

MAR 14 2012

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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re: ) BAP No. AZ-11-1551-DJuPa  
 )  
 TIMOTHY ANDREW SALAZAR and ) Bk. No. 08-11597-JMM  
 GENA ANNETTE SALAZAR, )  
 )  
 Debtors. )  
 )  
 \_\_\_\_\_ )  
 )  
 LAWRENCE J. WARFIELD, )  
 Chapter 7 Trustee, )  
 )  
 Appellant, )  
 )  
 v. ) **O P I N I O N**  
 )  
 TIMOTHY ANDREW SALAZAR; GENA )  
 ANNETTE SALAZAR, )  
 )  
 Appellees. )  
 \_\_\_\_\_ )

Argued and submitted on February 24, 2012  
at Phoenix, Arizona

Filed - March 14, 2012

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

Honorable James M. Marlar, Chief Bankruptcy Judge, Presiding

Appearances: \_\_\_\_\_  
 Jacob W. Sparks, Esq., of Scheef & Stone, LLP,  
 argued for appellant Lawrence J. Warfield,  
 Chapter 7 Trustee;  
 Kevin J. Rattay, Esq., of Kevin J. Rattay, PLC,  
 argued for appellees Timothy Andrew Salazar and  
 Gena Annette Salazar  
 \_\_\_\_\_

Before: DUNN, JURY, and PAPPAS, Bankruptcy Judges.

1 DUNN, Bankruptcy Judge:  
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3 During their bankruptcy case, the chapter 13<sup>1</sup> debtors  
4 received and spent tax refunds that were property of their  
5 bankruptcy estate under § 541 of the Bankruptcy Code. The  
6 debtors ultimately failed to confirm a chapter 13 plan and  
7 converted their case to chapter 7. The bankruptcy court denied  
8 the chapter 7 trustee's motion requesting that the debtors be  
9 compelled to pay into their chapter 7 estate the amount of the  
10 prepetition tax refunds. We AFFIRM.

11 I. FACTS

12 Appellees Timothy Andrew Salazar and Gena Annette Salazar  
13 (the "Salazars") filed a chapter 13 petition on September 3, 2008  
14 ("Petition Date"). In their Schedule of Personal Property  
15 ("Schedule B"), the Salazars marked "None" in response to  
16 Schedule B's request that they disclose "[o]ther liquidated debts  
17 owed to debtor including tax refunds." (Emphasis added).  
18 However, while the chapter 13 case was pending, the Salazars  
19 received refunds based upon their 2008 state and federal tax  
20 returns. The prepetition pro rata amount of those refunds  
21 totaled \$4,084.94 ("Prepetition Refund"). The Salazars never  
22 amended their Schedule B to disclose the Prepetition Refund. The  
23 Salazars used the Prepetition Refund for living expenses while  
24 the chapter 13 case was pending. No plan ever was confirmed in  
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26 <sup>1</sup> Unless otherwise specified, all chapter and section  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
28 all "Rule" references are to the Federal Rules of Bankruptcy  
Procedure, Rules 1001-9037.

1 their chapter 13 case.

2 The bankruptcy court converted the Salazars' case from  
3 chapter 13 to chapter 7 on August 19, 2009. Appellant Lawrence  
4 Warfield was appointed as the chapter 7 trustee ("Trustee") in  
5 the converted case. The Trustee filed a motion to compel the  
6 Salazars to turn over the Prepetition Refund. The Salazars  
7 responded by asserting that because the Prepetition Refund had  
8 been spent, i.e., was not in their possession, it no longer  
9 constituted property of the estate pursuant to § 348(f)(1)(A).  
10 The bankruptcy court agreed in a brief written decision. The  
11 Trustee timely filed a notice of appeal.

## 12 II. JURISDICTION

13 The bankruptcy court had jurisdiction under 28 U.S.C.  
14 §§ 1334 and 157(b)(2)(A) and (E). We have jurisdiction under 28  
15 U.S.C. § 158.

## 16 III. ISSUE

17 Whether the bankruptcy court erred when it denied the  
18 Trustee's motion for turnover of the Prepetition Refund.

## 19 IV. STANDARD OF REVIEW

20 Whether property is property of the estate is a question of  
21 law reviewed de novo. Mwangi v. Wells Fargo Bank, N.A. (In re  
22 Mwangi), 432 B.R. 812, 818 (9th Cir. BAP 2010). "De novo means  
23 review is independent, with no deference given to the trial  
24 court's conclusion. See First Ave. W. Bldg., LLC v. James (In re  
25 Onecast Media, Inc.), 439 F.3d 558, 561 (9th Cir. 2006)." Id.

## 26 V. DISCUSSION

27 The Panel must decide whether the debtors must pay over to  
28 the chapter 7 trustee the amount of a tax refund attributable to

1 the debtors' prebankruptcy earnings that they received and spent  
2 during the pendency of their chapter 13 case in which no plan was  
3 confirmed.

4 Section 541(a) (1) provides:

5 The commencement of a case under section 301 . . . of  
6 this title creates an estate. Such estate is comprised  
7 of all the following property, wherever located and by  
8 whomever held:

9 (1) . . . all legal or equitable interests of the  
10 debtor in property as of the commencement of the case.

11 The Salazars and the Trustee agree that pursuant to  
12 § 541(a), the Prepetition Refund was property of the chapter 13  
13 estate on the Petition Date, notwithstanding the failure of the  
14 Salazars to disclose it in their Schedule B. Therefore, the  
15 expansive definition of property, i.e., postpetition property, of  
16 a chapter 13 estate set forth in § 1306 does not impact the  
17 decision in this case.<sup>2</sup> The parties also agree that if the  
18 Salazars had not spent the Prepetition Refund, they would be  
19 compelled by § 348(f) to turn it over to the Trustee.

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20 <sup>2</sup> Section 1306(a) provides:

21 (a) Property of the estate includes, in addition to the  
22 property specified in section 541 of this title--

23 (1) all property of the kind specified in such section  
24 that the debtor acquires after the commencement of the  
25 case but before the case is closed, dismissed, or  
26 converted to a case under chapter 7, 11, or 12 of this  
27 title, whichever occurs first; and

28 (2) earnings from services performed by the debtor  
after the commencement of the case but before the case  
is closed, dismissed, or converted to a case under  
chapter 7, 11, or 12 of this title, whichever occurs  
first.

1 As relevant to this appeal, § 348(f) provides:

2 § 348. Effect of conversion

3 (f) (1) Except as provided in paragraph (2), when a case  
4 under chapter 13 of this title is converted to a case  
under another chapter under this title -

5 (A) property of the estate in the converted case  
6 shall consist of property of the estate, as of the date  
7 of filing of the petition, that remains in the  
possession of or is under the control of the debtor on  
the date of conversion . . . .<sup>3</sup>

8 (Emphasis added.)

9 Courts have struggled in applying § 348(f) (1) (A). The  
10 Salazars point to the decision of one bankruptcy court that has  
11 held that property of the estate following conversion from  
12 chapter 13 to chapter 7 will consist of the property in the  
13 chapter 13 estate on the petition date, less amounts lawfully  
14 removed by the debtors in good faith to pay ordinary and  
15 necessary living expenses during the period from the petition  
16 date to the conversion date. Bogdanov v. Laflamme (In re  
17 Laflamme), 397 B.R. 194 (Bankr. D.N.H. 2008). In Laflamme, the  
18 debtor, while in a chapter 13 case, received and spent  
19 prepetition commissions. The debtor was a self-employed real  
20 estate broker. When the debtor converted her case to chapter 7,  
21 the chapter 7 trustee sought to compel the debtor to turn over  
22 the commissions to the chapter 7 estate. Like the Salazars, the

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24 <sup>3</sup> At oral argument, counsel for the Trustee conceded that  
25 the Salazars actions did not raise an issue of bad faith. We  
26 therefore do not decide what impact § 348(f) (2) might have in  
27 this dispute. Section 348(f) (2) provides: "If the debtor  
28 converts a case under chapter 13 of this title to a case under  
another chapter under this title in bad faith, the property of  
the estate in the converted case shall consist of the property of  
the estate as of the date of conversion."

1 debtor in Laflamme asserted that § 348(f)(1)(A) required that she  
2 turn over to the chapter 7 trustee only the amount of the  
3 commissions remaining in her possession or under her control.  
4 The Laflamme court reasoned that (1) § 1303 vests a chapter 13  
5 debtor with the exclusive right to use and control all property  
6 of the chapter 13 estate,<sup>4</sup> (2) § 1304 authorizes a chapter 13  
7 debtor to operate its business in the ordinary course, and (3) it  
8 is "implicit" in § 1306(b) that a chapter 13 debtor has the right  
9 to use or lease property of the estate in the ordinary course of  
10 his or her affairs. Accordingly, the Laflamme court concluded  
11 that a chapter 13 debtor may use chapter 13 estate property for  
12 living expenses that are "ordinary" and "necessary," to be  
13 determined based upon the facts of each case. Id. at 206.

14 In contrast, the courts in In re Fatsis held that the  
15 Bankruptcy Code contains no authority for a chapter 13 debtor not  
16 engaged in business to use property of the estate in the  
17 "ordinary course."

18 The right to use property of the estate in the ordinary  
19 course of business is found in § 363(c), a subsection  
20 not incorporated into § 1303. It is § 1304, a section  
21 applicable only to a chapter 13 debtor who is "self-  
22 employed and incurs trade credit in the production of  
income from such employment . . ." that permits the use  
of property of the estate in the ordinary course of  
business. The Debtor does not assert that he falls  
within the ambit of § 1304.

23 In re Fatsis, 396 B.R. 579, 582 (Bankr. D. Mass. 2008), aff'd,  
24 405 B.R. 1, 8 (1st Cir. BAP 2009) (finding no legal support for  
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26 <sup>4</sup> "Subject to any limitations on a trustee under this  
27 chapter, the debtor shall have, exclusive of the trustee, the  
28 rights and powers of a trustee under sections 363(b), 363(d),  
363(e), 363(f), and 363(l), of this title." § 1303.

1 debtor's inference that because § 363(b), incorporated by § 1303,  
2 allows a chapter 13 debtor to use property of the estate other  
3 than in the ordinary course of business with leave of the court,  
4 the debtor can use property of the estate in the ordinary course  
5 of business without leave of the court). On the contrary,  
6 § 1306(b) provides: "Except as provided in a confirmed plan or  
7 order confirming a plan, the debtor shall remain in possession of  
8 all property of the estate." Further, § 1327(b) provides that  
9 "[e]xcept as otherwise provided in the plan or the order  
10 confirming the plan, the confirmation of a plan vests all of the  
11 property of the estate in the debtor." Thus, unless and until a  
12 plan was confirmed in the case, the Salazars arguably were not  
13 authorized to use prepetition estate property.

14 Our starting point for analysis in this appeal is the  
15 language of § 348(f)(1)(A). Where the language of a statute is  
16 plain and admits of no more than one meaning, our role is to give  
17 full effect to and follow the plain meaning of the statute  
18 whenever possible. 2A Norman J. Singer and J.D. Shambie Singer,  
19 Statutes and Statutory Construction § 46:1 (7th ed. 2007). "It  
20 is an elementary rule of construction that effect must be given,  
21 if possible, to every word, clause and sentence of a statute."  
22 Id. at § 46:6 (citations omitted). We must presume that every  
23 word of a statute was included for a purpose. See Ratzlaf v.  
24 United States, 510 U.S. 135, 140-41 (1994); United States v.  
25 Andrews, 600 F.3d 1167, 1173 (9th Cir. 2010) (Clifton, J.,  
26 concurring). Conversely, we must presume that every word  
27 excluded from a statute was excluded for a purpose. 2A Statutes  
28 and Statutory Construction § 46:6.

1 To "possess" or to be "in possession" of a thing is to have  
2 it or hold it as property. See Merriam-Webster's Collegiate  
3 Dictionary, Eleventh Ed. 2005. To "remain" means "to be a part  
4 not destroyed, taken, or used up," or "to continue unchanged."  
5 Id. Section 348(f)(1)(A), by its terms, contemplates that the  
6 debtors may have "used up" property of the estate and no longer  
7 possess it, and any such property of the estate "used up" prior  
8 to the conversion of the case to chapter 7 is not property of the  
9 estate in the converted case. Accordingly, a "plain meaning"  
10 interpretation of § 348(f)(1)(A) leads us to the conclusion that  
11 the Prepetition Refund, having been spent, is not property of the  
12 estate on conversion.

13 One court has gone so far as to posit that such a literal  
14 application of § 348(f)(1)(A), requiring turnover only of  
15 property of the estate as of the commencement of the case that  
16 the debtor still possesses on the conversion date, could give  
17 debtors "carte blanche to commit fraud."

18 A chapter 7 debtor who decides that he does not want to  
19 surrender to the trustee an asset which is property of  
20 the estate can convert to chapter 13 long enough to  
21 dispose of the asset, and then reconvert to chapter 7  
22 and obtain a discharge with impunity. In other words,  
23 the very act which generally would form the basis for  
24 the denial or revocation of discharge, i.e.,  
25 disposition of property of the estate, would insulate  
26 the debtor from liability.

27 Wyss v. Fobber (In re Fobber), 256 B.R. 268, 276 (Bankr. E.D.  
28 Tenn. 2000) (footnote omitted).

29 We find the Laflamme court's response to this contention  
30 persuasive: "Debtors should be cautioned that this right cannot  
31 be abused and will normally be tempered by one of the underlying  
32 concepts of the Bankruptcy Code - a fresh start is only available



1 to the honest debtor.” Laflamme, 397 B.R. at 206, citing Grogan  
2 v. Garner, 498 U.S. 279, 286-87 (1991). The Laflamme court  
3 declined “to adopt a bright-line rule to define under what  
4 circumstances (and for what purposes) a debtor may use chapter 13  
5 estate property other than to stress the use must be reasonable  
6 and will usually include normal living expenses,” determined by  
7 the facts of the case. Laflamme, 397 B.R. at 206. In other  
8 words, the debtor’s use of estate property in chapter 13 prior to  
9 conversion to chapter 7 is subject to “good faith” scrutiny.  
10 See, e.g., §§ 348(f)(2), 707(b)(3)(A) and 727(a)(2)(B).

11 We recognize that a plain meaning application of  
12 § 348(f)(1)(A) creates an anomaly with respect to the outcomes  
13 for consumer debtors and their creditors in any other context in  
14 chapters 13 and 7. The quid pro quo for a discharge in  
15 bankruptcy is that the debtor pay the equivalent of the value of  
16 his non-exempt assets to his creditors. Had the Salazars  
17 remained in chapter 13, they would have been required to account  
18 to their creditors for the Prepetition Refund even though it had  
19 been spent. Under the “best interests of creditors test,” the  
20 Salazars could only confirm a chapter 13 plan which would pay  
21 their unsecured creditors the amount those creditors would have  
22 received in a hypothetical chapter 7 liquidation as of the  
23 Petition Date. See § 1325(a)(4). The value of the Prepetition  
24 Refund would have been included in the hypothetical chapter 7  
25 liquidation in the Salazars’ chapter 13 case. Further, until the  
26 hypothetical chapter 7 liquidation value had been paid to their  
27 unsecured creditors, the Salazars would not have been entitled to  
28 a discharge in their chapter 13 case, either pursuant to

1 § 1328(a) by completing their plan payments, or pursuant to  
2 § 1328(b) in a "hardship" discharge.<sup>5</sup>

3       Alternatively, if their case had commenced as a chapter 7,  
4 the Salazars would have been required to turn over the  
5 Prepetition Refund to the Trustee. Tax refunds are property of  
6 the bankruptcy estate under § 541(a). See Segal v. Rochelle, 382  
7 U.S. 375, 379 (1966); United States v. Sims (In re Feiler), 218  
8 F.3d 948, 955-56 (9th Cir. 2000) (The legislative history of  
9 § 541 establishes that Congress adopted the result in Segal,  
10 making the right to a tax refund property of the estate.);  
11 Barowsky v. Serelson (In re Barowsky), 946 F.2d 1516, 1519 (10th  
12 Cir. 1991). Section § 521(a)(4)<sup>6</sup> requires the debtor to  
13 surrender all property of the estate to the Trustee.

14       Looking at this anomaly, some courts have declined to apply  
15 the plain meaning of § 348(f)(1)(A) in circumstances similar to  
16 the case before us on the basis that it produces an absurd result  
17 in the statutory scheme of the Bankruptcy Code, looking to the  
18 legislative history of the provision for their interpretation of  
19 its meaning. Those courts have concluded that the purpose of  
20 § 348(f)(1)(A) was to ensure that postpetition earnings of

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22       <sup>5</sup> Section 1328(b)(2) provides that, as a condition to  
23 chapter 13 debtors receiving a discharge prior to completion of  
24 payments under their plan, "the value, as of the effective date  
25 of the plan, of property actually distributed under the plan on  
26 account of each allowed unsecured claim is not less than the  
amount that would have been paid on such claim if the estate of  
the debtor had been liquidated under chapter 7 of this title on  
such date . . . ."

27       <sup>6</sup> As relevant, § 521(a)(4) provides: "The debtor shall--  
28 . . . if a trustee is serving in the case . . . , surrender to  
the trustee all property of the estate . . . ."

1 debtors while in chapter 13 need not be paid over to a chapter 7  
2 trustee when a case is converted to chapter 7, thus serving as  
3 encouragement to debtors to attempt to complete a chapter 13  
4 repayment plan rather than to proceed immediately to liquidation  
5 in chapter 7. See, e.g., In re Fobber, 256 B.R. at 277-79.

6           When a Chapter 13 case is converted to a Chapter 7  
7 case, a court must determine which assets belonging to  
8 the debtor must be considered property of the Chapter 7  
9 estate. Accordingly, a court will seek to apply the  
10 provisions of 11 U.S.C. § 348(f) to the facts of the  
11 case. However, in some instances, literal application  
12 of these provisions leads to an absurdity and is  
13 contrary to congressional intent. In order to avoid an  
14 absurd result, a court must differentiate between  
15 property acquired prior to the commencement of a  
16 bankruptcy case and property acquired after the  
17 commencement of a bankruptcy case.

18 In re Grein, 435 B.R. 695, 699 (Bankr. D. Colo. 2010) (footnotes  
19 omitted); 2A Statutes and Statutory Construction § 47:25 (not  
20 appropriate to adopt a "plain meaning" which would lead to an  
21 "absurd" result or create a clear contradiction in a statutory  
22 scheme).

23           While, as we pointed out above, application of the plain  
24 language of § 348(f)(1) may be anomalous, depending upon the  
25 facts of the case, we do not believe such anomaly equates to  
26 producing absurd results or creating a clear contradiction in the  
27 statutory scheme in light of the remedies available to chapter 7  
28 trustees where the debtors have not acted in good faith. For  
29 example, "chapter 7 trustees who seek former chapter 13 estate  
30 property under circumstances indicating abuse can be comforted by  
31 the availability of § 727 as a potential remedy." Laflamme, 397  
32 B.R. at 206.

33           Because we find the plain language of § 348(f)(1)(A)



1 the date they converted their case to chapter 7, the plain  
2 meaning of the language used in § 348(f)(1)(A) excluded the  
3 Prepetition Refund from property of the chapter 7 estate. We  
4 AFFIRM the bankruptcy court's order denying the Trustee's motion  
5 to compel turnover of the Prepetition Refund.

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