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The Seventh Circuit Allows Bankrupt Debtors a Fresh Start with Their Former Spouses' Property. In re Sanderfoot, 889 F.2d 598 (7th Cir.), cert. granted, 111 S. Ct. 507 (1990)

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THE SEVENTH CIRCUIT ALLOWS BANKRUPT DEBTORS A FRESH START WITH THEIR FORMER SPOUSES' PROPERTY

In re Sanderfoot, 889 F.2d 598 (7th Cir.), *cert. granted*, 111 S. Ct. 507 (1990)

In *In re Sanderfoot*,[1] the United States Court of Appeals for the Seventh Circuit held that a bankrupt debtor may avoid a lien on exempt property arising from a divorce decree granting the lien to the former spouse as part of the property division.[2] The court rejected both the Eighth Circuit's pre-existing interest theory[3] and the Tenth Circuit's equitable lien theory,[4] thus creating a split among the circuits.

Gerald Sanderfoot and Jeanne Farrey were divorced in a Wisconsin state court in 1987.[5] The divorce decree awarded the marital home to Mr. Sanderfoot and ordered him to pay Ms. Farrey $29,208.44 to achieve an equitable property distribution.[6] To secure payment of the amounts owed the decree created a lien against the marital home.[7] Less than three months later, Mr. Sanderfoot voluntarily filed for bankruptcy and moved to avoid the lien against the marital home pursuant to section 522(f)(1) of the Bankruptcy Code.[8] The Bankruptcy Judge denied the

1. 899 F.2d 598 (7th Cir.), *cert. granted*, 111 S. Ct. 507 (1990).

2. *Id.* at 605. To the extent a monetary award in a divorce decree constitutes alimony or maintenance and support of a spouse, ex-spouse, or child, it is not a dischargeable debt under the Bankruptcy Code. 11 U.S.C. § 523(a)(5) (Supp. 1990). In characterizing payments ordered in a divorce decree, the mere recitation that the payments constitute alimony or maintenance and support is not controlling. A court instead must look beyond such labels to the actual nature of the payments. *See* 11 U.S.C. § 523(a)(5)(B) (Supp. 1990).

This Case Comment addresses the dischargeability of liens placed on the debtor's property to secure the payment of a property division ordered in a divorce decree.

3. 899 F.2d at 601-03.

4. *Id.* at 604-05. Other courts have permitted the debtor to avoid such liens, either distinguishing or failing to consider the equitable lien theory. *See In re* Pederson, 875 F.2d 781 (9th Cir. 1989); Maus v. Maus, 837 F.2d 935, 939 (10th Cir. 1988) (equitable lien theory not applicable when lien arose from statute rather than divorce decree).

5. 899 F.2d at 599.

6. *Id.*

7. *Id.* at 599 n.2.

8. 11 U.S.C. §§ 101-1330 (1988 & Supp. 1990). Section 522(f) provides:

> Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—(1) a judicial lien . . . .

11 U.S.C. § 522(f) (1988).

Section 522(b) permits the debtor to exempt property specified in § 522(d), or alternatively, to exempt property under state or local law. 11 U.S.C. § 522(b)(2)(A) (1988 & Supp. 1990). *See infra* note 14. Mr. Sanderfoot relied upon the Wisconsin homestead exemption, which exempts a debtor's

motion,[9] but the district court reversed on appeal, ruling that the lien was avoidable.[10] The Seventh Circuit affirmed the district court and *held*: a bankrupt debtor may avoid a lien granted in a divorce decree as part of a property distribution if the lien impairs an otherwise valid homestead exemption.[11]

Under the Bankruptcy Code,[12] a debtor's property becomes property of the bankruptcy estate.[13] The debtor may, however, exempt certain property from the estate to protect it from liability for any prepetition debt.[14] Although liens on exempt property normally survive bank-

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homestead "[f]rom execution, from the lien of every judgment, and from liability for the debts of the owner to the amount of $40,000, *except* mortgages, laborers', mechanics' and purchase money liens . . . ." WIS. STAT. § 815.20(1) (Supp. 1990) (emphasis added).

Although not argued in the case, it is not clear that Ms. Farrey's lien impaired Mr. Sanderfoot's exemption. Under Wisconsin law most liens against the homestead are unenforceable, but not void. *Id.* Arguably, an unenforceable lien would not impair Mr. Sanderfoot's exemption, and thus § 522(f) would not apply. *See infra* note 17. Moreover, if the lien is an equitable purchase money lien, it could not impair an allowable exemption because the Wisconsin homestead exemption excludes amounts subject to such a lien. *Id.* *See* WIS. STAT. § 815.20(1); *infra* note 14.

9. 899 F.2d at 599-600.

10. *Id.* at 600.

11. *Id.* at 605-06.

12. 11 U.S.C. §§ 101-1330 (1988 & Supp. 1990).

13. 11 U.S.C. § 541(a) (1988 & Supp. 1990). The estate includes all the debtor's legal and equitable property interests. 11 U.S.C. § 541(a)(1). Upon the debtor's filing of bankruptcy, holders of estate property must deliver the property to a trustee. 11 U.S.C. § 542. The code gives the trustee broad administrative and equitable powers over the estate. *See* 11 U.S.C. §§ 361-66, 544, 545, 547, and 549.

14. Section 522(c) provides: "[P]roperty exempted under [§ 522] is not liable for any debt of the debtor that arose . . . before the commencement of the case . . . ." 11 U.S.C. § 522(c) (Supp. 1990). The debtor must elect either the federal exemptions listed in § 522(d) or available state and local exemptions. The debtor cannot mix federal and state exemptions. 3 COLLIER ON BANKRUPTCY § 522.02 (15th ed. 1990).

If the debtor elects state exemptions, it is unclear whether § 522(f)(1)'s lien avoidance mechanism applies to a lien enforceable under state law despite the exemption. In *In re* Snow, 899 F.2d 337 (4th Cir.), *pet. for cert. filed*, Green v. Snow, U.S. Sup. Ct. No. 90-44 (July 2, 1990), the Fourth Circuit held that § 522(f)(1) would apply to such a lien because the state exception is inconsistent with § 522(f)(1) and the Bankruptcy Code trumps state law.

Section 522(f) allows the debtor to avoid a lien to the extent that the lien impairs an exemption to which the debtor is entitled under subsection (b). 11 U.S.C. § 522(f) (1979). If under subsection (b) the state has opted out of the federal exemptions, some courts take the position that § 522(f) restores to the debtor the full state law exemption, including any state law exceptions to the exemption. One court adopting this position compared the exemption to wedge of swiss cheese:

> [j]ust as the entirety of the wedge is composed of both cheese and the holes, the entirety of the homestead exemption is composed of both the substantive provision allowing a debtor to exempt certain property and the exceptions to that exemption which, in the metaphor, constitute the holes.

In re Stone, 119 Bankr. 222, 229 n.18 (Bankr. E.D. Wash. 1990) (citing Green v. Snow, *pet. for*

ruptcy,[15] section 522(f)(1) permits the debtor to avoid a judicial lien[16] on the debtor's property to the extent that the lien would impair the debtor's exemptions.[17]

Courts holding that a lien on exempt property granted to secure payment of a court ordered property settlement is not avoidable rely on

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cert., 2 Bankr. L. Rep. (BNA) 744 (Aug. 9, 1990)); *see also* Owen v. Owen, 877 F.2d 44, 47 (11th Cir. 1989) (no impairment because exemption is specifically subject to exception), *cert. granted*, 110 S. Ct. 2166 (1990); *In re* Scott, 12 Bankr. 613, 616 (Bankr. W.D. Okla. 1981) (language of subsection (f) allowing debtor to avoid liens "to which the debtor would have been entitled under subsection (b)" reinstates state exemptions as is—including any exceptions that also exist under state law).

15. 11 U.S.C. § 522(c)(2)(A)(i) (Supp. 1990). "The bankruptcy discharge will not prevent enforcement of valid liens" even though the lien is attached to exempt property. H.R. REP. NO. 595, 95th Cong., 1st Sess. 361 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6317 (reaffirming the rule set out in Long v. Bullard, 117 U.S. 617 (1886)). Thus, the bankruptcy discharge only protects debtors from *in personam* liability, and does not prohibit a lienholder from proceeding against the property *in rem*, even though the debtor's personal liability for the debt underlying the lien is discharged. *See In re* Pence, 905 F.2d 1107 (7th Cir. 1990) (lien would have survived but for trustee's action avoiding lien and providing for full payment of underlying debt); Isom v. United States, 901 F.2d 744, 745-46 (9th Cir. 1990) (tax lien against debtor's property survived despite discharge of debtor's underlying personal liability); Chandler Bank of Lyons v. Ray, 804 F.2d 577, 579 (10th Cir. 1986) (bank's lien on collateral survived discharge of underlying debt); John Deere Indus. Equip. Co. v. Nason, 22 Bankr. 690, 691 (Bankr. D. Me. 1982) (unavoided liens survive bankruptcy unaffected).

16. A "lien" is defined in the Bankruptcy Code as a "charge against or interest in property to secure payment of a debt or performance of an obligation." 11 U.S.C. § 101(33) (Supp. 1990). A "judicial lien" is defined as a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." 11 U.S.C. § 101(32) (Supp. 1990). The Bankruptcy Code defines two other types of liens: a "statutory lien" arises "solely by force of a statute on specified circumstances or conditions . . ." and a "security interest" is simply defined as a "lien created by an agreement." 11 U.S.C. §§ 101(47), (45) (Supp. 1990). These three types of liens are "mutually exclusive and are exhaustive except for certain types of common law liens." H.R. REP. NO. 595, 95th Cong., 1st Sess. 312 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6269.

In *In re* Stone, 119 Bankr. 222, 227 (Bankr. E.D. Wash. 1990), the court stated that the three main types of liens—judicial, statutory, and security interests—are not mutually exclusive. Instead, the court stated that certain common law liens constitute exceptions to the exclusivity of the Code's definitions. *Id.* at 227-28.

The *Stone* court's construction contrasts with the apparent purpose of Congress: to define three mutually exclusive categories of liens. A better approach might recognize multiple liens arising from a single debt. For example, a creditor could foreclose on her collateral by obtaining a judicial lien, with the security interest remaining intact as a separate lien until the debt is satisfied or the property liquidated. *Cf. In re* Seidel, 752 F.2d 1382 (9th Cir. 1985).

17. 11 U.S.C. § 522(f)(1) (1979). If a state's homestead exemption renders liens against the homestead unenforceable, the lien arguably impairs nothing. *See In re* Goodwin, 82 Bankr. 616 (Bankr. S.D. Fla. 1988). *But see In re* Calandriello, 107 Bankr. 374 (Bankr. M.D. Fla. 1989) (lien impairs exemption because lienholder may enforce lien in the future if the property loses its homestead status and thus the lien represents a cloud on the title); *In re* Watson, 116 Bankr. 837, 838-39 (Bankr. M.D. Fla. 1990) (judgment lien clouds the title of homestead property and thus is avoidable).

either the pre-existing interest[18] or the equitable lien[19] theory.

The Eighth Circuit first advanced the pre-existing interest theory in *Boyd v. Robinson*.[20] In *Boyd*, a divorce decree awarded the marital home to the debtor "subject to" a lien securing the debtor's payment of the property settlement.[21] After filing for bankruptcy, the debtor claimed the home as exempt property and argued that the lien should be avoided.[22] The district court refused to avoid the lien and the Eighth Circuit affirmed, holding that the lien merely recognized and provided a remedy for the non-debtor spouse's pre-existing interest in the marital home.[23] Therefore, the lien did not attach to the debtor's property interest.[24] Since the lien did not attach to an interest of the debtor, the court refused to avoid it under section 522(f)(1).[25]

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18. *See In re* Donahue, 862 F.2d 259, 264 n.7 (10th Cir. 1988); Boyd v. Robinson, 741 F.2d 1112 (8th Cir. 1984); *In re* Rittenhouse, 103 Bankr. 250 (Bankr. D. Kan. 1989) (lien created in divorce decree to preserve non-debtor spouse's pre-existing interest); Zachary v. Zachary, 99 Bankr. 916 (Bankr. S.D. Ind. 1989) (lien does not attach to interest of the debtor, rather debtor acquires property already subject to the lien); *In re* Owen, 86 Bankr. 691 (Bankr. M.D. Fla. 1988) (creditor's lien attached simultaneously with acquisition of property); *In re* Seablom, 45 Bankr. 445 (Bankr. D.N.D. 1984) (lien protected non-debtor spouse's pre-existing property interest); *In re* Thomas, 32 Bankr. 11, 12 (Bankr. D. Or. 1983) (dissolution decree simultaneously conveys one spouse's half interest in homestead to debtor spouse and creates a lien in favor of non-debtor spouse). *See infra* notes 20-24 and accompanying text.

19. *See In re* Borman, 886 F.2d 273 (10th Cir. 1989); *In re* Lodek, 61 Bankr. 66 (Bankr. W.D. Tex. 1986) (wrongful taking of funds results in imposition of nonavoidable constructive trust); *In re* Hart, 50 Bankr. 956 (Bankr. D. Nev. 1985). *See infra* notes 36-42 and accompanying text. When the divorcees create a lien by express agreement and the court includes it in the divorce decree, some courts hold that a nonavoidable security interest is created. *See In re* Sanders, 61 Bankr. 381 (Bankr. D. Kan. 1986) (inclusion of consensual lien in court order does not convert it from security interest to judicial lien); *In re* Shands, 57 Bankr. 49 (Bankr. D.S.C. 1985) (same); *In re* Rosen, 34 Bankr. 648 (Bankr. E.D. Wis. 1983) (same); *In re* Dunn, 10 Bankr. 385 (Bankr. W.D. Okla. 1981) (same); *In re* Scott, 12 Bankr. 613 (Bankr. W.D. Okla. 1981) (same).

20. 741 F.2d 1112 (8th Cir. 1984).

21. *Id.* at 1113. The lien represented one-half the equity acquired jointly by the parties during the marriage. *Id.*

22. *Id.*

23. *Id.* at 1114.

24. *Id.*

25. *Id.* at 1114-15. Judge Ross dissented, arguing that the non-debtor spouse's pre-existing interest was irrelevant because the lien was a judicial lien avoidable under the code. *Id.* at 1115. He argued that the divorce decree extinguished the non-debtor spouse's pre-existing interest in the home and replaced it with a lien securing a debt. *Id.* Judge Ross characterized the lien as a judicial lien— a lien obtained by judgment— because the lien did not exist prior to the divorce decree. *Id.* at 1116. Furthermore, he noted that no agreement, contract, or conveyance that would make the lien a security interest or mortgage existed between the parties. *Id.* Finally, Judge Ross interpreted § 523(a)(5)(B) of the Bankruptcy Code, which provides that only alimony and support debts are nondischargeable, as indicating congressional intent to allow the discharge of property settlement

The Tenth Circuit in *Maus v. Maus*[26] criticized *Boyd*'s "convoluted theory." In *Maus*, the property settlement decree awarded the marital home to the debtor "free and clear" of the non-debtor spouse's claims and ordered the debtor to pay $22,000 as a property division.[27] Although the decree did not explicitly provide for a lien, the Tenth Circuit noted the possible creation of a judicial lien under Kansas law.[28] The court ruled, however, that the decree's specific language extinguished the non-debtor spouse's pre-existing interest and, if a lien arose under state law, it was an avoidable judicial lien impairing the debtor's homestead exemption.[29]

The Ninth Circuit in *In re Pederson*[30] also rejected the pre-existing interest theory. In *Pederson*, the divorce decree awarded the marital home to the debtor, subject to an $8,000 lien on the home.[31] The *Pederson* court declined to follow *Boyd*, reasoning that any interest the non-debtor spouse has in the marital home "disappear[s]" after the divorce decree.[32] Thus, the lien attaches only to the debtor's interest because only the debtor continues to have an interest in the marital home.[33] The court concluded that when a divorce decree grants the marital home to the debtor subject to a lien in favor of the non-debtor spouse, the debtor may avoid the lien under section 522(f)(1).[34]

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debts in bankruptcy. *Id.* The *Boyd* dissent has been influential in other circuits. *See, e.g., In re* Sanderfoot, 889 F.2d 598, 601-03 (7th Cir.) (adopting *Boyd* dissent), *cert. granted*, 111 S. Ct. 507 (1990), *In re* Pederson, 875 F.2d 781, 783 (9th Cir. 1989) (same); Maus v. Maus, 837 F.2d 935, 939 (10th Cir 1988) (same). *But see* Bush v. Taylor, 912 F.2d 989 (8th Cir. 1990) (questioning whether property *division* under a divorce decree constitutes a property *settlement* debt).

26. 837 F.2d 935, 939 (10th Cir. 1988).

27. *Id.* at 937.

28 *Id.* at 938-39. Kansas law provides that any judgment rendered by a Kansas court "under chapter 60 . . . shall be a lien on the real estate of the debtor within the county in which judgment is rendered." KAN. STAT. ANN. § 60-2022(a) (1983). The Tenth Circuit noted that divorce proceedings are commenced under chapter 60 of the Kansas statutes and the marital home was located in the same county where the divorce was granted. 837 F.2d at 938 (citing KAN. STAT. ANN. § 60-2202(1) (1983)).

29 837 F.2d at 939 (citing with approval *Boyd*, 741 F.2d at 1115 (Ross, J., dissenting)).

30. 875 F.2d 781 (9th Cir. 1989).

31. *Id.* at 782. Although the debtor entered the marriage owning the home, the $8,000 lien represented home improvements funded by marital community property. *Id.*

32. *Id.* at 783.

33. *Id.*

34. *Id.* at 782. The court found this result consistent with Congress' intent to allow the discharge of property settlement debts, but not alimony and child support awards. *Id.* at 784 (citing 11 U.S.C. § 523(a)(5)(B)). *See supra* note 25. In addition, the court characterized without discussion the non-debtor spouse's lien as a judicial lien. 875 F.2d at 782.

Shortly after deciding *Maus*,[35] the Tenth Circuit entered the fray again, this time holding that a lien created in a divorce decree *survives* bankruptcy under the equitable lien theory. In *In re Donahue*[36] the divorce decree gave the debtor the marital home "subject to" payment of a cash settlement under the property division.[37] The Tenth Circuit relied on the divorce decree's language indicating the property as the source from which the debtor would pay the debt.[38] The court ruled that the decree created an equitable lien or mortgage on the marital home because the non-debtor spouse had a "right" to have the marital home applied to payment of the debt.[39] The court restricted its *Maus* holding[40] to situations in which specific language in the divorce decree cuts off the non-debtor spouse's claim to the property, preventing attachment of a lien or security interest.[41] The *Donahue* court, however, did not decide whether an equitable lien or mortgage is an avoidable judicial lien within the scope of section 522(f)(1).[42]

In *In re Borman*,[43] the Tenth Circuit reached the issue left undecided in *Donahue* and held that a nondischargeable equitable lien attaches when it is clear from the divorce decree that the property is the source of payment of the debt.[44] The court reasoned that permitting the debtor to avoid a former spouse's lien would "unjustly enrich" the debtor.[45] Finally, the Tenth Circuit again limited *Maus*[46] to situations in which liens

35. 837 F.2d 935 (10th Cir. 1988). *See supra* notes 26-29 and accompanying text.

36. 862 F.2d 259, 264 (10th Cir. 1988).

37. *Id.* at 260.

38. *Id.* at 265.

39. *Id.* The court also stated that permitting the debtor to avoid the non-debtor spouse's lien would unjustly enrich the debtor. *Id. But see* Bush v. Taylor, 912 F.2d 989, 996 (8th Cir. 1990) (Arnold, J., dissenting) (unjust enrichment is the "other side of the fresh-start coin").

40. 837 F.2d 935 (10th Cir. 1988). *See supra* notes 26-29 and accompanying text.

41. 862 F.2d at 264-65.

42. *Id.* at 266 n.11.

43. 886 F.2d 273, 275 (10th Cir. 1989).

44. *Id.* at 274. In *Borman*, the divorce decree granted the marital home to the debtor, but provided for the sale of the home and distribution of the proceeds to the non-debtor spouse if the debtor failed to pay a cash settlement. *Id.* at 273.

45. *Id.* at 274. The court did not attempt to reconcile its holding that an equitable lien is nondischargeable with the language of § 522(f)(1). Presumably, the court would distinguish between an equitable lien and a judicial lien. Congress arguably envisioned a "common law" lien exclusive of judicial liens, security agreements, and statutory liens. *See supra* note 16. The Tenth Circuit's holding in *Borman* is sound if such common law liens exist and include equitable liens. Such liens would not be dischargeable because § 522(f)(1) applies only to judicial liens. See *supra* note 8 for text of § 522(f)(1).

46. 837 F.2d 935 (10th Cir. 1988). *See supra* notes 26-29 and accompanying text.

arise by virtue of a money judgment and the operation of state law, rather than by specific language in a divorce decree.[47]

In *In re Sanderfoot*[48] the Seventh Circuit held that section 522(f)(1) avoids a lien created by specific language in a divorce decree to secure payment of the property division.[49] The court rejected both the pre-existing interest[50] and equitable lien theories.[51] Instead, the court ruled that the divorce proceeding "dissolved" Ms. Farrey's pre-existing interest in the homestead.[52] Noting that its position was consistent with the "plain language" of the statute,[53] the court concluded that the lien created by the decree attached to Mr. Sanderfoot's interest in the homestead property.[54] The court also rejected any distinction between equitable and judicial liens.[55] The court noted that the Code's definition of "judicial lien" includes liens obtained by legal proceedings.[56] Because a Wisconsin state court judgment created Ms. Farrey's lien, the court held that the unambiguous language of the statute controlled.[57] Rejecting the equitable lien rationale as "strained," the court concluded that whether labelled equitable liens, vendor's liens, or security interests, a lien arising from a court ordered property division is a judicial lien.[58] Therefore, the *Sanderfoot* court determined that the lien was avoidable because it was a judicial lien fixed on the debtor's exempt property.[59]

Judge Posner, dissenting in *Sanderfoot*,[60] embraced the pre-existing interest theory, distinguishing a judicial lien intended to secure a spouse's pre-existing interest in the marital home from a judicial lien on the

47. 886 F.2d at 274 (citing *In re* Donahue, 862 F.2d 259 (10th Cir. 1988)).

48. 899 F.2d 598 (7th Cir.), *cert. granted*, 111 S. Ct. 507 (1990).

49. *Id.* at 605.

50. *See supra* notes 20-25 and accompanying text.

51. *See supra* notes 35-42 and accompanying text.

52. 899 F.2d at 602 (citing with approval *In re* Pederson, 875 F.2d 781 (9th Cir. 1989)). *See supra* notes 30-34 and accompanying text.

53. *Id.* (citing 11 U.S.C. § 522(f)(1)).

54. 899 F.2d at 602-03.

55. *Id.* at 603-05.

56. *Id.* at 603. The Bankruptcy Code defines a "judicial lien" as a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." *Id.* (citing 11 U.S.C. § 101(32)).

57. 899 F.2d at 605.

58. *Id.* at 604-05 (citing *In re* Boggess, 105 Bankr. 470, 474 (Bankr. S.D. Ill. 1989) (finding *Boyd* rationale strained and instead adopting position of *Pederson* line of cases)).

59. 899 F.2d at 605-06.

60. *Id.* at 606-08.

debtor's property.[61] Judge Posner asserted that the majority's decision placed the "crown of success" on Mr. Sanderfoot's "vicious scheme" to avoid the wife's lien and thus nullify the divorce decree, leaving him with all the marital property instead of half.[62] The dissent stated that Congress' purpose in enacting section 522(f)(1) was to prevent creditors from obtaining liens against a debtor's property in anticipation of bankruptcy, thereby frustrating the purpose of the exemptions.[63] Because the divorce decree did not create the lien to defeat the debtor's homestead exemption, but to protect Ms. Farrey's pre-existing property rights, Judge Posner argued that Ms. Farrey's lien was not the type Congress envisioned when drafting section 522(f)(1)'s avoidance provisions.[64] Finally, the dissent analogized to the situation in which a debtor acquires property already subject to a lien.[65] In such a situation the debtor cannot avoid the lien because it attached when the debtor had no interest in the property.[66] Judge Posner argued that the same principle should apply when creation of the lien occurs simultaneously with the debtor's acquisition of

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61. *Id.* at 607.

62. *Id.* at 606. Over one hundred years ago, the United States Supreme Court announced the principle that federal courts lack jurisdiction of family law matters. Rush, *Domestic Relations Law: Federal Jurisdiction and State Sovereignty in Perspective*, 60 NOTRE DAME L. REV. 1, 2 (1984) (citing Barber v. Barber, 62 U.S. (21 How.) 582 (1859)). This "domestic relations exception" embodies a federal judicial policy of abstaining from matters related to fundamental interests of the states, especially divorce, child custody, and alimony. Rush, *supra*, at 1. Judge Posner's argument that avoidance of Ms. Sanderfoot's lien would effectively nullify the divorce decree seemingly implicates this doctrine and calls into question the bankruptcy court's power to set aside such a lien. However, it is not clear whether the exception extends to property divisions arising from a divorce decree. *Id.* at 7-8 (some courts interpret the exception narrowly while others interpret it broadly). Moreover, the domestic relations exception applies only to a federal court's original jurisdiction; no restriction exists on the power of a federal court to enforce a divorce decree rendered by a state court. *Id.* at 13. Therefore, the exception may pose no obstacle to a federal bankruptcy court's determining the impact of federal bankruptcy law and the parties' rights under a state court divorce decree.

63. 899 F.2d at 606 (citing H.R. REP. NO. 595, 95th Cong., 1st Sess. 12627 (1977)). The legislative history of § 522(f) states:

> [The right to void a judicial lien on exempt property] allows the debtor to undo the actions of creditors that bring legal action against the debtor shortly before bankruptcy. Bankruptcy exists to provide relief for an overburdened debtor. If a creditor beats the debtor into court, the debtor is nevertheless entitled to his exemptions.

H.R. REP. NO. 595, 95th Cong., 1st Sess. 12627 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6087-88.

64. 899 F.2d at 606.

65. *Id.* at 607 (citing *In re* McCormick, 18 Bankr. 911 (Bankr. W.D. Pa. 1982) (a debtor cannot avoid a lien on an interest acquired after the lien attached); *In re* Stephens, 15 Bankr. 485 (Bankr. W.D.N.C. 1981) (same)).

66. 899 F.2d at 607. *See supra* note 16.

the property.[67] According to Judge Posner, the lien was not fixed on Mr. Sanderfoot's property interest because the lien was created at the same time he acquired the property.[68]

The *Sanderfoot* majority correctly rejected the pre-existing interest theory.[69] The divorce proceeding dissolved Ms. Farrey's pre-existing interest in the marital home and created a lien on Mr. Sanderfoot's property interest.[70] Mr. Sanderfoot's property interest in the marital home existed before, during, and after the divorce proceeding. Therefore, it is artificial to assert that he "acquired" property subject to a lien created by the divorce decree.[71]

The Seventh Circuit's rejection of the distinction between judicial and equitable liens, however, does not withstand close scrutiny.[72] The Bankruptcy Code recognizes three types of liens: judicial liens, statutory liens, and security interests.[73] Although the definitions are somewhat ambiguous, the legislative history makes clear that the three types of liens are mutually exclusive, except for certain common law liens.[74] A divorce decree, which specifically contemplates that the debtor's property will be the source to satisfy the money judgment, imposes a lien derived from equity.[75] Though an equitable lien may require judicial action for enforcement, it owes its existence to common law principles of equity; thus, it is not avoidable under section 522(f)(1).[76]

The Seventh Circuit's decision in *Sanderfoot* gives bankrupt debtors a license to nullify equitable property divisions created in divorce proceedings. Though the court correctly rejected the "convoluted" pre-existing interest theory, its rejection of the equitable lien theory is at odds with

67. 899 F.2d at 607.

68. *Id.*

69. *See supra* notes 52-54 and accompanying text.

70. *Sanderfoot*, 899 F.2d at 602. *But see supra* notes 20-25 and accompanying text.

71. *See Sanderfoot*, 899 F.2d at 602-03. Judge Posner erroneously argues that the creation of the lien simultaneously with the debtor's property interest is analogous to the debtor receiving property with a lien already in place. *Id.* at 607. When a debtor receives property with a lien already attached, the lien is fixed on the interest of the prior owner. However, in *Sanderfoot* the prior owner was the debtor. Thus, Judge Posner's argument suggests a vacuum in time when no one has any interest in the property. Construing the statute so that the lien attaches at this point, and then giving the property encumbered by the lien to Mr. Sanderfoot seems somewhat artificial.

72. *See supra* notes 55-58 and accompanying text.

73. *See supra* note 16.

74. *Id.*

75. *See In re* Borman, 886 F.2d 273 (10th Cir. 1989); *In re* Donahue, 862 F.2d 259 (10th Cir. 1988). *See supra* notes 36-47 and accompanying text.

76. *See supra* note 8 for the text of § 522(f)(1).

the Tenth Circuit, which permits equitable liens to survive bankruptcy.[77] On review of the Seventh Circuit's decision in *Sanderfoot*, the Supreme Court should embrace the Tenth Circuit's position, which achieves justice while remaining consistent with the purposes of the Bankruptcy Code.

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77. *See supra* notes 36-47 and accompanying text.