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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-07-1385-KPaJu
)		
DAMIAN RODERICK WHITE,)	Bk. No.	05-21488-SSC
)		
Debtor.)		
_____)		
)		
DAMIAN RODERICK WHITE,)		
)		
Appellant,)		
)		
v.)	O P I N I O N	
)		
RUSSELL BROWN, Chapter 13)		
Trustee,)		
)		
Appellee.)		
_____)		

Argued and Submitted on February 21, 2008
at Phoenix, Arizona

Filed - April 22, 2008

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

Honorable Sarah Sharer Curley, Bankruptcy Judge, Presiding

Before: KLEIN, PAPPAS and JURY, Bankruptcy Judges.

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1 KLEIN, Bankruptcy Judge:
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3 The appellant sold his Arizona homestead before filing the
4 bankruptcy case in which he claimed the proceeds as exempt, but
5 then did not reinvest them in a new homestead within the eighteen
6 months required by ARIZ. REV. STAT. § 33-1101(C). Instead, he lost
7 the proceeds in stock market trades made without the trustee's
8 permission and without abandonment of the estate's interest in
9 the fund. The bankruptcy court ordered turnover of \$144,816.96
10 to the trustee after the temporary exemption expired, ruling that
11 the debtor was not privileged to manage homestead sale proceeds
12 during the temporary exemption period in a manner inconsistent
13 with the exemption purposes of the Arizona statute. In re White,
14 377 B.R. 633 (Bankr. D. Ariz. 2007). We agree and AFFIRM.
15

16 FACTS

17 The facts summarized here are more fully set forth in the
18 bankruptcy court's published opinion. White, 377 B.R. at 635-40.

19 On August 31, 2005, appellant Damian White sold his Arizona
20 residence and received \$165,095.98 in net proceeds, of which
21 \$150,000 was protected by the Arizona homestead exemption.

22 When he filed his chapter 7 case on October 7, 2005, White
23 had \$144,816.96 traceable to homestead sale proceeds in a savings
24 account, a brokerage account, and miscellaneous investments.

25 On Schedule B, the debtor listed his savings and brokerage
26 account balances as \$22,000 and \$125,000, respectively, and
27 described each as, "Exempt proceeds from the sale of homestead."

28 On Schedule C, the debtor claimed \$147,000 in homestead sale

1 proceeds as exempt pursuant to the \$150,000 exemption provided by
2 ARIZ. REV. STAT. § 33-1101(A), which, by operation of ARIZ. REV.
3 STAT. § 33-1101(C), would remain exempt until February 28, 2007,
4 eighteen months after the initial sale. If not reinvested in a
5 new homestead residence by then, the proceeds would lose their
6 exempt status. There was no objection to the claim of exemption.

7 The debtor's bank initially froze his savings account but
8 released it with permission of the trustee, who did not know the
9 debtor intended to use the funds for nonexempt purposes.

10 The debtor did not reinvest in a new homestead by February
11 28, 2007, when the 18-month temporary exemption expired.

12 The trustee thereupon filed a motion for turnover of the
13 homestead sale proceeds pursuant to 11 U.S.C. § 542(a), which led
14 to an evidentiary hearing on June 27, 2007.

15 Account records in evidence, as confirmed by the debtor's
16 testimony, revealed pre- and postpetition investments using the
17 proceeds, including "put" and "call" option trading, at a rate
18 ranging from 12 to 302 transactions per month.

19 All but \$165.91 of the \$144,816.96 in homestead sale
20 proceeds was dissipated in investment losses, except for \$23,000
21 supposedly used for living expenses, \$9,000 to purchase the
22 estate's interest in his vehicle, and a \$5,000 family gift.

23 The court concluded that the debtor neither attempted, nor
24 intended, to use homestead sale proceeds in a manner consistent
25 with the purpose of protecting exemptions. Significantly, it
26 disbelieved the debtor's testimony ("created this testimony out
27 of whole cloth"—"not credible and seriously misleading" — White,
28 377 B.R. at 640) that he was unable to obtain a new homestead.

1 Although there was a stipulation between the debtor and
2 trustee that \$23,000 was used "for living expenses" during seven
3 months in 2006, the court noted that the debtor testified he had
4 no recollection of using the funds to pay rent for his residence
5 and that there was no evidence that the funds were expended for
6 shelter or other critical expenses; hence, the court specifically
7 declined to conclude that any of the proceeds went to "provide a
8 shelter for his family." White, 377 B.R. at 647.

9 After post-trial briefing, the court granted the trustee's
10 motion to compel turnover of \$144,816.96 in homestead sale
11 proceeds in its published decision issued September 28, 2007. It
12 concluded that there was no need for the trustee to have objected
13 to the claim of exemption in the homestead sale proceeds and
14 that, since the trustee never abandoned the proceeds, the estate
15 continued to have a contingent, reversionary interest in the
16 homestead proceeds for the 18-month period after the sale.

17 Admitting the possibilities that Arizona law might permit
18 homestead sale proceeds to be redirected to another exempt
19 purpose and that a debtor's benign intent might rescue an
20 imperiled exemption, it ruled that neither possibility applied
21 because this debtor "squandered" the homestead proceeds in a
22 manner "diametrically opposed" to the exemption purpose that
23 negated any intent to reinvest in a new homestead or in other
24 exempt property. White, 377 B.R. at 647-48. Thus, the trustee's
25 turnover motion was granted in the sum of \$144,816.96.

26 After filing a timely notice of appeal, the debtor succeeded
27 in having the case converted to chapter 13. Hence, the chapter
28 trustee, Russell Brown, is the substituted appellee. The

1 debtor's chapter 13 plan that is on file contemplates that the
2 amount paid under the plan will depend on the outcome of this
3 appeal, the existence of which appeal is expressly noted.

4
5 JURISDICTION

6 Subject-matter jurisdiction was founded on 28 U.S.C. § 1334
7 over this core proceeding under 28 U.S.C. § 157(b)(2)(E). We
8 have jurisdiction per 28 U.S.C. § 158(a)(1).

9
10 ISSUES

11 (1) Whether the subsequent conversion of the case from
12 chapter 7 to chapter 13 moots this appeal.

13 (2) Whether Arizona law restricts the use of homestead sale
14 proceeds during their period of temporary exemption.

15 (3) Whether a debtor must, when the Arizona temporary
16 exemption period expires, account to the trustee for postpetition
17 loss of homestead sale proceeds as property of the estate.

18 (4) Whether the trustee must have objected to the claim of
19 exemption before requesting turnover of net homestead sale
20 proceeds after Arizona's 18-month temporary exemption expires.

21
22 STANDARD OF REVIEW

23 Abatement and mootness are jurisdictional questions that we
24 raise sua sponte and determine de novo. Searles v. Riley (In re
25 Searles), 317 B.R. 368, 373 (9th Cir. BAP 2004), aff'd, 212 F.
26 App'x 589 (9th Cir. 2006); Official Comm. v. Henry Mayo Newhall
27 Mem'l Hosp. (In re Henry Mayo Newhall Mem'l Hosp.), 282 B.R. 444,
28 448 (9th Cir. BAP 2002).

1 that \$144,816.96 is nonexempt property of the estate, which is a
2 key factor in determining the minimum amount that must be paid
3 into the debtor's chapter 13 plan.

4 Turnover is governed by 11 U.S.C. § 542(a), which generally
5 requires persons in possession, custody, or control of property
6 that the trustee may use, sell, or lease, or that the debtor may
7 exempt, to deliver to the trustee such property or its value. 11
8 U.S.C. § 542(a).¹

9 As a matter of procedure, a proceeding to compel the debtor
10 to deliver property to the trustee need not be an adversary
11 proceeding and, instead, may be prosecuted as a contested matter.
12 Fed. R. Bankr. P. 7001(1) & 9014. The status of the outcome,
13 however, is the same as an adversary proceeding because an order
14 resolving a contested matter has the status of a "judgment" under
15 Federal Rule of Civil Procedure 58. Fed. R. Civ. P. 58,
16 incorporated by Fed. R. Bankr. P. 9021. Hence, the order to turn
17 over \$144,816.96 has the status of a money judgment.

18 By the terms of § 542(a), the question of turnover did not
19 ripen until the debtor could no longer exempt the homestead sale
20

21 ¹The actual turnover provision is:

22 (a) Except as provided in subsection (c) or (d) of this
23 section, an entity, other than a custodian, in possession,
24 custody, or control, during the case, of property that the
25 trustee may use, sell, or lease under section 363 of this
26 title, or that the debtor may exempt under section 522 of
27 this title, shall deliver to the trustee, and account for,
such property or the value of such property, unless such
property is of inconsequential value or benefit to the
estate.

28 11 U.S.C. § 542(a).

1 proceeds. Accordingly, the chapter 7 trustee was entitled to
2 wait to demand turnover until the temporary exemption period
3 expired.

4 Once the temporary exemption period expired, the homestead
5 sale proceeds became exposed to the trustee's § 542(a) power to
6 request turnover of property that the trustee can use, sell, or
7 lease under 11 U.S.C. § 363. Since the terms of § 363, in turn,
8 permit a trustee to use, sell, or lease only "property of the
9 estate," an essential element of a turnover order, necessarily
10 decided in every turnover ruling, is that the property to be
11 turned over is property of the estate. Thus, the order for the
12 debtor to turn over \$144,816.96 necessarily subsumed a
13 determination that the \$144,816.96 is nonexempt property of the
14 estate.

15 No chapter 13 plan can be confirmed unless "the value, as of
16 the effective date of the plan, of property to be distributed
17 under the plan on account of each allowed unsecured claim is not
18 less than the amount that would be paid on such claim if the
19 estate of the debtor were liquidated under chapter 7 of this
20 title [11] on such date." 11 U.S.C. § 1325(a)(4).

21 The status quo is that the property of the estate includes a
22 right to recover \$144,816.96 from the debtor. So long as that
23 status quo stands, § 1325(a)(4) requires that a chapter 13 plan
24 pay up to that amount because, in a hypothetical chapter 7
25 liquidation on the effective date of the plan, \$144,816.96 would
26 be available for distribution. Unsecured claims on the court's
27 claims register total \$120,186.86.

28 Indeed, it was reported during oral argument that

1 confirmation of the debtor's plan turns on the outcome of this
2 appeal. The proposed plan is said to be in two alternative
3 forms; one pays up to \$144,816.96, the other pays less.

4 Even though there is no chapter 7 trustee to whom to turn
5 over the \$144,816.96, the underlying determination that
6 \$144,816.96 is nonexempt property of the estate is a live
7 dispute, both sides of which are represented by adversaries who
8 are possessed of the standing and the incentive to litigate.

9 While the chapter 13 trustee may not be entitled to enforce
10 the \$144,816.96 turnover order as a money judgment against the
11 debtor because the chapter 13 debtor has possession of property
12 of the estate, the chapter 13 trustee has standing to object to
13 confirmation of a plan that does not dedicate at least the
14 required amount of nonexempt property of the estate to plan
15 payments. 11 U.S.C. § 1325(a)(4) & (5); Andrews v. Loheit (In re
16 Andrews), 49 F.3d 1404, 1409 (9th Cir. 1995); Searles, 317 B.R.
17 at 374-75. Thus, the answer to the question whether the
18 \$144,816.96 turnover sum is property of the estate is vital to
19 the chapter 13 trustee's position on plan confirmation.

20 The chapter 13 trustee is also automatically a party to the
21 appeal of the turnover order. By statute, the successor trustee
22 is substituted as a party in any pending action or proceeding to
23 which the prior trustee was party. 11 U.S.C. § 325. By rule of
24 procedure, the statutory substitution of the successor trustee is
25 automatic. Fed. R. Bankr. P. 2012(b). Such automatic
26 substitution occurs even in the transition from chapter 7 to
27 chapter 13. Searles, 212 B.R. at 375-76.

28 It follows that the chapter 13 trustee has standing to

1 insist upon the issue preclusive effect of the determination that
2 \$144,816.96 is nonexempt property of the estate, which enables de
3 facto enforcement of the \$144,816.96 turnover order by opposing
4 confirmation of any plan that does not distribute property of the
5 estate to creditors in the manner and sums, including the
6 \$144,816.96, required by the Bankruptcy Code.

7 Although we share the concern expressed in the dissent that
8 it is ordinarily inappropriate to entertain appeals regarding
9 plan confirmation issues until after the bankruptcy court acts on
10 plan confirmation, this appeal is different. It is significant
11 that this appeal is from a final order entered after a fully-
12 litigated trial in which there necessarily was determined an
13 embedded question – whether \$144,816.96 is nonexempt property of
14 the estate – that incidentally will be important to the structure
15 of the plan that is proposed. If one were to insist that the
16 change of context occasioned by the conversion to chapter 13
17 requires waiting until after plan confirmation, there
18 nevertheless would be no escaping the review of the trial record
19 that is now before us.

20 The plan on file contemplates the contingency of the outcome
21 of this appeal. The debtor wishes to have confirmed the version
22 of his plan that would pay less than \$144,816.96, but in order to
23 do so must succeed in overturning the turnover order in which it
24 was necessarily decided that \$144,816.96 is nonexempt property of
25 the estate. The chapter 13 trustee has the incentive to litigate
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28

1 the question. We need to make a decision now.²

2 In short, the appeal presents a dispute upon which chapter
3 13 plan confirmation depends and is neither moot nor abated.

4
5 II

6 The bankruptcy court's \$144,816.96 turnover award was
7 consistent on all counts with the Ninth Circuit's Golden
8 decision. England v. Golden (In re Golden), 789 F.2d 698, 700
9 (9th Cir. 1986). The court did more, however, than merely follow
10 Golden. It explained how ARIZ. REV. STAT. § 33-1101(C) and the
11 Arizona policy behind it is consistent with Golden.

12 According to ARIZ. REV. STAT. § 33-1101(C), the homestead
13 exemption of up to \$150,000 in identifiable cash proceeds
14 continues until the earlier of "eighteen months after the date of
15 the sale of the property or until the person establishes a new
16 homestead with the proceeds."³ Since the debtor did not

17
18 ²In addition, the order converting the case to chapter 13
19 specified that there would be no dismissal of the case without
20 notice to all interested parties, including the former chapter 7
21 trustee. Therefore, if no plan is confirmed, it is likely the
22 case will be re-converted to chapter 7, where our ruling on this
23 appeal would be critical.

24 ³The actual statutory language is:

25 The homestead exemption, not exceeding the value [\$150,000]
26 provided for in subsection A, automatically attaches to the
27 person's interest in identifiable cash proceeds from the
28 voluntary or involuntary sale of the property. The
homestead exemption in identifiable cash proceeds continues
for eighteen months after the date of the sale of the
property or until the person establishes a new homestead
with the proceeds, whichever period is shorter. Only one
homestead exemption at a time may be held by a person under
(continued...)

1 establish a new homestead, the exemption survived until February
2 28, 2007, and thereupon expired.

3 On appeal, the debtor makes three arguments to avoid the
4 consequences of expiration of the exemption period. First, he
5 argues that Arizona law does not restrict the use of homestead
6 sale proceeds during the period of temporary exemption under
7 ARIZ. REV. STAT. § 33-1101(C). Second, he contends he is not
8 required to account for the postpetition loss of net homestead
9 sale proceeds. Finally, he contends that the absence of a timely
10 objection to his claim of exemption deprived the trustee of the
11 ability to request turnover. We address each issue in turn.

12
13 A

14 As Arizona law controls the interpretation of how one fills
15 in the interstices of the Arizona homestead statute, the task for
16 federal courts is to predict how the Arizona Supreme Court would
17 rule if presented with the Arizona law issue in this appeal.

18 Looming in the background is the Ninth Circuit's decision
19 that, upon the expiration of California's 6-month homestead sale
20 proceeds exemption, proceeds that have not been reinvested in a
21 new homestead "revert to the trustee." Golden, 789 F.2d at 700.

22 Rejecting argument that there should be credit for
23 expenditures, the Ninth Circuit also held that the amount that
24 reverts is the sum claimed as exempt at the time of filing.

25
26 ³(...continued)
27 this section.

28 ARIZ. REV. STAT. § 33-1101(C).

1 Golden, 789 F.2d at 701. Its rationale was that denying credit
2 for amounts spent during the temporary exemption period “further
3 the purpose of the California exemption to preserve the proceeds
4 of the sale for reinvestment in another home, and to prevent
5 expenditures for nonexempt purposes.” Golden, 789 F.2d at 701.

6 Nor was the trustee required to give the debtor any pre-
7 expiration notice that the proceeds would be claimed by the
8 trustee. Golden, 789 F.2d at 701.

9 In Smith, we treated Golden as precedent even though we were
10 dealing with Arizona, not California, law. We concluded that
11 Arizona’s 18-month temporary exemption was sufficiently parallel
12 to California’s 6-month exemption that Golden supplied the basic
13 answer for the Arizona exemption as well. Hence, characterizing
14 the estate as holding a “contingent, reversionary interest” that
15 matured when the exemption expired without a new homestead, we
16 reversed an order denying the trustee’s turnover request.

17 The Smith appeal, however, did not present an issue of
18 permissible uses of funds during the exemption period. As the
19 trustee sought only the balance remaining as of expiration of the
20 exemption, we made clear that we were deciding nothing regarding
21 use of proceeds under Arizona law. Smith, 342 B.R. at 804 n.2.⁴

22 In Konnoff, we ruled that Golden was not overruled by the
23 Supreme Court’s decision in Owen v. Owen, 500 U.S. 305 (1991),
24 and that Arizona exemptions apply in bankruptcy with all of the

26 ⁴The bankruptcy court correctly noted that references in
27 Smith and Konnoff to permissible uses of funds were dicta not
28 without precedential effect. White, 377 B.R. at 647 n.49.

1 limitations imposed by Arizona law, including the 18-month
2 temporary period. Konnoff, 356 B.R. at 206-08. There was no
3 issue regarding use of proceeds, as the identifiable cash
4 proceeds were held in bank accounts about which there was no
5 controversy. Konnoff, 356 B.R. at 203.

6 Both Smith and Konnoff were accompanied by concurrences
7 expressing concern that the interplay between bankruptcy and the
8 temporary feature of the Arizona exemption created the potential
9 for dysfunctional prolongation of cases.⁵ In effect, bankruptcy
10 adds a dimension not normally present in the state judgment
11 enforcement matters where exemptions are normally assessed at the
12 moment of attempted enforcement: once the bankruptcy estate is
13 created, the trustee's "contingent, reversionary interest"
14 remains attached to homestead sale proceeds for the full duration
15 of that interest as property of the estate in the same manner as
16 if the trustee constructively attempted a judgment enforcement
17 each day for the life of the bankruptcy case. Nevertheless, each
18 concurrence conceded that our hands were tied by precedent.

19
20 B

21 Here, the debtor first argues that Arizona imposes no
22 restrictions on his use of the \$144,816.96 of temporarily-exempt
23

24 ⁵The Smith concurrence worried that Golden could create an
25 incentive to delay administration of bankruptcy cases until the
26 exemption is lost. Some of that fear is assuaged by a tolling
27 doctrine that applies when the debtor cannot reinvest because the
28 proceeds are tied up in litigation over which the debtor lacks
control. Thorsby v. Babcock, 222 P.2d 863, 866 (Cal. 1950); cf.
Golden, 789 F.2d at 701 (rejecting tolling because debtor
controlled proceeds after the bankruptcy petition was filed).

1 homestead sale proceeds extant as of filing the bankruptcy case,
2 at least until the 18-month temporary exemption period expired.

3 The bankruptcy court made several rulings that are important
4 in this connection. Its predicate ruling was that homestead sale
5 proceeds must be used in a manner consistent with the intent to
6 reinvest in a new homestead or other exempt purpose. White, 377
7 B.R. at 645. In dictum, the court rejected the trustee's
8 argument that the only permissible use is reinvestment in a new
9 homestead and, leaving details to future cases, suggested that
10 transferring the funds to another exempt asset, "such as an
11 appropriate retirement plan," might be permissible. White, 377
12 B.R. at 645 n.42.

13 The court's operational ruling was that the debtor's lack of
14 intent to reinvest the proceeds for an exempt purpose (as
15 evidenced, inter alia, by trading activities in risky investments
16 "so contrary to" the claim of exemption as to constitute
17 abandonment of the exemption) exposed the debtor to liability for
18 dissipation of proceeds that were property of the estate because
19 the trustee maintained a "contingent, reversionary interest"
20 during the period of exemption. White, 377 B.R. at 645, citing
21 Golden, 789 F.2d at 700, and Smith, 342 B.R. at 808.

22 These rulings followed from the bankruptcy court's careful
23 exploration of Arizona decisions in search of an answer to the
24 question of what uses of homestead sale proceeds are permissible
25 during the period of exemption. It located only some clues,
26 mostly regarding policy, from the few reported state-court
27 decisions. White, 377 B.R. 643-45. Having retraced those steps,
28 we agree that Arizona authority is sparse.

1 The basic interpretative problem is that the 18-month
2 temporary exemption embodied in ARIZ. REV. STAT. § 33-1101(C) was
3 not enacted until 1971, in a form that until 1994 applied to a
4 recorded homestead⁶ but not a homestead by operation of law, and
5 has not been the subject of an Arizona Supreme Court decision.

6 Some basic policy concepts can be gleaned from older Arizona
7 Supreme Court cases. There seems to be agreement dating from the
8 initial decades after statehood, when the homestead was
9 denominated in dollars, that the purpose of the homestead
10 exemption is to preserve funds to provide shelter for the family.
11 Union Oil Co. v. Norton Morgan Commercial Co., 202 P. 1077, 1079
12 (Ariz. 1922); Sec. Trust & Sav. Bank v. McClure, 241 P. 515, 517
13 (Ariz. 1925); Schreiber v. Hill, 95 P.2d 566, 568 (Ariz. 1939)
14 ("protect the family"). Modernly, it has been described as "to
15 protect the family against forced sale of its home property for
16 debts which are not specifically related to it." Md. Nat'l Ins.
17 Co. v. Ozzie Young Drilling Co., 526 P.2d 402, 406 (Ariz. Ct.

19 ⁶The 1971 version of ARIZ. REV. STAT. § 33-1101(C) provided:

20
21 (C) If a homestead claimed under subsection A has been duly
22 recorded before the date of a voluntary or involuntary sale
23 of the property, the homestead exemption, not exceeding the
24 value provided for in subsection A, automatically attaches
25 to the claimant's equity interest in identifiable cash
26 proceeds from the sale. The homestead exemption in
27 identifiable cash proceeds continues for eighteen months
after the date of the sale of the property or until the
claimant files a new claim of homestead exemptions pursuant
to subsection A, whichever period is shorter. Only one
homestead exemption at a time may be held by a person under
the provisions of this section.

28 ARIZ. REV. STAT. § 33-1101(C) (repealed 1994).

1 App. 1974); accord, Evans v. Young, 661 P.2d 1148, 1154 (Ariz.
2 Ct. App. 1983); Matcha v. Winn, 638 P.2d 1361, 1363-64 (Ariz. Ct.
3 App. 1981).

4 The one modern Arizona Supreme Court decision dealing with
5 the homestead exemption emphasizes strict compliance with the
6 requirement of an exemption statute before honoring the
7 exemption. McLaws v. Kruger, 636 P.2d 95, 97 (Ariz. 1981).
8 There, a debtor with a homestead that was not recorded and,
9 hence, not subject to the then-current version of ARIZ. REV. STAT.
10 § 33-1101(C), was not permitted to defeat a garnishment of the
11 \$1,971.64 in proceeds from sale of his homestead, which funds he
12 intended to reinvest in a new homestead. Quoting a 1925 decision
13 that "[w]hen exempt property is voluntarily converted into money,
14 or other property not also exempt by law, the right is gone" the
15 Arizona Supreme Court added, "[w]e believe this maxim holds
16 equally true under the statutory scheme as it exists today [in
17 1981]." McLaws, 636 P.2d at 97, quoting Mack v. Boots, 239 P.
18 794, 794 (Ariz. 1925).

19 The statutory structure that is evident from comparison of
20 ARIZ. REV. STAT. § 33-1101(A) with § 33-1101(C) further reveals a
21 purpose that the owner of a homestead be allowed to substitute
22 one family home for another. Nothing in that structure suggests
23 that the protected sale proceeds can be used as a grubstake.

24 For more specific guidance, however, one must fall back on
25 Arizona's rule of interpretation that when no Arizona cases are
26 directly on point, decisions from other states with similar laws
27 may be consulted. See, e.g., Ferguson v. Roberts, 170 P.2d 855,
28 857-58 (Ariz. 1946); Matcha, 638 P.2d at 1363-64.

1 In Smith and Konnoff, we noted that California, Oregon, and
2 Texas have temporary homestead sale proceeds exemptions similar
3 to that of Arizona and that they appear to be interpreted
4 consistently to restrict the use of proceeds to exempt purposes.
5 Use of proceeds in a manner inconsistent with the exempt purpose
6 may deprive the proceeds of their exempt status. Smith, 342 B.R.
7 at 806-08; Konnoff, 356 B.R. at 207; cf. Zibman v. Tow (In re
8 Zibman), 268 F.3d 298, 304 (5th Cir. 2001) (Texas law); Golden,
9 789 F.2d at 700 (California law); In re Earnest, 42 B.R. 395, 399
10 (Bankr. D. Or. 1984) (Oregon law).

11 The bankruptcy court added Idaho and Illinois to the list of
12 states with similar exemptions for homestead sale proceeds and
13 noted that each appears to bar expenditures for purposes other
14 than homestead reinvestment. White, 377 B.R. at 644-45; In re
15 Kierig, 2000 WL 33716966 at *2 (Bankr. D. Idaho 2000); Trustee
16 Servs. Corp. v. Deglopper (In re Deglopper), 53 B.R. 95, 97
17 (Bankr. D. Idaho 1985); In re Ziegler 239 B.R. 375, 378-80
18 (Bankr. C.D. Ill. 1999).

19 Indeed, restrictions on use of homestead sale proceeds have,
20 from early in their history, been regarded as essential to the
21 appropriate balance between exemption purpose and rights of
22 creditors. Thorsby, 222 P.2d at 865-66 (California law). As
23 noted in an influential law review article: "Statutes that do
24 not impose a requirement of reinvestment seem unfortunate, since
25 without such a restriction the debtor may squander the proceeds,
26 leaving his family homeless." George L. Haskins, Homestead
27 Exemptions, 63 HARV. L. REV. 1289, 1311 (1950); accord, Golden,
28 789 F.2d at 700, citing Thorsby, 222 P.2d at 866.

1 In sum, we predict that the Arizona Supreme Court would not
2 construe ARIZ. REV. STAT. § 33-1101(C) to permit use of
3 identifiable cash proceeds from the sale of a homestead in a
4 manner inconsistent with Arizona's exempt purposes. This
5 prediction coincides with Golden's view of the same issue under
6 California law. Golden, 789 F.2d at 700.

7
8 C

9 The debtor further contends that he is not required to
10 account for postpetition loss of homestead sale proceeds. In
11 practical effect, this is an argument that the trustee
12 correlatively bears the risk of loss for the debtor's activities
13 during the temporary exemption period.

14 The Ninth Circuit in Golden rejected substantially the same
15 argument when Mr. Golden contended that, even if the proceeds
16 were no longer exempt, he had "spent" some of the exempt funds
17 and that the trustee was entitled only to the balance remaining
18 in the debtor's possession. It ruled that measuring the
19 trustee's entitlement by the amount of the exemption at the time
20 of filing furthers the purpose of the exemption "to preserve the
21 proceeds of the sale for reinvestment in another home, and to
22 prevent expenditures for nonexempt purposes." Golden, 789 F.2d
23 at 701.

24 The purpose of Arizona's exemption is consistent with the
25 Ninth Circuit's assessment of the purpose of California's
26 parallel exemption. This follows from the Arizona Supreme
27 Court's validation in 1981 of the proposition that "[w]hen exempt
28 property is voluntarily converted into money, or other property

1 not also exempt by law, the right is gone." McLaws, 636 P.2d at
2 97, quoting Mack, 239 P. at 794.⁷

3 It would be inconsistent with Arizona law to require the
4 trustee to bear the risk of loss during the period the funds are
5 being used by the debtor in a manner not approved by the trustee.

6
7 D

8 There is no merit to the debtor's contention that the
9 absence of an objection to the debtor's claim of exemption
10 affects the trustee's ability to seek turnover of property of the
11 estate upon expiration of the exemption.

12 This procedural question of federal bankruptcy law was
13 definitively resolved by Golden and is law of the circuit with
14 respect to the temporary homestead sale proceeds exemptions of
15 all states: "Because the exemption remained in effect during the
16 six-month period, and the trustee had no right to claim the
17 proceeds during that period, we see no reason for requiring that
18 he notify the debtor of a claim not yet in existence." Golden,
19 789 F.2d at 701.

20 We so held in Smith, as did the bankruptcy court in this
21 case. Smith, 342 B.R. at 808; White, 377 B.R. at 642.

22 The Golden rationale that there was nothing to which to
23 object is similarly fatal to the debtor's argument based on 11
24 U.S.C. § 522(1). If an objectionable claim of exemption is made

25
26 ⁷Since the court apparently disbelieved the debtor's
27 assertion that he spent \$23,000 of the "identifiable cash
28 proceeds" for living expenses, this appeal does not present a
question whether such use of funds would or would not be
consistent with Arizona's exemption purpose.

1 and there is no timely objection, then the property is exempt
2 under that section. Taylor v. Freeland & Kronz, 503 U.S. 638,
3 642-43 (1992). But, here there was nothing objectionable about
4 the claim of exemption in homestead sale proceeds at the time
5 that claim was made.

6 Moreover, the contention that § 522(l) precludes the trustee
7 from exercising control over the property is too great a leap
8 because it does not account for situations in which the estate
9 has an interest simultaneous with the debtor in property that is
10 subject to exemption.

11 Where a homestead exemption is expressed in dollar terms
12 (\$150,000 in Arizona), the trustee is entitled to sell the
13 property for an amount that would yield net proceeds exceeding
14 the amount of the exemption. Hyman v. Plotkin (In re Hyman), 967
15 F.2d 1316, 1320-21 (9th Cir. 1992).

16 Moreover, postpetition appreciation in excess of the amount
17 of an exemption belongs to the trustee. Schwaber v. Reed (In re
18 Reed), 940 F.2d 1317, 1323 (9th Cir. 1991). To be sure, this
19 rule could foster an economic incentive for a trustee to prolong
20 a case in a rising market, the answer to which problem lies in
21 the ability of the debtor to seek to have the property abandoned
22 pursuant to 11 U.S.C. § 554(b) as being of inconsequential value
23 or benefit to the estate. 11 U.S.C. § 554(b); Fed. R. Bankr. P.
24 6007(b); Hyman, 967 F.2d at 1321 n.11.

25 The difficulty for the debtor is that the exemption that he
26 claimed was only temporary and expired by operation of ARIZ. REV.
27 STAT. § 33-1101(C) on February 28, 2007, eighteen months after
28 the sale of the homestead without a subsequent reinvestment in

1 another homestead and while the bankruptcy case remained open.
2 The claim of exemption came with all of the restrictions imposed
3 by Arizona law, including the temporal limitation that left the
4 estate with a "contingent, reversionary interest."

5 The trustee merely accepted the debtor's claim of exemption
6 at face value. There was nothing else to do until the exemption
7 period expired without the proceeds having been reinvested in a
8 homestead. Upon expiration of that period, there was no longer
9 an exemption, and the trustee made a motion for turnover, which
10 motion would have been premature under the terms of § 542(a)
11 until the homestead sale proceeds were no longer exempt.

12
13 CONCLUSION

14 The bankruptcy court correctly ruled that the debtor was not
15 privileged to use homestead sale proceeds for a purpose
16 inconsistent with the exemption purposes of Arizona law, that the
17 debtor is liable for turnover to the trustee under § 542(a) of
18 the full \$144,816.96 of homestead sale proceeds extant as of the
19 time the bankruptcy case was filed, and that the trustee was
20 neither required to object to the debtor's claim of exemption,
21 nor required to give the debtor notice that the trustee intended
22 to exercise the trustee's reversion rights upon expiration of the
23 18-month temporary exemption. AFFIRMED.

24
25
26 PAPPAS, Bankruptcy Judge, dissenting:

27
28 The majority aptly describes this Circuit's case law

1 concerning the bankruptcy status of state law temporary homestead
2 sale proceeds exemptions as "a festering sore." In my opinion,
3 the best salve for this condition would be a reconsideration by
4 the Ninth Circuit of its decision in Golden, which grants a
5 chapter 7 bankruptcy trustee what this Panel described in Smith
6 as a post-bankruptcy "contingent, reversionary interest" in a
7 debtor's exempt homestead sale proceeds. Even so, this appeal is
8 not an appropriate patient for such treatment. Because the
9 appeal is moot, it should be dismissed, and I dissent.

10
11 A

12 Almost two years after the debtor filed his petition, the
13 bankruptcy court granted the chapter 7 trustee's motion
14 compelling the debtor to "turn over"⁸ the full amount of exempt
15 homestead sale proceeds that he held on the date the bankruptcy
16 case was commenced. Unfortunately, the debtor had spent the
17 funds. Realizing that any hope for obtaining debt relief in
18 chapter 7 had now evaporated, the debtor sought and obtained a
19 conversion of his bankruptcy case to chapter 13 so that he could
20 propose, and hopefully confirm, a debt repayment plan.⁹

21 _____
22 ⁸ To be fair, as the majority acknowledges, an order
23 requiring a debtor to turn over to the trustee cash the debtor
24 admits he spent amounts to a money judgment. Ironically, then,
the trustee became a creditor competing with the debtor's other
post-bankruptcy creditors for his few nonexempt assets.

25 ⁹ Though it is unclear how the debtor could otherwise cope
26 with the chapter 7 trustee's claim against him, the trustee
27 nonetheless challenged the debtor's motives in seeking to convert
his bankruptcy case to chapter 13, arguing that the debtor was
acting in bad faith. See Marrama v. Citizens Bank of

28 (continued...)

1 The fact that this is now a chapter 13 case cannot be
2 ignored. Under § 348(e), “[c]onversion of a case under section
3 706 . . . of this title terminates the service of any trustee or
4 examiner that is serving in the case before such conversion.”
5 Simply put, there no longer is a chapter 7 trustee empowered to
6 collect and liquidate the assets of the bankruptcy estate. See
7 11 U.S.C. § 704(a)(1). Indeed, there is no one the debtor could
8 pay to discharge his obligation under the order, even were he
9 able to do so.

10 Instead, a chapter 13 trustee has now been appointed who,
11 under the Bankruptcy Code, holds no right to possession of the
12 debtor’s assets, including the funds in question. While a
13 curious result, under the Code, that right now belongs to the
14 debtor. See 11 U.S.C. § 1306(b) (providing that “Except as
15 provided in a confirmed plan or order confirming a plan, the
16 debtor shall remain in possession of all property of the
17 estate.”). In other words, the bankruptcy court’s order on
18

19 ⁹(...continued)
20 Massachusetts, 127 S. Ct. 1105, 1107-1112 (2007) (holding that a
21 debtor’s bad faith conduct in connection with a chapter 7 case
22 constitutes an appropriate basis for a bankruptcy court to deny a
23 debtor’s motion to convert to a chapter 13 case). The bankruptcy
24 court overruled the chapter 7 trustee’s objection, expressly
25 finding in its order that “[t]here is no egregious behavior
26 exhibiting ‘bad faith’ . . . so as to prohibit Debtor from
27 converting his case from Chapter 7 to Chapter 13.” Order
28 Converting Case to Chapter 13 at ¶ 1 (November 15, 2007),
Bankruptcy Docket No. 83. The chapter 7 trustee did not appeal
the conversion order. While the debtor’s decision to engage in
speculative investments during his bankruptcy case surely seems
foolish in retrospect, given the bankruptcy court’s decision, we
must presume that he is acting in good faith in seeking to pay
his debts via a chapter 13 plan.

1 appeal, directing the debtor to turn over funds to a nonexistent
2 chapter 7 trustee, constitutes an anomaly.

3 So how can this appeal proceed when the original appellee no
4 longer exists? The majority responds that the appeal should go
5 forward because, upon conversion, the chapter 13 trustee was
6 "automatically substituted" for the chapter 7 trustee. But
7 assuming this conclusion is correct,¹⁰ it is of no particular
8 moment. Whether the chapter 13 trustee is a proper party to this
9 appeal or not, he can exercise no rights greater than the Code
10 bestows upon him. Deciding whether the bankruptcy court
11 correctly ordered the debtor to pay the amount of the homestead
12 sale proceeds to a nonexistent chapter 7 trustee is now, at best,
13 an academic exercise.

14 The majority believes a live issue remains for resolution
15 because the propriety of the turnover order issued by the
16 bankruptcy court in the chapter 7 case may impact the chapter 13
17 trustee's position, and the bankruptcy court's analysis,
18 concerning whether the debtor's plan satisfies the "best
19

20
21 ¹⁰ The majority cites a Panel decision also written by
22 Judge Klein, Searles v. Riley (In re Searles), 317 B.R. 368, 375-
23 76 (9th Cir. BAP 2004), aff'd, 212 F. App'x 589 (9th Cir. 2006),
24 along with § 325 of the Bankruptcy Code and Rule 2012(b), to
25 support its conclusion that, upon conversion, a chapter 13
26 trustee has "automatic standing" and steps into the shoes of the
27 displaced chapter 7 trustee. However, a careful reading of the
28 Code and Rule reveals that they actually address the status of a
"successor trustee," or in the words used therein, one who
replaces a trustee who fills "[a] vacancy in the office of
trustee during a case" such as "[w]hen a trustee dies, resigns,
is removed, or otherwise ceases to hold office" Neither
the Code nor Rule expressly address the precise situation here:
conversion of a case from chapter 7 to chapter 13.

1 interests of creditors test" under § 1325(a)(4).¹¹ I disagree.

2 In reality, the debtor's and chapter 13 trustee's position
3 on plan confirmation, and the relevance of the bankruptcy court's
4 turnover order, are completely dependent upon what sort of plan
5 the debtor eventually attempts to confirm. If the debtor
6 sponsors a plan that provides for a distribution to unsecured
7 creditors of an amount less than that required by § 1325(a)(4),¹²
8 the chapter 13 trustee may object to that plan, and the losing
9 party in that contest may seek review on appeal. If, instead,
10 the debtor elects to propose a plan that pays the \$144,816.96 or
11 more to creditors, whether the bankruptcy court's ruling in the
12 chapter 7 case was correct or not is truly inconsequential.

13
14 ¹¹ We can only speculate about whether resolution of the
15 exemption issue will be critical in the context of the debtor's
16 chapter 13 case. The majority states the chapter 13 trustee is
17 entitled to "insist upon the issue preclusive effect of the
18 [exemption] determination" made by the bankruptcy court. But
19 even without the Panel's blessing, it is doubtful the bankruptcy
20 court would change its position, if indeed the issue becomes
21 significant during the confirmation process.

22 ¹² The majority is incorrect in assuming that, to satisfy
23 § 1325(a)(4), the debtor's plan must propose to pay at least
24 \$144,816.96 to his unsecured creditors. The hypothetical
25 liquidation analysis required by this Code provision to determine
26 if creditors are receiving as much under a proposed chapter 13
27 plan as they would receive in a liquidation is not based upon the
28 liquidation value of the debtor's assets on the petition date, or
even some later date, but is measured "as of the effective date
of the plan" As a result, if at the time the debtor's
plan is presented to the bankruptcy court for confirmation it
appears that the chapter 7 trustee's turnover order would be
uncollectible, a plan could conceivably satisfy § 1325(a)(4) by
paying unsecured creditors much less than \$144,816.96. But the
point is, this Panel simply can not anticipate how much the
debtor must pay to creditors under a plan until one is actually
presented to the bankruptcy court for confirmation - something
that has not yet occurred.

1 I appreciate that, currently, the debtor has proposed a plan
2 in the bankruptcy court, the terms of which are dependent upon
3 the outcome of this appeal. While this is a clever tactic, the
4 debtor may not thereby bestow jurisdiction on this Panel to
5 render an advisory opinion concerning a moot issue. The Panel
6 can only speculate about what sort of plan the debtor will
7 finally propose for confirmation, what objections that plan may
8 generate, what other problems may exist with respect to
9 confirmation of that plan,¹³ and what rulings the bankruptcy
10 court will make to resolve the issues. That the bankruptcy
11 court's decision in the converted chapter 7 case might have an
12 impact upon the bankruptcy court's decision to confirm the
13 debtor's proposed plan is not a proper basis for the Panel to
14 engage in theoretical speculation.

15 In sum, the majority's decision affirming the bankruptcy
16 court's turnover order represents a resolution in search of a
17 controversy. If the debtor, trustee or some other party with
18 proper standing is disappointed with the decision of the
19 bankruptcy court when (and if) a plan is actually submitted for
20 confirmation, that party may seek review. The issue raised in
21 this appeal is, at best, hypothetical, and this appeal should be
22

23 ¹³ Of course, § 1325(a)(4) is but one of many standards the
24 debtor must satisfy in order to achieve confirmation. See 11
25 U.S.C. § 1325(a)(1)-(9). Indeed, the bankruptcy court could
26 conceivably find that a plan that does not pay creditors the
27 amounts he lost day-trading with the homestead sale proceeds is
28 not proposed in good faith, as required by § 1325(a)(3). Again,
until the debtor shows that all of the other requirements for
confirmation of his proposed plan are met, the issue raised by
this appeal is not squarely presented for our review.

1 dismissed as moot.

3 B

4 Since the majority reaches the merits, I am obliged to
5 comment further.

6 That there would be painful, recurring issues concerning the
7 exempt status of homestead sale proceeds in Arizona bankruptcy
8 cases and others was predictable. The Ninth Circuit's decision
9 in Golden, together with this Panel's various decisions applying
10 it, creates an uneasy tension between classic chapter 7
11 bankruptcy policy, which, with very limited exceptions, measures
12 the respective property rights of a debtor and the bankruptcy
13 estate on the date of bankruptcy, and state exemption law, which
14 as here, determines the debtor's exemption rights based upon
15 events occurring (or not) over as much as eighteen months after
16 bankruptcy. In Ford v. Konnoff (In re Konnoff), 356 B.R. 201,
17 208-210 (9th Cir. BAP 2006), I attempted to predict some of the
18 challenges to be faced by debtors, trustees, and ultimately,
19 bankruptcy courts, by postponing the characterization of property
20 as exempt. This appeal presents yet another example of the
21 difficulties experienced in bankruptcy cases in implementing
22 Golden, Smith, Konnoff, et al.

23 The Bankruptcy Code provides that the bankruptcy estate
24 consists of all of a debtor's legal or equitable interests in
25 property as of the commencement of the bankruptcy case "wherever
26 located and by whomever held." 11 U.S.C. § 541(a)(1). Under
27 § 704(a)(1), the chapter 7 trustee is required to "collect and
28 reduce to money the property of the estate"

1 Exempt assets are property of the estate, but because any
2 proceeds from the sale of exempt assets are distributed to the
3 debtor, not to creditors, chapter 7 trustees generally do not
4 take possession of them, at least when they cannot be sold for an
5 amount greater than needed to satisfy the exemption. However, if
6 both the debtor and the bankruptcy estate hold an interest in
7 homestead sale proceeds (even a "temporary, reversionary
8 interest"), consistent with the statutory duty, a prudent chapter
9 7 trustee must promptly move to secure such asset. I therefore
10 strongly disagree with the majority's suggestion that "[b]y the
11 terms of § 542(a), the question of turnover [in this case] did
12 not ripen until the debtor could no longer exempt the homestead
13 sale proceeds, [and, accordingly,] the chapter 7 trustee was
14 entitled to wait to demand turnover until the temporary exemption
15 period expired."

16 Surely, the Code empowers a bankruptcy court to fashion an
17 order giving a chapter 7 trustee concurrent, if not exclusive,
18 control over monies in which both the debtor and the estate hold
19 an interest. See 11 U.S.C. § 105(a) ("The [bankruptcy] court may
20 issue any order, process, or judgment that is necessary or
21 appropriate to carry out the provisions of this title."). But
22 here, the chapter 7 trustee did not move to sequester the
23 homestead sale proceeds that were subject to the estate's
24 reversionary interest, and instead stipulated to release those
25 funds to the debtor. Because the chapter 7 trustee was something
26 less than aggressive, the debtor ill-advisedly speculated with
27 most of the homestead sale proceeds, and used the remainder of
28

1 them for "living expenses."¹⁴

2 I acknowledge that, under Golden, a chapter 7 trustee does
3 not bear the risk of loss for "the debtor's activities during the
4 temporary exemption period" But it is too simple to
5 indict all debtors for dipping into otherwise exempt money to
6 meet daily needs. While the debtor's decision to invest the
7 homestead funds proved very unwise, this case highlights the
8 practical problems created when, under Golden, a trustee and
9 bankruptcy court waits as much as eighteen months before finally

11 ¹⁴ In the bankruptcy court's view, the debtor "squandered"
12 all of the money. It declined to accept as fact that the debtor
13 used \$23,000 of the homestead sale proceeds for living expenses,
14 even though the debtor and chapter 7 trustee stipulated that he
15 did so. There is no Arizona case law holding that a creditor may
16 obtain a money judgment against a debtor who spends exempt cash
17 homestead sale proceeds during the reinvestment period. However,
18 the bankruptcy court and majority predict that the Arizona
19 Supreme Court would interpret its exemption statutes to prohibit
20 a debtor's use of the proceeds "in a manner inconsistent with
21 Arizona's exempt purposes."

22 The import of this ambitious assumption is not altogether
23 clear. Whatever it means, though, it guarantees even more
24 litigation will be required before the Arizona bankruptcy court,
25 this Panel, and the Ninth Circuit can divine the contours of what
26 is, and is not, a "permissible use" of "temporarily exempt"
27 homestead sale proceeds. For example, in dictum, the bankruptcy
28 court speculated that it is appropriate for a debtor to use
homestead sale proceeds to fund a retirement plan. White, 377
B.R. at 645 n.42. But is it permissible for a debtor to use such
funds to pay for rent or utilities, or other normal expenses for
maintaining a household (*i.e.*, "to provide shelter")? Is it
inconsistent with Arizona exemption law for the debtor to use the
exempt proceeds to buy a replacement vehicle, or to pay for a
dependent's medical treatments? I, for one, do not believe that,
in a chapter 7 context, Congress intended to postpone a debtor's
right to a financial fresh start while these questions are
settled, probably by litigation, nor to allow trustees and
bankruptcy courts to play such a pervasive, supervisory role in a
debtor's post-bankruptcy life.

1 deciding whether homestead sale proceeds are, or are not, to be
2 administered as part of the bankruptcy estate. Congress did not
3 contemplate this approach when, in § 522(b)(2)(A) of the pre-
4 BAPCPA Code, it provided that property protected from the reach
5 of a debtor's creditors under applicable law on the date of the
6 bankruptcy filing is exempt.

7 The Panel is bound to follow Golden. But given the
8 opportunity, the Ninth Circuit should reconsider that decision
9 and hold that, under the Bankruptcy Code, homestead sale proceeds
10 which are exempt from creditor's claims under applicable state
11 law on the date a petition is filed are, for purposes of that
12 bankruptcy case, exempt. Such a holding is not only correct
13 under the Code, it would avoid the recurring interpretative and
14 practical challenges presented by Golden to debtors, trustees and
15 bankruptcy courts.