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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re Marriage of DAVID and WENDY R. PRESTHOLT.	B227345 (Los Angeles County Super. Ct. No. BD439301)
DAVID A. PRESTHOLT, Appellant, v. WENDY R. PRESTHOLT, Respondent.	

APPEAL from a judgment of the Superior Court of Los Angeles County, David S. Cunningham, Judge. Affirmed in part and reversed in part.

David A. Prestholt, in pro. per., and Dale Washington for Appellant.

Feinberg, Mindel, Brandt & Klein and Wallace S. Fingerett for Respondent.

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David A. Prestholt appeals from the judgment entered following a bench trial on reserved issues in this marital dissolution action. We affirm in part and reverse in part.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Judgment of Dissolution, Support Order and Partial Asset Distribution*

In December 2005, after more than 14 years of marriage, David and Wendy Prestholt separated. In January 2006 Wendy filed a petition for dissolution of marriage. On October 25, 2006 the trial court entered a judgment of dissolution, reserving jurisdiction to determine issues including the nature, value and extent of the parties' community property; division of such property; child custody, visitation and support with respect to the couple's daughter, Michelle; and spousal support.

On January 9, 2007 the court ordered David, an attorney, to pay Wendy $5,000 per month in spousal support, subject to retroactive modification, until further order of the court. Finding both David and Wendy were "living off asset distributions" because neither had been working regularly for at least a year,[1] the court also ordered the refinance and sale of certain assets. In May and August 2007 the court entered orders distributing the proceeds from the sale of a residential property and assets owned by a limited liability company in which the Prestholts held an interest.

2. *The Bankruptcy Proceedings*

On January 29, 2009 David filed for bankruptcy under Chapter 7 of the United States Bankruptcy Code (11 U.S.C. §§ 701-784). Elissa D. Miller was appointed bankruptcy trustee.

On February 24, 2009 Wendy moved for relief from the automatic stay of proceedings against the debtor triggered by the filing of the bankruptcy petition.

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1 David was diagnosed in 2006 as suffering from conditions including chemical imbalance, attention deficit hyperactivity disorder and bipolar disorder. These conditions interfered with his ability to work on a regular basis.

(11 U.S.C. § 362(a)(4).)[2] Wendy argued several remaining issues in the dissolution case implicated only state law and thus were properly resolved in the family law proceedings, including child and spousal support, David's alleged failure to pay more than $100,000 in past-due family support and withdrawal of $50,000 from the community property 401(k) plan without consent, allegations of domestic violence by David and the characterization of an annuity David claimed was his separate property pursuant to an oral transmutation.

The trustee partially opposed the motion, arguing, "The Trustee would not oppose allowing the family law court to adjudicate the nature of the property in the Debtor's estate, except to the extent that [Wendy] asserts that any of the property comprising the estate is her separate property. [¶] However, pursuant to 11 U.S.C. § 541(a)(2), all of the Debtor's interest, as well as the Debtor's spouse's interest, in community property, along with the Debtor's interest in his separate property, is now property of his bankruptcy estate. As a result, no division of the property should be undertaken by the family law court at this time."

On July 10, 2009 the bankruptcy court granted in part and denied in part the motion, authorizing Wendy to seek a ruling from the superior court on issues relating to the custody of Michelle, David's visitation rights and child and spousal support. The order also provided Wendy "is hereby authorized to seek a ruling from the Family Law Court to adjudicate the nature of [Wendy's] interest in all of property in the Debtor's bankruptcy estate."

In February 2010 the bankruptcy court approved a stipulation authorizing the sale of the Prestholts' home and distributing David's homestead exemption in equal shares to David and Wendy. The order provided the distribution of the homestead exemption was subject to reallocation by the family law court.

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2 We take judicial notice of documents filed in David's bankruptcy action. (Evid. Code, §§ 452, subd. (h), 459, subd. (a); see *Bunch v. Hoffinger Industries, Inc.* (2004) 123 Cal.App.4th 1278, 1290, fn. 3.)

3. *The Trial on Reserved Issues*

a. *Determination of the scope of the trial*

On April 23, 2010 Wendy filed her trial brief identifying the only issues to be resolved in the continued family law proceedings as family support and attorney fees. Wendy contended David's separate property was within the jurisdiction of the bankruptcy court and division of community property would be addressed in the bankruptcy action pursuant to the law generally governing bankruptcy. Wendy did not mention she had obtained relief from the automatic stay to adjudicate the nature of her interest in any property in the bankruptcy estate. In his trial brief, however, David, who was representing himself, identified the characterization of property as an issue to be tried by the family law court based on Wendy's relief from stay. David also argued Wendy had failed to provide mandatory financial disclosures and asserted he had a postpetition claim against Wendy for breach of fiduciary duty.

At the outset of the bench trial on April 29, 2010, the court raised the question of the scope of the trial. In response to David's argument the court was obligated to determine Wendy's interest in the property in the bankruptcy estate, Wendy's counsel contended the bankruptcy court order merely permitted her to seek characterization of the property from the state court and asserted she had relinquished that right because she and the trustee were about to settle all outstanding issues. Wendy's counsel argued, "All of the assets that are community property are within the bankruptcy court and all of those assets are going to be determined by a settlement agreement. There have already been motions in the bankruptcy court to determine community property interest in the family residence and that's already finished. There [have] been motions and settlement agreements with regard to a community asset which is [an] annuity and the rest of them are going to be dealt with [by] an agreement my client is entering into with the trustee and her attorney. The entire bankruptcy estate includes Mr. Prestholt's separate property which they did release to him so he has [] separate property, but all community property is subject to the bankruptcy court jurisdiction. We're not asking this court to make any orders with regard to that."

After additional argument the trial court recessed proceedings because no one had provided it with a copy of the bankruptcy court order. When proceedings resumed and the court had reviewed the order, the court stated the order "authorized [Wendy] to seek a ruling from the family law court." In response David argued, "My position is that obviously if [Wendy] has the right to seek an adjudication before this court so I would, as respondent, have the same right to seek an adjudication." David, however, acknowledged his position was not supported by the literal language of the order.

The court then took testimony from the trustee to "develop the record on an interpretation of this order." The trustee testified she and Wendy were about to execute a settlement agreement resolving all disputes regarding the community or separate property character of the assets in the bankruptcy estate and the agreement would be filed with the bankruptcy court for its approval. David would have the right to oppose the settlement agreement. With respect to the disputed issues, the trustee determined, for example, it was in the best interest of the estate that $500,000 in a bank account in Wendy's name would not be included in the bankruptcy estate. Additionally, the trustee had abandoned "a whole host of . . . personal property assets. I recall the piano was part of it, the boat was part of it . . . [t]he house contents and the cars."[3] The trustee also testified, "We're both waiving any claims to breach of fiduciary duty. Her claim against the estate for any breach of fiduciary duties that she contends she may have against you. I'm waiving any prepetition claims for breach of fiduciary duty on behalf of the estate."

After hearing argument the court ruled the trial would not include the characterization of property. The court explained, "[T]he July 10th, 2009 order for relief from the automatic stay of Wendy Prestholt authorized her to seek a ruling from the family court to adjudicate the nature of Ms. Prestholt's interest in all of the property [in] the debtor's bankruptcy estate. The trustee, Ms. Miller, testified that it was her understanding that gave [Wendy] a choice in terms of how to proceed. Whether through

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3 The trustee testified the personal assets were abandoned "back to Mr. Prestholt," who she believed had sold the assets or still retained them.

the bankruptcy process or through the family law process that was what the relief from stay was about. [Wendy's] attorney has represented and trustee Miller has confirmed that [Wendy] has exercised that option by negotiating a settlement with the trustee in bankruptcy as to any claims and any interests that she may have in all of the property in the debtor's bankruptcy estate. Both [Wendy's] attorney and trustee Miller confirmed that there has been a meeting of the minds as to the terms of that settlement which resolved any interest that [Wendy] had in the property of the debtor's bankruptcy estate. As a consequence, none of those issues are before the court. All that remains is the custody and visitation issues."

David sought clarification whether the court's order prevented him from raising his postpetition claim against Wendy for breach of fiduciary duty, arguing the trustee had testified she had waived only prepetition claims. The court responded its ruling was clear that David had no relief from any provision of the automatic stay, "so that would mean the answer is any claim that you have against [Wendy] that you allege arose after the date of your filing of bankruptcy, that's not before this court."

b. *The judgment on reserved issues*

On July 12, 2010 the trial court entered judgment on reserved issues (Judicial Council form FL-180) granting sole legal and physical custody of Michelle to Wendy and providing neither party would pay child or spousal support to the other. Notwithstanding the court had found it was precluded from adjudicating property issues by the automatic stay, boxes on the form FL-180 judgment were checked providing, "Property division is ordered as set forth in the attached . . . Judgment on Reserved Issues." In the attachment the court found, "All community real property was sold through the [b]ankruptcy court" with proceeds to be distributed through the bankruptcy court, "[a]ll community debts have been paid through the [b]ankruptcy or will be paid through the [b]ankruptcy court" and "[a]ll community personal property was abandoned by the bankruptcy court." The attachment also specified certain enumerated items, such as clothing, jewelry, cars and various bank, investment and retirement accounts, were David or Wendy's separate property.

On September 24, 2010 David filed a notice of appeal of the judgment on reserved issues.

4. *Further Bankruptcy Court Proceedings*

On November 24, 2010 the bankruptcy court heard Wendy's motion to compel an interim distribution and several motions to disallow certain claims. The bankruptcy court continued the hearings until final resolution of David's appeal of the judgment on reserved issues in light of the trustee's assertion in opposition to Wendy's motions that the judgment on reserved issues was void to the extent it sought to divide or award property. The bankruptcy court explained, "[T]he court would not be in a position to determine what is in the estate until after the state court proceedings have terminated one way or the other, which means that I really don't want to start assuming what the estate consists of and then make distributions and then find out the estate, in fact, does not consist of X amount of dollars and then have to have that put back into the pot, so to speak, because you can't—it's very difficult to unring the bell at the point. So I'd just rather not go down that route."

On June 3, 2011 the trustee moved in bankruptcy court for approval of a stipulation she had entered with Wendy that the portions of the judgment on reserved issues purporting to characterize and divide property violated the bankruptcy stay and were void. On September 7, 2011 the bankruptcy court approved the stipulation. We have not been provided any information whether further proceedings have occurred in the bankruptcy court.

CONTENTIONS

David contends the bankruptcy court order partially granting Wendy's motion for relief from the automatic stay required the trial court to adjudicate the nature of Wendy's property interest even though she had settled her claims with the trustee; the judgment on reserved issues is void because, among other reasons, it characterizes and divides the parties' property notwithstanding the court's refusal to take evidence on the matter; and the court erred in finding the automatic stay prevented David from raising his postpetition claim against Wendy for breach of fiduciary duty.

DISCUSSION

1. *Law Generally Governing the Automatic Stay Triggered by the Filing of a Bankruptcy Petition and Determination of Property in the Bankruptcy Estate*

The filing of a bankruptcy petition "'triggers an automatic stay of actions against the debtor, the creation of an estate and the appointment of a trustee.'" (*In re Doser* (9th Cir. 2005) 412 F.3d 1056, 1062; see 11 U.S.C. § 362(a)(4); *Pioneer Const., Inc. v. Global Inv. Corp.* (2011) 202 Cal.App.4th 161, 167 ["filing of a bankruptcy petition operates as an automatic stay of the commencement or continuation of any action against a bankrupt debtor or against the property of a bankruptcy estate"].) The purpose of the stay is to provide debtors with "'breathing room'" to reorganize and to "'prevent[] creditors from racing to the courthouse in an attempt to drain the debtor's assets'" (*In re LPM Corp.* (9th Cir. 2002) 300 F.d 1134, 1137.) The stay "serves as one of the most important protections in bankruptcy law," and the scope of protection is broad. (*Eskanos & Adler, P.C. v. Leetien* (9th Cir. 2002) 309 F.3d 1210, 1214.) The stay remains in effect with respect to property of the estate "until such property is no longer property of the estate." (11 U.S.C. § 362(c)(1); see *In re Spirtos* (9th Cir. 2000) 221 F.3d 1079, 1081.)

The bankruptcy court has exclusive jurisdiction to determine the scope and applicability of the automatic stay. (*In re Marriage of Sprague & Spiegel-Sprague* (2003) 105 Cal.App.4th 215, 219 (*Sprague*); *In re Robert Gruntz* (9th Cir. 2000) 202 F.3d 1074, 1082 ["[a]ny state court modification of the automatic stay would constitute an unauthorized infringement upon the bankruptcy court's jurisdiction to enforce the stay"].) "Any action, including any judicial proceeding, taken in violation of the automatic stay is void." (*Sprague*, at p. 219; see *Gruntz*, at p. 1087 ["state court does not have the power to modify or dissolve the automatic stay"; "if it proceeds without obtaining bankruptcy court permission, a state court risks having its final judgment declared void"].)

Notwithstanding the breadth of the automatic stay, several types of actions and proceedings are exempted. (Cf. *Hillis Motors, Inc. v. Hawaii Auto Dealers' Assn.* (9th Cir. 1993) 997 F.2d 581, 590 ["[e]xceptions to the automatic stay should be read

narrowly"].) In family law, for example, the filing of a bankruptcy petition does not stay commencement or continuation of proceedings to establish or modify an order for "domestic support obligations." (11 U.S.C. § 362(b)(2)(A)(ii); see 11 U.S.C. § 101(14A) [broadly defining domestic support obligation].) It also does not stay proceedings concerning child custody or visitation. (11 U.S.C. § 362(b)(2)(A)(iii).)

Although certain aspects of marital dissolution proceedings are thus exempt from the automatic stay, "proceedings to determine the division of property that is property of the estate" are not. (11 U.S.C. § 362(b)(2)(A)(iv)). With respect to the property of the bankruptcy estate, 11 U.S.C. section 541(a)(2) generally provides community property interests of the debtor and the debtor's spouse at the commencement of the bankruptcy case must be transferred to the estate. (See *In re Dumas* (9th Cir. 1998) 153 F.3d 1082, 1085 (*Dumas*).) Although that section "defines what interests of the debtor must be transferred to the bankruptcy estate, it does not address 'the threshold questions of the existence and scope of the debtor's interest in a given asset.' [Citation.] Rather, bankruptcy courts are required to look to state property law . . . to determine the property which is to be included in the bankruptcy estate." (*Dumas*, at p. 1084; see *In re McCoy* (Bankr. 9th Cir. 1990) 111 B.R. 276, 279 ["characterization of property as separate or community as of the date of the petition is determined under applicable state law"].)

California law provides "that property acquired in joint form during marriage is presumed to be community property." (*In re Dumas*, *supra*, 153 F.3d at p. 1084 [citing Fam. Code §§ 760, 2581].) Thus, in a dissolution action all community property not yet divided by the state court at the time of the bankruptcy filing is property of the bankruptcy estate. (*Dumas*, at p. 1085.) However, the state court may divide community property interests determined to be exempt from being included as property of the bankruptcy estate or abandoned by the trustee in bankruptcy. (See *In re Marriage of Seligman* (1993) 14 Cal.App.4th 300, 309 ["scheduling of the community property by wife in her bankruptcy petition did not operate to oust state court jurisdiction to deal with the community interests of these parties in what was otherwise finally adjudicated by the bankruptcy court to be exempt and abandoned property"].)

To permit continuation of a marital dissolution property proceeding, the nonbankrupt spouse must file a motion with the bankruptcy court to lift the stay for cause. (See 11 U.S.C. § 362(d).) "'Cause'" is not defined in the bankruptcy code, so "courts must determine when discretionary relief is appropriate on a case-by-case basis." (*In re Robbins* (4th Cir. 1992) 964 F.2d 342, 345.) Because state courts have expertise in family law matters, a bankruptcy court generally does not abuse its discretion in lifting the stay to permit pending marital property division proceedings to continue to judgment. (See *ibid.* ["bankruptcy court correctly placed equitable distribution disputes in the category of cases in which state courts have a special expertise and for which federal courts owe significant deference"]; *Sprague*, *supra*, 105 Cal.App.4th at p. 220 ["[s]everal federal cases recognize that bankruptcy courts should defer to state law courts in resolving family law matters"].)

2. *The Trial Court Did Not Err in Refusing To Adjudicate the Nature of Wendy's Property Interest*

The trial court was not required to determine the nature of the parties' property in the bankruptcy estate pursuant to the bankruptcy court order partially granting Wendy's motion for relief from automatic stay. The court correctly determined that the bankruptcy court's order permitted Wendy to seek a ruling adjudicating the nature of her interest in the property in the bankruptcy estate and that Wendy relinquished this right by settling her claims with the trustee. The family law court did not have jurisdiction beyond this limited relief from the automatic stay.

Contrary to David's argument, as a debtor he did not have a reciprocal right to seek a ruling from the state court as to the character of his or Wendy's interest in the property in the bankruptcy estate. Once he voluntarily filed for bankruptcy, David lost, and the trustee assumed, standing with respect to any issues regarding property division. (See 11 U.S.C. § 323(a) ["trustee in a case under this title is the representative of the estate"]; *In re Eisen* (9th Cir. 1994) 31 F.3d 1447, 1451, fn. 2 [debtor has no standing to appeal order dismissing a Chapter 7 trustee's adversary proceeding even if debtor was person aggrieved because trustee is the representative of the estate]; cf. *In re Willard*

(Bankr. 9th Cir. 1981) 15 B.R. 898, 900 ["[o]nce the estate is created no interests in estate property remain in the debtor"].) Indeed, the trustee opposed allowing the state court to determine whether any of the property in the bankruptcy estate was Wendy's separate property, as opposed to David's separate property or community property, or to divide any property whatsoever. David cannot maintain a different position, which is essentially what he is attempting to do.

To be sure, as David argues, bankruptcy courts should generally defer to state courts in resolving family law matters because state courts have special expertise. (See *Sprague*, *supra*, 105 Cal.App.4th at p. 220; *In re Robbins*, *supra*, 964 F.2d at p. 345.) But the deference due when a nonbankrupt spouse seeks relief from the automatic stay does not oust the bankruptcy court from its exclusive jurisdiction to determine the appropriate division of marital property in the bankruptcy estate unless and until such full relief from the stay has been granted. (Cf. *In re Willard*, *supra*, 15 B.R. at p. 900 ["[u]nless and until the bankruptcy court deflects such jurisdiction to another court, the property of the estate will be unaffected by the superior court" judgment that was not final on the day the bankruptcy case commenced; "judgment can only be enforced by [wife] against the debtor if and when he once again obtains such property back from the estate"].)

3. *The Judgment on Reserved Issues Is Void to the Extent It Characterizes or Divides Estate Property*

There is no question the trial court exceeded its jurisdiction in making findings with respect to the parties' property, as David argues. Indeed, that is the import of the postappeal bankruptcy court order approving the trustee's and Wendy's stipulation concerning the state court property division, which David fails to mention. Yet that bankruptcy court order is not self-executing: The family law order remains outstanding.

As David requests, we find it void to the extent it purports to characterize and divide property.[4]

David, however, errs in contending the entire judgment is void. No one has challenged the family law court's findings and orders with respect to custody of Michelle, child support and spousal support. That portion of the judgment is affirmed. (See *Dakota Payphone, LLC v. Alcaraz* (2011) 192 Cal.App.4th 493, 503 [when "judgment only partially exceeds the trial court's jurisdiction, the trial court can modify the judgment in order to save the portion that was not void"]; see also *311 South Spring Street Co. v. Department of General Services* (2009) 178 Cal.App.4th 1009, 1019 [remanding with directions to vacate portion of judgment awarding postjudgment interest in excess of constitutional rate].)

4. *The Trial Court Improperly Precluded David from Pursuing His Postpetition Breach of Fiduciary Duty Claim*

a. *Spouses owe a fiduciary duty to each other*

Spouses have a duty to manage the couple's community property in accordance with "the general rules concerning fiduciary relationships." (See Fam. Code, §§ 721, subd. (b); 1100, subd. (e).) "This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other." (Fam. Code, § 721, subd. (b).)

Family Code section 1101, subdivision (a), creates a right of action for breach of this fiduciary duty: "'[A] spouse has a 'claim' against the other spouse for any breach of the fiduciary duty resulting in '*impairment'* to the claimant spouse's present undivided one-half interest in the community estate . . . .'" (See Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2011) ¶ 8:612, p. 8-158 (rev. # 1, 2011.) Subdivision (f) further states, "Any action may be brought under this section without filing an action for dissolution of marriage, legal separation, or nullity, or may be brought

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4 In light of our conclusion the court lacked jurisdiction to determine the property issues reflected in the judgment, we need not address David's other grounds challenging those findings.

in conjunction with the action or upon the death of a spouse." (See generally Hogoboom & King, Cal. Practice Guide: Family Law, *supra*, ¶ 8:613, p. 8-158 to 8-159 [spouse may sue in one of three ways: (1) without filing an action for dissolution, legal separation, or nullity; (2) "in conjunction with" an action for dissolution, legal separation, or nullity; or (3) on the death of a spouse].)

b. *The automatic bankruptcy stay does not include postpetition claims by a debtor*

An automatic bankruptcy stay does not prevent a debtor from bringing or continuing a lawsuit as a plaintiff. (See *In re Merrick* (Bankr. 9th Cir. 1994) 175 B.R. 333, 337 ["automatic stay is inapplicable to suits *by* the bankrupt"].) It also does not stay a debtor's cross-claims. (See *In re Miller* (Bankr. 9th Cir. 2001) 262 B.R. 499, 507, fn. 11 ["'automatic stay does not prohibit them from defending the cross-complaint initiated by Debtor'"].) Although David's prepetition claims against Wendy now belong to the trustee (see 11 U.S.C. § 541(a)(1); *In re Miller*, at p. 337 ["'the bankrupt's cause of action is an asset of the estate"]; *In re Eisen*, *supra*, 31 F.3d at p. 1451, fn. 2), postpetition claims may remain David's to pursue depending on the grounds asserted and the nature of the relief sought. Wendy does not dispute these essential points. Rather, she contends David has forfeited his argument on appeal because he failed to specify what affirmative claim he is referring to and there is no identification of any postpetition claim in his trial brief: "It cannot be ascertained from the record or David's opening brief the claims David is referring to."

As Wendy asserts, David's appellate brief does not detail his purported cause of action against her. However, in quoting his colloquy with the trial court during which he sought to clarify whether postpetition claims were stayed, David identifies his claim as one for breach of fiduciary duty against Wendy. And, although not set forth under a heading as an affirmative claim, in the "Family Support" section of his trial brief, David extensively described his allegations that Wendy breached her fiduciary duty in failing to oppose his former law partner's claims against the estate and in "lying about her involvement in and knowledge of" certain documents and agreements relevant to his

former partner's claims. After more than four pages setting forth the allegations, David argues, "Wendy's breach of fiduciary duty, and the damage caused to [David] by the breach occurred well after [David] filed for bankruptcy and is therefore not part of the bankruptcy proceeding." Thus, the record belies Wendy's argument the nature of David's affirmative claim for breach of fiduciary duty was not disclosed.[5]

Although David has not forfeited his argument the family law court's refusal to adjudicate his breach of fiduciary duty claim against Wendy is reversible error, we are unable to conclude from the limited record on appeal whether he properly presented that claim below. The Family Code does not specify the procedural steps a spouse must follow to bring an action for breach of fiduciary duty "in conjunction with the action" for dissolution of marriage (Fam. Code, § 1101, subd. (f)), but at a minimum there must be adequate notice to the opposing party of the nature of the claim and a concomitant opportunity to prepare a defense. (See *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 314 [70 S.Ct. 652, 94 L.Ed. 865] ["elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"]; *Memphis Light, Gas & Water Division v. Craft* (1978) 436 U.S. 1, 15 [98 S.Ct. 1554, 56 L.Ed. 2d 30] ["purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending 'hearing'"].) Raising a claim for the first time in a late-filed trial brief would not appear to satisfy these threshold requirements. However, the trial court on remand must in the first instance determine whether David properly and timely asserted his breach of fiduciary claim and, if so, whether David has standing to pursue it in the family law proceedings.

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5 The trial court was confronted with many challenges on the first day of trial and understandably may not have focused on David's breach of fiduciary duty claim. David filed his trial brief late, did not have his trial exhibits and did not have the bankruptcy court order partially granting Wendy's motion for relief from the stay. The court suggested several times the case was not ready for trial, but it persisted in working through the issues as best as possible under the circumstances.

DISPOSITION

We reverse in part and remand for further proceedings not inconsistent with this opinion. The parties are to bear their own costs on appeal.

PERLUSS, P. J.

We concur:

WOODS, J.

JACKSON, J.