

DEC 08 2014

ORDERED PUBLISHED

SUSAN M. SPRaul, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

|                              |   |                      |                  |
|------------------------------|---|----------------------|------------------|
| In re:                       | ) | BAP No.              | AZ-14-1106-DJuKi |
|                              | ) |                      |                  |
| STUART M. STARKY and CHERYL  | ) | Bk. No.              | 2:12-bk-22121-PS |
| M. STARKY,                   | ) |                      |                  |
|                              | ) |                      |                  |
| Debtors.                     | ) |                      |                  |
| <hr/>                        |   |                      |                  |
| STUART M. STARKY; CHERYL M.  | ) |                      |                  |
| STARKY,                      | ) |                      |                  |
|                              | ) |                      |                  |
| Appellants,                  | ) |                      |                  |
|                              | ) |                      |                  |
| v.                           | ) | <b>O P I N I O N</b> |                  |
|                              | ) |                      |                  |
| DAVID A. BIRDSELL, Chapter 7 | ) |                      |                  |
| Trustee,                     | ) |                      |                  |
|                              | ) |                      |                  |
| Appellee.                    | ) |                      |                  |
| <hr/>                        |   |                      |                  |

Argued and Submitted on November 20, 2014  
at Phoenix, Arizona

Filed - December 8, 2014

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

Honorable Sarah Sharer Curley, Bankruptcy Judge, Presiding

Appearances: \_\_\_\_\_  
Christopher J. Piekarski of Piekarski & Brelsford,  
P.C for appellants Stuart and Cheryl Starky;  
Patrick T. Derksen of Witthoft Derksen, P.C. for  
appellee David A. Birdsell.

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

1 DUNN, Bankruptcy Judge:

2  
3 Chapter 7<sup>1</sup> debtors Stuart and Cheryl Starky ("Debtors")  
4 appeal the bankruptcy court's order awarding reasonable  
5 attorneys' fees and costs to the chapter 7 trustee ("Trustee")  
6 after extended proceedings relating to the Debtors' exemption  
7 claims, the protracted nature of which resulted in large part  
8 from the actions, or more appropriately, the inaction, of Debtors  
9 and their counsel. We perceive no abuse of discretion in the  
10 bankruptcy court's award of fees and costs to Trustee's counsel.  
11 Accordingly, we AFFIRM.

12 **I. FACTUAL BACKGROUND**

13 The relevant facts in this appeal are essentially  
14 undisputed. The Debtors filed their chapter 7 petition on  
15 October 8, 2012. They filed their schedules contemporaneously  
16 with their bankruptcy petition, and on their Schedule B, the  
17 Debtors identified two Fidelity Advisor 529 Plans (the "529  
18 Plans"), valued at \$4,115.76 and \$5,672.60 respectively, and two  
19 Educational Savings Accounts with SunAmerica (the "SunAmerica  
20 Accounts"), valued at \$2,607.37 and \$1,719.46 respectively. The  
21 Debtors claimed exemptions in both 529 Plans and in both  
22 SunAmerica Accounts in their original Schedule C.

23 In their original schedules, the Debtors also listed two  
24 bank accounts, a checking account and a savings account, at JP

---

25  
26 <sup>1</sup> Unless otherwise indicated, all chapter and section  
27 references are to the federal Bankruptcy Code, 11 U.S.C. §§ 101-  
28 1532, and all "Rule" references are to the Federal Rules of  
Bankruptcy Procedure, Rules 1001-9037. All "Civil Rule"  
references are to the Federal Rules of Civil Procedure.

1 Morgan Chase Bank ("Chase Bank"). However, in fact, the Debtors  
2 had eight accounts at Chase Bank on the petition date, six of  
3 which were undisclosed in their schedules.

4 The § 341(a) meeting in the Debtors' bankruptcy case was  
5 held on November 13, 2012, at which the Debtors were examined by  
6 the Trustee. Thereafter, on December 4, 2012, the Trustee filed  
7 an objection ("Exemption Objection") to the Debtors' claimed  
8 exemptions in the two 529 Plans and the two SunAmerica Accounts  
9 on the precautionary basis that the Debtors had not provided the  
10 Trustee with copies of documentation for the 529 Plans and  
11 SunAmerica Accounts that would allow the Trustee to determine if  
12 they were "correctly set up and funded within the time limits to  
13 allow the exemptions." Contemporaneously, the Trustee filed a  
14 Notice of Bar Date ("Notice") setting a deadline of twenty-one  
15 days following service of the Notice for any party to respond and  
16 request a hearing on the Exemption Objection. The Notice  
17 provided that, "If no objections are filed, the Court may deny  
18 the Debtor's [sic] exemption." Both the Exemption Objection and  
19 the Notice were served on the Debtors and their counsel.

20 The Debtors did not respond or request a hearing in  
21 opposition to the Exemption Objection.

22 In the meantime, the Trustee filed an application to employ  
23 counsel on December 13, 2012, that was granted the following day.  
24 See Docket Nos. 18 and 22.<sup>2</sup>

---

26 <sup>2</sup> The parties did not include the application and order to  
27 employ Trustee's counsel in their excerpts of record. We have  
28 exercised our discretion to review the bankruptcy court's main  
(continued...)

1 The bankruptcy court entered an order ("Exemptions Order")  
2 sustaining the Exemption Objection and "ordering turnover of the  
3 assets to the Trustee" on February 20, 2013.

4 On or about April 11, 2013, counsel for the Trustee wrote a  
5 demand letter ("Demand Letter") to Debtors' counsel. At some  
6 point in time, the Trustee apparently had been made aware of the  
7 Debtors' undisclosed Chase Bank accounts. In the Demand Letter,  
8 Trustee's counsel demanded turnover of the two 529 Plans and the  
9 two SunAmerica Accounts and turnover

10 of all funds in Chase [Bank] Accounts -5358, -0691,  
11 -2774, -6083, -9559 and -1257 as of the Petition Date  
12 . . . of the balance in Chase [Bank] Accounts -2858 and  
13 -4040 (over \$150) as of the Petition Date [and] copies  
of the bank statements for the Chase [Bank] Accounts as  
of the Petition Date.

14 The Debtors apparently did not respond to the Demand Letter;  
15 so, on April 24, 2013, Trustee's counsel filed a Motion for  
16 Turnover and Accounting of Bankruptcy Estate property, pursuant  
17 to 11 U.S.C. § 542 ("Turnover Motion"). In the Turnover Motion,  
18 the Trustee sought bank statements and an accounting as to each  
19 of the Debtors' Chase Bank accounts on the petition date;  
20 turnover of all funds demanded in the Demand Letter; and an award  
21 of the Trustee's attorneys fees and costs incurred.

22 At this point, Debtors and their counsel finally woke up to  
23 their peril. On May 17, 2013, the Debtors filed amended  
24

---

25 <sup>2</sup>(...continued)  
26 case docket and the documents on record therein to assist us in  
27 our consideration of this appeal. See O'Rourke v. Seaboard Sur.  
28 Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir.  
1989); Atwood v. Chase Manhattan Mortg. Co. (In re Atwood), 293  
B.R. 227, 233 n.9 (9th Cir. BAP 2003).

1 Schedules B and C: The Debtors listed seven Chase Bank accounts  
2 on their amended Schedule B; and they renewed their exemption  
3 claims to the 529 Plans and SunAmerica Accounts in their amended  
4 Schedule C. In their amended Schedule C, the Debtors explicitly  
5 asserted that the two 529 Plans and one of the SunAmerica  
6 Accounts were not property of their bankruptcy estate, but  
7 anomalously, they did not make the same statement as to the  
8 second SunAmerica Account. On the same date, the Debtors filed a  
9 response ("Response") to the Turnover Motion.

10 In their Response, the Debtors argued that the two  
11 SunAmerica Accounts were set up under the Uniform Transfer to  
12 Minors Act ("UTMA"), as adopted in Arizona. The Debtors  
13 accordingly argued that they had no legal ownership interests in  
14 the SunAmerica Accounts, and there was no estate interest in the  
15 SunAmerica Accounts. As to the 529 Plans, the Debtors argued  
16 that they qualified as 529 College Savings Plans under 26 U.S.C.  
17 § 529 and, consequently, were not property of the estate to the  
18 extent of funds paid into the 529 Plans more than 720 days prior  
19 to the Debtors' bankruptcy filing and up to \$5,475 paid into each  
20 529 Plan between 365 and 720 days prior to the petition date.  
21 According to the Debtors, under those standards, none of the  
22 funds in the 529 Plans on the petition date belonged to the  
23 estate. Finally, as to the Chase Bank accounts, the Debtors  
24 argued that the account ending -1257 was a closed savings  
25 account. As to the rest of the accounts, the Debtors  
26 acknowledged nonexempt funds totaling \$273.72, which the Debtors  
27 agreed to turn over "upon the request of the Trustee."

28 On May 30, 2013, the Trustee filed a reply ("Reply"). In

1 his Reply, the Trustee argued that the prior Exemption Order was  
2 final, and the Debtors had not provided any authority justifying  
3 relief under Civil Rule 59 or 60(b), applicable in bankruptcy  
4 proceedings under Rules 9023 and 9024. In any event, the Debtors  
5 still had not provided adequate documentation to establish that  
6 the SunAmerica Accounts were validly created under UTMA. In  
7 addition, the Trustee argued that the Debtors had not presented  
8 adequate authority or evidence that the 529 Plans were not  
9 property of the estate. Finally, the Trustee argued that the  
10 Debtors had presented no evidence to establish that any of the  
11 funds in any of the Chase Bank accounts could be traced to a  
12 nondebtor. Other than \$300 in Chase Bank account -5358, the  
13 Trustee argued that the balance of funds in the Chase Bank  
14 accounts on the petition date were subject to turnover. On June  
15 12, 2013, the Trustee filed a renewed objection ("2d Exemption  
16 Objection") to the Debtors' exemption claims in the SunAmerica  
17 Accounts and the 529 Plans, relying on some of the same arguments  
18 asserted in the Reply.

19 The Debtors responded ("2d Response") to the 2d Exemption  
20 Objection on July 3, 2013. In the 2d Response, the Debtors  
21 argued that in the absence of bad faith or prejudice, under Rule  
22 1009(a), they could amend their exemption schedule at any time  
23 before their bankruptcy case was closed. Since they had  
24 disclosed the 529 Plans and the SunAmerica Accounts from the  
25 beginning in their schedules, neither prejudice nor bad faith  
26 could be imputed to the Debtors. In addition, they argued that  
27 the Exemption Order had no preclusive effect under applicable  
28 Ninth Circuit authority. Finally, they argued that the Turnover

1 Motion was inappropriate procedurally. Since the issues to be  
2 determined focused on whether the 529 Plans and the SunAmerica  
3 Accounts were property of the Debtors' bankruptcy estate, the  
4 Debtors argued that Rule 7001(2) required the Trustee to initiate  
5 an adversary proceeding rather than pursue turnover by motion as  
6 a contested matter.

7 The Trustee filed a reply ("2d Reply") on July 22, 2013. In  
8 the 2d Reply, the Trustee argued that the Debtors' right to amend  
9 their schedules was not absolute, and in this case, allowing the  
10 Debtors to amend their Schedule C was precluded because the  
11 Exemption Order was final, and the estate had been prejudiced by  
12 the costs incurred in reliance on the Debtors original schedules  
13 and Statement of Financial Affairs. The Trustee reiterated his  
14 request for reimbursement of attorneys' fees and costs. The  
15 Trustee further argued that the Debtors had waived any  
16 requirement that an adversary proceeding be filed in lieu of the  
17 Turnover Motion by failing to file a response to the Exemption  
18 Objection. In any event, the Debtors had been afforded all of  
19 the essential due process protections through the procedures  
20 followed by the Trustee.

21 The bankruptcy court held a hearing on the Turnover Motion  
22 on July 23, 2013, and after hearing argument from counsel,  
23 granted the Turnover Motion as to the Chase Bank accounts and  
24 continued the Turnover Motion as to the 529 Plans and the  
25 SunAmerica Accounts. An order approving turnover of all  
26 nonexempt funds in the Chase Bank accounts, totaling \$1,005.73,  
27 was entered on July 25, 2013. That order was not appealed. A  
28 further hearing on the remaining open issues regarding the

1 Turnover Motion was continued to November 20, 2013, and  
2 ultimately, to February 5, 2014.

3 The Trustee conducted Rule 2004 examinations of the Debtors  
4 to obtain documents and information regarding the 529 Plans and  
5 the SunAmerica Accounts.

6 On July 25, 2013, the Debtors finally filed a motion to set  
7 aside ("Motion to Vacate") the Exemption Order, based on their  
8 argument that the subject assets were not property of their  
9 estate. The Trustee responded on August 8, 2013, arguing that  
10 the Debtors did not establish grounds for such relief under any  
11 applicable subsection of Civil Rule 60(b). Initially, the  
12 bankruptcy court scheduled a hearing on the Motion to Vacate for  
13 January 8, 2014, but ultimately continued the hearing to  
14 February 5, 2014, in conjunction with the final hearing on the  
15 Turnover Motion.

16 At a preliminary hearing on November 20, 2013, the  
17 bankruptcy court required the Trustee to file a further position  
18 statement on the Turnover Motion and the Motion to Vacate by  
19 December 20, 2013, and gave the Debtors until January 2, 2014, to  
20 respond.

21 The Trustee filed his memorandum ("Trustee Position") on  
22 December 20, 2013. In the Trustee Position, after summarizing  
23 the background of the parties' continuing disputes, the Trustee  
24 reargued that relief was not available to the Debtors under Civil  
25 Rule 60(b), and that the Motion to Vacate should be denied based  
26 on the Debtors' culpable conduct in failing to respond to the  
27 Exemption Objection after being duly noticed. The Trustee  
28 further argued that in these circumstances, the Trustee's



1 attorneys' fees and expenses should be reimbursed by the Debtors,  
2 and the Trustee provided an itemization of the fees and expenses  
3 incurred. Finally, the Trustee argued, with supporting evidence,  
4 that \$1,000 contributed to one of the 529 Plans during the year  
5 prior to the Debtors' bankruptcy filing date was not exempt in  
6 any circumstances.

7 The Debtors filed their memorandum ("Debtors' Position") on  
8 January 2, 2014. In Debtors' Position, the Debtors argued that  
9 they did not need relief under Civil Rule 60(b) because Rule  
10 7001(2) still required that the Trustee pursue turnover through  
11 an adversary proceeding, and in any event, the Trustee had not  
12 met his burden of proof to establish that the subject assets were  
13 property of the estate. In addition, the Debtors argued that the  
14 Trustee was not entitled to an award of fees and costs because  
15 the Trustee had not filed the required adversary proceeding and  
16 laid the blame for the extensive proceedings on the Trustee, for  
17 "[h]ad the [Trustee] followed the required procedure or made  
18 requests for additional documentation at an earlier stage, this  
19 issue could have been resolved long ago." The Debtors conceded  
20 in their prayer for relief that the estate was entitled to an  
21 order directing the Debtors "to turn over contributions to the  
22 [529 Plans] within 365 [days] of their bankruptcy filing," but  
23 asserted that the estate was entitled to nothing more.

24 The bankruptcy court conducted the final hearing ("Hearing")  
25 on the Turnover Motion and the Motion to Vacate on February 5,  
26 2014. After colloquy with the Trustee's counsel, during which  
27 Trustee's counsel conceded that upon review of the documentation  
28 for the 529 Plans and the SunAmerica Accounts, as a substantive

1 matter, the estate only had a claim to \$1,000 total from the  
2 accounts, the bankruptcy court concluded that it only would  
3 require turnover of \$1,000. The bankruptcy court then confirmed  
4 with Trustee's counsel the itemized fees and costs for the estate  
5 and that the estate would have only about \$2,000 to pay them.

6 The bankruptcy court then turned to counsel for the Debtors,  
7 who admitted that both he and the Debtors were aware that any  
8 contributions to the 529 Plans within one year prior to the  
9 petition date would have to be turned over to the Trustee, as he  
10 and the Debtors had discussed that obligation before their  
11 bankruptcy filing. The bankruptcy court then stated:

12 You also - because you have dragged this out for too  
13 long - haven't responded forthrightly to the Trustee.  
14 Have caused - let's put it extensive pleading. So, I  
15 have a lot before me now where this could have been  
16 resolved very quickly. So, from my standpoint the  
Debtor[s] need[] to take responsibility for the  
attorney's fees and costs incurred by the Trustee. It  
should never have happened this way. It should not  
have been this prolonged, the process.

17 Tr. of Feb. 5, 2014 hr'g, at 12:23-25 to 13:1-5. Debtors'  
18 counsel responded that he did not disagree that the Debtors  
19 should pay "part of it." See Tr. of Feb. 5, 2014 hr'g, at 13, 14  
20 and 16. The bankruptcy court further pointed out that the  
21 Trustee's fees and costs did "not appear unreasonable." Tr. of  
22 Feb. 5, 2014 hr'g, at 13:6-9. Debtors' counsel then suggested  
23 that under the circumstances, a partial award of fees and costs  
24 to the estate might be appropriate.

25 Mr. Piekarski: There were - there were a couple errors,  
26 but at the same time the estate is also not faultless  
27 here either. It cuts both ways. So, if there was some  
28 kind of, you know, splitting the difference I'm not  
sure that we would object. I think that would be a  
fair outcome.

1 Tr. of Feb. 5, 2014 hr'g, at 16:12-16. Trustee's counsel  
2 responded that he did not have authority to engage in that kind  
3 of bargaining at the Hearing. Tr. of Feb. 5, 2014 hr'g, at  
4 16:19-20. Debtors' counsel did not object to the Trustee's fees  
5 and costs on reasonableness grounds at the Hearing.

6 Ultimately, the bankruptcy court ruled that the Debtors  
7 would only be required to turn over \$1,000 from the 529 Plans and  
8 could retain the other disputed assets, but it further ruled that  
9 the Debtors would be required to pay the Trustee's attorneys'  
10 fees and costs incurred. An order consistent with the bankruptcy  
11 court's oral rulings ("Final Order") was entered on February 26,  
12 2014.

13 The Debtors filed a timely notice of appeal of the Final  
14 Order.

## 15 **II. JURISDICTION**

16 The bankruptcy court had jurisdiction under 28 U.S.C.  
17 §§ 1334 and 157(b)(2)(A), (B) and (E). We have jurisdiction  
18 under 28 U.S.C. § 158.

## 19 **III. ISSUE**

20 Did the bankruptcy court abuse its discretion in awarding  
21 the Trustee's reasonable attorneys' fees and expenses against the  
22 Debtors?

## 23 **IV. STANDARDS OF REVIEW**

24 We review a bankruptcy court's decision to award attorney's  
25 fees and costs for abuse of discretion. See, e.g., Cal. Emp.  
26 Dev. Dep't v. Taxel (In re Del Mission Ltd.), 98 F.3d 1147, 1152  
27 (9th Cir. 1996). A bankruptcy court abuses its discretion if it  
28 applies the incorrect legal standard or misapplies the correct

1 legal standard, or if its fact findings are illogical,  
2 implausible or without support from evidence in the record.  
3 TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820, 832 (9th  
4 Cir. 2011) (citing United States v. Hinkson, 585 F.3d 1247, 1262  
5 (9th Cir. 2009) (en banc)).

6 We may affirm the bankruptcy court's decision on any basis  
7 supported by the record. Shanks v. Dressel, 540 F.3d 1082, 1086  
8 (9th Cir. 2008).

## 9 **V. DISCUSSION**

10 This appeal shines a spotlight on a persistent problem that  
11 arises in some consumer bankruptcy cases: failures of debtors  
12 and/or their counsel to respond timely, or at all, to the  
13 trustee's requests for information and documentation on behalf of  
14 the estate. Based on our experience as bankruptcy judges, such  
15 failures generally result from one or more of the following three  
16 causes: First, some consumer bankruptcy attorneys, already  
17 carrying a heavy case load, seek further volume at the expense of  
18 service on behalf of their existing clients. They simply do not  
19 have enough time to respond timely to trustee requests for  
20 information and documentation that require follow-up with their  
21 clients, particularly if the clients themselves are not  
22 responsive, as the attorneys pursue further fee-paying work.

23 Second, some consumer bankruptcy attorneys, on occasion or  
24 unfortunately, chronically, are simply inattentive to the details  
25 that are the essence of a consumer bankruptcy law practice. They  
26 do not return telephone calls and do not respond to letter  
27 requests for information or documents, generating unnecessary and  
28 costly motions to get a court order to deal with the collection

1 of information that should have been provided promptly and  
2 informally.

3 Finally, we suspect that on some occasions, debtors and  
4 their counsel drag their feet on requests for documents and  
5 information in the hope that with the passage of time, the  
6 trustee may abandon the pursuit as not worth the effort and leave  
7 some assets that otherwise would be available for estate  
8 administration in the hands of the debtors.

9 The record in this appeal reflects that both of the latter  
10 two causes may be in play in this case, as discussed in more  
11 detail infra. The Debtors advance three arguments as to why the  
12 bankruptcy court abused its discretion in awarding the Trustee  
13 fees and costs against them for their failure to cooperate.

14 A. Trustee's Duty to Investigate

15 As the Debtors correctly point out in their opening brief,  
16 under § 704, the chapter 7 trustee has the duty to "investigate  
17 the financial affairs of the debtor" and the duty to "collect and  
18 reduce to money the property of the estate . . . and close such  
19 estate as expeditiously as is compatible with the best interests  
20 of parties in interest." See § 704(a)(1) and (4). The Debtors  
21 identified and claimed exemptions in the 529 Plans and the  
22 SunAmerica Accounts in their schedules filed with their  
23 bankruptcy petition on October 8, 2012. They complain that the  
24 Trustee "did not request documents from the debtors to determine  
25 whether the accounts were assets of the estate until . . .  
26 July 29, 2013." Appellants' Opening Brief, at 12. However,  
27 their complaint is disingenuous.

28 Debtors also have duties under the Bankruptcy Code. Section

1 521(a)(3) provides that debtors shall "cooperate with the trustee  
2 as necessary to enable the trustee to perform the trustee's  
3 duties under this title," and § 521(a)(4) provides that debtors  
4 shall "surrender to the trustee all property of the estate and  
5 any recorded information, including books, documents, records,  
6 and papers, relating to property of the estate." Rule 4002(a)(4)  
7 underlines those responsibilities by requiring that debtors  
8 "cooperate with the trustee in . . . the administration of the  
9 estate."

10 We recognize that chapter 7 trustees have the affirmative  
11 statutory duty to investigate the financial affairs and assets of  
12 debtors whose estates they administer. However, information  
13 about a debtor's assets, of necessity, must come primarily if not  
14 entirely from the debtor. The trustee cannot conjure it out of  
15 thin air.

16 "When a debtor files a Chapter 7 bankruptcy petition, all of  
17 the debtor's assets become property of the bankruptcy estate, see  
18 11 U.S.C. § 541, subject to the debtor's right to reclaim certain  
19 property as 'exempt.'" Schwab v. Reilly 560 U.S. 770, 774 (2010).  
20 Section 522(1) provides that if a chapter 7 debtor claims assets  
21 as exempt in his or her schedules, "[u]nless a party in interest  
22 objects, the property claimed as exempt . . . is exempt." The  
23 deadline for filing objections to claimed exemptions is short.  
24 Rule 4003(b)(1) generally requires that a party in interest,  
25 including the chapter 7 trustee, must file an objection to an  
26 exemption claim within thirty days following the conclusion of  
27 the § 341(a) meeting or the right to object is waived. Taylor v.  
28 Freeland & Kronz, 503 U.S. 638, 642-44 (1992) ("Deadlines may

1 lead to unwelcome results, but they prompt parties to act and  
2 they produce finality.”).

3         Since the Supreme Court’s decision in Taylor v. Freeland &  
4 Kronz, chapter 7 trustees have taken the admonition to prompt  
5 action to heart. In many cases where trustees do not receive  
6 documentation required to confirm debtors’ exemption claims by  
7 the § 341(a) meeting or shortly thereafter, we see precautionary  
8 objections to exemptions, such as the Exemption Objection in this  
9 case, filed to preserve potential and actual objections to  
10 claimed exemptions before the Rule 4003(b)(1) deadline runs.  
11 Typically, such objections are resolved promptly without any  
12 extensive proceedings before the bankruptcy court when debtors or  
13 their counsel respond to the trustee with information and  
14 documentation supporting the claimed exemption, and the objection  
15 is withdrawn. This case is not typical in that neither the  
16 Debtors nor their counsel ever responded to the Trustee’s  
17 Exemption Objection, let alone by the noticed deadline.

18         In the Exemption Objection, the Trustee objected to the  
19 Debtors’ claimed exemptions in the 529 Plans and the SunAmerica  
20 Accounts solely because the Debtors did not provide documentation  
21 that the subject accounts were “correctly set up and funded  
22 within the time limits to allow the exemptions.” The Exemption  
23 Objection, which was served both on the Debtors and their counsel  
24 by first class mail on December 4, 2012, clearly advised Debtors  
25 and their counsel that the Trustee needed documentation to verify  
26 the appropriateness of the Debtors’ claimed exemptions in the 529  
27 Plans and the SunAmerica Accounts. On this record, the Debtors’  
28 assertion that the “estate did not request documents from the

1 [D]ebtors to determine whether the accounts were assets of the  
2 estate until . . . July 29, 2013" (Appellants' Opening Brief,  
3 at 12) is not credible. The argument that the Trustee violated  
4 his duties under § 704(a) (1) and (4) in pursuing turnover of the  
5 529 Plans and the SunAmerica Accounts is meritless, bordering on  
6 the frivolous.

7 B. Motion v. Adversary Proceeding

8 The Debtors next argue that the procedural path taken by the  
9 Trustee and his counsel was incorrect in that Rule 7001(2)  
10 requires an adversary proceeding when a party seeks a  
11 determination as to "the validity, priority, or extent of a lien  
12 or other interest in property." Emphasis added. See, e.g.,  
13 Cogliano v. Anderson (In re Cogliano), 355 B.R. 792, 804 (9th  
14 Cir. BAP 2006). Here, Debtors argue that the Trustee needed to  
15 secure an initial determination through an adversary proceeding  
16 that the 529 Plans and the SunAmerica Accounts were property of  
17 their bankruptcy estate and thus subject to turnover.

18 However, the Debtors did not raise any issue as to whether  
19 the 529 Plans and the SunAmerica Accounts were estate property  
20 until they filed their amended Schedules B and C and their  
21 Response to the Turnover Motion on May 17, 2013. Section  
22 521(a) (1) (B) (i) provides, among a chapter 7 debtor's duties, the  
23 obligation to file schedules of their assets and liabilities. In  
24 their initial schedules filed on October 8, 2012, the Debtors  
25 listed the 529 Plans and the SunAmerica Accounts along with their  
26 other assets on their Schedule B and claimed exemptions in those  
27 assets on their Schedule C. In neither schedule did they claim  
28 that any of the 529 Plans or the SunAmerica Accounts were not



1 property of their bankruptcy estate. That claim only belatedly  
2 was made as to the 529 Plans and one of the SunAmerica Accounts  
3 in their amended Schedule C. A lot had happened before they made  
4 that claim.

5 The Trustee had filed the Exemption Objection, and no  
6 response was filed by the deadline. Accordingly, the Trustee  
7 submitted the Exemptions Order, and it was entered on  
8 February 20, 2013. The Exemptions Order sustained the Trustee's  
9 objections to the subject exemption claims and ordered "turnover  
10 of the assets to the Trustee." No appeal was taken from the  
11 Exemptions Order, and it became final. The Trustee subsequently  
12 filed the Turnover Motion, and as noted by the bankruptcy court  
13 at the Hearing, "Rule 7001 clearly gives the estate the ability  
14 to file a motion against the Debtor." Rule 7001(1) generally  
15 requires that an adversary proceeding be filed to recover money  
16 or property, but it provides a specific exception for "a  
17 proceeding to compel the debtor to deliver property to the  
18 trustee." Since the Debtors from the outset of the case had  
19 scheduled the 529 Plans and the SunAmerica Accounts as their  
20 assets, and the Trustee had obtained an uncontested order  
21 requiring the turnover of those assets that became final, we see  
22 nothing procedurally improper in the Trustee pursuing the  
23 Turnover Motion as a contested matter.

24 However, even assuming that at some point in this process  
25 the "property of the estate" issue became preeminent, "the  
26 bankruptcy court's decision not to require an adversary  
27 proceeding is subject to a harmless error analysis." Korneff v.  
28 Downey Reg'l Med. Ctr.-Hosp., Inc. (In re Downey Reg'l Med.

1 Ctr.-Hosp., Inc.), 441 B.R. 120, 127 (9th Cir. BAP 2010) (citing  
2 Austein v. Schwartz (In re Gerwer), 898 F.2d 730, 734 (9th Cir.  
3 1990)); In re Cogliano, 355 B.R. at 806 ("Rule 7001(2) requires  
4 an adversary proceeding, absent waiver or harmless error . . .  
5 .") (emphasis added); and USA/Internal Revenue Serv. v. Valley  
6 Nat'l Bank (In re Decker), 199 B.R. 684, 689 (9th Cir. BAP 1996).  
7 The issue then becomes whether some procedural difference between  
8 contested matters and adversary proceedings prejudiced the  
9 Debtors in any meaningful way. See Korneff, 441 B.R. at 127.

10         At the outset, we note that the Debtors did not assert any  
11 argument that the Trustee needed to proceed by adversary  
12 proceeding rather than by motion until they filed the 2d Response  
13 on July 3, 2013, and while making the procedural point, the  
14 Debtors did not claim any prejudice to them resulting from the  
15 Turnover Motion or the 2d Exemption Objection being considered as  
16 contested matters. In their Motion to Vacate, the Debtors did  
17 not renew their procedural objection. In Debtors' Position, the  
18 Debtors again argued that property interests had to be determined  
19 in an adversary proceeding, but again did not assert any  
20 prejudice resulting to them from determining the Turnover Motion  
21 and the Motion to Vacate as contested matters.

22         In the meantime, the parties had multiple opportunities to  
23 brief their respective positions and conduct discovery for many  
24 months before the final Hearing. During that period, both of the  
25 Debtors had their Rule 2004 examinations taken. Debtors never  
26 argued to the bankruptcy court that they were not properly served  
27 with the Trustee's papers or did not receive notice of scheduled  
28 proceedings. The bankruptcy court's decisions at the Hearing

1 were based on undisputed facts. Ultimately, the Debtors retained  
2 all of the assets to which they were entitled against the estate,  
3 and they do not argue otherwise in this appeal.

4 In these circumstances, we agree with the bankruptcy court's  
5 conclusion, consistent with Rule 7001(1), that an adversary  
6 proceeding was not required. But, even if at some point Rule  
7 7001(2) could be interpreted as requiring the filing of an  
8 adversary proceeding by the Trustee to resolve "property of the  
9 estate" issues, the bankruptcy court's determination to proceed  
10 to decide the Turnover Motion and the Motion to Vacate as  
11 contested matters did not prejudice the Debtors and was no more  
12 than harmless error.

### 13 C. Reasonableness of Fees

14 Finally, the Debtors challenge the reasonableness of the  
15 attorneys' fees and costs awarded to the Trustee by the  
16 bankruptcy court. The bankruptcy court awarded attorneys' fees  
17 and costs to the Trustee based on its determinations that the  
18 Debtors had "dragged this out for too long," had not "responded  
19 forthrightly to the Trustee" and had caused "extensive pleadings"  
20 - in other words, had not cooperated with the Trustee as required  
21 by § 521(a)(3) and (4) and Rule 4002(a)(4). We presume that in  
22 making the award, the bankruptcy court relied on § 105(a)'s  
23 provision that the bankruptcy court "may issue any order . . .  
24 that is necessary or appropriate to carry out the provisions of  
25 this title." Cf. Arnold v. Gill (In re Arnold), 252 B.R. 778,  
26 789 (9th Cir. BAP 2000):

27 A number of courts have recognized the possibility of  
28 prejudice to the trustee, and the possible prejudice  
from litigation costs. [citations omitted] However, as

1 all but the earliest of these five cases suggest, any  
2 such prejudice can be mitigated or eliminated by  
3 conditioning allowance of the amended exemption on  
4 payment of the trustee's and counsel's fees and costs  
5 from assets not otherwise available to the estate.

6 The Debtors did not contest the bankruptcy court's authority  
7 to award the Trustee fees and costs at any point in the  
8 proceedings. Debtors did not argue otherwise in their opening  
9 brief to this Panel, and at oral argument, Debtors' counsel  
10 conceded that a failure to cooperate finding against debtors in a  
11 chapter 7 case would justify an award of attorneys' fees and  
12 costs to the trustee. At the Hearing, Debtors' counsel  
13 repeatedly stated that he would not object to an order that  
14 required the Debtors to pay a portion of the Trustee's attorneys'  
15 fees and costs and conceded that a split of the attorneys' fees  
16 and costs would be "fair." In these circumstances, we conclude  
17 that any issue Debtors might have raised as to the bankruptcy  
18 court's general authority to award the Trustee's fees and costs  
19 against them has been waived. See Beverly Cmty. Hosp. Ass'n v.  
20 Belshe, 132 F.3d 1259, 1267 (9th Cir. 1997); and Greenwood v.  
21 FAA, 28 F.3d 971, 977 (9th Cir. 1994).

22 What Debtors did argue is that the award of fees and costs  
23 against them was not reasonable in this case. Under § 330(a)(1),  
24 after notice and an opportunity for a hearing, the bankruptcy  
25 court can award to the trustee reasonable compensation for the  
26 "actual, necessary services" of the trustee's counsel and  
27 reimbursement for trustee's counsel's "actual necessary  
28 expenses."

29 The Trustee first requested an award of reasonable fees and  
30 costs against the Debtors in the Turnover Motion and reiterated

1 that request in various pleadings thereafter. The Trustee  
2 provided a detailed, itemized listing of attorneys' fees and  
3 costs ("Itemization") as Exhibit A to Trustee Position.

4 In Debtors' Position, the Debtors argued the fault/mistakes  
5 prolonging the subject matters before the bankruptcy court lay  
6 primarily with the Trustee and his counsel, and therefore, "it  
7 would be unfair for the debtors to incur additional fees for the  
8 mistakes made by the estate." However, the Debtors did not  
9 challenge the reasonableness of Trustee's counsel's billing rates  
10 or of any of the particular time entries or costs incurred by  
11 Trustee's counsel as set forth in the Itemization.

12 At the Hearing, the bankruptcy court determined that the  
13 Trustee's attorneys' fees and costs did "not appear  
14 unreasonable." Debtors' counsel never contested the  
15 reasonableness of the amount of Trustee's attorneys' fees and  
16 costs at the Hearing. In fact, as noted above, Debtors' counsel  
17 suggested that an award of "at least a portion" of the Trustee's  
18 attorneys' fees and costs would be fair.

19 Mr. Piekarski: There were - there were a couple errors,  
20 but at the same time the estate is also not faultless  
21 here either. It cuts both ways. So, if there was some  
22 kind of, you know, splitting the difference I'm not  
23 sure that we would object. I think that would be a  
24 fair outcome.

25 Tr. of Feb. 5, 2014 hr'g, 16:12-16 (emphasis added).

26 "Ordinarily, if an issue is not raised before the trial  
27 court, it will not be considered on appeal and will be deemed  
28 waived." Levesque v. Shapiro (In re Levesque), 473 B.R. 331, 335  
(9th Cir. BAP 2012). See Beverly Cmty. Hosp. Ass'n v. Belshe,  
132 F.3d at 1267. "We review only issues which are argued

1 specifically and distinctly in a party's opening brief."  
2 Greenwood v. FAA, 28 F.3d at 977, citing Miller v. Fairchild  
3 Indus., Inc., 797 F.2d 727, 738 (9th Cir. 1986). Since the  
4 Debtors did not raise before the bankruptcy court and did not  
5 argue in their opening brief to this Panel any specifics as to  
6 the reasonableness of the billing rates charged by Trustee's  
7 counsel or the reasonableness of the amount of the Trustee's  
8 attorneys' fees and costs awarded by the bankruptcy court, any  
9 such arguments are waived.

10       However, if we review generally whether the Trustee's  
11 retention of counsel and counsel's work on behalf of the estate  
12 in this case were reasonable and beneficial (see, e.g.,  
13 § 330(a)(3)(C) and (a)(4)(A)(ii)(I); Leichty v. Neary (In re  
14 Strand), 375 F.3d 854, 860 (9th Cir. 2004)), we consider the  
15 following: Debtors did not disclose six bank accounts in their  
16 original schedules, and with regard to the two accounts they did  
17 disclose, they claimed all funds on deposit as exempt. Only  
18 after investigation by the Trustee and the filing and pursuit of  
19 the Turnover Motion did the estate recover \$1,005.73 nonexempt  
20 funds from the Debtors' bank accounts. As late as May 2013, the  
21 Debtors were asserting only \$273.72 of their bank deposits was  
22 not exempt, and they would turn over even that much only "upon  
23 the request of the Trustee." At oral argument, Debtors' counsel  
24 conceded that the Trustee needed the assistance of counsel in  
25 investigating and recovering the nonexempt portions of the  
26 deposits in the Chase Bank accounts.

27       As to the 529 Plans, as Debtors' counsel admitted at the  
28 Hearing,

1 Mr. Piekarski: We have never disputed that the monies  
2 the Debtors paid into the 529 accounts within the  
3 preceding - one year before the filing date is subject  
4 to turnover. That's never been an issue. They're  
ready to turn that money over once there is a firm  
number given to them. They knew that. We discussed  
that before the case was ever filed.

5 Tr. of Feb. 5, 2014 hr'g, 11:9-16 (emphasis added). Of course,  
6 if those statements were accurate, when Debtors and their counsel  
7 were served with the Exemption Objection, they could have  
8 responded with the necessary documentation and disclosed the  
9 nonexempt amount to be turned over to the Trustee. Only the  
10 Debtors, and certainly not the Trustee, knew at that point in  
11 time what contributions they had made to the 529 Plans during the  
12 year preceding their bankruptcy filing. Instead, the Debtors did  
13 not respond to the Exemption Objection at all and set in motion  
14 the lengthy and expensive process leading through the filing of  
15 the Turnover Motion and the Motion to Vacate and culminating in  
16 the Hearing.

17 In these circumstances, the Trustee needed the services of  
18 counsel to perform his duties of investigating the Debtors'  
19 assets and maximizing the recovery for the estate through  
20 liquidating nonexempt assets. Contrary to Debtors' argument, we  
21 find no error in the bankruptcy court's conclusion that it was  
22 Debtors and their counsel who were not forthright with the  
23 Trustee and unnecessarily prolonged proceedings. We conclude  
24 that the bankruptcy court did not abuse its discretion in  
25 awarding the Trustee's reasonable attorneys' fees and costs  
26 against the Debtors.

27 ///

28 ///

**VI. CONCLUSION**

For the foregoing reasons, we AFFIRM.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28