NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE DANIEL J. SUTTER, doing business as D & D Services, Debtor.	BAP No. WO-06-037
DANIEL J. SUTTER, Appellant, v. G. DAVID BRYANT, Trustee, Appellee.	Bankr. No. 05-24508-BH Chapter 7 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the Western District of Oklahoma

Before McFEELEY, Chief Judge, CLARK, and BROWN, Bankruptcy Judges.

BROWN, Bankruptcy Judge.

Appellant Daniel J. Sutter (Debtor) appeals the bankruptcy court's order determining that his interest in property, formerly held in a trust established by his grandparents, was property of his bankruptcy estate. The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. For the following reasons, we affirm the decision of the bankruptcy court.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

I. Background

The Debtor's grandparents, Wallace and Betty Ross, executed a "Joint Living Trust" (Trust), on September 7, 2002, which is governed by California law.[1] It designated the grandparents as both the trustees and the beneficiaries of the Trust. It named the Debtor as the successor trustee in the event of his grandparents' death.[2] During the grandparents' lifetimes, it obligated the trustee to pay the beneficiaries any amount that they requested.[3] Upon the death of the last surviving grandparent, it required the trustee to distribute two-thirds of the Trust property to the Debtor and his father, or the survivor thereof, and the remaining one-third to the Debtor's aunt.[4]

The Debtor filed a Chapter 7 petition on October 7, 2005. On his Schedule C, he claimed an exemption in his interest in the Trust. He described his interest as "Trust Fund on Grandmother's Estate, Betty Ross - Grandmother, 1/3 Interest,"[5] valued at $90,000.00.

As Chapter 7 trustee for the Debtor's estate, Appellee (the "Trustee") timely filed an objection to the Debtor's claimed exemption. The Trustee argued that, at the time of the bankruptcy filing, the Trust had terminated. Both of the Debtor's grandparents and his father were deceased. Thus, he argued that the

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1 *The Wallace and Betty Ross Joint Living Trust* at 6, ¶ XI, *in* Appellant's Appendix at 64.

2 *Id.* at 5, ¶ VIII (B), *in* Appellant's Appendix at 63.

3 *Id.* at 1, ¶ IV, *in* Appellant's Appendix at 59.

4 *Id.* at 2, ¶ VI, *in* Appellant's Appendix at 60.

5 *Schedule C*, *in* Appellant's Appendix at 9. He claimed the exemption under "60 O.S. § 327." This statute validates spendthrift provisions in retirement, pension, or profit sharing plans. *See* 60 Okla. Stat. Ann. tit. 60, §§ 326-328 (2006). It appears to have no application to the Trust at issue in this case, which neither party has contended is a retirement, pension, or profit sharing plan. The Debtor apparently concedes that this exemption does not apply, as his arguments in the bankruptcy court and on this appeal have addressed only the applicability of 11 U.S.C. § 541(c)(2) to his interest in the Trust.

Debtor's interest was no longer held in trust, but was an inheritance, to which no exemption applied.

In defense of the Trustee's objection, the Debtor countered that the Trust was a valid spendthrift trust under California law. According to the provisions of 11 U.S.C. §541(c)(2), his interest as a beneficiary of the Trust did not become property of his bankruptcy estate. The Trustee disagreed that any language in this Trust created a spendthrift trust.

The bankruptcy court found that the Trust was not a valid spendthrift trust because it contained "no restriction on alienation of the interest of any beneficiary, either voluntarily or involuntarily."[6] It stated that, absent some indication of the intention to restrain transfer of a beneficiary's interest in the language of the trust, extrinsic evidence of such intent would not be admissible. Finally, the bankruptcy court concluded that, no matter what the Trust had provided with respect to the transfer of the Debtor's interest, the Trust terminated by its terms upon the death of both grandparents. The court stated that, at the time the Debtor filed his bankruptcy case, after the death of the Debtor's father and grandparents, "the [D]ebtor's interests were his alone and had been distributed to him."[7]

II. Appellate Jurisdiction

This Court has jurisdiction to hear timely filed appeals from "final

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[6] *Memorandum of Decision Granting Trustee's Objection to Claim of Exemption ("Order")* at 2, *in* Appellant's Appendix at 29.

[7] *Id.* at 3, *in* Appellant's Appendix at 30. The Debtor contends that the court made findings, without any supporting evidence, that he had received an inheritance from his father. We do not find in the bankruptcy court's Order, any findings of this nature. The Trust provides that, on the death of the last surviving grandparent, the trustee is required to distribute two-thirds of the Trust property to the Debtor and his father, *or the survivor thereof*. The death of the Debtor's father is relevant to this matter, but not because the Debtor did or did not receive an inheritance from his father. It is relevant because it entitled the Debtor to receive a full two-thirds distribution from the Trust.

judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal.[8] A decision is considered final if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[9] The bankruptcy court's order, determining that the Debtor's interest in the Trust was part of the estate and not subject to an exemption, was a final order for purposes of § 158(a)(1).[10] The Debtor's notice of appeal was timely filed within ten days of the entry of the Order. Neither party elected to have this appeal heard by the United States District Court for the Western District of Oklahoma. Thus, this Court has jurisdiction to review the Order.

III. Standard of Review

The facts in this case were not disputed. The bankruptcy court's determination of whether the Trust had terminated, whether it was a spendthrift trust, and whether extrinsic evidence was admissible to determine the grandparents' intent involved questions of law. Questions of law are reviewable *de novo*.[11] *De novo* review requires an independent determination of the issues, giving no special weight to the bankruptcy court's decision.[12]

IV. Discussion

The Debtor has correctly stated that the Bankruptcy Code does not include

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[8] 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002.

[9] *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (citation omitted).

[10] *In re Booth*, 260 B.R. 281, 283 (6th Cir. BAP 2001); *In re Duncan*, 294 B.R. 339, 341-42 (10th Cir. BAP 2003).

[11] *Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1370 (10th Cir. 1996).

[12] *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991).

in property of the estate a trust interest held in a valid spendthrift trust.[13] We must decide, as a matter of law, whether the language in this Trust created a spendthrift trust. We conclude that it did not.

The California Probate Code governs this Trust. It states that a spendthrift trust is created by a trust instrument providing that a beneficiary's interest in income or principal "is not subject to voluntary or involuntary transfer . . . ."[14] In describing what makes a trust a spendthrift trust, California courts have stated that "[a] spendthrift trust is created when the trust instrument provides that the beneficiary may not assign his interest and the trust is not subject to the claims of creditors."[15] While there is no particular wording which must be used, there must at least be some indication that the settlor of the trust intended to prevent the beneficiary from transferring his interest in the trust and that the beneficiary's interest be protected from his creditors.[16]

In support of his position that this Trust is a spendthrift trust, the Debtor relies on Section XIV (D) of the Trust Agreement: *Intentional Exclusion.* The failure of this Trust to provide for any distribution to the following person(s) or organization(s) is intentional: Any person or entity not specifically named herein as a beneficiary of Grantor's estate is intentionally and deliberately excluded as a beneficiary of Grantor's estate.[17] The Debtor contends that this provision

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[13] 11 U.S.C. § 541(c)(2).

[14] Cal. Prob. Code, §§ 15300, 15301(a) (2006).

[15] *Ventura County Dept. of Child Support Servs. v. Brown*, 11 Cal. Rptr. 489, 494 (Cal. Ct. App. 2004); *see also Crocker-Citizens Nat'l Bank v. Johnston (Estate of Johnston)*, 60 Cal. Rptr. 852, 853 (Cal. Ct. App. 1967) (A spendthrift trust is a trust which provides that the beneficiary cannot assign or alienate his interest and that his interest shall not be subject to the claims of creditors.).

[16] *See Estate of DeLano*, 145 P. 2d 672, 674 (Cal. Dist. Ct. App. 1944).

[17] *The Wallace and Betty Ross Joint Living Trust* at 6, ¶ XIV (D), *in* Appellant's Appendix at 64-65.

prevents any party other than the Debtor from taking his interest in the Trust's assets.

This Court concludes, however, that this language is instead a "disinheritance clause," by which the grantors indicated that the failure to include certain persons as beneficiaries of the Trust was intentional, not a mistake or oversight.[18] Such a clause typically contains language to the effect that the grantor (or testator) purposely or intentionally leaves nothing to anyone not mentioned.[19] This provision only concerns *who* is a beneficiary of the Trust. It has no effect on whether a named beneficiary can transfer his interest or whether creditors of a named beneficiary can reach the beneficiary's interest in the trust assets.

There is no provision anywhere in the Trust that indicates an intention on the part of the grantors to prevent or restrict the transfer of a beneficiary's interest or to protect it from the beneficiary's creditors. In fact, the grantors themselves were beneficiaries of the Trust, with the right to obtain as much of the Trust property as they wanted at any time. They could have caused the trustee of the Trust to distribute all of the Trust's assets to themselves, leaving nothing in the Trust at the time of their death for distribution to the Debtor.

The Debtor argues that the bankruptcy court erred in its holding that extrinsic evidence of his grandparents' intent to create a spendthrift trust was not admissible. The bankruptcy court held that any restriction as to alienation of the beneficiary's interest must be "'in the trust', which it isn't."[20] But it further held that "[e]ven if one were to conclude that extrinsic evidence of intent is admissible, the debtor has offered no evidence of any such intent other than the

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[18] *See Estate of Szekely*, 163 Cal. Rptr. 506 (Cal. Ct. App. 1980).

[19] *Estate of Torregano*, 352 P.2d 505, 516 (Cal. 1960).

[20] *Order* at 3, *in* Appellant's Appendix at 30.

trust instrument itself . . . ."[21] Thus, the Debtor should not be heard on the issue of extrinsic evidence, because he never offered any extrinsic evidence.

Furthermore, the California Probate Code provides that, in the construction of a will or a trust instrument, "[t]he intention of the transferor as expressed in the instrument controls the legal effect of the dispositions made in the instrument."[22] In general, extrinsic evidence is not admissible where the terms or provisions of an instrument are clear and certain.[23] In particular, "[e]xtrinsic evidence is not admissible to show the settlor's intention to prevent the voluntary or involuntary transfer of the interest of the beneficiary, if in the trust instrument there is nothing to indicate such an intention."[24] Thus, the court committed no error in regard to the admissibility of extrinsic evidence.

V. Conclusion

For the foregoing reasons, we conclude that the Trust is not a spendthrift trust. Without spendthrift protection, the Debtor's interest under the Trust became property of his bankruptcy estate, whether or not the Trust had terminated. As a result, we need not address the Debtor's assertions of error in regard to the termination of the Trust. Accordingly, we AFFIRM.

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[21] *Id.* at 3 n.2, *in* Appellant's Appendix at 30.

[22] Cal. Prob. Code § 21102(a) (2006).

[23] *Black v. Univ. of S. Cal. (Estate of Black)*, 27 Cal. Rptr. 418, 423 (Cal. Ct. App. 1962).

[24] Restatement (Second) of Trusts § 152 cmt. f (1959).