

66871-4

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

NO. 66871-4

SEAWEST SERVICES ASSOCIATION,

Respondent/Plaintiff,

v.

JIM COPENHAVER AND SUZANNE COPENHAVER,

Appellants/Defendants,

and

BANK OF AMERICA, BRANCH # 37103, OAK HARBOR/IN-STORE,

Garnishee Defendant.

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

This Court is being asked to rule on a question of first impression regarding the application of an exemption in RCW 6.27.080(3) “excluding” from garnishment the earnings of a judgment debtor contained in a branch bank account. The Court need look no further than the plain language of the exemption, which in a few clear words exempts a defendant’s earnings deposited into a branch bank account.

Respondent Seawest tries to limit the exemption to the earnings of financial institution employees. Respondent’s Brief (“Resp. Br.”) 10-11. The premise of this argument is that garnishment of financial institution employees is the main subject of subsection (3). That premise is wrong. The scope of the subsection is all of the personal property that can be garnished from financial institutions and their branches, which includes deposits, accounts, credits, other personal property, and (from the institution only but not a branch) the earnings of a bank employee.

Seawest needs to read additional language into subsection (3) to limit the exclusion to employees of a financial institution. But there is no such limiting language. Further proof that Seawest’s construct is wrong is that it necessarily assigns different meanings to the unmodified word “defendant” within the subsection and the entire statute. For Seawest’s

argument to prevail, the term sometimes means all debtors and other times means only debtors who are bank employees.

Moreover, Seawest's interpretation conflicts with well-established rules of statutory construction that require exemptions to be construed in favor of the debtor. Seawest's proposal is also contrary to the underlying purpose of exemption statutes: preventing the debtor's complete indigence and encouraging thrift, ultimately benefiting the creditor as well. Seawest's interpretation has the opposite effect. Because Seawest's arguments are contrary to the language, structure, and policies of the statute, the trial court's order and fee award should be reversed.

II. REPLY ARGUMENT

A. The Legislature Excluded a Debtor's Earnings that have been Deposited into a Bank Account from Garnishment Proceedings

Subsection (1) of RCW 6.27.080 authorizes a garnishment writ to be directed either to a financial institution or to a particular branch of a financial institution. Under subsection (3), a writ directed to a financial institution allows a creditor to garnish a debtor's earnings that are "due the defendant from the financial institution" (as well as any of the defendant's "deposits" with the institution), while a writ directed to a *branch* of a financial institution excludes a debtor's earnings in possession of the

branch (i.e., deposited after payment by the employer) while allowing garnishment of other deposits, credits, accounts, and other personal property held by the branch. RCW 6.27.080(3).

Subsection (3) is structured to enable a creditor to garnish the earnings of a debtor who happens to be a bank employee in the same manner as garnishment of other debtor employees, by serving the papers before the earnings are paid (earnings “due” from the financial institution, in the language of the statute). But it also provides that *any* debtor’s earnings, once they have been paid and are in the possession of a branch – for instance, contained in a bank account – are excluded from garnishment proceedings. RCW 6.27.080(3) and RCW 6.27.010(1); *see also*, App. Br. 20-21; 18 (*citing* 28 Wash. Prac. Creditors’ Remedies – Debtors’ Relief § 8.34).

Seawest claims that the second sentence of subsection (3) applies only to a “financial institution employee[,]” Resp. Br. 10, but offers no basis to conclude that the exclusion of earnings in the second sentence is an implied shorthand for the inclusion of bank employee earnings in the first sentence. If the legislature had intended to apply the second sentence only to a financial institution employee, a few additional words could have been included within the parenthetical tracking the language of the first

sentence (e.g., "... from the financial institution"). The references to earnings in the two sentences apply to different situations, the first to earnings due a bank employee and the second to earnings already paid to and deposited by any defendant debtor. The distinction is clearly intended to require a judgment creditor to garnish a debtor's earnings *prior* to the debtor depositing those earnings into a bank account.

Seawest accurately recites well-established rules of statutory construction, Resp. Br. 9, but fails to apply them correctly. For example, Seawest fails to give effect to the context and relation of the provisions to each other as well as the plain language of subsection (3). In the first sentence of RCW 6.27.080(3), the legislature used the word "due" to establish the statute's application to earnings not yet received by the bank account employee. The second sentence establishes that a garnishment applies to property "in the possession or control of the particular branch" excluding earnings already paid and deposited. All of the language in subsection (3) must be considered to determine its intended application.

Seawest offers no persuasive reason to conflate the exclusion of all defendants' earnings already paid and deposited in the second sentence with the distinct and more narrow phrase in the first sentence providing for attachment of a bank employee defendant's earnings that are "due" to be

paid. Moreover, Seawest's argument would require the Court to read the word "defendant" in the second sentence to be limited to defendants who are employed by the bank rather than all debtor defendants as obviously is intended in the usage of that word throughout the section.

Relying on the judicial doctrine of *expressio unius est exclusio alterius*, Seawest claims that the legislature's failure to include the exemption under RCW 6.27.080(3) within the legislatively-drafted notice form required under RCW 6.27.140 demonstrates that the language contained within RCW 6.27.080(3) should not be taken as it is plainly written. Resp. Br. 11-12. But the doctrine only applies where a statute "specifically designates the things or classes of things upon which it operates, [and] an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature[.]" *Landmark Development, Inc. v. City of Roy*, 138 Wn.2d 561, 571, 980 P.2d 1234 (1999), quoting *Washington Natural Gas Co. v. Public Util. Dist. No. 1*, 77 Wn.2d 94, 98, 459 P.2d 633 (1969). The doctrine has no application here.

RCW 6.27.140 requires a creditor to serve a judgment debtor a form that explains the debtor's exemption rights. The notice form includes language that a bank account where the debtor has "deposited

benefits *such as* Temporary Assistance for Needy Families, Supplemental Security Income (SSI), Social Security, veterans' benefits, unemployment compensation, or a United States pension" may be claimed exempt. Resp. Br. 11, *quoting* RCW 6.27.140(1) (emphasis added). The provision listing government benefits explicitly is a non-exhaustive list of potentially applicable exemptions. Where examples in a statute are "preceded by the words 'such as' [they] are plainly not all-inclusive as to the section's coverage." *Lucas Coal Co. v. Interior Bd. Of Mine Operations Appeals*, 522 F.2d 581, 585 (3rd Cir. 1975); *accord Molokai Homesteaders Co-op Ass'n v. Morton*, 506 F.2d 572, 578, n.3 (9th Cir. 1974). Explicit and irrefutable proof that the list relied on by Seawest is not exclusive is the form's statement, in capitalized letters, "THE LAW ALSO PROVIDES OTHER EXEMPTION RIGHTS. IF NECESSARY, AN ATTORNEY CAN ASSIST YOU TO ASSERT THESE AND OTHER RIGHTS." RCW 6.27.140(1).

Seawest also argues that the "statutorily-required exemption claim form contains no place to claim 'earnings' in a bank account as exempt." Resp. Br. 11-12. Seawest again is wrong. The claim form specified in RCW 6.27.140(2) lists some but not all of the exemptions referenced in subsection (1) of RCW 6.27.140. It does not include Supplemental

Security Income, which is listed in subsection (1). The claim form also does not include an exemption listed in subsection (1) that applies to community bank accounts under RCW 26.16.200. Conversely, subsection (2) includes “child support” which is not listed within subsection (1). As with the notice form, the listing on the claim form is explicitly not intended to be exhaustive. The claim form provides space labeled, “Other. Explain....” RCW 6.27.140(2). The claim form also gives ample space for the debtor to provide additional information if an exemption is claimed in a bank account, including whether the account has been mingled with nonexempt payments and a description of any property claimed to be exempt. *Id.*

The error in Seawest’s claim that there is “no place to claim ‘earnings’ in a bank account as exempt” is particularly striking given Seawest’s cite to the exemption claim form that was completed by the Copenhavers in this case. *See* Resp. Br. 11, *citing* CP 66-68. The Copenhavers responded on the form Seawest provided by marking an “x” in the preprinted box titled “Other” for claiming money or property as exempt and marked an “x” in the below section stating that “No money other than from above payments are in the account.” CP 67. The

Copenhavers then attached a statement explaining the basis of the claimed exemption. CP 69-70.

Seawest looks to legislative history to support its interpretation of the statute, but the language relied upon by Seawest is not pertinent to this case. Resp. Br. 12-13. The House Bill Report on SHB 1368 states that it “permits a writ of garnishment served on a financial institution to attach compensation payable to the defendant from the financial institution.” Resp. Br. 12-13, *quoting* H. B. Rep. on Substitute H.B. 1368, 50th Leg., Reg. Sess. (Wash. 1988). The Copenhavers have recognized that the first sentence of RCW 6.27.080(3) allows a creditor to garnish compensation due to an employee of a financial institution, *see* App. Br. 20-21, but this case does not concern whether the earnings of a bank employee may be garnished.

Seawest’s attempt to distinguish Washington Practice fails. Seawest claims that “the section concerns the ‘earnings of the defendant if he or she is employed in the head office or in any branch’ and not the earnings of any judgment debtor regardless whether the employer is the garnished financial institution.” Resp. Br. 13. Seawest omits the first phrase in the sentence limiting its application to a writ naming a *financial institution*: “[i]f the financial institution is named, the writ of garnishment

will reach... earnings of the defendant if he or she is employed in the head office or in any branch.” 28 Wash. Prac. Creditors’ Remedies – Debtors’ Relief § 8.34. The *next sentence* provides that if a branch of the institution is named...it will not reach earnings, *even if the principal defendant* is an employee of that branch. *Id.* (emphasis added).

RCW 6.27.080(3) plainly exempts a judgment debtor’s earnings that are contained in a branch bank account. There is no ambiguity. Even if there were, any ambiguities must be construed against Seawest. *See Watkins v. Peterson Enterprises, Inc.*, 137 Wn.2d 632, 646, 973 P.2d 1037 (1999) (garnishment statute should be “strictly construed against the party seeking the remedy”); *see also, Dean v. Opdycke*, 151 Wash. 504, 509, 276 P. 545 (1929) (applying the “rule of liberal construction of exemption statutes favorable [sic] to the debtor, [which is] adhered to by this court...”). Washington’s rule of construction favoring the debtor is reinforced by the underlying purpose of exemption statutes: “preventing indigence and encouraging thrift.” *Lemagie v. Acme Stamp Works*, 98 Wash. 34, 41, 167 P. 60 (1917). Seawest’s reading would cause indigence and essentially require a debtor to stash away his or her earnings beneath a mattress. Seawest’s interpretation should be rejected.

B. Exempting Earnings Contained in a Bank Account is Consistent with the Statutory Framework of Garnishment in Washington

Seawest looks to RCW 6.27.150, the earnings exemption, to try to answer the Copenhavers' claim that RCW 6.27.080(3) exempts a debtor's earnings contained in a bank account from garnishment. Resp. Br. 14-16. But the Copenhavers do not rely on RCW 6.27.150 to establish that earnings contained in a bank account are exempt. A debtor's earnings in a branch bank account are exempt pursuant to RCW 6.27.080(3). The Copenhavers cited RCW 6.27.150 not to establish that the earnings exemption "perpetually exempts earnings[.]" Resp. Br. 15, but to demonstrate a longstanding application of garnishment procedures in Washington that differentiates between exempt and nonexempt earnings. *See App. Br. 10-14.*

Seawest's argument that the earnings exemption is valid only until the earnings are paid to an employee deprives the earnings exemption of the intended protection of the debtor. Resp. Br. 16. Seawest ignores the statutory definition of "earnings," which means "compensation paid *or* payable to an individual for personal services[.]" RCW 6.27.010(1) (emphasis added). "Effect should be given to all of the language used, and the provisions must be considered in relation to each other, and

harmonized to ensure proper construction.” *King County v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 560, 14 P.3d 133 (2000); *see also*, Resp. Br. 9. This is accomplished only by recognizing that the legislature intended protection of earnings already paid as well as those “payable” or due to an employed debtor.

RCW 6.27.150 is just one of the exemptions contained within the garnishment statutory scheme. The statute allows a debtor claiming an exemption to prove “any claimed exemption, including the obligation to provide sufficient documentation to identify the *source* and amount of any claimed exempt funds.” RCW 6.27.160(2) (emphasis added). The use of the word “source” further confirms that exempt funds do not lose their exempt character upon deposit into a bank account, contrary to Seawest’s contention. Seawest also repeats its argument that the statutory forms do not mention wages specifically, again overlooking that the forms are explicitly not exhaustive. *See* Reply Br. 5-8.

Seawest relies on decisions from other states that have “enacted statutes defining the ability of a creditor to garnish a debtor’s earnings.” Resp. Br. 16. But those courts were not asked to interpret a garnishment statute that plainly (or even implicitly) exempted a debtor’s earnings contained in the debtor’s bank account. *In re Lawrence*, 219 B.R. 786,

794 (Bankr.E.D.Tenn. 1998) concerned the application of Tennessee garnishment law in a Chapter 7 bankruptcy proceeding. The bankruptcy court looked to a Tennessee statutory scheme that expressly exempted other certain assets contained in a bank account but the statute at issue did not include earnings. *Id.* at 794-95. Unlike the Tennessee statute, an explicit exemption for earnings is in Washington’s statute, i.e., the second sentence of RCW 6.27.080(3), and Washington law does not elsewhere address whether other assets retain exempt status after they have been deposited into a bank account.¹

The Wyoming and Kentucky decisions cited by Seawest, *In re Walsh*, 96 P.3d 1 (Wyo. 2004) and *Brown v. Commonwealth*, 40 S.W.3d 873 (Ky. 1999), did not involve a statutory provision that addressed earnings contained in a bank account. The statute in the Arizona case cited by Seawest specifically excluded “earnings” from “monies” in the debtor’s bank account. *See, Frazer, Ryan, Goldberg, Keyt and Lawless v. Smith*, 184 Ariz. 181, 907 P.2d 1384 (1995) (explaining statute that

¹ *Lawrence* also acknowledged that state courts are divided on whether earnings and wages retain their exempt status when deposited into a bank account. 219 B.R. at 799.

distinguished between “earnings” not yet paid and “monies” deposited into a bank account).

Moreover, Seawest relies on decisions from states that, unlike Washington, have modeled their garnishment statutes on the federal Consumer Credit Protection Act (CCPA), 15 U.S.C. §§ 1671-1677. *See, In re Lawrence*, 219 B.R. at 795; *Brown*, 40 S.W.3d at 876; *Frazer*, 184 Ariz. at 186. These decisions acknowledge that the CCPA provides a floor of protection for employed debtors, explicitly allowing states to provide greater protection. The CCPA “does not annul, alter, or affect, or exempt any person from complying with, the law of any State (1) prohibiting garnishments or *providing for more limited garnishments than are allowed under this chapter[.]*” 15 U.S.C. § 1677 (emphasis added). Accordingly, states may grant debtors greater protection from garnishment than they receive under the CCPA. *Id.*; *In re Osworth*, 234 B.R. 497, 499 (B.A.P. 9th Cir. 1999).

Like Washington, several Western states have enacted statutes that protect earnings contained in a judgment debtor’s bank account, including

the neighboring jurisdictions of Oregon and California.² Oregon’s exemption provides an exemption for wages “when deposited in an account in a financial institution as long as the exempt funds are reasonably identifiable.” Or. Rev. Stat. § 18.348(1) (2011); *see also, In re Robinson*, 241 B.R. 447, 449 (Bankr.D.Or. 1999) (relying on previous version of statutory exemption codified at Or. Rev. Stat. § 23.166(1) (2011)). California exempts 75 percent of “paid earnings that can be traced into deposit accounts[.]” *Ford Motor Credit Co. v. Waters*, 166 Cal. App. 4th Supp. 1, 12, 83 Cal.Rptr.3d 826 (2008) *citing* Civ. Proc. § 704.070(b). While RCW 6.27.080(3) does not specify that earnings in a bank account must be traceable, the exemption claim form instructs the debtor to “provide sufficient documentation to identify the *source* and

² Seawest compares the definition of “earnings” and “disposable income” under Chapter 6.27 RCW to the definition of the terms under the CCPA. Resp. Br. 16. But these are merely common definitional terms. However, there is no provision within the CCPA relating to the earnings exclusion contained in RCW 6.27.080(3) and no reference to bank accounts or financial institutions in the CCPA. *See* 15 U.S.C. §§ 1671-1677.

amount of any claimed exempt funds.” RCW 6.27.160(2) (emphasis added).³

Even without express statutory authority, other courts have ruled that earnings retain their exempt character when deposited into a bank account. A Nevada bankruptcy court was asked to determine whether disposable earnings retain their exempt status once disbursed to a checking account. Although the Nevada statute was silent on the issue, the court held that the “debtor’s earnings represented by the direct deposit to his checking account are readily traceable and retain their exempt status.” *In re Norris*, 203 B.R. 463, 465 (Bankr.D.Nev. 1996).

Norris relied on the state’s liberal construction of exemption statutes, a longtime recognition of the partial exemption of a debtor’s wages, and on courts in other jurisdictions similarly recognizing that “statutorily exempt funds do not lose their exempt status when deposited into a personal checking account.” 203 B.R. at 466-67, *citing In re*

³ An Idaho court found that earnings deposited into a prisoner’s account did not remain exempt because the prisoner did not trace the earnings. *See Hooper v. State*, 127 Idaho 945, 951, 908 P.2d 1252 (1995). However, the court acknowledged authority holding that a deposit of exempt funds in a bank does “not affect a debtor’s exemption, nor change the exempt character of the fund.” *Id.*, *citing* 31 AM.JUR.2d, Exemptions, § 45 (1989) (footnotes omitted).

Caslavka, 179 B.R. 141, 147 (Bankr.N.D.Iowa 1995) (construing Iowa law that “protection afforded by the exemption would be rendered meaningless if exempt status is lost by negotiating the paycheck”) (internal citation omitted); *In re Arnold*, 193 B.R. 897 (Bankr.W.D.Mo. 1996) (“[i]t elevates form over substance to claim that the [paycheck in debtor’s] hand was wages, but the check in his checking account was not”); *In re Frazier*, 116 B.R. 675 (Bankr.W.D.Wis. 1990) (exempt disability benefits check deposited into bank account with other exempt funds retained exempt status; benefits were “readily identifiable”).

Like Nevada, Washington liberally construes exemption statutes. *See, Watkins v. Peterson Enterprises, Inc.*, 137 Wn.2d 632, 646, 973 P.2d 1037 (1999); *Dean v. Opdycke*, 151 Wash. 504, 509, 276 P. 545 (1929). Also like Nevada, Washington courts recognize that exemption statutes have “long been conceded to be of the beneficent public policy of preventing indigence and encouraging thrift.” *Lemagie v. Acme Stamp Works*, 98 Wash. 34, 41, 167 P. 60 (1917); *see Norris*, 203 B.R. at 466 (garnishment statute intended to “preserve part of the debtor’s earnings for the benefit of himself and his family”).

The Ohio Supreme Court reached the same conclusion although no statute was directly on point. *Daugherty v. Central Trust Co. of*

Northeastern Ohio, N.A., 28 Ohio St.3d 441, 445, 504 N.E.2d 1100 (1986). The court reviewed decisions going both ways, and concluded, “[t]he better view, which is consistent with the language of R.C. 2329.66(A), is that statutorily exempt funds do not lose their exempt status when deposited in a personal checking account.” *Id.* The decision was based on the “legislature’s purpose ... to protect funds intended primarily for maintenance and support of the debtor’s family.” *Id.*, citing *Dennis v. Smith*, 125 Ohio St. 120, 180 N.E. 638 (1932). This intent would be frustrated if “exempt funds were automatically deprived of their statutory immunity when deposited in a checking account which depositor commonly maintains in order to pay by check those regular subsistence expenses he incurs.” *Id.* While Washington’s statute is clearer than statutes in Nevada and Ohio, those courts’ rationales apply equally here: a judgment debtor’s earnings contained in a bank account are exempt from garnishment.

C. Seawest Must Comply with Chapter 6.27 to Garnish the Copenhavers’ Earnings

Seawest claims that even if the Court concludes that earnings remain exempt after deposit into a bank account, the contents of the Copenhavers’ checking account were nonetheless subject to garnishment

because the account held less than 25 percent of Dr. Copenhaver's recent earnings. Resp. Br. 20-21. Seawest claims that it "would still have been entitled to garnish 25% of Dr. Copenhaver's earnings from PPDG." *Id.* 21.⁴

Seawest did not obtain an order to garnish Dr. Copenhaver's earnings from PPDG. *See* App. Br. 6, n.1. Apparently Seawest is now suggesting that a garnishment of Dr. Copenhaver's earnings from PPDG should be carried out by this Court. As with any creditor, Seawest is required to follow the procedures outlined in Chapter 6.27 to garnish a debtor's earnings. *See*, RCW 6.27.060-.265. Once earnings have been paid and have been deposited into the defendant's bank account, they are exempt. RCW 6.27.080(3).

D. Copenhavers' Exemption Claim was Made in Good Faith and No Fees should be Awarded

Seawest concedes that the trial court's award of attorney's fees cannot be sustained under the statute relied upon below by Seawest and the trial court. Resp. Br. 21-22. Now Seawest argues that although the trial court's award was "styled as a finding of 'bad faith'" under

⁴ Dr. Copenhaver took on a second job working for medical contractor PPDG for a few months.

RCW 6.27.160, the conclusion “is properly viewed as a finding that the Copenhavers’ arguments were frivolous” under RCW 4.84.185. Resp. Br. 21-23. Despite its concession that the trial court’s fee award did not meet the requirements of the directly governing statute, Seawest claims that the Copenhavers’ appeal of that fee award (as well as the garnishment order) is frivolous as well. *Id.*, citing RAP 18.9(a).

An appeal is “frivolous” if, “considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ, and that the appeal is so devoid of merit that there is no possibility of reversal.” *Advocates for Responsible Development v. Western Washington Growth Management Hearings Board*, 170 Wn.2d 577, 580, 245 P.3d 764 (2010), citing *Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 225, 241, 119 P.3d 325 (2005). “All doubts as to whether the appeal is frivolous should be resolved in favor of the appellant.” *Id.* Moreover, cases of first impression presenting “debatable issues of substantial public importance” very rarely are regarded as frivolous. *Cary v. Allstate Ins. Co.*, 130 Wn.2d 335, 347-48, 922 P.2d 1335 (1996); *Moorman v. Walker*, 54 Wn. App. 461, 466, 773 P.2d 887 (1989). *See also Daugherty*, 28 Ohio St.3d at 442 (“We are asked to resolve two important questions”).

Seawest argues that a trial court's ruling can be affirmed on alternative grounds, but that rule applies only if the record supports the affirmance. Resp. Br. 22, *citing* RAP 2.5(a); *see also*, *State v. Lakotiy*, 151 Wn. App. 699, 707, 214 P.3d 181 (2009) (an alternative theory must be established by pleadings and supported by proof). The record does not support application of RCW 4.84.185 here, both procedurally and substantively. Indeed, RCW 4.84.185 does not even apply here.

Under RCW 4.84.185, the court is required to enter "written findings" that the claim was "frivolous and advanced without reasonable cause[.]" The "determination shall be made upon motion by the prevailing party." *Id.* The trial court made no findings that the claim was "frivolous and advanced without reasonable cause" and Seawest did not make the motion required under RCW 4.84.185. *See* CP 11-16 (Trial court orders dated 2/22/11); CP 29-35 (Seawest motion to clarify court's ruling).⁵ The trial court even acknowledged the reasonableness of the Copenhavers' position. CP 38; *see also*, *In re Lawrence*, 219 B.R. at 799 (conceding that decisions from several states have ruled that earnings remain exempt).

⁵ The sole subject of Seawest's motion to clarify was its request for attorney's fees. Seawest could have, but did not, assert that it should be awarded fees pursuant to RCW 4.84.185.

Indeed, RCW 4.84.185 does not apply here at all. The statute is triggered by dismissal, summary judgment, final judgment, or “other final order terminating the action as to the prevailing party.” The garnishment order here was not a final order.

Even if RCW 4.84.185 was applicable, Seawest’s request for fees fails substantively as well. There is nothing frivolous about the Copenhavers’ attempt to protect their wages against garnishment. The Copenhavers relied upon a plain reading of the statute that gives effect to all of the language within the exemption and is in harmony with the distinction between writs issued to financial institutions and their branches within the statutory scheme. Seawest asks this Court to adopt an interpretation of the statute that reads additional language into the exemption and changes its plain meaning. The interpretation of subsection (3) in this context is an issue of first impression in our state, but the Copenhavers’ interpretation is reinforced by what little amount of Washington authority exists. 28 Wash. Prac. Creditors’ Remedies – Debtors’ Relief, § 8.34 (garnishment of bank accounts “will not reach earnings even if the principal defendant is an employee of the branch”).

Moreover, Copenhavers’ reading is supported by decisions in several jurisdictions (Nevada, Iowa, Missouri, Wisconsin, and Ohio)

holding that earnings retain their exempt status after deposit into a bank account if the funds are traceable. In decisions made in the absence of a statute directly addressing the issue, these courts relied on the same policy considerations cited by Washington decisions that debtors should be protected against indigence, and they recognized what Copenhavers argue here: the “protection afforded by the exemption would be rendered meaningless if exempt status is lost by negotiating the paycheck.” *In re Arnold*, 193 B.R. 897 (Bankr.W.D.Mo. 1996). Further, California and Oregon have come to the same result for the same reasons with statutes that (like Washington) do specify an exemption for personal earnings deposited into a bank account. This Court should reverse the lower court’s decision awarding attorneys’ fees against the Copenhavers and should not award fees on appeal.

III. CONCLUSION

The trial court’s judgment should be reversed. The plain language of RCW 6.27.080(3) exempts the Copenhavers’ earnings from garnishment if contained in a branch bank account. The trial court erred in allowing the Copenhavers’ earnings to be garnished and in awarding attorneys’ fees.

DATED this 28th day of December, 2011.

Respectfully submitted,

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By:



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APPENDIX

40 S.W.3d 873
(Cite as: 40 S.W.3d 873)

C

Court of Appeals of Kentucky.
Carl J. BROWN Appellant/Cross-Appellee,
v.
COMMONWEALTH of Kentucky, Natural Resources and Environmental Protection Cabinet, Appellee/Cross-Appellant.

Nos. 1998-CA-000840-MR (Direct),
1998-CA-000901-MR (Cross).
Oct. 8, 1999.

Natural Resources and Environmental Protection Cabinet, which obtained judgment for coal-mining violations, brought garnishment action against violator and his wife to recover penalties imposed for violations. The Circuit Court, Franklin County, Roger L. Crittenden, J., subjected portions of two checking accounts owned by violator and his wife to garnishment and exempted from garnishment other portions of those accounts. Cross-appeals were taken. The Court of Appeals, Knopf, J., held that: (1) statute governing amount of wages which may be garnished only restricts garnishment and does not exempt wages from garnishment; (2) joint bank account was not immune from garnishment; and (3) if violator could show that wife was sufficiently removed from his indebtedness or that he and wife mutually understood that he would not subject her portion of account to such a risk, then garnishment of her share of account would be inappropriate on remand.

Reversed in part and vacated in part and remanded.

West Headnotes

[1] Exemptions 163 ↪150

163 Exemptions
163VI Protection and Enforcement of Rights
163k150 k. Trial. Most Cited Cases

Garnishment 189 ↪171

189 Garnishment
189VI Proceedings to Support or Enforce
189k166 Trial of Issues Between Plaintiff and Garnishee
189k171 k. Questions for Jury. Most Cited Cases
Trial court's interpretation of a garnishment or exemption statute is a question of law.

[2] Appeal and Error 30 ↪893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases
Court of Appeals reviews trial court's legal conclusions de novo.

[3] Statutes 361 ↪184

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k184 k. Policy and Purpose of Act.
Most Cited Cases

Statutes 361 ↪188

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In General. Most Cited Cases
When interpreting a statute, court looks to statute's express language and overall purpose.

[4] Statutes 361 ↪188

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361 Statutes
 361VI Construction and Operation
 361VI(A) General Rules of Construction
 361k187 Meaning of Language
 361k188 k. In General. Most Cited

Cases
 When a statute's language is plain, sole function of courts is to enforce it according to its terms.

[5] Statutes 361 ↪208

361 Statutes
 361VI Construction and Operation
 361VI(A) General Rules of Construction
 361k204 Statute as a Whole, and Intrinsic Aids to Construction
 361k208 k. Context and Related Clauses. Most Cited Cases

Statutes 361 ↪217.4

361 Statutes
 361VI Construction and Operation
 361VI(A) General Rules of Construction
 361k213 Extrinsic Aids to Construction
 361k217.4 k. Legislative History in General. Most Cited Cases

Statutes 361 ↪226

361 Statutes
 361VI Construction and Operation
 361VI(A) General Rules of Construction
 361k226 k. Construction of Statutes Adopted from Other States or Countries. Most Cited Cases
 When statute's language admits of more than one reasonable interpretation, courts attempt to understand legislative intent by considering legislative history, statutory context, and, where statute is plainly based on or intended to coordinate with legislation from another jurisdiction, construction of similar statutes by other courts.

[6] Exemptions 163 ↪48(1)

163 Exemptions

163I Nature and Extent
 163I(C) Property and Rights Exempt
 163k48 Earnings, Wages, or Salaries
 163k48(1) k. In General. Most Cited

Cases
 Statute governing amount of wages which may be garnished only restricts garnishment and does not exempt wages from garnishment. KRS 427.010(2, 3).

[7] Consumer Credit 92B ↪3.1

92B Consumer Credit
 92B1 In General
 92Bk3 License and Regulation in General
 92Bk3.1 k. In General. Most Cited Cases
 Consumer Credit Protection Act (CCPA) establishes only a floor of debtor protection; states are free under the Act to impose their own more rigorous restrictions on garnishment. Consumer Credit Protection Act, § 102 et seq., 15 U.S.C.A. § 1601 et seq.

[8] Husband and Wife 205 ↪14.11

205 Husband and Wife
 2051 Mutual Rights, Duties, and Liabilities
 205k14 Conveyances to Husband and Wife
 205k14.11 k. Rights of Creditors as to Estate in Entirety or in Common. Most Cited Cases
 Joint bank account was not immune from garnishment for husband's debt; however, if husband could show that wife was sufficiently removed from husband's indebtedness or that husband and wife mutually understood that husband would not subject her portion of account to such a risk, then garnishment of her share of account would be inappropriate on remand.

[9] Garnishment 189 ↪123

189 Garnishment
 189VI Proceedings to Support or Enforce
 189k122 Grounds of Objection and Defenses by Garnishee
 189k123 k. In General. Most Cited Cases

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Because judgment creditor can acquire an interest in garnished property no greater than judgment debtor's, proof of debtor's non-interest will defeat garnishment.

[10] Statutes 361 ↪188

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In General. Most Cited Cases

Statutes 361 ↪208

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k208 k. Context and Related Clauses. Most Cited Cases

While it is true that courts interpreting statutes need be sensitive to their context, the more fundamental rule is that courts give effect to the statute's plain meaning.

[11] Attachment 44 ↪308(2)

44 Attachment
44IX Claims by Third Persons
44k301 Proceedings for Establishment and Determination of Claims to Property
44k308 Evidence
44k308(2) k. Presumptions and Burden of Proof. Most Cited Cases

Execution 161 ↪194(1)

161 Execution
161X Claims by Third Persons
161k187 Proceedings for Establishment and Determination of Claims
161k194 Evidence
161k194(1) k. Presumptions and Burden of Proof. Most Cited Cases

A party to a joint account may, for attachment and execution purposes, initially be presumed to own entire joint account; however, upon notice and objection, debtor or any third-party account tenant may rebut that presumption by proof of separate net contributions to account and an intention that non-contributor's use of the other's contributions be limited.

[12] Appeal and Error 30 ↪329

30 Appeal and Error
30VI Parties
30k329 k. Intervention or Addition of New Parties. Most Cited Cases

Better practice for nonparty attempting to intervene on appeal of garnishment determination was to formally intervene before trial court. Rules Civ.Proc., Rules 19.01, 24.01.

[13] Garnishment 189 ↪166.1

189 Garnishment
189VI Proceedings to Support or Enforce
189k166 Trial of Issues Between Plaintiff and Garnishee
189k166.1 k. In General. Most Cited Cases

Requirements that garnishee request a hearing to challenge order provided he file request within ten days of garnishee's date of receipt existed only for convenience of trial court; therefore, trial court was precluded from enforcing those requirements in so strict a manner as to be inconsistent with rule governing post-judgment garnishment. Rules Civ.Proc., Rule 69.02.

*875 Steve P. Robey, Valerie L. Bock, Law Office of Steve P. Robey, Providence, Kentucky, for appellant/cross-appellee.

Michael P. Wood, Natural Resources and Environmental Protection Cabinet, Frankfort, Kentucky, for appellee/cross-appellant.

Before: BUCKINGHAM, HUDDLESTON, and

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KNOPF, Judges.

OPINION

KNOPF, Judge:

Introduction

Carl Brown appeals and the Commonwealth's Natural Resources and Environmental Protection Cabinet (NREPC or the Cabinet) cross-appeals from March 12, 1998, and January 22, 1998, orders of Franklin Circuit Court subjecting portions of two (2) checking accounts owned by Brown and his wife to garnishment, and exempting from garnishment other portions of those accounts. Being persuaded that both Brown's appeal (1998-CA-000840) and the Cabinet's cross-appeal (1998-CA-000901) identify matters that must be corrected or reconsidered, we reverse in part and vacate in part the circuit court's orders and remand for additional proceedings.

In May 1997, the circuit court, on behalf of NREPC, found Brown liable for coal-mining violations and upheld penalties the Cabinet had assessed against him.^{FN1} In July 1997, the circuit court issued orders of garnishment pursuant to the May judgment, which the Cabinet served on two (2) banks maintaining joint checking accounts for Brown and his wife. One of the banks surrendered the money it held (\$322.39) to the Cabinet, and the other transferred its disputed funds (\$1,473.27) to the court. Brown asserted (it has since been stipulated) that the accounts contained no funds except wages paid to Brown or his wife, and thus that they were protected by two (2) statutory exemptions: one protecting his wages pursuant to KRS 427.010, and one protecting his wife's wages pursuant to KRS 390.310. The trial court rejected Brown's claim with respect to his wife's wages, but agreed that KRS 427.010 precluded garnishment of the accounts to the extent that they could be shown to contain Brown's wages. Brown appeals from the determination that his wife's wages are subject to garnishment, the Cabinet from the determination that Brown's are not.

FN1. In January[] 1999, this Court affirmed the liability determination against Brown, but remanded for reconsideration of the penalty. Because some penalty, albeit not necessarily the original one, remains in effect, the issues raised on this appeal require consideration on the merits. *Price v. Commonwealth of Kentucky, Transportation Cabinet, Ky.*, 945 S.W.2d 429 (1996).

Discussion

Standard of Review

[1][2][3][4][5] The trial court's interpretation of a garnishment or exemption statute is, of course, a question of law. This Court reviews the trial court's legal conclusions *de novo*. *Louisville and Nashville Railroad Co. v. Commonwealth, ex rel Kentucky Railroad Commission, Ky.*, 314 S.W.2d 940, 943 (1958). When interpreting a statute, we look to the statute's express language and overall purpose. *Democratic Party of Kentucky v. Graham, Ky.*, 976 S.W.2d 423 (1998); *Kentucky Region Eight v. Commonwealth, Ky.*, 507 S.W.2d 489 (1974). The task begins with the language of the statute itself. When a statute's language is plain, "the sole function of the courts is to enforce it according to its terms." *876 *Caminetti v. United States*, 242 U.S. 470, 485, 37 S.Ct. 192, 194, 61 L.Ed. 442 (1917); *Bailey v. Reeves, Ky.*, 662 S.W.2d 832 (1984). When the statute's language admits of more than one reasonable interpretation, however, courts attempt to understand the legislative intent by considering the legislative history, the statutory context, and, where the statute is plainly based on or intended to coordinate with legislation from another jurisdiction, the construction of similar statutes by other courts. *Schmitt Furniture Company, Inc. v. Commonwealth of Kentucky Revenue Cabinet, Ky.*, 722 S.W.2d 889 (1987); *Burke v. Stephenson, Ky.*, 305 S.W.2d 926 (1957); *City of Owensboro v. Noffsinger, Ky.*, 280 S.W.2d 517 (1955); and *City of Covington v. State Tax Commission*, 257 Ky. 84, 77 S.W.2d 386 (1934).

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Brown's Wages

[6] We shall first address the issue concerning Brown's wages and KRS 427.010. KRS Chapter 427 is titled Exemptions, and section .010 of that chapter provides in pertinent part as follows:

- (2) Except as provided in subsection
- (3) of this section and KRS 427.050, the maximum part of the aggregate disposable earnings of an individual for any workweek which is subjected to garnishment may not exceed the lesser of either:
- (a) Twenty-five percent of his disposable earnings for that week, or
- (b) The amount by which his disposable earnings for that week exceed thirty times the federal minimum hourly wage prescribed by Section 6(a)(1) of the Fair Labor Standards Act of 1938 in effect at the time the earnings are payable. In the case of earnings for any pay period other than a week, the multiple of the federal minimum hourly wage equivalent to that set forth in paragraph (b) of this subsection as prescribed by regulation by the federal secretary of labor shall apply.
- (3) The restrictions of subsection
- (2) of this section do not apply in the case of:
- (a) Any order of any court for the support of any person.
- (b) Any order of any court of bankruptcy under Chapter 13 of The Bankruptcy Code.
- (c) Any debt due for any state or federal tax.

This statute is modeled upon the federal Consumer Creditor Protection Act (the "CCPA").^{FN2} That act requires state garnishment exemption statutes to comply with federal limitations on amounts that may be garnished. Consequently, most state wage garnishment exemption statutes, including Kentucky's, track the language of the federal act.

The Supreme Court interpreted the federal act in *Kokoszka v. Belford*, 417 U.S. 642, 94 S.Ct. 2431, 41 L.Ed.2d 374 (1974), and determined that a tax refund did not constitute "disposable earnings" under the CCPA and therefore was not exempt from administration in Kokoszka's bankruptcy case. In reaching this decision, the Supreme Court analyzed the purpose of the CCPA and stated that

FN2. Congress enacted Subchapter II of the CCPA (15 U.S.C. §§ 1671 – 1677) in 1968 for the purpose of imposing nationwide restrictions on garnishments to protect debtors from the predatory lending practices of some credit institutions. *Kokoszka v. Belford*, 417 U.S. 642, at 650–51, 94 S.Ct. at 2435–36, 41 L.Ed.2d 374. 15 U.S.C. § 1671. The CCPA, which became effective on July 1, 1970, preempts any less restrictive state garnishment statutes. 15 U.S.C. § 1673(c).

[i]ndeed, Congress' concern [in passing the act] was not the *administration* of a bankrupt's estate but the *prevention* of *877 a bankruptcy in the first place by eliminating "an essential element in the predatory extension of credit resulting in a disruption of employment, production, as well as consumption" and a consequent increase in personal bankruptcies. *Id.* at 650, 94 S.Ct. at 2436 (footnote omitted) (citing H.R.Rep. No. 1040, 90th Cong., 1st Sess., 20 (1967)).

The Court, making further reference to the legislative history of the CCPA, went on to explain that

"[t]he limitations on the garnishment of wages adopted ... while permitting the continued orderly payment of consumer debts, will relieve countless honest debtors driven by economic desperation from plunging into bankruptcy in order to preserve their employment and insure a continued means of support for themselves and their families."

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Id. at 651, 94 S.Ct. at 2436 (quoting H.R.Rep. No. 1040, 90th Cong., 1st Sess., 21 (1967)). From this history, the Supreme Court summarized that “Congress, in an effort to avoid the necessity of bankruptcy, sought to regulate garnishment in its usual sense as a levy on periodic payments of compensation needed to support the wage earner and his family on a week-to-week, month-to-month basis.” *Id.*

As noted by the Supreme Court in *Kokoszka*, the federal CCPA did not create a true exemption applicable to bankruptcy proceedings, but sought instead to prevent bankruptcies by protecting the debtor's employment. This protection consisted of a limitation on the portion of earnings subject to the employer's garnishment and a prohibition against discharging employees because their earnings had been garnished for any one indebtedness. These provisions were not intended to create a new fund beyond the reach of creditors, but only to prevent creditors from unduly burdening the employment relationship.

[7] The act's reference to wages “payable or paid” has also required interpretation. Is it applicable only to wages still under the employer's control, or is it meant to apply to wages even after they have been transferred to the employee? In light of the CCPA's limited purpose, virtually all of the courts to consider whether that act applies to wages deposited into bank accounts or otherwise removed from the employer's control have found that it does not. *In re Lawrence*, 219 B.R. 786 (Bankr.E.D.Tenn.1998) (collecting cases); *Usery v. First National Bank of Arizona*, 586 F.2d 107 (1978). The CCPA, however, establishes only a floor of debtor protection; states are free under the act to impose their own more rigorous restrictions on garnishment. The first question before us, therefore, becomes whether Kentucky's adoption of the CCPA evidences an intention to extend the act's protection to wages that have passed from the employer to the employee's bank account.

In ruling that it does, the trial court relied heav-

ily upon our Supreme Court's opinion in *Matthews v. Lewis*, Ky., 617 S.W.2d 43 (1981). In that case, workers' compensation benefits in the appellant's checking account had been garnished, and the Court was asked to decide whether KRS 342.180 precluded the garnishment. That statute provided ^{FN3} in part that “[n]o claim for compensation under this chapter shall be assignable; and all compensation and claims therefor shall be exempt from all claims of creditors.” The Court ruled that this language was intended to preclude garnishment, and observed that

FN3. KRS 342.180 was amended in 1994.

[o]ur society's contemporary social programs exhibit a philosophy of relief for *878 the distressed, the impoverished, and the victims of personal and financial catastrophes among us. The Workers' Compensation Act is simply one aspect of those social programs. Kentucky's exemption statutes are simply another necessary instrument in the overall scheme of social welfare programs. They are the teeth in the prosecution [sic] given certain deserving victims from their creditors.

....

We hold that unless they provide clearly to the contrary, Kentucky's exemption statutes, including but not limited to KRS 342.180, extend protection to deposits in bank checking accounts so long as those deposits can be identified as or traced to payments of exempt funds.

Id. at 44, 46.

Believing the pertinent portions of KRS 427.010 to be an exemption statute, and believing the portions of *Matthews* just quoted to apply thereto, the trial court concluded that Brown's wages traceable to his checking accounts were subject to the statutory limitations on garnishment. We disagree.

As discussed above, KRS 427.010(2) and (3) appear to create what is most accurately called a re-

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striction on garnishment, not, as did the workers' compensation statute at issue in *Matthews*, a true exemption with bankruptcy ramifications. KRS 427.010(2), it will be recalled, provides only that "the maximum part of the aggregate disposable earnings of an individual for any workweek *which is subjected to garnishment* may not exceed" (emphasis added). KRS 342.180, on the other hand, as it did at the time of *Matthews*, still provides in part that "all compensation and claims therefor ... *shall be exempt from all claims of creditors.*" (emphasis added). Here and elsewhere, the General Assembly has demonstrated that, when it intends an exemption, it says so. *See, for example*, KRS 40.550(3) ("no claim for payment shall be subject to attachment, levy, garnishment or seizure by or under any legal or equitable process whatever") and KRS 61.690 ("All retirement allowances and other benefits ... are hereby exempt from any state, county, or municipal tax, and shall not be subject to execution, attachment, garnishment, or any other process, and an assignment thereof shall not be enforceable in any court.") We note that the states whose courts have found in their wage protection statutes a true exemption are all states whose legislatures modified the federal statute to make that intention clear. They have precluded not just the garnishment of wages beyond the twenty-five (25) percent limit, but the "attachment or execution upon" such wages as well. *In re Lawrence, supra*. This is the sort of language legislatures use to create exemptions, the General Assembly included. We are thus persuaded that KRS 427.010 is not an exemption statute and, therefore, that *Matthews* does not bear on our interpretation of it. We also note that the Supreme Court's opinion in *Kokoszka* and the Ninth Circuit's opinion in *Usery, supra*, are more than twenty (20) years old now and may be presumed to have come to the General Assembly's attention. That the General Assembly has not in the interim deviated from the federal version of the law strongly suggests an intention to adopt the federal interpretation. *Democratic Party v. Graham, supra*. We conclude that KRS 427.010(2) and (3) provide only for limited debtor protection and not for a

broader exemption such as that created by KRS 432.180 and similar statutes. We conclude further that the limited protection is the same found to have been provided by the federal CCPA, that is, a *879 limitation only on the extent to which an employee's earnings may be garnished at his or her workplace.

Brown maintains that this construction cannot be correct because it renders the statute meaningless. What relief is there for the debtor, he wonders, if the creditor need only replace his garnishment of the employer with a garnishment of the bank? We believe, however, that the difference is significant. Checking accounts are not as necessary as employment to the financial viability of a household. Furthermore, the limited protection afforded by the law encourages debtors and creditors alike to consider the long-term ramifications of the garnishment. Thus, both the creditor and the debtor must decide whether they would not be better off in the long run if the debtor was not forced into bankruptcy, but was instead encouraged to continue working and steadily repaying his debts. We do not agree, therefore, that KRS 427.010(2) and (3) are meaningless unless extended to wages deposited in a checking account.

We do agree with Brown, however, that at least the secondary purposes of the statute are to some extent compromised by the garnishment at issue here. For, while the debtor's plunge into bankruptcy is made likely if all or most of his wages are intercepted before he receives them, confiscation of the debtor's wages immediately after receipt tends toward the same result. The question arises, therefore, whether there is not a more generous interpretation of the statute than the one we have suggested. Would it not be possible to do both, to protect more fully than the CCPA seems to do the debtor's interest in maintaining a viable household as he gradually climbs out of debt, while at the same time avoiding the creation of a new exemption? It is conceivable, for example, that wages in a checking account could be afforded protection from creditors as

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long, but only as long, as the debtor refrained from bankruptcy and continued to work under a limited wage garnishment.

We are not persuaded, however, that KRS 427.010(2)-(3) can reasonably be read to afford such protection. Neither it, the similar sister-state statutes, nor the CCPA has ever, to our knowledge, been so read. Nor is the General Assembly likely to have intended such protection without having said so more clearly than KRS 427.010 does. We conclude, therefore, that, while the employment protection afforded by KRS 427.010(2)-(3) may provide only a weak and imperfect bulwark against bankruptcy, that imperfection does not render the statute meaningless, nor does it compel the interpretation adopted by the circuit court. Accordingly, we reverse the portion of the trial court's judgment that excluded from the Cabinet's order of garnishment the portions of Brown's checking accounts attributable to his wages.

Brown's wife's wages

[8] The parties stipulated that Brown's wife, Darla, contributed about forty-four (44) percent of the monies held in the garnished accounts. Brown claims that Darla's contributions are "exempt" from garnishment, and that the trial court erred by failing to so rule. The trial court, relying on *Barton v. Hudson*, Ky.App., 560 S.W.2d 20 (1977), held that, because Brown was authorized by the terms of the accounts to withdraw all the money in them, they should be deemed his separate property for garnishment purposes. Again, we must disagree. We are persuaded that the trial court has read *Barton* too broadly and in so doing has run afoul of statutory provisions for the joint ownership of checking accounts.

[9] It is well at the outset of our discussion of this issue to address a point of terminology. The garnishment statute, *880 KRS 425.501(5), provides in part that a challenged order of garnishment may not be upheld unless "the court finds that the garnishee was, at the time of service of the or-

der upon him, possessed of any property of the judgment debtor, or was indebted to him, and the property or debt is not exempt from execution" (emphasis added). The question raised by Darla's contribution to the checking accounts does not concern an exemption, as the parties seem to have presumed, but rather the other prong of KRS 425.501(5), that is, whether and to what extent the garnishee banks are "possessed of any property of the judgment debtor...." Because the judgment creditor can acquire an interest in garnished property no greater than the judgment debtor's, proof of the debtor's non-interest will defeat the garnishment. *Bank One, Pikeville, Kentucky v. Commonwealth of Kentucky, Natural Resources and Environmental Protection Cabinet*, Ky.App., 901 S.W.2d 52 (1995).

In *Barton v. Hudson*, this Court was asked to decide whether a joint checking account between husband and wife with right of survivorship was subject to garnishment by a creditor of the husband, or whether, like similarly owned realty, the checking account was immune from such execution. The Court distinguished the two (2) forms of property, in part on the ground that either the husband or the wife alone could alienate the funds in the account, and upheld the garnishment. As the Court noted, although a few states regard spouses' jointly held checking accounts as tenancies by the entirety in which neither spouse has a separate interest, the majority rule is otherwise. 560 S.W.2d at 22 (citing Annot. "Joint Bank Account as Subject to Attachment, Garnishment, or Execution by Creditor of one of the Joint Depositors" 11 A.L.R.3d 1465, II, § 3).

It thus having been determined that joint accounts are not immune from garnishment, the next question is to what extent is the account vulnerable? In *Barton*, the Court upheld the garnishment to the full extent of the husband's debt, but the question of the husband's ownership does not seem to have been an issue in that case, inasmuch as the Court did not discuss the wife's countervailing in-

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terest or the rule that the judgment creditor acquires an interest in the garnished property no greater than the debtor's.

Courts that have addressed this question have divided on the extent to which the debtor's access to the full account should be deemed proof of his or her ownership thereof. The Supreme Court of Minnesota, for example, has ruled that a joint owner of a checking account may, at least with respect to creditors, be conclusively presumed to own the entire balance, the other owners, whether contributors or not, having assumed the risk that any one of them might compromise it. *Park Enterprises v. Trach*, 233 Minn. 467, 47 N.W.2d 194 (1951).

Most courts, however, more sensitive than the Minnesota Court to the due process concerns involved and to the fact that people use such accounts for myriad purposes, have adopted a less categorical approach. Nebraska's courts, for instance, presume initially that joint-account holders own the account in equal proportions, but the presumption may be rebutted by evidence of the owners' different contributions, different degrees of control, and/or different intentions. The burden of proof is on the party attacking the presumption. *In re Overton*, 169 B.R. 196 (Bankr.D.Neb.1994). Hawaii's courts, on the other hand, presume that a joint-account holder owns the entire account, but allows her, or any other joint tenant, to rebut the presumption by suitable proof. *881 *Traders Travel International, Inc. v. Howser*, 69 Haw. 609, 753 P.2d 244 (1988). See also *Maloy v. Stuttgart Memorial Hospital*, 316 Ark. 447, 872 S.W.2d 401 (1994). According to the A.L.R. annotation cited in the *Barton* opinion, Hawaii's approach is that of the majority. This rule is favored in large part because it puts the burden of proving the nature of the account on those in the best position to do so. *Traders Travel International, Inc. v. Howser*, *supra*; 11 A.L.R.3d at 1476 (1967, Supp.1999).

The trial court here apparently understood *Barton* to imply a rule similar to Minnesota's. Brown's access to the entire balances of the joint accounts,

the court ruled, passed to the Cabinet. Its transfer of the accounts to itself, therefore, would injure Darla no more than would Brown's unilateral emptying of them. As noted, however, we are not persuaded that *Barton* even addressed this issue, much less decided it in this manner. On the contrary, we believe that provisions of KRS Chapter 391 require a different result.

KRS 391.310 provides in pertinent part as follows:

(1) A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.

A party's "net contribution" to the account is defined at KRS 391.300(6) as

the sum of all deposits thereto made by or for him, less all withdrawals made by or for him which have not been paid to or applied to the use of any other party, plus a pro rata share of any interest or dividends included in the current balance. The term includes, in addition, any proceeds of deposit life insurance added to the account by reason of the death of the party whose net contribution is in question[.]

Finally, KRS 391.305 provides that

The provisions of KRS 391.310 to 391.320 concerning beneficial ownership as between parties, or as between parties and P.O.D. payees or beneficiaries of multiple-party accounts, are relevant only to controversies between these persons and their creditors and other successors, and have no bearing on the power of withdrawal of these persons as determined by the terms of account contracts. The provisions of KRS 391.335 to 391.360 govern the liability of financial institutions who make payments pursuant thereto, and their set-off rights.

The Browns maintain that these statutes limit

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Brown's (and hence the Cabinet's) interest in the accounts to his net contributions thereto unless it can be shown that he and Darla intended something different. The trial court, on the other hand, ruled that these statutory provisions do not apply in this case because the chapter in which they appear, which is entitled **Descent and Distribution**, applies only to situations involving a death. With a significant proviso, we agree with the Browns.

[10] While it is true that courts interpreting statutes need be sensitive to their context, the more fundamental rule is that courts give effect to the statute's plain meaning. *Bailey v. Reeves, supra*. The codification of statutes, moreover, by means of titles and chapter headings does not alter that plain meaning. KRS 446.140. Property interests in particular, which arise in so many different legal contexts, defy neat statutory compartmentalization. That property interests in addition to those pertaining to decedents and their estates should be addressed in KRS Chapter 391 is no less to be expected than that provisions regarding decedents will be addressed*882 in Chapters other than 391.^{FN4} *Cf. In re Overton, supra* (construing a statute similar to ours). The trial court thus erred, by failing to apply to this case the above-quoted joint-account provisions.

FN4. See for example KRS 381.120.

[11] Those provisions expressly distinguish between the customers' agreement with the bank concerning each joint tenant's authority to draw on the joint account, and the ability of creditors to reach account funds contributed by a non-debtor joint tenant. Courts are obliged, therefore, to consider that distinction. Contrary to Brown, however, who naturally favors, a presumption that he held no interest in Darla's wages, we agree with those courts, such as the Hawaii court cited above, that have held that a party to a joint account may, for attachment and execution purposes, initially be presumed to own the entire joint account. Upon notice and objection, however, the debtor or any third-party account tenant may rebut that presumption by

proof of separate net contributions to the account and an intention that the non-contributor's use of the other's contributions be limited. 11 A.L.R.3d at 1476 § 8 (1967, Supp.1999). The parties in this case stipulated that the Browns contributed to their joint checking accounts in particular net amounts. If Brown can further show that Darla was sufficiently removed from Brown's indebtedness or that Brown and Darla mutually understood that Brown would not subject her portion of the account to such a risk, then garnishment of Darla's share of the accounts would be inappropriate. Accordingly, we must vacate this portion of the trial court's judgment and remand for additional findings on the extent of Brown's ownership of the joint accounts and the extent otherwise to which the joint accounts are vulnerable to the order of garnishment.

Procedural Questions

[12] We need, finally, to address some procedural matters. First, Darla participated before the trial court and has attempted to join this appeal even though she has never formally become a party. Her right to intervene in the appeal is anything but assured. *Pearman v. Schlaak, Ky., 575 S.W.2d 462* (1978). To be sure, Darla's claimed interest in the garnisheed accounts makes her intervention in the proceedings appropriate. CR 19.01. The better practice, however, is for her formally to intervene before the trial court. CR 24.01. Our remand of this case will give her an opportunity to do so.

Next, the Cabinet maintains that Brown waived his right to object to the garnishment by failing to abide by the terms of the garnishment order. Pursuant to KRS 425.501 and CR 69.02, that order instructed the garnishee banks to forward a copy of the order to Brown. It also, apparently for the sake of administrative efficiency, advised Brown that he might request a hearing to challenge the order provided he file his request "within ten (10) days of the Garnishee's Date of Receipt...." The date of receipt was July 25, 1997, and Brown's notice of exceptions to the order was not filed until August 6, 1997. The Cabinet complains that Brown's notice

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was untimely and was also defective in that it did not expressly request a hearing. The Cabinet's complaints merit only brief comment.

[13] As the trial court noted, neither of these particular requirements is contained in CR 69.02.^{FN5} They are incorporated in *883 the standard garnishment order to facilitate processing. Because these requirements exist only for the convenience of the trial court, the trial court is precluded from enforcing them in so strict a manner as to be inconsistent with CR 69.02, and, of course, is afforded broad discretion to enforce them leniently. *West v. Goldstein*, Ky., 830 S.W.2d 379 (1992); *Ready v. Jamison*, Ky., 705 S.W.2d 479 (1986). That is what it chose to do here. Because the debtor's notice from the garnishee was by mail, the court read the ten-day requirement as including a three-day notice period, (CR 6.05), by virtue of which Brown's exceptions were timely. The court construed the order's "request a hearing" provision to require only that the debtor's exceptions include reasons therefore sufficient to raise a genuine issue. Brown's exceptions clearly did. These rulings in no way exceeded the trial court's broad discretion to manage its own docket.

FN5. CR 69.02 provides in part as follows:

Except for child support arrearages, where wages are garnisheed, the attorney for the party in whose behalf the order of wage garnishment was issued, or the clerk of the court if such party has no attorney of record, shall safely hold the garnisheed funds in escrow for a period of fifteen (15) days from the issuance date of the employer's garnishment check. If the debtor files an objection within that period, the funds shall continue to be held until the court rules upon the objection. If an exemption is asserted and a hearing held, the attorney or clerk of the court shall disburse the garnisheed funds as ordered by the court. If no exemption is asserted the attorney

or clerk of the court shall after the fifteen (15) day period disburse the funds to the party in whose behalf the order of garnishment was issued.

Conclusion

In sum, we are persuaded that KRS 427.010(2) does not create a true exemption and thus does not shield Brown's wages from garnishment after they have passed from his employer's control. We are also persuaded that KRS 391.310 limits, at least potentially, Brown's ownership of the checking account he shares with his wife and thus limits, potentially, the extent to which the account may be garnished. Brown and his wife (after proper intervention) must therefore be afforded an opportunity to prove that such a limitation exists.

For these reasons, we reverse in part and vacate in part the March 12, 1998, and January 22, 1998, orders of Franklin Circuit Court, and remand for additional proceedings consistent herewith.

ALL CONCUR.

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V

Supreme Court of Ohio.
 DAUGHERTY, Appellee,
 v.
 CENTRAL TRUST COMPANY OF NORTH-
 EASTERN OHIO, N.A., Appellant.

No. 86-180.
 Dec. 30, 1986.

Debtor brought action for return of funds set off by creditor bank. The Canton Municipal Court granted summary judgment for debtor, and bank sought review. The Court of Appeals, Stark County, affirmed, and certified record of case for review and final determination. The Supreme Court held that: (1) debtor's exempt personal earnings retained their statutory exemption when deposited in bank checking account, and (2) debtor's exempt personal earnings were not exempt from bank's right to set off those funds against matured debt.

Affirmed in part and reversed in part.

Douglas and Wright, JJ., concurred in judgment only.

Holmes, J., concurred in part and dissented in part and filed opinion.

West Headnotes

[1] Banks and Banking 52 ↪154(2)

52 Banks and Banking
 52III Functions and Dealings
 52III(C) Deposits
 52k154 Actions by Depositors or Others for Deposits
 52k154(2) k. Time to Sue and Limitations. Most Cited Cases
 Debtor's action to recover her checking account funds set off by creditor bank was not barred by doctrines of waiver and laches where debtor imme-

diately objected to setoff and bank failed to show that it had been prejudiced by debtor's delay in asserting claim.

[2] Exemptions 163 ↪48(1)

163 Exemptions
 163I Nature and Extent
 163I(C) Property and Rights Exempt
 163k48 Earnings, Wages, or Salaries
 163k48(1) k. In General. Most Cited Cases

Debtor's personal earnings, which were statutorily exempt from execution, garnishment, attachment, or sale to satisfy judgment or order, retained their exempt status when deposited in personal checking account, where source of exempt funds was known or reasonably traceable; abrogating *Society Natl. Bank v. Tallman*, 19 Ohio App.3d 127, 483 N.E.2d 170. R.C. § 2329.66(A)(13).

[3] Exemptions 163 ↪62

163 Exemptions
 163I Nature and Extent
 163I(D) Liabilities Enforceable Against Exempt Property
 163k62 k. Exceptions from Exemptions in General. Most Cited Cases

Debtor's personal earnings, which were statutorily exempt from execution, garnishment, attachment, or sale to satisfy judgment or order, were not exempt from bank's right to set off those funds, on deposit in checking account, against debtor's matured debt. R.C. § 2329.66(A).

****1100 *441** On February 15, 1979, appellee Genevieve L. Richmond, now Daugherty, along with her then husband, entered into an installment loan agreement with appellant, the Central Trust Company of Northeastern Ohio, N.A. Pursuant to the terms of this loan, appellee agreed to pay monthly installments of \$42.42.

Appellee and her husband failed to make the

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monthly payments as required by the agreement. As a result, appellant commenced an action in the Canton Municipal Court and obtained judgment against appellee in the amount of \$468.62, plus interest and court costs.

In an effort to secure a portion of this judgment, on March 16, 1983, appellant set off \$369.59 from a personal checking account which appellee also maintained with Central Trust. Appellee thereafter filed a complaint in the Canton Municipal Court demanding return of the money, plus damages and costs. The parties agree that the funds debited by appellant consisted of wages from appellee's (part-time) employment at Burger King and that those funds would be exempt from judicial process pursuant to R.C. 2329.66(A)(13).^{FN1} Those funds, **1101 appellee alleged, were further exempt *442 from setoff by the bank pursuant to the public policy embodied in R.C. 2329.66.

FN1. R.C. 2329.66 provides in part as follows:

“(A) Every person who is domiciled in this state may hold property exempt from execution, garnishment, attachment, or sale to satisfy a judgment or order, as follows:

“ * * *

“(13) Except as provided in section 3113.21 of the Revised Code, personal earnings of the person owed to him for services rendered within thirty days before the issuing of an attachment or other process, the rendition of a judgment, or the making of an order, under which the attempt may be made to subject such earnings to the payment of a debt, damage, fine, or amercement, in an amount equal to the greater of the following amounts:

“(a) If paid weekly, thirty times the cur-

rent federal minimum hourly wage; or if paid biweekly, sixty times the current federal minimum hourly wage; if paid semimonthly, sixty-five times the current federal minimum hourly wage; or if paid monthly, one hundred thirty times the current federal minimum hourly wage which is in effect at the time the earnings are payable, as prescribed by the ‘Fair Labor Standards Act of 1938,’ 52 Stat. 1060, 29 U.S.C. 206(a)(1), as amended.

“(b) Seventy-five percent of the disposable earnings owed to the person.”

Both sides filed a motion for summary judgment. The trial court found in appellee's favor and granted judgment to her in the amount of \$1,000. Appellant then sought review of several issues in the court of appeals. The appellate court, in affirming the judgment for appellee, held that (1) appellee was not barred from asserting her claim by waiver or laches, (2) personal earnings exempt from judicial process pursuant to R.C. 2329.66 were also exempt from a bank's exercise of its right of setoff and (3) statutorily exempt personal earnings retain their exemption when deposited in a bank checking account, so long as the source of the exempt funds is reasonably traceable.

The court, finding its decision to be in conflict with the decision rendered by the Court of Appeals for Crawford County in *Society Natl. Bank v. Tallman* (1984), 19 Ohio App.3d 127, 483 N.E.2d 170, certified the record of the case to this court for review and final determination.

Thomas G. Bedall, Canton, for appellee.

David T. Tarr, Canton, for appellant.

PER CURIAM.

[1] We are asked to resolve two important questions. The first is whether personal earnings which are exempted by R.C. 2329.66 from execu-

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tion, garnishment, attachment or sale by judgment creditors retain their statutory exemption when deposited in a bank checking account. The second question is whether personal earnings exempt from judicial process pursuant to R.C. 2329.66(A) are also exempt from a bank's right to set off those funds against a matured debt of a depositor.^{FN2}

FN2. Appellant also contended below that appellee's action to recover her checking account funds was barred by the doctrines of laches and waiver. Appellant argued that appellee's action was precluded because she did not protest the removal of her funds until the filing of her lawsuit nearly one year after the setoff took place.

We find this contention to be wholly without merit. In order for appellant to succeed on the defense of laches, the bank must establish that it has been materially prejudiced by appellee's delay in asserting her claim. *Connin v. Bailey* (1984), 15 Ohio St.3d 34, 35-36, 472 N.E.2d 328; *Kinney v. Mathias* (1984), 10 Ohio St.3d 72, 461 N.E.2d 901; *Smith v. Smith* (1959), 168 Ohio St. 447, 156 N.E.2d 113 [7 O.O.2d 276], paragraph three of the syllabus. As we observed in *Connin, supra*, 15 Ohio St.3d at 36, 472 N.E.2d 328, “ * * * delay in and of itself in asserting a right does not constitute laches-length of time alone is insufficient to constitute a material prejudice.” In the instant case, appellant has not even alleged, much less demonstrated, that it has been prejudiced in any way by appellee's delay in asserting her claim. Clearly, then, appellant is not entitled to assert the defense of laches.

As to appellant's defense of waiver, we note that appellant must show that appellee intentionally relinquished a known right. *Allenbaugh v. Canton* (1940), 137 Ohio St. 128, 133, 28

N.E.2d 354 [17 O.O. 473]. The evidence in the record demonstrates that appellee did no such thing. On March 18, 1983, one day following the setoff and immediately upon learning of it, appellee telephoned the bank and made her position quite clear. In fact, appellant's agent jotted the following notes on its Installment Loan Department card:

“3-18 CCI [appellee] sd that we had no right to take this money[.] She got it from welfare. He [sic] exhusband is in Winterhaven, Florida[.] 3-16 ripped \$369.57 [sic] mad, mad, mad sd she is going to call her atty [.]” (Emphasis *sic*.)

This exchange hardly typifies an intentional relinquishment of a known right by appellee. Thus it cannot be said that appellee waived her right to bring an action to recover the funds set off by appellant.

443** We first consider the question of whether personal earnings exempt from creditors' reach pursuant to R.C. 2329.66(A) retain their exempt status when deposited in a personal checking account. Appellant would have this court adopt the *1102** approach taken by the court of appeals in *Society Natl. Bank v. Tallman, supra*. In *Tallman*, the court reasoned that personal earnings voluntarily deposited in a checking account were not exempt from garnishment under R.C. 2329.66(A) because they lost their character as “personal earnings” once deposited. The *Tallman* decision is in conflict with that of the reviewing appellate court in the instant case, which held that statutorily exempt personal earnings deposited in a checking account retain their exempt status, so long as the source of the exempt funds is reasonably traceable. The opinion of the court of appeals herein parallels those issued by the Court of Appeals for Hamilton County in *Bethesda Hospital v. Wolf* (1979), 11 O.O.3d 168, and *First Natl. Master Charge v. Gilardi* (1975), 44 Ohio App.2d 383, 324 N.E.2d 576 [73 O.O.2d 460].

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In each of the foregoing cases, various federal court decisions on related issues were analyzed and applied. The first of these federal decisions is *Porter v. Aetna Cas. & Sur. Co.* (1962), 370 U.S. 159, 82 S.Ct. 1231, 8 L.Ed.2d 407. In *Porter*, a judgment creditor of an incompetent veteran attached deposits in two federal savings and loan accounts established for his disability compensation. By federal statute, veterans benefits were exempt from attachment by creditors. The precise question posed in *Porter* was whether those benefits retained their exempt status after being deposited in the accounts. The court held at 162, 82 S.Ct. at 1233, that the funds remained exempt after deposit, stating:

“Since legislation of this type should be liberally construed, * * * [citations omitted] we feel that deposits such as are involved here should remain inviolate. The Congress we believe, intended that veterans in the safekeeping of their benefits should be able to utilize those normal modes adopted by the community, for that purpose-provided the benefit funds, regardless of the technicalities of title and other formalities, are readily available as needed for support and maintenance, actually retain the qualities of moneys, and have not been converted into permanent investments.”

The high court followed *Porter* in *Philpott v. Essex County Welfare Bd.* (1973), 409 U.S. 413, 93 S.Ct. 590, 34 L.Ed.2d 608. *Philpott* involved a suit brought by the welfare agency to reach a bank account containing the depositor's social security disability benefits. Again, by federal statute, these benefits were exempt from court action brought by creditors. The court similarly held at 417, 93 S.Ct. at 592 that the funds on deposit retained their exempt status and were protected against the use of any legal process to reach them.

A situation different from that in *Porter, supra*, and *Philpott, supra*, *444 was presented in *Usery v. First Natl. Bank of Arizona* (C.A. 9, 1978), 586 F.2d 107. In *Usery*, the court held that a bank was not required to determine a debtor's right to a wage earner's exemption under the Consumer Credit Pro-

tection Act when served with a garnishment directed at the depositor's account. The *Usery* court, in determining that these wages were *not* exempted by the Act once deposited, distinguished its judgment from that of the Supreme Court in *Porter* and *Philpott*. In *Usery*, the court concluded at 111 that the broad statutory exemptions on which *Porter* and *Philpott* were based were not present in the Consumer Credit Protection Act stating:

“* * * In *Porter* the Court held that veterans' benefits remain exempt from process even when deposited in a federal savings and loan association account. However, the statute interpreted by the Court in that case explicitly stated that such benefits ‘shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.’ 38 U.S.C. § 3101(a). The clear statement in that statute of a restriction on a creditor's ability to reach veterans' benefits even though they had already passed into the hands of the beneficiary, suggests that in drafting the Consumer Credit Protection Act Congress would have chosen similar unequivocal terms to restrict garnishment of wages already received by an employee if it had intended such a restriction. The **1103 Social Security Act, interpreted in *Philpott* to protect from legal process social security payments on deposit in a bank account, has similarly broad language: ‘[N]one of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process...’ 42 U.S.C. § 407. *Unlike the Social Security Act, the Consumer Credit Protection Act protects the funds concerned only from garnishment. If Congress had meant to restrict creditors' access to wages even after they left the control of the employer, it seems anomalous that it did not provide for protection from attachment of such monies while in the hands of the employee, as they did in the case of social security benefits.*” (Emphasis added.)

In the case at bar, the lower courts interpreted and applied the holdings of *Porter, Philpott* and

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Usery but reached conflicting results. The *Tallman* court relied on *Usery* in deciding that personal earnings deposited in a checking account do not retain the statutory exemption from garnishment once deposited. We believe, however, that this reliance was mistaken. The *Tallman* court failed to analyze the language of R.C. 2329.66 in order to determine whether its protection would continue after the wages left the control of the employer. Ohio's exemption statute is not so narrowly drafted as the statute at issue in *Usery*. R.C. 2329.66(A) provides in relevant part:

“Every person who is domiciled in this state may hold property exempt from *execution, garnishment, attachment, or sale* to satisfy a judgment or order * * *.” (Emphasis added.)

*445 That statutory language strongly indicates that exempted earnings are to remain exempt even *after* receipt by an employee. Unlike the Consumer Credit Protection Act, R.C. 2329.66(A) protects the funds concerned not only from garnishment, but also from attachment and execution. Thus, in contrast to the Consumer Credit Protection Act, the General Assembly apparently did intend to restrict creditors' access to exempt wages by providing for protection from attachment of such monies while in the hands of the employee. Therefore, the *Tallman* court's holding is without basis.

The better view, which is consistent with the language of R.C. 2329.66(A), is that statutorily exempt funds do not lose their exempt status when deposited in a personal checking account. Accord *Porter, supra*; *Philpott, supra*; *GMAC v. Deskins* (1984), 16 Ohio App.3d 132, 474 N.E.2d 1207 (social security benefits); *Goodyear Service Store v. Speck* (1976), 48 Ohio App.2d 115, 355 N.E.2d 886 [2 O.O.3d 82] (welfare benefits); *Gilardi, supra* (welfare benefits); *Wolf, supra* (personal earnings). The legislature's purpose, in exempting certain property from court action brought by creditors, was to protect funds intended primarily for maintenance and support of the debtor's family. *Dennis v. Smith* (1932), 125 Ohio St. 120, 180 N.E.

638. This legislative intent would be frustrated if exempt funds were automatically deprived of their statutory immunity when deposited in a checking account which a depositor commonly maintains in order to pay by check those regular subsistence expenses he incurs.

[2] In the instant case, the parties agreed that appellee's wages were exempt from legal process pursuant to R.C. 2329.66(A)(13). The parties also agreed that the proceeds of her checking account were from these wages. Thus, the source of the exempt funds was not only reasonably traceable, it was conclusively known. Consistent with the foregoing, then, we therefore affirm the judgment of the court of appeals below and hold that personal earnings exempt from execution, garnishment, attachment, or sale to satisfy a judgment or order pursuant to R.C. 2329.66(A)(13) retain their exempt status when deposited in a personal checking account, so long as the source of the exempt funds is known or reasonably traceable.^{FN3}

FN3. Additionally, we note that appellee's funds on deposit in her checking account retain their exemption because they meet the test set forth in *Porter v. Aetna Cas. & Sur. Co.* (1962), 370 U.S. 159, 162, 82 S.Ct. 1231, 1233, 8 L.Ed.2d 407. Appellee's funds were “readily available as needed for support and maintenance,” retained their quality as monies and were not converted into a permanent investment.

Further, and as the appellate court observed in *First Natl. Master Charge v. Gilardi* (1975), 44 Ohio App.2d 383, 385, 324 N.E.2d 576 [73 O.O.2d 460], our holding today may in many instances require the tracing of monies on deposit in a checking account in order to determine the amount attributable to an exempt source of funds.

**1104 Having decided that appellee's personal earnings retain the statutory exemption from judi-

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cial process when deposited in a personal checking account,*446 we must now determine whether those funds are also exempt from the bank's right of setoff exercised in the instant case.

Bank setoff is an extrajudicial self-help remedy based on general principles of equity. It allows a bank to apply general deposits of a depositor against a depositor's matured debt. Courts have found that this right arises from the contractual debtor-creditor relationship created between depositor and bank when an account is opened.^{FN4} See TeSelle, Banker's Right of Setoff-Banker Beware (1981) 34 Okla.L.Rev. 40; Note, Banking Setoff: A Study in Commercial Obsolescence (1972), 23 Hastings L.Rev. 1585, 1586-1587.

FN4. The exercise of setoff further requires certain prerequisites. First, there must be mutuality of obligation between bank and depositor. Second, the funds must not be on deposit in a special purpose account. TeSelle, Banker's Right of Setoff-Banker Beware (1981), 34 Okla.L.Rev. 40, 42; *Chickerneo v. Society Natl. Bank* (1979), 58 Ohio St.2d 315, 318, 390 N.E.2d 1183 [12 O.O.3d 298].

The banker's right of setoff asserted in the instant case is rooted in the ancient common law. As we explained in *Walter v. Natl. City Bank* (1975), 42 Ohio St.2d 524, 526-527, 330 N.E.2d 425 [71 O.O.2d 513]:

“ * * * Historically, the bank's right to setoff [sic] derives from the bank lien of the law merchant, and that right still possesses some of the characteristics of a lien, since it permits the bank by self-help to take priority over others claiming a right to the funds on deposit. Whereas, in the case of an ordinary debtor, setoff is available as an equitable and statutory defense, in the case of a bank, setoff becomes a means by which the bank, because of its position as a commercial middleman, acquires a priority of right whenever it acts as creditor for a depositor.” See, also, TeSelle, *supra*, at

40; Note, Banking Setoff, *supra*, at 1586.

Appellant herein contends that a bank's right of setoff is in no way defeated by the exemption provisions of R.C. 2329.66.^{FN5} As distinguished *447 from garnishment, attachment, execution or sale to satisfy a judgment (all of which involve judicial process), appellant argues that self-help setoff is *not* one of the creditors' remedies within the ambit of the protection afforded by the exemption statute. We must agree with appellant on this issue.

FN5. Appellant also contends that it acted pursuant to the authority granted by R.C. 2309.19 in setting off appellee's funds in the instant case. We do not agree. R.C. 2309.19 provides as follows:

“When cross demands have existed between persons under such circumstances that if one had brought an action against the other a counterclaim could have been set up, neither can be deprived of the benefit thereof by assignment by the other, or by his death. The two demands must be deemed compensated so far as they equal each other.”

By its terms, this statute appears to be restricted to cases of death and assignment. Indeed, the Sixth Circuit Court of Appeals concluded that R.C. 2309.19 has limited application in *Baker v. Natl. City Bank* (C.A.6, 1975), 511 F.2d 1016 [75 O.O.2d 275]. In *Baker*, the court stated at 1017-1018 that:

“This statute merely provides that a right to set off is not defeated by an assignment or by death of one of the parties to the debtor-creditor relationship. The section declares an automatic setoff upon death or assignment by providing that the two demands shall be ‘deemed compensated.’ It does not deal with the mechanics of effecting a setoff in other

circumstances.”

We are in accord with the Sixth Circuit's analysis. R.C. 2309.19 does not create a statutory right of setoff, but merely preserves that right in instances of assignment or death, neither of which is present in the instant case. Thus, appellant cannot rely on statutory authorization for its action against appellee. Rather, the bank's right of setoff asserted in this case has its source in the common law.

We realize that the longstanding purpose of Ohio's exemption statute is to protect from creditors' legal process those debtors with minimal assets “ * * * for the benefit of the children as well as for the parents, in order that the children * * * may be protected against the dangers to which they would be exposed without those household **1105 facilities which make the family relation possible * * *.” *Dennis v. Smith, supra*, 125 Ohio St. at 125, 180 N.E. 638. Accord *Dean v. McMullen* (1924), 109 Ohio St. 309, 313-314, 142 N.E. 683; *Williams v. Donough* (1902), 65 Ohio St. 499, 63 N.E. 84.

While we acknowledge the liberal construction of exemption statutes afforded by the courts of this state, *Dennis, supra*, 125 Ohio St. at 124, 180 N.E. 638, appellee essentially urges this court to expand R.C. 2329.66 so as to exempt her funds from the banker's right of setoff. This would involve reading into the statute protection from a common-law, extrajudicial creditors' remedy which was explicitly omitted by the legislature when R.C. 2329.66 was drafted. Moreover, this exemption statute has been amended on many occasions, most recently in 1984, each time without any reference to the banker's right of setoff. Thus, noticeably absent from the legislative history of this provision is any legislative intent to provide exemption protection from the setoff remedy available to banks.

As in other instances of statutory interpretation, even a liberal construction of R.C. 2329.66 does not

give us license to enlarge this statute or strain its meaning. We have made it clear that “ * * * [b]y ‘liberal construction’ is not meant that words and phrases shall be given an unnatural meaning, or that the meaning shall be * * * expanded to meet a particular state of facts.” *Dennis, supra*, at 124, 180 N.E. 638. See, also, *Morris Plan Bank v. Viona* (1930), 122 Ohio St. 28, 170 N.E. 650.

[3] This court is not unmindful of the devastating effect the exercise of a bank's right of self-help setoff may have on depositors, like appellee, whose personal earnings are minimal. But we are not free, in interpreting this statute, simply to rewrite it on grounds we are thereby improving the law. *Seeley v. Expert, Inc.* (1971), 26 Ohio St.2d 61, 71, 269 N.E.2d 121 [55 O.O.2d 120]. R.C. 2329.66 exempts certain funds of a debtor only from the use of judicial process by creditors in execution, garnishment, attachment or sale to satisfy a judgment or order. It is not the function of this court to create a right of exemption from a bank's extrajudicial right of setoff where none is found in the statute. Rather, if there is to be a resolution of this *448 dilemma, it must come from our legislature. We therefore hold that personal earnings on deposit in a checking account are not exempted by R.C. 2329.66(A) from a bank's right to set off those funds against a matured debt of a depositor. The judgment of the court of appeals is accordingly affirmed in part and reversed in part.

Judgment affirmed in part and reversed in part.

CELEBREZZE, C.J. and SWEENEY, LOCHER and CLIFFORD F. BROWN, JJ., concur.

DOUGLAS and WRIGHT, JJ., concur in judgment only.

HOLMES, J., concurs in part, dissents in part and dissents from the judgment.

HOLMES, Justice, concurring in part, dissenting in part and dissenting from the judgment.

I concur with the majority's holding that personal earnings, exempt from creditors' reach pursuant to R.C. 2329.66(A), retain their exempt status when deposited in a personal checking account, and

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its analysis of that issue. I also agree with the majority's resolution of the waiver issue in light of the facts that appellee not only notified the bank of her objections within forty-eight hours of the bank's debiting of her account, but also filed the complaint within a year of such action.^{FN6} However, I must ****1106** dissent from the majority's analysis and conclusion on the issue of whether appellee's personal earnings, exempt under R.C. 2329.66, are also exempt from the bank's common-law right of setoff.

FN6. Appellant set off \$369.59 from appellee's personal account on March 16, 1983 and appellee filed the complaint in the instant cause on March 15, 1984. Appellee reacted in a more timely fashion than did appellant to its three-year-old judgment which was admittedly obtained April 7, 1980. In any event, the case *sub judice* is distinguishable from *Matavich v. Budak* (1982), 4 Ohio App.3d 228, 447 N.E.2d 1311, in which the debtor did not assert the exemption until after the attached funds had been paid into court and disbursed to the creditor. Additionally, this court has held that before silence will be construed as a waiver of rights expressly conferred by statute, the duty to speak must be imperative, and the silence must clearly indicate an intent to waive, or be maintained under such circumstances that equity will impute thereto such intent. In the case *sub judice*, there is no evidence of any of these factors.

Common-law setoff rights generally have been found to exist whenever two parties owe, under independent contracts, a definite amount to each other. See *Witham v. South Side Building & Loan Assn. of Lima* (1938), 133 Ohio St. 560, 562, 15 N.E.2d 149 [11 O.O. 269]; and 9 Ohio Jurisprudence 3d (1979), Banks, Section 178.^{FN7} See, also, ***449***Chickerneo v. Society Natl. Bank* (1979), 58 Ohio St.2d 315, 318, 390 N.E.2d 1183 [12 O.O.3d

298] (bank may set off when there is mutuality of obligation). Although, here, the bank owed its depositor \$369.59 when she owed the bank \$486.62, plus interest and costs, the depositor, whose debt had been reduced to a judgment, was protected " * * * from execution, garnishment, attachment, or sale to satisfy a judgment * * * " to the limited extent provided by R.C. 2329.66(A). In other words, the statutory exemptions are in abrogation of common-law rights to that limited extent, *e.g.*, thirty days of personal earnings in the maximum amounts allowed in R.C. 2329.66(A)(13)(a) and (b), not here exceeded.

FN7. This court's holding in *Serhant v. Haker* (1906), 73 Ohio St. 250, 76 N.E. 943, that a statutory setoff is not subject to other statutes providing for exemptions, is inapposite because the then-existing statutes, G.C. 5066-5077, have all been repealed, except to the extent R.C. 2309.19 contains remnants of G.C. 5073. The current R.C. 2309.19 provides:

"When cross demands have existed between persons under such circumstances that if one had brought an action against the other a counterclaim could have been set up, neither can be deprived of the benefit thereof by assignment by the other, or by his death. The two demands must be deemed compensated so far as they equal each other."

This statute has been held to allow automatic setoffs upon death or assignment of one of the parties to the debtor-creditor relationship, but not to deal with the mechanics of effecting a setoff in other circumstances. *Baker v. Natl. City Bank of Cleveland* (C.A.6,1975), 511 F.2d 1016 [75 O.O.2d 275]. As neither death nor assignment is here involved, nothing more need be said on R.C. 2309.19.

The majority concedes that R.C. 2329.66 pro-

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fects appellee's funds, here stipulated as qualifying for its personal earnings exemption, from execution, garnishment, attachment, or sale, but evidently believes allowing such protection against setoff rights would be an unlawful enlargement of the statute. However, R.C. 2329.66 was clearly intended to protect a subsistence level of a debtor's income from even more direct means of obtaining payment, not just judicial processes. The section sets forth the various forms of statutory aids to satisfy judgments; however, the self-help remedy of setoff is a form of extrajudicial attachment, 24 Ohio Jurisprudence 3d (1980), Creditors Rights, Section 267, and it may reasonably be concluded that the General Assembly must have meant to include common-law setoff rights within the meaning of R.C. 2329.66. The unreasonable result created by the majority protects a debtor's subsistence level exemptions under R.C. 2329.66 from third-party creditors, but not from other creditors holding the debtor's exempt funds. This result is not only contrary to R.C. 1.47(C), in which it is presumed that a just and reasonable result is intended from a statute, but also contrary to R.C. 1.11. This latter statute provides:

“Remedial laws and all proceedings under them shall be liberally construed in order to promote their object and assist the parties in obtaining justice. The rule of the common law that statutes in derogation of the common law must be strictly construed has no application to remedial laws * * *.”

The creditor's common-law right of setoff may be, and has been, restricted by a state law and policy designed to protect a certain percentage*450 of a debtor's deposits derived from wages from coercive processes of law. The obvious purpose of the exemption statute is to allow the wage earner access to a small amount of earnings in order to purchase food, housing, health care and other necessities of life **1107 which the legislature decided creditors could not take. Since other creditors could not execute on appellee's deposit account, it is anomalous to allow appellant a setoff. Surely the

justice meant to be obtained by R.C. 2329.66 was the protection of thirty days' wages from this debtor's part-time work in order to care for herself and her two children.

It is against public policy to forcibly claim exempt funds. See *Dean v. McMullen* (1924), 109 Ohio St. 309, 313-314, 142 N.E. 683.^{FN8} As the trial court so aptly phrased it: “Exemption laws, which are in derogation of the common-law rights of creditors, in the context of the economic realities of our contemporary world, seek to afford some measure of protection to the family, to the debtor himself and to the public generally. *Williams v. Donough*, 65 [Ohio St.] 499, 63 N.E. 84; *Dennis v. Smith*, 125 [Ohio St.] 120, 180 N.E. 638 * * *. Their underlying purpose is the humane one of securing debtors from unjust and harassing litigation. *Edwards v. Kearzey*, 96 U.S. [6 Otto] 595, 24 L.Ed. 793; *Chandler v. Horne*, 23 [Ohio App.] 1 [154 N.E. 748] * * *.”

FN8. In *Dean, supra*, 109 Ohio St. at 313-314, 142 N.E. 683, we found that “ [t]he statutes which allow a debtor, being a householder and having a family for which he provides, to retain, as against the legal remedies of his creditors, certain articles of prime necessity, to a limited amount, are based upon views of policy and humanity which would be frustrated if an agreement waiving his right could be sustained.”

Since these funds could not be attached through judicial processes, by an action at law, appellant should not be able to accomplish the same result through self-help, because “[w]here an obligation is not enforceable in an action at law, it cannot be set off against an opposing claim.” *Kocsorak v. Cleveland Trust Co.* (1949), 151 Ohio St. 212, 85 N.E.2d 96 [39 O.O. 36], paragraph two of the syllabus. Appellant's argument that it has no knowledge of the exempt status of its depositor's funds is unpersuasive because, should the bank have chosen a judicial proceeding under R.C. Chapter 2716, which would

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grant a right to a hearing, a court would determine whether the funds are exempt. When a bank resorts to self-help techniques, it accepts the risks involved: “ * * * [T]he bank occupies the same position as any other creditor who seeks to satisfy his claim by levy upon a bank account; such a creditor can either inquire beforehand, or levy upon the account, taking the risk that he is seizing exempt property.” *Kruger v. Wells Fargo Bank* (1974), 113 Cal.Rptr. 449, 460-461, fn. 26, 521 P.2d 441, 452, fn. 26, 11 Cal.3d 352, 370.

Other state supreme courts facing this issue have not allowed a setoff or a counterclaim to defeat a debtor's exemption. *Kruger, supra; Finance Acceptance Co. v. Breaux* (1966), 160 Colo. 510, 419 P.2d 955; *Atlantic Life Ins. Co. v. Ring* (1936), 167 Va. 121, 187 S.E. 449; *Edgerton v. Johnson* (1940), 218 N.C. 300, 10 S.E.2d 918; *451 *Atkinson v. Pittman* (1886), 47 Ark. 464, 2 S.W. 114; *Banks v. Rodenbach* (1880), 54 Iowa 695, 7 N.W. 152; *William Deering & Co. v. Ruffner* (1891), 32 Neb. 845, 49 N.W. 771; *First Natl. Bank of Cushing v. Funnell* (1930), 144 Okla. 188, 290 P. 177; *Ex parte Rizer* (1932), 165 S.C. 487, 164 S.E. 131; *Collier v. Murphy* (1891), 90 Tenn. 300, 16 S.W. 465; Annotation (1937), 106 A.L.R. 1070-1084. While there is authority to the contrary, “ * * * the majority rule is that in any action the subject of which is exempt the defendant will not be permitted to defeat the exemption by setting up a counterclaim or set-off * * * . To allow a set-off would in most cases result in a palpable evasion of the law.” *Kruger, supra*, 113 Cal.Rptr. at 459-460, 521 P.2d at 451-460, 11 Cal.3d at 369, citing *Finance Acceptance Co., supra*, 419 P.2d at 957-958.

I feel that the majority rule should be followed in Ohio and that allowance of a setoff here results in an evasion of R.C. 2329.66. Accordingly, I would affirm the judgment of the court of appeals in all respects.

Ohio, 1986.
Daugherty v. Central Trust Co. of Northeastern Ohio, N.A.

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C

Supreme Court of Ohio.
 DENNIS
 v.
 SMITH et ux.

No. 23122.
 March 30, 1932.

Error to Court of Appeals, Greene County.

Action by Jerry M. Dennis against James C. Smith and wife. Judgment for plaintiff denying defendants' claim for exemptions was reversed by the Court of Appeals and the claim for exemptions allowed, and plaintiff brings error. -[By Editorial Staff.]

Judgment of Court of Appeals affirmed.

This cause comes to this court on allowance of motion to certify the record of the Court of Appeals of Greene county. In this court the legal question to be determined is the right of the defendants in error to claim specific exemptions in lieu of a homestead under sections 11725 and 11738, General Code. It grows out of the following facts and circumstances:

On April 12, 1930, the defendants in error, James C. Smith and Ethel J. Smith, then and ever since living together as husband and wife, were indebted to Jerry M. Dennis, plaintiff in error, in the sum of \$558, evidenced by a promissory note containing a warrant of attorney authorizing confession of judgment, and also containing the following stipulation: 'We hereby waive the benefit of all laws exempting real or personal property from levy and sale or any law intended for our advantage or protection.'

On June 14, 1930, judgment was entered upon that note, which judgment is unpaid. Defendants in error did not then and do not now own a homestead. The defendant in error Ethel J. Smith was the own-

er of certain household goods used in and about the home occupied by her, with her husband and family, which property was insured against loss by fire. On November 21, 1930, during the pendency of said judgment, the household goods were destroyed by fire, and thereupon proceedings in aid of execution were begun, which resulted in the insurance company paying the amount of the insurance into court in interpleader.

Two questions are presented by the record: First, whether the waiver of the benefit of the exemption laws contained in the note is valid; and, second, whether the defendants in error are entitled to claim as exempt the money paid into court by the insurance company as the proceeds of the loss by fire.

The court of common pleas denied the exemptions, and the case was thereupon appealed to the Court of Appeals, which court heard the case de novo, rendered a contrary judgment, and allowed the claim for exemptions out of the funds in the hands of the court.

West Headnotes

[1] Contracts 95 ⇨ 108(2)

95 Contracts

95I Requisites and Validity

95I(F) Legality of Object and of Consideration

95k108 Public Policy in General

95k108(2) k. Particular Contracts.

Most Cited Cases

Homestead 202 ⇨ 170

202 Homestead

202IV Abandonment, Waiver, or Forfeiture

202k170 k. Contracts Waiving Right in General. Most Cited Cases

Stipulation in executory contract for waiving benefit of homestead exemption laws is void as

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against public policy.

[2] Execution 161 ↪43

161 Execution

161I Property Subject to Execution

161k43 k. Interests Under Insurance Policies.
 Most Cited Cases

Exemptions 163 ↪57

163 Exemptions

163I Nature and Extent

163I(C) Property and Rights Exempt

163k53 Proceeds of Exempt Property

163k57 k. Proceeds of Insurance. Most

Cited Cases

Proceeds of fire policy covering exempt household goods which were destroyed by fire held exempt from execution to same extent as goods insured. Gen.Code, §§ 11725, 11738.

Syllabus by the Court.

*120 1. A stipulation in an executory contract, agreeing to waive the benefit of homestead exemption laws, is void as against public policy.

2. The proceeds of an insurance policy, covering personal property exempt from execution under the provisions of sections 11725 and 11738, General Code, which is destroyed by fire, stand in the place of the exempt property and are likewise exempt from execution and to the same extent.

*121 **639 Morris D. Rice, of Osborn, for plaintiff in error.

Miller & Finney, of Xenia, for defendants in error.

MARSHALL, C. J.

[1] The first inquiry must relate to the waiver of the benefit of exemption laws, which waiver was incorporated in the note. It appears that Ethel J. Smith was the owner of the household goods, but she was also one of the signers of the note. This exact question has never before been before this court for consideration. In the case of Dean v. McMullen,

109 Ohio St. 309, 142 N. E. 683, there was a clause in a lease agreeing that goods and chattels on the premises should be held for rent, whether exempt from execution or not. The husband who signed the lease was the owner of the property, but his wife did not join in this clause, and it was held that she was not bound by that waiver nor estopped from making claims for exemption under section 11738, General Code. While that *122 case is not parallel in its facts, it is a pertinent authority upon principle.

While the exact question has never been before this court for determination, it has in numerous cases been determined by courts of last resort in other jurisdictions. Almost without exception it has been held that a debtor's waiver of his exemption right, by stipulation contained in an executory contract, is void as against public policy. This is quite generally placed upon the ground that the purpose of the exemption laws is the protection of the debtor's family. The rule declaring the waiver to be against public policy, therefore, has peculiar force in all those jurisdictions where the principle of the protection of the family prevails. In Sears v. Hanks, 14 Ohio St. 298, at pages 300 and 301, 84 Am. Dec. 378, this principle was discussed by Scott, J.: 'The humane policy of the homestead act * * * seeks not the protection of the debtor; but its object is to protect his *family*, from the inhumanity which would deprive its dependent members of a *home*. Its benefits can only be claimed by *heads of families*; married persons living together as husband and wife; and widowers or widows having an unmarried minor child, or children residing with them as part of their family (sections 1 and 4). And, in aid of this wise and humane policy, the whole act should receive as liberal a construction, as can be fairly given to it. We think its provisions protect the debtor's family, as against *his creditor*, in the enjoyment of an actual homestead, irrespective of the title or tenure by which it is held.'

The principles declared in the opinion of Judge Scott have never been departed from in this state. Those principles must put the courts of Ohio in the

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column with practically all the states of the union in declaring that waivers of the benefits of exemption laws are against public policy and therefore void.

[2] The other question, as to whether money received *123 from an insurance company in payment of loss of household goods by fire is exempt from execution, must next be considered. This calls for a construction of sections 11725 and 11738, General Code. Section 11725, in its pertinent parts, is as follows: 'Every person who lives with and is the head and sole support of a family, and every widow, may hold property exempt from execution, attachment or sale, for debt, damage, fine or amercement, as follows: * * * live stock or household furnishings not exceeding one hundred and fifty dollars in value to be selected by the debtor.'

****640** Section 11738, in its pertinent parts, provides: 'Husband and wife living together, * * * resident of this state, and not the owner of a homestead, in lieu thereof, may hold exempt from levy and sale, real or personal property to be selected by such person or his attorney, before sale, not exceeding five hundred dollars in value, in addition to the amount of chattel property otherwise by law exempted. *Such selection and exemption shall not be made by the debtor, or his attorney, or allowed to him from money, salary or wages due to him from any person, partnership or corporation.* * * *'

In *Morris Plan Bank of Cleveland v. Viona*, 122 Ohio St. 28, 170 N. E. 650, this court determined that money voluntarily placed on deposit in a bank by a debtor could not be claimed as exempt. By parity of reasoning it must be held that money due to any debtor, whether a deposit in a bank or not, cannot be claimed as exempt. It does not follow that that rule should apply where, as in the instant case, property which might be claimed as exempt has been converted into money without any voluntary action on the part of the debtor. It would follow from the case of *Morris Plan Bank of Cleveland v. Viona* that if a debtor should voluntarily sell his household goods, and place the money on deposit in a bank, he could not claim the money as ex-

empt. The principle of that case more *124 particularly applies where the relation of debtor and creditor has been created by voluntary contract. In the instant case, the money on deposit with the clerk of the court is the proceeds of loss of household goods by fire. It was not the purpose of the insured to convert his property into money. Insurance protects the owner against loss and is designed to put the owner in position to replace property lost by fire. Ordinarily when buildings are insured against loss by fire, the insurance company reserves the right to rebuild or repair the building. Whether so expressed in the insurance policy or not, it was no doubt the purpose of the defendants in error in insuring the property to assure themselves of the ability to purchase other household goods, in the event of destruction by fire, in order that the family relation might continue to be maintained. Household goods, like any other property, receive no added assurance against loss or destruction by the mere fact of being insured. The insurance affects the owner, rather than the goods. It assures to the owner the means of replacement. These observations are made as reflecting upon the question whether the proceeds of a fire insurance policy shall have the same characteristics as the property itself in the interpretation of these statutes.

Another point to be considered is the rule of interpretation of exemption statutes. Upon this question there is some difference in the authorities, though the rule is well-nigh universal that a liberal rule of interpretation should be applied. By 'liberal construction' is not meant that words and phrases shall be given an unnatural meaning, or that the meaning shall be enlarged or expanded to meet a particular state of facts. A liberal construction must still be a fair and reasonable one, in an effort always to ascertain the legislative intent. Among other things, it must be inquired as to the object for which the law is framed; and that construction must be adopted which will promote*125 its purpose. In applying the rule of liberal construction, all reasonable doubts are to be resolved in favor of the statute being applicable to the particular case. Exemption statutes are in derogation of the common rights of

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creditors, and if no other elements are present such statutes should receive a strict construction. On the other hand, by reason of their being enacted for the public good, to effectuate beneficent purposes, the rule of liberal construction is almost universally held to apply. Numerous decisions of other states, holding the liberal rule applicable, could be cited, but it is not necessary to go beyond our own decisions. In *State ex rel. Coles v. Shook*, 97 Ohio St. 164, 118 N. E. 1010, it is said: 'Laws exempting property of a debtor from execution are to be construed liberally in his favor. A statutory provision in the nature of an exception to the general law on the subject of exemptions should be given a strict construction.'

The construction of the statutes in question must therefore be approached with the thought in mind: First, that the purpose of the exemption laws is to protect the family against destitution, and that it is for the benefit of children as well as for the parents, in order that the children may be trained and educated to become useful members of society, and may be protected against the dangers to which they would be exposed without those household facilities which make the family relation possible; second, that a liberal rule of construction is to be applied; third, that the money in the hands of the court is not the result of a voluntary contract, but that it stands in place of household goods destroyed by fire, and that other household goods are necessary to the comfort and maintenance of the family.

It has never been decided in this state that the exemption statutes apply to the proceeds of a policy of insurance covering exempt property, but it has been *126 so decided in numerous cases in other jurisdictions. The contrary has been decided in some of the states, but it is believed that those decisions rest upon the peculiar statutes of those states. In the overwhelming majority of the decisions, it has been held that the exemption should apply to the proceeds of a policy of insurance covering exempt property. It would not be profitable to discuss or even **641 cite the many cases pro and

con. They will be found in 11 Ruling Case Law, under the subject 'Exemptions,' § 45; in 25 Corpus Juris, p. 84; and in a note in 63 A. L. R. p. 1286.

Upon principle, as well as upon the overwhelming weight of authority, the defendants in error must be held to have the right to claim exemption in the money.

The judgment of the Court of Appeals will be affirmed.

Judgment affirmed.

JONES, MATTHIAS, DAY, ALLEN, and STEPHENSON, JJ., concur.

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C

Appellate Division, Superior Court,
 Alameda County.
 FORD MOTOR CREDIT COMPANY, Plaintiff and
 Respondent,
 v.
 Ana WATERS, Defendant and Appellant.

No. AD-2568.
 Aug. 15, 2008.
 Certified for Publication.^{FN*}

FN* Pursuant to California Rules of Court, rule
 8.707(b), this opinion is certified for publica-
 tion.

Background: After judgment creditor sought to enforce judgment by levying on judgment debtor's checking account, debtor filed claim of exemption. The Superior Court, Alameda County, No. WG06296356, granted debtor's claim of exemption in part, based on total wages deposited, rather than paid earnings that remained in the account on the date of the levy. Debtor appealed.

Holding: The Appellate Division of the Superior Court, Harbin-Forte, P.J., held that judgment debtor was entitled to claim an exemption for 75 percent of the paid earnings that remained in the deposit account on the date of the levy.

Reversed and remanded.

West Headnotes

[1] Exemptions 163 48(2)

163 Exemptions
 163I Nature and Extent
 163I(C) Property and Rights Exempt
 163k48 Earnings, Wages, or Salaries
 163k48(2) k. What are wages or personal
 earnings. Most Cited Cases
 When a judgment creditor opts to levy on a bank

account to enforce a judgment, the judgment debtor is entitled to claim an exemption for 75 percent of the paid earnings that remain in the deposit account on the date of the levy, as that balance is "the paid earnings that are levied upon" within the meaning of the exemption statute. West's Ann.Cal.C.C.P. § 704.070(b)(2).

See *Cal. Jur. 3d, Enforcement of Judgments*, § 289; *Cal. Civil Practice (Thomson/West 2007) Procedure*, § 30:33; *Ahart, Cal. Practice Guide: Enforcing Judgments and Debts (The Rutter Group 2008)* ¶ 6:953 (CA-DEBT Ch. 6E-5); 8 *Witkin, Cal. Procedure (4th ed. 1997) Enforcement of Judgment*, § 187.

[2] Appeal and Error 30 841

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k838 Questions Considered

30k841 k. Review where facts are not disputed. Most Cited Cases

Judgment debtor's appeal from an order granting in part her claim of exemption filed in response to a levy on her checking account was subject to independent review by appellate court, as the controlling facts were undisputed. West's Ann.Cal.C.C.P. § 703.600.

[3] Constitutional Law 92 2522(1)

92 Constitutional Law

92XX Separation of Powers

92XX(C) Judicial Powers and Functions

92XX(C)2 Encroachment on Legislature

92k2499 Particular Issues and Applications

92k2522 Property Rights

92k2522(1) k. In general. Most Cited Cases

Exemptions relating to property that might ordinarily be subject to enforcement of a money judgment by execution or otherwise, which debtor is allowed to retain all or part of for protection of debtor and debtor's family, are wholly statutory and can not be enlarged by courts. West's Ann.Cal.C.C.P. §§ 704.010-704.210.

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[4] Exemptions 163 ↩️1

163 Exemptions

163I Nature and Extent

163I(A) Nature, Creation, Duration, and Effect in
General

163k1 k. Nature of right. Most Cited Cases
(Formerly 163k3)

Exemption laws are designed to facilitate the debtor's financial rehabilitation and have the effect of shifting social welfare costs from the community to judgment creditors.

[5] Exemptions 163 ↩️4

163 Exemptions

163I Nature and Extent

163I(A) Nature, Creation, Duration, and Effect in
General

163k4 k. Construction of exemption laws in
general. Most Cited Cases

Exemption statutes should be construed, so far as practicable, to the benefit of the judgment debtor.

[6] Execution 161 ↩️54

161 Execution

161III Property Subject to Execution

161k50 Ownership or Possession of Property

161k54 k. Property in custody of agent or depository. Most Cited Cases

When the judgment creditor chooses a levy on a bank account, it can look to recover from only those sums in the deposit account on the date the levy hits; the judgment creditor can not lay claim to funds that previously may have been in the deposit account, even as recently as the day before. West's Ann.Cal.C.C.P. § 700.140(c, e).

****827** Vi Katerina Tran, for Defendant and Appellant.

Nelson & Kennard and Jonathan Ayers, Sacramento, for Plaintiff and Respondent.

ORDER REVERSING THE JUDGMENT AND REMANDING FOR ENTRY OF NEW JUDGMENT

CONSISTENT WITH THIS OPINION
HARBIN-FORTE, P.J.

***4 I. INTRODUCTION**

The instant case involves an appeal from an order granting in part a judgment debtor's claim of exemption filed in response to a levy on a bank account. The parties assert that the issue presented on appeal is one of first impression:

Whether the judgment debtor's exemption under Code of Civil Procedure section 704.070 for paid earnings traced to a deposit account is 75 percent of the paid earnings that had been in the account during the 30 days preceding the levy, or 75 percent of paid earnings that remain in the account on the date of the levy.

[1] For the reasons stated below, we conclude that, as a matter of law, when a judgment creditor opts to levy on a bank account to enforce a judgment, the judgment debtor is entitled to claim an exemption for 75 percent of the paid earnings that remain in the deposit account on the date of the levy, as that *5 balance is "the paid earnings that are levied upon" within the meaning of the exemption statute. (Code Civ. Proc., § 704.070, subd. (b)(2).)

Because the trial court's order calculated the exemption based on the amount of the earnings that had been in the account during the 30 days preceding the levy, to the detriment of the judgment debtor, we must reverse that order and remand this case for further proceedings consistent with our ruling.

II. FACTS

The pertinent facts in this case are undisputed. On March 1, 2007,^{FNI} the trial ****828** court entered a default judgment in favor of respondent Ford Motor Credit Company (Ford) and against appellant Ana Waters (Waters) in the amount of \$17,018.78. On or about June 21, Ford, the judgment creditor, sought to enforce the judgment by levying upon Waters's checking account at Wells Fargo Bank. On the date of the levy, the balance in the checking account was \$1,782.63. That balance, along with a \$75 fee (for a total of \$1,857.63), was deducted from Waters's bank account.

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FN1. All dates are for the year 2007 unless otherwise stated.

On or about June 25, Waters, the judgment debtor, timely filed her claim of exemption,^{FN2} and on July 12, Ford filed an opposition to the claim of exemption, asserting that Waters had the burden of tracing the funds to an exempt source.

FN2. The procedure for claiming an exemption after levy is set forth in Code of Civil Procedure section 703.510 et seq. Although it appears that Waters may not have initially entirely complied with those procedures, her omissions are not at issue in this appeal.

In response, Waters traced the funds in her account to net wages paid to her in the past 30 days. She demonstrated that she receives direct payroll deposits from her employer Northwest Air, and that such wages are directly deposited into her Wells Fargo Bank checking account. According to the bank statements, for the period from May 25 to June 26, her beginning balance was \$302.12. There were three direct deposits from Northwest Air in the 30-day period ending on the date of levy as follows: on June 1 for \$958.39, on June 11 for \$2,664.45, and on June 15 for \$1,015.36, for a grand total of \$4,638.20 in net wages deposited into the account.^{FN3}

FN3. There was a fourth direct payroll deposit on June for \$95.27, but since this was after the date of levy, it is not relevant to the resolution of the issue presented here.

*6 On July 31, a hearing on the claim of exemption was held in the law and motion department. Both parties agreed that the controlling exemption statute is Code of Civil Procedure section 704.070, which, along with its subdivisions,^{FN4} governs exemptions for "paid earnings" that can be traced into deposit accounts. Both agreed that subdivision (a)(2) defines paid earnings as "earnings ... that were paid to the employee during the 30-day period ending on the date of the levy." They disagreed, however, on how to apply subdivision (b)(2), which designates the percentage amount of the exemp-

tion.

FN4. All further statutory references are to the Code of Civil Procedure unless otherwise noted.

Waters advocated for a literal reading of the clause in subdivision (b)(2), which expressly provides that "seventy-five percent of *the paid earnings that are levied upon ... are exempt*" (italics added). Waters interpreted the language to mean that the court must calculate the 75 percent exemption based on the amount of \$1,782.63, or the balance of wages in the account on the date of the levy, since that was "the [amount] levied upon." Under Waters's theory, Ford could look to recover only approximately \$446, or 25 percent of \$1,782.63, and the balance, or approximately \$1,337 (75 percent of that amount) belonged to her.

Ford took the position that section 704.070, subdivision (a)(1), defines "paid earnings" as earnings paid to the employee during the 30-day period ending on the date of the levy, and, based on that definition, it was entitled to 25 percent of all wages paid to Waters and deposited into the checking account during the 30-day period leading up to the date of the levy. It supported its position by focusing primarily on the words "*paid earnings*" in the exemption provision of subdivision ****829** (b)(2), and overlooking the words "that are levied upon," which immediately follow "paid earnings." Under Ford's theory, the court was required to ignore the balance in the account on the date of the levy. Instead, according to Ford, the court was required to calculate the 75 percent exemption based on the sum of \$4,638.20, which represented the total amount of net wages deposited into the account during the 30-day period before the date of the levy. Thus, Ford claimed it was entitled to 25 percent of \$4,638.20, or approximately \$1,150.

The law and motion judge agreed with Ford's interpretation of the exemption clause, ignored the balance in the account on the date of the levy, granted Waters's claim of exemption in part, based on total wages deposited, and ordered the levying officer to release approximately \$1,150 to Ford, with the balance of approxi-

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ately \$633 going to Waters.

*7 Thus, under the court's ruling, Waters received not an exemption of 75 percent of the paid earnings levied upon, but an exemption of only approximately 35 percent of those paid earnings. On August 24, Waters filed a timely notice of appeal from the order.

III. ANALYSIS

A. Appealability and Standard of Review

[2] Orders granting or denying a claim of exemption are appealable. (§ 703.600; *Schwartzman v. Wilshinsky* (1996) 50 Cal.App.4th 619, 626, 57 Cal.Rptr.2d 790.) Waters and Ford agree that de novo review applies since this case involves application of the exemption statute, section 704.070, to a set of undisputed facts. As the controlling facts in the instant case are indeed undisputed, we concur that this appeal is subject to independent review by this court. (See *In re Retirement Cases* (2003) 110 Cal.App.4th 426, 1 Cal.Rptr.3d 790; *McMillin-BCED/Miramar Ranch North v. County of San Diego* (1995) 31 Cal.App.4th 545, 553, 37 Cal.Rptr.2d 472 [where there is no conflict in the evidence, or an issue is presented on appeal upon undisputed facts, the appellate court is free to draw its own conclusions of law].)

B. The Enforcement of Money Judgments Statutory Scheme

We begin our analysis by noting that our Legislature has enacted a comprehensive and precisely detailed scheme governing enforcement of money judgments. This statutory scheme covers four chapters and a total of 24 articles setting out the powers, duties, rights, privileges and responsibilities of the judgment creditor, the judgment debtor, the levying officer, the court, and others who may be impacted by the controlling statutes. (See §§ 697.010–706.154.)

In sections 700.010–700.200, the judgment creditor is advised of all methods of levy available to enforce a money judgment. Those statutes tell the judgment creditor and levying officer how to levy on assets such as real property, growing crops, automobiles, and, as here

relevant, bank accounts.

*8 For each particular method of levy, the governing statute contains the rules and procedures for carrying out the levy. The judgment creditor is in complete control of which method of levy to use, but must also be bound by the statutory limitations imposed upon that method.

[3] As a general rule, all property of the judgment debtor is subject to enforcement of a money judgment. (§ 695.010, subd. (a).) The California Constitution, however, requires the Legislature to protect from forced sale a certain portion of the homestead and other property of all **830 heads of families. (Cal. Const., art. XX, § 1.5.) The immunity of certain property from enforcement of a money judgment is based on the theory that some types of property should not be taken to satisfy a judgment. The kinds and degrees of property exempt from levy are described in sections 704.010 – 704.210. The exemptions available to a judgment debtor are for the personal benefit of the judgment debtor. These exemptions relate to property that might ordinarily be subject to enforcement of a money judgment by execution or otherwise, but the debtor is allowed to retain all or part of this property for the protection of the debtor and the debtor's family. The exemptions are wholly statutory and cannot be enlarged by the courts. (*Estate of Brown* (1899) 123 Cal. 399, 55 P. 1055; *Conlin v. Traeger* (1927) 84 Cal.App. 730, 258 P. 433; *Estate of Silverman* (1967) 249 Cal.App.2d 180, 183, 57 Cal.Rptr. 379; *Vineyard v. Sisson* (1990) 223 Cal.App.3d 931, 938, 272 Cal.Rptr. 914; see also 8 Witkin, Cal. Procedure (4th ed. 1997) Enforcement of Judgment, § 159.)

[4][5] The exemption laws are designed to facilitate the debtor's financial rehabilitation and have the effect of shifting social welfare costs from the community to judgment creditors. (See Recommendation Relating to Enforcement of Judgments Law, 16 Cal. Law Revision Com. Rep. (1982) p. 1079.) Consequently, the exemption statutes should be construed, so far as practicable, to the benefit of the judgment debtor. (*Lampley v. Alvares* (1975) 50 Cal.App.3d 124, 128, 123 Cal.Rptr. 181.)

method of enforcing its judgment from a broad menu of options open to it. Although the phrase “the amount levied upon” is not defined, either statutorily or judicially, its context in section 700.140 makes its meaning clear. The express and unambiguous language of section 700.140 should have served to put Ford on notice regarding the pool of available funds from which the judgment could be satisfied if Ford chose to levy on Waters's bank account. This statute warns Ford that neither funds that may have been in the account before the levy hit, nor funds that may come into the account after the levy hits, can be used to satisfy the debt. Instead, “[t]he execution lien reaches only amounts in the deposit account at the time of service on the financial institution.” (§ 700.140, subd. (a).) The phrase “the amount levied upon” is simply shorthand for the sum of money that the execution lien has the potential of reaching—i.e., only the balance in the account on the date the levy is served.

We now look at exemptions that might apply when a judgment creditor has executed on a bank account that contains paid earnings. Indisputably, “paid earnings” are one class of exempt property. Section 704.070, the exemption statute the parties ask us to construe, provides in pertinent part as follows:

“(a) As used in this section:

“(1) ‘Earnings withholding order’ means an earnings withholding order under Chapter 5 (commencing with Section 706.010) (Wage Garnishment Law).

****832** “(2) ‘Paid earnings’ means earnings as defined in Section 706.011 that were paid to the employee during the 30-day period ending on the date of the *11 levy. For the purposes of this paragraph, where earnings that have been paid to the employee are sought to be subjected to the enforcement of a money judgment other than by a levy, the date of levy is deemed to be the date the earnings were otherwise subjected to the enforcement of the judgment.

“(3) ‘Earnings assignment order for support’ means an earnings assignment order for support as defined in Section 706.011.

“(b) *Paid earnings that can be traced into deposit accounts or in the form of cash or its equivalent as provided in Section 703.080 are exempt in the following amounts:*

“(1) All of the paid earnings are exempt if prior to payment to the employee they were subject to an earnings withholding order or an earnings assignment order for support.

“(2) *Seventy-five percent of the paid earnings that are levied upon* or otherwise sought to be subjected to the enforcement of a money judgment *are exempt* if prior to payment to the employee they were not subject to an earnings withholding order or an earnings assignment order for support.” (Italics added.)

Regarding Waters's claim of exemption, it is undisputed that virtually all of those funds in the account on the date of the levy fell into the “paid earnings” category, and that none of them had been subjected to an earnings withholding order or an earnings assignment order. Thus, on the date of the levy, Waters had \$1,782.63 in “paid earnings” in her bank account.

Contrary to the Ford's suggestion, the paid earnings subject to execution are not any and all earnings paid over the past 30 days. The phrase “*seventy-five percent of the paid earnings that are levied upon*” (§ 704.070, subd. (b)(2)) is itself clear and unambiguous, and the exemption calculation is a simple one. After execution on a bank account, the levying officer has in his or her possession a specific and defined amount of “the paid earnings that are levied upon.” All a court granting the claim of exemption need do is ascertain what amount is in the possession of the levying officer, figure out what 75 percent of that sum is, and then make the allocations between the judgment creditor and judgment debtor accordingly.

Moreover, when one reads section 700.140, subdivision (a), the bank levy statute, and section 704.070, the exemption statute, *in pari materia*, one is led to the conclusion that when the Legislature used the phrase “*levied upon*” in these two statutes, the phrase was intended to have the same meaning—i.e., the amount that

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is in the deposit account on the date the levy *12 is served on the financial institution. Application of section 700.140, subdivision (a) compels the conclusion that \$1,782.63 is the only amount that the execution lien could reach. As such, Ford's potential recovery was limited to the amount that was in Waters's account on the date of the levy, not amounts that had been in the account at some previous time. We therefore conclude that the trial court erroneously calculated Waters's exemption amount.

The sum of \$1,782.63 thus being the amount of "paid earnings that are levied upon," Waters was entitled to claim an exemption of 75 percent of that amount, as provided for under section 704.070, subdivision (b)(2).

Acceptance of Ford's interpretation of section 704.070, subdivision (b)(2) would **833 necessarily render the bank-balance limitation of section 700.140, subdivision (a) nugatory, for it would require us to ignore not only the express language of the latter statute, but also the clear legislative intent and purpose for that method of levy—which is to limit the creditor to the amount in the deposit account on the date of the levy.

Further, ignoring the clear language of these two controlling statutes, and interpreting them in the way urged by Ford, would lead to absurd results. The Legislature

clearly intended for a judgment debtor to be able to claim an exemption for 75 percent of paid wages that remain in the bank account on the date a levy is served. Under Ford's theory, the judgment debtor is automatically deprived of that substantial statutory exemption whenever the bank balance falls below 25 percent of paid wages deposited into the bank account within the past 30 days.

Moreover, under Ford's theory, the *percentage* of the exemption would fluctuate depending on the bank balance, and a judgment creditor could in some circumstances end up with 100 percent of "the paid earnings levied upon," leaving the debtor with no exemption at all. This position finds no statutory support, as the Legislature has unambiguously stated that the judgment debtor is entitled to a 75 percent exemption. Under Waters's more reasonable theory, the percentage exemption always remains static, consistent with the express language of section 704.070, subdivision (b)(2), to allow the employee to protect 75 percent of any paid earnings levied upon. A few examples serve to illustrate the unreasonableness of Ford's position:

PAID EARNINGS DEPOSITED PAST 30 DAYS	BALANCE OF PAID EARNINGS IN DEPOSIT ACCOUNT ON DATE OF LEVY	% AND AMOUNTS OF BANK BALANCE TO EACH PARTY PER FORD'S THEORY THAT CREDITOR GETS 25% OF TOTAL PAID EARNINGS DEPOSITED PAST 30 DAYS	% AND AMOUNTS OF BANK BALANCE TO EACH PARTY PER WATERS'S THEORY THAT CREDITOR GETS 25% OF BALANCE OF PAID EARNINGS ON DATE OF LEVY
\$4,600	\$4,600	75% (\$3,450) to Debtor 25% (\$1,150) to Creditor	75% (\$3,450) to Debtor 25% (\$1,150) to Creditor
\$4,600	\$1,782	35.5% (\$632) to Debtor 64.5% (\$1,150) to Creditor	75% (\$1,336.50) to Debtor 25% (\$445.50) to Creditor
\$4,600	\$ 600	0% (\$0) to Debtor 100% (\$600) to Creditor	75% (\$450) to Debtor 25% (\$150) to Creditor

*13 Finally, we must decline Ford's offer to have us engage in a review of the legislative history of this particular exemption statute. Ford asks us to the consider

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the legislative committee comment for section 704.070:

“ Section 704.070 is new. Subdivision (b)(1) continues the protection of wages that have already been garnished or subjected to a wage assignment for support for 30 days after they are paid. Subdivision (b)(2) applies an exemption analogous to that provided by Section 706.050 to paid earnings that have not been garnished or subjected to a wage assignment for support in the hands of the employer.” (Legis. Com. com., West’s Ann.Code Civ. Proc. (1987 ed.) foll. § 704.070 , p. 325.)

Section 706.050 refers to the federal exemption of a debtor’s wages. “Except as otherwise provided in this chapter, the amount of earnings of a judgment debtor exempt from the levy of an earnings withholding order shall be that amount that may not be withheld from the judgment debtor’s earnings under federal law in ***834** Section 1673(a) of Title 15 of the United States Code.” (§ 706.050.)

Title 15 United States Code section 1673 –titled “Restriction on garnishment,” provides in part:

“(a) Maximum allowable garnishment[¶] Except as provided in subsection (b) of this section and in section 1675 of this title, the maximum part of the ***14** aggregate disposable earnings of an individual for any workweek which is subject to garnishment **may not exceed**

“ **(1) 25 per centum of his disposable earnings for that week, or**

“(2) the amount by which his disposable earnings for that week exceed thirty times the Federal minimum hourly wage....” (15 U.S.C. § 1673(a), italics added.)

Ford argues that under its theory, Waters is placed in the same position she would have been in had the wages been garnished directly from the employer, and argues that such an outcome is consistent with legislative intent. This argument is unpersuasive.

First, it should be noted that the federal statute’s 25

percent limit on the amount a judgment creditor may garnish from wages is simply an alternate way of stating the 75 percent exemption that the judgment debtor is entitled to under the state statute. Second, a wage garnishment would have initially been aimed at a specific paycheck to which the claim of exemption would have applied, just as a bank levy is aimed at the specific balance in the account on the date of the levy. The date of service starts the exemption clock running. In other words, had Ford served an earnings withholding order on June 21, instead of a bank levy, it would not have been able to have that earnings withholding order apply to any paychecks Waters had received and cashed *before* June 21. It would only have been that particular check, and *future wages*, of which Ford would have been entitled to receive a maximum of 25 percent. Our interpretation thus puts both Ford and Waters in the same position they each would have been in had Ford sought to garnish Waters’s wages.

Similarly, Ford argues that if we read section 704.070, subdivision (b)(1) and (2) of the exemption statute as complementary of each other, we would conclude that the Legislature intended to put Waters in the same position as she would have been in had Ford garnished her wages. Ford argues that subdivision (b)(1) provides for a complete exemption if the wages deposited had already been subjected to a wage garnishment, and subdivision (b)(2) gives the judgment creditor what it could have gotten had it garnished the wages directly from the employer. As with its previous argument, Ford ignores the fact that it would not have been able to garnish any wages paid to the debtor for any period *before* the wage garnishment request was served.

Perhaps more important for our analysis, the legislative committee comment actually supports Waters’s position, for it allows her to claim the same percentage exemption to wages that have been deposited into her bank account as she would have been able to claim had Ford served the earnings ***15** withholding order for a particular paycheck, that is, 75 percent. The legislative committee comment clearly expresses this legislative intent, and it comports with the public policy, expressed in the exemption statutes, of allowing a judgment debtor

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to retain funds to take care of basic necessities of life, and to have something to live on until the next paycheck. The comment also assists us in construing the exemption statutes to the benefit of the judgment debtor. (*Schwartzman v. Wilshinsky*, *supra*, 50 Cal.App.4th at p. 630, 57 Cal.Rptr.2d 790 [interpreting exemption statutes relating to individual retirement**835 and "401(k)" accounts]; *Lampley v. Alvares*, *supra*, 50 Cal.App.3d at p. 128, 123 Cal.Rptr. 181.)

Finally, Ford suggests that if we adopt Waters's argument, we would reward a judgment debtor who may have withdrawn funds from the deposit account before the date of the levy and spent them on luxuries or other frivolities. There is nothing to suggest that the Legislature did not consider this possibility when it enacted section 700.140 and limited the reach of the execution lien on a bank account to "only amounts in the deposit account at the time of service on the financial institution" (*id.*, subd. (a)), and when it enacted section 704.070 and created an exemption for 75 percent of "the paid earnings that are levied upon." Surely it occurred to members of the legislative branch the reasonable and obvious possibility that judgment debtors may make withdrawals to pay utility and other bills, buy food, and perhaps even splurge on luxury items before a levy on a deposit account is served. If Ford believes that, despite the express statutory limitations, judgment creditors should be able to access a debtor's funds retroactively when they seek to levy on a bank account, then Ford must look to the Legislature for a fix. Our role, as the judicial branch of government, is simply to interpret the controlling statutes as they are written.

IV. CONCLUSION

[6] When the judgment creditor chooses a levy on a bank account, it can look to recover from only those sums in the deposit account on the date the levy hits, i.e., "the amount levied upon." (§ 700.140, subds.(c), (e), italics added.) The judgment creditor cannot lay claim to funds that previously may have been in the deposit account—even as recently as the day before. Instead, as the bank account levy statute clearly provides, the lien reaches only amounts in the account at the time the lien is served. (*Id.*)

The exemption statute provides a debtor with an exemption for 75 percent of "the paid earnings that are levied upon." (§ 704.070, subd. (b)(2), italics added.) Because what is "levied upon" is the balance that exists on the date of the levy, the exemption applies to that amount.

*16 V. DISPOSITION

The judgment is reversed and the matter is remanded to the trial court for entry of an order granting Waters's claim of exemption in the amount that represents 75 percent of the qualifying paid earnings in her account on the date of the levy.

We concur: HUNTER and VILARDI, JJ.

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Westlaw.

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Page 1



Court of Appeals of Arizona,
 Division I, Department A.

FRAZER, RYAN, GOLDBERG, KEYT & LAW-
 LESS, a partnership, Plaintiff/Judgment Creditor,
 Appellee,
 Valley National Bank of Arizona, Garnishee, Ap-
 pellee,
 v.

Michael A. SMITH, a single man, Defendant/Judg-
 ment Debtor, Appellant.

No. 1 CA-CV 93-0225.

May 11, 1995.

Review Denied Dec. 19, 1995.

Judgment creditor issued writ of garnishment against debtor's bank account for unpaid legal fees. On debtor's request for hearing, the Superior Court, Maricopa County, Cause No. CV 91-04203, Elizabeth P. Arriola, J. pro tem., honored debtor's personal exemption of \$150 but treated debtor's deposit of wages as wholly susceptible to garnishment. Debtor appealed. The Court of Appeals, Fidel, P.J., held that: (1) exemption restricting disposable earnings subject to process to 25 percent of disposable earnings for that week did not extend to earnings disbursed to debtor's bank account, and (2) attorney fee statute did not extend right to reasonable compensation to successful garnishment plaintiff.

Affirmed.

West Headnotes

[1] Exemptions 163 ↪48(1)

163 Exemptions

163I Nature and Extent

163I(C) Property and Rights Exempt

163k48 Earnings, Wages, or Salaries

163k48(1) k. In General. Most Cited

Cases

Exemptions 163 ↪59

163 Exemptions

163I Nature and Extent

163I(C) Property and Rights Exempt

163k59 k. Ownership or Possession of
 Property in General. Most Cited Cases

Funds do not retain partially exempt status in garnishment as earnings once funds are disbursed to judgment debtor's bank account. A.R.S. §§ 12-1598.01, subd. A, 12-1598.10, subd. F, 33-1131, subds. A, B.

[2] Exemptions 163 ↪48(1)

163 Exemptions

163I Nature and Extent

163I(C) Property and Rights Exempt

163k48 Earnings, Wages, or Salaries

163k48(1) k. In General. Most Cited
 Cases

Although personal property exemption statute restricting percentage of disposable earnings subject to process, including garnishment, to 25 percent of disposable earnings for that week was found within different title of statutes, statute was closely intertwined with garnishment statute and had to be given consistent interpretation. A.R.S. §§ 12-1598 et seq., 12-1598.01, subd. A, 33-1131, subd. B.

[3] Exemptions 163 ↪48(2)

163 Exemptions

163I Nature and Extent

163I(C) Property and Rights Exempt

163k48 Earnings, Wages, or Salaries

163k48(2) k. What Are Wages or Per-
 sonal Earnings. Most Cited Cases

Distinction between "earnings" and "money" is relevant to garnishment of money. A.R.S. §§ 12-1570 et seq., 12-1570, subd. 6, 12-1570.01.

[4] Exemptions 163 ↪48(1)

163 Exemptions

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163I Nature and Extent

163I(C) Property and Rights Exempt
 163k48 Earnings, Wages, or Salaries
 163k48(1) k. In General. Most Cited

Cases

(Formerly 163k37)

Although garnishment statute contemplates category of exempt monies, statute did not support debtor's contention that exempt earnings turned into exempt monies upon disbursement to employee; nowhere did legislature suggest that exempt monies include those that were formerly exempt earnings. A.R.S. §§ 12-1570, 12-1598.10, subd. F, 33-1126, 33-1131.

[5] Exemptions 163 ⇨48(1)

163 Exemptions

163I Nature and Extent
 163I(C) Property and Rights Exempt
 163k48 Earnings, Wages, or Salaries
 163k48(1) k. In General. Most Cited

Cases

Arizona legislature did not give disposable earnings broader or more enduring protection under personal property exemption scheme than was given under federal Consumer Credit Protection Act. Consumer Credit Protection Act, §§ 302, 303, 15 U.S.C.A. §§ 1672, 1673; A.R.S. § 33-1131, subd. B.

[6] Exemptions 163 ⇨48(1)

163 Exemptions

163I Nature and Extent
 163I(C) Property and Rights Exempt
 163k48 Earnings, Wages, or Salaries
 163k48(1) k. In General. Most Cited

Cases

Legislature's repeal of limited exemption for already paid wages and its failure to provide replacement for provision when it revised Arizona postjudgment garnishment scheme suggested that legislature chose not to permit any such exemption to survive. A.R.S. § 12-1594 (Repealed); Laws 1986, Ch. 4, § 23.

[7] Garnishment 189 ⇨191

189 Garnishment

189VI Proceedings to Support or Enforce
 189k191 k. Costs and Attorney Fees. Most Cited Cases

Statute authorizing award of attorney fees to successful garnishee did not extend right to reasonable compensation to successful garnishment plaintiff. A.R.S. § 12-1591, subd. C.

[8] Garnishment 189 ⇨191

189 Garnishment

189VI Proceedings to Support or Enforce
 189k191 k. Costs and Attorney Fees. Most Cited Cases

"Cost," within meaning of statute authorizing award of attorney fees to successful garnishee, includes reasonable attorney fees. A.R.S. § 12-1591, subd. C.

****1385 *182** Paul Crane, Phoenix, for appellant.

Frazer, Ryan & Goldberg by John R. Fitzpatrick, Phoenix, for appellees.

OPINION

FIDEL, Presiding Judge.

Only 25% of a judgment debtor's disposable earnings is subject to garnishment in Arizona. *See* Ariz.Rev.Stat. Ann. ("A.R.S.") § 33-1131(B). In cases of extreme economic hardship, the court may reduce this non-exempt amount to 15%. *See* A.R.S. § 12-1598.10(F). Do funds retain their partially exempt status as earnings, however, once disbursed to the judgment debtor's bank account? That question is presented in this appeal.

****1386 *183 I. PROCEDURAL BACKGROUND**

Michael A. Smith appeals from a garnishment judgment in favor of his creditor, Frazer, Ryan, Goldberg, Keyt & Lawless ("Frazer"), on a writ of garnishment against Valley National Bank ("VNB"). After recovering a \$42,028.32 judgment against Smith for unpaid legal fees, Frazer served

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on Smith and VNB a non-earnings writ of garnishment identifying Smith's checking account at VNB.

VNB responded that Smith's account contained \$3,500.07 and froze all but \$150.00 pursuant to A.R.S. § 33-1126.^{FN1} Smith requested a hearing, alleging that the writ had frozen exempt monies. The trial court honored Smith's personal exemption of \$150.00 and found additional exemptions of \$1,144.60, representing social security and medicare payments that Smith had received on behalf of his mother. But the trial court treated Smith's deposited wages as wholly susceptible to garnishment, ruling that they had

FN1. Section 33-1126(A)(8) lists among various categories of debtor's property exempt from execution, attachment, or sale "A total of one hundred fifty dollars held in a single [bank] account." A.R.S. § 33-1126(A)(8) (Supp.1994).

not retain[ed] their identity as earnings once deposited. ARS § 12-1598.01(A) [sic] provides [that] "... earnings become monies as defined in Section 12-1570, paragraph six, upon their disbursement by the employer ...". These monies are subject to garnishment. ARS § 12-1570.01(A) 2. From that ruling, Smith appeals.

II. EARNINGS AND MONIES

[1] The undisputed facts raise pure questions of law concerning the scope of Arizona's statutory disposable earnings exemptions. Section 33-1131(A) defines "disposable earnings" as "that remaining portion of a debtor's ... compensation for his personal services ... after deducting from such earnings those amounts required by law to be withheld." Section 33-1131(B) restricts the percentage of disposable earnings subject to process, including garnishment, to "twenty-five per centum of disposable earnings for that week." Section 33-1131 has remained unchanged since it was adopted in 1976.

In 1985, the United States District Court for the District of Arizona found Arizona's then-existing

post-judgment garnishment statutes, former A.R.S. §§ 12-1571 et seq., unconstitutional. *Neeley v. Century Fin. Co.*, 606 F.Supp. 1453, 1469-70 (D.Ariz.1985). In 1986, our legislature extensively amended A.R.S. §§ 12-1571 et seq. and added new §§ 12-1598 et seq., governing garnishment of earnings. Although section 28 of the 1986 Act amended portions of A.R.S. Title 33, the legislature did not change the provisions of § 33-1131 concerning the exemption of disposable earnings.

As amended in and after 1986, the Arizona statutes distinguish garnishment of earnings from garnishment of "monies which are not earnings." Title 12, chapter 9, article 4, provides for "Garnishment of Monies or Property." Article 4.1 separately provides for "Garnishment of Earnings." The definitional sections of Articles 4 and 4.1 highlight the distinctive treatment of "earnings" and "monies." The term "earnings" is defined in Article 4.1, § 12-1598(4), as "compensation paid or payable for personal services." The term "monies" is defined in Article 4, § 12-1570(6), to include "cash, credit and accounts," but the definition expressly excludes "earnings as defined in § 12-1598, paragraph 4."

The disparate treatment of "earnings" and "monies" is additionally marked in the sections that define the scope of Articles 4 and 4.1. In § 12-1570.01, the legislature describes Article 4 as extending to "[i]ndebtedness owed to a judgment debtor by a garnishee for monies which are not earnings as defined in § 12-1598, paragraph 4." And in Article 4.1, § 12-1598.01, the legislature not only reiterates the distinction, but addresses the transformation of "earnings" subject to Article 4.1 into "monies" subject to Article 4. Section 12-1598.01 provides in pertinent part:

A. The provisions of this article are applicable to indebtedness owed to a judgment debtor by a garnishee for monies which are earnings as defined in § 12-1598, paragraph 4. *Earnings become monies*, as defined in § 12-1570, paragraph 6, upon ****1387 *184** their disbursement by the em-

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ployer to or for the account of the employee, except disbursements into a pension or retirement fund.

B. The provisions of this article are not applicable to garnishments of:

1. Indebtedness owed to a judgment debtor by a garnishee for amounts which are not earnings as defined in § 12-1598, paragraph 4.

2. Monies held by a garnishee on behalf of a judgment debtor.

(Emphasis added.)

The trial court based its ruling straightforwardly on the language of § 12-1598.01(A). Although § 33-1131(B) exempts 75% of “disposable earnings” from garnishment, funds are transformed from “earnings” into “monies” once disbursed into an employee’s account. Because the funds in Smith’s bank account were therefore “monies,” not “earnings,” the trial court found them beyond the protective reach of § 33-1131(B).

Smith attacks the trial court’s ruling by pointing out that § 12-1570.01 does not bring all of a judgment debtor’s “monies” within the reach of his creditors. Sections 12-1570(2) and (7) contemplate the existence of both “exempt” and “nonexempt” monies, only the latter of which are subject to garnishment.^{FN2} Smith asserts that we should attribute to the legislature an intent to categorize as exempt those monies which had taken on the character of exempt disposable earnings under A.R.S. § 33-1131. Citing *Vukovich v. Ossic*, 50 Ariz. 194, 70 P.2d 324 (1937), and *Midamerica Savings Bank v. Miede*, 438 N.W.2d 837 (Iowa 1989), Smith urges that if “disposable earnings,” which are exempt from garnishment in the hands of the employer, lose their exempt character merely through disbursement, the earnings exemption is reduced to an illusion.

FN2. Section 12-1570(2) defines “Exempt monies or property” as “monies or prop-

erty that, pursuant to a state or federal law, is not subject to judicial process, including ... garnishment.” Section 12-1570(7) defines “Nonexempt monies or property” as those “which are not restricted by law from judicial process.”

Vukovich concerned a provision in the Revised Code of 1928 that provided that worker’s compensation benefits, which are unassignable in the hands of the Industrial Commission, “shall be exempt from attachment, garnishment and execution, and shall not pass to another person by operation of law.” 50 Ariz. at 197, 70 P.2d at 325. Our supreme court held:

By the broad statement that compensation is exempt, without any limitation as to time, the Legislature evidently intended that the exemption should continue so long as compensation may be properly regarded as such, and it does not lose its character as compensation merely because it is paid to an employee and deposited in the bank but retains this status so long as it is kept intact and unmixed with his other funds.

Id. at 198, 70 P.2d at 325-26.

In *Midamerica Savings Bank*, the Iowa Supreme Court similarly applied a statutory earnings exemption to earnings that had been disbursed to the debtor’s bank account. Reversing a judgment for the judgment creditor, the court stated,

If wages intended by law to be exempt from creditors’ claims are only accorded that status in the hands of the debtor’s employer, the protection can be rendered meaningless by creditors levying on the funds in the hands of the debtor or on the debtor’s bank account.

438 N.W.2d at 839.

Vukovich and *Midamerica* expose the insubstantiality of an earnings exemption that endures only while the earnings remain in the hands of the employer and dissolves once they are disbursed to

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the employee. Yet we are faced with a different statute than the one our supreme court interpreted in *Vukovich*. And we find ourselves foreclosed by clear statutory language from following either *Vukovich* or *Midamerica*.

[2] First, the earnings exemption applies only to earnings, and as we have noted, A.R.S. § 12-1598.01(A) expressly defines the transition of earnings into monies upon disbursement to the employee. Even though the 75% earnings exemption is found at § 33-1131(B), within a different title of the ****1388 *185** statutes, § 33-1131 is closely intertwined with A.R.S. §§ 12-1598 et seq., and must be given a consistent interpretation. See, e.g., *In re Appeal in Maricopa County, Juvenile Action No. JD-6236*, 178 Ariz. 449, 452 n. 2, 874 P.2d 1006, 1009 n. 2 (App.1994). The intertwining of §§ 33-1131 and 12-1598 et seq. is particularly apparent in A.R.S. § 12-1598.10(F):

If at the [garnishment] hearing the court determines that the judgment debtor is subject to the twenty-five per cent maximum disposable earnings provision under § 33-1131, subsection B and based on clear and convincing evidence that the judgment debtor or his family would suffer extreme economic hardship as a result of the garnishment, the court may reduce the amount of nonexempt earnings withheld under a continuing lien ordered pursuant to this section from the twenty-five per cent to not less than fifteen per cent.

The statutes are explicitly cross-referenced. The 25% of earnings that are nonexempt under § 33-1131 may be reduced to 15% under § 12-1598.10(F). To operate in tandem as they do, these statutes must necessarily define “earnings” the same way.

[3] Second, although Smith argues that “the distinction between ‘earnings’ and ‘money’ is simply irrelevant” to the garnishment of money under A.R.S. §§ 12-1570 et seq., this argument is simply wrong. The legislature carefully distin-

guished “earnings” from “monies” within Article 4 as well as Article 4.1. See A.R.S. § 12-1570(6). And the legislature described Article 4 as extending to “monies which are not earnings.” See A.R.S. § 12-1570.01.

[4] Third, although A.R.S. § 12-1570 contemplates a category of “exempt monies,” the statutory framework does not support Smith’s contention that exempt earnings turn into exempt monies upon disbursement to the employee. The legislature has designated various types of exempt monies in A.R.S. § 33-1126.^{FN3} Nowhere, however, does the legislature suggest that exempt monies include those that were formerly exempt earnings under §§ 33-1131 or 12-1598.10(F).

FN3. For example, § 33-1126(A), entitled “Money benefits or proceeds; exceptions,” lists as exempt property:

1. All money received by or payable to a surviving spouse or child upon the life of a deceased spouse, parent or legal guardian, not exceeding twenty thousand dollars.

* * * * *

3. All monies received by or payable to a person entitled to receive child support or spousal maintenance pursuant to a court order.

4. All money, proceeds or benefits of any kind to be paid ... under any policy of health, accident or disability insurance or any similar plan or program of benefits....

5. All money arising from any claim for the destruction of, or damage to, exempt property....

[5] Fourth, A.R.S. § 33-1131 was modelled both in its definition of “disposable earnings” and in its partial exemption of disposable earnings from garnishment-after the federal Consumer Credit Pro-

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tection Act.^{FN4} Compare 15 U.S.C. §§ 1672-1673 with A.R.S. § 33-1131. The courts that have considered whether the federal garnishment exemption extends to earnings disbursed to the judgment debtor's bank account have uniformly held that it does not.^{FN5}

FN4. Similarly, A.R.S. § 12-1598(4) plainly adopted the definition of "earnings" contained in 15 U.S.C. § 1672(a).

FN5. *Usery v. First Nat'l Bank*, 586 F.2d 107, 110 (9th Cir.1978); *Dunlop v. First Nat'l Bank*, 399 F.Supp. 855, 857 (D.Ariz.1975); *Edwards v. Henry*, 97 Mich.App. 173, 293 N.W.2d 756, 757-58 (1980); *John O. Melby & Co. Bank v. Anderson*, 88 Wis.2d 252, 276 N.W.2d 274, 276-77 (1979); cf. *Citronelle-Mobile Gathering, Inc. v. Watkins*, 934 F.2d 1180, 1191 (11th Cir.1991); *In re Orndoff*, 100 B.R. 516, 519 (Bankr.E.D.Cal.1989).

Smith discounts federal precedent by arguing that Arizona's exemption scheme is more debtor-protective than the federal model. Section 33-1131 (B) exempts "disposable earnings" not just from "garnishment" (15 U.S.C. § 1673) but from "process," defined to include every form of judicial process for debt collection. A.R.S. § 33-1121(2). But this distinction does not help Smith's case. The Arizona legislature placed § 33-1131 among other personal property exemptions in a single article. That comprehensive article covers many forms of tangible personal ****1389 *186** property, not just "disposable earnings," and it employs the generic term "process" to exempt the various forms of covered property from all forms of judicial collection remedies, not just garnishment alone. But the legislature confined the scope of § 33-1131 to "disposable earnings," a term of art that federal authorities had interpreted to exclude already-paid compensation. And there is nothing within the wording of § 33-1131 that suggests our legislature meant to give disposable earnings a broader or

more enduring protection than was given under federal law.

[6] Finally, until 1986 the Arizona statutes did contain a limited exemption for already-paid wages. See A.R.S. § 12-1594 (repealed 1986).^{FN6} But the legislature repealed this exemption and provided no replacement when it revised the Arizona post-judgment garnishment scheme. 1986 Ariz.Sess.Laws ch. 4, § 23. The repeal of § 12-1594 sharply suggests that the legislature chose not to permit any such exemption to survive.

FN6. Former § 12-1594 provided in pertinent part:

A. One half of the earnings for personal services rendered at any time within thirty days preceding service of the writ shall not be subject to garnishment when such earnings are necessary for the support of the family of the debtor, supported wholly or in part by his labor.

In summary, the earnings protection of §§ 33-1131 and 12-1598.10 does not extend to monies disbursed to the debtor's bank account. We acknowledge that the earnings exemption is thus diluted, at least for debtors who deposit their earnings in bank accounts. But as we have said on other occasions, "An upholding is not an endorsement." *McPeak v. Industrial Comm'n*, 154 Ariz. 232, 235, 741 P.2d 699, 702 (App.1987). Those who believe that the earnings exemption should endure beyond disbursement to the employee must direct their remedial efforts to the legislature, not the courts. The trial court correctly granted Frazer judgment on its writ of garnishment.

III. ATTORNEY'S FEES

[7][8] Frazer seeks attorney's fees pursuant to A.R.S. § 12-1591(C). "Costs" within this statute includes reasonable attorney's fees. *Business Fin. Servs., Inc. v. AGN Dev. Corp.*, 143 Ariz. 603, 609, 694 P.2d 1217, 1223 (App.1984). But A.R.S. § 12-1591(C) does not extend the right to reasonable

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compensation to a successful garnishment plaintiff.
Spanier v. United States Fidelity & Guar. Co., 127
Ariz. 589, 598-99, 623 P.2d 19, 28-29 (App.1980).
We therefore deny Frazer's request for attorney's
fees on appeal.

WEISBERG and GARBARINO, JJ., concur.

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Court of Appeals of Idaho.
 John Wallace HOOPER, Petitioner–Appellant,
 v.
 STATE of Idaho, Respondent.

Nos. 21571, 21853.
 Dec. 11, 1995.
 Petition for Review Denied Jan. 23, 1996.

Following affirmance of defendant's 30-year sentence for voluntary manslaughter, 119 Idaho 606, 809 P.2d 467, defendant filed successive applications for postconviction relief. On denial of second application, the District Court of the Fourth Judicial District, Ada County, Gerald F. Schroeder, J., allowed \$150 in costs to state. State sought execution of judgment, and defendant filed claim of exemption, which was denied. Defendant appealed denial of application and denial of claim for exemption. The Court of Appeals, Walters, C.J., held that: (1) defendant was not entitled to file second application for postconviction relief on basis that trial court did not decide claims in first petition on their "merits"; (2) trial court did not err in denying second petition without making findings regarding sufficiency or insufficiency of reasons to allow second petition; (3) defendant was not denied due process with respect to award of costs to state; and (4) defendant failed to show prison account should be exempted from execution of judgment.

Affirmed.

West Headnotes

[1] Criminal Law 110 ↪1668(5)

110 Criminal Law
 110XXX Post-Conviction Relief
 110XXX(C) Proceedings
 110XXX(C)3 Hearing and Determination
 110k1666 Effect of Determination
 110k1668 Successive Post-

Conviction Proceedings

110k1668(4) Excuses for Failure to Raise Issue in Previous Post-Conviction Proceeding

110k1668(5) k. In General.

Most Cited Cases

(Formerly 110k998(21))

Under Idaho statute governing petitions for postconviction relief, any legal or factual grounds for relief not raised in the first petition are permanently waived if the grounds were known or should have been known at time of first petition; subsequent petitions are allowed if the application states a sufficient reason for not asserting the grounds in the earlier petition. I.C. § 19-4908.

[2] Criminal Law 110 ↪1668(3)

110 Criminal Law

110XXX Post-Conviction Relief

110XXX(C) Proceedings

110XXX(C)3 Hearing and Determination

110k1666 Effect of Determination

110k1668 Successive Post-

Conviction Proceedings

110k1668(3) k. Particular Issues

and Cases. Most Cited Cases

(Formerly 110k998(21))

Defendant was not entitled to file second application for postconviction relief on basis that trial court, in dismissing first petition for failure to state a basis for relief, did not decide "merits" of defendant's claims; district court's order was left undisturbed as an adjudication on the merits of first petition where defendant, though he timely filed an appeal, failed to pursue the appeal and it was ultimately dismissed. I.C. §§ 19-4906(b), 19-4908.

[3] Criminal Law 110 ↪1668(9)

110 Criminal Law

110XXX Post-Conviction Relief

110XXX(C) Proceedings

110XXX(C)3 Hearing and Determination

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110k1666 Effect of Determination
 110k1668 Successive Post-
 Conviction Proceedings
 110k1668(9) k. Proceedings.

Most Cited Cases

(Formerly 110k998(21))

District court, in denying defendant's second petition for postconviction relief, was not required to make any finding with regard to sufficiency or insufficiency of reasons to allow second petition, where second petition failed to allege or set forth any basis upon which district court could make such a finding; defendant had burden of providing factual reasons for not raising in the first petition the grounds he asserted in second petition. I.C. §§ 14-4906(b), 14-4908.

[4] Criminal Law 110 ↩️1652

110 Criminal Law

110XXX Post-Conviction Relief

110XXX(C) Proceedings

110XXX(C)3 Hearing and Determination

110k1651 Necessity for Hearing

110k1652 k. In General. Most Cited

Cases

(Formerly 110k998(18))

Dismissal of postconviction claim when court is satisfied, on basis of the application, the answer or motion, and the record, that applicant is not entitled to postconviction relief operates as a determination that the allegations of the application lack merit. I.C. § 19-4906(b).

[5] Constitutional Law 92 ↩️4841

92 Constitutional Law

92XXVII Due Process

92XXVII(H) Criminal Law

92XXVII(H)12 Other Particular Issues
 and Applications

92k4841 k. Costs. Most Cited Cases

(Formerly 92k317(1))

Costs 102 ↩️314

102 Costs

102XIV In Criminal Prosecutions

102k313 Taxation or Allowance of Bill

102k314 k. In General. Most Cited Cases

Trial court's decision to allow attorney fees to state for responding to defendant's frivolous application brought pursuant to Uniform Post-Conviction Procedure Act did not deny due process to defendant, where defendant was served with copies of decision and of state's memorandum for costs, but did not file any objection. U.S.C.A. Const.Amend. 14; I.C. §§ 12-121, 19-4901 et seq.; Rules Civ.Proc., Rule 54(d)(5, 6), (e)(1, 5, 6).

[6] Criminal Law 110 ↩️1570

110 Criminal Law

110XXX Post-Conviction Relief

110XXX(C) Proceedings

110XXX(C)1 In General

110k1570 k. In General. Most Cited

Cases

(Formerly 110k998(14.1))

The Idaho Rules of Civil Procedure are applicable to proceedings brought under Uniform Post-conviction Procedure Act. I.C. § 19-4901 et seq.

[7] Costs 102 ↩️220

102 Costs

102IX Taxation

102k220 k. Waiver and Correction of Irregularities and Errors. Most Cited Cases

Where no objection to a memorandum of costs is filed, the right to further contest the award is waived. Rules Civ.Proc., Rule 54(d)(5, 6), (e)(5).

[8] Constitutional Law 92 ↩️4018

92 Constitutional Law

92XXVII Due Process

92XXVII(E) Civil Actions and Proceedings

92k4017 Costs and Fees

92k4018 k. In General. Most Cited

Cases

(Formerly 92k317(1))

Constitutional Law 92 ⇨ **4019**

92 Constitutional Law
 92XXVII Due Process
 92XXVII(E) Civil Actions and Proceedings
 92k4017 Costs and Fees
 92k4019 k. Fees. Most Cited Cases
 (Formerly 92k317(1))

Costs 102 ⇨ **208**

102 Costs
 102IX Taxation
 102k208 k. Duties and Proceedings of Taxing Officer. Most Cited Cases
 Rules governing objections to memorandum of costs or to allowance of attorney fees satisfy the right to due process by providing objecting party with notice and an opportunity to be heard and to present objections before trial court. U.S.C.A. Const.Amend. 14; Rules Civ.Proc., Rule 54(d)(5, 6), (e)(5, 6).

[9] Exemptions 163 ⇨ **148**

163 Exemptions
 163VI Protection and Enforcement of Rights
 163k148 k. Evidence. Most Cited Cases
 Inmate failed to carry burden of proving, on basis of statute limiting garnishment of wages, that his prison account was entitled to exemption from award of \$150 in costs to state for responding to frivolous petition for postconviction relief, where inmate's prison wages were commingled with funds from outside sources, and where inmate did not undertake any tracing process to show what portion of account constituted the allegedly exempt wages, but simply claimed that all funds in account were exempt. I.C. § 11-207.

[10] Exemptions 163 ⇨ **3**

163 Exemptions
 163I Nature and Extent
 163I(A) Nature, Creation, Duration, and Effect in General
 163k3 k. Constitutional and Statutory Pro-

visions. Most Cited Cases

Debtor's right to exempt property from claims of creditors is not a common law right but is dependent upon constitutional or statutory allowance; thus, assets are generally not exempt from claims of creditors unless specifically exempted by statute.

[11] Exemptions 163 ⇨ **148**

163 Exemptions
 163VI Protection and Enforcement of Rights
 163k148 k. Evidence. Most Cited Cases
 Debtor claiming an exemption of assets from claims of creditors generally must prove that his claim comes within statutory exemption provisions.

[12] Exemptions 163 ⇨ **37**

163 Exemptions
 163I Nature and Extent
 163I(C) Property and Rights Exempt
 163k37 k. Specific Exemptions in General. Most Cited Cases

Inmate's claim that his prison account was entitled to exemption from award of costs to state for responding to frivolous petition for postconviction relief would fail under statute exempting from attachment or levy those funds necessary for a individual's support, even aside from trial court's finding that department of corrections provided inmate all of the necessities for his support, where account did not consist solely of prison wages but also contained funds from outside sources. I.C. § 11-604(3).

****1253 *946** John Wallace Hooper, Boise, pro se appellant.

****1254*947** Alan G. Lance, Attorney General; Myrna A.I. Stahman, Deputy Attorney General, Boise, for respondent.

WALTERS, Chief Judge.

In these consolidated appeals, John Hooper seeks review of the district court's order denying his application for post-conviction relief (case no.

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21571), and of the court's order denying his claim of exemption of his funds from a writ of execution to satisfy a judgment entered for attorney fees incurred by the state in responding to the application for post-conviction relief (case no. 21853). We affirm both orders.

Background

Hooper is an inmate who is serving a thirty-year enhanced sentence imposed after he pled guilty to a charge of voluntary manslaughter. *State v. Hooper*, 119 Idaho 606, 809 P.2d 467 (1991). Subsequent to the decision on his direct appeal, Hooper filed an application in April, 1993, for post-conviction relief under Idaho Code § 19-4901. This application alleged ineffective assistance of trial counsel on three grounds: (a) failure to inform Hooper of his right to appeal; (b) coercing him into pleading guilty; and (c) permitting him to suffer double jeopardy. Pursuant to Idaho Code § 19-4906(b), the district court issued notice of its intent to dismiss the application on the basis that the first and third allegations were contravened by the facts in the record and the remaining allegation was bare and conclusory. Following a nonresponsive motion filed by Hooper, the court dismissed the application. Hooper appealed, but the appeal was dismissed on January 5, 1994, for nonpayment of fees to the clerk of the district court.

On June 23, 1994, Hooper filed another application for post-conviction relief, reasserting the same grounds as the first petition and adding the additional grounds that his trial counsel had failed to investigate threats made against the victim by a neighbor and had failed to appeal the double jeopardy issue. The district court dismissed this application on the basis that it was a successive petition raising claims that had been adjudicated or should have been raised previously. I.C. § 19-4908. In the dismissal order, the court also allowed costs to the state in the nature of an attorney's fee for responding to Hooper's "repetitive claim which is frivolous and without foundation." Hooper filed a notice of appeal (case no. 21571). Later, when the state

sought execution of a judgment for \$150 representing the costs allowed by the court, Hooper filed a claim of exemption. The court denied Hooper's claim of exemption and Hooper filed an appeal (case no. 21853) from the order denying that claim.

Case No. 21571

[1] We address first the question of the dismissal of Hooper's second application for post-conviction relief. Idaho Code § 19-4908 provides:

All grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

In *Stuart v. State*, 118 Idaho 932, 801 P.2d 1283 (1990), our Supreme Court addressed this statute, explaining:

Idaho Code § 19-4908 requires that all legal and factual grounds for relief must be raised in the first petition for post-conviction relief. Any grounds for relief not raised are permanently waived if the grounds were known or should have been known at the time of the first petition. Subsequent petitions are allowed if the [applicant] states a sufficient reason for not asserting the grounds in the earlier petition. Hence, there is no absolute prohibition**1255 *948 against successive petitions for relief. *Palmer v. Dermitt*, 102 Idaho 591, 635 P.2d 955 (1981).

118 Idaho at 933-34, 801 P.2d at 1284-85.

[2][3] Hooper poses two arguments challenging the district court's dismissal of his second application. First, he contends that the claims in his origin-

al petition must have been decided on their “merits” before a subsequent application would be barred. In this regard, he argues that the summary dismissal of the first application on the ground that the allegations therein failed to state a basis for relief was not an adjudication of the merits of his claims. Second, he maintains that the district court erred by not making any finding whether Hooper presented a sufficient reason for failing to raise the second petition's claims in his original application.

[4] We are not persuaded that the dismissal of Hooper's second application should be set aside for either of these reasons. With respect to Hooper's first application, Idaho Code § 19-4906(b) permits the district court to dismiss a post-conviction claim, after twenty days notice to the applicant,

[w]hen the court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings....

In our view, a dismissal under this section clearly operates as a determination that the allegations of the application lack merit. Furthermore, the propriety of such a determination is subject to challenge by the applicant through the appellate process. Here, although Hooper timely filed an appeal from the order denying relief on his first application, the appeal was not pursued but ultimately was dismissed, leaving the district court's order undisturbed as an adjudication of the merits of the first petition. Accordingly, Hooper's contention that he was entitled to file a subsequent application because the district court did not decide the claims in the first petition on their “merits” must be rejected.

Nonetheless, as observed by our Supreme Court in *Stuart*, subsequent petitions are allowed if the applicant states a sufficient reason for not asserting the grounds in the earlier petition. This brings us to Hooper's other argument: that the district court erred by failing to make any finding with regard to the sufficiency, or insufficiency, of reasons

to allow the second petition. In this vein, we have reviewed Hooper's second application for relief and do not find where he alleged or set forth any basis upon which the district court could make a finding as to the sufficiency of a reason to allow Hooper to file a successive application. In order to prevent his second application from being dismissed, Hooper had the burden of providing the district court with factual reasons upon which the court could conclude there was a “sufficient reason” why the grounds for relief asserted in his second petition were “not asserted or were inadequately raised in the original, supplemental or amended application.” I.C. § 19-4908. This he failed to do. *Compare, Stuart, supra*, (second application set forth facts, with accompanying affidavits, alleging newly discovered information not known to applicant at the time of the filing of the first petition).

Under the circumstances presented, we decline to hold that the district court committed any error by failing to make findings with regard to the sufficiency of reasons for filing a successive post-conviction application. The order dismissing Hooper's second application for relief is affirmed.

Case No. 21853

As noted earlier, when the district court dismissed Hooper's second application for post-conviction relief, the district court awarded costs including a reasonable attorney's fee to the state for responding to Hooper's petition. See I.C. § 12-121; I.R.C.P. 54(e)(1). The state timely filed a memorandum of costs pursuant to I.R.C.P. 54(d)(5) and 54(e)(5) for \$150, representing two hours of its attorney's time at the rate of \$75 per hour. Hooper did not file any objection to the award or to the amount claimed by the **1256 *949 state as costs, under either I.R.C.P. 54(d)(6) or 54(e)(6), and the court entered a judgment in favor of the state in the amount of \$150. The state then obtained a writ of execution directing the Sheriff of Ada County to satisfy the judgment from Hooper's personal property. The Sheriff levied on Hooper's account as an

inmate at the penitentiary.

Hooper filed a claim of exemption, asserting that the funds in his account were reasonably necessary for his support, that the garnished funds were wages, and that the seizure of those funds exceeded the limit for garnishment of earnings permitted by Idaho Code § 11-207. Additionally, through a brief, Hooper contended that he had been denied due process because he was not given the opportunity to challenge the assessment of costs.

The state objected to Hooper's claim of exemption on two grounds. First, the state submitted that Hooper's account was not reasonably necessary for his support because, as an inmate, his care was provided for by the department of corrections. Second, the state alleged that the monies levied upon were not attached or garnished from an employer but were part of an account containing commingled funds, rendering the account not subject to exemption under Idaho Code § 11-604(3).

After conducting a hearing on the claim of exemption and objection, the district court denied Hooper's claim and held that the state was entitled to collect the attorney fees awarded by the court from Hooper's inmate account. Hooper then brought this appeal.

[5] Hooper challenges the district court's decision in two respects. First, he contends the district court erred in awarding attorney fees to the state without permitting him the opportunity to challenge the state's claim.^{FN1} Second, he maintains the court erred in holding that Hooper's inmate account was not exempt from garnishment under the provisions of Idaho Code § 11-207(1).

FN1. Except for this argument that he was denied notice and a hearing with regard to the state's request for fees, Hooper has not challenged the district court's authority to award fees or costs against the applicant in a frivolous action brought pursuant to the Uniform Post-Conviction Procedure Act,

I.C. § 19-4901 *et seq.*

[6][7][8] Hooper's first contention is unmeritorious. The Idaho Rules of Civil Procedure are applicable to proceedings brought under the Uniform Post-Conviction Procedure Act, I.C. § 19-4901 *et seq.* *State v. Goodrich*, 104 Idaho 469, 660 P.2d 934 (1983). Rules 54(d)(6) and 54(e)(6) provide the mechanism for objecting to awards of costs and attorney fees. Rule 54(d)(6) reads in pertinent part:

Any party may object to the claimed costs of another party set forth in a memorandum of costs by filing and serving on adverse parties a motion to disallow part or all of such costs within fourteen (14) days of service of the memorandum of costs. Such motion ... shall be heard and determined by the court as other motions under these rules. Failure to timely object to the items in the memorandum of costs shall constitute a waiver of all objections to the costs claimed.

The companion rule, I.R.C.P. 54(e)(6), states that "[a]ny objection to the allowance of attorney fees, or to the amount thereof, shall be made in the same manner as an objection to costs as provided in Rule 54(d)(6)." It is well settled that where no objection to a memorandum of costs is filed, the right to further contest the award is waived. *Conner v. Dake*, 103 Idaho 761, 653 P.2d 1173 (1982). Furthermore, because I.R.C.P. 54(d)(5) and 54(e)(5) provide for notice and an opportunity to be heard and to present objections before the trial court, the right to due process has been satisfied. *Farber v. Howell*, 111 Idaho 132, 721 P.2d 731 (Ct.App.1986).

The record shows that Hooper was served with a copy of the court's decision to allow costs to the state for responding to Hooper's second application for post-conviction relief and with a copy of the state's memorandum of costs. Hooper did not file any objection as allowed by the rules of civil procedure. Under these circumstances, we hold that Hooper's right to due process was not denied. *Farber v. Howell*, *supra*.

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****1257 *950** [9] We turn next to the question of whether the funds in Hooper's inmate account were exempt from execution to satisfy the judgment. Hooper argues that Idaho Code § 11-207 limited the garnishment of his inmate account to twenty-five percent of his disposable earnings per week or to the amount by which his disposable earnings exceed thirty times the federal minimum hourly wage, whichever is less. However, we are not persuaded that Hooper is entitled to any protection under Section 11-207.

[10][11] It is well recognized that a debtor's right to exempt property from the claims of creditors is not a common law right but is dependent upon constitutional or statutory allowance. 31 AM.JUR.2d, *Exemptions*, § 2 (1989). Thus, the general rule is that assets are not exempt from the claims of creditors unless specifically exempted by statute. *Id.* Furthermore, a debtor claiming an exemption generally must prove that his claim comes within the exemption provisions. *Id.*, § 367.

Hooper's claim of exemption, which although in writing was not in the form of an affidavit, asserted that

the garnished funds constitute every penny the plaintiff owns and even though he is a ward of the State, the State DOES NOT provide all that is necessary for life.... Further, the garnished funds represent the plaintiff's wages and the amount seized was 100% of the plaintiff's wages and exceeds the statutory maximum of 25% of disposable income or 30 times the federal minimum wage whichever is greater. Seizure of 100% of the plaintiff's wages is clearly in excess of the authority granted by the Writ [of Execution].

In a brief which responded to the state's objection to Hooper's claim of exemption, Hooper alleged that "All of [his] funds are wages earned by working at Corrections Industries at Idaho State Correctional Institution."

[12] At the hearing on the state's objection to

Hooper's claim, the state presented testimony from an officer with the department of corrections. Based upon the officer's testimony, the district court made a finding that

the department of corrections provides Mr. Hooper all of the necessities for his support without cost. To qualify as a necessity exemption, the petitioner must show that these funds are reasonably necessary for support. The state's evidence is that all of the petitioner's necessities are provided. He has not provided sufficient facts to rebut that evidence.

An exhibit which disclosed the nature of Hooper's account was also admitted in evidence during the hearing. This document shows the amounts credited into the account during the preceding four months and the disbursements made on Hooper's behalf from the account during the same period. The credits represent two forms of income, one being labelled as "incoming money outside source" and the other labelled as "incoming correctional industries payroll." The amounts by which these two sources contributed to the account were approximately equal. Thus, the account did not consist solely of wages earned by Hooper from Corrections Industries as he had alleged in his claim of exemption and brief. In fact, the account contained commingled funds. Although Hooper seemed to have asserted a claim of exemption on the ground that the garnished funds in his account were necessary for his support (notwithstanding the district court's ultimate finding to the contrary), Idaho Code § 11-604(3) provides that "The exemptions allowed by this section shall be lost immediately upon the commingling of any of the funds or amounts described in this section with any other funds." Thus a claim of exemption would fail under that statute, in this case.

Hooper's inmate account is similar to a bank account into which earnings may have been deposited. In this regard,

There is authority that statutorily exempt wages

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do not lose their exempt status when deposited in a personal checking account, as long as the proceeds of the account are traceable to those wages.

.....

****1258 *951** However, funds deposited in bank accounts and claimed as exempt wages have been found to be nonexempt where: ... it was no longer money due to the debtor for personal services because it had already been paid, and was now payable to the debtor by the bank by virtue of it being held to his credit in the account.

31 AM.JUR.2d, *supra*, § 45 (footnotes omitted). Stated another way,

There is authority that a deposit of exempt funds in a bank does not affect a debtor's exemption, nor change the exempt character of the fund, so long as the source of the exempt funds is reasonably traceable. If it is impossible to separate out exempt funds from nonexempt funds, the general rule is that an exemption cannot lie. This rule has been applied, though not without exception, to a deposit of exempt wages....

On the other hand, other cases hold that once money has been paid to a debtor for his personal services, it loses its exempt character and is instead payable to him by the bank by virtue of it being held by the bank to his credit and his bank account.

Id., § 224 (footnotes omitted).

The record does not demonstrate, nor does Hooper contend, that he undertook any tracing process with regard to his alleged wages. He simply asserted a claim that all of the funds in his account were exempt. In light of the evidence presented in this case, we conclude, as the district court essentially did, that Hooper failed in his burden of proof to show the entitlement to an exemption of his property. Accordingly, we affirm the district court's order denying Hooper's claim of exemption.

Conclusion

The district court properly denied Hooper's second application for post-conviction relief on the ground that it was prohibited under Idaho Code § 19-4908. The entry of the judgment for costs incurred in responding to Hooper's application for post-conviction relief did not violate due process. Finally, the district court correctly denied Hooper's claim of exemption of his inmate's account from execution to satisfy the judgment entered in favor of the state. Accordingly, the orders appealed from are affirmed.

LANSING and PERRY, JJ., concur.

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▷

United States Bankruptcy Court,
W.D. Missouri.

In re Samuel Houston ARNOLD, III, and Rebecca
Ann Arnold, Debtors.

Bankruptcy No. 96-30014.
March 13, 1996.

Chapter 7 debtors moved to quash administrative freeze bank, as unsecured creditor, placed on their account. Bank asserted right to set off funds against debt. The Bankruptcy Court, Arthur B. Federman, J., held that: (1) motion to quash would be granted, given lack of nonexempt funds available to be set off against unsecured debt to bank; (2) debtor's prepetition earned wages, directly deposited into account postpetition, did not lose exempt status due to commingling upon deposit; (3) debtor was entitled to claim exemptions for spouse's three children from prior marriages, for whom he provided support, under state head of household exemption; and (4) debtor was not entitled to claim, under head of household exemption, exemption for noncustodial child for whom he was not meeting child support obligations on date bankruptcy case was filed.

Motion to quash administrative freeze granted.

West Headnotes

[1] Bankruptcy 51  **2678**

51 Bankruptcy
51V The Estate
51V(G) Set-Off
51k2678 k. Bank Set-Off. Most Cited

Bankruptcy 51  **2793**

51 Bankruptcy
51VI Exemptions

51k2793 k. Operation and Effect. Most Cited Cases

Even if creditor bank had right of setoff against Chapter 7 debtors' non-exempt property, it had no right to set off debt against debtors' exempt assets.

[2] Exemptions 163  **1**

163 Exemptions
163I Nature and Extent
163I(A) Nature, Creation, Duration, and Effect in General
163k1 k. Nature of Right. Most Cited Cases
Property in Missouri is exempt if it is not subject to attachment and execution.

[3] Bankruptcy 51  **2762.1**

51 Bankruptcy
51VI Exemptions
51k2762 Effect of State Law
51k2762.1 k. In General. Most Cited Cases
Property of bankruptcy estate that is effectively exempt from attachment and garnishment under Missouri law may be allowed as exemption in bankruptcy.

[4] Bankruptcy 51  **2678**

51 Bankruptcy
51V The Estate
51V(G) Set-Off
51k2678 k. Bank Set-Off. Most Cited

Bankruptcy 51  **2793**

51 Bankruptcy
51VI Exemptions
51k2793 k. Operation and Effect. Most Cited Cases
Administrative freeze imposed by creditor bank upon bank account of Chapter 7 debtors would be

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quashed where, under Missouri law, no non-exempt funds were available to be set off against unsecured debt to bank, given debtors' entitlement to exemption for all but ten percent of earnings, \$800 wild card exemption, and head of household exemption, which together exceeded amount in account. V.A.M.S. §§ 513.427, 513.430(3), 513.440, 525.030, subd. 2.

[5] Exemptions 163 ⇐⇒16

163 Exemptions

163I Nature and Extent

163I(C) Property and Rights Exempt

163k31 k. General Exemptions of Personal Property. Most Cited Cases

Missouri statutes provide non-exclusive list of exemptions. V.A.M.S. §§ 513.430 – 513.530, 525.030, subd. 2.

[6] Bankruptcy 51 ⇐⇒2793

51 Bankruptcy

51VI Exemptions

51k2793 k. Operation and Effect. Most Cited Cases

Chapter 7 debtor's wages, which were earned prepetition but automatically deposited in debtor's bank account postpetition, retained exempt status accorded them under Missouri law, despite claim that wages became commingled funds upon their deposit, given debtor's attempt to intercept direct deposit and have earnings delivered directly to him and his entitlement, on petition date, to those wages, causing exempt status to attach as of that date. V.A.M.S. § 525.030, subd. 2.

[7] Bankruptcy 51 ⇐⇒2762.1

51 Bankruptcy

51VI Exemptions

51k2762 Effect of State Law

51k2762.1 k. In General. Most Cited Cases

Under Missouri law, debtor, who is entitled to exempt from garnishment all but ten percent of

wages payable to him, may exempt that amount from bankruptcy estate. V.A.M.S. §§ 513.427, 525.030, subd. 2.

[8] Exemptions 163 ⇐⇒16

163 Exemptions

163I Nature and Extent

163I(B) Persons Entitled

163k16 k. Head of Family and Members Thereof. Most Cited Cases

State "head of household" exemption, permitting head of family to exempt from execution property up to \$850, plus \$250 for each of head of family's unmarried dependent children under 18, is limited to one person in each family. V.A.M.S. § 513.440.

[9] Exemptions 163 ⇐⇒16

163 Exemptions

163I Nature and Extent

163I(B) Persons Entitled

163k16 k. Head of Family and Members Thereof. Most Cited Cases

Under Missouri statute permitting head of household to exempt property up to \$850, plus \$250 for each of household head's unmarried dependent children under 18, Chapter 7 debtor was entitled to exemption for spouse's three children from former marriages, even though spouse was entitled to child support from former husbands, who were legally responsible for children, given spouse's claim that former husbands did not provide support and undisputed statement that debtor was providing home and support for children. V.A.M.S. § 513.440.

[10] Exemptions 163 ⇐⇒16

163 Exemptions

163I Nature and Extent

163I(B) Persons Entitled

163k16 k. Head of Family and Members Thereof. Most Cited Cases

Under Missouri law, if former husbands of

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debtor's spouse were meeting support obligations for spouse's children living with spouse and debtor, former husbands would be entitled to head of household exemption of property from attachment for those children. V.A.M.S. § 513.440.

[11] Exemptions 163 ↩️16

163 Exemptions

163I Nature and Extent

163I(B) Persons Entitled

163k16 k. Head of Family and Members Thereof. Most Cited Cases

Chapter 7 debtor was not entitled to claim exemption from bankruptcy estate, under Missouri head of household exemption statute, for unmarried dependent child who did not live with him and for whom he was not meeting his support obligations on date that he filed bankruptcy case. V.A.M.S. § 513.440.

[12] Exemptions 163 ↩️4

163 Exemptions

163I Nature and Extent

163I(A) Nature, Creation, Duration, and Effect in General

163k4 k. Construction of Exemption Laws in General. Most Cited Cases

Exemption statutes are enacted for relief of debtor, and should be liberally construed.

[13] Exemptions 163 ↩️16

163 Exemptions

163I Nature and Extent

163I(B) Persons Entitled

163k16 k. Head of Family and Members Thereof. Most Cited Cases

Under Missouri law, Chapter 7 debtor was entitled to exemption from attachment under head of household exemption of property for custodial, unmarried, dependent child. V.A.M.S. § 513.440.

***898** Danny R. Nelson, Fitzsimmons, Schroeder, Nelson & Reynolds, Springfield, MO, for debtors.

George D. Nichols, Lamar, MO, for creditor.

MEMORANDUM OPINION

ARTHUR B. FEDERMAN, Bankruptcy Judge.

Debtors moved this Court to quash an administrative freeze on their bank account with Creditor First National Bank of Lamar ("FNB") and to release funds which debtors claim are exempt. This is a core proceeding under 28 U.S.C. § 157(b)(2)(B) over which the Court has jurisdiction pursuant to 28 U.S.C. §§ 1334(b), 157(a), and 157(b)(1). For ***899** the reasons set forth below, debtors' motion will be GRANTED.

Debtors filed a Chapter 7 bankruptcy petition on January 8, 1996. At the time of filing debtor Samuel Arnold, a physician, was employed by Freeman Hospital and his wages in the amount of \$3,284.67 were deposited directly into his account at FNB on January 12, 1996. The account contained \$162.84 just prior to the deposit. It is undisputed that the deposit four days post-petition was for wages that were earned pre-petition.

Debtors executed an unsecured Promissory Note with FNB in the original principal amount of \$10,000.00 on October 6, 1995. They also executed an unsecured Promissory Note in the original principal amount of \$5,000.00 on October 20, 1995. Debtors had not repaid said Notes prior to the bankruptcy filing. FNB, thus, placed an administrative freeze on the entire balance of \$3,447.51 contained in debtors' checking account on January 12, 1996, pending determination of FNB's right of setoff.

Debtors' attorney contacted FNB on January 12, 1996, and requested the release of \$1,500.00 as exempt property pursuant to Missouri Law. FNB released \$1,500.00 of the administratively frozen funds that same day, leaving a balance in dispute of \$1,947.51. Debtors then filed a motion to quash the administrative freeze and for the release of the remaining funds as exempt property. FNB countered with a response and with a motion for relief from the automatic stay. A hearing was conducted on

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February 22, 1996, at which both the attorney for FNB and the attorney for debtors made oral arguments. A discrepancy in the schedules as to the total number of children in debtors' household was noted at the hearing, and debtors' attorney supplied the Court with correct information on February 27, 1996. No evidence other than the Court's file and the oral argument was admitted. Debtors' attorney informed the Court that funds on deposit with Mercantile Bank of Western Missouri in the amount of \$450.00, which were also the subject of debtors' motion to quash the administrative freeze, will be released as exempt property.

FNB makes two separate arguments as to its right to set off the funds. First, FNB claims that the funds are not exempt as wages pursuant to Missouri's Revised Statutes § 525.030 because they lost their character as wages when deposited into the checking account. Second, FNB argues debtors have already used up their head of household exemption with the release of \$1,500.00, therefore, the remaining funds are not exempt pursuant to Missouri's Revised Statutes § 513.440.

Samuel Houston Arnold, III, has two children under the age of eighteen from a previous marriage or marriages. Rebecca Ann Arnold has three children under the age of eighteen from two previous marriages. One of Dr. Arnold's children lives with him and the other child resides with her mother. All three of Mrs. Arnold's children reside in the home. Debtors' schedules reflect that Dr. Arnold is \$21,000.00 in arrears on the child support payments he is ordered to make to his former spouse. Doc. # 4, schedule F. Mrs. Arnold was awarded child support for her three children from both of her former husbands in the total amount of \$385.00 per month, but she claims she has received no support for at least two or three years. As a result, Dr. Arnold's wages have been used to support Mrs. Arnold's children. Debtors are claiming an exemption of \$2,100.00 pursuant to Missouri's head of household exemption statute. Doc. # 4, schedule C: Mo.Stat. Ann. § 513.440 (Supp.1996). Debtors are

also claiming that all of the wages deposited on January 12, 1996, are exempt pursuant to section 525.030 of Missouri's Revised Statutes.

[1] Before I reach the issue of set-off, I must first deal with the issue of whether the funds are exempt. It seems clear from case law that, even if FNB has a right of setoff against nonexempt property of the debtors, it has no right to set off its debt against exempt assets. *State of Missouri, to the Use of John Codding v. Finn*, 8 Mo.App. 261, 264-65 (1880); *In re Cole*, 104 B.R. 736, 739 (Bankr.D.Md.1989); *In re Wilde*, 85 B.R. 147, 149 (Bankr.D.N.M.1988).

DISCUSSION

[2][3] A brief discussion of Missouri's exemption statutes is in order. The Bankruptcy Code (the "Code") permits a state to opt *900 out of the Federal bankruptcy exemption scheme. 11 U.S.C. § 522(b)(1). The State of Missouri has exercised this option. Mo.Stat. Ann. § 513.427 (Supp.1996). Section 513.427 provides that:

Every person by or against whom an order is sought for relief under Title 11, United States Code, shall be permitted to exempt from property of the estate any property that is exempt from attachment and execution under the law of the state of Missouri or under federal law, other than Title 11, United States Code, Section 522(d), and no such person is authorized to claim as exempt the property that is specified under Title 11, United States Code, Section 522(d).

Id. Property in Missouri is exempt if it is not subject to attachment and execution. *In re Mitchell*, 73 B.R. 93, 94 (Bankr.E.D.Mo.1987). Property of the bankruptcy estate which is "effectively exempt from attachment and execution under Missouri law may be allowed as an exemption in bankruptcy." *Id.*

[4][5][6][7] The Revised Statutes of Missouri provide a non-exclusive list of exemptions. *In re Sanders*, 69 B.R. 569, 572 (Bankr.E.D.Mo.1987). See generally Mo.Stat. Ann. §§ 513.430 through

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513.530 and 525.030(2). Specifically, Missouri provides for the exemption of wages as follows:

2. The maximum part of the aggregate earnings of any individual for any workweek, after the deduction from those earnings of any amounts required by law to be withheld, which is subjected to garnishment may not exceed (a) twenty-five percentum, or (b) the amount by which his aggregate earnings for that week, after the deduction from those earnings of any amounts required to be withheld by law, exceed thirty times the federal minimum hourly wage prescribed by section 6(a)(1) of the Fair Labor Standards Act of 1938 in effect at the time the earnings are payable, or, (c) if the employee is the head of a family and a resident of this state, ten percentum, whichever is less.... The term "earnings" as used herein means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or other- wise....

Mo.Stat. Ann. § 525.030(2) (Supp.1996). The parties agree that the funds in the amount of \$3,284.67 deposited into debtors' checking account at FNB on January 12, 1996, are Samuel Arnold's "earnings" from Freeman Hospital. FNB argues, however, that once the wages were deposited into a checking account they became commingled funds subject to the claims of creditors and, as such, lost their exempt status. There are two flaws in FNB's argument. First, debtor's attorney stated that Dr. Arnold attempted to intercept the direct deposit and have his earnings delivered to him in person, but Freeman Hospital failed to honor that request. It elevates form over substance to claim that the check in Dr. Arnold's hand was wages, but the check in his checking account was not. Second, at the time of the bankruptcy filing, debtor's wages had been earned, but not deposited into the checking account. Dr. Arnold was entitled to his wages on the petition date. Their status as exempt property attached at that time, therefore, they were deposited as exempt post-petition. In *In re Smith*, 124 B.R. 787, 789

(Bankr.W.D.Mo.1991), this Court concluded that under section 525.030(2) of Missouri's Revised Statutes, a debtor is entitled to exempt all but ten percent of wages payable to him. Under section 513.427 of Missouri's Revised Statutes, a debtor is entitled to exempt this same amount from the bankruptcy estate. *Id. See also In re Sanders*, 69 B.R. 569, 573 (Bankr.E.D.Mo.1987). At the time of the bankruptcy filing, \$3,284.67 represented wages payable to Dr. Arnold, therefore, ninety percent, or \$2956.20, of said wages were exempt. The remaining \$328.47, along with any other funds in debtors' bank accounts became subject to the claims of creditors but for the bankruptcy filing and the applicability of other exemptions.

In addition to the exemption for wages provided in Missouri's Revised Statutes, there are further exemptions for cash to be found in Sections 513.430 and 513.440. Section 513.430 provides:

The following property shall be exempt from attachment and execution to the extent of any person's interest therein:

.....

*901 (3) Any other property of any kind, not to exceed in value four hundred dollars in the aggregate.

Mo.Stat. Ann. § 513.430(3) (Supp.1996). This exemption is called the "wild card" exemption and entitles Rebecca and Samuel Arnold to an exemption of \$800.00 to be applied to any of their property. Pursuant to their schedules, debtors have applied this exemption to cash and to the remaining balances in their bank accounts at both FNB and Mercantile Bank of Western Missouri. Doc. # 4, Schedule C.

[8][9][10] Section 513.440 provides:

Each head of a family may select and hold, exempt from execution, any other property, real personal, or mixed, or debts and wages, not exceeding in value the amount of eight hundred

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fifty dollars plus two hundred fifty dollars for each of such person's unmarried dependent children under the age of eighteen years, except ten percent of any debt, income, salary, or wages due such head of a family.

Mo.Stat. Ann. § 513.440 (Supp.1996). This "head of household" exemption is limited to one person in each family. *In re Sartain*, 61 B.R. 1007, 1009 (Bankr.W.D.Mo.1986); *In re Crippen*, 36 B.R. 7, 9 (Bankr.E.D.Mo.1983). In *Crippen* the Court held that the debtor was not entitled to the head of household exemption for herself and her three children by a previous marriage when her non-debtor spouse provided all the support for the children. 36 B.R. at 9. In the case at hand Mrs. Arnold is not employed. Dr. Arnold, therefore, claims the head of household exemption in the amount of \$850.00 plus a \$250.00 exemption for each of five children. No one disputes his claim to the \$850.00. An issue arises, however, as to the number of Dr. Arnold's unmarried dependent children under the age of eighteen. The head of household exemption statute allows each head of household a \$250.00 exemption for "such person's unmarried dependent children." Mo.Stat. Ann. § 513.440 (Supp.1996). Dr. Arnold has two children of his own for whom he is legally responsible. He is admittedly in arrears in his child support for his noncustodial child, but it is undisputed that said child is his dependent. Mrs. Arnold, on the other hand, is the parent of three children who live in the home. Though said children are not Dr. Arnold's unmarried dependent children, he has claimed a \$250.00 exemption for each of them. Older Missouri cases hold that for a relative other than the biological father to qualify as head of the family he must be the financial supporter of the family and the manager of its household affairs. *Ridenour-Baker Grocery Co. v. Monroe*, 142 Mo. 165, 43 S.W. 633, 634 (Mo.1897) (where the Court found that a head of household is one who controls, supervises, and manages the affairs about the house, not necessarily a father or husband); *Wade v. Jones*, 20 Mo. 75, 77 (1854) (where the Court held

"one, who with his sister, keeps house for his younger brother and sister, thus, partly contributing to their support, is the head of a family under the exemption laws, though neither a husband nor a father, and though the children be not wholly dependent upon him"); *Duncan v. Frank*, 8 Mo.App. 286, 289 (1880) (where a brother supporting a widowed sister and her four small children was deemed head of household as to the four children). These cases deal with situations where relatives, other than parents, have assumed the moral obligation to support certain children. Mrs. Arnold's former husbands are legally responsible for her three children. If they were meeting their obligations they would be entitled to a head of household exemption for their children. *Murray v. Zuke*, 408 F.2d 483, 487 (8th Cir.1969). Mrs. Arnold, however, informed this Court that her former husbands provide no support for her children. No party in interest challenged the statement that Dr. Arnold is providing a home and support for Mrs. Arnold's three children by previous marriages. Absent any proof to the contrary, I find that Dr. Arnold is entitled to an exemption of \$750.00 for Mrs. Arnold's dependent children.

[11][12][13] As to his own child, who is not living with him, Dr. Arnold is not entitled to claim an exemption. The Eighth Circuit has held that a noncustodial father who is not meeting his support obligations on the date of filing is not entitled to the exemption. *Conklin v. Gasaway*, 468 F.2d 752, 753-54 (8th Cir.1972), *cert. den.*, 412 U.S. 951, 93 S.Ct. 3018, 37 L.Ed.2d 1004 (1973). See also *902 *McCarter v. Murrell (In re Murrell)*, 588 F.2d 1207, 1209 (8th Cir.1978) (where the Court held that a debtor is not entitled to a head of household exemption if he or she does not provide a home for the children and does not assume a significant share of the responsibility for the every day care of the children). While exemption statutes are enacted for the relief of the debtor, and should be liberally construed, *Murray v. Zuke*, 408 F.2d at 486, I am bound by the rather explicit language in the head of household statute. Therefore, I find that Dr. Arnold

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is not entitled to an exemption in the amount of \$250.00 for his non-custodial child because he was not fulfilling his legal responsibility toward that support at the time of the bankruptcy filing. He may, of course, claim an exemption of \$250.00 for his custodial child. In sum, Dr. Arnold may claim the head of household exemption for himself, as well as for the four children living with him, for a total of \$1,850.00.

For all of the above reasons I find that Dr. Arnold may exempt \$2,956.20 as earnings pursuant to section 525.030 of Missouri's revised Statutes. Additionally, debtors have an \$800.00 wild card exemption as to any remaining funds in their accounts at FNB and Mercantile Bank of Western Missouri pursuant to section 513.430(3) of Missouri's Revised Statutes. Finally, Dr. Arnold may claim a head of household exemption in the amount of \$1,850.00, pursuant to section 513.440 of Missouri's Revised Statutes, to exempt any personal property not covered by other exemption statutes. Debtors will be given ten days in which to amend their exemption schedules, in accordance with this Memorandum Opinion, to designate the property claimed as exempt.

There are no non-exempt funds available, pursuant to debtors' schedules, to be set off against the unsecured debt of FNB. I, therefore, will not reach the issue of whether FNB has such a right. As such, debtors' motion to quash the administrative freeze will be granted.

An Order in accordance with this Memorandum Opinion will be entered this date.

Bkrcty.W.D.Mo.,1996.
In re Arnold
193 B.R. 897

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▷

United States Bankruptcy Court,
N.D. Iowa.

In re Warren L. CASLAVKA, Debtor.

Bankruptcy No. 93-10188LC.
Feb. 24, 1995.

Chapter 7 trustee objected to debtor's claimed exemption in annuities. The Bankruptcy Court, Paul J. Kilburg, J., held that retired debtor's IRA annuities were exempt, under Iowa law, as rights to payment on account of age.

Objection overruled.

West Headnotes

[1] **Bankruptcy 51** ⚡2548

51 Bankruptcy
51V The Estate
51V(C) Property of Estate in General
51V(C)2 Particular Items and Interests
51k2548 k. Accrued rights under employment contracts; pension funds. Most Cited Cases
Annuities owned by retired Chapter 7 debtor were property of estate, even if ERISA-qualified profit sharing plan which was source of funds deposited in annuities would probably have been excludable, in that nonbankruptcy law no longer imposed any enforceable restriction on transfer of funds. Bankr.Code, 11 U.S.C.A. § 541(c)(2); Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

[2] **Exemptions 163** ⚡4

163 Exemptions
163I Nature and Extent
163I(A) Nature, Creation, Duration, and Effect in General

163k4 k. Construction of exemption laws in general. Most Cited Cases

Court should construe exemption statute liberally in favor of debtor in light of purpose of exemption.

[3] **Exemptions 163** ⚡49

163 Exemptions
163I Nature and Extent
163I(C) Property and Rights Exempt
163k49 k. Pension and retirement funds and accounts. Most Cited Cases
Under Iowa law, debtor may exempt complete or partial payments from pension plan which are made on account of age. I.C.A. § 627.6, subd. 8, par. e.

[4] **Exemptions 163** ⚡49

163 Exemptions
163I Nature and Extent
163I(C) Property and Rights Exempt
163k49 k. Pension and retirement funds and accounts. Most Cited Cases
Retired Chapter 7 debtor's IRA annuities were exempt, under Iowa law, as rights to payment on account of age; debtor purchased annuities after retirement, with funds rolled over from ERISA-qualified pension plan from which he had been receiving payments, and debtor had no right to control or receive any undistributed corpus. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.; I.C.A. § 627.6, subd. 8, par. e.

*142 Joseph A. Peiffer, Cedar Rapids, IA, for debtor.

Morris L. Eckhart, Milroy and Eckhart, Vinton, IA, for Creditor Terra Intern., Inc.

Harry R. Terpstra, Trustee, Cedar Rapids, IA.

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ORDER

PAUL J. KILBURG, Bankruptcy Judge.

On November 7, 1994, the above-captioned matter came on for trial pursuant to assignment. Attorney Joe Peiffer represented Debtor Warren Caslavka. Attorney Morris Eckhart represented Creditor Terra International, Inc. Harry Terpstra appeared as Trustee. The matters before the Court are: (1) Terra International's Objections to Statement of Intention, Statement of Affairs, Summary of Schedules and Schedules A-J; and (2) Trustee's Objections to Property Claimed Exempt by Debtor. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A, B).

STATEMENT OF THE CASE

Debtor claims three annuities exempt under Iowa Code sec. 627.6(8)(e). The parties' Joint Pre-trial Statement narrows the objections by Terra International and Trustee to whether these annuities are exempt under that statute. Additionally, Debtor claims that the annuities are excluded from property of the estate pursuant to 11 U.S.C. § 541(c)(2).

Debtor is 73 years old and has health problems. He retired from his family-operated business, Cas Feed Store, Inc., in June 1986 at age 64. From that time until September 1990, Debtor received monthly payments from the Cas Feed Store, Inc. Profit Sharing Plan and Trust which was an ERISA-qualified plan. He had made contributions to the Plan as well as to a predecessor Pension Plan since 1971. In the fall of 1990 at age 69, Debtor purchased three annuities ("Annuities") which qualify as Individual Retirement Annuities under 26 U.S.C. § 408(b).

Debtor sold his business to his son upon retirement. Serious issues of mismanagement and wasting of business assets soon arose. Debtor ultimately decided to rollover the funds from the Profit Sharing Plan and Trust because of concerns that the Plan would be involuntarily terminated by his son, Lon Caslavka, and the funds used for other purposes. To preserve his only source of retirement revenue, Debtor terminated his interest in the Profit

Sharing Plan in the fall of 1990. The funds were rolled over to these Annuities by a check from the Plan endorsed by the Plan Trustee, Lon Caslavka, for deposit directly to Jackson National Life which issued the Annuities to Debtor. The Plan was formally terminated by corporate resolution on June 26, 1991 to be effective September 30, 1991.

None of Debtor's three Annuities states that they are payable on account of illness, disability, death, age or length of service. Debtor's right to receive payments under the Annuities does not depend on his reaching any specified age. He was already retirement age and receiving retirement payments from the Profit Sharing Plan when he purchased the Annuities. Debtor began receiving payments from two of the Annuities when he was 69 and from the third when he was 70 years old. One of the Annuities provided for immediate payments. The other two provided various payment options and rights of withdrawals. Debtor has selected a payment option under each of the Annuities. The amounts of annuity payments from two of the Annuities are based in part on Debtor's age and gender.

ISSUES

Debtor argues that the Annuities are exempt under Iowa Code sec. 627.6(8)(e). In *143 the alternative, Debtor claims that the Annuities are not property of the estate pursuant to 11 U.S.C. § 541(c)(2). Terra International and Trustee assert that Debtor's unrestricted access to the Annuities makes them nonexempt and includable as property of the estate.

PROPERTY OF THE ESTATE, § 541(c)(2)

Before addressing the exemption issue, the Court must determine whether the property in dispute is property of the bankruptcy estate. Property of the debtor's estate is broadly defined in § 541 to include all the debtor's interests in property. However, § 541(c)(2) makes the following exception:

A restriction on the transfer of a beneficial in-

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terest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

The U.S. Supreme Court holds that a debtor's interest in an ERISA-qualified pension plan may be excluded from property of the bankruptcy estate pursuant to § 541(c)(2). *Patterson v. Shumate*, 504 U.S. 753, 764–66, 112 S.Ct. 2242, 2250, 119 L.Ed.2d 519 (1992). The Court found that the plain language of § 541(c)(2) requires the conclusion that “applicable nonbankruptcy law” refers not only to state spendthrift law but also to ERISA requirements. *Id.* at 757–58, 112 S.Ct. at 2246. Both ERISA and coordinate sections of the Internal Revenue Code (29 U.S.C. § 1056(d)(1) and 26 U.S.C. § 401(a)(13), respectively) impose restrictions on the transfer of a debtor's interest in a qualified plan. These restrictions are “enforceable” as required by § 541(c)(2). See *In re Kunkle*, No. 93–60077LW, slip op. at 4, 1993 WL 767974 (Bankr.N.D. Iowa June 4, 1993).

[1] It is probable that the ERISA-qualified Profit Sharing Plan which was the source of the funds deposited in Debtor's Annuities would have been excludable under § 541(c)(2). As noted above, these Annuities qualify as IRAs. However, IRAs have no enforceable restrictions under any non-bankruptcy law. *Velis v. Kardanis*, 949 F.2d 78, 82 (3d Cir.1991). Therefore, IRAs are includable as property of the estate under § 541(c). *Id.* Once a debtor gains unrestricted access to funds in an ERISA-qualified plan, such funds do not qualify as a spendthrift trust under § 541(c)(2) and thus are not excludable from the estate. *In re Reid*, 139 B.R. 19, 21 (Bankr.S.D.Cal.1992) (debtor had unrestricted access to ERISA plan funds through prepetition termination of employment).

This Court concludes that Debtor's Annuities are includable as property of his bankruptcy estate. They contain no restrictions on transfer and are not subject to ERISA requirements. See *Patterson*, 504 U.S. at 762–64, 112 S.Ct. at 2249. When Debtor gained unrestricted access to the Profit Sharing

Plan funds, they lost their status as ERISA-qualified such that § 541(c)(2) no longer applies.

EXEMPT AS PAYMENT “ON ACCOUNT OF AGE”, SEC. 627.6(8)(e)

Debtor argues that even if the Annuities are property of the estate, they are exempt under Iowa Code sec. 627.6(8)(e). That section provides that a debtor may hold exempt from execution rights in:

A payment or a portion of a payment under a pension, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service....

The Court must determine whether the Annuities are exempt regardless of their being funded by the Profit Sharing Plan. If the answer is no, the Court must determine whether the Annuities are exempt because they were funded by the Plan. That inquiry requires consideration of whether the lump sum distribution from the Plan was exempt and, if so, whether the proceeds of that lump sum in the Annuities are now exempt.

[2] These determinations are made with a view toward the general rule that courts should construe exemption statutes liberally in favor of the debtor in light of the purposes of the exemption. *In re Wallerstedt*, 930 F.2d 630, 631 (8th Cir.1991); *Chariton Feed & Grain, Inc. v. Kinser*, 794 F.2d 1329, 1331 (8th Cir.1986) (applying Iowa law); *Frudden Lumber Co. v. Clifton*, 183 N.W.2d 201, 203 (Iowa 1971). The exemption of payments under a pension or similar plan is intended to *144 protect payments which function as wage substitutes after retirement, to support the basic requirements of life at a time when the debtor's earning capacity is limited. *In re Pettit*, 55 B.R. 394, 398 (Bankr.S.D.Iowa), *aff'd*, 57 B.R. 362 (S.D.Iowa 1985).

The Eighth Circuit Court of Appeals has addressed the applicability of Iowa Code sec. 627.6(8)(e) to IRAs. In *In re Huebner*, 986 F.2d 1222, 1225 (8th Cir.), *cert. denied*, 510 U.S. 900, 114 S.Ct. 272, 126 L.Ed.2d 223 (1993), the court stated

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that the debtor's present right to receive payments from an IRA annuity did not depend on "illness, disability, death, age, or length of service." The court agreed with the District Court's conclusion that the debtor's access to and complete control over the timing of the annuity payments mean that the payments are not "on account of" age or length of service. *Id.* Therefore, the court held that the IRAs were not exempt. *Id.*

Mr. Huebner was 64 when he filed for bankruptcy and intended to begin receiving monthly payments when he turned 65. *Id.* at 1224. The court stated: "No payments have been made under Huebner's annuity contracts; rather, he is seeking to exempt the entire annuity corpus from which future payments will be made." *Id.* Mr. Huebner had personally purchased the IRAs several years prior to filing for bankruptcy. *In re Huebner*, 141 B.R. 405, 406 (N.D.Iowa 1992), *aff'd*, 986 F.2d 1222 (8th Cir.1993). Except for tax penalties for withdrawals prior to age 59 1/2, Mr. Huebner had unrestricted access to the IRA funds. *Huebner*, 986 F.2d at 1225. The court stated that the IRA was essentially a bank savings account with favorable tax treatment. *Id.*

This Court in *In re Matthews*, 65 B.R. 24 (Bankr.N.D.Iowa 1986) (Melloy, J.), and *In re Eggink*, No. X89-01622S (Bankr.N.D.Iowa Jan. 30, 1990) (Edmonds, J.), also held that IRAs are not exempt under sec. 627.6(8)(e). The Court focused on the amount of control the debtor had over the annuity and whether access to the funds was restricted as to age, length of service, etc. *Matthews*, 65 B.R. at 26; *Eggink*, slip op. at 5. Both the debtors in these cases were under age 59 1/2 and were not yet receiving payments. In *Matthews*, Judge Melloy specifically refrained from deciding whether a debtor over the age of 59 1/2 would be entitled to claim IRAs exempt. *Matthews*, 65 B.R. at 26 n. 1.

Thus, IRAs are generally not exempt in Iowa under sec. 627.6(8)(e). However, the circumstances of this case require further inquiry. The features which distinguish this case from *Huebner* are that

Debtor purchased his IRA Annuities 1) after he began receiving pension plan payments upon his retirement and 2) with funds rolled over from the ERISA-qualified Profit Sharing Plan. Thus, the payments he now receives are directly traceable to a pension or similar plan payable on account of age or length of service. The IRAs in *Huebner* were not similarly funded by an ERISA-qualified plan disbursement after retirement.

In order for the Annuities to be exempt, the lump sum distribution from the Profit Sharing Plan, which Debtor rolled over into these Annuities, must be determined to be exempt. Debtor was already receiving monthly payments from the Plan at the time he rolled over the funds to the Annuities in contemplation of termination of the Plan. It is undisputed that Debtor was receiving these monthly payments on account of age. The monthly payments were exempt under the language of sec. 627.6(8)(e) which exempts "rights in [a] payment or portion of a payment under a pension, annuity, or similar plan ... on account of ... age." The parties do not dispute that the ERISA-qualified Profit Sharing Plan is a "pension, annuity or similar plan" under the statute. See *In re Flygstad*, 56 B.R. 884, 888 (Bankr.N.D.Iowa 1986) (holding that profit sharing plan was "pension or similar plan" under the statute).

A significant but unresolved issue is whether lump sum distributions should be characterized as a "payment or portion of a payment" under a Plan "on account of age". In *Patterson*, the U.S. Supreme Court noted that a dispute exists regarding whether § 522(d)(10)(E), the Federal exemption for pension payments, applies only to "distributions from a pension plan that a debtor has an immediate and present right to receive, or to the entire undistributed corpus of the pension trust." *145504 U.S. at 763 n. 5, 112 S.Ct. at 2249 n. 5. The Court refused to express an opinion on the issue. *Id.* The Federal statute exempts:

(10) The debtor's right to receive—

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(E) a payment under a stock bonus, pension, profit sharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor ...

11 U.S.C. § 522(d)(10)(E).

The Eighth Circuit has stated that sec. 627.6(8)(e) is limited to “ ‘rights in’ an annuity *payment* ”. *Huebner*, 986 F.2d at 224 (emphasis in original). It held that Iowa has no statute granting an exemption for all or any part of the undistributed corpus of an annuity contract. However, Iowa courts have held that sec. 627.6(8)(e) applies to all assets of the plan, not just to a present payment due. *In re Pettit*, 57 B.R. 362, 363 (S.D.Iowa 1985). In determining the applicability of sec. 627.6(8)(e) to a privately-purchased annuity, one court has noted that, like the Iowa insurance exemption, the statute does not say the pension payment exemption is contingent on an absence of a right to accept a surrender value. *In re Lilienthal*, 72 B.R. 277, 279 (S.D.Iowa 1987).

These cases can be reconciled with *Huebner* and *Matthews* which focused on the “on account of age” requirement of sec. 627.6(8)(e). Lump sum distributions from a pension plan which are not “on account of age”, such as those made on termination of employment or termination of the plan prior to the time the debtor reaches retirement age, are not exempt under the statute. However, lump sum distributions upon retirement are payments on account of age the same as monthly payments upon retirement.

Cases which have considered whether lump sum distributions can be exempt under various exemption statutes tend to focus on the statutory language. As noted, the Federal statute exempts “rights to receive a payment” under a plan. This language does not allow exemption of an IRA funded by the rollover of funds from an exempt pension plan after termination of the plan according to *In re Cesare*, 170 B.R. 37, 39 (Bankr.D.Conn.1994). The court

concluded that after the debtor receives the payment, the exemption is lost. *Id.*; *In re Chapman*, 177 B.R. 161, 162 (Bankr.D.Conn.1994). *In re Summers*, 108 B.R. 200, 202 (Bankr.S.D.Ill.1989), stated that under § 522(d)(10)(E), there must be a “payment”. It is the payment that is exempt, not the entire asset. *Id.*; *In re Wilson*, 54 B.R. 796, 798 (Bankr.E.D.Mo.1985) (holding that neither Federal nor Illinois statute permits exemption of debtor's entire interest in lump sum distribution). Once the debtor receives an ownership interest in the pension assets, the debtor no longer has a right to receive payment under the plan. *In re McGoy*, 86 B.R. 174, 176 (Bankr.E.D.Mo.1988).

However, the court in *In re Donaghy*, 11 B.R. 677, 680 (Bankr.S.D.N.Y.1981), allowed the debtor to exempt a lump sum distribution received upon retirement under the Federal statute. It held that the benefits constituted an identifiable sum which is a tangible reflection of the debtor's right to receive payments under a pension plan within the language and spirit of the statute. *Id.* While some cases have attempted to limit *Donaghy*, of all these cases (*Cesare*, *Chapman*, *Summers*, *McGoy*, *Wilson* and *Donaghy*), the only debtor who had already reached retirement age at the time of the lump sum distribution was the debtor in *Donaghy*. The other lump sum distributions were made because of termination of employment or termination of the pension plan.

Other courts have construed other state exemption statutes to find a right to exempt a lump sum payment from a pension plan. The Wisconsin statute exempts a debtor's interest in a pension plan and “any pension or other benefit” derived from the plan. *In re Woods*, 59 B.R. 221, 225 (Bankr.W.D.Wis.1986). *Woods* held that the lump sum payment on termination of debtor's employment was exempt as “other benefit” under the statute. *Id.* In *In re Solomon*, 166 B.R. 832, 838 (Bankr.D.Md.), *aff'd*, 173 B.R. 325 (D.Md.1994), the court held that a lump sum payment from a pension plan, which the debtor had rolled over into an

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IRA, was exempt under the Maryland statute which *146 exempts “any interest” in a qualified retirement plan.

An IRA funded from a rollover from a pension plan account at age 55 was held exempt under the South Carolina exemption. *In re Sopkin*, 57 B.R. 43, 47 (Bankr.D.S.C.1985). Like the Federal statute, the state statute exempted the “right to receive a payment” under the plan. *Id.* at 45. The court allowed the exemption because the debtor was more than 59 1/2 years old and had the right to receive payments under the IRA. *Id.* at 47. As noted in *Huebner*, other states such as Tennessee and California exempt or refuse to exempt lump sum distributions based on specific language in their exemption statutes. *Huebner*, 986 F.2d at 1224 n. 5.

These cases teach that the result is often dependent on the language of the statute. Iowa's statute exempts a debtor's “rights in [a] payment or portion of a payment” under a pension or similar plan on account of age or length of service. This Court could find no other exemption statute which uses the language “payment or portion of a payment”. *Black's Law Dictionary* defines “payment” separately from “part payment”. Payment is “[the] fulfilment of a promise or the performance of an agreement.” *Black's Law Dictionary* 1129 (6th ed. 1990).

In a more restricted legal sense payment is the performance of a duty, promise, or obligation, or discharge of a debt or liability, by the delivery of money or other value by a debtor to a creditor, where the money or other valuable thing is tendered and accepted as extinguishing debt or obligation in whole or in part.

Id. “Part payment” is separately defined as “[t]he reduction of any debt or demand by the payment of a sum less than the whole amount originally due.”

[3] Using these definitions, the use of “payment” first in sec. 627.6(8)(e) can appropri-

ately be construed to mean the discharge of an obligation in its entirety. The use of the term “portion of a payment” therefore means discharge of an obligation in part. The addition of the language “or portion of a payment” is critical to the statutory analysis because it strongly implies that the first reference to “payment” authorizes complete payment from the pension plan if the other conditions are satisfied. In that regard, the Court recognizes that “on account of age” modifies both “payment” and “portion of a payment”. Giving a plain language meaning to the foregoing definitions, the statute is properly construed to mean that the debtor may exempt complete or partial payments from the pension plan which are made on account of age.

Debtor's Exhibit M is the original ERISA-qualified Profit Sharing Plan agreement. Section 6.5(b) allows Debtor to elect between receiving monthly or other periodic payments or a lump sum payment on retirement. Section 8.2 states that upon termination of the Plan by the employer, complete distribution of the assets shall be made in a manner consistent with Section 6.5.

The Iowa statute is distinguishable from the Federal statute on its language. Furthermore, the cases which refuse to exempt lump sum distributions under the Federal statute generally are based on distributions made pre-retirement rather than post-retirement. This is not a case where a debtor is attempting to protect the undistributed corpus of a pension plan in order to receive future payments for which the debtor is not yet eligible. *See Huebner*, 986 F.2d at 1224.

Case law mandates that sec. 627.6(8)(e) be construed liberally to protect Debtor's rights in pension payments as wage substitutes necessary now after retirement when his earning capacity is limited. The language of the statute contains no restrictions against lump sum distributions after retirement. It is not uncommon that qualified pension plans would contain a right to elect a lump sum distribution. *See Whetzal v. Alderson*, 32 F.3d 1302, 1304 (8th Cir.1994) (holding that option to with-

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draw lump sum in Civil Service Retirement plan with enforceable restrictions on transfer did not disqualify fund from being excluded from property of estate under § 541(c)(2)).

This Court concludes that the lump sum distribution from the Profit Sharing Plan constitutes a "payment on account of age" within sec. 627.6(8)(e). The statute does not specifically exclude lump sum payment on *147 retirement from its coverage. This construction of the statute promotes the purpose of the statute to protect pension payments as necessary wage substitutes after retirement.

Having determined that the lump sum payment from the Plan in 1990 was exempt, the Court must now consider the duration and time period for which the proceeds of that exempt property continues to retain exempt status. The Bankruptcy Court for the Northern District of Iowa has considered whether the proceeds of a debtor's exempt tax refund check continue to be exempt after deposit in the debtor's bank account. *In re Thompson*, No. 93-51364XS, slip op. at 2, 1993 WL 767973 (Bankr.N.D.Iowa Dec. 9, 1993). The court stated that the purpose of the exemption would be defeated unless the tax refund could be converted to cash. *Id.* at 4. The court held that tax refunds traceable to bank accounts retain their exempt character. *Id.* This analysis is based upon the application of existing Iowa law. The Iowa Supreme Court holds that exempt wages retain their exempt character after deposit in a bank account. *MidAmerica Savs. Bank v. Miede*, 438 N.W.2d 837, 839 (Iowa 1989). The Iowa court reasoned that the protection afforded by the exemption would be rendered meaningless if exempt status is lost by negotiating the paycheck. *Id.* Likewise, proceeds from the sale of an exempt homestead retain exempt status for a reasonable period of time. *In re Ersepke*, No. L-92-00541D, slip op. at 4, 1993 WL 767975 (Bankr.N.D.Iowa Nov. 30, 1993); Iowa Code § 561.20.

Whether exempt pension plan funds retained

their exempt status after rollover to an IRA was a critical issue in *In re Woods*, 59 B.R. 221, 225 (Bankr.W.D.Wis.1986). The court considered whether statutory intent would be thwarted if the exemption did not continue in proceeds of exempt property. *Id.* The Court concluded that a debtor cannot in practicality keep a lump sum in cash and, therefore, held that traceable exempt funds remain exempt in the IRA. *Id.*

[4] This Court concludes that Debtor's exempt lump sum payment from the Profit Sharing Plan retained its exempt status after rollover into the three Annuities. This holding promotes the purpose of the statute which is to protect pension plan payments after retirement. In this case, termination of the Plan forced Debtor to receive and reinvest his lump sum pension payment after retirement. All the proceeds of the distribution were transferred directly to the vendor of the Annuities and the proceeds, therefore, are directly traceable to the three Annuities. Debtor continues to receive periodic payments from these Annuities on account of his age and retirement. This Court must conclude that the payments made under the Annuities are exempt under sec. 627.6(8)(e).

At the time of filing his bankruptcy petition, Debtor had chosen to receive periodic payments from each of the Annuities. Thus, under the annuity contracts, Debtor no longer had the right to control or receive any undistributed corpus. Debtor receives monthly or quarterly payments from the Annuities. He purchased the Annuities from the funds he received from the lump sum distribution from the Profit Sharing Plan. He received the lump sum distribution after retirement when he was receiving monthly payments from the Plan on account of his age. The payments debtor receives from the Annuities are exempt as proceeds of the exempt lump sum distribution from the Plan.

WHEREFORE, Terra International's Objections to Statement of Intention, Statement of Affairs, Summary of Schedules and Schedules A-J is OVERRULED.

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FURTHER, the Trustee's Objections to Property Claimed Exempt by Debtor is **OVERRULED**.

FURTHER, Debtor is entitled to claim an exemption under sec. 627.6(8)(e) for payments received under the three Annuities listed on Joint Exhibit A.

SO ORDERED.

Bkrcty.N.D.Iowa,1995.
In re Caslavka
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116 B.R. 675, 20 Bankr.Ct.Dec. 1288, Bankr. L. Rep. P 73,556
(Cite as: 116 B.R. 675)

▽

United States Bankruptcy Court,
W.D. Wisconsin.

In re James FRAZIER, Debtor.

Bankruptcy No. MM7-90-00085.
July 10, 1990.

Trustee objected to exemptions claimed by debtor and the social security disability benefits. The Bankruptcy Court, Robert D. Martin, Chief Judge, held that: (1) bankruptcy exemption provided for debtor's "right to receive" disability, illness or employment benefit was not limited to benefits not yet received at time of bankruptcy filing, and (2) exempted disability benefits which debtor deposited into account prior to bankruptcy filing did not lose their exempt status, merely because they had been commingled with other exempt funds.

Objection denied.

West Headnotes

[1] Bankruptcy 51 ⇨2779

51 Bankruptcy
51VI Exemptions
51k2771 Property Exempt
51k2779 k. Pensions or Benefits. Most Cited Cases

Bankruptcy exemption for right to receive disability, illness or unemployment benefit is not limited to benefits not yet received when bankruptcy case is filed, but also extends the benefits already received to extent such benefits are traceable into currently existing account. Bankr.Code, 11 U.S.C.A. § 522(d)(10)(A).

[2] Bankruptcy 51 ⇨2761

51 Bankruptcy

51VI Exemptions

51k2761 k. In General. Most Cited Cases
Bankruptcy exemptions must be liberally construed. Bankr.Code, 11 U.S.C.A. § 522(d).

[3] Bankruptcy 51 ⇨2797.1

51 Bankruptcy
51VI Exemptions
51k2797 Waiver or Loss of Exemption
51k2797.1 k. In General. Most Cited Cases
(Formerly 51k2797)

Exempt disability benefits which debtor received and deposited in account prior to the bankruptcy filing did not lose their exempt status, merely because they had been commingled with other exempt funds; trustee did not contend that any other nonexempt funds had been deposited in account. Bankr.Code, 11 U.S.C.A. § 522(d)(10).

*676 Patricia K. Hammel, Madison, Wis., for debtor.

Catherine J. Furay, Axley Brynson, Madison, Wis., for trustee.

MEMORANDUM DECISION

ROBERT D. MARTIN, Chief Judge.

This objection to exemptions was submitted for decision without trial on the following undisputed facts. On January 11, 1990 the debtor, James Frazier, filed a petition under Chapter 7 of the Bankruptcy Code. In his schedules he claimed as exempt under 11 U.S.C. §§ 522(d)(10)(A) and (C) "Social Security disability benefits (cash in bank accounts, uncashed check)" in the amount of approximately \$6,475.00. The uncashed check is in the amount of \$3,975.00, while the remainder, \$2,500.00, is in the debtor's sole bank account.

In May of 1989 the debtor's bank account was opened with the deposit of a \$33,000.00 "back benefit" lump sum disability check. Since that time,

116 B.R. 675, 20 Bankr.Ct.Dec. 1288, Bankr. L. Rep. P 73,556
(Cite as: 116 B.R. 675)

the debtor has deposited his \$944 monthly income (\$617.00 Social Security disability check and \$327.00 pension check), into the account. The debtor has no other income except AFDC and disability money paid to him on behalf of his minor grandson/ward, which is also deposited in the account. All of the debtor's living expenses, stated in his schedules to be \$1,231.00 per month, are paid from the account. The \$287 difference between his monthly income and his monthly expenses is being met from what is left of the lump sum disability payment.

The trustee contends that “the exemption provided in § 522(d)(10) is related to the right to receive *future* payments and does not apply to accumulated benefits which have already been distributed.” The trustee further asserts that the fact “[t]hat a debtor might be entitled to an exemption under some other federal law is no longer of consequence” because the debtor chose his exemptions under Section 522(d). As to this latter contention the trustee appears to be on very firm ground. The Seventh Circuit Court of Appeals has stated:

The legislative history [to Section 522(b)] is explicit on the point that the debtor must choose either the exemptions to which he is entitled under the federal exemptions scheme, or those to which he is entitled under other federal law and the state of his domicile. H.R.Rep. No. 595, 95th Cong. 1st Sess. 362 (1977). That a debtor might be entitled to an exemption under some other federal law is of no consequence once the debtor has elected the exclusive list of federal exemptions outlined in the Bankruptcy Code. Other federal exemptions are only available to the debtor if he chooses the state exemptions. H.R.Rep. No. 595, 95th Cong. 1st Sess. 360 (1977); S.Rep. No. 989, 95th Cong. 2d Sess. 75 (1978).

Matter of Kochell, 732 F.2d 564, 566 (7th Cir.1984). Because the debtor chose the exemptions under Section 522(b)(1), his disability benefits qualify for exemption, if at all, only under Section 522(d)(10).

[1] The central question presented, then, is whether § 522(d)(10) is limited to payments not yet received when the bankruptcy*677 case was filed. I conclude that it is not.

11 U.S.C. § 522(d)(10)(A) (1986) provides that a debtor may exempt under 11 U.S.C. § 522(b)(1) “[t]he debtor's right to receive—a social security benefit, unemployment compensation, or a local public assistance benefit.” Similarly, 11 U.S.C. § 522(d)(10)(C) (1986) allows a debtor to exempt under 11 U.S.C. § 522(b)(1) “[t]he debtor's right to receive—a disability, illness, or unemployment benefit.” The legislative history to Section 522(d)(10) indicates that the provision “exempts certain benefits that are akin to future earnings of the debtor.” H.Rep. No. 595, 95th Cong., 1st Sess. 362, *reprinted in U.S.Code Cong. & Ad.News* 5787, 5963, 6318.

The debtor contends that “[t]he legislative history of 11 USC § 522(d) does not clearly demonstrate an intention to exclude lump sum or periodic payments already received when the estate is created from the category of exempt benefits.” He further asserts that “[t]he 1983 amendments to the Social Security Act indicates [sic] Congress's intent to protect such benefits from creditors' claims whether ‘paid or payable,’ and regardless of which exemption scheme the debtor has selected.”

In support of her position that Section 522(d)(10) provides an exemption only for disability benefits yet to be received, the trustee relies on the portion of the legislative history stating that the benefits referred to in Section 522(d)(10) are “akin to future earnings.” The suggested limitation is by no means clear from the language of the statute, which simply exempts a debtor's “right to receive” a disability benefit.

Justice Scalia, in *United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 108 S.Ct. 626, 630, 98 L.Ed.2d 740 (1988) (citations omitted), stated:

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Statutory construction ... is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear ... or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law[.]

Section 407 of the Social Security Act,^{FN1} like Section 522(d)(10) of the Bankruptcy Code, is designed to protect social security benefits from the reach of creditors. Although Section 407 does not apply to create the basis for the debtor's exemption in this case, Section 407 is part of Congress' treatment of the issue of social security benefits in bankruptcy, and the law existing under Section 407 should be considered in construing Section 522(d)(10).

FN1. 42 U.S.C. § 407 (1983) provides:

(a) Inalienability of right to future payments

The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

(b) Inamendability of section by inference

No other provision of law, enacted before, on, or after the date of the enactment of this section, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section.

In *Buren*, the Sixth Circuit Court of Appeals

elaborated upon the reasoning behind Section 407:

When Congress amended Title XVI, [which “established a welfare program for needy individuals who are aged, blind, or disabled”], it explicitly incorporated section 407 to protect the beneficiaries of the new and revised programs. 42 U.S.C. § 1383(d)(1). The committee reports that were written when the amendments were proposed in 1971 explained the rationale for the prohibition against assignments [contained in Section 407]:

Your committee wishes to emphasize its strong belief that if the benefits which would be provided under this program are to meet the most basic needs of the poor, the benefits must be protected from seizure in legal processes *678 against the beneficiary. Therefore, any amounts paid or payable under this program would not be subject to levy, garnishment, or other legal process, except the collection of delinquent Federal taxes. Also, entitlement to these benefits would not be transferable or assignable.

H.R.Rep. No. 92-231, 92nd Cong., 1st Sess. 156 (1971), *reprinted in* [1972] U.S.Code Cong. & Ad.News 4989, 5142.

In re Buren, 725 F.2d 1080, 1084 (6th Cir.1984).

[2] As the trustee noted, “[a]ll laws are presumed to be consistent with each other. Where it is possible to do so, it is the duty of the court to harmonize and reconcile statutory provisions.” *See* 73 Am Jur 2d *Statutes* § 254 (1974) and cases cited therein. Section 522(d)(10), which provides an exemption, must be liberally construed. A construction which exempts both benefits received and benefits to be received harmonizes Section 522(d)(10) with Section 407(a), which requires that “none of the moneys paid or payable ... shall be subject to ... the operation of any bankruptcy or insolvency law,” and represents the more liberal application. It is,

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moreover, consistent with the requirement in Section 407(b) that no statute “may be construed to limit ... the provisions of this section” except by express reference to Section 407.

A disability benefit, (whether a periodic or lump-sum payment), is not divested of its character as a payment in the nature of future earnings simply by virtue of its receipt by the beneficiary prior to the time the bankruptcy petition is filed. The timing of the payment ought not deprive a recipient of those monies meant to be spent for his basic care and maintenance by eliminating the recipient's right to exempt those funds.^{FN2}

FN2. Courts in numerous cases have determined that state laws precluding the assignment of workers compensation benefits applied to protect from the claims of creditors benefits which had already been paid to the recipients. See *In re Nolen*, 65 B.R. 1014 (Bankr.D.N.M.1986); *In re Covey*, 36 B.R. 696 (Bankr.W.D.Ark.1984); *Surace v. Danna*, 248 N.Y. 18, 161 N.E. 315 (1928), and cases cited therein.

[3] The debtor's benefits represented by the uncashed check are readily identifiable and retain their exempt status. Although it is less clear, the debtor's benefits now held in the deposit account also retain their exempt status. 31 Am Jur 2d *Exemptions* § 224 (1989) states the general rule:

There is authority that a deposit of exempt funds in a bank does not affect a debtor's exemption, nor change the exempt character of the fund, so long as the source of the exempt funds is reasonably traceable. If it is impossible to separate out exempt from nonexempt funds, the general rule is that an exemption cannot lie. This rule has been applied, though not without exception, to a deposit of exempt wages, exempt compensation awards, exempt veterans' benefits, and exempt insurance proceeds or funds.

The trustee concedes that the debtor's lump

sum and regular disability benefits were placed into his deposit account, but asserts that “funds have been commingled from various sources and are not traceable in their entirety.” Other than his social security disability benefits and pension benefits, the only deposits alleged to have been made to the account were AFDC and disability money paid on behalf of the debtor's grandson/ward. All the deposited funds are themselves exempt. The trustee has never contended that non-exempt funds were placed in the account.

The fact that the disability benefit funds traced in the account have been commingled with other exempt funds is irrelevant to the consideration of whether the disability funds retain their exempt status under Section 522(d)(10). In *Philpott v. Essex County Welfare Board*, 409 U.S. 413, 416, 93 S.Ct. 590, 592, 34 L.Ed.2d 608 (1973), the United States Supreme Court addressed the similar question of whether Section 407 extended protection to funds contained in a deposit account:

The protection afforded by § 407 is to “moneys paid” and we think the analogy to veterans' benefits exemptions which were reviewed in *679 *Porter v. Aetna Casualty Co.*, 370 U.S. 159 [82 S.Ct. 1231, 8 L.Ed.2d 407], is relevant here. We held in that case that veterans' benefits deposited in a savings and loan association on behalf of a veteran retained the “quality of moneys” and had not become a permanent investment. *Id.*, at 161–62 [82 S.Ct., at 1232.]

In the present case, as in *Porter*, the funds on deposit were readily withdrawable and retained the quality of “moneys” within the purview of § 407.

In *Porter* the Supreme Court had stated:

Since legislation of this type [38 USC § 3101(a), concerning the anti-assignment and exemption of veterans' benefits] should be liberally construed, see *Trotter v. Tennessee*, *supra*, [290 U.S. 354] at 356 [54 S.Ct. 138 at 139, 78 L.Ed. 358 (1933)], to protect funds granted by the

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Congress for the maintenance and support of the beneficiaries thereof, *Lawrence v. Shaw, supra*, [300 U.S. 245] at 250 [57 S.Ct. 443 at 445, 81 L.Ed. 623 (1937)], we feel that deposits such as are involved here should remain inviolate. The Congress, we believe, intended that veterans in the safekeeping of their benefits should be able to utilize those normal modes adopted by the community for that purpose—provided the benefit funds, regardless of the technicalities of title and other formalities, are readily available as needed for support and maintenance, actually retain the qualities of moneys, and have not been converted into permanent investments.

Porter v. Aetna Casualty Co., 370 U.S. 159, 162, 82 S.Ct. 1231, 1233, 8 L.Ed.2d 407 (1962). These same considerations apply with respect to funds in a deposit account claimed to be exempt under Section 522(d)(10).

In our case, the debtor's remaining disability benefits are funds on deposit, readily withdrawable and available as needed for the debtor's support and maintenance. As such, they retain the "quality of moneys" and have not become a permanent investment. They continue to be protected by the exemption granted under Section 522(d)(10).

The trustee has failed to establish that the debtor's claimed exemptions should not be allowed. The trustee's objection to the debtor's claim of exemption in the disability benefits contained in his deposit account and in the form of an uncashed check must be denied.^{FN3}

FN3. In reaching these conclusions, all of the evidence, arguments, and pleadings filed in this case have been carefully considered, regardless of whether they are specifically referred to in this Memorandum Decision.

Bkrcty.W.D.Wis.,1990.
In re Frazier

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▷

United States District Court, E.D. Tennessee.
In re Michael Warren LAWRENCE d/b/a Family
Foot Care Centers; d/b/a Northgate Podiatry Cen-
ter; d/b/a Tri-State Podiatry Center, Debtor.
Michael Warren LAWRENCE, Appellant,
v.
Richard P. JAHN, Trustee, Appellee.

Bankruptcy No. 96-11249.
No. 1:97-cv-217.
March 18, 1998.

Chapter 7 trustee objected to debtor-podiatrist's claimed exemption in 75% of his accounts receivable under Tennessee garnishment statute. The Bankruptcy Court, John C. Cook, J., 205 B.R. 115, entered order sustaining objection, and debtor appealed. The District Court, Edgar, J., held that Tennessee statute establishing a ceiling on what percentage of debtor's disposable earnings could be subject to garnishment merely limited creditors' ability to reach debtor's earnings while they were in hands of third-party garnishee, and did not create the kind of state law exemption that Congress intended to be utilized in bankruptcy.

Affirmed.

West Headnotes

[1] Bankruptcy 51  **2764**

51 Bankruptcy
51VI Exemptions
51k2762 Effect of State Law
51k2764 k. Validity and effect of opt-out legislation. Most Cited Cases
Tennessee, as "opt out" state, could create whatever property exemptions in bankruptcy it might elect, even if its state exemptions were less inclusive or more restrictive than federal bankruptcy exemptions, and even if state exemptions conflicted with the federal bankruptcy exemptions.

Bankr.Code, 11 U.S.C.A. § 522(d).

[2] Bankruptcy 51  **2764**

51 Bankruptcy
51VI Exemptions
51k2762 Effect of State Law
51k2764 k. Validity and effect of opt-out legislation. Most Cited Cases
"Fresh start" policy of the Bankruptcy Code does not require states that have opted out of federal bankruptcy exemptions to provide state exemptions comparable, concomitant or corresponding to the federal exemptions; rather, state may prescribe its own requirements for exempting particular property from bankruptcy, which may circumscribe or enlarge list of exempt property. Bankr.Code, 11 U.S.C.A. § 522(d).

[3] Bankruptcy 51  **2762.1**

51 Bankruptcy
51VI Exemptions
51k2762 Effect of State Law
51k2762.1 k. In general. Most Cited Cases

Bankruptcy 51  **2764**

51 Bankruptcy
51VI Exemptions
51k2762 Effect of State Law
51k2764 k. Validity and effect of opt-out legislation. Most Cited Cases
While Tennessee, as "opt out" state, was authorized to devise its own list of property that Tennessee considered exempt from creditors in bankruptcy, question of whether certain property was "exempt," within meaning of bankruptcy statute, was ultimately one of federal law. Bankr.Code, 11 U.S.C.A. § 522(d).

[4] Federal Courts 170B  **433**

170B Federal Courts

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170BVI State Laws as Rules of Decision
170BVI(C) Application to Particular Matters
170Bk433 k. Other particular matters.
Most Cited Cases

As general rule, words and phrases contained in federal statutes are defined by reference to federal law, particularly where federal statute in question is intended to have uniform nationwide application.

[5] Bankruptcy 51 ↪2762.1

51 Bankruptcy
51VI Exemptions
51k2762 Effect of State Law
51k2762.1 k. In general. Most Cited Cases
State exemption statutes apply to bankruptcy cases to no greater or lesser extent than that authorized by Congress. Bankr.Code, 11 U.S.C.A. § 522(d).

[6] Bankruptcy 51 ↪2762.1

51 Bankruptcy
51VI Exemptions
51k2762 Effect of State Law
51k2762.1 k. In general. Most Cited Cases
Exemption laws of the State of Tennessee must be applied in manner consistent with goals and policies of the Bankruptcy Code; when conflict occurs between Tennessee law and federal bankruptcy statutes, bankruptcy policy prevails. Bankr.Code, 11 U.S.C.A. § 522(d).

[7] Bankruptcy 51 ↪2761

51 Bankruptcy
51VI Exemptions
51k2761 k. In general. Most Cited Cases
In bankruptcy, "exempt" property is property which debtor can forever sequester to himself and place completely beyond reach of creditors. Bankr.Code, 11 U.S.C.A. § 522.

[8] Bankruptcy 51 ↪2761

51 Bankruptcy
51VI Exemptions
51k2761 k. In general. Most Cited Cases
Bankruptcy exemptions are enacted to ensure that debtor coming out of bankruptcy process retains sufficient property to obtain a fresh start, and to provide debtor with basic necessities of life so that he will not be left entirely destitute. Bankr.Code, 11 U.S.C.A. § 522.

[9] Bankruptcy 51 ↪2761

51 Bankruptcy
51VI Exemptions
51k2761 k. In general. Most Cited Cases

Bankruptcy 51 ↪2764

51 Bankruptcy
51VI Exemptions
51k2762 Effect of State Law
51k2764 k. Validity and effect of opt-out legislation. Most Cited Cases
When Congress enacted statute permitting bankruptcy debtors to utilize property exemptions granted under state law as alternatives to the federal bankruptcy exemptions, Congress had in mind the type of exemptions whereby property is completely and permanently exempt, so as to prevent creditors from ever threatening property with attachment, seizure or execution; essence and purpose of bankruptcy exemption is sequestration of debtor's property by placing it completely beyond reach of creditors for as long as property retains its exempt character and form. Bankr.Code, 11 U.S.C.A. § 522.

[10] Bankruptcy 51 ↪2764

51 Bankruptcy
51VI Exemptions
51k2762 Effect of State Law
51k2764 k. Validity and effect of opt-out legislation. Most Cited Cases
To the extent that Tennessee statute establishing a ceiling on what percentage of debtor's disposable earnings could be subject to garnishment

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merely limited creditors' ability to reach debtor's earnings while they were in hands of third-party garnishee, and did not provide for complete sequestration of debtor's earnings from creditors, statute could not be recognized and applied in bankruptcy as an "exemption" for debtor's disposable earnings. Bankr.Code, 11 U.S.C.A. § 522(b); West's Tenn.Code, § 26-2-106.

[11] Bankruptcy 51 ↪2764

51 Bankruptcy

51VI Exemptions

51k2762 Effect of State Law

51k2764 k. Validity and effect of opt-out legislation. Most Cited Cases

Tennessee statute establishing a ceiling on what percentage of debtor's disposable earnings could be subject to garnishment merely limited creditors' ability to reach debtor's earnings while they were in hands of third-party garnishee, and did not prevent creditors from attaching or executing on earnings once they came into debtor's possession; accordingly, Tennessee statute did not create the kind of state law exemption that Congress intended to be utilized in bankruptcy. Bankr.Code, 11 U.S.C.A. § 522(b); West's Tenn.Code, § 26-2-106.

[12] Bankruptcy 51 ↪2154.1

51 Bankruptcy

51II Courts; Proceedings in General

51II(B) Actions and Proceedings in General

51k2154 Rights of Action by or on Behalf of Trustee or Debtor

51k2154.1 k. In general; standing. Most Cited Cases

Exemptions 163 ↪48(1)

163 Exemptions

163I Nature and Extent

163I(C) Property and Rights Exempt

163k48 Earnings, Wages, or Salaries

163k48(1) k. In general. Most Cited

Cases

In seeking to collect, for the benefit of Chapter 7 estate, sums owed by debtor-podiatrist's patients for medical services which they had received, trustee did not stand in position of judgment creditor seeking to garnish property of debtor in hands of third parties; accordingly, trustee's ability to collect accounts for benefit of the estate was not restricted, pursuant to Tennessee statute establishing a ceiling on what percentage of debtor's disposable earnings could be subject to garnishment. West's Tenn.Code, § 26-2-106.

[13] Bankruptcy 51 ↪3770

51 Bankruptcy

51XIX Review

51XIX(B) Review of Bankruptcy Court

51k3770 k. Presentation of grounds for review. Most Cited Cases

District court would not consider, for first time on appeal from bankruptcy court order sustaining objection to exemption claimed by debtor-podiatrist in his patient accounts, debtor's argument that these accounts were excluded from property of his Chapter 7 estate on theory that they were held in constructive trust by his patients, where debtor had not made argument below and had not even included issue in his statement of issues on appeal, and where debtor's argument was of dubious merit. Bankr.Code, 11 U.S.C.A. § 541(c)(2).

[14] Bankruptcy 51 ↪3770

51 Bankruptcy

51XIX Review

51XIX(B) Review of Bankruptcy Court

51k3770 k. Presentation of grounds for review. Most Cited Cases

Federal appellate court will not consider arguments or issues raised for first time on appeal unless there are exceptional circumstances, such as where the proper decision is beyond doubt, or where miscarriage of justice might otherwise result.

[15] Bankruptcy 51 ↪2543

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51 Bankruptcy
51V The Estate
51V(C) Property of Estate in General
51V(C)2 Particular Items and Interests
51k2543 k. Property held by debtor as trustee, agent, or bailee. Most Cited Cases

Bankruptcy 51 ↪2547

51 Bankruptcy
51V The Estate
51V(C) Property of Estate in General
51V(C)2 Particular Items and Interests
51k2547 k. Property held in trust or custody for debtor; deposits. Most Cited Cases
As general rule, federal courts are very reluctant to impose constructive trusts in bankruptcy cases.

[16] Trusts 390 ↪91

390 Trusts
390I Creation, Existence, and Validity
390I(C) Constructive Trusts
390k91 k. Nature of constructive trust. Most Cited Cases
“Constructive trust,” unlike express trust, is equitable remedy devised by courts, which does not come into existence until plaintiff obtains judicial decision finding that he is entitled to judgment imposing constructive trust on defendant’s property or assets.

[17] Trusts 390 ↪91

390 Trusts
390I Creation, Existence, and Validity
390I(C) Constructive Trusts
390k91 k. Nature of constructive trust. Most Cited Cases
“Constructive trust” is equitable remedy applied by courts when necessary to serve ends of justice.

[18] Trusts 390 ↪95

390 Trusts

390I Creation, Existence, and Validity
390I(C) Constructive Trusts
390k95 k. Fraud or other wrong in acquisition of property in general. Most Cited Cases

Trusts 390 ↪103(1)

390 Trusts
390I Creation, Existence, and Validity
390I(C) Constructive Trusts
390k103 Contracts and Transactions Between Persons in Confidential Relations
390k103(1) k. In general. Most Cited Cases

Constructive trust may arise against person who, by the commission of a wrongful or dishonest act including fraud, duress, concealment and abuse of confidence, has acquired or holds legal right to property which he ought not, in equity and good conscience, hold and enjoy.

[19] Trusts 390 ↪91

390 Trusts
390I Creation, Existence, and Validity
390I(C) Constructive Trusts
390k91 k. Nature of constructive trust. Most Cited Cases

Under Tennessee law, constructive trusts are imposed in four types of cases: (1) where person procures legal title to property in violation of some express or implied duty owed to true owner of property; (2) where title to property is obtained by fraud, duress, concealment or other inequitable means; (3) where person makes use of some relation, influence or confidence to obtain legal title to property upon more advantageous terms than could otherwise have been obtained; and (4) where person acquires property with notice that another is entitled to its benefits.

*789 Thomas E Ray, Shannon L Seckler, Ray & Associates, PC, Chattanooga, TN, for appellants.

Richard P Jahn, Jr, Jahn & Clem, Chattanooga, TN, U.S. Trustee.

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MEMORANDUM

EDGAR, District Judge.

This is a direct appeal from a final decision by the United States Bankruptcy Court. Appellant Michael Lawrence ("Lawrence") brings the appeal pursuant to 28 U.S.C. § 158(a) and Bankruptcy Rule 8001. After reviewing the record, the Court concludes that the bankruptcy court's decision is correct, and it will be **AFFIRMED**. The appeal by Lawrence will be **DISMISSED**.

I. Standard of Review

The bankruptcy court is the finder of fact. *In re Isaacman*, 26 F.3d 629, 631 (6th Cir.1994); *In re Caldwell*, 851 F.2d 852, 857 (6th Cir.1988). This Court is required to uphold the findings of fact made by the bankruptcy court unless those findings are determined to be clearly erroneous. The bankruptcy court's conclusions of law are reviewed *de novo* on appeal. *In re 255 Park Plaza Associates Ltd. Partnership*, 100 F.3d 1214, 1216 (6th Cir.1996); *Isaacman*, 26 F.3d at 631; *In re Zick*, 931 F.2d 1124, 1126 (6th Cir.1991); Bankruptcy Rule 8013. This Court has the authority to affirm, modify, or reverse the judgment of the bankruptcy court. This Court may also remand the case, if necessary, to the bankruptcy court for further proceedings. Bankruptcy Rule 8013.

II. Facts

The essential facts are not in dispute. This Court agrees with the bankruptcy court's uncontested findings of fact. On March 11, 1996, Lawrence filed a Chapter 13 petition for bankruptcy. He subsequently converted the petition into a Chapter 7 bankruptcy pursuant to 11 U.S.C. § 1307. Lawrence was in private business as a self-employed licensed podiatrist, and he was a solo practitioner.

Prior to filing his bankruptcy petition, Lawrence accumulated \$140,000 in unpaid patient accounts receivable. Lawrence claimed 75% of the \$140,000 in accounts receivable, after taxes, as property exempt from bankruptcy pursuant to the Tennessee garnishment statute, TENN.CODE

ANN. § 26-2-106. The Bankruptcy Trustee objected to this claimed exemption. Lawrence and the Trustee disagreed about the interpretation and application of Tenn.Code Ann. §§ 26-2-105 and 26-2-106. Lawrence contended that his accounts receivable are "disposable earnings" under § 26-2-105.^{FN1} He also argued that the restriction on garnishment of disposable earnings in § 26-2-106(a)(1) constitutes an exemption of such earnings from bankruptcy within the purview of 11 U.S.C. § 522(b).

FN1. Section 26-2-105 provides:

"Earnings," "disposable earnings," "garnishment," defined. —As used in this part unless the context otherwise requires:

- (1) "Earnings" means the compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program;
- (2) "Disposable earnings" means that part of the earnings of an individual remaining after the deduction from those earnings of any amounts required by law to be withheld;
- (3) "Garnishment" means any legal or equitable procedure through which the earnings of an individual are required to be withheld for payment of any debt.

The Trustee argued in opposition that the accounts receivable of a self-employed podiatrist are not enough like wages or a salary paid by an employer to an employee to qualify as "earnings" within the meaning of TENN.CODE ANN. § 26-2-105(1). The Trustee further contended that TENN.CODE ANN. § 26-2-106 merely limits the amount of earnings which may be garnished outside of bankruptcy and does not purport to create an ex-

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emption of earnings from bankruptcy cognizable under 11 U.S.C. § 522(b).

***790 III. Bankruptcy Court Opinion**

In a well-reasoned opinion, Bankruptcy Court Judge John C. Cook ruled in the Trustee's favor and denied the claimed exemption. *In re Lawrence*, 205 B.R. 115 (Bankr.E.D.Tenn.1997). Judge Cook determined that Tenn.Code Ann. § 26-2-106 does not create an exemption for a debtor's earnings cognizable in bankruptcy. The bankruptcy court found it unnecessary to address the merits of the other question concerning whether the accounts receivable are "earnings" within the meaning of TENN.CODE ANN. § 26-2-105(1).^{FN2}

FN2. Judge Cook's opinion in *Lawrence* has been cited with approval and followed by at least one other bankruptcy court. *In re Siegel*, 214 B.R. 329 (Bankr.W.D.Tenn.1997).

IV. Issues on Appeal

Lawrence raises two issues on appeal: (1) whether Tenn.Code Ann. § 26-2-106 provides an exemption for earnings in bankruptcy; and (2) whether Lawrence's accounts receivable concerning medical services rendered to his patients are "earnings" under TENN.CODE ANN. § 26-2-105 (1).

V. Analysis

The Court agrees with the bankruptcy court and concludes that TENN.CODE ANN. § 26-2-106 does not provide an exemption for earnings in bankruptcy proceedings. The first issue presented on appeal must be resolved in favor of the Trustee. The Court need not address the second issue concerning whether the accounts receivable are "earnings" under TENN.CODE ANN. § 26-2-105. The second issue is moot.

A. Bankruptcy Exemptions Under 11 U.S.C. § 522(b)

The Trustee bears the burden of proving that the exemption claimed by Lawrence is improper

and should be disallowed. Bankruptcy Rule 4003(c). 11 U.S.C. § 541(a)(1) provides that the property of the Chapter 7 bankruptcy estate consists of "all legal or equitable interests of the debtor in property as of the commencement of the case." The accumulated accounts receivable of debtor Lawrence are property of the Chapter 7 bankruptcy estate pursuant to § 541(a)(1).

11 U.S.C. § 522(b) provides that notwithstanding 11 U.S.C. § 541, an individual debtor may exempt from the bankruptcy estate the property listed in either § 522(b)(1) or (b)(2). Section 522(b) grants States the authority to "opt out" of the federal scheme of property exemptions enumerated in 11 U.S.C. § 522(d). *In re Storer*, 58 F.3d 1125 (6th Cir.), cert. denied, 516 U.S. 990, 116 S.Ct. 520, 133 L.Ed.2d 428 (1995); *Rhodes v. Stewart*, 705 F.2d 159 (6th Cir.), cert. denied, 464 U.S. 983, 104 S.Ct. 427, 78 L.Ed.2d 361 (1983). The State of Tennessee has the right to create and substitute its own scheme of property exemptions for purposes of bankruptcy. *Storer*, 58 F.3d 1125; *Rhodes*, 705 F.2d 159. The Sixth Circuit has recognized that the United States Congress and the Tennessee Legislature share concurrent authority to promulgate bankruptcy laws governing exemptions. *Storer*, 58 F.3d at 1129; *Rhodes*, 705 F.2d at 163. Tennessee is an "opt out" state under 11 U.S.C. § 522(b). Tennessee requires its citizens who file for bankruptcy to rely on the exemptions granted by Tennessee law rather than the exemptions listed in 11 U.S.C. § 522(d). TENN.CODE ANN. § 26-2-112, *In re Lucas*, 924 F.2d 597, 599 n. 4 (6th Cir.1991); *Rhodes*, 705 F.2d 159; *In re Clemmer*, 184 B.R. 935, 939-40 (Bankr.E.D.Tenn.1995).

[1][2] Moreover, Tennessee is empowered by 11 U.S.C. § 522(b) to create whatever property exemptions in bankruptcy it may elect, even if the state exemptions are less inclusive or more restrictive than the exemptions afforded debtors by the federal exemption scheme in 11 U.S.C. § 522(d). *Storer*, 58 F.3d at 1128-29; *Rhodes*, 705 F.2d at 163-64. Likewise, Tennessee may enact different

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exemptions which would possibly conflict with the federal exemptions reflected in § 522(d). *Storer*, 58 F.3d at 1128–29; *Rhodes*, 705 F.2d at 164; *In re McManus*, 681 F.2d 353, 357 n. 7 (5th Cir.1982). As the Seventh Circuit stated in *Clark v. Chicago Mun. Emp. Credit Union*, 119 F.3d 540, 544 (7th Cir.1997), federal case law reflects that the “fresh start” for debtors policy in the BANKRUPTCY CODE does not *791 require states that have opted out of the federal exemptions to provide state exemptions comparable, concomitant or corresponding to the federal exemptions in 11 U.S.C. § 522(d). Consequently, the State of Tennessee may prescribe its own requirements for exemptions of particular property from bankruptcy which may “either circumscribe or enlarge the list of exempt property.” *McManus*, 681 F.2d at 355–56 (quoted with approval in *Rhodes*, 705 F.2d at 163).

[3][4] To resolve the first issue raised by Lawrence on appeal, the Court must look to both federal and Tennessee law. The Court has the task of interpreting 11 U.S.C. § 522(b) and TENN.CODE ANN. § 26–2–106. As Judge Cook explains in his opinion, § 522(b) provides that an individual debtor may exempt from the bankruptcy estate such property that is “exempt” under state law. Although Tennessee is authorized by § 522(b) to devise its own list of property that Tennessee considers exempt from the creditors in bankruptcy, the question of whether certain property is “exempt” within the meaning of § 522(b) of the BANKRUPTCY CODE is ultimately one of federal law. *Cf. Patterson v. Shumate*, 504 U.S. 753, 757–59, 112 S.Ct. 2242, 2246, 119 L.Ed.2d 519 (1992). As a general rule, words and phrases contained in federal statutes are defined by reference to federal law. This is particularly true where the federal statute such as 11 U.S.C. § 522(b) of the BANKRUPTCY CODE is intended to have uniform nationwide application. *In re Hodgson*, 167 B.R. 945, 949–50 (D.Kan.1994). The term “exempt” as used in § 522(b) must be given the proper meaning and application intended by Congress.

[5][6] State exemption statutes are applicable to cases under the BANKRUPTCY CODE to no greater or lesser extent than that authorized by Congress in § 522(b). *In re Butcher*, 189 B.R. 357, 371–72 (Bankr.D.Md.1995), *aff'd*, 125 F.3d 238 (4th Cir.1997). The laws of the State of Tennessee must be applied in a manner consistent with the goals and policies of the federal BANKRUPTCY CODE. When a conflict occurs between Tennessee law and the federal bankruptcy statutes, bankruptcy policy prevails. *In re McCafferty*, 96 F.3d 192, 196 (6th Cir.1996); *In re Omegas Group, Inc.*, 16 F.3d 1443, 1450–51 (6th Cir.1994).

When interpreting 11 U.S.C. § 522(b), we must first consider its text. *United States v. Alvarez-Sanchez*, 511 U.S. 350, 356, 114 S.Ct. 1599, 1603, 128 L.Ed.2d 319 (1994); *Floyd v. U.S. Postal Service*, 105 F.3d 274, 276 (6th Cir.1997). Courts are required to interpret and enforce statutes according to the plain meaning of their language as long as the language is unambiguous. *Toibb v. Radloff*, 501 U.S. 157, 111 S.Ct. 2197, 115 L.Ed.2d 145 (1991); *United States v. Ron Pair Enters.*, 489 U.S. 235, 240, 109 S.Ct. 1026, 1029–30, 103 L.Ed.2d 290 (1989); *In re Toti*, 24 F.3d 806, 809 (6th Cir.), *cert. denied*, 513 U.S. 987, 115 S.Ct. 482, 130 L.Ed.2d 395 (1994). If the language of a statute is unambiguous and susceptible of only one objectively reasonable interpretation, absent a clearly expressed legislative intent to the contrary, the plain language is ordinarily conclusive. *Reves v. Ernst & Young*, 507 U.S. 170, 177, 113 S.Ct. 1163, 1169, 122 L.Ed.2d 525 (1993); *Negonsott v. Samuels*, 507 U.S. 99, 104, 113 S.Ct. 1119, 1122, 122 L.Ed.2d 457 (1993); *Floyd*, 105 F.3d at 276. Where statutory language is not expressly defined, it will be given its common meaning. *Burlington N.R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461, 107 S.Ct. 1855, 1859, 95 L.Ed.2d 404 (1987); *Toti*, 24 F.3d at 809. When interpreting a statute, courts look not merely to a particular clause in which general words may be used, but will also consider the statute as a whole and the object and policy of the law, as indicated by its various provisions. The

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courts construe statutes so as to carry into execution the intent and will of the legislature. *Kokoszka v. Belford*, 417 U.S. 642, 650, 94 S.Ct. 2431, 2436, 41 L.Ed.2d 374 (1974).

The meaning of the term “exempt” in 11 U.S.C. § 522(b), as intended by Congress, is not ambiguous especially when considered in the context that one of the primary purposes of the BANKRUPTCY CODE is to give debtor Lawrence a fresh start and grant him relief from the weight of oppressive indebtedness. *Grogan v. Garner*, 498 U.S. 279, 286, 111 S.Ct. 654, 659, 112 L.Ed.2d 755 (1991); *Local Loan Co. v. Hunt*, 292 U.S. 234, 244, 54 S.Ct. 695, 699, 78 L.Ed. 1230 (1934); *792 *In re Fegeley*, 118 F.3d 979, 982 (3rd Cir.1997); *Toti*, 24 F.3d at 809; *Sanders Confectionery Products v. Heller Financial*, 973 F.2d 474, 481 (6th Cir.1992), cert. denied, 506 U.S. 1079, 113 S.Ct. 1046, 122 L.Ed.2d 355 (1993), (BANKRUPTCY CODE contains a strong preference for final resolution of all creditors' claims involving the debtor, largely in order for the debtor to obtain a fresh start); *In re Krohn*, 886 F.2d 123, 125 (6th Cir.1989); see also *Toth v. Michigan State Housing Development Auth.*, 136 F.3d 477 (6th Cir.1998). A fresh start for debtors in bankruptcy is accomplished through discharge of all or a portion of their debts. Chapter 7 of the BANKRUPTCY CODE allows the discharge of Lawrence's debts in exchange for liquidation of his nonexempt property and assets for the benefit of his creditors. *In re Arango*, 992 F.2d 611, 613 (6th Cir.); *Krohn*, 886 F.2d at 125. When a debtor files under Chapter 7, he is generally granted a complete discharge from debts that arose prior to the filing of the bankruptcy petition. 11 U.S.C. § 727(b); *Fegeley*, 118 F.3d at 982; *Toti*, 24 F.3d at 808.

[7][8][9] Bankruptcy Court Judge Cook correctly reasoned that, in bankruptcy, the debtor's property that is exempt is the property the debtor can forever sequester to himself and place completely beyond the reach of his creditors. Exempt property is subtracted from the bankruptcy estate and not distributed to creditors. Exemptions are en-

acted to ensure that a debtor coming out of the bankruptcy process retains sufficient property to obtain a fresh start and to provide the debtor with the basic necessities of life so that he will not be left entirely destitute by his creditors. *Arango*, 992 F.2d at 613; *Butcher*, 189 B.R. at 369; *In re Locarno*, 23 B.R. 622, 629 (Bankr.D.Md.1982). Once a debtor has been discharged in bankruptcy, the creditors are thereafter prohibited from attaching, seizing and executing on the debtor's exempt property. 11 U.S.C. § 524(a). When Congress enacted § 522(b) permitting debtors in bankruptcy to utilize property exemptions granted under state law as alternatives to the federal exemptions listed in § 522(d), Congress had in mind the type of exemptions where property is completely and permanently exempt thereby preventing creditors from ever threatening the exempt property with attachment, seizure and execution. In other words, the essence and purpose of a bankruptcy exemption is the sequestration of particular types of a debtor's property by placing the exempt property completely beyond the reach of creditors for as long as the property maintains its exempt character and form. This basic definition of a bankruptcy exemption is necessary and proper to fulfill a primary purpose of the BANKRUPTCY CODE, namely to give debtors a fresh start.

B. TENN.CODE ANN. § 26-2-106 Is Not An Exemption In Bankruptcy

Various Tennessee statutes provide for particular items of a debtor's property to be completely exempt from all judicial process initiated by creditors to collect debts. TENN.CODE ANN. §§ 26-2-102, 26-2-103, 26-2-104, 26-2-110, 26-2-111. These statutes create exemptions cognizable in bankruptcy under 11 U.S.C. § 522(b). Whenever the Tennessee Legislature has sought to create a bankruptcy exemption, it has inserted key language into the Tennessee statutes stating that the property shall either be “exempt from execution, seizure or attachment” (§§ 26-2-102, 26-2-103, 26-2-111) or, if the property may be in the possession of a third person, “exempt from execution, attachment or garnish-

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ment” (§§ 26–2–104, 26–2–110). This broad language expressly prohibits creditors from ever subjecting the debtor’s exempted property to any judicial process for the collection of debts. *Cf. Philpott v. Essex County Welfare Board*, 409 U.S. 413, 93 S.Ct. 590, 34 L.Ed.2d 608 (1973) (Disability insurance benefits under the Social Security Act were held completely exempt from creditors by virtue of all-inclusive language in 42 U.S.C. § 407 prohibiting execution, levy, attachment, garnishment, or other legal process).

The Tennessee garnishment statute at issue here, TENN.CODE ANN. § 26–2–106, is fundamentally different from these other Tennessee exemption statutes. Section 26–2–106 does not contain similar broad language that completely and permanently exempts a debtor’s earnings from the reach of *793 creditors through judicial process. Section 26–2–106 provides:

Maximum amount of disposable earnings exempt from garnishment—Garnishment costs.

(a) The maximum part of the aggregate disposable earnings of an individual for any workweek which is subjected to garnishment may not exceed:

(1) Twenty-five percent (25%) of his disposable earnings for that week; or

(2) The amount by which his disposable earnings for that week exceed thirty (30) times the federal minimum hourly wage at the time the earnings for any pay period become due and payable, whichever is less.

(b) In the case of earnings for any pay period other than a week, an equivalent amount shall be in effect.

(c) The debtor shall pay the costs of any and all garnishments on each debt on which suit is brought. Said costs shall not include commissions for sheriffs on any garnishment after the original garnishment and the total amount of any such

costs shall not exceed three dollars (\$3.00) for any garnishment after the original.

Section 26–2–106(a) merely limits to 25% the amount of disposable earnings that may be subjected to garnishment while the earnings are in the possession of a third person. Section 26–2–106 does not expressly prohibit creditors from the attachment, seizure and execution on earnings which are in the debtor’s possession. The statute is silent about whether the remaining 75% of the earnings are exempt from creditors once the earnings are paid over and distributed to the debtor. There are no reported decisions by the state courts of Tennessee which discuss this specific question of law and interpret § 26–2–106 as either allowing or not allowing creditors to attach and execute on earnings in the debtor’s possession.

[10] The bankruptcy court below correctly reasons that if TENN.CODE ANN. § 26–2–106 does not provide for the complete sequestration of the debtor’s earnings from creditors and instead merely limits the amount of earnings a creditor can obtain through the garnishment of a third-party garnishee, Congress does not intend in the BANKRUPTCY CODE for § 26–2–106 to be recognized and applied as an exemption for disposable earnings in bankruptcy proceedings. This Court agrees with the bankruptcy court’s analysis. When Congress enacted 11 U.S.C. § 522(b), it intended to provide for exemptions of property from bankruptcy where the state statute fully, permanently and unequivocally exempts the debtor’s property from the reach of his creditors. If creditors are permitted under TENN.CODE ANN. § 26–2–106 to attach and execute on earnings in the debtor’s possession where the earnings are no longer possessed by a third-party garnishee, then such earnings cannot be “exempt” property in bankruptcy pursuant to 11 U.S.C. § 522(b).

[11] This Court also agrees with the bankruptcy court’s conclusion that when earnings are paid and distributed to a debtor in Tennessee, the earnings do not retain their exempt status in the debtor’s

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hands and bank accounts under TENN.CODE ANN. § 26–2–106. Once earnings come into the debtor's possession, creditors have the right under Tennessee law to attach and execute on the earnings to collect debts except to the extent that another statutory exemption may apply. The Court reaches this conclusion based on the following reasons.

First, there is no Tennessee statute that provides a general exemption for earnings and wages paid to a debtor. In interpreting a Tennessee statute, the fundamental rule of statutory construction is to ascertain the legislative purpose and intent as expressed in the statute. The legislative intent is derived primarily from the natural, ordinary meaning of the plain language contained in the statute when read in context within the statute as a whole. The Court must not give the statutory language any forced or subtle construction that either unduly restricts or extends the coverage of the statute beyond its intended scope. *Riggs v. Burson*, 941 S.W.2d 44, 54 (Tenn.1997); *Perry v. Sentry Ins. Co.*, 938 S.W.2d 404, 406 (Tenn.1996); *Tuggle v. Allright Parking Systems, Inc.*, 922 S.W.2d 105, 107 (Tenn.1996); *Owens v. State*, 908 S.W.2d 923, 926 (Tenn.1995). A statute is ambiguous if it is capable of more than one reasonable *794 meaning. *Evans v. Young*, 201 Tenn. 368, 381, 299 S.W.2d 218, 224 (1957); *In re Conservatorship of Clayton*, 914 S.W.2d 84, 90 (Tenn.App.1995).

TENN.CODE ANN. § 26–2–106 is not ambiguous. The plain language in § 26–2–106 provides for disposable earnings to be exempt from garnishment to a limited degree only when the earnings are in the possession of a third-party garnishee. Section 26–2–106 does not provide for any exemption when the disposable earnings are in the debtor's hands and bank accounts.

Furthermore, even if we assume *arguendo* that § 26–2–106 is ambiguous, it is a well established rule of statutory construction in Tennessee that statutes *in pari materia*—those relating to the same subject matter or having a common purpose—are to

be construed together. *Petition of Gant*, 937 S.W.2d 842, 845 (Tenn.1996); *Owens*, 908 S.W.2d at 926; *State v. Blouvet*, 904 S.W.2d 111, 113 (Tenn.1995); *Roseman v. Roseman*, 890 S.W.2d 27, 29 (Tenn.1994); *Belle-Aire Village, Inc. v. Ghorley*, 574 S.W.2d 723, 726 (Tenn.1978). The construction of an ambiguous statute may be aided by considering the words and legislative intent indicated by the language of another related statute on the same subject. *Gant*, 937 S.W.2d at 845; *Blouvet*, 904 S.W.2d at 113; *Roseman*, 890 S.W.2d at 29; *Wilson v. Johnson Co.*, 879 S.W.2d 807, 809 (Tenn.1994); *Neff v. Cherokee Ins. Co.*, 704 S.W.2d 1, 2 (Tenn.1986).

TENN.CODE ANN. §§ 26–2–102^{FN3} and 26–2–106 are statutes *in pari materia* relating to the common subject matter of exemptions of debtors' personal property, and these statutes should be construed together and harmonized. Section 26–2–102 allows an exemption for personal property in the debtor's possession including his bank accounts. When §§ 26–2–102 and 26–2–106 are construed together, the Court concludes that once disposable earnings are received and possessed by a debtor and the earnings are no longer governed by the exemption from garnishment in § 26–2–106, then the earnings possessed by the debtor become subject to the exemption in § 26–2–102.

FN3. TENN.CODE ANN. § 26–2–102 provides:

Personal property selectively exempt from seizure.—Personal property to the aggregate value of four thousand dollars (\$4,000) debtor's equity interest shall be exempt from execution, seizure or attachment in the hands or possession of any person who is a bona fide citizen permanently residing in Tennessee, and such person shall be entitled to this exemption without regard to his vocation or pursuit or to the ownership of his abode. Such person may select for exemption the items of the owned and pos-

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sessed personal property, including money and funds on deposit with a bank or other financial institution, up to the aggregate value of four thousand dollars (\$4,000) debtor's equity interest.

Second, if the Tennessee Legislature had intended for TENN.CODE ANN. § 26-2-106 to make earnings paid to a debtor completely and permanently exempt from the reach of his creditors for bankruptcy purposes, it would have so provided. The Tennessee Legislature knows how to exempt money in the hands of debtors when it chooses to do so. For example, TENN.CODE ANN. § 26-2-104(a) provides that “[a]ll moneys received by a resident of the state, as pension from the state of Tennessee, or any subdivision or municipality thereof, before receipt, or while in the resident's hands or upon deposit in the bank, shall be exempt from execution, attachment or garnishment other than” an assignment for child support pursuant to TENN.CODE ANN. § 36-5-501. (Emphasis supplied). Section 26-2-104(a) concerns the distribution of pension funds to debtors which is virtually identical to situations where debtors receive unpaid earnings. Section 26-2-104(a) expressly covers the time periods before and after debtors receive pension funds, and it specifies that pension moneys in the hands and bank accounts of debtors are generally exempt from the reach of creditors through all means of attachment and execution. The Tennessee Legislature could have inserted language in § 26-2-106 similar to § 26-2-104(a) extending the garnishment exemption to disposable earnings in the hands and bank accounts of debtors but it has not done so.

An excellent comparison which illustrates the point is found in Florida. The Florida Legislature in 1985 amended its garnishment exemption statute, FLA.STAT. § 222.11, to add language expressly exempting wages received by debtors and deposited into debtors' *795 bank accounts thereby establishing an exemption cognizable in bankruptcy. See *In re Ryzner*, 208 B.R. 568, 569

(Bankr.M.D.Fla.1997); *Matter of Welch*, 115 B.R. 374 (Bankr.M.D.Fla.1990). Prior to the 1985 amendment of the Florida garnishment statute, the Florida courts had held that the statute did not extend the garnishment exemption to earnings directly deposited by an employer into a debtor-employee's bank account. *Ellis Sarasota Bank & Trust Co. v. Nevins*, 409 So.2d 178, 179 (Fla.App.1982); *Holmes v. Blazer Financial Services, Inc.*, 369 So.2d 987 (Fla.App.1979); *Hertz v. Fisher*, 339 So.2d 1148 (Fla.App.1976).

Another example directly on point is TENN.CODE ANN. § 26-2-111. Section 26-2-111 provides that in addition to the personal property exempt under § 26-2-102 quoted *supra*, certain other types of specified property “shall be exempt from execution, seizure or attachment in the hands or possession of any person who is a bona fide citizen permanently residing in Tennessee....” (Emphasis supplied). The property exempt under § 26-2-111 includes social security benefits, unemployment compensation, veteran's benefits, and a disability benefit or pension that vests as a result of disability.

The existence of §§ 26-2-102, 26-2-104(a) and 26-2-111 demonstrates that the Tennessee Legislature is capable of expressing its intentions in unequivocal language and drafting statutes that clearly provide bankruptcy exemptions for funds received by and in the possession of debtors. However, TENN.CODE ANN. § 26-2-106 by stark contrast does not make any provision whatsoever for disposable earnings in the possession of debtors to be exempt from creditors. Cf. *Usery v. First National Bank of Arizona*, 586 F.2d 107, 110-11 (9th Cir.1978). After comparing § 26-2-106 with §§ 26-2-102, 26-2-104 and 26-2-111, this Court concludes that Tennessee does not intend for § 26-2-106 to exempt in bankruptcy disposable earnings after the earnings have been distributed and paid to debtors. Once earnings are received by and come into the possession of debtors, § 26-2-106 is not designed to exempt such earnings from the

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reach of creditors. Accordingly, § 26–2–106 does not create the kind of state exemption that Congress intends to be utilized in bankruptcy under 11 U.S.C. § 522(b).

Third, TENN.CODE ANN. §§ 26–2–105 and 26–2–106 were enacted subsequent to Subchapter II of the federal Consumer Credit Protection Act (“CCPA”), 15 U.S.C. §§ 1671 – 1677. Congress enacted Subchapter II of the CCPA in 1968 for the purpose of imposing nationwide restrictions on garnishments to protect debtors from the predatory lending practices of some credit institutions. *Kokoszka*, 417 U.S. at 650–51, 94 S.Ct. at 2435–36; 15 U.S.C. § 1671. The CCPA, which became effective on July 1, 1970, preempts any less restrictive state garnishment statutes. 15 U.S.C. § 1673(c). The CCPA rendered the then-existing Tennessee garnishment laws obsolete. The State of Tennessee subsequently enacted its own version of the CCPA in 1978 and adopted the operative provisions of the CCPA almost verbatim. The language in TENN.CODE ANN. § 26–2–105 is taken directly from 15 U.S.C. § 1672. The text of TENN.CODE ANN. § 26–2–106(a) and (b) is copied directly from 15 U.S.C. § 1673(a). Thus, Tennessee modeled TENN.CODE ANN. §§ 26–2–105 and 26–2–106 after the CCPA.

Tennessee did not enact TENN.CODE ANN. §§ 26–2–105 and 26–2–106 in a vacuum. It is significant that §§ 26–2–105 and 26–2–106 were enacted in Tennessee in 1978, some four years after the Supreme Court’s decision in *Kokoszka*, 417 U.S. 642, 94 S.Ct. 2431, 41 L.Ed.2d 374. The Tennessee Legislature either knew or should have known about *Kokoszka* when it adopted §§ 26–2–105 and 26–2–106. The Tennessee Legislature is presumed to know the state of the law at the time it passes legislation. *Riggs*, 941 S.W.2d at 54; *Holder v. Tennessee Judicial Selection*, 937 S.W.2d 877, 883 (Tenn.1996); *Owens*, 908 S.W.2d at 926; *Wilson*, 879 S.W.2d at 810; *Neff*, 704 S.W.2d at 5.

In *Kokoszka*, the Supreme Court addressed two questions: (1) whether an income tax refund is

“property” under § 70a(5) of the Bankruptcy Act, 11 U.S.C. § 110(a)(5); and (2) assuming that all or part of the income tax refund is property which passes to the bankruptcy trustee, whether the CCPA’s limitation on the garnishment of *796 earnings or wages, 15 U.S.C. § 1673, serves to exempt 75% of the tax refund from the jurisdiction of the bankruptcy trustee. *Id.* at 642–43, 94 S.Ct. at 2431–32. *Kokoszka* holds that the CCPA does not restrict the right of a bankruptcy trustee to treat an income tax refund as nonexempt property of the bankruptcy estate. The *Kokoszka* Court examined the legislative history of the CCPA and determined that while the CCPA had been enacted against the background of the BANKRUPTCY CODE, the CCPA was not intended by Congress to alter the purpose of the BANKRUPTCY CODE, *i.e.*, to assemble all of the debtor’s assets after the bankruptcy petition is filed for the benefit of his creditors. The concern of Congress in enacting the CCPA was not the administration of a bankrupt’s estate but rather the prevention of bankruptcy in the first place. *Id.* at 650–51, 94 S.Ct. at 2436. If bankruptcy should occur, despite the protection afforded to consumers by the CCPA, Congress intends that the debtor’s protection from creditors and remedy remains under the BANKRUPTCY CODE. *Id.* at 651, 94 S.Ct. at 2436. The CCPA is designed to operate prior to bankruptcy and not within bankruptcy as some sort of an exemption. *Kokoszka* holds that the restrictions on garnishment of disposable earnings in 15 U.S.C. § 1673 of the CCPA do not constitute an exemption of such earnings cognizable in bankruptcy.

Kokoszka is most instructive and has important implications in the instant case concerning this Court’s construction and interpretation of TENN.CODE ANN. § 26–2–106, the Tennessee counterpart to 15 U.S.C. § 1673. Logic dictates that if the Tennessee Legislature, in the aftermath of *Kokoszka*, had intended for the garnishment restrictions in § 26–2–106 to also serve as an exemption for debtors’ disposable earnings in bankruptcy, then the Tennessee Legislature would have clearly stated

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such an intent in the language of § 26-2-106 when it enacted this statute in 1978. That the Tennessee Legislature did not use any new, special or different language in § 26-2-106 to expressly create a bankruptcy exemption for disposable earnings in the possession of debtors despite the Supreme Court's ruling in *Kokoszka*, is persuasive in establishing that § 26-2-106 is not intended by Tennessee to be an exemption cognizable in bankruptcy.

The Tennessee Legislature enacted TENN.CODE ANN. § 26-2-106 utilizing the very same language from 15 U.S.C. § 1673 of the CCPA as construed and explained by the Supreme Court in *Kokoszka*. The only interpretation this Court can reasonably attribute to the actions of the Tennessee Legislature is that Tennessee accepts *Kokoszka* and does not intend for § 26-2-106 to create a bankruptcy exemption. Since Tennessee closely modeled § 26-2-106 after 15 U.S.C. § 1673 using almost the same language verbatim, Tennessee has shown that it intends to have § 26-2-106 interpreted and applied consistently with 15 U.S.C. § 1673 and *Kokoszka*.

Fourth, various other federal and state courts that have considered the question whether the CCPA extends the garnishment exemption in 15 U.S.C. § 1673 to disposable earnings in the hands and bank accounts of debtors have consistently said it does not. *Usery v. First National Bank*, 586 F.2d 107, 110 (9th Cir.1978); *Dunlop v. First National Bank*, 399 F.Supp. 855, 857 (D.Ariz.1975); *Frazer, Ryan, Goldberg, Keyt & Lawless v. Smith*, 184 Ariz. 181, 907 P.2d 1384, 1388 and n. 5 (App.1995); *Edwards v. Henry*, 97 Mich.App. 173, 293 N.W.2d 756, 757-58 (1980); *John O. Melby & Co. Bank v. Anderson*, 88 Wis.2d 252, 276 N.W.2d 274, 276-78 (1979). In *Frazer*, 907 P.2d at 1388, the Arizona Court of Appeals held that an Arizona garnishment exemption statute modeled after 15 U.S.C. §§ 1672 - 1673 did not extend the exemption to earnings deposited into a debtor's bank account.

There are certain types of exempt moneys and government benefits which retain their exempt

status even after being transferred or deposited into a debtor-employee's bank account, depending of course upon the particular language used in the applicable exemption statute. In *Porter v. Aetna Casualty & Surety Co.*, 370 U.S. 159, 82 S.Ct. 1231, 8 L.Ed.2d 407 (1962), the Supreme Court held that veteran's benefits remain exempt from judicial process to collect debts even when the veteran's benefits are deposited into a debtor's federal savings and loan association *797 account. However, the particular federal statute at issue in *Porter*, former 38 U.S.C. § 3101(a), provided that veteran's benefits "shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." A similar result was reached in *Philpott*, 409 U.S. 413, 93 S.Ct. 590, 34 L.Ed.2d 608, wherein the Supreme Court held that social security disability insurance benefits deposited into a bank account are exempt from creditors by virtue of 42 U.S.C. § 407(a) which provides that none of the social security benefits paid or payable "shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law." See also *Huskey v. Asmann*, 1990 WL 55853 (Tenn.App. May 3, 1990) (unpublished); *Daugherty v. Central Trust Co. of Northeastern Ohio, N.A.*, 28 Ohio St.3d 441, 443-45, 504 N.E.2d 1100, 1102-03 (1986) (Ohio garnishment exemption statute).

The federal statutes reviewed by the Supreme Court in *Porter* and *Philpott* are distinguishable from 15 U.S.C. § 1673 and its Tennessee counterpart, TENN.CODE ANN. § 26-2-106. *Usery*, 586 F.2d at 111. When it enacted the CCPA, Congress choose not to include in 15 U.S.C. § 1673 any similar language restricting the attachment, seizure and execution on earnings once they have been distributed to and received by the debtor. This Court, therefore, concludes that the garnishment exemption in 15 U.S.C. § 1673 does not extend to disposable earnings received and possessed by debtors. Once earnings are disbursed to the debtor by a third-party garnishee, the earnings lose their status

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as exempt property pursuant to § 1673. This same analysis applies with equal force to the interpretation of TENN.CODE ANN. § 26-2-106 which is modeled after 15 U.S.C. § 1673. There is nothing in the language of § 26-2-106 and the Tennessee exemption scheme that requires a different result. *Cf. Daugherty*, 504 N.E.2d at 1102-03.

Lawrence contends 15 U.S.C. § 1673 and *Kokoszka* should not be used to interpret TENN.CODE ANN. § 26-2-106. He argues that the legislative intent and purpose of Congress in passing the CCPA is different from the intent behind the Tennessee Legislature's decision to enact § 26-2-106. Lawrence asserts that the Tennessee Legislature intends for § 26-2-106 to serve as an exemption in bankruptcy and such intent is implied or can be inferred from the placement of § 26-2-106 within Tennessee's scheme of statutory exemptions. He points out that § 26-2-106 is located in Title 26, Chapter 2, Part 1 of TENNESSEE CODE ANNOTATED, which is entitled "Exemptions." Furthermore, Lawrence says that when Tennessee decided to opt out of the federal bankruptcy exemptions pursuant to 11 U.S.C. § 522(b), it adopted TENN.CODE ANN. § 26-2-112 which states that the property exemptions provided in Title 26, Chapter 2, Part 1 are declared adequate and the citizens of Tennessee are not authorized to claim as exempt the property listed in 11 U.S.C. § 522(d). It is argued by Lawrence that the Tennessee Legislature must intend for § 26-2-106 to serve as an exemption in bankruptcy or else this statute would have been placed in a different part of the TENNESSEE CODE. Lawrence says the bankruptcy court erred by allowing the legislative intent of the CCPA to dominate its interpretation of § 26-2-106 even though Congress gave Tennessee the right to opt out of the federal bankruptcy exemptions.

Part of the argument presented by Lawrence is not entirely unreasonable. The title of a statute or section of statutes can sometimes aid in resolving an ambiguity in the legislation's text. *INS v. Center for Immigrant's Rights*, 502 U.S. 183, 189, 112

S.Ct. 551, 555-56, 116 L.Ed.2d 546 (1991); *Mead Corp. v. Tilley*, 490 U.S. 714, 723, 109 S.Ct. 2156, 2162-63, 104 L.Ed.2d 796 (1989). The placement of § 26-2-106 within Title 26, Chapter 2, Part 1 of the TENNESSEE CODE which contains various bankruptcy exemptions is a matter that should be taken into consideration. However, for the reasons explained *infra*, Lawrence's argument fails. After considering the plain language of § 26-2-106 and the history and circumstances surrounding its enactment subsequent to 15 U.S.C. § 1673 and *Kokoszka*, 417 U.S. 642, 94 S.Ct. 2431, 41 L.Ed.2d 374, this Court concludes that Tennessee does not intend for *798 § 26-2-106 to be an exemption in bankruptcy.

Although § 26-2-106 falls within Title 26, Chapter 2, Part 1 of TENNESSEE CODE ANNOTATED, which bears the general heading of "Exemptions," this does not *per se* constitute irrefutable proof that the Tennessee Legislature intends for § 26-2-106 to be an exemption cognizable in bankruptcy. There can be different types of property exemptions which may or may not be bankruptcy exemptions. Not every exemption provided under Tennessee law must necessarily be construed as an exemption in bankruptcy. Section 26-2-106 can be interpreted as being only an exemption for purposes of garnishment and not bankruptcy. The title or caption of § 26-2-106 reads as follows: "Maximum amount of disposable earnings exempt from garnishment—Garnishment costs." There is nothing in the language of § 26-2-106 and its title to indicate that it is anything more than an exemption from garnishment.

Moreover, even if we assume *arguendo* that the Tennessee Legislature intends for § 26-2-106 to be an exemption in bankruptcy by virtue of TENN.CODE ANN. § 26-2-112, this Court holds that § 26-2-106 in its present form is deficient to fulfill this purpose. Section 26-2-106 does not create the kind of complete exemption of property from creditors that Congress intends to have recognized and enforced in bankruptcy proceedings pur-

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suant to 11 U.S.C. § 522(b). Section 26–2–106 does not exempt earnings from creditors once the earnings are in the debtor's possession.

In an effort to show that Tennessee intends for § 26–2–106 to be a bankruptcy exemption, Lawrence points to TENN.CODE ANN. § 26–2–111, the Tennessee “catch-all” provision for personal property exemptions. Sections 26–2–106 and 26–2–111 are statutes *in pari materia* and should be construed together. Section 26–2–111(1) provides in relevant part:

In addition to the property exempt under § 26–2–102, the following shall be exempt from execution, seizure or attachment in the hands or possession of any person who is a bona fide citizen permanently residing in Tennessee:

....

(D) To the same extent that earnings are exempt pursuant to § 26–2–106, a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of death, age or length of service....

The Court does not interpret § 26–2–111(1)(D) as a clear expression of intent by the Tennessee Legislature to make § 26–2–106 an exemption for disposable earnings cognizable in bankruptcy. Rather, the Court construes the plain language of § 26–2–111(1)(D) as only creating a bankruptcy exemption for funds in the hands or possession of Tennessee debtors where the funds are derived from stock bonus, pension, profitsharing, annuity, or similar plans or contracts. The reference in § 26–2–111(1)(D) to § 26–2–106 merely places a limit of 75% on the amount of such funds that are exempt. What is most significant about these two statutes when they are compared and construed together is that § 26–2–111 expressly provides for certain personal property in the hands or possession of a debtor to be completely exempt from creditors while § 26–2–106 does not create the same type of exemption for earnings in a debtors' hands or pos-

session. Lawrence simply cannot bootstrap his way into a bankruptcy exemption for earnings based on § 26–2–111(1)(D).

Lawrence next argues the bankruptcy court erred by discounting judicial decisions that have interpreted the garnishment statutes of other states and allowed them to be exemptions in bankruptcy. Because this is a case of first impression in Tennessee and there are currently no reported cases from the Tennessee courts directly on point construing TENN.CODE ANN. § 26–2–106 as either permitting or prohibiting a creditor to attach and execute on earnings in the debtor's possession, Lawrence urges this Court to follow several analogous opinions from other states. This Court must of course focus its attention on interpreting the Tennessee statutes and exemptions rather than those of some other state.

***799** The Court has reviewed the cases from other states cited and discussed by Lawrence and Bankruptcy Court Judge Cook. These opinions from other states have mixed results. A portion of the cases may be read as supporting Lawrence's position, but some cases are also in accord with this Court's analysis and interpretation of TENN.CODE ANN. § 26–2–106. The reported caselaw from other states is not uniformly in Lawrence's favor.

There are a few cases interpreting state garnishment exemption statutes from Nevada, Ohio, Colorado, Iowa and Missouri which lend varying degrees of support to Lawrence's position that earnings and wages exempt from garnishment under a state statute retain their exempt status when the earnings are deposited into a debtor's bank accounts as long as the funds deposited are traceable to those exempt earnings. *In re Norris*, 203 B.R. 463 (Bankr.D.Nev.1996); *In re Arnold*, 193 B.R. 897 (Bankr.W.D.Mo.1996); *In re Caslavka*, 179 B.R. 141, 147 (Bankr.N.D.Iowa 1995); *In re Kobernusz*, 160 B.R. 844 (D.Colo.1993); *In re Smith*, 124 B.R. 787, 789 (Bankr.W.D.Mo.1991); *In re Sanders*, 69 B.R. 569 (Bankr.E.D.Mo.1987); *MidAmerica Savings Bank v. Miehle*, 438 N.W.2d 837, 839 (Iowa

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1989); *Daugherty*, 28 Ohio St.3d at 441, 504 N.E.2d at 1100. The cases most favorable to Lawrence come from Nevada, Iowa and Missouri. The Court also notes that two other bankruptcy courts have similarly held that Utah and Maryland garnishment exemption statutes allow debtors to exempt from bankruptcy wages that accrue but are unpaid at the time of bankruptcy. *In re Stewart*, 32 B.R. 132 (Bankr.D.Utah 1983); *In re Smith*, 23 B.R. 708 (Bankr.D.Md.1982). This Court sitting in Tennessee does not find any of these cases from other States to be persuasive in ascertaining the proper construction and application of TENN.CODE ANN. § 26–2–106.

Kobernusz, 160 B.R. at 847, is of minimal value to Lawrence as legal precedent. The Colorado bankruptcy court in *Kobernusz* considered an exemption claim for earnings under the Colorado garnishment exemption statute and it was required to follow an old opinion rendered by the Colorado Supreme Court in *Rutter v. Shumway*, 16 Colo. 95, 26 P. 321 (1891). *Rutter* held that earnings do not lose their exempt identity under Colorado law when deposited into a debtor's bank account. The *Kobernusz* court, however, indicated it would have reached a different conclusion and relied on *Usery*, 586 F.2d 107, as compelling precedent if the case had hinged instead on an interpretation of the CCPA. In the present case, there is no precedent in the Tennessee caselaw comparable to the Colorado case of *Rutter* to guide this Court in its interpretation of TENN.CODE ANN. § 26–2–106. Moreover, this Court does consider the CCPA, 15 U.S.C. §§ 1672 – 1673, to be material to understanding the intent and purpose of § 26–2–106 because the Tennessee statute is modeled after and does not substantially deviate from 15 U.S.C. § 1672–1673.

This Court's interpretation of the Tennessee garnishment exemption statute, § 26–2–106, is entirely consistent and in accord with the opinion of the Arizona Court of Appeals in *Frazer*, 184 Ariz. 181, 907 P.2d 1384, 1388, interpreting a similarly worded Arizona garnishment exemption statute

modeled after 15 U.S.C. §§ 1672 – 1673. In deciding which line of caselaw to follow, this Court has determined that *Frazer* provides the better legal analysis of the issue and is most closely analogous to the Tennessee garnishment exemption statute.

In *Daugherty*, 28 Ohio St.3d 441, 504 N.E.2d 1100, the Supreme Court of Ohio held that an Ohio debtor's earnings retain their exempt status when deposited into the debtor's personal checking account where the source of the funds is known or reasonably traceable to exempt earnings. Unlike TENN.CODE ANN. § 26–2–106, the Ohio statute contains express language strongly indicating that earnings are to remain exempt even after the earnings are received by the debtor. OHIO REV.CODE ANN. § 2329.66(A). The Ohio statute provides that persons domiciled in Ohio may hold property exempt from execution, garnishment, attachment and sale to satisfy a judgment or order. Thus, the Ohio statute governing the exemption of earnings from the reach of creditors was not limited merely to the garnishment of a debtor's *800 earnings while in the possession of third-party garnishees.

The Ohio Supreme Court in *Daugherty* compared the Ohio statute with the CCPA, 15 U.S.C. § 1673, stating: "Unlike the Consumer Credit Protection Act, R.C. 2329.66(A) protects the funds concerned [debtor's earnings and wages] not only from garnishment but also from attachment and execution. Thus, in contrast to the Consumer Credit Protection Act, the [Ohio] General Assembly apparently did intend to restrict creditors' access to exempt wages by providing for protection from attachment of monies while in the hands of the employee." *Id.* at 444–445, 504 N.E.2d at 1103. TENN.CODE ANN. § 26–2–106 is readily distinguishable from the Ohio statute in *Daugherty* because § 26–2–106 is closely modeled after 15 U.S.C. § 1673 and does not contain any language that seeks to exempt earnings from attachment and execution by creditors after the earnings have been received by debtors. The rationale of the Ohio Supreme Court in *Daugherty* supports this Court's in-

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terpretation of TENN.CODE ANN. § 26-2-106.

C. Trustee As Representative Of Bankruptcy Estate

[12] Lawrence makes a novel argument that the bankruptcy proceeding is in the nature of a garnishment for purposes of applying TENN.CODE ANN. § 26-2-106. The term "garnishment" is defined in TENN.CODE ANN. § 26-2-105(3) as "any legal or equitable procedure through which the earnings of an individual are required to be withheld for payment of any debt." Lawrence contends that bankruptcy is in effect a legal procedure for garnishment within the meaning of § 26-2-105(3). Based on the faulty premise that bankruptcy is a form of garnishment, Lawrence goes on to assert that the patients who owe the accounts receivable for medical services performed by Lawrence are garnishees under § 26-2-106 and the Bankruptcy Trustee is a judgment lien creditor attempting to collect the debtor's unpaid earnings from the patients-garnishees. Lawrence further takes the position that the Trustee's right to recover and collect accounts receivable from the patients on behalf of the bankruptcy estate is governed and restricted by Tennessee garnishment statutes. Lawrence contends the Trustee can only collect the accounts receivable through garnishment of the nonexempt portion of the debtor's unpaid earnings which, under TENN.CODE ANN. § 26-2-106(a)(1), is 25% of Lawrence's accounts receivable. According to Lawrence, the remaining 75% of his earnings, *i.e.*, accounts receivable, are exempt from garnishment by the Trustee and should be paid over to Lawrence by the garnishees pursuant to TENN.CODE ANN. § 26-2-214. Lawrence does not cite any caselaw in support of his theory.

The Court concludes this argument is without merit and is predicated on an erroneous concept of the manner in which the Trustee functions in Chapter 7 bankruptcy proceedings. Lawrence's theory of how the Tennessee garnishment laws should be applied in the present case is not a correct statement of how the federal bankruptcy laws operate in

these circumstances. The Court disagrees with Lawrence's attempt to portray and characterize the Bankruptcy Trustee as essentially being in the same posture as a judgment creditor of Lawrence for purposes of utilizing the Tennessee garnishment laws. The Trustee is not the equivalent of a creditor who has obtained a judgment against Lawrence and is trying to collect that judgment by the garnishment of Lawrence's earnings in the hands of third party garnishees.

The BANKRUPTCY CODE provides that when Lawrence filed his Chapter 7 bankruptcy petition, a bankruptcy estate was created. The bankruptcy estate is comprised of all legal and equitable interests of debtor Lawrence in property as of the date when the bankruptcy was commenced. 11 U.S.C. § 541(a)(1); *In re Wirmel*, 134 B.R. 258, 259 (Bankr.S.D.Ohio 1991). Any causes of action Lawrence had prior to bankruptcy against his patients to recover the accounts receivable became property of the bankruptcy estate pursuant to § 541(a)(1). *Dutka v. Rosenthal*, 1997 WL 225510, at *2 (6th Cir. May 1, 1997); *In re RCS Engineered Products Co., Inc.*, 102 F.3d 223, 225 (6th Cir.1996); *801*DeMarco v. Ohio Decorative Products, Inc.*, 1994 WL 59009, at *5 (6th Cir. Feb. 25, 1994); *Davis v. Ford Motor Co.*, 1992 WL 322377, at *3 (6th Cir. Nov. 5, 1992); *In re Cottrell*, 876 F.2d 540 (6th Cir.1989); *Bauer v. Commerce Union Bank, Clarksville, Tenn.*, 859 F.2d 438, 440-41 (6th Cir.1988), *cert. denied*, 489 U.S. 1079, 109 S.Ct. 1531, 103 L.Ed.2d 836 (1989).

The Trustee is the representative of the bankruptcy estate. *DeMarco*, 1994 WL 59009, at *5; *Bauer*, 859 F.2d at 441; 11 U.S.C. § 323(a). 11 U.S.C. § 704(1) provides that the Trustee shall "collect and reduce to money the property of the [bankruptcy] estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest." It is the Trustee who has the exclusive standing and capacity to sue and be sued on behalf of the bankruptcy estate under 11 U.S.C. § 323(b). *DeMarco*.

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1994 WL 59009, at *5; *Bauer*, 859 F.2d at 441; *Ball v. Nationscredit Financial Services Corp.*, 207 B.R. 869, 872 (N.D.Ill.1997). The Trustee is appointed by the Bankruptcy Court to take charge of the debtor's estate, collect assets, bring suit on the debtor's claims against other persons, defend actions against the estate, and otherwise administer the estate. *In re Asher*, 168 B.R. 614, 616 (Bankr.N.D. Ohio 1994); 11 U.S.C. § 704. Once he initiated the bankruptcy, debtor Lawrence lost standing to himself pursue any claims against his patients to collect the accounts receivable. *Dutka*, 1997 WL 225510, at *2; *DeMarco*, 1994 WL 59009, at *5; *Davis*, 1992 WL 322377, at *3; *Bauer*, 859 F.2d at 441; *Whitfield v. Ford Motor Co.*, 1995 WL 871142 (E.D.Mich. Feb. 27, 1995).

To carry out his duty to administer and liquidate the bankruptcy estate, the Trustee steps into the shoes of debtor Lawrence to collect the accounts receivable owed by Lawrence's patients. *In re Dow*, 132 B.R. 853, 861 (Bankr.S.D. Ohio 1991). Any right Lawrence has to bring a cause of action against his patients to collect and recover payment for his accounts receivable vests in the bankruptcy estate and are subject to the Trustee's control as the estate's representative. *DeMarco*, 1994 WL 59009, at *5; *In re Smith*, 185 B.R. 285, 292 (Bankr.S.D.Ill.1995); *Folz v. BancOhio Nat'l Bank*, 88 B.R. 149 (S.D. Ohio 1987). Once Lawrence files for bankruptcy, the Trustee in effect is substituted for Lawrence with regard to collecting debts owed to Lawrence.

The Trustee, acting in his capacity as the representative of the bankruptcy estate, can bring a legal action directly against the patients in place of Lawrence to recover the accounts receivable in the same manner that Lawrence had a right to file a civil suit for damages prior to bankruptcy. If the Trustee should obtain a civil judgment on behalf of the bankruptcy estate against a Tennessee patient of Lawrence on an account receivable, the Trustee may utilize the Tennessee garnishment laws to aid in collecting the judgment in the same manner and

to the same extent that Lawrence could have utilized the Tennessee garnishment laws to collect the debt owed to him prior to bankruptcy. The Trustee would then, however, be garnishing the earnings of the defendant patient to collect the judgment owed to the bankruptcy estate by the patient rather than, as Lawrence suggests, garnishing the "earnings" of Lawrence in the hands of the patient to collect debts owed by Lawrence to his creditors.

Any money recovered by the Trustee on the accounts receivable is paid into and becomes part of the bankruptcy estate to be distributed to creditors except to the extent that Lawrence can claim a valid personal property exemption pursuant to TENN.CODE ANN. § 26-2-102. Thus, the Court concludes that Lawrence is incorrect when he argues that the Trustee stands in the same position as one of Lawrence's judgment lien creditors when it comes to the application of the Tennessee garnishment statute, TENN.CODE ANN. § 26-2-106. Bankruptcy is not a form of "garnishment" as that term is defined in TENN.CODE ANN. § 26-2-105 (3). Instead, the Tennessee garnishment laws may be utilized by a Chapter 7 Bankruptcy Trustee to collect money judgments owed to the bankruptcy estate when the Trustee has filed suit and obtained a judgment against another person who owes money to the bankruptcy debtor. Accordingly, when the Bankruptcy Trustee seeks to collect Lawrence's accounts receivable on behalf of the bankruptcy estate, the *802 Trustee is not the same as a judgment creditor of Lawrence who is trying to collect a debt owed by Lawrence through the garnishment of his earnings in the possession of third party garnishees.

D. 11 U.S.C. 541(c)(2) and Constructive Trust

[13] Finally, Lawrence contends in the alternative that if this Court holds that TENN.CODE ANN. § 26-2-106 is not an exemption in bankruptcy, then the accounts receivable should be excluded from the bankruptcy estate pursuant to 11 U.S.C. § 541(c)(2). Lawrence raises this particular argument for the first time on appeal in his reply brief. (Court

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File No. 4, pp. 9–13). He did not make the argument or claim during the proceedings before the bankruptcy court below. The bankruptcy court was never given an opportunity by Lawrence to consider the matter. Moreover, Lawrence did not include this specific issue in his statement of the issues for appeal as required by Bankruptcy Rule 8006. *In re McCauley*, 105 B.R. 315, 320–21 (E.D.Va.1989); *In re Pine Mountain, Ltd.*, 80 B.R. 171, 173 (9th Cir. BAP 1987). Accordingly, this district court on appeal is not required to consider Lawrence's new claim that his accounts receivable are excluded from the bankruptcy estate under 11 U.S.C. § 541(c)(2).

[14] The well-established rule in the Sixth Circuit is that an appellate court will not consider arguments or issues raised for the first time on appeal unless there are exceptional circumstances. Such exceptional circumstances where either the proper decision is beyond doubt or a miscarriage of justice might otherwise result. *Bailey v. Floyd County Bd. of Educ. By and Through Towler*, 106 F.3d 135, 143 (6th Cir.1997); *Perez v. Aetna Life Ins. Co.*, 96 F.3d 813, 820 (6th Cir.1996); *Noble v. Chrysler Motors Corp., Jeep Div.*, 32 F.3d 997, 1002 (6th Cir.1994); *Roush v. KFC Nat'l Management Co.*, 10 F.3d 392, 397 (6th Cir.1993), *cert. denied*, 513 U.S. 808, 115 S.Ct. 56, 130 L.Ed.2d 15 (1994); *Meade v. Pension Appeals and Review Committee*, 966 F.2d 190, 194 (6th Cir.1992). This is an extremely narrow exception which is infrequently invoked. *Perez*, 96 F.3d at 820.

The exception enunciated by the Sixth Circuit is not applicable in the instant case and the Court will exercise its discretion to decline to decide the new issue on the merits. This Court is not persuaded that a substantial miscarriage of justice will occur unless it considers the new issue being raised by Lawrence for the first time on appeal. Lawrence's argument, that the accounts receivable from his medical practice concerning patients who have not paid Lawrence for personal services rendered should be excluded from the bankruptcy

estate under 11 U.S.C. § 541(c)(2), falls short of being persuasive.

[15] Lawrence's entire argument under § 541(c)(2) hinges on the questionable contention that his patients are holding in constructive trust the money they owe for medical services rendered to them by Lawrence. Section 541(c) provides that an interest of the debtor in property becomes property of the bankruptcy estate with the following exception under § 541(c)(2): "A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title." Lawrence does not cite any competent legal authority in support of his bold allegation that the accounts receivable are held by the patients in a constructive trust for the benefit of debtor Lawrence. As a general rule, federal courts are very reluctant to impose constructive trusts in bankruptcy cases. *Omegas Group*, 16 F.3d at 1451.

[16] Based on the facts and circumstances in the instant case, it appears that no such constructive trust exists under Tennessee law regarding Lawrence's accounts receivable for at least two obvious reasons. First, a constructive trust unlike an express trust, is an equitable remedy devised by courts. A constructive trust does not exist until a plaintiff obtains a judicial decision finding him to be entitled to a judgment imposing a constructive trust upon the defendant's property or assets. *Omegas Group*, 16 F.3d at 1451; *Wells v. Wells*, 556 S.W.2d 769, 771 (Tenn.App.1977). Lawrence does *803 not allege and there is nothing in the record indicating that, prior to filing his bankruptcy petition, Lawrence brought suit against any of his patients to collect the accounts receivable and a court of competent jurisdiction granted relief to Lawrence in the form imposing a constructive trust on funds and property in the patients' possession. Accordingly, Lawrence has not shown that there is a court-ordered constructive trust in existence at this time which is cognizable under 11 U.S.C. § 541(c)(2). *See McCafferty*, 96 F.3d at 197, *Omegas*

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Group, 16 F.3d at 1451.

Second, the current relationship between the bankruptcy estate and Lawrence's patients regarding the accounts receivable is in the nature of a normal debtor-creditor relationship which does not require the creation of a constructive trust. Lawrence performed medical services as a podiatrist and the patients owe him fees for these services. The Bankruptcy Trustee can, if necessary, bring a routine civil action against the patients to recover the accounts receivable. There is no extraordinary misconduct on the part of the patients who now owe money to the bankruptcy estate requiring the application of equity principles to prevent an in-justice.

[17][18][19] A constructive trust is an equitable remedy applied by courts when necessary to serve the ends of justice. *Omegas Group*, 16 F.3d at 1451; *Black v. Boyd*, 248 F.2d 156, 162 (6th Cir.1957); *In re Tinnell Traffic Services, Inc.*, 41 B.R. 1018, 1021 (Bankr.M.D.Tenn.1984); *Rowlett v. Guthrie*, 867 S.W.2d 732, 734 (Tenn.App.1993); *Akers v. Gillentine*, 191 Tenn. 35, 39, 231 S.W.2d 369, 371 (1948). A constructive trust may arise against a person who by the commission of a wrongful or dishonest act including fraud, duress, concealment, and abuse of confidence has acquired or holds the legal right to property which he ought not, in equity and good conscience hold and enjoy. *Rutherford County v. City of Murfreesboro*, 202 Tenn. 455, 304 S.W.2d 635 (1957), *Rowlett*, 867 S.W.2d at 734; *Livesay v. Keaton*, 611 S.W.2d 581, 584 (Tenn.App.1980). Tennessee courts impose constructive trusts in four types of cases: (1) where a person procures legal title to property in violation of some express or implied duty owed to the true owner of the property; (2) where title to property is obtained by fraud, duress, concealment or other inequitable means; (3) where a person makes use of some relation, influence or confidence to obtain legal title to property upon more advantageous terms than could otherwise have been obtained; and (4) where a person acquires property with notice

that another is entitled to its benefits. *Myers v. Myers*, 891 S.W.2d 216, 219 (Tenn.App.1994); *Inter-spaxex Leddin KG v. Al-Haddad*, 852 S.W.2d 245, 249 (Tenn.App.1992); *Browder v. Hite*, 602 S.W.2d 489, 492 (Tenn.App.1980); see also *In re Webb*, 187 B.R. 221, 229 n. 12 (Bankr.E.D.Tenn.1995). The record in the present case does not establish that the failure of Lawrence's patients to pay their bills or accounts receivable falls into any of these categories which would justify a court imposing of a constructive trust under Tennessee law.

The Court does not express a final opinion on the merits concerning Lawrence's claim that his accounts receivable are excluded from the property of the bankruptcy estate pursuant to 11 U.S.C.A. § 541(c)(2). The Court has taken the time to briefly explain some reasons why it considers this new claim to be of dubious merit for the purpose of demonstrating why the Court will not permit Lawrence to raise this new issue for the first time on appeal.

VI. Conclusion

An order will enter affirming the bankruptcy court's decision and dismissing Lawrence's appeal.

ORDER

In accordance with the accompanying memorandum opinion, the decision of the United States Bankruptcy Court rendered on January 14, 1997, is **AFFIRMED**. The appeal filed by debtor Michael Warren Lawrence is **DISMISSED** with the parties to each bear their own costs of this appeal

SO ORDERED.

E.D.Tenn., 1998.
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United States Bankruptcy Court,
D. Nevada.

In re Ronald L. NORRIS and Beverly Jean Norris,
a/k/a Jeanne Norris, Debtors.

Bankruptcy No. BK-S-96-21845-LBR.
Nov. 26, 1996.

Chapter 7 debtors claimed as exempt, under Nevada law, percentage of wages deposited directly into debtor-husband's bank account on petition filing date. Trustee objected to exemption, claiming funds were commingled with estate property and lost exempt status. The Bankruptcy Court, Linda B. Riegle, Chief Judge, held that wages retained exempt status.

Exemption allowed.

West Headnotes

[1] Bankruptcy 51 ⚡2558

51 Bankruptcy
51V The Estate
51V(C) Property of Estate in General
51V(C)2 Particular Items and Interests
51k2558 k. After-Acquired Property;
Proceeds; Wages and Earnings. Most Cited Cases
Earnings from services that were performed prior to bankruptcy but were paid after filing of petition are property of bankruptcy estate.

[2] Bankruptcy 51 ⚡2762.1

51 Bankruptcy
51VI Exemptions
51k2762 Effect of State Law
51k2762.1 k. In General. Most Cited Cases
In bankruptcy actions, validity of claimed state exemption is controlled by applicable state law.

[3] Bankruptcy 51 ⚡2002

51 Bankruptcy
51I In General
51I(A) In General
51k2002 k. Application of State or Federal Law in General. Most Cited Cases
Bankruptcy court is bound by state's rules of construction while interpreting state statute.

[4] Bankruptcy 51 ⚡2793

51 Bankruptcy
51VI Exemptions
51k2793 k. Operation and Effect. Most Cited Cases

Exemptions 163 ⚡48(2)

163 Exemptions
163I Nature and Extent
163I(C) Property and Rights Exempt
163k48 Earnings, Wages, or Salaries
163k48(2) k. What Are Wages or Personal Earnings. Most Cited Cases

Exemptions 163 ⚡102

163 Exemptions
163V Forfeiture
163k102 k. In General. Most Cited Cases
Prepetition wages deposited directly into Chapter 7 debtor's checking account on filing date retained exempt status under Nevada law, notwithstanding trustee's claim that wages became commingled with estate property upon being deposited and thereby lost exempt status; earnings were readily withdrawable and retained quality of "disposable earnings" within meaning of exemption statute, and no nonexempt funds were deposited to account that affected ability to trace deposited wages as of petition date. N.R.S. 21.090, subd. 1(g).

[5] Federal Courts 170B ⚡390

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170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(B) Decisions of State Courts as Authority
170Bk388 Federal Decision Prior to State Decision
170Bk390 k. Anticipating or Predicting State Decision. Most Cited Cases

Federal Courts 170B ↪391

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(B) Decisions of State Courts as Authority
170Bk388 Federal Decision Prior to State Decision
170Bk391 k. Sources of Authority; Assumptions Permissible. Most Cited Cases

When decision turns upon applicable state law and state's highest court has not decided issue, federal court must use its best judgment to ascertain how state court would decide that issue; even dicta from state court, while not controlling, is relevant to this inquiry.

[6] Federal Courts 170B ↪391

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(B) Decisions of State Courts as Authority
170Bk388 Federal Decision Prior to State Decision

170Bk391 k. Sources of Authority; Assumptions Permissible. Most Cited Cases
In ascertaining how state court would decide issue of state law on which state's highest court has not ruled, federal court may be aided by looking to well-reasoned decisions from other jurisdictions.

[7] Statutes 361 ↪181(1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction

361k180 Intention of Legislature
361k181 In General
361k181(1) k. In General. Most Cited Cases

Statutes 361 ↪181(2)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k181 In General
361k181(2) k. Effect and Consequences. Most Cited Cases
Under Nevada law, court must interpret statute consistent with intent of legislature, must ascribe intent which will accomplish reasonable result, and must resolve any doubt as to legislative intent so as to avoid absurd result.

[8] Statutes 361 ↪183

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k183 k. Spirit or Letter of Law. Most Cited Cases

Statutes 361 ↪184

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k184 k. Policy and Purpose of Act. Most Cited Cases

Statutes 361 ↪205

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k205 k. In General. Most Cited Cases

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Under Nevada law, statute may be interpreted by considering reason or spirit of the law, causes which induced legislature to enact it, and entire subject matter and policy of the law.

[9] Exemptions 163 ↪4

163 Exemptions

163I Nature and Extent

163I(A) Nature, Creation, Duration, and Effect in General

163k4 k. Construction of Exemption Laws in General. Most Cited Cases

Under Nevada law, state exemption statutes are liberally and beneficially construed.

[10] Exemptions 163 ↪48(1)

163 Exemptions

163I Nature and Extent

163I(C) Property and Rights Exempt

163k48 Earnings, Wages, or Salaries

163k48(1) k. In General. Most Cited

Cases

Nevada statute providing for partial exemption of debtor's wages is intended to promote basic purpose of exemption statutes in general; namely, to preserve part of debtor's earnings for benefit of himself and his family. Nev. Const. Art. 1, § 14; N.R.S. 21.090, subd. 1(g).

[11] Statutes 361 ↪223.2(.5)

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k223 Construction with Reference to Other Statutes

361k223.2 Statutes Relating to the Same Subject Matter in General

361k223.2(.5) k. In General. Most Cited Cases

It is basic tenet of statutory construction that if legislature includes qualification in one statute, but omits qualification in another related statute, it should be inferred that omission was intentional.

*464 Terry V. Leavitt, Las Vegas, NV, for Debtor.

CiCi Cunningham, Lisowski Law Firm, Chtd., Las Vegas, NV, for Chapter 7 Trustee.

ORDER ALLOWING EXEMPTION

LINDA B. RIEGLE, Chief Judge.

[1] On March 29, 1996, the debtors, Ronald and Beverly Norris, filed a Chapter 7 bankruptcy petition. They filed two amended schedules on June 5, 1996. On their amended Schedule C they claimed \$2,867 as "Debtor's Gross Paycheck for 3/29/96 ... up to 75%" exempt under N.R.S. § 21.090(1)(g) (75% of disposable earnings exemption). On the day of the bankruptcy filing, debtor Ronald Norris's wages in the amount of \$2,275.28 were deposited directly into his checking account at his bank.^{FN1} The account contained \$35.96 just prior to the deposit. It is undisputed that the deposit on the day of the *465 petition was for wages that were earned pre-petition.^{FN2}

FN1. The debtors attached a copy of their checking account statement in support of their Opposition. The deposit on March 29, 1996 is identified as "Clark County Payroll \$2,275.28."

FN2. While it is true that post-petition earnings are not property of the estate of a Chapter 7 debtor (11 U.S.C. § 541(a)(6)), earnings from services which were performed prior to bankruptcy but were paid after the filing of the petition are property of the estate (*In re Ryerson*, 739 F.2d 1423, 1426 (9th Cir.1984)). For this reason, it is unnecessary to determine whether the paycheck was deposited before or after the petition was filed at 1:52 p.m. on March 29th.

The trustee objects to the debtors' exemption. He contends that once Ronald Norris' wages were deposited into his checking account, those funds became commingled with property of the estate and

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thereby lost their exempt status. The trustee maintains that “the commingling of [Norris’] paycheck with property of the estate effectively transforms the paycheck into estate property.”

[2][3][4] In bankruptcy actions, the validity of a claimed state exemption is controlled by the applicable state law. *In re Goldman*, 70 F.3d 1028, 1029 (9th Cir.1995). A bankruptcy court is bound by the state’s rules of construction when interpreting a state statute. *Id.* The trustee has the burden of proving that the exemption is improper. Fed.R.Bankr.P. 4003(c).

Pursuant to N.R.S. § 21.090(1)(g), Nevada provides for the exemption of wages as follows:

1. The following property is exempt from execution, except as otherwise specifically provided in this section:

(g) For any pay period, 75% of the disposable earnings of a judgment debtor during that period, or for each week of the period 30 times the minimum hourly wage prescribed by section 6(a)(1) of the federal Fair Labor Standards Act of 1938 and in effect at the time the earnings are payable, whichever is greater. Except as otherwise provided in paragraphs (n), (r) and (s), the exemption provided in this paragraph does not apply in the case of any order of a court of competent jurisdiction for the support of any person, any order of a court of bankruptcy or of any debt due for any state or federal tax. As used in this paragraph, “disposable earnings” means that part of the earnings of a judgment debtor remaining after the deduction from those earnings of any amounts required by law, to be withheld.

[5][6][7][8] The statute is silent as to whether funds retain their exempt status as “disposable earnings” once disbursed to a debtor’s checking account. Furthermore, the Nevada Supreme Court has not ruled on this issue. When a decision turns upon applicable state law and the state’s highest court has not decided the issue, a federal court must use its

best judgment to ascertain how the state court would decide that issue. *General Motors Corp. v. Doupnik*, 1 F.3d 862, 865 (9th Cir.1993). Even dicta from the state court, while not controlling, is relevant to this inquiry. *Henkin v. Northrop Corp.*, 921 F.2d 864, 867 (9th Cir.1990). The court may also be aided by looking to well-reasoned decisions from other jurisdictions. *Takahashi v. Loomis Armored Car Service*, 625 F.2d 314, 316 (9th Cir.1980). The court must interpret a statute consistent with the intent of the legislature, must ascribe an intent which will accomplish a reasonable result, and must resolve any doubt as to legislative intent so as to avoid an absurd result. *Steward v. Steward*, 111 Nev. 295, 302, 890 P.2d 777 (1995). A statute may be interpreted by considering the reason or spirit of the law, the causes which induced the legislature to enact it, and the entire subject matter and policy of the law. *Cragun v. Nevada Pub. Employees’ Ret. Bd.*, 92 Nev. 202, 205, 547 P.2d 1356 (1976).

[9] The debtor’s earnings represented by the direct deposit to his checking account are readily traceable and retain their exempt status. In Nevada, state exemption statutes are liberally and beneficially construed. See *Jackman v. Nance*, 109 Nev. 716, 718, 857 P.2d 7 (homestead exemption); *Elder v. Williams*, 16 Nev. 416 (1882) (occupation-related exemption). See also, *In re Turner*, 186 B.R. 108, 113 (9th Cir. BAP 1995) (state exemption statutes are to be liberally construed given their manifest purpose). The historical purpose of exemptions in Nevada is to protect a debtor by permitting him to *466 retain the basic necessities of life so that after the levy of nonexempt property he and his family will not be left destitute. See Nev. Const. Art. I, § 14 (“[t]he privilege of the debtor to enjoy the necessary comforts of life shall be recognized by ... exempting a reasonable amount of property from seizure or sale”); *Kreig v. Fellows*, 21 Nev. 307, 310, 30 P. 994 (1892) (occupation-related exemption; the “general policy of all exemption laws is that the unfortunate debtor shall not be left without the means of supporting himself and his family in

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the vocation usually pursued by him.”).

[10] Nevada has long recognized the partial exemption of a debtor's wages, and first enacted the income exemption statute in 1911.^{FN3} While there is no legislative history suggesting the purpose for N.R.S. § 21.090(1)(g),^{FN4} it is apparent that it was intended to promote the basic purpose of the exemption statutes in general: namely, to preserve part of the debtor's earnings for the benefit of himself and his family. *See also, Miller v. Monrean*, 507 P.2d 771 (Alaska 1973) (purpose of income exemption statutes are to encourage debtor rehabilitation, preserve part of the debtor's earnings for benefit of his family, and to prevent debtor's family from being destitute).

FN3. Revised Laws of Nevada § 5288 (1912) stated:

What exempt from execution.

Sec. 346. The following property is exempt from execution, except as herein otherwise specially provided:

8. The earnings of the judgment debtor for his personal services rendered at any time within thirty days next preceding the levy of execution or attachment, when it appears, by the debtor's affidavit or otherwise, that such earnings are necessary for the use of his family, residing in this state, supported in whole or in part by his labors; but where debts are incurred by any such person, or his wife or family, for the common necessities of life, or have been incurred at a time when the debtor had no family, residing in this state, supported in whole or in part by his labor, the one-half of such earnings above mentioned is nevertheless subject to execution, garnishment, or attachment to satisfy debts so incurred.

FN4. Generally, unless specially provided for, there is no legislative history available in Nevada prior to 1965. The Assembly adopted a standing rule in 1973 to keep minutes of the meetings of the standing committees. The Senate adopted a similar rule in 1977. Some, but not all, standing committees kept minutes of their meetings beginning in 1965.

In order to permit a wage earner to enjoy any benefit from the protection afforded N.R.S. § 21.090(1)(g), it is necessary to accord the wage earner a reasonable opportunity to negotiate the “disposable earnings” and spend the funds, otherwise the exemption would be rendered meaningless. A deposit of the earnings, whether by the debtor or directly by the employer, should not cause the statutorily exempt wages to lose their exempt status as long as the proceeds of the account are traceable to those earnings. The deposited earnings in this case were readily withdrawable and retained the quality of “disposable earnings” within the meaning of N.R.S. § 21.090(1)(g).^{FN5}

FN5. The statutory scheme of N.R.S. § 21.090(1)(g) protects a judgment debtor's right to receive 75% of the disposable earnings for “any pay period.” It is neither contended here nor decided that a bankruptcy debtor may, under § 21.090(1)(g), claim an earnings exemption for multiple “pay periods” of an ongoing income stream.

While the Nevada Supreme Court has not addressed this issue in an authoritative holding, it has provided some guidance as to how it would rule. In *Sec. Nat'l Bank of Reno v. McColl*, 79 Nev. 423, 385 P.2d 825 (1963) the judgment creditor of an incompetent veteran attached funds on deposit in the bank account of the veteran's guardian. The funds were, in their entirety, paid to the veteran's guardian by the Veteran's Administration and maintained by the guardian in a savings account, which accrued a small amount of interest. By federal statute, veter-

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ans' benefits were exempt from attachment by creditors.^{FN6} The precise question posed in *Sec. Nat'l Bank of Reno* was whether the funds were exempt from attachment given that they were on deposit in a savings account *467 held by the guardian for the veteran's benefit. Still, this case is instructive because the Nevada Supreme Court held that, under the federal act, the funds retained their exempt status after being deposited in the bank account and were exempt from attachment by the creditor.

FN6. 38 U.S.C. § 3101(a) read, in pertinent part:

Payments of benefits due or to become due under any law administered by the Veterans' Administration ... made to, or on account of, a beneficiary ... shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.

Other jurisdictions have recognized that statutorily exempt funds do not lose their exempt status when deposited into a personal checking account. See *In re Caslavka*, 179 B.R. 141, 147 (Bankr.N.D.Iowa 1995) (construing Iowa law that "protection afforded by the exemption would be rendered meaningless if exempt status is lost by negotiating the paycheck") (citing *MidAmerica Savs. Bank v. Miede*, 438 N.W.2d 837, 839 (Iowa 1989); *In re Arnold*, 193 B.R. 897 (Bankr.W.D.Mo.1996) ("[i]t elevates form over substance to claim that the [paycheck in debtor's] hand was wages, but the check in his checking account was not"); *In re Frazier*, 116 B.R. 675 (Bankr.W.D.Wis.1990) (exempt disability benefits check deposited into bank account with other exempt funds retained exempt status; benefits were "readily identifiable").

At least two United States Supreme Court opinions have also recognized that exempt funds do not lose their exempt status upon deposit if the funds in the account can be traced to exempt funds. See

Porter v. Aetna Casualty & Sur. Co., 370 U.S. 159, 82 S.Ct. 1231, 8 L.Ed.2d 407 (1962) (veterans' benefits) and *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413, 93 S.Ct. 590, 34 L.Ed.2d 608 (1973) (welfare benefits). In *Porter*, 370 U.S. at 159, 82 S.Ct. at 1232, the United States Supreme Court held that veterans' benefits retained their exempt status after being deposited in a savings account, reasoning that:

Since legislation of this type should be liberally construed, to protect funds granted by the Congress for the maintenance and support of the beneficiaries thereof, we feel that deposits such as are involved here should remain inviolate. The Congress we believe, intended that veterans in the safekeeping of their benefits should be able to utilize those normal modes adopted by the community for that purpose—provided the benefit funds, regardless of the technicalities of title and other formalities, are readily available as needed for support and maintenance, actually retain the qualities of moneys, and have not been converted into permanent investments.

Id. at 162, 82 S.Ct. at 1233 (citations omitted). And 31 Am.Jur.2d *Exemptions* § 224 (1989) states:

There is authority that a deposit of exempt funds in a bank does not affect a debtor's exemption, nor change the exempt character of the fund, so long as the source of the exempt funds is reasonably traceable. If it is impossible to separate out exempt from nonexempt funds, the general rule is that an exemption cannot lie. This rule has been applied, though not without exception, to a deposit of exempt wages, exempt compensation awards, exempt veterans' benefits, and exempt insurance proceeds or funds.

[11] Finally, the Nevada Legislature has specifically excluded commingled funds in another Nevada execution and attachment statute. N.R.S. § 612.710 expressly provides that otherwise exempt benefits are not exempt from execution if they are commingled "with other money of the recipient."^{FN7} Such an exclusion is absent from N.R.S. §

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21.090(1)(g). It is a basic tenet of statutory construction that if the legislature includes a qualification in one statute, but omits the qualification in another related statute, it should be inferred that the omission was intentional. *Williams v. Matthews*, 248 Va. 277, 448 S.E.2d 625, 629 (1994); *Perlenfein and Perlenfein*, 316 Or. 16, 848 P.2d 604, 607-608 (1993). See also *Ex Parte Arascada*, 44 Nev. 30, 35, 189 P. 619 (1920) (failure of statute to include a matter is indication that exclusion was intended). It is assumed that the provisions of N.R.S. § 21.090, the statutory scheme for exemptions, were carefully drafted; they are a result of a legislative drafting process which began in 1911 and they have been the subject of numerous legislative revisions since that *468 time.^{FN8} Based upon this premise, this Court will not supply a statutory provision when it is reasonable to suppose the Legislature intended to omit it.

FN7. N.R.S. § 612.710 provides that unemployment compensation benefits are exempt from any remedy for the collection of all debts "if they are not mingled with other money of the recipient."

FN8. N.R.S. § 21.090 has been amended fifteen times since its origin in 1911. In 1971, N.R.S. § 21.090(1)(g) was amended to increase the disposable earnings exemption from 25% to 75%.

In this case, the parties agree that the debtor's earnings were partially exempt from execution prior to deposit pursuant to N.R.S. § 21.090(1)(g). Furthermore, the trustee does not contend, nor has he provided any proof, that any nonexempt funds have been deposited in the account.^{FN9} Thus, the source of the funds is directly traceable.

FN9. The checking account statement provided by the debtors as an exhibit to their Opposition shows that an unidentified deposit of \$568.10 was made to the account on April 8, 1996. This deposit was made several days after the petition was

filed, and thus Ronald Norris' earnings were readily identifiable on the date of the petition. See *In re Kolsch*, 58 B.R. 67, 69 (Bankr.D.Nev.1986) (right to exemptions is determined as of the date the petition is filed).

Accordingly, this Court holds that the trustee has not met his burden of proving that the exemption is not properly claimed. The exemption is allowed, and shall be calculated pursuant to N.R.S. § 21.090(1)(g) upon the \$2,275.28 shown as a direct payroll deposit in Debtors' Opposition, Exh. "A."

IT IS SO ORDERED.

Bkrcty.D.Nev.,1996.
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▷

United States Bankruptcy Appellate Panel
of the Ninth Circuit.

In re Edward M. OSWORTH and Kerry L. Os-
worth, Debtors.

Boyd Yaden, Chapter 7 Trustee, Appellant,
v.

Edward M. Osworth and Kerry L. Osworth, Ap-
pellees.

BAP No. OR-98-1409-MeRRy.

Bankruptcy No. 697-67189-fra7.

Argued and Submitted Jan. 21, 1999.

Decided April 19, 1999.

Chapter 7 trustee objected to exemption claimed by debtor in account receivable for commission which he had earned in his capacity as self-employed real estate agent. The United States Bankruptcy Court for the District of Oregon, Frank R. Alley, III, J., entered order overruling objection, on theory that employer-employee relationship was not prerequisite to debtor's claiming state law exemption in account as "earnings" from his personal services, and trustee appealed. The Bankruptcy Appellate Panel, Meyers, J., held that for fees payable to debtor to constitute "earnings," within meaning of Oregon statute authorizing debtor to exempt a portion of his/her earnings from garnishment, fees had to be payable in connection with employer-employee relationship or in connection with employment relationship having the quality of employer-employee relationship.

Reversed and remanded.

West Headnotes

[1] Bankruptcy 51 ↔3782

51 Bankruptcy

51XIX Review

51XIX(B) Review of Bankruptcy Court

51k3782 k. Conclusions of Law; De Novo
Review. Most Cited Cases

Bankruptcy court's decision regarding scope of state law exemption involved construction of state law, which Bankruptcy Appellate Panel (BAP) would review de novo.

[2] Exemptions 163 ↔48(2)

163 Exemptions

1631 Nature and Extent

1631(C) Property and Rights Exempt

163k48 Earnings, Wages, or Salaries

163k48(2) k. What Are Wages or Personal Earnings. Most Cited Cases

For fees payable to debtor to constitute "earnings," within meaning of Oregon statute authorizing debtor to exempt a portion of his/her earnings from garnishment, fees had to be payable in connection with employer-employee relationship or in connection with employment relationship having the quality of employer-employee relationship, even if debtor might be considered independent contractor for other purposes; term could not be interpreted so broadly as to include account receivable for commission owing to Chapter 7 debtor, in his capacity as self-employed real estate agent. ORS 23.185.

[3] Statutes 361 ↔205

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k204 Statute as a Whole, and Intrinsic Aids to Construction

361k205 k. In General. Most Cited Cases

Statutes 361 ↔208

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k204 Statute as a Whole, and Intrinsic

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Aids to Construction

361k208 k. Context and Related
Clauses. Most Cited Cases

When court looks to plain language of statute in order to interpret its meaning, court does more than view words or subsections in isolation; rather, it derives meaning from context, which requires reading the relevant statutory provisions as whole.

*498 Michael L. Spencer, Klamath Falls, OR, for
Boyd Yaden, Chapter 7 Trustee.

Before MEYERS, RUSSELL and RYAN, Bank-
ruptcy Judges.

OPINION

MEYERS, Bankruptcy Judge.

I

The bankruptcy court allowed the debtors to exempt an account receivable for a real estate commission.

We REVERSE and REMAND.

II

FACTS

Edward and Kerry Osworth ("Debtors") were self-employed real estate agents. They filed for relief under Chapter 7 of the Bankruptcy Code ("Code") on December 15, 1997. The Debtors scheduled an account receivable for a \$1,925 commission owed to Edward Osworth. They claimed \$1,443.75, or 75%, of the commission exempt as earnings. The Chapter 7 trustee, Boyd C. Yaden, ("Trustee") objected to the exemption, and the bankruptcy court ruled in favor of the Debtors. The Trustee appeals.

III

STANDARD OF REVIEW

[1] The scope of a state law exemption involves construction of state law, which is reviewed *de novo*. *In re Turner*, 186 B.R. 108, 112 (9th Cir. BAP 1995).

IV DISCUSSION

Section 522(b)(2)(A) of the Bankruptcy Code allows a debtor to exempt from property of the estate any property exempt under applicable state law. Pursuant to Or.Rev.Stat. 23.305, a debtor in bankruptcy must use the Oregon statutory exemptions scheme. *In re Godfrey*, 102 B.R. 769, 771 (9th Cir. BAP 1989). Because Oregon has "opted out" of the federal exemption scheme of 11 U.S.C. § 522, Oregon law governs issues regarding the allowance of a claimed exemption. *See Turner, supra*, 186 B.R. at 113. The bankruptcy court decides the merits of state law exemptions, but state law controls the validity of the claimed exemption. *In re Been*, 153 F.3d 1034, 1036 (9th Cir.1998).

[2] Under Section 23.185, a debtor can exempt a portion of earnings from garnishment. Section 23.175 provides definitions that apply also in Section 23.185. "Disposable earnings" is defined as "that part of the earnings of an individual remaining after the deduction from those earnings of any amounts required to be withheld by law." O.R.S. 23.175(1). "Earnings" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus or otherwise, and includes periodic payments pursuant to a pension or retirement program." O.R.S. 23.175(2).

[3] The question before us is whether the Oregon statute applies only where there is an employer-employee relationship, as the Trustee contends. ^{FN1} "When we look to the plain language of a statute in order to interpret its meaning, we do more than view words or sub-sections in isolation. We derive meaning from context, and this requires reading the relevant statutory provisions as a whole." *In re Rufener Const., Inc.*, 53 F.3d 1064, 1067 (9th Cir.1995).

FN1. The Trustee also contends that Section 23.185 simply limits garnishment and is not an exemption statute. *See In re Lawrence*, 205 B.R. 115, 116 (Bankr.E.D.Tenn.1997), *aff'd* 219 B.R. 786

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(E.D.Tenn.1998). We decline to address that issue because we determine that the Osworths do not come within the scope of Section 23.185.

The bankruptcy court held that the definition of earnings was unambiguous and, *499 based on that definition, the court concluded that the statute did not require the existence of an employer-employee relationship. It stated that the Section focused on the “type of income (i.e. compensation for personal services) rather than the source of that income.”

The Oregon statute is modeled on the Federal Consumer Credit Protection Act (“CCPA”), 15 U.S.C. § 1671 et seq. One concern of Congress in enacting the CCPA was to preserve the stability of the employer-employee relationship. *Usery v. First Nat. Bank of Arizona*, 586 F.2d 107, 110 (9th Cir.1978). The court in *Usery* concluded that the CCPA was limited in “its application to employers (or those who stand in the position of employers by virtue of paying or owing compensation for services to the individual debtor)...” *Id.* In *Kokoszka v. Belford*, 417 U.S. 642, 650–51, 94 S.Ct. 2431, 41 L.Ed.2d 374 (1974), the Supreme Court explained that the CCPA was intended to temper harsh garnishment laws that were driving debtors into bankruptcy. The Court further stated that “[t]here is every indication that Congress, in an effort to avoid the necessity of bankruptcy, sought to regulate garnishment in its usual sense as a levy on periodic payments of compensation needed to support the wage earner and his family on a week-to-week, month-to-month basis.” *Id.* at 651, 94 S.Ct. 2431.

If our analysis ended here, we would conclude that Osworth could not claim the exemption. However, Congress did not preempt all state garnishment law when it enacted the CCPA. Indeed, 15 U.S.C. § 1677 provides as follows:

This subchapter does not annul, alter, or affect, or exempt any person from complying with, the laws of any State

(1) prohibiting garnishments or providing for more limited garnishments than are allowed under this subchapter.

Pursuant to this Section, states are allowed to grant debtors greater protection from garnishment than they receive under the CCPA. We must then decide whether the Oregon statute should be read more broadly than the CCPA, indeed broadly enough to protect the account receivable owed to the Debtors from garnishment. Under the Oregon statute the definitions for “earnings,” “disposable earnings” and “garnishment” are the same as those in the CCPA. ^{FN2} The Oregon statute does include one definition that does not appear in the CCPA. Pursuant to Section 23.175(3),

FN2. The Oregon Supreme Court examined the scope of the terms “earnings” and “wages” in the context of O.R.S. 29.401 to 29.415, which concerns writs of continuing garnishment. *Zidell Marine Corp. v. West Painting, Inc.*, 322 Or. 347, 355, 906 P.2d 809 (1995). That court made specific reference to O.R.S. 23.175, but noted that the definitions in 23.175 apply only to terms in that Section and to 23.185. *Id.* The court concluded that it needed to search further for the meaning of “earnings.” Since the court found the definitions of Section 23.175 inapplicable, the remainder of that court’s discussion does not serve to aid the Panel in deciding the issue now before us.

“Employer” means any entity or individual who engages a person to perform work or services for which compensation is given in periodic payments or otherwise, even though the relationship of the person so engaged may be as an independent contractor for other purposes.

The import of that definition is limited to O.R.S. 23.185(5), which provides that “[n]o employer shall discharge any person for the reason that the person has had earnings garnished.” This

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Section essentially matches the protection provided under CCPA Section 1674. The definition of "employer" serves such a limited purpose that we are unwilling on this basis alone to construe the protections otherwise found in O.R.S. 23.185 so broadly as to encompass the account receivable due the Debtors. Furthermore, nothing else in the Oregon statute demonstrates an intent on the part of the Oregon legislature to expand the protections granted through the enactment of the CCPA by Congress beyond this one provision. Accordingly, the employment*500 relationship involved must have the quality of an employer-employee relationship, even if the employee might be considered an independent contractor for other purposes. *See, e.g., In re Price*, 195 B.R. 775, 777-79 (Bankr.D.Kan.1996) (independent contractor for tax purposes treated as employee for purposes of Kansas' statute based on the CCPA).

V

CONCLUSION

We conclude that the statute is applicable where there is an employer-employee relationship and that this definition includes a relationship between an independent contractor and a regular payor. Mr. Osworth's position does not fall under the scope of the statute. Therefore, the Osworth's could not use the statute to exempt the account receivable. The bankruptcy court is directed to enter an order upholding the Trustee's objection to the claim of exemption.

REVERSED and REMANDED.

9th Cir.BAP,1999.

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(Cite as: 241 B.R. 447)

C

United States Bankruptcy Appellate Panel
of the Ninth Circuit.

In re Kirk Pllice ROBINSON and Deanna Lee
Robinson, Debtors.

Boyd Yaden, Chapter 7 Trustee, Appellant,
v.

Kirk Pllice Robinson and Deanna Lee Robinson,
Appellees.

BAP No. OR-98-1689-KMoB.
Bankruptcy No. 698-60866-aer7.
Argued and Submitted July 23, 1999.
Decided Nov. 2, 1999.

Treating the Oregon garnishment statute as creating an exemption, Chapter 7 debtors claimed as exempt a percentage of their accrued but unpaid wages, and trustee objected. The United States Bankruptcy Court for the District of Oregon, Albert E. Radcliffe, J., ruled in favor of debtors, and trustee objected. The Bankruptcy Appellate Panel (BAP), Klein, J., held that under Oregon law, as predicted by the BAP, statute imposing a limitation on garnishment of earnings functions as an exemption statute for purposes of the Bankruptcy Code.

Affirmed.

West Headnotes

[1] **Bankruptcy 51**  **2762.1**

51 Bankruptcy
51VI Exemptions
51k2762 Effect of State Law
51k2762.1 k. In General. Most Cited Cases
Availability of state law exemptions is controlled by state law and interpreted under state rules of construction.

[2] **Bankruptcy 51**  **3782**

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3782 k. Conclusions of Law; De Novo Review. Most Cited Cases
Bankruptcy Appellate Panel's review of questions of law is de novo.

[3] **Statutes 361**  **174**

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k174 k. In General. Most Cited Cases

Statutes 361  **188**

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In General. Most Cited Cases

Statutes 361  **208**

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k208 k. Context and Related Clauses. Most Cited Cases

Statutes 361  **217.4**

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k217.4 k. Legislative History in General. Most Cited Cases
Under Oregon's approach to statutory construction, court first examines a statute's text and context; if the intent of the Oregon legislature is not

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plain from such examination, then court turns to legislative history, and if that does not suffice, then court resorts to general maxims of statutory construction.

[4] Garnishment 189 ↪106

189 Garnishment

189V Lien of Garnishment and Liability of Garnishee

189k106 k. Creation and Existence of Lien or Priority. Most Cited Cases

Garnishment 189 ↪110

189 Garnishment

189V Lien of Garnishment and Liability of Garnishee

189k110 k. Grounds and Extent of Liability of Garnishee in General. Most Cited Cases

Under Oregon law, service of a writ of continuing garnishment constitutes a lien and continuing levy against earnings owed by the garnishee to the judgment debtor at the time of the service of the writ and on all earnings accruing from the garnishee within 90 days thereafter. ORS 29.401.

[5] Garnishment 189 ↪12

189 Garnishment

189I Nature and Grounds

189k12 k. Simultaneous and Successive Garnishments. Most Cited Cases

Under Oregon law, a continuing garnishment is strictly limited to non-exempt wages for personal services. ORS 29.401.

[6] Garnishment 189 ↪12

189 Garnishment

189I Nature and Grounds

189k12 k. Simultaneous and Successive Garnishments. Most Cited Cases

Under Oregon law, continuing garnishment has the advantage of reducing costs for employer, bill collector, and the debtors who otherwise wind up having fees for issuing and serving writs before

each payday added to the debt. ORS 29.401.

[7] Exemptions 163 ↪48(2)

163 Exemptions

163I Nature and Extent

163I(C) Property and Rights Exempt

163k48 Earnings, Wages, or Salaries

163k48(2) k. What Are Wages or Personal Earnings. Most Cited Cases

Under Oregon law, funds that are protected from wage garnishment "remain exempt" so long as they are in the judgment debtor's deposit account and are traceable. ORS 23.166.

[8] Exemptions 163 ↪48(1)

163 Exemptions

163I Nature and Extent

163I(C) Property and Rights Exempt

163k48 Earnings, Wages, or Salaries

163k48(1) k. In General. Most Cited Cases

Under Oregon law, as predicted by the Bankruptcy Appellate Panel, statute imposing a limitation on garnishment of earnings creates an exemption for purposes of the Bankruptcy Code. Bankr.Code, 11 U.S.C.A. § 522(b)(2); ORS 23.166, 23.185, 29.401.

[9] Bankruptcy 51 ↪2762.1

51 Bankruptcy

51VI Exemptions

51k2762 Effect of State Law

51k2762.1 k. In General. Most Cited Cases

Oregon has plenary authority over its own law of exemptions.

***447** Michael L. Spencer, Klamath Falls, OR, for appellant.

***448** Before KLEIN, MONTALI,^{FNI} and BRANDT, Bankruptcy Judges.

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FN1. Hon. Dennis Montali, Bankruptcy Judge for the Northern District of California, sitting by designation.

Court would settle the question whether the earnings exclusions from garnishment are also exemptions.

OPINION

KLEIN, Bankruptcy Judge.

We must decide whether Oregon law exempts a portion of accrued unpaid earnings in bankruptcy. Resolving the issue left open in *Yaden v. Osworth* (*In re Osworth*), 234 B.R. 497 (9th Cir. BAP 1999), we conclude that Oregon does exempt such earnings, and AFFIRM.

FACTS

The joint debtors were owed \$430.93 and \$425.39, respectively, in accrued but unpaid wages at the time of bankruptcy. Treating the Oregon garnishment statute as creating an exemption, they each claimed 75 percent—i.e., \$323.20 and \$319.04, respectively,—as exempt.

The chapter 7 trustee objected to the claim of exemption, contending that the Oregon garnishment statute does not create a cognizable exemption for purposes of 11 U.S.C. § 522(b)(2).

The bankruptcy court ruled for the debtors. This appeal ensued.

ISSUE

Whether Oregon's limitation on garnishment of earnings also functions as an exemption for purposes of § 522(b)(2).

STANDARD OF REVIEW AND CHOICE OF LAW

[1][2] The availability of state law exemptions is controlled by state law and interpreted under state rules of construction. *Goldman v. Salisbury* (*In re Goldman*), 70 F.3d 1028, 1029 (9th Cir.1995). Our review of questions of law is de novo. *Osworth*, 234 B.R. at 498.

DISCUSSION

This is a matter of Oregon statutory construction. We must predict how the Oregon Supreme

I

[3] Oregon's approach to statutory construction requires that we first examine the text and context of the statute. If the intent of the Oregon legislature is not plain from such examination, then we turn to legislative history. If that does not suffice, then we resort to general maxims of statutory construction. *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.*, 317 Or. 606, 610–12, 859 P.2d 1143, 1145–47 (1993). In this instance, we need not go beyond the first level.

The context is crucial and requires assembly of a three-piece puzzle drawn from Oregon Revised Statutes ("ORS"): ORS 23.185 (limiting garnishments); ORS 29.401 (writs of continuing garnishment); and ORS 23.166 (exempting certain funds in deposit accounts).

A

Under ORS 23.185(1), the greater of \$170.00 per week or 75 percent of aggregate disposable weekly earnings is excluded from garnishment. The statute is couched in terms of a limitation on garnishment and does not use the words "exempt" or "exemption."^{FN2}

FN2. The relevant language of the garnishment statute is:

(1) Except as provided in subsections (2) and (6) of this section, the maximum part of the aggregate disposable earnings of an individual for any workweek that is subjected to garnishment may not exceed:

(a) 25 percent of the individual's disposable earnings for that week; ... [1991–1992 limits omitted]

(d) For wages payable on or after July 1, 1993, the amount by which the individu-

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al's disposable earnings for that week exceed \$170; or

(e) The amount described in paragraph (a), (b), (c) or (d) of this subsection, minus any amount required to be withheld from the individual's disposable earnings for that week pursuant to an order issued under ORS 25.311, 110.300 to 110.441, 419B.408 or 419C.600, whichever amount is less.

ORS 23.185.

***449** The pertinent "earnings" consist of "compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus or otherwise, and includes periodic payments pursuant to a pension or retirement program." ORS 23.175(2).

And "garnishment" is "any legal or equitable procedure through which the earnings of an individual are required to be withheld for payment of a debt." ORS 23.175(4).

Viewed in isolation, the Oregon garnishment statute is silent about whether it constitutes an exemption and would present a tricky question. Fortunately, Oregon's legislature has provided pertinent context in the form of a statutory scheme that also includes both continuing garnishment and connected exemption statutes.

B

The second piece of the contextual puzzle is the writ of continuing garnishment provided by ORS 29.401.

[4] The service of a writ of continuing garnishment constitutes a lien and continuing levy against earnings owed by the garnishee to the judgment debtor at the time of the service of the writ and on all earnings accruing from the garnishee within ninety days thereafter. ORS 29.401.

[5] Although the term "earnings" is used, the

continuing garnishment is strictly limited to non-exempt wages for personal services. *Zidell Marine Corp. v. West Painting, Inc.*, 322 Or. 347, 353-59, 906 P.2d 809, 811-15 (1995).

[6] The continuing garnishment has the advantage of reducing costs for employer, bill collector, and the debtors who otherwise wind up having fees for issuing and serving writs before each payday added to the debt. *Zidell*, 322 Or. at 357-58, 906 P.2d at 813-14.

C

[7] The final piece of the contextual puzzle is the connected exemption provided by ORS 23.166. Funds that are protected from wage garnishment "remain exempt" so long as they are in the judgment debtor's deposit account and are traceable:

23.166 Certain funds exempt when deposited in account; limitations.

(1) All funds exempt from execution and other process under ORS ..., 23.185(1)(b), (c), (d) and (e), ... shall *remain exempt* when deposited in an account of a judgment debtor as long as the exempt funds are identifiable.

(2) The provisions of subsection (1) of this section shall not apply to any accumulation of funds greater than \$7,500.

ORS 23.166 (emphasis supplied).

The significance of ORS 23.166 to us is that it is an unambiguous exemption that appears to say that earnings protected from garnishment are also exempt. Moreover, it provides for continuation of such exempt status once the funds are in a deposit account.

The connection between ORS 23.166 and ORS 23.185 that is inherent in the phrase "remain exempt" represents a context in which the garnishment limitation also functions as an exemption that would apply in bankruptcy per § 522(b)(2). And it bespeaks legislative intent to treat earnings limita-

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tions on garnishment as exemptions.

D

The context of the Oregon statutory scheme is that part of one's pay is insulated from garnishment. In the case of wages for personal services, a garnishment can operate as a continuing levy. And to the extent that the protected earnings are *450 placed in the judgment debtor's deposit account, they continue to be exempt so long as they (and similarly protected items) do not accumulate to more than \$7,500.

Under the appellant's theory, there would be a gap in the protection for wages that cannot be garnished. They would be protected during the time they are in the hands of the employer, not exempt for any interval between the time the debtor is paid and the time the debtor deposits them into a traceable account, and exempt thereafter.

We do not believe that the Oregon legislature meant to conjure up the image of Keystone creditors trying to catch judgment debtors between the pay window and the bank.

II

Our construction of the Oregon garnishment statute as entailing an unpaid earnings exemption for purposes of § 522(b)(2) is consistent with the few reported decisions touching on the subject.

A

In 1982 an Oregon bankruptcy court squarely held that ORS 23.185 constitutes a formal Oregon exemption. *In re Langley*, 22 B.R. 137 (Bankr.D.Or.1982). The narrow question was whether the "property not otherwise exempt" exemption, ORS 23.160(1)(k), could be applied to protect unpaid wages that are protected from garnishment.

Faithful to Oregon's requirement that the "intention of the legislature is to be pursued if possible," ORS 174.020, the bankruptcy court rooted about in legislative history, finding a transcript of

judiciary committee discussions of what became ORS 23.160(1)(k). This legislative history indicated that the "property not otherwise exempt" exemption could not be used to protect unpaid wages because such wages were exempt under the garnishment statute. *Id.* at 139.

The linchpin of the *Langley* analysis, which does not appear to have been undermined by subsequent amendments, is that the garnishment statute does create an exemption. Hence, the separate exemption for "property not otherwise exempt" does not apply.

B

In 1983 the bankruptcy court reiterated its analysis of the Oregon garnishment statute as creating an exemption. *Straight v. Willamette Collection Serv., Inc. (In re Straight)*, 35 B.R. 445, 446-47 (Bankr.D.Or.1983); *cf. In re Berry*, 29 B.R. 10 (Bankr.D.Or.1983) (relying on *Langley*).

Straight involved the status of the Oregon garnishment statute as an exemption in connection with the exercise of a debtor's statutory avoiding power to recover involuntary prepetition transfers of exempt property. § 522(h)-(i). The court reiterated its *Langley* analysis and permitted the debtor to avoid prepetition wage garnishments on the premise that there is a valid exemption. *Straight*, 35 B.R. at 446-47. This decision retains vitality.

C

Finally, the trial court in *Osworth* rejected our appellant's argument that the garnishment statute is not an exemption statute. Although our prior panel reversed on the separate ground that the debtors were ineligible to claim a garnishment exemption because they lacked the requisite employment relationship, it expressly left open the question whether the garnishment statute creates an exemption for purposes of § 522(b)(2). *Osworth*, 234 B.R. at 498 n. 1.

[8] We now decide that question, agreeing with the various courts that have considered it under

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Oregon law: if faced with the question, we predict that the Oregon Supreme Court would hold that the Oregon garnishment statute creates an exemption *451 that transcends a mere limitation on garnishment.

D

Neither case relied on by the appellant controls Oregon law.

I

The appellant's reliance on a contrary decision involving Tennessee's similarly-worded garnishment statute, *Lawrence v. Jahn (In re Lawrence)*, 219 B.R. 786 (E.D.Tenn.1998), is unavailing. Although Tennessee's garnishment statute parallels ORS 23.185, there is no analog to ORS 23.166 providing that funds exempt from garnishment remain exempt after the debtor places them in a deposit account. In other words, in context, it is a different scheme.

Moreover, even if Oregon and Tennessee had identical statutes, they could have different meanings. While uniformity among states may be a desideratum, our concern is limited to what the Oregon legislature intended. Nothing suggests that Oregon adopted Tennessee law in a subject area in which states are notoriously idiosyncratic.

2

Nor does the fact that Oregon's garnishment statute may have been modeled on the Federal Consumer Credit Protection Act ("FCCPA"), 15 U.S.C. § 1671 et seq., warrant a different conclusion.

The appellant relies on *Kokoszka v. Belford*, 417 U.S. 642, 650-51, 94 S.Ct. 2431, 41 L.Ed.2d 374 (1974), for the proposition that the garnishment limitations prescribed by FCCPA were not intended to protect a debtor from the bankruptcy trustee. Thus, a bankruptcy trustee's rights under the Bankruptcy Act of 1898 trumped federal garnishment exemptions. It does not follow, however, that the Oregon legislature had the same intent when enacting the Oregon garnishment statute.

[9] Oregon has plenary authority over its own law of exemptions. Such exemptions are honored in bankruptcy per § 522(b)(2), regardless of whether a state exercises its right under § 522(b)(1) to "opt out" of the federal bankruptcy exemptions.

While ORS 23.185 may track the FCCPA, this does not mean that Oregon may not also use its garnishment statute to create an exemption good in bankruptcy if it so chooses. We conclude that it has done so.

Hence, a portion of the debtors' unpaid wages can properly be claimed as exempt in bankruptcy under ORS 23.185 and § 522(b)(2).

CONCLUSION

The interest of consistency with prior local decisions and the appearance of the phrase "remain exempt" within the statutory scheme combine to warrant the conclusion that the Oregon garnishment statute is also an exemption statute for purposes of § 522(b)(2). We AFFIRM.

9th Cir.BAP,1999.

In re Robinson

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C

Supreme Court of Wyoming.
In re Cleve Calvin WALSH and Jennifer Lynn
Walsh, Debtors.
Randy Royal, Appellant (Trustee/Objector),
v.
Cleve Calvin Walsh and Jennifer Lynn Walsh, Ap-
pellees (Debtors/Respondents).

No. 03-164.
Aug. 23, 2004.

Background: Bankruptcy trustee objected to debt-
or's claim of an exemption for 75% of the funds
garnished from their bank account. The United
States Bankruptcy Court for the District of Wyom-
ing, Peter J. McNiff, J., certified questions.

Holding: The Supreme Court, Voigt, J., held that
debtor was not entitled to exempt deposited wages
from garnishment.

Questions answered.

Lehman, J., dissented and filed opinion joined
by Hill, C.J.

West Headnotes

[1] Statutes 361 ↪181(1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k181 In General
361k181(1) k. In general. Most
Cited Cases

Statutes 361 ↪188

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction

361k187 Meaning of Language
361k188 k. In general. Most Cited
The Supreme Court's primary concern in statu-
tory interpretation is legislative intent, which in-
tent must be ascertained from the words of the statu-
te.

[2] Statutes 361 ↪190

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k190 k. Existence of ambiguity.
Most Cited Cases
Construction is unnecessary where statutory
language is unambiguous.

[3] Statutes 361 ↪188

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In general. Most Cited
The intent of an unambiguous statute is deter-
mined from the ordinary and obvious meaning of the
words used.

[4] Statutes 361 ↪190

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k190 k. Existence of ambiguity.
Most Cited Cases
When the words are clear and unambiguous, a
court risks an impermissible substitution of its own
views, or those of others, for the intent of the legis-
lature if any effort is made to interpret or construe
statutes on any basis other than the language in-
voked by the legislature.

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[5] Statutes 361  **190**

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k187 Meaning of Language

361k190 k. Existence of ambiguity.

Most Cited Cases

A statute is clear and unambiguous if its wording is such that reasonable persons are able to agree on its meaning with consistency and predictability.

[6] Statutes 361  **176**

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k176 k. Judicial authority and duty.

Most Cited Cases

In interpreting a statute, courts are not free to ignore any word the legislature has used.

[7] Statutes 361  **176**

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k176 k. Judicial authority and duty.

Most Cited Cases

Courts will not enlarge, stretch, expand or extend a statute to matters not falling within its express provisions.

[8] Exemptions 163  **48(2)**

163 Exemptions

163I Nature and Extent

163I(C) Property and Rights Exempt

163k48 Earnings, Wages, or Salaries

163k48(2) k. What are wages or personal earnings. Most Cited Cases

Garnishment exemption for certain personal service income applied only to money the debtor had earned but not yet received, and thus, debtor was not entitled to exempt 75% of money contained in bank account from garnishment, even though the money was solely derived from his wages, where

debtor had already received and deposited the money. Wyo.Stat. Ann. §§ 1-15-408(a), 40-14-505(a)(ii).

*1 Representing Appellant: Randy L. Royal, Greybull, Wyoming.

Representing Appellees: Stephen R. Winship of Winship & Winship, P.C., Casper, Wyoming.

Before HILL, C.J., and GOLDEN, LEHMAN, KITE, and VOIGT, JJ.

VOIGT, Justice.

[¶ 1] In their bankruptcy petition, Cleve Calvin Walsh and Jennifer Lynn Walsh (the Walshes) claimed an exemption of seventy-five percent of the funds garnished from their bank account. The bankruptcy trustee objected to the claimed exemption. The United States Bankruptcy Court, for the District of Wyoming, then certified to this Court the following questions, which we have agreed to answer:

1. Are funds derived from a debtor's wages and deposited into the debtor's bank account exempt from garnishment*2 under Wyo. Stat. Ann. § 1-15-408 or § 40-14-505(b) (LexisNexis 2003)?
2. If yes, under what circumstances?

FACTS

[¶ 2] On April 29, 2003, the Walshes filed a Chapter 7 bankruptcy petition. On the same date, a judgment creditor garnished their bank account. The money in the account—\$2,541.18—was derived solely from Mr. Walsh's personal service earnings with his employer. The trustee has objected to the Walshes' claim under Wyo. Stat. Ann § 1-15-408 (LexisNexis 2003) that seventy-five percent of the funds are exempt from garnishment. The pertinent portion of that statute reads as follows:

- (a) A writ of post judgment garnishment attaching earnings for personal services shall attach

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that portion of the defendant's accrued and unpaid disposable earnings, specified in subsection (b) of this section. The writ shall direct the garnishee to withhold from the defendant's accrued disposable earnings the amount attached pursuant to the writ and to pay the exempted amount to the defendant at the time his earnings are normally paid. Earnings for personal services shall be deemed to accrue on the last day of the period in which they were earned or to which they relate. If the writ is served before or on the date the defendant's earnings accrue and before the same have been paid to the defendant, the writ shall be deemed to have been served at the time the periodic earnings accrue. If more than one (1) writ is served, the writ first served shall have priority. Notwithstanding any other provision of this subsection, an income withholding order for child support obtained pursuant to W.S. 20-6-201 through 20-6-222 shall have priority over any other garnishment.

STANDARD OF REVIEW

[1][2][3][4][5] [¶ 3] The certified questions require this Court to determine the meaning of Wyo. Stat. Ann. § 1-15-408. Our rules of statutory construction are well known and we will not repeat them at length. See *Pagel v. Franscell*, 2002 WY 169, ¶ 9, 57 P.3d 1226, 1230 (Wyo.2002) (quoting *Wyoming Community College Com'n v. Casper Community College Dist.*, 2001 WY 86, ¶¶ 16-18, 31 P.3d 1242, 1249 (Wyo.2001)). We will, however, note a few particularly pertinent rules of construction. Our primary concern is legislative intent, which intent must be ascertained from the words of the statute. *Id.* Construction is unnecessary where statutory language is unambiguous. *Id.* The intent of an unambiguous statute is determined from the ordinary and obvious meaning of the words used. *In re Wilson*, 2003 WY 105, ¶ 6, 75 P.3d 669, 672 (Wyo.2003) (quoting *Wyoming Dept. of Transp. v. Haglund*, 982 P.2d 699, 701 (Wyo.1999)). “When the words are clear and unambiguous, a court risks an impermissible substitution of its own views, or those of others, for the intent of the legislature if any effort is made to inter-

pret or construe statutes on any basis other than the language invoked by the legislature.” *Pagel*, 2002 WY 169, ¶ 9, 57 P.3d at 1230 (quoting *Wyoming Community College Com'n*, 2001 WY 86, ¶ 16, 31 P.3d at 1249). “A statute is clear and unambiguous if its wording is such that reasonable persons are able to agree on its meaning with consistency and predictability.” *Pagel*, 2002 WY 169, ¶ 9, 57 P.3d at 1230 (quoting *Wyoming Community College Com'n*, 2001 WY 86, ¶ 17, 31 P.3d at 1249).

[6][7] [¶ 4] In addition to these general rules of construction, we also note more specifically that courts are not free to ignore any word the legislature has used. *Keats v. State*, 2003 WY 19, ¶ 28, 64 P.3d 104, 113 (Wyo.2003). And finally, “it is a universal rule that courts will not enlarge, stretch, expand or extend a statute to matters not falling within its express provisions.” *Knowles v. Corkill*, 2002 WY 119, ¶ 19, 51 P.3d 859, 865 (Wyo.2002) (quoting *Lo Sasso v. Braun*, 386 P.2d 630, 632 (Wyo.1963)).

DISCUSSION

[8] [¶ 5] It is impossible reasonably to read the words “accrued and unpaid” in Wyo. Stat. Ann. § 1-15-408(a) as meaning anything other than money the debtor has earned but has not yet received. This is *3 especially true inasmuch as the entire subsection is concerned with an employer's responsibilities when served with a writ of garnishment. For example, the garnishee is to “withhold” the amount attached before paying the exempted amount “at the time ... earnings are normally paid.” Wyo. Stat. Ann. § 1-15-408(a). That is not language directed to a bank holding a debtor's deposits. Further, the statute requires that income withholding orders for child support, which orders attach to “payments” due to an obligor, continue to have priority. See Wyo. Stat. Ann. § 20-6-201 *et seq.* (LexisNexis 2003). Clearly, this is a statutory construct designed to reach monies not yet paid to the debtor.

[¶ 6] The same is true of Wyo. Stat. Ann. § 40-14-505(a)(ii) (LexisNexis 2003), which concerns garnishments resulting from consumer credit

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transactions. Under that statute, certain amounts are exempt from garnishment where “the *earnings* of an individual are required to be *withheld* for payment of a debt.” (Emphasis added.) The legislative intent is clear on the face of both Wyo. Stat. Ann. § 1-15-408(a) and Wyo. Stat. Ann. § 40-14-505(a)(ii)—these statutes deal with *unpaid* wages or other earnings. They do not deal with wages or other earnings that have made their way into a debtor’s bank account.

[¶ 7] While it may seem illogical to extend an exemption to a debtor only until such time as he or she has earnings “in hand,” it is not this Court’s job to say that the law should be something other than it is. Rather, it is this Court’s job only to determine legislative intent from the law as it is. And as it is, the law now clearly limits this exemption to “accrued and unpaid” earnings.

CONCLUSION

[¶ 8] We answer the first certified question in the negative, making it unnecessary to answer the second question.

LEHMAN, Justice, filed a dissenting opinion with which HILL, Chief Justice, joined.

LEHMAN, Justice, dissenting, with whom HILL, Chief Justice, joins.

[¶ 9] I must respectfully dissent. Upon consideration of the certified questions, I reach a different conclusion than that reached by the majority. Accordingly, I would hold that disposable income derived from a debtor’s wages and deposited into the debtor’s bank account are exempt from garnishment under Wyo. Stat. Ann. §§ 1-15-408 and 40-14-505(b) (LexisNexis 2003) if the debtor can establish by competent evidence that such sums were derived from earnings for personal services.

[¶ 10] It is clear that pursuant to Wyoming Stat. Ann. § 1-20-109 (LexisNexis 2001), Wyoming has “opted-out” of the federal exemptions and has prescribed its own recognized exemption structure as allowed by law. Section 1-15-408 provides

such an exemption. That statute provides:

(a) A writ of post judgment garnishment attaching earnings for personal services shall attach that portion of the defendant’s accrued and unpaid disposable earnings, specified in subsection (b) of this section. The writ shall direct the garnishee to withhold from the defendant’s accrued disposable earnings the amount attached pursuant to the writ and to pay the exempted amount to the defendant at the time his earnings are normally paid. Earnings for personal services shall be deemed to accrue on the last day of the period in which they were earned or to which they relate. If the writ is served before or on the date the defendant’s earnings accrue and before the same have been paid to the defendant, the writ shall be deemed to have been served at the time the periodic earnings accrue. If more than one (1) writ is served, the writ first served shall have priority. Notwithstanding any other provision of this subsection, an income withholding order for child support obtained pursuant to W.S. 20-6-201 through 20-6-222 shall have priority over any other garnishment.

(b) The maximum portion of the aggregate disposable earnings of an individual which are subject to garnishment is the lesser of:

*4 (i) Twenty-five percent (25%) of defendant’s disposable earnings for that week; or

(ii) The amount by which defendant’s aggregate disposable earnings computed for that week exceeds thirty (30) times the federal minimum hourly wage prescribed by the Fair Labor Standards Act of 1938, 29 U.S.C. § 206(a)(1), in effect at the time the earnings are payable, or, in case of earnings for any pay period other than a week, any equivalent multiple thereof prescribed by the administrator of the Wyoming Uniform Consumer Credit Code in the manner provided by W.S. 40-14-505(b)(iii).

(c) Unless a garnishee is specifically informed by affidavit of the plaintiff that the defendant has

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other periodic earnings from sources other than from the garnishee and the amount thereof, the garnishee shall treat the defendant's earnings becoming due from the garnishee as the defendant's entire aggregate earnings for the purpose of computing the sum attached by the garnishment.

Section 40-14-505 sets forth:

(a) For the purposes of this part:

(i) "Disposable earnings" means that part of the earnings of an individual remaining after the deduction from those earnings of amounts required by law to be withheld; and

(ii) "Garnishment" means any legal or equitable procedure through which the earnings of an individual are required to be withheld for payment of a debt.

(b) The maximum part of the aggregate disposable earnings of an individual for any workweek which is subjected to garnishment to enforce payment of a judgment arising from a consumer credit sale, consumer lease, or consumer loan may not exceed the lesser of:

(i) Twenty-five percent (25%) of his disposable earnings for that week; or

(ii) The amount by which his disposable earnings for that week exceed thirty (30) times the federal minimum hourly wage prescribed by section (6)(a)(1) of the Fair Labor Standards Act of 1938, U.S.C. tit. 29, § 206(a)(1), in effect at the time the earnings are payable;

(iii) In the case of earnings for a pay period other than a week, the administrator shall prescribe by rule a multiple of the federal minimum hourly wage equivalent in effect to that set forth in paragraph (b)(ii) of this section.

(c) No court may make, execute, or enforce an order or process in violation of this section.

[¶ 11] The majority concludes that when peri-

odic earnings for personal services are paid, they lose their character as exempt property under Wyoming's statutory exemption scheme. In support of this argument, the majority points out that § 1-15-408 specifically provides that wage garnishment applies only to "accrued and unpaid" disposable earnings. The majority surmises, therefore, that with the exception of some limited provisions for accounts found in Wyo. Stat. Ann. §§ 1-20-110 and -111 (LexisNexis 2003), there is no exemption in Wyoming for cash or bank accounts.^{FN1} I feel it is improper to determine if the exemption specified within § 1-15-408 should apply based upon the vagaries and arbitrariness of where a judgment debtor's wages are located at the time of service of a writ of garnishment. It makes little sense to allow a judgment creditor to wait to serve a garnishment until a judgment creditor is paid his wages and places such payment into his wallet (or his bank account via automatic deposit or otherwise) and thereby receive one hundred percent of those wages circumventing the purpose of § 1-15-408.

FN1. Wyo. Stat. Ann. § 1-20-110 exempts retirement, pension, and annuity accounts from execution, attachment, garnishment or any other judicial process while Wyo. Stat. Ann. § 1-20-111 does the same for contributions to medical savings accounts.

[¶ 12] In addition, because § 1-15-408 refers to "earnings for personal services," the definition for that terminology found within Wyo. Stat. Ann. § 1-15-102(a)(vi) (LexisNexis 2003) must be applied by this court.

"Earnings" or "earnings from personal services" means compensation paid or payable for personal services, whether denominated*5 as wages, salary, commission, bonus, proceeds of any pension or retirement benefits or deferred compensation plan or otherwise.

Id. Thus, the majority's ultimate determination improperly ignores the legislature's definition of "earnings from personal services," specifically that

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such earnings may also be “paid” and need not be simply “accrued and payable.”

[¶ 13] In a somewhat parallel manner, § 1-15-408 also uses the term “garnishee” rather than the term “employer.”^{FN2} Therefore, this court should recognize that Wyo. Stat. Ann. § 1-15-502(a) (LexisNexis 2003), addressing the subject of continuing garnishments, is limited to a “garnishee who is an employer of the judgment debtor” indicating that the legislature clearly knew how to specify a “garnishee employer” had it desired to do so within § 1-15-408. Hence, the legislature’s use of the term “garnishee” as opposed to “employer” in § 1-15-408 must infer that the term “garnishee” was meant to include banks and other depository institutions. Furthermore, exemption statutes are to be construed liberally in favor of the debtor in order to accomplish their beneficial purposes. *In re Lindell-Heasler*, 154 B.R. 748, 751 (D.Wyo.1992); *Johnston v. Barney*, 842 F.2d 1221, 1223 (10th Cir.1988); *Lingle State Bank v. Podolak*, 740 P.2d 392, 393-94 (Wyo.1987); *In re Barker*, 768 F.2d 191, 196 (7th Cir.1985); and *Wright v. Union Central Life Ins. Co.*, 311 U.S. 273, 278-79, 61 S.Ct. 196, 200, 85 L.Ed. 184 (1940).

FN2. Wyo. Stat. Ann. § 1-15-102(a)(vii) (LexisNexis 2003) sets forth:

“Garnishee” means a person other than a plaintiff or defendant who is in possession of earnings or property of the defendant and who is subject to garnishment in accordance with the provisions of this chapter.

[¶ 14] Upon my review of the applicable Wyoming statutes, giving particular attention to § 1-15-408, as well as § 40-14-505, I also conclude that § 1-15-408 is ambiguous. As evidenced by the parties’ arguments, a question remains whether disposable earnings/earnings from personal services may be attached through garnishment when they are “accrued and unpaid” or “paid or payable.” Re-

sort to the ordinary and obvious common meaning of the terms “accrued,” “payable,” and “paid” is of little help. The American Heritage Dictionary (Second College Edition, 1991) defines “accrue” as: “3. Law. To become an enforceable or permanent right.” That same authority defines the term “payable” as: “1. Requiring payment on a certain date; due.” Thus, “accrued” and “payable” have virtually the same meaning. On the other hand, The American Heritage Dictionary defines “paid” as the “[p]ast tense and participle of pay” and the word “pay” as: “1. To give money to in return for goods or services rendered.” Therefore, it appears that any distinction between the words “accrued,” “payable,” and “paid” is one of timing alone, which does not definitively aid us in interpreting § 1-15-408.

[¶ 15] The fact that § 1-15-408 uses the term “garnishee” and not “employer” does not assist me in my analysis. It is true that the continuing garnishment statute, § 1-15-502(a), limits garnishment to a “garnishee who is an employer of the judgment debtor,” perhaps implying that the legislature meant to include banks and other depository institutions within the ambit of § 1-15-408. However, §§ 1-20-110 and 1-20-111, which provide an exemption for retirement fund accounts and contributions to medical savings accounts, specifically enumerate that those accounts are “exempt from execution, attachment, garnishment or any other process issued by any court.”^{FN3} Thus, one could similarly argue that the legislature knew how to and could have utilized this same language in § 1-15-408 had it desired the exemption for disposable income to continue once deposited into a debtor’s account.

FN3. Likewise, the language used within Section 407 of the Social Security Act (42 U.S.C. § 407) provides: “none of the monies paid or payable ... under the [the Social Security Act] shall be subject to execution, levy, attachment, garnishment, or other legal process.” *See also S & S Diversified Services, L.L.C. v. Taylor*, 897 F.Supp. 549

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(D.Wyo.1995).

[¶ 16] Nonetheless, we have clearly established that when interpreting statutes, our primary consideration must be to determine the legislature's intent. *6 *In re Winters*, 2002 WY 29, ¶ 6, 40 P.3d 1231, ¶ 6 (Wyo.2002). While there is no formal legislative history suggesting the purpose of the enactment of § 1-15-408, the historical purpose of exemption statutes has been to protect a debtor by permitting him to retain the basic necessities of life. Therefore, it was intended that after the levy of nonexempt property, the debtor and the debtor's family should not be left destitute. See *In re Norris*, 203 B.R. 463, 465-66 (D.Nev.1996); *Miller v. Monrean*, 507 P.2d 771, 773-76 (Alaska 1973). *In accord see Pellish Bros. v. Cooper*, 47 Wyo. 480, 38 P.2d 607 (1934). Further, this purpose is consistent with our explanation of Wyoming's wedding ring exemption. We said:

We conclude this limited approach is consistent with the general purposes and guidelines behind allowing debtors to file for bankruptcy protection. 4 *Collier on Bankruptcy* at ¶ 522.01 (15th rev. ed.) explains:

A fundamental component of an individual debtor's fresh start in bankruptcy is the debtor's ability to set aside certain property as exempt from the claims of creditors. Exemption of property, together with the discharge of claims, lets the debtor maintain an appropriate standard of living as he or she goes forward after the bankruptcy case.

1 *Collier on Bankruptcy* at ¶ 1.03[2][a] also recognizes that:

Chapter 7 of the Bankruptcy Code is entitled "Liquidation" and the title fully expresses the purpose of the chapter's provisions. Chapter 7 provides the mechanism for taking control of the property of the debtor, selling it, and distributing the proceeds to creditors in accordance with the distribution scheme of the Code.

Two ideals underlie chapter 7. From the creditor's viewpoint, chapter 7 establishes the concept of equitable distribution among creditors of a debtor's resources which, in most cases, are insufficient to permit full payment to all. From the individual debtor's vantage point, chapter 7 permits the honest debtor to obtain a new financial life through the discharge of unpaid debts.

(Footnotes omitted.)

In attempting to balance the above noted basic bankruptcy principles, we believe that the better approach is to allow debtors an exemption as to their own personal wedding rings thereby not requiring debtors to hand over those wedding rings to satisfy claims of their creditors. As recognized long ago in the case of *Towns v. Pratt*, 33 N.H. 345, 66 Am.Dec. 726, 728 (1856):

The object of the [exemption] statute is not to secure to the debtor the enjoyment of property of that character at the expense of his creditors, but to prevent his being stripped of those articles of utility and convenience, under the limited value prescribed, requisite for the comfort of himself and family in maintaining a household in every condition of life.

In re Winters, ¶¶ 12-13.

[¶ 17] Furthermore, as pointed out in footnote 1 of *Hancock v. Stockmens Bank & Trust Co.*, 739 P.2d 760, 760 (Wyo.1987), Wyo. Stat. Ann. § 1-17-411 (Michie Cum.Supp.1986) provided the applicable language concerning garnishment exemption for earnings for personal services rendered until it was amended in 1987 by the legislature to its present form. Wyo. Stat. Ann. § 1-17-411 (Michie Cum.Supp.1986) provided that:

The court may order any property of the judgment debtor or money due him in the hands of either himself or another person, not exempt by law, to be applied toward the satisfaction of a

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judgment. Upon seizure of his property or money, a judgment debtor may request a hearing pursuant to W.S. 1-17-405(c). One-half (1/2) of the earnings of the judgment debtor for his personal services rendered within sixty (60) days immediately preceding the levy of execution or levy of attachment, and due and owing at the time of the levy, are exempt when it appears by the debtor's affidavit or otherwise that the earnings are necessary for the use of his family residing in this state, supported wholly or in part by his labors.

Accordingly, in its previous form, the legislature obviously desired to afford the debtor an *7 opportunity to continue to provide for his/her family through use of half of his personal services earnings. This exemption was limited, however, merely to personal services earnings due and owing within sixty-days prior to levy. This language clearly infers that the legislature then intended to narrow the exemption to the applicable time frame and perhaps even implies the legislature's desire to limit the exemption only to earnings due and owing and not continue the exemption once these earnings were paid and placed into either the debtor's hands or deposited into an account.

[¶ 18] However, when the legislature modified the language to its present form in 1987, it deleted any sixty-day period preceding levy of the funds. This modification surely evidences the legislature's intention to apply the exemption to any due and owing personal services earnings of the debtor regardless of any prior time frame. In addition, I believe that this change signals the legislature's choice to allow the designated portion of these funds to remain exempt even after they were paid.

[¶ 19] Although this court has not directly addressed the issues posed in this case, it has given some limited direction in the area. In *Hancock v. Stockmens Bank & Trust Co.*, at 761-63, in interpreting § 1-15-408's predecessor statute, this court impliedly recognized an exemption for the funds within a debtor's bank account insofar as the debtor could provide some accounting in the form of tra-

cing that the deposited funds came from disposable income. We said:

The majority rule is that the burden of proving what funds in a bank account, held jointly by the judgment debtor and another depositor, are not subject to execution is on the depositors. *Yakima Adjustment Service, Inc. v. Durand*, 28 Wash.App. 180, 622 P.2d 408, 411 (1981). See also *Hayden v. Gardner*, 238 Ark. 351, 381 S.W.2d 752 (1964); *Leaf v. McGowan*, 13 Ill.App.2d 58, 141 N.E.2d 67 (1957); *Miller v. Clayco State Bank*, 10 Kan.App.2d 659, 708 P.2d 997 (1985); *Purma v. Stark*, 224 Kan. 642, 585 P.2d 991 (1978); *Walnut Valley State Bank v. Stovall*, 223 Kan. 459, 574 P.2d 1382 (1978); *Baker v. Baker*, Okl.App., 710 P.2d 129 (1985); Annot., Joint Bank Account as Subject to Attachment, Garnishment, or Execution by Creditor of One of the Joint Depositors, 11 A.L.R.3d 1465 (1967). This rule is in harmony with the "general rule of evidence that the burden of proof lies on the person who wishes to support his case by a particular fact which lies more peculiarly within his knowledge, or of which he is supposed to be cognizant." Principles of Evidence, § 274; 1 Greenl. Ev. § 79; Starkie Ev. § 589." *Selma, Rome and Dalton Railroad Company v. United States*, 139 U.S. 560, 567-568, 11 S.Ct. 638, 640, 35 L.Ed. 266 (1891). See also *United States v. New York, New Haven and Hartford Railroad Company*, 355 U.S. 253, 78 S.Ct. 212, 2 L.Ed.2d 247 (1957); *United States v. Denver and Rio Grande Railroad Company*, 191 U.S. 84, 24 S.Ct. 33, 48 L.Ed. 106 (1903); *Lake v. Callis*, 202 Md. 581, 97 A.2d 316 (1953); *Skeen v. Stanley Company of America*, 362 Pa. 174, 66 A.2d 774 (1949); IX Wigmore on Evidence, § 2486 at 290 (1983).

The majority rule is consistent with a common sense approach, and "is the fair and reasonable rule because the depositors are in a much better position than the judgment creditor to know the pertinent facts." *Hayden v. Gardner, supra*, 381

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S.W.2d at 754. This rule also conforms to the principle that is well established in Wyoming jurisprudence that the burden of proof is on the party who asserts the affirmative of any issue. *Osborn v. Manning*, Wyo., 685 P.2d 1121, 1124 (1984); *Morrison v. Reilly*, Wyo., 511 P.2d 970, 972 (1973). See also *Younglove v. Graham and Hill*, Wyo., 526 P.2d 689, 693 (1974) (affirmative defense); *Hawkeye-Security Insurance Company v. Apodaca*, Wyo., 524 P.2d 874, 879 (1974) (exception to statute of limitations—estoppel); *Gonzales v. Personal Collection Service*, Wyo., 494 P.2d 201, 207 (1972) (affirmative defense); *First National Bank at Cody v. Fay*, 80 Wyo. 245, 257, 341 P.2d 79 (1959) (entitlement to reimbursement); *Takahashi v. Pepper Tank and Contracting Company*, 58 Wyo. 330, 362, 131 P.2d 339 (1942) (exception such as license); *8 *First National Bank of Morrill v. Ford*, 30 Wyo. 110, 216 P. 691, 692, 31 A.L.R. 1441 (1923).

The manifest intention of § 1-17-405(c), W.S. 1977, Cum.Supp.1986, in accordance with which Hancock pursued the claimed exemption, is that the debtor should assert his right to the exemption. The statutory exemptions serve to avoid the execution or garnishment, and thus are affirmative defenses in accordance with Rule 8(c), W.R.C.P. See *Texas Gulf Sulphur Company v. Robles*, Wyo., 511 P.2d 963, 965 (1973) (An affirmative defense is “a direct or implicit admission of plaintiff’s claim and assertion of other facts which would defeat a right to recovery * * *”). Hancock had the burden of proving which of the garnished funds in the joint bank account were exempt from execution. He acknowledged that burden by failing to object in the trial court or to argue on appeal that imposing the burden of proof on him was improper. It follows that, not only under the majority rule, but because it became the law of this case, Hancock had the burden of proving those amounts in the joint bank account which were exempt from execution. *Fife v. State*, Wyo., 676 P.2d 565, 568 (1984).

(Footnote omitted.) *In accord see S & S Diversified Services, L.L.C. v. Taylor*, 897 F.Supp. 549, 552 (D.Wyo.1995).

[¶ 20] More recently, this court indicated in *McManaman v. McManaman*, 2002 WY 128, 53 P.3d 103 (Wyo.2002), dealing with a claimed exemption to garnished proceeds from cattle sales deposited in a bank account, that it was not the location of those funds within the account but the origin of those funds that was determinative of whether an exemption applied. This court stated:

McManaman next contends that the district court erred in determining that the statutory exemption for earnings does not apply to proceeds from the sale of his cattle. He contends that his ranching operations are his sole source of income and the legislature intended to exempt earnings which provide for the basic necessities of life. We proceed with our discussion of this issue, but note that a majority of jurisdictions now recognize that support orders are exceptions to statutory limitations on collection. Because the parties here did not raise or brief the issue whether the garnishment statutory exemptions apply to court-ordered child support and arrearages reduced to money judgment, we assume without deciding that the statutory exemptions apply to this garnishment proceeding.

Wyo. Stat. Ann. § 1-15-102 (LexisNexis 2001) defines earnings as follows:

(a) As used in this chapter unless otherwise defined:

...

(vi) “Earnings” or “earnings from personal services” means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, proceeds of any pension or retirement benefits or deferred compensation plan or otherwise;

...

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McManaman relies upon our decision in *Lingle State Bank of Lingle v. Podolak*, 740 P.2d 392 (Wyo.1987). Podolak considered an earnings exemption available under § 1-17-411, now superseded, and decided the legislature intended the earnings exemption to apply to income produced by farming and ranch. *Id.* at 394. Because new statutory provisions had taken effect at the time of the *Podolak* decision, we noted that the case was consequently circumscribed in future application. *Id.* n. 1. Relying upon this footnote and our decision in *Coones v. FDIC*, 796 P.2d 803 (Wyo.1990), the State contends that this Court has already decided that proceeds from the sale of cattle are not exempt under § 1-15-102(a)(vi).

In *Coones*, the general exemption statutes, Wyo. Stat. Ann. § 1-20-101 through 1-20-110, did not provide any provision for earnings exemption; however, the appellants in the case contended that a transferred application of the garnishment statute execution, § 1-15-102, provided a basis for allowing a rancher or farmer to claim a seventy-five percent exemption of proceeds from the sale of non-purchase money livestock and seventy-five percent of the value of crops planted and livestock born after *9 the security interest was perfected. *Id.* at 805. *Coones* rejected appellant's contention, first, by noting that *Podolak* provided no precedent because the statute addressed in it no longer existed, and, secondly, because the statutory language "earnings for personal services" could not be interpreted to include any income other than that periodically payable by a third party. Specifically, *Coones* stated:

We find from a comparison of the changed phraseology that the broadly based rules found in earlier Wyoming law were constricted by the 1987 definition which itemizes a character of identical rights, e.g., wages, salary, commission, bonus and proceeds of any pension or retirement benefit or deferred compensation plan. Statutes are entitled to a reasonable interpreta-

tion and we consider the character of benefits clearly defined within a wage and salary characterization. Profits and business earnings are outside the meaning of wage and salary. This interpretation gathers support from the garnishment statute provision which recognizes an obligation to pay as being different from profit or business earnings which involve a right to receive.

Appellants further contend that the word "otherwise" could suffice to provide entitlement for the broad character of rights found in *Podolak* to result from the prior statute. We cannot accept this thoughtful contention since its effect would be to disassociate the structure of the clause when relating to one character of exempt funds by adding an almost unlimited character of other funds which would have no particular validation within the constraints of a continuing wage garnishment statutory system. We limit any application of "otherwise" in W.S. 1-15-102(a)(vi) to a character of third-party obligations payable for services rendered by the claimant for exemption. Intrinsic to the meaning of W.S. 1-15-102 are the provisions of W.S. 1-15-408 which are related to earnings for personal services periodically payable. Business profits and receipts from crop and livestock simply cannot be logically impressed with the garnishment concept.

Id. at 805-06.

Although *Coones* involved bankruptcy issues, this last holding broadly sweeps and does not permit McManaman's argument to prevail. McManaman's bank account funds are not traceable to a third-party obligation payable periodically. Additionally, if the exemption did apply when the funds were owing, McManaman has not provided any argument or authority that the exemption was not extinguished upon payment of the earnings into his bank account. We, therefore, hold that McManaman's bank account funds are not exempt from the writ of garnishment and affirm the

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district court's order.

McManaman, ¶¶ 10–14. Hence, while this court did not address the particular issue raised by this appeal in *McManaman*, we did recognize the possibility that the disposable income exemption might continue after being placed in a debtor's bank account.

[¶ 21] Courts in other jurisdictions that have faced this issue have found that to the extent funds in a bank account can be traced to the debtor's wages, that portion is exempt. I find the reasoning used by the bankruptcy court in *In re Kobernusz*, 160 B.R. 844, 847–48 (D.Colo.1993) (footnote omitted), when interpreting a Colorado statutory scheme very similar to that of Wyoming, particularly persuasive.

Plaintiff's counsel had issued from this Court a writ of garnishment. That writ was in accordance with the Colorado state practice as set forth in Colo.R.Civ.P. 103. The writ was properly served upon the Bank, which promptly responded that it had funds on account in the name of Defendant. At the time of the service of the writ of garnishment, Defendant received notice of the garnishment and a partial list of exemptions that could be claimed.

Defendant filed his claim for exemption under Colo.Rev.Stat. § 13–54–104. He claims that 75% of his money is exempt, as it constitutes wages earned by him. On the other hand, Plaintiff argues that the ability to claim this exemption was lost when the money was placed into a joint *10 bank account and co-mingled with other monies.

Colorado law provides that no more than twenty-five percent of the aggregate of disposable earnings per week is subject to garnishment. Colo.Rev.Stat. § 13–54–104(2)(a). Multiples of the minimum federal wage may also be used. That is the case where earnings are paid other than by the week. Colo.Rev.Stat. § 13–54–104(2)(b). Plaintiff's claim is that this

statute does not apply at all, since the money lost its identity as earnings when placed into the bank account.

It is clear from the offer of proof that Defendant was not paid in the normal weekly fashion, but was paid as a subcontractor. His pay was not subject to deductions for federal income tax or Social Security. By the same token, the income falls into the category of "earnings" as defined by Colo.Rev.Stat. § 13–54–104(1)(b). The Court is satisfied that the money in the account came from Defendant's labor and is, thus, earnings for purposes of claiming an exemption.

Plaintiff's argument is that the character of earnings is lost once funds are placed into a bank account. Indeed, there is case law that indicates that such a view is appropriate. *John O. Melby & Co. v. Anderson*, 88 Wis.2d 252, 276 N.W.2d 274 (1979); *Edwards v. Henry*, 97 Mich.App. 173, 293 N.W.2d 756 (1980); *Dunlop v. First Nat. Bank of Arizona*, 399 F.Supp. 855 (D.Ariz.1975).

On the other hand, Colorado case law has taken the opposite view of the law. In *Rutter v. Shumway*, 16 Colo. 95, 26 P. 321 (1891), the Colorado Supreme Court specifically held that earnings did not lose such identity when placed into a bank account. This case has not been overruled by the Colorado Supreme Court. Indeed, it has been followed, though admittedly all cases are many years old. The general concept of the sanctity of the exemption for wages was upheld in *Finance Acceptance Company v. Breaux*, 160 Colo. 510, 419 P.2d 955 (1966) (refusal to allow set-off for debt owed to employer from wages upheld). At least one court outside of Colorado has questioned the continued vitality of *Rutter v. Shumway*. See *Holmes v. Blazer Financial Services, Inc.*, 369 So.2d 987, 989 (Fla.App.1979).

Plaintiff does call the Court's attention to *Usery v. First Nat. Bank of Arizona*, 586 F.2d 107 (9th Cir.1978). This case would appear, at first, to fully support Plaintiff's position. Yet a careful

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reading indicates that it deals with a bank's duty to calculate an exemption for a debtor under the Consumer Credit Protection Act (CCPA). 15 U.S.C. § 1672, et seq. If this case hinged on an interpretation of the CCPA, then *Usery* would be compelling precedent. In this case, though, Defendant has chosen to rely upon Colorado law for his exemption.

Defendant has stated through his offer of proof that he was receiving earnings for his personal services in construction. Such payment appears to fall clearly into the category of "earnings", as indicated by Colo.Rev.Stat. § 13-54-104 [(1)](b)(A). The Colorado Supreme Court's decision in *Rutter v. Shumway* stressed that wages should not lose such designation solely on the basis of being placed into a bank account. The same could also be said of money being held in a defendant's pocket. To follow the logic of Plaintiff, money received from an employer, even if exempt at time of payment, would lose such exemption when placed into a wallet. Such a result would be absurd and improper. Though one hundred and two years old, the decision *Rutter v. Shumway* is still applicable and controlling.

[¶ 22] Similarly, in *In re Norris*, 203 B.R. at 466, that court recognized that in order to permit a wage earner to enjoy any benefit from the protection afforded under Nevada law, it was necessary to allow the wage earner a reasonable opportunity to negotiate the "disposable earnings" and spend the funds, otherwise the exemption would be rendered meaningless. Thus, that court reasoned that a deposit of earnings, whether by the debtor or directly by the employer, should not cause the statutorily exempt wages to lose their exempt status as long as the proceeds of the *11 account are traceable to those earnings. In support of this holding, the court said:

Other jurisdictions have recognized that statutorily exempt funds do not lose their exempt status when deposited into a personal checking account. See *In re Caslavka*, 179 B.R. 141, 147

(Bankr.N.D.Iowa 1995) (construing Iowa law that "protection afforded by the exemption would be rendered meaningless if exempt status is lost by negotiating the paycheck") (citing *MidAmerica Savs. Bank v. Miede*, 438 N.W.2d 837, 839 (Iowa 1989); *In re Arnold*, 193 B.R. 897 (Bankr.W.D.Mo.1996) ("[I]t elevates form over substance to claim that the [paycheck in debtor's] hand was wages, but the check in his checking account was not); *In re Frazier*, 116 B.R. 675 (Bankr.W.D.Wis.1990) (exempt disability benefits check deposited into bank account with other exempt funds retained exempt status; benefits were "readily identifiable").

At least two United States Supreme Court opinions have also recognized that exempt funds do not lose their exempt status upon deposit if the funds in the account can be traced to exempt funds. See *Porter v. Aetna Casualty & Sur. Co.*, 370 U.S. 159, 82 S.Ct. 1231, 8 L.Ed.2d 407 (1962) (veterans' benefits) and *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413, 93 S.Ct. 590, 34 L.Ed.2d 608 (1973) (welfare benefits). In *Porter*, 370 U.S. at 159 [82 S.Ct. 1231], the United States Supreme Court held that veterans' benefits retained their exempt status after being deposited in a savings account, reasoning that:

Since legislation of this type should be liberally construed, to protect funds granted by the Congress for the maintenance and support of the beneficiaries thereof, we feel that deposits such as are involved here should remain inviolate. The Congress we believe, intended that veterans in the safekeeping of their benefits should be able to utilize those normal modes adopted by the community for that purpose—provided the benefit funds, regardless of the technicalities of title and other formalities, are readily available as needed for support and maintenance, actually retain the qualities of moneys, and have not been converted into permanent investments.

Id. at 162 [82 S.Ct. 1231] (citations omitted).

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And 31 Am.Jur.2d *Exemptions* § 224 (1989) states:

There is authority that a deposit of exempt funds in a bank does not affect a debtor's exemption, nor change the exempt character of the fund, so long as the source of the exempt funds is reasonably traceable. If it is impossible to separate out exempt from nonexempt funds, the general rule is that an exemption cannot lie. This rule has been applied, though not without exception, to a deposit of exempt wages, exempt compensation awards, exempt veterans' benefits, and exempt insurance proceeds or funds.

Id. at 467.

[¶ 23] The trustee counters by citing *Usery v. First Nat'l Bank of Arizona*, 586 F.2d 107 (9th Cir.1978) and *In re Adcock*, 264 B.R. 708 (D.Kan.2000). I am not persuaded by the reasoning within the *Usery* case for those same reasons expressed by the court in *In re Kobernusz*, at 847. Additionally, I find the case of *In re Adcock* to be distinguishable to the instant case. The facts presented by *In re Adcock* dealt with a bankruptcy trustee's avoidance powers as opposed to an actual garnishment. I recognize that there exists a split in case law authority. See *In re Kobernusz*, at 847-48. However, I do not find the contradictory reasoning within those cases to be convincing and, thus, I would not adopt the holdings therein.

[¶ 24] The trustee also complains that if the exemption provided by § 1-15-408 is allowed to continue after such monies are placed into a debtor's bank account, there will be no end to the exemption because the debtor may always argue that his earnings were used to purchase his residence, vehicles, or other tangible assets. I do not agree. I believe that the legislature's intent is served only insofar as such monies are traceable from the debtor's earnings into an account and does not continue once the debtor chooses to spend such monies for the purchase of tangible assets, unless such assets*12 may

qualify for their own independent exemption.

[¶ 25] The trustee further expresses that in situations where a garnishment is served on a bank, a bank does not have the ability to calculate a wage earner's exemption because it will not know if the amount deposited into the account comes from earnings and if proper withholdings have been made from those amounts. However, the process provided by the Wyoming garnishment scheme does not require a bank to determine the exempt status of the monies held in bank accounts. Rather, it is the debtor's responsibility to affirmatively assert any exemption that he may have in the subject assets.

[¶ 26] Thus, having carefully considered the parties' arguments and reviewed Wyoming's statutory exemption scheme and applicable authority, I would hold that disposable income derived from a debtor's wages and deposited into the debtor's bank account are exempt from garnishment under §§ 1-15-408 and 40-14-505(b) insofar as the debtor can by competent evidence establish that such monies were derived from earnings for personal services.

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(Cite as: 522 F.2d 581)



United States Court of Appeals,
Third Circuit.
LUCAS COAL COMPANY et al., Petitioners,
v.
INTERIOR BOARD OF MINE OPERATIONS
APPEALS et al., Respondents.

No. 74-1813.
Argued June 10, 1975.
Decided Aug. 29, 1975.

Coal mine operators sought review of an order of the Secretary of the Interior acting through the Board of Mine Operations Appeals. The Court of Appeals, Adams, Circuit Judge, held that the Board's interpretation of a safety standard as requiring that bulldozers be equipped with back-up alarms was reasonable. The Board did not err in sustaining issuance of a notice of violation despite a contention that satisfactory equipment was unavailable. The Board did not err in deciding that certain violations of the mandatory safety standards were rendered moot by the abatement of the violations prior to the hearing.

Board's order affirmed.

West Headnotes

[1] Administrative Law and Procedure 15A ↪ 413

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules and Regulations
15Ak412 Construction
15Ak413 k. Administrative Construction. Most Cited Cases

Labor and Employment 231H ↪ 2650

231H Labor and Employment

231HXV Mines
231HXV(A) In General
231Hk2649 Machines and Equipment; Structures
231Hk2650 k. In General. Most Cited Cases
(Formerly 232Ak13 Labor Relations)

Mines and Minerals 260 ↪ 92.5(2)

260 Mines and Minerals
260III Operation of Mines, Quarries, and Wells
260III(A) Statutory and Official Regulations
260k92.5 Federal Law and Regulations
260k92.5(2) k. Coal Mining. Most Cited Cases
(Formerly 260k92.6)

Ruling that bulldozers were within coverage of administrative regulations constituted interpretation of administrative regulation and could not be set aside unless it was plainly erroneous or inconsistent with regulations. Federal Coal Mine Health and Safety Act of 1969, § 106(a), 30 U.S.C.A. § 816(a).

[2] Administrative Law and Procedure 15A ↪ 413

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules and Regulations
15Ak412 Construction
15Ak413 k. Administrative Construction. Most Cited Cases

Statutes 361 ↪ 219(1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k219 Executive Construction
361k219(1) k. In General. Most Cited Cases
Courts are obliged to accord great deference to

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administrative agency's construction of language of statute which it administers and, even more clearly, the agency's interpretation of a regulation it has drafted. Federal Coal Mine Health and Safety Act of 1969, § 106(a), 30 U.S.C.A. § 816(a).

[3] Administrative Law and Procedure 15A ↪
413

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules and Regulations
15Ak412 Construction

15Ak413 k. Administrative Construction. Most Cited Cases

Agency's explication of its regulation, if reasonable, is controlling despite existence of other interpretations that might seem even more reasonable. Federal Coal Mine Health and Safety Act of 1969, § 106(a), 30 U.S.C.A. § 816(a).

[4] Mines and Minerals 260 ↪92.5(2)

260 Mines and Minerals
260III Operation of Mines, Quarries, and Wells
260III(A) Statutory and Official Regulations
260k92.5 Federal Law and Regulations
260k92.5(2) k. Coal Mining. Most Cited Cases
(Formerly 260k92.6)

Where safety standard of Secretary of Interior required that "mobile equipment", such as trucks, forklifts, front-end loaders, tractors and graders be equipped with warning device to give alarm when equipment is put in reverse, included within "mobile equipment" were the five examples given, but they were not all-inclusive, and administrator's determination would govern what other mobile equipment would be subject to such requirements. Federal Coal Mine Health and Safety Act of 1969, § 101 et seq., 30 U.S.C.A. § 811 et seq.

[5] Mines and Minerals 260 ↪92.20

260 Mines and Minerals

260III Operation of Mines, Quarries, and Wells
260III(A) Statutory and Official Regulations
260k92.15 Powers and Proceedings of Commissions and Officers in General
260k92.20 k. Effect of Determination, and Presumption of Validity. Most Cited Cases

Secretary of Interior's interpretation of term "mobile equipment," in safety standard requiring that mobile equipment such as trucks, forklifts, front-end loaders, tractors and graders be equipped with warning device to give alarm when equipment is put in reverse, as including bulldozers was not unreasonable and was binding upon the court. Federal Coal Mine Health and Safety Act of 1969, § 101 et seq., 30 U.S.C.A. § 811 et seq.

[6] Mines and Minerals 260 ↪92.5(2)

260 Mines and Minerals
260III Operation of Mines, Quarries, and Wells
260III(A) Statutory and Official Regulations
260k92.5 Federal Law and Regulations
260k92.5(2) k. Coal Mining. Most Cited Cases
(Formerly 260k92.6)

Word "adequate" within Secretary of Interior's safety standard requiring that mobile equipment be equipped with an adequate automatic warning device to give audible alarm when equipment is put in reverse refers to employer's burden to comply adequately with requirements, and notices of abatement issued as to five violations constituted evidence of such compliance. Federal Coal Mine Health and Safety Act of 1969, § 101 et seq., 30 U.S.C.A. § 811 et seq.

[7] Mines and Minerals 260 ↪92.16

260 Mines and Minerals
260III Operation of Mines, Quarries, and Wells
260III(A) Statutory and Official Regulations
260k92.15 Powers and Proceedings of Commissions and Officers in General
260k92.16 k. In General. Most Cited Cases
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interpreting safety standard as applying so long as there were alarm or warning devices available sufficient to satisfy agency was not unreasonable, as opposed to contention that unavailability of equipment made compliance impossible. Federal Coal Mine Health and Safety Act of 1969, § 106(a), 30 U.S.C.A. § 816(a).

**[8] Administrative Law and Procedure 15A ↩️
678**

15A Administrative Law and Procedure

15AV Judicial Review of Administrative Decisions

15AV(A) In General

15Ak678 k. Dismissal. Most Cited Cases

Short time administrative orders capable of repetition yet evading review are not considered dismissable on grounds of mootness. Federal Coal Mine Health and Safety Act of 1969, § 105(a), 30 U.S.C.A. § 815(a).

[9] Mines and Minerals 260 ↩️92.16

260 Mines and Minerals

260III Operation of Mines, Quarries, and Wells

260III(A) Statutory and Official Regulations

260k92.15 Powers and Proceedings of Commissions and Officers in General

260k92.16 k. In General. Most Cited

Cases

(Formerly 260k92.15)

Given avenues of review available under Federal Coal Mine Health and Safety Act of 1969, interpretation by Board of Mine Operations Appeals, of section concerning review of orders of withdrawal and limiting review of notice of violation to those issues necessary to determination of reasonableness of time allowed for abatement is permissible notwithstanding principle that short term administrative orders capable of repetition yet evading review are not considered dismissable on grounds of remoteness; Board may thus consequently determine that an abatement of a notice of violation renders notice moot. Federal Coal Mine Health and Safety Act of 1969, §§ 104(a, b, d), 105,

105(a)(1), 106, 109, 30 U.S.C.A. §§ 814(a, b, d), 815, 815(a)(1), 816, 819.

*582 Henry J. Wallace, Jr., Reed, Smith, Shaw & McClay, Pittsburgh, Pa., for petitioners; Leo M. Stepanian, Brydon & Stepanian, Butler, Pa., of counsel.

Carla A. Hills, Asst. Atty. Gen., William Kanter, Michael Kimmel, Attys., Dept. of Justice, Washington, D. C., for respondents.

Before ADAMS, HUNTER and GARTH, Circuit Judges.

OPINION OF THE COURT

ADAMS, Circuit Judge.

Petitioners, pursuant to s 106(a) of the Federal Coal Mine Health and Safety Act of 1969,[FN1] seek review of an order of the Secretary of the Interior acting through the Board of Mine Operations Appeals.[FN2] Three principal issues are presented by this appeal.

FN1. 30 U.S.C. s 816(a) (1970).

FN2. Appeals Division, Office of Hearings and Appeals, Department of the Interior.

First, whether the Secretary of the Interior, acting through the Board of Mine Operations Appeals, erred in interpreting s 77.410 of the Secretary's mandatory *583 safety standards so as to require bulldozers to be equipped with back-up alarms. [FN3]

FN3. 30 C.F.R. s 77.410 (1974), promulgated by the Secretary pursuant to s 101 of the Act, 30 U.S.C. s 811 (1970), provides:

s 77.410 Mobile equipment; automatic warning devices.

Mobile equipment, such as trucks, forklifts, front-end loaders, tractors and graders, shall be equipped with an adequate automatic warning device which

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shall give an audible alarm when such equipment is put in reverse.

Second, whether the Board erred in sustaining the issuance of a notice of violation in view of the unavailability of satisfactory equipment.

Third, whether the Board erred in deciding that certain violations of the mandatory safety standards were rendered moot by the abatement of the violations prior to hearing.

A.

Petitioners are thirteen owners and operators of surface coal mines located in Butler, Clarion and Mercer Counties, Pennsylvania, whose mines are subject to the provisions of the Federal Coal Mine Health and Safety Act and to the mandatory safety standards [FN4] promulgated by the Secretary pursuant to the act. In 1971 and 1972 the Bureau of Mines of the Department of the Interior, [FN5] following the directives of s 104(b) of the Act,[FN6] caused to be issued and served on the petitioners twenty-nine notices of violations.

FN4. 30 U.S.C. s 801 et seq. (1970); 30 C.F.R. s 77-1 et seq. (1974).

FN5. Prior to 1973 the Bureau was charged with the task of enforcing the Secretary's safety regulations. This function is now administered by the Mining Enforcement and Safety Administration of the Department. 38 Fed.Reg. 18665-68 (1973).

FN6. 30 U.S.C. s 814(b) (1970).

Section 104(b) requires a mine inspector finding a violation of the mandatory safety standards not creative of an imminent danger to issue to the mine operator a notice of such violation, fixing a time for its abatement. An inspector who, by contrast, finds a condition of imminent danger must order "forthwith," under section 104(a) of the Act, [FN7] that the operator withdraw all persons from the affected area.

FN7. 30 U.S.C. s 814(a) (1970).

Twenty-five of the notices received by the petitioners related to alleged violations of s 77.410 because of the failure of the mine operators to attach to mobile equipment then being used an alarm device which activated when the equipment moved in reverse. Nineteen of the twenty-five notices of violations of s 77.410 had reference to bulldozers, and were served on nine of the petitioners. The other six notices of alleged violations of s 77.410 concerned mobile equipment other than bulldozers. As to the other types of mobile equipment, the question whether a violation of s 77.410 actually occurred is not raised in the petition. The remaining four of the twenty-nine notices of violations received by petitioners during the period in question set forth alleged violations of various of the Secretary's mandatory safety standards other than s 77.410. The fact of violation of the other safety standards also is not an issue before us.

As provided in s 105(a) of the Act,[FN8] petitioners filed applications for review by the Secretary of each of the twenty-nine notices both as to the fact of violation in the first instance, as well as to the reasonableness of the time fixed for abatement of the violations. An administrative law judge of the Hearings Division of the Office of Hearings and Appeals*584 of the Department, after holding extensive prehearing conferences, consolidated the twenty-nine applications and conducted the consolidated hearings from June 20 to 22, 1972.

FN8. 30 U.S.C. s 815(a)(1) (1970), which sets forth in part:

s 815. Review by Secretary . . .

(a)(1) An operator issued an order pursuant to the provisions of section 814 of this title . . . may apply to the Secretary for review of the order . . . An operator issued a notice pursuant to section 814(b) or (i) of this title . . . may, if he believes that the period of time fixed in such notice for abatement

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of the violation is unreasonable, apply to the Secretary for review of the notice . . .

Prior to the hearings, twelve of the twenty-nine alleged violations had been abated: five of the nineteen notices of violations of s 77.410 applicable to bulldozers, three of the six notices of violations of s 77.410 applicable to mobile equipment other than bulldozers, and all four notices of violations of various mandatory safety standards other than the s 77.410 safety standard. An attorney for the Bureau of Mines stipulated with counsel for petitioners that the Bureau would not move to dismiss, on the ground of their abatement, the twelve abated violations.

The administrative law judge, who admitted the notices of abatement into the record, appears to have honored the stipulation. In any event, he proceeded to find against the petitioners in all but one of the twenty-nine applications for review,[FN9] and petitioners appealed to the Board of Mine Operations Appeals.

FN9. Decision and order of November 19, 1973.

Following its earlier decision in *Reliable Coal Corp.*,[FN10] the Board held that the twelve applications for review of notices of abated violations should have been dismissed by the administrative law judge, that all review of notices under s 105 must relate to a determination of the reasonableness of the time fixed for abatement, and in the case of an abated violation, there remains no appropriate issue for review under s 105(a), notwithstanding the stipulation, since a stipulation cannot create a justiciable issue where none exists.[FN11]

FN10. 1 IBMA 50, 1971-1973 OSHD PP 20,515, 20,518 (1971).

FN11. Opinion and order of July 16, 1974.

The Board ratified the administrative law judge's disposition of the remaining seventeen applications, including the determination that bull-

dozers are mobile equipment subject to the requirements of s 77.410. Petitioners appealed, and we affirm.

B.

[1][2][3] The ruling that s 77.410 includes bulldozers in its coverage constitutes an interpretation of an administrative regulation that may not be set aside unless such ruling is plainly erroneous or inconsistent with the regulations.[FN12] Courts are obliged to accord great deference to an administrative agency's construction of the language of a statute which it administers and, even more clearly, the agency's interpretation of regulations it has drafted.[FN13] An agency's explication of its regulation if reasonable, therefore, is controlling despite the existence of other interpretations that may seem even more reasonable.[FN14]

FN12. *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965).

FN13. *Id.* at 16, 85 S.Ct. 792; *Budd Co. v. Occupational Safety and Health Review Comm'n*, 513 F.2d 201, 204 (3d Cir. 1975).

FN14. *Budd Co. v. Occupational Safety and Health Review Comm'n*, 513 F.2d 201, 205 (3d Cir. 1975).

Petitioners contend that the "unambiguous" wording of s 77.410 excludes bulldozers from its coverage. They maintain that bulldozers are the most common piece of equipment used by strip miners and that the several illustrative types of mobile equipment specified in s 77.410, which is a safety standard directed to strip mining, exclude bulldozers. Accordingly, they claim, bulldozers were intentionally eliminated from the section's coverage. In addition, petitioners contend that bulldozers may be distinguished from the equipment listed in s 77.410 in that bulldozers are heavier and move more slowly. Petitioners state that the administrative law judge based his decision applying s 77.410 to bulldozers on an erroneous finding that bulldozers are a type of tractor and tractors are, by

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way of example, one of the kinds of equipment referred to in s 77.410.

*585 [4] Petitioners, however, cannot deny that bulldozers are "mobile equipment" to which the section is generally applicable. The five examples set forth in s 77.410, and preceded by the words "such as," are plainly not all-inclusive as to the section's coverage. Therefore the administrator's interpretation of s 77.410 must govern what other mobile equipment will be subject to its requirements.

[5] The size, weight and velocity of bulldozers and their bearing on the particular safety hazard that s 77.410 was intended to correct are matters primarily for the expertise of the Board. Petitioners' contention that bulldozers are not similar to the listed equipment is lacking in merit since, as petitioners admit, standard dictionaries commonly define bulldozers as a type of tractor, and a tractor is one of the listed items of equipment illustrating the type of mobile equipment covered by s 77.410. The Bureau's A Dictionary of Mining, Mineral and Related Terms, 1968 edition, also defines bulldozers generally as tractors. The decision that a bulldozer is included in the class of equipment covered by s 77.410 is neither inconsistent with the language of the regulation nor with its safety purpose. Since we cannot say that the Board's interpretation of s 77.410 is unreasonable, we may not set it aside.

Petitioners also maintain that a reasonable interpretation of s 77.410 would not include bulldozers in its coverage because, they claim, the view by a bulldozer operator of the area behind the vehicle is not obstructed. In this regard petitioners rely on a 1971 coal mine inspection manual providing that certain vehicles, such as automobiles and jeeps, need not be equipped with a warning device required by s 77.410. They also rely on an Occupational Safety and Health Administration regulation [FN15] providing that certain earth-moving equipment which in contrast to automobiles and jeeps have an obstructed view to the rear be equipped with a reverse signal alarm comparable to the alarm required by s 77.410.

FN15. 29 C.F.R. s 1926.602(a)(9)(ii) (1974).

We need only say that there is nothing in s 77.410 which limits its coverage to vehicles with an obstructed view to the rear. Furthermore, a directive to the effect that vehicles such as automobiles and jeeps are not encompassed within the "mobile equipment" covered by s 77.410 unless their view to the rear is obstructed seems wholly consistent with the Board's interpretation of the section challenged by petitioners. Automobiles and jeeps are light-weight vehicles in a class that is distinct from mobile equipment such as trucks, tractors and graders included in s 77.410.

Even if we could agree, which we cannot, that the only reasonable interpretation of s 77.410 is that it be applied exclusively to vehicles with an obstructed view to the rear, there is evidence in the record that the operator of a bulldozer does not have a completely clear view to the rear.

C.

Petitioners argue that the Board is bound by a prior ruling in Buffalo Mining Co.[FN16] that unavailability of equipment that makes compliance with a safety standard impossible prohibits issuance of a notice of violation. However, there was no demonstration that back-up alarms were not available; instead petitioners contend only that "Adequate " back-up alarms were not available. "Adequate" is a word that appears in s 77.410.

FN16. 2 IBMA 226, 1973-1974 OSHD P 16,618 (1973).

[6] As previously mentioned, five of the nineteen notices of violations of s 77.410 pertaining to bulldozers were abated and notices of satisfactory abatement of them were issued to the respective petitioners before the hearings conducted by the administrative law judge began. This fact indicates that back-up alarms sufficient to satisfy the agency were available. Buffalo Mining Co., the case relied on by petitioners, dealt with *586 unavailable

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equipment, not with available but arguably unsatisfactory equipment. The word "adequate" in s 77.410 would reasonably seem to refer to the petitioners' burden to comply adequately with the section's requirements. Notices of abatement issued as to five of the violations certainly constituted evidence of such compliance.

[7] Any difficulty the petitioners have experienced in dealing with the mechanism mandated by s 77.410 must be weighed against the safety hazard which the requirement is intended to correct. This, again, is an area where the courts must defer to the expert judgment of the administrators of the Act and the regulations promulgated under it. We cannot, on this ground or on any of the grounds advanced by petitioners, say that the Board's interpretation of s 77.410 is neither congruent with the regulation or an unreasonable interpretation of it. [FN17] We accordingly affirm the Board's decision interpreting s 77.410 to include bulldozers and to apply so long as there are devices available sufficient to satisfy the agency.

FN17. See footnotes 13 & 14 Supra and accompanying text.

D.

Our discussion in parts B and C above disposes of nineteen of the twenty-nine violations under review pertaining to the Board's decision that s 77.410 is applicable to bulldozers. Of the remaining ten alleged violations, three were not abated prior to the time of the Board's decision, but petitioners raise no issue before us as to those three violations. However, as to the final seven notices of violations which were concededly abated by petitioners and on that ground dismissed by the Board, petitioners question the correctness of the Board's ruling that these infractions were rendered moot by their abatement.

[8] Petitioners would appear to acknowledge that ordinarily an abatement would eliminate a "case or controversy" between the parties, and thus render these matters moot. But they maintain that

under the doctrine of Southern Pacific Terminal Co. [FN18] there is an exception here. Under that doctrine, short-term orders capable of repetition, yet evading review are not considered dismissible on the grounds of mootness.

FN18. Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed. 310 (1911). Petitioners also cite as supporting cases: Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 94 S.Ct. 1694, 40 L.Ed.2d 1 (1974); Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); Moore v. Ogilvie, 394 U.S. 814, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969); Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969); Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968); Ginsberg v. New York, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968).

In considering the contention by petitioners that the doctrine of Southern Pacific Terminal Co., is apposite here, it is necessary to review the terms of the Act. The Act clearly contains a number of provisions for review of administrative action taken under its authority against mine operators. Thus, section 109 [FN19] provides that all violations of mandatory safety standards require the imposition of a civil penalty. The amount of the penalty is determined after a decision by the Secretary that a violation did in fact occur. A failure by an affected mine operator to pay the penalty requires the Secretary to file a petition for enforcement in a district court which then considers De novo all relevant issues not previously considered by a court of appeals under section 106.[FN20] And one of the issues would be the fact of violation.

FN19. 30 U.S.C. s 819 (1970).

FN20. 30 U.S.C. s 816 (1970).

In addition, section 105(a)(1) [FN21] permits the mine operator to apply for administrative re-

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view of an order of withdrawal [FN22] immediately after its issuance,*587 and section 106 provides for judicial review of the Secretary's decision regarding the fact of violation that caused the order of withdrawal to be issued. Section 104(b) [FN23] states that where an operator has failed to abate a violation covered by a notice in the time allowed and the inspector "finds" that the time for abatement should not be extended, the inspector shall issue an order of withdrawal. And in the latter event, the full review permitted orders of withdrawal under section 105 is available.

FN21. See footnote 8.

FN22. An order of withdrawal is an order requiring the mine operator to withdraw all persons, with certain necessary exceptions, from the violation area until a determination that the violation has been abated. 30 U.S.C. s 814(b), (d) (1970).

FN23. 30 U.S.C. s 814(b) (1970).

[9] Given these avenues of review available under the Act, the Board's interpretation of section 105 as limiting review of a notice of violation to those issues necessary to the determination of the reasonableness of the time allowed for abatement is permissible despite the Southern Pacific Exception. This is so since the Supreme Court's concern in Southern Pacific was the unavailability of any review at all of certain agency action.[FN24] It follows that the Board may consequently determine that an abatement of a notice of violation renders the notice moot.

FN24. It is conceivable that some factual configuration would bring this case within the Southern Pacific rule. No such facts have been brought to our attention in this case, however, and we therefore need not discuss that possibility.

This result is consonant with the Board's consideration of the fact of violation itself when re-

viewing unabated notices of violation. The Board reasoned that the fact of violation is an issue necessary to the determination of the reasonableness of the time fixed for abatement, stating "any time for abatement is an unreasonable time if no violation exists." [FN25] Thus, the fact of violation is subject to section 105 review where the violation remains unabated. In contrast, where a violation has been abated, the question of the reasonableness of the time fixed for abatement, with all its subsidiary issues, becomes academic.[FN26] Review would be available through a challenge to the mandatory civil penalty assessed under s 109.

FN25. Freeman Coal Corp., 1 IBMA 1, 1971-1973 OSHD P 15,367 (1970).

FN26. We consider that the Fourth Circuit in Reliable Coal Corp. v. Morton, 478 F.2d 257, 258 n. 1 (4th Cir. 1973), although it did not explicate the underlying reasoning, reached the same result. Petitioners' reliance on Eastern Assoc. Coal Corp. v. Interior Board of Mine Operations Appeals, 491 F.2d 277 (4th Cir. 1974), to arrive at a contrary conclusion would appear to be inapposite, since that case dealt with review of a withdrawal order that had been abated, and not with review of a notice of violation.

The Board's interpretation here is a particularly acceptable one in view of the safety objectives of the Act, the obvious desirability of encouraging prompt abatement of violations while still allowing ultimate review, and the necessity of limiting review in order to permit more expeditious consideration of serious grievances.[FN27] Accordingly, we conclude that the ruling of the Board that the violations abated are moot is not erroneous.

FN27. Budd Co. v. Occupational Safety and Health Rev. Comm'n, 513 F.2d 201 (3d Cir. 1975). "(T)he agency's interpretation of a regulation 'is deemed of controlling weight as long as it is one of sever-

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al reasonable interpretations . . . ' ” Id. at
205 (quoting Roy Bryant Cattle Co. v.
United States, 463 F.2d 418, 420 (5th Cir.
1972)).

The order of the Board will be affirmed.

C.A.3 1975.
Lucas Coal Co. v. Interior Bd. of Mine Operations
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18.348 Certain funds exempt when deposited in account; limitation. (1) Funds that are exempt from execution under ORS 18.358, 18.385, 238.445, 344.580, 348.863, 407.595, 411.760, 414.095, 655.530, 656.234, 657.855 and 748.207 remain exempt when deposited in an account in a financial institution as long as the exempt funds are reasonably identifiable.

(2) Subsection (1) of this section does not apply to any accumulation of funds greater than \$7,500.

(3) All funds that are exempt under federal law remain exempt when deposited in an account in a financial institution as long as the exempt funds are reasonably identifiable.

(4) The application of subsections (1) and (3) of this section is not affected by the commingling of exempt and nonexempt funds in an account. For the purpose of identifying exempt funds in an account, first in, first out accounting principles shall be used.

(5) The provisions of this section do not affect the duties of a garnishee with respect to amounts in accounts that are not subject to garnishment under ORS 18.619. [Formerly 23.166; 2005 c.381 §19; 2009 c.430 §4; 2009 c.718 §37]

704.070. (a) As used in this section:

(1) "Earnings withholding order" means an earnings withholding order under Chapter 5 (commencing with Section 706.010) (Wage Garnishment Law).

(2) "Paid earnings" means earnings as defined in Section 706.011 that were paid to the employee during the 30-day period ending on the date of the levy. For the purposes of this paragraph, where earnings that have been paid to the employee are sought to be subjected to the enforcement of a money judgment other than by a levy, the date of levy is deemed to be the date the earnings were otherwise subjected to the enforcement of the judgment.

(3) "Earnings assignment order for support" means an earnings assignment order for support as defined in Section 706.011.

(b) Paid earnings that can be traced into deposit accounts or in the form of cash or its equivalent as provided in Section 703.080 are exempt in the following amounts:

(1) All of the paid earnings are exempt if prior to payment to the employee they were subject to an earnings withholding order or an earnings assignment order for support.

(2) Seventy-five percent of the paid earnings that are levied upon or otherwise sought to be subjected to the enforcement of a money judgment are exempt if prior to payment to the employee they were not subject to an earnings withholding order or an earnings assignment order for support.

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Chapter
8. Garnishment

§ 8.34. Garnishments directed to financial institutions

A number of special rules apply to garnishments directed to a bank, savings and loan association, or credit union. By a 1988 amendment, the special requirements relating to these financial institutions were incorporated in a single section, RCWA 6.27.080.

A writ of garnishment directed to a bank, savings and loan association, or credit union that maintains branch offices may identify either the financial institution or one of its branches as the garnishee.[1] If the financial institution is named, the writ of garnishment will reach a deposit or deposits in the head office and in any branch of the institution; it will also reach earnings of the defendant if he or she is employed in the head office or in any branch.[2] If a branch of the institution is named as the garnishee, the garnishment will reach only the deposits, accounts, credits, or other personal property of the principal defendant in the possession or control of that branch (including property in a safety deposit box, which will not be reached by a garnishment directed to the institution); it will not reach earnings, even if the principal defendant is an employee of that branch.[3] The head office is considered as a separate branch for purposes of these rules.[4]

All the basic procedural steps for a general garnishment[5] apply to a garnishment directed to a financial institution or branch but with variations in the step 4 requirements for service on the garnishee:

First, information to aid in identifying the defendant must be incorporated in the writ or in a separate statement to be served with the writ. If a separate statement is used, it must be signed by the plaintiff or plaintiff's attorney. The following information is required: (1) the defendant's place of residence and business, occupation, trade, or profession; or (2) the defendant's federal tax identification number, or (3) the defendant's account number.[6] The requirements are stated in the alternative, but inclusion of all available information will provide greater assurance of quick identification of the defendant. If the required information is not provided, the service is "deemed incomplete," and the garnishee will not be liable for funds owed or property held that the garnishee fails to discover.[7] A form of informational statement appears in § 8.35.

Second, special service requirements are stated. The required personal service or certified mailing, return receipt requested,[8] must be on or directed to the manager, cashier, or assistant cashier of the branch designated as garnishee, or, if the financial institution is named as the garnishee, service must be made on the head office of the institution or a place designated by the institution for receipt of process.[9]

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