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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	WW-13-1173-DTaKu
)		
JOHN PETER MELE,)	Bk. No.	11-24015-MLB
)		
Debtor.)	Adv. No.	12-01271-MLB
)		
JOHN PETER MELE,)		
)		
Appellant,)		
)		
v.)	O P I N I O N	
)		
KIMBERLY MELE,)		
)		
Appellee.)		

Argued and Submitted on October 17, 2013
at Seattle, Washington

Filed - November 5, 2013

Appeal from the United States Bankruptcy Court
for the Western District of Washington

Honorable Marc L. Barreca, Bankruptcy Judge, Presiding

Appearances: William F. Malaier, Esq. of Nagler & Malaier,
P.S., argued for Appellant John Peter Mele;
Appellee Kimberly Mele argued pro se.

Before: DUNN, TAYLOR, and KURTZ, Bankruptcy Judges.

1 DUNN, Bankruptcy Judge:
2

3 Chapter 13¹ debtor John Peter Mele ("John")² appeals the
4 bankruptcy court's decision excepting from his discharge part of
5 a Washington state court ("State Court") property allocation
6 judgment entered in marital dissolution proceedings with his
7 former wife, Kimberly Mele ("Kimberly"), under § 523(a)(4). We
8 REVERSE.

9 **I. FACTUAL BACKGROUND**

10 The underlying facts in this appeal are not in dispute,³ and
11 they reflect a distressing but, unfortunately, all-too-common
12 scenario.

13 The parties were married for nineteen years. They separated
14 in April 2007 and divorced on April 15, 2009. They have three
15

16 ¹ Unless otherwise indicated, all chapter and section
17 references are to the federal Bankruptcy Code, 11 U.S.C. §§ 101-
18 1532, and all "Rule" references are to the Federal Rules of
19 Bankruptcy Procedure, Rules 1001-9037. The Federal Rules of
Civil procedure are referred to as "Civil Rules."

20 ² Because both of the parties retain the same surname, we
21 refer to them by their first names to identify them. No
22 disrespect is intended by their first name references.

23 ³ Our summary of the facts relies primarily on the "Facts"
24 set forth in the bankruptcy court's Memorandum Decision
25 ("Memorandum Decision"), entered on March 8, 2013, on the
26 parties' cross-motions for summary judgment in adversary
27 proceeding no. 12-01271-MLB ("Adversary Proceeding"), which in
28 turn relied on the findings and conclusions of the State Court in
its oral ruling on March 17, 2009 ("Oral Findings") and in its
written opinion ("Opinion") entered on April 15, 2009, in the
State Court marital dissolution proceeding between the parties,
King County Superior Court Case No. 08-3-01695-5 SEA.

1 children.

2 Both parties are trained in the law, but different obstacles
3 leave each of them in circumstances where they do not realize
4 their full professional potential. Kimberly works as a house
5 counsel for Costco, but she has multiple sclerosis, a condition
6 that has resulted in her being on permanent long term disability.
7 At best, she works part time. When Kimberly works part time, her
8 salary is adjusted with her disability compensation.

9 John worked at a the Ryan Swanson law firm, where he
10 ultimately became a partner. He left the law firm to work for a
11 start-up company, Electric Hendrix. His employment at Electric
12 Hendrix ended shortly after he was disbarred and his new employer
13 was sued successfully for copyright infringement by the family of
14 rock guitarist Jimmy Hendrix.

15 John apparently has decided that he wishes to return to
16 college to obtain credentials to become a public school teacher
17 and, ultimately, a school administrator. In addition to
18 attending school, he works as a tutor, at seventeen dollars an
19 hour, a job he located from a sign he saw posted on the street.
20 The State Court found that John had not made any attempt to
21 locate current employment consistent with his training and
22 background and found that he was voluntarily underemployed.

23 After the parties separated, they engaged in what the State
24 Court characterized as a "collaborative process" with the
25 objective of avoiding litigation. It did not work out that way.
26 Early in the marital dissolution proceeding, the State Court
27 entered a temporary order that stated, "Both parties are
28 restrained and enjoined from transferring, removing, encumbering,

1 concealing or in any way disposing of any property except in the
2 usual course of business or for the necessities of life"

3 John had approximately \$274,000 in a 401(k) account
4 ("401(k)") from his years of service at Ryan Swanson, which was
5 the marital community's largest asset. During the early stages
6 of the marital dissolution proceeding, he liquidated the 401(k)
7 and spent almost all of the funds in a year's time. In its Oral
8 Findings, the State Court made the following findings, confirmed
9 in the Opinion, regarding the dissipation of the 401(k) funds:

10 The evidence is unclear to this court how he [John]
11 spent that money, but it is clear that he did not spend
12 that money to support the community. Without
13 employment except for the tutoring, he has still been
14 able to purchase a 2008 Nissan SUV, a new I-phone,
15 spend hundreds per month on comic books and related
16 expenses.

17 At some point early in this process, he
18 unilaterally stopped paying . . . child support and any
19 support for the community.

20 Oral Findings, at p.6. During this same period, he withdrew
21 \$30,000 from community funds, which he spent for his own
22 purposes. Opinion, at p.7.

23 Following a nine-day trial, the State Court entered a Decree
24 of Dissolution ("Decree") of John and Kimberly's marriage. The
25 Decree included detailed analyses and calculations as to the
26 parties' separate and community property. As the bankruptcy
27 court noted, net community assets totaled \$584,147, and the State
28 Court ascribed \$250,002 of the net community assets to Kimberly
and \$334,145 of the net community assets to John. However,
consistent with the State Court's Oral Findings, \$274,607 of
funds "inappropriately withdrawn from the community [401(k)] and
spent by [John]" were treated as a "pre-distribution" to him.

1 Memorandum Decision, at p.3. Accordingly, the 401(k) funds that
2 John appropriated for his own use constituted approximately 82%
3 of the net community assets ascribed to him.⁴ Id.

4 Kimberly was allocated less of the net community assets
5 (\$250,002) than John (\$334,145) in the State Court's accounting,
6 but the State Court ultimately determined in the Decree that
7 Kimberly was entitled to 60% of the net community assets.
8 Accordingly, the State Court entered a property settlement
9 judgment ("Property Settlement Judgment") in favor of Kimberly
10 and against John in the amount of \$100,486. Memorandum Decision,
11 at p.4.

12 John filed his chapter 13 petition on December 5, 2011.
13 Kimberly filed a claim in John's bankruptcy case totaling
14 \$208,953.06, \$135,746.38, including accrued interest, from the
15 unpaid Property Settlement Judgment, and \$73,206.20 for
16 attorney's fees awarded against John in the marital dissolution
17 proceeding. Kimberly initiated the Adversary Proceeding on
18 March 30, 2012, seeking to have portions of her claim excepted
19 from John's discharge under §§ 523(a)(2)(A), (a)(4), (a)(5),
20 (a)(6), and (a)(15). On May 11, 2012, Kimberly filed an amended
21 complaint ("Amended Complaint") in the Adversary Proceeding
22 limiting her exception to discharge claims against John to
23 §§ 523(a)(4) and (a)(5).

24 John filed an objection to Kimberly's claim in his main
25 case, and the bankruptcy court ultimately determined that no
26

27 ⁴ \$274,607 (401(k) funds spent by John) ÷ \$334,145 (net
28 community assets ascribed to John) = .8218, or 82.18%.

1 portion of Kimberly's claim constituted a "domestic support
2 obligation" for purposes of § 101(14A). On May 24, 2012, the
3 bankruptcy court entered an order disallowing Kimberly's claim as
4 a priority claim under § 507(a)(1)(A), but allowing it as a
5 nonpriority general unsecured claim. This order has not been
6 appealed.

7 John subsequently moved for summary judgment on both of the
8 remaining claims stated in the Amended Complaint. Kimberly
9 cross-moved for summary judgment on her § 523(a)(4) claim and
10 withdrew the § 523(a)(5) claim based on the bankruptcy court's
11 ruling on John's objection to her claim.

12 After considering the parties' memoranda and declarations in
13 support of their opposing motions and after hearing oral argument
14 on February 15, 2013, the bankruptcy court granted and denied in
15 part both of the parties' motions. The bankruptcy court
16 concluded that under Washington common law, married spouses
17 "stand in a trust relationship with one another and have
18 fiduciary duties to manage community property for the benefit of
19 the community interest." Memorandum Decision, at p.8. The
20 bankruptcy court further concluded that John had fiduciary
21 obligations to Kimberly when he liquidated and spent the 401(k)
22 funds. The bankruptcy court found that John's "bad acts" in
23 dealing with the 401(k) funds constituted a defalcation for
24 purposes of § 523(a)(4) in that he breached the marital trust
25 relationship with Kimberly and breached his fiduciary duty to the
26 marital community. Memorandum Decision, at p.9.

27 However, since the \$274,607 401(k) funds represented only
28 82.18% of the net community assets initially ascribed by the

1 State Court to John in the Decree, the bankruptcy court found
2 that only 82.18% of the net community assets ascribed to John
3 were "tainted" by his defalcation. Memorandum Decision, at p.
4 10. Accordingly, the bankruptcy court excepted only 82.18% of
5 the Property Settlement Judgment amount, or \$82,579.39, plus
6 interest, from John's chapter 13 discharge under § 523(a)(4).
7 Memorandum Decision at p.11. The bankruptcy court entered an
8 agreed form of order ("Order") granting in part and denying in
9 part the parties' respective cross-motions for summary judgment
10 on March 26, 2013.

11 John filed a timely Notice of Appeal of the Order on
12 April 9, 2013. Kimberly did not file a cross-appeal.

13 **II. JURISDICTION**

14 The bankruptcy court had jurisdiction under 28 U.S.C.
15 §§ 1334 and 157(b)(1) and (b)(2)(I). We have jurisdiction under
16 28 U.S.C. § 158.

17 **III. ISSUES**

18 1. Did the bankruptcy court apply the appropriate intent
19 standard in concluding that John had committed a "defalcation" to
20 except a portion of John's debt to Kimberly from discharge under
21 § 523(a)(4)?⁵

22 2. Did the bankruptcy court err in concluding that under
23 Washington common law, the marital relationship is in the nature
24

25
26 ⁵ This issue was not raised by John but was discussed by
27 Kimberly in light of the decision of the Supreme Court in Bullock
28 v. BankChampaign, N.A., 133 S. Ct. 1754 (2013), issued after the
bankruptcy court had issued its Memorandum Decision and entered
the Order.

1 of an "express" or "technical" trust, making spouses fiduciaries
2 with respect to one another so long as the marital relationship
3 continues for purposes of exception to discharge claims under
4 § 523(a)(4)?⁶

5 **IV. STANDARDS OF REVIEW**

6 We review a bankruptcy court's legal conclusions, including
7 its interpretation of provisions of the Bankruptcy Code and state
8 law, de novo. Roberts v. Erhard (In re Roberts), 331 B.R. 876,
9 880 (9th Cir. BAP 2005), aff'd, 241 F. App'x 420 (9th Cir. 2007).
10 Likewise, we review de novo a bankruptcy court's decision to
11 grant in whole or in part summary judgment. Marciano v. Fahs (In
12 re Marciano), 459 B.R. 27, 35 (9th Cir. BAP 2011), aff'd, 708
13 F.3d 1123 (9th Cir. 2013). De novo review requires that we
14 consider a matter anew, as if no decision had been rendered
15 previously. United States v. Silverman, 861 F.2d 571, 576 (9th
16 Cir. 1988); B-Real, LLC v. Chaussee (In re Chaussee), 399 B.R.
17 225, 229 (9th Cir. BAP 2008).

18 **V. DISCUSSION**

19 The record reflects that John's conduct in liquidating and
20 spending the 401(k) funds entirely for himself without any
21

22 ⁶ Kimberly raises a further issue in her brief, arguing that
23 John breached fiduciary duties under ERISA to manage the 401(k)
24 funds for the benefit of the marital community. This issue was
25 not raised before, and not considered by, the bankruptcy court.
26 Our review does not indicate that the factual or legal issues
27 implicated by this argument were adequately addressed in the
28 bankruptcy court record. Accordingly, it is not appropriate for
this Panel to consider this issue on appeal. See, e.g., Lowery
v. Channel Communications, Inc. (In re Cellular 101, Inc.), 539
F.3d 1150, 1156 (9th Cir. 2008).

1 benefit to the marital community was both irresponsible and
2 reprehensible. The question in this appeal is whether that
3 conduct supports an exception to his chapter 13 discharge
4 consistent with the specific provisions of § 523(a)(4).

5 1. Generally Applicable Standards in Exception to Discharge
6 Litigation

7 One of the major policy objectives of the Bankruptcy Code is
8 to provide the "honest but unfortunate" debtor with a fresh
9 start. Bugna v. McArthur (In re Bugna), 33 F.3d 1054, 1059 (9th
10 Cir. 1994), citing Grogan v. Garner, 498 U.S. 279, 286-87 (1991).
11 Accordingly, the discharge provisions of the Bankruptcy Code are
12 interpreted liberally in favor of debtors. In re Bugna, 33 F.3d
13 at 1059. "[E]xceptions to discharge 'should be confined to those
14 plainly expressed.'" Kawaauhau v. Geiger, 523 U.S. 57, 62
15 (1998), quoting Gleason v. Thaw, 236 U.S. 558, 562 (1915). "In
16 determining whether a particular debt falls within one of the
17 exceptions of section 523, the statute should be strictly
18 construed against the objecting creditor and liberally in favor
19 of the debtor." 4 Collier on Bankruptcy ¶ 523.05 (Alan N.
20 Resnick & Henry J. Sommer eds., 16th ed. 2013). Generally, a
21 creditor seeking to except a debt from the debtor's discharge
22 bears the burden of proof to establish by a preponderance of the
23 evidence all of the elements of the statutory exception to
24 discharge upon which the creditor relies. See Grogan v. Garner,
25 498 U.S. 279 (1991).

26 2. Section 523(a)(4) Elements and Standards

27 Section 523(a)(4) provides that:

28 (a) A discharge under section 727 . . . or 1328(b) of

1 this title does not discharge an individual debtor from
2 any debt - . . . (4) for fraud or defalcation while
3 acting in a fiduciary capacity, embezzlement, or
4 larceny

4 A debt is excepted from discharge under § 523(a)(4) where "1) an
5 express trust existed, 2) the debt was caused by fraud or
6 defalcation, and 3) the debtor acted as a fiduciary to the
7 creditor at the time the debt was created." Otto v. Niles (In re
8 Niles), 106 F.3d 1456, 1459 (9th Cir. 1997), quoting Klingman v.
9 Levinson, 831 F.2d 1292, 1295 (7th Cir. 1987). "Case law makes
10 clear that the broad, general definition of fiduciary - a
11 relationship involving confidence, trust and good faith - is
12 inapplicable in the context of exception to a bankruptcy
13 discharge." Utnehmer v. Crull (In re Utnehmer), ___ B.R. ___,
14 ___, 2013 WL 5573198, at *5 (9th Cir. BAP 2013), citing Ragsdale
15 v. Haller, 780 F.2d 794, 796 (9th Cir. 1986).

16 The question as to whether the debtor is or was a
17 "fiduciary" for purposes of a claim under § 523(a)(4) is governed
18 by federal law. Cal-Micro, Inc. v. Cantrell (In re Cantrell),
19 329 F.3d 1119, 1125 (9th Cir. 2003), citing Lee-Benner v. Gergely
20 (In re Gergely), 110 F.3d 1448, 1450 (9th Cir. 1997). "[T]he
21 fiduciary relationship must be one arising from an express or
22 technical trust that was imposed before and without reference to
23 the wrongdoing that caused the debt." Lewis v. Scott (In re
24 Lewis), 97 F.3d 1182, 1185 (9th Cir. 1996), citing Ragsdale, 780
25 F.2d at 796; Davis v. Aetna Accept. Co., 293 U.S. 328, 333
26 (1934). We consult state law to determine whether the requisite
27 trust relationship exists. In re Cantrell, 329 F.3d at 1125,
28 citing In re Lewis, 97 F.3d at 1185, and Ragsdale, 780 F.2d at

1 796.

2 3. The Intent Standard in Light of the Supreme Court's Bullock
3 Decision

4 Before we address the issues as to whether the marital
5 relationship under Washington law satisfies the "express" or
6 "technical" trust and fiduciary elements of a § 523(a)(4)
7 exception to discharge claim, we note a change in the law that
8 occurred after the bankruptcy court issued its Memorandum
9 Decision with important implications in this appeal.

10 In May 2013, the Supreme Court decided Bullock v.
11 BankChampaign, N.A., 133 S. Ct. 1754 (2013). The Bullock
12 decision effectively overruled the line of Ninth Circuit
13 authority culminating in In re Lewis, 97 F.3d at 1186-87, holding
14 that a debtor who failed to account to a creditor to whom he or
15 she owed a fiduciary duty need not have a particular state of
16 mind or bad intent to be subject to an exception to discharge for
17 a "defalcation" under § 523(a)(4). The Supreme Court held that
18 the term "defalcation:"

19 includes a culpable state of mind requirement akin to
20 that which accompanies application of the other terms
21 in the same statutory phrase. We describe that state
22 of mind as one involving knowledge of, or gross
recklessness in respect to, the improper nature of the
relevant fiduciary behavior.

23 Bullock, 133 S. Ct. at 1757.

24 In the State Court case, after describing some of John's
25 personal purchases during the year period in which he dissipated
26 the 401(k) funds, which included a 2008 Nissan SUV, a new I-
27 phone, and comic books and related expenses, the State Court
28 found that John did not spend the 401(k) funds to support the

1 marital community or to pay child support. The State Court's
2 Oral Findings and written Opinion express implicit disapproval of
3 John's actions in spending the 401(k) funds for his personal use.
4 However, the State Court did not make any specific findings as to
5 John's mental state in dissipating the 401(k) funds. In the
6 Memorandum Decision, the bankruptcy court concluded, consistent
7 with the State Court determinations, that John had
8 inappropriately withdrawn the 401(k) funds from the community and
9 spent them. The bankruptcy court further concluded that John's
10 "bad acts" were the "most significant component" in the State
11 Court's decision to impose the Property Settlement Judgment. The
12 bankruptcy court's ultimate conclusion was that John had
13 committed a defalcation for purposes of § 523(a)(4) that
14 supported the decision to except a portion of the Property
15 Settlement Judgment from his chapter 13 discharge. However, it
16 expressly relied on the In re Lewis defalcation standards in
17 reaching that conclusion.

18 The bankruptcy court did not have the opportunity to address
19 the enhanced intent standard adopted by the Supreme Court in
20 Bullock in concluding that John had committed a defalcation,
21 resulting in an exception to his discharge under § 523(a)(4) for
22 a portion of the Property Settlement Judgment. Accordingly, at
23 the very least, we are required to vacate the Order and remand
24 this matter for further proceedings to address the Bullock intent
25 standard.

26 4. Washington Law and the "Express" or "Technical" Trust
27 Requirement

28 However, we ultimately determine that there is a more

1 fundamental problem with the bankruptcy court's analysis in the
2 Memorandum Decision supporting the Order that requires reversal.
3 We conclude that Washington common law does not make marriage an
4 "express" or "technical" trust relationship that necessarily
5 makes married spouses fiduciaries of the marital community for
6 purposes of the exception to discharge provisions of § 523(a)(4).

7 In determining whether the requisite trust relationship
8 exists for an exception to discharge under § 523(a)(4), we look
9 to state law. Honkanen v. Hopper (In re Honkanen), 446 B.R. 373,
10 379 (9th Cir. BAP 2011). The bankruptcy court determined that
11 married spouses stand in a trust relationship to one another
12 without specifying the nature of their relationship as an
13 "express" or "technical" trust.

14 Under Washington law, the requirements for creating a trust
15 are established by statute. Revised Code of Washington ("RCW")
16 § 11.98.008, entitled "Trust creation - Methods," states:

17 A trust may be created by:

18 (1) Transfer of property to another person as
19 trustee during the trustor's lifetime or by will or
20 other disposition taking effect upon the trustor's
21 death;

22 (2) Declaration by the owner of property that the
23 owner holds identifiable property as trustee; or

24 (3) Exercise of a power of appointment in favor of
25 a trustee. (Emphasis added.)

26 RCW § 11.98.011, entitled "Trust creation - Requirements," states
27 among other provisions that, "A trust is created only if: . . .

28 (b) the trustor indicates an intention to create the trust."

(Emphasis added.) Finally, RCW § 11.98.014, entitled "Trust
creation - Oral trusts," provides that, "Except as required by a
statute other than this title, a trust need not be evidenced by a
trust instrument, but the creation of an oral trust and its terms

1 may be established only by clear, cogent, and convincing
2 evidence." (Emphasis added.) Existence of a marital
3 relationship in Washington simply does not, of itself, satisfy
4 any of the highlighted statutory requirements for the
5 establishment of an express trust under Washington law. See,
6 e.g., Smith v. Fitch, 25 Wash. 2d 619, 626-27, 171 P.2d 682, 686
7 (Wash. 1946). Accordingly, we conclude as a matter of law that
8 the marital community of the parties, when they were married
9 spouses, did not constitute an express trust relationship for
10 purposes of § 523(a)(4).

11 The issue then becomes whether the relationship between
12 married spouses is appropriately characterized as a "technical"
13 trust relationship. As opposed to an "express" trust, created by
14 the covenants of the parties, a "technical" trust is a trust
15 imposed by law. In re Lewis, 97 F.3d at 1185-86; 4 Collier on
16 Bankruptcy ¶ 523.10[1][d] (Alan N. Resnick & Henry J. Sommer
17 eds., 16th ed. 2013). There is Ninth Circuit authority for the
18 proposition that whether a technical trust exists can be
19 determined with reference to a state's statute and/or common law.
20 See, e.g., Lewis v. Short (In re Short), 818 F.2d 693, 695-96
21 (9th Cir. 1987); Ragsdale, 780 F.2d at 796-97.

22 Recognizing that there was no case authority directly on
23 point, the bankruptcy court in its Memorandum Decision cited Lam
24 v. Lam (In re Lam), 364 B.R. 379 (Bankr. N.D. Cal. 2007), for the
25 proposition that in California, married spouses are "fiduciaries"
26 for purposes of satisfying the elements of a § 523(a)(4) claim.
27 However, also as recognized by the bankruptcy court, in
28 California, the fiduciary relationship between spouses is

1 established by statute. See California Family Code ("Cal. Fam.
2 Code") §§ 721, 1100(e) and 1101(a).⁷ There are no comparable

3 _____
4 ⁷ Cal. Fam. Code § 721 provides:

5 (a) Subject to subdivision (b), either husband or wife may
6 enter into any transaction with the other, or with any other
7 person, respecting property, which either might if unmarried.

8 (b) . . . [I]n transactions between themselves, a husband
9 and wife are subject to the general rules governing fiduciary
10 relationships which control the actions of persons occupying
11 confidential relations with each other. This confidential
12 relationship imposes a duty of the highest good faith and fair
13 dealing on each spouse, and neither shall take any unfair
14 advantage of the other. This confidential relationship is a
15 fiduciary relationship subject to the same rights and duties of
16 nonmarital business partners, as provided in Sections 16403,
17 16404, and 16503 of the Corporations Code, including, but not
18 limited to, the following:

19 (1) Providing each spouse access at all times to
20 any books kept regarding a transaction for the purposes
21 of inspection and copying.

22 (2) Rendering upon request, true and full
23 information of all things affecting any transaction
24 which concerns the community property. Nothing in this
25 section is intended to impose a duty for either spouse
26 to keep detailed books and records of community
27 property transactions.

28 (3) Accounting to the spouse, and holding as a
trustee, any benefit or profit derived from any
transaction by one spouse without the consent of the
other spouse which concerns the community property.

Cal. Fam. Code § 1100(e) provides:

(e) Each spouse shall act with respect to the other
spouse in the management and control of the community
assets and liabilities in accordance with the general
rules governing fiduciary relationships which control
the actions of persons having relationships of personal
confidence as specified in Section 721, until such time
as the assets and liabilities have been divided by the

(continued...)

1 provisions under Washington statutes to establish the marital
2 relationship as an express trust or fiduciary relationship.

3 The bankruptcy court also cited In re Short, 818 F.2d 693
4 (9th Cir. 1987), for the propositions that the trust relationship
5 established by Washington law for partners in a partnership
6 extended to joint venturers in a real property development joint
7 venture, and "the Washington courts have also expanded the duties
8 of partners beyond those required by the literal language of the
9 state statute." Id. at 695. Accordingly, even though Revised
10 Code of Washington ("RCW") § 26.16.030,⁸ which states provisions

11
12 ⁷(...continued)
13 parties or by a court. This duty includes the
14 obligation to make full disclosure to the other spouse
15 of all material facts and information regarding the
16 existence, characterization, and valuation of all
17 assets in which the community has or may have an
18 interest and debts for which the community is or may be
19 liable, and to provide equal access to all information,
20 records, and books that pertain to the value and
21 character of those assets and debts, upon request.

22 Cal. Fam. Code § 1101(a) further provides:

23 (a) A spouse has a claim against the other spouse for
24 any breach of the fiduciary duty that results in
25 impairment to the claimant spouse's present undivided
26 one-half interest in the community estate, including,
27 but not limited to, a single transaction or a pattern
28 or series of transactions, which transaction or
29 transactions have caused or will cause a detrimental
30 impact to the claimant spouse's undivided one-half
31 interest in the community estate.

32 ⁸ RCW 26.16.030 provides:

33 Community property defined - Management and control.

(continued...)

1
2
3 ⁸(...continued)

4 Property not acquired or owned, as prescribed in RCW 26.16.010
5 and 26.16.020, acquired after marriage or after registration of a
6 state registered domestic partnership by either domestic partner
7 or either husband or wife or both, is community property. Either
8 spouse or either domestic partner, acting alone, may manage and
control community property, with a like power of disposition as
the acting spouse or domestic partner has over his or her
separate property, except:

9 (1) Neither person shall devise or bequeath by will more than
10 one-half of the community property.

11 (2) Neither person shall give community property without the
12 express or implied consent of the other.

13 (3) Neither person shall sell, convey, or encumber the community
14 real property without the other spouse or other domestic partner
15 joining in the execution of the deed or other instrument by which
16 the real estate is sold, conveyed, or encumbered, and such deed
or other instrument must be acknowledged by both spouses or both
domestic partners.

17 (4) Neither person shall purchase or contract to purchase
18 community real property without the other spouse or other
19 domestic partner joining in the transaction of purchase or in the
execution of the contract to purchase.

20 (5) Neither person shall create a security interest other than a
21 purchase money security interest as defined in RCW 62A.9-107 in,
22 or sell, community household goods, furnishings, or appliances,
23 or a community mobile home unless the other spouse or other
domestic partner joins in executing the security agreement or
bill of sale, if any.

24 (6) Neither person shall acquire, purchase, sell, convey, or
25 encumber the assets, including real estate, or the good will of a
26 business where both spouses or both domestic partners participate
27 in its management without the consent of the other: PROVIDED,
28 That where only one spouse or one domestic partner participates
in such management the participating spouse or participating
(continued...)

1 for the management and control of community property during
2 marriage, does not specify that the relationship between spouses
3 is a "trust" or "fiduciary" relationship, the bankruptcy court
4 concluded that Washington courts have "expanded the duties of
5 [spouses] beyond those required by the literal language of the
6 state statute." Memorandum Decision, at p.7; citing, with
7 modification as noted, In re Short, 818 F.2d at 695.

8 The bankruptcy court then quoted from various Washington
9 court decisions to the effect that the relationship between
10 married spouses is a relationship of trust imposing fiduciary
11 duties to one another and to the marital community. See, e.g.,
12 In re Marriage of Chumbley, 150 Wash. 2d 1, 9, 74 P.3d 129, 133
13 (Wash. 2003) ("A spouse is required to act in good faith when
14 managing community property, and a disposition of community funds
15 is within the scope of a spouse's authority to act alone only if
16 he or she acts 'in the community interest.'"), quoting Schweitzer
17 v. Schweitzer, 81 Wash. App. 589, 597, 915 P.2d 575, 579-80
18 (Wash. Ct. App. 1996); Peters v. Skalman, 27 Wash. App. 247, 251,
19 617 P.2d 448, 452 (Wash. Ct. App. 1980) (Community property "is a
20 special form of partnership with the spouses not only owing each
21 other the highest fiduciary duties, but also with the husband
22 (and since 1972 the wife) charged with the statutory duty to
23 manage and control community assets for the benefit of the

24 _____
25 ⁸(...continued)
26 domestic partner may, in the ordinary course of such business,
27 acquire, purchase, sell, convey or encumber the assets, including
28 real estate, or the good will of the business without the consent
of the nonparticipating spouse or nonparticipating domestic
partner.

1 community."); In the Marriage of Hadley, 88 Wash. 2d 649, 665,
2 565 P.2d 790, 799 (Wash. 1977) (Horowitz, A.J., dissenting) ("The
3 relationship between a husband and wife after marriage is not and
4 is not expected to be an arm's length relationship. That
5 relationship is one of trust and confidence in which the managing
6 husband stands in a fiduciary relationship to his wife."); and In
7 the Marriage of Funk, 2007 WL 4112210, at *4 (Wash. Ct. App. Nov.
8 20, 2007) (unpublished) ("The management and control of community
9 property belongs to both spouses. RCW 26.16.030. Each spouse
10 stands in a relationship of trust to the other and, even after
11 separation, owes a fiduciary duty to manage and preserve the
12 community assets for the benefit of the community."), citing
13 Peters v. Skalman, 27 Wash. App. at 251, 617 P.2d at 452.

14 Notably, in none of the cited Washington court authorities
15 was the nature of the marital relationship an issue on appeal.
16 Chumbley and Schweitzer concerned community versus separate
17 property issues. Peters v. Skalman was an adverse possession
18 case. Hadley and Funk presented issues as to appropriate
19 property divisions in the marital dissolution context.
20 Accordingly, the quoted statements from Washington decisions
21 relied on by the bankruptcy court to establish the fiduciary
22 nature of the marital relationship appear to be no more than
23 dicta. In addition, the colorful earlier era decision of the
24 Washington Supreme Court in Marston v. Rue, 92 Wash. 129, 159 P.
25 111 (Wash. 1916), cited by Kimberly in Appellee's Brief,
26 concerned the husband's suit to recover a motor car from the
27 party who bought it from his wife. The wife had sold it out from
28 under the husband's mistress, who was "flaunting herself

1 intolerably" in the vehicle. Id. at 130, 159 P. at 112. The
2 decision has plenty to say about the Marstons' marriage but
3 nothing that could be characterized as dispositive about the
4 nature of the marital relationship.

5 We recognize the intuitive appeal of the bankruptcy court's
6 conclusion that marriage establishes a trust relationship between
7 spouses that entails the imposition of fiduciary duties.

8 However, in the absence of a Washington statute that
9 characterizes marriage as a trust relationship or that describes
10 the obligations of spouses in managing and disposing of community
11 property as fiduciary in nature, we do not see how the incidental
12 characterizations of the marital relationship and its obligations
13 in Washington common law decisions, upon which the bankruptcy
14 court relied for its conclusion, constitute more than generalized
15 descriptions of fiduciary duty that do not meet the "express" or
16 "technical" trust standard required as an element of a
17 § 523(a)(4) claim. See Ragsdale, 780 F.2d at 796 ("The broad,
18 general definition of fiduciary - a relationship involving
19 confidence, trust and good faith - is inapplicable in the
20 dischargeability context.").

21 In addition, Kimberly's assertion of a § 523(a)(4) claim in
22 this case cuts against the scheme of the Bankruptcy Code. If
23 John had sought protection under chapter 7, the Property
24 Settlement Judgment would be excepted from his discharge under
25 § 523(a)(15).⁹ In seeking relief under chapter 13, John is

27 ⁹ Section 523(a)(15) provides that:

28 (continued...)

1 attempting to take advantage of the shrunken "superdischarge"
2 available only in chapter 13¹⁰. Debts arising from marital
3 property settlement obligations are dischargeable in chapter 13,
4 as they are not in chapter 7. "[T]he dischargeability of debts
5 in chapter 13 that are not dischargeable in chapter 7 represents
6 a policy judgment that [it] is preferable for debtors to attempt
7 to pay such debts to the best of their abilities over three years
8 rather than for those debtors to have those debts hanging over
9 their heads indefinitely, perhaps for the rest of their lives.'" Pa. Pub. Welfare Dept. v. Davenport, 495 U.S. 552, 563 (1990),
10
11

12
13 ⁹(...continued)

14 (a) A discharge under section 727 . . . of this title does
15 not discharge an individual debtor from any debt - . . . (15) to
16 a . . . former spouse . . . of the debtor and not of the kind
17 described in paragraph 5 [a domestic support obligation] that is
18 incurred by the debtor in the course of a divorce or separation
19 or in connection with a separation agreement, divorce decree or
20 other order of a court of record

21 ¹⁰ Section 1328(a)(2) in relevant part currently provides
22 that:

23 [A]s soon as practicable after completion by the debtor
24 of all payments under the plan, . . . the court shall
25 grant the debtor a discharge of all debts provided for
26 by the plan . . . except any debt - . . . (2) of the
27 kind specified in section 507(a)(8)(C) or in paragraph
28 (1)(B), (1)(C), (2), (3), (4), (5), (8), or (9) of
section 523(a);

Prior to enactment of the Bankruptcy Abuse Prevention and
Consumer protection Act of 2005, Pub. L. 109-8, April 20, 2005,
119 Stat. 23, the list of exclusions from discharge included in
§ 1328(a)(2) was much more limited, i.e., "except any debt - (2)
of the kind specified in paragraph (5), (8), or (9) of Section
523(a) of this title."

1 quoting 5 Collier on Bankruptcy ¶ 1328.01[1][c] (15th ed. 1986).

2 While the bankruptcy court's decision to except a portion of
3 the Property Settlement Judgment from John's chapter 13 discharge
4 pursuant to § 523(a)(4) as a defalcation of his fiduciary duties
5 to the marital community between him and Kimberly may be
6 defensible as a matter of policy, it appears "to override the
7 balance Congress struck in crafting the appropriate discharge
8 exceptions for Chapter 7 and Chapter 13 debtors." Davenport, 495
9 U.S. at 563. It is generally the prerogative of Congress rather
10 than individual bankruptcy courts to make such policy choices.

11 12 **V. CONCLUSION**

13 Based on the foregoing analysis and discussion of
14 § 523(a)(4) and relevant authorities, we conclude that the
15 bankruptcy court erred as a matter of law in determining that
16 Washington common law established the marital relationship as in
17 the nature of an express or technical trust, imposing fiduciary
18 duties on spouses to manage community property for the benefit of
19 the marital community during marriage, for purposes of
20 establishing the elements of a § 523(a)(4) claim. Accordingly,
21 we REVERSE.