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NOT FOR PUBLICATION

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. EC-15-1144-JuDta
)
 MICHAEL WEILERT and GENEVIEVE) Bk. No. 13-16155
 M. de MONTREMARE,)
)
 Debtors.)
)
 MICHAEL WEILERT; GENEVIEVE M.)
 de MONTREMARE,)
)
 Appellants,)
)
 v.) **MEMORANDUM***
)
 BRIAN L. GWARTZ and CHERYL A.)
 SKIGIN, CO-TRUSTEES OF THE)
 PENDRAGON TRUST,)
)
 Appellees.)

Argued and Submitted on June 23, 2016
at Sacramento, California

Filed - July 8, 2016

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

Honorable W. Richard Lee, Bankruptcy Judge, Presiding

Appearances: Holly E. Estes argued for appellants Michael
Weilert and Genevieve M. de Montremare; Cheryl A.
Skigin argued for appellees Brian L. Gwartz and
Cheryl A. Skigin, Co-Trustees of the Pendragon
Trust.

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

* 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 Chapter 7¹ debtors Michael Weilert (Weilert) and Genevieve
2 M. de Montremare (Montremare) (collectively, Debtors) appeal
3 from the bankruptcy court's order denying their motion under
4 § 522(f)(1)(A) to avoid the judicial lien of appellees, Brian L.
5 Gwartz and Cheryl A. Skigin, co-trustees of the Pendragon Trust
6 (Pendragon). For the reasons discussed below, we VACATE and
7 REMAND.

8 I. FACTS

9 A. Prepetition Events

10 In March 2008, Weilert purchased a home for himself and his
11 wife, Montremare, located on North Marion Lane, Clovis,
12 California (Marion Property), as his sole and separate property.
13 Montremare later executed a deed transferring any interest she
14 had in the Marion Property to Weilert as his sole and separate
15 property.

16 The purchase of the Marion Property coincided with the sale
17 of Debtors' prior home located in Parlier, California (Parlier
18 Property) to Pendragon. The Parlier Property consisted of
19 fifteen acres of land that included a residence, riding arena,
20 and associated buildings. In a subsequent nondischargeability
21 proceeding based on fraud,² Pendragon alleged that prior to the
22 sale, Debtors represented to the Friesian horse community,
23

24 ¹ Unless otherwise indicated, all chapter and section
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
26 "Rule" references are to the Federal Rules of Bankruptcy
Procedure.

27 ² We take judicial notice of the complaint filed in Adv.
28 No. 13-01104. Atwood v. Chase Manhattan Mortg. Co.
(In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

1 including Ms. Skigin, that Montremare was a French heiress of
2 enormous wealth who spared no expense in the care of her horses
3 or in her horse facility. Pendragon also alleged that in
4 various communications, Weilert told Mr. Gwartz and Ms. Skigin
5 that the Parlier Property was being sold due to Montramare's
6 death. Other allegations included Weilert's representation that
7 Montramare's French family owned 6,000 acres of land in the
8 surrounding area which they intended to maintain for
9 agricultural use for many years rather than for development.
10 Weilert also allegedly told them that the property had a private
11 beach and that there was a contract in place to reassemble the
12 horse arena on the property. Based on these and other
13 representations, Pendragon purchased the property for
14 \$2.3 million. Shortly after the close of escrow, Mr. Gwartz and
15 Ms. Skigin learned that Weilert's representations about the
16 property were not true.

17 On January 5, 2009, Pendragon's counsel demanded that
18 Debtors mediate the dispute in order to avoid litigation.

19 About a month later, on February 6, 2009, Montremare formed
20 the Madonna della Pietra Trust (Madonna Trust). In the trust
21 document, Montremare was named the trustor, the trustee, and a
22 beneficiary. The "trust estate" was described as the "property,
23 plus any proceeds and undistributed income listed in Schedule A
24 and any property hereafter transferred to the trust by the
25 Trustor, . . . her attorney-in-fact. . . or from any other
26 person or source." Montremare, as trustee, expressed her
27 consent and agreement with Weilert to transmute the property in
28 Schedule A, including the Marion Property, to her separate

1 property.

2 The trust instrument also provided that the power to revoke
3 "may be exercised only by the Trustor personally . . . or
4 pursuant to authority and for purposes expressly provided in a
5 durable power of attorney executed by her." The trust did not
6 say how the property would be distributed if Montremare revoked
7 the trust. Upon Montremare's death, the trust would become a
8 spendthrift trust benefitting Debtors' daughter. Montremare
9 executed the trust in her capacity as trustor and trustee.

10 On the same date the Madonna Trust was formed, Weilert
11 transferred the Marion Property by grant deed to Montremare, as
12 trustee of the Trust. The grant deed stated that Weilert, as
13 grantor, "consents and agrees that the property . . . shall be
14 and is hereby, transmuted into the separate property of"
15 Montremare.

16 On March 25, 2009, Pendragon filed suit against Weilert in
17 the Fresno County Superior Court alleging breach of contract and
18 fraud centered on the alleged misrepresentations regarding the
19 horse arena. The complaint was amended several times including
20 an amendment to add Montremare as a defendant after Pendragon
21 learned through discovery that she was not deceased. Pendragon
22 alleged that repairs to the barn and arena exceeded \$800,000.
23 It further asserted that the fair market value of the property
24 without the barn and arena was \$1.6 million.

25 The state court lawsuit against Debtors was tried before a
26 jury in September and October 2012. On October 25, 2012, the
27 jury returned a special verdict in favor of Pendragon on each
28 count, including intentional fraud and fraud by concealment, in

1 the amount of \$700,000 on each fraud count. On October 29,
2 2012, after additional evidence, the jury awarded \$850,000 in
3 punitive damages for a total award of \$1.50 million. On
4 October 30, 2012, the state court entered the judgment against
5 Weilert and Montremare.

6 Debtors appealed the judgment but did not post a bond.
7 Pendragon commenced collection efforts in January 2013. On
8 January 18, 2013, Pendragon recorded an abstract of judgment in
9 Fresno County.

10 As part of its collection efforts, Pendragon moved for
11 various postjudgment enforcement orders. The state court
12 granted these motions and issued a freeze order, turnover order,
13 assignment order and charging order. These orders enjoined
14 Debtors from transferring any assets and froze funds held in any
15 deposit account.

16 Pendragon later discovered that Debtors had violated the
17 enforcement orders and thus moved to dismiss Debtors' appeal of
18 the judgment under the doctrine of disentitlement.³ Pendragon
19 identified forty-seven different transfers of money that
20 violated the trial court's orders. On this basis, the state
21 appellate court dismissed Debtors' appeal of the judgment,
22 finding that it would be unjust to allow them to seek the
23 benefit of an appeal while willfully disobeying the trial
24

25 ³ Disentitlement is based in equity. San Francisco Unified
26 School Dist. ex. rel. Contreras v. First Student, Inc.,
27 213 Cal.App.4th 1212, 1239 (2013) (disentitlement is "[A]
28 discretionary tool that may be applied when the balance of the
equitable concerns make it a proper sanction.") (citing People
v. Puluc-Sique, 182 Cal.App.4th 894, 897 (2010)).

1 court's valid orders and frustrating Pendragon's efforts to
2 enforce the judgment.

3 **B. Bankruptcy Events**

4 On September 13, 2013, Debtors filed a chapter 7 bankruptcy
5 case.⁴ They listed the Marion Property in Schedule A showing
6 that legal title to the property was held by the Madonna Trust
7 (actually, title was held by Montremare as trustee). They
8 valued the property at \$429,000 and showed that it was
9 encumbered by a lien in favor of M&T Bank in the amount of
10 \$289,000. In Schedule B, they listed their interest in the
11 Madonna Trust showing it as a "revocable estate planning trust
12 holding title to Debtors' residence." In Schedule C, Debtors
13 listed an exemption in the Marion Property in the amount of
14 \$175,000 under Cal. Code Civ. Proc. § 704.730. Pendragon was
15 the largest creditor.

16 Debtors filed a motion to compel abandonment of the Marion
17 Property. The bankruptcy court granted Debtors' motion by order
18 entered on April 2, 2015, which abandoned the "bankruptcy
19 estate's interest" in the property.

20 Debtors also filed a motion to avoid Pendragon's judicial
21 lien contending that it impaired their homestead exemption under
22
23
24

25 ⁴ On June 7, 2013, M&G Weilert Family, L.P. filed a
26 chapter 11 proceeding. This case was dismissed on August 8,
27 2013, on the motion of the United States Trustee. Debtors
28 re-filed the partnership case under chapter 7 on September 13,
2013. Debtors' individual case was later substantively
consolidated with the partnership case.

1 § 522(f)(1).⁵ Montremare submitted her declaration in support.
2 There, she declared that she owned the Marion Property as the
3 sole trustee of the Madonna Trust and claimed a homestead
4 exemption in the property in the amount of \$175,000.

5 Pendragon opposed the motion on several grounds. First, it
6 argued that the homestead exemption should be \$100,000 and not
7 \$175,000 as claimed by Debtors. Pendragon asserted that Debtors
8 set forth no basis for claiming the \$175,000 exemption which
9 required one of the Debtors to be over 65, disabled, or over the
10 age of 55 and with gross annual income of less than \$35,000.
11 Next, Pendragon maintained that the homestead exemption should
12 be reduced for improvements made to the Marion Property because
13 the funds used for those improvements were made after the state
14 court had issued a freeze order prohibiting the transfer of any
15 funds from Debtors' accounts. According to Pendragon, the funds
16 used for the improvements were funds obtained from the
17 fraudulent sale of the Parlier Property. Therefore, Pendragon
18 asserted that the homestead exemption should be reduced under
19 § 522(o) and (p).

20 Third, Pendragon argued that under the holding in
21 In re Bogetti, 349 B.R. 14 (Bankr. E.D. Cal. 1996), Debtors
22 could not utilize § 522(f)(1) to avoid its judicial lien because
23 the trust, not the Debtors, held legal title to the property.

24
25 ⁵ Debtors had previously filed a motion to compel
26 abandonment and a motion to avoid Pendragon's judicial lien.
27 Debtors' first motion to avoid Pendragon's lien was taken off
28 calendar since the parties went to mediation. The bankruptcy
court denied Debtors' motion to abandon without prejudice at the
same time.

1 Finally, Pendragon maintained that under Cal. Code Civ.
2 Proc. § 697.340,⁶ its judgment lien did not attach to
3 Montremare's beneficial interest in the Madonna Trust. Since
4 her beneficial interest was the only interest to which the
5 homestead exemption attached, Pendragon argued that there could
6 be no impairment of that exemption when, under California law,
7 her interest was not subject to attachment.

8 On March 26, 2015, the bankruptcy court held a hearing on
9 the matter, after which the parties submitted supplemental
10 briefing. In its supplemental brief, Pendragon further
11 explained why its judgment lien did not attach to Montremare's
12 beneficial interest in the Marion Property. Pendragon noted
13 that under California law, a judgment lien attaches only to the
14 judgment debtor's interest in the real estate not to bare legal
15 title. Palm v. Klapperman (In re Cady), 266 B.R. 172, 181 (9th
16 Cir. BAP 2001) (citing Davis v. Perry, 120 Cal.App. 670, 676
17 (1932) ("The law is well settled that the lien of a judgment
18 does not attach to a naked title but only to the judgment
19 debtor's interest in the real estate; and if he has no interest,
20 though possessing the naked title, then no lien attaches.")).

21 Next, Pendragon cited Cal. Prob. Code § 18200 which governs
22

23 ⁶ Cal. Code Civ. Proc. § 697.340(a) provides:

24 A judgment lien on real property attaches to all
25 interests in real property in the county where the lien
26 is created (whether present or future, vested or
27 contingent, legal or equitable) that are subject to
28 enforcement of the money judgment against the judgment
debtor . . . at the time the lien was created, but does
not reach . . . the interest of a beneficiary under a
trust. . . .

1 the rights of creditors in a revocable trust where the settlor
2 retains the power to revoke the trust. The statute states:

3 If the settlor retains the power to revoke the trust
4 in whole or in part, the trust property is subject to
5 the claims of creditors of the settlor to the extent
of the power of revocation during the lifetime of the
settlor.

6 According to Pendragon, this statute had no application because
7 Weilert, not Montremare, was the "settlor," as he was the one
8 who contributed the Marion Property, his sole and separate
9 property, to the Madonna Trust. Pendragon further argued that
10 Weilert terminated any revocation rights with the transmutation
11 of his prior ownership interest to Montremare. Based on this
12 reasoning, Pendragon asserted that under Cal. Code Civ. Proc.
13 § 697.340(a), since Montremare was not the "settlor" and only
14 had a beneficial interest in the trust property, its judgment
15 lien did not attach to that interest.⁷

16 The bankruptcy court issued its memorandum decision denying
17 Debtors' motion on April 16, 2015. There, the bankruptcy court
18 first addressed Debtors' interest in the Marion Property. The
19 court found that Weilert's interest terminated in 2008 when he
20 conveyed the property to the Madonna Trust. The court further
21 found that Montremare's interest in the Marion Property was that
22 of a trust beneficiary. Next, following Bogetti, the bankruptcy
23 court found that since legal title to the trust res (the Marion
24 Property) was vested in the Madonna Trust, the trust was the

26 ⁷ While Pendragon raised other issues relating to the
27 imposition of a constructive trust and the homestead exemption,
28 those issues were not decided by the bankruptcy court and thus
are not before us in this appeal.

1 legal owner of the property. The court concluded that Debtors
2 could not utilize § 522(f)(1) to avoid a judicial lien that
3 encumbered property "owned by another."

4 The bankruptcy court then considered whether there was a
5 "fixing" of the judicial lien against Montremare's beneficial
6 interest in the Marion Property for purposes of § 522(f)(1).
7 The bankruptcy court observed that under Cal. Code Civ. Proc.
8 § 697.340(c), her beneficial interest in the Madonna Trust was
9 excluded from the normal lien attachment process. The court
10 next pointed out that under Cal. Code Civ. Proc. § 709.010, a
11 judgment creditor had to file an application in a court with
12 jurisdiction over the trust to enforce a money judgment against
13 the beneficial interest of a trust. Based on the statutory
14 scheme, the bankruptcy court found that Pendragon's recording of
15 an abstract of judgment did not automatically "fix a lien"
16 against Montremare's beneficial interest. For these reasons,
17 the court denied Debtors' motion.

18 On April 17, 2015, the bankruptcy court entered the order
19 denying Debtor's motion to avoid Pendragon's judicial lien.
20 Debtors timely appealed from that order.

21 On June 3, 2015, Debtors filed their opening brief without,
22 among other things, excerpts of record. As a result, the
23 Clerk's office sent a notice of deficient brief to Debtors'
24 counsel. Debtors filed their excerpts of record after Pendragon
25 had filed its brief and after Debtors had filed their reply.

26 On September 28, 2015, the Clerk's office issued an order
27 (September Order) stating that it was informed that the parties
28 reached a settlement of their dispute at an August 2015

1 mediation and planned to dismiss the appeal. No motion to
2 dismiss the appeal had been filed and the underlying bankruptcy
3 docket did not indicate that a motion to approve the settlement
4 had been filed in the bankruptcy court. The order required
5 Debtors, no later than October 5, 2015, to file either a motion
6 to dismiss the appeal, a stipulation to dismiss the appeal, or a
7 statement indicating that the parties intended to proceed with
8 the appeal. To the extent necessary, the order provided a
9 limited remand so that the bankruptcy court could address any
10 motion for approval of a settlement.⁸ Having received no
11 response to the September Order by the October 5 deadline, the
12 Clerk's office issued an order requiring Debtors to file a
13 response showing cause why the appeal should not be dismissed
14 for lack of prosecution.

15 On November 4, 2015, Debtors' attorney filed a response
16 requesting oral argument and informing the Panel that even
17 though Debtors had further settlement discussions with Judge
18 Ross, the mediator, those discussions were not successful.

19 On November 23, 2015, Pendragon filed a motion to dismiss
20 the appeal, or in the alternative, to impose appropriate
21 sanctions. Pendragon's motion was based on Debtors' and their
22 counsel's alleged bad faith for filing excerpts of the record
23 after briefing and including documents which were not within the
24

25 ⁸ Pendragon asserts that a settlement was reached and placed
26 on the record. However, according to Pendragon, Debtors
27 repudiated the settlement claiming they did not understand the
28 meaning of the terms to which they had agreed. Debtors maintain
there was no agreement. The mediator, Judge Ross, evidently made
further attempts to settle the matter.

1 designation of the record. Pendragon further asserted that
2 Debtors and their counsel had consistently failed to follow the
3 procedures and rules of this court, thereby prejudicing them in
4 this appeal, increasing the costs and unreasonably delaying the
5 appeal. Pendragon argued that if the Panel deemed alternative
6 sanctions should be imposed, the Panel should strike from
7 Debtors' excerpts of record all documents not previously
8 designated, prohibit any further reference to such documents,
9 and award sanctions against Debtors and their counsel.

10 Debtors opposed the motion, contending that they filed
11 their excerpts of record and corrected excerpts of record after
12 briefing had concluded to comply with the Clerk's orders
13 regarding the deficiencies and such filing was not "done with
14 any ill intention." Debtors consented to striking the ten
15 documents they "inadvertently" included in the record which were
16 not included in their designation of record on appeal. Debtors
17 also conceded to procedural shortfalls, but stated that their
18 counsel had acted to remedy them to the extent possible within
19 the deadlines imposed by the court. They further maintained
20 that any delay in the appeal was the result of their good faith
21 participation in the mediation process. Finally, Debtors argued
22 that their failure to follow all procedural rules should not
23 result in the dismissal of the appeal under the standards set
24 forth in Ehrenberg v. Cal. State Fullerton (In re Beachport
25 Enter.), 396 F.3d 1083, 1087 (9th Cir. 2005).

26 Attached to the opposition was the declaration of Debtors'
27 counsel, Riley C. Walter. Mr. Walter explained that it was not
28 his firm's intention to ignore the Clerk's September Order

1 regarding dismissal of the appeal. Rather, because settlement
2 discussions were still on-going, it was unclear by the
3 October 5, 2015 deadline if the case would be settled, and
4 therefore dismissed, or if oral argument should be set.

5 Mr. Walter represented: "In the future, my office will timely
6 apprise the Court of continued settlement discussions and
7 request additional time to respond." Finally, Mr. Walter
8 declared that he addressed internal office procedures that
9 contributed to the missteps regarding the excerpts and other
10 shortfalls.

11 On March 15, 2016, the Panel issued an order denying all
12 relief requested in the motion to dismiss and the opposition
13 without prejudice to reconsideration by the merits panel.

14 **II. JURISDICTION**

15 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
16 §§ 1334 and 157(b)(2)(A). We have jurisdiction under 28 U.S.C.
17 § 158.

18 **III. ISSUES**

19 A. Whether the bankruptcy court erred in determining
20 Debtors' interests in the Marion Property?

21 B. Whether the bankruptcy court erred in finding that
22 Debtors could not utilize § 522(f)(1) because the Madonna Trust
23 held legal title to the Marion Property?

24 C. Whether the bankruptcy court erred in finding that
25 Pendragon's lien obtained by filing its abstract of judgment did
26 not "fix" to Montremare's interest in the Marion Property?

27 **IV. STANDARDS OF REVIEW**

28 We review the bankruptcy court's conclusions of law and

1 questions of statutory interpretation de novo and factual
2 findings for clear error. Beneficial Cal., Inc. v. Villar
3 (In re Villar), 317 B.R. 88, 92 (9th Cir. BAP 2004).

4 Whether a creditor's judicial lien was avoidable under
5 § 522(f)(1) is a question of bankruptcy law that we review de
6 novo. Id. "When we conduct a de novo review, 'we look at the
7 matter anew, the same as if it had not been heard before, and as
8 if no decision previously had been rendered, giving no deference
9 to the bankruptcy court's determinations.'" Barnes v. Belice
10 (In re Belice), 461 B.R. 564, 572 (9th Cir. BAP 2011) (citing
11 AlohaCare v. Haw. Dept. of Human Servs., 572 F.3d 740, 744 n.2
12 (9th Cir. 2009)).

13 Findings of fact are reviewed under a clearly erroneous
14 standard. A court's factual determination is clearly erroneous
15 if it is illogical, implausible, or without support in the
16 record. United States v. Hinkson, 585 F.3d 1247, 1261-62 (9th
17 Cir. 2009) (en banc).

18 V. DISCUSSION

19 A. Pendragon's motion to dismiss this appeal

20 We first consider Pendragon's motion to dismiss this
21 appeal. Debtors and their counsel failed to file the
22 transcript, an appendix, and certifications in violation of 9th
23 Cir. BAP R. 8009-1, 8015(a)-1, 8018(b)-1. When they finally
24 filed their excerpts of record after briefing was complete, they
25 included ten documents which were not included in their
26 designation of the record or Pendragon's counter designation.
27 These documents are listed in Pendragon's motion to dismiss and
28 will not be repeated here. They mostly relate to Debtors'

1 motion to compel abandonment of the Marion Property and
2 objections to the amount of their homestead exemption. Debtors
3 and their counsel concede to striking these documents and,
4 therefore, we do not consider them.

5 The standards for dismissal for non-compliance with
6 procedural rules are set forth in In re Beachport Entertainment.
7 "In determining whether to dismiss summarily an appeal for
8 non-compliance with a procedural rule, the BAP must consider the
9 impact of the sanction, alternative sanctions, and 'the relative
10 culpability of the appellant and his attorney, because dismissal
11 may inappropriately punish the appellant for the neglect of his
12 counsel.'" 396 F.3d at 1087. "The failure to take into
13 consideration 'the impact of the sanction and the alternatives
14 available to achieve assessment of the penalties in conformity
15 with fault' constitutes an abuse of discretion." Id. "Where
16 the procedural violations have been egregious, however, we have
17 not required an explicit discussion of alternative sanctions."
18 Id.

19 Here, although we do not condone Debtors' conduct, we are
20 not persuaded that dismissal is warranted. Debtors' brief did
21 contain citations to the docket and once Debtors' counsel became
22 aware of the defect regarding the filing of the excerpts, it was
23 corrected. Furthermore, Mr. Walters explained that he has
24 corrected internal office procedures which caused the procedural
25 violations. He also explained why he did not timely respond to
26 the September Order regarding the status of the settlement.
27 Although his explanation does not excuse his tardiness, we
28 perceive no bad faith or other egregious motive or conduct as to

1 why the response was untimely. At minimum, in light of these
2 explanations, the procedural violations appear to be more the
3 fault of counsel than Debtors. Finally, despite the fact no
4 transcript has been filed, the record before us is adequate for
5 us to reach the merits of this appeal. In short, we do not find
6 the procedural violations were based on bad faith or so
7 egregious as to warrant dismissal of this appeal.

8 Since Debtors have conceded to the striking of the ten
9 documents which were "inadvertently" included in their excerpts
10 of record, Pendragon will suffer no prejudice. Accordingly, we
11 find it unnecessary to consider any alternative sanctions. In
12 sum, Pendragon's motion to dismiss this appeal is denied, and we
13 now consider the merits.

14 **B. The Merits**

15 Section 522(f)(1)(A) permits a debtor to avoid the lien of
16 a judgment creditor on exempt property. It states in relevant
17 part:

18 Notwithstanding any waiver of exemptions but subject
19 to paragraph (3), the debtor may avoid the fixing of a
20 lien on an interest of the debtor in property to the
21 extent that such lien impairs an exemption to which
22 the debtor would have been entitled under subsection
(b) of this section, if such lien is--

(A) a judicial lien

23 "[A] debtor may avoid a lien if three conditions are met:

24 (1) there was a fixing of a lien on an interest of the debtor in
25 property; (2) such lien impairs an exemption to which the debtor
26 would have been entitled; and (3) such lien is a judicial lien."

27 Culver, LLC v. Chiu (In re Chiu), 304 F.3d 905, 908 (9th Cir.

28 2002). This appeal presents issues involving the first element;

1 i.e., whether either of the Debtors had an interest in the
2 Marion Property at the time Pendragon recorded its abstract of
3 judgment and, if so, whether Pendragon's lien "fixed" to that
4 interest within the meaning of § 522(f)(1).

5 **1. Debtors' Interest in the Marion Property**

6 Whether a debtor ever possessed an interest to which the
7 lien fixed, before it fixed, is a question of state law. Nelson
8 v. Barnes (In re Barnes), 198 B.R. 779, 782 (9th Cir. BAP 1996)
9 (citing Farrey v. Sanderfoot, 500 U.S. 291, 299 (1991)). Here,
10 California law determines whether Weilert and Montremare had
11 interests in the Marion Property before Pendragon's lien
12 "fixed."

13 We first consider Weilert's property interest. The
14 bankruptcy court found that his interest in the Marion Property
15 terminated in 2008 when he conveyed the property to the Madonna
16 Trust. The bankruptcy court's determination was a conclusion of
17 law which is subject to the de novo standard of review, under
18 which we determine the issue independently of the bankruptcy
19 court's determination. In re Belice, 461 B.R. at 572.

20 Although the Marion Property became part of the Madonna
21 Trust by way of the deed transfer, the mere transfer of property
22 into a family trust will not transmute property unless there is
23 a writing that unambiguously states Weilert was making a change
24 in character or ownership of the property. In re Marriage of
25 Starkman, 129 Cal.App.4th 659, 664 (Cal. Ct. App. 2005)
26 (transfer of separate property stock into a family trust did not
27 transmute the property into community property because the
28 writing did not unambiguously state it was making a change in

1 character or ownership of the property). Therefore, only a
2 valid transmutation would effectively divest him of any interest
3 in the Marion Property.

4 In California, a spouse may transmute separate property to
5 separate property of the other spouse by agreement or transfer.
6 Cal. Fam. Code § 850(c). A transmutation is "an interspousal
7 property transaction or agreement that works a change in the
8 character of the property." In re Marriage of Haines,
9 33 Cal.App.4th 277, 293 (Cal. Ct. App. 1995). "A transmutation
10 of real property is not valid unless made in writing by an
11 express declaration that is made, joined in, consented to, or
12 accepted by the spouse whose interest in the property is
13 adversely affected." Cal. Fam. Code § 852(a). Neither spouse
14 owns an interest in the separate property of the other. Cal.
15 Fam. Code § 752.

16 Whether a writing is a valid transmutation is subject to
17 de novo review. In re Marriage of Lafkas, 237 Cal.App.4th 921,
18 932 (2015). The record shows that Weilert transmuted the Marion
19 Property from his sole and separate property to Montremare's
20 sole and separate property in 2008 through the express terms of
21 the grant deed conveying the property to her as trustee of the
22 Madonna Trust: "Grantor consents and agrees that the property
23 described on Exhibit A shall be, and is hereby, transmuted into
24 the separate property of Genevieve M. de Montremare." The grant
25 deed, signed by Weilert, meets the statutory requirement of a
26 writing that was "made, joined in, consented to, or accepted by
27 the spouse whose interest in the property is adversely
28 affected." Cal. Fam. Code § 852(a). Accordingly, Weilert's

1 legal interest in the Marion Property was extinguished in 2008
2 by a valid transmutation by virtue of the language in the grant
3 deed. Therefore, the bankruptcy court correctly found that
4 § 522(f)(1) was not applicable as to Weilert.

5 We next consider Montremare's interest in the Marion
6 Property. Again, there is no dispute that Montremare had, at
7 minimum, a beneficial interest in the Marion Property. Indeed,
8 she held various legal interests in the Marion Property. See
9 In re Moffat, 107 B.R. 255, 259 (Bankr. C.D. Cal. 1989) (noting
10 while title to the dwelling was in the living trust, debtor held
11 "various legal interests" in the subject dwelling as a trustor
12 and beneficiary of the living trust which became property of his
13 estate).

14 As trustor, during her lifetime, Montremare retained all
15 the powers of the trust, including the right to amend or revoke
16 the trust in whole or in part thereby giving her a vested,
17 albeit contingent, reversionary interest in the Marion Property.
18 That reversionary interest made her eligible to claim a
19 homestead exemption under California law – a proposition which
20 Pendragon does not dispute. See Fisch, Spiegler, Ginsbur &
21 Ladner v. Appel, 10 Cal.App.4th 1810, 1813 (1992). The trust
22 terms also show that Montremare retained a life estate in the
23 Marion Property, after which the property was to be held in
24 trust for Debtors' daughter. A life estate is also an interest
25 in real property which gave Montremare the right to claim a
26 homestead exemption despite legal title being held by the
27 Madonna Trust. Id. Finally, as a beneficiary, she held a
28 contingent equitable interest in the Marion Property. Gonsalves

1 v. Hodgson, 38 Cal.2d 91, 98 (1951) (it is a rudimentary
2 principle of trust law that the creation of a trust divides
3 title—placing legal title in the trustee, and equitable title in
4 the beneficiaries). Montremare acquired these various legal
5 interests in 2008, prior to Pendragon’s recording its abstract
6 of judgment.

7 **2. Legal title in the Madonna Trust did not defeat**
8 **Montremare’s lien avoidance rights.**

9 The bankruptcy court found that Debtors could not avoid
10 Pendragon’s judicial lien because the Madonna Trust held title
11 to the property. In reaching this conclusion, the bankruptcy
12 court followed the reasoning in Bogetti which, in turn, cited
13 Estate of Willey, 128 Cal. 1, 9-10 (1900), for the proposition
14 that until a trust is revoked, it or its trustee “owns” the
15 trust res. The Bogetti court held that because the revocable
16 trust “owns” the title to its property, “the debtors may not
17 utilize section 522(f)(1)(A) to avoid a judicial lien that
18 encumbers property owned by another.”

19 The bankruptcy court’s reliance on Bogetti to defeat
20 Montremare’s lien avoidance rights is misplaced for several
21 reasons. First, lien avoidance under § 522(f)(1) does not refer
22 to “ownership” or “legal title,” but speaks to the debtor’s
23 “interest” in the property. That interest is not limited to
24 ownership or legal title. Indeed, Montremare had several legal
25 interests in the Marion Property as discussed above.

26 Second, in California, a trust is not a separate entity and
27 does not itself hold title to any property. Portico Mgt. Group,
28 LLC v. Harrison, 202 Cal. App.4th 464, 473 (Cal. Ct. App. 2011);

1 see also Nielsen v. Field (In re Nielsen), 526 B.R. 351, 357-58
2 (Bank. D. Haw. 2015) (noting that Bogetti rests on the view that
3 a trust is a separate entity that owns the property contributed
4 to it - this view is incorrect). Rather, “[l]egal title to
5 property owned by a trust is held by the trustee. . . . ‘A
6 . . . trust . . . is simply a collection of assets and
7 liabilities.’” Portico, 202 Cal.App.4th at 473. Here,
8 Montremare held legal title to the Marion Property in her
9 capacity as trustee.

10 Next, the record shows that (1) Montremare is the trustor,
11 trustee and present beneficiary of the Madonna Trust;
12 (2) Montremare, as trustee, has the power to revoke the trust
13 during her lifetime; and (3) Montremare retained full control
14 over and benefit of the Marion Property in the same manner as if
15 the trust did not exist. These attributes collectively show
16 that the Madonna Trust is a self-settled revocable inter vivos
17 trust. For most purposes, “[t]here is no distinction in
18 California law between property owned by the revocable trust and
19 property owned by the settlor of such a revocable trust during
20 the lifetime of the settlor.” Carolina Cas. Ins. Co. v. L.M.
21 Ross Law Group, LLP, 184 Cal.App.4th 196, 208 (2010). In
22 California, “a revocable inter vivos trust is recognized as
23 simply a probate avoidance device’ Property transferred
24 to, or held in, a revocable inter vivos trust is nonetheless
25 deemed the property of the settlor.” Id. (citing Zanelli v.
26 McGrath, 166 Cal.App.4th 615, 633 (2008), and Cal. Prob. Code
27 § 18200 (“If the settlor retains the power to revoke the trust
28 in whole or in part, the trust property is subject to the claims

1 of creditors of the settlor to the extent of the power of
2 revocation during the lifetime of the settlor.").

3 Pendragon asserts that these principles do not apply
4 because Weilert is the sole settlor of the Madonna Trust since
5 he contributed the Marion Property - his sole and separate
6 property - to the trust. We disagree. The definition of a
7 settlor is broad and means both the creator of, and donor to the
8 trust. See Cal. Probate Code § 263 (a settlor is creator of an
9 interest under a trust); Cal. Probate Code § 15200 (describing
10 numerous methods of creating a trust); and Black's Law
11 Dictionary (defining a settlor as "one who sets up a trust.
12 Also termed creator; donor; trustor; grantor; founder.").

13 Montremare falls within the broad definition of a
14 "settlor." She created the Madonna Trust, was the only party to
15 execute the Madonna Trust, and was the trustor. Through the
16 transmutation of the Marion Property to her sole and separate
17 property, she became the owner of the property and held it as
18 trustee. See Cal. Probate Code § 15200(a) ("A declaration by
19 the owner of property that the owner holds the property as
20 trustee" and (d) "An exercise of a power of appointment to
21 another person as trustee."). In addition, as highlighted by
22 Debtors at oral argument, the Madonna Trust held other property
23 which Montremare had contributed directly herself. No case law
24 or statute supports an argument that she would be a settlor as
25 to some properties only. In short, she is a settlor of the
26 trust.

27 Finally, as noted above, under California law, although the
28 legal title to the Marion Property was held by Montremare as

1 trustee, her various interests in the property entitled her to
2 claim a homestead exemption. As the Neilsen bankruptcy court
3 noted: "the text of the Bankruptcy Code does not support the
4 Bogetti court's conclusion that a debtor can exempt property
5 held by revocable living trusts but not avoid liens that impair
6 that exemption." Neilsen, 526 B.R. at 357-58.

7 For all these reasons, the bankruptcy court erred by
8 concluding that Bogetti provided a basis for cutting off
9 Montremare's lien avoidance rights under § 522(f)(1).

10 **3. The "fixing" of Pendragon's lien against Montremare's**
11 **interest**

12 Our final inquiry is whether Pendragon's abstract of
13 judgment "fixed" a liability on Montremare's various interests
14 in the Marion Property. The bankruptcy court found that
15 Pendragon's lien did not attach to Montremare's "beneficial
16 interest" based on California's statutory scheme relating to the
17 attachment of judgment liens. This was error.

18 First, as discussed above, Montremare held other legal
19 interests in the Marion Property beyond that of a beneficiary.
20 Cal. Code Civ. Proc. § 697.340(a) does not carve out any special
21 procedure for interests other than beneficial interests.
22 Second, the special procedure to enforce a money judgment
23 against a beneficiary's interest in a trust is not applicable
24 here when Montremare is a settlor and has retained the power to
25 revoke the Madonna Trust. As noted above, there is no
26 distinction in California law between property owned by the
27 revocable trust and property owned by the settlor of such a
28 revocable trust during the lifetime of the settlor. Therefore,

1 Montremare's interest in the Marion Property was subject to the
2 claims of her creditors. See Cal. Probate Code § 18200 ("If the
3 settlor retains the power to revoke the trust in whole or in
4 part, the trust property is subject to the claims of creditors
5 of the settlor to the extent of the power of revocation during
6 the lifetime of the settlor.").

7 Accordingly, Montremare's interest in the Marion Property
8 was subject to Pendragon's abstract of judgment at the time it
9 was recorded, which recording created a judicial lien on the
10 property. Montremare was thus entitled to seek avoidance of
11 that lien to the extent it impaired her homestead exemption.⁹

12 **VI. CONCLUSION**

13 For the reasons discussed above, we VACATE and REMAND.
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26 ⁹ The validity or amount of her claim of exemption is not
27 before us in this appeal nor are other issues raised by Pendragon
28 in opposition to the lien avoidance which were never addressed by
the bankruptcy court. Thus, remand is required for the
bankruptcy court to address those issues.