

2007

# Janerae F. Smith v. R. Kimball Mosier : Brief of Appellant

Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH

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In re: Janerae R. Smith,

Debtor.

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JANERAE F. SMITH,

Appellant,

v.

R. KIMBALL MOSIER, Trustee,

Appellee.

Case No. 20070892-SC  
Bankruptcy No. 06-24973  
(Chapter 7)

BRIEF OF APPELLANT

On Certification of Question of State Law

From The Bankruptcy Appellate Panel of the Tenth Circuit

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UTAH APPELLATE COURTS

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## **STATEMENT OF THE BASIS OF APPELLATE JURISDICTION**

The United States Bankruptcy Appellate Panel (BAP) for the Tenth Circuit, on its own motion, in accordance with Utah R. App. P. 41, submitted a request to the Utah Supreme Court to exercise its discretion to accept a certified question of Utah law in connection with an appeal in this case then pending before the BAP. This Court issued an Order of Acceptance on December 17, 2007.

## **STATEMENT OF THE ISSUES PRESENTED AND APPLICABLE STANDARD OF REVIEW**

“Whether, pursuant to Utah Code Anno. § 78-23-9 (1953), monies refunded to a taxpayer as an overpayment of taxes are exempt when the monies with which the tax deposit was made were exempt.”

There is no factual dispute. The certified issue is a question of law subject to *de novo* review.

## **DETERMINATIVE STATUTE**

Utah Code Anno. § 78-23-9. Exemption of proceeds from property sold, taken by condemnation, lost, damaged, or destroyed -- Tracing exempt property and proceeds.

(1) (a) An individual who owned property described in this Subsection (1) is entitled to an exemption of proceeds that are traceable for one year after the compensation for the property is received if:

(i) (A) the property, or a part of the property, could have been claimed exempt under Subsection 78-23-5(1)(a)(i) or (ii); or

(B) the property is personal property subject to a value limitation under Subsection 78-23-8(1)(a), (b), or (c); and

(ii) the property has been:

(A) sold or taken by condemnation; or

(B) lost, damaged, or destroyed; and

(C) the owner has been compensated for the property.

(b) The exemption of proceeds under this Subsection (1) does not entitle the individual to claim an aggregate exemption in excess of the value limitation otherwise allowable under Section 78-23-3 or 78-23-8.

(2) Money or other property exempt under Subsection 78-23-5(1)(a)(iii), (iv), (v), (vi), (vii), (xiii), or (xiv) remains exempt after its receipt by, and while it is in the possession of, the individual or in any other form into which it is traceable.

(3) Money or other property and proceeds exempt under this chapter are traceable under this section by application of:

(a) the principle of:

(i) first-in first-out; or

(ii) last-in last-out; or

(b) any other reasonable basis for tracing selected by the individual.



## **STATEMENT OF THE CASE**

This is a bankruptcy case originated by the Debtor/Appellant filing a voluntary petition under Chapter 7 of the United States Bankruptcy Code in the Bankruptcy Court for the District of Utah. The Appellee, who was appointed as the Chapter 7 trustee in this case, objected to the Debtor/Appellant's claim that over-withheld exempt pension monies received back by her from the tax authorities (tax refunds) remained exempt under Utah law. The Bankruptcy Court sustained the Appellee/Trustee's objection to her exemption claim without addressing the Utah tracing statute. Appeal was timely taken to the Bankruptcy Appellate Panel for the Tenth Circuit, which certified the present question for determination by this Court.

## **STATEMENT OF FACTS**

As presented in the Certification of Question of State Law by the three judge panel of the Bankruptcy Appellate Panel for the Tenth Circuit, the facts are stated as follows:

The facts relevant to this matter are undisputed. In 2006 Appellant/Debtor Janerae F. Smith's only source of income was distribution from social security and qualified pension plans ("exempt income") in the approximate amount of \$50,031.00. On December 22, 2006, Smith filed a case under Chapter 7 of the Bankruptcy Code. Appellee, R. Kimball Mosier was appointed Chapter 7 Trustee ("Trustee").

Smith's income tax liability for 2006 was \$3,746.00; however she withheld \$7,058.00 from the exempt income she received and deposited these monies with the tax authorities. When filing her tax returns, Smith discovered that she had overpaid her tax liability and was entitled to a \$3,312.00 refund. Subsequently, she filed an Amended Schedule B in her bankruptcy case, simultaneously claiming that amount exempt under Utah Code Anno. § 78-23-5(1)(xiv) as traceable proceeds from an exempt fund.

### **SUMMARY OF ARGUMENT**

Pension monies are this retired Debtor/Appellant's only source of income. Such retirement income type funds are exempt from creditor attachment. And, to give debtors further protection for this specific type of property, the Utah legislature provided that such money remains exempt "in any other form into which it is traceable." It doesn't matter that the funds can no longer be labeled as a pension or retirement asset. It doesn't matter where they are. Debtor/Appellant's pension funds were once indisputably exempt, and because they are traceable on a "reasonable basis," they still remain exempt today. Reference to case law concerning characterization is misplaced. The exemption was properly claimed.

## ARGUMENT

Retirement funds of a debtor are exempt under Utah law from creditor attachment and execution. That exemption serves an importance public purpose of protecting the often very limited income of retired individuals from creditor claims. Utah Code Anno. § 78-23-9 provides that the exemption is retained if the funds are traceable into another form. The Bankruptcy Court for the District of Utah, in the case below referred to three opinions as justification for denial of Debtor/Appellant's claimed exemption. Each of those cases, and many like them, ask whether an asset retains an exemption after its **character** has been changed by a transfer or modification into another form. None of those cases involved an additional statute mandating that exemption continue into the changed form if it can be traced into the new asset. Just such a statute exists here, but it was not considered by the bankruptcy court. That was error. The Bankruptcy Appellate Panel for the Tenth Circuit has now certified the question of interpretation of Utah's tracing statute for decision by this Court. The language is plain:

(2) *Money or other property exempt under* Subsection 78-23-5(1)(a)(iii), (iv), (v), (vi), (vii), (xiii), or (xiv) *remains exempt* after its receipt by, and while it is in the possession of, the individual *or in any other form into which it is traceable*.

(3) Money or other property and proceeds exempt under this chapter are traceable under this section by application of:

(a) the principle of:

(i) first-in first-out; or

(ii) last-in last-out; or

(b) any other reasonable basis for tracing selected by the individual.

Utah Code Anno. § 78-23-9 (emphasis added).

Here, the original funds were exempt because they constituted “money or other assets held for, or payable to, the individual as a participant or beneficiary from or an interest of the individual as a participant or beneficiary in a retirement plan or arrangement that is described in Section 401(a) [or] 414(d)...” Utah Code Anno. § 78-23-5(1)(a)(xiv). The Debtor/Appellant does not contend that the funds forever remained the type of assets described in (a)(xiv) – or that they retained forever the same characterization. She does not need to. Instead, the Utah legislature anticipated the probability that exempt assets may be converted into otherwise non-exempt assets. To give further protection, the lawmakers provided specific additional protection to certain favored classes of the original exempt assets. The Debtor/Appellant’s retirement funds are within that protection. They are in one of the favored categories or classes that are traceable. So long as they are traceable on a reasonable basis<sup>1</sup>, the exemption must be allowed, regardless

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<sup>1</sup>During the relevant time period, the Debtor had not either paid in, or received out, from the tax authorities, any other amounts besides the \$3,746 of taxes paid, and \$3,312 of over-withheld amounts. All such amounts derived from her pensions. Under either of the statutory specified tracing methods, FIFO or LIFO, the \$3,312 amount to be returned to her by the taxing authorities is traceable to, and clearly came from, the Debtor’s retirement funds.

of the present location<sup>2</sup> or characterization.

“When a Utah statute grants an exemption, the Utah Supreme Court has consistently applied a liberal construction in favor of debtors to protect debtors and their families from hardship. *Miller v. Givan*, 7 Utah 2d 380, 325 P. 2d 908 (1958); *Spangler v. Corless*, 61 Utah 88, 211 P. 692 (1922); *Lindquist v. Clayton*, 54 Utah 79, 179 P. 655 (1919).” *In re Neiheisel*, 32 B.R. 146, 167-168 (Bankr. D. Utah 1983) (the *Neiheisel* opinion contains a lengthy and scholarly analysis of exemption laws by Chief Bankruptcy Judge Glen E. Clark, District of Utah).

The Debtor’s social security and pension payment amounts were all exempt when and as received during 2006, and the court should properly determine that they remain exempt today, in the form of the refund she receives back from the tax authorities. Conclusions of law are reviewed de novo. *Pierce v. Underwood*, 487 U.S. 552, 558, 101 L. Ed. 2d 490, 108 S. Ct. 2541 (1988); *Dunivent v. Bechtoldt (In re Bechtoldt)*, 210 B.R. 599, 600 (Bankr. Fed. App. 1997); *Waddoups v. Amalgamated Sugar Co.*, 2002 UT 69 (UT 2002).

The Bankruptcy Court for the District of Utah in this case below, referred in its ruling to three cases, which are summarized and distinguished below.

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<sup>2</sup>If the Debtor had chosen to reduce or eliminate her income tax withholding she could have deposited those funds into a bank account. Since she had no other source of income, all of her additional bank deposits for the reduced or eliminated withholding would be traceable clearly and directly from the retirement funds. The fact that her retirement funds were deposited with the tax authorities, simply a different location, name, and form, should not alter that result.

In *Carbaugh v. Carbaugh (In re Carbaugh)*, 278 B.R. 512, 521 (10<sup>th</sup> Cir. BAP 2002), the Trustee and that Debtor's ex-wife both objected to an exemption claimed with respect to the \$51,000 portion of a lump sum retirement distribution placed by the Debtor in an investment account. Seeking to reverse the Bankruptcy Court disallowance of his exemption claim, that Debtor argued under both federal and state law that the exemption should be traceable to its origin essentially on equitable principles. The BAP rejected these arguments, finding no exemption under ERISA, the Kansas retirement exemptions statute, or the Kansas wage garnishments statute. None of those statutes contain an accompanying tracing provision as does the Utah statute. However, the BAP did footnote:

Additionally, we note that it is unsettled in Kansas whether the Debtor could even claim an exemption on wages after they were placed in a checking account. Compare *In re Adcock*, 264 B.R. 708 (D. Kan. 2000) (finding that under the wage garnishment exemption statute, a debtor could claim an exemption on wages only until they were deposited in a debtor's checking account, reasoning that after the wages were deposited they lost their character as earnings on the grounds that 60-2310(b) protects only those wages held by the employer), with *In re Urban*, 262 B.R. 865, 870 (Bankr. D. Kan. 2001) (disagreeing with *Adcock* and finding that Kan. Stat. Ann. 60-2310 provides an exemption for wages that have been deposited in a checking account until they are untraceable or commingled).

*Carbaugh*, 278 B.R. at 524 (footnote 10).

Thus, even without a specific comparable tracing statute, some courts extend an exemption to traceable proceeds. Reference to case law and such equitable concepts and

principles is not needed here, however, because there is a clearly controlling statute, Utah Code Anno. § 78-23-9, which expressly requires tracing.

The bankruptcy court below also referred to *Dickerson v. Manchester (In re Dickerson)*, 227 B.R. 742, 743 (10<sup>th</sup> Cir. BAP 1998), where the following question is answered by the BAP:

Are funds that a debtor receives from the United States as a result of qualifying for an earned income credit "earnings from personal service" as used in Okla. Stat. tit. 31, § 1.1.A, and thus property that is exempt from administration in this bankruptcy estate? We conclude the funds are not earnings from personal services and are not exempt under Oklahoma law. We therefore affirm the ruling of the bankruptcy court.

Finally, in *Manchester v. Annis (In re Annis)*, 229 B.R. 802, 805 (10<sup>th</sup> Cir. BAP 1999), the bankruptcy court had held that the tax refund was exempt under the Oklahoma hardship exemption for earnings from personal services, finding that “monies retain their status as earnings albeit in the possession of the government.” Again, the focus in *Annis* was on status, location, or characterization, not tracing. Because tracing was not involved, the BAP quite correctly reversed the bankruptcy court concluding “that the Debtor's tax refund in this case is not ‘earnings from personal services’ within the meaning of the Oklahoma statute and the Debtor's claimed exemption must be denied.” 229 B.R. at 805.

The Debtor/Appellant here has absolutely no disagreement with the principles set forth in *Carbaugh*, *Dickerson*, and *Annis*. But, they are simply not applicable. None of those cases involved a state statute specifically providing for tracing of exempt funds into a different form or location. Utah does. Utah Code Anno. § 78-23-9, specifically provides that money from an

otherwise exempt pension fund “*remains exempt ... in any other form into which it is traceable.*” Accordingly, reference to cases focusing on the “form” or “status” of the asset, rather than on tracing it, is misplaced. Instead, “[i]t is well established that when the statute's language is plain, the sole function of the courts - at least where the disposition required by the text is not absurd - is to enforce it according to its terms.” (Internal quotation marks and citations omitted.). *Hodes v. Jenkins (In re Hodes)*, 308 B.R. 61, 68-69 (10<sup>th</sup> Cir. BAP 2004); quoting *Lamie v. United States Trustee*, 540 U.S. 526, 157 L. Ed. 2d 1024, 124 S. Ct. 1023, 1030 (2004).

The meaning of Utah Code Anno. § 78-23-9 is plain. This court should answer the certified question and interpret the statute according to its plain terms, finding that the Debtor/Appellant’s pension funds are traceable and therefore remain exempt.

When interpreting a statute, the language of the statute is first examined. *Zeigler Eng'g Sales, Inc. v. Cozad (In re Cozad)*, 208 B.R. 495 (10<sup>th</sup> Cir. BAP 1997) (citing *Dalton v. Internal Revenue Service*, 77 F.3d 1297, 1299 (10<sup>th</sup> Cir. 1996)). Language is given its common meaning if the unambiguous statutory language is not defined and the result is not absurd or contrary to the legislative purpose. *Id.* (citing *Dalton*, 77 F.3d at 1299). When interpreting exemption statutes, the interpretation must further the spirit of such laws. Specifically the court must be “guided by the general principle that exemption statutes are to be liberally construed so as to effect their beneficent purposes.” [Citations omitted]

*Dunivent v. Bechtoldt (In re Bechtoldt)*, 210 B.R. 599, 601 (10<sup>th</sup> Cir. BAP 1997); see also: *Miller v. Givan*, 7 Utah 2d 380, 325 P. 2d 908 (1958); *Spangler v. Corless*, 61 Utah 88, 211 P. 692 (1922); *Lindquist v. Clayton*, 54 Utah 79, 179 P. 655 (1919).



The language of Utah Code Anno. § 78-23-9 is “unambiguous,” and the result sought in the Bankruptcy Court by the Debtor/Appellant is consistent with “the general principle that exemption statutes are to be liberally construed so as to effect their beneficent purposes.” Pensions were Debtor/Appellant’s only source of income and only source of tax refunds. The funds at issue here are traceable only to the pensions. The legislature decreed that they should remain exempt. The Bankruptcy Court below made an erroneous legal conclusion in ignoring the statutory tracing provision and improperly focusing instead on irrelevant cases that concern characterization. The Trustee’s objection concerning Debtor/Appellant’s traceable funds in the amount of \$3,312 should ultimately be rejected, and the lower court’s legal conclusion reversed. To get there, this Court should now answer the certified question in the affirmative, interpreting the plain language of the statute so that tax refunds from an exempt source remain exempt from creditor attachment or execution when returned to the taxpayer from the tax authorities.

### CONCLUSION

The Debtor/Appellant prays that the Utah State Supreme Court answer the certified question by determining that her pension monies are traceable into her tax refund, and should therefore continue to be exempt.

DATED this 5<sup>TH</sup> day of March, 2008

  
DAVID L. MILLER  
Attorney for Debtor/Appellant

ADDENDUM – Text of Relevant Statutes:

§ 78-23-9. Exemption of proceeds from property sold, taken by condemnation, lost, damaged, or destroyed -- Tracing exempt property and proceeds

(1) (a) An individual who owned property described in this Subsection (1) is entitled to an exemption of proceeds that are traceable for one year after the compensation for the property is received if:

(i) (A) the property, or a part of the property, could have been claimed exempt under Subsection 78-23-5(1)(a)(i) or (ii); or

(B) the property is personal property subject to a value limitation under Subsection 78-23-8(1)(a), (b), or (c); and

(ii) the property has been:

(A) sold or taken by condemnation; or

(B) lost, damaged, or destroyed; and

(C) the owner has been compensated for the property.

(b) The exemption of proceeds under this Subsection (1) does not entitle the individual to claim an aggregate exemption in excess of the value limitation otherwise allowable under Section 78-23-3 or 78-23-8.

(2) Money or other property exempt under Subsection 78-23-5(1)(a)(iii), (iv), (v), (vi), (vii), (xiii), or (xiv) remains exempt after its receipt by, and while it is in the possession of, the individual or in any other form into which it is traceable.

(3) Money or other property and proceeds exempt under this chapter are traceable under this section by application of:

(a) the principle of:

(i) first-in first-out; or

(ii) last-in last-out; or

(b) any other reasonable basis for tracing selected by the individual.

HISTORY: C. 1953, 78-23-9, enacted by L. 1981, ch. 111, § 9; 1989, ch. 19, § 2; 1998, ch. 13, § 96; 2005, ch. 234, § 2.

NOTES:

AMENDMENT NOTES. --The 1998 amendment, effective May 4, 1998, updated the subsection references in Subsections (1) and (2).

The 2005 amendment, effective May 2, 2005, rewrote Subsection (1) without substantial change; substituted "(vii), (xiii), or (xiv)" for "or exempt to the extent reasonably necessary for support under Section 78-23-6" in Subsection (2); and subdivided Subsection (3).

§ 78-23-5. Property exempt from execution

- (1) (a) An individual is entitled to exemption of the following property:
- (i) a burial plot for the individual and the individual's family;
  - (ii) health aids reasonably necessary to enable the individual or a dependent to work or sustain health;
  - (iii) benefits the individual or the individual's dependent have received or are entitled to receive from any source because of:
    - (A) disability;
    - (B) illness; or
    - (C) unemployment;
  - (iv) benefits paid or payable for medical, surgical, or hospital care to the extent they are used by an individual or the individual's dependent to pay for that care;
  - (v) veterans benefits;
  - (vi) money or property received, and rights to receive money or property for child support;
  - (vii) money or property received, and rights to receive money or property for alimony or separate maintenance, to the extent reasonably necessary for the support of the individual and the individual's dependents;
  - (viii) (A) one:
    - (I) clothes washer and dryer;
    - (II) refrigerator;
    - (III) freezer;
    - (IV) stove;
    - (V) microwave oven;
    - (VI) sewing machine;(B) all carpets in use;
  - (C) provisions sufficient for 12 months actually provided for individual or family use;
  - (D) all wearing apparel of every individual and dependent, not including jewelry or furs;
- and
- (E) all beds and bedding for every individual or dependent;
  - (ix) except for works of art held by the debtor as part of a trade or business, works of art:
    - (A) depicting the debtor or the debtor and his resident family; or
    - (B) produced by the debtor or the debtor and his resident family;
  - (x) proceeds of insurance, a judgment, or a settlement, or other rights accruing as a result of bodily injury of the individual or of the wrongful death or bodily injury of another individual of whom the individual was or is a dependent to the extent that those proceeds are compensatory;
  - (xi) the proceeds or benefits of any life insurance contracts or policies paid or payable to the debtor upon the death of the spouse or children of the debtor, provided that the contract or policy

has been owned by the debtor for a continuous unexpired period of one year;

(xii) the proceeds or benefits of any life insurance contracts or policies paid or payable to the spouse or children of the debtor upon the death of the debtor, provided that the contract or policy has been in existence for a continuous unexpired period of one year;

(xiii) proceeds and avails of any unmatured life insurance contracts owned by the debtor, excluding any payments made on the contract during the one year immediately preceding a creditor's levy or execution;

(xiv) except as provided in Subsection (1)(b), any money or other assets held for or payable to the individual as a participant or beneficiary from or an interest of the individual as a participant or beneficiary in a retirement plan or arrangement that is described in Section 401(a), 401(h), 401(k), 403(a), 403(b), 408, 408A, 409, 414(d), or 414(e), Internal Revenue Code; and

(xv) the interest of or any money or other assets payable to an alternate payee under a qualified domestic relations order as those terms are defined in Section 414(p), Internal Revenue Code.

(b) The exemption granted by Subsection (1)(a)(xiv) does not apply to:

(i) an alternate payee under a qualified domestic relations order, as those terms are defined in Section 414(p), Internal Revenue Code; or

(ii) amounts contributed or benefits accrued by or on behalf of a debtor within one year before the debtor files for bankruptcy. This may not include amounts directly rolled over from other funds which are exempt from attachment under this section.

(2) The exemptions in Subsections (1)(a)(xi), (xii), and (xiii) do not apply to proceeds and avails of any matured or unmatured life insurance contract assigned or pledged as collateral for repayment of a loan or other legal obligation.

(3) Exemptions under this section do not limit items that may be claimed as exempt under Section 78-23-8.

HISTORY: C. 1953, 78-23-5, enacted by L. 1981, ch. 111, § 5; 1989, ch. 19, § 1; 1997, ch. 138, § 2; 1999, ch. 370, § 2; 2004, ch. 135, § 2; 2005, ch. 234, § 1.

#### NOTES:

AMENDMENT NOTES. --The 2004 amendment, effective May 3, 2004, added the last sentence in Subsection (1)(b)(ii).

The 2005 amendment, effective May 2, 2005, added Subsections (1)(a)(vii), (1)(a)(xi) to (xiii), and (2), and made related and stylistic changes throughout.

CERTIFICATE OF SERVICE

I hereby certify that on this 5<sup>th</sup> day of **March, 2008**, I electronically served as indicated below, a correct copy of the foregoing Brief with its accompanying Appendix, to the following persons, each of whom has previously consented to be served by electronic means, and additionally mailed the same by first class mail.

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