

FILED

MAR 31 2005

**HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

ORDERED PUBLISHED

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

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

In re:)	BAP No. CC-04-1333-PKMo
)	
CAROL E. DAVIS,)	Bk. No. LA 03-15835-EC
)	
Debtor.)	
<hr/>		
)	
ROSENDO GONZALEZ,)	
Chapter 7 Trustee,)	
)	
Appellant,)	
)	
v.)	
)	OPINION
CAROL E. DAVIS,)	
)	
Appellee.)	
<hr/>		

Argued and Submitted on
January 20, 2005 at Pasadena, California

Filed - March 31, 2005

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

Honorable Ellen Carroll, Bankruptcy Judge, Presiding.

Before: PERRIS, KLEIN and MONTALI, Bankruptcy Judges.

1 PERRIS, Bankruptcy Judge.

2
3 In this case, the bankruptcy trustee objected to debtor's claim
4 of exemption under California law in her Keogh and Individual
5 Retirement Account (IRA), arguing that they were not necessary for
6 the support of debtor or her dependents in retirement.¹ Because we
7 conclude that the bankruptcy court clearly erred in finding that the
8 trustee had not met his burden of proving that the exemption was not
9 properly claimed, we REVERSE.

10 FACTS

11 Debtor is an ophthalmologist. In 2002, she and her husband
12 divorced. The dissolution judgment provided for the distribution of
13 various retirement accounts held by debtor and her ex-husband.

14 When debtor filed her bankruptcy petition in March 2003, she
15 claimed an exemption under California law in all of the retirement
16 accounts, listing their total value at \$198,000.² The trustee

18 ¹ Debtor did not claim in the bankruptcy court and does not
19 claim on appeal that the accounts are not property of the estate.
20 Therefore, the only issue before us is whether the accounts are
exempt under California law.

21 ² Debtor's original schedules listed Keogh accounts and IRAs
22 valued at \$579,813, all of which debtor claimed exempt. Later,
23 debtor amended her schedules to value the exempt accounts at
24 \$198,000. The trustee objects to debtor's claim of exemption in
25 three accounts, which are shown on trial exhibit 3 as "W's IRA,"
26 "W's Fidelity Keogh," and "W's Merrill Keogh." That exhibit shows
an estimated value of each of the three accounts as of February 29,
2004, as \$23,060 for the IRA, \$132,422 for the Fidelity Keogh
account, and \$84,607 for the Merrill Keogh account. The exhibit
also lists four other retirement accounts, which are held in
debtor's ex-husband's name.

1 objected to the claim of exemption in three accounts held solely in
2 debtor's name: two Keogh accounts and one IRA, arguing that the
3 Keogh accounts are not exempt as a matter of law and that none of
4 the accounts are necessary for debtor's support when she retires.
5 The trustee did not object to any exemption that might be claimed in
6 a distribution that debtor is entitled to receive from her ex-
7 husband's retirement accounts pursuant to the dissolution judgment.

8 After a hearing, the court concluded that the trustee had not
9 met his burden of proving that debtor had not properly claimed her
10 exemptions, and overruled the trustee's objection. The trustee
11 appeals the court's order overruling his objection to the claim of
12 exemption.

13 ISSUES³

- 14 1. Whether the court erred in ruling that debtor's Keogh accounts
15 could be exempt as a matter of law.
- 16 2. Whether the court clearly erred in finding that the trustee had
17 not met his burden of proving that the retirement accounts are
18 not necessary for debtor's support in her retirement.

19 STANDARD OF REVIEW

20 We review the scope of a statutory exemption de novo, as a
21 question of law. In re Bloom, 839 F.2d 1376, 1378 (9th Cir. 1988).
22 The court's findings regarding the necessity of retirement accounts
23 for debtor's support are reviewed for clear error. In re Spenler,

24
25 ³ Appellee uses part of her Statement of Issues to complain
26 that the trustee's second objection to debtor's exemptions was
improper and that the trustee's counsel had a conflict of interest.
She does not make any argument about those issues, so we did not
address them.

1 212 B.R. 625, 628 (9th Cir. BAP 1997). Clear error exists when,
2 after examining the evidence, the reviewing court is left with a
3 definite and firm conviction that a mistake has been committed.
4 United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

5 DISCUSSION

6 1. Exemption of Keogh accounts

7 The trustee argued to the bankruptcy court that Keogh accounts
8 are not exempt as a matter of law. The court never specifically
9 addressed this argument, but impliedly rejected it when it overruled
10 the trustee's objection to the claimed exemption. The cases cited
11 by the trustee in support of this argument are all distinguishable.

12 In Hebert v. Fliegel, 813 F.2d 999 (9th Cir. 1987), the court
13 concluded that Keogh plans are not exempt under Oregon exemption
14 law, which, at that time, provided for exemption of "pensions
15 granted to any person in recognition by reason of a period of
16 employment by . . . [any] person, partnership, association or
17 corporation" ORS 23.170 (1985). The court explained that
18 Keogh plans

19 are funded exclusively by the self-employed individual, who
20 retains complete control over the amounts invested and the
21 management of the funds. The individual also retains the right
22 to terminate the plan and withdraw the funds at any time,
23 subject only to a tax penalty.

24 813 F.2d at 1001.

25 The trustee argues that Hebert stands for the proposition that
26 Keogh plans are not exempt as a matter of law, based on the court's
"conclusion" that "the benefits to be derived from granting an
exemption for self-funded plans are outweighed by the 'strong public

1 policy that will prevent any person from placing his property in
2 what amounts to a revocable trust for his own benefit which would be
3 exempt from the claims of his creditors.'" 813 F.2d at 1001. There
4 are two problems with the trustee's reliance on Hebert, and on the
5 quoted portion in particular. First, the court did not "conclude"
6 that policy considerations precluded exemption of Keogh plans; the
7 beginning of the sentence quoted above is, "Moreover, the majority
8 of courts that have addressed the policy issues have concluded that"
9 the benefits of exemption are outweighed by the policy against
10 allowing debtors to put their assets beyond the reach of creditors.
11 Id. The court went on to hold that, "[w]hatever the policy
12 considerations, the issue is still governed by the Oregon statute."
13 Id. at 1002. Thus, it did not rely on policy considerations at all.

14 Second, the court's decision was based on the Oregon exemption
15 statute, which did not include self-funded Keogh accounts. Its
16 holding has no application in this case, where the exemption is
17 claimed under a very different California exemption statute.

18 The other two cases on which the trustee relies are similarly
19 inapplicable. In In re Shuman, 78 B.R. 254, 256 (9th Cir. BAP
20 1987), we held that a debtor's interest in profit-sharing and
21 pension plans was included in the debtor's bankruptcy estate
22 because, under Nevada law, the plans were not valid spendthrift
23 trusts and therefore were not exempt under state law. The issue in
24 this case is neither whether debtor's Keogh accounts are exempt
25 under Nevada law, nor whether they are property of her bankruptcy
26 estate.

1 The question in the portion of the decision in Schwartzman v.
2 Wilshinsky, 50 Cal.App.4th 619 (Cal. Ct. App. 1996), to which the
3 trustee refers was whether the appellant's 401(k) plan was "designed
4 and used for retirement purposes" pursuant to Cal. Code Civ. Pro.
5 § 704.115. There is no argument in this case that debtor's Keogh
6 accounts are exempt under California law only if they were "designed
7 and used for retirement purposes." The only factual issue in this
8 case, as explained below, is whether the amounts held in debtor's
9 retirement accounts are necessary to provide for her support after
10 she retires. Thus, Schwartzman does not support the trustee's
11 argument that the Keogh accounts are nonexempt as a matter of law.

12 The bankruptcy court did not err in implicitly rejecting the
13 trustee's argument that Keogh accounts cannot be exempt as a matter
14 of law.

15 2. Amounts necessary for the support of debtor in retirement

16 Debtor claims that the retirement accounts are exempt under
17 Cal. Code Civ. Pro. § 704.115(b). That section exempts amounts held
18 in self-employed retirement plans and IRAs, but "only to the extent
19 necessary to provide for the support of the judgment debtor when the
20 judgment debtor retires and for the support of the spouse and
21 dependents of the judgment debtor, taking into account all resources
22 that are likely to be available for the support of the judgment
23 debtor when the judgment debtor retires." Cal. Code Civ. Pro.
24 § 704.115(e).⁴ In determining whether the amounts held in the

25
26 ⁴ In her schedules, debtor claimed the exemption under Cal.
Code Civ. Pro. § 703.140(b)(10)(E). However, both she and the
trustee have argued about whether the exemption is proper under Cal.
Code Civ. Pro. § 704.115(b), so that is the statute we will apply.

(continued...)

1 accounts are necessary for debtor's support when she retires, the
2 court should consider various factors, including:

3 the debtor's present and anticipated living expenses and
4 income; the age and health of the debtor and his or her
5 dependents; the debtor's ability to work and earn a living; the
6 debtor's training, job skills and education; the debtor's other
7 assets and their liquidity; the debtor's ability to save for
8 retirement; and any special needs of the debtor and his or her
9 dependents.

10 In re Moffat, 119 B.R. 201, 206 (9th Cir. BAP 1990), aff'd, 959 F.2d
11 740 (9th Cir. 1992) (addressing whether annuity was exempt under
12 statute that exempted matured life insurance policies "to the extent
13 reasonably necessary for the support of the judgment debtor and the
14 spouse and dependents of the judgment debtor." 119 B.R. at 203).

15 Once the debtor claims an exemption on her bankruptcy
16 schedules, "the objecting party has the burden of proving that the
17 exemptions are not properly claimed." Fed. R. Bankr. P. 4003(c).
18 Thus, in this case, the trustee had the burden to show that debtor
19 had not properly claimed the exemption in her Keogh and IRAs.⁵

20 _____
21 ⁴(...continued)

22 Both provisions limit the exemption to the amount necessary for the
23 support of the debtor, which is the factual issue raised in this
24 appeal.

25 The trustee does not make the argument that is pending before
26 the United States Supreme Court, that IRAs are not exempt as a
matter of law under Bankruptcy Code § 522(d)(10)(E), which is
comparable to Cal. Code Civ. Pro. § 703.140(b)(10)(E). See In re
Rousey, 347 F.3d 689 (8th Cir. 2003), cert. granted, 124 S.Ct. 2817
(June 7, 2004) (No. 03-1407) (argued December 1, 2004).

⁵ We express no view about the issue addressed in Judge
Klein's concurrence, because it is neither presented in nor
dispositive of this appeal. We do note, however, that the Supreme
Court in Raleigh v. Ill. Dep't of Revenue, 530 U.S. 15 (2000), made
clear that burdens of proof could be established by the Bankruptcy
Rules as well as by the Bankruptcy Code: "The legislative history
(continued...)"

1 The trustee provided the declaration and testimony of Donald
2 Fife, an accountant, who provided an analysis of debtor's income and
3 expenses during debtor's projected work life and retirement. He
4 concluded that debtor needed \$123,308 in current retirement funds in
5 order to support her in retirement, which would leave a \$100,000
6 cushion at the end of debtor's life expectancy. His opinion took
7 into account various facts and assumptions.

8 At the time of the hearing, debtor was 51 years old. She was a
9 practicing ophthalmologist. Fife assumed that debtor could work
10 through the age of 65, and projected debtor's income from her
11 practice over the 15 remaining years of debtor's work life at \$8,435
12 per month, which was based on debtor's bankruptcy schedules and 2002
13 tax return. From that amount, he deducted \$3,414 in business
14 expenses, a number he took from debtor's bankruptcy schedules. This
15 resulted in annual projected income net of business expenses of
16 \$60,252 during debtor's working life. To this he added \$2,400 for
17 rental income that debtor also reported on her bankruptcy schedules,
18 for a total annual income of \$62,652.

19 From this amount, Fife deducted certain expenses. He arrived
20 at the expenses by looking at debtor's bankruptcy schedules and then
21 adjusting them based on Bureau of Labor statistics used by the
22 Internal Revenue Service in considering offers of compromise. Fife
23 eliminated debtor's expenses for insurance and transportation, based
24 on his understanding that those expenses were being paid as business
25

26 ⁵(...continued)
indicates that the burden of proof on the issue of establishing
claims was left to the Rules of Bankruptcy Procedure." Id. at 22
n.2.

1 expenses. He also reduced the amount claimed for electricity from
2 \$200 per month to \$100, food from \$900 per month to \$500, clothing
3 from \$300 to \$100, laundry/dry cleaning from \$100 to \$50, and
4 medical and dental from \$1,040 to \$100. He eliminated debtor's
5 \$1,500 child support expense, based on his understanding that debtor
6 was no longer paying support. He also added in a \$100 contingency.

7 For debtor's retirement years and through her life expectancy,
8 Fife eliminated income from work and calculated a projected amount
9 of \$1,550 for social security income. Because debtor could no
10 longer deduct her automobile or insurance as a business expense once
11 she retired, he also included those as individual expenses in
12 retirement.

13 Based on those calculations, Fife concluded that debtor
14 currently needed \$123,308 in retirement funds to support her in her
15 retirement. This amount took into account a projection of 7 percent
16 earnings on retirement funds, and the addition to the retirement
17 account each year of the amount of income in excess of expenses.

18 Debtor testified that she continues to have a \$1,200 per month
19 child support obligation that she pays to her ex-husband for their
20 13-year-old daughter. She also testified that the dissolution
21 judgment from her divorce entitles her to one-half of the community
22 property retirement accounts that the couple had during the
23 marriage. At the time of dissolution, the spouses had five
24 retirement accounts, some held in debtor's name and some in the name
25 of her ex-husband. The dissolution judgment provides that each
26 spouse will retain the accounts held in their own name, and that an

1 equalizing division will be made from debtor's ex-husband's AMGR
2 account. According to the list of property used in the dissolution
3 action, as of May 16, 2002, the parties' retirement accounts were
4 valued as follows:

5	AMGR Money Savings Plan	\$727,484
6	Fidelity IRA (husband)	14,181
7	Fidelity IRA (wife)	20,939
	Fidelity Keogh	112,156
	Fidelity USC 401 and 403	48,966

8 Those accounts totaled \$923,726, to which debtor was entitled to
9 half.

10 The retirement accounts had not been divided at the date of the
11 trial, and debtor testified that she did not know how much her
12 distribution would be. She estimated that she would receive
13 \$200,000, based on her understanding that her ex-husband had
14 approximately \$500,000 in his retirement account at the time of
15 separation. She acknowledged that, if his retirement account was
16 larger than that, she would be entitled to more.

17 Debtor was also questioned about a document that showed the
18 estimated value of the couple's total retirement assets at
19 \$1,095,151, which debtor testified she thought was approximately
20 correct with regard to the amount in her accounts and she hoped was
21 accurate as to her ex-husband's accounts. Debtor acknowledged that,
22 if that amount is accurate, she had no reason to doubt that she
23 would be entitled to \$307,000 as her equalizing distribution.

24 Fife's projections of the amount needed to support debtor in
25 her retirement did not take into account either the child support
26 debtor is obligated to pay or the fact that she is entitled to a

1 substantial sum in an equalizing distribution from the dissolution
2 of her marriage. Fife testified that, assuming debtor was obligated
3 to pay \$1,500 per month in child support (based on outdated
4 information; debtor testified that she was currently obligated to
5 pay \$1,200 per month) and that she received a lump sum distribution
6 of retirement funds from the dissolution of \$307,000, debtor would
7 have \$470,000 left over in retirement funds at the end of her life
8 expectancy. Based on that fact, Fife opined that debtor would not
9 need the IRA and Keogh accounts that she sought to exempt in the
10 bankruptcy case.

11 The bankruptcy court rejected Fife's analysis as "seriously
12 flawed," Transcript of May 21, 2004 hearing at 8:25 - 9:1, and
13 concluded that the trustee had failed to meet his burden of proof.
14 The court noted five "faulty assumptions" in Fife's report, which
15 caused the court to view the income and expense projections as
16 "significantly flawed." Id. at 5:16-17; 7:25 - 8:1.

17 First, the court noted that Fife erroneously understood that
18 debtor owned and operated her own ophthalmology practice. In fact,
19 the practice had been sold and debtor was working as an independent
20 contractor for other ophthalmologists.

21 This assumption did not affect Fife's analysis of debtor's
22 income or expenses, nor was is used to project what debtor might
23 need for her support on retirement. In his declaration, Fife
24 explained that he calculated debtor's monthly income based on what
25 debtor listed on her bankruptcy schedules, which was from her
26 independent contractor work, and from her 2002 corporate tax

1 returns, which reflected income of debtor's corporation.⁶

2 Second, the court pointed out that Fife had said that he had
3 not allowed for the eventual sale of debtor's business and that any
4 proceeds received from such a sale could be used to fund debtor's
5 retirement. As the court recognized, the business had already been
6 sold and there were no remaining proceeds.

7 Because Fife did not depend on any projected proceeds from the
8 sale of debtor's business, nor rely on her ownership of a business
9 in projecting her income, this faulty assumption could not have
10 affected his analysis.

11 Third, the court noted that Fife failed to include debtor's
12 child support obligation, based on faulty information that debtor's
13 children were over 18 years old. As the court noted, one daughter
14 was 19 years old, living with debtor, and debtor was paying \$1,200
15 per month child support for a 13-year-old daughter who lived with
16 her father.

17 Although Fife did not include child support in his written
18 projections, he did testify that, if debtor was obligated to pay
19 \$1,500 per month for five years, and assuming that she received a
20 lump sum distribution of a retirement fund under the dissolution
21 judgment, debtor would have sufficient funds necessary to support
22 herself in retirement. There was no evidence contradicting that
23 conclusion.

24 Fourth, the court questioned Fife's use of a website called
25

26 ⁶ Debtor testified that she sold her business in 2001.

1 "salary.com" to find that the median expected income of an
2 ophthalmologist in Los Angeles is \$210,416. The court found it
3 unclear whether those numbers took into account ophthalmologists who
4 were working as independent contractors.

5 Although the court's criticism of the basis for the median
6 income is reasonable, it did not impact Fife's analysis. Fife did
7 not attribute to debtor the median income of ophthalmologists in Los
8 Angeles; he used her actual income, earned working less than full-
9 time. He did mention the median income in explaining why he did not
10 adjust the income and expense numbers for inflation over time; he
11 testified that, based on the median income for ophthalmologists in
12 the area, he assumed that debtor's income would increase more than
13 the rate of inflation.⁷ That assumption does not make the entire
14 projection faulty. Fife presumably could have adjusted both income
15 and expense for inflation, coming to the same result.

16 Finally, the court questioned Fife's reductions in debtor's
17 claimed expenses, reducing the food expense from \$900 to \$500 per
18 month, clothing from \$300 to \$100, and laundry \$100 to \$50. The
19 court concluded that Fife was unaware that debtor's older daughter
20 was living with and still dependent on debtor, and therefore found
21 the reductions not reasonable. Notably, the court did not question
22 Fife's exclusion of certain expenses, including insurance and
23

24 ⁷ The trustee correctly points out that debtor is currently
25 earning \$100 per hour. If she were to work 40 hours a week, 50
26 weeks in a year, her income would be \$200,000, very close to the
\$210,416 median used by Fife.

1 transportation costs, based on his understanding that those expenses
2 were being deducted as business expenses.⁸

3 Debtor testified that her 19-year-old daughter was dependent on
4 her for room and board as well as school expenses and
5 psychotherapy.⁹ Thus, if Fife's reductions in certain expenses were
6 based on the fact that debtor was supporting herself only, the
7 reductions were improper. However, those additional expenses
8 relating to the 19-year-old daughter will last only a few more
9 years, at the most. There is no evidence that debtor will need to
10 support her daughter 16 years from now when debtor retires.

11 The bankruptcy court also concluded that the trustee had failed
12 to provide evidence of other factors that are to be considered in
13 determining whether retirement funds are necessary for the debtor's
14 support in retirement, such as the health of debtor and her

15
16 ⁸ Fife looked at debtor's Schedule J, which showed current
17 business expenses totaling \$3,414.00 per month. At the time debtor
18 filed bankruptcy, she no longer owned a business, yet she continued
19 to claim \$3,414.00 as business expenses. According to Fife's
20 testimony, debtor's corporation had deducted auto expenses in 2002.
Debtor never disputed Fife's assumption that the transportation and
insurance costs continued to be included in her reported business
expenses even after the corporation was sold.

21 Nor did the court or debtor challenge Fife's reduction of
22 debtor's reported medical and dental expenses from \$1,040 per month
23 to \$100 per month, based on Fife's application of the Bureau of
Labor statistics. There was no evidence that this reduction was
improper.

24 ⁹ The trustee argues that Fife was correct that debtor's
25 daughter did not live with her, pointing out that debtor's 13-year-
26 old lived with her father. The trustee ignores the evidence that
debtor's 19-year-old daughter was dependent on her and caused debtor
to incur expenses for her support.

1 dependents, debtor's other assets and their liquidity, debtor's
2 ability to save for retirement, and any special needs of debtor and
3 her dependents.

4 The factors set out in Moffat are factors the court should
5 consider; there is no requirement that the trustee provide evidence
6 of each one, if there is other evidence from which it can be
7 determined that the retirement funds at issue are not necessary for
8 debtor's support upon retirement. In this case, there was
9 uncontroverted testimony that debtor is entitled to a lump sum
10 distribution of retirement funds pursuant to her dissolution
11 judgment in addition to the accounts at issue in this appeal, which
12 she expects to be at least \$200,000 and could be as much as
13 \$307,000. The testimony was uncontroverted that debtor was working
14 nearly three days per week at the time of the trial, and hoped to be
15 able to do better after the bankruptcy case was concluded. There
16 was no evidence that her health in any way interfered with her
17 ability to work or that she was not physically capable of working
18 full-time. Where a debtor is working and there is no evidence about
19 the debtor's health, it can be inferred that the debtor's health is
20 not an impediment to future productive work.

21 The lack of evidence about debtor's other assets, their
22 liquidity, and her ability to save for retirement is not critical in
23 this case, where it is known that debtor will have at least \$200,000
24 in retirement funds available to her pursuant to the dissolution
25 judgment in addition to amounts in the disputed accounts. If she
26 has sufficient funds in a retirement account now, there is no need

1 to be concerned about whether she has other liquid assets that can
2 be used for retirement or whether she can save for retirement.

3 Fife testified that debtor needed to have approximately
4 \$123,000 in current retirement funds in order to provide for her
5 support in retirement. Even taking into account the additional five
6 years of child support that debtor has to pay, and the fact that she
7 is currently providing some support for her 19-year-old daughter, it
8 is unreasonable to conclude that those additional obligations would
9 increase debtor's need for current funds beyond the \$200,000 that
10 she admits she will receive.

11 The bankruptcy court did not mention at all the undisputed
12 evidence that debtor will have a substantial exempt retirement fund
13 to provide for her on retirement. Given the undisputed evidence
14 about the value of that fund, as well as the fact that the errors in
15 Fife's analysis that the court mentioned do not undermine his
16 ultimate conclusion, we are left with a definite and firm conviction
17 that the court erred in finding that the trustee had failed to meet
18 his burden of proving that the exemption was not properly claimed.

19 We realize that the reviewing court's role is limited when
20 reviewing findings of fact; great deference is given to the trial
21 court, and the clearly erroneous standard "does not entitle a
22 reviewing court to reverse the finding of the trier of fact simply
23 because it is convinced that it would have decided the case
24 differently." Anderson v. City of Bessemer City, 470 U.S. 564, 573
25 (1985). In this case, however, the bankruptcy court ignored the
26 uncontroverted evidence that debtor would have a substantial exempt

1 retirement fund available to her, even without the funds held in the
2 IRA and Keogh accounts. Even without requiring her to maximize her
3 income by working full time, the evidence was that the distribution
4 from her ex-husband's retirement funds under the dissolution
5 judgment would be sufficient to supply her needs in retirement.
6 Therefore, the court clearly erred in overruling the objection to
7 debtor's claim of exemption.¹⁰

8 CONCLUSION

9 The bankruptcy court clearly erred in finding that the trustee
10 failed to meet his burden of proving that debtor's IRA and Keogh
11 accounts are not necessary for her support when she retires.
12 Therefore, we REVERSE.

13
14
15 KLEIN, Bankruptcy Judge, concurring:

16
17 I agree with the majority that the trustee proved the debtor
18 was not entitled to the California exemption in question and write
19 separately to note that we may be holding the trustee to a higher
20 burden than necessary.

21 There is reason to doubt the validity of the allocation, in
22

23 ¹⁰ After the court overruled the trustee's objection to
24 debtor's claim of exemptions, debtor was denied a discharge (Adv.
25 No. 03-01856). The appeal of the discharge denial was dismissed on
26 December 6, 2004. BAP No. CC-04-1430. Neither party argues that
the denial of discharge should affect the analysis of the trustee's
objection.

1 Federal Rule of Bankruptcy Procedure 4003(c), of the burden of proof
2 to the party objecting to a claim of exemption, especially an
3 exemption claimed under state law.

4 At least with respect to state-law exemptions, the better view,
5 after the Supreme Court's decision in Raleigh v. Ill. Dep't of
6 Revenue, 530 U.S. 15 (2000), may be that, if challenged, the debtor
7 has the burden to establish entitlement to a claim of exemption
8 under state law by the same standard that applies in the courts of
9 that state. If so, then the objecting party does not properly bear
10 the burden of proof.

11 This post-Raleigh view necessarily calls into question the
12 validity of Rule 4003(c), which expressly allocates the burden of
13 proof on claims of exemption: "the objecting party has the burden of
14 proving that the exemptions are not properly claimed."¹¹

15 The basic problem is that Rule 4003(c) suffers from being a
16 procedural rule that attempts to accomplish a substantive task, it
17 being settled by Raleigh that a burden of proof in bankruptcy is
18 substantive and generally is regarded as an essential element of a
19 claim itself. Raleigh, 530 U.S. at 20-21.

20 This problem has multiple dimensions that may lead to differing
21

22 ¹¹ The rule provides:

23 (c) Burden of Proof. In an hearing under this rule, the
24 objecting party has the burden of proving that the exemptions
25 are not properly claimed. After hearing on notice, the court
shall determine the issues presented by the objections.

26 Fed. R. Bankr. P. 4003(c).

1 results as between exemptions based on nonbankruptcy law and
2 exemptions based on the Bankruptcy Code. It is even possible that
3 the allocation of burden in Rule 4003(c) is valid with respect to
4 federal bankruptcy exemptions but not, as in this appeal, with
5 respect to state exemptions.

6 The state-law exemptions that apply by way of § 522(b) are
7 probably subject to the burdens of proof that are prescribed under
8 state law.¹² Since Raleigh teaches that the burden of proof is
9 substantive, it follows that state law provides the rule of decision
10 regarding the burden on each state exemption. States (either
11 through legislation or decisional law) ordinarily require the
12 proponent of an exemption to bear the burden of proof, the precise
13 quantum of proof varying state-by-state and, sometimes, exemption-
14 by-exemption. E.g., In re Barnes 275 B.R. 889, 898-99 n.2 (Bankr.
15 E.D. Cal. 2002) (California law).

16 The analysis of federal bankruptcy exemptions is different.
17 Congress did not specify a burden of proof for the exemptions that
18 it created in Bankruptcy Code § 522(d). Nor, in contrast to § 502,
19 did Congress say in legislative history that the burden of proof was
20 being left to the rules of procedure.¹³ Nevertheless, if one

21
22 ¹² Putting a finer point on the pencil, this analysis also
23 applies to exemptions created by federal nonbankruptcy law. Thus, a
24 debtor claiming \$600 per month exempt as a Medal of Honor pension
25 will, if questioned, be obliged to produce a copy of the certificate
26 showing they are on the Army, Navy, Air Force, and Coast Guard Medal
of Honor Roll. 38 U.S.C. §§ 1560-62 (2000).

¹³ The House and Senate committee reports on the enactment of
the Bankruptcy Code each state:

(continued...)

1 accepts that there was a clean slate, a rule could plausibly operate
2 to fill a substantive gap in a manner that would make Rule 4003(c)
3 an effective allocation of burden of proof for purposes of the
4 § 522(d) exemptions.

5 The difficulty with the view that Rule 4003(c) may play a valid
6 gap-filling role for federal bankruptcy exemptions is that the slate
7 was not clean in 1983. The rule indirectly, and without either
8 necessity or explanation, inverted the burden of proof from settled
9 practice under the Bankruptcy Act of 1898, as reflected by
10 Bankruptcy Rule 403(c) and the case law on which it was based.¹⁴

11 Former Bankruptcy Rule 403(c) functioned in a regime in which
12 the trustee was required to make a report to the court specifying
13 the claimed exemptions that were not allowable.¹⁵ The "bankrupt"

14
15 ¹³ (...continued)

16 The burden of proof on the issue of allowance [of claims] is
17 left to the Rules of Bankruptcy Procedure. Under the current
18 Chapter XIII Rules, a creditor is required to prove that his
claim is free from usury, Rule 13-301. It is expected that the
Rules will make similar provision for both liquidation and
individual repayment plan cases.

19 S. Rep. No. 95-989, at 62 (1978); H.R. Rep. No. 95-595, at 352
20 (1977). No rules regarding burden of proof for allowance of claims
were subsequently adopted. Raleigh, 530 U.S. at 22, n.2.

21 ¹⁴ Congress authorized the former Bankruptcy Rules that were
22 promulgated between 1973 and 1976 to fill substantive gaps because
23 the version of 28 U.S.C. § 2075 in effect from 1964 to 1979 directed
24 that all laws in conflict with bankruptcy rules be of no further
25 force or effect after such rules have taken effect, so long as they
did not abridge, enlarge, or modify a substantive right. 28 U.S.C.
§ 2075 (repealed 1979). As noted later in this concurrence, Rule
403(c) merely restated settled decisional law.

26 ¹⁵ Bankruptcy Rule 403 provided, in relevant parts:

(a) Claim of Exemptions. - A bankrupt shall claim his
(continued...)

1 (now, "debtor") or any creditor could object to the report. Bankr.

2 ¹⁵(...continued)

3 exemptions in the schedule of his property required to be filed
4 by Rule 108.

5 (b) Trustee's Report. - The trustee shall examine the
6 bankrupt's claim for exemptions, set apart such as are lawfully
7 claimed, and allowable, and report to the court the items set
8 apart, the amount or estimated value of each, and the
9 exemptions claimed that are not allowable. The report shall be
10 filed with the court no later than 15 days after the trustee
11 qualifies. If the trustee reports that any exemption claimed
12 is not allowable, he shall forthwith mail or deliver copies of
13 the report to the bankrupt and his attorney.

14 (c) Objections to Report. - Any creditor or the bankrupt
15 may file objections to the report within 15 days after its
16 filing, unless further time is granted by the court within such
17 15-day period. Copies of the objections so filed shall be
18 delivered or mailed to the trustee and, if the objections are
19 by a creditor, to the bankrupt and his attorney. After hearing
20 upon notice the court shall determine the issues presented by
21 the objections. The burden of proof shall be on the objector.

22 (d) Procedure If No Trustee Qualified. - If no trustee has
23 qualified, the bankruptcy judge shall file the report
24 prescribed by subdivision (b) of this rule within 15 days after
25 the first date set for the first meeting of creditors. If the
26 bankrupt files objections to the report, the court shall
appoint a trustee or receiver, who shall represent the estate
in the hearing on the objections.

(e) Approval of Report If No Objections. - If no
objections are filed within the time provided by this rule, the
report shall be deemed approved by the court. On request, the
court may, at any time and without reopening the case, enter an
order approving the report.

(f) Claim of Exemption by Person Other Than Bankrupt. - If
the bankrupt fails to claim the exemptions to which he is
entitled, or if he dies before his exemptions have been set
apart to him, his spouse, dependent children, or any other
persons who are entitled to claim the exemptions allowable to
the bankrupt may, within such time as the court may order, file
a claim for his exemptions or object to the report.

Bankr. Rule 403 (repealed 1983).

1 Rule 403(c). The trustee's report was "deemed approved" if there
2 were no timely objections. Bankr. Rule 403(e). If there was an
3 objection to the trustee's report, the burden of proof was on the
4 objector. Bankr. Rule 403(c).

5 The Bankruptcy Code made significant structural changes in the
6 exemption process. The biggest difference was elimination of the
7 requirement of the trustee's report, which had the consequence of
8 causing the debtor and the trustee to exchange roles. The identity
9 of the objector in an exemption context shifted from debtor to
10 trustee.

11 Under the former regime, the debtor's claim of exemptions had
12 to pass through the filter of the trustee's report. Claimed
13 exemptions were treated as presumptively valid only to the extent
14 the trustee agreed and did not propose to reject the exemption in
15 the required report; if the trustee did not agree with the debtor,
16 then it was incumbent on the debtor to object to the report and
17 prove entitlement to the exemption.

18 Under the current regime, the debtor's claim of exemptions is
19 treated as presumptively valid; if the trustee does not agree, it is
20 incumbent on the trustee to object. 11 U.S.C. § 522(1); Taylor v.
21 Freeland & Kronz, 503 U.S. 638, 642-43 (1992).

22 None of the changes wrought by the Bankruptcy Code, however,
23 necessitated any adjustment in the settled burden of proof. Nor was
24 there any mention in the legislative history of § 522 regarding the
25 burden of proof in a fashion that would suggest that any change was
26 contemplated.

Moreover, the general transition rule is that settled judge-

1 made rules established under the Bankruptcy Act were not silently
2 abrogated unless inconsistent with the new Bankruptcy Code. See,
3 e.g., Kelly v. Robinson, 479 U.S. 36, 47 (1986). This rule of
4 construction was not undermined by Raleigh, which rejected an appeal
5 to pre-Code practice because the Court concluded that the pre-Code
6 cases were contradictory, inconsistent, and anything but settled.
7 Raleigh, 530 U.S. at 22-23.

8 The settled judge-made rule under the Bankruptcy Act was that
9 the debtor had the burden of proof on exemption issues. The
10 Advisory Committee Note to the 1973 adoption of Bankruptcy Rule
11 403(c) explained that the rule was essentially restating judge-made
12 law regarding the burden of proof on exemptions: "the case law has
13 generally placed the burden of proof on the bankrupt whenever there
14 is an issue raised as to his right to an exemption claimed."¹⁶

16 ¹⁶ The Advisory Committee explained, in relevant part:

17 *Subdivision (c)* of the rule is an elaboration of the last
18 clause of General Order 17(2). ... The allocation of the
19 burden of proof made by the last sentence of subdivision (c)
20 rests on the assumption that the trustee has performed the
21 duties imposed on him by subdivision (b) [trustee's report of
22 exemptions] with due regard to the rights of the bankrupt as
23 well as the creditors whom he represents. Although the
24 assumption might be questioned by the bankrupt, the case law
25 has generally placed the burden of proof on the bankrupt
26 whenever there is an issue raised as to his right to an
exemption claimed. In re Dederick, 91 F.2d 646, 650 (10th Cir.
1937); In re Campbell, 124 Fed. 417, 421-22 (W.D. Va. 1903); In
re Stinemetz, 38 Am.B.R.(N.S.) 544, 547 (Ref., D.Kans. 1938); 1
Collier ¶ 6.23 (1960). ...

Bankr. Rule 403(c), Advisory Comm. Note (repealed 1983).

General Order 17(2) provided for objections to the trustee's
report of exemptions but was silent about the burden of proof. Gen.
Order in Bankr. 17(2), 305 U.S. 688 (1939).

1 The settled pre-Code law placing the burden of proof on the
2 debtor (and other objectors) was an allocation that comported with
3 general nonbankruptcy law by requiring the objecting debtor to prove
4 entitlement. Under nonbankruptcy law, the person claiming property
5 as exempt from judgment enforcement generally has the burden to
6 demonstrate that the exemption is warranted.

7 The Advisory Committee Note to the adoption of Rule 4003(c) in
8 1983 explained that the rule was derived from § 522(1) and from
9 former Bankruptcy Rule 403.¹⁷ Although the new Rule 4003(c)
10 replicated the portion of Rule 403(c) that allocated the burden of
11 proof to objectors, the Advisory Committee Note did not point out
12 that this would operate to invert the burden of proof established
13 under prior law and would do so in a fashion that would no longer be
14 in harmony with nonbankruptcy law. The representation in that note
15 that the "Code changes the thrust of that rule [403(c)] by making it
16 the burden of the debtor to list and the burden of parties in
17 interest to object" appears to be a reference to the procedural
18 burden of going forward, rather than a reference to the substantive
19 burden of proof.

20 There are, thus, two ultimate questions regarding Rule 4003(c):
21

22 ¹⁷ Note that § 522(1) was, itself, derived in substantial part
23 from Rule 403. The explanation was:

24 This rule is derived from § 522(1) of the Code and, in
25 part, former Bankruptcy Rule 403. The Code changes the thrust
26 of that rule by making it the burden of the debtor to list his
exemptions and the burden of parties in interest to raise
objections in the absence of which "the property claimed as
exempt on such list is exempt;" § 522(1).

Fed. R. Bankr. P. 4003(c), Advisory Comm. Note (1983).

1 first, whether any rule of procedure can permissibly require that
2 exemptions based on nonbankruptcy law be subject to a burden of
3 proof different than nonbankruptcy law; and, second, whether this
4 particular rule validly altered the burden of proof that had been
5 settled in eight decades of practice under the Bankruptcy Act.

6 The answer to the first question was suggested by the Supreme
7 Court in Raleigh when it rejected the proposition that the
8 allocation of burdens of proof in tax matters should be different in
9 bankruptcy. One could credibly argue that there is no reason to
10 think that the same analysis would lead to a different conclusion
11 with respect to exemptions under nonbankruptcy law, particularly
12 since that was the state of the pre-Code law.

13 The answer to the second question is suggested by the Supreme
14 Court's approach, in cases such as Kelly, perpetuating settled pre-
15 Code judge-made doctrine that is not inconsistent with the
16 Bankruptcy Code and was not otherwise rejected by Congress.

17 Nor are these questions more theoretical than real. A majority
18 of states have exercised their statutory power under § 522(b)(1) to
19 "opt out" of the "federal exemptions" in § 522(d). 14 COLLIER ON
20 BANKRUPTCY (ALAN N. RESNICK & HENRY J. SOMMER, eds.), Exemptions
21 ¶ Intro.[3] (15th ed. rev. 2004). And, in every state, a debtor may
22 elect to take exemptions based on state law in lieu of the
23 exemptions created by § 522(d). Thus, the state-law burden of proof
24 is potentially significant.

25 As noted, the automatic allowance of exemptions to which there
26 is no objection that appears in Bankruptcy Code § 522(1) does not

1 change this analysis.¹⁸ That subsection, which was plainly modeled
2 on Bankruptcy Rule 403(e), does not specify a burden of proof.
3 Insofar as it implicates burdens, § 522(1) deals with the procedural
4 burden of going forward, rather than the burden of proof. It
5 arguably also operates to create an evidentiary presumption that a
6 mere claim of exemption is valid, which presumption is rebutted by
7 making an objection. If rebutted, then the usually-applicable
8 burden of proof applies.

9 The present appeal does not require us to resolve the extent of
10 the validity of Rule 4003(c) because we are unanimous that, under
11 all plausible views regarding the burden of proof, the evidence of
12 record does not support the claimed exemption. We agree that,
13 assuming that the trustee had the burden of proof, the trustee
14 carried that burden. It follows that the evidence also would not be
15 sufficient to support an exemption if the debtor were to have had
16 the burden of proof. The assertion in the majority opinion that the
17 burden of proof is on the trustee should be regarded as nonbinding
18 dictum because it is not necessary to the decision.

19 In another case, however, the allocation of the burden of proof
20

21 ¹⁸ The statute provides:

22 (1) The debtor shall file a list of property that the
23 debtor claims as exempt under subsection (b) of this section.
24 If the debtor does not file such a list, a dependent of the
25 debtor may file such a list, or may claim property as exempt
26 from property of the estate on behalf of the debtor. Unless a
party in interest objects, the property claims as exempt on
such list is exempt.

11 U.S.C. § 522(1).

1 could be crucial. I CONCUR.

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26