

DEC 14 2012

SUSAN M SPRAU, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP Nos. SC-12-1209-JuMkPa
	)	SC-12-1217-JuMkPa
JOSE J. HERNANDEZ,	)	(consolidated appeals)
	)	
Debtor.	)	Bk. No. 11-15921
	)	
COLLECT ACCESS LLC,	)	
	)	
Appellant,	)	
v.	)	O P I N I O N
	)	
JOSE J. HERNANDEZ,	)	
	)	
Appellee.	)	
	)	

Argued and Submitted on November 15, 2012  
at Pasadena, California

Filed - December 14, 2012

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

Honorable Margaret M. Mann, Bankruptcy Judge, Presiding

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Appearance: Tappan Zee, Esq., Zee Law Group, P.C. argued for  
appellant Collect Access LLC. Jorge Halperin,  
Esq. and Elizabeth P. Swiller, Esq.,  
submitted on brief for appellee Jose J.  
Hernandez.

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Before: JURY, MARKELL, and PAPPAS Bankruptcy Judges.

1 JURY, Bankruptcy Judge:  
2

3 Appellant-creditor, Collect Access LLC (Collect), levied  
4 on funds in chapter 7<sup>1</sup> debtor's deposit account in the amount of  
5 \$712.39. Twenty days later, debtor filed his bankruptcy  
6 petition and claimed the funds exempt. Debtor sought an ex  
7 parte turnover order requiring Collect to surrender the funds.  
8 The bankruptcy court found that debtor had an interest in the  
9 funds despite the levy and ordered turnover. Collect moved to  
10 vacate the turnover order which the bankruptcy court denied.  
11 Collect appeals from that order.<sup>2</sup>

12 For the reasons stated, we AFFIRM the bankruptcy court's  
13 result, but we rely on different grounds.  
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15  
16 <sup>1</sup> Unless otherwise indicated, all chapter and section  
17 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
18 "Rule" references are to the Federal Rules of Bankruptcy  
19 Procedure.

20 <sup>2</sup> The bankruptcy court treated Collect's motion to vacate as  
21 a timely motion for reconsideration under Rule 9023, which tolled  
22 the time to appeal the original order. Accordingly, we have  
23 jurisdiction to review both the underlying order and the order  
24 denying reconsideration. Wall St. Plaza, LLC v. JSJF Corp. (In  
25 re JSJF Corp.), 344 B.R. 94, 99 (9th Cir. BAP 2006). Further,  
26 Collect's Notice of Appeal (NOA) designates only the order  
27 denying its motion to vacate and does not attach the underlying  
28 turnover order. Rule 8001(a) does not require the NOA to  
designate the order or judgment from which an appeal is taken,  
but our local rule, 9th Cir. BAP Rule 8001(a)-1, does. We may  
depart from our local rule absent prejudice. In re JSJF Corp.,  
344 B.R. at 100. There is no prejudice here as the parties have  
briefed the issues with respect to the turnover order. We thus  
review the turnover order.

1 **I. FACTS**

2 On August 30, 2002, the California state court entered a  
3 judgment in favor of First Select, Inc. (First Select) and  
4 against Jose J. Hernandez, the debtor in this case.

5 On January 22, 2008, First Select recorded an abstract of  
6 judgment for the sum of \$2,091.71 in the County of San Diego.

7 On May 19, 2008, First Select renewed the judgment for the  
8 sum of \$3,723.19.

9 On July 12, 2011, apparently as a successor to First  
10 Select,<sup>3</sup> Collect submitted a writ of execution to the Los  
11 Angeles County Sheriff's Department (Sheriff). On August 26,  
12 2011, the writ was served on Wells Fargo Bank (Bank). On  
13 September 7, 2011, the Sheriff received from the Bank \$712.39  
14 that was in debtor's deposit account.

15 On September 27, 2011, debtor filed his bankruptcy  
16 petition. At the time of his filing, the levied funds were in  
17 the Sheriff's possession. Debtor claimed the funds exempt under  
18 Cal. Civ. Proc. Code (CCP) § 703.140(b)(5).<sup>4</sup>

19 On October 29, 2011, the chapter 7 trustee filed her report  
20 of no distribution.

21 \_\_\_\_\_  
22 <sup>3</sup> The standing of Collect to pursue execution on the  
23 judgment has not been challenged.

24 <sup>4</sup> CCP § 703.140(b)(5) is referred to as the "wild card"  
25 exemption because it can be used to protect any kind of property.  
26 Goswami v. MTC Distrib. (In re Goswami), 304 B.R. 386, 390 (9th  
27 Cir. BAP 2003). The wild card exemption allows debtors to exempt  
up to \$925, along with any unused portion of the \$17,425  
exemption amount under CCP § 703.140(b)(1).

1 On November 3, 2011, debtor filed an ex parte motion for  
2 turnover of the funds under § 542, contending they were property  
3 of his estate, had been exempted, and therefore belonged to him.  
4 The next day the bankruptcy court entered an order requiring the  
5 Sheriff to turn over \$712.39 to debtor (Turnover Order I).

6 On November 7, 2011, before receiving the order, the  
7 Sheriff transferred the funds to Zee Law Group (Zee), the  
8 attorney for Collect.

9 On November 11, 2011, debtor sought ex parte a second  
10 turnover order, this time directed at Zee. The bankruptcy court  
11 granted debtor's request by order entered on November 30, 2011  
12 (Turnover Order II).

13 On December 1, 2011, Collect filed an opposition to  
14 debtor's turnover request. First, relying on the holding in Del  
15 Riccio v. Super. Ct. of L.A. Cnty., 115 Cal.App. 2d 29, 31 (Cal.  
16 Ct. App. 1952), Collect argued that the funds were no longer  
17 property of debtor or his estate because ownership of the funds  
18 passed from debtor to the judgment creditor once the Sheriff  
19 received the funds. Second, Collect maintained that the chapter  
20 7 trustee neither asserted a preference claim nor sought to  
21 recover the levied funds. Third and last, Collect argued that  
22 debtor had waived his claim of exemption against the funds  
23 because he did not timely assert it. Six days later, Collect  
24 filed an ex parte application to quash Turnover Order II (Motion  
25 to Vacate).

1 Debtor responded to Collect's opposition, this time  
2 alleging that he had the right to recover the funds under  
3 § 522(g) and (h) rather than § 542. Debtor maintained that he  
4 listed the levied funds in Schedule B and claimed them exempt in  
5 Schedule C, the trustee filed a report of no distribution  
6 thereby abandoning the asset and, as a result, debtor could seek  
7 to recover the funds. Debtor further argued that the levy  
8 constituted a preference under § 547. He also maintained that  
9 he did not waive his exemption in the funds, because he claimed  
10 them exempt under CCP § 703.140(b)(5) when he filed his  
11 petition. Finally, debtor alleged that Collect violated the  
12 automatic stay by continually refusing to turn over the funds  
13 and requested \$1,100 in attorneys' fees.

14 On January 17, 2012, the bankruptcy court issued a  
15 tentative ruling indicating its reasons for entering the  
16 turnover orders. The court explained that under CCP § 697.710,  
17 a levy on property under a writ of execution creates a lien on  
18 the property from the time of the levy until the expiration of  
19 two years after the date of issuance of the writ unless the  
20 judgment is sooner satisfied. The court reasoned that because  
21 Collect's execution lien was unsatisfied on the date of debtor's  
22 bankruptcy filing, the funds remained part of debtor's estate  
23 under the holdings in United States v. Whiting Pools, Inc., 462  
24 U.S. 198, 207, 76 L.Ed. 2d 515, 103 S.Ct. 2309 (1983) and  
25 Ramirez v. Fuselier (In re Ramirez), 183 B.R. 583, 591 (9th Cir.  
26 BAP 1995). In the end, the bankruptcy court opined that debtor  
27

1 may be eligible to recover actual fees and costs associated with  
2 his two motions seeking a turnover order.

3 On January 19, 2012, the bankruptcy court heard oral  
4 argument from the parties and took the matter under submission.

5 On March 19, 2012, the bankruptcy court entered a  
6 Memorandum of Decision which essentially adopted its earlier  
7 tentative ruling. See In re Hernandez, 468 B.R. 396 (Bankr.  
8 S.D. Cal. 2012).

9 On April 3, 2012, the bankruptcy court entered the order  
10 denying Collect's Motion to Vacate Turnover Order II. On April  
11 9, 2012, Collect timely appealed.<sup>5</sup>

12 Meanwhile, on April 4, 2012, debtor filed a motion for  
13 costs, damages and fees. On April 26, 2012, debtor filed a  
14 motion to avoid Collect's lien under § 522(f) and a motion for  
15 contempt.

16 On June 14, 2012, the bankruptcy court heard the three  
17 motions. The court (1) granted debtor's motion to avoid  
18 Collect's lien; (2) denied his motion for contempt because  
19 Collect had complied with Turnover Order II by that time, and  
20 (3) granted debtor's motion for costs, damages and fees,

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21  
22 <sup>5</sup> This appeal was transmitted to the Panel and assigned BAP  
23 No. SC-12-1209. On April 18, 2012, Collect filed a second NOA  
24 which was also transmitted to the Panel and assigned BAP No. SC-  
25 12-1217. A notice of Deficient Appeal and Impending Dismissal  
26 (NOD) was issued in this later appeal, since it appeared  
27 untimely. On May 23, 2012, this Panel determined that the NOD  
was satisfied and that appellant had filed a timely NOA. Since  
Collect's NOAs were identical and requested review of the same  
set of orders, the Panel entered an order consolidating the  
appeals on the same date.

1 awarding debtor \$3,572.06 in actual damages and \$1,000 in  
2 punitive damages for Collect's failure to turn the funds over to  
3 debtor pursuant to the court's orders.

4 On June 19, 2012, the bankruptcy court entered the order  
5 awarding the fees and damages.

6 On June 20, 2012, debtor filed a motion to dismiss this  
7 appeal as moot on the grounds that Collect complied with  
8 Turnover Order II and its lien was avoided under § 522(f). On  
9 July 25, 2012, the Panel issued an order denying debtor's motion  
10 to dismiss the appeal as moot, but authorized the parties to  
11 further address the issue in their briefs. We discuss the  
12 mootness issue below.

## 13 II. JURISDICTION

14 The bankruptcy court had jurisdiction over this proceeding  
15 under 28 U.S.C. §§ 1334 and 157(b)(2)(A), (B) and (E). We have  
16 jurisdiction under 28 U.S.C. § 158.

## 17 III. ISSUES

18 A. Whether this appeal is moot;

19 B. Whether the bankruptcy court erred in finding that the  
20 levied funds held by the Sheriff were property of debtor's  
21 estate subject to turnover;

22 C. Whether the bankruptcy court erred in denying  
23 Collect's Motion to Vacate Turnover Order II; and

24 D. Whether the bankruptcy court erred by granting  
25 debtor's ex parte motion for turnover of the funds without an  
26 adversary proceeding.

1 IV. STANDARDS OF REVIEW

2 Whether an appeal is moot and whether property is property  
3 of the estate are questions of law we review de novo. See Menk  
4 v. Lapaqlia (In re Menk), 241 B.R. 896, 903 (9th Cir. BAP 1999);  
5 Mwangi v. Wells Fargo Bank, N.A. (In re Mwangi), 432 B.R. 812,  
6 818 (9th Cir. BAP 2010). We also review de novo the bankruptcy  
7 court's conclusions of law, including statutory interpretations.  
8 DeMassa v. MacIntyre (In re MacIntyre), 74 F.3d 186, 187 (9th  
9 Cir. 1996).

10 A bankruptcy court's denial of a motion for reconsideration  
11 is reviewed for abuse of discretion. First Ave. W. Bldg., LLC  
12 v. James (In re Onecast Media, Inc.), 439 F.3d 558, 561 (9th  
13 Cir. 2006). To determine whether the bankruptcy court abused  
14 its discretion, we conduct a two-step inquiry: (1) we review de  
15 novo whether the bankruptcy court "identified the correct legal  
16 rule to apply to the relief requested" and (2) if it did,  
17 whether the bankruptcy court's application of the legal standard  
18 was illogical, implausible or "without support in inferences  
19 that may be drawn from the facts in the record." United States  
20 v. Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009)(en banc).

21 Whether an adversary proceeding was required is an issue  
22 that requires us to interpret and apply Rule 7001, which is a  
23 matter for de novo review. Ruvacalba v. Munoz (In re Munoz),  
24 287 B.R. 546, 550 (9th Cir. BAP 2002).

25 We may affirm on any ground supported by the record.  
26 Siriani v. Nw. Nat'l Ins. Co. (In re Siriani), 967 F.2d 302, 304



1 (9th Cir. 1992).

2 **V. DISCUSSION**

3 **A. Mootness**

4 Before reaching the merits, we consider debtor's mootness  
5 argument. An appeal is constitutionally moot when events occur  
6 during the pendency of the appeal that make it impossible for  
7 the appellate court to grant effective relief. Clear Channel  
8 Outdoor, Inc. v. Knupfer (In re PW, LLC), 391 B.R. 25, 33 (9th  
9 Cir. BAP 2008). Debtor contends that the following events  
10 render this appeal moot: (1) the funds are now in the hands of  
11 the debtor; (2) the lien which gave rise to Collect's claim has  
12 been avoided; and (3) the underlying debt has been discharged.  
13 Under these circumstances, debtor argues, effective relief is no  
14 longer available. On the other hand, Collect maintains that if  
15 the Panel reverses the bankruptcy court and finds that debtor's  
16 interest in the funds was extinguished after the levy, we can  
17 order debtor to return the funds to Collect. Collect further  
18 argues that it would not have been a violation of the automatic  
19 stay for Collect to retain the funds postpetition if, under  
20 California law, ownership of the funds passed from debtor to the  
21 judgment creditor once the Bank released the funds to the  
22 Sheriff. On these grounds, Collect contends effective relief is  
23 available.

24 Debtor, as the party arguing for dismissal based on  
25 mootness, "has the heavy burden of establishing that there is no  
26 effective relief remaining for a court to provide." Suter v.

1 Goedert, 504 F.3d 982, 986 (9th Cir. 2007). Debtor has not met  
2 his burden here. Where the order appealed involves the  
3 distribution of money and the party who received the funds is a  
4 party to the appeal, the appeal is not moot because we have the  
5 power to fashion effective relief by ordering the party to  
6 return the money. See Spirtos v. Moreno (In re Spirtos), 992  
7 F.2d 1004, 1007 (9th Cir. 1993). Under this rule, we can  
8 implement effective relief because debtor is a party to the  
9 appeal, and we can order him to repay the money to Collect upon  
10 reversal of the bankruptcy court's ruling. Debtor's discharge  
11 also would not impact the return of the funds to Collect. If  
12 debtor had no interest in the funds after the levy, they would  
13 have been rightfully in the Sheriff's possession. In addition,  
14 under these facts, no stay violation would have occurred.  
15 Accordingly, we conclude that the appeal is not moot.

16 **B. Property of the Estate**

17 A bankruptcy court may order turnover of property to the  
18 debtor's estate if, among other things, such property is  
19 considered "property of the estate." See §§ 541(a) (defining  
20 property of the estate), 542(a) (authorizing turnover of  
21 property that the trustee may use, sell, or lease under section  
22 363 of this title, or that the debtor may exempt under section  
23 522 of this title). Section 541(a) provides that property of  
24 the estate includes all legal or equitable interests of the  
25 debtor in property as of the commencement of the case. The  
26 primary question on appeal is whether the prepetition levied  
27

1 funds in the hands of the Sheriff on the petition date were in  
2 fact property of debtor's bankruptcy estate. We hold that they  
3 were.

4 Whether a debtor's interest constitutes "'property of the  
5 estate' is a federal question to be decided by federal law."  
6 McCarthy, Johnson & Miller v. N. Bay Plumbing, Inc. (In re  
7 Pettit), 217 F.3d 1072, 1078 (9th Cir. 2000). However, the  
8 nature and extent of the debtor's interest in property must be  
9 determined by nonbankruptcy law. Travelers Cas. & Sur. Co. of  
10 Am. v. Pac. Gas & Elec. Co., 549 U.S. 443, 451, 127 S.Ct. 1199,  
11 167 L.Ed.2d 178 (2007) (citing Butner v. United States, 440 U.S.  
12 48, 54-55, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979)). California law  
13 applies to this case.

14 California statutory law governs generally the rights and  
15 obligations of debtors and creditors with respect to the  
16 enforcement of money judgments. In examining the statutory  
17 scheme, the bankruptcy court first found that the Sheriff's levy  
18 under Collect's writ of execution resulted in an execution lien,  
19 rather than a transfer of the ownership of the funds. In re  
20 Hernandez, 468 B.R. at 402; see also CCP § 697.710 ("A levy on  
21 property under a writ of execution creates an execution lien on  
22 the property from the time of levy . . ."). Next, the court  
23 found that before the execution lien could be transformed into  
24 ownership of the funds, the Sheriff had to release the funds to  
25 the judgment creditor. Id. In reaching this conclusion, the  
26 court relied on CCP §§ 697.710 and 724.010(b). Under CCP

1 § 697.710, entitled "Creation and Duration of Execution Lien",  
2 an execution lien created by levy "survives for the earlier of  
3 two years, or when the judgment is satisfied." Id. Under CCP  
4 § 724.010(b),<sup>6</sup> the court reasoned, the judgment is not fully  
5 satisfied until the creditor receives the levied funds from the  
6 levying officer and files an acknowledgment of satisfaction. On  
7 this basis, the bankruptcy court concluded that since the  
8 Sheriff still held the funds when debtor filed his petition,  
9 Collect only held a lien on the funds because the second step of  
10 satisfaction had not yet occurred. Id. at 402-03.

11 The bankruptcy court's analysis relies on the incorrect  
12 statutory scheme. The California legislature has enacted a  
13 "comprehensive and precisely detailed scheme governing  
14 enforcement of money judgments." Ford Motor Credit Co. v.  
15 Waters, 166 Cal.App.4th Supp. 1, 7 (Cal. App. Dep't Super. Ct.  
16 2008). In CCP §§ 700.010-700.200, "the judgment creditor is  
17 advised of all methods of levy available to enforce a money  
18 judgment. Those statutes tell the judgment creditor and levying  
19 officer how to levy on assets . . . , as here relevant, bank  
20 accounts." Id.

21 CCP § 700.140 entitled "Deposit accounts" provides in  
22 relevant part:

23  
24  
25 

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<sup>6</sup> This subsection provides: "Where a money judgment is  
26 satisfied by levy, the obligation of the judgment creditor to  
27 give or file an acknowledgment of satisfaction arises only when  
the judgment creditor has received the full amount required to  
satisfy the judgment from the levying officer."

1 (a) [T]o levy upon a deposit account, the levying  
2 officer shall personally serve a copy of the writ of  
3 execution and a notice of levy on the financial  
4 institution with which the deposit account is  
5 maintained . . . . The execution lien reaches only  
6 amounts in the deposit account at the time of service  
7 on the financial institution, including any item in  
8 the deposit account that is in the process of being  
9 collected, unless the item is returned unpaid to the  
10 financial institution.

11 . . .

12 (e) When the amount levied upon pursuant to this  
13 section is paid to the levying officer, the execution  
14 lien on the deposit account levied upon terminates.

15 Under the plain language of CCP § 700.140, Collect obtained  
16 an execution lien on the amounts in the deposit account at the  
17 time of the service on the financial institution. These amounts  
18 were not available for debtor's use. The lien was terminated  
19 under subsection (e) at the time the funds were paid to the  
20 levying officer. The termination of Collect's execution lien  
21 occurred well before debtor's bankruptcy. Given this statutory  
22 framework that applies to deposit accounts, the bankruptcy  
23 court's reliance on CCP §§ 697.710 and 724.010(b) for its  
24 analysis was misplaced.

25 Nonetheless, we do not think the plain language of CCP  
26 § 700.140 provides an answer to the ownership question Collect  
27 raises on appeal. Although the statute suggests that debtor's  
28 interest in the funds was transferred when the funds were paid  
to the levying officer and the lien terminated, the statute does  
not plainly say so. Compare In re Ramirez, 183 B.R. at 589  
(noting that although relevant California statute stated when  
levy was complete, it did not state that a completed levy  
transferred ownership of the property).

1 Collect relies on Del Riccio, 115 Cal.App.2d 29, to support  
2 its position that the transfer of funds to the Sheriff  
3 extinguished all rights that debtor had in the property  
4 prepetition. Although Collect urges the Panel to rely on Del  
5 Riccio to adopt a bright line rule, we decline to read the case  
6 so broadly. In Del Riccio, after a judgment was obtained, a  
7 writ of execution was issued and levied upon a bank in which the  
8 defendant had the sum of \$6,426.66. While the sheriff had the  
9 money in his possession, defendant applied for and obtained a  
10 court order prohibiting the sheriff from paying any money to the  
11 plaintiffs. The plaintiffs moved to vacate the order which the  
12 court denied. The defendant then moved for an order staying  
13 execution upon posting a cash undertaking in the action. After  
14 defendant posted a satisfactory bond, the court made a further  
15 order staying the execution. Plaintiffs appealed.

16 The California Court of Appeal found that the trial court  
17 had the power to impose a stay of execution, but had no power to  
18 undo what had already been done so as to deprive the creditor of  
19 ownership and use of the money collected under the writ. The  
20 appellate court discussed the parties' interest held in money in  
21 levy as follows:

22 When the writ has been regularly issued and executed,  
23 money collected, while in the hands of the officer, is  
24 property of the judgment creditors and not the debtor.  
25 Nothing can be done with it other than to turn it over  
26 to the creditor. The possession of the officer solely  
27 for the use and benefit of the creditor is possession  
28 by the latter . . . . Correspondingly, when the  
debtor's money is taken on a valid execution it ceases  
to be his and he immediately becomes entitled to  
partial or full satisfaction of the judgment.

Del Riccio has not been overruled, but the rule of law it

1 established is not a complete answer to the bankruptcy issue  
2 before us. Although Del Riccio does say that money collected  
3 while in the hands of the Sheriff is the property of the  
4 judgment creditor, the decision discussed only the trial court's  
5 power with respect to a valid execution. The court had no  
6 reason to examine the various statutory rights and obligations  
7 of the judgment creditor vis-a-vis the debtor after the  
8 execution. Therefore, we do not read Del Riccio as stating a  
9 per se rule that the levying officer's possession of money after  
10 a valid execution accomplishes a complete transfer of ownership  
11 of the property, without limitation, and in disregard of other  
12 statutes in the enforcement of money judgment scheme.

13 The bankruptcy court's analysis in In re Caldwell, 111 B.R.  
14 836 (Bankr. C.D. Cal. 1990), sheds further light on the property  
15 of the estate analysis. There, the bankruptcy court partially  
16 relied on Del Riccio in analyzing the conflicting claims of the  
17 debtors and the State Board of Equalization in funds held by a  
18 bank. Under Cal. Rev. & Tax Code § 6703, a notice of levy was  
19 the equivalent of a levy. The Caldwell court found that "[a]  
20 levy transfers ownership in property. This usually takes place  
21 when a law enforcement officer seizes the property." Id. at  
22 838. Citing Del Riccio, the bankruptcy court noted that under  
23 Cal. Rev. & Tax Code § 6703, the bank in effect became the  
24 executing officer for the benefit of the Board.<sup>7</sup> Id.

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26  
27 <sup>7</sup> See also McCaffey Canning Co. v. Bank of Am., 109 Cal.  
28 App. 415, 423-24 (Cal. Ct. App. 1930) ("While the property was in  
the custody of the sheriff, it was constructively in the  
possession of plaintiff through the sheriff as his agent.").

1 Accordingly, the court concluded that under California law, the  
2 Board's notice of levy (which was the equivalent of a levy)  
3 extinguished the debtors' property interest in the funds. "In  
4 other words, the Notice of Levy transferred ownership of the  
5 Funds from debtors to the Board." Id. Finally, because the  
6 debtors had no right of redemption under Cal. Rev. & Tax Code §  
7 6703, the court observed that "a levy under [this statute]  
8 terminates any and all interests a debtor may have in the  
9 property." Id. at n.2.

10 If anything, Caldwell's analysis instructs us to delve  
11 further into whether the effect of the levy was to divest debtor  
12 of all interests in the property seized for purposes of a  
13 property of the estate analysis.<sup>8</sup> Use of the term "ownership"  
14 to identify the interests of the parties does not help because  
15 the term is not defined. The Bankruptcy Code does not define  
16 property, ownership, or owner; however, dictionary definitions  
17 provide guidance. Property is defined as "[t]he right to  
18 possess, use, and enjoy a determinate thing . . .; the right of  
19

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20 <sup>8</sup> Here, just as in Caldwell, debtor had no redemption rights  
21 with respect to the funds. Likewise, although the bankruptcy  
22 court partially relied on Whiting Pools for its decision, debtor  
23 had none of the interests which were identified by the Supreme  
24 Court in Whiting Pools as interests sufficient to consider the  
25 seized property part of the debtor's estate. There, the IRS's  
26 levy was on tangible property that was subject to the  
27 requirements of a statutory tax sale which provided the debtor  
28 with notice rights, redemption rights, and rights to the surplus  
from the sale. 462 U.S. at 211. Thus, although Whiting Pools  
provides a summary of the law in the turnover/property of the  
estate analysis, its facts are distinguishable from those here.  
Whiting Pools is also distinguishable in that it was a debtor-in-  
possession in a reorganization that sought turnover. As  
discussed below, a chapter 7 debtor generally does not have  
standing to seek a turnover order under § 542.



1 ownership . . . . Also termed bundle of rights." Black's Law  
2 Dictionary 1335 (9th ed. 2009). Ownership is defined as "[t]he  
3 bundle of rights allowing one to use, manage, and enjoy  
4 property, including the right to convey it to others. . . ."  
5 Id. at 1215. An owner is "[o]ne who has the right to possess,  
6 use, and convey something; a person in whom one or more  
7 interests are vested." Id. at 1214. Taken together, these  
8 definitions demonstrate that a debtor's "bundle of rights" in  
9 property must be identified on a case-by-case basis.

10 It appears from the bankruptcy court's findings of fact  
11 that virtually all of the funds in debtor's account on the day  
12 of the levy consisted of social security benefits.<sup>9</sup> The  
13 bankruptcy court found that debtor's only source of income other  
14 than \$100 of family contributions was \$636 in monthly social  
15 security benefits. In re Hernandez, 468 B.R. at 404. Collect  
16 does not dispute this finding on appeal.<sup>10</sup>

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17  
18 <sup>9</sup> The Code of Federal Regulations (CFR), which govern state  
19 and federal financial institutions, sets forth rules regarding  
20 social security benefits in a debtor's deposit account. "State  
21 and federal financial institutions must, before complying with a  
22 creditor's garnishment order, determine whether certain exempt  
23 federal benefits (e.g., social security, supplemental security  
24 income, etc.; see 31 CFR § 212.2(b)) have been electronically  
25 deposited into the debtor's account within the preceding two  
26 months and, if so, protect whatever amount was deposited during  
27 that period. In short, banks may not freeze the entire account  
28 and the debtor retains access to the exempt funds. [See 31 CFR  
§ 212.1 et seq.; see also 31 CFR § 212.3 (definitions)]." Hon.  
Alan M. Ahart, Cal. Prac. Guide: Enforcing Judgments and Debts  
§ 6:560.10 (2012). It is not apparent from the record whether  
these regulations were followed in this case and, therefore,  
whether the execution here was valid.

<sup>10</sup> CCP § 703.080 provides:

(continued...)

1 Under California law, government benefits such as social  
2 security are intended exclusively for the benefit and support of  
3 qualified recipients. These funds are exempt and cannot be  
4 subject to collection. See Kruger v. Wells Fargo Bank, 521 P.2d  
5 441, 458-60 (Cal. 1974).<sup>11</sup> Under CCP § 704.080(b), social  
6 security benefits in deposit accounts are exempt in the amount  
7 of \$2,425 and the exemption is automatic. The debtor need not  
8 make a claim and thus there could be no transfer of ownership in  
9 the funds by waiver or by operation of law. See CCP

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10  
11 <sup>10</sup>(...continued)

12 (a) Subject to any limitation provided in the  
13 particular exemption, a fund that is exempt remains  
14 exempt to the extent that it can be traced into deposit  
15 accounts or in the form of cash or its equivalent.

16 (b) The exemption claimant has the burden of tracing an  
17 exempt fund.

18 (c) The tracing of exempt funds in a deposit account  
19 shall be by application of the lowest intermediate  
20 balance principle unless the exemption claimant or the  
21 judgment creditor shows that some other method of  
22 tracing would better serve the interests of justice and  
23 equity under the circumstances of the case.

24 Collect raised no issue in the bankruptcy court regarding  
25 debtor's burden of tracing his exempt social security benefits  
26 which were made into his deposit account. Consequently, any  
27 tracing issue is waived on appeal. Campbell v. Verizon Wireless  
28 S-CA (In re Campbell), 336 B.R. 430, 434 n.6 (9th Cir. BAP 2005)  
(citing O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.),  
887 F.2d 955, 957 (9th Cir. 1989) ("The rule in this circuit is  
that appellate courts will not consider arguments that are not  
'properly raise[d]' in the trial courts.")).

<sup>11</sup> Federal statutes also provide that social security and  
supplemental security income benefits (whether paid or payable)  
ordinarily are not subject to execution, levy, attachment,  
garnishment or other legal process; or to the operation of  
bankruptcy laws. See 42 U.S.C. §§ 407, 1382(d).

1 § 703.030(b).<sup>12</sup> “Some exemptions need not be claimed. They are  
2 automatic and are denoted by the statutory terms of art ‘exempt  
3 without making a claim,’ which has the effect of eliminating the  
4 applicability of the procedure for enforcing a money judgment.”  
5 In re Hernandez, 468 B.R. at 404 (citing In re Petruzzelli, 139  
6 B.R. 241, 243 (Bankr. E.D. Cal. 1992)). One treatise further  
7 explains:

8       Theoretically, a claim of exemption should never have  
9       to be filed for property ‘exempt without making a  
10       claim.’ In practice, however, if such property is  
11       levied upon by the judgment creditor, a claim of  
12       exemption may have to be filed to obtain its  
13       release—unless the creditor can be persuaded to order  
14       it released. [CCP § 703.510(b)] (But so long as no  
15       sale has occurred, the levying officer should release  
16       the property whether or not the exemption filing is  
17       timely.).

18 Hon. Alan M. Ahart, Cal. Prac. Guide: Enforcing Judgments and  
19 Debts § 6:870 (2012).

20       Exemptions under California law are wholly statutory and  
21       cannot be enlarged [or diminished] by the courts. Ford Motor  
22       Credit Co., 166 Cal. App. 4th Supp. at \*8. Furthermore, “the  
23       exemption laws are designed to facilitate the debtor’s financial  
24       rehabilitation and have the effect of shifting social welfare  
25       costs from the community to judgment creditors. Consequently,  
26       the exemption statutes should be construed, so far as

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27       <sup>12</sup> CCP § 703.030(b) provides:

28       Except as otherwise specifically provided by statute,  
29       property that is described in this chapter or in any  
30       other statute as exempt without making a claim is not  
31       subject to any procedure for enforcement of a money  
32       judgment.

1 practicable, to the benefit of the judgment debtor." Id. at \*9.  
2 California's exemption philosophy is echoed in bankruptcy law.

3 Because debtor had an exempt property interest in the  
4 funds, we conclude that Collect's levy did not operate to  
5 extinguish those interests. See In re Hernandez, 468 B.R. at  
6 404 (debtor's exemption rights in the funds had not been  
7 terminated prepetition). To adopt Collect's argument for a  
8 bright line ownership rule under these circumstances would  
9 render the automatic exemption for social security benefits  
10 meaningless and allow creditors to levy on exempt funds that  
11 they are not entitled to under both state and federal law. In  
12 short, debtor had grounds to recover the exempt funds and could  
13 have challenged the levy in the state court prepetition on that  
14 basis.<sup>13</sup>

15 As property in which debtor held a legal or equitable  
16 interest when his petition was filed, the bankruptcy court's  
17 conclusion that the funds in question constituted property of  
18 the estate was correct. See In re Varney, 449 B.R. 411 (Bankr.  
19 D. Idaho 2011) (even potentially exempt assets nonetheless  
20 become property of the estate upon the commencement of the  
21 bankruptcy case); In re McAlister, 56 B.R. 164, 166 (Bankr. D.  
22 Or. 1985) (even exempt property must initially be regarded as  
23 property of the estate and then claimed and distributed as  
24 exempt).

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25  
26 <sup>13</sup> Even if the ten-day rule to claim an exemption did apply  
27 to some or all of the funds, the state court had authority "to  
28 relieve a person upon such terms as may be just from failure to  
claim an exemption within the time and in the manner prescribed  
in the applicable enforcement procedure." CCP § 703.030(c).

1           Although we conclude that the funds were property of  
2 debtor's estate, we note a procedural irregularity with debtor's  
3 motion for a turnover order under § 542. Section 542(a) enables  
4 the bankruptcy trustee, or the debtor-in-possession in a  
5 reorganization case to seek turnover of the debtors' assets, for  
6 the benefit of the estate. Indeed, in Whiting Pools, it was the  
7 debtor-in-possession in a reorganization case that sought  
8 turnover. Under the statute, a chapter 7 debtor is not  
9 mentioned and generally has no standing to bring an action for  
10 turnover. See In re Freeman, 331 B.R. 327, 329 (Bankr. N.D.  
11 Ohio 2005) (the general provision in the Bankruptcy Code  
12 governing turnover, confers this right upon the trustee); Price  
13 v. Gaslowitz (In re Price), 173 B.R. 434, 440 (Bankr. N.D. Ga.  
14 1994) (turnover action is one facet of a chapter 7 trustee's  
15 general duties under § 704(1)).

16           The procedural irregularity was remedied however by  
17 debtor's response to Collect's opposition. The ultimate relief  
18 that debtor sought was to preserve his exemption in the levied  
19 funds by invoking § 522(g) and/or by exercising the trustee's  
20 avoiding powers under § 522(h).<sup>14</sup> Moreover, as of the

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21  
22           <sup>14</sup> Sections (g) and (h) provide:

23           (g) Notwithstanding sections 550 and 551 of this title,  
24 the debtor may exempt under subsection (b) of this  
25 section property that the trustee recovers under  
26 section 510(c)(2), 542, 543, 550, 551, or 553 of this  
27 title, to the extent that the debtor could have  
28 exempted such property under subsection (b) of this  
section if such property had not been transferred, if--

(1)(A) such transfer was not a voluntary transfer of

(continued...)

1 commencement of the case, the automatic stay under § 362(a)  
2 arises, which enjoins any and all collection efforts against the  
3 debtor. As an enforcement mechanism, a debtor is afforded a  
4 private right of action to seek redress under § 362(k)(1).  
5 "Section 522's right to claim exemptions in property of the  
6 estate bestows standing on debtors for purposes of § 362(k)(1)."  
7 In re Mwangi, 432 B.R. at 822. Therefore, debtor's statutory  
8 standing to seek the return of the funds levied upon was  
9 conferred by statutes other than § 542(a). Further, debtor's  
10 procedural irregularity did not in any way affect the bankruptcy  
11 court's ability to enter an order that required Collect to  
12 surrender the funds to debtor. Since this is a protection of  
13 exemption case rather than one for turnover, the bankruptcy  
14

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15 <sup>14</sup>(...continued)  
16 such property by the debtor; and

17 (B) the debtor did not conceal such property; or

18 (2) the debtor could have avoided such transfer under  
19 subsection (f)(1)(B) of this section.

20 (h) The debtor may avoid a transfer of property of the  
21 debtor or recover a setoff to the extent that the  
22 debtor could have exempted such property under  
23 subsection (g)(1) of this section if the trustee had  
24 avoided such transfer, if--

24 (1) such transfer is avoidable by the trustee under  
25 section 544, 545, 547, 548, 549, or 724(a) of this  
26 title or recoverable by the trustee under section 553  
27 of this title; and

26 (2) the trustee does not attempt to avoid such  
27 transfer.

28 Eventually, debtor did avoid the lien under § 522(f).

1 court had the authority to enter an order requiring Collect to  
2 surrender the funds to debtor under § 105(a). See § 105(a)  
3 ("The court may issue any order, process, or judgment that is  
4 necessary or appropriate to carry out the provisions of this  
5 title."). Once the property came into the estate, it revested  
6 in debtor when his exemption claim went unchallenged. See In re  
7 Mwangi, 432 B.R. at 821 (noting that "[p]roperty claimed as  
8 exempt leaves the estate and reverts in the debtor.").  
9 Finally, debtor's ex parte motion seeking the return of his  
10 exempt funds was a contested matter under Rule 9014 requiring  
11 reasonable notice and opportunity for a hearing. No adversary  
12 proceeding was required under Rule 7001. Here, Collect had  
13 ample opportunity to contest Turnover Order II through written  
14 opposition and oral argument at the eventual hearing on its  
15 Motion to Vacate. That said, Collect does not contend on appeal  
16 that it was prejudiced in any way by the procedure used.

#### 17 **VI. CONCLUSION**

18 Accordingly, we AFFIRM the bankruptcy court's order, albeit  
19 for different reasons, and hold that the prepetition levied  
20 funds in the hands of the Sheriff on the petition date were  
21 property of debtor's estate under § 541(a) due to debtor's  
22 exemption rights in the funds. Therefore, the bankruptcy court  
23 properly ordered Collect to surrender the funds.