)(B) and (E). We do under 28 U.S.C.
16 § 158(c).

18 **IV. STANDARDS OF REVIEW**

19 We review the bankruptcy court's findings of facts regarding the
20 necessity of an IRA for the judgment debtor's support under the clearly
21 erroneous standard. See In re Bernard, 40 F.3d 1028, 1033 (9th Cir.
22 1994); Rule 8013. A factual finding is clearly erroneous if the
23 appellate court, after reviewing the entire record, has a firm and
24 definite conviction that a mistake has been committed. Anderson v. City
25 of Bessemer City, N.C., 470 U.S. 564, 573 (1985).

26 The bankruptcy court's application of California exemption law is
27 a question of statutory construction which we review de novo. In re
28

1 Spencer, 212 B.R. 625, 628 (9th Cir. BAP 1997); In re Toplitzky, 227
2 B.R. 300, 302 (9th Cir. BAP 1998).

3 We may affirm on any basis supported by the record, even where the
4 issue was not expressly considered by the bankruptcy court. In re E.R.
5 Fegert, Inc., 887 F.2d 955, 957 (9th Cir. 1989).

7 V. DISCUSSION

9 A. Procedure

10 Ordinarily, under California law, a written claim of exemption must
11 be filed with the levying officer within ten days after the date of
12 service of the notice of levy. The judgment debtor files a written
13 claim of exemption with the levying officer, CCP § 703.520, and a
14 creditor who wishes to contest the claim must notice his opposition
15 within 10 days and set the matter for a hearing. Imperial Bank v. Pim
16 Elec., Inc., 33 Cal. App. 4th 540, 554-55, 39 Cal. Rptr. 2d 432 (1995)
17 (outlining statutory procedure); see also 2 C.E.B., Debt Collection
18 Practice in California, § 9.56 et seq. (2d ed. 2005). While the
19 proceedings here did not exactly track the statutory course, Welther did
20 not raise this as an issue on appeal, nor has the receiver argued that
21 Welther waived his exemption claim by failing to adhere strictly to the
22 statutory procedure.

23 A disputed exemption claim in bankruptcy court is a contested
24 matter, see In re Moffat, 107 B.R. 255, 256 (Bankr. C.D. Cal. 1989),
25 aff'd, 959 F.2d 740 (9th Cir. 1992), governed by Rule 9014. Welther
26 could have but did not request an evidentiary hearing. Nor did he brief
27 it. Accordingly, Welther has waived any issue regarding the propriety
28 of the procedure. In re Sedona Inst., 220 B.R. 74, 76 (9th Cir. BAP

1 1998), aff'd mem., 21 Fed Appx. 723 (9th Cir. 2001) (issue not briefed
2 is deemed waived).

3
4 B. IRA Exemption Claims in California

5 California law on enforcement of judgments against "private
6 retirement plans" provides:

7 (b) All amounts held, controlled, or in process of
8 distribution by a private retirement plan, for the payment of
9 benefits as an annuity, pension, retirement allowance,
10 disability payment, or death benefit from a private retirement
11 plan are exempt.

12 . . .

13 (d) After payment, the amounts described in subdivision (b)
14 and all contributions and interest thereon returned to any
15 member of a private retirement plan are exempt.

16 (e) Notwithstanding subdivisions (b) and (d), except as
17 provided in subdivision (f), the amounts described in
18 paragraph (3) of subdivision (a) are exempt only to the extent
19 necessary to provide for the support of the judgment debtor
20 when the judgment debtor retires and for the support of the
21 spouse and dependents of the judgment debtor, taking into
22 account all resources that are likely to be available for the
23 support of the judgment debtor when the judgment debtor
24 retires. . . .

25 CCP § 704.115(b), (d) and (e) (emphasis added).

26 The Legislative Committee's Official Comment to CCP § 704.115(e)
27 provides, in part:

28 Subdivision (e) requires that the court consider all
resources--such as social security payments and other income
assets--that are likely to be available to the judgment debtor
when the judgment debtor retires. Accordingly, where it will
be a number of years before the judgment debtor will retire,
the court will take into account not only all the assets of
the judgment debtor at the time the exemption claim is
determined but also all the assets and income (including
pension rights) that the judgment debtor is likely to acquire
prior to retirement.

16 Cal. Law Revision Commission Report on 1982 Creditors' Remedies
Legislation, 1413 (1981-82).

1 The time for determining an exemption is at the earliest of: the
2 time of the levy; the time of the commencement of court proceedings for
3 application of the property to satisfaction of the judgment; or the time
4 a lien is created under the Enforcement of Judgments Law or the
5 Attachment Law. CCP § 703.100(a); see also Imperial Bank, 33 Cal. App.
6 4th at 552. In this case, the date is 19 October 2004, when the
7 receiver filed his motion in bankruptcy court.

8 Since Welther's right to claim an exemption lies in California
9 state law, the state law burden of proof applies. In contrast to the
10 determination of a bankruptcy debtor's claim of exemption under § 522,
11 the burden of proof in establishing the claim of exemption under
12 California law is on the judgment debtor claiming it. CCP § 703.580(b);
13 Schwartzman v. Wilshinsky, 50 Cal. App. 4th 619, 626, 57 Cal. Rptr. 2d.
14 790, 795 (1996); In re Davis, 323 B.R. 732, 741 (9th Cir. BAP 2005)
15 (Klein, B.J., concurring) (burden of proof is substantive, so state law
16 should provide the rule of decision regarding the burden on each state
17 exemption).

18
19 C. Extent Necessary for Support

20 The question is what, if any, portion of the IRA is necessary for
21 support of the judgment debtor and his dependents? The bankruptcy court
22 has wide discretion in deciding what amounts are reasonably necessary,
23 taking into account the judgment debtor's present and future
24 circumstances. Spenler, 212 B.R. at 631. Courts have considered
25 various factors including income, employment situation and prospects,
26 retirement status, age, life expectancy, health, certainty of future
27 financial status, budget, ability to regenerate retirement assets, tax
28 obligations, and dependents' needs. Id; In re Moffat, 119 B.R. 201, 206

1 (9th Cir. BAP 1990), aff'd, 959 F.2d 740 (9th Cir. 1992); In re Switzer,
2 146 B.R. 1, 5-6 (Bankr. C.D. Cal. 1992). "The California exemption
3 statutes are liberally construed, for their manifest purpose is to
4 protect income and property needed for the subsistence of the judgment
5 debtor." In re Payne, 323 B.R. 723, 727 (9th Cir. BAP 2005) (citation
6 omitted); see also Schwartzman, 50 Cal. App. 4th at 630 (California
7 exemption statutes should be construed to benefit the judgment debtor).

8 Four factors would seem to favor exemption: Welther's age, his
9 retirement status, his dependents' ages, and the amount of the judgment,
10 given that Welther can never hope to pay the principal. Even if he
11 could replenish the IRA, the replenished funds could also be subject to
12 levy.

13 It is appropriate that, as an elderly retiree, the bankruptcy court
14 consider Welther's future financial needs, see Legislative Committee's
15 Official Comment, supra, and Welther seems to imply that future
16 financial needs will be at least as great or greater than present.

17 Nevertheless, Welther offered virtually no evidence on these
18 issues, and the bankruptcy court was left largely to speculation, as are
19 we. The bankruptcy court expressly directed Welther to supplement his
20 testimony. Welther's declarations were superficial and sketchy
21 respecting his and his dependents' current and future needs and living
22 situation. He provided neither a financial statement nor copies of
23 retirement plans, account statements, banking records, title and asset
24 valuations, agreements regarding the children's support, education or
25 living arrangements, tax returns (which would reflect 1099-R
26 distributions), nor documentation on the rollover of funds. He has
27 never expressly stated how much IRA money he needs now or will need in
28

1 the future, nor explained why he has made only two IRA withdrawals in
2 2003 and 2004, totaling less than \$10,000, although he retired in 1996.

3 Welther has not even argued, much less shown, how the bankruptcy
4 court's decision was clear error. Welther simply did not carry his
5 burden of proof to show the IRA necessary for his support.

6 Because we affirm on the merits, we need not remand for
7 determination of whether the IRA qualifies as a private retirement plan
8 under CCP § 704.115(a)(3).

9
10 **VI. CONCLUSION**

11 Welther failed to meet his state law burden of proof that the IRA
12 was necessary for his support. As he did not carry his burden of
13 proof, and there was evidence from which the court could infer the IRA
14 was not necessary for his support, there was no error in denying
15 Welther's claim of exemption. We AFFIRM.