

UNITED STATES BANKRUPTCY COURT
DEPARTMENT 1
JUDGE MARGARET M. MANN, PRESIDING
THURSDAY, DECEMBER 8, 2016

10:00 AM

1 - 12-00260-MM Ch 7 KELLIE ARCHER

OPPOSITION TO U.S. TRUSTEE'S MOTION TO REOPEN CASE FILED BY DEBTOR

Tentative Ruling: The court will reopen the case as this is a ministerial act. Whether the personal injury settlement is property of the estate is an issue that will be reserved for a later time. Appearances are excused.

US TRUSTEE: HAEJI HONG
ATTORNEY: JULIAN MCMILLAN (KELLIE ARCHER)

2 - 14-00182-MM Ch 7 MARIEA M LEWIS & JON C BLAKE

**ADV: 15-90186 MARIEA LEWIS v. U.S. DEPARTMENT OF EDUCATION & NAVY
FEDERAL CREDIT UNION & ECMC**

1) PRE-TRIAL STATUS CONFERENCE (fr. 10/20/16)

Tentative Ruling: To be heard.

2) MOTION TO COMPEL FILED BY DEFENDANT (fr. 10/20/16)

Tentative Ruling: To be heard.

3) ORDER TO SHOW CAUSE FOR FAILURE TO APPEAR (fr. 10/20/16)

Tentative Ruling: Debtor has been subject to an order to show cause since May 26

Debtor has failed to appear at several hearings.

Debtor has failed to comply with discovery and meet and confer obligations and the information provided indicates that the suit may well not be meritorious.

Actual notice has been given to this pro per plaintiff that failure to participate in this action would lead to the dismissal of this action.

Court has conversed with debtor to ensure her understanding.

As such the court will dismiss the case.

4) MOTION TO DISMISS CASE FILED BY DEFENDANT

Tentative Ruling: To be heard.

ATTORNEY: BETH A. CLUKEY (U.S. DEPARTMENT OF EDUCATION)
ATTORNEY: CRAIG E. DWYER (ECMC)
OTHER: MARIEA LEWIS

10:00 AM

3 - 14-01647-MM Ch 7 MEHDI BOLOURIRAD

ADV: 14-90104

GEORGE MYERS & KIMBERLY LARSON & OLAF LARSON v. MEHDI BOLOURIRAD

PRE-TRIAL STATUS CONFERENCE (fr. 9/8/16)

Tentative Ruling: Continued to January 19, 2017 at 10:00 a.m., Department 1 to accommodate health issues and a potential settlement. If no settlement is reached, trial dates will be set. Status reports are due to be filed not later than January 12, 2017. Appearances at the December 8, 2016 hearing are excused.

ATTORNEY: JONATHAN P. BECK (MEHDI BOLOURIRAD)
OTHER: GEORGE MYERS
OTHER: KIMERLY LARSON
OTHER: OLAF LARSON

4 - 14-09610-MM Ch 7 DOUGLAS WILLIAM SAIN

TELE

OPPOSITION TO TRUSTEE'S NOTICE OF INTENDED ACTION FILED BY DEBTOR

Tentative Ruling: This dispute appears to be over the Trustee's desire to pay a Domestic Support Obligation ("DSO") from the Debtor's homestead exemption. While Trustee has the obligation under 11 U.S.C. Section 704(a) to pay DSOs before all the claims, he can only do so from property of the estate. Debtor's homestead exemption, which has been allowed, is no longer property of the estate. *Mwangi v. Wells Fargo Bank, N.A. (In re Mwangi)*, 764 F.3d 1168, 1176-77 (9th Cir. 2014).

The Trustee is free to distribute the net proceeds of the sale to the lienholder for the DSO in the amount of \$42,499.37 from other funds of the estate, subject to the rights of Brooke Sain and Debtor in family court. Resolution of rights in family court is beyond the jurisdiction of this court.

The opposition will be sustained to this extent and all collateral matters raised by the parties will be resolved upon proper notice and a hearing.

ATTORNEY: GARY E. SLATER (RICHARD KIPPERMAN, TRUSTEE)
ATTORNEY: KATHRYN M.S. CATHERWOOD (DOUGLAS SAIN)

5 - 15-00312-MM Ch 7 YU MA

ADV: 15-90067

NAOMI LIZAMA v. YU MA

TELE

PRE-TRIAL STATUS CONFERENCE (fr. 11/10/16)

Tentative Ruling: Continued to January 19, 2017 at 10:00 a.m., Department 1. If the settlement has not been documented, status reports are due to be filed not later than January 12, 2017. Appearances at the December 8, 2016 hearing are excused.

ATTORNEY: DONALD E. WOLFE (NAOMI LIZAMA)
ATTORNEY: JAENAM J. COE (YU MA)

10:00 AM

6 - 15-00313-MM Ch 7 FENG CHEN

ADV: 15-90068 NAOMI LIZAMA v. FENG CHEN

TELE

PRE-TRIAL STATUS CONFERENCE (fr. 11/10/16)

Tentative Ruling: Continued to January 19, 2017 at 10:00 a.m., Department 1. If the settlement has not been documented, status reports are due to be filed not later than January 12, 2017. Appearances are excused.

ATTORNEY: DONALD E. WOLFE (NAOMI LIZAMA)

ATTORNEY: JAENAM J. COE (FENG CHEN)

7 - 15-04566-MM Ch 7 JASON R. ARZOLA

OPPOSITION TO TRUSTEE'S NOTICE OF OBJECTIONS TO DEBTOR'S CLAIM OF EXEMPTIONS FILED BY DEBTOR (fr. 7/21/16)

Tentative Ruling: Off calendar. Settlement has been approved. Appearances are excused.

ATTORNEY: HENRY AHRENS (JASON ARZOLA)

8 - 15-07421-MM Ch 7 GARY PIMENTEL

1) FIRST AND FINAL APPLICATION FOR COMPENSATION AND REIMBURSEMENT OF EXPENSES FOR DEAN JOHNSON, ACCOUNTANT

Tentative Ruling: The Court having considered the Application for Final Professional Compensation (the "Application") filed by R. Dean Johnson, Accountant to Chapter 7 Trustee, for fees of \$900.00 and expenses of \$110.02; No opposition having been timely filed and good cause appearing; The Application is granted and appearances are excused. R. Dean Johnson may upload an order granting the Application in full as requested.

2) FIRST AND FINAL APPLICATION FOR COMPENSATION AND REIMBURSEMENT OF EXPENSES FOR FINANCIAL LAW GROUP, ATTORNEY FOR TRUSTEE

Tentative Ruling: The Court having considered the Application for Final Professional Compensation (the "Application") filed by Financial Law Group, Attorneys for Chapter 7 Trustee, for fees of \$5,687.50 and expenses of \$29.71; No opposition having been timely filed and good cause appearing; The Application is granted and appearances are excused. Financial Law Group may upload an order granting the Application in full as requested.

ATTORNEY: JUDITH A. DESCALSO (GARY PIMENTEL)

9 - 16-00580-MM Ch 7 FERNANDO ALCARAZ

TELE

MOTION FOR RELIEF FROM STAY, RS #JHW-1 FILED BY SANTANDER CONSUMER USA, INC. (fr. 11/17/16)

Tentative Ruling: Off calendar. Motion has been withdrawn. Attorney's guideline fees are awarded. Appearances are excused.

ATTORNEY: JOHN F BRADY (FERNANDO ALCARAZ)

ATTORNEY: JENNY H. WANG (SANTANDER CONSUMER USA, INC.)

10:00 AM

10 - 16-02144-MM Ch 13 WALLACE HICKEY

MOTION FOR RELIEF FROM STAY, RS #TSC-1 FILED BY CITIMORTGAGE, INC.

ATTORNEY: GARY A. QUACKENBUSH (WALLACE HICKEY)
ATTORNEY: THERON S. COVEY (CITIMORTGAGE, INC.)

11 - 16-05355-MM Ch 7 OCTAVIO ESCATEL

MOTION TO EXTEND AUTOMATIC STAY FILED BY TRUSTEE

Tentative Ruling: Unopposed motion is granted and appearances are excused.

ATTORNEY: WILFRED E. BRIESEMEISTER (OCTAVIO ESCATEL)

11:00 AM

1 - 11-07124-MM Ch 7 TAMI LYN & STEVEN MICHAEL SATKOWIAK

ADV: 11-90377 CASTROL NORTH AMERICA, INC. v. TAMI & STEVEN SATKOWIAK

PRE-TRIAL STATUS CONFERENCE (fr. 9/29/16)

Tentative Ruling: Off calendar. Matter is resolved and case will be closed pursuant to the terms of the stipulation which the court has approved. Appearances are excused.

ATTORNEY: DAVID A. RENTTO (CASTROL NORTH AMERICA, INC.)
ATTORNEY: JUDITH A. DESCALSO (TAMI & STEVEN SATKOWIAK)

2 - 13-01900-MM Ch 7 MICHEAL L. & MELANIE E. AUSTIN

OPPOSITION TO TRUSTEE'S OBJECTIONS TO DEBTOR'S CLAIM OF EXEMPTIONS FILED BY DEBTOR

Tentative Ruling: Off calendar. Settlement has been reached. Appearances are excused.

ATTORNEY: CHRISTIN A. BATT (LESLIE GLADSTONE, TRUSTEE)
ATTORNEY: DEREK J. LOBO (MICHEAL & MELANIE AUSTIN)

3 - 13-06596-MM Ch 7 VICTORIA J. WAGNER

1) FIRST AND FINAL APPLICATION FOR COMPENSATION AND REIMBURSEMENT OF EXPENSES FOR DEAN JOHNSON, ACCOUNTANT

Tentative Ruling: The Court having considered the Application for Final Professional Compensation (the "Application") filed by R. Dean Johnson, Accountant to Chapter 7 Trustee, for fees of \$8,016.00 and expenses of \$454.58; No opposition having been timely filed and good cause appearing; The Application is granted and appearances are excused. R. Dean Johnson may upload an order granting the Application in full as requested.

2) FINAL APPLICATION FOR COMPENSATION AND REIMBURSEMENT OF EXPENSES FOR FOLEY & LARDNER, ATTORNEY FOR TRUSTEE

Tentative Ruling: Previous tentative vacated (Docket No. 158) pertaining to Foley & Lardner's final fee application. Matter to be heard.

ATTORNEY: JUDITH A. DESCALSO (VICTORIA WAGNER)

11:00 AM

4 - 14-03556-MM Ch 7 KENNETH ROSS SUTHERLAND

ADV: 16-90058

RICHARD KIPPERMAN, TRUSTEE v. KENNETH SUTHERLAND & HELEN NAISMITH & VIVIAN HATHAWAY & BARBARA SUTHERLAND

1) PRE-TRIAL STATUS CONFERENCE (fr. 9/8/16)

Tentative Ruling: Before the court are cross motions for summary judgment filed by Trustee Richard M. Kipperman ("Trustee"), Debtor Kenneth Ross Sutherland ("Debtor"), and Successor Trustee Barbara A. Sutherland ("Barbara"). The parties disagree whether and to what extent the Debtor's interest in 235 Apple Blossom Lane in Vista, California ("Property") worth approximately \$520,672.00, and funds in the amount of \$225,000 ("Funds") constitute property of the Debtor's bankruptcy estate. Certain facts are undisputed:

1. Debtor's parents William Sutherland ("William") and Mary Sutherland ("Mary" and together the "Testators") created an inter vivos trust ("Trust") on or about October 21, 1991. Doc. 29, pg. 8, ¶ 2.2.
2. The Trust was amended on October 6, 2003.
3. William died on January 10, 2006. Doc. 44, pg. 4.
4. Debtor filed a voluntary Chapter 7 petition on May 2, 2014.
5. Mary died on May 8, 2014.
6. Barbara is the successor trustee to the Trust.
7. On May 23, 2014, Debtor amended his Schedules to list his interest in the Property as a "Fee Simple" interest, with a value of \$520,672.00.
8. On May 23, 2014, Debtor also listed his interest in the Funds, stating: Debtor is entitled to receive \$225,000. Sister is to disburse funds to Debtor by taking out a loan against real property she inherited though their late mother's Trust. Mother recently passed away on 5/8/2014. Case no. 14-03556 (Debtor's "Main Bankruptcy"), Docket No. 13.
9. On May 27, 2014, Debtor filed a motion to convert his chapter 7 case to a case under chapter 13. Main Bankruptcy, Docket No. 14. This motion was granted on May 29, 2014.
10. On October 8, 2014-without obtaining relief from the automatic stay-Debtor's ex -wife, Cinamon Sutherland ("Cinamon"), filed a petition in the Santa Barbara County Superior Court in which she requested an order directing Barbara to distribute property from the Trust to her pursuant to her marital settlement agreement with Debtor. Cinamon's request was denied on July 2, 3, 2015 on the grounds that the Trust contained a spendthrift provision. See Or. Deny Pet., Decl. Debtor, Docket No. 26-5, Ex. D.
11. On October 26, 2015, approximately three months after the Superior Court's decision, Debtor converted his Chapter 13 case back to Chapter 7, citing the Superior Court's determination as the basis for claiming the Property and the Funds were not property of the estate. See Main Bankruptcy, Docket No. 43.
12. Barbara has not distributed any of the Funds or the Property to Debtor.
13. Debtor is more than 25 years old.

These facts present certain legal issues

1. Does 11 U.S.C. § 541(a)(1) cause the disputed assets to become property of the estate? If not, there is no need to consider the remaining issues.
2. Is the spendthrift clause contained in Paragraph 7.15 of the Trust ("Spendthrift Clause") applicable to Debtor since he has not received distribution of the any assets from the Trust?

3. If the Spendthrift Clause is applicable, does Trustee have any rights to Trust assets which may be property of the estate?

The Trust

The Trust provides that, upon the first of the Testators to die, all of the assets of the Trust will be divided and placed in a "Survivor's 'A' Trust" ("Survivor's Trust") and a "Credit Shelter 'B' Trust" ("Credit Trust"). In her Amended Points and Authorities in Opposition to Trustee's Motion for Summary Judgment, Barbara states that at the time of William's death the Community Assets held by the Trust had an estimated value of no more than \$3,000,000 and were divided 50% to the Survivor's Trust and 50% to the Credit Trust. Doc. 44, pg. 5. While Debtor argues that the Credit Trust was revocable on the petition date, Barbara states that at the time the Trust was bifurcated, it was bifurcated into a revocable portion (the Survivor's Trust) and an irrevocable portion (the Credit Trust).

Section 2.4 of the Trust provides that the trustee of the Trust "shall, until the death of the surviving spouse, hold, deal with, and dispose of the trust property hereinabove directed to be set apart in the credit shelter trust" except that:

- (a) "[T]he surviving spouse shall receive the entire net income of the trust so long as he or she lives."
- (b) "[S]hould the trustee . . . determine that the surviving spouse is in need of funds for his or her support . . . the trustee may pay to or apply for the benefit of the surviving spouse . . . principal of the credit shelter trust [that] . . . in the discretion of the trust may from time to time deem necessary or advisable"; and
- (c) "[T]he surviving spouse shall have the power to withdraw from the principal each calendar year those amounts as shall not exceed . . . \$5,000 . . . or 5 percent of the assets at the time of the lapse of the power by written instrument signed by him or her and delivered to the trustee."

Section 2.5 of the Trust (titled "Governing Provisions of Credit Shelter 11 B11 Trust Upon Death of Surviving Spouse"), as amended on October 21, 1991, provides that upon Mary's death, the trustee is required to distribute the property "subject to the credit shelter trust" as follows:

- (1) The Property to Debtor;
- (2) \$225,000 to Debtor; and
- (3) The rest distributed 100% to Barbara.

Section 2.5 further provides that, if Debtor predeceases the deceased spouse (William), the special gift would pass "to the residue of this trust."

Paragraph 2.6 of the Trust provides that: "Notwithstanding any other provision of this instrument, if any person otherwise entitled to an outright distribution of trust properties (referred to in this paragraph as "the beneficiary") has not attained the age of TWENTY-FIVE (25) YEARS on the date on which the properties become so distributable, the trustee shall retain and administer the beneficiary's properties in a sub-trust for his or her benefit."

Section 4.5 of the Trust provides that after the death of the first spouse the survivor "may revoke or amend any of the trusts . . . except a credit shelter ("B"), or QTIP ("C") trust, each of which shall be irrevocable and shall not be subject to amended by any person."

Property of the Estate

Section 541(a)(1) defines property of the estate broadly to include "all legal or equitable interests of the debtor in property as of the commencement of the case."

Debtor argues that his interest in the Trust is not property of the estate under § 541(a)(1) because it was revocable on the petition date. A trust is presumed to be revocable by the settlor unless the trust instrument expressly makes the trust irrevocable. Cal. Prob. Code § 15400. Debtor relies upon section 1.4 of the Trust in which his parents reserved "the

right to both amend or revoke the trust during our joint lives." What this argument ignores however, is that the Testators' lives were no longer joint after William died pre-petition. The potential contingency to the revocable status of the Trust had been resolved by the petition date and Debtor's interest in the trust was irrevocable. To corroborate that interpretation, Section 4.5 provides that, after the death of the first testator, the Credit Trust "shall be irrevocable."

This express language of irrevocability is controlling here. "The intentions of the transferor as expressed in the instrument controls the legal effect of the disposition made" Cal. Probate Code § 21102. Generally, courts must ascertain the intent of the of the testator "from the whole of the trust instrument." *Estate of Cairns*, 188 Cal. App. 4th 937, 944 (2011). Since the Credit Trust from which Debtor claims his interest was irrevocable on the petition date, Debtor had a vested interest in it. *Aulisio v. Bancroft*, 230 Cal. App. 4th 1516, 1525 (2014) (citing *Estate of Giralдин*, 55 Cal.4th 1058, 1062 (2012)) (when a settlor dies the trust becomes irrevocable and the beneficiaries' interest in the trust vests). The revocable or irrevocable status of the Trust may in any event not even matter under *In re Neuton*, 922 F.2d 1379, 1381 (9th Cir. 1990), which did not discuss whether the trust at issue in *Neuton* was revocable or irrevocable. The provisions of the intervivos trust in *Neuton* required that the trustee pay the testator a share of the trust during her lifetime and a share of the trust income to her living children after her death. *Id.* The trust further stated that the debtor was entitled to a distribution of the trust corpus upon the termination of the trust if he was alive at that time. *Id.* at 1382. The debtor argued that income from the trust was not property of the estate because his right to receive the income was contingent on the petition date. *Id.* at 1381. Relying upon *In re Ryerson*, 739 F.2d 1423 (9th Cir. 1984) (money the debtor became entitled upon the termination of his employment attributable to pre-petition services should be included with the bankruptcy estate), the Ninth Circuit stated "contingent interests of the type at issue in this case typically have been held to be property of the bankrupt estate."

Even if a portion of the Trust was revocable pre-petition, Debtor's interest in the specific gifts vested pre-petition upon the death of William and is property of the estate. *Jones v. Mullen (In re Jones)*, No. AZ-12-1644, 2014 Bankr. LEXIS 488 (B.A.P. 9th Cir. Feb. 5, 2014) (distinguishing *Burton v. Ulrich (In re Schmitt)*, 215 B.R. 417, 420 (B.A.P. 9th Cir. 1997) on the grounds that *Schmitt* involved an interest that had not yet vested when the trustee sought to enforce it). Under *Neuton*, 922 F.2d at 1381, what matters is whether the contingent interest had vested before the enforcement by trustee, which happened here as in *Jones*. Debtor's vested interests in the Trust as of his father's death are much more than "a mere expectation of renewal of an interest in property" and as such are property of the estate. *Abele v. Phx. Suns Ltd. P'ship (In re Harrell)*, 73 F.3d 218, 219 (9th Cir. 1996).

For this reason, the court need not determine whether or not Debtor's interest in the Credit Trust would have been property of the estate if it was "contingent" or part of a revocable trust. The Property and Funds are property of the estate under § 541(a)(1). Similarly, the court need not determine whether additional conditions in the Trust (such as the assets remaining in the Trust subject to Mary's ability to access the principal for her maintenance and support) effected the estate's interest under 11 U.S.C. § 541(a)(1). If such conditions were conditions subsequent then Debtor's interest would remain vested property of the estate. *Estate of Ferry*, 55 Cal. 2d 776 (1961). If such conditions were conditions precedent, making Debtor's interest in the Trust contingent, under *Neuton* the contingent nature of the gift would not have prevented it from being

property of the estate.

The Spendthrift Clause is Applicable

Because Debtor's interest in the Credit Trust is property of the estate under § 541(a)(1), the court must next decide if the Spendthrift Clause applies since this could remove Debtor's interest in the Trust from the definition of property from the estate under 11 U.S.C. § 541(c)(2). Debtor argues the Spendthrift Clause would prevent the Property and Funds from becoming property of the estate under § 541(c)(2) because, even if the Spendthrift Clause is not enforceable upon the death of the last testator, it was enforceable on the petition date. Debtor also asserts that 25% of the Property and Funds are necessary for his support because he has a special needs child. Trustee argues that the Spendthrift Clause does not apply because Section 2.5 of the Trust requires that all assets of the Trust be distributed directly to Debtor and did not provide for a distribution of income during the testator's lifetime and after as was the case in *Neuton*, 22 F.2d at 1381, where the spendthrift clause was clearly applicable.

Section 541(c)(2) provides that a proper spend thrift clause can remove property from the estate. As held in *Frealy v. Reynolds*, 779 F.3d 1028, 1034 (9th Cir. 2015):

"a spendthrift provision protects the beneficiary's income and principal interests only so "long as the income or principal is properly held" in the trust. *Chatard v. Oveross*, 179 Cal. App. 4th 1098, 101 Cal. Rptr. 3d 883, 889 (Ct. App. 2009). After the amount is paid to the beneficiary, creditors may reach it. *Kelly v. Kelly*, 11 Cal. 2d 356, 79 P.2d 1059, 1063 (Cal. 1938); see also Cal. Prob. Code §§ 15300, 15301(a).

The significance of a spendthrift clause for assets about to be distributed from a trust is described in *Chatard*, 179 Cal. App. 4th at 1107, which provides that a spendthrift clause "only precludes a third party from reaching . . . beneficiaries' interests in the discrete period between the second settlor's death and distribution of the Trust estate to them."

Perhaps cognizant that distributing the trust assets to Debtor would end that "discrete period," Barbara has not yet done so, and could not have done so on the petition date since Mary was still alive. .

The court was unable to find any California case in which a court distinguished between final or interim distributions under an inter vivos trust for purposes of the application of a spendthrift clause. Instead, California courts generally hold that where a testator includes a spendthrift provision in a trust, "[i]t is the intent of the trustor . . . that the benefits [of the trust] reach the hands of the cestui free from liens and attachments." *Kelly v. Kelly*, 11 Cal. 2d 356, 363, 79 P.2d 1059, 1063 (1938). This would mean that spendthrift clauses are applicable to any gift or distribution of the inter vivos trust, "so long as that interest hasn't yet been paid to the beneficiary." *Frealy v. Reynolds*, 779 F.3d 1028, 1030 (9th Cir. 2015), request granted, No. S224985, 2015 Cal. LEXIS 2410 (Apr. 29, 2015). That courts do not distinguish between final and interim distributions is consistent with courts' refusal to treat gifts under inter vivos trusts as testamentary. *Kosmala v. Cook (In re Cook)*, No. CC-08-1091-HMoD, 2008 Bankr. LEXIS 4728 (B.A.P. 9th Cir. Nov. 3, 2008) ("Inter vivos trusts are considered to be non-testamentary even though the terms of the trust may provide for the transfer of the trust's assets to its beneficiaries upon the last settlor's death."), *aff'd*, *Kosmala v. Cook (In re Cook)*, 370 F. App'x 791, 791-92 (9th Cir. 2010).

Here, the assets were in the Trust on the petition date. While this did not prevent Debtor's interest from becoming property of the estate under § 541(a)(1), this did mean that they came into the estate subject to the Spendthrift Clause under applicable California because they had not yet

been paid to the beneficiary. See *Butner v. United States*, 440 U.S. 48, 54, 99 S. Ct. 914, 59 L. Ed. 2d 136 (1979) (a debtor's property rights are determined as of the petition date). Indeed, even the court in *Chatard* found the spendthrift clause applicable until the final distributions were made to the beneficiaries.

For these reasons, the court finds there is no triable issue of fact regarding whether the Spendthrift Clause applies. There are several factual issues regarding the extent of that applicability.

No Preclusive Effect of State Court Order

In determining exactly how the Spendthrift Clause is to be applied, the state court's determination about the applicability of the spendthrift clause is not entitled to "res judicata" effect because it is void. as a violation of the automatic stay. *In re Gruntz*, 202 F3d 1074, 1081-1082 (9th Cir. 2000). Even if it were not void, Debtor's ex-wife would not be in "privity" with the Trustee because the Trustee would not "reasonably have expected to be bound" by this suit. *DKN Holdings LLC v. Faerber*, 61 Cal. 4th 813, 826 (2015), *reh'g denied.*; Even if there had been privity, to the extent that the probate order affected property of the estate, it would have been void; see also *In re DLC, Ltd.*, 295 B.R. 593, 602 (8th Cir. BAP 2003) *aff'd sub nom, Stalaker v. DLC, Ltd.*, 376 F.3d 819 (8th Cir. 2004) ("Because the trustee is invested with extraordinary rights as a general representative of creditors, he is not bound, either on res judicata or judicial collateral estoppel grounds by the prior state proceedings") (internal quotations omitted).

Application of the Spendthrift Clause

Having determined that the spendthrift clause is applicable, the court must determine whether it applies to 25% of the trust interest, or a lesser or greater amount. The parties do not dispute that spendthrift provisions under the California Probate Code are subject to a number of exceptions. *Frealy*, 779 F.3d at 1035; *request granted, Frealy v. Reynolds*, No. S224985, 2015 Cal. LEXIS 2410 (Apr. 29, 2015). For example, under Prob. Code § 15301(b), a court can order the trustee of a trust to satisfy a money judgment out of the principal of a trust, after the amount has become "due and payable." The court may also order a trustee to satisfy a judgment creditor from any amount to which a beneficiary is entitled under a trust in excess of the amount that is necessary for the support of the beneficiary under Probate Code § 15307. Finally, a court may order the trustee to satisfy a judgment creditor up to 25% of future payments under Probate Code § 15306.5. However, § 15306.5(c) restricts creditors' access to 25% of future payments, stating that "[a]n order under this section may not require that the trustee pay in satisfaction of the judgment any amount that the court determines is necessary for the support of the beneficiary and all the persons the beneficiary is required to support."

In *Neuton*, the Ninth Circuit applied § 15306.5 to limit the estate's interest in proceeds from a trust to 25%. *Neuton*, 922 F.2d at 1383. The court then applied § 15306.5(c) to provide that any amount necessary for a debtor's support must be deducted from the estate's 25% interest and scheduled an evidentiary hearing on these issues. Like the debtor in *Neuton*, Debtor argues that because he has a special needs child that the estate's 25% interest should be reduced to the extent "the court determines is necessary for the support of the beneficiary" under Cal. Probate Code § 15306.5(c). Trustee argues that Debtor has ample resources to pay the estate's interest and still have a sizable surplus remaining. Trustee also argues that the estate's 25% interest could be satisfied from Debtor's \$225,000 cash gift without selling the Property, with remaining cash proceeds and the Property to be used to address Debtor and his dependents on going care.

In addition, should the court determine that it is appropriate to make deductions from 25% reduced amount for Debtor's support, Trustee reserves the right to assert that the estate is entitled to a greater percentage of Debtor's interest in the Trust under Cal. Probate Code §§ 15301(b) and 15307. In that event, the court must await the outcome of *Frealy*, in which the bankruptcy trustee requested distributions in excess of 25% under Probate Code §§ 15301(b) and 15307. *Frealy*, 779 F.3d at 1030. The court certified the question of whether the 25% cap applied to actions brought under §§ 15301(b) and 15307 to the California Supreme Court. *Id.* at 1033-35. Oral argument in this case is scheduled for January 4, 2017. See *Frealy v. Reynolds*, No. S224985, 2015 Cal. LEXIS 2410 (Apr. 29, 2015). Because the Trustee has reserved his rights, the court cannot grant summary judgment to either party.

As in *Neuton*, 922 F.2d at 1383, the court cannot grant summary judgment on the inherently factual issue of whether any amounts in which the estate has an interest are necessary for Debtor's support under § 15306.5(c). In addition, the court believes it is not appropriate to bifurcate the issue of whether or not the estate would be entitled to a percentage greater than 25%. Instead, the exact extent of the estate's interest and what amounts, if any, are necessary for Debtor's support must be tried together.

Application of the Homestead Exemption

Debtor listed the Property as his address in voluntary Chapter 7 petition filed May 2, 2014. Doc. No. 1, pg. 1. In his Schedule A filed May 2, 2014, Debtor did not list any interest in the Property, however, on May 23, 2014, Debtor amended his Schedule A to list a "fee simple" interest in the Property valued at \$520,572. At that time Debtor stated he was the beneficiary of the property through his late mother's Trust. Debtor claims an exemption in the Property of \$100,000 under Cal. Code Civ. Proc. § 704.730. Debtor subsequently amended his Schedules A and C a second time on November 11, 2015. In this amendment to note his assertion that the Spendthrift Clause applied to his interest in the Property and valued his interest in the Property as \$0. Debtor also removed his exemption in the Property from his Schedule C. Debtor amended his Schedule A a third time on November 22, 2016. In this amendment, Debtor continued to value his fee simple interest in the Property at \$0 and added a note that the Property is Debtor's primary residence and necessary for his support under Cal. Probate Code § 15306.5. Debtor did not claim an exemption in the Property, however, he did claim an exemption of \$21,929 in the Trust under Cal. Code Civ. Proc. § 703.140(b)(5), to which no party has objected.

While in her motion opposition to Trustee's motion for summary judgment, Barbara asserts that Debtor would have the right to a statutory homestead exemption, Debtor has not claimed an exemption in the Property, so the court need not analyze the applicability in the context of this proceeding.

Conclusion

For the reasons set forth above, summary judgment is granted in part and denied in part.

- 2) MOTION FOR SUMMARY JUDGMENT DISMISSING COMPLAINT IN ITS ENTIRETY FILED BY DEFENDANT KENNETH SUTHERLAND
- 3) MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT FILED BY PLAINTIFF

ATTORNEY: KIT J. GARDNER (RICHARD KIPPERMAN, TRUSTEE, RICHARD KIPPERMAN, TRUSTEE)
ATTORNEY: DAVID L. SPECKMAN (BARBARA SUTHERLAND)
ATTORNEY: AHREN TILLER (KENNETH SUTHERLAND)

11:00 AM

5 - 16-04815-MM Ch 7 ADAM MICHEL & RACHAEL JENNY ATAMIAN
REAFFIRMATION AGREEMENT BETWEEN DEBTORS AND WELLS FARGO BANK

OTHER: ADAM & RACHEL ATAMIAN

6 - 16-04924-MM Ch 7 PEDRO JOSE FORD
REAFFIRMATION AGREEMENT BETWEEN DEBTOR AND AMERICAN HONDA FINANCE CORPORATION

ATTORNEY: DAVID E. BRITTON (PEDRO FORD)

7 - 16-05445-MM Ch 7 RODEL CARAS & LEILANI RODRIGUEZ GERONIMO
REAFFIRMATION AGREEMENT BETWEEN DEBTORS AND SANTANDER CONSUMER USA, INC.

Tentative Ruling: Because there is no evidence of undue hardship, the reaffirmation agreement will be approved and appearances are excused.

ATTORNEY: JEFFREY D. SCHREIBER (RODEL & LEILANI GERONIMO)

02:00 PM

1 - 11-14011-MM Ch 7 JULIE LEAP
MOTION TO AVOID JUDICIAL LIEN OF WELLS FARGO FINANCIAL NATIONAL BANK FILED BY DEBTOR

Tentative Ruling: Properly served unopposed motion is granted and appearances are excused.

OTHER: JULIE LEAP

2 - 13-11913-MM Ch 7 JASON SCOTT BROWN
ADV: 15-90085 CHRISTOPHER BARCLAY, TRUSTEE v. JASON BROWN & CURTIS BROWN & KENNETH BROWN & CHRISTOPHER BROWN

PRE-TRIAL STATUS CONFERENCE (fr. 9/8/16)

Tentative Ruling: Continued to January 19, 2017 at 10:00 a.m., Department 1. If the settlement has not been documented, status reports are due to be filed not later than January 12, 2017. Appearances at the December 8, 2016 hearing are excused.

ATTORNEY: YOSINA M. LISSEBECK (CHRISTOPHER BARCLAY, TRUSTEE)
ATTORNEY: ROBERT W. TIANGCO (CURTIS BROWN, KENNETH BROWN, CHRISTOPHER BROWN)
ATTORNEY: CHRISTOPHER R. BUSH (JASON BROWN)

02:00 PM

3 - 15-07271-MM Ch 11 CHRISTOPHER ROBIN LAMONT

STATUS CONFERENCE ON CHAPTER 11 VOLUNTARY PETITION (fr. 11/17/16)

Tentative Ruling: All objections to the Debtor's recently filed combined plan and disclosure statement will be heard on December 20, 2016 at 3:00 p.m., together with the status conference. Trustee's motion for leave to file a reply is granted as long as the reply is filed not later than December 13, 2016. Appearances at the December 8, 2016 hearing are excused.

US TRUSTEE: KRISTIN MIHELIC
ATTORNEY: MICHAEL AVANESIAN (CHRISTOPHER LAMONT)

4 - 16-02852-MM Ch 7 PEDRO HERRERA

OPPOSITION BY AGUEDA PONS TO DEBTOR'S OBJECTION TO CLAIM #3

ATTORNEY: SHAWN A. DOAN (PEDRO HERRERA)

5 - 16-02852-MM Ch 7 PEDRO HERRERA

ADV: 16-90131 AGUEDA PONS v. PEDRO HERRERA

- 1) MOTION TO DISMISS COMPLAINT FILED BY DEFENDANT
- 2) PRE-TRIAL STATUS CONFERENCE

ATTORNEY: WILLIAM A. SMELKO (AGUEDA PONS)
OTHER: PEDRO HERRERA
OTHER: PEDRO HERRERA

6 - 16-03135-MM Ch 11 8110 AERO DRIVE HOLDINGS, LLC

MOTION FOR USE OF CASH COLLATERAL FILED BY DEBTOR

Tentative Ruling: Since neither party has submitted further briefing on this cash collateral motion as required, the court assumes the matter has been resolved and takes this hearing off calendar. Appearances are excused.

ATTORNEY: WILLIAM M. RATHBONE (8110 AERO DRIVE HOLDINGS, LLC)

7 - 16-03285-MM Ch 11 GEORGE THOMAS KELLY & LORI ANN SAVOY-KELLY

MOTION FOR RECONSIDERATION OF COURT'S ORDER APPROVING EMPLOYMENT OF CHARLES D. NACHAND, III FILED BY J.A.W. LAND & TRADING, LLC

Tentative Ruling: Off calendar; to be rescheduled in Department 2. Appearances are excused.

ATTORNEY: BRUCE R. BABCOCK (GEORGE & LORI KELLY)
ATTORNEY: MICAH BAILEY (J.A.W. LAND & TRADING, LLC)

02:00 PM

8 - 16-06230-MM Ch 7 CLOVERSHIELD, INC., A CALIFORNIA CORPORATION

TELE

MOTION TO DISMISS INVOLUNTARY PETITION AND REQUEST FOR ATTORNEY'S FEES, COSTS AND DAMAGES, OR, IN THE ALTERNATIVE, FOR THE POSTING OF A BOND FILED BY JOSHUA YOUNG, SHEILA HOYT, MOVING SHAREHOLDERS OF ALLEGED DEBTOR

ATTORNEY: JOHN FITZGERALD (SHEILA HOYT)

ATTORNEY: WILLIAM F. SMALL (JOSHUA YOUNG)

ATTORNEY: JONATHAN S. DABBIERI (STEPHEN HARMON & MARIANNE HARMON TRUST)