

MAR 09 2012

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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NOT FOR PUBLICATION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

5	In re:	)	BAP No. AZ-11-1505-JuPaD
		)	
6	CYNTHIA L. MESSER,	)	Bk. No. 11-03007
		)	
7	Debtor.	)	
		)	
8	<hr/> CYNTHIA L. MESSER,	)	
		)	
9	Appellant,	)	
		)	
10	v.	)	M E M O R A N D U M*
		)	
11	EDWARD J. MANEY, Chapter 13	)	
	Trustee,	)	
12		)	
	Appellee.	)	
13	<hr/>	)	

Argued and Submitted on February 24, 2012  
at Phoenix, Arizona

Filed - March 9, 2012

Appeal from the United States Bankruptcy Court  
for the District of Arizona

Honorable Redfield T. Baum, Sr., Bankruptcy Judge, Presiding

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Appearances: David Allegrucci, Esq. of Allegrucci Law Office,  
PLLC argued for appellant Cynthia L. Messer;  
Stuart Bradley Rodgers, Esq. of Lane & Nach, P.C.  
argued for appellee Edward J. Maney, Chapter 13  
Trustee.

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Before: JURY, PAPPAS, and DUNN, Bankruptcy Judges.

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\* 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.

1 Chapter 7<sup>1</sup> debtor, Cynthia L. Messer, claimed as exempt  
2 100% of the fair market value of her vehicle listed at \$12,000.  
3 This amount was over the \$5,000 statutory limit for vehicle  
4 exemptions under Arizona law. Debtor also claimed that her  
5 \$2,000 monthly benefit from a structured settlement annuity was  
6 not property of her estate. The bankruptcy court sustained the  
7 chapter 7 trustee's objection to debtor's claimed exemption in  
8 her vehicle and found that her annuity payments were property of  
9 her estate. This timely appeal followed. We AFFIRM.

### 10 I. FACTS

11 On February 7, 2011, debtor filed her chapter 7 petition.  
12 Jill H. Ford was appointed the chapter 7 trustee.

13 In Schedule C, debtor claimed 100% of the fair market value  
14 ("FMV") of her 2007 Honda Accord, listed at \$12,000,<sup>2</sup> as exempt  
15 under Ariz. Rev. Stat. ("ARS") §33-1125(8). That statute allows  
16 a debtor to exempt "[o]ne motor vehicle not in excess of a fair  
17 market value of five thousand dollars."

18 Debtor also claimed as exempt her \$2,000 monthly benefit  
19 from a 1985 annuity under ARS §33-1126(B).<sup>3</sup> The record shows  
20 that the annuity arose from a settlement for the wrongful death  
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22 <sup>1</sup> As explained below, debtor converted her case to one under  
23 chapter 13 before this appeal was taken. Unless otherwise  
24 indicated, all chapter and section references are to the  
25 Bankruptcy Code, 11 U.S.C. §§ 101-1532, and rule references are  
to the Federal Rules of Bankruptcy Procedure.

26 <sup>2</sup> Debtor's Schedule D showed that the vehicle was encumbered  
27 by a lien in an amount over \$15,000.

28 <sup>3</sup> ARS §33-1126(B) was inapplicable to the annuity because  
that section concerns the exemption of certain retirement plans.

1 of debtor's husband. The insurer, United States Fidelity and  
2 Guaranty Company ("USF&G"), owned the annuity and it was not  
3 assignable.

4 Debtor amended Schedule C to show that her basis for  
5 claiming 100% of the FMV of her vehicle exempt was the holding  
6 in Schwab v. Reilly, \_\_ U.S. \_\_, 130 S.Ct. 2652, 2668 (2010).  
7 Debtor also changed the statutory basis for her exemption in the  
8 annuity to ARS §33-1126(A)(7) which authorizes as exempt "an  
9 annuity contract where for a continuous unexpired period of two  
10 years that contract has been owned by a debtor and has named as  
11 beneficiary the debtor . . . ."

12 The chapter 7 trustee objected to debtor's exemptions,  
13 asserting that the claimed exemption in her vehicle was over the  
14 \$5,000 statutory limit set forth in ARS §33-1125(8) and her  
15 exemption in the annuity under ARS §33-1125(A)(7) should be  
16 denied because that statute applied only to annuities owned by a  
17 debtor. In response, debtor asserted that the annuity was not  
18 property of her estate because (1) it contained an anti-  
19 alienation provision; (2) she did not own the annuity; and  
20 (3) the annuity qualified as a spendthrift trust under Arizona  
21 law.

22 On July 28, 2011, the bankruptcy court heard the matters.  
23 At the hearing, the court found that the Supreme Court's  
24 decision in Schwab did not authorize debtor to claim an  
25 exemption in her vehicle greater than the \$5,000 limit under ARS  
26 §33-1125(8). The bankruptcy court took the matter of debtor's  
27 exemption in the annuity under advisement.

28 On August 25, 2011, the bankruptcy court issued its ruling

1 on the annuity exemption. Siding with the trustee, the court  
2 found that because the annuity was never owned by debtor, debtor  
3 could not claim it exempt under ARS §33-1126(A)(7). The  
4 bankruptcy court also found that there was nothing in the record  
5 that established the annuity qualified as a spendthrift trust  
6 under Arizona law. The court reasoned that the facts, analysis,  
7 and holding in In re Kent, 396 B.R. 46 (Bankr. D. Az. 2008),  
8 were very similar to this case and compelled the conclusion that  
9 the annuity was not exempt and was property of the estate.

10 On September 7, 2011, the bankruptcy court entered the  
11 order sustaining the trustee's objection to debtor's claimed  
12 exemption in the annuity and finding that it was property of her  
13 estate. As a result of the court's ruling, debtor converted her  
14 case to chapter 13 on September 14, 2011. On October 11, 2011,  
15 the court entered the order denying debtor's claim of exemption  
16 in her vehicle above the statutory limit of \$5,000 allowed under  
17 Arizona law. Debtor timely appealed the orders.

## 18 **II. JURISDICTION**

19 The bankruptcy court had jurisdiction over this proceeding  
20 under 28 U.S.C. §§ 1334 and 157(b)(2)(A) and (B). We have  
21 jurisdiction under 28 U.S.C. § 158.

## 22 **III. ISSUES**

23 A. Whether the bankruptcy court erred in sustaining the  
24 chapter 7 trustee's objection to debtor's claimed exemption for  
25 100% of the FMV of her vehicle; and

26 B. Whether the bankruptcy court erred by finding that the  
27 annuity was property of debtor's estate.



1 holding in Schwab she can validly claim 100% of the FMV of her  
2 vehicle exempt if she did so in good faith. Debtor contends her  
3 claim of exemption for the full FMV of her vehicle was made in  
4 good faith because there was no equity in her vehicle and the  
5 trustee did not contest the value of her vehicle. On this  
6 basis, debtor contends her exemption should stand. We disagree.

7 Debtor misunderstands the holding in Schwab and the scope  
8 of the decision. In Schwab, the debtor claimed exemptions in  
9 catering equipment equal to the value which she had listed for  
10 the items themselves. The trustee did not object to the  
11 exemptions even though he had an appraisal which showed the  
12 equipment worth more than the amount debtor had listed. The  
13 trustee sought permission to auction the equipment. The  
14 bankruptcy court and Third Circuit Court of Appeals agreed that  
15 the trustee could not sell the equipment because he failed to  
16 object to the exemptions. The Supreme Court disagreed, holding  
17 that when the debtor's schedule of exempt property accurately  
18 describes the asset and declares the "value of [the] claimed  
19 exemption" in that asset to be an amount within the limits which  
20 the Code prescribes, an interested party such as the trustee  
21 "need not object to an exemption claimed in this manner in order  
22 to preserve the estate's ability to recover value in the asset  
23 beyond the dollar value the debtor expressly declared exempt."  
24 130 S.Ct. at 2657. The court reasoned that all the debtor  
25 received for her properly listed exemption in the catering  
26 equipment was the dollar value that she had claimed.

27 The facts in Schwab are distinguishable from those here.  
28 In contrast to the debtor in Schwab, debtor did not properly

1 list the exemption in her vehicle in an amount prescribed by ARS  
2 §33-1125(8) on her Schedule C. Therefore, her claimed exemption  
3 was objectionable on its face. Accordingly, the trustee was  
4 required to object to her exemption under the holding of Taylor  
5 v. Freeland & Kronz, 503 U.S. 638 (1992). See Schwab, 130 S.Ct.  
6 at 2666 (noting that Taylor established and applied "the  
7 straightforward proposition that an interested party must object  
8 to a claimed exemption if the amount the debtor lists as the  
9 'value claimed exempt' is not within statutory limits . . . .").

10 Debtor's reliance on the following passage in Schwab to  
11 support her position is also misplaced.

12 Where, as here, it is important to the debtor to  
13 exempt the full market value of the asset or the asset  
14 itself, our decision will encourage the debtor to  
15 declare the value of her claimed exemption in a manner  
16 that makes the scope of the exemption clear, for  
17 example, by listing the exempt value as 'full fair  
18 market value (FMV)' or '100% of FMV.' Such a  
19 declaration will encourage the trustee to object  
20 promptly to the exemption if he wishes to challenge it  
21 and preserve for the estate any value in the asset  
22 beyond relevant statutory limits. If the trustee  
23 fails to object, or if the trustee objects and the  
24 objection is overruled, the debtor will be entitled to  
25 exclude the full value of the asset.

26 130 S.Ct. at 2668. While this passage provides guidance to  
27 debtors who intend to exempt the actual value of the asset by  
28 listing its value claimed exempt as "100% of FMV," it does not  
stand for the proposition that such a listing constitutes a  
"valid and unobjectionable scheduling of a claimed exemption  
value where the relevant exempting statute, such as the  
[Arizona] Code, expressly limits the exemption to a maximum cash  
value." In re Stoney, 445 B.R. 543, 552 (Bankr. E.D. Va. 2011).  
The Stoney court noted that "to interpret Schwab as such would

1 permit a judicial superseding of the state statutory  
2 requirements for exemptions and functionally negate the express  
3 authority of a state to opt out and impose its exemption  
4 limitations – as well as the procedural and substantive  
5 requirements necessary to perfect those exemptions – on debtors  
6 who are citizens of the opt-out state.” Id.

7 Further, as the bankruptcy court observed, debtor  
8 overlooked a crucial part of the passage cited above: “If the  
9 trustee objects and the objection is sustained, the debtor will  
10 be required either to forfeit the portion of the exemption that  
11 exceeds the statutory allowance, or to revise other exemptions  
12 or arrangements with her creditors to permit the exemption.”  
13 Schwab, 130 S.Ct. at 2668. At the hearing on the matter in the  
14 bankruptcy court, debtor’s counsel explained that because both  
15 sides agreed that there was no equity in the vehicle, this  
16 sentence would never apply. However, the record shows there was  
17 no agreement regarding the lack of equity in debtor’s vehicle.  
18 The trustee stated on the record that he objected to debtor’s  
19 exemption in case it turned out there was actually less owed on  
20 the vehicle than what was reported on debtor’s schedules.  
21 Therefore, the trustee properly objected, preserving the value  
22 in excess of debtor’s exemption, if any, for the creditors of  
23 her estate.

24 Debtor does not contend on appeal that the basis for the  
25 trustee’s objection was invalid, nor could she, when her counsel  
26 acknowledged at the hearing that debtor’s statutory exemption  
27 for her vehicle was limited to \$5,000 under Arizona law. Under  
28 these circumstances, we conclude the bankruptcy court correctly



1 sustained the trustee's objection to debtor's exemption in her  
2 vehicle over the \$5,000 statutory limit.<sup>4</sup>

3 **B. The Bankruptcy Court Properly Found That The Annuity Was**  
4 **Property Of Debtor's Estate And Not Exempt**

5 Section 541(c)(2) provides an exception to the general rule  
6 set forth in § 541(a)(1) that all legal or equitable interests  
7 of the debtor become property of the estate as of the  
8 commencement of the case. Section 541(c)(2) provides that "[a]  
9 restriction on the transfer of a beneficial interest of the  
10 debtor in a trust that is enforceable under applicable  
11 nonbankruptcy law is enforceable in a case under this title."  
12 This provision excludes from the property of the bankruptcy  
13 estate interests in trusts that are protected under a  
14 spendthrift clause that is enforceable under applicable state  
15 law. See Patterson v. Shumate, 504 U.S. 753, 758 (1992) ("The  
16 natural reading of the provision entitles a debtor to exclude  
17 from property of the estate any interest in a plan or trust that  
18 contains a transfer restriction enforceable under any relevant  
19 nonbankruptcy law.").

20 Debtor contends that her annuity falls within the scope of  
21 § 541(c)(2) because it constitutes a valid spendthrift trust  
22 \_\_\_\_\_

23 <sup>4</sup> Technically, because debtor's vehicle was overencumbered,  
24 she had no equity or "interest" in her vehicle to remove from her  
25 estate. From what we can tell, debtor's claim of 100% FMV in her  
26 vehicle was apparently to protect any eventual equity she might  
27 have once she paid off the vehicle. However, as the bankruptcy  
28 court noted, debtor's counsel confused the concept of abandonment  
with the exemption process. If debtor properly listed the  
vehicle and it was not administered at the time her case was  
closed, the vehicle would be abandoned by operation of law,  
thereby protecting her equity vis-a-vis her estate.

1 under the Arizona Trust Code. In support of this conclusion,  
2 debtor begins by citing ARS §14-10102, which provides that the  
3 Arizona Trust Code "applies to express trusts, charitable or  
4 noncharitable trusts and trusts created pursuant to a statute,  
5 judgment or decree that requires the trust to be administered in  
6 the manner of an express trust." According to debtor, her  
7 annuity income falls within the scope of the Arizona Trust Code  
8 because it was the result of a state court judgment or decree.  
9 To support this premise, debtor relies on two documents that  
10 relate to a probate proceeding regarding the approval of a  
11 separate settlement arising out of the wrongful death of  
12 debtor's husband which was for the benefit of debtor's minor  
13 daughter. The first document is a petition for a protective  
14 proceeding under ARS §14-5409(b) which debtor brought on behalf  
15 of her minor daughter and the second is a petition for an order  
16 approving the settlement of the wrongful death claim of the  
17 minor daughter which simply contains a reference to the annuity  
18 payable to debtor.

19 We are not persuaded by debtor's argument. Notably, the  
20 documents were simply petitions and not orders. We thus fail to  
21 see how the documents prove that the alleged trust arose from a  
22 "judgment or decree." Further, even if we could get past that  
23 requirement, neither of the documents prove that a trust was  
24 created for her benefit through the probate proceeding. Debtor  
25 was neither a protected person in the proceeding nor would the  
26 probate court have had jurisdiction over her assets.

27 There is also nothing in either document that is consistent  
28 with a trust arrangement. Under Arizona law, the essential

1 elements of a valid trust include (1) a competent settlor, (2) a  
2 trustee, (3) an intention to create a trust, (4) the trustee has  
3 duties to perform and (5) the same person is not the sole  
4 trustee and sole beneficiary. ARS §14-10402. On appeal, debtor  
5 simply makes conclusory statements that these elements are  
6 satisfied. However, the documents in the record do not identify  
7 a settlor or trustee nor do they come close to establishing that  
8 the probate court or USF&G intended to create a trust for the  
9 benefit of debtor.<sup>5</sup> Compare In re Kent, 396 B.R. at 52.

10 We are also unpersuaded by debtor's argument that the so-  
11 called trust qualifies as a spendthrift trust. Under ARS §14-  
12 10502(A), "a spendthrift provision is valid only if it restrains  
13 either voluntary or involuntary transfer of a beneficiary's  
14 interest." ARS §14-10502(B) provides: "[a] term of a trust  
15 providing that the interest of a beneficiary is held subject to  
16 a spendthrift trust, or words of similar import, is sufficient  
17 to restrain both voluntary and involuntary transfer of the  
18 beneficiary's interest." Thus, the statute governing  
19 spendthrift trusts contemplates that the trust document itself  
20 would manifest the parties' intent to create a spendthrift  
21 trust, although no specific language is required.

22 Instead of relying on a trust document, which debtor  
23

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24 <sup>5</sup> Besides not offering a written trust instrument into  
25 evidence, debtor's argument that an oral trust was somehow  
26 created also fails. ARS § 14-10407 states in relevant part:  
27 "[T]he creation of an oral trust shall be established only by  
28 clear and convincing evidence and the terms of the oral trust  
shall be established by a preponderance of the evidence. . . ."  
Debtor's evidence does not come close to meeting the clear and  
convincing standard of proof required under the statute.

1 apparently does not have, she contends that ARS §12-2902 serves  
2 as a "statutory restraint" on debtor's transfer of her interest  
3 which proves her trust was a spendthrift trust. ARS §12-2902  
4 provides that structured settlement payments are transferable if  
5 authorized by a court after finding that such transfer is "in  
6 the best interests of the payee, taking into account the welfare  
7 and support of the payee's dependents." ARS §12-2902(B)(3).  
8 Debtor contends that because she can transfer her stream of  
9 income only upon an "express finding" that it is in her best  
10 interests to do so, that limitation takes her annuity out of her  
11 creditors' reach.

12 We are not convinced that ARS §12-2902, which authorizes a  
13 payee of a structured settlement to transfer payments upon court  
14 approval, constitutes the kind of "restraint" envisioned for a  
15 spendthrift trust under Arizona law.<sup>6</sup> Debtor's argument makes  
16 no sense when the statute itself authorizes transfers of  
17 structured settlement payments. This authorization is contrary  
18 to the very nature of spendthrift trusts. Furthermore, statutes  
19 such as this were enacted for the protection of payees under  
20 structured settlements to "prevent serious overreaching by  
21 factoring companies and to prevent the sale of payments at a  
22 mere fraction of their present or future value." Jay M. Zitter,  
23 Annotation, Construction and Application of State Structured  
24 Settlement Protection Acts, 27 A.L.R. 6th 323 (2007). This  
25 purpose does not evidence an intent by the Arizona legislature

26 \_\_\_\_\_  
27 <sup>6</sup> Note that we do not find that ARS § 12-2902 applies to  
28 debtor because she provided no court order that pertained to her  
annuity at all.

1 to turn every structured settlement into a spendthrift trust  
2 under Arizona law.

3 In sum, as there is no evidence in the record to the  
4 contrary, we conclude that as a matter of law debtor's annuity  
5 was not a spendthrift trust. Therefore, despite the restrictive  
6 language contained in the March 29, 2011 letter also in the  
7 record (which stated that debtor's benefit could not be  
8 assigned), we agree with the bankruptcy court that debtor's  
9 annuity payments were property of her estate for the reasons  
10 explained in In re Kent, 396 B.R. 45. See also In re Jackus,  
11 442 B.R. 365 (Bankr. D.N.J. 2011).

12 Finally, debtor's annuity is not exempt under ARS §33-  
13 1125(A)(7) because that statute applies only to annuities owned  
14 by a debtor. Debtor conceded that she did not own the annuity.

#### 15 VI. CONCLUSION

16 For the reasons stated, we AFFIRM.