

OCT 31 2007

HAROLD S. MARENUS, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

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In re:	)	BAP No.	CC-07-1066-TPaMk
	)		
HOUSHANG DARDASHTI,	)	Bk. No.	LA 99-36522-BR
	)		
Debtor.	)	Adv. No.	LA 06-01823-BR
_____	)		
HOUSHANG DARDASHTI,	)		
	)		
Appellant,	)		
v.	)	<b><u>MEMORANDUM</u></b> <sup>1</sup>	
	)		
JEFFREY I. GOLDEN, Chapter 7	)		
Trustee,	)		
	)		
Appellee.	)		
_____	)		

Argued and Submitted on September 21, 2007  
at Pasadena, California

Filed - October 31, 2007

Appeal from the United States Bankruptcy Court  
for the Central District of California

Honorable Barry Russell, Bankruptcy Judge, Presiding

\_\_\_\_\_  
Before: TCHAIKOVSKY,<sup>2</sup> PAPPAS and MARKELL, Bankruptcy Judges.

<sup>1</sup> This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1) it has no precedential value. See 9th Cir. BAP Rule 8013-1.

<sup>2</sup> Hon. Leslie J. Tchaikovsky, U.S. Bankruptcy Judge for the Northern District of California, sitting by designation.

1           Houshang Dardashti (the "Debtor") appeals the bankruptcy  
2 court's order granting the motion of the chapter 7 trustee (the  
3 "Trustee") to dismiss the Debtor's complaint for declaratory  
4 relief (the "Complaint"). The Complaint seeks a declaration that  
5 the Debtor's interest in real property (the "Real Property") is  
6 not property of his bankruptcy estate. Prior to the commencement  
7 of the Debtor's adversary proceeding, the Trustee had obtained a  
8 turnover order (the "Turnover Order"), on a default basis, with  
9 respect to the Debtor's interest in the Real Property.

10           The Trustee moved to dismiss the Complaint on the alternate  
11 grounds that: (1) the Complaint was legally precluded by the  
12 Turnover Order and (2) in any event, the Real Property was  
13 property of the bankruptcy estate because the Debtor acquired it  
14 by devise within 180 days after the filing of his bankruptcy  
15 petition. The bankruptcy court granted the Trustee's motion to  
16 dismiss on both grounds.

17           On appeal, the Debtor contends that the Complaint was not  
18 precluded by the Turnover Order. He also contends that, under  
19 Israeli law, he did not acquire his interest in the Real Property  
20 until the probate estate was approved for distribution, which  
21 occurred more than 180 days after he filed his bankruptcy  
22 petition.

23           We conclude that the Turnover Order did not bar litigation of  
24 the issue as to whether the Debtor's interest in the Real Property  
25 was property of his bankruptcy estate, either as a matter of issue  
26 or claim preclusion. Therefore, the bankruptcy court's granting  
27 of the motion to dismiss on this ground was in error. However, we  
28 conclude that the bankruptcy court's ruling that the Debtor's

1 interest in the Real Property was property of his bankruptcy  
2 estate as a matter of law was correct. Therefore, the dismissal  
3 of the Complaint with prejudice was proper and should be AFFIRMED.

#### 4 I. FACTS

##### 5 A. The Debtor's Bankruptcy Filing

6 The Debtor filed a chapter 7 bankruptcy petition in the  
7 Central District of California on July 15, 1999, and shortly  
8 thereafter, the Trustee was appointed as trustee of his bankruptcy  
9 estate. On October 25, 1999, the Debtor was granted a discharge,  
10 and the case was closed as a "no-asset" case on November 2, 1999.

##### 11 B. The Testator's Death

12 The Debtor's father, Loghman Dardashti (the "Testator"), died  
13 on November 14, 1999, 122 days after the Debtor filed for  
14 bankruptcy. The Testator's will, which was dated February 23,  
15 1996 (the "Will"), gave the Debtor an interest in the Testator's  
16 estate (the "Interest"). The Will devised to the Debtor a 40%  
17 interest in real property located in Ra'anana, Israel and a 20%  
18 interest in real property in Natanya, Israel (collectively, the  
19 Real Property). The Debtor did not move to reopen his bankruptcy  
20 case to supplement or amend his schedules to reflect the Interest.  
21 The Will was probated in the Family Court of Israel. The  
22 Testator's estate was approved for distribution on April 13, 2000.

##### 23 C. The Trustee's Turnover Motion

24 Learning of the circumstances surrounding the Debtor's  
25 acquisition of the Interest, the Trustee moved to reopen the  
26 Debtor's bankruptcy case. The motion was granted, and the Trustee  
27 was reappointed on September 28, 2005. On November 10, 2005, the  
28 Trustee filed a motion requesting that the Debtor's Interest in

1 the Real Property be turned over pursuant to § 521(a)(3) and (4)<sup>3</sup>  
2 (the "Turnover Motion"). The Trustee asserted that, because the  
3 Testator died within 180 days of the date that the Debtor filed  
4 his bankruptcy petition, the Interest was property of the estate.  
5 The Debtor did not file an opposition to the Turnover Motion.

6 A hearing on the Turnover Motion was conducted on December 6,  
7 2005. The Debtor did not appear at the hearing. He contends that  
8 he did not receive notice of the motion. The bankruptcy court  
9 granted the motion, and an order to that effect was entered on  
10 December 28, 2005 (the "Turnover Order"). In the Turnover Motion,  
11 the Trustee did not request a finding that the Interest was  
12 property of the estate, and no finding to that effect was made,  
13 either orally on the record at the hearing or in the Turnover  
14 Order. The Debtor did not seek reconsideration of the Turnover  
15 Order and did not appeal it.

16 D. The Adversary Proceeding

17 On November 27, 2006, the Debtor filed an adversary  
18 proceeding seeking a declaration that the Interest is not property  
19 of his bankruptcy estate pursuant to § 541(a)(5)(A). The Debtor  
20 argued that, according to applicable non-bankruptcy law--in this  
21 case, Israeli law--the Debtor did not acquire the Interest until  
22 the probate order was entered, which occurred more than 180 days  
23 after his bankruptcy petition was filed. The Trustee moved to

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25 <sup>3</sup> Unless otherwise indicated, all chapter, section and rule  
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and  
27 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as  
28 enacted and promulgated prior to the effective date of The  
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,  
Pub. L. 109-8, 119 Stat. 23 ("BAPCPA"), because the case from  
which this appeal arises was filed before its effective date  
(generally October 17, 2005).

1 dismiss the Debtor's complaint for failure to state a claim upon  
2 which relief can be granted. Fed. R. Civ. P. 12(b)(6) (made  
3 applicable to bankruptcy proceedings via Rule 7012).

4 The Trustee argued that the case should be dismissed on two  
5 grounds. First, he contended that the litigation of whether the  
6 Interest was property of the estate was precluded by the Turnover  
7 Order. Second, he contended that, because the Testator died  
8 within 180 days of the date that the Debtor filed his bankruptcy  
9 petition, the Interest was property of the Debtor's bankruptcy  
10 estate as a matter of law pursuant to § 541(a)(5)(A). The  
11 bankruptcy court heard oral argument on the Trustee's motion on  
12 January 17, 2007.

13 E. The Bankruptcy Court's Rulings

14 The bankruptcy court ruled orally on the record. A copy of  
15 the transcript is included in the record on appeal. The court  
16 stated that it had previously found that the Interest was property  
17 of the estate in connection with granting the Turnover Order. It  
18 concluded that this precluded further litigation of the issue.  
19 Tr. H'rg. Jan. 17, 2007 at 7. The bankruptcy court also held that  
20 the Interest was property of the estate as a matter of federal  
21 bankruptcy law, based on the undisputed fact that the Testator  
22 died 122 days after the Debtor filed his bankruptcy petition. On  
23 February 7, 2007, the bankruptcy court entered an order granting  
24 the Trustee's motion to dismiss the Complaint with prejudice. The  
25 Debtor filed a timely notice of appeal from the order.

26 **II. ISSUES**

27 1. Whether the Turnover Order, granted on a default basis,  
28 precludes litigation in a subsequent adversary proceeding of the

1 issue of whether the Interest is property of the Debtor's  
2 bankruptcy estate, either as a matter of issue or claim  
3 preclusion.

4 2. Whether the Interest, which was acquired pursuant the Will  
5 the result of the death of the Debtor's father less than 180 days  
6 after the bankruptcy petition was filed but as to which the  
7 probate order authorizing distribution of the Interest was entered  
8 more than 180 days after the petition was filed, is property of  
9 the Debtor's bankruptcy estate pursuant to  
10 § 541(a) (5) (A) .

### 11 **III. JURISDICTION**

12 The bankruptcy court had jurisdiction over the adversary  
13 proceeding pursuant to 28 U.S.C. § 1334 and § 157(b) (2) (A) . We  
14 have jurisdiction over this appeal pursuant to 28 U.S.C. § 158(c) .

### 15 **IV. STANDARD OF REVIEW**

16 We review the determination of whether issue or claim  
17 preclusion applies "de novo as [it presents] mixed questions of  
18 law and fact in which legal questions predominate." George v. City  
19 of Morro Bay (In re George), 318 B.R. 729, 732-33 (9th Cir. BAP  
20 2004), aff'd, 144 Fed. Appx. 636 (9th Cir. 2005), cert. denied,  
21 546 U.S. 1094 (2006) .

22 Where the underlying facts are undisputed, we also review de  
23 novo the determination of whether property is included in a  
24 bankruptcy estate. Cisneros v. Kim (In re Kim), 257 B.R. 680, 684  
25 (9th Cir. BAP 2000), aff'd, 35 Fed. Appx. 592 (9th Cir. 2002) .

26 We review the bankruptcy court's decision to dismiss a claim  
27 pursuant to FRCP 12(b) (6) de novo. Busseto Foods, Inc. v. Laizure  
28 (In re Laizure), 349 B.R. 604, 606 (9th Cir. BAP 2006) .

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**V. DISCUSSION**

A. The Turnover Order Does Not Bar the Determination of Whether the Interest is Property of the Debtor's Bankruptcy Estate.

The Debtor argued below that the issue raised by the Complaint was not precluded by the Turnover Order under principles of res judicata. The bankruptcy court disagreed. It found that "[the turnover order] is a proper and valid order. . . . So it is clear that [the turnover order] is res judicata." Tr. H'rg. Jan. 17, 2007 at 7. On appeal, the Debtor contends that this ground for the bankruptcy court's dismissal of the Complaint was in error. We agree.

Under contemporary usage, "res judicata" describes the preclusive effect of a prior adjudication that includes both claim preclusion and issue preclusion. See Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 77 n.1 (1984); Robi v. Five Platters, Inc., 838 F.2d 318, 321 (9th Cir. 1988). The burden to show the elements of preclusion is on the party asserting preclusion. Khaligh v. Hadaegh (In re Khaligh), 338 B.R. 817, 825 (9th Cir. BAP 2006).

The Debtor argues that claim preclusion does not bar litigation of the issue of whether the Interest is property of his bankruptcy estate because, absent waiver of the right to have the issue determined in the context of an adversary proceeding, the issue could not have been determined pursuant to the Turnover Motion. He contends that he did not waive this right. The Debtor also argues that issue preclusion does not bar litigation of the issue of whether the Interest is property of his bankruptcy estate because the issue was not actually litigated in connection

1 with the Turnover Motion. We address both of these contentions  
2 below.

3  
4 1. Claim preclusion does not bar litigation of the issue of  
whether the Interest is property of the estate.

5 Claim preclusion stands for the principle that a final  
6 judgment is the full extent of relief afforded between the same  
7 parties on the same claim. Robi, 838 F.2d at 321-22. Claim  
8 preclusion prevents the subsequent litigation of all claims or  
9 defenses that could have been raised in the prior proceeding,  
10 regardless of whether they were actually raised. Id. at 322; In  
11 re Cogliano, 355 B.R. 792, 804 (9th Cir. BAP 2006); Restatement  
12 (Second) of Judgments § 17.

13 Subject to exceptions not applicable here, pursuant to § 542,  
14 the chapter 7 trustee may only seek turnover of property of the  
15 estate.<sup>4</sup> A proper basis for opposing such a motion is that the  
16 property in question is not property of the bankruptcy estate.  
17 See Cogliano, 355 B.R. at 304-05. The Debtor here did not respond  
18 to the Turnover Motion and thus did not raise this basis for  
19 opposing it.

20 The Turnover Order was a final order in a contested matter  
21 and functionally a judgment for preclusion purposes. See Rules  
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23 <sup>4</sup> The text of § 542(a) states:

24 Except as provided in subsection (c) or (d) of this section,  
25 an entity, other than a custodian, in possession, custody, or  
26 control, during the case, of property that the trustee may  
27 use, sell, or lease under section 363 of this title, or that  
the debtor may exempt under section 522 of 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 § 542(a).



1 9014 & 7054. Therefore, at first blush, it would appear that the  
2 issue raised by the Complaint should be barred as a matter of  
3 claim preclusion. However, this Panel previously identified an  
4 exception to the rule that is applicable here.

5 In Cogliano, we held that the Restatement (Second) of  
6 Judgments § 26(1)(c) provides a limitation on the availability of  
7 claim preclusion as to the estate's interest in property where the  
8 previous proceeding was not an adversary proceeding.<sup>5</sup> Cogliano,  
9 355 B.R. at 804-05. We found that the bankruptcy court lacked  
10 authority to decide whether the Debtor's interest in an IRA was  
11 property of the estate in a turnover motion because Rule 7001(2)  
12 requires an adversary proceeding for such a determination. Id.;  
13 see also Johnson v. TRE Holdings, LLC (In re Johnson), 346 B.R.  
14 190, 195-96 (9th Cir. BAP 2006) (holding that the bankruptcy court  
15 lacks authority in deciding a relief from stay motion--a contested  
16 matter--to enter an order determining interests in property). We  
17 went on to state that, because the bankruptcy court lacked  
18 authority to determine the estate's interest in the IRA in the  
19 context of an objection to the debtor's claim of exemption in the

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21 <sup>5</sup> Section 26(1)(c) of the Restatement states:  
22 When any of the following circumstances exists, the general  
23 rule of § 24 does not apply to extinguish the claim, and part  
24 or all of the claim subsists as a possible basis for a second  
25 action by the plaintiff against the defendant:

26 . . . (c) The plaintiff was unable to rely on a certain theory of  
27 the case or to seek a certain remedy or form of relief in the  
28 first action because of the limitations on the subject matter  
jurisdiction of the courts or restrictions on their authority  
to entertain multiple theories or demands for multiple  
remedies or forms of relief in a single action, and the  
plaintiff desires in the second action to rely on the theory  
or to seek that remedy or form of relief.

Restatement (Second) of Judgments § 26(1)(c).

1 interest or the trustee's turnover motion, the issue could not  
2 have been raised in those contested matters absent waiver of the  
3 requirement or harmless error. Cogliano, 355 B.R. at 805.  
4 Finding no such waiver or harmless error, we held that there was  
5 no claim preclusion.

6 For the same reasons as in Cogliano, we find no basis for  
7 claim preclusion in the instant case. The record does not reflect  
8 that the Debtor waived the requirement of an adversary proceeding  
9 to determine whether the Interest was property of his bankruptcy  
10 estate. Thus, because the bankruptcy court lacked authority to  
11 determine the issue in the context of a contested matter--i.e.,  
12 the Turnover Motion, claim preclusion does not apply.

13  
14 2. Issue preclusion does not bar litigation of whether the  
Interest is property of the bankruptcy estate.

15 Issue preclusion prevents the relitigation of all issues of  
16 fact or law that were actually litigated and actually and  
17 necessarily decided in a prior proceeding after a full and fair  
18 opportunity for litigation. Robi, 838 F.2d at 322; Restatement  
19 (Second) of Judgments § 27. Issue preclusion (collateral  
20 estoppel) applies when the following elements are met: (1) there  
21 was a full and fair opportunity to litigate the issue in the  
22 previous action; (2) the issue was actually litigated in that  
23 action; (3) the issue was lost as a result of a final judgment in  
24 that action; and (4) the person against whom collateral estoppel  
25 is asserted in the present action was a party or in privity with a  
26 party in the previous action. In re Palmer, 207 F.3d 566, 568  
27 (9th Cir. 2000). Here, the critical element is the second one:  
28 that is, was the issue of whether the Interest was property of the

1 Debtor's bankruptcy estate actually litigated in the Turnover  
2 Motion? We conclude that, because the Turnover Order was entered  
3 on a default basis, the issue was not actually litigated.

4        "\"In the case of a judgment entered by confession, consent,  
5 or default, none of the issues is actually litigated. Therefore,  
6 the rule of this Section [describing issue preclusion] does not  
7 apply with respect to any issue in a subsequent action.\"\" Arizona  
8 v. California, 530 U.S. 392, 414 (2000) (alteration in original) A  
9 (citing Restatement (Second) of Judgments § 27, cmt. e (1982)). A  
10 default judgment is generally not entitled to issue preclusive  
11 effect unless the litigant otherwise actively participated in the  
12 case or engaged in obstructive tactics to impede the usual process  
13 of adjudication. Palmer, 207 F.3d at 568; see also In re Daily,  
14 47 F.3d 365, 368 (9th Cir. 1995) (giving preclusive effect to a  
15 default judgment where debtor substantially participated in the  
16 adversary process prior to the default judgment); In re  
17 Gottheiner, 703 F.2d 1136 (9th Cir. 1983) (finding that sixteen  
18 month's participation in a lawsuit was sufficient to give the  
19 debtor his day in court and to give the default judgment  
20 preclusive effect).

21        The Ninth Circuit's holding in Palmer is determinative of  
22 this issue. There, the debtors had previously petitioned the  
23 United States Tax Court for a redetermination of their tax  
24 liability. The Service responded with affirmative allegations  
25 that the debtor's tax deficiency was in part attributable to  
26 fraud. Palmer, 207 F.3d at 567. The debtors took no further part  
27 in the litigation. The Tax Court ultimately granted summary  
28 judgment in favor of the Service. It specifically found that the

1 debtors' tax deficiency was attributable to fraud. Id.

2 The debtors subsequently filed a voluntary bankruptcy  
3 petition and filed a complaint to determine the dischargeability  
4 of the tax liability in question. Id. The bankruptcy court  
5 concluded that the issue of fraud was precluded from  
6 redetermination by collateral estoppel (issue preclusion). See  
7 id. On appeal, the Ninth Circuit reversed. It found that the  
8 debtors had "give[n] up at the outset" after filing the  
9 redetermination petition. It held that, under these  
10 circumstances, the fraud issue was not actually litigated and  
11 could not preclude litigation of the issue in the debtors'  
12 subsequent bankruptcy proceeding. Id. at 568.

13 Palmer clearly dictates the outcome in the present matter.<sup>6</sup>  
14 Nothing in the record before us indicates that the issue of  
15 whether the Interest is property of the Debtor's bankruptcy estate  
16 was "actually litigated" by the Debtor when the court granted the  
17 Turnover Order on a default basis. Whether or not the Debtor  
18 failed to receive actual notice of the Turnover Motion, as he  
19 contends, it is clear that the Debtor, like the debtors in Palmer,  
20 did not actively participate in the prior proceeding.

21 The Trustee has not presented any facts to suggest that the  
22 Debtor otherwise meaningfully participated in the Turnover Motion

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23  
24 <sup>6</sup> The Trustee cites a pre-Code case for the proposition that  
25 the underlying validity of a turnover order cannot be collaterally  
26 attacked in a contempt proceeding. See Clements v. Coppin, 72  
27 F.2d 796, 797-98 (9th Cir. 1934). The Trustee's argument is  
28 unpersuasive. Clements was decided without the benefit of the  
modern Code and Rules. Moreover, to the extent Clements is  
inconsistent with the Ninth Circuit's subsequent decision in  
Palmer, we follow Palmer as the most recent authority on the  
issue.

1 or that he engaged in obstructionist tactics so as to render him  
2 vulnerable to issue preclusion "without completion of the usual  
3 process of adjudication." See Daily, 47 F.3d at 368. Thus,  
4 regardless of whether the bankruptcy court "actually found" that  
5 the Interest was property of the estate in connection with the  
6 Turnover Motion, the Trustee has not satisfied the second element  
7 as required for the application of issue preclusion. We therefore  
8 conclude that issue preclusion does not bar the redetermination of  
9 this issue.<sup>7</sup>

10 B. The Interest is Property of the Bankruptcy Estate as a Matter  
11 of Law.

12 All legal and equitable interests of the debtor in property--  
13 wherever located and by whomever held--at the commencement of the  
14 case are property of the estate. § 541(a)(1). Any interest that  
15 the debtor "acquires or becomes entitled to acquire" by bequest,  
16 devise or inheritance within 180 days after the filing of the  
17 debtor's bankruptcy petition is property of the estate if the

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19 <sup>7</sup> For the same reason, the law of the case doctrine did not  
20 compel the bankruptcy court to determine that the Interest was  
21 property of the Debtor's bankruptcy estate. This doctrine is  
22 similar to issue preclusion except that it operates to discourage  
23 (rather than to preclude) redetermination of an issue previously  
24 determined in the *same* case rather than a *subsequent* one. See In  
25 re Wiersma, 483 F.3d 933, 941 (9th Cir. 2007). It is questionable  
26 whether the adversary proceeding commenced by the filing of the  
27 Complaint is properly viewed as the same case as the contested  
28 matter commenced by the filing of the Turnover Motion. More  
important, like issue preclusion, the law of the case doctrine  
applies only when the issue was previously actually determined.  
See Cady v. Klapperman (In re Cady), 266 B.R. 172, 184 (9th Cir.  
BAP 2001). The record does not reflect that the issue of whether  
the Interest was property of the Debtor's bankruptcy estate was  
actually determined pursuant to the Turnover Motion. Finally,  
applying the doctrine of the law of the case under these  
circumstances would vitiate the requirement of Rule 7001(2) that  
the validity and extent of an interest in property be determined  
pursuant to an adversary proceeding.

1 interest would have been property of the estate if the interest  
2 was an interest of the debtor on the date the petition was filed.  
3 § 541(a)(5)(A).

4 The existence and extent of a debtor's legal or equitable  
5 interest is determined under applicable nonbankruptcy law.  
6 Whether that interest would be property of the estate if held by  
7 the debtor at the time of filing the bankruptcy case is a matter  
8 of federal bankruptcy law. See In re Pettit, 217 F.3d 1072, 1078  
9 (9th Cir. 2000) (citing Butner v. United States, 440 U.S. 48, 54-  
10 55 (1979)). Thus, the critical inquiry is whether the Debtor  
11 "acquired or became entitled to acquire" any legal or equitable  
12 interest in the Testator's estate within 180 days of commencement  
13 of the Debtor's bankruptcy case. We conclude that the Debtor  
14 acquired at least an equitable interest in the Testator's estate  
15 at the time of the Testator's death. That interest then  
16 automatically became a part of the Debtor's bankruptcy estate as a  
17 matter of federal bankruptcy law.

18 The Testator's will, devising the Interest, was probated in  
19 Israel. Therefore, whether the Debtor acquired or became entitled  
20 to acquire a legal or equitable interest in the Testator's estate  
21 is determined by Israeli law. See Restatement (Second), Conflict  
22 of Laws § 239 ("(1) Whether a will transfers an interest in land  
23 and the nature of the interest transferred are determined by the  
24 law that would be applied by the courts of the situs. (2) These  
25 courts would usually apply their own local law in determining such  
26 questions"); Inheritance Law, 5725-1965 § 138 (Isr.), translated  
27 in Aryeh Greenfield, Inheritance Law and Regulations 38 (3d ed.  
28 2001) ("The Law of the place where assets are located shall apply

1 to assets, that are inherited only according to that Law.”).<sup>8</sup>

2 The determination of foreign law is a question of law. In  
3 making such a determination, a trial court may consider any  
4 relevant source, regardless of admissibility, and whether or not  
5 submitted by a party. Fed. R. Civ. P. 44.1 (made applicable in  
6 bankruptcy by Rule 9017). Appellate courts review questions of  
7 foreign law de novo. Richmark Corp. v. Timber Falling  
8 Consultants, 959 F.2d 1468, 1473 (9th Cir. 1992). Therefore, an  
9 appellate court may also consider any relevant source to determine  
10 foreign law. See 9 Charles Alan Wright & Arthur R. Miller,  
11 Federal Practice and Procedure § 2446 (2d ed. 1994). Thus,  
12 despite the absence of findings by the trial court as to Israeli  
13 law, and only cursory briefing by the parties on appeal, we  
14 properly look to Israeli inheritance law in order to determine the  
15 nature and extent, if any, of the Debtor’s rights to the Interest  
16 at the time of the Testator’s death.

17 Under Israeli inheritance law, upon a person’s death, the  
18 decedent’s estate passes to his heirs. Inheritance Law, 5725-1965  
19 § 1 (Isr.), translated in Aryeh Greenfield, Inheritance Law and  
20 Regulations 5 (3d ed. 2001). Generally, no rights under a will  
21 can be claimed until the probate order is entered. See id. §§ 39  
22 and 66. However, the heir has the right to renounce any portion  
23 of the estate after the testator’s death and prior to the  
24 distribution of the estate. Id. § 6(a). The heir also has the  
25 right to transfer or charge any portion of his part of the estate

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26  
27 <sup>8</sup> All of the citations to Israeli inheritance law are to an  
28 English translation of the Hebrew text and are current through the  
time of the Testator’s death. See Aryeh Greenfield, Inheritance  
Law and Regulations 3 (3d ed. 2001).

1 after the testator's death and prior to distribution of the  
2 estate. Id. § 7(a). Furthermore, creditors of the heir may  
3 attach the heir's part of the estate. Id. The Debtor obtained  
4 these rights as to the Interest under Israeli inheritance law as  
5 of the Testator's death, 122 days after the Debtor commenced his  
6 bankruptcy case.

7       Moreover, in a case not involving foreign law, we previously  
8 found an interest in a probate estate to be property of the  
9 bankruptcy estate based on the date of the testator's death. See  
10 Chappel v. Proctor (In re Chappel), 189 B.R. 489, 492 (9th Cir.  
11 BAP 1995); see also H.R. Rep. No. 95-595, at 367-68 (1977),  
12 reprinted in 1977 U.S.C.C.A.N. 5963, 6323-24 (stating that the  
13 concept of property of the estate is to be interpreted broadly).  
14 Therefore, because the Debtor acquired rights in the Interest as  
15 of the Testator's death within 180 days of the filing of his  
16 bankruptcy petition, which rights he could renounce, transfer, and  
17 encumber and which rights creditors could reach, these rights were  
18 property of his bankruptcy estate under § 541(a)(5)(A).

19       In considering whether to sustain a motion to dismiss for  
20 failure to state a claim under Fed. R. Civ. P. 12(b)(6), we must  
21 take as true all allegations of material fact and construe them in  
22 the light most favorable to the nonmoving party. The trial court  
23 should dismiss the complaint only if it appears certain that there  
24 are no facts which the plaintiff could prove that would entitle  
25 him to relief. Laizure, 349 B.R. at 606.

26       There are no facts here in dispute. The Testator died 122  
27 days after the Debtor filed his bankruptcy petition. For the  
28 reasons stated above, the Interest became property of the Debtor's



1 bankruptcy estate as a matter of law. There are no facts which  
2 the Debtor could present that would entitle him to the relief  
3 requested. Therefore, the Complaint was properly dismissed  
4 pursuant to Fed. R. Civ. P. 12(b)(6), and the bankruptcy court's  
5 order dismissing the Complaint with prejudice was correct.<sup>9</sup>

## 6 VI. CONCLUSION

7 The issue raised by the Complaint is not barred by either  
8 claim preclusion or issue preclusion. Therefore, the bankruptcy  
9 court's conclusion that litigation of the issue of whether the  
10 Interest is property of the Debtor's bankruptcy estate was barred  
11 by the Turnover Order is in error. However, because we find the  
12 Interest to be property of the Debtor's bankruptcy estate as a  
13 matter of law, the bankruptcy court correctly granted the motion  
14 to dismiss the Complaint with prejudice pursuant to Fed. R. Civ.  
15 P. 12(b)(6). The order dismissing the Complaint for failure to  
16 state a claim upon which relief may be granted is AFFIRMED.

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23 <sup>9</sup> The Trustee contends that we need not address whether the  
24 Interest is property of the Debtor's bankruptcy estate because the  
25 Debtor did not raise it in his opposition to the Trustee's motion  
26 to dismiss the Complaint or in his appellate brief. However, on  
27 appeal, we may consider any issue supported by the record that was  
28 raised sufficiently for the trial court to rule on. See In re  
E.R. Fegert, Inc., 887 F.2d 955 (9th Cir. 1989). The Debtor  
raised the issue in the Complaint and addressed the bankruptcy  
court's questions on the issue at the hearing on the Trustee's  
motion to dismiss. The facts are undisputed, and the issue in  
question is a pure question of law. Accordingly, we find the  
record sufficient to permit us to consider the issue.