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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6 In re:) BAP No. MT-11-1366-JuMkH
7)
7 BARRON D. PARKS and LINDA R.) Bk. No. 11-60050
PARKS,)
8)
Debtors.)
9)

10 BARRON D. PARKS; LINDA R.)
PARKS,)
11)
Appellants,)
12)
v.) **O P I N I O N**
13)
14 ROBERT G. DRUMMOND, Chapter 13)
Trustee,)
15)
Appellee.)

16)

Argued and Submitted on June 14, 2012
at Boise, Idaho

Filed - August 6, 2012

Appeal from the United States Bankruptcy Court
for the District of Montana

Hon. Ralph B. Kirscher, Chief Bankruptcy Judge, Presiding

22 _____
23 Appearances: Craig D. Martinson, Esq., of Patten, Peterman,
24 Bekkedahl & Green, PLLC, argued for Appellants;
25 Appellee Robert G. Drummond, Esq., chapter 13
trustee, argued pro se; William A. McNeal, Esq.,
of Becket & Lee LP on brief for eCast Settlement
Corp. as amicus curiae supporting appellee.
26 _____

27 Before: JURY, MARKELL, and HOLLOWELL, Bankruptcy Judges.
28

1 JURY, Bankruptcy Judge:

2
3 Relying on § 541(b)(7)(A)¹, above-median chapter 13
4 debtors, Barron and Linda Parks, calculated their disposable
5 income by deducting voluntary postpetition 401(k) contributions
6 in the amount of \$318 per month from their monthly income. They
7 then sought confirmation of their first amended plan.

8 The chapter 13 trustee, Robert G. Drummond, objected to
9 confirmation of debtors' proposed plan on the ground that
10 deductions for voluntary postpetition 401(k) contributions were
11 not authorized for purposes of calculating disposable income
12 under § 1325(b)(2) based on the holding in In re Prigge, 441
13 B.R. 667 (Bankr. D. Mont. 2010).² Following its own decision in
14 Prigge, the bankruptcy court sustained the trustee's objection
15 and debtors appealed. For the reasons stated below, we AFFIRM.

16 **I. FACTS**

17 The relevant facts are few and undisputed. On January 14,
18 2011, the Parks filed their chapter 13 petition. At that time,
19 both Barron and Linda were employed and had been contributing
20 approximately \$318 per month to their respective 401(k) plans

21 _____
22 ¹ Unless otherwise indicated, all chapter and section
23 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532 and
24 "Rule" references are to the Federal Rules of Bankruptcy
Procedure.

25 ² We authorized eCAST Settlement Corporation ("eCAST") to
26 file its brief amicus curiae. eCAST is the assignee of an
27 unsecured claim totaling \$7,037.56 which comprises over twenty-
28 seven percent of the total filed unsecured claims. Not
surprisingly, eCAST aligns itself with the trustee's position
because it stands to recover more from debtors if the voluntary
retirement deductions are not allowed.

1 prior to filing. In calculating their disposable income on
2 Official Form 22C, the above-median debtors claimed a deduction
3 of \$318 per month for their voluntary 401(k) contributions on
4 Line 55. Debtors showed monthly disposable income listed on
5 Line 59 of -\$40.04. Debtors' Schedules I and J, which set out
6 anticipated income and actual expenses, showed monthly income of
7 \$5,559.57 and expenses of \$4,672.60, for a monthly net income of
8 \$886.97.

9 Debtors filed their initial plan on January 28, 2011 and
10 filed their first amended plan on February 28, 2011. Their
11 first amended plan proposed monthly payments of \$475.03 for a
12 term of 60 months.

13 On March 2, 2011, the trustee objected to the confirmation
14 of debtors' first amended plan contending that their 401(k)
15 contributions should not be allowed as an ongoing deduction in
16 computing their disposable income. Following an evidentiary
17 hearing and post-hearing briefing by the parties, the bankruptcy
18 court issued a Memorandum of Decision sustaining the trustee's
19 objection based on Prigge. The court entered an order denying
20 confirmation of debtors' first amended plan on June 22, 2011.
21 This appeal followed.

22 **II. JURISDICTION**

23 The bankruptcy court had jurisdiction over this proceeding
24 under 28 U.S.C. §§ 1334 and 157(b)(2)(L). We have jurisdiction
25 under 28 U.S.C. § 158, subject to the resolution of a possible
26 mootness issue that we discuss below.

27 The order denying confirmation of debtors' first amended
28 chapter 13 plan is an interlocutory order. Giesbrecht v.

1 Fitzgerald (In re Giesbrecht), 429 B.R. 682, 687 (9th Cir. BAP
2 2010). We may hear an appeal from an interlocutory order only
3 if we grant leave to appeal. Id. However, if prior to our
4 addressing the finality issue, another order is entered fully
5 and finally disposing of the matter, the finality defect
6 associated with the prior interlocutory order can be deemed
7 "cured." Cato v. Fresno City, 220 F.3d 1073, 1074-75 (9th Cir.
8 2000). Here, the interlocutory order appealed became final when
9 debtors' third amended plan dated July 12, 2011, was confirmed
10 by order entered on July 14, 2011. Debtors did not appeal this
11 final order. Therefore, we must consider whether debtors'
12 appeal of the order denying confirmation of their first amended
13 plan has been rendered moot.

14 We sua sponte raise the issue of mootness. Omoto v.
15 Ruggera (In re Omoto), 85 B.R. 98, 99-100 (9th Cir. BAP 1988).
16 "A claim is moot if it has lost its character as a present, live
17 controversy." United States v. Geophysical Corp. of Alaska, 732
18 F.2d 693, 698 (9th Cir. 1984). We do not have jurisdiction over
19 a claim for which no effective relief can be granted. Id. In
20 this case, all potential relief is not foreclosed because if we
21 were to reverse on the merits, debtors could file a motion to
22 modify their plan under § 1329 or seek to obtain relief under
23 Rule 9024. With these possible avenues of relief still
24 available, the appeal is not moot. We thus consider the merits.

25 **III. ISSUE**

26 Whether a chapter 13 debtor's voluntary postpetition
27 retirement contributions are excluded from his or her disposable
28 income under § 541(b)(7).

1 **IV. STANDARDS OF REVIEW**

2 We review de novo a bankruptcy court's conclusions of law,
3 including statutory interpretations. Simpson v. Burkart (In re
4 Simpson), 557 F.3d 1010, 1014 (9th Cir. 2009).

5 **V. DISCUSSION**

6 Our resolution of this case turns on the interpretation of
7 § 541(b)(7)(A), which was added to the list of exclusions from
8 property of the estate in 2005 with the enactment of the
9 Bankruptcy Abuse Prevention and Consumer Protection Act
10 ("BAPCPA"), Pub. L. No. 109-8, 119 Stat. 23. Section
11 541(b)(7)(A) provides that property of the estate does not
12 include any amount

13 (A) withheld by an employer from the wages of
14 employees for payment as contributions--

15 (i) to--

16 (I) an employee benefit plan that is subject to title
17 I of the Employee Retirement Income Security Act of
18 1974 or under an employee benefit plan which is a
19 governmental plan under section 414(d) of the Internal
20 Revenue Code of 1986;

21 (II) a deferred compensation plan under section 457 of
22 the Internal Revenue Code of 1986; or

23 (III) a tax-deferred annuity under section 403(b) of
24 the Internal Revenue Code of 1986;

25 except that such amount under this subparagraph shall
26 not constitute disposable income as defined in section
27 1325(b)(2). . . .³

28 Questions of statutory interpretation begin with the plain
language of the statute. Lamie v. U.S. Trustee, 540 U.S. 526,

³ This final phrase is referred to as the "hanging
paragraph."

1 534 (2004). If the statute is clear, the inquiry is at its end,
2 and we enforce the statute on its terms. United States v. Ron
3 Pair Enters., Inc., 489 U.S. 235, 241 (1989). If the plain
4 meaning of the statutory language is not clear, the statute's
5 context within the overall statutory framework should be
6 examined. Davis v. Mich. Dept. of Treasury, 489 U.S. 803, 809
7 (1989) ("[S]tatutory language cannot be construed in a vacuum.
8 It is a fundamental canon of statutory construction that the
9 words of a statute must be read in their context and with a view
10 to their place in the overall statutory scheme.").

11 As with other provisions contained in BAPCPA, applying
12 statutory interpretation rules to discern Congress's intent in
13 adding § 541(b)(7) is easier said than done. In this case, the
14 statute's placement within § 541 instead of chapter 13 and its
15 reference to disposable income under § 1325(b)(2) in the hanging
16 paragraph reflects its ambiguity. These contextual conundrums
17 have split the courts nationwide. Compare Baxter v. Johnson (In
18 re Johnson), 346 B.R. 256, 263 (Bankr. S.D. Ga. 2006) (holding
19 that § 541(b)(7) excludes all voluntary retirement
20 contributions, both pre and postpetition, from disposable
21 income) and the cases following Johnson with In re Prigge, 441
22 B.R. 667 (holding § 541(b)(7) does not permit exclusion of
23 postpetition voluntary retirement contributions in any amount
24 when determining disposable income); In re McCullers, 451 B.R.
25 498, 503-05 (Bankr. N.D. Cal. 2011) (same); Seafort v. Burden
26 (In re Seafort), 669 F.3d 662, 673-74 (6th Cir. 2012) (same).
27 Although none of these decisions are binding on us, we find the
28 Prigge line of cases persuasive. To avoid repetition, we borrow

1 heavily from these decisions.

2 We begin by looking at the language and structure of § 541,
3 which defines property of the estate generally, as well as its
4 relationship to § 1306, which completes the definition of
5 property of the estate for purposes of chapter 13.

6 Section 541(a)(1) defines property of the estate as
7 including "all legal or equitable interests of the debtor in
8 property as of the commencement of the case" and § 541(a)(6)
9 states that "earnings from services performed by an individual
10 debtor after the commencement of the case" are not brought into
11 the estate. Under the plain reading, "as of the commencement of
12 the case", a debtor's postpetition earnings are not included in
13 property of the estate. However, because this is a chapter 13
14 case, we cannot ignore the relationship between § 541 and
15 § 1306. Section 1306(a) states:

16 Property of the estate includes, in addition to the
17 property specified in section 541 of this title-

18

19 (2) earnings from services performed by the debtor
20 after the commencement of the case but before the case
21 is closed, dismissed, or converted to a case under
chapter 7, 11, or 12 of this title, whichever occurs
first.

22 "Section 1306(a) expressly incorporates § 541. Read together,
23 § 541 fixes property of the estate as of the date of filing,
24 while § 1306 adds to the 'property of the estate' property
25 interests which arise post-petition." In re Seafort, 669 F.3d
26 at 667. It is § 1306(a)(2) which operates to bring the debtor's
27 earnings from postpetition services into his or her estate.

28 Given this statutory framework, the question then becomes

1 what is "excluded" from property of the estate under
2 § 541(b)(7)(A) which also does not constitute disposable income?
3 In answering this question, we keep in mind that statutory
4 provisions are to be read in harmony in the context of the whole
5 statute. Houglund v. Lomas & Nettleton Co. (In re Houglund),
6 886 F.2d 1182, 1184 (9th Cir. 1989) (citing Davis v. Mich. Dept.
7 of Treasury, 489 U.S. at 809). All parts of a statute are to be
8 read as a whole, and in harmony with one another, and not in
9 conflict. Culver, LLC v. Chiu (In re Chiu), 266 B.R. 743, 747,
10 750 (9th Cir. BAP 2001), aff'd, 304 F.3d 905 (9th Cir. 2002).
11 In light of these principles, by reading § 541(a)(1) and
12 § 541(b)(7)(A) together, the most reasonable interpretation of
13 § 541(b)(7)(A) is that it excludes from property of the estate
14 only those 401(k) contributions made before the petition date.
15 In re Seafort, 669 F.3d at 673; In re McCullers, 451 B.R. at
16 503-05; see also In re Prigge, 441 B.R. at 677 n.5 (noting that
17 § 541(b)(7) "seems intended to protect amounts withheld by
18 employers from employees that are in the employer's hands at the
19 time of filing bankruptcy, prior to remission of the funds to
20 the plan.") (citing 5 COLLIER ON BANKRUPTCY, ¶ 541.22(C)[1] (15th
21 ed. rev.)). Otherwise, as noted by the Sixth Circuit in In re
22 Seafort, if "contributions to a qualified retirement plan never
23 constitute property of a bankruptcy estate . . . Congress would
24 not have needed to include an additional provision in
25 § 541(b)(7)(A) stating that such contributions are excluded from
26 disposable income." 669 F.3d at 673.

27 From here, it follows that "such amount" referred to in the
28 hanging paragraph of § 541(b)(7)(A) means that only prepetition

1 contributions shall not constitute disposable income. In re
2 McCullers, 451 B.R. at 503-04. As a consequence, we are
3 persuaded that the term "except that" in the hanging paragraph
4 was designed simply to clarify that the voluntary retirement
5 contributions excluded from property of the estate are not
6 postpetition income to the debtor. Id. at 504-05. Finally, to
7 give meaning to the words "under this subparagraph" found in the
8 hanging paragraph, it is reasonable to conclude that "Congress
9 intentionally limited the type of contributions to qualified
10 retirement plans that would be excluded from disposable income,
11 namely those 'under this subparagraph', § 541(b)(7)(A), which in
12 turn governs only those contributions in effect as of the
13 commencement of a debtor's bankruptcy case, per § 541(a)(1)."
14 In re Seafort, 669 F.3d at 673.

15 We also attach significance to the fact that § 1306(a)(2)
16 makes postpetition earnings of a debtor part of his or her
17 estate but nowhere in chapter 13 are voluntary retirement
18 contributions excluded from disposable income. To the contrary,
19 when Congress amended BAPCPA, it chose to exclude the repayment
20 of 401(k) loans from disposable income in § 1322(f).⁴ "Where
21 Congress includes particular language in one section of a statute
22 but omits it in another, it is generally presumed that Congress
23 acts intentionally and purposely in the disparate inclusion or
24 exclusion." Keene Corp. v. United States, 508 U.S. 200, 208

26 ⁴ This section states that "[a] plan may not materially
27 alter the terms of a loan described in section 362(b)(19) and
28 any amounts required to repay such loan shall not constitute
'disposable income' under section 1325."

1 (1993). Accordingly, it is likely "that Congress did not intend
2 to treat voluntary 401(k) contributions like 401(k) loan
3 repayments, because it did not similarly exclude them from
4 'disposable income' within Chapter 13 itself." In re Seafort,
5 669 F.3d at 672. Simply put, without a clearer direction
6 comparable to the carve out from disposable income for the
7 repayment of retirement loans in § 1322(f), it seems unlikely
8 that Congress intended § 541(b)(7)(A) to bestow a benefit on
9 above-median chapter 13 debtors while their creditors absorbed
10 an even greater loss.

11 Further support for the Prigge holding comes from other
12 sections in the Code as well. Section 1325(b)(2)(A)(i) states
13 that "disposable income means current monthly income received by
14 the debtor . . . less amounts reasonably necessary to be
15 expended . . . for the maintenance or support of the debtor
16" Here, because debtors' income exceeded the state
17 median, the "amounts reasonably needed to be expended" are
18 determined by the "means test" set forth in § 707(b)(2).
19 § 1325(b)(3). Voluntary contributions to 401(k) retirement
20 plans are not mentioned as "reasonable and necessary expenses"
21 under the "means test" set forth in § 707(b)(2)(A) & (B). In re
22 Seafort, 669 F.3d at 672; see also In re Prigge, 441 B.R. at 676
23 (citing Egebjerg v. Anderson (In re Egebjerg), 574 F.3d 1045,
24 1052 (9th Cir. 2009) (citing Internal Revenue Manual
25 § 5.15.1.23)). Congress's failure to mention contributions to
26 401(k) retirement plans as reasonable and necessary expenses in
27 § 707(b)(2) suggests that Congress did not intend § 541(b)(7)(A)
28 to exclude postpetition 401(k) contributions from disposable

1 income.

2 We also agree that the Ninth Circuit's decision in In re
3 Egebjerg, 574 F.3d 1045, which was heavily relied upon by the
4 Prigge court, lends support to the interpretation discussed
5 above notwithstanding the nuanced difference of the issues.
6 There, the Ninth Circuit rejected the chapter 7 debtor's
7 argument that his 401(k) loan repayments qualified as an "other
8 necessary expense" for purposes of applying the means test under
9 § 707(b)(2). In doing so, the court noted that "[w]hen it
10 introduced the means test, Congress provided, by reference to
11 the IRS guidelines, specific guidance as to what qualifies as a
12 necessary expense for the purposes of applying that test." 574
13 F.3d at 1052. The 401(k) loan repayments were neither listed in
14 any of fifteen categories as expenses which may be considered
15 necessary nor were the repayments of the same kind and character
16 of the expenses allowed elsewhere in guidelines. Id. at 1051-
17 52. The court also noted that "the IRS guidelines themselves
18 provide that '[c]ontributions to voluntary retirement plans are
19 not a necessary expense.'" Id. at 1052. Although the IRS
20 guidelines do not prevail over a plain reading of
21 § 541(b)(7)(A), they do provide "specific guidance that [401(k)
22 contributions] are not a necessary expense, in any amount". In
23 re Prigge, 441 B.R. at 676.

24 VI. CONCLUSION

25 For all these reasons, we hold that § 541(b)(7) does not
26 authorize chapter 13 debtors to exclude voluntary postpetition
27 retirement contributions in any amount for purposes of
28 calculating their disposable income. Accordingly, we AFFIRM.