

JUL 30 2010

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

In re:)	BAP No. CC-10-1036-PaKiTa
)	
MYRNA JACOBSON,)	Bk. No. 06-10093-RK
)	
Debtor.)	Adv. No. 07-01404-RK
_____)	
)	
JOHN M. WOLF, Chapter 7 Trustee,)	
)	
Appellant.)	
)	
v.)	M E M O R A N D U M ¹
)	
MYRNA JACOBSON; DONALD JACOBSON,)	
)	
Appellees.)	
_____)	

Argued and Submitted on July 23, 2010
at Pasadena, California

Filed - July 30, 2010

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

Hon. Robert Kwan, United States Bankruptcy Judge, Presiding

Before: PAPPAS, KIRSCHER and TAYLOR,² Bankruptcy Judges

¹ 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.

² The Honorable Laura Taylor, United States Bankruptcy Judge for the Southern District of California, sitting by designation.

1 John M. Wolfe ("Trustee") appeals the judgment of the
2 bankruptcy court dismissing his complaint for turnover of property
3 from Chapter 7³ debtor Myrna E. Jacobson ("Myrna")⁴ and her spouse
4 Donald L. Jacobson ("Donald", and together, "the Jacobsons"). We
5 AFFIRM.

6
7 **FACTS**

8 The following facts are presented, roughly, chronologically.

9 The Jacobsons have been married since 1959. For most of
10 those years, Myrna worked as a licensed real estate broker.
11 Donald is disabled.

12 Myrna has been involved in litigation with her major creditor
13 for over 20 years. In 1985, Larry Cunningham ("Cunningham") sued
14 the Jacobsons and their business partners for multiple torts
15 stemming from the construction and sale to Cunningham of a beach
16 house. Cunningham v. Imperial Bank et al., Case no. 460596
17 (Orange County Superior Court, June 7, 1985). As discussed below,
18 after a trial, the state court awarded a large money judgment to
19 Cunningham against Myrna. While Cunningham does not figure
20 prominently in this appeal, an understanding of his ongoing
21 dispute with the Jacobsons sheds light on the developments in the
22 Jacobsons' bankruptcy cases.

23
24
25 _____
26 ³ Unless otherwise indicated, all chapter, section and rule
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532 and
28 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

⁴ For clarity, we refer to some parties by their first
names. No disrespect is intended.

1 The Prior Bankruptcy Cases and the Acquisition
2 of the Kensington and Enterprise Properties

3 In February 1994, the Jacobsons purchased a residence (the
4 "Kensington property") from Alvin and Barbara Fink. The
5 Kensington property was initially titled in the name of Lynn
6 Jacobson ("Lynn"), Donald's son and Myrna's stepson.

7 The Jacobsons filed a joint Chapter 7 voluntary petition on
8 October 6, 1995, Case No. SA-95-02024-JR. At the Jacobsons'
9 request, the case was converted to a chapter 13 case on January
10 24, 1996.

11 During the pendency of the chapter 13 case, Donald received a
12 \$14,266.74 inheritance from his mother. Trustee in this appeal
13 alleges that Donald did not disclose his receipt of this money to
14 the chapter 13 trustee, or amend his schedules in the bankruptcy
15 case. Trustee's Open. Br. at 5.

16 In 1997, Myrna and Donald allegedly purchased a 95 percent
17 interest in the Kensington property from Lynn. This left Lynn
18 with a 5 percent interest.

19 On motion of the chapter 13 trustee, the bankruptcy court
20 found that the chapter 13 petition, schedules and statement of
21 financial affairs had been filed in bad faith, and on February 12,
22 1997, the court reconverted the case to chapter 7.⁵ Cunningham
23 filed an adversary proceeding in the reconverted chapter 7 case
24 objecting to the Jacobsons' discharge under § 727(a). After a
25 trial, the bankruptcy court entered a judgment denying Myrna a

26
27 ⁵ While the reconverted chapter 7 case was ongoing, the
28 Jacobsons filed another chapter 13 petition on August 5, 1998.
SA-21038-JR. The bankruptcy court dismissed this chapter 13 case
as another bad faith filing on October 14, 1998.

1 discharge because, the court found, that Myrna had engaged in
2 fraudulent conduct during the case, but that Donald had not.

3 Shortly thereafter, a jury trial was concluded in
4 Cunningham's state court action. The jury returned a verdict in
5 favor of Cunningham, and the state court entered a judgment in his
6 favor against Myrna for \$862,933.41 on August 11, 2000.

7 Donald contracted to purchase a rental property in Los
8 Alamitos (the "Enterprise property") in 2001 for \$260,000. The
9 deed he received for the property conveyed title to Donald as his
10 sole and separate property. With Myrna's help, the Enterprise
11 property was refinanced in 2005, yielding cash proceeds to the
12 Jacobsons of \$89,000.

13 On April 26, 2004, Lynn executed a grant deed conveying his
14 remaining 5 percent interest in the Kensington property to Myrna
15 and Donald as a gift. This deed was not recorded.

16 By early 2006, the amount due on Cunningham's judgment had
17 grown to \$1,302,918.03; he applied to the state court for an order
18 to sell the Kensington property at an execution sale. Apparently
19 in reaction to this move, Myrna filed a chapter 7 petition on
20 February 2, 2006, commencing the bankruptcy case out of which the
21 adversary proceeding and this appeal arise.

22 Cunningham moved for relief from stay to proceed with the
23 judgment execution sale of the Kensington property. The motion
24 was granted on May 5, 2006, and the Kensington property was sold
25 by the Orange County Sheriff on August 2, 2007. The Sheriff paid
26 the Jacobsons \$150,000 from the proceeds of the sale as their
27 homestead exemption on August 24, 2007.

28

1 six months of receiving them. Second, Trustee contended that the
2 Jacobsons were not entitled to a homestead exemption on the
3 Kensington property because of their fraud and bad faith regarding
4 that property. Finally, Trustee argued that the bankruptcy estate
5 held an interest in the Enterprise property that should be turned
6 over to Trustee.

7 A trial was held in the adversary proceeding on December 11,
8 2008. Trustee, Myrna and Donald were each represented by counsel,
9 and Myrna testified. The questions focused primarily on the
10 Enterprise property. Trial Tr. 29:13-40:19 (December 11, 2008).
11 Over sixty documentary exhibits were entered into evidence. While
12 counsel made closing arguments, the bankruptcy court invited them
13 to also file supplemental briefing, which they did, and the court
14 took the issues under advisement.

15 On September 22, 2009, the bankruptcy court entered a
16 detailed Memorandum Decision resolving all of the issues in favor
17 of the Jacobsons. Among other conclusions, the bankruptcy court
18 held that:

19 - Donald and Myrna had not lost their homestead exemption in
20 the sale proceeds from the Kensington property sold after Myrna's
21 bankruptcy petition was filed.

22 - Trustee lacked standing to challenge the Jacobsons'
23 purchase of the Kensington property based upon conduct occurring
24 during their prior bankruptcy case.

25 - The Enterprise property, the refinance proceeds, and any
26 rents, were the sole and separate property of Donald.

1 The bankruptcy court entered a judgment in the Jacobsons'
2 favor on January 25, 2010. Trustee filed a timely notice of
3 appeal on January 27, 2010.

4 5 **JURISDICTION**

6 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
7 and 157(b)(2)(A), (B) and (E). The Panel has jurisdiction under 28
8 U.S.C. § 158.

9 10 **ISSUES**

11 1. Whether the bankruptcy court erred in determining that
12 the Jacobsons' homestead exemption did not lose its exempt status
13 because the funds were not reinvested.

14 2. Whether Trustee lacked standing to challenge the purchase
15 transaction for the Kensington property, which purchase occurred
16 during the Jacobsons' prior bankruptcy case.

17 3. Whether the bankruptcy court clearly erred in determining
18 that the Enterprise property, the refinance proceeds, and any
19 profits from the property, were Donald's separate property.

20 4. Whether the bankruptcy court abused its discretion in
21 rejecting Trustee's estoppel arguments.

22 23 **STANDARDS OF REVIEW**

24 The terms of statutory exemptions, whether property is
25 property of the estate, and procedures for recovering property of
26 the estate are questions of law reviewed de novo. White v. Brown
27 (In re White), 389 B.R. 693, 698 (9th Cir. BAP 2008).

1 Standing is a legal issue that we review de novo. Kronemyer
2 v. Am. Contrs. Indem. Co. (In re Kronemyer), 405 B.R. 915, 918
3 (9th Cir. BAP 2009).

4 Whether the Enterprise property was Donald's sole and
5 separate property is a factual question. In re Marriage of
6 Broderick, 209 Cal. App.3d 489, 497 (Cal. Ct. App. 1989). We
7 review a bankruptcy court's findings of fact for clear error.
8 Rule 8013; Wolkowitz v. Beverly (In re Beverly), 374 B.R. 221, 230
9 (9th Cir. BAP 2004), aff'd in part, dismissed on other grounds,
10 551 F.3d 1092 (9th Cir. 2008). Under the "clear error" standard,
11 we accept findings of fact unless they leave the "definite and
12 firm conviction that a mistake has been committed" by the trial
13 judge. Id. (citing Latman v. Burdette, 366 F.3d 774, 781
14 (9th Cir. 2004)).

15 Application of judicial estoppel is reviewed for abuse of
16 discretion. Yanez v. United States, 989 F.2d 323, 326 (9th Cir.
17 1993). The bankruptcy court's application of issue preclusion is
18 also reviewed for abuse of discretion. Lopez v. Emergency Serv.
19 Restoration, Inc. (In re Lopez), 367 B.R. 99, 107-08 (9th Cir. BAP
20 2007), as is its decision concerning whether to invoke quasi-
21 estoppel. Kritt v. Kritt (In re Kritt), 190 B.R. 382, 388 (9th
22 Cir. BAP 1995). In applying an abuse of discretion test, we first
23 "determine de novo whether the [bankruptcy] court identified the
24 correct legal rule to apply to the relief requested." United
25 States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009). If the
26 bankruptcy court identified the correct legal rule, we then
27 determine whether its "application of the correct legal standard
28 [to the facts] was (1) illogical, (2) implausible, or (3) without

1 support in inferences that may be drawn from the facts in the
2 record." Id. (internal quotation marks omitted). If the
3 bankruptcy court did not identify the correct legal rule, or its
4 application of the correct legal standard to the facts was
5 illogical, implausible, or without support in inferences that may
6 be drawn from the facts in the record, then the bankruptcy court
7 has abused its discretion. Id.

8 9 DISCUSSION

10 I.

11 **The bankruptcy court did not err in determining that the**
12 **Jacobsons' homestead sale proceeds did not lose their**
13 **exempt status because the funds were not reinvested**
14 **within 180 days.**

15 A bankruptcy estate consists of all legal and equitable
16 interests of the debtor in property as of the date of the filing
17 of the bankruptcy petition. § 541(a)(1). A debtor may claim
18 property as exempt from administration by a trustee. § 522(b)(1).
19 Although the bankruptcy code provides a list of categories of
20 property exemptions, § 522(d), States may choose not to
21 participate in the federal exemption scheme. § 522(b).
22 California has opted out of the federal exemption scheme, CAL. CODE
23 CIV. PROC. § 703.130, and instead has established its own automatic
24 exemption scheme for debtors. CAL. CODE CIV. PROC. §§ 704.010 et
25 seq. Under the California statutes, a debtor in a bankruptcy case
26 may claim an exemption in a homestead. CAL. CODE CIV. PROC.
27 § 703.140.

28 Under both the bankruptcy code and California law, exemptions
are to be construed broadly and liberally in favor of the debtor.

1 In re Arrol, 207 B.R. 662, 665 (Bankr. N.D. Cal. 1997). The
2 homestead exemption, in particular, "[is] to be construed
3 liberally on behalf of the homesteader." Id. at 665 (quoting
4 Ingebretsen v. McNamer, 137 Cal. App. 3d 957, 958 (Cal. Ct. App.
5 1982)).

6 In 2006, when Myrna filed her chapter 7 bankruptcy case, she
7 claimed a \$150,000 homestead exemption in the Kensington property
8 under CAL. CODE CIV. PROC. § 704.730(a)(3)(A), which provided at the
9 time of the exemption:⁶

10 **§ 704.730. Amount of homestead exemption**

11 (a) The amount of the homestead exemption is
12 (3) One hundred fifty thousand dollars (\$150,000) if the
13 judgment debtor or spouse of the judgment debtor who
14 resides in the homestead is at the time of the attempted
15 sale of the homestead any one of the following: (A) A
16 person 65 years of age or older.

17 Both Myrna and Donald were over the age of 65 at the time of
18 the exemption. Myrna's homestead exemption claim was not
19 challenged by Trustee, or any other party, in the bankruptcy case.
20 As a result, that exemption was deemed allowed. § 522(l)
21 (providing that, "[u]nless a party in interest objects, the
22 property claimed exempt . . . is exempt."); Taylor v. Freeland &
23 Kronz, 503 U.S. 638, 641-42 (1992).

24 However, after the bankruptcy was commenced, the Kensington
25 property was sold at a sheriff's sale, and the Jacobsons were paid
26 \$150,000 from the proceeds of that sale for their homestead
27 exemption. Trustee argues that, even if the property was exempt,
28 in order to preserve the exempt status of the homestead sale
proceeds, the Jacobsons were required to reinvest them in the

⁶ In 2009, the California homestead exemption was increased to \$175,000. Cal. Stats 2009, c. 499 (A.B. 1046) § 2.

1 purchase of another homestead within six months of receipt,
2 pursuant to CAL. CODE CIV. PROC. § 704.720(b). That statute
3 provides:

4 If a homestead is sold under this division or is damaged
5 or destroyed or is acquired for public use, the proceeds
6 of sale or of insurance or other indemnification for
7 damage or destruction of the homestead or the proceeds
8 received as compensation for a homestead acquired for
9 public use are exempt in the amount of the homestead
10 exemption provided in Section 704.730. The proceeds are
exempt for a period of six months after the time the
proceeds are actually received by the judgment debtor,
except that, if a homestead exemption is applied to
other property of the judgment debtor or the judgment
debtor's spouse during that period, the proceeds
thereafter are not exempt.

11 CAL. CODE CIV. PROC. § 704.720(b) (emphasis added). Because the
12 Jacobsons did not reinvest their homestead proceeds by the six-
13 month deadline, February 24, 2008, according to Trustee, the
14 proceeds became nonexempt, and Trustee should be entitled to
15 recover them as property of Myrna's chapter 7 bankruptcy estate.

16 The bankruptcy court rejected Trustee's argument. Relying on
17 the Panel's analysis of California homestead exemption law in
18 Harris v. Herman (In re Herman), 120 B.R. 127 (9th Cir. BAP 1990),
19 the bankruptcy court reasoned that "exemptions are determined on
20 the petition date, without reference to subsequent changes in the
21 character or value of the property and, thus, any post-petition
22 disposition of the property, or post-petition change in the
23 identity of the property from real property into proceeds, has no
24 impact upon the exemption analysis." Memorandum Decision at 5
25 (paraphrasing In re Herman, 120 B.R. at 130).

26 The bankruptcy court's reliance on In re Herman is
27 appropriate. In Herman, the debtor owned and resided in a
28 residence. A creditor obtained state court default judgments

1 against the debtor and recorded them as judgment liens on the
2 house. The debtor filed a chapter 7 petition, claimed a homestead
3 exemption under CAL. CODE CIV. PROC. § 704.710 on the house, and
4 moved to avoid the judgment liens under § 522(f)(1)(a) (providing
5 that a debtor may avoid judicial liens impairing the debtor's
6 exemption). The following day, the debtor entered into a contract
7 to sell the residence. The creditor challenged the debtor's right
8 to avoid the judgment liens on the proceeds to be received from
9 the voluntary sale of the property. The bankruptcy court ordered
10 the liens avoided as impairing the debtor's homestead exemption,
11 and the creditor appealed.

12 Although the bankruptcy court in Herman was primarily
13 concerned with whether the debtor's post-petition sale was an
14 execution sale or a voluntary sale for purposes of the California
15 homestead statute, the Panel ultimately decided that the nature of
16 the sale was, simply, "irrelevant in determining the exemption [in
17 that bankruptcy case]." Id. at 130. The Panel explained:

18 Absent conversion from one chapter to another, the
19 nature and extent of a debtor's exemption rights are
20 determined as of the date of the petition [citing, among
21 others, In re Magallanes, 96 B.R. 253, 255 (9th Cir. BAP
22 1988)]. The petition date is appropriate because the
23 existence of exemptions presupposes a hypothetical
24 attempt by the trustee to levy upon and sell all of the
25 debtor's property upon the filing of the petition.

26 Id.; accord Pasquina v. Cunningham (In re Cunningham), 513 F.3d
27 318, 325 (1st Cir. 2008) (citing Herman for the proposition that
28 "federal bankruptcy law does not allow post-petition uses of
exempt property to change the previously established exemption
status" and concluding that "the post-petition sale of
Cunningham's home, for which he obtained a homestead exemption

1 under the law of Massachusetts, did not cause the proceeds of the
2 sale to lose their exempt status under the Bankruptcy Code.").
3 Because the Panel concluded that the debtor's homestead exemption
4 on his house was valid as of the date the petition was filed, the
5 creditor's judgment liens could be avoided, thereby allowing the
6 debtor to retain the equity generated by the sale as exempt sale
7 proceeds.

8 The majority of courts to consider the question reach a
9 conclusion consistent with In re Herman and hold that "a post-
10 petition change in the character of property properly claimed as
11 exempt will not change the status of that property, relying on the
12 principle that once property is exempt, it is exempt forever and
13 nothing occurring post-petition can change that fact." In re
14 Hyde, 334 B.R. 506, 514 (Bankr. D. Mass. 2005) (citing cases).
15 Among the cases cited by Hyde are: In re Peterson, 897 F.2d 935,
16 937 (8th Cir. 1990) (debtor's post-petition death did not cause
17 his homestead exemption to lapse); Payne v. Wood, 775 F.2d 202,
18 204 (7th Cir. 1985) (insurance proceeds of destroyed exempt
19 property did not become property of the estate); Lasich v. Estate
20 of A.N. Wickstrom (In re Wickstrom), 113 B.R. 339, 343-44 (Bankr.
21 W.D. Mich. 1990) (debtor's post-petition death did not cause
22 exempt worker's compensation proceeds to lapse); In re Whitman,
23 106 B.R. 654, 656-57 (Bankr. S.D. Cal. 1989) (conversion of
24 homestead to proceeds post-petition does not cause proceeds to
25 become property of the estate); In re Harlan, 32 B.R. 91, 92-93
26 (Bankr. W.D. Tex. 1983) (same). The thrust of these cases is that
27 property which is deemed to be exempt is thereafter no longer
28 property of the estate, so that its subsequent transformation does

1 not restore it to the estate. See also Owen v. Owen, 500 U.S.
2 305, 307-08 (1991) ("An exemption is an interest withdrawn from
3 the estate (and hence its creditors) for the benefit of the debtor
4"); Mwangi v. Wells Fargo Bank, N.A. (In re Mwangi), ___
5 B.R. ___, 2010 WL 2723204 *6 (9th Cir. BAP 2010) (exempt property
6 "leaves the estate and reverts in the debtor.").

7 In re Herman also provides an answer to the Trustee's
8 argument to the bankruptcy court that our court of appeals'
9 decision in England v. Golden (In re Golden), 789 F.2d 698
10 (9th Cir 1986), and its progeny, somehow change this result, at
11 least in this Circuit. Like the bankruptcy court, we do not think
12 Golden controls under these facts.

13 While Golden no doubt applied the California homestead
14 exemption in a bankruptcy case, the issue presented in that appeal
15 was significantly different than the one we consider here. The
16 Ninth Circuit was called upon to decide "whether an individual who
17 files for bankruptcy after selling his home, and claims a
18 homestead exemption under California law for the proceeds of that
19 sale, is required to reinvest those proceeds in another home
20 within six months in order to maintain the exemption." Id. at
21 699. The court held that the debtor, who had sold his residence
22 before the bankruptcy petition was filed, and was holding the
23 proceeds on the petition date, was required under California law
24 to reinvest the proceeds in real property within six months of
25 receipt of the proceeds to preserve the homestead exemption as
26 against the trustee in his bankruptcy case. Id. at 699-701.
27 But the Herman Panel directly addressed whether Golden applied to
28

1 situations where the debtor's homestead had not been sold on the
2 petition date:

3 In Golden the court determined that a debtor lost his
4 exemption in the proceeds of a pre-petition sale of his
5 residence when he did not reinvest the proceeds in
6 another homestead within six months. Golden is
7 distinguishable because the debtor in that case held
8 proceeds on the date of filing rather than an interest
9 in the residence. The court looked to the exemption in
10 proceeds existing at the date of the petition and the
11 affirmative requirement that those proceeds be
12 reinvested in order for the exemption to continue beyond
13 six months. In this [the Herman] case, the homestead
14 exemption existing at the date of the petition was not
15 limited by such a requirement of affirmative action for
16 its continuing validity.

17 In re Herman, 120 B.R. at 130 n.5. Thus, under Golden as
18 interpreted by Herman, a homestead exemption in sale proceeds that
19 exists on the petition date is subject to a condition subsequent,
20 that is, a "requirement of affirmative action for its continuing
21 validity" that those proceeds be reinvested within six months.
22 That condition subsequent, according to Herman's analysis of
23 Golden, does not apply where the homestead exemption is in real
24 property as of the petition date.

25 The analysis in Herman was also shared in a cogent decision
26 by the bankruptcy court in In re Lane, 364 B.R. 760 (Bankr. D.
27 Ore. 2007), where Judge Perris concluded, correctly we believe,
28 that:

Where the debtor holds homestead proceeds on the date of
bankruptcy and the pertinent exemption statute contains
a "sunset provision" that conditions validity of an
exemption on the satisfaction of a condition subsequent,
such as reinvesting sales proceeds within a specified
time period, the sunset provision can apply in the
bankruptcy context. (Citations omitted.) This limited
exception does not apply to a debtor who claims a
homestead exemption in real property rather than
proceeds if the state law provides, as does Oregon [and
California], that upon sale the sheriff turns over to
the debtor the amount of the homestead exemption. The

1 right to a homestead exemption in real property is not
2 conditional. . . . This approach is consistent with the
3 Ninth Circuit Bankruptcy Appellate Panel's decision in
4 Herman[.]

5 Id. at 763.

6 Although Trustee relied heavily on Golden in his trial brief
7 before the bankruptcy court, except for one conclusory reference,
8 he spends no time in his briefs in this appeal urging that this
9 decision controls. Instead, Trustee now relies for support on the
10 Fifth Circuit's opinion in In re Zibman, 268 F.3d 298 (5th Cir.
11 2001). According to Trustee, Zibman stands for the proposition
12 that the entire state law on exemptions should be applied in a
13 bankruptcy setting, and not to "read the 6-month limitation out of
14 the statute." Id. at 304. Trustee describes the supposed rule
15 that all elements of a state law should be considered by the
16 bankruptcy court in determining whether the exemption has lapsed
17 as the "Zibman-Golden" Rule. Trustee's Br. at 18.

18 Clearly, there is nothing in Golden that requires us to apply
19 the six-month limitation where the homestead property has not been
20 converted to sale proceeds on the petition date. In fact, Zibman
21 itself is a case dealing with an exemption in proceeds on the
22 petition date, not an exemption in real property on that date.⁷

23 ⁷ Trustee cites to only one case where the conversion of the
24 real property into sale proceeds occurred post-petition. In re
25 Zavala, 366 B.R. 643 (Bankr. W.D. Tex. 2007). In Zavala, debtors
26 argued that Zibman did not apply where the homestead was sold
27 after the petition was filed. The Zavala court found that this
28 was a distinction without a difference and that, in its reading of
Zibman, whether a conversion of property to proceeds occurred pre-
or post-petition was immaterial for application of the six-month
limitation. At oral argument before the Panel, counsel for
Trustee conceded that he was aware of no other authority for this
interpretation of Zibman. Additionally, Trustee's position is not
advanced by his reference to the Panel's unpublished memorandum in

(continued...)

1 Simply put, Zibman does not compel nor persuade us to reverse in
2 this appeal.

3 In sum, we conclude that the bankruptcy court did not err in
4 ruling that the exemption claimed by Myrna in the Kensington
5 property was effectively determined as of the petition date in
6 this case; that the post-petition conversion of that real property
7 into sales proceeds had no impact on the validity of Myrna's
8 exemption; and that she was not required to reinvest the sale
9 proceeds in another homestead real property in order to preserve
10 her exemption.

11 II.

12 **Trustee lacks standing to challenge the purchase** 13 **transaction for the Kensington property which occurred** 14 **during the an earlier bankruptcy case.**

15 Trustee argues on appeal that the Jacobsons were not entitled
16 to a homestead exemption in the Kensington property because they
17 acquired that property fraudulently, having secretly purchased the

18 _____
19 ⁷(...continued)

20 In re Perpnan, 2007 WL 2345019 (9th Cir. BAP 2007) as in "accord"
21 with Zavala. Not only is our Perpnan decision not precedent in
22 this appeal, it also is not in accord. Perpnan dealt with exempt
23 proceeds on the petition date, not real property.

24 With the exception of Zavala, Trustee cites to no other case
25 and we have found no other case which interprets Zibman for the
26 proposition that the six-month limitation period (which is similar
27 in Texas and California exemption law) applies to a homestead
28 exemption in real property. On the contrary, there are elements
in Zibman consistent with our approach in this appeal. Zibman
recognizes that the rights to exemption are fixed on the petition
date. Id. at 304 ("It is the entire state law applicable on the
filing date that is determinative [of exemptions]."
Zibman also acknowledges that the limitation period in the Texas statute
specifically applies to proceeds, not to the real property. Id.
at 305. And of course, Zibman is a case dealing with exemption of
proceeds and makes no direct or indirect reference to exemption in
real property. For these reasons we see no significant
inconsistency between our decision in this appeal and Zibman.

1 Kensington property with funds that were properly funds of their
2 prior bankruptcy estate. However, Trustee seems to ignore in his
3 Opening Brief that the bankruptcy court ruled that he lacked
4 standing to make this argument because, if any fraud occurred
5 during the prior bankruptcy case, only the trustee in that case
6 would be the proper party to seek to recover the property, and
7 only in that prior case.

8 We believe the bankruptcy court correctly based its ruling on
9 the well-established rule that a party, to have standing in the
10 trial court, must only assert its own rights, rather than the
11 rights and interests of a third party. Williams v. Boeing Co.,
12 517 F.3d 1120, 1126-27 (9th Cir. 2008) (citing Warth v. Seidin,
13 422 U.S. 490, 499 (1975). And Trustee's failure to challenge the
14 bankruptcy court's ruling on standing prevents him from asserting
15 his argument in this appeal. Id.; accord Tippett v. Umpqua
16 Shopping Center, Inc. (In re Umpqua Shopping Center, Inc.),
17 111 B.R. 303, 305 (9th Cir. BAP 1990) (citing Seiden for the above
18 rule, even where the party is directly affected by an appealed
19 order).

20 Of course, a decision that a party lacks standing is itself
21 appealable. Buono v. Norton, 371 F.3d 543, 546 (9th Cir. 2004).
22 However, Trustee did not list such as an issue in his statement of
23 issues on appeal, nor did he even discuss it in his Opening Brief.
24 Like our court of appeals, "we will not ordinarily consider
25 matters on appeal that are not specifically and distinctly argued
26 in appellant's opening brief." Koerner v. Grigas, 328 F.3d 1039,
27 1048-49 (9th Cir. 2003) (quoting United States v. Ullah, 807 F.2d
28 1483, 1487 (9th Cir. 1987).

1 We acknowledge that, as an exception to the general rule, we
2 have "discretion to review an issue not raised by appellant . . .
3 when it is raised in the appellee's brief." In re Riverside
4 Linden Investment Co., 945 F.2d 320, 324 (9th Cir. 1991). Here,
5 the Jacobsons' brief did, indeed, discuss the standing issue, in
6 that it repeats the bankruptcy court's ruling that only the
7 bankruptcy trustee in the prior bankruptcy case had standing to
8 challenge the propriety of the purchase transaction in the prior
9 case.

10 However, Trustee's reply brief does not satisfactorily
11 address the standing issue. Trustee cites to Schwartz v. United
12 States (In re Schwartz), 954 F.2d 569 (9th Cir. 1992) concerning
13 the "effects of events in a prior bankruptcy case on standing in a
14 subsequent bankruptcy case." Trustee's Reply Br. at 4. In
15 Schwartz, the IRS assessed penalties against the debtors and their
16 corporation in a prior chapter 11 bankruptcy case. Later, when
17 debtors filed a chapter 13 case, they challenged the unpaid
18 assessments as void in violation of the automatic stay. The
19 bankruptcy court ruled in favor the debtors, holding that the IRS
20 claims were void in the chapter 13 case. Id. at 570. Other cases
21 cited by Trustee are: In re Covino, 245 B.R. 162, 169 (Bankr. D.
22 Idaho 2000) (attempting to conceal assets in prior chapter 7 case
23 resulted in dismissal of subsequent chapter 13 case);
24 In re Chesnut, 300 B.R. 880, 889 (Bankr. N.D. Tex. 2003) (reliance
25 on deed records not appropriate where debtors concealed assets in
26 prior chapter 13 case); In re Lami, 49 Collier Bankr. Cas.2d 1074
27 (Bankr. E.D. Pa. 2003) (debtor's actions in earlier bankruptcy
28 cases "usually most probative evidence of willful conduct.").

1 Contrary to Trustee's assertion, none of these cases support
2 his standing in the bankruptcy court to challenge the Jacobsons'
3 acquisition of the Kensington property which occurred in their
4 prior bankruptcy case. Indeed, none of these decisions even
5 includes the word "standing." They all sponsor the unremarkable
6 proposition that misdeeds committed by parties in an earlier
7 bankruptcy case may come back to haunt them in a subsequent case.
8 In contrast, the standing issue focuses on what party may, in
9 reliance upon those earlier misdeeds, seek relief in the
10 subsequent bankruptcy case.

11 On this record, we think that bankruptcy court correctly
12 concluded that Trustee did not have standing to challenge the
13 purchase transaction for the Kensington property which occurred in
14 an earlier bankruptcy case in which he was not the trustee.
15 Because Trustee did not adequately address the standing issue in
16 this appeal, we decline to disturb the bankruptcy court's
17 decision.

18

19

III.

20

**The bankruptcy court did not clearly err in determining that
the Enterprise property was Donald's separate property and
thus not part of Myrna's bankruptcy estate.**

21

22

23

24

25

26

27

28

It is "well established" that the party asserting that an
asset should be turned over to the bankruptcy estate under § 542
bears the burden of proof. Evans v. Robbins, 897 F.2d 966, 968
(8th Cir. 1990); Boyer v. Davis (In re U.S.A. Diversified Prod.,
Inc.), 193 B.R. 868, 872 (Bankr. N.D. Ind. 1995), aff'd, 196 B.R.

1 801 (N.D. Ind.), aff'd, 100 F.3d 53 (7th Cir. 1996).⁸ Trustee was
2 therefore obliged to show that he should be able to recover the
3 Enterprise property, the refinance proceeds received by the
4 Jacobsons, and the rents.

5 Myrna is the debtor in the bankruptcy case, and Trustee is
6 charged with administering her bankruptcy estate. The Enterprise
7 property therefore would only be subject to turnover to Trustee if
8 it was either Myrna's separate property or community property of
9 the Jacobsons. § 541(a)(1)-(2) (providing that property of the
10 estate includes the debtor's property, and all interests of the
11 debtor and her spouse in community property).

12 The bankruptcy court conducted a trial in the adversary
13 proceeding at which it received evidence and testimony concerning
14 the nature of Myrna's interest in the Enterprise property. In its
15 Memorandum Decision, the bankruptcy court ruled that "the weight
16 of the evidence shows that Donald was the sole owner of the
17 Enterprise property and the transmutation of the property by the
18 interspousal grant deed to Donald by Myrna otherwise demonstrates
19 that the Enterprise property was his separate property." The
20

21
22 ⁸ Although it is not doubted that the party seeking to
23 recover property in a turnover motion bears the burden of proof,
24 there is considerable dispute whether the proper standard of proof
25 in turnover actions is preponderance of the evidence or clear and
26 convincing evidence. Evans, 897 F.2d at 968 (applying clear and
27 convincing standard); Boyer, 193 B.R. at 872 (commenting that it
28 is "doubtful that the need to prove turnover by clear and
convincing evidence . . . survived the enactment of § 542.").
However, this distinction is of no moment in the present appeal,
because the bankruptcy court ruled against Trustee, the party
asserting turnover, under the preponderance of the evidence
standard. Consequently, neither party is prejudiced by the
court's use of the more lenient standard, and we express no
opinion concerning the proper standard.

1 bankruptcy court listed its reasons for its factual findings and,
2 in our view, they are supported in the record.

3 A. The Title Documents

4 The bankruptcy court ruled that "the title documents show
5 that the [Enterprise] property was conveyed to Donald only by
6 third party sellers, and the documents for the purchase of the
7 Enterprise property only show Donald as the buyer." The court
8 cited to documentary evidence in the record, including title
9 documents showing only Donald as owner, the Interspousal Transfer
10 Deed, and the depositions of Donald, Myrna and Shellie
11 Schneiderei (daughter of Myrna and stepdaughter of Donald, who
12 acted as broker).

13 Under California law, there is a rebuttable presumption that
14 the name appearing on title documents is the owner of the real
15 property. CAL. EVID. CODE § 662; In re Marriage of Haines, 33 Cal.
16 App.4th 277, 297 (Cal. Ct. App. 1995). This "form of title
17 presumption" is a matter of California public policy and can only
18 be overcome by clear and convincing evidence. Id.⁹

19 There is also a rebuttable presumption under California law
20 that all property acquired during marriage is community property.
21 CAL. FAM. CODE § 760. However, "there is a stronger rebuttable
22 presumption that the terms of a conveyance accurately state the
23 ownership interests." In re Allustiarte, 786 F.2d 910, 915 (9th
24 Cir. 1986)(applying California law). Under California case law,
25 the form of title presumption overcomes the community property

26
27 ⁹ As noted earlier, the bankruptcy court applied the lesser
28 preponderance of evidence standard in rejecting Trustee's
position. To the extent the bankruptcy court may have applied an
incorrect standard, Trustee was not prejudiced.

1 presumption where there is evidence of spousal consent. This was
2 the holding in In re Marriage of Brooks, 169 Cal. App.4th 176
3 (Cal. Ct. App. 2008), where the court states:

4 Thus, the mere fact that property was acquired during
5 marriage does not . . . rebut the form of title
6 presumption; to the contrary, the act of taking title to
7 property in the name of one spouse during marriage with
8 the consent of the other spouse effectively removes that
property from the general community property
presumption. In that situation, the property is
presumably the separate property of the spouse in whose
name title is taken.

9 Id. at 186-87.

10 The bankruptcy court found that Myrna's execution of the
11 Interspousal Transfer Deed at the time of Donald's acquisition of
12 the Enterprise property was sufficient evidence of her consent
13 that the Enterprise property was to be his separate property.
14 Under California law, even if property is otherwise community
15 property, a married person may by agreement "transmute an asset in
16 which [she] has a community property interest into the separate
17 property of [her] spouse." CAL. FAM. CODE § 850(a); Marriage of
18 Brooks & Robinson, 169 Cal. App.4th at 191-92. Transmutation is
19 effective provided that it is made in a writing by an "express
20 declaration." CAL. FAM. CODE § 852(a). The express declaration
21 must contain "language which expressly states that the
22 characterization of ownership of the property is being changed."
23 Estate of MacDonald, 794 P.2d 911, 919 (Cal. 1990).

24 In its Memorandum Decision, the bankruptcy court cited to the
25 Interspousal Transfer Deed, which contains the following: "Myrna
26 Jacobson, spouse of grantee hereby GRANTS to Donald L. Jacobson, A
27 Married Man as His Sole and Separate Property the real property in
28 the City of Los Alamitos, Count of Orange, State of California:

1 [the Enterprise Property]." Memorandum Decision at 11. The
2 bankruptcy court found that this instrument was sufficient
3 evidence of an "express declaration" to meet the requirements for
4 transmutation under the California Family Code. The bankruptcy
5 court also found that the documents submitted by Trustee
6 purportedly showing that the Jacobsons considered the Enterprise
7 property to be community property did not meet the express
8 declaration requirements.

9 The bankruptcy court weighed the evidence and concluded that
10 Donald was the sole owner of the Enterprise property. The court
11 supported its findings by reference to the evidence, and to the
12 extent that the bankruptcy court was presented with two
13 permissible views of the evidence, its rulings cannot be clearly
14 erroneous. Anderson v. City of Bessemer City, NC, 470 U.S. 564,
15 574 (1985). The bankruptcy court was justified in finding that
16 Trustee had not overcome the strong presumption in California law
17 favoring recorded title in Donald's name alone.

18 We therefore conclude that the bankruptcy court did not
19 clearly err in determining that Trustee did not adequately prove
20 that the Enterprise property is an asset of Myrna's bankruptcy
21 estate and, therefore, that he was not entitled to an order
22 compelling the Jacobsons to turn over the property.

23 B. Trustee's Estoppel Arguments

24 Trustee argues that Donald and Myrna should be precluded from
25 arguing that Donald was capable of managing his own financial
26 affairs because, in their previous chapter 7 case, in connection
27 with saving Donald's discharge, they argued successfully to the
28 bankruptcy court that Myrna had complete control of their

1 finances, and that he did not actively engage in the parties'
2 financial and property transactions. Trustee relies on the
3 doctrine of judicial estoppel, which allows a court to estop a
4 party from gaining advantage by taking one position and later
5 seeking another advantage from an inconsistent position. See
6 New Hampshire v. Maine, 532 U.S. 742, 749-51 (2001).

7 The bankruptcy court reviewed the documents from the previous
8 bankruptcy case and observed that, in the prior bankruptcy case,
9 the court had indeed denied the trustee's request to deny a
10 discharge to Donald under § 727(a) because "Myrna was the business
11 person in the debtors' relationship, and Donald Jacobson merely
12 followed her instructions." However, the bankruptcy court in this
13 case ruled that "the fact that Donald was not sufficiently
14 involved in the prior bankruptcy case or followed Myrna's
15 instructions is not per se inconsistent with Donald's purchase of
16 the Enterprise property as his separate and sole property." The
17 court also found that Trustee had not identified any "prior
18 inconsistent position" that Donald had taken in the previous
19 bankruptcy case that was inconsistent with any statement made in
20 the current case. Again, to the extent that the bankruptcy court
21 was presented with two permissible views of the evidence, its
22 choice of the Jacobsons' view cannot be clearly erroneous.
23 Anderson, 470 U.S. at 574

24 In the Ninth Circuit, whether to apply judicial estoppel is a
25 matter within the discretion of the trial court:

26 As a general principle, the doctrine of judicial
27 estoppel bars a party from taking inconsistent positions
28 in the same litigation. . . . Although this circuit has
adopted the doctrine of judicial estoppel, we have not
yet determined the circumstances under which it will be

1 applied. . . . The majority of circuits recognizing the
2 doctrine hold that it is inapplicable unless the
3 inconsistent statement was actually adopted by the court
4 in the earlier litigation; only in that situation,
5 according to those circuits, is there a risk of
6 inconsistent results and a threat to the integrity of
7 the judicial process. . . . The minority view, in
8 contrast, holds that the doctrine applies even if the
9 litigant was unsuccessful in asserting the inconsistent
10 position, if by his change of position he is playing
11 "fast and loose" with the court. . . . In either case,
12 the purpose of the doctrine is to protect the integrity
13 of the judicial process. Accordingly, the doctrine of
14 judicial estoppel "is an equitable doctrine invoked by a
15 court at its discretion."

9
10 Yanez v. United States, 989 F.2d 323, 326 (9th Cir. 1993). In
11 connection with its finding that there was no inconsistency
12 between the positions taken by Donald in the earlier and later
13 cases, the bankruptcy court applied the correct rule of law on
14 judicial estoppel, and that finding was not illogical,
15 implausible, or without support in inferences that may be drawn
16 from the facts in the record. In other words, the bankruptcy
17 court did not abuse its discretion in rejecting Trustee's judicial
18 estoppel argument.

19 Similar to the judicial estoppel argument, Trustee also
20 argues that issue preclusion applies to prevent Donald and Myrna
21 from now arguing that Donald was capable of managing his own
22 financial affairs, and therefore, of transacting in separate
23 property. Issue preclusion forecloses "relitigation of issues of
24 fact or law actually litigated and necessarily decided by a valid
25 and final judgment in a prior action between the parties." Duncan
26 v. United States (In re Duncan), 713 F.2d 538, 541 (9th Cir. 1983)

27 The bankruptcy court determined that the issue decided in the
28 earlier bankruptcy case involved whether Donald was sufficiently

1 involved in the parties' financial affairs to justify denial of
2 his discharge, or whether he had simply followed Myrna's
3 instructions. In contrast, the bankruptcy court identified the
4 issue in the current case as whether Donald was the sole owner of
5 the Enterprise property.

6 Under Supreme Court precedent, the bankruptcy court had
7 "broad discretion" in deciding when issue preclusion is to be
8 applied. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 (1979);
9 Frankfort Digital Servs. v. Kistler (In re Reynoso), 477 F.3d
10 1117, 1123 (9th Cir. 2007); Lopez v. Emergency Serv. Restoration,
11 Inc. (In re Lopez), 367 B.R. 99, 107-08 (9th Cir. BAP 2007).

12 Because the court determined, correctly we think, that the issues
13 in the two bankruptcy cases were not the same, issue preclusion
14 would not apply, especially in view of the six-year time span
15 between the prior case and Donald's purchase of the Enterprise
16 property. Again, the court applied the correct law and its
17 findings were not illogical, implausible, or without support in
18 inferences that may be drawn from the facts in the record. The
19 court did not abuse its discretion in rejecting Trustee's issue
20 preclusion argument.

21 Finally, Trustee argues that because Donald and Myrna claimed
22 tax benefits from the Enterprise property on their joint income
23 tax returns, under what Trustee characterizes as "quasi-estoppel,"
24 the Jacobsons should be estopped from arguing that the Enterprise
25 property is not community property subject to administration in
26 Myrna's bankruptcy case. "Quasi estoppel forbids a party from
27 accepting the benefits of a transaction or statute and then
28 subsequently taking an inconsistent position to avoid the

1 corresponding obligations or effects." Kritt v. Kritt (In re
2 Kritt), 190 B.R. 382, 388 (9th Cir. BAP 1995).

3 In view of the tax laws, Trustee's argument for application
4 of the doctrine here is unfounded. If spouses elect to file a
5 joint tax return, they are obliged to report their income received
6 from all sources, both community and separate, and may jointly
7 claim deductions and credits for both separate and community
8 property. 26 U.S.C. §§ 61 and 161-172; IRS PUBLICATION 555, COMMUNITY
9 PROPERTY (2007). The evidence presented to the bankruptcy court
10 was that Donald and Myrna had, throughout their marriage, been
11 joint tax filers, and the bankruptcy court concluded that they
12 were required to report all income, deductions and credits,
13 whether derived from separate or community property, on their
14 joint tax returns. Under these circumstances, the bankruptcy
15 court did not err in declining to apply quasi-estoppel.

16 All things considered, we conclude the bankruptcy court did
17 not abuse its discretion in declining to estop the Jacobsons from
18 arguing that the Enterprise property was Donald's separate
19 property.

20
21 **CONCLUSION**

22 We AFFIRM the bankruptcy court's judgment in all respects.
23
24
25
26
27
28