

ORS 23.185(1)
ORS 23.175(2) & (4)
ORS 23.166
ORS 29.401
Wages
Exemption

Yaden v. Robinson
In Re Robinson

BAP # OR-98-1689-KMoB
Main Case # 698-60866-aer7

11/2/99 BAP aff'g Radcliffe Published
(No underlying written bankruptcy court opinion)

The Chapter 7 Trustee appealed a ruling by the bankruptcy court that ORS 23.185(1) provided an exemption for a portion of accrued unpaid earnings. The trustee argued that ORS 23.185 was merely a limitation on the amount subject to garnishment and was not an exemption.

Held: Affirmed

Based on the text and context of Oregon's statutory scheme, especially the interplay between ORS 23.185, ORS 29.401 (continuing garnishments) and ORS 23.166 (certain nongarnishable funds "remain exempt" in deposit accounts), the BAP held that ORS 23.185(1) recognizes an exemption in a portion (per the statute) of accrued but unpaid earnings. The Panel commented that prior case law supported this conclusion.

PUBLISHED

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3 UNITED STATES BANKRUPTCY APPELLATE PANEL
4 OF THE NINTH CIRCUIT
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6 In re) BAP No. OR-98-1689-KMoB
7 KIRK PLICE ROBINSON and)
8 DEANNA LEE ROBINSON,)
9 Debtors.)

10 BOYD YADEN, Chapter 7 Trustee,
11 Appellant,

12 v.

13 KIRK PLICE ROBINSON and)
14 DEANNA LEE ROBINSON,)
15 Appellees.)

O P I N I O N **FILED**

NOV 02 1999

NANCY B. DICKERSON, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

16 Argued by Telephone Conference and Submitted
17 on July 23, 1999

18 Filed - November 2, 1999

19 Appeal from the United States Bankruptcy Court
20 for the District of Oregon

21 Honorable Albert E. Radcliffe, Bankruptcy Judge, Presiding.

22
23 Before: KLEIN, MONTALI,¹ and BRANDT, Bankruptcy Judges.
24
25
26

27 ¹ Hon. Dennis Montali, Bankruptcy Judge for the Northern District
28 of California, sitting by designation.

E99-25(10)

1 KLEIN, Bankruptcy Judge:
2

3 We must decide whether Oregon law exempts a portion of accrued
4 unpaid earnings in bankruptcy. Resolving the issue left open in
5 Osworth v. Yaden (In re Osworth), 234 B.R. 497 (9th Cir. BAP 1999), we
6 conclude that Oregon does exempt such earnings, and AFFIRM.
7

8 **FACTS**

9 The joint debtors were owed \$430.93 and \$425.39, respectively,
10 in accrued but unpaid wages at the time of bankruptcy. Treating the
11 Oregon garnishment statute as creating an exemption, they each claimed
12 75 percent - i.e., \$323.20 and \$319.04, respectively, - as exempt.
13

14 The chapter 7 trustee objected to the claim of exemption,
15 contending that the Oregon garnishment statute does not create a
16 cognizable exemption for purposes of 11 U.S.C. § 522(b)(2).
17

18 The bankruptcy court ruled for the debtors. This appeal ensued.
19

20 **ISSUE**

21 Whether Oregon's limitation on garnishment of earnings also
22 functions as an exemption for purposes of § 522(b)(2).
23

24 **STANDARD OF REVIEW AND CHOICE OF LAW**

25 The availability of state law exemptions is controlled by state
26 law and interpreted under state rules of construction. Goldman v.
27 Salisbury (In re Goldman), 70 F.3d 1028, 1029 (9th Cir. 1995). Our
28 review of questions of law is de novo. Osworth, 234 B.R. at 498.

1 DISCUSSION

2 This is a matter of Oregon statutory construction. We must
3 predict how the Oregon Supreme Court would settle the question whether
4 the earnings exclusions from garnishment are also exemptions.
5

6 I

7 Oregon's approach to statutory construction requires that we
8 first examine the text and context of the statute. If the intent of
9 the Oregon legislature is not plain from such examination, then we
10 turn to legislative history. If that does not suffice, then we resort
11 to general maxims of statutory construction. Portland Gen. Elec. Co.
12 v. Bureau of Labor & Indus., 317 Or. 606, 610-12, 859 P.2d 1143, 1145-
13 47 (1993). In this instance, we need not go beyond the first level.

14 The context is crucial and requires assembly of a three-piece
15 puzzle drawn from Oregon Revised Statutes ("ORS"): ORS 23.185
16 (limiting garnishments); ORS 29.401 (writs of continuing garnishment);
17 and ORS 23.166 (exempting certain funds in deposit accounts).
18

19 A

20 Under ORS 23.185(1), the greater of \$170.00 per week or 75
21 percent of aggregate disposable weekly earnings is excluded from
22 garnishment. The statute is couched in terms of a limitation on
23 garnishment and does not use the words "exempt" or "exemption."²
24

25 ² The relevant language of the garnishment statute is:

26 (1) Except as provided in subsections (2) and (6) of
27 this section, the maximum part of the aggregate disposable
28 earnings of an individual for any workweek that is subjected

(continued...)

1 The pertinent "earnings" consist of "compensation paid or payable
2 for personal services, whether denominated as wages, salary,
3 commission, bonus or otherwise, and includes periodic payments
4 pursuant to a pension or retirement program." ORS 23.175(2).

5 And "garnishment" is "any legal or equitable procedure through
6 which the earnings of an individual are required to be withheld for
7 payment of a debt." ORS 23.175(4).

8 Viewed in isolation, the Oregon garnishment statute is silent
9 about whether it constitutes an exemption and would present a tricky
10 question. Fortunately, Oregon's legislature has provided pertinent
11 context in the form of a statutory scheme that also includes both
12 continuing garnishment and connected exemption statutes.

13
14 B

15 The second piece of the contextual puzzle is the writ of
16 continuing garnishment provided by ORS 29.401.

17 The service of a writ of continuing garnishment constitutes a
18

19 ²(...continued)

20 to garnishment may not exceed:

21 (a) 25 percent of the individual's disposable
22 earnings for that week; ...[1991-1992 limits omitted]

23 (d) For wages payable on or after July 1, 1993, the
24 amount by which the individual's disposable earnings
25 for that week exceed \$170; or

26 (e) The amount described in paragraph (a), (b), (c)
27 or (d) of this subsection, minus any amount required to
28 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.

1 lien and continuing levy against earnings owed by the garnishee to the
2 judgment debtor at the time of the service of the writ and on all
3 earnings accruing from the garnishee within ninety days thereafter.
4 ORS 29.401.

5 Although the term "earnings" is used, the continuing garnishment
6 is strictly limited to non-exempt wages for personal services. Zidell
7 Marine Corp. v. West Painting, Inc., 322 Or. 347, 353-59, 906 P.2d
8 809, 811-15 (1995).

9 The continuing garnishment has the advantage of reducing costs
10 for employer, bill collector, and the debtors who otherwise wind up
11 having fees for issuing and serving writs before each payday added to
12 the debt. Zidell, 322 Or. at 357-58, 906 P.2d at 813-14.

13
14 C

15 The final piece of the contextual puzzle is the connected
16 exemption provided by ORS 23.166. Funds that are protected from wage
17 garnishment "remain exempt" so long as they are in the judgment
18 debtor's deposit account and are traceable:

19 23.166 Certain funds exempt when deposited in account;
20 limitations.

21 (1) All funds exempt from execution and other process
22 under ORS ..., 23.185(1)(b), (c), (d) and (e), ... shall
23 remain exempt when deposited in an account of a judgment
24 debtor as long as the exempt funds are identifiable.

25 (2) The provisions of subsection (1) of this section shall
26 not apply to any accumulation of funds greater than \$7,500.

27 ORS 23.166 (emphasis supplied).

28 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

1 exempt status once the funds are in a deposit account.

2 The connection between ORS 23.166 and ORS 23.185 that is inherent
3 in the phrase "remain exempt" represents a context in which the
4 garnishment limitation also functions as an exemption that would apply
5 in bankruptcy per § 522(b)(2). And it bespeaks legislative intent to
6 treat earnings limitations on garnishment as exemptions.

7
8 D

9 The context of the Oregon statutory scheme is that part of one's
10 pay is insulated from garnishment. In the case of wages for personal
11 services, a garnishment can operate as a continuing levy. And to the
12 extent that the protected earnings are placed in the judgment debtor's
13 deposit account, they continue to be exempt so long as they (and
14 similarly protected items) do not accumulate to more than \$7,500.

15 Under the appellant's theory, there would be a gap in the
16 protection for wages that cannot be garnished. They would be
17 protected during the time they are in the hands of the employer, not
18 exempt for any interval between the time the debtor is paid and the
19 time the debtor deposits them into a traceable account, and exempt
20 thereafter.

21 We do not believe that the Oregon legislature meant to conjure up
22 the image of Keystone creditors trying to catch judgment debtors
23 between the pay window and the bank.

24
25 II

26 Our construction of the Oregon garnishment statute as entailing
27 an unpaid earnings exemption for purposes of § 522(b)(2) is consistent
28

1 with the few reported decisions touching on the subject.
2

3 A

4 In 1982 an Oregon bankruptcy court squarely held that ORS 23.185
5 constitutes a formal Oregon exemption. In re Langley, 22 B.R. 137
6 (Bankr. D. Or. 1982). The narrow question was whether the "property
7 not otherwise exempt" exemption, ORS 23.160(1)(k), could be applied to
8 protect unpaid wages that are protected from garnishment.

9 Faithful to Oregon's requirement that the "intention of the
10 legislature is to be pursued if possible," ORS 174.020, the bankruptcy
11 court rooted about in legislative history, finding a transcript of
12 judiciary committee discussions of what became ORS 23.160(1)(k). This
13 legislative history indicated that the "property not otherwise exempt"
14 exemption could not be used to protect unpaid wages because such wages
15 were exempt under the garnishment statute. Id. at 139.

16 The linchpin of the Langley analysis, which does not appear to
17 have been undermined by subsequent amendments, is that the garnishment
18 statute does create an exemption. Hence, the separate exemption for
19 "property not otherwise exempt" does not apply.
20

21 B

22 In 1983 the bankruptcy court reiterated its analysis of the
23 Oregon garnishment statute as creating an exemption. Straight v.
24 Willamette Collection Serv., Inc. (In re Straight), 35 B.R. 445, 446-
25 47 (Bankr. D. Or. 1983); cf. In re Berry, 29 B.R. 10 (Bankr. D. Or.
26 1983) (relying on Langley).

27 Straight involved the status of the Oregon garnishment statute as
28

1 an exemption in connection with the exercise of a debtor's statutory
2 avoiding power to recover involuntary prepetition transfers of exempt
3 property. § 522(h)-(i). The court reiterated its Langley analysis
4 and permitted the debtor to avoid prepetition wage garnishments on the
5 premise that there is a valid exemption. Straight, 35 B.R. at 446-47.
6 This decision retains vitality.

7
8 C

9 Finally, the trial court in Osworth rejected our appellant's
10 argument that the garnishment statute is not an exemption statute.
11 Although our prior panel reversed on the separate ground that the
12 debtors were ineligible to claim a garnishment exemption because they
13 lacked the requisite employment relationship, it expressly left open
14 the question whether the garnishment statute creates an exemption for
15 purposes of § 522(b)(2). Osworth, 234 B.R. at 498 n.1.

16 We now decide that question, agreeing with the various courts
17 that have considered it under Oregon law: if faced with the question,
18 we predict that the Oregon Supreme Court would hold that the Oregon
19 garnishment statute creates an exemption that transcends a mere
20 limitation on garnishment.

21
22 D

23 Neither case relied on by the appellant controls Oregon law.
24

25 1

26 The appellant's reliance on a contrary decision involving
27 Tennessee's similarly-worded garnishment statute, Lawrence v. Jahn (In
28

1 re Lawrence), 219 B.R. 786 (Bankr. E.D. Tenn. 1998), is unavailing.
2 Although Tennessee's garnishment statute parallels ORS 23.185, there
3 is no analog to ORS 23.166 providing that funds exempt from
4 garnishment remain exempt after the debtor places them in a deposit
5 account. In other words, in context, it is a different scheme.

6 Moreover, even if Oregon and Tennessee had identical statutes,
7 they could have different meanings. While uniformity among states may
8 be a desideratum, our concern is limited to what the Oregon
9 legislature intended. Nothing suggests that Oregon adopted Tennessee
10 law in a subject area in which states are notoriously idiosyncratic.

11
12 2

13 Nor does the fact that Oregon's garnishment statute may have been
14 modeled on the Federal Consumer Credit Protection Act ("FCCPA"), 15
15 U.S.C. § 1671 et seq., warrant a different conclusion.

16 The appellant relies on Kokoszka v. Belford, 417 U.S. 642, 650-51
17 (1974), for the proposition that the garnishment limitations
18 prescribed by FCCPA were not intended to protect a debtor from the
19 bankruptcy trustee. Thus, a bankruptcy trustee's rights under the
20 Bankruptcy Act of 1898 trumped federal garnishment exemptions. It
21 does not follow, however, that the Oregon legislature had the same
22 intent when enacting the Oregon garnishment statute.

23 Oregon has plenary authority over its own law of exemptions.
24 Such exemptions are honored in bankruptcy per § 522(b)(2), regardless
25 of whether a state exercises its right under § 522(b)(1) to "opt out"
26 of the federal bankruptcy exemptions.

27 While ORS 23.185 may track the FCCPA, this does not mean that
28

1 Oregon may not also use its garnishment statute to create an exemption
2 good in bankruptcy if it so chooses. We conclude that it has done so.

3 Hence, a portion of the debtors' unpaid wages can properly be
4 claimed as exempt in bankruptcy under ORS 23.185 and § 522(b)(2).

5
6 **CONCLUSION**

7 The interest of consistency with prior local decisions and the
8 appearance of the phrase "remain exempt" within the statutory scheme
9 combine to warrant the conclusion that the Oregon garnishment statute
10 is also an exemption statute for purposes of § 522(b)(2). We AFFIRM.