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OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. AZ-10-1306-KiMyD
PHILIP N. RICHEY and ANNA P. RICHEY, Debtors.	Bk. No. 05-16229-GBN
	Adv. No. 06-00524-GBN
D.A.N. JOINT VENTURE III, L.P., Appellant,	
v.	**M E M O R A N D U M**[1]
PHILIP N. RICHEY; ANNA P. RICHEY, Appellees.	

Argued on July 22, 2011,
at Phoenix, Arizona

Filed - August 8, 2011

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

Honorable George B. Nielsen, Bankruptcy Judge, Presiding

Appearances: Pamela B. Petersen argued for Appellant, D.A.N. Joint Venture III, L.P.
Lawrence D. Hirsch of DeConcini McDonald Yetwin & Lacey, P.C. argued for Appellees, Philip and Anna Richey

Before: KIRSCHER, MYERS[2] and DUNN, Bankruptcy Judges

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[1] 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.

[2] Hon. Terry L. Myers, Chief Bankruptcy Judge for the District of Idaho, sitting by designation.

Appellant, D.A.N. Joint Venture III, L.P. ("DAN"), appeals an order from the bankruptcy court granting Philip and Anna Richey's ("Richeys") motion for partial summary judgment, and denying DAN's cross motion for partial summary judgment regarding DAN's objection to Richeys's claimed exemption for two of Mr. Richey's individual retirement accounts. We AFFIRM.

I. FACTUAL AND PROCEDURAL BACKGROUND

Richeys, who are in their late 80's and have been married for nearly 70 years, filed a voluntary chapter 7[3] petition for relief on August 30, 2005. In their Schedule C, Richeys claimed two IRA annuities as exempt property - an "IRA Loyal Life 2166" in the amount of $272,929.42, and an "IRA-ING 8965" in the amount of $68,382.59 (collectively "IRAs"). DAN objected to the claimed exemptions in the IRAs because they "[did] not qualify as exempt property under Arizona law due to the Debtors' continuous concealment and fraudulent transfers of funds into these accounts."

In September 2006, DAN filed a First Amended Complaint seeking to deny Richeys's discharge under section 727. In short, DAN alleged that the source from which the IRA funds came - the Philip N. Richey Construction Company of New Mexico Pension Plan ("Pension Plan") and the Philip N. Richey Construction Company of

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[3] Unless otherwise indicated, all chapter, section, and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 as enacted and promulgated before the effective date (October 17, 2005) of the relevant provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. 109-8, 119 Stat. 23 (2005), and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036. The Federal Rules of Civil Procedure are referred to as "FRCP." The Internal Revenue Code is referred to as "IRC."

New Mexico Profit Sharing Plan (“Profit Sharing Plan”) (collectively the “Plans”) - were not “qualified” plans under applicable tax law at the time the funds were transferred and rolled over to the IRAs. Thus, according to DAN, if the Plans were not qualified at the time of the rollover, then the IRAs were not exempt under Arizona law. Richeys admitted the funds were initially held by the Plans, but denied that the Plans were not qualified. They further denied DAN’s allegations of fraud.

In January 2007, Richeys moved for partial summary judgment (“Motion”) contending that the “only question of significance for [the bankruptcy court] is whether the original plan was ‘qualified’ and, therefor, exempt under State Law and not to be considered as property of the estate under [section 541(c)(2)].” Richeys asserted the Plans were tax qualified at the time of the rollover so, therefore, the IRAs were exempt. Specifically, Richeys asserted that the Pension Plan was originally established on February 28, 1979. On November 7, 1980, the IRS made a favorable determination on the qualified status of the Pension Plan under IRC § 401. In a letter dated December 2, 1987, Richeys were informed by their pension attorney that proposed amendments to the Pension Plan (which then became the Profit Sharing Plan) had been accepted by the IRS. Richeys then terminated the Profit Sharing Plan in November 1997, and the proceeds belonging to Richeys were transferred to an IRA. In 2002 and 2003, with funds from the IRA, Mr. Richey purchased two annuities - the subject IRAs.

DAN responded to the Motion and cross moved for partial summary judgment (“Cross Motion”), contending that it was entitled to summary judgment because Richeys had not met their burden establishing the propriety of the exemptions. DAN contended that, despite three Rule 2004 orders and FRCP 34 requests for production of documents, Richeys had not produced the original Pension Plan established in 1979 and shown that it was qualified at the time of its termination in 1987,[4] and Richeys had not shown that the Profit Sharing Plan was qualified when it was terminated in 1997, all of which was required for the IRAs to be exempt.

In their reply to the Motion and response to DAN's Cross Motion, Richeys contended they were entitled to summary judgment because they had now located: the original Pension Plan from 1979; the 1987 amended Pension Plan referred to in the pension attorney's letter from December 1987; the Profit Sharing Plan dated April 29, 1988; and several other documents, which satisfied their burden of entitlement to the exemption.

In DAN's reply to its Cross Motion, DAN contended, supported by an affidavit from its expert witness, Melissa Kurtzman ("Kurtzman"), that it was entitled to summary judgment on the exemption issue because Richeys had still failed to produce favorable determination letters from the IRS showing that both Plans were qualified at the time they were terminated. In any event, Kurtzman, based on her preliminary review of the Plans, opined they were not qualified as of their termination dates. Alternatively, DAN argued that even if the Plans were qualified at the time of termination, disqualifying events could occur after-

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[4] The record later established that the Pension Plan was terminated sometime in 1988 and became the Profit Sharing Plan, established April 29, 1988.

the-fact, and courts may determine that a plan is no longer qualified based upon such events, citing Plunk v. Yaquinto (In re Plunk), 481 F.3d 302, 307 (5th Cir. 2007), and Dzikowski v. Blais (In re Blais), 220 B.R. 485, 489-90 (S.D. Fla. 1997). DAN requested under FRCP 56(f) that Kurtzman be allowed time to review the Plans and provide the court with her expert opinion on whether any subsequent events occurred rendering the Plans disqualified.

On April 4, 2007, Richeys produced a favorable determination letter from the IRS, dated January 24, 1994, stating that the Profit Sharing Plan was qualified on the proposed termination date of January 15, 1993. Richeys made no mention about a favorable determination letter for the Pension Plan at the time of its termination in 1988.

At a hearing on April 5, 2007, the bankruptcy court determined that based on the incomplete record before it (i.e., whether any disqualifying events occurred during the “gap” in time between when the IRS issued its favorable determination letter regarding the Profit Sharing Plan in January 1994 and when that plan was actually terminated in 1997[5]), it was unable to rule on the cross motions for summary judgment, and it granted DAN’s FRCP 56(f) request for a continuance. Richeys also agreed to contact the IRS to see if more documents regarding the Plans could be retrieved.

In July 2007, DAN filed a supplement to its Cross Motion,

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[5] Richeys’s son, Clinton Richey, testified by an unsigned affidavit that he was the investment manager of the Plans, and that shortly after termination of the Profit Sharing Plan all participants, other than Mr. Richey, received their distributions, and it was due to his negligence that Mr. Richey’s distribution did not occur until November 1997.

which included a second affidavit from Kurtzman. DAN explained that in a May 15, 2007 letter from the IRS to Mr. Richey, the IRS stated:

> According to our records the most current determination letter [for the Profit Sharing Plan] was issued on or around January 31, 1994. It was for termination of the plan.
>
> Our records indicate the most current determination letter [for the Pension Plan] was issued on or around August 21, 1986. There are no records of any other determination letter for this plan.
>
> We are sorry, but we are unable to reproduce a copy of the favorable determination letter due to the age of the case. . . . The determination letter application case files are destroyed after 10 years.

Hence, by this point, the record established that: a favorable determination letter existed when the Pension Plan was terminated, although no one had a copy of it, and Richeys had produced the favorable determination letter executed at the time the Profit Sharing Plan was to be terminated in 1994, but which was not actually terminated until 1997. Accordingly, DAN contended that it was entitled to summary judgment because: (1) Richeys had not produced the actual favorable determination letter for the Pension Plan from August 1986; (2) Kurtzman had concluded that even if the August 1986 letter existed, the Pension Plan, which was not actually terminated until 1988, was not qualified because Richeys failed to comply with various tax laws;[6] and (3) Kurtzman

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[6] Specifically, Kurtzman stated that after issuance of the August 1986 determination letter for the Pension Plan, the tax act known as TRA '86 was enacted, which imposed many new requirements on retirement plans, and such requirements were to be adopted in 1988 by plan sponsors. On April 29, 1988, when the Profit Sharing Plan was established, the TRA '86 amendments would have been (continued...)

concluded at least six events occurred subsequent to the January 1994 IRS determination letter that rendered the Profit Sharing Plan disqualified.[7]

Richeys's response to DAN's supplement to its Cross Motion was supported by an affidavit from their expert witness, Michael Pietzsch ("Pietzsch"). Pietzsch opined that the IRS letter from August 1986 confirmed the Pension Plan was qualified at the time of its termination, and the Profit Sharing Plan was still qualified when the assets were finally distributed to Mr. Richey in 1997. To support his opinion about the Profit Sharing Plan, Pietzsch noted that three documents existed establishing its qualified status, which Kurtzman failed to address in her analysis: (1) the Restated Profit Sharing Plan, executed on January 15, 1993; (2) the Contingent Amendment to the Restated Profit Sharing Plan, executed on November 28, 1997; and (3) the First Amendment to the Profit Sharing Plan, dated February 11, 1994. According to Pietzsch, all of the required and necessary amendments noted by Kurtzman were made via those documents to the Profit Sharing Plan. Further, in his opinion, none of the so-called required amendments would have had any practical effect on

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[6](...continued)
required for the Pension Plan if the last letter issued was August 1986. Thus, according to Kurtzman, the Pension Plan would have been disqualified by the IRS because the plan sponsor did not adopt the TRA '86 plan amendments on a timely basis.

[7] The six events Kurtzman referred to here were primarily amendments that the Profit Sharing Plan had to include subsequent to 1994 and up until 1997 to remain qualified, such as definitions for "highly compensated employee" and "leased employee," and the new contribution limits for a defined contribution plan under IRC § 415.

the Profit Sharing Plan since all assets, other than Mr. Richey’s, were allocated to participants within one year of the favorable determination letter of 1994; the plan received no new contributions, had no new participants, or otherwise acted except to distribute funds already on hand. In any event, Pietzsch opined that the IRS would never have disqualified either of the Plans based on any of the technical defects noted by Kurtzman. In fact, Pietzsch believed that, if requested to do so through its voluntary compliance program (“VCP”), the IRS would permit either and/or both of the Plans to be amended currently to eliminate any perceived defects and, further, the IRS would recognize the qualified status of the Pension Plan retroactive to its termination date and the qualified status of the Profit Sharing Plan retroactive to the date of the rollover to the IRA.

In DAN’s reply, which included a third affidavit from Kurtzman, DAN complained that the three documents Pietzsch referred to in his affidavit (the Restated Profit Sharing Plan, the Contingent Amendment to the Restated Profit Sharing Plan, and the First Amendment to the Profit Sharing Plan) had never been previously produced or provided to Kurtzman, and therefore Richeys should not be allowed to use them. However, even if the court considered them, Kurtzman still opined that the Pension Plan was not qualified for the same reasons she stated previously, and the Profit Sharing Plan was not qualified because certain amendments were not timely adopted by the time of Mr. Richey’s first distribution to his IRA in December 1997. Kurtzman said nothing about Pietzsch’s suggestion to use the VCP to obtain a qualified status ruling from the IRS for the Plans retroactively, but DAN argued that Richeys should not be allowed to correct any plan deficiencies postpetition because the petition date of August 30, 2005, is the critical date for determining exemption rights. Alternatively, if the court considered allowing Richeys to participate in the VCP, DAN insisted on being a party to the process.

On November 1, 2007, Richeys filed a supplemental reply to their Motion contending they were entitled to summary judgment because they had shown, by unequivocal evidence, that the Plans, and thus the IRAs, were qualified, and DAN had failed to meet its burden of persuasion that the Plans were not qualified. The only issues, in Richeys's opinion, were hyper-technical claims concerning verbiage in the Profit Sharing Plan which had been inactive for at least two years before the final distribution occurred to Mr. Richey, which was eight years before bankruptcy.

At a hearing on November 6, 2007, the bankruptcy court ruled that DAN had made enough of a showing in its objection to the exemption so that the burden of production now shifted back to Richeys. To satisfy that burden, the court ordered Richeys to submit the Plans to the VCP and seek a determination from the IRS of qualification or disqualification, and to see if the IRS would permit Richeys to cure any possible defects in the Plan, and agree that any cure be given retroactive effect. The court reasoned that although the validity of an exemption is determined on the petition date without any reference to subsequent changes in the character or value of the exempt property, tax law, which applied to determine the validity of Richeys's IRA exemptions, allows taxpayers an opportunity to cure operational defects potentially disqualifying a plan in order to make them qualify under the IRC. As such, Richeys, even though debtors in bankruptcy, should be accorded the same cure rights as any non-debtor taxpayer. In the court's opinion, the issues in this case were distinguishable from <u>Plunk</u> and required more than simply examining whether a debtor improperly used plan assets to pay bills; the issues here were more arcane and required the court to defer to the IRS and allow Richeys to seek a determination as to whether the Plans were qualified at termination.

The bankruptcy court opted not to order the IRS to permit DAN to participate in the process because perhaps tax law did not allow it. However, it noted that, to the extent DAN was shut out of the process, it would give less deference to the IRS's decision because the issues may not have been fully presented. Therefore, the court ordered that Richeys, at the very least, keep DAN apprised of the developments in the process.

Nearly one year later, Richeys filed a supplement to their Motion contending that they had submitted the Plans to the VCP, and the IRS issued compliance statements with retroactive effect. Apparently, Richeys's first submission to the IRS in February 2008 was rejected because it did not identify specific failures in the Plans or propose amendments as required for a compliance statement. Richeys sent a second submission in May 2008, this time identifying the failures in each of the Plans noted by Kurtzman and proposing various methods of correction, which the IRS accepted. In other words, Richeys now had to admit the Plans contained certain failures. Notably, the compliance statements stated:

> A compliance statement constitutes an enforcement resolution solely with respect to certain failures of an employee retirement plan that is intended to satisfy the requirements of the [IRC]. It does not constitute a . . . determination letter within the meaning of Revenue Procedure 2007-6, 2007-1 I.R.B. 189.
>
> This compliance statement is conditioned on . . . there being no misstatement or omission of material facts in connection with the submission . . . .
>
> The Service will not pursue the sanction of plan disqualification on account of the qualification failure(s) described in Part I [which lists the failures contained in each plan].[8]

The parties reappeared on the cross motions about 18 months later when DAN filed another reply in support of its Cross Motion in April 2010. It was supported by a fourth affidavit from Kurtzman. DAN contended that the bankruptcy court should disregard the compliance statements because: (1) Richeys deliberately kept DAN out of the VCP process; (2) Richeys advocated a unilateral position to the IRS by disclosing only those failures raised by Kurtzman; and (3) Richeys had failed to seek and obtain a determination letter from the IRS indicating the Plans were qualified at termination.

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[8] The next hearing in connection with the cross motions was over one year later on December 1, 2009. The law firm of Peitzsch, Bonnett & Womack (the firm of Richeys's expert witness) handled the VCP matter. Apparently, DAN had been precluded from the VCP process and was concerned with whether the plan documents Richeys submitted to the IRS for its review provided the IRS with the whole picture. In other words, DAN wanted to test the accuracy of the submission to the IRS to make sure there was no "misstatement or omission of material facts." Therefore, DAN propounded discovery on the former law firms of Richeys and their companies to produce any and all plan documents and any related information. Some documents were produced, but Richeys, now appearing pro se, objected to the discovery of certain other documents asserting confidentiality privilege. The bankruptcy court found that the privilege did not attach to the Pietzsch materials, but was applicable as to certain documents held by Fennemore Craig. This ruling is not disputed on appeal.

Specifically, DAN explained that the VCP submission was handled entirely by Richeys's attorney, Patrick Waltz, who admitted at deposition that he was under strict instructions from Richeys's former counsel, Edwin Lee, to not seek any input from DAN's attorneys, and to limit any plan failures to those raised by Kurtzman, which was contrary to Waltz's normal practice. Waltz admitted he made no effort to identify any other plan failures. Further, according to Kurtzman, the IRS would have allowed her to participate in the VCP process if Richeys had given her power of attorney, which they chose not to do. Finally, DAN contended that the compliance statements were not the same as determination letters, which Richeys still needed in order to prove the Plans were qualified.

Alternatively, Kurtzman opined that even despite the compliance letters, the Plans were still not qualified because of Richeys's failure to inform the IRS of a significant operational error that occurred between 1992 and 1994 under the Profit Sharing Plan, which she believed rendered it disqualified. Kurtzman explained that Mr. Richey had received 19 lump-sum distributions from the Profit Sharing Plan without obtaining the required consent of Ms. Richey, who held survivor benefits under the plan. However, in November 1997, Ms. Richey executed a consent and waiver form after-the-fact, permitting Mr. Richey to retain his 19 contributions, or about $105,000. Kurtzman contended that the record was not clear whether Ms. Richey received adequate disclosures about the benefit she gave up and the true impact on her. Nonetheless, according to Kurtzman, even though Rev. Proc. 2006-27 allows self-correction of insignificant operational errors, or correction of significant operational errors within two years, this error was significant and more than two years had passed between the errors and Ms. Richey’s consent form. More importantly, the error was not submitted to the IRS in the VCP.

In May 2010, Richeys, now pro se, filed a reply in support of their Motion. Richeys argued that if the court determined the Plans were not qualified, such a ruling would detrimentally affect many others who were participants under the Plans.

On May 6, 2010, the bankruptcy court held a further hearing on the cross motions. At the hearing, the court expressed its disappointment that DAN was not allowed to participate in the VCP process, and requested that DAN file a final brief addressing two concerns raised by the court: (1) why the operational error identified in Kurtzman’s fourth affidavit (the consent issue) was not raised earlier; and (2) a further explanation of that operational error.

In DAN’s final brief on the cross motions, Kurtzman explained in her fifth affidavit that she did not discover the operational error until after she received the documents requested in the subpoenas to Richeys’s former attorneys, which was months after the IRS issued the compliance statements. She further explained that Ms. Richey’s failure to timely consent to the distributions was an operational error that could disqualify the Profit Sharing Plan, citing § 6.04(1) Rev. Proc. 2006-27 (which was in effect at the time of the VCP submission). In Kurtzman’s opinion, it did not appear that Ms. Richey received information necessary to make an informed decision about her waiver of interest in Mr. Richey’s distributions. In short, Kurtzman was still of the opinion that the Plans were not qualified because: (1) Richeys failed to obtain a favorable determination letter from the IRS; and (2) Richeys failed to inform the IRS of the operational error in the Profit Sharing Plan.

In their final brief on the cross motions, Richeys contended that DAN was not deliberately kept out of the VCP process, but, even if it was, the only thing DAN might have added to that process was the alleged defective consent by Ms. Richey.

The final hearing on the cross motions for summary judgment was held on July 15, 2010. The bankruptcy court orally granted Richeys's Motion and denied DAN's Cross Motion. Thus, DAN's objection to Richeys's claimed exemptions for the IRAs was overruled. As for Richeys's failure to obtain favorable determination letters from the IRS, the court concluded that having only the compliance statements, rather than favorable determination letters, based on the plan failures identified by Kurtzman left it with "less than a gold standard ruling from the IRS." Further, although the court was troubled that Kurtzman was not allowed to participate in the VCP process and agreed that it should give less deference to the IRS, "it is also the case that Debtors were able to obtain a compliance statement that indicated IRS would not pursue plan disqualification if the failures were corrected." Hr'g Tr. (July 15, 2010) at 15:14-16. "It is not entirely clear if [DAN] has provided enough fact and argument to completely undercut the IRS process in this case." Id. at 14:17-19. "All in all, I don't see what is gained by requiring a definite ruling from the IRS. I didn't . . . make that an absolute requirement here." Id. at 22:7-13.

With respect to the operational error, the court found that while it would have been useful to know if Ms. Richey received independent advice before she executed the waiver to Mr. Richey’s distributions, based on the evidence submitted - a signed, notarized consent form - Ms. Richey made a knowing waiver of her rights and her consent complied with the IRC. It rejected Kurtzman’s opinion that this error would disqualify the Profit Sharing Plan because: (1) although she opined that Ms. Richey may not have received adequate disclosures to make an informed consent, her opinion was not dependant on any clearly expressed factual predicate; and (2) even had Richeys disclosed this correctable error to the IRS in the VCP, Kurtzman never indicated whether or not Ms. Richey’s consent form would have failed to correct the operational error. While again noting DAN’s lack of involvement in the VCP process, the court questioned: “What would have been gained if [DAN] was involved in the process? While [DAN] now attacks the procedures followed, it has not been established that the operational error . . . would sink this plan.” Id. at 18:8-12.

An amended judgment was entered in accordance with the bankruptcy court’s oral ruling on November 10, 2010. DAN timely appealed.

II. JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and 157(b)(2)(B). Generally, a judgment as to fewer than all the claims or fewer than all the parties is not a “final judgment” unless the court makes an “express determination that there is no just reason for delay” and “an express direction for the entry of judgment." FRCP 54(b)(made applicable here by Rules 7054 and 9014). The bankruptcy court entered its certified amended judgment directing entry of final judgment pursuant to FRCP 54(b) on November 10, 2010, which we treat as a final order. As such, we have jurisdiction over the appeal under 28 U.S.C. § 158.

III. ISSUES

1. Did the bankruptcy court err by ordering Richeys to participate in the VCP?

2. Did the bankruptcy court err in overruling DAN's objection to Richeys's IRA exemptions and granting Richeys partial summary judgment?[9]

IV. STANDARDS OF REVIEW

We review the bankruptcy court's conclusions of law and questions of statutory interpretation de novo. Nowak v. Hummel (In re Hummel), 440 B.R. 814, 817 (9th Cir. BAP 2010). Questions regarding the right of a debtor to claim an exemption are questions of law reviewed de novo. Ford v. Konnoff (In re Konnoff), 356 B.R. 201, 204 (9th Cir. BAP 2006).

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[9] Richeys argue, for the first time on appeal, that because the Plans and IRAs are "ERISA qualified," then they are exempt per § 541(c)(2), citing Patterson v. Shumate, 504 U.S. 753 (1992). DAN contends that ERISA law applied only while the Plans were in existence and held assets, and thus it does not apply to the IRAs. Without resolving that issue, we must reject Richeys's argument.

The existence of an ERISA plan is a question of fact, to be answered in light of all the surrounding facts and circumstances. Harper v. Am. Chambers Life Ins. Co., 898 F.2d 1432, 1433 (9th Cir. 1990). We cannot address material issues of fact raised for the first time on appeal, especially in the context of a summary judgment. Richeys should have raised this issue long ago. Even if we could address the issue, we do not have sufficient facts in the record to render any decision on the matter. For example, Richeys argue that the IRAs include an ERISA-qualified anti-alienation clause, however we have no copies of the IRAs to review.

A bankruptcy court's grant of summary judgment is also reviewed de novo. T & D Moravits & Co v. Munton (In re Munton), 352 B.R. 707, 711 (9th Cir. BAP 2006). In reviewing a summary judgment, the task of an appellate court is the same as a trial court under FRCP 56, made applicable here by Rule 7056. Id. Viewing the evidence in the light most favorable to the non-moving party, the appellate court must determine whether the bankruptcy court correctly found that there was no genuine issue of material fact and that the moving party was entitled to judgment as a matter of law. Cutter v. Seror (In re Cutter), 398 B.R. 6, 16 (9th Cir. BAP 2008).

V. DISCUSSION

A. Applicable Law.

1. Sections 541 and 522, and A.R.S. § 33-1126(B).

When a bankruptcy petition is filed, an estate is created that is comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case." Section 541(a). Section 522(b) permits a debtor to exempt from property of the estate either the property set forth in section 522(d) or, alternatively, any property that is exempt under state law "that is applicable on the date of the filing of the petition." Arizona has elected to "opt out" of the federal exemptions provided in section 522(d) and has instead adopted its own exemptions. See A.R.S. § 33-1133(B). Therefore, substantive issues regarding the allowance or disallowance of the claimed exemptions at issue in this appeal are governed by Arizona law. An Arizona debtor may exempt any property that is exempt under state law in effect on the petition date. Under Arizona law, exemption statutes are to be liberally construed to effect their intent and purpose. In re White, 377 B.R. 633, 643 (Bankr. D. Ariz. 2007).

A.R.S. § 33-1126(B) governs a debtor's right to exempt certain money benefits or proceeds, including an interest in retirement plans. In 2005, the year in which Richeys filed bankruptcy, A.R.S. § 33-1126(B) allowed an exemption for:

> Any money or other assets payable to a participant in or beneficiary of, or any interest of any participant or beneficiary in, a retirement plan under section 401(a), 403(a), 403(b), 408, 408A or 409 or a deferred compensation plan under section 457 of the United States internal revenue code of 1986, as amended, shall be exempt from any and all claims of creditors of the beneficiary or participant.[10]

2. Rule 4003(c).

A claimed exemption is “presumptively valid.” Tyner v. Nicholson (In re Nicholson), 435 B.R. 622, 630 (9th Cir. BAP 2010)(citing Carter v. Anderson (In re Carter), 182 F.3d 1027, 1029 n.3 (9th Cir. 1999)). “If a party in interest timely objects, ‘the objecting party has the burden of proving that the exemptions are not properly claimed.’” Nicholson, 435 B.R. at 630 (quoting Rule 4003(c)). Initially, this means that the objecting party has the burden of production and the burden of persuasion. Carter, 182 F.3d at 1029 n.3. The objecting party must produce evidence to rebut the presumptively valid exemption. Id. Once rebutted, the burden of production then shifts to the debtor to come forward with unequivocal evidence that the exemption is proper. Id. The burden of persuasion, however, always remains with the objecting party. Id. It is undisputed that the

[10] Three exceptions to this rule are also listed, but none apply in this case.

bankruptcy court applied the proper burdens of proof in this case.

3. IRC §§ 401, 402, and 408.

Here, Mr. Richey rolled over funds from the Profit Sharing Plan to an IRA in 1997, and then in 2002 and 2003 he purchased two annuities with funds from the IRA, which are the subject of this appeal.

Under IRC § 402(c), any portion of a distribution from a "qualified plan" that is an "eligible rollover distribution" may be rolled over to an "eligible retirement plan." See 26 C.F.R. § 1.402(c)-2 Eligible rollover distributions: Q&A. A "qualified plan" means an employees' trust described in IRC § 401(a) which is exempt from tax under IRC § 501(a), such as the Pension Plan and Profit Sharing Plan here, or an annuity plan described in IRC § 403 (not applicable here). Id. An "eligible rollover distribution" means any distribution to an employee of all or any portion of the balance to the credit of the employee in a qualified plan. Id. For our purposes, an "eligible retirement plan" means an individual retirement account described in IRC § 408(a) or an individual retirement annuity described in IRC § 408(b).[11] See IRC § 402(c)(8)(B)(i), (ii).

In simple terms, a qualified rollover allows a taxpayer to take funds from one retirement account (like the Pension Plan or Profit Sharing Plan under IRC § 401(a)) and transfer that money to another retirement account (like the IRA under IRC § 408) without incurring any immediate tax consequences. Retirement funds from

[11] DAN has never contended that the subject IRAs do not meet the definition of "individual retirement annuities" under IRC § 408(b).

tax-exempt qualified employee plans retain their tax-exempt status when rolled over into a tax-exempt IRA. An IRA is not tax-exempt, however, even if it is otherwise qualified under the IRC, if the funds in the IRA were transferred from a non-qualified plan. See Baetens v. Comm'r of Internal Revenue, 777 F.2d 1160, 1167 (6th Cir. 1985); In re Banderas, 236 B.R. 837, 840 (Bankr. M.D. Fla. 1998). Under the IRC, IRA funds rolled over from a non-qualified account retain non-qualified status. See In re Willis, 2009 WL 2424548, at *11 (Bankr. S.D. Fla. 2009)(citing In re Swift, 124 B.R. 475, 485 (Bankr. W.D. Tex. 1991)(citing 26 U.S.C. § 408(d)(3)(A)(ii))); In re Daniels, 2011 WL 2443720, at *11 (Bankr. D. Mass. 2011); Banderas, 236 B.R. at 840 (citing Baetens, 777 F.2d at 1167).

B. Richeys contend Arizona law does not require retirement plans subject to A.R.S. § 33-1126(B) be "tax qualified" in order to be exempt.

The issue faced by the bankruptcy court was whether the Plans were "tax qualified" under IRC § 401(a) so as to allow exemption of the IRAs under Arizona law. Richeys now argue, for the first time on appeal, whether the Plans were "tax qualified" is irrelevant for purposes of exemption under Arizona law. They contend that, on the petition date, the funds were invested in IRAs, and Arizona law exempts IRAs without regard to whether they are "tax qualified" under the IRC. Because this case involves a rollover, in order for the IRAs to be tax exempt under IRC § 408, the source from which the funds came had to have also been tax exempt - i.e., from a qualified plan. See IRC § 402(c).

Richeys raise an interesting question: For exemption purposes under A.R.S. § 33-1126(B)(2005), must a retirement plan (i.e., pension plan, IRA, etc.) be "tax qualified" under the IRC?[12] No Arizona court has squarely answered this question post-1998, the year in which the Arizona legislature deleted the language "which is qualified" and "that is qualified" from the statute.[13] Although we could exercise our discretion to consider it because the

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[12] Notably, A.R.S. § 33-1126(B)(2005) makes no reference to the word "qualified." However, this was not always the case. Until 1998, A.R.S. § 33-1126(B), then known as A.R.S. § 33-1126(C), read:

> Any money or other assets payable to a participant in or beneficiary of, or any interest of any participant or beneficiary in, a retirement plan **which is qualified** under section 401(a), 403(a), 403(b), or 409 or a deferred compensation plan **that is qualified** under section 457 of the United States internal revenue code of 1986, as amended, shall be exempt from any and all claims of creditors of the beneficiary or participant (emphasis added).

Senate Bill 1199 deleted the language "which is qualified" and "that is qualified" from the statute in 1998. See Az. Legis. 15 (1998). Unfortunately, what legislative history exists does not shed any light as to why the Arizona legislature deleted the "qualified" language. Perhaps the legislature believed it was redundant because retirement plans must be qualified under IRC §§ 401(a), 403(a), 403(b), and 409 in both form and operation in order to receive favorable tax treatment. On the other hand, the Arizona legislature may have intended to eliminate the requirement that a retirement plan be "tax qualified" under the IRC in order to be exempt under Arizona law, presuming there ever was such a requirement. Arguably, the deletion of the "qualified" language leaves open the argument that a retirement plan that does not satisfy federal tax law may still be entitled to the exemption.

[13] On July 19, 2011, just three days prior to oral argument, DAN filed Appellant's Supplemental Authorities citing various cases (three of which are from Arizona courts) that DAN contends support its position that the Plans must be tax qualified to be exempt under Arizona law. Richeys moved to strike DAN's supplement for failing to comply with FRAP 28(j). We agree that DAN's supplement does not precisely comply with FRAP 28(j). Therefore, the motion is granted. However, even if we consider the cases cited, they are of no help to DAN because we have determined, as discussed below, regardless of whether Arizona law requires that retirement plans be "tax qualified" under the IRC in order to be exempt, the Plans were tax qualified on the petition date.

question is purely one of law, and DAN will not be prejudiced because this issue has been fully briefed by both parties (United States v. Thornburg, 82 F.3d 886, 890 (9th Cir. 1996)), we need not address it because, as we explain more fully below, the Plans were tax qualified on the petition date. Hence, the IRAs are also tax qualified and therefore exempt under Arizona law.

C. The bankruptcy court did not err when it ordered Richeys to participate in the VCP.

At the hearing on November 6, 2007, the bankruptcy court determined that DAN had made enough of a showing in its objection to shift the burden of production to Richeys to show they were entitled to exempt the IRAs. To satisfy that burden, the court ordered Richeys to participate in the VCP to get a determination of qualification or disqualification from the IRS and, if there were any defects in the Plans, to see if the IRS would permit a cure and agree that any cure would be given retroactive effect. The court reasoned that because federal tax law allows plan participants an opportunity to cure operational defects without the penalty of disqualification, Richeys, even though debtors in bankruptcy, should be accorded the same cure rights as any non-debtor taxpayer.

DAN contends that the bankruptcy court erred as a matter of law by allowing Richeys to participate in the VCP postpetition to cure plan deficiencies because of the well-established rule that exemption rights are fixed as of the filing date of the petition, and because no Ninth Circuit authority exists supporting the court’s decision. We agree that a debtor's exemption rights are fixed as of the petition date. Cisneros v. Kim (In re Kim), 257 B.R. 680, 687 (9th Cir. BAP 2000)(citing White v. Stump, 266 U.S. 310, 313 (1924)("When the law speaks of property which is exempt and of rights to exemptions, it, of course, refers to some point of time. In our opinion this point of time is the one as of which the general estate passes out of the bankrupt's control, and with respect to which the status and rights of the bankrupt, the creditors, and the trustee in other particulars are fixed.")); see Owen v. Owen, 500 U.S. 305, 314 n.6 (1991)(proper date for determining whether exemption exists is the petition date). We also recognize that no Ninth Circuit (or any other circuit) authority exists either supporting or rejecting the bankruptcy court's decision to order Richeys to participate in the VCP.[14]

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[14] We located one bankruptcy court case rejecting the view that postpetition efforts can retroactively cure a plan that was disqualified on the date of petition. See In re Lawrence, 235 B.R. 498 (Bankr. S.D. Fla. 1999), rev'd on other grounds, 244 B.R. 868 (S.D. Fla. 2000). There, the debtor filed bankruptcy in 1997. As early as 1995, he was aware that the pension plan was disqualified for failing to incorporate various amendments. Id. at 502-03. Nonetheless, the debtor waited until after bankruptcy to attempt to cure the plan deficiencies with the IRS's "Audit Closing Agreement Program" or CAP. (The CAP is similar to the VCP but is the compliance program used after taxpayers have been audited and sanctioned by the IRS for having disqualified plans. See the IRS's website at: http://www.irs.gov/retirement/article/0,,id=214900,00.html).

After determining that the plan had to be "tax qualified" in order to be exempt, the court rejected debtor's assertion that IRS approval of the amended plan would retroactively "qualify" the plan and render it exempt as of the petition date for two reasons: (1) because exemptions are determined on the date of petition, not based on subsequent events; and (2) nothing about the CAP process indicated that it is "retroactive" but, rather, it merely allowed a plan sponsor to get its tax affairs in order without harsh penalties, and once the compliance issues were resolved, the IRS would ignore the period of disqualification in the future. Id. at 510:

> Furthermore, when the smoke of the debtor's arguments is cleared away, one fact remains evident. The plan was

(continued...)

Without any controlling or persuasive authority on the matter, we must look to case law regarding homestead exemptions for insight. In Arkison v. Gitts (In re Gitts), 116 B.R. 174 (9th Cir. BAP 1990), aff'd 927 F.2d 1109 (9th Cir. 1991), the day after debtors filed their chapter 7 petition, they recorded a declaration of homestead pursuant to Washington law to claim a homestead exemption in a property in which they did not reside, but intended to move into within a few months. The trustee objected to the exemption claim, contending that debtors were not entitled to perfect the homestead exemption by filing a declaration of homestead postpetition. Id. at 179. The Panel disagreed, reasoning that, on the petition date, debtors had the right under Washington law to record a declaration of homestead

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[14](...continued)

> not compliant with the tax code on the petition date. The law looks not only to the form of the plan, but to its operation as well (citation omitted). In this case, the plan was not operated in conformity with the tax code. It had not been amended and restated to bring it into compliance. The post-petition attempt to cure the plan deficiencies under the tax laws cannot alter that simple fact. With that in mind, the plan does not qualify under § 401(a) of the Internal Revenue Code. It is therefore not exempt under either Fla. Stat. § 222.21(2) or § 222.201. Id.

We believe Lawrence is distinguishable from the instant case. First, no evidence suggests that Richeys were on notice by the IRS that the Plans were disqualified prior to bankruptcy and yet they failed to fix the problem until after filing bankruptcy, a key fact the Lawrence court found important. Unlike here, the IRS had already determined by audit that the pension plan was disqualified prior to the petition date. Second, while the Lawrence court opined that a compliance letter only meant that the IRS would ignore the period of disqualification in the "future," thus rejecting debtor's notion that it applied retroactively, here we have compliance statements stating that "The Service will not pursue the sanction of plan disqualification on account of the qualification failure(s)," which clearly suggests they have a retroactive effect.

for the property and thus create a valid homestead exemption against a judgment creditor up to the date of an execution sale. Id. at 180. In Gitts, the Panel focused on the debtors's rights that existed under Washington law on the date of petition, and concluded that such rights included their ability to file a declaration of homestead postpetition to retroactively cure any defect existing in their homestead exemption on the petition date. To support its decision, the Panel relied on the reasoning set forth in Myers v. Matley, 318 U.S. 622, 628 (1943), in which the Supreme Court held that while exemption rights become fixed on the date of petition and such rights cannot thereafter be enlarged or altered by anything the debtor may do, the debtors possessed a right under Nevada law on the petition date to perfect a homestead exemption by recording a declaration postpetition. Id.

We find the reasoning in Gitts and Myers persuasive. Each focused on the rights the debtors held as of the petition date, not on the postpetition act curing the alleged defect of the exemption at the time of petition. Here, on the date of petition, Richeys possessed a right under federal tax law to participate in the VCP and seek a determination from the IRS on whether or not the Plans were qualified on their termination dates, and to cure any defects potentially disqualifying the Plans to bring them back into IRC compliance with a retroactive effect. According to the compliance statements, as far as the IRS was concerned the Plans were now in compliance with the IRC and, actually, were never considered “disqualified” at any point in time.

Participating in the VCP did not, as DAN contends, “enlarge or alter” Richeys’s rights as they existed on the petition date and run afoul of the long-standing rule regarding exemption rights. Richeys merely sought to benefit from a right already fixed on the petition date. Although Richeys did not seek determination letters, which the parties agree are different than compliance statements, we believe, as did the bankruptcy court, they have the same effect for purposes here. Because the compliance statements express that the IRS will not seek the sanction of disqualification of the Plans, the Plans were and are, for all intents and purposes, qualified. Contrary to DAN's contention, the bankruptcy court never ordered that Richeys obtain a "determination letter." Although the court agreed that the compliance statements left it with "less than a gold standard ruling from the IRS," it only required Richeys to "seek a determination from the service of qualification or disqualification," (Hr'g Tr. (Nov. 6, 2007) at 26:15-16) and that is what they did through the compliance statements. "All in all, I don't see what is gained by requiring a definite ruling from the IRS. I didn't . . . make that an absolute requirement here." Hr'g Tr. (July 15, 2010) at 22:7-9. Accordingly, we see no error by the bankruptcy court.

D. The bankruptcy court did not err in overruling DAN's objection to the IRA exemptions and granting partial summary judgment to Richeys.

DAN contends that it should be granted summary judgment because Richeys failed to meet their burden of production to demonstrate that the IRA exemptions were proper. Specifically, DAN contends that the bankruptcy court violated DAN's due process rights by ignoring its express directive that DAN be allowed to participate in the VCP, which was allowed by IRS rules and which

Richeys deliberately prevented DAN from doing.

The bankruptcy court did order that DAN either be allowed to participate in the VCP, if allowed by the IRS, or, at minimum, that DAN be kept apprised of the administrative process, and Richeys failed to do as ordered. However, DAN points to no authority supporting its contention that not participating in the VCP rises to the level of a violation of its due process rights. The purpose of the VCP is for plan sponsors to voluntarily bring plan failures to the attention of the IRS in order to preserve the tax benefits of the retirement plan. See the IRS's website at: http://www.irs.gov/retirement/article/0,,id=214899,00.html. The program's intent is not to provide a forum for an aggrieved creditor to challenge a plan's qualified status. Accordingly, we fail to see how DAN's due process rights were violated by not participating in the VCP.

DAN further contends that Richeys's submission to the IRS limited the plan failures to only those issues raised by Kurtzman; it failed to disclose the consent issue, which Kurtzman opined would constitute a significant operational error disqualifying the Profit Sharing Plan. Therefore, argues DAN, this material omission renders the compliance statements invalid.

Even had DAN been allowed to participate in the VCP, Kurtzman testified in her fourth affidavit that the only post-1994 event not presented to the IRS was the consent issue. She opined that the record was unclear whether Ms. Richey received adequate disclosures about the benefits she gave up and the true impact on her. Kurtzman further opined that the consent issue was a significant operational error because more than two years had passed between the errors and Ms. Richey's consent form, thereby subjecting the Profit Sharing Plan to disqualification. The bankruptcy court rejected Kurtzman's testimony on this issue because her opinion as to whether Ms. Richey received adequate disclosures was not based upon any factual predicate, and she failed to opine on whether Ms. Richey's consent form, which the court ruled supported a knowing waiver of her rights, would not have corrected the operational error and would have sunk the plan.

We, as did the bankruptcy court, do not question the validity of Ms. Richey's consent form, and agree that Kurtzman failed to provide any basis for her opinion that Ms. Richey did not receive adequate disclosures about waiving her rights to Mr. Richey's prior distributions.

As for whether the consent issue was a significant operational error that would have rendered the Profit Sharing Plan disqualified, we agree with the reasoning by the Fifth Circuit in Plunk that a bankruptcy court can determine whether a retirement plan has lost its tax-qualified status, and therefore its protection in bankruptcy, by events occurring after a qualifying determination from the IRS. 481 F.3d 302 (5th Cir. 2007). Section 6.04 of Rev. Proc. 2006-27: Correction of failure to obtain spousal consent, and Appendix A.07: Operational Failures and Correction Methods, explain how a plan participant can correct the failure to obtain spousal consent prior to a distribution. Here, in 1997 Mr. Richey obtained Ms. Richey's consent to the 19 lump-sum distributions to Mr. Richey that commenced in 1992 and ended in 1994. Although a plan sponsor must correct "significant operational failures" within two years of the year in which the failure occurred, nowhere in Rev. Proc. 2006-27 is failure to obtain spousal consent "labeled" a significant operational error nor does it state that such error would clearly disqualify a plan. Kurtzman's opinion as to the error's status or that it would disqualify the Profit Sharing Plan was merely that, an opinion, and one that the bankruptcy court was free to reject as not raising a genuine issue of material fact. We too reject Kurtzman's opinion for the same reason. She did not, on this record, establish that Ms. Richey's untimely consent form would not have corrected the operational error.

As the objecting party, DAN had the burden of persuasion to show that Richeys were not entitled to exempt the IRAs. Exemption statutes are to be liberally construed to effect their intent and purpose. White, 377 B.R. at 643. DAN failed to meet its burden on this record. Accordingly, the bankruptcy court did not err when it entered partial summary judgment in favor of Richeys.

VI. CONCLUSION

For the foregoing reasons, we AFFIRM.