

NOT FOR PUBLICATION

MAR 10 2017

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. NV-16-1080-JuKuL
)
 GLOYD GREEN and GAIL HOLLAND,) Bk. No. 2:14-bk-15981-ABL
)
 Debtors.)
)
 GLOYD GREEN; GAIL HOLLAND,)
)
 Appellants,)
)
 v.) M E M O R A N D U M *
)
 YVETTE WEINSTEIN, Chapter 7)
 Trustee; OSCAR BRANNON HOWARD,)
 III; TRUMAN HOLT, Trustee for)
 the Howard Family Trust Dated)
 August 21, 1998,)
)
 Appellee.)

Argued and Submitted on February 24, 2017
at Las Vegas, Nevada

Filed - March 10, 2017

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

Honorable August B. Landis, Bankruptcy Judge, Presiding

Appearances: Christopher P. Burke argued for appellants Gloyd
 Green and Gail Holland; Jerimy L. Kirschner
 argued for appellee Truman Holt, Trustee for the
 Howard Family Trust Dated August 21, 1998.

Before: JURY, KURTZ, and LAFFERTY, 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 8013-1.

1 Debtor-appellants, Gloyd Green (Green) and Gail Holland
2 (Holland) (collectively, Debtors), filed a chapter 11¹
3 bankruptcy case which was converted to chapter 7. In
4 schedule C, Debtors claimed a homestead exemption in real
5 property located on Loma Portal, Las Vegas, Nevada (Loma
6 Property).

7 Creditor-appellee, Truman Holt (Holt), Trustee for The
8 Howard Family Trust dated August 21, 1998 (THFT), and Oscar
9 Brannon Howard, III (Howard)² objected to Debtors' homestead
10 exemption on the ground that Green had embezzled thousands of
11 dollars from THFT while acting as trustee and used part or all
12 of the funds to purchase the Loma Property. As a result, Holt
13 asserted that under Maki v. Chong, 75 P.3d 376 (Nev. 2003),
14 Debtors were not protected by the homestead exemption.

15 After an evidentiary hearing, the bankruptcy court orally
16 issued its findings of fact and conclusions of law, sustaining
17 the objection and disallowing Debtors' homestead in its
18 entirety. This appeal followed. For the reasons set forth
19 below, we AFFIRM.

20 I. FACTS

21 A. Prepetition Events

22 Oscar B. Howard, Jr. and Betty J. Howard created THFT and
23 designated themselves as the initial co-trustees. Green, a
24

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

28 ² Howard has not participated in this appeal.

1 family friend, was named as a successor trustee upon Oscar and
2 Betty's death or other events not relevant here. Green was also
3 a beneficiary of the trust. Betty died on February 25, 2005.
4 Oscar died on November 5, 2005, survived by his only son. After
5 Oscar's death, Green took over as successor trustee. According
6 to Green, the trust agreement authorized him, among other
7 things, to loan or advance his own funds for any trust purposes.

8 **1. The Probate Action**

9 In 2008, suspecting possible misappropriation of trust
10 assets, Holt, Betty's brother and a trust beneficiary, and
11 Howard, also a beneficiary, filed a petition in the probate
12 court for the Eighth Judicial District of Clark County, Nevada.
13 They requested the probate court to assume jurisdiction over
14 THFT, issue an order confirming Green as successor trustee, and
15 compel Green to provide an accounting of THFT's assets and
16 liabilities.

17 On October 17, 2008, the probate court assumed jurisdiction
18 over THFT, confirmed Green as successor trustee, and ordered him
19 to (1) prepare an inventory of the trust's assets as of
20 November 5, 2005 - the date of Oscar's death - including current
21 values for those assets; (2) provide tax returns filed during
22 that period for the trust or the trustor's estates; (3) pay
23 \$2,650 in attorney's fees and costs to Holt's attorney;
24 (4) provide an accounting; and (5) provide a full copy of the
25 complete trust agreement together with all amendments to all
26 beneficiaries of the trust (2008 Order).

27 Green did not appear at the hearing on the matter, but was
28 personally served with the 2008 Order. He failed to comply. He

1 did not pay the attorney's fees and costs or provide tax returns
2 for the trust. He provided a copy of the trust agreement which
3 showed the names of the beneficiaries blacked out and which was
4 missing the page setting forth the distribution after the
5 trustors' deaths. He also provided a handwritten inventory of
6 trust assets and values (2008 List). Holt complained that there
7 were significant omissions and misstatements in the 2008 List.
8 The list showed zero income from the date of Oscar's death on
9 November 5, 2005 through October 31, 2008. Expenses were simply
10 listed as \$6,274 for property taxes and about \$1100 for
11 utilities. Despite repeated requests, Green failed to produce a
12 more detailed inventory or sufficiently answer questions about
13 trust assets.

14 In March 2009, Holt petitioned the probate court for
15 Green's removal as the successor trustee and for appointment of
16 an interim successor trustee. On April 8, 2009, the probate
17 court entered an order removing Green. The probate court found
18 that Green failed to comply with the 2008 Order – he did not
19 fully account for trust assets, disclose income received by the
20 trust or himself while he was trustee, provide proper tax
21 documents, and pay court ordered costs. The probate court
22 appointed Holt as the successor trustee. The order also
23 prohibited Green from making or completing any transactions
24 involving the trust and compelled him to immediately comply with
25 the 2008 Order by turning over to Holt, within 15 days of the
26 entry of the order, complete copies of the trust agreement and
27 all amendments, and copies of all records of the trust during
28 the term of his administration, including tax returns, check

1 registers, cancelled checks, information regarding trust
2 investments, copies of all deeds, mortgages, deeds of trust,
3 promissory notes and similar documents related to trust
4 activities.

5 On June 8, 2009, Green provided a new accounting of the
6 trust's assets and liabilities to Holt's attorney (2009 List).
7 The 2009 List was different from the 2008 List and stated that
8 THFT held \$612,000 in assets, almost a two-fold increase from
9 his previous accounting.

10 In early 2012, Holt, on behalf of the trust, filed a notice
11 of taking Green's deposition on May 3, 2012. The probate court
12 also issued a "Citation to Appear and Show Cause" related to
13 Green's failure to account for THFT assets or comply with its
14 previous orders. Although served, Green did not appear at the
15 May deposition. Green was served with a second "Citation to
16 Appear and to Show Cause" for a hearing scheduled on
17 September 21, 2012. Again, Green did not appear.

18 On November 28, 2012, the probate court issued an order
19 granting Holt's motion for enforcement of the forfeiture
20 provision in the trust. That clause provided that a violation
21 of the terms of the trust resulted in a complete forfeiture of
22 property designated to be received by a violating beneficiary
23 under the terms of the trust. The probate court found that
24 Green had failed to provide an accounting and otherwise adhere
25 to the provisions of the trust. Accordingly, the court found
26 that enforcement of the forfeiture clause was proper under the
27 circumstances and thus required Green to return to Holt any
28 prior and current trust property taken by him.

1 In the forfeiture order, the court made findings that
2 Green had violated the terms of the trust and had failed to
3 carry out his duties as trustee. The probate court found that
4 Green "intentionally obscure[d] the true identity of the
5 beneficiaries by 'blacking out' their names, and then making
6 distributions from the [thrust in accordance which [sic] his
7 desires, rather than the desire of the creators." Green did not
8 appeal the forfeiture order.

9 **2. The Civil Action**

10 In August 2012, Holt, in his individual capacity and as
11 successor trustee, filed a civil action against Debtors and
12 their revocable trust alleging ten causes of action, including
13 conversion, embezzlement, breach of fiduciary duty, civil theft
14 and fraud, both actual and constructive (Civil Action). On
15 September 13, 2012, Holt filed a first amended complaint.
16 Debtors failed to answer the complaint. On January 31, 2013,
17 the civil court entered a default judgment against Debtors and
18 their revocable trust.

19 In the Civil Action, Holt's expert, Ms. Klein, conducted a
20 forensic accounting that traced hundreds of thousands of dollars
21 taken by Green from THFT over several years and assets that
22 should have been returned pursuant to previous court orders. On
23 May 22 and August 28, 2014, the civil court held a prove-up
24 hearing regarding THFT's damages. Green appeared in the Civil
25 Action for the first time at the prove-up hearing and submitted
26 a statement.

27 Since he appeared late at the first hearing, the civil
28 court agreed to continue the hearing to allow Green to review

1 the testimony of Ms. Klein and prepare to cross-examine her. At
2 the continued hearing held on August 28, 2014, Green questioned
3 Ms. Klein about her investigation. Ms. Klein concluded that at
4 least \$638,427.07 in funds or assets were either stolen from
5 THFT or lost by Debtors. Ms. Klein testified that there could
6 be additional undiscovered assets and losses, but Green's
7 refusal to cooperate in the investigation made finding
8 additional assets problematic.

9 At the hearing, the court found that Green had stolen
10 \$638,427.07 from the trust over a period of years. The judge
11 indicated his intent to enter a default judgment against Debtors
12 for that amount and a like amount for punitive damages, along
13 with equitable relief in the form of a constructive trust and
14 equitable liens. Holt's counsel later submitted a proposed
15 judgment which the judge signed.

16 In the judgment, the civil court found Ms. Klein qualified
17 as an expert forensic accounting investigator and found her
18 testimony was both credible and supported by the summaries and
19 voluminous financial records admitted into evidence. The court
20 found that Green was not credible and that his 2008 and 2009
21 accountings were intentionally and materially misleading, with
22 irreconcilable differences between them and the actual assets of
23 THFT. The civil court also adopted the findings of the probate
24 court – that Green had provided an altered trust document with
25 the names of THFT beneficiaries blacked out in an apparent
26 attempt to call into question the determination of the rights of
27 the other beneficiaries. The civil court further found that the
28 transfer and commingling of trust property with Debtors'

1 personal property resulted in the complete loss of identity of
2 any of Debtors' property. Finally, the court found that Debtors
3 purchased the Loma Property with cash that had been at some
4 point converted from THFT assets, that the purchase price of the
5 Loma Property was less than the total amount stolen from THFT,
6 and that Debtors could not produce evidence showing the Loma
7 Property was purchased with their personal funds. The court
8 ordered the Loma Property held in constructive trust for THFT
9 and granted Holt and Howard equitable liens on all Debtors' real
10 and personal property. The civil court awarded compensatory
11 damages for \$638,427.07 and punitive damages in the same amount.
12 Although the judgment was signed by the civil court judge, it
13 was not entered on the state court docket due to Debtors'
14 bankruptcy filing.

15 **B. Postpetition Events**

16 Debtors filed a chapter 11 case on September 3, 2014.
17 Later, the bankruptcy court converted the case to chapter 7.³
18 Debtors' schedules showed that they owned free and clear all
19 three of their real properties valued at \$455,000 and that they
20 had nearly \$1 million in their retirement accounts. They had no
21 secured creditors or unsecured priority creditors. Debtors
22 scheduled Holt and THFT as having an unsecured claim of
23 \$1.3 million. In schedule B, Debtors listed the Loma Property
24 with a value of \$265,000, and in schedule C they claimed an

25
26 ³ On September 30, 2015, the bankruptcy court converted
27 Debtors' case to chapter 7 on the grounds that their bankruptcy
28 filing was not made in good faith. Debtors appealed the
conversion order to this Panel. On November 9, 2016, the Panel
issued a memorandum decision affirming the conversion order.

1 exemption in the property under Nev. Rev. Stat. (NRS)
2 21.090(1)(1) and 115.050 in the amount of \$265,000.⁴

3 **1. The Objection To Debtors' Homestead Exemption**

4 In March 2015, Holt filed an objection to Debtors' list of
5 property claimed as exempt, including their homestead exemption
6 in the Loma Property.⁵ Holt argued that the Loma Property was
7 purchased with funds or assets stolen from THFT accounts during
8 Green's time as trustee. Holt further asserted that at the
9 January 8, 2015 § 341 meeting, his attorney questioned Debtors
10 about the eventual disposition of two specific sets of assets:
11 (1) HSBC and General Electric (GE) bonds held in a THFT account
12 with Zions Direct, Account #5994 (ZD5994) and (2) a \$50,000
13 Certificate of Deposit (CD) purchased by Green from Nevada State
14 Bank, Account #7177 (NSB7177), after Green was notified that he
15 was being removed as trustee.

16 The ZD5944 account was held as "Gloyd G. Green TEE for the
17 Howard Family Trust DTD 8/21/1998." A mixture of cash and bonds
18 in this account amounted to \$304,962.49. The GE bonds were
19 worth \$45,323.60 and the HSBC bonds were worth \$54,186.63.
20 Green testified that the GE and HSBC bonds were transferred into
21 his own personal account and used to partially pay for the
22 purchase of the Loma Property.

23 The NSB7117 account was held as "Gloyd G Green The Howard
24 _____

25 ⁴ In January 2012, Debtors purchased the Loma Property for
\$230,000. Green homesteaded the property on June 20, 2012.

26 ⁵ Holt also objected to Debtors' exemption in various
27 retirement accounts. On March 10, 2016, the bankruptcy court
28 overruled that objection and allowed Debtors' exemption in the
retirement accounts in the amount of \$960,349.04.

1 Family Trust." On March 9, 2009, approximately sixty-five days
2 after he received notice he was being removed as trustee, Green
3 wrote himself a \$50,000 check "for CD" from NSB7177. Green
4 testified that the funds from the CD were later used to purchase
5 the Loma Property.

6 According to Holt, Green's testimony corroborated that
7 \$152,300 came from funds held in THFT accounts and was used to
8 pay for the purchase of the Loma Property. Attached to the
9 opposition were the bank statements showing the transfers of
10 amounts associated with the GE and HSBC bonds and CD and a copy
11 of the \$50,000 check in the name of Green which was written on
12 the NSB7117 account.

13 In April 2015, Debtors responded to Holt's objection.
14 Debtors argued that under Nevada law they were allowed to trace
15 the proceeds from the sale of their prior residences for
16 homestead exemption purposes under the holding in Christensen v.
17 Pack (In re Christensen), 149 P.3d 40 (2006). In that regard,
18 Green and Holland sold two houses - one in 1999 and another in
19 2000, and they also sold a vacant lot. According to Debtors,
20 proceeds from those sales were used to purchase the Loma
21 Property. Debtors also argued that no fraud had been proven and
22 thus their home was protected. Alternatively, Debtors argued
23 that an evidentiary hearing was necessary.

24 Green submitted a declaration showing that Debtors
25 individually owned three properties that were sold and that the
26 proceeds from the sale of those properties were used to purchase
27 the Loma Property.

28 In a subsequent declaration, Green declared that he took

1 the funds from THFT accounts because he was repaying himself for
2 a previous loan to the trust. Green stated that in January 2006
3 he loaned his own money to THFT in the approximate sum of
4 \$163,000 to pay off a line of credit on Oscar's home located on
5 Race Street in Las Vegas. According to Green, over the next few
6 years, he reimbursed himself the \$163,000 that he loaned to the
7 trust.

8 In reply, Holt argued that § 522(o) prevented Debtors from
9 claiming a homestead exemption in the Loma Property to the
10 extent Debtors acquired the homestead with nonexempt property in
11 the previous 10 years "with the intent to hinder, delay, or
12 defraud a creditor.'" Holt reiterated that Debtors testified
13 under oath at their § 341 meeting that the funds they used to
14 purchase the Loma Property could be directly traced to funds
15 previously held in THFT accounts. Finally, Holt argued that
16 under Maki v. Chong the homestead exemption could not be taken
17 when the proceeds used to purchase the Loma Property could be
18 traced directly to funds obtained through Green's fraud or
19 similar tortious conduct.

20 **2. The Evidentiary Hearing**

21 The bankruptcy court held an evidentiary hearing on July 2
22 and July 15, 2015.⁶ Green testified that he transferred more
23

24 ⁶ After the evidentiary hearing was set, Debtors amended
25 their schedule C twice. With respect to the Loma Property, the
26 amended schedule C showed that it was held in a revocable trust.
27 Other amendments are not relevant to this matter. On June 2,
28 2015, Holt filed a second objection to Debtors' claim of
exemptions, including the homestead exemption, essentially
reiterating points made in the first objection. Debtors filed a
(continued...)

1 than \$360,000 from THFT accounts or money belonging to THFT into
2 Debtors' personal accounts. He also testified that he loaned
3 the trust approximately \$163,000 in 2006, which he used to pay
4 off the line of credit on Oscar's home. He admitted that there
5 was no documentation regarding the loan. Green also
6 acknowledged that the accounting he provided in 2008 or 2009 to
7 the probate court did not mention a loan from him to the trust
8 for \$163,000 nor did he ever inform the beneficiaries that he
9 had made the loan.

10 Green further testified that he used funds from liquidating
11 assets of the trust (the GE and HSBC bonds and \$50,000 CD) to
12 pay part of the purchase price of the Loma Property. When asked
13 why those assets did not belong to THFT, Green testified that
14 they were partial reimbursement for the loan he had made to the
15 trust in 2006.

16 **3. Post Trial Briefs**

17 The bankruptcy court authorized the parties to file post
18 trial briefs. In his brief, Holt argued that he had traced
19 THFT's funds through the bank statements and Green's testimony
20 to the purchase of the Loma Property. Holt further asserted
21 that Green did not have the right to use the funds, and even if
22 he did have the right at some point, the forfeiture order
23 required him to return any and all assets taken from THFT. Holt
24 asserted that Green's taking of the funds from THFT amounted to

26 ⁶(...continued)

27 response to the second objection. The second objection was not
28 considered by the bankruptcy court during this proceeding and did
not go on the court's calendar.

1 fraud, conversion, embezzlement and defalcation.

2 Holt also maintained that Green's allegation of a loan to
3 the trust was unsupported. Holt pointed out that Green made
4 this claim for the first time a decade after he became trustee
5 and that the loan was not listed in either the 2008 List or the
6 2009 List. Moreover, he never mentioned the loan in the probate
7 court. Holt further asserted that Green had transferred more
8 than the \$165,000 from trust funds into Debtors' personal
9 accounts. Thus, even if the loan existed, Debtors took more
10 than they were entitled to receive. Finally, Holt contended
11 that Green was obligated to disclose the existence of the loan
12 in an accounting to the probate court and also would have been
13 required to disclose the existence of the loan in annual
14 accountings to the beneficiaries, but he did not do so.

15 According to Holt, Debtors should have disclosed the loan
16 as a defense in the Civil Action or disclosed the details of the
17 loan in the probate matter. Since they did not do so, the
18 defense was waived and they were precluded from asserting it in
19 the bankruptcy court.

20 Finally, Holt noted that Green could not remember where
21 tens of thousands of dollars worth of CDs purchased with trust
22 funds went to, or even how many he had purchased. Accordingly,
23 Holt maintained that Debtors' claim of a loan was simply
24 untenable by operation of law and also implausible under a
25 review of the facts.

26 In Debtors' post trial brief, they argued that they sold
27 their separate homesteads, loaned part of that money to THFT
28 several years later, and then after they reimbursed themselves,

1 used the money to purchase the Loma Property. According to
2 Debtors, the "unrebuked evidence" proved these facts and showed
3 that Green paid bills and beneficiaries from the trust account
4 and his own account as permitted by the trust agreement
5 throughout his term as trustee. Debtors further asserted that
6 Holt did not meet his burden of proof on the exemption. Debtors
7 maintained that they "whittled away" at the \$360,000 number
8 which Green allegedly transferred from THFT accounts into
9 Debtors' personal accounts through Green's testimony that showed
10 the monies were used for the trust.

11 Finally, Debtors argued that the facts in Maki were
12 distinguishable. First, Maki involved a default judgment rather
13 than just a default as in this case. Second, there was a lien
14 against the homesteaded property, while here there were no liens
15 ever filed against Debtors' property.

16 In sum, Debtors argued that neither Holt nor Howard ever
17 proved that THFT's money was used to purchase the Loma Property.
18 Since Green did not obtain the funds to purchase the Loma
19 Property by fraud, as he only reimbursed himself the money he
20 loaned to THFT, Debtors maintained that their home was exempt.

21 **4. The Bankruptcy Court's Ruling**

22 On March 10, 2016, the bankruptcy court issued its findings
23 of fact and conclusions of law sustaining Holt's objection to
24 Debtors' homestead exemption. The bankruptcy court found that
25 based on Green's testimony, he had transferred more than
26 \$360,000 from accounts belonging to THFT into Debtors' personal
27 bank accounts. The court also found that Green testified that
28 he was reimbursing himself for undocumented loans which he had

1 made to the trust. Finally, the court noted that Green
2 testified that he cashed in or sold outright assets of the
3 trust, including a \$50,000 CD and \$102,300 in GE and HSBC bonds,
4 for a total of \$152,300, and used those funds to pay a portion
5 of the purchase price for the Loma Property.

6 Based on these facts and the entire record, the bankruptcy
7 court concluded that as a matter of law, under Maki equitable
8 considerations would not permit the homestead exemption to
9 protect Debtors who bought their real property with THFT funds.
10 The court stated that Nevada follows the public policy that an
11 individual using fraudulently obtained funds to purchase real
12 property should not be protected by the homestead exemption
13 because the exemption's purpose was to protect individuals who
14 claimed their homestead in good faith. The court noted that
15 Green acknowledged that at least \$152,300 of funds derived from
16 the sale or liquidation of trust assets were used to purchase
17 the Loma Property.

18 In addition, the bankruptcy court opined that even if
19 Nevada law did not require the denial of Debtors' homestead in
20 its entirety, Nevada law would limit the exemption to the amount
21 of Debtor's equity in the property. Since Green testified that
22 he bought the Loma Property for \$230,000 of which \$152,300 was
23 derived from the liquidation of trust assets, the trust assets
24 amounted to 66.21 percent of the purchase price. Therefore,
25 according to the court, if Debtors were entitled to claim a
26 homestead exemption, which they were not, the exemption would be
27 limited to \$89,525.91.

28 Next, the court noted that § 522(o) and (p) operated to

1 limit the value of Debtors' homestead exemption under specific
2 circumstances. The court found that § 522(o)(4) was not
3 applicable since the statute was limited to scenarios where a
4 debtor disposes of his or her non-exempt assets and then
5 increases the exempt assets with the intent to hinder, delay or
6 defraud a creditor. The court reasoned that since \$152,300 of
7 the purchase price for the Loma Property was a trust asset,
8 those funds were never Debtors' non-exempt property and thus
9 § 522(o) was inapplicable.

10 In applying § 522(p), the court found that the Loma
11 Property was purchased within 1,215 days of the bankruptcy and,
12 therefore, under § 522(p)(1)(D), the homestead exemption would
13 be capped at \$155,675. However, the court found that since
14 trust assets were used to purchase the Loma Property, Debtors'
15 homestead exemption would still be limited to \$89,523.91 based
16 upon their equity in the property.

17 On March 14, 2016, the bankruptcy court entered an order
18 consistent with its ruling and disallowed Debtors' homestead
19 exemption in its entirety. Debtors filed a timely appeal from
20 that order.

21 **II. JURISDICTION**

22 The bankruptcy court had jurisdiction over this proceeding
23 under 28 U.S.C. §§ 1334 and 157(b)(2)(B). We have jurisdiction
24 under 28 U.S.C. § 158.

25 **III. ISSUE**

26 Did the bankruptcy court err by disallowing Debtors'
27 homestead exemption in its entirety?
28

1 **IV. STANDARDS OF REVIEW**

2 We review questions regarding a debtor's right to claim an
3 exemption de novo. Kelley v. Locke (In re Kelley), 300 B.R. 11,
4 16 (9th Cir. BAP 2003).

5 The bankruptcy court's factual findings, for purposes of
6 determining the validity of a claimed exemption, are reviewed
7 under the clearly erroneous standard. Id. Factual findings are
8 clearly erroneous if they are illogical, implausible or without
9 support in the record. Ret. v. Samson (In re Ret.), 606 F.3d
10 1189, 1196 (9th Cir. 2010).

11 "Clearly erroneous review is significantly deferential,
12 requiring that the appellate court accept the [trial] court's
13 findings absent a definite and firm conviction that a mistake
14 has been made." United States v. Syrax, 235 F.3d 422, 427 (9th
15 Cir. 2000). This deference is also given to inferences drawn by
16 the trial court. Beech Aircraft Corp. v. United States, 51 F.3d
17 834, 838 (9th Cir. 1995). The bankruptcy court's choice among
18 multiple plausible views of the evidence cannot be clear error.
19 See Anderson v. City of Bessemer City, 470 U.S. 564, 573-74
20 (1985) ("Where there are two permissible views of the evidence,
21 the factfinder's choice between them cannot be clearly
22 erroneous.").

23 We may affirm the bankruptcy court's orders on any basis
24 supported by the record. See ASARCO, LLC v. Union Pac. R. Co.,
25 765 F.3d 999, 1004 (9th Cir. 2014).

26 **V. DISCUSSION**

27 **A. Exemptions: Burdens and Standard of Proof**

28 The bankruptcy code authorizes a debtor to exempt certain

1 assets. § 522(b). A claimed exemption is “presumptively
2 valid.” Carter v. Anderson (In re Carter), 182 F.3d 1027, 1029
3 n.3 (9th Cir. 1999). Once an exemption has been claimed, the
4 objecting party has the burden of proving that an exemption is
5 not properly claimed. Id. (quoting Rule 4003(c)). The
6 objecting party thus has the initial burden of production and
7 the burden of persuasion. Id. The Ninth Circuit further
8 explained:

9 The objecting party must produce evidence to rebut the
10 presumptively valid exemption. If the objecting party
11 can produce evidence to rebut the exemption, the
12 burden of production then shifts to the debtor to come
13 forward with unequivocal evidence to demonstrate that
14 the exemption is proper. The burden of persuasion,
15 however, always remains with the objecting party.

16 Id.

17 The standard of proof is by a preponderance of the
18 evidence. See Leavitt v. Alexander (In re Alexander), 472 B.R.
19 815, 821 (9th Cir. BAP 2012). “The burden of showing something
20 by a ‘preponderance of the evidence,’ . . . ‘simply requires the
21 trier of fact to believe that the existence of a fact is more
22 probable than its nonexistence before [he] may find in favor of
23 the party who has the burden to persuade the [judge] of the
24 fact’s existence.’” Concrete Pipe & Prods. of Cal., Inc. v.
25 Constr. Laborers Pension Tr. for So. Cal., 508 U.S. 602, 622
26 (1993).

27 **B. Nevada Homestead Exemption: Legal Standards**

28 Nevada has opted out of the federal exemption scheme
provided under § 522(d). See NRS 21.090(3). Therefore, Nevada
law governs substantive issues regarding the allowance or
disallowance of Debtors’ homestead exemption. See Elliott v.

1 Weil (In re Elliott), 523 B.R. 188, 192 (9th Cir. BAP 2014)
2 (bankruptcy court must look to state law and not § 105(a) in
3 determining whether there is a basis to disallow an exemption).

4 Under Nevada law, exemptions are liberally construed in
5 favor of the debtor. In re Christensen, 149 P.3d at 43.
6 Subject to specific exceptions, the Nevada Constitution exempts
7 from a forced sale the homestead that is available to Nevada
8 residents. See Nev. Const. art. 4, § 30. NRS 21.090(1)(1)
9 permits Nevada residents to claim the "homestead as provided for
10 by law" Under NRS 115.020, a homestead is claimed by
11 recording a declaration of homestead at any time before an
12 execution sale of the property. Under NRS 115.010(2), a
13 homestead claimed as exempt from execution "extends only to that
14 amount of equity in the property held by the claimant which does
15 not exceed \$550,000 in value"

16 While the Nevada homestead exemption is liberally construed
17 in favor of the debtor, protection of the homestead is not
18 absolute. In Maki, the Nevada Supreme Court rejected a
19 homestead claim by a judgment debtor who was the sister of a
20 Nevada prison inmate. Maki, 75 P.3 at 390. While her brother
21 was in prison, she misappropriated his state insurance
22 disability settlement funds and his monthly disability benefit
23 checks. She used the monies to purchase a residence and then
24 claimed a Nevada homestead exemption after her brother obtained
25 a fraud judgment against her. In holding that the homestead
26 exemption did not apply under the circumstances before it, the
27 Maki court observed:

28 There is a time-honored principle that states that he

1 who keeps property that he knows belongs to another
2 must restore that property. This idea, manifested in
3 the doctrine of equitable liens, permeates our entire
4 system of justice regarding equity. '[O]ne who has
5 purchased real property with funds of another, under
6 circumstances which ordinarily would entitle such
7 other person to enforce a constructive trust in, or
8 equitable lien against, the property, cannot defeat
9 the right to enforce such trust or lien on the grounds
10 that [the homestead exemption applies].'

11 75 P.3d at 378-79. The court went on to say:

12 'The homestead exemption statute cannot be used as an
13 instrument of fraud and imposition.' Public policy
14 supports our application of an exception to homestead
15 exemptions for victims of fraud or similar tortious
16 conduct. An individual using fraudulently obtained
17 funds to purchase real property should not be
18 protected by the homestead exemption because the
19 exemption's purpose is to provide protection to
20 individuals who file the homestead exemption in good
21 faith. Id.

22 The Maki court concluded:

23 Under equitable lien principles, the homestead
24 exemption is inapplicable when the proceeds used to
25 purchase real property can be traced directly to funds
26 obtained through fraud or similar tortious conduct.
27 Id.

28 In making its decision, the Maki court relied upon Webster
v. Rodrick, 394 P.2d 689 (Wash. 1964). In Webster, a married
couple claimed a homestead exemption. The wife had embezzled
funds from her employer and the funds may have been used to
purchase and improve the couple's residence. The employer
obtained a judgment against the wife and the marital community
based on misappropriation. The employer sufficiently traced the
embezzled funds to the residence to support the imposition of an
equitable lien against the debtors' residence. The Washington
Supreme Court rejected the debtors' claim of a homestead
exemption, concluding that the Washington "homestead exemption

1 statute cannot be used as an instrument of fraud and
2 imposition.” Webster, 394 P.2d at 692.

3 The holding in Henry v. Rizzolo, 2012 WL 4092604 (D. Nev.
4 2012) is also persuasive. Rizzolo, a Nevada debtor faced with
5 execution of a judgment, asserted an exemption in certain
6 annuity contracts under NRS 687B.290.1. That statute included a
7 specific exception for “amounts paid for or as premium on any
8 such annuity with intent to defraud creditors” The
9 federal court interpreting Nevada law concluded that the
10 exception to the annuity contracts exemption required proof of
11 intent to defraud creditors. Id. at *5. A judgment under
12 NRS 112.180(1)(a) had been entered in favor of the executing
13 creditors determining that the same debtor had received a
14 fraudulent transfer of funds owned by her stepson. Applying the
15 statutory exception and “the equitable lien principals set forth
16 in Maki,” the court rejected the claimed exemption of the
17 annuity contracts as there was a sufficient basis to conclude
18 that the contracts had been purchased in whole or in part with
19 funds owned and fraudulently transferred by the judgment
20 debtor’s stepson. Id. at *8. The court also concluded that
21 dollar for dollar tracing was not required for the entire
22 exemption to be precluded. Id. at *7.

23 As was the case in Maki and Webster, in Rizzolo the funds
24 used to acquire the property claimed exempt did not belong to
25 the judgment debtor.

26 **C. Analysis**

27 Debtors contend that the bankruptcy court erred in finding
28 that Holt met his burden of proof for disallowance of their

1 homestead exemption and argue that the holding in Maki does not
2 apply under these circumstances. We are not persuaded.

3 The bankruptcy court considered all of the testimony and
4 documentary evidence presented and then chose between two
5 permissible views of the evidence. "Where there are two
6 permissible views of the evidence, the fact finder's choice
7 between them cannot be clearly erroneous." Anderson, 470 U.S.
8 at 574. The record supports the bankruptcy court's implicit
9 finding of fact that it was more likely than not that the monies
10 transferred from THFT accounts into Debtors' personal account
11 were not based on a loan. Green acknowledged that there were no
12 documents regarding the loan, no security interest for the loan,
13 and that he did not provide for a liability to himself on the
14 2008 or 2009 accounting provided to the probate court. He also
15 testified that he never disclosed the loan to the beneficiaries.
16 Other than his testimony, there was no corroborating evidence
17 that Green actually made any such loan or that it was a valid
18 and existing debt of the trust. As the bankruptcy court found,
19 the loan was "undocumented."⁷ Accordingly, based on the
20 evidence before it, the bankruptcy court could reasonably infer

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22 ⁷ In federal tax cases, courts consider a number of factors
23 to determine whether a particular payment must be characterized
24 as a loan, although no one factor is controlling. While this is
25 not a federal tax case, the factors are relevant. They include:
26 (1) the existence of a note or other evidence of indebtedness,
27 (2) whether the prepaid loan amount is determinable, (3) whether
28 a definite time for repayment exists, (4) whether interest is
paid on the "indebtedness," (5) whether there is a provision for
security, (6) the borrower's ability to repay, and (7) how the
parties treat the transaction. See United States v. Williams,
395 F.2d 508 (5th Cir. 1968); Kohler-Campbell Corp. v. United
States, 298 F.2d 911 (4th Cir. 1962).

1 there was no loan.

2 Furthermore, while Green testified that the trust agreement
3 gave him almost unlimited discretion, including transferring
4 money into Debtors' personal account, his testimony also showed
5 that he could not remember or fully explain what happened to
6 certain trust funds. Green admitted that he mistakenly paid
7 some personal expenses with trust funds and that he could not
8 account for over \$29,000 which was received for the sale of
9 trust property. Finally, nowhere in the record is there a full
10 accounting of trust assets or liabilities.

11 Without evidence of a loan or an accounting, the bankruptcy
12 court could reasonably infer that there was no legitimate reason
13 for transferring THFT's funds into Debtors' personal account.
14 Because Green admitted that he used funds from THFT's account to
15 purchase the Loma Property, the bankruptcy court properly
16 applied the holding in Maki. Debtors' attempt to distinguish
17 Maki on the basis that Holt did not obtain a default judgment
18 against them or obtain an equitable lien against the Loma
19 Property is unavailing. Maki simply applied equitable lien
20 principles to disallow the homestead exemption. There is
21 nothing in Maki that requires a judgment. Maki essentially
22 concludes that the Nevada legislature never contemplated or
23 intended that a homestead interest could be created or
24 maintained with wrongfully appropriated property.

25 Finally, the bankruptcy court issued an alternative ruling
26 allowing Debtors' homestead exemption to the extent Holt did not
27 trace THFT's funds dollar for dollar into the Loma Property.
28 While Holt had the initial burden of tracing THFT's funds into

1 Debtors' homestead, "[t]he burden of tracing does not require
2 'dollar-for-dollar accounting', and the party seeking
3 recovery may meet this burden by identifying the relevant
4 pathways." Rizzolo, 2012 WL 4092604, at *7. Without an
5 accounting of trust assets and liabilities, the commingling of
6 THFT's funds with Debtors' personal funds made it impossible to
7 sort out on a dollar-for-dollar basis which funds were used to
8 purchase the Loma Property. The fact that Debtors cannot
9 account for over \$300,000 of THFT's funds supports the
10 conclusion that the homestead was purchased with its funds. Id.
11 In sum, the bankruptcy court's disallowance of Debtors'
12 homestead exemption in its entirety was proper.⁸

13 **VI. CONCLUSION**

14 For the reasons stated, we AFFIRM.

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28 ⁸ Neither § 522(o) nor (p) applies under these
circumstances.