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NOT FOR PUBLICATION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. AZ-12-1644-DPaKu
)
 BENJAMIN JONES and) Bk. No. 11-34839-SSC
 JESSICA TREOLA JONES,)
)
 Debtors.)
 _____)
)
 BENJAMIN JONES;)
 JESSICA TREOLA JONES,)
)
 Appellants,)
)
 v.) **M E M O R A N D U M**¹
)
 BRIAN J. MULLEN, Chapter 7)
 Trustee,)
)
 Appellee.)
 _____)

Argued and Submitted on January 23, 2014
at Tempe, Arizona

Filed - February 5, 2014

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

Honorable Sarah Sharer Curley, Bankruptcy Judge, Presiding

Appearances: _____
 Trucly Pham Swartz, Esq. of John Joseph Volin,
 P.C. argued for appellants Benjamin Jones and
 Jessica Treola Jones; Michael A. Jones, Esq., of
 Allen, Sala & Bayne, PLC argued for appellee Brian
 M. Mullen, Chapter 7 Trustee.

Before: DUNN, PAPPAS and KURTZ, 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 8013-1.

1 The bankruptcy court approved the chapter 7² trustee's sale
2 of real property transferred to debtor postpetition upon the
3 death of the grantor under a Beneficiary Deed under Arizona Law,
4 which had been executed and recorded prepetition. We AFFIRM.

5 I. FACTS

6 As part of her estate plan, on July 16, 2010, Mary Alice
7 Jones ("Mary") signed a Beneficiary Deed transferring real
8 property ("Property") in Maricopa County, Arizona, to her
9 grandson, Benjamin Jones ("Benjamin"), effective on her death.
10 The Beneficiary Deed was recorded in the Maricopa County property
11 records on July 27, 2010.

12 Together with his wife, Jessica Treola Jones, Benjamin filed
13 a chapter 7 petition ("Petition") in the Bankruptcy Court for the
14 District of Arizona on December 28, 2011. Brian J. Mullen
15 ("Trustee") was appointed as the chapter 7 trustee in the Jones'
16 bankruptcy case.

17 Benjamin did not disclose an interest in the Property in his
18 bankruptcy schedules filed on December 28, 2011. Mary died on
19 December 31, 2011, having never revoked the transfer made
20 pursuant to the Beneficiary Deed.

21 On August 24, 2012, the Trustee filed a motion ("Sale
22 Motion") pursuant to § 363(b) and (f) to approve a sale of the
23 Property as property of the bankruptcy estate, free and clear of
24
25

26
27 ² Unless otherwise indicated, all chapter and section
28 references are to the federal Bankruptcy Code, 11 U.S.C. §§ 101-
1532.

1 liens. Benjamin objected.³

2 Relying on § 541(a)(5), Benjamin asserted that to become
3 property of his bankruptcy estate, the transfer of the Property
4 to him must have been by "bequest, devise, or inheritance" within
5 180 days after the Petition was filed. He further asserted that
6 under Arizona law, a bequest is a transfer of personal property
7 under the terms of a decedent's will, a devise is a transfer of
8 real property under the decedent's will, and an inheritance is
9 property received as a result of a decedent dying intestate.
10 Because the transfer was of real property, the transfer was not a
11 bequest. Because Mary had a will, the transfer was not an
12 inheritance. Because the transfer was not made to him through
13 that will, the transfer was not a devise. Accordingly, Benjamin
14 asserted that the transfer did not fall within the parameters of
15 § 541(a)(5), and for that reason, the Property never became
16 property of his bankruptcy estate.

17 Following briefing and argument, the bankruptcy court took
18 under submission the issue of whether the Property was property
19 of Benjamin's bankruptcy estate,⁴ twice requesting that Benjamin
20

21 ³ All proceedings opposing the sale of the Property,
22 including this appeal, were filed in the names of both debtors.
23 Because any interest in the Property was in Benjamin's name only,
we refer only to Benjamin as the opposing party.

24 ⁴ Any procedural error arising from the bankruptcy
25 court's determination of the validity, priority, or extent of
26 Benjamin's interest in the Property in the context of a contested
27 matter rather than through an adversary proceeding pursuant to
28 Rule 7001(2) has been waived by Benjamin. He did not raise the
issue before the bankruptcy court and has not raised it in this
(continued...)

1 provide further documentation. The first request was that he
2 provide a copy of Mary's will, which he did. The second was that
3 he provide any other estate planning documents Mary executed on
4 July 16, 2010. Benjamin responded to this request only by
5 stating that he had no knowledge of any other estate planning
6 documents executed on that date, except that he believed Mary
7 used beneficiary designations and joint accounts to control the
8 disposition of some assets.

9 On December 13, 2012, the bankruptcy court issued its
10 memorandum decision ("Decision"), in which it determined that the
11 Property was property of the bankruptcy estate.

12 The bankruptcy court first analyzed the transfer of the
13 Property to Benjamin under § 541(a)(5), observing that the
14 dispute as argued by the parties, was solely whether the Property
15 became property of the estate "by devise." As such, the
16 definition of "devise" in the Arizona Probate Code was
17 controlling; under Arizona law, a devise "when used as a noun,
18 means a testamentary disposition of real or personal property
19 and, when used as a verb, means to dispose of real or personal
20 property by will." A.R.S. § 14-1201 (West 2012). The bankruptcy
21 court determined that because "devise" is used as a noun in
22 § 541(a)(5), under Arizona law the Property is a devise if

23
24 ⁴(...continued)
25 appeal. See Levesque v. Shapiro (In re Levesque), 473 B.R. 331,
26 335 (9th Cir. BAP 2013) ("Ordinarily, if an issue is not raised
27 before the trial court, it will not be considered on appeal and
28 will be deemed waived."); Simpson v. Burkart (In re Simpson),
366 B.R. 64, 76 at n.10 (9th Cir. BAP 2007) ("Generally, an
appellate court will not consider matters not specifically and
distinctly argued in an appellant's opening brief.").

1 Benjamin acquired it as a "testamentary disposition," a term not
2 defined in the Arizona Probate Code. The bankruptcy court
3 adopted the Black's Law Dictionary definition of a "testamentary
4 disposition" contained within the definition of "disposition" as
5 "a disposition to take effect upon the death of the person making
6 it, who retains substantially entire control of the property
7 until death." See Black's Law Dictionary 539 (9th ed. 2009).

8 The bankruptcy court then turned to the Beneficiary Deed
9 itself, noting that its use was first adopted in 2001, that it is
10 a provision of the "Property" section (Title 33) of the Arizona
11 Revised Statutes rather than the "Trusts, Estates and Protective
12 Proceedings" section (Title 14), and that the bankruptcy court
13 was unaware of any decision interpreting the Beneficiary Deed
14 statute or the treatment of a beneficiary deed in the bankruptcy
15 context. The bankruptcy court therefore looked to the treatment
16 of trusts, non-probate instruments, for guidance.

17 Citing the distinction this Panel made in Birdsell v. Coumbe
18 (In re Coumbe), 304 B.R. 378, 384-85 (9th Cir. BAP 2003), between
19 testamentary trusts and inter vivos trusts, the bankruptcy court
20 determined that Benjamin's acquisition of the Property
21 substantially mirrored the effect of a testamentary trust,
22 because Benjamin acquired the Property effective upon Mary's
23 death, and found that the Property vested in Benjamin at the same
24 time income distributions would vest in a beneficiary under a
25 testamentary trust. Further, Mary's execution of both her will
26 and the Beneficiary Deed on the same date as part of her estate
27 planning evidenced Mary's requisite intent to make a testamentary
28 disposition—a transfer of property on her death. The bankruptcy

1 court also ruled, in the alternative, that the Beneficiary Deed
2 represented a contingent interest held by Benjamin on the
3 Petition Date, and that § 541(a)(1) therefore applied to bring
4 the Property into the bankruptcy estate.

5 An order approving the Sale Motion was entered December 18,
6 2012, and this appeal followed.⁵

7 II. JURISDICTION

8 The bankruptcy court had jurisdiction under 28 U.S.C.
9 §§ 1334 and 157(b)(2)(A) and (N). We have jurisdiction under
10 28 U.S.C. § 158.

11 III. ISSUE

12 Whether the bankruptcy court erred when it determined that
13 the Property was an asset of Benjamin's bankruptcy estate that
14 the Trustee could sell.

15 IV. STANDARDS OF REVIEW

16 Whether property is included in a bankruptcy estate is a
17 question of law that we review de novo. White v. Brown
18 (In re White), 389 B.R. 693, 698 (9th Cir. BAP 2008). We can
19 affirm on any basis supported by the record. Shanks v. Dressel,
20 540 F.3d 1082, 1086 (9th Cir. 2008).

21 V. DISCUSSION

22 The filing of the Petition created an estate comprised of
23 all of the Joneses' legal and equitable interests in property.
24 § 541(a). What constitutes a property interest under § 541 "has
25

26 ⁵ The sale took place. The bankruptcy court entered an
27 order on January 16, 2013, which directed the Trustee to retain
28 the proceeds in the amount of \$54,982.48 pending resolution of
this appeal.

1 been construed most generously and an interest is not outside its
2 reach because it is novel or contingent or because enjoyment must
3 be postponed." United States v. Sims (In re Feiler), 218 F.3d
4 948, 955 (9th Cir. 2000) (quoting Segal v. Rochelle, 382 U.S.
5 375, 379 (1966)). Although the Bankruptcy Code defines what
6 property is transferred to the bankruptcy estate, "[p]roperty
7 interests are created and defined by state law." Butner v.
8 United States, 440 U.S. 48, 55 (1979). Thus, we look to Arizona
9 law to establish the existence and scope of Benjamin's interest
10 in the Property to determine whether it is to be included in the
11 bankruptcy estate.

12 Benjamin's interest in the Property was created through a
13 Beneficiary Deed, executed and recorded as provided by A.R.S.
14 § 33-405. As relevant to the appeal before the Panel, A.R.S.
15 § 33-405 provides:

16 33-405. Beneficiary deeds; recording; definitions

17 A. A deed that conveys an interest in real property
18 . . . to a grantee beneficiary designated by the
19 owner and that expressly states that the deed is
20 effective on the death of the owner[,] transfers the
21 interest to the designated grantee beneficiary
22 effective on the death of the owner subject to all
23 conveyances, assignments, contracts, mortgages,
24 deeds of trust, liens, security pledges and other
25 encumbrances made by the owner or to which the owner
26 was subject during the owner's lifetime.

27 . . .
28 E. A beneficiary deed is valid only if the deed is
executed and recorded as provided by law in the
office of the county recorder of the county in which
the property is located before the death of the
owner or the last surviving owner. A beneficiary
deed may be used to transfer an interest in real
property to the trustee of a trust even if the trust
is revocable.

F. A beneficiary deed may be revoked at any time by
the owner . . . who executed the beneficiary deed.
To be effective, the revocation must be executed and
recorded as provided by law in the office of the

1 county recorder of the county in which the real
2 property is located before the death of the owner
3 who executes the revocation....

4 G. If an owner executes and records more than one
5 beneficiary deed concerning the same real property,
6 the last beneficiary deed that is recorded before
7 the owner's death is the effective beneficiary deed.

8 H. This section does not prohibit other methods of
9 conveying property that are permitted by law and
10 that have the effect of postponing enjoyment of an
11 interest in real property until the death of the
12 owner. This section does not invalidate any deed
13 otherwise effective by law to convey title to the
14 interests and estates provided in the deed that is
15 not recorded until after the death of the owner.

16 M. For the purposes of this section:

17 1. "Beneficiary deed" means a deed authorized under
18 this section.

19 2. "Owner" means any person who executes a
20 beneficiary deed as provided in this section.

21 The parties agree that the Beneficiary Deed did not transfer
22 a present interest in the Property to Benjamin. Nor is it
23 disputed that Mary could have revoked the Beneficiary Deed at any
24 time prior to her death.

25 The bankruptcy court determined that the Beneficiary Deed
26 created a contingent interest in the Property, and that the
27 contingent interest passed to the bankruptcy estate consistent
28 with the broad scope of § 541(a)(1). Because the contingent
interest was held by the estate at the time of Mary's death, it
ripened into a present interest by operation of the terms of the
Beneficiary Deed and of law three days after Benjamin's
bankruptcy filing.

On appeal, Benjamin challenges this determination on two
grounds.

First, he asserts that he held no property interest on the
Petition date. Rather, he held only an "expectancy." To support
this position, he cites to McKenzie v. Badillo (In re Meza),

1 465 B.R. 152 (Bankr. D. Ariz. 2012), which in turn cites Abele v.
2 Phoenix Suns Ltd. P'ship (In re Harrell), 73 F.2d 218 (9th Cir.
3 1996). Neither is on point.

4 In Meza, the debtor's wife changed the beneficiary
5 designated on a term life insurance policy she owned from the
6 debtor to third parties. The bankruptcy trustee asserted the
7 change constituted a fraudulent transfer. The Meza court
8 disagreed, stating that Arizona law does not provide designated
9 beneficiaries of term life policies any rights during the life of
10 the insured that could amount to a property interest recognized
11 by federal bankruptcy law. The Meza court relied upon case law
12 from the Arizona Supreme Court which held that prior to the
13 insured's death, a life insurance beneficiary had no vested right
14 which the law would protect. We read Meza only to provide that
15 had Mary revoked the Beneficiary Deed postpetition but before her
16 death (which she did not do), the Trustee would not have been
17 able to assert a fraudulent transfer claim.

18 The Meza court then states broadly "[a]nd Ninth Circuit law
19 is clear that when state law recognizes no such vested right,
20 bankruptcy law cannot find a property interest to exist, but only
21 a mere expectancy." The Ninth Circuit case cited by the Meza
22 court for this broad proposition is Harrell. In Harrell, the
23 debtor held season tickets, playoff tickets, and an opportunity
24 to renew the season tickets to a local professional sports
25 franchise. The Ninth Circuit stated that the mere expectation of
26 an interest in property, in Harrell the right to renew season
27 tickets, did not constitute a property right, where the sports
28 franchise made clear in written notices sent to season ticket

1 holders each year that the "opportunity [to renew season tickets]
2 is a privilege granted by the [franchise] and may be withdrawn in
3 the [franchise's] discretion." We cannot make the stretch
4 Benjamin asks of us to apply Harrell to this case. The debtor in
5 Harrell never had a legal right to renew his season tickets.
6 Benjamin, however, held a valid future interest in the Property
7 by virtue of the Beneficiary Deed, subject only to Mary's
8 revocation of the Beneficiary Deed, which never occurred.

9 Second, Benjamin contends that his rights with respect to
10 the Beneficiary Deed were similar to those of a beneficiary of a
11 paid on death ("POD Account") account. He cites to In re Hall,
12 394 B.R. 582 (Bankr. D. Kan. 2008), and In re Holter, 401 B.R.
13 372 (Bankr. W.D. Wis. 2009), as decisions of courts that have
14 held that a contingent interest to a POD Account should not
15 constitute property of the estate.

16 Unfortunately for Benjamin, the issue is governed by
17 longstanding Ninth Circuit precedent which holds that property of
18 the estate under § 541(a)(1) includes contingent interests. See,
19 e.g., Neuton v. B. Danning (In re Neuton), 922 F.2d 1379 (9th
20 Cir. 1990).

21 In Neuton, the Ninth Circuit held that a beneficial interest
22 in an inter vivos trust that was revocable on the petition date
23 constituted property of the bankruptcy estate, as it became
24 irrevocable when the debtor's interest vested upon the death of
25 the settlor, an occurrence which took place forty-six days after
26 the bankruptcy petition was filed.

27 Ignoring Neuton, Benjamin asserts that in Burton v. Ulrich
28 (In re Schmitt), 215 B.R. 417, 421 (9th Cir. BAP 1997), this

1 Panel held, "We determine that because the Trust was revocable,
2 the Debtor's interest in it is no part of the estate." While
3 that is a direct quote from Schmitt, it mischaracterizes what was
4 actually decided. In Schmitt, the chapter 7 trustee sought to
5 compel turnover of the value of a debtor's beneficial interest in
6 an inter vivos trust. When the trustee determined that the
7 debtor's interest in the trust likely was not property of the
8 estate because it remained revocable, the trustee filed a motion
9 seeking approval for his proposed compromise of the dispute with
10 the trust grantor regarding turnover. In affirming the
11 bankruptcy court's approval of the settlement, the Schmitt Panel
12 decided that an inter vivos trust that remained revocable at the
13 time the chapter 7 trustee sought to enforce debtor's contingent
14 interest in it, was not property of the estate. Thus, by
15 inference, we have recognized that an interest of the debtor in
16 property that was contingent on the petition date, but vests
17 postpetition, is property of the estate pursuant to § 541(a)(1).

18 Because the bankruptcy court correctly concluded that
19 Benjamin's contingent interest in the Property became property of
20 the estate pursuant to § 541(a)(1), the bankruptcy court did not
21 err when it authorized the trustee to sell the Property once
22 ownership of the Property had vested in Benjamin following Mary's
23 death. The proceeds of the sale belong to the estate.
24 § 541(a)(6).

25 We therefore do not reach the issue of whether the transfer
26 of the Property through the Beneficiary Deed constitutes a
27 "bequest, devise or inheritance" to render it property of the
28 estate under the provisions of § 541(a)(5).

1 VI. CONCLUSION

2 Under the Beneficiary Deed, Benjamin held a contingent
3 interest in the Property on the Petition Date. Because legal
4 title vested in Benjamin upon the Mary's death three days later,
5 the Property is property of Benjamin's bankruptcy estate pursuant
6 to § 541(a)(1). We AFFIRM.

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