

11 U.S.C. § 522(f) (1) (A)
judicial lien
support judgment

In re Ulledahl, Case No. 398-38715-elp7, BAP No. 99-1376

12/15/99

BAP, aff'g ELP

Unpublished

The BAP affirmed Judge Perris's ruling that a lien that arose out of a marital dissolution judgment could not be avoided pursuant to § 522(f) (1) as impairing debtor's homestead exemption. The dissolution court awarded debtor property that had been acquired and jointly owned during the marriage, but which was held solely in debtor's name by the time of the divorce. It also entered a money judgment for attorney fees. Although the debtor held real property in his own name before the dissolution, debtor's counsel conceded that, under Oregon law, the dissolution court had equitable power to reorder the debtor's interest in the property. Therefore, debtor's interest in the property was created simultaneously with the creation of the judgment lien, and under Farrey v. Sanderfoot, 500 U.S. 291 (1991), debtor could not use § 522(f) (1) to avoid wife's interest in the property.

With regard to a second lien arising out of a contempt judgment, the BAP affirmed Judge Perris's finding that the judgment was in the nature of support, and therefore could not be avoided under § 522(f) (1) (A).

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3 **NOT FOR PUBLICATION**

4 **UNITED STATES BANKRUPTCY APPELLATE PANEL**
5 **OF THE NINTH CIRCUIT**
6

7 In re) BAP No. OR-99-1376-MeRyK
8 JOEL HOWARD ULLEDAHL,)
9 Debtor.) Bk. No. 398-38715-elp7
10 _____)
11 JOEL HOWARD ULLEDAHL,)
12 Appellant,)
13 v.) **MEMORANDUM¹ FILED**
14 CHERYL VOLKENAND,)
15 Appellee.)

DEC 15 1999

16 Argued and Submitted on October 21, 1999, at Portland, Oregon
17 NANCY B. DICKERSON, CLERK
18 U.S. BKCY. APP. PANEL
19 OF THE NINTH CIRCUIT

20 Filed - December 15, 1999

21 Appeal from the United States Bankruptcy Court
22 for the District of Oregon

23 Honorable Elizabeth L. Perris, Bankruptcy Judge, Presiding
24 _____

25 Before: MEYERS, RYAN and KLEIN, Bankruptcy Judges.
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27 _____
28 ¹ This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except when relevant under the doctrines of the law of the case, res judicata or collateral estoppel. See BAP Rule 13 & Ninth Circuit Rule 36-3.

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I

The debtor moved to avoid two liens arising from a marital dissolution. The court denied the motion. It found that one lien was created simultaneously with the creation of the Debtor's interest in the property. It found the other lien was in the nature of support.

AFFIRMED.

II

FACTS

Joel Howard Ulledahl ("Debtor") filed for bankruptcy under Chapter 7 of the Bankruptcy Code in November 1998. He then filed a motion to avoid two judicial liens that arose out of a marital dissolution. He claimed the liens impaired his homestead exemption. Cheryl Volkenand ("Volkenand"), the Debtor's former wife, objected to the motion.

There are two judgments underlying the liens. In the first judgment ("First Judgment"), Volkenand was awarded \$12,000 in attorneys' fees on May 21, 1997. In a supplemental judgment arising out of a contempt proceeding ("Contempt Judgment"), Volkenand was awarded \$7,543 in additional attorney fees plus \$392.60 in costs.

Volkenand argued that the First Judgment was not avoidable pursuant to Farrey v. Sanderfoot, 500 U.S. 291 (1991), because the interest was created simultaneously with the Debtor's acquisition of his interest in the property. Alternatively, she argued that the First Judgment was in the nature of support and could not be

1 avoided pursuant to Section 522(f)(1)(A). She also argued that
2 this reasoning applied to the Contempt Judgment, that it too was in
3 the nature of support.

4 The parties do not dispute the facts. While still married,
5 the Debtor and wife acquired and jointly owned certain real
6 property in Bend, Oregon ("Property"). Prior to the divorce, the
7 Debtor became the sole owner of the Property when Volkenand deeded
8 her interest to the Debtor in exchange for \$10,000.

9 The marriage dissolution occurred in May 1997, at which time
10 the family court was asked to make an equitable distribution of
11 property. The dissolution judgment awarded the Debtor the
12 Property, while giving Volkenand other real property that she held
13 solely in her name. The family court recognized that the Debtor
14 had received a greater share of assets and therefore awarded
15 Volkenand a judgment of \$12,000 for her attorneys' fees. The court
16 specifically found that this amount was "less than the amount to
17 which [she] would otherwise be entitled to as an equalizing
18 judgment for property division"

19 Claims of contempt against the Debtor brought by Volkenand
20 were heard by the family court in November 1997. The court found
21 that the Debtor failed to meet certain provisions of the
22 dissolution judgment regarding visitations, child support and
23 transfers of personal property. This led to the Contempt Judgment.

24 When the Debtor filed for bankruptcy a year later, he listed
25 the Property at a value of \$141,000, and claimed a homestead
26 exemption of \$25,000. He also asserted that there were two deeds
27 of trust securing debts of \$89,529 and \$35,466, for a total of

1 \$124,995 in encumbrances. He then moved to avoid Volkenand's
2 judgment liens on the basis that they impaired his homestead
3 exemption. Volkenand did not dispute the Debtor's valuation of the
4 Property. Nor does she dispute that her liens impair the
5 exemption.

6 The bankruptcy court concluded that Farrey v. Sanderfoot
7 applied to the First Judgment, that the Debtor obtained his
8 interest in the Property simultaneously with the fixing of the
9 judicial lien based on the First Judgment. It also concluded that
10 the judicial lien based on the Contempt Judgment secured a debt
11 that was in the nature of support and could not be avoided.

12 13 III

14 STANDARD OF REVIEW

15 The bankruptcy court's conclusions of law are reviewed de
16 novo. In re Lam, 211 B.R. 36, 38 (9th Cir. BAP 1997). Factual
17 findings are reviewed under a clearly erroneous standard. In re
18 Chang, 163 F.3d 1138, 1140 (9th Cir. 1998).

19 20 IV

21 DISCUSSION

22 A. Debtor Cannot Avoid First Judgment Under Sanderfoot

23 Under Farrey v. Sanderfoot, "the critical inquiry remains
24 whether the debtor ever possessed the interest to which the lien
25 fixed, before it fixed. If he or she did not, § 522(f)(1) does not
26 permit the debtor to avoid the fixing of the lien on that
27 interest." 500 U.S. at 299. The Debtor argues that he was the

1 sole owner of the Property at the time of the dissolution, and the
2 dissolution judgment did not affect his ownership interest in any
3 way. He argues that Sanderfoot does not apply since he owned the
4 entire interest prior to the creation of the lien.

5 The court concluded that because the family court had the
6 equitable power to reorder the Debtor's interest in the Property, a
7 point that Debtor's counsel conceded at the hearing before the
8 bankruptcy court, that the Debtor's interest was effectively
9 created at the same time as the lien by way of the dissolution
10 judgment.

11 The court pointed to a series of cases in support of this
12 conclusion. In re Foss, 200 B.R. 660 (9th Cir. BAP 1996) (applying
13 Washington law); In re Barnes, 198 B.R. 779 (9th Cir. BAP
14 1996) (California law); In re Yerrington, 144 B.R. 96 (9th Cir. BAP
15 1992), aff'd, 19 F.3d 32 (9th Cir. 1994) (Alaska law).

16 In Foss, the Panel concluded that although the debtor owned
17 the property in question as his sole property and had acquired that
18 interest prior to the marriage, under Washington law the divorce
19 court could reorder the parties' interests in the subject property,
20 and therefore Sanderfoot applied and the lien could not be avoided.

21 In Barnes, the Panel concluded that the divorce court has the
22 power to reorder the parties' interests in property, and therefore,
23 the dissolution judgment created new interests to which the ex-
24 spouse's lien would attach. Accordingly, it held that Section
25 522(f)(1) could not be used to avoid the judicial lien in that
26 case.

27 In Yerrington, the debtor owned the subject property prior to
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1 the marriage and continued to hold it solely in his name throughout
2 the marriage. The Panel held that Alaska law allowed the divorce
3 court to reorder the parties' interests for an equitable result
4 even if this meant invading one spouse's property interests, and
5 therefore, the dissolution decree destroyed the previous interests
6 of the parties and created new ones. The fact that the husband had
7 an interest in the property both before and after the dissolution
8 decree was not determinative.

9 Again, at the hearing before the bankruptcy court, the
10 Debtor's counsel conceded that the family court had the equitable
11 power to reorder the parties' interests in the Property even though
12 the Debtor held title solely in his name. The Debtor argues that
13 the above cases should not apply because those states, unlike
14 Oregon, are community property states.

15 The bankruptcy court correctly rejected this argument because
16 this ignores the fact that, based on the family court's power to
17 reorder the interests in the Property, Volkenand had an equitable
18 interest in the Property that was destroyed when the dissolution
19 judgment was entered. At the same time, the Debtor's interest in
20 the Property was newly created free of Volkenand's equitable
21 interest, but subject to the judicial lien created simultaneously
22 with the Debtor's new interest. The court's equitable power and
23 Volkenand's equitable interest existed under Oregon law and were
24 not affected by the fact that Oregon is not a community property
25 state.

26 The bankruptcy court correctly held that Sanderfoot was
27 applicable pursuant to the reasoning of Foss, Barnes and

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1 Yerrington. The Debtor could not avoid the First Judgment.

2 B. Contempt Judgment Cannot Be Avoided

3 The bankruptcy court recognized that in determining if a debt
4 was in the nature of support the court was to consider the need of
5 the recipient spouse, the presence of minor children, any imbalance
6 in the relative income of the parties and whether the obligation
7 terminated on the death or remarriage of the recipient spouse. In
8 re Gibson, 103 B.R. 218, 221 (9th Cir. BAP 1989). The bankruptcy
9 court also held that "[w]here the judgment is a result of post-
10 dissolution proceedings, the court should consider the character of
11 the underlying action." (citing to In re Ray, 143 B.R. 937 (D.Colo.
12 1992)). Furthermore, it held that "if fees are awarded in a
13 contempt proceeding to enforce a support obligation, the award is
14 considered to be in the nature of support." (citing to In re
15 Sinewitz, 166 B.R. 786 (Mass. 1994)).

16 The court concluded that the Contempt Judgment was in the
17 nature of support because it was awarded in a proceeding to enforce
18 support and visitation provisions of the dissolution judgment.
19 Furthermore, the issues raised by the Debtor that were litigated at
20 the same time went to issues concerning the well-being of the
21 children. The court also found that the state court made its award
22 based, in part, on the financial need of Volkenand.

23 The Debtor's argument is that the Contempt Judgment had more
24 to do with a sanction than it had to do with compensation or
25 support. The Debtor fails to demonstrate that the court's findings
26 of fact are clearly in error or that the court reached an erroneous
27 conclusion of law.

1 The family court hearing was focused on issues of child
2 support and welfare, and Volkenand was able to adequately
3 demonstrate financial need. The court correctly ruled that the
4 Debtor could not avoid the lien arising from the Contempt Judgment.

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6 V

7 CONCLUSION

8 The court correctly ruled that the First Judgment created new
9 interests to which Volkenand's lien attached. Accordingly,
10 pursuant to Sanderfoot, the Debtor could not avoid the related
11 lien.

12 Furthermore, the court correctly held that the Contempt
13 Judgment was in the nature of support. Therefore, the Debtor could
14 not avoid the lien arising from that judgment.

15 **AFFIRMED.**

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