IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

IN THE CENTRAL DIVISION

In re:	
James David and Tracee David,	Bankruptcy Number 02-21500
Debtors.	Chapter 7

MEMORANDUM DECISION AND ORDER ON CHAPTER 7 TRUSTEE'S MOTION FOR ORDER DIRECTING DEBTORS TO TURN OVER PROPERTY OF THE ESTATE

Duane H. Gillman, McDowell & Gillman, P.C., Salt Lake City, Utah, Chapter 7 Trustee.

Lee J. Davis and Tony Jones, Craig S. Trenton, P.C., Salt Lake City, Utah, for the Debtors.

A hearing in the above-entitled case to consider the Chapter 7 Trustee's "Motion for Order Directing Debtors to Turn Over Property of the Estate" (the "Motion") was held Monday, June 2, 2003. Duane H. Gillman appeared on behalf of himself, the Chapter 7 Trustee (the "Trustee") and Tony Jones appeared on behalf of James and Tracee David (the "Debtors"). At the conclusion of the hearing, the Court took the matter under advisement and this Memorandum Decision and Order follows. For the following reasons, the Court sustains the Debtors' objection and denies the Motion.

BACKGROUND

On January 28, 2002, the Debtors filed a voluntary Chapter 7 petition for bankruptcy relief. That same day, the Debtors filed their Statement of Financial Affairs and Schedules including Schedule B – Personal Property. On Schedule B, the Debtors indicated that they owned $900.00 in a bank checking account at Bank One. The Debtors did not claim any exemption for the money held at Bank One on Schedule C. The Debtors appeared at the first meeting of creditors held March 13, 2002. Pursuant to an ex-parte motion seeking to convert the case to one under Chapter 13, an order was entered converting the case on April 22, 2002. Subsequently, a new meeting of creditors was scheduled for June 7, 2002. The Debtors did not appear at the new meeting and did not make their initial Chapter 13 plan payment. Accordingly, the Chapter 13 Trustee recommended that the case be dismissed.

The former Chapter 7 Trustee objected to the Chapter 13 Trustee's recommendation for dismissal arguing that because the Debtors were entitled to receive tax refunds totaling $1,200, and unsecured debt was only $2,840, if the tax refunds could be liquidated, unsecured creditors could receive a significant return. The Chapter 7 Trustee asked the Court to deny the recommendation for dismissal and reconvert the case back to Chapter 7. The Debtors responded that they were unable to go forward in the Chapter 13 case because they were separated and had greater living expenses. They also argued that after the costs of administering the case were deducted that the money from the tax refunds would only provide a very small return, if any, to unsecured creditors. After a hearing on the matter, held July 22, 2002, the Court entered an order

converting the case back to Chapter 7 on August 29, 2002. Sometime thereafter, the Debtors turned over their tax refunds to the Trustee.

A new meeting of creditors was scheduled for August 30, 2002 which was subsequently continued until September 24, 2002. For reasons unclear from the record, yet another meeting of creditors was scheduled for February 18, 2003. The Debtors received their discharge on April 23, 2003. On May 1, 2003, approximately 15 months after the Debtors initially filed their case, the Trustee filed the current motion, requesting the Court to direct the Debtors to turn over $825.74. The Trustee argues that this is the amount that existed in the Debtors checking account at Bank One as of the date of the filing of the bankruptcy petition. The Trustee argues that the money in the checking account is property of the estate and is subject to turnover under 11 U.S.C. §§ 521(4) and 542(a).[1] The Debtors argue that the money that was in the checking account as of January 28, 2002, the petition date, has since been used for moving expenses and is no longer in their possession and therefore not property of the estate as defined by § 348(f). They further argue that this is the first time they have been asked to turn over the money. It was never requested at any of the meetings of creditors held in this case.

The issue before the Court is whether the money in the checking account constitutes property of the estate upon conversion of the case from Chapter 13 to Chapter 7. Although the amount in question in the case is relatively small, this issue has broader implication.

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[1] All further references to the United States Code are to Title 11 unless otherwise noted.

ANALYSIS

A. Jurisdiction

The Court has jurisdiction over the parties and subject matter of this contested matter under 28 U.S.C. § 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2)(D) and the Court has authority to enter a final order. Venue is proper in the Central Division of the District of Utah under 28 U.S.C. § 1409.

B. Discussion

Section 348(f) states:

> (1) [W]hen a case under chapter 13 of this title is converted to a case under another chapter under this title –
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> (A) property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion; . . . .

11 U.S.C. § 348(f)(1)(A). This language seems to be quite clear – if the debtor still has the property at the time the case is converted then it should be property of the estate. If the debtor is no longer in possession of the property at the time of conversion then it should not be considered property of the estate. While this seems fairly obvious, this interpretation could produce unintended results.

This scenario is illustrated by the case of Wyss v. Fobber (In re Fobber), 256 B.R. 268 (Bankr. E.D. Tenn. 2000). In that case, the debtors also initiated their bankruptcy by filing a Chapter 7 petition. The case was converted to Chapter 13 but then reconverted to Chapter 7 prior to confirmation. During the pendency of the Chapter 13 case, the debtors sold an asset of the estate without notice to either the Chapter 13 or 7 Trustee. When discovered, the debtors refused

to turn over the proceeds of the sale to the Chapter 7 trustee arguing that the asset they sold during the pendency of the Chapter 13 case was not property of the Chapter 7 estate by virtue of § 348(f). See In re Fobber, 256 B.R. at 271. They argued that because it was no longer in their possession at the time of conversion back to Chapter 7, it did not meet the definition of property of the estate as defined by § 348(f)(1)(A). The Trustee argued that § 348(f) did not apply because the case had originated as a Chapter 7 case which gave the Chapter 7 estate an interest in the property of the estate throughout the case. See id. at 272.

The court in Fobber analyzed § 348(f)(1) and determined that it applied anytime a case was converted to Chapter 7 from 13 regardless of the case's previous conversion history. The court stated:

> A close reading of § 348(f)(1) reveals that it is not limited to cases *commenced* under chapter 13, but that it applies 'when a case under chapter 13 of this title is converted.' The legislative history to § 348(f), which was added to the Bankruptcy Code in 1994, indicates that the amendment 'adopts the reasoning of In re Bobroff, 766 F.2d 797 (3d Cir. 1985).' Bobroff, like the instant case, was originally filed under chapter 7, converted to chapter 13, and then reconverted to chapter 7, presenting the issue of what was property of the estate in the reconverted chapter 7. Based on the precise language of § 348(f) and the reference to Bobroff in the statute's legislative history, it would appear that § 348(f)(1) is not limited to cases commenced as chapter 13, but applies whenever a case is converted from chapter 13 to another chapter, regardless of the case's original status.

Id. at 276 (emphasis in original) (citation omitted). After this analysis of § 348(f), however, the court in Fobber concluded that a "literal application" of that section would produce an "absurdity" and give debtors easy opportunities to commit fraud. Id. The court theorized that "[a] chapter 7 debtor who decides that he does not want to surrender to the trustee an asset which is property of the estate can convert to chapter 13 long enough to dispose of the asset, and then

reconvert to chapter 7 and obtain a discharge with impunity. In other words, the very act which generally would form the basis for the denial or revocation of discharge, i.e., disposition of property of the estate, would insulate the debtor from liability." Id.

The legislative history to § 348(f) bears this argument out somewhat. It appears from the legislative history that § 348(f) was added to deal with the problem of after-acquired property in a Chapter 13 case. Under § 1306, property of a Chapter 13 estate includes property acquired after the commencement of the case and also earnings from services provided after commencement of the case.[2] Prior to the addition of § 348(f) in 1994, courts were split as to whether funds contributed to a Chapter 13 trustee should revert to the debtor upon conversion to Chapter 7 or should revert to the Chapter 7 trustee as property of the Chapter 7 estate. It appears from the legislative history to § 348(f) that Congress agreed with the line of cases that held that after-acquired property did not become property of the Chapter 7 estate.[3] However, nowhere in

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[2] 11 U.S.C. § 1306(a) states:

> (a) Property of the estate includes, in addition to the property specified in section 541 of this title -
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> (1) all property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title whichever occurs first; and
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> (2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first.

[3] In the legislative history, Congress used an example to illustrate the problem. It notes that concluding that after-acquired property is property of the Chapter 7 estate upon conversion would result in a "serious disincentive to chapter 13 filings." It went on to explain:

> For example, a debtor who had $10,000 equity in a home at the beginning of the case, in a State with a $10,000 homestead exemption, would have to be counseled concerning the risk that after he or she paid off a $10,000 second mortgage in the chapter 13 case, creating $10,000 in equity, there
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> (continued...)

the legislative history is there an indication that Congress considered the possible "absurd" result that presented itself in the Fobber case. The Fobber court concluded that § 348(f)(1)(A) was designed only to protect property brought into the estate by virtue of § 1306(a) and held that

> [N]otwithstanding § 348(f), a chapter 7 trustee in a case originally filed under chapter 7, converted to chapter 13, and then reconverted to chapter 7, may seek to revoke the discharge of a debtor who in the chapter 13 phase of the case disposed of property which was property of the estate in the original chapter 7. To hold otherwise would lead to an absurdity and would not further the legislative intent of § 348(f).

Id. at 279.

Despite the lack of information provided in the legislative history, however, the language of the statute also includes the words "that *remains in the possession of* or is under the control of the debtor on the date of conversion." 11 U.S.C. § 348(f)(1)(A) (emphasis added). This language seems to indicate that Congress contemplated that a debtor may have property on the date of the filing of the petition that may be used or otherwise disposed of prior to conversion to Chapter 7. If Congress was only concerned with after-acquired property, as the legislative history seems to indicate, why did Congress include these words? Even Fobber recognized that these words are confusing in light of the legislative history. Fobber surmised that Congress recognized that other events occur during the pendency of Chapter 13 cases, such as

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[3](...continued)
would be a risk that the home could be lost if the case were converted to chapter 7 (which can occur involuntarily). If all of the debtor's property at the time of conversion is property of the chapter 7 estate, the trustee would sell the home, to realize the $10,000 in equity for the unsecured creditors and the debtor would lose the home.

140 Cong. Rec. H10,770 (daily ed. Oct. 4, 1994). See also Stamm v. Morton (In re Stamm), 222 F.3d 216, 218 (5th Cir. 2000) (interpreting § 348(f) and concluding that debtors' wages earned post-petition in a Chapter 13 case are not part of the converted Chapter 7 estate).

abandonment and consumption that change the nature of the debtor's property. See In re Fobber, 256 B.R. at 279. In the Fobber case, however, the court did not follow a literal application of § 348(f)(1)(A) because of the court's belief that application of the statute in that case would produce an "absurdity."

The same absurdity does not exist in the case before this Court. In this case, the Debtors properly listed the money in the checking account on their Schedule B at the onset of the Chapter 7 case. While that case was pending, the Debtors were notified that they would have to turn over tax refund money to the trustee and decided to convert to a Chapter 13. The Debtors were never put on notice that they would be required to turn over the money in the checking account until after the reconversion to Chapter 7. The Trustee in the original Chapter 7 case made no demand for the money in the checking account and he did not immediately demand a turnover of that money in the reconverted Chapter 7 until some time after receiving the tax refund money. It also does not appear he ever issued an abandonment of the assets in the checking account. When the Debtors were unable to prosecute the Chapter 13 case, they converted back to the Chapter 7. Prior to the second conversion, the Debtors consumed the money in the checking account, specifically for moving expenses. Although the legislative history does not comment on this particular scenario, the language of § 348(f) appears to contemplate this very situation. The Debtors were no longer in possession of the money in the checking account at the time the case was converted to Chapter 7. The money, therefore, is not property of the estate because it no longer "remains in the possession of or [was] under the control of the debtor on the date of conversion." 11 U.S.C. § 348(f)(1)(A).

This conclusion is supported by additional case law. See e.g., Bell v. Bell (In re Bell), 225 F.3d 203, 227 (2d Cir. 2000) ("property owned by the debtor at the time the petition is filed, even if previously listed as exempt, would be part of the converted estate, *provided that it remains in the debtor's possession on the date of conversion*") (emphasis added); In re Zamora, 274 B.R. 268, 272 (Bankr. W.D. Tex. 2002) ("[O]nce a case is converted from chapter 13 to chapter 7, the debtor's estate consists only of property that would have been property of the estate under that chapter as of the date of filing. Assets that may have been disposed of since the filing do not come into the estate upon conversion, however.") (citations omitted); EconoLube N'Tune, Inc. v. Frausto (In re Frausto), 259 B.R. 201, 207 (Bankr. N.D. Ala. 2000) ("[section 348(f)(1)(A)] excludes from 'property of the estate' any property which the debtor disposed of after the Chapter 13 petition was filed and before conversion"); Montclair Prop. Owners Ass'n, Inc. v. Reynard (In re Reynard), 250 B.R. 241, 247 n.6 (Bankr. E.D. Va. 2000) ("The chapter 13 debtor remains in possession and has the right to use the estate's property in the ordinary course of his financial affairs.").

While the Court believes this is the correct result in this case, the court also believes it is important to comment on other provisions of § 348(f) to put this decision in perspective. Section 348(f)(2) provides:

> (2) If the debtor converts a case under chapter 13 of this title to a case under another chapter under this title in bad faith, the property in the converted case shall consist of the property of the estate as of the date of conversion.

From this language, it is clear that Congress anticipated situations where debtors may engage in bad faith tactics in converting back and forth among chapters. Section 348(f)(2) provides a

penalty to a Chapter 13 debtor who enhances his property during the pendency of the Chapter 13 and then seeks conversion for reasons that amount to bad faith. In those situations, the estate, as of the date of conversion, consists of all newly acquired property during the pendency of the Chapter 13, whereas, under § 348(f)(1)(A), property of the estate is only that which existed as of the date of the filing of the petition and which remains in the debtors possession as of the conversion date. Converting with bad faith, then, will penalize the debtor to enlarge the scope of property of the estate upon conversion to another chapter.[4]

This specific inclusion under § 348(f)(2) tends to support the Court's conclusion that had Congress wanted to enlarge the estate property upon conversion from a Chapter 13 to another Chapter to specifically include property held by debtors at the onset of a case, it would have so stated as it did with § 348(f)(2). The absence of such language in § 348(f)(1)(A) leads the Court to conclude that absent evidence of bad faith, consumed funds in a checking account during a Chapter 13 case are not property of the estate in the converted case.

CONCLUSION

The Court concludes that the statutory language of § 348(f)(1)(A) contemplates that Chapter 13 debtors will use property in their possession in the ordinary course of their lives as the Debtors did in using the money in the checking account for moving expenses. The above-cited case law supports this conclusion. Because the Debtors were no longer in possession of the money that existed in their bank checking account at the time of the filing of the initial Chapter 7

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[4] "In determining whether a debtor's conversion from Chapter 13 to Chapter 7 is in bad faith, a court should look at the specific facts of the case to determine if there is fraud, deception, dishonesty, lack of disclosure of financial acts or an abuse of the provisions, purpose or spirit of the law." In re Siegfried, 219 B.R. 581, 586-87 (Bankr. D. Colo. 1998).

petition when the case converted back to Chapter 7, the money in the checking account is not property of the estate subject to turn over. This result may not be the same if the Debtors were in possession of large amounts of money or assets at the onset of the Chapter 7 case then converted to Chapter 13 in order to use those assets as they chose prior to reconverting back to Chapter 7. This may suggest bad faith which § 348(f)(2) addresses. If that had been the case, then an "absurdity" would have resulted, as Fobber suggests, and issues of bad faith would need to be considered. However, there is no evidence to suggest bad faith here where the debtors used less than $900.00 in the ordinary course and as contemplated by § 348(f)(1)(A). Further, the Trustee has not raised the issue of bad faith at all.

Accordingly, the Court hereby

ORDERS that the Trustee's Motion is denied.

DATED this 8th day of July, 2003.

William T. Thurman
United States Bankruptcy Judge

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I, the undersigned, hereby certify that I served a true and correct copy of the foregoing **MEMORANDUM DECISION AND ORDER ON CHAPTER 7 TRUSTEE'S MOTION FOR ORDER DIRECTING DEBTORS TO TURN OVER PROPERTY OF THE ESTATE** by mailing the same, postage prepaid, to the following, on the 10th day of July, 2003.

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Order Entered on 7/10/03