

MAR 22 2016

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

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In re:)	BAP No.	CC-15-1026-KiKuF
)		
GILES DUANE SPELLMAN,)	Bk. No.	12-bk-19871-WB
)		
Debtor.)		
_____)		
BRADLEY R. KIRK & ASSOCIATES,)		
INC.; BRADLEY R. KIRK,)		
)		
Appellants,)		
)		
v.)	MEMORANDUM¹	
)		
GILES DUANE SPELLMAN,)		
)		
Appellee.)		
_____)		

Argued and Submitted on October 22, 2015,
at Los Angeles, California

Filed - March 22, 2016

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

Honorable Julia Wagner Brand, Bankruptcy Judge, Presiding.

Appearances: Fritz J. Firman argued for appellants Bradley R. Kirk & Associates, Inc. and Bradley R. Kirk; Eric Alan Mitnick argued for appellee Giles Duane Spellman.

Before: KIRSCHER, KURTZ and FARIS, Bankruptcy Judges.

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 8024-1.

1 Creditor Bradley R. Kirk & Associates, Inc. ("Kirk") appeals
2 an order of the bankruptcy court confirming Debtor Giles Duane
3 Spellman's First Amended Chapter 13 Plan. We AFFIRM.

4 **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

5 Debtor is the beneficiary of the Giles J. Spellman Living
6 Trust ("Trust"), which was established by his now-deceased
7 grandfather, Giles J. Spellman. Article 5 of the Trust contains
8 spendthrift provisions limiting Debtor's ability to spend the
9 trust proceeds until he turns thirty-five on November 22, 2017:

- 10 (a) The Trustee shall distribute to GILES DUANE
11 SPELLMAN, as soon as practicable after the death of
12 Trustor, cash in the sum of ten thousand dollars
13 (\$10,000). Thereafter, on the first of each month,
14 beginning with the month following Trustor's death,
15 Trustee shall disburse to GILES DUANE SPELLMAN the
16 sum of one thousand dollars (\$1,000), until said
17 beneficiary reaches the age of thirty-five (35).
18 On said beneficiary's 35th birthday, or as soon as
19 practicable thereafter, Trustee shall distribute to
20 GILES DUANE SPELLMAN the entire balance of
21 principal and earnings in said trust account. . . .

22 Debtor has a son who is a contingent beneficiary of the Trust
23 should Debtor pass away before November 22, 2017. The assets of
24 the Trust include a home located at 9503 Borson, Downey,
25 California, in which Debtor resides.

26 In 2006, Debtor retained Kirk to represent him in matters
27 relating to the Trust and litigation associated therewith. Debtor
28 signed two agreements with Kirk, one dated May 9, 2007, and the
second dated June 11, 2007. The second agreement provided that
Kirk would receive a contingency fee of 33% of all amounts and
property Debtor eventually received from the Trust.

In 2009, a retired judge, who was appointed to serve as a
referee in the Trust litigation, found that a purported

1 revocation of the Trust by Giles J. Spellman in 2006 was invalid.
2 The referee recommended that Debtor be appointed as successor
3 trustee under the Trust and indicated in his findings that Debtor
4 had requested that the Trust assets be distributed immediately,
5 rather than pursuant to the terms of the Trust.

6 Debtor claims he believed Kirk's fee would be 3 to 7% of the
7 Trust and only learned in 2009, after the referee entered his
8 findings, that Kirk was claiming 33% of the Trust proceeds.
9 Debtor also claims that he first learned during this same time
10 that if the spendthrift provision of the Trust was removed, Debtor
11 would immediately owe Kirk approximately \$200,000 in legal fees.
12 Debtor informed Kirk that "the fees were too high" and soon after
13 informed Kirk that Debtor no longer wanted Kirk to represent him.
14 Kirk initiated a fee arbitration in November 2009, which the
15 California Bar dismissed as premature. Kirk then filed a lawsuit
16 against Debtor in December 2009 to collect the unpaid fees.

17 Despite having been informed by Debtor that he no longer
18 wanted Kirk to represent him, and after Kirk had filed its lawsuit
19 against Debtor, Kirk filed an ex parte application with the Los
20 Angeles Superior Court requesting that it enter a judgment that
21 would allow the Trust assets to pass to Debtor immediately, rather
22 than pursuant to the terms of the Trust. Kirk also requested that
23 the Los Angeles Superior Court appoint Robert J. Dutil, rather
24 than Debtor, as successor trustee of the Trust. The ex parte
25 motion was granted on August 11, 2010, without notice to Debtor or
26 Dutil, and reads:

27 1. The Court declares that Giles D. Spellman is
28 the sole beneficiary of the Giles J. Spellman Living
Trust dated August 18, 2004 (the "Spellman 2004 Trust")

1 and that Daniel Wassgren's interest as a contingency
2 remainder beneficiary has been assigned to Giles D.
Spellman.

3 3. The 2004 Trust is hereby modified in all
4 respects such that Giles D. Spellman shall be entitled
5 to immediate outright distribution of all assets owed by
such Trust and Daniel Wassgren shall have no interest in
the Trust.

6 4. Robert Dutil is hereby appointed as sole
7 Trustee of the Trust for all purposes.

8 5. That certain deed dated March 22, 2006
9 purporting to transfer that certain real property
10 commonly known as 9503 Borson, Downey, CA from the Giles
11 J. Spellman 2004 Trust into the name of Giles J.
Spellman, an individual, is hereby canceled. Title to
the Borson Property is hereby quieted for all purposes
in Giles D. Spellman, Trustee of the Giles J. Spellman
2004 Trust dated August 18, 2004.

12 Debtor and Kirk subsequently participated in a fee
13 arbitration conducted by JAMS in December 2010. The arbitrator
14 found in favor of Kirk, awarding it 33% of the value of the Trust.
15 Kirk petitioned the Los Angeles Superior Court to confirm the
16 arbitration award, which it did on March 2, 2011, ordering Debtor
17 to pay Kirk \$214,447.88.

18 Dutil was nominated to act as successor trustee of the Trust
19 on March 24, 2010; Dutil accepted on March 25, 2010. On
20 February 17, 2011, Dutil secured an order from the Los Angeles
21 Superior Court setting aside Kirk's ex parte removal of the
22 spendthrift provision of the Trust. Like the August 11, 2010
23 order, the February 17, 2011 order also canceled the deed dated
24 March 22, 2006, that purportedly transferred the home at
25 9503 Borson, Downey, California from the Trust to Debtor, but
26 "quieted title for all purposes in Robert J. Dutil, Trustee of the
27 [Trust]." Among the reasons cited by the court for setting aside
28 the removal of the spendthrift provision were:

1 2. [T]hat the Motion to Set Aside Portions of
2 the August 11, 2010 Order has merit based on the lack of
3 notice, the conflict of interest between Mr. Kirk and
4 Mr. Spellman due to the civil lawsuit filed against
5 Mr. Spellman by Mr. Kirk on December 28, 2009 which had
6 already been filed when the Petition for Order Adopting
7 the Report of the Referee was brought to this Court.
8 The Court further finds that Mr. Spellman is now
9 represented by new counsel as shown in his declaration
10 filed December 29, 2010 and based on his declaration,
11 the original Petition for Order Adopting the Report of
12 the Referee were not his wishes and could not be based
13 on California Probate Code Section 15403.

14 On January 31, 2012, Kirk filed a petition in the Los Angeles
15 Superior Court requesting various relief, including entry of an
16 order requiring Dutil to pay Kirk the monthly maintenance payments
17 Debtor was entitled to receive under the terms of the Trust.
18 Before a scheduled hearing on Kirk's petition, Debtor filed his
19 voluntary chapter 13² petition on March 20, 2012. Debtor was 29
20 years old on his petition date.

21 Debtor filed his schedules, a chapter 13 plan and his
22 statement of financial affairs on April 3, 2012. On Schedule B,
23 Debtor listed under "Contingent and noncontingent interest in
24 estate of a decedent, death benefit plan, life insurance policy,
25 or trust" his interest in "Giles J. Spellman Trust (irrevocable,
26 spendthrift); not property of the estate; listed and claimed as
27 exempt out of abundance of caution. Debtor receives
28 \$1,000/month." Debtor claimed an exemption of \$21,675.00 in the
foregoing property pursuant to California Code of Civil Procedure
§ 703-140(b)(5). Debtor's other assets have a value totaling
\$3,400.

² Unless specified otherwise, all chapter, code, and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 In his schedule of debts, Debtor listed a priority child
2 support obligation of \$4,038. Debtor also listed unsecured debt
3 totaling \$231,375, which consisted of debt owing to Bank of
4 America, a bail bond company and Kirk. Debtor also listed Robert
5 M. Papell, Esq. on his schedule F relating to a claim on behalf of
6 Pamela Bray. Pamela Bray filed a proof of claim asserting a claim
7 of \$50,000 stemming from a dog bite incident that happened on
8 February 25, 2011.

9 Debtor did not complete high school and is not employed. Per
10 schedule J, Debtor's sole source of income is the \$1,000 per month
11 he receives from the Trust. Debtor's monthly expenses total \$655,
12 which amount includes \$355 for child support, \$200 for food, \$5
13 for clothing and \$50 for transportation.

14 To resolve an objection to confirmation by the Orange County
15 Department of Child Support Services, Debtor filed a First Amended
16 Chapter 13 Plan on May 30, 2012 ("Plan"). Debtor's Plan provides
17 for payments of \$345 per month for 36 months, with a proposed
18 distribution of \$7,012, or 3%, to unsecured creditors. Debtor's
19 monthly Plan payment of \$345 represents the difference between
20 Debtor's monthly Trust income of \$1,000 and his expenses of \$665.

21 Per the notice of commencement of case entered March 20,
22 2012, the hearing on confirmation of Debtor's plan was originally
23 scheduled for November 28, 2012, and the deadline for
24 non-governmental entities to file proofs of claims was set for
25 July 18, 2012. In a separate Notice entered April 3, 2012, the
26 deadline for filing objections to Debtor's Plan was set for
27 April 12, 2012. Bradley Kirk, Esq., through counsel, filed a
28 proof of claim on July 12, 2012, asserting a claim in the amount

1 of \$237,007.88. On November 21, 2012, Debtor objected to Bradley
2 Kirk's proof of claim, correctly arguing that Bradley Kirk was not
3 a creditor.

4 Kirk amended Bradley Kirk's proof of claim on November 28,
5 2012, to identify the creditor as "Bradley Kirk, Esq. & Bradley R.
6 Kirk & Associates, Inc." The amended proof of claim again
7 asserted a claim of \$237,007.88 stemming from the judgment entered
8 March 2, 2011, in the Superior Court.

9 Debtor filed an objection to Kirk's claim. On September 22
10 and 26, 2014, the bankruptcy court held a trial on Debtor's
11 objection to Kirk's claim. At a hearing held December 2, 2014,
12 the bankruptcy court entered its oral ruling, reducing Kirk's
13 claim to \$43,875, reasoning, in part:

14 Mr. Kirk also had a conflict. I feel once the fee
15 dispute arose, his conduct in going to court ex parte to
16 confirm the petition to make the trust assets available
immediately, with no notice to the new trustee or the
debtor, when he did that, is troubling to me.

17 I think he should have given them notice. There's
18 a new trustee in place. I don't think that that was
appropriate.

19 I find Mr. Kirk's statement that he did this for
20 the benefit of his client to be not credible. I think
21 Mr. Kirk did this for his own benefit, rather than for
the benefit of his client.

22 On January 2, 2015, the bankruptcy court entered an order allowing
23 Kirk's claim as a general unsecured nonpriority claim in the
24 amount of \$43,875, with the balance of the claim denied. Kirk
25 appealed the bankruptcy court's January 2, 2015 order.³

27 ³ On September 17, 2015, the United States District Court for
28 the Central District of California reversed the bankruptcy court's
(continued...)

1 Bradley Kirk filed an objection to confirmation of Debtor's
2 Plan on November 14, 2012, arguing that Debtor's bankruptcy case
3 and Plan were filed in bad faith because Kirk had successfully
4 obtained an order for an early distribution of the Trust, which
5 early distribution Kirk alleges Debtor refused after learning of
6 Kirk's fees. According to Bradley Kirk, instead of taking the
7 early distribution, Debtor filed his chapter 13 bankruptcy case
8 and proposed a plan that would pay Kirk pennies on the dollar,
9 while allowing Debtor, upon turning 35, to collect hundreds of
10 thousands of dollars from the Trust. On November 21, 2012, Debtor
11 filed a response to Bradley Kirk's objection, arguing in part,
12 that Bradley Kirk was not a creditor who had standing to object to
13 confirmation of Debtor's Plan and that Bradley Kirk's "objections
14 appear[ed] to be untimely and entirely without merit."

15 Kirk filed its own objection to confirmation of Debtor's Plan
16 on October 15, 2014. Kirk, like Bradley Kirk in his earlier

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19 ³(...continued)
20 ruling on Debtor's objection to Kirk's claim. According to the
21 District Court:

22 [A]t least where there is a state court Judgment
23 establishing the amount of attorneys' fees, § 502(b)(4)
24 does not allow a Bankruptcy Court to ignore that
25 Judgment. Instead, 28 U.S.C. § 1738 requires that such
26 a judgment be accorded the Bankruptcy Court's full faith
27 and credit. "Since the confirmation of a private
28 arbitration award by a state court has the status of a
judgment, federal courts must, as a matter of full faith
and credit, afford the confirmation the same preclusive
consequences as would occur in state court."
In re Khaligh, 338 B.R. 817, 824 (B.A.P. 9th Cir. 2006).

27 Bradley R. Kirk & Assoc., Inc. v. Spellman (In re Spellman),
28 Case 2:15-cv-00507-PA, Docket No. 16 (C.D. Cal. Sept. 17,
2015). Debtor appealed this order to the Ninth Circuit Court
of Appeals on September 30, 2015. Docket No. 17.

1 objection, argued that Debtor's bankruptcy case and Plan were
2 filed in bad faith and, in addition, argued that Debtor's Plan
3 failed to meet the best interest of creditors test found at
4 § 1325(a)(4).

5 After the bankruptcy court made its oral ruling on
6 December 2, 2014, regarding Debtor's objection to Kirk's claim,
7 Kirk argued for an evidentiary confirmation hearing. Debtor
8 countered that the bankruptcy court could rule on confirmation as
9 a matter of law based on the evidence already before the court.
10 The bankruptcy court agreed that further consideration of the
11 matter was necessary and continued the December 3, 2014
12 confirmation hearing to January 7, 2015.

13 Although no January 7, 2015 minute entry appears on the
14 bankruptcy court's docket, the transcript of Debtor's January 7,
15 2015 confirmation hearing reflects that the chapter 13 trustee
16 appeared at that hearing, as did counsel for both Debtor and Kirk.
17 No witness testimony or exhibits were offered, but counsel for
18 Debtor and Kirk argued their respective positions. Counsel for
19 Kirk argued, in part:

20 [Debtor] doesn't meet the liquidation analysis.
21 This case is a poster child for bad faith, and the Court
22 ought to deny confirmation and dismiss this case, or set
23 this matter for an evidentiary hearing, and make the
24 Debtor come in and testify and convince you of his bona
25 fides and convince you of his good faith.

26 At the conclusion of the parties' arguments, the court ruled:

27 All right. I'm going to overrule the objection to
28 confirmation by Bradley R. Kirk and Associates. I have
- for good faith I look at the totality of the
circumstances in making a good-faith determination here.

Here, I find that the Debtor did file the case in
good faith. He's exercising his rights under the law

1 with respect to the Spend Thrift Trust. It is what it
2 is, and he has the right to file bankruptcy to address
3 his debts. He has more debts than simply the debt to
4 Bradley R. Kirk and Associates. And he has the right to
5 file a plan that complies with the bankruptcy code,
6 which is what he did.

7 And so, I think that he did file the case in good
8 faith. The objection I found when I re-read it again
9 today, restates many of the issues that we covered
10 during the claim objection and, you know, Mr. Kirk and
11 Kirk and Associates are unhappy because there's no
12 distribution because, again, because the Spend Thrift
13 Trust is not available to the Debtor when Mr. Kirk acted
14 to make it available to him early. That's the crux of
15 the argument.

16 And, you know, we've been through that many times
17 already in various pleadings here, and in the testimony
18 that we had on the claim objection trial. And the
19 Court, upon the motion, reversed that order. It's
20 reversed. There's a Spend Thrift Trust in place, and
21 that's legitimate.

22 And so, on that basis, I find that the case was
23 filed in good faith. And that also addresses the
24 liquidation analysis issue, too, because it's the
25 objection with respect to the liquidation, under
26 Chapter 7 is, a, speculative, that the Trustee would
27 keep the case open for three more years in order to
28 claim that money. But, secondly, it relies on the fact
that he should be able to get that money now, and that
simply is not the case. So, that objection is also
overruled.

The bankruptcy court's oral ruling was reduced to writing and
entered on January 13, 2015. Kirk filed a timely notice of appeal
on January 27, 2015.

Subsequent to entry of the confirmation order, Debtor filed
on February 19, 2015, a "Certification of Compliance Under
11 U.S.C. § 1328(a) and Application for Entry of Discharge,"
representing he had completed all payments required under the
terms of his confirmed Plan.

On October 7, 2015, Kirk filed a request that the Panel take
judicial notice of the District Court's September 17, 2015 ruling

1 in Bradley R. Kirk & Assoc., Inc. v. Spellman (In re Spellman),
2 Case 2:15-cv-00507-PA, Docket No. 16 (C.D. Cal. Sept. 17, 2015).
3 Kirk argues that such ruling impacts the feasibility of Debtor's
4 Plan. Kirk also requests that the Panel take judicial notice of
5 the fact that Debtor appealed the District Court's ruling to the
6 Ninth Circuit Court of Appeals on September 30, 2015. Debtor
7 opposes Kirk's request for judicial notice, arguing Kirk's
8 feasibility issue was not one of the issues designated or briefed
9 on appeal.

10 **II. JURISDICTION**

11 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
12 and 157(b)(2)(L). We have jurisdiction under 28 U.S.C. § 158.

13 **III. ISSUES**

14 1. Did the bankruptcy court err in finding that Debtor's
15 proposed plan satisfied the good faith requirements of
16 § 1325(a)(3)?

17 2. Did the bankruptcy court err in finding that Debtor's
18 proposed plan satisfied the "best interests of creditors" test
19 under § 1325(a)(4)?

20 3. Did the bankruptcy court abuse its discretion in not
21 holding an evidentiary hearing on confirmation of Debtor's Plan?

22 **IV. STANDARDS OF REVIEW**

23 A bankruptcy court's decision concerning confirmation of a
24 chapter 13 plan is reviewed for abuse of discretion. Bank of Am.
25 Nat'l Trust & Sav. Ass'n v. Slade (In re Slade), 15 B.R. 910, 913
26 (9th Cir. BAP 1981). This standard has two parts. First, we
27 consider whether the bankruptcy court applied the correct legal
28 standard; and second, we must decide whether the court's factual

1 findings supporting the legal analysis were clearly erroneous.
2 United States v. Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009)
3 (en banc).

4 Rulings concerning confirmation of a chapter 13 plan present
5 mixed questions of fact and law. The bankruptcy court's factual
6 determinations are reviewed under the clearly erroneous standard,
7 while its legal determinations are reviewed de novo. Meyer v.
8 Lepe (In re Lepe), 470 B.R. 851, 855 (9th Cir. BAP 2012) (citing
9 Andrews v. Loheit (In re Andrews), 155 B.R. 769, 770 (9th Cir. BAP
10 1993)).

11 **V. DISCUSSION**

12 Kirk, in its Opening Brief, asserts that five issues exist on
13 appeal, even though it asserted additional issues in its Statement
14 of Issues. We have consolidated Kirk's five issues into the three
15 issues noted above.

16 **A. Good Faith**

17 We first consider Kirk's asserted issues involving good
18 faith. As a threshold matter, Kirk argued in its amended
19 objection to confirmation of Debtor's Plan that:

20 The Trust was revoked. The order that Mr. Kirk obtained
21 says the Trust is valid. Mr. Spellman undid that order
22 but he wants to cherry pick and say the revocation of
23 the Trust is void but reject the rest of the order
24 allowing early distribution. Mr. Spellman had all the
assets in hand and then sought to void that order and
put the assets out of reach of all creditors by seeking
to hide behind the spendthrift provision of the [T]rust.

25 Kirk continues to contend on appeal that the "question of trust
26 revocation is still an open question" because Giles J. Spellman
27 signed a "Revocation of Living Trust" on March 22, 2006, and,
28 thus, Giles J. Spellman's assets belonged to his probate estate

1 and should have been distributed to Debtor immediately. The
2 judgment, prepared by Kirk and entered by the Los Angeles Superior
3 Court on August 11, 2010, is set forth above.

4 The above judgment does not contain a paragraph 2 and is
5 internally inconsistent in that it appoints Dutil as trustee of
6 the Trust in paragraph 4, but then, in paragraph 5, quiets title
7 in the property at 9503 Borson in Giles J. Spellman, Trustee of
8 the Giles J. Spellman 2004 Trust dated August 18, 2004. The
9 judgment, by its plain terms, modified the Trust to entitle Debtor
10 "to immediate outright distribution of all assets owned by such
11 Trust[.]"

12 Upon motion of Dutil, the above judgment was modified on
13 February 17, 2011, to set aside that portion of paragraph 3 of the
14 August 11, 2010 judgment that granted Debtor the "immediate
15 outright distribution of all assets owed by such Trust[.]" The
16 February 17, 2011 judgment also corrected the internal
17 inconsistency in the August 11, 2010 judgment by quieting title in
18 the 9503 Borson property in "Robert J. Dutil, Trustee of the Giles
19 J. Spellman 2004 Trust[.]" The end effect of the two judgments
20 was that Daniel Wassgren had no interest in the Trust, Dutil was
21 the trustee of the Trust, title to the property at 9503 Borson was
22 quieted in the Trust, and the spendthrift provision remained
23 intact as originally provided for in the Trust. Consistent with
24 the foregoing, Kirk argued in a petition filed with the
25 Los Angeles Superior Court on January 31, 2012, that "as it stands
26 now, all of the Trust assets remain in the Trust, and [] Dutil is
27 acting as trustee of the Trust. The current assets of the Trust
28 are believed to be approximately \$620,000. Dutil will presumably

1 continue to act as Trustee until the Trust is distributed in
2 2018.” Kirk’s argument that Giles J. Spellman revoked the Trust
3 in 2006 is contrary to the facts in the record and is an improper
4 attack on the judgments entered by the Los Angeles Superior Court
5 in 2010 and 2011.

6 In considering Kirk’s § 1325(a)(3) argument, a debtor must
7 prove that its chapter 13 plan is proposed in good faith and not
8 by any means forbidden by law. § 1325(a)(3). The debtor, as the
9 chapter 13 proponent, has the burden of proof in establishing good
10 faith (as well as all other elements of plan confirmation in
11 § 1325). Meyer v. Hill (In re Hill), 268 B.R. 548, 552 (9th Cir.
12 BAP 2001).

13 Pursuant to § 1325(a)(3), “the court shall confirm a plan if
14 . . . the plan has been proposed in good faith and not by any
15 means forbidden by law.” In examining application of the good
16 faith standard in cases involving denial of confirmation of
17 chapter 13 plans, this Panel has explained that a bankruptcy court
18 must apply a totality of the circumstances test in determining
19 good faith and consider “(1) whether the debtor misrepresented
20 facts, unfairly manipulated the Bankruptcy Code or otherwise
21 proposed the plan in an inequitable manner; (2) the history of the
22 debtor's filings and dismissals; (3) whether the debtor intended
23 only to defeat state court litigation; and (4) whether the
24 debtor's behavior was egregious. [Leavitt v. Soto (In re Leavitt),
25 171 F.3d 1219, 1224 (9th Cir. 1999)] (applying same factors for
26 good faith filing of chapter 13 petition).” Drummond v. Welsh
27 (In re Welsh), 465 B.R. 843, 851 (9th Cir. BAP 2012), aff'd
28 711 F.3d 1120, 1129 (9th Cir. 2013); see also HSBC Bank USA, Nat’l

1 Ass'n, as Indenture Tr. of the Fieldstone Mortg. Inv. Tr., Series
2 2006-1 v. Blendheim (In re Blendheim), 803 F.3d 477, 499 (9th Cir.
3 2015). Courts should examine a debtor's intentions and the legal
4 effect of confirmation in light of the spirit and purposes of
5 chapter 13. Fid. & Cas. Co. of N.Y. v. Warren (In re Warren),
6 89 B.R. 87, 93 (9th Cir. BAP 1988) (citing Chinichian v.
7 Campolongo (In re Chinichian), 784 F.2d 1440, 1444 (9th Cir.
8 1986)).

9 Factors to be considered in determining good faith include,
10 but are not limited to:

- 11 1. The amount of the proposed payments and the amounts of
12 the debtor's surplus;
- 13 2. The debtor's employment history, ability to earn, and
14 likelihood of future increases in income;
- 15 3. The probable or expected duration of the plan;
- 16 4. The accuracy of the plan's statements of the debts,
17 expenses and percentage of repayment of unsecured debt,
18 and whether any inaccuracies are an attempt to mislead
19 the court;
- 20 5. The extent of preferential treatment between classes of
21 creditors;
- 22 6. The extent to which secured claims are modified;
- 23 7. The type of debt sought to be discharged, and whether
24 any such debt is dischargeable in Chapter 7;
- 25 8. The existence of special circumstances such as
26 inordinate medical expenses;
- 27 9. The frequency with which the debtor has sought relief
28 under the Bankruptcy [Code];

1 10. The motivation and sincerity of the debtor in seeking
2 Chapter 13 relief; and

3 11. The burden which the plan's administration would place
4 upon the trustee.

5 In re Warren, 89 B.R. at 93.

6 Kirk, citing an unpublished decision entered by this Panel in
7 Mead v. Loheit (In re Mead), BAP No. EC-09-1241-MkHDu (9th Cir.
8 BAP June 15, 2010), aff'd, No. 10-60034 (9th Cir. June 20, 2013),
9 suggests that Debtor's Plan was filed in bad faith because Debtor
10 is depriving Kirk of its state law rights. In Mead, the debtor
11 sought to discharge a secured obligation owing to an ex-spouse by
12 mischaracterizing the debt as an unsecured debt. No evidence
13 exists in our record that Debtor has made any misrepresentations
14 or mischaracterizations such as were made in Mead.

15 More persuasive is the recent decision in Blendheim, where
16 the Ninth Circuit Court of Appeals found that a bankruptcy court
17 did not err in concluding that debtors had filed their chapter 13
18 bankruptcy case in good faith where the chapter 20 debtors filed
19 their petition only one day after receiving their chapter 7
20 discharge, on the eve of a foreclosure sale, and to avoid a wholly
21 unsecured junior lien on the debtors' principal residence. As
22 noted in that decision, while the debtors may have been
23 "motivated" to "avoid the foreclosure sale of their Residence,"
24 the debtors had other "additional, valid reasons" for filing their
25 chapter 13 bankruptcy. In re Blendheim, 803 F.3d at 499. Indeed,
26 "[m]any Chapter 13 debtors file for bankruptcy on the eve of
27 foreclosure sale as a last resort." Id. (quoting In re Blendheim,
28 2011 WL 6779709, at *9 (Bankr. W.D. Wash. Dec. 27, 2011)).

1 Here, Debtor had other valid reasons for filing his petition,
2 such as the debt owed to Orange County Department of Child Support
3 Services and the \$50,000 dog bite claim; he is not unlike other
4 debtors who file a bankruptcy petition as a last resort. Under
5 the particular facts of this case, Debtor's actions simply do not
6 constitute bad faith.

7 Kirk argues in its objection to confirmation that the timing
8 of this case cannot be coincidence. It most likely is not a
9 coincidence, just as it is not a coincidence when debtors file
10 bankruptcy on the eve of a foreclosure sale.

11 Based upon the record, Kirk has an unsecured claim against
12 Debtor in the amount of \$237,007.88. Kirk argues Debtor's Plan
13 was not proposed in good faith because Debtor, as a beneficiary of
14 the Trust, stands to receive assets worth \$600,000 in November
15 2017. Other than his interest in the Trust, Debtor has minimal
16 assets valued at \$3,400. Debtor is not employed; his sole source
17 of income is the \$1,000 per month he receives from the Trust.
18 Debtor's monthly expenses total \$655, of which \$355 is for child
19 support. Debtor's Plan provided for 36 monthly payments of \$345
20 each, which payments Debtor has made. Debtor has no secured
21 creditors; after payment of administrative and priority claims,
22 Debtor's plan payments will be distributed to unsecured creditors.
23 Additionally, Debtor's Plan does not attempt to discharge an
24 otherwise nondischargeable debt, nor is there any unfair
25 discrimination or dishonesty by the debtor.

26 On the record before us and based on our analysis set forth
27 above, we cannot conclude that the bankruptcy court committed
28 reversible error in its application of the totality of the

1 circumstances test or that it clearly erred in making its good
2 faith findings.

3 **B. Best Interests of Creditors**

4 Kirk also asserts that Debtor's Plan does not satisfy the
5 "best interests of creditors" test under § 1325(a)(4). Analysis
6 under § 1325(a)(4) requires a court to make two determinations:
7 (1) the present value of the property to be distributed to
8 unsecured creditors (the value of the stream of plan payments) as
9 of the "effective date of the plan;" and (2) the amount available
10 to unsecured creditors if a chapter 7 liquidation were held on the
11 "effective date of the plan." The "best interests of creditors"
12 test has been met if the present value of the distributions to
13 unsecured creditors as of the "effective date of the plan" is
14 equal to or greater than the value of a hypothetical chapter 7
15 liquidation held on such date.

16 The crux of Kirk's argument is that Debtor could have had or
17 had \$600,000 in hand and that such amount should factor into the
18 confirmation analysis. Section 541(a)(1) provides that property
19 of a bankruptcy estate is comprised of "all legal or equitable
20 interests of the debtor in property as of the commencement of the
21 case." However, § 541(c)(2), which operates as an exception to
22 § 541(a)(1), provides that "[a] restriction on the transfer of a
23 beneficial interest of the debtor in a trust that is enforceable
24 under applicable nonbankruptcy law is enforceable in a case under
25 this title." Property that falls within this latter category is
26 excluded from property of the bankruptcy estate. See Spacone v.
27 Atwood (In re Atwood), 259 B.R. 158, 161 (9th Cir. BAP 2001).

28 California law recognizes the validity of spendthrift trusts.

1 See Neuton v. Danning (In re Neuton), 922 F.2d 1379 (9th Cir.
2 1990) (citing Cal. Prob. Code §§ 15300 et seq.). The critical
3 inquiry in determining whether a spendthrift trust is valid under
4 California law is whether the trust's beneficiaries exercise
5 excessive control over the trust. See In re Witwer, 148 B.R. 930,
6 937 (Bankr. C.D. Cal. 1992).

7 On Debtor's petition date, the Trust contained a spendthrift
8 provision restricting Debtor's ability to transfer his beneficial
9 interests and the ability of third parties to levy upon Debtor's
10 interests. Nothing in the record, other than unsubstantiated
11 argument of counsel, shows that Debtor exercised control over the
12 Trust on his petition date; in fact, other than the monthly
13 payment of \$1,000, Debtor does not have access to the Trust's
14 benefits until he turns 35 on November 22, 2017 (a postpetition
15 event). Finally, the Debtor (as beneficiary) was not the settlor
16 of the Trust; the Trust was thus not "self-settled."
17 Consequently, under California law, the Trust is a valid
18 spendthrift trust, and according to Ninth Circuit law, 75% of
19 Debtor's interest in the Trust is excluded from property of the
20 bankruptcy estate pursuant to § 541(c)(2). Bendon v. Reynolds
21 (In re Reynolds), 479 B.R. 67, 75 (9th Cir. BAP 2012); Cisneros v.
22 Kim (In re Kim), 257 B.R. 680, 688 (9th Cir. BAP 2000).

23 The foregoing analysis suggests that a hypothetical chapter 7
24 trustee could reach 25% of the Trust and that 25% of the value of
25 the Trust should factor into the § 1325(a)(4) analysis. However,
26 "[e]ven though a bankruptcy trustee may reach 25% of what the
27 debtor/beneficiary is entitled to receive, that amount may be
28 reduced by whatever amount the court determines is necessary for

1 the beneficiary's (and his dependents') support." In re Reynolds,
2 479 B.R. at 75 (citing Cal. Prob. Code § 15306.5(c); In re Neuton,
3 922 F.2d at 1384). While the bankruptcy court did not make
4 specific findings on this point, the record shows that Debtor
5 lives in the home at 9503 Borson. Based on numbers posited by
6 Kirk, the home represents roughly one-half the value of the Trust.
7 The remainder of the Trust provides Debtor's sole source of
8 support for himself and his son.

9 Based upon the facts before us, the bankruptcy court's
10 finding that Debtor's Plan satisfied § 1325(a)(4) is not
11 illogical, implausible, or without support in inferences that may
12 be drawn from the record. The foregoing ruling would also apply
13 to § 1325(a)(7)'s requirement that the petition be filed in good
14 faith; given the facts of this case, the other provisions of
15 § 1325(a) do not appear to be at issue, despite Kirk's arguments
16 to the contrary. See Rule 3015(f) ("If no objection is timely
17 filed, the court may determine that the plan has been proposed in
18 good faith and not by any means forbidden by law without receiving
19 evidence on such issues.")

20 **C. Failure to Hold an Evidentiary Hearing**

21 Kirk also complains that the bankruptcy court erred by not
22 holding an evidentiary confirmation hearing. Local Bankruptcy
23 Rule ("Local Rule") 3015-1(g)(1) of the United States Bankruptcy
24 Court for the Central District of California provides that
25 objections to confirmation of a chapter 13 plan are to be
26 "supported by appropriate declarations or other admissible
27 evidence[.]" Between the objections to confirmation filed by
28 Bradley Kirk and Kirk, together with Debtor's responses thereto,

1 the bankruptcy court had before it in excess of 100 pages of
2 exhibits and the declarations of Bradley R. Kirk, Fritz J. Firman,
3 Robert J. Dutil, CLPF, Min N. Thai, Regina Filippone and Eric Alan
4 Mitnick. In addition to the foregoing, the bankruptcy court had
5 previously held a two-day trial on Debtor's objection to Kirk's
6 claim, where the bankruptcy court considered numerous exhibits and
7 heard the testimony of Debtor, Min Thai, and Bradley R. Kirk.

8 By the time of Debtor's confirmation hearing on January 7,
9 2015, the bankruptcy court had already considered a vast amount of
10 evidence that directly related to Kirk's confirmation objections.
11 As explained by the Ninth Circuit in Acequia v. Clinton
12 (In re Acequia), 787 F.2d 1352, 1358-59 (9th Cir. 1986), a
13 bankruptcy court may consider evidence from prior evidentiary
14 hearings even though the court must hold an evidentiary
15 confirmation hearing.

16 Kirk objected to confirmation of Debtor's Plan, arguing it
17 failed to satisfy §§ 1325(a)(3) and (a)(4). Kirk does not
18 indicate what additional evidence could or should have been
19 presented at the confirmation hearing that was not already
20 presented at the objection to claim trial. By the time of
21 confirmation, the bankruptcy court was amply familiar with the
22 facts leading up to Debtor's bankruptcy and the facts that gave
23 rise to Kirk's confirmation objections. The bankruptcy court did
24 not abuse its discretion when it concluded that a further
25 evidentiary hearing was not necessary.

26 **D. Issues Not Addressed**

27 Kirk's Statement of Issues identifies eight issues to be
28 presented in this appeal, but Kirk only lists five issues in its

1 Opening Brief, which we have consolidated into the three issues
2 noted above. Any of the issues identified in the Statement of
3 Issues that are not addressed by argument in the Opening Brief are
4 deemed abandoned. See Branam v. Crowder (In re Branam), 226 B.R.
5 45, 55 (9th Cir. BAP 1998), aff'd, 205 F.3d 1350 (9th Cir. 1999)
6 (an issue not adequately addressed by appellant in its opening
7 brief is deemed abandoned).

8 Further, Kirk suggests that Debtor is the alter ego of the
9 Trust. Kirk presented no admissible evidence to support such an
10 assertion. Kirk also argues that a chapter 7 trustee could avoid,
11 pursuant to §§ 548(a)(1)(A) and 544, the order Dutil secured on
12 February 17, 2011, setting aside portions of the judgment Kirk
13 obtained ex parte. Because Kirk did not assert such claim before
14 the bankruptcy court and exceptional circumstances are lacking, we
15 refuse to consider that argument now. See El Paso City v. Am. W.
16 Airlines, Inc. (In re Am. W. Airlines), 217 F.3d 1161, 1165 (9th
17 Cir. 2000) ("Absent exceptional circumstances, we generally will
18 not consider arguments raised for the first time on appeal,
19 although we have discretion to do so."). See also Mano-Y & M,
20 Ltd. v. Field (In re The Mortg. Store, Inc.), 773 F.3d 990, 998
21 (9th Cir. 2014); Baldwin v. Marshack (In re Baldwin), 70 B.R. 612,
22 617 (9th Cir. BAP 1987) (citing Diamond Nat'l Corp. v. Lee,
23 333 F.2d 517, 528 (9th Cir. 1964)).

24 **E. Request for Judicial Notice**

25 Finally, Kirk requests that the Panel take judicial notice of
26 the decision entered in Bradley R. Kirk & Assoc., Inc. v. Spellman
27 (In re Spellman), Case 2:15-cv-00507-PA, Docket No. 16 (C.D. Cal.
28 Sept. 17, 2015), and the appeal thereof at Docket No. 17. The

1 Panel takes judicial notice of the above, but agrees with Debtor
2 that it would not be proper for this Panel to consider any
3 feasibility issue stemming therefrom as that issue was neither
4 designated nor briefed in this appeal.

5 **VI. CONCLUSION**

6 For the foregoing reasons, we AFFIRM the holding of the
7 bankruptcy court.

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