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NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. SC-17-1068-AKuS
)	
JASON SCOTT BROWN,)	Bk. No. 13-11913-MM7
)	
Debtor.)	Adv. No. 15-90085-MM
)	
_____)	
KENNETH BROWN,)	
)	
Appellant,)	
)	
v.)	MEMORANDUM*
)	
CHRISTOPHER BARCLAY,)	
)	
Appellee.)	
)	
_____)	

Argued and Submitted on November 30, 2017
at Pasadena, California

Filed - May 21, 2018

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

Honorable Margaret M. Mann, Bankruptcy Judge, Presiding

Appearances: Christopher Bush argued for appellant; Yosina Lissebeck
argued for appellee.

Before: ALSTON,** KURTZ, and SPRAKER, Bankruptcy Judges.

Memorandum by Judge Alston
Concurrence by Judge Spraker

* 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 8024-1.

** Hon. Christopher M. Alston, United States Bankruptcy Judge for
the Western District of Washington, sitting by designation.

1 **I. INTRODUCTION**

2 After the bankruptcy court converted the bankruptcy case of the
3 debtor, Jason Brown ("Jason"),¹ from chapter 13² to chapter 7, the
4 chapter 7 trustee, Christopher Barclay ("Barclay"), brought an
5 adversary proceeding to recover post-petition transfers of inheritance
6 proceeds made by Jason to his three brothers, Kenneth Brown
7 ("Kenneth"), Christopher Brown ("Christopher"), and Curtis Brown
8 ("Curtis"), prior to conversion. The bankruptcy court granted partial
9 summary judgment to Barclay and ultimately entered judgment in favor
10 of Barclay against the three brothers. Kenneth appealed, arguing that
11 post-conversion the transferred inheritance proceeds no longer
12 constituted property of the estate under sections 348(f)(1) and (2),
13 preventing Barclay from avoiding the transfers under section 549(a).
14 Because Jason's transfers to his brothers were not ordinary and
15 necessary expenses, and therefore section 348(f)(1)(A) did not remove
16 the inheritance proceeds from the estate, we AFFIRM.

17 **II. FACTS**

18 Our prior decision affirming the bankruptcy court's conversion
19 order set forth most of the pertinent facts.³ For ease of reference,
20 we restate them here as necessary.

21 **A. Jason Inherits from His Father's Estate.**

22 In 2012, Herbert P. Brown, the father of Jason, Kenneth,
23

24 ¹ Because the appellant, the other defendants, and the debtor in
25 this appeal share the same surname, we refer to them by their first
26 name for ease of reference. No disrespect is intended.

27 ² Unless otherwise indicated, all chapter, section, and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

³ See Brown v. Billingslea, BAP No. SC-14-1388-JuKlPa (9th Cir.
BAP 2015).

1 Christopher, and Curtis, died intestate as a resident of San Diego
2 County, California. Kenneth, Christopher, and Curtis executed
3 Assignments of Beneficial Interests, in which they assigned and
4 abandoned to Jason their beneficial interests in their father's
5 estate. Jason, as personal representative for his father's estate,
6 filed these documents in the state court probate proceedings in 2013.
7 The bankruptcy court found that Jason, as the filer of the
8 assignments, was clearly aware of the documents.

9 The only asset of the probate estate was a single family
10 residence in Oceanside, California. An inventory and appraisal filed
11 in the state court probate proceeding in late 2013 valued this asset
12 at \$240,000. Jason, as personal representative of the probate estate,
13 arranged to sell the asset. The bankruptcy court inferred Jason
14 obtained a sale prior to commencing his bankruptcy case because escrow
15 of the asset closed three days after he filed his bankruptcy petition.
16 The property sold for \$289,000.

17 **B. Jason Files a Chapter 13 Case While the State Court Probate**
18 **Proceedings are Ongoing.**

19 Jason commenced his chapter 13 case on December 13, 2013, and
20 filed his schedules and chapter 13 plan eleven days later. Jason
21 scheduled an "anticipated inheritance" with a stated value of \$2,500,
22 which he exempted in full under California Code of Civil Procedure
23 section 703.140(b)(5). His chapter 13 plan proposed monthly payments
24 of \$520, repayment of three secured creditors, and no distribution to
25 non-priority unsecured creditors.

26 Shortly after Jason filed his chapter 13 case, the probate estate
27 received net proceeds of \$64,267.97 from the sale of the real
28 property. In the state court probate proceeding, Jason filed a

1 Petition for Waiver of Account, for Distribution, for Statutory
2 Attorney's Fees and for Waiver of Statutory Personal Representative's
3 Fee in early 2014. In this court filing, Jason maintained the probate
4 estate owed only statutory attorney's fees of \$8,780 and had no other
5 liabilities. His petition specifically noted the assignments filed by
6 his brothers and requested that the entire net proceeds be disbursed
7 solely to him. On April 1, 2014, the Superior Court of San Diego
8 County entered an order and decree approving the petition and ordering
9 the distribution of the entirety of the net proceeds of the estate,
10 \$55,487.97 (the "Inheritance Proceeds"), solely to Jason. During his
11 chapter 13 case, without notice or court authority, Jason distributed
12 to each brother \$12,372, one quarter shares of the net Inheritance
13 Proceeds.

14 Jason's proposed chapter 13 plan drew objections from a secured
15 creditor and the chapter 13 trustee. After learning of the
16 unauthorized transfers to the brothers, the chapter 13 trustee moved
17 for conversion of Jason's case to chapter 7 under section 1307(c),
18 asserting Jason abused the bankruptcy system. At the hearing, Jason
19 admitted that he had either spent or transferred to his brothers the
20 entirety of the Inheritance Proceeds and was unable to give an
21 accounting or a satisfactory explanation for his low valuation of the
22 Inheritance Proceeds in his schedules. Jason argued the bankruptcy
23 court should allow him to remain in chapter 13 in order to pursue a
24 100% plan, and alternatively requested dismissal of his case instead
25 of conversion. The bankruptcy court, however, rejected Jason's
26 requests, concluded Jason had abused the bankruptcy system, and
27 converted the case to chapter 7 under section 1307(c) for cause. At
28 the time of the hearing, the bankruptcy court declined to find that

1 Jason had acted in bad faith, but the court later made that finding in
2 its ruling on Jason's motion for reconsideration of the conversion.
3 This Panel affirmed the ruling on Jason's appeal of the conversion.
4 Brown v. Billingslea, supra.

5 **C. Barclay Commences an Adversary Proceeding Against Jason and His**
6 **Brothers.**

7 Barclay was appointed as chapter 7 trustee. Jason filed post-
8 conversion bankruptcy schedules, listing the full value of the
9 Inheritance Proceeds and claiming an \$18,725 exemption in them.

10 Barclay filed a complaint in May 2015 that he subsequently
11 amended, asserting claims of conversion and avoidance of post-petition
12 transfer under section 549 against Kenneth, Christopher, and Curtis.
13 Barclay also asserted claims against Jason for conversion and denial
14 of discharge under sections 727(a)(2)(A) and (B), 727(a)(3),
15 727(a)(4), 727(a)(5), and 727(c). Only the avoidance claims are at
16 issue in this appeal.

17 Barclay filed a motion for summary judgment in May 2016. Jason
18 opposed the motion arguing that section 348(f) excluded the
19 Inheritance Proceeds from the chapter 7 estate upon conversion from
20 chapter 13 because they had left his possession and control,
21 preventing Barclay from seeking return of the Inheritance Proceeds.
22 Jason's three brothers submitted their own response, joining in
23 Jason's opposition and also asserting they received the transfers in
24 good faith.

25 After a hearing, the bankruptcy court ruled that Barclay was
26 entitled to summary judgment against Kenneth, Christopher, and Curtis
27 on the avoidance claim. The court recognized that the parties did not
28 dispute that the Inheritance Proceeds had been property of the chapter

1 13 estate. The bankruptcy court then held that the Inheritance
2 Proceeds became property of the chapter 7 estate under section
3 348(f)(2) because Jason's case was converted from chapter 13 to 7 as a
4 result of his bad faith conduct. Alternatively, the bankruptcy court
5 ruled that under section 348(f)(1), the Inheritance Proceeds remained
6 in Jason's control because he held a claim against his brothers for
7 return of the Inheritance Proceeds at the time of conversion. Under
8 both subsections 348(f)(1) and (2) the bankruptcy court concluded that
9 the Inheritance Proceeds remained property of the chapter 7 estate,
10 allowing Barclay to pursue them under section 549.

11 The bankruptcy court denied summary judgment as to the conversion
12 claim as an unnecessary cause of action.

13 Jason first appealed the bankruptcy court's order to this Panel
14 in July 2016, which we dismissed as interlocutory. After dismissal of
15 the first appeal, Barclay filed a motion for entry of partial judgment
16 as to all claims in the complaint against Kenneth, Christopher, and
17 Curtis. Over the objections of the defendants, the bankruptcy court
18 granted the motion and entered partial judgment against Kenneth,
19 Christopher, and Curtis for \$12,372 each.

20 Kenneth and Jason then appealed both the order granting partial
21 summary judgment and the partial judgment. Because Barclay's claims
22 against Jason remained unresolved, this Panel again dismissed the
23 appeal as interlocutory. Barclay and Jason then stipulated to the
24 dismissal of the remaining claims against Jason, and the bankruptcy
25 court entered an order dismissing Jason from the adversary proceeding
26 on February 28, 2017. The order dismissing the claims against Jason
27 thus fully resolved the adversary proceeding. Kenneth timely filed
28 this appeal on March 6, 2017, appealing both the order granting

1 partial summary judgment and the partial judgment.

2 **III. JURISDICTION**

3 The bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 1334
4 and 157(b)(2)(A) and (E). This Panel has jurisdiction pursuant to
5 28 U.S.C. § 158(c).

6 **IV. ISSUE**

7 Whether the bankruptcy court erred in determining that the
8 Inheritance Proceeds were property of the estate post-conversion under
9 section 348(f)(1) or (2) so that Barclay could avoid the transfers to
10 Kenneth, Christopher, and Curtis under section 549.

11 **V. STANDARD OF REVIEW**

12 This Panel reviews the bankruptcy court's conclusions of law de
13 novo. Wyle v. Pac. Mar. Ass'n (In re Pac. Far East Line, Inc.),
14 713 F.2d 476, 478 (9th Cir. 1983). The parties agree that there are
15 no disputed facts in this case. This Panel may affirm on any ground
16 supported by the record. ASARCO, LLC, v. Union Pac. R. Co., 765 F.3d
17 999, 1004 (9th Cir. 2014).

18 **VI. DISCUSSION**

19 **A. Kenneth Preserved His Issue for Appeal.**

20 Barclay first argues this Panel should dismiss this appeal
21 because Kenneth makes new arguments that he did not raise in his
22 opposition to Barclay's motion for summary judgment. Barclay contends
23 Kenneth did not previously assert that the Inheritance Proceeds are
24 not property of the chapter 7 estate under subsections 348(f)(1) and
25 (2) and therefore unreachable by Barclay under section 549.

26 Usually, "a federal appellate court does not consider an issue
27 not passed upon below." Mano-Y & M, Ltd., v. Field (In re Mortgage
28 Store, Inc.), 773 F.3d. 990, 998 (9th Cir. 2014) (citing Singleton v.

1 Wulff, 428 U.S. 106, 120 (1976)). "A litigant may waive an issue by
2 failing to raise it in a bankruptcy court." Id. (citing Kieslich v.
3 United States (In re Kieslich), 258 F.3d 968, 971 (9th Cir. 2001);
4 Price v. Lehtinen (In re Lehtinen), 332 B.R. 404, 411 (9th Cir. BAP
5 2005)). Although federal appellate courts have discretion to hear
6 arguments raised for the first time on appeal, the Ninth Circuit
7 declines to do so absent "exceptional circumstances:" (1) when review
8 is required to "prevent a miscarriage of justice or to preserve the
9 integrity of the judicial process," (2) "when a new issue arises while
10 appeal is pending because of a change in the law," and (3) "when the
11 issue presented is purely one of law and either does not depend on the
12 factual record developed below, or the pertinent record has been fully
13 developed." Id. (citing In re Mercury Interactive Corp. Sec. Litig.,
14 618 F.3d 988, 992 (9th Cir. 2010) (internal citation omitted)).

15 Barclay's position misstates the underlying facts. Unlike
16 In re Mortgage Store, where the Plaintiff raised an entirely new issue
17 on appeal, the bankruptcy court squarely decided the issue of law that
18 Kenneth now appeals. Barclay asserts that Jason, not Kenneth, raised
19 the argument, and consequently Kenneth may not argue the issue on
20 appeal. The three brothers, however, began their response to
21 Barclay's motion for summary judgment with the statement, "CURTIS
22 BROWN, KENNETH BROWN, AND CHRISTOPHER BROWN (hereinafter "Defendants")
23 respectfully *joinder* [sic] in the Debtor's Opposition to the Motion
24 for Summary Judgment on file herein." (capitalization and emphasis in
25 the original.) Their response continues by clarifying that the
26 remaining arguments are asserted in addition to those Jason raised
27 regarding sections 348(f)(1) and (2). Kenneth therefore clearly
28 incorporated Jason's arguments into his own response to Barclay's

1 motion. This Panel therefore denies Barclay's request for dismissal
2 of the appeal.

3 **B. The Inheritance Proceeds Constituted Property of the Estate in**
4 **the Converted Case, thus Allowing Barclay to Recover from the**
5 **Brothers as Recipients of Unauthorized Transfers.**

6 Kenneth asks this Panel to reverse the bankruptcy court's
7 determination that the transfer of the Inheritance Proceeds to the
8 brothers could be avoided by Barclay under section 549. Under that
9 section, a trustee "may avoid a transfer of property of the estate—
10 (1) that occurs after the commencement of the case; and (2) (A) that is
11 authorized only under section 303(f) or 542(c) of this title; or
12 (B) that is not authorized under this title or by the court."
13 11 U.S.C. § 549(a). This Panel has stated previously that a prima
14 facie case under section 549 requires the trustee to prove: "(1) a
15 transfer (2) of estate property; (3) that occurred after the
16 commencement of the case; and (4) that was not authorized by statute
17 or the court." Fursman, et al v. Ulrich (In re First Protection,
18 Inc.), 440 B.R. 821, 827-28 (9th Cir. BAP 2010). The parties do not
19 dispute that Jason made a post-petition transfer to Kenneth without
20 notice or court approval. Kenneth only disputes that the Inheritance
21 Proceeds constituted property of the estate that Barclay could recover
22 during the chapter 7 case under section 549.

23 Considering section 348(a), this Panel has stated that "the
24 trustee was vested with avoidance rights under [section] 549 from the
25 commencement of Debtors' case," and allowed a chapter 7 trustee to
26 pursue transfers of estate property that occurred prior to the
27 conversion of the bankruptcy case from chapter 11 to chapter 7.
28 In re First Protection, Inc., 440 B.R. at 832. To the extent that

1 there is any dispute that Barclay can seek to unwind a post-petition,
2 pre-conversion transfer, it is resolved by this Panel's prior ruling
3 in In re First Protection.

4 Property of the estate includes "all legal or equitable interests
5 of the debtor in property as of the commencement of the case."
6 11 U.S.C. § 541(a)(1). At the time that Jason commenced his
7 bankruptcy case, his father had passed away, the probate case had
8 commenced, and his brothers had assigned their beneficial interests to
9 him. His legal interest in his father's estate therefore existed at
10 the time of his bankruptcy and was an asset of the estate. The
11 Inheritance Proceeds also became property of the estate when this
12 interest was liquidated through the sale of his father's home.⁴
13 Finally, Jason received the Inheritance Proceeds in April 2014, within
14 180 days of filing the petition,⁵ making the funds property of the
15 estate under section 541(a)(5)(A).⁶ The Inheritance Proceeds were
16 therefore property of the estate when Jason filed his chapter 13
17 petition.

18
19 ⁴ Property of the estate includes "[p]roceeds, product,
20 offspring, rents, or profits of or from property of the estate, except
21 such as are earnings from services performed by an individual debtor
after the commencement of the case." 11. U.S.C. § 541(a)(6).

22 ⁵ The record is not clear on the exact date Jason actually
23 received the funds, but the state court's order allowing disbursement,
24 the timing of the majority of the transfers to the brothers, and the
25 chapter 13 trustee's objection to confirmation indicate that the money
was disbursed in April 2014. Jason's petition date was December 13,
2013, and the statutory 180-day period would have run on June 11,
2014.

26 ⁶ Property of the estate also includes "[a]ny interest in
27 property that would have been property of the estate if such interest
28 had been an interest of the debtor on the date of the filing of the
petition, and that the debtor acquires or becomes entitled to acquire
within 180 days after such date—(A) by bequest, devise, or
inheritance." 11. U.S.C. § 541(a)(5)(A).

1 Kenneth argues, though, that under a plain reading of section
2 348(f), which defines property of the estate in a case converted from
3 chapter 13 to another chapter, the Inheritance Proceeds were no longer
4 property of the estate after conversion of Jason's case. Kenneth
5 contends that, as a consequence, Barclay could not recover any monies
6 from the brothers an unauthorized transfers of property of the
7 chapter 7 estate under section 549.

8 **1. Jason Did Not Have Possession or Control of the Inheritance**
9 **Proceeds on the Date of Conversion.**

10 The bankruptcy court ruled that the Inheritance Proceeds remained
11 property of Jason's chapter 7 estate under section 348(f)(1)(A). This
12 section provides that property of the estate in a case converted from
13 chapter 13 includes "property of the estate, as of the date of filing
14 of the petition, that remains in the possession of or is under the
15 control of the debtor on the date of conversion." 11 U.S.C.
16 § 348(f)(1)(A). The bankruptcy court determined that because Jason
17 had the power to avoid the transfers under section 549 while in
18 chapter 13, he maintained control of the Inheritance Proceeds until
19 conversion.⁷

20 This Panel begins by looking to the plain language of the
21

22 ⁷ In addition to arguing that the plain meaning of section
23 348(f)(1)(A) prevents the Inheritance Proceeds from becoming property
24 of the estate, Kenneth also argues that the bankruptcy court erred in
25 determining that the debtor's section 549 avoidance powers were
26 property of the estate that passed to Barclay upon conversion.
27 Although Kenneth is correct, see section 541(a)(3) and (4); In re
28 Sweetwater, 55 B.R. 724, 731 (D. Utah 1985), rev'd on other grounds,
884 F.2d 1323 (10th Cir. 1989), the bankruptcy court did not determine
that the 549 avoidance powers were property of the estate. Rather,
the bankruptcy court determined that the avoidance powers held
concurrently by Jason and the chapter 13 trustee under Houston v.
Eiler (In re Cohen), 305 B.R. 886, 889 (9th Cir. BAP 2004), gave Jason
control over the transferred Inheritance Proceeds such that they
remained property of the estate under section 348(f)(1)(A).

1 statute. Where the language of a statute is plain and has only one
2 meaning, this Panel follows the plain language whenever possible.
3 Warfield v. Salazar (In re Salazar), 465 B.R. 875, 879 (9th Cir. BAP
4 2012). "We must presume that every word of a statute was included for
5 a purpose." Id. (citing Ratzlaf v. United States, 510 U.S. 135,
6 140-41, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994); United States v.
7 Andrews, 600 F.3d 1167, 1173 (9th Cir. 2010) (Clifton, J.,
8 concurring)). In Salazar, this Panel considered dictionary
9 definitions to determine the plain meaning of "possession" and
10 "remain" under section 348(f)(1)(A). 465 B.R. 879-80. The Panel
11 determined that the meaning of "remain" is "'to be a part not
12 destroyed, taken, or used up,' or 'to continue unchanged.'" Id. at
13 880. We did not determine the meaning of "control." Id.

14 To "control" means to "direct or supervise," to "limit or
15 regulate something." See Oxford American Dictionary, (Second Ed.
16 2008). Section 549 did not give Jason control over the transferred
17 Inheritance Proceeds during his chapter 13 case within the meaning of
18 section 348(f)(1)(A). Jason transferred the Inheritance Proceeds to
19 his brothers in cash and check; there is no evidence that he
20 maintained any power to direct or limit the brothers' use of the
21 transferred Inheritance Proceeds. At best, Jason had a claim against
22 his brothers and a right to initiate a lawsuit against them to attempt
23 to recover the Inheritance Proceeds. To determine that such a claim
24 and right give Jason control of the Inheritance Proceeds presupposes
25 that his lawsuit will succeed, and until that claim is adjudicated, he
26 has no legal right to recover the Inheritance Proceeds from his
27 brothers. Thus, the bankruptcy court erred by concluding the
28 Inheritance Proceeds remained property of Jason's chapter 7 estate

1 under section 348(f)(1)(A) because Jason maintained control over them.

2 **2. Because the Proceeds Distributed to the Brothers Were Not**
3 **used for Ordinary Expenses of the Debtor, the Proceeds**
4 **Remained Property of the Estate Recoverable Under**
5 **Section 549.**

6 Even though the bankruptcy court erred by ruling Jason had
7 possession or control of the Inheritance Proceeds at the time of
8 conversion, we may affirm on any grounds supported by the record.
9 In re Frontier Properties, Inc., 979 F.2d 1358, 1364 (9th Cir.1992).

10 The Inheritance Proceeds Jason transferred to his brothers became
11 property of estate in the converted case under section 348(f)(1)
12 because Jason did not use those particular funds for ordinary and
13 necessary living expenses.

14 Declining to strictly apply the plain language of section
15 348(f)(1)(A), this Panel and other courts have consistently imposed a
16 good faith requirement when a case is converted from chapter 13 to
17 another chapter. In Salazar, we held that, under section
18 348(f)(1)(A), the debtor's use of estate property in chapter 13 prior
19 to conversion to chapter 7 is subject to "good faith" scrutiny.
20 465 B.R. at 880. Salazar relied on Bogdanov v. LaFlamme (In re
21 LaFlamme), 397 B.R. 194, 201 (Bankr. D.N.H. 2008), which held that
22 because debtors have an "implicit right" to use property of the
23 chapter 13 estate, a debtor may use that property for "ordinary" and
24 "necessary" living expenses while in chapter 13.

25 A decision from the Eastern District of New York examining
26 Salazar and LaFlamme provides further guidance. The court in Pagano
27 v. Pergament, 2012 WL 1828854 (E.D.N.Y. May 16, 2012), noted that "in
28 enacting [s]ection 348(f), Congress intended to equalize the treatment

1 of a debtor in a Chapter 13 case that is subsequently converted to a
2 Chapter 7 case with the treatment of a debtor who filed a Chapter 7
3 petition originally." Pergament at *4-5. That code section, however,
4 "was never designed to be a safe harbor for debtors who fraudulently
5 and surreptitiously dispose of property of the estate while in
6 chapter 13." Id. The Pergament court ultimately adopted the approach
7 of LaFlamme, holding courts should not "reward shenanigans by debtors
8 in failing Chapter 13 cases," and declaring a debtor's use of chapter
9 13 assets needs to be for ordinary and necessary living expenses and
10 the conversion to chapter 7 cannot be in bad faith. Pergament,
11 2012 WL 1828854, at *5-6.

12 Legislative history bolsters this interpretation of the statute.
13 When Congress amended section 348, it declared an intention to clarify
14 the Bankruptcy Code to resolve a split in the case law about what
15 property is in the bankruptcy estate when a debtor converts from
16 chapter 13 to chapter 7. Congress expressly overruled cases such as
17 Matter of Lybrook, 951 F.2d 136 (7th Cir. 1991), which held that if
18 the case is converted, all after-acquired property becomes part of the
19 estate in the converted chapter 7 case, and adopted In re Bobroff,
20 766 F.2d 797 (3d Cir. 1985), which held that the property of the
21 estate in a converted case is the property the debtor had when the
22 original chapter 13 petition was filed. 140 Cong. Rec. H10752-01,
23 1994 WL 545773 (Oct. 4, 1994), 1994 U.S. Code Cong. & Admin. News
24 3366.

25 One court noted that by adopting In re Bobroff in its enactment
26 of section 348(f)(1)(A), "Congress intended to avoid penalizing
27 debtors for their chapter 13 efforts by placing them in the same
28 economic position they would have occupied if they had filed chapter 7

1 originally." Wyss v. Fobber (In re Fobber), 256 B.R. 268, 278 (Bankr.
2 E.D. Tenn. 2012). Congress also expressly stated the amendment to
3 section 348 gives the court discretion, in a case in which the debtor
4 has abused the right to convert and converted in bad faith, to order
5 that all property held at the time of conversion shall constitute
6 property of the estate in the converted case." 140 Cong. Rec.
7 H1075201, 1994 WL 545773 (Oct. 4, 1994), 1994 U.S. Code Cong. & Admin.
8 News 3366.

9 The court in In re Tobkin, 2013 WL 1292679 (Bankr. S.D. Fla.
10 2013), examined LaFlamme, Pergament, and Salazar, and concluded those
11 cases support the proposition that Congress did not intend section
12 348(f)(1)(A) to allow debtors to freely dispose of property during
13 chapter 13 proceedings that would otherwise have been part of the
14 chapter 7 estate had the case been originally filed under chapter 7.
15 Section 348(f)(1) only shields assets from becoming property of the
16 estate if the debtor used the assets for "ordinary" and "necessary"
17 living expenses prior to conversion. Tobkin, 2013 WL 1292679, at *4.
18 Under Tobkin, property of the chapter 13 estate on the petition date
19 which later leaves the debtor's possession or control, but was not
20 used for ordinary and necessary expenses, flows into the chapter 7
21 estate upon conversion.

22 Under the test this Panel adopted in Salazar, which is supported
23 by LaFlamme, Pergament, and Tobkin, the Inheritance Proceeds are
24 property of the chapter 7 estate. The Inheritance Proceeds were
25 property of Jason's estate as of the petition date. Jason never
26 asserted his transfer of the Inheritance Proceeds to his brothers was
27 done to pay his ordinary and necessary living expenses. On the
28 contrary, the bankruptcy court determined that Jason's use of the

1 monies was an abuse of the bankruptcy system. Kenneth has not
2 challenged that determination in this appeal. Therefore, despite
3 Jason's transfer of the Inheritance Proceeds, the proceeds remained
4 property of the estate in the converted chapter 7 case; their
5 inclusion in the estate was not affected by the conversion. The
6 bankruptcy court's conclusion of law that the Inheritance Proceeds
7 which Jason transferred to Kenneth remained property of the chapter 7
8 estate under section 348(f)(1) that could be recovered under section
9 549 was not error, and we affirm. Because we do so, we need not reach
10 the bankruptcy court's alternative conclusion that section 348(f)(2)
11 applies.

12 **VII. CONCLUSION**

13 The bankruptcy court correctly determined that the Inheritance
14 Proceeds were recoverable by Barclay under section 549 because the
15 transferred Inheritance Proceeds remained property of the post-
16 conversion estate under section 348(f)(1)(A). For all of the reasons
17 set forth above, we AFFIRM the bankruptcy court's order granting
18 summary judgment and partial judgment.

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20 Concurrence begins on next page.
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1 SPRAKER, Bankruptcy Judge, concurring:

2 I concur in the result reached. I write separately, however,
3 because while Salazar portends the result we now reach, it did not
4 address the basis by which a chapter 7 trustee recovers estate
5 property improperly transferred postpetition but prior to conversion
6 from chapter 13 to chapter 7.¹ Section 549(a) specifically provides,
7 with exceptions not pertinent here, that a trustee may avoid the
8 unauthorized postpetition transfer of property of the estate. Kenneth
9 acknowledges that the chapter 13 trustee could have challenged Jason's
10 payment to him, but argues that the chapter 7 trustee is without
11 remedy to recover the monies because the transfer did not occur while
12 Jason's case was in chapter 7. In short, Kenneth asks the court to
13 read an additional requirement into the statute to limit recovery
14 under section 549(a) to only those transfers that occur while the
15 bankruptcy case is within that chapter.

16 A trustee establishes a prima facie case under section 549(a)
17 upon presenting evidence of: "(1) a transfer (2) of estate property;
18 (3) that occurred after the commencement of the case; and (4) that was
19 not authorized by statute or the court." Fursman v. Ulrich (In re
20 First Protection, Inc.), 440 B.R. 821, 827-28 (9th Cir. BAP 2010).
21 Section 549(a) requires only that the transfer occur postpetition.
22 This is because there is only one bankruptcy filing regardless of
23 conversion. Id. at 832 (citing § 348(a)). For this very reason, the
24 chapter 7 trustee in First Protection was able to recover an
25 unauthorized transfer made by the debtor while it was in chapter 11.

27 ¹ Salazar involved a claim for turnover against the debtor
28 whereas the trustee here asserts an avoidance claim under section
549(a).

1 Kenneth argues that section 348(f) alters this analysis when a
2 case is converted from chapter 13 to chapter 7. He argues that
3 because the money at issue was transferred by Jason preconversion
4 while he was in chapter 13, it was no longer property of the estate.
5 Under either section 348(f)(1) or (2), Kenneth notes that only
6 property of the chapter 13 estate remaining upon conversion passes
7 through to the chapter 7 estate. Because he received his payment
8 postpetition but prior to conversion, Kenneth concludes that there was
9 nothing to pass from the chapter 13 estate to the chapter 7 estate
10 upon conversion.

11 The money Jason transferred to Kenneth was no longer property of
12 the estate at the time of conversion, but that is irrelevant to the
13 trustee's claims. Upon the unauthorized postpetition transfer, a
14 claim arose under section 549(a). That claim vested in the trustee
15 the right to remedy the wrongful transfer and protect the creditors of
16 the estate. See Schawartz v. United States (In re Schwartz), 954 F.2d
17 569, 573-74 (9th Cir. 1992). Because the avoidance claim vested
18 postpetition and accrues to the trustee, such claim is not property of
19 the estate and is unaffected by conversion under section 348(f).

20 In its broadest form, property of the estate includes "all legal
21 or equitable interests **of the debtor in property** as of the
22 commencement of the case." § 541(a)(1) (emphasis added).
23 Additionally, property of the estate includes proceeds of property of
24 the estate, as well as any interests that the estate may acquire after
25 commencement of the case. §§ 541(a)(5), (7). In chapter 13, section
26 1306(a)(1) augments the estate to include not only those interests
27 defined under section 541(a) but also "all property of the kind
28 specified in such section that the **debtor acquires** after the

1 commencement of the case but before the case is closed, dismissed, or
2 converted to chapter 7, 11, or 12 of this title, whichever occurs
3 first." (Emphasis added.) This includes the debtor's earnings from
4 postpetition services. § 1306(a)(2).

5 In contrast to property of the estate, which is defined by what
6 interests the debtor may have or acquire under nonbankruptcy law, the
7 trustee's avoiding powers have no existence independent of the
8 bankruptcy case and never accrue to the debtor.² In other words, the
9 trustee's avoidance claims arise, if at all, postpetition and vest in
10 the trustee as the representative of the bankruptcy estate.

11 §§ 544(a), 547(b), 548(a)(1), 549(a).

12 Section 541(a) recognizes the dichotomy between an avoidance
13 claim and the recovery upon such claim. Subsection (a)(3) defines
14 property of the estate to specifically include recoveries from
15 avoidance actions, but section 541(a) omits any reference to the
16 underlying avoidance claims. Thus, some courts conclude that
17 it "is quite clear that it is only the property . . . of a successful
18 avoidance action that in fact becomes property of the estate." Moyer
19 v. ABN Amro Mortg. Grp., Inc. (In re Feringa), 376 B.R. 614, 624

21 ² Debtors in possession under chapter 11 also may utilize the
22 trustee's avoiding powers. § 1107(a); Brookview Apartments, LLC v.
23 Bronson Family Tr. (In re Know Weigh, L.L.C.), 576 B.R. 189, 206
24 (Bankr. C.D. Cal. 2017); Shults & Tamm v. Tobey (In re Hawaiian Telcom
25 Commc'ns, Inc.), 483 B.R. 217, 221(Bankr. D. Haw. 2012). And, this
26 panel has held chapter 13 debtors have "statutory standing to exercise
27 the trustee's avoiding power as provided in their chapter 13 plan as a
28 means to fund the plan." Houston v. Eiler (In re Cohen), 305 B.R. 886,
900 (9th Cir. BAP 2004). In certain instances not applicable here, a
debtor may also step into the shoes of the trustee and maintain an
avoidance action, or exempt a recovery from an avoidance action.
§§ 522(g) and (h). Yet, a debtor's authority to bring an avoidance
action always derives from the trustee's powers. There is no distinct
statutory authority directly empowering debtors to bring their own
avoidance actions.

1 (Bankr. W.D. Mich. 2007);³ see also In re Bruner, 561 B.R. at 405 ("It
2 is not until the transfer is avoided under section 549(a) that the
3 property becomes property of the estate.").

4 The exact nature of the trustee's statutory avoidance claims
5 remains unsettled.⁴ Most often the question arises as part of an
6 estate's efforts to transfer such claims. The bankruptcy court in
7 Robinson v. First Fin. Capital Mgmt. Corp. (In re Sweetwater), 55 B.R.
8 724 (D. Utah 1985), rev'd on other grounds, 884 F.2d 1323 (10th Cir.
9 1989), wrestled with the nature of avoidance actions while considering

10
11 ³ In re Feringa demonstrates another mischievous ramification
12 concerning the nature of an avoidance action. There, a chapter 7
13 trustee mistakenly closed the case before pursuing a preference
14 action. After setting aside the order closing the case, the trustee
15 filed the preference action. The preference defendant moved to
16 dismiss the preference claim, arguing that it had been technically
17 abandoned upon the closing of the case. The court rejected this
18 argument, finding that the "trustee's ability to avoid a lien under
19 any of the pertinent bankruptcy sections is a power as opposed to an
20 interest in property itself." Id. at 624.

21 ⁴ The exact nature of the trustee's avoidance powers is not as
22 significant as the fact that the claims existed at the time of
23 conversion to remedy the unauthorized postpetition transfer. The
24 claim under section 549(a) arguably could be viewed as property of the
25 estate under either sections 541(a)(5) or (7). See Nat'l Labor Rel.
26 Bd. v. Martin Arsham Sewing Co., 873 F.2d 884, 887 (6th Cir. 1989);
27 In re MortgageAmerica Corp., 714 F.2d 1266, 1275 (5th Cir. 1983).
28 Subsection (a)(5) provides that proceeds of property of the estate are
also property of the estate. Here, the avoidance claims arguably
could be considered proceeds of the money. See HR Rep. No. 95-595, at
368 (1977); S. Rep. No. 95-989, at 83 (1978) ("The term 'proceeds' as
used in this section is not to be read in the confining sense as
defined in the UCC, but is intended to be a broad term to encompass
all proceeds of property of the estate.") Additionally, section
541(a)(7) captures "any interest in property that the estate acquires
after the commencement of the case." Section 541(a)(7) "is confined
to property interests that are themselves traceable to 'property of
the estate' or generated in the normal course of a debtor's business."
In re Townside Constr., Inc., 2018 WL 1352698, at *4 (Bankr. W.D. Va.
Mar. 14, 2018) (citing In re TMT Procurement Corp., 764 F.3d 512, 523
(5th Cir. 2014)); Shields v. Adams (In re Adams), 453 B.R. 774, 780
(Bankr. N.D. Ala. 2011). If the avoidance claim itself is treated as
property of the estate, it necessarily passed to the chapter 7 estate
as the claims existed as of the conversion. But see In re Adams,
453 B.R. at 780.

1 the assignability of the estate's claims. It reasoned:

2 The avoiding powers are not "property" but a statutorily
3 created power to recover property. The plaintiff's argument
4 ignores the simple fact that Congress gave those powers to
5 the trustee and no one else. The powers belong to the
6 debtor in possession only because he stands in the shoes of
7 the trustee. "Property of the estate," on the other hand is
8 that property that belonged to the debtor in his own right
9 or that the estate later acquires.

7 Id. at 731; see also Cybergenics Corp. v. Chinery (In re Cybergenics
8 Corp.), 226 F.3d 237, 244 (3rd Cir. 2000) ("The fact that section
9 544(b) authorizes a debtor in possession, such as Cybergenics, to
10 avoid a transfer using a creditor's fraudulent transfer action does
11 not mean that the fraudulent transfer action is actually an asset of
12 the debtor in possession, nor should it be confused with the separate
13 authority of a trustee or debtor in possession to pursue the
14 prepetition debtor's causes of action that become property of the
15 estate upon the filing of the bankruptcy petition."); In re Adams,
16 453 B.R. at 780 (turnover claims not property of the estate); see
17 generally Westphal v. Norwest Bank (In re Missouri River Sand &
18 Gravel, Inc.), 86 B.R. 1006, 1012 (Bankr. N.D. 1988).

19 The Ninth Circuit Court of Appeals has similarly considered a
20 bankruptcy estate's ability to assign avoidance claims. In 1930, the
21 Ninth Circuit held in Grass v. Osborn, 39 F.2d 461 (9th Cir. 1930),
22 that the trustee's "avoidance powers" could not be transferred under
23 the Bankruptcy Act. In Briggs v. Kent (In re Prof'l Inv. Props.),
24 955 F.2d 623, 626 (9th Cir. 1992), the Ninth Circuit held that the
25 adoption of section 1123(b)(3)(B) statutorily superseded the rule
26 adopted by Grass by vesting matters involving the settlement and
27 enforcement of bankruptcy plans to "the debtor, by the trustee, or by
28 a representative appointed for that purpose." In Duckor Spradling &

1 Metzger v. Baum Tr. (In re P.R.T.C., Inc.), 177 F.3d 774, 781 (9th
2 Cir. 1999), the Ninth Circuit clarified that "a trustee can transfer
3 its avoidance powers: (1) pursuant to a Chapter 11 reorganization
4 plan, or (2) outside a Chapter 11 reorganization plan, when a creditor
5 is pursuing interests common to all creditors." See also Simantob v.
6 Claims Prosecutor, L.L.C. (In re Lahijani), 325 B.R. 282, 288 (9th
7 Cir. BAP 2005).

8 Although the Ninth Circuit has repeatedly held that estates and
9 trustees may transfer their avoidance claims, it has never
10 specifically examined the nature of such claims. But, the Ninth
11 Circuit has consistently referred to them as "avoidance powers" vested
12 in the trustee. In re P.R.T.C., Inc., 177 F.3d at 782 ("the
13 bankruptcy court did not err by holding that the trustees could
14 transfers their avoidance powers."); In re Prof'l Inv. Props. of Am.,
15 955 F.2d at 626 (9th Cir. 1992) ("If a creditor is pursuing interests
16 common to all creditors or is appointed for the purpose of enforcement
17 of the plan, he may exercise the trustee's avoidance powers"). The
18 Ninth Circuit's recognition of the trustee's avoidance powers,
19 consistent with the statutory rubric creating such rights,
20 demonstrates that the resulting claims are not property of the estate
21 as defined by section 541(a). Accordingly, the trustee's avoidance
22 powers under section 549(a) were unaffected by the conversion of the
23 bankruptcy case from one chapter to another as recognized in First
24 Protection.⁵

25
26 ⁵ As detailed above, the distribution Jason received on account
27 of his vested right in his father's probate estate was prepetition
28 property of the estate. Accordingly, the chapter 7 estate was harmed
by the unauthorized transfer by Jason to Kenneth, and section 549(a)

(continued...)

1 In sum, upon Jason's unauthorized, postpetition transfer of part
2 of the Inheritance Proceeds to Kenneth, a claim under section 549(a)
3 accrued in the trustee to recover those funds for the benefit of the
4 bankruptcy estate. That claim existed as of the conversion date.
5 Technically, the claim under section 549(a) was not property of the
6 bankruptcy estate and passed to the chapter 7 trustee upon conversion
7 of the chapter 13 case unaffected by section 348(f).

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25 ⁵(...continued)
26 provides the statutory means to remedy that harm. A more difficult
27 question may arise if the unauthorized transfer within a chapter 13
28 involved postpetition property that became property of that estate
only through section 1306(a). As this situation is not before the
court, the parties have not briefed the issue and it will not be
considered further.