UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1855

TAMMY BROWN,

Plaintiff-Appellant,

versus

PAMELA JOY BYER, ET AL.,

Defendants,

BOB BRACKEN,

Defendant-Appellee,

UNITED STATES OF AMERICA,

Intervenor-Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas
(4:84 CV 566 K)

(June 9, 1993)
( )

Before REAVLEY, KING and GARWOOD, Circuit Judges.[*]

PER CURIAM:

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[*] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

In April 1987, plaintiff-appellant Tammy Brown obtained a judgment in the United States District Court for the Northern District of Texas against defendant-appellee Bob Bracken, a Deputy Constable of Dallas County. A jury concluded that Brown, in November 1984, had been subjected to false arrest, false imprisonment, and two strip searches, as a result of Bracken's alteration of an arrest warrant issued in the name of "Tammie Brown," and awarded damages in the amount of $80,000.[1] In April 1989, we upheld the judgment against Bracken on appeal. *Brown v. Byer*, 870 F.2d 975 (5th Cir. 1989).

Evidently unable to otherwise collect on this judgment, in September 1991 Brown, for the first time, sought a court order under Federal Rule of Civil Procedure 69(a)[2] and the Texas Turnover Statute[3] to have Bracken turn over a portion of each of his paychecks toward satisfaction of the judgment. The district court denied the motion on the ground that an amendment to the Turnover Statute, see TEX. CIV. PRAC. & REM. CODE § 31.002(f), which took effect on June 15, 1989, precludes such a remedy.[4]

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[1] Brown's claims against several other defendants either were settled, rejected by the jury, or reversed on appeal.

[2] Rule 69(a) provides that the enforcement of money judgments shall be in accordance with existing state law procedures.

[3] Texas Civil Practice & Remedies Code § 31.002 authorizes a court to order a judgment debtor to turn over nonexempt property in the debtor's possession or control.

[4] Section 31.002(f) provides in part that "[a] court may not enter or enforce an order under this section that requires the turnover of the proceeds of, or the disbursement of, property exempt under any statute . . . ." Current wages for personal services are exempt under Texas law. *See* TEX. PROP. CODE § 42.002(8) (Vernon's 1984); *id.* § 42.001(b)(1) (Vernon's Supp.

Brown argues that the district court erred in concluding that Rule 69(a) required the application of section 31.002(f) because Congress had not expressly delegated rulemaking authority to permit the retroactive application of a state law exempting property otherwise subject to collection under a preexisting federal judgment. She further argues that, if Congress did authorize such retroactive rulemaking authority, then the application of section 31.002(f) constitutes a taking of her property under the Fifth and Fourteenth Amendments.

Before considering Brown's first argument directly, it is important to note what she does not argue. First, she concedes that under Rule 69(a) the remedies available for enforcement of a federal judgment are defined by existing state law. Second, she concedes that section 31.002(f) prohibits a paycheck turnover remedy, at least as to judgments obtained after the adoption of section 31.002(f). Her only objection is to the application of section 31.002(f) to judgments, such as hers, obtained *prior* to the effective date of 31.002(f). She concedes, as she must, that it was the intent of the Texas legislature to do just that.[5] The legal argument that she makes is that, because a paycheck turnover remedy was available under state law at the time that she obtained her judgment, section 31.002(f), as applied through Rule 69(a), cannot abrogate such a remedy unless Congress has expressly

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1993).

[5] "This Act applies to the collection of any judgment, regardless of whether the judgment is rendered before, on, or after the effective date of this Act." Acts 1989, 71st Leg., R.S., ch. 1015, § 2, 1989 Tex. Gen. Laws 4112.

delegated retroactive rulemaking authority to the Supreme Court (the body ultimately responsible for the promulgation of the Federal Rules of Civil Procedure). Cf. *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204 (1988).

Brown's argument, however, rests upon a legally shaky premise: that prior to the adoption of section 31.002(f) she would have had a clearly established right to a paycheck turnover remedy. As it stood in 1987 when Brown obtained her judgment, the constitutional and statutory law of Texas had long placed current wages at least largely beyond the reach of a judgment creditor. *See* TEX. CONST. art. XVI, § 28 (1876, amended 1983) (prohibiting the garnishment of current wages); TEX. CIV. PRAC. & REM. CODE § 63.004 (Vernon's 1986) (same); TEX. CIV. PRAC. & REM. CODE § 31.002(b)(1) (Vernon's 1984) (subjecting to turnover only nonexempt property); TEX. PROP. CODE § 42.002(8) (Vernon's 1984) (classifying current wages as exempt property).[6] To be sure, some lower courts had held that once a judgment debtor takes possession of his wages they cease to be "current" and hence become nonexempt and subject to turnover.[7] But

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[6] The Texas Property Code was amended effective May 24, 1991 to expressly exempt current wages from "seizure." *See* TEX. PROP. CODE § 42.001(b)(1) (Vernon's Supp. 1993).

[7] See *Caulley v. Caulley*, 777 S.W.2d 147 (Tex. App.SQHouston [14th Dist.] 1989), *rev'd*, 806 S.W.2d 795 (Tex. 1991); *Buttles v. Navarro*, 766 S.W.2d 893 (Tex. App.SQSan Antonio 1989, no writ); *Cain v. Cain*, 746 S.W.2d 861 (Tex. App.SQEl Paso 1988, writ denied); *Barlow v. Lane*, 745 S.W.2d 451 (Tex. App.SQWaco 1988, writ denied); *Salem v. American Bank of Commerce*, 717 S.W.2d 948 (Tex. App.SQEl Paso 1986, no writ). Of these cases, only *Cain* and *Salem* squarely support Brown's position. *Caulley* is no longer good law. *Barlow* and *Buttles* actually state only that it is within a trial court's *discretion* to order a paycheck turnover remedy; in both cases the court upheld a trial court's decision *not* to order such a remedy. *See also Commerce Savings Ass'n v.*

this was by no means a unanimous view.[8] The Texas Supreme Court, meanwhile, has not spoken definitively on the matter.[9] Against

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Welch, 783 S.W.2d 668, 671 (Tex. App.SQSan Antonio 1989, no writ) ("whether to grant an application for a turnover order under § 31.002 is addressed to the sound discretion of the trial judge").

[8] See *Maumus v. Lyons*, 771 S.W.2d 191 (Tex. App.SQFort Worth 1989, no writ); *Davis v. Raborn*, 754 S.W.2d 481 (Tex. App.SQHouston [1st Dist.] 1988), *vacated as moot*, 795 S.W.2d 716 (Tex.1990).

[9] In *Davis v. Raborn*, 754 S.W.2d 481 (Tex. App.SQHouston [1st Dist.] 1988), the trial court had ordered a judgment debtor to turnover his future paychecks. The Court of Appeals reversed, holding that the trial court had authority under the Turnover Statute to force the judgment debtor to surrender only wages that he has already received, and that an order reaching future wages violates the state constitutional prohibition against garnishment. The Supreme Court initially reversed, holding that trial court's order was not unconstitutional garnishment. The Court added that a paycheck in the hands of a judgment debtor is not current wages and therefore is nonexempt. See *Raborn v. Davis*, 1990 Tex. LEXIS 17, 33 Tex. Sup. Ct. J. 249 (Feb. 21, 1990). Four Justices concurred, arguing that Texas' constitutional prohibition of imprisonment for debt would prevent a trial court from enforcing a turnover order by imprisonment for contempt. See *id.* (Mauzy, J., concurring). On motion for rehearing, the Texas Supreme Court vacated its prior opinion and judgment and the opinions and judgments of the courts below. See *Raborn v. Davis*, 795 S.W.2d 716 (Tex.1990) (per curiam). The Court explained that its original decision had not considered the effect of section 31.002(f)SQ which was added by the Texas legislature after *Raborn* had been argued but before the Court had issued its decisionSQand that the parties had settled their dispute since the Court's original decision. Thus, at the end of the day, the *Raborn* case created no law.

In *Caulley v. Caulley*, 777 S.W.2d 147 (Tex. App.SQHouston [14th Dist.] 1989), the Court of Appeals held that a court could order paycheck turnover remedy. The judgment debtor appealed, arguing that the order violated the state constitutional prohibition against garnishment of wages. The Supreme Court reversed, declaring the paycheck turnover remedy invalid. However, the Court's decision was not based upon the Texas Constitution, but on the newly added section 31.002(f). See *Caulley v. Caulley*, 806 S.W.2d 795 (Tex.1991). Only Justice Mauzy passed on the constitutionality of the paycheck turnover remedy, and he would have found it an unconstitutional garnishment. See *id.* at 798-800.

this legal backdrop, it cannot be said that judgment creditors in Texas in 1987 could confidently assume they were entitled to a paycheck turnover remedy.

We think it plausible that section 31.002(f) was intended only to clarify existing legal understandings, not create new ones. *See Caulley v. Caulley*, 806 S.W.2d 795, 799 (Tex. 1991) (section 31.002(f) "was intended to *clarify* that paychecks, retirement checks, individual retirement accounts, and other such property are exempt from [turnover].") (Mauzy, J., concurring in the denial of rehearing) (emphasis added). This conclusion is arguably buttressed by the fact that the Texas legislature explicitly made section 31.002(f) applicable to *all* outstanding judgments, whether they were entered before or after June 15, 1989. See *supra* note 5.[10]

Even if it were true that paycheck turnover was an available remedy at the time Brown obtained her judgment, it would not follow that she had a vested right to it. As a general matter, we cannot agree that judgment creditors necessarily have a vested right to future employment of all those judgment enforcement procedures in existence at the time the judgment is obtained. *Cf. Fore v. United States*, 339 F.2d 70, 72 (5th Cir. 1964), *cert. denied*, 381 U.S. 912 (1965) (under Texas law, a lien does not arise solely as a result

[10] Moreover, the Texas legislature adopted section 31.002(f) while *Raborn v. Davis*, a case raising the issue of the constitutionality of the paycheck turnover remedy, was pending before the Texas Supreme Court, also arguably suggesting that the legislature never intended that the Turnover Statute reach a judgment debtor's paychecks.

of a judgment's rendition). Paycheck turnover, of course, is not a judgment creditor's only means of enforcing a judgment in Texas. See Toben & Toben, *Using Turnover Relief to Reach the Non-Exempt Paycheck*, 40 BAYLOR L. REV. 195, 196 n.5 (1988) (principal postjudgment remedies in Texas include execution, postjudgment garnishment, and abstracting of judgment to create lien on real property). Federal Rule 69, which has remained unchanged in this respect since its adoption in 1937, states that enforcement of a judgment "shall be in accordance with the practice and procedure of the state in which the district court is held, *existing at the time the remedy is sought*." FED. R. CIV. P. 69(a).[11] As available remedies under state law change, so does the scope of Rule 69(a).[12] Thus, when Brown was injured, when she commenced her federal suit and when she recovered her judgment, the law clearly was that her enforcement remedies extended only to those that might be available under state law effective when the particular remedy was sought. There has been no change, retroactive or otherwise, in this principle. And, as noted, at the time that Brown obtained her judgment, only one appellate court had ruled that the Turnover Statute authorized paycheck turnover remedies. While others were to follow, two of these courts held only that the paycheck turnover remedy was *discretionary* and upheld trial court decisions not to

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[11] The validity of this provision seems clear. *See United States v. Sharpnack*, 78 S.Ct. 291, 297 & n.12 (1958).

[12] *See Nelson v. Maiden*, 402 F.Supp. 1307, 1309 (E.D. Tenn. 1975) (under Rule 69(a), a federal court "has no more nor less authority to aid the judgment creditor in supplementary proceedings than is provided under [state] law").

award such remedies, and still others held the remedy was unavailable, further undermining the notion that a judgment creditor could confidently expect entitlement to a turnover remedy.

Brown's attempted analogy to *Gunn v. Barry*, 82 U.S. 610, 21 L.Ed. 212 (1872), is flawed, for that case involved the creation of an exemption for certain land to which the creditor's judgment lien had already attached. Here, the paychecks which Brown seeks to have turned over did not come into existence until nearly two years after the enactment of section 31.002(f) which expressly exempted such items from the Turnover Statute. Moreover, it is obvious that the indebtednesses which those checks discharged, and Bracken's services which gave rise to those indebtednesses, did not come into being until long after the enactment of section 31.002(f). Brown, of course, never had any even arguable right to force Bracken to labor for her.

Rule 69 has not been applied retroactively to Brown. Under our analysis, Brown's takings argument must also fail. If a paycheck turnover remedy was unavailable prior to the 1989 adoption of section 31.002(f), in no way could it be said that Brown's property has been taken. If paycheck turnover was available until 1989, it nevertheless did not give rise to a vested right, or a property interest, in the checks Brown sought by her September 1991 motion.[13]

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[13] It is also clear that as to the checks Brown sought to reach by her September 1991 motion, she had no distinct investment-backed expectations, the complained of governmental action was not aimed at her but was rather general in scope, and her judgment remains in effect and subject to the same rules of collection as any other Texas judgment. *Cf. Connolly v. Pension*

The judgment below is

AFFIRMED.

Benefit Guaranty Corp, 106 S.Ct. 1018, 1026 (1986).