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

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re: ) BAP No. ID-16-1316-JuFB  
 )  
 STEPHEN J. ANDERSON and ) Bk. No. 4:15-bk-40878-JDP  
 MELANIE ANDERSON, )  
 )  
 Debtors. )  
 \_\_\_\_\_ )  
 )  
 STEPHEN J. ANDERSON; MELANIE )  
 ANDERSON, )  
 )  
 Appellants, )  
 )  
 v. ) **O P I N I O N**  
 )  
 GARY L. RAINSDON, chapter 7 )  
 trustee, )  
 )  
 Appellee. )  
 \_\_\_\_\_ )

Argued and Submitted on July 27, 2017  
at Pasadena, California

Filed - August 11, 2017

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

Honorable Jim D. Pappas, Bankruptcy Judge, Presiding

Appearances: Aaron J. Tolson of Tolson & Wayment, PLLC argued  
 for appellants, Stephen J. Anderson and Melanie  
 Anderson; Jason R. Naess of Parsons, Smith,  
 Stone, Loveland & Shirley, LLP argued for  
 appellee, Gary L. Rainsdon, chapter 7 trustee.

Before: JURY, FARIS, and BRAND, Bankruptcy Judges.

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1 JURY, Bankruptcy Judge:

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3 Appellants/debtors, Stephen J. Anderson and Melanie  
4 Anderson (Debtors), pose the issue in this appeal as an open  
5 question of law which splits the two divisions of the Idaho  
6 Bankruptcy Court. Debtors argue that because under Idaho law a  
7 licensed real estate professional does not earn a right to a  
8 sales commission until the sales transaction closes (which took  
9 place in this case after the petition date), such commission is  
10 not property of the estate and belongs to Debtors. According to  
11 Debtors, this is the position of the trustees in the Boise  
12 Division. To the contrary, in the Pocatello Division, where  
13 this case arises, trustees assert that such commissions are  
14 estate property, following our decision in Tully v Taxel (In re  
15 Tully), 202 B.R. 481, 483 (9th Cir. BAP 1996), a case arising in  
16 California where under state law the right to a commission does  
17 not require the transaction to close.

18 Despite Debtors' assertion that this is an open question,  
19 we hold that the Ninth Circuit in Jess v Carey (In re Jess), 169  
20 F.3d 1204 (9th Cir. 1999), has answered the question, ruling  
21 that § 541<sup>1</sup> trumps any distinction in state law in this  
22 instance, its broad sweep making the contingent right to a  
23 commission estate property. Accordingly, WE AFFIRM.

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27 \_\_\_\_\_  
28 <sup>1</sup> Unless otherwise indicated, all chapter and section  
references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.



1 then paid the commission to the real estate agents as a salary.  
2 Debtors organized a company called Melanie Anderson Realty,  
3 Inc., but closed it before the Petition Date. After the  
4 Petition Date, Debtors created a new business entity called  
5 Bastille Enterprises, Inc. (Bastille). Melanie is the sole  
6 shareholder of Bastille, while Stephen is an employee. Bastille  
7 pays Debtors' business expenses and some of their personal  
8 expenses. Bastille also pays a salary to both Stephen and  
9 Melanie. Under the contract between Keller and Debtors, after  
10 Keller receives a commission, Keller pays Debtors' share to  
11 Bastille.

12 On the Petition Date, Debtors were involved in thirteen  
13 real estate transactions where a sales contract had been  
14 executed by the buyer and seller, but the sale had yet to close.  
15 Each transaction closed postpetition and Keller paid Debtors'  
16 share of the commission to Bastille.

17 On April 6, 2016, appellee/chapter 7 trustee, Gary L.  
18 Rainsdon (Trustee), filed a motion for turnover of \$52,485.92 in  
19 commissions that were paid to Debtors through Bastille.<sup>3</sup>  
20 Trustee argued that the commissions were property of Debtors'  
21 bankruptcy estate because they had performed the work necessary  
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23 <sup>3</sup> Through the thirteen transactions, Debtors had earned  
24 approximately \$105,222.00 in commissions. The amount of  
25 \$52,485.92 is the "Associate Commission" amount included in the  
26 Associate Detail exhibits. The difference was paid to Hicks.  
27 Trustee maintained that the \$52,485.92 amount was the amount he  
28 could prove Debtors had control or custody over during the  
pendency of the bankruptcy case. He did not pursue the  
remaining balance of the commissions which went to Hicks, but  
reserved his right to do so.

1 to earn the commissions prior to the Petition Date. Therefore,  
2 the commissions were subject to turnover under § 542(a). In  
3 response, Debtors argued that the commissions were not part of  
4 their estate because the commissions were paid to Bastille.  
5 Alternatively, Debtors asserted that if the commissions were  
6 part of their bankruptcy estate, a portion of the work to earn  
7 the commissions was performed postpetition. Debtors requested  
8 the bankruptcy court to apportion the commission between the  
9 pre- and postpetition period and order turnover of the portion  
10 earned prepetition.

11 After an evidentiary hearing, the bankruptcy court ordered  
12 simultaneous post-hearing briefing of the issues and took the  
13 matter under advisement.

14 The bankruptcy court issued a memorandum decision, finding  
15 that the commissions were property of Debtors' bankruptcy estate  
16 under § 541(a)(1) because all Debtors' acts necessary to earn  
17 the commissions were performed prepetition and therefore were  
18 rooted in the pre-bankruptcy past. The court also noted that  
19 under Idaho law, only a licensed real estate broker or  
20 salesperson is entitled to collect a real estate commission.  
21 Idaho Code § 54-2054. Therefore, as the licensed agents, the  
22 commissions belonged to Debtors, not to Bastille. The  
23 bankruptcy court concluded: "[T]hat Debtors had entered into a  
24 contract with Keller to have their commissions paid to Bastille,  
25 a corporation they created after their bankruptcy filing, does  
26 not alter the result. Under § 542(a), a debtor must turn over  
27 possession, **or account to the trustee**, for any property of the  
28 estate." 558 B.R. at 374.

1 Finally, the court found that Debtors produced no evidence  
2 which would allow it to apportion the commissions between pre-  
3 and post-bankruptcy efforts. As a result, Debtors did not show  
4 any portion of the commissions should be excluded from the  
5 estate under the "personal services" exception in § 541(a)(6).  
6 Therefore, the bankruptcy court ordered Debtors to turn over  
7 \$52,485.92 to Trustee. Debtors filed a timely appeal from that  
8 order.

## 9 **II. JURISDICTION**

10 The bankruptcy court had jurisdiction over this proceeding  
11 under 28 U.S.C. §§ 1334 and 157(b)(2)(E). We have jurisdiction  
12 under 28 U.S.C. § 158.

## 13 **III. ISSUE**

14 Whether the commissions, which were paid on contracts  
15 entered into prepetition and deposited into the account of  
16 Bastille postpetition, should be considered property of Debtors'  
17 estate as of the date of the petition, thereby making them  
18 subject to turnover under § 542(a).

## 19 **IV. STANDARD OF REVIEW**

20 Whether an asset is estate property is a conclusion of law  
21 reviewed de novo. Groshong v. Sapp (In re MILA, Inc.), 423 B.R.  
22 537, 542 (9th Cir. BAP 2010).

## 23 **V. DISCUSSION**

### 24 **A. Legal Standards**

25 Under § 542(a), an entity "in possession, custody, or  
26 control, during the case, of property that the trustee may use  
27 . . . shall deliver the property to the trustee, and account  
28 for, such property or the value of such property," subject to

1 certain exceptions.

2 Section 541(a) provides that the filing of a bankruptcy  
3 case creates an estate. The estate is "comprised of all the  
4 following property, wherever located any by whomever held:

5 (1) . . . all legal or equitable interests of the debtor in  
6 property as of the commencement of the case." This definition  
7 of property of the estate has been broadly construed to  
8 encompass a debtor's contingent interest in future payments, as  
9 long as that interest is "sufficiently rooted" in the debtor's  
10 prepetition past, even if that interest is reliant on future  
11 contingencies that have not occurred as of the filing date.

12 Segal v. Rochelle, 382 U.S. 375, 379-80 (1966). In this  
13 Circuit, any contingent interest of the debtor "sufficiently  
14 rooted in the pre-bankruptcy past" is estate property, even if  
15 the contingency is not satisfied until after the bankruptcy is  
16 filed. See Neuton v. Danning (In re Neuton), 922 F.2d 1379,  
17 1382-83 (9th Cir. 1990) (beneficial interest in an inter vivos  
18 trust constituted property of the bankruptcy estate as debtor's  
19 interest vested upon the death of the preceding beneficiary  
20 which occurred after the bankruptcy petition was filed); Rau v.  
21 Ryerson (In re Ryerson), 739 F.2d 1423, 1425-26 (9th Cir. 1984)  
22 (contingent interests in payments due under a prepetition  
23 contract were property of the estate and passed to the trustee).

24 An exception to the broad definition of property of the  
25 estate is the postpetition earnings exception under § 541(a)(6).  
26 That section provides that earnings from services performed by  
27 an individual debtor after the commencement of the case are not  
28 property of his or her estate. In considering whether the

1 postpetition earnings exception applies, we first determine  
2 whether any postpetition services are necessary to obtain the  
3 payments at issue. In re Jess, 169 F.3d at 1208 (citing Towers  
4 v. Wu (In re Wu), 173 B.R. 411, 414-15 (9th Cir. BAP 1994)  
5 (citing In re Ryerson, 739 F.2d at 1426)). "If not, the  
6 payments are entirely 'rooted in the pre-bankruptcy past' and  
7 the payments will be included in the estate." Id. at 1208; see  
8 also Tully v Taxel (In re Tully), 202 B.R. 481, 483 (9th Cir.  
9 BAP 1996) (citing Segal, 382 U.S. at 380). "[W]here the debtor  
10 receives a commission post-petition but essentially fulfilled  
11 all of his obligations for that commission pre-petition, the  
12 commission will be deemed property of the estate." In re Tully,  
13 202 B.R. at 483.

14         Given this background, in determining whether the  
15 commissions at issue here should be included in Debtors' estate,  
16 the touchstone is the Supreme Court's decision in Segal. There,  
17 the Supreme Court confronted the question whether the estate or  
18 the debtors owned a loss carryback tax refund claim arising from  
19 losses generated during the year of the bankruptcy filing. The  
20 Supreme Court determined that the refund claim was estate  
21 property based on its conclusion that the claim was  
22 "sufficiently rooted in the pre-bankruptcy past and [was] little  
23 entangled with the bankrupts' ability to make an unencumbered  
24 fresh start." 382 U.S. at 380. "The Code follows Segal insofar  
25 as it includes after-acquired-property 'sufficiently rooted in  
26 the prebankruptcy past' but eliminates the requirement that it  
27 not be entangled with the debtor's ability to make a fresh  
28 start." Johnson v. Taxel (In re Johnson), 178 B.R. 216, 218



1 (9th Cir. BAP 1995) (quoting In re Ryerson, 739 F.2d at 1426).  
2 Therefore, the test for purposes of deciding whether a  
3 postpetition payment on a prepetition contract is excluded from  
4 property of the estate under the earnings exception is whether  
5 the payment is "sufficiently rooted in the pre-bankruptcy past"  
6 so as to be included in the bankruptcy estate.

7 **B. Analysis**

8 Debtors base their right to the commissions on two legal  
9 theories. First, they contend that, under Idaho law, their  
10 commissions were not earned until the purchaser completed the  
11 transaction by closing title. And this did not happen until  
12 after their petition was filed. Implicitly, they suggest that  
13 they had no legal or equitable interests in the commissions on  
14 the Petition Date and that the timing of the closing was  
15 dispositive.

16 Second, they argue that the bankruptcy court erred by  
17 disregarding Debtors' business agreement with Keller and with  
18 Debtors' corporation Bastille. Debtors maintain that the real  
19 estate sales contracts were property of Keller and not Debtors  
20 individually. When the transactions closed, Keller was paid the  
21 commission in question. Keller, in turn, paid Bastille,  
22 Debtors' corporation, and Debtors were paid either a salary or a  
23 distribution from Bastille. Accordingly, Debtors maintain that  
24 by the time they received any portion of the commissions, it  
25 constituted postpetition earnings which are not subject to  
26 turnover under § 541(a)(6). We are not persuaded by Debtors'  
27 arguments.

28 "Property interests are created and defined by state law."

1 Butner v. United States, 440 U.S. 48, 55 (1979). However, what  
2 constitutes property of Debtors' bankruptcy estate is not  
3 determined by looking solely at Idaho law. Instead, we look at  
4 Idaho law to determine when and how Debtors earned the real  
5 estate commissions and then apply §§ 541(a)(1) and (a)(6) to  
6 determine whether the commissions are estate property.

7 Generally, under Idaho law, a real estate broker is  
8 entitled to a commission when he or she (a) produces a purchaser  
9 ready, willing, and able to buy on the terms fixed by the owner;  
10 (b) the purchaser enters into a binding contract with the owner  
11 to do so; and (c) the purchaser completes the transaction by  
12 closing the transaction in accordance with the contract terms.

13 Margaret H. Wayne Tr. v. Lipsky, 846 P.2d 904, 911 (Idaho 1993).

14 Debtors' interest in receiving a commission upon the  
15 satisfaction of all three prongs set forth in Lipsky is a state  
16 law property right. See In re John Chezik Imports, Inc., 195  
17 B.R. 417, 420 (Bankr. E.D. Mo. 1996).

18 Whether Debtors' state law property right in the  
19 commissions is estate property is answered by the analysis and  
20 reasoning set forth in Jess. There, the debtor-attorney argued  
21 that because he had no cause of action which would have allowed  
22 him to sue his client for any portion of his contingency fee on  
23 the petition date, the later-realized contingency fee was not  
24 property of the estate. After a hearing before the bankruptcy  
25 court, the debtor was ordered to turn over 78% of the fee to the  
26 estate, the amount attributable to the attorney-debtor's  
27 prepetition performance. The Ninth Circuit affirmed, holding  
28 that: "Although [the debtor] may not have been able to sue his

1 client for a portion of his fee at the time he filed his  
2 bankruptcy petition, he had an interest in the fee attributable  
3 to pre-petition work on the case." 169 F.3d at 1208. This  
4 interest, the court stated, was "clearly property of the estate  
5 under section 541(a)(1)." Id.

6 Here, like the debtor-attorney in Jess, Debtors entered  
7 into the real estate sale contracts prepetition. Under Idaho  
8 law, their right to receive the commissions was contingent upon  
9 the sales closing. Therefore, on the Petition Date, like  
10 Mr. Jess, Debtors had, at least, a contingent interest in the  
11 commissions that was attributable to their prepetition work.  
12 Id. at 1207-08; see also In re Neuton, 922 F.2d at 1382-83; In  
13 re Ryerson, 739 F.2d at 1425-26. This contingent interest which  
14 was attributable to their prepetition work is property of their  
15 estate under the broad parameters of § 541(a)(1).

16 Unlike Mr. Jess, Debtors presented no evidence at trial  
17 that shows they performed services postpetition in connection  
18 with the closings. This lack of evidence prevented the  
19 bankruptcy court from apportioning the commissions between pre-  
20 and postpetition work. Accordingly, the commissions, although  
21 received postpetition, were sufficiently rooted in the pre-  
22 bankruptcy past as to constitute property of Debtors' estate.

23 Finally, contrary to Debtors' arguments, the bankruptcy  
24 court considered Debtors' relationships with Keller and Bastille  
25 in deciding whether the commissions were property of Debtors'  
26 estate. Under Idaho law, only a licensed real estate broker or  
27 salesperson is entitled to collect a real estate commission.  
28 Idaho Code § 54-2054. And, under Idaho law, only an individual

1 may hold a real estate license. Idaho Code §§ 54-2004; 54-2002.  
2 Melanie testified that the commissions were earned by her and  
3 her husband. She also testified that she had never heard of a  
4 corporation earning a real estate commission. Her testimony was  
5 thus consistent with Idaho law.

6 Because Debtors were the licensed agents, only Debtors  
7 could have a legal or equitable interest in the commissions as  
8 of the commencement of their case. Bastille legally could not  
9 earn the commission. Furthermore, Bastille was not formed when  
10 Debtors filed their petition, and property of the estate is  
11 determined as of the petition date.

12 In addition, as the bankruptcy court held, Debtors'  
13 contract with Keller to have their commissions paid to Bastille  
14 does not change the result under § 542(a). Under the statute,  
15 Debtors must turn over property in their possession, and **account**  
16 **to the trustee**, for any property of the estate. Section 542(a)  
17 does not require current possession of the property. Newman v.  
18 Schwartzner (In re Newman), 487 B.R. 193, 200 (9th Cir. BAP  
19 2013).

20 Debtors also argue that § 542 as applied in this case  
21 violates the Thirteenth Amendment's prohibition against  
22 involuntary servitude because the statute, in effect, forces  
23 Debtors to close the transactions in question for the sole  
24 benefit of their creditors after filing for bankruptcy. They  
25 further contend that § 542 violates their right to equal  
26 protection under the law. These arguments are raised for the  
27 first time on appeal. Therefore, we do not address them. See  
28 Cold Mountain v. Garber, 375 F.3d 884, 891 (9th Cir. 2004).

1 **VI. CONCLUSION**

2 In sum, for the reasons stated, we AFFIRM. The bankruptcy  
3 court properly determined that the \$52,485.92 in real estate  
4 commissions paid by Keller to Debtors postpetition constituted  
5 property of their estate. Therefore, Debtors are required to  
6 turn over the commissions to Trustee under § 542(a).

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